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We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law

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"How does it feel
To be without a home
Like a complete unknown
Like a rolling stone?"
—Bob Dylan[1]

1. BOB DYLAN, *Like a Rolling Stone*, *on* HIGHWAY 61 REVISITED (Columbia Records 1965).

I. INTRODUCTION

In September of 2004, a group of local business owners and professionals in Nashville, Tennessee, together with the Nashville Downtown Partnership, a local downtown improvement organization,

submitted a plan to the Metro Council[2] that proposed making it illegal to panhandle in the busiest areas of the city.[3] Advocates of the proposed legislation argued that panhandlers "harass tourists and customers and make the city less appealing."[4] Opponents viewed the proposal as nothing more than an attempt to force the homeless out of the city.[5] The Nashville plan is patterned after the measures that several major American cities—including Philadelphia, Denver, and Seattle—have adopted in an attempt to deal with the epidemic of homelessness that has swept the nation in recent years.[6]

Homelessness was first recognized as a significant social problem in the United States in the 1980s.[7] Though the problem has since become increasingly prominent in the public eye, Congress has done surprisingly little to ameliorate its effects. To date, the only major piece of federal legislation that has attempted to address homelessness is the Stewart B. McKinney Homeless Assistance Act of 1987,[8] which authorized a variety of services for the homeless, including emergency shelter, transitional housing, job training, primary health care, education, and some permanent housing. While the McKinney Act was and remains landmark legislation concerning the plight of the homeless, red tape, budget cuts, and the magnitude of the homeless problem have hampered its efficacy in addressing homelessness.[9]

In the absence of effective federal legislation, state and city governments have been left largely to their own devices to manage the problems posed by local homeless populations. Many local governments have responded to the problems caused by homelessness by criminalizing certain conduct commonly associated with

2. The Metropolitan Council serves as the legislative body for both Nashville and Davidson County, Tennessee. Metro Council Home Page, http://www.nashville.org/council (last visited May 31, 2006).

3. Holly Edwards, *Plan to Outlaw Beggars Draws Strong Reaction*, THE TENNESSEAN, Sept. 2, 2004, at 1A.

4. *Id.*

5. *See id.* ("Nashville has got an overpopulation of homeless people, and the business people and the mayor are trying to force us out.").

6. *See id.* (explaining that the plan was modeled after anti-panhandling laws in Philadelphia, Denver, Seattle, and Chattanooga).

7. JAMES D. WRIGHT ET AL., BESIDE THE GOLDEN DOOR 1 (1998).

8. 42 U.S.C. §§ 11301–11472 (2006).

9. *See generally* NATIONAL COALITION FOR THE HOMELESS, NCH FACT SHEET #18, MCKINNEY/VENTO ACT (2006), *available at* http://www.nationalhomeless.org/publications/facts/McKinney.pdf.

homelessness, such as begging,[10] sleeping or camping in public,[11] and loitering.[12]

Expanding the scope of the criminal law in this way and placing the homeless in jail is certainly one way of addressing homelessness. However, while such a solution will likely please tourists, merchants, and others who are made uncomfortable by the mere presence of the homeless, this approach does nothing to address the causes of homelessness or prevent the homeless from returning to the streets once they are released from jail. If the intent of local governments is to find a permanent solution to the problem—one that helps individuals overcome the circumstances that have led to their homelessness and sets them on a path toward becoming productive members of society—then criminalizing conduct that is unavoidable for the homeless is futile.

This Note argues that criminalizing acts commonly associated with homelessness is an ineffective solution to the problem of homelessness. This Note further argues that courts should strike down laws that essentially criminalize the status of homelessness as violations of state constitutional due process guarantees. A brief history of the types of legal challenges that have been brought against state and local laws targeting the homeless will be presented in Part II. Part III explains why future challenges to these laws brought under the Due Process Clauses of the Fifth and Fourteenth Amendments to the federal Constitution are unlikely to be successful. Part IV then argues that due process challenges under *state* constitutions are far more likely to succeed. This Note will conclude in Part V by highlighting cities that are creatively working to reduce their problems with the homeless and by encouraging advocates for the homeless to work toward the repeal or invalidation of "anti-homeless" laws and urging local governments to develop more creative and effective solutions to the problem.

10. *See, e.g.*, ATLANTIC CITY, N.J., CODE § 204-24(B)(1) (2006) (prohibiting begging in public).

11. *See, e.g.*, DALLAS, TEX., CODE § 31-13(a) (2006) (prohibiting sleeping in a public place).

12. *See, e.g.*, INDIANAPOLIS, IND., CODE § 407-103 (2006) (prohibiting loitering, with exceptions).

II. BACKGROUND

A. Who is Homeless and Why?

An accurate count of the homeless population in America and analysis of its demographic information are difficult to attain, as the homeless are not easy to include in official population counts.[13] Despite this difficulty, researchers in recent years have performed studies that have yielded general information about the age, gender, families, and employment status of America's homeless.

Estimates place the size of the homeless population in America between 200,000 and 600,000.[14] One study estimates the average age of a homeless individual to be thirty five,[15] and most studies show that unmarried homeless adults are more likely to be male than female. In 2001, a U.S. Conference of Mayors survey found that single men comprised 41 percent of the urban homeless population and single women comprised 14 percent.[16] Another study showed that children under the age of eighteen accounted for 39 percent of the homeless population in 2003.[17] The U.S. Conference of Mayors further determined that the racial and ethnic composition of the American homeless population was 49 percent African-American, 35 percent Caucasian, 13 percent Hispanic, 2 percent Native American, and 1 percent Asian.[18]

Families with children are among the fastest growing segments of the homeless population. In a 2004 survey, the U.S. Conference of Mayors found that families comprised 40 percent of the homeless population, a significant increase from previous years.[19] Unaccompanied minors were found to compose roughly 5 percent of the urban homeless population.[20]

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13. THE OHIO STATE UNIVERSITY EXTENSION, POVERTY FACT SHEET SERIES: POVERTY AMONG THE HOMELESS, *available at* http://ohioline.osu.edu/hyg-fact/5000/5711.html (listing several reasons why the homeless are difficult to count, including the temporary nature of homelessness, their ability to blend in with non-homeless people, and the fact that the homeless often do not tell the truth about their homeless status).

14. *Id.*

15. *Id.*

16. NATIONAL COALITION FOR THE HOMELESS, FACT SHEET, WHO IS HOMELESS? (2004), *available at* http://www.nationalhomeless.org/publications/facts/Whois.pdf.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

Research has also yielded some information regarding the education level and employment status of the homeless. Approximately 40-50 percent of homeless individuals are believed to have at least a high school education.[21] Somewhat surprisingly, an estimated 17 percent of the urban homeless population is employed in some manner.[22] Studies have also discovered that the rate of homelessness among military veterans is disproportionately high, with approximately 40 percent of homeless men having served in the armed forces.[23] The Conference of Mayors survey found that 10 percent of the overall urban homeless population consisted of veterans.[24]

While there are almost limitless reasons why an individual may become homeless, in reality, most people become homeless for one of only a handful of reasons. Homelessness is most commonly a consequence of unemployment, low wages, rising housing costs, or any combination thereof. For individuals faced with such circumstances, an inability to make rent or mortgage payments often results in eviction or foreclosure.[25] Moreover, declining wages have put housing altogether out of reach for many workers. In every state in the nation, the average employee working forty hours per week at the local minimum wage cannot afford a two-bedroom apartment at Fair Market Rent.[26] In fact, in forty-six of the fifty-two U.S. jurisdictions (including Puerto Rico and the District of Columbia), the Housing Wage[27] is more than double the federal minimum wage,[28] meaning that an employee earning the federal minimum wage would have to work over eighty hours each week for fifty-two weeks each year in

21. THE OHIO STATE UNIVERSITY EXTENSION, *supra* note 13.

22. NATIONAL COALITION FOR THE HOMELESS, *supra* note 16. In a number of areas not surveyed by the U.S. Conference of Mayors, the percentage is even higher. *Id.*

23. *Id.* By contrast, just 34% of the general population has served in the armed forces.

24. *Id.*

25. *See* THE OHIO STATE UNIVERSITY EXTENSION, *supra* note 13 (noting that unemployment and lack of money are two of the primary reasons individuals become homeless).

26. *See* NATIONAL LOW INCOME HOUSING COALITION, OUT OF REACH 2005, *available at* http://www.nlihc.org/oor2005/minjobsmap.pdf (displaying the "[n]umber of jobs (40 hours per week, 52 weeks a year) per household at prevailing minimum wage that are needed to afford the Fair Market Rent for a two-bedroom unit at 30% of income"). "Fair Market Rents" are the monthly amounts "needed to rent privately owned, decent, safe, and sanitary rental housing of a modest (nonluxury) nature with suitable amenities." NATIONAL COALITION FOR THE HOMELESS, *supra* note 16. Fair Market Rents are established by the United States Department of Housing and Urban Development for cities in all 50 states. *Id.*

27. The Housing Wage represents the hourly wage that a household must earn in order to afford the Fair Market Rent for a two-bedroom unit at 30% of income. *See* NATIONAL LOW INCOME HOUSING COALITION, *supra* note 26.

28. The current federal minimum wage is $5.15 per hour. 29 U.S.C. § 206(a)(1) (2006).

order to afford a two-bedroom apartment at 30 percent of his or her income—the federal definition of affordable housing.[29]

Substance abuse and mental illness are other common causes of homelessness. Substance abusers comprise approximately one-third of the total homeless population,[30] and a survey recently found that approximately 23 percent of the single adult homeless population suffers from some form of severe and persistent mental illness.[31] Habitual substance abusers tend to become homeless when they spend their money supporting addictions rather than on necessities, such as housing. Mental illnesses often render people either entirely unemployable or relegate them to very low paying jobs. Without friends, family, or government assistance to help them, substance abusers and the mentally ill are often forced to live on the streets.

Among women, domestic violence is also a significant factor contributing to homelessness. Poor and battered women are often forced to choose between abusive relationships and living on the streets. In a study of 777 homeless parents (mostly women) in ten U.S. cities, 22 percent reported that domestic violence played a role in their decision to leave their last residence.[32] In addition, 44 percent of cities surveyed in another study identified domestic violence as a primary cause of homelessness.[33] The problem appears to be even more serious nationally, with approximately half of all homeless women and children reportedly fleeing abusive domestic arrangements.[34]

The statistics on homelessness are somewhat surprising. The numbers seem to indicate that most homeless individuals are not drunk or lazy bums who essentially "choose" to be homeless—the type of people for whom many Americans have little sympathy. In fact, homelessness is a temporary condition for most individuals.[35] Insufficient wages, a lack of affordable housing, addiction, mental illness, and domestic abuse are all factors that contribute to the existence and growth of the American homeless population. Revising the stereotype of the typical homeless individual to reflect the true

29. NATIONAL COALITION FOR THE HOMELESS, *supra* note 16.

30. *See id.* (noting that there is no generally accepted figure for the number of homeless with substance abuse problems, but estimating the percentage to be around thirty percent).

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *See* UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 42 (2005), *available at* http://www.usmayors.org/uscm/hungersurvey/2005/HH2005FINAL.pdf ("People remain homeless for an average of 7 months in the survey cities.").

causes of homelessness could go a long way toward ending the mistreatment of the homeless in the United States.

