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NOTES

The Promotion of the General Welfare: Using the Spending Clause to End the Criminalization of Homelessness in America

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The U.S. is experiencing a homelessness crisis. While the government claims that there are half a million people experiencing homelessness in this country, the actual number is likely much larger than that estimate. Rather than investing in long-term solutions to homelessness, most states and municipalities have responded to this crisis by criminalizing conduct related to homelessness—an expensive approach that perpetuates the cycle of homelessness and causes many people experiencing homelessness to needlessly suffer as a result. While advocates have fought criminalization in the courts, a problem of this size and scale cannot be solved through litigation alone.

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This Note advocates that Congress could constitutionally end or substantially reduce the criminalization of homelessness by using the powers allocated to it in the Spending Clause. Notwithstanding the limitations the Court imposed on Congress's spending power in recent cases such as National Federation of Independent Business v. Sebelius*, this Note argues that Congress may attach conditions to funding earmarked for or substantially related to homelessness that would require states to reduce or end criminalization within their jurisdiction. While not ultimately a solution to homelessness in the U.S., this Note advocates that only by taking criminalization policies off the table can the U.S. move towards a humane policy towards its people experiencing homelessness.*

INTRODUCTION

> *The fact developed quickly that the states were unable to give the requisite relief. The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.*
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> — Justice Benjamin N. Cardozo.[1]

In March 2018, Tabitha Bass, a woman experiencing homelessness in the City of Miami, jolted awake to the traumatic scene of her boyfriend, Chetwyn Archer, being handcuffed by Miami police.[2] When she protested, the officers informed her that she was arrested for "obstructing the sidewalk."[3] Ms. Bass had serious health issues, and during the three days she spent in jail, she had limited access to health care.[4] This term in jail exacerbated her condition and likely lead to her unfortunate death a few weeks later.[5]

As a person experiencing homelessness, Ms. Bass did not have a choice but to break the law in Miami by sleeping in a public space. A person experiencing homelessness is, nevertheless, a person[6] and must sleep *somewhere* as a biological condition of their existence. Given the high price of housing in Miami[7] and the low availability

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[1] Steward Mach. Co. v. Davis, 301 U.S. 548, 586–87 (1937).

[2] Tarpley Hitt, *Police Broke Rules While Arresting Homeless Woman Who Later Died, Activists Say*, MIA. NEW TIMES (May 18, 2018, 8:00 AM), https://www.miaminewtimes.com/news/amid-miamis-homeless-crackdown-police-break-the-rules-and-a-woman-dies-10359984.

[3] *Id.*

[4] *See id.*

[5] *Id.*

[6] *See* Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 295 (1991).

[7] RICHARD FLORIDA & STEVEN PEDIGO, FIU MIA. URB. FUTURE INITIATIVE, MIAMI'S HOUSING AFFORDABILITY CRISIS 3 (2019), https://carta.fiu.edu/mufi/wp-content/uploads/sites/32/2019/03/Miamis_Housing_Affordability_Crisis_FNL.pdf ("Greater Miami ranks as the seventh least-affordable large metro

of shelter,[8] Ms. Bass did not have any option that night but to "obstruct[] the sidewalk," as police charged her with doing.[9] As Jeremy Waldron pointed out in his landmark paper on the absurdity of such laws applied to people experiencing homelessness, "Since land is finite in any society, there is only a limited number of places where a person can (physically) be, and [a person experiencing homelessness] would find that he was legally excluded from all of them."[10] In other words, as Jacob, a person experiencing homelessness in Salt Lake City, explained, "[I'm] at risk of getting a ticket every night . . . . I can sleep on the sidewalk and get a ticket. I can sleep [across the street] and get a ticket. No matter where I go, I get a ticket."[11]

The criminalization of homelessness is a major human rights crisis in the United States that, effectively, makes it illegal for millions of Americans experiencing homelessness to exist in virtually any metropolitan area in the country.[12] Broadly, the term "Criminalization of Homelessness" refers to laws, typically at the local level, that criminalize any conduct a person experiencing homelessness must engage in simply to stay alive, such as sleeping on the streets, urinating in public absent public bathrooms, loitering, or sitting in

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(with more than 5 million people) in the world, trailing only Hong Kong, Sydney, Los Angeles, London and its suburbs, and Toronto and ranking one place above New York.").

[8] Isabella Paoletto, *Luxury Housing Is Increasing in Miami. So Is Homelessness*, LATINO REP. (July 18, 2018), http://latinoreporter.org/2018/luxury-housing-increasing-miami-homelessness/ (quoting Evian White De Leon, then-director of Miami Homes for All, a major local group working to solve homelessness in Miami, "[Government data on unsheltered homelessness in Miami doesn't] reflect a much bigger story of how shelters are always full, how folks return to shelter, how women/children hide in plain sight, how The Homeless Helpline gets about 7,000 calls per month for help, how folks get evicted, how people are cost burdened or severely cost burdened, how in the City of Miami there is an unmet need of 32,000 affordable units.").

[9] Hitt, *supra* note 2.

[10] Waldron, *supra* note 6, at 300.

[11] *Homeless Youth Aged out of Foster Care*, INVISIBLE PEOPLE, https://invisiblepeople.tv/videos/jacob-homeless-youth-foster-care-salt-lake-city/ (last visited May 15, 2021).

[12] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING CRIM. OF HOMELESSNESS IN U.S. CITIES 9 (2019), http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [hereinafter HOUSING NOT HANDCUFFS].

public.[13] Criminalization can also include municipal enforcement of laws that are arbitrarily enforced against people experiencing homelessness for crimes such as jaywalking or displacing people experiencing homelessness for public sanitation sweeps.[14] Given that some variation of such laws exist in practically every jurisdiction in America, the legal system places people experiencing homelessness in an impossible bind: break the law by living in public or stop existing altogether.[15]

Advocates on behalf of people experiencing homelessness have brought several challenges against such laws in federal court arguing that, among other things, enforcement of such laws is a form of cruel and unusual punishment prohibited by the Eighth Amendment.[16] Even though some of these challenges have been successful,[17] they have ultimately been unable to stop cities from enacting more and more laws criminalizing homelessness across the United States.[18]

Given the scope of the problem, a national legislative solution makes sense to coordinate the effort and push states to either remove such laws or reduce enforcement of them. One major problem with such a strategy, however, lies in the fact that laws criminalizing homelessness fall within a state's police powers, generally thought to be reserved to the states.[19] Thus, an order by the federal government directing the states to end criminalization of homelessness could be unconstitutional, violating principles of federalism and extending beyond the bounds of Congress's enumerated powers in Article I of the Constitution.[20]

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[13] *Id.* at 1, 12–15.

[14] *See id.*

[15] Waldron, *supra* note 6, at 300 (noting that "It would not be entirely mischievous to add that since, in order to exist, a person [experiencing homelessness] has to be somewhere, such a person would not be permitted to exist.").

[16] *See, e.g.*, Pottinger v. City of Mia., 810 F. Supp. 1551, 1561–65 (S.D. Fla. 1992); Jones v. City of L.A., 444 F.3d 1118, 1125 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (2007); Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018).

[17] *See Martin*, 902 F.3d at 1048. The Ninth Circuit in *Martin* sided with the plaintiffs in finding that the City of Boise's ban on sleeping in public was unconstitutional as a form of cruel and unusual punishment. *Id.*

[18] *See* HOUSING NOT HANDCUFFS, *supra* note 12, at 12–14.

[19] Santiago Legarre, *The Historical Background of the Police Power*, 9 U. PA. J. CONST. L. 745, 778–79.

[20] *See id.* at 777.

