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"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless

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COMMENTS

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Do people have a right to life simply by reason of their humanity or citizenship? . . . [S]hall we permit people to freeze to death in the winter, to starve, to die from the effects of preventable disease, merely because they are poor, insane, or addicted to drugs? In the long run, the ways in which our society responds to that fundamental question will determine far more than the plight of the homeless. It will define our civilization.¹

I. INTRODUCTION

December 30, 1987, was an unusually cold night in Miami; temperatures hovered around forty degrees Fahrenheit. The following evening was the annual King Orange Bowl Parade, a nationally televised New Year's Eve extravaganza through the streets of downtown Miami. Seventy-five persons slept in the streets around Camillus House, one of downtown Miami's privately funded homeless shelters.²

1. Note, *Hunger and Homelessness in America: A Survey of State Legislation*, 66 DEN. U.L. REV. 277, 287 (1989) (footnote omitted) (citing Blasi, *Litigation on Behalf of the Homeless: Systematic Approaches*, 31 WASH. U.J. URB. & CONTEMP. L. 137 (1957)).

2. Camillus House is a privately funded shelter for homeless men. It offers a wide variety

The individuals lay huddled in blankets supplied by the shelter. Camillus House had closed its doors early that evening, as it often must, because it was filled to capacity.³ At 2:30 A.M., several City of Miami police officers swept into the area and arrested forty-one homeless persons⁴ for violating a City ordinance that prohibited sleeping in the streets.⁵ The director of Camillus House decried the City's attempt to "clean up the streets" by eliminating the unsightly presence of homeless individuals prior to the parade.⁶

Similar atrocities have been perpetrated with increasing frequency in cities across the country as police enforce legislation prohibiting people from sleeping in the streets or on sidewalks,⁷ or

of services to Miami's homeless population, including meals, showers, mail service, clothing, and health care. MIAMI COALITION FOR CARE TO THE HOMELESS, TOWARDS AN END TO HOMELESSNESS AND HUNGER IN SOUTH FLORIDA: A PLAN FOR DADE AND MONROE COUNTIES, 1989-1994, at 27 (1989); see also Greer, *Medical Problems of the Homeless: Consequences of a Lack of Social Policy—A Local Approach*, 45 U. MIAMI L. REV. 407 (1990-1991) (discussing Camillus Health Concern).

3. Camillus House has available space for 70 men. MIAMI COALITION FOR CARE TO THE HOMELESS, *supra* note 2, at 27.

4. Ryan, *Police Arrest Homeless Outside Camillus House*, Miami News, Dec. 30, 1987, at A4, col. 5.

5. MIAMI, FLA., CODE § 37-63 (1990) ("It shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof.")

6. Ryan, *supra* note 4, at A4, cols. 5-6. The following night, the Miami police arrested another 30 to 35 people in the downtown area. Prichard & Quadayol, *Police Harass Homeless, Camillus House Chief Says*, Miami News, Dec. 31, 1987 at A5, col. 2, A5, col. 3. Police arrest an estimated 3,000 to 4,000 people annually for sleeping in public in Miami. *Police Arrest 40 Homeless People Sleeping Outside Crowded Shelter*, Miami Herald, Dec. 31, 1987, at B2, col. 5. As a result of the December 30, 1987, arrest, homeless advocates filed a class action lawsuit on behalf of homeless people living in Miami. See *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988).

7. As homeless advocates recently argued in a case involving homeless persons in San Diego, California:

Before the City of San Diego began its current activities, the phrase the "crime of homelessness" referred to the way our society treats the homeless, rather than the culpability of the homeless themselves. The City of San Diego, however, is disturbed by homelessness. It is unsightly, and therefore it is bad for business, tourism, and public image. Thus, instead of social services, the City has sought a more immediate solution by discovering the archaic remnant of a vagrancy statute drafted in the 19th century and, based on that statute, declaring that the homeless of San Diego are committing a crime by sleeping outside.

Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer at 1, *Manicom v. Burgreen*, No. 613914 (Cal. Sup. Ct., San Diego Cty. filed Aug. 2, 1989); see also CAL. PENAL CODE § 647(i) (West 1988) (prohibiting "lodg[ing] in any building, structure, vehicle or place, whether public or private, without the permission of the owner or person entitled to [its] possession or control"); PHOENIX, ARIZ., CITY CODE § 23-48.01 (1981) (providing that "[i]t shall be unlawful for any person to use a public street, . . . sidewalk [or] other right-of-way, for lying, sleeping, or otherwise remaining in a sitting position thereon, except in the case of a physical emergency or the administration of medical assistance), cited in *Seeley v. State*, 134 Ariz. 263, 655 P.2d 803 (Ct. App. 1982); L.A. Times, Sept. 21, 1988, at Pt. 2, col. 1

remaining in parks after closing hours.⁸ These arrests are symptomatic of a clash of competing interests between homeless persons' exigency to perform fundamental life activities⁹ in public,¹⁰ and non-homeless citizens' desire to be able to utilize freely public facilities without encountering "unsightly" homeless people. Government, the entity entrusted with regulating and maintaining public health, safety, and welfare, is largely responsible for balancing these competing interests. To put the tension in perspective, one must first try to

(discussing the issuance of citations in San Diego for violating statute); L.A. Times, Mar. 31, 1988, at Pt. 2, col. 5 (describing the enforcement of an ordinance prohibiting sleeping on the beach in Los Angeles). Other ordinances utilized against homeless persons prohibit loitering, engaging in disorderly conduct, and displaying public intoxication. For an account of a homeless person sweep in Santa Ana, California, see *Santa Ana Police Chief Vows to Continue with Sweeps; Civil Rights: Despite Questions of Legality, He Defends the Roundup of 64 Homeless Men at the Civic Center on Wednesday*, L.A. Times, Aug. 18, 1990, at B5, col. 3 (Orange Cty. ed.) (explaining that homeless people were held for six hours for one of four infractions: jaywalking, urinating in public, public drunkenness, or littering); and *64 Homeless Men Seized in Santa Ana Police Sweep; Crime: Officers Write Numbers on Arms of Those Arrested: A Civil Rights Proponent Says the Action Smacks of Nazism*, L.A. Times, Aug. 17, 1990, at B6, col. 1 (Orange Cty. ed.) (noting that police wrote large, red numbers on the forearms of the homeless persons arrested).

8. See SANTA BARBARA, CAL., MUNICIPAL CODE § 15.16.085 (1986), cited in *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985), cert. denied, 475 U.S. 1141-42 (1986); see also Rogers, *Police 'Bum Busters' Oust the Homeless*, Miami Herald, Feb. 27, 1991, at A1, col. 2 (describing the arrest of 200 people for sleeping in parks in downtown Miami); Molotsky, *Upset by Beggars, Washington Is Arresting Them*, N.Y. Times, Nov. 7, 1990, at A20, col. 4, A20 col. 5 (describing Washington, D.C.'s use of a law prohibiting "wandering abroad and begging"); Ifill, *Sympathy Wanes for Homeless; Funding Drop, Arrests Herald New Attitude*, Wash. Post, May 21, 1990, at A1, col. 1 (describing Atlanta's change of attitude, resulting in a campaign to arrest homeless men and women for blocking traffic and being drunk in public); Kifner, *Police Dismantle Tent City in Lower East Side Park*, N.Y. Times, Dec. 15, 1989, at A6, col. 1 (describing eviction of 90 homeless persons from an encampment in a New York park); Dunlap, *Stern Seeks Expanded Rules to Curb House of Parks in New York*, N.Y. Times, Mar. 15, 1989, at B1, col. 2 (describing expanded city park regulations that forbid overnight sleeping, begging, or loitering).

9. Fundamental life activities can be separated into two categories. The first category includes those activities that are absolutely essential to the maintenance of life (e.g., sleeping, eating, and tending to personal hygiene). The second category includes those activities that are necessary for a balanced and normal lifestyle (e.g., socializing and moving around freely).

10. The vast majority of homeless persons lack a place in which to perform basic life activities. Although some homeless persons live in shelters, many do not enjoy such "luxury." Those that do are usually required to leave during the day. Finally, because many shelters are unsafe, homeless persons often choose to remain on the streets rather than risk their personal safety by sleeping in shelters. See Gibbs, *Answers at Last: After a Decade of Despair, Americans Are Finding Ways to Help the Homeless by Providing Treatment, Counseling and Training—Along with Shelter*, TIME, Dec. 17, 1990, at 44, 46 (describing how men in shelters prevent theft by sleeping with their shoes wedged under the legs of their cots); Barron, *In Bitter Cold, Some of Homeless Resist Shelters They Often Fear*, N.Y. Times, Dec. 13, 1988, at A1, col. 2; Thornton, *Gangs, Drug Sales Found in the Shelters*, Chicago Tribune, Mar. 24, 1988, at C2, col. 1.

understand the magnitude of homelessness and its origins.¹¹

Congress defines a homeless individual as:

- (1) an individual who lacks a fixed, regular, and adequate nighttime residence; and
- (2) an individual who has a primary nighttime residence that is—
 - (A) a supervised . . . shelter designed to provide temporary living accommodations . . . ;
 - (B) . . . a temporary residence for individuals intended to be institutionalized; or
 - (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.¹²

This broad definition encompasses an extremely diverse group of persons with disparate needs.¹³ The homeless population includes fami-

11. For a discussion of the causes of homelessness and attempts by local governments to remove homeless individuals from public areas, see Comment, *The Unconstitutionality of 'Antihomesless' Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595 (1989). See also R. ROPERS, *THE INVISIBLE HOMELESS: A NEW URBAN ECOLOGY* (1988) (providing insights into the origins and nature of homelessness in America).

12. Steward B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302(a) (1988). Some commentators have broadened this definition to include persons living in unsafe or unsanitary housing. See Chackes, *Sheltering the Homeless: Judicial Enforcement of Governmental Duties to the Poor*, 31 WASH. U.J. URB. & CONTEMP. L. 155 (1987).

13. Although most homeless individuals require assistance in obtaining health care, food, and other basic subsistence items, certain sub-groups of the homeless population require additional services. For example, homeless substance abusers need assistance in overcoming the cycle of their addictions. The homeless mentally ill require community outreach programs, psychological counseling, and, possibly, drug therapy. The unemployed homeless need employment assistance, job training, and counseling. Homeless families need child-care assistance. A city official in Kansas City described some of the consequences of homelessness:

Adults exhibit a state of hopelessness, sometimes so severe that it limits their ability to focus beyond meeting immediate demanding needs. Low self-esteem also characterizes many, perhaps, most of the women. The longer individuals remain in a shelter, the greater the negative impact of their situation on their behavior.

The impact of homelessness on children is varied and extreme, and it is probably much more severe than we can currently determine. We do know that younger children suffer developmental delays and often persist in infantile behavior into and beyond the pre-school years. We have observed that older children often assume parental roles toward younger siblings and their parents. Such inappropriate role assumption typifies the development problem even at these older ages. Low self-esteem emerges as a factor in disruptive and self-destructive behavior of teens. Sadly, these and other undesirable effects of homelessness on children are often beyond the parents' ability to cope, given the magnitude of their personal problems.

U.S. CONFERENCE OF MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES*: 1989, at 31 (1989) (hereinafter U.S. MAYORS); see also Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337 (1990-1991) (discussing basic issues in mapping legal strategies for homeless children); Comment, *The Homeless School-Age Child: Can Educational Rights Meet Educational Needs?*, 45 U.

lies,¹⁴ mentally ill persons,¹⁵ drug and alcohol abusers,¹⁶ recently and chronically unemployed persons,¹⁷ veterans,¹⁸ the working poor,¹⁹ and individuals suffering from AIDS.²⁰

Homelessness emerged in the early 1980's as one of this country's largest and most visible social problems.²¹ An alarming number of

MIAMI L. REV. 537 (1990-1991) (discussing statutory and litigative avenues for meeting the education needs of homeless persons).

14. Families with children comprise, on average, 36% of the homeless population. U.S. MAYORS, *supra* note 13, at 2 (1989). In New York, 60% of the homeless population are families. *Id.* at 68.

15. Approximately 25% of homeless individuals are severely mentally ill. *Id.* at 2. Many of the mentally ill homeless are "benefitting" from the deinstitutionalization policies of the 1960's. See E. TORREY, NOWHERE TO GO: THE TRAGIC ODYSSEY OF THE HOMELESS MENTALLY ILL (1988); Belcher, *Are Jails Replacing the Mental Health System for the Homeless Mentally Ill?*, 24 COMMUNITY HEALTH J. 185 (1988) (concluding that changes in the mental health care system would prevent criminalization of homeless mentally ill persons); McCoy, *Enforcement Workshop: Policing the Homeless*, 22 CRIM. L. BULL. 263 (1986) (describing the failure of deinstitutionalization because of a lack of adequate community facilities ill).

16. An average of 44% of the homeless population in surveyed cities are substance abusers. U.S. MAYORS, *supra* note 13, at 2.

17. An estimated 76% of homeless persons are unemployed. *Id.* at 2. It is extremely difficult for homeless persons to break their unemployment cycle. They do not have access to personal hygiene facilities to be presentable for job interviews and no permanent address or telephone number to receive messages or to contact potential employers. See Rule, *Resentment of New Thatcher Tax Feeds the Bonfire of Britain's Anarchists*, N.Y. Times, Apr. 29, 1990, at L3, col. 1 (quoting a homeless man encountering such difficulties).

18. Twenty-six percent of the homeless population are veterans. U.S. MAYORS, *supra* note 13, at 2.

19. An average of 24% of homeless persons are employed in full-time or part-time jobs. *Id.* Some psychologists argue that the lack of "social support," including financial assistance for child care and transportation, and emotional assistance through family and community networks, may contribute to the perpetuation of one's homeless status. See Solarz & Bogat, *When Social Support Fails: The Homeless*, 18 J. COMMUNITY PSYCHOLOGY 79 (1990).

20. Boston, Los Angeles, New Orleans, and Trenton reported that over five percent of their homeless population are HIV-positive. U.S. MAYORS, *supra* note 13, at 29. Many of the 27 cities surveyed lacked the necessary information to respond to this inquiry. *Id.*; see also Comment, *Adding Insult to Injury: The Lack of Medically-Appropriate Housing for the Homeless HIV-III*, 45 U. MIAMI L. REV. 567 (1990-1991).

21. Homelessness existed as a social problem before the 1980's. The demographics of today's homeless, however, differ significantly from that of earlier periods in that today's homeless are younger people, include women and families, and are "considerably more deprived in their housing." Rossi, *The Family, Welfare and Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281, 282 (1989); see also Hopper, *The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301 (1989) (providing a historical perspective and discussing a social recognition of homelessness); Stern, *The Emergence of the Homeless as a Public Problem*, 58 SOC. SERV. REV. 291, 293 (1984) (discussing how the "homeless" have been conceptualized in the public's mind). Reid, in *Law, Politics and the Homeless*, 89 W. VA. L. REV. 115, 116 (1986), asserts that had the homelessness social problem arisen in the 1960's, it would have been managed by President Johnson's "War on Poverty," which was instituted to create a "Great Society," by funding programs such as the Model Cities Program. *Id.* Reid argues that today's homeless are "one of the most vulnerable and stigmatized populations of our

Americans are homeless, with estimates ranging from 250,000 to 3,000,000 persons.²² Some studies have estimated that the homeless population is increasing by twenty-five percent annually.²³ Concurrently, the number of shelter beds and the amount of low-income housing has not kept pace with the rapidly rising demand.²⁴ According to a 1989 survey of twenty-seven major American cities, an average of twenty-two percent of the demand for emergency shelter goes unmet.²⁵ In seventy-eight percent of the surveyed cities, homeless families are turned away from shelters because of a lack of resources.²⁶ In all of the surveyed cities, a lack of affordable housing

current society," *id.*, because as poverty, alcohol, and drug abuse sweep across America, these social problems are being largely ignored. *Id.* The Court is leaving the most difficult socio-economic questions to policymakers, and the legislature is powerless to initiate new programs because it is facing mounting budget deficits and social problem cutbacks. *Id.*

The factors that contributed to homelessness gathered momentum in the 1970's. Hopper & Hamberg, *The Making of America's Homeless: From Skid Row to New Poor, 1945-1984*, in CRITICAL PERSPECTIVES ON HOUSING (R. Bratt, C. Hartman, & A. Meyerson eds. 1986) (noting that during the 1945-1970 skid-row era America did not have a significant street-dwelling population because of the availability of low-cost or free housing, even though it was often of "wretched" quality).

