

March 2016

Median Bans, Anti-Homeless Laws and the Urban Growth Machine

Colin L. Anderson

Follow this and additional works at: <https://via.library.depaul.edu/jsj>

Recommended Citation

Colin L. Anderson, *Median Bans, Anti-Homeless Laws and the Urban Growth Machine*, 8 DePaul J. for Soc. Just. 405 (2015)

Available at: <https://via.library.depaul.edu/jsj/vol8/iss2/12>

This Article is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Journal for Social Justice by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

MEDIAN BANS, ANTI-HOMELESS LAWS AND THE URBAN GROWTH MACHINE

COLIN L. ANDERSON*

PART I: INTRODUCTION

In July of 2013, the Portland, Maine City Council voted to prohibit individuals from standing in the city's many street medians.¹ The City Council ostensibly passed the law out of concern for traffic safety, and not because of a desire to limit panhandling by the city's growing homeless population,² who often stationed themselves on traffic islands to solicit money.³ Indeed, many of Portland's community members expressed sim-

* J.D. Candidate, The University of Pennsylvania Law School, 2016; M.A. in American Studies, New York University, 2013; B.A. Boston College, 2009.

¹ Karen Antonacci, *Residents, Visitors Support Portland Panhandling Ban*, PORTLAND PRESS HERALD, July 17, 2013, available at http://www.pressherald.com/2013/07/17/residents-visitors-back-panhandling-ban_2013-07-17/.

² Although not all panhandlers are homeless, the public discourse on the median bans, and panhandling more generally, has often treated homelessness interchangeably with the impoverished. See CITY OF PORTLAND, MAINE PUBLIC SAFETY/HEALTH & HUMAN SERVICES DEP'T, JUNE 11, 2013 MEETING MINUTES 3-4 (June 11, 2013), available at <http://www.portlandmaine.gov/AgendaCenter/ViewFile/Minutes/06112013-138>. In addition, the law review literature has analyzed anti-panhandling ordinances under the broader category of anti-homeless laws, and likewise treated homelessness and extreme poverty interchangeably. See, e.g., Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1 (1996). This article primarily employs and refers to the category of homelessness, but also includes various references to the impoverished generally.

³ CITY OF PORTLAND, MAINE PUBLIC SAFETY/HEALTH & HUMAN SERVICES DEP'T, *supra* note 2, at 1-5. Portland's homeless population nearly doubled from 276 in 2009 to 480 in 2013. MAINE STATE HOUSING AUTHORITY, 480 HOMELESS PEOPLE IN THE PORTLAND COC: ANNUAL POINT IN TIME SURVEY—JAN. 30, 2013 (Jan. 30, 2013), available at <http://www.portlandmaine.gov/ArchiveCenter/ViewFile/Item/217>.

ilar concerns when they advocated passing the ordinance at a public Council meeting, often specifically proclaiming to be worried about the safety of the panhandlers.⁴ Notably, none of the speakers at the meeting were homeless.⁵ Nonetheless, despite the City Council's professed intentions, critics soon charged that the median ban targeted the homeless and marked an effort to "improve" the aesthetics of the city for tourists.⁶ Soon afterwards, the ACLU of Maine filed a lawsuit challenging the constitutionality of the ordinance.⁷

Taking Portland's recent median ban and the controversy surrounding its enactment as its entry point, this article analyzes the anti-homeless laws preventing individuals from occupying traffic islands that local governments have enacted in recent years.⁸ In doing so, it draws on a range of work from disciplines

⁴ CITY OF PORTLAND, MAINE PUBLIC SAFETY/HEALTH & HUMAN SERVICES DEP'T, *supra* note 2, at 2-4.

⁵ *Id.* It should be noted that an individual who worked at a homeless shelter announced his support for the ordinance, stating it responded to a safety issue and did not purposefully target the homeless. *Id.* Such a stance speaks to the messy and complicated politics surrounding anti-homeless laws that prevent any simplistic reduction of the issue to pro- and anti-homeless feelings in the citizen-body, a point I address further below. *See infra*, page 32.

⁶ *See* Lida Holst, *Maine Voices: Portland's Panhandling Ban Exacerbates a Problem By Trying to Hide It*, PORTLAND PRESS HERALD (Nov. 25, 2013), available at http://www.pressherald.com/2013/11/25/maine_voices_portland_s_panhandling_ban_exacerbates_a_problem_by_trying_to_hide_it/; Antonacci, *supra* note 1; *Our View: Median Panhandling Ban Won't Address Core Issues*, PORTLAND PRESS HERALD (July 17, 2013), available at http://www.pressherald.com/2013/07/17/median-panhandling-ban-wont-address-core-issues_2013-07-17/.

⁷ Gillian Graham, *Panhandling Lawsuit Thrust Portland Into Wider Fray on Free Speech*, PORTLAND PRESS HERALD, Sept. 26, 2013, available at http://www.pressherald.com/2013/09/26/lawsuit-thrusts-city-into-wider-fray-on-free-speech_2013-09-26/.

⁸ *See, e.g., Thayer v. City of Worcester*, 755 F.3d 60, 65 (1st Cir. 2014) (upholding a law banning activities on traffic medians in Worcester, MA); *Reynolds v. Middleton*, No. 3:12-CV-00779-JAG, 2013 WL 5652493, at *1 (E.D. Va. Oct. 15, 2013) (upholding a law banning solicitations from traffic medians in Henrico County, VA); *see also* Graham, *supra* note 7 (noting that the city of Lewiston, Maine followed Portland's lead by passing a similar ban, and,

outside of legal studies, including sociology and geography, to inject into the law review discourse an account of anti-homeless laws cognizant of capitalism's underlying imperatives, especially its requisite spatial politics. In particular, this article employs sociologists John R. Logan and Harvey L. Molotch's theorization of "the city as a growth machine"⁹ as its organizational framework to argue that the logic of economic growth and its attendant spatial demands fundamentally motivate, at least in part, the anti-homeless laws of the neoliberal era.¹⁰

Logan and Molotch's "city as a growth machine" insight recognizes that "place is a market commodity that can produce wealth and power for its owners"¹¹ and that urban elites push a "growth consensus" ideology which installs economic growth facilitation as the primary purpose of local government.¹² This insight provides the socio-spatial analysis and diagnostic rigor that the law review literature on this subject lacks.¹³ Contextualizing

despite a lawsuit challenging Portland's law, the city council of Biddeford, Maine was considering enacting their own ban).

⁹ JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 50 (20th anniversary ed. 2007). Molotch first defined the concept of the "city as growth machine" in a 1976 essay, but his joint work with Logan elaborates on the theory. See Harvey Molotch, *The City As a Growth Machine: Toward a Political Economy of Place*, 82 *AMERICAN JOURNAL OF SOCIOLOGY* 309 (1976).

¹⁰ In bringing space to the fore in my analysis of anti-homeless laws I follow the lead of scholarship that has called for greater attention to the spatial politics of law. See Nicholas K. Blomley & Joel C. Bakan, *Spacing Out: Towards a Critical Geography of Law*, 30 *OSGOODE HALL L. J.* 662, 662-64 (1992); Sharron FitzGerald & Andreas Philippopoulos-Mihalopoulos, *Invisible Laws, Visible Cities*, 17 *GRIFFITH L. REV.* 435, 435-37 (2008).

¹¹ LOGAN & MOLOTCH, *supra* note 9.

¹² *Id.* at 51.

¹³ See, e.g., Foscarinis, *supra* note 2; Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness* 6 *GEO. J. ON POVERTY L. & POL'Y* 145 (1999); Helen Hershkoff & Roger Conner, *Aggressive Panhandling Laws: Do These Statutes Violate the Constitution?* 79 *A.B.A. J.* 40 (1993); Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco* 13 *HASTINGS WOMEN'S L. J.* 261 (2002); Paul Ades, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Out-*

door Public Areas as a Violation of the Right to Travel, 77 CAL. L. REV. 595 (1989); Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes*, 96 J. CRIM. L. & CRIMINOLOGY 329 (2005); 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 (1992); Sarah Finnane Hanafin, Student Work, *Legal Shelter: A Case For Homelessness As A Protected Status Under Hate Crime Law And Enhanced Equal Protection Scrutiny*, 40 STETSON L. REV. 435 (2011); Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197 (2014); Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545 (2006); Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches By Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407 (2008); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615 (1956); Arthur H. Sherry, *Vagrants, Rogues, and Vagabonds—Old Concepts in Need of Revision*, 48 CAL. L. REV. 557 (1960); Kathryn Hansel, *Constitutional Othring: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J. L. & SOC. POL'Y 445 (2011); Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995); Robert C. McConkey III, *"Camping Ordinances" and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas*, 26 CUMB. L. REV. 633 (1996); Case Comment, *Constitutional Law—Eighth Amendment—Ninth Circuit Holds That "Involuntary" Conduct Cannot Be Punished.—Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), 120 HARV. L. REV. 829 (2007); Jason Leckerman, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540 (2001); Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. AND POL'Y 165 (1999); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L. J. 1165 (1996); Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997); Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004); Cassandra Goldie, *Living in Public Space: A Human Rights Wasteland?* 27 ALTERNATIVE L. J. 277 (2002); Gary Blasi, *Advocacy And Attribution: Shaping And Responding To Perceptions Of The Causes Of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207 (2000); Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 J.L. Soc'y 515 (2012); Tulin Ozdeger, *Targeting the Homeless: Constructing Alternatives to Criminalization Mea-*

anti-homeless action within the “city as a growth machine” paradigm reveals the systemic ideological and economic impetuses behind the excise of homeless individuals from public space. Furthermore, capitalism’s desire for homogeneous space¹⁴ also expresses itself in a “place patriotism of the masses,”¹⁵ informing notions of civic pride that lead citizens outside the elite to perceive growth as beneficial to the majority.¹⁶ This widespread, often uncritical, endorsement of economic growth reveals middle- and working-class individuals’ complaints about the homeless as “eyesores” to be a product of capitalism’s broader ideological mandates.

Situating anti-homeless laws within the “growth machine” theory is a vital addition to the existing scholarship because it

asures in U.S. Cities, 41 CLEARINGHOUSE REV. 202 (2008). One article worth specifically addressing is Anyu Fang’s *Hiding Homelessness*, which appeared in an interdisciplinary legal studies journal. Fang’s work contextualizes anti-homeless laws within neoliberal urban restructuring and development imperatives, and discusses the spatial implications of anti-homeless laws to a fair extent. However, Fang’s analysis is wandering, covering a diversity of issues outside of the relationship between anti-homeless laws and economic development, such as knowledge production in the documenting of homeless populations, racialization processes, and the splitting of housing issues from homelessness. See Anyu Fang, *Hiding Homelessness: “Quality of Life” Laws and the Politics of Development in American Cities*, 5 INTERNATIONAL J. OF L. IN CONTEXT 1 (2009). This article diverges from Fang’s work in that it focuses on economic growth’s spatial politics in a sustained, more in-depth manner, as well analyzes the litigation challenges brought against anti-homeless laws, specifically assessing the tactics of legal advocates in relation to capitalist structures.

¹⁴ Henri Lefebvri, *Space: Social Product and Use Value*, in CRITICAL SOCIOLOGY: EUROPEAN PERSPECTIVES 285, 293 (J.W. Freiberg ed., J.W. Freiberg trans., 1979) (“[C]apitalist and neocapitalist space is a space of quantification and growing homogeneity, a merchandised space where all the elements are exchangeable and thus interchangeable. . . . Economic space and political space thus converge toward the elimination of all differences.”).

¹⁵ LOGAN & MOLOTCH, *supra* note 9, at 60.

¹⁶ As Logan and Molotch write, “the overall ideological thrust [of the growth machine] is to deemphasize the connection between growth and exchange values and to reinforce the link between growth goals and better lives for the majority.” *Id.* at 62. For the role of pride, see *Id.* at 60-62.

necessitates certain and specific legal and policy responses. It shifts the focus from myopic explanations of “discrimination” and “intolerance,”¹⁷ and nebulous claims by residents and business owners about “aesthetic concerns,”¹⁸ to the underlying, inter-related structural pressures and deep-seated modes of thought that organize and shape anti-homeless action. It also highlights the integral relationship between public space, identity and capitalism—capturing urban space as a site of political contestation and class struggle, a terrain produced by and producing capitalism’s inequalities. Pinpointing the enmeshed structural and ideological motivations for anti-homeless sentiment and laws thus allows for a more comprehensive mapping of the forces driving homeless exclusion and oppression, and reveals the systemic backdrop to anti-homeless laws that legal advocates and policy makers must confront and attack. This analysis illustrates the need for advocates to instigate far-ranging, structural responses that take into account the spatial politics of our modern, capitalist cityscapes.¹⁹ Without tackling the root motivations of anti-homeless action, such action will only spread. Even if courts strike down current laws as unconstitutional, anti-homeless regulation will merely proliferate under new guises.²⁰

¹⁷ See, e.g., Foscarinis, *supra* note 2, at 55; Foscarinis, Cunningham-Bowers & Brown, *supra* note 13, at 155; Hershkoff & Conner, *supra* note 13, at 40; Nordberg, *supra* note 13, at 282; Ades, *supra* note 13, at 603; Weisberg, *supra* note 13, at 357; Simon, *supra* note 13, at 669.

¹⁸ See, e.g., Weisberg, *supra* note 13, at 359; Foscarinis, Cunningham-Bowers & Brown, *supra* note 13, at 154-55; Foscarinis, *supra* note 2, at 55-6; Ali, *supra* note 13, at 229; Saelinger, *supra* note 13, at 554.

