View metadata, citation and similar papers at core.ac.uk
brought to you by CORE
provided by Fordham University School of Law

Fordham Urban Law Journal

Volume 46
Number 4 *Human Impacts of Criminalization and Collateral Consequences*

Article 6

2019

Homeless and Hungry: Demanding the Right to Share Food

Sydney Rosenblum

Follow this and additional works at: https://ir.lawnet.fordham.edu/ulj

Recommended Citation

Sydney Rosenblum, *Homeless and Hungry: Demanding the Right to Share Food*, 46 Fordham Urb. L.J. 1004 (2019).
Available at: https://ir.lawnet.fordham.edu/ulj/vol46/iss4/6

This Note is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

HOMELESS AND HUNGRY: DEMANDING THE RIGHT TO SHARE FOOD

Sydney Rosenblum[*]

ABSTRACT

There is an alarming trend in cities in the United States to pass ordinances that criminalize homelessness. These ordinances outlaw typical acts that a homeless person must engage in to survive. In recent years, many cities have employed a new tactic – enacting food sharing ordinances. Food sharing ordinances target both homeless persons and organizations that attempt to share food with them. These food sharing ordinances discourage people from sharing food with homeless persons by requiring many steps before being able to legally do so. This increases the number of people who are hungry, leaving many in even more need than before.

Drawing from recent litigation in the Eleventh Circuit's case of Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, this Note examines potential arguments for constitutional protections supporting the homeless population's right to food and the providers' right to share food. This Note urges courts to utilize the whole-text approach to constitutional interpretation to protect the homeless. Doing so is legally sound and safeguards the homeless from a policy perspective. Further, this Note discusses how the United States' participation in certain international agreements also lends support to such protection.*

---

[*] J.D. Candidate, 2020, Fordham University School of Law; B.A., 2017, University of Michigan. The author would like to thank Professor Abner Greene, for his insight and guidance, *Fordham Urban Law Journal* editors and staff for their hard work, and her family and friends for their unwavering support.

TABLE OF CONTENTS

Introduction 1005
I. Government Efforts to Criminalize the Homeless 1007
  A. Poverty in the United States 1007
  B. Criminalization of the Homeless.....................................1009
  C. Continuing the Trend of Criminalization Through the Use of Food Sharing Ordinances 1012
  D. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale 1013
II. Food Sharing and the Constitution..1015
  A. Interpreting the First Amendment's Right to Expressive Conduct 1016
  B. First Time for Everything: Applying the Fourteenth Amendment to the Homeless Population........................1024
    1. Due Process...1026
    2. Equal Protection...1028
III. Protecting the Right to Share Food Is Necessary 1033
  A. Finding Protection in the Constitution as a Whole.........1034
  B. The Pragmatic Basis for Protecting the Homeless..........1036
  C. International Agreements as a Justification for Domestic Action 1038
Conclusion...1039

INTRODUCTION

Everyone is smiling in Stranahan Park in Fort Lauderdale. Tables are lined up and filled with an abundance of food. Volunteers have come to communicate a message to both the local government and the general population about homelessness in the city, by distributing food to the hungry. But the smiles do not last long. Police begin to swarm the park and cite the volunteers for misdemeanors.[1] The volunteers violated a local city ordinance that limits "food sharing"[2] on city-owned property, because they did not satisfy a list of required conditions and therefore were not granted access to use the park for

1. "A person convicted of a violation of this Code, shall be punished by a fine not to exceed five hundred dollars ($500.00) or by imprisonment for a term not to exceed sixty (60) days or by both such fine and imprisonment." FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 1-6(c) (2018).

2. "Food sharing" refers to distributing food free of charge, to anyone who chooses to participate. It is also the action that takes place at "outdoor food distribution centers." FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014).

that purpose.[3] This situation led to the dispute in *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*.[4]

Fort Lauderdale Food Not Bombs exemplifies how local government has taken unconstitutional action against the hungry by forbidding volunteers from sharing food with them. This restrictive practice has detrimental impacts on the hungry and is just another example of the government's attempt to criminalize[5] the portion of the population that is already stuck in poverty. This type of criminalization is constitutionally problematic under the First Amendment's freedom of expressive conduct and under the Fourteenth Amendment's Due Process and Equal Protection Clauses.

Part I of this Note provides contextual information about poverty in the United States, clarifies how food sharing ordinances fit into the larger context of actions taken to criminalize the homeless population, and explains the importance of *Fort Lauderdale Food Not Bombs*. Part II explores constitutional arguments that both were made and *could* have been made in *Fort Lauderdale Food Not Bombs* to protect the constitutional rights of the homeless. It focuses on the First and Fourteenth Amendments and explains which arguments, in light of the case's facts, would be the most persuasive on remand or in future litigation of this type. Part III urges courts[6] to consider the whole text of the U.S. Constitution, policy implications

---

3. *Id.* The city ordinance imposed restrictions on location and contained requirements regarding food handling and safety. In addition, under the ordinance, Stranahan Park is zoned to require a condition use permit. Therefore, individuals and organizations can only use the park for the purpose of it being a social service facility, if they satisfy the permit requirements as well.

4. 901 F.3d 1235 (11th Cir. 2018).

5. The word "criminalize" refers to the type of action that is taken against the homeless, in a broader context. Specifically, for food sharing ordinances, volunteers, not the homeless, are the ones that are technically criminalized. However, scholars classify food sharing ordinances as an action that "criminalizes the homeless" due to the detrimental impact they have on that segment of the population. Therefore, this Note does the same. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 26, https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf [https://perma.cc/XS2A-GQ4X] ("It should be noted that food sharing bans are unique among criminalization ordinances in that they impose liability on homeless service providers and other individuals, rather than on homeless people themselves. In this way, a reduction of food sharing bans do[es] not directly reduce criminalization of homelessness.").

6. It is important to note that many scholars find judicial activism problematic in a political democracy. *But see* Richard H. Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1218 (1987) ("[T]he framers actually intended to invest in judges the responsibility for giving content to the farmers' highly general directives.").

of these ordinances, and the United States' involvement in international agreements to ultimately protect the rights of both the food sharing organizations and the homeless population.

I. GOVERNMENT EFFORTS TO CRIMINALIZE THE HOMELESS

This Part explains how the situation in *Fort Lauderdale Food Not Bombs* fits into the larger context of many cities' constant effort to criminalize the homeless. Section I.A. provides a contextual and statistical analysis of poverty in the United States. Section I.B. details how cities attempt to criminalize the homeless. Section I.C. describes food sharing ordinances and their overall impact on the hungry. Section I.D. depicts *Fort Lauderdale Food Not Bombs*.

A. Poverty in the United States

Context is essential when considering poverty law. This is because the ways in which one defines poverty, one's beliefs and opinions about struggling persons, and government responses to the poor all shape how a person understands the problems that arise out of poverty.

Poverty can be defined as "a level of income below the threshold considered necessary to achieve a sufficient standard of living."[7] It is important to discuss poverty in terms of "relative deprivation," which is defined as the absence or inadequacy of those diets, amenities, standards, services, and activities that are common or customary in that society.[8] In 2017, the official poverty rate in the United States was 12.3%, meaning that 39.7 million people were living in poverty.[9] Although evidence shows that overall poverty rates are declining,[10]

---

7. *Poverty*, BLACK'S LAW DICTIONARY (10th ed. 2014); *Poverty*, MERRIAM WEBSTER'S DICTIONARY https://www.merriam-webster.com/dictionary/poverty [https://perma.cc/9P7T-X8EY] (last visited June 1, 2019) (defining poverty as "the state of one who lacks a usual or socially acceptable amount of money or material possessions").

8. JULIET M. BRODIE ET AL., POVERTY LAW, POLICY AND PRACTICE 5 (Vicki Been et al. eds., 2014). Absolute mobility compares, in absolute terms, how well an individual does in relation to his or her parents. *Id.* at 3. The measures are based on the bare minimum required for a person or family to meet basic needs, independent of the relative wealth of the surrounding community. *Id.*

9. KAYLA FONTENOT ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2017 11 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/p60-263.pdf [https://perma.cc/CY8M-NJPT].

10. *Id.* The poverty rate fell 2.5% since 2014, making it the third consecutive annual decline. *Id.*

the effects of poverty continue to severely and disproportionately affect certain subgroups of the population, including single-parent households and minority neighborhoods.[11]

There is strong statistical evidence[12] that parents' income will affect their children's future income, causing rates of relative intergenerational mobility to be flat.[13] In terms of absolute mobility, in the last few decades, there has been a sharp decline, meaning that most Americans did not surpass their parents' family income.[14] Additionally, geographic location is important for mobility.[15] Children who move away from low-mobility areas the earliest and the fastest receive the greatest benefits.[16] There is even a gender gap, as in some ways, boys may feel the effects of poverty more acutely than girls.[17] Further, education can positively affect a child's trajectory.[18] Specifically, a college education can radically reduce the correlation between parents' incomes and their children's future incomes.[19] Yet, a child's likelihood of going to college after high school is correlated to household income.[20] Moreover, poverty even has concrete effects on a person's longevity.[21] Due to persistent systemic inequities, these conditions and circumstances are often well beyond the control of the children they inevitably affect. Thus, is poverty really a choice?

---

11. John Cassidy, *Relatively Deprived*, NEW YORKER (Apr. 3, 2006), https://www.newyorker.com/magazine/2006/04/03/relatively-deprived [https://perma.cc/F5C8-Q7QV] ("It would be one thing if poverty hit at random, and no one group were singled out . . . [i]t is another thing to realize that some seem destined to poverty almost from birth- by their color or by the economic status or occupation of their parents." (quoting Mollie Orshansky, *Children of the Poor*, SOC. SECURITY BULL. July 1963, at 3.).

12. Richard V. Reeves & Eleanor Krause, *Raj Chetty in 14 Charts: Big Findings on Opportunity Mobility We Should All Know*, BROOKINGS (Jan. 11, 2018), https://www.brookings.edu/blog/social-mobility-memos/2018/01/11/raj-chetty-in-14-charts-big-findings-on-opportunity-and-mobility-we-should-know/ [https://perma.cc/4Z5J-Y5X3]. *See infra* notes 13–21 and accompanying text.