22. Comment, *Homeless Families: Do They Have a Right to Integrity?*, 35 UCLA L. REV. 159, 162 (1987) (citing DEPARTMENT OF HOUS. & URB. DEV., A REPORT TO THE SECRETARY ON THE HOMELESS AND EMERGENCY SHELTERS, cited in *Community for Creative Non-Violence v. Pierce*, 814 F.2d 663, 664-65 (D.C. Cir. 1987) (other citations omitted)). Estimates of the number of homeless persons vary significantly depending on one's definition of homelessness. See White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271, 275 (1990-1991). For a report of the difficulties in counting the homeless population, see Wessel, *Street Sweep: Counting the Homeless Will Tax the Ingenuity of 1990 Census Takers*, Wall St. J., Nov. 14, 1989, at 1, col. 1.

23. In 1989, 27 major American cities reported that the demand for emergency shelter increased by an average of 25%. U.S. MAYORS, *supra* note 13, at 2.

24. In 59% of the cities surveyed, emergency shelters must reject some homeless people because of a lack of resources. *Id.*

25. *Id.* In many cities, the "homeless problem" is becoming markedly (and embarrassingly) more noticeable as well.

There have always been beggars and vagrants in New York. But the surge in the number of street people over the last few years has made many New Yorkers uneasy and has shocked visitors to the city. Their presence has defined, for many, an erosion in the quality of life and in concern for others.

Homeless advocates say many other cities are as burdened by the homeless as New York. . . . [They say that] Los Angeles and Chicago may have proportionately as many homeless as New York, and that complaints about safety in huge government run shelters can be heard elsewhere in the country as well.

But the problem is particularly visible in New York, where the homeless have settled in the midst of a dense downtown area and have become part of the daily routine. In other, more sprawling cities, the homeless are less visible, seen more often on television news programs than in the streets.

Barbanel, *Homeless: What New York Can't Do*, N.Y. Times, Dec. 14, 1988, at A1, col. 4.

26. U.S. MAYORS, *supra* note 13, at 27.

was identified as the principal cause of homelessness.²⁷ Other causes of homelessness include mental illness (and a lack of support services for mentally ill people),²⁸ unemployment,²⁹ economic factors (such as the erosion of real incomes among poor people),³⁰ inadequate income assistance programs,³¹ substance abuse (and a lack of needed support services for substance abusers),³² family crises and domestic violence,³³ and criminal victimization.³⁴

Poverty in the United States increased drastically during the 1980's. A 1990 Congressional Budget Office study determined that the poorest twenty percent of Americans have an average pretax income of only \$7,725.³⁵ During the 1980's, this group's real income shrunk by three percent, while their net federal tax rate increased by sixteen percent.³⁶ Concurrently, the wealthiest twenty percent of Americans, who enjoy an average pretax income of \$105,209, have seen their real income grow by thirty-two percent, while their net federal tax rate dropped by five and one-half percent.³⁷ President Reagan, apparently believing that homeless persons choose to be homeless, noted, "There are shelters in virtually every city and shel-

27. *Id.* at 2; see Heller, *The Crisis in Low-Income Housing*, 58 J. NEGRO EDUC. 281 (1989); Wright & Lam, *Homelessness and the Low-Income Housing Supply*, 17 SOC. POL'Y 48 (1987).

28. U.S. MAYORS, *supra* note 13, at 42.

29. *Id.*

30. *Id.*

31. *Id.* For a report documenting the relationship between homeless families and inadequate public assistance levels, see NATIONAL COALITION FOR THE HOMELESS, *OVER THE EDGE: HOMELESS FAMILIES AND THE WELFARE SYSTEM* (1988).

32. U.S. MAYORS, *supra* note 13, at 42; Kolata, *Twins of the Streets: Homelessness and Addiction*, N.Y. Times, May 22, 1989, at A1, col. 2 (attributing drug and alcohol abuse as a major reason for homelessness); see also Davidson, *Cries for Help; Some Addicts Beg for Drug Treatment, but Programs Are Full*, Wall St. J., Sept. 4, 1990, at 1, col. 1 (describing the shortage of drug treatment programs). *But cf.* Letter to the Editor, N.Y. Times, June 12, 1989, at A18, col. 4 (arguing that such substance abuse is symptomatic, rather than a cause of profound poverty and homelessness).

33. U.S. MAYORS, *supra* note 13, at 42.

34. Nearly 13% of the participants in a 1985 study of homeless persons (19.6% of women and 8.9% of men) identified criminal victimization as the direct cause of their homelessness. Of these crime victims, 68.8% were victims of family violence or assault. A. Solarz, *Criminal Victimization Among the Homeless 13-15, 19-20* (Oct. 29-Nov. 1, 1986) (paper presented at the annual meeting of the American Society of Criminology).

35. Zaldivar, *Tax Study Finds Rich Are Richer; Poor, Poorer*, Miami Herald, Feb. 17, 1990, at A1, col. 1.

36. *Id.*

37. *Id.* A statistical analysis of American living standards published by the Economic Policy Institute reported that in the 26 years from 1947 to 1973, average family incomes rose by 111%. From 1973 to 1989, income increased only nine percent. Passell, *Economic Scene: Harder Times, Softer Politics*, N.Y. Times, Sept. 5, 1990, at D2, col. 1. In 1973, the poorest 40% of American families received 17% of the national income, while the richest 20% took home 41%. Comparatively, by 1988, the poorest 40% of Americans pocketed only 15% of the national income, while the richest 20% took home 44%. *Id.*

ters here, and those people still prefer out there on the grates or the lawn to going into one of those shelters.”³⁸

Local and state governmental responses to the problems of homeless persons vary. Most of these governments are facing severe budget shortfalls and have tremendously reduced social program funding accordingly.³⁹ Many cities have responded aggressively to homeless individuals living in their streets and parks by arresting them or by trying to relocate them to other locales.⁴⁰ Other cities have adopted a policy of benign neglect, tolerating homeless persons on their streets as an unfortunate fact of urban life and permitting them to sleep in parks, subways, and public buildings.⁴¹ Some cities, which at first had been restrained in their response, have become less tolerant as they find themselves “overrun” with homeless persons.⁴² Citizens grumble about an inability to walk down the street or use public transportation without encountering homeless individuals beg-

38. Cannon, *Reagan Cites 'Choice' by Homeless; Shelters Available President Says*, Wash. Post, Dec. 23, 1988, at A8, col 3. President Reagan also stated that a large percentage of homeless citizens were “retarded” and blamed the ACLU for successfully promoting legal changes that deinstitutionalized the mentally ill. *Id.* The President proclaimed, “They wanted freedom, but they walked out to where there was nothing for them.” *Id.*

39. See Verhovek, *Cuomo Seeks Big Cuts; 10,000 May Be Laid Off*, N.Y. Times, Nov. 18, 1990, at A1, col. 1 (discussing huge reductions in New York state’s government workforce, Medicaid, and social spending amounting to \$200 million); Uchitelle, *Data Verify Economic Malaise: 16 States in or Near a Recession*, N.Y. Times, July 16, 1990, at A1, col. 1 (noting that 16 states, with more than a third of the nation’s population, are in a recession or close to one).

40. See *supra* notes 4-8 and accompanying text. Often, arresting homeless men and women has the effect of encouraging them to relocate. Other cities have actively enhanced the relocation process by offering homeless persons free, one-way airplane and bus tickets. See *Plan to Bus Homeless Out of Town Questioned*, UPI, Dec. 5, 1989 (LEXIS, Nexis library, Omni file) (citing an Atlantic City, New Jersey councilwoman’s plan to give one-way bus tickets to homeless persons); *Newspaper: Suburbs Shipping Their Homeless to Philadelphia*, UPI, Feb. 12, 1989 (LEXIS, Nexis library, Omni file) (asserting that various suburban organizations send homeless individuals to Philadelphia against their will); Johnson, *Homeless Get Ticket to Leave*, N.Y. Times, Nov. 20, 1988, at 52, col. 1 (describing a Burlington, Vermont restaurant owner’s offer to give homeless individuals a free one-way ticket out of town).

41. In New York City, former Mayor Koch ruled out the use of criminal laws to deal with homeless people explaining that “[t]here are other priorities to deal with in this town. . . . I believe that New Yorkers, like all Americans, have compassion at heart and want a compassionate response. . . . You cannot use police powers. They have nothing to do with the shelter system.” Barbanel, *supra* note 23, at B10, col. 1. The Koch administration used coercion only to prevent people from freezing to death or to hospitalize severely mentally ill people. However, these programs reached only a “tiny fraction of those on the streets.” *Id.*

42. See Rimer, *Public Areas Try to Repel Homeless*, N.Y. Times, Nov. 18, 1989, at A1, col. 1 (describing the public’s growing exasperation with the homeless population and explaining municipalities’ and public institutions’ responses by using greater restrictions and access to city parks, subways, and train stations); Freitag, *For the Homeless, Public Spaces Are Growing Smaller*, N.Y. Times, Oct. 1, 1989, at E5, col. 5 (describing the codes of conduct in public spaces and the closing off of areas frequented by homeless).

ging, sleeping, or simply existing.⁴³ They protest that they cannot enjoy the use of city parks that now house large camps of homeless persons.⁴⁴ Merchants in urban centers complain of difficulties in attracting, or in simply retaining, customers.⁴⁵

43. One New Yorker wrote of waiting for the Long Island Railroad on an evening when service was extremely delayed:

Penn Station is a mecca of apparently homeless, drug-dealing, alcoholic, pickpocketing, begging, stinking vagabonds. I spent much of the evening negotiating my way through rivers of urine, broken glass and human feces. All this in a place where commuters are not permitted to smoke cigarettes. Because of the repulsive bathrooms and nauseating odors permeating the air, I was forced to stand outdoors, unable to hear announcements.

It repels me to question how the [railroad], police department and the City of New York can possibly let this continue. This situation is a clear infringement on the rights of the general public. All the rules of public health and safety are totally disregarded. These people must be encouraged to seek refuge in public shelters.

Foggi, *Clean Up Penn Station*, *Newsday*, April 10, 1990, at 53, col. 1. The frequency of these types of encounters depends on a number of factors, including whether one lives or works in an urban area, and, if so, the method of commute. For example, most Miami residents never come into contact with homeless individuals. Miami is a sprawling metropolis with several urban centers. The homeless population is concentrated in only one such urban center, downtown Miami. Few middle-class or more affluent individuals live downtown. Many Miami residents who work downtown, drive to work, park in their buildings, and rarely come into contact with homeless people. The only contact most Miami residents have with homeless citizens is through television or newspaper accounts of their difficulties.

Miami residents cannot agree on where to locate a shelter for the homeless—"not in my backyard." Camillus House, a privately funded shelter, was scheduled to move to another area of Miami to permit the development of the neighborhood where it is currently located. However, after a last minute bid by residents of the neighborhood that was scheduled to receive the new shelter, the City of Miami Commission failed to permit the move. Goldfarb, *Miami Left Bruised by Camillus Vote*, *Miami Herald*, Mar. 2, 1991, at B1, col. 4; Rogers, *Stay Put, City Tells Camillus; Commission Blocks Site Near Omni*, *Miami Herald*, Mar. 1, 1991, at B1, col. 5.

44. See Kifner, *supra* note 8, at A6, col. 1 (describing the clearing of an encampment of homeless persons from New York's Tompkins Square Park). Parks Commissioner Henry Stern said, "The Lower East Side is a very liberal community, but they found they had lost their park and they weren't willing to live with that." *Id.* at A6, col. 4.

45. As one commentator noted,

The homeless are perceived at best as a constant irritant and at worst a discouraging menace. This public perception translates into a major economic drain on the downtown [Seattle] economy. Retailers, for example, lose potential sales and have to pay increased security costs. Service providers . . . are faced with the prospect of reluctant or lost clients. Unnerved or fed-up employees seek work elsewhere in the city. Commercial real estate managers lose revenue on leases and suffer lower occupancy rates because of the street scene, and convention promoters must steer visiting planners through a *cordon sanitaire* of downtown streets to avoid exposing their clients to aggressive panhandlers or drug dealers.

Roth, *Perceptions of Menace: The Homeless and the Downtown Economy*, 6 PAC. NORTHWEST EXECUTIVE 2, 4 (1990); see also Buckley, *D.C. Merchants Losing Patience with Panhandlers*, *Wash. Post*, Mar. 10, 1990, at B1, col. 2 (describing similar concerns in Washington, D.C.).

The underlying question in this dilemma of competing interests is whose interest should prevail. Homeless advocates maintain that homeless persons have a right to shelter⁴⁶ and that enforcement of "anti-homeless" legislation, such as laws that prohibit sleeping on sidewalks, violates both the right to unrestricted travel and to due process.⁴⁷ Conversely, local governments insist that their police power gives them the right to enforce such laws to advance the public health, safety, and welfare.⁴⁸ The enforcement of anti-homeless legislation against homeless citizens, however, only temporarily assuages the problem because homeless citizens who are arrested and incarcerated for minor offenses are generally released after several hours.⁴⁹ Instead of maximizing the public welfare, enforcement of anti-homeless ordinances avoids solving the homelessness problem and merely encourages homeless persons to relocate from one city's streets to become another city's burden.

This Comment argues that although local governments sometimes have significant, valid interests in utilizing anti-homeless legislation to maintain the public health, safety, and welfare, courts should preclude enforcement of this legislation because it is either facially unconstitutional, or unconstitutional as applied. More pointedly, although the advancement of the public health, safety, and welfare is reasonable and justifiable, arresting homeless citizens to remove them from the streets and parks to encourage them to move elsewhere is not. Section II analyzes "traditional" constitutional challenges to anti-homeless ordinances on the basis of vagueness and overbreadth in light of the current homelessness dilemma. Section III argues that enforcement of anti-homeless ordinances is an unconstitutional punishment of homeless persons for involuntary manifestations of their homeless status. Section IV examines enforcement of and defenses to anti-homeless ordinances through the criminal law doctrines of justifi-

46. See Langdon & Kass, *Homeless in America: Looking for the Right to Shelter*, 19 COLUM. J.L. & SOC. PROBS. 305 (1985); Note, *Establishing a Right to Shelter for the Homeless*, 50 BROOKLYN L. REV. 939 (1984); Comment, *Finding a Right to Shelter for Homeless Families*, 22 SUFFOLK U.L. REV. 719 (1988); Comment, *supra* note 22.

47. See Comment, *supra* note 11.

48. Cities contend that enforcing park closing hours allows them to conserve scarce resources. See *infra* note 95. In addition, non-homeless citizens are often unable to use parks because of fear of crime and apprehension in encountering homeless persons. See *Seeley v. State*, 134 Ariz. 263, 267, 655 P.2d 803, 807 (Ct. App. 1982). Similarly, cities argue that they should have the ability to keep city sidewalks clear for citizens to pass and that people should have the right to walk down the street without fear and harassment from homeless persons. *Id.* Finally, police argue that they are merely enforcing statutes against all violators and that they cannot be expected to differentiate between homeless and non-homeless violators. See *infra* note 165 and accompanying text.

49. See *infra* note 98 and accompanying text.

cation and excuse, and through the morality of the criminal law. Section V then evaluates these constitutional challenges and defenses in light of *Pottinger v. City of Miami*,⁵⁰ a class action lawsuit against the City of Miami, and suggests alternatives to arresting homeless individuals for violating anti-homeless ordinances. Section VI concludes that because ordinances that prohibit sleeping in streets or in parks after hours do nothing to alleviate homelessness, courts should prohibit their enforcement and encourage cities to seek more humane, long-term solutions. In other words, we must treat the causes and not the effects of homelessness.

II. TRADITIONAL CHALLENGES TO VAGRANCY ORDINANCES: VAGUENESS AND OVERBREADTH

Until the early 1970's, police often arrested persons who lived on the streets for the crime of vagrancy.⁵¹ Vagrancy statutes evolved from English common law,⁵² which punished such *evils* as "idleness," "loafing," and "wandering."⁵³ In the 1960's, a number of commenta-

50. No. 88-2406 (S.D. Fla. filed Dec. 30, 1988).

51. See *infra* notes 52-59.

52. English vagrancy law found its roots in the decay of feudalism. Vagrancy laws were first incorporated as a means of encouraging labor stability, i.e., to confine the laboring population to certain places and require them to work for specified wages. Thereafter, vagrancy laws were used to make criminal the status of poverty. The vagrant came to be regarded not only as a runaway slave but also as a probable criminal. J. STEPHEN, 3 HISTORY OF THE CRIMINAL LAW OF ENGLAND 266-75 (1883); see also Sherry, *Vagrants, Rogues and Vagabonds—Old Concepts in Need of Revision*, 48 CALIF. L. REV. 557, 558-61 (1960) (criticizing vagrancy statutes as antiquated); Note, *The Vagrancy Concept Reconsidered: Problems and Abuses of Status Criminality*, 37 N.Y.U. L. REV. 102, 103-07 (1962) (arguing that vagrancy statutes are an anachronism and reflect a disregard for basic criminal theory).

