

Roulette v. City of Seattle:
A City Lives With Its Homeless

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I. INTRODUCTION

There are at least 228,000 homeless people living in temporary shelters or on America's streets according to the United States Census Bureau,¹ but a more accurate figure is probably closer to 500,000.² Many are mentally ill, drug dependent or have a history of criminality.³ According to researchers Alice S. Baum and Donald W. Burnes, most homeless people live personal lives "entrapped by alcohol and drug addictions, mental illness, lack of education and skills, and self-esteem so low it [is] often manifested as self-hate."⁴

One public perception is that the homeless are responsible for an increase in crime and a decrease in the quality of urban life.⁵ As he navigated the campaign trail, then New York City mayoral candidate Rudolph Giuliani heard these words from a frustrated citizen:

I have lived only a few blocks from here for 23 years and I was asked for money three times by bums on the way here tonight. Sometimes they have guns. When is this going to stop? I am not interested in other people's neighbourhoods [sic], I'm interested in mine. What are you going to do for me and for my children?"⁶

1. The United States Census Bureau reports that of the 249.6 million people living in the United States in 1991, 178,828 lived in emergency shelters and 49,793 others lived on the street. The homeless census count was derived from a one-night enumeration conducted on March 20, 1991. *One-night Census Count Totals 228,621 Homeless*, UPI, Apr. 12, 1991; see also, *At a Glance*, THE NAT'L J., Apr. 20, 1991, at 944 (census bureau officials admit their count was incomplete); *The Homeless Count*, AM. DEMOGRAPHICS, Sept., 1991, at 13 (census bureau estimates Seattle's homeless population at 2,539).

2. A 1987 study by the Urban Institute indicated the homeless population was between 500,000 and 600,00. MARTHA R. BURT AND BARBARA E. COHEN, *AMERICA'S HOMELESS 1-2* (1989). In 1992, Martha Burt estimated the homeless population at "roughly" 15 to 25 homeless persons for every 10,000 people in the country. MARTHA R. BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980'S 4* (1992). Based on the 1990 census, Burt's estimate would put the homeless population at between 374,400 and 624,000. Other estimates place the number of homeless as high as two to three million, or about one-percent of the population, a figure comparable to the estimated percentage of homeless in January, 1933. Martha Burt claims the higher estimates are exaggerated. *Id.* at 3-4.

3. See *infra* text accompanying notes 46-52.

4. ALICE S. BAUM & DONALD W. BURNES, *A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS 2* (1993).

5. See Jim Doyle & John King, *Matrix Program Passes Test in Federal Court*, S.F. CHRON., Mar. 16, 1994, at A1 ("The mayor insists that Matrix [a program designed to control the conduct of homeless people on the street] was created in response to a torrent of citizens' complaints about 'street crime. . . .'"); see also Sylvia W. Nogaki, *Downtown at Crossroads*, SEATTLE TIMES, May 8, 1994, at A1.

6. Peter Pringle, *Rudy Guiliano [sic] of Mayor*, THE INDEPENDENT, Oct. 20, 1993, at 21 (quoting a New York City resident speaking to mayoral candidate Rudy Giuliani at a campaign forum).

Politicians have responded to the public outcry with promises to enact ordinances aimed at the homeless.⁷ One homeless advocate calls the official responses “knee-jerk reactions to political pressure.”⁸ Nonetheless, in the 1992 mayoral races in Los Angeles⁹ and New York,¹⁰ the winner was the candidate with the toughest position on crime.¹¹

Elected politicians have made good on their promises to enact ordinances aimed at the homeless. In a sixteen-city study conducted in 1993, the National Law Center on Homelessness and Poverty found that the number of local government ordinances aimed at controlling homeless people had “sharply increased” in the previous two years.¹² For example, seven Southern California municipalities have passed new ordinances since 1991 that prohibit the homeless from sleeping or camping on public property.¹³ In San Francisco, a mayor who was falling behind in popular support instituted a comprehensive program to address public nuisance crimes—the Matrix Quality of Life program.¹⁴ So strong was the perceived support for the program that the Board of Supervisors was sufficiently emboldened to briefly consider a proposal to have the police seize stolen shopping carts from the homeless.¹⁵

7. See William Schneider, *Crime Pays for the Politicians; How the Politics of Fear Devoured the Incumbents*, THE WASHINGTON POST, Nov. 7, 1993, at C1 (noting that crime is the anti-incumbent's issue of choice).

8. Maria Foscarinis, *Homelessness is the Foe, Not the Homeless*, LOS ANGELES TIMES, Dec. 16, 1993, at B7.

9. *Republican Wins L.A. Mayor Election*, CHI. TRIB., June 9, 1993, at 4.

10. *Election Results: Full Reports, State by State*, U.S.A. TODAY, Nov. 4, 1993, at 4A.

11. Schneider, *supra* note 7, at C1.

12. NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, THE RIGHT TO REMAIN NOWHERE 5 (1993) [hereinafter NOWHERE].

13. *Id.* at 6.

14. The program was instituted in August, 1993. It redirects police resources to the enforcement of San Francisco's ordinances prohibiting camping in public places and sleeping in the parks between 10 p.m. and 6 a.m. April Lynch, *Jordan Extends Crackdown on Homeless for Second Month*, S.F. CHRON., Sept. 1, 1993, at A1.

A federal district court denied a preliminary injunction, sought by homeless advocates, to halt those aspects of the Matrix program that proscribed sleeping, camping, or lodging in public parks, and the obstruction of public sidewalks. *Joyce v. City & County of San Francisco*, 846 F. Supp. 843, 851-53 (N.D. Cal. 1994). The court held that the homeless plaintiffs failed to establish a sufficient probability of success on the merits of their claim to warrant injunctive relief. *Id.* at 864. Specifically, the plaintiffs alleged violations of the Eighth Amendment for punishing “status,” equal protection, right to travel, due process, and for unreasonable search and seizure under the Fourth Amendment. *Id.* at 853-64.

15. Debra J. Saunders, *Matrix A La Cart*, S.F. CHRON., Sept. 24, 1993, at A24. The proposal was not adopted after Mayor Jordan changed his mind on the shopping cart seizure proposal. Phillip Matier & Andrew Ross, *S.F. Matrix Plan Lurches*, S.F. CHRON., Oct. 11, 1993, at A17.

In Seattle, Washington, the challenger to Mayor Norman Rice, David Stern, focused his entire campaign on street crime.¹⁶ He lost the election.¹⁷ However, just one month prior to that election, the Seattle City Council adopted, and Mayor Rice signed into law, two ordinances for the express purpose of better controlling sidewalk disorder.¹⁸

One ordinance forbids a person to sit or lie down upon public sidewalks in certain designated business districts between 7:00 a.m. and 9:00 p.m.¹⁹ Violation of the sidewalk ordinance is a civil infraction, punishable by a maximum fifty dollar fine.²⁰

The other ordinance prohibits aggressive begging— begging with an intent to intimidate another person into giving money or goods.²¹ Violation of the aggressive begging ordinance is punishable as a misdemeanor.²²

The facial validity of both Seattle ordinances was unsuccessfully challenged in federal district court under 42 U.S.C. § 1983 on grounds of overbreadth, due process, and equal protection. In *Roulette v. City of Seattle*,²³ Judge Barbara J. Rothstein upheld both ordinances as valid exercises of governmental police power and as minor intrusions on individual liberty.²⁴

This Note will focus on the sidewalk ordinance for two reasons. First, the ordinance is a unique method to control conduct in a public forum. While its holding is consistent in outcome with *City of Seattle v. Webster*,²⁵ a decision that upheld an intent-based pedestrian interference ordinance, *Roulette* may be contrasted with a number of decisions denying enforcement of loitering ordinances on grounds that they punished a person's status.²⁶

16. See Dick Lilly, *Rice, Stern Tell Tale of Two Cities — Stern Says 'Scary,' Mayor Sees the Contrary*, THE SEATTLE TIMES, Oct. 14, 1993, at B1.

17. *Election Results: Full Reports, State by State*, U.S.A. TODAY, Nov. 4, 1993, at 4A.

18. See Letter from Mark H. Sidran, Seattle City Attorney, to the Honorable George Benson, President, Seattle City Council (Aug. 2, 1993) (on file with *Seattle University Law Review*).

19. SEATTLE, WASH., CODE §§ 15.48.040-.050 (1993) [hereinafter sidewalk ordinance]. See *infra* note 173 for full text of ordinance.

20. SEATTLE, WASH., CODE § 15.48.050 (1993).

21. SEATTLE, WASH., CODE § 12A.12.015 (1993) [hereinafter aggressive begging ordinance]. A proscription on aggressive begging is one section of Seattle's Pedestrian Interference Ordinance.

22. SEATTLE, WASH., CODE § 12A.12.015(D).

23. 850 F. Supp. 1442 (W.D. Wash. 1994), *appeal docketed*, No. 94-35354 (9th Cir. 1994). The appellants, homeless people and their advocates, did not appeal the aggressive begging ordinance. Only the sidewalk ordinance will be at issue at the Ninth Circuit Court of Appeals. Brief of Appellants at 1, *Roulette* (No. 94-35354).

24. *Id.* at 1454.

25. 115 Wash. 2d 635, 642, 802 P.2d 1333, 1338 (1990), *cert denied*, 500 U.S. 908 (1991).

26. See *infra* text accompanying notes 114-25.

The second reason to focus on the sidewalk ordinance is because the ordinance has a disproportionate impact on the homeless—a class of people who, by definition, make their homes in public places. While the author of the sidewalk ordinance notes that his proposal is not “an attack on the homeless,”²⁷ it certainly affects the homeless more than it does those who maintain private dwellings. As Sylvia A. Law points out in her article entitled *Economic Justice*,²⁸ “[private property] is valuable precisely because it protects the individual’s ability to march to a different drummer, without having to account to the collective will.”²⁹ Thus, the sidewalk ordinance could be viewed as an unfair burden on those who, out of necessity, must relax on the public byways.³⁰

This Note analyzes the *Roulette* holding with respect to prior decisions on begging and vagrancy. In addition, this Note discusses the sidewalk ordinance with respect to the efforts of other communities to control the detrimental effects of a growing homeless population. This Note concludes that the *Roulette* holding strikes a constitutionally valid doctrinal and jurisprudential middle ground between abandoning the streets to the homeless and driving them from the community. It is argued that the sidewalk ordinance is normatively valid, in that it sets a reasonable standard of conduct that meets commonly accepted norms of civility, serving to benefit the homeless as well as the larger community.

Part II of this Note sets out the background for the *Roulette* holding through an examination of the case law and the underlying policy considerations regarding vagrancy and begging. Section A explores the politics of poverty. Section B briefly traces the evolution of case law on vagrancy and loitering. Section C presents the still unsettled state of the law regarding the right of homeless people to beg in public fora.

Part III examines the *Roulette* decision in some detail. Section A presents and explains the sidewalk ordinance at issue in the case. Section B sketches a picture of the actual people who are represented under the more generic terms of “plaintiff” and “defendant.” Finally, Section C sets out the issues and holdings in the case.

27. Mark Sidran, Address to Downtown Seattle Rotary Club 3 (Aug. 4, 1993) (copy on file with *Seattle University Law Review*).

28. Sylvia A. Law, *Economic Justice*, in *OUR ENDANGERED RIGHTS* 134 (Norman Dorsen ed., 1984).

29. *Id.* at 155.

30. See Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295, 302 (1991). In his essay, Professor Waldron points out the link between actual freedom and spatial freedom. He argues that actual freedom is illusory absent the physical space in which to exercise free will. According to this view, the homeless are denied freedom because they lack the private space in which they may do as they please, free from government intrusion.

Part IV analyzes the outcome of the *Roulette* holding, its reasoning, and policy rationale, in light of prior case law and current thinking on the problems of homelessness. Part IV focuses on the governmental interests that are said to justify the sidewalk ordinance: the prevention of sidewalk obstructions and the prevention of urban blight. In this Section, it is suggested that the *Roulette* court may have erred in accepting the City's argument that the sidewalk ordinance is justified on grounds of preventing sidewalk obstructions. The Note argues a better rationale is the prevention of urban blight. Indeed, it is argued that preventing urban blight is a substantial governmental interest that justifies infringing even protected First Amendment activity—an issue not reached in the holding.³¹ Urban experts justify minor intrusions on personal liberty on the grounds that uncontrolled behavior leads to physical decay, creating a perception of unsafe streets. The perception of insecurity can destroy a neighborhood.

Moreover, the *Roulette* holding is distinguishable from the recent federal and state court decisions that have invalidated laws aimed at the homeless. Unlike other ordinances classified by political activists as anti-homeless, Seattle's sidewalk ordinance reflects an intention to control rather than expel the homeless population. Part IV considers the appropriateness of burdening homeless people with a coercive ordinance—an ordinance that further complicates the already desperate lives of people who live on the street. While most people rightfully worry that laws that have a disproportionate effect on homeless persons are normatively suspect, the sidewalk ordinance constitutes a minor intrusion on the homeless while substantially benefiting the larger community. Unless the majority community is permitted to regulate disorderly behavior in public places, it will turn its back on the homeless, exacerbating their problems by denial of assistance and encouragement of repressive police practices. A majoritarian backlash may already be underway in other cities.³²

Part V summarizes the likely implications of the *Roulette* decision. Part V suggests that the decision supports the notion that municipalities are free to regulate how homeless people may utilize public spaces on the mere assertion of a legitimate governmental purpose. Furthermore, protecting safety and aesthetics remains a substantial governmental interest that justifies intrusions on otherwise harmless sidewalk

31. Although Judge Rothstein concluded that preventing "pedestrian hazards" and "promoting the economic health" of commercial districts are "substantial" governmental interests, *Roulette*, 850 F. Supp. at 1448, she did not reach the reasonable time, place, manner question because she found no protected activity at issue. *Id.* at 1448-49.

32. See, e.g., Rick Bragg, *Homeless Seeing Less Apathy, More Anger*, N.Y. TIMES, Feb. 25, 1994 at A1; NOWHERE, *supra* note 12.

activity. However, laws that are facially valid against the homeless may be found unconstitutional in their application if their enforcement leaves the homeless person with no lawful place to rest.

The poor have always been with us, and so has the majoritarian desire to punish and control the dislocated.³³ An analysis of the new ordinance proscribing sidewalk sitting must begin with an overview of homelessness and the historical development of laws proscribing general vagrancy and begging.

II. BACKGROUND

If the enactment of homeless laws seems to create public dissension, that may be because the public is in conflict on how it ought to treat its homeless population.³⁴ Part II of this Article briefly explores this societal dilemma as it is reflected in the politics of poverty and in the case law on vagrancy and begging.

A. *The Politics of Poverty*

The politics of poverty is about squaring America's historical compassion for the underdog with its worship of the work ethic. This Section explores the underlying policy considerations that courts confront in determining whether laws that intrude on the liberty of the displaced poor are fair assertions of governmental power.

