Supportive Housing in the Age of Market Fundamentalism: 
A Human Rights-Based Approach to the Provision of Supportive Housing 
for Mentally Ill Homeless People

By

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ABSTRACT

Despite its cost-effectiveness, supportive housing is grossly underprovided. In this paper, I build a rights-based strategy for supportive housing advocates, specifically structured around meeting the needs of mentally ill homeless people. A rights-based strategy, emanating from constitutional law, is the most robust way to secure this support.

The failure of New York State to provide supportive housing for mentally ill homeless people is a *prima facie* violation of human rights under domestic law (specifically, NYS constitution Article 17, Section 1) and various international treaties. The government has enforced a property ownership and regulatory regime that interferes with mentally ill citizens’ ability to satisfy their basic needs and therefore must provide a publicly-financed remedy for their condition. This thesis identifies the best legal strategy by which activists can secure this remedy.

To make this is case, it is necessary to circumvent resistance from federal courts to affirmative welfare policy. I do this by identifying the state law basis of the right to adequate housing. Once it has been established as a right at the state level, federal attitudes take a different character as federal courts treat welfare entitlements as *property*—and federal courts vigorously defend property.
For Mom & Dad
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INTRODUCTION

On a given night in January 2014, there were 578,424 homeless people in the United States, with 69 percent of that number living in emergency shelters or transitional housing programs, and the remainder sleeping on the street. The magnitude and nature of the homeless community shifts with the economic tides, the expansion and contractions of specific industries with more or less vulnerable labor populations, the local and regional housing markets and the public policy environment *du jour*. However, between 2005 and 2012, homelessness has declined 17%. However, despite this promising national trend, which “covers a period when unemployment doubled (2007-2010) and foreclosure proceedings quadrupled (2005-2009),” homelessness in New York State has been increasing.

Twenty-two percent of the national homeless population has a serious mental illness (or are otherwise disabled)—a proportion that is relatively stable across geographies. These people are unable to reenter the labor market or reliably care for themselves. A number of measures have criminalized the lives of homeless citizens. Thirty-one cities have criminalized providing food for homeless citizens. Many other cities have criminalized the satisfaction of basic necessities like eating, sleeping, or going to the bathroom. The deinstitutionalization of psychiatric care that took place from the 1970s to 80s and widespread disinvestment in Single Room Occupancy units, which had been a successful care typology, left homeless citizens without a remedy and affected mentally ill people the most.

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Supportive housing is a well-regarded public policy intervention for mentally ill homeless people, to provide a stable, and sometimes rehabilitative environment. By definition, supportive housing is a form of government-subsidized public housing paired with in-house social services, including psychiatric care. Numerous studies, including a December 2013 report from the NYC Department of Health and Mental Hygiene, indicate that supportive housing in fact reduces the net fiscal burden on the government, saving money from public expenditure on Medicaid, shelters, jails and psychiatric hospital care. The most startling fact regarding supportive housing policy is that spending money to provide this service is ultimately more cost effective than doing “nothing.” Having mentally ill people in supportive housing allows the city to avoid these costs by consolidating service provision and dealing with problems preventatively, before they become costly emergencies. A study of the NY/NY III agreement by the Supportive Housing Network of New York (SHNNY) found that the city and state save $10,100 per year per tenant.\(^5\)

Despite these facts, many local and state governments ignore this remedy. Demand for supportive housing is 500% greater than supply.\(^6\) Advocates for supportive housing have leaned heavily on the cost-effectiveness argument and still find themselves failing to persuade politicians. The typical reason for the failure of public assistance programs is lack of political will for initiatives that cut against liberal economic thinking. And yet, in the case of supportive housing, we have a situation in which politicians are failing to make the rational economic choice. The fact that policymakers fail to support this social welfare program despite the unique fiscal case in support of its implementation, suggests that a more radical argument is needed.

It is in this context that I offer a human rights-based framework for demanding the provision of supportive housing for the homeless community in the US. Though beyond

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the scope of this paper, this argument ultimately opens the door for deeper incursions into economic rights in the US.

**Relevant Rights Frameworks**

Much of the US national narrative hinges on our protection of civil and political rights. The first amendment, enshrining freedom of speech, is the hallmark of US democracy. Throughout modern history, diplomats have deployed this as part of the bundle of rhetorical strategies that serve as pretexts for invasions of nations, from last century’s Latin American interventions to current involvements in the Middle East and South Asia. Important progress has been made in affirmative action policies that correct the institutionalized racism and sexism of the past, and increasing momentum for the gay rights movement has put America at the forefront of certain political rights debates. However, for the most part, our political discourse and legal code ignore more complex economic and social rights.

In this thesis, I outline a rights-based strategy deriving its spirit from international human rights agreements but realizing its protections via state laws. While the federal constitution holds only negative rights (freedom *from* government interference), state constitutions, including that of New York, enshrine economic rights.

New York courts have shown promising signs regarding affirmative rights (freedom *to* certain kinds of government assistance). Winning a supportive housing welfare entitlement at the state level would reframe the role of the federal courts. Federal courts historically treat welfare entitlements as private property. Thus, should the right to a certain kind of government assistance be established at the state level, opponents would find it difficult to disarm welfare recipients with a judicial challenge at the federal level.

The insufficiency of supportive housing is a problem of political path dependency rather than financial constraints or institutional anemia. In response to the particular nature of this problem, I approach the solution via a qualitative analysis of human rights
commitments at the international, federal, and state level, both in their language and application.

The success of building a human rights-based argument for supportive housing provision would yield a number of strategic victories for the political left. First, by sidestepping the cost-effectiveness argument, it avoids subordinating human rights to liberal economics by refusing to justify itself in the terms of the market. Second, the homeless population of the US is largely concentrated in three states—New York, California, and Texas—so it allows for activists to pursue a meaningful solution for those most affected by homelessness, without battling more conservative states on a federal approach.

Research Question

In this thesis, I examine how a rights-based strategy for supportive housing for mentally ill homeless people can be developed in light of differing understandings and levels of enforcement of human rights at the international, national, and state levels.

Embedded in this question are necessary analyses of how affirmatively expressed human rights—and housing rights, in particular—play out at each of these levels. It also demands an examination of the failure of market- and subsidy-based interventions. Finally, successfully establishing an affirmative right to supportive housing would set a precedent with implications for other economic rights issues in the US.

Research Approach

Background research revealed that there were deeper issues than public finance considerations preventing supportive housing from meeting full need. The under-provision of supportive housing, despite the overwhelming body of research establishing the cost-effectiveness, suggested that the biggest hurdle might be the lack of political will. Therefore, I pivoted to approach the question via human rights.
To investigate this question, I conducted interviews with a variety of stakeholders in the supportive housing ecosystem, including:

- Connie Max, Vice President, Chief Credit Officer at the Local Initiatives Support Corporation (LISC)
- Robin Pagliuco, Policy Analyst at the Supportive Housing Network of NY
- Nicole Branca, Deputy Executive Director at the Supportive Housing Network of NY
- Gabriela Sandoval, Policy Analyst at the Coalition for the Homeless, Inc.
- Christopher McKenzie, Assistant Program Officer at the Local Initiatives Support Corporation (LISC)
- Jason Osborn, Senior Project Manager, New York City Housing Development Corporation
- Tony Proscio, former Deputy Commissioner, Homeless Services, City of New York
- Jill Edwards, Senior Vice President, Tax Credit Originations at Bank of America
- Eric Tars, Senior Attorney at the National Law Center on Homelessness & Poverty
- Mark Tushnet, Constitutional Law Professor at Harvard Law School
- Alexander Flores, Leasing and Compliance Administrative Associate at Lantern Community Services
- Rob Robinson, formerly a homeless shelter resident and currently a Community Organizer at the National Economic & Social Rights Initiative

As a result of speaking with these stakeholders from across government, public finance, private finance, legal advocacy, legal scholarship, supportive housing management, and supportive housing users, I came to the understanding supportive housing as an intervention has been successful both in terms of user outcomes and cost-effectiveness for government.
This thesis integrates public finance analysis and interview-based research along with a particular, and perhaps subjective, reading of U.S. case law precedents, state legal obligations, and human rights law, in order to bolster the case for supportive housing as a central obligation of this modern, well-resourced state.

