

## Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States

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Scotland has a great mission to end homelessness by 2012. We share a similar vision and we base it on the notion of abolishing a social wrong, a social evil. If you look at the initiatives in Scotland and in the United States, there are great similarities, such as on the priority of partnership and increased resources from central government. The strategies that are being developed in Scotland are aimed to accomplish certain results within a specific time frame, moving away from managing homelessness to ending it. What we've come to realize in the last 20 years is that no one level of government and no one element of the private sector can do this alone. This is a national problem with local solutions.

—Philip Mangano, Chair of the Inter-Agency Council on Homelessness<sup>1</sup>

### INTRODUCTION

An estimated 3.5 million people experience homelessness in the United States in any given year, including over 1 million children.<sup>2</sup> While many face literal street homelessness, millions more are doubled up with friends or family, or living paycheck-to-paycheck and in danger of losing their housing at any point.<sup>3</sup> At the core of this problem is an overwhelming deficit of affordable housing, with a full-time minimum wage worker unable to afford a single bedroom apartment anywhere in the country.<sup>4</sup> The current foreclosure crisis is making matters worse, both for homeowners who are losing their life's savings and being forced into

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1. BBC News Online, *Scotland's Homeless Drive Praised*, Mar. 23, 2006, [http://news.bbc.co.uk/go/pr/ft/-/2/hi/uk\\_news/scotland/4834902.stm](http://news.bbc.co.uk/go/pr/ft/-/2/hi/uk_news/scotland/4834902.stm).

2. Martha Burt et al., *Helping America's Homeless* (Washington: The Urban Institute Press, 2001), 49-50.

3. See JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIV., *STATE OF THE NATION'S HOUSING 2008 4* (2008), [hereinafter JOINT CENTER REPORT] (“[I]n 2006, 39 million households were at least moderately cost burdened (paying more than 30 percent of income on housing) and nearly 18 million were severely cost burdened (paying more than 50 percent)”).

4. NATIONAL LOW INCOME HOUS. COAL., *OUT OF REACH* (2005) (based on federal affordability guidelines, or 30% of income or less spent on rent).

homelessness, and for renters whose buildings are being sold off and who face eviction through no fault of their own.<sup>5</sup>

A country that recognized the basic human right to housing would not let this happen to its people. The government would recognize its duty to ensure the right, through proactive policies that require communities to plan to meet the affordable housing needs of their residents, enable people to maintain their housing, and—for those on the streets—solidly assure that they will be quickly and adequately housed for as long as it takes to get them stable and back on their feet.<sup>6</sup>

The U.S. is sadly not that country. We seemed to be headed in the right direction when Franklin Delano Roosevelt declared that “we have adopted a . . . second Bill of Rights . . . Among these are . . . the right of every family to a decent home.”<sup>7</sup> His wife, Eleanor Roosevelt, was a central figure in drafting and promoting the adoption of the Universal Declaration of Human Rights, which guarantees to every individual “the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . .”<sup>8</sup> But by the time Congress got around to creating the Housing Act of 1949, this *right* had been whittled back to “the realization as soon as feasible of the *goal* of a decent home and suitable living environment for every American family” (emphasis added).<sup>9</sup> Subsequently, the U.S. has failed to take any further steps toward an enforceable right to housing domestically, and has opposed at the international level any notion of justiciable standards for the right to housing.<sup>10</sup>

The international community, however, has moved forward without the U.S.<sup>11</sup> The United Nations Committee on Economic, Social, and Cultural Rights has defined the human right to adequate housing by seven criteria. These are:

(a) Legal security of tenure.

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5. See generally JOINT CENTER REPORT, *supra* note 3.

6. See generally Robert Rosenthal & Maria Foscarinis, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in 316 A RIGHT TO HOUSING: A FOUNDATION FOR A NEW SOCIAL AGENDA, 322–23 (Rachel Bratt et al. eds., 2006); Maria Foscarinis, Brad Paul, Bruce Porter & Andrew Scherer, *The Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97, 100 (2004).

7. President Franklin Delano Roosevelt, State of the Union Address (Jan. 11, 1944), available at <http://www.fdrlibrary.marist.edu/011144.html>.

8. Universal Declaration of Human Rights, G.A. Res. 217A (III) at art. 25(1), U.N. Doc A/810 (Dec. 12, 1948).

9. Housing Act of 1949, ch. 338, 63 Stat. 413.

10. See, e.g., United States, *Initial Report to the Committee on the Elimination of Racial Discrimination*, Part II(C) Art. 5, U.N. Doc. CERD/C/351/Add.1 (Oct. 10, 2000). (“Some of these enumerated rights, which may be characterized as economic, social and cultural rights, [including the right to adequate housing] are not explicitly recognized as legally enforceable ‘rights’ under U.S. law.”)

11. See NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, *Homelessness in the U.S and the Human Right to Housing* (2004), at 11-35.

- (b) Availability of services, materials, facilities and infrastructure.
- (c) Affordability.
- (d) Habitability.
- (e) Accessibility.
- (f) Location.
- (g) Cultural adequacy.<sup>12</sup>

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12. COMMITTEE ON ECON., SOC. AND CULTURAL RIGHTS [HEREINAFTER CESCR], *General Comment 4, The right to adequate housing*, at 114, U.N. Doc. E/1992/23, annex III (1991), *reprinted in* Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, at ¶ 8, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003). Each of these rights is further defined:

(a) Legal security of tenure. Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort and nutrition. 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;

(c) Affordability. Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. 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. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d) 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. The physical safety of occupants must be guaranteed as well. The Committee encourages States parties to comprehensively apply the Health Principles of Housing prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) Accessibility. Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many States parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to

Each of these aspects is in turn further broken down in ways that give countries substantial guidance in how they should create policies to ensure the right to adequate housing.

Public officials since Roosevelt have decried the situation of homelessness, and many communities are now engaged in processes to create 10-year plans to end homelessness.<sup>13</sup> But few have actually followed through with the resources necessary to make a significant difference because housing remains seen as a charitable *goal* for Americans, not a *right*. In the meantime, shelters remain overfilled, public housing waiting lists are years long, and the government makes no commitment to any individual that he will have his basic shelter needs met.<sup>14</sup>

But does such a country exist where the right to housing is being made real? Indeed, it does, and that country is Scotland, where the Homelessness, Etc. (Scotland) Act of 2003 caps a long term effort by advocates to create the closest thing to the practical implementation of the right to housing the world has yet seen.<sup>15</sup> The comprehensive features of Scotland's housing plan include the right to be immediately housed for all homeless persons and the right to long-term, supportive housing as long as is needed for priority groups—a category that will be progressively abolished by 2012, at which point the right will extend to all.<sup>16</sup> Crucially, this includes an individual right to sue if one believes one's rights are not being respected.<sup>17</sup> Complementary policy includes a number of other rights, including the right to purchase public housing units and the ability to sell one's house to the government to avoid foreclosure, but rent it back to allow one to maintain one's residence through financial difficulty, perhaps ultimately repurchasing the home. All of these policies work together to ensure the right to housing is

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substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) Location. Adequate housing must be in a location which allows access to employment options, health-care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) 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. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, inter alia, modern technological facilities, as appropriate are also ensured.

13. See NATIONAL ALLIANCE TO END HOMELESSNESS, TEN YEAR PLAN, <http://www.endhomelessness.org/section/tools/tenyearplan> (last visited Oct. 10, 2008).

14. Limited exceptions do exist at the local level. For example, the New York City AIDS Housing Bill guarantees a right to housing for homeless New Yorkers living with AIDS. New York, N.Y., Local Law 50 (May 11, 2005).

15. See Homelessness (Scotland) etc. 2003; Housing (Scotland) Act 2001; Housing (Scotland) Act 1987; Housing (Homelessness) Act 1977.

16. KATE BERRY, SCOTTISH PARLIAMENT INFORMATION CENTER, BRIEFING: HOMELESSNESS (2004), at 7.

17. See Housing (Scotland) Act 1987, Ch. 35A.

upheld.

While the Scottish situation is not identical to that of the U.S., and while implementation of the law is not without its problems, the law is certainly a bold step in the right direction, and should be examined by housing advocates in the U.S. as a potential model. This article seeks to explain three key features for those who would want to see such a law enacted: how the law came to be, what the concrete mechanisms for protecting the rights are, and how the law is being implemented in practice. The article concludes with a comparison of various features of the Scottish law with U.S. law with a view to proposing potential directions for future advocacy. These include expanding the definition of homelessness so more individuals are protected, requiring adequate planning for the housing needs of all income levels of society, and creating a legally enforceable duty on the government to meet the housing needs of its residents.

### I. THE DEVELOPMENT OF THE SCOTTISH MODEL

Despite relatively expansive legislation which specifically addressed homelessness—namely the Housing (Scotland) Act of 1987—the number of homeless persons in Scotland rose throughout the 1990s.<sup>18</sup> While this trend was consistent throughout the world, Scotland, unlike many countries, took proactive measures to address the growing problem of homelessness. In 1999 the Scottish Executive created the Homeless Task Force (“HTF”) to assess the situation and to make recommendations to improve legislation.<sup>19</sup> The group was comprised of 21 people, including community advocates, professors, and members of the Scottish Executive.<sup>20</sup> This group was charged with the following instructions: “To review the causes and nature of homelessness in Scotland; to examine current practice in dealing with cases of homelessness; and to make recommendations on how homelessness in Scotland can best be prevented and, where it does occur, tackled effectively.”<sup>21</sup> The HTF produced two reports over the course of three years.<sup>22</sup> The reports included specific recommendations for how to improve and change

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18. See BERRY, *supra* note 16, at 4.