1. Are the Homeless "Deserving" or "Undeserving" Poor People?

America's view of poverty is framed by two related and deep-seated values: a strong work ethic and a suspicious attitude toward poor people.³⁵ A Jacksonville, Florida vagrancy ordinance, struck

33. Official attempts to punish and control the displaced poor have been documented as far back as the seventh century. See 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, 635 n.26 (1992); see generally Robert Teir, *Maintaining Safety and Civility in Public Places: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993) (this recently published article provides an excellent history of how a number of countries have attempted to control begging).

34. A 1993 Harris poll reflected the public's conflicting emotions of compassion and coercion toward the homeless. The fact that 81% said they would be willing to pay higher taxes if the money was directed at helping the homeless shows the public's compassionate side. By comparison, 90% were willing to pay higher taxes to fight crime. However, the details of the poll reveal the public's coercive side. Where 50% said they were "very willing" to pay higher taxes to fight crime, only 28% were "very willing" to help the homeless. Mark N. Vamos, *The Lowdown on High Taxes*, BUS. WK., Nov. 1, 1993, at 35. The poll surveyed 1,252 adults October 14-18, 1993, and the results are accurate to within three percentage points. *Id.*

For further discussion of the dispute in this country over treatment of the homeless, see generally MICHAEL B. KATZ, *THE UNDESERVING POOR* (1989).

35. See LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY* 20 (1992).

down by the United States Supreme Court in 1972, illustrates the point:

*Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers . . . persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business . . . persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.*³⁶

Early in the nineteenth century, public officials attempted to divide the poor into two classes, the deserving and the undeserving. This distinction remains alive today.³⁷ The deserving poor are the aged, widows, heads of family who lose a job, and the infirmed. The undeserving poor, the paupers, are the able-bodied who refuse to work.³⁸ Under the vagrancy principle, the community cares for its poor and drives out its paupers.³⁹

Throughout most of our history, Americans have considered the homeless part of the undeserving pauper class by virtue of their transience, their economic dependence, and often their addiction to alcohol and drugs.⁴⁰ But beginning in the early 1980's, political advocates have attempted to portray the homeless as among the deserving poor.⁴¹ To do this, the homelessness problem was redefined as one of poverty and victimization,⁴² growing out of flawed governmental policies and adverse macroeconomics.⁴³ As a result of this effort by political advocates, Urban Studies Professor Michael B. Katz finds that a "moral

36. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156-157 n.1 (1972).

37. MICHAEL E. KATZ, *THE UNDESERVING POOR* 5 (1989).

38. *Id.* at 191-92.

39. See BAUM & BURNES, *supra* note 4, at 107.

40. *Id.*; see also, KATZ, *supra* note 37, at 191 ("[U]nemployed men asking for relief were the quintessential undeserving poor, immediately suspect for their inability to support themselves in the land of opportunity.").

41. BAUM & BURNES, *supra* note 4, at 108.

42. *Id.*

43. See *id.* at 91. Specific policy changes that have had an effect on homelessness include decriminalization of public drunkenness, resulting in a shift of inebriates from the jail to the street; a decrease in the number of public hospital treatment beds for alcohol and drug treatment; loss of low-income housing where inebriates could hide and imbibe; and the deinstitutionalization of the mentally ill without a corresponding increase in community-based mental health centers. See *id.* at 156-66. For an excellent discussion of the effects of mental illness and chemical dependency on the homeless population and corresponding affects or changes in governmental policy, see BURT, *infra* note 46, at 107-126.

ambiguity" now hovers over the homeless.⁴⁴ Some people now consider today's homeless to constitute a "new deserving poor" despite the fact that today's homeless probably work less than their nineteenth century counterparts.⁴⁵

While the increasing numbers of homeless correlate to the baby-boom population bulge,⁴⁶ the most comprehensive homelessness studies⁴⁷ support the view that today's street denizens are not merely a microcosm of the general population who, because of bad luck, are temporarily without shelter. Instead, the majority of homeless are in serious need of medical and behavioral treatment. More than half the homeless population has been institutionalized in a mental hospital, a chemical dependency in-patient program, or a state or federal prison.⁴⁸ If county and municipal jails are considered, the figure rises to two-thirds of the homeless population.⁴⁹ Half the homeless people studied rated high enough on the scale of depression to warrant immediate treatment.⁵⁰ Furthermore, the forty-three percent that have been hospitalized for mental or chemical dependency problems have been, on average, out of work for four to five years.⁵¹ That compares to a mean of thirty-eight months out of work for those who have not been institutionalized.⁵²

2. How Much Help Do the Homeless Deserve?

The American understanding of the social compact is that people are inherently responsible to provide for their own welfare.⁵³ At the framing of the United States Constitution, it was the general view that

44. KATZ, *supra* note 37, at 192.

45. *Id.* But see BAUM & BURNES, *supra* note 4, at 108 (In the 1990's, "Compassion fatigue" has caused many people to reclassify the homeless as "undeserving." The public is "becoming less generous and more careful about its support [of the homeless and] city officials are using a variety of laws to prevent their cities from becoming 'havens' for homeless people.").

46. BAUM & BURNES, *supra* note 4, at 30-33, 156-57. In 1990, there were 108 million people between the ages of 18 and 44, the age group most at risk for the onset of mental illness and most likely to be seriously involved with alcohol, drugs, and the criminal justice system. This is 48% more people than fell in that age bracket in 1970. *Id.* Indeed, the numbers of alcoholic and mentally ill people are consistent with their historic distribution in the population. MARTHA R. BURT, *OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980's* 107 (1992). These data suggest that the homelessness problem may be relieved as the baby-boomers age.

47. For a comprehensive statistical study of homelessness in America, see generally BURT, *supra* note 46.

48. *Id.* at 24.

49. *Id.*

50. BURT & COHEN, *supra* note 2, at 3-4.

51. See BURT, *supra* note 46, at 25.

52. *Id.*

53. See LOUIS HENKIN, *THE AGE OF RIGHTS* 153-54 (1990).

the poor had no inherent right to be free from want.⁵⁴ Since then, the social compact has expanded, at least to the extent that it is considered the purpose of government to provide for minimum necessities at poverty levels for those who cannot help themselves.⁵⁵

In his book, *The Age of Rights*, Louis Henkin points out that caring for the needy was traditionally viewed as a moral obligation satisfied principally through the church.⁵⁶ Henkin believes that the United States has become a "welfare state,"⁵⁷ where the polity now accepts the notion that the social compact includes responsibility for the general welfare that exceeds the "sum of the particular rights narrowly conceived."⁵⁸ In other words, public purpose and retained rights are informed by the moral assumptions of the social compact. On this view, the homeless are not entitled to welfare, but the legislature should still extract wealth from the majority and transfer it to the needy out of moral, if not constitutional, obligation.⁵⁹

Because welfare is provided by the grace of the legislature, and not out of inherent right, it is provided grudgingly and selectively. The traditional view holds that the primary responsibility for a person's welfare, happiness, and financial security lies with the individual.⁶⁰ Societal responsibility is seen as secondary and supplementary to what the individual can do for himself or herself.⁶¹ According to this view, societal support will be minimal, and adjusted in accordance with some general notion of an individual's effort toward self-help and compliance with social norms.⁶²

For example, New York City Mayor Rudolph W. Giuliani recently announced a new plan to deny shelter to homeless families who refuse to participate in treatment or training programs.⁶³ In addition, homeless single adults would be required to pay rent for shelter space unless they participate in similar programs.⁶⁴

According to this view, the homeless are not relieved of personal responsibility to account to the collective will. As Harvard Law Pro-

54. *Id.* at 99, 101.

55. *Id.* at 102.

56. *Id.* at 160.

57. *Id.* at 153.

58. *Id.* at 102.

59. *Cf. id.* at 153.

60. *See id.* at 160.

61. *See id.*

62. *See id.* at 160-61.

63. Celia W. Dugger, *Plan Ties Shelter for the Homeless to Social Services*, N.Y. TIMES, May 7, 1994, at A1.

64. *Id.*

fessor Mary Ann Glendon points out in her book, *Rights Talk*,⁶⁵ everyone shares an obligation to the commonweal. To apply Glendon's argument, a homeless person is not "a captain of fate in a sea of unlimited liberty."⁶⁶ The homeless owe something more to the community than merely avoiding the "active infliction of harm."⁶⁷

Perhaps it is this expectation of shared obligation to the welfare of the community that also causes many Americans to look on the homeless with some measure of contempt when they see evidence of disrespect and disorder.

Having briefly examined the policy considerations that underlie governmental promulgation and judicial scrutiny of laws affecting the homeless, a discussion of the case law on vagrancy and loitering is now in order.

B. Vagrancy and Loitering Laws

Historically, vagrancy laws were designed to coerce paupers back into the workplace in order to maintain an adequate labor force and to prevent crime.⁶⁸ For example, until the Massachusetts Supreme Court struck down the state's vagrancy statute in 1967, it was a crime to be poor and found wandering the streets.⁶⁹ The statute had criminalized idleness, which it defined as failure to give a satisfactory account.⁷⁰ Such harsh laws were an extension of the community's moral voice that demanded individual productivity from all members of the society, except those who were considered the deserving poor.⁷¹

Beginning in the 1950's, courts began striking down vagrancy laws as unconstitutionally criminalizing status.⁷² For example, Washington struck down its vagrancy statute in 1967.⁷³ But, communities have not given away control over their streets and parks. General vagrancy prescriptions have evolved into more targeted loitering laws that homeless

65. MARY ANN GLENDON, *RIGHTS TALK* (1991).

66. *See id.* at 44-45.

67. *See id.* at 77.

68. FRANCES F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR* 3, 22, 40-41 (1971); *see also* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 n.4 (1972) (noting that economics and crime prevention have historically driven the promulgation of loitering laws).

69. *Alegata v. Commonwealth*, 231 N.E.2d 201, 206-07 (Mass. 1967) (striking down the statute on grounds of unreasonable use of police power).

70. *Id.* at 206.

71. *See* KATZ, *supra* note 37, at 12-14.

72. *E.g.*, *Commonwealth v. Carpenter*, 91 N.E.2d 666, 666-67 (Mass. 1950) ("Prima facie, mere sauntering or loitering on a public way is lawful and the right of any man, woman or child."); *Papachristou*, 405 U.S. at 164-65 (holding that there is a constitutional right to walk, stroll, or wander aimlessly). *But see* *City of Cleveland v. Gogola*, 113 N.E.2d 264 (Ohio Ct. App. 1953) (upholding ordinance that criminalized "common" begging).

73. *City of Seattle v. Drew*, 70 Wash. 2d 405, 423 P.2d 522 (1967).

advocates call "sophisticated, deliberate and institutionalized [efforts to] persecut[e] an already terribly destitute and marginalized group of people."⁷⁴

The evolution of vagrancy and loitering laws falls into three "generations":⁷⁵ first, general vagrancy laws that criminalize mere status; second, laws that proscribe loitering with intent to solicit prostitution; and, third, laws that criminalize loitering with an intent to commit a variety of illegal acts, most particularly selling drugs or intimidating passersby.⁷⁶

1. General Vagrancy Laws

General vagrancy laws are usually attacked on two grounds: void-for-vagueness and overbreadth.⁷⁷ A vagueness challenge attacks the clarity of a law and whether it serves as a vehicle for arbitrary enforcement by police.⁷⁸ In *Papachristou v. City of Jacksonville*,⁷⁹ the United States Supreme Court invalidated on vagueness grounds a Jacksonville, Florida vagrancy ordinance that criminalized, *inter alia*, habitual loafing.⁸⁰ Justice William Douglas, writing for a unanimous court, said the Jacksonville ordinance was void for vagueness because it failed to provide "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden," and because it encouraged "arbitrary and erratic arrests and convictions."⁸¹

Similarly, in *Kolender v. Lawson*,⁸² the Court struck down a California vagrancy statute that penalized wandering "upon the streets or from place to place without apparent reason or business" and failing to provide police with satisfactory identification.⁸³ The Court found the statute unconstitutionally vague because it failed to define what constituted "credible and reliable" identification.⁸⁴

74. NOWHERE, *supra* note 12, at 5.

75. See generally William Trosch, Comment, *The Third Generation of Loitering Laws Goes to Court: Do Laws that Criminalize 'Loitering with the Intent to Sell Drugs' Pass Constitutional Muster?*, 71 N.C. L. REV. 513 (1993).

76. *Id.* at 518.

77. Tracy A. Bateman, Jr., Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R.5th 455, 463 (1992).

78. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972) ("A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.")

79. 405 U.S. 156 (1972).

80. *Id.*

81. *Id.* at 162.

82. 461 U.S. 352 (1983).

83. *Id.* at 354.

84. *Id.* at 358. Of the two prongs of the vagueness test, the most important is defining standards for arrest. *Kolender*, 461 U.S. at 358; *cf.* *Shuttlesworth v. City of Birmingham*, 382 U.S.

The overbreadth doctrine applies in two circumstances. First, overbreadth may apply where a government regulation infringes protected speech and, second, where the regulation reaches other constitutionally protected conduct.⁸⁵ The latter form of overbreadth is really a substantive due process claim.

Where expressive conduct and not pure speech is at stake, the United States Supreme Court will uphold an ordinance unless the overbreadth is "real" and "substantial."⁸⁶ However, as the Court acknowledged in *Los Angeles City Council v. Taxpayers for Vincent*,⁸⁷ substantial overbreadth "is not readily reduced to an exact definition."⁸⁸ It does appear, though, that symbolic conduct is within the outer perimeter of speech that the Court considers worthy of protection under the overbreadth doctrine. For example, in *Board of Airport Commissioners of Los Angeles v. Jews for Jesus, Inc.*,⁸⁹ the Court voided a regulation that prohibited First Amendment activities in an airport terminal on grounds that it unconstitutionally encompassed the wearing of, *inter alia*, "symbolic clothing."⁹⁰ But, where the speech is merely incidental to the regulated conduct, the Court is unwilling to preclude governmental action on First Amendment grounds.⁹¹

Consequently, where the government can show harm to the community, homeless advocates have had no success in challenging loiter-

87 (1965). In *Shuttlesworth*, the Court ruled on a Birmingham, Alabama ordinance that criminalized any failure to heed a police order to move on. The Court found the ordinance constitutionally repugnant where a person was not acting unlawfully because, "[l]iterally read, . . . this ordinance says that a person may stand on a public sidewalk . . . only at the whim of any police officer." *Id.* at 90. But, where the ordinance is narrowly construed to apply only where the person is obstructing the sidewalk, the *Shuttlesworth* Court found the "move on" order could be a facially valid exercise of police authority. *Id.* at 91.

85. See *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

86. *Id.*; accord *City of Houston v. Hill*, 482 U.S. 451, 458 (1987); *City of Seattle v. Ivan*, 71 Wash. App. 145, 150, 856 P.2d 1116, 1118 (1993).