The justifications for punishing vagrancy included legislative imposition of the Protestant work ethic and recognition of society's interest in preventing an individual from becoming a "public charge," a manifestation of the right of the state to recognize social sensibilities and protect "decent people" from contact with "undesirables," and protection of the public by prevention of crime. Note, *supra*, at 102-03.

53. See *infra* note 55.

tors decried their use,⁵⁴ and in *Papachristou v. City of Jacksonville*,⁵⁵ the United States Supreme Court held vagrancy laws facially unconstitutional.⁵⁶ Relying on the fourteenth amendment's due process clause, which prohibits a state from "depriv[ing] any person of life, liberty, or property, without due process of law,"⁵⁷ the Court held that vagrancy laws were void for vagueness because they "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct [was] forbidden by the statute,"⁵⁸ and because they "encourage[d] arbitrary and erratic arrests and convictions."⁵⁹

54. See Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956); Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203 (1953); Sherry, *supra* note 52; Note, *supra* note 52. Professor Caleb Foote warned of using vagrancy statutes as a substitute for eliminating the root causes of particular social problems:

The common ground that brings such a motley assortment of human troubles before the magistrates in vagrancy-type proceedings is the procedural laxity which permits "conviction" for almost any kind of conduct and the existence of the House of Corrections as an easy and convenient dumping-ground for problems that appear to have no other immediate solution.

Foote, *supra*, at 631. Professor Foote also discussed the use of vagrancy ordinances to "dress up the city center" by eliminating unattractive persons who were "loitering" and to "clean up skid row" by arresting alcoholics who were sleeping on the streets. *Id.* at 631-33. He criticized both uses of vagrancy ordinances, arguing that the former was unconstitutionally vague, and that the latter was an entirely ineffective way of dealing with alcoholics' problems. *Id.*

55. 405 U.S. 156 (1972). Eight defendants were convicted for violating the Jacksonville, Florida, vagrancy ordinance which provided as follows:

Rogues and vagabonds, or dissolute persons who go about begging, persons who use juggling or unlawful games or plays, common drunkards, common night walkers[,] . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons[,] . . . persons able to work but habitually living upon the earnings of their wives and minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses."

Id. at 156 n.1. (citing JACKSONVILLE, FLA., CODE §§ 26-57 & 1-8 (1965)). Class D offenses at the time of conviction were punishable by 90 days' imprisonment, \$500 fine, or both. *Id.*

56. *Id.* at 171.

57. U.S. CONST. amend. 14, § 1.

58. *Papachristou*, 405 U.S. at 162 (citations omitted) (explaining that the constitutional requirement of definiteness prohibits holding one responsible for conduct which he could not reasonably understand to be proscribed); see *United States v. Harriss*, 347 U.S. 612, 617 (1954) (describing the constitutional requirement of definiteness in a criminal statute); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939) (striking a criminal statute punishing membership in a gang because it found that the law did not give fair notice of the offending conduct).

59. *Papachristou*, 405 U.S. at 162 (citations omitted). The Court also criticized the ordinance because it was enforced to prevent future criminality:

A presumption that people who might walk or loaf or loiter or stroll . . . are to become future criminals is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—is too extravagant to deserve extended treatment. Of course, vagrancy statutes are useful to the police. Of course, they are nets making easy the round-up of so-called undesirables. But the rule of law implies equality and justice in its application. Vagrancy laws . . . teach that the scales of justice are so

Many similar laws were invalidated under the fourteenth amendment in later cases.⁶⁰ In *Kolender v. Lawson*,⁶¹ for example, the Court invalidated a California statute that "required persons who loiter or wander on the streets to provide a 'credible and reliable' identification and account for their presence when requested by a police officer."⁶² The Court held the statute void for vagueness because it failed to give actual notice to citizens of forbidden conduct and, more importantly, because the legislature failed to "establish minimal guidelines to govern law enforcement."⁶³ The Court found that without "minimal guidelines," the statute encouraged "arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute."⁶⁴

Today, the legislation that local and state governments utilize to police homeless persons (collectively referred to as anti-homeless legislation) can be separated into two categories. One category includes laws that utilize broad, inexplicit language, such as a ban on "lodg-

tipped that even-handed administration of the law is not possible. The rule of law, evenly applied to minorities as well as majorities, to the poor as well as to the rich, is the great mucilage that holds society together.

Id. at 171. The Court alludes to a possible racial motivation on the part of the police. *Id.* at 158-59.

The *Papachristou* opinion approaches vagrancy from a romanticized individual freedom standpoint. The Court seems to be saying that laws should not be enacted or construed to prohibit a person from choosing to walk the streets and live a life of leisure. Justice Douglas writes of these activities as "historically part of the amenities of life as we have known them." *Id.* at 164. He discusses the choice to walk the streets as being embodied by Walt Whitman's "Song of the Open Road," by Lindsay's "I Want to Go Wandering," and by Thoreau's writings. *Id.* Today's homeless population no longer embodies endearing images of individual freedom or of the "open road."

60. See, e.g., *Squire v. Pace*, 516 F.2d 240 (4th Cir.), cert. denied, 423 U.S. 840 (1975); *Waters v. McGuriman*, 656 F. Supp. 923 (E.D. Pa. 1987); *Farber v. Rochford*, 407 F. Supp. 529 (N.D. Ill. 1975).

61. 461 U.S. 352 (1983).

62. *Id.* at 356.

63. *Id.* at 358.

64. *Id.* at 361.

ing”⁶⁵ or “public habitation.”⁶⁶ Without legislative guidance, it is difficult for an individual to evaluate whether his actions constitute illegal “lodging” or “habitat[ing]” in a public place.⁶⁷ In addition, without minimal definitional guidelines, the terms “lodging” or “habitation” fail effectively to limit police conduct. Police, therefore, retain complete discretion in determining whether someone is lodging or habitating.⁶⁸ Accordingly, under the *Papachristou* and *Kolender* rationales, this broad, inexplicit form of anti-homeless legislation should be facially invalidated under the fourteenth amendment due process clause for vagueness because it fails to provide both the requisite public notice and police guidelines.⁶⁹

The second category of anti-homeless legislation utilizes more specific, narrow language, such as a prohibition against “sleeping on public streets and sidewalks” and “remaining in parks after closing

65. CAL. PENAL CODE § 647(i) (West 1988) (A person is guilty of disorderly conduct when the person “lodges in any building, structure, vehicle or place, whether public or private, without the permission of the owner or person entitled to the possession or in control thereof.”) Numerous homeless persons have been arrested in San Diego, California, for violating this statute. The attorneys for the American Civil Liberties Union argue, in their Demurrer to the State’s complaint for an arrest of a homeless person, the difficulties with this statute. A non-homeless person goes to a public park carrying a plastic bag with a change of clothes and food for the afternoon. She spreads out an old sheet, drinks a beer, eats a bologna sandwich she prepared earlier, and dozes off to sleep. Nearby, a person pushing a shopping cart containing all of his worldly possessions, stops to rest, eats a bologna sandwich given to her by a local shelter, and falls asleep. Which of these activities is lodging? Can police be expected to draw a distinction between the two? Demurrer to Complaints; Memorandum of Points and Authorities Supporting Demurrer at 6-8, *State of California v. Griffan*, Nos. B973409 & B945720 (San Diego Mun. Ct. filed Aug. 18, 1988).

66. NEW ORLEANS, LA., MUNICIPAL CRIMINAL CODE § 42-80 (1987). This section states:

- (a) It shall be unlawful for any person to commit the crime of unauthorized public habitation [defined as]:
 - (1) The sleeping by any person on a street, sidewalk, neutral ground, alleyway, park or other public property in this city; or
 - (2) The use of any motor vehicle . . . for . . . sleeping, cooking, washing, and/or showering.

Id.

67. For example, to be “lodging” or “habitating” in a public place, must an individual establish a temporary residence in public, or be sleeping in public, or be standing in public? See Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendants’ Demurrer at 13, *Manicom v. Burgreen*, No. 613914 (Cal. Sup. Ct., San Diego Cty. filed Aug. 2, 1989).

68. *Id.* at 16; see also *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-69 (1971) (noting that such ordinances place “almost unfettered discretion in the hands of police” and replace the probable cause requirement for arrest of the fourth and fourteenth amendments with a mere “suspicion” requirement).

69. *Kolender v. Lawson*, 461 U.S. 352 (1982); *Papachristou*, 405 U.S. at 156. *But cf.* Statement of Decision on Demurrer at 2-3, *People v. Robinson*, No. B973545 (San Diego Mun. Ct. filed Oct. 24, 1988) (finding the statute, CAL. PENAL CODE § 647(i) (West 1988), prohibiting lodging not vague.)

hours."⁷⁰ Courts have generally found this category of laws not unconstitutionally vague because they provide individuals with adequate notice regarding prohibited behavior and contain proper police guidelines to regulate enforcement.⁷¹ Although this type of legislation is not be unconstitutionally vague because it provides the requisite notice, it is unconstitutionally overbroad if it prohibits innocent, unoffending conduct that is beyond the state's police power to regulate.⁷² In *Kent v. Dulles*,⁷³ for example, the Court emphasized that "[o]ur nation . . . has thrived on the principle that, outside areas of plainly harmful conduct, every American is left to shape his own life as he thinks best, do what he pleases, go where he pleases."⁷⁴ Similarly, the *Papachristou* Court, criticized vagrancy statutes for making criminal certain activities that are "normally innocent" by modern standards.⁷⁵ The Court specifically condemned the ordinance's prohibitions against "nightwalking,"⁷⁶ against "persons . . . living off the earnings of their wives or minor children,"⁷⁷ and against persons "neglecting all lawful business and habitually spending their time by frequenting . . . places where alcoholic beverages are sold or served."⁷⁸ The Court was concerned that these prohibitions might implicate the innocent, unoffending conduct of insomniacs, the *legitimately* unemployed, and even members of country clubs, respectively.⁷⁹

70. See *supra* note 7-8.

71. See *Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987) (upholding ordinance prohibiting sleeping in motor vehicles because it provided "proper and precise notice of the conduct prohibited"); *Seeley v. State*, 134 Ariz. 263, 655 P.2d 803 (Ct. App. 1982) (finding an ordinance prohibiting "lying, sleeping or otherwise remaining in a sitting position" on a street not unconstitutionally vague because it was "capable of being understood by any individual"); *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 222 Cal. Rptr. 736 (App. Dep't Super. Ct. 1985) (finding an ordinance prohibiting sleeping in a park after hours unconstitutionally vague only if "vague in all of its applications"), *cert. denied*, 475 U.S. 1141 (1986); *People v. Trantham*, 161 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 535 (App. Dep't Super. Ct. 1984) (finding an ordinance prohibiting entry into a park from 10:30 P.M. to 5:00 A.M. not vague when read as simply a park closure law).

72. See *Fenster v. Leary*, 20 N.Y.2d 309, 299 N.E.2d 426, 282 N.Y.S.2d 739 (1967) (holding a vagrancy statute unconstitutional because it prohibited conduct of an individual which in no way impinged upon rights or interests of others). Overbroad legislation may also be invalidated if it prohibits constitutionally protected conduct. See *Grayned v. City of Rockford*, 408 U.S. 104 (1972) (upholding an anti-noise ordinance because it did not prohibit conduct protected under the first and fourteenth amendments).

73. 357 U.S. 116 (1958).

74. *Id.* at 126 (quoting Z. CHAFEE, THREE HUMAN RIGHTS IN THE CONSTITUTION OF 1787, at 197 (1956)).

75. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 163 (1971).

76. *Id.*

77. *Id.*

78. *Id.* at 164.

79. *Id.* at 163-64.

Recently, in *City of Pompano Beach v. Capalbo*,⁸⁰ a Florida appellate court held an anti-homeless ordinance that prohibited sleeping in a motor vehicle facially unconstitutional on two grounds. First, the ordinance gave police "unbridled discretion," because many persons who violate the ordinance, such as a child sleeping in a car seat or a driver who is sleeping off inebriation, would never be arrested.⁸¹ Second, the ordinance made criminal conduct that did not impinge on the rights or interests of others.⁸² Other courts, however, have found that laws prohibiting sleeping in motor vehicles or on public streets are not overbroad because the over-inclusion is generally minor and, thus, such narrow laws are within a city's broad police powers.⁸³

The test to determine the legitimacy of a city's police power is that police conduct must bear a reasonable relationship to an objective of the law.⁸⁴ On a constitutional challenge, if the court finds that "a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects[,] . . . it is the duty of the court[] to so adjudge, and thereby give effect to the constitution."⁸⁵

The cases that have challenged the constitutionality of legislation, prohibiting sleeping in motor vehicles or in parks, have not involved homeless defendants.⁸⁶ Significant issues are raised, however, when local governments attempt to use narrowly drawn anti-homeless legislation to prohibit homeless individuals from sleeping in the streets and parks. As the following discussion will illustrate, not

80. 455 So. 2d 468 (Fla. Dist. Ct. App. 1984), *cert. denied*, 474 U.S. 824 (1985).

81. *Id.* at 470.

82. *Id.* (quoting *Lazarus v. Faircloth*, 301 F. Supp. 266, 272 (S.D. Fla. 1969), *vacated*, 401 U.S. 987 (1971); *see also* *State v. Penley*, 276 So. 2d 180 (Fla. Dist. Ct. App. 1973) (finding that an ordinance that prohibited a person from sleeping in public made no distinction between conduct calculated to harm and conduct that is essentially innocent).

83. *See, e.g.*, *Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987). The Hershey court upheld an ordinance prohibiting sleeping in motor vehicles because it did not attempt to regulate a substantial amount of constitutionally protected activity; thus, it was a valid exercise of the city's broad police powers. *Id.* at 940. Also, the court determined that it was possible to construe the statute to give it a limiting effect to avoid overbreadth. *Id.* at 939; *see also* *United States v. Hogue*, 752 F.2d 1503, 1505 (9th Cir. 1985) (upholding conviction under a park regulation of a drunk driver who chose to sleep off the effects of alcohol, noting that "[t]he law does not exonerate one who forces an election between evils and chooses the lesser of the two"); *Seeley v. State*, 134 Ariz. 263, 655 P.2d 803 (Ct. App. 1982) (finding an ordinance prohibiting sitting on a street not overbroad because the state had a valid reason for making the conduct illegal).

84. *See* *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 16, 222 Cal. Rptr. 736, 739 (App. Dep't Super. Ct. 1985), *cert. denied*, 475 U.S. 1141 (1986).

85. *Mugler v. Kansas*, 123 U.S. 623, 661 (1887).

86. *Hershey*, 834 F.2d at 937 (involving a defendant who was resting in his car); *People v. Trantham*, 161 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 535 (App. Dep't Super. Ct. 1984) (involving a defendant who was using a park restroom after hours).

only are these types of anti-homeless legislation unconstitutional for prohibiting innocent conduct and for failing to be rationally related to a legitimate state purpose, but they are a waste of limited city resources as well.

In analyzing innocent conduct, it is self-evident that it is a biological necessity for all individuals to sleep.⁸⁷ By definition, however, homeless persons lack a permanent residence and, thus, lack a regular place to sleep.⁸⁸ Many homeless citizens do not have shelter available,⁸⁹ they have no other choice but to sleep outside. For others, shelter options are available, but concerns for personal safety override that alternative.⁹⁰ In any event, rather than being a crime, the homeless person's act of sleeping outside constitutes completely innocent conduct because it is an act of compulsion and harms no one. Accordingly, under the *Kent v. Dulles* and *Papachristou* rationales, by enforcing anti-homeless ordinances that prohibit sleeping in the streets or parks, the state is unconstitutionally prohibiting innocent, necessary conduct.⁹¹

In analyzing whether anti-homeless legislation is unconstitutional for failure to advance a legitimate state interest, the court must determine whether the police conduct bears a reasonable relationship to the objective of the legislation.⁹² Local governments have given various rationales for exercising their police power to prohibit sleeping in the streets and parks. These rationales include "protect[ing] . . . the community from an increase in criminal behavior caused by the transient population,"⁹³ "protecting the sleeping transient as *victim*,"⁹⁴ and conserving scarce city resources by restricting entrances to parks between certain hours.⁹⁵ The use of the police power in this

87. Toufexis, *Drowsy America*, NEWSWEEK, Dec. 17, 1990, at 78, 79 ("[S]leep is a biological imperative. . . . A typical adult needs about eight hours of [sleep] a night to function effectively.").

88. See Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302(1) (1988) (defining a homeless individual as a person lacking a "fixed, regular, and adequate nighttime residence.").