¹⁹ To be clear, this essay is not the first addressing a legal audience that recommends structural solutions to homelessness as opposed to merely implementing new litigation strategies. But this article is different in that it incorporates an overt understanding of space as a politicized and socially constructed sphere in addressing advocates, and maintains that any effective structural responses to anti-homeless acts must account for this fact.

²⁰ In this point I follow the observation of many critical legal scholars, such as Dean Spade, who note that “[v]arious social movements have had to contend with why legal change in the form of rights has not brought the deep transformation they were seeking, why disparities in life chances have in-

Indeed, homeless rights litigation, while well intentioned, actually perpetuates and contributes to the hegemony of pro-growth ideologies and neoliberal economic policies by obscuring the central role those ideologies and policies play in motivating anti-homeless legislation.

This article proceeds in four parts. Part II gives a brief overview of the history of laws targeting homeless individuals, from their roots in medieval England through the American anti-tramp and vagrancy laws of the late 19th and mid-20th century before the Supreme Court declared them unconstitutional in 1972. It then runs through the various forms besides median bans that anti-homeless laws have taken since that time and some of the constitutional challenges brought against them. Part III introduces the “city as growth machine” framework and discusses the work of historians and geographers in the urban studies field to present a historical account of the neoliberal city’s spatial politics. In particular, this part examines the central role of homeless populations in struggles over the appearance and use of the public landscape, noting these contests are largely the result of pro-economic growth agendas. With the historical and socio-spatial contexts of anti-homeless laws established, Part IV takes an in-depth look at three traffic median ordinances and the challenges litigants have raised against them in court—with mixed results—in three different states: Maine, Massachusetts and Virginia.²¹ This section then observes how these laws both fit the contours of growth-machine spatial politics and mark a new tactic in the efforts to control the mobility of the poor and unhoused. Finally, the article concludes in Part V with thoughts

creased during a period when we have seen the elimination of formal segregation and the advent of policies prohibiting discrimination on the basis of sex, race, and disability.” DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF LAW* 20 (2011).

²¹ *Cutting v. City of Portland*, No. 2:13-CV-359-GZS, 2014 WL 580155 (D. Me. Feb. 12, 2014); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014); *Reynolds v. Middleton*, No. 3:12-CV-00779-JAG, 2013 WL 5652493 (E.D. Va. Oct. 15, 2013).

on the recent traffic median bans' implications for policymakers and legal advocates interested in the rights of the homeless, as well as on how advocates can fight growth machine ideology. In the end, this article posits that under neoliberalism, urban economic growth policies produce a city benefiting and designed for a particular segment of society at the expense of our communities' most vulnerable members. Dismantling the "city as growth machine" system involves asking not simply how do we want to use city space, but also the intimately related question, to whom does city space belong? Creating truly equitable, open and livable urban and public spaces for all requires placing the perspectives and needs of homeless individuals and other marginalized groups above the needs of neoliberal capitalism in our spatial politics.

PART II: A BRIEF HISTORY OF ANTI-HOMELESS LAWS

Current anti-homeless laws are merely the most recent in a long history of laws targeting the homeless, indigent and poor. Most scholars cite the Statute of Laborers, passed in England in 1349 and creating the category of "vagrancy," as the first law aimed at the indigent.²² The English nobility passed the law in response to labor conditions created by the Black Plague, which so decimated the population that workers often took to the road to take advantage of higher wages in other areas.²³ The Statute of Laborers was an attempt to prevent this labor mobility and keep wages from increasing by establishing the crime of vagrancy.²⁴ About a year after the English law passed, a similar

²² Paul Ocozbek, *Introduction*, in *CAST OUT: VAGRANCY AND HOMELESSNESS IN GLOBAL AND HISTORICAL PERSPECTIVE* 1, 6 (A.L. Beier & Paul Ocozbek eds., 2008); Simon, *supra* note 13, at 635; *see also* Jarvis, *supra* note 13, at 413 and the works cited therein; Caleb Foote, *supra* note 13, at 615. On the development of the word "vagrant," *see* Sherry, *supra* note 13, at 557 n.2.

²³ Ocozbek, *supra* note 22; Jarvis, *supra* note 13, at 413; Simon, *supra* note 13, at 635.

²⁴ Ocozbek, *supra* note 22; Simon, *supra* note 13, at 635.

law appeared in France.²⁵ In the 1500s, after the population had recovered from the devastation of the Plague and a surplus of labor arose, merchants and the landed elite employed vagrancy laws to discipline labor and control the unemployed.²⁶ The Elizabethan Poor laws, a series of enactments passed from 1536 to 1604, allowed corporal punishment for vagrancy in an attempt to “promote the teaching of labor virtues” and force the unemployed into work.²⁷ Authorities also sometimes shipped vagrants overseas to the colonies or impressed them into military service.²⁸ Even at this early date, vagrancy was “predominantly an urban phenomenon,” and State authorities in England and France relied on vagrancy laws more and more to control the large influx of the traveling poor to medieval cities.²⁹ In 1662, English authorities passed the Law of Settlement and Removal, which enabled local community officials to interrogate any newly arrived individuals to determine whether or not they could support themselves.³⁰ If officials determined the newcomer would not be able to do so, they could forcibly remove that person from the town and send them back to their last known residence or place of birth.³¹

²⁵ Ocobock, *supra* note 22.

²⁶ *Id.*; Foote, *supra* note 13, at 616. A number of other factors also converged to raise unemployment rates: soldiers returned from wars abroad and could find no jobs; land enclosure became more widespread, kicking peasants off the land they had previously farmed; and craft and guild trades dissolved, leaving a subset of the populations without pensions. Simon, *supra* note 13, at 636; *see also* Ocobock, *supra* note 22, at 6-7; Jarvis, *supra* note 13, at 413-14.

²⁷ Jarvis, *supra* note 13, at 413; *see also* KENNETH L. KUSMER, *DOWN & OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* 19 (2002). One scholar notes that as early as 1494, during the reign of Henry VII, civil officials punished “beggars and idle persons” by placing them “in the stocks” and then afterwards kicking them “out of town.” Sherry, *supra* note 13, at 559.

²⁸ Ocobock, *supra* note 22, at 8, 12-13.

²⁹ *Id.* at 7-8.

³⁰ Jarvis, *supra* note 13, at 414; Simon, *supra* note 13, at 638.

³¹ Simon, *supra* note 13, at 638. However, an unintended effect of the law was that local authorities often “simply pass[ed] vagrants from parish to parish with local communities paying the bill.” Ocobock, *supra* note 22, at 11.

Early American colonists carried the English disdain for vagrants across the Atlantic,³² likewise instituting vagrancy laws modeled on their English predecessors.³³ By 1650 all the colonies had laws prohibiting vagrancy,³⁴ and the colonists considered transient individuals not only a burden on public resources, but also unworthy of aid for rejecting the protestant work ethic for a life of idleness.³⁵ In addition, colonists feared the criminality they assumed would arise from vagrants' idleness.³⁶ The practice of "warning out" became widespread, whereby town leaders physically expelled indigent individuals who wandered into their town in order to avoid taking on a public burden and to prevent "moral decay."³⁷ In line with protestant beliefs about the importance of work, many colonies increasingly punished vagrants by sending them to workhouses and forcing them to labor.³⁸ The Articles of Confederation, ratified in 1781, explicitly denied the indigent poor the right to travel to and from the individual states and exempted them from the privileges and immunities clause.³⁹ This overt exclusion demonstrates how deeply woven in the American social and political fabric anti-vagrant sentiments were at the end of the 18th century.

Throughout the 19th century, the targeting of the wandering homeless via vagrancy laws continued in the United States, par-

³² KUSMER, *supra* note 27; Jarvis, *supra* note 13, at 415.

³³ Jarvis, *supra* note 13, at 415; Sherry, *supra* note 13, at 558-61; KUSMER, *supra* note 27, at 20; Simon, *supra* note 13, at 638-39; Ocobock, *supra* note 22, at 15, 17. *See also* Foote, *supra* note 13, at 615.

³⁴ Jarvis, *supra* note 13, at 415.

³⁵ KUSMER, *supra* note 27, at 19-22. *See also, generally*, MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Stephen Kalberg trans. 2011).

³⁶ Sherry, *supra* note 13, at 564.

³⁷ KUSMER, *supra* note 27, at 20-21; Ocobock, *supra* note 22, at 15, 18. This practice became more popular as the numbers of impoverished persons grew in the late 17th and 18th century as a result of King Philip's War, general conflicts with indigenous populations, the French-Indian War, and the increasing number of former indentured servants. *Id.* at 15.

³⁸ KUSMER, *supra* note 27, at 20-34.

³⁹ Foote, *supra* note 13, at 616; Nordberg, *supra* note 13, at 266.

ticularly during economic downturns when the population of the destitute rose dramatically.⁴⁰ Every state had a vagrancy statute on the books during this period, and the Supreme Court explicitly upheld the constitutionality of such laws in 1837 in *Mayor of New York v. Miln*.⁴¹ The transition to an industrial society in the years 1820 to 1860 produced greater economic insecurity and the number of unemployed poor rose proportionately, especially in the quickly expanding urban areas of the U.S.⁴² The end of the Civil War in 1865 saw many returning soldiers enter into homelessness, either as a result of war injuries or inability to find employment.⁴³ Economic depression in 1873 further exacerbated the situation and homelessness skyrocketed.⁴⁴ City officials again turned to vagrancy statutes to control the perceived disorder, as vagrancy arrests “grew by 50 percent in New York City.”⁴⁵ In the former slave states, white Southerners used vagrancy laws to limit the mobility of blacks and coerce them into

⁴⁰ Ocobock, *supra* note, 22, at 18.

⁴¹ *Mayor, Aldermen & Commonalty of City of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142 (1837). The Court stated, “[w]e think it as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence.” *Id.* See also Nordberg, *supra* note 13, at 266; Simon, *supra* note 13, at 639.

⁴² KUSMER, *supra* note 27, at 22-23.

⁴³ *Id.* at 37; Jarvis, *supra* note 13, at 415; Ocobock, *supra* note 22, at 19. Historian Paul Ocobock notes that in “Pennsylvania, Massachusetts, and Illinois, two-thirds of vagrants were veterans.” Ocobock, *supra* note 22, at 19. On the importance of the Civil War for “laying the groundwork” for what would later become the “tramp” lifestyle, such as exposing soldiers to camp life and the use of the rail way system, see KUSMER, *supra* note 27, at 35-36.

⁴⁴ TIM CRESSWELL, *THE TRAMP IN AMERICA* 37-38 (2001); Ocobock, *supra* note 22, at 19; KUSMER, *supra* note 27, at 38; Sidney L. Harring, *Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894*, 11 *LAW & SOC’Y REV.* 873, 879 (1977).

⁴⁵ KUSMER, *supra* note 27, at 39; see also Harring, *supra* note 44 (noting that states across the country adopted “Tramp Acts” following the depressions of the 1870s).

highly exploitative labor contracts⁴⁶ or into prison camps where officials then contracted their labor out to employers.⁴⁷

In the North and West during this time period the figure of the “tramp” or “hobo” emerged, racialized and gendered as a white, male wanderer who roamed the rails cross-country from town to town.⁴⁸ The mobility provided by the railroad allowed the homeless to search for jobs across greater geographic areas and thus made homelessness a rural, as well as urban, issue at the end of the 19th century.⁴⁹ Old anxieties about vagrants reached a new pitch in American society, and tramps increasingly drew the ire of the middle and upper class.⁵⁰ Conflicts between labor and employers in the 1870s through the 1890s also catalyzed this crisis over tramps and led to the passage of anti-tramping legislation, as the swell in homeless individuals sharpened elites’ fears of losing control over labor that strikes and the formation of unions had engendered.⁵¹

Indeed, middle and upper class Americans not only blamed tramps for fomenting labor unrest, but also often mobilized anti-tramping and vagrancy laws against striking workers.⁵²

⁴⁶ Ocobock, *supra* note 22, at 20-21; CRESSWELL, *supra* note 44, at 39.

⁴⁷ See generally, DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2009). Indeed, as Historian Douglas Blackmon makes clear, this practice continued well into the 20th century. *Id.*

⁴⁸ CRESSWELL, *supra* note 44, at 20. Cresswell’s book provides an excellent history of the “multiple ways in which the tramp was made up” in the U.S. through various public and private discourses.

⁴⁹ KUSMER, *supra* note 27, at 39-43.

⁵⁰ *Id.*

⁵¹ See SVEN BECKERT, *THE MONIED METROPOLIS: NEW YORK CITY AND THE CONSOLIDATION OF THE BOURGEOISIE, 1850-1896* 303-304 & 454 n.81 (2001); Harring, *supra* note 44, at 879-95.

⁵² See Harring, *supra* note 44, at 888-90. Despite the fact that most tramps were transient laborers, unemployed due to structural forces, or often simply poor working-class individuals migrating to a promised job elsewhere in the country, elites vilified tramps as pariahs and loafers who refused to work because of laziness. See *id.* at 879-908.

