

# Getting kicked when you are down: The criminal law and the chronically homeless in the United States.

Conor Califf<sup>1</sup>

*“To be shelterless and alone in the open country, hearing the wind moan and watching for day through the whole long weary night; to listen to the falling rain, and crouch for warmth beneath the lee of some old barn or rick, or in the hollow of a tree; are dismal things—but not so dismal as the wandering up and down where shelter is, and beds and sleepers are by thousands; a houseless rejected creature.”<sup>2</sup>*

## Introduction:

The issue of the criminalization of homelessness in the United States was thrown into the national spotlight in November of 2014 when a 90-year-old preacher and World War Two veteran, Arnold Abbot was charged by the Fort Lauderdale, Florida police for feeding homeless people in public in breach of a recently enacted law that banned food sharing in the city.<sup>3</sup> It wasn't the first time the pastor was cited by the local government for breaking this city ordinance and it highlights a problem, which needs to be tackled now in the United States. A disturbing trend has surfaced

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<sup>1</sup> Undergraduate in Law (LLB) at Trinity College Dublin. This research paper was written as part of Washington and Lee University's Poverty Research Seminar with the invaluable help of Professors Howard Pickett and Erik Luna and classmates Caroline Hamp and Joseph Ciborowski. As far as possible the Oscola Oxford citation method has been used in this paper. All errors and omissions are the author's own.

<sup>2</sup> Charles Dickens (1812–1870), British novelist. *Barnaby Rudge*, ch. 18 (1841).

<sup>3</sup> Kevin Conlon and Catherine E. Shoichet, CNN, '90-year-old Florida man charged for feeding homeless people' (<http://www.cnn.com> 2014) <<http://www.cnn.com/2014/11/04/justice/florida-feeding-homeless-charges/index.html>> accessed 5 February 2015

across American cities of criminal and administrative laws being used in a manner which arbitrarily persecutes and criminalizes the homeless population.

The vast majority of the United States' estimated homeless (85 percent) are of the temporary variety, mainly men but also women and whole families who spend relatively short periods of time sleeping in shelters or cars, then get their lives back together and find a place to live. However, the remaining 15 percent, the chronically homeless, fill up the shelters night after night and spend a lot of time in emergency rooms and jails. This costs between \$30,000 and \$50,000 per chronically homeless person per year according to the Interagency Council on Homelessness.<sup>4</sup> In recent years, both local and federal efforts to solve the homelessness epidemic have concentrated on criminalizing the chronic population, currently about 84,000 nationwide.

In this paper I intend to examine how this process has developed in the United States. I intend to highlight what the problem is factually by showing what these laws are, arguments for their existence and counters to these arguments. I will analyze certain ways which homeless litigants could challenge these modern laws and ordinances constitutionally by examining previous precedents which could back their respective cases. I will then conclude by suggesting an alternative approach to criminalization which has proved effective in the United States.

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<sup>4</sup> <http://usich.gov/population/chronic>

## What are these laws?

Large urban cities have increasingly been passing laws that as stated above, effectively make it illegal to be homeless in the United States. In 2014 the National Law Center on Homelessness and Poverty released a comprehensive report surveying 187 American cities on types of laws, which these cities have been passing, which criminalize the homeless.<sup>5</sup> These laws restrict necessary human activities and include the following:

- Laws prohibiting “camping” in public (34% city-wide, 57% in particular public places)
- Laws prohibiting sleeping in public (18 % city-wide, 27 % in particular places such as parks)
- Laws prohibiting begging in public (24 %)
- Laws prohibiting loitering, loafing and vagrancy (33% in the entire city, 66% in particular public places)
- Laws prohibiting sitting or lying down in public (53 % in particular public spaces)
- Laws prohibiting sleeping in vehicles (43%)
- Laws prohibiting food sharing (9%)

The NLCH concludes in its report that the rates of anti-homeless laws have increased since it conducted its last similar report in 2011. There has been a 35%

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<sup>5</sup> The full report can be found here: [http://www.nlchp.org/documents/No\\_Safe\\_Place](http://www.nlchp.org/documents/No_Safe_Place)

increase in anti-loitering laws, a 25 % increase in anti-begging laws and a 60 % increase in anti-camping ordinances.<sup>6</sup>

Theoretically, these laws are available to be used against any citizen. In effect, they are arbitrarily enforced against homeless population by law enforcement. These laws have brought back what the Supreme Court ruled as unconstitutional forty years ago. They are punishing people for their status as a homeless person, rather than their individual actions.

