

FROM CRIMINALIZATION TO HUMANIZATION: ENDING DISCRIMINATION AGAINST THE HOMELESS

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ABSTRACT

Homeless people experience legal and societal discrimination, manifested in the criminalization of homelessness and in many small but profound societal slights. Addressing this discrimination will require both innovative legal advocacy and the correction of misconceptions about homeless people.

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I.

INTRODUCTION

“This guy could have been mentally ill, he could have imprinted on you, raped you, killed you, or any number of other bad things.” That’s what someone told my friend after she wrote on Facebook about her conversation with a homeless man. Her post relayed the story of a homeless man on her block who recently suffered a heart attack and was struggling to afford the healthy food that doctors told him he needed. My friend noted in her post that people might find it “weird” that she was talking to the homeless man in the first place. Many might be uncomfortable striking up a conversation with him, even though he is always friendly and polite and spends his days reading peacefully on the street. Notwithstanding these positive traits, a commenter on my friend’s post cautioned her about the “risk” she was taking by talking to a homeless man. He complimented her for being “brave”

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but warned her to be careful because “we can’t afford to lose any more colleagues like you.”

Is this fear justified? It’s certainly not uncommon: many people confess to experiencing a twinge of fright whenever they encounter a homeless person.¹ But fears of the homeless are one of many pervasive fears—like fear of sharks or of public speaking²—that are irrational in light of the actual risk of harm. Irrational fears are fueled by a variety of factors, including the media, levels of education, a natural discomfort with unfamiliarity, and personal vulnerabilities such as poor health.³ Fear of violence is especially susceptible to irrationality: people overestimate their risk of experiencing violence and, out of fear, take measures that cause more harm than they prevent. For example, a common motivation for gun ownership is the fear of a violent home invasion. But, in reality, only about 100 homicides per year happen during home invasions, while over 18,000 people kill themselves each year with their own gun.⁴ Americans also have an overstated fear of violent crime in general: a survey found that most Americans believe that violent crime has increased in recent years, even though it has steadily decreased.⁵

Highly-publicized stories of violent acts committed by homeless people⁶ are brought out as justifications for generalized fears of the homeless,⁷ reinforcing an

1. See, e.g., Agha Zain, *5 Reasons You are Scared of Homeless People*, REASONER, <http://thereasoner.com/articles/5-reasons-you-are-scared-of-homeless-people> (last visited Feb. 6, 2015); *Hobophobia—Fear of Bums or Beggars*, PHOBIA SOURCE, <http://www.phobiasource.com/hobophobia-fear-of-bums-or-beggars/> (last visited Feb. 6, 2015); Mary Da Rosa, *Shame on Me... I Am Afraid of the Homeless*, MEDIUM (Jan. 4, 2014), <https://medium.com/musings-of-a-first-generation-baby-boomer/shame-on-me-i-am-afraid-of-the-homeless-e892053aee6c>.

2. Olga Khazan, *The Psychology of Irrational Fear*, ATLANTIC (Oct. 31, 2014), available at <http://www.theatlantic.com/health/archive/2014/10/the-psychology-of-irrational-fear/382080/>.

3. Khazan, *supra* note 2; Wilkinson College of Humanities and Social Sciences, *Fear Factors: Why Are People Afraid*, CHAPMAN UNIVERSITY SURVEY OF AMERICAN FEARS (Oct. 21, 2014), <http://blogs.chapman.edu/wilkinson/2014/10/21/fear-factors-why-are-people-afraid/>; Jeralynn S. Cossman & Nicole E. Rader, *Fear of Crime and Personal Vulnerability: Examining Self-Reported Health*, 31 SOCIOLOGICAL SPECTRUM 141 (2011), available at https://www.academia.edu/1750368/Fear_of_Crime_and_Personal_Vulnerability_Examining_Self_Rated_Health.

4. Harold Pollack, *We Fear Each Other, When Guns Themselves are the Real Danger*, NATION, <http://www.thenation.com/article/171879/we-fear-each-other-when-guns-themselves-are-real-danger#> (Dec. 20, 2012).

5. *Id.*; Wilkinson College of Humanities and Social Sciences, *The Sky is Falling (and the Boogeyman is Chasing Me)*, CHAPMAN UNIVERSITY SURVEY OF AMERICAN FEARS (Oct. 21, 2014), <http://blogs.chapman.edu/wilkinson/2014/10/21/the-sky-is-falling-and-the-boogeyman-is-chasing-me/>.