89. See *supra* notes 10, 22-27, 38 & 49 and accompanying text.

90. See *supra* note 10.

91. For a review of those rationales, see *Kent v. Dulles*, 357 U.S. 116 (1958); and *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).

92. *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 16, 222 Cal. Rptr. 736, 739 (App. Dep't Super. Ct. 1985), *cert. denied*, 475 U.S. 1141 (1986).

93. *Id.*

94. *Id.*

95. Motion to Dismiss or for Summary Judgment with Incorporated Memorandum of Law at 10, *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988) ("The city argued that "[t]he City of Miami has the right to police its streets and regulate the use of its parks for the good and benefit of all the citizenry and it should not be hampered in this regard by the unfortunate needs and requirements of a relatively small group of persons."); see also

way is ineffectual, however, in terms of eliminating what the local government perceives as manifestations of homelessness. The "crime control rationale" fails for two reasons. First, it is impossible for homeless persons to commit crimes in their sleep.⁹⁶ Second, homeless persons do not commit more crimes than the general population.⁹⁷ The "protecting the homeless persons" rationale is also flawed because homeless persons that are arrested for violating anti-homeless legislation are simply removed from the streets for several hours and then released.⁹⁸ Hence, they are protected as potential victims only for the short time that they are in custody. Instead of protecting homeless persons, arresting them may just encourage them to relocate to suburban areas where they lose the benefit of support from other homeless individuals and from social service groups, both of which are generally concentrated in urban areas.⁹⁹ Likewise, scarce governmental resources, including funds, personnel, and property, are only conserved for the several hours that homeless citizens are off the streets. Ironically, enforcing these types of anti-homeless legislation will actually result in a net loss of governmental resources when one considers the aggregate costs of manpower used to sweep the streets of homeless individuals day after day and process and prosecute them in the criminal justice system.¹⁰⁰ Certainly, legislators must realize that, with no other options available, homeless persons likely will return to the same streets and parks where they subsisted before being arrested, only to repeat the cycle. Thus, the state interest in prohibiting sleeping in the streets or parks is not sufficiently rationally related to a legitimate state purpose. Therefore, anti-homeless legislation should be adjudged unconstitutional.¹⁰¹ Local governments do not

People v. Trantham, 161 Cal. App. 3d Supp. 1, 208 Cal. Rptr. 535 (App. Dep't Super. Ct. 1984) (finding a park closure law reasonable to protect city property).

96. *Davenport*, 176 Cal. App. 3d Supp. at 16, 222 Cal. Rptr. at 739.

97. See *infra* notes 233-38 and accompanying text.

98. Second Amended Complaint for Declaratory, Injunctive, and Compensatory Relief/Class Action at 6, *Pottinger*, (No. 88-2406). Homeless defendants are often "coerced" into pleading guilty in exchange for time served. *Id.*

99. The *Davenport* court suggests that "the City acts reasonably in lessening the risks to transients by restricting the areas where overnight sleeping, and thus vulnerability, can legitimately take place." *Davenport*, 176 Cal. App. 3d Supp. at 17, 222 Cal. Rptr. at 739. The problem with this rationale is that cities are not using such legislation to restrict homeless persons to certain areas of the city; they are subject to arrest whenever they sleep outside.

100. For a discussion of using city resources in an alternative, productive manner to combat homelessness, see *infra* notes 268-76 and accompanying text.

101. Advocates and commentators have posed several possible alternatives for finding laws used to punish homeless individuals facially unconstitutional. Some advocates have argued that homeless persons have a constitutionally protected right to remain on the streets because sleep is a constitutionally protected activity. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The Court, however, held that the government may restrict sleeping in

advance the public welfare by shielding either homeless persons or the public at large from harm. Rather, legislation prohibiting sleeping in the streets and parks bears no substantial relation to the protection of public health, morals, or safety. These types of legislation actually waste limited governmental resources by causing substantial expenditures of public funds to remove homeless citizens from the streets and parks on a daily basis rather than channeling those funds into effective solutions to the homelessness crisis.

III. PUNISHMENT FOR AN INVOLUNTARY MANIFESTATION OF HOMELESS STATUS

Advocates for homeless citizens have also relied on the eighth amendment to invalidate anti-homeless legislation.¹⁰² They have argued that legislation that prohibits sleeping in public or parks after hours unconstitutionally punishes homeless persons for involuntary manifestations of their homeless status. This Section sets forth the background and development of the prohibition against punishing

public via reasonable time, place, or manner restrictions, and thus, such conduct is not constitutionally protected under the first amendment. *Id.* at 293-99. The Court did not decide whether sleeping in public was protected under the fourteenth amendment substantive due process clause, which "protects substantive aspects of liberty against unconstitutional restrictions by the state." See *Kelley v. Johnson*, 425 U.S. 238, 244 (1976) (citing *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972)). Some commentators have argued that ordinances used to police homeless citizens may violate a homeless person's right to travel. See Comment, *supra* note 11, at 605-23. The right to privacy is another theory that might be used to establish a constitutionally protected interest for homeless men and women to remain on the streets. Justice Brandeis argued that all individuals enjoy a liberty interest derived from the "right to be left alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. U.S.*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled*, *Berger v. New York*, 388 U.S. 41 (1967). For a discussion of a case in which the Connecticut Supreme Court held that the possessions of a homeless person are protected by the fourth amendment, even though his "home" was technically a public place anyone could enter, see Johnson, *Hartford Court Rules Belongings of a Homeless Man Are Private*, N.Y. Times, Mar. 19, 1991, at 5A, col. 1. In a simpler sense, punishment violates a homeless person's right to human dignity. See Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry into Criteria and Content*, 27 How. L.J. 145 (1984).

102. The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The constitutional claim that homeless persons are being punished for involuntary manifestations of their status is being advanced in Complaint for Declaratory and Injunctive Relief/Class Action at 7-8, *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988), and was advanced both in Memorandum in Support of the Plaintiffs' Motion for Summary Judgment at 22-26, *Thompson v. City of New Orleans*, No. 85-5475 (E.D. La. filed May 27, 1986), and Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer at 9-12, *Manicom v. Burgreen*, No. 613914 (Cal. Sup. Ct., San Diego Cty. filed Aug. 2, 1989). For a discussion of the history and uses of the eighth amendment, see *Ingraham v. Wright*, 430 U.S. 651, 666 (1977).

status, hereinafter referred to as the *Robinson* doctrine,¹⁰³ analyzes the extension of this doctrine to encompass anti-homeless legislation, and then discusses criticisms to the extension of the *Robinson* doctrine.

A. *Background: The Robinson Doctrine*

In *Robinson v. California*,¹⁰⁴ the defendant was convicted for violating a California statute that made it a criminal offense for a person to "be addicted to the use of narcotics."¹⁰⁵ The Court did not question the state's power to regulate narcotics in the interest of public health and welfare.¹⁰⁶ Rather, it held the statute unconstitutional because it allowed for conviction based on the defendant's "status" or "chronic condition" of being "addicted to the use of narcotics."¹⁰⁷ *Robinson* was the first reported decision in which the Court applied the eighth amendment as a limitation upon state power and, more importantly, invoked that amendment's ban on cruel and unusual punishment against a statute's substantive provisions.¹⁰⁸ The Court compared conviction for narcotics addiction to conviction for mental illness, leprosy, or affliction with venereal disease, maintaining that these conditions require treatment—not punishment.¹⁰⁹

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

104. *Id.*

105. *Id.* at 660 n.1. The California statute at issue provided as follows:

No person shall use, or be under the influence of, or be addicted to the use of narcotics Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced to serve a term of not less than 90 days nor more than one year in the county jail.

CAL. HEALTH & SAFETY CODE § 11721 (West 1975), *repealed by* 1972 CAL. STAT. 1407.

106. *Robinson*, 370 U.S. at 664. The state has the power to impose criminal sanctions for possession, manufacture, and distribution of narcotics within its borders, as well as compulsory treatment (including involuntary confinement) for persons addicted to narcotics. The Court suggested that states implement a broader attack on narcotics using public health education and amelioration of the economic and social conditions under which drug abuse flourishes. *Id.* at 664-65.

107. *Id.* at 665. The Court implied that the statute would have been valid had it punished the actual use, purchase, sale, or possession of narcotics within the State's borders, or had it provided or required medical treatment for addiction. *Id.* at 664-65. The statute was unconstitutional, however, because the punishment for the status of addiction allowed the state to prosecute an addict "at any time before he reforms." *Id.* at 666. The Court also found the statute repugnant to the constitution because it made it a crime to suffer from the illness of narcotics addiction, "which may be contracted innocently or involuntarily." *Id.* at 667 (footnote omitted).

108. See Manes, *Robinson v. California: A Farewell to Rationalism*, 22 L. TRANSITION 238 (1962); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 645-46 (1966). For a summary of critiques of the *Robinson* decision, see L. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 98-99 (1975).

109. *Robinson*, 370 U.S. at 666.

We hold that a state law which imprisons a person thus afflicted as a criminal,

Commentators have suggested three constitutional rationales as to why punishment of an illness is cruel and unusual.¹¹⁰ First, the law may not punish a mere condition, but must address the acts of individuals.¹¹¹ In *Robinson*, the Court confirmed that it was not addressing the state's ability to punish acts, such as the manufacture, possession, or purchase of narcotics,¹¹² or to civilly confine an addict for treatment.¹¹³ Instead, the *Robinson* Court was concerned with the state's punishment of a person's "chronic condition" of "being addicted to the use of narcotics."¹¹⁴

The second rationale, termed the "status one cannot change" argument,¹¹⁵ involves the notion that "the victim *cannot help himself*; once an individual has acquired a sickness, he is not free voluntarily to quit his condition."¹¹⁶ Accordingly, a law that prohibits a sickness

even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment.

Id. at 667.

In his concurrence, Justice Douglas noted:

A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." . . . Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. . . . A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. . . . This prosecution has no relationship to the curing of an illness.

Id. at 676-78 (Douglas, J., concurring).

Justice Douglas also emphasized the involuntary nature of drug addiction, criticizing those who believe that addicts can simply choose to "forsake their evil ways." *Id.* at 669-70.

110. Note, *supra* note 108, at 646-55.

111. *Id.* at 646-47.

112. *Id.* at 664. The Court noted that:

There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs. . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question.

Id. (quoting *Whipple v. Martinson*, 256 U.S. 41, 45 (1921)).

113. *Id.* at 664-65. The Court explained,

In the interest of discouraging the violation of [narcotics] laws, or in the interest of the general health and welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures.

Id. (footnote omitted).

114. *Id.* at 665.

115. *Id.* at 648.

116. *Id.*

can have no deterrent effect and is morally repugnant.¹¹⁷

The third rationale is that courts are reluctant to punish a person for a condition that was contracted "innocently or involuntarily."¹¹⁸ This rationale suggests, however, that if an individual consciously chooses to experiment with drugs, he could be punished for his condition. Further, one who innocently or involuntarily acquired his addiction could be punished for *possession* or *use* of drugs.¹¹⁹

Advocates have argued persuasively that the prohibition against punishing status applies to other criminal contexts besides addiction. For example, in *Wheeler v. Goodman*,¹²⁰ a North Carolina federal district court invalidated a statute that defined "vagrant" as a person living in idleness or without visible means of support because it made this unfortunate status criminal.¹²¹ The court held that the statute punished a person for his economic status without mens rea,¹²² in violation of the eighth and fourteenth amendments.¹²³

Although some courts have extended the *Robinson* reasoning to laws punishing public intoxication,¹²⁴ the Supreme Court refused to

117. *Id.* (criticizing this rationale by noting that there is a significant difference between addiction and most sicknesses; an individual, at least initially, made the choice to use narcotics).

118. *Id.* (citing *Robinson v. California*, 370 U.S. 660, 667 (1962)). Justice Douglas emphasized this point in *Robinson* by discussing how addiction can be acquired involuntarily by infants at birth and as innocently as a "boy's puff on a cigarette in an alleyway." *Robinson v. California*, 370 U.S. 660, 670 (1962).

119. For a judicial acknowledgment of the potential conflict in the Court's affirmation of statutes prohibiting possession and the Court's prohibition of illness and involuntariness, see *Hutcherson v. United States*, 345 F.2d 964, 977 (D.C. Cir.), *cert. denied*, 382 U.S. 894 (1965); and *Lloyd v. United States*, 343 F.2d 242, 245 (D.C. Cir. 1964), *cert. denied*, 381 U.S. 952 (1965).

For an argument that an addict's use of drugs should not be punished, see *United States ex rel. Swanson v. Reincke*, 344 F.2d 260 (2d Cir.), *cert. denied*, 382 U.S. 869 (1965); and *Browne v. State*, 24 Wis. 2d 491, 129 N.W.2d 175 (1964), *cert. denied*, 379 U.S. 1004 (1965).

120. 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

121. *Id.* at 62.

122. For a discussion of mens rea, see *infra* notes 200-05.

123. *Wheeler*, 306 F. Supp. at 62. The *Wheeler* court also criticized the statute on equal protection grounds. It noted that the statute did not punish persons who own property and, therefore, are able to live idly, while it did punish persons who have neither property nor jobs, regardless of whether employment is available. "To make poverty and misfortune criminal is contrary to our fundamental beliefs, and to arrest and prosecute a person under this statute violates the Fourteenth Amendment." *Id.* at 62; see also *Farber v. Rochford*, 407 F. Supp. 529, 533-34 (N.D. Ill. 1975) (invalidating an ordinance that punished individuals "known to be" a prostitute or narcotics addict); *Goldman v. Knecht*, 295 F. Supp. 897, 907-08 (D. Colo. 1969) (invalidating a statute prohibiting loitering by any "able-bodied" person); *State v. Pugh*, 369 So. 2d 1308, 1309-10 (La. 1979) (invalidating a vagrancy statute aimed against "habitual drunkards").

124. See *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

do so in *Powell v. Texas*.¹²⁵ In *Powell*, the defendant argued that because he was a chronic alcoholic, "his appearance in public while drunk was not of his own volition," and that, therefore, his punishment would be a violation of the eighth and fourteenth amendments.¹²⁶ The Court rejected this argument noting that the defendant was convicted for the voluntary act of being in public while drunk, not for the status of being a chronic alcoholic.¹²⁷ The Court's analysis rested on the defendant's ability to have made the choice to drink at home.¹²⁸

Justice White's concurrence recognized that although it was constitutionally permissible to punish an alcoholic who has a home, and hence, has an opportunity not to be drunk in public, it would be unconstitutional to punish a homeless alcoholic for drinking in public:

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.¹²⁹

Justice White's argument that an act cannot be punished if it cannot be avoided reveals the Court's differentiation between a crime requiring an act and the prohibition of a particular status. Other

125. 392 U.S. 514 (1968) (echoing the voluntary/involuntary and act/non-act distinction).

126. *Id.* at 517.

127. *Id.* at 532.

128. *Id.* at 535.

129. *Id.* at 551 (White, J., concurring) (footnote omitted). Justice Fortas, writing for the dissent, argued that:

Robinson stands upon the principle that . . . is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson 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 for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

Id. at 567 (Fortas, J., dissenting) (footnote omitted).

attempts to extend the *Robinson* doctrine—that is, the notion of status criminality—beyond punishment for sociomedical or economic problems generally have not been successful.¹³⁰ One rationale for courts' reluctance to extend the *Robinson* doctrine stems from the fear that it would be difficult to delimit truly involuntary offenses.¹³¹ In *Perkins v. North Carolina*,¹³² for example, a homosexual defendant attempted to apply the *Robinson* doctrine to sodomy statutes.¹³³ A North Carolina federal district court refused to find that the defendant was being punished for his status as a homosexual and upheld the conviction because the defendant had been "convicted of an overt act."¹³⁴ Another rationale for courts' refusal to extend the doctrine is that the Supreme Court has never discussed fully the standards relating to actus reus (the physical element of a crime) and mens rea (the mental element of a crime).¹³⁵ In *Watson v. United States*,¹³⁶ for instance, a narcotics addict, arrested for possessing a small amount of heroin, claimed that *Robinson* precluded punishment of an addict for possession of narcotics for personal use.¹³⁷ The *Watson* court rejected the defendant's argument, distinguishing punishment for possession of narcotics from punishment for being addicted to narcotics,¹³⁸ which the *Robinson* Court found unconstitutional.¹³⁹ The *Watson* court explained its reticence to find that the eighth amendment precluded punishment of an addict for possession of narcotics as follows:

130. "The doctrine of involuntariness as part of a constitutional view of a criminal responsibility has completely stagnated. The few cases in the area have been relegated to isolated examples primarily dealing with the punishment of sociomedical problems like drug addiction and chronic alcoholism." Sundby, *The Reasonable Doubt Rule and the Meaning of Innocence*, 40 HASTINGS L.J. 457, 478 (1989).

