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NOTES

QUALITY OF LIFE—AT WHAT PRICE?: CONSTITUTIONAL CHALLENGES TO LAWS ADVERSELY IMPACTING THE HOMELESS

Communities nationwide are rethinking their approach to combating crime.¹ Citizens overwhelmed by crime have demanded that the federal government assist them in their struggle to reclaim city streets and neighborhoods.² In response to the public's

¹ See George L. Kelling, *Acquiring a Taste for Order: The Community and Police*, 33 *CRIME AND DELINQ.* 90, 90 (1987). The author notes that the importance of maintaining order in society is grounded in empirical evidence indicating that people's fears result more from disorder than the actual commission of crime. *Id.* at 92-93. Disorder is described as "a condition [that] is offensive in its violation of local expectations for normalcy and peace in a community." *Id.* at 95; see also Elish King, *Fear Lives in Homes, Study Says Violence Seen Moving Into Safe Communities*, *WASH. POST*, Apr. 24, 1994, at M1. The study indicated that people would feel safer if violent criminals served tougher prison terms, poverty were reduced, drug and alcohol abuse lessened, and harsher gun control legislation was passed. *Id.*; Courtland Milloy, *The Shot Heard 'Round Sammy's*, *WASH. POST*, Nov. 23, 1993, at B1. Local businesses in metropolitan areas facing the grim realities of crime, arm themselves with weapons to fight crime. *Id.*

² See Ann Devroy, *President Says Congress is Too Slow on Crime Bill*, *WASH. POST*, Feb. 16, 1994, at A7. The Clinton administration's "comprehensive framework," includes crime legislation and a "concerted, disciplined approach" integrating the efforts of all federal agencies in addressing the broader issues of family and community. *Id.*; Jonathan P. Hicks, *New York City Exceeds Limit on Overtime*, *N.Y. TIMES*, Aug. 9, 1994, at B1. The New York Police Department had made a priority of arresting people violating quality of life offenses. *Id.*; *What's in the New Crime Bill?*, *U.S.A. TODAY*, Sept. 14, 1994, at 11A (listing law enforcement and crime prevention provisions benefiting state and local governments in new crime bill signed into law by President Clinton). See generally Marc C. Cozzolino, Note,

outcry, Congress reacted with legislation including the federal crime bill³ and gun control laws.⁴ Citizens hope federal legislation will benefit their neighborhoods by providing safer streets, parks, schools, and a greater police presence.⁵ These federal endeavors bolster community efforts to combat crime by providing funding for, and emphasizing the enforcement of, laws on the local level.⁶

The public's call for ways to halt the ever-increasing cycle of social disorder has spurred a recent resurgence in "quality-of-life" laws.⁷ Politicians and lawmakers center their campaigns around

Gun Control: The Brady Handgun Violence Prevention Act, 16 SETON HALL LEGIS. J. 245, 245 (1992) (discussing debates over gun control by legislature and general public).

³ See Violent Crime Control and Law Enforcement Act of 1994, H.R. 3355, 103rd Cong., 2d Sess. (1994) (enacted); *Congress Should Focus on Community Solutions*, DETROIT FREE PRESS, Sept. 17, 1993, at 10A. The assertion was that the federal government's role in fighting crime and improving the quality of life in communities infested with crime is through funding which will positively impact communities by augmenting local policing efforts. *Id.*; see also Steven Thomma, *\$33 Billion Crime Bill Set for Final Vote*, PHILA. INQUIRER, July 29, 1994, at A1. The majority of the money allocated in the federal crime bill will go to state and local law enforcement efforts to fight crime. *Id.* Spending on preventive social programs was also included in the bill because, according to President Clinton, "we cannot jail our way out of this crisis." *Id.* Other provisions for the crime bill include: funding for an increase in all levels of law enforcement, specific grants for local community policing programs, money for more prisons, a ban on certain types of assault weapons, and the imposition of the death penalty for more federal crimes. *Id.*

⁴ See Brady Handgun Violence Prevention Act ("Brady Bill"), 18 U.S.C. § 922 (1994). Under the Brady Bill, before a handgun dealer can transfer a gun to a buyer, the dealer must either wait for five days to elapse or for the approval of a chief law enforcement officer. *Id.*; cf. Daniel D. Polsby, *The False Promise of Gun Control*, ATLANTIC MONTHLY, Mar. 1994, at 62. The author discussed how gun control laws may save some lives, but are not effective in controlling the flow of guns to citizens who rely on them as a defense strategy for survival. *Id.*

⁵ See *What's in the New Crime Law*, USA TODAY, Sept. 14, 1994, at A11. The crime bill, signed into law by President Clinton, contains provisions for increased funding for law enforcement and crime prevention programs to address crime and disorder problems. *Id.*

⁶ See H.R. REP. NO. 103-324, 103d Cong., 2d Sess. 1 (1994) (discussing federal crime bill provisions affecting local law enforcement efforts); see also Thomma, *supra* note 3, at A1 and accompanying text (discussing spending provisions of federal crime bill affecting federal, state, and local law enforcement efforts). See generally Andrew J. McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 53 (1992) (discussing sociological motivation for gun control legislation); see *infra* note 7 (discussing relationship between disorder and crime).

⁷ See James Q. Wilson & George L. Kelling, *Broken Windows*, ATLANTIC MONTHLY, Mar. 1982, at 29. The authors discussed how increased crime and fear are the inevitable results of social disorder. *Id.* at 31. They maintained that society perceives a neighborhood evidencing broken windows, graffiti, abandoned property, deterioration of family structure, and the presence of youth gangs, drug-dealers, prostitutes, and panhandlers as a public threat to society precisely because these characteristics indicate that disorder has infiltrated the community. *Id.* at 32-33; see also Ronald Brownstein, *Taming the Mean Streets*, L.A. TIMES, May 4, 1994, at A1. Advocates of this new agenda for social order stress the rights of the community to demand certain minimum standards of behavior, and argue that disorder is not only a symptom but a cause of social distress. *Id.* Maintaining urban order and controlling threatening street behavior is seen as essential to stop the flight of the middle class from cities. *Id.* The efforts to reclaim public spaces are based on the theory that disorderly conduct signals a breakdown in social and law enforcement controls, and

promises of law enforcement programs intended to attack quality-of-life violations.⁸ These efforts have ranged from the enforcement of noncontroversial ordinances regulating such conduct as littering and excessive noisemaking,⁹ to regulations that essentially "criminalize" the often involuntary state of homelessness.¹⁰ The

thus leads to more serious criminal offenses. *Id.*; Devroy, *supra* note 2, at A7 (discussing how proponents of anticrime legislation have recognized that polls indicate crime as leading concern among Americans); *Everybody's Problem: How Cities Around the Country Are Dealing with the Homeless*, S.F. CHRON., July 5, 1992, at 10 [hereinafter *Everybody's Problem*]. Politicians have responded to the frustration of citizens who are "simply fed up" with the deterioration of urban life by emphasizing quality of life issues in their campaigns. *Id.* A recent poll by Columbia University which surveyed 1507 adults nationwide indicated that public opinion supported the implementation of more aggressive police tactics to improve the quality of life in public spaces. *Id.*

⁸ See Ester B. Fein, *The 1994 Campaign Issues; Facing Social Problems*, N.Y. TIMES, Nov. 1, 1994, at B4. The candidates in New York's gubernatorial campaign, Mario Cuomo and George Pataki, focus on the issue of crime. *Id.*; James L. Tyson, *Cities Crack Down on Homeless*, CHRISTIAN SCI. MONITOR, Jan. 21, 1994, at 4. San Francisco has instituted a comprehensive law enforcement program called Matrix Quality of Life Enforcement. *Id.* Under this program, San Francisco police have aggressively enforced a variety of ordinances prohibiting panhandling, obstructing sidewalks, sleeping in parks, and other quality of life offenses. *Id.*; see also Brownstein, *supra* note 7, at A1. In New York City, Mayor Rudolph Giuliani and Police Commissioner, William J. Bratton, have devised a law enforcement program which targets quality of life violations. *Id.* Programs such as New York's and San Francisco's are representative of steps advocated by an informal coalition of law enforcement officials and urban planners seeking to reduce disorder and incivility. *Id.*

⁹ See Brownstein, *supra* note 7, at A1. Increased enforcement of ordinances controlling truancy, littering, drinking alcohol, urinating in public, making too much noise, and illegal street vending have met little or no controversy. *Id.*; see, e.g., N.Y. PENAL LAW § 145.5 (McKinney 1988) (prohibiting littering on railroad property); N.Y. PENAL LAW § 145.60 (McKinney 1988) (prohibiting graffiti); N.Y. PENAL LAW §§ 220-221 (regulating drug-related activities); N.Y. PENAL LAW § 240.37 (McKinney 1988) (loitering for purposes of engaging in prostitution); N.Y. PENAL LAW § 240.20(7) (McKinney 1988) (prohibiting urinating in public); N.Y. PENAL LAW § 240.46 (McKinney 1988) (prohibiting criminal nuisance in first degree as related to drug dealing); NEW YORK, N.Y., ADMIN. CODE ch. 1, § 10-117 (1994) (prohibiting graffiti); NEW YORK, N.Y., ADMIN. CODE ch. 1, § 10-125 (1994) (prohibiting drinking in public); NEW YORK, N.Y., ADMIN. CODE ch. 2, § 10-201 (1994) (prohibiting unlawful sale or possession of controlled substances); NEW YORK, N.Y., ADMIN. CODE ch. 1, § 16-118 (1994) (prohibiting littering); NEW YORK, N.Y., ADMIN. CODE ch. 3, § 24-218 (1994) (prohibiting making excessive noise).

¹⁰ Tyson, *supra* note 8, at 4. Nationwide, cities are increasingly enacting or strictly enforcing regulations which prohibit persons from lying or sleeping on public spaces. *Id.* Violators are subject to arrest, fines and incarceration. *Id.* The article quotes a recent report by the National Law Center on Homelessness & Poverty in Washington, D.C., reporting that "[i]nstead of attacking the problem of homelessness, some cities are now attacking homeless people themselves." *Id.*; see, e.g., ARIZ. REV. STAT. ANN. § 13-2905(A)(3) (1989) (prohibiting loitering for purpose of begging); PHOENIX, ARIZ., CITY CODE § 23-48.01 (1981); SAN FRANCISCO, CAL., PARK CODE § 3.13 (1988); MIAMI, FLA., CODE § 37-63 (1990); ST. PETERSBURG, FLA. ORDINANCE § 25.57 (1973) (prohibiting sleeping or lying in public spaces); N.J. STAT. ANN. § 40:48-1(7) (West 1963) (granting every municipality authority to punish begging and prevent loitering); N.Y. PENAL LAW § 240.20(5) (McKinney 1993) (prohibiting disorderly conduct); N.Y. PENAL LAW § 240.35 (McKinney 1993) (prohibiting loitering); N.Y. PENAL LAW § 240.35(1) (McKinney 1993) (prohibiting begging); N.Y. PENAL LAW § 240.35(7) (McKinney 1993) (prohibiting sleeping in any transportation facility); SEATTLE, WASH. MUN. CODE § a.12.015(B) (1987) (prohibiting aggressive begging); see also *Young v. New York City Transit Auth.*, 729 F. Supp. 341, 354 n.23-26 (S.D.N.Y.), *rev'd*, 903 F.2d 146 (2d

enactment and aggressive enforcement of these laws have prompted heated exchanges and court battles¹¹ between proponents of the laws and advocates for those who will be most impacted by such regulations: the homeless, young people, and minorities.¹²

Quality-of-life laws that proscribe loitering, begging, and sleeping outdoors may adversely impact one group in particular, the homeless.¹³ The face of homelessness has changed from the stereotypically depicted alcoholic, drug addict, or mentally ill individual to now encompass entire families made homeless by adverse economic conditions.¹⁴ Homeless persons are often forced to sleep

Cir.), *cert. denied*, 498 U.S. 984 (1990) (outlining 25 states nationwide that have statutes ranging from regulating begging to outright prohibition).

¹¹ See *Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991-X, 1994 WL 447283, at *1 (N.D. Tex. Aug. 18, 1994) (examining constitutionality of ordinances allegedly enforced for purpose of removing homeless from public view); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 843 (N.D. Cal. 1994) (discussing action on behalf of class of homeless adversely impacted by San Francisco's Matrix Quality of Life Program); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1551 (S.D. Fla. 1992) (examining constitutional challenges brought by class of homeless against City of Miami for custom, policy, and practice of arresting, harassing, and interfering with homeless for performing life-sustaining activities in public spaces).