**New York Study as a Case Study**

I am using New York State as my case study for the rights-based approach to supportive housing. First, it contains one of the largest populations of homeless people in the US—13% of the national total, behind only California. Further, five states—California, New York, Texas, Florida, and Massachusetts—contain more than half of the national population of homeless people, which is an additional incentive to embark on a state-based approach. Second, despite recent backsliding, New York has historically been a leader in supportive housing. Third, its state constitution explicitly enshrines affirmative housing (and other forms of welfare) in language that closely resembles that of international human rights treaties, allowing for the marriage of the local struggle to a powerful global lineage of housing struggles.

There are also a number of leading civil society organizations headquartered in New York, including the National Economic & Social Rights Initiative and the Supportive Housing Network of New York. New York is also the headquarters of the United Nations. This mix of affirmative constitutional mandates, historical commitment to supportive housing, active civil society organizations, and the presence of the United Nations make it the ideal site to seed a rights-based strategy with global influence.
CHAPTER 1.
The State of Supportive Housing

What is Supportive Housing?
The primary form supportive housing takes is collocated units in a single development. Siting supportive housing units in a single building allows for the more cost-effective provision of the services component. Historically, some supportive housing developments have been “scatter site,” which means that users live in individual apartments, sometimes not near one another, and among non-supportive housing tenants. The scatter site approach is not widely used in New York City and is increasingly difficult to implement because the extremely tight housing market disincentivizes landlords from taking tenants who potentially are a credit risk. Despite the fact that the government subsidizes supportive housing users, the history of the financial relationship between supportive housing programs and the government has created uncertainty among landlords. If the subsidy were to disappear, which is a concern given the precarious political willpower behind the program, landlords would face substantial barriers (both moral and legal) to evicting tenants.

Supportive Housing Policy in New York
New York State historically has been a leader in progressive policies that provide housing and services through a series of city-state agreements. As governor, Mario Cuomo introduced the first of a series of historic “New York/New York” agreements between the city and the state to address this problem. The third and most recent
"NY/NY" agreement, passed in 2005, funded a housing program for those suffering from issues related to mental illness, HIV/AIDS, and substance abuse.

Over the past 24 years, NY/NY I, II, and III have created 14,000 units of supportive housing, making New York the national leader in providing care to the most vulnerable—and placing it at the forefront of fulfilling the internationally-recognized human right to adequate housing. However, despite the cost-effectiveness of the intervention, New York’s program is perennially underfunded. New York City has 58,000 residents living in homeless shelters and there are 25,000 applications for supportive housing each year, and growing. The most recent city-state supportive agreement, NY/NY III, allocated funding for 9,000 units, of which only 117 remain. NY/NY IV is currently being negotiated between the city and the state. Governor Cuomo’s administration has proposed funding for 5,000 units of housing, 3,800 of which would be located in New York City—well short of the 30,000 units that advocates had hoped for.

The New York/New York agreements began on August 22, 1990, when Governor Mario Cuomo and NYC Mayor David Dinkins signed the “New York/New York Agreement to House Homeless Mentally Ill Individuals.”7 The state acted through the State Office of Mental Health (SOMH) and the city acted through both the Human Resources Administration, Department of Social Services (HRA) and the Department of Mental Health, Mental Retardation and Alcoholism Services (DMH). The goal was to provide shelter for people who cannot avail themselves of it independently, and who likely do not

have the capacity to independently make prudent life decisions. The terms of the agreement were such that the state paid two thirds of the construction costs and the city paid the remainder.

The NY/NY program targeted both mentally ill individuals in the shelter system as well as mentally ill individuals living in the streets or other public spaces. Each group presented its own particularities. "An individual is characterized as a homeless mentally ill shelter system user if he or she has spent at least 14 or more nights, not necessarily consecutively, in a City shelter or Reception Center or Partnership for the Homeless shelter within the previous 60 days." The definition then goes on to specify a number of categories for those meeting the requirements for this category. The unsheltered group definition included all mentally ill individuals who are homeless and did not meet the requirements for the first category.

Between these two groups, NY/NY I sought to provide housing and services for 5,225 citizens—4,750 shelter users and 475 non-shelter users, per the terms of the original agreement. By the time of NY/NY II was signed in 1999, the New York Times reported that the previous agreement was "widely hailed for moving almost 4,000 mentally ill people off the city's streets and out of its crowded homeless shelters." The number of homeless people has been declining over recent years, between 2013 and 2014 it declined by 2 percent (13,344 people) between 2013 and 2014.

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8 NY/NY Agreement
From 2007, it declined by 11 percent (or 72,718). Further, just over two thirds of homeless people are in a residential program. New York State has a particularly large portion of the nation’s homeless people, and, despite evidence of promising trends elsewhere in the nation, these numbers only appear to be rising.

An analysis by Coalition for the Homeless has found that homelessness in New York is the worst it has been since the Great Depression. Between 2013 and 2014, the number of homeless people in New York City shelters increased seven percent to 53,615 in January 2014—a record level. In February 2015, the number reached 60,484. There have been similar increases of homelessness among children and families with children, both in terms of length of stay and number of individuals staying. Over 2013, more than 111,000 New Yorkers passed through the shelter system. As the housing and the shelter systems become increasingly stressed, mentally ill homeless people, the least able to care for themselves, are hit the hardest.

**Summary of homeless persons in NYS by subpopulations reported (2014)**

<table>
<thead>
<tr>
<th>Subpopulation</th>
<th>Sheltered</th>
<th>Unsheltered</th>
<th>Total Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>Chronically Homeless</td>
<td>4,783</td>
<td>2,429</td>
<td>7,212</td>
</tr>
<tr>
<td>Chronically Homeless Individuals</td>
<td>1,947</td>
<td>2,403</td>
<td>4,350</td>
</tr>
<tr>
<td>Chronically Homeless Persons in Families</td>
<td>2,836</td>
<td>26</td>
<td>2,862</td>
</tr>
<tr>
<td>Chronic Substance Abuse</td>
<td>14,061</td>
<td>2,634</td>
<td>16,695</td>
</tr>
</tbody>
</table>

---

We can see in the graph above that of the general statistics, there were 14,443 “severely mentally ill” people in the state’s homeless population, with 2,001 unsheltered.

The Increasing Difficulty of Resourcing Supportive Housing

As previously noted, there are significant barriers—both from a political willpower perspective and the financial difficulties the lack of political willpower creates—to meeting the full need. This is despite the overwhelming evidence of the cost-effectiveness of the program. A SHNNY study of the NY/NY III agreement found that the city and state save $10,100 per year per tenant.14 The difficulty is that the savings are spread out across disparate agencies, and at different levels of the government, so no single stakeholder in these multi-stakeholder projects has significant incentive to promote the project.

SHNNY published a study of supportive housing cost-effectiveness for 177 residents in Illinois that found enormous cost-savings. Costs to the homelessness support systems fell 39% ($854,477). This was $2,414 per resident, per year. New users of supportive housing were subsequently less likely to end up in mental health hospitals, prisons, and other restrictive facilities. Users also consistently moved from expensive “acute” services to less expensive “preventative” services after moving into supportive housing. Qualitatively, “residents reported an increased quality of life after the supportive housing intervention. Not only did their housing stabilize, but their health improved, and they experienced less stress.”15

<table>
<thead>
<tr>
<th>Condition</th>
<th>HIV/AIDS</th>
<th>Severely Mentally Ill</th>
<th>Veterans</th>
<th>Victims of Domestic Violence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total</td>
<td>4,832</td>
<td>144</td>
<td>4,976</td>
<td>12,442</td>
</tr>
<tr>
<td>Unsheltered</td>
<td>12,442</td>
<td>2,001</td>
<td>14,443</td>
<td>2,085</td>
</tr>
<tr>
<td>Total</td>
<td>2,085</td>
<td>457</td>
<td>2,542</td>
<td>1,221</td>
</tr>
<tr>
<td>Total</td>
<td>1,221</td>
<td>58</td>
<td>1,279</td>
<td>1,221</td>
</tr>
</tbody>
</table>

The real benefit is likely even larger than reported: this study did not include a number of costs including costs to the homeless system and substance abuse treatment costs.