13. Reeves & Kraus, *supra* note 12.

14. *Id.*

15. *Id.* There are significant differences in upward mobility rates across places in the country. *Id.* For example, mobility is slower in the South and Midwest compared to other regions. *Id.*

16. *Id.*

17. *Id.* For example, growing up in Baltimore City reduced boys' household income by 27.9%. *Id.* Additionally, boys born poor are less likely to work than girls in similar situations. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

The poor have been classified in two ways: as undeserving or deserving persons.[22] Undeserving poor persons do not "deserve" sympathy from society, because they brought their poverty on themselves through perceived behavioral or moral deficiencies.[23] This view attempts to justify America's callous treatment of the poor by neither providing needed services nor compassion to this segment of the population.[24] However, there are other explanations of poverty besides personal failure.[25] Deserving poor persons are those who are poor due to unfortunate or inevitable circumstances that are no fault of their own.[26] The deserving poor are in poverty because of "forces that are much larger and more powerful than they are."[27]

Overall, statistical evidence[28] proves that collectively, those facing poverty are not doing so as a choice. Unfortunately, "there are very high, structural barriers to social mobility in the U.S.," but "these barriers are not insurmountable, and can be lowered through the sustained application of good policies."[29] However, most cities do not have "good policies" in place.

B. Criminalization of the Homeless

People living in poverty face disproportionate exposure to criminal sanctions through homelessness.[30] Homeless people are eleven times

---

22. Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1075 (2017); Jaime Alison Lee, *Poverty, Dignity, and Public Housing*, 47 COLUM. HUM. RTS. L. REV. 97, 101 (2015).

23. Bridges, *supra* note 22, at 1078 ("These persons are not poor because the fates dealt them an unfortunate hand. An illness has not incapacitated them. Age has not made their bodies incapable of productive labor. Quite the contrary, the undeserving poor are persons of sound mind and body. They are simply lazy or otherwise averse to work, promiscuous, incapable of delaying gratification, criminally inclined, predisposed to addiction and vice. In essence, they are poor because of flaws in their characters or ethical codes.").

24. Lee, *supra* note 22.

25. Bridges, *supra* note 22, at 1076.

26. *Id.*

27. *Id.* (noting that the "deserving poor" are often in poverty "because they were born disabled or became disabled (through an accident that was in no way attributable to recklessness or negligence on their part), because they have become too old to work, [or] because they were stricken with an illness that robbed them of their savings or their ability to earn a living").

28. *See supra* notes 13–20 and accompanying text (detailing the factors that affect the mobility of those stuck in poverty).

29. Reeves & Krause, *supra* note 12.

30. BRODIE ET AL., *supra* note 8, at 567; Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 553 (2007) ("[P]enalties exceed a homeless person's ability to pay, and they thus have the effect of lengthening the individual's criminal record, increasing

more likely than members of the general population to be incarcerated.[31] The definition of "homelessness" includes, broadly, individuals who "experience a spell of being without a home during a given one-year period."[32] According to the U.S. Housing and Urban Development's Annual Homeless Report to Congress, 553,742 persons experienced homelessness on a single night in 2017.[33] It is evident that homelessness is a pervasive problem in the United States.[34]

There is a common misperception that everyone who is in poverty is homeless and vice versa.[35] However, regardless of a person's technical classification, the portion of the population that is homeless on any given night no longer receives humane treatment.[36] Cities have adopted anti-nuisance laws to attempt to make the homeless population "less visible and less intrusive to urban residential and business communities."[37] Cities and states have criminalized typical acts that homeless persons *must* partake in.[38] Hence, by engaging in basic life activities, the homeless are now deemed to be breaking the

---

his debt to the city, or forcing him or her to leave the city out of fear of further prosecution."); *see infra* notes 248–49 and accompanying text.

31. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 5, at 19.

32. Saelinger, *supra* note 30, at 547.

33. U.S. DEP'T OF HOUS. & URBAN DEV., 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1, 8, 9 (2017), https://files.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf [https://perma.cc/4DJY-W96L]. There was an estimated increase of 0.7% in the homeless population since 2016. *Id.*

34. In 2018, Sesame Street, a show that prides itself on staying current with its storylines, introduced Lily, its first character, to experience homelessness. Jacqueline Howard, *Sesame Street Muppet Becomes First to Experience Homelessness*, CNN (Dec. 12, 2018), https://www.cnn.com/2018/12/12/health/sesame-street-homeless-muppet-bn/index.html [https://perma.cc/VA25-QJQA]. Lily was originally just food insecure but now the show portrays her as struggling with homelessness as well. *Id.* "With any of our initiatives, our hope is that we're not only reaching the children who can identify with that Muppet but that we're also helping others to have greater empathy and understanding of the issue." *Id.*

35. Saelinger, *supra* note 30, at 547.

36. *Id.* at 545.

37. *Id.*

38. These typical acts can be defined as "quality-of-life offenses" and include: sleeping, sitting, or storing property in public spaces, panhandling, and peddling. *Id.* at 551. Due to the lack of private property available to these persons, anything the law does to regulate public property inevitably affects them. Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991) ("Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere to perform it.").

law.[39] This criminalization creates a pipeline to prison for those who are already in need, and therefore is counter-productive.[40]

Myths[41] surrounding the issue of homelessness result in people accepting false narratives and supporting the passage of laws that criminalize homeless persons and volunteers.[42] Correcting the misconceptions surrounding homelessness could go a long way toward ending the mistreatment of the homeless in the United States.[43] But now, city and state legislatures are enacting laws to criminalize the homeless, and the judiciary is arguably experiencing compassion fatigue by "appear[ing] less willing to uphold individual rights for the homeless."[44]

---

39. ALLARD K. LOWENSTEIN INT'L HUMAN RIGHTS CLINIC, YALE LAW SCH., FORCED INTO BREAKING THE LAW: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 19 (2016), https://law.yale.edu/system/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf [https://perma.cc/B5XZ-K4NW]. "Without housing, performing life-sustaining functions becomes a criminal act that can carry dangerous consequences." *Id.* at 20.

40. *See infra* notes 248–49 and accompanying text.

41. Common myths include: "Hunger is not a problem for homeless individuals because there are plenty of food pantries and soup kitchens; SNAP/Food Stamp benefits are easily accessible to people who are homeless and many homeless people take advantage of this program; sharing food with people in outdoor locations enables them to remain homeless." NAT'L COAL. FOR THE HOMELESS ET AL., A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 8–9 (2010), https://www.nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf [https://perma.cc/XVZ2-ZPMC]; NAT'L COAL. FOR THE HOMELESS, FOOD-SHARING REPORT: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 7 (Oct. 2014), https://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/EQF3-Q7EZ] (including another myth that "if you stop feeding them, they will disappear").

42. NAT'L COAL. FOR THE HOMELESS ET AL., A PLACE AT THE TABLE, *supra* note 41, at 8. *See also* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 25, https://www.nlchp.org/documents/No_Safe_Place [https://perma.cc/YWU3-KX3Q] ("The theories surrounding food sharing restrictions are not supported by evidence of the feared harms. Indeed, they are not supported by common sense.").

43. Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1419–20 (2006).

44. Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 266 (1994). This results in "rendering the homeless constitutional castaways." *Id.*

C. Continuing the Trend of Criminalization Through the Use of Food Sharing Ordinances

Not only are homeless individuals criminalized for engaging in life-sustaining activities, but cities are also criminalizing volunteers for publicly engaging in food sharing with the homeless.[45] Though food sharing bans are commonly referred to as a criminalization of the *homeless* population, this type of ban more broadly affects the larger portion of the population that is *hungry*, regardless of whether they are homeless.[46] In other words, the ordinances specifically affect the segment of the population that is "food insecure."[47]

In 2017, forty million people in the United States, including more than twelve million children, struggled with hunger.[48] On a daily basis, one out of every six Americans goes hungry.[49] Addressing hunger is crucial, as it causes innumerable physical, mental, and emotional health consequences that can significantly worsen if they are not addressed.[50] Food sharing ordinances are no help, as they encourage society to take steps in the wrong direction by criminalizing hunger.[51]

Limitations on the ability to share food with the homeless are rooted in permit requirements, zoning restrictions, and the practice of selectively enforcing ordinances.[52] Since 2013, over thirty cities have tried to restrict practices of sharing food with those experiencing homelessness.[53] Six percent of cities restrict food sharing.[54]

---

45. *See, e.g.*, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

46. This Note refers to the homeless and the hungry populations by using the words interchangeably.

47. *Facts About Poverty and Hunger in America*, FEEDING AMERICA, https://www.feedingamerica.org/hunger-in-america/facts [https://perma.cc/E5MV-733E]. "Food insecure" can be defined as having limited or uncertain access to enough food to support a healthy lifestyle. *Id.*

48. *Id.*

49. *Homeless People Deserve Food Too*, NAT'L COAL. FOR THE HOMELESS, https://nationalhomeless.org/campaigns/food-sharing/ [https://perma.cc/WZ42-XRES] [hereinafter *Homeless People Deserve Food Too*].

50. *Id.*

51. *No Picnic in the Park*, NAT'L COAL. FOR THE HOMELESS, (Feb. 24, 2015), https://nationalhomeless.org/tag/food-sharing/ [https://perma.cc/XL4K-E96L] ("When showing compassion becomes illegal, we know we have a serious problem to tackle.").

52. NAT'L COAL. FOR THE HOMELESS ET AL., A PLACE AT THE TABLE, *supra* note 41, at 9.

53. Robbie Couch, *33 Cities Have Restricted Feeding the Homeless in Past Year Alone: Report*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffingtonpost.com/2014/06/10/bans-on-feeding-the-

D. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale

The most recent federal appellate case regarding food sharing is *Fort Lauderdale Food Not Bombs*.[55] Fort Lauderdale Food Not Bombs (FLFNB) is a non-profit organization[56] that engages in peaceful political direct action by conducting weekly food sharing events at Stranahan Park, where homeless people tend to congregate.[57] FLFNB sets up a table underneath a gazebo in the park and distributes vegetarian or vegan food, free of charge to anyone who participates, as an act of political solidarity meant to convey the organization's message.[58]

This litigation arose from the city enforcing, for the first time since February of 2015, Ordinance C-14-42 (the "Ordinance") and Park Rule 2.2 (the "Rule") against FLFNB volunteers whom were engaging in their normal volunteer work.[59] Under the Ordinance,

---

homeless_n_5479450.html [https://perma.cc/KL57-6E2P]; *see* NAT'L COAL. FOR THE HOMELESS, FEEDING INTOLERANCE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS (Nov. 2007), https://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [https://perma.cc/M5PQ-2F6J] (listing which cities have implemented food sharing bans).

54. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 5, at 10.

55. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

56. This Note specifically discusses the actions of the organization Fort Lauderdale Food Not Bombs, which is an entity of the nationwide organization Food Not Bombs. *See* FOOD NOT BOMBS, http://foodnotbombs.net/new_site/ [https://perma.cc/R9JR-UMTM] (last visited Dec. 17, 2018). Additionally, there are hundreds of other organizations across the country that engage in non-profit work to share food with those in need. These include: Feeding America, WhyHunger, and Share Our Strength. *Hunger Relief Organizations*, U.S. DEP'T AGRICULTURE, https://www.nal.usda.gov/fnic/hunger-relief-organizations [https://perma.cc/UD7A-DYSH] (last visited Dec. 17, 2018). Personally, Rock and Wrap It Up! is what sparked my passion for helping the homeless. *See* ROCK AND WRAP IT UP!, https://www.rockandwrapitup.org [https://perma.cc/LG2A-UGV7] (last visited Dec. 17, 2018). It is an organization that started in my hometown and picks up prepared but untouched food from stadiums and concert venues around the country and delivers it to local shelters and soup kitchens. *Id.* My family and I have been active members since I was a child.

57. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1238.

58. *Id.*

59. *Id.* at 1239. This case deals only with the City of Fort Lauderdale's Code of Ordinances from 2014. However, it is important to note that the most recent version of the Ordinance, updated on December 3, 2018, now includes a separate provision specific to outdoor social service feeding events (new provision). FORT LAUDERDALE, FLA., CODE OF ORDINANCES ch. 15, art. V, § 15-186 (Dec. 3, 2018). Outdoor social service feeding events are no longer under the "social service facility" section of the Code but rather under the general outdoor events section. *Id.* The new provision includes *most* of the same requirements as the C-14-42 Amendment did in

outdoor food distribution centers ("OFDC")[60] are subject to restrictions on hours, location, food handling, and safety.[61] There is no minimum number of members of the public who need to receive the meals to trigger the requirements.[62] Additionally, depending on the specific zoning district of the OFDC, an event may be permitted, not permitted, or required to obtain a conditional use permit.[63] Even if permitted, it is still subject to review by the City's development review committee.[64] Stranahan Park is zoned as a "Regional Activity Center-City Center" and requires a conditional use permit.[65] To add, for this type of activity, the Rule states the park may not be used "unless authorized pursuant to a written agreement with City."[66] Thereby, the Rule adds an additional requirement of written consent, on top of approval by the City's development review committee, to allow FLFNB to distribute its food in the park.[67]

FLFNB claims that it does not share food as a charity, but rather does so to communicate its message "that society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all."[68] Further, FLFNB alleges that the

---

2014. *Id.* The main difference is that there is now a minimum number of people (fifteen) to trigger the requirement to obtain a zoning permit. *Id.* If the number of people exceeds fifteen then the requirements are the *same* as those in C-14-42, and include a detailed application, and a list of stipulations about hours, location, sanitation and safety. *Compare* FORT LAUDERDALE, FLA., CODE OF ORDINANCES ch. 15, art. V, § 15-186 (Dec. 3, 2018), *with* FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014). It is unclear whether the new provision was in place in 2014 when C-14-42 was adopted to interpret what "social service facility" included as per Section 47-18.31. Regardless, the constitutional arguments are still identical.

60. FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(B)(4) (2014).

61. FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014).

62. *Id.*; Initial Brief for Appellant at 7–9, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018) (No. 16-16808). *See supra* note 59 and accompanying text.

63. FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014); *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1239.

64. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1239.

65. *Id.*

66. FORT LAUDERDALE, FLA., PARK RULES AND REGULATIONS 2.2, https://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/S78T-NK89].

67. *Id.* In other words, just because written consent is obtained does not mean Zoning Ordinance C-14-42 can be disregarded; all other specific use requirements still must be met, and vice versa.

68. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240.

Ordinance and the Rule violate its right to free speech guaranteed by the First Amendment.[69] FLFNB relies on the fact that sharing food is one of the oldest forms of human expression and the context of the situation portrays the message to a reasonable viewer.[70] Furthermore, FLFNB points out the City's malicious reasoning for and malicious effects of implementing the laws at issue.[71]

On the other hand, the City contends that the food sharing events are not expressive conduct, because the act of feeding is not inherently communicative of FLFNB's "intended, unique and *particularized* message."[72] Additionally, the City explains that even if the food sharing is deemed subject to First Amendment protection, the two laws at issue are valid and include reasonable time, place, and manner restrictions.[73] This is because the City's regulations promote its "substantial and compelling governmental interests in protecting the peace, health, safety and property of its citizens."[74]

The Eleventh Circuit held that FLFNB's actions were expressive conduct.[75] The court explained that, on remand, the district court will need to determine whether the Ordinance and Rule violated the First Amendment.[76] This Note uses this case's facts to explore this issue, among other constitutional challenges that could have been brought to protect the volunteers and the hungry.

II. FOOD SHARING AND THE CONSTITUTION

Homeless rights advocates have been creative in their increasingly numerous challenges to laws aimed at criminalizing the homeless.[77] Unfortunately, their failures greatly outnumber their successes.[78] Section II.A. discusses how the First Amendment's guarantee of

---

69. *Id.* at 1239.

70. Brief for Appellant at 20 & 29, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018) (No. 16-16808).

71. *Id.* at 41. "Food sharing is presumptively prohibited in all City parks and on all City sidewalks, and there is no public place in the City where FLFNB is lawfully allowed to engage in their political demonstrations that includes sharing food as symbolic expression." *Id.* at 42.

72. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1239 (emphasis added).

73. Brief for Appellee at 40, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018) (No. 16-16808).

74. *Id.* at 45. Further, the City wants to ensure the homeless are fed in safe, secure, and sanitary conditions. *Id.* The City also wants to preserve the ability for its parks to be used by all. *Id.*

75. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1245.

76. *Id.*

77. Liese, *supra* note 43, at 1454.

78. *Id.*

freedom of expressive conduct protects the volunteers' actions. Section II.B.1. analyzes the argument for employing the Fourteenth Amendment's Due Process Clause to protect the hungry. Section II.B.2. considers how the Fourteenth Amendment's Equal Protection Clause can be used to safeguard the homeless.

A. Interpreting the First Amendment's Right to Expressive Conduct[79]

Under the First Amendment, speech is not limited to verbal or written communication.[80] Protection has been granted to expressive conduct that qualifies as "symbolic speech."[81] Hence, the First Amendment guarantees all people the right to engage in expressive conduct.[82] Only two circuits, the Eleventh Circuit and the Ninth Circuit, have analyzed whether food sharing is inherently expressive conduct.[83]

First, it is important to consider whether the Eleventh Circuit was correct in holding that FLFNB's conduct is expressive. Although there has been disagreement as to what qualifies as expressive, U.S. Supreme Court precedent establishes a two-step test to help

---

79. Another argument that could be made using the First Amendment is regarding the right to expressive association, which is the right to associate for the purpose of engaging in activities that are protected by the First Amendment. *See* Roberts v. U.S. Jaycees, 468 U.S. 609 (1984). Due to the lack of a restriction on associational membership or leadership in *Fort Lauderdale Food Not Bombs*, the *Roberts v. United States Jaycees* line of reasoning is not applicable to the situation at hand. Therefore, there would be no significant distinction between the expressive conduct analysis and the expressive association analysis because a generally applicable law with facially legitimate ends affects the right of expressive association no more or less than it affects any individual who wants to use the park. If the City's ordinance unconstitutionally limits the expressive conduct of FLFNB, then it does so whether or not the organization is an association of one person or multiple persons. Thus, expressive association is not discussed in this Note.

80. Caleb Detweiler, *Breaking Bread and the Law: Criminalizing Homelessness and the First Amendment Rights in Public Parks*, 51 VAL. U. L. REV. 695, 710 (2017); Eugene Volokh, *Speech as Conduct*, 90 CORNELL L. REV. 1277, 1278 (2005).

81. Detweiler, *supra* note 80.

82. *Id.*

83. *See* Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018) (holding the conduct is expressive); First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011) (circumventing the question of whether the conduct is expressive); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006) (discussing whether food distribution is on its face expressive activity, but not deciding on the issue); McHenry v. Agnos, No. 92-15123, 1993 WL 8728 (9th Cir. 1993) (circumventing the question of whether the conduct is expressive).

determine what is protected.[84] As laid out in *Spence v. Washington*, for conduct to be sufficiently expressive, there needs to be (1) "an intent to convey a *particularized* message," and it must be the case that (2) "in the surrounding circumstances[,] the likelihood was great that the message would be understood by those who viewed it."[85] Since then, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection," and thus is not the meaning of *particularized*.[86] Therefore, in determining whether conduct is expressive, the question is "whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message."[87] FLFNB clearly *intended* to convey a particularized message.[88] Thus, the critical question is whether the reasonable person would interpret FLFNB's food sharing events as *some* sort of message.

Applying the objective second part of the *Spence* test often requires looking at facts surrounding the speech in question.[89] Context helps differentiate between activity that is sufficiently expressive and similar activity that is not.[90] In this situation, five circumstances arguably make FLFNB's events expressive.[91] First, at FLFNB events, the organization not only sets up tables and banners, but also distributes literature.[92] Second, the food sharing events are open to everyone, which has social implications.[93] Third, the food sharing is held in Stranahan Park, a public park located near city

---

84. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557 (1995); Spence v. Washington, 418 U.S. 405 (1974); United States v. O'Brien, 391 U.S. 367 (1968).

85. *Spence*, 418 U.S. at 410–11.