¹² See Brownstein, *supra* note 7, at A1. A new urban policy movement which has cities attempting to reclaim besieged areas by enforcing quality of life laws has raised complex questions of rights, responsibilities, and fairness. *Id.* Communities are struggling with striking a balance between individual civil liberties, such as freedom of speech and freedom of movement, against the rights of communities to enjoy certain minimum standards of behavior that are necessary to preserve a well-ordered community. *Id.* Civil rights advocates maintain that these laws fall disproportionately and discriminatorily on the young, the poor, and the nonwhite. *Id.*; Tyson, *supra* note 8, at 4. Cities nationwide are in the process of "criminalizing" homelessness by enacting or strictly enforcing ordinances meant to reclaim public spaces through punitive measures. *Id.* Laws directed at the homeless prohibit people from sleeping, aggressively begging, and even sitting on public property. *Id.*; see also Haywood Burns, *New York Forum About Justice: Johannesburg On the Hudson?*, N.Y. NEWSDAY, July 13, 1994, at A28. The author voiced concerns that enforcement of quality of life laws, rooted in social policy based on anger and fear, will disproportionately impact youth, the poor, and minorities. *Id.*

¹³ See Rick Bragg, *Sleepless in Central Park*, N.Y. TIMES, July 24, 1994, at 33. In New York City, police order homeless from Central Park after dark. *Id.* Crimes involving the homeless as both victims and perpetrators have motivated the police to clear the park of homeless camps. *Id.* Mary Brosnahan, Executive Director of New York's Coalition for the Homeless, stated her concern that "homeless people seem to be the last group not afforded equal protection under the law." *Id.* But see ALICE S. BAUM & DONALD W. BURNS, *A NATION IN DENIAL* 15 (1993) (discussing how high population of homeless families in New York City is not necessarily representative of homeless population nationwide).

¹⁴ See Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11301-11472 (1988). Congress defined a homeless individual to be "an individual who lacks a fixed, regular, and adequate nighttime residence." *Id.* § 11302(a). Additionally, the congressional definition of a homeless person includes individuals whose primary nighttime residence is a public or private temporary shelter, or place not designated for accommodation of individuals. *Id.*; see also *Pottinger*, 810 F. Supp. at 1558-59. Expert testimony asserted that homelessness is increasingly caused by factors beyond an individual's control. *Id.* Adverse economic conditions such as joblessness and lack of low-income housing are factors contributing to homelessness. *Id.* Additionally, persons are being born into homelessness. *Id.*; Paul Ades, Com-

and remain outdoors, and typically must beg to obtain food, clothing, transportation, and medical care.¹⁵ Laws aimed at improving the quality of life in communities often directly affect the homeless, and implicate constitutional protections such as due process,¹⁶ equal protection,¹⁷ freedom of expression,¹⁸ freedom of movement,¹⁹ and the prohibition against cruel and unusual punishment.²⁰ In order to evaluate the constitutionality of such laws, it is crucial to analyze the competing interests at stake, including those of the government, the general public, and the offenders.²¹

Part One of this Note addresses several constitutional claims brought by advocates representing homeless people who have been adversely impacted by legislation that was specifically intended to improve the quality of life in communities nationwide. Throughout Part One, this Note will highlight leading cases on the rights of the homeless in order to illustrate the diverse and inconsistent judicial analyses applied in evaluating the various constitutional challenges. Part Two examines the issue of whether the homeless, as a subset of the poor, exhibit the traditional indicia of suspectness, calling for heightened constitutional protection. The Conclusion discusses how courts recognize the issue of potential municipal liability based on the enactment and enforcement of legislation that adversely impacts the homeless by

ment, *The Unconstitutionality of "Antihomesless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 601 (1989). The author noted that, increasingly, the ranks of the homeless are made up of individuals not suffering from mental illness or drug and alcohol addiction, rather, many are physically handicapped, elderly, and female-headed families. *Id.*; Rob Polmer, *Camp Misery*, N.Y. NEWSDAY, Oct. 9, 1994, at A7 (reporting New York City shelter system swelled with thousands of families lacking shelter).

¹⁵ See *infra* note 22 (discussing necessary life-sustaining activities of homeless).

¹⁶ See *infra* notes 111-16 and accompanying text (discussing due process challenges to antihomesless legislation).

¹⁷ See *infra* notes 132-36 and accompanying text (discussing equal protection challenges brought on behalf of homeless persons).

¹⁸ See *infra* notes 24-28, 42-48, and accompanying text (discussing First Amendment protection of begging as expressive conduct).

¹⁹ See *infra* notes 100-10 and accompanying text (discussing anti-sleeping regulations as violative of fundamental right to travel); see also Ades, *supra* note 14, at 605-23 (arguing that ordinances prohibiting outdoor sleeping in all public areas unconstitutionally burden fundamental right to travel).

²⁰ See *infra* notes 64-74, 80-91, and accompanying text (discussing Eighth Amendment challenges to regulations banning necessary life-sustaining public activities of homeless persons). See generally Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631, 631 (1992) (discussing constitutional challenges to homeless arrests).

²¹ See *infra* notes 42-45 and accompanying text (discussing competing interests of parties involved in litigation resulting from legislation adversely impacting homeless).

denying them constitutional protection. Finally, the Note will conclude that the homeless, as a group, evidence many of the traditional indicia of suspectness, entitling them to treatment as a suspect or quasi-suspect class.

I. CONSTITUTIONAL CHALLENGES TO THE CRIMINALIZATION OF HOMELESSNESS

A. *Begging as Expressive Conduct*

Many homeless persons subsist on begging alone.²² The established view of the legal system treats personal begging as a nuisance subject to extensive governmental control.²³ Increasingly, the poor and the homeless are challenging ordinances prohibiting begging on the grounds that they are a violation of their constitutional right to free speech under state and federal constitutions.²⁴

²² See *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1033 (S.D.N.Y. 1992) (defining "needy person" as someone who must beg to pay for life's necessities: food, shelter, clothing, medical care, and transportation), *aff'd*, 999 F.2d 699 (2d Cir. 1993); Charles F. Knapp, Comment, *Statutory Restriction of Panhandling in Light of Young v. New York City Transit: Are States Begging Out of First Amendment Proscriptions?*, 76 IOWA L. REV. 405, 406 (1991) (recognizing begging or panhandling as necessary activity of homeless persons).

²³ See Panhandling Control Act, 1993 D.C. Stat. 54. The Washington D.C. law defined aggressive begging in part as "approaching, speaking to, or following a person in a manner as would cause a reasonable person to fear bodily harm or the commission of a criminal act upon the person, or upon property in the person's immediate possession." *Id.*; see also Paul G. Chevigny, *Begging and the First Amendment: Young v. New York City Transit Authority*, 57 BROOK. L. REV. 525, 526 (1991). The traditional judicial stance towards personal begging is that it is a "nuisance which the government had full power to control." *Id.*; see also *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) (stating "certain methods of expression may legitimately be deemed a public nuisance" and therefore do not warrant protection); *ACORN v. St. Louis County*, 930 F.2d 591, 597 (8th Cir. 1991) (upholding ordinance prohibiting solicitation of motorists on roadways by political organization); *Young v. New York City Transit Auth.*, 903 F.2d 146, 154-56 (2d Cir.) (characterizing personal begging as attempt by beggars to "exact money from those whom they accost"), *cert. denied*, 498 U.S. 984 (1990). The court distinguished between solicitation by organized charities, which served the public's interests in communicating information, and personal begging which "amounts to nothing less than a menace to the common good." *Id.* at 156; *ACORN v. City of Phoenix*, 798 F.2d 1260, 1267-68 (9th Cir. 1986) (denying First Amendment protection to political organization soliciting funds from motorists stopped at intersections); see also *infra* note 49 and accompanying text (discussing permissible solicitation by organized charities).

²⁴ See Tracy A. Bateman, Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R.5TH 455, 462-63 (1992). The author discussed how the swelling numbers of homeless persons lead to a growing desire by local governments to push the problems of homelessness out of the public's view. *Id.* With state and local governments instituting or reinstating laws prohibiting begging, the legality of these laws are increasingly being challenged as unconstitutional restrictions of free speech. *Id.*

Several state courts have held that begging does not constitute protected speech.²⁵ Typically, in refusing to extend First Amendment protection to begging, courts determine that begging does not necessarily bear a relationship to the communication of information.²⁶ In 1990, the federal courts addressed the conflict in *Young v. New York City Transit Authority*,²⁷ when a divided Second Circuit Court of Appeals reversed the United States District Court for the Southern District of New York, and held that begging in New York City's subway system was not protected by the First Amendment.²⁸

In *Roulette v. City of Seattle*,²⁹ a coalition of homeless individuals and advocacy organizations brought an action challenging an ordinance that prohibited "aggressive begging," which was defined as begging in a manner so as to compel fear in those solicited.³⁰ The court addressed the constitutionality of the ordinance prohibiting "aggressive begging."³¹ The ordinance explicitly prohibited begging with the intent to threaten, intimidate, or compel people to offer money out of fear for their safety.³² The court recognized an individual's First Amendment rights to free speech and peaceful begging, while differentiating between solicitations that are protected as First Amendment activity and those that constitute

²⁵ See *People v. Zimmerman*, 19 Cal. Rptr. 2d 486, 489 (App. Dep't. Super. Ct. 1994) (citing *Ulmer v. Municipal Court*, 127 Cal. Rptr. 445 (Ct. App. 1976) in finding that begging does not necessarily bear a relationship to First Amendment's protection of freedom to speak, write, print, or distribute information or opinion); *City of Seattle v. Webster*, 802 P.2d 1333, 1338-39 (Wash. 1990) (en banc) (holding ordinance did not violate First Amendment by making it unlawful for beggars and others to intentionally obstruct pedestrian or vehicular traffic), *cert. denied*, 500 U.S. 908 (1991).

²⁶ See *Zimmerman*, 19 Cal. Rptr. 2d at 489. The *Zimmerman* court noted that the mere fact that begging may be performed by speech does not by itself justify First Amendment protection. *Id.*

²⁷ 903 F.2d 146 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990).

²⁸ See *Young*, 903 F.2d at 147-48. The Second Circuit held that a regulation prohibiting begging in the New York subway system did not violate the First Amendment. *Id.* The Court of Appeals considered begging to be "expressive conduct" rather than "speech." *Id.* at 153. Citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), the court recognized that expressive conduct is protected by the First Amendment if such conduct is intended to convey a "particularized message," but decided that "begging is not inseparably intertwined with a particularized message," and is not deserving of constitutional protection. 903 F.2d at 153-54.

²⁹ 850 F. Supp. 1442 (W.D. Wash. 1994).

³⁰ See SEATTLE, WASH. MUN. CODE § 12A.12.015(A)(1) (1987). This section prohibits begging with the "intent to intimidate." *Id.*; see also SEATTLE, WASH. MUN. CODE § 12A.12.015(A)(2) (1987). The regulation defines intimidate as conduct which "would make a reasonable person fearful or feel compelled." *Id.*

³¹ *Roulette*, 850 F. Supp. at 1451.

³² *Id.* at 1452.

threats of imminent physical harm, which are unprotected.³³ The court upheld the statute, but invalidated a section of the ordinance which prescribed circumstances to be considered in determining a beggar's intent as unconstitutionally overbroad and vague.³⁴ According to the court, the circumstances section did not define with sufficient specificity the particular circumstances that were prohibited by law.³⁵

Some courts, however, have recognized begging or panhandling as a right to solicit contributions that is worthy of protection as "expressive conduct" under the First Amendment.³⁶ An action is deemed to be constitutionally protected expressive conduct when there exists "an intent to convey a particularized message" and it is likely that those viewing the action would understand the message meant to be conveyed.³⁷

The plaintiffs in *Loper v. New York City Police Department*³⁸ were members of a class of "needy persons" who begged in city

³³ *Roulette*, 850 F. Supp. at 1452. The court distinguished *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), which prohibited begging throughout New York City from the ordinance at issue which contained a mens rea element of intent. *Roulette*, 850 F. Supp. at 1452; see also *supra* note 30 (discussing intent element of Seattle's aggressive begging ordinance).

³⁴ *Roulette*, 850 F. Supp. at 1454. The court recognized that the circumstances section in the Seattle antibegging ordinance was initially intended to assist citizens, law enforcement, and judiciaries in determining whether or not the ordinance was violated. *Id.* However, some of the circumstances outlined in the ordinance described protected speech and did not define the circumstances with specificity. *Id.*

³⁵ *Id.*

³⁶ U.S. CONST. amend. I. The First Amendment provides that "[c]ongress shall make no law . . . abridging the freedom of speech." *Id.*; see also *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1047 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). The *Loper* court recognized that the government had a valid interest in "preserving public order" and protecting and promoting the interests of audiences and bystanders, but also found begging to be "conduct with an expressive component entitled to some First Amendment protection." *Id.*; *Blair v. Shanahan*, 775 F. Supp. 1315, 1324 (N.D. Cal. 1991) (stating that beggars have First Amendment freedom to speak in public), *aff'd*, No. 92-15447, 1994 WL 593074, (9th Cir. Oct. 31, 1994); *C.C.B. v. State of Florida*, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984) (invalidating Jacksonville ordinance proscribing begging as unconstitutional infringement of right to free speech); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-7, at 829 (2d ed. 1988) (reasoning that soliciting contributions is activity "intertwined with speech" raising First Amendment issues). See generally Cynthia R. Mabry, *Brother Can You Spare Some Change—And Your Privacy Too?: Avoiding a Fatal Collision Between Public Interests and Beggars' First Amendment Rights*, 28 U.S.F. L. REV. 309, 309 (1994) (discussing various assessments by courts of beggars' right to beg).

