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NOTES

“AMERICA’S LOST CAUSE”: THE UNCONSTITUTIONALITY OF CRIMINALIZING OUR COUNTRY’S HOMELESS POPULATION

JAMIE MICHAEL CHARLES

[The Constitution] was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

- Justice Cardozo in *Baldwin v. G.A.F. Seelig, Inc.*¹

[I]n not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation.

- Justice Byrnes in *Edwards v. California*²

I. INTRODUCTION

Everything that is done has to be done somewhere. This truism holds special meaning for the homeless, who lack private property on which to conduct certain necessities of life such as sleeping, and instead must engage in these activities on public lands.³ Unfortunately, recent trends in criminalizing homelessness have left these individuals with no place to conduct their daily activities without fear of persecution and abuse.⁴ Many of the new ordinances result in the forced migration of the homeless, and are proliferating with virus-like speed as cities attempt to divert those displaced by other towns from their communities.⁵ As a result, many homeless individuals are left with no option but to risk imprisonment while carrying out the daily activities necessary for their surviv-

¹ *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 523 (1935).

² *Edwards v. California*, 314 U.S. 160, 173-74 (1941).

³ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) (recognizing a place to sleep and cover from the elements, among other things, as necessities of life).

⁴ See, e.g., SARASOTA, FLA., CITY CODE ch. 34, art. V, § 34-41 (2005); PHOENIX, ARIZ., CITY CODE ch. 23, art. III, § 23-48.01 (1981) (“It shall be unlawful for any person to use a public street, highway, alley, lane, parkway, [or] sidewalk . . . for lying [or] sleeping . . . except in the case of a physical emergency or the administration of medical assistance.”).

⁵ See Randy Diamond, *Homeless Face a Cold Shoulder Across US*, CHRISTIAN SCI. MONITOR, Dec. 10, 1990; but cf. Rob Teir, *Restoring Order in Urban Public Spaces*, 2 TEX. REV. L. & POL. 255, 257 (1998) (perfect example of flawed opposition argument to freedom of movement for homeless individuals).

al.⁶

Anti-homeless ordinances take many different forms. Some ban sleeping or camping on public lands, while others restrict the ability of the homeless to solicit donations or occupy sidewalks in urban centers.⁷ Certain cities have even criminalized attempts by charitable organizations to house and clothe the homeless.⁸ In addition to imposing civil fines for transgressions, these ordinances commonly permit criminal penalties such as incarceration for up to six months.⁹ Opponents have repeatedly challenged the constitutionality of these measures in courts across the United States.¹⁰ However, despite occasional opinions favoring the minority, the prevailing mood on the part of the judiciary appears to be one of indifference to the homeless' plight; judges choose not to find anti-homeless ordinances unconstitutional when such a finding would be well within their discretion.¹¹

This Note demonstrates that statutes and ordinances criminalizing the behavior of the homeless, specifically anti-sleeping and anti-camping ordinances, are per se illegal, violate multiple rights protected by the United States Constitution, and are inadvisable and counter-productive from a policy perspective. Part II provides an overview of the plight of the homeless, examining various statutes and ordinances criminalizing homelessness, legal challenges to those statutes, and the general attitudes of state and federal courts to such challenges. Part III examines the legal frameworks of the most fruitful challenges to the criminalization of homelessness, both under the Eighth Amendment's prohibi-

⁶ See Jonathan Saltzman & Erica Noonan, *Antipoverty Group Sues Framingham Over Rights; Says Town Targets Disabled People*, BOSTON GLOBE, Oct. 25, 2007, at A1.

⁷ See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000) (Municipal ordinance prohibiting camping on public property is rationally related to a legitimate city interest, not unconstitutionally vague, and did not punish status in violation of the Eighth Amendment.); *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996) (holding that an ordinance prohibiting sitting or lying on the sidewalks at certain hours of the day did not violate First Amendment rights to free speech or Fourteenth Amendment right to substantive due process); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995) (holding that an ordinance banning camping and storage of personal property in public areas does not impermissibly restrict the right to travel or unconstitutionally permit punishment for status).

⁸ See generally *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225 (E.D. Va. 1996) (holding that enforcement of zoning ordinances threatening plaintiff churches' giving free meals to the poor on its premises violated their free exercise of religion pursuant to the First Amendment).

⁹ See, e.g., SANTA MONICA, CAL., MUN. CODE art. IV, ch. 4.54, § 4.54.040 (1994) ("Any person who engages in abusive solicitation as defined herein shall be guilty of a misdemeanor and, upon conviction, shall be fined an amount not to exceed five hundred dollars or be imprisoned for a period not to exceed six months, or both.").

¹⁰ See generally *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

¹¹ See *Joel*, 232 F.3d 1353; *Roulette*, 97 F.3d 300; *Tobe*, 892 P.2d 1145.

tion against cruel and unusual punishment and the right to travel inherent within the Equal Protection Clause of the Fourteenth Amendment. Finally, Part IV takes these legal challenges a step further, advocating for the invalidation of anti-homeless ordinances for both legal and policy reasons.

II. LEGAL LANDSCAPE

Over the past twenty-five years, the trend in cities around the country has been to increase criminalization measures targeting unsightly homeless populations in an effort to remove these undesirables from view.¹² Such measures miss the mark. They fail to offer any meaningful remedy to the homeless people's plight even as recent surveys reveal increasing requests for shelter.¹³ Many anti-homeless ordinances also raise constitutional concerns, with homeless individuals and the organizations that support them bringing numerous challenges over the past several decades.¹⁴ The current status of homelessness in our country is unsurprising when juxtaposed with several ordinances passed to supposedly deal with the problem, or, as is often the case, relegate the problem from public view.¹⁵ When faced with challenges to these ordinances, U.S. courts take conflicting positions and have not definitively resolved the dispute.

A. Statutes Criminalizing Homelessness

In 2006, a survey of twenty-three U.S. cities conducted by the U.S. Conference of Mayors showed an increase in the number of homeless individuals as well as the number of unmet requests for shelter.¹⁶ The Federal Department of Housing and Urban Development estimated that in 2005, the homeless population was approximately 754,000,¹⁷ a number far exceeding the estimated

¹² See NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8 (Jan. 2006) [hereinafter A DREAM DENIED], available at <http://www.nationalhomeless.org/publications/crimreport/report.pdf>.

¹³ *Id.* at 8 (citing U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 24-CITY SURVEY 14-16 (2005)).

¹⁴ See discussion *infra* Part II.B.

¹⁵ See, e.g., Judd Slivka, *Some Fear WTO Will Displace Homeless; City Told Not to Hide Its Poor for Meeting*, SEATTLE POST-INTELLIGENCER, Sept. 13, 1999, at B1 ("A coalition of six homeless-rights groups has sent an open letter to Seattle's police chief . . . 'We are . . . concerned that some who are embarrassed by the dramatic disparities in wealth-and-living standards in Seattle will attempt to use "law enforcement" measures to make these disparities less visible' A city ordinance, passed before the APEC event, made it easier for the police to arrest people for vagrancy by prohibiting panhandling, drinking and urinating in public.").

¹⁶ See U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 23-CITY SURVEY 4 (2006) [hereinafter U.S.C.M. 2006 REPORT], available at <http://www.usmayors.org/hungersurvey/2006/report06.pdf>.

¹⁷ Stephen Ohlemacher, *Gov't Estimates 754,000 Homeless People*, USA TODAY, Feb.

“438,300 emergency and transitional year-round beds” available nationwide.¹⁸ Furthermore, according to the U.S. Conference of Mayors, sixty-eight percent of the cities surveyed reported a five percent increase or greater in requests for emergency shelter over the course of a year.¹⁹ The survey also revealed that approximately twenty-three percent of all such shelter requests went unmet.²⁰

The reduction in other types of housing besides emergency shelters further compounds the problem. Between 1955 and 1980, state mental hospital beds were reduced from 559,000 to 150,000.²¹ A subsequent study of urban homeless conducted by the Urban Institute in 1987 revealed that ten percent of those sampled were previously committed to a mental institution.²² A 2006 study by the U.S. Conference of Mayors shows that the figure of homeless people who are mentally ill increased to sixteen percent.²³ Moreover, the wait for assisted housing took an average of nineteen months in 2002 and stretched to as many as thirty-six months in certain cities.²⁴ While a 2005 survey reflected a twenty-three percent increase in the total number of housing programs available between 1995 and 2005,²⁵ requests for housing by low-income and homeless individuals increased in eighty-six percent of the cities surveyed in 2006.²⁶ The gap between the total number of homeless and available shelter means that, in 2005, over 300,000 people faced the nightly dilemma of having nowhere to sleep other than public places.²⁷ Also in 2005, the number of homeless on the streets exceeded 700,000,²⁸ suggesting that homeless individuals performed essential bodily functions—such as sleeping and using the bathroom—in public. They must also beg for spare change to obtain essential resources to pay for transportation to shelters, and relevant fees charged by the shelters.²⁹

Unfortunately, these statistics coincide with a recent increase in all catego-

28, 2007, available at http://www.usatoday.com/news/washington/2007-02-28-1221135236_x.htm.

¹⁸ See U.S. DEP'T OF HOUS. AND URBAN DEV., OFFICE OF CMTY. PLANNING AND DEV., ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS (Feb. 2007) [hereinafter 2007 HUD HOMELESS REPORT], available at <http://www.huduser.org/Publications/pdf/ahar.pdf>.

¹⁹ U.S.C.M. 2006 REPORT, *supra* note 16, at 4.

²⁰ U.S.C.M. 2006 REPORT, *supra* note 16, at 4, 59.

²¹ MARTHA R. BURT, OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s 121 (1992).

²² *Id.* at 12, 25.

²³ U.S.C.M. 2006 REPORT, *supra* note 16, at 48.

²⁴ See U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES: A 25-CITY SURVEY 101 (2002).

²⁵ 2007 HUD HOMELESS REPORT, *supra* note 18, at 38.

²⁶ U.S.C.M. 2006 REPORT, *supra* note 16, at 81.

²⁷ See Ohlemacher, *supra* note 17.

²⁸ *Id.*

²⁹ Beth D. Jarrett & Wes Daniels, *Law and the Homeless: An Annotated Bibliography*, 85 LAW LIBR. J. 463, 483 n.85 (1993).

ries of laws criminalizing the actions of homeless individuals.³⁰ A survey of 224 cities, conducted jointly by the National Coalition for the Homeless and the National Law Center on Homelessness and Poverty, revealed increases in all three major areas of criminalization: anti-panhandling and loitering ordinances, anti-camping and anti-sleeping measures, and police sweeps.³¹ Sixteen percent of cities maintained laws that imposed non-discretionary citywide bans on camping and loitering, while twenty-one percent imposed a citywide ban on begging.³² The percentages rose dramatically when accounting for ordinances that limit their ban on such activities to certain public places.³³

The harshest ordinances are public place restrictions that, explicitly or implicitly, attempt to forbid the presence of the homeless within city limits. These ordinances typically take the form of anti-sleeping, anti-camping or anti-lodging ordinances.³⁴ Broad ordinances such as section 31-13 of the Dallas City Code punish any individual who "sleeps or dozes in a street, alley, park, or other public place . . ."³⁵ Narrower ordinances prohibit specified conduct at certain times and locations. For example, many cities prohibit sleeping in parks or beaches at night.³⁶ These codes and ordinances, by their very nature, impose a heavy burden primarily on the homeless as such individuals are the principal—if not the only—group subject to arrest as a result of such enactments.