B. Challenges to the Traditional Treatment of the Homeless in the American Legal System

The U.S. political and legal systems have historically treated the homeless as outcasts. Actions traditionally associated with homelessness, such as vagrancy and begging, have been regulated or prohibited for centuries.[36] The Articles of Confederation went so far as to specifically exclude paupers from the privileges and immunities guaranteed to other citizens,[37] and in 1837, the Supreme Court referred to homeless individuals in a published opinion as morally pestilent.[38] Admittedly, the homeless are not quite as overtly denigrated in contemporary society. Nonetheless, "anti-homeless" laws are still alive and well.

Today, the laws most commonly targeted at the homeless prohibit or restrict loitering, sleeping in public, and begging.[39] For years, these laws went unchallenged. Two explanations offered for the lack of legal challenges are (1) that the individuals most affected by the laws were unable to afford legal counsel, and (2) that police more often used the laws to disperse violators than to arrest them, leaving relatively few adjudications to be challenged.[40] In recent years, however, the homeless population has grown, as has public dissatisfaction with the desire of local governments to push the

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36. *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. L. & SOC. PROBS. 293, 301 (1996) (noting that vagrancy was criminalized in England in the 14th century); Young v. New York City Transit Authority, 729 F. Supp. 341, 353 (S.D.N.Y. 1990), *rev'd in part, vacated in part*, 903 F.2d 146 (2d Cir. 1990) ("begging has been regulated, monitored and at times prohibited throughout history").

37. 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, 639 (1992).

38. *See* Mayor of New York v. Miln, 36 U.S. 102, 142 (1837) (stating that it is "necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds and . . . convicts").

39. Out of the forty-nine cities surveyed in the 2001 report of the National Law Center on Poverty and Homelessness, one-third prohibited sitting or lying down in certain public places and all forty-nine had some kind of public space restriction besides anti-begging laws. *See* NATIONAL COALITION FOR THE HOMELESS, COMBATING THE CRIMINALIZATION OF HOMELESSNESS: A GUIDE TO UNDERSTAND AND PREVENT LEGISLATION THAT CRIMINALIZES LIFE-SUSTAINING ACTIVITIES 3 (Oct. 2002), *available at* http://www.nlchp.org/FA_CivilRights/CR_ crim_booklet.pdf [hereinafter COMBATING THE CRIMINALIZATION].

40. *See* Smith, *supra* note 36, at 321 n.168 (stating that arrests of the homeless often fall short of final adjudication); C.C.B. v. State, 458 So. 2d 47, 48 (Fla. Dist. Ct. App. 1984) (speculating that the lack of cases addressing the rights of the homeless is a result of homeless individuals "not having the ability or wherewithal to pursue the challenge").

problem out of the public view. This dissatisfaction has inspired a number of challenges against laws that target conduct primarily engaged in by the homeless.

Legal challenges have been brought against two distinct types of anti-homeless laws: those that try to keep the homeless out of public areas and those aimed at preventing the homeless from asking passers-by for money or food ("panhandling"). Challenges to both of these types of laws have been brought under multiple legal theories. The majority of these challenges, however, have been unsuccessful, signaling the need for new legal strategies if the laws are to be overturned in favor of more progressive methods of reducing the homeless population.

1. Attacks on Laws Seeking to Keep the Homeless out of Public Areas

The first category of laws that advocates for the homeless have challenged are those that attempt to keep the homeless out of public areas. Many cities that have sought to keep the homeless out of high-traffic public areas first enacted ordinances that prohibited vagrancy and then amended those laws to restrict sleeping in public.[41] Vagrancy laws were widespread in the United States until 1972.[42] The laws were originally intended to punish those who were physically able to work yet chose not to do so, remaining idle with no apparent means of support.[43] Today's versions of these laws, however, are generally justified on different grounds, usually a city's interest in sanitation, aesthetics, or protection of public safety.[44]

Challenges to laws regulating vagrancy and sleeping in public have been brought on a number of different grounds, including allegations that the laws are unconstitutionally vague, constitute cruel and unusual punishment, violate equal protection, and infringe upon the fundamental right to travel. Additionally, some suggest that the homeless might successfully defend against a prosecution for a violation of these types of laws by asserting that the conduct in

41. *See, e.g.*, DALLAS, TEX., CODE § 31-13(a) (2006) (prohibiting sleeping in a public place).

42. *See* Smith, *supra* note 36, at 302 (noting that vagrancy laws in the United States can be traced to colonial times and that by 1960 nearly every state in the nation had passed a law outlawing vagrancy).

43. *See* Dominguez v. Denver, 363 P.2d 661, 662 (Colo. 1961) (citing a Colorado statute defining a vagrant as "any person able to work and support himself in some honest and respectable calling, who shall be found loitering or strolling about"), *overruled by* Arnold v. Denver, 464 P.2d 515 (Colo. 1971).

44. *See* Portland v. Johnson, 651 P.2d 1384, 1387 (Or. Ct. App. 1982) (noting that the anti-camping ordinance at issue was passed by the City Council in response to "unsafe and unsanitary living situations which pose a threat to the peace, health and safety" of citizens).

question was justified or necessary to avoid a greater societal harm. The strengths and weaknesses of many of these challenges to vagrancy and sleeping in public laws will be examined below.

a. Unconstitutional Vagueness

By the 1960s, nearly every state in the nation had passed a statute prohibiting vagrancy in some way.[45] However, the U.S. Supreme Court sounded the death knell for vagrancy laws in *Papachristou v. City of Jacksonville*,[46] when it struck down a statute that defined "vagrants" as "rogues and vagabonds," "dissolute persons who go about begging," and "persons wandering or strolling around from place to place without any lawful purpose or object."[47] In *Papachristou*, the Court held that the vagrancy statute at issue violated the Due Process Clause[48] because it was unconstitutionally vague. Finding it unclear exactly which types of conduct made one a "vagrant" under the statute, the Court held that the law violated a fundamental principle of due process, since the statute failed to make it clear to the average person whether "his contemplated conduct is forbidden by the statute."[49]

In response to *Papachristou*, local governments passed laws that simply prohibited loitering.[50] The Supreme Court, however, found loitering statutes similarly vague and unconstitutional in *Kolender v. Lawson*.[51] In *Kolender*, the Court deemed a loitering statute unconstitutionally vague that required individuals who wandered the streets to provide "credible and reliable" identification and to account for their purpose when asked by a police officer.[52] The Court held that such requirements failed to establish minimal guidelines for law enforcement officers to follow in enforcing the

45. *See* Simon, *supra* note 37, at 639 n.55.

46. 405 U.S. 156, 158 (1972).

47. *Id.* at 156 n.1 (quoting JACKSONVILLE, FLA., CODE §§ 26-57).

48. "No State shall . . . deprive any person of life, liberty or property without due process of law." U.S. CONST. amend. XIV, § 1.

49. *Papachristou*, 405 U.S. at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

50. *See* Smith, *supra* note 36, at 303 ("Once Papachristou largely invalidated vagrancy laws, localities increasingly relied on loitering laws to control transient populations."). Loitering laws typically "permit the arrest of individuals whose apparent and unexplained aimlessness engenders the suspicion that they are about to commit a crime." Paul Ades, *The Unconstitutionality of "Antihomeless" Law: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595, 604 n.70 (1989).

51. 461 U.S. 352, 353 (1983).

52. *Id.* at 353 n.1.

statute and therefore denied individuals due process.[53] Since *Kolender*, however, local laws prohibiting loitering have typically been rewritten to provide more specific guidelines for police enforcement. These more narrowly tailored laws have generally withstood challenges for vagueness.[54]

b. Cruel and Unusual Punishment

Perhaps the strongest argument to date against laws banning sleeping in public takes the position that such laws punish individuals for a status, rather than an act, in violation of the Eighth Amendment's guarantee against cruel and unusual punishments.[55] This argument stems from the Supreme Court's holding in *Robinson v. California*.[56] In *Robinson*, the plaintiff challenged his conviction under a California statute that made it a crime to "be addicted to the use of narcotics."[57] The Court compared the statute at issue to laws that made it a criminal offense "for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease,"[58] and held that such laws "would doubtless be universally thought to be an infliction of cruel and unusual punishment."[59] *Robinson* thus established that a criminal law that punishes a mere status without requiring an affirmative act is cruel and unusual punishment in violation of the Fourteenth Amendment.[60]

A few years after *Robinson*, in *Powell v. Texas*,[61] the Supreme Court was asked to extend the *Robinson* doctrine and reverse the conviction of a man who had been convicted under a statute prohibiting public drunkenness. The petitioner presented evidence that he was a chronic alcoholic who had no control over his compulsion to become drunk in public.[62] There was no majority opinion, but the

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53. *Id.* at 358 ("[T]he statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute.").

54. *See, e.g.*, United States v. Cassiagnol, 420 F.2d 868, 877 (4th Cir. 1970) (upholding regulation banning loitering on government property).

55. *See* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

56. 370 U.S. 660 (1962).

57. CAL. HEALTH & SAFETY CODE § 11721 (West 2006).

58. *Robinson*, 370 U.S. at 666.

59. *Id.*

60. *Id.* at 667. The Court held that the statute violated the Fourteenth Amendment, rather than the Eighth Amendment, since the Fourteenth Amendment had previously been held to incorporate the Eighth Amendment. *See* Lockett v. Ohio, 438 U.S. 586, 614 (1978) (stating that the Fourteenth Amendment incorporates the Eighth Amendment).

61. 392 U.S. 514 (1968).

62. *Id.* at 517–20.

Court refused to reverse the conviction under *Robinson*.[63] Justice White's concurrence, however, did strongly suggest that if the petitioner had been homeless, he would have voted with the dissent to overturn the conviction.[64]

Recently, in at least four cases, lower courts have considered challenges to anti-sleeping ordinances under the *Robinson* doctrine. The outcomes of these challenges have varied. In *Pottinger v. City of Miami*,[65] a district court in Florida granted injunctive relief to a class of homeless plaintiffs, holding that *Robinson* prohibited punishing the homeless for innocent acts such as sleeping and eating in public.[66] By contrast, in *Joyce v. City and County of San Francisco*,[67] a California court held that the plaintiffs failed to show a likelihood of success on the merits by relying on *Robinson* for the proposition that individuals could not be punished for acts resulting from their homeless status.[68] Two additional courts held that ordinances forbidding the homeless from sleeping in public were unconstitutional under *Robinson*, but both decisions were reversed on other grounds on appeal.[69]

While a compelling argument can be made that anti-sleeping laws punish the status of homelessness in violation of *Robinson*, the argument has so far found limited success in court. Its likelihood of success in the future cases is therefore questionable.

c. Unconstitutional Interference with the Right to Travel

Opponents have advanced a third argument against anti-sleeping laws, alleging that such laws violate the constitutional right

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63. *Id.* at 537, 548, 554.

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> For all practical purposes the public streets may be home for [some chronic alcoholics]. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

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

65. 810 F. Supp. 1551, 1584 (S.D. Fla. 1992).

66. *Id.* at 1565 ("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 for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct.").

67. 846 F. Supp. 843, 856 (N.D. Cal. 1994).

68. *Id.* at 858.