³⁷ See *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (articulating Supreme Court's criteria for determining whether particular conduct is deserving of First Amendment protection).

³⁸ 802 F. Supp. 1029 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

streets and parks.³⁹ They challenged a New York State statute prohibiting loitering for the purposes of begging.⁴⁰ Although the plaintiffs had never been arrested or received a summons for begging, the court found that they had standing to bring a First Amendment challenge because police relied on the statute to order beggars to “move along.”⁴¹

In assessing the plaintiffs’ First Amendment claim, the court balanced the competing interests of the beggars,⁴² the interests of those being directly solicited for money,⁴³ the general public’s interests,⁴⁴ and the unifying interest of the government in protecting and promoting all of these competing interests.⁴⁵ Though the court recognized that the government has a strong interest in improving the quality of life by restoring public order,⁴⁶ the court asserted that in attempting to remove peaceful beggars from the public’s view, the government was not confronting the base causes of homelessness.⁴⁷ The court held that the interests of beggars

³⁹ *Id.* at 1033. The *Loper* court defined needy persons as “someone who, because of poverty, is unable to pay for the necessities of life, such as food, shelter, clothing, medical care, and transportation.” *Id.*

⁴⁰ *Id.* at 1032. The New York Penal Law provides that “[a] person is guilty of loitering when he . . . [l]oiters, remains, or wanders about in a public place for the purpose of begging” N.Y. PENAL LAW § 240.35(1) (McKinney 1993). *Id.*

⁴¹ *Loper*, 802 F. Supp. at 1035. The court stressed that even though only very few “peaceful begging” arrests had been made, evidence existed that police asked beggars to “move along,” establishing actual imminent threat of injury. *Id.*

⁴² *See id.* at 1042. The beggar has an interest in soliciting funds and in sending out a social message calling his or her plight to the attention of the public. *Id.*

⁴³ *See Loper v. New York City Police Dep’t*, 802 F. Supp. 1029, 1042 (S.D.N.Y. 1992), *aff’d*, 999 F.2d 699 (2d Cir. 1993). The *Loper* opinion also listed the interests of the beggar’s specific audience, those being directly solicited by the beggars, as primarily the interest in freely obtaining information. *Id.* Additionally, members of the audience have an interest in “not being defrauded, . . . in being informed about social conditions, and in having one’s personal privacy respected.” *Id.*

⁴⁴ *Id.* at 1045. The *Loper* court recognized the general public’s interests as not only encompassing the availability of information, but also protecting the public order and protecting against fraud. *Id.*

⁴⁵ *Id.* at 1045. The opinion noted that the government’s interest is all-encompassing in that it includes protecting and promoting the legitimate interests of beggars, their audiences, and the general public. *Id.*

⁴⁶ *Id.* at 1046. Professor Kelling’s “Broken Windows” theory, which has been adopted by New York City, is directed at quality of life concerns and the ability of society to ban those things it finds offensive. *Id.* Kelling maintained that indicia of disorder such as the homeless and panhandlers, increase the public’s “perception of fear” by indicating that “crime is more frequent and no one is in charge.” *Id.* Based on this, the City claims that the police are justified in enforcing the antibegging statute in an attempt to reestablish order. *Id.*; *see also supra* note 7 and accompanying text (discussing sociological theories used to explain social disorder).

⁴⁷ *Loper*, 802 F. Supp. at 1046. A beggar, solely by being impoverished, does not represent a threat to society. *Id.* By criminalizing a peaceful beggar’s activity in an effort to remove the message of disorder that begging sends to society, the city is avoiding the base

and the message begging sends to the public prevails over the city's interest in preserving public order.⁴⁸

Commonly, an ordinance will ban begging by an individual, but allow for solicitation by organized charities.⁴⁹ Courts may refuse to recognize begging as a protected activity by either declining to equate personal begging with solicitation by organized charities, which has been afforded strong protection by the Supreme Court,⁵⁰ or by treating begging as "incidental speech" that is not necessarily communicative of views and ideas.⁵¹ Even where begging has been recognized by the courts as expressive conduct, it

cause of begging and homelessness and pretending the problem does not exist. *Id.*; cf. Ades, *supra* note 14, at 599-601 (outlining major causes of homelessness such as deinstitutionalization of mentally ill, lack of low income housing, chronic unemployment, and cutbacks in social welfare).

⁴⁸ *Loper*, 802 F. Supp. at 1047 (holding N. Y. PENAL LAW § 240.35(1) unconstitutional under First Amendment of United States Constitution).

⁴⁹ See *Young v. New York City Transit Auth.*, 903 F.2d 146, 150 (2d Cir. 1990). In prohibiting begging on the subways, the New York Transit Authority relied on an ordinance which exempted certain classes of organized charities and solicitations for religious or political purposes. *Id.*; see also Nancy A. Millich, *Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?*, 27 U.C. DAVIS L. REV. 255, 265 (1994) (recognizing nationwide antibegging statutes typically prohibit individual begging while allowing solicitation by organized charities).

⁵⁰ See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2704 (1992) (per curiam). The Court heard a challenge to New York Port Authority's regulations banning the solicitation of funds and distribution of literature within the area's airports. *Id.* Though the Court upheld a ban on solicitation in airports, it permitted distribution of pamphlets, effectively extending First Amendment protection to solicitation by the organized charity. *Id.* at 2709; *Cornelius v. NAACP Legal Defense and Educ. Fund*, 473 U.S. 788, 799 (1985) (deciding literature from political advocacy group was protected as charitable solicitation, although "not equally permissible in all places at all times"); *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980). The Supreme Court invalidated a statute which attempted to regulate solicitation by an organized charity. *Id.* at 639. The Court recognized the interrelationship between the act of solicitation and forms of expressing views and ideas afforded First Amendment protection. *Id.* at 635-39.

⁵¹ See *Young*, 903 F.2d at 152-53 (citing *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). The court noted that the Supreme Court has refused to accept all conduct as analogous to "speech" simply based upon the actor's intent to convey an idea. *Id.* In distinguishing community service through charities from personal begging, the Second Circuit questioned whether begging equaled communication in the degree necessary to afford constitutional protection. *Id.* at 153; see also Robert Tier, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285, 322 (1993). The author asserted that a beggar's objective in begging is to obtain money, not to express some political or economic idea. *Id.* Accordingly, begging does not communicate anything about a beggar's state of mind sufficient to come within "the freedom of speech" protections of the First Amendment. *Id.* at 322-24. The author, though concluding that begging is not protected speech, recognized that begging may be deemed to have expressive elements, and that any regulations must be directed at the nonexpressive components of begging. *Id.* at 324. But see Helen Hershkoff & Adam S. Cohen, Comment, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908-09 (1991). The authors argued that begging is clearly not unprotected "conduct." *Id.* at 908. The authors noted that the Supreme Court has recognized activities such as entering onto a stranger's property and ringing his doorbell, distributing leaflets, and even playing a portable phonograph for potential contributors, as fully protected speech. *Id.* The article stressed that a holding

may nevertheless be limited by reasonable time, manner, and place restrictions.⁵² The constitutional standard for assessing such restrictions focuses on whether the regulation serves a valid and important government interest; is narrowly drawn to achieve that interest; and is unrelated to the suppression of free expression.⁵³ Additionally, this standard, as applied to begging, means that regulations restricting begging in a public forum must leave open ample alternative channels of communication.⁵⁴

The homeless have a strong interest in communicating their plight to the general public.⁵⁵ Regulations that completely ban expressive conduct deprive a beggar of his or her ability to inform the public that economic and social conditions render it impossible for people to provide for themselves.⁵⁶ Aside from the societal message that begging conveys, begging often amounts to a lifeline

which finds begging to be unprotected conduct cannot be reconciled in light of the Supreme Court's rulings protecting such activities as those described above. *Id.*

⁵² See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294-95 (1984) (recognizing demonstrators sleeping in capital's parks to protest homelessness was expressive conduct subject to reasonable time, place, and manner restrictions); see also *Young*, 903 F.2d at 160 (quoting *New York City Unemployed & Welfare Council v. Brezenoff*, 742 F.2d 718, 721 (2d Cir. 1984), recognizing blanket prohibition of particular type of speech in public forum may be "reasonable time, place or manner restriction"). The court decided that a regulation calling for an absolute ban on panhandling in the subways constituted a reasonable time, place, and manner restriction. *Id.* But see *Loper v. New York City Police Dept.*, 802 F. Supp. 1029, 1040 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993). The *Loper* court, in invalidating a New York statute that amounted to a total ban on begging, by prohibiting loitering for the purpose of begging, noted that no alternative means existed for the needy to communicate their message of despair. *Id.*

⁵³ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968). In *O'Brien*, the Supreme Court set forth a test that is used to evaluate government regulations which affect conduct which may have an expressive element. *Id.* The *O'Brien* court stated:

[A] government 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.

Id.; see also *Loper*, 802 F. Supp. at 1039. In analyzing whether a government regulation is sufficiently justified in regulating expressive conduct, the *Loper* court used this test as set forth in *O'Brien*, 391 U.S. at 377. 802 F. Supp. at 1037.

⁵⁴ See *International Socy for Krishna Consciousness, Inc. v. City of Baton Rouge*, 876 F.2d 494, 497 (5th Cir. 1989). The Fifth Circuit noted that regulations must not completely ban the speech at issue. *Id.*; see also *Tier*, *supra* note 51, at 324. (discussing constitutional standard for weighing content-neutral restrictions of time, place, or manner of speech).

⁵⁵ See *Loper*, 802 F. Supp. at 1042. The beggar, in requesting money for his immediate subsistence, often inadvertently communicates the valuable message that society has fundamentally failed in addressing the root causes of poverty. *Id.*

⁵⁶ But see *Chevigny*, *supra* note 23, at 539. The author, in analyzing *Young*, noted that the Second Circuit drew upon the discussion in *Spence v. Washington*, 418 U.S. 405, 410-11 (1974), which concluded that conduct could be protected when "an intent to convey a particularized message was present, and . . . the likelihood was great that the message would be understood by those who viewed it." *Id.* The pivotal argument was that the beggar's message, if one exists, will go unheard. *Id.*

for many of society's poor.⁵⁷ There are legitimate governmental interests in regulating begging to provide for the public's general health, safety, and welfare by preventing fraud,⁵⁸ protecting citizens from harassment,⁵⁹ and reducing vehicular and pedestrian congestion.⁶⁰ However, such regulations must be narrowly tailored to achieve these governmental interests without unnecessarily restricting a beggar's freedom to communicate.⁶¹ Furthermore, ample alternative channels must exist to enable one to express whatever political, social, or economic message one desires to convey.⁶² Regulations that restrict the time, manner, and place in which beggars may solicit funds must meet these constitutional standards.⁶³

B. *Cruel and Unusual Punishment*

Advocates for the homeless have recently challenged the constitutionality of antihomeless statutes under the Eighth Amendment.⁶⁴ This innovative approach maintains that ordinances which prohibit sleeping in public areas constitute cruel and unusual punishment to the homeless based on their prohibition of the involuntary status of homelessness.⁶⁵

⁵⁷ See *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (noting begging is frequently plea for such essentials as food, shelter, clothing, medical care, or transportation).

⁵⁸ See *Riley v. National Fed'n for the Blind*, 487 U.S. 789, 792 (1988) (finding protecting public from fraud is sufficiently substantial interest); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1046-47 (S.D.N.Y. 1992) (acknowledging government's interest in preventing fraud).

⁵⁹ See *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2708 (1992) (finding regulation of face-to-face solicitation may be appropriate because of risk of duress present); *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1453 (W.D. Wash. 1994) (upholding ordinance prohibiting begging which constitutes threats of bodily injury or property damage as unprotected speech).

⁶⁰ See *ACORN v. St. Louis County*, 930 F.2d 591, 594 (8th Cir. 1991) (finding significant government interest in providing for traffic efficiency); *Young v. New York City Transit Auth.*, 903 F.2d 146, 158 (2d Cir.), *cert. denied*, 498 U.S. 984 (1990) (recognizing begging in subways impedes pedestrian traffic and creates potential dangers to public).