87. 466 U.S. 789 (1984).

88. *Id.* at 800.

89. 482 U.S. 569 (1987).

90. *Id.* at 575. The Court has protected many forms of symbolic speech. See *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning); *Cohen v. California*, 403 U.S. 15 (1971) (obscene garment); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (black armbands as protest against the Vietnam War); *Spence v. Washington*, 418 U.S. 405, 410-11 (1974) (carrying a flag upside down demonstrates that "an intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it."). But see *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."); *Grayned*, 408 U.S. at 116 ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.").

91. *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

ing ordinances on First Amendment grounds, except when they attack bans on begging. In *Clark v. Community for Creative Non-Violence*,⁹² homeless advocates had constructed a symbolic encampment across the street from the White House to protest insufficient concern for the plight of homeless people. In upholding the National Park Service's ban on unauthorized camping, the United States Supreme Court concluded that while sleeping and camping may involve some symbolic expression, it was insufficient to overcome the Park Service's valid interest in protecting the park.⁹³

Similarly, in *Stone v. Agnos*,⁹⁴ the Ninth Circuit Court of Appeals noted that "sleeping would seem to be the antithesis of speaking."⁹⁵ Without reaching whether sleeping could be protected as expression, the *Agnos* court found that the City of San Francisco could validly remove homeless people from a park even where the homeless person was intending to "dramatize" his plight.⁹⁶

Homeless advocates have had more success in challenging vagrancy ordinances where the proscribed conduct is not shown to be harmful to the community. In striking down an ordinance proscribing habitual loafing, the United States Supreme Court in *Papachristou* gave constitutional protection to aimlessly wandering the public streets.⁹⁷ The Court said the government cannot "broadly and absolutely" deny access to streets, sidewalks and parks.⁹⁸ Similarly, the Washington Supreme Court has given standing still in a public place equal constitutional validity to moving about.⁹⁹

Whether a proscription on particular conduct passes the substantive due process test turns on the perceived harmfulness of the conduct or whether the governmental motive is proper or improper. Lack of harmful consequence was the linchpin of the Washington Supreme

92. 468 U.S. 288, 294 (1984); cf. *University of Utah Students Against Apartheid v. Peterson*, 649 F. Supp. 1200 (D. Utah 1986) (holding that shanties erected in protest to apartheid constitute symbolic speech).

93. *Id.* at 294.

94. 960 F.2d 893 (9th Cir. 1992).

95. *Id.* at 895.

96. *Id.*

97. *Papachristou*, 405 U.S. at 171; see also *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968) ("[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."); *Coates v. City of Cincinnati*, 402 U.S. 611, 612 n.1 (1971) (ordinance proscribing the mere gathering of three or more people in an alleyway is invalid on grounds of overbreadth and vagueness); *Fields v. City of Omaha*, 810 F.2d 830, 835 (8th Cir. 1987) (walking in the street is not a crime).

98. *Papachristou*, 405 U.S. at 171.

99. *City of Seattle v. Drew*, 70 Wash. 2d 405, 408, 423 P.2d 522, 524 (1967).

Court decision in *Seattle v. Pullman*,¹⁰⁰ overturning a curfew ordinance. The ordinance prohibited minors from loitering, wandering or playing during proscribed hours. The court concluded the ordinance was overbroad because it made "no distinction between conduct calculated to harm and that which is essentially innocent."¹⁰¹

Similarly, a Florida appellate court found the following ordinance vague and overbroad: "No person shall sleep upon or in any street, park, wharf or other public place."¹⁰² The court found that the ordinance punished "unoffending behavior" and gave insufficient warning that the conduct was forbidden by statute.¹⁰³ The court apparently found that no health or safety purpose was served by the ordinance.

Another Florida appellate court drew a distinction between sleeping and camping, finding one activity harmful and the other not. In *City of Pompano v. Capalbo*,¹⁰⁴ the court invalidated on vagueness and overbreadth grounds an ordinance that made it unlawful to "lodge or sleep in" a vehicle on a street or other public property. The court held the sleeping proscription was unconstitutionally vague because it, *inter alia*, would punish a "tired child asleep in his car-seat."¹⁰⁵ Furthermore, the court held that absent a health, safety or aesthetic rationale, the sleeping proscription would punish conduct that "cannot be conceivably criminal in purpose."¹⁰⁶ However, the court acknowledged that if the ordinance had been limited to just "lodging," it probably would have survived a constitutional challenge on grounds that public lodging could be harmful.¹⁰⁷

Thus, sleeping and camping ordinances usually survive overbreadth challenges when the government can show the ordinances are enacted for a health, safety, or aesthetic purpose. For example, in *Seeley v. State of Arizona*,¹⁰⁸ an appellate court upheld an ordinance that

100. 82 Wash. 2d 794, 514 P.2d 1059 (1973).

101. *Id.* at 799, 514 P.2d at 1063 (1973).

102. *State v. Penley*, 276 So. 2d 180, 180-81 (Fla. Dist. Ct. App. 1973), *cert. denied*, 281 So. 2d 504 (Fla. 1973).

103. *Id.* at 131; *see also* *State v. Father Richard*, 836 P.2d 622 (Nev. 1992). In *Father Richard*, the Nevada Supreme Court invalidated a Las Vegas ordinance that punished and defined vagrancy as wandering upon private property without "visible or lawful business with the owner or occupant." *Id.* at 623. The court held the ordinance void-for-vagueness on grounds that "an individual must necessarily guess as to when an innocent stroll becomes a criminal 'loitering.'" *Id.* at 624.

104. 455 So. 2d 468 (Fla. Dist. Ct. App. 1984), *review denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985).

105. *Id.* at 470.

106. *Id.* at 470-71.

107. *Id.* at 469; *accord* *Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987). The *Hershey* court held that a proscription on sleeping in a car was void-for-vagueness and unconstitutionally overbroad, but "lodging" in car was a valid proscription.

108. 655 P.2d 803 (Ariz. Ct. App. 1982).

prohibited lying, sleeping, or sitting in *any* public right of way at any time.¹⁰⁹ The court found that sleeping and lying on the public sidewalk were not protected rights and that proscribing sidewalk sitting was rationally related to preventing pedestrian and traffic obstruction.¹¹⁰

Similarly, in *Whiting v. Town of Westerly*,¹¹¹ the First Circuit Court of Appeals upheld a ban on beach and car sleeping in a resort community, writing "[t]he act of sleeping in a public place, absent expressive content, is not constitutionally-protected conduct."¹¹² The ordinance at issue in *Whiting* was only enforced during the summer tourist season, was limited to sleeping during the nighttime hours, and was obviously aimed at preventing tourists from camping out on public property after they failed to find lodging in the community.¹¹³

Homeless advocates have had their greatest success where they have shown an improper governmental purpose. In three cases often cited in support of constitutional challenges to loitering ordinances, the courts found the impermissible governmental purpose was to drive the homeless from the community.

In *Parr v. Municipal Court for Monterey-Carmel Judicial District*,¹¹⁴ the California Supreme Court held a loitering ordinance invalid on grounds that it was aimed at "hippies" even though it facially applied to everyone.¹¹⁵ The Carmel City Council had taken official notice of the "extraordinary influx of undesirable and unsanitary visitors to the City" and passed a "Declaration of Urgency" to ban people from sitting on public sidewalks or steps, or lying or sitting on any public lawns.¹¹⁶

Similarly, in *Tobe v. City of Santa Ana*,¹¹⁷ a California appellate court invalidated an ordinance that proscribed camping in streets, parks, and parking lots.¹¹⁸ The court took notice of the fact that several years earlier the city had entered into a stipulation ending a "war on the

109. *Id.* at 805.

110. *Id.* at 807; *see also* *Graff v. City of Chicago*, 9 F.3d 1309, 1314 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 1837 (1994) ("[N]o person has a constitutional right to erect or maintain a structure on the public way.").

111. 942 F.2d 18 (1st Cir. 1991).

112. *Id.* at 21; *accord* *City of Portland v. Johnson*, 651 P.2d 1384, 1387 (Or. Ct. App. 1982), *review denied*, 660 P.2d 681 (Or. 1983); *People v. Davenport*, 222 Cal. Rptr. 736, 738 (App. Dep't Super. Ct. 1985), *cert. denied*, 475 U.S. 1141 (1986); *Ferrell v. City of Santa Monica*, 102 Cal. Rptr. 705 (App. Dep't Super. Ct. 1972).

113. *See Whiting*, 842 F.2d at 20.

114. 92 Cal. Rptr. 153, *cert. denied*, 404 U.S. 869 (1971).

115. *Id.* at 158.

116. *Id.* at 354.

117. 27 Cal. Rptr. 2d 386 (Ct. App.), *review denied*, 30 Cal. Rptr. 2d 18 (1994).

118. *Id.* at 395.

homeless"¹¹⁹—a war that included mass arrests for trivial offenses and the use of harassment techniques such as frequently turning the park sprinklers on at night.¹²⁰ Thus, even though the anti-camping ordinance was established for the "purpose of . . . maintain[ing] public streets and areas . . . in a clean and accessible condition," the court overturned the ordinance with the following explanation:

*The camping ordinance is a butcher knife where a scalpel is required. It is a transparent manifestation of Santa Ana's policy, adopted five years ago, to expel the homeless. The city may preclude the erection of structures in public places and it might ban "camping" in select locations with a properly drafted ordinance, but it may not preclude people who have no place to go from simply living in Santa Ana. And that is what this ordinance is about.*¹²¹

Finally, in *Pottinger v. City of Miami*,¹²² a federal district court enjoined Miami officials from enforcing the city's various ordinances prohibiting sleeping in public, obstructing sidewalks, and using parks at night.¹²³ The court found that the ordinances were overboard as applied to homeless people "to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places"—conduct such as eating and sleeping.¹²⁴ In the court's view, because Miami had created a legal milieu where the homeless had "no place where they [could] lawfully be," the ordinances interfered with a right to be free of cruel and unusual punishment and a right to free movement.¹²⁵

Pottinger draws a clear distinction between the facial validity of vagrancy ordinances and their validity as applied to an identifiable group of individuals. The case law appears to support the notion that vagrancy ordinances that do not merely criminalize status, those that are designed with a public safety or aesthetic purpose, may be found facially valid. However, as *Pottinger*, *Tobe*, and *Parr* indicate, facially valid ordinances may be held unconstitutional where the real purpose is illegitimate as evidenced by the ordinances' enforcement.

119. *Id.* at 389.

120. *Id.* at 388.

121. *Id.* at 395.

122. 810 F. Supp. 1551 (S.D. Fla. 1992).

123. *Id.* at 1584.

124. *Id.* at 1577. However, the *Pottinger* court concluded that there is no facial right of privacy in this regard. *Id.* at 1575 ("[T]he law does not yet recognize an individual's legitimate expectation of privacy in such activities as sleeping and eating.")

125. *Id.*; cf. *Joyce*, 846 F. Supp. at 858 (holding that homelessness is a "condition" and not a "status," and thus not cognizable under the Eighth Amendment).

As will be shown in the next section, lawmakers have responded to the concern over an illegitimate purpose by writing ordinances that associate the vagrancy with an intent to engage in an otherwise illegal activity.

2. Loitering With Intent

The second and third generation of loitering laws were aimed at deterring certain illegal conduct by criminalizing otherwise innocent activity where the actor demonstrated an intent to engage in an unlawful act.¹²⁶ In this way, lawmakers hoped to overcome the twin concerns of overbreadth and vagueness. These "intent-type" ordinances associate the otherwise innocent loitering with an illegal activity, require a showing of specific intent, and sometimes list circumstances from which police officers and jurors can infer intention.

For example, the second generation of loitering laws was aimed at deterring prostitution.¹²⁷ Seattle's prostitution loitering law, upheld in *Seattle v. Slack*,¹²⁸ requires that the perpetrator intentionally solicit another to commit prostitution: "A person is guilty of prostitution loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to commit prostitution."¹²⁹ Thus, the right to loiter on a street corner is not disturbed unless the loitering is for the purpose of soliciting prostitution.

The third generation of loitering laws—laws that focus on crimes other than prostitution—have not found universal acceptance in the courts. Although the Washington Supreme Court has upheld intent-type drug and pedestrian interference ordinances, other courts have found similar ordinances constitutionally flawed. In *City of Tacoma v. Luvone*,¹³⁰ the Washington Supreme Court upheld a Tacoma, Washington drug loitering ordinance that proscribed conduct "manifesting the purpose to engage in drug-related activity."¹³¹ The court interpreted the phrase "manifesting the purpose" as an intent element, and explained that the purpose of requiring an intent element is to limit the universe of prohibited conduct and thereby limit the "reach into the

126. Trosch, *supra* note 75, at 518.

127. For a comprehensive discussion of prostitution loitering laws, see generally Jack L. Littwin, Annotation, *Validity and Construction of Statutes or Ordinances Proscribing Solicitation for Purposes of Prostitution, Lewdness, or Assignment—Modern Cases*, 77 A.L.R.3d 519 (1977).

128. 113 Wash. 2d 850, 784 P.2d 494 (1989).

129. *Id.* at 854, 784 P.2d at 496. *Contra, e.g.*, *Wyche v. State*, 619 So. 2d 231, 233-34 n.2 (Fla. 1993); *Coleman v. City of Richmond*, 364 S.E.2d 239, 242 (Va. Ct. App. 1988).

130. 118 Wash. 2d 826, 827 P.2d 1374 (1992).

131. *Id.* at 836, 827 P.2d at 1379. "The use of the word 'manifesting' in the ordinance indicates that some overt conduct performed while loitering is necessary to determine if a person has the intent to engage in illegal drug-related activity." *Id.* at 843, 827 P.2d at 1383.

arena of constitutionally protected First Amendment conduct."¹³² But, *Luvenc* holds that intent must be inferred from acts that are *in themselves* consistent with the underlying illegal activity and are clearly articulable.¹³³

However, even carefully framed drug and prostitution loitering laws have failed on grounds of vagueness and overbreadth.¹³⁴ For example, in *City of Akron v. Rowland*,¹³⁵ the Ohio Supreme Court struck down an Akron drug loitering law similar to that of Tacoma, Washington.¹³⁶ The *Rowland* court refused to find an intent element in the words "circumstances manifesting the purpose"¹³⁷ and found that, even if there was an intent element, the law was overbroad because it encompassed such "innocent" acts as "furtive" transfers¹³⁸—acts that the Washington court found consistent with drug dealing.¹³⁹

The Washington Supreme Court has upheld another intent-type ordinance that bears more directly on the subject of this Note. In 1990, the Washington Supreme Court upheld a pedestrian interference ordinance that proscribes intentionally obstructing a pedestrian or vehicular traffic¹⁴⁰ by walking, standing, sitting, lying, or placing an object in such a manner as to block passage by another person or vehicle or requiring another person to take "evasive action to avoid physical contact."¹⁴¹ In *City of Seattle v. Webster*,¹⁴² the majority held that the

132. *Id.* at 844, 827 P.2d at 1384.