86. *Hurley*, 515 U.S. at 569.

87. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240; Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004); Laurie Magid, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 487 (1984). This Note focuses on using the more relaxed standard; however, some courts still require a "particularized" message.

88. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1240.

89. Texas v. Johnson, 491 U.S. 397, 405 (1989) ("In characterizing such action for First Amendment purposes, we have considered the context in which it occurred."). *See also Spence*, 418 U.S. at 410.

90. Magid, *supra* note 87, at 487–91. Courts have considered a variety of indicia in analyzing observer understanding: time and locale, current events, media attention, verbal or written explanations and the use of recognized symbols. *Id.*

91. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1242–43. These five reasons are what the Eleventh Circuit relies on in reaching its decision. *Id.*

92. *Id.* at 1242.

93. *Id.*

government buildings.[94] This park is known by both parties to be a traditional public forum.[95] Fourth, the treatment of the City's homeless population is an issue of concern in the community.[96] The City admits that its elected officials held a public workshop on the "homeless issue" in January of 2014.[97] Fifth, FLFNB uses the sharing of food as the means of conveying its message.[98] Additionally, the Eleventh Circuit recognized that sharing food is one of the oldest forms of human expression.[99]

Even if every other incidence of food sharing is deemed not to be expressive, this situation is and should continue to be deemed so. Conduct does not lose its expressive nature just because it is also accompanied by other speech.[100] Regardless, in this situation, any explanatory speech, including the text and logo contained on FLFNB's banner, is not *needed* to convey a message.[101] Hence, the reasonable observer at FLFNB's events would infer *some* sort of message based off of the activity.[102]

---

94. *Id.*

95. *Id.* Public parks have been used as a forum for communicating ideas. Detweiler, *supra* note 80, at 698; Hague v. Cmty. for Indus. Org., 307 U.S. 496, 515 (1939) (explaining that parks "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions").

96. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1242.

97. *Id.* A relevant contextual indication of observer understanding is the existence of a "contemporaneous issue of intense public concern." Magid, *supra* note 87, at 489. The public workshop is evidence that the issue of homelessness was of important public concern at that time. Therefore, observers are more likely to view the conduct as communicative. *Id.*

98. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1243; *see supra* note 68 and accompanying text.

99. *Id.*; *see also* Brief for Appellant, *supra* note 70. The history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer *some* message when viewing it. *Id.*

100. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1244. *But see* Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47 (2006) (holding that the conduct was not expressive because speech was necessary to provide an explanation for the law school's conduct as the point of requiring military interviews away from the law school is not overwhelmingly apparent that the law school is expressing disapproval of the military).

101. *See Fort Lauderdale Food Not Bombs*, 901 F.3d at 1244. The words may be required for onlookers to recognize a *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying *some* sort of message. *See, e.g.*, Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, 515 U.S. 557, 569 (1995).

102. *Fort Lauderdale Food Not Bombs*, 901 F.3d at 1244. At the very least an observer would interpret the event as communicating a message of solidarity and social unity. *See* Initial Brief for Appellant, *supra* note 62, at 31. Additionally,

On the other hand, one could argue, similarly to the analysis presented in *Rumsfeld v. Forum for Academic and Institutional Rights*,[103] that feeding people in the park is too ambiguous to allow a conclusion that an objective reasonable observer would understand that the volunteers are trying to convey a *particular* message.[104] That message would not be understood without the explanatory speech included in FLFNB's banners in the park, and therefore the conduct is not inherently expressive.[105] In other words,

> [w]ithout the assistance of explanatory speech, an objective reasonable observer would not know whether the group feeding was a family having a reunion, a church intending to engage in a purely charitable act, a restraint distributing surplus food for free instead of throwing it away, or an organization trying to engage in a form of political speech.[106]

However, the standard is that a reasonable onlooker is able to infer *some* message, and for this reason, it is irrelevant what *particular* message is conveyed. Therefore, although the banners are helpful in portraying FLFNB's *specific* message, they are not necessary to understand that *some* message is trying to be illustrated.[107] The

---

providing basic human necessities to the homeless communicates compassion for those in need. Matthew M. Cummings, Comment, *The Continued Illegalization of Compassion:* United States v. Millis *and Its Effects on Humanitarian Work with the Homeless*, 31 B.C. THIRD WORLD L.J. 439, 452 (2011).

103. *See generally* 547 U.S. 47 (2006).

104. The expressive nature of conduct has been recognized in many U.S. Supreme Court cases. *See, e.g.*, Texas v. Johnson, 491 U.S. 397 (1989) (recognizing the expressive nature in burning the American flag on the steps of the Dallas City Hall to protest the policies of the Regan administration); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984) (recognizing the expressive nature in sleeping outdoors in the winter near the vicinity of the magisterial residence of the President of the United States); Schacht v. United States, 398 U.S. 58 (1970) (recognizing the expressive nature in wearing American uniforms in a dramatic presentation to criticize American involvement in Vietnam); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (recognizing the expressive nature in students' wearing black armbands to protest American military involvement in Vietnam); Brown v. Louisiana, 383 U.S. 131 (1966) (recognizing the expressive nature in sit-in by blacks in a "whites only" area to protest segregation).

105. Rumsfeld v. Forum for Acad. & Institutional Rights, 547 U.S. 47, 66 (2006) ("The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive.").

106. Detweiler, *supra* note 80, at 722. In other words, deeming food sharing expressive conduct "misidentifies speech for a philanthropic gesture in a convenient location." *Id.*

107. Initial Brief for Appellant, *supra* note 62 and accompanying text. *See supra* note 102 and accompanying text (explaining the different messages that an observer could understand from the conduct).

Eleventh Circuit's analysis ended here, finding FLFNB's conduct to be expressive for the same reasons that FLFNB argued.

Although conduct may sometimes be expressive and thus presumptively covered by the First Amendment, the state may still regulate it, subject to various tests[108] set forth by the U.S. Supreme Court.[109] The Eleventh Circuit did not engage in an analysis of state interest, but rather remanded the issue to the lower court.[110] First, it must be determined whether the City's regulation addresses expression. The Ordinance and the Rule clearly do not regulate expression based on its content, thereby setting aside doctrine about content-based regulation.[111] Regarding content-neutral speech regulation, if the Ordinance facially or as-applied addresses expression, then the time, place, and manner test is used.[112] But, if the Ordinance is generally applicable, meaning it does not address expression on its face, but rather sometimes is applied to expressive conduct and sometimes to non-expressive conduct, the *O'Brien* test is preferred.[113] Both tests require intermediate scrutiny, and courts are split on the correct analysis to apply when analyzing food sharing ordinances.[114]

The time, place, and manner test explains that restrictions are justified if they are "without reference to the content of the regulated speech, that they [are narrowly tailored to] serve a significant

---

108. These tests are the time, place, and manner test, and the *O'Brien* test. *See infra* notes 115–16 and accompanying texts.

109. Detweiler, *supra* note 80, at 714.

110. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1245 (11th Cir. 2018). *See also supra* note 76 and accompanying text.

111. Although a weak argument, it can be argued that Fort Lauderdale's regulations are content based as it requires the Zoning Administrator to evaluate the purpose or intent of an event to determine whether it is prohibited or not. This discretion is required because providing food as a social service is prohibited but doing so for a business marketing purpose is allowed. Initial Brief for Appellant, *supra* note 62, at 37. *But see* Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002) ("Where the licensing official enjoys unduly broad discretion in determining whether to grant or deny a permit, there is risk that he will favor or disfavor speech based on its content. We have thus required that a time, place[,] and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review.").

112. *See generally* Lee v. Int'l Soc. for Krishna Consciousness, 505 U.S. 830 (1992); Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640 (1981).

113. United States v. O'Brien, 391 U.S. 367 (1968).

114. First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011) (using both the time, place, and manner test and the *O'Brien* test); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022 (9th Cir. 2006) (analyzing based on the time, place, and manner test); McHenry v. Agnos, No. 92-15123, 1993 WL 8728 (9th Cir. 1993) (utilizing a time, place, and manner analysis).

governmental interest, and that in doing so they leave open ample alternative channels for communication of the information."[115] On the other hand, *United States v. O'Brien* explained that a regulation is sufficiently justified:

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[116]

Due to the fact that these tests are used interchangeably in precedent with similar circumstances, this Note analyzes the Ordinance by using the important overlapping requirements of both tests.[117] The corresponding requirements include: (i) the restriction does not regard the content of the speech,[118] (ii) there is a legitimate government interest, and (iii) the restriction is narrowly tailored so as to be no greater than necessary.[119] As articulated in *United States v. O'Brien*, the Court will not delve into a city's invidious purpose for enactment.[120] Furthermore, the Court in *Ward v. Rock Against Racism* held that the government does not need to show that it used the least restrictive means to serve its interests, but rather that the means are not overbroad in relation to accomplishing the desired ends.[121]

---

115. *Heffron*, 452 U.S. at 647–48; *see also* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

116. *See generally* United States v. O'Brien, 391 U.S. 367 (1968).

117. *Clark*, 468 U.S. at 299, 308 n.6 (Marshall, J., dissenting) ("I also agree with the majority that no substantial difference distinguishes the test applicable to time, place, and manner restrictions and the test articulated in *United States v. O'Brien*."); *see also* Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989). This Note will also analyze the requirement that the ordinance leave ample alternative channels of communication for the speaker, even though it is only stated in the time, place, and manner test. The arguments that follow in this section are arguments that should be made on remand or in future litigation. In other words, they were not made in the litigation of *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*. 901 F.3d 1235 (11th Cir. 2018).

118. *See supra* note 111 (discussing why the Ordinance and Rule at issue do not regard the content of the speech).

119. Heffron v. Int'l Soc. for Krishna Consciousness, 452 U.S. 640 (1981); United States v. O'Brien, 391 U.S. 367 (1968).