⁶¹ See *supra* note 37 and accompanying text (discussing constitutional standard for assessing regulation of expressive conduct).

⁶² See *supra* note 54 and accompanying text (discussing necessity for regulations restricting begging to provide alternative channels of communication).

⁶³ See *supra* note 52 and accompanying text (discussing how states may impose reasonable time, manner, and place restrictions upon begging).

⁶⁴ U.S. CONST. amend. VIII. The Eighth Amendment provides that: "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

⁶⁵ See *Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991-X, 1994 WL 447283, at *5 (N.D. Tex. Aug. 18, 1994) (holding ordinance prohibiting sleeping in public unconstitutional as cruel and unusual punishment against homeless); *Pottinger v. City of Miami*, 810 F. Supp.

The Supreme Court decision, *Robinson v. California*,⁶⁶ is the benchmark for assessing Eighth Amendment challenges.⁶⁷ In *Robinson*, the Court held that punishing someone based on their involuntary addiction to narcotics amounted to cruel and unusual punishment.⁶⁸ The Court based its decision on the fact that narcotic addiction is a status, rather than a punishable act.⁶⁹ Subsequently, however, in a plurality decision, the Supreme Court in *Texas v. Powell*⁷⁰ refused to extend the doctrine established in *Robinson*, and upheld the conviction of a chronic alcoholic who was arrested for public intoxication.⁷¹ Justice Thurgood Marshall, writing for the plurality, stated that the defendant was punished for his behavior, the act of being drunk, not the status of being a chronic alcoholic.⁷²

Justice Byron White's concurring opinion in *Powell*, however, provides guidance for an expansion of the Eighth Amendment argument.⁷³ Although Justice White acknowledged that the *Robinson* doctrine would not protect a person with a home from a conviction for public intoxication, he stated that the doctrine might protect a homeless alcoholic, who had no choice but to drink in public, from cruel and unusual punishment.⁷⁴

At the heart of the Eighth Amendment argument is whether acts performed by the homeless, such as sleeping or eating in public areas, are merely manifestations of the status of being home-

1551, 1561 (S.D. Fla. 1992) (stating that conduct for which homeless are arrested is "inseparable from their involuntary condition of being homeless"); see also *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 393 (Ct. App. 1994) (upholding Eighth Amendment challenge to ordinance). *But see Joyce v. City of San Francisco*, 846 F. Supp. 843, 857-58 (N.D. Cal. 1994) (denying that homelessness is status to be afforded Eighth Amendment protection).

⁶⁶ 370 U.S. 660 (1962).

⁶⁷ See *Robinson*, 370 U.S. at 660. The *Robinson* Doctrine was used to invalidate vagrancy laws punishing status. *Id.*; see also *Wheeler v. Goodman*, 306 F. Supp. 58, 64 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

⁶⁸ *Robinson*, 370 U.S. at 666 (holding criminalization of involuntary status of narcotic addiction amounted to cruel and unusual punishment); see also *Pottinger*, 810 F. Supp. at 1562 (recognizing that courts have overturned vagrancy ordinances based on *Robinson* because such ordinances punish status).

⁶⁹ See *Robinson*, 370 U.S. at 666 (equating drug addiction with illness).

⁷⁰ 392 U.S. 514 (1968).

⁷¹ See *Powell*, 392 U.S. at 532. The Court in *Powell* found that the offense of public intoxication punished the act of "being in public while drunk on a particular occasion," not the mere status of being an alcoholic. *Id.*

⁷² *Id.* at 532.

⁷³ *Id.* at 551 (White, J., concurring).

⁷⁴ *Id.* (White, J., concurring).

less or constitute conduct that may be punished.⁷⁵ Advocates for the homeless argue that the involuntary status of homelessness is based on various economic, physical, and psychological factors that may be beyond the control of homeless individuals.⁷⁶ Based upon expert testimony, courts have recognized that social isolation and the lack of access to shelter exacerbate the problems of the homeless and may cause them to continue to perform harmless acts, such as eating or sleeping, in public places.⁷⁷ Cities throughout the nation continue to be unable to provide shelter to those residing in public parks and spaces.⁷⁸

Recently, in *Johnson v. City of Dallas*,⁷⁹ the Federal District Court for the Northern District of Texas declared that though the City had no obligation to provide shelter to the homeless, it would amount to cruel and unusual punishment to allow the City of Dallas to penalize the homeless for sleeping in public.⁸⁰ Lower courts have permitted an expansion of the *Robinson* doctrine to protect the homeless from being arrested for performing necessary life-

⁷⁵ See *Joyce v. City of San Francisco*, 846 F. Supp. 843, 853-58 (N.D. Cal. 1994) (discussing the Eighth Amendment argument under the *Robinson* doctrine); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1561-65 (S.D. Fla. 1992); see also Donald E. Baker, "Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417, 441 (1991). Laws that punish the homeless for performing necessary life functions in public spaces would be "disproportionately severe in relation to the . . . moral fault of the offender," a rationale for the Eighth Amendment protection from cruel and unusual punishment. *Id.* at 446.

⁷⁶ See *Pottinger*, 810 F. Supp. at 1563. Numerous experts testified to the base causes of homelessness. *Id.* Expert testimony acknowledged that, except in rare cases, people rarely choose to be homeless. *Id.* Sociology Professor James Wright testified that unemployment, like physical and mental illness, becomes harder to overcome once a person becomes homeless. *Id.* at 1564.

⁷⁷ See *Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991-X, 1994 WL 447283, at *6 (N.D. Tex. Aug. 18, 1994) (stating that if there were beds for each of Dallas's homeless then homelessness would be choice and not status). *Id.*; *Pottinger*, 810 F. Supp. at 1564 (discussing experts' testimony explaining effects of being homeless).

⁷⁸ See *Johnson*, 1994 WL 447283, at * 5. The court noted that there are people in Dallas with no place to go, and no alternative but to reside in public spaces. *Id.* There are not enough shelters to meet the demand of the homeless. *Id.* See also *Pottinger*, 810 F. Supp. at 1564. See generally *Everybody's Problem*, *supra* note 7, at 10 (noting that there were approximately 700 beds in Miami's shelters for estimated 6,000 individuals). The homeless have extended out from the traditional urban skid rows into middle-American suburbs and small cities, which are frequently less capable of or less willing than big cities to address the problem. *Id.* New York is the nation's leader in terms of homelessness, with an estimated 10% of the total U.S. population of homeless people. *Id.* Estimates of the size of New York City's homeless population range from 34,000 to more than 100,000 individuals. *Id.*

⁷⁹ No. CIV.A.3:9-CV-991-X, 1994 WL 447283 (N.D. Tex. Aug. 18, 1994).

⁸⁰ See *id.* at *6. In discussing whether the City of Dallas was obligated to provide housing to the homeless, the court explicitly stated that the City was not obligated to provide the homeless with "anything." *Id.*

sustaining activities such as sleeping and eating in public.⁸¹ Moreover, courts have found that harmless conduct, which the homeless must perform in public in order to survive, is merely a manifestation of their homeless status and therefore not punishable.⁸²

In *Pottinger v. City of Miami*,⁸³ the plaintiffs claimed municipal liability⁸⁴ based on the City of Miami's custom, policy, and practice of arresting, harassing, and interfering with homeless people and their property for performing life's daily basic functions in public spaces.⁸⁵ The plaintiffs did not challenge the validity of the statutes,⁸⁶ but they asserted that the City applied these laws in a discriminatory fashion, with the explicit intent to drive the homeless from public areas.⁸⁷

⁸¹ See *Johnson*, 1994 WL 447283, at *5 (applying *Robinson* doctrine in invalidating anti-sleeping ordinance); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992). The *Pottinger* court recognized that due to the "unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct life-sustaining activities in public spaces." *Id.* Experts on homelessness and sociology testified that homelessness results for the most part from factors including economic crises and physical and psychological impairments that are outside the control of those afflicted. *Id.* at 1563. Impediments to securing adequate shelter by the homeless include: social isolation, lack of low-income housing and government benefits, illness, and unemployment. *Id.* at 1564; see also *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 393 (Ct. App. 1994) (extending *Robinson* doctrine to protect homeless living in public areas by invalidating anticamping ordinance).

⁸² See *supra* note 68 and accompanying text (discussing Supreme Court's holding in *Robinson*); see also *Pottinger*, 810 F. Supp. at 1564 (recognizing that harmless conduct for which homeless are arrested is inseparable from their involuntary status of being homeless); *Tobe*, 21 Cal. Rptr. 2d at 393-94 (invalidating anticamping ordinance as punishment for poverty). But see *Joyce v. City of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (denying homeless protection under Eighth Amendment because homelessness is not readily classified as status); *Loper v. New York City Police Dep't*, 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992) (casting doubt on viability of Eighth Amendment claim brought on behalf of the homeless in response to New York's blanket ban on begging), *aff'd*, 999 F.2d 699 (2d Cir. 1993).

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

⁸⁴ *Id.* at 1561 (citing *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978)); see also 42 U.S.C. § 1983 (1988) (authorizing municipal liability where a persistent or widespread policy of local government inflicts injury). See generally 1 CIVIL RIGHTS LIBRARY SECTION 1983 LITIGATION Ch. 7 (2d ed. 1992) (discussing municipal liability).

⁸⁵ *Pottinger*, 810 F. Supp. at 1554. These activities include sleeping and eating in public by the homeless because they have no other alternative. *Id.*; see *Baker*, *supra* note 75, at 457-63 (commenting on decision in *Pottinger*).

⁸⁶ *Pottinger*, 810 F. Supp. at 1559. The City of Miami arrested thousands of homeless over a period of three years for violating various ordinances and statutes. *Id.*; see MIAMI, FLA., CODE § 37-53.1 (1990) (prohibiting obstructing sidewalks); MIAMI, FLA., CODE § 37-63 (1990) (prohibiting sleeping in public); MIAMI, FLA., CODE § 38-3 (1990) (prohibiting presence in parks between hours of 10:00 p.m. and 7:00 a.m.). A majority of the arrest reports indicated that the arrests were not for disorderly behavior, and many were merely for the act of sleeping. *Pottinger*, 810 F. Supp. at 1559-60.

⁸⁷ See *Pottinger*, 810 F. Supp. at 1554, 1566. The plaintiff's malicious abuse of process claim failed, but the court did find that the city used its arrest process for the ulterior purpose of "purging" the homeless from public spaces. *Id.* at 1566. Police Department memoranda illustrated the detailed strategy devised to remove "undesirables" from parks and "sanitize" the areas. *Id.* at 1567.

Plaintiffs asserted an Eighth Amendment challenge, claiming that they were victims of discrimination due to their involuntary status of being homeless.⁸⁸ The court stated that although the government's interest in maintaining orderly, aesthetically pleasing streets and parks, and promoting tourism and development was important, it could not justify arresting the homeless for innocent acts.⁸⁹ Ultimately, the court held that the City of Miami was liable to the homeless because policymakers within the city had constructive knowledge of the targeted arrests.⁹⁰ The court ordered that counsel for both parties create "safe zones" where the homeless could reside without fear of arrest.⁹¹

The Federal District Court for the Northern District of California refused to recognize homelessness as a status in *Joyce v. City of San Francisco*.⁹² In *Joyce*, a group of homeless persons sought preliminary injunctive relief enjoining the City from enforcing part of a comprehensive social service and law enforcement program called the "Matrix Quality of Life Program."⁹³ The plaintiffs challenged the portion of the program that penalized homeless individuals for performing life-sustaining activities in public

⁸⁸ *Pottinger*, 810 F. Supp. at 1578. The plaintiffs argued that because the homeless do not have access to private property, they must perform their daily activities in public. *Id.* The court recognized that the homeless may exhibit the "traditional indicia of suspectness" as a class. *Id.* (citing the test set forth in *San Antonio Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The court was hesitant to rule on the issue of suspectness, but indicated that the homeless evidenced the traditional indicia. *Id.*

⁸⁹ *Pottinger*, 810 F. Supp. at 1583. The policy of arresting homeless persons for harmless acts was deemed unconstitutional because the arrests were cruel and unusual punishment under the Eighth Amendment, burdened the fundamental right to travel, and violated the Due Process Clause. *Id.* at 1584. The court also held that the city's practice of seizing and destroying the personal belongings of the homeless violated the Fourth Amendment. *Id.* at 1573.

⁹⁰ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992). The City consistently failed to prevent "improper police conduct." *Id.*

⁹¹ *Id.* at 1584-85 (enjoining police from arresting homeless for harmless, innocent conduct).

⁹² 846 F. Supp. 843, 857-58 (N.D. Cal. 1994).