69. Johnson v. Dallas, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd and vacated for lack of standing*, 61 F.3d 442 (5th Cir. 1995); Tobe v. Santa Ana, 27 Cal. Rptr. 2d 386, 393 (Cal. Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995) (refusing to consider an "as applied" challenge and considering only a facial challenge).

to travel.[70] This argument contends (1) that laws prohibiting homeless individuals from lying down, sleeping, or performing other harmless, life-sustaining activities penalize them for migrating to places where such laws have been enacted and (2) that such a penalty on migration amounts to a violation of the right to travel.[71] Since the right to travel is considered a fundamental right,[72] any infringement upon the right must serve a compelling state interest and use the least restrictive means possible.[73]

Lower courts at both the state and federal levels have accepted the right to travel argument in finding anti-sleeping laws unconstitutional.[74] In *Pottinger*, for instance, the court found that "the 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."[75] The court went on to find that the burden was not justified by a compelling state interest and did not represent the least restrictive means of achieving the city's interests.[76] In *Tobe v. City of Santa Ana*, the court held that a law prohibiting the homeless from sleeping in public was "a blatant and unconstitutional infringement on the right to travel."[77] Unfortunately for the homeless, the right to travel argument has yet to be upheld on appeal at either the state or federal level,[78] thus undermining its precedential value in homeless' rights cases.

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70. The Supreme Court has recognized a constitutional right to travel. *See, e.g.*, Crandall v. Nevada, 73 U.S. 35, 48–49 (1868). The Court has not made clear, however, from which specific constitutional provision this right to travel was derived. Professor Thomas McCoy makes a compelling argument that right to travel cases are essentially Equal Protection cases in which established residents of a state are discriminating against "newcomers" to that state. Thomas R. McCoy, *Recent Equal Proteetion Decisions - Fundamental Right to Travel or 'Newcomers' as a Suspect Class?*, 28 VAND. L. REV. 987, 1021 (1975).

71. *See Pottinger*, 810 F.Supp. at 1580 (noting that many courts "have found that laws infringe on the right to travel where their primary purpose is to impede migration").

72. *See, e.g.*, United States v. Guest, 383 U.S. 745, 757 (1966) ("The constitutional right to travel . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has heen firmly established and repeatedly recognized.").

73. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain fundamental rights are involved, the Court has held that regulation limiting these rights may be justified only by a compelling state interest, and that legislative enactments must be narrowly drawn to express only the legitimate interests at stake.") (quotation marks and citations omitted).

74. *See Pottinger*, 810 F. Supp. at 1554; *Tobe*, 27 Cal. Rptr. 2d at 392.

75. *Pottinger*, 810 F. Supp. at 1580.

76. *Id.* at 1583.

77. *Tobe*, 27 Cal.Rptr.2d at 393.

78. The city did not appeal the result in *Pottinger*, and the *Tobe* decision was later overturned by the California Supreme Court on grounds unrelated to the right to travel claim. *See* Tobe v. Santa Ana, 892 P.2d 1145 (Cal. 1995).

d. Necessity Defense

Advocates for the homeless have also suggested that the homeless could use the affirmative defense of necessity to defend against a charge of violating an anti-sleeping statute.[79] The necessity defense reflects society's general belief that a criminal act should not be punished if it is undertaken to prevent a greater harm.[80] One scholar suggests that a homeless defendant might successfully argue that violating an anti-sleeping ordinance is necessary to avoid the greater evil of trespassing on private property.[81] The necessity defense may only be raised by an individual being prosecuted for a crime, however, and cannot be used to attack the legality of a statute. As such, it would be futile to enlist this argument in any future attempt to categorically strike down anti-sleeping statutes. Moreover, it is only of limited usefulness even to individuals, since the homeless are often arrested but rarely prosecuted for violating anti-sleeping ordinances.[82]

2. Attacks on Laws Regulating Panhandling

Many cities have passed ordinances prohibiting or regulating panhandling. Cities that regulate this practice purportedly do so in order to protect their citizens from what they perceive to be a nuisance or potentially dangerous behavior.[83] Advocates for the homeless, however, have brought a number of legal challenges against anti-panhandling laws, alleging that these laws violate the First Amendment's guarantee of free speech, are unconstitutionally vague, amount to an unreasonable exercise of police power, and/or violate the Equal Protection Clause of the Constitution.[84] As with challenges to laws prohibiting vagrancy and sleeping in public, challenges to anti-panhandling statutes have had only limited success.

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79. *See* Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 452–53 (1990).

80. *See* State v. Chisholm, 882 P.2d 974, 976 (Ct. App. Idaho 1994).

81. *See* Baker, *supra* note 79, at 453 (arguing that a woman arrested for sleeping in the street has avoided the greater harm that could have resulted by her breaking into a building to sleep).

82. *See* Smith, *supra* note 36, at 321 n.168.

83. *See, e.g.*, People v. Zimmerman, 19 Cal. Rptr. 2d 486, 491 (Cal. Ct. App. 1993) (noting that a state has a legitimate interest in protecting citizens from unwanted exposure to certain types of expression that may properly be deemed a puhlic nuisance).

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

a. Freedom of Speech

Perhaps the strongest constitutional claim levied against anti-panhandling laws is the argument that the laws violate the First Amendment's guarantee of free speech. Courts are split at both the federal and state levels, however, as to whether panhandling should be protected under the First Amendment as a form of speech.[85]

Courts have rejected First Amendment challenges on a number of different grounds. At least one court has held that laws that restrict panhandling do not implicate the First Amendment because panhandling does not involve speech.[86] Other courts have held that laws restricting panhandling do not violate the First Amendment because they are narrowly tailored and restrict only conduct that the government has a legitimate interest in regulating, while permitting all other forms of speech.[87] A California court upheld anti-panhandling laws on still other grounds, holding that the state had a legitimate interest in protecting its citizens from certain unpleasant methods of expression, such as begging, which might properly be deemed a nuisance and which bore no necessary relationship to freedom of speech.[88] Finally, a New York court held that panhandling is a form of speech, but that the government may rightfully restrict panhandling in New York City's subway system, since the subway system is a nonpublic forum, subject to reasonable restrictions on speech imposed by the city government.[89]

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85. *Compare* Young v. New York City Transit Auth., 903 F.2d 146 (2d Cir. 1990), *with* Loper v. New York Police Dept., 766 F. Supp. 1280 (S.D.N.Y. 1991); *compare* Ulmer v. Municipal Court of Oakland-Piedmont Judicial Dist., 55 Cal. App. 3d 263 (1st Dist. 1976), *with* Ledford v. State, 652 So. 2d 1254 (Fla. Dist. Ct. App. 2d Dist. 1995).

86. *See Young*, 903 F.2d at 154 (holding that the object of panhandling is the simple transfer of money and that speech is not inherent to the act or essence of the conduct).

87. *See* Gresham v. Peterson, 225 F.3d 899, 906 (7th Cir. 2000) (holding that restriction on panhandling was reasonable in that it was limited "to only those certain times and places where citizens naturally would feel most insecure about their surroundings"); Smith v. Fort Lauderdale, 177 F.3d 954, 956 (11th Cir. 1999) (finding a restriction on begging "narrowly tailored to serve the City's interest in providing a safe, pleasant environment and eliminating nuisance activity on the beach"); Roulette v. Seattle, 850 F. Supp. 1442, 1449 (W.D. Wash. 1994) (finding a legitimate interest in keeping streets and sidewalks free of obstructions and thus holding a pedestrian interference statute constitutional, despite its possible interference with any expressive conduct involved in "the mere silent presence of an unkempt and disheveled person sitting or lying on a sidewalk"); McFarlin v. District of Columbia, 681 A.2d 440, 449 (Dist. Col. App. 1996) (holding that a restriction on begging at any subway station was a reasonable regulation designed to ensure public safety in a nonpublic forum).

88. *See* People v. Zimmerman, 19 Cal. Rptr. 2d 486, 489 (Cal. Ct. App. 1993).

89. *See* People v. Schrader, 617 N.Y.S.2d 429, 437 (City Crim. Ct. 1994) (finding the city's ban on begging in the subways reasonable).

The courts that have ruled in favor of the homeless plaintiffs in First Amendment challenges have done so for at least two reasons. First, courts have held that certain restrictions on panhandling were overly broad, since, in addition to regulating panhandling, the restrictions regulated conduct that is undoubtedly protected by the First Amendment.[90] Courts seem particularly receptive to this argument where local governments have attempted to restrict panhandling while carving out an exception for the solicitation of donations for nonprofits or other charitable organizations.[91] Second, at least two courts have also indicated that a government's interest in protecting its citizens from the annoyance of panhandlers may not be sufficient to support a ban on panhandling.[92]

While several lower courts have been persuaded that the First Amendment protects the right to panhandle, appellate courts have been hesitant to follow suit.[93] Without binding precedent establishing that panhandling is to be considered speech for First Amendment purposes, courts remain free to deny panhandling any First Amendment protection. As a result, the success of First Amendment challenges to these laws may turn on subjective factors, such as the political ideology of the particular court before which the challenge is brought. Until there is precedent binding on trial courts establishing that begging and panhandling are entitled to First Amendment protection, the First Amendment is unlikely to provide an effective means for attacking anti-panhandling laws.

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90. *See* Loper v. New York City Police Dept., 802 F.Supp. 1029, 1047 (S.D.N.Y. 1992) (invalidating a broad ban on begging that served to prohibit all the messages that begging sends about society); Ledford v. State, 652 So. 2d 1254, 1256 (Fla. Dist. Ct. App. 1995) (finding that speech was restricted in a manner more intrusive than necessary); C.C.B. v. State, 458 So. 2d 47, 50 (Fla. Dist. Ct. App. 1984) (finding that a restriction on begging restricted the right to free speech "in a more intrusive manner than necessary").

91. *See* Perry v. Los Angeles Police Dept., 121 F.3d 1365, 1370 (9th Cir. 1997) (finding no evidence that panhandlers were any more cumbersome upon fair competition or free traffic flow than organizations with nonprofit status); Blair v. Shanaban, 775 F. Supp. 1315, 1322 (N.D. Cal. 1991) (finding no distinction of a constitutional dimension between soliciting funds for oneself and for charities).

92. *See Blair*, 775 F. Supp. at 1324 (describing the interest in avoiding annoyance to the public as "hardly compelling"); *C.C.B.*, 458 So. 2d at 50 ("Protecting citizens from mere annoyance is not a sufficient compelling reason to absolutely deprive one of a first amendment right.").

93. The Second Circuit appears to be the only circuit to have held that begging is protected by the First Amendment. *See* Loper v. New York City Police Dept., 999 F.2d 699, 704 (2d Cir. 1993) ("It cannot be gainsaid that begging implicates expressive conduct or communicative activity."). Several lower federal courts, however, have also held that begging has an expressive component and is therefore entitled to First Amendment protection. *See, e.g.*, *Blair*, 775 F. Supp. at 1322 ("A request for alms clearly conveys information regarding the speaker's plight. Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised.").

b. *Unconstitutional Vagueness*

A second type of challenge to laws outlawing panhandling has been a due process challenge alleging that the laws are unconstitutionally vague in that they fail to put an individual on notice as to what type of conduct is prohibited.[94] The vast majority of vagueness challenges have alleged that certain words in the laws prohibiting panhandling have more than one meaning or are otherwise unclear.[95] Since the language of the law is ambiguous, so the argument goes, a person is unable to determine whether his or her contemplated conduct violates the law. A fundamental tenet of due process is that an individual cannot be punished for something that the law did not clearly indicate was punishable at the time the offense was committed.[96] Thus, when the homeless are prosecuted under ambiguous panhandling laws, they are being denied due process because the law did not make clear that panhandling was punishable conduct.

