

# Downward Spiral: Homelessness and Its Criminalization

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A city council recently developed a policy that homeless residents “are no longer welcome in the City.”<sup>1</sup> City memoranda describe a plan “continually [to] remov[e] [homeless people] from the places that they are frequenting in the City.” In one phase of what a court later described as the city’s “war on the homeless,”<sup>2</sup> police conducted a “harassment sweep” in which homeless people “were handcuffed, transported to an athletic field for booking, chained to benches, marked with numbers, and held for as long as six hours before being released to another location, some for such crimes as dropping a match, a leaf, or a piece of paper or jaywalking.”<sup>3</sup>

Over the past decade, as homelessness has increased across the country,<sup>4</sup> the number of people living in public places has also grown.<sup>5</sup> Emergency shelters, the primary source of assistance, do not provide sufficient space to meet the need even for temporary overnight accommodations; on any given night there are at least as many people living in public as there are sheltered.<sup>6</sup>

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1. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 387-88 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995). The municipal memorandum quoted by the court used the more pejorative term “vagrant” rather than “homeless.” 27 Cal. Rptr. 2d at 387-88.

2. *Tobe*, 27 Cal. Rptr. 2d at 389.

3. *Id.*

4. *See generally* U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES: 1995 (1995) [hereinafter U.S.C.M. 1995 REPORT]; MARTHA R. BURT, OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980S (1992) [hereinafter BURT, OVER THE EDGE]; James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 AM. J. OF ORTHOPSYCHIATRY 320 (1995). *But see* CHRISTOPHER JENKS, THE HOMELESS 17 (1994) (contending that number of homeless people peaked in 1987-88).

5. Wright & Devine, *supra* note 4, at 323. Some social scientists suggest that the number of homeless persons living in public places is increasing. *Id.* at 323. *But see* JENKS, *supra* note 4, at 17 (stating that number of homeless people in public places peaked in 1987-88).

6. Wright & Devine, *supra* note 4, at 323 (describing range from “conservative” one-to-one estimate to ten times as many homeless people on the streets as in shelters).

Moreover, shelters typically require their residents to leave during the day.<sup>7</sup> Several hundred thousand people have nowhere to sleep but public places; at least twice that number have nowhere to be during the day save public places.<sup>8</sup>

Increasingly, local governments are using criminal laws to address the presence of homeless people in public places.<sup>9</sup> Some cities are enacting and penalizing activities associated with homelessness, such as sleeping, sitting, and begging in public places.<sup>10</sup> Others are using rarely enforced laws, such as prohibitions on vagrancy and loitering, to conduct "sweeps" aimed at homeless people.<sup>11</sup> Restrictions on providers of aid to homeless people are also prevalent.<sup>12</sup> Santa Ana's concerted, deliberate, and documented effort to force its homeless residents out, summarized above, is a dramatic example of a growing national phenomenon.<sup>13</sup>

Constitutional challenges to such laws and practices have been filed in courts across the country. City actions have been invalidated as unconstitutional in some cases.<sup>14</sup> They have been upheld in others as legitimate efforts to regulate public space.<sup>15</sup> One leading court decision ordered the city to create "safe zones" for homeless people, in effect invalidating city actions as unconstitutional in only part of the city.<sup>16</sup> In analyzing the constitutional issues raised, courts have adopted a variety of sometimes conflicting approaches.<sup>17</sup>

7. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH, A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS 38 (1988) [hereinafter HUD SHELTER REPORT].

8. See *infra* Section I.A for a discussion of the numbers of homeless people and the aid available to them.

9. See generally NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NO HOMELESS PEOPLE ALLOWED (1994) [hereinafter NO HOMELESS PEOPLE ALLOWED]; NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, THE RIGHT TO REMAIN NOWHERE (1993) [hereinafter RIGHT TO REMAIN NOWHERE]; NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, GO DIRECTLY TO JAIL (1991) [hereinafter GO DIRECTLY TO JAIL].

10. See generally RIGHT TO REMAIN NOWHERE, *supra* note 9; NO HOMELESS PEOPLE ALLOWED, *supra* note 9; GO DIRECTLY TO JAIL, *supra* note 9.

11. See generally RIGHT TO REMAIN NOWHERE, *supra* note 9; NO HOMELESS PEOPLE ALLOWED, *supra* note 9; GO DIRECTLY TO JAIL, *supra* note 9.

12. See NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, NO ROOM FOR THE INN ii (1995) [hereinafter NO ROOM FOR THE INN]. It is not possible to state with certainty that such restrictions are actually increasing. However, based on reports from many areas across the country it is possible to make an informed supposition that they are.

13. See generally RIGHT TO REMAIN NOWHERE, *supra* note 9; NO HOMELESS PEOPLE ALLOWED, *supra* note 9; GO DIRECTLY TO JAIL, *supra* note 9.

14. *E.g.*, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991); *Richard v. Nevada*, CV-S-90-51-HDM (D. Nev. 1991).

15. *E.g.*, *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990); *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

16. *Pottinger*, 810 F. Supp. at 1584.

17. Compare *Young*, 903 F.2d 146, with *Loper*, 999 F.2d 699, and *Blair*, 775 F. Supp. 1315; compare *Pottinger*, 810 F. Supp. 1507, and *Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994),

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During the 1980s, efforts to establish a “right to shelter” defined much of the activism, litigation, and debate about homelessness.<sup>18</sup> Now, efforts to criminalize activities associated with homelessness are playing that defining role.<sup>19</sup> This evolution follows the failure to address homelessness adequately, and the inability of shelter alone to do so. The trend toward criminalization threatens a further spiraling of minimal aspiration and standard from a cot in a shelter to a spot on the street. At the same time, much of the debate it has sparked presumes a polarity between the “public’s” interest in orderly public places and homeless persons’ “right” to sleep and beg in public.<sup>20</sup>

Seeking to reverse the fall, this Article rejects that polarity. It rests instead on the premise that everyone has an interest in pleasant public places and that no one has an interest in living on the street. Activism and debate should focus on addressing the conditions that require people to live on the street, by defining and implementing solutions to homelessness. Longer-term measures that address the causes of homelessness—as opposed to merely providing emergency relief—offer the only realistic possibility of doing so.

The Article begins with an overview of homelessness in America, including a summary of its size, nature, and causes. The Article reviews recent efforts by local governments to criminalize activities associated with homelessness, focusing on three major categories: begging, public place, and indirect restrictions. It discusses the purposes and effects of criminalization, noting that a common underlying goal is the removal of homeless people from all or selected city areas.

The Article reviews recent court rulings in litigation challenging the constitutionality of such local government actions. It discusses divergent results and analyses, identifies common themes, and argues for a fact-based approach. The Article proposes that laws criminalizing activities associated with homelessness are unlikely to be both constitutional and effective in meeting their goals.

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with Joyce, 846 F. Supp. 843.

18. See, e.g., HERITAGE FOUNDATION, RETHINKING POLICY ON HOMELESSNESS 43 (1988); Robert Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 23-27 (1992); Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy, and Strategy*, 12 ST. LOUIS PUB. L. REV. 37, 44-51 (1993); Kim Hopper, *The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness*, 4 NOTRE DAME J. L. ETHICS & PUB. POL’Y 301, 317-19 (1992); David Whitman, *Remarks at the Heritage Foundation*, in THE HERITAGE FOUNDATION, RETHINKING POLICY ON HOMELESSNESS 43 (1988).

19. See RIGHT TO REMAIN NOWHERE, *supra* note 9; NO HOMELESS PEOPLE ALLOWED, *supra* note 9; GO DIRECTLY TO JAIL, *supra* note 9. This shift in emphasis is indicative of the direction in which societal response to homelessness has moved over the past decade and a half.

20. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in Public Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165 (1996); Robert Tier, *Let’s Restore Urban Civility to City Streets*, 5 CUP REPORT 3 (1994); Vivian Rothstein, *Their Space Is Ours, Too*, N.Y. TIMES, Dec. 19, 1993, at 13; Letter from Mark Sidran, Candidate for City Attorney, Seattle, WA, to George Sander, Chairman, King County Democratic Party (Sept. 27, 1993) (on file with author) [hereinafter Sidran Letter].

Next, the Article focuses on public policy concerns. The Article identifies major justifications for criminalizing responses, including public opinion, and aesthetic, safety, economic and social policy concerns. The Article discusses public opinion polls which show that the majority of the public supports increased aid to homeless people and opposes efforts to remove them from public places. The Article then discusses other policy concerns, recognizing the legitimacy of some, but concluding that they do not justify criminalization efforts.

The Article identifies three emerging city responses to court rulings: a reactive approach that imposes modified restrictions in an effort to come within constitutional limits; a "safe zone" approach that protects but also isolates homeless people in certain city areas; and a proactive approach that seeks to address the causes of homelessness. The Article argues that the proactive approach offers the best possibility for a solution that is both constitutional and effective.

## I. INTRODUCTION: HOMELESSNESS IN AMERICA

Homelessness has been a significant and growing problem in America for over a decade.<sup>21</sup> Almost all aspects of the problem—its size, causes, and even existence—have been the subject of controversy.<sup>22</sup> Perhaps because of this, there has been significant research on homelessness over the past decade.<sup>23</sup> Currently, there is a relatively high degree of consensus among social scientists on many significant points.<sup>24</sup>

Summarizing the research, this Part provides an overview of contemporary homelessness in America. First, it discusses the size and nature of the population, noting that despite contrary stereotypes, the homeless population is in fact demographically diverse. Next, it discusses causes of homelessness; it notes that any dichotomy between "personal" as opposed to "structural" analyses does not center on the causes themselves but rather on the origins and solutions to these causes or, in some cases, on ideology rather than empirical

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21. See JENKS, *supra* note 4, at 9; Wright & Devine, *supra* note 4, at 320. See generally BURT, *OVER THE EDGE*, *supra* note 4.

22. See generally HUD Report on Homelessness, Joint Hearings Subcomm. on Housing and Community Development, Comm. on Banking, Finance, and Urban Affairs, and Subcom. on Manpower and Housing, Comm. on Government Operations (1984); see also ELLIOT LIEBOW, *TELL THEM WHO I AM: THE LIVES OF HOMELESS WOMEN* 311-14 (1993).

23. E.g., JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* (1992); BURT, *OVER THE EDGE*, *supra* note 4; MARTHA R. BURT & BARBARA E. COHEN, *AMERICA'S HOMELESS: NUMBERS, CHARACTERISTICS, AND PROGRAMS THAT SERVE THEM* (1989); LIEBOW, *supra* note 22; JAMES D. WRIGHT, *ADDRESS UNKNOWN: THE HOMELESS IN AMERICA* (1989); Wright & Devine, *supra* note 4; Kim Hopper, *Taking the Measure of Homelessness: Recent Research on Scale and Race*, 29 *CLEARINGHOUSE REV.* 730 (1995).

24. See *infra* Section I.A; see also Wright & Devine, *supra* note 4, at 323 (noting that social scientists generally agree on numbers of homeless).

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research. Finally, this Part reviews recent remedial responses to homelessness.

### A. *The Size and Nature of the Homeless Population*

Homelessness can be and is defined in a variety of ways.<sup>25</sup> A common, narrow, definition is limited to the “literally homeless”: those persons who lack a fixed and regular address and whose primary night-time residence is a public or private place “not designed for, or ordinarily used as, a regular sleeping accommodation for human beings,” or a shelter or similar facility designed to provide “temporary living accommodations” for persons with no other residence.<sup>26</sup>

Current estimates suggest that on any given night at least 700,000 people across the country are “literally” homeless.<sup>27</sup> More people become homeless than remain homeless over a year; generally, estimates that extend over time are substantially larger than “point-in-time” estimates. Currently, over the course of a year, two to three million people are homeless.<sup>28</sup> Over a five year period from 1985 to 1990, seven million people were homeless. About 12 million adults—6.5% of the adult population—have been literally homeless at some time in their lives.<sup>29</sup>

Some stereotypes depict homeless people as single, white male alcoholics. While this characterization may have had a basis in the past,<sup>30</sup> the homeless

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25. Broad definitions include not only those persons living on the streets or in shelters but also those who, having no home of their own, are doubled-up with friends or relatives, sometimes constantly moving among such accommodations; some definitions also include those living in substandard accommodations. See WRIGHT, *supra* note 23, at 19-21 (discussing different definitions).

26. This is a narrow version of the definition enunciated by Congress in the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11301 (1995) which arguably also includes persons in inadequate housing. See also WRIGHT, *supra* note 23, at 19-23; INTERAGENCY COUNCIL ON THE HOMELESS, PRIORITY: HOME!: THE FEDERAL PLAN TO BREAK THE CYCLE OF HOMELESSNESS 22-23 (1994) [hereinafter PRIORITY: HOME!].

27. See Martha R. Burt, *Critical Factors in Counting the Homeless*, 65 AM. J. ORTHOPSYCHIATRY 334, 335 (1995); Wright & Devine, *supra* note 4, at 321 (citing W. Tucker, *Where Do the Homeless Come From*, 25 NAT. REV. 32, 32-43 (1987), and Congressional Budget Office estimates).

28. Burt, *supra* note 27, at 336.

29. Bruce Link et al., *Lifetime and Five-Year Prevalence of Homelessness in the United States: New Evidence on an Old Debate*, 65 AM. J. ORTHOPSYCHIATRY 347, 353 (1995). The question of numbers was highly controversial in the early to mid 1980s. See, e.g., BURT, *OVER THE EDGE*, *supra* note 4, at 3-5; JENKS, *supra* note 4, at 1-2. Estimates ranged from 250,000, see HUD SHELTER REPORT, *supra* note 7, at 8; to 2-3 million. See MITCH SNYDER & MARY ELLEN HOMBS, *HOMELESSNESS IN AMERICA: A FORCED MARCH TO NOWHERE* (1982). A limited enumeration in selected areas by the Census Bureau in 1990 yielded 228,372; however, the Bureau specifically said this number was not a count of the nation's homeless population. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *COMMERCE NEWS, CENSUS BUREAU RELEASES 1990 DECENNIAL COUNTS FOR PERSONS ENUMERATED IN EMERGENCY SHELTERS AND OBSERVED ON STREETS 2* (Apr. 12, 1991). Currently, there is considerable consensus among researchers supporting 700,000 as the “point-in-time” estimate and 2-3 million as the annual estimate. Burt, *supra* note 27, at 335.

30. See, e.g., Louisa Stark, *Blame the System, Not Its Victims*, in *HOMELESSNESS: CRITICAL ISSUES FOR POLICY AND PRACTICE* 7-10 (1987); cf. Hopper, *supra* note 23, at 734-36 (noting that historically African-Americans have constituted “substantial minority” overlooked by researchers).

population is now demographically diverse.<sup>31</sup> According to a recent national survey, of the total population single men account for 46%, members of families with children account for 36.5%, single women account for 14%, and unaccompanied youth account for 3.5%.<sup>32</sup> Overall, children make up 25% of the population.<sup>33</sup> Minorities are disproportionately represented: of the homeless population, about 56% are African-American; 29% white, 12% Hispanic, 2% Native American, and 1% Asian.<sup>34</sup> Of the adult male homeless population, 30 to 47% are veterans.<sup>35</sup>

Homeless people are generally extremely poor. Nationally, average monthly income for homeless people, from any source—including work, public assistance, and begging—is under \$200.<sup>36</sup> At any given time, about 20% of the homeless population is employed full- or part-time;<sup>37</sup> of those homeless people living in shelters, about one-third work at some point during a given week.<sup>38</sup> In many cases, employment is through day labor.<sup>39</sup> Just over one-half of homeless adults have completed high school.<sup>40</sup> Relatively few homeless people are eligible for or actually receive public assistance benefits: only about half are enrolled in any kind of benefit program.<sup>41</sup>

A significant number of homeless people are disabled. About 23 to 30% of the adult homeless population suffer from severe mental illness.<sup>42</sup> About half

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31. See BURT, *OVER THE EDGE*, *supra* note 4, at 20; PRIORITY: HOME!, *supra* note 26, at 23-25; WRIGHT, *supra* note 23, at 72; Kim Hopper & Jill Hamburg, *The Making of America's Homeless: From Skid Row to the New Poor, 1945-1984*, in CRITICAL PERSPECTIVES ON HOUSING 12-40 (R.G. Bratt, C. Hartman, & A. Myerson, eds. 1986).

32. U.S.C.M. 1995 REPORT, *supra* note 4, at 40. This is not a "scientific" study; it is the most recent national survey, however, and it was conducted by cities, a focus of this Article. More rigorous studies support these rough breakdowns. It is important to note, however, that the family percentage refers to members, not households. See BURT, *OVER THE EDGE*, *supra* note 4, at 12-13.

33. U.S.C.M. 1995 REPORT, *supra* note 4, at 40. The average age of single homeless persons is in the late thirties; the average age of homeless mothers is in the early thirties. BURT, *OVER THE EDGE*, *supra* note 4, at Table 2-1.

34. U.S.C.M. 1995 REPORT, *supra* note 4, at 40.

35. PRIORITY: HOME!, *supra* note 26, at 25 (reviewing literature); see WRIGHT, *supra* note 23, at 63 (stating that 47% of homeless men are veterans).

36. PRIORITY: HOME!, *supra* note 26, at 24; BURT, *OVER THE EDGE*, *supra* note 4, at 20, 21.

37. U.S.C.M. 1995 REPORT, *supra* note 4, at 40.

38. PRIORITY: HOME!, *supra* note 26, at 24.

39. WRIGHT, *supra* note 23, at 66.

40. PRIORITY: HOME!, *supra* note 26, at 24; BURT, *OVER THE EDGE*, *supra* note 4, at 17.

41. WRIGHT, *supra* note 23, at 72; see also BURT, *OVER THE EDGE*, *supra* note 4, at 20 (describing results of study showing that very few homeless people receive public assistance); NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *ABANDONED TO THE STREETS: AN ANALYSIS OF SOCIAL SECURITY'S PRE-RELEASE PROGRAM 3-4* (1992) (stating that studies show that majority of homeless not receiving SSI benefits); RICHARD C. TESSLER & DEBORAH L. DENNIS, NATIONAL INSTITUTE OF MENTAL HEALTH, *A SYNTHESIS OF NIMH-FUNDED RESEARCH CONCERNING PERSONS WHO ARE HOMELESS AND MENTALLY ILL* 20-21 (outlining percentage of homeless who receive SSI or public assistance in seven major cities).

42. See FEDERAL TASK FORCE ON HOMELESSNESS AND SEVERE MENTAL ILLNESS, *OUTCASTS ON MAIN STREET 7-13* (1992) (reporting on mental illness among homeless people in conjunction with other characteristics such as alcoholism and contact with criminal justice system); PRIORITY: HOME!, *supra* note 26, at 24 (stating that up to one third of homeless population is mentally ill); TESSLER & DENNIS,

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of the single adults suffer from past or present alcohol or drug addiction.<sup>43</sup> There is some overlap between these groups, with about 23% suffering from more than one of these conditions; overall, about one-half to two-thirds of homeless adults suffer from one or more.<sup>44</sup> About 48 to 80% are seriously depressed or demoralized, three to five times the national average.<sup>45</sup> About 17% are physically disabled.<sup>46</sup> The average life expectancy for homeless people is 51.<sup>47</sup>

Homeless people tend to be socially isolated. Few live with a spouse or other adult partner.<sup>48</sup> About 88% have living relatives,<sup>49</sup> but only about 60% maintain some contact with them; about 24% have no contact with either friends or relatives.<sup>50</sup> Many homeless individuals and families double up with relatives or friends before reaching the streets or shelters; however, the ability of families to help is limited, at least in part due to lack of resources.<sup>51</sup>

Homeless people are not especially mobile. About 70% of homeless people were born in their current state or have resided in their current city for over 10 years.<sup>52</sup> On average, about 50% were born in their current state; the national average for the general population is about 60%.<sup>53</sup> There is some, but not much, variation within the country: in “Rustbelt” states, 54% were born in their current state, in “Sunbelt” states, 45% were born in their current state.<sup>54</sup>

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*supra* note 41, at 29-30 (describing incidence of mental illness among homeless in Los Angeles and Baltimore); U.S.C.M. 1995 REPORT, *supra* note 4, at 40 (stating that 23% of homeless people are mentally ill).

43. PRIORITY: HOME!, *supra* note 26, at 24 (“At least half of the adult homeless population has a current or past alcohol or drug abuse problem.”); U.S.C.M. 1995 REPORT, *supra* note 4, at 40 (“Substance abusers account for 46% of the homeless population.”).

44. See JAMES D. WRIGHT & ELEANOR WEBER, HOMELESSNESS AND HEALTH 94 (1987).

45. BURT, OVER THE EDGE, *supra* note 4, at 21.

46. WRIGHT, *supra* note 23, at 111.

47. WRIGHT, *supra* note 23, at 62. Overall, about two-thirds of homeless adults have been in some institution—mental hospital, chemical dependency in-patient program, prison or jail—at some point in their lives. See *id.* at 95-112. In many cases criminal convictions are for activities such as sleeping in abandoned buildings, in part a result of the trends that are the focus of this Article. See *infra* Section II.A.

48. About 18% of women and 9% of men live with a spouse or partner. WRIGHT, *supra* note 23, at 68.

49. *Id.* at 69.

50. *Id.*

51. PRIORITY: HOME!, *supra* note 26, at 33 (citing M.J. Stern, *Poverty and Family Composition Since 1940*, in THE “UNDERCLASS” DEBATE 220-53 (N.B. Katz ed., 1993)). Significantly, many more extremely poor people avoid homelessness by relying on family and friends. WRIGHT, *supra* note 23, at 72. This group is at a high risk of homelessness and may become homeless when the ability or willingness of family and friends to help runs out. *Id.*

52. WRIGHT, *supra* note 23, at 70; see also BLAU, THE VISIBLE POOR, *supra* note 23, at 28.

53. WRIGHT, *supra* note 23, at 70.

54. *Id.* However, according to that study, recency of migration varies significantly: 71% of Sunbelt migrants are recent arrivals, compared to 15% of Rustbelt migrants, suggesting a higher turnover rate among Sunbelt migrants. *Id.*

### B. *Causes of Homelessness*

In a recent national survey, city officials most frequently identified unemployment and other employment-related problems as the cause of homelessness in their city.<sup>55</sup> In descending order of frequency, the officials also identified lack of affordable housing, substance abuse and the lack of needed services, mental illness, domestic violence, family crisis, and poverty or insufficient income.<sup>56</sup> In general, social scientists agree, identifying similar "structural" causes of homelessness.<sup>57</sup>

The lack of affordable housing, social scientists say, results from both growing demand and diminishing supply. In 1991, there were eight million very poor renters, yet only three million units that were affordable to them; this gap of five million units represents an increase of over four million since 1970.<sup>58</sup> Large numbers of inexpensive, private housing units—such as single room occupancy hotels—were lost to urban renewal: the number of people living permanently in hotels and rooming houses declined from 640,000 in 1960 to 137,000 in 1990.<sup>59</sup> Increases in federal funding for housing assistance for the poor has also slowed; in 1991 only 25% of those eligible received such aid.<sup>60</sup>

Discussing inadequate employment and income, social scientists note that unemployment can be a first step toward homelessness.<sup>61</sup> In the early 1950s, work force participation for both black and white men aged 16 to 24 was over 70%; in 1985, for the same age group, it was less than 45% for black males and about 65% for white males.<sup>62</sup> The declining real value of the minimum

55. U.S.C.M. 1995 REPORT, *supra* note 4, at 45.

56. *Id.* at 45-46.

57. See generally BURT, *OVER THE EDGE*, *supra* note 4 (emphasizing joblessness, lack of affordable housing, and changes in income support programs); PRIORITY: HOME!, *supra* note 26 (discussing poverty, changes in labor market, lack of income assistance and lack of affordable housing); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* (1989); WRIGHT, *supra* note 23 (outlining causes ranging from lack of affordable housing to disabilities and unemployment); Hopper, *supra* note 23.

58. PRIORITY: HOME!, *supra* note 26, at 28 (citation omitted). As used here, "very poor" refers to the poorest one-fourth of renters. "Affordable" refers to the standard established by HUD that rent be no more than 30% of income. *Id.*

59. *Id.* at 28 (citing CHRISTOPHER JENCKS, *RETHINKING SOCIAL POLICY* (1992)).

60. *Id.* at 29. The decline is reflected in the rate of increase in new units, not in absolute numbers. For example, from 1977 to 1984, an average of 219,000 additional poor households were assisted each year. But from 1985 to 1991, the average annual increase was just 61,285. *Id.* (citing HOUSE COMM. ON WAYS AND MEANS, 102ND CONG. 1ST SESS., *OVERVIEW OF ENTITLEMENT PROGRAMS*, 1991 GREENBOOK (Comm. Print 1991) [hereinafter 1991 GREENBOOK]).

61. BURT, *OVER THE EDGE*, *supra* note 4, at 72 (referring to study of homeless men); see also BLAU, *supra* note 23, at 36-47 (discussing economic causes of homelessness).