19. See, *id.*

20. Chairs: Jackie Baillie MSP (Minister for Social Justice (until November 2001)), Iain Gray MSP (Minister for Social Justice (from December 2001)) Members: Robert Aldridge (Scottish Council for Single Homeless), David Alexander (Scottish Federation of Housing Associations), Pat Bagot (Communities Scotland), David Belfall (Development Department, Scottish Executive), Suzanne Fitzpatrick (Department of Urban Studies, University of Glasgow), Paul Howarth (Department for Work and Pensions), Councillor Rita Miller (CoSLA), Liz Nicholson (Shelter Scotland), Catriona Renfrew (Greater Glasgow Health Board), Bill Robertson (Association of Directors of Social Work), Margaret Taylor (Glasgow Council for Single Homeless), Mark Turley (CoSLA), Mel Young (The Big Issue in Scotland) Secretariat (all Scottish Executive): Lindsay Manson (Homelessness Team), Isabel Drummond-Murray (Homelessness Team) Brad Gilbert (Homelessness Team), Anna Donald (Homelessness Team), Sue Irving (Health and Homelessness Coordinator)

21. BERRY, *supra* note 16, at 5.

22. SCOTTISH EXECUTIVE, HELPING HOMELESS PEOPLE: LEGISLATIVE PROPOSALS ON HOMELESSNESS (2000); SCOTTISH EXECUTIVE, HELPING HOMELESS PEOPLE: AN ACTION PLAN FOR PREVENTION AND

the existing legislation.<sup>23</sup>

From the beginning of their work, the HTF implemented the perspective that housing is a right that should be available to all.<sup>24</sup> This creation of an affirmative right to housing is relatively rare on the global scene, and has the potential to lead to legal claims for individuals.<sup>25</sup> In addition, the HTF acknowledged that housing is only one area that needs to be addressed in the fight against homelessness,<sup>26</sup> and that legislation is not the only way to combat homelessness.<sup>27</sup> These core principles enabled the HTF to evaluate the problem of housing through a comprehensive lens and raised the potential for holistic solutions to homelessness. The fact that the Scottish Executive has incorporated many of the recommendations of the HTF shows a willingness on the part of the Scottish government to embrace this inclusive perspective.<sup>28</sup>

## II. THE SCOTTISH APPROACH TO ENDING HOMELESSNESS

Because of this holistic approach to ending homelessness, the full range of features of Scottish law and policy would require many volumes to document. Therefore, this section examines only a few key features of the law that can provide guidance for U.S. advocates. This includes the expansive definition of homelessness under the Act and the deliberate reduction in the limiting factors by which assistance is denied to applicants, the planning requirements, the justiciability of the rights created under the act, and two specific eviction and foreclosure protection programs.

### A. *An Inclusive Definition of Homelessness*

A key element of this rights-based approach in developing the HTF's approach to solving homelessness was the inclusive definition of "homelessness" used by the Task Force. The definition includes:

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EFFECTIVE RESPONSE HOMELESSNESS TASK FORCE FINAL REPORT (2003) [hereinafter TASK FORCE FINAL REPORT].

23. *Id.*

24. *Id.*

25. Only India, South Africa, and France have created or affirmed similar legal duties regarding the right to housing. See *Francis Coralie v. Union Territory of Delhi* (AIR 1981, SC 746) (India) (Indian Supreme Court held that the constitutional right to life includes basic necessities including shelter.); *Grootboom v. Oostenberg Municipality & Others* 2000 (3) BCLR 277 (CC) (S. Afr.) (court held, under the Constitutional right to housing, the State had a duty to provide relief to those without a roof over their head); Padraic Kenna & Marc Uhry, *How The Right To Housing Became Justiciable In France: The contribution of Article 31 of the Revised European Social Charter from the Council of Europe*, EUROPEAN FEDERATION OF NATIONAL ORGANISATIONS WORKING WITH THE HOMELESS, [www.feantsa.org/files/housing\\_rights/art31final.doc](http://www.feantsa.org/files/housing_rights/art31final.doc) (last visited Oct. 10, 2008).

26. TASK FORCE FINAL REPORT, *supra* note 22, at 6.

27. *Id.* at 7.

28. See, e.g., Section III.A., *infra*.

1. Persons defined in current legislation as homeless persons and persons threatened with homelessness—i.e. those:-
  - without any accommodation in which they can live with their families.
  - who can't gain access to their accommodation or would risk domestic violence by living there.
  - whose accommodation is “unreasonable”; or is overcrowded and a danger to health.
  - whose accommodation is a caravan or boat and they have nowhere to park it.
2. Those persons experiencing one or more of the following situations, even if these situations are not covered by the legislation:-
  - Roofless: Those persons without shelter of any kind. This includes people who are sleeping rough, victims of fire and flood, and newly-arrived immigrants.
  - Houseless: Those persons living in emergency and temporary accommodation provided for homeless people. Examples of such accommodation are night shelters, hostels and refuges.
  - Households residing in accommodation, such as Bed & Breakfast premises, which is unsuitable as long-stay accommodation because they have no where else to stay.
  - Those persons staying in institutions only because they have nowhere else to stay.
  - Insecure accommodation: Those persons in accommodation that is insecure in reality rather than simply, or necessarily, held on an impermanent tenure. This group includes:
    - tenants or owner-occupiers likely to be evicted (whether lawfully or unlawfully).
    - persons with no legal rights or permission to remain in accommodation, such as squatters or young people asked to leave the family home.
    - persons with only a short-term permission to stay, such as those moving around friends' and relatives' houses with no stable base.
  - Involuntary Sharing of Housing in Unreasonable Circumstances: Those persons who are involuntarily sharing accommodation with another house-



hold on a long-term basis in housing circumstances deemed to be unreasonable.<sup>29</sup>

This definition is noteworthy in that it demands assistance be given not only to those who are literally without shelter, but rather to many people under a wide range of circumstance, including those living in intolerable conditions and those who are threatened with homelessness but are presently housed. In addition to covering a wide range of circumstances, it lays out specific factors that raise the risk of homelessness, such as domestic violence.<sup>30</sup>

This definition was largely adopted in the resulting 2003 Act, retaining all the essential inclusive features noted above.<sup>31</sup> As will be discussed further below, this definition is significantly broader than those used in the U.S.

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29. *Id.* at Appendix B.

30. *Id.*

31. *See* Housing (Scotland) Act, 1987, c. 26. Part II, § 24.

- (1) A person is homeless if he has no accommodation in the United Kingdom or elsewhere.
- (2) A person is to be treated as having no accommodation if there is no accommodation which he, together with any other person who normally resides with him as a member of his family or in circumstances in which the local authority consider it reasonable for that person to reside with him—
  - (a) is entitled to occupy by virtue of an interest in it or by virtue of an order of a court, or
  - (b) has a right or permission, or an implied right or permission to occupy, or in England and Wales has an express or implied license to occupy, or
  - (c) occupies as a residence by virtue of any enactment or rule of law giving him the right to remain in occupation or restricting the right of any other person to recover possession.
- (2A) A person shall not be treated as having accommodation unless it is accommodation which it would be reasonable for him to continue to occupy.
- (2B) Regard may be had, in determining whether it would be reasonable for a person to continue to occupy accommodation, to the general circumstances prevailing in relation to housing in the area of the local authority to whom he has applied for accommodation or for assistance in obtaining accommodation.
- (3) A person is also homeless if he has accommodation but—
  - (a) he cannot secure entry to it, or
  - (b) it is probable that occupation of it will lead to abuse (within the meaning of the Protection from Abuse (Scotland) Act 2001 (asp 14)), or
  - (bb) [it is probable that occupation of it will lead to abuse (within the meaning of that Act) from some other person who previously resided with that person, whether in that accommodation or elsewhere, or
  - (c) it consists of a movable structure, vehicle or vessel designed or adapted for human habitation and there is no place where he is entitled or permitted both to place it and to reside in it; or
  - (d) it is overcrowded within the meaning of section 135 and may endanger the health of the occupants; or
  - (e) it is not permanent accommodation, in circumstances where, immediately before the commencement of his occupation of it, a local authority had a duty under section 31(2) in relation to him.



*B. Eligibility after the 2003 Legislative Changes*

The original legislation, enacted in 1977 and amended slightly in 1987,<sup>32</sup> focused on the duty of local housing authorities to provide services and assistance not only to persons who were homeless, but also to those who were threatened with the possibility of becoming homeless.<sup>33</sup> However, similar to U.S. housing aid, the various tests used to determine who was eligible for the assistance by the LAs were used exclusively—with a view toward minimizing the burden—rather than inclusively – with a view toward ensuring the right to housing.<sup>34</sup> The 2003 legislation fundamentally shifted that approach, as will be described below.

There were four major inquiries that acted as gate keeping tools in order to filter through those who presented themselves as homeless, and to give assistance only to those who fit specific criteria. First, there was the threshold question of whether or not the person(s) were homeless as per the broad definition in the legislation.<sup>35</sup> Second, at least one member of the household had to be in the “priority need” category. This included: a household with dependent children or an expectant mother; vulnerability due to old age, illness, disability, or any other “special reason”; and finally, a household which is homeless due to an emergency such as a fire or a flood.<sup>36</sup> Third, there would be an inquiry as to whether or not the household was intentionally homeless due to a deliberate act or omission.<sup>37</sup> Fourth, there had to be a local connection between the household and the local authority (LA) to which they present (either through residence or employment).<sup>38</sup> If the household met all four criteria, the local housing authority then had a duty to secure long-term accommodation. Typically, this was done either through a referral to an independent housing authority, or through the placement of a

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(4) A person is threatened with homelessness if it is likely that he will become homeless within 2 months.