### Daily Cost to House Individuals in Different Institutional Settings (2004)

<table>
<thead>
<tr>
<th>Setting</th>
<th>Cost (2004)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Supportive Housing</td>
<td>$1,400.00</td>
</tr>
<tr>
<td>Shelter</td>
<td>$1,200.00</td>
</tr>
<tr>
<td>Prison</td>
<td>$1,000.00</td>
</tr>
<tr>
<td>Jail</td>
<td>$800.00</td>
</tr>
<tr>
<td>Psychiatric Hospital</td>
<td>$600.00</td>
</tr>
<tr>
<td>Hospital</td>
<td>$400.00</td>
</tr>
<tr>
<td>Supportive</td>
<td>$200.00</td>
</tr>
</tbody>
</table>


Supportive housing depends on the financial assistance provided by the New York/New York Agreements, which you can observe in the uptick in 1990 of the below graph.

**Figure B: Supportive Housing Developments Completed Annually**

Source: [http://furmancenter.org/files/FurmanCenterPolicyBriefonSupportiveHousing_LowRes.pdf](http://furmancenter.org/files/FurmanCenterPolicyBriefonSupportiveHousing_LowRes.pdf)
The capital costs for pre-development and construction are relatively easy to finance given the tax credits available, by which non-profit developers can offset the costs. The ongoing services are more difficult to finance. The services component typically runs on three-year contracts—and these three-year contracts are subject to appropriations. Because of the uncertainty around the political horse-trading that occurs around each appropriations cycle, it is difficult to find lenders willing to underwrite to these contracts. Jill Edwards of Bank of America Merrill Lynch, a major underwriter of supportive housing deals says that the main risk for the projects is the annual appropriation risk. Thus, on the financial side, financing the services component of supportive housing is the most difficult piece.

Further, under NY/NY III, the state paid 80% of operating costs and the current state is resistant to providing money again for operating and service contracts. Advocates for supportive housing have leaned heavily on the cost-effectiveness argument and still find themselves failing to persuade lawmakers.

NY/NY II, signed between Governor Pataki and Mayor Giuliani, allocated an additional $100 million to provide 1,500 apartments for mentally ill homeless people. Despite the earlier success of the program and strong support from significant political stakeholders, it had lukewarm support. The New York Times noted “Mr. Giuliani, a strong supporter of the program, originally had been pushing to build 2,500 apartments, but that would have cost the state far more money than the Pataki administration was prepared to spend.”16 And even Giuliani’s proposal, however, did not go far enough to meet needs. Advocates were hoping for 10,000 new supportive housing units.

For example, they noted, the number of adults in shelters in the city dropped to a 10-year low of 6,000 a night in 1994, four years after the state and city created New York/ New

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York. But beginning in 1995, as most of the original New York/New York apartments were filled, the number began to rise again, and now stands at 7,200, the advocates said.\(^7\)

At the time of writing, the current negotiations between de Blasio and Governor Andrew Cuomo (son of former Governor Mario Cuomo) concern Cuomo’s low-bid to create 5,000 units of supportive housing over the next ten years against a backdrop of 25,000 applications per year—and in a broader political context that increasingly leans toward a neoliberalism that, in its philosophical roots, is deeply opposed to social welfare programs.

Along with political resistance and ongoing financing challenges, there is also the community resistance to locating supportive housing, which creates a third barrier to consider. The arguments against often center around concerns that property values will drop if the housing isn’t well maintained or if the residents engage in offensive behavior. Arguments to the contrary note that supportive housing development can rehabilitate blighted buildings and provide useful services to the community.\(^18\) However, though counter-intuitive and despite prevailing public opinion to the contrary, there is evidence that supportive housing actually raises property values where it is sited.\(^19\) In November 2008, the Furman Center published a study of 7,500 supportive housing units built over the last twenty years in New York City. The research filled a critical gap in knowledge about supportive housing—much research had been done on group homes.

These problems are especially contentious in city land politics because supportive housing developers often choose to site supportive housing developments in areas with high poverty and low homeownership because land values are lower. However, the Furman Center found: “In fact, a simple comparison of census tracts in the city reveals that in 1990, before most supportive housing was sited, tracts that now have supportive

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19 Ibid.
housing tended to have higher poverty rates and lower homeownership rates than tracts
that do not."20 In the their study, the Furman Center found:

In sum, our research reveals that the prices of properties closest to supportive housing—
which are the properties opponents of supportive housing claim are most likely to be
affected by the development—increase in the years after the supportive housing opens,
relative to other properties located in the neighborhood but further from the supportive
housing. Prices of properties 500 to 1,000 feet from the supportive housing may fall
somewhat while the buildings are being built and as they open, but then steadily increase
relative to the prices of properties further away from the supportive housing but in the
same neighborhood. Our results accordingly suggest that over time, the values of homes
near supportive housing do not suffer because of their proximity to the supportive
housing.21

Despite this fact, NIMBYism remains a major hurdle facing supportive housing
developers, both in dealing with communities as well as codified in government law.
Before beginning work on a development, would-be supportive housing developers must
get approval from local community boards—a requirement that no other type of housing
must satisfy.

So what is next? How can advocates better frame the supportive housing project to
overcome intense inherent biases that are deaf to even the most rationalist economic
arguments, ignoring market incentives and public budget benefits? In a political
environment dominated by liberal economics, where our faith is placed in “efficiency,”
where municipalities are increasingly managed in the model of a business (see
Bloomberg’s “the business of government”), and where the traditional mandate of
government to correct market failures is consistently challenged by many on the political
right, how can we rise above the fiscal matrix and build a case for supportive housing
based on human dignity? This paper develops a rights-based framework, touching on
state, national, and international channels, as an alternative to the current approach. The

20 Ibid.
21 Ibid.
following chapter will examine challenges in the achieving a rights-based remedy in the domestic legal context.

CHAPTER 2.
Recovering the Natural State

“That government is best which governs least.” These words are most often attributed to Thomas Jefferson. The sentence and its various permutations are the foundation of conservative politics in the US. The phrase contains the basis for the justification of market fundamentalism, the belief that markets are the best way to allocate resources. The fact that this assertion, ascribed reverently to a Founding Father, actually occurs in Thoreau’s “Civil Disobedience” does not seem to matter. It is held by some to the level of axiomatic truth that it does not warrant scrutiny, and the extreme position, put forth as a reasonable attitude, has shifted the entire political frame to the right. Welfare advocates find themselves having to fight harder for policies that redistribute down than proponents of the multitude of tax breaks and other programs that redistribute up.

We’re still less interested in the argument of which it is a mere part. Thoreau carries it to a more extreme expression: “That government is best which governs not at all.” Thoreau confirms in this follow-on that he misunderstands the mechanisms that grant him security of tenure, i.e. a claim to private property, to make this lifestyle possible. Examining the contours of this line of thought reveals much about its modern instantiation.
In most cases, Thoreau is correct in suggesting that, in theory, a person is able to satisfy his most fundamental, biological needs independently, but he fails to recognize the regulatory structures that separate a person from being able to satisfy needs in a simple way. Participating in society and securing a home in Thoreau’s time and now involves entering into a contract with a landowner or homeowner to exchange money in return for access to a given space. Even if you already own the land, positivist legal structures and their enforcement mechanisms are what prevent others from depriving you of your property. Ownership is only sustained through the continual potential invocation of government enforcement. When wars or riots break out—i.e. when the government loses the monopoly on force—the notion of private property is abandoned.

A mentally ill homeless person faces deep disadvantages in a system that only benefits itself to those who understand it. The most basic, natural rights of human beings are the rights that allow each one of us to survive. We need food to eat, water to drink, a place to sleep, and basic sanitation. Without these capabilities, a person cannot exist. To deny a person these rights is to sentence him to death. A mentally ill homeless person might choose to relieve himself in a river, which would be a natural way of achieving personal sanitation, but society has recognized that it is not in everyone’s best interest to permit this. Thus, it is restricted. Access to a place to sleep for mentally ill homeless citizens is similarly restricted. These restrictions are an affirmative imposition on natural rights: the government has intervened in the natural world to restrict access to otherwise common resources. The constraints are largely invisible because of the frame that is popular for viewing the world. We see only the extension of the government’s hand in situations in which it upsets the current order. The public has erroneously confused as the natural state what is in fact a positivist intervention that benefits most, but not all people (i.e. the commodification land and housing).

Modern opponents of social welfare remedies lean heavily on the restrictive language of the Constitution. Unlike the constitutions of our peer states, the US Constitution has not been understood by modern federal courts to enshrine affirmative economic rights and is in fact heavily restrictive of action by the federal government. The authors of the
document, separating themselves from a monarchy they saw as unjust, inflicted the document heavily with language limiting state power. In this line of reasoning, the state exists merely to enforce property rights and adjudicate private contracts.