⁹³ *Id.* at 845-46. The Matrix Quality of Life Program is aimed at providing social services to homeless people and eradicating street crime. *Id.* at 845-46. The program specifically targets "public drinking and inebriation, obstruction of sidewalks, lodging, camping or sleeping in public parks, littering, public urination and defecation, aggressive panhandling, dumping of refuse, graffiti, vandalism, street prostitution and street sales of narcotics among others." *Id.* at 846. The court emphasized the nonpunitive aspects of the program which provide for "shelter, medical care, information about services and general assistance" to the homeless and needy. *Id.* at 847. The program was structured around a cooperative effort involving the Department of Social Services, the Department of Public Health, the Police Department, and the Department of Public Works. *Id.*; see also Tyson *supra* note 8 (reporting on the Matrix Program).

places.⁹⁴ The district court denied the plaintiffs' claim for injunctive relief because the proposed injunction lacked the specificity necessary to be enforceable and the plaintiffs failed to show success on the merits of their constitutional claims.⁹⁵

In assessing the plaintiffs' Eighth Amendment claim, the court distinguished decisions of other jurisdictions which recognized that the status of homelessness can be protected from penal sanctions.⁹⁶ Moreover, the court concluded that homelessness is a condition, not a status to be afforded constitutional protection.⁹⁷ The court noted that finding otherwise would potentially extend constitutional protection to any condition over which defendants could show that they had no control.⁹⁸ In determining whether homelessness is a status, like drug addiction, the court addressed two factors: whether the characteristic at issue was present at birth, and the degree to which an individual had control over the characteristic.⁹⁹

C. *Anti-Sleeping Ordinances as a Violation of the Fundamental Right to Travel*

Courts have considered whether anti-sleeping ordinances¹⁰⁰ burden the fundamental right to travel because such laws may

⁹⁴ *Joyce v. City of San Francisco*, 846 F. Supp. 843, 846 (N.D. Cal. 1994). Life-sustaining activities consist of basic routines of daily life that include sleeping and eating. *Id.*; *Pottinger*, 810 F. Supp. at 1554.

⁹⁵ *Joyce*, 846 F. Supp. at 851. The court noted two reasons for denying preliminary injunctive relief: (1) the plaintiff's request lacked the "necessary specificity to be enforceable," and (2) the plaintiffs failed to establish a "sufficient probability of success on the merits to warrant injunctive relief." *Id.*

⁹⁶ *See, e.g.*, *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562-65 (S.D. Fla. 1992) (invalidating ordinances, pursuant to Eighth Amendment, which prohibited homeless from lying down, sleeping, standing, sitting, or performing other essential life-sustaining activities in public places); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 393 (Ct. App. 1994) (equating homelessness with illness and addiction as involuntary status not subject to criminal prosecution); *see also Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991-X, 1994 WL 447283, at *5 (N.D. Tex. Aug. 18, 1994) (holding that ordinance prohibiting sleeping in public as applied against homeless is unconstitutional).

⁹⁷ *Joyce*, 846 F. Supp. at 857. The *Joyce* court stated that they were "unable to conclude at this time that the extension of the Eighth Amendment to the acts at issue here is warranted by governing authorities." *Id.*

⁹⁸ *Id.* at 858. The court concluded that without precedent from the Supreme Court, constitutional protection cannot be extended to any condition for which "a showing could be made that the defendants had no control." *Id.* *But see Johnson*, 1994 WL 447283, at *5 (pertaining to sleeping ordinance). "The evidence demonstrates that for a number of Dallas homeless at this time homelessness is involuntary and irremediable. They have no place to go other than the public lands they live on." *Id.*

⁹⁹ *See Joyce v. City of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

¹⁰⁰ *See, e.g.*, *Seeley v. State*, 655 P.2d 803, 807-08 (Ariz. Ct. App. 1982) (holding that City Code provision making it unlawful to sleep, lie, or remain in public right-of-way was not

make it impossible for the homeless to enter or remain in a community.¹⁰¹ Although the Supreme Court has unequivocally recognized a fundamental right to interstate travel,¹⁰² the Court has expressly refrained from extending such a right to intrastate travel.¹⁰³ Lower courts, however, have determined that a fundamental right to intrastate travel exists.¹⁰⁴

Anti-sleeping ordinances burden the right to travel primarily when no shelter exists.¹⁰⁵ Consequently, a homeless person must decide to either break the law or leave the community.¹⁰⁶ Additionally, law enforcement officers rely on anti-sleeping ordinances for authority to conduct arrest sweeps directed against the homeless.¹⁰⁷ It can be argued that courts should render such ordinances invalid as a violation of the freedom of movement when they ulti-

unconstitutional); *People v. Davenport*, 222 Cal. Rptr. 736, 738 (App. Dep't Super. Ct. 1985) (holding that ordinance prohibiting sleeping in any public spaces between hours of 10:00 a.m. and 6:00 a.m. was not unconstitutional), *cert. denied*, 475 U.S. 1141 (1986); *cf. City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. Dist. Ct. App. 1984) (holding city ordinance prohibiting lodging or sleeping in motor vehicle on any public property within city limits unconstitutional), *cert. denied*, 474 U.S. 824 (1985); *State v. Penley*, 276 So. 2d 180, 181 (Fla. Dist. Ct. App. 1973) (invalidating City of St. Petersburg ordinance prohibiting sleeping in public spaces), *cert. denied*, 281 So. 2d 504 (Fla. 1973); *City of Portland v. Johnson*, 651 P.2d 1384, 1386 (Or. Ct. App. 1982) (upholding regulations prohibiting sleeping in public).

¹⁰¹ See *Pottinger*, 810 F. Supp. at 1579; *Tobe*, 27 Cal. Rptr. 2d at 392 (holding custom, policy, and practice targeting evicting homeless from public spaces within city limits as violation of right to travel). *But see Joyce*, 846 F. Supp. at 860 (denying right to travel claim). *Cf. Seeley*, 655 P.2d at 808 (stating that anti-sleeping ordinance did not prohibit movement, but actually encouraged it).

¹⁰² See *United States v. Guest*, 383 U.S. 745, 757-58 (1966). The Court stated that: "The constitutional right to travel from one state to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." *Id.*; see also *Attorney General v. Soto-Lopez*, 476 U.S. 898, 902 n.2 (1986) (finding that right to migrate is firmly established).

¹⁰³ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1579 (S.D. Fla. 1992) (stating that Supreme Court has not directly expressed whether right to travel includes intrastate travel); see also *Ades*, *supra* note 14, at 609-13 (arguing that right to travel encompasses intrastate travel).

¹⁰⁴ *Pottinger*, 810 F. Supp. at 1579 (citing *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646, 648 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971)). The *King* holding pointed out that it would be illogical to protect the rights of one migrating from outside the state, and not afford the same protection to one within the state. *King*, 442 F.2d at 648-49.

¹⁰⁵ See *Pottinger*, 810 F. Supp. at 1580. See generally *Ades*, *supra* note 14, at 616-23 (stating that these ordinances discourage homeless persons from entering or remaining in area governed by such legislation).

¹⁰⁶ See *supra* note 101 and accompanying text (examining local efforts burdening right to travel).

¹⁰⁷ *Tobe*, 27 Cal. Rptr. at 392. The court found that the city enacted the anticamping ordinance because previous efforts to rid the area of the homeless failed when challenged through litigation. *Id.* Arrest sweeps were a component of a larger plan to rid the City of Santa Ana of vagrants quickly and efficiently. *Id.*

mately deprive the homeless of the ability to perform one of life's basic functions—sleeping—within a community.¹⁰⁸

In order to survive constitutional scrutiny, a regulation which implicates the fundamental right to travel, such as an anti-sleeping ordinance, must be a necessary means to achieve a compelling governmental interest.¹⁰⁹ Government objectives commonly associated with the homeless, such as health and safety concerns, are better served by providing shelter, medical services, and protection to the needy, rather than subjecting them to arrest.¹¹⁰

D. Due Process and Equal Protection Challenges

1. Due Process

Quality-of-life laws which adversely affect the homeless often raise the specter of Due Process¹¹¹ and Equal Protection¹¹² challenges.¹¹³ Such challenges are grounded in the Fifth and Fourteenth Amendments of the Constitution.¹¹⁴ Advocates of the homeless turn to the Equal Protection and Due Process Clauses to ensure governmental fairness with regard to antibegging and

¹⁰⁸ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992) (stating ordinances preventing homeless from performing necessary life functions in public areas violate right to travel). *Id.*

¹⁰⁹ See *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (holding freedom of movement as fundamental right); see also *Pottinger*, 810 F. Supp. at 1581 (finding that City of Miami's interest in promoting tourism and business and maintaining parks was not compelling governmental interest).

¹¹⁰ See *McCain v. Dinkins*, 84 N.Y.2d 216, 229, 639 N.E.2d 1132, 1140, 616 N.Y.S.2d 335, 343 (1994) (holding New York City and City officials in contempt and describing problem of housing homeless families in New York City as "municipal government problem of mammoth proportions and complexity"); *Callahan v. Carey*, 118 A.D.2d 1054, 1054, 499 N.Y.S.2d 567, 567 (1st Dep't 1986) (recognizing right to shelter through consent decree). See generally JOEL BLAU, *THE VISIBLE POOR, HOMELESS IN THE UNITED STATES*, 98-108 (1992) (discussing history of legal advocacy for homeless and establishment of right to shelter in New York City); Maria L. Ciampi, Note, *Building a House of Legal Rights: A Plea for the Homeless*, 59 ST. JOHN'S L. REV. 530, 530 (1985) (stating that homeless should be recognized to ensure their political influence); Christine Robitscher Ladd, Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 285-89 (1986) (discussing right to shelter emanating from New York State Constitution).

¹¹¹ U.S. CONST. amend. V. The Fifth Amendment provides that "[n]o person shall . . . be deprived of life liberty or property without due process of law." *Id.* U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty or property, without due process of law." *Id.*

¹¹² U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

¹¹³ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1575-78 (S.D. Fla. 1992); *Tobe*, 27 Cal. Rptr. at 394. (discussing due process and equal protection challenges to antihomeless legislation).

¹¹⁴ See *supra* notes 111-12 (listing Due Process and Equal Protection Clauses).

anti-sleeping ordinances.¹¹⁵ Increasingly, such ordinances are enacted by legislators in response to demands by "compassion-fatigued" constituents—citizens whose former empathy toward the plight of the homeless has changed into intolerance.¹¹⁶ Compassion-fatigue reflects the growing consensus among homeless advocates, social workers, government officials, and taxpayers that the increased efforts of the 1980's, designed to eradicate homelessness, have failed.¹¹⁷

The guarantees of procedural due process require that an ordinance delineate clear legal standards so the public is on notice that certain behavior is unlawful.¹¹⁸ Such standards provide a safeguard against the arbitrary and discriminatory enforcement of laws by the police.¹¹⁹ Historically, vagrancy laws¹²⁰ permitted the police to apply largely unbridled discretion in enforcing prohibitions against sleeping in public, obstructing public pathways, and loitering or trespassing on public property.¹²¹

¹¹⁵ See *infra* notes 118-19 (discussing challenges to ant begging and anti-sleeping ordinances).

¹¹⁶ See *infra* notes 152-54 and accompanying text (discussing stated mission of community to remove all indigents); see also Millich, *supra* note 49, at 259 (discussing compassion-fatigue in context of ant begging legislation and First Amendment protection). The author stated that empathy has turned to intolerance as Americans seek to remove the homeless from public view. *Id.* Economic recession, unemployment, and increased homelessness have sparked public hostility towards the homeless. *Id.* at 261. According to the Assistant Director of the National Coalition for the Homeless, Michael Stoops, compassion-fatigue has prompted legislatures in at least twelve major cities in the late 1980's to early 1990's to enact ant begging ordinances. *Id.* at 265.

¹¹⁷ See *Everybody's Problem*, *supra* note 7, at 10. The author claimed that the country is now afflicted with "compassion-fatigue." *Id.* Mainstream America collectively addressed the problem of the homeless through fundraising, shelter construction, and legislation which provided funding for the eradication of homelessness, such as the Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. §§ 11301-11472 (1988). *Id.* Increased numbers of homeless persons indicate that these efforts have failed. *Everybody's Problem*, *supra*, at 10.