133. *Id.* at 843-44, 827 P.2d at 1383; *see also Roulette*, 850 F. Supp. at 1453-54. Judge Rothstein struck all circumstances of intent to intimidate from the aggressive begging ordinance on grounds that the listed circumstances, such as directing profane language at the person solicited, impermissibly "describe[d] speech which is clearly protected by the First Amendment." *Id.* at 54. *Cf. Coleman v. City of Richmond*, 364 S.E.2d 239, 242 (Va. Ct. App. 1988) (invalidating a prostitution loitering ordinance on grounds that it inferred intent from the arresting officer's knowledge that the suspect had been convicted of prostitution in the past). *But see* Lisa A. Kainec, Comment, *Curbing Gang Related Violence in America: Do Gang Members Have A Constitutional Right to Loiter on Our Streets?*, 43 CASE W. RES. L. REV. 651 (1993) (arguing that being a known gang member should be a circumstance consistent with drug dealing).

134. *See Wyche v. Florida*, 619 So. 2d 231 (Fla. 1993) (prostitution loitering); *Holliday v. City of Tampa*, 619 So. 2d 244 (Fla. 1993) (drug loitering); *City of Akron v. Rowland*, 618 N.E.2d 138 (Ohio 1993) (drug loitering); *Houston v. City of Oklahoma City*, 856 P.2d 574 (Okla. Crim. App. 1993) (prostitution loitering).

135. 618 N.E.2d 138 (Ohio 1993).

136. *Id.* at 145.

137. *Id.* at 144.

138. *Id.* at 149; *see also A.C.L.U. v. City of Alexandria*, 747 F. Supp. 324, 328 (E.D. Va. 1990) (passing small objects such as business cards). *But see Wyche v. State*, 619 So. 2d 231, 237 (Fla. 1993) (arbitrary enforcement found to have resulted from an insufficient list of circumstances).

139. *Luvenc*, 118 Wash. 2d at 844, 827 P.2d at 1384.

140. SEATTLE, WASH., CODE § 12A.12.015(B)(1) (1993).

141. SEATTLE, WASH., CODE § 12A.12.015(A)(4) (1993).

intent element "saved" the ordinance from unconstitutional overbreadth.¹⁴³ Thus, as indicated by *Webster*, intent-type ordinances can be effective at avoiding overbreadth and vagueness challenges.

In order to round out a background discussion on vagrancy ordinances, it is important to touch on the case law related to begging. While Seattle's sidewalk ordinance does not proscribe begging *per se*, it does affect the beggar's ability to solicit on downtown sidewalks by requiring him or her to remain standing.

C. Laws Regulating Begging

The First Amendment plays an active role in determining the limits government may place on begging in public fora.¹⁴⁴ As a general rule, soliciting money for charitable purposes receives at least an intermediate level of scrutiny by the courts (requiring the government to show a substantial interest in the activity)¹⁴⁵ and, in some cases strict scrutiny, a level of protection equal to that given pure, non-commercial speech.¹⁴⁶

In *Schneider v. State*,¹⁴⁷ the United States Supreme Court applied intermediate scrutiny by overturning an ordinance that prohibited door-to-door solicitation.¹⁴⁸ The Court held that a substantial governmental interest in protecting the community from fraudulent sollicita-

142. 115 Wash. 2d 635, 802 P.2d 1333 (1990), *cert. denied*, 500 U.S. 908 (1991).

143. *Id.* at 642, 802 P.2d at 1338; *see also* *People v. Superior Ct. of Santa Clara (Caswell)*, 758 P.2d 1046, 1049 (1988). In *Caswell*, the California Supreme Court upheld a state statute proscribing loitering near a public toilet with intent to engage in "lewd or lascivious" conduct. The court found that lewdness was of sufficient clarity to provide adequate notice of the proscribed conduct and that, because the lewdness was proscribed near a designated area, it provided sufficient guidance to police. *Caswell*, 758 P.2d at 1057; *cf.* *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90 (1965) (holding that an ordinance that proscribed loitering after being told to "move on" by a police officer lacked sufficient guidelines to inform police and citizen of what constituted the proscribed activity).

144. *See generally* Tracy A. Bateman, Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R.5TH 455 (1992).

145. Kathleen M. Sullivan, *Post Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 297 (1992).

146. *Village of Schaumburg v. Citizens for a Better Env't.*, 444 U.S. 620, 632 (1980) (ruling that charitable solicitation is not commercial speech because it "does more than inform private economic decisions"); *see also* *Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 965-67 (1984) (holding that a state may not distinguish between charities by percentage of solicitation costs). Even though charitable fundraising is protected as pure speech, the Court's holdings in the area of *commercial speech* supports the conclusion that an ordinance aimed at the conduct of fundraising will be treated by the courts as a regulation aimed at the underlying speech itself. *See* *Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748, 756 (1976).

147. 308 U.S. 147 (1939).

148. *Id.* at 165.

tion provides insufficient grounds to restrain "one who wishes to present his views on political, social or economic questions."¹⁴⁹

Strict scrutiny was applied in *Riley v. National Federation of the Blind of North Carolina, Inc.*,¹⁵⁰ where the Court clearly articulated the nexus between the economic activity of fundraising and protected speech. The Court held that charitable solicitation merits "exactng first amendment scrutiny" because speech is intertwined with the conduct of raising money.¹⁵¹ Therefore, said the Court, regulations that result in limiting the character of the charitable appeal, even when based on a "paternalistic premise," unfairly burden the speaker's rights.¹⁵²

In certain circumstances, charitable solicitation and panhandling may be distinguishable activities for First Amendment purposes. In *Arizona ex rel. Williams v. City Court of Tucson*,¹⁵³ the court distinguished between charitable solicitation, generally, and begging, specifically, assigning the latter to the realm of impermissible loitering.¹⁵⁴ However, the *Williams* court never reached the First Amendment implications of the begging ban. Rather, the court's decision turned solely on whether the proscription on loitering with intent to beg was unconstitutionally vague.¹⁵⁵

149. *Id.* at 163; *see also* *Larson v. Valente*, 456 U.S. 228, 255 (1982) (holding that a law requiring religious organizations to register with the state if more than half their funds were raised from nonmembers violated the establishment clause of the Constitution); *Schaumburg*, 444 U.S. at 636 (invalidating an ordinance that limited door-to-door solicitation to those organizations that used at least 75% of their receipts for charitable purposes).

150. 487 U.S. 781 (1988).

151. *Id.* at 788-89.

152. *Id.* at 790-91, 794 (noting that, although solicitation is subject to regulation, government has no greater authority to regulate the fundraising activity than it does to regulate the speech that accompanies the appeal); *see also* *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (holding that a state could not "prohibit the distribution of handbills in the pursuit of a clearly religious activity merely because the handbills invite the purchase of [religious] books . . . or because the handbills seek in a lawful fashion to promote the raising of funds for religious purposes"); *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (holding that government can not restrain itinerant evangelists who spread religious doctrine as well as solicit funds). *But see* *Valentine v. Chrestensen*, 316 U.S. 52, 54 (1942) (holding that an ordinance could ban purely commercial handbills from the streets that implicate only the solicitor's interest in pursuing "a gainful occupation in the streets").

153. 520 P.2d 1166 (Ariz. Ct. App. 1974).

154. *Id.* at 1170.

155. *Id.* at 1170-71; *Cf. C.C.B. v. State*, 458 So. 2d 47 (Fla. Dist. Ct. App. 1984). In *C.C.B.*, an ordinance that proscribed "solicit[ing] alms in the streets or public places of the city" was overturned on overbreadth grounds because the government is "not entitled to absolutely prohibit a beggar's exercise of his freedom of speech." *Id.* at 50. However, the court held the city could impose a "narrowly drawn permit system." *Id.*; *see also* *People v. Fogelson*, 145 Cal. Rptr. 542 (1978) (overturning a Los Angeles ordinance that required a permit to solicit on public property on grounds that it gave unlimited discretion to licensing officials).

A California appellate court, in *Ulmer v. Municipal Court*,¹⁵⁶ upheld a state law that strictly limits begging to a passive activity.¹⁵⁷ The statute proscribes "accosting" a person in public for the purpose of begging or soliciting alms, a method of solicitation that the court found did not merit constitutional protection.¹⁵⁸ The statute distinguishes between the person who merely sits or stands by the wayside asking for money and one who purposely walks up to a person and seeks a hand-out.¹⁵⁹ In *Blair v. Shanahan*,¹⁶⁰ a federal district court in California declined to follow *Ulmer* on grounds that the statute prevents mere annoyance.¹⁶¹ However, the *Blair* court acknowledged that if "accost" means "intimidation," then there is a sufficiently compelling state interest to overcome the burden imposed on a constitutionally protected activity such as begging.¹⁶²

The Second Circuit Court of Appeals, in *Young v. New York City Transit Authority*,¹⁶³ distinguished charitable solicitation from begging on the basis of its effect on subway passengers. The *Young* court held that the New York City Transit Authority was not unreasonable in concluding that, by disrupting and startling passengers, the beggar created "alarmingly harmful conduct" that could result in a serious accident.¹⁶⁴ This court addressed the First Amendment question only in dictum. Judge Altamari, writing for the majority, "wonder[ed]" whether begging was "divested of any expressive element as a result of the special surrounding circumstances" of a crowded subway platform.¹⁶⁵

But even the Second Circuit Court of Appeals would not permit its *Young* subway holding to be brought to the surface as an absolute ban on begging in a public forum. In *Loper v. New York City Police Department*,¹⁶⁶ the Second Circuit invalidated an ordinance that pro-

156. 127 Cal. Rptr. 445 (Ct. App. 1976).

157. *Id.* at 488.

158. *Id.*

159. *Id.* at 447-48; accord *People v. Zimmerman*, 19 Cal. Rptr. 2d 486 (App. Dep't Super. Ct. 1993).

160. 775 F. Supp. 1315 (N.D. Cal. 1991).

161. *Id.* at 1324.

162. *Id.*

163. 903 F.2d 146 (2d Cir.), cert. denied, 498 U.S. 984 (1990).

164. *Id.* at 158; The United States Supreme Court has upheld bans on charitable solicitation where the activity does not take place in a traditional public forum. See, e.g., *International Society for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701 (1992) (holding that charitable solicitation can be proscribed in airport terminals because terminals are nonpublic fora); *United States v. Kokinda*, 497 U.S. 720 (1990) (holding that the post office could prohibit charitable solicitation on the sidewalk near the entrance).

165. *Young*, 903 F.2d at 154.

166. 999 F.2d 699 (2d Cir. 1993).

scribed loitering for the purpose of begging on city streets. The City had advanced the ordinance on grounds that panhandling inevitably leads to aggressiveness and "the ruination of a neighborhood."¹⁶⁷ The *Loper* court distinguished the city streets from the limited public forum of a subway terminal, finding that the City had failed to offer a compelling state interest in "excluding those who beg in a peaceful manner from communicating [their financial needs to] their fellow citizens."¹⁶⁸

The dissenting judge in *Williams* summed up in a cogent hypothetical the difficulty of distinguishing legitimate charitable solicitation from what others might perceive to be an illegitimate and therefore unprotected act of panhandling.

*For example, imagine the following situation at the corner of Congress and Stone in downtown Tucson: (1) a group of Salvation Army workers soliciting contributions; (2) a blind man playing his accordion with a tin cup available for contributions; and (3) a group of "hippie-type" individuals engaged in like conduct. No one would dispute that they are all doing exactly the same thing, namely, remaining in a public place for the manifest purpose of begging.*¹⁶⁹

In summary, some view the homeless as undeserving of special treatment because they have no one but themselves to blame for their plight. Others, however, view the homeless as victims of governmental and economic mistakes who are, thus, deserving of social and legal compassion.

Faced with the legal, and often political, inability to simply ban vagrants from town, governments have developed sophisticated ordinances that attempt to control a growing homeless population. A survey of the case law reveals that courts have given broad deference to lawmakers where ordinances are narrowly tailored to deter harmful conduct, avoid infringing protected speech, and are not designed to

167. *Id.* at 701.

168. *Id.* at 705; *see also* *United States v. Grace*, 461 U.S. 171 (1983) (holding that streets and sidewalks are traditional venues for expressive activity and, thus, government must offer a compelling societal interest in limiting speech); Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 910 (1991) (noting that "begging is speech that attempts to engage the listener in the beggar's poverty and difference" and is particularly worthy of First Amendment protection).

169. *Williams*, 520 P.2d at 1172 (Krucker, J. dissenting). Chief Justice William Rehnquist may not concur that charitable solicitation and panhandling are indistinguishable in a public forum. Writing in dissent in *Schaumburg*, then Justice Rehnquist argued that there is "nothing in the United States Constitution [that] should prevent residents of a community from making the collective judgment that certain worthy charities may solicit door to door while at the same time insulating themselves against panhandlers, profiteers, and peddlers." *Schaumburg*, 444 U.S. at 644 (Rehnquist, J. dissenting).

merely harass the homeless.¹⁷⁰ As will be shown later in this Note, the *Roulette* decision falls into this category of deferential holdings.¹⁷¹

While it may be comforting to learn that a community has the right to maintain its health, safety, and aesthetic standards against the dispossessed who wander the streets and parks, the reasonableness of the laws offer little solace to the homeless themselves. It must be remembered that the homeless have no private space where they can avoid the majority's coercive presence, even if that presence is altruistic and facially constitutional. This fact of life has caused other courts to overturn a variety of ordinances *as applied* to homeless people.

In *Roulette v. City of Seattle*, lawmakers did not attempt to ban begging per se. However, as will be shown in the next part of this Note, the *Roulette* court had to determine if speech was infringed by an ordinance that possibly affects the ability of homeless people to solicit money or others to conduct First Amendment activities such as registering voters.

III. STATEMENT OF THE CASE: *ROULETTE V. CITY OF SEATTLE*

Roulette v. City of Seattle came on cross motions for summary judgment before Judge Barbara J. Rothstein of the United States District Court for the Western District of Washington. On March 10, 1994, Judge Rothstein held for the defendant, the City of Seattle, finding the City's sidewalk ordinance constitutionally valid on its face.¹⁷²

In the following sections, the *Roulette* holding on the sidewalk ordinance is discussed in some detail. After setting out the ordinance at issue in Section A, the parties are illuminated in Section B because, after all, the ordinance affects real human beings who have a vital stake in the outcome of the litigation. This Part then concludes with an explication of the issues and holdings in the *Roulette* decision.

A. *The Ordinance*

The sidewalk ordinance¹⁷³ provides a civil infraction for sitting or lying down upon the public sidewalks in the downtown and neighborhood commercial zones between 7:00 a.m. and 9:00 p.m. The ordi-

170. See *supra* notes 85-125 and accompanying text.

171. See *infra* notes 190-96 and accompanying text.

172. *Roulette*, 850 F. Supp. at 1454.