The City Code of Sarasota, Florida contains one of the most blatantly anti-homeless lodging ordinances currently on record.³⁷ Pursuant to the terms of the ordinance, the mere fact that an individual is homeless provides sufficient probable cause for making an arrest.³⁸ The ordinance prohibits the use of any public or private property "out-of-doors for lodging," which includes "[b]eing in a tent, hut, lean-to, shack or in a temporary shelter or being asleep atop or cov-

³⁰ A DREAM DENIED, *supra* note 12, at 9 (Report shows a twelve percent increase in laws prohibiting begging, a fourteen percent increase in laws prohibiting sitting or lying in public spaces, and a three percent increase in laws prohibiting loitering or vagrancy.).

³¹ *Id.* at 16-17.

³² *Id.* at 9.

³³ *Id.*

³⁴ See, e.g., LAWRENCE, KAN., CITY CODE ch. XIV, art. IV, § 14-417(C)-(D) (2005) ("It shall be illegal to engage in . . . camping on any public right of way or public property . . . [u]pon conviction for a violation of this section, the violator shall be fined in an amount not to exceed \$1000 dollars, or sentenced to a jail term not to exceed 6 months, or both."); ORLANDO, FLA. CITY CODE tit. II, ch. 43, § 43.52(2) (2000) ("Camping is prohibited on all public property . . .").

³⁵ DALLAS, TEX., CITY CODE vol. II, ch. 31, § 31-13 (a)(1) (1992), available at <http://dallascityhall.com/html/codes.html>.

³⁶ See, e.g., SANTA MONICA, CAL., MUN. CODE art. 4, ch. 4.08, § 4.08.095 (1994).

³⁷ See SARASOTA, FLA., CITY CODE ch. 34, art. V, § 34-41 (2005); see, e.g., A DREAM DENIED, *supra* note 12, at 10 (listing Sarasota, FL, as the meanest city towards homeless individuals in the U.S. for 2005).

³⁸ SARASOTA, FLA., CITY CODE ch. 34, art. V, § 34-41(c)(5) (2005).

ered by materials.”³⁹ To establish probable cause for an arrest, an officer must first find that an individual is “in a temporary shelter or being asleep atop or covered by materials” in a designated area without permission; secondly, the officer must make at least one additional finding set forth in the ordinance.⁴⁰ The most relevant finding is that “[t]he person is asleep and when awakened states that *he or she has no other place to live*.”⁴¹ The penalty for violation of this provision is a fine of up to five hundred dollars, a maximum of sixty days imprisonment, or both.⁴² While most statutes and ordinances lack such explicit language regarding the criminalization of homelessness, their effect is no less taxing on the homeless community.⁴³

In addition to place restrictions, homeless individuals are often subject to predatory police “sweeps” of downtown areas and suspected homeless encampments.⁴⁴ These sweeps often involve selective police enforcement of rarely prosecuted public space laws.⁴⁵ Their purpose, often expressly stated, is to create a culture of fear and exclusion for the homeless that ultimately leads to their expulsion from the city.⁴⁶ For example, Mayor Oscar Goodman of Las Vegas—voicing his support for habitual sweeps of homeless encampments and a proposal to privatize city parks—stated, “I don’t want them [here]. They’re not going to be [here].”⁴⁷ In November 2004, Little Rock, Arkansas police took steps to “sweep” twenty-seven known homeless encampments that officers previously agreed to leave intact.⁴⁸ Such sweeps are particularly prevalent during tourism season, as cities attempt to preserve their tourist base.⁴⁹ Penalties incurred for violations of these sporadically enforced laws vary great-

³⁹ § 34-41.

⁴⁰ § 34-41(c).

⁴¹ § 34-41(c)(5) (emphasis added).

⁴² SARASOTA, FLA., CITY CODE ch. 1, § 1-11(a) (2008).

⁴³ See, e.g., PORTLAND, OR., MUN. CODE tit. 14, ch. 14A.50, §§ 14A.50.020, .030 (2006) (prohibiting camping on public property or obstruction of public sidewalks in a designated area); SEATTLE, WASH., MUN. CODE tit. 15, ch. 15.48, § 15.48.040 (2005) (“No person shall sit or lie down upon a public sidewalk . . . during the hours between seven (7:00) a.m. and nine (9:00) p.m. in the following zones . . .”).

⁴⁴ See, e.g., *Johnson v. Bd. Of Police Comm’rs*, 351 F. Supp. 2d 929 (E.D. Mo. 2004) (challenging police sweeps conducted on July 4th weekend without probable cause and based on largely fabricated charges).

⁴⁵ See *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1151 (Cal. 1995) (homeless individuals arrested for rarely enforced laws such as jaywalking and removing trash from a bin).

⁴⁶ See Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 552 (2006).

⁴⁷ A DREAM DENIED, *supra* note 12, at 11.

⁴⁸ NAT’L COAL. FOR THE HOMELESS, ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES 16-17 (2004) [hereinafter ILLEGAL TO BE HOMELESS], available at <http://www.nationalhomeless.org/publications/crimreport2004/report.pdf>.

⁴⁹ Saelinger, *supra* note 46, at 552.

ly, from as little as a ten dollar fine to significant jail time.⁵⁰

A third category of laws impacting the homeless are anti-loitering and anti-panhandling ordinances. Although they are often vague as to prohibited conduct, these laws tend to target solicitation in general or begging in particular.⁵¹ Certain cities opt for broad bans on such conduct. In 2005, Atlanta, Georgia passed a fairly comprehensive ban on panhandling—begging passersby for food or money—in the “tourist triangle” and anywhere in the city after sunset.⁵² In accord with the anti-panhandling ordinance, Atlanta police arrested a homeless Hurricane Katrina evacuee who was asleep in his car with his family at a mall in the affluent suburb of Buckhead.⁵³

The more common trend among cities in proscribing unwanted conduct via this third category of ordinances, however, is to apply the prohibition to defined places or times.⁵⁴ Again, these ordinances often impact multiple groups but their common thread remains the heavy burden they place on homeless individuals forced to perform life-sustaining functions in public places.⁵⁵ A recently amended Pittsburgh panhandling ordinance prohibits solicitation within twenty-five feet of an outdoor eating establishment, any admission line, entrance to a place of religious assembly or money-dispensing areas, and within ten feet of any food vendor or bus stop.⁵⁶ A third violation of the ordinance carries a possible fine of three hundred dollars and up to thirty days in jail.⁵⁷ In Milwaukee, Wisconsin, homeless individuals received tickets for loitering while waiting for soup kitchens to open.⁵⁸ The passage and enforcement of such ordinances in recent years spawned a large number of legal challenges by homeless individuals and advocacy groups, testing the waters of the judicial system in an attempt to regain basic rights.⁵⁹

These ordinances take many forms and often raise constitutional concerns. For example, ordinances criminalizing panhandling and loitering raise First

⁵⁰ *Id.* at 552-53; *see, e.g.*, ATLANTA, GA., CODE OF ORDINANCES ch. 43, § 43-1 (2005); PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. I, ch. 602, § 602.04 (2005).

⁵¹ *See* A DREAM DENIED, *supra* note 12, at 14; *see also* CHICAGO, ILL., MUN. CODE ch. 8-4, § 8-4-010(f) (1958) (carries a maximum fine of five hundred dollars).

⁵² ATLANTA, GA., CODE OF ORDINANCES ch. 43, § 43-1 (2005).

⁵³ A DREAM DENIED, *supra* note 12, at 10-11.

⁵⁴ *See* Maria Foscarnin, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 21 (1996).

⁵⁵ This note refers interchangeably to “life-sustaining functions” and “necessities of life.” In accordance with *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), any law infringing on these necessities burdens the fundamental right to travel and is therefore unconstitutional unless narrowly tailored to meet a compelling state interest.

⁵⁶ PITTSBURGH, PA., CODE OF ORDINANCES tit. 6, art. I, ch. 602, § 602.04 (2005); A DREAM DENIED, *supra* note 12, at 42.

⁵⁷ § 602.05(c)(2).

⁵⁸ *See* ILLEGAL TO BE HOMELESS, *supra* note 48, at 33.

⁵⁹ *See* discussion *infra* Part II.B.

Amendment free speech concerns and are challenged as unconstitutional time, place, and manner restrictions.⁶⁰ Homeless individuals have challenged anti-camping ordinances on several occasions with varied success, claiming violations of procedural and substantive due process.⁶¹ In these cases, indigents and advocacy groups challenged ordinances both facially and as applied on vagueness grounds.⁶² Moreover, many cities recently stepped up anti-homeless measures, choosing to criminalize pedestrian acts of kindness such as feeding the homeless.⁶³ These recent expansions on anti-homeless ordinances to encompass restrictions on feeding, aimed primarily at churches and other religious groups, implicate the Free Exercise Clause of the First Amendment.⁶⁴

B. *Legal Challenges to Criminalization of Homelessness*

Over the past twenty-five years, cities have increasingly enacted laws and policies that target homeless individuals living in public spaces.⁶⁵ As a result, homeless individuals, and organizations such as the National Coalition for the Homeless that support them, have vigorously challenged laws which violate their constitutional rights.⁶⁶ To comprehend the plight of homeless individuals, it is important to understand the nature of deprivations these laws impose on the homeless, and the uphill battle these individuals face in the majority of U.S. courts. Not all courts are hostile to the homeless' plight.⁶⁷ However, success-

⁶⁰ See *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1201, 1203 (C.D. Cal. 1997):

In assessing the constitutionality of a regulation that limits the time, place or manner of speech in a public forum, a court must first determine whether the statute is content-neutral or content-based. If it is content-based, the court applies strict scrutiny to determine whether the statute is tailored to 'serve a compelling state interest and is narrowly drawn to achieve that end.' However, if the statute is content-neutral, the government may enforce its rules provided that they (1) are narrowly tailored to serve a significant governmental interest, and (2) leave open ample alternative channels for communicating the information.

(internal citations omitted); *L.A. Alliance for Survival v. City of Los Angeles*, 993 P.2d 334, 341 (Cal. 2000).

⁶¹ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165-67 (1972); *Joel v. City of Orlando*, 232 F.3d 1353, 1359-60 n.3 (11th Cir. 2000) (plaintiffs challenged the law on its face and as applied); *Roulette v. City of Seattle*, 97 F.3d 300, 305-06 (9th Cir. 1996) (plaintiffs brought only facial due process challenge).

⁶² *Id.*

⁶³ See *Stuart Circle Parish v. Bd. of Zoning Appeals*, 946 F. Supp. 1225, 1236 (E.D. Va. 1996).

⁶⁴ U.S. CONST. amend. I, cl. 1 ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."); see *Daytona Rescue Mission v. City of Daytona Beach*, 885 F. Supp. 1554, 1557 (M.D. Fla. 1995).