Courts, however, have not been receptive to challenges for vagueness. In general, courts have usually dismissed such challenges by holding that the meaning of the challenged term is apparent to an individual of ordinary intelligence in the context of the statute; thus the statute provides adequate notice of the prohibited conduct.[97] To date, no vagueness challenge to anti-panhandling statutes has been successful. Such a track record indicates that the argument would be of limited utility in future attacks on anti-homeless legislation.

c. *Equal Protection*

A third type of challenge against laws prohibiting or restricting panhandling has been brought under the Equal Protection Clause.

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94. *See* Seattle v. Webster, 802 P.2d 1333, 1338 (Wash. 1990) ("A statute is unconstitutionally vague if persons of intelligence must necessarily guess at its meaning and differ as to its application.") (quotation marks omitted).

95. *See, e.g.*, State ex rel. Williams v. City Court of Tucson, 520 P.2d 1166, 1170 (Ariz. 1974) (determining that the word "begging" in an ordinance does put a reasonable person on notice as to exactly what conduct was forbidden).

96.

> The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.

United States v. Harriss, 347 U.S. 612, 617 (1954).

97. *See, e.g.*, Chad v. Fort Lauderdale, 66 F. Supp.2d 1242, 1245 (N.D. Fla. 1998) (rejecting vagueness challenge and holding that the words "soliciting," "begging," and "panhandling" were common terms known to everyone of ordinary intelligence).

Equal protection challenges allege that laws regulating begging, panhandling, or similar activities are invalid because they disparately affect the homeless as a class.[98] These arguments have generally failed, however, for a variety of reasons.

i. Brief Overview of Current Equal Protection Doctrine[99]

The Fourteenth Amendment's Equal Protection Clause prohibits states from denying any citizen equal protection of the law.[100] When the Supreme Court is confronted with a case in which a party alleges unequal treatment by a state in violation of the Equal Protection Clause, it generally applies "rational basis" scrutiny, asking whether the alleged disparity in treatment is reasonably related to a legitimate state interest.[101] When the alleged disparate treatment involves a fundamental right[102] or a suspect class,[103] however, the Court applies the "most rigid scrutiny,"[104] requiring a state to demonstrate a compelling governmental interest and to show that the inequality created by the state action is the least restrictive method of achieving that interest.

ii. Equal Protection Doctrine Applied to the Homeless

Various U.S. courts have been asked to apply the Supreme Court's Equal Protection doctrine to cases involving the homeless. In *Johnson v. City of Dallas*,[105] for instance, a Texas court, applying rational basis scrutiny, held that the city's various laws restricting the

98. *See, e.g.*, Seattle v. Webster, 802 P.2d 1333, 1340 (Wash. 1990) (respondent arguing that statute at issue disparately affects the homeless as a class).

99. The Supreme Court's Equal Protection jurisprudence is exceedingly complex and a detailed analysis of the Court's treatment of Equal Protection cases is beyond the scope of this Note. I offer this concededly oversimplified summary simply as background to aid the reader in understanding how the Equal Protection Clause might be applicable to the homeless.

100. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

101. *See* Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (finding no Equal Protection violation because "the classification has relation to the purpose for which it is made").

102. *See, e.g.*, Skinner v. Oklahoma, 316 U.S. 535, 536 (1942) (involving a punishment of mandatory sterilization for a convicted thief).

103. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 2 (1967) (involving classifications based on race).

104. *Id.* at 11 (quoting Korematsu v. United States, 323 U.S. 214 (1944)) (internal quotation marks omitted).

105. 860 F. Supp. 344 (N.D. Tex. 1994).

removal of solid waste, prohibiting solicitation by coercion, specifying hours of closure for city-owned parks, and defining criminal trespass were rationally related to legitimate state interests, despite allegations that they were likely to be disproportionately applied to the conduct of the homeless.[106] Additionally, in *Chad v. City of Fort Lauderdale*,[107] a Florida court found that the regulation at issue, which prohibited panhandling on a public beach, applied even-handedly to persons aspiring to solicit, beg, or panhandle along the beach, regardless of their agenda, and therefore did not violate the Equal Protection Clause. Furthermore, in *Seattle v. Webster*,[108] a Washington court refused to recognize the homeless as a suspect class,[109] thereby allowing courts to continue applying only rational basis scrutiny to anti-homeless laws.[110]

Though equal protection did not initially seem to be a successful means of challenging anti-homeless laws, equal protection challenges may have gained ground in the past fifteen years. In *Blair v. Shanahan*,[111] for example, a federal district court in California held that the California statute at issue *did* violate the Equal Protection Clause. The statute made it a crime for any person to accost another person in a public place for the purpose of begging.[112] The court held that the law violated the Equal Protection Clause by distinguishing lawful from unlawful conduct based on the content of the communication.[113] The court noted that discriminating in such a way was not narrowly tailored to serve a substantial state interest[114] since begging is so rarely used as a means of intimidation or coercion. Thus, the court found that a ban was not justified.[115]

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106. *Id.* at 358.

107. 66 F. Supp.2d 1242 (N.D. Fla. 1998).

108. Seattle v. Webster, 802 P.2d 1333, 1340–41 (Wash. 1990).

109. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938) ("there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution").

110. For an argument for why the homeless should be considered a suspect class, see Jennifer E. Watson, Note, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501 (2003).

111. 775 F. Supp. 1315 (N.D. Cal. 1991).

112. CAL. PEN. CODE § 647(c) (West 2006).

113. *See Blair*, 775 F. Supp. at 1325 (noting that the statute prohibits all begging, while permitting other "accosts" or solicitations).

114. *Id.* The *Blair* court inquired about a "substantial" state interest as a result of the Supreme Court's earlier holding that "[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests." Carey v. Brown, 447 U.S. 455, 461 (1980).

115. *Blair*, 775 F. Supp. at 1325–26 ("Solicitations for alms are not generally and frequently enough proxies for intimidating or coercive threats to justify this statute.").

The future success of equal protection arguments as a means of striking down anti-homeless laws is unclear, as the Supreme Court has refused to hold that the impoverished are a suspect class.[116] Since the impoverished are not a suspect class, the government need only show a rational basis for treating the homeless differently from other citizens in order to withstand an equal protection challenge. Given that nearly all state action withstands rational basis scrutiny,[117] it is unlikely that a court will strike down a law that disproportionately affects the homeless on the ground that it is not reasonably related to a legitimate state interest.

d. Potential for a New Argument

In addition to the arguments detailed above, there is an argument to be made that anti-homeless laws are unconstitutional on a more fundamental level. Though few cities or states would be candid enough to admit it, the goals of many anti-homeless laws are almost certainly motivated in part by a desire to reduce the visibility of the homeless in heavily trafficked areas.[118] By passing laws targeting the homeless, lawmakers are likely hoping to urge homeless individuals to relocate to less regulated, and less traveled, areas.[119] The relocation of such individuals benefits the local economy of the vacated city by encouraging tourism and commerce from those visitors and shoppers who would ordinarily avoid areas with homeless people.

Regardless of the true reasons for passing anti-homeless legislation, cities offer a variety of more politically palatable reasons

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116. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (refusing to subject discrimination on the basis of wealth to strict scrutiny).

117. Only the most irrational or illegitimate state action will fail the rational basis test. *See* 16B C.J.S., *Constitutional Law* § 1120 (2005):

> [U]nder the rational relation test or reasonable basis test, a challenged classification scheme may be invalidated only if it is arbitrary or bears no rational relationship to a legitimate state purpose, or if the classification rests on grounds wholly irrelevant to the achievement of the state's objective, and if no set of facts can reasonably be conceived to justify it.

118. *Cf.* Paul Nyhan, *Shelter Finds Itself Homeless*, SEATTLE POST-INTELLIGENCER, Aug. 12, 2005, at B1 ("The fact is many people don't want to work or live next to the homeless.").

119. If it could be proven that cities are in fact trying to get the homeless to leave, there would be a potential for arguments that cities are making it so difficult for an individual to be homeless that they (1) are effectively being banished from the city or (2) are being "dumped" on neighboring cities or states. Both are likely prohibited as a matter of public policy and may be unconstitutional as cruel and unusual punishment or a denial of due process. *See* Rutherford v. Blankenship, 468 F. Supp. 1357, 1360 (W.D. Va. 1979) ("To permit one state to dump its convict criminals into another is not in the interests of safety and welfare."); State v. Doughtie, 74 S.E.2d 922, 923 (N.C. 1953) (noting that the general rule throughout the nation is that a state court may not impose a sentence of banishment); People v. Baum, 231 N.W. 95, 96 (Mich. 1930) ("[Banishment] is not authorized by statute, and is impliedly prohibited by public policy.").

in support of these laws, including preventing crime, protecting the homeless from becoming crime victims, avoiding public health hazards, preventing fraud, preserving public order, protecting members of audiences and bystanders, avoiding annoyance and public nuisance, protecting local merchants, and aiding traffic flow.[120] The state statutes and municipal ordinances that purport to advance these interests, however, may be so ineffective as a means of advancing them that a court may not consider the laws rationally related to a legitimate governmental interest. Such statutes and ordinances should be invalidated as unconstitutional deprivations of due process.

III. THE POTENTIAL FOR SUBSTANTIVE DUE PROCESS CHALLENGES TO ANTI-HOMELESS LAWS

Given the failures of previous challenges to anti-homeless laws, advocates for the homeless are in need of a novel approach if they are to be successful in striking down these laws. Substantive due process challenges that attack the motivations for passing laws that target the homeless may provide such a novel approach. As the result of several Supreme Court decisions, courts are unlikely to be receptive to substantive due process arguments based on the federal Constitution. State courts, however, have displayed a tendency to interpret state constitutions in such a way as to provide greater limitations on the types of conduct that a state may criminalize under its police powers.[121] As such, substantive due process arguments alleging that city or state legislatures have overstepped the bounds of their police powers in criminalizing certain conduct may be more likely to succeed at the state level.

A. Why Substantive Due Process Challenges Under the Federal Constitution Are Doomed to Fail

The ideal weapon with which to attack local "anti-homeless" laws would be a Supreme Court ruling that such laws violate one or more provisions of the federal Constitution. Such a ruling would be

120. *See, e.g.*, Portland v. Johnson, 651 P.2d 1384, 1386 (Or. Ct. App. 1982) (quoting legislative finding that individuals who establish campsites as a temporary place to live "are creating unsafe and unsanitary living situations which pose a threat to the peace, health and safety of themselves and other citizens of the City").

121. *See, e.g.*, Coffee-Rich, Inc. v. Comm'r of Pub. Health, 204 N.E.2d 281, 286 (Mass. 1965) ("What is permissible under the Federal Constitution . . . is not necessarily permissible under State law. The Constitution of a State may guard more jealously against the exercise of the State's police power.").

the "supreme Law of the Land"[122] and would require that inconsistent laws and judicial decisions be overturned.[123] As a result, and as evidenced by the challenges discussed above, advocates for the homeless have focused on the First, Eighth, and Fourteenth Amendments to the Constitution as possible limitations on a government's power to pass anti-homeless legislation.[124] Plaintiffs have raised procedural due process arguments in alleging that anti-homeless statutes are unconstitutionally vague because such statutes fail to provide either sufficient notice as to what conduct is prohibited or guidelines for police officers to follow in enforcing the law.[125] A homeless plaintiff could also make a plausible substantive due process argument by alleging that the liberty in question (i.e., the liberty to sleep, sit, or lie down in public) is a fundamental right that the government may not infringe upon without a compelling justification. As discussed below, the Supreme Court has rejected such arguments in the past, but it is not inconceivable that a future Court would find tbem convincing.

