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THE JOURNAL OF LAW IN SOCIETY

Volume 13

Winter 2012

Number 2

Table of Contents

LETTER FROM THE EDITOR.....	385
INTRODUCTION.....	387

Homelessness

HOMELESSNESS: A MORAL DILEMMA AND AN ECONOMIC DRAIN GARY A. BENJAMIN	391
ALONE IN THE COUNTRY: NATIONAL GUARD AND RESERVE COMPONENT SERVICE AND THE INCREASED RISK OF HOMELESSNESS AMONG RURAL VETERANS BRIAN CLAUSS	405
HEROES OR HOPELESS? HOMELESS VETERANS CAUGHT IN A DYSFUNCTIONAL SYSTEM MARGARET A. COSTELLO	417
LGBT SELECTIVE VICTIMIZATION: UNPROTECTED YOUTH ON THE STREETS NUSRAT VENTIMIGLIA	439
HOMELESS CHILDREN AND YOUTH: AN EXAMINATION OF LEGAL CHALLENGES AND DIRECTIONS YVONNE VISSING	455
HOMELESSNESS IN AMERICA: A HUMAN RIGHTS CRISIS MARIA FOSCARINIS	515

Notes

SEXUAL ABUSE MEMORY REPRESSION: THE QUESTIONABLE INJUSTICE OF <i>DEMEYER</i> JOSHUA LUSHNAT	529
DEMANDING MORE FROM MICHIGAN'S CHARTER SCHOOLS TRACY PETERS	555

CORRECTION

The article “Born In Jail: America’s Racial History and the Inevitable Emergence of the School-to-Prison Pipeline,” by Mark P. Fancher cites two incidents involving Battle Creek police officers as examples of the use of tasers on minors of African descent.¹ The second cited incident concerns a fight between a white youth and a black youth. In the original article, it was mistakenly stated that the black youth was tasered. Although both youths were pepper-sprayed and charged with disorderly conduct, it was the white youth who was tasered. The author and *The Journal of Law in Society* regret the error.

1. Mark P. Fancher, *Born in Jail: America’s Racial History and the Inevitable Emergence of the School-to-Prison Pipeline*, 13 J.L. Soc’y 267, 277 (2012).

LETTER FROM THE EDITOR

CHELSEA ZUZINDLAK

Homelessness is ubiquitous. The United States, and Detroit especially, are no exception. I once took a family friend, a French citizen, on a tour of metro Detroit, starting from the downtown “hub” and driving northward twelve miles across the infamous divider 8 Mile Road to the first suburb outside Detroit – the city of Ferndale. When our conversation about landmarks and history subsided, my visitor remarked, “We just went from hell to heaven in ten minutes.”

To be sure, there are “at risk” populations in every developed and undeveloped nation, including France. However, in America, a land that prides itself in “equal opportunity” and “life, liberty, and the pursuit of happiness” – both myths and realities of the American Dream – the ever-present phenomenon of homelessness in both rural and urban America is a moral failure. Currently, the “rights”¹ of Americans to access food, housing, healthcare, and education are center-stage in political debates and will become increasingly so as the poverty class swells and the middle-class fades. The lack of or difficulties accessing such necessities, among other factors, are often the root cause of homelessness, as addressed by the scholarship of this issue’s panel of experts.

For our readership, I hope the discussions on homelessness included in this issue shed light on a problem that is too often hidden in the dark recesses of our social minds. For budding lawyers and members of the bar, I hope the discussions herein remind you of the service roots of the legal profession. Not only do risk-factors and outcomes of homelessness run the gamut of essentially every specialty and sub-specialty of law, but lawyers are in a particularly privileged position to address such compelling

1. Used here, the word “rights” refers to positive rights and is in quotations to indicate the unsettled status and checkered nature of positive rights interpretations in American constitutional jurisprudence. In general, positive rights mandate government action, whereas negative rights, such as those under the federal Constitution, restrain government action.

social problems. Thus, I urge every student and practitioner to commit to servicing the needs of at-risk and homeless populations living in the shadows of our communities. To help make that line between “hell” and “heaven” a little less stark.

In this issue on “Homelessness,” Adele M. Morrison, Associate Professor and Damon J. Keith Center expert faculty member, introduces the subject matter and our authors who come from diverse backgrounds in the fields of law, clinical studies, sociology, policy advocacy, and outreach. This issue concludes with two exemplary Notes written by graduate *Journal* editors, Tracy Peters and Joshua Lushnat.

INTRODUCTION

OUT OF HOUSE AND HOME: REFOCUSING ON HOMELESSNESS, VULNERABLE POPULATIONS, AND HUMAN RIGHTS

ADELE M. MORRISON¹

When I think of home I think of a resting place[.]

When I think of home I think of a place where there's love overflowing.

- "Dorothy" in THE WIZ²

Since the beginning of the recession of the late 2000s there has been a noticeable change in the public discourse around individuals and families who find themselves without homes or lacking a permanent place to live. The discussion has shifted toward describing the problem as a "housing crisis," and devising ways to address foreclosures and away from articulating the fact that people are living on the streets, in their cars, or in shelters and that what needs to be addressed is homelessness. It may seem subtle, but indeed there is a difference between focusing on housing rather than homelessness. Though each

1. Associate Professor of Law, Wayne State University Law School. B.A. San Francisco State University, J.D. Stanford Law School, LL.M University of Wisconsin Law School. Professor Morrison was an Echoing Green Fellow where she directed a project focused primarily on same-sex domestic violence that was incubated by San Francisco Neighborhood Legal Assistance Foundation. She was also a Remington-Hastie Fellow at the University of Wisconsin Law School. Professor Morrison is a Critical Theorist who teaches, writes and is committed to service in the areas of criminal law and family law, especially as they converge in addressing domestic and sexual violence and race, gender, sexuality and the law as well public interest and poverty law. Her scholarship often addresses the locations where these topics intersect as reflected in a chapter entitled *Black v. Gay? Centering LGBT People of Color in Civil Marriage Debates*, which appears in *LOVING v. VIRGINIA IN A "POST-RACIAL" WORLD: RETHINKING RACE, SEX AND MARRIAGE* (Kevin Maillard & Rose Cusion Villazor eds., 2012), as well as her article *Same Sex Loving: Subverting White Supremacy Through Same Sex Marriage*, 13 MICH. J. RACE & L. 177 (2007), and essay *Straightening Up: Black Women Law Professors, Interracial Relationships and Academic Fit(ting) In*, 33 Harv. J.L. & Gender 85 (2010).

2. THE WIZ—THE SUPER SOUL MUSICAL. The quote is from *Home* sung by Stephanie Mills as "Dorothy" in the Broadway Musical and on the original cast recording. See STEPHANIE MILLS, *Home*, THE WIZ—THE SUPER SOUL MUSICAL, ORIGINAL CAST ALBUM (Atlantic Records 1975) (lyrics and music by Charlie Smalls).

may be short or long-term, or an acute or chronic condition, a housing problem connotes difficulties with the structures themselves, seemingly forgetting that people live or lived there; whereas homelessness brings attention to those people who are going without stable shelter, without a place of regular safety, without the real or imagined comforts of home. There is a difference between a house and a home, between a housing crisis and homelessness. The articles in this edition, though they do address the housing crisis and its impact, bring the attention back to homelessness and the people who experience it.

Several of the authors address a population at special risk to become homeless and who are particularly impacted by it. Gary A. Benjamin focuses his analysis on the homeless in the Detroit area, specifically, suggesting solutions to what he describes as “a moral dilemma and economic drain.”³ Both Brian Clauss and Margaret Costello consider the particular needs of veterans. Clauss provides insight into the increased risk for homelessness among National Guard and Military Reservists who come from rural areas, noting that, although they struggling with many of the same issues of urban and suburban veterans, their problems are exacerbated by the logistics of reaching services located many miles away. Professor Costello offers a broad view of veterans currently experiencing homelessness with a particular emphasis on those in Michigan. Next, Nasrat Ventimiglia introduces readers to a particularly vulnerable population; homeless youth who identify or are identified as sexual and/or gender identity minorities. In doing so, Ventimiglia demonstrates how they are particularly victimized. Yvonne Vissing addresses children and youth as well, providing a comprehensive assessment of, and strategies for, addressing their legal needs. Children and youth, as Dr. Vissing notes, are a growing population at risk of becoming homeless with their families or on their own. Finally, Maria Foscarinis frames homelessness as a “human rights crisis.”⁴ Foscarinis turns to domestic and international locales for models of advocacy done by those who are homeless themselves and on behalf of those who are homeless, much of which is grounded in identifying housing as a human right.

Though indeed for some who are chronically or acutely homeless, home itself was not a place with “love overflowing,”⁵ — I think of those victimized by domestic violence or youth kicked out for coming out as lesbian, gay, bisexual or transgender. For many, home does at least

3. Gary A. Benjamin *infra*.

4. Maria Foscarinis *infra*.

5. MILLS, *supra* note 2.

symbolize a “resting place.”⁶ The individuals and families who are homeless, of which these authors write, are most certainly unable to truly rest—something, which as noted by the United States Ninth Circuit Court of Appeals in *Jones v. City of Los Angeles*, human beings are compelled to do.⁷ Veterans whether rural or urban, youth of all gender identities and sexual orientations, individuals and families in Detroit and around the nation, are all human beings with rights and all deserve the attention that these authors bring to their desires to do more than simply “think of home”⁸ but to actually find one.

6. *Id.*

7. *Jones v. City of L.A.*, 444 F.3d 1118, 1136 (9th Cir. 2006) (“[H]uman beings are biologically compelled to rest, whether by sitting, lying, or sleeping.”).

8. MILLS, *supra* note 2.

HOMELESSNESS: A MORAL DILEMMA AND AN ECONOMIC DRAIN

GARY A. BENJAMIN¹

I. INTRODUCTION	392
II. CITY OF DETROIT EFFORT	393
III. WHO ARE THE HOMELESS IN DETROIT?.....	393
III. HIGH COST OF HOUSING	395
IV. STEPS TO LESSEN THE PROBLEM OF HOMELESSNESS.....	396
A. <i>Step One: Lessen the Inequity in Bargaining Power Between Lenders and Citizens</i>	396
B. <i>Step Two: Reinstate Usury Laws for Financial Institutions</i>	396
C. <i>Step Three: Regulate the Industry More Strictly</i>	397
D. <i>Step Four: Limit Tax Foreclosures</i>	397
E. <i>Step Five: Reform the Family Independence Program (FIP)</i> ..	397
F. <i>Step Six: Limit Financial Institution Spending</i>	399
G. <i>Step Seven: Control Financial Institution Practices</i>	399
H. <i>Step Eight: Create Tax Benefit Legislation for Financial Institutions</i>	400
I. <i>Step Nine: Reinstate Re-Entry Programs</i>	401
J. <i>Step Ten: Make the Convicted Felon Rule More Rational</i>	401
K. <i>Step Eleven: Increase These Programs</i>	401
L. <i>Step Twelve: Eliminate Credit Checks for Public Housing</i>	401
M. <i>Step Thirteen: Increase Legal Aid Attorneys</i>	402
V. THE TEN YEAR PLAN.....	402
VI. CONCLUSION.....	403

1. Gary Benjamin is a graduate of Wayne State University Law School and an adjunct faculty member. He received his BA from Ohio Wesleyan University. He has been lead counsel or participating counsel in several class actions and presently serves as the Health Policy Staff Attorney at Michigan Legal Services. Mr. Benjamin has served on several non-profit boards in the Detroit area including Bridging Communities, Inc. He also has served on the Mayoral Health Care Task Force, the Community Advisory Committee of the Detroit-Wayne County Health Authority, and the Board for the Michigan Trial Lawyers' Association (now MAJ). Michigan Legal Services does a substantial amount of work with homeless people and in trying to prevent homelessness, particularly by working in the foreclosure process. This paper was written with input from staff at Michigan Legal Services – particularly Timothy Greer and Marilyn Mullane; Ted Phillips from the United Community Housing Coalition; and Terri Stangl, Judy Lincoln and Jackie Doig of the Center for Civil Justice. Thanks to all of you.

I. INTRODUCTION

The right to decent housing is embedded in Western thought. Article 25 of the United Nations Universal Declaration of Human Rights, adopted in 1948, and ratified by the United States Senate states:

Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.²

This sentiment was predated by less than a year in 1948 by the Organization of American States (OAS) in Article 11 of the American Declaration on Rights and Duties of Man,³ and then reaffirmed in 1965, in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination;⁴ in 1966, in Article 11 of the International Covenant on Economic, Social and Cultural Rights;⁵ in 1979, in Article 14 of the Convention on the Elimination of All Forms of Discrimination Against Women;⁶ and in 1989, in Article 27 of the Convention on the Rights of the Child.⁷

2. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/810, at 71 (Dec. 10, 1948), *available at* <http://www.un.org/en/documents/> (scroll down to "Search by Symbol," type "A/810" and select "Search," then select "English").

3. Organization of American States, *American Declaration on Rights and Duties of Man*, OAS/RES/XXX (1948), *available at* <http://www.cidh.oas.org/Basicos/English/Basic2.American%20Declaration.htm>.

4. International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX) A, Annex, U.N. GAOR, 20th Sess. Supp. No. 14, U.N. Doc. A/6014, at 47 (Dec. 21, 1965), *available at* <http://www.un.org/en/documents/> (scroll down to "Search by Symbol," type "A/6014" and select "Search," then select "English").

5. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI) A, U.N. GAOR, Annex, 21st Sess. Supp. No. 16, U.N. Doc. A/6136 (Dec. 16, 1966), *available at* <http://www.unhcr.org/refworld/docid/3ae6b36c0.html>.

6. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, Annex, U.N. GAOR, 34th Sess. Supp. No. 46, U.N. Doc. A/34/46, at 193 (Dec. 18, 1979), *available at* <http://www.un.org/en/documents/> (scroll down to "Search by Symbol," type "A/34/46" and select "Search," then select "English").

7. Convention on the Rights of the Child, G.A. Res. 44/25, Annex, U.N. GAOR, 44th Sess. Supp. No. 49, U.N. Doc A/44/49, at 167 (Nov. 20, 1989), *available at* <http://www.un.org/en/documents/> (scroll down to "Search by Symbol," type "A/44/49" and select "Search," then select "English").

In the strongest economic power the world has ever known, we at Michigan Legal Services, the Center for Civil Justice, other legal aid organizations throughout the state, and the United Community Housing Coalition, witness homelessness that could easily be prevented. This paper will outline some of the causes of homelessness and arguments for the recognition of housing as a human right, and as a means of combating the problem.

II. CITY OF DETROIT EFFORT

In 2004, the City of Detroit began the process of creating a plan to end homelessness in Detroit, Hamtramck and Highland Park. A community-wide coalition of city departments, social services, not-for profits, and others met and created a plan driven by this vision statement:

Our vision is that every individual and family in our community has a home that is decent, safe and affordable, and that they receive every support needed in order to remain housed. This vision is grounded in the belief that through our commitment to working together, being open to new ways of thinking and acting, and having this shared vision, we can – and will – move forward together to achieve real change in our community.⁸

The coalition members clearly acted within the scope of a vision embraced by the international community for decades. In February 2006, Detroit hosted Super Bowl XL and new impetus was given to this planning process. It resulted in a plan, described below, that is now in search of resources to carry it out.

III. WHO ARE THE HOMELESS IN DETROIT?

There are many ways to become homeless, and many pressures that accompany home ownership today that were not present when this nation was built. Particularly in Detroit, where home ownership was seen as an American birthright, and where the percentage of home ownership has typically been one of the highest in the nation, the prevalence of homelessness is a historical change. Home ownership built this city to the extent that we now have more housing units than we need. And yet,

8. HOMELESS ACTION NETWORK OF DETROIT (HAND), MOVING FORWARD TOGETHER: A TEN-YEAR ACTION PLAN TO END HOMELESSNESS IN DETROIT, HAMTRAMCK, AND HIGHLAND PARK, MICHIGAN (2006), <http://handetroit.org/documents/10YP.pdf> [hereinafter THE PLAN].

we see houses being torn down; not people in need of housing moving in. Throughout the 1920s and into the 1970s, Detroit expanded and became one of the largest cities, geographically, in the world; a city with a low population density because of the number of single family homeowners. Jimmy Stewart's Savings and Loan attitude was real; it *was* a "Wonderful Life."⁹ Americans, at that time, believed that everyone should own a house and, in turn, become a solid citizen with a stake in the community. The financial community also bought into that belief and helped people achieve their dream of home ownership.

That attitude, however, has changed. Today we see a financial aristocracy that looks for profit, whether that builds a sustainable community or not. This is true not only in the for-profit real estate marketplace, but also of those who build public housing and must survive financially in this harsh climate. Today we see laws and governments that favor the aristocracy of financiers to the detriment of the working person. To put it most simply, homelessness is caused by a homeowner or tenant not having the resources to afford a property. We have become a nation of banks and credit card companies, not a nation of citizens who can build a stake in the system.

The pressures on homeownership are rising given the economic change. Jobs are paying less. Jobs are not permanent. Long term careers in one company are rare and careers within an industry with multiple companies are becoming scarce. We are in changing times with the government reacting with "solutions" such as cutting services that have not worked in the past and do not promise success in the near future. In fact, it is well accepted that solving the homelessness problem is less expensive than most alternatives. The Lewin Group found that the service cost per day, per person, in the City of Chicago was:

Shelter	\$22.00
Supportive Housing	\$20.55
Prison	\$61.99
Jail	\$60.00
Mental Hospital	\$437.00
Hospital	\$1,201.00 ¹⁰

Cutting services actually costs money and hurts those who need the service the most. People who are homeless often end up in jail, prison or

9. *See* *It's a Wonderful Life* (Paramount Pictures 1946).

10. THE LEWIN GROUP, *COSTS OF SERVING HOMELESS INDIVIDUALS IN NINE CITIES* (2004), <http://www.rwjf.org/files/newsroom/cshLewinPdf.pdf>; *see also* THE PLAN, *supra* note 8.

a mental institution. The above mathematics appear clear. Not only is homelessness a moral outrage, it is also costly; and like so many other values-driven disputes, those of us who argue the moral high ground are also arguing for fiscal responsibility.

The economy and job loss is the number one cause of homelessness. In Detroit, there are an estimated 13,000 to 14,827 homeless people. Of those, 1,400 are chronically homeless and difficult to serve. Sixty-seven percent are families with children. Out of 3,700 prisoners who are released and return to Wayne County a year, approximately 370 are instantly homeless. Other major populations are those who are mentally ill, 5,895; those with substance abuse issues, 8,466; those who have HIV/AIDS, 3,032. There are also 3,596 veterans and 6,000 victims of domestic violence estimated in the homeless population in Detroit.¹¹

Though there is a lot of “overlap” among these counts, for example a substance abuser may also be mentally ill, it is clear that the needs among the population of people who are homeless vary widely.

The overarching reality is this population lost the ability to maintain housing for themselves or their family either financially or emotionally. Forty-six percent of the total population in Southeast Michigan suffers from housing costs that are considered a financial burden and over twenty-five percent suffer under a severe financial burden to maintain housing.¹² This means that almost half of the people in Detroit, Hamtramck, and Highland Park are at risk of losing the ability to pay for their own housing. That is a negative testament to our economy and the manner in which it has changed. And yet, almost all of us still want to own our own home.

III. HIGH COST OF HOUSING

The housing bubble was blamed, in part, on those who obtained financing, tried courageously to maintain payments and stay in their newly purchased “castles.” People who got these burdensome loans wanted to keep their homes and pay off their loans. Often they were talked into signing “the best deal possible” as sold by the broker, or maybe they hoped for more income at a later time, or for another reason they believed they could handle the payments. The makers of these loans charged the highest interest over the shortest term possible. People took what they could get from the financial aristocracy. Instead of affordable mortgages we now see foreclosures because the occupant lost or never

11. For the facts stated in this paragraph, reference THE PLAN, *supra* note 8.

12. *Id.* (noting financial or cost burden is over thirty percent of household income and severe cost burden is over fifty percent).

had the resources to make the payments. Yet the bankers and mortgage holders made billions in bonuses.¹³

IV. STEPS TO LESSEN THE PROBLEM OF HOMELESSNESS

A. Step One: Lessen the Inequity in Bargaining Power Between Lenders and Citizens

Changing the bonus payment system for officers of lending organizations is a place to start. By including in the bonus formula a factor for foreclosures, an incentive would be created for bank officers to work with people to keep them in their homes. The more foreclosures in a bank; the lower the bonuses. This would make the incentives in the financial aristocracy work for a community instead of against it.

B. Step Two: Reinstate Usury Laws for Financial Institutions

In the 1978 decision of *Marquette National Bank of Minneapolis vs. First of Omaha Service Corporation*, the Supreme Court held that nationally chartered banks could charge the legal rate of interest in their state regardless of the borrower's state of residence.¹⁴ Two years later Congress passed the Depository Institutions Deregulation and Monetary Control Act exempting federally chartered savings banks, installment plan sellers, and chartered loan companies from state usury laws.¹⁵ In 1996 the Court extended this exemption to fees charged by banks and other institutions as well.¹⁶

If usury laws were in place for mortgages at an affordable level given the present economy the cost burden would drop, and we would see fewer homeless people. The difference in a monthly loan payment between one that includes six percent interest and one that includes three percent interest would help anyone's budget and would allow more people to remain in their homes.

13. Aaron Lucchetti & Stephen Grocer, *On Street, Pay Vaults to Record Altitude*, WALL ST. J., Feb. 2, 2011, at C1; see also NassimTaleb, Op-Ed, *End Bonuses for Bankers*, N.Y. TIMES, Nov. 8, 2011, at A27.

14. *Marquette Nat'l Bank of Minneapolis v. First Omaha Service Corp.*, 439 U.S. 299 (1978).

15. Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, 94 Stat. 132.

16. *Smiley v. Citibank* 517 U.S. 735 (1996).

C. Step Three: Regulate the Industry More Strictly

With new usury laws we should regulate the industry much more strictly. The financial aristocracy's irresponsible behavior should not be allowed to continue. The new Consumer Financial Protection Bureau of the Federal Government is showing signs of acting creatively and aggressively. That agency's recent call for public comment on mortgage servicing regulations is well taken by this author.¹⁷

D. Step Four: Limit Tax Foreclosures

When a homeowner's resources wane, the homeowner must decide whether to pay for food or to pay the property tax. Michigan county governments across the state have taken a "let them eat taxes" approach. If property taxes rise, the cost burden on the homeowner increases. Local governments should be focused on keeping people in their homes, establishing funds to pay taxes and mortgages for families in crisis, or simply following a tax forgiveness policy.

E. Step Five: Reform the Family Independence Program (FIP)

FIP is a cash assistance program that can be used to pay housing bills. FIP is an assistance program available to low income parents with children during periods of unemployment. Low wage, part-time and seasonal workers who are not eligible to collect unemployment insurance benefits in Michigan, as well as parents unable to work due to the needs of disabled children, spouses, domestic violence, or the parent's own medical problems, are eligible to receive FIP. It provides a bare bones income stream, about thirty percent of the federal poverty level, to pay housing and utility expenses. It is not available to everyone, but, like Medicaid, requires that the person be both low-income and fit some other category as well.

Under a new Department of Human Services' (DHS) sixty-month time limit policy, imposed in October 2011 but counting months back to October 1996,¹⁸ more than 11,000 families were terminated from FIP in

17. See High-Cost Mortgage and Homeownership Counseling Amendments to the Truth in Lending Act (Regulation Z) and Homeownership Amendments to the Real Estate Settlement Procedures Act (Regulation X), 77 FED. REG. 4,9089, 4,9089-9166 (proposed Aug. 15, 2012) (to be codified at 12 C.F.R. pts. 1024 and 1026).

18. Beginning in September 2007, families were told FIP had a forty-eight-month time limit but months prior to October 2007, or in which the parent was working and attending employment and training activities as assigned, or was exempt from work by the department, would not count.

late 2011.¹⁹ Thousands of the families are headed by parents who are recognized by the state as unable to work because they are needed at home to care for a child or spouse with disabilities.

Prior to October 2011, the State of Michigan would grant these assistance payments indefinitely. But as of October 1, 2011, the Michigan League for Human Services reports that 12,601 families will lose benefits statewide and 4,863 in Wayne County because they were already beyond the newly approved “sixty-month” limit.²⁰ These “cases” involve people who have been unable to get on their feet. Many are believed to be disabled, but are not receiving disability pay for some reason. These 12,601 people will fall back on family and friends and social service agencies until those resources are also exhausted.²¹

There were no exceptions built into the rule.²² If someone has applied for Supplemental Security Income (SSI) because of disability and the application is pending, he or she will lose cash assistance. The Social Security Administration takes time making a decision the loss of assistance could leave a person who is later found to be eligible for SSI without income for months while they await a decision. Such “holes in the system” create pressures that lead to homelessness.

The state does allow three additional months after time limit cut offs for emergency housing payments. But, historically, the housing program is not available to people until they are actually in summary proceedings. By the time a case goes into summary proceedings, “[i]t tends to be more hostile and the ability of a landlord and tenant to work together and maintain a relationship is eroding. The cost of curing the eviction is higher (depleting scarce state resources) due to court costs. I have long thought that the state should change this policy to one of

19. Interview with Tim Greer, Paralegal for Homeless Project, Mich. Legal Serv., in Detroit, Mich. (Feb. 1, 2012).

20. Shannon Jones, *Thousands of Michigan Students Lose Food Stamp Eligibility*, WORLD SOCIALIST WEB SITE, Aug. 10, 2011, <http://www.wsws.org/articles/2011/aug2011/food-a10.shtml>.

21. Written Comments from Jackie Doig, Senior Staff Att’y, Ctr. for Civ. Just., Saginaw, Mich. (February 8, 2012) (on file with author). Although the state created a special, time limited housing assistance program for families time limited off FIP, the program reportedly has resulted in payments for very few families. Families and advocates report computer problems, red tape and lost paperwork, lack of transportation assistance, and lack of information have all contributed to underutilization of the program. *Id.*

22. Telephone Interview with Jackie Doig, Senior Staff Att’y, Ctr. for Civ. Just., in Saginaw, Mich. (Feb. 7, 2012) (except that those already exempted from work because of disability kept that exemption).

paying State Emergency Relief (SER) to cure a notice to quit rather than wait until it's in court."²³

The State recognizes the benefits of intervening very clearly, "home ownership services may help prevent loss of a home, providing services such as: house payments (mortgage or land contract payments), including principal, interest, legal fees and escrow for taxes and insurance; property taxes and fees; mobile home lot rent for owners or purchasers of mobile homes; insurance coverage required by a mortgage or land contract."²⁴

DHS goes on to write: "[t]he lifetime Home Ownership Services maximum is \$2,000. The lifetime maximum is the combined cumulative total of all home ownership service payments. Home Ownership Services cannot be approved if the emergency was client-caused. The total amount of taxes past due for all years does not exceed \$2,000."²⁵ Two-thousand dollars is ridiculously low. To make things worse, if the homeowner has missed payments for six-months, it is considered a "client caused" crisis and no aid will be forthcoming. An expedited SER process would help avoid some homelessness.

A more permanent and reasonable way to "fix" the problem of too few resources to maintain a home is needed. There are no consequences to banks if they foreclose. The home sits vacant without maintenance while the bank tries to recoup its investment. The bank is not forced to secure the property, maintain the property, or do anything with the property because the bank is bigger than the municipality being affected. The power lies with the financial aristocracy, not with our elected local officials.

F. Step Six: Limit Financial Institution Spending

Make financial institutions spend assets only maintaining the housing upon which they foreclose.

G. Step Seven: Control Financial Institution Practices

Use the licensing or chartering process to control financial institutional practices. Federal or state governments charter banks. The number of foreclosures and state of foreclosed properties should be a factor in approving or denying renewals.

23. Email from Terri Stangl, Executive Dir., Ctr. for Civ. Just., to Gary Benjamin, Mich. Legal Serv. (Feb. 2, 2012) (on file with author).

24. *Id.*

25. MICH. ADMIN. CODE R. 400.7001 (2012).

H. Step Eight: Create Tax Benefit Legislation for Financial Institutions

Pass a law rewarding the banks that do the best job keeping people in their homes with a tax benefit of some sort. It is possible to keep people in their homes. Judy Lincoln tells the story of a widow whose income was drastically cut when her husband passed away. She was struggling to pay the mortgage, which left her with little money for food, and in fear of foreclosure. What an injustice that would have been? What a travesty that she deprived herself of food in order to fight to keep her home! The interest rate was high and out of desperation, she told the bank she would have to take steps to allow it to foreclose. The bank adjusted the interest downward, allowing her to keep up her monthly payments with enough left over to buy food. She stayed in her family home.

Did anyone “lose” in that scenario? The community won because she could stay in and maintain her house with her family’s support. The widow and her family won because they could keep the major family investment: equity in that house. And, the bank won because it simply lowered its profit and continued to collect the principal. The home was maintained by the widow and her family and would not be a bigger liability on the bank’s books.²⁶

The mentally ill and those returning from prison are two populations of the homeless with special needs. “The poor you will always have with you,”²⁷ and, probably the mentally ill and those returning from prison, too. Specialized support programs are needed to aid these populations. Recently the State of Michigan cut back prisoner “re-entry” programs. The one at the Mound Road facility was closed down entirely.²⁸ This is a reversal of Michigan’s leadership role in reentry work started over a decade ago. Someone released from prison after a long stay often has no family left to move in with. Being separated from society for that long leaves the released person adrift. Because of U.S. Department Housing and Urban Development (HUD) rules, the newly released prisoner cannot get in to public housing. Even if a convicted felon has family in public housing, if he or she moves into the facility, the family could be forced out. “Our society is more intent on punishing people than doing

26. The facts in the first two paragraphs of Section IV.H. were stated in the author’s telephone interview with Judy Lincoln, Pol’y Analyst, Ctr. for Civ. Just., in Saginaw, Mich. (Feb. 7, 2012).

27. Matthew 26:11.

28. Chad Livengood, *Ryan Facility to Be Retooled for Parole Absconders*, DET. NEWS, May 25, 2012, at A3.

something that will work to re-integrate released prisoners into society.”²⁹

I. Step Nine: Reinstate Re-Entry Programs

Reinstate the re-entry programs.

J. Step Ten: Make the Convicted Felon Rule More Rational

If a tenant’s relative who is staying with them commits a crime miles away from home, the entire family will likely lose their public housing and be barred from it for life.³⁰ The mentally ill sometimes choose to be homeless, but often they simply need special arrangements. Some Community Mental Health agencies have apartment buildings for the mentally ill which include as the building manager a therapist, on duty to make sure medications are taken and to watch over the tenants. This form of community based treatment has been successful in keeping people out of the mental health system and allowing them to live independently, as much as possible, and in their own apartment.

When the mental hospitals were closed in the 1970s the number of homeless went up and community agencies were burdened. But the innovative approaches developed to housing the mentally ill have succeeded in some areas beyond all expectations.

K. Step Eleven: Increase These Programs

Today, we see non-profit homeless service providers evicting people, including families, from transitional housing and putting them back on the street, too often. The causes can be serious, such as violent behavior from a mentally ill tenant, to inconsequential, such as paperwork filed late. The mentally ill often do not follow the same time schedule as the rest of us.³¹

L. Step Twelve: Eliminate Credit Checks for Public Housing

HUD demands credit checks and scoring for people moving into subsidized housing. This makes no sense for people who spend over thirty percent of their income on housing to start with. One case was of a

29. Tim Greer, *supra* note 19.

30. *Id.*; Interview with Ted Phillips, Executive Dir.; United Cmty. Hous. Coalition, in Detroit, Mich., (Feb. 1, 2012).

31. *Id.*

waitress trying to raise three kids, and rent was eighty percent of her income. She could not qualify for public housing because of her credit score when the public housing would have cost her only thirty percent of her income. She was a “bad credit risk” when she would have been a good credit risk at thirty percent.³² Others become homeless because the eviction process does not provide legal counsel. Even if there is a defense, it is not raised, resulting in an eviction that was needless.

M. Step Thirteen: Increase Legal Aid Attorneys

Increase the number of legal aid attorneys to help people who are in danger of eviction and/or foreclosure. Over the last few years the Legal Services Corporation has cut funding. State funding sources for legal aid are tied to the interest rates banks give to attorneys’ trust accounts and those interest rates are low. These funding sources should be increased so that fewer people lose their homes.

V. THE TEN YEAR PLAN

The ten-year plan suggests some solutions that could fix some of these problems. It states, “[t]he provision of permanent supportive housing and affordable housing is key to ending and preventing homelessness in our community.”³³ Because both the lack of health care and other supportive services contribute to homelessness, “we must also improve the supply of and access to other supports and resources, such as health care, substance abuse treatment, education, child care, job training and placement, and transportation. Preventing homelessness from occurring in the first place must be a priority in our community. This is no small task that lies before us. We face many challenges – including difficult economic times – that must be overcome if we are to be successful.”³⁴

The ten-year plan follows these basic principles:

Housing First: a proven method of helping move people with substance abuse and/or mental health issues off the streets and keep them housed by providing housing first, and then treatment services as that individual is prepared to receive them. Our community recognizes that Housing First is one of the best ways to serve people who are chronically homeless.

32. *Id.*

33. THE PLAN, *supra* note 8.

34. *Id.*

Rapid Re-Housing: ensures that when a person becomes homeless, he or she is quickly placed into safe, affordable, and appropriate housing, thus eliminating the need for lengthy stays in emergency or transitional housing. We are committed to reducing the amount of time a person spends in emergency shelters.

Prevention: the best way to end homelessness is to prevent it from even occurring in the first place. We will explore ways in which more of our resources can be dedicated to prevention services.

Streamlining Services: to shorten the time a person is homeless, our community will do a better job of making it easier to access the support services needed to gain and maintain housing. Our plan is centered on five core areas for action; housing, prevention, supportive services, community engagement, collaboration. These five areas are closely interconnected, and each must be addressed in its own measure in order for our community to make progress in ending homelessness in our communities. Accomplishing this will be a significant challenge. There are close to 14,000 men, women, and children who are homeless. A homeless population this large has many and diverse needs, such as mental health care, substance abuse treatment, job training and placement, education, health care, transportation, and much more.³⁵

VI. CONCLUSION

There is no pragmatic reason not to attack homelessness just as the ten-year plan suggests. The federal changes to tip the balance of power back from the one percent to the ninety-nine percent seem to be a long way off. At base this is a problem of power. Those who are in the ninety-nine percent do not have the political muscle to make homelessness a thing of the past.

The existence of homelessness is an indictment of our present way of life. We do not even have the political will to make the rules for public housing and vouchers more humane. Our housing system flies in the face of western morality and of our history of encouraging home ownership.

It is time we took steps to correct this moral outrage.

35. THE PLAN, *supra* note 8.

**ALONE IN THE COUNTRY: NATIONAL GUARD AND
RESERVE COMPONENT SERVICE AND THE INCREASED
RISK FOR HOMELESSNESS AMONG RURAL VETERANS**

BRIAN CLAUSS¹

I. INTRODUCTION	405
II. BACKGROUND.....	406
III. THE INCREASED RISK OF HOMELESSNESS AMONG RURAL VETERANS	413
A. <i>Risk Factors</i>	413
B. <i>Employer Support of the Guard and Reserve Program</i>	414
C. <i>Posttraumatic Stress Disorder</i>	414
D. <i>Living in Rural America</i>	415
IV. CONCLUSION.....	416

I. INTRODUCTION

Veterans face a myriad of challenges, some of which are unique to veterans. Among the many issues facing veterans is homelessness. Homelessness among U.S. veterans is a serious and growing problem. The issue is exacerbated by a variety of risk factors that make veterans more vulnerable to homelessness than other civilians. The risks facing all veterans are amplified for National Guard and reserve component service members, by a national defense structure which releases these service members from active duty service and returns them to civilian life without sufficient time or preparation for the challenges of civilian life. Part II of this article contextualizes these issues in the national defense structure and illustrates the difference between active duty and reserve component service members. Part III discusses the risk factors that lead to increased homelessness among veterans, including physical and mental health problems, the inadequacy of reemployment and reintegration systems, and veterans' inability to access necessary aid. Part IV concludes that current government resources for these veterans are backlogged and lacking necessary authority. Ultimately, the systems in place are inadequate to address the scope of veterans' issues – leaving unemployed veterans with limited recourse and compounding risk factors that contribute to homelessness.

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II. BACKGROUND

The citizen-soldier has a long history of being the first to defend the country that dates back to colonial militiamen fighting the British during the Revolution. Poorly trained and serving for only short durations of service, the colonial citizen-soldiers served the new nation and then returned to their private lives.² Following the Revolution, Congress passed a militia act in 1792 for “every able-bodied male citizen between the ages of 18 and 45.”³

State militias were among the first to answer the call of the Union and provided the bulk of the Union troops during the early months of the Civil War.⁴ During the early parts of the Spanish American War, the state militias again comprised a large part of the combat forces. President Roosevelt declared the antiquated militia laws as “obsolete and worthless” and those laws were repealed in 1901.⁵ The modern National Guard was created with the Militia Act of 1903.⁶ The National Guard came under federal control and became part of the reserve component of the Army in 1916 in response to the war in Europe and the potential need to deploy outside the United States.⁷ The modern National Guard has a combined federal and state command structure and mission.⁸ When the United States entered the Great War in 1917, National Guard units comprised approximately forty percent of the American Expeditionary Forces in France.⁹ National Guard units were also the first units to see combat in World War II shortly after Pearl Harbor was attacked.¹⁰ National Guard units answered the call in Korea and again in Vietnam.¹¹ They deployed in large numbers during the first Gulf War, Panama,

2. See generally THE AMERICAN REVOLUTIONARY WAR, <http://www.americanrevolutionarywar.net> (last visited July 15, 2011).

3. *Perpich v. Dep't of Defense*, 496 U.S. 334, 341 (1990).

4. *About the National Guard*, NAT'L GUARD, <http://www.ng.mil/about/default.aspx> (last visited July 15, 2011) (para. 3).

5. *Perpich*, *supra* note 3, at 341 (internal citation omitted).

6. *National Guard's Birthday*, NAT'L GUARD, <http://www.ng.mil/features/birthday/index.html> (last visited July 15, 2011) (para. 10).

7. Samuel W. Asbury, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 GONZ. L. REV. 67, 70 (1995).

8. See 10 U.S.C. § 10501 (2011).

9. *About the National Guard*, *supra* note 4, at para. 3.

10. *Id.*

11. LAWRENCE KAPP, CONG. RESEARCH SERV., RL30802, RESERVE COMPONENT PERSONNEL ISSUES: QUESTIONS AND ANSWERS 9 (2010), <http://www.fas.org/sgp/crs/natsec/RL30802.pdf>.

Bosnia, the invasion of Afghanistan, and were a large percentage of the forces in Iraq from 2001 to 2011.¹²

In addition to the National Guard, each branch of the armed forces has a reserve component.¹³ Like the militias and National Guard, these reserve components have been among the first units to fight when hostilities break out. The reserve components have been an important part of national defense since their creation and provide a vital manpower reserve to supplement active-duty forces.¹⁴ Unlike the National Guard's combined federal-state function, the Reserve Components have no dual role.

In the twentieth century, the cessation of hostilities led to a drastic reduction in the manpower and mission of the Armed Forces.¹⁵ Following World War I, World War II, the Korean Conflict and the Vietnam Conflict, the government reduced the number of active duty personnel substantially.¹⁶ The end of the Cold War produced a similar result. The collapse of the Eastern Bloc brought about a dramatic change in the size and structure of the American Armed Forces.¹⁷ Absent a

12. *Id.* These involuntary activations include the: intervention in Haiti (1994-1996; 6,250 reservists involuntarily activated); the Bosnian peacekeeping mission (1995-2004; 31,553 reservists involuntarily activated); the ongoing Kosovo mission (1999-present; 11,485 reservists involuntarily activated through 2003; no available data since then); the Persian Gulf War (1990-91; 238,729 reservists involuntarily activated); the low-intensity conflict with Iraq (1998-2003; 6,108 reservists involuntarily activated); and current military operations – Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn (2001-present; over 816,941 reservists involuntarily activated as of July 12, 2011). Unlike the once a decade average for activations during the Cold War, Guard and Reserve members have been involuntarily activated an average of once every thirty-six months since 1990. *Id.*

13. The Army Reserve was created in 1908, the Navy Reserve in 1915, and the Marine Reserve in 1916. See *Army Reserve History*, U.S. ARMY RESERVE, <http://www.usar.army.mil/ourstory/History/Pages/Publications.aspx> (last visited Aug. 18, 2012) (scroll down to "Army Reserve: A Concise History," and select hyperlink to download); *Navy Reserve History*, U.S. NAVY RESERVE, <http://www.navyreserve.com/about/history.html> (last visited Aug. 18, 2012); *Marine Corps History*, U.S. MARINE CORPS, <http://www.marines.mil/unit/marforres/4thAnglico/Pages/History.aspx> (last visited Aug. 18, 2012).

14. Kapp, *supra* note 11, at 1.

15. ANTHONY CORDESMAN, CTR FOR STRATEGIC & INT'L STUD., TRENDS IN U.S. MILITARY FORCES AND DEFENSE SPENDING: PEACE DIVIDEND OF UNDERFUNDING? 6 (1999); see also Robert L. Goldich, CONG. RESEARCH SERV., THE ARMY RESERVE COMPONENTS: STRENGTH AND FORCE STRUCTURE ISSUES 12-13 (1997).

16. *Id.*

17. *Id.*

Soviet threat, Congress determined that major threats to the United States no longer existed, and that the military was too large.¹⁸

After the breakup of the Warsaw Pact alliance, the United States significantly reduced the number of active duty members in each branch. Further, the Base Re-Alignment and Closure Commission (BRAC) began its work of reviewing American military installations in 1988.¹⁹ The BRAC Commission recommended that over seven hundred military installations either be closed or realigned in the Commission's five rounds of recommendations.²⁰

The American military had to address a largely unforeseen conflict when Iraq invaded Kuwait in 1990.²¹ The onset of hostilities meant that, once again, National Guard and Reserve forces were called upon to step into the breach. When Operation Desert Storm began in 1991, about forty percent of ground forces were from either National Guard or Reserve units.²² The military continued to reduce in size throughout the 1990s. Gone were the days of the Berlin Brigade or Army units guarding the Fulda Gap awaiting a Red Army invasion.

After the collapse of the Soviet Union and the Warsaw Pact, the United States saw smaller threats on the horizon. Those threats did not include large-scale terrorist attacks. The Iraqi invasion of Kuwait was a traditional military conflict involving one nation attacking another. The American and Coalition response during the Gulf War was also a traditional military response with a large military invasion through air, land, and sea forces. The American military response was accomplished, in large part, with reserve component forces.²³

The large number of reserve component members called to active duty during the Gulf War led to complaints from service members about civilian employment. The civilian employment issues experienced by the reserve component service members led Congress to pass the Uniformed Service members Employment and Re-employment Rights Act

18. Brian Clauss, *Rights of National Guard and Armed Forces Reserve Members Under the Uniformed Service members and Employment and Reemployment Rights Act*, in *SERVICE MEMBER AND VETERANS RIGHTS*, at § 2.01 (LexisNexis 2011).

19. U.S. DEP'T OF DEFENSE, *DEF. BASE CLOSURE AND REALIGNMENT COMM'N FINAL REPORT*, at ch. 3 (2005).

20. *Id.* In 1988 the BRAC commission proposed 145 closures or realignments; in 1991 the commission proposed 82; in 1993 the commission proposed 175; in 1995 the commission proposed 132; and in 2005 the commission proposed 190.

21. James M. Cypher, *Military Spending after the Cold War*, 25 *J. OF ECON. ISSUES* 607, 607-15 (1991).

22. Lt. Col. Ellen Krenke, Nat'l Guard Bureau, *Army Guard Provides Combat Support Troops in First Gulf War*, Nov. 4, 2010, <http://www.ng.mil/news/archives/2010/11/110410-Gulf.aspx>.

23. *Id.*

(USERRA) in 1994.²⁴ USERRA has two components: anti-discrimination prohibitions for members of the National Guard and reserve components and re-employment protections upon return from military service.²⁵ The nation was at peace for the remainder of the 1990s and the all-volunteer military draws from approximately one percent of the population.²⁶ Accordingly, the USERRA law remained largely unchallenged during the remainder of the twentieth century.²⁷

The United States was prepared for conflict of a traditional military nature after Operation Desert Storm. American citizens and interests had been attacked abroad in events ranging from those targeting soldiers abroad like the Berlin Disco attack, the Beirut barracks attack, the attack on the USS Cole, and the bombings of the African Embassies.²⁸ Prior acts of domestic terrorism had been perpetrated by home-grown radical fringe groups like the twentieth century "militia" movement,²⁹ foreign nationals intent on damaging American industrial production capacity,³⁰ 1970s radicals,³¹ or foreign terror groups attacking iconic American targets.³² September 11, 2001 brought a new and unforeseen threat to the Nation, completely unlike anything previously encountered.

24. Clauss, *supra* note 18, at §§ 2.02[1], 2.02[2].

25. *Id.*

26. Greg Jaffe, *Lt. Gen. John Kelly, Who Lost Son to War, Says U.S. Largely Unaware of Sacrifice*, WASH. POST, Mar. 2, 2011, <http://www.washingtonpost.com/wp-dyn/content/article/2011/03/01/AR2011030106938.html>.

27. Clauss, *supra* note 18, at § 2.01.

28. Stephen Erlanger, *4 Guilty in Fatal 1986 Disco Bombing in Libya*, N.Y. TIMES, Nov. 14, 2001, at A7 (stating that the Berlin Disco attack of 1986 killed two and wounded seventy-nine American soldiers). The German terrorist group Badermeinhof took credit for the bombing and members were later convicted for the attack.

29. Timothy McVeigh and his co-conspirators were responsible for the death of 168 people in the bombing of the Murrah Federal building in Oklahoma City on April 19, 1995. It was the most devastating terrorist attack in the United States prior to the second attacks on the World Trade Center on September 11, 2001. McVeigh and the other conspirators were members of the "militia" movement.

30. James Powles, *Terror Strike on Black Tom Island*, 28 AM. HIST., Oct. 2004, at 28-36, 76-77 (discussing how German agents sabotaged an armory in New York harbor in 1916, despite the United States having declared it neutrality in the Great War).

31. Daniel Berger, *The Weather Underground's Place in History: A Response to Jonah Raskin*, 20 SOCIALISM & DEMOCRACY, July 2006, <http://sdonline.org/41/the-weather-underground%E2%80%99s-place-in-history-a-response-to-jonah-raskin/> (discussing how the Weathermen were responsible for a campaign of bombing attacks targeting government building and tanks).

32. Robert D. McFadden, *Explosion at the Twin Towers*, N.Y. TIMES, Feb. 27, 1993, at § 1 p. 1 (discussing how the World Trade Center was first attacked on 1993 when a truck bomb was detonated in the parking garage). Operatives of an Islamic extremist group were determined to be responsible for the attack.

The United States faced a new reality on September 12, 2001, when distance and oceans could no longer isolate the nation. As had been done many times before, National Guard and Air Guard units were activated in large numbers immediately after the attacks in order to provide not only increased military readiness and protect the skies, but also to provide additional security at airports, filtration plant, dams, power plants, hydroelectric facilities and other potential terrorist targets.³³

In response to the attacks on America, the United States responded by attacking Afghanistan in 2001. That invasion was accomplished through the activation of 75,000 service members in the National Guard and reserve components as part of the coalition force.³⁴ Over 700,000 citizen soldiers have been deployed since the 9/11 invasion and many continue to serve in Afghanistan today.³⁵

The National Guard and other reserve components were activated in large numbers for the invasion of Iraq. Following the invasion and the eight years that American forces remained in Iraq, hundreds of thousands of National Guard and Reserve Component members were deployed to the theaters. National Guard members comprised a significant portion of American forces in both Afghanistan and Iraq.³⁶ Reserve components have comprised approximately twenty-eight percent of the American forces in the NATO operation in Afghanistan and Coalition Forces in Iraq.³⁷ The average activation length for a National Guard member in Afghanistan has been twenty months.³⁸ These reserve components have not been activated solely for support roles. To the contrary, numerous National Guard Brigade Combat Teams have deployed to Iraq,

33. Kapp, *supra* note 11, at 21. These forces contributed about 1 million service days per year between 1986 and 1989. *Id.* at 10. From 1996 to 2001, they contributed approximately 13 million service days per year. *Id.* In the decade since 9/11, reserve component service days have averaged approximately 50 million service days per year. *See id.* at 10-11.

34. DEP'T OF DEF., OFFICE OF THE UNDER SEC'Y OF DEF. FOR ACQUISITION, TECH. & LOGISTICS, DEFENSE SCIENCE BOARD TASK FORCE ON DEPLOYMENT OF MEMBERS OF THE NATIONAL GUARD AND RESERVE IN THE GLOBAL WAR ON TERRORISM 6 (2007), <http://www.acq.osd.mil/dsb/reports/ADA478163.pdf>.

35. DEF. MANPOWER DATA CTR, RESERVE COMPONENTS: NOBLE EAGLE, ENDURING FREEDOM, IRAQI FREEDOM (2009), <http://www.defense.gov/news/Mar2009/d20090310ngr.pdf>.

36. *Most Veteran Suicides Among Guard, Reserve Troops*, MSNBC (Feb. 2, 2008, 4:39:10 PM), <http://www.msnbc.msn.com/id/23132421> (discussing that, as of 2007, twenty-eight percent of deployed troops in Iraq and Afghanistan were National Guard or Reserve).

37. *Id.*

38. *Costs to the United States: Economic Costs*, IRAQOMETER.COM, <http://www.iraqometer.com/> (last visited Mar. 9, 2012).

Afghanistan and Kuwait.³⁹ The Global War on Terror is responsible for the deaths of 477 National Guard members, 120 Army Reservists, and ninety Marines Reservists.⁴⁰

The role of the citizen soldier in the current military will not change in the near future.⁴¹ High-ranking members of the military have testified before Congress that the reserve forces are the most cost-effective personnel in the armed forces. The Government Accounting Office has also noted that Reserve components are more cost effective than active duty forces.⁴² For example the Air Force has reported:

Air Force Reserve Airmen comprise about 14 percent of the total Air Force authorized end-strength at only 5.3 percent of the Air Force's military personnel budget . . . This means the nation gains 3.5 Reserve Airmen, for the cost of one active component.⁴³

Further, Chief of the Air Force Reserve, Lieutenant General Charles Stenner Jr., testified before the House Armed services Committee on October 12, 2011:

This is one of the most efficient and cost-effective programs in DOD. We retain the most experienced warriors and powerful

39. See Press Release, U.S. Dep't of Def., DOD Identifies Units for Upcoming Afghanistan Deployment (June 17, 2011), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=14583>. The current Afghanistan and Kuwait deployment rotation schedules includes two Brigade Combat Teams and one Combat Aviation Brigade involving 10,000 personnel beginning in late summer 2011 and will continue through early 2012. *Id.* These units have previously deployed to Iraq or Afghanistan. See also Press Release, U.S. Dep't of Def., DOD Identifies Units for Upcoming Afghanistan and Kuwait Rotation (March 3, 2011), *available at* <http://www.defense.gov/releases/release.aspx?releaseid=14304> (the 27th Infantry Brigade Combat Team, New York National Guard, and the 55th Heavy Brigade Combat Team, Pennsylvania National Guard). Reserve component members can be activated in a number of ways, from being activated as Individual Augmentees to fill a specific position, to large activations, such as a Brigade Combat Team activation.

40. *Faces of the Fallen*, WASH. POST, <http://apps.washingtonpost.com/national/fallen> (last visited Mar. 27, 2012).

41. See Kapp, *supra* note 11, at 21, for a sequence of service days committed by the National Guard from 1986 until today.

42. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-06-125, ASSESSMENTS OF NAVY RESERVE MANPOWER REQUIREMENTS NEED TO CONSIDER THE MOST COST-EFFECTIVE MIX OF ACTIVE AND RESERVE MANPOWER TO MEET MISSION NEEDS (2005).

43. Col. Robert Thompson, *Congress Reviews Future Reserve Equipment Needs*, AIR FORCE PRINT NEWS TODAY, Oct. 18, 2011, http://www.af.mil/news/story_print.asp?id=123275763.

combat capability our nation has ever produced at a fraction of the cost of regular component programs. . . In today's fiscally constrained environment, Reservists remain efficient and cost-effective solutions to our nation's challenges.⁴⁴

Given the current DOD budget issues, there is little chance that the reliance on the reserve forces will change in the near future.