131. The *Powell* majority was reticent to extend the use of the eighth amendment to public intoxication for two reasons: (1) the lack of data demonstrating that alcoholism is a disease; and (2) the difficulty in placing limits on which offenses are truly involuntary. The second rationale is discussed in W. LAFAVE & A. SCOTT, CRIMINAL LAW § 2.14, at 183 (abr. 2d. ed. 1986). The authors explain that if possession and use of narcotics are inevitable for the addict, then perhaps the commission of offenses which supply the funds necessary for the continued use of narcotics, such as robbery, may similarly be inevitable. *Id.* The *Powell* dissent disagrees with LaFave and Scott, arguing that there are definable limits. The dissent noted that there is no constitutional bar on conviction for crimes such as theft and robbery because such crimes "are not part of the syndrome of the disease of chronic alcoholism." *Powell*, 392 U.S. at 559 n.2 (Fortas, J., dissenting).

132. 234 F. Supp. 333 (W.D.N.C. 1964).

133. *Id.* at 336-37.

134. *Id.* at 337.

135. For a discussion of actus reus and mens rea, see *infra* notes 197-205 and accompanying text.

136. 439 F.2d 442 (D.C. Cir. 1970).

137. *Id.* at 446.

138. *Id.* at 447.

139. *Robinson v. California*, 370 U.S. 660, 667 (1962).

[T]he Supreme Court in *Powell* has left th[e] matter of criminal responsibility, as affected by the Eighth Amendment, in a posture which is, at best, obscure. The majority in [*Powell*] unmistakably recoiled from opening up new avenues of escape from criminal accountability by reason of the compulsions of such things as alcoholism and, presumably, drug addiction—conditions from which it is still widely assumed, rightly or wrongly, that the victim retains some capacity to liberate himself. In any event, . . . *Powell* at the least contemplates a heavy burden of proof on one who claims to the contrary.¹⁴⁰

B. *Applying the Robinson Doctrine to Homelessness*

Despite most courts' reluctance to extend *Robinson* beyond a very limited set of circumstances, the *Robinson* doctrine can be cautiously expanded to encompass other crimes involving involuntary manifestations of a particular status. The *Robinson* doctrine can effectively be limited to make it manageable and, therefore, palatable.¹⁴¹ As Justice White explained in his *Powell* concurrence, a chronic alcoholic without a home cannot avoid being drunk in public; thus, under the eighth amendment, he cannot be prosecuted for public intoxication.¹⁴² Following this analysis, it is equally violative of the eighth amendment to prosecute a homeless person for involuntary manifestations of his status, such as sleeping, bathing, urinating, or residing in the streets or in parks after hours. Congress has defined a homeless individual as one who lacks a fixed, regular, and adequate nighttime residence or has a primary nighttime residence in a shelter, an institution, or a place not normally used as a regular sleeping accommodation for human beings.¹⁴³ As Congress' definition of a homeless person illustrates, the status of being homeless is inextricably linked with the manifestations of that status. The definition emphasizes that the lack of a fixed, adequate place to sleep is central

140. *Watson*, 439 F.2d at 451. The dissent disagreed, arguing that "*Powell* should be read not as a bar, but as an exhortation toward further experiment with common-law doctrines of criminal responsibility." *Id.* at 459 (Bazelon, J., dissenting in part, concurring in part).

141. *See supra* note 131. In applying the *Robinson* doctrine to homeless people, the involuntary manifestations of their status would include sleeping on the streets, begging for food, defecating in public, and staying in parks after hours. Involuntary manifestations would not include breaking into a home to sleep or stealing to earn money to pay for housing. Even though the notion of sleeping on the streets (or in the subway) is appalling to most individuals, it is still an option available to homeless persons. Thus, the direct invasion of another's private property should not be included as an involuntary manifestation of the status of homelessness. Perhaps the result would be different if a homeless man or woman faced freezing temperatures or starvation.

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

143. Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302(a) (1988).

to defining one as being homeless. To punish a person for not having an adequate place to sleep, then, is equivalent to punishing that individual for *being* homeless.

This analogy to Justice White's *Powell* concurrence assumes that homeless people are involuntarily without a residence.¹⁴⁴ Based on two factors—the reported dearth of affordable housing and available emergency shelter in the United States¹⁴⁵ and the difficulties that homeless persons experience in attempting to obtain employment to help them leave the streets¹⁴⁶—involuntary homelessness is a reality. For example, in Dade County (Miami), Florida, 20,700 units were removed from the housing stock between 1979 and 1983.¹⁴⁷ During the same period, the percentage of renters in Dade County paying more than thirty-five percent of their income for rent increased from thirty-nine to forty-nine percent.¹⁴⁸ Further, four out of five of the over five thousand homeless persons in Dade County are without even temporary shelter.¹⁴⁹ Although some critics charge that homeless individuals could simply “get a job,” and earn their way off the streets,¹⁵⁰ this assertion ignores the twenty-four percent of homeless

144. The vast majority of homeless individuals are on the streets involuntarily. See *supra* notes 24-27 & 148 and accompanying text for an account of the tremendous shortage of public housing in the United States. See *supra* note 10 for an account of the dangers present in many shelters and for a description of shelter rules that require shelter residents vacate the shelter's premises during daytime hours. Very few homeless individuals bring to mind Justice Douglas' romantic notions of wanderers. See *supra* note 59.

145. See *supra* notes 24-27 & 148 and accompanying text.

146. See Rule, *supra* note 17, at L3, col. 1 (describing the rise in Britain's anarchist movement, fueled in part by difficult economic conditions). One homeless man, William Dean, discussed his frustration in attempting to secure employment:

The people in government should be doing something for us but they don't want to do anything. They think that we just got to put up with it. But you get angry when you can't get a job without an address and someplace to live and you can't get someplace to live unless you got a job.

Id. at L3, col. 2.

147. MIAMI COALITION FOR CARE TO THE HOMELESS, *supra* note 2, at 3 (citing data from a United States census survey).

148. *Id.* at 4-5. In 1983, 25% of Miami renters were paying over 60% of their income for rent. *Id.* at 5. Public housing agencies meet only 42.5% of the demand for low-cost housing in South Florida. *Id.*

149. Dlühy, *How to Help Dade County's Homeless*, Miami Herald, Jan. 13, 1991, at 1C, col. 1.

150. See Buckley, *supra* note 45, at B5, col. 5 (One homeless person panhandling in Washington, D.C., “said he gets angry ‘when people say, “You're big, you're healthy, go get a job.” Why don't they say, “Son, you want to work? I know where you can get a job,” even if it's mowing lawns or digging ditches or fixing cars.’”); Jaynes, *Intense Nights in a Cold Shanty on Sixth Street*, N.Y. Times, Dec. 30, 1987, at B1, col. 1 (Michael Cruzado, a former construction foreman, now homeless man living in a plywood shack in New York City noted, “I'd tell panhandlers to get a job, but when I lost mine I found out: share what you've got, every little bit.”).

citizens who already have full or part-time jobs.¹⁵¹ An additional group of the homeless population is chronically unemployed,¹⁵² and an estimated twenty-five percent of homeless persons are mentally ill,¹⁵³ for whom ordinary employment is not plausible.¹⁵⁴ A wage earner in Miami, for example, would have to earn about seven dollars per hour in order to be able to afford even the poorest quality housing, and such jobs are simply unavailable.¹⁵⁵ Finally, ordinary employment is not possible for the estimated forty-four percent of homeless people who are substance abusers,¹⁵⁶ until they have been rehabilitated.¹⁵⁷ In any event, under *Robinson*, the circumstances under

151. See *supra* note 19. One must often pay first and last month's rent and one month's security deposit to obtain housing. In Miami, Florida, for example, such deposits average \$650 for an individual and \$790 for a family. Dluhy, *supra* note 149, at 6C, col. 1. Many Americans cannot afford these expenses. In addition, countless Americans are simply one or two paychecks away from becoming homeless. For example, millions of Americans have no health insurance. "In one 28 month period spanning 1985 through 1987, 28% of Americans were covered [with health insurance] for less than the full 28 months. Among 18- to 24-year-olds, however, 52% suffered from interruptions in coverage." Passell, *supra* note 37, at D2, col. 1. For an individual employed by a small business that offers no medical benefits, the effects of an illness can be catastrophic. The effects may cause the individual to use any accumulated savings to pay for medical assistance. Consequently, they may be forced to miss rent payments, and possibly be evicted. It is then a short step to homelessness. The effects of being laid off from work can be similarly devastating.

152. The American economy has 5.6% unemployment. See Hershey, *Job Growth Hits a Standstill, While Unemployment Rises*, N.Y. Times, Sept. 8, 1990, at A1, col. 1. The statistics for blacks are even more grim: Blacks face unemployment rates of 11.8%. A certain percentage of this unemployment has been termed "chronic unemployment," encompassing individuals who are, quite simply, "unemployable." The Labor Department reported that 45,000 factory jobs were lost in August 1990, bringing the aggregate between January and August 1990 to 455,000; 40,000 construction jobs were lost in August 1990, bringing the total factory jobs lost between June and August 1990 to 100,000. *Id.* at A10, col. 4. As the film *Roger & Me*, so aptly demonstrated, one cannot tell an unemployed auto worker in Flint, Michigan to "get a job." See *Roger & Me* (Warner Brothers 1989).

153. See *supra* note 15.

154. Some of these individuals could be gainfully employed in certain occupations. However, they still require some care and counseling and generally cannot take care of themselves entirely. Deinstitutionalization has been widely criticized because it did not provide essential outpatient care facilities. See McCoy, *supra* note 15, at 265.

155. Dluhy, *supra* note 149, at 6C, cols. 1-2.

156. See *supra* note 16.

157. Ordinary employment is not available because the substance abuser is a slave to his addiction, and therefore is generally not responsible enough to hold regular employment for any length of time. Also, with a growing number of employers screening employees with drug tests, it becomes more difficult for substance abusers to obtain gainful employment. See Behrens, *The Limits: The Right to Privacy vs. Drug-Free America*, Newsday, Jan. 13, 1989, at 2, col. 1. In 1988, 50% of the Fortune 500 companies had drug-testing programs, an increase from roughly 5% in 1982. *Id.* at 3, col. 5. A Labor Department survey of 7,500 private employers indicated that one of every 100 American workers was tested for drug use in 1988. *Id.* at 5, col. 1. Some policymakers have proposed drug testing of public assistance recipients. See *Drug Testing Is Urged for Welfare Recipients*, Chicago Tribune Wire, Aug. 3, 1989 (LEXIS, Nexis library, Omni file) (A Milwaukee, Wisconsin city official proposed drug testing

which an individual becomes homeless¹⁵⁸ and the possibility that he may someday overcome that status is irrelevant.¹⁵⁹ Rather, the key issue is whether the homeless person is involuntarily homeless—that is, whether he is able to effect an immediate change in his homeless status.¹⁶⁰ As the statistics demonstrate, most homeless persons have no hope of effecting even a short-term change in their homeless status.

C. *Criticisms to the Extension of the Robinson Doctrine to Homelessness*

1. PROHIBITION OF OVERT ACTS

Some advocates argue that anti-homeless legislation is constitutional because it prohibits overt, voluntary acts,¹⁶¹ as distinguished from legislation that prohibits a certain status, which the Court found unconstitutional in *Robinson*.¹⁶² The overt acts prohibited, for example, include falling asleep in public, littering, urinating in public, or seeking shelter in a park after hours. Based on *Robinson*, in which the Court noted that it was within a state's police power to prohibit the use and possession of narcotics to protect the public health and welfare, local governments have argued that it is within their police power to prohibit overt acts of homelessness.¹⁶³

The overt acts in question, however, are essential to the homeless persons' survival. Although one might argue that a narcotics addict exercises some free will every time he chooses to use narcotics, a homeless individual does not exercise discretion in deciding to sleep, eat, drink, or excrete. All individuals are compelled to engage in these basic life sustaining activities. In other words, the homeless person's acts of falling asleep in the street or being in a park after hours

for recipients of Aid to Families with Dependent Children ("AFDC")). Finally, there are simply not enough rehabilitation programs available for the substance abusers. See Davidson, *supra* note 32, at 1, col. 1.

158. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Demurrer at 11, *Manicom v. Burgreen*, No. 613914 (Cal. Sup. Ct., San Diego Cty. filed Aug. 2, 1989) (citing *Robinson v. California*, 370 U.S. 660, 666-67 (1962)) (arguing that it was irrelevant to the Court's decision that the drug addict could have altered his status by seeking treatment).

159. *Id.* (citing *Robinson v. California*, 370 U.S. 660, 666-67 (1962)) (arguing that although the *Robinson* Court noted that addiction can be voluntarily or involuntarily acquired, the Court did not inquire into how *Robinson* became addicted).

160. *Id.*

161. Motion to Dismiss or for Summary Judgment with Incorporated Memorandum of Law at 1-2, *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988).

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

163. Motion to Dismiss or for Summary Judgment with Incorporated Memorandum of Law at 10, *Pottinger* (No. 88-2406).

are not overt,¹⁶⁴ and therefore, under the *Robinson* doctrine they are not acts for which the homeless individual can be prosecuted.

In enforcing anti-homeless legislation, police argue that they cannot be expected to differentiate between homeless and non-homeless individuals.¹⁶⁵ Yet, in the vast majority of cases, it is only homeless persons who commit offenses like sleeping in the streets, urinating in public, or remaining in parks after hours.¹⁶⁶ When homeless individuals sleep outside, and bathe and eat in public, they do so to survive and in doing so are simply manifesting their homeless status. To punish homeless men and women for manifestations of their status is nothing less than punishing them for their underlying homeless status of homelessness.

Admittedly, courts must define the limits to this doctrine of involuntary action so that the rights of homeless individuals not to be prosecuted for involuntary acts are balanced against the rights of individuals to be secure in their homes and to protect their property. Crimes such as a hungry person stealing to eat or a cold person trespassing to stay warm involve more difficult threshold questions.¹⁶⁷ These criminal acts, however, differ from sleeping on the streets or in parks. Sleeping in public is integrally part of the status of homelessness and is behavior for which the harm to the public is not outweighed by the need and rights of the homeless individuals.¹⁶⁸

164. Aristotle believed that conduct due to compulsion is involuntary and that blame is only appropriate for voluntary acts. Bayles, *Reconceptualizing Necessity and Duress*, 33 WAYNE L. REV. 1191, 1193 (1987). For further discussion of the voluntary act requirement of the criminal law, see *infra* Section IV.

165. "A police officer working a beat on a busy urban street can hardly be expected to determine . . . whether or not the person he questions or arrests is 'homeless.'" Order on Application for a Preliminary Injunction at 4, *Pottinger*, (No. 88-2406).

166. Persons with homes or other available shelter do not need to sleep in the streets or in parks, or to bathe or eat in public.

167. For a discussion of the justification/necessity defense, see *supra* notes 209-14 and accompanying text.

168. In discussing relief from criminal sanctions for homeless persons and its relationship to both private property interests and public health and welfare interests, the balance in favor of homeless individuals is stronger, and qualitatively different, than the balance under similar arguments regarding drug addicts. First, when examining voluntary actions, it is clear that acts of theft, whether by a homeless person or a narcotics addict, threaten private property interests and should not be condoned. When examining involuntary actions, however, one needs to weigh the state's interest in protecting the public from harm against the harm that would be inflicted on the sanctioned individual by the regulation. This balancing must occur because an individual acting involuntarily has no choice but to have acted in a particular manner. Thus, it is in the public interest for the state to criminally sanction a drug addict for the *use* of drugs because the potential for violence or harm to the general public outweighs the harm that would be inflicted on the addict by criminal sanctions. See *supra* notes 106 & 112. Conversely, the state should not be able to criminally sanction a homeless person's *use* of public property (parks and streets) for engaging in life-sustaining activities. The homeless

Although local governments have an interest in maintaining their sidewalks and parks for the public benefit, to paraphrase Justice White in his *Powell* concurrence, the homeless population exists and must continue to exist *somewhere*.¹⁶⁹ Accordingly, the public interest cannot outweigh the rights of homeless men and women to sleep in public places until some viable alternatives develop for these individuals. Rather than punishing homeless persons for involuntary manifestations of their status, the most promising way to attack homelessness is "to ameliorate the economic and social conditions under which [the problem] . . . flourish[es]."¹⁷⁰ Otherwise, punishment of homeless individuals for sleeping in public violates "the common standards of decency"—one of the important rationales of the eighth amendment—by becoming "punishment that is disproportionately severe in relation to the susceptibility to deterrence and moral fault of the offender."¹⁷¹

2. IMPROPER APPLICATION OF THE PROTECTIONS OF THE EIGHTH AMENDMENT

Some advocates have argued¹⁷² that because homeless arrestees are usually released prior to receiving a formal adjudication of guilt,¹⁷³ the eighth amendment's protection against punishment based on status should not apply.¹⁷⁴ Simply put, they argue that without

person's right to survive exceeds the state's interest in protecting the public's ability to use parks and streets. Similarly, homeless persons should not be criminally sanctioned when they impair merchants' private property interests (their economic livelihood through their ability to attract customers) by sleeping on merchants' doorsteps. Again, the right of the homeless person to engage in life-sustaining activities outweighs these incidental private property interests.