### **Why should we protect the homeless from these laws?**

Homelessness has been a problem in society since its beginning, but measuring the extent of the problem is difficult, since many people may be made temporarily homeless (particularly after the worldwide economic crash in 2008). To use a rough estimate, on an average January night in 2013, the US department of Housing and Urban Development found that 610,000 people were experiencing homelessness.<sup>7</sup>

People who are homeless are already highly vulnerable individuals, the great majority of whom often suffer from a combination of one or more of the problems of substance addiction, mental illness and/or a traumatic childhood. An attitude that has facilitated the implementation of these anti-homeless laws recently across the United States is the idea that being homeless is simply down to the individual's

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<sup>6</sup> National Law Center on Homelessness and Poverty , 'No Safe Place: The Criminalization of homelessness in US cities' [2014] 1, 18

<sup>7</sup> National Alliance to end Homelessness, 'The State of Homelessness in America 2014 ' (<http://www.endhomelessness.org> 2014) <<http://www.endhomelessness.org/library/entry/the-state-of-homelessness-2014>> accessed 2/21/15

choice.<sup>8</sup> As Lynch and Cole note, it is nearly always much more complicated than that:

“The pathways into homelessness are complex and varied. They include structural causes, government fiscal and social policy causes, individual causes and in some instances include cultural causes. In many cases of homelessness, the causes are intersectional and interrelated.”<sup>9</sup>

It is undoubted that in some cases individual choice may be the overwhelming factor as to why one is homeless. The caveat with this however is that even in these cases; the individuals are often mentally ill<sup>10</sup> or in many cases, veterans of the recent wars in Iraq and Afghanistan.<sup>11</sup> Society has accepted that we have a positive obligation to care for the mentally ill while some veterans may have struggled to readjust to the normality of civilian life after being in war situations. One must question the fairness of using the law to persecute a section of the population who sacrificed so much for their country and its ideals.

Behind all the facts and figures are the human stories of the effects of these laws.

Franklin, a homeless veteran who was shot twice in combat has been cited four times for breaking a Florida State law which made it illegal to stand on the

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<sup>8</sup> See S Keyes, 'Mayor: People are homeless 'By choice,' won't use city funds to help them.' (<http://thinkprogress.org/> 2014) <<http://thinkprogress.org/economy/2014/05/02/3432472/temecula-homeless/>> accessed 2/21/2015 and S.V. Roberts, 'Reagan on Homelessness: Many Choose to Live in the Streets' (<http://www.nytimes.com/> 1988) <<http://www.nytimes.com/1988/12/23/us/reagan-on-homelessness-many-choose-to-live-in-the-streets.html>> accessed 2/21/105

<sup>9</sup> M Elliot, 'Homelessness and human rights: Regarding and responding to homelessness as a human rights violation' [2003 ] *Melb. J. Intl.* 139, 142

<sup>10</sup> See [http://www2.nami.org/factsheets/mentalillness\\_factsheet.pdf](http://www2.nami.org/factsheets/mentalillness_factsheet.pdf)

<sup>11</sup> [http://nchv.org/index.php/news/media/background\\_and\\_statistics/#faq](http://nchv.org/index.php/news/media/background_and_statistics/#faq)

highway and ask for money. “Every time I try to do anything... I just get kicked in my ass man...maybe I’m stupid... but I got to eat.”<sup>12</sup>

Proving that the problem spans age and gender divides is the story of Dasani covered in the New York Times recently. The homeless 11 year old girl acts as a minder for her younger siblings due to her parents battling drug addiction. Her tale highlights the fact that the United States now has the highest child poverty rate of any developed nation except for Romania. Due to Ordinances passed by Mayor Bloomberg’s government, she is stuck in in a never-ending system of shelters, no place for an 11 year old girl who has hopes and dreams like any other normal child.<sup>13</sup>

There are a number of other compelling legal reasons as to why should we afford protection to this group in society and seek to find alternative approaches to criminalizing them:

Firstly, criminalization measures are expensive to tax payers. An example can be found in the state of Utah. The Utah State Housing and Community Development Division found that the annual cost of emergency room visits and jail incarcerations for a homeless person was \$16,670, while providing that same person with an apartment and year round social worker cost the State \$11,000. Similarly, Creative Housing Solution’s in Florida recently conducted an economic-impact report which found that providing chronically homeless people with a house and a year round