62. BLAU, *supra* note 23, at 36-47. "Work force participation" refers to percentage of those employed, as opposed to unemployment statistics, which do not include "discouraged" workers who are no longer actively looking for work.



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wage is also cited as a cause of homelessness.<sup>63</sup> At the same time, the real value of income assistance benefits has declined: from 1970 to 1992 median monthly benefits under Aid to Families with Dependent Children dropped from \$799 to \$435 (in 1992 dollars).<sup>64</sup> For single people, less aid is available. Unemployment benefits are time-limited,<sup>65</sup> income assistance programs for single individuals were cut and in some cases eliminated in the 1980s and early 1990s, affecting over a third of recipients nationwide.<sup>66</sup> Currently, only eight states provide any assistance to single poor persons.<sup>67</sup>

Lack of care for the indigent mentally ill has also been cited as a causal factor. Between 1955 and 1980 state mental hospital beds were reduced from 559,000 to 150,000; most of the reduction occurred between 1963 (504,000 beds) and 1974 (216,000 beds).<sup>68</sup> According to many analysts, the failure to replace state mental hospitals with community mental health care for the mentally ill indigent—rather than deinstitutionalization itself—is a cause of homelessness.<sup>69</sup> In addition, disability payments under the Social Security Act—which aid both the physically and mentally disabled—were significantly curtailed in the early 1980s; at least some former recipients subsequently became homeless.<sup>70</sup>

Finally, extreme poverty is identified by social scientists as an underlying common denominator. Beginning in 1980, the proportion and numbers of poor and extremely poor people increased significantly. In 1983 the poverty rate was 15.2%, higher than at any time since 1966.<sup>71</sup> From 1989 to 1992, the poverty

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63. PRIORITY: HOME!, *supra* note 26, at 27; BURT, OVER THE EDGE, *supra* note 4, at 196.

64. *Id.* (citing 1991 GREENBOOK, *supra* note 60). In 1992, the combined value of AFDC benefits and food stamps brought a family of four to about two-thirds of the poverty level. *Id.* Some argue that the poverty level does not take account of other non-cash benefits for which such a family may be eligible. *See, e.g.*, Heritage Foundation, *How the Poor Really Live*, in BACKGROUNDERS NO. 875, at 3 (Jan. 31, 1992); Dana Milbank, *Old Flaws Undermine New Poverty Level Data*, WALL ST. J., Oct. 5, 1995, at B1. However, many eligible families do not receive these benefits. *See* PRIORITY: HOME!, *supra* note 26, at 29 (only 25% of those eligible actually receive housing aid, the largest such benefit); *see also* MICHAEL TANNER ET AL., CATO INSTITUTE: THE WORK VERSUS WELFARE TRADE-OFF: AN ANALYSIS OF THE TOTAL LEVEL OF WELFARE BENEFITS BY STATE 28 (1995). In addition, the poverty level is based on a standard created in the 1950s that understates what would be currently be considered a minimum subsistence level. *See, e.g.*, CENTER ON BUDGET AND POLICY PRIORITIES & FAMILY USA FOUNDATION, REAL LIFE POVERTY IN AMERICA: WHERE THE AMERICAN PUBLIC WOULD SET THE POVERTY LINE viii (1990).

65. *Id.* In 1990, such benefits reached a smaller number of those eligible than at any time in the previous 20 years. PRIORITY: HOME!, *supra* note 26, at 28.

66. *Id.*

67. MARION NICHOLS & KATHRYN PORTER, CENTER ON BUDGET AND POLICY PRIORITIES, GENERAL ASSISTANCE PROGRAMS: GAPS IN THE SAFETY NET 13-14 (1995); telephone interview by Laurel Weir, Policy Director, National Law Center on Homelessness & Poverty, with Marion Nichols, Senior Research Analyst, Center on Budget and Policy Priorities (Apr. 1, 1996). The eight states are Alaska, California, Connecticut, Maine, Minnesota, New Jersey, New York, and Utah. *Id.*

68. BURT, OVER THE EDGE, *supra* note 4, at 121.

69. *Id.* (citations omitted).

70. *See* GOVERNMENT ACCOUNTING OFFICE, HOMELESSNESS: A COMPLEX PROBLEM AND THE FEDERAL RESPONSE 23-24 (1985) [hereinafter GAO HOMELESSNESS REPORT].

71. WRIGHT, *supra* note 23, at 38.

population increased by 5 million; of that number, 3 million had incomes less than 50% of the poverty threshold.<sup>72</sup> In 1994, a total of 38.1 million Americans were poor, 5.6 million more than in 1989; about 15 million were extremely poor, with incomes under 50% of the poverty line.<sup>73</sup> Of the extremely poor, as many as one in ten become homeless.<sup>74</sup>

Some analysts identify mental illness and drug and alcohol addiction as the primary causes of homelessness, describing them as "personal" problems and placing them in opposition to "structural" causes such as lack of affordable housing, poverty, and declining social benefits.<sup>75</sup> Some commentators have interpreted this analysis to mean that homelessness is actually a personal choice, as opposed to a societal phenomenon that is at least partially externally determined.<sup>76</sup> Nevertheless, primary recent proponents of this analysis disavow the view that homeless people "choose to live this way" or are "lazy, shiftless bums."<sup>77</sup> Further, despite their emphasis on the "personal," they also note the importance of factors generally considered structural, such as the "gentrification" of inexpensive housing, as well as the "gentrification" of addictions treatment, which they say has dramatically reduced treatment for indigent addicts.<sup>78</sup>

Similarly, other traditionally "conservative" analysts have not generally questioned the relevance of housing, employment, and mental health care as underlying causes. Rather, such analysts differ from others in their view of the origins of and solutions to these causes. For example, some argue that rent control laws create housing shortages which in turn lead to homelessness;<sup>79</sup>

72. PRIORITY: HOME!, *supra* note 26, at 26.

73. Commerce Department, Bureau of the Census, *Income, Poverty, and Valuation of Noncash Benefits: 1994*, Table 9 (forthcoming 1996); *see also* BURT, *OVER THE EDGE*, *supra* note 4, at 46-48 (discussing Michael Stone's concept of "shelter poverty," the burden placed on poor when significant portion of their income is spent on housing); MARY ELLEN HOMBS, *A CONTINUUM OF VIOLENCE: RETHINKING ADVOCACY PRIORITIES IN HOMELESSNESS* 3, 5 (1994); U.S.C.M. 1995 REPORT, *supra* note 4, at 45.

74. ROSSI, *supra* note 57, at 77. Rossi defines extreme poverty as 75% or less than the poverty threshold. *Id.* at 13; *see also* BURT, *OVER THE EDGE*, *supra* note 4, at 57-58.

75. *E.g.*, ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL* 153 (1993).

76. *E.g.*, Richard Cohen, *Forced Shelter*, WASH. POST, Dec. 8, 1993, at A23, Andrew P. Thomas, *The Rise and Fall of the Homeless*, THE WEEKLY STANDARD, Apr. 8, 1996, at 27; *see also* Heather MacDonald, *Real Roots of Homelessness*, WALL ST. J., June 15, 1993, at A16.

77. *Id.* at 155. Baum and Burnes cite somewhat higher figures for these conditions than most social scientists, stating that 65 to 85% of homeless adults suffer from mental illness or substance abuse. *Id.* at 29. *But see* WRIGHT & WEBER, *supra* note 44, at 94.

78. BAUM & BURNES, *supra* note 75, at 159-62. Baum and Burnes also point to what they call "disinstitutionalization"—the loss of capacity in institutions and consequent failure to institutionalize persons who might otherwise be institutionalized. *Id.* at 162.

79. *E.g.*, William Tucker, *Remarks at the Heritage Foundation*, in *RETHINKING POLICY ON HOMELESSNESS* 33-39 (1989); *see also* Carl Horowitz, *Washington's Continuing Fiction: A National Housing Shortage*, in *HERITAGE FOUNDATION BACKGROUNDERS* 14, 16 (1990) (arguing that contrary to claims by "special interests" including the real estate industry and the homeless "lobby," there is no "national housing shortage," but acknowledging shortages of affordable housing in certain parts of the country due to overly strict building and zoning codes; and recommending reducing regulation, and providing housing "vouchers" and increased job opportunities to the poor). Another analyst argues that

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others fault cities for using federal funds to destroy, without replacing, low-cost housing, and for failing to provide community-based mental health care to formerly institutionalized persons.<sup>80</sup>

Finally, some commentators state that homelessness is a “choice,” and that homeless people simply prefer living outdoors as a “lifestyle”; this appears to be a view espoused by some politicians and pundits, as opposed to social scientists or others who have studied the issue.<sup>81</sup> Similarly, some commentators question whether the non-homeless should take any responsibility for addressing homelessness, and suggest that it is up to homeless people themselves to address their plight.<sup>82</sup> While sometimes stated in terms of causal theories, such views speak more to solutions: what should be done and who should do it.<sup>83</sup> Insofar as they make statements about causation—such as attributing homelessness in general to “choice”—they do not appear to be based on any empirical evidence.<sup>84</sup>

Currently, despite this range of causes, there appears to be a relatively high degree of consensus among social scientists.<sup>85</sup> In some cases there may be different emphasis on the relative significance of the various causes; however, even this difference diminishes when distinctions between levels of causation are made.<sup>86</sup> In general, “structural” causes—such as insufficient housing

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policies that provide preferences for subsidized housing to shelter residents contribute to homelessness by providing an incentive to those living doubled-up or in otherwise illegal or inadequate housing to leave that housing, become homeless, and seek space in shelters. *See, e.g.*, JENKS, *supra* note 4, at 104. This analysis also acknowledges that a shortage of affordable housing is a factor in causing homelessness.

80. Stuart M. Butler, *Remarks at the Heritage Foundation*, in THE HERITAGE FOUNDATION, RETHINKING POLICY ON HOMELESSNESS 61-65 (1988); *see also* Anna Kondratas, *Remarks at the Heritage Foundation*, in RETHINKING POLICY ON HOMELESSNESS, *supra*, at 56-61 (stating that many homeless people may need ongoing support services).

81. *See, e.g.*, M. Engel & E. Sargent, *Meese's Hunger Remarks Stir More Outrage Among Groups*, WASH. POST, Dec. 11, 1983, at A1; S. Roberts, *Reagan on Homeless: Some Choose to Live in the Streets*, N.Y. TIMES, Dec. 23, 1988, at A1; Interview with Mayor Bruce Tarr of Austin, TX (BBC radio broadcast, Dec. 27, 1995); Craig Knight et al., *The Real Homeless*, G.W. HATCHET, Jan. 31, 1994, at 4; Cohen, *supra* note 76, at A23.

82. *E.g.*, PBS Special, *Am I My Brother's Keeper* (PBS television broadcast, Dec. 21, 1995); Editorial, *The Homeless Who Reject Help*, TAMPA TRIB., June 1, 1993. PAGE #S??

83. For example, some commentators state, often in the context of the larger debate about “welfare reform,” that homelessness should be addressed by individuals, families, churches, and charities reaching out to individual homeless people. *E.g.*, Arianna Huffington, *Why Charities Should First of All be Charitable*, WASH. TIMES, Aug. 2, 1995, at A21.

84. This is not to say that no homeless people choose to be homeless; a few may, but the evidence clearly is that the vast majority do not. Further, with regard to those who are mentally ill, the question of “choice” may have little—or at least different—meaning, a point that proponents of the “choice” theory presumably would accept.

85. *See, e.g.*, PRIORITY: HOME!, *supra* note 26, at 25-26 (summarizing causes to include all of those listed above—except “personal choice”—and also distinguishing between “structural causes” and “risk factors”).

86. For example, Burt describes poverty as a “risk factor” rather than a “cause” of homelessness; she considers low-paying jobs, high living costs, and tight housing markets to be factors that cause poor people to become homeless. BURT, OVER THE EDGE, *supra* note 4, at 198 (noting that high poverty rates and high homelessness rates alone do not correlate). Wright summarizes the cause of homelessness as

affordable by the poor, poverty, unemployment, insufficient income assistance, and insufficient treatment facilities—determine that some number of the poor will become homeless.<sup>87</sup> Specific “personal” characteristics—such as disabilities, substance abuse, and social isolation—place individuals at risk for being members of that group.<sup>88</sup> In neither case, however, can homelessness be considered a choice.

### C. *Societal Response to Homelessness*

To date, the primary societal response to homelessness has been emergency relief: shelters and soup kitchens. In the early 1980s, local groups began responding to the growing need with emergency aid.<sup>89</sup> Beginning in 1983, some federal funds were appropriated through the federal disaster relief agency to fund local government and private groups to provide emergency aid.<sup>90</sup> In 1987, more comprehensive federal aid was provided; however, most of the funding was for emergency shelter, and has been sufficient to meet only a fraction of the need.<sup>91</sup> Nationwide, cities regularly report that they are unable to meet the need even for emergency food and shelter.<sup>92</sup> A recent survey of 29 large cities across the country found that on average 19% of the need for emergency shelter went unmet in the cities over the past year due to lack of resources.<sup>93</sup> The survey also found that on average 15% of requests for emergency food assistance went unmet over the past year due to lack of

too many poor people competing for too little affordable housing. WRIGHT, *supra* note 23, at 37-38. He also notes that the lack of sufficient affordable housing is not always the “proximate” cause of homelessness but it is the “ultimate” cause of homelessness in all cases. *Id.* at 38.

87. *E.g.*, WRIGHT, *supra* note 23, at 37-38; BURT, *OVER THE EDGE*, *supra* note 4, at 198.

88. PRIORITY: HOME!, *supra* note 26, at 25-36; WRIGHT, *supra* note 23, at 50. Wright cautions against conflating the characteristics of homeless people—high proportions of mental illness, drug and alcohol use—with the causes of homelessness—fundamentally, an imbalance between the availability of affordable housing and poor people in need of it. He argues that the causes dictate that some people will become homeless, and the characteristics make it likely that those particular people will become homeless. *Id.*

89. PRIORITY: HOME!, *supra* note 26, at 39.

90. *Id.* at 39; GAO HOMELESSNESS REPORT, *supra* note 70, at iii-iv. The funds, appropriated but not authorized, were funneled through the Federal Emergency Management Agency (FEMA), the agency responsible for assisting victims of disasters such as hurricanes and floods.

91. Stewart B. McKinney Homeless Assistance Act, 42 U.S.C.A. § 11301 (West 1995). While the Act was comprehensive in the scope of needs it addressed, most of the funding was for emergency shelter. Moreover, while its funding has been increased, *compare* Supplemental Appropriation Act of 1987, Pub. L. No. 100-7, 101 Stat. 391 (1987) (appropriating \$325 million for FY 1987), with Pub. L. No. 103-33, 108 Stat. 2589 *et seq.* (1994), the emergency aid the McKinney Act provides remains severely inadequate to the need: in one recent funding cycle, nearly 3000 proposals for transitional housing projects were submitted but only 818 could be funded under the Act. *See* DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, FACT SHEET: 1995 HOMELESS ASSISTANCE COMPETITION RESULTS (1995). For a detailed review of the Act, see Maria Foscarinis, *The Federal Role: The Stewart B. McKinney Homeless Assistance Act* (book chapter) (forthcoming 1996); Maria Foscarinis, *Shelter and Housing: Programs Under the Stewart B. McKinney Homelessness Assistance Act*, 29 CLEARING-HOUSE REV. 760 (1995); *see also* Foscarinis, *supra* note 18.

92. *See, e.g.*, U.S.C.M. 1995 REPORT, *supra* note 4, at 5 (citing 11 annual surveys).

93. U.S.C.M. 1995 REPORT, *supra* note 4, at 58.

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resources.<sup>94</sup> These figures are likely conservative.<sup>95</sup>

The most recent national estimate is that there are approximately 275,000 shelter spaces available across the country; this includes not only beds but also floor and chair space.<sup>96</sup> About one-third of these facilities require their residents to leave during the day; many also do not permit persons to leave their belongings there.<sup>97</sup> Some shelters charge fees, generally ranging from \$3 to \$10 per night.<sup>98</sup> While they sometimes offer food and donated clothing, shelters typically do not provide cash assistance which may be necessary for transportation, telephone calls, and toiletries.<sup>99</sup> In some cities there are daytime “drop-in” or “warming” centers where homeless people may sit, use the bathroom and sometimes bathe; nationally, there are few such facilities.<sup>100</sup> Access to public toilets and bathing facilities is generally very limited.<sup>101</sup>

In many cities, the discrepancy between need and resources is extremely high, based on the cities’ own estimates. For example, in Atlanta, there are 15,000 to 22,000 people homeless on any given night, and a maximum of 2700 beds for them.<sup>102</sup> In Dallas, 3500 to 5000 people are homeless on any given night, and a maximum of 1729 shelter beds are available.<sup>103</sup> In Los Angeles, there are 42,000 to 77,000 people homeless on any given night and a maximum of 8300 beds available.<sup>104</sup> In Aurora, Colorado, there are approximately 1350

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94. *Id.* at 1.

95. See Wright & Devine, *supra* note 4, at 323 (estimating at least same number and up to ten times as many unsheltered as sheltered). In addition, not all shelter spaces are available to all homeless people: for example, many do not shelter whole families. See NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, NO WAY OUT 1-2 (1993) [hereinafter NO WAY OUT]; U.S.C.M. 1995 REPORT, *supra* note 4, at 2. Some do not serve mentally ill or chemically dependent people. See HUD SHELTER REPORT, *supra* note 7, at 41.

96. PRIORITY: HOME!, *supra* note 26, at 40.

97. HUD SHELTER REPORT, *supra* note 7, at 38.

98. *Id.*; see also Sherry Jacobson, *Homeless Enclaves Targeted: City to Remove Encampments*, DALLAS MORNING NEWS, Apr. 16, 1993, at A27. If current trends continue, more are likely to do so in the future, and the amounts may be substantial.

99. HUD SHELTER REPORT, *supra* note 7, at 38. Transportation may be necessary to gain access to services, which are often scattered across cities; it may be especially necessary for children, the elderly and the ill. See also NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, A FOOT IN THE SCHOOLHOUSE DOOR 15 (1995) [hereinafter A FOOT IN THE SCHOOLHOUSE DOOR] (outlining special transportation needs for homeless school children).

100. See, e.g., U.S.C.M. 1995 REPORT, *supra* note 4, at 38.

101. See, e.g., Ann Hagedorn & Wayne Green, *Advocacy Group Sues New York, Citing Lack of Public Restrooms*, WALL ST. J., Nov. 1, 1990, at B8.

102. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 55 (citing STATE OF GEORGIA COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 50 (1994)). Number of beds includes emergency and “transitional” beds; 500 are winter beds, bringing the number down to 2,200 in summer. *Id.* These numbers do not include battered women’s shelters, youth only shelters or facilities for the mentally ill. *Id.* at 55 n.224.

103. *Id.* at 80 (citing CITY OF DALLAS, TEX. COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 29 (1994)). These beds are emergency shelter beds; there is also transitional housing for 69 families. *Id.*

104. *Id.* at 14-15. These are figures for Los Angeles County; beds include 1500 winter beds.

people homeless on any given night and 65 emergency shelter beds.<sup>105</sup>

The discrepancy between need and emergency aid means that each night, at least 425,000 people have nowhere to sleep except in public places, and that each day at least 700,000 people—at least—have nowhere to be save public places.<sup>106</sup> At the very minimum, this means that they must perform essential bodily functions—such as sleeping, eating, bathing, urinating and defecating—in public. Some must also beg for spare change<sup>107</sup> to obtain essential survival resources,<sup>108</sup> or to secure funds to pay the fees charged by some shelters, or to pay for transportation or food.<sup>109</sup>

Resources that could provide long-term solutions to homelessness are in short supply as well. In a 1995 survey of twenty-nine cities, 73% of the cities reported that requests for assisted housing by low income families and individuals increased over the past year; no city reported a decrease.<sup>110</sup> Average waits for such housing ranged from 17 to 39 months, depending on the type of assistance;<sup>111</sup> 71% of cities reported that they have closed their waiting list for at least one type of assistance because the waiting periods were so long.<sup>112</sup> On the private market housing is also unaffordable by many: In a 1994 survey of 49 cities, in no city were minimum wage earnings sufficient

105. NO ROOM FOR THE INN, *supra* note 12, at 35 (citing CITY OF AURORA, COLORADO COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY 28, 42 (1994)).

106. Some commentators argue that shelters are not always full, and that homeless people therefore "choose" to sleep outdoors. However, many shelters have eligibility requirements that many homeless people cannot meet, accounting for some or all vacancies. *See generally* HUD SHELTER REPORT, *supra* note 7. Some shelters, particularly large ones, may be dangerous. *See generally* HOMBS, *supra* note 73 (describing violent situation in many shelters). Some people may be mentally ill and unable to make a meaningful choice. Finally, some may indeed choose to retain some independence on the streets over shelters that require a nightly request for a bed and departure in the morning; this may be especially true for those with few or no realistic prospects of moving into any form of housing.

107. *See* BURT, OVER THE EDGE, *supra* note 4, at 44, which cites data ranging from 44% (homeless men categorized as "other"—neither single nor with children) to 8% (homeless women with children) (national data based on interviews with homeless people who uses services—shelters or soup kitchens—non-service users not included). *Id.* at 12.

108. Providers of emergency shelter and food are unable fully to meet the need, *see* U.C.S.M. 1995 REPORT, *supra* note 4, at 5. The larger context—especially unemployment and low or no public assistance—also indicates that some significant number of people are resorting to begging as a means of securing some income. *See infra* Part V.

109. Some beggars may use change collected for alcohol or drugs; some may be mentally ill and otherwise use money received improperly or ineffectively. However, indigent addicts and mentally ill persons also have survival needs for shelter and food, and these may be particularly great. In the absence of treatment services and to the extent that alcoholism and drug abuse are addictions that cannot be controlled without treatment, an indigent addict without access to treatment may have no alternative but to beg. *See Powell v. Texas*, 392 U.S. 514 (1968), and discussion of addictions, *infra* Subsection III.B.2.b. Increasingly, shelters are imposing rules that exclude people who are mentally ill or who are chemically dependent. Finally, some note that not all beggars are homeless. *E.g.*, Ellickson, *supra* note 20, at 1191-93. However, beggars who are also addicts are also most likely impoverished, even if not homeless.

110. U.C.S.M. 1995 REPORT, *supra* note 4, at 77-82.

111. *Id.* at 77-78. The wait averaged 17 months for public housing, 39 months for Section 8 vouchers, and 40 months for Section 8 Certificates. *Id.* at 78.

112. *Id.* at 79.

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to afford a one-bedroom apartment, under federal guidelines.<sup>113</sup> In no city were income assistance payments for families—or for individuals, where such programs existed—sufficient to afford such housing.<sup>114</sup> In no city were combined federal and state disability payments sufficient.<sup>115</sup> Moreover, in a 1993 survey of 16 cities, no city for which information was available had sufficient mental health treatment services for the poor.<sup>116</sup>

The absence of longer-term aid provides few options for homeless people to move off the streets or out of emergency shelters. In addition, homelessness itself creates additional barriers to long-term aid: without a permanent address, telephone, and transportation, finding housing and employment, for example, is extremely difficult.<sup>117</sup> Without a quiet place to sleep, a place to wash, and clean clothes, maintaining employment is extremely difficult.<sup>118</sup> Without an address, it may also be difficult or impossible to apply for and receive public assistance benefits; this is especially true for those who are disabled.<sup>119</sup> Homelessness may also create or exacerbate physical or mental disabilities, further compounding these difficulties.<sup>120</sup> Overall, at any given time, the options for a homeless person to escape homelessness are extremely limited; the immediate options for doing so are virtually non-existent.<sup>121</sup>

The dearth of significant steps to prevent homelessness or address its causes has led to its persistence and rise. As a result, for more than a decade, at any given time significant numbers of people have lived in public places, in a very visible and extreme state of destitution and despair. With the passage of time, homeless people can become increasingly marginalized and isolated. At least

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113. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at Table II. In fact, such earnings exceeded the fair market rent, as determined by the federal government, in only two cities, New York and San Francisco. *Id.*

114. *Id.*; *see also* NO WAY OUT, *supra* note 95, at Table I (describing 1993 study indicating that in 19 cities income assistance programs were insufficient for affordable housing).

115. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at Table II.

116. RIGHT TO REMAIN NOWHERE, *supra* note 9 (providing information for nine cities); *see also* U.S.C.M. 1995 REPORT, *supra* note 4, at 4 (listing sixteen cities that identified mental illness and lack of needed services as a main cause of homelessness). The percentage of need met ranged from 41% (Las Vegas and Reno) to 1% (Washington, D.C.). RIGHT TO REMAIN NOWHERE, *supra* note 9, at 88-98, 116-25.

117. *See* WRIGHT, *supra* note 23, at 115-24; LIEBOW, *supra* note 22, at 51-59.

118. *See, e.g.*, LIEBOW, *supra* note 22, at 51-59.