6. See, e.g., “Homeless Man” Attacks Man at Gas Station for One Dollar, CBS MIAMI (Feb. 10, 2015, 12:24 PM), <http://miami.cbslocal.com/2015/02/10/homeless-man-attacks-man-at-gas-station-for-one-dollar/>; Thomas Tracy, *Homeless Man Attacks 57-year-old with Broken Bottle near Port Authority Bus Terminal: Cops*, N.Y. DAILY NEWS (Dec. 17, 2014), <http://www.nydailynews.com/new-york/nyc-crime/homeless-man-attacks-57-year-old-broken-bottle-cops-article-1.2048120>; MyFox New York Staff, *Homeless Man Attacks Elderly Person in Subway, NYPD Says*, MYFOXNY.COM (Nov. 23, 2013, 5:16 PM), <http://www.myfoxny.com/story/24052987/nypd-arrests-homeless-man-in-subway-push>.

irrational fear. At most, there is an inconclusive link between homelessness and violence, and some studies have found that homeless people are no more likely, or are even *less* likely, than non-homeless people to commit violent crime.⁸ Rather, when homeless people are arrested, it tends to be for non-violent, homelessness-related crimes like “disorderly conduct” arising from sleeping on a park bench.⁹ Moreover, a person’s homelessness does not imply that she is mentally ill, nor does a mental illness imply that she will engage in violent behavior. The percentage of homeless people who suffer from mental illness (20–25%)¹⁰ is only slightly higher than the percentage of all adults who suffer from mental illness (18.6%)¹¹—the vast majority of whom pose absolutely no danger to the people they live and work with. Research has shown that mental illness alone is not a predictor of violence and that people with mental illness are actually more likely to

7. Lorelei Laird, *Unwanted Guests*, 100 A.B.A. J. 37, 39 (2014) (interviewing a wealthy resident of Venice Beach, CA who “notes that residents sometimes have a well-founded fear of violence, thanks to some high profile crimes”).

8. See Sean N. Fischer, Marybeth Shinn, Patrick Shrout, & Sam Tsemberis, *Homelessness, Mental Illness, and Criminal Activity: Examining Patterns Over Time*, 42 AM. J. COMMUNITY PSYCHOL. 251, 261–264 (Oct. 28, 2008) (noting that prior research on the link between homelessness and crime produced varying results, and finding that street homelessness is not a predictor of violent crime but that shelter homelessness does correlate with increased levels of violent crime, perhaps because of the close-quartered shelter environment); Dale E. McNeil, Reneé L. Binder, & Jo C. Robinson, *Incarceration Associated with Homelessness, Mental Disorder, and Co-Occurring Substance Abuse*, 56 PSYCHIATRIC SERVS. 840, 840–46 (July 2005) (finding that inmates who had been homeless before their incarceration were significantly less likely to have been arrested for a violent crime than previously-housed inmates); David A. Snow, Susan G. Baker, & Leon Anderson, *Criminality and Homeless Men: An Empirical Assessment*, 36 SOCIAL PROBLEMS 532, 538–39 (Dec. 1989) (finding that arrest rates for violent crime among homeless men are either lower than or have no statistically significant differences from arrest rates for violent crime among the general male population).

9. Nat’l Law Center on Homelessness and Poverty, *Myths and Facts About Homelessness*, available at <http://www.ashevilenc.gov/Portals/0/city-documents/planning/homeless/National%20Law%20Center%20Myths%20and%20Facts.pdf> (citing Pamela J. Fischer, *Criminal Activity Among the Homeless: A Study of Arrests in Baltimore*, 39 PSYCHIATRIC SERVS. 46 (1988) (finding that the majority of homeless arrests were for trivial, victimless crimes)). See also Sean N. Fischer, Marybeth Shinn, Patrick Shrout, & Sam Tsemberis, “Homelessness, Mental Illness, and Criminal Activity:

Examining Patterns Over Time,” 42 AM. J. COMMUNITY PSYCHOL. 251, 261–264 (Oct. 28, 2008) (finding that street homelessness is not a predictor of violent crime but that shelter homelessness, by contrast, does correlate with increased levels of violent crime, perhaps because the close-quartered shelter environment provokes violence).

10. Nat’l Coalition for the Homeless, “Mental Illness and Homelessness” (July 2009), available at http://www.nationalhomeless.org/factsheets/Mental_Illness.html.

11. Nat’l Inst. of Mental Health, *Any Mental Illness (AMI) Among Adults*, <http://www.nimh.nih.gov/health/statistics/prevalence/any-mental-illness-ami-among-adults.shtml> (last visited Feb. 6, 2015).

be *victims* of violence than perpetrators of violence.¹² Indeed, homeless people are often the victims of hate crimes based on their homeless status.¹³

Unfortunately, cities have increasingly begun to treat homeless people as criminals, not victims, by enacting laws that essentially criminalize being homeless in public. In a July study examining 187 U.S. cities, the National Law Center on Homelessness and Poverty (NLCHP) found a 119 percent increase since 2011 in city bans on sleeping in vehicles, a 25 percent increase in citywide laws against panhandling, a 60 percent increase in citywide camping bans, and a 35 percent increase in citywide loitering or vagrancy laws.¹⁴ Such ordinances make the already-difficult lives of homeless people even more challenging, by hampering their ability to carry out life-sustaining tasks like eating, sleeping, and taking care of personal hygiene, and by subjecting them to criminal penalties based on their homeless status.¹⁵

Advocates have mounted legal challenges anti-homeless ordinances, employing the First, Fourth, Eighth, and Fourteenth Amendments to argue that anti-homeless ordinances are unconstitutional. Some of these challenges have been successful. In 2014, the Ninth Circuit struck down a citywide ordinance banning sleeping in vehicles in *Desertrain v. City of Los Angeles*, holding the ordinance “unconstitutionally vague on its face because it provides insufficient notice of the conduct it penalizes and promotes arbitrary and discriminatory enforcement.”¹⁶ This piece will highlight some of the legal bases under which advocates can continue to challenge anti-homeless laws.