⁶⁵ See *A DREAM DENIED*, *supra* note 12, at 8.

⁶⁶ *Id.* at 79-134.

⁶⁷ See *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and*

ful constitutional challenges to anti-homeless laws remain the minority.⁶⁸ While not representative of the entire country, the increased level of litigation in the Ninth and Eleventh Circuits illustrates the plethora of legal challenges and the overall reaction of courts to these appeals for help.⁶⁹

1. Anti-Camping Challenges

The common trend in recent years has been to uphold most types of anti-homeless laws and ordinances.⁷⁰ However, a minority of courts recognize the validity of constitutional challenges when ordinances criminalize life-sustaining functions performed in public by homeless individuals. One example is *Pottinger v. City of Miami*,⁷¹ in which plaintiffs⁷² alleged that the City of Miami had a custom, practice and policy of arresting and harassing homeless people for engaging in the basic activities of daily life in public places.⁷³ The plaintiffs further alleged that thousands of homeless individuals had been arrested and spent time in jail for violating city ordinances designed to drive the homeless from public places.⁷⁴

The U.S. District Court for the Southern District of Florida found that the city's practice of arresting the homeless for sitting, sleeping or eating in public violated their fundamental right to travel, as well as the Eighth Amendment's prohibition against cruel and unusual punishment.⁷⁵ Taking into account the testimony of several experts, the court recognized the often involuntary nature of homelessness.⁷⁶ The court also embraced the idea that "idleness and poverty should not be treated as a criminal offense."⁷⁷ The court acknowledged that laws preventing homeless individuals from seeking shelter can violate the right to travel by forcing the homeless to face the choice between being arrested for

vacated as moot, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement); *Justin v. City of Los Angeles*, 2000 U.S. Dist. LEXIS 17881 (C.D. Ca. 2000); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

⁶⁸ See discussion *infra* Parts II.B.1 & II.B.2.

⁶⁹ See discussion *infra* Parts II.B.1 & II.B.2.

⁷⁰ See *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996); *Greater Cincinnati Coal. for the Homeless and Charles Gooden v. City of Cincinnati*, 56 F.3d 710 (6th Cir. 1995); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

⁷¹ *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

⁷² *Id.* at 1553-54 (plaintiffs were part of a class representing 6,000 homeless people living in the City of Miami).

⁷³ *Id.* at 1554.

⁷⁴ *Id.*

⁷⁵ U.S. CONST. amend. VIII; *id.* at 1564 ("[A]rresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.").

⁷⁶ *Pottinger*, 810 F. Supp. at 1563.

⁷⁷ *Id.* at 1562 n.17 (citing *Robinson v. California*, 370 U.S. 660 (1968)).

violating a law or leaving a jurisdiction altogether.⁷⁸

Pottinger, however, is the exception rather than the rule. Several years later, in *Tobe v. City of Santa Ana*,⁷⁹ the California city charged several homeless people with violating city ordinances prohibiting all camping in public spaces and the storage of personal property on public lands.⁸⁰ A police sweep of the downtown area culminated in officers arresting a large number of the homeless for rarely enforced criminal violations, such as jaywalking and blocking passageways.⁸¹ The homeless challenged the arrests on the grounds that the ordinance and accompanying police conduct was the apex of a four-year effort to expel homeless persons from the city.⁸² They further challenged the ordinance for vagueness, violating the fundamental right to travel, and permitting unconstitutional criminalization of status in violation of the Eighth Amendment.⁸³

Despite recognizing that police acted improperly and acknowledging that many homeless had no choice but to remain on the streets,⁸⁴ the Supreme Court of California rejected the petitioners' facial challenges.⁸⁵ The court found that the ordinances did not impermissibly criminalize involuntary conduct in violation of the Eighth Amendment or infringe on the homeless' right to travel.⁸⁶ Implicit in the court's decision—and a distinguishing factor from cases such as *Pottinger*—was Santa Ana's prior settlement of a similar lawsuit, conditioned on the stipulation that the city would cease enforcing discriminatory laws against "undesirables."⁸⁷ However, the city presented no evidence of officials ever abiding by the terms of the settlement.⁸⁸

Moreover, the court indicated that the ordinance's stated purpose did not

⁷⁸ *Id.* at 1580.

⁷⁹ *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

⁸⁰ SANTA ANA, CA., MUN. CODE art. VIII, § 10-402 (1992) ("It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided: (a) any street; (b) any public parking lot or public area, improved or unimproved."); SANTA ANA, CA. MUN. CODE art. VIII, § 10-403 (1992) ("It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council: (a) any park; (b) any street; (c) any public parking lot or public area, improved or unimproved.").

⁸¹ *Tobe*, 892 P.2d at 1151.

⁸² *Id.* (There was evidence of a 1988 policy to show vagrants that they were not welcome in the city. A police task force would continually move vagrants from locations they frequented, and the city began closing parks at night, constantly turning on park sprinklers, and taking other similar measures).

⁸³ *Id.* at 1151-52, 1161-67.

⁸⁴ *Id.* at 1151-52.

⁸⁵ *Id.* at 1150.

⁸⁶ *Id.* at 1161-67.

⁸⁷ *Id.* at 1159.

⁸⁸ *Id.*

suggest that it would be enforced solely against the homeless.⁸⁹ This contention holds less weight when considering what the ordinance prohibits. Common sense suggests that no individual would choose to sleep or camp on a street or in a public parking lot unless he or she had no residence to which he or she could retreat. Finally, the court's dismissal of the right to travel argument rested largely on the belief that the burden placed on petitioner's right to travel was indirect and incidental.⁹⁰ Thus, the court subjected the ordinance to fairly lax rational basis review.⁹¹ In reality, the proliferation of anti-camping laws had a far more severe effect on these individuals' right to travel.⁹²

The U.S. District Court for the District of Arizona came to a similar conclusion one year later in *Davison v. City of Tucson*.⁹³ The Tucson City Council passed a resolution requiring the dissolution of a homeless campground that had existed within city limits for the past decade without incident.⁹⁴ Several residents of the campground brought Eighth and Fourteenth Amendment challenges, claiming that the resolution imposed cruel and unusual punishment and violated their fundamental right to travel.⁹⁵ Despite recognizing that "the destitution of the homeless is sobering, and clearly is a societal problem demanding attention," and that "the threat of irreparable injury to [p]laintiffs in the instant case is haunting and undeniable," the court denied a preliminary injunction and struck down both claims summarily.⁹⁶ The court accepted the justifications—quite typical in cases concerning the homeless—of crime prevention, health and sanitation set forth by the city.⁹⁷ Additionally, because the petitioners' suit was a preemptive action and petitioners had not yet been arrested for violating the ordinance, the court dismissed their Eighth Amendment claim because such a claim requires an arrest.⁹⁸ Moreover, the court found that the petitioners sought to remain in one place, rather than to travel, and that the Fourteenth Amendment does not protect such a right.⁹⁹ Citing *Tobe*, the court found that the right to travel does not "endow citizens with a 'right to live or stay where one will.'"¹⁰⁰

In 2000, the Eleventh Circuit Court of Appeals upheld an anti-camping ordi-

⁸⁹ *Id.*

⁹⁰ *Id.* at 1163-64.

⁹¹ *Id.* at 1164.

⁹² See *infra* Part IV.A.1.

⁹³ *Davison v. City of Tucson*, 924 F. Supp. 989 (D. Ariz. 1996).

⁹⁴ *Id.* at 991.

⁹⁵ *Id.* at 992-93.

⁹⁶ *Id.* at 992.

⁹⁷ *Id.* at 991.

⁹⁸ *Id.* at 992-93.

⁹⁹ *Id.* at 993. But see *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) (right to travel ensures "freedom to enter and abide" (emphasis added)).

¹⁰⁰ *Id.* (quoting *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1165 (Cal. 1995)).

nance in *Joel v. City of Orlando*.¹⁰¹ Petitioner Joel was arrested for sleeping on the sidewalk in violation of section 43.52 of the City Code,¹⁰² an anti-camping provision, and spent a day in jail.¹⁰³ The ordinance prohibits “sleeping or otherwise being in a temporary shelter out-of-doors,”¹⁰⁴ and, similar to the Sarasota anti-camping ordinance,¹⁰⁵ the code instructed police that certain factors were indicative of camping prohibited by the ordinance.¹⁰⁶ Once again, the mere fact that an individual was homeless sufficed to find him in violation of the statute.¹⁰⁷ Notwithstanding the fact that sleeping is a life-sustaining function, the court found that sleeping outside was not a fundamental right, dismissing the Fourteenth Amendment claim under rational basis review.¹⁰⁸ The court then proceeded to dismiss petitioner’s Eighth Amendment claim, concluding that the ordinance did not criminalize status because space was available at a local homeless shelter and therefore there was no need for Joel to sleep on the streets.¹⁰⁹ However, the court’s understanding of “availability” of emergency homeless shelters was overly broad in interpreting the legality of challenged ordinances.¹¹⁰ For instance, a shelter with open beds may not be accessible to a homeless individual if located in a remote part of the city.¹¹¹

More recently, the Ninth Circuit, in *Jones v. City of Los Angeles*, found that a Los Angeles ordinance which criminalized sleeping in public violated the Eighth Amendment’s prohibition against cruel and unusual punishment because it punished involuntary conduct.¹¹² The court found that the city could not criminalize the unavoidable act of sitting, lying, or sleeping at night while being homeless.¹¹³ Petitioners were arrested for violating section 41.18(d) of the Los Angeles Municipal Code,¹¹⁴ which carried a potential fine of up to one

¹⁰¹ *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000).

¹⁰² *Id.* at 1356 (“Section 43.52 of the City Code provides: . . . (2) ‘Camping is prohibited on all public property, except as may be specifically authorized by the appropriate governmental authority.’”).

¹⁰³ *Id.* After being released from jail, Joel was arrested the following day for violating the same ordinance and spent nearly a week in jail before the prosecutor declined to prosecute.

¹⁰⁴ *Id.*

¹⁰⁵ See *supra* notes 37-42 and accompanying text.

¹⁰⁶ *Joel*, 232 F.3d at 1356.

¹⁰⁷ *Id.* (citing ORLANDO, FLA. CITY CODE tit. II, ch. 43, § 43.52(2) (2000)) (“[T]he suspect is asleep and when awakened volunteers that he has no other place to live.”).

¹⁰⁸ *Id.* at 1357-59.

¹⁰⁹ *Id.* at 1362.

¹¹⁰ See discussion *infra* Part IV.A.2.

¹¹¹ See discussion *infra* Part IV.A.2.

¹¹² *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement).

¹¹³ *Id.* at 1132.