1. Overview of Modern Substantive Due Process Doctrine

The doctrine of substantive due process was perhaps best articulated in *Mugler v. Kansas*.[126] In *Mugler*, Justice Harlan wrote that while the states generally have broad police powers, there "are limits . . . beyond which legislation cannot rightfully go."[127] He further wrote that it is the duty of the judicial branch to ensure that states do not abuse their police powers by wielding them too broadly: "If . . . a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects . . . it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[128]

122. *See* U.S. CONST. art. VI, cl. 2 (stating that the laws made pursuant to the U.S. Constitution "shall be the supreme Law of the Land").

123. *See generally* Marbury v. Madison, 5 U.S. 137 (1803) (establishing the principle of judicial review and mandating that government action inconsistent with the Constitution be invalidated).

124. *See supra* Part II.B.

125. *See* Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (holding a statute "void for vagueness"); Chad v. Ft. Lauderdale, 66 F. Supp.2d 1242, 1245 (S.D. Fla. 1998) (describing a court's two-part analysis of a vagueness challenge as "whether there has been sufficient notice, and whether the legislature has established clear minimal guidelines to govern law enforcement").

126. 123 U.S. 623 (1887).

127. *Id.* at 661.

128. *Id.*

In the ensuing decades, the Court, adhering to the doctrine of substantive due process announced in *Mugler*, struck down more than one hundred state statutes as exceeding state legislative power.[129] Critics denounced the Court's holdings in these cases, claiming the Court had substituted its own judgment for legislative judgment in violation of the principle of separation of powers. Critics point to *Lochner v. New York* as perhaps the most famous and egregious instance of the Court substituting its own judgment for that of a state legislature.[130]

At issue in *Lochner* was a New York law that limited the maximum number of hours bakers could work each week.[131] Despite evidence in the record that tended to show that bakeries were unhealthy places to work[132] and precedent upholding state labor laws that protected the health of employees,[133] the Supreme Court struck the law down as an overbroad exercise of state legislative power.[134] The Court held that the statute at issue was not sufficiently related to protecting the health of bakers and thus could not be regarded as a health law.[135] Rather, the Court held that the purpose of the law was simply an impermissible interference with the freedom of an employer to contract for labor with his employees.[136]

After years of being lambasted by politicians and law professors who believed that *Lochner* turned the Court into a superlegislature that could essentially veto any laws that it disapproved of, the Court grew more hesitant to second-guess the wisdom and authority of state legislatures. It subsequently retreated from its position in *Mugler* and amended its definition of substantive due process to require only that a law "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained."[137] The Court eventually began to defer to state legislatures in matters of state police power, noting that the Supreme Court was not designed to "sit as a superlegislature to weigh the wisdom of legislation nor to decide

129. 1 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW, § 3.3(a) (2d ed. 2003).

130. 198 U.S. 45 (1905).

131. *See id.* at 52.

132. *See id.* at 58 (noting a lower court judge's conclusion that the evidence tended to show that working in a bakery led to respiratory disease).

133. *See, e.g.*, Holden v. Hardy, 169 U.S. 366 (1898) (upholding a state law regulating the number of hours an employee could work in an underground mine).

134. *See Lochner*, 198 U.S. at 64–65.

135. *Id.* at 64.

136. *Id.*

137. Nebbia v. New York, 291 U.S. 502, 525 (1934).

whether the policy it expresses offends the public welfare."[138] While the Court reiterated that state legislative power has its limits,[139] it conceded that "the state legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may within extremely broad limits control practices in the business-labor field, so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided."[140]

By expanding the substantive due process doctrine in *Lochner* to allow for the substitution of judicial judgment for legislative judgment, the Court created a controversy so great that it nearly led the President of the United States to fundamentally alter the Supreme Court's structure.[141] It took nearly thirty years for the Court to untangle the mess created by its decision in *Lochner* and to accept its role in the federal government as judge of the constitutionality, not the wisdom, of state action. The Court today is exceedingly unlikely to hold that a state exceeded its police powers in creating a particular law.[142]

2. Contemporary Substantive Due Process Challenges

If a law targeting the homeless were challenged in the Supreme Court on substantive due process grounds today, the law would almost certainly be upheld. Applying a standard of review deferential to the state legislature,[143] the Court would likely hold that

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138. Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952).

139. *Id.*

140. *Id.*

141. After the Supreme Court struck down numerous pieces of New Deal legislation, President Franklin D. Roosevelt proposed that Justices be added to the Court to change the balance of opinion on the Court. *See generally* THE NEW DICTIONARY OF CULTURAL LITERACY (3d ed. 2002), *available at* http://www.bartleby.com/59/12/rooseveltsco.html.

142. There are, however, two cases in which the Court might possibly find a state to have exceeded its authority. The first is when the state has interfered with what the Court deems to be a "fundamental" right. *See* Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental' rights are involved . . . regulation limiting these rights may only be justified by a 'compelling state interest.'"); Moore v. E. Cleveland, 431 U.S. 494, 499 (1977) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.") (citation omitted). The second is where a state regulates certain conduct for purely moral reasons. *See* Lawrence v. Texas, 539 U.S. 558, 582 (2003) ("Moral disapproval . . . is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.").

143. This deferential test, commonly known as the rational basis test, is a two-pronged test that analyzes state action by asking first whether the state is attempting to achieve a legitimate governmental interest and then whether the method chosen is rationally related to that interest. *See* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is

the state has a legitimate governmental interest in preventing the commission of crime, reducing health hazards, or preserving public order. Furthermore, nearly every imaginable method of regulating the conduct of the homeless—including laws outlawing or regulating vagrancy, sleeping in public, or begging—is related in some rational way to one of these governmental interests, even if the method is ill-conceived to the point of being asinine.[144]

Consider a hypothetical law prohibiting sleeping in public. In defense of such a law, a local government could assert an interest in preventing crime. The prevention of crime is without question a legitimate governmental interest, as evidenced by the innumerable criminal laws of cities and states. Furthermore, the government can probably demonstrate that the law is rationally related to the prevention of crime merely by presenting legislative findings that at least a handful of crimes in city or state history were committed by people who had been sleeping in public. While a blanket prohibition on all sleeping in public may not be the most effective way of dealing with a particular crime or the most efficient use of law enforcement resources, it is certainly rationally related to crime prevention if the legislature has found that at least some people who sleep in public commit crimes. Since the Supreme Court is now quite deferential to the judgment of state lawmakers,[145] it is unlikely the Court would hold that the Fourteenth Amendment requires more than this type of tenuous connection in order to uphold the prohibition on sleeping in public if confronted with a substantive due process challenge.

B. Hope for the Homeless Under State Constitutions

Despite the almost certain failure of substantive due process challenges under the federal Constitution, the potential exists for successful due process challenges under state constitutional law. State courts have showed a willingness to invoke state substantive due process doctrines to strike down statutes that would likely have been upheld under the federal Constitution.[146] Simply because the

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an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

144. The Court has expressed a tendency to uphold state laws even when they are an inefficient means of dealing with a legitimate governmental concern. *See id.* ("[T]he law need not be in every respect logically consistent with its aims to be constitutional."); Griswold v. Connecticut, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting) (calling the law at issue "uncommonly silly," "unwise," and "asinine," but refusing to find it unconstitutional).

145. *See supra* §III(A)(I).

146. *See* Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521, 526 (1998).

U.S. Supreme Court would find a state criminal statute consistent with the federal Constitution, it does not follow that the state's highest court will reach a similar conclusion vis-à-vis the state constitution.

Additionally, one of the primary criticisms of *Lochner* is inapplicable when applied to instances of state courts overruling state legislatures. *Lochner* was criticized most harshly for permitting as few as five Justices to establish policy for the entire nation by substituting their own judgment for that of state legislatures. The biggest problem with a scenario in which five Supreme Court Justices overrule a state legislature is that the Justices are unlikely to be experts on conditions unique to each individual state which call for unique, individualized remedies. Such may not be the case when state judges review the actions of state legislative bodies. Since state judges preside over much smaller jurisdictions than Supreme Court Justices, they are more likely to be in touch with problems and conditions that are unique to their states. As such, they are in a far better position to judge the wisdom and desirability of state legislative action. The arguments against *Lochner* thus do not apply as forcefully when state judges overrule state legislatures.

It is difficult to generalize about state courts with respect to substantive due process issues, as constitutional provisions and interpretations of those provisions vary among jurisdictions. Some state courts have followed the example of the U.S. Supreme Court and are reluctant to hold that a state has abused its police powers in violation of the state's doctrine of substantive due process; other courts, however, have interpreted their constitutions more liberally and have been willing to hold that legislatures exercised more power than authorized by the state constitution.[147]

State courts may find a number of factors relevant in analyzing a criminal law under their varying doctrines of substantive due process. Such factors include whether the law addresses a specific problem, whether that problem requires a criminal penalty, whether the criminal penalty is an effective solution to the problem, whether the criminal law is likely to disproportionately benefit a particular group, whether the law prohibits a legitimate business, and whether the law is likely to make harmless conduct criminal. Each of these factors is discussed in detail below.

147. *See, e.g.*, Monrad G. Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 98–99 (1950).

1. Advancing "Public Welfare"

In some jurisdictions, courts take a more limited view of the purposes for which the state's police power may be exercised. In these jurisdictions, courts allow the state to use its police power to address specific threats to public morals, health, and safety, but are less likely to permit tbe police power to be used for the generic purpose of advancing the public welfare.[148] In jurisdictions that take such a limited view of police powers, courts may invalidate laws that purport to improve the public in a general way, such as improving a community's aesthetics,[149] but which are not directed to a specific problem. The trend, however, appears to be moving away from such a limited view of a state's police powers,[150] thus state courts are increasingly likely to permit legislatures to exercise the state's police powers to address a fairly broad or generic problem without finding a due process violation.

2. The Problem does not Require a Criminal Penalty

Since state courts are perceived to be more in touch with local conditions, they are often more skeptical of legislative conclusions that a problem exists which requires a criminal penalty.[151] While the U.S. Supreme Court generally is willing to assume the existence of the facts that prompted a state legislature to pass a given criminal law,[152] state courts are far more willing to analyze the alleged need for criminal legislation[153] and will invalidate laws if they determine that the evil perceived by the legislature does not in fact exist.[154] In *Coffee Rich, Inc. v. Commissioner of Public Health*,[155] for example, a Massachusetts court invalidated a statute making it an offense to sell Coffee-Rich, a particular brand of imitation cream. The state defended the statute on the ground that the state was concerned that consumers would confuse Coffee-Rich with real cream.[156] The court

148. *Id.*

149. *See, e.g.*, State v. Brown, 108 S.E.2d 74 (N.C. 1959) (invalidating a statute that made it a crime to own a junkyard within 150 feet of a highway, unless concealed from view), *overruled by* State v. Jones, 290 S.E.2d 675 (N.C. 1982).

150. 1 LAFAVE, *supra* note 129, § 3.3(b); *see also* Montgomery v. Norman, 816 So. 2d 72, 79 (Ala. Crim. App. 1999); Hendricks v. Commonwealth, 865 S.W.2d 332, 338 (Ky. 1993).

151. 1 LAFAVE, *supra* note 129, § 3.3(b)(2).

152. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 109 (1949).

153. 1 LAFAVE, *supra* note 129, § 3.3(b)(2).

154. *Id.*

155. 204 N.E.2d 281 (Mass. 1965).