120. 391 U.S. at 384. Legislative history will not be used for this purpose. *Id.*

121. 491 U.S. 781, 798 (1989). "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation

First, the City's stated purpose of the laws is to balance competing uses of its public property.[122] The City also listed many other reasons in its Brief.[123] These reasons are likely to be deemed to reflect a legitimate purpose.[124] However, the numerosity of differing reasons leaves the real reason for enactment undefined, and homeless rights advocates will argue that the law is rooted in illegitimate concerns and bias against homeless persons.[125] Further, the City had recently discussed the topic of homelessness at a public workshop and therefore could have put the laws in place for the purpose of hiding or clearing the city of those persons.[126] However, the Court will not look to invidious purpose of the City, even though its underlying reasoning for passage may not be justifiable or constitutional.[127]

Second, FLFNB will likely argue that the requirements as set forth in the Ordinance and Rule demand too many hurdles for an organization to have to go through before being able to share food with participants.[128] The argument is that requiring these steps proves that the law is not narrowly tailored to the City's goal, and thus overbroad.[129] Fort Lauderdale, on the other hand, will state all of the reasons for enactment, including concerns of safety, security,

---

will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative." *Id.* at 800.

122. FORT LAUDERDALE, FLA., CODE OF ORDINANCES § 1-6(c) (2018). "[E]nsure that the location and concentration of these uses will have a minimal negative impact on the surrounding neighborhood." *Id.*

123. *See supra* note 74 and accompanying text (explaining other reasons the City has for implementing the laws at issue).

124. McHenry v. Agnos, No. 92-15123, 1993 WL 8728 (9th Cir. 1993) ("By maintaining a system of food establishment permits, the city has leverage to ensure that food preparers adhere to minimum standards of health and sanitation. By maintaining a system of special use permits for its parks, the city can prevent the abuse of park property and balance the competing uses to which citizens put them."); *see also* First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011) (finding that spreading the burden of large group feedings is a substantial government interest).

125. Detweiler, *supra* note 80, at 726.

126. *See* Saelinger, *supra* note 30 and accompanying text.

127. United States v. O'Brien, 391 U.S. 367, 384 (1968).

128. FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C) (2014); FORT LAUDERDALE, FLA. PARK RULES AND REGULATIONS 2.2, https://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/S78T-NK89].

129. "Regulations could be written less restrictively by providing for simple permit processes, requiring humanitarians to notify park rangers or city authorities of the locations of food or water dispensaries, and requiring the volunteers to return and retrieve leftover bottles or other refuse." Cummings, *supra* note 102, at 453–54.

smell, noise, and crowdedness.[130] Additionally, the use of the Park is not strictly prohibited; rather, requirements must be met before access will be granted.[131] In other words, filling out the required paperwork and fulfilling the necessary obligations is not an onerous burden. Yet, this is not a simple permit process, but instead requires the organization to go through a costly, lengthy, and difficult zoning application process usually applicable only to development of private property.[132] Additionally, those legitimate concerns may be achieved by requiring less on the part of the organization and its volunteers.[133]

Lastly, although only required when the Court uses the time, place, and manner test, Fort Lauderdale's laws did not leave open ample alternative channels of communication. It can be argued that organizations and their volunteers can utilize local food shelters, soup kitchens, or religious organizations to serve food to those in need. On the other hand, it can also be argued that for volunteers to be most effective in their outreach, they should be able to meet the homeless wherever the homeless are located.[134] The park was specifically selected because it is a public place and thereby homeless persons could easily access it.[135] Further, FLFNB picked Stranahan Park for the purpose of communicating a significant message, and that message would be hindered if FLFNB were required to share food

130. *See supra* note 74 and accompanying text (explaining other reasons the City has for implementing the laws at issue). Grace Guarnieri, *Why It's Illegal to Feed the Homeless in Cities Across America*, NEWSWEEK (Jan. 16, 2018, 5:01 PM), https://www.newsweek.com/illegal-feed-criminalizing-homeless-america-782861 [https://perma.cc/9RA5-VH9A]. Further, even if Fort Lauderdale cited a desire to ensure that shared food is prepared according to certain food preparation standards, there are no documented cases of food poisoning coming from food that is shared with hungry people in public places. *Id.*

131. McHenry v. Agnos, No. 92-15123, 1993 WL 8728, at *2 (9th Cir. 1993) ("These ordinances do not foreclose McHenry from alternative forms of communication: feeding the homeless in public parks is not the only way of calling attention to their plight. In fact, these ordinances do not foreclose McHenry from feeding the homeless or otherwise demonstrating in public parks at all."); *see also* First Vagabonds Church of God v. City of Orlando, 638 F.3d 756 (11th Cir. 2011) (finding it to be sufficient that the ordinance allows other activities such as political rallies, demonstration, distributions of literature, and any other expressive activities).

132. Initial Brief for Appellant, *supra* note 62, at 40.

133. At a minimum, only the Ordinance should apply, not the Ordinance *and* Rule 2.2.

134. *See Homeless People Deserve Food Too*, *supra* note 49; *see infra* notes 243–45 and accompanying text. *But see* Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1215 n.276 (1996) ("[A] food provider has considerable power to draw the destitute to a location of the provider's choice.").

135. *See supra* Section I.D.; *Homeless People Deserve Food Too*, *supra* note 49.

elsewhere.[136] Overall, the arguments for using the First Amendment's right to expressive conduct are strong, and thus the courts should be persuaded to find accordingly in future litigation.

B. First Time for Everything: Applying the Fourteenth Amendment to the Homeless Population

The Fourteenth Amendment states: ". . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[137]

When evaluating particular laws for their constitutionality, under both due process and equal protection, the outcome often depends on which "level of scrutiny" the Court uses.[138] The minimal level of review, the "rational basis" test, is deferential to the government: a law will be upheld if it is rationally related to a legitimate government purpose.[139] The middle tier is termed "intermediate scrutiny"; here, a law will be upheld if it is substantially related to an important government purpose.[140] Lastly, "strict scrutiny" requires that a law be necessary to achieve a compelling government purpose to be upheld.[141] Due to the rigidness of the three tiers of scrutiny, courts have sometimes applied enhanced rational basis scrutiny, known as "rational basis with bite," to cases involving historically disadvantaged groups that do not fall within the suspect or quasi-suspect classes or for people who want to associate in a certain way, where the law expressly limits such association.[142] In footnote four of

---

136. *See supra* note 68 and accompanying text (explaining FLFNB's intended message). However, this argument is rejected in Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

137. U.S. CONST. amend. XIV § 1.

138. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1239–44 (5th ed. 2015) (e-book).

139. *Id.*

140. *Id.*

141. *Id.*

142. *See generally* Sarah Finnane Hanafin, *Legal Shelter: A Case for Homelessness as a Protected Status Under Hate Crime Law and Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435 (2011); *see also* Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (recognizing that the mentally retarded are different due to their misfortunes and finding the law invalid as it does not surpass scrutiny); Moore v. City of East Cleveland, 431 U.S. 494 (1977) (finding that when the government intrudes on choices concerning family living arrangements, the Court must examine carefully the importance of the governmental interest advanced and the extent to which they are served by the challenged regulation).

United States v. Carolene Products, the Court set forth two areas where heightened scrutiny must be applied.[143]

The poor population, and the subgroup of homeless population, is currently only afforded the default level of rational basis scrutiny for challenges brought against ordinances that criminalize it.[144] Given that nearly all state action withstands rational basis scrutiny, it is unlikely that a court will strike down a law that disproportionately affects the homeless on the ground that it is not reasonably related to a legitimate state interest.[145] Although the Court has articulated that economic status does not create a suspect class,[146] it has not examined the class using the factors[147] typically used to determine whether a particular group should be treated as such.[148] Many scholars argue

---

143. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938) ("1) legislation which *restricts those political processes* which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . 2) whether *prejudice against discrete and insular minorities* may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry") (emphasis added).

144. Hanafin, *supra* note 142, at 462. *See, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988) (holding that classifications based on wealth are not suspect and noting that the Court has "previously rejected the suggestion that statutes having different effects on the wealthy and the poor would on that account alone be subjected to strict equal protection scrutiny"); Harris v. McRae, 448 U.S. 297, 323 (1980) (noting that poverty, standing alone, is not a suspect classification); Maher v. Roe, 432 U.S. 464, 471 (1977) ("This Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[A]t least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.").

145. Liese, *supra* note 43, at 1432.

146. *See supra* note 144 and accompanying text.

147. *See infra* note 190 and accompanying text.

148. *Id.* In other words,

> the Court has not given actual consideration to whether poor people meet the suspect class criteria or whether they need judicial protection because they have suffered historical discrimination, are unable to protect themselves in the political process and find it difficult or sometimes impossible to reduce their poverty—especially given recent data demonstrating the difficulty of an impoverished child escaping poverty as an adult.

Julie Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629, 648 (2008). In fact, the majority of poverty law cases the Court has considered have not directly presented discrimination between poor and non-poor people. *Id.*; *see also* Maurice R. Dyson, *Rethinking Rodriguez After* Citizens United*: The Poor as a Suspect Class in High-Poverty Schools*, 24 GEO. J. ON POVERTY LAW & POL'Y 1, 13 (2016). *See*

that the poor receive no scrutiny whatsoever, because the poor continuously do not receive judicial protection.[149] Further, "the popularity of anti-homeless ordinances throughout the country suggests the creation of the kind of class or caste treatment[150] that the Fourteenth Amendment was designed to abolish."[151]

1. Due Process

The due process test does not dwell on comparisons among individuals, as equal protection does, but instead balances the importance of the right to the individual against relevant state interests.[152] Due process is implicated when there is an infringement on an individual's fundamental rights.[153] The Court has recognized two fundamental rights that may be interpreted as protecting the homeless population: the right to vote and the right to travel.[154] To understand what constitutes a fundamental right, courts evaluate whether the right is deeply rooted in history and tradition, and whether the law violates basic values implicit in the concept of ordered liberty.[155]

First, even though the right to food has not yet been deemed fundamental by the Court, sharing food is inherent in the country's

---

generally Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34 NOVA L. REV. 407 (2010); Jennifer Watson, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501 (2003).

149. Nice, *supra* note 148, at 656; James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (arguing that the Court applies "no scrutiny whatsoever and treats the provision as if it contained a totally benign, technical economic classification").

150. *See infra* Section II.B.2.