Congress, however, can overcome this limitation through its spending power.[21] The Spending Clause grants Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States."[22] By attaching conditions to grants of funds to states, Congress has a long history of indirectly influencing state policy related to the general welfare of the United States.[23] So long as such conditional grants are not coercive, meaning they do not *force* states to make the policy change, the Supreme Court has largely upheld such grants as valid exercises of Congress's spending power.[24]

This Note looks at the possibility of ending the criminalization of homelessness through Federal Congressional Legislation via the Spending Clause rather than, as most efforts have been focused on in this area, through challenges in the Federal Judiciary. Part I of this Note introduces readers to the criminalization issue and the history of judicial challenges advocates have brought against laws criminalizing homelessness; concluding with the argument that a judicial approach, in isolation, will not be enough to solve the problem. Part II focuses largely on the boundaries the Court has placed on Congress's spending power and what can be done permissibly. Part III applies the Spending Clause analysis discussed in Part II towards a practical solution aimed at ending the criminalization of homelessness in the United States.

I. BACKGROUND

Laws criminalizing homelessness, though enacted at the state and municipal level, are and should be a concern of and a priority for all branches of the federal government. Such laws affect, potentially, millions of Americans' rights and freedoms to exist, violating core American values enshrined in both the Constitution and the

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[21] *See* David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1, 5–6 (1994).

[22] U.S. CONST. art. I, § 8, cl. 1.

[23] *See* Engdahl, *supra* note 21, at 26–35.

[24] *See, e.g.*, Steward Mach. Co. v. Davis, 301 U.S. 548, 587–90 (1937); South Dakota v. Dole, 483 U.S. 203, 211–12 (1987).

Declaration of Independence.[25] This Part begins with a general discussion of the criminalization of homelessness and the significant costs—both human and economic—that such policies impose on jurisdictions across the country. It then moves on to discuss the history of federal judicial action in this space and why judicial decisions alone may not be enough to effect lasting change.

A. *The Criminalization of Homelessness*

While the number of people experiencing homelessness is difficult to measure, the number is likely much larger than the government officially reports.[26] To determine the number of people experiencing homelessness, the federal government primarily relies on Department of Housing and Urban Development's ("HUD") point-in-time ("PIT") estimate of people experiencing homelessness in the United States.[27] This number is an aggregate of local counts of people experiencing homelessness conducted by a jurisdiction's Continuum of Care ("CoC"), regional or local bodies that coordinate funding for homelessness services within an area.[28] To amass this data, HUD first requires each CoC to report all people experiencing homelessness who are sheltered in local emergency shelters or

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[25] U.S. CONST. amend. XIV, § 1 (no government shall deprive a U.S. citizen of "life, liberty, or property without due process of law"); THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (noting that all citizens are endowed with basic rights to "Life, Liberty, and the pursuit of Happiness").

[26] NAT'L L. CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 6 (2017), https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf [hereinafter DON'T COUNT ON IT].

[27] *See Homelessness Statistics by State*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, https://www.usich.gov/tools-for-action/map/#fn[]=1400&fn[]=2900&fn[]=6000&fn[]=9900&fn[]=13500 (last visited May 15, 2021); *see also* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *United States Interagency Council on Homelessness*, https://www.usich.gov/ (last visited May 15, 2021) [hereinafter USICH] (USICH is main organ of government in the United States responsible for coordinating homelessness efforts across nineteen federal member agencies, including HUD, Department of Justice ("DOJ"), and Department of Education ("DOE"). Data it aggregates through its member agencies represents U.S. government's official understanding of scale of homelessness in the United States.).

[28] *Point-in-Time Count and Housing Inventory Count*, HUD EXCH., https://www.hudexchange.info/programs/hdx/pit-hic/ (last visited May 15, 2021).

transitional housing in their jurisdiction "on a single night in January."[29] HUD then requires that CoCs, every other year, conduct a count of people experiencing unsheltered homelessness in their jurisdiction on that same night.[30] Under the most recent count in 2019, HUD determined that on any given night 568,000 individuals experience homelessness.[31]

The PIT methodology, however, likely undercounts the number of people experiencing homelessness in the United States by a wide margin. A study comparing HUD's data with administrative data from various homelessness services organizations concluded that the number of people experiencing homelessness is likely anywhere from 2.5–10.2 times greater than what any PIT count suggests.[32] Critics of the HUD number point, firstly, to the fact that HUD's guidance to CoCs on how to conduct the count is inconsistent year-over-year resulting in "trends that are difficult to interpret and often do not reflect the true underlying data."[33] Second, critics contend that to obtain counts of people experiencing unsheltered homelessness, CoCs typically have volunteers conduct visual street counts over one night—as if one night was sufficient to conduct a count of all the people experiencing unsheltered homelessness across the country.[34] Further, these visual street counts typically miss many people experiencing unsheltered homelessness who sleep in places that are not visible at night.[35] Thirdly, critics contend that the PIT count very narrowly defines homelessness, missing people experiencing homelessness who are "doubled up" with family or friends; or people experiencing homelessness who are housed in other

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[29] *Id*.

[30] *Id.*

[31] HUD, 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2020), https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf.

[32] Stephen Metraux et al., *Assessing Homeless Population Size Through the Use of Emergency and Transitional Shelter Services in 1998: Results from the Analysis of Administrative Data from Nine US Jurisdictions*, 116 PUB. HEALTH REPS. 344, 350 (2001).

[33] DON'T COUNT ON IT, *supra* note 26, at 6.

[34] *Id.*

[35] *Id.* (noting that many people experiencing unsheltered homelessness strategically try to remain invisible at night given overwhelming number of laws that expose them to arrest if seen by police).

institutions such as hospitals or jails.[36] This is problematic because many of these unaccounted for people experiencing homelessness will likely cycle between these forms of "shelter" and unsheltered homelessness, making them potential targets for criminalization laws.[37] In short, by dramatically undercounting and estimating homelessness in this way, the U.S. government is tacitly expressing a policy preference for how to manage homelessness: keep it invisible.

The criminalization of homelessness is widespread in the United States, and many municipalities have passed at least some laws that criminalize homelessness.[38] A 2019 survey of 187 major American cities found that 72% of cities have at least one law restricting camping in public, 55% of cities have at least one law prohibiting sitting or lying in public, and 51% of cities have at least one law prohibiting sleeping in public.[39] Additionally, 83% of cities surveyed prohibit public urination and defecation, 76% prohibit scavenging or dumpster diving, and 55% prohibit storing property in public places.[40] While all of these laws, on their face, apply to everyone, those with a roof over their head inherently have the advantage of having *somewhere else*—a home—in which to exist. It follows that these laws, beyond their facial reality, disproportionately affect—or, more appropriately, disproportionately *criminalize* those experiencing homelessness.

That is to say, laws criminalizing homelessness are needlessly cruel and ineffective at solving the underlying problems of homelessness. Lacking a home, people experiencing homelessness must, among other things, sleep, eat, store their things, and use the bathroom in public spaces. Consequently, while it isn't *illegal* to experience homelessness anywhere in the United States, when municipalities pass laws prohibiting such actions as sleeping or urinating in public—life-sustaining actions that a human must do to literally survive—they are, in effect, making it illegal for people experiencing

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[36] *Id.*

[37] *See id*. at 12–14.

[38] HOUSING NOT HANDCUFFS, *supra* note 12, at 105–118 (charting prohibited conduct laws that criminalize homelessness in 187 urban and rural municipalities across country).

[39] *Id*. at 12–13.

[40] *Id*. at 14.

homelessness to do the basic things they need to do to remain alive. These laws, furthermore, often worsen the situation of people experiencing homelessness by saddling them with a criminal record that makes escaping homelessness all the more difficult.[41] The United States Interagency Council on Homelessness (the "USICH"), the main organ of government in the United States responsible for coordinating homelessness efforts across nineteen federal member agencies, notes the inefficiency of these policies in stating that "criminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back."[42]

Beyond the human costs, laws criminalizing homelessness are expensive in their inefficiency. An economic impact study conducted by the Berkley Law Policy Advocacy Clinic of Berkley's sit-lie ordinances, which are similar to such ordinances around the country, looked at the costs of police resources involved in enforcing such laws, finding "that while economic costs [of such laws] may be substantial, economic benefits are uncertain and perhaps illusory."[43] Beyond the costs of direct enforcement, many major municipalities have faced large costs in the form of civil litigation brought on behalf of people experiencing homelessness in their jurisdictions.[44] Finally, because these laws do not fix the underlying issues that cause homelessness, such as a lack of affordable housing, the cyclical nature of people experiencing homelessness getting arrested and then thrown back on the street can quickly run up costs to taxpayers. A study conducted by Creative Housing Solutions found that giving "housing [to] just 50% of the current chronic

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[41] *See id*. at 64.