However, this understanding masks the fact that supposed non-interference perpetuates an artificial system that disadvantages mentally ill citizens. This inequality perpetuates homelessness.

What would Thoreau have done if a homeless person were to arrive at Walden to eat his food and sleep in his cabin? By what right did Thoreau maintain his cabin? (Invoking the law is even unnecessary: without bringing law into the question, what social norms kept others from doing this?) Thoreau only owned the assets by which he secured his livelihood through the mechanisms of the government. This inability to know the difference between the world we enjoy by natural right and the world we enjoy by the architecture of laws inhibits our ability to conduct our economy in a humane way.

Thoreau spent two years living in his cabin by Walden Pond, on land owned by Emerson and, ultimately, he was unable to square his philosophy with the facts of his life. He refused to pay taxes to the US government because of his opposition to the Mexican-American War and slavery, but it was this very government that protected his exclusive right to his cabin. American political and judicial norms do not recognize the institution of private property rights as a government intervention, and yet real estate markets exist because of government-protected property laws. In fact, government “interventions” in the form of land use law, affordability standards, and other community benefit regulations are simply manners of styling a market that is already constructed by the original “intervention” of property law. The institution of land ownership requires a process of making one’s claims intelligible to the state, and prevents the unrestricted and natural use of the land. This necessarily disadvantages certain citizens who cannot express or otherwise codify their claims. There were, no doubt, people starving in Thoreau’s era, who might have made use of his food and shelter. However, he, like many
today, saw the violence of government only in its actions, when there is a more sustained violence where it does not act.

**Resistance at the Federal Level**

The limits of the modern state’s positive responsibility to its citizens were established in *DeShaney v. Winnebago County*. This 1989 Supreme Court case, concerning the custody of a divorced couple’s child, found that the government was not liable when it allowed the father to retain custody of his child, even though caseworkers knew that the father was beating the child. The beatings continued, the government did not act, and eventually “Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. ... Joshua did not die, but he suffered brain damage so severe that he is expected to spend the rest of his life confined to an institution for the profoundly retarded.” 22 The mother of the child sued the government on the basis that the government failed to intervene in child abuse that it knew about, and thus denied the child’s right to liberty under the 14th Amendment. The Court did not find the government liable because, it argued, the child *was no worse off than if there had been no state services offered at all.*

This ruling typifies a difficult strain in US jurisprudence that provides a significant challenge for welfare advocates. The government finds itself liable only when it has created the adverse conditions. The Court stated:

> The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without “due process of law,” but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text...[The purpose of the Clause] was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.

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Consistent with these principles, our cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid.... If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them.23

Even for a four year old minor in the state welfare system, the government owes no positive protection—the Court reasons that, after all, Joshua would have been beaten even in the absence of government.24 Deshaney is a loadstar case demonstrating just how conservative the U.S. federal government can be in interpreting personal liability for the well-being of its citizens, only holding itself accountable to corrects ills that it believes it has created. The state determines it has not created the initial harm for this family, and therefore does not owe a remedy.25 In this case, the federal government denies responsibility for private actions within the home, on the premise that Joshua’s abuse would have transpired independent of the institution of government. This is an extreme example of the preference for negative rights, or the “freedom from” government intervention in the private realm, in the American judicial system, even when it comes to the most helpless citizens. This point will become crucial to understanding the position of mentally ill homeless people in the public realm, as this paper explores jurisprudential attitudes to their predicament.

The Interventionist Character of the Status Quo

There is a strong basis for arguing that there is an existing government intervention that actively creates a disadvantage for certain citizens. If we can establish this, it is easier to hold the government accountable for those its system actively disadvantages—even under the extremely conservative federal tendencies typified by the DeShaney ruling.

23 Ibid.
25 Ibid.
At a baseline, citizens have the right to the circumstances necessary to allow them to survive. These are the most basic needs: food, shelter, and sanitation. We could argue that even so-called rights like “education” are not necessary in this sense and, being harder to defend and unnecessary for my purposes, I set them aside. In the US context, as in most contexts around the world, obtaining these subsistence conditions requires the navigation of a system of regulations and contractual norms. The government has overlaid a socially constructed system on the natural world and all ownership and use of the services necessary to secure these conditions depends on the ability to navigate this artificial system. We do not need to decide where this order of affairs falls in a normative moral framework. It is enough to recognize the intervention in private contract for the government intervention that it is.

The parceling of land—land ownership, whether by public or private parties—allows exclusive uses of the land. The government has created a scenario in which the basic subsistence of people must be negotiated through the government—everything from sleeping to sanitation infrastructure. This is not a “natural state.” Living as a human being is not a matter as simple as identifying a plot of land, erecting a cabin, and growing food on it. Thoreau deceives us with his advertised simplicity: he could not have that cabin without property rights and the mechanisms to enforce property rights. Where would he be if someone else came onto his land and attempted to use it? All property ownership is an act of force—or more often the “shadow” of force—and is necessarily exclusionary.

And, in fact, federal and state governments in fact go well beyond mere property rights enforcement. The entire legal regime is a statutory process for the negotiation of private agreements, supplemented with measures skewing housing markets in favor of the wealthy. The most glaring example of this is the Home Mortgage Interest Deduction that is written in such a way that “the 5 million households in America making more than $200,000 a year get a lot more housing aid than the 20 million households living on less
than $20,000.”26 The incentives even extend to second homes. The subsidy costs the
government between $30-40 billion per year—money that could be put to a more morally
and fiscally sensible purpose.

Government creates individual dependency on its services and resources. For example, it
has asserted monopoly power to protect from crime and to enforce the laws. It has the
power to tax and to decide how tax dollars are spent. It has monopoly control over access
to certain resources, such as highways, legal proceedings, and government information.
It has displaced private alternatives and required or encouraged reliance on its own
regulatory structure in numerous areas, including licensing of professionals, inspection of
buildings, food and drugs, and supervision of child welfare. In short, it has stripped
citizens of self-help remedies in numerous areas.27

In fact, the government actively interferes with and mediates contracts between private
parties all of the time. “It is uncontroversial that government activity affects wages,
prices and job and housing availability, and protects certain entitlements but not others.”28

Vulgar proponents of free enterprise [may argue that poverty and dependence are not the
result of other people’s arrangements]. But free enterprise theories of any standing from
Adam Smith to Bentham to Mill ... have recognized that it is indeed arrangements made
by other human beings (as well as differences in native abilities and industriousness) that
determine the distribution of wealth and poverty....[This distribution] is a matter of social
institutions, [which decide how property is to be held or controlled].... [This] unequal
access....diminishes....negative liberty, since dependence on others....diminishes the area
in which [people] cannot be pushed around.29

The tidiness of the non-interference framework loses some of its former strength. What
is, after all, the base case? The government less visibly but more powerfully exerts its
force in regulating the ability of individuals to access essential resources.

26 Badger, Emily, and Christopher Ingraham. "The Rich Get Government Handouts Just like the Poor. Here
27 Bandes Pp. 2321-2
28 Bandes P. 2306
29 Bandes P.2306
Through regulation, the government displaces private remedies to basic biological issues and holds a "monopoly over some avenues of relief." 30 We can see this clearly if we suppose a world in which there is no government at all. In this world, a homeless person would in fact be able to construct a home and feed himself however he sees fit. And the only reason a police officer has the "right" to arrest a homeless person—whether for vagrancy or any number of the other ways that governments have criminalized the existence of homeless citizens—is because he is acting through the superstructure of the law. Because of the government’s positively-enforced regulation of the housing market and sanitation facilities, mentally ill homeless people are placed at a disadvantage. Even the federal DeShaney court would have to accept that the government directly created these unfavorable circumstances and order a publicly financed remedy.

**Article XVII & New York State Case Law**

It is important to note that many states interpret their responsibilities to citizens with a more proactive, positivist stance, as compared to the federal government. State constitutions are intended to be supplemental to the federal constitution, and are free to add additional responsibilities. The legal environment with regard to the government’s positive responsibilities looks quite different in certain states. The New York State constitution, for example, contains strong affirmative language that protects welfare rights for “needy citizens.” Ratified in 1938, deep in the New Deal-era, the state legislature ratified, Article XVII, Section 1. It reads:

> The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.