151. Hanafin, *supra* note 142, at 472.

152. Harvard Law Review Ass'n, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 438 (1967). On the other hand, the Court's equal protection analysis compares individuals to others. *Id.*

153. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938). John Hart Ely, a widely renowned legal scholar of constitutional law, interpreted the first part of footnote four to mean that courts should apply heightened scrutiny when a law hinders fundamental rights, including rights essential for political participation.

154. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966) (holding that it is a violation of the Equal Protection Clause whenever the affluence of the voter or payment of any fee becomes an electoral standard because the "right to vote is too precious, too fundamental to be so burdened or conditioned"); Shapiro v. Thompson, 394 U.S. 618, 630–31 (1969) ("[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.").

155. *See generally* Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

history.[156] Sharing food has significant meaning both in the country's history (Thanksgiving) and in major world religions (Passover in the Jewish tradition and Communion in the Christian tradition).[157] Furthermore, there is an innate understanding that food is essential to staying alive.[158]

Second, there is a notion of the concept of "liberty" and "dignity" found in a line of cases about sexual freedom and privacy, that can be applied to grant protection to the homeless.[159] The Court in *Lawrence v. Texas* articulated a right to dignity as free persons as part of affording liberty, but did not provide its contours or definition.[160] Furthermore, the Court in *Obergefell v. Hodges* expressed that the framers left liberty open to develop through the progressive understanding of successive generations.[161] Together, these cases made a tremendous impact on the evolution of Fourteenth Amendment jurisprudence "by shifting the focus of procedural review from narrow classifications and nomenclature restrictions to a broader focus on the substantive principles and rights at stake."[162] The Fourteenth Amendment gives protection regardless of the articulation of a "fundamental right" or the establishment of traditional "moral" support for a particular act.[163]

---

156. Brief for Appellant, *supra* note 70, at 23. *See also* Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1243 (11th Cir. 2018) ("Like the flag, the significance of sharing meals with others dates back millennia.").

157. Brief for Appellant, *supra* note 70, at 23.

158. *See* A. H. MASLOW, A THEORY OF HUMAN MOTIVATION 6 (Midwest Journal Press ed., 1943). Maslow explains that there is a hierarchy of needs: (1) physiological (food, water, warmth, rest), (2) safety (security, safety), (3) belongingness and love (intimate relationships, friends), (4) esteem (prestige and feeling of accomplishment), and (5) self-actualization (achieving one's full potential, including creative activities). *Id.* "Undoubtedly these physiological needs are the most pre-potent of all needs." *Id.* at 7.

159. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting). "The full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution." *Id.*

160. Lawrence v. Texas, 539 U.S. 558, 567 (2003). One scholar explained three different concepts of dignity: the dignity of the individual associated with autonomy and negative freedom; the positive dignity of maintaining a particular type of life; and the dignity of recognition of individual and group differences. *See generally* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011).

161. 135 S. Ct. 2584 (2015).

162. Nancy C. Marcus, *Beyond* Romer *and* Lawrence*: The Right to Privacy Comes out of the Closet*, 15 COLUM. J. GENDER & L. 355, 398 (2006); *see also* Luke A. Boso, *Dignity, Inequality, and Stereotypes*, 92 WASH. L. REV. 1119, 1137 (2017).

163. Marcus, *supra* note 162, at 397.

Precedent leaves room for interpretation, and thus, the Court should interpret its role of preserving individual liberty and human dignity to encompass other basic values that underlie society – the right to feed others in need and the right to gain access to free food.[164] Those rights are so basic that the government should not be allowed to interfere with them.[165] Simply because the Court has failed to recognize these rights in the past does not mean it should continue to do so.[166] A person simply cannot survive without food, making this freedom potentially even more immediately necessary than the right to sexual freedoms.[167] Furthermore, having food to sustain oneself is a precondition to the exercise of *any* kind of constitutional liberty.

2. Equal Protection

Equal protection is the natural constitutional text that is implicated when there is a legal right to certain basic wants and needs which stems from a comparison between the burdens and opportunities between the relatively rich and poor.[168] Equal protection is

164. *See generally* Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740 (2006). The Supreme Court has often relied on values and rights not expressly found in the Constitution. *Id.* Human dignity itself is a value not mentioned in the Constitution, yet the Court has routinely relied upon it. *Id.* Therefore, a constitutional right to food security in the United States should be recognized. *Id.*

165. Lee, *supra* note 22, at 108 ("Dignity is what gives each of us equal standing against arbitrary government action that demeans, humiliates[,] and degrades.").

166. *Compare* Swift v. Tyson, 41 U.S. 1 (1842), *with* Erie v. Tompkins, 304 U.S. 64 (1938); *compare* Plessy v. Ferguson, 163 U.S. 537 (1896), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954); *compare* Hammer v. Dagenhart, 247 U.S. 251 (1918), *with* U.S. v. Darby, 312 U.S. 100 (1941); *compare* Baker v. Nelson, 409 U.S. 810 (1972), *with* Obergefell v. Hodges, 135 S.Ct. 2584 (2015); *compare* Bowers v. Hardwick, 478 U.S. 186 (1986), *with* Lawrence v. Texas, 539 U.S. 558 (2003); *compare* Stanford v. Kentucky, 429 U.S. 361 (1989), *with* Roper v. Simmons, 543 U.S. 551 (2005). *But see* Goodman, *supra* note 164, at 786 ("During the past thirty-five years, the Court has typically reversed lower court decisions favoring the poor. These rulings reflect that, constitutionally speaking, the state need not take affirmative steps to protect and preserve human dignity."). *See supra* note 164 and accompanying text.

167. *See* MASLOW, *supra* note 158 and accompanying text; *see also* Rao, *supra* note 160, at 266–67 (explaining that the Court can undermine dignity by failing to recognize the particular needs of certain groups).

168. Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11 (1969).

implicated when a law targets a discrete and insular minority.[169] The Ordinance and the Rule will likely be deemed facially neutral.[170]

When a law is facially neutral, the Court has held that a showing of disparate impact is not enough to receive heightened scrutiny.[171] It must be proven that the government had an underlying discriminatory purpose for enactment.[172] The Court, in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, articulated factors that should be considered in ascertaining such intent.[173] These factors include: (1) the historical background of the official action, (2) the sequence of events, both procedural and substantive, that led to the action, and (3) the legislative or administrative history of the action.[174] If it is found that there is a constitutional violation due to discriminatory intent, then the Court applies the analysis of the relevant heightened tier of scrutiny.[175] On the other hand, if there is no constitutional violation because the law is facially neutral and no discriminatory intent was found, then rational basis scrutiny applies.[176]

For the Ordinance and the Rule, it may be difficult to prove discriminatory intent.[177] However, there is evidence that the topic of homelessness was discussed at a recent city public workshop, which goes directly to the factors of historical background and sequence of events and lends support to the argument that the enactment was motivated by an invidious purpose.[178] Furthermore, both the

---

169. United States v. Carolene Prods., 304 U.S. 144, 153 n.4 (1938). This refers to the second prong established in footnote four. *Id.*

170. FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014); FORT LAUDERDALE, FLA., PARK RULES AND REGULATIONS 2.2, https://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/S78T-NK89].

171. Washington v. Davis, 426 U.S. 229, 239 (1976).

172. *Id.*

173. 97 S. Ct. 555 (1977).

174. *Id.* at 564.

175. CHEMERINSKY, *supra* note 138, at 1634.

176. *Id.*

177. The language of both the Ordinance and the Rule are facially neutral because they apply universally to *anyone* or *any* organization seeking access to the Park. *See* FORT LAUDERDALE, FLA., UNIFIED LAND DEVELOPMENT CODE art. III, § 47-18.31(C)(2)(c) (2014); FORT LAUDERDALE, FLA., PARK RULES AND REGULATIONS 2.2, https://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/S78T-NK89].

178. *See supra* note 97. However, more information regarding the contents of the meeting would be needed to make that argument.

Ordinance and Rule serve as part of a trend to criminalize the homeless to remove them from society.[179]

However, due to the weakness of this argument, homeless rights activists should argue that precedent should be overturned, and a showing of disparate impact should be enough.[180] The poor are disparately affected by these laws as they are the ones who suffer from hunger because of the lack of food sharing events in the city.[181] The *Washington v. Davis* standard should be relaxed at least in a setting where plaintiffs can show governmental neglect of a particular group.[182]

Opponents of this relaxed standard will argue that cities may have a *moral* obligation to eliminate the evils of poverty, but it is *not required* by the Equal Protection Clause to give to some what others can afford.[183] In other words, there is no affirmative duty to lift the handicaps flowing from differences, and therefore the State cannot and should not have to control the disparate impact of its laws.[184] However, Equal Protection is needed because the government is taking action that, although it may not be purposeful, exacerbates the problem of homelessness.[185] Additionally, homelessness is not merely an economic class, but rather a state of being.[186] Federal intervention by the court vis-à-vis Equal Protection is needed to

---

179. Saelinger, *supra* note 30 and accompanying text.

180. Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 47–48 (1987) (arguing that *Washington v. Davis* needs to be overruled in whole, or in part, or distinguished from this particular type of case). In addition, government action that has a foreseeable negative impact should be deemed unconstitutional regardless of the level of scrutiny used to examine the state action involved. *Id.*

181. *See supra* Section I.C.; *infra* Section III.B.

182. When the government acts with either the purpose *or effect* of disfavoring one similarly situated group over another, it creates or reinforces existing social hierarchies that tell outgroup members that they are inferior. Boso, *supra* note 162, at 1132; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 61 (1973) (Steward, J., concurring) ("Quite apart from the Equal Protection Clause, a state law that impinges upon a substantive right or liberty created or conferred by the Constitution is, of course, presumptively invalid, whether or not the law's purpose *or effect* is to create any classifications") (emphasis added). Edelman, *supra* note 180, at 48 ("[B]ut, if we are not going to overrule *Davis* and *Arlington Heights*, this should be one of those circumstances where we do not require proof of intent or purpose.").