Service members in the reserve components train with their units pursuant to a drill schedule of one weekend drill a month and approximately two weeks of Annual Training a year. Like an active duty unit, that training becomes much more intense when a unit is readying for a deployment— sometimes taking months to complete. Following activation and pre-deployment training, the reserve or National Guard unit is no different than a unit of full-time service members – the reserve or National Guard unit deploys as a unit to the theater and generally returns home as a unit. However, that is where the similarities with active duty service members largely end.

Active duty units train as a unit, deploy as a unit and return as a unit to their permanent base. The unit remains intact and continues to train and prepare. If a service member is experiencing transition, or more serious issues, the individual has access to medical facilities at his or her base. National Guard and other reserve component units return to their base and shortly thereafter return to civilian lives.⁴⁵ The service members return to the unit for drill and annual training, but do not remain on active duty as a unit upon return. Absent being in the company of comrades who are experiencing some of the same transition issues, the National Guard or reserve member in rural America is essentially alone and without the support of an active duty unit. A National Guard or reserve component member experiencing issues in the transition to civilian life, or more severe issues such as posttraumatic stress disorder (PTSD), traumatic brain injury (TBI), injury or disability, will be experiencing those issues in the home, workplace, school or community. Transition issues can be difficult for civilians to recognize in a returning citizen-soldier or veteran.

44. *Id.*

45. Clauss, *supra* note 18, at § 2.02[2][f]. An employee must return to work in a timely manner for USERRA protections to apply. For service less than thirty days, an employee must return the next day following an eight hour rest period; for thirty days to 181 days, no later than fourteen days after completion of service; and for periods of greater than 180 days, the service member must return to work no more than ninety days after completion of service. *Id.*

III. THE INCREASED RISK OF HOMELESSNESS AMONG RURAL VETERANS

Veterans who live in rural areas are further removed from sources of aid both because fewer resources exist in rural areas and transportation to urban areas is lacking. The risk is even greater for veterans who suffer from PTSD because delayed treatment exacerbates the disorder. As a result, these veterans are unable to access necessary help, compounding the risk factors and placing them at an even more serious risk for homelessness.

A. Risk Factors

Numerous factors can increase the risk of homelessness. Some of the identified factors are: job loss, mental health problems, health problems, lack of health insurance, foreclosure, and family problems. These risk factors also place service members and veterans at risk for suicide.⁴⁶ Returning service members have a high rate of unemployment, reaching nearly twenty-two percent in 2010 for veterans of Iraq and Afghanistan.⁴⁷ A large number of these soldiers are members of the National Guard and reserves, most having been deployed multiple times overseas— and many come home to find that a dismal economy has eliminated the jobs held pre-deployment.⁴⁸ If the National Guard or Reserve member is experiencing a problem with the civilian employer related to military service, the U.S. Department of Defense's Employer Support of the Guard and Reserve Program (ESGR) is, at best, marginally able to assist the service member and, at worse, a liability to the service member.

46. The branches of the U.S. military frequently study the risk of suicide among veterans. One such report is U.S. ARMY, OFFICE OF THE CHIEF OF PUBLIC AFFAIRS, ARMY HEALTH PROMOTION, RISK REDUCTION & SUICIDE PREVENTION REPORT 17(2010) (stating that many of the factors listed by the author for risk of homelessness are also known stressors for suicide among active duty and non-active duty [National Guard and Reserve] military personnel). Economic stresses from deployment and moving assignments are major factors for active duty members. Job-related stressors are significant factors for National Guard and Reserve component members.

47. Kimberly Hefling, *Unemployment Rate for Young Vets Hit 21.1%*, ARMY TIMES (Mar. 12, 2010, 4:10:30 PM), http://www.armytimes.com/news/2010/03/ap_military_young_vets_unemployment_031210.

48. *Soldiers Say It's Hard to Return to Civilian Life*, NAT'L PUB. RADIO, Oct. 10, 2011, <http://www.npr.org/2011/10/10/141213271/soldiers-say-its-hard-to-return-to-civilian-life>.

B. Employer Support of the Guard and Reserve Program

ESGR resolves complaints of workplace disputes through a network of volunteer mediators – many with little training in the USERRA law.⁴⁹ In 2009, ESGR received 15,870 USERRA related inquiries.⁵⁰ A significant number of these USERRA related inquiries are not accepted by ESGR for referral to the Ombudsmen Program for informal mediation by ESGR volunteers.⁵¹ If ESGR does not accept a complaint, the subject of that complaint is not totaled and reported in the ESGR Annual Report.⁵² This means that ESGR does not effectively report the number of inquiries received, which contain allegations of violations of the USERRA law by civilian employers. Further, ESGR lacks enforcement power. A complaint must be filed with the Department of Labor if ESGR’s “informal mediation” does not resolve the matter.⁵³

C. Posttraumatic Stress Disorder

Things grow even grimmer for soldiers suffering from PTSD.⁵⁴ Symptoms like insomnia, hyper-arousal, and avoidance of stimuli cause many veterans to struggle to keep their jobs, or worse, quit good jobs.⁵⁵ Although USERRA allows a returning service member up to ninety days to return to the workplace, the USERRA law does not protect an employee who must take time off after returning to work. If the veteran has filed a claim for Veteran’s Affairs (VA) benefits for PTSD, he or she

49. ASSESSMENTS OF NAVY RESERVE MANPOWER REQUIREMENTS, *supra*, note 42.

50. U.S. DEP’T OF DEF., EMPLOYER SUPPORT OF GUARD AND RESERVE ANNUAL REPORT 2009, at 17 (2009).

51. *Id.* (out of the 15,870 inquiries, 2,475 became ombudsmen cases in 2009).

52. *Id.*

53. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO 06-60, MILITARY PERSONNEL: FEDERAL MANAGEMENT OF SERVICE MEMBER EMPLOYMENT RIGHTS CAN BE FURTHER IMPROVED 2 (2005). The U.S. Department of Labor’s VETS program (DOL-VETS) receives formal USERRA-related complaints against civilian employers. Representatives of VETS investigate USERRA complaints and try to resolve disputes. If DOL-VETS is unable to resolve complaints, DOL informs the service members that they may request to have their complaints referred to the U.S. Department of Justice (DOJ) or to the Office of Special Counsel (OSC). DOL refers unresolved complaints to DOJ to investigate, mediate, and litigate.

54. *DSM-IV-TR Criteria for PTSD*, NAT’L CTR. FOR PTSD, <http://www.ptsd.va.gov/professional/pages/dsm-iv-tr-ptsd.asp> (last visited Sep. 24, 2011) (stating that the symptoms of PTSD are wide ranging and can additionally include, but are not limited to, intrusive recollections, intense fear, feelings of helplessness, feeling detached from others, and difficulty concentrating).

55. *Id.*

will wait for a physical examination and then wait for the VA's decision, and wait, and wait— many times for well over a year.⁵⁶

D. Living in Rural America

Further complicating the reintegration of the reserve component member or a recent veteran is the location of his or her residence. A significant portion of enlistees hails from rural America, where the risk of homelessness is possibly greater than urban enlistees. For example, Pope County, Illinois is a rural community in downstate Illinois near the Kentucky border, with a median per capita income below the national average, and an unemployment rate over 9% in 2011.⁵⁷ Pope County consistently ranks within the top 20 counties for military enlistment rates as a percentage of population.⁵⁸ The closest VA medical facility is in Marion, Illinois, which is approximately fifty miles from the county seat in Golconda, Illinois.

An urban veteran in need of VA services has access to a variety of services and non-profit organizations that are simply not available in rural America. Further, an urban veteran has access to public transportation to get to treatment whereas public transportation is non-existent in rural America.⁵⁹ Accordingly, the rural reserve component member or veteran lacking transportation is unable to get to treatment. Although Golconda, Illinois, is only an hour from the VA hospital in Marion, without an automobile or somebody to provide transportation, the Pope County veteran in need of services is simply abandoned in the country. The example of Pope County, Illinois, is repeated in thousands of rural communities throughout America. Many rural veterans are in need of VA services and unable to receive those services.

An additional complicating factor for the rural veteran is PTSD. Current PTSD estimates for service members who deployed are thirteen

56. Julie Rose, *VA Officials Try To Ease Disability Exam Backlog*, NAT'L PUB. RADIO, Apr. 8, 2011, <http://www.npr.org/2011/04/08/135218770/va-officials-try-to-ease-disability-exam-backlog>.

57. *Local Area Unemployment Statistics*, ILL. DEP'T OF EMP'T SEC., <http://www.ides.illinois.gov/custom/library/statistic/LAUS/2011AALWA.pdf> (last visited Sept 7, 2012).

58. Jim Suhr, *Nonprofit analyzes military recruiting data*, TIMES ARGUS, Dec. 25, 2005, <http://www.timesargus.com/apps/pbcs.dll/article?AID=/20051225/NEWS/512250418/1002/NEWS0>.

59. PAMELA FRIEDMAN, RURAL ASSISTANCE CTR., *TRANSPORTATION NEEDS IN RURAL COMMUNITIES* (2004), <http://76.12.61.196/publications/transportationneedsINRAC.html>.

percent for male veterans and nearly double that for female veterans.⁶⁰ For a person suffering from PTSD, a delay in treatment can cause the condition to worsen dramatically.⁶¹ Essentially, a rural veteran suffering from PTSD needs transportation to access treatment or his or her PTSD will get worse. If that veteran is jobless, without benefits or awaiting VA benefits, suffering from PTSD and in rural America, he or she is at serious risk for homelessness.

IV. CONCLUSION

There are a variety of reasons that our nation's veterans are experiencing high rates of homelessness. Veterans of Iraq and Afghanistan and members of the National Guard and Reserve are at substantial risk for unemployment upon return to civilian status. Service members entrust the resolution of his or her reemployment or discrimination issues to a network of poorly trained volunteer mediators through the ESGR program. The ESGR program lacks enforcement and the National Guard or Reserve member must file a complaint with the U.S. Department of Labor if ESGR cannot resolve the matter. A U.S. Department of Labor action must then be initiated, leading to further delay in resolution of their employment issue.

Further, a significant percentage of returning National Guard and Reserve members and veterans suffer from PTSD, a condition that also places them at greater risk for homelessness because they are often unable to maintain employment due to the condition. If unable to work and filing for VA benefits, that veteran will sit and wait for a VA decision— sometimes for years. Moreover, the sheer distance to VA medical facilities and lack of transportation can leave the rural veteran stranded and unable to get treatment.

The risk of homelessness only increases among those located veterans in rural America because of a small number of resources and the distance to the available resources. In effect, living in a rural area can become a “force multiplier” for some of the stressors that contribute to homelessness.

60. See generally BRETT LITZ & WILLIAM SCHLENGER, NAT'L CTR. FOR PTSD, PTSD IN SERVICE MEMBERS AND NEW VETERANS OF THE IRAQ AND AFGHANISTAN WARS (2009), <http://www.ptsd.va.gov/professional/newsletters/research-quarterly/V20N1.pdf>.

61. Matthew Tull, *The Effect of PTSD on a Person's Life*, ABOUT.COM, June 26, 2011, <http://ptsd.about.com/od/relatedconditions/a/effectofptsd.htm>.

HEROES OR HOPELESS? HOMELESS VETERANS CAUGHT IN A DYSFUNCTIONAL SYSTEM

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I. INTRODUCTION AND SCOPE OF THE PROBLEM	418
A. <i>National Demographics</i>	418
B. <i>Michigan’s Homeless Veterans</i>	420
II. CAUSES AND CONTRIBUTING FACTORS TO VETERANS’ HOMELESSNESS	420
III. CURRENT VA STATUTES, REGULATIONS, AND PROCEDURES THAT CONTRIBUTE TO THE PROBLEM OF HOMELESSNESS.....	422
A. <i>Benefits Available to Veterans</i>	422
1. <i>Pension Benefits</i>	423
2. <i>Disability Compensation for Service-Connected Injuries or Illnesses</i>	423
B. <i>Difficulties in Obtaining Benefits</i>	424
1. <i>Who Is Eligible?</i>	424
2. <i>Delays in Determination of Eligibility</i>	426
3. <i>Common Bars to Benefits</i>	427
a. <i>Length of Service</i>	427
b. <i>Character of Discharge</i>	428
c. <i>Alcohol and Drug Use</i>	428
4. <i>Development of Evidence and Need for Corroboration</i>	429
5. <i>Rating System</i>	430
6. <i>Limitation on Attorney Representation</i>	431
IV. PROGRAMS THAT ASSIST HOMELESS VETERANS	432
A. <i>VA Programs</i>	432
B. <i>Programs for Homeless Veterans in Southeastern Michigan</i> ..	434

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1. <i>VA Domiciliary Rehabilitation Treatment Program: Detroit VA Medical Center</i>	434
2. <i>Michigan Veterans Foundation Detroit Veterans Center</i> ...	435
3. <i>Piquette Square, a Project of Southwest Solutions</i>	435
4. <i>Southeastern Michigan Veterans Stand Down</i>	436
5. <i>Veterans' Courts</i>	436
V. CONCLUSION AND SUGGESTED REFORMS	436

I. INTRODUCTION AND SCOPE OF THE PROBLEM

It has been recognized for some time that veterans are overrepresented in the homeless population.² Various reasons have been proffered for the overrepresentation. This article will summarize the current state of homelessness among veterans, and discuss the relationship between homelessness and ability to obtain monetary veterans' benefits. It is suggested that a dysfunctional system for obtaining veterans' benefits contributes to veterans becoming, and remaining, homeless. Some proposed reforms will be presented.

A. National Demographics

The 2011 "point-in-time" estimate of homelessness among veterans is that 67,495 veterans were homeless in the United States.³ That figure represents approximately fourteen percent of all homeless adults.⁴ The good news is that this figure reflects a decline of nearly twelve percent in homelessness among veterans since January 2010.⁵ An estimated fifty-nine percent of these veterans were sheltered, while forty-one percent were unsheltered, in 2011.⁶

According to a joint study conducted by the U.S. Department of Housing and Urban Development and the U.S. Department of Veterans Affairs, "in 2010, homeless veterans accounted for 1 in 150 veterans and

2. See, e.g., Marjorie J. Robertson, *Homeless Veterans: An Emerging Problem?*, in *THE HOMELESS IN CONTEMPORARY SOCIETY* 64-66 (Richard J. Bingham, Roy E. Green & Sammis B. White eds. 1987).

3. See U.S. DEP'T OF HOUSING & URBAN DEV., OFFICE OF CMTY. PLANNING & DEV., *THE 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS: SUPPLEMENT TO THE ANNUAL HOMELESS ASSESSMENT REPORT* (2011). Point-in-Time (PIT) estimates are based on one-night counts, conducted in January, of sheltered and unsheltered homeless individuals. The 2007 to 2011 PIT counts are available at www.hudhre.info.

4. *Id.*

5. *Id.*

6. *Id.* at 6.

1 in 9 veterans living in poverty.”⁷ “Veterans are overrepresented among the homeless,” as they account for less than ten percent of the total adult population in the U.S.⁸ The typical profile of a veteran living in a homeless shelter is a male (ninety-two percent of homeless veterans), between the ages of fifty-one and sixty-one (forty-one percent), who has some type of disability (fifty-one percent).⁹ Veterans who currently are most at risk of being homeless are those who served during the Vietnam era.¹⁰ Reasons given for this include a higher incidence of substance abuse in this group and selection of more “potentially ineligible” recruits for service.¹¹

The 100,000 Homes Campaign¹² found that veterans were homeless approximately two years longer than their non-veteran counterparts.¹³ That survey also disclosed that, among veterans who had been homeless for more than two years, more than sixty-one percent reported a serious physical health condition, fifty-five percent reported a mental health problem, seventy-six percent reported substance abuse, and thirty-two percent reported all three.¹⁴ Homeless veterans are older than non-veterans; 21.3% were over the age of sixty, compared to 9.4% of homeless non-veterans.¹⁵

Women comprise only a small segment (approximately eight percent) of homeless veterans, and “only 7% of the total veteran population.”¹⁶ However, female veterans are more than twice as likely as female non-veterans to be homeless.¹⁷ Additionally, compared to female

7. U.S. DEP’T OF HOUSING AND URBAN DEV. & U.S. DEP’T OF VETERANS AFFAIRS, VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, at i (2011).

8. *Id.* at 4.

9. *Id.* at 7.

10. MARSHA McMURRAY-AVILA, NAT’L HEALTH CARE FOR THE HOMELESS COUNCIL HOMELESS VETERANS AND HEALTHCARE: A RESOURCE GUIDE FOR PROVIDER 4 (2001).

11. *Id.* at 5-6; see also Latrena Davidson, *Healthcare for U.S. Veterans: Is the System Sufficient?* 7 INTERNET J. HEALTHCARE ADMIN., Jan. 2010.

12. “The 100,000 Homes Campaign is a national movement of communities working together to find permanent homes for 100,000 homeless Americans by July 2013.” 1,000 HOMES CAMPAIGN, DATA REPORT: NATIONAL SURVEY OF HOMELESS VETERANS IN 100,000 HOMES CAMPAIGN COMMUNITIES 5 (2011). The Campaign is led by the nonprofit Community Solutions and supported by other national and local partners in 102 communities. *Id.*

13. *Id.* at 3.

14. *Id.*

15. *Id.*

16. VETERAN HOMELESSNESS, *supra* note 7, at 7.

17. *Id.* at 13.

non-veterans in the poverty population, female veterans in the poverty population are more than three times as likely as to be homeless.¹⁸

B. Michigan's Homeless Veterans

Michigan currently is ranked eleventh in the nation in number of veterans; approximately 704,000 veterans or 7.1% of the veteran population reside there.¹⁹ That number is expected to progressively decline, as over half of those veterans are between the ages of fifty and seventy.²⁰ Over thirty percent of Michigan's veterans (approximately 220,000) are located in southeastern Michigan in Wayne, Oakland, and Macomb Counties.²¹

The majority of Michigan's veterans who have served in combat are veterans of the Vietnam War, followed closely by veterans who have served in the Gulf War conflict.²² Approximately seven percent (45,000) of Michigan's veterans are women, at par with the national average.²³

Michigan's homeless veterans make up approximately 7.4% of the state's homeless population.²⁴ That number reflects 2.1% of total homeless veterans in the United States,²⁵ compared to 1.3% counted in the earlier 2010 PIT count.²⁶

II. CAUSES AND CONTRIBUTING FACTORS TO VETERANS' HOMELESSNESS

Most studies of homelessness that compare homeless veterans to non-homeless veterans were conducted in the 1980s and 1990s; therefore, they do not include most veterans who served in the Gulf War conflict. Most of the data was generated by The National Vietnam Veterans Readjustment Study (NVVRS), which was conducted from

18. *Id.*

19. SARA E. WYCOFF, MICH. DEP'T. OF MILITARY & VETERANS AFFAIRS, VETERANS IN MICHIGAN: A BRIEF OVERVIEW OF DEMOGRAPHIC TRENDS IN VETERANS POPULATIONS IN THE STATE OF MICHIGAN AND NATIONWIDE 3 (2011).

20. *Id.* at 5.

21. *Id.* at 8.

22. *Id.* at 6. Service in the Gulf War conflict refers to service from August 2, 1990 to the present. 38 U.S.C. § 101(33) (2011).

23. *Id.* at 11.

24. VETERAN HOMELESSNESS, *supra* note 7, at 18.

25. 2011 POINT-IN-TIME ESTIMATES, *supra* note 3, at 4.

26. VETERAN HOMELESSNESS, *supra* note 7, at 17.

1984 to 1988.²⁷ Studies from the 1980s found that homeless male veterans were older and better educated than homeless male non-veterans.²⁸ However, homeless veteran men experienced more health problems, mental illness, and alcohol abuse than homeless non-veterans.²⁹ Both male and female veterans had a history of more stable family backgrounds and fewer incidents of conduct disorder or acting-out behavior as children.³⁰

Researchers have sought to explain why veterans represent a disproportionate number of the homeless. This is particularly true with respect to Vietnam era veterans. There are some consistent findings. For example, stress that occurs as a result of deployment and exposure to combat is linked to a higher incident of homelessness. Vietnam veterans who experienced “war zone” stress reported difficulty readjusting to civilian life, including problems such as social isolation and violent behavior.³¹ They were also more likely to become homeless.³²

An extensive study of Vietnam era veterans conducted in 1994 evaluated eighteen variables potentially associated with homelessness.³³ The four post-military variables found to have a direct relationship to homelessness were: (1) lack of social support upon returning home from the military; (2) psychiatric disorders (not including posttraumatic stress disorder); (3) substance abuse disorders; and (4) being single, separated, divorced or widowed.³⁴ Two military factors – combat exposure and participation in atrocities- contributed to these four variables. However, the military factors themselves were not directly correlated with homelessness.³⁵

27. The NVVRS was conducted at the direction of Congress as part of the Veterans Health Care Amendments of 1983, and included 1,600 veterans who had served in the Vietnam theatre, and 730 Vietnam era veterans who did not serve in the theater.

28. Robert Rosenheck et al., *Homeless Veterans*, in *HOMELESSNESS IN AMERICA* 97, 104-05 (Jim Baumohl, ed.1996).

29. *Id.*; see also Richard Tessler, Robert Rosenheck & Gail Gamache, *Comparison of Homeless Veterans with Other Homeless Men in a Large Clinical Outreach Program*, 73 *PSYCHIATRIC Q.* 109, 113-14 (2002).

30. Rosenheck et al., *supra* note 28, at 114; see also Gail Gamache, Robert Rosenheck & Richard Tessler, *Overrepresentation of Women Veterans Among Homeless Women*, 93 *AM. J. PUB. HEALTH* 1132, 1133-34 (2003).

31. RICHARD A. KULKA ET AL., *TRAUMA AND THE VIETNAM WAR GENERATION: REPORT OF FINDINGS FROM THE NATIONAL VIETNAM VETERANS READJUSTMENT STUDY* 142 (1990).

32. *Id.*

33. See Robert Rosenheck & Alan Fontana, *A Model of Homelessness Among Male Veterans of the Vietnam War Generation*, 151 *AM. J. PSYCHIATRY* 421, 421-27 (1994).

34. *Id.* at 423-24.

35. *Id.* at 424.

Characteristics associated with homelessness among female veterans vary somewhat from the variables directly affecting homelessness in male veterans. In female veterans, the characteristics most commonly associated with homelessness were sexual assault during military service (military sexual trauma or MST), unemployment, disability, poor overall health, and screening positive for an anxiety disorder or posttraumatic stress disorder.³⁶

It should come as no surprise that lack of income or other financial resources strongly contributes to homelessness. Of all veterans living below the poverty level, thirteen percent are homeless. This figure reflects more than twice the number of homeless non-veterans living below the poverty level.³⁷ The disparity is likely a result of the greater lack of social support experienced by homeless veterans, which is in itself a result of fewer opportunities for friends or relatives to offer them a place to live or otherwise assist them financially. Young veterans living in poverty are even more likely (3.7 times) to be homeless than young non-veterans living below the poverty level.³⁸

III. CURRENT VA STATUTES, REGULATIONS, AND PROCEDURES THAT CONTRIBUTE TO THE PROBLEM OF HOMELESSNESS

A. *Benefits Available to Veterans*

As was noted above, poverty is highly correlated with veterans' homelessness, and to a much greater extent than in the general homeless population. Consequently, while not the only form of assistance needed, a source of income often can prevent homelessness or allow homeless veterans to obtain a home. Contrary to what many believe, not all veterans are entitled to obtain benefits from the U.S. Department of Veterans Affairs (VA). There are two types of monetary benefits, which may be available to veterans – pension benefits and compensation for service-connected disabilities.³⁹

36. See Donna L. Washington et al., *Risk Factors for Homelessness among Women Veterans*, 21 J. HEALTH CARE FOR THE POOR & UNDERSERVED 81, 84-86 (2010).

37. VETERAN HOMELESSNESS, *supra* note 7, at 13.

38. *Id.* at 15.

39. This does not include military retirement, severance, or other special forms of compensation not available to the general veteran population.

1. Pension Benefits

The rationale behind pension benefits is to provide a source of income for disabled veterans who had to give up career opportunities while they served their country during a time of war, and therefore were not able to advance their careers or accumulate sufficient resources to support themselves after they became disabled.⁴⁰ The pension benefit is not a retirement benefit. Pension benefits may be available to veterans who are totally and permanently disabled or age sixty-five and older, and who served during wartime.⁴¹ The disability does not have to be connected to the veteran's military service. Such benefits are based on financial need, and are not available to veterans who have an annual income of more than \$11,830 (single veteran with no dependents).⁴² Similarly, free medical treatment at a VA facility is not available to a veteran who does not have a service-connected disability unless he or she demonstrates financial need.⁴³

A determination of income eligibility for pension is based on the family income (e.g., the income of the veteran's spouse is considered). Monthly pension benefits are offset by income of any kind, including Social Security income.⁴⁴ However, medical expenses that are not reimbursed will be deducted from the veteran's income when determining whether he or she is income-eligible to receive a pension.⁴⁵

2. Disability Compensation for Service-Connected Injuries or Illnesses

Veterans who have a current disability (physical or mental), which is the result of a disease or injury that was incurred or aggravated during active military duty, will be eligible for service-connected disability compensation.⁴⁶ Unlike pension, such compensation is not income dependent. A veteran with a serious service-connected disability

40. VETERANS BENEFITS MANUAL 459 (Barton F. Stichman & Ronald B. Abrams eds., LexisNexis 2011).

41. 38 U.S.C. § 1513 (2011); 38 U.S.C. § 1521 (2011).

42. 38 U.S.C. § 1521(b). This is the amount payable in 2012; the amount increases to \$15,493 for a married veteran and increases by \$2,020 for each additional dependent. 38 U.S.C. § 1521(c). If the veteran is in need of regular aid and attendance, he or she is entitled to a higher rate of payment. 38 U.S.C. § 1521(d). *See also Improved Disability Benefits Pension Rate Table*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/pen01.htm> (last visited Aug. 18, 2012) (effective Dec. 1, 2011).

43. *See* 38 U.S.C. § 1710 (2011).

44. *See* 38 U.S.C. § 1521.

45. *See* 38 C.F.R. § 3.272(g) (2011).

46. 38 U.S.C. §§ 1101, 1110 (2011).

generally will receive much higher monthly payments than he or she would receive if entitled to pension benefits for a non-service-connected disability.⁴⁷

Once a veteran is determined to have a service-connected disability or disabilities, the VA will issue a rating (in the form of a percentage from zero percent to 100%) for each disability. The VA, under the authority of Congress, developed a schedule to be used in rating disabilities. The ratings are based upon the statistically average impairment of earning capacity resulting from the respective injuries or illnesses.⁴⁸ Each rating (ten percent, twenty percent, etc.) reflects a specific monthly payment. A veteran's total rating is not computed simply by adding the ratings attributed to each disability. Rather, the overall percentage of disability is calculated by using the formula contained in the "Combined Ratings Table" to combine the individual ratings.⁴⁹

The highest rating of 100% means that the veteran is totally disabled. A total disability rating may be assigned to a person who fails to meet the criteria for a 100% rating, but nevertheless is unable to secure or maintain substantially gainful employment as a result of service-connected disabilities.⁵⁰

A veteran cannot receive both pension and service-connected disability compensation. If eligible for both, he or she will receive the one that provides the greatest monetary benefit.⁵¹

B. Difficulties in Obtaining Benefits

1. Who Is Eligible?

Only veterans are eligible for benefits or services administered by the VA. The VA defines a veteran as "a person who served in the active military, naval, or air service, and who was discharged or released there from under conditions other than dishonorable."⁵² Thus, anyone discharged with an "other than honorable" or "dishonorable" discharge is not considered a veteran, regardless of the nature or overall quality of his or her military service.

47. 38 U.S.C. § 1114 (2011); *but cf.* 38 U.S.C. § 1521.

48. Schedule for Rating Disabilities, 38 C.F.R. §§ 4.40-4.150 (2011).

49. 38 U.S.C. § 1155 (2011); Combined Ratings Table, 38 C.F.R. § 4.25 (2011).

50. 38 C.F.R. § 4.16 (2011).

51. 38 U.S.C. § 1521(i).

52. 38 U.S.C. § 101(2) (2011); 38 C.F.R. § 3.1(d) (2011).

With respect to pension benefits, only veterans with minimal or no income are eligible. As noted above, annual income for a single veteran must be less than \$11,830.⁵³ Additionally, those veterans under age sixty-five, who are the majority of veterans applying for pension benefits,⁵⁴ generally must provide an expert opinion that they are unable to work.⁵⁵ This is an obstacle for many veterans because they do not have the financial resources to obtain such an opinion if a VA doctor is not willing to provide it.

The greatest obstacle for many veterans seeking to obtain VA pension is that they did not serve any time during a “period of war.”⁵⁶ A period of war is defined as a time period, which Congress has designated as a period of war.⁵⁷ The time periods that Congress has designated as “periods of war” include the Vietnam era (August 5, 1964, through May 7, 1975)⁵⁸ and the Persian Gulf War (August 2, 1990 continuing to the present).⁵⁹ Therefore, veterans whose active duty service occurred only between May 7, 1975, and August 2, 1990, are not eligible for pension regardless of whether they satisfy the other criteria. That is significant because a large segment of homeless veterans are veterans of that time period.⁶⁰ Such veterans are over three times as likely to be homeless as

53. 38 U.S.C. § 1521(b); *see also Veterans Compensation Benefits Rate Tables*, U.S. DEP’T OF VETERANS AFFAIRS, <http://www.vba.va.gov/bln/21/rates/comp01.htm> (last visited Aug. 18, 2012) (effective Dec. 1, 2011).

54. Most veterans over age sixty-five are eligible for some type of social security or social security disability benefit, although the VA pension benefit may be used to supplement that benefit if income remains below the required threshold.

55. The VA is permitted to assist veterans with claims for disability compensation by conducting a medical examination or by obtaining a medical opinion when an examination or opinion is necessary for the VA to make a decision on the claim. 38 U.S.C. § 5103A(d)(1) (2011); 38 C.F.R. § 3.159(c)(4) (2009). A VA conducted medical examination is only adequate when it is based on the consideration of a claimant veteran’s “whole recorded [medical] history” and examinations. 38 C.F.R. 4.2 (2009). Because the VA cannot refute medical evidence submitted by the claimant, and the claimant’s medical evidence carries at least as much weight as the VA’s, it is best practice for veteran claimants to procure the independent medical opinion of their own private physicians whether or not the VA agrees to assist them with their claims by conducting its own medical examinations.

56. *See* 38 U.S.C. §§ 1521(a), 1521(j) (requiring service members to be veterans of a period of war to receive pension benefits).

57. *See, e.g.*, 38 U.S.C. § 101(11) (2011).

58. Veterans who served on land in the Republic of Vietnam also are eligible if they served between February 28, 1961, and August 5, 1964. 38 U.S.C. §§ 101(29), 1501(4) (2011); 38 C.F.R. § 3.2(f) (2011).

59. 38 U.S.C. §§ 101(33), 1501(4); 38 C.F.R. § 3.2(i) (2011).

60. Like Vietnam veterans, veterans of the post-Vietnam era have been found to be overrepresented in the homeless population. LIBBY PERL, CONG. RESEARCH SERV., RL34024, VETERANS AND HOMELESSNESS 13 (2011).

non-veterans.⁶¹ Veterans who enlisted after the military transitioned to an all-volunteer military in 1973 were found to be at highest risk for homelessness.⁶² Many of those veterans will not have served any time during a designated period of war, and therefore will not be eligible even for the meager VA pension benefit.

Recipients of service-connected disability benefits are limited to those individuals who have diseases or disabilities that began during, or were caused or aggravated by, their military service.⁶³ The veteran must be able to prove, to the satisfaction of the VA, that his or her current disabilities are related to the military service. Again, this most often triggers the need for an expert medical opinion, which generally is beyond the scope of what homeless veterans can afford. The veterans then must depend on VA medical personnel for such an opinion, and the opinion often is not forthcoming.

2. *Delays in Determination of Eligibility*

When a veteran applies for either pension or service-connected disability compensation, he or she can expect to wait a considerable amount of time for a decision. The VA receives over 830,000 new claims per year.⁶⁴ My experience at the University of Detroit Mercy Veterans Law Clinic during the past five years has been that veterans who apply at the Detroit VA Regional Office wait an average of eighteen months for an initial determination on a new claim.

The VA also must address the high number of claims remanded because of errors or for further development. If a claim is denied and appealed to the Board of Veterans' Appeals, it takes an average of 3.9 years from the date of the appeal for the Board to issue a decision.⁶⁵ This delay obviously harms veterans, particularly homeless veterans or those on the verge of homelessness because, although many ultimately will be

61. *Id.* at 14.

62. *Id.* at 13; see also Robert Rosenheck et al., *The Proportion of Veterans Among Homeless Men*, 84 AM. J. PUB. HEALTH 466, 466-69 (1994).

63. 38 U.S.C.S. §§ 1101, 1110 (2011).

64. See, e.g., *Veterans for Common Sense v. Shinseki*, 44 F.3d 845, 859 (9th Cir. 2011).

65. *Id.* It has been my experience in the Veterans Law Clinic that many veterans who appeal the denial of their benefits, and whose claim is remanded by the Board of Veterans' Appeals, wait for more than two years for the VA Regional Office to comply with the remand order. Moreover, even if the denial is appealed at the Regional Office, veterans are waiting nearly two years for a hearing.

granted benefits, they do not have the use of those benefits in a time of desperate need.⁶⁶

The rate of reversal of initial VA decisions is high. A 2010 report of the Office of the Inspector General reported that a review of decisions issued by six regional offices during a six-month period revealed that twenty-seven percent of them were in error.⁶⁷ In 2010, the Board of Veterans Appeals allowed approximately twenty-seven percent of claims that had been denied by the Regional Offices, and remanded 42.4% of denied claims.⁶⁸ Thus, the odds of a veteran's claim being granted after an initial denial are reasonably good. However, the delay may cause severe and irreversible hardship.

A homeless veteran can request to have his or her initial claim expedited. The effectiveness of this procedure varies between VA Regional Offices, and it has been my experience that claims are more likely to be expedited if the veteran is housed in a VA program or otherwise receiving VA services.

3. *Common Bars to Benefits*

In addition to the criteria for eligibility, discussed above, which restrict some homeless veterans from receiving benefits, there are additional bars to benefits that may have a disparate impact on the homeless.

a. Length of Service

Veterans who entered military service after September 1980⁶⁹ must have completed a minimum of twenty-four months of continuous active duty or the "full period for which [the veteran] was called or ordered to active duty"⁷⁰ in order to be eligible for pension benefits.⁷¹ This requirement excludes from pension veterans who may have been discharged early for their inability to adapt to military life (it is likely

66. The author could find no studies or data on the number of homeless veterans who receive monetary VA benefits, or the amount of benefits received.

67. VETERANS BENEFITS MANUAL, *supra* note 40, at 8-9 (citing U.S. DEP'T OF VETERANS AFFAIRS, OFFICE OF THE INSPECTOR GENERAL, SEMI-ANNUAL REPORT TO CONGRESS 16 (Mar. 2010)).

68. *Id.* at 1005-06 (citing U.S. DEP'T OF VETERANS AFFAIRS, BOARD OF VETERANS' APPEALS, REPORT OF THE CHAIRMAN: FISCAL YEAR 2010, at 21-22 (2011)).

69. Length of service requirements are not applicable to veterans with any active service before September 1980. 32 U.S.C. § 5303A(b)(2) (2011).

70. 38 U.S.C.S. § 5303A (2011); 38 C.F.R. § 3.12a (2011).

71. The requirement does not apply to service-connected disability compensation.

that a number of veterans who now are struggling with homelessness fall into that category), and veterans who receive an involuntary early discharge due to reduction of forces.

b. Character of Discharge

As previously noted, a person who receives a dishonorable, or other than honorable, discharge does not meet the definition of a “veteran,” and therefore generally is ineligible for any veterans’ benefits.⁷² The VA specifies several categories of conduct that constitute a discharge under dishonorable conditions, including offenses involving “moral turpitude,” willful and persistent misconduct (often including possession or use of drugs), and homosexual acts involving aggravating circumstances or affecting the performance of duty.⁷³ Mental health problems or other hardships sometimes contribute to the conduct that led to the discharge. However, unless the discharge is upgraded or re-characterized by the VA – a result that is difficult to obtain – pension, service-connected disability compensation, and even health care benefits likely will be unavailable.

c. Alcohol and Drug Use

If the disability which the veteran is experiencing is due to alcohol or drug abuse, the veteran generally is not able to receive either pension or service-connected disability compensation. That is because the VA considers alcohol and drug abuse “willful misconduct,” and the law specifically exempts injuries or diseases due to such abuse from payment of compensation.⁷⁴ Regardless of whether the veteran’s exposure to, and use of, alcohol or drugs began during his military service, he will be barred from receiving benefits for any injury or illness resulting from that use. This is particularly significant to the homeless veteran population where the majority report substance abuse (fifty-eight percent of those homeless less than two years; seventy-six percent of those homeless two years or more).⁷⁵

However, the United States Court of Appeals for the Federal Circuit has held that veterans are not precluded “from receiving compensation for alcohol or drug-related disabilities arising secondarily from a service-

72. 38 U.S.C.S. § 101(2) (2011); 38 C.F.R. § 3.12(a) (2011).

73. 38 C.F.R. § 3.12(d) (2011).

74. 38 U.S.C. §§ 105(a), 1110 (2011); 38 C.F.R. § 3.301(c) (2011). A veteran’s disability also will not be considered service connected “on the basis that it resulted from injury or disease attributable to the use of tobacco products by the veteran during the veteran’s service.” 38 U.S.C. § 1103 (2011); 38 C.F.R. § 3.300 (2011).

75. 100,000 HOMES CAMPAIGN, *supra* note 12, at 9.

connected disability, or from using alcohol or drug-related disabilities as evidence of the increased severity of a service-connected disability.”⁷⁶ As 31.3% of veterans who were homeless for less than two years and forty-six percent of veterans homeless two years or more experience both mental illness and substance abuse,⁷⁷ they may not be barred from receiving benefits if the disabling substance abuse can be shown to be secondary to another service-connected condition.

4. Development of Evidence and Need for Corroboration

In order to obtain benefits for a service-connected disability, a veteran must present evidence that the condition began during his military service, or was caused or aggravated by that service. Although the VA has a duty to assist the veteran in developing his or her claim,⁷⁸ unless the claim is very straightforward, the veteran will need to develop and provide evidence to support the claim.

For example, in the case of a disability resulting from an injury, or posttraumatic stress disorder, that is not related to a combat situation, the veteran will have to provide evidence that the in-service event occurred. That can be difficult, particularly if the event occurred many years ago. The VA is not required to accept a veteran’s statement about what happened in a non-combat setting as true. The VA may reject a veteran’s statement regarding non-combat events where there are no records that corroborate the statement, and the available records either contradict or do not corroborate the statement.⁷⁹

Sometimes the veteran’s service records cannot be located. The service medical records of some veterans of World War II and the Korean Conflict were destroyed in a 1973 fire at the National Personnel Records Center. Even if records are lost or presumed destroyed, the standard for proving that the in-service event occurred does not change.⁸⁰ Arguments that there should be a presumption of service connection in

76. *Allen v. Principi*, 237 F.3d 1368, 1370 (Fed. Cir. 2001).

77. 38 U.S.C. § 101(16) (2011); 38 C.F.R. §§ 3.1(k), 3.303(a) (2011).

78. *See* 38 U.S.C.S. § 5103A(a) (2011).

79. *See generally* *Cook v. Shinseki*, No. 09-4366, 2011 U.S. App. Vet. Claims LEXIS 1088 (Ct. Vet. App. May 18, 2011) (unpublished); *Cornaire v. Shinseki*, No. 08-3303, 2011 U.S. App. Vet. Claims LEXIS 813 (Ct. Vet. App. Apr. 18, 2011) (unpublished); *Wright v. Shinseki*, No. 09-1386, 2011 U.S. App. Vet. Claims LEXIS 753 (Ct. Vet. App. Apr. 6, 2011) (unpublished).

80. *Russo v. Brown*, 9 Vet. App. 46, 51 (1996).

favor of the veteran where records are presumed lost or destroyed have been rejected.⁸¹

Therefore, the veteran must attempt to corroborate his statement about what occurred. Evidence that can be submitted in support of the in-service incident or the veteran's condition while in service include buddy statements (lay statements from military personnel or others who observed, or otherwise have knowledge of, the incident or the veteran's condition), newspaper articles, letters written by the veteran or others contemporaneous with the incident, and photographs. It may be difficult or impossible to obtain such evidence, especially with the passage of time.

5. Rating System

Once it has been determined that a veteran has a service-connected disability, that disability must be rated. The rating will determine the amount of monthly compensation the veteran will be awarded.

A schedule of ratings applies, and is based, "as far as practicable, upon the average impairments of earning capacity resulting from such injuries in civil occupations."⁸² The statute also provides for ten percent increments of disability.⁸³ This results in the VA assigning each service connected disability a rating of 0% (non-compensable), 10%, 20%, 30%, 40%, 50%, 60%, 70%, 80%, 90% or 100%. The rating system used by the VA can be found in Part Four of 38 C.F.R. Part Four, Subpart B, is divided into a series of sections correlating to various body systems (e.g., musculoskeletal, skin, neurological) and diseases or injuries that affect those systems. The rating for the disability increases with the severity of symptoms.

When a veteran has two or more service-connected disabilities, the overall percentage of disability is calculated by combining the individual ratings, but not simply by adding them together. The Combined Rating Table, contained in the VA regulations, reflects how a veteran's overall rating is calculated.⁸⁴ If a veteran believes the rating he is awarded does not accurately reflect his or her condition, he or she can appeal.

Additionally, if a service-connected disability worsens, the veteran may apply for an increase in his or her rating. Therefore, not only is the rating system complex (e.g., Subpart B or the Ratings section of the

81. See generally, *Cromer v. Nicholson*, 19 Vet. App. 215, 218-19 (2005), *aff'd*, 455 F.3d 1346 (Fed. Cir. 2006).

82. 38 U.S.C. § 1155.

83. *Id.*

84. 38 U.S.C.S. § 1155; 38 C.F.R. § 4.25.

Code of Federal Regulations consists of ninety-four pages)⁸⁵ with opportunity for error, but veterans are able to repeatedly seek an increased rating for one or more rated conditions. These additional claims further strain an already over-burdened claims system.

6. Limitation on Attorney Representation

Until 1988, the VA operated with no judicial oversight. In 1988, Congress passed the Veterans' Judicial Review Act (VJRA).⁸⁶ That Act established a new Article I Court, now called the U.S. Court of Appeals for Veterans Claims.

Historically, attorney representation of VA claimants has been discouraged due to the philosophy that the VA is a non-adversarial system that assists veterans, and resulted in limitations on attorney's fees. In 1862, Congress passed an Act limiting the fee that an attorney or agent could charge a person applying for a pension, reenlistment bounty, or other military allowance to \$5.00.⁸⁷ The limitation later was raised to \$10.00.⁸⁸ Individuals who exceeded the statutory limit on fees could be fined up to \$300, imprisoned for hard labor for up to two years, or both.⁸⁹

With the passage of the VJRA, attorneys and others were authorized to practice before the newly established court, and to charge a reasonable fee for that representation. However, attorneys still could not charge any more than the \$10.00 authorized in 1864 for representation of clients at most stages of the VA administrative process. The VJRA allowed attorneys and agents who were retained within one year of a final BVA decision to charge a reasonable fee for representation of a claimant only with respect to a reopened claim filed at a VA Regional Office for the same benefit denied by the Board, a motion for reconsideration or for revision based on clear and unmistakable error filed with the Board, or an appeal to the Court.⁹⁰ However, in 2006, the law was revised to eliminate the 1864 restriction and allow recognized agents and attorneys to charge a reasonable fee for representation both at the VA Regional Office and the Board of Veterans' Appeals after a Notice of

85. 38 C.F.R. §§ 4.40-4.150.

86. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988).

87. Act of July 14, 1862 §§ 6-7, 12 Stat. 566, 568.

88. Act of July 4, 1864 §§ 12-13, 13 Stat. 387, 389 (originally codified at 38 U.S.C. §§ 3404, 3405); *see also* Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 359-62 (1985) (Stevens, J., dissenting).

89. Act of July 1864, *supra*, at § 13.

90. 38 U.S.C. § 5904(c) (2011) (amending 38 U.S.C. § 3404).

Disagreement had been filed, so long as the Notice of Disagreement was filed on or after June 20, 2007.⁹¹

Although attorneys and authorized representatives are now able to receive reasonable compensation for the representation of veterans who appeal the denial of a claim, no payment is authorized for initial filing of the claim or assistance at the VA prior to a denial.⁹² Therefore, many veterans struggle through filing initial claims with minimal, or no, assistance unless they are able to obtain free assistance from an attorney or from a service officer, many of whom are burdened with hundreds of pending claims. It is likely that, if many of these veterans were able to obtain quality assistance in the initial stages of the claims process, the denial rate would decline and the VA system would be less burdened with appeals. Moreover, because until less than five years ago, attorneys were barred from practicing before the VA for compensation, except in the very limited situations described above, most attorneys are not familiar with veterans' benefits law, or have yet to develop significant experience in representing clients before the VA.

IV. PROGRAMS THAT ASSIST HOMELESS VETERANS

Programs designed to assist homeless veterans, like programs designed to assist other homeless individuals, began to proliferate in the late 1980s. Among the programs that were implemented to assist veterans are Health Care for Homeless Veterans, Domiciliary Care for Homeless Veterans, and Homeless Veterans Reintegration programs.⁹³

A. VA Programs

The U.S. Department of Housing and Urban Development (HUD) and the VA began a collaborative effort in 1992 where HUD provided housing to homeless veterans through a specific set aside of Section 8 vouchers; the VA provided supportive services. That program targeted veterans with severe psychiatric or substance abuse disorders and distributed approximately 1,753 Section 8 vouchers to veterans in three

91. *Id.*

92. Attorneys may be able to charge clients for a "pre-filing consultation" pursuant to a VA General Counsel's opinion. VETERANS BENEFITS MANUAL, *supra* note 40, at 1556. A copy of the General Counsel's letter can be found at www.nvlsp.org/Information/ArticleLibrary/images/attorney-fees-LaneEvansdoc.pdf. However, the VA has stated that the General Counsel's opinion may be limited to the specific facts before the General Counsel at the time of the opinion, and has declined to formalize the opinion in regulations promulgated in 2008. *See* 73 Fed. Reg. 29852-01, 29866 (2008).

93. LIBBY PERL, *supra* note 60, at 18.

years.⁹⁴ However, no new vouchers were made available for approximately fifteen years until, in 2008, Congress revived HUD-VASH. Half of HUD-VASH vouchers are allowed to be project based (i.e., attached to a specific unit of housing). A total of approximately 500 such vouchers are available.⁹⁵

On November 3, 2009, the VA announced a plan to end homelessness among veterans within five years. Six areas of focus were outlined: (1) prevention; (2) outreach and education; (3) treatment; (4) housing and supportive services; (5) employment and benefits; and (6) community partnerships.⁹⁶ In 2010, the Federal Strategic Plan to End Homelessness was promulgated.⁹⁷ One of the four key goals of this plan is to prevent and end homelessness among veterans in five years from when the plan was written, i.e., by 2015.⁹⁸ The Veterans Signature Initiative was designed to increase collaboration at the federal and local level for government and community providers.⁹⁹ To support this effort, VA has announced it will make over \$100 million in grants available to community agencies to prevent veterans and their families from becoming homeless or to quickly return them to stable housing. The funds are offered for fiscal year 2012 through VA's Supportive Services for Veteran Families (SSVF) program, a homeless prevention and rapid re-housing program.¹⁰⁰ The program provides community organizations with funding for counseling, training, education assistance, direct time-limited financial assistance, transportation, child care, rent, utilities, and other services aimed at preventing homelessness or providing homes for participating veterans and family members.¹⁰¹

94. *Id.* at 30.

95. U.S. DEP'T OF HOUSING & URBAN DEV., PUB. & INDIAN HOUSING, NOTICE PIH 2010-40 (HA), SET-ASIDE FUNDING AVAILABILITY FOR PROJECT-BASING HUD-VETERANS AFFAIRS SUPPORTIVE HOUSING VOUCHERS (2010), http://portal.hud.gov/hudportal/HUD?src=/program_offices/public_indian_housing/centers/fmc/notices (scroll down and select "PIH 2010-40 (HA)" hyperlink to download).

96. *See* Press Release, U.S. Dep't of Veterans Affairs, Secretary Shinseki Details Plan to End Homelessness for Veterans (Nov. 3, 2009), <http://www1.va.gov/OPA/pressrel/pressrelease.cfm?id=>.

97. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, OPENING DOORS FEDERAL STRATEGIC PLAN TO PREVENT AND END HOMELESSNESS 4 (2010).

98. *Id.* Homelessness among veterans has declined during the past two years. *See* Part I.A. *supra*.

99. OPENING DOORS FEDERAL STRATEGIC PLAN, *supra* note 97, at 31-32.

100. Press release, U.S. Dep't of Veterans Affairs, VA-HUD: Homelessness among Veterans Declines 12% in 2011 (Dec. 13, 2011), <http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2234>. The \$100 million in grants compares to \$60 million, which the VA provided to SSVF in 2010.

101. *Id.*

Most programs and services for homeless veterans are provided, or funded, by the VA. In addition to the SSVF program, the VA has initiated homelessness prevention services that include: a National Call Center for Homeless Veterans; the Health Care for Re-entry Veterans Program to address the community re-entry needs of incarcerated veterans; a Veteran Justice Outreach initiative which facilitates access to VA mental health and substance abuse services and other VA benefits for veterans involved in the criminal justice system; and the Veterans Homelessness Prevention Demonstration Program which focuses on veterans returning from Iraq and Afghanistan.¹⁰² The VA also provides treatment for: homeless veterans through Healthcare for Homeless Veterans; Veteran Stand Downs; a Homeless Veterans Dental Program; Domiciliary Care for Homeless Veterans; Drop-in Centers;¹⁰³ and a compensated work therapy program.¹⁰⁴

B. Programs for Homeless Veterans in Southeastern Michigan

In Southeastern Michigan, there are a number of programs designed to assist homeless veterans. A brief description of a few programs which impact a substantial number of veterans follows.

1. VA Domiciliary Rehabilitation Treatment Program: Detroit VA Medical Center

This is a highly structured fifty-bed co-ed residential treatment program that is operated by the VA. The average length of stay is four to six months. One of the goals of the program is to assist the veteran in obtaining some type of regular income, either through working or by obtaining benefits. Veterans must be willing to remain drug and alcohol free during their stay in the program. They must be motivated to work toward an independent living situation.¹⁰⁵ Veterans in this program generally have medical or mental health issues, and many of them have been incarcerated.

102. See generally *Homeless Veterans Prevention Services*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/HOMELESS/prevention.asp> (last visited Jan. 15, 2012).

103. See generally *Homeless Veterans Treatment*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.va.gov/HOMELESS/treatment.asp> (last visited Jan. 15, 2012).

104. See generally *Compensated Work Therapy*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.cwt.va.gov> (last visited Jan. 15, 2012).

105. *Detroit VAMC, Domiciliary Residential Rehabilitation Treatment Program (DRRTP)*, U.S. DEP'T OF VETERANS AFFAIRS, <http://www.detroit.va.gov/visitors/domiciliary.asp> (last visited Jan. 16, 2012).

2. *Michigan Veterans Foundation Detroit Veterans Center*

The Michigan Veterans Foundation, a nonprofit agency, founded in 1989 and funded primarily by grants, operates a transitional housing facility and resource center in Detroit's Cass Corridor. The Detroit Veterans Center houses 104 homeless male veterans in its transitional housing program. Over 900 veterans participate in this program annually, and the average length of stay is eighteen months. Veterans who are addicted to alcohol or drugs undergo a detoxification phase before entering the program. The Detroit Veterans Center accepts veterans and individuals who served in the military but were discharged other than honorably, and will attempt to assist the latter group in upgrading the discharges so that veterans can be eligible to apply for VA benefits. Almost all individuals who enter the program have little or no income upon entry. Participants in the program receive training, counseling, legal assistance and other supports; an individual service plan is prepared and implemented for each participant. When he leaves the program, the veteran is expected to have a means of support, either through employment or benefits.¹⁰⁶ The Detroit Veterans Center also operates a Veterans Rescue, which provides temporary shelter for any homeless veteran.