Vagrancy laws remained on the books throughout the early- to mid-20th century and law enforcement officials and courts continued to apply them in myriad disturbing ways.⁵³ However, the Great Depression and changing understandings of poverty accompanying the rise of the welfare state increased societal sympathy for the homeless and extreme poor.⁵⁴ Finally, in 1972 the Supreme Court declared vagrancy laws unconstitutionally vague in *Papachristou v. City of Jacksonville*.⁵⁵ Although the Court now forbids vagrancy laws, local governments across the country continue to enact ordinances targeting the homeless and visible poor in the form of the modern anti-homeless law. The new anti-homeless laws, “[u]nlike vagrancy laws, which made the criminalization of the homeless (or ‘vagrants’) explicit. . . do not reference any particular target group. These laws can be seen as anti-homeless because they are perceived to covertly target the homeless and because enforcement of these laws disproportionately affects the homeless.”⁵⁶ The panoply of laws aimed at the homeless include prohibitions on sleeping in public,⁵⁷

⁵³ Karen H. Bancroft, *Zones of Exclusion: Urban Spatial Policies, Social Justice, and Social Services*, 39 J. SOC. & SOC. WELFARE 63, 65 (2012); See Foote, *supra* note 13 for a particularly harrowing description of procedural laxity and violent abuse of vagrancy laws against the homeless in 1950s Philadelphia. See also BLACKMON, *supra* note 47 for a history of vagrancy laws’ racist application in the 20th century American South.

⁵⁴ Ocobock, *supra* note 22, at 25.

⁵⁵ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). See also Paul Ades, *supra* note 13, at 604; Saelinger, *supra* note 13, at 550.

⁵⁶ Hansel, *supra* note 13, at 447.

⁵⁷ NAT’L LAW CENTER ON HOMELESSNESS AND POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 19 (2014) [hereinafter NAT’L LAW CENTER, NO SAFE PLACE]; Ali, *supra* note 13, at 212; Simon, *supra* note 13, at 647; Walters, *supra* note 13, at 1632-33; Foscarinis, *supra* note 2, at 17. Some cities, such as Dallas, Texas, have enacted bans on sleeping in all public areas city-wide. Foscarinis, *supra* note 2, at 17. Other cities outlawed sleeping in specific public areas. Ades, *supra* note 13, at 595. In 1990, the Mayor of Philadelphia “announced that the police would no longer permit homeless people to dwell in downtown Philadelphia from 6:00 a.m. to 10:00 p.m., and that street sweepers would remove their possessions.” Simon, *supra* note 13, at 633 n.10. Out of data collected in 2014 from 187 U.S.

criminalizing sitting down or lying down in public,⁵⁸ bans on panhandling and “aggressive” panhandling,⁵⁹ proscriptions on camping in public,⁶⁰ anti-loitering ordinances,⁶¹ sanitation ordinances,⁶² and prohibitions on food sharing.⁶³

cities, 18% had city-wide bans on sleeping in public, and 27% forbade sleeping in certain public areas. NAT’L LAW CENTER, NO SAFE PLACE at 19.

⁵⁸ NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 22; Walters, *supra* note 13, at 1633; Ali, *supra* note 13, at 213. Of the 187 cities surveyed by the National Law Center on Homelessness and Poverty in 2014 53% had laws prohibiting sitting or lying down in public, an increase of 43% since the Center’s last survey in 2011. NAT’L LAW CENTER, NO SAFE PLACE *supra* note 58, at 22.

⁵⁹ Barta, *supra* note 13, at 171; Ali, *supra* note 13, at 213-14; NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 20-1; Jarvis, *supra* note 13, at 421-22; Foscarinis, *supra* note 2, at 20-1. Some anti-panhandling laws “prohibit the activity outright, while others place strict limitations on how the action is performed.” NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 20. The National Law Center on Homelessness and Poverty found a 25% increase in laws banning begging in all public spaces among the 187 cities they monitored from 2011 to 2014, and a 20% increase in the number of cities banning begging in certain areas. *Id.*

⁶⁰ McConkey III, *supra* note 13, at 633-38; Simon, *supra* note 13, at 647; NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 18. Anti-camping laws “are often written broadly to encompass a wide range of living arrangements, prohibiting homeless people from using any resource that might be their only option for shelter.” NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 18.

⁶¹ The Supreme Court has declared anti-loitering laws unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (finding a California anti-loitering statute “unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment”). However, prohibitions on loitering remain on the books in many U.S. cities. See NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 21.

⁶² Ali, *supra* note 13, at 214-15 (“Specifically, some city ordinances prohibit urinating or defecating in public spaces, while others prohibit bathing in public fountains, or the use of shopping carts to carry and store personal belongings in public. Some cities even prohibit homeless persons from using public restrooms, while others plan to outlaw the use of these facilities for activities such as shaving, bathing, and washing items of clothing.”).

⁶³ NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 25. These laws do “[m]ore than limit[] food availability to homeless people, [they] also expose individuals or organizations, often faith-based organizations, to fines or criminal liability for feeding poor.” *Id.* Indeed, in November of 2014 police in Fort

Legal actors have challenged the constitutionality of many of these laws with mixed results.⁶⁴ The California Supreme Court upheld an anti-camping ordinance as constitutional in *Tobe v. City of Santa Ana*, and the federal court for the Northern District of California did the same in *Joyce v. City and County of San Francisco*.⁶⁵ However, in *Jones v. City of Los Angeles*, the Ninth Circuit struck down a prohibition on sleeping in public as violating the Eighth Amendment—although the court later vacated the decision as part of a settlement agreement between the parties—holding that the law punished involuntary conduct because the City of Los Angeles did not provide enough shelter space for its homeless population, forcing them to sleep outside.⁶⁶ Similarly, in *Pottinger v. City of Miami*, the federal court ruled that since homeless individuals do not choose to be homeless, a ban on sleeping in public punishes an involuntary status and thus violates the Eighth Amendment.⁶⁷ In *Pottinger*,

Lauderdale, Florida charged two pastors and a 90-year-old man for feeding the homeless in violation of a local ordinance that stipulates groups may not hand out food within 500 feet of a residence. Elizabeth Chuck, *Fort Lauderdale Charges 90-Year-Old, Two Pastors For Feeding Homeless* (Nov. 5, 2014 12:50pm), NBCNEWS.COM, <http://www.nbcnews.com/news/us-news/fort-lauderdale-charges-90-year-old-two-pastors-feeding-homeless-n241971>.

⁶⁴ Saelinger, *supra* note 13, at 555-56 (“During the past decade, in response to the passage of new anti-nuisance laws, homeless advocates and legal commentators have promulgated a substantial body of literature challenging the validity of anti-nuisance regulations, focusing on their potential constitutional defects. . . . [C]ontemporary courts have generally been reluctant to endorse constitutional challenges to new anti-nuisance laws brought by homeless advocates, and most of the provisions have been upheld.”).

⁶⁵ *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 892 P.2d 1145 (1995); *Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994); see also McCoskey III, *supra* note 13, at 633-36.

⁶⁶ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) *vacated*, 505 F.3d 1006 (9th Cir. 2007); Case Comment, *Constitutional Law—Eighth Amendment—Ninth Circuit Holds That “Involuntary” Conduct Cannot Be Punished*, *supra* note 13, at 829.

⁶⁷ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1584 (S.D. Fla. 1992); see also Walters, *supra* note 13, at 1633-34. For an in-depth look at the Eighth Amendment’s applicability to anti-homeless laws, see generally, Weisberg, *supra* note 13. Crucially, most Eighth Amendment claims have not gained

the court also found the ban denied homeless individuals their fundamental right to travel under the Fourteenth Amendment,⁶⁸ but most courts refuse to grant right to travel and freedom of movement claims.⁶⁹ Further, courts have refused to find that the homeless constitute a suspect “class,” so Equal Protection claims have met with little success.⁷⁰

Litigation against bans on panhandling has primarily proceeded under First Amendment freedom of speech claims, with advocates arguing that begging constitutes expressive conduct.⁷¹ Two cases from the Second Circuit illustrate the varied career of these claims: *Young v. New York City Transit Authority* and *Loper v. New York City Police Department*.⁷² In *Young*, the Second Circuit found that the Metropolitan Transit Authority (MTA) could lawfully prohibit panhandling on New York City subway trains since it disturbed riders and the MTA designed the subway solely for transportation purposes.⁷³ In contrast, the Second Circuit ruled that a New York City ordinance outlawing panhandling in all public places was unconstitutional because panhandling amounted to expressive activity and therefore fell within the ambit of the First Amendment’s protection.⁷⁴ Distinguishing their decision from *Young*, the Second Circuit in *Loper* applied a higher level of review under the First Amendment forum analysis, categorizing the public sidewalks regulated by the statute a traditional public forum triggering strict scrutiny.⁷⁵ Es-

traction in the courts. Hansel, *supra* note 13, at 461; *see also, e.g., Joel v. City of Orlando*, 232 F.3d 1353, 1355 (11th Cir. 2000).

⁶⁸ Pottinger, 810 F.Supp at 1584.

⁶⁹ Hansel, *supra* note 13, at 452 (“Both the Supreme Court and many lower courts, however, have been more reluctant to find that anti-homeless measures violate the fundamental right to travel.”).

⁷⁰ Saelinger, *supra* note 13, at 557.

⁷¹ *See, e.g., Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993).

⁷² *Id.*; *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990).

For an extended discussion of both cases, *see Barta, supra* note 13, at 171-77.

⁷³ Barta, *supra* note 13, at 173-75.

⁷⁴ *Id.* at 175-77.

⁷⁵ *See Loper*, 999 F.2d at 704; Foscarinis, *supra* note 2, at 30.

tablishing begging as expressive speech was a major victory for homeless advocates, and “[a]lthough courts in [First Amendment] cases have decided both for and against homeless persons, by far the majority of courts have opted to prohibit or severely limit the enforcement of the measures in question.”⁷⁶ However, other courts have refused to extend First Amendment protections to the acts of sitting and lying down on sidewalks, upholding city bans on such activities.⁷⁷

The larger takeaway from these courtroom skirmishes is that, despite some victories for homeless advocates, anti-homeless laws continue to survive and proliferate nation-wide. The National Law Center on Homelessness and Poverty’s 2014 study on anti-homeless laws found that the number of laws criminalizing homelessness had increased since 2011, continuing the upward trend the Center had noted in its 2009 report.⁷⁸ Indeed, in November of 2014 the Fort Lauderdale, Florida police cited two pastors and a 90-year-old man for distributing food to the homeless in violation of an ordinance forbidding groups from giving out food within 500 feet of a residence.⁷⁹ The Fort Lauderdale police department and local lawmakers’ violence in enacting and strictly enforcing such an ordinance shows that anti-homeless sentiment remains as strong as ever. The new wave of local ordinances prohibiting individuals from occupying traffic medians—spaces hyper-utilized by the homeless and extremely poor—form but the latest front in the effort to eradicate homeless individuals from visible public spaces.⁸⁰ Before jumping into an analysis of the recent median bans, this article turns to the work of historians and geographers, especially Logan and

⁷⁶ Ali, *supra* note 13, at 223.

⁷⁷ Hansel, *supra* note 13, at 454-55 (discussing *Roulette v. City of Seattle*, 97 F.3d 300 (9th Cir. 1996)); Leckerman, *supra* note 13, at 554-56 (*Idem*).

⁷⁸ NAT’L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 16-17.

⁷⁹ Chuck, *supra* note 63.

⁸⁰ *Cutting v. City of Portland*, 2014 WL 580155 (D. Me. Feb. 12, 2014); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014); *Reynolds v. Middleton*, 2013 WL 5652493 (E.D. Va. Oct. 15, 2013).

Molotch's "city as growth machine" paradigm, to explain the broader spatial politics of neoliberal capitalism that underpin and shape anti-homeless laws. It then examines the median bans through the lens of this framework to arrive at a more comprehensive and productive analysis.

PART III: THE CITY AS GROWTH MACHINE: THE SPATIAL DEMANDS OF CAPITALISM

Adequately addressing anti-homeless laws requires fully excavating their causes. Urban historians and geographers have produced a substantial body of scholarship detailing the role of what theorist Henri Lefebvre calls "the production of space"⁸¹ to capitalist accumulation. Recognizing that space is a social construct, these writers interrogate the politics surrounding the production of society's spatial arrangements.⁸² Lefebvre reveals that individuals and society can manipulate and use space to generate surplus value,⁸³ both as "a means of production"⁸⁴ and as "an object of consumption."⁸⁵ Sociologists Logan and Molotch build on this basic insight to conceptualize and historicize the "city as a growth machine." Noting that "place is a market commodity that can produce wealth and power for its owners,"⁸⁶ Logan and Molotch find the unifying factor linking all urban centers in modern history has been a consensus and focus among city leaders on using institutions, local political systems and the built environment to create economic growth.⁸⁷ This project remains a central one to current day cities, albeit

⁸¹ Lefebvre, *supra* note 14, at 285.

⁸² *See, e.g., Id.* at 286 (Space is permeated with social relations; it is not only supported by social relations, but also is producing and produced by social relations.").

⁸³ *Id.* ("Space as a whole enters into the modernized mode of capitalist production: it is utilized to produce surplus value.").

⁸⁴ *Id.* at 287-88.

⁸⁵ *Id.* at 288.

⁸⁶ LOGAN & MOLOTCH, *supra* note 9.

⁸⁷ *Id.* at 50-57.

under various new and different configurations resulting from recent shifts in capitalist production—i.e. those accompanying the rise of neoliberal capitalism.⁸⁸ However, before exploring the specific organization and operation of growth machine politics in the neoliberal city, and before turning to the work of scholars who have connected contemporary anti-homeless sentiment with growth machine impulses, it is necessary to sketch the historical and material contours of the neoliberal city that make it distinct from prior urban forms.