[42] U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS 7 (2012), https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf [hereinafter SEARCHING OUT SOLUTIONS].

[43] Joseph Cooter et al., *Does Sit-Lie Work: Will Berkeley's "Measures" Increase Economic Activity and Improve Services to Homeless People?*, BERKLEY L. POL'Y ADVOC. CLINIC, UNIV. OF CAL. 1–3 (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2165490.

[44] *See, e.g.*, Emily Alpert Reyes, *L.A. Agrees to Pay Nearly $950,000 in Two Cases Involving the Homeless*, L.A. TIMES (June 14, 2016, 11:08 AM), http://www.latimes.com/local/lanow/la-me-ln-attorney-fees-homeless-case-20160613-snap-story.html (discussing high expense associated with litigating challenges against enforcement of L.A. laws criminalizing homelessness).

homeless population in Central Florida over a multiyear period, with a 10% recidivism rate, would save the taxpayers a minimum of $149,220,414," compared with the amount spent on enforcing laws that criminalize homelessness.[45] Therefore, rather than spending taxpayer money directly addressing the root causes of homelessness (e.g., lack of affordable housing and social services) municipalities are simply hiding the much bigger cost of criminalization in the budgets of jails, courts, and law enforcement.

Despite these costs, municipalities continue to pass laws that criminalize homelessness. Between 2006 and 2019, there have been major increases in all types of laws criminalizing homelessness including a 103% increase in laws prohibiting loitering, loafing, or vagrancy; an 80% increase in laws criminalizing begging; and a 78% increase in laws criminalizing sitting or lying down in public.[46] These laws allow politicians a quick and simple way to respond to complaints by a powerful contingent of business owners and property owners about the visibility of people experiencing homelessness.[47] While there are more effective long-term solutions to homelessness, the short-term solution of criminalization is generally too tempting for politicians to ignore.

B. *Judicial Actions*

The foundational case in fighting criminalization laws is *Papachristou v. City of Jacksonville*, in which the Supreme Court found a vagrancy statute unconstitutional and void for vagueness under the Fourteenth Amendment Due Process Clause because it "fail[ed] to give a person of ordinary intelligence fair notice that his contemplated conduct [was] forbidden by the statute," and "encourage[d] arbitrary and erratic arrests and convictions."[48] The result of this case is that it required legislatures to criminalize the specific actions

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[45] GREGORY A. SHINN, CENT. FLA. COMM'N ON HOMELESSNESS, COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA 8 (2014), https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf.

[46] HOUSING NOT HANDCUFFS, *supra* note 12, at 13.

[47] Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 54 (1996).

[48] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

of individuals, rather than their identities.[49] In other words, legislatures could no longer pass ordinances criminalizing merely being a vagrant, but would be instead required to pass ordinances criminalizing specific actions that a vagrant might take. As a result, legislatures passed ordinances that targeted specific loitering actions, such as sleeping in public or panhandling.[50] And, while the Supreme Court has since struck down some such action-based ordinances as being void for vagueness,[51] many of these ordinances have been found to be constitutional under the Fourteenth Amendment and persist to the present day.[52]

Following *Papachristou*, advocates have since shifted to other avenues for striking down ordinances that criminalize aspects of homelessness such as the First Amendment[53] and the Fourth Amendment.[54] Advocates, however, have been most successful in arguing against the criminalization of homeless by using the Eighth Amendment jurisprudence forbidding cruel and unusual punishment.[55] This theory developed, largely, out of the Supreme Court

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[49] *See id*.

[50] Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407, 420–21 (2008).

[51] *See* City of Chi. v. Morales, 527 U.S. 41, 62–64 (1999) (finding a loitering law targeted specifically at gang members void for vagueness under Fourteenth Amendment because it both failed to give an ordinary person adequate notice of what is forbidden conduct and also afforded police an impermissible amount of discretion in determining who to enforce the ordinance against); Kolender v. Lawson, 461 U.S. 352, 361 (1983).

[52] Jarvis, *supra* note 50, at 421.

[53] Homelessness advocates have used the First Amendment to invalidate, in some jurisdictions, ordinances that prohibit panhandling or that target loitering for the purposes of begging. *See* Speet v. Schuette, 726 F.3d 867, 878 (6th Cir. 2013); Loper v. N.Y.C. Police Dep't, 999 F.2d. 699, 706 (2d Cir. 1993). *But see* Gresham v. Peterson, 225 F.3d 899, 903–07 (7th Cir. 2000) (finding that an ordinance that prohibited panhandling did not impinge plaintiff's First Amendment rights because the ordinance only restricted panhandling done at night, in specific areas, or that was particularly "aggressive" as defined by the ordinance).

[54] *See* Pottinger v. City of Mia., 810 F. Supp. 1551, 1569–73 (S.D. Fla. 1992); Lavan v. City of L.A., 797 F. Supp. 2d 1005, 1110–16 (C.D. Cal. 2011) (finding that city's practice of confiscating and destroying the property of homeless persons was an unconstitutional seizure under Fourth Amendment).

[55] Jarvis, *supra* note 50, at 422.

decision in *Robinson v. California*.[56] In *Robinson*, the plaintiff was convicted by both a municipal and appellate court under a California statute that criminalized the status of being a drug addict, even in the absence of any observable drug use at the time of arrest.[57] The Supreme Court, however, overturned the conviction, finding that a law which "imprisons a person thus afflicted [of a narcotic addiction] as a criminal, 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" under the Eighth and Fourteenth Amendments.[58]

The holding in *Robinson* was subsequently interpreted in *Powell v. Texas*.[59] There, the Court, in a plurality opinion, held that the plaintiff, an alcoholic who, by definition, could not control his alcohol addiction, could be convicted under a public drunkenness statute without that conviction being viewed as cruel and unusual punishment under the Eighth Amendment.[60] The plurality distinguished *Powell* from *Robinson* by arguing that in *Robinson*, the plaintiff was convicted solely for his status as a drug user, whereas in *Powell*, the plaintiff was convicted for the action of being drunk in public.[61] Justice White's concurrence in *Powell* is particularly noteworthy in reference to the criminalization of the homeless because it suggests that the plaintiff was only guilty because he did not *have to* get drunk in public, but, rather, could *choose to* be drunk in the privacy of his own home:

> Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking.[62]

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[56] *Id.*; Robinson v. California, 370 U.S. 660 (1962).
[57] *Robinson*, 370 U.S. at 661–64.
[58] *Id.* at 667.
[59] Powell v. Texas, 392 U.S. 514 (1968).
[60] *Id.* at 532.
[61] *Id*.
[62] *Id*. at 551 (White, J., concurring).