119. WRIGHT, *supra* note 23, at 117. Moreover, typically documents such as social security cards, tax records or doctors' reports are required. Literacy skills and mental capacity may be needed to fill out forms. Many homeless people are not literate and mentally disabled homeless people—eligible for SSI because of their disability—are unlikely to be able to complete the 15 page application form unassisted. *See also* Susan Bennett, "No Relief But Upon Coming Into the House"—Controlled Spaces, *Invisible Disentitlements, and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157 (1995).

120. *See, e.g.*, Hopper, *supra* note 23, at 731; WRIGHT, *supra* note 23, at 95.

121. People do in fact escape homelessness. *E.g.*, WRIGHT, *supra* note 23, at 73. But on any given night a homeless person has virtually no immediate chance of doing so; the chance that is available requires time, and is also extremely limited. *See, e.g.*, *supra* text accompanying notes 91-94 (lack of housing assistance); *see also* ROSSI, *supra* note 57; WRIGHT, *supra* note 23, at 73 (many leave homelessness only to soon return, because of continued extreme poverty).

in part, the failure to address homelessness in an adequate manner in the 1980s has made its criminalization possible in the 1990s.

## II. "ANTI-HOMELESS" CITY ACTIONS: AN OVERVIEW

Since 1991, the National Law Center on Homelessness & Poverty has conducted three surveys of city laws and policies that criminalize activities associated with homelessness.<sup>122</sup> The most comprehensive survey, conducted in 1994,<sup>123</sup> found that 42 of the cities examined took actions directed against their homeless residents.<sup>124</sup> While no hard data are available, and the surveys cannot be considered "scientific," indications are that such actions are rapidly rising nationally.<sup>125</sup> This Part presents an overview of three major types of criminalizing city actions. It then reviews some purposes of these actions, and their effects.

### A. *Forms of Criminalization*

City actions directed against homeless people can be divided into several major categories. Some city actions regulate or restrict their presence in public places. Others restrict or regulate their solicitation of money or other aid.<sup>126</sup> In addition to direct restrictions on homeless people, some cities place restrictions on organizations or individuals providing aid or services to homeless people. In practice, these distinctions blur, as different types of actions are often used in combination.

#### 1. *Public Place Restrictions*

Perhaps the most severe public place restrictions are city efforts to prohibit

122. See NO HOMELESS PEOPLE ALLOWED, *supra* note 9; RIGHT TO REMAIN NOWHERE, *supra* note 9; GO DIRECTLY TO JAIL, *supra* note 9. The current trend reflects and continues much older ones. See Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972); Harry Simon, *Towns Without Pity*, 66 TULANE L. REV. 631, 650 (1992) ("With the invalidation of vagrancy and loitering laws, officials have turned to arrest campaigns against sleeping in public to punish and control the displaced poor.")

123. NO HOMELESS PEOPLE ALLOWED, *supra* note 9. The report examined 49 cities across the country in which some action addressing the presence or activities of homeless people in public areas was known to have been taken.

124. *Id.* at i.

125. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 4; RIGHT TO REMAIN NOWHERE, *supra* note 9, at ii. Seven of the 49 cities in the 1994 survey adopted alternatives to criminalization; six adopted both approaches. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at i. In 1995 the National Law Center conducted another survey, using similar methodology, and identified 30 cities that initiated additional punitive measures in 1995, not including continuations of the policies engaged in during 1994. NO ROOM FOR THE INN, *supra* note 12, at Table I (1995). Some of the 42 cities identified in the 1994 report also continued their activities into 1995. *Id.*

126. In some cases, the line between these categories is blurring. See, e.g., Patton v. City of Baltimore, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994); see also District of Columbia, Panhandling Control Congressional Recess Emergency Act of 1993 (Aug. 4, 1993), amending D.C. CODE ANN. § 22-3306 (1989); Seattle, Wash. Ordinance 113697 (Oct. 19, 1987), adding SEATTLE MUN. CODE ch. 12A.12.015 (1987).



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the mere presence of homeless people in the city. These include efforts physically to transport homeless people out of the city. For example, a Dallas City Councilmember proposed giving homeless people bus tickets out of town;<sup>127</sup> in Cleveland and Huntsville, Alabama, police have driven homeless people to city limits and left them there.<sup>128</sup>

Similarly broad are ordinances that prohibit sleeping in all public places.<sup>129</sup> For example, the Dallas city code makes it a crime to “sleep[] or doze[] in a street, alley, park, or other public place.” Similar to these are ordinances that prohibit “camping” in any public area, where “camping” is defined to include using a sleeping bag or occupying a temporary shelter;<sup>130</sup> as are those that prohibit “lodging” or “us[ing] any public space or public street for living accommodations.”<sup>131</sup> Many cities prohibit urinating or defecating in public;<sup>132</sup> some prohibit public bathing.<sup>133</sup>

Facially narrower ordinances impose restrictions at certain locations or times or both. Some prohibit “camping” in certain areas.<sup>134</sup> Many cities close

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127. See Jonathan Eig, *Homeless Eviction May Take Effect Soon; City Unsure Where to Send up to 200*, DALLAS MORNING NEWS, May 11, 1993, at 13A.

128. *Church v. Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401, at \*2, (N.D. Ala. Sept. 23, 1993). Similar events have occurred in Cleveland, see *Clements v. City of Cleveland*, 1:94 CV 2074 (1994); *4 Homeless Men Sue Cleveland*, AP, Oct. 5, 1994; Paul Shepard, *Advocates Say Cleveland Hard on Homeless*, PLAIN DEALER, Dec. 16, 1994, at 4B; and Seattle, see Michael Paulson, *Going for Broke on Panhandling, City Attorney Seeks Clampdown on 'Misbehavior on the Streets'*, SEATTLE POST INTELLIGENCER, May 20, 1993, at B1 (quoting Seattle Mayor's statement that law is intended to give aggressive panhandlers the message that “they probably ought to move out of town.”).

129. DALLAS, TEX. CITY CODE § 31-13 (a)(1) (1992). A Beverly Hills ordinance prohibits sitting, lying or sleeping in any public place; it provides exceptions for persons who must sit because of a physical disability, who are “viewing a legally conducted parade,” and who are “seated on a bench lawfully installed for such purpose.” Beverly Hills, Cal., City Ordinance 93-0-2165 (1993) *amending BEVERLY HILLS, CAL. CITY CODE art. 13 § 5.6.1303* (1993).

130. For example, a 1992 Santa Ana, California, ordinance makes it “unlawful for any person to camp, occupy camp facilities, or use camp paraphernalia in . . . (a) any street; (b) any public parking lot or public area, improved or unimproved.” Santa Ana, Cal., Ordinance NS-2160 (Apr. 3, 1992), *amending SANTA ANA, CAL. CITY CODE § 10-402* (1992). “Camp facilities” and “camp paraphernalia” are defined to include “temporary shelters,” “tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.” *Id.* at § 10-401 (b), (c). The ordinance also makes it unlawful to “store personal property” in any public area. *Id.* at § 10-403.

131. *E.g.*, CAL. PENAL CODE § 647 (West 1988) (defining lodging as “any building, structure, vehicle”; Santa Monica, Cal., Ordinance 1620 (Apr. 14, 1992), *adding SANTA ANA, CAL. CITY CODE § 4202B* (a) (prohibiting using public areas as living accommodations “except in areas specifically designated for such use”).

132. *See, e.g.*, *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Church v. Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. Sept. 23, 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994); SEATTLE, WASH. MUN. CODE 12A.10.100 (1993) (creating crime of “repeatedly urinating or defecating in public”); see also NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 80 n.80 (describing similar ordinance in Chester County, Pennsylvania); Hagedorne & Green, *supra* note 101.

133. *See, e.g.*, RIGHT TO REMAIN NOWHERE, *supra* note 9, at 79.

134. For example, a Santa Ana ordinance prohibits “camping” in the Civic Center area. Santa Ana, Cal. Ordinance NS-2210 (Dec. 20, 1993) *amending SANTA ANA, CAL. CITY CODE § 10-550* (b), (d) (1992). The ordinance provides an exemption for “[s]hort-time, casual sleeping which does not occur in the context of using the Civic Center for living accommodations.” *Id.* at § 10-550 (a), (e).

parks or prohibit sleeping or "camping" in them at night;<sup>135</sup> others close or prohibit sleeping on beaches at night.<sup>136</sup> A Reno, Nevada ordinance prohibits remaining in parks for more than four hours;<sup>137</sup> an Atlanta ordinance places restrictions on "remain[ing]" on a parking lot.<sup>138</sup> Many prohibit loitering within a defined distance of an ATM.<sup>139</sup> A Seattle ordinance prohibits lying or sitting on sidewalks in downtown and neighborhood commercial areas from 7 a.m. to 9 p.m.<sup>140</sup>

In several cities restrictions are aimed at homeless people living in public transportation systems and areas. For example, Seattle posts "no trespassing" signs in bus shelters and arrests homeless people who use them under the state's trespassing laws.<sup>141</sup> In San Francisco, state codes prohibiting loitering at public transportation stations have been used to cite homeless people and require them to move on.<sup>142</sup> In New York City, transit authority rules prohibit begging on subway trains;<sup>143</sup> in the New York-New Jersey Port Authority homeless people have been ordered to move on and treated roughly as part of an effort to remove them from the station.<sup>144</sup> Some cities have initiated special efforts to remove homeless people from airports.<sup>145</sup>

135. See, e.g., *Joyce v. City of San Francisco*, 846 F. Supp. 843; *Tobe v. Santa Ana*, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995); 36 C.F.R. § 7.96 (i) (1992); RIGHT TO REMAIN NOWHERE, *supra* note 9, at 110-11 (Seattle); *id.* at 100-01 (New York City).

136. See, e.g., Santa Monica Cal., Ordinance 1738 (Apr. 26, 1994), *amending* SANTA MONICA, CAL. MUN. CODE § 4.08.090; see also RIGHT TO REMAIN NOWHERE, *supra* note 9, at 76-77 (discussing Key West ordinance).

137. For example, a New York City park rule titled "storage of materials" prohibits using a park bench "so as to interfere with its use by other people." N.Y.C. PARKS AND RECREATION RULES, Article iii, § 19 (1984).

138. Atlanta, Ga. Ordinance to Amend Part 17 of the Code of Ordinances (July 17, 1991) *adding* § 17-1007 (prohibiting remaining on lot unless person has a vehicle parked on it, is an employee, or has "other lawful business" on it).

139. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 33 (documenting that San Francisco ordinance prohibited loitering within 30 feet of an ATM); see also *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

140. Seattle, Wash. Ordinance Forbidding Sitting or Lying Down on Public Sidewalks, *adding* § 15.48.040 (1993). Trespass laws are also used to keep homeless people out of certain areas at certain times; Dallas used the trespass laws to ban people from downtown areas from midnight to 5 a.m. in July 1994. Jonathan Eig, *No Trespassing Signs Posted*, DALLAS MORNING NEWS, July 8, 1994, at 25A, *cited in* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 32.

Nuisance laws have also been used in Huntington Beach, California, see NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 82, San Francisco, see NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 32; and Santa Cruz, see Santa Cruz, Cal. Ordinance No. 94-11 (1994) *amending* SANTA CRUZ, CAL. CITY CODE § 636.040 (1994) (declaring any campsite within the city to be a public nuisance subject to immediate removal).

141. RIGHT TO REMAIN NOWHERE, *supra* note 9, at 115.

142. *Id.* at 45.

143. See *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990).

144. See *Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055 (S.D.N.Y. 1995).

145. See RIGHT TO REMAIN NOWHERE, *supra* note 9, at 65 (describing Chicago's airport relocation program. Cities also regulate use of vacant buildings, see, e.g., ATLANTA, GA. CODE OF ORDINANCES § 17-1006 (1991) (making it unlawful "for any person to enter or to remain in a vacant or unoccupied building"), as well as public buildings. See, e.g., NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at

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In addition to enacting new laws, cities also enforce existing but often unenforced laws—such as prohibitions on loitering, littering, jaywalking, and carrying open containers—selectively against homeless people.<sup>146</sup> Selective enforcement is used to conduct regular “sweeps” to remove homeless people from certain areas of a city, such as downtown business or tourist areas;<sup>147</sup> it may be part of a city effort to “clean up” in preparation for a particular event.<sup>148</sup> Cities may also take actions before private events held by major businesses.<sup>149</sup> Selective enforcement may be used to arrest people, to order them to “move on,” or to remove them from encampments.<sup>150</sup>

Some cities proceed without any underlying law.<sup>151</sup> For example, in Huntsville, Alabama, as described by a federal judge, homeless people were “harassed” for “simply walking or congregating in certain sections of the City,” and “ordered out of city parks by city employees and told not to return,

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79-80 (describing Chester County, Pennsylvania ordinance that prohibits loitering on county property or in county buildings); RIGHT TO REMAIN NOWHERE, *supra* note 9, at 93 & n.347 (describing Las Vegas, Nevada library board policy that prohibits bringing personal belongings “such as sleeping rolls or luggage” into library).

146. *E.g.*, Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994); *see also* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 80-84 (Dallas); RIGHT TO REMAIN NOWHERE, *supra* note 9, at 30-32 (San Diego); *id.* at 55-56 (Atlanta); *id.* at 25-27 (Santa Ana).

147. *See* RIGHT TO REMAIN NOWHERE, *supra* note 9, at 101 (describing New York City’s removal of homeless in Manhattan); *id.* at 28-29 (discussing Atlanta’s effort to create downtown “hospitality zone”).

148. *See* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 51, 53 (describing how Miami officials bulldozed shantytown in preparation for Miami Grand Prix). Dallas selectively enforced criminal trespass, public sleeping, and panhandling laws before and in areas surrounding the site of the World Cup. Gilbert Jimenez, *City Hiding Homeless For Cup, Advocates Say*, CHI. SUN-TIMES, Jun. 15, 1994, at 4. New York City “swept” the areas surrounding the site of the Democratic Convention in 1992, directing homeless people to City “service centers” set up for this purpose. RIGHT TO REMAIN NOWHERE, *supra* note 9, at 101. Atlanta has increased enforcement of a variety of ordinances against homeless people; local advocates report that this is preparation for the 1996 Olympic games. *Id.* at 29.

149. *See* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 85-86 (reporting events of Houston city council meeting where removal of homeless encampment was ordered after complaints by local business).

150. *E.g.*, RIGHT TO REMAIN NOWHERE, *supra* note 9, at 100-02 (demonstrating how New York selectively uses laws to remove homeless people from parks, subway stations or to justify seizure of property); *id.* at 77-79 (describing Miami’s arrest of homeless through select use of park closing and loitering laws); *id.* at 111 (reporting Seattle’s use of park regulations to force homeless to “move along”).

151. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1567 (S.D. Fla. 1992) (quoting police memorandum noting that homeless people were “not violating any laws,” and decision to order a “permanent watch” on area and encourage merchants to call with any violations they observed); *see also* RIGHT TO REMAIN NOWHERE, *supra* note 9, at 31-32 (describing how homeless are simply arrested with reason to be determined later); NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 25 (stating that city of Santa Ana would simply throw out homeless people’s belongings). In San Francisco, the city developed a policy to make San Francisco “inhospitable to homeless people.” Brief for the National Law Center on Homelessness & Poverty, et al. as Amicus Curiae at 3, Joyce v. City of San Francisco (9th Cir. 1995) (No. 95-16940) (citation omitted). The Mayor’s office then instructed the police department and city attorney’s office to develop a list of laws under which homeless people could be arrested. *Id.* at 7.

even though they were not violating any laws at the time."<sup>152</sup> Some homeless persons were detained and taken out of the city by police, and then abandoned.<sup>153</sup>

## 2. *Restrictions on Begging*

Some cities impose broad bans on begging. For example, a Chicago law prohibits the "solicitation of alms" in public.<sup>154</sup> Other broad bans include begging within other prohibitions: for example, some laws define "disorderly conduct" to include being "idle, dissolute or found begging";<sup>155</sup> others prohibit "loiter[ing] . . . with the intent to . . . solicit[.]"<sup>156</sup> Some ordinances prohibit "solicitation" generally.<sup>157</sup> The trend, however, is away from broad bans in favor of prohibitions that are more narrowly fashioned, in various degrees and ways.<sup>158</sup>

Narrower prohibitions apply in defined places or times. For example, some laws prohibit begging on subways<sup>159</sup> or near automated teller machines;<sup>160</sup> some prohibit solicitation of occupants of motor vehicles.<sup>161</sup> Some are extremely detailed in describing the area of their prohibition. For example, a Santa Cruz ordinance prohibits solicitation of donations within ten feet of a street corner or sidewalk cafe, six feet of a building entrance, window, crosswalk, kiosk or vending cart, four feet of a drinking fountain,

152. *Church v. Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401, at \*2 (N.D. Ala. Sept. 23, 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994); *see also* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 77 (describing alleged Cleveland policy of driving homeless to city limits and leaving them there); *id.* at 21 (reporting that homeless in Santa Monica were ticketed while standing on sidewalks).

153. *Church v. Huntsville*, 1993 WL 646401 at \*2.

154. CHICAGO, ILL., CITY CODE § 8-4-010(f) (1958).

155. MIAMI, FLA., CODE § 37-17 (2) (1990). A California statute defining "disorderly conduct" to include "accost[ing] . . . for the purpose of begging or soliciting alms" was held unconstitutional by a federal district court. *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991); *see also* *Heathcott v. Las Vegas Metro. Police Officers*, CV-S-93-045-LDG (D. Nev. Mar. 3, 1994) (holding law prohibiting loitering with intent to beg unconstitutional).

156. Raleigh, N.C., Ordinance No. 1994-447 (July 19, 1994) (pertaining to solicitation of persons in motor vehicles).

157. Enforcement, however, may be limited to begging; this may be the result of explicit city direction. For example, in a brochure describing its ordinance prohibiting solicitation, Santa Cruz includes a parenthetical notation "panhandling" after the title "solicitation." SANTA CRUZ, CAL., POLICE DEPARTMENT, CITY PUBLIC PROPERTY ORDINANCES (n.d.). Such unequal enforcement, however, may raise concerns under the Equal Protection Clause. *See Patton v. Baltimore*, No. S-93-2389, slip op. at 50 (D. Md. 1994).

158. This is because of the likely unconstitutionality of broad bans. *See infra* Section III.C; *see also* CITY OF TUCSON, ARIZ., MAYOR AND COUNCIL MEMORANDUM (n.d.) (stating this explicitly). Narrow laws may have constitutional defects as well, *see* *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), *aff'd*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge to ordinance).

159. *E.g.*, RIGHT TO REMAIN NOWHERE, *supra* note 9, at 99 (describing New York City Transit Authority laws prohibiting begging on subways).

160. D.C. CODE ANN. § 22-3306 (Supp. 1994).

161. Alexandria, Va., Ordinance 3716 (Apr. 16, 1994), *adding* tit. 13 § 13-1-41.

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public telephone or bench.<sup>162</sup> Prohibitions on begging during certain times as well as in certain places include an Akron ordinance that prohibits all panhandling on public streets, sidewalks and other public property “after sunset or before sunrise.”<sup>163</sup>

Increasingly, cities are enacting prohibitions on “aggressive panhandling,” generally defined to include behavior that affects the person being solicited in a particular manner.<sup>164</sup> For example, a San Francisco law prohibits “closely follow[ing]” another and repeating a request after the person being solicited has “expressly or impliedly made it known” that he or she does not want to give.<sup>165</sup> An Atlanta ordinance prohibits “approaching or speaking to someone in such a manner as would cause a reasonable person to fear imminent bodily harm or the commission of a criminal act upon his/her person,”<sup>166</sup> and “continuing to request, beg or solicit alms in close proximity to the [person] . . . after the person . . . has made a negative response, blocking the passage of the [person], or otherwise engaging in conduct which could reasonably be construed as intended to compel or force a person to accede to demands.”<sup>167</sup>

### 3. *Indirect Restrictions*

In addition to direct restrictions on homeless people, many cities restrict individuals or groups attempting to aid them. One major example is the so-called Not-In-My-Back-Yard (“NIMBY”) phenomenon, which prevents programs serving homeless people from locating in certain—or in some cases any—neighborhoods.<sup>168</sup> Typically, this involves the use of zoning or building

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162. Santa Cruz Ordinance No. 94-13, SANTA CRUZ, CAL. CITY CODE § 5.43 (1994); *see also* Santa Monica, Cal., Ordinance No. 1773 (Oct. 25, 1994) (abusive begging includes coming closer than three feet).

163. Akron, Ohio Ordinance 536-1994 (1994), *amending* AKRON CITY CODE Title 13 § 135; *see also* Santa Cruz, Cal., Ordinance 94-10 (Mar. 8, 1994).

164. District of Columbia, Panhandling Control Congressional Recess Emergency Act of 1993, 10 D.C. Reg. 98 § 3 (a)(Aug. 4, 1993) *adding* D.C. CODE ANN. § 22-3306.

165. San Francisco, Cal., Ordinance Prohibiting Harassing or Handling Solicitation (1992), *amending* SAN FRANCISCO, CAL. CITY CODE Part I, ch. 8, § 120-1 (1992) (prohibiting “harass[ing] or hound[ing] another person for the purpose of inducing that person to give money or other thing of value”).

166. Atlanta, Ga., An Ordinance to Amend Part 17 of the Code of the Ordinances of the City of Atlanta, *amending* Part 17 (July 17, 1991).

167. *Id.*; *see also* Beverly Hills, Cal., Ordinance 93-0-2165 (Mar. 23, 1993), *adding* ch. 6, tit. 5; Panhandling Control Congressional Recess Emergency Act of 1993, 10 D.C. Reg. 98; Sacramento, Cal., An Ordinance Adding Chapter 10.00 to Title 10 of the Sacramento City Code (Nov. 3, 1993); Westminster, Cal., Ordinance 2226 (July 12, 1993); Raleigh, N.C. Ordinance 1994-495, *adding* § 12-1026(d) (1994). Some cities have attempted to regulate begging by requiring beggars to obtain licenses or prohibiting “knowingly mak[ing] false or misleading representation in the course of soliciting,” such as claiming a non-existent need and falsely claiming one is homeless. Akron, Ohio, Ordinance 536-1994, *amending* AKRON, OH. CITY CODE Title 13, ch. 135 (1994).

168. *See generally* NO ROOM FOR THE INN, *supra* note 12 (describing local opposition to housing and social service facilities for homeless in 36 cities). *See also* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at i; RIGHT TO REMAIN NOWHERE, *supra* note 9, at 17-18.

codes to prevent programs from obtaining needed permits or variances.<sup>169</sup> Such exclusionary efforts may be mounted by private individuals, neighborhood or business groups, as well as by cities themselves; however, they rely on local laws and administrative or court processes.<sup>170</sup>

Cities may pass zoning laws specifically to restrict services and programs for homeless people from certain parts of the city.<sup>171</sup> They may also enforce such laws selectively, as when shelters or other such programs are targeted for enforcement of code provisions that are generally not otherwise enforced.<sup>172</sup> There may be more subtle barriers as well: zoning provisions that require variances for such programs—and which may be routinely granted for other purposes—create an opportunity for opposition that may allow even a small number of persons to stop a program.

In addition to zoning, cities impose other indirect restrictions. For example, the New York City Transit Authority mounted a public relations campaign to deter subway riders from giving money to beggars.<sup>173</sup> San Francisco enforced laws against individuals distributing free food to hungry people in a public park.<sup>174</sup> Some deter business establishments from serving homeless clients.<sup>175</sup> Restrictions on services may accompany direct restrictions on homeless people: A city may restrict services as part of an effort to keep homeless people out of the city or an area of it.<sup>176</sup>

### B. *Purposes of Criminalization*

Some cities state expressly that their intention is to drive their homeless residents out of the city. Examples include policies or plans to “force” homeless people out of town; to make clear that they are “no longer welcome

169. See generally NO ROOM FOR THE INN, *supra* note 12. See also NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 5; RIGHT TO REMAIN NOWHERE, *supra* note 9, at 17.

170. See generally NO ROOM FOR THE INN, *supra* note 12; see also NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 5; RIGHT TO REMAIN NOWHERE, *supra* note 9, at 17.

171. For example, Dallas zoning codes were revised in 1991 to prohibit construction of new shelters in central business district. RIGHT TO REMAIN NOWHERE, *supra* note 9, at 17, 77 (citations omitted).

172. See *Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401, at \*2 (N.D. Ala. Sept. 23, 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994) (declaring that city “uses its inspection department and zoning laws in an uneven manner to discourage the establishment and continued operation of homeless shelters in residential areas of the city”).

173. RIGHT TO REMAIN NOWHERE, *supra* note 9, at 99-100 (citations omitted).

174. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 32-33.

175. In Atlanta the City Council adopted an ordinance to require operators of motels, hotels and SROs to monitor and supervise their guests, and to require that clients provide a permanent address as a condition of registering. Atlanta, Ga., Ordinance to Amend Article F of Chapter 6 of Part 14 (1991).

176. *E.g.*, *Church*, 1993 WL 646401; *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992). Conversely, a city may provide services at the same time that it restricts homeless peoples’ public activities. *E.g.*, Santa Monica, Cal., Ordinance 1742 (May 10, 1994) (emergency ordinance waiving variety of requirements for construction of a new emergency shelter); see also NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 17-18.