A. *The Growth Machine Under Neoliberalism*

It is vital to contextualize anti-homeless laws and modern growth machine politics within the restructuring of capital and urban spaces that occurred in the last half of the 20th century. Racially selective, government-backed homeowner loans and the increased mobility of capital due to technological innovations fueled the twin processes of white flight and capital flight to the suburbs in the 1950s and 1960s, rearranging the American spatiality.⁸⁹ The flight of manufacturing and industry from the now predominantly black and brown urban cores locked inner-city residents out of the high-wage, blue collar marketplace, increasing dislocation and poverty in already vulnerable neighborhoods during the 1960s and 1970s.⁹⁰ In addition, the further

⁸⁸ See generally, David Harvey, *From Managerialism to Entrepreneurialism: The Transformation in Urban Governance in Late Capitalism*, 71 *GEOGRAFISKA ANNALER. SERIES B, HUMAN GEOGRAPHY* 3 (1989) (explaining that the “managerial” approach to urban regulation common in the 1960s gave way to a more free-market-based, privatization-focused approach, what Harvey calls “entrepreneurialism,” in the 1970s and 1980s).

⁸⁹ See KENNETH T. JACKSON, *CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES* 190-218 (1985); CHARLES ABRAMS, *FORBIDDEN NEIGHBORS: A STUDY OF PREJUDICE IN HOUSING* 227- 243 (1955); Harvey, *supra* note 88, at 10-11; THOMAS J. SUGRUE, *THE ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* 125-152 (1996).

⁹⁰ SUGRUE, *supra* note 89; Loic J.D. Wacquant & William Julius Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 *ANNALS OF THE*

transnationalization of industry and corresponding exportation of jobs overseas also cut many lower-class whites from the rungs of economic security.⁹¹

State retrenchment of welfare and public services—beginning in the last years of the 1960s and accelerating with the rise of the neo-conservative movement in the 1970s and 1980s—compounded the hardships created by these spatial, economic and racial transformations.⁹² This retrenchment grew directly out of neoliberal ideology and its emphasis on free-market ideals and privatization.⁹³ Thus, marginalized groups saw a rollback in the

AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE 8, 8-25 (1989); ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 195-199* (1989); WILLIAM JULIUS WILSON, *MORE THAN JUST RACE: BEING BLACK AND POOR IN THE INNER CITY* 28-42 (2009); ANDREW ROSS, *NICE WORK IF YOU CAN GET IT: LIFE AND LABOR IN PRECARIOUS TIMES* 1 (2009). For an excellent history on the construction of the ghetto since the turn of the century, as well as an analysis of deindustrialization and suburbanization, see DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

⁹¹ ROBIN D.G. KELLEY, *YO' MAMA'S DISFUNKTIONAL!: FIGHTING THE CULTURE WARS IN URBAN AMERICA* 7 (1997) (“The decade of hope [the 1970s] was marked by the disappearance of heavy industry, the flight of American corporations to foreign lands and the suburbs, and the displacement of millions of workers across the country. Permanent unemployment and underemployment became a way of life.”); WILSON, *supra* note 90, at 8-9 (discussing the movement of companies to countries where wage labor is cheaper and how the vast increase in the importation of manufactured goods in the early 1980s depressed the wages of low-skilled employees in the United States); ROSS, *supra* note 90, at 1, 83.

⁹² LISA DUGGAN, *THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* X-XI, XV, 9-10 (2003); Jamie Peck & Adam Tickell, *Neoliberalizing Space*, 34 *ANTIPODE* 380, 380 (2002); see also Neil Smith, *New Globalism, New Urbanism: Gentrification as Global Urban Strategy*, 34 *ANTIPODE* 427, 440-41 (2002) [hereinafter Smith, *New Globalism, New Urbanism*].

⁹³ Katherine Beckett & Steve Herbert, *Dealing With Disorder: Social Control in the Post-Industrial City*, 12 *THEORETICAL CRIMINOLOGY* 5, 17 (2008) (“[Under Neoliberalism] federal and local government policies have become increasingly focused on economic growth rather than redistribution, and the US ‘semi-welfare’ state has been significantly retracted. . . . Profit enhance-

support structure of the state at both the national and local level just as urban deindustrialization and the globalization of capitalist production exacerbated and sharpened already existing inequalities.⁹⁴ In addition, rampant neoliberal deregulation granted an already unprecedentedly mobile capital further flexibility in choosing where to locate operations, both internationally and nationally.⁹⁵ These developments meant that American cities, which had experienced the “widespread erosion of [their] economic and fiscal base”⁹⁶ in prior decades, needed to re-attract capital investment in an extremely competitive global economy.⁹⁷ In an adjustment geographer David Harvey labels “from managerialism to entrepreneurialism,” cities have engaged in inter-urban competition aimed at “maxim[izing] the attractiveness of the local site as a lure for capitalist development”⁹⁸ by embracing the logics of neoliberalism.⁹⁹ Indeed, inter-urban competition in an economic landscape decidedly tilted in capital’s favor due to capital’s tremendous mobility¹⁰⁰ dictates that cities

ment and tax relief have largely replaced policy efforts to enhance social citizenship.”).

⁹⁴ Beckett & Herbert, *supra* note 93, at 17; DUGGAN, *supra* note 92, at 35-42.

⁹⁵ Peck & Trickell, *supra* note 92, at 394; Smith, *New Globalism, New Urbanism*, *supra* note 92, at 433 (“communications and financial deregulation have expanded the geographical mobility of capital”); *see also* DUGGAN, *supra* note 92, at 35.

⁹⁶ Harvey, *supra* note 88, at 4.

⁹⁷ Beckett & Herbert, *supra* note 93, at 16; Dennis R. Judd, *Promoting Tourism in US Cities*, 16 *TOURIST MANAGEMENT* 175, 175-76 (1995); Smith, *New Globalism, New Urbanism*, *supra* note 92, at 447 (“Whereas the major territorial axis of economic competition prior to the 1970s pitted regional and national economies against each other, by the 1990s the new geographical axis of competition was pitting cities against cities in the global economy.”).

⁹⁸ *Id.* at 5.

⁹⁹ *Id.* at 4-5; Peck & Tickell, *supra* note 92, at 395-96 (“‘Entrepreneurial’ regimes of urban governance are, therefore, not simply local manifestations of neoliberalism; their simultaneous rise across a wide range of national, political, and institutional contexts suggests a systemic connection with neoliberalization as a macro process.”); DUGGAN, *supra* note 92, at 35.

¹⁰⁰ As Harvey notes,

With the diminution in transport costs and the consequent reduction in spatial barriers to the movement of goods, people,

have little choice but to adopt the neoliberal policies so favorable to business.¹⁰¹ The national, and even international, embrace of neoliberalism¹⁰² has thus brought extreme ramifications for local urban systems, pushing them towards ever more acute competition.¹⁰³

Current day manifestations of growth machine politics play out against this historical backdrop. The traditional function of city space that Logan and Molotch identify as the “city as a growth machine” remains in place, as generating economic

money and information, the significance of the qualities of place has been enhanced and the vigour of inter-urban competition for capitalist development (investment, jobs, tourism, etc.) has strengthened considerably. Consider the matter, first of all, from the standpoint of highly mobile multinational capital. With the reduction of spatial barriers, distance from the market or from raw materials has become less relevant to locational decisions. . . . Small differences in labour supply . . . infrastructures and resources, in government regulation and taxation, assume much greater significance than was the case when high transport costs created ‘natural’ monopolies for local production in local markets.

Harvey, *supra* note 88, at 10-11.

¹⁰¹ *Id.*

¹⁰² Peck & Tickell, *supra* note 92, at 380-81; Smith, *New Globalism, New Urbanism*, *supra* note 92, at 437-38.

¹⁰³ Harvey, *supra* note 88, at 11; Judd, *supra* note 97, at 175-76 (“Since the early 1980s, cities have been involved in a competition so fierce that Ruth Messinger, a member of the City Council of New York, appropriately compared it to the international arms race of the Cold War.”). As Peck and Tickell observe, cities’ adoption of neoliberal strategies only further undermines their own bargaining power, as

ultimately, their persistent efforts and sporadic successes only serve to further accelerate the (actual and potential) mobility of capital, employment, and public investment. In selling themselves, cities are therefore actively facilitating and subsidizing the very geographic mobility that first rendered them vulnerable, while also validating and reproducing the extralocal rule systems to which they are (increasingly) subjected. The logic of interurban competition, then, turns cities into accomplices in their own subordination. . . .

Peck & Tickell, *supra* note 92, at 393 (internal citations omitted).

growth “can increase aggregate rents and trap related wealth for those in the right position to benefit.”¹⁰⁴ The growth machine strategy works by making city space attractive to capital investment and development, and, once capital investment locates in the city, producing more intensive land use which drives up the property value of downtown space and surrounding private homes.¹⁰⁵ Economic growth also galvanizes the local market for “ancillary production services,” such as “housing, retailing, and wholesaling,”¹⁰⁶ as both capital development and population influxes spark a demand for greater services.¹⁰⁷

Closely intertwined with the goal of securing capital investment is the goal of drawing in a strong consumer base, either through tourism, retail or gentrification.¹⁰⁸ Not only does luring middle- and upper-class consumers to city space as “an object of consumption”¹⁰⁹ produce a robust tourism and retail sector, but it also further “reassures”¹¹⁰ capital that the locality offers a vibrant, business-friendly climate.¹¹¹ To entice middle- and upper-class consumers and the capital investment that both follows and further draws in consumers—a symbiotic process geographer Neil Smith calls “gentrification” writ large¹¹²—urban leaders

¹⁰⁴ LOGAN & MOLOTCH, *supra* note 9.

¹⁰⁵ *Id.* at 58-59.

¹⁰⁶ *Id.* at 58.

¹⁰⁷ *Id.* at 75, 82-83.

¹⁰⁸ Harvey, *supra* note 88, at 9; see also Smith, *New Globalism, New Urbanism*, *supra* note 92, at 433 (“Retaking the city for the middle classes involves a lot more than simply providing gentrified housing. . . . [G]entrification has evolved into a vehicle for transforming whole areas into new landscape complexes that pioneer a comprehensive class-inflected urban remake. These new landscape complexes now integrate housing with shopping, restaurants, cultural facilities. . . open space, employment opportunities—whole new complexes of recreation, consumption, production, and pleasure, as well as residence.”).

¹⁰⁹ Lefebvre, *supra* note 14, at 288.

¹¹⁰ Here I refer to scholar Timothy Gibson’s term “projects of reassurance,” cited in Beckett & Herbert, *supra* note 93, at 17.

¹¹¹ See *Id.*

¹¹² Smith, *New Globalism, New Urbanism*, *supra* note 92, at 440, 443.

must present city terrain as “safe. . .to play and consume in”¹¹³ by pushing cultural innovations, upgrading physical infrastructure and installing consumer attractions, such as shopping complexes, restaurants and “diversion districts.”¹¹⁴ Crucially, authoritarian measures aimed at disciplining and excluding populations that clash with middle-class aesthetics go hand in hand with efforts to reconstruct the built environment.¹¹⁵ Those left behind by the neoliberal state and capitalism represent objects impeding the return of capital through their disruption of the city’s image as a safe, vibrant and consumer and investment worthy space.¹¹⁶ These exclusionary “efforts to counter widespread images of cities as sites of decay and danger with sanitized images of urban consumer utopias”¹¹⁷ therefore assume great import in growth machine politics, especially in light of extreme inter-urban competition.¹¹⁸

The manifold uses and manipulations of urban space to produce economic growth throw the socially constructed and highly

¹¹³ Harvey, *supra* note 88, at 9.

¹¹⁴ *Id.*; Don Mitchell, *The Annihilation of Space By Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 *ANTIPODE* 303, 304 (noting the link between sites of consumerism and capital investment). On “diversion districts,” downtown areas with many bars, restaurants, and shops, see Judd, *supra* note 97, at 185. One notable failure in “revitalization” efforts through infrastructure development is that of publicly subsidized sports stadiums, which often saddle even those cities with the most successful stadium projects with huge public debts and provided virtually no economic benefits. Ross, *supra* note 90, at 88.

¹¹⁵ Smith, *New Globalism, New Urbanism*, *supra* note 92, at 437, 442; Beckett & Herbert, *supra* note 93, at 17.

¹¹⁶ Mitchell, *supra* note 114, at 305, 313; Bancroft, *supra* note 53, at 76-77; Smith, *New Globalism, New Urbanism*, *supra* note 92, at 442.

¹¹⁷ Beckett & Herbert, *supra* note 93, at 17.