¹¹⁸ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (holding ordinance void for vagueness because it failed to give fair notice of forbidden conduct and encouraged arbitrary arrests and convictions); see also *Pottinger*, 810 F. Supp. at 1575. The court discussed vagrancy statutes that have been declared unconstitutional on due process grounds. *Id.*

¹¹⁹ See *Kolendar v. Lawson*, 461 U.S. 352, 357-58 (1983). The Court addressed the two elements that the "void-for-vagueness" doctrine focuses on: (1) that an ordinance must provide notice and (2) that it avoid arbitrary and discriminatory enforcement. *Id.* The Court stressed the second element—"the requirement that a legislature establish minimum guidelines to govern law enforcement." *Id.*

¹²⁰ See 77 AM. JUR. 2D *Vagrancy* § 1 (1975). The common law defined vagrancy as: "wandering or going about from place to place by an idle person who has no visible means of support, and who subsists on charity and does not work for a living although he is able to do so." *Id.*

¹²¹ See *Papachristou*, 404 U.S. at 159-61 (examining arrests for loitering resulting from "arbitrary and discriminatory" enforcement of vagrancy laws); see also Simon, *supra* note

In 1972, the Supreme Court, in *Papachristou v. City of Jacksonville*,¹²² held vagrancy laws to be unconstitutionally vague.¹²³ Justice William O. Douglas noted that the City of Jacksonville's vagrancy statute allowed for the arbitrary and discriminatory enforcement of the law and that it failed to provide sufficient notice of the prohibited conduct.¹²⁴ The Court in *Papachristou* declared that vagrancy ordinances criminalized activity that would normally be deemed lawful.¹²⁵ *Papachristou* established that in order to be valid, an ordinance must provide standards governing the exercise of discretion by police.¹²⁶ In the absence of such standards, a literal application of many anti-sleeping ordinances could lead to the result that a person who has fallen asleep in a park while picnicking is in violation of a prohibition against sleeping in public spaces.¹²⁷ Extending *Papachristou* and its progeny to anti-homeless legislation may lead to the conclusion that lawmakers must carefully draft laws to discourage arbitrary and discriminatory enforcement of laws which tend to target the homeless.¹²⁸

Vagrancy and loitering statutes have also been invalidated by due process challenges based on overbreadth.¹²⁹ A regulation is

20, at 638-40. The Simon article traced vagrancy legislation in America from its roots in English law to the present day implications for the homeless. *Id.*

¹²² 405 U.S. 156 (1972).

¹²³ *Id.* at 162.

¹²⁴ *Id.*; see *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1575 (S.D. Fla. 1992).

¹²⁵ See *Papachristou*, 405 U.S. at 163.

¹²⁶ See *id.* at 170. The Court noted that it is imperative to our system of justice that the laws be equally applied to both rich and poor, minority and majority. *Id.* at 171.

¹²⁷ See *Papachristou*, 405 U.S. at 163-64. The Court listed examples of conduct proscribed by the vagrancy ordinance, which inadvertently included lawful activity. *Id.* For example, a statute that makes it a crime to be "habitually living upon the earnings" of one's spouse while capable of working, results in criminalizing the act of being unemployed due to recession or increased technology in the work place. *Id.*

¹²⁸ See *City of Pompano Beach v. Capalbo*, 455 So. 2d 468, 470 (Fla. Dist. Ct. App. 1984), *cert. denied*, 474 U.S. 824 (1985) (voiding statute prohibiting sleeping in vehicles for vagueness); *State v. Penley*, 276 So. 2d 180, 181 (Fla. Dist. Ct. App.), *cert. denied*, 281 So. 2d 504 (Fla. 1973) (holding ordinance prohibiting sleeping in public void). The court found that the ordinance did not distinguish between conduct intended to do harm and that which is basically innocent. *Id.* But see *People v. Davenport*, 222 Cal. Rptr. 736, 738-39 (App. Dep't Super. Ct. 1985), *cert. denied*, 475 U.S. 1141 (1986) (holding ordinance prohibiting sleeping in certain public areas not unconstitutionally vague or overbroad).

¹²⁹ See *Fenster v. Leary*, 20 N.Y.2d 309, 312, 282 N.Y.S.2d 739, 742, 229 N.E.2d 426, 428 (1967) (invalidating statute allowing for overbroad police discretion). The court found that the statute provided for punishment of an activity which did not impinge upon the rights of others or disrupt public order. *Id.* Compare *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 394 n.11 (Ct. App. 1994) (claiming that overbreadth challenges are not limited to First Amendment challenges) with *Joyce v. City of San Francisco*, 846 F. Supp. 843, 862 (N.D. Cal. 1994) (citing *Schall v. Martin*, 467 U.S. 253, 268 n.18 (1984)). The *Joyce* court stated that overbreadth is a challenge brought only where First Amendment issues are a concern. 846 F. Supp. at 862.

overbroad when it proscribes more conduct than is necessary to realize stated government objectives.¹³⁰ When less restrictive alternatives exist to achieve the governmental interests of maintaining order and preserving the aesthetic qualities of outdoor spaces, it may be unreasonable for courts to uphold laws that sanction innocent activities such as sleeping outdoors in order to realize those objectives.¹³¹

2. Equal Protection

The Equal Protection Clause ensures the neutrality of laws passed by the legislature.¹³² Quality-of-life laws that result in arrests of the homeless may implicate equal protection guarantees by being discriminatory.¹³³ Courts have recognized that the homeless are an increasingly unpopular, politically powerless group often subjected to organized efforts to drive them from the public's view.¹³⁴

The Fourteenth Amendment guarantees equal protection by treating all similarly situated persons alike.¹³⁵ In recent cases where regulations aimed at restoring public order have adversely affected the homeless, courts have tried to ascertain whether the regulations reflect official animus against the homeless.¹³⁶ In *Rou-*

¹³⁰ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1576 (S.D. Fla. 1992) (emphasizing ordinances resulting in arrests based on harmless conduct).

¹³¹ See *Ades*, *supra* note 14, at 625-27 (listing governmental interests advanced by local governments in response to constitutional challenges).

¹³² U.S. CONSR. amend. XIV, § 1.

¹³³ See *Pottinger*, 810 F. Supp. at 1583 (holding laws that are aimed at improving Miami's quality of life adversely impact homeless and infringe upon their right to travel in violation of Equal Protection Clause).

¹³⁴ See *Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991-X, 1994 WL 447283, at *12 (N.D. Tex. Aug. 18, 1994). The district court discussed how vagrancy laws may indicate a systematic prejudice against the poor and the homeless. *Id.* However, the court asserted that the homeless have political support by virtue of their representation in litigation, and the numerous advocacy organizations that exist for their benefit. *Id.*

¹³⁵ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Equal protection has been described by the Supreme Court as "essentially a direction that all persons similarly situated should be treated alike." *Id.* A group home for the mentally-challenged successfully sought review of a city's zoning decision that denied them a special use permit. *Id.* at 435. The Court stated that under the Equal Protection Clause, state laws are subject to strict scrutiny when they impinge on personal rights protected by the Constitution. *Id.* at 440. Such laws will only be upheld if they are tailored to serve a compelling state interest. *Id.*

¹³⁶ See *Pottinger*, 810 F. Supp. at 1561 (holding city's custom, policy, and practice of arresting, harassing, and interfering with homeless unconstitutional); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 387-88 (Ct. App. 1994) (holding municipal anticamping ordinance prohibiting storage of personal property constitutionally repugnant). The ordinance, while having a laudable public purpose, entirely suppressed the homeless and left them with no place to go. *Id.* at 395; *cf.* *Church v. City of Hunstville*, 30 F.3d 1332 (11th

lette v. City of Seattle,¹³⁷ in addition to the action challenging the City's "aggressive begging" ordinance,¹³⁸ the plaintiffs also questioned the constitutionality of an ordinance that prohibited sitting or lying down on public sidewalks located in commercial areas of the city during certain hours.¹³⁹ The plaintiffs made numerous claims with respect to the anti-sleeping ordinance. These claims alleged that the ordinance was: (1) invalid because it was vague;¹⁴⁰ (2) violative of the fundamental right to travel;¹⁴¹ (3) a denial of equal protection;¹⁴² and (4) violative of the right of free expression.¹⁴³ The City contended that the purpose of the ordi-

Cir. 1994) (denying preliminary injunctive relief to homeless claiming custom, policy, and practice of harassment by police); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 845, 859 (N.D. Cal. 1994) (finding comprehensive law enforcement program which encompasses social services element not hostile to homeless population).

¹³⁷ 850 F. Supp. 1442 (W.D. Wash. 1994).

¹³⁸ See SEATTLE, WASH. MUN. CODE § 12A.12.015(A)(1) (1987). This section prohibits begging with the "intent to intimidate." *Id.*; see also SEATTLE, WASH. MUN. CODE § 12A.12.015(A)(2) (1987). The regulation defines "intimidate" as conduct which "would make a reasonable person fearful or feel compelled." *Id.*

¹³⁹ SEATTLE, WASH. MUN. CODE § 15.48.040 (1993). The statute provides: "No person, after having been notified by a law enforcement officer that he or she is in violation of the prohibition in this section, shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m." in commercial areas. *Id.*

¹⁴⁰ See *Roulette*, 850 F. Supp. at 1445. In asserting their procedural due process claim plaintiff's relied on *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 (1972) and *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 87 (1965), comparing Seattle's sidewalk ordinance to the vagrancy statutes that were struck down for allowing arbitrary and discriminatory enforcement of the law. *Roulette*, 850 F. Supp. at 1445-46. The court rejected the plaintiff's vagueness claim and found that the sidewalk ordinance clearly defined the proscribed behavior and did not grant police officers the discretion to define the prohibited conduct in an arbitrary manner. *Id.* at 1446.

¹⁴¹ *Roulette*, 850 F. Supp. at 1447 (citing *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898 (1986) and *Shapiro v. Thompson*, 394 U.S. 618 (1969), recognizing right to travel as fundamental constitutional right). The court, however, held that the sidewalk ordinance did not impermissibly impinge upon the plaintiff's right to travel because it did not represent a total restriction of movement. *Roulette*, 850 F. Supp. at 1448. Under the ordinance, individuals are free to travel into commercial areas and are free to sit or lie down elsewhere. *Id.* The district court found that the ordinance was justified by Seattle's substantial interest in preserving aesthetically pleasing public facilities. *Id.* The court distinguished the Seattle ordinance from the ordinances at issue in *Pottinger* and *Tobe* where they were the result of a coordinated effort to drive the homeless from public spaces by attempting to ban access to all public areas. *Id.*

¹⁴² *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1449-50 (W.D. Wash. 1994) (denying plaintiff's request to treat homelessness as suspect class and applying minimal scrutiny test in finding ordinance constitutional).

¹⁴³ *Id.* at 1448-49. The court refused to recognize the act of sitting or lying down as protected expressive conduct. *Id.* They further noted that to do so would virtually require that every act by homeless people in public be acknowledged as a social statement protected by the First Amendment. *Id.*

nance was to provide safe and efficient movement of pedestrians and goods on public sidewalks.¹⁴⁴

In addressing the viability of the constitutional claims, the court distinguished the plaintiffs' arguments relying on prior decisions that were favorable to the homeless, *Pottinger v. City of Miami*¹⁴⁵ and *Tobe v. City of Santa Ana*,¹⁴⁶ by explaining that the ordinances involved in *Roulette* were not the result of a concerted effort by municipal leaders to target the homeless.¹⁴⁷ Consequently, the court held that under the rational basis test¹⁴⁸ the City's legitimate interests in public safety were rationally related to and advanced by the prohibition on sitting or lying down on public streets.¹⁴⁹

In *Tobe*, upon invalidating an anticamping ordinance,¹⁵⁰ the California Court of Appeals discussed at length the City of Santa Ana's systematic "crusade against the homeless."¹⁵¹ The stated goal of this program was to remove all indigents and their belongings from the community.¹⁵² To accomplish this goal, the City

¹⁴⁴ *Roulette*, 850 F. Supp. at 1445. The legislative intent listed specific purposes such as enhancing public safety and promoting the "economic health and productivity of commercial areas." *Id.*

¹⁴⁵ 810 F. Supp. 1551 (S.D. Fla. 1992); see *supra* notes 83-91 and accompanying text (discussing challenges brought in *Pottinger*).

¹⁴⁶ 27 Cal. Rptr. 2d 386 (Ct. App. 1994); see *infra* notes 150-55 and accompanying text (discussing challenges brought in *Tobe*).

¹⁴⁷ *Roulette v. City of Seattle*, 850 F. Supp. 1442, 1448 (W.D. Wash. 1994).

¹⁴⁸ See *infra* note 164 and accompanying text (discussing rational relation test).

¹⁴⁹ *Roulette*, 850 F. Supp. at 1447. The legitimate government interests that the ordinance sought to protect are ensuring pedestrian safety and protecting the economic vitality of the commercial areas. *Id.*

¹⁵⁰ See *Tobe*, 27 Cal. Rptr. 2d at 392. In invalidating the ordinance, the court noted that government interests affecting the homeless include a significant interest in providing for the efficient use of, and preserving the aesthetic qualities of, public facilities. *Id.* at 394. However, though substantial, the government's interests may not entirely suppress the fundamental rights and interests of a minority group. *Id.*

¹⁵¹ See *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 389 (Ct. App. 1994). In 1990, the City of Santa Ana agreed to cease policies which discriminated against the homeless, including police "sweeps" of public spaces and arrests of the homeless for trivial offenses. *Id.* Some acts that were considered criminal prior to the stipulation were dropping a match, a leaf, or a piece of paper. *Id.* The court chronicled detailed evidence that was presented to the trial court which illustrated a virtual "crusade against the homeless." *Id.* at 387.