156. *See id.* at 287 (noting that the law at issue was "designed to avoid confusion of other products with defined and familiar foods") (citation omitted).

concluded that the average consumer of that state would not be confused, noting first, that Coffee-Rich, unlike real cream, was sold in the frozen foods sections of supermarkets and second, that "[c]onspicuous lettering on the container of [Coffee-Rich] announces to all who can read that Coffee-Rich is a 'vegetable product' which 'contains no milk or milk fat.'"[157] In invalidating the law, the court determined that the potential for confusion of consumers was so minimal that the criminal penalty was unwarranted. State courts may thus strike down criminal penalties where they find that no criminal penalty is justified.

3. Ineffective Legislative Response to the Problem

A third factor that courts may consider in evaluating challenges to criminal laws, such as those that punish the homeless, based on state substantive due process doctrines is whether a criminal penalty is an effective response to a problem confronting the state. State courts are more likely than federal courts to decide for themselves whether criminalization is an effective means of dealing with a particular problem.[158] Smaller geographic areas and electoral accountability generally allow state courts to be more familiar with unique local conditions than are federal courts.[159] *State v. Park*[160] provides a salient example of a state court's willingness to scrutinize legislative conclusions about the need for a criminal law. *Park* involved a Nevada law making it illegal to possess cattle hide from which the ears had been removed or the brand obliterated.[161] The court conceded that cattle theft was a significant problem in the state, but it nevertheless invalidated the statute, finding that it was broad enough to cover the innocent activity of manufacturing leather goods, while unlikely to result in the conviction of people who stole cattle.[162] The court reasoned that a cattle thief could get around the statute by simply disposing of the hide, which was far less valuable than the cattle carcass,[163] and thus struck down the law.[164] In contrast to the

157. *Id.*

158. 1 LAFAVE, *supra* note 129, § 3.3(b)(3).

159. *Cf. id.* § 3.3(b)(2).

160. 178 P. 389 (Nev. 1919).

161. *Id.* at 390.

162. *See id.* at 392 ("[T]he statute entirely prohibits the use of hides in this state. To prevent a few from illegal practices the many are deprived of the use of property.").

163. *See id.* ("Cattle are stolen for the value of the carcass, and not for the hides. . . . Consequently the more effectively the latter are destroyed the less is the risk of detection.").

164. *Id.* at 393.

state court in *Park*, the Supreme Court has refused to examine "the adequacy or practicability of the law" being challenged.[165]

State courts are also more willing than are federal courts to consider alternative, less restrictive methods of resolving state problems when judging the validity of state laws.[166] While the United States Supreme Court has repeatedly noted that it will refuse to inquire into the wisdom of a state's choice of remedies,[167] state courts are generally free to make such an inquiry.[168] State courts occasionally invalidate laws when they decide that the legislature could have found an equally effective but less severe method of serving the public interest.[169] For instance, an Arizona court held that a statute criminalizing the sale of certain food products, such as imitation ice cream, failed to meet Arizona's due process requirements because the objective of the law could have been achieved just as well by requiring clear product labeling.[170] Similarly, a court in Nevada invalidated a law regulating the size of signs that may be used to advertise the price of gasoline at service stations because the law's purpose in preventing misleading advertising could have been accomplished at least as well by regulating the content rather than the size of such signs.[171] These cases are illustrative of the tendency of state courts to determine that non-criminal solutions were likely to be more effective in resolving a particular problem than were the criminal penalties chosen by their legislatures.

4. Disproportionate Benefit to a Particular Group or Class

Since state courts are generally thought to be familiar with local conditions, they are more likely than federal courts to invalidate laws if they find that the laws are intended to benefit a particular group more than the population in general.[172] The Supreme Court has refused to speculate about the motives of state legislatures, provided there is *some* legitimate purpose upon which a statute could be based.[173] Some state courts, by contrast, have taken the position that

165. Nebbia v. New York, 291 U.S. 502, 537 (1934).

166. 1 LAFAVE, *supra* note 129, § 3.3(b)(4).

167. *See, e.g.*, Ferguson v. Skrupa, 372 U.S. 726, 730 (1963).

168. 1 LAFAVE, *supra*, note 129, § 3.3(b)(4).

169. *Id.*

170. *See* State v. A.J. Bayless Mkts., Inc., 342 P.2d 1088, 1090 (Ariz. 1959).

171. *See* State v. Redman Petroleum Corp., 360 P.2d 842, 846 (Nev. 1961).

172. *See* 1 LAFAVE, *supra* note 129, § 3.3(b)(5).

173. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (refusing to speculate that the legislature's true motive in passing a statute barring females from becoming bartenders was "an unchivalrous desire of male bartenders to monopolize the calling").

"if the dominant purpose of the legislation be to serve private interests under the cloak of the general public good, the resulting legislation is a perversion and abuse of power and therefore unlawful . . .."[174] This is not to say, however, that merely showing that a special interest group proposed or drafted legislation is enough to render it unconstitutional.[175] Even absent evidence of a legislature's motives, state courts have struck down criminal laws that were apparently intended to aid some special interest group rather than to advance the interests of the general public.[176] Scholars agree that this type of judicial review is appropriate given the prominent role of lobbyists and wealthy campaign contributors in the state legislative process.[177]

5. Prohibition of a Legitimate Business

Some state courts have held that a state's police power may not be used to prohibit a "legitimate" business. While the Supreme Court abandoned such a position in *Ferguson v. Skrupa*,[178] several states continue to follow the rule the Supreme Court established in *Adams v. Tanner*.[179] The *Adams* rule states that due process forbids a state from prohibiting an industry that is useful to some and neither immoral nor dangerous to public well-being.[180] A Pennsylvania court, for instance, held that criminalizing the business of debt adjusting was unconstitutional, finding that the mere possibility of fraud by those engaged in the profession did not justify an outright prohibition of the industry.[181]

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174. Gundaker Cent. Motors v. Gassert, 127 A.2d 566, 573 (N.J. 1956).

175. 1 LAFAVE, *supra* note 129, §3.3(b)(5).

176. *See id.* § 3.3(b)(5) n.49.

177.

> In some states the judiciary is reluctant to sit idly by while minority groups capture the machinery of the state in order to secure a monopoly position. Given the short legislative session in many states and the concentrated attention which pressure groups may devote to that session, one may well sympathize with that point of view.

Paulsen, *supra* note 147, at 117; *see* John A. C. Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 NW U. L. REV. 226, 249 (1958) ("Judicial invalidation of such legislation may be technically anti-democratic, but it can hardly be called frustration of the popular will in any meaningful sense.").

178. 1 LAFAVE, *supra* note 129, § 3.3(b)(6) n.52.

179. 244 U.S. 590 (1917).

180. *Id.* at 594 (holding that the possibility for abuses to arise in connection with a profession is not a reason for absolutely prohibiting that profession to those who wish to engage in the profession in an upright way).

181. Commonwealth v. Stone, 155 A.2d 453, 455 (Pa. Super. Ct. 1959).

6. Criminalization of harmless conduct

Another argument against criminal statutes that has found some success in state courts is the contention that the criminal statute is overbroad because it proscribes more conduct than is actually or potentially harmful to the public. Advocates have argued that some criminal statutes are overbroad and an unlawful exercise of state police powers, claiming that it is inappropriate for a state to proscribe certain conduct where not all who engage in the proscribed conduct are likely to cause harm.[182] Examples of statutes intended to remedy legitimate harms, but which also prohibit certain innocent conduct include juvenile curfews or age limits for certain activities (in response to juvenile crime);[183] bans on the possession of devices associated with substance abuse, such as needles and syringes, without a doctor's permission (in response to illegal drug trafficking);[184] and selling magazines without covers (in response to the fraudulent act of returning magazine covers for credit and then selling the coverless magazine for profit).[185]

In evaluating these types of statutes, state courts often ask whether it is reasonable to presume the existence of one fact based on the proof of another.[186] For instance, the statute prohibiting the possession of needles and syringes was invalidated because the court found that it essentially created "a conclusive presumption that the possession is for an illegal purpose—an unrebuttable presumption which factually runs counter to human experience."[187] The court held it unreasonable to presume that the possession of needles and syringes was related to harmful activity, since there are non-harmful reasons for possessing such items,[188] such as in the case of a diabetic who needs to give herself an insulin injection. Similarly, other courts have invalidated laws based on the conclusion that a relatively high percentage of individuals who might engage in the prohibited conduct would be unlikely to have any "evil" purpose in doing so.[189]

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182. *Id.*

183. *See* Alves v. Justice Court of Chico Judicial Dist., 306 P.2d 601 (Cal. Ct. App. 1957); People v. Munoz, 172 N.E.2d 535, 536–37 (N.Y. 1961).

184. *See* State v. Birdsell, 104 So. 2d 148, 152 (La. 1958).

185. *See* People v. Bunis, 172 N.E.2d 273, 273 (N.Y. 1961).

186. *Id.*

187. *Birdsell*, 104 So. 2d at 153.

188. *See id.* at 153–54 ("[T]he article in question, as is well recognized, is widely used for numerous beneficial and helpful purposes.").

189. *See, e.g.*, Alves v. Justice Court of Chico Judicial Dist., 306 P.2d 601, 605 (Cal. Ct. App. 1957) (noting that the juvenile curfew at issue made "unlawful many . . . activities by minors

IV. THE CASE AGAINST ANTI-HOMELESS LAWS IN STATE COURTS

Based on the language and interpretations of state constitutions, the laws of a number of American cities and states may be susceptible to substantive due process challenges based on state constitutions using one or more of the grounds discussed above.

A. Laws Allegedly Advancing the Public Welfare That do not Address a Specific Health, Safety, or Moral Issue

Laws prohibiting sleeping in public continue to exist in a number of American cities.[190] One can argue that such laws exist purely for the protection of a city's aesthetics and for the convenience of its merchants, shoppers, and tourists and do little, or nothing, to further the health, safety, or morality of the general public. Like a law prohibiting an unconcealed junkyard near a public highway,[191] a law prohibiting sleeping in public is arguably intended exclusively to protect a city's aesthetic image. Underlying such a law is likely a desire to prevent residents from being discouraged from using public parks and sidewalks by the "unsightly" homeless individuals who sleep there.

A ban on sleeping in public cannot be reasonably defended on the grounds that it protects the general public from a potential harm. The only harms such a ban seeks to prevent are the loss of enjoyment of public facilities by those who choose not to be around the homeless and the economic loss suffered by merchants whose patrons choose not to shop at stores located in areas where they will encounter the homeless.[192] If these are harms at all, they are harms caused by individuals choosing not to associate with a certain class of people (*i.e.*, the homeless), not by any danger to public health, safety, or morality.

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which would otherwise be entirely lawful" including attending night classes, studying at the library, and attending games, dances, or other school functions).

190. *See, e.g.*, ATLANTIC CITY, N.J., CODE § 204-24 (2006); LOUISVILLE, KY., CODE § 132.03(A)(18) (2006).

191. *See* State v. Brown, 108 S.E.2d 74, 75 (N.C. 1959), *overruled by* State v. Jones, 290 S.E.2d 675 (N.C. 1982).

192. Economic harm might result from a decrease in a city's tourism and commerce caused by the perception that a particular city is a place where homeless people are sleeping everywhere around the city. Tourists and shoppers, not wanting to make themselves uncomfortable by being forced to acknowledge the homeless, would avoid these areas, thereby decreasing the revenues of businesses in the areas where the homeless gather to sleep. Such a justification might be attacked on the ground that it disproportionately benefits special interest over the public at large. *See infra* Part IV.D.