This is not to say that the public and merchants are not without redress. Their redress should come from the government in the form of a long-term solution to the problem of homelessness. In the interim, a short-term solution in the form of an arrest-free zone in certain areas of the city and/or certain parks which are open to homeless persons may be appropriate. These areas could be supplied with portable bathroom facilities and staffed with community outreach personnel. See *infra* notes 268-76.

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

170. *Id.* at 665.

171. Note, *supra* note 108, at 649.

172. See, e.g., Motion to Dismiss or for Summary Judgment with Incorporated Memorandum of Law at 2, *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988).

173. In many situations, homeless defendants are not given the benefit of a trial and the ability to raise any defenses to their arrests; rather, they are arrested, brought to jail, processed, and released in exchange for time served. Second Amended Complaint for Declaratory, Injunctive, and Compensatory Relief/Class Action at 6, *Pottinger* (No. 88-2406).

174. See *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979) (quoting *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977)). *Bell* involved questions of condition of confinement for certain pretrial detainees. The *Bell* Court held that a person who has been lawfully committed to

adjudication, there can be no question of improper punishment. This argument is without merit. First, cases based on *status* and determining the propriety of treatment of pre-adjudicated detainees involve the substantive provisions of the eighth amendment,¹⁷⁵ not the penalties imposed by it.¹⁷⁶ Accordingly, it is not essential to have a formal adjudication of guilt to challenge a statute that makes status a criminal offense.

Second, in cases involving the arrest of homeless individuals for a violation of anti-homeless legislation, the state retains the power to punish despite the lack of a final adjudication of guilt. This is significant because the eighth amendment applies to a particular case once the state acquires the power to punish.¹⁷⁷ In most criminal cases, "[a] state does not acquire the power to punish . . . until after it has secured a formal adjudication of guilt in accordance with due process of law."¹⁷⁸ In cases involving homeless persons, however, the state acquires this crucial power to punish although it has not obtained a formal adjudication of guilt.¹⁷⁹ The homeless individual is incarcerated upon arrest and remains incarcerated until he pleads guilty, goes to trial, or is simply released without a trial. When he is released in exchange for his time served, his pretrial incarceration becomes his ultimate punishment, although at the time he was incarcerated, there was no final adjudication of guilt. Not permitting homeless defendants to utilize the eighth amendment's protection against punishment based on status would be unfair, because the homeless person generally has no realistic choice but to plead guilty.¹⁸⁰ He faces an option of either remaining in jail until a trial takes place¹⁸¹ or of being released immediately by pleading guilty.¹⁸² In effect, this is no option

pretrial detention has not been adjudged guilty of any crime; therefore, such pretrial detention cannot involve questions of punishment. *Id.* at 536.

175. See *Hamm v. DeKalb County*, 774 F.2d 1567 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

176. See *supra* note 107 and accompanying text.

177. *Ingraham v. Wright*, 430 U.S. 651, 671 n.40 (1977).

178. *Id.*

179. Legal punishment is considered generally to involve a system of threats which demonstrates that if legal rules are violated, unpleasant consequences will follow for the violator. H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 34-61 (1968); E. PINCOFFS, *THE RATIONALE OF LEGAL PUNISHMENT* 56-58 (1966).

180. In the alternative, the fourteenth amendment could be utilized, because "[w]here the State seeks to impose punishment without such an adjudication, the pertinent constitutional guarantee is the Due Process Clause of the Fourteenth Amendment." *Ingraham*, 430 U.S. at 671 n.40.

181. These individuals cannot afford to make bail.

182. That the ordinance with which they have been accused of violating is considered a misdemeanor and, therefore, not deserving of utilization of the full resources of the criminal justice system is irrelevant.

because it puts the homeless person, who is in need of protection, at the mercy of the criminal justice system. To prohibit the homeless individual from utilizing the eighth amendment to protect him from punishment by incarceration is to champion form over substance. Consequently, the homeless individual is haunted by a criminal record and the stigma of arrest for the rest of his life. Indeed, this criminal record may increase the gravity of later punishment if he is arrested again.¹⁸³ As Justice Stewart stated, in emphasizing the importance of evaluating the relative weights of various punishments: "[I]mprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."¹⁸⁴

For homeless men and women, a mere arrest and release without trial is cruel and unusual punishment. The arrest process displaces the homeless individual (often in the middle of the night), and causes him to lose his meager belongings. He is subjected to humility and degradation while being processed and held, and then is subjected to a criminal process that he often does not understand. Upon his eventual release, he is forced to return on foot to the area where he resides, despite his poor physical condition. Ultimately, he is inevitably stigmatized with the taint of a criminal record.¹⁸⁵ Again, this "punishment" is within the coverage of the eighth amendment¹⁸⁶ because it violates "the common standards of decency" by being "disproportionately severe in relation to the susceptibility to deterrence and moral fault of the offender."¹⁸⁷

183. Many states include a defendant's past criminal record as one of the criteria for sentencing. See, e.g., FLA. STAT. § 921.005 (1)(b)(6) (1989) (instructing courts to consider a defendant's prior criminal background in determining whether to withhold a sentence of imprisonment). In addition, it is much more difficult for an individual with a criminal record to obtain employment.

184. *Robinson v. California*, 370 U.S. 660, 667 (1962).

185. See *In re Winship*, 397 U.S. 358, 363-64 (1970) (Criminal conviction "stigmatize[s]" a defendant because of its "moral force."); *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) (Conviction is "an expression of the moral sense of the community").

186. The constitutional prohibition against cruel and unusual punishment serves societal values as follows:

[The prohibition rests on] considerations of human decency. Punishment is ordinarily justified under a utilitarian theory as being necessary for the achievement of a long range benefit. But no matter how great the benefit produced . . . there are standards of decency that may not be violated in punishing a lawbreaker. Not only is the offender's own human dignity at stake, but the standards of humanity embodied in any notion of society limit the methods of punishment that society can conscientiously impose.

Note, *supra* note 93, at 635.

187. Note, *supra* note 108, at 649.

III. JUSTIFICATION, EXCUSE, AND MORALITY

In addition to the constitutional challenges to the validity of anti-homeless legislation, homeless persons should be able to assert the criminal law doctrines of justification and excuse as defenses to their "crimes." Further, in examining the underlying bases for criminal punishment, local governments should be barred from prosecuting and punishing homeless persons for engaging in life-sustaining activities based on morality grounds because such punishment does not further the purposes of criminal punishment. This Section first discusses the requirements of both a physical and mental act in the commission of a crime, and then discusses justification, excuse, and morality.

In *Powell v. Texas*,¹⁸⁸ Justice Marshall emphasized that "[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."¹⁸⁹ Although the courts have never thoroughly developed these concepts into a workable model for legal advocates, these doctrines provide a basis for arguing that criminal law justification and excuse provide defenses to homeless persons for violation of anti-homeless legislation.¹⁹⁰ Judge Bazelon's separate opinion in *Watson v. United States*,¹⁹¹ suggests that a test of accountability for criminal conduct derives from "traditional doctrines of duress and involuntary actions."¹⁹² Some commentators stress that moral considerations enter into the test of accountability for criminal conduct:

Whatever one's position on whether moral or legal responsibility are logically related, it is a plain fact that in practice our criminal law is such that people are generally held criminally responsible only when they would also be held morally responsible. Such an overlap between moral and criminal responsibility is supported by practical as well as moral considerations: Only a criminal law that incorporated to some extent the morality of the society it was supposed to serve, could hope to endure and effectively achieve general deterrence and the other societal benefits that are thought to justify criminal punishment.¹⁹³

188. 392 U.S. 514 (1968).

189. *Id.* at 536.

190. Fletcher, *The Unmet Challenge of Criminal Theory*, 33 WAYNE L. REV. 1439, 1439-41 (1987).

191. 439 F.2d 442, 464-75 (1970) (Bazelon, J., dissenting in part, concurring in part).

192. *Id.* at 469.

193. Vuoso, *Background, Responsibility and Excuse*, 96 YALE L.J. 1661, 1663 n.8 (1987) (citing the following cases among others: *Morrisette v. United States*, 342 U.S. 246, 252 (1952) ("[C]ourts of various jurisdictions . . . have sought to protect those who were not blameworthy

This leads to the conclusion that "it is morally wrong to punish someone who has not done something for which he is morally blameworthy."¹⁹⁴ Judge Bazelon argued that a "law's aims must be achieved by a moral process cognizant of the realities of social injustice"¹⁹⁵ and that "no act should be made criminal if it is not viewed as immoral."¹⁹⁶

Two of the basic principles of criminal conduct include *actus reus* and *mens rea*.¹⁹⁷ *Actus reus* embodies the requirement of a voluntary act for behavior to be treated as criminal.¹⁹⁸ "Bad thoughts alone cannot constitute a crime; there must be an act, or an omission to act where there is a legal duty to act. Thus, the common law crimes are defined in terms of act or omission to act and statutory crimes are unconstitutional unless so defined."¹⁹⁹ *Mens rea* involves the notion that "conduct is criminal only if the actor is aware of the facts making it so."²⁰⁰

[T]o punish conduct without reference to the actor's state of mind is both inefficacious and unjust. It is inefficacious because conduct unaccompanied by an awareness of the factors making it criminal does not mark the actor as one who needs to be subjected to punishment in order to deter him or others from behaving similarly in the future, nor does it single him out as a socially dangerous individual who needs to be incapacitated or reformed. It is unjust because the actor is subjected to the stigma of criminal punishment without being morally blameworthy.²⁰¹

Mens rea is generally not thought to be required for public welfare or regulatory offenses (often called strict liability offenses) because the

in mind from conviction of infamous common-law crimes."); *United States v. Moore*, 486 F.2d 1139, 1240-41 (D.C. Cir. 1973) (Wright J., dissenting) ("The concept of criminal responsibility is, by its very nature, 'an expression of the moral sense of the community.'") (quoting *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966), *cert. denied*, 414 U.S. 980 (1973)); and *Holloway v. United States*, 148 F.2d 665, 666-67 (D.C. Cir. 1945), *cert. denied*, 334 U.S. 852 (1948) ("Our collective conscience does not allow punishment where it cannot impose blame.")).

194. *Id.* at 1663.

195. Bazelon, *Morality of the Criminal Law*, 49 S. CAL. L. REV. 385, 386 (1976). *But cf.* Morse, *The Twilight of Welfare Criminology: A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976) (arguing that Judge Bazelon's view of law-and-order advocates as amoral is incorrect and that his solutions to problems of social justice are unrealistic).

196. Bazelon, *supra* note 195, at 387.

197. MODEL PENAL CODE §§ 2.01-02 (1962).

198. *See id.* § 2.01; W. LAFAVE & A. SCOTT, *supra* note 131, § 3.1, at 193; G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* § 1-13, at 1-29 (2d ed. 1961).

199. W. LAFAVE & A. SCOTT, *supra* note 131, § 3.2, at 195.

200. Packer, *Mens Rea and the Supreme Court*, 1962 SUP. CT. REV. 107, 108; *see also* MODEL PENAL CODE, *supra* note 197, § 2.02 ("[A] person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently . . .").

201. Packer, *supra* note 200, at 109.

penalties for violation are relatively minor and the conduct is sought to be controlled for reasons of public health or safety.²⁰² In addition, public injury in these cases will occur irrespective of the actor's intentions.²⁰³

Where criminal sanctions are applied, however, even in the case of public welfare crimes, the concept of mens rea should not be discarded, and defendants should be entitled to use the traditional defenses to mens rea, such as justification and excuse:²⁰⁴

[A] civil offense [encompassing public welfare and regulatory offenses] has its own peculiar mens rea which requires, not culpability, but at least a mind that is not too young and not too greatly affected by mental disorder or compulsion, plus a degree of fault in that the *actus reus* could have been avoided by some method which it is not against good conscience to require under all the circumstances.²⁰⁵

For homeless individuals, being arrested for violations of anti-homeless legislation causes displacement from their usual environs, subjection to a harsh criminal justice system, incarceration for several hours, and the stigma of an arrest and a criminal record. Collectively, the consequences of the homeless person's arrest result in "severe" punishment, especially in relation to the severity of the offense. Because of the criminal sanctions involved, homeless persons should be able to assert the defenses to mens rea.

Excuse and justification are defenses that "exculpate an actor because of his blamelessness."²⁰⁶ The difference between the defenses

202. See R. PERKINS & R. BOYCE, *THE CRIMINAL LAW* 899 (3d ed. 1982); Packer, *supra* note 200, at 140, 146-47.

203. R. PERKINS & R. BOYCE, *supra* note 202, at 905.

204. Packer, *supra* note 200, at 146-47.

[T]here is a conspicuous lack of authority explicitly considering and avowing the propriety of distinctively "criminal" sanctions as applied to minor infractions. On the contrary, these offenses have been treated as something different from traditional criminal law, as a kind of hybrid category to which the odium and hence the safeguards of the criminal process do not attach. . . . However limited in application the departure from *mens rea* may be in [public welfare] offenses, it cannot be doubted that its recognition as an operational concept has been a powerful brake on the development of a general theory of *mens rea* in the criminal law.

. . . Legislatures are open to severe criticism for their indiscriminating resort to the criminal sanction. But they have rarely given a clear direction to the judiciary to impose the stigma of a criminal conviction on persons who are unaware of the factual circumstances that make their conduct potentially criminal or upon persons who are, without fault on their part, unaware of the existence of a legislative norm affecting their conduct.

Id.

205. R. PERKINS & R. BOYCE, *supra* note 202, at 904 (footnotes omitted).

206. Robinson, *Criminal Law Defenses: A Systematic Analysis*, 82 COLUM. L. REV. 199,

of justification and excuse is that justification focuses on the act—"justified conduct is correct behavior, which is encouraged or at least tolerated"²⁰⁷—while excuse focuses on the actor—excused conduct is wrong and undesirable, but "criminal liability is inappropriate because some characteristic of the actor vitiates society's desire to punish him."²⁰⁸ Homeless persons who have been arrested for sleeping outside, or for some other manifestation of their homeless status, should be relieved of liability on three grounds: (1) homeless persons' actions can be justified on the basis of necessity; (2) homeless persons' can be excused because they lack the requisite state of mind to be found criminally liable; and (3) prosecution of homeless persons violates fundamental principles of morality in the criminal law.

A. *Justification/Necessity Defense*

Justification defenses all have certain "triggering conditions" that "permit a necessary and proportional response."²⁰⁹ A case of necessity arises when, as a result of natural forces, one "must either suffer detriment or commit an act that violates the letter of the law."²¹⁰ "[I]f the harm which results from compliance with the law is greater than that which will result from [its] violation, then [the actor] is by virtue of the defense of necessity justified in violating it."²¹¹ The rationale of the necessity defense is that it would be contrary to the purpose of the criminal law to punish persons who choose the greatest value or least harm possible.²¹² There are four requirements for the necessity defense: (1) an avoided harm, which may be harm to the defendant himself; (2) a harm done, which is not limited

229 (1982). "Commonly recognized justifications include self-defense, lesser evils, consent, and law enforcement." Byrd, *Wrongdoing and Attribution: Implications Beyond the Justification-Excuse Distinction*, 33 WAYNE L. REV. 1289, 1290 (1987) (footnotes omitted).

207. See Robinson, *supra* note 206, at 234-36 (discussing the difficulty in categorizing self-defense and the justification of necessity).

208. *Id.* "[Excuses] express[] an understanding for an actor because of his diminished ability to conform to the legal or moral norms involved. This diminished ability may be the result of personal incapacity or the extreme nature of the circumstances." Byrd, *supra* note 206, at 1290. "Typical excuses are duress, necessity, involuntary intoxication, unavoidable mistake of law, and insanity." *Id.* at 1290-91 (footnotes omitted). It is sometimes difficult to categorize some of the criminal law defenses as either justification or excuse. Robinson, *supra* note 206, at 234-36 (discussing the difficulty in categorizing necessity and self-defense).

209. Robinson, *supra* note 206, at 216. To be justified, the response conduct "must be necessary to protect or further the interest at stake," and "must cause only a harm that is proportional, or reasonable in relation to the harm threatened or the interest to be furthered." *Id.* at 217. See generally MODEL PENAL CODE, *supra* note 197, § 3.02 (describing the general requirements of the defense of justification).