(5) For the purposes of subsection (3)(e), ‘permanent accommodation’ includes accommodation—

- (a) of which the person is the heritable proprietor,
- (b) secured by a Scottish secure tenancy,
- (c) secured by an assured tenancy that is not a short assured tenancy
- (d) where paragraph 1 or 2 of schedule 6 to the Housing (Scotland) Act 2001 (asp 10) is satisfied in relation to the person, secured by a short Scottish secure tenancy.

32. Housing (Homelessness) Act 1977 was the law in both England and Scotland; Housing (Scotland) Act 1987.

33. Isobel Anderson, *Sustainable Solutions to Homelessness: the Scottish Case*, 1 EUR. J. HOMELESSNESS 163, 165 (2007).

34. *Id.*

35. *Id.* [generally follows the European Typology of Homelessness and Housing Exclusion which includes those who are roofless, houseless, as well as those who are in insecure and/or inadequate housing, available at [www.feantsa.org](http://www.feantsa.org)].

36. *Id.*

37. *Id.*

38. *Id.*

household into housing stock owned by the LA.<sup>39</sup>

The use of these categories led to unequal and inadequate treatment of homeless persons. According to Professor Anderson, Senior Lecturer in Housing Studies, in the Department of Applied Social Science at University of Stirling, in Scotland:

Despite guidance requiring local authorities to look closely at the interpretation of “vulnerability” most single people or couples of working age, who did not have evident and serious physical or mental health problems, were deemed to be “non-priority” households to which the statutory legal system was not designed to respond.<sup>40</sup>

The Homelessness Task Force presented recommendations, in both their interim report published in 2000 and their final report published in 2003, to ameliorate the inequitable consequences of the legislation in the hopes of reaching more people. The recommendations from those reports were used as the basis for the Housing (Scotland) Act 2001, and the Homelessness Etc. (Scotland) Bill, both of which amended the Housing (Scotland) Act of 1987.

The new legislation made significant changes in the assessment rubric employed by the LAs when presented with a homeless household, specifically with respect to the definition of priority need, the evaluation of intentionality, and the requirement of a local connection.<sup>41</sup> These changes are key because the outcome of the assessment is still determinative of the amount of help the LA must provide. In addition, the 2003 Act (which incorporates the changes of the 2001 Act) encourages participation by LAs to address the problem of reoccurring or chronic homelessness.<sup>42</sup>

Once an assessment of homelessness has been made – regardless of whether or not a household meets the status of ‘priority need’ - the 2001 Act demands that the LA provide temporary accommodation, pending further investigation, as well as advice in the areas of housing, legal needs, social issues, and finances.<sup>43</sup> If a household is deemed to both be homeless and in the category of ‘priority need’, the authority must secure permanent accommodation with security of tenure.<sup>44</sup> Of even greater importance was the suggestion made by the Homelessness Task Force and codified through the legislation, to phase out the distinction of ‘priority need’ all together by the year 2012.<sup>45</sup>

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39. *Id.*

40. *Id.*

41. BERRY, *supra* note 16, at 3.

42. *Id.*

43. *Id.* at 6.

44. Tom Mullen, *Homelessness in Scotland*, Part II, 6 J. HOUSING L. 5, 5 (2004).

45. Anderson, *supra* note 33, at 167.

## 1. Priority Need

In order to phase out the use of ‘priority need’ as a determinative factor in how to handle homelessness, the HTF recommended its expansion first.<sup>46</sup> As is described in a governmental briefing by the Scottish Executive, “(t)he intention is to end the test of priority need by gradually expanding the groups so defined until, in effect, since everyone becomes in priority need, the term becomes redundant.”<sup>47</sup> In addition to the categories already covered, and noted above, under the amendment of 2003 the definition of ‘priority need’ grew to include: Homeless youth aged 16 or 17; homeless youth aged 18-20 who were at risk for exploitation in a sexual and/or financial way, dealt with substance misuse, or who were in the care of the LA beyond school age; adults vulnerable due to personality disorder; people who are discharged from prison, hospitals, and the armed forces; and those at risk of violence or harassment.<sup>48</sup>

## 2. Intentionality

The 2003 Act retains the “intentionality” distinction, but whereas before there was no duty to assist those who were intentionally homeless, under the amended law the LAs have affirmative duties to provide support to those households. Assistance is to include appropriate programs in both social and financial areas, with a specific focus on whatever behavior was deemed to be the cause of their “intentional” homelessness.<sup>49</sup> Although there is no exact date set nor timeline mentioned, the 2003 Act does call for a switch from the *duty* on the part of LAs to assess intentionality to simply the *power* to do so.<sup>50</sup> The purpose of this change is to place more emphasis on giving supportive assistance to homeless households in order to address a wide range of problems and hopefully tackle the issue of chronic homelessness.

At the very least, an ‘intentionally’ homeless household that is deemed to have ‘priority need’ will trigger a duty on the part of the LA to provide temporary accommodation for one year, with the ultimate goal of securing longer-term tenancy. Furthermore, at the end of that year, the authority still has an affirmative duty to provide accommodations, again on a short term basis, but with a view towards finding permanent housing, or in the alternative, “accommodation on an occupancy basis with support.”<sup>51</sup> This kind of safety net not only ensures safe havens for those households that are deemed to be worthy of help, but also provides for those who may take over a year to get into a position to escape the,

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46. *Id.* at 168.

47. BERRY, *supra* note 16, at 7.

48. Anderson, *supra* note 33, at 167; *see also* Homelessness (Scotland) etc. Act, 2003, (A.S.P. 10) sec. 1.

49. *Id.* at 168.

50. BERRY, *supra* note 16, at 8.

51. *Id.* *See also* Homelessness (Scotland) 2003, (A.S.P. 10) sec. 10.

often debilitating, cycles of poverty.

Not all households automatically qualify for this type of assistance. For example, households that have ‘failed’ the short tenancy in some way, and those who have been kicked out of their temporary accommodations due to ‘anti-social’ behavior are not guaranteed the same kind of treatment. Instead, in those situations, the LAs rather will have the discretion whether or not to provide a short tenancy or short-term accommodation to these households.<sup>52</sup>

### 3. Local Connection

The tradition set by the 1987 legislation was that the household presenting as homeless needed the ability to show a connection to the location it was soliciting in order to trigger mandatory action by authorities.<sup>53</sup> The change set out by the legislative amendments in this respect is for the Scottish ministers to modify, by order, the rules pertaining to local connection.<sup>54</sup> These orders can be either applicable to specific locations, or to all locations and should deal with the process of making and receiving referrals. A compelling aspect of this change, which furthers the notion that these legislative changes are holistic in nature, is the recognition that some people may be requesting assistance in a specific location for good reason, such as the desire to leave an abusive partner.<sup>55</sup> Looking beyond the superficial to determine the potential reasons people have for being in various locations provides more comprehensive solutions to complex problems.

#### *C. Planning Requirements*

Practical planning requirements place an affirmative duty on LAs to provide assistance to homeless persons and to be proactive in the prevention of homelessness. One of the main points of the 2001 Act was to charge LAs to examine the homelessness situation in their area and to then develop strategies for how to address the issue.<sup>56</sup> They were tasked to do this in both the areas of homelessness and housing, in the hopes that solutions in those two areas would work in concert with each other.<sup>57</sup> These mandates were backed up by pledges by the Scottish Executive to help with both financial assistance and advice.<sup>58</sup>

While LAs were allowed discretion in developing their plans, there were some basic guidelines set by the legislation. At the very least, with the changes to the Act made in 2001, LAs became responsible for providing information and advice

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52. BERRY, *supra* note 16, at 8.

53. *Id.*; *See also* Housing (Scotland) Act 1987, Ch. 27.

54. *Id.*, at 9; *See also* Homelessness (Scotland) etc. 2003 (asp 10) sec. 8.

55. *Id.*; *See also* Homelessness (Scotland) etc. 2003 (asp 10) sec. 10.

56. BERRY, *supra* note 16, at 5. *See also*, Housing (Scotland) Act, 2001, (A.S.P. 10) sec. 1(3).

57. BERRY, *supra* note 16, at 5

58. *Id.*; *See also*, Housing (Scotland) Act 2001 (asp10) sec. 1(3).

on homelessness and its prevention free of charge to everyone.<sup>59</sup> More substantial responsibilities were placed on LAs as well, which are articulated through various guides produced by the Scottish Executive.