Despite the reported decrease in the number of homeless veterans in Michigan and nationally, the executive director of the Michigan Veterans Foundation reported that there has been a progressive increase in the number of people seeking shelter at the Detroit Veterans Center. The individuals served experience the causes and contributing factors referenced in Part II (i.e., most are between the ages of fifty and seventy, are Vietnam era veterans, have little or no income, and are experiencing problems with substance abuse).¹⁰⁷

3. *Piquette Square, a Project of Southwest Solutions*

The Piquette Square Project is a permanent supported housing program for veterans that began operating in 2010. The apartment building contains 150 one-bedroom units. Many veterans use HUD or HUD-VASH vouchers to obtain housing at the project. While Piquette Square provides an independent living situation, supportive services are

106. Interview with Tyrone Chatman, Executive Dir. of Mich. Veterans Found., in Detroit, Mich. (Jan. 17, 2012) (on file with author); see also *Our Services*, MICH. VETERANS FOUND., <http://michiganveteransfoundation.org/id2.html> (last visited Jan. 8, 2012).

107. *Id.*

available. Such services include case management, counseling, job training, and computer labs.¹⁰⁸

4. Southeastern Michigan Veterans Stand Down

Stand Down is a military term that refers to the removal of combat troops from the battlefield to a place of relative safety and security, so that they may rest and recover. Several organizations, often in collaboration with the National Coalition for Homeless Veterans,¹⁰⁹ hold Stand Downs for veterans. These events generally take place over a period of one to three days, and provide services that include food, shelter, clothing, health screenings, benefits counseling, legal assistance, picture ID services, and even haircuts. Southeastern Michigan Veterans Stand Down is one of the biggest Stand Downs in the state. The number of veterans participating in that Stand Down has risen from 242 in 2000 to 682 in 2011, and the number has increased each year since 2006.¹¹⁰

5. Veterans' Courts

A relatively new concept, the veterans' court is designed to divert identified veterans who are charged with crimes to a program that is an alternative to jail or prison. Like drug courts, veterans' courts mandate participation in appropriate programming such as mental health or substance abuse counseling, job counseling and placement, and programs that assist veterans in obtaining benefits. In Michigan, there currently are at least six such courts in operation in Detroit, Lansing, Redford, Novi, and Mount Clemens/Macomb; additional courts are expected to be added.¹¹¹ Legislation (House Bill 5162) was introduced in 2011 to create a standardized model and structure for veterans' courts in Michigan.

V. CONCLUSION AND SUGGESTED REFORMS

It is well recognized that lack of income is very highly correlated with homelessness among veterans. It also is well recognized that many

108. Press Release, Southwest Housing Solutions, Piquette Square Project to House 150 Homeless Vets in Detroit (May 5, 2008).

109. *Stand Down*, NAT'L COALITION FOR HOMELESS VETERANS, <http://www.nchv.org/standdown.cfm> (last visited Jan. 19, 2012).

110. SOUTHEASTERN MICHIGAN VETERANS STAND DOWN, INC. (Nov. 13, 2011) (on file with author); *see also* SOUTHEASTERN MICHIGAN VETERANS STAND DOWN, INC., www.4vets.org (last visited Jan. 19, 2012).

111. *See generally* Ann Zaniewski, *Veterans Court Helps Service Members*, OAKLAND PRESS (Mich.), Aug. 8, 2010.

veterans, including homeless veterans, have a difficult time, and endure long delays, in obtaining monetary veterans benefits to which they ultimately are determined to be entitled.¹¹² Others face bars to receiving any benefits, such as military discharges that are not honorable and substance abuse. Although programs that are being implemented to target homeless veterans are needed and welcome, they are costly (e.g., \$100 million allocated in 2012 for SSVF programs alone), and have much less of a positive effect if those participating do not develop an income stream. The reality is that most homeless veterans are not employable, and will require benefits or other subsidies to overcome homelessness. While programs such as the University of Detroit Mercy's Veterans Law Clinic and Project Salute¹¹³ assist low-income veterans in navigating the VA maze, the process remains arduous and time consuming. It is notable that the primary desk reference/practice manual for veterans' advocates is comprised of a whopping 2,044 pages.¹¹⁴ Moreover, the cost of administering the dysfunctional Veterans Benefits Administration is high and rising. Therefore, rather than simply allocating more taxpayers' money to the VA system to continue doing more of the same, efforts should be focused, at least to some extent, on reforms that will make it simpler, less time consuming and less costly for veterans to obtain the VA benefits to which they are entitled.

The following are just a few suggested reforms that, if adopted, would assist veterans in obtaining a quicker and more cost-effective resolution of their benefit claims. Because homeless veterans need an income stream to break the cycle of homelessness, such reforms likely would have a disproportionately positive impact on that population. It is recognized that these reforms would require statutory and/or rule changes.

Serious consideration should be given to a complete overhaul of the VA rating system, described in Part III.B.5. The current system of rating is complicated and difficult to apply. It also encourages veterans to frequently and repeatedly seek increases in their ratings, thereby clogging a system that should be focused on the adjudication of new claims and determination of service-connection. Examinations by VA medical personnel generally are required, and must be scheduled, each time a veteran seeks an increased rating. A more simplified rating system, such as overall ratings of "mild," "moderate," "severe," and

112. See, e.g., Rick Little & Stacy Garrick Zimmerman, *Helping Veterans Overcome Homelessness*, 43 CLEARINGHOUSE REV. 292 (2009).

113. University of Detroit Mercy School of Law, *What is Project Salute? Who We Are*, www.law.udmercy.edu/index.php/what-is-project-salute (last visited Aug. 18, 2012).

114. VETERANS BENEFITS MANUAL, *supra* note 40.

“unemployable,” rather than ratings in ten percent increments for each disability, and a period of time during which a final rating would be required to be in place before an increase could be sought, would be a simpler, fairer and more cost-effective approach.

The Board of Veterans’ Appeals should take more responsibility for issuing final opinions, rather than remands. A remand to the Detroit Regional Office adds an average of two to three years to the adjudication of a claim. As it provides a de novo review, the Board can consider the evidence presented and reach a conclusion. Thus, the Board should be encouraged to make decisions on the evidence available to it, and remand cases only where there are severe deficiencies in evidence development by the VA.

Consideration might be given to elimination of the intermediate appeal to a Decision Review Officer (DRO) at the Regional Office. This stage is time intensive as it requires a de novo review, and adds approximately two years to the process. Requiring a direct appeal to the Board of Veterans Appeals would free up regional office resources to more carefully adjudicate initial claims and requests to reopen claims.

There are a number of procedural requirements at the Veterans Benefits Administration that can be simplified, or eliminated, to expedite claims processing, without prejudicing veterans’ claims. For example, the procedure that is to be followed when a record is unavailable, including the “waiting” periods, adds months, if not years, to claims adjudication. The use of technology, consistent with what is used in other governmental agencies, such as Social Security Administration, would facilitate quicker decisions and reduce the number of records and documents lost.

There should be no bar on advocates representing veterans (including for pay, if that is the agreement) at the initial stage of claims filing. Advocates often can assist veterans in properly developing their claims at this early stage, reducing the need for an appeal.

Finally, consideration should be given to providing all veterans who are suffering economic hardship with a modest monthly stipend (similar to the amount now awarded for pension benefits), regardless of age or proof he or she is unemployable. This modest amount of income (approximately \$1,000 per month, offset by all other income) often is sufficient for the veteran to avoid homelessness, but not high enough to deter the veteran from working or seeking other means of income.

The suggested reforms above are not meant to imply that there is a simple answer to solving the problem of homelessness among veterans. However, such changes are rarely, if ever, addressed in proposed approaches to addressing homelessness, and should not be ignored.

LGBT SELECTIVE VICTIMIZATION: UNPROTECTED YOUTH ON THE STREETS

NUSRAT VENTIMIGLIA¹

I.	INTRODUCTION	440
II.	LGBT YOUTH AND RISK FACTORS FOR HOMELESSNESS	440
	A. <i>Intersecting Identities Lead to Higher Rates of Victimization of LGBT Homeless Youth</i>	441
	B. <i>Hate Crimes Represent a Portion of Victimization of LGBT Homeless Youth</i>	443
III.	VICTIMIZATION OF LGBT HOMELESS YOUTH STEMS FROM SYSTEMIC BIAS IN GOVERNMENT SERVICES AND RESTRICTED ACCESS TO SOCIAL SERVICES.....	444
	A. <i>Bias Leading to Homelessness</i>	444
	1. <i>Angela, age eighteen (at time of initial report), transgender woman, African-American</i>	444
	B. <i>LGBT Homeless Youth, Greater Victimization Due to Limitations in Subsistence</i>	446
	1. <i>Shelley Hilliard, age nineteen, transgender woman, African American</i>	446
	C. <i>Limitations in Shelter Space for LGBT Youth</i>	448
	1. <i>Blair, age nineteen, white transgender male</i>	448
	D. <i>Exclusion of LGBT Youth from Protective Institutions</i>	449
	1. <i>Joe, age approximately sixteen to nineteen, gay non-transgender male, African American</i>	449
	E. <i>Systemic Bias Has Real Effects on Rates of Homelessness for LGBT Youth, Rates of Victimization, and Access to Assistance</i>	451
IV.	CONCLUSION & RECOMMENDATIONS	452

1. Former Director, Victim Services, Equality Michigan (2010-2012). Equality Michigan is a state-wide LGBT anti-violence and advocacy organization. The Department of Victim Services receives eighty percent of its funding from the Victims of Crime Act, administered by the Michigan Department of Community Health. Prior to her tenure at Equality Michigan, Nusrat Ventimiglia served as the Legal Director at Freedom House Detroit, an organization providing shelter and legal services to those seeking asylum in the United States. She graduated from Wayne State University Law School in 2008, and received her bachelors degree from University of Michigan-Dearborn in 2005 with distinction political science and psychology.

I. INTRODUCTION

Homeless and street youth who identify as lesbian, gay, bisexual, transgender, queer or questioning² are more persistently and more severely victimized than their heterosexual counterparts; yet, existing policies do not separately identify or address this particular vulnerability. Homeless and street youth who identify as lesbian, gay, bisexual or transgender are over represented amongst homeless youth in general. Furthermore, harms faced by LGBT homeless youth are rarely addressed by traditional routes of law enforcement due largely to longstanding and too-often reinforced mistrust of police. As a result, crimes and police misconduct often go unreported. Hate crimes laws, though important in addressing crimes directed against LGBT identities, often create a false dichotomy in public discourse, preventing the problem of LGBT selective victimization from being fully addressed. A full understanding of the problem of victimization of LGBT homeless and street youth demonstrates that though some of the crimes they fall victim to may be addressed by hate crimes law, changes in structural support are necessary to remedy the systematic victimization of homeless LGBT youth. Changes must be made also to increase LGBT cultural competency by police, prosecutors, and victim assistance agencies.

II. LGBT YOUTH AND RISK FACTORS FOR HOMELESSNESS

The difficulties of defining and counting homeless youth generally, and lesbian, gay, bisexual, and transgender (LGBT) youth in particular has been well documented;³ however, the general consensus is that anywhere from twenty⁴ to forty percent of homeless youth identify as lesbian, gay, or bisexual.⁵ There are fewer studies focusing on the

2. The term queer is a controversial term; though it is one of many ways an individual may describe their attractional identity. In the interest of efficiency, the acronym "LGBT" (lesbian, gay, bisexual and transgender) will be used, unless in reference to studies that exclude either lesbian, gay, bisexual, or transgender individuals.

3. See generally, NICHOLAS RAY ET AL., NAT'L GAY AND LESBIAN TASK FORCE POL'Y INST. & NAT'L COALITION FOR THE HOMELESS, LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS (2006), <http://www.thetaskforce.org/downloads/HomelessYouth.pdf>; NAT'L NETWORK FOR YOUTH, NATIONAL RECOMMENDED BEST PRACTICES FOR SERVING LGBT HOMELESS YOUTH (2009), <http://www.nn4youth.org/system/files/Recommended%20Best%20Practices%20for%20LGBT%20Homeless%20Youth.pdf>.

4. Les B. Whitbeck, et al., *Mental Disorder, Subsistence Strategies and Victimization among Gay, Lesbian, and Bisexual Homeless and Runaway Adolescents* 41 J. SEX RES. 329, 330 (2004).

5. *Id.*

numbers for transgender youth, and thus the inclusion of homeless transgender individuals who do not identify as gay, lesbian, or bisexual would likely raise the estimation of forty percent.⁶ Approximations of Detroit's LGBT youth homeless population who are not receiving shelter services in any given day were estimated to be between 320 and 800 in 2005.⁷ A recent national survey of transgender men and women found that rates of homelessness were higher for African-Americans (thirteen percent), Native Americans (eight percent) and undocumented non-citizens (three percent).⁸ The racial and ethnic disparities in rates of homelessness seem to compound other risks along the continuum of homelessness.

A. Intersecting Identities Lead to Higher Rates of Victimization of LGBT Homeless Youth

LGBT homeless youth are more often victims of crime. Even accounting for overrepresentation amongst the homeless population, LGBT youth are more often victims of a range of crimes compared with their heterosexual counterparts. Of note is a recent finding by the Southern Poverty Law Center that gays and lesbians (transgender individuals were not counted) are most likely to suffer hate crimes compared with other groups for which hate crimes are tracked.⁹ Although the SPLC's assessment does not necessarily take in account intersections of race, gender, and sexual orientation, the assessment mirrors findings of increased victimization of LGBT individuals, whether homeless or not. Homeless and street youth (those youth who are not residing in

6. See Stephen Gaetz, *Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization*, 46 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 423, 448 n.2 (2004). "Because the transgendered sample is so small (n=5), these respondents have been excluded from analysis. Future research should focus on the safety issues of this population, however, as transgendered youth are among the most marginalized-and, potentially, the most victimized- of street youth." *Id.* See also RAY, *supra* note 3, at 13 n.59 ("The available research on the proportion of the U.S. population that identifies as transgender is too limited to permit an accurate estimation.").

7. NAT'L GAY & LESBIAN TASKFORCE, FACT SHEET: HOMELESS LESBIAN, GAY, BISEXUAL AND TRANSGENDER (LGBT) YOUTH IN DETROIT, MICH. (undated), http://www.thetaskforce.org/downloads/reports/fact_sheets/HomelessYouthDetroit012507.pdf.

8. JAIME M. GRANT ET AL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 107 (2011), http://transequality.org/PDFs/Executive_Summary.pdf.

9. Mark Potok, *Gays Remain Minority Most Targeted by Hate Crimes* (S. Poverty Law Ctr., Intelligence Rep. Issue No. 140, 2010), <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2010/winter/under-attack-gays-remain-minority-mos>.

shelters) are shown to have been victimized at extremely high rates for violent crimes such as physical assault, violent robbery, and sexual assault.¹⁰ Social science research has produced a number of theories to explain higher rates of victimization amongst LGBT homeless youth including lifestyle and routine activities theory, social capital theory, and looking to background factors.¹¹ Lifestyle and background factors offer descriptive insight into higher rates of victimization, however, social exclusion and a lack of social capital captures the essence of LGBT youth homelessness including increased risk, the amplification in risks and negative outcomes for those with intersecting oppressed identities.

Intersecting racial, ethnic, and sexual identities have a profound impact on negative outcomes for homeless youth, and an understanding of this impact is essential to the discourse on achieving social equality and inclusion for LGBT youth. The varied rates of victimization across race, class, and sexuality demonstrate the complexity of oppression.¹² Any proposed solution to selective victimization and increased risk faced by LGBT homeless youth must be based on an understanding of this complexity. Individual cases of victimization of LGBT homeless youth may fall under the Matthew Shepard and James Byrd Hate Crimes Prevention Act,¹³ or under state hate crime laws in the concept of “bias motivation”; however, the increased risk for all crimes that LGBT

10. See Gaetz, *supra* note 6, at 436; Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents With Their Heterosexual Counterparts*, 92 AM. J. PUB. HEALTH 773, 774 (2002).

11. Gaetz, *supra* note 6, at 425-26.

[A] consensus has emerged suggesting that a majority of street youth in Canada and the United States come from homes characterized by high levels of physical, sexual, or emotional abuse and neglect, compared with domiciled youth . . . [A]ggressive behaviors [sic] produced by a violent upbringing may often lead to provocative interactions. *Id.*

12. NAT'L COALITION OF ANTI-VIOLENCE PROGRAMS, HATE VIOLENCE AGAINST LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV AFFECTED COMMUNITIES IN THE UNITED STATES IN 2010 (2011), <http://avp.org/documents/NCAVPHateViolenceReport2011Finaldjlfinaldits.pdf>.

[P]eople of color and transgender people face disproportionate rates of certain forms of hate violence as compared to LGBTQH individuals who are non-transgender and white. This data also shows that being both transgender and a person of color increases the risk of violence and of murder . . . [F]indings reveal further information about the increased risk of violence for transgender people, communities of color, and other impacted identities. *Id.*

13. Matthew Shepard and James Byrd Hate Crimes Prevention Act of 2009, Pub. L. No. 111-84, §§ 4701-713, 123 Stat. 2190 (2009) (codified as amended in scattered sections of 18, 28, AND 42 U.S.C.).

homeless youth face point to the problem of bias and inequality embedded within cultural and governmental systems.

B. Hate Crimes Represent a Portion of Victimization of LGBT Homeless Youth

Hate crime prevention legislation is important in addressing the peculiar harm that hate crimes cause – the violence directed towards an entire community; however, many of the victimizations of LGBT homeless youth cannot be characterized as hate crimes. For that reason, hate crime legislation is not a complete solution to increased vulnerability to victimization of LGBT homeless youth. The Matthew Shepard and James Byrd Jr. Amendment to the Hate Crimes Prevention Act¹⁴ considers those crimes that are motivated by animus towards real or perceived sexual orientation or gender identity, produce bodily injury, and bear a connection to interstate commerce or occur on federal territory, as federal hate crimes. Additionally, for such crimes to be charged under federal law based on sexual orientation or gender identity bias the crime must be under federal jurisdiction. Because of the jurisdictional limitations, Shepard-Byrd is necessarily under-inclusive.¹⁵ Some states fill the gaps with state legislation to criminalize hate motivated attacks in various ways, ranging from sentence enhancements to separately punishable felonies.¹⁶ For example, Michigan’s hate crimes law excludes crimes motivated by bias towards real or perceived sexual orientation, gender identity or gender expression. Michigan’s hate crime law, the Ethnic Intimidation Act, defines a hate crime as one that is motivated by the victim’s race, color, religion, gender, and/or national origin.¹⁷ “Michigan is one of 18 states that excludes sexual orientation in hate crime law and one of 22 states that excludes gender identity or gender expression in hate crime law.”¹⁸ Michigan law requires specific intent to harass or intimidate, but does not necessarily require that such

14. *Id.*

15. Because Shepard-Byrd targets private conduct and not “color of law” conduct, the provisions relating to disability and gender are based on federal jurisdiction from the commerce clause of the Fifth Amendment to the U.S. Constitution. For provisions in the hate crime law relating to national origin, race and religions, authority for federal jurisdiction comes from the Thirteenth, Fourteenth, and Fifteenth amendments to the U.S. Constitution.

16. MICH. COMP. LAWS § 750.147b (2012).

17. *Id.* (“A person is guilty of ethnic intimidation if that person maliciously, and with specific intent to intimidate or harass another person because of that person’s race, color, religion, gender, or national origin.”).

18. *Hate Violence Targeting Gay & Transgender People*, EQUALITY MICHIGAN, <http://www.equalitymi.org/issues/hate-violence> (last visited Apr. 2, 2012).

intent to harass or intimidate be the sole motivating factor for an attack that is otherwise prohibited conduct.¹⁹ Laws seeking to address the peculiar damage hate crimes have on communities united by common identities, such as race and/or sexual orientation, are necessary but not sufficient in addressing the risks homeless LGBT homeless youth face. Youth are targeted for complex reasons, including those that may coincide with sexual identity rather than be a direct cause.

III. VICTIMIZATION OF LGBT HOMELESS YOUTH STEMS FROM SYSTEMIC BIAS IN GOVERNMENT SERVICES AND RESTRICTED ACCESS TO SOCIAL SERVICES

The following stories represent the magnified risk that homeless or near-homeless youth face as a result of vulnerability, exposure and proximity to criminal actors, lack of cultural competence within systems, and the resulting failure of traditional protective systems to do so with respect to LGBT homeless or near-homeless youth.

A. Bias Leading to Homelessness

1. Angela, age eighteen (at time of initial report), transgender woman, African-American

Angela²⁰ was placed in foster care in her early teens, after being severely abused by her father. Angela was placed in a home through a supervised independent living program (SIL), in which older adjudicated youth are placed in homes with rent assistance and social worker supervision. Although this SIL home purported to be transgender friendly, there was no criteria whatsoever for qualifying the home as such. After spending approximately six months in the home, Angela informed her case worker that the home supervisor pressured or coerced her and other young transgender women living in the home into sex work in exchange for housing. The supervisor allegedly threatened to “cause problems” for the young women living in the home if they did not cooperate, and verbally harassed, controlled and intimidated the residents at his whim. Angela claimed that the supervisor further threatened residents against reporting his conduct. Angela expressed great fear in revealing the information to the caseworker, and revealed information about the abuse and coercion in a piecemeal fashion. Angela explained to her caseworker that the information she revealed had to stay confidential

19. *People v. Schutter*, 695 N.W.2d 360, 362 (Mich. Ct. App. 2005).

20. Name changed to maintain privacy.

until she could find another living situation. The caseworker contacted the home supervisor, apparently under the impression that she required verification of the report before she could approve Angela to move under the SIL program. Angela's self-protective measures, requiring assurances of confidentiality, withholding names of other transgender women with the same experience, and desire to secure other stable housing prior to coming forward with her allegations were interpreted by her caseworker to be signs of dishonesty. Angela stated that she was then confronted by her home supervisor and was in fear for her safety. Communication with Angela abruptly ended when she left the home. Her current whereabouts are unknown. She is believed to have moved out of state to find space at an LGBT shelter in another city.

The realities of systemic bias are revealed when studying the unique needs of LGBT children and youth in the jurisdiction of the foster care system. Unaccompanied LGBT identified youth face bias towards their identity from courts and attorneys charged with determining and acting within the youths' best interest.²¹ As demonstrated by Angela's case, whether such bias is benign or malicious, the effect is the same.²² Angela's caseworker would have benefitted from training on rates and conditions of sex work amongst transgender women, patterns of self-protective measures youth may take, and a nuanced understanding of transgender inclusiveness and the lack of such factors in the SIL home in which Angela was placed. Indeed, LGBT youth face more severe problems in foster care because of sexual orientation and gender identity bias from verbal abuse and ridicule to physical and sexual assault.²³ The lack of state-sponsored protection from discrimination based on sexual orientation or gender identity in foster care in most states further exacerbates the climate of abuse and exclusion for LGBT youth.²⁴ The failure of the foster care system to provide for the needs of LGBT youth is evident throughout the process of adjudication and placement.²⁵ Like

21. See generally Sara Valentine, *When Your Attorney Is Your Enemy: Preliminary Thoughts on Ensuring Effective Representation for Queer Youth*, 19 COLUM. J. GENDER & L. 773 (2010).

22. See *id.* at 803-04.

23. COLLEEN SULLIVAN ET AL., LAMBDA LEGAL DEF. & EDUC. FUND, *YOUTH IN THE MARGINS: A REPORT ON THE UNMET NEEDS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER ADOLESCENTS IN FOSTER CARE* 9 (2001).

24. See James W. Gilliam Jr., *Toward Providing a Welcoming Home for All: Enacting a New Approach to Address the Longstanding Problems Lesbian, Gay, Bisexual, and Transgender Youth Face in the Foster Care System*, 37 LOY. L.A. L. REV. 1037, 1040 (2004).

25. See generally Colleen Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 LAW & SEXUALITY 31, 35 (1996).

Angela, youth choose to leave placements in group homes or other supervised living arrangements as self-protective measures.²⁶

The systemic biases coupled with further limitations in shelter and safe space makes LGBT homeless youth particularly vulnerable to victimization. Considering high visibility due to a lack of identity affirming shelters, perceived lack of social support, and limitations in choice in means of subsistence, movement and shelter it is not surprising that LGBT homeless youth are victimized at far higher rates than their heterosexual counterparts.²⁷

B. LGBT Homeless Youth, Greater Victimization Due to Limitations in Subsistence

1. Shelley Hilliard, age nineteen, transgender woman, African American

Shelley Hilliard's murder²⁸ came as a sad shock to Detroit's LGBT community, and made local and national news. Shelley was well loved, and had a reputation for being polite, pleasant, and considerate to her peers and staff at the Ruth Ellis Center, which she frequented. Shelley did not live at home, but for (at least) an intermittent two-month span prior to her death, lived in a suburban motel. Shelley spent a considerable amount of time at the Ruth Ellis Center, an organization dedicated to providing residential services and a drop-in center for LGBTQ identified homeless and street youth. Shelley by many accounts considered her friends and staff at the center as her own family. Although Shelley's murder bore signs of a hate crime, it was later learned that the crime was the result of retaliation for cooperation with police (labeled "snitching"). Shelley had cooperated with police after being held for possession of a small amount of marijuana, by some family accounts Shelley felt coerced into assisting police. Shelley asked an alleged drug dealer, Qasim Raqib, to deliver drugs to a motel when police apprehended Raqib and his female companion. The \$5,000 Raqib had in his possession was held as a forfeiture by police, while Raqib himself was released hours later. Raqib's companion stated that during questioning officers told her of

26. NAT'L CTR. FOR LESBIAN RIGHTS, LGBTQ YOUTH IN THE FOSTER CARE SYSTEM (2006), http://www.nclrights.org/site/DocServer/LGBTQ_Youth_In_Foster_Care_System.pdf?docID=1341.

27. *Id.*

28. See Shelley Hilliard, *Missing Transgender Teen, Found Dead, Burned in Detroit*, HUFFPOST: GAY VOICES, Nov. 11, 2011, http://www.huffingtonpost.com/2011/11/11/shelley-or-treasure-hilliard-henry-hilliard-jr-transgender-teen_n_1088373.html?view=screen.

Shelley's cooperation with police, using her name and outing her as an informant. According to family members, Shelley was never informed about Raqib's release from police custody. Two days later, on October 23, 2011, James Matthews (Raqib's alleged drug boss) called Shelley, posing as an out-call client, as part of a plan hatched by Raqib and Matthews to murder Shelley in retaliation for the arrest and loss of money. Raqib and Matthews plead guilty in 2012 to second-degree murder.

Both participation in, and proximity to illegal behavior can, in part, account for higher levels of victimization. LGBT youth more often leave home as a result of physical abuse in the home, and such background risk factors are linked both to greater participation in "deviant" behavior and greater victimization.²⁹ "Deviant" behaviors may include increased participation in sex work as well as substance abuse and sale of illegal drugs. Homeless youth who have sold illegal drugs are more likely to report having been victims of crime.³⁰ It is important to note that gender differences exist in subsistence strategies, and that risks associated with survival sex also vary for female identified and male identified youth.³¹ In a federal study, 27.5% of street youth and 9.5% of shelter youth had engaged in survival sex, and engaging in sex work was positively related to age, time away from home, previous victimization, participation in criminal behaviors, and with drug use.³² Findings such as this demonstrate the difficulties in determining the proximal relation between involvement in criminal behavior and homelessness;³³ however, for those who engage in survival sex or in the sex trade generally, there is far greater exposure to risk in potential assailants, and far greater vulnerability at least in part due to lack of access to protection from police. GLB youth significantly report engaging in survival sex.³⁴ Non-transgender males, those who self-identified as gay or bisexual, are more likely to be sexually assaulted.³⁵ In reports of hate violence and murders

29. Cochran, *supra* note 10, at 773.

30. Gaetz, *supra* note 6, at 438.

31. Kimberly A. Tyler et al., *Risk Factors for Sexual Victimization Among Male and Female Homeless and Runaway Youth*, 19 J. INTERPERSONAL VIOLENCE 503, 516 (2004).

32. Jody M. Greene et al., *Prevalence and Correlates of Survival Sex Among Runaway and Homeless Youth*, 89 AM. J. OF PUB. HEALTH 1406, 1407 (1999). (emphasizing that in this study on survival sex "[s]exual orientation and risky sexual behaviors were not examined because the study was precluded by the federal government from asking questions about sex other than survival sex.")

33. Gaetz, *supra* note 6, at 438.

34. Rashmi Gangamma et al., *Comparison of HIV Risks among Gay, Lesbian, Bisexual and Heterosexual Homeless Youth*, 37 J. YOUTH ADOLESCENCE 456 (2008).

35. *Id.*

against LGBT persons, transgender women are far more likely, particularly transgender women of color, to experience violence than their non-transgender counterparts.³⁶ As noted by the National Coalition of Anti-Violence Programs, “transgender women, particularly transgender women of color, may find that sex work may be one of the only ways to make a living wage.” Transgender women have high rates of participation in the sex industry, homelessness and a lack of social support, contributing to this social isolation and exclusion is the fact that sex work remains illegal in most states.³⁷

C. Limitations in Shelter Space for LGBT Youth

1. Blair, age nineteen, white transgender male

Blair³⁸ found himself homeless in Detroit. As a nineteen-year-old transgender male, the options for shelters were limited. Blair, with difficulty, found an available bed at a religiously based shelter. Blair was hesitant to go to the shelter, considering the reputation of the organization as being unwelcoming towards LGBT persons. Blair spent three days in the shelter. On Blair’s last day, he was confronted aggressively by another shelter resident with questions about his sexuality and gender expression. The argument escalated, and according to Blair, the shelter resident threw a chair at Blair. Rather than restraining the aggressor, Blair stated that two male staff members held Blair’s arms and stated, “[t]ake it like the man you wanna be.” When Blair asked the men to let him go, they laughed and stated, “you ain’t so big and bad.” The incident carried on later in the evening, culminating in Blair being attacked by three or more other residents at the shelter, with shelter staff looking on and allowing the attack to occur, with some encouraging the attackers and making transphobic remarks. When the shelter did call the police, Blair was the only person arrested. Blair described how the officers used excessive force when arresting him. After being charged with a felony assault, Blair entered a guilty plea in hopes of eventually obtaining a clean record through the Holmes Youthful Trainee Act,³⁹ and

36. HATE VIOLENCE, *supra* note 12, at 19.

37. *Id.*

38. Name changed to maintain privacy.

39. MICH. COMP. LAWS § 762.11 (2012). To provide context, the Holmes Youthful Trainee Act, or HYTA, permits the trial court to hold a guilty plea for a person between seventeen and twenty-one years of age in abeyance until the individual can carry out the terms of his sentence or probation, at which point the trial court will reserve entering the judgment in the individual’s criminal record.

expressed that his decision was at least partially informed by expected bias from potential jurors due to his gender identity and expression.

Limitations in identity affirming shelters cause more LGBT youth to remain on the streets, increasing their vulnerability due to increased rates of participation in deviant subsistence strategies and higher visibility. The prevalence of faith based shelters, and the lack of LGBT-specific shelters, is troubling for a number of reasons. As Blair's case demonstrates, those seeking assistance are reluctant to seek it at a shelter that is backed by an anti-LGBT religious organization, are more likely to be stigmatized and (particularly for youth) denied expression of their authentic selves.⁴⁰ Once excluded from shelters, street youth are involved in larger numbers in survival sex and are at greater risk for victimization of all kinds.⁴¹

D. Exclusion of LGBT Youth from Protective Institutions

1. Joe, age approximately sixteen to nineteen, gay non-transgender male, African American

Joe,⁴² a young homeless gay male, did not complain of discrimination, harassment, or police misconduct. His revelation of persistent victimization in an area of the city where many LGBT youth congregate, and where sex work is also often done, came as part of a broader conversation on issues of transportation and cooperation with police. Joe described how he and his LGB or T-identified friends would be robbed, physically assaulted, and terrorized by motorists who attempted to hit the youth with their vehicles. When asked whether Joe would report these incidents, Joe described that some police would harass the youth rather than help them, calling them "fags" from patrol vehicles or refusing to take reports of being robbed, assaulted or otherwise victimized. Very few individuals in Joe's position, or his friends' positions, have contacted Equality Michigan's report line. As Joe described, the general consensus is that nothing will come of complaints of police misconduct against LGBT youth.

Not only do LGBT homeless youth like Joe face greater victimization on the streets, LGBT youth, particularly LGBT youth of color, are less likely to receive assistance from police and may even be targeted for harassment by police. Many homeless youth, and many

40. RAY, *supra* note 3, at 85; Gilliam *supra* note 24, at 1039.

41. Cochran, *supra* note 10, at 774; Greene, *supra* note 32, at 1408; Gaetz *supra* note 6, at 434.

42. Name changed to maintain privacy.

LGBT youth, do not report victimization to police. In one study, not only did street and homeless youth refrain from reporting victimization to any adult, only twelve percent of street youth reported their *most serious* victimization to police.⁴³ Low rates of reporting by LGBT persons have been well documented.⁴⁴ The reasons for this underreporting are perhaps well demonstrated by Joe's and indeed Shelley's story, from fear of prosecution, retaliation, and finally fear of outright victimization.⁴⁵ The further profiling of LGBT youth by police, particularly transgender women, contributes to negative attitudes towards police.⁴⁶ LGBT youth are sent to prison in disproportionate numbers.⁴⁷ LGBT youth are more likely than straight youth to be detained prior to adjudication for nonviolent offenses like truancy, running away, and prostitution.⁴⁸ Police frequently profile transgender people for criminal activity deterring transgender women from approaching police officers for support.⁴⁹ A San Francisco study on the effect of stigma on HIV risk for transgender women noted that the participants reported an immense amount of violence in their lives. *All* of the participants described being verbally attacked in the streets, many described being physically attacked, several had been stabbed, one had been shot and another had been threatened with a gun and though many said they called the police, no action was taken on their behalf.⁵⁰ Many involved in the study perceived going outside the home as dangerous.⁵¹ The combination of police indifference, hostility, or a simple lack of cultural competency isolates LGBT homeless youth when they are victimized, and changes in training and policing policies would do much to improve the outcomes for LGBT homeless youth.

Aside from direct assistance from police, other assistance is available generally for victims of crime, but is often difficult for LGBT survivors of crime to obtain. The Crime Victim's Rights Act established a fund for

43. Gaetz, *supra* note 6, at 440.

44. HATE VIOLENCE *supra* note 12, at 31.

45. Gaetz, *supra* note 6, at 440; HATE VIOLENCE, *supra* note 12, at 41.

46. HATE VIOLENCE, *supra* note 12, at 41.

47. Daniel Redman, 'I Was Scared to Sleep': LGBT Youth Face Violence Behind Bars, NATION, June 21, 2010, <http://www.thenation.com/article/36488/i-was-scared-sleep-lgbt-youth-face-violence-behind-bars>.

48. *Id.*

49. HATE VIOLENCE, *supra* note 12, at 21.

50. Rita M. Melendez & Roferio Pinto, 'It's Really a Hard Life': Love, Gender and HIV Risk Among Male-to-Female Transgender Persons, 9 CULTURE, HEALTH & SEXUALITY 233, 238 (2007).

51. *Id.*

assisting victims of crime.⁵² Through state administration, victim assistance agencies receive funding to help victims cope with the effects of victimization, including explaining the criminal justice process, assisting with completion of forms necessary to obtain compensation for medical expenses related to victimization, and other related tasks. Despite increased rates of victimization, including by some accounts being proportionately the most targeted “community,” LGBT victims of crime do not have “consistent access to culturally competent services.”⁵³ The emphasis on crime reporting to obtain benefits under the Crime Victim Compensation Fund further limits access to remedial resources for LGBT homeless youth.

E. Systemic Bias Has Real Effects on Rates of Homelessness for LGBT Youth, Rates of Victimization, and Access to Assistance

The difficulties LGBT homeless youth may face fall along a continuum of homelessness – from foster care to street life. This reality places LGBT homeless youth at greater risk of victimization and pushes the few lifelines that federal funding provides, further from reach. Lifelines intended to help all persons, regardless of their immutable identity. Higher rates of homelessness, higher rates of depression and stress,⁵⁴ and the resultant higher risk for substance abuse⁵⁵ is a result of a network of exclusion from the home, shelters,⁵⁶ and restrictions even in

52. Crime Victims’ Rights Act, Pub. L. No. 108-405, tit. I, 118 Stat. 2260, 2261-65 (2004) (codified as amended at 18 U.S.C. § 3771 (2006) and to be codified at 42 U.S.C. §§ 10603(d)-(e)).

53. NAT’L CTR. FOR VICTIMS OF CRIME & NAT’L COALITION OF ANTI-VIOLENCE PROGRAMS, WHY IT MATTERS: RETHINKING VICTIM ASSISTANCE FOR LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER VICTIMS OF HATE VIOLENCE & INTIMATE PARTNER VIOLENCE 2 (2010), <http://www.avp.org/documents/WhyItMatters.pdf>.

54. Gangamma, *supra* note 34, at 456.

55. RAY, *supra* note 3, at 52.

56. For example, the Salvation Army has come under scrutiny for its position statement on homosexuality:

The Salvation Army does not consider same-sex orientation blameworthy in itself. Homosexual conduct, like heterosexual conduct, requires individual responsibility and must be guided by the light of scriptural teaching. Scripture forbids sexual intimacy between members of the same sex. The Salvation Army believes, therefore, that Christians whose sexual orientation is primarily or exclusively same-sex are called upon to embrace celibacy as a way of life. There is no scriptural support for same-sex unions as equal to, or as an alternative to, heterosexual marriage. Likewise, there is no scriptural support for demeaning or mistreating anyone for reason of his or her sexual orientation. SALVATIONARMYUSA.ORG (last visited Apr. 4, 2012) (the Salvation Army removed its homosexuality positional statement from its webpage as of the

public spaces.⁵⁷ “Social exclusion may, therefore be seen as the denial (or non-realisation [sic]) of the civil, political, and social rights of citizenship.”⁵⁸ In order to help LGBT homeless youth reach services intended to help them, concrete steps must be taken to eradicate systemic bias in the provision of government services, and limitations in access to social services.

IV. CONCLUSION & RECOMMENDATIONS

LGBT youth have engaged in a number of effective self-protective measures, and such activities have served to improve their outcomes and increase their social capital. Creating their own families, in some cases referred to as “fictive street family relationships,” has been associated with reduced violence, where the primary bases of these relationships relate to mutual trust.⁵⁹ In reflecting the existing self-protective measures youth already engage in, it is evident that trusting relationships providing instrumental assistance (such as shelter, food transportation) and social support reduce victimization. Social support networks counter the negative effects of homelessness, including the stress that leads to physical and mental health problems, as well as substance abuse.⁶⁰ This most direct route to safety for LGBT homeless youth must be nurtured, in terms of opening funding streams for organizations that provide safe space for youth to meet their basic needs and further socialize with those provide reinforcement to the youths’ sense of self-worth. Opening funding streams for LGBT specific services would not only reduce risks for victimization directly, but would build the social capital of LGBT

publication of this article); *see also* *Salvation Army Confronted About Anti-LGBT Positions*, PFLAG (Nov. 28, 2011), <http://blog.pflag.org/2011/11/salvation-army-confronted-about-anti.html> (referencing portions of the Salvation Army’s positional statement on homosexuality); *but see* Press Release, Salvation Army, Statement in Response to Australian Radio Interview (June 25, 2012) (rejecting scriptural support for the mistreatment of homosexuals and reaffirming its non-discrimination policy).

57. Press Release, FIERCE, LGBTQ Youth of Color Organization Demands Immediate End To The Targeting And Harassment of LGBTQ Youth In the West Village (June 3, 2011), http://www.fiercencyc.org/media/docs/4173_FIERCE_EndQualityofLife_PressRelease.pdf (describing unprovoked stops and questioning of LGBTQ youth of color in public spaces by NYPD); *See also* Gaetz, *supra* note 6, at 429.

58. BRITAIN DIVIDED: THE GROWTH OF SOCIAL EXCLUSION IN THE 1980S AND 1990S 8 (Alan Walker & Carol Walker eds., 1997).

59. McCarthy et al., *In and Out of Harm’s Way: Violent Victimization and the Social Capital of Fictive Street Families*, 40 CRIMINOLOGY 831, 837 (2002).

60. Jennifer B. Unger et al., *Stress, Coping, and Social Support Among Homeless Youth*, 13 J. OF ADOLESCENT RES. 134, 151 (1998).

identified youth by providing systemic support as well as personal support.

Legal buttresses to a supportive social system could take form as explicit prohibitions of discrimination on the basis of sexual orientation, gender identity, and gender expression. Such prohibitions must reach the conduct of social service providers, first responders, and actors charged with acting in the best interest of unaccompanied children such as guardians ad litem, lawyer guardians ad litem, etc. Finally, those involved in the provision of foster care services, first responders, direct service providers and police must be required to complete cultural competency training, ideally modeled by existing training offered by OVC funded LGBTQ specific training.⁶¹ Opening up funding streams for LGBT specific service providers, including shelters and anti-violence programs would go far in reducing the gap in needed services versus available services, particularly in shelter services for transgender individuals.

LGBT homeless youth face great challenges, and the persistent overrepresentation of LGBT youth in the homeless population and amongst those who are victimized signal a need for committed change in the provision of services and support. The marginalization of LGBT homeless youth is not unrelated to larger questions of inequality and discrimination, whether in housing, employment or public accommodations. Intersections of race and class amplify the negative effects of societal discrimination for these youth, expressed in audacious acts of harassment and violence and then in the denial of assistance on the basis of identity. However, successful models for assisting LGBT homeless youth exist, and can be found amongst existing anti-violence programs, and by examining the protective strategies the youth have themselves formed. These models are valuable in ensuring that persistent violence and brutality do not plague the lives of the most vulnerable, and that in its most basic form, equality amongst people includes a right for all to be free from violence.

61. See DIXON, *supra* note 12, at 41.

**HOMELESS CHILDREN AND YOUTH:
AN EXAMINATION OF LEGAL CHALLENGES
AND DIRECTIONS**

YVONNE VISSING¹

I. INTRODUCTION	456
II. THE ISSUE OF NUMBERS	457
III. DEFINITION AND THE LAW	462
A. HUD Definition.....	464
B. DOE Definition	464
IV. LEGAL OBSTACLES FACING HOMELESS CHILDREN AND YOUTH...	466
A. National Coalition for the Homeless Survey.....	466
B. Housing	468
1. Family Based Issues for Younger Children and Youth.....	468
2. Guardianship Issues	470
3. Illegal or Undocumented Parents.....	471
4. Older Youth.....	472
5. Foster Care.....	474
6. LGBT Youth.....	474
7. Youth with Juvenile Justice Histories	475
8. Unaccompanied Youth.....	477
9. Emancipation.....	480
V. EDUCATIONAL PROBLEMS OF HOMELESS CHILDREN AND YOUTH	482
A. McKinney-Vento Homeless Assistance Act	482
1. Residency requirements.....	486
2. Records	486
3. Transportation.....	486
4. Guardianship Requirements	486
5. Preschool.....	486
6. Higher Education	487
7. Disabled Students	488
VI. SOCIAL SERVICES	490

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A. <i>Contracting for Services</i>	497
B. <i>Financial Assistance</i>	499
C. <i>Health Care</i>	500
D. <i>Dental Coverage</i>	507
E. <i>Food and Transportation</i>	508
VII. CONCLUSION.....	509
A. <i>More Inclusive, Broader, Nationally Consistent Definitions for Homeless, Unaccompanied, and Runaway Youth</i>	509
B. <i>Creation of a National Children's Ombudsman Office</i>	510
C. <i>Greater Access to Legal Representation</i>	511
D. <i>Greater Ability to Secure Housing, Utility Assistance, and Food on Their Own Behalf</i>	511
E. <i>Greater Access to Physical, Mental, and Dental Health Care Insurance and Care</i>	511
F. <i>Greater Access to Social Services</i>	511
G. <i>Adopt Explicit Exemptions for Reasonable Cause in Anti-Harboring Provisions</i>	512
H. <i>Emancipation Processes Should Become Easier and Provide Support</i>	512
I. <i>Create Statutes that Explicitly Assign Responsibility for Providing Services/Shelter to Homeless or Runaway Youth to a Designated Executive Branch Agency With Local Affiliates</i>	512
J. <i>Create Alternative Arrangements to Foster Care for Older Youth</i>	512
K. <i>Allow Youth to Engage in Contractual Arrangements, With Protection</i>	513
L. <i>Strengthen the McKinney-Vento Act</i>	513
M. <i>Reconsider Illegal Immigration Status for Children</i>	513
N. <i>Eliminate the Stigma and Criminality of Homelessness</i>	513
O. <i>Amend Existing Laws so it is Appropriate to Report Homeless, Runaway, and Unaccompanied Children and Youth to Social Services and Child Welfare Authorities</i>	514

I. INTRODUCTION

The legal rights of homeless children and youth have been compromised because of their status as young citizens and because of their status as homeless individuals. Individually, age and housing issues pose legal obstacles that would be significant enough on their own, but when they are combined, they pose almost insurmountable problems for

this group of at-risk individuals.² As poverty has increased in the United States, the concomitant problems for children exponentially increase.³ According to both qualitative and quantitative data, it appears that the legal rights of homeless youth and children are frequently violated and that these populations are in need of further legal protections. This paper explores the obstacles that face them and recommends a set of legal strategies that would improve their lot in life.

II. THE ISSUE OF NUMBERS

The first question that typically gets asked about the homeless is “how many are there?” This question implies that if many people are homeless that their needs should be addressed more aggressively than if only a few people are affected. Numbers are irrelevant to the central issue – that when one person’s legal rights are violated, that is one person too much.

The numbers of homeless people and the methodologies used to count them vary significantly.⁴ According to the National Coalition for the Homeless,⁵ there is no definitive number about how many people in general, and children and youth in particular, are homeless for a variety of reasons. One reason is definitional: the question of how many people is misleading since homelessness is a temporary circumstance and not a permanent condition. Homelessness is best understood as a process, not just an outcome. A second definitional issue is that children are often counted within the context of families and not as individuals in and of themselves. Despite the knowledge that homeless children face poor outcomes, research has largely focused on the parent or family as the unit of analysis. However, children and youth themselves have different and

2. YUMIKO ARANTI, NAT’L CTR. ON CHILDREN IN POVERTY, *HOMELESS CHILDREN AND YOUTH: CAUSES AND CONSEQUENCES* 3-4 (2009); *see also* Ellen Bassuk & Lenore Rubin, *Homeless Children: A Neglected Population*, 57 AM. J. ORTHOPSYCHIATRY 279, 284-85 (1987).

3. *See* CHILDREN’S DEF. FUND, *TRENDS IN CHILD POVERTY* (2008); *see also* BARBARA DUFFIELD (NAT’L ASS’N FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH) & PHILLIP LOVELL (FIRST FOCUS), *THE ECONOMIC CRISIS HITS HOME: THE UNFOLDING INCREASE IN CHILD & YOUTH HOMELESSNESS*, at exec. sum. (2008), <http://www.naehcy.org/dl/TheEconomicCrisisHitsHome.pdf>.

4. Yvonne Vissing, *Researching Homeless Children*, in *RESEARCH ISSUES IN THE STUDY OF CHILDREN* (Amy Best ed. 2007).

5. NAT’L COALITION FOR THE HOMELESS, *HOW MANY PEOPLE EXPERIENCE HOMELESSNESS?* (2009), *available at* http://www.nationalhomeless.org/factsheets/How_Many.html; *see also* NAT’L COALITION FOR THE HOMELESS, *NCH FACT SHEET NO. 13, HOMELESS YOUTH* (2007), <http://www.nationalhomeless.org/publications/facts/youth.pdf>.

separate needs from their parents. Given the impact of the current recession, it is critical to understand the impact of homelessness on the youngest segments of the population and to identify if their needs are being met quickly and thoroughly.⁶ Children and youth, especially those who are unaccompanied, may fall through the definitional cracks and tend to be drastically under-counted as a result. Another reason is methodological: a more appropriate measure of the magnitude of homelessness is the number of people who experience homelessness over time, not the number of “homeless people” at any one point in time. Many homeless studies are panel designs or one-shot studies that obtain numbers at a given moment; the numbers may vary dramatically from season-to-season or as a result of environmental or situational pressures. It is therefore likely that any number of homeless children we receive is likely an underestimate of the actual number of how many children and youth actually do not have housing.⁷

According to the National Center on Family Homelessness,⁸ current economic problems have put significantly more children at risk of poverty than ever before. They estimate there are 1.6 million homeless American children, which amounts to one in forty-five of all children, 30,000 each week, or 4,400 homeless children each day. These figures represent a thirty-three percent increase in homeless children from 2007, when there were a reported 1.2 million homeless children. These figures indicate more distress than the figure produced by the U.S. Department of Housing and Urban Development (HUD), which reports a twenty-eight percent increase in homeless families from 131,000 in 2007 to 168,000 in 2010. HUD’s numbers are much smaller because they count only families living on the street or in emergency shelters.⁹

6. See JUDITH SAMUELS, MARY BETH SHINN & JOHN BUCKNER, U.S. DEPT. OF HEALTH & HUMAN SERVICES, *HOMELESS CHILDREN: UPDATE ON RESEARCH, POLICY, PROGRAMS, AND OPPORTUNITIES* 7 (2010).

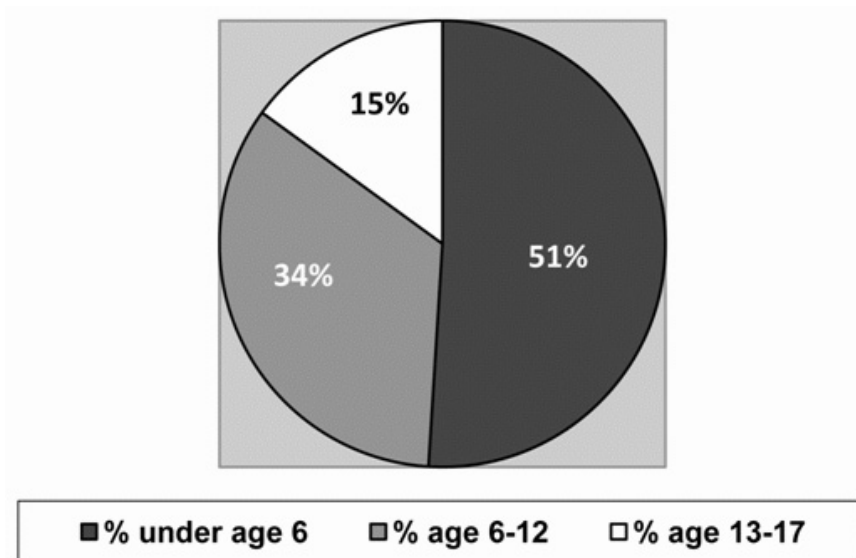
7. See generally CHRISTOPHER HUDSON, *AN INTERDEPENDENCY MODEL OF HOMELESSNESS: THE DYNAMICS OF SOCIAL DISINTEGRATION* (1998); YVONNE VISSING, *ENUMERATING HOMELESS TEENS IN THE SEACOAST AREA* (1993); Yvonne Vissing & Joseph Diament, *Are There Homeless Youth In My Community? Differences of Perception Between Service Providers and High School Youth*, 4 J. SOC. DISTRESS & HOMELESS 287, 287-99 (1996); and see YVONNE VISSING, *OUT OF SIGHT, OUT OF MIND: HOMELESS CHILDREN IN SMALL TOWN AMERICA* 8 (1996) [hereinafter *OUT OF SIGHT*].

8. ELLEN L. BASSUK, ET AL., NAT’L CTR. ON FAMILY HOMELESSNESS, *AMERICA’S YOUNGEST OUTCASTS: STATE REPORT CARD ON CHILD HOMELESSNESS 2010*, at exec. sum. (2011) [hereinafter *AMERICA’S YOUNGEST OUTCASTS*], available at <http://www.scribd.com/doc/75506633/Report-Americas-Youngest-Outcasts>.

9. Marisol Bello, *Child Homelessness Up 33% in 3 Years*, USA TODAY, Dec. 13, 2011, <http://www.usatoday.com/news/nation/story/2011-12-12/homeless-children-increase/51851146/1>.

Families are the largest subgroup of the homeless.¹⁰ The National Law Center on Homelessness and Poverty indicates that there are more than 1.3 million homeless children in the United States, and forty percent of all homeless people consist of families with young children.¹¹ The U.S. Department of Education found that forty-two percent of homeless children are under five years of age.¹² A study for the U.S. Department of Health and Human Services stated that the majority of homeless children and youth are under the age of six. (Table 1.)¹³ However, for reasons to be discussed in the next section, it is useful to consider that HUD counts traditionally underestimate the number of older children and youth.

Table 1. Age Distribution of Homeless Children, HUD's Housing Management Information System



The U.S. Department of Education relies upon McKinney-Vento counts to help them determine how many homeless students are in its

10. See AMERICA'S YOUNGEST OUTCASTS, *supra* note 8; see also NAT'L COALITION FOR THE HOMELESS, WHO IS HOMELESS? (2009), available at <http://www.national-homeless.org/factsheets/who.html>.