¹⁵² *Tobe*, 27 Cal. Rptr. 2d at 387. As early as 1988, a task force was formed with the purpose of fulfilling Santa Ana City Council's policy that "vagrants are no longer welcome in the City." *Id.* The court recited repeated actions taken by the City to dispel homeless, including the confiscation of abandoned shopping carts and sleeping bags used by the homeless and stored on public property. *Id.* at 388. Other actions included strictly enforcing park closing hours, harassment sweeps conducted by the police, and the regular use of water sprinklers to render public areas unfit for sleeping or lying. *Id.* The court stated that the facts in *Tobe* were similar to and could not be distinguished from similar attempts to target the homeless that were declared unconstitutional in *Pottinger*. *Id.* at 393 n.8. The

Council not only enacted an anticamping ordinance,¹⁵³ but also employed a sweeping policy which specifically targeted the homeless.¹⁵⁴ Though the California Court of Appeals did not weigh the constitutionality of these acts within an equal protection framework, it appears that such manifestations of government hostility are within the scope of what the Equal Protection Clause was enacted to prevent.¹⁵⁵

II. LAWS IMPACTING THE HOMELESS SHOULD BE SUBJECTED TO HEIGHTENED LEVELS OF SCRUTINY

Laws that discriminate on the basis of suspect classification,¹⁵⁶ or which impinge upon fundamental rights,¹⁵⁷ are subject to strict scrutiny, and will be upheld only if they are narrowly tailored to meet a compelling governmental interest.¹⁵⁸ The Supreme Court has also developed an intermediate level of scrutiny which re-

Tobe court stated that the ordinance enacted was a covert attempt to sidestep the 1990 stipulation. *Id.* at 392.

¹⁵³ See *Tobe*, 27 Cal. Rptr. 2d at 388. The court referred to Santa Ana's passage of the anticamping ordinance as another "offensive" in the "war on the homeless." *Id.* The ordinance provides that:

[T]he public streets and areas within the City of Santa Ana should be readily accessible and available to residents and the public at large. The use of these areas for camping purposes or storage of personal property interferes with the rights of others to use the areas for which they were intended. The purpose of this Article is to maintain public streets and areas within the City of Santa Ana in a clean and accessible condition.

SANTA ANA, CAL. MUN. CODE, ch. 10, art. VIII, § 10-400 (1992).

¹⁵⁴ *Tobe*, 27 Cal. Rptr. 2d at 387-89 (discussing task force objectives designed to remove vagrants from city limits).

¹⁵⁵ See Simon, *supra* note 20, at 664-670 (discussing equal protection analysis of discriminatory actions against vagrants).

¹⁵⁶ See *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938). Justice Harlan Fisk Stone's famous dictum recognized that a classification is suspect if it is directed to a "discrete and insular minority." *Id.* But see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 290 n.28 (1978) (weakening Justice Stone's *Carolene* criteria by noting that discreteness and insularity are not necessary to holding particular classification invidious).

¹⁵⁷ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992) (finding Miami's practice of arresting indigents infringes on their fundamental right to travel).

¹⁵⁸ See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). Government actions which discriminate on the basis of suspect classifications (race, alienage, and national origin), or which impinge on constitutionally protected rights, will be valid only if they are narrowly tailored to meet compelling governmental interests. *Id.* This need for a strong nexus between the ends and means of a classification is because suspect classifications "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy." *Id.* Under heightened scrutiny the law must be substantially related to an important governmental purpose. *Id.* at 441; see also *Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 904 (1986) (noting that state law classifications infringing upon constitutionally protected rights require heightened justification); *Pottinger*, 810 F. Supp. at 1581 (finding that arresting indigents for sleeping, lying down, or eating in public serves no compelling state interests).

quires that a classification must be substantially related to an important governmental interest.¹⁵⁹ Intermediate scrutiny is not as stringent as strict scrutiny and, therefore, does not require as great a nexus between the government's objectives to be achieved and the means employed to obtain those objectives.¹⁶⁰ To date, only legislative classifications based on gender¹⁶¹ or illegitimacy¹⁶² have been afforded the intermediate level of scrutiny by the Supreme Court.¹⁶³ Lacking a finding of strict or heightened scrutiny, a legislative classification need only bear a rational relationship to a legitimate government interest.¹⁶⁴

The Supreme Court has not delineated a precise test for determining which groups qualify for suspect or quasi-suspect status.¹⁶⁵ Several factors have been considered by the Court in determining whether a law should be subjected to heightened scrutiny.¹⁶⁶ One factor the Supreme Court has addressed is whether the affected group's defining characteristic is immutable.¹⁶⁷ Race, alienage, illegitimacy, and national origin have been

¹⁵⁹ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982). The Court reasoned that legislation must have an "exceedingly persuasive justification" when such legislation classifies individuals based on gender (quoting *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981) and *Personnel Adm'r. of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). *Id.* The Court in *Hogan* stated that laws meet the burden of "exceedingly persuasive justification" by showing at the minimum, that the classification "serves 'important government objectives . . . and that the means employed' are 'substantially related to the achievement of those objectives.'" 458 U.S. at 724 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

¹⁶⁰ See *supra* notes 158-59 and accompanying text.

¹⁶¹ *E.g.*, *Craig v. Boren*, 429 U.S. 190, 198 (1976) (holding gender irrelevant classification for purpose of establishing drinking age).

¹⁶² *E.g.*, *Trimble v. Gordon*, 430 U.S. 762, 762 (1977) (viewing illegitimacy as classification subject to intermediate scrutiny).

¹⁶³ See *supra* notes 155-60 and accompanying text (discussing intermediate scrutiny).

¹⁶⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973) (noting traditional standard of review "requires only that State's system be shown to bear some rational relationship to legitimate state purpose"); see also GERALD GUNTHER, *CONSTITUTIONAL LAW* 608-09 (12th ed. 1991). The author notes that under the basic standard of the Court's equal protection analysis only a "minimal" fit must exist between legislative means and objectives. *Id.*

¹⁶⁵ See *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (stating that "[s]everal formulations might explain our treatment of certain classifications as 'suspect'"); *Rodriguez*, 411 U.S. at 98-99 (Marshall, J., dissenting) (stating that Supreme Court has "applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause").

¹⁶⁶ See *infra* notes 167-71 and accompanying text (listing factors used to determine whether group may be protected under heightened scrutiny); see also *TRIBE*, *supra* note 36, § 16-23, at 1545 (discussing criteria used in determining suspectness).

¹⁶⁷ See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (noting immutable characteristics are "seldom relevant to the achievement of any legitimate state interest"); *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (noting immutable characteristics such as sex, race, and national origin are "determined solely by the accident of birth").

established as immutable characteristics, that are unalterable or beyond an individual's control.¹⁶⁸ The Court has also considered whether a group has historically suffered from discrimination¹⁶⁹ or has a history of political powerlessness.¹⁷⁰ Furthermore, the Court has considered whether the defining characteristic of a group is at all related to its members' ability to perform in or contribute to society.¹⁷¹

The protection of heightened scrutiny was recently expanded by the United States District Court for the Southern District of Ohio which held that laws adversely affecting individuals based on their sexual orientation would be subjected to strict or heightened scrutiny.¹⁷² In rendering its decision, the court weighed such fac-

¹⁶⁸ See *Cleburne*, 473 U.S. at 440. Laws that classify based upon race, alienage, or national origin are "subjected to strict scrutiny and will be sustained only if they are suitably tailored to serve a compelling state interest." *Id.* Courts also recognize gender and illegitimacy as quasi-suspect classes. *Id.* at 440-41; see, e.g., *Graham v. Richardson*, 403 U.S. 365, 377 (1971) (recognizing alienage as suspect class); *Korematsu v. United States*, 323 U.S. 214, 218 (1944) (recognizing national origin as suspect class).

¹⁶⁹ See *Cleburne*, 473 U.S. at 440-42 (noting discrimination may be longstanding and "is unlikely to be rectified soon by legislative means"); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (weighing whether aged have been subjected to long-standing discriminatory treatment); *Frontiero*, 411 U.S. at 684-85 (noting sex discrimination has "long and unfortunate history" in United States).

¹⁷⁰ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (recognizing political powerlessness as traditional indicia of suspectness); see also *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (noting that homeless may be afforded extraordinary protection due in part to political powerlessness).

¹⁷¹ See *Cleburne*, 473 U.S. at 441-44 (finding mentally-challenged people have reduced ability to cope and function with everyday challenges, and legislative distinctions based upon their reduced abilities are constitutionally permissible). The Court noted that certain characteristics like illegitimacy are beyond an individual's control and bear no relation to an individual's ability to participate in and contribute to society. *Id.* at 441; *Matthews v. Lucas*, 427 U.S. 495, 505 (1976) (finding individual's ability to participate in and contribute to society is not dependent upon illegitimacy status); *Murgia*, 427 U.S. at 310-11, 315 (holding individual's age bears relationship to ability to perform as police officer); *Frontiero*, 411 U.S. at 686 (deciding gender "frequently bears no relation to ability to perform or contribute to society"); see also *Plyler v. Doe*, 457 U.S. 202, 217 n.14 (1982) (stating legislation adversely affecting groups "by virtue of circumstances beyond their control suggest the kind of 'class or caste' treatment that the Fourteenth Amendment was designed to abolish").

¹⁷² See *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746, at *2 (S.D. Ohio Aug. 9, 1994). Plaintiffs challenged a referendum which repealed ordinances enacted to prohibit discrimination based upon sexual orientation in city employment and appointments. *Id.* In weighing whether legislation adversely impacting individuals based on their sexual orientation should be subjected to heightened or strict scrutiny, the court outlined the most decisive factors put forth by the Supreme Court in determining suspect classification. *Id.* at *16. The court concluded that "sexual orientation is a quasi-suspect classification." *Id.* at *18. The court based its decision on five factors:

(1) whether an individual's sexual orientation bears any relationship to his or her ability to perform, or to participate in, or contribute to, society; (2) whether the members of the group have any control over their sexual orientation; (3) whether sexual orientation is an immutable characteristic; (4) whether that group has suffered a history of

tors as whether gays, lesbians, and bisexuals have been subjected to a history of discriminatory treatment, suffer from political powerlessness, or have been handicapped by such disabilities that extraordinary protection as a group is warranted.¹⁷³

The Supreme Court has refused to recognize classifications based on wealth or poverty as suspect.¹⁷⁴ However, the Federal District Court for the Southern District of Florida, in *Pottinger v. City of Miami*,¹⁷⁵ opened the door for an inquiry into whether the laws affecting the homeless should be subjected to heightened levels of scrutiny by recognizing that the homeless may commonly possess the traditional indicia of suspectness.¹⁷⁶ Although courts have been reluctant to extend suspect classification to the homeless,¹⁷⁷ the Supreme Court has evidenced a tendency to disfavor legislative distinctions based upon wealth.¹⁷⁸ In *San Antonio In-*

discrimination based on their sexual orientation; and (5) whether the class is politically powerless.

Id.

¹⁷³ See *Equality Foundation*, 1994 WL 442746, at *18-20 (weighing factors of suspectness applying to sexual orientation).

¹⁷⁴ See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988) (finding that statutes affecting wealthy and poor unequally are not afforded strict scrutiny analysis solely on that basis); *Harris v. McRae*, 448 U.S. 297, 323 (1980) (explaining poverty alone is not basis for suspect classification); *Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (stating that financial need alone does not identify suspect class in denying poor women suspect classification).

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

¹⁷⁶ *Id.* at 1578. Though the court recognized that the homeless evidence "traditional indicia of suspectness," the court declined to rule on whether the homeless should be afforded the protection of a suspect class. *Id.* But see *infra* note 177 (discussing courts denying suspect classification to homeless).