According to Executive guides, the strategy of each LA should have clear and articulated goals as to an overall vision of what it will achieve.<sup>60</sup> This should include the “local authority’s values, corporate agenda and strategic vision.”<sup>61</sup> In addition, the action plans should take into consideration how to ameliorate the current problem of homelessness in their area as well as ways to prevent homelessness in the future.<sup>62</sup> In adopting their individual strategies, LAs have a duty to comply with equal opportunities standards and to not discriminate on the basis of gender, race, disability, marital status, religion or sexual orientation.<sup>63</sup>

The idea of partnership with various other organizations and social sectors is stressed by the Scottish Executive in order to address homelessness from various angles. For example, each strategy is to include a plan to work with agencies and groups to address the issue of housing supply.<sup>64</sup> In addition, LAs should include in their strategy how to coordinate with other departments, such as Social Work and Finance, in order to facilitate early notification of possible evictions.<sup>65</sup>

Each strategy plan should have a review process so that the plan can be evaluated once it is in practice. Notably, the Scottish Executive urges LAs to elicit participation in the review process by service users, asking them to “(r)ecognize the essential contribution to service development provided by consultation with homeless people and people who have experienced homelessness or who are at risk of homelessness.”<sup>66</sup>

Finally, certain broad performance standards have to be met, namely: protecting the interests of current and future tenants and service users; protecting public investment and access to private funds; promoting high standards in homelessness functions in a way that encourages innovation, self-reliance, openness and accountability; and contributing to wider social justice and equality objectives.<sup>67</sup>

#### *D. Justiciability*

Under section 35A of the Housing (Scotland) Act, there is a right to review assessments made by the LAs as to the eligibility of households for benefits and

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59. *Id.*

60. Housing (Scotland) Act 2001 (asp10) sec. 1, 2.

61. BERRY, *supra* note 16, at 11; *See also*, Housing (Scotland) Act 2001 (asp10) sec. 1, 2.

62. *Id.*

63. Policy Memorandum, Homelessness Etc. (Scotland) Bill (SP Bill 63), (Sept. 16, 2002); *see also* Housing (Scotland) Act, 2001, (A.S.P. 10) sec. 106.

64. HOMELESSNESS TEAM SCOTTISH EXECUTIVE DEVELOPMENT DEPARTMENT.

65. *Id.* at 5-6.

66. *Id.* at 4.

67. *Id.* at 23.

assistance.<sup>68</sup> Although the process of the review is not written into the legislation, in 2005, the Scottish Executive released a report entitled *Code of Guidance on Homelessness: Guidance on Legislation, Policies and Practices to Prevent and Resolve Homelessness*, in order to provide guidelines for implementation of the law to the various areas of Scotland. The general guidelines direct that once an eligibility determination has been made, each housing authority has a duty to not only notify the applicant of its decision within 28 days, but to provide its reasons as well. Additionally, with the delivery of the decision, “Local Authorities must notify that there is a right to review of the decision, the time within which a request for a review should be made and of any advice and assistance that is available to the applicant in connection to the review.”<sup>69</sup> Throughout the section of the code on the right to review, the idea that applicants should be advised of their right to consult legal counsel as well as be represented in the event of a review of the decision is repeatedly stressed.

Section 35B of the Housing (Scotland) Act specifies that the reviewer must be senior to the decision-maker and must have no involvement in the initial determination.<sup>70</sup> Even during review, in line with the other times where a duty to accommodate persons exists before a determination of eligibility has been made, the LAs must provide for those awaiting their review decision.<sup>71</sup> As is mentioned in the guide, this provides a number of benefits as the household is not only prevented from being on the streets, but are also guaranteed to get the answers they are waiting for as applicants can be reached at their temporary accommodations. Additional guidelines for the review process include: highlighting the need for speedy determinations in these kinds of cases “as is consistent with a full and fair hearing of the case, bearing in mind that an applicant will often be in urgent need”<sup>72</sup>; the right to access to advocacy support; the right to an interpreter and/or intermediary; and the option for the person requesting the review to make verbal as well as written representations.<sup>73</sup>

### *E. Eviction and Foreclosure Protection*

Based on recommendations from the HTF and in keeping with the definition of homelessness that includes those in danger of becoming homeless, the 2001 legislation includes important protections connecting those faced with eviction or foreclosure to state services. Before issuing a re-possession order to a private sector tenant, or a foreclosure for homeowners, courts are placed under a

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68. See Housing (Scotland) Act 1987, Ch. 35A.

69. SCOTTISH EXECUTIVE, CODE OF GUIDANCE ON HOMELESSNESS; GUIDANCE ON LEGISLATION, POLICIES AND PRACTICES TO PREVENT AND RESOLVE HOMELESSNESS, 76 (2005), [hereinafter CODE OF GUIDANCE].

70. *Id.* at 77.

71. Housing (Scotland) Act, 1987, Ch. 26. Part II, s. 29 (1)(b).

72. CODE OF GUIDANCE, *supra* note 69, at 77.

73. *Id.*

requirement to examine to the extent to which the conduct of third parties is a contributory factor.<sup>74</sup> Among other things this would enable the court to take into account situations in which there has been a delay in dealing with a housing benefit claim. Any landlord (other than a LA landlord) or other person applying to the court for a re-possession order against a tenant or a mortgage lender against a homeowner is required to notify the relevant LA of the application for eviction.<sup>75</sup> This enables the LA to consider what assistance could be provided to prevent the eviction and avoid homelessness.

#### *F. Preventing Homelessness through the Mortgage to Rent Scheme*

In addition to protecting tenants, the Scottish Executive also provides the innovative Mortgage to Rent scheme, which protects homeowners who face the risk of foreclosure. Although not codified in legislation, the Mortgage to Rent scheme is integrally linked to the efforts to reduce homelessness, and is especially noteworthy given the current foreclosure crisis in the United States. The program, aimed at households who, because of the threat of legal action are at risk of becoming homeless, provides a safeguard to homeowners against foreclosure and is funded by the Scottish Executive. This process is primarily done through referrals to Registered Social Landlords (RSLs), which are usually housing associations, co-operatives and/or companies that are registered with the Scottish Housing Corporation.<sup>76</sup> RSLs work closely with the Scottish Executive to provide housing for homeless individuals and others in need in a variety of ways.<sup>77</sup> In the Mortgage to Rent situation, RSLs are funded through the Scottish Executive to buy a property from a household in danger of foreclosure and then rent it back to them. The funds for this scheme are administered through Communities Scotland, which is in charge of registering social landlords and which, through a specific Mortgage to Rent team, acts as an intermediary among lenders, landlords and advisers.

The requirements a household must meet to qualify for this program are numerous, though not insurmountable. The qualifying conditions include an assurance that all owners agree to the plan, ensuring that the home is the household's sole property and that there are no other pending legal actions that would prohibit the sale to a RSL.<sup>78</sup> An important part of this scheme is the

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74. Housing (Scotland) Act 2001 §16(3)(b).

75. SCOTTISH EXECUTIVE HOMELESS MONITORING GROUP SECOND REPORT: HELPING HOMELESS PEOPLE DELIVERING THE ACTION PLAN FOR PREVENTION AND EFFECTIVE RESPONSE (April 2005) [hereinafter MONITORING GROUP SECOND REPORT]; BERRY, *supra* note 16, at 11.

76. Housing (Scotland) Act 2001 Part 3 57; see also [http://www.esystems.communitiesscotland.gov.uk/register/reg\\_pub\\_dsp.home](http://www.esystems.communitiesscotland.gov.uk/register/reg_pub_dsp.home) (last visited Apr. 26, 2009).

77. SHELTER SCOTLAND, REPORT: HALFWAY TO 2012? DELIVERING ON SCOTLAND'S HOMELESSNESS COMMITMENTS (2007), [hereinafter SHELTER SCOTLAND REPORT].

78. See SCOTTISH EXECUTIVE, REVISED MORTGAGE TO RENT MANUAL (June 2007), at ii-iii: 1) There is legal action that threatens the household with homelessness. For example, the applicant has received a



insistence that households have advice regarding their larger financial position to see if this scheme is right for them.

If a household is deemed eligible to participate in the plan, there is a specific timeline that the Mortgage to Rent team is encouraged to follow. A few of the first steps of the timeline include contact with the lender to confirm the intent to repossess the property, an assessment of the property, and contact with any party who holds an inhibition against the property. Because there is a great incentive on everyone's part to turn things around quickly, there is a fourteen-week timetable which benchmarks specific steps and designates which party is responsible for what process. "Considerable importance is attached to turning cases around quickly and minimizing the effect that the process has on the arrears situation and personal circumstances of the household."<sup>79</sup> Households are provided counsel and assistance throughout the process, and are able to appeal a determination of ineligibility.

The modifications and expansions of the law described above were intended to allow for more households to access services and resources while maintaining the right to housing.<sup>80</sup> Translating policy into action is never easy, however, and both the successes and remaining issues are discussed in the next section.

### III. THE SCOTTISH MODEL IN PRACTICE

The Homelessness Monitoring Group (HMG), created as a follow-up entity to the HTF for monitoring implementation of the Act, was able to point to many positive developments in its second report to the Scottish Executive.<sup>81</sup> According to the report, a number of communities are meeting many of their planning

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calling up notice, notice of default or possession order, or a trustee is forcing the sale of a property (See Worked Example 8, Annexe D) and the property remains in imminent danger of being repossessed. Applicants will also be considered eligible for the scheme where a secured lender has agreed to withdraw or delay legal action to allow the application to the Mortgage to Rent scheme to take place. Cases where one party forces the sale of the property (for example, involving a relationship breakdown) are not eligible for the Mortgage to Rent scheme. 2) The household has received advice about its financial situation. 3) All owners agree to be considered and have signed the application form. 4) The property is the sole or main residence of someone in the household. 5) The household has a need to stay in the local area. 7) There are no inhibitions, adjudications or other legal action pending against the property that would prohibit the sale. 8) The applicants are under 60 and do not have capital (excluding any expected equity from the sale of the property and surrender value(s) of any savings or endowment policies to which they are entitled and which are used as security for the mortgage) in excess of 8,000. OR The applicants are 60 or over and do not have capital (excluding any expected equity from the sale of the property and surrender value(s) of any savings or endowment policies to which they are entitled and which are used as security for the mortgage) in excess of 8,000. 9) Someone in the household has lived in the property for at least twelve months. 10) The open market value of the property is lower than the local area average house price. 11) The repairs required to the property are assessed at no more than 6,000 or the cost of repairs in excess of this limit can be funded in another way. 12) The property is suitable for the needs of the household, for example, it is not overcrowded.