¹¹⁴ *Id.* at 1123 (“No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.”).

thousand dollars and/or imprisonment of up to six months.¹¹⁵ The court found the need to perform acts such as sleeping to be the "unavoidable consequence[] of being human" and found the conduct at issue to be "involuntary and inseparable from status," which cannot be criminalized without violating the Eighth Amendment.¹¹⁶ Unfortunately, while reaching settlement with those victimized by police in 2007, the city required that the Ninth Circuit vacate its opinion as moot.¹¹⁷

2. Challenges to Anti-Panhandling and Loitering Statutes

Judicial indifference is not limited to challenges brought against anti-camping ordinances. In *Roulette v. City of Seattle*,¹¹⁸ the Ninth Circuit Court of Appeals rejected a facial constitutional challenge brought by homeless persons to a city ordinance prohibiting sitting or lying on public sidewalks.¹¹⁹ For homeless individuals, the ordinance indirectly limited their sole means of sustenance—soliciting donations.¹²⁰ The ordinance defied them to either remain standing for fourteen consecutive hours or to vacate the downtown and commercial areas of Seattle—the most fruitful areas for soliciting alms.¹²¹ Petitioners claimed the ordinance violated their right to free speech pursuant to the First Amendment by preventing the expressive conduct of soliciting, and that the ordinance further violated their right to substantive due process.¹²²

Much like the opinion in *Davison v. City of Tucson*,¹²³ the court summarily dismissed both claims.¹²⁴ In response to petitioner's contention that the ordinance was a "thinly veiled attempt to drive unsightly homeless people from Seattle's commercial areas," the court cited an amicus brief alleging that individuals blocking sidewalks make downtown areas "dangerous to pedestrian safety and economic vitality."¹²⁵ The dissent quickly noted that preserving economic vitality of commercial areas was a questionable interest and that the city

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1136 (citing *Powell v. Texas*, 392 U.S. 514, 554 (1968) (White, J., concurring)).

¹¹⁷ *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

¹¹⁸ *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996).

¹¹⁹ *Id.*; SEATTLE, WASH., MUN. CODE § 15.48.040(A) (1994) ("No person shall sit or lie down upon a public sidewalk, or upon a blanket, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m., in the following zones: (1) The Downtown Zone . . . (2) Neighborhood Commercial Zones . . .").

¹²⁰ *Roulette*, 97 F.3d at 311 (Pregerson, J., dissenting).

¹²¹ *Id.*

¹²² *Id.* at 302.

¹²³ *Davison v. City of Tucson*, 924 F. Supp. 989, 992 (D. Ariz. 1996).

¹²⁴ *Roulette*, 97 F.3d at 302-06.

¹²⁵ *Id.* at 306 ("A downtown area becomes dangerous to pedestrian safety and economic vitality when individuals block the public sidewalks, thereby causing a steady cycle of decline as residents and tourists go elsewhere to meet, shop, and dine.").

was seeking to achieve this interest by "ridding itself of social undesirables."¹²⁶ The dissent went on to argue that "[courts] should hesitate to accord great weight to a 'perceived public interest in avoiding the aesthetic discomfort of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty.'"¹²⁷

In support of petitioner's First Amendment claims, the dissent noted that the ordinance's multiple exceptions permitting sitting and lying for non-expressive conduct¹²⁸ evidenced the fact that the ordinance itself was aimed at protected conduct.¹²⁹ The dissent then echoed a previous finding that "the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support or assistance."¹³⁰

The following year, in *Doucette v. City of Santa Monica*,¹³¹ a federal district court held that section 4.54.030 of the Santa Monica Municipal Code,¹³² an ordinance that prohibited solicitation in a multitude of public locations, was a permissible time, place, and manner restriction.¹³³ Santa Monica's only justification for the code was that it protected the safety of the public.¹³⁴ Punishment for soliciting in any prohibited area carried a possible \$500 fine and up to six

¹²⁶ *Id.* at 308 (Pregerson, J., dissenting).

¹²⁷ *Id.* at 309 (Pregerson, J., dissenting) (quoting *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1066 (S.D.N.Y. 1995)).

¹²⁸ SEATTLE, WASH., MUN. CODE § 15.48.040(B) (1994) (Examples of non-expressive conduct exempted from the statute include medical emergencies, sitting on the street while waiting for a bus, and sitting on the sidewalk for a demonstration or parade.).

¹²⁹ *Roulette*, 97 F.3d at 306 (Pregerson, J., dissenting).

¹³⁰ *Id.* at 308 (Pregerson, J., dissenting) (quoting *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993)).

¹³¹ *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1209 (C.D. Cal. 1997).

¹³² SANTA MONICA, CAL., MUN. CODE § 4.54.030 (1994) ("Solicitation shall be prohibited when the person solicited is in any of the following locations: (a) Bus stops; (b) Public transportation vehicles or facilities; (c) A vehicle on public streets or alleyways; (d) Public parking lots or structures; (e) Outdoor dining areas of restaurants . . . (f) Within fifty feet of an automated teller machine . . .")

¹³³ When an ordinance is viewed as content-neutral (i.e. non-discriminatory), time, place, and manner inquiries focus on three questions: (1) Are the city's interests significant? (2) Is the ordinance narrowly tailored to serve those interests? (3) Are there alternative forms for communicating this expression? To be narrowly tailored, an ordinance need not be the least intrusive means of achieving a desired end, but should not burden substantially more speech than is necessary. However, when an ordinance is content-based, courts apply strict scrutiny to determine whether the statute is narrowly tailored to serve a compelling state interest. *See, e.g., Frisby v. Schultz*, 487 U.S. 474 (1988).

¹³⁴ SANTA MONICA, CAL., MUN. CODE § 4.54.010 (1994). *But see Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046 (S.D.N.Y. 1992) (striking down a similar ordinance and noting that "[a] peaceful beggar poses no threat to society. The beggar has arguably only committed the offense of being needy.").

months in prison.¹³⁵ Nonetheless, the court found the ordinance constitutional as it did not ban solicitation outright and was content-neutral.¹³⁶

The court reasoned that the ordinance left "ample alternative channels of communication for solicitors," such as parks and beaches.¹³⁷ Contrary to the court's finding, however, many homeless individuals are prevented from being in public parks and, furthermore, cannot hope to match the sums they expect to collect when soliciting in downtown commercial areas. When a time, place, or manner regulation burdens substantially more speech than is necessary to reach the government's desired end, the regulation cannot be constitutional.¹³⁸ Here, the challenged ordinance effectively ejected all homeless individuals from commercial areas. Furthermore, while sometimes addressing legitimate concerns, public safety has become the catch-all rationale for cities seeking to justify their anti-homeless conduct.¹³⁹

As these cases illustrate, many courts continue to exhibit indifference toward judicial challenges of anti-homeless ordinances and legislation. Fortunately, several recent cases chronicled above provide a framework for legitimate challenges to the constitutionality of most—if not all—anti-homeless laws.

III. LEGAL FRAMEWORK FOR CHALLENGING ANTI-HOMELESS ORDINANCES

Though courts tend to uphold the majority of anti-homeless laws, there is by no means a consensus as to their validity. Most circuits remain in conflict as to the constitutionality of anti-homeless ordinances. Nonetheless, an analysis of the case law surrounding the most fruitful attacks on such laws—criminalization of status in violation of the Eighth Amendment and violations of the fundamental right to travel implicit in the Fourteenth Amendment—illustrates the ordinances' vulnerability to constitutional attack. Taken together with supporting case law, such as *Pottinger*¹⁴⁰ and *Jones*,¹⁴¹ these recognized constitutional rights form the basis of a valid attack on the majority of statutes criminalizing

¹³⁵ SANTA MONICA, CAL., MUN. CODE § 4.54.040 (1994).

¹³⁶ *Doucette*, 955 F. Supp. at 1208.

¹³⁷ *Id.* (noting that plaintiffs submitted no evidence in support of their contention that the ordinance leaves few, if any, places open to solicitation).

¹³⁸ See *Roulette v. City of Seattle*, 78 F.3d 1425, 1433 (9th Cir. 1996) (Pregerson, J., dissenting).

¹³⁹ See Beth Kuhles, *Conroe ordinance aims to roust homeless from parks; No-camping law targets transients in city*, HOUSTON CHRONICLE, Feb. 26, 2009 ("The purpose of the ordinance is to maintain street, parks and other public and private areas within the city in a safe, clean, sanitary and accessible condition in order to adequately protect the health, safety and public welfare of the community . . ."); Rick McKay, *Eola homeless meals banned; Over loud protest, much of downtown is ruled off-limits*, ORLANDO SENTINEL, July 25, 2006, at B1 ("Sam Ings, a retired police officer, . . . said that, while the ordinance was being case as a public-safety issue, he thinks it's more about covering up the city's homeless problem.").

¹⁴⁰ *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

the behavior of the homeless. An understanding of the origin of the fundamental right to travel pursuant to the Fourteenth Amendment's Equal Protection Clause,¹⁴² and the prohibition on criminalization of status under the Eighth Amendment, is crucial to comprehending the true impact of these decisions.

A. *The Right to Travel*

1. Interstate Travel

The right of American citizens to free and uninhibited interstate travel has been ingrained in U.S. constitutional law for more than 150 years.¹⁴³ The right to move freely from state to state is an incident of national citizenship protected by the Privileges and Immunities Clause of the Fourteenth Amendment against state interference.¹⁴⁴ Although not explicit, the right is protected by implied guarantees of the Constitution.¹⁴⁵ Moreover, the right does not apply only to those who seek permanent residence, but also to individuals seeking access temporarily.¹⁴⁶

In *Edwards v. California*, the United States Supreme Court struck down a California statute that prohibited the transportation of indigent non-residents into California from other states.¹⁴⁷ While the majority based their decision on the Commerce Clause,¹⁴⁸ four justices set the groundwork for the modern right to travel when they concluded that the statute impermissibly erected a barrier to interstate travel by indigents.¹⁴⁹ Speaking for the majority, Justice Douglas found that the challenged statute "prevent[s] a citizen because he [is] poor from seeking new horizons in other States," and would "relegate[] [indigents] to an inferior class of citizenship."¹⁵⁰ In his separate concurrence, Justice Jackson recognized that:

[A]ny measure which would divide our citizenry on the basis of property into one class free to move from state to state and another class that is poverty bound to the place where it has suffered misfortune is . . . at war

¹⁴¹ *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement).

¹⁴² U.S. CONST. amend. XIV, § 1 ("No state shall . . . deny to any person within its jurisdiction equal protection of the laws.").

¹⁴³ *See generally* *Crandall v. Nevada*, 73 U.S. 35 (1867).

¹⁴⁴ U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . ."); *Edwards v. California*, 314 U.S. 160, 178 (1941) (Douglas, J., concurring).

¹⁴⁵ *See* *The Slaughter House Cases*, 83 U.S. 36, 79 (1872).

¹⁴⁶ *See Edwards*, 314 U.S. at 183 (Jackson, J., concurring).

¹⁴⁷ *Id.* at 177.

¹⁴⁸ *Id.* at 176; U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have the power to . . . regulate Commerce with foreign Nations, and among the several States . . .").

¹⁴⁹ *Edwards*, 314 U.S. at 180-81 (Douglas, J., concurring).