11. ELLEN L. BASSUK & STEVEN M. FRIEDMAN, FACTS ON TRAUMA AND HOMELESS CHILDREN 1 (2005), http://www.nctsn.org/nctsn_assets/pdfs/promising_practices/Facts_on_Trauma_and_Homeless_Children.pdf.

12. U.S. DEPT. OF EDUC., REP. TO CONG. FISCAL YEAR 2000, EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM 5, 13-14 (2000).

13. SAMUELS, SHINN & BUCKNER, *supra* note 6, at 10.

schools. In 2007, over 700,000 school-aged children were identified,¹⁴ which is likely a gross underestimation of the likely number of children who are homeless since those responsible for conducting the counts may not have the time or expertise to conduct thorough counts. Additionally, schools may use different enumeration methodologies, have different reporting mechanisms, and different amounts of funding, all of which impact the numbers that are obtained. What seems to be certain is that the reported numbers are likely just the tip of the iceberg when it comes to the identifying distress experienced by many less visible homeless students.

While McKinney-Vento counts are considered as the standard, further indications that the McKinney-Vento numbers are undercounts come from the National Network for Youth, which has conducted research on unaccompanied and homeless youth and found that there are over 1.6 million youth age twelve to seventeen who are homeless each year.¹⁵ This number does not include children eleven and younger. This organization notes that 7.6 percent of youth aged twelve to seventeen had at least one episode of staying in a shelter or with a stranger, that five percent of all homeless people were aged eighteen to nineteen, and that seven percent of the homeless population is between twenty and twenty-four years of age.¹⁶ Collectively, these statistics point to about twenty percent of the homeless population consisting of young people who are left to fend for themselves.

The National Incidence Studies of Missing, Abducted, Runaway and Thrownaway Children found that an estimated 1.7 million youth had a runaway/throwaway episode.¹⁷ Of these youth only twenty-one percent were reported to authorities as missing. According to the National Alliance to End Homelessness, national studies indicate a surprisingly high rate of homelessness among teens under age eighteen, with five to seven percent, or 1 to 1.5 million adolescents, experiencing at least one episode of homelessness each year.¹⁸ The Urban Institute has been active in the enumeration of homeless individuals since 1987, when it estimated that there were 229,000 homeless children and adults on any given night.

14. See Yvonne Vissing & Christopher Hudson, Presentation at the National Association for the Education of Homeless Children and Youth Conference: Issues in Enumerating Homeless and Youth (Nov. 2, 2008).

15. NAT'L NETWORK FOR YOUTH, UNACCOMPANIED YOUTH FAST FACTS 1 (2011).

16. *Id.*

17. See Heather Hammer, David Finkelhor & Andrea J. Sedlak, *National Estimates and Characteristics: Runaway/Thrownaway Children*, NISMART BULL., NCJ 196469 (U.S. Dep't of Justice, Office of Juvenile Justice & Delinquency Prevention), Feb. 2006.

18. STEVE MANCUSO & MIKE MAFFIE, NAT'L ASS'N FOR URBAN DEBATE LEAGUES, CORE REPORT 2009/2010, at 7 (undated), <http://www.urbandebate.org/resources/09-10.Core.Files.Final.pdf>.

It has continued its active involvement identifying social problems that afflict individuals and recently concluded that 2.3 to 3.5 million people in the United States are homeless over the course of a typical year, with over a third of them being children and youth.¹⁹ The National Law Center on Homelessness and Poverty found that approximately 3.5 million people, 1.35 million of them children, are likely to experience homelessness in a given year, and that children have a one in fifty chance of being homeless.²⁰ This author²¹ found in a sample of about a dozen high schools that in each of the schools, about ten percent of the youth identified themselves as homeless or in housing distress. This ten percent figure is similar to that found in other studies.²² Combining the known numbers of homeless children with the known numbers of homeless youth, the figures exceed the known numbers for the adult population. Most researchers agree that whatever number is obtained through traditional survey methods, that actual number is likely much higher.

Homeless children are found in every state in the nation, and even with methodological and definitional differences it appears that early life homelessness is unevenly distributed. Half of the homeless children reside in six states; seventy-five percent reside in eighteen states.²³ States with the highest percentage of homeless children are generally located in the South and Southwest, reflecting the higher levels of national poverty levels. These include Alabama, Mississippi, Arkansas, Arizona, California, New Mexico, Louisiana, Nevada, Florida and Georgia.²⁴ California in recent years has accounted for twenty-five percent of the reported number of homeless children and youth.²⁵ The states with the lowest percentages of homeless children and youth tend to be located in the North and Northeast, including Vermont, Minnesota, Nebraska, North Dakota, Maine, New Hampshire, New Jersey, Massachusetts, Montana and Iowa.²⁶ These states tend to have less poverty and stronger safety nets for children.

19. *A New Look at Homelessness in America*, URBAN INST. (Feb. 1, 2000), <http://www.urban.org/url.cfm?ID=900366>.

20. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, TWENTIETH ANNIVERSARY OF THE MCKINNEY VENTO ACT 1 (2007), available at http://www.nlchp.org/view_report.cfm?id=208.

21. OUT OF SIGHT, *supra* note 7, at 10.

22. See Yvonne Vissing & Christopher Hudson, Presentation at the National Association for the Education of Homeless Children and Youth Conference: How Can You Measure Homelessness More Accurately? (Nov. 1, 2008).

23. AMERICA'S YOUNGEST OUTCASTS, *supra* note 8, at 10.

24. *Id.* at 14 (2010 State Composite).

25. *Id.* at 6.

26. *Id.* at 14 (2010 State Composite).

III. DEFINITION AND THE LAW

Access to housing may be considered a human rights issue.²⁷ But the definition of what constitutes homelessness influences its legal determination, funding, and services provided. As a result, definitions are very important factors to consider in any legal forum regarding homeless children and youth. Laws can open doors, or slam them shut for homeless children and youth. They are political and ideological. Essentially, one governmental faction seeks to limit the official definition of homelessness to people who are in shelters or on the street, which will reduce the amount of funding, programs and services. With limited funds available, it seeks to assist the most visible sector of homeless adults. Another faction defines homeless children and youth to include not just those found in shelters, but also unaccompanied underage youth, children who live in doubled-up with others, and those who live in orthodox “homes” such as abandoned buildings, motels, cars and campgrounds. This latter definition expands the number of individuals considered to be homeless as well as the financial and programmatic resources needed to assist them. With too few shelter beds and services available to help the homeless who are already living on the streets, the debate over whether to expand significantly the pool of people eligible for such limited aid has sharply divided advocates for the homeless.²⁸ The National Alliance To End Homeless alleges that the definition of homeless people is “a high stakes game” because the stakes include money, resources, staff, supplies, and also policies and the law itself.²⁹

The main players in this high stakes game are the HUD and the U.S. Department of Education (DOE). HUD counts focus primarily upon people in homeless shelters and those who can be found on the street. DOE wants to continue using the legal definition of homelessness instituted into law by the McKinney-Vento Homeless Assistance Act of 2001, which enables schools to count, and therefore serve children who would be otherwise ignored by HUD. Because these two federal agencies operate with different legal definitions of who is homeless, homeless children and youth may not receive the services that adults would be entitled to, and they may be denied needed services because they don't fit exactly into the eligibility standards each set. In an analysis of

27. See generally Maria Foscarinis, *The Human Right to Housing*, SHELTERFORCE (2011).

28. Judy Chang, *Expanding HUD's Definition of Homelessness*, PLANETIZEN (Sept. 17, 2007, 7:00 AM), <http://www.planetizen.com/node/35084> (citing Rachel L. Swarns, *Capital Strives to Define 'Homelessness'*, N.Y. TIMES, Sept. 15, 2008).

29. NAT'L ALLIANCE TO END HOMELESSNESS, HOMELESSNESS COUNTS 8 (2007).

definitions of homeless children and youth, it was found that most governmental agencies use slightly different definitions, and that HUD's is most restrictive. (Table 2.)³⁰

Table 2. Definitions of Homelessness Used by Federal Programs Serving Children

Program	Agency/Department	Shelter	Doubled-up	Hotel/Motel	Other locations
All HUD programs	Department of Housing and Urban Development	X			
McKinney-Vento Education for Homeless Children and Youth Program	Office of Elementary and Secondary Education, Department of Education	X	X	X	X
Head Start	Administration for Children and Families, Department of Health and Human Services	X	X	X	X
Runaway and Homeless Youth	Administration for Children and Families, Department of Health and Human Services	X	X	X	X
Health Care for the Homeless	Health Resources and Services Administration, Department of Health and Human Services	X	X	X	X
Treatment for the Homeless	Substance Abuse and Mental Health Services Administration, Department of Health and Human Services	X	X	X	X
Homeless Veterans Reintegration Program	Veterans Employment and Training Service, Department of Labor	X	X	X	X
Violence Against Women	Office of Violence Against Women, Department of Justice	X	X	X	X
School Lunch Program	Food and Nutrition Service, Department of Agriculture	X	X	X	X

30. SAMUELS, SHINN & BUCKNER, *supra* note 6, at 3.

A. HUD Definition

The federal definition of homelessness according to HUD can be found in Title 42, Chapter 119, Subchapter I of the United States Code.³¹ It narrowly defines homelessness and targets street adults, many of whom may have mental health, physical health, or substance abuse issues that are consequences of homelessness. HUD's definition does not include people who live doubled-up with others or unaccompanied youth and misses many of homeless children and youth. HUD leaders allege that because insufficient funds are available to serve the needs of all people who could use assistance, by focusing just upon those people on the street and in shelters they will be able to better address the needs of the most visibly homeless. They also question whether a family of four who lost their home to the bank and is now couch-surfing with relatives should be considered homeless.³²

HUD's adult emphasis largely leaves families and independent youth out of the equation, because most shelters are not equipped to handle families. Families generally need more resources because exponentially there are more people with whom to be concerned. The etiology of family, child and youth homelessness is different than that of single adults who may be on the street. Most of them have become homeless not because they had mental health or substance abuse problems, but because they either could not find affordable, available housing or they lost their economic ability to pay for all the things their families require. Once without housing, a host of personal problems may occur, but they tend to be outcomes of homelessness and not the cause of it. This means that structural problems, rather than personal problems, are more likely to be identified as the cause of child and youth homelessness.³³

B. DOE Definition

The McKinney-Vento Assistance Act of 1987³⁴ definition of homelessness is considerably broader than that advocated by HUD. Title VII, Subtitle B of the McKinney-Vento Homeless Assistance Act defines homelessness as youth who share the housing of other persons due to loss of housing, economic hardship or a similar reason (sometimes

31. See 42 U.S.C. § 11302 (providing six definitions of the terms "homeless" and "homeless person").

32. NATHAN THORNBURGH, *Defining 'Homelessness Down'*, TIME, July 30, 2008, available at <http://www.time.com/time/nation/article/0,8599,1827876,oo.html>.

33. See OUT OF SIGHT, *supra* note 7, at 172.

34. McKinney-Vento Assistance Act of 1987, P.L. 100-77, 101 Stat. 482 (1987).

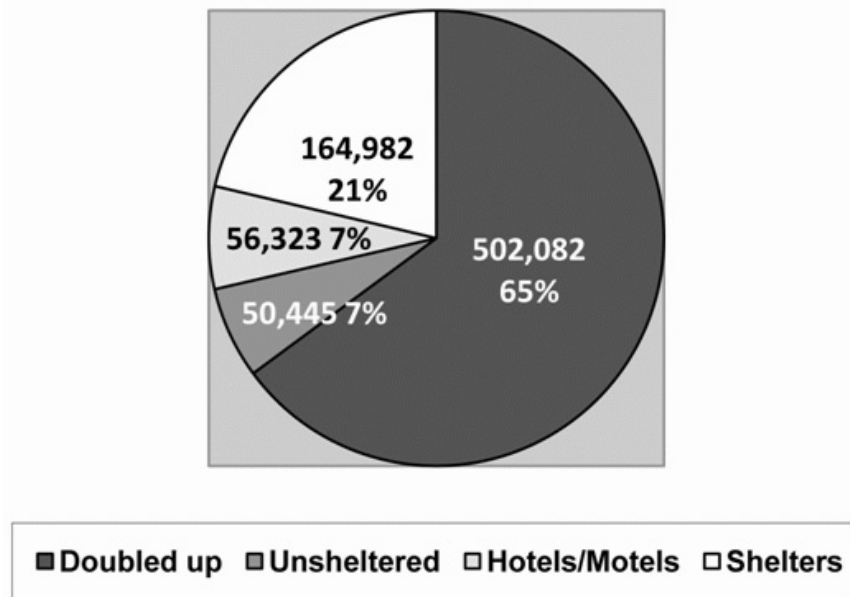
referred to as doubled-up), living in motels, trailer parks or campgrounds due to lack of alternative accommodations, living in emergency or transitional shelters, abandoned in hospitals, awaiting foster care placement, using a primary nighttime residence that is a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings, living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations or similar situations, and migratory children who qualify as homeless because they are living in those circumstances.³⁵

This federal law is regarded as the first significant federal law to help homeless children. It authorizes a spectrum of services that include the Continuum of Care Programs, the Supportive Housing Program, the Shelter Plus Care Program, the Single Room Occupancy Program and Emergency Shelter Grant Program, and established the Interagency Council on Homelessness. Because it allows the counts of people who lack a fixed, regular, and adequate nighttime residence and who may live in unorthodox housing arrangements, this definition allows providers to address the needs of a variety of children and youth who lived in distressed housing conditions. Because homelessness is not an event but a process, a broader definition helps bridge the debate between a family that is in “housing distress” and when they are “homeless.”

DOE counts of homeless children and youth consider living arrangements not counted by HUD. In Table 3, the majority of homeless children live doubled-up with others, and only about one in five live in shelters.³⁶ Because the counts come from the schools, they would neither include children too young to be in school nor older youth who have dropped out. This is an indication that many official numbers of homeless youth and children are but the tip of the iceberg.

35. McKinney-Vento Education for Homeless Children and Youths Program, 67 Fed.Reg. 10,697, 10,698 (Mar. 8, 2002).

36. SAMUELS, SHINN & BUCKNER, *supra* note 6, at 5.

Table 3. Students Primary Nighttime Residence 2008

IV. LEGAL OBSTACLES FACING HOMELESS CHILDREN AND YOUTH

Homeless children and youth regularly face problems including access to housing, education, social services, health care and transportation. These issues will be explored with particular attention to legal ramifications. In the section below, first survey data from the board members and staff of the National Coalition for the Homeless will be provided followed by an elaboration of specific legal obstacles.

A. National Coalition for the Homeless Survey

The board members of the National Coalition for the Homeless were surveyed in summer 2011 to ascertain what kinds of legal problems homeless children and youth confront. This national sample represented a variety of homeless service providers and advocates. Responding to a four-point Lickert scale question, over eighty percent of them felt most homeless children and youth experience many or some legal problems; none thought they experienced no legal problems. When asked to identify which types of homeless children and youth experienced legal problems, Table 4 illustrates that respondents felt that the groups most likely to experience legal problems were immigrant children (seventy-three percent), underage parents (sixty-four percent) and teens aged

fifteen to eighteen (fifty-five percent). Groups least likely to experience legal problems were babies and children up to age ten. Young children from birth to ten years were those least likely to have legal problems because they are under the care of their parents. This is not necessarily the case for babies who are born to underage parents who are homeless since those parents were identified to experience significant legal difficulties. Risk, then, is associated for children of teenage parents who are on their own and homeless because those young parents may not qualify for housing, social services and a variety of assistance programs that older parents may get.

Table 4. NCH Identification of Degree Groups Experience Legal Problems

Group	Significant	Some	Not many
Immigrant children/youth	72.7%	27.3%	0.0%
Underage parents	63.6%	36.4%	0.0%
Teens age 15 – 18	54.5%	45.5%	0.0%
Young adult 19 – 21	45.5%	54.5%	0.0%
GLBT youth	45.5%	45.5%	9.1%
Foster children	45.5%	45.5%	9.1%
Adolescents age 11 – 14	18.2%	72.7%	9.1%
Preschoolers (birth – 6)	9.1%	54.5%	36.4%
Children age 7 – 10	9.1%	54.5%	36.4%

The NCH board/staff were asked to rank a series of issues on a four-point ordinal scale to determine if they posed a legal problem for homeless children and youth. Homeless children and youth were found by the NCH to have significant difficulties obtaining secure and affordable housing. They may not be able to get housing of their own and be forced into living in risky situations as a result. In Table 5, they concluded that the most pressing problems for homeless children and youth were: Housing, access to social services, being an unaccompanied/independent/emancipated youth and experiencing sexual assault. They have significant difficulty obtaining the social services they need and services that could buffer them against a host of preventable problems. The problem least likely to be of concern was being a perpetrator of crime since most homeless children are more likely to be victims of crime than perpetrators. They are at particular risk of sexual and physical assault when they are on the streets.

Table 5. Pose Legal Problems for Homeless Children/Youth

Problem	Significant	Somewhat	Not much	Not a problem
Housing	90.9%	9.1%	0.0%	0.0%
Social service access	72.7%	9.1%	18.2%	0.0%
Unaccompanied youth	72.7%	9.1%	9.1%	9.1%
Sexual assault	66.7%	22.2%	11.1%	0.0%
Employment	55.6%	33.3%	11.1%	0.0%
Alcohol/substance abuse	54.5%	18.2%	27.3%	0.0%
Education	54.5%	36.4%	9.1%	0.0%
Physical health	54.5%	27.3%	18.2%	0.0%
Mental health	54.5%	36.4%	9.1%	0.0%
Transportation	54.5%	27.3%	18.2%	0.0%
Crime (as victims)	45.5%	18.2%	36.4%	0.0%
Physical assault	40.0%	40.0%	20.0%	0.0%
Financial assistance	40.0%	50.0%	10.0%	0.0%
Staying with parents	36.4%	36.4%	18.2%	9.1%
Access to food	27.3%	36.4%	27.3%	9.1%
Crime (as perpetrators)	18.2%	36.4%	36.4%	9.1%

The NCH board and staff were also asked to provide qualitative data on each of the aforementioned issues. These findings are interjected into discussion of the different legal issues that confront homeless children and youth, as described below.

B. Housing

Housing is the number one problem for homeless children and youth. Homes are the essential foundation to establish the wellbeing of children, and when children are deprived of adequate housing a variety of preventable but traumatic events occur to disrupt normal physical, cognitive and emotional development.³⁷ The legal issues they confront vary by age and family composition.

1. Family Based Issues for Younger Children and Youth

Families may become homeless for a variety of economic, health, educational, and interpersonal reasons. Their trajectory into homelessness can be slow and progressive or swift and decisive. The

37. BASSUK & FRIEDMAN, *supra* note 11, at 2.

etiology of homelessness may create interrelated legal problems that complicate the acquisition of housing. The biggest factor contributing to child and youth homelessness is the legal definition of homelessness itself since that determines eligibility requirements. The more narrow the definition, the less likely the family is to obtain assistance; the more rigorous the eligibility process, the longer it takes for people to qualify for housing and services, if they can qualify at all. These factors may put people into precarious housing and economic arrangements for some time, thereby worsening their situation.³⁸

Children may be removed from parents who have economic problems and compromised living arrangements. If parents were well served by the economic and social service sectors they may have housing and supportive assistance that could keep their families together and stable. But the current economic downturn has created a significant increase in request for services, which results in waiting lists and eligibility challenges.³⁹ National Coalition for the Homeless representatives reported that need is up and services are down; as a result more families live in doubled-up with others or even in cars because there is inadequate shelter space available. Across the nation, more children are finding themselves living in unorthodox housing arrangements, including parking lots as they try to keep their families together. Because parents cannot find affordable housing, if a family's living situation is not conducive to the well-being of the child for an extended period of time, the children may be removed from the family and put into foster care. Once removed, any financial assistance the family may have received prior to that time may become unavailable to them, which makes it harder for parents to secure adequate housing and get their children back. There is a fine line between what constitutes the best interest of the child: is it staying with their family in an inadequate living arrangement or being removed from them to stay with strangers in a more affluent housing arrangement? This is a matter of subjective interpretation.

Families seeking housing may be questioned by landlords about how many children they have, and those with "too many" as defined by the landlord may be denied housing. It is difficult for parents to prove this is the reason, but many feel this is indeed the case. If anyone in the family has legal problems that are not even related to the housing, the legal issues may become justification for their eviction from public or section

38. See generally *OUT OF SIGHT*, *supra* note 7.

39. Hope Yen, *Census Shows 1 in 2 People Are Poor or Low-Income*, YAHOO!FINANCE (Dec. 15, 2011), <http://finance.yahoo.com/news/census-shows-1-2-people-103940568.html>.

8 housing, often with a three-year no-return policy. This results in people becoming chronically homeless. It particularly penalizes children and youth who had nothing to do with the legal problem for which they were evicted. Children and youth whose families are evicted cannot do a thing about it and cannot secure housing for themselves because of economic and legal constraints.

In some cases the housing that is offered to homeless families is substandard and may play into an ideology that “beggars can’t be choosers” when they are given any place to live. Low-income housing may be more commonly found in low-income neighborhoods; low-income neighborhoods are associated with crime and problems like exposed wiring, inadequate plumbing, asbestos, or lead paint. States like New York have enacted law S1391-2011 to bar discrimination in the leasing of rental property against families receiving public assistance or governmental housing subsidies and to protect homeless children from lead paint poisoning. Other states do not have such laws and homeless children may find themselves living in houses or apartments but their conditions may be lax. The data proves a clear relationship between housing and health.⁴⁰

2. Guardianship Issues

Grandparents, siblings, relatives and friends may step up and take care of homeless children or youth because the children’s family cannot, will not, or should not take care of them, yet they may not have the official paper work that legally allows them to do so. Legal problems confront caregivers of children and youth who do not have formal authorization to be the guardians for their young charges. Family and friends may shelter children when their parents are unable to do so, but if they do not have legal guardianship papers they cannot secure housing or other services for them.

Informal agreements may have been made between the parents and caregivers, but unless there are legal documents transferring guardianship to the caregivers, the children may be unable to receive assistance. Frequently the parents are unavailable or unable to authorize the necessary paperwork giving guardian’s custody. Children and youth may get stonewalled without services as a result. Providers experience significant legal difficulty because they may know these relatives or

40. *See, e.g.*, NATIONAL CTR. FOR HEALTHY HOUSING, HOUSING INTERVENTIONS AND HEALTH OUTCOMES: A REVIEW OF THE EVIDENCE (2009); NATIONAL CTR. FOR HEALTHY HOUSING, U.S. DEPT. OF HOUSING & URBAN DEV. HOUSING QUALITY STANDARDS (1995), available at <http://www.healthyhomestraining.org/Codes/HQS.htm>.

friends are taking charge, yet they may not have so much as a handwritten note giving them permission to do so. As one National Coalition for the Homeless board member and shelter provider reflected,

The custody issues have always been a big legal problem for the children in homeless families. We have a grandmother with her two year old grandson in our waiting room now, and no shelter or transitional program will take them without evidence of the grandmother's legal custody. They need to have guardianship authorization in order to act on behalf of the youth.

The Administration for Children and Families estimates that about six million children are being raised by grandparents.⁴¹

3. Illegal or Undocumented Parents

Immigrant parents may have problems obtaining housing for their children which results in them becoming homeless. Some parents may be in the country illegally, others may be here legally but live with someone who is not, and some may not have the paper work in order to meet the official designation of meeting legal residency standards. Immigrant children are at risk of homelessness because their parents' illegal status makes it impossible for them to access services. Their parents may be afraid to sign legal documents or contracts or be in contact with organizations who could on one hand help them, but on the other hand turn them in to legal authorities. Immigrant parents of children may hide in order to evade Immigrations and Customs Enforcement (ICE); trying to keep their families together, they may live in precarious housing arrangements or become homeless because of laws that influence the lives of immigrants.⁴²

According to the Homeland Security Act of 2002, the correct legal designation to refer to unaccompanied undocumented youth is "unaccompanied alien child."⁴³ This refers to children under age eighteen who do not have a lawful immigration status or a parent/legal guardian in the U.S. available to provide physical custody and care. A youth who entered into the U.S. with a parent but subsequently left the care of the

41. See ADMIN. FOR CHILDREN & FAMILIES, GRANDPARENTS RAISING GRANDCHILDREN: A CALL FOR ACTION 1 (undated), <http://www.acf.hhs.gov/opa/doc/grandparents.pdf>.

42. See generally NAT'L ASS'N FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, IMMIGRATION AND SCHOOLS: SUPPORTING SUCCESS FOR UNDOCUMENTED AND UNACCOMPANIED HOMELESS YOUTH (2010).

43. *Id.* at 3.

parent could pragmatically be considered an unaccompanied alien child, but not necessarily legal under immigration law. In 2007 the U.S. Department of Health and Human Services had 8,227 unaccompanied youth, eighty-five percent of them between fourteen and eighteen years of age.⁴⁴ Most (seventy-six percent) were male.⁴⁵ The majority of youth (eighty-five percent) were from three countries – Guatemala, Honduras, and El Salvador.⁴⁶

There is the overarching issue that sometimes children and youth do not get the assistance that could legally be available to them because they, or their caregivers, either are not aware of services or do not apply for them. Understanding their legal rights, knowing what services are available and being able to access them are complicated for people of any age, and especially challenging for children and youth. There is no nationally organized system of child advocacy or ombudsmen that children can easily identify and access for assistance. There exists significant debate on how to serve the best interests of this group of homeless children.⁴⁷

4. Older Youth

Older youth may not be in a family setting or cared for by a responsible adult. Some have fled because of abuse, others have been pushed-out or thrown-out, and some have left on their own volition. The National Law Center on Homeless and Poverty found in their report *Alone Without a Home: A State by State Review of Laws Affecting Unaccompanied Youth*⁴⁸ that the legal rights and responsibilities of unaccompanied youth vary state-by-state. Despite the fact that they are living apart from their parents or guardians, minor aged youth lack the legal status to live independently.⁴⁹ This report found that most states have established statutory definitions of the term “youth” that have not kept pace with contemporary understanding of human development and the distinctions between its childhood and adolescent phases.⁵⁰ Many

44. *Id.* at 3 n.9 (citing CHAD C. HADDEL, CONG. RES. SERV. REP., UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES (2009)).

45. *Id.*

46. *Id.*

47. See Christopher Nugent, *Whose Children Are These? Towards Ensuring the Best Interests and Empowerment of Unaccompanied Alien Children*, 15 B.U. PUB. INT. L.J. 219, 219 (2006).

48. See generally NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *ALONE WITHOUT A HOME* (2003) [hereinafter *ALONE WITHOUT A HOME*].

49. *Id.* at 1.

50. *Id.* at 3-4.

jurisdictions determine the age of majority to be eighteen, indicating that older youth are not viewed as different from adults.⁵¹ But most people at age eighteen, or even older, are rarely independent at age eighteen and able to handle the demands that confront adulthood.⁵² Many states do not have specific definitions of runaway or homeless children/youth, which reflects their lack of attention on these populations. Many states use a terminology that reflects a punitive attitude toward these young people, using terms like vagrant, unruly, incorrigible, rebellious, absence from the family without permission, with little mention that the youth may have fled the home for safety reasons.⁵³

Legal obstacles are overwhelming for homeless youth. Minors do not have the right to even fill out a housing application. They cannot sign a rental or lease agreement. They likely do not have much income of their own to pay for housing and fail to qualify for public assistance. Unaccompanied youth fall through the cracks and are not served because they do not fit the HUD or other definition. There may be few institutional resources available to help them short of putting them into foster care if they are not emancipated. Older youth may not want to go into foster care. Some may have the capabilities, with support, to live independently. When unaccompanied youth cannot be reunited with parents or guardians, they must care for themselves. Living independently either by choice or because there are no adults to assist the un-emancipated youth are unable legally to obtain housing, buy cars, make health care decisions, take out educational loans, or engage in other contractual transactions necessary to live independently.

Some studies indicate that there are some populations of youth that are grossly overrepresented in the homeless youth populations. These groups include: gay, lesbian and bisexual youth; youth who are transgender; minority youth; youth with some history of foster care; and youth who have been through either the juvenile justice or criminal justice systems.⁵⁴

51. *Id.* at 4.

52. *Id.*

53. *Id.* at 3.

54. *See, e.g.*, LANCE FREEMAN & DARRICK HAMILTON, EMPIRE STATE COAL. OF YOUTH & FAMILY SERV., A COUNT OF HOMELESS YOUTH IN NEW YORK CITY, at exec. sum. (2008), http://www.citylimits.org/images_pdfs/pdfs/HomelessYouth.pdf; NICHOLAS RAY ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS 1 (2006).

5. Foster Care

Youth who have been placed into foster care have a much higher chance of becoming homeless when they leave foster care.⁵⁵ There are over a half-million children and youth in foster care in the United States.⁵⁶ This group of people could be considered homeless because they are in temporary housing and away from their family. About 20,000 foster children age-out or emancipate annually, and about two-thirds of them leave foster care (usually at their eighteenth birthday) without a place to live.⁵⁷ About half of foster children do not complete high school and most have trouble getting or holding a job.⁵⁸ About half the former foster care youth become homeless within the first eighteen months after they are considered adult; fifty-eight percent of all young adults in youth shelters had previously been in foster care.⁵⁹ Girls in foster care are six times more likely to have a baby before turning age twenty-one than the general population.⁶⁰ Allowing young people to remain in foster care until their twenty-first birthday may not prevent, but may delay entry into homelessness. Foster youth in Illinois were found to be about one-third as likely to become homeless by age nineteen and about three-quarters as likely to become homeless by age twenty-one as foster youth in other states.⁶¹

6. LGBT Youth

Gay, lesbian, bisexual, transgender, and people questioning their sexual identity have been found to have higher than average rates of homelessness, usually attributed to parental resistance accepting their children's sexual identity or orientation. The National Coalition for the Homeless found that twenty percent of homeless youth are LGBT,

55. Richard Barth, *On Their Own: Experiences After Foster Care*, 7 CHILD & ADOLESCENT SOC. WORK J. 419, 420, 424 (1990); *National Foster Care Youth Statistics*, ON THE MOVE, <http://www.onthemovebayarea.org/node/561> (last visited Sept. 14, 2012).

56. *National Foster Care Youth Statistics*, ON THE MOVE, <http://www.onthemovebayarea.org/node/561> (last visited Sept. 14, 2012).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. AMY DWORSKY & MARK COURTNEY, *ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 5* (2010), available at <http://www.chapinhall.org/research/brief/assessing-impact-extending-care-beyond-age-18-homelessness-emerging-findings-midwest>.

compared to only ten percent of the general youth population.⁶² While youth who are homeless report severe family conflict as the reason for their homelessness, LGBT youth are twice as likely to experience sexual abuse before age twelve.⁶³ Once homeless, they are at higher risk of victimization, mental health problems and unsafe sexual practices⁶⁴. Almost fifty-nine percent of LGBT homeless youth have been sexually victimized compared with thirty-four percent of heterosexual homeless youth.⁶⁵ LGBT homeless youth commit suicide at higher rates than heterosexual sexual youth (sixty-two percent to twenty-nine percent).⁶⁶ The Homelessness Resource Center⁶⁷ indicates that thirty percent of families reject their child when they learn of their alternative sexual preference, and that one in five homeless youth are LGBT. PFLAG⁶⁸ indicate that about a quarter of gay males are thrown out of their homes when they tell their families about their sexual orientation, and that between twenty-five percent and fifty percent of homeless youth are LGBT and on the streets because of their sexual identity. Because of the stigmatization LGBT individuals have experienced, their legal rights have been compromised historically and add that stigmatization to that of being homeless, there is a reasonable probability that this population of youth experience high rates of exclusion.⁶⁹

7. Youth with Juvenile Justice Histories

According to the National Center on Homeless Education,⁷⁰ there is a significant overlap between youth homelessness and contact with the juvenile/criminal justice system. There seems to be both a cause and an effect relationship between them; in some cases homelessness triggers actions that put the youth into contact with the criminal justice system; in other cases detained youth may find themselves more likely to become

62. See NAT'L COALITION FOR THE HOMELESS, LGBT HOMELESS (2009), available at <http://www.nationalhomeless.org/factsheets/lgbtq.html>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. See NAT'L GAY AND LESBIAN TASK FORCE & NAT'L COALITION FOR THE HOMELESS, LESBIAN GAY, BISEXUAL AND TRANSGENDER YOUTH: AN EPIDEMIC OF HOMELESSNESS (2011).

68. *Statistics You Should Know About Gay and Transgender Students*, PFLAG, <http://www.pflagnyc.org/safeschools/statistics> (last visited Sept. 15, 2012).

69. See WENDY EVANS, HOMELESSNESS RES. CTR., SUPPORTING LGBT YOUTH AND THEIR FAMILIES: THE FAMILY ACCEPTANCE PROJECT (2010).

70. See NAT'L CENTER ON HOMELESS EDUC., YOUTH HOMELESSNESS AND JUVENILE JUSTICE (2011), http://www.terrifictransitions.org/nche/downloads/briefs/juv_just.pdf.

homeless upon their release. In a study of a homeless youth center in New York, thirty percent of the youth had been arrested or incarcerated previously.⁷¹ Usually the crimes that led to their arrest were nonviolent or status offenses, including loitering, camping, panhandling or breaking curfew.⁷² Some homeless youth engage in illegal activities such as prostitution, survival sex or drug dealing in exchange for food or shelter. Some may qualify as a “child in need of services” (CHINS). Almost none have parents or legal counsel who can help them to navigate the criminal justice system.⁷³

When detained youth are released from juvenile justice, detention, or correctional facilities, many become homeless because they do not have a stable home to return to. Sometimes the reason they were at the juvenile facility in the first place concerned family dysfunction.⁷⁴ Once youth have been convicted of certain crimes (such as domestic violence), they may be prohibited from living in public or Section 8 housing.⁷⁵

Unaccompanied youth tend to engage in delinquent survival strategies because they have few legitimate means to support themselves. Studies indicate that the longer unaccompanied youth experience homelessness, the higher the probability of committing a crime. Further, in addition to being homeless, the lack of financial assistance from the

71. Paul A. Toro, Amy Dworsky & Patrick J. Fowler, Paper prepared for the 2007 National Symposium on Homelessness Research: Homeless Youth in the United States: Recent Research Findings and Intervention Approaches (2007), available at <http://aspe.hhs.gov/hsp/homelessness/symposium07/toro/index.htm>. Cited material is located in subsec. “Homelessness Among Youthful Offenders,” at ¶ 4.

72. Yvonne Vissing, *Curfews*, in KEY ISSUES IN CRIME AND PUNISHMENT 64, 66 (William Chambliss ed., 2010); NELL BERNSTEIN & LISA K. FOSTER, CAL. RESEARCH BUREAU, VOICES FROM THE STREET: A SURVEY OF HOMELESS YOUTH BY THEIR PEERS 53-55 (2007), <http://www.library.ca.gov/crb/08/08-004.pdf>; Andrea J. Sedlak & Carol Bruce, *Youth’s Characteristics and Backgrounds: Findings from the Survey of Youth in Residential Placement*, JUV. JUST. BULL. (U.S. Dep’t of Justice, Office of Juvenile Justice & Delinquency Prevention), Dec. 2010, at 3-4, <https://www.ncjrs.gov/pdffiles1/ojjdp/227730.pdf>.

73. NAT’L CTR. ON HOMELESS EDUC., YOUTH HOMELESSNESS AND JUVENILE JUSTICE 1-2 (2011), http://www.terrifictransitions.org/nche/downloads/briefs/juv_just.pdf.

74. U.S. DEPT. OF HEALTH & HUMAN SERVICES, FAMILY & YOUTH SERV. BUREAU, REP. TO CONG., PROMISING STRATEGIES TO END YOUTH HOMELESSNESS 2 (2005), http://www.acf.hhs.gov/programs/fysb/content/docs/reporttocongress_youthhomelessness.pdf.

75. JUVENILE JUSTICE & DELINQUENCY PREVENTION COAL., YOUTH REENTRY TASK FORCE, BACK ON TRACK: SUPPORTING YOUTH REENTRY FROM OUT-OF-HOME PLACEMENT TO THE COMMUNITY 18 (2009)

state also increases the likelihood of youth being involved in violent crime.⁷⁶

Congress enacted the Juvenile Justice and Delinquency Prevention Act of 1974⁷⁷ to address needs of runaway, homeless and at-risk youth. While the intention was to create a system that would rehabilitate young offenders to mold them into successful members of society, according to the National Center on Homeless Education,⁷⁸ statistics show that the juvenile justice system has failed many homeless youth. Youth who are involved with the juvenile justice system have substantially higher rates of mental health disorders comparable to those among youth being treated in the mental health system. The prevalence of mental disorders among youth in the general population is estimated to be about twenty-two percent; the prevalence rate for youth in the juvenile justice system is as high as sixty percent.⁷⁹ Over eighty percent of the young people who enter New York's juvenile facilities end up returning or being put into adult prisons within three years, which is a recidivism rate significantly higher than in the adult criminal justice system. Similar failures in the system can allegedly be found in other major cities across the country.

8. *Unaccompanied Youth*

Young people who are on their own quickly find themselves unable to meet their basic survival needs without assistance from others. The National Law Center for Homelessness and Poverty⁸⁰ found that it is commonplace for states to enact statutes that explicitly prohibit the "harboring" of unaccompanied or runaway youth by individuals and organizations who are not their legal guardians. Other jurisdictions have

76. ARATANI, *supra* note 2, at 7; see generally Stephen W. Baron, *Street Youth, Unemployment, and Crime: Is It That Simple? Using General Strain Theory to Untangle the Relationship*, 50 CANADIAN J. CRIMINOLOGY & CRIM. JUST. 399, 399-434 (2008); Jeanne G. Kaufman & Cathy Spatz Widom, *Childhood Victimization, Running Away, and Delinquency*, 36 J. RES. CRIME & DELINQ. 347, 347-70 (1999); Les B. Whitbeck & Ronald L. Simons, *Life on the Streets – the Victimization of Runaway and Homeless Adolescents*, 22 YOUTH & SOC'Y 108, 108-25 (1990).

77. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974).

78. NAT'L CTR. FOR HOMELESS EDUC., EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM: DATA COLLECTION SUMMARY FROM SCH. YEAR 2009-2010, at 18 (2011).

79. NAT'L MENTAL HEALTH ASS'N, MENTAL HEALTH TREATMENT IN THE JUVENILE JUSTICE SYSTEM 1 (2004), https://www.nttac.org/views/docs/jabg/mhcurriculum/mh_mht.pdf.

80. ALONE WITHOUT A HOME, *supra* note 48, at 87.

enacted contributory delinquency, custodial interference and minor concealment statutes that may lead to not serving them.⁸¹ These put youth in very precarious situations. While such statutes are designed to preserve the rights of families and to prevent states from unnecessarily assuming custodial responsibilities, they limit individuals and organizations that have legitimate purpose in providing safe havens for youth in need. The National Law Center⁸² found that sixteen jurisdictions make it a crime to harbor a runaway; at least one jurisdiction makes it a crime to harbor any child, at least eight jurisdictions make it a crime to interfere with custodial rights, and four jurisdictions make it a crime to conceal a minor. This makes it very difficult to legally help unaccompanied youth. The sixteen jurisdictions explicitly make it a crime to harbor include: Colorado, Delaware, the District of Columbia, Florida, Illinois, Iowa, Kansas, Michigan, Mississippi, Missouri, North Dakota, Texas, Utah, Vermont, Washington and American Samoa.⁸³ The District of Columbia statute applies only to persons who harbor young people who run away from the child welfare system.⁸⁴ Ohio makes it a crime to harbor any person under age eighteen.⁸⁵ Since less than one-third of jurisdictions have enacted statutes that prohibit the harboring of runaways, jurisdictions rely on broader child protection provisions to avert unwarranted trespass across legally established guardian-child custodial boundaries. The result is uncertainty as to whether or not harboring of unaccompanied youth actually falls within the scope of these more general statutes. A number of statutes compel individuals and organizations to notify law enforcement officials to report their harboring actions in order to avoid committing a crime.

There are some states with laws that are worth mentioning as they pertain to the management of unaccompanied youth. Wyoming's statute (WYO. STAT. ANN. § 6-4-403) has custodial interference and minor concealment provisions that establish defenses to harboring them "in order to protect the child from abuse, or that the child was over the age of fourteen and the child wanted to be taken away and not returned, provided that the person took the child without intent to commit a criminal offense with the child."⁸⁶ This provision enables the young person to express his or her wishes regarding their custodial relationship and empowers the harboring agent to act in accordance with the youth's

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. ALONE WITHOUT A HOME, *supra* note 48, at 88.

request. Alaska's statute (ALASKA STAT. § 11.51.130), criminalizing the aid, inducement, causation or encouragement of a child to be absent from a guardian without having the guardian's permission, can be defended against if the person harboring the youth reasonably believed that the child was in physical danger or needed shelter or reported the name of the child and his/her location within twelve hours to a peace officer, law enforcement officer or Department of Health and Social Services.⁸⁷ The explicit mention of need for shelter as a reasonable purpose for harboring, as well as the option for reporting the young person's location to the child welfare system negates the criminalization teeth of this statute. A New Jersey statute (N.J. REV. STAT. § 9:12A-6) gives homeless youth a statutory right to access walk-in shelters.⁸⁸ The law allows youth care organizations to provide safe, stabilizing services to youth in crisis. They can provide basic shelter to homeless youth, age twenty-one or younger, without parental notification or a court order. After proper notification to a juvenile-family crisis intervention unit, an admitted homeless youth may remain at the basic shelter for up to ten days without the consent of the youth's parent or legal guardian. Where abuse and/or neglect is suspected and an official report is filed, the youth may remain in the shelter for up to thirty days pending upon the disposition of the case. Washington's statute (WASH. REV. CODE § 13.32A.080) provides civil immunity from liability if the person reports a runaway within eight hours of learning of their runaway status and only criminalizes harboring when a person prevents a police officer, not a parent, from taking a runaway into custody.⁸⁹

As a general rule, even when youth are parents, if they are under age eighteen, they are still considered minors and not eligible to sign legal documents on their own behalf. However, they can sign paperwork for their children. This group of homeless individuals is legally considered as both minors and adults (in their role as parent), and may find themselves falling between the cracks and unable to obtain assistance. When all options are depleted, youth may seek assistance from shelters. But shelters cannot serve youth because they are minors who legally need parents to sign on their behalf for them to access services. Yet they lack the parental supports that would enable them to do so. Shelters may be subject to legal penalties if they do serve undocumented youth. In one case in New Hampshire, an underage mother sought shelter for herself and her new baby in the middle of a blizzard; the shelter could not legally serve her and offered to put her into foster care, but there was

87. *Id.*

88. *Id.*

89. *Id.*

concern that the baby may not be allowed to stay with her. They left to take their chances on the wintry streets.

9. *Emancipation*

Emancipation is a serious legal decision since it terminates parental responsibility and leaves the youth with no legal rights to demand assistance from parents. But it may in the youth's best interests to do so, especially in cases of abuse and domestic violence. Emancipation may enable the young person to control their own finances, own property, engage in contractual arrangements, consent to medical care, or marry if they choose. When they apply for aid the financial benefits may go directly to them rather than to parents or guardians. When this occurs, they may be able to apply for public assistance housing. The National Law Center for Homelessness and Poverty⁹⁰ found that thirty jurisdictions have established processes for emancipation, in nine of the jurisdictions, parental consent is required for emancipation, but such consent can be waived in four of those nine. In particular, the most common minimum age to petition for emancipation is sixteen years old, with twenty jurisdictions establishing that limit: Alaska, Arkansas, Connecticut, Florida, Illinois, Maine, Michigan, Montana, Nevada, New Mexico, North Carolina, Oregon, Pennsylvania, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia and the U.S. Virgin Islands.⁹¹ California permits youth as young as fourteen years old to petition for emancipation, Louisiana has set fifteen years old as its minimum age.⁹² Five jurisdictions do not specify any minimum age: Indiana, Kansas, Mississippi, Oklahoma and Tennessee. Nine jurisdictions specifically require parental consent for emancipation.⁹³ Three of those jurisdictions require parental consent by prohibiting emancipation unless youth are living on their own with the consent of parents: California, South Dakota and Wyoming.⁹⁴ The remaining six jurisdictions require parental consent as part of the court process for granting emancipation: Alaska, Illinois, Louisiana, Michigan, Puerto Rico and the U.S. Virgin Islands.⁹⁵ However, four of those six jurisdictions allow courts to waive the consent requirement: Alaska, Louisiana, Puerto Rico and the U.S. Virgin Islands. For example, courts

90. *Id.* at 63.

91. *Id.*

92. ALONE WITHOUT A HOME, *supra* note 48, at 63.

93. *Id.*

94. *Id.*

95. *Id.*

in Alaska do not need parental consent to grant emancipation if such consent is difficult to obtain, and courts in Louisiana can waive consent if the parents have treated the young person roughly or had a negative influence on the youth.⁹⁶ Only twenty-one jurisdictions recognize emancipation in limited circumstances, but do not set forth a statutory process for becoming emancipated.⁹⁷

Common requirements for emancipation include attaining a minimum age, living apart from parents, managing oneself and being able to support oneself financially. Some jurisdictions permit youth to become emancipated without a court proceeding if they and their parents agree. For example, in Puerto Rico, a parent and youth can agree to emancipation and complete the process by signing a notarized declaration.⁹⁸ In Louisiana, a youth age fifteen or over and his or her parents can complete emancipation by signing a notarized declaration in front of two witnesses.⁹⁹ Emancipation may permit courts to treat them as adults for criminal purposes as well, as it explicitly does in Wyoming.¹⁰⁰ Emancipation without court involvement could be very attractive to young people whose parents consent to emancipation, as it would likely be faster, easier and less costly than judicial emancipation. However, it may be possible for a parent to abuse the process by coercing a youth to agree to emancipation. In Indiana, IND. CODE § 31-34-20-6 does not establish a minimum age for emancipation and does not require parental consent; youth must state that they wish to be independent and show that they can support themselves, including acceptable living arrangements.¹⁰¹ This statute protects a young person's right to become legally independent, but also requires the court to ensure the youth understands what emancipation means and has a safe place to live. Emancipated youth in Indiana have the right to enter contracts, marry, own property and consent to medical care.¹⁰² The U.S. Virgin Islands maintains certain legal protections for young people even after they are emancipated; they cannot enter any contract that would obligate them to pay a sum greater than their annual income, appear in a lawsuit without a guardian ad litem or sell real property without the court's approval (see V.I. CODE ANN. tit. 16, §§ 211, 231-33, 241, 251, 253-54).¹⁰³

96. *Id.*

97. *Id.* at 63-64.

98. ALONE WITHOUT A HOME, *supra* note 48, at 63.

99. *Id.*

100. *Id.* at 70-71.

101. *Id.* at 66-67.

102. *Id.*

103. *Id.* at 71.

In sum, homeless children and youth experience a host of housing difficulties. There is no national standard for their definition of who they are or how they should be served. There is an attempt to deal with their housing problems in some states, but the variability is considerable. The result is that there is no single law that protects the housing needs of either children or youth.

V. EDUCATIONAL PROBLEMS OF HOMELESS CHILDREN AND YOUTH

A. *McKinney-Vento Homeless Assistance Act*

Perhaps the most successful legal action to protect the rights of homeless children and youth has occurred within the educational arena. The right of equal access to a free public education is today firmly established in federal law. The educational rights of homeless children are rooted in state, federal and international law. Congress passed the McKinney Homeless Assistance Act in 1987 to protect the educational rights of homeless children and youth. The federal McKinney-Vento Homeless Assistance Act – Title X, Part C, of the No Child Left Behind Act of 2001 – provides a comprehensive national framework to protect the educational rights of homeless children across the United States, and also provides protections to many unaccompanied youth.¹⁰⁴ According to the McKinney-Vento Act, a child or youth meets the legal definition of homelessness when he or she does not have a fixed, regular and adequate nighttime residence.¹⁰⁵ This includes students who live with friends, relatives or others because they have financial problem that forced them to lose their home. People who stay in shelters, motels, hotels, trailer parks, campgrounds, substandard housing, cars, parks, abandoned buildings or transportation stations also fit the definition. Youth who do not live with parents or guardians are known as “unaccompanied youth,” and include those who were thrown out or pushed out by their parents, who left home with the consent of parents, or who do not have parents to care for them. Students who live in transitional housing programs are considered homeless under Subtitle VII-B of the McKinney-Vento Act.¹⁰⁶

104. See McKinney-Vento Education for Homeless Children and Youths Program, 67 Fed. Reg. at 10,701.

105. NAT'L CTR. FOR HOMELESS EDUC., BEST PRACTICES IN HOMELESS EDUCATION: DETERMINING ELIGIBILITY FOR RIGHTS AND SERVICES UNDER THE MCKINNEY-VENTO ACT 2 (undated).

106. See 42 U.S.C. §§ 11431-11435. See generally NAT'L ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, A CRITICAL MOMENT: CHILD AND YOUTH HOMELESSNESS IN OUR NATION'S SCHOOLS (2010), http://www.naehcy.org/dl/crit_mom.pdf; NAT'L

Subtitle VII-B of the McKinney-Vento Act establishes an array of rights for unaccompanied youth in homeless situations. The Act defines unaccompanied youth as young people who are not in the physical custody of parents or guardians (42 U.S.C. 11434A). Homelessness is defined broadly, to include a wide variety of temporary, inadequate living situations such as staying temporarily with friends or relatives due to a loss of housing, economic hardship or a similar reason; living in emergency and transitional shelters; staying in motels, hotels, campgrounds or trailer parks due to the lack of alternative adequate accommodations; sleeping in parks, cars, abandoned buildings, train or bus stations and other public spaces; and awaiting foster placement. Unaccompanied youth experiencing homelessness have the right to the same free, public education and opportunities for academic success as housed students. They must be provided with equal access to appropriate secondary education and support services. Youth in homeless situations also have the right to remain in one school, even if their lack of housing forces them to move to a different area. As long as it is feasible, unaccompanied youth can stay in the same school for the entire time they are homeless. The school district must provide transportation to and from that school by providing free passes for public transportation, reimbursement for gas or other transportation services. Unaccompanied youth who are covered by the McKinney-Vento Act also have the right to enroll in school immediately, even if they lack documents normally required for enrollment.

Every school district must appoint a liaison who is responsible for assisting unaccompanied youth with enrollment, transportation and other issues. Liaisons and state departments of education must also ensure that school personnel are made aware of the specific needs of runaway youth and other youth experiencing homelessness and help them to participate

ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, *BEST PRACTICES IN HOMELESS EDUCATION: DETERMINING ELIGIBILITY FOR RIGHTS AND SERVICES UNDER THE MCKINNEY VENTO ACT* (2008); NAT'L CTR. FOR HOMELESS EDUC., *EDUCATION FOR HOMELESS CHILDREN AND YOUTH PROGRAM: DATA COLLECTION SUMMARY FROM SCH. YEAR 2007-2008* (2009); NAT'L ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, *FACT CHECK: UPDATING HUD'S DEFINITION OF HOMELESSNESS IN THE REAUTHORIZATION OF THE HUD MCKINNEY-VENTO ACT PROGRAMS* (2008); NAT'L ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH ET AL., *QUESTIONS AND ANSWERS ABOUT EXPANDING HUD'S DEFINITION OF HOMELESSNESS* (2008); NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *SUBTITLE VII-B-MCKINNEY VENTO ACT* (2002); Ann S. Masten et al., *Educational Risks for Children Experiencing Homelessness*, 35 J. SCH. PSYCHOL. 27, 27-46 (1997); V.C. McLoyd, *Socioeconomic Disadvantage and Child Development*, 53 AM. PSYCHOL. 185, 185-204 (1998); E.M. Menke & J.D. Wagner, *A Comparative Study of Homeless, Previously Homeless, and Never Homeless School-Age Children's Health*, 20 ISSUES IN COMPREHENSIVE PEDIATRIC NURSING 153, 153-173 (1997).

fully in school activities in order to succeed. School liaison or coordinators are to be present in every school to assist students. They are to ensure that students receive appropriate services, transportation, special education, English language services, vocational education, mentoring and preschool. Students are to be enrolled even if they do not have traditional records such as immunizations, physical exams, academic records, proof of residency, birth certificates and a parent or legal guardian. These are to be obtained later, if possible, but they should not impair the student's ability to attend school. The liaisons are to also make referrals to health care services, dentists, mental health providers and other needed resources. Some homeless students may have health problems or disabilities and may need special assistance or educational services. They also facilitate students staying in one school to help them so they do not fall behind on their school or their work or drop out. Staying in a single school provides them with stability, friends, and opportunities that they could not have if they were transient.