79. *Id.* at vi.

80. *Id.*

81. See MONITORING GROUP SECOND REPORT, note 75.

requirements and executing most of their substantive duties to house individuals, making great progress toward ending homelessness in Scotland.<sup>82</sup> However, as could be expected with so bold an effort, not all has gone smoothly, with shortfalls in affordable housing supply and a delay in changing the mentality of some government officials to a truly inclusive approach. But the overall goal and commitment remains, and there are clear mechanisms in place for accountability on the road to success.

#### *A. Requirements to Plan for Meeting House Goals*

As recommended by the HTF and put into legislation by the Scottish Executive, by 2005 the HMG was able to describe how “(a)ll local authorities have a homeless strategy in place and all but one have had these strategies approved by the national assessment panel.”<sup>83</sup> In addition, each LA had been asked to assess its current position and report back in order to monitor where it stood in terms of achieving the abolition of priority need as a category.<sup>84</sup> In step with the idea of a cooperative approach to the issue of homelessness across different sectors, the HMG noted a number of programs launched in conjunction with The Scottish Executive, namely the Scottish Homelessness and Employability Network, and national Health and Homelessness Standards.<sup>85</sup> The HMG also noted that “(r)esearch relating to the rough sleepers initiative, homelessness amongst black and minority ethnic communities, lead tenancies, housing advice services for prisoners, priority need and local connection has been published and is being taken forward.”<sup>86</sup>

The success of the Housing (Scotland) Act requires communication among LAs and the Scottish Executive. HMG was able to report that “local authorities are now being asked to provide further information on the current and anticipated levels of homelessness applications, lettings, support needs and wider housing needs. This information . . . will feed into the development of the Ministerial statement to be made by the end of this year.”<sup>87</sup> This kind of dialogue is crucial to legislation, which is set on the National level, but implemented locally.

#### *B. Housing Provided to Homeless Persons*

The essential part of the legislation’s purpose to end homelessness is actually housing those who are homeless. A portion of the Housing (Scotland) 2001—referred to as Section 5—places a duty on RSLs to provide accommodation for

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82. MONITORING GROUP SECOND REPORT, *supra* note 75.

83. MONITORING GROUP SECOND REPORT, *supra* note 75, at 2.

84. *Id.* at 4

85. *Id.* at 2

86. *Id.*

87. *Id.* at 3.

homeless households when asked by a local housing authority.<sup>88</sup> At the halfway mark of HMG's recommended timeline for changes, RSLs accounted for 42% of the social housing sector, and in 2005/6, roughly 13% of rentals through RSLs were the result of section 5 referrals.<sup>89</sup>

In analyzing data at the same halfway mark, Shelter Scotland, a housing and homelessness charity, drew conclusions from the numbers of Homelessness applications in the years following the passage of the Housing Act amendments.<sup>90</sup> In the years directly after the passage of Homelessness (Scotland) Act 2003, the number of Homelessness applications rose. "This rise was largely attributed to increased rights, particularly to temporary accommodation being extended to all households assessed as homeless in the Housing (Scotland) Act 2001."<sup>91</sup> Seen through this perspective, the rise in numbers is a positive thing, because it means more homeless people are accessing support. Echoing this sentiment, the Homelessness Monitoring Group noted in their report that a majority of LAs see marked improvement in addressing the hidden homeless in their areas.<sup>92</sup>

But from 2003-2006, while the number of homelessness applications continued its upward trend, the numbers of those being deemed homeless did not rise in accordance.<sup>93</sup> Shelter Scotland remarked that this pattern "has been interpreted as evidence that LAs are becoming more strict in applying the homelessness test as a result of having increased duties to those who are assessed as homeless."<sup>94</sup> While getting more services to more people, it is necessary to heed the caution that expanded duties on the part of LAs may have a narrowing effect on who gets to receive the benefits. The Homelessness Monitoring Group has a slightly different take on the numbers. The HMG also points out the rise in numbers as a positive, attributing it to increased visibility of homelessness, but is "concerned that pressures on LAs caused by rising applications do not affect assessment decisions".<sup>95</sup>

In its commentary, Shelter Scotland raised additional concerns about the state of affairs. The report points out how the expansion of the definition of Priority Need—the first step towards the elimination of that category—is left to the discretion of the various areas. As a result, there is some fear that if one area extends the category in a way that other places do not, that area will attract numerous people applying for homelessness, thereby straining the area's

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88. *Id.*

89. *Id.* at 18.

90. SHELTER SCOTLAND, REPORT: HALFWAY TO 2012? DELIVERING ON SCOTLAND'S HOMELESSNESS COMMITMENTS (2007), [hereinafter SHELTER SCOTLAND REPORT].

91. *Id.* at 4.

92. MONITORING GROUP SECOND REPORT, *supra* note 75.

93. SHELTER SCOTLAND REPORT, *supra* note 90, at 4.

94. SHELTER SCOTLAND REPORT, *supra* note 90, at 5.

95. MONITORING GROUP SECOND REPORT, *supra* note 75, at 15.

resources.<sup>96</sup> However, similar concerns, often raised by communities in the U.S. who fear attracting homeless persons through more affordable housing policies, have been generally discredited.<sup>97</sup> Additionally, encouraging homeless persons to migrate towards the urban centers to access services has in fact been a common practice in cities throughout the United States.<sup>98</sup> Whether it be local police and/or social workers pointing people to the inner city from the suburbs,<sup>99</sup> or a strategy employed by the homeless to obtain the best services available by migrating to specific cities, such as Philadelphia,<sup>100</sup> this phenomenon already occurs. Ensuring that each city has progressive solutions to homelessness so that individuals can obtain the help they need in their local area would likely ameliorate, rather than exacerbate, this problem.

Another issue of concern that comes up in both publications from Shelter Scotland and reports from the Scottish Executive is the lack of housing supply. The cost of housing has risen disproportionately to the earning capacity of households, resulting in an increased risk of homelessness for many individuals and families.<sup>101</sup> With housing in short supply, compounded by a rise in the number of applications, long waiting lists have begun to emerge. Shelter Scotland explains:

House prices have increased by unprecedented levels over the past five years, resulting in a situation where the average house price has now grown to 6.7 times the average salary in Scotland . . . homeless applications have also been on the increase in recent years as have the numbers of people on waiting lists for social housing. At last count in March 2006 there were over 200,000 households on council waiting lists in Scotland and over 8000 homeless households living in temporary accommodation.<sup>102</sup>

Another legislative program that interferes with the available Housing supply is the “Right to Buy” initiative, which was introduced in 1980.<sup>103</sup> The introduction of this program has a negative effect on the available housing stock for homeless people as more resources are funneled into it. More homes are sold through this scheme than are created as affordable housing, resulting in cuts to

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96. *Id.*

97. *See generally*, NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, ACCESS DELAYED, ACCESS DENIED, LOCAL OPPOSITION TO HOUSING FOR HOMELESS PEOPLE ACROSS THE UNITED STATES (1997), available at <http://nlchp.org/content/pubs/> (follow “Access Delayed, Access Denied” hyperlink). ; 80b: PAUL M. CUMMINGS AND JOHN D. LANDIS, RELATIONSHIPS BETWEEN AFFORDABLE HOUSING DEVELOPMENTS AND NEIGHBORING PROPERTY VALUES (1993).

98. *See generally*, Steven R. Paisner, *Compassion, Politics And The Problems Lying On Our Sidewalks: A Legislative Approach For Cities to Address Homelessness*, 67 Temp. L. Rev. 1259 (1994)

99. *Id.* at 1268.

100. *Id.* at 1267

101. MONITORING GROUP SECOND REPORT, *supra* note 75; SHELTER SCOTLAND REPORT, *supra* note 90.

102. SHELTER SCOTLAND REPORT, *supra* note 90, at 16.

103. *Id.* at 24.

the amount of housing stock available as rental units.<sup>104</sup>

In some situations, this crisis has caused cities to meet their duty to provide immediate housing to individuals not by housing them locally, but by seeking housing in neighboring towns. Reports state an estimated 15,000 households are being transported to other cities, sometimes up to 200 miles away, in order to be accommodated.<sup>105</sup> As one reporter notes,

Sometimes the results have been frankly daft: Clackmannanshire has paid £24,000 since January for one family to stay in Stirling, while because Stirling cannot find room for all of its homeless, it sends some of them to spend the night in Glasgow - and pays their bus fare back to Stirling each day.<sup>106</sup>

However, the Scottish Executive is taking proactive steps to ameliorate the gaps between what is needed and what is available. In 2005 the Scottish Executive earmarked £1.2 billion to invest in affordable housing over three years.<sup>107</sup> The most recent report from the HMG notes that the Government is placing the focus on LAs, and reports that housing supply is a high priority, although it punts the issue, saying it will be discussed at a later time.<sup>108</sup>

Despite the problems cited above, because the law puts an affirmative duty on the LAs to house people, the result has been that individuals are no longer forced to stay on the streets, even if they have to travel for their accommodations or their long-term housing needs have yet to be met. Since the 2003 implementation of the law, the number of people applying for assistance who have “slept rough” (on the streets) before they applied has decreased from 10% to 6%, indicating resources are reaching more people before they are forced onto the streets.<sup>109</sup> The fact that towns are ensuring homeless persons are housed, whatever the logistics of the situation, shows a fundamentally different approach to homelessness, one that views housing as a human right. By preventing street homelessness from extending indefinitely, the law has already taken a large step toward a practical implementation of the right to housing. The additional pieces for long-term support are being progressively implemented with resources appropriate to the scale needed to ensure the right over the long term.