In other words, Article 17 states that the NY State government *owes* its “needy” citizens a secure livelihood, with remedies to be defined by the legislature. In the 1977 New York Court of Appeals case, *Tucker v. Toia*, which concerned plaintiffs appealing ineligibility

30 Bandes P. 2283
for welfare relief, Article 17 was found to require “a positive duty upon the State.” The language of the injunction was strong: the NYS Constitution “unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy.” This is in sharp contrast to the DeShaney court, which would have likely absolved the government of any responsibility to the plaintiffs. In this State court case, the local government was indeed held accountable for remedying individual sufferings without establishing responsibility for the “initial harm” related to the plaintiffs. A different standard is upheld: One must only prove that certain individuals are classified as “needy,” not the cause or catalyst of deprivation.

However, the language of the article was found to situate within the legislature exclusively “discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term ‘needy.’”

This evidence of willingness to accept affirmative welfare rights in general is reinforced by successes in cases dealing directly with housing rights. In NY State law, Article 17 is often used in cases establishing affirmative housing rights, recognizing that providing adequate housing is an important way to safeguard the livelihood of the needy. The landmark case in this arena is McCain v. Koch (1986), which required the city and the state to shelter homeless families with children. Since that ruling, there have been several decisions reinforcing “the power of the courts to set minimum standards of decency and habitability for emergency shelters…and to compel officials to comply with those court-ordered standards.” This decision was reinforced by a trial court decision in 2005 that saw the court exercise its power to rule that the state was not living up to its affirmative obligations under the realized right to shelter.

32 Ibid.
34 Ibid.
Despite the dependence on the legislature for implementation, this line of case law demonstrates a real, non-anomalous strain of jurisprudence that holds state constitutional law as protecting affirmative legislative action—in stark opposition to the federal trend that courts are there primarily to check (affirmative) legislative actions. In the words of one scholar:

Article XVII opens with words of command, that the legislature provide forms of public assistance to the poor, and concludes with words of permission, affording the state flexibility and open-ended authority to carry out this duty. The clauses are sequential and conjunctive, first imposing a duty on the legislature, and then empowering the legislature to meet its duty through any chosen device. The individual’s right to assistance is thus interconnected with the government’s power to effectuate that right.36

This analysis of Article 17 establishes that this is a “mandatory duty” rather than a “discretionary function.” There are parallels in numerous states regarding education. Every state has educational provisions in its constitution. Helen Hershkoff, a civil liberties professor at New York University, notes, “Numerous other state courts that have considered the issue have rejected the argument that state educational clauses raise a political or otherwise nonjusticiable question simply because the legislature has discretion in operating the state’s public school system.”37 This respects legislative discretion in addressing an issue while deploying the judiciary to enjoin the legislature to meet its constitutional requirements. Throughout any legislative action in this arena, the process by which it is achieved remains subordinate to the outcome demanded. Here, we see that law around affirmative rights functions quite differently than it does at the federal level, which typically treats legislative discretion with “unreviewable power.”38

37 Ibid. P.1413
38 Ibid. P. 1415
The Historical Context

This use of Article 17 through State courts in recently years—as a means of providing housing as a basic welfare right—is interpreted directly as intended at the time the legislation was adopted. The amendment’s purpose was to create grounds for state-level judicial remedies for minority population segments “who lack conventional forms of political access” and whose needs are not protected by federal law.39

The historical context of Article XVII reinforces the appropriateness of this purchase on the affirmative mandate. The Social Security Act of 1935 rejected the idea “that income support constitutes an essential right of social citizenship.”40 Instead, it created a distinction between the “deserving” and the “undeserving” poor. In 1936, FDR’s administration turned over assistance for the poor to the states by terminating the Federal Emergency Relief Administration. This move produced significant hardship in many states, which suddenly found themselves with vastly increased responsibilities. New York responded “by expanding its commitment to the poor and by solidifying its power to adopt social welfare legislation.”41

The New York Constitutional Convention of 1938 occurred in the wake of the Great Depression, which staggering unemployment and other social issues. From 1929 to 1933, totally employment dropped by 25%. “By 1933,” Hershkoff writes, “more than one and a half million New Yorkers were receiving some kind of assistance and many more needed relief but went unaided.”42 Employment and wages fell dramatically, putting extreme pressure on some of the most vulnerable groups. In Buffalo, the number of homeless men seeking shelter spiked 1000%, to more than 750,000. Malnutrition among children in the Mulberry district of New York City rose by a third to 99%.

In 1934, New York State Governor Herbert Lehman created the Commission on Unemployment Relief. The commission’s report in 1936 “coincided with the

39 Ibid. P. 1432
40 Ibid. P. 1417
41 Ibid. P. 1418
42 Ibid. P. 1419
government's controversial decision to dismantle" the Federal Emergency Relief Administration. While 15 states, including progressive states such as Massachusetts, drastically cut back on relief in the vacuum of a federal administration, Lehman and his commission doubled down. They diagnosed the social problems of poverty as a long term problem extending beyond the Depression and its most dramatic symptoms. Indeed, in its report, the commission called for “a continuing and permanent policy for home relief.”43

Lehman's administration advanced its “little New Deal” with the governor announcing in 1938, “government must adhere to the policy of assuring to the needy adequate food, clothing and shelter.”44 It was in this context that Article 17 of the New York Constitution came into being at the 1938 Constitutional Convention. The drafting committee for the article was chaired by Edward Corsi, a prominent New York City Republican. The goal of the committee was to transform a discretionary norm into a constitutional right and ensure that the state could meaningfully fulfill the newly constituted right. The committee denounced the failure of other states to serve the poor. (For example, one participant noted, the “brutal callousness to human suffering ... witnessed ... in the State of New Jersey.”45

When presenting Article 17, Corsi declared the purpose in unequivocal terms:

Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.46
Other members of the committee reinforced Corsi's words: "We feel that up to that very last penny where somebody needs help to eat and to have shelter and to preserve body and soul, there is a claim on the state."\textsuperscript{47}

In addition to delivering welfare at the state level, the other key feature is that Article 17 leaves significant legislative discretion in terms of how to execute on this obligation. This is significant because it doesn't necessarily require the creation of state or city agencies. Social problems have many causes. We suffer from an education problem not necessarily because there is a shortage of schools or teachers. It can be because children are malnourished or it takes too long to get to school. An educational problem can thus be a nutrition problem or a transportation problem. Similarly, a homelessness problem can be a low-wage problem or a property market regulation problem. The legislature is left with a full array of remedies rather than any command to violate the market fundamentalism that prevails in modern political discourse.

Courts cannot enforce these rights alone: as in any legal reform, buy-in is necessary from many parties. This insight from international state building exercises is particularly relevant here. In addition to the necessarily uncalibrated application of a federal policy at the state (and local) level, emanating the reform from a federal court would create situations of unfunded federal mandates. Unfunded and unpopular mandates are likely to underperform and the negative press from such outcomes would be deleterious to future political will around the issue. In contrast, states, more attuned to the specific needs of their constituents, "may arguably be in a better position to provide these affirmative social and economic rights because they arise from problems faced within the boundaries of one state and may reflect traditions of dedication to a particular area."\textsuperscript{48}

\textsuperscript{47} Ibid. P. 1424
Returning to the Federal Sphere with Rights in Hand

As outlined above, it is difficult to realize the affirmative right to adequate housing for mentally ill homeless people under the attitudes held by US federal courts and a general inclination of the public to liberal economic policies. However, establishing these rights at the state level would make them welfare entitlements, which have a different character in the federal sphere.

New York courts have shown promising signs regarding the affirmative interpretation of existing welfare laws. The 1970 federal Supreme Court case Goldberg v. Kelly held that recipients of welfare entitlements must have a hearing before the entitlements are revoked. The underlying logic of the court held that welfare entitlements were, effectively, the property of the recipients, which is cause to invoke the federal government’s vigorous protections of property rights.

Federal court precedents for applying special consideration to mentally disabled citizens can further bolster this defense. In the 2002 case Atkins v. Virginia, the Supreme Court ruled six to three that it was illegal to execute mentally disabled citizens. Although this discretion was limited in the 2014 case Hall v. Florida, which established a clear intelligence quotient score, the underlying willingness to grant special consideration remains. This willingness to grant mentally ill citizens special exemptions to regular consideration is a favorable signal for advocates planning several steps ahead, anticipating a challenge at the federal level.