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in the City;”<sup>177</sup> to make the city “inhospitable to homeless people;”<sup>178</sup> and “to show these folks where the city limits are.”<sup>179</sup> In other cases, the stated purpose is to remove homeless people from particular places, such as parks, streets or downtown areas.<sup>180</sup> In some cases, an express purpose of prohibitions on begging and public place restrictions is to order people to move along, rather than to arrest them,<sup>181</sup> and city laws may be used to move people away from specific areas such as ATMs.<sup>182</sup> Some target the “visible” homeless with the goal of making them “invisible.”<sup>183</sup>

Cities cite a variety of reasons for these policies; often, several are cited together. Some cities associate homeless people with crime<sup>184</sup> or equate them with “criminal elements;”<sup>185</sup> others associate activities such as begging with crime.<sup>186</sup> Others express concern about public health and sanitation problems associated with people living in public,<sup>187</sup> or about the health and safety of

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177. *Tobe v. Santa Ana*, 27 Cal. Rptr. 2d 386, 387 (Ct. App. 1994) (quoting Allen E. Doby, Executive Director of the Recreation Services Agency, Vagrants (Municipal Memorandum dated June 16, 1988)).

178. Brief for the National Law Center on Homelessness & Poverty, et al. as Amicus Curiae at 3, *Joyce v. City of San Francisco* (9th Cir. 1995) (No. 95-16940) (citation omitted).

179. *Church*, 1993 WL 646401, at \*2.

180. For example, a police memorandum states these goals and strategies: “keep the homeless moving in order to ‘sanitize’ city parks and streets; remove ‘undesirables’ from parks and discourage their return; and “eliminate” the homeless or “move them out” of certain areas. *Pottinger*, 810 F. Supp. at 1567 (citing internal police memoranda, Plaintiff’s Exhibits 2A-7C, 2B, 7C). A city official’s memorandum notes that the city does not want “unsightly homeless people in the downtown development area.” *Id.* at 1568. Referring to people standing in a food line, a police memorandum describes a plan “to arrest and/or force the extraction of the undesirables from the area.” *Id.* at 1567 (quoting patrol supervisor memorandum, Plaintiffs’ Exhibit 3L).

181. *See, e.g.*, RIGHT TO REMAIN NOWHERE, *supra* note 9, at 118 (quoting chief sponsor of Washington, D.C., panhandling law, Councilmember Jim Nathanson: “The purpose of the law is to give the police the authority to tell the panhandlers to move on . . . [T]he fine or jail is a threat the police can use.”) (citation omitted).

182. *See, e.g.*, NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 33-34 (citing laws in City of San Francisco).

183. Another police memorandum specifically notes the targeting of the “visible homeless,” progress in “see[ing] a decrease in the number,” and that “the homeless remain almost invisible” as a result of this effort. Brief for Appellant at 8, & 8 n.5, *Joyce v. City of San Francisco*, No. 95-16940 (9th Cir., filed Jan. 16, 1996) (citations omitted).

184. *See* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 22 (discussing response to complaints by businesses in Huntington Beach, California).

185. Dallas, Tex., Ordinance 940871 (Feb. 23, 1994). Letter from Dallas, Tex. City Councilman Glenn Box to Constituent (Mar. 3, 1994) (“Not only have individuals been aggressively panhandled, but individuals and businesses in the area have been victims of robberies, burglaries, rapes, and shootings, all of which can be directly attributed to [the homeless] residing under the bridges.”).

186. *E.g.*, Committee on the Judiciary, Council of the District of Columbia, Panhandling Control Act of 1993, at 2-3 (May 12, 1993) (associating begging from motorists with carjacking, and stating many panhandlers are not homeless but rather are “confidence operators who prey on the elderly and tourists who are uncertain about the genuine needs of the panhandler”). This illustrates the tendency of some legislatures to blame the homeless for any crimes. RIGHT TO REMAIN NOWHERE, *supra* note 9, at 107-08.

187. *See, e.g.*, Brief for the National Law Center on Homelessness & Poverty, et al. as Amicus Curiae at 8, *Joyce v. City of San Francisco* (9th Cir. 1995) (No. 95-16940) (quoting police memorandum describing policy of “zero tolerance” towards “filth, flea infested, disease [sic] ridden people”); *see also* *Roulette v. City of Seattle*, 850 F. Supp. 1442, 445 (W.D. Wash. 1994), *preliminary*

homeless people living on the streets.<sup>188</sup> Cities also frequently cite concerns that the presence of homeless people or beggars adversely affects businesses or tourism.<sup>189</sup> Another type of purpose is “preserving the appearance” of public areas and facilities.<sup>190</sup> Some cities simply express concern about “homeless people wandering around.”<sup>191</sup>

Some cities combine actions aimed at removing homeless people with actions aimed at aiding them. For instance, some city councils have adopted policies to “remove” homeless people while also providing some aid;<sup>192</sup> Some cities refer homeless people to shelters and other services while also removing them from downtown or other areas.<sup>193</sup> In support of such efforts, cities cite concerns that by not taking action they are “enabling self-destructive behavior,”<sup>194</sup> the need to “obtain order and accountability on the part of the homeless who people the streets,”<sup>195</sup> and an intent to “redirect” homeless people to shelters or services.<sup>196</sup>

Increasingly, cities appear to be citing purposes that do not specifically mention homeless people or express a goal to remove them. This is particularly the case in official legislative statements of intent, and possibly in public statements by city officials. In some cases, this is likely to reflect concern

*injunction vacated*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (stating purpose of challenged law to be “to facilitate the safe and efficient movement of pedestrians and goods . . . to eliminate public safety hazard[s], and to protect the economic health and productivity of commercial areas”).

188. NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 22 (reporting that business owners in Huntington Beach, California were concerned about health and safety of homeless in encampments).

189. *See, e.g.*, Memorandum from Michael F. Brown, City Manager, Tucson, Arizona, to Mayor and City Council of Tucson, Arizona (n.d.) (on file with author) (discussing proposed panhandling ordinance based in part on concern by business association about business disruption) [hereinafter Brown Memorandum]; *see also* NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 102 (discussing the anti-panhandling ordinance for Nashville, Tennessee that was proposed by business association but subsequently withdrawn).

190. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 395 (Cal. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

191. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1567 (S.D. Fla. 1992).

192. Following media attention as well as pressure from advocates and homeless people, the Dallas City Council passed a resolution that simultaneously outlined past measures taken with regard to a homeless center and ordered that homeless people be removed from public places. *See* Jacobson, *supra* note 98. In some cases the reverse happens and existing aid is eliminated or capped. *E.g.*, Santa Monica, Cal. Ordinance 1773 (Oct. 25, 1994), *amending* SANTA MONICA, CAL. CITY CODE § 5.08.370 (1995) (applying restaurant standards to those who distribute to homeless). *See also* Brief for Appellant at 6, *Joyce v. City of San Francisco*, No. 95-16940 (9th Cir. 1995) (stating that in 1992, San Francisco closed half of its shelter rooms).

193. *E.g.*, Brief for Defendant at 15, *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1995) (stating that outreach team consists of two social workers, mental health worker, and police officer).

194. Brief for the National Law Center on Homelessness & Poverty, et al. as Amici Curiae at 7, *Joyce v. City of San Francisco* (9th Cir. 1995) (No. 95-16940) (citing city declarations regarding homeless people).

195. *Id.*

196. *See, e.g.*, Dallas, Tex., Resolution for Construction of a Homeless Assistance Center (Feb. 23, 1994).



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about possible litigation, which many cities are aware of and concerned about.<sup>197</sup> Noting the absence of “smoking-gun memos, minutes of the city council, or statements by public officials,” one court wrote that after years of litigation, the city learned this lesson: “Do not document an intention to displace the homeless.”<sup>198</sup>

Overall, cities cite a variety of reasons for their actions.<sup>199</sup> Nonetheless, removal of homeless people from cities or city areas, in general or for particular occasions, is usually a common underlying goal of criminalizing measures. Alternatively stated, the goal may be to prevent people from engaging in certain kinds of activities in all or some public places: for example, sleeping, begging, urinating, sitting. However, homeless people are those who regularly, and necessarily, engage in such activities in public; so long as this is the case, the two formulations are essentially the same.

### C. *Effects of Criminalization*

Cities instituting criminalizing measures typically do not offer assistance—emergency or long-term—in any way sufficient to allow their homeless residents to move off the streets or out of the shelters. None of the cities included in the 1994 survey had sufficient shelter spaces for their homeless populations. Nor did any have sufficient affordable housing, employment, or income assistance.<sup>200</sup> Cities that enforce prohibitions on sleeping in public may penalize homeless people who have no alternative place to sleep. Cities that enforce anti-begging laws may be penalizing people who may have no alternative sources for survival. In these circumstances, the effect is that homeless people must either violate the law or leave the covered area.

In practice, cities generally use different types of ordinances and enforcement policies in combination.<sup>201</sup> This increases the overall impact, particularly where restrictions on services are combined with restrictions on homeless people. For example, in Huntsville, Alabama, private shelters attempting to serve homeless people “swept” from downtown streets were closed by city

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197. See, e.g., Brown Memorandum, *supra* note 189.

198. *Tobe v. Santa Ana*, 27 Cal. Rptr. 2d 386, 342 n.4 (1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

199. For example, in Dallas the City Council adopted a resolution to begin enforcing its prohibition on public sleeping while at the same time noting it would provide additional shelter “in the near future.” The Director of the city’s Department of Health and Human Services noted that some homeless people could not afford the fees charged by shelters, some could not meet the eligibility criteria, and some did not “like the rules.” Nonetheless, she concluded that the city had “adequate services . . . [b]ut you can’t force [homeless people] to do what they don’t want to do.” Jacobson, *supra* note 98, at 30A.

200. The 1994 study did not include this information, but the 1993 study found that none of the cities for which data was available had anywhere near sufficient mental health services. See *RIGHT TO REMAIN NOWHERE*, *supra* note 9, at Table II (Supp.).

201. See, e.g., *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Roulette v. Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), *aff'd*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994).

officials applying building and zoning codes in a selective manner.<sup>202</sup> The effect of such a combination—which both prohibits public sleeping and the operation of shelters in a given area—may be an absolute, and lasting, prohibition on homeless persons' presence in that area.<sup>203</sup>

The increased prevalence of restrictions on both homeless people and service providers across the country magnifies their impact, potentially creating a domino effect. A given community's efforts to force its homeless residents out, if successful, will drive them into neighboring communities; these communities may then in turn pursue similar efforts.<sup>204</sup> Over the longer run, if the current trend continues, the effect will be one of pervasive banishment: homeless Americans may literally be left with nowhere to go.<sup>205</sup>

### III. COURT RULINGS: DIVERGENT RESULTS AND ANALYSES

As local government actions directed against homeless people have increased, so too have legal challenges to them. Homeless people, service providers, and advocacy groups have raised a variety of legal arguments, including claims based on the United States Constitution, in challenges to city laws and practices.<sup>206</sup> To date, the resulting court rulings have been mixed, and in some cases conflicting.<sup>207</sup> Important recent rulings have overturned ordinances and policies directed against homeless people in some cities,<sup>208</sup>

202. *Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401, at \*2 (N.D. Ala. 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994).

203. Some challenges to restrictions on service providers have relied on the Fair Housing Act. *See, e.g., Turning Point, Inc. v. City of Caldwell, Idaho*, No. 94-0169-S-CMB (D. Idaho Dec. 28, 1994). These challenges, while significant and relevant, will not be discussed here.

204. In a striking example of this effect, seven neighboring Southern California municipalities adopted anti-sleeping ordinances within 18 months of each other. *See RIGHT TO REMAIN NOWHERE*, *supra* note 9, at ii (citing Shelter Partnership, HOMELESS REPORTER, Apr. 1993, at 1,9).

205. Some commentators have recently proposed or imagined the extermination of homeless people. *See Bob Erlenbusch, Radio Station KFI: The Killing Frequency of Intolerance*, HOSPITALITY: OPEN DOOR COMMUNITY NEWSLETTER, May 1995, at 5 (discussing radio disk jockey's advocacy of killing homeless people with ovens); *Essays Anger Mensa Members*, WASH. TIMES, Jan. 11, 1995, at A8 (reporting controversy after Mensa newsletter published articles advocating killing homeless, retarded, and elderly); Nora Zamichow, *L.A. Mensa Chapter Told to Fire Newsletter Editor*, L.A. TIMES (Wash. ed.), Jan. 13, 1995, at B1 (recounting firing of newsletter editor); *See also Homeless People Make Great Pets!*, WASH. CITY PAPER, July 29, 1994 (cartoon "advertising" Poorina Homeless Chow).

206. *E.g., Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995). In some cases, challenges are made in both contexts. *Id.*

207. *E.g., Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991); *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993); *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

208. *E.g., Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. Sept. 23, 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994); *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Pottinger*, 810 F. Supp. 1551; *State of Nevada v. Father Richard*, 836 P.2d 622 (Nev. 1992).

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limited some,<sup>209</sup> and upheld others.<sup>210</sup>

This Part reviews these rulings and their divergent results and analyses. In the area of begging, it identifies points of consensus as well as dispute, and argues that begging is fully protected expression. In the area of public place restrictions, it identifies differing conceptual assumptions, and argues for an approach that supports one view while also addressing the concerns of the other. The Part ends by summarizing and drawing some conclusions.

### A. *Begging*

Challenges to restrictions on begging focus primarily on First Amendment protections of freedom of expression. Some courts have also considered whether restrictions on begging differ from restrictions on other forms of solicitation, raising concerns under the Equal Protection Clause.<sup>211</sup>

#### 1. *The First Amendment*

Courts have disagreed on the threshold question whether begging is protected expression under the First Amendment. Some courts have held that begging is fully protected expression. Applying traditional analysis, they have struck down broad restrictions on begging in public forums,<sup>212</sup> while permitting narrowly drawn “time, place and manner” restrictions.<sup>213</sup> In contrast, other courts have held that begging is actually conduct rather than expression, and thus not protected under the First Amendment; in some cases they have also noted that even if begging were protected, prohibitions on conduct associated with it would not be.<sup>214</sup> Such courts have upheld restrictions on

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209. *E.g.*, *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), *aff'd*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge).

210. *E.g.*, *Joyce*, 846 F. Supp. 843; *Tobe*, 27 Cal. Rptr. 386; *Roulette*, 850 F. Supp. 1442.

211. *E.g.*, *Blair*, 775 F. Supp. 1315.

212. *E.g.*, *Blair*, 775 F. Supp. 1315; *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993). Under traditional analysis, expression in a “public forum” is accorded the highest degree of protection. Content-based restrictions on expression in such a forum must be necessary to serve a “compelling” state interest and must be “narrowly drawn” to achieve that end; content-neutral regulation of the “time, place or manner” of expression is permitted so long as it is narrowly drawn and leaves open ample alternative channels of communication. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983); *Loper*, 999 F.2d at 703. Public forums include government property “traditionally” available for public expression, such as streets and parks, which are “quintessential” public forums. *Loper*, 999 F.2d at 703 (citing *Perry*, 460 U.S. at 45).

213. *E.g.*, *Loper*, 999 F.2d at 703.

214. *Young v. New York City Transit Auth.*, 903 F.2d 146, 154 (2d Cir. 1993); *Seattle v. Webster*, 115 Wash. 2d 635 (1990). A regulation of conduct that is “directed at the communicative nature of the conduct” must be evaluated as a restriction on speech and justified by the “substantial showing of need that the First Amendment requires.” *Young*, 903 F.2d at 157, quoting *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (citation omitted). But a regulation of conduct will be upheld if the limitation on expression is “incidental,” and the regulation protects a “sufficiently important government interest” that is “unrelated to the suppression of free expression.” (quoting *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968)).

begging, or what they have construed as conduct associated with it.<sup>215</sup>

Charitable solicitation is expression protected by the First Amendment. In *Village of Schaumburg v. Citizens for a Better Environment*,<sup>216</sup> the Supreme Court noted that “[s]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on . . . social issues.”<sup>217</sup> The Court held that “charitable appeals for funds, on the street or door to door, involve a variety of speech interests.”<sup>218</sup> The ordinance struck down by the Court prohibited solicitation by charities that did not use at least seventy-five percent of their revenue for charitable purposes.<sup>219</sup>

In *Young v. New York City Transit Authority*, the Second Circuit held that begging is not protected solicitation.<sup>220</sup> The court reasoned that “[c]ommon sense tells us that begging is much more ‘conduct’ than it is ‘speech.’”<sup>221</sup> Applying the Supreme Court’s test for determining whether conduct is expressive and thus protected, the court concluded that begging is not “inseparably intertwined with a ‘particularized message,’” and that beggars are rather simply trying “to collect money.”<sup>222</sup> The court drew a distinction between begging by individuals and solicitation by organized charities: “While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good.”<sup>223</sup>

In contrast, three years later, in *Loper v. New York City Police Dep’t*,<sup>224</sup> a different panel of the Second Circuit invalidated a New York state statute prohibiting loitering with intent to beg on city streets. The court saw no significant distinction for First Amendment purposes between organized

215. *Young*, 903 F.2d at 153-54.

216. 444 U.S. 620 (1980).

217. *Id.* at 632.

218. *Id.*

219. The Court noted that the ordinance was not narrowly drawn to serve its interest in “protecting the public from fraud, crime, and undue annoyance.” *Id.* at 636.

220. 903 F.2d 146 (2d Cir. 1990).

221. *Id.* at 153.

222. *Id.* at 153-54 (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). Furthermore, the court suggested that any expressive element might be erased by the “special circumstances” of the subway, where it is the conduct, “totally independent of any particularized message, that passengers experience as threatening, harassing and intimidating.” *Young*, 903 F.2d at 154. But the court also noted that its holding “does not ultimately rest on an ontological distinction between speech and conduct,” presumably because it went on to apply first amendment analysis and uphold the regulation under it. *Id.*

223. *Young*, 903 F.2d at 156. In *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991), the court expressly rejected the *Young* court’s reasoning, and noted that it found this statement “disturbing.” *Id.* at 1323 n.9.

224. *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993); see also *Blair*, 775 F. Supp. 1315; *Heathcott v. Las Vegas Metro. Police Officers*, CV-S-93-045-LDG (D. Nev. Mar. 3, 1994); *Patton v. City of Baltimore*, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994); *Roulette v. City of Seattle*, 850 F. Supp. 1442 (1994), *aff’d*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge).

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charities, which communicate the needs of others, and beggars, who communicate their own needs.<sup>225</sup> Further, the court concluded that begging usually involves some communication of a “social or political message.”<sup>226</sup> The court noted that begging is often accompanied by speech indicating the need for food, shelter, transportation or medical care; moreover, even in the absence of particularized speech, the presence of an “unkempt and disheveled person” holding out a hand or cup conveys a “message of need for support and assistance.”<sup>227</sup>

The *Loper* court’s conclusion that begging is protected expression is clearly correct.<sup>228</sup> Begging generally is defined by speech: a request for money or other aid.<sup>229</sup> Even where a beggar is silent, there is some other clear form of communication, such as a sign, donation cup or outstretched hand; indeed, with the exception of such actions, there is no conduct which is characteristic of begging.<sup>230</sup> Moreover, a constitutional distinction between solicitation by “organized charities” and needy individuals is contrary to Supreme Court rulings that professional fundraisers—who solicit solely for payment—are fully protected by the First Amendment.<sup>231</sup> Finally, while the recitation of poetry cited by the *Young* court as a clear example of protected expression may express a range of human needs,<sup>232</sup> so too does a beggar’s request for spare change; the sole difference is one of format and—perhaps—eloquence and immediacy. This should not be the basis for a constitutional distinction.

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225. Rather, the court concluded, “[b]oth solicit the charity of others.” *Loper*, 999 F.2d at 704. Similarly, a federal district court struck down a Nevada statute prohibiting loitering with intent to beg. *Heathcott*, CV-S-93-045-LDG. Another federal district court struck down a California statute prohibiting “accost[ing] other persons in any public place or in any place open to the public for the purpose of begging or soliciting alms” as violative of the First Amendment. *Blair*, 775 F. Supp. at 1324-25. The court held the statute was content-specific, applied to public forums, and was not narrowly-tailored to meet a compelling state interest. *Id.*

226. *Loper*, 999 F.2d at 704. The holdings of the cases are distinguishable: *Young* involved a restriction limited to subways, while *Loper* involved a city-wide ban. Still, the different analyses of the two courts may imply different conclusions even allowing for these differences.

227. *Id.* at 704.

228. See, e.g., *Patton*, Civ. No. S-93-2389; *Roulette*, 850 F. Supp. 1442; *Blair*, 775 F. Supp. 1315.

229. The question whether begging communicates any particularized “social or political” message is inapposite, since that is an inquiry applicable to expressive conduct, not to speech. See *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990).

230. For a detailed discussion of this issue, see Helen Hershkoff & Adam Cohen, *Begging to Differ*, 104 HARV. L. REV. 896, 904-10 (1991).

231. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 628-32 (1980). In *Riley v. National Fed. of the Blind of North Carolina*, 487 U.S. 781 (1988), which applied First Amendment protection to a professional fund raiser, the Supreme Court directly addressed this point. *Id.* at 801. See also *Blair*, 775 F. Supp. 1315, 1316-17. Precisely because of their destitution, homeless and extremely poor people often are not able to organize themselves into groups; denying protection to them would threaten the further disappearance of their voices. See *id.*; see also THERESA FUNICELLO, TYRANNY OF KINDNESS (1993) (arguing that organizations that purport to speak on behalf of the poor may not always do so; their nature and structure may conflict with interests or desires of poor themselves).

232. *Young*, 903 F.2d at 154 (recitation of Donne or Keats clearly protected).

Given a conclusion that begging is fully protected expression, the level of judicial review depends on the characterization of the restriction.<sup>233</sup> In *Loper*, because the prohibition as challenged<sup>234</sup> applied to the public streets and parks of the city, the court applied public forum analysis, and held that the statute did not meet its stringent criteria.<sup>235</sup> First, because it prohibited speech relating to begging, but not other forms of solicitation, it was not "content neutral."<sup>236</sup> Second, even if the state's interest in preventing fraud, intimidation, coercion, and harassment was "compelling," the total ban imposed by the statute was not narrowly tailored to serve it.<sup>237</sup> The court observed that "there are a number of statutes that address this sort of conduct directly." Moreover, the statute could not be considered to serve even an "important" government interest, because the state permitted street solicitations by persons representing organized charities.

Narrowly tailored restrictions on begging in a public forum also raise First Amendment concerns. Restrictions that apply to begging—and not to speech generally—are not content-neutral, since their applicability depends on what is being communicated.<sup>238</sup> In a nonpublic forum, a less stringent standard applies. Restrictions must be reasonable and viewpoint-neutral.<sup>239</sup> But most restrictions on begging are aimed at public areas, and thus are subject to public forum analysis.<sup>240</sup>

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233. In *Young*, assuming arguendo that begging was conduct that possessed some communicative qualities, *Young*, 903 F.2d at 157, the court considered the regulation not to be "directed at speech itself" but rather "incidental" to it, and applied a relatively lenient standard of review. *Id.* (quoting *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989), *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (regulation of conduct with "incidental" limitation on expression will be upheld if it protects a "sufficiently important government interest"). The court held that the regulation furthered an government important interest in promoting safety in the subways, that it was not based on any objection to any idea or message conveyed by begging, and that it left open alternative channels of communication. *Young*, 903 F.2d at 157-61. The court also applied public forum analysis, although it said it was not necessary to its holding, and upheld the regulation.

234. The state statute was challenged as enforced in those places. *Loper v. New York City Police Dep't*, 999 F.2d 699, 701 (2d Cir. 1993).

235. Expression in a "public forum" is accorded the highest degree of protection. Content-based restrictions on expression in such a forum must be necessary to serve a "compelling" state interest and must be "narrowly drawn" to achieve that end; content-neutral regulation of the "time, place, or manner" of expression is permitted so long as it is narrowly drawn and leaves open ample alternative channels of communication. Government property "traditionally" available for public expression, such as streets and parks, is a "quintessential" public forum. *Loper*, 999 F.2d at 703 (citing *Perry Educ. Ass'n v. Local Educators' Ass'n*, 460 U.S. 37 (1983)).

236. *Loper*, 999 F.2d at 705.

237. Applying the more lenient *O'Brien* standard, see *supra* note 233, the court also held that the total prohibition could not be considered "incidental" because it served to "silence both speech and expressive conduct on the basis of the message." *Loper*, 999 F.2d at 705.

238. See *Blair v. Shanahan*, 775 F. Supp. 1315 (N.D. Cal. 1991). But see *Patton v. City of Baltimore*, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994) (distinguishing between aggressive solicitation and other aggressive speech would be permissible under equal protection clause).

239. See *International Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672 (1992) (invalidating ban on leafletting in airport).