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104. *Id.*

105. *The Home Truth*, SCOTLAND ON SUNDAY, Oct. 14, 2007, available at <http://scotlandonsunday.scotsman.com/ViewArticle.aspx?articleid=3470422>.

106. *Id.*

107. MONITORING GROUP SECOND REPORT, *supra* note 69, at 6.

108. HELPING HOMELESS PEOPLE HOMELESS MONITORING GROUP REPORT, March 2008, at 27 [hereinafter HOMELESS MONITORING GROUP REPORT, 2008].

109. See SCOTTISH GOVERNMENT STATISTICAL SERVICES, OPERATION OF THE HOMELESS PERSONS LEGISLATION IN SCOTLAND: NATIONAL AND LOCAL AUTHORITY ANALYSES 2006-07, HSG/2007/06 (2007), at 20; SCOTTISH GOVERNMENT STATISTICAL SERVICES, OPERATION OF THE HOMELESS PERSONS LEGISLATION IN SCOTLAND: 2007-08, (2008), at 1.

## IV. LESSONS FOR THE U.S. ADVOCATES

Although the implementation of the Scottish model has not been without its flaws, many aspects of the program can provide useful lessons for advocates grappling with homelessness in the U.S. These include expanding our federal definition of homelessness to accommodate a more rights-based perspective, creating more positive duties on local entities to plan for the affordable housing needs of their communities, and, perhaps most importantly, shifting to a right-to-housing framework in which all homeless individuals are entitled to housing.

*A. Expanding the Definition of Homelessness*

The first element of the Scotland law that could benefit the U.S. is its expansive definition of homelessness. Current federal law has two different definitions: a narrower one used by the Department of Housing and Urban Development (HUD) and other federal agencies implementing aspects of the McKinney-Vento Homeless Assistance Act,<sup>110</sup> and a broader one promulgated for homeless children and youth by the Department of Education (ED).<sup>111</sup> HUD's definition for most practical purposes is restricted to those either in shelters or similar situations or on the streets. ED's is slightly better, including also those doubled up with friends or relatives or sleeping in hotels or motels due to lack of alternative accommodations. But neither approaches the breadth of the Scottish definition, which is designed to fully accommodate a substantive approach to the right to housing rather than merely asking if there is a roof over one's head.

The HUD definition was originally designed to be broad but in practice has not been interpreted this way. Under the law, the term "homeless" or "homeless individual or homeless person" includes:

1. an individual who lacks a fixed, regular, and adequate nighttime residence; and
2. an individual who has a primary nighttime residence that is —
  - a. a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
  - b. an institution that provides a temporary residence for individuals intended to be institutionalized; or
  - c. a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.<sup>112</sup>

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110. 42 U.S.C. § 11302(a) (2000).

111. 42 U.S.C. 11431 (2) (2002).

112. 42 U.S.C. §11302(a) (2002).

Crucially, the “and” between sections 1 and 2, and the examples given in section 2 have been read restrictively. In particular, section 2c could be read broadly to include individuals doubling up with others, sleeping on couches or on kitchen floors or other places “not designed for . . . regular sleeping accommodation.” In practice, however, the definition has been essentially limited to those in shelter, short term private housing, or sleeping in public.

The ED definition captures some of those that the HUD definition misses. For ED purposes, the term ‘homeless children and youths’:

- (A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 103(a)(1)); and
- (B) includes—
  - (i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; are abandoned in hospitals; or are awaiting foster care placement;
  - (ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 103(a)(2)(C));
  - (iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and
  - (iv) migratory children (as such term is defined in section 1309 of the Elementary and Secondary Education Act of 1965) who qualify as homeless for the purposes of this subtitle because the children are living in circumstances described in clauses (i) through (iii).<sup>113</sup>

Importantly, the definition explicitly captures those who are living in doubled up situations with family and friends, as well as migratory children. These two subpopulations are essential for ED because these groups face many of the same problems of transitional living as children who are on the street or in shelters. However, from a right-to-housing perspective, even this definition falls short.

As discussed earlier, the Scottish definition of homelessness includes all the above populations, as well as those whose housing presents unreasonable risks to their safety or health, and those at risk of imminent housing loss.<sup>114</sup> These additional aspects of the definition are significant from a rights-based perspective. As noted in the introduction, the international definition of the right to adequate housing requires much more than a roof over one’s head.<sup>115</sup> Many

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113. 42 U.S.C. 11431 (2) (2002).

114. Housing (Scotland) Act 1987, Ch. 26. Part II, s. 24 (2A), (3)(b-d), (4).

115. See CESCR *General Comment 4*, *supra* note 12.



aspects, from the legal security of tenure to affordability and accessibility, are all essential for the full scope of the right to be ensured.<sup>116</sup> The Scottish definition begins to address these other aspects.

For example, victims of domestic violence who may have legal residences, but do not have meaningful access to their homes are explicitly given the protections of the Scottish law.<sup>117</sup> This ensures that the accessibility aspect of the right is taken into account. Similarly, the law makes room for those whose accommodation is a threat to their health, overcrowded, or otherwise “unreasonable,” ensuring the habitability aspect of the right by making alternative accommodations available under the act.<sup>118</sup> Importantly, the law also addresses those families who have not yet lost their homes but are living in extremely unstable conditions.<sup>119</sup> Although these individuals might not need housing resources immediately, to be considered eligible and qualified for assistance before becoming physically house-less means there is no gap time between losing one’s accommodation and gaining access to resources. Knowing one will not have to fend on the streets but that resources are available is essential for peace of mind and ensuring the basic human dignity that underlies all human rights.

A telling indicator of the difference in approach between the U.S. and Scottish systems is the way they deal with individuals who are being discharged from prison. Evidence indicates that ex-offenders are often “thrown into a vicious circle, whereby a criminal record prevents them from accessing secure housing, their insecure housing situation precipitates reoffending, which further restricts their opportunity to access secure housing and increases the likelihood of homelessness.”<sup>120</sup> In the U.S., ex-felons are banned from applying for public housing for a number of years, up to life,<sup>121</sup> and can even cause their friends and

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116. *Id.*

117. Housing (Scotland) Act 1987, Ch. 26. Part II, s. 24. (3)(b).

118. *Id.* at (3)(d).

119. *Id.* at 4.

120. COMMUNITIES SCOTLAND, PRECIS NO. 5: PREVENTING HOMELESSNESS: THE ROLE OF HOUSING MANAGEMENT, 3 (2001).

121. See Debbie A. Mukamal & Paul N. Samuels, *Statutory Limitations on Civil Rights of People with Criminal Records*, 30 FORDHAM URB. L.J. 1501, 1506 (2003). “In determining eligibility for Section 8 and other federally assisted housing, the Housing Opportunity Program Extension Act of 1996 (Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120, 110 Stat. 834 (1996)) and the Quality Housing and Work Responsibility Act of 1998 (Veteran Affairs and HUD Appropriations Act, Pub. L. No. 105-276, tit. V, 112 Stat. 2461 (1998)) require local housing authorities to permanently bar individuals convicted of certain sex offenses and methamphetamine production on public housing premises (42 U.S.C. § 13663(a) (2003); 42 C.F.R. § 960.204(a)(3)-(4) (2003)). The federal laws also give local public housing agencies discretion to deny eligibility to virtually anyone with a criminal background, including: 1) people who have been evicted from public, federally assisted, of Section 8 housing because of drug-related criminal activity for three years; and 2) anyone who has engaged in any drug-related criminal activity, any violent criminal activity, and other criminal activity that would adversely affect the health, safety, or right to peaceful enjoyment of the premises (42 U.S.C. § 13661; 24 C.F.R. § 960.204 (2002)). Local housing agencies have the authority to: 1) identify which crimes make an applicant ineligible for public housing; 2) decide whether they will consider arrests not leading to conviction in eviction proceedings; 3) decide how long to deny housing assistance to people with criminal records; and

relatives in public housing to be evicted if they even attempt to visit with them after release.<sup>122</sup> In contrast, in Scotland, returning from prison triggers more, rather than less, help. The Housing Act specifically names ex-offenders as among those in priority need of housing.<sup>123</sup> The HMG report for 2008 notes that many LAs have specialist teams devoted to meeting the housing needs of ex-offenders, and under local plans, many authorities have started prison outreach programs to prevent homelessness amongst ex-offenders.<sup>124</sup>

The bottom line of the difference in approach to the definitions is that both the HUD and ED definitions are being implemented in an exclusive manner while the Scottish definition is flexible by design and intended to be implemented in an increasingly inclusive manner. The elimination of the requirement to investigate intentionality and the broadening of the priority needs test to its eventual demise in 2012 are clear indicators that the Scottish Parliament of the rights-based approach tries to ensure people's needs are met, while the U.S.'s charity model tries to deny benefits to all but those who are "worthy." Indeed, in the explanatory notes accompanying the Act, the Scottish Executive anticipates that there will be "increased duties owed to more people; by increases in the numbers of people applying as homeless, which might be expected at least initially as people become aware of the changed duties owed to them."<sup>125</sup> However, in the long term, "the increased emphasis on prevention may be expected to result in fewer people becoming homeless and more sustainable solutions for those who are, resulting in fewer repeat applications."<sup>126</sup> Moreover, "the proposal to change the LAs' duty to investigate intentionality to a power to do so is expected to reduce substantially the number of people found to be intentionally homeless, and reduce the present burden on LAs to carry out the investigation."<sup>127</sup> Thus, the increased number of homeless persons applying for, and receiving assistance in the early years of the program is seen as an indicator of success of the program, and the savings reaped from *not* having to endlessly investigate the "worthiness" of the applicant can be instead applied to ensuring the right to housing for all.