Despite these encouraging signs, the fate of a supportive housing entitlement at the federal level would, however, remain uncertain. The Goldberg ruling was a high water mark in welfare entitlement jurisprudence—the Supreme Court subsequently stepped away from this ruling. Activists should not understand Goldberg as part of a general trend, but rather the outer bounds of what is possible with regard to welfare-as-property in federal jurisprudence.49

49 There are other reasons to not depend on the welfare-as-property approach. Defending welfare because of its status as property commoditizes something that is better
The *Goldberg* ruling would nevertheless remain a strong tool. The more modest result of the case, finding that welfare recipients are entitled to a hearing before the revocation of their benefits, would make it difficult to revoke an established right to supportive housing. Attempting this would involve bringing mentally ill people before a court and arguing that their right to a decent livelihood be revoked. The emotional content of the scene would likely be a strong disincentive to revoke a supportive housing unit. And, again, this would be bolstered by a jurisprudential path dependency to granting special consideration to mentally ill people.

understood, as I have been arguing, as a fundamental right that must be realized at a more basic level than that of the marketplace.
CHAPTER 3.
Applying an International Human Rights Approach

Activists seeking the implementation of economic and social rights often turn to international agreements, which unambiguously endorse these rights. Of particular relevance to this debate is the International Covenant on Economic, Cultural, and Social Rights. This covenant (ICESCR) protects a number of key economic rights, including the right to education, fair wages, and adequate housing. However, although President Carter signed the treaty, the US Senate never ratified it. International law holds that countries that are signatories are bound not to implement policies contrary to the spirit of the agreement. Failing to provide supportive housing could be construed as a violation of this principle. However, there is little prospect of this coming into play because federal courts often disregard even ratified treaties. Instead, international human rights norms can provide a legal grounding to strengthen the commitments of Article XVII, and to connect domestic activism to global housing struggles through the language of mobilization.

Mobilizing with an International Rights Framework

The idea of a shared, international normative framework is a powerful and flexible tool. The Declaration of Independence of 1776 contains the oft-quoted phrase (emphasis added): "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life,
Liberty and the pursuit of Happiness.” In the absence of a basis for the rights they sought in the laws of their nation, the authors looked abroad.

A few decades later, black rights advocates turned to international norms to push for the rights of those excluded from the Declaration’s “all men.” Frederick Douglass used the term “human rights” when he was defending the humanity of African American slaves. Continuing in this tradition, the NAACP lobbied intensely at foundational meetings for the UN for the inclusion of language that encompassed the human rights struggles of civil rights-era blacks. The juxtaposition of these movements highlights the flexible application of international norms. Sometimes the law is not the law, and we can make it what we want it to be by tapping into international attitudes.

In the present day, like any good hegemon, the US attempts to circumscribe the scope of valid rights to head off criticism. By narrowly construing “rights” to mean only civil or political rights, the US ignores the continued protection of human rights, which are also violated in our country through various forms of indignity, oppression and neglect that affect basic human survival. In response to this, contemporary advocates should recover the tradition of looking abroad for moral support.

**International Frameworks in Action**

On October 18, 2014, Catarina de Albuquerque, the United Nations special rapporteur on the human right to safe drinking water and sanitation, and Leilani Farha, UN special rapporteur on adequate housing arrived in crisis-stricken Detroit. Amid the city’s myriad problems, the water utility had shut off supply to 27,000 residents who were unable to pay their water bills. The residents argued that this shut off violated their human right to water. De Albuquerque and Farha agreed, censuring the US government on the basis of an internationally recognized right to water.

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51 This right is recognized under several international treaties—none of which have been ratified by the US—including, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW, Art.14(2)), the Convention on the Rights of the Child (CRC, Art.24) and the International
Invoking UN mandates in the United States is an unusual practice. After all, we most often hear about “human rights” selectively deployed against far-away foreign dictators, like Saddam Hussein’s Weapons of Mass Destruction or extreme hunger in North Korea. In Detroit, it came after an unsuccessful lawsuit against the city. Frustrated by the lack of local action, advocates “shopped” for a different jurisdiction through which to voice their complaint. Bringing it to the attention of the UN gave global weight to the local issue; suddenly, a failure in Detroit would be a setback for the global struggle. The involvement of the UN also provided an additional incentive for the US to act, if only to avoid shame.

The underlying issues that created this crisis run deep. Detroit’s economy has been shrinking and some of its more impoverished residents have found themselves unable to pay their water bills. Rochelle McCaskill, a representative citizen, lives on a $672-a-month disability check—$600 of which goes to rent, leaving her with little money for anything else. The city was unsympathetic to McCaskill and at least 27,000 other households. Those on the other side of the issue asserted that, although we have largely given provision of water over to the private sector, it’s a basic human necessity and therefore requires special consideration. “Disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human rights,” de Albuquerque wrote in their report.

That a rights-based intervention on behalf of residents necessarily means interfering with the liberal economic model of service provision makes this issue particularly thorny in the contemporary political climate. While the UN intervention provided visibility more than a remedy, the application of international legal norms provides guidance for advocates working across a wide array of economic justice initiatives in the US.

Covenant on Economic Social and Cultural Rights. The ICESCR reads: "The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses", UN CESC - General Comment 15, para.2.


53 Gottesdiener
International rights agreements—to say nothing of norms—are rarely upheld in contemporary domestic courts. However, their interface with domestic legal structures and grassroots movements can bolster the work of local human rights advocates.

The human right to adequate housing is an analogous rights silo. The essential elements of the right to adequate housing are established in General Comment No. 4 of the ICESCR and the “Women and Housing Questionnaire” annex of the 2007 annual report of Miloon Kothari, the former UN Special Rapporteur on the Right to Adequate Housing.

**Essential Elements of the Right to Adequate Housing**

1. **Legal security of tenure** — “All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats.”

2. **Availability of services, materials, facilities and infrastructure** — “All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services”

3. **Affordability** — “Steps should be taken by States parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs.”

4. **Habitability** — “Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors.”

5. **Accessibility** — “Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as ... the

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mentally ill ... and other groups should be ensured some degree of priority consideration in the housing sphere.”

6. Location – “Adequate housing must be in a location which allows access to employment options, health-care services, schools, childcare centres and other social facilities.”

7. Cultural adequacy – “The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing.”

Mentally ill homeless people, even more so than the Detroit residents, are unable to take advantage of the market to satisfy basic human necessities. Without adequate protections under US law, and with the relative magnitude of this issue compared to the myriad other social issues affecting greater numbers of (politically active) citizens, supportive housing advocates would be wise to reach into this toolkit. It provides a normative framework for defining appropriate remedies.

The international framework is important in diagnosing the extent of the problem. Most importantly, introducing the international right to adequate housing as a frame for understanding the situation of mentally ill homeless people in New York, locates the issue within the broader structural issues of public health, housing, among a host of others. It prevents policymakers from seeing housing for mentally ill homeless people as a discrete silo, having no relationship to other housing issues. The international framework calls for citywide housing policy response. It demands both unpacking the relationship of mental health to environmental determinants and acknowledging the continuum of cognitive ability. With regard to the latter, fully acknowledging the continuum of cognitive ability demands a continuum of supportive housing remedies, so that higher-functioning tenants can meaningfully realize rehabilitation.

Engaging deeply in each constituent element of the right to adequate housing yields specific enhancements in public policy responses to the issue at hand. For example, introducing legal security of tenure as a component of a housing solution for mentally ill
supportive housing tenants provides a strong theoretical platform from which to demand that financing the services component not be left to three-year appropriations—instead, being fully funded for the life of the project. Without the guarantee of services, tenants face the threat of eviction due to circumstances beyond their control. In this way, using the rights framework prompts the design of more structurally robust solutions.

This relates closely to, and possibly overlaps with, the element of location. If the services component of supportive housing disappears, the government would fail the accessibility test. This provides a second avenue for safeguarding services financing. (Location should also be a central focus because it can combat arguments to push mentally ill people to the peripheries of cities by reinforcing the need for access to appropriate care.)

Taking the accessibility lens seriously would also prompt a change in thinking. It demands priority be given to disadvantaged groups (among which it specifically names mentally ill people) in housing policy. For policymakers to meaningfully adhere to these guidelines, they must reallocate (or otherwise find) resources from tax breaks for wealthier homeowners in order to meet the needs of the street homeless and shelter populations. New York has failed to realize the right to adequate housing as long as problems persist for these groups.