¹⁵⁰ *Id.* at 181 (Douglas, J., concurring).

with the habit and custom by which our country has expanded.¹⁵¹

Subsequent cases recognized that the right to travel encompasses the right to remain in addition to the right to enter or depart.¹⁵² Specifically, *Dunn v. Blumstein* recognized that the right to travel ensures the "freedom to enter *and abide*."¹⁵³ The Court went on to note that "any classification which serves to penalize the exercise of [the right to travel], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."¹⁵⁴ Moreover, the possibility of deterring migration suffices to penalize the right; actual proof of deterrence is not required.¹⁵⁵

Laws that indirectly inhibit interstate travel may burden the constitutionally-protected right to travel in several ways. For example, in *Shapiro v. Thompson*, the Court invalidated statutes denying welfare assistance to residents who had not resided in the state for at least one year on the grounds that the statutes impermissibly restricted the ability of residents to travel.¹⁵⁶ The Court stated that "moving from State to State or to the District of Columbia, appellees were exercising a constitutional right, and any classification which serves to penalize that right . . . is unconstitutional."¹⁵⁷ Five years later, the Court decreed that laws infringe on the right to travel when they deny an indigent person any "necessity of life" on the basis of where they live.¹⁵⁸ The majority in *Memorial Hospital v. Maricopa County* found that a statute which conditioned free medical care on a one-year residency requirement violated the Equal Protection Clause because it penalized the exercise of the right to travel.¹⁵⁹ The justices held that "medical care is as much a basic necessity of life to an indigent as welfare benefits," and that the denial of such care to indigents violated the right to travel because of the potential deterrent to migration.¹⁶⁰ The need for sleep, sustenance and shelter merit recognition as necessities of life to the same extent as medical care and welfare benefits.¹⁶¹

¹⁵¹ *Id.* at 185 (Jackson, J., concurring).

¹⁵² See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972) ("[Strolling and loitering] are historically part of the amenities of life as we have known them."); *Kent v. Dulles*, 357 U.S. 116, 125-26 (1958) ("Freedom of movement is basic in our scheme of values.").

¹⁵³ *Dunn*, 405 U.S. at 338 (emphasis added).

¹⁵⁴ *Id.* at 339 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)) (emphasis added).

¹⁵⁵ *Id.* at 340.

¹⁵⁶ *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

¹⁵⁷ *Id.*

¹⁵⁸ *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 258-60 (1974).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 259, 263-64.

¹⁶¹ See discussion *infra* Part IV.A.1; see also *Mem'l Hosp.*, 415 U.S. at 259-60 ("It would be odd, indeed, to find that the State of Arizona was required to afford Evaro welfare assis-

When evaluating laws and local ordinances infringing on the right to travel, the Court applies its most stringent form of judicial review—strict scrutiny.¹⁶² Therefore, any classification penalizing the exercise of the fundamental right to travel is unconstitutional absent a showing of necessity in promoting a compelling governmental interest.¹⁶³

2. Intrastate Travel

In addition to recognizing a fundamental right to interstate travel, the United States Supreme Court implicitly recognizes a right to intrastate travel.¹⁶⁴ In *Kolender v. Lawson*, the Court held unconstitutional a law prohibiting wandering the streets at night without identification and justified its decision in part by the “consideration of the constitutional right to freedom of movement.”¹⁶⁵ Multiple circuit courts echo the sentiments of the Supreme Court and explicitly recognize the right to intrastate travel.¹⁶⁶

In *Lutz v. City of York*, the Third Circuit acknowledged that a city ordinance prohibiting walking around certain major public roads in the heart of the city implicated the petitioners’ fundamental rights.¹⁶⁷ The court explained that the right to move freely around one’s neighborhood or town is “implicit in the concept of ordered liberty” and “deeply rooted in the Nation’s history.”¹⁶⁸ The Second Circuit reached a similar conclusion in *King v. New Rochelle Municipal Housing Authority*, finding the city’s residency requirement unconstitutional as applied to individuals seeking public housing.¹⁶⁹ Crucial to the decision was the recognition that “[i]t would be meaningless to describe the right to travel

tance to keep him from the *discomfort of inadequate housing* or the *pangs of hunger* but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.”) (emphasis added).

¹⁶² See *Dunn v. Blumstein*, 405 U.S. 330, 339-42 (1972); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1182 (Cal. 1995) (“Because the ordinance impairs the right to travel of plaintiffs and other homeless persons, it is subject to strict scrutiny.”).

¹⁶³ See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *Tobe*, 892 P.2d at 1183.

¹⁶⁴ See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983); see also *Kent v. Dulles*, 357 U.S. 116, 126 (1958) (“The right to travel is a part of the ‘liberty’ of which a citizen cannot be deprived without due process . . . Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage.”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164 (1972) (“[W]andering or strolling” are “historically part of the amenities of life as we have known them.”).

¹⁶⁵ *Kolender*, 461 U.S. at 358.

¹⁶⁶ See, e.g., *Tobe*, 892 P.2d at 1181 (“In California we have expressly recognized that the constitutional right to freedom of movement necessarily embraces intrastate travel. The right to intrastate travel . . . is a basic human right protected by the United States and California Constitutions.”).

¹⁶⁷ *Lutz v. City of York*, 899 F.2d 255, 267 (3d Cir. 1990).

¹⁶⁸ *Id.* at 268.

¹⁶⁹ See *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648-49 (2d Cir. 1971).

between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel *within* a state."¹⁷⁰

B. *Criminalization of Status and Involuntary Conduct*

The Eighth Amendment to the U.S. Constitution provides that "excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*."¹⁷¹ These prohibitions apply equally to the states through the Due Process Clause of the Fourteenth Amendment.¹⁷² The relevant precedent on this issue, as it applies to anti-homeless ordinances, evolved out of the seminal case *Robinson v. California*, in which the Court overturned a California statute making it a criminal offense for a person to be addicted to narcotics.¹⁷³ The *Robinson* majority opined that status—in this case addiction to narcotics—differed from conduct in that "[it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time after he reforms."¹⁷⁴

In reaching its conclusion in *Robinson*, the majority analogized the state's actions to an attempt to criminalize being mentally ill or being afflicted with a venereal disease, in that such laws would constitute violations of the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁷⁵ Like all manners of status, the Court noted, these were illnesses and conditions that could be contracted "innocently or involuntarily."¹⁷⁶ Similarly, the involuntary nature of homelessness should be the decisive factor in determining whether anti-homeless ordinances are unconstitutional attempts to criminalize status.¹⁷⁷

Several years later, the Court re-examined *Robinson* in a case concerning a Texas law that criminalized any individual found intoxicated in a public place.¹⁷⁸ *Powell v. Texas* clarified the holding in *Robinson*, interpreting the opinion to mean that a state may not criminalize status.¹⁷⁹ More specifically, a state may not criminalize the act of "being"; a state may not punish an individual for status, independent of conduct.¹⁸⁰

The alignment of the justices in *Powell* is key to the decision's enduring

¹⁷⁰ *Id.* at 648 (citing *Valenciano v. Bateman*, 323 F. Supp. 600 (D. Ariz. 1971)) (emphasis added).

¹⁷¹ U.S. CONST. amend. VIII (emphasis added).

¹⁷² U.S. CONST. amend. XIV, § 1; *Powell v. Texas*, 392 U.S. 514, 558-59 (1968) (Fortas, J., dissenting).

¹⁷³ *Robinson v. California*, 370 U.S. 660 (1962).

¹⁷⁴ *Id.* at 662-63.

¹⁷⁵ *Id.* at 666.

¹⁷⁶ *Id.* at 667.

¹⁷⁷ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992).

¹⁷⁸ *Powell v. Texas*, 392 U.S. 514, 516 (1968) (Marshall, J., plurality opinion).

¹⁷⁹ *Id.* at 532.

¹⁸⁰ *Id.* at 533.

precedential value.¹⁸¹ The plurality opinion viewed *Robinson* as standing for the principle that “criminal penalties may be inflicted only if the accused has committed some [volitional] act”¹⁸² The opinion did not deal with “the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, ‘involuntary’”¹⁸³ However, five of the nine justices found that *Robinson* supported the principle that states cannot punish a person for “certain conditions, either arising from his own [volitional] acts or contracted involuntarily, or acts that he is powerless to avoid.”¹⁸⁴ Many anti-homeless ordinances, such as laws that criminalize being asleep in public while involuntarily homeless, also fall within the prohibition set forth in *Robinson* and clarified in *Powell*—that states cannot criminalize status.¹⁸⁵

Due to the disagreement between the plurality and Justice White on the meaning of *Robinson* and the commands of the Cruel and Unusual Punishment Clause, the precedential value of the *Powell* plurality opinion is limited to its precise facts.¹⁸⁶ When a fragmented Court decides a case and no single rationale enjoys the assent of five justices, the holding of the Court may be viewed as the position taken by those members concurring on the narrowest grounds.¹⁸⁷ Therefore, in lieu of this disagreement, the views of Justice White can and should be adopted as the rationale of the Court.¹⁸⁸

Justice White’s concurrence in *Powell* further clarifies the *Robinson* decision. In explaining *Robinson*, Justice White set forth certain criteria, opining that by precluding criminal convictions for status the Court was referring to “a condition brought about by acts remote in time from the application of the

¹⁸¹ See, e.g., *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement): [F]ive Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one’s status or being. . . . Because the conclusion that certain involuntary acts could not be criminalized was not dicta, we adopt this interpretation of *Robinson* and the Cruel and Unusual Punishment Clause as persuasive authority.

¹⁸² *Powell*, 392 U.S. at 533.

¹⁸³ *Id.*

¹⁸⁴ *Jones*, 444 F.3d at 1133 (citing *Powell v. Texas*, 392 U.S. 514, 567 (1968) (Fortas, J., dissenting) (endorsing this reading of *Robinson*)); see *Powell*, 392 U.S. at 550 n.2 (White, J., concurring) (endorsing this reading of *Robinson*, but only where acts predicate to the condition are remote in time); see also *Robinson v. California*, 370 U.S. 660, 666-67 (1962).; Robert L. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201, 219 (1981) (“The consensus [of White and the dissenters apparently] was that an involuntary act does not suffice for criminal liability.”).

¹⁸⁵ See discussion *infra* Part IV.A.1.

¹⁸⁶ See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006, 1006 (2007) (parties reached settlement).

¹⁸⁷ *Id.* at 1135-36 (citing *Marks v. United States*, 430 U.S. 188, 193 (1977)).

¹⁸⁸ *Id.*

criminal sanctions contemplated."¹⁸⁹ Moreover, Justice White referred to "condition[s] which [were] relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values."¹⁹⁰ Notably, the concurrence makes explicit reference to homelessness, stating that:

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. . . . 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.¹⁹¹

Although Justice White referred specifically to being drunk in public, the homeless easily fit within the *Robinson* rationale. Homeless individuals often go without shelter for a significant period of time before being subjected to a criminal statute. Moreover, an individual's homeless status lasts, on average, for a period of nearly five months; that figure increases to six months for homeless families with children.¹⁹² One can easily analogize the condition criminalized in *Powell* to criminalizing being asleep in public while involuntarily homeless. Justice White, at the end of his concurrence, implicitly acknowledges that a showing by an individual that he was unable to stay off the streets might suffice to prevent criminalization of that individual's presence on the streets.¹⁹³

Based on *Robinson* and *Powell*, courts have overturned vagrancy laws and anti-sleeping ordinances on the grounds that they punish status in violation of the Eighth Amendment.¹⁹⁴ These cases sound the death knell for anti-homeless ordinances criminalizing status.¹⁹⁵ They also astutely identify the flaws inherent in criminalizing the homeless and provide a framework for overturning the majority of anti-homeless laws.¹⁹⁶

¹⁸⁹ *Powell*, 392 U.S. at 550 n.2 (White, J., concurring).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 551.