183. BRODIE ET AL., *supra* note 8, at 155.

184. *Id.*

185. Dyson, *supra* note 148, at 44.

186. Jason Leckerman, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 564 (2001).

protect this class from animus that may not be provable, yet is implicit and pervasive.[187]

Moreover, although this Note focuses on the laws in just one local jurisdiction, Fort Lauderdale, the following analysis is applicable if a different food sharing ordinance were to be deemed facially discriminatory. When a law is facially discriminatory, the Court considers several factors to determine whether the particular group it is referring to should be treated as a quasi-suspect or suspect class under Equal Protection.[188] These factors include: (1) whether the class suffered from a history of discrimination, (2) whether members of the group have immutable characteristics, (3) whether the classifying trait was relevant to the individual's ability to contribute to society,[189] and (4) whether the class was politically powerless in its ability to attract the attention of lawmakers.[190] A class that meets all four criteria would be considered suspect and deserving of heightened scrutiny.[191]

First, homeless persons have been subject to a history of unfair treatment by the political majority, which is evidenced by the plethora of anti-homeless ordinances targeting their day-to-day activities.[192] Further, tax abatements and exclusionary zoning policies confine poor people within an "invisible wall."[193]

Additionally, poverty is not a choice and is therefore immutable.[194] A counter argument is that poverty is not an immutable characteristic due to the fact that a person can, over time, work their way out of it. But that argument does not reference recent studies that evidence

---

187. Dyson, *supra* note 148, at 44.

188. *Id.* at 12–13; Rose, *supra* note 148, at 420.

189. This factor refers to stereotypes and stigma surrounding the group that would impact its role in society.

190. Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Rose, *supra* note 148, at 420; Dyson, *supra* note 148, at 12–13; Bertrall L. Ross, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 CALIF. L. REV. 323, 333 (2016).

191. *Id.*

192. *See supra* Section I.C.; *see also generally* Samantha Holloway, *Homeless, Hungry, and Targeted: A Look at the Validity of Food-Sharing Restrictions in the United States*, 46 HOFSTRA L. REV. 733 (2017); Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163 (1995). *See also* Hanafin, *supra* note 142, at 472 ("If equal protection under the law is to mean anything, surely it cannot stand for the ideal of targeting the most vulnerable groups in society and criminalizing the activities that sustain their very existence.").

193. Watson, *supra* note 148, at 517.

194. *See supra* notes 13–20 and accompanying text; Hanafin, *supra* note 142; Holloway, *supra* note 192.

that poverty is usually not a choice of the person it affects and hence the poor person is deserving of sympathy.[195]

Third, there is a societal stigmatization of the poor, including the indifference about their needs.[196] Furthermore, government policies contribute to the stigma as the attempts to criminalize them in effect demean them.[197]

Lastly, this segment of the population unfortunately is politically powerless, as they are underrepresented in decision-making councils.[198] This is because the homeless do not have the *ability* to vote.[199] Therefore, they are perceived as an unimportant voting bloc and subject to targeting.[200] All of these conditions encourage giving this segment of the population at least some form of heightened scrutiny to which the government would have to prove that the law is more than rationally related to a legitimate government purpose.[201]

To receive rational basis with bite scrutiny, the Court looks to whether there is animus behind the law.[202] The City will argue that it has an interest in protecting the peace, health, safety and property of its citizens.[203] However, there is not only a general history of actions taken to criminalize the homeless,[204] but also there was a city

---

195. *See supra* note 13–25 and accompanying text.

196. Ross, *supra* note 190, at 344. Many homeless individuals are easily identifiable by their clothes, appearance, and conduct, which visibly marks the homeless as a distinct group. Watson, *supra* note 148, at 517.

197. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 795 (2011).

198. Ross, *supra* note 190, at 344. *See* Leckerman, *supra* note 186, at 565 (explaining that the poor lack financial resources to obtain access to many of the most effective means of persuasion).

199. Factors include the lack of a legal address, knowledge of how to register, and access to transportation or telephones. Christine L. Bella & David L. Lopez, *Quality of Life – At What Price?: Constitutional Challenges to Laws Adversely Impacting the Homeless*, 10 ST. JOHN'S J. LEGAL COMMENT 89, 99 (1994). All of these factors make it virtually impossible for the homeless to vote even though the U.S. Supreme Court has deemed a homeless person's right to vote fundamental. *Id.*

200. Holloway, *supra* note 192, at 52; Bella & Lopez, *supra* note 199.

201. These factors prove that when using the literal definition of "discrete and insular" the homeless are an isolated and detached group. Watson, *supra* note 148, at 516.

202. Romer v. Evans, 517 U.S. 620, 632 (1996). The Court has found animus in cases involving the mentally retarded, certain living arrangements, sexual orientation and alien children. *See, e.g.*, Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (recognizing that the mentally retarded are different due to their misfortunes and finding the law invalid as it does not surpass rational basis scrutiny because it appeared to rest on an irrational prejudice against the mentally retarded); Moore v. City of East Cleveland, 431 U.S. 494 (1977); Hanafin, *supra* note 142.

203. *See supra* note 74 and accompanying text.

204. Saelinger, *supra* note 30 and accompanying text.

workshop and the Ordinance had not been enforced since 2015 until after that workshop took place.[205] Hence, there is apparent animus on the part of the government, and the laws should not be found to be more than rationally related to a legitimate government purpose.[206] Regardless of the true reasons for passing the anti-homeless legislation, the state statutes and municipal ordinances that purport to advance these interests may very well be ineffective. Therefore, the Court must not consider the laws rationally related to a legitimate governmental interest.[207]

Overall, "relative impecuniousness appears to be joining race and national ancestry to compose a complex of traits which, if detectible as a basis of officially sanctioned disadvantage, render such disadvantage 'invidious' or 'suspect.'"[208] By not recognizing the poor as a suspect class, the Court is serving as an accomplice to the continuation of cyclical poverty caused by no fault of the person it affects the most.[209]

III. PROTECTING THE RIGHT TO SHARE FOOD IS NECESSARY

Section III.A. compels future courts to interpret the Constitution by applying the whole-text approach to protect the homeless population. Section III.B. explains the important policy benefits of safeguarding the homeless. Section III.C. argues that the United

---

205. *See supra* note 97 and accompanying text.

206. Holloway, *supra* note 192. Food sharing laws create undifferentiated disability on homeless communities. *Id.* Additionally, by making it illegal or difficult for those who attempt to feed the homeless, there is an immediate negative impact on the homeless. *Id.* Those food providers are sometimes the only access a homeless individual may have to safe food for extended periods of time. *Id.* These reasons make it clear that there would be no reason for the City to enact this type of law, but for having prejudice against the group.

207. Liese, *supra* note 43, at 1433. "If the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Wright, *supra* note 192, at 197.

208. Michelman, *supra* note 168, at 19.

209. Shayan H. Modarres, *The Fourteenth Amendment Isn't "Broke": Why Wealth Should Be a Suspect Classification Under the Equal Protection Clause*, 3 GEO. J.L. & MOD. CRITICAL RACE PERSP. 171, 196 (2012); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L. & CONTEMP. PROBS. 109, 121 (2009); *see also supra* notes 13–20 and accompanying text; James v. Valtierra, 402 U.S. 137, 146 (1971) (Marshall, J., dissenting) ("It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.").

States' participation in international agreements lends support to such protection.

A. Finding Protection in the Constitution as a Whole

The worst way to deal with the problem of homelessness in the United States is to make it a crime in an attempt to fix it.[210] The first step to protecting the homeless population is simple: courts must turn to the U.S. Constitution. The solution to this problem is not embedded in a single clause, but rather throughout the Constitution as a whole.[211]

Constitutional norms embodied throughout the entirety of the text are deserving of protection.[212] Precedent establishes that the Court has the power to interpret the Constitution to protect rights that were not explicitly enumerated.[213] Not everything in the Constitution is textually itemized and specified; therefore, some of what is covered by the Constitution is implied rather than expressed.[214] This stems from the fact that "it is a *Constitution* we are expounding" and therefore not all rights are explicit.[215] This gives rise to the idea that reading the document as a whole helps "construe ambiguous [f]ounding language so as to redeem the vision of later amendments

---

210. "[C]riminalizing these activities doesn't resolve the underlying problems, but it does sometimes move the problems out of public view; to some that seems to be a worthy objective." Andrew Horwitz, *First Amendment Protects the Right to Give and to Receive*, NEW ENG. FIRST AMEND. COALITION (May 26, 2017), http://nefac.org/first-amendment-protects-the-right-to-give-and-to-receive/ [https://perma.cc/HRU6-XUC9].

211. Akhil Reed Amar, *A Few Thoughts on Constitutionalism, Textualism, and Populism*, 65 FORDHAM L. REV. 1657, 1659 (1997) ("It is not a clause, it is not a generation, it is a Constitution."). The Constitution was not ratified as an individual clause; it was ratified as an entire document. *Id.*; *see also* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 795 (1999); Fallon, *supra* note 6, at 1200.

212. *See* Fallon, *supra* note 6, at 1201 ("Arguments of this kind can be viewed as ones of constitutional theory because, although they do not rely on either the precise linguistic meaning of particular constitutional provisions or on the historically identifiable intent of the farmers, they are text focused.").

213. *See supra* note 164 and accompanying text; Eve E. Garrow & Jack Day, *Strengthening the Human Right to Food*, 7 U.C. IRVINE L. REV. 275, 287 (2017); Fallon, *supra* note 6, at 1193 ("Implicit norms of our constitutional practice call for a constitutional interpreter to assess and reassess the arguments in the various categories in an effort to understand each of the relevant factors as prescribing the same result.").

214. Akhil Reed Amar, *America's Lived Constitution*, 120 YALE L.J. 1734, 1740 (2011). When construing the Constitution, the Ninth Amendment gives the direction to look beyond enumeration. *Id.*

215. McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

that are more inclusive in both process and result."[216] Thus, to modify Marshall's interpretation, it is a *single*, *coherent* Constitution that we are expounding.[217]

Food sharing regulations require protection because they give rise to constitutional infirmities. First, the expressed purpose of the Constitution was the desire to "insure domestic tranquility"[218] and "promote the general welfare."[219] Hence, the Constitution protects the homeless population on its face and must be applied to do so. This is because "[t]he desire to insure that diligent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless."[220]

Further, the Declaration of Independence established an unalienable right – the right to life.[221] Though the positive right to life is not recognized in the Constitution, the Fifth and Fourteenth Amendments protect individuals from being "deprived of life . . . without due process of law."[222] The right to life, as understood when interpreting historical context and these provisions together, is foundational to the protection of our basic human rights.[223] All other human rights are meaningless when the right to life is not guaranteed.[224] To effectuate the right to life, a person must have access to free food, as food is essential to sustain life.[225]

To continue, the Ordinance and the Rule are seemingly neutral general laws; yet, they have a significantly harmful effect on a historically powerless group. The laws have unconstitutional implications of a homeless person's right to expressive conduct, due process, and equal protection.[226] These different constitutional rights

216. Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 49 (2000).