To truly address the criminalization of homelessness, however, it is necessary to challenge not only laws but also biases that pervade our society. Fear and discomfort around homeless people is the driving force behind anti-homeless laws,¹⁷ and such fears are irrational and unnecessary. As the homeless-run organization Picture the Homeless proclaims, “Don’t Talk About Us—Talk With

12. Margarita Tartakovsky, *Media’s Damaging Depictions of Mental Illness*, PSYCH CENTRAL (2009); <http://psychcentral.com/lib/medias-damaging-depictions-of-mental-illness/0002220> (quoting Cheryl K. Olson, Sc.D., co-director of the Center for Mental Health and Media at Massachusetts General Hospital Department of Psychiatry).

13. NAT’L COALITION FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST HOMELESS PEOPLE IN 2013 (June 2014), *available at* <http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-FINAL.pdf> (finding that, in the past 15 years, 1437 reported acts of violence have been committed against homeless individuals and that, since the homeless community is treated so poorly in our society, many more attacks go unreported).

14. Laird, *supra* note 7, at 40 (citing NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (July 2014), *available at* http://www.nlchp.org/documents/No_Safe_Place [hereinafter NO SAFE PLACE]).

15. NO SAFE PLACE, *supra* note 14, at 16.

16. *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1149 (9th Cir. 2014).

17. MADELINE R. STONER, THE CIVIL RIGHTS OF HOMELESS PEOPLE 135–136 (1995); Laird, *supra* note 6, at 39.

Us!”¹⁸ The homeless must be recognized as people worthy of empathy and respect. To end the criminalization of homelessness, we must begin the humanization of homelessness.

This piece highlights ways in which advocates can challenge anti-homeless laws, both in the courts and in the court of public opinion. First, I will describe what homelessness is and who it affects, and provide an overview of some of the anti-homeless ordinances that cities have enacted. Then, I will describe some of the legal bases under which advocates can continue to challenge anti-homeless laws. Finally, I will argue that to truly combat anti-homeless policies, it is necessary to persuade the public that homeless people should receive empathy and assistance, not discrimination and criminalization.

II.

WHO IS HOMELESS?

Before undertaking an analysis of anti-homeless policies, it is critical to understand who the homeless are. Under federal law, there are two definitions of homelessness. The United States Department of Housing and Urban Development uses a definition that includes people living in shelters, in transitional housing, and in public places and also includes people who are imminently at risk of losing their housing, families with children who are persistently in unstable housing situations, and people who are fleeing or attempting to flee a dangerous situation such as domestic violence.¹⁹ The Department of Health and Human Services uses a broader definition that also includes people who are “doubled-up” with family or friends.²⁰

The homeless are an extremely diverse group. A significant proportion of the homeless are families; hundreds of thousands of American families become homeless each year, including over 1.6 million children.²¹ Most of the heads of homeless households currently work or have recently worked.²² Among homeless families, only a small portion of adults suffer from serious mental illness or addiction. Homeless single adults, however, experience higher rates of mental

18. PICTURE THE HOMELESS, <http://www.picturethehomeless.org/> (last visited Feb. 10, 2015).

19. 42 U.S.C. § 11302; Nat’l Law Ctr. on Homelessness & Poverty, *Homelessness in America: Overview of Data and Causes*, http://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet (last visited Feb. 10, 2015).

20. 42 U.S.C. § 254b(h)(1); Nat’l Health Care for the Homeless Council, *What is the Official Definition of Homelessness?*, <http://www.nhchc.org/faq/official-definition-homelessness/> (last visited Feb. 10, 2015).

21. Nat’l Ctr. on Family Homelessness, *What is Family Homelessness?*, AMERICAN INSTITUTES FOR RESEARCH <http://www.familyhomelessness.org/facts.php?p=tm> (last visited Feb. 10, 2015).

22. Mireya Navarro, *In New York, Having a Job, or 2, Doesn’t Mean Having a Home*, N.Y. TIMES Sep. 17, 2013, available at <http://www.nytimes.com/2013/09/18/nyregion/in-new-york-having-a-job-or-2-doesnt-mean-having-a-home.html> (citing a Vera Institute for Justice study that found that 79 percent of homeless heads of family had recent work histories and more than half had educational levels, up to college, that made them employable).

illness and addiction. In New York City, around one-third of homeless single adults in shelters and around two-thirds of homeless single adults who are sleeping on the streets or in public spaces suffer from mental illness or addiction.²³