¹¹⁸ Mitchell, *supra* note 114, at 304 (“When capital is seen to have no need for any particular place, then cities do what they can to make themselves so attractive that capital — in the form of new businesses, more tourists, or a greater percentage of suburban spending — will want to locate there. If there has been a collapse of space, then there has also simultaneously been a new, and important reinvestment in place — a reinvestment both of fixed (and often collective) capital and of imagery.”).

politicized nature of city space in stark relief.¹¹⁹ In mobilizing space as a market commodity, the economic growth machine benefits some groups more than others—primarily city elites who own downtown property or have a direct stake in the enlargement of local markets rather than the working class or unemployed poor.¹²⁰ Although elites are the main beneficiaries, most residents support the growth machine agenda, both for reasons of local pride—the “place patriotism of the masses”¹²¹—and because the majority see growth as generally beneficial, despite the fact that under neoliberal values it most often merely distributes advantages upwards to property and business owners.¹²² Thus, while disagreements may arise over which visions of urban growth to pursue, the notion that economic growth is inherently good remains largely unquestioned in public discourse.¹²³ The resulting hegemony around generating and encouraging development has meant that cities across the country have ruthlessly targeted those individuals and groups incom-

¹¹⁹ Lefebvre, *supra* note 14, at 286 (“Space is permeated with social relations; it is not only supported by social relations, but it also is producing and produced by social relations.”).

¹²⁰ LOGAN & MOLOTCH, *supra* note 9, at 50, 62. As Logan and Molotch observe, the general outcome of economic growth is that “[u]se values of a majority are sacrificed for the exchange gains of the few.” *Id.* at 98.

¹²¹ *Id.* at 60.

¹²² *Id.* at 98 (“[T]he evidence on fiscal health and economic or social problems indicates clearly that the assumptions of value-free development are false. In many cases, probably in most, additional local growth under current arrangements is a transfer of wealth and life chances from the general public to the rentier groups and their associates.”); Ross, *supra* note 90, at 89 (“Wherever the ideology of growth is accepted as common sense, elite coalitions are able to leverage local government powers to harvest profits at the expense of their counterparts in competing cities. Study after study shows that growth costs much more than it adds to the tax base, and yet politicians can no more question growth than they can afford to be seen as laggards in the competition to beggar their neighborly rivals.”). Smith’s naming of neoliberal urban redevelopment as a broader “gentrification” is thus particularly appropriate because it captures the class-based dimensions and politics of modern urban economic growth. Smith, *New Globalism, New Urbanism*, *supra* note 92, at 440, 443.

¹²³ LOGAN & MOLOTCH, *supra* note 9, at 51, 60-61.

patible with neoliberal capitalism's spatial politics, including the homeless.¹²⁴ Anti-homeless laws grow out of these entrenched, systemic ideological and economic imperatives that shape the spatial arrangements of our cities, comprising but one component of the larger spatial makeover dictated by capitalism.

B. The Growth Machine and Anti-Homeless Laws

One result of deindustrialization and welfare retrenchment in the 1960s and 1970s was an explosion in the homeless population of American cities in the 1980s.¹²⁵ In the move to reinvigorate urban economies, city policymakers across the U.S. quickly identified the homeless and visible inner-city poor as obstacles preventing the return of capital that had abandoned urban cores through white flight and capital flight.¹²⁶ The mandates of neoliberal competition and the ideology of economic growth deeply informed and structured this response. Before closely examining these ties, it is necessary to discuss a socio-spatial motivation behind anti-homeless laws that overlaps with growth machine logics, but is also semi-independent—that is, a desire to reassert class-based identities in urban space as manifested in the broken windows theory. This short evaluation shows that anxieties over identity play out in urban space and that the remedies for these anxieties dovetail with, and are ultimately conscripted by, growth machine politics.

In many parts of the country, city officials blamed the homeless for rising crime rates, adopting the broken windows theory. The broken windows theory, put forth in 1982 by James Q. Wil-

¹²⁴ Smith, *New Globalism, New Urbanism*, *supra* note 92, at 442.

¹²⁵ Simon, *supra* note 13, at 646; Mitchell, *surpa* note 114, at 314. Other structural forces also played a role, including a severe shortage in affordable housing, the deinstitutionalizing of mental illness patients, and paucity of social services. Simon, *supra* note 13, at 646 n.97; Foscarinis, *supra* note 2, at 9.

¹²⁶ As New York City Mayor Rudy Giuliani once famously remarked, the removal of poor people was “not an unspoken part of our strategy. That [was] our strategy.” Quoted in Beckett & Herbert, *supra* note 93, at 17.

son and George Kelling, identified small, daily signs of “decay,” including the homeless and panhandlers, as encouraging more serious criminal activity.¹²⁷ Wilson and Kelling argued that law enforcement officials should target these root causes.¹²⁸ This theory reinvigorated the trope of homeless criminality and gained traction nationally after New York City embraced the strategy in the early to late 1990s during Mayor Rudy Giuliani’s administration.¹²⁹ City leaders across the country thus named the problem of homelessness, which had its roots in the restructuring of capital, as a cause, rather than a symptom, of urban misfortunes.¹³⁰ This move played well politically with “a white middle class that [saw] the city as its birthright”¹³¹ and felt the homeless, along with the racialized poor and unruly adolescents,¹³² had “stolen” urban spaces.¹³³ Many of the anti-home-

¹²⁷ Barta, *supra* note 13, at 166-67.

¹²⁸ *Id.*

¹²⁹ Barta, *supra* note 13, at 167. On the Giuliani administration’s implementation of the broken windows theory via the “Police strategy Number 5” order, see also Neil Smith, *Which New Urbanism?: The Revanchist ‘90s*, 30 PERSPECTA 98, 98-105 (1999) [hereinafter Smith, *Which New Urbanism?*]. While the NYPD focused on numerous sources of “disorder” under the broken windows theory, such as graffiti and prostitution, “[t]he brunt of 1990s revanchism. . . was borne by homeless people.” Smith, *Which New Urbanism?* at 100.

¹³⁰ Smith, *Which New Urbanism?* *supra* note 129, at 99-100. As Smith notes, “rather than indict capitalists for capital flight, landlords for abandoning buildings, or public leaders for a narrow retrenchment to class and racial self-interest, Giuliani led the clamor for a different kind of revenge.” *Id.* at 99. Thus, “[u]rban decline, street crime, and ‘signs of disorder’ are here galvanized into a single malady. . . . [T]he symptoms are the cause.” *Id.* at 100.

¹³¹ *Id.* at 98.

¹³² *Id.* at 100-102.

¹³³ *Id.* at 98. It is important to recognize that this sentiment is not limited to the white middle and upper class, but has “draw[n] in significant numbers of the white working class and black middle class.” *Id.* at 102. However, the targeting of homeless individuals broadly embodies “the standpoint of white and middle-class interests.” *Id.*

less laws enacted since 1980 are an outgrowth, in part, of this logic of criminality.¹³⁴

Three points about the broken windows theory require mentioning. First, there is no evidence that the practice reduces crime.¹³⁵ Second, its application in New York City and other metropolitan areas underlines the politicization of space; it is intimately bound up in notions of identity and social control.¹³⁶ As

¹³⁴ Smith, *Which New Urbanism?*, *supra* note 129, at 102 (noting that over “forty municipalities now have legal statutes explicitly designed to repel and deport homeless people.”); Barta, *supra* note 13, at 170-71 (discussing the anti-panhandling laws in New York City implemented based on the broken windows theory); Nordberg, *supra* note 13, at 265-79 (surveying the impacts of “quality of life” violations informed by the broken windows theory that target such diverse actions as loitering, sleeping in public, camping in parks, sitting on sidewalks, and panhandling).

¹³⁵ As Barta writes,

Despite the hype, it is by no means certain that Giuliani’s crackdown is the real reason crime is down in the Big Apple. Giuliani inherited a falling crime rate from his Democratic predecessor, David Dinkins, who significantly increased the size of the police force. Other factors, including an improved economy, longer incarceration of convicted criminals, and an apparent drop in the crack epidemic may have also played a major role in causing the dramatic drop in crime witnessed during Giuliani’s first term in office.

As a matter of fact, crime rates have dropped across the country. The nationwide homicide rate is down 20% from the beginning of the decade. Nor is it just murder rates that have dropped. Violent felonies have dropped 14% across the country since 1993. Given that the crime rate is down throughout the country, regardless of whether or not jurisdictions utilize a Broken Windows strategy, it seems clear that a zero tolerance approach is not responsible for the drop.

Barta, *supra* note 13, at 167-68.

¹³⁶ As Lefebvre says of the relationship between space and the state, “[s]pace has become for the state a political instrument of primary importance. The state uses space in such a way that it ensures its control of places, its strict hierarchy, the homogeneity of the whole, and the segregation of the parts.” Lefebvre, *supra* note 14, at 288. *See also* Eugene J. McCann, *Race, Protest, and Public Space: Contextualizing Lefebvre in the U.S. City*, 31 *ANTIPODE* 163, 168 (1999) (discussing the dialectical relationship between identity and urban space).

Smith points out, under the broken windows theory “[c]riminality is spatialized, postmodernized even, insofar as the sign and the symptom are the same thing; it is identified with certain kinds of social presence in the urban landscape.”¹³⁷ Class- and race-based identities coalesce around and express themselves through the control of urban spaces. A discursive white, middle- and upper-class identity pits itself against the homeless in a struggle over the appearance, use and occupancy of public terrain, seeking to “decriminalize” those spaces and make them “safe” and accessible for well-off residents. Anti-homeless laws thus reflect antagonisms rooted in ideas over class-ownership and social identity. However, although “revanchist”¹³⁸ politics partly animate anti-homeless laws independent of economic growth logics, desires to maximize the economic value of city space also motivate and drive broken windows rhetoric.¹³⁹ Which leads to the third point: the broken windows strategy meshes with and colludes to further urban growth machine goals;¹⁴⁰ city elites often consciously leverage the practice as a means to generate economic wealth and are well aware of its use in attracting capital investment.¹⁴¹ Therefore, while not dismissing the influential power of ideas about criminality and class access, this article draws attention to the broader, overlapping forces of capitalist accumulation that mold anti-homeless action.

¹³⁷ Smith, *Which New Urbanism?*, *supra* note 129, at 100.

¹³⁸ *Id.* at 98.

¹³⁹ Smith, *New Globalism, New Urbanism*, *supra* note 92, at 437, 442-43.

¹⁴⁰ *Id.* at 442-43.

¹⁴¹ *Id.* at 442 (“The emergence of the revanchist city. . . was not just a New York phenomenon: it can be seen in the antisquatter campaigns in Amsterdam in the 1980s, attacks by Parisian police on homeless (largely immigrant) encampments, and the importation of New York’s zero-tolerance techniques by police forces around the world. In São Paulo, highly repressive tactics applied to the city’s street people are rationalized in terms of the ‘scientific’ doctrine of ‘zero tolerance’ emanating from New York. In all of these cases, the new revanchism was explicitly justified in terms of making the city safe for gentrification. The new authoritarianism both quashes opposition and makes the street safe for gentrification.”); Mitchell, *supra* note 114, at 307.

Urban space is not just a market commodity in the sense that it possesses property values capable of rising or falling, but also in that cities must sell their socio-spatial environment to businesses and consumers.¹⁴² The uneven relationship between highly mobile capital and local municipalities seeking investment magnifies the importance of even minor differences between locations, including everyday appearance.¹⁴³ As geographer Don Mitchell puts it, “[i]mage becomes everything. When capital is seen to have no need for any particular place, then cities do what they can to make themselves so attractive that capital—in the form of new businesses, more tourists, or a greater percentage of suburban spending—will want to locate there.”¹⁴⁴ In the inter-urban race to create the best pro-business climate the (fictional) line between the social and the economic is at its fuzziest, as traditionally understood social factors take on enormous economic weight.¹⁴⁵

The homeless sit in the cross-hairs of policies designed to regulate spatial aesthetics and thereby convince capital that a given city is “safe”¹⁴⁶—safe for the middle-class “to play and consume

¹⁴² Mitchell, *supra* note 114, at 313 (“[W]hat sets the present era, and the present wave of anti-homeless laws, apart is the degree to which regulation [of the homeless] has. . . become an important ingredient in not just expanding capital, but in either attracting it in the first place, or in protecting it once it is fixed in particular places.”).

¹⁴³ *Id.* at 304 [T]here has. . . been a new, and important reinvestment in place — a reinvestment both of fixed (and often collective) capital and of imagery.”); *see also* Pleck & Tickell, *supra* note 92, at 395 (“Neoliberal regimes are unforgiving in the face of incompetence or noncompliance, punishing cities that fail in the unyielding terms of competitive urbanism.”).

¹⁴⁴ Mitchell, *supra* note 114, at 304.

¹⁴⁵ Pleck & Tickell, *supra* note 92, at 389 (“No longer concerned narrowly with the mobilization and extension of markets (and market logics), neoliberalism is increasingly associated with the political foregrounding of new modes of ‘social’ and penal policymaking, concerned specifically with the aggressive reregulation, disciplining, and containment of those marginalized or dispossessed by the neoliberalization of the 1980s.”); *see also* Smith, *New Globalism, New Urbanism*, *supra* note 92, at 437.

¹⁴⁶ Smith, *New Globalism, New Urbanism*, *supra* note 92, at 442.

in,”¹⁴⁷ and safe for business to invest in because the city is not decaying, or stuck in the post-industrial slump, but instead is a vibrant economic marketplace on the upswing.¹⁴⁸ The homeless stand as the antithesis to this dual “safety.” As representations of our social and economic system’s violence, their presence interrupts the smoothness of middle- and upper-class tourists’ or residents’ engagement in consumerism,¹⁴⁹ as well as suggests deep-seated regional economic failure to potential investors.¹⁵⁰ Of course, a decline in tourism/retail affects a decline in capital investment, and vice versa.¹⁵¹ Under normative conceptions of homelessness and poverty in our society, the visible homeless simply clash with the psychology of pleasing recreation, sight

¹⁴⁷ Harvey, *supra* note 88, at 9; *see also* Mitchell, *supra* note 114, at 319 (“For law-makers the immediate thing that happens [under neoliberal capitalism]. . . is that control over space within cities is seemingly lost; the long-term solution is thus to re-regulate those spaces, annihilate the homeless, and allow the city to once again become a place of order, pleasure, consumption and accumulation.”); *see also* Mitchell, *supra* note 114, at 324 (“Creating a city as [aesthetic] landscape. . . restores to the viewer (the tourist, the suburban visitor, or even the housed resident) an essential sense of control within a built environment. . .”).