In addition to these rights provided by the McKinney-Vento Act, several jurisdictions have also adopted statutes or regulations to ensure access to education for unaccompanied young people. For example, Colorado enacted its own version of the McKinney-Vento Act in 2002.¹⁰⁷ The statute reinforces the protections of the federal law and has garnered attention and results for unaccompanied youth in Colorado. Illinois has conferred statutory protections on unaccompanied youth since 1995.¹⁰⁸ In fact, many of the recent changes to the McKinney-Vento Act were actually inspired by successful provisions in the Illinois statute. Many other states, including Maine, Maryland and New Jersey have adopted regulations applying the McKinney-Vento Act in the state.¹⁰⁹

Organizations such as National Association for the Education of Homeless Children and Youth (NAEHCY) and the National Law Center for Homeless Children and Youth conduct work to strengthen legislation that guarantees homeless students' right to education, and they train state and district education workers to pursue litigation when necessary to protect America's homeless students. Many individuals, organizations, and schools also attempt to help homeless students to succeed.¹¹⁰ While the McKinney-Vento legislation has sought to protect access to

107. COLO. REV. STAT. § 22-1-102; § 22-1-102.5; § 22-33-103.5 (2002).

108. Education for Homeless Children Act, 105 ILL. COMP. STAT. 45/1-5 *et seq.* (1994).

109. *See* N.J. ADMIN. CODE §§ 6A:17-2.1 *et seq.*; 05-071 ME. CODE R. §§ 1-3.3; MD. CODE REGS. 13A.05.09 *et seq.*

110. *See generally* Yvonne Vissing, *Homelessness in Middle School Students*, in EDUCATING HOMELESS STUDENTS: PROMISING PRACTICES (2000); *see also* Yvonne Vissing, *Prepping Homeless Students for School*, 69 EDUC. DIGEST 34, 34-38 (2004).

education for homeless children and youth, the realization of that right has been an ongoing struggle. In 1999, the U.S. Department of Education found that while forty-two percent of homeless children are under five years old, only fifteen percent of them are enrolled in preschool. Over thirty-eight percent of the homeless population has less than a high school degree by age eighteen¹¹¹ and fifty percent of the homeless population drops out of school during the course of their education.¹¹² In 2010, NAEHCY reported in a study of over 2,200 schools in forty-seven states that in two years alone the number of homeless children and youth identified by the schools increased forty-one percent, and that seventy percent of all schools reported seeing an increase of homeless students, further documenting that this is a national, not isolated, problem. The report found a variety of causes of child and youth homelessness, with the most common being the economic downturn that has resulted in loss of jobs, increased housing foreclosures, higher cost of living and increased need with dwindling community resources. Access to affordable housing and greater homeless student identification are priorities for the schools. School districts reported that many remaining barriers continue to exist for the education of homeless children and youth. The most frequently cited barriers included lack of affordable housing, difficulty identifying homeless students, transportation to the school of origin and meeting basic needs. The National Law Center on Homelessness and Poverty has examined the impact of homelessness on access to public education and in their report *Separate and Unequal*¹¹³ found that separate schools or classrooms for homeless children have been an increasing trend. Going to school is often one of the few regular, fixed, reliable aspects of a homeless child's life. Regular school attendance gives homeless children the chance to be treated like all other children, and to experience the same routines and rituals. Yet homeless children and youth are often denied their right to attend public schools because of the following barriers:

111. MARTHA R. BURT ET AL., U.S. DEP'T OF HOUSING & URBAN DEV., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE, at ch. 2 (1999) (highlights).

112. *Understanding Homeless Youth: Numbers, Characteristics, Multisystem Involvement, and Intervention Options: Hearing Before the Subcomm. on Income Security & Family Support of the H. Comm. on Ways & Means*, 110th Cong. 4, (2007) (testimony of Martha R. Burt, Principal Research Associate and Director, Social Services Research Program, Urban Institute).

113. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, SEPARATE AND UNEQUAL: A REPORT ON THE EDUCATIONAL BARRIERS FOR HOMELESS CHILDREN AND YOUTH I (2000).

1. Residency requirements

State or local laws typically require students to prove they are residents who live within a school district's boundaries as a prerequisite to enrollment. If public schools are paid for with tax dollars, schools want to ensure that only residents of their community attend their schools. Schools have denied enrollment to children or youth living in a shelter, doubled up with others or other alternative arrangement. They have also refused to serve students who belong to the school but are temporarily living across the geographic boundaries.

2. Records

Most schools require certain kinds of documents in order to enroll a student. These include birth certificates, health reports, immunization records and documents from previous schools attended. Homeless parents and children may not have ready access to these documents. As a result, some students have been refused to attend school until their parents produce them. This may take an extended period of time.

3. Transportation

All students need transportation to and from school, and homeless students may rely upon school-based transportation in order to attend. If they do not live on a bus route or have missed the bus for any reason, they may be unable to attend.

4. Guardianship Requirements

Some states have laws that require parental or guardian consent before they may enroll in school. Students may live with people who are not their official guardians, so they may not legally be allowed to enroll them. Students who have fled home because of abuse may not be able to secure parental signatures. Sometimes guardianships are pending and until they are official, schools may not be able to honor them.

5. Preschool

Most homeless preschoolers do not attend preschool even though they are a group that may benefit significantly from doing so. The

National Law Center on Homelessness and Poverty¹¹⁴ found that there is more of a demand for preschool spaces than there is availability, which puts homeless children at a distinct disadvantage, especially for transient families who may not know the community or have been at the top of the waiting list. Sixty percent of parents were not familiar with their educational rights; around half did not have immunization records, birth certificates or other residency requirements or paper work that the school requested, and these became obstacles in their securing preschool for their children. Transportation can be a major problem getting children to and from preschool, especially if the parents do not have their own transportation. But charging the parents for not getting children into preschool is misplaced blame; while most school homelessness coordinators know about the legal support for getting preschoolers enrolled into programs, little emphasis is placed on enrolling them, which results in few actually going to preschool. Public officials do not generally seem committed to getting the youngest homeless citizens into preschools where they and their families could likely gain more support and access to services.

For children under age five, efforts are geared toward increasing access to childcare or education programs such as the U.S. Department of Health and Human Services' Head Start Program. There is an underrepresentation of homeless preschoolers in early education programs even though they are entitled to one under McKinney-Vento Act. The Improving Head Start for School Readiness Act of 2007 made homeless children categorically eligible to participate in Head Start. States are required to ensure that homeless children have equal access to the same public preschool programs administered by state agencies and attended by housed children in the state, including Even Start. State coordinators for the education of homeless children and youth must coordinate with social services agencies, child development and preschool program personnel, and other agencies to provide comprehensive services to preschoolers.

6. Higher Education

Education is the one sure way for young people to break the cycle of poverty and homelessness in their families. If a student graduates from high school, it is still hard to find a job that pays well enough unless one goes on to vocational school or college. Homeless students may not have

114. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, BLOCKS TO THEIR FUTURE: A REPORT ON THE BARRIERS TO PRESCHOOL EDUCATION FOR HOMELESS CHILDREN ii (1997), for facts stated in this paragraph.

been able to obtain high grades because of their more disruptive home situation, which makes securing scholarships more challenging. This means that obtaining financial aid may be very important to them. The National Law Center on Homelessness and Poverty has worked with the federal government to revise the Free Application for Federal Student Aid (FAFSA) so it will comply with the tenets of the McKinney-Vento Act, and increase the chances they can go to college. For instance, twenty-two and twenty-three year old unaccompanied homeless students seeking independent status are not counted as “youth” under the FAFSA rules that identified youth as twenty-one years or younger, but they cannot achieve independent student status, granted only to persons twenty-four years or older without pursuing arduous administrative remedies. These policies create extraordinary barriers for twenty-two and twenty-three year old unaccompanied youth seeking to enter higher education. To eliminate the barriers facing these youth, the U.S. Department of Education should eliminate the definition of “youth” or define “youth” as twenty-four years of age or younger on the 2011-2012 FAFSA. The current FAFSA definition of “youth” is arbitrary and unsupported by federal statute, and it threatens the ability of unaccompanied homeless youth to seek higher education. It is recommended that the DOE change its process on how to verify unaccompanied homeless youth.¹¹⁵

7. Disabled Students

Homelessness and poverty breed a variety of physical, emotional and cognitive problems. Schools are obligated to enroll and help homeless children and youth to attend classes, and must make sure students with disabilities, including preschool children, get the special education and related services they need. Sometimes homeless students have trouble getting these services if they move or transfer schools frequently.¹¹⁶ Title I is a federal law that gives schools money to educate disadvantaged students. Title I services often include extra academic help and resources such as tutoring. Children and youth in homeless situations must get Title

115. See generally NAT'L ASSOC. FOR THE EDUC. OF HOMELESS CHILDREN & YOUTH, UNACCOMPANIED YOUTH TOOL KIT (2012), available at <http://www.naehcy.org/tk/faa.html>

116. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, CONNECTING HOMELESS STUDENTS TO SPECIAL EDUCATION SERVICES: A GUIDE TO RIGHTS AND RESOURCES 5 (2011).

I services no matter where they go to school, and school districts must set aside money to make sure homeless students get services.¹¹⁷

In contrast to the strides made by Title I, the United States Supreme Court case *Schaffer v. Weast*¹¹⁸ harms disabled students, because it found that the parents of a disabled child, not the school, are the appropriate party to bear the burden of proof of a child's disadvantaged state, even though the school "occupie[s] the position of advantage."¹¹⁹ In determining where the burden of proof should lie in due process hearings under the Individuals with Disabilities Education Act (IDEA, 20 U.S.C. § 1400 *et seq.*), the Court considered the entire spectrum of parents of children with disabilities and the resources they are able to muster to participate in the procedures established by the IDEA. Although there is great variation, parents of homeless children with disabilities are more likely to have characteristics that make it more difficult to navigate successfully the procedures established by the IDEA. Parents of children with disabilities tend to be less educated than parents of students in the general population and ignorant of their rights and intimidated by the process. A substantial portion of children with disabilities come from economic and social conditions like poverty and homelessness that likely limit the parents' involvement.¹²⁰ Inexperienced parents or those not represented by counsel are at a substantial disadvantage when trying to obtain services for their children, especially when dealing with schools that have legal representation.¹²¹

In sum, significant strides have been made to address the educational needs of homeless students. Social structures have been modified thanks to the McKinney-Vento Act that force schools to be receptive to, and accountable for, homeless students. With that said, indications exist that the educational laws and school implementation of them still have a way to go before they adequately address the educational needs of homeless children and youth.

117. Bonnie T. Zima et al, *Sheltered Homeless Children: Their Eligibility and Unmet Need for Special Education Evaluations*, 87 AM. J. PUB. HEALTH 236, 236 (1997).

118. *Schaffer v Weast*, 543 U.S. 1145 (2005).

119. *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681, 682-683 (1914).

120. *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

121. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 267 (1989) (O'Connor, J., concurring); *see also Philadelphia Newspapers v. Hepps*, 475 U.S. 767, 776 (1986); *Smith v. Robinson*, 468 U.S. 992, 1013 (1984); Pub. L. No. 94-142, § 3(a), 89 Stat. 775 (1975).

VI. SOCIAL SERVICES

The early years of life are most critical for the developing child, and homeless children and youth tend not to have their needs adequately addressed and experience preventable problems.¹²² Homelessness results after other resources have been depleted; this means that someone who is homeless will likely need more assistance than they would if they were helped before they hit bottom. The two major forms of assistance that people need are income and available affordable housing. When these two things are compromised, preventable physical, emotional and cognitive problems may occur, and more services will be needed as a result. Because of the resultant array of problems that accompanies homelessness, it usually costs more to help people who are homeless than people who are just poor; an investment in shoring up the middle class would likely result in lifting all boats, and reducing the number of people who need a multiplicity of services. The increase in economic distress has resulted in pressuring the existing social safety net to near its breaking point as more people need assistance and services and funding are limited or cut. According to the Foundation for Child Development,¹²³ twenty-one percent of U.S. children now live below the poverty line, which is the highest figure in over twenty years. The Child and Youth Well-Being Index Project at Duke University allege that as economic indicators have plummeted, the quality of all children's lives has also gone down. Sheldon Danziger, a University of Michigan public policy professor predicts dismal prospects for the increasing number of poor and near-poor families unless Congress allocates greater funding and support for families.¹²⁴ A study of American cities found that homelessness is up and more than one in four people needing assistance could not receive it. Many middle-class Americans have dropped below

122. See generally Elizabeth Mayfield Arnold & Mary Jane Rotheram-Borus, *Comparisons of Prevention Programs for Homeless Youth*, 10 PREVENTION SCI. 76, 76-86 (2009); John C. Buckner, *Understanding the Impact of Homelessness on Children: Challenges and Future Research Directions*, 51 AM. BEHAV. SCIENTIST 721, 721-36 (2008); Anne Hicks-Coolick et al., *Homeless Children: Needs and Services*, 32 CHILD & YOUTH CARE FORUM 197, 197-210 (2003); Marybeth Shinn et al., *Long-term Associations of Homelessness with Children's Well-Being*, 51 AM. BEHAV. SCIENTIST 789, 789-809 (2008); ManSoo Yu et al., *A Comparison Study of Psychiatric and Behavioral Disorders and Cognitive Ability Among Homeless and Housed Children*, 44 MENTAL HEALTH J. 1, 1-10 (2008); Brenda Kabler & Elena Weinstein, *The State of Homeless Children in America*, 38 NASP COMMUNIQUÉ ONLINE (2009), available at <http://www.nasponline.org/publications/cq/mocq384homeless.aspx>.

123. Elizabeth Landau, *Children's Quality of Life Declining*, CNN, June 08, 2010, <http://www.cnn.com/2010/HEALTH/06/08/children.wellbeing/index.html?hpt=T3>.

124. *Id.*

the low-income threshold (around \$45,000 for a family of four) because they have had hours cut at work, lost their jobs, or benefits, or cannot keep up with housing, food, health and child care costs. Families in the south and west, including Arizona, New Mexico and South Carolina have cut programs for the needy but have some of the highest numbers of low-income families in the nation. Texas and California have the largest total numbers of poor families.¹²⁵ The relationship between increased need and decreased funding for social services is clear, resulting in many homeless children, youth and families being unable to access the services and care they need.¹²⁶

There are federal programs in place, established by law, that attempt to assist homeless children and youth. But many of the programs have such rigorous requirements that homeless youth and children may not qualify, thereby leaving at-risk children who need assistance underserved. In Table 6,¹²⁷ Samuels, Shinn, and Buckner summarize the list of programs traditionally available for homeless children and youth. While the list attempts to cover a vast array of needs, many of the social service needs of homeless children and youth may fall between the cracks.

125. *Id.*

126. See generally MARJORIE ROBERTSON & PAUL TORO, HOMELESS YOUTH: RESEARCH, INTERVENTION, AND POLICY (1998), available at <http://aspe.hhs.gov/homeless/symposium/3-Youth.htm>.

127. SAMUELS, SHINN & BUCKNER, *supra* note 6, at 27.

Table 6. Selected Federal Programs That Assist Homeless Children and Their Families

Program	Agency/Department	Who is eligible	Eligibility	Service(s)
McKinney-Vento Education for Homeless Children and Youth Program	Office of Elementary and Secondary Education, Department of Education	Homeless children in schools.	Must report they are homeless at a school	Transportation to school of origin
Medicaid & Children's Health Insurance Program (CHIP)	Centers for Medicare & Medicaid Services, Department of Health and Human Services	Low income children	US Citizen or lawfully admitted immigrant, must meet specific income levels by state and age	Health/mental health insurance
National School Lunch and Breakfast Programs	Food and Nutrition Service, Department of Agriculture	Homeless children in school	Must report they are homeless at a school. Then they are categorically eligible	Free lunch and breakfast where available at schools
Supplemental Nutrition Assistance Program (SNAP)	Food and Nutrition Service, Department of Agriculture	Children in households with a citizen or legal immigrant	Income and resource limitations	SNAP benefits (formerly, food stamps)
Earned Income Tax Credit (EITC)	Internal Revenue Service	Low to moderate income workers		Refundable tax credit
Child Tax Credit (CTC)	Internal Revenue Service	Working individual with care of a child	Must have a child under age 17, some citizenship requirements	Federal tax reduction

Section 8: Housing Choice Voucher Program	Public and Indian Housing, Department of Housing and Urban Development	Low income families, seniors and the disabled	US Citizens and some with eligible immigration status. Income requirements vary by location.	Rent assistance
Temporary Assistance for Needy Families (TANF)	Administration for Children and Families, Department of Health and Human Services	Low income families	Eligibility varies by state as do work, school and other requirements	Cash assistance
Low Income Home Energy Assistance Program (LIHEAP)	Administration for Children and Families, Department of Health and Human Services	Low income households	Varies by state. In some states households who receive TANF, Social Security Income (SSI) or Food Stamps are categorically eligible	Assistance for paying energy bills
Federal-State Unemployment Insurance Program	Employment and Training Administration, Department of Labor	Workers who became unemployed through no fault of their own	Varies by state	Temporary financial assistance
Home Affordable Refinance Program (HARP)	Departments of the Treasury and Housing and Urban Development	Homeowners	Homeowners with good credit and payment histories	Home loan refinancing
Home Affordable	Departments of the Treasury and Housing	Homeowners	Homeowners with good	Home mortgage

Mortgage Program (HAMP)	and Urban Development		credit and payment histories	modifications to lower payments and terms
Child Care Assistance through the Child Care and Development Fund	Administration for Children and Families, Department of Health and Human Services	Low income families, families receiving TANF and those transitioning	Assistance is for families that need child care to work or attend training or education for children under age 13 unless disabled or under court supervision	Subsidies and payments for child care

The Runaway and Homeless Youth Act (RHY) became law in 2008. The mandates and benefits are administered by the Family and Youth Services Bureau of the U.S. Department of Health and Human Services (DHHS) Administration for Children and Families. It was established to connect youth to family reunification programs, outreach workers on the streets, emergency shelter, longer-term housing and myriad additional support systems, including workplace preparation, education, health and behavioral health services, and other opportunities to ensure their safety and well-being. The RHY Act includes four programs: the Basic Center Programs, which includes emergency shelter and services related to food, clothing, counseling and access to health care and reunification when possible; the Transitional Living Programs, which support long-term (up to eighteen months and an additional 180 days for those under age eighteen) residential services to homeless youth ages sixteen to twenty-one for self-sufficiency living; the Maternity Group Homes for Pregnant and Parenting Youth programs, which support long-term residential services (up to eighteen months and an additional 180 days for those under age eighteen) for homeless pregnant and parenting young people aged sixteen to twenty-one and their dependent children; and Street Outreach Programs, which provide financial assistance to private and nonprofit agencies for their outreach efforts targeting getting youth off the streets including information and referrals to crisis interventions.

The National Law Center for Homelessness and Poverty studied the assistance needs of unaccompanied youth and alleges that states bear

constitutional responsibility for ensuring the health, safety and welfare of their citizens.¹²⁸ When parents/guardians are unable or unwilling to care for their children, the state itself is obligated to assume such a role.¹²⁹ They may do so by assuming custodial responsibility directly or may delegate care and assistance responsibilities to private entities.¹³⁰ States are also to establish laws to ensure the protection of young people when they are in the custody of the state or outside of the immediate supervision of a parent/guardian.¹³¹ One type of child protection law, organizational licensure, requires entities providing services to young people to meet certain health and safety, clinical practice and staff qualifications standards in order to operate legally in the jurisdiction.¹³² Proof of licensure may also be a condition for the entity's receipt of public or private funds.¹³³

Their study focused on which jurisdictions assigned responsibility for providing services to runaway and homeless youth to a particular executive branch agency; which jurisdictions require runaway and homeless youth shelters to be licensed, and through what authority; and which jurisdictions establish and/or authorize funding for targeted runaway and homeless youth programs.¹³⁴ They also compiled where statutes regarding homeless shelters and services generally, recognizing that in some cases homeless youth (particularly those at or over the age of majority) may be served through a jurisdiction's general (typically, adult) homeless assistance system rather than its child-and youth systems.¹³⁵

They found that eleven jurisdictions explicitly assign responsibility for providing services and/or shelter to runaway and/or homeless youth to a designated executive branch agency, including Alabama, Florida, Idaho, Illinois, Minnesota, Mississippi, New Jersey, New Mexico, North Dakota, South Carolina and Vermont.¹³⁶ In ten of those jurisdictions, responsibility rests with a human services agency, and in one state (Alabama), such responsibility rests with a juvenile justice agency.¹³⁷ Twenty jurisdictions establish in statute a licensure requirement explicitly for runaway and homeless youth shelters or programs,

128. ALONE WITHOUT A HOME, *supra* note 48, at 95.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. ALONE WITHOUT A HOME, *supra* note 48, at 95.

135. *Id.*

136. *Id.*

137. *Id.*

including Alaska, California, Colorado, Florida, Illinois, Iowa, Louisiana, Maine, Massachusetts, Mississippi, New Hampshire, New Jersey, New York, Tennessee, Texas, Vermont, Virginia, Washington, Wisconsin and the District of Columbia.¹³⁸ In eighteen of those jurisdictions, responsibility for issuing the license rests with a human service agency, while Iowa puts such authority with a department of inspections and appeals and in the District of Columbia that authority rests with the mayor.¹³⁹

At least twenty-five jurisdictions regulate runaway and homeless youth shelters and programs via a broader child-caring license, and tend not to prescribe any standards for licensure.¹⁴⁰ Statutes of ten jurisdictions explicitly authorize the expenditure of funds or authorize local units of government to expend funds for programs and services targeted to runaway and homeless youth.¹⁴¹ These include Alaska, California, Illinois, Maryland, Minnesota, Missouri, Nebraska, New Jersey, North Dakota and Wisconsin.¹⁴² The authors note that the presence of authorization language does not necessarily mean that appropriations actually occur or that providing services for runaway and homeless youth programs actually exist.¹⁴³ The study highlights the Florida statute (FLA. STAT. § 409.441) because runaways are the responsibility of the Department of Children and Family Services (DCFS) which coordinates efforts to assist services for them, including community outreach, family services, shelter care, crisis intervention and counseling.¹⁴⁴ It must also establish standards for services offered for runaways, including guidelines focused on an intake system, counseling and case management.¹⁴⁵ Minnesota's "assignment" statute (MINN. STAT. § 256E.115) obligates the Commissioner of Human Services to arrange for housing supports for homeless youth and mentions funding considerations.¹⁴⁶ Louisiana's statute (LA. REV. STAT. ANN. §§ R.S.46:1352-1356) regulating runaway and homeless youth gives facilities sufficient time to notify the guardian of the youth's location, and the latitude to not contact the guardian if there is a compelling reason not to do so.¹⁴⁷ Youth have the right to leave the facility at any time.¹⁴⁸

138. *Id.*

139. *Id.*

140. ALONE WITHOUT A HOME, *supra* note 48, at 95.

141. *Id.* at 96.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. ALONE WITHOUT A HOME, *supra* note 48, at 96.

147. *Id.*

They may remain at the facility up to seventy-two hours without a guardian's consent and up to fifteen days with a guardian's consent.¹⁴⁹ Facilities are required to provide care to the young person until the state human services agency or a court makes a placement decision.¹⁵⁰ Facilities are required to serve all runaway and homeless youth.¹⁵¹ Facility staff members are granted immunity from liability except in acts of gross negligence and intentional misconduct.¹⁵² A California statute authorizes funding for runaway and homeless youth programs and services, including a Runaway Youth and Families in Crisis Project and the Youth Center and Youth Shelter Bond Act.¹⁵³

In sum, homeless children and youth may or may not be able to access the comprehensive services they need, depending upon where they live. There is considerable variability in how they can access services, and considerable variability with how states mandate their care. Prevention programs are cost effective in the long run, but ironically they seem to be among the first type of programs that are cut.¹⁵⁴

A. Contracting for Services

If youth are homeless and have no one to advocate for them, what is their legal ability to self-advocate in a contractual way for housing, transportation, the purchase of goods, or securing services? The National Law Center for Homelessness and Poverty¹⁵⁵ found that only seventeen jurisdictions have passed laws that permit unaccompanied young people to enter into binding contracts for necessities. In the remaining thirty-nine jurisdictions, minors who are on their own may be unable to rent apartments, buy cars to transport themselves to school or work or enter into other contracts essential for independent living.¹⁵⁶ Although they may be otherwise capable of caring for themselves, this inability to engage financially with society may prevent them from surviving on their own. Four of the seventeen jurisdictions that permit minors to enter certain binding contracts specifically permit contracts for real property.¹⁵⁷ It is unclear if the remaining thirteen jurisdictions would

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. ALONE WITHOUT A HOME, *supra* note 48, at 96.

153. *Id.*

154. *See generally* Arnold & Rotheram-Borus, *supra* note 121.

155. ALONE WITHOUT A HOME, *supra* note 48, at 73.

156. *Id.*

157. *Id.*

consider real property to be a “necessity” covered by their statutes. Many youth who are on their own need to rent apartments or purchase property because they either have no other housing alternative or they desire to live independently. All jurisdictions should provide unaccompanied minor youth with the right to enter into binding contracts for real property. Only three jurisdictions allow minors to enter into binding student loan contracts.¹⁵⁸ For many young people, higher education is impossible without the assistance of student loans. Minors who are academically prepared to enter college or trade schools may be forced to wait until they become legal adults before they can obtain the funding for school. This delay can affect students’ income, school and work opportunities, as well as their motivation. Educational loans should be available to young people who need them.

Laws in some states are more amenable to minor contracts than others. Missouri law specifies a wide variety of important contracts that minors can enter, including housing, employment, automobiles, student loans, admission to schools, medical care, bank accounts and admission to domestic violence and homeless shelters.¹⁵⁹ These categories recognize the goods and services unaccompanied youth may need, and gives them a means to obtain them. Missouri law authorizes minors who are sixteen or seventeen years old to sign binding contracts; homeless or survivors of domestic violence; self-supporting; and living independently of parents with the parents’ consent.¹⁶⁰ By limiting the circumstances under which minors can enter binding contracts, this statute continues to protect other young people from burdensome contract liability while permitting young people who are truly on their own to engage financially with society as adults.¹⁶¹ Because many unaccompanied youth have been forced by neglect, abuse or family dysfunction to leave home without parental consent, it is unfortunate when statutes require parental consent.¹⁶² Oregon’s law also establishes certain eligibility criteria for entering binding contracts, specifically permits contracts for residential living units and expressly does not require parental consent.¹⁶³ Oregon’s statute includes the right to contract for dwelling units and utilities without parental consent but does not permit minors to enter binding

158. *Id.*

159. *Id.* at 74.

160. *Id.*; MO. REV. STAT. § 431.056 (2001).

161. ALONE WITHOUT A HOME, *supra* note 48, at 74.

162. *Id.*

163. *Id.*

contracts for other necessities like employment, cars, educational loans and medical care.¹⁶⁴

B. Financial Assistance

It is unrealistic to assume that homeless children and youth have access to trust funds, bank accounts or jobs that give them the financial resources to pay for their own place to live. Children depend upon their parents to provide for them. When they are unable or unwilling to do so, children have limited options to provide for themselves. They need assistance from outside sources in order to survive.

If a child can qualify, certain forms of governmental assistance may be provided such as health care insurance or food stamps, and these are still considered financial aid even though there is no money directly put into the hands of the child/youth. Similarly, if they can qualify for housing, this is considered financial aid. The two forms of assistance that put money into the hands of the individual to use with some discretion are welfare and Supplemental Security Income (SSI) or Social Security Disability Insurance (SSDI). Social Security Disability Insurance is based upon income paid into the social security system. As this pertains to children, they may qualify because they are minors even though they have never paid into the system. They may also be entitled to Medicare. Supplemental Security Income is not related to work history. It is designed for people who have not worked enough to qualify for SSDI, and is considered a form of welfare.¹⁶⁵ Medicaid, not Medicare, is provided as insurance, and the monthly payments or SSI are less than they are for someone receiving SSDI. In both cases, disability is an important consideration in the allocation of assistance. The word on the street is that people applying for SSI and SSDI will likely be rejected upon their first application; this discourages many people from reapplying. Some individuals hire attorneys to help them obtain assistance, but this is highly unlikely for homeless people who have limited resources and do not know their rights.

Some children/youth may qualify for SSDI if their parents had a substantial work history. If their parents did not, they would be more likely to qualify for SSI. Supplemental Security Income can be of significant benefit to unaccompanied homeless youth and for homeless families who have to spend more of their money to support a disabled

164. *Id.*; OR. REV. STAT. § 109.697 (2001).

165. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, SSI: RIGHTS OF CHILDREN AND YOUTH (2011), <http://www.nlchp.org/content/pubs/SSI%20Rights%20Children%20and%20Youth2.pdf>.

child. In order to be considered disabled, the Social Security Administration demands proof that a physical or mental condition is present that results in functional limitations.¹⁶⁶ Assistance is only provided to U.S. citizens or eligible immigrants.¹⁶⁷ Unaccompanied youth may file for benefits without providing any information or permission from their parents if they can prove that they do not live with their parents.¹⁶⁸ Just like anyone receiving children's SSI, unaccompanied youth will have their cases re-evaluated when they turn eighteen, when their case will be evaluated under the adult disability standards.¹⁶⁹ Schools and medical practitioners can be of significant assistance to homeless children to obtain SSI by documenting their disability. School psychological evaluations, Individual Education Plans (IEPs), and standardized test results can be used to prove medical disability due to a cognitive impairment. School records and contact reports can be used to document need.¹⁷⁰

Legally, while there are some source of money that have been authorized by state or federal units, it may be difficult for homeless children and youth to access them because they may lack the documentation and representation to do so. They may not even be aware of what resources are available for them to actually access.

C. Health Care

Homeless children and youth systematically lack access to both physical and mental health care.¹⁷¹ A safe, decent, affordable home has

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See GARY W. EVANS & THEODORE D. WACHS, CHAOS AND ITS INFLUENCE ON CHILDREN'S DEVELOPMENT: AN ECOLOGICAL PERSPECTIVE 113-131 (2010). See generally ELLEN L. BASSUK ET AL, FAMILY PERMANENT SUPPORTIVE HOUSING: PRELIMINARY RESEARCH ON FAMILY CHARACTERISTICS, PROGRAM MODELS, AND OUTCOMES (2006) available at <http://www.csh.org>; Garth Alperstein et al., *Health Problems of Homeless Children in New York City*, 78 AM. J. PUB. HEALTH 1232 (1988); Ellen L. Bassuk & Lynn Rosenberg, *Psychosocial Characteristics of Homeless Children and Children with Homes*, 85 PEDIATRICS 257 (1990); Kerry E. Bolger et al., *Psychosocial Adjustment Among Children Experiencing Persistent and Intermittent Family Economic Hardship*, 66 CHILD DEV. 1107 (1995); John C. Buckner et al., *Characteristics of Resilient Children Living in Poverty: The Role of Self-Regulatory Processes*, 15 DEV. & PSYCHOPATHOLOGY 139 (2003); John C. Buckner et al., *Homelessness and Its Relation to the Mental Health and Behavior of Low-Income School Age Children*, 35 DEV. PSYCHOL. 246 (1999); Greg J. Duncan et al., *Economic Deprivation and Early Childhood Development*, 65 CHILD DEV. 296 (1994); Gary W. Evans, *Child Development and the Physical Environment*, 57

been compared to a vaccine because it literally keeps children healthy. Homes help a child to be clean, to have a place to sleep, to have a place to keep and cook food and a place to be safe. Homelessness naturally breeds a variety of preventable physical, behavioral, and mental health problems.

A national study conducted by the Robert Wood Johnson Foundation¹⁷² found four in five physicians indicating that patients' social needs are as important as medicine to address as their health conditions, and among physicians serving patients in low-income communities, nine in ten physicians believe this is true. They allege that one's zip code is more powerful than one's genetic code when it comes to health, since where we live, learn, work and play have a greater impact on quality of health and life expectancy than medical conditions and the health care received.¹⁷³ In a national survey of primary care providers and pediatricians, eighty-five percent believe that unmet social needs like access to nutritious food, reliable transportation, and adequate housing lead directly to worse health for all Americans.¹⁷⁴ But four in five physicians do not feel confident in their capacity to meet their patients' social needs because they do not have the time or sufficient staff support to address all of their patient's needs, and believe this impedes their ability to provide quality care.¹⁷⁵ Physicians surveyed feel so strongly about the connection between social needs and good health that three in four verbalize supporting health care coverage to pay for the costs associated with connecting patients to services that address their social needs if a physician deems it important for their overall health.¹⁷⁶ Results also revealed that if physicians had the power to write prescriptions for social needs, they would prescribe things ranging from housing, employee assistance, education, fitness programs, nutritional food, transportation assistance and mental health services.¹⁷⁷

Access to health insurance is an important step in securing health care for homeless children. Medicaid is the primary source of health

ANN. REV. PSYCHOL. 423 (2006); Abigail Gewirtz et al., *Psychosocial Status of Homeless Children and Youth in Family Supportive Housing* 51 AM. BEHAV. SCI. 810 (2008); Michael R. Kennedy, *Homeless and Runaway Youth Mental Health Issues: No Access to the System*, 12 J. ADOLESCENT HEALTH 576 (1991).

172. ROBERT WOOD JOHNSON FOUND., HEALTH CARE'S BLIND SIDE: THE OVERLOOKED CONNECTION BETWEEN SOCIAL NEEDS AND GOOD HEALTH 4 (2011).

173. *Id.* at 8.

174. *Id.* at 3.

175. *Id.* at 5.

176. *Id.* at 1.

177. *Id.* at 6.

insurance for homeless children.¹⁷⁸ Medicaid is health insurance for children and adults who meet the financial and general eligibility requirements. Eligibility depends on income and asset limitations, family size, living situation and government disability standards. The Children's Health Insurance Program (CHIP) program provides health insurance coverage to over eight million children in families with incomes too high to qualify for Medicaid, but cannot afford private coverage. Signed into law in 1997, CHIP provides federal matching funds to states to provide this coverage.¹⁷⁹ Both Medicaid and CHIP are financed by the federal and state governments, and are administered at the state level. For children in some states, Medicaid and CHIP are combined into one program. Many homeless children without health insurance are likely eligible for Medicaid or CHIP. Fourteen states have presumptive eligibility for Medicaid and eleven states have presumptive eligibility for CHIP for poor children.¹⁸⁰ Presumptive eligibility allows qualified health care providers to immediately enroll children who appear to meet the state's income eligibility requirements into Medicaid or CHIP. Thus, immediate care can be given to children without documentation of eligibility, although documentation must be provided by the end of the following month. In some states homeless shelters are considered qualified entities for presumptive enrollment of children into Medicaid and CHIP. Because Medicaid and CHIP do not collect information about children's housing status when they receive services, the amount of Medicaid or CHIP funding that is spent on children who are homeless is unknown. The recently enacted Patient Protection and Affordable Care Act¹⁸¹ may help people keep health insurance when they lose their jobs, switch jobs, move, or get sick. Another widely used source of health care for homeless children is the Health Care for the Homeless Program administered by the Health Resources and Services Administration within the U.S. Department of Health and Human Services. This program was first established with the McKinney Homeless Assistance Act of 1987 and reauthorized in 2002 in the Health Care Safety Net

178. See AMERICA'S YOUNGEST OUTCASTS, *supra* note 8, at 83.

179. *Children's Health Insurance Program*, MEDICAID.GOV, <http://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/By-Topic.html> (select "Children's Health Insurance Program" hyperlink) (last visited Sept. 21, 2012).

180. See *Presumptive Eligibility for Medicaid/CHIP*, STATEHEALTHFACTS.ORG, <http://www.statehealthfacts.kff.org/comparetable.jsp?ind=229&cat=4&rghl=22> (last visited Sept. 16, 2012).

181. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat.119 (2010).

Amendments Act,¹⁸² and then again in 2008 in the Health Care Next Act.¹⁸³ In Fiscal Year 2010, the Health Care for the Homeless Program received \$185.5 million.¹⁸⁴ About seventeen percent of those served by this program are children.¹⁸⁵ HUD's Moving to Opportunity demonstration project has been shown to reduce rates of obesity, diabetes, depression and other physical and psychological problems when homeless people are allowed to move to safer more affluent neighborhoods.¹⁸⁶ This suggests long-term investments in improving neighborhoods may help improve the health outcomes of poor families. Another study, conducted in Southwest Baltimore found that racial differences in hypertension, diabetes and obesity among women either vanished or substantially narrowed when researchers took into account where people lived.¹⁸⁷ Neighborhoods matter. For years, the health and affordable housing sectors have worked on parallel but separate tracks to improve the lives of low-income people.¹⁸⁸ The affordable housing sector focused on improving neighborhoods suffering from poverty, overcrowded housing and high unemployment.¹⁸⁹ The health sector focused on combating poor health, including high rates of obesity, asthma and chronic disease.¹⁹⁰ Greater collaboration between the housing and health care communities should result in improving the health and quality of life for millions of Americans. The evidence makes clear that housing policy is health policy.¹⁹¹

Laws determine both funding and access to services. In a study of thirty industrialized countries that analyzed the relationship between social factors like rent subsidies, employment-training programs, unemployment benefits, financial assistance, family support and other services and health, it was found that health improves when social

182. Health Care Safety Net Amendments Act, Pub. L. No. 107-251, 116 Stat.1621 (2002).

183. See generally ABIGAIL ENGLISH ET AL., ADOLESCENTS IN PUBLIC HEALTH INSURANCE PROGRAMS: MEDICAID AND CHIP (1999); ABIGAIL ENGLISH ET AL., STATE MINOR CONSENT LAWS: A SUMMARY (2003); Abigail English et al., *Access to Health Care for Youth Leaving Foster Care: Medicaid and SCHIP*, 325 J. ADOLESCENT HEALTH 53 (2008).

184. SAMUELS, SHINN & BUCKNER, *supra* note 6, at 26.

185. *Id.*

186. See Raphael Bostic & Risa Lavizzo-Mourey, *Housing and Health Care Go Hand in Hand*, ROLL CALL, Dec. 15, 2011, available at http://www.rollcall.com/issues/57_75/raphael_bostic_risa_lavizzo_mourey_housing_health_care_go_hand-211053-1.html.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

service support is given; the less social service support, the lower the health of a society.¹⁹² In 2005, the United States devoted only twenty-nine percent of gross domestic product to health and social services combined, while countries like Sweden, France, the Netherlands, Belgium and Denmark dedicated up to thirty-eight percent.¹⁹³ America is one of only three industrialized countries to spend the majority of its health and social services budget on health care itself; for every dollar we spend on health care, we spend ninety cents on social services while in other developed countries, for every dollar spent on health care, an additional two dollars is spent on social services.¹⁹⁴ So not only is the U.S. spending less, but it is allocating resources disproportionately on health care.¹⁹⁵ Countries with high health care spending relative to social spending had lower life expectancy and higher infant mortality than countries that favored social spending.¹⁹⁶ While life expectancy in the United States remains at seventy-eight years, in many European countries it has leapt to well over eighty years and several countries boast infant mortality rates approximately half of ours.¹⁹⁷ Authors advocate a broader conceptualization about how to achieve a healthier society and recommend investing more heavily in social services since current social programs leave holes for the undocumented, uneducated and unemployed to slip through cracks and become acutely ill. While homelessness is not typically thought of as a medical problem, it often precludes good nutrition, personal hygiene and basic first aid, and it increases the risks of frostbite, leg ulcers, upper respiratory infections and trauma from muggings, beatings and sexual abuse.¹⁹⁸

In 2003, the National Law Center on Homelessness and Poverty found that homeless, unaccompanied youth (both those who are legally minors and those who are legally adults because of emancipation) regularly encounter serious obstacles in seeking health care.¹⁹⁹ They suffer disproportionately high rates of health problems such as mental illness, substance abuse, pregnancy and sexually transmitted infections.²⁰⁰ Since health insurance coverage is a key element in assuring access to health care, adolescents traditionally have been

192. Elizabeth H. Bradley & Lauren Taylor, Op-Ed, *To Fix Health, Help the Poor*, N.Y. TIMES, Dec. 8, 2011, at A.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. Bradley & Taylor, *supra* note 192.

199. ALONE WITHOUT A HOME, *supra* note 48, at 83.

200. *Id.*

uninsured at higher rates than other age groups and young adults have lacked insurance at the highest rates of any age group.²⁰¹ About half of young adults ages eighteen to twenty-four or younger who are living under the poverty level are uninsured.²⁰² Young people who are living apart from family are likely to encounter serious obstacles when seeking health care whether they are living on the street, staying in temporary quarters, living in a shelter, or residing under the supervision of a public agency.²⁰³ The major barrier that they encounter is financial: usually they have no means of paying for care.²⁰⁴ Although some youth may qualify for a publicly funded insurance program or be able to obtain health care at a publicly funded site, many seek care in an emergency room only after their health problems have become severe.²⁰⁵ Additionally, they encounter difficulties associated providing legally authorized consent for their own health care and assuring the confidentiality of that care.²⁰⁶

While Medicaid and State Children's Health Insurance Program (SCHIP) eligibility expansions have made it possible for more poor and low-income adolescents to qualify for health insurance, homeless youth are difficult to locate and often applications must be signed by a parent/guardian and information about family income and other financial data must be included in the application.²⁰⁷ This alone makes it difficult for unaccompanied youth to apply for and receive coverage through Medicaid and SCHIP.²⁰⁸ The specific rules for Medicaid and SCHIP eligibility, as well as application procedures, are determined by the states within federal guidelines.²⁰⁹ Most states have expanded Medicaid and SCHIP eligibility for older adolescents in recent years, but few have specifically addressed the needs of homeless or unaccompanied youth.²¹⁰ A few states have explored innovative approaches such as allowing homeless youth to apply for Medicaid or SCHIP independently of their families or implementing a new Medicaid eligibility option for youths in foster care on their eighteenth birthday, but most states have not.²¹¹ In addition to the publicly funded health insurance programs, the Performance Partnership Grant for Community Mental Health Services,

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

205. ALONE WITHOUT A HOME, *supra* note 48, at 83.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. ALONE WITHOUT A HOME, *supra* note 48, at 83.

the Performance Partnership Grant for Prevention and Treatment of Substance Abuse, the Maternal and Child Health Services Block Grant, the Ryan White CARE Act, the Title X Family Planning Services Program and the Consolidated Health Centers Program exist.²¹² But most homeless youth do not know where to go and what is available to them.²¹³ Moreover, these safety net programs have come under increasing financial pressure in recent years and often have insufficient funds to care for all of the uninsured individuals who need their services.²¹⁴

When unaccompanied youth do find their way to a health care provider or site and can overcome the financial barriers, additional legal obstacles associated with consent and confidentiality may impede his or her access to comprehensive services.²¹⁵ Depending on their age, unaccompanied youths may or may not be legally authorized to give consent for their own care. In addition, limitations on the confidentiality of that care may exist. Unaccompanied youth who are age eighteen or older are generally able to give consent for their own care on the same basis as other adult but those who are under age eighteen are minors and may or may not be able to give their own consent for care, depending on the specifics of state and federal law and the services they are seeking. Generally the consent of a parent is required for health care that is provided to a minor child. However, most states have a legal mechanism that allows minors to give their own consent for care in specific circumstances. These laws are based either on the status of the minor or the services sought. Every state has laws that allow one or more of the following groups of minors to consent for their own health care: emancipated minors, minors living apart from their parents, married minors, minors in the armed services, pregnant minors, minor parents, high school graduates, or minors over a certain age. In addition, every state has laws that allow minors of varying ages to give their own consent for one or more of the following types of health care: general medical care, emergency care, family planning or contraceptive services, pregnancy related care, sexually transmitted infection care, HIV/AIDS care, care for reportable infectious diseases, care for sexual assault, drug or alcohol care, and outpatient mental health services. With respect to confidentiality of health care, unaccompanied youth who are age eighteen or older are generally entitled to the same confidentiality

212. *Id.*

213. *Id.*

214. *Id.*

215. For information stated here and for the remainder of this paragraph, see *id.* at 83-84.

protections as other adults but confidentiality for those under age eighteen may be different. The Health Insurance Portability and Accountability Act (HIPAA) contain important provisions that affect medical privacy for both adults and minors. The Act's rules and other federal and state laws determine the confidentiality of health care that is provided to an adolescent who is a minor based in part on whether the minor can give consent for his or her own care. Thus, there is an important link between the minor consent laws and confidentiality protections. Even when a law authorizes a minor to give consent for care, it may also grant discretion to a physician to notify the minor's parents. The specifics in this regard vary significantly from state to state. Many of the health services needed by unaccompanied youth fall within the scope of states' minor consent laws. Also, many unaccompanied youth fall within the groups of minors who are authorized to give consent for their own care. Often, however, young people themselves and their health care providers, as well as the sites where they seek care are not aware of the different ways in which laws may allow these youth to give their own consent for care and receive it on a confidential basis.

In sum, there are programs to provide both physical and mental health care for homeless children and youth. However, many do not know how to access the programs, may not qualify for them, or may find obstacles that limit the scope of services. It is clear that homeless children have a variety of physical and emotional health care needs and that they are not being adequately addressed.

D. Dental Coverage

Oral health problems are widespread among homeless children and youth. Tooth decay is common among homeless children, who find it challenging to receive dental care. Lack of dental insurance, access to affordable dental care and oral hygiene knowledge complicate this type of health care for homeless children. Medicaid covers only a fraction of dental costs, if they cover anything at all since economic cutbacks have resulted in less than half of all states provide comprehensive dental care coverage assistance. If a child needs dental care, they must have a direct dental referral. The Early Periodic Screening, Diagnostic and Treatment (EPSDT) mandates that any service be determined to be a medical necessity; the SCHIP provides some funding for dental care of uninsured children whose family income is above Medicaid level, but not sufficient for other forms of health insurance. Not all dentists accept or participate

in SCHIP.²¹⁶ Therefore, while there are some dental services available, they are challenging for homeless children to access, especially for non-emergency, preventive care such as cleanings, sealants, or fillings.

E. Food and Transportation

Data from the National Coalition for the Homeless survey indicates that food and transportation may pose problems for homeless children and youth, but they are toward the bottom of the list of legal concerns. Children and youth may access food from a variety of means; how nutritious it is may be questioned. Homeless children tend to suffer from not having enough to eat, and not being able to eat the most nutritious foods because they cost more. Processed and fast foods tend to be more readily available to poor families, especially those with limited resources to keep food safe or cook it. It is no surprise to find that many homeless children and youth are overweight but malnourished as a result.²¹⁷ From 2007 to 2010, over 750,000 more children were estimated to live in food-insecure households.²¹⁸ Food stamps may be available to families and emancipated youth who qualify. The Child and Adult Care Food Program (CACFP) provides subsidies to shelters and day care centers for meals provided to qualifying adults and children. The issue is that many do not qualify for the aid, and children/youth cannot qualify on their own. The funds are designed to feed people who live in homeless and domestic violence shelters in congregate meal settings for breakfast, lunch and dinner or two meals and one snack per child per day. The National School Lunch Program is a federal entitlement program that provides money to schools so that they can offer nutritious meals to students. Students can qualify for free school lunch if their household income is below 130 percent of the federal poverty guidelines, if the household receives food stamps or TANF or if the student is homeless. Homeless students must be documented by the school homeless liaison

216. NAYDA RONDON, MEDICAID DENTAL COVERAGE AND OTHER ASSISTANCE FOR DISADVANTAGED PEOPLE (2009) *available at* <http://www.yourdentistryguide.com/medicaid-dental-coverage/>.

217. *See generally* MARK NORD, FOOD INSECURITY IN HOUSEHOLDS WITH CHILDREN: PREVALENCE, SEVERITY, AND HOUSEHOLD CHARACTERISTICS (2009), <http://www.ers.usda.gov/Publications/EIB56/EIB56.pdf>; U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 23-CITY SURVEY (2007), *available at* <http://usmayors.org/uscm/home.asp>; U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 23-CITY SURVEY (2006), *available at* <http://www.usmayors.org/hungersurvey/2006/report06.pdf>; Marian Sigman, *Nutrition and Child Development: More Food for Thought*, 4 CURRENT DIRECTIONS IN PSYCHOL. SCI. 52 (1995).

218. Landau, *supra* note 123.

who can work with the cafeteria so the student can obtain the meals free of charge.²¹⁹ Therefore, even though food may be available to fill hungry bellies, the food may not always be high quality or easy to access.

Transportation to and from school is mandated by the McKinney-Vento Act for homeless students. However, if students miss the bus for any reason, that becomes their problem – even when they could not help it, which is common in the chaotic lives of homeless youth. Homeless children and youth may be on their own to get from one place to another and there may be legal restrictions on at what age they can travel alone on buses, subways or taxis. Sometimes travel vouchers may be available, but there is no legal requirement to provide them for routine travel to doctor appointments and the like.

VII. CONCLUSION

Homeless children and youth confront a variety of legal obstacles ranging from getting housing to getting assistance from doctors and social service providers. Many of their legal obstacles stem from discrimination against children in general and discrimination because they are homeless. Combine these two sources of discrimination together and homeless children and youth disproportionately are hit with a double-whammy of legal challenges that are almost impossible for them to overcome on their own. The overall recommendation would be to create or alter laws addressing children and youth rights, and to be more receptive to the legal rights of the homeless populations.

Some of the more detailed legal changes that could help homeless children and youth include:

A. More Inclusive, Broader, Nationally Consistent Definitions for Homeless, Unaccompanied, and Runaway Youth

Current definitions vary, stigmatize, penalize and fail to take into consideration the broad range of situations they confront. Possible models include Ohio's definition of "runaway" to be "any child who is separated from the child's guardian and appears to be in need of emergency housing and other services."²²⁰ It does not comment on the cause of the child's separation from the guardian or whether the separation need be voluntary or coerced on the part of the young person.

219. NATIONAL L. CTR. ON HOMELESSNESS & POVERTY, EDUCATION OF HOMELESS CHILDREN & YOUTH: A GUIDE TO THEIR RIGHTS 18 (2011), <http://www.nlchp.org/content/pubs/Basic%20McKinney-Vento%20Booklet%20%282011%29.pdf>.

220. OHIO REV. CODE ANN. § 5119.64 (LEXISNEXIS 2012).

New Jersey's definition of "homeless youth" includes persons twenty-one years of age or younger within its scope and because it acknowledges that even these older young people are in need of "appropriate care and supervision."²²¹ The NCLHP recommends that a nationally consistent definition of "youth" be created that is distinct from the definition of who is a child"; that eligibility for publicly funded opportunities and supports that are available to children and youth be extended to include older youth (up to age twenty-one) because of their developmental needs; that the terms "runaway child" and "runaway youth" in both criminal and civil statutes be defined to de-stigmatize them and reflect the realities that many children flee for safety reasons; that the terms "homeless child" and "homeless youth" in both criminal and civil statutes be more explicitly defined (perhaps to be in accordance with the McKinney-Vento definition); that separate definitions of "missing child" and "runaway child" be defined; and that judgmental and negative terminology (e.g., unruly, incorrigible, vagrant) for youth in high-risk situations be replaced with neutral terminology.

B. Creation of a National Children's Ombudsman Office

If a national organization existed that was well publicized to provide advocacy for children and youth, it could network homeless children and youth to the resources they need. This type of organization exists in Norway, where children have been taught to contact when they need help.²²² This type of organization would benefit not just homeless children but all youth in general. The duties of the Norwegian Child Ombudsman are to promote the interests of children vis-à-vis public and private authorities and to follow up the development of conditions under which children grow up. Children are taught at an early age that a governmental resource exists that they can contact independently that will assist them. This office could assist homeless (and all) children and youth to (a) learn what resources exist that may help them, (b) how to access those resources, and (c) what to do if they need additional advocacy. This office would provide an invaluable service to homeless

221. N.J. STAT. ANN. § 9:12A-4 (2001).

222. An overview of the Norwegian ombudsmen for children and youth program can be found at *About the Ministry*, MINISTRY OF CHILDREN, EQUALITY & SOC. INCLUSION, <http://www.regjeringen.no/en/dep/bld/BLD-arbeider-for-at.html?id=303> (select "Offices and Agencies Associated with the Ministry of Children and Equality" hyperlink on the left toolbar; then select "Ombudsman for Children in Norway" hyperlink) (last visited Sept. 16, 2012). See also *Ombudsman for Children – Norway*, CHILD RIGHTS INT'L NETWORK, <http://www.crin.org/organisations/vieworg.asp?id=1895> (last visited Sept. 16, 2012).

children and youth who tend to not know what resources exist and what their rights are.

C. Greater Access to Legal Representation

Poor children and youth are underserved because they have no one to advocate for them with any legal clout. Access to legal representation is a significant concern. They cannot afford lawyers, their parents cannot afford lawyers, and it is unlikely that they can get public defenders, who generally have over-burdened caseloads. Most do not know their legal rights or how to protect them. There needs to be a better, more accessible system of legal aid. The McKinney-Vento liaisons may be of some assistance, but interviews with them indicate that they are overworked, understaffed, and may not be as helpful in assisting homeless children as it may seem on paper.