Although there are many different types of homeless people, the criminalization of homelessness primarily affects the subset of homeless people who live in public places, panhandle, or are otherwise more visible than the many homeless people living with relatives, in unstable housing situations, or in shelters or transitional housing programs. However, the stereotypes about homeless people—that the homeless do not work, are mentally ill, abuse alcohol or drugs, and are susceptible to violence—have a deleterious impact on all homeless people, who are stigmatized and discriminated against.²⁴

In January, 2014, there were an estimated 578,424 people experiencing homelessness in the United States, about 15 percent of whom were chronically homeless.²⁵ America's homeless population has grown significantly in recent years, especially in light of the economic crisis of 2008 and 2009.²⁶ Although a limited number of cities and states, such as New York City²⁷ and the state of Massachusetts,²⁸ purport to fulfill a “right to shelter” for all citizens, even these regions have barriers to shelter access²⁹ and, in most areas, shelter is sparse and by no means guaranteed.³⁰ As a result, homeless people are increasingly visible, and cities feel pressure to keep the homeless out of the public eye.

23. Coalition for the Homeless, *FAQs & Myths*, <http://www.coalitionforthehomeless.org/the-catastrophe-of-homelessness/faqs-and-myths/#4> (last visited Feb. 12, 2015).

24. Jo Phelan, Bruce Link, Robert Moore, & Ann Stueve, *The Stigma of Homelessness: The Impact of the Label 'Homeless' on Attitudes Toward Poor Persons*, 60 SOCIAL PSYCHOLOGY QUARTERLY 323 (1997).

25. Nat'l Alliance to End Homelessness, *Snapshot of Homelessness*, http://www.endhomelessness.org/pages/snapshot_of_homelessness (last visited Feb. 10, 2015).

26. NAT'L ALLIANCE TO END HOMELESSNESS, STATE OF HOMELESSNESS IN AMERICA 5, 17 (Jan. 2011), available at http://b3cdn.net/naeh/4813d7680e4580020f_ky2m6ocx1.pdf. See also NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COALITION FOR THE HOMELESSNESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN NEW YORK CITY 8 (July 2009), available at http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf [hereinafter HOMES NOT HANDCUFFS].

27. Coalition for the Homeless, *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, <http://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/> (last visited Feb. 11, 2015).

28. Katie Johnston, *Strict Shelter Rules for Homeless Families Draw Critics*, BOSTON GLOBE (Jan. 15, 2015), <http://www.bostonglobe.com/business/2015/01/14/strict-rules-force-homeless-families-into-risky-situations-advocates-say/OpdRjVC601VvonOQ3hUp5L/story.html>.

29. *Id.*; Coalition for the Homeless, *Protecting the Right to Shelter*, <http://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/protecting-the-legal-right-to-shelter/> (last visited Feb. 26, 2015).

30. HOMES NOT HANDCUFFS, *supra* note 26, at 8.

III.
THE CRIMINALIZATION OF HOMELESSNESS

As homelessness has grown throughout the United States, many cities have attempted to “solve” the problem of homelessness by enacting laws that prohibit life-sustaining activities like sleeping in public places and panhandling.³¹ Non-homeless citizens often prefer not to interact with homeless people due to a combination of fear, health concerns, spatial needs, and aesthetic considerations.³² Consequently, cities implement anti-homeless policies in order to please their citizens and to promote business and tourism.³³ But the unfortunate reality is that many homeless people have no choice but to sleep on the streets or otherwise engage in prohibited activities that will put them in the public eye. Throughout the country, approximately 24 percent of homeless people are turned away from shelter due to lack of space, yet cities continue to penalize people for living on the streets.³⁴

Anti-homeless policies target a range of activity related to homelessness, often interfering with vital activity like sleeping, eating, and maintaining personal hygiene. Some anti-homeless policies prohibit specific activities, such as sleeping, sitting, or storing personal belongings in public spaces; panhandling; or sharing food with the homeless in public spaces.³⁵ Other anti-homeless measures take the form of discriminatory policing practices such as the selective enforcement of loitering, jaywalking, or open container laws and the enforcement of “quality of life” ordinances like bans on public urination even though no public facilities are available.³⁶ Finally, cities often conduct “sweeps” of areas in which homeless people live, driving them out of those areas and destroying their property in the process.³⁷

31. Kevin Bundy, *“Officer, Where’s My Stuff?” The Constitutional Implications of a De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L. J. 57, 57–58 (2003).

32. STONER, *supra* note 17, at 135–136; Laird, *supra* note 6, at 39.

33. Bundy, *supra* note 31, at 58 (citing Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631 (1992); Paul Ades, *The Unconstitutionality of “Antihomeless” Laws*, 77 CAL. L. REV. 595 (1989); Nancy Wright, *Not in Anyone’s Backyard: Ending the “Contest of Nonresponsibility” and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163 (1995)).

34. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN NEW YORK CITY 6 (Nov. 2011), *available at* http://www.nlchp.org/Criminalizing_Crisis (citing THE UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY 2, 19 (Dec. 2010), *available at* <http://usmayors.org/pressreleases/uploads/2010HungerHomelessnessReportfinalDec212010.pdf>).

35. *Id.* at 6–7.