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<sup>12</sup> Scott Keyes, 'The Problem With Criminalizing Homelessness' (<http://thinkprogress.org/> 2013) <<http://thinkprogress.org/justice/2013/09/19/2629581/criminalizing-homelessness/>>

<sup>13</sup> <http://www.nytimes.com/projects/2013/invisible-child/#/?chapt=1>

case worker would cost the state \$10,000. That same region in Florida currently spends \$31,000 on law enforcement and medical costs for each chronically homeless person per year.<sup>14</sup> From a pure cost-benefit standpoint, this current process of criminalization just does not make sense.

Secondly, these laws tie in with the over-incarceration/over criminalization problem in United States in general. The United States now boasts an incarceration rate of over 6-10 times greater than most other developed nations<sup>15</sup>. The economic downturn saw the return of the Dickensian era like debtor's prisons, which have greatly affected the already destitute homeless hard<sup>16</sup> and have been universally panned as archaic and unjust by modern legal commentators. Homeless people are naturally the poorest in our society and are highly vulnerable to ending up in a debtor's prison.

Thirdly and this is a large focus of this paper, I would argue that many of these laws are in fact unconstitutional under different provisions of the United States Constitution. Homeless litigants today have a large array of options they can pursue at challenging these laws and ordinances in the highest courts of the land.

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<sup>14</sup> National Alliance to end Homelessness, 'The State of Homelessness in America 2014 ' (<http://www.endhomelessness.org> 2014) <<http://www.endhomelessness.org/library/entry/the-state-of-homelessness-2014>> accessed 2/21/15 at 30

<sup>15</sup> C Slobogin , 'How triggers in American culture triggered hyper-incarceration: Variations on the Tazian view' [2014] 1, 3

<sup>16</sup> M Diamond , 'The return of debtors prisons ' (<http://thinkprogress.org> 2014) <<http://thinkprogress.org/justice/2011/12/13/388303/the-return-of-debtors-prisons-thousands-of-americans-jailed-for-not-paying-their-bills/>> accessed 21 March 2015

Later in this paper I will analyze avenues I believe may be open to them but first the justifications for these harsh laws must be examined.

### **Justifications for these laws:**

There are a number of possible reasons listed below for the surge in the number of these laws recently along with arguments against their proponents.

#### **1) The Broken windows theory:**

These anti-homelessness laws tie in with the “broken windows” approach to crime prevention as made famous by New York City mayor Rudolf Giuliani in the 1990’s. Originating in a highly influential *Atlantic Monthly* article, the theories creators Wilson and Kelling argue that “disorder and crime are usually inextricably linked.”<sup>17</sup> Ellickson, a respected legal academic links the theory to homeless people:

“A regular beggar is like an unrepaired broken window- a sign of the absence of effective social-control mechanisms in that public space- Passersby, sensing this diminished control, become prone to committing additional, perhaps more serious criminal acts.”<sup>18</sup>

Amster notes that serious problems have been raised with using this approach to the homeless. He points out the logical problem identified by the creators of the term itself, Wilson and Kelling: “How do we ensure that the police do not becomes the agents of neighborhood bigotry?”<sup>19</sup> Amster contends that they do not give

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<sup>17</sup> Wilson and Kelling , ' Broken Windows The police and neighborhood safety' [1982] *The Atlantic* ,

<sup>18</sup> Ellickson, Robert C., "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" (1996).

Faculty Scholarship Series. Paper 408,1165 at 1182

<sup>19</sup> Wilson and Kelling , ' Broken Windows The police and neighborhood safety [1982] *The Atlantic*



straight answer, arguing that the best they could hope for law enforcement themselves using their discretionary authority in a fair way.<sup>20</sup> Together with this some scholars question whether the broken windows approach actually contributes as much to crime prevention as its proponents suggest. Harcourt suggests in his book on the “broken windows” tactic is that there is no empirical evidence that the tactic reduces crime.<sup>21</sup> Baker, by referencing empirical research conducted by Sampson and Raudenbush contends that structural disadvantage and attenuated collective efficacy was more likely to cause high crime rates, rather than simple public disorder like passive begging or sleeping.