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4) determine what, if anything, qualifies as rehabilitation for purposes of lifting the bars to public housing. Thus, local authorities have wide discretion in determining how restrictive, or inclusive, their policies regarding admission of people with criminal records will be."

122. See Fox Butterfield, *Invisible Penalties Stalking Ex-Convicts, Sanctions Target Jobs, Housing, Welfare, Voting*, PITTSBURGH POST-GAZETTE, Dec. 29, 2002, at A9.

123. Housing (Scotland) Act 1987, Ch. 26. Part II, s. 25, (1)(c)(viii).

124. HOMELESS MONITORING GROUP REPORT, 2008, *supra* note 108, at ¶ 100, 138. In 2008, 3.4% of persons seeking assistance had come from prison. See SCOTTISH GOVERNMENT STATISTICAL SERVICES, OPERATION OF THE HOMELESS PERSONS LEGISLATION IN SCOTLAND: 2007-08, (2008), at 27.

125. Scottish Executive, Homelessness Etc. (Scotland) Bill: Explanatory Notes (2002), available at [http://www.opsi.gov.uk/legislation/scotland/acts2003/en/aspn\\_20030010\\_en\\_1](http://www.opsi.gov.uk/legislation/scotland/acts2003/en/aspn_20030010_en_1), at ¶ 22. See also *id.*, at ¶ 24, "it is expected that there will initially be a limited increase in the numbers assessed as entitled to permanent accommodation and an increase in the number of people applying in these categories."

126. *Id.*

127. *Id.*, at ¶ 25.

### B. Planning

Another important element of the Scottish system in terms of progressively realizing the right to housing is the statutorily required comprehensive planning process. As described above, Scottish LAs are required to plan for the affordable housing and homeless prevention needs of the community, and the Scottish Executive is committed to meeting the needs described in the plan.<sup>128</sup> Some U.S. efforts to develop 10-year plans to end homelessness and statutory requirements for planning for housing needs provide a similar framework in the U.S., but more can be done to create a true duty for municipalities to plan and meet these goals.

In the U.S., hundreds of municipalities have developed 10-year plans to end homelessness.<sup>129</sup> These plans have brought together a wide variety of local, state, and federal agency officials together with local activists to work to develop coordinated approaches to ending homelessness. Many of these programs are on track with successful programs; others, however, are facing uncertainty due to lack of adequate, and adequately stable, funding streams.<sup>130</sup>

Certain state laws require planning for the adequate development of affordable housing for all segments of society in order to access state affordable housing development funds.<sup>131</sup> For example, California's Housing Element law is a near-model program that directs local governments to use their land use and zoning powers to provide for the housing needs of all economic segments of the community, including special needs populations such as the homeless and the disabled. However, the fatal flaw in the law is that it is a requirement to *plan* for, not necessarily produce, sufficient numbers of units to accommodate a city's housing needs.<sup>132</sup> Unfortunately, the law's "carrot" approach of providing funding for adequate plans has not worked – barely a quarter of southern California's jurisdictions met their affordable housing allocations between 1998

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128. See, e.g., CAL GOV'T CODE § 65582.

129. National Alliance to End Homelessness, *Community Plans*, at <http://www.endhomelessness.org/section/tools/communityplans>. According to the National Alliance, 213 plans have been completed with an additional 130 in development.

130. See William Echols, *How the Northwest's Cities are Coping with the Homeless*, CROSSCUT.COM, Aug. 10, 2007, <http://www.crosscut.com/social-services/6165/How+the+Northwest's+cities+are+coping+with+the+homeless/> ("The task of Seattle and other American cities has been complicated by mixed signals from the federal government. Though the Clinton administration oversaw modest increases in federal money for housing, the Bush administration has been far less willing to fund low-income housing. Stephen Norman, the executive director of the King County Housing Authority, says that his agency and others like it are facing future problems because federal public housing programs have been suffering from budget cuts. Existing properties are falling into disrepair due to a lack of capital funds; if this trend continues, it will require expensive redevelopment to replace existing units.

Frequently, the federal government has failed to match its own rhetoric with action. The Section 8 housing voucher program—the main federal form of rental assistance—was cut even as the federal government was urging local jurisdictions to end homelessness, though funding levels have since increased again.”).

131. See, e.g., CAL. GOV'T CODE § 65582.

132. CAL. DEP'T OF HOUS. AND CMTY. DEV., STATUS OF HOUSING ELEMENTS IN CALIFORNIA (2004).

and 2005,<sup>133</sup> and in 2007, 20 cities in L.A. County alone had failed to even adopt compliant plans designed to further the planning of affordable housing.<sup>134</sup>

U.S. advocates should promote statutorily requiring adequate planning and execution of those plans for ending homelessness and ensuring the right to adequate housing for all. The best model would marry the Scottish duty to plan with the best aspects of the participatory and comprehensive 10-year plan strategy and statutory requirements of laws like the California Housing Element law, but also add an enforceable duty on municipalities to execute those plans, together with a corresponding commitment from federal, state, and local governments to provide adequate funding. These plans should examine the right to housing framework established by the Committee on Economic, Social & Cultural Rights described in the introduction to ensure they are addressing all aspects of the right. In this way, our government can be held accountable for all the elements of its obligation to ensure the right to housing.

### *C. Duty to Protect the Right to Housing*

The entitlement to housing for all persons in need is the basis of a rights-based approach to housing and reflects a fundamental difference between the U.S. and Scottish systems. Part of this is reflected in the narrower versus broader definition of homelessness discussed above, enabling more persons to access services. Another part is the method in which those services are delivered, with deficits in the immediacy of services provided, the duration of the commitment, and the actual entitlement or right to housing being the greatest shortcomings.

#### 1. Immediacy and Duration of Duty

The idea that individuals presenting as homeless should be given immediate temporary housing which seamlessly merges into long-term permanent, supportive housing is not novel, but the idea of making it a legal obligation of the government is. In the U.S., many cities are successfully implementing the “Housing First” model, which provides homeless persons with immediate housing, enabling them to stabilize their existence before moving into service delivery in other areas (such as drug or mental health treatment).<sup>135</sup> In fact, the

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133. S. CAL. ASS'N OF GOV'TS, HOUSING ELEMENT COMPLIANCE AND BUILDING PERMIT ISSUANCE IN THE SCAG REGION (Apr. 2006); Table 2— because there is no uniform, reliable data source for the creation of lower income housing units, SCAG used Lower Income Housing Tax Credit projects and units as a minimum measure of achievement.

134. CAL. DEP'T OF HOUS. AND CMTY. DEV., 2007 HOUSING ELEMENT COMPLIANCE REPORT 9-11 (2007). Nevertheless, the state mandate has proven to be an effective tool; “from 1999 to the present, compliant jurisdictions that have appropriately planned in compliance with state law supplied between 78 and 92 percent of all multifamily permits issued in California.”

135. BEYOND SHELTER, *Housing First*, [http://www.beyondshelter.org/aaa\\_initiatives/ending\\_homelessness.shtml](http://www.beyondshelter.org/aaa_initiatives/ending_homelessness.shtml) (last visited Oct. 20, 2008) (“‘Housing First’, or rapid re-housing as it is also known, is an

most recent report to Congress on homelessness credits this model with the 30 percent reduction in chronic homelessness over the past two years.<sup>136</sup> The Housing First model resembles a rights-based approach in that it presents few qualifying barriers, such as sobriety, for those it serves, and it promises long-term, supportive housing for as long as is needed before individuals move on. However, despite its success, its use in the U.S. falls far short of a truly rights-based system.

Unlike Scotland, where housing programs are made available to the broadest homeless population, in the U.S., federal funding for Housing First-type programs is currently directed toward ending chronic homelessness.<sup>137</sup> While this is a laudable goal, this leaves out many families and individuals who are temporarily moving in and out of homelessness, or who are at risk of homelessness. Again, with a rights-based approach, the psychological cushion of knowing there is a social safety net is an essential component of maintaining basic human dignity.<sup>138</sup> Keeping broad populations out of the Housing First programs and requiring any individual to be homeless for at least a year prior to gaining access to this option certainly falls far short of meeting the right.

Other emergency housing programs also fail to adequately ensure that all homeless persons receive services immediately as they need them. The number of emergency shelter beds available on any given night falls greatly short of meeting demand. The U.S. Conference of Mayors reports that more than half of cities surveyed in 2007 turn people away from shelters all or some of the time.<sup>139</sup> This means many people face street homelessness, and even those who have shelter one night can face a game of musical chairs for the next. This conflicts with the element of security of tenure for providing the full right to adequate housing – even if the shelter provided is temporary, individuals should have at least the security of knowing they will be able to have a place to sleep the next

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alternative to the current system of emergency shelter/transitional housing, which tends to prolong the length of time that families remain homeless. The methodology is premised on the belief that vulnerable and at-risk homeless families are more responsive to interventions and social services support after they are in their own housing, rather than while living in temporary/transitional facilities or housing programs. With permanent housing, these families can begin to regain the self-confidence and control over their lives they lost when they became homeless.”)