¹⁹² NAT'L COAL. FOR THE HOMELESS, HOW MANY PEOPLE EXPERIENCE HOMELESSNESS? 1 (June 2008), available at http://www.nationalhomeless.org/publications/facts/How_Many.pdf.

¹⁹³ *Powell*, 392 U.S. at 552 (White, J., concurring).

¹⁹⁴ See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1135 (9th Cir. 2006), appeal dismissed and vacated as moot, 505 F.3d 1006, 1006 (2007) (parties reached settlement) ("The *Robinson* and *Powell* decisions, read together, compel us to conclude that enforcement of section 41.18(d) at all times and in all places against homeless individuals who are sitting, lying, or sleeping in Los Angeles's Skid Row because they cannot obtain shelter violates the Cruel and Unusual Punishment Clause."); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965).

¹⁹⁵ See discussion *infra* Part IV.A.

¹⁹⁶ See discussion *infra* Part IV.A.

IV. CRIMINALIZATION OF HOMELESSNESS: ILLEGAL AND POOR POLICY

"The idea that '[i]dleness and poverty should not be treated as a criminal offense' should be no less applicable to those who have no home."¹⁹⁷ The justices presiding in *Pottinger v. City of Miami*, in recognizing this tenet, acknowledged the moral impropriety of criminalizing homelessness while striking down an ordinance doing just that.¹⁹⁸ *Pottinger*, in conjunction with *Jones v. City of Los Angeles*, presents a valid argument against statutes criminalizing the behavior of the homeless.¹⁹⁹ An examination of these cases, coupled with relevant precedents of the United States Supreme Court, supports the argument that attempts by cities to criminalize homelessness are illegal and unconstitutional as violations of the fundamental right to travel and the Eighth Amendment's prohibition against cruel and unusual punishment.²⁰⁰ Moreover, the unconstitutionality of these legislative efforts aside, such ordinances are inadvisable and counter-productive from a policy perspective.²⁰¹

A. Unconstitutionality of Anti-Sleeping and Anti-Camping Ordinances

1. Right to Travel

In the majority of jurisdictions, where relatively little, if any, shelter is available for the homeless, ordinances prohibiting overnight sleeping in public locations unconstitutionally burdens the fundamental right to travel. For the purposes of right to travel analysis, several jurisdictions misconstrue the phrase "availability of shelter."²⁰² For example, the court in *Joel v. City of Orlando* dismissed petitioners' claims because a large homeless shelter within the city "never reached its maximum capacity."²⁰³ However, to be truly available to a homeless person, a shelter must be accessible.²⁰⁴ A shelter must be either within a reasonable walking distance of a person who must likely carry all of his belongings, or it must be serviced by free transportation.²⁰⁵ Homeless individu-

¹⁹⁷ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562 n.17 (S.D. Fla. 1992) (quoting *Wheeler v. Goodman*, 306 F. Supp. 58 (D.C.N.C. 1969)).

¹⁹⁸ *Id.* at 1583.

¹⁹⁹ See discussion *supra* Part III.

²⁰⁰ See discussion *infra* Parts IV.A.1 & 2.

²⁰¹ See discussion *infra* Part IV.B.

²⁰² The availability of shelter argument is equally applicable to the discussion of status and the Eighth Amendment in Part IV.A.2; however, it is the position of this note that such an argument is unnecessary when challenging an ordinance on Eighth Amendment grounds as such laws are unconstitutional regardless of the availability of shelter.

²⁰³ *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000).

²⁰⁴ Paul Ades, *The Unconstitutionality of "Antihomless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 616 n.164 (1989).

²⁰⁵ *Id.*

als, rarely models of good health,²⁰⁶ cannot be expected to travel great distances each day to obtain shelter. Moreover, "even where there is available shelter space, it may not be a viable alternative 'if . . . the shelter is dangerous, drug-infested, crime-ridden, or especially unsanitary.'"²⁰⁷ Given the lack of truly "available" shelter space in most cities, city ordinances that prevent the homeless from seeking shelter in limited public areas essentially leave the homeless with a "Hobson's choice." They can choose to leave a jurisdiction altogether or remain and face arrest and criminal prosecution.²⁰⁸

The inability of indigents to remain within a particular city without facing arrest and prosecution burdens both the right to interstate travel and the right to intrastate travel. Ordinances that expose the homeless to situations where their mere presence in a city subjects them to arrest²⁰⁹ impacts their freedom of movement, as defined by the Court in *Kolender v. Lawson*.²¹⁰ These ordinances also burden the homeless' right to remain, recognized as essential to the right of interstate travel.²¹¹ Anti-homeless ordinances resulting in the deprivation of the right to sleep or camp within city grounds are analogous to residency requirements affecting a deprivation of welfare benefits, which the Court struck down in *Shapiro v. Thompson*.²¹² Both laws deprive individuals of necessities which, in turn, impact movement.²¹³ While no federal courts of appeal have directly drawn this analogy, a lower court has echoed that the right to travel is violated by any and all features of a zoning plan which, directly or indirectly, seeks to control migration.²¹⁴ Stated simply, attempting to exclude certain indi-

²⁰⁶ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992) (noting that individuals become increasingly ill on the streets due to factors such as difficulty of obtaining adequate healthcare, exposure to the elements, and the absence of sanitary facilities for sleeping, bathing or cooking).

²⁰⁷ *Id.* at 1580 n.34.

²⁰⁸ *Pottinger*, 810 F. Supp. at 1581 ("[A] homeless person who is forced to sleep in public must keep moving within the city or leave it altogether to avoid being arrested.").

²⁰⁹ *Id.* at 1580.

²¹⁰ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (holding that law prohibiting wandering the streets at night without ID implicated "consideration of the constitutional right to freedom of movement.").

²¹¹ See *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

²¹² *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); see *Mem'l Hosp. V. Maricopa County*, 415 U.S. 250, 259 (1974) ("[M]edical care is . . . 'a basic necessity of life' to an indigent. . . . And, governmental privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements.").

²¹³ See *id.*

²¹⁴ See *Ades, supra* note 204, at 617-18 (discussing *Constr. Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976)).

viduals from the overall population via statute violates the right to travel.

Anti-homeless laws, in addition to inhibiting movement, simultaneously force movement by denying indigents necessities of life.²¹⁵ *Pottinger* recognized that forcing the homeless from sheltered areas, public parks and streets burdens a number of these necessities, chief among them a place to sleep, minimal safety, and cover from the elements.²¹⁶ Moreover, the denial of these necessities leaves indigents with no place to migrate safely. As a result of the proliferation of ordinances targeting the homeless in larger cities, surrounding areas have passed similar laws to divert those homeless displaced from the cities from relocating to their communities.²¹⁷ This domino effect does not merely discourage homeless individuals from traveling to a particular city, but also essentially prevents them from doing so because it forbids them from sleeping or storing their belongings in any public area.²¹⁸

A statute or ordinance burdening the fundamental right to travel is subject to strict scrutiny and is constitutional only when narrowly tailored and necessary to serve a compelling state interest.²¹⁹ These ordinances are not aimed at the act of public sleeping, but rather at homeless transients generally; they are not narrowly tailored. In response to criticism, states set forth several interests that they claim justify these anti-homeless laws. Among the many rationales are public safety, aesthetics, economic prosperity, and public health.²²⁰ While often accepted without much scrutiny, some judges have recognized the questionable nature of these justifications.²²¹ The dissenting justices in *Roulette v. City of Seattle* noted that preserving the economic vitality of commercial areas remained a questionable interest and that, more likely than not, cities were "seek[ing] economic preservation by ridding [themselves] of social undesirables."²²² The opinion went on to note that courts "should hesitate to accord great weight to 'a perceived public interest in avoiding the aesthetic discomfort of being reminded on a daily basis that many of our fellow citizens are forced to live in abject and degrading poverty.'"²²³ *Pottinger v. City of Miami* echoed this sentiment; the majority espoused that an interest in aesthetically pleasing parks and streets is not compelling where there is a necessity of home-

²¹⁵ See *Mem'l Hosp.*, 415 U.S. at 258-64.

²¹⁶ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992).

²¹⁷ See Saltzman & Noonan, *supra* note 6, at A1.

²¹⁸ *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1181-82 (Cal. 1995) (Mosk, J., dissenting).

²¹⁹ *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974).

²²⁰ See *Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000).

²²¹ See, e.g., *Roulette v. City of Seattle*, 97 F.3d 300, 308 (9th Cir. 1996); *Johnson v. Bd. of Police Comm'rs*, 351 F. Supp. 2d 929, 935 (E.D. Mo. 2004).

²²² *Roulette*, 97 F.3d at 308 (Pregerson, J., dissenting).

²²³ *Id.* at 309 (quoting *Streetwatch v. Nat'l R.R. Passenger Corp.*, 875 F. Supp. 1055, 1066 (S.D.N.Y. 1995)).

less persons to be in some public place.²²⁴ In 2004, a federal district court in Missouri enjoined all police personnel from clearing homeless people from public areas "solely to sanitize" those areas, or because of a perception that such individuals detract from an "[aesthetically] pleasing environment that promotes commerce."²²⁵

The most prevalent—and proponents would say the strongest—rationale in support of anti-homeless legislation is public safety.²²⁶ This rationale is largely based on the misperceptions and fears held by both the public and judiciary.²²⁷ Surveys have revealed that a majority of individuals believe that homeless people are "more dangerous than other people" and are "more likely to commit violent crimes than other people."²²⁸ This public stereotyping of homeless individuals, coupled with a modern culture of fear, motivates our society to take harsh punitive measures to suppress crime.²²⁹ These fear-based policies are often irrational and result in the legitimization of vagrancy and anti-camping laws.²³⁰ Public safety may serve as a legitimate interest when proffered to support a narrowly-tailored aggressive panhandling ordinance. However, the force behind such a rationale dissipates when applied to ordinances prohibiting conduct such as sleeping and sitting. This conduct is not inherently dangerous; a homeless individual poses little danger to anyone while asleep. More often than not, proffered public safety rationales are the result of stereotypical, and often inaccurate, views of the homeless and serve as a proxy for the less compelling rationale of promoting aesthetics.²³¹ An examination of opinions in which courts espouse the public safety rationale, and other similar rationales,

²²⁴ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992).

²²⁵ *Johnson*, 351 F. Supp. 2d at 935.

²²⁶ See Saelinger, *supra* note 46, at 560 ("[O]ne of the primary goals of anti-nuisance ordinances is to promote public safety . . .").

²²⁷ See Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 716, 719-21 (1997).

²²⁸ *Id.* at 720.