Taking up White's concurrence, some advocates have sought to use this jurisprudence to forbid cities from enforcing certain laws criminalizing homelessness. In both *Jones v. City of Los Angeles* and *Martin v. City of Boise*, plaintiffs, people experiencing homelessness in Los Angles and Boise respectively, sought to challenge city ordinances that outlawed sleeping or camping in public.[63] In both cases the district court ruled for the city, and, in both cases, the ruling was overturned by the Ninth Circuit for violating the Eighth Amendment's ban on cruel and unusual punishment.[64] Whether this strain of Eighth Amendment jurisprudence will hold up in other circuits or in front of the Supreme Court is hitherto an open question, as, in December 2019, the Supreme Court declined to review *Martin*, leaving that ruling in effect.[65]

Some advocates have used court victories to work with cities to strike a settlement agreement rather than enact an all-out ban on any particular type of law criminalizing homelessness; *Jones* is an example of this strategy, as that ruling was vacated following a settlement agreement between the parties,[66] in which the city of Los Angeles agreed to not enforce sleeping bans between 9 P.M. and 6 A.M.[67] In a similar earlier case, the City of Miami agreed to abide by a consent decree issued by a district court after losing the 1992 case of *Pottinger v. City of Miami* to advocates challenging the city's draconian enforcement of criminalization laws.[68] The consent decree included, among other things, the right for people experiencing homelessness to be offered shelter before being moved by the police; the right to be warned before being arrested for minor conduct crimes; and the right to certain property protections during street clean-ups.[69]

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[63] Jones v. City of L.A., 444 F.3d 1118, 1120 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (2007); Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018).

[64] *Jones*, 444 F.3d at 1125, 1136–38; *Martin*, 902 F.3d at 1036, 1048.

[65] City of Boise v. Martin, 140 S. Ct. 674, 2019 WL 6833408, at *1 (Dec. 16, 2019) (mem.).

[66] Jones v. City of Los Angeles, 505 F.3d 1006, 1006 (9th Cir. 2007).

[67] Susan Shelley, *Los Angeles Is Right to Back Away from the Jones Settlement*, ORANGE CNTY. REG. (June 26, 2018), https://www.ocregister.com/2018/06/26/los-angeles-backs-away-from-the-jones-settlement/.

[68] Settlement Agreement at 1, Pottinger v. City of Mia., No. 88-2406-CIV-ATKINS (S.D. Fla. Oct. 1, 1998), ECF No. 382.

[69] *Id*. at 7–13.

Despite these successes, there are several reasons to be skeptical of a complete end to the criminalization of homelessness arising out of the federal judiciary. For one, the problem of criminalization is largely an issue of state and local police powers,[70] a fact which the Supreme Court has, in the past, deferred to in some Eighth Amendment cases.[71] The plurality in *Powell*, for example, explicitly narrowed *Robinson's* holding for precisely this reason:

> The doctrines of [substantive criminal law] 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. This process of adjustment has always been thought to be the province of the States.[72]

Moreover, cases like *Martin* only stop municipalities from enforcing certain laws, rather than winning an outright ban on policies criminalizing homelessness.[73] While the city of Boise, for example, is barred from enforcing sleeping- and camping-in-public against people experiencing homelessness, the Ninth Circuit's ruling didn't "nullif[y] the range of laws that punish homeless people."[74] Thus, given the large volume of laws criminalizing homelessness across municipalities, even advocates in circuits friendly to Eighth Amendment arguments might find themselves having to play a game of judicial whack-a-mole to get all such laws found unconstitutional.[75]

Finally, in cases in which advocates settled for equitable relief or settlements, those forms of relief are tenuous and can be overturned by subsequent actions when tensions mount for cities to make homelessness less visible. This was true in *Jones* where, in 2018,

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[70] *See* Legarre, *supra* note 19, at 778–79.

[71] *See, e.g.*, Powell v. Texas, 392 U.S. 514, 536 (1968).

[72] *Id*.

[73] *See Eighth Amendment — Criminalization of Homelessness — Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public*, 133 HARV. L. REV. 699, 703 [hereinafter *Eighth Amendment — Criminalization of Homelessness*].

[74] *Id*.

[75] *See generally* HOUSING NOT HANDCUFFS, *supra* note 12, at 105–118 (listing the wide array of prohibited conduct criminalized in cities across the United States).

Los Angeles's mayor Eric Garcetti announced his intention to back away from the *Jones* settlement, which had allowed people experiencing homelessness to sleep in public between 9 P.M. and 6 A.M. for eleven years.[76] This was also true in Miami, where the *Pottinger* consent decree could not stand up to city pressure to manage communities experiencing homelessness.[77] In 2019, twenty years after the initial settlement went into effect, the Southern District of Florida ruled that the City had substantially complied with the mandates of the consent decree and allowed it to be dissolved.[78] The court came to this conclusion despite the testimony of numerous people experiencing homelessness who each recounted several times when police and city officials routinely violated many of the consent decree's provisions.[79] If the Southern District's opinion is allowed to stand, it follows that there is nothing in place to stop the City from once again pursuing a strategy of criminalizing homelessness if the City so chooses.

Despite these issues, advocates should continue to pursue judicial action because they do often produce substantial benefits for people experiencing homelessness. In *Pottinger*, for example, even though the consent decree was eventually terminated, it did lead to initiatives such as the passing of a food and beverage tax, which help fund a number of homelessness programs within Miami's CoC network.[80] Similarly, in both *Jones* and *Martin* the litigation was important in both raising awareness of the issues of criminalization and in effecting some concrete changes.[81] Given the issues discussed above, however, federal judicial solutions, in isolation, will likely not be enough to solve the problem of criminalization in the United States.

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[76] Shelley, *supra* note 67.

[77] *See generally* Pottinger v. City of Miami, 359 F. Supp. 3d 1177 (S.D. Fla. 2019).

[78] *Id*. at 1195–99.

[79] *Id*. at 1191–93.

[80] *Id.* at 1183–88.

[81] *See* Shelley, *supra* note 67; *Eighth Amendment — Criminalization of Homelessness*, *supra* note 73, at 706.

II. THE SPENDING CLAUSE

Given the scope of criminalization and its significant costs, advocates might see more success in pushing politicians in the federal legislature to attempt to address the issue head-on. This Note advocates that one effective and politically feasible way for Congress to accomplish this would be through incentivizing states through strategic use of the Spending Clause. Before discussing this, however, this Note reviews the history of the Spending Clause so as to illustrate how it can be properly used to incentivize change in state policy.

The Constitution grants Congress the power "to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."[82] This clause, known as the Spending Clause, generally allows Congress to spend money as it sees fit and has frequently been utilized by Congress to incentivize state-level policy, particularly with respect to granting state funding subject to various conditions.[83] Congress has, in fact, done this on a number of occasions to advance policy objectives on the state level such as eliminating racial discrimination[84] and promoting policies that help the handicapped.[85] Thus, in theory, if Congress wanted to, the federal legislature could appropriate state and municipal funding for various programs on the condition that states and municipalities reduce enforcement of laws criminalizing homelessness and divert funds to less harsh forms of managing people experiencing homelessness.

While this might sound straightforward, this use of the Spending Clause is a quite controversial area of Constitutional law. As far back as the time of the Founders, the bounds of Congress's Article I enumerated powers have been a large point of controversy, and Alexander Hamilton and James Madison debated the issue shortly after the Constitution was ratified.[86] Those generally opposed to

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[82] U.S. CONST. art I, § 8, cl. 1.

[83] *See* Mark Seidenfeld, *The Bounds of Congress's Spending Power*, 61 ARIZ. L. REV. 1, 3 (2019).

[84] Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d (2000).

[85] Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (2000).