240. See *supra* Subsection II.A.2.

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### 2. *The Equal Protection Clause*

Laws restricting begging may also implicate the Equal Protection Clause. Prohibitions on panhandling, but not other forms of solicitation, have been held to be content-specific, implicating the First Amendment. Free speech is, of course, a “fundamental right” in equal protection analysis.<sup>241</sup> Accordingly, unless this differential treatment is narrowly tailored to serve a compelling state interest, it violates the Equal Protection Clause.<sup>242</sup>

In *Blair v. Shanahan*, a federal district court held that a statute prohibiting “accost[ing] . . . for the purpose of begging or soliciting alms” violated the Equal Protection Clause because it was content-based.<sup>243</sup> The court held that the law treated differently those who approached others to solicit alms and those who approached others to communicate about anything else. Further, while the city may have a legitimate and substantial interest in protecting residents from intimidation, the court held that the law swept too broadly. “Solicitations for alms are not generally and frequently enough proxies for intimidating or coercive threats to justify this statute.”<sup>244</sup>

Discriminatory enforcement of anti-panhandling laws may also violate the Equal Protection Clause. In *Patton v. Baltimore City*, the court held that plaintiffs’ allegations that the city had a practice of directing homeless people, but not other people, to move along, and directing panhandlers, but not other solicitors, to stop soliciting, stated a claim under the Equal Protection Clause.<sup>245</sup> Further, because plaintiffs had shown that this alleged practice interfered with their fundamental rights “to move about” and to freedom of expression, such discrimination would have to be narrowly tailored to meet a compelling state interest, under the strict scrutiny standard.<sup>246</sup>

### 3. *Aggressive Panhandling*

Aggressive panhandling ordinances, on the increase in cities across the country, restrict “aggressive” begging, which is typically defined to include at least some conduct.<sup>247</sup> In addition, they typically include limited restrictions,

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241. *E.g.*, *Patton v. City of Baltimore*, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994).

242. *Carey v. Brown*, 447 U.S. 455, 461-62 (1972); *Patton*, Civ. No. S-93-2389, slip op. at 61; *Blair*, 775 F. Supp. at 1324.

243. *Blair*, 775 F. Supp. at 1325, citing *Carey*, 447 U.S. at 460.

244. *Blair*, 775 F. Supp. at 1325-26.

245. *Patton*, Civ. No. S-93-2389, slip op. at 49, 50.

246. *Id.* at 50; *see also infra* Subsection III.B.2.c. Following this ruling, the Baltimore City Council amended the ordinance to prohibit all aggressive solicitation, presumably addressing the court’s concern. Indeed, the court had specifically suggested this remedy. *Patton*, Civ. No. S-93-2389, slip op. at 50.

247. *E.g.*, Seattle, Wash., Ordinance 113697, *amending* SEATTLE, WASH. CITY CODE §§ 12A.12.-010-12A.12.01S (1987); Panhandling Control Congressional Recess Emergency Act of 1993, 10 D.C. Reg. 98 § 2; Atlanta, Ga., Ordinance to Amend ATLANTA, GA. CODE OF ORDINANCES § 17-3006 (1991).

such as prohibitions on begging within ten feet of an automated teller machine.<sup>248</sup> Generally, they are an effort to respond to the recent case law by more narrowly crafting restrictions on begging so as to avoid the First Amendment's constraints on laws restricting begging.<sup>249</sup> But aggressive panhandling laws may also raise First Amendment, as well as Equal Protection Clause, concerns.

In *Roulette v. Seattle*, a federal district court upheld that city's aggressive panhandling law only after limiting it to cover only threats. The ordinance prohibited "beg[ging] with the intent to intimidate another person into giving money or goods",<sup>250</sup> the city argued in its briefs that "intimidate" should be construed narrowly by the court to mean conduct which "threatens" the person solicited.<sup>251</sup> Adopting this limiting construction, the court held that "threats to cause bodily injury or physical damage to the property of another . . . are not protected speech."<sup>252</sup> However, the court struck down a portion of the ordinance, which included persisting in begging after the person solicited had given a negative response as an example of evidence to intimidate, as vague and overbroad.<sup>253</sup>

The court in *Patton*<sup>254</sup> considered the constitutionality of the city's "Aggressive Panhandling Ordinance."<sup>255</sup> The court concluded that the statute was content-specific because it penalized only aggressive panhandling and not other forms of aggressive solicitation.<sup>256</sup> The court held that while the city had a compelling interest in protecting persons from intimidation, it had made no showing that panhandling is inherently more intimidating than any other type of solicitation for money. Thus, the distinction did not serve, and was not

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248. *E.g.*, D.C. CODE ANN. § 22-3306 (Supp. 1994).

249. *E.g.*, Brown Memorandum, *supra* note 189; Panhandling Control Congressional Recess Emergency Act of 1993, 10 D.C. Reg. 98 § 3(c).

250. The court defined "intimidate" as a "conduct which would make a reasonable person fearful or feel compelled," and assumed (and the city did not dispute) that "peaceful" begging is entitled to "some First Amendment protection." *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1451 (W.D. Wash. 1994), *aff'd*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge).

251. *Id.* at 1453.

252. *Id.* at 1453 (citing *State v. Brown*, 748 P.2d 276 (1988)).

253. The court stated that some of the circumstances describe speech which is "clearly protected," and that others lacked specificity. *Id.* at 1454.

254. *Patton v. City of Baltimore*, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994).

255. The ordinance prohibited aggressive panhandling, defined as panhandling combined with one or more of six types of conduct, as well as panhandling, aggressive or passive, at "inherently intimidating" locations (within 10 feet of any automatic teller machine; in any public transportation vehicle, stop or station; on private or residential property if the owner, tenant or occupant has asked the person not to panhandle or has posted a sign; from occupants of motor vehicles that are in traffic on public streets; and from occupants of motor vehicles on streets in exchange for reserving or finding a parking space). *Patton*, Civ. No. S-93-2389, slip op. at 6-7.

256. *Id.* at 56-59. The court also held that panhandling is a form of charitable solicitation protected by the first amendment and that the distinction between soliciting funds for a charities and for oneself is "not a distinction of constitutional dimension." *Id.* at 55-56 (citing *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993); and *Blair v. Shanahan*, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991)).



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“finely tailored” to serve, the city’s interest. The court held that the distinction could not be justified under the Equal Protection Clause.<sup>257</sup>

Aggressive panhandling laws, narrowly crafted, penalize acts that are likely already prohibited. However, they have the effect, and perhaps the purpose, of singling out particular types of persons—beggars. In fact, they are often passed as a part of a larger set of laws aimed at homeless people.<sup>258</sup> At a minimum, this may increase the possibility of selective enforcement in actually carrying out the law: such laws may send a message to police, as well as to the public, that begging, and beggars, pose a special threat.<sup>259</sup> In addition, it may be reason for a court to question the validity—or importance—of any government interest offered in support of the law.<sup>260</sup> As the Second Circuit observed in *Loper*:

It is ludicrous, of course, to say that a statute that prohibits loitering for the purpose of begging provides the only authority that is available to prevent and punish all socially undesirable conduct incident to begging. . . . There are, in fact, a number of . . . statutes that proscribe conduct of the type that may accompany individual solicitations for money.<sup>261</sup>

Anti-panhandling laws that are narrow enough so as to prohibit only conduct and not expression, and so pass muster under the First Amendment, will almost certainly be redundant. Alternatively, if they are broad enough to pass muster under the Equal Protection Clause, they will not be targeted enough to achieve their apparent goal: to prevent the poor—but not other solicitors—from begging in public places.

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257. *Id.* at 66. The *Patton* court limited this ruling to solicitation, stating that discriminating between aggressive solicitation generally and other aggressive speech would be permissible. “Aggressive begging and aggressive direction seeking are simply worlds apart.” *Id.* at 69. Other courts have not made such a distinction, however, ruling instead that differential treatment of potentially intimidating solicitation as against other forms of speech violates the equal protection clause. *Blair*, 775 F. Supp. at 1325-26.

258. *See Berkeley Community Health Project v. City of Berkeley*, No. C. 95-0665-CW (N.D. Cal. May 5, 1995), slip op. at 24 (discussing linkage of sitting and panhandling ordinance cited as supporting court’s conclusion that sitting ordinance was aimed at panhandlers).

259. Such messages may also signal that aggression or violence against homeless people is acceptable. In fact, violent actions against homeless people appear to have increased over the past few years. *See HOMBS*, *supra* note 73.

260. Aggressive panhandling laws appear to be enforced loosely, at least in part because very few beggars engage in the proscribed behavior. For example, in San Francisco, a police “sting” operation targeted at “aggressive panhandlers” expended 450 hours of police time and \$11,000 but resulted in only 15 arrests and no convictions. *RIGHT TO REMAIN NOWHERE*, *supra* note 9, at 41. The police sergeant in charge of the operation stated that “the overwhelming number of panhandlers . . . ask for money, then when refused say, ‘thank you, have a nice day,’ or ‘God bless you.’” *Id.* at 41-42, and internal police memoranda cited therein.

261. *Loper v. New York City Police Dep’t*, 999 F.2d 699, 701 (2d Cir. 1993).

## B. *Public Place Restrictions*

Public place restrictions have been challenged as facially unconstitutional; more recently, they have also been challenged as applied to homeless people. This section briefly reviews the earlier facial challenges. It then focuses on the as applied challenges, discussing in some detail three important recent cases. It then reviews the relevant constitutional principles and Supreme Court precedent and discusses their application to public place restrictions on homeless persons.

### 1. *Facial Challenges*

A group of decisions beginning in the 1970s considered facial challenges to laws prohibiting sleeping, camping, lying, or sitting in public places;<sup>262</sup> of these, several concerned challenges to laws specifically prohibiting sleeping or "lodging" in motor vehicles.<sup>263</sup> These facial challenges were based primarily on constitutional overbreadth or vagueness grounds; a few also included equal protection or right to travel claims.<sup>264</sup> While such challenges were upheld in some cases,<sup>265</sup> they were often rejected.<sup>266</sup>

For example, in *Whiting v. Town of Westerly*, the plaintiffs were travelers who had spent the night in their car after being unable to find other accommodation and were arrested under a town ordinance prohibiting sleeping out of doors.<sup>267</sup> In response to their constitutional challenge to the ordinance, the court held that the law was neither overbroad nor vague.<sup>268</sup> The court

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262. *E.g.*, *Whiting v. Town of Westerly*, 942 F.2d 18 (1st Cir. 1991); *Seeley v. State of Arizona*, 655 P.2d 803 (Ariz. Ct. App. 1982) (ordinance prohibiting lying, sitting and sleeping); *People v. Davenport*, 222 Cal. Rptr. 736 (Cal. App. Dep't Super. Ct. 1985), *cert. denied*, 475 U.S. 1141 (1986) (ordinance prohibiting sleeping in public); *Parr v. Municipal Court*, 479 P.2d 353 (Cal. 1971) (ordinance prohibiting sitting and lying in public); *State v. Penley*, 276 So. 2d 180 (Fla. Dist. Ct. App. 1973) (ordinance prohibiting sleeping in public); *City of Portland v. Johnson*, 651 P.2d 1384 (Or. Ct. App. 1982) (ordinance prohibiting camping in public).

263. *E.g.*, *Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987); *Vehicular Residents Assoc. v. Agnos*, 272 Cal. Rptr. 216 (Cal. Ct. App. 1990) (holding that ordinance prohibiting sleeping in cars at night does not violate equal protection rights of poor; applies equally to all who sleep in car); *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. Dist. Ct. App. 1984).

264. *See, e.g.*, *Seeley*, 655 P.2d at 808; *Vehicular Residents Assoc.*, 272 Cal. Rptr. at 218.

265. *See, e.g.*, *Hershey*, 834 F.2d at 939 (challenge upheld in part); *Parr*, 479 P.2d at 358 (holding that ordinance prohibiting sitting on sidewalks or steps and lying or sitting on lawns violated Equal Protection Clause because legislative history showed it was targeted against "hippies" because of their status); *Penley*, 276 So. 2d at 180 (holding that ordinance prohibiting sleeping in public places was unconstitutional because it drew no distinction between conduct calculated to harm and conduct that is essentially innocent); *City of Pompano Beach*, 455 So. 2d at 471 (holding ordinance prohibiting sleeping in public to be overbroad because it punishes unoffending behavior; for same reason subject to arbitrary enforcement).

266. *E.g.*, *San Francisco Coalition on Homelessness v. City of San Francisco*, Super. Ct. No. 924724 (Ca. Ct. App. 1992); *City of Portland v. Johnson*, 59 Or. App. 647 (1982) (ordinance prohibiting camping in public neither vague nor overbroad).

267. 942 F.2d at 20.

268. *Id.* at 22.

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reasoned that sleeping in public enjoys no constitutional protection, and that the ordinance was sufficiently clear so as to give notice to potential violators and to protect against arbitrary enforcement or harassment by police.<sup>269</sup>

In contrast, in *City of Pompano Beach v. Capalbo*, the court invalidated an ordinance that prohibited sleeping “in, on or about” a motor vehicle as unconstitutionally overbroad and vague.<sup>270</sup> The court held that the ordinance was overbroad because it would allow arrest of persons engaged in innocent conduct. It would cover “a tired child asleep in his car-seat . . . the alternate long-distance driver asleep in the bunk of a moving or parked tractor-trailer . . . the tired or inebriated driver who has taken widely disseminated good counsel and chosen to go to sleep in his parked car rather than take his life or others’ lives into his hands.”<sup>271</sup> The court held that the ordinance was vague because it gave “unbridled” enforcement discretion to the police.<sup>272</sup>

Some of these cases have reached mixed results. For example, in *Hershey v. Clearwater*, plaintiffs challenged an ordinance that made it unlawful to “lodge or sleep in, or about any” motor vehicle.<sup>273</sup> Plaintiffs argued that sleeping was protected under the Constitution, specifically that sleeping is expressive conduct protected by the First Amendment.<sup>274</sup> The court did not reach the question of the constitutionality of the portion of the ordinance prohibiting sleeping.<sup>275</sup> But the court suggested that if the portion of the ordinance prohibiting sleeping encompassed “innocent nappers” it would be overbroad.<sup>276</sup>

### 2. *As-Applied Challenges*

More recently, some courts have upheld as-applied challenges to similar laws on other federal constitutional grounds<sup>277</sup> including violations of the Eighth Amendment, the right to travel, and the Equal Protection and Due Process Clauses.<sup>278</sup> Courts have also rejected similar facial, as well as some

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269. *Id.* at 24.

270. 455 So. 2d 468, 470 (Fla. Dist. Ct. App. 1984).

271. *Id.*

272. *Id.*

273. 834 F.2d 937 (11th Cir. 1987).

274. *Id.* at 939.

275. *Id.* at 940 n.5. The court held that even if sleeping is constitutionally protected, the prohibition on lodging in vehicles in public was a reasonable restriction within the police power of the city; accordingly, the court upheld the portion of the law prohibiting lodging in vehicles.

276. *Id.* at n.5.

277. Three of the cases cited—*Vehicular Residents Assoc.*, 272 Cal. Rptr. 216, *Seeley*, 655 P.2d 803, and *Parr*, 479 P.2d 353—involved or included Equal Protection Clause challenges; *Seeley* also included a right to travel claim. 655 P.2d at 808.

278. *See Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992); *Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. Sept. 23, 1993); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

as-applied, challenges to such laws.<sup>279</sup> *Pottinger v. City of Miami*, probably the most significant recent case,<sup>280</sup> has resulted in important court rulings as well as policy changes by the local county government. Its analysis has been adopted by other courts;<sup>281</sup> some courts have specifically rejected the court's reasoning and conclusions.<sup>282</sup>

a. *Three recent decisions* In *Pottinger*, a plaintiff class of some 6,000 "involuntarily homeless" people living in Miami<sup>283</sup> challenged the city's policy and practice of arresting and harassing them for engaging in basic activities of daily life, such as sleeping and eating, in public.<sup>284</sup> Plaintiffs claimed that by arresting them for performing "essential, life-sustaining activities" such as sleeping, eating, standing and congregating in public the city was punishing plaintiffs for their "involuntary homeless status" and that this constituted cruel and unusual punishment in violation of the Eighth Amendment. In addition, plaintiffs claimed that arresting homeless people for the involuntary public performance of essential activities infringed their fundamental right to travel.<sup>285</sup> Plaintiffs alleged that the city arrested them under a variety of laws; however, they did not ask the court to invalidate any laws but rather to enjoin the city from arresting them for innocent conduct that they were forced to perform in public.<sup>286</sup>

279. One recent important ruling explicitly relied on this distinction, rejecting a facial challenge to a law prohibiting camping in public but noting that it may have treated an applied challenge differently. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1152 (Cal. 1995).

280. 810 F. Supp. 1551 (S.D. Fla. 1992).

281. E.g., *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994) (Eighth Amendment); *Church v. City of Huntsville*, No. Civ. A. 93-C-1239-S, 1993 WL 646401 (N.D. Ala. 1993), *preliminary injunction vacated*, 30 F.3d 1222 (11th Cir. 1994); see also Associated Press, *Judge: Homeless Can Stay on Beach*, Nov. 22, 1992 (Newswire) (Key West, Florida).

282. *Joyce v. City of San Francisco*, 846 F. Supp. 843, 856 (N.D. Cal. 1994); *Patton v. Baltimore*, No. S-93-2389, slip op. at 52-53 (D. Md. 1994) (disagreeing with *Pottinger* and agreeing with *Joyce* that homelessness is not a status "as a matter of law"). The Eleventh Circuit has so far allowed the ruling to stand, but has avoided ruling on the merits; it may never do so. See *Pottinger v. Miami*, 40 F.3d 1155 (11th Cir. 1994) (remanding case to district court); No. 88-2406-Civ.-CCA (S.D. Fla. 1995) (ruling on remand); 76 F.3d 1154 (11th Cir. 1996) (order to settle appeal).

283. *Pottinger*, 810 F. Supp. at 1553-54, 1555.

284. 810 F. Supp. at 1554. Plaintiffs claimed this was part of an overall city practice of driving them from public places. *Id.*

285. Plaintiffs also raised claims under the Florida constitution and common law. They also alleged that the city violated the "fundamental" right of homeless people to engage in public in essential activities such as sleeping, eating, bathing and congregating, that the arrests of homeless people were pretextual and amounted to unreasonable searches and seizures under the Fourth Amendment, and that the city's seizures of plaintiffs' property lacked probable cause, were unreasonable, and violated the Fourth, Fifth and Fourteenth Amendments. *Id.* at 1555.

286. 810 F. Supp. at 1555. The suit was originally filed in 1988 and proceedings in it have been lengthy. Plaintiffs first moved for injunctive relief, which the court denied. In 1990, plaintiffs filed a second request for a preliminary injunction after two incidents in which police awakened and arrested homeless people sleeping in a park, put their personal belongings into a pile and set them on fire; this motion was granted. *Id.* at 1556. In 1991, plaintiffs again sought injunctive relief, following an incident in which police officers removed homeless people sleeping under a highway overpass and required them to move to two parks. The court held the city in civil contempt for violating its earlier order. *Id.* at

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Based on record evidence that the number of shelter beds and other resources was extremely inadequate relative to the need,<sup>287</sup> the court found that the plaintiffs “truly had no place to go.” It held that the city’s practice of arresting them “for performing essential, life-sustaining acts in public when they have absolutely no place to go” punished them for their status, in violation of the Eighth Amendment’s prohibition on cruel and unusual punishment. The court held that the city violated plaintiff’s rights under the Equal Protection Clause, and burdened their right to travel by making it impossible for them to remain in or enter the city.<sup>288</sup> It also held that the city violated their procedural due process rights by arresting them when they were not in violation of any laws.<sup>289</sup>

In *Johnson v. City of Dallas*, a class of homeless plaintiffs challenged that city’s enforcement of a series of laws against them, including a prohibition on sleeping in public.<sup>290</sup> The court found based on the record evidence that there were insufficient shelter beds to meet the need. Agreeing with *Pottinger*, the court held that punishing the homeless plaintiffs for sleeping in public when they had nowhere else to go punished their involuntary status, in violation of the Eighth Amendment. However, disagreeing with *Pottinger*, the court found no right to travel violation. The court held that the right to travel only prohibits differential treatment of residents and non-residents, and that since no such differential treatment was at issue there was no violation.<sup>291</sup>

In *Joyce v. City of San Francisco*, a class of homeless plaintiffs<sup>292</sup>

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1556. Later in 1991, plaintiffs sought to enjoin the city from closing a park and the area under the highway overpass, primary living areas for homeless people. The court denied the request based on the city’s representation that it would offer comparable or better “housing” to those displaced. *Id.* at 1557.

287. *Id.* at 1558. The court rejected the malicious abuse of process claim, as well as the claim that the arrests were pretextual. *Id.* at 1568-69. The court upheld the claim that the city unlawfully seized and took plaintiffs’ property in violation of the Fourth Amendment. *Id.* at 1571-73. The court also upheld plaintiffs’ procedural due process claim. The court distinguished this case from the Eleventh Circuit’s statement in *Hershey v. Clearwater*, 834 F.2d 937 (11th Cir. 1987), at *Pottinger*, 810 F. Supp. at 1577, that sleeping “of the general kind” is not constitutionally protected, noting that the protection arose only because of plaintiffs’ particular circumstances. *Id.*

288. The court rejected plaintiff’s claim that they were a “suspect class,” noting that the Supreme Court has held repeatedly that the Supreme Court has held repeatedly that classifications based on “wealth alone” are not suspect. *Id.* at 1578, and cases cited therein. However, the court did note that it was not “entirely convinced that homelessness as a class” has none of the “traditional indicia of suspectness.” *Id.*, quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

289. The court granted plaintiffs’ motion to bifurcate the trial, with the first part, considering only liability, to be tried without a jury and the second part (if liability was found), considering damages, to be tried by a jury. *Pottinger*, 810 F. Supp. at 1557.

290. 860 F. Supp. 344 (N.D. Tex. 1994), *rev’d* 61 F.3d 442 (5th Cir. 1995) (reversing on grounds that named plaintiffs did not have standing because there was no evidence they had actually been convicted under challenged laws).

291. The court also held that homeless people do not constitute a suspect class. The court relied on prior cases considering the issue, although it noted that the authority is not “voluminous.” 860 F. Supp. at 355.

292. The class was defined as those persons in the city who “(1) are without shelter, lack the financial resources or mental capacity necessary to provide for their own shelter, and have been cited or arrested for a violation of any of the portions of the Matrix program now challenged.” *Joyce v. City*

challenged the application of a series of ordinances against them as part of a concerted city effort to remove them from the city.<sup>293</sup> They also alleged that they were cited or roused even when they were not violating any ordinance,<sup>294</sup> and that they are also regularly ordered to move on, without being arrested.<sup>295</sup> Plaintiffs alleged that these city policies and practices violated the Eighth Amendment and the Equal Protection Clause.<sup>296</sup> The city conceded that shelter space was insufficient.<sup>297</sup> Disagreeing with *Pottinger* and *Johnson*, the court held that homelessness is not a status and that the ordinances punished acts, not conduct; it held that there was therefore no Eighth Amendment violation.<sup>298</sup> Further disagreeing with *Pottinger* and agreeing with *Johnson*, the court ruled that because the laws did not discriminate between residents and non-residents, they did not violate the right to travel.<sup>299</sup>

b. *The Eighth Amendment* The differences in the rulings on the Eighth Amendment claims can be traced to different interpretations of two Supreme Court cases: *Robinson v. State of California*<sup>300</sup> and *Powell v. Texas*.<sup>301</sup> In *Robinson*, the Court held that a state statute that made being addicted to

of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994), Class Certification Order, slip op. at 2 (Aug. 4, 1994).

293. Citing city testimony and documents, plaintiffs alleged that the Mayor had adopted a policy priority to make the city "inhospitable to homeless people." Appellant's Brief at 6, *Joyce v. City of San Francisco*, No. 95-16940 (9th Cir.) (filed 1996). Plaintiffs also relied on evidence that the city instructed its officials to "get rid of" organizations providing food to homeless people, offered one-way tickets out of town to homeless people, closed half of its shelter facilities, and confiscated and destroyed the property of homeless people. As part of this effort, and to "get around" constitutional limitations on enforcing vagrancy laws, the mayor's office asked city departments to identify ordinances that could be used "to obtain order and accountability on the part of homeless individuals who people the streets." One memo from a police captain advocated a "no tolerance program" to deal with "filth, flea infested, disease [sic] ridden people." *Id.* at 8.

294. Under the city's "Matrix" program, police enforced some 18 ordinances including prohibitions on being in parks at night, "camping" in parks at any time, "lodging" in any public place, and "obstructing" sidewalks; plaintiffs alleged that these ordinances were being enforced in a targeted manner against them. Violations of ordinances under the Matrix program are punishable by fines of at least \$76 per infraction as well as jail terms. *Joyce*, 846 F. Supp. at 848-49. In two and a half years of enforcement under the Matrix ordinance, 5700 citations have been issued. Appellant's Brief at 10, *Joyce v. City of San Francisco*, No. 95-16940 (9th Cir.) (filed 1996).