36. *Id.*

37. *Id.*

IV.

LEGAL ISSUES CHALLENGES TO THE CRIMINALIZATION OF HOMELESSNESS

Advocates for the homeless may substantially improve the lives of homeless people by bringing legal challenges to anti-homeless laws, which oppress the homeless by hampering their ability to carry out life-sustaining tasks like eating, sleeping, and taking care of personal hygiene, and which subject homeless people to criminal penalties based on their homeless status.³⁸ Advocates have challenged anti-homeless laws on a variety of constitutional grounds, including First Amendment freedom of speech claims, Fourth Amendment claims of unreasonable search and seizure, cruel and unusual punishment claims under the Eighth Amendment, Fourteenth Amendment due process claims, and Fourteenth Amendment equal protection claims. Additionally, there are other potential claims against cities that violate the rights of the homeless, such as a property-based claim against law enforcement officials who recklessly destroy homeless persons' property during a homeless sweep.³⁹ Thus far, many challenges to anti-homeless laws have been unsuccessful, but this is a growing area of law with many open questions, and advocates can seek new and innovative ways to challenge laws that criminalize homelessness.

A. Panhandling Ordinances and the First Amendment

The First Amendment has been used to enforce the rights of homeless people, often in the context of panhandling. Strictly speaking, panhandlers and homeless people are not one and the same—not all panhandlers are homeless, and most homeless people do not panhandle—but anti-panhandling ordinances and other anti-homeless ordinances are alike in that they both ban public displays of poverty. Anti-panhandling ordinances are extremely common in the United States. In a survey of 187 cities conducted by the National Law Center on Homelessness & Poverty, twenty-four percent have sweeping bans on panhandling, and the remaining seventy-six percent of cities have narrower bans on begging in particular public places, such as on public transportation and in shopping districts or downtown areas.⁴⁰ Anti-panhandling ordinances tend to allow passive solicitation activities using written signs to request food or money, and sometimes allow panhandling generally while prohibiting “aggressive panhandling.”⁴¹ But aggressive panhandling may encompass activity that is as mild as approaching someone who is standing on line to enter a building and politely asking them for money.⁴²

38. NO SAFE PLACE, *supra* note 14, at 16.

39. *See* Bundy, *supra* note 31 (making the case for property-based claims against cities whose law enforcement activities result in the loss or destruction of homeless citizens' personal belongings).

40. NO SAFE PLACE, *supra* note 14, at 20.

41. *Id.*

42. *Id.* (citing Mobile, Alabama, Muni. Code § 55-101).

Although the Supreme Court has not directly addressed the issue of whether panhandling is protected by the First Amendment, it *has* held that solicitation of charitable donations (by nonprofit organizations, rather than by individuals) is protected speech under the First Amendment.⁴³ That rationale has been applied to the panhandling context by lower courts to find that a total ban on panhandling activity would be unconstitutional under the First Amendment.⁴⁴ The mere exchange of money does not constitute speech, but the act of begging typically conveys a social or political message through statements about the panhandler's need for food, shelter, clothing, medical care, or transportation.⁴⁵ As the Second Circuit noted in *Loper v. New York City Police Dep't*, "[e]ven without particularized speech, . . . the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a donation itself conveys a message of need for support and assistance."⁴⁶

However, even under the First Amendment, cities are permitted to enact anti-panhandling ordinances that are narrowly tailored to limit panhandling with certain characteristics. For example, ordinances have been upheld that ban panhandling in a city's downtown area,⁴⁷ on property of the United States Postal Service,⁴⁸ and in the New York City subway system.⁴⁹ In many communities, a "narrowly" tailored ban may have the practical effect of quashing panhandling altogether, since the areas where panhandling is most likely to be prohibited (e.g., commercial and tourist districts, etc.) may also be the few places where homeless people have sufficient contact with passersby such that panhandling is worthwhile.

Another obstacle to the protection of panhandlers' rights is that facially constitutional statutes may be applied improperly to inhibit speech that is *not* illegal under the statute and *is* First Amendment protected speech. For example, the ACLU just filed a lawsuit against the city of Fort Collins, Colorado, for its

43. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 622 (1980).

44. *Speet v. Schuette*, 726 F.3d 867, 874 (6th Cir. 2013) (citing *Schaumburg*, 444 U.S. at 622). *See also* *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 551 (4th Cir. 2013) ("[a]s a preliminary matter," that "the speech and expressive conduct that comprise begging merit First Amendment protection." [ALN: This could probably be made into a complete sentence]); *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000) (using *Schaumburg* to find that solicitation is protected speech under the First Amendment); *U.S. v. Kokinda*, 497 U.S. 720, 725 (1990) (holding that a United States Postal Service regulation prohibiting the solicitation of alms on postal premises was constitutional, but stating that "[s]olicitation is a recognized form of speech protected by the First Amendment").

45. *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993) (holding that a New York City statute prohibiting loitering in public places for purposes of begging was unconstitutional under the First Amendment).