173. The sidewalk ordinance, No. 116885, was enacted by the Seattle City Council on October 4, 1993 and signed by the Mayor on October 7, 1993. The ordinance was codified at SEATTLE, WASH., CODE §§ 15.48.040-.050. Section 15.48.050 provides that a violation of the sidewalk ordinance is a civil infraction, punishable by a \$50 fine. Failure to sign the citation or appear in court constitutes a misdemeanor regardless of the disposition of the notice of civil infraction.

nance contains a warn-before-citing provision, in which the offender is not to be cited unless he or she continues in violation after having been notified by a police officer.¹⁷⁴ The ordinance also provides exceptions for disabled people and those using the sidewalk under a valid permit.¹⁷⁵

B. The Parties

The *Roulette* plaintiffs were a diverse group of people who used the public streets for business, social, and political activities, as well as for life sustaining activities such as sleeping.¹⁷⁶ The lead plaintiff, Megan S. Roulette, is described as a homeless person who "left home due to abuse."

At night, Ms. Roulette sleeps in parks or alleys. She dislikes shelters because there are insufficient beds and she finds the atmosphere disempowering. If Ms. Roulette is not allowed to sit or to lie down on the

Sitting or lying down on public sidewalks in downtown and neighborhood commercial zones.

A. Prohibition. No person, after having been notified by a law enforcement officer that he or she is in violation of the prohibition in this section, shall sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7:00 a.m. and 9:00 p.m. in the following zones:

1. The Downtown Zone, defined as the area bounded by the Puget Sound waterfront on the west, South Jackson Street on the south
2. Neighborhood Zones, defined as areas zoned as Commercial 1 (C1), Commercial 2 (C2), Neighborhood Commercial 1 (NC1)

B. Exceptions. The prohibition in Subsection A shall not apply to any person:

1. sitting or lying down on a public sidewalk due to a medical emergency;
2. who, as the result of a disability, utilizes a wheelchair or similar device to move about the public sidewalk;
3. operating or patronizing a commercial establishment conducted on the public sidewalk pursuant to a street use permit; or a person participating in or attending a parade, festival, performance, rally, demonstration, meeting, or similar event conducted on the public sidewalk pursuant to a street use or other applicable permit;
4. sitting on a chair or bench located on the public sidewalk which is supplied by a public agency or by the abutting private property owner;
5. sitting on a public sidewalk within a bus stop zone while waiting for public or private transportation SEATTLE, WASH., CODE § 15.48.040 (1993).

174. *Id.* § 15.48.040(A). Subsequent to the *Roulette* decision, the city of Seattle amended the sidewalk ordinance to clarify the warn-before-citing provision. SEATTLE, WASH., ORDINANCE 117103 (1994). Section 15.48.050(A) was amended to delete the notification reference and the following provision was incorporated as new Section C: "No person shall be cited under this section unless the person engages in conduct prohibited by the section after having been notified by a law enforcement officer that the conduct violates this section." SEATTLE, WASH., CODE § 15.48.050(C) (1994).

175. SEATTLE, WASH., CODE § 15.48.040(B) (1993).

176. See Memorandum in Support of Plaintiffs' Motion for Summary Judgment at 3-10, *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1993) (No. C93-1554R) [hereinafter *Plaintiffs' Memo*].

*sidewalks . . . she believes she will starve and will go to jail. She does not know a safe way to hitchhike out of town.*¹⁷⁷

Plaintiffs Brian Wojcik and Jules E. Richard use the sidewalks to solicit alms.¹⁷⁸ Leslie Soderberg, who is in frail health, uses the sidewalks to access various public services. "She walks with a cane and must often sit down to relieve her exhaustion. Many times she cannot find a bench to use, and so she sits down on the sidewalk."¹⁷⁹ Among the other plaintiffs were a registrar of voters who sits at a table on the sidewalk; members of political parties and activist organizations who use the sidewalks for protests and to seek political donations; and a street musician who sits at a piano.¹⁸⁰

The defendants were the city of Seattle, its mayor, and its police chief.¹⁸¹ In its argument to the court, the city identified a number of citizens who were concerned about the safety of the sidewalks and the community's economic vitality.¹⁸² For instance, 82-year-old Myrtle Cottman was identified as a person who has difficulty "navigating . . . around people sitting or lying on the sidewalks."¹⁸³ Carol McCarthy was quoted as being fearful of aggressive panhandling.¹⁸⁴ And, Cathy Wickwire was quoted as being tired of having to call the police in order to have an inebriated person removed from her office doorway.¹⁸⁵

Betty Spieth, the executive director of a business association, was quoted as being concerned about the loss of retail business:

*Walking down the Ave [sic] can feel like running a gauntlet. Pedestrians have to dodge aggressive panhandling, lewd and derogatory comments, and the residue of urine, alcohol, and worse. They also have to step over people sitting individually or in groups on our sidewalks. Everyday I hear from people who just simply choose not to come to the district anymore. The result of this activity has been a noticeable deterioration in our business district.*¹⁸⁶

177. *Id.* at 3-4.

178. *Id.* at 4.

179. *Id.* at 5-6.

180. *Id.* at 7-10.

181. *Roulette*, 850 F. Supp. at 1442.

182. Defendants' Memorandum in Response to Plaintiffs' Motion for Summary Judgment and in Support of Defendants' Motion at 14-19, *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1993) (No. C93-1554R) [hereinafter *Defendants' Memo.*].

183. *Id.* at 14.

184. *Id.* at 14-15.

185. *Id.* at 16.

186. *Id.* at 18.

C. Issues and Holdings

The sidewalk ordinance was unsuccessfully challenged on five grounds: void-for-vagueness, violation of substantive due process, infringement of a right to travel, infringement of First Amendment rights, and violation of equal protection.

1. Void-for-Vagueness

The warn-before-citing provision was the focus of the plaintiffs' vagueness attack on the sidewalk ordinance. At issue was whether the legal right to tell a person to "move on" before issuing a citation provided police with the type of "unfettered discretion" that was found constitutionally objectionable in *Papachristou* and *Shuttlesworth*.¹⁸⁷ The court distinguished these cases by pointing out that the Seattle ordinance clearly defined the conduct to be avoided: specifically, that the prohibited conduct is sitting on the sidewalk during the proscribed hours. "Since the police cannot cite an individual until he or she has been warned about the ordinance, the notification requirement operates to restrict police discretion rather than increasing police discretion to define the prohibited conduct."¹⁸⁸

The court also rejected the plaintiffs' criticism that the ordinance lacks specificity as to how much time may elapse between warnings and whether the warnings are "space specific." "Certainly the ordinance does not address every conceivable question concerning the applicability and enforcement of the ordinance which could arise. But if this were the standard, few laws, if any, would pass constitutional muster."¹⁸⁹

2. Substantive Due Process

The plaintiffs' substantive due process claim revolved around the issue of whether sidewalk sitting relates to any legitimate municipal interest. The city advanced the notion that it had a legitimate interest in pedestrian safety and economic vitality.¹⁹⁰ The plaintiffs countered that "merely sitting on a sidewalk in this city, when that activity does not interfere with pedestrian traffic, is . . . innocent activity."¹⁹¹

Judge Rothstein rejected the plaintiffs' substantive due process argument that the sidewalk ordinance punished inoffensive conduct. The court found that "ensuring pedestrian safety and safeguarding the

187. *Plaintiffs' Memo*, *supra* note 176, at 12; *see also supra* text accompanying notes 79-84.

188. *Roulette*, 850 F. Supp. at 1446.

189. *Id.* at 1447.

190. *Defendants' Memo*, *supra* note 182, at 13-21.

191. *Plaintiffs' Memo*, *supra* note 176, at 16.

economic vitality of commercial areas" were legitimate governmental interests.¹⁹² The court also concluded that the sidewalk ordinance was rationally related to a legitimate governmental purpose.¹⁹³ The court's conclusions were based upon three findings. First, the court found it made "common sense" to discriminate between people sitting on the sidewalk and those standing outside a business establishment because "nobody has been complaining about people standing or squatting."¹⁹⁴ Second, the fact that the ordinance is under-inclusive of all hazards that might impair pedestrian travel does not make the ordinance irrational.¹⁹⁵ Third, providing exceptions for "sidewalk cafes" and other sidewalk uses does not preclude a rational basis for the ordinance.¹⁹⁶

3. Right to Travel¹⁹⁷

The *Roulette* plaintiffs attempted to analogize the sidewalk ordinance to the denial of travel rights found in *Pottinger v. City of Miami*.¹⁹⁸ First, the plaintiffs claimed the ordinance interfered with the ability of homeless people to travel through the city, and to rest when and where necessary.¹⁹⁹ Second, the ordinances were designed to impermissibly expel and had the effect of expelling the homeless from the city by burdening their freedom of movement.²⁰⁰

192. *Roulette*, 850 F. Supp. at 1447.

193. *Id.* at 1450.

194. *Id.*

195. *Id.*

196. *Id.* Judge Rothstein accepted the City's argument that "abutting property owners can't use any other location while "sidewalk sitter[s] . . . can just as well sit elsewhere." *Id.*

197. The right to travel is a claim brought under the equal protection clause of the Fourteenth Amendment. It was first recognized by the United States Supreme Court in *Shapiro v. Thompson*, 394 U.S. 618 (1969), where the Court invalidated a one-year residency requirement for receiving welfare on grounds that the statute inhibited interstate travel. In *Shapiro*, the Court held that the right to travel is a fundamental constitutional right for which abridgment requires a compelling governmental interest. *Id.* at 630. In another right to travel holding, *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974), the Court invalidated a one-year waiting period for free non-emergency medical care, holding that what was important was not so much the deterrent effect on travel to the state, but rather the irrational penalty the waiting period imposed on newcomers. *Id.* at 258.

198. 810 F. Supp. 1551 (S.D. Fla. 1992). Citing *Memorial Hospital*, the federal district court in *Pottinger* found that a number of Miami, Florida, ordinances combined to deny the homeless the fundamental right to travel. "[T]he City's enforcement of laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life sustaining activities burdens their right to travel." *Id.* at 1580. See also *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App. 1994) (holding that an anti-camping ordinance violated the homeless' right to travel); Paul Ades, *The Constitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 609 (1989). For a discussion of the *Pottinger* and *Tobe* cases, see *supra* text accompanying notes 117-25.

199. *Plaintiffs' Memo*, *supra* note 176, at 17-18.

200. *Id.*

Judge Rothstein disagreed. She did not find that the ordinances intruded on the right to travel, and she distinguished the instant case from *Pottinger* and *Tobe* on two grounds. First, unlike the cities in the analogous cases, there is no evidence that Seattle was motivated by a desire to expel the homeless from the community. Second, because Seattle allows the homeless to sleep on its streets at night, there is no evidence that the homeless are impermissibly impeded in traveling through the commercial areas of the city.²⁰¹

4. First Amendment Rights

The focus of plaintiffs' First Amendment violation claim was whether the sitting or lying on a sidewalk involved any constitutionally protected expression.²⁰² Judge Rothstein quickly disposed of the claim, concluding that sidewalk lounging, in and of itself, does not contain an expressive element. Thus, in the court's view, the sidewalk ordinance only regulates "pure physical conduct."²⁰³

The plaintiffs made two arguments in support of sitting as expression. First, "the silent presence of an unkempt and disheveled person sitting or lying on a sidewalk, holding out his or her hand or cup to receive a donation, is expressive conduct" Second, the sidewalk ordinance was overbroad because it would interfere with pure speech activities such as musical performances, registering people to vote, and collecting political initiative petition signatures.²⁰⁴

The court acknowledged that a "kernel of expression" could be found in almost any human activity,²⁰⁵ but that sitting was not "inextricably intertwined with, or essential to, the protected expression" cited by the plaintiffs.²⁰⁶ For example, begging and petitioning could be conducted from a standing position.²⁰⁷ However, the court did invite an "as applied" challenge to the ordinance from the piano-playing, street musician plaintiff should he later find that his expressive activities become substantially abridged.²⁰⁸

Because the court did not find any facial infringement of the First Amendment, it did not reach the question of whether the sidewalk

201. *Roulette*, 850 F. Supp. at 1447-48.

202. *Id.* at 1448.

203. *Id.* 1448-49.

204. *Plaintiffs' Memo*, *supra* note 176, at 24-25.

205. *Roulette*, 850 F. Supp. at 1449 (citing *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

206. *Roulette*, 850 F. Supp. at 1449.

207. *See id.*

208. *Id.* at 1449 n.8; *see also id.* at 1446 ("If police officers enforce the otherwise clear directives of the sidewalk ordinance in an arbitrary or discriminatory manner, then plaintiffs would certainly be justified in bringing a suit challenging the application of the ordinance.").

ordinance was content neutral or a reasonable time, place, manner restraint.

5. Equal Protection Rights

Finally, Judge Rothstein concluded that the sidewalk ordinance did not offend equal protection guarantees.²⁰⁹ Citing to *City of Cleburne v. Cleburne Living Center*,²¹⁰ the *Roulette* court set out the two grounds under which it would give strict scrutiny to the sidewalk ordinance: first, if the ordinance discriminated on the basis of a suspect classification or, second, if it infringed on a constitutionally protected personal right.²¹¹ Judge Rothstein found neither ground applicable because the plaintiffs had failed to convince the court that there were due process, free speech, or right to travel infringements, or that there is precedent for establishing homelessness as a suspect classification.²¹²

Relying on *Parr v. Municipal Court*,²¹³ the case where a California seaside community tried blatantly to eject "hippies" from town, the plaintiffs argued that Seattle's sidewalk ordinance was inspired by similar, improper motives in violation of the equal protection clause: "[T]he defendants have publicly stated that the purpose of the sidewalk ordinance . . . was to improve the appearance of city streets by prohibiting unsightly persons from sitting or lying on sidewalks."²¹⁴

Judge Rothstein distinguished between ordinances that are targeted at individuals engaging in disorderly conduct and ordinances that target homeless people "in a hostile and discriminatory fashion."²¹⁵ Citing to the Washington Supreme Court decision in *Webster*, the case upholding Seattle's Pedestrian Interference Ordinance, Judge Rothstein held that the sidewalk ordinance does not violate equal protection guarantees "by disparately affecting the homeless as a class."²¹⁶

209. *Id.* at 1449-50. Usually a plaintiff who fails to prevail on First Amendment grounds can do no better under the Equal Protection Clause. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 55 n.4 (1986).

210. 473 U.S. 432 (1985).

211. *Roulette*, 850 F. Supp. at 1450.

212. *Id.* Indeed, United States Supreme Court precedent argues against suspect classification for the homeless. The Court has refused to grant such status to three populations that compose a would-be "homeless class." Specifically, suspect class definition was denied on the basis of poverty, *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 23 (1972), age, *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1976), and mental retardation, *Cleburne*, 473 U.S. at 441.