Amster argues a final objection to broken windows approach being used against the homeless, citing the work of Waldron. There is an implicit derogation that comes when human beings are compared “even figuratively to *things*.”<sup>22</sup> Amster highlights Duneier’s brilliant critique of this dehumanization method:

“Because Americans ruthlessly use race and class categories as they navigate through life, many citizens generalize from the actual broken windows to all the windows that look like them?-and assume that a person who looks broken must be shattered, when in fact he is trying to fix himself as best he can.”

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<sup>20</sup> Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness Randall Amster  
Source: Social Justice, Vol. 30, No. 1 (91), Race, Security & Social Movements (2003), pp. 195-221 at 208

<sup>21</sup> B. Harcourt Illusion of Order: The False Promise of Broken Windows Policing. By . Cambridge, Mass.: Harvard University Press at 59

<sup>22</sup> J Waldron "Homelessness and Community." University of Toronto Law Journal 50: 371.

Duneier suggests that allowing survival activities such as panhandling can actually prevent more serious crimes, implying a sort of "reverse broken windows theory".<sup>23</sup>

## **2) Use of public spaces:**

Proponents of these new ordinances which limit basic liberties for the homeless in public spaces make what is facially a valid and simple argument: They want use of the public spaces as well. Scholars who support Ordinances which limit the use of public spaces emphasize that public behavior laws “apply to everyone equally.”<sup>24</sup>

The problem is, unlike the majority of society, the homeless have no private spaces where they can perform private functions which break many of these laws, such as urinating or sleeping. The famous quote from France springs to mind:

“The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”

The situation which has arisen is that in many cities homeless people have no option but to commit a crime (constitutional challenges based on this fact will be analyzed later.) Considering that incarceration costs and levels are extremely high it is simply illogical to regulate public spaces in this way. Better alternatives are available which will be explored later in this paper.

## **3) Economics:**

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<sup>23</sup> Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness Randall Amster  
Source: Social Justice, Vol. 30, No. 1 (91), Race, Security & Social Movements (2003), pp. 195-221 at 210

<sup>24</sup> Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness Randall Amster Source:  
Social Justice, Vol. 30, No. 1 (91), Race, Security & Social Movements (2003)

In this author's view this may be one of the most important factors in the rise of criminalization of homelessness across the United States.<sup>25</sup> In many cities across America, a new class of affluent residents are moving into urban areas which traditionally contained large homeless populations.<sup>26</sup> With this change in inner cities occurring, business lobby groups have pressured local policy makers to quickly "fix" the homeless problem.

The simple and somewhat cynical explanation for the raft of measures brought in across the United States recently is simply to move the homeless out of sight of the central districts in urban areas. However forcing the homeless to simply move out of business districts does not end the problem in the long-term. Cities may not even have the option to use these laws going forward into the future if they are successfully challenged in the courts under constitutional grounds. Below I have analyzed some of the laws and argue that homeless litigants have legal avenues and precedent to challenge them.

### **Anti-homelessness laws and constitutional protections:**

Vagrancy laws really came to prominence in the United States after the Civil War when southern legislators sought ways to constrain the black former slave populations who were emancipated. With the establishment of these "Black

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<sup>25</sup> See B. Harcourt, 'Policing LA's Skid Row: Crime and Real Estate Redevelopment in Downtown Los Angeles [An Experiment in Real Time]' [2005] U. Chi. Legal F 325, 32

<sup>26</sup> See <http://www.governing.com/gov-data/census/gentrification-in-cities-governing-report.html>

Codes”<sup>27</sup> Southern officials created inventive legal ways to reclaim their former property. As Stewart notes, under the prospect of being arrested at a whim under broadly defined vagrancy statutes, former slaves were discouraged from leaving their former master’s plantations. The damage to the Southern economy that emancipation would have brought compelled the creation of statutes. Similarly in modern times, as I highlighted earlier, economic incentives may be the driving force behind anti-homelessness statutes. Some of today’s provisions sadly seem similar to the “black codes”.