46. *Id.*

47. *Norton v. City of Springfield*, 768 F.3d 713 (2014) (upholding an ordinance that prohibits oral requests for the immediate donation of money prohibits panhandling in its "downtown historic district," which constitutes less than 2% of the City's area but contains its principal shopping, entertainment, and governmental areas).

48. *Kokinda*, 497 U.S. at 720.

49. *Young v. New York City Transit Authority*, 903 F.2d 146 (2d Cir. 1990).

abuse of a statute that allows panhandling but imposes various restrictions on the location and manner of solicitation.⁵⁰ This statute was enforced improperly against people who did not in any way violate the statute—such as panhandlers who silently and passively requested money using signs—and thus, the panhandlers’ free speech rights were violated.⁵¹

Finally, it may be possible, but would likely be difficult, to apply First Amendment protections to other anti-homeless laws, such as prohibitions on sitting or sleeping in public. In *Stone v. Agnos*, a homeless person brought a civil rights action against San Francisco city officials after he was arrested for sleeping on a public plaza.⁵² The plaintiff, Mr. Stone, was a homeless man who often spoke out to the media about homeless rights and argued that his sleeping in a public space was part of that speech.⁵³ Sleeping in a public place was First Amendment protected activity, he argued, because it dramatized the plight of the homeless.⁵⁴ In deciding *Stone*, the Ninth Circuit was skeptical about whether sleeping constituted speech but ultimately did not reach the issue of whether Mr. Stone’s activity was protected by the First Amendment because they found that the state had an “interest in maintaining its parks in attractive condition,” which would override First Amendment concerns.⁵⁵

B. Restrictions on the Use of Public Spaces: Due Process Vagueness

In challenging statutes that restrict the freedom of homeless people to sit, sleep, eat, and engage in other activities in a public space, advocates may invoke the Due Process Clause of the Fourteenth Amendment, which prohibits the enactment of vague statutes. In a 1971 case, *Papachristou v. City of Jacksonville*, the Supreme Court held that an anti-vagrancy ordinance was void for vagueness because it “fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute”⁵⁶ and because it “encourages arbitrary and erratic arrests and convictions.”⁵⁷ The *Papachristou* ordinance banned activities including “wandering or strolling around from place to place without any lawful purpose or object”⁵⁸ and was “so sweepingly broad that, by its literal terms, a person out for a

50. Jason Pohl, *ACLU Sues Fort Collins for Police Panhandling Enforcement*, COLORADAN (Feb. 10, 2015, 8:33 PM), available at <http://www.coloradoan.com/story/news/local/2015/02/10/aclu-sue-fort-collins-police-panhandling-enforcement/23170821/>; Complaint, *Landow v. City of Fort Collins*, No. 1:15-cv-00281 (D. Colo. Feb. 10, 2015). See City of Fort Collins, *Panhandling*, <http://www.fcgov.com/socialsustainability/panhandling.php> (last visited Feb. 11, 2015) (describing the prohibitions in Fort Collins’s anti-panhandling ordinance).

51. Complaint, *Landow v. City of Fort Collins*, No. 1:15-cv-00281 (D. Colo. Feb. 10, 2015).

52. 960 F.2d 893 (9th Cir. 1992).

53. *Stone*, 960 F.2d at 895.

54. *Id.*

55. *Id.*

56. 405 U.S. 156, 162 (1972) (quoting *United States v. Harriss*, 347 U.S. 612 (1954)).

57. *Papachristou*, 405 U.S. at 162.

58. *Papachristou*, 405 U.S. at 156, n.1.

leisurely, aimless stroll could be classified as a ‘vagrant.’”⁵⁹ In practice, vague statutes are enforced non-uniformly at the discretion of the police and prosecutors.⁶⁰ Vague statutes “allow the net to be cast at large, to enable men to be caught who are vaguely undesirable in the eyes of police and prosecution, although not chargeable with any particular offense.”⁶¹ In the homelessness context, a vague statute allows law enforcement officers to arrest people simply for being homeless, when they are perhaps violating an overbroad vagrancy statute but are doing no other wrong.

Over forty years after *Papachristou*, vagueness continues to be a major way in which anti-homeless laws have been challenged in court.⁶² Most recently, *Desertrain v. City of Los Angeles* challenged a Los Angeles ordinance that prohibited the use of a vehicle “as living quarters either overnight, day-by-day, or otherwise.”⁶³ The statute did not define what using a vehicle as “living quarters” meant, but the city trained police officers to “look for vehicles containing possessions normally found in a home, such as food, bedding, clothing, medicine, and basic necessities,” and the ordinance did not even require proof that an individual had slept in the vehicle.⁶⁴ The Ninth Circuit struck down this statute as vague on its face because it fails to specify a clear standard of prohibited conduct. It therefore fails to provide ordinary people with notice of what is forbidden and may lead to arbitrary and discriminatory enforcement.⁶⁵

Vagueness is a valuable legal framework with which advocates can challenge certain statutes that are traditionally enforced against homeless people. However, it is limited to cases in which statutes craft overbroad prohibitions and so may be unsuccessful against narrower, homeless-specific bans such as prohibitions against sleeping on a park bench.