D. Greater Ability to Secure Housing, Utility Assistance, and Food on Their Own Behalf

Many homeless youth may be able to make it on their own if they were provided assistance to do so. Without access to housing, heat, electricity, water, and food, they will inevitably end up in compromised, and often dangerous, living situations.

E. Greater Access to Physical, Mental, and Dental Health Care Insurance and Care

Homeless children and youth confront the customary health problems that accompany poverty, only they are heightened because of the lack of housing and resources. Their health and development are compromised when they cannot access needed care. They need both access to health care providers and a way of paying for needed health care services.

F. Greater Access to Social Services

Homeless children and youth confront extraordinarily challenging situations and need help from professionals trained in the social sciences to help prevent, treat, and ameliorate problems associated with their complex social situations. Issues of access and reimbursement to providers are of paramount consideration.

G. Adopt Explicit Exemptions for Reasonable Cause in Anti-Harboring Provisions

Explicit exemptions for reasonable cause in anti-harboring provisions should be adopted in those jurisdictions that make it a crime to harbor a runaway youth and make sure they meet constitutional standards. Amending or instituting anti-harboring, custodial interference, contributory delinquency and minor concealment prohibitions could ensure that a "Good Samaritans" providing temporary shelter to an unaccompanied youth at the young person's request won't be subject to criminal penalties for providing care. This pertains to both guardians and professionals. Sometimes licensed human services agencies and professionals acting within the scope of their duties provide care for homeless youth but do so at significant risk.

H. Emancipation Processes Should Become Easier and Provide Support

Youth should be able to initiate the procedures independently and should not have to obtain parental consent. In some cases, neglectful or abusive parents may withhold consent and guardianship and emancipation procedures should permit courts the maximum flexibility to according to the best interest of the youth. Emancipation laws should be established in all states that permit young people to initiate the process and repeal parental consent as a condition for emancipation.

I. Create Statutes that Explicitly Assign Responsibility for Providing Services/Shelter to Homeless or Runaway Youth to a Designated Executive Branch Agency With Local Affiliates

Only one-fifth of jurisdictions have enacted such a provision, indicating gross under-attention to unaccompanied youth. Many organizations across the nation fail to serve homeless youth, even by providing them with short-term assistance or shelter, because they do not have appropriate statutes and policies in place.

J. Create Alternative Arrangements to Foster Care for Older Youth

Given the statistics reflecting high rates of homelessness, low high school graduation rates and high unemployment post-foster care, it is questionable whether foster care is a reasonable long term solution for helping at risk children and youth. It is agreed that they need help; how best to provide care and assistance is a topic worthy of more examination.

K. Allow Youth to Engage in Contractual Arrangements, With Protection

The National Law Center on Homelessness and Poverty recommends that 1) all states enact laws permitting minors to contract for necessities, including real property, employment, educational loans, admission to school, medical/mental health care and treatment, bank accounts and admission to shelter, housing and supportive service programs and 2) states establish eligibility criteria for entering into binding contracts that will permit such contracts for unaccompanied youth but protect other young people from contract liability.

L. Strengthen the McKinney-Vento Act

The McKinney-Vento Act has been a huge help in providing a legal framework for schools to serve homeless children and youth but some still do not adhere to the McKinney-Vento guidelines, usually because they do not have the staff to do so, or they may not fully understand the range of McKinney-Vento programs. Keeping students in their home school remains a problem. Drop-out rates among homeless students are unnecessarily high. Transportation is essential and yet some students. Assignments and course scheduling may be problematic for students who have been transient, and adjustments to their courses, schedules, or credits are important for homeless students to help them succeed.

M. Reconsider Illegal Immigration Status for Children

Some parents who are illegal immigrants cannot provide an adequate lifestyle for their families yet cannot receive assistance. Even applying for assistance may result in deportation. While illegal immigration poses legal issues, children and youth are innocent victims in this legal debate. The illegal status of their parents results in preventable housing, education, health, and social problems for their children.

N. Eliminate the Stigma and Criminality of Homelessness

Homeless youth are more likely to be victims, not perpetrators, of crime. Homeless children and youth are at high risk of becoming victims, and often do not have recourse or know how to access assistance. Youth who are homeless live their lives in public, and rarely have access to adequate council. In courts and jails they are often treated in the system as adults. When engaged in crime, often in infractions are status offenses, substance use. Negative peer influences may occur, sometimes including gang involvement because they need a support network. Many homeless

children and youth experience abuses and are victims of crime but they do not report it. Problems include physical assault, sexual assault, substance abuse and economic exploitation.

O. Amend Existing Laws so it is Appropriate to Report Homeless, Runaway, and Unaccompanied Children and Youth to Social Services and Child Welfare Authorities

Laws should be amended to allow reporting to social services and child welfare authorities instead of law enforcement. Homeless children and youth need help; they are not criminals and would benefit significantly more from first contact with social service providers. Stigmatization of homelessness and fear of criminalization or punitive legal action prohibit homeless youth from seeking the care they need. A more humane, open door approach for homeless youth to seek services would be in their best interests.

In summary, local, state and federal laws dramatically impact the trajectory of life for homeless children and youth. A community will inevitably spend more trying to treat the outcomes of homelessness than trying to prevent it. All children, homeless or not, have constitutional rights that need to be protected and enforced in order for them to develop to their highest potential. Denying assistance to homeless children and youth because of their young age or their financial condition is an ultimate form of discrimination that is not in their best interest, or in the best interest in the nation. More benevolent implementation of broadened laws may cost more but research indicates that in a cost-benefit analysis, the constitutional and social rewards may well be worth it. This is especially true if adequate housing for children, like food, health care or education, is considered a basic human right.

HOMELESSNESS IN AMERICA: A HUMAN RIGHTS CRISIS

MARIA FOSCARINIS¹

I. INTRODUCTION	515
II. THE HOMELESSNESS CRISIS	516
III. THE HUMAN RIGHT TO HOUSING	519
IV. INTERNATIONAL VENUES AND PROCESSES	521
V. LOCAL HUMAN RIGHTS ADVOCACY	523
A. <i>Chicago</i>	523
B. <i>Minnesota</i>	523
C. <i>Salt Lake City</i>	524
D. <i>Sacramento</i>	525
VI. INTERNATIONAL MODELS.....	526
A. <i>Scotland</i>	526
B. <i>Republic of South Africa</i>	526
VII. CONCLUSION	527

I. INTRODUCTION

Before the foreclosure crisis and recession began in 2007, an estimated 2.5 to 3.5 million people were homeless each year. Since then, things have gotten much worse. In 2011 alone, on average, cities across the country reported that family homelessness increased by sixteen percent.² In many communities, tent cities are going up.

These developments mirror, in their scope and impact, the dramatic growth in homelessness that took place in the early 1980s. That earlier

1. Executive Director, National Law Center on Homelessness & Poverty. The author is grateful to her colleagues, Eric Tars, Human Rights Program Director, and Julie Butner, a former Program on Human Rights and the Global Economy (PHRGE) Fellow at Northeastern University School of Law, for their assistance. For an earlier version of this article, see Maria Foscarinis, *The Human Right to Housing: Housing and Homelessness Are Human Rights Issues—And That Can Be an Organizing Strength*, SHELTERFORCE, Dec. 14, 2011, http://www.shelterforce.org/article/2485/the_human_right_to_housing/.

2. U.S. DEP'T OF HOUSING & URBAN DEV., THE 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS: SUPPLEMENT TO THE ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 1, 2 (2011) [hereinafter 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS], http://www.hudhre.info/documents/PITHIC_SupplementalAHARReport.pdf (reporting the “point-in-time” estimate counts people as homeless who are sleeping in shelter or transitional housing, defined as housing with services where homeless people can stay for up to twenty-four months, or safe havens, defined as long-term, small scale housing for homeless people with severe mental illness, or in parks, on sidewalks, in abandoned buildings, or other places not meant for human habitation).

growth resulted in the emergence of homelessness as a serious national crisis affecting a broad range of the population and the country. Later in that decade, national advocacy led to enactment of the first major federal legislation addressing homelessness, the Stewart B. McKinney Homeless Assistance Act.³ That legislation, the McKinney-Vento Act, marked the transformation of homelessness from a local issue, often viewed as one best addressed by charity, to an issue of national policy.

In this article, I will argue that the time is ripe for another paradigm shift. Beginning with a brief overview of homelessness in America, noting that – measured against international norms – homelessness in the United States is a human rights crisis. I will then discuss the human right to housing and the development of human rights strategies to support advocacy for solutions to homelessness. The article highlights several examples of how such strategies are augmenting and supporting advocacy, drawing from the work of my own organization. I conclude that full recognition of that right may be a long-term project, but movement towards it could constitute the shift necessary to end and prevent homelessness.

II. THE HOMELESSNESS CRISIS

According to the most recent estimates from the U.S. Department of Housing and Urban Development (hereinafter HUD), 636,017 people were homeless on a single night in January 2011.⁴ Of these totals, sixty-three percent were homeless individuals, while thirty-seven percent were homeless persons in families.⁵ Because of the transient nature of homelessness, estimated numbers over the course of a year are several times larger; for example, according to HUD, in 2010, 1.59 million people spent at least one day in emergency shelter or transitional housing. This figure does not account for those who were unsheltered during that time.⁶

HUD's numbers are conservative estimates for several reasons. First, counts of unsheltered people, included in the "point-in-time" figures, are notoriously difficult to execute accurately.⁷ Further, HUD's numbers rely

3. 42 U.S.C. §§ 11431-35 (2012).

4. 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS, *supra* note 2, at 1-2.

5. *Id.*, at 3.

6. See MARTHA BURT ET AL., HELPING AMERICA'S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING? (2001), http://www.urban.org/UploadedPDF/end_homelessness.pdf (estimating much higher annual numbers of homelessness, and including a national study, published in 1999, which put that figure at 2.5 to 3.5 million).

7. 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS, *supra* note 2, at 2-3 (the numbers reported by HUD are based on data collected by 432 "continuums-of-care,"

on a narrow definition of homelessness employed by that agency that excludes those who have no home of their own and may live with others, or double up, due to economic necessity, a number estimated to be over six million.⁸ While HUD does not consider them homeless, other agencies do, notably the U.S. Department of Education.⁹

In any event, even according to HUD's definition and numbers, the disparity between need and resources is disturbingly large. HUD estimates that, on that night in January 2011, sixty-two percent of all homeless people were sheltered and thirty-eight percent were unsheltered.¹⁰ It also reports the total number of shelter and transitional housing beds, on that night, at 427,389.¹¹ Thus, according to these figures, almost a third of those counted and defined as homeless on that night (208,628 people) had no available shelter or transitional housing options.¹²

It is easy to forget that it was not always like this. Widespread homelessness first emerged in the early 1980s in large part as a result of significant cuts in federal housing and other programs designed to help low-income people. Gentrification, which pushed low-income residents out of their homes and communities, also played a significant role.¹³ These changes affected a broad swath of people and places. No longer was it a limited problem affecting a narrow group of people, generally older, single, white males living in urban centers. Instead, families, working men and women, younger people, racial and ethnic minorities, and both suburban and rural areas were affected. Homelessness became a national crisis.

Nevertheless, it was not initially viewed as a national issue by the federal government. Indeed, President Reagan, then in office, and

groups typically consisting of local government and non-profit service providers; while HUD provides guidance, data collection methods and accuracy vary, especially for estimates of unsheltered persons. For example, the unexplained, and less than credible, drop in point-in-time count in 2009 of over 35,000 people).

8. M. WILLIAM SERMONS & PETER WITTE, NAT'L ALLIANCE TO END HOMELESSNESS & HOMELESSNESS RES. INST., STATE OF HOMELESSNESS IN AMERICA: A RESEARCH REPORT ON HOMELESSNESS 5 (2011), http://www.endhomelessness.org/files/3668_file_SOH_report_FINAL_LOW_RES_NOT_embargoed.pdf.

9. 42 U.S.C. § 11434a (2012).

10. 2011 POINT-IN-TIME ESTIMATES OF HOMELESSNESS, *supra* note 2, at 9.

11. *Id.*, at 11.

12. *Id.*, at 2 (this number underestimates the true gap between need and resources, even taking the numbers as a given. This is because shelters and transitional housing facilities often limit the types of clients they will accommodate; for example, some specialize in families, others in people with mental illness).

13. Letter from Maria Foscarinis, Executive Dir. Nat'l Law Ctr. on Homelessness & Poverty, to Barack Obama, U.S. President (Aug. 27, 2009), *available at* http://nationalhomeless.org/advocacy/obama_letter_9_09.html.

members of his administration stated on numerous occasions that it was a “lifestyle” choice and that primary responsibility for responding was on charities or, at most, local government.¹⁴ Members of both parties in Congress did not view homelessness as a national policy concern.¹⁵ Advocacy, too, initially focused on campaigns for local government response. Much of early advocacy was centered on local level demands for a right to shelter.¹⁶

In the mid-1980s, advocacy for a comprehensive federal response was initiated.¹⁷ Following a concerted, multipronged national campaign, advocates won a major victory: passage by Congress of the Stewart B. McKinney Homeless Assistance Act of 1987. Now known as the McKinney-Vento Homeless Assistance Act, the bill was passed by large bi-partisan majorities and reluctantly signed into law by President Reagan.¹⁸ While it represented only part one of advocates’ three-part agenda, it nonetheless was an extremely significant event; it marked the transformation of homelessness into a national policy issue.

Since then, advocates have successfully pushed for an increase in funding and a re-engineered focus away from emergency response and toward permanent solutions. Over the years, the McKinney-Vento Act has expanded, and additional legislation has been enacted. Recently, as part of the 2009 economic stimulus, \$1.5 billion was appropriated by Congress to fund a new Homelessness Prevention and Rapid Re-housing Program, designed to respond to the increases in homelessness resulting from the foreclosure crisis and recession and to prevent further increases.¹⁹ According to HUD, more than 690,000 people have been helped by the program to end homelessness or avoid it.²⁰

By any measure, the foreclosure crisis and economic downturn have led to dramatic increases in housing instability and homelessness.

14. National Law Center on Homelessness & Poverty, *Obama Says Homelessness is Unacceptable: Advocates Applaud Obama’s Statement, Propose Specific Steps* (April 14, 2009), <http://www.nlchp.org/news.cfm?id=90>.

15. *CSPAN Video Library: Homelessness in America* (CSPAN television broadcast Dec. 14, 1994), available at <http://www.c-spanvideo.org/program/62200-1#>.

16. Maria Foscarinis, *Homelessness, Litigation and Law Reform Strategies: A United States Perspective*, 10.2 *AUSTL. J. HUM. RTS.* 105 (2004), available at <http://www.austlii.edu.au/au/journals/AUJIHRights/2004/6>.

17. *Id.*

18. See, Robert Pear, *President Signs \$1 Billion Bill to Aid Homeless*, *N. Y. TIMES*, Jul. 24, 1987, at A1.

19. E.g., *American Recovery and Reinvestment Act of 2009*, Pub. Law. 111-5, 123 Stat. 115, 221-22 (2009).

20. U.S. DEP’T OF HOUSING & URBAN DEV., *THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS*, at iv (2011), <http://www.hudhre.info/documents/2010HomelessAssessmentReport.pdf>.

According to HUD, family homelessness increased by 20% from 2007 to 2010.²¹ In some communities, the increases were significantly higher.²² According to a recent report, 1.6 million children were homeless over the course of 2010, a thirty-eight percent increase since 2007.²³ In 2011, more than eighty-seven percent of cities surveyed reported an increase in first time visitors to food pantries,²⁴ as more and more Americans are now seeking assistance. Homelessness on this scale is clearly a humanitarian crisis. And, measured against international norms, it is a human rights crisis.

III. THE HUMAN RIGHT TO HOUSING

There is now broad consensus that access to permanent, affordable housing is essential to ending and preventing homelessness. Other measures are important; work that pays a living wage, for those able to work, income supports for those unable to work; access to affordable healthcare and child-care; education and job training. Housing remains fundamental; indeed some of these other measures (such as wages and income support) are means to pay for it, while others, such as medical care and education, are likely to be compromised by its absence.²⁵

The American legal system is commonly described as one that protects civil and political rights, but not economic or social rights.²⁶ For

21. *Id.*, at iii. *See also id.* at 11 (reporting 576,337 sheltered homeless persons in families in 2010) and U.S. DEP'T OF HOUSING & URBAN DEV., 2007 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 18 (2008) (473,500 sheltered homeless persons in families in 2007).

22. NAT'L L. CENTER FOR HOMELESSNESS & POVERTY, INDICATORS OF INCREASING HOMELESSNESS DUE TO THE FORECLOSURE AND ECONOMIC CRISES (2010), http://www.nlchp.org/content/pubs/Foreclosure_effects_on_homelessness.pdf.

23. NAT'L CTR. ON FAM. HOMELESSNESS, STATE REPORT CARD ON CHILD HOMELESSNESS: AMERICA'S YOUNGEST OUTCASTS 7 (2011), http://www.homelesschildrenamerica.org/media/NCFH_AmericaOutcast2010_web.pdf. (arguing that, but for the assistance provided through the Homelessness Prevention and Rapid Rehousing Program, these numbers would likely be significantly larger).

24. U.S. CONF. OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, A 29-CITY SURVEY 7 (2011) [hereinafter HUNGER AND HOMELESSNESS SURVEY], <http://usmayors.org/pressreleases/uploads/2011-hhreport.pdf>.

25. *See, e.g.*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, OPENING DOORS: FEDERAL STRATEGIC PLAN TO END AND PREVENT HOMELESSNESS 35 (2010), http://www.ich.gov/PDF/OpeningDoors_2010_FSPPreventEndHomeless.pdf.

26. In theory, the former should ensure a democratic process in which everyone's interests in the latter can be addressed. Nevertheless, whatever the merits of this theory, the current reality is that for some significant number of Americans basic needs are not met, in the most extreme cases resulting in homelessness. Further, homeless Americans are often, and by virtue of their status, excluded from the political process as well. *See*

that reason, the most important elements of solutions, housing, jobs and medical care, are not legally guaranteed.²⁷ There is little or no constitutional basis for protecting or creating access to these necessities; nor are there broad statutory guarantees of access to them. Statutory schemes have been restricted to particular categories of persons in need, limited by funding levels significantly lower than need, or both.²⁸ In some important ways, there is an imperfect fit between the problem and the legal tools available to address it.

International human rights law does recognize and protect economic and social rights. It specifically includes the right to adequate housing, defined to include seven elements. Those rights are habitability, accessibility, affordability, security of tenure, location near jobs, schools and other needed services, availability of infrastructure such as sanitation, and cultural adequacy.²⁹ International standards require governments to realize this right progressively, using the “maximum of their available resources.” Governments are not required to ensure the right for all immediately, but they must show constant progress toward that goal.³⁰

The right to housing does not require government to build a free house for everyone. Rather, government’s obligation is to put policies in place to ensure housing for all. It can do this in any number of ways, including through policies that encourage private developers to create affordable housing. It can fund non-profits to re-house people through the “housing first” model. It can provide rental assistance that helps people stay in their homes and prevents homelessness.

Public opinion research indicates that most Americans support this approach. Indeed, fifty-one percent of Americans believe that housing is a human right, and two-thirds support increased government spending to

Frank v. Walker, No. 2:11-cv-1128 (E.D. Wis. filed Dec. 13, 2011); *see also* Pitts v. Black, 608 F. Supp. 696, 709 (S.D.N.Y. 1984) (holding that the New York City Board of Election’s application of state election law to refuse to allow homeless individuals to register to vote on the ground that they did not inhabit fixed premises violated the Equal Protection clause).

27. MARTHA BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s*, at 120-26 (1992); *see also* HUNGER AND HOMELESSNESS SURVEY, *supra* note 24, at 2.

28. *E.g.*, Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. §§ 601-19 (2006) (safety nets have been slowly repealed, as welfare benefits for needy families are no longer an entitlement helping families avoid homelessness).

29. U.N. Comm. on Econ., Soc. & Cultural Rts. (CESCR) General Comment 4, The Right to Adequate Housing (Art. 11 (1) of the Covenant), U.N. CESCR, 6th Sess., U.N. Doc. E/1992/23, Annex III, at 114 (Dec. 13, 1991) (reprinted in United Nations, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.7, at 19 (May 12, 2004)).

30. *Id.*

ensure that right.³¹ Moreover, there are signs that American courts are increasingly receptive to human rights principles and law. The most publicized efforts and successes have applied human rights law and utilized international comparison to challenge violations of civil and political rights. For example, the United States Supreme Court abolished the juvenile death penalty, acknowledging, “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty.”³² More recently, in international policy contexts, the United States has shown increased willingness to embrace economic and social rights, and has followed up to develop tools to apply them domestically.³³

Advocates are leading the way, through international, national and local level advocacy, and that work is starting to bear fruit. Nevertheless, it is unlikely that the human right to housing will be fully realized in the United States anytime soon. Yet, advocates are increasingly working toward that long-term goal. At the same time, they are using the human right to housing in advocacy to achieve more immediate, albeit incremental, results.

One way advocacy groups are doing this is by incorporating the right to housing into their own advocacy agendas. For example, in 2007 the National Law Center on Homelessness & Poverty (hereinafter NLCHP) began working with United States Representative Keith Ellison (D-MN) on the human right to housing. As foreclosures increased, we and our partner organizations worked with him on a bill to protect tenants living in foreclosed properties from being summarily evicted, strengthening their security of tenure, one of the seven elements of the human right to housing. The Protecting Tenants at Foreclosure Act was enacted into law in 2009.³⁴ It was a major victory, and the human right to housing helped achieve it.

IV. INTERNATIONAL VENUES AND PROCESSES

The human rights framework makes available the powerful language of human rights instruments that recognize, define, and protect economic and social rights. It also opens the door to an additional arena for

31. BELDEN, RUSSONELLO & STEWART FOR THE OPPORTUNITY AGENDA, HUMAN RIGHTS IN THE UNITED STATES: FINDINGS FROM A NATIONAL SURVEY 53, 54 (2007), <http://opportunityagenda.org/pdfs/HUMAN%20RIGHTS%20REPORT.PDF>.

32. *See Roper v. Simmons*, 543 U.S. 551, 575 (2005).

33. *See id.*, at 575-76.

34. Protecting Tenants at Foreclosure Act of 2009, Pub. L. No. 111-22, 123 Stat. 1660 (2009) (codified at 12 U.S.C. § 5201 et seq.).

advocacy through United Nations' (hereinafter UN), bodies and review processes.

One such process is the Universal Periodic Review (hereinafter UPR), organized by the UN Human Rights Council,³⁵ under which the United States was reviewed for compliance with all human rights treaties this past November. Preparation for the review included a nationwide consultation by the United States government involving thousands of community participants. NLCHP and other advocates participated and helped organize the process, and scores of people and organizations testified about the foreclosures and evictions, racial steering practices and predatory lending, and the criminalization of homelessness. According to a State Department official leading the consultations, housing was the "number one human rights issue raised."³⁶ However, the official report submitted to the UN barely mentioned the housing and homelessness crisis sweeping the country.

Non-governmental groups are permitted to participate in the process, and NLCHP coordinated housing and homelessness groups to submit a "shadow report" and travel to Geneva, where homeless and low-income people told their stories to the UN. Following this testimony, the Human Rights Council provided a number of recommendations to the United States. At the review, HUD stated: "The Universal Periodic Review process helps to inform and influence our nation's effort to dramatically increase the amount of affordable housing, especially for those struggling to find a place to call home," the first time any domestic agency had affirmed the relevance of an international human rights mechanism to its role in setting domestic policy.³⁷

Advocates followed up, and five months later, again for the first time, the State Department and HUD supported recommendations on affordable housing and protecting the rights of homeless persons, among others, in response to the Review.³⁸ The following week, the State Department

35. See Eric Tars & Déodonné Bhattarai, *Opening the Door to the Human Right to Housing: the Universal Periodic Review and Strategic Federal Advocacy for a Rights-Based Approach to Housing*, 45 CLEARINGHOUSE REV. 197, 197-98 (2011).

36. *Id.*, at n.16 (citing David Sullivan, Office of the Legal Adviser, U.S. State Dep't, at an event called "Human Rights on the Hill," D.C., May 25, 2010).

37. U.S. Dep't of Housing & Urban Dev., Statement on the U.S. Participation in the United Nations' Universal Periodic Review (Nov. 5, 2010).

38. U.N. Human Rights Council, Press Release, Council Adopts Outcome of Universal Periodic Review on the United States, Holds General Debate on the Universal Periodic Review ¶ 21 (Mar. 18, 2011), <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=10867&LangID=E>.

announced a re-embrace of economic and social rights;³⁹ the agency is now beginning to incorporate those rights into its strategic plan.

The United States is now officially on record before the world community on these issues. In four years, the next UPR will analyze the efforts made toward progressive realization of these goals.

V. LOCAL HUMAN RIGHTS ADVOCACY

Human rights commitments apply not only to the federal government, but also to the state and local levels. Human rights strategies can be used successfully at these levels, as illustrated by these examples. In each case, NLCHP worked with the local groups to support their efforts.

A. Chicago

In Chicago, the Coalition to Protect Public Housing (hereinafter CPPH) lobbied the Cook County Board of Supervisors to pass a resolution endorsing the human right to housing, one of the first of its kind in the country. CPPH and others then used the resolution in their state budget advocacy, winning \$14 million in rental subsidies to create 1,600 new affordable housing units for the residents of Cook County. By linking their lobbying to the county's resolution on the right to housing, advocates created a framework that supported their request for an increase in state funding for subsidized housing and laid the groundwork for future advocacy efforts.⁴⁰

B. Minnesota

In Minneapolis, as in many cities, people without housing are subject to arrest for living in public places.⁴¹ In Minneapolis, between 2003 and 2007, over 100 homeless people living in public places were arrested

39. Michael Posner, Asst. Sec., Bureau of Democracy, Hum. Rts., and Labor, U.S. State Dep't, Address to the American Society of International Law: The Four Freedoms Turns 70 (Mar. 24, 2011) (transcript available at <http://bit.ly/k3Ujx4>).

40. Maria Foscarinis & Eric Tars, *Housing Rights and Wrongs: The United States and the Right to Housing*, in 3 BRINGING HUMAN RIGHTS HOME: PORTRAITS OF THE MOVEMENT 149, 154-55 (2008), http://www.nlchp.org/content/pubs/Housing_Rights_And_Wrongs_20081.pdf.

41. For a national overview of this issue, see NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2011), <http://www.nlchp.org/content/pubs/11.14.11%20Criminalization%20Report%20&%20Advocacy%20Manual,%20FINAL1.pdf>.

under an “anti-lurking” ordinance⁴² – all African American. A local criminal justice advocate, Guy Gambill, joked, “I’d like to talk about the racial disparity, but that requires at least two races being involved.”⁴³ In 2007, a City Council member proposed repealing the lurking law due to concerns that it was being applied discriminatorily.

Local advocates mounted a human rights campaign to support the repeal effort. They distributed flyers saying “You have fundamental human rights under international law: you are a human being. Your human rights cannot be taken away from you by the government.” This helped empower the homeless community to organize, and also galvanized an education campaign to humanize homeless people with the general public. The Minneapolis groups also gave testimony to the UN Special Rapporteur on Racism – an international expert on racial discrimination – during his official visit to the U.S., and let the City Council know about this international interest.⁴⁴

Ultimately, the repeal effort lost by one vote. But following the human rights campaign, enforcement decreased to only four arrests in the months after the vote.⁴⁵

C. Salt Lake City

In May 2010, the Crossroads Urban Center and a small group of advocates in Salt Lake City, Utah, mounted a human rights campaign to fight the city’s anti-camping ordinance. They generated significant press coverage, focusing attention on the human rights of people being penalized for sleeping in public even though they had no private place to do so.⁴⁶ The following day, Bill Tibbits of the Crossroads Urban center sent NLCHP this email:

[t]oday the Chief of Police invited me to a press conference where he thanked me for drawing his attention to this issue,

42. Vanessa Wheeler, *Discrimination Lurking on the Books: Examining the Constitutionality of the Minneapolis Lurking Ordinance*, 26 LAW & INEQ. 467 (2008) (Minneapolis City Code 385.80 states, “[n]o person, in any public or private place, shall lurk, lie in wait or be concealed with intent to commit any crime or unlawful act”).

43. Mosedale, Mike. *What Lurks Beneath? Critics Say a Minneapolis Law Criminalizes Walking While Black*, CITY PAGES, Feb. 28, 2007, <http://www.citypages.com/2007-02-28/news/what-lurks-beneath/>.

44. See Letter from Tulin Ozdeger & Eric Tars, Nat’l Law Ctr. on Homelessness & Poverty, to Council Comm. on Pub. Safety (May 20, 2008) (on file with author).

45. City of Minneapolis, *Lurking Charges 2008-2009* (on file with author).

46. Shara Park, *Advocates Stage ‘Sleep-in’ for Homeless*, KSL.COM, May 6, 2010, <http://www.ksl.com/?nid=148&sid=10669685>.

stated that he intended to halt enforcement of the City's anti-camping ordinance and that he planned to ask the Council to make some revisions to the ordinances. I was not expecting that.⁴⁷

Enforcement of the ordinance remains suspended, and the city is reworking its response to homelessness, and advocates are hopeful for a positive outcome.

D. Sacramento

Human rights law treats rights as interdependent, and advocacy for the right to housing can be helped by related human rights, as demonstrated by this example from Sacramento. In the Sacramento area, each night, 1,194 people must sleep outside due to lack of available shelter beds and affordable housing units.⁴⁸ Safe Ground Sacramento is an informal organization of people living in temporary encampments formed in 2009 in response to the government's dismantling of tent cities and the continual harassment of homeless people.⁴⁹

Safe Ground and Legal Services of Northern California recently participated in an official mission by the UN Independent Expert on the right to water and sanitation. The expert's report describes the conditions in the encampment, without access to clean water or sanitation, as "unacceptable, an affront to human dignity and a violation of human rights that may amount to cruel, inhuman or degrading treatment. An immediate, interim solution is to ensure [homeless persons have] access to restroom facilities in public places, including during the night."⁵⁰ This visit both energized the Safe Ground members and received significant local media coverage, giving the advocates there an additional tool in their ongoing advocacy with the city.

47. Email from Bill Tibbits, Crossroads Urban Ctr., to Eric Tars, Nat'l Law Ctr. on Homelessness & Poverty (May 7, 2010) (on file with author).

48. SACRAMENTO CNTY. DEP'T OF HUM. ASSISTANCE HOMELESS PROGRAM, HOMELESSNESS IN SACRAMENTO COUNTY: 2009 HOMELESS COUNT SUMMARY REPORT 1 (2009), <http://dhaweb.saccounty.net/homeless/documents/2009%20Count%20Summary%20Final.pdf>.

49. See Jesse McKinley, *Residents of Sacramento's Tent City to Move to Fairground*, N.Y. TIMES, Mar. 25, 2009, <http://www.nytimes.com/2009/03/26/us/26sacramento.html>.

50. Catarina de Albuquerque, U.N. Indep. Expert on the Right to Water and Sanitation, Statement from Press Conference on Mission to the United States of America from Feb. 22 to Mar. 4 2011 (Mar. 4, 2011) (transcript available at <http://www.ushrnetwork.org/content/pressrelease/catarina-de-albuquerque-un-independent-expert-right-water-and-sanitation-missio>).

VI. INTERNATIONAL MODELS

Advocates also point to international models such as Scotland and South Africa.

A. Scotland

In 2001 and 2003, Scotland passed the Housing and Homelessness Acts, which includes the right for all homeless persons to be immediately housed and the right to long-term housing as long as is needed for priority groups, a category that will be progressively abolished by 2012 at which point the right will extend to all.⁵¹ Crucially, this includes an individual right to sue to enforce the law.⁵² Other legal provisions compliment this law; including the right to purchase public housing units, the ability for homeowners to sell their house to the government to avoid foreclosure and rent it back, the individual stays in the residence through financial difficulty with the opportunity to later repurchase the home.⁵³ As the 2012 date approaches, implementation of the law has varied, but some localities have already achieved 100% housing for all homeless applicants.⁵⁴

B. Republic of South Africa

South Africa explicitly guarantees a right to adequate housing, to be read in accordance with international human rights standards, as well as a ban on unjustified evictions, in its 1996 Constitution.⁵⁵ While battling

51. Homelessness etc. (Scotland) Act, 2003, (A.S.P. 10); Housing (Scotland) Act, 2001, (A.S.P. 10); see Eric Tars & Caitlin Egleson, *Great Scot! The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States*, 16 GEO. J. POVERTY L. & POL'Y 187 (2009).

52. See Housing (Scotland) Act, 1987, 35A.

53. See TARS, *supra* note 51, at 201 n.78.

54. SHELTER SCOT, A SHELTER SCOT. REP.: PROGRESS AND DRIFT: A REVIEW OF THE HOMELESSNESS TASK FORCE RECOMMENDATIONS, 15-16 (2011), http://scotland.shelter.org.uk/_data/assets/pdf_file/0008/332990/HTF_FINAL_Report_Feb_2011.pdf.

55. S. AFR. CONST., 1996.

26 Housing (1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation [sic] of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions. . . . 39 Interpretation of Bill of Rights (1) When interpreting the Bill of Rights, a court, tribunal or forum- (a) must promote the values that underlie an open and democratic society based on

ongoing resource distribution problems, South Africa has developed some of the most progressive case law in protecting the right to housing. This has included orders to municipalities to find housing for squatters *before* they can be evicted, and orders to the police to rebuild the shacks of those living in the slums that they had destroyed, despite the tenants not having formal title to the land.⁵⁶

VII. CONCLUSION

A paradigm shift is possible. The human right to housing can help advance solutions to the homelessness and housing crisis. Ultimately, it can help us shift from a paradigm that treats housing as a discretionary privilege to one that treats it as a priority and a right.

Making this shift will not be easy. In the early 1980s, when homelessness was first becoming a national crisis, it was considered an issue for the private sector, faith communities, and charities; it was not viewed as an issue for national policy. Advocates lobbied, organized, persisted—and eventually succeeded, when what is now known as the McKinney-Vento act was passed. Now, no one would dispute that homelessness is an issue for the federal government; indeed, just last year the Obama administration released a federal plan to end homelessness.⁵⁷

Accomplishing a shift towards recognition of the human right to housing, and economic and social rights more generally, will take time. As the long trajectory of the advocacy campaign against the juvenile death penalty shows, such long-term strategies can be successful. Incorporating human rights strategies in advocacy is a first step towards that goal.

To *end* homelessness, and the affordable housing crisis that drives it, we still have a long way to go. The human right to housing can help us get there.

human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.

56. KATE TISSINGTON, SOCIO-ECON. RTS. INST. OF S. AFR., A RESOURCE GUIDE TO HOUSING IN SOUTH AFRICA 1994-2010: LEGISLATION, POLICY, PROGRAMMES AND PRACTICE 31-32, 42-43, n.154 (2011), http://www.escr-net.org/usr_doc/SERI_A_Resource_Guide_to_Housing_in_South_Africa_Feb11.pdf.

57. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 25, at 2.

**SEXUAL ABUSE MEMORY REPRESSION:
THE QUESTIONABLE INJUSTICE OF *DEMEYER***

JOSHUA LUSHNAT¹

I. INTRODUCTION: PUBLIC PERCEPTION OF SEXUAL ASSAULT	529
II. WHAT IS A REPRESSED MEMORY AND HOW DOES IT OCCUR?.....	532
A. <i>How Repressed Memories Are Discovered</i>	533
B. <i>The Dangers of Repressed Memories</i>	534
C. <i>The Repressed Memory Debate</i>	535
III. MICHIGAN’S VIEWS ON REPRESSED MEMORIES OF SEXUAL ABUSE AND THE STATUTE OF LIMITATIONS	536
A. Meiers-Post	536
B. Lemmerman	538
C. Guerra.....	539
D. <i>The Unbelievable Demeyer</i>	540
IV. JUDICIAL REMEDY	541
A. <i>The Policy Behind the Statute of Limitations</i>	542
B. <i>The Policy Underlying the Application of the Insanity Tolling Provision</i>	543
C. <i>The Toppling of Meiers-Post’s Significance</i>	545
D. <i>The Case for Demeyer and the Judicial Remedy That Should Have Been</i>	546
V. LEGISLATIVE ACTION	548
A. <i>No Statute of Limitation</i>	548
B. <i>The Discovery Rule</i>	549
C. <i>The Way the Michigan Legislature Can Correct Demeyer</i>	552
VI. CONCLUSION.....	554

I. INTRODUCTION: PUBLIC PERCEPTION OF SEXUAL ASSAULT

Sexual assault on a child is a degrading and horrific event. The act itself is one of the most disgusting and degrading physical exertions of superiority and selfishness that a human being can perform. Not only is the minor physically assaulted, but the psychological damage, extortion

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of trust, and emotional devastation can wreak havoc on a victim's life for tens of years. The experience can be so traumatizing that a victim actually forgets about the event for years and seals it away from their consciousness.² Eventually, although potentially never, a "triggering event" will bring a victim's memories of sexual abuse rushing back into their conscious memory. This phenomenon, although up for great debate in the scientific world, is what is referred to as a repressed memory, and can stand in the way of a victim and their vindication.³

The law, in general, treats criminal sexual assault very heavily. A criminal offender found guilty of criminal sexual conduct could have a life sentence imposed.⁴ The incarceration served by the guilty offender is only half of the penalty. The social stigma associated with a sexual predator, even after serving his sentence, has been referred to by one judge as "infamous."⁵ Terms like "monster" and "sexual predator" are used to describe sexual offenders, and some people believe they are beyond the realm of reform and rehabilitation.⁶ The stigma is so strong that Congress, and, arguably the judiciary, has refused to stand in opposition of laws against "sexual predators" that some may deem excessive or abusive.⁷ The Supreme Court of the United States has held that involuntary confinement for an indefinite period of time, sought by the state, for long-term care and treatment of a sexual predator, part and parcel from any jail sentence served, is constitutional and permissible by law.⁸ Sexual offenders are regularly forced to identify themselves on sex

2. See ELIZABETH LOFTUS & KATHERINE KETCHAM, *THE MYTH OF REPRESSED MEMORY* 48 (1994).

3. See generally JANICE HAAKEN & PAULA REAVEY, *MEMORY MATTERS: CONTEXTS FOR UNDERSTANDING SEXUAL ABUSE RECOLLECTIONS* (2009) (looking back at the repressed memory debate of the 1980s and 1990s, re-analyzing cases from that era, and offering a fresh perspective on recollections of child abuse from a wide range of applied settings); see also Amina Memon & Mark Young, *Desperately Seeking Evidence: The Recovered Memory Debate*, 2 *LEGAL & CRIMINOLOGICAL PSYCHOLOGY* 131, 131-54 (1997) (concluding further research needs to be conducted in order to ascertain under what conditions false recollections may occur and how they can be prevented).

4. MICH. COMP. LAWS § 750.520b(2) (2008).

5. *Bassile v. Covenant House*, 575 N.Y.S.2d 233, 237 (N.Y. App. Div. 1991).

6. Daniel M. Filler, *Terrorism, Panic, and Pedophilia*, 10 *VA. J. SOC. POL'Y & L.* 345, 361 (2003).

7. *Id.* at 362. The panic over child molesters has become so extreme that some states have adopted laws that allow for indefinite preventative detention to people who did not have a mental disease or defect, but are likely to engage in "predatory acts of sexual violence." *E.g.*, Sexually Violent Predator Act, Kan. Stat. § 59-29a01 to -29a23 (2003) (famously upheld by the U.S. Supreme Court in *Kansas v. Hendricks*, *infra*).

8. *Kansas v. Hendricks*, 521 U.S. 346 (1997). The Court declined to accept the petitioner's argument that the civil commitment after the serving of jail time was effectively double jeopardy, and instead held that the second "incarceration" was not

offender registries and the federal government requires the Attorney General for each state to maintain such a registry.⁹ The registries can contain personal identifying information including the address and the birth date of the offender as well as the offender's conviction, and are freely available to the public via databases and public websites.¹⁰ Criminal sex offenders are punished heavily for their crimes.

With sexual predators being so feared, exposed, and loathed among the population, one would think that the civil counterpart to the criminal sentence – the civil judgment – would be obtained easily in cases alleging sexual abuse. However, the civil law seems to take a less aggressive stance towards sexual assault. Absent a slam-dunk-case brought immediately after the incident, civil vindication for the victim is rather difficult to obtain. Highly traumatic sexual abuse scenarios—the ones so horrendous the victim's memories of the attack are repressed for years—encounter an insurmountable obstacle preventing plaintiffs from recovering any compensation or redress for the tragedy they were exposed to: the statute of limitations. The duality between the criminal law's heavy hammer, swinging directly at the offender, and the civil law's strict adherence to a simple timing procedure, that potentially robs plaintiffs of justice, seems to be counterintuitive. With such harsh treatment of sex offenders in the penal system, one would expect that the civil courts would find a way around the statute of limitations to allow civil judgments to be levied against sex offenders.

The dichotomy between the policies of the penal and civil systems addressed in this Note has been succinctly penned by the Arizona Court of Appeals when then Presiding Judge Pelander wrote:

Child sexual abuse cases present very difficult problems because of the competing interests at stake. The acts alleged are awful. They would arouse the righteous indignation of any sensible person. On the other hand, statutes of limitations are designed to encourage plaintiffs to pursue claims diligently and to prevent the assertion of stale and fraudulent claims.¹¹

intended for retribution or deterrence and therefore not punitive and not subject to the Double Jeopardy argument. Due process was comported with because the offender was permitted release upon a showing of being no longer dangerous. *Id.* at 360-64.

9. 42 U.S.C §14071.

10. *Id.*; see also FAMILY WATCHDOG, <http://familywatchdog.us> (last visited Feb. 17, 2012).

11. *Florez v. Sargeant*, 917 P.2d 250, 255 (Ariz. 1996).

Part II of this Note will discuss what exactly a repressed memory is, the challenges associated with it, and the ongoing debate on its validity. Part III will discuss the current state of the civil law in Michigan dealing with cases of child sexual abuse resting upon repressed memories. The Note will trace the rationale and development of the law from the case of first impression to the last published case. The final parts of this Note will explore how to change the current laws of Michigan to allow greater access to justice for plaintiff's suffering from repressed memories of sexual abuse. Specifically, this Note will discuss how more progressive jurisdictions confront the issue of repressed memories, and recommend both a judicial and legislative way to provide better access to justice.

II. WHAT IS A REPRESSED MEMORY AND HOW DOES IT OCCUR?

Sigmund Freud, over one hundred years ago, first proposed the theory of memory repression as a defense mechanism that uses powerful emotions to shield victims' painful memories of traumatizing experiences from their consciousness.¹² The fundamental rationale behind memory repression is that people routinely exile disturbing experiences from their conscious memory because contemplation is too terrifying. The forgotten experiences can cause terrible mental and emotional injury. The causal connection between the injury and the experience is unbeknownst to the victim, and accurate revitalization of the memory is the only cure. However, revitalization of the memory back into a victim's consciousness is only possible through special techniques to be administered by qualified professionals.¹³ Whether or not a memory is going to be repressed depends on a number of factors. Some factors have nothing to do with the sexual abuse itself and are properties of a victim's psyche such as age, susceptibility to hypnosis, and family history of memory repression.¹⁴ Other factors spawning memory repression, including the bizarre nature of the attack, dissociation, refocusing, self-hypnosis, and drug or alcohol sedation, are generated during the event.¹⁵ Once removed from the event, a victim may still be induced into repressing a memory through denial, normalization by those

12. LOFTUS & KETCHAM, *supra* note 2, at 49-51..

13. Elizabeth Loftus, *Memory Distortion and False Memory Creation*, 24 BULL. AM. ACAD. PSYCHIATRY & L. 281, 281-95 (1996). However, the last step – needing a professional for revitalization – although cited as a basic tenant of repressed memory has been demonstrated to not be true. In certain cases, victims have “remembered” repressed memories by simply noticing a particular sight or smell, for example, see *infra* note 23 and accompanying text.

14. RENEE FREDRICKSON, *REPPRESSED MEMORIES* 54-57 (1992).

15. *Id.* at 57-63.

around them, and post-hypnotic suggestion — similar to the self-hypnosis during the attack — to forget what just happened to them.¹⁶ The end result is that the survivor somehow manages to file away the memory so completely that he simply does not remember the traumatizing experience.¹⁷

Once the memory is repressed, it could potentially be years until it is recalled back into a victim's consciousness and she is made aware of past abuse.¹⁸ Repressed memories, like all memories, cannot simply be recalled by trying to remember them.¹⁹ All memories come back by association. For example, if you see a picture of a place you once traveled as a child, then you recall memories associated with that trip and that location. If you were told to just think of a memory, however, it would be unlikely that one from that trip would be the first you would think about.

A. How Repressed Memories Are Discovered

Repressed memories can be recalled during “triggering events,” in which the event, by association like normal memories, sets off the surfacing of the once repressed memory in the victim's conscious mind. The triggering event could be any event, including viewing a television show discussing similar abuse as that experienced by the victim, a particular scent, engaging in sexual intercourse if the abuse was sexual, breaking an addiction, undergoing surgery, or seeing a peculiar object that resembled something present during the repressed event.²⁰ Some psychologists, however, have the view that most repressed memories are not recoverable through spontaneous triggering events, and need to be

16. *Id.* at 64-66.

17. *Farris v. Compton*, 652 A.2d 49, 56 (1994) (citing Jill Blake-White & Christine Madeline Kline, *Treating the Dissociative Process in Adult Victims of Childhood Incest*, 66 SOC. CASEWORK 394, 394-402 (1985)).

18. Julie Schwartz Silberg, *Memory Repression: Should it Toll the Statutory Limitations Period in Child Sexual Abuse Cases?*, 39 WAYNE L. REV. 1589, 1597 (1993) (citing Don Oldenburg, *Dark Memories; Adults Confront Their Childhood Abuse*, WASH. POST, June 20, 1991, at D5). In one of the most famous repressed memory cases of recent time, Eileen Franklin-Lipsker remembered that her father had killed a classmate in front of her twenty years after the event. Based on the recalled memories, her father was sentenced to life in prison.

19. Trying to remember a memory results in exploring what you already know, intuitively making it impossible to remember a repressed memory of which you have no knowledge.

20. See FREDRICKSON, *supra* note 14.

exposed through therapeutic exercises aimed specifically at memory retrieval.²¹

B. The Dangers of Repressed Memories

Therapeutic exercises aimed at retrieving a repressed memory have also been blamed for creating repressed memories. Dr. Elizabeth Loftus is a scholar in the fields of psychology and social behavior.²² Dr. Loftus and other professionals in her field claim that psychologists are quite capable of implanting false memories into a patient's mind.²³ A patient is encouraged to accept as true any lurking memories of child abuse, in order to explain their normal everyday problems.²⁴ Studies have been conducted and successfully shown that the power of suggestion and expectation can be projected on to the patient during hypnosis and therapy to increase the number of abuse reports.²⁵ Psychiatrist memory implantation has resulted in rather large settlements within the court system.²⁶ Nevertheless, memory repression remains widely accepted as having some validity and is, in some courts across the country, recognized as a convincing method of overcoming statutes of limitation that have long passed by the time the memory is revitalized, and the victim is aware of the wrongdoing.²⁷

21. *Id.* at 97-99. Memory retrieval techniques include: imagistic work, dream work, journal writing, body manipulation, hypnosis, art therapy, and re-experiencing extreme emotions.

22. See ELIZABETH F. LOFTUS, <http://faculty.washington.edu/eloftus> (last visited Feb. 19, 2012).

23. LOFTUS & KETCHAM, *supra* note 2 at 85-99. See also *id.* for a list of her publications on the topic.

24. Jacqueline Monte, *Recovered Memories and the Psychologists That Create Them: A Study of the Repressed Memory Controversy*, 1997 DET. C.L. MICH. ST. U.L. REV. 163, 174 (1997).

25. LOFTUS & KETCHAM, *supra* note 2, at 79.

26. Elizabeth Loftus, 'The Price of Bad Memories', SKEPTICAL INQUIRER, 1998, at 22. A hospital and group of therapists settled a case of alleged memory implantation for \$10.6 million. For an explanation of a similar type suit, see generally *Sullivan v Cheshire*, 846 F. Supp. 654 (N.D.Ill. 1994).

27. Many jurisdictions accept repressed memories as a way to toll the statute of limitation for battery — and sometimes specifically sexual abuse. Nevada, Ohio, North Dakota, Arizona, Wisconsin, California, and many other jurisdictions accept repressed memory as a means of tolling the statute of limitation.

C. The Repressed Memory Debate

Even with the proven existence of memory implantation, repressed memories are still the subject of an ongoing debate.²⁸ Some scientists still believe firmly in the authenticity of repressed memories while others are extremely critical and doubt a person would forget about a traumatizing event.²⁹ Like scientists, courts have yet to reach unanimity with regard to repressed memory existence and reliability.³⁰ Doctors have testified in open court, and firmly believe, that the phenomenon of memory repression is scientifically possible.³¹ The problem with recognizing repressed memories as reliable from an objective standpoint is that there exists no cogent scientific support.³² The American Medical Association believes that repressed memories are of uncertain authenticity, and should be verified by external evidence.³³ Independent corroboration is the only known way to be sure with any level of certainty that the events alleged in a repressed memory are accurate.³⁴

The critics that express disbelief in memory repression justify their disbelief with anecdotes of memory fabrication and confusion as proof.³⁵ Dr. Loftus believes that repression is a “philosophical entity, requiring a leap of faith in order to believe.”³⁶ She also believes that without the help of a psychologist actual memories that are factually accurate can become entangled with extraneous information gained elsewhere to manifest into

28. See LOFTUS & KETCHAM, *supra* note 2.

29. *Id.*

30. Compare *Petersen v. Bruen*, 792 P.2d 18 (Nev. 1990) (Nevada recognizes memory repression) with *Dalrymple v. Brown*, 701 A.2d 164 (Pa. 1997) (“it would be absurd to argue that a reasonable person, even assuming for the sake of argument, a reasonable six year old, would repress the memory of a touching so that no amount of diligence would enable that person to know of the injury”).

31. *Meiers-Post v. Schafer*, 427 N.W.2d 606 (Mich. Ct. App. 1988); see also *FREDRICKSON*, *supra* note 14.

32. *Florez*, 917 P.2d 250; *Monte supra*, note 24, at 174.

33. *Monte*, *supra* note 24.

34. Loftus & Ketcham, *supra* note 2, at 90. Dr. Loftus recalls a conversation she had with Dr. Ganaway — a professor of psychiatry at Emory University and the director of a dissociative-disorders unit at a psychiatric hospital — after a lecture by Ganaway.

35. See generally *Memon & Young*, *supra* note 3, at 131-54. A woman recalled memories of her father being naked and threatening her when she was sixteen years old. The woman alleged that her father sexually abused her. The sexual abuse at the age of sixteen was impossible due to the parent’s divorce and it was later determined, and confirmed by the father, that at the age of twelve, the woman had walked in on her father having sex with a sixteen-year old girl. The father admitted to threatening his daughter while naked. The belief is that the woman placed herself in the role of the other child and fabricated *partially* false memories.

36. LOFTUS & KETCHAM, *supra* note 2, at 64.

what the individual believes is an actual memory hidden outside of their consciousness.³⁷ This is the scenario the doctor predicts happened in the famous 1989 case of Eileen Franklin-Lipsker, a woman who, arguably, fabricated the memory of her father murdering her childhood friend by mixing accurate personal memories with details gleaned from the news coverage of the event.³⁸ The father's murder conviction, which was based solely on Eileen's testimony, was later over turned.³⁹

III. MICHIGAN'S VIEWS ON REPRESSED MEMORIES OF SEXUAL ABUSE AND THE STATUTE OF LIMITATIONS

A. Meiers-Post

In July of 1986, Mrs. Jan Post was a thirty-year-old professional watching a television program discussing a teacher sexually abusing his students when it dawned on her that as a high school student, some twenty-four years earlier, she had been the victim of sexual abuse at the hands of her math teacher.⁴⁰ She began to experience nightmares, insomnia, depression, anxiety, and guilt stemming from her realization.⁴¹ Post's complaint filed in 1986 alleged sexual abuse from 1970 to 1974, and presented a matter of first impression for the Michigan courts.⁴² Before the court stood a thirty-year old woman that alleged her former teacher engaged in a sexual relationship with her when she was in high school.⁴³ The defendant, Robert Schafer, openly acknowledged in his deposition that he had sexual intercourse with Post when she was a sophomore in high school.⁴⁴ The problem facing Post, however, was that the applicable statute of limitations was only three years.⁴⁵ In *Meiers-Post v. Schafer*, the Michigan Court of Appeals was faced with the issue of "whether the psychological phenomena known as repression and post-traumatic syndrome can constitute insanity for tolling purposes."⁴⁶ Insanity is defined as a condition of mental derangement that prevents the sufferer from comprehending rights that he or she would otherwise

37. *Id.* at 40-72.