295. *Id.*

296. Plaintiffs also alleged violations of the Due Process Clause, the Fourth Amendment, and the California constitution. *Joyce*, 846 F. Supp. at 861, 863.

297. The City estimates that there were between 11,000 to 16,000 homeless people in the city at any given time, and that there were only 1,395 shelter beds and 798 transitional housing units. MAYOR'S OFFICE OF COMMUNITY DEVELOPMENT, MAYOR'S OFFICE OF HOUSING, CITY AND COUNTY OF SAN FRANCISCO 1995 CONSOLIDATED PLAN (1994). In addition, there were 9085 on the waiting list for housing assistance as of December 1994, and income assistance available to homeless people was \$345 per month, not sufficient to rent an apartment or room. *Id.*

298. *Joyce*, 846 F. Supp. 843 (denying plaintiffs' motion for preliminary injunction).

299. The case is now on appeal to the Ninth Circuit. *Joyce*, No. 95-16940, Docket No. CV-93-04149-DJJ.

300. 370 U.S. 660 (1962).

301. 392 U.S. 514 (1968).

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narcotics a crime imposed cruel and unusual punishment in violation of the Eighth Amendment.<sup>302</sup> Following a factual inquiry, the Court found that “narcotic addiction is an illness” that “apparently . . . may be contracted innocently or involuntarily.” The Court concluded that the statute punished the “status” of being addicted in violation of the Eighth Amendment.<sup>303</sup>

In *Powell*, the Court considered a law that penalized getting or being drunk in public. The Court undertook an extensive factual inquiry into alcoholism and public drunkenness. A plurality of the Court was “unable to conclude, on the basis of this record or on the current state of medical knowledge, that chronic alcoholics in general . . . suffer from . . . such an irresistible compulsion to drink and get drunk in public that they are utterly unable to control their performance of either or both of these acts. . . .”<sup>304</sup> The Court held that the statute did not violate the Eighth Amendment.<sup>305</sup>

Significantly, Justice White, who cast the fifth and deciding vote to uphold the statute,<sup>306</sup> cautioned against “preoccupation” with any distinction between “status” and “conduct.”<sup>307</sup> Noting that the difference between status and act is temporal—“being” drunk may occur within five minutes after “getting” drunk—he argued that predicating a constitutional standard on this distinction was inappropriate.<sup>308</sup> Instead, he focused on whether what was punished was volitional—and thus within the power of the defendant to avoid or not—as a matter of fact.<sup>309</sup> Whether or not Powell could have resisted the urge to drink, “he had a home,” and “nothing in the record indicates that he could not have done his drinking in private.” In these circumstances the defendant’s drinking in public was voluntary and so could constitutionally be punished.<sup>310</sup>

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302. 370 U.S. 660, 666-67.

303. 392 U.S. at 667. The Court cited a variety of medical books and journals in support of this view. *Id.* at n.9. The Court also noted that “imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be cruel and unusual punishment for the ‘crime’ of having a common cold.” *Id.* at 667.

304. *Id.* at 535. The plurality in *Powell* treated this as a factual inquiry and went to considerable lengths discussing whether and to what extent alcoholism is voluntary or not, reviewing both the record and a variety of medical writings. Indeed, the Court drew distinctions between “compulsions” and “impulses” in assessing different levels of voluntariness. *Id.* at 531-37.

305. *Id.* at 531-37. The holding in *Robinson* is the basis for the principle that status may not be punished; the holding in *Powell* is the basis for its purported corollary that conduct may be punished.

306. Justice White’s opinion in *Powell* is controlling precedent. *See* *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that narrowest basis for decision controls when fragmented court decides case and no single rationale is adopted by majority).

307. *Powell*, 392 U.S. at 550 n.2.

308. *Id.*

309. For Eighth Amendment purposes “[t]he proper subject of inquiry is whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it to be permissible to impose penal sanctions on the condition.” *Id.* at 550 nn.2 & 4. For example, according to this analysis punishing an alcoholic for drinking would not be permitted if the drinking being punished was not volitional and if any initial act of volitional drinking was not “proximate” to the act being punished.

310. *Id.*

Justice White specifically stated that his conclusion would have been different had the defendant not had a home:

Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. . . . As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.”<sup>311</sup>

In the context of laws penalizing homeless people for sleeping in public, the relevant inquiry is whether that activity is voluntary or not. Clearly, sleeping itself is not: unlike drinking or taking narcotics, which may be unavoidable for alcoholics or addicts, sleeping is necessary for all human beings. Determining whether sleeping in public can be avoided requires a factual inquiry, the same inquiry made by Justice White when he argued that if “a showing can be made . . . that avoiding public places when intoxicated is . . . impossible” then such laws would violate the Eighth Amendment.<sup>312</sup>

In *Pottinger*, the court’s ruling was based on three key factual findings. First, the court found based on expert testimony that homeless persons “rarely, if ever,” choose to be homeless, and that instead people become homeless because of a financial crisis or because of physical or mental illness.<sup>313</sup> Based on the testimony, the court concluded that the plaintiffs were homeless involuntarily. Second, the court found that at the time of trial the city had fewer than 700 shelter beds available for some 6,000 homeless people, and that most homeless people were unable to turn to family or friends for assistance.<sup>314</sup> Therefore, the city could not argue persuasively that the homeless plaintiffs had made a deliberate choice to live in public places or that their decision to sleep in the park as opposed to some other exposed place could be

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311. *Id.* at 551, 553 (White, J., concurring). Justice White noted that in addition to having a home, the defendant also had a wife. *Id.* at 552.

312. *Id.* at 551.

313. *Pottinger*, 810 F. Supp. at 1557. It noted that the lack of low-income housing was a significant factor contributing to homelessness as well. The court reasoned that a person who loses his home due to economic hard times or illness “exercises no more control over these events than he would over a natural disaster.” *Id.* at 1564. It also reasoned, based on expert testimony, that the problems faced by homeless people, such as substance abuse and joblessness, are “both a cause and a consequence” of homelessness. *Id.* at 1558.

314. *Id.* at 1564. The court noted that an expert witness had testified that of the 700, 200 were “program beds” with special eligibility criteria, and thus not available to all homeless people. *Id.* The court also found that homeless people are socially isolated and do not generally have friends or family who can take them in. *Id.* at 1563. In addition, the court found that many forms of government assistance are unavailable to homeless people, many of whom are not eligible for any income assistance. *Id.* at 1564. As a result, the court concluded that “[e]xcept for a fortunate few, most homeless individuals have no alternative to living in public areas.” *Id.* at 1558.



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considered a “volitional act.”<sup>315</sup> Third, the court considered the conduct being punished: “essential, life-sustaining” activities such as sleeping and eating.<sup>316</sup> The court noted that plaintiffs were not challenging arrests for harmful conduct, and that “resisting the need to eat, sleep or engage in other life-sustaining activities is impossible.”<sup>317</sup>

Based on these findings, the court concluded that “the harmless conduct” for which plaintiffs were being arrested was “inseparable from their involuntary condition of being homeless.”<sup>318</sup> Consequently, arresting homeless people for harmless acts they are forced to perform in public effectively punished them for being homeless.<sup>319</sup> The court held that “[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the Eighth Amendment—sleeping, eating, and other innocent conduct.”<sup>320</sup>

Similarly, in *Johnson v. City of Dallas* the court found that the evidence before it demonstrated that there were not enough shelter beds in the city to accommodate the demand for them. The court also found that “for a number of Dallas homeless at this time homelessness is involuntary and irremediable. They have no place to go other than the public lands they live on. In other words, they must be in public. And it is also clear that they must sleep.”<sup>321</sup> The court concluded that in these circumstances punishing plaintiffs for sleeping in public punished them for their involuntary status, in violation of the Eighth Amendment.<sup>322</sup>

The court stated that “a critical distinction exists between status and act.”<sup>323</sup> Still, the “status of being” clearly could not be criminalized: “Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless because of their status as homeless, a status

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315. *Id.* at 1565.

316. City records indicated that most of the persons arrested were not disorderly, were not involved in any “drug activity,” and did not “pose any apparent harm to anyone.” *Id.* at 1560. Indeed, in many cases the persons arrested were asleep. *Id.*

317. *Id.* at 1565.

318. *Id.* at 1564.

319. *Id.*

320. *Id.* at 1565.

321. *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994).

322. *Id.* The court held that the other laws, which prohibited removing waste from trash receptacles and trespassing, did not violate the Eighth Amendment. *Id.* at 349-50. The court also noted its concern that accepting the argument that these acts are “the necessary correlative of homelessness would be to create a class of persons who are constitutionally immune from much of the criminal law.” *Id.* Further, the court noted, this could lead to “rationaliz[ing] constitutional protection for stealing food or clothing.” *Id.* at 350. The court however, noted that “[r]easonable minds could differ over the wisdom of criminalizing the conduct of a hungry man trying to feed himself by foraging through abandoned property in hopes of finding food thrown out by a restaurant or grocery store at the end of the day’s business.” *Id.* at 350, n.5. However, the court stated this was a matter for the legislature, not the courts. *Id.* See also Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

323. *Id.* at 349 (agreeing with *Joyce*, but disagreeing on significance).

forcing them to be in public.”<sup>324</sup> The court rejected the city’s contention that status may not be a “function of the discretionary acts of others;” in other words, that status could not depend on whether or not the city had provided sufficient shelter beds.<sup>325</sup> The court noted that the city could redress the ordinance’s unconstitutionality by providing some place for homeless people to be other than public places. However, the court emphasized that it was not requiring the city to provide any aid, but rather that “so long as the homeless have no other place to be, they may not be prevented from sleeping in public.”<sup>326</sup>

Because “status” may suggest immutability, a court may hesitate to adopt such a designation.<sup>327</sup> For example, the *Joyce* court said that granting homelessness “the protection of status” would have “staggering” effects because it would provide “constitutional protection to any condition over which a showing could be made that the defendant had no control.”<sup>328</sup> Given its adoption of the status versus conduct paradigm, the court apparently assumed that holding otherwise would require granting unconditional “protection” to anyone coming within the designation “homeless,” no matter the circumstances.<sup>329</sup>

Focusing instead on whether punishment is being imposed on acts that are volitional—as a matter of fact—is a more straightforward task with a more limited result. This is a factual inquiry that may vary from city to city and within the same city at different times. As such the constitutional “protection” it offers is limited to the relatively few cases where punishment is imposed for

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324. *Id.* at 350 (“It seems that situation would put one in the position of a Mr. Powell, who could be punished for conduct not inextricably intertwined with status.”).

325. The court’s response does not directly address the city’s point, which seems to be that status must be immutable. However, this view is not supported by *Robinson* or *Powell*. See discussion *infra*.

326. *Johnson*, 860 F. Supp. at 351.

327. A similar concern may explain the *Powell* plurality’s discussion of its reluctance to endorse a “constitutional doctrine of criminal responsibility.” *Powell v. Texas*, 392 U.S. 514, 534 (1968). This formulation suggests that the plurality had in mind categories of “conditions” that would as a constitutional matter preclude criminal sanction, as opposed to a principle which when applied would lead to outcomes dependent on the particular facts in a particular record. If the relevant question is considered to depend on particular facts, however, this concern should be obviated: rather than create a new “constitutional doctrine,” under this approach a court simply applies existing doctrine—the Eighth Amendment’s constraints on criminal law—to a particular fact pattern.

328. The court also dismissed as irrelevant plaintiffs’ contention that the city failed to provide sufficient housing because “status cannot be defined as a function of the discretionary acts of another.” *Joyce v. City of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994). This suggests a view of status that is inherent and immutable. Analytical concerns aside, the concept of “status” as a designation of immutable characteristics may be becoming obsolete. Even qualities such as race and gender may become less than fixed, either physically (e.g., transsexuals, mixed race people) or socially (as hopefully, they stop being a basis for differential treatment, possibly to be replaced by other bases).

329. It provided no explanation for its different conclusions concerning the involuntariness of addiction as opposed to homelessness; indeed, the court suggested that its views on addiction would be different as well were it not for *Robinson*. *Id.* The *Joyce* court dismissed as dicta Justice White’s discussion of his different view of the constitutionality of punishing Powell had he been homeless, and did not otherwise discuss Justice White’s opinion. *Id.*

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necessary, involuntary activities that cannot be avoided.<sup>330</sup> An analysis based on whether punishment is being imposed for conduct that could have been avoided is also more closely tailored to the principles underlying the Eighth Amendment's protections.<sup>331</sup>

The *Pottinger* analysis suggests a three part test for conducting this inquiry. First, are plaintiffs involuntarily homeless? Second, do plaintiffs have available to them nonpublic places to carry out the punished activities? Third, are the activities being punished involuntary? If the answer to each part of the inquiry, based on the facts, is affirmative, then under *Powell* the imposition of punishment in those circumstances violates the Eighth Amendment.

c. *The Right to Travel* While the right to travel is not specifically enumerated in the Constitution,<sup>332</sup> it has long been recognized by the Supreme Court as a "fundamental," constitutionally protected right.<sup>333</sup> The Court has described the right as the "free[dom] to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement."<sup>334</sup> However, the Court has also stated that the right does not protect "merely" movement<sup>335</sup> but rather includes a right to settle and abide in a place.<sup>336</sup>

In addition, and more broadly, the Court has recognized a "right of locomotion, the right to remove from one place to another according to

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330. In the absence of widespread, severe deprivation, this should encompass a relatively narrow universe; in the event of massive deprivation, a broader universe is appropriate.

331. This focus is compatible with the view that deterrence is a primary goal of punishment, since that which is unavoidable will not be deterred by being punished. It is consistent with the view that the goal of punishment is retribution, to the extent that society does not want to exact retribution for unavoidable and otherwise innocent acts. See Note, *Toward A Constitutional Definition of Punishment*, 80 COLUM. L. REV. 1667 (1980) (discussing theories of punishment). For a related discussion of a duress defense to criminalization efforts, see David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487 (1994).

332. The Court has suggested that this is because the right is "so elementary" that it is necessarily implicit in the Constitution, *United States v. Guest*, 383 U.S. 745 (1966); it has also said that the right derives from "the nature of our Federal Union and our constitutional concepts of personal liberty." *Shapiro v. Thompson*, 394 U.S. 618, 624 (1969). At times the Court has suggested a variety of sources for the right, including the Privileges and Immunities Clause, *United States v. Wheeler*, 254 U.S. 281 (1920); and the Commerce Clause, *Edwards v. California*, 314 U.S. 160 (1941); *Passenger Cases*, 49 U.S. (7 How.) 283 (1849). Justice Brennan has cited the Equal Protection Clause, *Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 n.2 (1986) (citing *Zobel v. Williams*, 457 U.S. 55, 67 (1982) (Brennan, J., concurring)), and the Due Process Clause, *Kent v. Dulles*, 357 U.S. 116, 125 (1958).

333. See *Shapiro v. Thompson*, 394 U.S. 618 (1969), and cases cited therein. For a discussion of the nature and origin of the right to travel and its application to laws prohibiting sleeping in public, see Paul Ades, *The Unconstitutionality of "Anti-Homeless" Laws*, 77 CAL. L. REV. 595 (1989).

334. *Shapiro*, 394 U.S. at 629.

335. *Id.*

336. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 262-63 (1974); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (right to enter and abide); *United States v. Wheeler*, 254 U.S. 281, 297-98 (1920) (Court recognized longstanding "right of citizens of the United States to reside peacefully in, and have free ingress into and egress from, the several states").

inclination.<sup>337</sup> Recently, noting that the “constitutional right to freedom of movement” was implicated,<sup>338</sup> the Court struck down a loitering statute requiring persons “loiter[ing]” or “wander[ing]” on the streets to produce identification.<sup>339</sup> In an earlier decision, striking down a law prohibiting loitering, the Court noted that “wander[ing]” and “stroll[ing]” are “historically part of the amenities of life.”<sup>340</sup>

Although the Supreme Court has not ruled on whether the right to travel includes the right to travel intrastate as well as interstate,<sup>341</sup> a number of lower federal as well as state courts have specifically so held.<sup>342</sup> For example, in *King v. New Rochelle Municipal Housing Authority*,<sup>343</sup> the Second Circuit invalidated as violative of the right to travel a county requirement that applicants for state-subsidized public housing have lived in the county for a year. The Court held that the right to travel includes the right to intrastate travel, reasoning that a contrary holding would lead to an absurd result: applicants moving to the county from out of state would be protected from the rule while state residents moving from another county would not be protected.<sup>344</sup>

State action may impinge on the right to travel in three separate ways.<sup>345</sup> First, action that “actually deters” travel impinges on the right. For example, a state durational residency requirement for welfare benefits “actually deters” travel because an indigent “will doubtless hesitate” to migrate knowing that if she needs assistance in her first year she will be unable to get it.<sup>346</sup> Second, state action impinges on the right when impeding travel is its “primary objective.” Examples include laws intended to discourage the “in-migration of indigents” or to “fence out” indigents seeking to move in specifically for higher welfare benefits.<sup>347</sup> Third, state action that uses “any classification

337. *Williams v. Fears*, 179 U.S. 270, 274 (1900).

338. *Kolender v. Lawson*, 461 U.S. 352 (1983) (holding statute was facially vague in violation of Due Process Clause).

339. *Id.*

340. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972).

341. *Maricopa County*, 415 U.S. at 255-56. Some early formulations define the right as being able to travel as freely outside one’s state as within it, see *Passenger Cases*, 49 U.S. (7 How.) 283, 492 (1844), suggesting an implicit acknowledgement of such a right. In *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993), the Court noted that, “a purely intrastate restriction does not implicate the right of interstate travel . . . .” *Bray*, 506 U.S. at 277; however, it was considering whether the right to interstate travel was violated, not whether a right to interstate travel exists. *Id.*

342. *E.g.*, *King v. New Rochelle*, 442 F.2d 646 (2d Cir. 1971); *Bykofsky v. Borough of Middletown*, 410 F. Supp. 1242 (M.D. Pa. 1975), *aff’d mem.*, 535 F.2d 1245 (3d Cir. 1975).

343. 442 F.2d 646 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971).

344. 442 F.2d at 648 n.6.

345. *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898, 903 (1986) (citations omitted).

346. *Shapiro v. Thompson*, 394 U.S. 618, 629 (1968). See *Soto-Lopez*, 476 U.S. at 903 (citing *Shapiro*, 394 U.S. 618 and *Crandall v. Nevada*, 74 U.S. (6 Wall.) 35, 46 (1867) for the “actually deters” prong of the right to travel test).

347. *Shapiro*, 414 U.S. at 628-31.

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which serves to penalize the exercise” of the right impinges on it.<sup>348</sup> Even a temporary deprivation of a “very important” benefit, including welfare benefits needed to procure the “necessities of life,” medical care, or the right to vote, “penalizes” travel.<sup>349</sup> State action that impinges on the right must be narrowly tailored to serve a “compelling” state interest in order to pass constitutional muster.<sup>350</sup>

Applying these principles, the *Pottinger* court held that the city’s enforcement of laws to prevent homeless people from sleeping in public, in the absence of any alternative, required them either to leave the city or to face arrest.<sup>351</sup> The court concluded that in these circumstances the city’s policies toward homeless people implicated their right to both intrastate and interstate travel, as well as their right to freedom of movement.<sup>352</sup> The court held that these policies violated the right under each of the three independent prongs of traditional right to travel analysis.<sup>353</sup> First, the city’s actions imposed a penalty by denying a “necessity of life”—sleep—to homeless people traveling into or seeking to remain in Miami.<sup>354</sup> In addition, the city’s actions deterred travel within the city of homeless people already there, and deterred others from entering the city.<sup>355</sup> Finally, the court found that the city intended to expel homeless people from the city.<sup>356</sup>

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348. *Soto-Lopez*, 476 U.S. 898, 903 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 340 (1972) (quoting *Shapiro*, 394 U.S. 618, 634 (1969))).

349. *Soto-Lopez*, 476 U.S. at 907 (discussing *Dunn*, 405 U.S. at 330 (striking down durational residency requirement for voting eligibility); *Shapiro*, 394 U.S. 61 (1969) (striking down durational residence requirement for welfare assistance); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (striking down durational residence requirement for free medical care)). State action that imposes a permanent deprivation of a “substantial” benefit such as civil service employment also impinges on the right. *Soto-Lopez*, 476 U.S. 907, 908 (discussing *Hooper v. Bernalillo*, 472 U.S. 612 (1985) (striking down a permanent tax exemption); *Zobel v. Williams*, 457 U.S. 55 (1982) (striking down dividend payments from natural resources)).

350. *Soto-Lopez*, 476 U.S. at 904. This is the language of equal protection review, which the Court applies where the third form of impingement is present—using a classification that serves to penalize travel—because challenges to such restrictions typically arise in the equal protection context. The court also noted that “regardless of the label the standard of review is the same.” *Id.* at 904 n.4.

351. *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1559 (S.D. Fla. 1992).

352. *Id.* at 1579.

353. *Id.* at 1580-81.

354. *Id.* at 1580.

355. *Id.* at 1581.

356. *Id.* at 1566. Other courts have followed similar reasoning. *E.g.*, *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 395 (Cal. Ct. App. 1994) (finding that normal public policy purposes were actually “a transparent manifestation of [a policy] to expel the homeless.”), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev’d*, 892 P.2d 1145 (Cal. 1995). The court held that the city’s practice infringed on plaintiffs’ fundamental right to travel and hence must be “strictly scrutinized” and “narrowly tailored.” under the equal protection clause. The court noted that the city had advanced no “compelling interest” that its practice was “narrowly tailored” to serve. Accordingly, its actions could not pass constitutional muster under the equal protection clause. *Id.*

The *Pottinger* court rejected plaintiffs’ claim that they are a “suspect class” noting that the Supreme Court has held repeatedly that classifications based on “wealth alone” are not suspect. 810 F. Supp. at 1578. (citing *Kademas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988) (differing effects on poor not subject to strict scrutiny); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (financial need not suspect

Other courts have rejected this analysis.<sup>357</sup> These courts have relied on three key—but flawed—considerations. First, they have held that in order to implicate the right to travel state action must treat residents and non-residents differently.<sup>358</sup> However, the right to travel is a fundamental “personal right,” not simply a right not to be treated differently;<sup>359</sup> the right protects against both the “erection of actual barriers” to travel and being “treated differently.”<sup>360</sup> Courts holding that differential treatment of residents and non-residents is required have apparently conflated right to travel and equal protection analysis. This may be because several important Supreme Court right to travel cases have involved durational residency requirements which by definition treat residents and non-residents differently.<sup>361</sup> Because they distinguished between classes of people, these cases were analyzed under the Equal Protection Clause; the right to travel was relevant to the “fundamental right” prong of that analysis.<sup>362</sup> Differential treatment is not required, however, to implicate the right to travel.<sup>363</sup>

Second, courts rejecting homeless plaintiffs’ right to travel claims have been concerned that recognizing the right would entail recognizing other rights as well. For example, in *Joyce*, the court noted that there is no fundamental right to sleep. Similarly, in *Tobe v. Santa Ana* the California Supreme Court noted that the creation or recognition of a constitutional right to travel does not impose an obligation on a state to provide the means to enjoy the right, noting that there is no constitutional right to housing.

These formulations suggest a basic misconception of the issues. An

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class); *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973) (filing fees held not suspect); *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1269 n.6 (3d Cir. 1992) (homeless are not suspect class)). However, the court did not that it was not “entirely convinced that homelessness as a class” has none of the “traditional indicia of suspectness.” *Pottinger*, 810 F. Supp. at 1578, (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

357. *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994); *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), *aff’d*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996) (rejecting facial challenge); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev’d*, 892 P.2d 1145 (Cal. 1995).

358. *Johnson v. City of Dallas*, 860 F. Supp. 354, citing *Attorney Gen. v. Soto-Lopez*, 476 U.S. 898 (1986); *Zobel v. Williams*, 457 U.S. 55 (1982); *Shapiro v. Thompson*, 394 U.S. 618 (1968).

359. *E.g.*, *United States v. Wheeler*, 254 U.S. 281, 293 (1920).

360. *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 277 (1993).

361. *See supra* note 349.

362. By classifying based on recency of arrival in a place, such laws necessarily both create classifications and affect travel. Moreover, in *Soto-Lopez*, the Court suggested in dicta that the Equal Protection Clause may be the source of the right, citing earlier opinions applying the right to durational residency requirements. However, it appears that while the Court has analyzed alleged violations of this fundamental right under the Equal Protection Clause—which requires strict scrutiny where fundamental rights are impinged, it has not located the source of the right in that Clause. *Compare Soto-Lopez*, 476 U.S. at 907, *with* cases cited *supra* note 349.

363. The *Tobe* court recognized that differential treatment was not required outside of the equal protection context. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 394 n.11 (1994), *superseded* by 272 P.2d 559 (Cal. 1994), *judgment rev’d*, 892 P.2d 1145 (Cal. 1995).

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obligation not to penalize or prevent the exercise of a right is different from an affirmative obligation to provide assistance.<sup>364</sup> Recognition of the right would not require a city to provide housing or to ensure that homeless people have a place to sleep.<sup>365</sup> Rather, it would prevent enforcement of a law when that law burdens the constitutional right.