¹⁷⁷ See, e.g., *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992) (concluding that homelessness does not warrant suspect classification); *Johnson v. City of Dallas*, No. CIV.A.3:94-CV-991X, 1994 WL 447283, at *11-13 (N.D. Tex. Aug. 18, 1994) (denying suspect classification to homeless because this classification lacks some fair relationship to legitimate public purpose); *Joyce v. City of San Francisco*, 846 F. Supp. 843, 859 (N.D. Cal. 1994) (declining to extend heightened or strict scrutiny to laws affecting homeless); *D'Aguanno v. Gallagher*, 827 F. Supp. 1558, 1563 (M.D. Fla. 1993) (finding homeless are not suspect class for purpose of equal protection analysis); *People v. Scott*, 26 Cal. Rptr. 2d 179, 183 n.9 (App. Dep't. Super. Ct. 1993) (rejecting amici curiae argument that homeless are "suspect class" entitled to protections of heightened scrutiny); *People v. Zimmerman*, 19 Cal. Rptr. 2d 486, 491 (App. Dep't. Super. Ct. 1993) (finding beggars do not constitute suspect class for purposes of equal protection analysis).

¹⁷⁸ See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966) (striking down poll tax). The Supreme Court, under Chief Justice Earl Warren, appeared close to declaring wealth a suspect classification by stating: "Lines drawn on the basis of wealth or property render a classification highly suspect." *Id.*; see also *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (invalidating one-year residency requirement as condition to receiving welfare benefits); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (holding state must provide indigent criminal defendants free trial transcripts necessary to file appeal). But see *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988). The Court noted that it has repeatedly denied suspect classification based on wealth alone. *Id.* The Court stated that "[w]e have previously rejected the suggestion that statutes having different effects on the wealthy and the poor should on that account alone be subjected to strict equal protection scrutiny." *Id.*

dependent School District v. Rodriguez,¹⁷⁹ the Supreme Court firmly rejected the argument that classifications based on wealth alone should be subject to strict scrutiny.¹⁸⁰ However, Justice Marshall's dissent raised the possibility of the application of intermediate scrutiny to wealth classifications by voicing dissatisfaction with the Court's denial of suspect status to the plaintiffs.¹⁸¹

The homeless, as a subset of the poor, face many of the obstacles which courts have identified as applying to classes that have been afforded heightened scrutiny.¹⁸² The Supreme Court has recognized that legislative classifications based upon immutable characteristics often justify heightened levels of scrutiny.¹⁸³ American political and economic principles have traditionally supported the prospect of infinite upward mobility.¹⁸⁴ Although class mobility has been a reality throughout our nation's development,¹⁸⁵ recent studies indicate that people's chances of improving their socioeco-

¹⁷⁹ 411 U.S. 1 (1973).

¹⁸⁰ See *id.* at 4-5. A class action suit was brought on behalf of schoolchildren who resided in a property district distinctly poorer than other districts to challenge Texas's system of financing public education based upon the property tax base. *Id.* The Court rejected the plaintiff's arguments for strict scrutiny analysis and noted that it had never "held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny." *Id.* at 29; cf. *supra* note 178. The Warren Court cases which applied heightened levels of scrutiny to laws burdening the poor also involved distinctions which constituted an infringement of a constitutionally protected fundamental right. *Id.*

¹⁸¹ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98-99 (1973) (Marshall, J., dissenting). Justice Marshall suggested a "sliding scale" approach to equal protection analysis by stating:

I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause.

Id.

¹⁸² See *supra* notes 167-71 and accompanying text (discussing factors considered by courts in determining whether to grant suspect or quasi-suspect status to group).

¹⁸³ See *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (recognizing that classifications based upon immutable traits are "contrary to the basic concept . . . that legal burdens should bear some relationship to individual responsibility or wrongdoing").

¹⁸⁴ See Marc S. Gerber, *Equal Protection, Public Choice Theory, and Learnfare: Wealth Classifications Revisited*, 81 GEO. L. J. 2141, 2161 (1993). The author noted that America has enjoyed a history of opportunity and prosperous growth. *Id.* American political and socioeconomic systems have ingrained upon the American consciousness the proposition that upward mobility is a possibility. *Id.*

¹⁸⁵ See *id.* The fact that people have moved up and down the socioeconomic ladder indicated that class mobility is a reality. *Id.*; Ronald Brownstein, *America's Anxiety Attack; the Cold War Is Over, the Family Is Collapsing, the Economy Is Going Global and the Melting Pot Is Boiling—When Everything's in Flux, What's a Nation To Do?*, L.A. TIMES, May 8, 1994, (Magazine), at 14 (noting Americans have traditionally considered upward mobility a birthright).

conomic status have significantly diminished.¹⁸⁶ Accordingly, an individual's lack of control over access to wealth suggests that wealth as a trait should be afforded immutable or quasi-immutable status.¹⁸⁷

When a group's defining characteristic has a direct bearing on the members' ability to function in or contribute to society, the Court has declined to afford the class suspect or quasi-suspect status.¹⁸⁸ Age and mental ability are characteristics that have been found by the Supreme Court to bear a relationship to an individual's ability to perform, participate in, or contribute to society.¹⁸⁹ The changing composition of homelessness indicates that homelessness does not necessarily bear a relationship to one's ability to function in society.¹⁹⁰ Homelessness is increasingly the result of factors which are not related to an individual's ability to perform in society, such as adverse economic conditions, the lack of low-income housing and affordable health care, and displacement by

¹⁸⁶ See Gerber, *supra* note 184, at 2161. An Urban Institute study found that the chances of an individual moving their income classification from the bottom 20% to the top 40% were 1 in 10. *Id.* Another study revealed that 75% of the 20-year-olds who started in the bottom quintile remained there 30 years later and virtually none made it to the top quintile. *Id.*; see also Brownstein, *supra* note 185, at 14 (discussing how advancing technology and integrating global markets are forcing companies to reexamine basic operations, thereby undermining upward mobility of Americans); Jonathan Eig, *Temporary Workers Alter Face Of Business, Job-seekers Fear Trend; Firms Like It*, DALLAS MORNING NEWS, June 5, 1994, at A1 (noting growth in low-wage, temporary, and part time jobs represents declining opportunities for upward mobility); *Study By University of Michigan Confirms Trends Toward Extremes in Financial Split*, DETROIT FREE PRESS, Nov. 1, 1991, at A14. A University of Michigan study disclosed the decreased possibilities of upward mobility among the working poor. *Id.* The study noted that although the number of people who moved up and out of the middle class in the 1980's was greater than those falling down and out, the number of middle-income people falling to low-income status significantly increased. *Id.* Throughout the 1980's, the division between rich and poor increased. *Id.*

¹⁸⁷ See Gerber, *supra* note 184, at 2161-62. The author acknowledged that although wealth has not been recognized as an immutable trait, the growing lack of upward mobility indicates that wealth should be afforded quasi-immutable status. *Id.*

¹⁸⁸ See *Frontiero v. Richardson*, 411 U.S. 677, 686-87 (1973) (recognizing "sex characteristic frequently bears no relation to ability to perform or contribute to society"); *TRIBE*, *supra* note 36, § 16-33, at 1615 (discussing Supreme Court's finding that lack of group's responsibility for its own defining characteristic is relevant in determination of heightened scrutiny).

¹⁸⁹ *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440-41 (1985) (finding mental disability bears "undeniable" relationship to one's ability to perform); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (declining to apply heightened protection to police officers over the age of 50, because of relationship between increasing age and physical ability).

¹⁹⁰ See *supra* note 15 and accompanying text (discussing factors contributing to homelessness).

natural disasters.¹⁹¹ Thus, homelessness is not necessarily a characteristic defining one's ability to contribute to society.¹⁹²

The homeless have suffered a history of purposeful governmental discrimination.¹⁹³ Courts have recognized that antihomeless legislation represents continuing governmental hostility toward the homeless.¹⁹⁴ Discriminatory actions against the homeless as a group have ranged from government sanctioned arrest sweeps and destruction of their property,¹⁹⁵ to incarceration without any proof of the commission of a criminal act.¹⁹⁶ Such purposeful discrimination against the homeless as a group calls for providing them with the protection of suspect or quasi-suspect status.¹⁹⁷

Typically, homeless individuals lack a legal address, a place to bathe, access to transportation or telephones, and often suffer from poor health.¹⁹⁸ These factors make it difficult for the home-

¹⁹¹ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1558, 1564 (S.D. Fla. 1992). Persons can be born into homelessness. *Id.* at 1558. Economic hard times may cause an individual to lose their job or home. *Id.* at 1564. Natural disasters can destroy one's residence and result in the individual becoming homeless. *Id.*; see also *supra* note 15 and accompanying text (discussing factors beyond one's control which may cause homelessness).

¹⁹² See *Edwards v. California*, 314 U.S. 160, 184-85 (1941) The Court stated that, "[i]ndigence . . . is a neutral fact—constitutionally an irrelevance, like race, creed, or color." *Id.*; *Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, No. C-1-93-773, 1994 WL 442746, at *16-19 (S.D. Ohio Aug. 9, 1994). The court, in determining that sexual orientation should be afforded quasi-suspect status held that sexual orientation has no bearing upon an individual's ability to function in or contribute to society. *Id.*

¹⁹³ See *Simon, supra* note 20, at 668-69 (discussing history of government hostility towards the homeless dating back to 1600's).

¹⁹⁴ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1566 (S.D. Fla. 1992) (recognizing City of Miami's custom, policy, and practice of arresting, harassing, and interfering with homeless people and their property constituted systematic effort to drive homeless from Miami's environs); *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386, 392 (Ct. App. 1994) (discussing City of Santa Ana's program to rid community of homeless and their belongs represented concerted, discriminatory efforts against homeless); see also *supra* notes 150-55 and accompanying text (describing manifestations of government hostility noted by *Tobe* court).

¹⁹⁵ See *Pottinger*, 810 F. Supp. at 1555-59 (noting City of Miami's practice of conducting arrest sweeps of homeless, and seizing and destroying their property); *Tobe*, 27 Cal. Rptr. 2d at 388-89 (discussing Santa Ana's policy of engaging in homeless "harassment sweeps," and of confiscating and destroying their personal property).

¹⁹⁶ See *Simon, supra* note 20, at 669 (noting historically homeless have been jailed absent proof of their committing any criminal acts).

¹⁹⁷ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (recognizing whether group has been "subjected to history of purposeful unequal treatment" is factor to be weighed in determining need for "extraordinary protection"); see also *supra* note 193 and accompanying text (discussing purposeful discrimination as factor entering into Supreme Court's analysis).

¹⁹⁸ See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1557-58 (S.D. Fla. 1992). In its findings of fact, the court discussed expert testimony establishing that the homeless are plagued by chronic unemployment which is worsened by health maladies, and the lack of a legal address, bathing facilities, transportation, and telephones. *Id.* Typically, a homeless person's day is preoccupied with the struggle to obtain food and shelter. *Id.*

less to obtain and keep a job.¹⁹⁹ Additionally, the lack of a legal address and transportation make it virtually impossible for the homeless to vote, rendering them politically powerless as a group.²⁰⁰ An analysis of the foregoing factors suggests that homeless people should be afforded heightened constitutional protections as a quasi-suspect class.²⁰¹

CONCLUSION

As cities nationwide suffer from ever-increasing budget constraints, the issue of municipal liability should cause policymakers to practice due care in implementing governmental interests that are designed to improve the quality of life for all citizens. There is no denying that city budgets are burdened by costs associated with providing care for the homeless. However, increased costs stemming from law enforcement efforts that proscribe innocent conduct vital to the homeless and those resulting from judicially imposed damages, which is also associated with costly litigation, are wasteful and unjustifiable. There is no denying that the government has a legitimate interest in maintaining and preserving public areas for its citizens and visitors, however, "a minority may not be entirely suppressed in the name of otherwise laudable public purposes."²⁰² Although the Supreme Court has declined to extend strict scrutiny to classifications based upon wealth, the Court has not expressly addressed whether intermediate scrutiny would be applicable. Laws adversely impacting the homeless should be subjected to heightened judicial scrutiny. In order to

¹⁹⁹ See *id.* at 1558 (recognizing that many homeless are chronically unemployed).

²⁰⁰ See Simon, *supra* note 20, at 668. In discussing discrimination against the homeless, the author noted that "[t]he homeless are an increasingly unpopular, politically powerless group who are readily identifiable by their dress and mode of life." *Id.*

²⁰¹ See *id.* at 676 (concluding homeless must be afforded extraordinary protections by courts based on history of discrimination and political powerlessness); see also Greg Vamos, Comment, Kreimer v. Bureau of Police: *Are the Homeless Ready for Suspect Classification?*, 14 WHITTIER L. REV. 731, 746 (1993) (arguing wealth-based distinctions and subordination will continue unless homeless are afforded suspect classification). Factors such as the lack of low-income housing, poor job opportunities, and high rate of substance abuse combine to make the state of homelessness an involuntary one. *Id.* at 745. See generally Gerber, *supra* note 184, at 2164. The author argued that intermediate scrutiny is the proper level of judicial review to be applied in order to protect the poor from "invidious wealth classifications." *Id.*

²⁰² Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 395 (Ct. App. 1994).

achieve the optimum quality of life for all, we must preserve the guarantees provided for in the Constitution.

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