¹⁴⁸ Mitchell, *supra* note 114, at 316 (“[A]nti-homeless legislation is reactionary in the most basic sense. As a reaction to the changed conditions of capital accumulation, conditions themselves that actively (if not exclusively) produce homelessness. . . such legislation seeks to bolster the built environment against the ever-possible specter of decline and obsolescence.”); *see also* Beckett & Herbert, *supra* note 93, at 17.

¹⁴⁹ Mitchell, *supra* note 114, at 319 (“Regulating the homeless takes on a certain urgency. ‘Refusing’ to conform to the dictates of new urban realities, homeless people daily remind us of the vagaries of the contemporary political economy. By lying in our way on the sidewalks, they require us to confront. . . what the [modern capitalism] so celebrated in laudatory accounts of the new economy leaves in its wake. . .”); *see also* Barta, *supra* note 13, at 181 (“So long as the poor remain an abstract concept, faceless and anonymous, segregated in isolated neighborhoods far from our daily rounds, we can ignore the fact that today, in the richest nation on Earth, millions of Americans, men, women, and children, are forced to live in abject poverty.”); Beckett & Herbert, *supra* note 93, at 17.

¹⁵⁰ *See* Mitchell, *supra* note 114, at 313, 316.

¹⁵¹ *See supra* page 19-20.

seeing and consumption.¹⁵² Capitalism, in its pursuit of “abstract space”¹⁵³—that which produces exchange value¹⁵⁴—pushes to rigidly control the meaning of urban space and the activities allowed therein, as well as erase any traces of the social struggles involved in its creation.¹⁵⁵ The homeless embody the social struggles involved in modern day capitalism and fail to conform to the conventions of “abstract,” commercialized space. These transgressions are unacceptable to a neoliberal spatial politics that increasingly builds “public spaces. . . designed to keep the frequency of uncomfortable encounters to a minimum.”¹⁵⁶

The homeless thus become the locus for anxieties over the uncertainty of capital investment and divestment,¹⁵⁷ marking them as subjects for regulation under anti-homeless laws.¹⁵⁸ City leaders propagate anti-homeless laws to portray “a seemingly stable, ordered urban landscape” that acts “as a positive inducement to continued investment and to maintain the viability of current investment in core areas (by showing merchants, for example, that they are doing something to keep shoppers coming downtown).”¹⁵⁹ Anti-homeless laws are thus individual nodes in a larger political network and atmosphere aimed at securing capital circulation and accumulation. In this way, society “others” the homeless, rendering them a litmus test for capital investment: if homeless are present, capital perceives develop-

¹⁵² Beckett & Herbert, *supra* note 93, at 17 (“The presence of large numbers of homeless people. . . is highly inconsistent with images [of the sanitized consumer utopia].”).

¹⁵³ Lefebvre, *supra* note 14, at 287.

¹⁵⁴ McCann, *supra* note 136, at 169. As McCann puts it, elites present “abstract space” as “homogeneous, instrumental, and ahistorical in order to facilitate the exercise of state power and the free flow of capital.” *Id.* at 164.

¹⁵⁵ *Id.* at 169.

¹⁵⁶ *Id.* at 179.

¹⁵⁷ Mitchell, *supra* note 114, at 304.

¹⁵⁸ *Id.* at 316 (“The goal for cities in the 1990s has been to experiment with new modes of regulation over the bodies and actions of the homeless in the rather desperate hope that this will maintain or enhance the exchangeability of the urban landscape in a global economy of largely equivalent places.”).

¹⁵⁹ *Id.*

ment and investment as riskier, if the homeless are absent, all is safe. This symbolic and ideological freight attached to the homeless requires their exclusion from the urban growth machine's spatiality in the highly competitive arena of neoliberal capitalism. Combatting the anti-homeless sentiment that continues to seep across the country requires engaging with the structurally produced and ideologically maintained demands of economic growth. This larger hegemonic framework predetermines the policy responses of city leaders and middle- and upper-class residents, channeling local laws towards the construction of class-exclusive public spaces.

Incorporating an understanding of the growth machine process into an analysis of anti-homeless laws reveals new structural and ideological factors for legal advocates to consider. As the next section shows, examining the recent median bans with this context in mind offers up insights and lessons about how to most effectively fight these laws. Moreover, the current stance of the courts towards these laws carries serious implications for the future direction of homeless advocacy.

PART IV: LAWS BANNING THE OCCUPANCY OF TRAFFIC MEDIANS

The "City By the Sea," as Henry Wadsworth Longfellow once called Portland, Maine, enacted an ordinance banning individuals from standing in traffic medians in 2013.¹⁶⁰ The ordinance incited dialogue about the city's growing homeless population as well as provoked resistance, as the ACLU of Maine challenged the law's constitutionality in federal court.¹⁶¹ Taking the experience of Portland as its primary lens, but touching on other locales where litigants have contested similar bans in court, this section looks at the recent phenomenon of cities prohibiting individuals from standing or sitting on traffic medians. Situating

¹⁶⁰ Antonacci, *supra* note 1.

¹⁶¹ *Id.*; Holst, *supra* note 6; Graham, *supra* note 7.

Portland's median ban and the Maine District Court's decision within the wider contexts of the city's economic scene exposes the illegibility of the motivations for anti-homeless laws to the Court's constitutional jurisprudence. The conceptual and theoretical blind spots of homeless-rights litigation, as well as the constraining nature of rigid judicial doctrine, have prevented the courts from confronting the inequities of anti-homeless laws. This mismatch between courts' analytical treatment of median bans and the bans' violent structural basis not only shows the inadequacy of negative rights litigation as a long-term strategy in the fight against laws targeting the homeless,¹⁶² but also reveals the necessity of questioning and challenging the spatial politics underlying anti-homeless sentiment if any concrete gains are to be had in the fight for open and equal urban spaces.

A. *The Median Bans*

Portland, like many urban centers across the country, experienced a period of economic downturn following the end of World War II.¹⁶³ As a hub for wartime manufacturing, primarily focused around waterfront industries, Portland's population swelled during the 1940s and its local economy flourished.¹⁶⁴ But with the end of the global conflict, wartime plants slowly began to shut down and the economic growth based around those in-

¹⁶² In making this argument, I reach the same conclusion as Kathryn Hansel, who also points out the "insufficiency of negative rights-based challenges" to anti-homeless laws, but for different reasons. Hansel sees negative rights-based litigation as "insufficient to shift the paradigm that denies citizenship to the homeless" because the "negative liberty regime ensures that economic independence remains a central tenet of citizenship." Hansel, *supra* note 13, at 445-46, 470. While I do not necessarily disagree with Hansel, my point here is merely that litigation seeking to have local laws struck down as unconstitutional has failed as a strategy of preventing the oppression of homeless populations.

¹⁶³ JOHN F. BAUMAN, GATEWAY TO VACATIONLAND: THE MAKING OF PORTLAND, MAINE 172-174, 179 (2012).

¹⁶⁴ *Id.* at 173-174.

dustries receded.¹⁶⁵ The beginnings of mass suburbanization in the 1950s only compounded the city's economic woes.¹⁶⁶ The resulting deindustrialization and population loss hit Portland's downtown businesses hard, as stores that had once thrived in the 1940s suddenly faced stiff competition from their suburban counter-parts.¹⁶⁷

The Portland of the early 21st century differs vastly from the Portland of the post-WWII years. The city transformed into a successful service sector provider,¹⁶⁸ with over 90% of jobs concentrated in service-providing industries.¹⁶⁹ In addition, a robust tourist industry emerged in the latter third of the 20th century and continued to thrive throughout the first decade of the 21st century.¹⁷⁰ Increasingly, Portland has become a popular destination for cruise ships in the summer months,¹⁷¹ and the city built a new docking facility specifically to accommodate larger and more frequent passenger ships.¹⁷² The tourist industry in turn sparked a proliferation of world-class restaurants, hotels and bars, most of which are scattered throughout the now thriving downtown Old Port district.¹⁷³ The economic revitalization of

¹⁶⁵ *Id.* at 174.

¹⁶⁶ *Id.* at 179-180.

¹⁶⁷ *Id.*; John F. Bauman, *A Saga of Renewal in a Maine City: Exploring the Fate of Portland's Bayside District*, 5 *J. OF PLANNING HISTORY* 329, 342 (2006).

¹⁶⁸ BAUMAN, *GATEWAY TO VACATIONLAND*, *supra* note 163, at 230.

¹⁶⁹ MIT DEPARTMENT OF URBAN STUDIES AND PLANNING, *MIT PORTLAND REPORT 4* (Spring 2010).

¹⁷⁰ BAUMAN, *GATEWAY TO VACATIONLAND*, *supra* note 163, at 230, 232-33; MIT DEPARTMENT OF URBAN STUDIES AND PLANNING, *MIT PORTLAND REPORT 5*, 46 (Spring 2010).

¹⁷¹ BAUMAN, *GATEWAY TO VACATIONLAND*, *supra* note 163, at 232-33.

¹⁷² See The Associated Press, *LePage To Dedicate Portland Cruise Ship Terminal*, *BANGOR DAILY NEWS*, Oct. 12, 2011, available at <http://bangordailynews.com/2011/10/12/news/portland/lepage-to-dedicate-portland-cruise-ship-terminal/>.

¹⁷³ MIT DEPARTMENT OF URBAN STUDIES AND PLANNING, *MIT PORTLAND REPORT 4*, 46 (Spring 2010); BAUMAN, *GATEWAY TO VACATIONLAND*, *supra* note 165, at 230-235.

downtown Portland also benefitted from the growth of the financial sector, and the city now stands as the financial capital of Maine.¹⁷⁴

Exemplifying this economic growth has been the expansion of downtown commerce into surrounding neighborhoods, such as the Bayside and East Bayside neighborhoods. In recent years, a surge of economic investment has flooded these two neighborhoods from the private sector, both in housing construction and commercial business. Bayside alone has seen over \$97 million in investments since 2007, primarily in the form of commercial developments such as a Whole Foods supermarket, bowling alley, Trader Joe's market, office space and restaurants.¹⁷⁵ East Bayside, on the other hand, has seen a steady mix of commercial and residential development.¹⁷⁶

Critically, city officials have enshrined the agenda of economic growth as a central goal of Portland's long-term economic and political mandate. A guiding plan for Portland's economic policies assembled in 2011 by city officials and leaders in the business community calls for the City to "support and market Portland's distinct urban commercial targeted growth districts, encouraging a mix of housing and commercial development to create 24/7 activity and vitality. Each district will capitalize on its unique strengths to maximize the employment and tax base, channeling growth into emerging districts and established em-

¹⁷⁴ BAUMAN, GATEWAY TO VACATIONLAND, *supra* note 165, at 232; *but see* MIT DEPARTMENT OF URBAN STUDIES AND PLANNING, MIT PORTLAND REPORT 16 (Spring 2010) (discussing Portland's loss of financial jobs to the suburbs in recent years due to factors such as rising rents and increased parking costs and how the movement of financial jobs to the suburbs represents a national trend).

¹⁷⁵ David Carkhuff, "Portland's Economic Development Successes," *Portland Daily Sun*, May 16, 2012.

¹⁷⁶ Craig Lyons, *East Bayside: 'As Good As It's Ever Been,'* PORTLAND DAILY SUN, May 2, 2013, available at <http://www.portlanddailysun.me/index.php/newsx/local-news/9259-east-bayside-as-good-as-it-s-ever-been>.

ployment areas.”¹⁷⁷ So far Portland has seen this goal of commercial and housing growth fulfilled, as it experienced a boom in both sectors in recent years.¹⁷⁸

Although Portland has been lucky in its economic fortunes many individual residents have not, as the city’s homeless population increased drastically from 2009 to 2013, nearly doubling from 276 to 480 individuals.¹⁷⁹ In this regard Portland followed the national trend, as the recession plaguing the nation’s economy since 2008 has caused a spike in homelessness in cities across the country.¹⁸⁰ With the rise in Portland’s homeless came a rise in the number of homeless individuals panhandling in the city’s traffic medians.¹⁸¹ In 2012, the chief of the Portland Police Department deemed this increase a public safety emergency, and asked the Portland City Council to address the problem.¹⁸² The City Council considered adopting an ordinance banning individuals from occupying medians that year, but voted against its enactment.¹⁸³ However, following a rise in the complaints re-

¹⁷⁷ CITY OF PORTLAND, PORTLAND COMMUNITY CHAMBER, AND THE CREATIVE PORTLAND CORPORATION, ECONOMIC DEVELOPMENT VISION + PLAN, PORTLAND, MAINE 5 (August 2011).