²²⁹ See Tamara Walsh, "Waltzing Matilda" *One Hundred Years Later: Interactions Between Homeless Persons and the Criminal Justice System in Queensland*, 25 SYDNEY L. REV. 75, 83 (2003):

[A]n unrealistic and ill-informed culture of fear exists in our modern society whereby crime is depicted as a problem of such overwhelming proportions that the very fabric of society is considered to be at risk unless harsh punitive measures are taken to suppress it. The effect of this law and order commonsense is that law and order policy is based on fear (no matter how irrational), and the retention of crimes such as vagrancy is considered necessary to protect the public.

²³⁰ See *id.*

²³¹ Cf. MADELEINE R. STONER, *THE CIVIL RIGHTS OF HOMELESS PEOPLE* 149 (1995) (noting that people are tired of the problem of homelessness, want it to disappear, and that an increasingly vocal minority of city residents are promoting stereotypical views of the dangers of homeless individuals).

reveals that such a justification is rarely supported by facts or statistics.²³²

Moreover, a cursory review of attitudes in cities that have enforced anti-sleeping ordinances in the past indicates that disdain and fear of the homeless are the primary force behind such laws.²³³ The City of Santa Ana, California developed a policy that homeless residents “[were] no longer welcome in the [c]ity,” and described a plan to “continually . . . remov[e] [homeless people] from the places that they are frequenting in the [c]ity.”²³⁴ However, an express purpose is not necessary; as previously stated, the Court has invalidated loitering and vagrancy laws that implicate the right to travel even though they do not facially discriminate against migrants.²³⁵ Many laws prohibiting sleeping in public appear neutral on their face; however the impact of these laws falls almost exclusively on the homeless, because they are the only societal group with no alternative to sleeping outdoors. Absent a compelling state interest, ordinances criminalizing necessary behavior on the part of the homeless inhibit movement and violate the fundamental right to both interstate and intrastate travel.

2. Criminalization of Status and Involuntary Conduct

An equally compelling case exists that anti-homeless ordinances are unconstitutional because they criminalize status in violation of the Eighth Amendment’s prohibition against cruel and unusual punishment. The United States Supreme Court, in *Robinson* and *Powell*, opined that laws criminalizing status are unconstitutional.²³⁶ These cases and their progeny, coupled with the court’s rationale in *Jones v. City of Los Angeles*,²³⁷ support the view that anti-sleeping ordinances are unconstitutional.

While the *Powell* plurality seemed to exclude involuntary conduct inextricably linked to status—e.g., sleeping or camping in public—from the category of conduct protected by *Robinson*,²³⁸ the case is distinguishable based on the fact that, unlike the plaintiff in *Powell*, homeless plaintiffs have no alternative but to

²³² See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353, 1358-59 (11th Cir. 2000); *Doucette v. City of Santa Monica*, 955 F. Supp. 1192, 1206-07 (C.D. Cal. 1997).

²³³ See Daryl Kelley, *Long Beach Studies Camping Ban on Homeless*, L.A. TIMES, July 27, 1986, § 9, at 1 (“Long Beach police officials and at least one group of local downtown businessmen . . . say that the draft legislation would target vagrants who have long been a problem downtown and elsewhere in the city.”); Martha L. Willman, *Proposed Curbs on Homeless May Face Legal Snag*, L.A. TIMES, May 25, 1985, § 2, at 17 (“The [police] chief’s proposal . . . is aimed at pushing transients out of town.”).

²³⁴ See Foscarinis, *supra* note 54, at 1.

²³⁵ See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

²³⁶ *Powell v. Texas*, 392 U.S. 514, 532 (1968); *Robinson v. California*, 370 U.S. 660, 662-63 (1962).

²³⁷ *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement).

²³⁸ See discussion *supra* Part III.B.

live in public places.²³⁹ More importantly, *Powell* only garnered a plurality of four votes. Thus the prevailing view on *Robinson's* meaning can be found in Justice White's concurring opinion.²⁴⁰ Justice White opined that states cannot criminalize conditions or acts that individuals are powerless to avoid.²⁴¹ He further hypothesized that those alcoholics who could show they had no private residence in which to drink would be spared conviction pursuant to the relevant ordinance.²⁴² Therefore, a showing that homelessness is involuntary would render any laws addressing acts that are a direct result of being homeless unconstitutional as criminalization of status.

Homelessness often occurs because of various economic, physical or psychological factors that are beyond the homeless individual's control.²⁴³ Moreover, in both *Robinson* and *Powell*, the defendants were prosecuted for being in conditions over which they had no capacity to change or avoid.²⁴⁴ Justice Fortas's dissent in *Powell* recognized the impropriety of criminalizing a "state of being" which resulted from these uncontrollable factors:

In all probability, [the defendant] at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct. The statute imposed a penalty on the offense of "addiction"—a condition which [the defendant] could not control. Once [the defendant] had become an addict, he was utterly powerless to avoid criminal guilt. *He was powerless to choose not to violate the law.*²⁴⁵

A brief examination of the causes of homelessness reveals that these individuals are in the exact position described by Justice Fortas in his dissent and recognized by Justice White in his controlling concurrence.

The overwhelming majority of homeless individuals are needy and helpless

²³⁹ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992); see STONER, *supra* note 231, at 149:

Many federal and local officials, and citizens groups, agree that the problem of homelessness has grown so huge that the patchwork of shelters and soup kitchens is more inadequate than ever. While there are many excellent programs and services, the demand far exceeds the supply everywhere. The shelter system falls so short of need that people have no other choice but to live in the streets and parks.

²⁴⁰ Justice White's view of *Robinson* was supported by the four dissenting justices, giving them a majority of five votes on the issue of criminalization of status. *Jones*, 444 F.3d at 1134-35:

Justice White and the *Powell* dissenters shared a common view of the importance of involuntariness to the Eighth Amendment inquiry. . . . [F]ive justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.

²⁴¹ *Powell*, 392 U.S. at 551 (White, J., concurring).

²⁴² *Id.*

²⁴³ *Pottinger*, 810 F. Supp. at 1563.

²⁴⁴ *Powell*, 392 U.S. at 567-68 (Fortas, J., dissenting).

²⁴⁵ *Id.* at 567 (emphasis added).

individuals who are not homeless by choice.²⁴⁶ Among the major causes of homelessness are the de-institutionalization of mental patients,²⁴⁷ a general lack of low-income housing,²⁴⁸ and inefficiencies and cutbacks in social services and benefits programs.²⁴⁹ Homeless individuals are socially isolated; they lack a consistent basis for community support and often cannot trust those similarly situated.²⁵⁰ Indigents become increasingly ill on the streets due to the difficulty of obtaining adequate healthcare, exposure to the elements, and the absence of sanitary facilities for sleeping and bathing.²⁵¹ This in turn hinders their ability to crawl out of their predicaments, as they have little time and are not in the proper condition to obtain work.²⁵² In 2008, individuals were homeless on average a minimum of five months.²⁵³ There can be little doubt that indigent people are often unable to stay off the streets for a prolonged period of time through no fault of their own.²⁵⁴ Cities therefore should not be permitted to criminalize the status of homelessness, nor should they criminalize acts that are an integral aspect of that status.²⁵⁵

The court in *Jones v. City of Los Angeles* viewed those acts that were “an integral aspect of status” as the key distinction in defining the limits of the Eighth Amendment’s prohibition against cruel and unusual punishment.²⁵⁶ In line with the *Jones* court, other courts across the country should follow the admonition of Justice White’s concurrence in *Powell*. White opined that “the proper subject of inquiry is whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it

²⁴⁶ See MARJORIE HOPE & JAMES YOUNG, *THE FACES OF HOMELESSNESS* xi-xiii, 23-24 (Lexington Books 1986).

²⁴⁷ *Id.* at 163-66.

²⁴⁸ See Inez Smith Reid, *Law, Politics and the Homeless*, 89 W. VA. L. REV. 114, 139 n.119 (1986).

²⁴⁹ See James K. Langdon II & Mark A. Kass, *Homelessness in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305, 305 (1985).

²⁵⁰ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992).

²⁵¹ *Id.*

²⁵² *Id.* at 1564:

[J]oblessness, like physical and mental illness, becomes more of a problem once a person becomes homeless. This is so because of the barriers homeless individuals face in searching for a job. For example, they have no legal address or telephone. Also, they must spend an inordinate amount of time waiting in line or searching for seemingly basic things like food, a space in a shelter bed or a place to bathe.

²⁵³ See NAT’L COAL. FOR THE HOMELESS, *supra* note 192; see also *Powell v. Texas*, 392 U.S. 514, 550 n.2 (1968) (White, J., concurring) (noting that Court envisioned conditions relatively permanent in duration when referring to status).

²⁵⁴ See *Powell*, 392 U.S. at 551 (White, J., concurring).

²⁵⁵ See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1132 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement).

²⁵⁶ *Id.* at 1136.

to be permissible to impose penal sanctions."²⁵⁷ The majority of the homeless are on the streets through no fault of their own,²⁵⁸ and ordinances criminalizing sitting, lying, or sleeping in public—or, simply put, acts that criminalize the status of homelessness—criminalize the involuntary performance of life-sustaining functions that are integral aspects of being homeless.²⁵⁹ Sitting, lying, and sleeping are unavoidable consequences of being human, as human beings are biologically compelled to rest. The *Jones* court put it best when they acknowledged that:

Homelessness is not an innate or immutable characteristic, nor is it a disease, such as drug addiction or alcoholism. But generally one cannot be a drug addict or alcoholic, as those terms are commonly used, without engaging in at least some voluntary acts (taking drugs, drinking alcohol). Similarly, an individual may become homeless based on factors both within and beyond his immediate control.²⁶⁰

The judges recognized that the majority of homeless individuals are involuntarily homeless, and have no alternative to performing certain necessities of life in public.²⁶¹ The fact that some indigents may obtain shelter on certain nights and may eventually escape the plight of homelessness does not render their status at the time of arrest any less worthy of protection than the drug addict protected in *Robinson*.²⁶² Likely recognizing the significance of the court's decision in *Jones*, the City of Los Angeles subsequently settled with the plaintiffs on the condition that the court vacate its opinion.²⁶³ Despite this action, the court's rationale remains solid as a means for the homeless and their advocates to continue arguing for the invalidation of anti-sleeping and similar ordinances as violations of the Eighth Amendment.

In essence, the effect of laws criminalizing homelessness is no different from the vagrancy ordinance struck down in *Headley v. Selkowitz*.²⁶⁴ When indigents are arrested for harmless acts that they are forced to perform in public, they are essentially punished for being homeless.²⁶⁵ In *Selkowitz*, the Florida Supreme Court noted that "[p]ersons should not be charged with vagrancy unless it is clear they are vagrants *of their own volition and choice*."²⁶⁶ They also opined that "[i]nnocent victims of misfortune ostensibly appearing to be vagrants, *but who are not such either by choice or intentional conduct* should not

²⁵⁷ *Id.* (citing *Powell*, 392 U.S. at 550 n.2 (White, J., concurring)).

²⁵⁸ *See supra* notes 246-254 and accompanying text.

²⁵⁹ *Jones*, 444 F.3d at 1136.

²⁶⁰ *Id.* at 1137.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

²⁶⁴ *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965).