136. See Rachel Swarns, *U.S. Reports Drop in Homeless Population*, N.Y. TIMES, July 30, 2008, available at <http://www.nytimes.com/2008/07/30/us/30homeless.html?ex=1217995200&en=3d6acfa85f094032&ei=5070&emc=eta1>; U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF COMMUNITY PLANNING AND DEVELOPMENT, THIRD ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS, iii (2008) [hereinafter 2008 HOMELESS ASSESSMENT]. According to the government report, chronic homelessness is defined as disabled individuals who have been continuously homeless for more than a year or have experienced at least four episodes of homelessness in the past three years.

137. National Alliance to End Homelessness, *Poverty Versus Pathology: What's 'Chronic' About Homelessness*, at <http://www.nationalhomeless.org/publications/chronic/full.html>.

138. NATIONAL HOUSING TASK FORCE, REPORT OF THE NATIONAL HOUSING TASK FORCE: A DECENT PLACE TO LIVE (1988), at 3.

139. U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 23-CITY SURVEY, 17 (2007).

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Long-term housing options are even more lacking in terms of the immediacy of the commitment. Federal funding for long-term public housing has plummeted over the past two decades, resulting in the loss of at least 700,000 units of affordable housing as demand has increased.<sup>140</sup> This has resulted in waiting lists that are sometimes years long, and many cities have closed their waiting lists so newly needy individuals cannot even apply for services.<sup>141</sup> This means for most families or individuals who lose their housing the government provides no assurance that any sort of long-term housing will be available in any sort of reasonable time frame. Although waiting lists for Scottish permanent housing have grown, at least individuals there have an assurance of interim housing.

Under federal Rapid Re-housing grants, which have funded some of the growth in the use of the Housing First model for families, the grant commitment is only for up to eighteen months of rental assistance.<sup>142</sup> Individual grantees can make use of the funding as a bridge to a longer term commitment to homeless families that they will have housing as long as they need it, but this is a programmatic choice, not an enforceable right.<sup>143</sup> Moreover, total federal funding for the Rapid Rehousing program is only \$25 million, a small fraction of what would be needed to create guaranteed immediate housing opportunities for the millions who experience homelessness every year.<sup>144</sup>

Government programs do provide a safety net for millions, and should not be shortchanged in the help that they do provide. But they are a piecemeal solution representing a discretionary approach. The Scottish rights-based approach

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140. See DOUGLAS RICE & BARBARA SARD, CTR. ON BUDGET & POLICY PRIORITIES, THE EFFECTS OF THE FEDERAL BUDGET SQUEEZE ON LOW INCOME HOUSING ASSISTANCE (Feb. 2, 2007) (Finding that in the last ten years, 300,000 units have been lost to deterioration, largely due to an inadequate funding level that did not provide for rehabilitation. More than 400,000 additional units have been lost since 1996, when Congress ended the Title VI Preservation regulatory program, which required owners of subsidized buildings to maintain affordable rental levels below market rate. The Joint Center for Housing Studies estimates that there is an annual loss of 200,000 private market rental units due to demolition).

141. See, e.g., NATIONAL ALLIANCE TO END HOMELESSNESS, *Fact Checker*, Sept. 2007 (noting in January of 2007, New York City opened its waiting list for the first time in 12 years. St. Paul, Minnesota opened its waiting list for 2 days and had an 11,000 person response); FLORIDA HOUSING DATA CLEARINGHOUSE, PUBLIC HOUSING AUTHORITY WAITING LIST CHARACTERISTICS (2001) (citing, among other findings, that nearly all of the PHAs responding to the survey indicated that they had waiting lists for their public housing and Section 8 programs. Typical wait times for applicants for public housing units and Section 8 vouchers ranged from six months to two years. However, nearly one-quarter of respondents indicated that Section 8 wait times could exceed two years. Most public housing waiting lists were open and accepting new applicants, but most Section 8 waiting lists were closed). See also Kevin Deutsch, Gretel Sarmiento, and Lona O'Connor, *Hundreds Seeking Housing Money Overwhelm Boca Authority*, PALM BEACH POST, Mar. 13, 2008, available at <http://www.commondreams.org/archive/2008/03/13/7675/> (describing how in Boca Raton, Florida, several individuals were trampled and riot police were brought in to disperse a crowd of over 500 people waiting in line for hours for voucher applications after the applications ran out.)

142. NATIONAL ALLIANCE TO END HOMELESSNESS, RAPID REHOUSING 2 (2008).

143. *Ibid.*

144. *Ibid.*



compels government to meet the full right for all who require aid. This is the essential difference.

## 2. Enforceability of the Right

A core component of a right is its enforceability.<sup>145</sup> Although there are many methods to ensure enforcement, our legal system places a premium on the ability to sue if that right is being violated. In Scotland, homeless individuals have the right to immediate housing, guaranteed by an option to sue for enforcement, and further guaranteed by the right to be housed during the dispute resolution process. In the U.S., while the federal government appropriates roughly \$38 billion to housing and community development, only 25 percent of the eligible renter households receive assistance.<sup>146</sup> But no American has the ability to sue to gain access to the above-described housing programs, much less to be housed during the interim: U.S. housing programs are discretionary on the part of the government and the service providers. Certain rights and entitlements have been carved out for families in public and publicly subsidized housing which do allow them to bring legal action to maintain their housing, but there is no guarantee to get into housing in the first place.<sup>147</sup> Moreover, excluding some limited tax credits, federal housing programs are funded from the discretionary side of the federal budget. This means housing must compete with other federal programs for limited resources, unlike Social Security benefits, which come from the mandatory side of the federal budget. Making housing a justiciable right for individuals would finally force the government to put adequate resources in place to fulfill the right.

## 3. Eviction and Foreclosure Protection

The complementary eviction and foreclosure prevention programs in Scotland provide essential means of preventing homelessness rather than merely treating its symptoms. Again, the inclusive definition of homelessness reaching those who are in imminent danger of homelessness allows resources to be directed to individuals before it is too late.<sup>148</sup> By requiring landlords (renters) and mortgage lenders (homeowners) to notify LAs of potential homelessness, the state can proactively target resources to individuals who need them most.<sup>149</sup> The fact that

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145. See generally Maria Foscarinis, *Homelessness, Litigation and Law Reform: A U.S. Perspective*, 10.2 AUSTL. J. HUM. RTS. 105, 111, available at <http://www.austlii.org/au/journals/AJHR/2004/6.html>.

146. JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY, *The State of the Nation's Housing* (2006).

147. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that the right to maintain housing is not an entitlement in the sense of a substantive due process right to a home, rather it is a procedural due process right based on a property interest in the receipt of benefits that derives from).

148. See Housing (Scotland) Act 1987, Ch. 26. Part II, s. 24.

149. See BERRY, *supra* note 16, at 11.



most landlord-tenant court lawyers could probably scarcely imagine all of their clients (and the millions of unrepresented tenants) being affirmatively connected to resources to prevent their evictions shows just how greatly this change is needed in the U.S. Similarly, giving government agencies the affirmative duty to reach out to homeowners in danger of foreclosure with adequate time to prevent disaster, rather than relying on individuals to seek assistance, could potentially greatly stem the tide of needless foreclosures.

Giving local governments the authority to purchase homes and rent them back to their previous owners as in the Scottish scheme might seem far-fetched in the U.S. But given that recent legislation allows governments to purchase foreclosed homes that have been abandoned, it seems it would be an even better solution to enable that purchase before the home is abandoned, to allow the family stability.<sup>150</sup> Again, this represents a rights-based approach—focused on keeping the individual or family in housing, rather than the economic approach—focused on enabling municipalities to prevent deteriorating housing stock without concern for where the people have gone.

#### CONCLUSIONS

Shifting advocacy in the U.S. from a charity model that laments the current conditions of housing crisis but fails to provide the accountability necessary for ending it to a framework that assumes that housing is a basic right for all is by no means an easy task. But looking at the Scottish model shows the potential for the gains we can make by doing so. Just as there are many elements to the right to housing, there are many players who need to be involved, on many levels. Local advocates must engage in educating grassroots communities, developing local policy, and promoting litigation within a rights-based framework. Advocates at the national level must similarly educate representatives of national organizations and federal policy makers to begin to shift their paradigm. Unless we do so, we will continue to see more policies that alleviate some of the problem, but ultimately miss the mark.

Much of the critique of the idea of a right to housing or other economic and social rights comes from the ideas that justiciable standards cannot be developed for the rights and that somehow these rights are incompatible with a capitalist democracy. Scotland's success in tackling these difficult questions should hearten those of us who believe such a rights-based approach is necessary, and provides evidence to begin to address the critics' concerns. By returning to the American origins of the idea of these rights—in Franklin Roosevelt's "Second Bill of Rights"—while looking to their practical expression in places like Scotland, we can help move our country forward to a more just and humane future.

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150. See David M. Herszenhorn, *Bush Signs Sweeping Housing Bill*, N.Y. TIMES, July 31, 2008, available at <http://www.nytimes.com/2008/07/31/business/31housing.html?scp=1&sq=housing%20bill&st=cse>.