¹⁷⁸ Seth Koenig, *Portland Seeing Nearly \$540 Million Development Explosion, But Office Space Vacancies Still High*, BANGOR DAILY NEWS, Nov. 4, 2013, available at <http://bangordailynews.com/2013/11/04/news/portland/portland-seeing-nearly-540-million-development-explosion-but-office-space-vacancies-still-high/>; Seth Koenig, *Next 10 Years Could Hold a Billion Dollars in New Construction in Portland*, BANGOR DAILY NEWS, June 28, 2013, available at <http://bangordailynews.com/2013/06/28/news/portland/destination-portland-a-new-golden-age-looms-for-maines-largest-city/>. But see PORTLAND COMMUNITY CHAMBER OF COMMERCE, PORTLAND’S ECONOMIC SCORECARD: 2014-2015 1 (Sept. 2014), available at <http://www.portlandregion.com/uploads/2/5/8/0/25808280/prcc.economiccorecardbooklet.pdf> (stating that “Portland’s boom conceals some difficult and troubling realities,” as weaknesses in key economic sectors remained, with the City falling short of its goals in two-thirds of indicator areas).

¹⁷⁹ MAINE STATE HOUSING AUTHORITY, *supra* note 3.

¹⁸⁰ Ali, *supra* note 13, at 197-98.

¹⁸¹ *Cutting v. City of Portland*, 2014 WL 580155 *2 (D. Me. Feb. 12, 2014).

¹⁸² *Id.*

¹⁸³ *Id.*

ceived by the police about people panhandling in medians—purportedly from individuals concerned about safety hazards—and an influx of petitions from residents asking it to reconsider the ordinance, the City Council changed course and passed the median ban in July of 2013.¹⁸⁴

Portland’s median ban is a paradigmatic example of an anti-homeless law. On its surface, the law deals with traffic safety, but it also disproportionately affects homeless people and the extremely poor.¹⁸⁵ Its covert purpose and its overt result is the removal of homeless people from the highly visible spaces of traffic medians—spaces homeless people overwhelmingly use compared to other residents. While the city and the Portland Police Department mentioned they had received numerous “complaints” about panhandler’s safety, they did not reveal that they had also received complaints from residents claiming the homeless were a “sty on [the] city,”¹⁸⁶ a “‘problem’ that was ‘getting out of control,’”¹⁸⁷ and that people were “fed up with beggars.”¹⁸⁸ Of course, not everyone who supported the ordinance held such feelings; indeed, an individual who worked at a homeless shelter spoke in support of the ordinance at the City Council voting session.¹⁸⁹ Views about the ordinance do not break down into neat, clear-cut sides, with residents sympathetic to the homeless opposite those “fed up” with them. Nonetheless, the ordinance satisfies anti-homeless desires and its effect

¹⁸⁴ *Id.*

¹⁸⁵ Hansel, *supra* note 13, at 447.

¹⁸⁶ Quoted in Brief of Plaintiffs-Appellees Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior (C.A.1) at *9, *Cutting v. City of Portland*, 2014 WL 580155 (Nov. 3, 2014) (No. 14-1421), 2014 WL 6602186.

¹⁸⁷ Brief of Plaintiffs-Appellees Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior (C.A.1) at *10, *Cutting v. City of Portland*, 2014 WL 580155 (Nov. 3, 2014) (No. 14-1421), 2014 WL 6602186.

¹⁸⁸ Quoted in Brief of Plaintiffs-Appellees Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior (C.A.1) at *10, *Cutting v. City of Portland*, 2014 WL 580155 (Nov. 3, 2014) (No. 14-1421), 2014 WL 6602186.

¹⁸⁹ CITY OF PORTLAND, MAINE PUBLIC SAFETY/HEALTH & HUMAN SERVICES DEP’T, JUNE 11, 2013 MEETING MINUTES, *supra* note 4.

remains straightforward: the shunting away of the homeless from noticeable spaces.

The ban touched off a discussion in the local media about homelessness in Portland; while many residents expressed support for the ordinance, others claimed that the law's unstated purpose was to hide the city's visible poor and make the downtown area more palatable for tourists.¹⁹⁰ Not long after the ordinance's enactment, the ACLU of Maine filed a lawsuit in U. S. District Court for the District of Maine, alleging the ban violated the First Amendment.¹⁹¹ The case, *Cutting v. City of Portland*, featured two plaintiffs who often stood on street medians holding political protest signs and a third homeless plaintiff who used medians to solicit donations from passing motor traffic.¹⁹² The ACLU made a facial challenge to the ordinance, arguing it was unconstitutionally overbroad.¹⁹³ The text of the ordinance read, "no person shall stand, sit, stay, drive or park on a median as defined in Section 25-118, except that pedestrians may use median strips only in the course of crossing from one side of the street to the other."¹⁹⁴ Crucially, the City repeatedly stated in its arguments before the court that the ban did not apply to individuals who entered traffic strips to place or remove political campaign signs, and the court therefore treated this exception as a part of the City's official interpretation of the ordinance.¹⁹⁵

This exception for individuals posting campaign signs proved to be the key factor in the court's decision to strike the ordinance down in February of 2014.¹⁹⁶ The court ruled that for the City to prohibit the constitutionally protected expressive activity

¹⁹⁰ See Holst, *supra* note 6; Antonacci, *supra* note 1; *Our View: Median Panhandling Ban Won't Address Core Issues*, *supra* note 6.

¹⁹¹ Graham, *supra* note 7.

¹⁹² *Cutting v. City of Portland*, 2014 WL 580155 *1 (D. Me. Feb. 12, 2014).

¹⁹³ *Id.* at *5.

¹⁹⁴ *Id.* at *6 (internal quotation marks omitted).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *2.

of panhandling¹⁹⁷ while allowing the placement of campaign signs comprised a content-based restriction in violation of the First Amendment.¹⁹⁸ Although the court assumed public safety constituted a compelling state interest, it concluded that the ordinance “is not absolutely necessary to serve the state’s asserted interest in public safety”¹⁹⁹ because “to keep the public safe. . . it is not necessary to allow individuals to transit the City’s medians in order to place or remove campaign signs.”²⁰⁰ As such, Portland’s median ban failed to pass the strict scrutiny standard under which the court evaluates content-based restrictions.²⁰¹ A victory at the moment for Portland homeless advocates, the City has appealed the District Court’s ruling.²⁰²

The City of Worcester, Massachusetts instituted a similar ban on occupying traffic medians in January of 2013²⁰³ amidst city policymakers’ overt discussions about curbing panhandling.²⁰⁴ Indeed, the Worcester City Manager presented the median ban ordinance to the City Council as a means of reducing panhandling,²⁰⁵ citing, like officials in Portland, safety concerns as the law’s justification.²⁰⁶ Home to nine colleges, Worcester—a gritty, former industrial city—is currently attempting to refashion itself into a college town, planning its future economic

¹⁹⁷ *Id.* at *4.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at *10.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² Randy Billings, *Portland to Appeal Ruling on Panhandling Ban*, PORTLAND PRESS HERALD, Apr. 16, 2014, available at http://www.pressherald.com/2014/04/16/portland_to_appeal_ruling_on_panhandling_ban/.

²⁰³ *Thayer v. City of Worcester*, 755 F.3d 60, 65 (1st Cir. 2014).

²⁰⁴ Brief for Plaintiffs-Appellants Robert Thayer, Sharon Brownson, and Tracy Novick at *3-4, *Thayer v. City of Worcester*, 755 F.3d 60 (2014) (No. 13-2355), 2013 WL 6221927; Zachary L. Heiden, *Maine Median Strip Ordinance Unconstitutional*, JURIST.ORG, Mar. 14, 2014, <http://jurist.org/hotline/2014/03/zachary-heiden-maine-panhandling.php>.

²⁰⁵ Brief for Plaintiffs-Appellants Robert Thayer, Sharon Brownson, and Tracy Novick, *supra* note 204, at *3.

²⁰⁶ *Thayer*, 755 F.3d at 64-65.

growth around the strategy of drawing student-consumers into the city's downtown.²⁰⁷ Against this political backdrop, the ACLU of Massachusetts and the law firm Goodwin Procter sued the city on behalf of two homeless plaintiffs and a plaintiff who often held political signs on medians.²⁰⁸ Specifically, the suit charged that the ordinance contravened the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.²⁰⁹

In June of 2014 the First Circuit decided the suit in *Thayer v. City of Worcester* following the District Court's denial of a preliminary injunction.²¹⁰ Unlike the situation in Portland, where the median ban featured an exception for those placing campaign signs, the Worcester ordinance established a blanket ban on occupying medians, stating, "No person shall, after having been given due notice warning by a police officer, persist in walking or standing on any traffic island or upon the roadway of any street or highway, except for the purpose of crossing the roadway at an intersection or designated crosswalk or for the purpose of entering or exiting a vehicle at the curb or for some other lawful purpose."²¹¹ For purposes of the First Amendment

²⁰⁷ Matt Rocheleau, *Worcester's Big Plan Off Campus*, THE BOSTON GLOBE, Nov. 28, 2014, A1.

²⁰⁸ Brief for Plaintiffs-Appellants Robert Thayer, Sharon Brownson, and Tracy Novick, *supra* note 204, at *1, *10-11.

²⁰⁹ *Thayer*, 755 F.3d at 60, 66.

²¹⁰ *Id.* *Thayer* also involved review of a law prohibiting "aggressive panhandling" which the City of Worcester enacted at the same time as the median ban. The Court upheld both laws, but this paper focuses solely on the Court's analysis of the median ban, as aggressive panhandling laws are not new and have been upheld by courts in the past. *See supra*, page 11. However, it is worth noting that the Supreme Court may reconsider the First Circuit's decision in *Thayer* on the grounds that both bans may be unconstitutional under the Supreme Court's recent First Amendment decision in *McCullen v. Coakley*. The Supreme Court will decide in early 2015 if it will hear the case. *See* Adam Liptak, *Begging Law Tests Ruling on Buffer Zones*, N.Y. TIMES, Dec. 9, 2014, at A18; *see also* *McCullen v. Coakley*, 134 S. Ct. 2518, 189 L. Ed. 2d 502 (2014).

²¹¹ *Thayer*, 755 F.3d at 65.

claim, the undifferentiated scope of the ban led the First Circuit to determine that the ordinance was a content-neutral restriction, and thus did not trigger strict scrutiny.²¹² The court acknowledged that evidence existed suggesting that “some public officials have been of a mind to suppress panhandling, though not other forms of solicitation.”²¹³ However, the court refused to find this fact dispositive since further evidence in the record corroborated the city’s claim that safety concerns motivated the law.²¹⁴

The court then found no need to hold the traffic median ban up to the intermediate standard of review because the plaintiffs failed to “address their burden of persuasion that the ordinance[s] overbreadth is substantial.”²¹⁵ The court declared that the plaintiffs had submitted no evidence indicating any unnecessarily suppressive effects of the ban rising to a substantial level, and thus dismissed the First Amendment claim.²¹⁶ The court moved on to summarily reject the plaintiff’s Equal Protection claim, citing their previous discussion of the evidence supporting the city’s legitimate safety concerns and pointing out that the plaintiffs offered no proof that the city engaged in a discriminatory pattern of enforcement.²¹⁷ Likewise, the First Circuit quickly dismissed the Due Process claim of unconstitutional vagueness,²¹⁸ and affirmed the District Court’s denial of the preliminary injunction request.²¹⁹ An undeniable setback for homeless rights, the First Circuit’s decision in *Thayer* opens the door

²¹² *Id.* at 71.

²¹³ *Id.* at 68.

²¹⁴ *Id.*

²¹⁵ *Id.* at 72. Notably, in its appeal to the Supreme Court the ACLU has questioned the First Circuit’s ruling that the plaintiff’s bear this burden. Petition for Writ of Certiorari at 14-23, *Thayer v. City of Worcester*, 755 F.3d 60 (Oct. 14, 2014) (No. 14-428), available at https://www.aclum.org/sites/all/files/legal/worcester_antippanhandling/thayer_cert_petition.pdf.

²¹⁶ *Thayer*, 755 F.3d at 74-75.

²¹⁷ *Id.* at 76.

²¹⁸ *Id.* at 77.

²¹⁹ *Id.* at 78.

for municipalities within its jurisdiction to pass unqualified bans on occupying traffic medians.²²⁰

In addition to the First Circuit, the District Court for the Eastern District of Virginia has also upheld the constitutionality of a median ban.²²¹ In *Reynolds v. Middleton*, decided in October of 2013, the District Court granted a motion for summary judgment validating an ordinance prohibiting people from soliciting contributions on traffic strips in Henrico County, Virginia.²²² Henrico County, a populous metropolitan region around the city of Richmond, Virginia,²²³ enacted its ban on panhandling in medians in October of 2012 out of professed public safety concerns.²²⁴ Robert Reynolds, a chronically homeless person who used street medians to beg for income when he was both homeless and living in affordable housing,²²⁵ challenged the law *pro*

²²⁰ However, the plaintiffs have appealed the case to the Supreme Court, which will decide whether or not to hear the case in early 2015. See Adam Liptak, *Begging Law Tests Ruling on Buffer Zones*, N.Y. TIMES, Dec. 9, 2014, at A18.

²²¹ *Reynolds v. Middleton*, No. 3:12-CV-00779-JAG, 2013 WL 5652493 *1 (E.D. Va. Oct. 15, 2013).