Finally, courts rejecting homeless plaintiffs' right to travel claims have ruled that the public place restrictions did not create a direct barrier to travel but rather had an incidental impact which may make it more difficult for some—such as homeless people—to establish residence in the given city; the courts noted that the purpose of the laws was not to deter travel.<sup>366</sup> For example, in *Johnson v. City of Dallas*, the court stated that if the ordinances deterred anyone from moving to Dallas they did so only in the “same sense that anti-smoking ordinances or laws prohibiting the sale of alcohol in certain areas might deter smokers or drinkers from migrating to particular areas.”<sup>367</sup> According to the court, “any law might arguably affect one’s determination to remain or leave.”<sup>368</sup> Accordingly, the court found no violation of the right to travel.

As applied to homeless persons with no other alternative, however, some public place restrictions erect a very direct barrier to the right to travel and to “freedom of movement.” Laws and policies that prevent sleeping in public, when there is no other place for them to sleep, require homeless persons to leave. It is difficult to imagine a more direct barrier than expulsion. Courts holding otherwise appear to have wanted to avoid a result under which any law that burdens a group of people by making it difficult for them to remain in the city could implicate the right to travel. But making it impossible to live in a given place is different from merely making it more difficult. Expulsion—state action that requires residents to leave the jurisdiction by making it impossible to remain—clearly implicates their right to travel.

More difficult are cases involving narrower restrictions that make remaining in the jurisdiction difficult but arguably not impossible.<sup>369</sup> For

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364. In *Maricopa County*, for example, the Court did not consider whether or decide that in general governments must provide any “necessitates of life,” but simply that such a benefit—already provided—could not be withheld based on a durational residency requirement. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

365. A city might argue that in practice non-enforcement of such laws against homeless people would result in turning over certain public areas to homeless people. However, this is not the same as creating a legal “right” to sleep in public, and it does not necessarily follow from this reasoning. It is not the only option available to cities; they could also establish alternatives for their homeless residents. Further, in practice enforcement will also result in at least some homeless people living on the streets, in the absence of any alternative, and especially if neighboring localities establish similar policies.

366. *Joyce v. City of San Francisco*, 846 F. Supp. 843, 860-61 (N.D. Cal. 1994).

367. *Johnson v. City of Dallas*, 860 F. Supp. 344, 354 (N.D. Tex. 1994).

368. *Id.*

369. The trend appears to be toward increasingly narrower restrictions; it includes “pedestrian interference” ordinances. *E.g.*, BALTIMORE, MD. DISTRICT OF COLUMBIA ACT 10-98 (1995);

example, Seattle's "sidewalk" ordinance bans sitting or lying on sidewalks in downtown and other specified commercial zones between the hours of 7 a.m. and 9 p.m.<sup>370</sup> This imposes a much more limited prohibition than, for example, a broad ban on sleeping in public. But by preventing their access to needed resources—such as food pantries, medical clinics, and other services, located in the downtown area—it may also make impossible homeless persons' existence in the city.<sup>371</sup> Whether it does so or not is a factual question.<sup>372</sup> Less drastically, the ordinance may restrict them to certain places and times.<sup>373</sup> This may also implicate the right to travel by restricting homeless persons' freedom of movement to those areas and times.<sup>374</sup>

d. *Remedies* In fashioning relief, the *Pottinger* court ordered the city to create two "safe zones," public areas where homeless people would not be arrested for harmless, life-sustaining acts.<sup>375</sup> While not expressly stated, the judge's reasoning may have been that such zones would constitute places where homeless people could "go," thus altering the context and curing the constitutional violation.<sup>376</sup> This remedy may raise its own constitutional difficulties, and at least one suit has challenged "safe zones" created in a different jurisdiction.<sup>377</sup>

CINCINNATI, OH, Improper Solicitation Ordinance, modifying provisions of CINCINNATI, OH, CITY CODE Ch. 904, § 910 (1995); Seattle, Wash., Ordinance 113697 (Oct. 28, 1987), adding 12A.12.015 to SEATTLE, WASH. CITY CODE Chapter 12.12, Code ch. 12A.12.015 (1987).

370. Persons sitting at cafes, at bus stops while waiting for the bus, and on chairs provided by commercial establishments are specifically exempted from the ban. See *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1444-45 (W.D. Wa. 1994), *aff'd*, 64 U.S.L.W. 2598 (9th Cir. Mar. 18, 1996).

371. Because they generally cannot afford to pay for transportation, homeless people are likely to have to walk there, to become tired, and to need to rest. This is especially likely to be so for the significant proportions who are disabled or who are children. At the same time, they are unable to afford to sit down in restaurants, cafes, or other commercial establishments. They are thus likely to need to sit on public sidewalks to rest. The inability to do so may preclude them from traveling to the downtown area and to necessary survival resources such as food and health care. See National Law Center on Homelessness & Poverty, Brief of Amicus Curiae, *Roulette*, 850 F. Supp. 1442 (describing plaintiffs' affidavits).

372. In *Roulette*, the court rejected plaintiffs' right to travel challenge to the ordinance, ruling that the ordinance did not impede migration into commercial areas because it did not make it impossible to carry out essential activities there but rather only prohibited sitting or lying at certain times. *Roulette*, 850 F. Supp. at 1442. The court did not address plaintiffs' preclusion from essential services.

373. The result is akin to reverse safe zones, defining by omission places and times where homeless people may carry out necessary life activities.

374. This argument does not appear to have been made, nor was it addressed, in *Roulette*.

375. The remedy has been controversial, and criticized publicly by some, including this author. A Fort Lauderdale suit has challenged that city's "safe zones" as a "sanitary nuisance" and a violation of the Fifth, Eighth, Ninth and Fourteenth Amendments. Plaintiffs' Complaint, *McElroy v. City of Fort Lauderdale*, (No. 94-6266) (filed March 30, 1994) (S.D. Fla. 1994).

376. Following the *Pottinger* court's ruling, Dallas considered creating open air pavilions in an area outside downtown where homeless people would be allowed to sleep on the floor. Homeless people not in the pavilions would be subject to arrest for sleeping in public. Dallas, Tex., Ordinance 940,871 (Feb. 23, 1994) (proposed but not adopted). This was apparently intended to address constitutional concerns by providing some areas for homeless people to "be" and to carry out essential life-sustaining activities.

377. See *McElroy v. City of Fort Lauderdale*, No. 94-6266 (S.D. Fla. 1994).



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While they do provide a place to be, safe zones also restrict homeless people to those areas, narrowly limiting their ability to move about the city, and thus potentially infringing upon their right to travel. Further, essentially confining homeless people to specific zones may impose some standard of care on the city for those so confined, raising issues of adequacy of conditions within the zones. Establishing safe zones—and requiring homeless people to be in them in order to avoid arrest for the essential acts of living—may require cities to meet minimal levels of safety and sanitation.

In contrast, in *Johnson v. City of Dallas* the court simply enjoined enforcement of the anti-sleeping ordinance. The court did not order any affirmative relief. But the court specifically noted that if in the future sufficient shelter beds became available so that homeless Dallas residents in fact had an alternative to sleeping in public then the outcome of the constitutional analysis would be different: “One way to remove the impediment to that ordinance’s enforcement . . . would be for [homeless persons] to have some place to be other than in public. . . . But as long as homeless persons must live in public, their sleeping may not be constitutionally criminalized.”<sup>378</sup>

### C. *A Summary, and Some Conclusions*

Broad bans on begging in all public areas are unlikely to be upheld. Targeted bans on “aggressive” begging are also subject to invalidation as content-based restrictions under both the First Amendment and the Equal Protection Clauses.<sup>379</sup> Bans on “aggressive solicitation” are more likely to be upheld if they apply to all solicitation and are construed to ban conduct that is already covered by existing laws such as prohibitions on assault and battery. Consequently, restrictions that are constitutional are likely to be duplicative of existing laws.<sup>380</sup> Essentially, to be constitutional, restrictions on begging must not be recognizable as such. If the goal of such restrictions, however, is specifically to stop beggars from begging in public areas, then restrictions that are constitutional will likely be ineffective in meeting that goal.

Public place restrictions are more likely to withstand facial challenges than challenges to their application to homeless people. Courts have disagreed in their treatment of as applied challenges based on different interpretations of Eighth Amendment and right to travel principles.

Disagreement on the Eighth Amendment claims turns on the “status-

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378. *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994) (“It seems that situation would put one in the position of a Mr. Powell, who could be punished for conduct not inextricably intertwined in a status.”).

379. They may also raise enforcement concerns, inviting targeting of begging and beggars. *See Patton v. Baltimore*, No. S-93-2389 (D.Md. Aug. 19, 1994), slip op. at 45-48, and discussion *supra*.

380. Even narrow restrictions may be unconstitutional if they apply only to begging and not to other forms of solicitation. *See, e.g., Patton*, Civ. No. S-93-2389, slip op. at 65-67.

conduct" dichotomy. Courts reluctant to designate homelessness as a "status" have assumed that status is a rigid concept that confers unconditional, presumably lasting protection from otherwise applicable laws. This concept should be rejected, in favor of a fact-based approach focused on whether a given activity is voluntary or involuntary in a given jurisdiction during the relevant period of time. Under this approach, the availability of nonpublic places to homeless people for sleep and other life-necessities is of paramount importance. In the absence of such alternatives, criminal penalties on activities such as sleeping in public—as applied to homeless people—is cruel and unusual in violation of the Eighth Amendment. This approach allows for a changed result based on changed facts, and does not grant "unconditional protection" for all time and in all circumstances. It also focuses on conditions—which may change—rather than on permanent personal traits.<sup>381</sup>

Disagreement on right to travel claims turns on whether the right is viewed as only protecting against differential treatment of residents as opposed to non-residents. Here the underlying concern appears to be establishing limits, so that not every burden on living in a jurisdiction implicates the right to travel. Impossibility can help define a limit. A burden that as a matter of fact makes remaining in the jurisdiction impossible should implicate the right. Preclusion of a necessary life activity such as sleep should meet a test of impossibility. Because this is a factual inquiry, results are subject to change based on changed facts.

Where alternatives are available, constitutional concerns should be cured. If given alternatives, however, few homeless people are likely to live in public places. The constitutional cure thus appears to remove, in large part, the need for such bans.<sup>382</sup> In the absence of alternatives, therefore, public place restrictions are likely to be unconstitutional; given alternatives, they are likely to be moot.

"Safe zones" can also cure constitutional concerns by providing places for homeless people to "be."<sup>383</sup> Nonetheless, they raise their own difficulties.<sup>384</sup> As a constitutional matter, the restrictions implicate right to travel and freedom of movement concerns. Furthermore, the conditions within them may implicate the Due Process Clause. As a policy matter, they serve to isolate homeless people further, impeding their escape from homelessness.

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381. A sophisticated grasp of "status" may also operate in this way. *Johnson*, 860 F. Supp. at 350, is a good example. Such an approach defines status based on particular facts, which may change. In addition, as discussed *supra*, a rigid distinction between status and conduct is largely untenable.

382. This is not to suggest that there may not be some people who, whether homeless or not, and for whatever reason, may voluntarily choose to live outdoors; a jurisdiction may wish to pursue public place restrictions to address this possibility.

383. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1582 (S.D. Fla. 1992).

384. Plaintiff's Complaint at 1, *McElroy v. City of Fort Lauderdale*, No. 94-6266 (S.D. Fla. 1994).

## Homelessness and Its Criminalization

### IV. CAUSES OF CRIMINALIZATION: LAW AND POLICY

Commentators often assume that the increase in criminalizing actions by city governments is fueled by a public “backlash” against homeless people.<sup>385</sup> Local officials, sometimes also citing public opinion, generally outline aesthetic, health, and safety concerns in justifying the need for criminalizing measures. Such concerns may stand alone or they may be coupled with a stated goal of removing homeless people from all or part of the city; in some cases that goal is the primary or only reason for a given city policy. In addition, preventing urban decay and the commission of serious crimes are also cited. This Part reviews and discusses causes of and justifications for criminalizing responses to homelessness.

#### A. Public Opinion

Commentators have attributed the recent trend toward criminalization to a “backlash” by the public against homeless people. They argue that public sympathy for homeless people is waning, and that the public now simply wants to reclaim its public places. While during the 1980s the public was “sympathetic” to the plight of the homeless, it is said that the public now suffers from “compassion fatigue.” In some cases, this argument is combined with claims that homeless people are not in fact sympathetic, but rather blameworthy persons—such as drug addicts—who somehow chose their plight. The public may have had some indulgence for them in the past—or been deceived as to their true nature. Having run out of patience or learned the truth, however, the public will no longer put up with them. Hence, criminalization.<sup>386</sup>

Public opinion polls, however, do not support the view that the public is not sympathetic to homeless people. A December 1995 Gallup poll on public attitudes on homelessness found that 86% of the public are sympathetic to homeless people, and that 33% report that they feel more sympathy now than they did five years ago.<sup>387</sup> Of those who were sympathetic, one in six fear that they may become homeless themselves.<sup>388</sup> Moreover, polls and surveys

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385. See, e.g., Timothy Egan, *In 3 Progressive Cities, It's Law v. Street People*, N.Y. TIMES, Dec. 12, 1993, § 1, at 26; John Leo, *Distorting the Homeless Debate*, U.S. NEWS & WORLD REPORT, Nov. 8, 1993, at 27; Jill Smolowe, *Giving the Cold Shoulder*, TIME, Dec. 6, 1993, at 28. Andrea Stone, *For Homeless, Streets are Meaner*, USA TODAY, Nov. 25, 1991, at 3A; David Treadwell, *Middle-Class Backlash Hits at Panhandlers*, L.A. TIMES, Mar. 5, 1990, at A1.

386. See, e.g., Leo, *supra* note 385; Elena Neuman, *Cities Get Tough With the Homeless*, INSIGHT, Feb. 14, 1994, at 6; Smolowe, *supra* note 385; see also Ellickson, *supra* note 20, at 4 (citing “disorder fatigue”).

387. Constance Casey, *One in Six Americans Say they Fear They Could Become Homeless*, NEWHOUSE NEWS SERVICE, Dec. 28, 1995.

388. *Id.* This number only reflects those who are sympathetic; those who were not were not asked the question. Since some of those people may also fear becoming homeless, the true number may actually be greater than one in six, according to the Gallup Organization. *Id.* Interestingly, those who

indicate that the public supports funding for solutions to homelessness. A November 1993 Business Week/Harris poll found that 81% of the public would be willing to pay higher taxes to fund increased government aid to homeless people.<sup>389</sup> A Spring 1994 poll found that 65% of the public would be willing to pay higher taxes specifically to increase government spending on homeless people and that this number was fairly evenly divided among Democrats and Republicans; the poll takers also stated that this number has changed little over the past ten years.<sup>390</sup>

Polls also indicate that the majority of the public believes that homelessness is attributable to "structural" causes. A 1990 Columbia University national survey found that 71.6% of the public attributed homelessness to "forces people can't control, such as housing shortages or changes in the economy;" 62% cited substance abuse as well; 29% cited laziness.<sup>391</sup> A 1994 *Parade Magazine* national poll found that 56% of the public believe that homeless people are not responsible for the situation they are in; 20% said they believe homeless people are unwilling to work.<sup>392</sup> Polls also indicate that the majority of the public supports long-term solutions. The Columbia survey found that 72.5% believed that government should provide rent subsidies.<sup>393</sup> A 1988 Media General/Associated Press poll found that 62.8% believed that government should spend more to provide housing.<sup>394</sup> The *Parade* poll found that 65% believe that the government should build housing for homeless people.<sup>395</sup>

feared they could become homeless were primarily women under the age of 35. *Id.*

389. Mark N. Vamos, ed., *The Lowdown on High Taxes*, BUS. WEEK, Nov. 1, 1993, at 35. Similarly, a Fall 1995 Nielsen survey found that 95% of the public felt that alleviating hunger and poverty is an "important" issue in the 1996 Presidential and Congressional election; 68% said it was an "extremely" or "very" important issue. Nielsen Consumer Panel Data: Attitudes Toward Hunger and Poverty in the United States; Food Action and Research Center, Unprecedented Nielsen Panel Research of 16,000 households" (1995) (press release summarizing data). The survey found that as income decreased an increasing proportion of respondents said alleviating hunger and poverty is "extremely" important. *Id.*

390. Paul A. Toro & Manuel Manrique, *National Public Opinion on Homelessness: Is There Compassion Fatigue?*, in ANNUAL MEETING OF THE AMERICAN PUBLIC HEALTH ASSOCIATION (Nov. 1994); see also Barrett A. Lee, et al., *Images of the Homeless: Public Views and Media Messages*, in Fannie Mae, 2 HOUSING POLICY DEBATE 649, 658 (1991) (citing Media General/Associated Press national poll conducted in November 1988 in which 60.2% said government should spend more to help homeless, 51.9% of public willing to pay higher taxes; 1990 Columbia University national poll finding 71.2% believe federal government is doing too little to help; 53.4% would be willing to pay more taxes); *Parade Magazine National Poll*, PARADE MAGAZINE, Jan. 9, 1994 (77% believe government not doing enough; 65% would give if there were a check-off box on tax return form).

391. Lee et al., *supra* note 390, at 656. In each case the statistic shows those who believed that the factor contributes "a lot" to homelessness. *Id.* The 1988 Media General/Associated Press poll found that 45.4% said "society" is mainly at fault. *Id.*

392. PARADE, *supra* note 390, at 6.

393. Lee et al., *supra* note 390, at 658.

394. *Id.* A 1987 Nashville poll found that 78.9% believed government should provide more housing and 87.9% said government should increase substance abuse treatment. *Id.*

395. PARADE, *supra* note 390, at 5.

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Public opinion polls also indicate that the majority of the public does not perceive homeless people as especially dangerous and does not want them removed from the streets. According to the 1990 Columbia survey, 31% said they believed that homeless people are more dangerous than other people;<sup>396</sup> the *Parade* poll found that only 7% thought that homeless people are violent; 16% said they go out of their way to avoid homeless people.<sup>397</sup> The *Parade* poll also found that 82% of the public do not believe that homeless people should not be prohibited from public places, such as libraries, parks, and mass transit facilities; 69% said they did not want a legal procedure that would remove homeless people from the streets.<sup>398</sup>

Some commentators might argue that the prevalence of the “Not-in-My-Back-Yard” phenomenon, or “NIMBYism,” demonstrates the public’s antipathy to and fear of homeless people.<sup>399</sup> According to this argument, the majority of the public would oppose placement of a shelter, transitional home, or other program for homeless people in their own neighborhood. The Columbia University poll, however, found that 76.2% of the public would be willing to have housing for homeless people in their own neighborhood.<sup>400</sup> A 1987 Nashville poll found that 61.6% would be willing to have such housing in their neighborhoods.<sup>401</sup>

Nonetheless, this significant and consistent public support has not generally given rise to broad-based public campaigns to pressure government officials to provide such aid. Similarly, measures aimed against homeless people generally do not meet organized opposition from large numbers of people. The public’s desire for government officials to effect solutions to homelessness, articulated in response to questions, does not generally result in corresponding political action or protest.<sup>402</sup> As a result, there is a discrepancy between public opinion and the actions of public officials.

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396. Lee et al., *supra* note 390, at 653 (noting also that causal observations of homeless on street would tend to exaggerate public perception of deviance, since homeless persons behaving in peculiar way are more likely to stand out and be remembered). They are also more likely to be noticed and identified as homeless.

397. PARADE, *supra* note 390, at 5. Twice as many whites (20%) as blacks and Hispanics (10%) said they do this. *Id.* 60% thought that homeless people contribute at least somewhat to the rising crime rate. *Id.*

398. *Id.* at 4.

399. On NIMBYism generally, see NO ROOM FOR THE INN, *supra* note 12 (documenting instances of NIMBYism nationally); Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the “Not in My Backyard” Syndrome*, 43 SYRACUSE L. REV. 945 (1992); Michael Deer & Brendan Gleeson, *Community Attitudes Towards the Homeless*, 12 URB. GEOGRAPHY 155 (1991).

400. Lee et al., *supra* note 390, at 658. See also PAUL A. TORO & DENNIS M. MCDONNELL, BELIEFS, ATTITUDES AND KNOWLEDGE ABOUT HOMELESSNESS: A SURVEY OF THE GENERAL PUBLIC 5 (draft on file with author) (citing study showing public support for shelters in own neighborhood, especially if shelters small).

401. Lee et al., *supra* note 390, at 658.

402. The failure of government officials to address homelessness effectively, and the continued presence of homeless people on the streets, despite public support for solutions, may promote apathy or frustration with the political process.

At the same time, homeless people themselves face formidable barriers in making their views heard, influencing public opinion, or rallying public support. Effective participation in the political process is generally extremely difficult for homeless people: caught in a daily struggle for simple survival, they also generally lack access to basic communication devices, such as a telephone, mailing address, and money. Further, they may also be denied political rights, such as the right to vote, which are critical elements of participation in public debate and political process.<sup>403</sup> Illness, physical or mental, pose additional barriers for many homeless people. In addition, criminalization efforts themselves may burden their ability to express opposition, through both fear of and the need to avoid arrest.<sup>404</sup>

Proponents of government actions directed against homeless people include merchants or downtown associations;<sup>405</sup> increasingly they also include politicians seeking to assign blame for deteriorating city conditions.<sup>406</sup> In some cities such measures have been adopted following or as part of political campaigns.<sup>407</sup> Although they are in the minority, these groups are vocal, active, and able to exert political influence effectively.<sup>408</sup> But because their

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403. Indeed, homeless people have had to establish their right to vote through litigation, see, e.g., *Pitts v. Black*, 608 F. Supp. 696 (S.D.N.Y. 1984); Decision of the District of Columbia Board of Elections and Ethics, In the Matter of: The Applications for Voter Registration of Willie R. Jenkins, et al., June 7, 1984. Legislation pending in Congress to establish the right nationally has not been acted upon. See Voting Rights of Homeless Citizens Act of 1995, H.R. 55, 104th Cong., 1st Sess. (1995).

404. Avoidance of arrest can add significantly to the tasks needed to be accomplished in the daily struggle for survival, leaving little time or inclination for anything else. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (testimony of Professor James Wright stating that homeless people spend most of their time searching for food and shelter); Nancy Lewis, *Cities Accused of Hiding the Homeless*, WASH. POST, Dec. 18, 1991, at A20.

405. See, e.g., Brief of Amicus Curiae Central Dallas Association and American Alliance of Rights and Responsibilities, *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994); Ken Koehn, *Merchants Get Tighter Laws to Stop Beggars*, TAMPA TRIB., July 23, 1993; see also Deer & Gleeson, *supra* note 399; Margulies, *supra* note 399.

406. E.g., RIGHT TO REMAIN NOWHERE, *supra* note 9, at 102 (reporting New York City's effort to crack down on homeless who wash car windows for money); Sidran Letter, *supra* note 20, at 1 ("the conditions on our streets are intolerable and directly threaten the safety of all our citizens and the economic viability of our downtown and neighborhood business districts.").

407. In San Francisco, then-candidate Frank Jordan campaigned for Mayor on a promise to "clean up" downtown. See, e.g., Heather MacDonald, *San Francisco Gets Tough With the Homeless*, CITY JOURNAL, Autumn 1994, at 33. Similarly, Seattle City Attorney Mark Sidran campaigned on a promise to restore "order" to public areas. Carlton Smith, *This is Sidran's City*, SEATTLE WEEKLY, Mar. 9, 1994, at 17, 18. During his campaign for Mayor of New York, Rudolph Guiliani pointed to "squeegee men," street windshield washers seeking spare change, as significant causes of the decline in the quality of city life and sense of security. See RIGHT TO REMAIN NOWHERE, *supra* note 9, at 102; Francis X. Clines, *Candidates Attack the Squeegee Men*, N.Y. TIMES, Sept. 26, 1993, § 1, at 39. Each of these politicians appears to have been invoking, expressly or not, the "broken window" theory of urban decay articulated by James Q. Wilson and George Kelling. See discussion *infra* note 422.

408. This combination of factors creates special dangers. The inability or unwillingness of the majority of the public to exert political pressure on politicians to prevent criminalization responses, combined with the barriers to their own political process, leaves homeless people very vulnerable. These factors underscore the fundamental importance of the courts in setting constitutional limits on city actions.

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views cannot be seen as reflecting public opinion,<sup>409</sup> they should not provide a measure of public policy justification for a criminalization.

### B. *Other Justifications: Aesthetics, Economics, Safety, Health, and Magnets*

In addition to perceived public support for such policies, proponents of efforts to criminalize activities associated with homelessness also outline other, more targeted concerns. These fall into several often overlapping categories: aesthetic, economic, safety, and health. Some also assert an interest in preventing their city from becoming a “magnet” for homeless people. Some of these arguments raise significant concerns. However, carefully considered, they do not justify criminalization responses to homelessness.