213. 479 P.2d 353 (Cal.), *cert. denied*, 404 U.S. 869 (1971).

214. *Plaintiffs' Memo*, *supra* note 176, at 22.

215. *Roulette*, 850 F. Supp. at 1450.

216. *Id.*

IV. ANALYSIS

Part IV contains an analysis of the court's holding in *Roulette*. While the analysis concludes that the outcome was correct, it suggests that one rationale for the holding is better than another. But regardless of the legal rationale, the principal conclusion of the analysis is that a city should feel no shame in passing an ordinance that requires any person, homeless or not, to maintain a reasonable standard of civility in public fora.

Section A of Part IV examines the principle rationale for the sidewalk ordinance: that it is designed to prevent sidewalk obstructions. The analysis concludes that the obstruction rationale, standing alone, may be an unreasonable exercise of the police power, especially in light of Seattle's existing intent-based pedestrian interference ordinance.

Section B maintains that the urban blight rationale is actually a better one, because preventing urban blight is a legitimate governmental purpose and keeping business sidewalks clear is rationally related to that end. Furthermore, had the court reached the question, the Seattle ordinances could have withstood heightened scrutiny on the basis of preventing urban blight.

Section C sets out a policy rationale that justifies an ordinance that is likely to have a disproportionate impact on the homeless. The analysis distinguishes the circumstances of the *Roulette* case from the circumstances underpinning the holdings in *Pottinger*, *Tobe*, and San Francisco's action under their "Matrix" program. In Seattle, the city is attempting to find a way to live with its homeless population. In the other cities, officials are or have been attempting to export their homeless population through unreasonably enforced, mean-spirited anti-camping and sleeping ordinances. Seattle should feel no guilt in enacting what appears to be aspirational ordinances that, in the end, set a reasonable standard of behavior and forestall the unreasonable enforcement of other valid nuisance ordinances.

A. *The Obstruction Rationale*

Judge Rothstein based her rational basis review of the sidewalk ordinance principally on the city's interest in preventing sidewalk obstructions.²¹⁷ If preventing sidewalk obstructions had been the sole reason for the ordinance, one could argue that the court had failed to appreciate the irrationality of the means-ends fit. Although Judge Rothstein held the ordinance to be rationally related to both preventing obstructions and "safeguarding the economic vitality of commercial

217. *Id.*

areas,"²¹⁸ the obstruction purpose appears underinclusive, perhaps unjustified, and probably unneeded in light of the city's existing pedestrian interference ordinance.²¹⁹

In citing the case of 82-year-old Myrtle Cottman, the woman who has trouble "navigating" through the sidewalk loungers, the City sought to establish the sidewalk obstruction problem posed by street denizens. While the problem may at times be real, the question is whether it is so substantial as to warrant infringing the ability of a tired child to sit upon the sidewalk while waiting in line with its mother for a movie—an act that "cannot be conceivably criminal in purpose."²²⁰

If the city is to burden those who wish to rest on the sidewalk, but pose no threat to passersby, then it ought to demonstrate that the sidewalk ordinance will effectively clear a path for the aged and disabled. One can argue that the ordinance fails to measure up in this regard because its' sweep is substantially underinclusive, leaving in place many sidewalk impediments. For instance, the ordinance itself excludes an array of permitted sidewalk impediments, from espresso carts to wheelchair-bound citizens.²²¹ The plaintiffs conjure the unjustly discriminatory image of the homeless person nestled up against the side railing of a sidewalk cafe that juts into the public right-of-way. Under the ordinance, a table sitter impeding sidewalk travel is legal but the sidewalk lounger is not.²²² The city's response to this discrimination, a rationale apparently accepted by the court, is somewhat suspect in the context of obstructions: "[Abutting property owners] contribute to public safety by maintaining the vitality of the urban area."²²³ Would not "vitality" bring to the sidewalk yet more people who pose yet more impediments?

While the underinclusive argument may appear persuasive under these circumstances, the argument usually fails to convince a court, as it failed to do in the instant case.²²⁴ The underinclusive argument fails

218. *Id.* at 1447.

219. SEATTLE, WASH., CODE § 12A.12.015 (1993).

220. *Cf. City of Pompano v. Capalbo*, 455 So. 2d 468, 470-71 (Fla. Dist. Ct. App. 1984), *review denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985) (holding an anti-sleeping ordinance unconstitutional because, *inter alia*, it would infringe upon a sleeping child); *United States v. Grace*, 461 U.S. 171, 182 (1983) (holding that activities that might justify a ban on content neutral expression include obstructing sidewalks; blocking access to buildings; and threatening injury to persons or property).

221. SEATTLE, WASH., CODE § 15.48.040(B) (1993). The permitted exceptions are listed in the ordinance at *supra* note 173.

222. *See Plaintiffs' Memo*, *supra* note 176, at 21.

223. *Roulette*, 850 F. Supp. at 1450.

224. *Id.* ("[T]he City does not need to address all hazards of a similar nature in order to have a rational basis for passing legislation addressing a particular part of the perceived problem.").

because the United States Supreme Court has made clear that an ordinance will survive rational basis review even though it resolves only part of the problem.²²⁵

A better approach may lie in attacking the justification for the ordinance, where common sense indicates not all sidewalk loungers pose a threat to passersby. As a rule, an ordinance proscribing constitutionally protected activity should target and eliminate "no more than the exact source of the 'evil' it seeks to remedy."²²⁶ In *Roulette*, the "evil" is the obstructed sidewalk. For example, in *Boos v. Barry*,²²⁷ the United States Supreme Court limited the construction of a statute making it unlawful "to congregate within 500 feet of any embassy" on grounds of protecting the security of the buildings.²²⁸ The Court limited enforcement to circumstances where police reasonably think security is threatened.²²⁹ According to this view, the sidewalk ordinance should be limited to those circumstances where police reasonably believe a sidewalk lounge will obstruct someone. Surely a lounging homeless person would not pose an obstruction in many circumstances.

Moreover, courts have required that an ordinance take into account the physical circumstances such as sidewalk width.²³⁰ For example, in *Davenport v. Alexandria*,²³¹ the court remanded for factual findings a case involving an ordinance that proscribed musical performances on the sidewalk.²³² The court remanded because the com-

225. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (Brennan, J. dissenting) ("This Court frequently has upheld underinclusive classifications on the sound theory that a legislature may deal with one part of a problem without addressing all of it.").

226. *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); see also *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*, 391 U.S. 308, 315 (1968) (noting that courts are especially protective of public places "historically associated with the exercise of the First Amendment rights").

227. 485 U.S. 312 (1988).

228. *Id.* at 329.

229. *Id.* at 330.

230. See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). In *Grayned*, the Court struck down an ordinance that banned picketing near schools because it failed to take into account the particular physical circumstances. However, the Court upheld a companion ordinance that limited the making of loud noise near the school, even though the noise ordinance had an incidental impact on expression. See also *Davis v. Francois*, 395 F.2d 730 (5th Cir. 1968) (holding that an ordinance limiting the number of picketers must take account of time, place, and circumstances); *Hickory Fire Fighters Ass'n v. City of Hickory*, 656 F.2d 917, 923-24 (4th Cir. 1981) ("In order to uphold the ordinance [regulating picketing], we must find that its requirements concerning the number and spacing of demonstrators, and sign and stave size have been carefully tailored to the locality."); cf. *United States v. Kokinda*, 497 U.S. 720 (1990). In upholding a ban on solicitation on Postal Service sidewalks, the Court in *Kokinda* found that solicitation is "disruptive of business" because it "impedes the normal flow of traffic." *Id.* at 733-34.

231. 710 F.2d 148 (4th Cir. 1983).

232. *Id.* at 152-53.

plaint failed to take into account such factors as the number of musicians, sidewalk width, and whether the performances actually blocked access to buildings.²³³

On this view, the *Roulette* court should have been more skeptical of the ordinance's sweep, considering that the ordinance does not consider whether the sidewalk lounge is actually posing a threat to passersby.²³⁴ And, it applies to sidewalks without regard to their width.

Judge Rothstein may not have been as concerned as these other courts about the precise nature of the threat posed by sidewalk loungers because she did not find that the sidewalk ordinance substantially burdened expressive activity.²³⁵ While acknowledging that the ordinance could have some effect on people conducting First Amendment activities, such as beggars, voter registrars, political groups, and musicians, Judge Rothstein found that sitting was "not essential to the communication of their message."²³⁶

The obstruction rationale is weakened most, however, by the fact that the city has already adopted an ordinance that targets "the exact source of evil":²³⁷ the sidewalk lounge that *intentionally* obstructs passersby. A person is in violation of the city's pedestrian interference ordinance²³⁸ when "he or she intentionally . . . obstructs pedestrian or vehicular traffic."²³⁹ Thus, the police have at their disposal a legal means to cite people who do, in fact, pose a threat to sidewalk safety.

This intent-based pedestrian interference ordinance was upheld by the Washington Supreme Court in *City of Seattle v. Webster*.²⁴⁰ Moreover, one can deduce from that holding that the non-intent-based sidewalk ordinance, upheld in *Roulette*, might have failed to pass constitutional muster had it been heard by the Washington Supreme Court. That court, in *Webster*, upheld the pedestrian interference ordinance only on the grounds that it did *not* proscribe innocent acts:²⁴¹

The ordinance does not prohibit innocent intentional acts which merely consequentially block traffic or cause others to take evasive

233. *Id.* at 151.

234. The ordinance does, however, protect the innocent sidewalk lounge to the extent that a violation does not occur unless the violator fails to heed a police warning. SEATTLE, WASH., CODE § 15.48.040(C) (1994).

235. *Roulette*, 850 F. Supp. at 1449; cf. *Playtime Theatres*, 475 U.S. at 41 (1986) (Brennan, J. dissenting) ("[The] presumption of statutory validity . . . has less force when a classification turns on the subject matter of expression.").

236. *Roulette*, 850 F. Supp. at 1449.

237. *Frisby*, 487 U.S. at 485.

238. SEATTLE, WASH., CODE § 12A.12.015 (1993).

239. *Id.* § 12A.12.015(b)(1).

240. 115 Wash. 2d 635, 647, 802 P.2d 1333, 1341 (1990), cert. denied, 500 U.S. 908 (1991).

241. *Id.* at 642, 802 P.2d at 1338.

action. Many of those consequential results may arise from protected activities such as collecting signatures on a petition. In addition, mere sauntering or loitering on a public way is lawful and the right of any man, woman, or child. Under [Seattle's pedestrian interference ordinance], it is not unlawful to exercise that right even though it may cause another person or driver to take evasive action. The City of Seattle argues that inclusion in the ordinance of the element of specific intent saves it from being unconstitutionally overbroad. We agree.²⁴²

If resting upon the public sidewalk is conduct akin to the "walk[ing] or loaf[ing]" protected in *Papachristou v. City of Jacksonville*,²⁴³ Seattle's sidewalk ordinance may be unconstitutionally overbroad because it reaches the sidewalk lounge who is not actually obstructing—not engaging in conduct calculated to harm;²⁴⁴ not intentionally causing people to "take evasive action."²⁴⁵ If, on the other hand, sidewalk sitting receives less protection than walking or loitering, one must still question whether the ordinance is rationally related to preventing obstructions where it appears underinclusive, fails to consider physical circumstances, such as sidewalk width, and where police already have at their disposal an intent-based obstruction ordinance.

A more realistic and justifiable rationale for the sidewalk ordinance may be that sidewalk loungers in the downtown and commercial zones pose a threat to economic vitality, aesthetic values, and a general

242. *Id.* at 641-42, 802 P.2d. at 1338 (internal quotations and citations omitted). In his concurrence and dissent, Justice Robert Utter said that even with its intent element, the pedestrian interference ordinance "should be upheld, but its application limited to substantial obstruction of traffic." *Id.* at 653, 802 P.2d at 1344 (Utter, J. concurring in part and dissenting in part). There is nothing unusual about employing an intent element to narrow the reach of an ordinance. See, e.g., *Colten v. Kentucky*, 407 U.S. 104 (1972) (gathering in a crowd with the intent to cause a public inconvenience, annoyance or alarm); *United States v. Hutson*, 843 F.2d 1232 (9th Cir. 1988) (intent to extort through use of a threatening letter); *United States v. Tabacca*, 924 F.2d 906 (9th Cir. 1990) (upholding 49 U.S.C. § 1472(j), which proscribes interference with airline personnel); *United States v. Gilbert*, 813 F.2d 1523 (9th Cir.), *cert. denied*, 484 U.S. 860 (1987) (upholding a housing ordinance that proscribed intimidation of housing workers); *City of Seattle v. Huff*, 111 Wash. 2d 923, 767 P.2d 572 (1989) (holding that a statute proscribing the intent to intimidate on the telephone using threats of physical or property harm is valid); *Maciolek v. Johnson*, 101 Wash. 2d 259, 676 P.2d 996 (1984) (proscribing the use of a weapon with the "intent to intimidate another . . ."); see also *Cicarelli v. Key West*, 321 So. 2d 472, 474 (Fla. Dist. Ct. App. 1975) ("Absent criminal intent or criminal negligence 'tending to impede passage' is not a crime, and absent a refusal to obey a lawful order to move on, no threat to public safety is apparent. Under such circumstances the 'delicate balance' must favor the petitioner's constitutional rights including the right of assembly."); cf. *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971) (holding that municipalities are "free to prevent people from blocking sidewalks" when the criteria for enforcement does not "entirely depend upon whether or not a policeman is annoyed").

243. 405 U.S. 156, 171 (1972).

244. Cf. *Seattle v. Pullman*, 82 Wash. 2d 794, 799, 514 P.2d 1059, 1063 (1973) (An ordinance is overbroad where it makes "no distinction between conduct calculated to harm and that which is essentially innocent.").

245. *Webster*, 115 Wash. 2d at 642, 802 P.2d at 1338.

feeling of physical safety. In a speech to downtown business people, Seattle City Attorney Mark Sidran, the author of the sidewalk ordinance, said that when people sit or lie on the sidewalk "day after day . . . [they] threaten public safety in a less direct but perhaps more serious way."²⁴⁶

*A critical factor in maintaining safe streets is keeping them vibrant and active in order to attract people and create a sense of security and confidence. When people are deterred from using the sidewalk and storefronts close, a downward spiral of blight may begin. . . . We must do what we can to prevent this downward spiral from setting in.*²⁴⁷

If the author of the sidewalk ordinance is to be taken at his word, then it seems an important governmental purpose is to protect the city from people who lie about on urban sidewalks. In Section B, this purpose's legitimacy is analyzed.