As we have seen, the international framework is important in developing adequate housing remedies. The elements of the international right to adequate housing provide a frame through which policymakers can develop holistic solutions. As mentioned above, adequate housing means more than having a roof over your head. For supportive housing, the services component of housing is a *sine qua non*, but highlighting the centrality of location and security of tenure is also critical. Without the international frame, these essential but less obvious elements might be overlooked. For advocates from all sectors, it provides a methodology for developing arguments that will be intelligible to global housing rights entities—entities that are often important allies for politically weak grassroots movements.
Parallels with the Global Anti-AIDS Movement

The global anti-AIDS movement, a component of the broader “Right to Health” agenda, offers lessons on how civil society groups can advance their local causes by linking them to global concerns.\textsuperscript{55} Brazil provides a case study for this strategy. “In 1988, Brazil had the second highest number of reported AIDS cases in the world, second only to the USA.”\textsuperscript{56} Now, Brazil has an AIDS prevalence of less than 1%. This is a result of actions from a number of actors, including a significant contribution from civil society, to create a policy for free, universal access to anti-retroviral medicines.\textsuperscript{57}

Civil society actors catalyzed this rapid decline by adopting a human rights framework. This approach embraced the political content of public health, “remov[ing] health policy decisions from being matters of pure political discretion by placing them squarely in the domain of law.”\textsuperscript{58} Issues that are central to sustaining human life, from health to housing, are as political as everything else. However, a minimally acceptable standard of well-being—here, conservatively presented as the \textit{conditions necessary to sustain life}—should be secured as a baseline. Both the delegates to the 1938 New York Constitutional Convention and the drafters of the ICESCR took this view.

Advocates in Brazil were committed to establishing a baseline condition of “well-being,” and pursued this goal through a number of avenues. Their first step was to tackle the social framing of the AIDS issue through de-stigmatization efforts. This was important because it has been found that HIV/AIDS patients “living in areas where discrimination, 

\textsuperscript{55} Although a significant subpopulation of supportive housing users consists of people suffering from HIV/AIDS, the primary lesson here is in connection national public health concerns to global ones. Another parallel is The US has ratified the International Convention on the Elimination of all Forms of Racial Discrimination, which binds the government “to eliminate racial disparities in public health and health care.” Mentally ill homeless people in New York are disproportionately black. This is a violation of the Race Convention, and advocacy campaigns, supplemental to the general housing issues facing mentally ill citizens, can be organized around this.


stigmatization, and threats against individuals with HIV/AIDS are high, are less inclined to seek testing, thereby postponing treatment if available, which means that opportunities to decrease HIV transmission are lost. It is unlikely that the analogous stigmatization of mental illness will result in an increase in new mental illness cases, but may contribute to policy inaction and public apathy toward the issue, thereby violating the human right to adequate housing, as defined explicitly in the ICESCR and implicitly in the NYS constitution, of mentally ill citizens.

Veriano Terto, Jr, executive director of a national NGO called the Brazilian Interdisciplinary AIDS Association (ABIA) said:

The participation of civil society also was fundamental for including solidarity, respect for human rights, and the struggle against prejudice and discrimination to the response against AIDS. These points were fundamental for amplifying the notion of health beyond the search for physical well-being, and technical measures focused only on the treatment of individuals. In this sense, the demand for universal and free access to medicines should be seen as a question of making real the right to life, and respect of the basic human rights of people living with HIV/AIDS in Brazil.

Brazilian activists also strengthened the country’s constitutional right to health by connecting it to global efforts. The 1948 Universal Declaration of Human Rights is the basis of the anti-AIDS movement. The UN General Assembly unanimously accepted it as a global standard. Included in this text is a right to a “standard of living adequate for the health and well-being of himself and his family, including ... medical care and ... the right to security in the event of ... sickness, disability ... or lack of livelihood in circumstances beyond his control.” The right to health was ultimately implemented via the ICESCR (in Article 12) in strong language, calling on countries to “realize progressively” “to the maximum available resources” the “highest attainable standard of health.”

59 Galvão
60 Galvão
A Brazilian lawyer involved in the movement, specifically cited the strategy as the “successful result of a model of action adopted by organized civil society.” The strategy successfully “utilized the language of human rights and the strategic application of national laws . . . [and] succeeded in placing on the political agenda questions that affect the life of people living with HIV/AIDS, and in so doing altered public and state policies regarding health care.” Although the US did not ratify the ICESCR, the treaty should still be an important factor in advocacy for mentally ill homeless people.

Connecting anti-AIDS struggles to global ideals catalyzed a strong (and, to some, an outsized) response. Capitalizing on the emotional resonance of the issue produced global support far beyond the relative impact, measured in terms of human lives, of the virus itself. The issue was a major component of the UN’s Millennium Development Goals. The MDGs specifically targeted AIDS; in 2002, 300,000 people in the developing world received antiretroviral therapy; by 2013 that number was almost 10 million. However, some scholars assert that such an approach is a danger to the greater system. Dr. Ezekiel Emanuel, a bioethicist and former Obama administration health policy adviser, wrote: “The fundamental ethical, economic, and policy question is not whether PEPFAR is doing good, but rather whether other programs would do even more good in terms of saving life and improving health.” The willingness of policymakers to disproportionately allocate public funds can work to the advantage of supportive housing advocates.

As we have seen, the success of Brazil’s anti-AIDS campaign, albeit in the context of a broader move toward populist policies and a universal healthcare system, was heavily dependent on civil society organizing around international norms to realize a domestic

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constitutional Right to Health. Advocates for supportive housing for mentally ill homeless people can look to this struggle for three lessons:

1. How to amplify the public’s attention to the issue;
2. The role of destigmatization in a long term public remedy/response; and
3. How to achieve a meaningful realization of the right via policy and budgetary mechanisms.

The power of these lessons is amplified by South Africa’s experience. Under the administration of Thabo Mbeki, which began in 1999, the AIDS crisis worsened in the country, due in large part to Mbeki’s denialism. Mbeki’s policies promoted tribal remedies to the extent that they blocked access to proven clinical treatments. In contrast, Mandela worked hard to destigmatize the disease, even going as far as to publicly acknowledge his own son’s death from AIDS. Mbeki’s harmful policies remained entrenched despite the support of a singularly powerful public figure and the work of grassroots organizations to change the policy response to the country’s AIDS crisis.

With policymakers unwilling to act in the best interests of the population, the Treatment Action Campaign, one of the most powerful grassroots organizations in South Africa, challenged Mbeki’s policies in the constitutional court. Section 27 of the South African constitution compels the government to progressively realize a right to health. The court ruled in favor of TAC in the 2002 case Minister of Health v Treatment Action Campaign.65 In addition to widening the availability of medicines, which prevented hundreds of thousands of deaths, it drove public financial resources to meet the needs of the poor.66 The victory demonstrates a pathway to achieving a specific element of a Right to Health via the judiciary when, in situations where, unlike Brazil, policymakers are unsympathetic to public health goal. This lesson is complementary to the lessons

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from the case of Brazil, widening the breadth of options available to activists working on mental health issues in the US.

**International Monitoring on US Human Rights Obligations**

US advocates for supportive housing policy can draw on important precedents for the invocation of international law in domestic courts. The concluding observations published in August 2014 of the Committee on the Elimination of Racial Discrimination, which monitors US compliance on the Race Convention, specifically highlighted the connection of the convention both to housing issues in general and public health and housing in particular, citing “inadequate access to health-care facilities.” 67 The committee recommended that the US “ensur[e] the availability of affordable and adequate housing for all, including by effectively implementing the Affirmatively Furthering Fair Housing requirement by the Department of Housing and Urban Development and across all agencies administering housing programmes.”

The Human Rights Committee also devoted a section of their report specifically censuring the US government for its criminalization of the homeless (emphasis added).

19. While appreciating the steps taken by federal and some state and local authorities to address homelessness, the Committee is concerned about reports of criminalization of people living on the street for everyday activities such as eating, sleeping, sitting in particular areas etc. The Committee notes that such criminalization raises concerns of discrimination and cruel, inhuman, or degrading treatment (arts. 2, 7, 9, 17, and 26).