217. Amar, *supra* note 214; Fallon, *supra* note 6, at 1200 ("According to Dean John Hart Ely, the Constitution, read as a whole, creates a predominant democratic and majoritarian structure of government; the rights with which it is, and must be, most concerned are those relating to failures of the democratic process.").

218. U.S. CONST. pmbl.

219. *Id.*

220. BRODIE ET AL., *supra* note 8, at 5.

221. Garrow & Day, *supra* note 213, at 285.

222. *Id.*

223. *Id.*

224. *Id.*

225. MASLOW, *supra* note 158 and accompanying text; *see also infra* notes 235–37 and accompanying text.

226. *See supra* Part II.

respectively protect the right to both food sharing and access to free food. However, homeless advocates have yet to successfully convince the courts that these constitutional doctrines should extend for the protection of homeless individuals.[227] But, to read the Constitution in segments would be a disservice to this portion of the population that clearly demands protection.[228] Together, the different clusters support the rights to both share food and have access to free food. The Court is uniquely situated with the power to interpret the Constitution as including a positive, justiciable right to adequate food — or at least to block the state from interfering with private efforts to provide such food — and it should.[229]

B. The Pragmatic Basis for Protecting the Homeless

The homeless population suffers from immense hardship to begin with and restricting food sharing merely exacerbates the problems.[230] It is important for the courts to correct the falsehoods[231] regarding homelessness and seriously consider the policy implications surrounding food sharing ordinances. Doing so will prove the necessity of protection for the homeless. The Court has the opportunity to change its negative response to this segment of the population and hopefully it will trickle down throughout society.

Some individuals wrongly believe that the act of sharing food enables people to remain homeless.[232] Importantly, however, restricting access to free, safe food does nothing to end homelessness, because the problem is rooted in the lack of access to public housing.[233] In fact, providing the homeless with easy access to free, safe food greatly increases their chances of both survival and removal

---

227. David Rudin, *You Can't Be Here: The Homeless and the Right to Remain in Public Spaces*, 42 N.Y.U. REV. L. & SOC. CHANGE 309, 311 (2018).

228. Amar, *supra* note 211.

229. Garrow & Day, *supra* note 213, at 286.

230. *See* Saelinger, *supra* note 30.

231. *See supra* note 41 and accompanying text (articulating common myths that surround the discussion of the homeless population).

232. NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4 (Oct. 2014), https://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/48XU-C5K2]; NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 42, at 24; *see* NAT'L COAL. FOR THE HOMELESS ET AL., *supra* note 41 and accompanying text. However, regulations that completely ban the expressive conduct of food sharing deprive the hungry of their ability to receive a necessity from the public that amount to a lifeline. Bella & Lopez, *supra* note 199, at 99.

233. NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 5, at 26.

from unwanted public areas.[234] There are an infinite number of stress-factors that homeless persons must face every day.[235] For example, a homeless person must think about "shelter, nutrition, health concerns, and employment as well as fears of being vulnerable to violence and arrest."[236] Thus, if homeless persons can depend on consistent, reliable food sharing programs, then they have a guarantee that at the very least their most basic needs are met.[237] This would allow them to exert more energy on improving other aspect of their lives.[238]

Additionally, sometimes these laws are premised on the belief that the homeless already do, in fact, have access to food resources.[239] In 2017, fifty-eight percent of food insecure households participated in at least one of the major federal food assistance programs.[240] But "participation in these federal programs is just one indicator of how great the need is."[241] Almost half of the hungry population does not use the federal programs, and even those who are using the federal benefits are still participating in non-profit food sharing events, hence proving that current services, where used, are likely inadequate.[242]

Further, because of the demand for these programs, organizations should be able to give out food in public spaces. Requiring a different location may make it impossible for the homeless to gain access to the free food, as many homeless persons must travel long distances to reach shelters, or they may be unable to reach the shelters at all due to "work conflicts, illness, disability, or lack of adequate public transportation."[243] Furthermore, "a need so basic must be addressed

---

234. Cummings, *supra* note 102, at 448.

235. *Homeless People Deserve Food Too*, *supra* note 49.

236. *Id.*

237. *Id.* This avenue may be the only way some homeless individuals can obtain healthy and safe food options.

238. Cummings, *supra* note 102, at 448.

239. *See* NAT'L COAL. FOR THE HOMELESS ET AL., *supra* note 41 and accompanying text.

240. FEEDING AMERICA, *supra* note 47 ("More than half of the households that the Feeding America network serves receive SNAP benefits, and nearly all Feeding America households with school-aged children receive free or reduced-priced lunch."). The federal food assistance programs include, but are not limited to the Supplemental Nutrition Assistance Program, (SNAP, formerly Food Stamps); the National School Lunch Program; and the Special Supplemental Nutrition Program for Women, Infants and Children (WIC). *Id.*

241. FEEDING AMERICA, *supra* note 47.

242. *Id.*

243. Cummings, *supra* note 102, at 448.

in any way it can be,[244] without deference to the location of the service resources."[245] Overall, meals should not come quid pro quo.[246] Therefore, food sharing organizations should be allowed to provide their services, and more cities should repeal this type of ordinance.

To clarify, this Note does not argue that the government's actions make the poor worse off; it argues that the means chosen to deal with a legitimate problem are both insufficient and ineffective.[247] Research has indicated that providing individuals with certain services, such as housing, counseling, and food, would cost less than incarcerating those individuals.[248] When police arrest or cite homeless individuals, the resulting police records make it even more difficult for those individuals to find employment.[249] Additionally, when police force the homeless to leave certain parts of a city, they almost always move them further from the social service centers that can potentially help them.[250] Therefore, cities are exacerbating, rather than resolving, the problem of homelessness.[251] As scholars have noted, homelessness will not self-correct, and the criminalization of homelessness is merely a stopgap measure that fails to engage with root causes of the problem.[252]

C. International Agreements as a Justification for Domestic Action

It is perplexing as to how *all* food sharing ordinances have not been repealed, as the United States federal government and its agencies seem to disagree with general methods that criminalize the homeless.[253] The U.S. Interagency Council on Homeless recognized

---

244. This is because food is a necessary condition for any human action. *See* Edelman, *supra* note 180; MASLOW, *supra* note 158 and accompanying text.

245. *Homeless People Deserve Food Too*, *supra* note 49.

246. *Id.*

247. Edelman, *supra* note 180, at 43; Liese, *supra* note 43.

248. Liese, *supra* note 43, at 1446.

249. *Id.*; Rudin, *supra* note 227, at 346 ("Most homeless people are unable to afford the fines for violating routine quality-of-life offenses and are subsequently sent to jail. Their criminal records then cost them eligibility for housing and public assistance benefits, cripple their efforts to find jobs, and impair their credit."). *See also* BRODIE ET AL., *supra* note 30 and accompanying text.

250. Liese, *supra* note 43, at 1446.

251. *Id.*

252. *See, e.g.*, *id.* at 1455 ("American cities must cure the disease, not just cover the symptoms.").

253. U.S. INTERAGENCY COUNCIL ON HOMELESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 8 (2012), http://usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf

in a 2012 report that these methods may also violate international human rights laws of the Convention Against Torture and the International Covenant on Civil and Political Rights.[254] Further, during the U.N. Human Rights Council's Universal Periodic Review process, the U.S. expressed a commitment to pursue alternatives to criminalization of homelessness.[255] While America stands against criminalization of the homeless internationally, the actions of several cities directly conflict with that belief, and hence, a change is necessary.

Furthermore, the right to food is an international human right recognized in Article 25 of the Universal Declaration of Human Rights.[256] This basic human right has been "explicitly addressed in over 120 instruments of international law since 1920, including major international agreements."[257] However, the United States has signed but not ratified the Universal Declaration of Human Rights, and therefore is not bound to adhere to it.[258] International law that does not undermine the U.S. Constitution should be used to supplement the established, baseline constitutional right with more progressive ones.[259] Additionally, considering the important role that international law has played in shaping issues of social justice and human rights over the last few decades, it should play an instructive role in strengthening the right to food and the right to share it in the United States.[260]

CONCLUSION

Food sharing ordinances have far-reaching consequences for the homeless population. This Note urges future courts to find food

---

[https://perma.cc/N3LV-Y6EJ]; *see also* Allard K. Lowenstein Int'l Human Rights Clinic, *supra* note 39, at 21–22.

254. *Id.*

255. *Id.*

256. NAT'L COAL. FOR THE HOMELESS ET. AL., *supra* note 41, at 17; *see The Universal Declaration of Human Rights*, UNITED NATIONS, http://www.un.org/en/universal-declaration-human-rights/ [https://perma.cc/7M29-R6PM].

257. *Id.*

258. Maxine D. Goodman, *The* Obergefell *Marriage Equality Decision, with Its Emphasis on Human Dignity, and Fundamental Right to Food Security*, 13 HASTINGS RACE & POVERTY L.J. 149, 197 (2016).

259. Garrow & Day, *supra* note 213. In fact, Article 25 of the Universal Declaration of Human Rights explains that the right to food security is based largely on the promise of *human dignity*, which is a recognized right in the United States. Goodman, *supra* note 258, at 196.

260. Garrow & Day, *supra* note 213, at 283.

sharing ordinances unconstitutional by looking at the Constitution as a whole as opposed to individual clauses. Doing so would protect the homeless population at large and ultimately save lives. Even without relying on the Constitution, this Note compels the courts to consider the myriad of harmful policy implications of such ordinances on homeless individuals. Further, the country's actions with regard to the right to food internationally exemplify its core belief in the necessity of protecting it; hence, the court must defend the right domestically as well.