210. R. PERKINS & R. BOYCE, *supra* note 202, at 1065.

211. W. LAFAYE & A. SCOTT, *supra* note 131, § 5.4, at 441.

212. See Bayles, *supra* note 164, at 1192-93.

to any particular type of harm; (3) an intention to avoid a greater harm, hence that the individual acted to avoid the greater harm; and (4) the resulting harm from the defendant's actions be less than the harm that would have resulted if he had chosen another course.²¹³

Homeless men and women, who have no other choice but to exist outside, meet the requirements of the necessity defense for their violation of anti-homeless legislation. For example, a homeless woman who has been arrested for sleeping in the street would meet the requirements of the necessity defense. First, she is compelled to sleep. Second, she has caused some harm in that her violation of the letter of the law infringes on the government's ability to maintain the public health, safety, and welfare. Third, the homeless woman has avoided the greater harm that could have occurred if she had chosen to break into a building to sleep. Because the greater harm was avoided and the lesser harm chosen, the homeless woman should be able to utilize the necessity defense.²¹⁴

B. *Excuse*

Commentators have explained criminal law excuses on utilitarian and non-utilitarian grounds.²¹⁵ Utilitarian theories of punishment center on deterrence.²¹⁶ The punishment of an excused actor is "inef-

213. See generally W. LAFAVE & A. SCOTT, *supra* note 131, § 5.4(d), at 445-50 (outlining the requirements of the necessity defense). Additionally, the individual cannot have been responsible for bringing about the situation that caused the choice of the lesser harm. *Id.* § 5.4(d)(6), at 449-50.

214. The triggering condition of homelessness permits a necessary and proportional response: sleeping and defecating in public. In New York, the justification defense may get its first test in a case involving a homeless person. A homeless man was arrested for trespass for sleeping in an abandoned apartment building in Long Beach, Long Island, on December 27, when the temperature was only seven degrees. Police charged him with trespassing. The man's attorneys, professors at the Hofstra University School of Law, base their defense on justification. King, *Man Trespasses to Stay Alive: Is He Justified?*, N.Y. Times, Mar. 6, 1990, at B1, col. 1. "There is no question he committed the misdemeanor of trespass. . . . But the law allows for a violator to be considered justified where the threat of harm to a person is greater than the harm involved in the violation." *Id.* (quoting Professor Alan Levine of the Hofstra University School of Law). "Under New York law, such a violation is regarded as 'justifiable and not criminal' when it is 'necessary as an emergency measure to avoid an imminent public private injury.'" *Id.* (quoting Professor Levine). In this case, since there are no homeless shelters in Long Beach, homeless people can either trespass in abandoned buildings or risk freezing to death. *Id.* (citing Professor Douglas Colbert of the Hofstra University School of Law).

215. Dressler, *Justification and Excuses: A Brief Review of the Concepts and the Literature*, 33 WAYNE L. REV. 1155, 1165-66 (1987).

216. H. PACKER, *supra* note 179, at 39-45; see also Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 219 (1973) ("[A] utilitarian theory of punishment . . . must involve justifying punishment in terms of its social results . . .").

ficacious,"²¹⁷ "because she is undeterrable."²¹⁸ Non-utilitarian theories include the causation theory, which excuses criminal behavior over which the actor has no control,²¹⁹ a character theory, which excuses behavior when the actor does not possess a bad character,²²⁰ and a "personhood" principle, which excuses behavior based on lack of capacity or opportunity.²²¹ There are four categories of excuses (in decreasing order of severity): (1) when the actor has not performed a volitional act; (2) when there is a voluntary act, but the actor does not accurately perceive the nature or consequence of the act; (3) when the actor performs a voluntary act with knowledge of its nature, but does not know or understand that the act or its consequences are criminal; and (4) when the actor performs a voluntary act, understanding its consequences and aware that it is wrong, but cannot control his conduct and, therefore, cannot be fairly held accountable for it.²²²

Different categories of homeless people meet some or all of the four categories of excuse. By sleeping in public, defecating in a park, or obstructing a sidewalk, homeless persons are not performing volitional acts; rather, they are acting under compulsion. Many homeless individuals do not know or understand the consequences of their acts; they are merely surviving. Others that do understand the consequences of sleeping in a park, defecating in public, or obstructing a sidewalk, do not realize that these acts are criminal. Finally, homeless persons cannot fairly be held accountable for their acts because performance of such acts is essential for their survival.²²³

217. Dressler, *supra* note 215, at 1165.

218. *Id.*; see also H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 28-53 (1968) (discussing excusing conditions in the criminal law).

219. Under this theory, an excuse is available when a person's conduct is caused by a condition over which he has no control. Dressler, *supra* note 215, at 1166. For a complete discussion and criticism of the causation theory, see Moore, *Causation and the Excuses*, 73 CALIF. L. REV. 1091 (1973).

220. This theory is based on the assertion that

[A] person does not deserve punishment for committing a bad act unless she is a bad person, i.e., possesses a bad character. . . . Excuses are recognized when bad character cannot be inferred from the bad act. We do not infer bad character, for example, if the wrongdoer was the victim of severe mental illness or coercion. In such circumstances, we assume that the person's moral nature is substantially similar to our own.

Dressler, *supra* note 215, at 1166.

221. This theory excuses an individual when he "substantially lacked the capacity or opportunity to function in uniquely human fashion." *Id.* This theory generally has been used to absolve the insane and infants. *Id.*

222. Robinson, *supra* note 206, at 229.

223. Those who say that homeless people are without shelter because of their own deficiencies are ignoring the statistics. The great majority of homeless are not homeless by choice, but rather because they have no viable alternative. For a discussion of the

C. *Morality*

Courts and commentators have justified criminal punishment in a number of ways, including retribution, deterrence, incapacitation of the wrongdoer during punishment, and rehabilitation.²²⁴ Punishment of homeless persons does not accomplish any of these rationales. Retribution is not proper because homeless offenders are morally blameless. Punishment of homeless citizens does not deter them from being homeless; when they are released from incarceration, they still have to exist somewhere (although it may encourage them to relocate to another area). Moreover, homeless individuals are not rehabilitated by incarceration. Punishment of homeless men and women can be readily compared to the punishment of chronic alcoholics, as Justice Fortas described in his *Powell v. Texas*²²⁵ dissent:

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest. The jails, overcrowded and put to a use for which they are not suitable, have a destructive effect upon alcoholic inmates.²²⁶

Put simply, punishment of homeless people cannot be morally justified. As Jeffrie Murphy²²⁷ so aptly describes:

If we think that institutions of punishment are necessary and desirable, and if we are morally sensitive enough to want to be sure that we have the moral right to punish before we inflict it, then we had better first make sure that we have restructured society in such a way that criminals correspond to the only model that will render punishment permissible—i.e. make sure that they are autonomous and that they do benefit in the requisite sense.²²⁸

Some local governments persist in attempting to justify the arrest of homeless persons on public welfare grounds.²²⁹ Despite strong public welfare concerns, the use of arrest to advance these interests is

characteristics of the homeless population, the magnitude of the problem, and its origins, see *supra* notes 12-38 and accompanying text. The "why can't they just get a job" argument ignores these realities. For a discussion of this argument, see *supra* notes 150-57 and accompanying text.

224. H. PACKER, *supra* note 179, at 35-61.

225. 392 U.S. 514 (1968).

226. *Id.* at 564-65 (Fortas, J., dissenting).

227. Murphy, *supra* note 216.

228. *Id.* at 243.

229. For an argument in favor of utilizing the police against homeless citizens, see Wilson & Kelling, *Broken Windows*, 249 ATLANTIC MONTHLY 29 (1982).

ill-advised because such a policy does nothing to alleviate homelessness on either a short- or long-term basis.

Local governments also enumerate crime prevention,²³⁰ and protection of homeless persons from abuse and attack,²³¹ as justification for homeless persons' arrest. Use of the criminal justice system against homeless persons as a crime prevention tool is misguided. First, homeless individuals are not likely to commit more serious crimes than the general population.²³² Rather, homeless persons are most often arrested for minor, victimless offenses, such as loitering, disorderly conduct, or public intoxication.²³³ More serious offenses committed by homeless persons, such as assault, larceny, and burglary, have generally resulted from their subsistence needs.²³⁴ A 1985 study of homeless criminal offenders found that most were "supplementing criminals" or "criminals out of necessity."²³⁵ "Supplementing criminals" resort to low levels of illegal acts to supplement the meager income provided by public assistance or temporary employment. These illegal acts include supplementing welfare payments with work income, selling small amounts of drugs, and shoplifting.²³⁶ "Criminals out of necessity" are homeless individuals without any income source who engage in illegal behavior as a means of survival, including breaking into cars to obtain shelter, failing to pay for restaurant meals, living in abandoned buildings without permission, living in public parks, and shoplifting.²³⁷ Second, even if we were to accept the notion of homeless persons as a serious law enforcement problem, jailing them for short periods of time for minor offenses, such as sleep-

230. See *People v. Davenport*, 176 Cal. App. 3d Supp. 10, 16, 222 Cal. Rptr. 736, 739 (App. Dep't Super. Ct. 1985), *cert denied* 475 U.S. 1141 (1986). For a discussion of this rationale, see *supra* notes 93 & 96-97 and accompanying text.

231. See *Davenport*, 176 Cal. App. 3d Supp. at 16, 222 Cal. Rptr. at 739. For a discussion of this rationale, see *supra* notes 94 & 98.

232. Fischer, *Criminal Activity Among the Homeless: A Study of Arrests in Baltimore*, 39 HOSP. & COMMUNITY PSYCHIATRY 46, 49 (1988). Serious crimes are defined using the FBI standard offense category, Part I, which includes crimes against persons such as homicide, rape, and aggravated assault, and crimes against property, such as burglary, larceny, and robbery. *Id.*

233. *Id.* (defined using Part II of the FBI standard offense category).

234. *Id.*

235. A. Solarz, *An Examination of Criminal Behavior Among the Homeless* (Nov. 13-17, 1985) (paper presented at the American Society of Criminology). The author further segregated the homeless who commit illegal acts into several categories, including chronic criminals (the smallest grouping), criminals out of necessity, substance abusers, and the mentally ill. *Id.* at 19-21. This study was conducted prior to the increase in the use of crack cocaine. Today, some homeless people are crack addicts, and therefore may commit crimes to satisfy their addictions. Arresting them for sleeping on the streets, however, is a misdirected use of the criminal justice system.

236. *Id.* at 20.

237. *Id.*

ing in the streets, would not accomplish the traditional goals of criminal incarceration: punishment, deterrence, or rehabilitation.²³⁸

Use of the criminal justice system to protect homeless individuals from becoming crime victims is also myopic. Although homeless persons generally experience much higher rates of victimization for robbery, assault, and burglary or theft than other inner-city residents,²³⁹ arresting these individuals for sleeping in the streets and parks does not significantly change the possibility that they will become crime victims. They are simply displaced from the streets for a short time; they are not protected. Because they have no other place to go, arresting homeless persons cannot be seen as providing them with shelter for more than a very short period.

Rather than punishing homeless individuals for acts that they cannot avoid committing in public, the more humane solution to the problem involves providing adequate shelter and social service resources and aligning police and social service agencies in a network to help, rather than harass, homeless citizens.²⁴⁰ The most efficient way to involve the criminal justice system within the plight of homeless persons is to train the system's personnel to deal with the problems of this special, disadvantaged population, and to integrate the work of the police and social service agencies. The latter can manage the problems of homeless citizens far better than jails and "revolving-door" justice.

V. A CURRENT CHALLENGE: THE *POTTINGER* CASE

In response to the continual arrests and harassment of homeless persons in downtown Miami,²⁴¹ homeless advocates filed a class

238. See *supra* note 224 and accompanying text.

239. A. Solarz, *supra* note 34, at 15-17. Solarz notes that while 1.3% and 3.2% of the respondents in a national crime survey of inner-city residents reported being robbed and assaulted, respectively, during the previous six months, 21.4% and 19.2% of homeless persons reported being similarly victimized. *Id.* Similar comparisons conducted for property offenses revealed similar findings. *Id.* at 17; see also Gibbs, *supra* note 10, at 46. Gibbs notes that at least one-third of all homeless women have been raped. *Id.* A homeless woman in Seattle exclaimed, "You don't get to sit and relax when you're homeless. . . . God help your behind while you're out there." *Id.*

240. See *infra* notes 268-76 and accompanying text.

241. For descriptions of particular atrocities, see *supra* notes 1-8 and accompanying text. The City of Miami has arrested and harassed homeless persons for a number of different violations, including: disorderly conduct, MIAMI, FLA., CODE § 37.17 (1990); public intoxication, *id.* § 37.21; loitering and prowling on public streets, sidewalks, and other public places, *id.* §§ 37-34 to 35; standing, sitting, or sleeping on sidewalks, *id.* § 37-53.1; sleeping in benches, in parks, or on sidewalks *id.* § 37-63; sleeping in the park *id.* § 38-3; sleeping on a piece of cardboard or a pile of trash, METROPOLITAN DADE COUNTY, FLA., CODE § 38-3 (1990); and sleeping, sitting, or standing in public buildings, FLA. STAT. § 810.08 (1989).

action lawsuit on behalf of homeless men and women against the City of Miami ("City")²⁴² for declaratory and injunctive relief²⁴³ to bar the

242. *Pottinger v. City of Miami*, No. 88-2406 (S.D. Fla. filed Dec. 30, 1988). The homeless plaintiffs are represented by attorneys Benjamin Waxman, Valerie Jonas, and Daniel Jonas, volunteering for the American Civil Liberties Union.

The Defendant [City of Miami] has a custom, practice and policy of arresting homeless persons for conduct which is very simply the ordinary activity of daily life on the streets where Plaintiffs are forced to live. Plaintiffs and the class have been and continue to be arrested and charged with trespass, obstruction of streets, sleeping on the sidewalks, sleeping in the parks, littering, loitering, and vagrancy based solely on conduct such as sleeping, sitting, eating, talking, tending to personal needs, associating with friends, and raising families. Such conduct is fundamental to the maintenance of life. Such conduct is legal when conducted within one's home.

The vast majority of arrests on these charges are never brought to trial. Rather, Plaintiffs and the class are routed from the streets which are their homes and taken to jail. Many are released there without further, official process. Others are incarcerated and then, upon arraignment, by virtue of their homelessness and related circumstances, are coerced by judges and prosecutors into pleading guilty in exchange for a sentence to time served. Thus, Plaintiffs and their class have never had the opportunity to raise any of their valid and substantial defenses to these charges: e.g. necessity, duress, justification, defense of self, and defense of others.

Complaint for Declaratory and Injunctive Relief/Class Action at 5-6, *Pottinger* (No. 88-2406).

In addition to arresting and harassing the Plaintiffs, the Defendant has a custom, practice, and policy of seizing and destroying the personal property of the Plaintiffs, including identification, clothing, medication, food, and bedding materials before, during, and after its encounters with the Plaintiff. Alternatively, upon arrest of the Plaintiffs by the Defendant, the Plaintiffs are forced, by virtue of their arrest to abandon all of their personal belongings at the public sites of their arrests. The foreseeable and inevitable result of either of these scenarios is that incident to the arrest of homeless persons all of their belongings are lost forever.

By arresting homeless persons and removing them or temporarily incarcerating them and by seizing and destroying their property, the Defendant has not legitimately exercised its police powers to protect the health, safety, and welfare of the people of this city. Rather, the Defendant is harassing, interfering with, and intimidating homeless persons with no other object than to punish them for being without shelter or the means to acquire it.

Second Amended Complaint for Declaratory, Injunctive, and Compensatory Relief/Class Action at 6-7, *Pottinger* (No. 88-2406).

243. On December 29, 1988, the plaintiffs moved for a preliminary injunction to prevent the police from conducting "sweeps" of homeless persons which were intended to remove homeless individuals from the streets of downtown Miami before the Orange Bowl parade (an annual nationally televised major tourist extravaganza held annually on New Year's Eve in the streets of downtown Miami). On December 30, 1988, the court denied the preliminary injunction. The court, however, stated that it:

acknowledges the grievous plight facing [the] plaintiffs and others who are similarly situated. Life on the streets of Miami . . . is a degrading, frightening experience. The few shelters that provide free lodging and meals apparently cannot keep pace with the sheer volume of homeless persons. It is also clear that whatever steps the city has taken to alleviate this problem simply are not working.