B. A Problem Does Not Exist that Calls for a Criminal Remedy

Anti-homeless laws are also vulnerable to the argument that they address problems that are either non-existent or greatly exaggerated. For instance, in passing a law that prohibited camping anywhere on public property in the city,[193] the Portland, Oregon, City Council alleged that homeless persons who established campsites on public property were "creating unsafe and unsanitary living situations which pose a threat to the peace, health and safety of themselves and other citizens of the City."[194] If a court had examined the council's assertion with the healthy skepticism exhibited by the court in *Coffee-Rich, Inc. v. Commissioner of Public Health*,[195] it likely would have found that the alleged threat to peace, health, and safety was far less dire than the council made it out to be. While public camping may have occasionally created unsafe and unsanitary living conditions, the individuals creating them were likely few in number and the conditions almost certainly did not pose such a serious threat to themselves or other Portland citizens as to necessitate an unconditional citywide ban on public camping.

Rather than trying to remedy a legitimate threat to the peace, health, and safety of the public, the Portland City Council arguably passed the anti-camping ordinance out of a desire to move the city's homeless "residents" out of sight and to encourage them to leave Portland. The lack of a legitimate problem to be remedied may have been an unstated rationale when an Oregon court held the Portland anti-camping ordinance unconstitutional several years later.[196]

Prohibitions on sleeping in public are not the only types of laws subject to the argument that no problem exists that requires a criminal remedy. Cities that have implemented outright bans on begging or panhandling in public places,[197] rather than reasonable regulations of such activities,[198] are also vulnerable to the argument

193. *See* PORTLAND, OR., CODE § 14.08.250 (2000). The Portland law was later declared unconstitutional. Oregon v. Wicks, Case Nos. Z711742 & Z711743 (Or. Cir. Ct. 2000).

194. *See* City of Portland v. Johnson, 651 P.2d 1384, 1386 (Or. Ct. App. 1982) (quoting PORTLAND, OR., CODE § 14.08.250).

195. 204 N.E.2d 281 (Mass. 1965) (invalidating a statute making it unlawful to sell imitation cream on the grounds that a reasonable citizen can tell the difference between real and imitation cream).

196. *See Wicks*, Case Nos. Z711742 & Z711743 (Or. Cir. Ct. 2000) (finding the ordinance unconstitutional as cruel and unusual punishment, a violation of equal protection and a violation of the right to travel).

197. *See, e.g.*, CHARLESTON, S.C., CODE § 21-111 (2006); DETROIT, MICH., CODE § 38-1-1 (2006).

198. Regulating the time during which begging may take place and the locations where an individual may beg are usually reasonable restrictions on such conduct, provided they still allow

that they are addressing a "phantom" problem in order to further an economically motivated or self-serving agenda.

C. The Means Chosen to Deal with a Legitimate Problem are Ineffective

Anti-homeless laws are also susceptible to the argument that a non-criminal remedy would address the problems created by homelessness more effectively than a criminal solution. Criminalizing conduct such as begging and sleeping in public raises the obvious moral dilemma of whether it is appropriate to punish an individual for carrying out a life-sustaining and harmless activity in public when there are no other realistic alternatives.[199] Rather than adding insult to injury by arresting the homeless for essentially having nowhere else to go, it seems that the proper reaction of a caring and responsible society would be to offer some sort of assistance in finding food and shelter.

Perhaps more importantly, however, anti-homeless laws are counterproductive if their goal is to reduce the problem of homelessness. Studies have shown that it costs more to incarcerate individuals than to provide them with housing, food, and counseling.[200] Furthermore, when police arrest or cite homeless individuals, the resulting police records make it even more difficult for those seeking jobs to secure gainful employment.[201] Finally, when police force the homeless to leave certain parts of a city, they almost always move them further from the social service centers—usually located in downtown areas—that offer medical care, job training, and other aid that is necessary to overcome the usually temporary condition of homelessness.[202] By criminalizing conduct that the homeless can realistically only engage in publicly, cities are compounding rather than ameliorating the problem of homelessness.

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the individual access to those from whom he is reasonably likely to receive a donation. A regulation limiting begging to daylight hours, for example, furthers a legitimate interest in creating a feeling of public safety. Similarly, restricting begging activities to certain parts of sidewalks advances the legitimate interest in preserving the free flow of automobile and pedestrian traffic.

199. The majority of cities in America have far fewer spaces in shelters available than are needed to adequately care for the number of homeless residents residing in these cities. *See generally* UNITED STATES CONFERENCE OF MAYORS, *supra* note 35, at 37–41. Thus, most homeless individuals are not *choosing* to sleep in public instead of in a shelter; rather, there is no room for them to sleep in shelters and they have no viable alternative than to sleep in a public place.

200. COMBATING THE CRIMINALIZATION, *supra* note 39, at 4.

201. *Id.*

202. *Id.*

The problem is thus one that is poorly addressed by a criminal solution.[203]

D. A Criminal Statute Disproportionately Benefits Special Interest Groups

Anti-homeless statutes also could be invalidated on the ground that they benefit special interest groups far more than the general public. The individuals most adversely affected by the presence of the homeless in the city are typically not victims of crimes perpetrated by the homeless, but rather, business owners who lose customers due to the presence of the homeless near their stores. Statutes intended to keep the homeless from begging and sleeping in public, therefore, are rarely implemented in an effort to protect the public health or safety. Far more often, anti-homeless statutes are passed to benefit the small group of wealthy business owners who are able to effectively lobby the city council to serve their business interests. In these cases, it would seem as though the statutes are designed to "serve private interests under the cloak of the general public good,"[204] rather than to remedy a legitimate public problem.

E. States are Outlawing a "Business" that is Neither Immoral Nor Dangerous to the Public

Several American cities have passed laws completely prohibiting begging or panhandling, with no exceptions.[205] These laws are vulnerable to the argument that due process restricts a state from absolutely prohibiting any business that is not "useful" or "inherently immoral or dangerous to the public welfare."[206] Since some view begging as a useful business, a city that outlaws begging may be depriving individuals who wish to engage in the business of begging of due process under the doctrines of some states. While it is certainly debatable whether begging is a useful business, at least one court noted that:

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203. This has been noted by courts that have been persuaded by the argument that anti-homeless laws burden the right of homeless individuals to travel. *See* Pottinger v. Miami, 810 F. Supp. 1551, 1582 (S.D. Fla. 1992) ("Because the City's interests in maintaining public areas and in promoting tourism and business can be achieved without arresting homeless individuals, these interests cannot justify the burden that the arrests place on the right to travel.").

204. Gundaker Cent. Motors v. Gassert, 127 A.2d 566, 573 (N.J. 1956).

205. *See, e.g.*, NEW ORLEANS, LA., CODE § 54-411 (2006); CHARLESTON, S.C., CODE § 21-111 (2006).

206. *See* Adams v. Tanner, 244 U.S. 590, 593 (1917). *Adams* was strongly criticized in a later case. Ferguson v. Skrupa, 372 U.S. 726 (1963).

> A request for alms clearly conveys information regarding the speaker's plight. Begging gives the speaker an opportunity to spread his views and ideas on, among other things, the way our society treats its poor and disenfranchised. And in some cases, a beggar's request can change the way the listener sees his or her relationship with and obligations to the poor.[207]

A cogent argument can thus be made that enlightening passers-by should be considered a useful activity.

Begging is not inherently dangerous to the public. Citizens are placed in no danger when an individual simply and politely asks for a donation as they pass.[208] And while undoubtedly some homeless individuals use donations for purposes of questionable morality,[209] the potential or even likelihood that some members of a profession will engage in harmful or immoral conduct does not justify an absolute prohibition of that profession in states that still adhere to the *Adams* rule.[210] Outright bans on panhandling in *Adams* states are therefore ripe for attack.

F. States Are Criminalizing Conduct That Can Be Engaged in Innocently

A strong case can be made that cities have overstepped the boundaries of their police powers and violated due process where they have unconditionally prohibited begging or sleeping in public. It is possible to engage in both activities without causing any of the harms that such prohibitions purport to prevent. Depending on the wording of the law, a citywide ban on begging may be broad enough to encompass the innocent acts of the Salvation Army ringing a bell and soliciting donations outside department stores around the holidays or

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207. Blair v. Shanahan, 775 F. Supp. 1315, 1322–23 (N.D. Cal. 1991), *vacated*, 919 F. Supp. 1361 (N.D. Cal. 1996); *see also* Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 908 (1991) (noting that begging does more than propose a commercial transaction, appealing to the listener's sense of compassion and social justice).

208. So-called "aggressive panhandling" is appropriately regulated as a threat to the public welfare. Many cities have laws that outlaw begging activities such as following a pedestrian once he has passed, intentionally blocking vehicular or pedestrian traffic while soliciting donations in order to solicit donations and using profane or abusive language in requesting donations. *See, e.g.*, ALBUQUERQUE, N.M., CODE § 12-2-28 (2006). This type of conduct is easily addressed by a narrowly tailored law, however, and does not justify a blanket ban on begging of all kinds.

209. It is safe to assume that some homeless individuals spend donations on drugs and alcohol, since one-third of all homeless are estimated to have substance abuse problems. *See supra* note 30.

210. *See* Commonwealth v. Stone, 155 A.2d 453, 455 (Pa. Super. Ct. 1959) ("The mere *possibility*, however, that one engaged in a lawful business may also engage in unlawful practices is no justification for prohibiting the business, if it be a legitimate one in the first instance.").

Girl Scouts selling cookies.[211] Few would argue that these activities should be prohibited, and most would agree that these activities in fact benefit society by providing for the needy and raising funds for youth activities.

Similarly, an absolute prohibition on sleeping in public would prevent the businessman from taking a nap in a public park on his lunch break or a sunbather from falling asleep at the beach on a sunny weekend afternoon—both perfectly legitimate and harmless ways of spending one's leisure time. Even assuming that safety, health, or morality issues *were* implicated by homeless individuals who beg or sleep in public places, these types of outright bans are arguably an abuse of the state's police power, since they are so broad as to encompass activities that are innocent and even beneficial to society.

As demonstrated above, substantive due process arguments that have been accepted by state courts in the past can be applied to anti-homeless laws that penalize conduct largely unique to the homeless, although the merits of such arguments may be questionable in some cases. A court might be receptive to an otherwise weak substantive due process argument, however, if an advocate could present the court with a demonstrably effective alternative solution to the problems underlying a criminal law targeting the homeless. Fortunately, such alternative solutions do exist.

V. NON-CRIMINAL ALTERNATIVES

Invalidating anti-homeless laws as violations of state substantive due process doctrines is merely the first step in curtailing the proliferation of the homeless population in the United States. If existing laws were struck down, local governments would need to replace them with programs that assist the homeless in finding permanent homes, medical treatment, and employment opportunities, while helping other residents feel more comfortable being in areas where the homeless congregate. Several U.S. cities are demonstrating the feasibility of non-criminal solutions to the problems associated with homelessness. The viability of non-criminal methods of dealing

211. Such a broad ban is not unrealistic. Consider the law at issue in *Perry v. Los Angeles Police Department*, which stated that "[n]o person shall hawk, peddle or vend *any* goods, wares or merchandise, or beg or solicit alms or *donations* upon" any sidewalk, boardwalk or public way in an area near Venice Beach. Perry v. Los Angeles Police Dep't, 121 F.3d 1365, 1367 (9th Cir. 1997) (emphasis added). Apparently concerned that the breadth of the ban would prohibit certain beneficial activities, the city created two exceptions to it: (1) the sale of magazines and newspapers; and (2) the solicitation of donations or sale of goods by non-profit organizations. *Id.*

with the homeless is likely to make state courts more willing to strike down anti-homeless laws and recommend that lawmakers adopt similar non-criminal measures.