B. The Urban Blight Rationale

If preventing urban blight is an important purpose underlying the sidewalk ordinance, then is such a purpose a legitimate governmental interest and, if so, is the sidewalk ordinance rationally related to that purpose? In this section, it is suggested that a community may protect its aesthetic values by enacting proscriptions on otherwise innocent conduct that has the secondary consequence of causing urban blight. Moreover, it is possible that preventing urban blight would support a favorable holding, even if a court should find that the sidewalk ordinance infringed constitutionally protected conduct.

In looking at the secondary consequences, the City asserts a significant governmental interest in the economic vitality of its commercial areas.²⁴⁸ By citing the comments of Betty Spieth, the businesswoman who worries that customers will not run the "gauntlet" of sidewalk loungers to shop in area stores, the city expressed concern for the effects of sidewalk disorder on those citizens who have the means to avoid trouble—those who can choose to live or shop elsewhere. It is the prevention of disorder—or, really the prevention of the *perception* of disorder—that is the governmental interest at stake in the sidewalk ordinance.

Whether it is fair to burden the homeless in order to avoid disorder is debatable, and is addressed later in this Note.²⁴⁹ But, whatever

246. Mark Sidran, Address to Downtown Seattle Rotary Club 2-3 (Aug. 4, 1993) (copy on file with *Seattle University Law Review*).

247. *Id.* at 3.

248. *Defendants' Memo*, *supra* note 182, at 17.

249. *See infra* text accompanying notes 268-313.

the case for reasonableness, case law supports the view that a municipality is justified in addressing urban blight, even if doing so burdens expressive activities.²⁵⁰

For example, the United States Supreme Court said in *Young v. American Mini Theatres*, "a city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect."²⁵¹ Furthermore, the validity of the secondary consequences of the expressive activity (i.e. whether sidewalk sitting actually creates urban blight) does not depend on scientific studies, but rather on a reasonable belief in the cause and effect relationship based on the experiences of other communities.²⁵²

If preventing urban blight is a significant governmental interest, does preventing people from sitting on the sidewalk during the business day address that interest? Authorities on urban sociology say it does. Wesley G. Skogan in his book, *Disorder and Decline*,²⁵³ points out that teenage gangs congregating on street corners, the presence of prostitutes and panhandlers, the verbal harassment of passersby, public drinking, gambling, and drug use creates the perception of disorder.²⁵⁴ This perception of disorder results in what Professors James Q. Wilson and George L. Kelling describe as the "broken windows" effect.²⁵⁵

The broken windows effect is the notion that "if a window in a building is broken and is left unrepaired, all the rest of the windows will soon be broken" by people out for "fun or plunder."²⁵⁶ On this view, "[t]he unchecked panhandler is, in effect, the first broken window."²⁵⁷

250. See *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 479 (1984). In permitting Los Angeles to prohibit signs on utility poles, the Court said that visual clutter implicated aesthetic interests that "are both psychological and economic. The character of the environment affects the quality of life and the value of property in both residential and commercial areas." *Id.* at 816-17; cf. *City of Ladue v. Gilleo*, 114 S. Ct. 2038, 2044-45 (1994) (holding that cities may use sign ordinances to minimize visual clutter but may not "completely foreclose a veneral means of communication that is both unique and important").

The Washington Supreme Court has held that aesthetic concerns can rise to the level of a compelling governmental interest. See *State v. Lotze*, 92 Wash. 2d 52, 59, 592 P.2d 811, 814, appeal dismissed, 444 U.S. 921 (1979). But see *Collier v. City of Tacoma*, 121 Wash. 2d 737, 747, 854 P.2d 1046, 1051 (1993) (holding that aesthetic interests are not sufficiently compelling to infringe a candidate's right to political speech under the state constitution (Art. 1, § 5)).

251. 427 U.S. 50, 71 (1976).

252. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51 (1986) (finding that "neighborhood blight" is a consequential effect of adult movie theaters without requiring the city to prove it).

253. WESLEY G. SKOGAN, *DISORDER AND DECLINE* 2 (1990).

254. *Id.*

255. James Q. Wilson & George L. Kelling, *Broken Windows*, *THE ATLANTIC*, March 1982, at 31.

256. *Id.* (emphasis in original).

257. *Id.* at 34.

As a contributor to street disorder, panhandlers or the groups of people camped out on busy street corners (homeless or not) can initiate the decline of an urban zone, creating an environment that attracts muggers and robbers—people who prefer to operate where *they believe* law enforcement is lax and victims are already intimidated.²⁵⁸

In the public forum, sidewalk camping often instills in passersby the fear of distasteful, worrisome encounters.²⁵⁹ In an area prone to panhandling, verbal harassment may be used like a weapon to gain dominance over a victim. As Wilson and Kelling point out, “the prospect of a confrontation with an obstreperous teenager or a drunken panhandler can be as fear-inducing for defenseless persons as the prospect of meeting an actual robber; indeed, to a defenseless person, the two kinds of confrontation are often indistinguishable.”²⁶⁰

Wesley G. Skogan argues that disorderly conditions “signal a breakdown of the local social order.”²⁶¹ This “signal”—a doubt about security—has serious consequences for a community and its citizens because it can bring about a spiral of decline. The spiral results from what Wilson and Kelling describe as, first, a citizen’s fear of the streets, then an avoidance of public places, and finally, flight from the community altogether.²⁶² As the lower court in *Loper* put it, “[r]eality and everyday experience confirm this ‘Broken Windows’ effect.”²⁶³

If the sidewalk ordinance partially addresses the secondary consequences of otherwise constitutionally protected activity (for example, begging or registering voters), does the ordinance discriminate on the basis of content? It could be argued, for example, that only homeless people—and their symbolic message of plight—are infringed by the ordinance.²⁶⁴

258. *Id.*

259. Wilson & Kelling, *supra* note 255, at 31.

260. *Id.* at 32; *But see* Donald E. Baker, “Anti-Homeless” Legislation: Unconstitutional Efforts to Punish the Homeless, 45 U. MIAMI L. REV. 417, 433-434 (1990-91) (arguing that ordinances that infringe on the homeless can not be justified on grounds of crime prevention because, statistically, the homeless do not commit more crimes than other people).

261. SKOGAN, *supra* note 253, at 2.

262. *See* Wilson & Kelling, *supra* note 255, at 36; *see also* SKOGAN, *supra* note 253, at 3, 13, 47-50.

263. *Loper v. New York City Police Dep’t*, 802 F. Supp. 1029, 1034-35, 1046 (S.D.N.Y. 1992), *aff’d*, 999 F.2d 699 (2d Cir. 1993) (holding that despite the validity of the “broken windows” effect, a complete ban on begging is unreasonably restrictive).

264. However, this Author agrees with Judge Rothstein in *Roulette* that merely sitting on the sidewalk, absent actual begging, is not an expressive act because it conveys none of the characteristics that pertain to a political statement. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 302-06 (1984) (Marshall, J. dissenting). Specifically, merely sitting is not rendered at a selected time or location; it is not a reenactment or staging of homelessness; it does not present a satirical theme; it does not constitute a novel mode of communication; and one is not able to distinguish “impostors” who are taking advantage of the “demonstration” to merely camp

Even if the ban on sidewalk sitting could be construed as a restraint on symbolic speech or peaceful begging, the ordinance retains a content neutral character where the asserted governmental interest (urban blight) is unrelated to the suppression of the expression.²⁶⁵ Thus, the day-to-day sidewalk activity by the homeless is not a political message that trumps a city's substantial governmental interest in protecting the public from the secondary consequences of the protected activity.²⁶⁶ This is especially true where the message that the homeless send by camping out on the sidewalk is not a coherent one nor is it one capable of being readily understood by passersby.²⁶⁷

Thus, preventing urban blight is a substantial governmental interest that justifies the enactment of Seattle's sidewalk ordinance even though the ordinance might infringe the liberty of homeless people to one degree or another. While sidewalk lounging is not the sole cause of urban blight, it can lead to the perception of civil disorder, and the perception of disorder can begin and exacerbate a spiral of decline.

But, justifying the ordinance is only part of the analysis. Section C takes up the question of whether the ordinance treats the homeless unfairly when one considers that their very home is the public walkways.

on the sidewalk. Valid political demonstrations are permitted under an exception to the sidewalk ordinance. See SEATTLE, WASH., CODE § 15.48.040(b)(3) (1993).

265. *Clark*, 468 U.S. at 294. Where the regulation aims at the secondary consequences of the constitutionally protected activity and is not applied because of a disagreement with the message presented, the court will deem it content neutral. Where alternative channels are available for the expression, the court will find the ordinance facially constitutional on a showing of substantial, as opposed to compelling governmental interests. See *Playtime Theatres*, 475 U.S. at 47; *Clark*, 468 U.S. at 298 n.7 ("When the Government seeks to regulate conduct that is ordinarily non-expressive it may do so regardless of the situs of the application of the regulation. Thus, even against people who choose to violate Park Service regulations for expressive purposes, the Park Service may enforce regulations relating to . . . urination . . ."); see also *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (noting that the government has a lesser burden where the expression is in the form of conduct rather than the written or spoken word).

266. See *American Mini Theaters*, 427 U.S. at 71 (holding that "quality of urban life must be accorded high respect"); see also *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968) (holding that where the governmental intent is not the suppression of the underlying message, government may regulate personal conduct if the regulation has only an "incidental limitation on First Amendment freedoms.").

267. See *Young v. New York City Transit Authority*, 903 F.2d 146, 154 (2d Cir. 1990), cert. denied, 498 U.S. 984 (1990) ("[B]egging in the subway is experienced as transgressive conduct whether devoid of or inclusive of an intent to convey a particularized message."); see also *Spence v. Washington*, 418 U.S. 405, 410-11 (1974); *Johnson*, 491 U.S. at 404.

C. *Distinguishing Roulette from Pottinger, Tobe and "Matrix": Aspirational Ordinances, Reasonably Enforced*

Homeless advocates tend to lump the enactment of Seattle's sidewalk ordinance with other municipal actions they consider "hostile" to the homeless.²⁶⁸ Section One considers whether Seattle's ordinances are hostile in the same way as those considered in *Pottinger*²⁶⁹ and *Tobe*,²⁷⁰ and those being enforced in San Francisco's Matrix Program.

Sections Two and Three conclude that Seattle's approach is different, more aspirational, and tending to benefit the homeless as well as the larger community. An aspirational ordinance is one that sets a community standard that maintains common and widely held values of civil behavior.²⁷¹

1. *Distinguishing Pottinger, et al.: An Effort to Live with the Homeless*

Seattle's approach is different from those in *Pottinger*, *Tobe*, and those enforced in San Francisco's Matrix Program because there is no evidence that the city intends to drive out its homeless population. First, Seattle has not denied the homeless a place to lawfully sleep at night on public property. Specifically, the downtown sidewalks may be used for sleeping after 9:00 p.m.²⁷²

In contrast to Seattle, Miami provided no lawful place for homeless people to sleep at night, unless they secured private accommodations.²⁷³ On this ground, the *Pottinger* court found the enforcement of Miami's relevant ordinances,²⁷⁴ *inter alia*, cruel and unusual punishment when applied to homeless people.

For plaintiffs, resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them

268. See NOWHERE, *supra* note 12, at ii-iii.

269. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla 1992).

270. *Tobe v. City of Santa Ana*, 27 Cal. Rptr. 2d 386 (Ct. App.), *review granted*, 30 Cal. Rptr. 18 (1994).

271. See MARY ANN GLENDON, RIGHTS TALK 104-05 (1991).

272. SEATTLE, WASH., CODE, § 15.48.040(A) (1993).

273. *Pottinger*, 810 F. Supp. at 1559 n.11.

274. The court noted five relevant laws: pedestrian interference; sleeping in any public place; park closure from 10:00 p.m. to 7:00 a.m.; loitering in a manner that tends to alarm or create an "immediate concern for safety"; and loitering with intent to obstruct pedestrians or vehicles. *Pottinger*, 810 F. Supp. at 1559-60 nn.10-14.

for something for which they may not be convicted under the eighth amendment [sic]—sleeping, eating and other innocent conduct.²⁷⁵

In *Pottinger*, Judge Atkins recognized the principle that laws seem reasonable when applied to people who own private property may be unreasonable to those who must conduct all of their personal activities in the public forum.²⁷⁶ Similarly, in *Tobe*, the anti-camping ordinance at issue in the case made it virtually impossible for the homeless to sleep anywhere on city property. Camping was defined as using “tar-paulins, cots, beds, sleeping bags, [or] hammocks” and the camping ban applied to streets, parking lots, parks, and “public area[s], improved or unimproved.”²⁷⁷ And, in San Francisco, the city enforces eleven offenses against the homeless that constitute “quality of life” crimes. These include camping on public property and sleeping on the city streets.²⁷⁸

A second reason Seattle’s approach is different is that Seattle has not conducted mass “sweeps” of the homeless as have the other cities.²⁷⁹ For example, the *Pottinger* court noted that Miami had a history of conducting “systematic police ‘sweeps’ of homeless areas prior to high-profile events.”²⁸⁰ In *Tobe*, Santa Ana had a history of brutal sweeps.

*The homeless were handcuffed, transported to an athletic field for booking, chained to benches, marked with numbers, and held for as long as six hours before being released at another location, some for crimes such as dropping a match, a leaf, or a piece of paper or jaywalking.*²⁸¹

Moreover, San Francisco boasts that the purpose of “Matrix” is to focus police attention on the homeless.²⁸² According to a *San Francisco Chronicle* study, between August 1, 1993 and February, 1994, the police had written “at least 6,240 citations for “quality of life” offenses.”²⁸³

A final difference is that Seattle has not indicated it desires to expel the homeless from the community. In contrast, the *Pottinger*

275. *Id.* at 1565.

276. See *supra* text accompanying notes 123-25.

277. *Tobe*, 27 Cal. Rptr. 2d at 389 n.3.

278. John King, *Matrix Program Lacking Teeth*, S.F. CHRON., Feb. 23, 1994, at A13.

279. Cf. NOWHERE, *supra* note 12, at 111. The director of a Seattle social service agency is quoted as saying that Seattle police conduct “routine sweeps of the park” after closing hours and “rarely arrest homeless people [but rather] use the regulations as a means of harassing them and forcing them to move along.” *Id.*

280. *Pottinger*, 810 F. Supp. at 1555.

281. *Tobe*, 27 Cal. Rptr. 2d at 389.

282. King, *supra* note 278.

283. *Id.*

court noted numerous internal police memoranda discussing a "City policy of driving homeless from public areas . . . and elimination of food distribution as strategy to disperse homeless."²⁸⁴ There were similar internal communications noted in *Tobe*, where city officials intended to " 'force out the vagrant population.' "²⁸⁵ Thus, unlike San Francisco, Santa Ana and Miami, Seattle does not appear to be interested in using the ordinance as a sword to drive homeless people out of the city.

2. Aspirational Ordinances

Seattle officials contend that the sidewalk and aggressive ordinances are intended to restore a measure of civility to the city streets.²⁸⁶ Moreover, according to the Seattle City Attorney, the laws are aspirational in that they announce a broadly held standard of personal conduct.