Aesthetic concerns may include a desire to remove “unsightly people” from public view,<sup>410</sup> to make parks and other public areas more “pleasant,”<sup>411</sup> and to make downtown areas “welcoming to all.”<sup>412</sup> They may also include broad “quality of life” concerns, such as preserving and fostering parks and other public areas as places of “interaction, integration, relaxation and reflection.”<sup>413</sup> Aesthetic concerns may also include a desire to avoid the moral discomfort of confronting extreme destitution.<sup>414</sup>

An interest in a pleasing city appearance and environment may be legitimate, appropriate, and rational. However, it may also be a pretext—perhaps not a conscious one—for rationalizing bias against a particular group of people.<sup>415</sup> Given the composition of the homeless population, such bias may include racism and prejudice against people with disabilities.<sup>416</sup> Or it may simply be hostility toward and a desire to exclude a particular group of people who are viewed negatively because of untested stereotypes and

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409. There are some examples of public support for referendum items creating criminalization campaigns. These results, however, are also in some measure dependent on political influence and resources, which affect the ability to present and advocate for a position to the voters; they also may reflect a difference between the public in general and the voting public. The public opinion polls generally report increased sympathy by minority and poorer persons; these may be the groups who are less likely to vote. Moreover, other referendum votes (in San Francisco, for example) have yielded different results. See NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 33-34.

410. *E.g.*, “Police Memorandum Implementing San Francisco’s Matrix Program,” Appellant’s Opening Brief at 8, *Joyce v. City of San Francisco*, No. 95-16946 (9th Cir.) (filed Jan. 16, 1996).

411. *See, e.g.*, Robert Tier, *Let’s Restore Urban Civility to City Streets*, in 5 CUP REPORT 3, (publication of Center For Urban Policy Research at Rutgers University) (1994).

412. Amicus Memorandum of American Alliance of Rights and Responsibilities at 2, *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

413. *Id.* at 2.

414. *See Streetwatch v. National R.R. Passenger Corp.*, 875 F. Supp. 1055, 1066 (S.D.N.Y. 1995).

415. *E.g.*, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985).

416. It may also indicate bias against poverty. While classifications based on wealth alone do not violate equal protection standards, *see, e.g.*, *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450 (1988), they implicate policy concerns in a society dedicated to openness and opportunity.

stigmas.<sup>417</sup> Further, aesthetic considerations, even where not pretextual, should be given appropriate weight; they cannot, for example, outweigh a homeless person's need to eat, sleep, and live.

Another set of concerns is economic. For example, merchants and other business associations assert interests in encouraging shoppers and tourists to frequent downtown business areas; they fear losing clients who they believe may be frightened or put off by the presence of homeless people sleeping, sitting, or begging in the vicinity.<sup>418</sup> Cities also fear losing tourism and the patronage of organizations hosting conventions or other large gatherings, such as sports events, that bring visitors with the ability and inclination to spend money.<sup>419</sup> Some argue further consequences: the visible presence of homeless people discourages visitors to downtown areas, leading to urban flight, abandonment, and decay.<sup>420</sup>

Urban decay and middle class flight are significant problems that should be addressed. However, homelessness can hardly be considered a cause of these major problems; rather, they are the result of major economic changes affecting the structure of the national and global economy. Indeed, to some extent homelessness is a result of these changes. Further, criminalization efforts aimed at homeless people are unlikely to solve these problems; homeless people chased away from outside one storefront will simply appear outside another. In addition, some "economic" concerns may actually be a cover for "private" bias or a desire by merchants to comply with what they assume to be their customers' biases. Ultimately, the true solution is creating and repairing infrastructure, bringing resources and jobs, addressing the cost of living, and other major issues.

Public safety and crime prevention are also cited. For example, in justifying its Matrix Program, San Francisco claimed that "homeless encampments can lead to drug sales, vandalism . . . as well as facilitation of a host of other crimes."<sup>421</sup> This argument assumes that homeless people themselves are likely to commit crimes. In addition, and much more broadly, proponents of

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417. See *infra* note 425.

418. Tier, *supra* note 411, at 3; see also Complaint for Declaratory Relief at 11, *Clements v. City of Cleveland*, 1:94-CV-2074 (N.D. Ohio) (filed Sept. 27, 1994); Amicus Memorandum at 3, *Joyce*, 846 F. Supp. 843.

419. See, e.g., NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 55-56 (describing Atlanta's need to remove homeless people, claiming "pre-Olympic" renovations); Gwen Ifill, *Sympathy Wanes for Homeless*, WASH. POST, May 21, 1990, at A1, A6. Note also Atlanta's 1989 idea of a downtown "hospitality zone," which would remove homeless people from area to make more hospitable to tourists and businesses. See RIGHT TO REMAIN NOWHERE, *supra* note 9, at 28, 29. See also *Patton v. City of Baltimore*, Civ. No. S-93-2389 (D.Md. Aug. 19, 1994), slip op. at 36 (discussing city's and businesses' concern with tourism).

420. Tier, *supra* note 411, at 3; Amicus Memorandum at 2, *Joyce*, 846 F. Supp. 843.

421. *Joyce*, 846 F. Supp. at 847-90. The list also included "public elimination of bodily wastes, and other unhealthful conditions" as part of the "other crimes," perhaps illustrating both the lack of precision and the underlying assumptions of criminality at work.



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such ordinances argue that they are necessary to prevent more serious crimes. Relying on the “broken windows” theory,<sup>422</sup> this argument proposes that failure to penalize the commission of minor “crimes” creates a sense of “disorder” that allows more serious crimes to be committed by others.<sup>423</sup> In another formulation, minimum standards of conduct and civility must be enforced to maintain a sense of “order.”<sup>424</sup>

This justification presents several difficulties. The first is factual: the evidence is that homeless people are not more likely to be perpetrators of serious crime than any one else; in fact they are more likely to be victims.<sup>425</sup> Further, there is evidence that the majority of the public does not perceive homeless people as perpetrators of crime.<sup>426</sup> The second is perhaps more fundamental: to the extent the crime justification is concerned with future criminal acts by others—based on the “broken window” or any other theory—it is potentially illogical and certainly unfair. Punishing one group of people to prevent a different group of people from committing crimes is clearly and fundamentally at odds with basic concepts of equity.<sup>427</sup>

Significantly, the authors of the now classic article on the “broken windows” theory have themselves raised questions about the legality and equity of a police program to implement the theory, noting that it might not be “easily reconciled with any conception of due process or fair treatment.”<sup>428</sup> Further, in a more recent article, they suggest that law enforcement may not be the only means of repairing the “broken window.” They describe a situation where merchants concerned about homeless persons creating a mess and frightening

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422. This theory posits that if one window in a building is broken, and left unrepaired, then eventually all the other windows will also be broken. In essence, the theory holds, the failure to repair sends the message that “no one cares,” and permits and invites such actions. This leads to fear and silence as the public begins to avoid the streets and other people on them. This abandonment then makes the area vulnerable to serious crime. According to this theory, “[t]he unchecked panhandler is, in effect, the first broken window.” See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, March 1982, at 36, 37 [hereinafter Wilson & Kelling, *Broken Windows*].

423. See, e.g., Amicus Memorandum at 7, *Joyce*, 846 F. Supp. 843; Malcolm Gladwell, *In N.J. Enclave, Order is the Law*, WASH. POST, Aug. 30, 1995, at A1; James Kunen, *Quality and Equality*, NEW YORKER, Nov. 28, 1994, at 9; Smith, *supra* note 407; Sidran Letter, *supra* note 20, at 4.

424. Sidran Letter, *supra* note 20, at 2-4.

425. E.g., Pamela Fischer, *Criminal Behavior and Victimization Among Homeless People*, in HOMELESSNESS: A PREVENTION ORIENTED APPROACH 92 (Rene Jahiel ed., 1992) (proportion of arrests for serious offenses—i.e. excluding “relatively trivial” crimes, primarily street disorder—lower among homeless than general population; many serious crimes such as burglary were directly associated with homelessness, e.g. sleeping in abandoned buildings); Pamela Fischer, *Criminal Activity Among the Homeless: A Study of Arrests in Baltimore*, 1 HOSPITAL & COMMUNITY PSYCHIATRY 46 (1988) (study of 634 arrests of 275 homeless people); cf. Rodney Luckenbuck & Paul Acosta, *The Street Beggar: Victim or Con Artist?*, POLICE CHIEF, Oct. 1993, at 126, 128 (police interviews of 36 beggars found most had criminal histories; of these, 31% were “low grade” misdemeanors). For purposes of this discussion, street disorder crimes should be excluded to avoid circularity in the justification.

426. See Lee et al., *supra* note 390, at 653; PARADE, *supra* note 390, at 5.

427. See *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Edwards v. California*, 314 U.S. 160 (1941).

428. Wilson & Kelling, *Broken Windows*, *supra* note 422, at 35.

customers outside their stores complained to a police officer; instead of rousting them the police suggested that the merchants hire the homeless persons to clean the streets in front of the stores. The merchants agreed, solving their problem and also assisting the homeless persons.<sup>429</sup>

Health concerns are also frequently cited. For example, concern about eating, cooking, urinating and defecating in public, and the possible attraction of vermin, setting of fires, and general unsanitary conditions are cited.<sup>430</sup> In addition, some cite concerns about homeless people living in unsanitary conditions, arguing that ordinances penalizing their activities are necessary for their own protection. Some also argue that this is necessary for their mental as well as physical health, and that enforcement of such ordinances will force them to get help.<sup>431</sup>

Public health concerns are undoubtedly important; and eating, sleeping, urinating, and defecating in public present sanitation problems. However, criminalizing these activities—in the absence of alternative places to perform them—is not a rational or effective response. Because these activities must be performed somewhere, if there is no alternative then they must be performed in public. Criminalizing the performance of these activities in public cannot and will not prevent it. Conversely, providing alternatives—such as public toilets, day centers, shelter, or housing—would be both rational and effective. Similarly, concern about the health of homeless people living on the streets is important; however, criminalization does not address this concern. Again, the difficulty is with the absence of alternatives; an effort to “force” people to seek unavailable help is irrational and doomed to failure.<sup>432</sup>

Finally, another set of arguments is that criminalization measures are necessary in order to prevent a given city from becoming a “magnet” for homeless people.<sup>433</sup> Such concerns are sometimes coupled with the belief that certain parts of the country, such as the South, are more attractive to homeless

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429. James Q. Wilson & George L. Kelling, *Making Neighborhoods Safe*, ATLANTIC MONTHLY, Feb. 1989, at 48.

430. See, e.g., Brief Amicus Curiae, American Alliance for Rights and Responsibilities at 3; Appellants' brief at 14, *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994) (citing internal city memoranda); Brief of Amicus Curiae Central Dallas Association and American Alliance for Rights and Responsibilities at 10, *Johnson v. City of Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 387-88 (Cal. Ct. App. 1994) (citing internal city memoranda), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995).

431. See, e.g., Brief Amicus Curiae Central Dallas Association and American Alliance for Rights and Responsibilities at 10, *Johnson*, 860 F. Supp. 344; Vivian Rothstein, *Their Space is Our Space*, N.Y. TIMES, Dec. 19, 1993, § 4, at 13.

432. Similarly, concern that beggars are using funds collected to satisfy addictions are misplaced in the absence of available treatment. See U.S.C.M. 1995 REPORT, *supra* note 4, at 45 (noting lack of services to address substance abuse).

433. For a general description of the “magnet” theory, see WRIGHT, *supra* note 23, at 148-49 (“In discussing this issue with policy makers at the city level, I have often sensed a subtle, certainly unspoken feeling that if the shelters are made *too* nice, it will only encourage homelessness.”) (emphasis in original).

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people because of the warmer climate.<sup>434</sup> This view, however, is not geographically limited.<sup>435</sup> The concern is that homeless people will move to a city in large numbers unless steps are taken to make it “inhospitable” to them.

This “magnet” justification is both illegitimate and largely unfounded. First, to the extent that it is predicated on an effort to “fence out indigents” it is potentially unconstitutional.<sup>436</sup> Second, it is not true that significant numbers of homeless people migrate to areas perceived as more attractive or less punitive; in fact, the majority of homeless people are long-time residents of their communities.<sup>437</sup> Further, to the extent that homeless people do migrate, the evidence is that they do so in order to find work, not to find more favorable street conditions.<sup>438</sup>

### C. Criminalization as Public Policy

Criminalizing homelessness is poor public policy for several reasons. First, as discussed earlier, it may be constitutionally suspect, especially in contexts where the city offers inadequate resources to its homeless residents.<sup>439</sup> In addition to the inherent problems this poses, it means that they are subject to legal challenges, which may take years to resolve, regardless of outcome. Especially in cases involving new or potentially gray areas, this possibility is significant. The danger is that scarce city resources are expended on litigation which, at most, will allow the city to arrest and fine its destitute residents.<sup>440</sup>

In addition, criminalization measures do not reflect public sentiment; at best, they represent the will of a vocal, politically influential minority. They also reflect the frustration of the majority and powerlessness of those most directly affected—homeless people. This combination of factors makes for especially poor, and dangerous, public policy.

Criminalization responses foster divisiveness, pitting “us”—the

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434. E.g., Sue Ann Presley, *Homeless Feel Chill*, WASH. POST, Dec. 28, 1995, at A1; comments of Mayor Bruce Tarrt of Austin, Texas, see *supra* note 81.

435. E.g., San Francisco’s efforts to become less attractive cited in *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994). It is also not limited to the streets; it is made as an argument against providing shelter and other services, as well as welfare benefits. E.g., Jonathan Rabinovitz, *Fighting Poverty Programs*, N.Y. TIMES, Mar. 24, 1996, § 1, at 41; Cheryl Weitzman, *Why Welfare Reform’ seems Likely to Aggravate the Cost Dilemma*, WASH. TIMES, Oct. 16, 1995 (discussing “race to the bottom”); see also *NO ROOM AT THE INN*, *supra* note 12.

436. See *United States v. Guest*, 383 U.S. 745 (1966), and text accompanying note 332.

437. See *WRIGHT*, *supra* note 23, at 70.

438. See *WRIGHT*, *supra* note 23, at 69-71 & n.24; *HUD SHELTER REPORT*, *supra* note 7, at 29.

439. See discussion *supra* Section I.A.

440. Criminalizing responses are a poor use of fiscal resources. For example, according to a local group the city of Atlanta spends \$300,000 to \$500,000 a year to incarcerate homeless people for sleeping and begging in public. *ATLANTA TASK FORCE FOR THE HOMELESS, THE CRIMINALIZATION OF POVERTY* (Sept. 1993). In San Francisco, police spent 450 hours and \$11,000 to arrest 15 people for begging. *RIGHT TO REMAIN NOWHERE*, *supra* note 9, at 40. In addition to these direct expenditures, cities also use resources in crafting, promoting, and passing new laws, and defending their actions in legislative and judicial forums.

housed—against “them”—the homeless. For example, the San Francisco “Matrix Quality of Life” program, designed to remove homeless people from downtown areas, suggests by its very name that homeless people are not part of the “life” the “quality” of which city government is concerned with protecting.<sup>441</sup> In some areas, much political effort is expended in battles waged between supporters of homeless people and proponents of “anti-homeless” measures, deepening political, as well as social divisions.<sup>442</sup>

Further, the criminalization response repeats the mistakes of the emergency shelter response to homelessness, and it does so with much harsher and more dangerous consequences. Like emergency relief, criminalization quickly, and seemingly simply, addresses a primary, visible symptom of homelessness: the presence of homeless people in public places. However, neither response addresses the causes, and thus neither solves the problem. In both cases, although to significantly different degrees, the problem is often worsened, as homeless people become further marginalized and isolated.<sup>443</sup> Further, criminalization significantly lowers any standards of acceptable survival conditions, converting the debated living options into jail versus the streets, instead of the streets versus a shelter, or a shelter versus housing. The result is a debate that avoids meaningful, long term solutions to homelessness.

Perhaps most fundamental, criminalization responses do not and cannot work. Like all human beings, homeless people must eat, sleep, and occupy space. If they are prohibited from essential acts of existence in one area, they will go somewhere else. Barring an express effort to exterminate them,<sup>444</sup> homeless people cannot simply be made to disappear from all parts of a city, a state, or the country.

## V. BEYOND CRIMINALIZATION? A PROACTIVE APPROACH

City responses to court rulings overturning or restricting laws and practices criminalizing homelessness suggest three general approaches. In a “reactive” response, some cities are adopting much more narrowly drawn restrictions on both begging and public place use, perhaps in an effort to avoid or create a defense to litigation. As discussed above, however, such laws are unlikely to be both constitutional and effective in meeting their proponents’ goal of removing homeless people or beggars from city areas. Thus this effort is both

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441. See *Joyce v. City of San Francisco*, 846 F. Supp. 843, 846-49 (N.D. Cal. 1994).

442. For example, in Seattle a bitter political battle is being waged by advocates protesting the City’s policies. See Smith, *supra* note 407; see also Seattle Displacement Coalition, *What You Always Wanted to Know About Mark Sidran* (on file with author); Sidran Letter, *supra* note 20.

443. In both cases, it may become more difficult to escape homelessness through employment: potential employers generally disfavor applicants living in shelters, as well as applicants with arrest records.

444. This has actually been suggested in some places. See *supra* note 205.

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misguided and unlikely to succeed.

Other cities are creating special outdoor areas similar to the “safe zones” ordered by the court in *Pottinger*. As noted above, this approach is also fundamentally flawed. Homeless people are likely to be isolated in the zones, cut off from social services, jobs, and the rest of society.<sup>445</sup> In addition, confinement to the zones will likely accentuate the divisive difference between “us” and “them,” fostering ghettoization, and perhaps leading to additional punitive or even violent responses.<sup>446</sup> Safe zones also threaten to sanction living literally on the streets as an acceptable form of survival in American society. Just as during the 1980s, temporary shelter became the housing of last resort for the poor,<sup>447</sup> “safe zones” threaten an even lower floor, making the streets the “housing” of last resort.<sup>448</sup>

In contrast to the reactive and safe zone approaches, some cities are beginning to respond proactively to address the problem of homelessness. Rather than attempting to sweep away or isolate homeless people, these cities are initiating substantive programs including housing, health, and employment measures. This approach aims to address the reasons that people are on the streets, and to provide solutions.

Probably the most significant current example of this approach is a Dade County, Florida initiative. In October 1993, Dade County, which encompasses Miami, began collecting a meal tax to raise funds to provide assistance to its homeless residents, including not only shelter but also housing, job training, and social services. The 1% tax, limited to restaurants grossing over \$400,000 annually, is expected to raise \$7.5 million in its first year.<sup>449</sup>

The meal tax came after the court’s ruling in *Pottinger*, and most likely as a direct reaction to it. Moreover, it came after years of local government efforts to remove homeless residents by arresting them, harassing them, and confiscating their belongings. It is therefore not only an example of a positive, proactive government program, but also an example of the significance of litigation as a strategy to produce such a response. The meal tax is still in its initial stages, and there has been some dispute over how the funds generated will be used. Some controversy centers around the extent to which they will be used for emergency shelter as opposed to permanent housing, employment

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445. See *McElroy v. Fort Lauderdale*, No. 94-6266 (filed Mar. 30, 1994), (S.D. Fla. 1994).

446. See generally *HOMBS*, *supra* note 73.

447. See, e.g., Hopper, *supra* note 23; see also CHRISTOPHER JENKS, *THE HOMELESS* 103-06 (1994).

448. Safe zones may simultaneously establish a new low for de facto “private” space, while also further eroding the concept of “public” space, contrary to the intent of their proponents. In addition, the downward slide may occur in increments, as in the shelter example, where shelter ranges from beds to cots to floor space. See *HUD SHELTER REPORT*, *supra* note 7.

449. Larry Rohrer, *Miami Meal Tax to Aid Homeless*, N.Y. TIMES, Aug. 3, 1993, at A10; Dade County Homeless Task Force, Jan. 28, 1993 (documents on file with author).

services, health care, and substance abuse treatment.<sup>450</sup> Nonetheless, the tax is a positive step forward and a dramatic contrast to both the reactive and the safe zone approaches.

In Reno, Nevada, a proactive response was initiated directly as a result of litigation: by consent decree following a successful constitutional challenge to that city's anti-sleeping laws, the city agreed to open a day center for homeless people—who otherwise had nowhere to go but the streets. Previously, the city had no day center at all.<sup>451</sup>

Nashville, Tennessee, offers an example of the proactive approach in the panhandling context. There, local merchants proposed the adoption by the city council of an anti-panhandling ordinance. In response, a local advocacy group for homeless people arranged a meeting among the merchants and service providers, as well as a local judge, who explained that the aggressive behavior the merchants feared was already prohibited by existing law. As a result of the group's discussion, the merchants agreed to the withdrawal of the proposed ordinance and instead initiated a pilot parking meter program to collect money to fund services to homeless people.<sup>452</sup>

The proactive response seeks to address the causes of homelessness and to provide solutions. To the extent the focus of this effort is emergency aid, such as providing more shelter, it will be of limited effectiveness, although clearly less destructive than arresting people or herding them into remote "zones."<sup>453</sup> To the extent it focuses on addressing the causes of homelessness, by providing affordable housing, adequate income, job training and placement, and social services, it has the potential to be both humane and effective.<sup>454</sup> Instead of dividing their citizens, cities should work at forging the consensus to support such solutions.<sup>455</sup>

In addition to working toward longer-term solutions, cities can also respond constructively to immediate concerns. For example, making public toilets available is more constructive, and effective, than making urinating in public a crime. Ensuring that day labor pools—where many homeless people find

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450. See, e.g., Letter from Gale Lucy, Miami Coalition for the Homeless, to Maria Foscarinis, National Law Center on Homelessness and Poverty (May 9, 1995) (on file with author).

451. See generally *Benavidez v. City of Reno*, No. 92-25 (D. Nev. filed July 28, 1992).

452. See NO HOMELESS PEOPLE ALLOWED, *supra* note 9, at 102, 103.

453. While they do provide emergency aid, shelters are a short-term "Band-Aid" measure that does nothing to address the underlying causes of homelessness. Indeed, the emergency-shelter response may fuel public frustration by creating the illusion that real solutions are in place, when in fact they are not.

454. See, e.g., Richard Wallace, *Experts Say Give Long-Term Aid, Not Shelters*, MIAMI HERALD, June 23, 1993, at 1B.

455. The Dade County meal tax is an example of a local initiative aimed at long-term solutions. To the extent the County intends to use the tax revenues to provide housing, job training and placement and social services, it will begin to provide solutions to homelessness residents. Local governments pressing the federal government for more resources may be in a better position to do so having undertaken such initiatives on their own.

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work—meet basic standards is more constructive than criminalizing begging.<sup>456</sup> Establishing community councils that bring together business groups, homeless people, and service providers can create dialogue and help forge political consensus.<sup>457</sup>

### VI. CONCLUSION

Criminalization responses to homelessness are inhumane, do not solve the problem, and are subject to constitutional challenge. Where constitutional violations are present, courts can and should step in to invalidate city laws and policies. Judicial intervention is especially important given the difficulty of using the political process to oppose them. Cities have the power to avoid such intervention by rejecting criminalization responses, and they should do so.<sup>458</sup> Such responses foster divisiveness, waste resources, and divert effort from more positive responses. They are also unlikely to be effective, particularly as they become more widespread: people who are homeless ultimately must live somewhere. Rather than penalizing their homeless residents, cities should work constructively to address the problem of homelessness. By taking this approach, cities can constitutionally and responsibly address the common interest of those who are homeless and those who are not: ending homelessness.

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456. Such regulation has been proposed in Atlanta (proposed ordinance on file with author).

457. See, e.g., RIGHT TO REMAIN NOWHERE, *supra* note 9, at 94-96, 127-29 (initiatives in St. Paul and Las Vegas). See also Maria Foscarinis & Jim Scheibel, *Homelessness is the Foe, not the Homeless; Criminalizing Street Dwellers Won't Solve the Problem, We Need Solutions that Address the Cause*, L.A. TIMES, Dec. 16, 1993, at B7.

There is also an important role for the federal government to play. The civil rights division of the Department of Justice should defend civil rights of homeless people against "anti-homeless" actions; it made a start in that direction by filing an amicus curiae brief in support of homeless appellees in *Tobe v. Santa Ana*, 27 Cal. Rptr. 2d 386 (Cal. Ct. App. 1994), *superseded*, 272 P.2d 559 (Cal. 1994), *judgment rev'd*, 892 P.2d 1145 (Cal. 1995), and in *Joyce v. City of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994). At the same time, other departments—especially Housing and Urban Development, Health and Human Services and Labor—should be implementing and mobilizing support for long-term solutions to homelessness. See PRIORITY: HOME!, *supra* note 26.

458. As the court in *Johnson* noted: "Although as a matter of constitutional jurisprudence the City is not required to provide shelter or housing to anyone, the City is required to enforce its ordinances constitutionally. As noted above, so long as the homeless have no other place to be, they may not be prevented from sleeping in public. One way to remove the impediment to that ordinance's enforcement, though, would be for them to have some other place to be other than in public." *Johnson v. Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994).