²⁶⁵ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

²⁶⁶ *Selkowitz*, 171 So. 2d at 370 (emphasis added).

be charged with vagrancy.”²⁶⁷ The Florida Supreme Court struck down a vagrancy law, another form of anti-homeless ordinance, for being overly broad and penalizing involuntarily-obtained status.²⁶⁸ Other U.S. courts should follow suit and recognize the unconstitutionality of anti-homeless laws generally for criminalizing status in violation of the Eighth Amendment.

B. *Anti-Homeless Laws as Bad Policy*

While evidence illustrates that anti-sleeping ordinances and many other anti-homeless laws may be unconstitutional,²⁶⁹ legislatures and courts have thus far been unwilling to take the necessary action. Most individuals justify anti-homeless laws as efforts to remove indigents from their streets,²⁷⁰ but the proliferation of such laws may actually perpetuate what many people deem the homeless “problem.”²⁷¹

Ordinances criminalizing homelessness have a systemic effect and encourage unhealthy competition among cities to impose comparable restrictions in order to avoid becoming a refuge for indigents driven from other cities.²⁷² If all communities responded by enacting similar ordinances, indigents would effectively be excluded from every state.²⁷³ These ordinances also have a negative impact on U.S. prisons. The current cost of maintaining our correctional system is over sixty billion dollars each year; further clogging the correctional system with homeless individuals charged with harmless conduct will not solve the problem.²⁷⁴

Homeless offenders are caught in a “revolving door”—leading from arrest on the street through a brief stint in jail, back to the street and, eventually, another arrest.²⁷⁵ Putting already overcrowded jails to such an unsuitable use would likely have a destructive effect upon indigent inmates.²⁷⁶ For example,

²⁶⁷ *Id.* (emphasis added).

²⁶⁸ *See id.* (“The ordinance provision because of its broad language is too vague to withstand constitutional tests Innocent victims of misfortune ostensibly appearing to be vagrants, but who are not such either by choice or intentional conduct should not be charged with vagrancy.”).

²⁶⁹ *See* discussion *supra* Part IV.A.

²⁷⁰ *See* STONER, *supra* note 231, at 149.

²⁷¹ *See* Tobe v. City of Santa Ana, 892 P.2d 1145, 1182 (Cal. 1995) (Mosk, J., dissenting).

²⁷² *Id.* (“[O]rdinances like Santa Ana’s encourage an unhealthy and ultimately futile competition among cities to impose comparable restrictions”); *see* Saltzman & Noonan, *supra* note 6, at A1.

²⁷³ Tobe, 892 P.2d at 1182 (Mosk, J., dissenting).

²⁷⁴ *See* Christopher Shea, *Life Sentence*, BOSTON GLOBE, Sept. 23, 2007, available at http://www.boston.com/news/globe/ideas/articles/2007/09/23/life_sentence/.

²⁷⁵ *See* Powell v. Texas, 392 U.S. 514, 564 (1968) (Fortas, J., dissenting).

²⁷⁶ *See id.* at 564-65 (Fortas, J., dissenting) (Justice Fortas was referring to alcoholic inmates in making this statement. However the ultimate effect on alcoholics, often indigents

nearly fifty percent of all homeless individuals suffer from a severe mental illness.²⁷⁷ These individuals are swept up by police and deposited in jail, despite acknowledgment by law enforcement and elected officials that correctional facilities are not properly equipped to deal with them.²⁷⁸ Moreover, the threat of fines and jail sentences does not have a deterrent effect upon indigent people.²⁷⁹ Faced with the choice between leaving a jurisdiction, and spending a night in jail, where they will receive food and shelter, many indigents may willingly violate statutes and eventually return to the streets with a criminal record. Add to this the fact that a 2004 study concluded that jail and prison services cost twice as much as housing and shelter for the homeless, the flawed logic of criminalization becomes even more apparent.²⁸⁰

The likely result of criminalization measures will be to enhance the overall problem of getting indigents off the streets. Indigents inevitably serve a short jail sentence and then return to the streets.²⁸¹ A criminal record makes their presence on the streets more certain because individuals with criminal records have a difficult time finding work.²⁸² Homeless individuals already face a variety of barriers when searching for a job. They must spend the majority of their time searching for food and shelter because they have no legal address.²⁸³ Without opportunities for employment, current indigents will remain on the streets.

themselves, as a result of imprisonment can be easily analogized to the effect on the homeless.).

²⁷⁷ See Leroy L. Kondo, *Advocacy of the Establishment of Mental Health Specialty Courts in the Provision of Therapeutic Justice for Mentally Ill Offenders*, 28 AM. J. CRIM. L. 255, 257 (2001).

²⁷⁸ *Id.* at 259.

²⁷⁹ See Powell, 392 U.S. at 565 (Fortas, J., dissenting).

²⁸⁰ See Ramona Ripston, *A Police State on Skid Row*, L.A. TIMES, Mar. 12, 2007, at A15.

²⁸¹ See John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 819-20 (2000):

In prosecuting the homeless, cities end up hurting themselves. Not only can they not collect fines from the homeless, the cases of the homeless take up an inordinate amount of court time since they get re-docketed numerous times due to the failure of the homeless to appear or because the person does not have the funds to pay the fine. For many of the homeless who get arrested on outstanding warrants or who get sentenced to a jail term, the cost of their incarceration, even if for a few days, far exceeds the amount of the original fine they would have had to pay. Many defendants get released after a few days after the municipality realizes they are losing money by holding the homeless person. They decide it is cheaper to let them go.

²⁸² See PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* 144 (1989); Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1229 (2003) ("A criminal conviction means vastly decreased employment opportunities, including exclusion from jobs, many requiring a professional license.").

²⁸³ See Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

Criminalizing homelessness will inevitably further this troubling predicament. Consider that for slightly more than thirty dollars, a homeless person can be provided with a day of housing, food, transportation and counseling services.²⁸⁴ Legislators' time would be better spent devising methods to increase government assistance for the homeless rather than trying to render them invisible by either forcing them out of metropolitan areas or depositing them in jail.

V. CONCLUSION

Despite evidence that imprisoning indigents merely traps them in a "revolving door", temporarily clogging our correctional system but ultimately placing indigents back on the streets, thus perpetuating the problem²⁸⁵, cities across the country have passed a myriad of anti-homeless laws in recent years to keep indigents off their streets and out of their towns.²⁸⁶ These actions have the systemic effect of encouraging unhealthy competition among cities and towns to ratify ordinances criminalizing homelessness in order to avoid becoming a refuge for indigents.²⁸⁷ While several courts recognize that ordinances criminalizing homelessness are unconstitutional,²⁸⁸ the majority of federal and state courts continue to uphold such practices.²⁸⁹ Fortunately, *Jones and Pottinger* provide a legitimate framework for overturning the majority of anti-homeless ordinances. Building on the rationale of these opinions, a compelling case exists for finding anti-homeless ordinances unconstitutional as violations of both the fundamental right to travel and the prohibition against cruel and unusual punishment.²⁹⁰

First, such ordinances violate the fundamental right to travel protected by the Fourteenth Amendment to the U.S. Constitution.²⁹¹ Very little shelter is truly "available" to indigents,²⁹² and as a result anti-homeless ordinances burden homeless individuals' freedom of movement within the city in which they re-

²⁸⁴ See Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight-Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 155 (1999) (citing HUD, NATIONAL EVALUATION OF THE SUPPORTIVE HOUSING DEMONSTRATION PROGRAM: FINAL REPORT, 2-38 (1995)).

²⁸⁵ See *Powell v. Texas*, 392 U.S. 514, 564 (1968) (Fortas, J., dissenting); Shea, *supra* note 274.

²⁸⁶ See A DREAM DENIED, *supra* note 12, at 9.

²⁸⁷ See STONER, *supra* note 231, at 152; Saltzman & Noonan, *supra* note 6, at A1.

²⁸⁸ See *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement); *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

²⁸⁹ See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000); *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

²⁹⁰ See discussion *supra* Part IV.A.

²⁹¹ See discussion *supra* Part IV.A.1.

²⁹² See *supra* notes 202-208 and accompanying text.

side,²⁹³ forcing migration to other communities. At the same time, such ordinances inhibit indigents' ability to migrate because the passage of such laws in major cities results in a domino effect as surrounding communities pass similar laws.²⁹⁴ In inhibiting an indigent's right to remain in the community, while simultaneously making it more difficult for indigents to migrate to other communities, anti-homeless laws burden the right to both interstate and intrastate travel.²⁹⁵ States have attempted to justify laws prohibiting sleeping and camping in public as both supporting aesthetically-pleasing urban areas and reducing crime; however, neither justification is "compelling" when examined under the strict scrutiny test imposed on any law burdening the right to travel.²⁹⁶

Second, many anti-homeless laws criminalize status in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.²⁹⁷ In *Powell v. Texas*, Justice White stated that states cannot criminalize conditions or acts that an individual is powerless to avoid.²⁹⁸ The "homeless condition" is nearly always involuntary, resulting from economic and psychological factors beyond an individual's control.²⁹⁹ That shelter is occasionally available to these unfortunates does not excuse the enactment of such ordinances.³⁰⁰ Ordinances criminalizing conduct that indigents are inevitably forced to perform on the streets and in public parks are unconstitutional.

Finally, such ordinances are simply bad policy.³⁰¹ Contrary to popular belief, anti-homeless laws may actually increase the number of indigents inhabiting our nation's streets.³⁰² The effect of these laws is to heap additional weight on an already overburdened corrections system,³⁰³ exposing indigents to futile prison sentences before placing them back on the streets.³⁰⁴ These indigents, who now have criminal records, will drift from town to town, spurred on

²⁹³ See *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (Law prohibiting wandering the streets at night without ID implicated "consideration of the constitutional right to freedom of movement.").

²⁹⁴ See *STONER*, *supra* note 231, at 152; Saltzman & Noonan, *supra* note 6, at A1.

²⁹⁵ See discussion *supra* Part IV.A.1.

²⁹⁶ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992) (An "interest in having aesthetically pleasing parks and streets" is "not compelling" where there is a "necessity of homeless persons to be in some public place."); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046 (S.D.N.Y. 1992) ("A peaceful beggar poses no threat to society. The beggar has arguably only committed the offense of being needy.").

²⁹⁷ See discussion *supra* Part IV.A.2.

²⁹⁸ *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring).

²⁹⁹ *Pottinger*, 810 F. Supp. at 1563.

³⁰⁰ See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1137 (9th Cir. 2006), *appeal dismissed and vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (parties reached settlement).

³⁰¹ See discussion *supra* Part IV.B.

³⁰² See *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1182 (Cal. 1995) (Mosk, J., dissenting).

³⁰³ See *Powell*, 392 U.S. at 564-65; Kondo, *supra* note 277, at 259.

³⁰⁴ See *Powell*, 392 U.S. at 564.

by the proliferation of anti-homeless laws, unable to find a job as a result of their imprisonment. Legislatures must cease and desist passing anti-homeless laws. They must repeal anti-homeless laws currently on the books because they are unconstitutional enactments that perpetuate rather than solve our nation's homeless problem.