Homelessness and the Public’s Health: Legal Responses

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Introduction
Homelessness remains a prevalent, pervasive public health issue in the United States despite years of legal and policy interventions offering short- and long-term solutions. In 2002, the U.S. Interagency Council on Homelessness (USICH) began working with states and localities to create ten-year plans to end homelessness. Over the last 6 years alone, USICH reports a 33% reduction of veteran homelessness, 21% reduction of individuals experiencing chronic homelessness, and a 53% reduction in unsheltered homelessness among families. These achievements are laudable. Still, 564,000 people were homeless on average each night in 2015, according to the U.S. Department of Housing and Urban Development (HUD), and 1.5 million accessed homeless services in 2014.

Progress in reducing homelessness and its detrimental impacts on public health is promising, but insufficient. Homeless populations have become targets nationally for interventions that can be discriminatory or degrading, raising complicated issues at the intersection of protecting community health and respecting individual rights. This commentary initially frames public health issues for homeless individuals and the community and then assesses related law, policy, and advocacy options. Major topics include access to basic health services through state-based Medicaid programs, deficits in housing availability, criminalization of homelessness, and use of emergency declarations to address specific issues related to homelessness in select states and localities.

Homelessness and the Public’s Health
Poor health is simultaneously a cause and consequence of homelessness. The experience of homelessness leads to new health conditions, exacerbates existing ones, and complicates treatment options. Consequently, homeless people have high rates of chronic disease and acute illnesses, often associated with, or exacerbated by, their living situations. A considerable amount of published research on the health status and conditions of homeless persons also shows that they have a broad range of mental health and substance use needs. Greater exposure to violence, malnutrition, extreme weather, and criminal charges are additional risk factors for homeless persons, contributing to poor health outcomes and premature deaths.

Lack of health insurance and access to basic health services lead homeless populations to frequent emergency rooms and hospitals more often than the general public. They also have high rates of hospital inpatient readmissions. Pursuant to the Affordable Care Act (ACA), expansions of Medicaid coverage in 31 states to very low income people (under 138% of poverty, or about $16,000 a year for an individual) are key to improving health coverage for homeless populations. States that opted to expand their Medicaid programs created greater access to treatment options, enabled community-based safety net providers to deliver services, and helped patients transition to, and sustain, housing placements (although federal matching funds cannot be used directly for rental assistance). Unfor-
unfortunately, nearly 20 states (including big population states like Florida and Texas) have refused to expand their Medicaid programs to date, leaving approximately 3 million low-income people, including tens of thousands of homeless, medically uninsured. Millions more may lose access to health insurance if key portions of the ACA are repealed by President Trump’s administration.

Even among states that expanded their Medicaid coverage, provider reimbursements remain low, which diminishes their participation and communities’ capacity to meet patient needs (particularly concerning specialty care and behavioral health). Additionally, services critical to homeless persons, including adult dental care, case management, and housing support, are optional in state-based Medicaid plans.

Greater efforts to improve access to comprehensive health care, housing, and support services for homeless populations are still needed. Additionally, communities need to increase mental health and substance abuse treatment capacity, change laws that criminalize mental illness and addiction, and prioritize permanent and supportive housing over emergency shelters.

Greater efforts to improve access to comprehensive health care, housing, and support services for homeless populations are still needed. All states should consider expanding their Medicaid programs. States choosing expansion should include optional benefits, ensure adequate provider networks, and seek higher reimbursements. Additionally, communities need to increase mental health and substance abuse treatment capacity, change laws that criminalize mental illness and addiction, and prioritize permanent and supportive housing over emergency shelters. According to one survey conducted by the U.S. Conference of Mayors, between 2014–2015, emergency shelters in 76% of surveyed cities turned away homeless families with children; 61% turned away unaccompanied individuals. Improved access to lower-cost housing may flow from inclusionary zoning laws for affordable, low-income housing, and rejection of “not-in-my-backyard” (NIMBY) efforts to block such housing units or corollary health care facilities. Greater access to stable, affordable housing reduces homelessness among individuals and families, and improves community health.

Alternatives to Criminalization of Homelessness

The lack of affordable housing and available shelter space subjugates many homeless persons to survive on the streets, often prompting responses from the criminal justice system. Some communities target homeless persons by making it a crime to perform life-sustaining activities (e.g., eating, sitting, sleeping, camping, and begging) in public spaces. Criminalization efforts also include selective enforcement of community neutral laws, such as loitering or open container prohibitions, against homeless persons. Prompted by concerns of businesses and neighbors, law enforcement officers may also conduct sweeps to drive homeless persons from specific areas, including encampments. These enforcement measures frequently result in the destruction of homeless persons’ personal property, including private documents and medications, but do not typically result in housing placements of homeless individuals.

In 2007, the American Bar Association adopted a policy against state and local efforts to criminalize homelessness or punish “Good Samaritans” for assisting homeless persons. These types of laws make it difficult for homeless persons to stay in urban areas and drive them away from crucial public and private sector services and outreach. Homeless persons who are arrested for non-violent offenses develop criminal records, accumulate fines, and may be temporarily incarcerated, all of which makes it more difficult to obtain employment or secure housing. Incarcerating homeless persons costs communities up to two to three times more than providing long-term supportive housing.