²²² *Id.* The regulation at issue in Henrico County differs from those dealt with in *Cutting* and *Thayer* in that it targets activity—any form of solicitation—within the space of traffic medians to remove the homeless, rather than simply banning occupancy outright. Compare *id.* with *Cutting v. City of Portland*, No. 2:13-CV-359-GZS, 2014 WL 580155 *3 (D. Me. Feb. 12, 2014) and *Thayer*, 755 F.3d at 65. Although the Henrico County ordinance fits into the lineage of anti-homeless laws prohibiting panhandling in certain spaces, such as on New York City subways, it more accurately resembles the median bans of Portland and Worcester because solicitation, and any speech aimed at drivers generally, is for all intents and purposes the *only* activity citizens perform on medians. It thus operates as a blanket ban.

²²³ United States Census Bureau, *State and County Quick Facts: Henrico County, Virginia*, CENSUS.GOV, <http://quickfacts.census.gov/qfd/states/51/51087.html> (last visited Nov. 30, 2014).

²²⁴ *Reynolds*, 2013 WL 5652493, at *1.

²²⁵ Brief of Plaintiff-Appellant Robert S. Reynolds (C.A.4) at *1, *Reynolds v. Middleton*, 2013 WL 5652493 (Jan. 14, 2014) (No. 13-2389), 2014 WL 126033.

se, primarily on First Amendment grounds.²²⁶ In a fairly truncated analysis, the court concluded that the ordinance was content-neutral since “on its face [it] does not distinguish between different types of contributions. . . .”²²⁷ The court also pointed out that “[t]he government [did] not justify the regulation because of the content of the regulated speech,”²²⁸ further confirming the ordinance’s content-neutrality. The court then found that the ban passed muster under intermediate scrutiny, stating it served the substantial government interest of public safety, was narrowly tailored to prohibit only activity on roadways that required interaction between the speaker and drivers, and left open other channels of communication.²²⁹ As such, the court dismissed the suit and upheld the county’s median ban.²³⁰

B. The Limits of Litigation

The median ban decisions are troubling for a number of reasons. For one, they are disturbing because the courts appear disinclined to recognize the right of homeless people to occupy traffic islands and solicit funds under the First Amendment. Despite the fact that the police departments in *Thayer* and *Reynolds* did not provide evidence of a single traffic accident or injury caused by people begging in medians,²³¹ the courts em-

²²⁶ *Reynolds*, 2013 WL 5652493, at *1. Although the Reynolds made Fourteenth Amendment claims and a claim under the Contract Clause of the Constitution, the Court bluntly dismissed these arguments. *See id.* at *4-5.

²²⁷ *Id.* at *3.

²²⁸ *Id.* Notably, the Court did not question why the County should prohibit distracting speech in roadways, including on medians, and not distracting speech made on sidewalks or areas adjacent to roadways. *See id.* at *3-4.

²²⁹ *Id.* at *4.

²³⁰ *Id.* at *5.

²³¹ *Thayer v. City of Worcester*, 755 F.3d 60, 69 (1st Cir. 2014); Brief of Plaintiff-Appellant Robert S. Reynolds (C.A.4) at *28-29, *Reynolds v. Middleton*, 2013 WL 5652493 (Jan. 14, 2014) (No. 13-2389), 2014 WL 126033. The Portland Police Department has identified only one incident involving solicitation from a median over a five-year period from 2008-2013, and even in that case the cause of the accident appeared to be the result of a careless driver, rather

braced the government's surface justification of public safety.²³² Even the favorable decision in *Cutting*, striking down Portland's ordinance inspires little confidence as the victory proceeded from the city's tactical blunder of attempting to snuff out pan-handling but still allow campaign signs on the medians. Should the Portland City Council wish to prevent the homeless from standing in medians, it need only remove the ordinance's exception for campaign signs, thereby aligning it with the First Circuit's parameters in *Thayer*.²³³ At the moment, it looks like the courts will not interfere with local governments wishing to prohibit the homeless and extremely poor from accessing street medians.

Secondly, these recent cases demonstrate the ineffectiveness of negative rights-based litigation as a means of combatting anti-homeless laws. Anti-homeless laws continue to increase nationwide despite various judicial victories over the years,²³⁴ and the median ban cases continue the trend of courts refusing to take a firm stand against regulations targeting the homeless. The decisions in *Thayer* and *Reynolds* upholding the legality of median bans illustrate the courts' recurrent hostility to, and constant unreliability for, advocates wishing to protect homeless individuals' liberties.²³⁵

than of the person soliciting in the median. Brief of Plaintiffs-Appellees Michael W. Cutting, Wells Staley-Mays, and Alison E. Prior, *supra* note 187, at *18-19.

²³² See *Thayer*, 755 F.3d at 68-69; *Reynolds*, 2013 WL 5652493, at *3.

²³³ The written text of the Portland ordinance and the Worcester median ordinance are essentially identical in terms of their scope. Compare *Cutting v. City of Portland*, 2014 WL 580155 *3 (D. Me. Feb. 12, 2014) with *Thayer*, 755 F.3d at 65.

²³⁴ NAT'L LAW CENTER, NO SAFE PLACE, *supra* note 58, at 16-17.

²³⁵ To raise the potential objection that the poor results in *Thayer* and *Reynolds*—and in the many losses preceding them—are the product of bad lawyering would be to miss the point entirely. To argue securing homeless rights merely requires better attorneys than those at the ACLU of Massachusetts who worked on the *Thayer* litigation simply states yet one more reason litigation fails as a sustainable solution to anti-homeless laws. When ACLU attor-

However, the most disconcerting aspect of the recent median ban decisions, and of negative rights-based litigation in general, is the absence of any discussion of the economic and spatial politics motivating anti-homeless laws. To some extent a product of judicial doctrine's inherent constraints, this invisibility of neoliberal capitalism's spatial dynamics in both the litigants' arguments and the courts' analysis is the primary reason litigation fails as a sustainable, long-term solution to anti-homeless laws. Failure to address the ideological and structural forces of capitalism that fundamentally animate anti-homeless sentiment ensures that oppressive acts against homeless populations will continue so long as excising the homeless from urban space is integral to economic growth.²³⁶ This is not to say that median bans do not implicate First Amendment rights—they very much do. Rather, the point is that framing the problems posed by median bans in free speech terms obscures the broader socio-spatial pressures that drive the exclusion of the homeless from public spaces. Even if courts protected the indigent poor's ability to access traffic medians on First Amendment grounds, city policymakers would simply target the homeless using new policies and laws focused on different times and spaces in homeless people's lives. These new laws would necessitate yet another round of slow-moving litigation that may or may not succeed. City leaders, with elite and middle-class residents' support, might also resort to extralegal, rather than legal, mechanisms of control, as they have in the past.²³⁷

neys are unable to protect the basic right of homeless individuals to public space, we have a serious problem indeed.

²³⁶ Again, the proliferation of anti-homeless laws across the country despite resistance from legal advocates speaks to the growing strength of anti-homeless sentiment and the ineffectiveness of litigation as a strategy. For statistics on the increase in anti-homeless laws, see NAT'L LAW CENTER, *NO SAFE PLACE*, *supra* note 58, at 16-17.

²³⁷ See, e.g., *Smith, Which New Urbanism?* *supra* note 131 (describing extralegal tactics used by the NYPD against the homeless).

The framework of constitutional jurisprudence restricts the arguments and topics available to legal advocates, especially limiting the power of any claims about freedom of movement,²³⁸ a concept more consonant with the underlying problems posed by median bans and anti-homeless laws generally. The rigid contours of judicial review thus render the spatial inequities and structural violence of the growth machine paradigm illegible to the legal system and judicial actors. These theoretical blind spots in judicial doctrine mean that litigation, while well intentioned, actually perpetuates and contributes to the hegemony of pro-growth ideologies and neoliberal economic policies by refusing to question their saliency. Exposing the spatial politics of capitalism at play in anti-homeless laws is the first necessary step to opening up the growth machine's logic to attack. Once exposed, possibilities exist for undermining and resisting the economic and governing regime that demands the exclusion of the homeless from public space. Crucially, those concerned with homeless rights must recognize and confront the rationale justifying, motivating and shaping anti-homeless sentiment for what it is: an ideology standing in dialectical relation to capitalism's structural formations. A central contention of this article is that it matters how we think about things, and approaching anti-homeless action as a product and extension of ideology dictates a vigorous and comprehensive response if we want to achieve any substantive gains in the fight for inclusive urban spaces.

Portland's experience trenchantly illustrates the importance of recognizing anti-homeless laws as outcroppings of the economic growth agenda. The federal court's order to strike down the median ban ordinance has not shaken the underlying logic that produced the ban in the first place, conserving the potential

²³⁸ As discussed, *supra*, Courts have generally found no extensive right to freedom of movement under the federal Constitution, especially in the localized contexts surrounding anti-homeless laws. See Hansel, *supra* note 13, at 452 ("Both the Supreme Court and many lower courts, however, have been more reluctant to find that anti-homeless measures violate the fundamental right to travel.").

for other anti-homeless action. In a city organized around tourism and consumer-based industries, and which has seen heavy investment in retail and high-end housing in recent years, the absence of any discourse or narrative pointing out that urban space is an integral component in capitalist accumulation has meant that the basic conditions propelling homeless removal lie unseen. Even residents who critiqued the median ban as an attempt to hide the homeless “for tourists” have not grappled with the immense monetary interests emanating from multiple sectors of the economy that produce the ordinance. These critics’ failure to contest and question the neoliberal imperatives that hinge massive capital investment and property values on the presence or non-presence of the homeless leaves the ideological support for anti-homeless sentiment intact and unruffled. Until advocates dismantle the hegemonic assumption that economic growth benefits the majority of residents—an incorrect assumption, as growth tends to merely advantage the upper echelons of society²³⁹—city leaders and elected officials will, with the support of most citizens, continue to gear their visions for Portland’s spatial makeup and regulation towards economic growth. With these problems in mind, this article concludes with

²³⁹ LOGAN & MOLOTCH, *supra* note 9, at 85, 98 (“[F]or many places and times, growth is at best a mixed blessing and the growth machine’s claims are merely legitimating ideology, not accurate descriptions of reality. Residents of declining cities, as well as people living in more dynamic areas, are often deceived by the extravagant claims that growth solves problems. . . . [T]he evidence on fiscal health and economic or social problems indicates clearly that the assumptions of value-free development are false. In many cases, probably in most, additional local growth under current arrangements is a transfer of wealth and life chances from the general public to the rentier groups and their associates. Use values of a majority are sacrificed for the exchange gains of a few.”); ROSS, *supra* note 90, at 89 (“Wherever the ideology of growth is accepted as common sense, elite coalitions are able to leverage local government powers to harvest profits at the expense of their counterparts in competing cities. Study after study shows that growth costs much more than it adds to the tax base, and yet politicians can no more question growth than they can afford to be seen as laggards in the competition to beggar their neighborly rivals.”).

thoughts on the lessons legal advocates can draw from contextualizing anti-homeless laws within the “city as a growth machine” framework and the future direction advocates must take to resist the spatial politics of neoliberal capitalism.

PART V: CONCLUSION

The systemic forces of capital accumulation and neoliberal inter-urban competition pervade and organize modern city space through the “city as a growth machine” ideology. The primacy of the economic growth agenda dictates that local governments remove the homeless, whose presence militates against capital investment, from public space. This demand fundamentally motivates the proliferation of anti-homeless laws occurring in American cities. Advocates interested in establishing homeless individuals’ right to public space must confront this root cause of anti-homeless laws and directly contest and resist the structural pressures of the growth machine. Destabilizing the hegemony of pro-growth power requires both overturning the notion that economic development is always beneficial to the majority of residents and pointing out the violence inherent in allowing growth to command municipal spatial policies. Advocates must question the economic logics and class-based notions of identity that dominate the construction of urban spaces and show that acquiescing to capital’s competitive demands in fact disadvantages cities by reinforcing neoliberalism’s zero-sum game.

Combatting these deep-seated structures and displacing economic growth from its primary position in local politics is certainly a daunting task, but it is a possible and necessary one.²⁴⁰

²⁴⁰ See Neil Brenner, Peter Marcuse, & Margit Meyer, *Cities for People, Not Profit*, in *13 CITY: ANALYSIS OF URBAN TRENDS, CULTURE, THEORY, POLICY, ACTION* 176, 178 (2009) (“Urban space under capitalism is. . . never permanently fixed; it is continually shaped and reshaped through a relentless clash of opposed social forces oriented, respectively, towards the exchange-value (profit-oriented) and use-value (everyday life) dimensions of urban sociospatial configurations.”).

The more neoliberal capitalism excludes individuals to ensure its success, the more it creates the political disaffection and dispossessed groups from which transformative action can flow.²⁴¹ Mobilizing this disaffection requires engaging in more proactive strategies. For advocates, taking a more proactive role means not only attacking the growth machine ideology, but also envisioning alternate urban spaces. Imagining equitable ways of configuring and using urban space begins with the recognition that under neoliberalism, urban economic growth policies produce a city benefiting and designed for a particular segment of society at the expense of its most vulnerable members. Reading anti-homeless laws through the lens of the “city as growth machine” framework requires asking not only “how do we want to use city space?”, but also the intimately related question, “who do we want city space to be for?” Creating truly open and livable urban and public spaces for all members of our communities requires placing the perspectives and needs of homeless individuals and other marginalized groups above the needs of neoliberal capitalism in our spatial politics. In large part, this means emphasizing the use values of urban space rather than its exchange values. It is only by centering the lived experiences of homeless individuals in our spatial politics that we can ensure the construction of truly public spaces.

²⁴¹ *Id.* at 176.