C. Other Constitutional Challenges to Anti-Homeless Ordinances

There are a variety of other constitutional provisions under which advocates can challenge the criminalization of homelessness, including Fourth Amendment

59. KENT S. SHEIDEGGER, A GUIDE TO REGULATING PANHANDLING (Crim. Just. Legal Foundation 1992), available at <http://www.cjlf.org/publications/RegulatePanhandling.pdf>.

60. *Papachristou*, 405 U.S. at 169.

61. *Papachristou*, 405 U.S. at 166 (citing *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)).

62. See *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1149 (9th Cir. 2014); *Richard v. State of Nevada*, 108 Nev. 626, (1992) (holding that provisions criminalizing “loitering” on private property when the person has “no lawful business with owner or occupant thereof” were unconstitutionally vague because they lacked articulable standards and failed to provide law enforcement officials with proper guidelines to avoid arbitrary and discriminatory enforcement); *Kolender v. Lawson*, 461 U.S. 352 (1983) (invalidating on vagueness grounds a California statute requiring persons who loiter or wander on the streets to provide “credible and reliable” identification and to account for their presence when requested by a police officer).

63. *Desertrain*, 754 F.3d at 1149 (citing Los Angeles Municipal Code Section 85.02).

64. *Desertrain*, 754 F.3d at 1149.

65. *Id.* at 1155.

claims for unreasonable search and seizure, cruel and unusual punishment claims under the Eighth Amendment, and Fourteenth Amendment overbreadth and equal protection claims. Some of these claims may be particularly useful in contexts wherein laws do not explicitly target the homeless and are not vague, but are enforced in ways that have a discriminatory impact on the homeless. For example, advocates for the homeless are currently considering taking action against the New York City Police Department for its discriminatory use of the “disorderly conduct” statute to arrest and ticket homeless people.⁶⁶ In the past, the New York State Court of Appeals has held that the disorderly conduct statute itself is not unconstitutionally vague on its face.⁶⁷ However, even if the statute is not facially vague, the statute might still be enforced in a manner that violates a provision of the Constitution, particularly the Fourth Amendment, Eighth Amendment, or the Fourteenth Amendment’s Equal Protection Clause.

Fourth Amendment claims have been advanced against cities that conducted homeless sweeps involving confiscation and destruction of homeless persons’ personal possessions.⁶⁸ For example, in *Pottinger v. Miami*, the court held that the city of Miami violated homeless plaintiffs’ Fourth Amendment rights when, while conducting homeless sweeps, law enforcement officials gathered and destroyed homeless persons’ property.⁶⁹ However, other courts have denied Fourth Amendment claims, holding that the homeless have no reasonable expectation of privacy in property located in public spaces.⁷⁰

Eighth Amendment claims have been advanced to argue that it constitutes cruel and unusual punishment to enforce laws that essentially punish people for being homeless. For example, in the case *Jones v. City of Los Angeles*, advocates argued that it was an Eighth Amendment violation to enforce against homeless individuals an ordinance that criminalized sitting, lying, or sleeping on public streets and sidewalks. The Ninth Circuit found in favor of plaintiffs that such enforcement was an Eighth Amendment violation because it criminalized a person’s homeless status; the judgment was later vacated, and the case settled.⁷¹ Nonetheless, *Jones* and a few other prior cases⁷² serve as promising examples of ways in which the Eighth Amendment may be used to promote the rights of the homeless.

66. Picture the Homeless, *Civil Rights Campaign*, http://www.picturethehomeless.org/civil_rights.html (last visited Feb. 11, 2015).

67. *People v. Grandy*, 409 N.Y.S.2d 77 (1978).

68. *See, e.g., Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005 (C.D. Cal. 2011).

69. *Pottinger v. Miami*, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992).

70. Kathryn Hansel, *Constitutional Othring: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J. L. & SOC. POL’Y 445, 455 (2011) (citing *Whiting v. State*, 885 A.2d 785, 799-801 (Md. 2005)).

71. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

72. *See, e.g., Anderson v. Portland*, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); *Pottinger v. Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992); *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969); Hansel, *supra* note 71, at 457-458.

Finally, the Equal Protection Clause of the Fourteenth Amendment may be used to advance claims that laws are being discriminatorily enforced against the homeless.⁷³ Equal protection claims on behalf of the homeless have not been successful thus far, because “no court has ever held the homeless to be a suspect class.”⁷⁴ However, in light of cases like *Floyd v. City of New York*, which challenge law enforcement practices on other equal protection grounds,⁷⁵ equal protection claims should be kept in mind with respect to the homeless, especially in cases where homeless persons are predominately members of minority groups that are suspect classes under the Fourteenth Amendment.

V.

A MOVE TOWARDS HUMANIZATION

Legal challenges to anti-homeless laws are an important way in which public interest lawyers can make a meaningful impact on the lives of the homeless, many of whom find every aspect of their day-to-day activities scrutinized and penalized. However, developing a successful legal claim against an anti-homeless policy is a formidable task; even if the lawsuit is successful, law enforcement agencies may continue to flout the law and require advocates to bring repeated enforcement actions.⁷⁶ Therefore, legal action is only one of many activities that must be undertaken to advance the rights of homeless people in the United States.