[86] THE FEDERALIST NO. 34 (Alexander Hamilton) (arguing that Congress's powers are plenary when pursuing national ends; to put limitations on these powers would be, "to a sacrifice of the great interests of the union to the power of the

such usage point out that in many cases, such conditions circumvent Congress's clearly enumerated powers in Article I and inappropriately encroach on police powers reserved to the states.[87] Proponents of such usage point to the fact that the language of the Spending Clause allows Congress to "provide for the . . . general Welfare of the United States,"[88] which could be interpreted to allow Congress to spend for purposes beyond the enumerated powers.[89]

As noted above, while Congress has, in many cases, used the Spending Clause to permissibly incentivize states to change local policy, recent Supreme Court cases have put substantial limitations on what Congress may do. If advocates are to lobby for legislative solutions to the criminalization of the homelessness, or, truly, any cause, understanding how these limitations work will be key to avoiding potential barriers in the courts. This Part lays out the history of Spending Clause jurisprudence and examines, first, the conventional understanding of the Spending Clause doctrine as applied to conditional grants of federal funds. This Part then discusses how Spending Clause doctrine has evolved in the modern era through the seminal cases of *South Dakota v. Dole*[90] and *National Federation of Independent Business v. Sebelius* ("*NFIB*").[91]

A. *Early Spending Clause Jurisprudence*

Arguments over Congressional enactments that circumvent Article I's enumerated powers are as old as the United States itself. While delegates at the 1787 Constitutional Convention could easily agree on the basic principle that the federal government should handle issues of national concern while states should handle issues of

individual states."); THE FEDERALIST NO. 41 (James Madison) (arguing that Congress should have broad powers, but differs from Hamilton by arguing that Congressional power is carefully limited to those purposes strictly enumerated in Article I).

87 Randy E. Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430, 440, 485–87 (2004).

88 U.S. CONST. art. I, § 8, cl. 1.

89 Seidenfeld, *supra* note 83, at 3.

90 South Dakota v. Dole, 483 U.S. 203 (1987).

91 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

local concern,[92] they had difficulty agreeing on the best way to cabin together those two realms of sovereignty.[93] The Founders eventually settled on the concept of enumerated powers,[94] but this did not end the debate over such powers. Only a few years after ratification, in 1819, the Supreme Court heard the landmark case of *McCulloch v. Maryland*, and held that Congress could, through the Necessary and Proper Clause, transcend any strict reading imposed by enumeration if Congress was legislating towards the end of an enumerated power.[95] Foreseeing this exercise in line drawing was a feature, not a bug, of American federalism, Justice Marshall noted in his opinion: "But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist."[96]

With respect to the Spending Clause's boundaries, much of nineteenth century jurisprudence conformed with the Hamiltonian view espoused in *McCulloch*.[97] This view, named by David E. Engdahl as the "Principle of Extraneous Means,"[98] held that the Necessary and Proper clause brought "all matters potentially within Congress's reach but permits Congress to reach them only insofar as it does so to effectuate one or another of the other enumerated federal powers."[99] Thus, as in *McCulloch*, Congress may act in a manner extraneous to its enumerated powers, if Congress is pursuing an end enumerated in the Constitution.[100] As a corollary to this, Engdahl also posits that, throughout much of the nineteenth and early twentieth

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[92] UNITED STATES CONSTITUTIONAL CONVENTION, JOURNAL OF THE FEDERAL CONVENTION KEPT BY JAMES MADISON 62 (E.H. Scott ed., 1893) (1787) (discussing the role of the federal legislature: "the National Legislature ought . . . to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.").

[93] Engdahl, *supra* note 21, at 5–6.

[94] *Id.* at 7.

[95] M'Culloch v. State of Maryland, 17 U.S. 316, 411–24 (1819) (holding that Congress could establish a national bank even though such power was not enumerated and determining that the establishment of the bank was valid insofar as Congress deemed it necessary to carry out its taxing and spending powers).

[96] *Id.* at 405.

[97] Engdahl, *supra* note 21, at 11–12.

[98] *Id.* at 13.

[99] *Id.* at 15 (emphasis omitted).

[100] *Id.*

century, the judiciary would have also understood the Spending Clause in the light of the "principle of extraneous ends."[101] That is, Congress is also justified to use whatever means it has available to pursue ends that are extraneous to its enumerated powers.[102] Therefore, applying both principles together, much of the early understanding of enumerated powers, including the Spending Clause, viewed each of Congress's enumerated powers as quite substantial. In terms of the Spending Clause, under this view, Congress could constitutionally condition state acceptance of federal funds subject to any policy goals it deems fit.[103]

This classic view began to shift in the early twentieth century when, due to a surplus in federal income tax, Congress was able to begin enacting a number of large federal spending programs.[104] The seminal case that brought this issue to the Supreme Court was *United States v. Butler*, which although primarily about Congress's taxation power, had important implications for limiting Congress's spending power as well.[105] The issue in *Butler* stemmed from Congress's enactment of the Agricultural Adjustment Act (the "AAA"), which allowed the Secretary of Agriculture to limit the production of certain farm products and tax farmers who exceeded that limit.[106] The AAA then appropriated those tax dollars to farmers who would reduce their yields of those crops.[107] Butler, a crop processer, filed suit against the government arguing that the tax was not a tax, but rather a federal attempt to regulate agriculture, a power reserved to the states under the Tenth Amendment.[108]

The Court ultimately sided with Butler, departing from the earlier view of the enumerated powers and, puzzlingly, citing Hamilton as the basis for its departure.[109] While the Court found that the tax and spending power was, as Hamilton proposed, not confined to the enumerated powers, there were limits to what Congress could or

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101 *Id.* at 16.
102 *Id.*
103 *See id.* at 20–21.
104 David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 497 (2007).
105 United States v. Butler, 297 U.S. 1 (1936).
106 *Id.* at 53–56.
107 *Id.*
108 *See id.* at 68.
109 *Id.* at 66–69.

could not do with it.[110] The Court, in effect, determined that both the tax and spending powers were subject to the limitations of Tenth Amendment state sovereignty holding that, "Congress has no power to enforce its commands on the farmer to the ends sought by the Agricultural Adjustment Act. It must follow that it may not indirectly accomplish those ends by taxing and spending to purchase compliance."[111]

Butler, effectively, began to draw a line between government spending that was contractual in the way that it moved state policy and spending that was more regulatory in nature.[112] Thus, when spending is transactional, or, in other words when the federal government spends money to buy goods or conduct from the states, it engages in a willing transaction with the states similar to a contract.[113] Spending is regulatory in nature when the states are not a willing party and the outcome is more governmental in nature.[114]

Steward Machine Co. v. Davis clarified this limitation of the Spending Clause further, while simultaneously expanding the scope of federal power.[115] *Steward* dealt with a provision of the Social Security Act's (the "SSA") unemployment compensation program that provided a 90% federal tax credit to employers on the program's tax if those employers contributed to their state's unemployment compensation fund that met federal standards.[116] As in Butler, the issue in *Steward* was whether Congress's spending in the form of the national unemployment compensation program was a form of regulation impermissibly encroaching on powers reserved to the states via the Tenth Amendment.[117] In other words, the concern here was whether, through the tax credit, Congress was putting pressure on states to develop their own unemployment compensation fund that was in line with federal standards.[118]

The Court sided with the government, finding Congress's spending to be constitutional because it *induced*, rather than *coerced*,

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110 *Id.*
111 *Id.* at 74.
112 Seidenfeld, *supra* note 83, at 6–7.
113 *See id.*
114 *Id.*
115 Steward Mach. Co. v. Davis, 301 U.S. 548 (1937).
116 *Id*. at 573–78.
117 *Id.*
118 *Id.*

states to establish their own federally compliant unemployment programs.[119] Justice Cardozo framed Congress's enactment of a national unemployment program as a necessary response to a problem, the unprecedented number of unemployed persons during the Depression, that, while local in nature, had become national in dimension.[120] As many states in the 1930s had been holding back on passing unemployment funds out of fear that it would place them in a "position of economic disadvantage as compared with neighbors or competitors," Cardozo described the SSA as a federal attempt to coordinate cooperation with state governments for the betterment of the general welfare.[121] The federal tax would help fund federal unemployment resources if the states continued not to act, and the tax credit would push funding towards state programs that would reduce the burden on federal programs.[122] Cardozo concluded his analysis by determining that this was not coercing the states to regulate, but, rather, merely encouraging them to regulate, which was not unconstitutional.[123]