38. *Id.*

39. FREDRICKSON, *supra* note 14.

40. *Meiers-Post*, 427 N.W.2d at 607.

41. *Id.* at 608.

42. *Id.*

43. *Id.*

44. *Id.* at 607.

45. *Id.* at 608

46. *Id.*

be bound to understand and recognize.⁴⁷ The court of appeals looked to two other jurisdictions, California and Washington, for help in their disposition of the issue. Both decisions reviewed debated whether or not the delayed-discovery rule could toll the statute of limitations in repressed memory cases⁴⁸ *Tyson v. Tyson*, out of the Washington Supreme Court, was most influential on the court's decision.⁴⁹ The Washington Supreme Court relied heavily on the policy considerations underlying the statute of limitations to conclude that the discovery rule was applicable when the injustice of denying a justified cause of action outweighs the risk of a stale claim.⁵⁰ The majority opinion in *Tyson* required objective and verifiable evidence of the claim as a prerequisite to applying the discovery rule; a requirement that sharply divided the court 5-4.⁵¹ With objective verifiable evidence — the defendant's deposition — on the record, the court in *Meiers-Post* was not focused on deciding cases where an adult testifies, via a repressed memory, years after alleged abuse absent corroborating evidence.⁵² In a surprising move, however, the court instead decided to use the insanity rule for tolling the statute of limitations and held:

[T]hat the statute of limitations can be tolled under the insanity clause if (a) plaintiff can make out a case that she has repressed the memory of the facts upon which claim is predicated, such that she could not have been aware of rights she was otherwise bound to know, and (b) there is corroboration for plaintiff's testimony that the sexual assault occurred.⁵³

The court felt, and rightfully so, that its rule struck a fair balance between the policy concerns of the statute of limitations for the defendant and any unfairness to the plaintiff produced by precluding a justifiable claim.⁵⁴

47. MICH. COMP. LAWS § 600.5851(2) (2008).

48. *Meiers-Post*, 427 N.W.2d at 609.

49. *See id.* at 610; *Tyson v. Tyson*, 727 P.2d 226 (Wash. 1986).

50. *Tyson*, 727 P.2d 226.

51. *Meiers-Post*, 427 N.W.2d at 609. The *Tyson* dissent would have held that there was no requirement of objective verifiable evidence if the fact-finder concluded that the plaintiff had repressed all conscious memory of the abuse during the statute of limitations.

52. *Id.* at 610.

53. *Id.*

54. *Id.*

B. Lemmerman

It was not until nine years later in which the issue was before the Michigan Supreme Court.⁵⁵ Marlene Lemmerman alleged that her father physically and sexually abused her for ten years during her youth, and that as a result of her mother repeatedly denying the allegations against her father and even threatening her, she repressed the memories for years until undergoing therapy later in life.⁵⁶ Lemmerman offered testimony that her father corroborated the repressed memory during a conversation with her in which he apologized multiple times shortly before his death.⁵⁷ The Michigan Court of Appeals, in *Lemmerman v. Fealk*, decided that the discovery rule and the insanity provision applied to toll the statute of limitations, and that neither rule required the accompaniment of corroboration, which constituted an unnecessary restraint.⁵⁸ This landmark decision represented a great stride towards justice for individuals suffering from repressed memories as a result of sexual abuse when they were children.⁵⁹ In its review of *Lemmerman*, the Michigan Supreme Court turned the court of appeals decision on its head. The Michigan Supreme Court went back and evaluated the *Tyson* decision.⁶⁰ The court neither extended the discovery rule nor the insanity provision to Lemmerman's claim because, absent verifiable evidence, the court felt that the concerns protected by the statute of limitations were nullified by placing the plaintiff in a position to exercise her discretion in bringing suit at any opportune time without respecting time limitations.⁶¹ The court did not stop there: they held that neither the discovery rule nor the insanity provision would be available even if there was objective and verifiable evidence to support the repressed memory.⁶² The court defaulted to the state legislature, and felt that the proper forum for the plaintiff's case was before the lawmakers, in hopes of having a statutory provision provided to avoid such harsh and unjust results.⁶³ The court

55. *Lemmerman v. Fealk*, 534 N.W.2d 695 (Mich. 1995).

56. *Id.* at 696-97.

57. *Id.* Plaintiff alleged that she showed her father a picture of her when she was younger and told him that he hurt her very bad to which he responded, approximately six times, that he was sorry and stated that God would never forgive him.

58. *Lemmerman v. Fealk*, 507 N.W.2d 226 (Mich. Ct. App. 1993), *rev'd*, 534 N.W.2d 695 (Mich. 1995).

59. See Bradford J. Roegge, *Lemmerman V. Fealk: A 'Reasonableness' Solution Allows Michigan's Incest Victims Greater Access To The Courts*, 71 U. DET. MERCY L. REV. 943 (1994).

60. *Lemmerman*, 534 N.W.2d at 700.

61. *Id.* at 703.

62. *Id.* at 702.

63. *Id.* at 703-05.

clearly and repeatedly refused to recognize the authenticity of a repressed memory standing on its own with objective verifiable evidence.⁶⁴ Although the court struck a substantial blow to plaintiffs similarly situated to Lemmerman, it did, however, through a footnote that would become increasingly debated, leave unadulterated the court of appeals earlier decision in *Meiers-Post*.⁶⁵

C. Guerra

Guerra v. Garratt was the case that would parse through the footnote of the *Lemmerman* decision.⁶⁶ The Michigan Court of Appeals in *Guerra* was faced with a plaintiff that alleged her female high school basketball coach engaged in wrongful sexual contact with her, including oral sex and digital penetration.⁶⁷ The defendant acknowledged that the plaintiff slept in her bed; french kissed her; and fondled her clothed breasts.⁶⁸ The plaintiff argued that with objective and verifiable evidence of the sexual abuse the case fell under the *Meiers-Post* decision that was carved out of the *Lemmerman* holding.⁶⁹ The argument was that the defendant's admissions were express and unequivocal, which took the plaintiff's action outside the realm of being unverifiable because it was partially admitted to by the alleged perpetrator. Taking into account the *Lemmerman* footnote, along with the concerns expressed within, and the decision in *Tyson* that served as the foundation for Michigan's line of cases, it was reasonable for one to believe the plaintiff's argument would likely succeed.⁷⁰ Judges Markman, O'Connell, and Talbot, however, felt that the correct interpretation of the footnote was to address the retroactivity of *Lemmerman*, and in no way fashion an exception.⁷¹ That is, the *Lemmerman* opinion was interpreted as not upsetting the court's prior decisions (i.e. no retroactivity), while simultaneously overruling the law applied therein (absolutely no discovery rule or insanity provision

64. *Id.* (Weaver, J., concurring).

65. *Id.* at 703 n.15. Footnote 15 of the majority opinion reads: "We do not address the result of those repressed memory cases wherein long-delayed tort actions based on sexual assaults were allowed to survive summary disposition because of the defendants' admissions of sexual contact with the plaintiffs when they were minors. Such express and unequivocal admissions take these cases outside the arena of stale, unverifiable claims with which we are concerned in the present cases."(internal citations omitted).

66. *Guerra v. Garratt*, 564 N.W.2d 121 (Mich. Ct. App. 1997).

67. *Id.* at 122.

68. *Id.* at 122-23.

69. *Id.* at 124.

70. See *supra* notes 51 and 65 and accompanying text.

71. *Guerra*, 564 N.W.2d at 125. The court relied on the fact that the court in *Lemmerman* repeatedly stated it's general holding.

for repressed memories).⁷² The law of *Lemmerman* remained, neither the discovery rule nor the insanity provision was available to plaintiffs with repressed memories, and the only way around the statute of limitations was through the legislature.⁷³

*D. The Unbelievable Demeyer*⁷⁴

The latest case in the repressed memory lineage involved a plaintiff that claimed to have been sexually assaulted by his priest as early as the age of nine years old.⁷⁵ The defendant priest, who had previously been accused of sexual misconduct, admitted during a deposition to massaging the plaintiff's chest and stomach while they were alone in the plaintiff's bedroom, and massaging other boys while sometimes wearing nothing but their underwear.⁷⁶ Aside from the admission, the Archdiocese had a psychiatric evaluation performed on the priest, and the psychiatrists determined that the plaintiff's claims were well founded. The priest was treated with medication to calm him and curb his sex drive, and counseling as well.⁷⁷

The Michigan Court of Appeals declined to allow the plaintiff to escape the statute of limitations, because, as the lead opinion cites, it was bound by *stare decisis* to follow *Guerra*.⁷⁸ That opinion rightfully exhibits frustration with the *Guerra* decision because the *Demeyer* case seemed to fit into the exception created by the *Lemmerman* footnote, but the court in *Guerra* did not recognize the creation of the exception expressed in the footnote.⁷⁹ The stale fact finding present in *Lemmerman* was not present in *Demeyer*, and the majority felt *Demeyer* would fall outside of *Lemmerman*.⁸⁰ *Lemmerman*'s father was dead at the time of suit: whereas, the priest in *Demeyer* was still alive. *Demeyer* is more akin to *Meiers-Post* because reliable fact-finding was obtainable, and Judge

72. *Id.*

73. *Id.* at 124

74. *Demeyer v. Archdiocese of Detroit*, 593 N.W.2d 560 (Mich. Ct. App. 1999), *cert. denied*, 608 N.W.2d 810 (Mich. 2000). This case was the author's motivation for writing this article.

75. *Demeyer*, 593 N.W.2d 560.

76. *Id.* at 561.

77. *Id.*

78. *Id.* at 560-61.

79. *Id.* at 563. The opinion states: "[W]ere we to consider this issue as a matter of first impression, we would hold that repressed memory cases supported by admissions may fall outside *Lemmerman*. Under the reasoning of *Lemmerman*, the focus in determining whether to apply the discovery rule in those cases is on whether the court can be assured of reliable fact finding." (internal citation omitted).

80. *Id.* (noting that reliable fact-finding was surely obtainable in *Demeyer*).

Corrigan wrote that he would have found for the plaintiff on that basis and would not have dismissed the action.⁸¹

The Michigan Supreme Court, however, seemed to think that the analogy to *Meiers-Post* was far more attenuated, and declined to hear *Demeyer*.⁸² In a concurrence, then Chief Justice Weaver stated that *Demeyer* was not the factual scenario that would allow the court to consider the unanswered question of *Lemmerman*: whether the statute should be tolled for repressed memories accompanied by an unequivocal incriminating admission.⁸³

As Michigan law stands now, it has completely departed from its original requirements of corroboration and verifiable evidence that would allow a claim to be free from stale fact-finding, and now demands unequivocal admissions.⁸⁴ Although rooted in *stare decisis*, this evolution seems to be to the contrary of following precedent. The Michigan Supreme Court has ignored the bases for past decisions, and in accord with its conservative reputation, declined to take a proactive approach to correcting the current state of the law.⁸⁵ The balance of this Note will delve into how other states have handled similar cases of memory repression, and propose actions that should be taken in Michigan to correct — what this author views as — the injustice of *Guerra* and *Demeyer*. One such action will pertain to the Michigan Supreme Court, while the other — in accord with *stare decisis* and its present perceived binding nature — will be proposed legislation for the Michigan Legislature.

IV. JUDICIAL REMEDY

Michigan common law, pre-*Guerra*, provided a narrow framework that allowed plaintiffs with repressed memories to overcome the hurdle posed by the statute of limitations if there was objective verifiable evidence that corroborated the sexual abuse. The insanity tolling provision was the vehicle for such escape.⁸⁶ The Michigan line of cases

81. *Id.*

82. *Demeyer v. Archdiocese of Detroit*, 608 N.W.2d 810 (Mich. 2000). The concurrence in the court of appeals decision in *Demeyer*, 593 N.W.2d at 564, differentiated *Meiers-Post* from *Demeyer* because *Meiers-Post* contained an unequivocal admission and *Demeyer* was, at best, an admission to “questionable behavior.”

83. *Demeyer*, 608 N.W.2d 810 (Weaver, C.J. concurring).

84. Contrasting the policies and requirements behind the decisions in *Tyson* and *Lemmerman* with the most recent *Guerra* and *Demeyer*.

85. *Id.*

86. *See Meiers-Post*, 427 N.W. 2d 606; *see also Tyson*, 727 P.2d 226.

has since foreclosed the use of the provision.⁸⁷ The Michigan Supreme Court could easily undo the injustice of the plaintiff in *Demeyer* by addressing the court of appeals decision in *Guerra*. Based on the previous case law and policy concerns, *Guerra* should be overturned, and the insanity provision should be reinstated, in limited cases, as a viable means for plaintiffs suffering from repressed memories to overcome the statute of limitations.

A. *The Policy Behind the Statute of Limitations*

The statutes of limitations, used by legislatures to limit the window of time a lawsuit may be commenced, protects defendants and assists the court in their pursuit of truth, but it is diametrically opposed to the notion of repressed memories.⁸⁸ The statute of limitation provides a qualified freedom from unending harassment of judicial process that is one of the hallmarks of justice.⁸⁹ Statutes of limitation are a necessary evil that counterbalance the ambition of the law — to provide a remedy for every wrong — because it has traditionally been viewed that forcing one to answer a stale claim is a substantial wrong in and of itself.⁹⁰ Justice requires that

[n]o civilized society . . . lay claim to an enlightened judicial system which puts no limits on the time in which a person can be compelled to defend against claims brought in good faith, much less whatever stale, illusory, false, fraudulent or malicious accusations of civil wrong might be leveled against him.⁹¹

The threat of litigation is a stress inducing fear that is in itself punishment that should not be suffered indefinitely.⁹² As time passes, claims tend to become more elaborate, specious, and embellished, and minor grievances can morph into outlandish claims.⁹³ The main reason

87. See *Lemmerman*, 534 N.W.2d 695; see also *Guerra*, 564 N.W.2d 121. The holding in *Guerra* closed any possible use of the insanity provision that was left after the decision in *Lemmerman*.

88. *Tyson*, 727 P.2d at 227.

89. *Ruth v. Dight*, 453 P.2d 631, 634 (Wash. 1969).

90. Compare *Ruth*, 453 P.2d 631 with *Lenawee County v. Nutten*, 208 N.W. 613, 614 (Mich. 1926) (“statutes of limitation are intended to remedy . . . the *general inconvenience* resulting from delay” in asserting a legal right) (emphasis added) (internal citations omitted).

91. *Ruth*, 453 P.2d at 634.

92. See *Doe v. Roman Catholic Archbishop of Archdiocese of Detroit*, 692 N.W.2d 398 (Mich. Ct. App. 2004).

93. *Ruth*, 453 P.2d at 634.

stale claims present a problem is the dissipation of evidence.⁹⁴ Crucial eyewitnesses may die or cannot be located. Physical evidence becomes misplaced or was not originally collected because its significance was unknown.⁹⁵ Inherently, most of the evidentiary issues addressed by statutes of limitation are present in cases based on repressed memories.

If a plaintiff is unaware of an event that gives rise to his cause of action for some time, it is logical to conclude that no evidence would have been gathered or witness testimony secured. This lack of evidence in cases involving repressed memories undermines a court's ability to determine the facts pertinent to the cause of action.⁹⁶ To that end, and to ensure fairness to the defendant to be free of stale claims, statutes of limitation require prompt prosecution of cases by plaintiffs.⁹⁷

In its basic application, a statute of limitations is deemed not to present a hardship to the plaintiff because the plaintiff will have notice of the wrong or injury done to him at the time it is committed and the short window of opportunity is ample for the claim to be brought to court.⁹⁸ However, because limitation periods are procedural and not substantive, they are not absolute and may not be followed if the plaintiff is able to demonstrate that upholding the statute of limitations is "so harsh and unreasonable in its consequences that it effectively divests 'plaintiffs of the access to the courts intended by the grant of the substantive right [of due process].'"⁹⁹ One such exception created by the judiciary to avoid harsh and unjust results to a plaintiff is the "discovery rule." The discovery rule prevents the statute of limitations from commencing if the plaintiff is unable to discover his injury or unable to discern the causal connection between the injury and the defendant's actions.¹⁰⁰ Michigan's courts have historically and continually declined to extend the discovery rule to cases involving repressed memories.¹⁰¹

B. The Policy Underlying the Application of the Insanity Tolling Provision

In facing repressed memories for the first time, the Michigan courts opted to stick with a statutory exception to the statute of limitations, and toll the limitation period with the insanity provision.¹⁰² The insanity

94. *Tyson*, 727 P.2d at 228.

95. *Id.*

96. *Id.*

97. *Wright v. Rinaldo*, 761 N.W.2d 114 (2008).

98. *Lenawee County*, 208 N.W. at 613.

99. *Forest v. Parmalee*, 262 N.W.2d 653, 657 (Mich. 1978).

100. *Brennan v. Edward D. Jones & Co.*, 626 N.W.2d 917, 919 (Mich. Ct. App. 2001).

101. *See generally Meiers-Post*, 427 N.W. 2d 606 and *Lemmerman*, 534 N.W.2d 695.

102. *See Tyson*, 727 P.2d 226.

provision allows a plaintiff to get around the limitation period if his mental condition is such that they were unable to comprehend the rights he was otherwise bound to know at the time of the defendant's actions.¹⁰³ Being mindful that the purpose behind the statute of limitations is to prevent the prosecution of stale claims, the court in *Meiers-Post* allowed the plaintiff to overcome the statute of limitations when there was corroboration of the plaintiff's claim.¹⁰⁴ The main concern of courts, in making similar decisions, is to bar the case where there is entirely no corroboration of the plaintiff's claim because this scenario is clearly on point with the policy underlying the statute of limitations.¹⁰⁵ But, where the evidentiary record justifies the plaintiff's cause of action by clear support the balance is in favor of not precluding the plaintiff's access to justice, and the defendant's right to be free from the never-ending threat of litigation must yield.¹⁰⁶

Having verifiable corroborating evidence in the record avoids the evidentiary issues underlying the statute of limitations.¹⁰⁷ In *Meiers-Post*, it was the defendant's admission of sexual abuse that provided the verifiable corroborating evidence. The evidentiary standard needed to overcome the statute of limitations was never elaborated in the cases that followed *Meiers-Post*.¹⁰⁸ The evidentiary standard of verifiable corroborating evidence almost never existed at all. In *Tyson*, the case relied heavily upon in *Meiers-Post*, the dissent argued vigorously that the prerequisite of objective verifiable evidence was not needed where the court entertained "swearing contests" (one's word versus another's) in the past, and that the main concern at the pre-discovery point of litigation is the plaintiff's opportunity to prove his case, not whether they will be able to do so.¹⁰⁹ *Meiers-Post*, however, presented perfectly verifiable evidence and left the court free to make their decision without arguing the intricacies of the *Tyson* decision.¹¹⁰

Nevertheless, it seemed that the court in *Meiers-Post* carved a niche exception into the rigid application of the statute of limitations that would allow a plaintiff to present a case based on repressed memories

103. MICH. COMP. LAWS § 600.5851(1)-(2) (2000).

104. *Meiers-Post*, 427 N.W.2d at 610 or *Tyson*, 727 P.2d at 235 (Pearson, J. dissenting); *Ruth*, 453 P.2d at 635 (balancing "the harm of being deprived of a remedy versus the harm of being sued [on a stale claim]").

105. See *Meiers-Post*, 427 N.W.2d at 610 (discussing the concerns of the courts making the decisions it relied on in its decision).

106. *Id.*

107. See generally *Ruth*, 453 P.2d 631; *Doe*, 692 N.W.2d 398.

108. See generally *Lemmerman*, 534 N.W.2d 695; *Guerra*, 564 N.W.2d 121.

109. See *Tyson*, 727 P.2d at 232 (Pearson, J. dissenting).

110. See *Meiers-Post*, 427 N.W.2d at 610.

when he could present corroborating evidence sufficient to prove that his claim was not stale. The protections afforded by the statute of limitations were still honored. The key behind limitation periods is mainly the evidentiary burden. But when plaintiffs can demonstrate corroborating evidence, the risk of stale claims is nullified, and there are less evidentiary concerns than a case that would be barred by the limitations period. *Meiers-Post* at least provided a plaintiff suffering from repressed memories a narrow window to overcome the statute of limitations.¹¹¹

C. The Toppling of *Meiers-Post*'s Significance

Lemmerman, the case that followed *Meiers-Post*, was nearing the other side of the evidentiary spectrum in relation to its predecessor. In *Lemmerman*, the court was not even faced with a "swearing contest." Before the court was a single plaintiff suing her father's estate who alleged that he had corroborated her repressed memories of sexual abuse before his death.¹¹² It was clear that there was no way the court would allow the plaintiff to overcome the statute of limitations on what could have arguably been completely fabricated facts. What was not expected was the breadth of power and subsequent impact the *Lemmerman* decision would carry with it. The only remaining hope for plaintiffs suffering from repressed memories to overcome the statute of limitations was the interpretation of the opinion's footnote, which read to the effect that the *Lemmerman* decision did not affect the precedent of *Meiers-Post*.¹¹³ However, the footnote misstated the evidentiary standard of *Meiers-Post* as requiring an express unequivocal admission even though *Meiers-Post* never stated the need for an express unequivocal admission.¹¹⁴ This mischaracterization of *Meiers-Post* and the subsequent disregard of *Meiers-Post* in *Guerra* are judicial errors that could be remedied to fix the injustice of *Demeyer*.

There is no denying that *Lemmerman* was surely going to be decided for the defendant when considering the evidentiary concerns of the statute of limitations. The court's broad holding, however, seemed to be at odds with the precedent before it. Consistent with *Lemmerman*, however, the court of appeals dealt the final blow to *Meiers-Post* by characterizing the exception-bearing footnote of *Lemmerman* as solely

111. See *id.* (stating that verifiable corroborating evidence opens a narrow window).

112. See *Lemmerman*, 534 N.W.2d at 696.

113. See *id.* at 702.

114. Compare *Lemmerman*, 534 N.W.2d 695 with *Meiers-Post*, 427 N.W. 2d 606 (requiring corroborative evidence).

addressing the retroactivity of *Lemmerman*.¹¹⁵ The court in *Guerra* refused to recognize an exception because the court in *Lemmerman* chose to defer to the legislature for any tolling of the statute of limitations.¹¹⁶ This author is not the first to express disbelief and frustration with the holding of *Lemmerman* and the interpretation in *Guerra*.¹¹⁷

D. The Case for Demeyer and the Judicial Remedy That Should Have Been

In reading the majority opinion in *Demeyer*, it is clear that the justice penning the opinion, then Chief Justice Corrigan, was uneasy with the broad holding of *Lemmerman* and believed that an exception based on *Meiers-Post* should exist.¹¹⁸ The majority and concurrence both recognized that the court was bound to find for the defendant based on *Guerra* and *stare decisis*.¹¹⁹ The concurrence and majority disagreed as to whether the exception that could have been created in *Lemmerman* required an express admission and whether it would be applicable in *Demeyer*.¹²⁰ The majority specifically set out that if not for *Guerra*, the Court would have focused on whether there was assurance of reliable fact-finding when deciding to toll the statute of limitations or not because the court in *Lemmerman* implicitly accepted the premise that “[i]n cases supported by admissions, courts are essentially asked to recognize memory repression as a verifiable basis for a person’s inability to bring his claim within the limitation period.”¹²¹

Reliable fact-finding is the essential prerequisite to allow the statute of limitations to toll. It is the only way to ensure that the plaintiff’s harsh detriment of being denied legal remedy may actually outweigh the defendant’s burden of the threat to be sued. The evidentiary issues underlying the statute of limitations are all avoided and irrelevant.¹²² Essentially, *Demeyer* is the case that fell short of the unequivocal admission in *Meiers-Post*, but that still satisfied all of the Court’s concerns addressed when it examined *Tyson* for its decision.

In *Demeyer*, the defendant admitted to massaging the plaintiff’s chest and stomach, and also to inappropriately massaging other altar

115. *Guerra*, 564 N.W.2d at 124.

116. *Id.* at 125.

117. *See Demeyer*, 593 N.W.2d 560 (indicating the court’s frustrated desire to find for the plaintiff).

118. *Id.* at 562-64.

119. *See id.* at 564 (Sawyer, J., concurring).

120. *Id.* at 562-64.

121. *Id.* at 563.

122. *See generally Meiers-Post*, 427 N.W. 2d 606 and *Lemmerman*, 534 N.W.2d 695.

boys while each wore only his underwear.¹²³ Psychologists *examined the defendant* and found the plaintiff's claims to be well founded.¹²⁴ The Archdiocese even sent the defendant to treatment, which resulted in a drug prescription for the priest to curb his sex drive.¹²⁵ The priest had also been accused of previous sexual misconduct.¹²⁶

The evidentiary concerns that were highly examined by the court in *Meiers-Post* are almost equally satisfied in *Demeyer*, and as required by the holding of *Meiers-Post*, *Demeyer* provided "corroboration for [the] plaintiff's testimony that the sexual assault occurred."¹²⁷ *Demeyer* provided reliable fact-finding that would have prevented the defendant from becoming a victim of a stale claim. It appears that the plaintiff could have brought forth no more evidence but an unequivocal admission by the defendant. Like the majority opinion in *Demeyer*, this author feels that the court in *Guerra* made the wrong decision and have thus precluded meritorious claims like *Demeyer* from accessing justice.

The Supreme Court of Michigan had their chance to correct *Demeyer*, but failed and instead interpreted *Meiers-Post* as requiring an express unequivocal admission.¹²⁸ The author concedes that *Meiers-Post* did not address the question of repressed memories absent an unequivocal admission, but the court's opinion laid the ground work for cases like *Demeyer* to proceed past summary disposition because they are removed from being stale claims due to the presence of verifiable corroborative evidence.¹²⁹ Making the failure of the Michigan courts to correct their decisions in *Guerra* and *Lemmerman* and to allow justice to *Demeyer* even worse is their acknowledgment of "the plight of sexual abuse victims, especially those victimized by Catholic priests..."¹³⁰

The Michigan Supreme court should narrow the holding of *Lemmerman* to address only those cases outside the court's reasoning in *Meiers-Post*. The discovery rule and the insanity grace period should never apply, absent legislative action, to claims that are premised on unverifiable evidence that calls into question the corroboration of the claim. The evidentiary burden should not be heightened from objective verifiable evidence that corroborates the plaintiff's testimony (built from *Tyson* and *Meiers-Post*) to the unequivocal admission required by the Michigan Supreme Court in *Demeyer*. The concern of the statute of

123. *Demeyer*, 593 N.W.2d at 561

124. *Id.*

125. *Id.*

126. *Id.*

127. *Meiers-Post*, 427 N.W. 2d at 610.

128. *Demeyer*, 608 N.W.2d at 810 (Weaver, C.J., concurring).

129. *Meiers-Post*, 593 N.W.2d at 610.

130. *Doe*, 692 N.W.2d at 401.

limitations is the ability to bring a claim, not the ability to prevail on it. The mountain of evidence presented nullified the underlying policy of the statute of limitations: thus, Demeyer should have been entitled to his day in court. The Michigan Supreme Court should re-examine the body of law before it and apply *stare decisis* properly. *Demeyer* presented an almost perfect factual scenario for reform. The injustice suffered by *Demeyer* could be avoided in the future with the simple judicial remedy of limiting the holding of *Lemmerman*, and correcting the decision of *Guerra*.

V. LEGISLATIVE ACTION

Because Michigan, like so many other jurisdictions, has decided that the power to remedy cases like *Demeyer* falls squarely within the legislature's power, the remainder of this Note will examine how other jurisdictions handle repressed memories and propose legislation that could better handle repressed memories in future litigation.¹³¹ The rationale behind the decision to leave change to the legislature is the judiciary's inability to make a precious judgment call between the effects of any decision they may make against the effect of potentially open-ended claims against defendants and society in general.¹³²

A. No Statute of Limitation

One of the simplest ways that states have handled the problems associated with repressed memories is to make them exempt from statutes of limitation. One such jurisdiction is Nevada.¹³³ In Nevada, the statutes of limitation used to not bar actions of an adult survivor asserting a claim of child sexual abuse when the plaintiff could demonstrate by clear and convincing evidence that there in fact was sexual abuse, by the named defendant, during the plaintiff's minority.¹³⁴ If the plaintiff is unable to meet the requisite evidentiary burden, the claim was instead subjected to the two-year period of limitation provided by statute.¹³⁵

131. See generally *Lemmerman*, 534 N.W.2d 695; see also *Bassile*, 575 N.Y.S.2d 233.

132. *Bassile*, 575 N.Y.S.2d at 236 ("The argument [for a discovery rule] is not new. We have carefully considered it on numerous occasions. In each, we weighed the detriments of such a result against the effect of potentially open-ended claims upon the repose of defendants and society, and held that the statute of limitations must run from the time of the act until the Legislature decrees otherwise . . .") (citing *Goldsmith v. Howmedica, Inc.*, 491 N.E.2d 1097, 1099 (N.Y. 1986)).

133. See generally *Petersen*, 792 P.2d 18.

134. *Id.*, at 24-25.

135. *Id.*; see also Nev. Rev. Stat. § 200.366 (2007).

At first glance this scheme seems that it would be beneficial to plaintiffs similarly situated to Demeyer. However, upon further examination, this author believes that by having to meet the clear and convincing evidentiary standard enunciated in *Petersen v. Bruen* the decision that would need to be reached by the Michigan court's would be those same decisions argued in the first half of this Note's analysis section. By asking the plaintiff to prove his case by clear and convincing evidence, the court is essentially asking the plaintiff to demonstrate that there exists sufficient evidence to remove the plaintiff's claim from the realm of stale claims, thus placing the same decisions in the court's hands that would require analysis of objective and verifiable evidence and re-examination of the *Lemmerman* footnote.

For the foregoing reasons, this Note will no longer wrestle with the possible use of the statutory scheme employed in Nevada. Additionally, a past article, long before the decision in *Demeyer*, proposed the use of the Nevada legislation, but due to the cases after the publication of that article the argument to be made is redundant for purposes of this Note.¹³⁶

B. The Discovery Rule

In general, a cause of action accrues when the plaintiff is injured, whether or not he knows of the wrong or injury, and that accrual of his cause of action starts the statute of limitations.¹³⁷ The discovery rule, however, lengthens the statute of limitations by delaying the cause of action from accruing until the plaintiff knows or should have known of the defendant's conduct giving rise to their injury.¹³⁸ Although Michigan has previously declined to extend a discovery rule to the application of the statute of limitation, the legislature could choose to recognize a discovery rule in limited instances.¹³⁹ Michigan and other state legislatures, such as New York, have passed statutes codifying discovery rules for causes of action including medical malpractice and toxic

136. Silberg, *supra* note 18, at 1597.

137. See generally *Bassile*, 575 N.Y.S.2d 233.

138. *Logerquist v. Danforth*, 932 P.2d 281, 284 (Ariz. Ct. App. 1996) (discussing the common law discovery rule used in Arizona). It should be noted that there exists discovery rules that prolong the statute of limitations by delaying when it begins, see Nev. Rev. Stat. § 200.366 and there are tolling provisions that suspend the period of limitations. For a detailed analysis and difference, see *Hearndon v. Graham*, 767 So.2d 1179, 1184-85 (Fla. 2000).

139. For denying application of the discovery rule, see *Meiers-Post*, 427 N.W. 2d at 610.

torts.¹⁴⁰ Michigan's codification of a discovery rule in the realm of professional malpractice allows a plaintiff to bring a claim within two years or "within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later."¹⁴¹

The rationale for allowing the discovery rule to toll the accrual of a cause of action and thus delay the statute of limitation is fairly straightforward. Courts believe that the application of the discovery rule is fair.¹⁴² A victim of certain torts has no reason to know he was damaged until manifestations of his injury exist, and it would be unjust to deprive a victim of a claim before he has reason to believe that the claim exists.¹⁴³ Not allowing a plaintiff to bring a cause of action once he is aware that his claim exists would foreclose plaintiffs from bringing any claim based on a hidden injury if the injury was not discovered within the applicable statute of limitation.¹⁴⁴

Applying the discovery rule liberally to cases of sexual abuse premised on repressed memories appears to be the modern trend in American jurisprudence.¹⁴⁵ The two reasons enunciated by one Florida court, include: (1) the wide recognition that repressed memories of sexual abuse are possible, if not rampant, and (2) that it is only fair and consistent to apply the rule to a uniquely sinister and heinous tort in comparison to its current applications.¹⁴⁶ This seems to make perfect sense. Courts have even wrestled with the considerations of stale claims and lack of evidence that underlie the statutes of limitation. Seemingly revolutionary in light of Michigan's stance, the courts that apply a

140. N.Y.C.P.L.R. §214-a to -c (McKinney 2010), all cited in *Bassile*, 575 N.Y.S.2d 233. N.Y.C.P.L.R. §214-c, since *Bassile*, has been constitutionally preempted. Proposed legislation is in the process of amending it, but the discovery aspect remains codified in the proposed legislation. See also MICH. COMP. LAWS §§ 600.5838, 600.5838(a) (2010). Michigan's statutory discovery rules prolong the statute of limitations and not the accrual of the claim. See also MICH. COMP. LAWS § 600.5827 (2010), which governs the accrual of a claim in general. However, for purposes of this Note, the difference between the exact mechanism is irrelevant and was only discussed at length in *Logerquist*, 932 P.2d 281, due to the statutory scheme and legislative intent of that jurisdiction.

141. MICH. COMP. LAWS § 600.5838.

142. *Hearndon*, 767 So.2d at 1186. Even though a large number of discovery rules are created and applied by the courts, the same concerns underlie that application that would underlie a legislative codification of a discovery rule.

143. See *Doe v. Roe*, 955 P.2d 951, 960 (Ariz. 1998).

144. Such "hidden" injuries include breaches of implied warranties or medical malpractice (see *Hearndon*, 767 So.2d at 1186) or toxic torts (see *Bassile*, 575 N.Y.S.2d 233).

145. See, e.g., *Ault*, 637 N.E.2d at 871-73 (recognizing the application of the discovery rule to the accrual of a claim for sexual assault when the plaintiff suffers from repressed memory).

146. *Hearndon*, 767 So.2d at 1186.

discovery rule to repressed memory cases feel that the discovery rule does not prejudice defendants, and that the defendant's burden is much less than the greater injustice of the plaintiff being robbed of a remedy.¹⁴⁷ The concern that there will be a lack of evidence is not protected by the statute of limitation but still must be overcome by the plaintiff when presenting his case.¹⁴⁸ This seems to be a logical and fundamentally fair way to address the problems with repressed memories.

Some jurisdictions, such as Oklahoma, take application of the discovery rule to stringent new heights and require that objective verifiable evidence also be presented to warrant the application of the discovery rule.¹⁴⁹ Not only is the plaintiff required to produce evidence that the abuse actually occurred but also that his memory was repressed.¹⁵⁰ This view, although more in line with the focus of the Michigan courts, is not the majority rule and is contrary to the application of the discovery rule by most courts.¹⁵¹ This heightened evidentiary standard would require the plaintiff to prove his case before even getting to discovery. This is a very rare pleading requirement.¹⁵² No other applications — to different causes of action — of the discovery rule, including Michigan's currently codified version, require the plaintiff to meet an evidentiary burden to overcome the statute of limitation.¹⁵³ Placing a burden on the plaintiff to prove his memory was repressed and to present objective verifiable evidence of his claim in order to overcome the statute of limitation essentially takes us back to the debate that went on in Michigan's earliest case law dealing with repressed memories. Such a standard seems ridiculous in light of how other states apply the discovery rule — whether judge made or legislative.

147. *Logerquist*, 932 P.2d at 287 (citing *Ault*, 637 N.E.2d at 872).

148. *Id.*

149. OKLA. STAT. tit. 12, § 95(6) (2010).

150. *Id.*

151. *Logerquist*, 932 P.2d at 287. This opinion actually demonstrates the spectrum of current ways used to handle repressed memories. That spectrum includes liberal application of the discovery rule at one end, with Michigan's current refusal to apply the discovery rule at the other end. In the middle of the spectrum lies Oklahoma's discovery rule with the heightened evidentiary burden.

152. See 15 U.S.C. § 78 (1995) (popularly known as the Private Securities Litigation Reform Act) for heightened pleading requirements for securities litigation that require very detailed pleading to avoid mandatory application of FED. R. CIV. P. 11 sanctions. See also FED. R. CIV. P. 9.

153. MICH. COMP. LAWS § 600.5838.

C. The Way the Michigan Legislature Can Correct Demeyer

Michigan's best hope to provide justice to plaintiffs similarly situated to Demeyer is to pass legislation providing a discovery provision for claims of child sexual abuse. This seems to be the most suitable alternative over passing legislation that makes claims of sexual abuse exempt from a statute of limitation. Making claims of sexual abuse entirely excused from any statute of limitation would completely undermine the rationale for having the statute of limitation, and would allow plaintiffs to abuse the system. Plaintiffs that clearly recognized the accrual of their claim would be free to wait years to bring suit against the defendant. Having no statute of limitation in cases of child sexual assault, although helpful to Demeyer, would be a poor legislative decision.

The Nevada approach, from *Petersen*, although still open to abuse by plaintiffs cognizant of their claim, could be helpful to Demeyer. It is arguable whether the evidence presented in Demeyer would be clear and convincing evidence of sexual abuse. Recall that in *Demeyer*, the church sent the priest for treatment — including curbing his sex drive, psychiatrists and concluded that the plaintiff's claim was well founded, and the priest admitted to massaging the plaintiff while wearing only underwear.¹⁵⁴ Giving the plaintiff, Demeyer, the benefit of the doubt, it is possible that a fact finder could conclude by a preponderance of the evidence that a sexual assault occurred. However, clear and convincing proof is a higher standard than preponderance of the evidence and it is likely Demeyer would fall short. For this reason, and because the heightened pleading of clear and convincing proof is fundamentally unfair, for the situation, in this author's eyes, the Nevada approach is not the best option for Michigan's legislature.

The discovery rule is perfect and tailor-made for repressed memory plaintiffs. It is fundamentally fair to apply it. It is already applied to malpractice cases and toxic tort cases where plaintiffs are unaware of their injury or unaware of a causal connection. The utter heinousness of child sexual abuse cases warrants that sexual abuse should qualify for similar application of a discovery rule. Michigan should follow the emerging trend of American jurisprudence and liberally apply the discovery rule to cases of sexual abuse premised on repressed memories. Michigan's existing discovery rules operate by extending the statute of limitation and not delaying the accrual of the plaintiff's claim—although

154. *See Guerra*, 564 N.W.2d at 124; *see also Demeyer*, 593 N.W.2d 560.

the same result is reached. Therefore this author proposes that legislation be passed reading:

A claim based on the sexual abuse of a person accrues at the time of the harm.¹⁵⁵ An action involving a claim based on sexual abuse of a person may be commenced at any time within the applicable period prescribed by section 5805 or within six months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later.

This statute would read very similar to the malpractice discovery rules already in place. This new legislation would allow plaintiffs like Demeyer, and all other plaintiffs suffering from repressed memories of sexual abuse, to bring their claims into court. The cases could be properly adjudicated on the merits, instead of preliminarily disposed. Any evidentiary inadequacies would become apparent during discovery and defendants would still be able to avoid trial. This method should be preferred because the monetary and reputational burden placed on the defendant in the assertion of an action is nothing compared to the burden placed on a plaintiff that is unable to access justice with a meritorious claim.

The Oklahoma discovery rule with a heightened evidentiary burden was not selected because the evidentiary burden again places too high of a step in front of the plaintiff at such an early stage in the litigation. In Michigan, a plaintiff asserting professional malpractice is not required to plead his case with objective verifiable evidence to overcome the statute of limitation. With sexual abuse being so much more despicable, it only follows that plaintiffs asserting a delayed claim should likewise not be held to such a high evidentiary burden at the onset of a suit.

This Note is not advocating that a plaintiff asserting a claim of sexual abuse premised on repressed memory should not have to carry his full evidentiary burden. It is this Note's position that the burden should not be carried at the pleading stage of the controversy. Many cases get past pleading and never make it to trial. Many of those cases are still considered victories for the plaintiff by virtue of the compensatory settlements awarded to the plaintiffs. Although the defendants are exposed to having to defend the suits, even those later determined frivolous, this inconvenience seems minor in relation to the criminal penalties and subsequent treatment available if the allegations have merit. The legislation proposed in this Note would open the door to

155. To be consistent with MICH. COMP. LAWS § 600.5827 (2010).

justice for those plaintiffs that suffer from repressed memories and avoid the automatic preclusion—absent a confession—from justice that they are now faced with in the justice system. It's time the civil system took a hint from the criminal system's treatment of child sexual assault.

VI. CONCLUSION

Horrendous acts of sexual abuse that force the victims to repress the memories of their attack should not also give the potential defendants a free pass on their conduct. Michigan has been hesitant to extend the chance at justice to plaintiffs suffering from repressed memories of sexual assault. It could be the conservative nature of the court system that makes the court reluctant to recognize repressed memories and follow suit with the ever-growing number of jurisdictions. Nonetheless, Michigan should take steps to make justice accessible to those plaintiffs. Whether it is accomplished through the judiciary correcting its past interpretations and providing a narrow gate for the plaintiff to walk through, or by the legislature passing a wider discovery rule similar to those already employed for other torts, Michigan needs to take action to correct this serious deterioration of justice.

DEMANDING MORE FROM MICHIGAN'S CHARTER SCHOOLS

TRACY PETERS¹

I. INTRODUCTION	555
II. EXAMINATION OF MICHIGAN'S CHARTER SCHOOLS.....	559
III. ECONOMIC SEGREGATION IN MICHIGAN'S CHARTER SCHOOLS	564
A. <i>Examination of Michigan's PSAs</i>	564
B. <i>Federal Legislation Increases Economic Segregation in Michigan's PSAs</i>	568
C. <i>Economic Segregation is Harmful to Michigan's Schoolchildren</i>	571
IV. THE NEGATIVE IMPACT OF CHARTER SCHOOLS ON DETROIT'S NEIGHBORHOODS.....	575
V. REVERSING ECONOMIC SEGREGATION IN MICHIGAN'S PSAs	577
A. <i>Changes To Michigan Legislation</i>	577
B. <i>Changes to Federal Legislation</i>	579
C. <i>Charter Schools That Work for Michigan</i>	580
VI. CONCLUSION.....	583

I. INTRODUCTION

Michigan charter schools now compete with traditional public schools for scarce state resources. Since charter schools receive generous amounts of public dollars, it is time for parents and state regulatory agencies to contest their legitimacy and assess their performance of a state regulated function – education. Whether public schools draw checks to the charters, the state forwards a portion of what public schools would have received to charter schools, or the state's discretionary resources – which could have been used to improve public schools – are slated for charter schools. The result is that traditional public schools have fewer dollars to deliver education and services. With this grant of public monies comes the corresponding responsibility for charter schools to provide racially and economically diverse schools that offer comparable educational services to similar students.

The nature and characteristics of charter schools depend on the approach adopted by a state's applicable charter school legislation.² In

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Michigan, this legislation relieves charter schools from many state mandates to which traditional public schools are subject. Charter school proponents contend that such freedom has a number of benefits, including: engendering a more creative approach to teaching and learning, helping schools serve as models of educational reform strategies, making schools more reflective of parent and community priorities, and proving more cost-effective to operate. In education this belief in business principles and market forces leads to the proposition that "all schools will succeed if there is competition." Instead of solving academic problems such as reading levels or improved student assessment, charter school legislation redesigns a school system's management and structure by concentrating on incentives and sanctions. Charter school advocates insist that freedom from government regulation will solve many of the problems incumbent upon public education today.

Despite purported efficient management principles, many Michigan charter schools leave behind the state's most economically disadvantaged children because the state's charter school legislation creates educational environments that become racially and economically segregated.³ In theory, charter schools cannot pick and choose students because they are public schools. In practice, however, charter schools have far more control over student characteristics than the traditional public school counterparts. In Michigan and other states, for example, charter schools are authorized to shape student enrollment through recruitment and marketing efforts, parental involvement requirements, and discipline or expulsion practices.⁴

Though recent research reveals both racial and economic segregation in Michigan's charter schools, this Note focuses solely on economic segregation.⁵ Economically segregated learning environments particularly disadvantage low-income students, and evidence has emerged that the level of poverty in a school can affect academic outcomes.⁶ Since Michigan's public charter schools are clustered in high-

2. For background on the charter school movement, see generally RAY BUDD, *EDUCATION BY CHARTER: RESTRUCTURING SCHOOL DISTRICTS: KEY TO LONG-TERM CONTINUING IMPROVEMENT IN AMERICAN EDUCATION* (1988).

3. GARY MIRON, ET AL., *EDUC. AND THE PUB. INTEREST CTR. & EDUC. POL'Y RESEARCH UNIT, SCHOOLS WITHOUT DIVERSITY: EDUCATION MANAGEMENT ORGANIZATIONS, CHARTER SCHOOLS, AND THE DEMOGRAPHIC STRATIFICATION OF THE AMERICAN SCHOOL SYSTEM* 26 (Feb. 2010), <http://nepc.colorado.edu/files/EMO-Seg.pdf>.

4. AMY STUART WELLS, *UCLA CHARTER SCH. STUDY, BEYOND THE RHETORIC OF CHARTER SCHOOL REFORM: A STUDY OF TEN CALIFORNIA SCHOOL DISTRICTS* 43 (1998).

5. See generally MIRON, *supra* note 3.

6. Russell Rumberger, *Parsing the Data on Student Achievement in High Poverty Schools*, 85 N.C. L. REV. 1293 (2007).

poverty urban areas,⁷ there is an immediate need to evaluate the state's charter schools and its charter school legislation. Significantly, Detroit Public Schools (DPS) is also Michigan's largest school district, and thus stands to lose the most from economically segregated charter schools.

Charter schools also present a timely issue for Detroit as their growth coincides with mayoral efforts to "resize" the city. Since quality schools are a central piece of the Mayor's efforts to incentivize residential movement to strong, viable neighborhoods there is an urgent need to determine whether Detroit's schools will maintain their traditional public school status or convert to charter schools. Currently, Michigan's charter school legislation operates against the Mayor's commitment to building strong residential neighborhoods because it provides for schools to be built and/or created outside of the very neighborhoods they serve. Economically segregated schools therefore impact public education at both the state and local levels.

Michigan's strong charter school legislation gains further support from the federal government's advocacy of charter schools as an educational reform tool under its "Race To The Top" (RTTT) initiative. RTTT is a competitive federal grant program included in the "No Child Left Behind" (NCLB) legislation. Congress enacted NCLB in the spirit of the Elementary and Secondary Education Act (ESEA) of 1965, which expressed as its primary goal the creation of equitable educational opportunities for low-income schoolchildren in rural and urban areas. Significantly, NCLB holds schools and school districts accountable for demonstrating annual progress in improving the achievement of all students, including major racial and ethnic groups, English learners, and poor students. Thus, a traditional public school with high-poverty enrollment is at a disadvantage when it must compete against a charter school whose membership does not reflect similar levels of poverty.

Ironically, though one of RTTT's objectives is ensuring economic diversity in our nation's public schools, this federal grant program actually incentivizes state-created schools that produce the opposite result – charter schools that are economically segregated. If Michigan continues to apply for additional RTTT grant monies, this state action will continue to have a disparate impact on Michigan's poorest schoolchildren and school districts. Although NCLB advocates charter schools as a tool for turning around low performing schools, this objective should not be achieved at the expense of our nation's most economically disadvantaged students.

7. CITIZEN'S RESEARCH COUNCIL OF MICH., REPORT 364, NONTRADITIONAL K-12 SCHOOLS IN MICHIGAN 14 (Sept. 2010) [hereinafter *NONTRADITIONAL K-12 SCHOOLS*] (noting that Detroit has the second highest enrollment of charter students nationwide).

Despite existing federal and state legislation, Michigan's charter schools can effectively serve their students by adopting the following suggestions. First, Michigan's existing charter school legislation should be amended to reflect a state commitment to economically integrated public schools, and any new applicants for charter schools should reflect this sentiment in proposed charter documents. Second, Michigan should not apply for additional RTTT funding until federal legislation has been amended to reflect the original spirit of the ESEA. Finally, new charter schools in Michigan should follow charter schools' original design as introduced by Ray Budde and Albert Shanker in the 1980s⁸ Collectively, these changes will help ensure economically diverse public schools that effectively serve all of Michigan's schoolchildren.

In sum, this Note begins in Part II by providing background on the development of Michigan's charter schools. In Part III, this Note discusses the effects of Michigan's current charter school legislation on both Michigan's schoolchildren and its traditional public school districts; and summarizes charter school related provisions of federal "Race to the Top" legislation. In Part IV, this Note identifies the disconnect between Detroit's effort to "resize" the city and the city's explosion of charter schools. Finally, in Part V, this author proposes amended language to both state and federal education legislation, and recommends a model for successful Michigan charter schools that reflect the diversity of their neighboring communities.

With the recent twentieth anniversary of the United States' first charter school law, educators, school districts, and parents alike are waiting to learn the effectiveness of this relatively "new" idea in public education. Currently, public charter schools enjoy "immunity" because there is no conclusive nationwide data on individual charter school student achievement over time, or on the effects that public charter schools have on their students and host communities. When Michigan's results become available, however, state charter school legislation should be revisited and amended.

This Note presents preliminary data which is not reflective of all Michigan charter schools, however, some troubling truths have emerged which will adversely affect the character of public education in Michigan if neglected.

8. DIANE RAVITCH, *THE DEATH AND LIFE OF THE GREAT AMERICAN SCHOOL SYSTEM: HOW TESTING AND CHOICE ARE UNDERMINING EDUCATION* 22 (2010) (describing original charter schools as teacher-created "mini-schools" within existing public schools where groups of teachers "pursue[d] innovative ways of educating . . . students").

II. EXAMINATION OF MICHIGAN'S CHARTER SCHOOLS

Simply stated, charter schools have been defined as a combination of public and private schools – in essence quasi-public, quasi-private schools.⁹ Though most often defined in the state's enabling legislation as "public schools,"¹⁰ these schools lack many of the characteristics of a traditional public school. Most charter school programs contain three essential elements: (1) a privately organized corporation or "entity;" (2) a contract or "charter" with the state and organizing body; and (3) some state funding.¹¹ These components are present at some level in all charter school programs. Program requirements do, however, differ significantly among states, depending on that state's enabling legislation and its intended purpose. Importantly, states have unquestioned authority to organize and reorganize systems of public education,¹² and even privatize the delivery of certain public services.¹³

Charter schools in Michigan are referred to as "public school academies" (PSAs).¹⁴ Michigan's enabling legislation, first passed by the legislature in 1993, can be found in the Public School Academies Act, located in Article 1 of the Revised School Code.¹⁵ Current examples of PSAs include urban high school and strict discipline academies, schools of excellence, and cyber schools.¹⁶ Michigan's Public School Academies Act was passed at the end of Governor John Engler's strong crusade for educational reform¹⁷ in which charter school legislation was seen as one of the Governor's three primary educational initiatives.¹⁸ Governor Engler's three consecutive four-year terms allowed him to plan and implement all three of these initiatives in great detail.¹⁹

9. Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment's State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 136 (2000).

10. See MICH. COMP. LAWS § 380.501 (2012).

11. MICH. COMP. LAWS §§ 380.501-380.507 (2012).

12. See generally 1-3 Educ. Law §3.02 (Matthew Bender & Co., Inc., 2010) (regarding the role of state government in education).

13. Council of Orgs. & Others for Educ. About Parochial, Inc. v. Engler, 566 N.W.2d 208 (Mich. 1997) (Boyle, J., dissenting) (acknowledging rule).

14. MICH. COMP. LAWS. §380.501.

15. MICH. COMP. LAWS. §§ 380.501-380.507.

16. NONTRADITIONAL K-12 SCHOOLS, *supra* note 7, at 3.

17. GARY MIRON & CHRISTOPHER NELSON, WHAT'S PUBLIC ABOUT CHARTER SCHOOLS: LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 23-24 (2002).

18. *Id.* at 24 (describing the other two educational initiatives as funding and fiscal reform for existing school districts, and the School of Choice Act).