For decades, anti-vagrancy statutes made it possible to arbitrarily clamp down on the homeless at will.<sup>28</sup> Unlike most criminal statutes, vagrancy laws punished a person’s status rather than their conduct. For much of American legal history, this was perfectly acceptable and applied not only to the homeless, but also to drug users and alcoholics.<sup>29</sup> As Luna notes, in the mid-20<sup>th</sup> century jurists and legal commentators began to have reservations about status crimes as being “ineffective at preventing crime or solving profound social problems.”<sup>30</sup>

Status offences came to be under attack. In *Lanzetta v. New Jersey*<sup>31</sup> the Supreme Court considered if a state law of effectively being a “gangster” was void for vagueness. The Supreme Court reasoned that a statute which was defined in

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<sup>27</sup> See G Stewart, 'Black Codes and Broken Windows' [1998] YLJ 2249, 2259

<sup>28</sup> See Simon, Towns without pity: A constitutional and historical analysis of official efforts to drive homeless persons from American cities] Tul. L. Rev. 632

<sup>29</sup> See E. Luna, '2 The story of Robinson: From revolutionary constitutional doctrine to modest ban on status crimes' in D Coker and R Weisburg (eds), *Criminal law stories* (1st, Thomson Reuters, New York 2013).

<sup>30</sup> Ibid at 48

<sup>31</sup> *Lanzetta v. New Jersey*, 306 U.S. 451 (1939)

terms so vague that an ordinary person would have to guess as to its meaning and its application would violate due process and be void for vagueness.

*Lanzetta* helped to establish the precedent that criminal statutes must be sufficiently certain to be constitutionally allowable. In 1972 this logic was applied to a Florida vagrancy statute in the case of *Papachristou v. City of Jacksonville*<sup>32</sup>. *Papachristou* held that the Jacksonville statute was void under the Fourteenth Amendment's due process guarantee. Some of the defendants in this case were charged with "prowling by auto" under the Jacksonville statute. The other two were arrested for "loitering." Justice Douglas here reasoned that the statute was archaic and void for vagueness, drawing from the precedent set down in *Lanzetta*.

"Living under a rule of law entails various suppositions, one of which is that "[all persons] are entitled to be informed as to what the State commands or forbids." *Lanzetta* is one of a well-recognized group of cases insisting that the law give fair notice of the offending conduct"<sup>33</sup>

Justice Douglas considered that the activities, which the statute outlawed, were "historically part of the amenities of life as we have known them."<sup>34</sup> The vagrancy laws like this make "even-handed administration of the law...not possible."<sup>35</sup>

Despite this seemingly rock solid precedent from the Supreme Court outlawing status offences, Saelinger notes that from the early 1980's, cities began to embrace more narrowly tailored laws restricting the access of the homeless to public places.

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<sup>32</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972)

<sup>33</sup> *ibid*

<sup>34</sup> *ibid*

<sup>35</sup> *ibid* at 171

Penalties for breaking these modern laws include fines and a potential custodial sentence. This process simply exacerbates the homeless problem rather than helping to solve it.

Getting a criminal record in the United States is often a death knell to employment prospects and can make it more difficult to avail of state social protection and housing benefits. Outlined below are present-day anti-homeless which have been struck out by courts of different levels. Using these precedents, I intend to show that homeless litigants can mount legal challenges to similar laws across the United States.

### **1) Anti-Panhandling/Begging Ordinances**

The Supreme Court has not as of yet directly answered the question regarding whether or not cities using ordinances to ban the practice of begging/panhandling violates the First Amendment. It may be forced to do so quite soon, as in recent years, spearheaded by the American Civil Liberties Union; challenges to anti-begging/anti-panhandling laws have sprung up in courts across the country. One of the most influential decisions was handed down by the U.S. Court of Appeals for the Sixth Circuit who in 2013 invalidated Great Falls Michigan's criminal anti-begging statute.<sup>36</sup> The two plaintiffs in this case are similar to many homeless people across the country who have been convicted under these laws. Mr. Speet was arrested for holding out a sign which stated "Cold and Hungry, God Bless."<sup>37</sup> He was charged with begging illegally and given a \$198 dollar fine which he unable to pay and so

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<sup>36</sup> *Speet, et al v. Schuette [2013] e.g. 1 1 (6th Cir.)*

<sup>37</sup> *Ibid* at page 2

spent four days in jail. The second plaintiff Mr. Sims, was an Armed Forces veteran who was arrested for requesting money (1 dollar) for a bus fare and fined \$100.

They sued the Attorney General of Michigan arguing that the anti-begging statute violated the First and Fourteenth Amendments of the Constitution both facially and as applied to the plaintiffs.