Steward, therefore, allowed the Federal government to use its spending power to encourage state regulation;[124] it clarified the boundaries somewhat further than *Butler*, suggesting that the issue was not about the distinction between a transactional relationship and a regulatory one, but, rather, about the distinction between a willing relationship and a coercive one.[125] Thus, "if the federal government could establish a program directly, but it is more efficient or politically expedient to involve the states, there is no barrier to the federal government inducing state cooperation . . . to help implement the federal program."[126] *Steward*, thereby, created an important foundation for the modern notion of cooperative-federalism,

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119 *Id.* at 588–90.
120 *Id.* at 586–87.
121 *Id.* at 588.
122 *Id.* at 588–90.
123 *Id.*
124 *See* Seidenfeld, *supra* note 83, at 9.
125 *Id.* at 8–10.
126 *Id.* at 8–9.

in which state and federal governments work in conjunction with one another for the advancement of a common good.[127]

Furthermore, by drawing the boundaries of federal spending power at coercion, *Steward* set the stage for the modern Spending Clause jurisprudence and the dimensions it would take on following *Dole*.[128] Before moving on, however, it is important for the reader to understand how the Court in *Steward* understood coercive spending in this context, because such a distinction is not always obvious. In *Steward*, Justice Cardozo determined that the federal spending at issue was permissible because the government was, in effect, "buying" state regulation, not forcing the states to legislate by leveraging spending that it had already promised in exchange for regulation.[129] The latter would be coercive because, effectively, such a threat might not be related to the regulation the original spending was attempting to "purchase," and, thus, the federal government would be using the state's reliance on the original spending to induce further concessions from the states.[130] If, however, as in *Steward*, a conditional grant of federal funding is related to the product on which those federal funds are going to be spent, such a grant would not be coercive because it did not alter the fundamental terms of the "contract" between the state and federal government.[131]

B. Dole, NFIB, *and the Evolving Coercion Standard*

In 1984, Congress passed a law directing the then-Secretary of Transportation, Elizabeth Dole, to withhold federal highway funding from states that did not have a minimum drinking age of twenty-one, which significantly reignited the argument around the

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[127] *See* Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813, 858–59 (1998).

[128] South Dakota v. Dole, 483 U.S. 203 (1987).

[129] Steward Mach. Co. v. Davis, 301 U.S. 548, 590–91 (1937); Seidenfeld, *supra* note 83, at 9.

[130] *See* Seidenfeld, *supra* note 83, at 9.

[131] *Id.* ("The Steward Machine Court essentially held that the condition (the state adopting an unemployment-compensation program) triggering the discount of federal unemployment-compensation fees paid by employers (the spending) is related to the product on which federal funds are spent (federal unemployment-compensation benefits) because a state administering its own program reduces the need for the federal government to pay out benefits.").

boundaries of the Spending Clause.[132] In *South Dakota v. Dole*, the crux of the issue was whether the provision to withhold spending unless South Dakota adopted a drinking age of twenty-one was coercive and, therefore, an unconstitutional use of Congress's spending power.[133] South Dakota claimed that under the Twenty-First Amendment, the states were granted complete control over the importation and sale of alcohol within their jurisdictions.[134] Therefore, Congress's threat to withhold funding was a usurpation of that power by indirectly attempting to set a national drinking age.[135] The government responded by arguing that its use of the Spending Clause in this context was permissible because it merely *encouraged* states to conform to the national drinking age rather than *forced* them to do so.[136]

The Court ruled for the government while further delineating the boundaries on government spending.[137] Justice Rehnquist set out a four-part test for determining a permissible use of the Spending Clause: (1) exercise of the spending power must be in the pursuit of the general welfare, as specified in the Constitution; (2) if Congress conditions the states' receipt of federal funds it must make such conditions unambiguous to put the states on notice; (3) the conditions on federal grants must be related to a federal interest or national project; and (4) conditional grants may not conflict with other constitutional provisions.[138] As the government's withholding of funds here met all four parts of this test, its use of the Spending Clause was constitutional.[139]

Justice Rehnquist did address the *Steward* coercion standard, but focused only briefly on it here.[140] That is, Justice Rehnquist found that there was some connection between the condition and the funds being withheld: underage drunk driving threatened highway

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[132] 23 U.S.C. § 158(a)(1)(A). *See generally* Elianna Spitzer, *South Dakota v. Dole: The Case and Its Impact*, THOUGHTCO. (May 5, 2019), https://www.thoughtco.com/south-dakota-v-dole-4175647.

[133] *Dole*, 483 U.S. at 205.

[134] *Id.* at 205–206.

[135] *See id*.

[136] *Id.* at 206.

[137] *Id*.

[138] *Id.* at 207–08.

[139] *Id.* at 208–10, 212.

[140] *Id.* at 208–10.

safety.[141] Justice Rehnquist instead determined that the focal point of the coercion analysis should be the effects of the withheld spending.[142] Under this test, Justice Rehnquist held for the government because the amount of federal funding being withheld here was small: only 5% of the funds it would otherwise receive under highway grant programs.[143] In other words, South Dakota did not stand to lose much by not increasing the drinking age.[144] Thus, to Justice Rehnquist, the amount of the funding being withheld was the critical point of a coercion analysis.

As Justice O'Connor pointed out in her dissent, however, the funding being withheld in *Dole*, which was allocated for highway maintenance, had very little to do with the drinking age given that underage drinking was not a main cause of highway damage.[145] Thus, under a *Steward* analysis of the facts, the government's withholding of funds would likely be unconstitutional. Rehnquist's opinion, however, shifts the coercion test to one of determining whether the amount of funding being withheld would cripple the states, such that the states would not have any other choice but to accede to federal demands. This understanding of coercion represents an important departure from the understanding of it in *Steward.* If withholding funds was considered unconstitutional, were it unrelated to the product on which those funds would be spent, as in *Steward*, then, in *Dole*, the analysis looks more at the consequences of removing funding.

It follows that this shift in the coercion standard under *Dole* would have major implications for Medicaid expansion under the Affordable Care Act (the "ACA"). In *NFIB*, plaintiffs brought suit against the government challenging, among other things, the provision of the ACA that gave states additional funding on the condition that they provide health care to all citizens whose income falls below

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141 *Id.*

142 *Id.* at 211.

143 *Id.*

144 *See id.*

145 *Id.* at 213–15 ("[Congress] is not entitled to insist as a condition of the use of highway funds that the State impose or change regulations in other areas of the State's social and economic life because of an attenuated or tangential relationship to highway use or safety.").

a certain threshold.[146] Plaintiffs contended that this expansion exceeds Congress's authority under the Spending Clause because Congress was also threatening to withhold all of a state's Medicaid grants unless that state accepted the conditions that came with the expanded funding.[147]

Justice Roberts sided with plaintiffs, largely applying the coercion standard developed in *Dole*.[148] Applying this "financial inducement" test, Justice Roberts found that the Federal Government's threat to withhold all Medicaid funding if states did not agree to the terms of Medicaid expansion was more than just a form of encouragement, it was "a gun to the head."[149] Justice Roberts argued that, while in *Dole* the amount of funding the government intended to withhold was relatively small (only 5% of federal highway funds—a small portion of the state's total budget), the threatened loss in Medicaid funding could be as large as 10% of a state's total budget.[150] This, he concluded, would leave "the States with no real option but to acquiesce in the Medicaid expansion."[151]

Applying the *Steward* test, Justice Roberts largely underplayed the aspect of the test focusing on the relationship between the condition and the funds being withheld, instead emphasizing more the coercive effects of the condition.[152] Roberts characterized the Medicaid expansion as "a shift in kind, not merely degree," discussing how the expansion was a dramatic departure from Medicaid's original mandate of, as Roberts characterizes it, "cover[ing] medical services for four particular categories of the needy" to "meet the health care needs of the entire nonelderly population with income below 133 percent of the poverty level."[153] As in Rehnquist's cursory analysis of the relationship in *Dole*, Roberts's analysis on this point is also somewhat confusing when looking at the relationship between the condition and the spending at issue. In the Medicaid Act, Congress very clearly stipulated that part of the Act's mandate was to

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146 Nat'l Fed'n of Indep. Bus. v. Sebelius ("*NFIB*"), 567 U.S. 519, 541–42 (2012).