*Maintaining the civility of our streets and the quality of urban life is vitally important for all of us. By setting standards and limits on behavior we help the addicted and mentally ill confront the reality of their afflictions and the need to come to grips with it, rather than enabling self-destructive behavior through denial and blame shifting.*²⁸⁷

The notion that a sidewalk ordinance can be *prescriptive* has support within the academic and social service community. Codification of normative values serves to guide and strengthen the community where the urban environment is characterized by a more socially disconnected citizenry. Professor Amitai Etzioni, in his book *The Spirit of Community*,²⁸⁸ points out that in the last century, the kind of innocent conduct proscribed in Seattle's sidewalk ordinance would usually not have required police enforcement. According to Etzioni, as long as family members stayed within the community or another community with similar values, the community's "moral voice" was generally sufficient to control individualistic, disorderly behavior.²⁸⁹ If the community's expectation was oppressive, it still served to temper behavior that was destructive of society. But, when young people left the community

284. *Pottinger*, 810 F. Supp. at 1561.

285. *Tobe*, 27 Cal. Rptr. 2d at 388.

286. Mike Meritt, *Anti-Loitering Ordinances Upheld*, SEATTLE POST-INTELLIGENCER, Mar. 11, 1994 at C1.

287. Letter from Mark H. Sidran, Seattle City Attorney, to Josh Cohen, Editor in Chief, THE BOSTON REVIEW (Dec. 23, 1993) (letter on file with *Seattle University Law Review*); see generally Rosa Eckstein, Comment, *Toward a Communitarian Theory of Responsibility: Bearing the Burden for the Unintended*, 45 U. MIAMI L. REV. 843, 907-10 (1991).

288. AMITAI ETZIONI, THE SPIRIT OF COMMUNITY (1993).

289. *Id.* at 18.

to work in factory towns and live in factory barracks, their community context changed and the moral voice was lost, perhaps gladly.²⁹⁰ The result, however, was rowdiness, alcoholism, prostitution and criminal conduct. It required law enforcement to temper the destructive behavior.²⁹¹ Thus, according to Etzioni and his "communitarian" philosophy, to object to the codification and enforcement of commonly held notions of civility is to object to the "social glue that helps hold the moral order together."²⁹²

Professor Mary Ann Glendon points out that in the absence of family, church, and community connections, many Americans regard legal norms as expressions of minimal common values.²⁹³ Laws reflecting these common values of civil conduct—what Mary Ann Glendon calls aspirational laws—are required to control rowdy behavior.²⁹⁴ She says laws have become aspirational and educational, "expressing something about what kind of people we are and what kind of society we are in the process of creating."²⁹⁵ Professor Lawrence M. Mead puts it more directly than Glendon: "Personal responsibility must be willed, precisely because it can no longer be assumed."²⁹⁶

While it is probably safe to assume that a proscription on intimidating solicitation is a common value of personal conduct, it is not so clear that there is a consensus against sidewalk sitting, even on busy commercial streets. This raises the question, who is to decide what conduct is normative?

Professor John Hart Ely disparages the notion that a legislature or the courts can discover consensus values. He sees this assertion of group norms as merely the domination of some groups over others by the enactment of laws deriving from fuzzy ideals and from vague references to an ill-defined moral truth.²⁹⁷ But, on grounds that it is easier for antimajoritarian influences to *block* legislation than to enact it, Ely allows that "as between courts and legislatures, it is clear that the latter are better situated to reflect consensus."²⁹⁸

This notion of deference to the legislature was reflected in Judge Rothstein's opinion in *Roulette*. As to whether the sidewalk ordinance

290. *Id.*

291. *Id.* at 118; see also CHARLES J. SYKES, *A NATION OF VICTIMS* 46 (1992) (supporting the point that changes in lifestyle require codification of certain normative values).

292. ETZIONI, *supra* note 288, at 36.

293. GLENDON, *supra* note 271, at 102.

294. *Id.* at 104-05.

295. *Id.*

296. LAWRENCE M. MEAD, *THE NEW POLITICS OF POVERTY* 260 (1992).

297. JOHN H. ELY, *DEMOCRACY AND DISTRUST* 64-65 (1980); see also GLENDON, *supra* note 271, at 137 (Glendon posits that asserting group rights can result in tribalism.).

298. ELY, *supra* note 297, at 67.

would further the city's interest in safety and economic health, Judge Rothstein held:

*The City of Seattle has made a legislative determination that this ordinance will help it to accomplish its goals. In the absence of any showing that the method it has selected intrudes on constitutionally protected activities, the sidewalk ordinance is a legitimate legislative determination.*²⁹⁹

If the community benefits from the homeless ordinance, can it be said the homeless benefit from the ordinances? This issue is taken up in Section 3.

3. The Ordinance Benefits the Homeless

For two reasons, Seattle's sidewalk ordinance may benefit the homeless themselves. First, the ordinance thwarts a cycle of victimization³⁰⁰ by treating the homeless like every other citizen. Second, the ordinance provides government with the legal power to control disorderly behavior, thus tempering the impulse to merely harass the homeless out of town.

A social worker who has worked with the homeless for a decade argues that demanding less of the homeless due to their health or economic circumstance ultimately works a disservice.

*All people need structure and accountability in their lives. None of us can maintain our integrity and morality without pressure from our community. To exempt homeless people from healthy standards of living and socially useful modes of operating is to expect less from them as human beings than we expect of ourselves. That is ultimately disempowering, dishonest, and socially destructive.*³⁰¹

This notion that disadvantaged persons require special dispensation from widely held standards of personal conduct is what Professor Charles J. Sykes deems the "ethos of victimization."

*The ethos of victimization has an endless capacity not only for exculpating one's self from blame, washing away responsibility in a torrent of explanation—racism, sexism, rotten parents, addiction, and illness—but also for projecting guilt onto others.*³⁰²

299. *Roulette*, 850 F. Supp. at 1448.

300. Victimization is a "generalized cultural impulse to deny personal responsibility and to obsess on the grievances of the insatiable self." SYKES, *supra* note 291, at 22.

301. Vivian Rothstein, *Is There a Right to Be Homeless?*, BOSTON REVIEW, Dec./Jan. 1993-94, at 21.

302. SYKES, *supra* note 291, at 11.

Sykes suggests that victimization results in "social gridlock" where nothing socially useful gets accomplished. Social gridlock, Sykes contends results from an "irresistible search for someone or something to blame colliding with the unmoveable unwillingness to accept responsibility."³⁰³

In addition, Professor Mead says victimization fails to promote social harmony and discourages progressive change; a perceived unwillingness to engage in work or treatment sparks the public impression that the homelessness problem is unsolvable.³⁰⁴ Thus, when homeless advocates make demands that pay no heed to the needs of the community, they set the stage for a harsh, authoritarian backlash that ignores the underlying causes of homelessness.³⁰⁵

Professor Etzioni points out another reason for holding the homeless—or anyone who sits on busy urban sidewalks—to normative standards of conduct: An unreasonable assertion of individual rights merely serves to devalue their "moral claims."³⁰⁶ Professor Glendon adds that an unreasonable assertion of rights undercuts the very personal liberty asserted, by corroding the "fabric of beliefs, attitudes, and habits upon which life, liberty, property, and all other individual and social goods ultimately depend."³⁰⁷

At a political level, this unreasonable assertion of rights equates to what Professor Mead calls the "politics of dependency."³⁰⁸ By claiming the status of victim, Mead says the victim is led to greater dependency: "To exempt people from minimal standards of civility on grounds that they cannot cope would tempt the poor, and others with them, toward a collective slough of despondency. That way, most Americans feel, lies the abyss."³⁰⁹

To apply this reasoning to Seattle's sidewalk ordinance, one could argue that the ordinance has the virtue of tempering the public desire to use other laws against the homeless to enforce norms of civility, the enforcement of which might result in mere harassment. For example, in Santa Ana, California, frustrated officials used littering ordinances to arrest homeless people for using the parks.³¹⁰

Lee C. Bollinger points out that there is danger in unreasonable toleration by society for conduct it considers normatively inappropri-

303. *Id.* at 15.

304. *Id.*

305. See ETZIONI, *supra* note 288, at 164.

306. *Id.* at 5.

307. GLENDON, *supra* note 271, at 15.

308. MEAD, *supra* note 296, at 158.

309. *Id.* at 260.

310. See *supra* text accompanying notes 117-22.

ate.³¹¹ For example, Bollinger argues that unreasoned veneration of the First Amendment, when it results in toleration of annoying speech-related behavior, often leads to less restraint in areas where constitutional doctrine is less protective.³¹²

To apply Bollinger's theory, if Seattle is forced to tolerate homeless people lying on commercial sidewalks because such behavior is constitutionally protected, then the city will tend to more vigorously enforce valid laws against obstruction, public drinking, and urinating in public. Such a result hinders consensus and promotes an authoritarian backlash against the homeless.

In summary, the *Roulette* holding was correct on policy grounds, although one might quibble with courts' adoption of the obstruction rationale. Where the city has available another, intent-based, pedestrian interference ordinance,³¹³ it is difficult to justify on obstruction grounds a broad-based ban on sidewalk lounging that potentially encompasses non-obstructive, innocent behavior. On the other hand, the urban blight rationale has more merit where the proscribed conduct—sitting on certain commercial sidewalks during daylight hours—has a secondary consequence of deterring other people from using the public walkways.

It has been argued here that the sidewalk ordinance should withstand heightened scrutiny—not reached in *Roulette*—because preventing urban blight is a substantial governmental interest. Furthermore, Seattle should feel no guilt in enacting this ordinance knowing that it is likely to fall most heavily on people who make their home in the public forum. To the contrary, this ordinance serves to demonstrate the community's commitment to maintaining shared values of personal conduct.

If the foregoing analysis is correct, then it is likely that the *Roulette* holding will have a number of implications in this area of the law. Those implications are considered in the next part of this Note.

V. IMPLICATIONS

In its broadest sense, the *Roulette* holding stands for the proposition that municipalities may regulate the use of their public spaces against the homeless on the mere assertion of a legitimate governmental purpose. The *Roulette* holding strengthens the doctrinal notion that government has at least a substantial interest in maintaining the safety and aesthetics of streets and parks. Furthermore, it appears from the

311. LEE C. BOLLINGER, *THE TOLERANT SOCIETY* 228-29 (1986).

312. *Id.*

313. SEATTLE, WASH., CODE 12A 12.015 (1993).

holding that courts will not look very deeply at whether a regulation on sidewalk use actually advances the municipalities asserted interests in safety and aesthetics.

The *Roulette* holding only dealt with a facial challenge to the sidewalk ordinance. The holding left open the possibility that the ordinance as applied to the homeless may raise constitutional issues, particularly if the city attempts to use the law to expel homeless people from the community.³¹⁴

However, it appears that Seattle intends to live with its homeless population, using the ordinance to correct inappropriate behavior in public places. This intention is evidenced by the fact that the city has not attempted to close its streets to sleeping at night nor has it attempted to ban peaceful begging.

Three specific implications can be gleaned from the *Roulette* decision:

1. *Roulette* does not disturb the general rule that sleeping in public has no constitutional protection. Thus, the municipality need only assert a legitimate, as opposed to substantial or compelling, governmental interest to infringe the physical conduct of homeless citizens.

2. Preventing sidewalk obstructions and urban blight are sufficiently legitimate governmental interests to sustain a regulation limiting how people may use the sidewalk. However, the *Roulette* decision appears to caution municipalities against adopting regulations that are so restrictive that homeless people would be left without a lawful place to sleep in public. Furthermore, the decision holds open the possibility that facially valid sidewalk ordinances could infringe upon the First and Fourteenth Amendment rights of homeless individuals, as the ordinance is applied to them in its enforcement. For example, the Fourteenth Amendment right to travel could be implicated if homeless people were entirely excluded from public places through official harassment or stringent enforcement of various nuisance ordinances.

3. Finally, although begging and other political and expressive activities may be more comfortably performed in a sitting position, a proscription on sidewalk sitting is not so "inextricably linked"³¹⁵ to First Amendment conduct as to trigger heightened scrutiny. It appears that as long as the First Amendment activity may be continued in some alternative fashion, such as by standing up on the sidewalk, the regulation will be seen as proscribing pure, non-expressive physical conduct.

314. *Roulette*, 850 F. Supp. at 1446.

315. *Id.* at 1449.

VI. CONCLUSION

By upholding a law that proscribes citizens from sitting on busy sidewalks, the *Roulette* holding affirmatively elevates personal responsibility over individual rights, even where the ordinance directly impacts an impoverished class that lives on the streets. But, the holding also recognizes that the ordinances *as applied* could be found unconstitutional if the city unreasonably discriminates against the homeless in its enforcement practices.

The *Roulette* court's expectation of personal responsibility combined with political tolerance and respect for individual dignity is what Professor Lawrence M. Mead calls "a new social citizenship."³¹⁶ Professor Amitai Etzioni, guru of the communitarian movement, calls it being a good steward of the community.³¹⁷ The central feature of social citizenship is an elevation of responsibility over rights. The central message is that society will help treat the underlying causes of homelessness, but the homeless are, in the final analysis, responsible for their own destinies.³¹⁸ Moreover, the general public and the homeless are entitled to be free from fear and to enjoy an expectation that all members of society will abide by common notions of acceptable conduct.

In light of the *Roulette* holding, Seattle officials and their constituents should recognize that economic justice and attention to civil liberties are mutually reinforcing goals.³¹⁹ If the general public benefits from the enactment of an ordinance which impinges, if not unconstitutionally, the freedom of the homeless, then there is a corresponding obligation to extend to the homeless access to a new measure of personal liberty and dignity. For many homeless people, access to treatment or work would extend their civil liberties and promote the very civility that is said by Seattle officials to underpin the sidewalk ordinance.

Put another way, a new social citizenship recognizes an affirmative commitment by government to promote two freedoms not recognized under the constitution: the freedom from fear and the freedom from

316. MEAD, *supra* note 296, at 253.

317. ETZIONI, *supra* note 288, at 28.

318. See Henry G. Cisneros, *If We Are to Truly Help These People, We Must Address the Problems That Have Rendered Them Homeless in the First Place*, THE ARIZONA REPUBLIC, Dec. 7, 1993, at B5; Celia W. Dugger, *Plan Ties Shelter for the Homeless to Social Services*, NEW YORK TIMES, May 7, 1994, at A1.

319. See Law, *supra* note 28, at 148.

want.³²⁰ The Seattle ordinances address the former; the homeless await the latter.

320. See LOUIS HENKIN, *THE AGE OF RIGHTS* 104 (1990). See also BURT, *supra* note 46, at 226. Burt suggests that the best way to help the homeless is to better treat those with severe mental illness and to reshape the work environment by improving education and training. *Id.*