The State party should engage with state and local authorities to: (a) abolish criminalization of homelessness laws and policies at state and local levels; (b) ensure close cooperation between all relevant stakeholders including social, health, law enforcement and justice professionals at all levels to intensify efforts to find solutions for the homeless in accordance with human rights standards; and (c) offer incentives for decriminalization and implementation of such solutions, including by providing

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67 CERD Concluding observations on the combined seventh to ninth periodic reports of United States of America (29 August 2014) UN Doc C/USA/CO/7-9
continued financial support to local authorities implementing alternatives to
criminalization and withdrawing funding for local authorities criminalizing the
homeless. 68

Domestic housing advocates can also draw on well-established international human rights
norms/language by explicitly connecting the lack of adequate, appropriate housing for
mentally ill homeless people with “cruel, inhuman, or degrading treatment.” The
language aligns with domestic attitudes of what is unacceptable and comes from a ratified
international treaty—offering greater legitimacy and legibility to a domestic discourse
around human rights norms/protector, even within a highly industrialized and
developed nation. The ICESCR and other agreements can provide additional support by
situating local instances of injustice with related struggles globally, increasing the
significance of what otherwise might be viewed as a negligible push for a marginal
improvement on the well-being of a small population segment. In particular, the
ICESCR General Comment No. 14 (and echoed in the Race Convention), dealing with
the Right to Health, that enshrines the right to “the highest attainable standard of health”
and links it with a number of global agreements, from regional African conventions to
global treaties. 69 Issues affecting small groups of people—and, in particular, people who
are both stigmatized and not politically active—benefit from global linkages as
majoritarian political processes are not well-suited to provide them with a remedy.

68 HRC Concluding observations on the fourth report of the United States of America (Advance unedited
version)
69 UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 14: The
Right to the Highest Attainable Standard of Health (Art. 12 of the Covenant), 11 August 2000,
In conclusion, the lack of supportive housing options for mentally ill homeless people in New York constitutes a prima facie violation of their human rights established in Article 17, Section 1 of the New York State Constitution, under the US-ratified Racial Convention, and the US-signed ICESCR. The unwillingness of politicians to enact a sufficient remedy via discretionary spending, despite the clear fiscal sense of the welfare intervention and an affirmative mandate in the state constitution, indicates that a more robust solution is necessary. A legal remedy for the condition of mentally ill homeless citizens is the only meaningful way of addressing this violation. Mentally ill homeless people are placed at a disadvantage under the positively-enforced markets method for housing allocation, rendering their basic life-sustaining activities illegal—which, in effect, criminalizes their existence. Because government actions have made them worse off, the government is responsible for providing a remedy for their situation. This is both a normative moral fact and a realistic jurisprudential goal for advocates, given the DeShaney ruling.

Policymakers and activists should consider the following four points in advancing fair housing for mentally ill homeless people:

1. Near-term ways of addressing supportive housing needs through changes in public finance priorities.

2. Synergies with government entities already providing housing to vulnerable citizens.

3. Opportunities to look upstream in order to address the causes of disproportionate homelessness among mentally ill people.

4. Opportunities to critique the global fixation on liberal economics with an emotionally resonant example of those this system leaves behind.
Immediate Financial Impacts

Establishing a right to supportive housing for mentally ill homeless people will have a number of downstream impacts on public finance. What once was discretionary spending would become mandatory allocations. In the short term, this will put a strain on public budgeting. In the long term, it could create incentives for creative policymaking upstream from the immediate symptoms of homelessness among this segment.

A court-ordered mandate to provide supportive housing would immediately require increased spending on new construction of supportive housing stock and an expansion of the public finance instruments necessary to fund the services component. Financing for supportive housing under NY/NY III came from the Office of Mental Health (a state agency) and the Department of Health & Mental Hygiene (a city agency). Assuming that financing increased supportive housing falls on these agencies, at least in the short term, they would face significant budgetary issues. Tax credits at both the federal and state level, such as the federal Low Income Housing Tax Credits, and other government subsidies make both components viable for developers.

Operating costs to cover caseworkers and other “soft” support are more difficult to finance. Historically, these have been allocated from discretionary spending on three-year contracts. Regardless, bridging the gap in the availability of supportive housing via this policy strategy would require more capital subsidies.

A major concern for developers and landlords is that, if the rent subsidies disappear, they are stuck with tenants who are unable to pay, and who are politically and morally difficult to evict. Policymakers can mitigate this risk in three ways. First, there is an emerging trend of mixing supportive housing units with traditional low-income housing units in new developments. Expanding incentives for this type of development exposes each developer and landlord to less risk per unit. Second, and in combination, the government could ensure landlords are able to retenant developments should they fail—provided that adequate emergency housing is provided for displaced residents. Third, the government...
can provide longer term funding contracts for services, ideally on 15 to 20 year schedules. This will make the developments more ideal for project financiers.

However, establishing supportive housing as a constitutional obligation could be enough to derisk the projects, by giving landlords the confidence that the projects have the full backing of the administration, regardless of political climate or election cycle. Jill Edwards, a Senior Vice President of Tax Credit Originations at Bank of America, who has extensive experience providing private sector financing for these projects has noted that one of the biggest deterrents for increased financing is the fear that discretionary allocations will disappear. In an interview, she said that “If the opex subsidy goes away, [banks] want to know that all the regulatory agencies and any lenders involved in the project will allow [the banks] to re-tenant.” A constitutional victory could provide just such a guarantee.

**Interdepartmental Synergies**

There are several potential remedies. The most obvious place to turn would be the Department of Homeless Services. This city agency has an annual budget in excess of $1 billion. (The large budget has grown out of a series of lawsuits that established a “right to shelter” in New York City.) Working with DHS to identify the extent to which increased supportive housing would lessen shelter capacity needs could provide opportunities for sharing costs.

The ballooning of the DHS budget in the wake of the establishment of the city’s “right to shelter” offers a positive sign that the city is willing to meet positive rights obligations imposed on it by the judiciary. A series of judicial victories created this right, beginning with the 1981 lawsuit *Callahan v. Carey*. The lawsuit, brought by the Coalition for the Homeless against New York City, specifically grounded itself in Article XVII. At the time, conditions for homeless people in New York City were dire. “When modern homelessness first emerged in the late 1970s, thousands of homeless New Yorkers were
forced to fend for themselves on the streets, and many died or suffered terrible injuries.”

In response to this, Robert Hayes, one of the co-founders of Coalition for the Homeless, brought a class action lawsuit on behalf of all homeless men. The New York State Supreme Court ruled in the plaintiff’s favor, and specifically cited the constitutional protections granted under Article XVII. Two years of negotiations ensued, at the end of which the city and the state agreed to finance shelter for homeless people who met a minimum level of need. In the decades following *Callahan*, numerous cases have been brought by plaintiffs, winning injunctions to improve the adequacy of court-ordered shelter. Although in recent years, various legislatures and administrations have pursued strategies to raise the bar—and thereby exclude—for shelter applicants, groups like the Coalition for the Homeless have been successful in preventing them.

The historical willingness of New York State to realize court-ordered remedies for housing-related economic rights is a positive signal for advocates pushing for the provision of supportive housing for mentally ill homeless people. If the state judiciary can be convinced that this population segment qualifies as “needy,” the legislature must comply.

**Touchstones for Domestic Human Rights Activism**

The root causes of an increased prevalence of homelessness among mentally ill people are diverse. Mental health care is burdensome to families, particularly in low-income communities. The state obligation to provide this subsidy could incentivize it to look upstream at the root causes. It is possible that providing support to households with mentally ill dependents is less costly than supportive housing. This is an area for further research that could yield important insights.

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71 "In the three decades since the Callahan consent decree was entered, numerous violations of the decree have been documented and several have resulted in court action. For instance, the court has instructed the City to address violations of the Callahan decree that involved insufficient shelter capacity for homeless men during the winter of 1996-1997, and persistent flooding of sleeping areas at a 400-bed shelter for homeless veterans in 1998. In recent years, plaintiffs and the Coalition have challenged the City’s persistent denial of stable shelter placements, through the use of single-night shelter placements for thousands of homeless men and women.” Ibid.
The difficulty enforcing human rights agreements and norms reveals the class bias in the global order. Multilateral entities such as the International Monetary Fund and the World Trade Organization vigorously defend financial agreements. To illustrate this point, consider that membership to WTO, unlike human rights agreements, allows no RUDs. And countries generally comply with WTO rulings. We have a system in which the political elite and corporations have a meaningfully empowered international body to look after their rights. Ordinary people on the other hand, who are in some cases struggling against depredations brought on by the international elite’s rush for housing stock, have no recourse. The situation of mentally ill homeless people provides an extreme example of this, and can be an entry point for critiques of the global order’s fixation on liberal economics.

Bibliography