147 *Id*. at 542.

148 *Id*. at 579–81.

149 *Id*. at 581.

150 *Id.* at 581–82.

151 *Id.* at 582.

152 *See id.*

153 *Id.* at 583.

furnish "medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services."[154] Thus, the change in the amount of people covered would, indeed, be only a change in degree rather than kind if those covered had "income and resources [] insufficient to meet the costs of necessary medical services," which they presumably would if they could not purchase other health insurance.[155]

Justice Ginsburg made a similar argument in her concurrence/dissent.[156] Justice Ginsburg argued that the shift in funding merely "embrac[ed] a larger portion of the Nation's poor."[157] Addressing Robert's coercion analysis of the effects of the conditional spending, Ginsburg found the amount of a state's budget implicated somewhat irrelevant to the coercion analysis.[158] Taking a Hamiltonian view of the Spending Clause, she held that states never really had a right to the Medicaid funds in the first place, and that such funding was only money "States *anticipate* receiving from future Congresses."[159]

While the strains of *Steward* and the early more expansive understanding of the Spending Clause still remain embedded in the law, since *Dole*, the trend has shifted away from looking at the purpose of spending towards looking at the nature of the spending's effects. Whether the "financial inducement" test is best for determining the boundaries of Congress's Spending Clause powers is beyond the scope of this Note. If advocates do intend to push Congress to use the Spending Clause to induce states and municipalities to decrease both the number and enforcement of laws criminalizing homeless, advocates must be aware of these limitations so that they can achieve policy solutions that will not be found unconstitutional in the courts.

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154 42 U.S.C. §§ 1396-1 (1984).

155 *See id.*

156 *See NFIB*, 567 U.S. at 640–41 (Ginsburg, J., concurring in part and dissenting in part).

157 *Id.* at 641.

158 *Id*. at 642–44.

159 *Id.* at 644.

III. CONDITIONAL SPENDING FOR ENDING THE CRIMINALIZATION OF HOMELESSNESS

As in *Steward*, the criminalization of homelessness is a problem that is national in scope, but one which most states have not addressed in any substantive way.[160] Such a problem invites a solution from the Federal Legislature to encourage states to move in a more humane and fiscally sound direction towards managing their populations of people experiencing homelessness. Understanding the limitations of the Spending Clause set out in Part II, this Note now turns to possible ways Congress could utilize the Spending Clause to induce states to remove, or lessen, enforcement of their laws criminalizing homelessness. This Part begins by introducing readers to the key instruments that currently exist to fund state homelessness response programs. It then discusses strategies for using spending from those programs to influence state policy without being coercive.

The criminalization of homelessness is a multifaceted problem that implicates a number of government agencies and, therein, a number of sources of legislative funding.[161] Thus, there are several places Congress could in theory condition funding grants on states and municipalities taking steps to end local laws criminalizing homelessness. Therefore, the first question in applying the Spending Clause jurisprudence discussed in Part II is where Congress should condition funds.

As the holding in *Steward* established, coercive conditions are those that are generally unrelated to the underlying purpose of the grant being withheld.[162] While this test was deemphasized by the majorities in both *Dole*[163] and *NFIB*[164] in favor of the *Dole* coercive

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[160] It should be noted that some states (Rhode Island, Connecticut, Illinois, and Puerto Rico) have passed Homeless Bills of Rights, which do attempt to curb criminalization of homelessness statewide. These states, however, are in the minority and most continue to allow laws criminalizing homelessness. *See* Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 403–04 (2015).

[161] USICH, *supra* note 27 (noting that the USICH, the federal agency responsible for coordinating national efforts around homelessness, is comprised of nineteen different federal agencies).

[162] Steward Mach. Co. v. Davis, 301 U.S. 548, 590–91 (1937).

[163] South Dakota v. Dole, 483 U.S. 203, 211 (1987).

[164] *NFIB*, 567 U.S. at 582–83 (majority opinion).

effects standard, *Steward* remains good law, and the jurisprudence still exists in some strains on the court. Indeed, Justice O'Connor's dissent[165] in *Dole* and Justice Ginsburg's concurrence/dissent[166] in *NFIB* both signal that even if the relationship between condition and funds is no longer the main focus of a coercion analysis, it might still play a factor in future challenges to Congress's use of the Spending Clause.

Thus, the best place to start would be with programs already earmarked for homelessness spending. Congress has previously passed major legislation directly targeted at managing homelessness through the 1987 McKinney-Vento Act (the "MVA").[167] The MVA is a broad act targeted at addressing a wide scope of issues faced by people experiencing homelessness including funding for emergency shelter,[168] housing assistance,[169] and education.[170] Additionally, the MVA created the USICH to broadly oversee enforcement of the Act.[171]

In 2009, Congress reauthorized the MVA through the Homeless Emergency Assistance and Rapid Transition to Housing (the "HEARTH") Act.[172] Twenty years after the MVA, the HEARTH reauthorization targeted many of the deficiencies in the original legislation.[173] The HEARTH Act strengthened the MVA in a number of key ways, including expanding the definition of homelessness to include many people left out of the MVA's definition, such as those people experiencing homelessness who are "doubled up" and sharing space with other people enduring economic hardship.[174] The HEARTH Act also expanded the USICH's mission to reflect the broad needs of people experiencing homelessness, e.g., "to coordinate the Federal response to homelessness and to create a national

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165 *Dole*, 483 U.S. at 213–15 (O'Connor, J., dissenting).

166 *NFIB*, 567 U.S. at 641 (Ginsburg, J., concurring in part and dissenting in part).

167 McKinney-Vento Act, 42 U.S.C. §§ 11301–11435 (1987).

168 42 U.S.C. §§ 11331–11352.

169 42 U.S.C. §§ 11360–11408.

170 42 U.S.C. §§ 11431–11435.

171 42 U.S.C. §§ 11311.

172 42 U.S.C. § 11302.

173 Nigel Graham, *Lawmakers Propose the HEARTH Act to Aid Millions of Homeless Americans*, 13 LOYOLA PUB. INT. L. REP. 60, 61–62 (2008).

174 *Id.* at 62.

partnership at every level of government."[175] The HEARTH Act increased yearly federal funding for homelessness programs from $1.8 billion to $2.5 billion.[176]

Another important change that the HEARTH Act brought with it was that it created better lines of communication between the federal and local governments.[177] Importantly, it consolidated many of the numerous MVA homelessness programs all within CoCs, streamlining local efforts into units with umbrella support.[178] It also streamlined much of the funding for these programs through the CoC system, allowing for there to be centralized federal funding through HUD.[179]

The MVA, as reauthorized by HEARTH, would likely be the best vessel through which to condition funding on states taking drastic measures to end criminalization of homelessness. Conditioning funding grants on states ending criminalization of homelessness through the MVA would satisfy the *Steward* test because the condition would be directly related to one of the explicit purposes of the MVA grants: "to use public resources and programs in a more coordinated manner to meet the critically urgent needs of the homeless of the Nation; and . . . to provide funds for programs to assist the homeless."[180] Given that, by USICH's own admission,[181] criminalization of homelessness actively harms people experiencing homelessness, conditioning funding grants on reducing or altogether ending enforcement of those policies would certainly be in line with the purposes of the MVA.

Furthermore, there is strong evidence that such a strategy would be effective. In 2015, at the urging of advocates on behalf of people experiencing homelessness, HUD made a slight change to its annual

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175 42 U.S.C. §§ 11311.

176 Graham, *supra* note 173, at 62.

177 *See id.*

178 NAT'L ALLIANCE TO END HOMELESSNESS, HOMELESS EMERGENCY ASSISTANCE AND RAPID TRANSITION TO HOUSING (HEARTH) ACT OF 2009 SECTION BY SECTION ANALYSIS 6–7, http://endhomelessness.org/wp-content/uploads/2009/06/hearth-section-by-section-analysis.pdf.