19. Governor Engler was governor of Michigan from 1991-2002.

Following the Michigan Supreme Court's holding in *Council of Organizations & Others for Education About Parochialaid*,²⁰ in which charter schools were held to be a constitutional use of state resources, Michigan implemented PSAs with great enthusiasm because both Governor Engler and the Michigan legislature viewed PSAs as a potential solution to the state public school's administrative bureaucracy.²¹ As of 2010, an estimated 5,453 charter schools enrolled more than 1.7 million students nationwide²² with Michigan enrolling over 110,000 students in its 299 operating PSAs.²³ Locally, between 32,000 and 34,000 of Detroit's schoolchildren are currently enrolled in the District's seventy-three PSAs, as compared to approximately 73,000 students enrolled in its 173 traditional public schools.²⁴ Significantly, Detroit's charter school enrollment is the second highest nationwide.²⁵

Section 380.501 of Michigan Compiled Laws defines a PSA, describes its scope and authority, and outlines the necessary requirements for its existence.²⁶ Initially, an entity proposes a contract²⁷ – also known

20. *Parochialaid*, 566 N.W.2d 208 (holding that Michigan charter schools are constitutional under Article 8, Section 2 of the Michigan Constitution, which prohibits public funds from going to nonpublic schools).

21. See James N. Goenner, *Michigan's Chartering Strategy*, 12 EDUCATIONNEXT, no. 3, 2012, <http://educationnext.org/michigan%E2%80%99s-chartering-strategy/> (online journal) (summarizing Governor Engler's chartering strategy and his business-model prescription for Michigan's broken school system).

22. CTR. FOR EDUC. REFORM, NATIONAL CHARTER SCHOOL & ENROLLMENT STATISTICS 2010 (2010), <http://www.edreform.com/2012/01/national-charter-school-and-enrollment-statistics-2010/>.

23. *Id.*; see also CTR. FOR EDUC. REFORM, 2011 CHARTER SCHOOL LAWS ACROSS THE STATES: RANKING & SCORECARD 2 (2011) [hereinafter 2011 CHARTER SCHOOL LAWS], <http://www.edreform.com/issues/choice-charter-schools/laws-legislation/> (select publication hyperlink to download).

24. Interview with Dr. Frances Laplante-Sosnowsky, Program Coordinator/Associate Professor, Wayne State Univ. Coll. Of Educ. (Mar. 24, 2011) (on file with author).

25. NAT'L ALLIANCE FOR PUBLIC CHARTER SCH., A GROWING MOVEMENT: AMERICA'S LARGEST CHARTER SCHOOL COMMUNITIES 2 (5th ed. 2010), <http://www.publiccharters.org/publication/?id=119> (select publication hyperlink to download) (Detroit ranks second in the "Top 10" districts serving the highest number of public charter school students nationwide.).

26. MICH. COMP. LAWS §380.501.

27. See MICH. COMP. LAWS § 380.512(2)(d) (2012). This statute defines a "contract" as:

[t]he executive act taken by an authorizing body that evidences the authorization of a public school academy and that establishes, subject to the constitutional powers of the state board and applicable law, the written instrument executed by an authorizing body conferring certain rights, franchises, privileges, and obligations on a public school academy, as provided by this part, and confirming the status of a public school academy as a public school in this state.

as the charter – to an authorizing body.²⁸ “An entity can be a partnership, nonprofit or business corporation, labor organization, or any other association, corporation, trust, or other legal entity.”²⁹ The authorizing body then approves the contract and confers to the entity the power and authority to operate the PSA, subject to certain controls and supervision by the state and authorizing body.³⁰ During the PSA formation and application process, the entity selects and submits the names of the proposed members of the board of directors for the public school academy.³¹ The charter school management company is also introduced at this stage.

Management companies are for-profit, private corporations that serve as third party contractors for the charters. Management companies are hired by the board of directors to complete many of the needed tasks for the formation and operation of the PSA.³² These companies’ most commonly contracted obligations are the hiring and firing of staff, custodial duties, accounting, payroll, taxes, book-keeping, organizing parent-teacher conferences, developing and maintaining budgets, securing of supplies, dealing with vendors, and facilitating the overall startup of the school.³³ Unlike the regulatory and administrative restraints faced by public schools, charter school management companies are allowed more autonomy in the performance of their duties.³⁴ Education Management Organizations (EMOs) – one type of a management company – are “private organization[s] or firm[s] that directly or indirectly receive public funds to manage schools, whether district schools or charter schools.”³⁵

The contract issued to organize and administer a charter school has several specific requirements. Section 380.503(5) of Michigan Compiled Laws lists the minimum required elements in a valid contract for the formation of a Michigan PSA.³⁶ Those elements are:

28. See MICH. COMP. LAWS § 380.512(2)(a) (2012). This statute defines an “authorizing body” as:

any of the following that issues a contract as provided in this part: (i) The board of a school district that operates grades K to 12; (ii) an intermediate school board, (iii) The board of a community college; (iv) The governing board of a state public university.

29. MICH. COMP. LAWS § 380.501(e).

30. MICH. COMP. LAWS § 380.502.

31. *Id.* at §380.502(3)(b).

32. Telephone interview with Michael Graves, President, Southfield Mich. Educ. Support Pers. Ass’n. (Sept. 14, 2010) (on file with author).

33. *Id.*

34. MIRON, *supra* note 3, at 2.

35. *Id.*

36. MICH. COMP. LAWS §380.503(5) (2012).

- (a) the educational goals and methods by which the school will be held accountable;
- (b) a description of the method that will be used to monitor the adherence to those goals and the applicable law;
- (c) a description of the amendment process;
- (d) incorporation of all the elements required in the application;
- (e) an agreement that the employees will be covered by a collective bargaining agreement if authorized by a school board;
- (f) procedures and grounds to revoke the contract;
- (g) the address and location of the school; and
- (h) procedures for financial audits.³⁷

Michigan law does not mandate local control of charter schools.³⁸ Further, the Michigan Supreme Court has held that charter schools may be considered public, irrespective of whether they are under the control of a private board.³⁹

The current structure of state education funding is well suited to support charter schools since it is based on a per pupil allowance system.⁴⁰ This structure was approved in a 1994 state constitutional amendment known as Proposal A.⁴¹ Since Proposal A's enactment, funding to school districts became based largely on pupil head counts, as opposed to local property values.⁴² Per pupil funding provides that if a student leaves a traditional public school for a PSA, that state money received by the school leaves with him or her.⁴³ Consequently, charter schools that fail to attract and retain students will go out of business. In 2009, Michigan PSAs received an average of \$7,412 per pupil, about \$2,000 less than the average per pupil amount for traditional public school districts.⁴⁴ The fact that PSAs receive fewer dollars for each

37. *Id.*

38. *Parochiaid*, 566 N.W. 2d at 221.

39. *Id.* at 218-19.

40. *MIRON*, *supra* note 3, at 44.

41. *Id.* at 22.

42. *Id.*

43. *Id.* at 43.

44. *Id.* at 22.

student they lure away from traditional public schools provides an incentive to seek out the students who are least expensive to educate since the state already compensates PSAs with a lower per pupil amount.⁴⁵ Thus, this funding system provides a clear incentive for charter schools to avoid high-need and high-cost students.

In further support of PSAs, the Michigan Department of Education in 2009 received a Public Charter Schools Program grant for \$22.8 million to be used over a three-year period to provide grants to strengthen the pool of charter school developers and support new charter schools.⁴⁶ This money came from the federal Charter Schools Program (CSP) that was designed to encourage the creation of strong state charter school laws and to expand the number of charter schools by providing support for planning, program design, and initial implementation⁴⁷ and solidified Michigan's firm commitment to charter schools. In combination, these laws and grant monies make Michigan's current charter school laws the fifth strongest in the nation.⁴⁸

Michigan's charter school legislation is based on a free market, or neoclassical theory of economics.⁴⁹ From the neoclassical perspective, incentives and sanctions matter.⁵⁰ Good performance gets rewarded, poor performance is penalized, and employers have the power to hire and fire their employees at will.⁵¹ While perhaps viable as a business model, neoclassicism is not a viable option in the educational setting because it assumes that competition between charter schools and traditional public schools will lead to successful outcomes for students in both settings. In reality, Michigan's traditional public schools are at a huge disadvantage when they compete with charter schools. First, traditional public schools must accept everyone who applies, including the students who leave charter schools. These schools must educate every student, including students with inattentive or absent parents, students with multiple absences, and students with behavior problems. Charter schools often do not compete with traditional public schools for these types of students. Therefore, the market principle that competition fosters mutual school improvement proves to be false because the two types of schools often work with markedly different student populations. As a result of these

45. *Id.*

46. NONTRADITIONAL K-12 SCHOOLS, *supra* note 7, at 40.

47. *Id.*

48. Michigan has the fifth strongest laws out of the forty-one states that have enacted charter school laws. See 2011 CHARTER SCHOOL LAWS, *supra* note 23 (2011 Rank).

49. See generally DOUGLASS C. NORTH, UNDERSTANDING THE PROCESS OF ECONOMIC CHANGE (2005).

50. *Id.*

51. *Id.*

student differences, Michigan's generous charter school legislation often produces public schools that are economically segregated.

III. ECONOMIC SEGREGATION IN MICHIGAN'S CHARTER SCHOOLS

Following *Parochiaid*, state resources provided to charter schools must be used to benefit Michigan's public school students.⁵² Because Michigan's public schools are funded with a per-pupil allotment, the competition for students between PSAs and traditional public schools results in a direct competition for state education dollars.⁵³ Accordingly, the student characteristics of PSA students must reflect those of their traditional public school counterparts. Recent nationwide research, however, suggests that PSAs tend to leave economically disadvantaged students concentrated in the most disadvantaged traditional public schools.

A. Examination of Michigan's PSAs

Despite *Parochiaid*'s mandate, a multistate study by the Evaluation Center, a well-known research group at Western Michigan University, "supports the conclusion that EMO-operated schools have facilitated the creation of segregated learning environments where students are more isolated by race, class, ability, and language than the public school district from which they were drawn."⁵⁴ Gary Miron's findings indicate that federal and state legislation governing PSAs must be amended to remedy this inequitable situation.

The Evaluation Center's study explored the effect of school choice on segregation of public schools.⁵⁵ Although this study showcased nationwide findings about both racial and economic segregation in charter schools,⁵⁶ this note focuses exclusively on the economic segregation that currently exists in Michigan's PSAs.

School districts use the Free or Reduced Price Lunch (FRPL) figure as a proxy for the poverty level of their enrolled students.⁵⁷ "The eligibility guidelines to qualify for a free or reduced price school lunch from July 1, 2009, to June 30, 2010, were obtained by multiplying the year 2009 federal income poverty guidelines by 1.30 (free lunch) or by

52. *Parochiaid*, 566 N.W.2d at 563 (prohibiting public funds from going to nonpublic schools).

53. MIRON, *supra* note 3, at 22.

54. *Id.*

55. *Id.* at 2.

56. *Id.*

57. *Id.* at 77.

1.85 (reduced price lunch) and by rounding the result upward to the next whole dollar.”⁵⁸ Miron’s study relied on this FRPL figure to measure the economic status of Michigan’s PSA students.⁵⁹ For the 2000-2001 school year ninety-eight charter schools – a little more than half of the state’s PSAs – participated in the FRPL program.⁶⁰

Miron examined charter schools nationwide that were operated by Education Management Organizations (EMOs).⁶¹ “An EMO is a private organization or firm that directly or indirectly receives public funds to manage schools, whether district schools or charter schools.”⁶² EMOs manage ninety-five percent of the nation’s charter schools and are required to use the same admission criteria as traditional public schools.⁶³ In Michigan, close to eighty percent of its charter schools are operated by EMOs.⁶⁴ Thus, the study’s general conclusions indicate patterns in Michigan’s EMO-managed PSAs.

There are three types of EMOs: for-profit, non-profit, and a subset of non-profit EMOs called “charter management organizations” (CMOs).⁶⁵ “CMOs are distinguished by receiving substantial financial support from private foundations for the purpose of helping bring, what they believe, are successful models up to scale.”⁶⁶ In Michigan, there are approximately 181 charter schools operated by for-profit EMOs, but less than twenty-five such schools are operated by nonprofit EMOs.⁶⁷

58. 74 Fed. Reg. 58, 13411-12 (Mar. 27, 2009).

59. MIRON, *supra* note 3, at 77.

60. *Id.* at 26.

61. *Id.* at exec. sum.

62. *Id.* at 2.

63. *Id.* at exec. sum.

64. *Education Reforms: Exploring the Vital Role of Charter Schools: Hearing Before the Subcomm. on Early Childhood, Elementary, and Secondary Education of the H. Comm. on Education and the Workforce*, 112th Cong. 4 (2011) (statement of Dr. Gary Miron, Professor, Western Michigan University).

65. MIRON, *supra* note 3, at 2.

66. *Id.* (citing D.E. Meyerson, R. Quinn & M. Tompkins, *Bringing Resources Back On: Philanthropic Elites as Agents of Institutional Change in Education* (Ctr. for Philanthropy & Civil Soc’y, Stanford Univ., Working Paper, 2009). See also *Diligence and Investment*, NEW SCH. VENTURE FUND, <http://www.newschools.org/model/diligence> (last visited Sept. 10, 2012) (select “current investment strategy” hyperlink), for more details regarding the effort to bring in private resources to support charter management organizations.

67. GARY MIRON, ET AL., NAT’L EDUC. POL’Y CTR., *PROFILES OF FOR-PROFIT AND NONPROFIT EDUCATION MANAGEMENT ORGANIZATIONS* iii, (13th ed. 2012), <http://nepc.colorado.edu/publication/EMO-profiles-10-11> (available for download) (stating that Michigan has one of the highest numbers of charter schools operated by for-profit EMOs with 181 currently operating in the state); Julie Mack, *Michigan Has a Quarter of the Nation’s For-Profit Charter Schools: Should We Care?*, MLIVE.COM, Jan. 15, 2012, http://www.mlive.com/news/kalamazoo/index.ssf/2012/01/michigan_has_a

Miron compared each EMO with the district-level dataset from 2006-2007 to determine variations between them.⁶⁸ He gathered data from 968 schools nationwide (ninety percent of the nation's EMO-operated schools)⁶⁹ and found that "some EMOs enrolled much higher concentrations of low-income students (20.4%) than local districts, while others enrolled few low-income students (55.6%)."⁷⁰ Whether the low-income students were concentrated in the PSAs or in the traditional public schools, these student groupings were caused by PSAs. Also, "both for-profit and nonprofit EMOs produced 'U'-shaped distributions indicating high segregative effects for poor as well as more affluent students."⁷¹ Finally, "the typical pattern was for some EMO-operated charter schools to serve a high proportion of students qualifying for free- or reduced-priced lunch, while other schools had only a few low-income students."⁷² The New York Times has reported on this phenomenon, noting Congress' present concern over the current rise of economic segregation in our nation's public schools.⁷³

In his review of relevant literature, Miron also examined a Michigan study of PSAs; finding that "[c]harter schools differed substantially from local districts in terms of ethnic background, family income, and proportion of children with disabilities."⁷⁴

In another earlier study of social stratification in Michigan's PSAs, Yongmei Ni examined FRPL data from 2003 and 2004.⁷⁵ Although Ni's results indicated that "PSAs could provide new opportunities for students who struggled academically in their assigned schools, [the results also indicated that] these schools tended to leave behind the most disadvantaged students in the traditional public schools."⁷⁶ In particular, low-performing students and students from low-income families became increasingly concentrated in urban traditional public schools.⁷⁷ Ni's study

quarter_of_the.html (citing the National Education Policy Center's finding that less than twenty-five nonprofit charter schools operate in Michigan).

68. MIRON, *supra* note 3, at 8.

69. *Id.* at 9.

70. *Id.* at 15.

71. *Id.* at 22.

72. *Id.* at 24.

73. Richard D. Kahlenberg, *Stronger Schools With an Income Mix*, N.Y. TIMES, Jan. 26, 2011, <http://www.nytimes.com/roomfordebate/2011/01/26/grading-the-education-president/stronger-schools-with-an-income-mix>.

74. MIRON, *supra* note 3, at 5.

75. See generally Yongmei Ni, *School Efficiency, Social Stratification, and School Choice: An Examination of Michigan's Charter School Program (2007)* (unpublished Ph.D. dissertation, Michigan State University).

76. *Id.* at 42.

77. *Id.*

concluded that traditional DPS schools had a much higher measure of FRPL, while a fewer proportion of students receiving free and reduced lunches attended the district's PSAs.⁷⁸

Notably, when proponents deny the discriminatory effects of PSAs, Miron emphasizes two important points about these "favorable" studies. First, these researchers pool the data from all PSAs, rather than compare it to traditional public schools in the district.⁷⁹ This method of analysis can conceal important school-to-district differences.⁸⁰ Miron points out that the correct analysis is one that "disaggregated the data for both charter schools and district schools by race/ethnicity, income, and degree of urbanicity."⁸¹ This sort of analysis, conducted by researchers Carnoy, Jacobsen, Mishel, and Rothstein, helped ensure that similar urban populations were being compared, and revealed that "charter schools enrolled a lower percentage of Black, Hispanic, and White students eligible for a free or reduced-priced lunch than did district schools."⁸² Pooling the data also fails to reveal that "when these charter schools were compared to the traditional public schools in the same borough or neighborhood, charter school students were less poor, less likely to be disabled, and more likely to speak English."⁸³

Finally, the Citizen's Research Council of Michigan reports that:

the theory that competition from charter schools will improve traditional public schools appears to be untrue in Michigan, where the total student population has been declining. A 2009 study of the Michigan experience [instead] 'suggests that charter competition had a negative impact on student achievement and school efficiency in Michigan's public schools' [Further, an] analysis of school data from 1994 through 2004 revealed that, in Michigan, urban districts that had larger proportions of low income and African-American students had increasingly significant charter competition. 'Charter competition appears to reinforce a vicious cycle of enrollment loss, revenue decline,

78. *Id.*

79. MIRON, *supra* note 3, at 4.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* (citing UNITED FED'N OF TEACHERS, SEPARATE AND UNEQUAL: THE FAILURE OF NEW YORK CITY CHARTER SCHOOLS TO SERVE THE CITY'S NEEDIEST STUDENTS (2010), <http://www.uft.org/files/attachments/uft-report-2010-01-separate-and-unequal.pdf>).

program cuts, lower educational quality, and further enrollment loss in those districts.”⁸⁴

Comparisons between charter schools and their host districts also reveal that “while charter schools and their host districts as a group enroll roughly equal proportions of low-income students, there are remarkable variations in ethnic and family representation between charter and noncharter schools.”⁸⁵ “The problem is especially acute among those managed by EMOs, several of which enroll few or no low-income students.”⁸⁶ EMO-operated charter schools more strongly segregate students who are economically challenged and are “divided into either very segregative high-income schools or very segregative low-income schools.”⁸⁷ As Michigan contains the second highest number of EMOs, these results suggest that EMO-operated schools contribute significantly to economic segregation in Michigan’s PSAs.

B. Federal Legislation Increases Economic Segregation in Michigan’s PSAs

Economic segregation in Michigan’s PSAs has been further exacerbated due to the federal legislation No Child Left Behind (NCLB) and Race to the Top (RTTT). In reference to these two programs, a coalition of civil rights organizations, including the Urban League, the NAACP Legal Defense Fund, and the Rainbow Push Coalition, released a statement that “[s]uch an approach reinstates the antiquated and highly politicized frame for distributing federal support to states that civil rights organizations fought to remove in 1965.”⁸⁸ RTTT, for example, incentivizes state governments to compete against one another for federal education dollars that all schoolchildren should receive.

NCLB’s roots originate with the Elementary and Secondary Education Act (ESEA) of 1965.⁸⁹ The ESEA was a significant

84. NONTRADITIONAL K-12 SCHOOLS, *supra* note 7, at 35 (citing Yongmei Ni, *The Impact of Charter Schools on the Efficiency of Traditional Public Schools*, 28 *ECON. EDUC. REV.* 571, 571-84 (2009)).

85. MIRON, *supra* note 3, at 4.

86. *Id.* at 77 (noting that the limited participation by Michigan charter schools in the federal free and reduced-price lunch program forces the author to draw conclusions about income based on a sample of approximately half the charter schools).

87. MIRON, *supra* note 3, at exec. sum.

88. Michelle McNeil, *Civil Rights Groups Call for New Federal Education Agenda*, *EDUC. WEEK*, July 26, 2010, http://blogs.edweek.org/edweek/campaign-k-12/2010/07/civil_rights_groups_call_for_n.html.

89. *See generally* 20 U.S.C. § 6301 *et seq.* (2002).

component of President Lyndon B. Johnson's "War on Poverty" campaign. Congress' primary intent in its enactment was to increase equity among the nation's schoolchildren by remedying the unequal educational opportunities that existed for different types of students (e.g., based on income level or ethnicity).⁹⁰ The most recent reauthorization of ESEA in 2001 – which included the No Child Left Behind Act – increased the federal government's role in both education and educational funding by authorizing temporary fiscal relief funds provided in the 2008-2009 American Recovery and Reinvestment Act (ARRA).⁹¹ Significantly, the ARRA was also drafted with the intent of remedying unequal educational opportunities among American schoolchildren. However, because the ARRA operates a grant program that relies heavily on charter schools, it effectively perpetuates economically segregated PSAs in Michigan, or any state that applies for its grants.

On February 17, 2009, President Barack Obama signed ARRA into law.⁹² "The ARRA laid the foundation for education reform by supporting investments in innovative strategies that were most likely to lead to improved results for students" in our nation's public school system.⁹³ One part of the ARRA was the RTTT fund.⁹⁴ RTTT was provided \$4.35 billion to create a competitive grant program designed to encourage and reward states that created the conditions for education innovation and reform.⁹⁵ States who applied for RTTT funding had to detail their strategies for:

achieving significant improvement in student outcomes, including making substantial gains in student achievement, closing achievement gaps, improving high school graduation rates, and ensuring student preparation for success in college and careers; and implementing ambitious plans in four core education reform areas.⁹⁶

90. *Id.*

91. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 181 (2009).

92. U.S. DEP'T OF EDUC., RACE TO THE TOP PROGRAM EXECUTIVE SUMMARY 2 (2009) [hereinafter RACE TO THE TOP], <http://www2.ed.gov/programs/racetothetop/index.html> (select "Executive Summary" hyperlink to download).

93. *Id.*

94. American Recovery and Reinvestment Act §§ 14005-14006 (allowing states to apply for state incentive grants, also known as Race to the Top (RTTT Funds)).

95. RACE TO THE TOP, *supra* note 92, at 2.

96. *Id.*

RTTT lists six priorities for states to address as they create conditions for education innovation and reform.⁹⁷ Priority One, an Absolute Priority, is the applicant state's Comprehensive Approach to Education Reform.⁹⁸ An Absolute Priority means that states applying for RTTT funds must implement reform plans in four core education areas.⁹⁹ One core area, "[t]urning around our lowest-achieving schools," relies heavily on charter schools as a technique for turning around persistently struggling schools in urban areas.¹⁰⁰ Additionally, RTTT's scoring system allocates up to forty of the possible 500 points for "ensuring successful conditions for high-performing charter schools and other innovative schools."¹⁰¹

Because RTTT relies on competitive funding and hand-picking winning states, the majority of low-income and minority children, who may reside in the losing states, will not benefit from additional education funds.¹⁰² RTTT's winning states are hand-picked for dutiful compliance with as many of Congress' mandates as possible.

Using the language of the ARRA, voluntary school integration is also recognized as one of the "innovative strategies that are most likely to lead to improved results for students, long-term gains in school and school system capacity, and increased productivity and effectiveness."¹⁰³ One integration goal of ARRA Section 14005(c) is "to improve academic achievement, graduation rates, and other outcomes for children in identifying subgroups (including racial and ethnic minorities and economically disadvantaged students)."¹⁰⁴ Since Congress hopes to improve the chances of economically disadvantaged students, it is unclear why it encourages charter schools; as research has shown that these schools become economically segregated.

Michigan lost in successive applications for RTTT funding on March 30 and August 24, 2010.¹⁰⁵ Reportedly though, "[President Barack

97. *Id.* at 3.

98. *Id.* at 4.

99. *Id.*

100. RACE TO THE TOP, *supra* note 92, at 3.

101. *Id.*

102. *Id.* at 2.

103. Notice of Proposed Priorities, Requirements, Definitions, and Selection Criteria for the U.S. Department of Education's Race To The Top Fund, 74 Fed. Reg. 37,803, 37,804 (Dep't of Educ. July 29, 2009).

104. Letter from Philip Tegeler et. al (representing various civil rights institutions), to U.S. Dep't of Educ, Office of Elementary & Secondary Educ. 1 (Aug. 24, 2009); *see also* American Recovery and Reinvestment Act § 14005(c).

105. *See Michigan 21st in 'Race to the Top,'* EDUC. REP., Mar. 30, 2010, at ¶ 2, <http://www.educationreport.org/pubs/met/article.aspx?id=12434> (stating that only two states, Delaware and Tennessee, qualified for first-round funds); *Don't Stop Race to the*

Obama] is [planning] to extend [this] competitive grant program . . . , calling it the ‘most significant education reform initiative we’ve seen in a generation.’”¹⁰⁶ If RTTT continues, Michigan will likely again compete for funding, since the state has been able to provide fewer dollars for public education in recent years. Sadly, Michigan’s dismal economic picture means that the state is willing to sign on to legislation that produces economically segregated public schools.

The recognition of “economically disadvantaged students” as an identified subgroup under NCLB reveals another problem that arises when Michigan’s PSAs become economically segregated. Under NCLB, Adequate Yearly Progress (AYP) measures the extent to which schools succeed in educating all students to proficiency in at least reading and mathematics.¹⁰⁷ AYP must be calculated for each school, including charter schools, each school district, and each state. “To make AYP, a school must test ninety-five percent of its students in total in each subgroup of students.”¹⁰⁸ If charter schools have few or no “economically disadvantaged” students, they will likely achieve AYP in this particular category since there are fewer students to assess. Finally, NCLB might create more charter schools because it allows local educational agencies (LEAs) to convert low performing Title I schools into charter schools.¹⁰⁹

Whether or not RTTT funds again become available, if Michigan continues to create and/or operate PSAs without acknowledging the conclusions of Miron’s study, it will continue to have a disparate impact on the state’s most economically disadvantaged students.

C. Economic Segregation is Harmful to Michigan’s Schoolchildren

NCLB has fueled renewed interest in research on understanding the causes of, and solutions to, the widespread disparities in student achievement. The most well known study of student achievement, the Coleman Report,¹¹⁰ was undertaken in 1965 to investigate the equality of educational opportunity in America as part of the federal government’s

Top Education Reform, MLIVE.COM, Aug. 3, 2010, at ¶ 2, http://www.mlive.com/opinion/grand-rapids/index.ssf/2010/08/editorial_dont_stop_race_to_th.html (stating that Michigan also lost the second-round of funds).

106. Marisa Schultz, *No Consensus on No Child Left Behind*, DET. NEWS, Mar. 24, 2011, at B1.

107. RAVITCH, *supra* note 8, at 97-8.

108. FREDERICK M. HESS & MICHAEL J. PETRILLI, *NO CHILD LEFT BEHIND* 36 (2006).

109. *Id.* at 98.

110. *See generally* JAMES S. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* (1966) (also known as the “Coleman Report”).

commitment to overcoming the detrimental effects of poverty.¹¹¹ Coleman made two findings. First, that “schools had relatively little impact on student achievement compared to the background of the students who attended these schools.”¹¹² Second, that the “social composition of the student body was the most important factor affecting student achievement; more important than teacher characteristics or school facilities.”¹¹³ Since the Coleman study, research has consistently shown that socioeconomic status is often the single most powerful predictor of student achievement.¹¹⁴ Since income level can be highly correlative to student achievement, it deserves the same level of scrutiny as race with respect to school integration issues.

Nationwide, “over 70% of black students [in the United States] attend predominantly minority schools in 2000,” a higher percentage than thirty years earlier.¹¹⁵ Racial segregation is closely tied to socioeconomic segregation because blacks and Latinos have much higher poverty rates than other racial and ethnic groups.¹¹⁶ “In 2004, almost one-third of all black and Latino children under the age of eighteen were living in poverty, compared to fourteen percent of white children.”¹¹⁷ Thus, black and Latino children not only are more likely to be poor, they are also more likely to attend schools with other poor children. Data from the fourth-grade results of the 2003 National Assessment of Educational Progress showed not only that poor students had lower math achievement than students who were not poor, but also that poor and non-poor students had lower achievement in high-poverty schools.¹¹⁸ According to Erika Frankenberg, any school with a high-poverty, high minority,

111. JAMES S. COLEMAN, *EQUALITY AND ACHIEVEMENT IN EDUCATION* 67-164 (1990) (summarizing his research and providing commentary).

112. *Id.* at 325.

113. *Id.*

114. JULIAN R. BETTS, ET. AL., PUB. POL’Y INST. OF CAL., *EQUAL RESOURCES, EQUAL OUTCOMES? THE DISTRIBUTION OF SCHOOL RESOURCES AND STUDENT ACHIEVEMENT IN CALIFORNIA IV* (2000), <http://www.ppic.org/main/publication.asp?i=64> (select “full report” hyperlink to download); Guang Guo & Kathleen M. Harris, *The Mechanisms Mediating the Effects of Poverty on Children’s Intellectual Development*, 37 *DEMOGRAPHY* 431, 442 (2000).

115. ERIKA FRANKENBERG ET. AL., CIVIL RIGHTS PROJECT, HARVARD UNIV., *A MULTIRACIAL SOCIETY WITH SEGREGATED SCHOOLS: ARE WE LOSING THE DREAM?* 30 (2003).

116. *Id.* at 35.

117. Rumberger, *supra* note 6, at 1295.

118. See U.S. DEP’T. OF EDUC., *THE CONDITION OF EDUCATION 2003*, at 33 (2003), <http://nces.ed.gov/pubs2003/2003067.pdf>.

student population faces challenges that are nonexistent in a school that is racially and economically integrated.¹¹⁹

Russell W. Rumberger also investigated student achievement in high-poverty schools.¹²⁰ Rumberger used data from standardized math assessments to measure differences between poor students and non-poor students¹²¹ and found a “large achievement gap” between the two groups.¹²² He then examined differences in achievement by the concentration of low-income and poor students in students’ schools. Since the differences seemed to be largely related to differences in students in their families, Rumberger concluded that future policy interventions should focus on improving family and community resources and practices.¹²³ He found that students attending private and low-poverty schools had much higher achievement than students attending high-poverty schools.¹²⁴ Rumberger’s final results suggested that “the sizeable observed differences in fifth-grade achievement associated with the concentration of poor and low-income students in a school were largely explained by differences in the achievement levels of students when they first enter[ed] school.”¹²⁵ In sum, his analysis revealed

substantial differences in observed achievement levels of students in fifth grade by the concentration of poor and low-income students. Students attending high-poverty public schools, where more than 75% of the students were poor or low-income, had much lower achievement levels than students who attended low-poverty public schools, where less than 25% of the students were poor or low-income [As such,] students attending low-poverty public schools retained a significant educational advantage over students attending any other type of school.¹²⁶

Rumberger’s findings further support the principle that student achievement has the greatest potential for success when the school’s population is representative of diverse racial and socioeconomic backgrounds.

119. See FRANKENBERG, *supra* note 116.

120. Rumberger, *supra* note 6, at 1304.

121. *Id.* at 1301.

122. *Id.*

123. *Id.* at 1307.

124. *Id.* at 1306.

125. *Id.* at 1310-11.

126. Rumberger, *supra* note 6, at 1313.

Recent findings by the federal government fortify those made by Frankenberg and Rumberger; as applied to educational opportunities and achievement, their findings reveal a stark contrast between students in high-poverty and low-poverty schools.¹²⁷

As Justice Thomas concurred in *Missouri v. Jenkins*, “‘racial isolation’ itself is not a harm; only state-enforced segregation is.”¹²⁸ A school district’s unintentional economic isolation of low-income students in its traditional public schools is not a harm that violates the holding of *Jenkins*.¹²⁹ Though this harm may restrict the educational opportunities of low-income children, economic isolation in traditional public schools based on residential housing patterns is not the type of harm that the Court found inviolate of equal protection principles in *Jenkins*.¹³⁰ Unlike the school district’s actions in *Jenkins*, however, PSAs are not reflective of their surrounding communities’ demographics. Rather, PSAs are often comprised of students from different neighborhoods possessing similar characteristics.

Economically segregated PSAs are also bad when they are created through state action. In *Swann v. Charlotte-Mecklenburg Board of Education*, the U.S. Supreme Court upheld a North district court’s order requiring a North Carolina school system to execute a plan with regard to the desegregation of faculty and secondary rezoning and busing.¹³¹ One recent Michigan example of *Swann*-like state action is the Michigan legislature’s successful campaign to raise the cap on PSAs when the state applied for RTTT funds.¹³² There is an important difference, however, between Michigan’s situation and *Swann*. In *Swann*, the state action being remedied was one that intentionally segregated schools.¹³³ Conversely, there is no indication that Michigan legislators intended to produce economically segregated charter schools, so it is unlikely this legislative action would require judicial intervention to carry out such *Brown II* remedial measures as upheld by the Court in *Swann*.

127. *Id.* at 6.

128. *Missouri v. Jenkins*, 515 U.S. 70, 122 (1995).

129. U.S. DEP’T. OF EDUC., INST. OF EDUC. SCIENCES, THE CONDITION OF EDUCATION 2010, at 6 (2010), <http://nces.ed.gov/pubs2010/2010028.pdf>.

130. *Jenkins*, 515 U.S. at 102.

131. *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 7 (1971) (stating that all parties agreed that the North Carolina school system in 1969 fell short of “achieving the unitary system” mandated by state courts following the *Brown I* holding that segregated school systems violated the Equal Protection clause of the U.S. Constitution, and the *Brown II* holding that required immediate remedial measures).

132. Martin Ackley, *Michigan’s Race to the Top Application Secures All Three Key Signatures*, (May 11, 2010), available at http://www.michigan.gov/mde/0,1607-140-37818_34785-236816--,00.html.

133. *Swann*, 402 U.S. at 7.

IV. THE NEGATIVE IMPACT OF CHARTER SCHOOLS ON
DETROIT'S NEIGHBORHOODS

The market theory behind school choice suggests that “[b]y allowing students in low-income neighborhoods access to schools outside of their neighborhoods, . . . levels of economic segregation in the district will drop.”¹³⁴ This theory ignores the search costs of accessing information. For parents working full-time in inflexible jobs, the time needed to access and assess this information might be too great. Class disparities between high and low-income families further exacerbate the issue of accessing information; families with less access to good information about educational options may be less likely to participate in the PSA application process. When this happens, it “causes poor students to be left behind in low-performing public schools while the most advantaged students and their more informed parents opt out for schools of choice.”¹³⁵ In this scenario, parental choice not only drain resources from already struggling public schools, it also exacerbates economic segregation through the cream-skimming of students because only the higher, socially mobile families will be eligible to apply for PSAs.

Economically segregated schools will have a particularly detrimental effect on Detroit at a critical time in the city's history. First, Michigan's charter school laws allow private corporations to build PSAs outside of Detroit's existing residential neighborhoods¹³⁶ and this provision can have the effect of removing a “neighborhood school” from its existing location. When private corporations realize that legislation allows them to abandon an existing neighborhood and locate their charter school in a different location, there is no incentive for the corporation to stay and serve the neighborhood. When a charter school leaves an existing Detroit neighborhood and locates to, for example, an economic enterprise zone,¹³⁷ the Mayor's goal of creating strong neighborhoods within the city becomes nearly unreachable because these zones are located outside

134. Deborah M. Warnock, *The Effect of Charter School Enrollment on Economic Segregation in Ohio's Public Schools* (paper presented at the Am. Sociological Ass'n's annual meeting) (Aug. 2008), at 4.

135. *Id.* at 6.

136. See MICH. COMP. LAWS §§ 380.502(3)(c)(ii) and (e)(ii) (requiring the application for a charter to include the intended purpose for creating the public school academy and a copy of its academic goals).

137. Enterprise zones are designated areas within a city where tax abatements are offered to property owners, usually for the purpose of reducing blighted areas or redevelopment. Detroit's busiest areas are downtown, Midtown, and Corktown. See Marti Benedetti, *Zones of Opportunity*, CRAIN'S DET. BUS., Aug. 21, 2006, <http://www.craainsdetroit.com/article/20060821/LIVINGD/60816029/zones-of-opportunity#>.

of the very neighborhoods he hopes to strengthen.¹³⁸ According to a term applied by David Harvey to the devaluation of inner city housing, “poor families are literally ‘blown-out’ of their public school districts, losing the benefits accumulated by several generations of labor embodied in the existing public school facilities that are located in the existing neighborhood.”¹³⁹ Thus, some existing charter schools in Detroit and proposed plans for future charter schools that are located outside of Detroit neighborhoods work directly against the concept of strong neighborhoods desired by the Mayor. As reported by *Michigan Citizen*, by openly selecting certain schools and neighborhoods they are hand-picking to invest money in, [the Mayor and the Detroit Public Schools Emergency . . . Manager] are openly denying support to other schools and neighborhoods that are deteriorating.”¹⁴⁰ Consequently, some families will be unable to take advantage of these schools because they may lack the resources to travel to their locations.

The Supreme Court in *Swann v. Charlotte-Mecklenburg Bd. of Education* recognized the importance of the construction and location of new facilities and the closing of old facilities in the desegregation of a dual school system.¹⁴¹ The *Swann* Court noted that facility utilization decisions of school officials have often served to create, or enhance, segregation.¹⁴² The Court ruled that “it is the responsibility of local authorities and district courts to see to it that future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system.”¹⁴³ This means that newly built PSAs cannot re-establish segregated schools.

Another negative impact PSAs have on Detroit’s traditional public schools is that the market philosophy of competition lying behind PSAs does not always mean that the traditional district responds to the competition by increasing resources for its students. For example, as recent competition from PSAs increased, Detroit Public Schools dedicated a significant portion of their budget to fund the “I’m In.”

138. Press Release, The Detroit Works Project, Opportunities and Challenges (Sept. 2010) (on file with author).

139. See DAVID HARVEY, *THE URBANIZATION OF CAPITAL: STUDIES IN THE HISTORY AND THEORY OF CAPITALIST URBANIZATION* (1985)

140. Diane Bukowski, *Money talks, Detroit silenced: Who’s listening to the grassroots?*, MICH. CITIZEN, Oct. 5, 2010, at A1.

141. *Swann*, 402 U.S. at 20-21.

142. *Id.* at 21.

143. *Id.*

student recruitment campaign.¹⁴⁴ This successful recruitment campaign cost the district approximately \$500,000 and brought in 830 students.¹⁴⁵ These monies, instead, could have provided direct resources to students.

One final problem with PSAs is that the intensity of competition behind PSAs changes depending on the enrollment dynamics of school districts. “In districts with growing enrollments, traditional public schools may not feel much competition from PSAs and they might even welcome them as a method of easing their enrollment pressures.”¹⁴⁶ “In districts with declining enrollments, however, PSAs can create an intense competition for students and resources, triggering a downward spiral in some of the traditional public schools that are already facing declining enrollments.”¹⁴⁷ In conclusion, Michigan should limit its future investment in PSAs.

V. REVERSING ECONOMIC SEGREGATION IN MICHIGAN’S PSAs

The Supreme Court has recognized that education is one of the most important functions of state and local governments,¹⁴⁸ and is, perhaps, at the very “apex” of the functions of a state.¹⁴⁹ As such, states must provide their schoolchildren with a quality public education. For Michigan to accomplish this goal, both state and federal education legislation should be amended to reflect the principle that PSAs should not pursue practices that economically discriminate against economically disadvantaged students.

A. Changes To Michigan Legislation

First, PSA charters should be required to contain language that encourages the economic integration of students, so that they are truly public schools entitled to funding that will further their constitutional purpose.¹⁵⁰ Connecticut, for example, requires charter schools to recruit

144. See Det. Pub. Sch., Presentation of Gold Medallion Award Submission to the Nat’l Sch. Pub. Relations Ass’n: “I’m In!” Blue Door Student Retention Campaign (2010), http://www.nspra.org/files/docs/DPS_Student_Retention_Campaign.pdf.

145. *Id.* at Evaluation.

146. DAVID ARSEN & YONGMEI NI, THE COMPETITIVE EFFECT OF SCHOOL OF CHOICE POLICIES ON PERFORMANCE IN TRADITIONAL PUBLIC SCHOOLS 7 (2008).

147. *Id.*

148. *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (*Brown I*).

149. *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972).

150. *Parochiaid*, 566 N.W.2d at 212.

from all segments of a school district.¹⁵¹ Since Michigan's Revised School Code allows authorizing bodies to revoke PSA contracts if the school fails to abide by and meet the educational goals set forth in the contract,¹⁵² these contracts should include the goal of economic integration so the authorizing body would have authority to revoke the contract in the event of noncompliance.

Second, in Michigan, local school boards should have the authority to authorize PSA applications, the process should be open to the public, and applicants should have the right to appeal to a state agency's decision to deny or revoke a charter. Each of these ideas includes an element of public involvement at different stages of a PSA's existence. Since all aspects of traditional public schools are transparent and reviewable by the members of the community, PSAs (as recipients of public school monies) should be subject to the same public scrutiny. Further, because local control is not essential for characterization as a public school,¹⁵³ a potential problem arises when people outside of the public school district (perhaps a board of directors) cannot pay attention to the demographic makeup of its students. Maintaining local control allows local school boards to develop and implement integration plans that emphasize the socioeconomic status of PSA students and potential students. This will be very difficult in Michigan with the recent enactment of "[t]he new emergency manager law, which became effective when Gov[ernor] Rick Snyder signed it on [March 16, 2011], giv[ing] the state-appointed officials the power to dissolve elected governing bodies in school districts and cities operating at a deficit."¹⁵⁴

Third, to create additional incentives for schools that are severely economically unbalanced, state integration aid should be awarded to individual schools that are specified percentage more economically integrated than the surrounding community.

Finally, since PSAs recruit many of their students, they should be required to recruit from economically diverse segments of the community. Even though there are recruitment restrictions—charter schools cannot charge tuition and are not allowed to select students based on "intellectual or athletic ability, measures of achievement or aptitude,

151. CONN. GEN. STAT. §10-66aa-ff (2011) (including a provision that allows charter schools outside this range to continue operating if a monitoring board finds that the school enrolls students in a nondiscriminatory manner).

152. MICH. COMP. LAWS § 380.502(6).

153. *Parochiaid*, 566 N.W.2d at 219.

154. Doug Guthrie & Jennifer Chambers, *Bobb Gains Control of DPS Academics, Judge Reverses Stand After Snyder Signs Financial Manager Bill*, DET. NEWS, Mar. 19, 2011, <http://www.detnews.com/article/20110319/SCHOOLS/103190366/1026/Bobb-gains-control-of-DPS-academics>.

status as a student with a disability, or any other basis that would be illegal if used by a school district,”¹⁵⁵ PSAs may limit admission to students within a particular grade or range. Currently, charter schools can focus recruiting efforts to reflect the desired student population. This practice has a limiting effect on families with limited social mobility and accounts for the hidden costs of attending a “free” public school. Also, most PSAs give enrollment preferences to siblings and children of employees, and current students are exempt from a lottery.¹⁵⁶ This practice, likewise, can contribute to a student population that lacks racial and economic diversity.

B. Changes to Federal Legislation

Federal policy makers, likewise, must consider the economic, social, and ethnic repercussions of charter school legislation on various racial and socioeconomic groups to ensure that it does not create the very problems it was intended to prevent.

Significantly, since RTTT (under NCLB) is a rededication of legislation whose primary goal was the creation of equitable educational opportunities for poor schoolchildren, Congress should stay faithful to the legislation’s original intent and remove provisions that have a disparate impact on economically disadvantaged students. Additionally, if states are offered another round of grants in 2011-2012, several of RTTT’s provisions should be amended to reflect the original spirit of NCLB and the ESEA.

First, the “Invitational Priorities” language should add a Proposed Priority 7, “Innovative Approaches to Voluntary School Integration.”¹⁵⁷ This would encourage newly built charter schools to take positive steps to achieve racial and economic integration among their student populations. Additionally, under Section V.B, “Standards and Assessments,” a new section, (B)(4), should be included to support

155. MICH. COMP. LAWS §380.504(2) (2012).

156. See *Admission Policies*, R.I. HIGHLANDER CHARTER SCH., <http://highlandercharter.org/parents/admission.policies>.

157. See Overview Information; Race to the Top Fund Assessment Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 2010, 75 Fed. Reg. 19,496 to 19,497 (Dep’t of Educ., Apr. 14, 2010) (listing the Invitational Priorities; Priorities Three to Six). The U.S. Department of Education ranks applications for RTTT funding based on three priority tiers. First, the Department of Education only accepts applications from schools that meet the Absolute Priority (Priority One) criteria. Next, schools that meet the criteria for the Competitive Priority (Priority Two) will be rewarded an additional fifteen points. Finally, schools that meet the criteria of Invitational Priorities (Priorities Three through Six) signal the interest of the Department, but do not receive any preferential treatment. *Id.*

voluntary school integration.¹⁵⁸ The language could read, “The extent to which the State in collaboration with its participating Local Education Associations (LEAs),¹⁵⁹ has a high quality plan for substantially reducing the segregation of low-income children in separate schools, through innovative intra- or inter-district collaborations, magnet schools, transfer programs, or school restructuring and consolidation.” This requirement would encourage close analysis of a school district’s demographics and lead to remedial programs that combat economic segregation in schools.

Also, Section V.E, entitled “Turning Around the Lowest Achieving Schools,”¹⁶⁰ should include incentives and requirements that charter schools funded under this section take affirmative constitutional steps to become economically integrated, both in the initial recruitment for the school and in ongoing marketing. Any new charter school created or funded under RTTT should be required to meet these criteria. Since PSAs can choose their target audience, they should have to remedy any adverse side effects with ongoing recruitment efforts to create diverse student populations.

Finally, the federal government should encourage educational reforms that allocate funding to our schools based on integration programs like PSAs that attract students from diverse racial and economic backgrounds to learn and develop together. These inter-district and metropolitan-wide school desegregation programs would ensure that the best quality education is provided to every student.

C. Charter Schools That Work for Michigan

As states began to allow schools to be authorized by agencies separate and apart from local district control, charters became open to outside entrepreneurs.¹⁶¹ Gradually, Michigan PSAs became free of the constraints imposed by collective bargaining agreements, district budget allocations, and enrollment criteria.¹⁶² “In essence, these schools ‘stopped’ functioning as public schools and began catering to a select few.”¹⁶³

158. *See id.* at 19,503 to 19,504 (referring to Section V.B of the selection criteria applied by the application reviewers).

159. LEAs are local educational agencies that exist primarily to operate schools or to contract for educational services, including primary and secondary public and private schools. *See generally* U.S. DEP’T. OF EDUC, LEA AND SCHOOL IMPROVEMENT: NON-REGULATORY GUIDANCE (last revised July 21, 2006).

160. 75 Fed. Reg. at 19,505.

161. MIRON, *supra* note 3, at 21.

162. *Id.* at 30.

163. *Id.* at exec. sum.

Charter schools were a response to The National Commission on Excellence in Education's 1983 report – "A Nation at Risk."¹⁶⁴ This unprecedented report asserted that declines in United States students' educational performance were in large part the result of inadequacies in the way the traditional process of education was conducted.¹⁶⁵ In response to these findings, educational leaders began to experiment with new ways of "doing business" in our nation's schools, including the invention of charter schools.¹⁶⁶

The original model for charters was as alternative public schools that operated inside of traditional public school buildings.¹⁶⁷ Then President of the American Federation of Teachers, Albert Shanker, first defined charter schools as "publicly funded institutions that would be given greater flexibility to experiment with new ways of educating students."¹⁶⁸ In the 1991 Minnesota model, small groups of teachers and parents submitted research-based charter school proposals outlining their plans to educate children in innovative ways.¹⁶⁹ The local school board and teachers' union officials would review these proposals and identify children who would benefit from these alternative teaching strategies.¹⁷⁰ The key component of these original schools was their small size and location inside of existing public neighborhood schools, which meant that they serviced the exact same students who attended the traditional public school. This original design also allowed sustainable neighborhoods to grow from strong neighborhood public schools. There was no chance of economic or racial segregation because students were not leaving their existing public school to attend a charter school that may have admission criteria.

Michigan's PSAs are not the small settings envisioned by Albert Shanker. A recent national study (RPP International, 2000) put the median charter school size across the nation at 137; the median charter school size in Michigan is 288.¹⁷¹ But even though charters are, on average, smaller than the traditional public school counterparts, the small

164. NAT'L. COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION 9 (1983), <http://teachertenure.procon.org/sourcefiles/a-nation-at-risk-tenure-april-1983.pdf>.

165. *Id.*

166. RAVITCH, *supra* note 8, at 28.

167. *Id.* at 122.

168. *Id.* at 123.

169. *Id.*

170. *Id.*

171. MIRON, *supra* note 3, at 35.

sizes are not working in Detroit.¹⁷² Charter school students score about the same on state tests as Detroit district students, even though charters have fewer special education students and fewer poor children.¹⁷³ Even though critics show that PSAs are not guaranteed to perform any better than traditional public schools, DPS's Emergency Financial Manager views them as a financially viable alternative to closing schools.¹⁷⁴ Thus, it appears that Detroit endorses charter schools because they are a more inexpensive method of educating students; rather than for any record of successfully educating students.

Michigan should implement Shanker's model for its future PSAs. Following Shanker's definition, newly built PSAs in Michigan would be located within existing, or newly built public schools. This type of PSA could also have positive effects on some Detroit neighborhoods because the schools would remain inside the neighborhood and contribute to the surrounding community.

Charter schools under Shanker's original design also complement Detroit's resizing initiative. The Detroit Works Project and the Mayor have repeatedly defined resizing as "shrinking the city."¹⁷⁵ Consistent resizing initiatives have included repurposing vacant land, demolishing abandoned structures, and financial investment in a handful of Detroit's neighborhoods.¹⁷⁶ The most recent description of resizing involves the creation of nine or ten denser areas of the City to be created by Mayoral "incentives" for relocation.¹⁷⁷ PSAs under Shanker's model could serve as an "incentive" in the Mayor's resizing campaign because there would

172. Michael Weinrip, *For Detroit Schools, Mixed Picture on Reforms*, N.Y. TIMES, Mar. 13, 2011, http://www.nytimes.com/2011/03/14/education/14winerip.html?_r=2&hpw=&pagewanted=

173. *Id.*

174. *Id.* An Emergency Manager has many powers when a municipality or district faces a financial emergency. Under the Local Government and School District Fiscal Accountability Act, Act No. 4, 2011, Mich. Pub. Acts (codified at MICH. COMP. LAWS §§ 141.1501 *et. seq.*) (known as Public Act 4). Under Public Act 4, Emergency Managers have the authority to close schools and lease assets of a school district. However, Public Act 4 is currently suspended pending a statewide November 2012 ballot referendum, and 1990 P.A. 72, MICH. COMP. LAWS § 141.1201-141.1291 is reactivated pending the vote of the electors at the November 2012 election. Under 1990 P.A. 72, DPS' Emergency Financial Manager has control over all fiscal matters of the District. The Detroit Board of Education has appointed an unpaid Superintendent with the responsibility in academics

175. Press Release, The Detroit Works Project, Opportunities and Challenges (Sept. 2010) (on file with author).

176. Nancy Kaffer, *Foundations, City at Brink of Plan to Shrink Detroit*, CRAIN'S DET. BUS., Jan. 27, 2010, <http://www.craindetroit.com/article20100127/CO3/30279999/1024>.

177. Jeff Gerritt, *Dave Bing Says There'll Be Incentives for Detroiters to Move*, DET. FREE PRESS, Dec. 9, 2010, <http://www.freep.com/article/20101209/OPINION02/12090488/1319>.

no longer be a need to seek educational opportunities outside the neighborhood. This model would ensure that Michigan's PSAs served all of its students.

VI. CONCLUSION

America's public schools have, as some of their primary goals, to acculturate, sensitize, and civilize our children to prepare them for their future roles in a democratic society. These goals are now seriously compromised due to the current direction of Michigan's charter school legislation and its participation in the federal government's Race to the Top grant program. Any existence and perpetuation of federal and state education legislation that has the effect of further dividing society is troubling and demands rectification.

Right now, PSAs are an attractive alternative to poorly funded, unionized public schools. Their current success, however, derives largely from state and nationwide economic woes and a belief that free market forces will "fix" public education. Whatever their future role, as public schools, PSAs must provide all students with equal educational opportunities. Research has shown that economic segregation in public schools is a problem that policy makers should pay special attention to as they draft education policy reforms. Children, and democratic societies, are best served by public schools that are located within their neighborhoods and that provide them with the necessary exposure to other children from diverse racial and economic backgrounds.