Criminalizing homelessness also raises troubling constitutional questions. In 2006, the Ninth Circuit invalidated a Los Angeles ordinance that made it a crime to sit, sleep, or lie down in city public spaces on the basis that the ordinance violated homeless persons’ Eighth Amendment rights. Courts have similarly found constitutional problems with anti-panhandling laws. In 1993, the Second Circuit court
of appeals ruled that a New York law banning begging violated homeless people’s First Amendment rights to free speech. The court held that to the extent that begging constituted expressive conduct, the government lacked a compelling interest in prohibiting those who beg peacefully from communicating with fellow citizens. New York’s statutory attempt to ban homeless persons from begging was not narrowly tailored, not content-neutral, and left open no alternative channels of communication.13 Recent, expansive views of free speech interests noted by the U.S. Supreme Court in Reed v. Town of Gilbert14 in 2015 led lower courts to strike down state and local laws banning panhandling.

There are more constructive law and policy approaches to address homelessness rather than criminalizing their conduct or expressions. They include:

1. An array of cost-effective local government programs that partner community health and justice systems to address high rates of serious mental illness among hospitalized and incarcerated populations;
2. Collaborations among homeless persons, pertinent city/county agencies, health care and behavioral health systems and providers, and law enforcement to implement best practices focused on outreach, housing, and community-based treatment;
3. Diversion of individuals from criminal justice systems to appropriate community-based housing, treatment and services through “homeless outreach” or “crisis intervention” teams including police and social workers;
4. Development of specialty courts or dockets (e.g., Community Justice Courts, Behavioral Health Courts, Veterans Treatment Courts) centered on homeless assistance instead of punishment; and
5. Business community support for homelessness assistance, such as safe day centers for persons to access when overnight or emergency shelters are typically closed. These centers provide homeless persons critical services such as laundry, showers, and meals, as well as connections with health care providers and housing officials.

**Emergency Declarations Addressing Homelessness**

Even as communities consider policies to provide improved access to health care and housing for homeless persons or decriminalize their behaviors, escalating rates of homelessness have led to increased use of emergency declarations to address public health and other impacts. Unprecedented rates of homelessness, dangerous weather conditions,15 shortages of affordable housing, and protection of minors undergird emergency declarations aimed at ameliorating homelessness. These declarations can be beneficial in assisting the homeless, but also raise significant issues of fairness and justice in specific states and localities.

Hawaii has the highest rate of homelessness per capita in the U.S. In 2015, nearly 8,000 individuals across the State’s islands experienced some form of homelessness on any given night.16 In response, Hawaii’s Governor David Ige issued a declaration of emergency on October 26, 2015 (which has since been renewed four times).17 The declaration suspends various laws to hasten construction of temporary shelters for homeless families, extends homeless service contracts, and shifts $1.3 million from general funds to mitigate Hawaii’s homelessness crisis. Conversely, the City of Honolulu has passed various laws aimed at criminalizing homelessness, including controversial bans on panhandling and sweeps on tent camps.18

Even though California has about 12% of the total U.S. population, 21% of all homeless persons nationally live in the state. Unlike in Hawaii, California’s Governor Jerry Brown has not declared a state-wide emergency, although some localities have urged him to do so.19 However, the cities of San Diego, Los Angeles, and Oakland have each declared local states of emergency or “shelter crisis,” invoked in response to spikes in the number of homeless persons (e.g., Oakland’s declaration cited 2,190 homeless persons in its jurisdiction).20 Although most of these emergency declarations, designed to provide rapid access to shelters, are fairly short in their duration, the Los Angeles City Council unanimously voted to extend its shelter crisis indefinitely.

In November, 2015, San Diego’s San Ysidro School District relied on California’s Emergency Services Act and San Diego’s local state of emergency (in response to El Nino) to issue a local declaration of emergency.21 This resolution authorized the school district to use its property to provide temporary relief shelters for over 1,500 homeless children (roughly 30% of the student population) and their families. Around this same time, King County (Washington) declared a homelessness emergency to increase mental health services for the county’s youth.22 The city council of Portland (Oregon) proclaimed a one-year housing emergency, waiving various zoning codes23 to increase temporary housing and emergency shelters and launch a day-storage pilot program to provide portable units with sanitation facilities and trash disposal.

New York’s homeless, concentrated in New York City, comprise nearly 16% of the nation’s homeless population. On January 3, 2016, Governor Andrew Cuomo issued an “Emergency Declaration Regarding
Homelessness During Inclement Winter Weather.” Based in part on a provision of New York State’s Mental Hygiene Law, the declaration allowed for the involuntary transfer of homeless individuals to sheltered facilities. Police officers were authorized to “take into custody any person who appears to be mentally ill and is conducting himself in a manner which is likely to result in serious harm to [one’s self] or other[s].”

The order raised mixed responses from New York municipalities and mental health professionals who questioned the legality of such transfers without sufficient medical justification. To the extent the Governor’s emergency declaration authorized an effective “round-up” of individuals based on specious grounds, it runs counter to constitutional principles of liberty and equal protection. Of note, New York City Mayor Bill De Blasio issued a Winter Weather Emergency Declaration the same month, activating the city’s Code Blue protocols. The protocols mandate that police officers offer unsheltered homeless individuals transportation to emergency shelters.

Conclusion

The public health, health care, and housing challenges homeless persons and families face across U.S. communities are profound and daunting despite decades of remedial efforts. Initial policy and practical approaches fraught with legal complications and outright discrimination are giving way to new and innovative legal approaches. Opportunities to expand health care and housing access, divert affected persons from criminalization, and address homelessness crises head on through emergency declarations provide viable options. Yet each of these legal interventions must be carefully crafted to chart solutions that are politically viable, cost-effective, and constitutionally sound. Working together, public and private sectors can improve the plight of homeless persons in their communities in furtherance of the public’s health and with respect for individual rights.

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