A. Washington, D.C.

In response to a lack of affordable housing in the metro area, Washington, D.C. created a program called the "D.C. Downtown Day Center."[212] The drop-in center serves approximately 260 people each day during the times other shelters for the homeless are closed.[213] The facility offers indoor seating, laundry facilities, showers, and a morning meal.[214] The most notable aspect of the Washington, D.C. program is its source of funding. The program was developed and is funded by the D.C. Downtown Business Improvement District.[215] Businesses located within the District pay a tax of 1 cent for each square foot of property they own.[216] The funds raised by the tax are used to fund the Center and are enough to employ a full-time director.[217]

The Center has had success in placing "employment-ready" individuals in jobs and has also made strides in aiding mentally ill persons who have migrated to the D.C. area from out-of-state.[218] The Center also attempts to contact the families of individuals who wish to return home.[219] If an arrangement can be made with a family to provide housing, the Center has agreements with Amtrak and Greyhound to provide free transportation home.[220]

B. Philadelphia, Pennsylvania

In an effort to control a homeless population estimated at 6,500 per day, with between 150 and 800 of those individuals living on the

212. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, CONSTRUCTIVE ALTERNATIVES TO CRIMINALIZATION: MODELS TO REPLICATE AND USEFUL TIPS TO CONSIDER (2002), *available at* http://www.nlchp.org/FA_CivilRights/CR_conalt_booklet.pdf.

213. NATIONAL COALITION FOR THE HOMELESS, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, *available at* http://www.nationalhomeless.org/publications/crimreport/summary.html.

214. *Id.*

215. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

streets,[221] police officers in the city of Philadelphia, Pennsylvania used to employ a law that prohibited obstructing public highways to force homeless people off the city's streets.[222] The city eventually proposed the "Sidewalk Behavior Bill" ("the Bill"), which regulated or prohibited sitting or sleeping on public sidewalks and created zones from which the homeless were prohibited around banks, ATMs, restaurants, and other premises.[223] After learning about the proposed legislation, homeless advocacy groups organized the Open Door Coalition, a network set on preventing the passage of the Bill.[224] When the Coalition first attempted to negotiate with the city for a suitable alternative to the Bill, the city was reluctant, citing a lack of funds.[225] The Coalition subsequently took political action, staging sit-ins at city hall, testifying at city council meetings, and lobbying key constituent groups.[226] At the same time, members of the Coalition worked to produce a document entitled *Our Way Home: A Blueprint to End Homelessness*.[227] The document was the result of interviews with homeless and formerly homeless people, social service providers, case workers, city officials, and academics.[228] With the publication of *Our Way Home*, the Coalition attempted to offer the City Council practical, concrete alternatives that would help get people off the streets and into programs that provide services, without policing or criminalizing them.[229]

Although the Bill eventually became law,[230] it was amended to include non-criminal penalties and stronger provisions for police to work with outreach teams instead of simply arresting homeless people.[231] The Coalition's actions also resulted in the city allocating roughly $6 million toward social services for the homeless.[232] Advocates for the homeless worked closely with city leaders to develop long-term strategies for addressing homelessness, including an

221. Gwen Shaffer, *Gimme Shelter*, PHILA. CITYPAPER, June 4–11, 1998, *available at* http://citypaper.net/articles/060498/hr.homeless.shtml.

222. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. William O'Brien, *Organize! Philadelphia Campaign Reshapes Homelessness Debate*, SHELTERFORCE ONLINE, (July/Aug. 1999), http://www.nhi.org/online/issues/106/organize.html (last visited May 31, 2006).

228. *Id.*

229. *Id.*

230. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

231. O'Brien, *supra* note 227.

232. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

outreach hotline, additional shelter beds, and a written protocol for all interactions between police officers and homeless individuals.[233] The Coalition also created a task force, consisting of advocacy groups, neighborhood associations, businesses, and city leaders, which was designed to monitor the implementation and enforcement of the new law.[234]

As a result of the partnership between advocates for the homeless and city leaders, very few individuals have been cited for violations of the law.[235] Following the passage of the law, a Sidewalk Ordinance Task Force was created, which included many city business representatives, social service providers, and government officials.[236] The goal of the task force was to monitor ongoing implementation of the new law.[237] Surveys conducted by advocacy groups indicated that there was a significant reduction in the number of homeless on Philadelphia's streets in the first two years after the Bill was passed. City leaders attributed the result to the additional financial resources that facilitated the availability of housing options for those living in public spaces.[238]

C. Fort Lauderdale, Florida

In the past, Fort Lauderdale police officers regularly used any means possible to remove the homeless from public beaches and downtown areas.[239] As a result of the *Pottinger* case,[240] however, and the subsequent $1.5 million settlement in favor of the homeless, it became clear to Fort Lauderdale officials that they were exposing themselves to a similar lawsuit, so they began to seek other ways of addressing homelessness.[241]

Advocates for the homeless offered to educate police officers about the causes of homelessness and the need for alternatives other than enforcement action as a response to homelessness.[242] Additionally, after a survey of the community showed homelessness to be a primary issue of concern, the city established a Homelessness

233. *Id.*
234. *Id.*
235. *Id.*
236. *See* O'Brien, *supra* note 227.
237. *Id.*
238. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.
239. *Id.*
240. Pottinger v. Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).
241. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.
242. *Id.*

Assistance Center ("Center").[243] The Center offers 200 beds, and provides the homeless with a health screening, a need assessment, case management, and life management skills.[244] Following the success of the first center, two additional centers were created.[245] In addition, Fort Lauderdale police officers developed a written protocol for encounters with the homeless, which explicitly states, "[h]omelessness is not a crime."[246] The protocol encourages officers to engage in casual, non-enforcement contact with homeless individuals and to provide them with information about the various social services available to them in the city and county.[247] The Fort Lauderdale Center estimates that approximately 50 percent of their clients come from police referrals.[248] In November 1999, one year after the program began, police estimated that they had approached approximately 1,000 homeless individuals and persuaded about 680 to seek help from family or social service agencies.[249]

With the success of Washington, D.C., Philadelphia, Fort Lauderdale, and other cities in finding viable alternatives to criminalizing homelessness, state courts are likely to be receptive to arguments that there are alternative methods of addressing homelessness that treat the root of the problem, rather than merely its symptoms. Partnerships between homeless advocates and community leaders (as in Washington, D.C.), increased financial resources for social programs that serve the homeless (as in Philadelphia), and written protocols encouraging police to warn, not punish, the homeless and to disseminate information about services available (as in Fort Lauderdale) have all proven successful in combating the problems created by homelessness and are far more productive solutions to homelessness than criminalization.

VI. CONCLUSION

Homelessness in the United States is a problem desperately in need of a solution, and the problem is not likely to resolve itself without some sort of government intervention. While cities certainly

243. *Id.*

244. BOB PUSINS, THE FORT LAUDERDALE MODEL: POLICE RESPONSE TO HOMELESSNESS, *available at* http://www.flpd.org/homeless5.html.

245. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

246. PUSINS, *supra* note 244.

247. NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, *supra* note 212.

248. Lisa J. Huriash, *Power of Positive Policing*, SUN-SENTINEL (Fort Lauderdale), Nov. 12, 2000, *available at* http://ci.ftlaud.fl.us/police/homeless6.html.

249. *Id.*

have an interest in maintaining a clean, aesthetically pleasing, and enjoyable environment, the homeless have due process interests that must be weighed in any solution that a city may develop to remedy its problems with homelessness.

The criminalization of homelessness inadequately balances a city's desire to create a hospitable environment for its tourists and citizens against the interests of the homeless in obtaining food, shelter, employment assistance, counseling for addiction or mental illness, and other social services. Citing or arresting individuals for engaging in innocent and life-sustaining activities solely because the city council has decided they are an eyesore is an inefficient means of dealing with homelessness. The homeless are almost certainly unable to afford any fines they may be assessed, which likely results in a warrant being issued for their arrest once the fine becomes delinquent. Arresting the homeless only takes them further from the social services they need to overcome what is normally a temporary situation.

Rather than turn to the criminal law for a solution, American cities should follow the examples of a few innovative cities that are developing constructive long-term solutions to homelessness. Washington, D.C.'s "D.C. Downtown Day Center" is a model of how business owners and city leaders can work together to help the homeless, rather than exacerbating their problems with criminal penalties. Philadelphia's Open Door Coalition provides a wonderful model of how activists can work with city governments to ensure that the homeless are represented, and how vast sums of money are not always required to provide an effective solution to the problem. Fort Lauderdale exemplifies the way a city should react to correct a problem when citizens identified homelessness as a priority in need of a solution. Other cities like Madison, Wisconsin, and Sacramento, California, have chosen to create outreach programs to deal with homelessness rather than resort to criminalization.[250]

Homeless rights advocates have been creative in their increasingly numerous challenges to laws aimed at the homeless. While they have had a number of successes in their challenges to such laws, these successes are still greatly outnumbered by their failures. Advocates should continue to urge cities to deal with the problem of homelessness in a more humane and forthright way by filing lawsuits where local governments are passing criminal laws directed at the

250. *See* NATIONAL LAW CENTER ON HOMELESSNESS AND POVERTY, SOLUTIONS THROUGH ALTERNATIVE REMEDIES: PRACTICAL MODELS TO HELP END HOMELESSNESS 3-4 (2004), *available at* http://www.nlchp.org/content/pubs/Solutions%20through%20alternative%20rem.%203-24-04.pdf (describing the programs in Madison and Sacramento).

homeless. The substantive due process challenges suggested in this Note represent potential arguments for future litigants to use in state courts to overturn those anti-homeless laws currently in existence in favor of more progressive policies toward the homeless. The merits of these arguments are debatable and the likelihood of success of each varies from jurisdiction to jurisdiction. State courts have shown sympathy for the plight of the homeless in a number of cases,[251] however, and advocates for the homeless should use whatever arguments they can find in hopes of reducing the criminalization of homelessness.

In developing methods to deal with the homelessness problem in the future, cities should increasingly look to those cities that have developed constructive alternatives to criminalization. States could encourage innovation in this regard by awarding grants to help establish new programs designed to provide long-term solutions to homelessness, such as more affordable housing and livable wages. Homelessness is not going away by itself and criminalization is a quick fix that does nothing to address the underlying causes of homelessness. American cities must cure the disease, not just cover the symptoms.

Andrew J. Liese[*]

251. *See* Headley v. Selkowitz, 171 So. 2d 368, 370 (Fla. 1965) (stating that a vagrancy statute should not be applied to "[i]nnocent victims of misfortune" who appear to be vagrants, but "who are not such either by choice or intentional conduct"); Parker v. Mun. Judge of Las Vegas, 427 P.2d 642, 644 (Nev. 1967) ("It is simply not a crime to be unemployed, without funds, and in a public place. To punish the unfortunate for this circumstance debases society."); Alegata v. Commonwealth, 231 N.E.2d 201, 207 (Mass. 1967) ("Idleness and poverty should not be treated as a criminal offence.").

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