City from arresting homeless persons for conduct that is necessary for their daily lives on the public streets.²⁴⁴ *Pottinger v. City of Miami*²⁴⁵ is unique because of the plaintiffs' success in certifying themselves as a class,²⁴⁶ and because of their novel challenge to a municipality's enforcement of various ordinances and statutes that have the effect of encouraging homeless persons to relocate. The plaintiffs have asserted a number of legal theories that have been examined in depth

Order on Application for a Preliminary Injunction at 3, *Pottinger* (No. 88-2406). The Court relied on the defendant's good faith representation that it would "voluntarily [suspend] enforcement of any municipal ordinance aimed at arresting persons for merely sleeping on the sidewalks." *Id.* at 3. In denying the motion, the court concluded that it "[could not] fashion an injunction that would provide the requisite specificity," both providing the plaintiffs with freedom from "harassment" and providing police with notice of what they could and could not do. *Id.* at 4.

A police officer working a beat on a busy urban street can hardly be expected to determine, under penalty of criminal contempt, whether or not the person he questions or arrests is "homeless." Nor can an officer be expected to determine whether or not he is proceeding under a law which falls under the undefined heading "harassment."

Id. at 4-5. The court suggested that the best way to proceed would be "by a fully-briefed, well-prepared attempt to invalidate obnoxious ordinances, not by enjoining the city police force." *Id.* at 6. The court granted a preliminary injunction to prevent the police from destroying personal property seized from arrested homeless persons in April 1990. Order on Plaintiffs' Second Application for Preliminary Injunction, *Pottinger* (No. 88-2406).

Despite the City of Miami's original representations, Miami police continue to arrest homeless persons for sleeping in parks after closing hours and urinating in public. Rogers, *supra* note 8, at A5, col. 1. When Vice-President Dan Quayle visited Miami for a luncheon, police evicted a group of homeless persons living under a highway underpass for six hours because his motorcade would pass the site. *Id.* at A5, col. 5. Police that enforce anti-homeless ordinances are referred to within the police department as "bum busters." *Id.* at A5, col. 1. In addition, in violation of the court's preliminary injunction, Miami police have repeatedly seized and destroyed property belonging to homeless persons, even emptying out grocery carts containing individuals' personal possessions and burning these possessions. *Id.* at A5, cols. 2-4. On March 18, 1991, the court found the City of Miami in civil contempt for the City's burning and destruction of homeless person's belongings, which the City had labeled as "clean-up." The court enjoined the City from any further destruction, ordered it to pay a symbolic fine to the Camillus House shelter, and ordered the parties to determine the feasibility of leaving two downtown Miami parks open at night for homeless persons. Order Finding City of Miami in Civil Contempt of Court's April 26, 1990 Order and Providing Further Injunctive Relief, *Pottinger* (No. 88-2406).

244. See Complaint for Declaratory and Injunctive Relief/Class Action at 1-7, *Pottinger* (No. 88-2406).

245. *Pottinger* (No. 88-2406).

246. According to the order filed on July 21, 1989, the class was certified to include:

[The named plaintiffs and] approximately 5,000 homeless men and women who reside on the public streets in the City of Miami in [a narrowly defined geographic area in downtown Miami] . . . Plaintiffs allege that they "have been arrested in the past and/or expect to be arrested in the future" and seek to represent those who "have also been, or expect to be, arrested" for conduct arising from their homeless condition on the public streets.

Order Granting Plaintiffs' Motion for Certification of Class Action at 1, *Pottinger* (No. 88-2406).

in this Comment: namely, a violation of the fourteenth amendment's due process requirements because of the vagueness and overbreadth²⁴⁷ of the ordinances being enforced; a violation of the eighth amendment's prohibition against cruel and unusual punishment;²⁴⁸ and a defense of necessity.²⁴⁹

Some of the challenged ordinances that should be adjudged facially vague under the *Papachristou v. City of Jacksonville*²⁵⁰ and *Kolender v. Lawson*²⁵¹ rationales include: (1) the disorderly conduct section, which prohibits "[being] idle, dissolute, or found begging" and "lounging, prowling or loitering on the streets";²⁵² (2) the disorderly person section, which punishes "any vagrant";²⁵³ and (3) the loitering or prowling section, which punishes "any person [who] loiters or prowls in a place, at a time, or in a manner not usual for law abiding individuals, under circumstances that warrant a justifiable and reasonable alarm . . . [including] when a person refuses to identify himself, or manifestly endeavors to conceal himself."²⁵⁴ These ordinances fail to provide individuals with adequate notice of prohibited behavior and fail to provide police with proper guidelines to regulate enforcement of the ordinances.²⁵⁵

Other ordinances that may not be facially vague should be adjudged facially overbroad under *Kent v. Dulles*²⁵⁶ and *Papachristou*²⁵⁷ because they prohibit conduct that is constitutionally protected and beyond the police power of the state to regulate. Thus, the ordinance that prohibits "sleep[ing] on any of the streets, sidewalks, [or] public places"²⁵⁸ should be found facially unconstitutional for overbreadth because it makes criminal conduct that is usually considered innocent, giving the police unrestricted judgment in interpreting the law. Such an ordinance is overbroad as enforced against homeless persons because it is an unavailing use of the police power.²⁵⁹

247. See *supra* Section II.

248. See *supra* Section III.

249. See *supra* Section IV.

250. 405 U.S. 156 (1971).

251. 461 U.S. 352 (1982).

252. MIAMI, FLA., CODE §§ 37-17(2), (13) (1990).

253. *Id.* § 37-19.

254. *Id.* § 37-34.

255. See *supra* notes 55-69 and accompanying text.

256. 357 U.S. 116 (1958).

257. *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1971).

258. MIAMI, FLA., CODE § 37-63.

259. See *supra* notes 70-101 and accompanying text. Miami police do not evenly enforce the ordinance prohibiting being in parks after closing hours. "Nightly, police ignore the legions of fishermen who show up after sunset. Some shrimp for hours. all have a home to go to." Rogers, *supra* note 8, at 5A, col. 5.

The anti-sleeping ordinance²⁶⁰ and the ordinance outlawing obstruction of free passage on sidewalks²⁶¹ should be found unconstitutional as enforced against homeless citizens because, under the *Robinson* doctrine,²⁶² the ordinances violate the prohibition against prosecution for status guaranteed by the eighth and fourteenth amendments.²⁶³ In Miami, there is a severe undersupply of public and shelter housing,²⁶⁴ leaving many homeless persons no other choice but to exist on the streets. Therefore, it should be unconstitutional to prosecute homeless persons for involuntary manifestations of their homeless status, such as sleeping, bathing, or eating in the streets and parks.²⁶⁵

If the ordinances are not invalidated on the above constitutional grounds, the homeless plaintiffs should be able to utilize the defenses of justification and excuse.²⁶⁶ They are violating the various ordinances because of a lack of other options; thus, criminal punishment should not be permitted because the homeless plaintiffs lack the requisite state of mind to perform the criminal acts and have not performed any overt acts. Punishment of homeless persons should be barred on moral grounds because it does not meet any of the goals of criminal punishment.²⁶⁷ Rather, it helps to promote an unjustifiable goal of encouraging homeless men and women to relocate to become another municipality's burden.

The *Pottinger* plaintiffs should be afforded relief from arrest and harassment by police because of the constitutional claims discussed above. Accordingly, enforcement of the ordinances being challenged should cease immediately. The court should attempt to fashion a remedy that encourages the City of Miami to channel resources that are currently being used to police homeless persons into improving emergency shelters and assistance. Such a remedy would not only mollify all of the parties involved, but also would help to remove homeless people from the streets, and alleviate, to some degree, the City's public welfare concerns. More importantly, it would be the most humane way to treat this disadvantaged group.

To assist the police in dealing with homelessness, networks could

260. MIAMI, FLA., CODE § 37-63.

261. *Id.* § 37-53(1).

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

263. *Id.* at 667.

264. *See supra* notes 147-49 and accompanying text.

265. *See supra* Section III.

266. *See supra* notes 206-23 and accompanying text.

267. *See supra* notes 224-28 and accompanying text.

be developed between police and social service agencies.²⁶⁸ Networking between police and social service agencies has three common goals: to relieve police from having repeatedly to deal with individuals whose primary problems are psychiatric, medical, or economic;²⁶⁹ to ensure that law enforcement officers refer only those special populations that facilities are mandated to assist;²⁷⁰ and to provide needed assistance to homeless persons to prevent their reentry into the criminal justice system.²⁷¹ Such networks have the benefit of creating more time for law enforcement²⁷² and increasing job satisfaction for police officials.²⁷³ An arrest-free zone should be established in downtown Miami, at least encompassing the two downtown Miami parks where arrests more frequently occur. These parks are rarely used by members of the public for recreation, so their use by homeless individuals will further the public interest. Police, instead of arresting persons found on the street, would refer them to the appropriate social service agency for assistance. This solution, of course, assumes the availability of adequate resources to fund such programs. Unfortunately, funding has been widely unavailable in recent times of declining eco-

268. Finn & Sullivan, *Emergency Response to the Homeless: The Police Role*, 209 NAT'L INST. JUST. REP. 1 (1988); see also Gibbs, *supra* note 10, at 49 (describing the importance of networking between various social service groups in order to provide a wide range of services for homeless individuals (including drug rehabilitation programs, job training, day care, parenting classes, health care, and social services)); Johnson & Kayden, *A Stand-In for Failed Representative Government; Homeless: Public-Private Cooperation—And Leadership—To Help the Poor May Be Our Only Option when There Is Not a Lot of Money*, L.A. Times, Nov. 18, 1990, at M5, col. 1 (describing efforts of a network of cooperating agencies, private and public, that assist the poor of Los Angeles); Philips, *New Program Aids Homeless*, N.Y. Times, May 17, 1987, § 11 (Long Island ed.), at 4, col. 4 (Philips describes the Community Advocates project that was established as a result of a settlement of a lawsuit filed to insure adequate housing for homeless people in Long Island. The project established a clearinghouse for information about organizations offering services for homeless men and women. Many such organizations were unaware of other organizations' services.).

269. Finn & Sullivan, *supra* note 268, at 3.

270. *Id.*

271. *Id.* Networks have been used primarily to assist the mentally ill. However, some cities have successfully extended the use of networks to homeless persons and inebriates. *Id.* at 2 (Boston and New York). All relevant groups must be involved in the planning of the network. *Id.* at 3 (discussing the importance of written agreements detailing the roles and responsibilities of the various agencies and individuals involved). The first step in networking is to train the police and social workers to interact both with the special populations involved and with one another. *Id.* at 3-4 (explaining that training methods include the cross-training between police and social workers, coursework at the police academy, workshops at various precincts, and field trips to the social service agencies).

272. *Id.* (noting that networks substantially reduce the amount of time police spend responding to the problems of the homeless population, thereby freeing their time for law enforcement activities).

273. *Id.* at 3 (citing the benefit of reducing danger to police from dealing with potentially volatile situations).

conomic social program budgets.²⁷⁴ One possible source of funds for social service solutions is the potentially significant savings from operating efficiencies that would be a result of not utilizing the criminal justice system against homeless men and women.²⁷⁵ As Art Agnos, the Mayor of San Francisco, stated, "If you give me the money, we have the chance to end sleeping on the streets. . . . I'm willing to be the first mayor in America to say so."²⁷⁶

The *Pottinger* court should attempt to fashion a remedy that incorporates the networking concept. While such a remedy will not be easy to shape, it is the only remedy that will provide both short- and long-term benefits to the *Pottinger* plaintiffs and to the City of Miami. Our society must realize the necessity of creative solutions to the problem of homelessness and be willing to accept such costs as the cost of living in a "kinder, gentler nation."²⁷⁷ If we choose to continue with the status quo, the even greater cost due to problems caused by homelessness is certain to plague generations to come.

VI. CONCLUSION: MORE HUMANE ALTERNATIVES

This Comment argues that certain legislation used to arrest homeless individuals is unconstitutional both on its face and as enforced, and that homeless persons can utilize both constitutional and common law criminal defenses against the enforcement of such legislation. Applying these arguments to *Pottinger* provides one example of a case where homeless persons will be free from prosecution and the court will be required to devise alternative, humane solutions. The possibility of linking police and social service agencies in a "network" constitutes a proactive approach that endeavors to provide a solution to homelessness rather than merely dealing with the effects of homelessness.

Using the police to arrest and harass homeless individuals is futile and counter-productive because this approach merely removes

274. See *supra* note 31 and accompanying text.

275. Finn & Sullivan, *supra* note 268, at 4. (noting that in a study of 12 networks, two were able to operate without significant special funding); see also Finn, *Street People*, NAT'L INST. JUSTICE/RESEARCH IN ACTION (1988).

276. See Gibbs, *supra* note 10, at 45. When San Francisco received \$1.2 million in federal relief money after the 1989 earthquake, instead of building standard emergency homeless shelters, the city built a state-of-the-art multi-service center where homeless persons can live, get health care, see a social worker, treat their addictions, and receive job training. *Id.* Camillus House, a homeless shelter in Miami, has a health clinic that renders medical treatment and provides social welfare to thousands of homeless (and low-income) persons annually. See Greer, *supra* note 2, at 413-15.

277. Hoffman, *Bush Strategy Minimizes Reagan-Era Liabilities*, Wash. Post, Oct. 16, 1988, at A26, col. 1, A26, col. 2.

homeless individuals from the streets or parks for a short time. It does nothing to alleviate the problem in a meaningful way. We must recognize the huge and growing desperate population living on the streets of our cities and towns. Solutions to the problem of homelessness are necessarily long-term, involving greater expenditures for education, public housing, mental health facilities, and drug-abuse treatment centers. Short-term solutions, in the form of meeting the subsistence needs of homeless persons in a more humane fashion by providing adequate food, shelter, and medical treatment, are also required.²⁷⁸ Where local governments do not voluntarily stop the enforcement of legislation against homeless men and women, courts must react by declaring such legislation unconstitutional or recognizing defenses to the legislation's enforcement.

Sadly, many Americans are oblivious to the level of seriousness that the homeless problem has reached. For many, homelessness is a problem only confined to the inner-cities, and includes a group of people who are easily ignored. They are people to be laughed at, rather than pitied; people who should "get a job" and "clean up their act." These views are not the views of a "kinder, gentler nation," nor should they be the views of the richest, most powerful nation on earth, a nation that prides itself as an example to all others.

When foreign visitors come to American cities, their reaction is almost invariably astonishment, and sorrow, at what they see on the streets. America is a wealthy nation of conspicuous ideals, one that presumes to have something to teach infant democracies all around the world. By failing to act creatively, generously and mercifully on behalf of its most desperate citizens, a country loses more than its credibility; it weakens its character.²⁷⁹

It is disturbing to note the public's perceptions of homeless people. When individuals become homeless due to a completely fortuitous natural disaster, like an earthquake or a hurricane, the public responds with an outpouring of sympathy and funds.²⁸⁰ The public

278. See Gibbs, *supra* note 10, at 49. Gibbs discusses the need for multipurpose centers combining drug rehabilitation programs, job training, day care, parenting classes, health care, and social services. *Id.* Traditional shelters do not assist their "clients" by returning to the streets. Traditional shelters offer a kind of "invisible quarantine: shunned by their neighbors, the families [have] no sense of community, no help for the problems that put them on the streets in the first place." *Id.* at 48.

279. *Id.* at 49.

280. See *Red Cross Raised \$98.7 Million for Hurricane, Quake Victims*, UPI, Dec. 4, 1989 (LEXIS, Nexis library, Omni file). The article noted that:

The American Red Cross has raised \$98.7 million—more than twice its previous record fund-raising—to aid victims of Hurricane Hugo, the California earthquake, and other recent disasters. . . . Since Sept. 16 when Hugo [struck][.]

sympathizes with these individuals, possibly because members of the public could foresee themselves in the same situation. Yet, when individuals are homeless by virtue of economic or other difficulties, the public is not nearly as forgiving, concerned, or involved. Imagine the outcry if police were to arrest homeless earthquake victims. Yet, this is the course we sometimes take with *other* homeless individuals. The time has come to recognize that the vast majority of homeless persons are not homeless by choice, but are homeless due to a variety of factors that could afflict any one of us at any time. So many Americans are just a missed paycheck or two away from becoming homeless. The time has come to remedy, rather than ignore, the problem of homelessness.

DONALD E. BAKER

. . . the Red Cross has sheltered 188,735 people, served 12.4 billion meals and provided financial assistance to 143,698 families and individuals around the country.

Id.; *Red Cross Announces Final Tally of Disaster Relief Campaign*, Business Wire, Feb. 12, 1990 (LEXIS, Nexis library, Omni file) ("The American Red Cross announced . . . that contributions to its 1989 disaster relief fund . . . [was the] highest in its peacetime history." A Red Cross officer said, "We are very proud of the American public for its outpouring of assistance to disaster victims.").