179 *Id*.

180 42 U.S.C. §§ 11301(b).

181 SEARCHING OUT SOLUTIONS, *supra* note 42, at 7 ("[C]riminalization creates a costly revolving door that circulates individuals experiencing homelessness from the street to the criminal justice system and back.").

CoC Program Notice of Funding Application, funding which flows directly from the MVA.[182] The change allocated some funding dollars to CoCs whose governments "implemented specific strategies to prevent criminalization of homelessness within the CoC's geographic area."[183] While the change only applied two additional funding points, the shift in incentives it produced for cities to begin to reduce laws criminalizing homelessness was significant.[184] The National Law Center on Homelessness and Poverty found that since the change in HUD's questionnaire, the number of surveyed CoCs who reported zero strategies to prevent the criminalization of the homeless declined "from nine to only one."[185] Furthermore, the report found that from 2015 to 2017 the number of surveyed CoCs reporting community wide plans to decriminalize homelessness increased by 11.9 percent.[186] As this modest change from a federal entity shows, conditioning federal funding can have a significant effect at the state and local level in inducing change on this issue.

Advocates should also bear in mind the definition of coercion that dominates the analysis of *Dole* and *NFIB*. Both cases focused on the amount of federal funds being withheld in relation to how much the state relied on those funds.[187] If the amount of funding the federal government proposes to conditionally withhold is small enough that a state could plausibly reject it,[188] then the jurisprudence suggests that such conditions will be upheld as constitutional. If, by contrast, the amount of dollars Congress conditionally withholds is so large that, the state would be crippled by the resulting budget

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[182] U.S. DEPT. OF HOUSING & URBAN DEVELOPMENT, NOTICE OF FUNDING AVAILABILITY (NOFA) FOR THE FISCAL YEAR (FY) 2016 CONTINUUM OF CARE COMPETITION TECHNICAL CORRECTION 35 (2016), https://www.hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf.

[183] *Id.*

[184] *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, SCORING POINTS: HOW ENDING THE CRIMINALIZATION OF HOMELESSNESS CAN INCREASE HUD FUNDING TO YOUR COMMUNITY 6 (2018), https://nlchp.org/wp-content/uploads/2018/10/NOFAtoolkit2018.pdf [hereinafter INCREASE HUD FUNDING].

[185] *Id.*

[186] *Id.*

[187] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–81 (2012); South Dakota v. Dole, 483 U.S. 203, 211 (1987).

[188] Such as a loss of only 5% of all federally granted highway funds. *See Dole*, 483 U.S. at 211 (1987).

deficit if it rejected the funding,[189] such a condition will likely be found an unconstitutional usurpation of state police powers.

Within the MVA, determining the percent or portion of funding Congress should conditionally withhold from the States is beyond the scope of this Note. As the minor change in HUD funding shows, however, a change in the conditions for federal funding do not have to be large to get results in this space.[190] The jurisprudential history resulting from *Dole* further proves this point: even though the amount of federal funds Congress threatened to withhold was small, every state in the United States currently has a drinking age of twenty-one.[191] What is important is that the amount be large enough to pressure states to take steps towards decriminalization without being so large as to force the states to adopt the conditions to continue receiving any federal aid for their CoCs.

CONCLUSION

Should it be illegal for people to exist? In the United States, the answer to that question should be a resounding "no." The Constitution explicitly provides that no government shall deprive a person of "life, liberty, or property without due process of law;" the Supreme Court interprets this clause to prohibit any government—state or federal—from passing laws that criminalize the separation of a person's existence from that person's life-sustaining conduct.[192] Outside of the law, the belief that all citizens are endowed with the basic rights to "Life, Liberty and the pursuit of Happiness" fundamentally

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[189] Such as a loss of 100% of all Medicaid funding, or upwards of 10% of a state's entire budget. *See* Nat'l Fed'n of Indep. Bus. v. Sebelius ("*NFIB*"), 567 U.S. 519, 580–81 (2012).

[190] *See* INCREASE HUD FUNDING, *supra* note 184, at 6.

[191] *Age 21 Minimum Legal Drinking Age*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/alcohol/fact-sheets/minimum-legal-drinking-age.htm (last visited May 15, 2021).

[192] U.S. CONST. amend. XIV, §1; Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (holding that laws criminalizing "vagrancy" are unconstitutional under Fourteenth Amendment Due Process Clause because these laws "'fail[] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,'" and "encourage[] arbitrary and erratic arrests and convictions.").

influences American culture and law.[193] And yet, virtually every city in America deliberately passes and routinely enforces laws that effectively make it illegal for millions of Americans experiencing homelessness to exist at all.[194]

A legislative strategy focused on reducing or ending the criminalization of homelessness by attaching federal funding conditions would be an important first step in managing the homelessness epidemic in the United States. While ending or reducing the criminalization of homelessness would not solve the problem of the lack affordable housing in major metropolitan areas,[195] it would force cities to consider alternate and more humane strategies to manage their populations of people experiencing homelessness.[196] It follows that only when criminalization is off the table will states and municipalities be forced to address the issue of homelessness in their jurisdictions in more humane ways.

Another important benefit of this strategy is that it would not necessarily require Congress to spend additional dollars to enact the change. Given that the funds for the MVA are already earmarked in the federal budget,[197] Congress only need attach a condition requiring states to reduce or abolish the criminalization of homelessness to the following year's grant of funds. Thus, while Congress should allocate more funding towards homelessness assistance to give states a carrot as well as a stick in accepting federal funding, Congress need not do so.

This Note does not suggest that this is the *only* avenue advocates should pursue to end the criminalization of homelessness in the

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193 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

194 *See* HOUSING NOT HANDCUFFS, *supra* note 12, at 9.

195 *See* NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES 1, https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf (discussing fact that main contributor to homelessness is a housing gap of roughly 7.4 million units of affordable housing across the United States).

196 *See* Pottinger v. City of Mia., 359 F. Supp. 3d 1177, 1183–88 (S.D. Fla. 2019) (discussing how once consent decree largely removed criminalization as an enforcement strategy in the City of Miami, City was forced to pursue other strategies to manage its population of people experiencing homelessness; these strategies included more training for police officers, establishment of a city department dedicated to homelessness outreach, more funding for local shelters, and a local food and beverage tax to fund these services).

197 Graham, *supra* note 173, at 62.

United States. Challenges to the criminalization of homelessness need to continue to be brought within the federal judiciary. Cases like *Pottinger* and *Martin* have been incredibly important in bringing about substantial changes for people experiencing homelessness and have raised the national discussion on such issues.[198] Furthermore, within the federal legislature, advocates should continue to fight for major bills on housing and homelessness assistance that work towards ending the root causes of homelessness. This Note merely suggests that advocates should also lobby Congress to adopt conditions against laws criminalizing homelessness, given that such conditional funding could either end or substantially reduce the criminalization of homelessness in the United States without imposing extensive costs on taxpayers.[199] Such a policy is not only appealing as a matter of basic human rights, but also as a matter of economic sense. The criminalization of homelessness is, in no uncertain terms, cruel, inefficient, and expensive. Using Congress's spending power to end the criminalization of homelessness would be, as Justice Cardozo put it in *Steward*, "for [no] purpose narrower than the promotion of the general welfare."[200]

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[198] *See* Shelley, *supra* note 67; *Eighth Amendment — Criminalization of Homelessness*, *supra* note 73, at 706.

[199] As the HUD CoC notice of funding change shows, all that would be involved in a conditional spending change would be for Congress to rewrite the legislation granting MVA to include conditional language. Such an approach would not necessarily require a reallocation of funds. *See* INCREASE HUD FUNDING, *supra* note 184, at 6.

[200] Steward Mach. Co. v. Davis, 301 U.S. 548, 587 (1937).