Critically, advocates for homeless rights should seek to educate and empower members of society to question their own biases and fears about the homelessness and to become more empathetic supporters of our homeless neighbors. As discussed, the fear of the homeless that is so pervasive and ubiquitous in our society is not empirically supported, and anti-homeless statutes are costly and inefficient ways to reduce the visibility of homelessness in our communities. Evidence shows that the most cost-effective way to combat homelessness is the “Housing First” model, which immediately provides homeless people with their own apartments, along with supportive services designed to help them maintain their housing and achieve self-sufficiency.⁷⁷ Resources should be diverted away from the enforcement of anti-homeless statutes—which punish people for conduct

73. See, e.g., *Joyce v. City & Cnty. of San Francisco*, 846 F. Supp. 843 (N.D. Cal. 1994).

74. *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996).

75. *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013), *appeal dismissed*, [ALN: no citation?] (Sept. 25, 2013).

76. See, e.g., Pohl, *supra* note 51 (noting that the city of Fort Collins continues to arrest panhandlers in violation of the First Amendment, even though the city’s anti-panhandling ordinance does not provide for such arrests).

77. NO SAFE PLACE, *supra* note 14, at 9, 30–31, 37 (describing studies in Florida, New Mexico, and Utah that illustrated the cost-effectiveness of the Housing First model by demonstrating that the cost of providing apartments to homeless people was outweighed by savings in law enforcement and medical costs).

they cannot control—towards constructive solutions for homelessness, such as resources, supports, and—most importantly—housing.

Advocates have taken steps to encourage people to question their anti-homeless stereotypes and to become more compassionate to the homeless. For example, the New York City-based organization Picture the Homeless was founded entirely by homeless people, based “on the principle that in order to end homelessness, people who are homeless must become an organized, effective voice for systemic change.”⁷⁸ Since its founding in 1999, Picture the Homeless has become a vocal advocate in New York for homeless rights, fair housing policies, and other social justice and policy issues.⁷⁹ One of its recent accomplishments was convincing the New York City Council to institute an annual count of the city’s vacant property, to help identify where unused property can be put towards housing people in need.⁸⁰

Another promising sign that cities are becoming more compassionate towards the homeless is the enactment of “Homeless Bills of Rights,” which work to ensure that homeless individuals are protected against segregation, anti-homeless laws, and restrictions on the use of public space.⁸¹ Homeless Bills of Rights are enacted partially as a response to and safeguard against anti-homeless law enforcement practices.⁸² They promote greater privacy and property rights for the homeless, guarantee the right to vote, safeguard against harassment, and promote broad access to shelter, social services, legal counsel, and education.⁸³ Thus far, Homeless Bills of Rights have been enacted in eleven states and two cities, and there are burgeoning movements for Homeless Bills of Rights throughout the country.⁸⁴ Although anti-homeless policies are still being enacted and enforced at alarming levels, Homeless Bills of Rights demonstrate that there is also a burgeoning awareness of the need to protect our homeless neighbors.

The enactment of Homeless Bills of Rights, affordable housing policies, and other laws to promote rights and opportunities for homeless people can be powerful tools for safeguarding the constitutional rights of the homeless and granting them positive benefits to help them escape homelessness and poverty. Perhaps more importantly, growing interest in such laws is an optimistic sign that

78. *Who We Are*, PICTURE THE HOMELESS, <http://www.picturethehomeless.org/about.html> (last visited Feb. 12, 2015).

79. *Id.*

80. Email from Picture the Homeless, news@picturethehomeless.org, to Joanna Laine (May 5, 2014, 2:47 PM) (on file with author) (citing THE CITY OF NEW YORK, HOUSING NEW YORK: A FIVE-BOROUGH, TEN YEAR PLAN 9 (2014), *available at* http://www.nyc.gov/html/housing/assets/downloads/pdf/housing_plan.pdf (“We will perform a comprehensive survey of all vacant sites in the City.”)).

81. Nat’l Coalition for the Homeless, *Homeless Bill of Rights*, NATIONALHOMELESS.ORG, <http://nationalhomeless.org/campaigns/bill-of-right/> (last visited Feb. 12, 2015).

82. NO SAFE PLACE, *supra* note 14, at 40–41.

83. *Id.*

84. *Id.*

society is becoming less discriminatory about and more compassionate toward the homeless.

The anti-homeless legal framework mirrors broader discrimination within society about homelessness, and makes the lives of the homeless more difficult. As with many important issues of social justice, solutions will likely require both innovative legal advocacy and a shift in assumptions about homelessness. From the passage of Homeless Bills of Rights to the small acts of striking up a conversation with a panhandler, there is much that both advocates and ordinary citizens can do to build bonds between homeless people and other members of the public. Increased compassion and understanding may be as necessary as a successful legal argument to end criminalization of the homeless.