In finding for the petitioners the 6<sup>th</sup> Circuit relied on a Supreme Court case which could be used by the current Supreme Court as precedent to strike down laws banning passive begging/panhandling nationwide. In *Village of Schaumburg v. Citizens for a Better Environment*<sup>38</sup>the court addressed the validity under the First and Fourteenth Amendments of an ordinance that prohibited charitable donations to a group from soliciting contributions unless they used at least seventy-five percent of their receipts for what the ordinance defined as “charitable purposes”. After summarizing a long list of supporting cases, the court came to the conclusion that

“[p]rior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests-communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes-that are within the protection of the first amendment.”<sup>39</sup>

The Sixth Circuit reasoned that because the Supreme Court had recognized that the First Amendment covers organizations soliciting alms in public there was no reason

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<sup>38</sup> 444 U.S. 620,622 (1980)

<sup>39</sup> *Village of Schaumburg v. Citizens for a Better Environment* 444 U.S. 620,622 (1980) at 632

why this protection should not extend to individuals also. They therefore deemed the law unconstitutional under the First Amendment. Even with this decision being handed down in 2013, cities have not stopped passing laws similar to the Grand Rapids anti-begging ordinance.<sup>40</sup> It is possible this case could be used as a strong precedent to challenge other begging laws similar to Michigan's across the United States and so it is likely that we will see this question in the Supreme Court soon to be settled for good. Whether the currently conservative Robert's court upholds the Sixth Circuit's decision remains to be seen, although given the strong argument put forward by Justice Martin in the decision, there is reason to be optimistic that they will.

There is a huge difference between an aggressive beggar who harasses a member of the public for money and a passive one like Mr Speet', whose only crime was to passively hold up a sign. International courts such as the Irish High Court have already recognized this<sup>41</sup> and the American courts should follow suit and declare these ordinances unconstitutional when the question inevitably reaches the Supreme Court.

## **2) Anti-Camping or Anti-Sleeping Measures:**

As shown above 34 % of cities surveyed have a citywide ban on camping in public while 18 % have a ban on sleeping in public. It is arguable that having bans on both in public could infringe on homeless people's Eighth Amendment right to be

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<sup>40</sup> For example Lake Worth, Florida, passed a similar ordinance just last year.

<sup>41</sup> *Dillon v. DPP* [2007] e.g. 1 IEHC 480 (HC)



free from cruel and unusual punishment. Precedent for this can be found from the “*Robinson*” doctrine.

In *Robinson v. California*<sup>42</sup> the Supreme Court invalidated the conviction of a man who was charged with being a habitual drug user holding that the Eighth Amendment prevented someone being convicted on their status alone. At the time of the decision, some scholars predicted that *Robinson* would as Luna put it “shake American criminal justice to its core.”<sup>43</sup> This did not pan out to be this way, with fears from courts and certain scholars of a slippery slope effect developing of States being unable to punish even exceptionally culpable conduct if the *Robinson* case was read so broadly that acts derived from the defendant’s status and thus done compulsively were taken of the table under the Eighth Amendment.<sup>44</sup>

Despite these fears, I believe that homeless litigants can still take claims against anti-sleeping and anti-camping ordinances under the approach suggested by Weisburg which would allay the fears of people such as Justice White and others of overextending the *Robinson* doctrine. Weisberg simply suggests that the courts distinguish between innocent and culpable conduct by looking at the contextual facts of the defendant’s arrest.<sup>45</sup> He proposes a test as follows:

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<sup>42</sup> 370 U.S. 660, (1962)

<sup>43</sup> See E. Luna, '2 The story of Robinson: From revolutionary constitutional doctrine to modest ban on status crimes' in D Coker and R Weisburg (eds), *Criminal law stories* (1st, Thomson Reuters , New York 2013) at 68

<sup>44</sup> See *Powell v. Texas*, 392 U.S. 514, 534

<sup>45</sup> B Weisberg, 'When punishing innocent conduct violates the Eight Amendment: Applying the Robinson Doctrine to homelessness and other contextual "crimes"' [e.g. 2005] JCLC 329,

“Is the targeted conduct only unlawful in a particular context? If so, then the conduct is innocent, and if the defendant is unable to either escape the context, or avoid performing the conduct it would violate the Eighth Amendment to hold him criminally liable.”<sup>46</sup>

Using this logic, a homeless litigant could argue that if the city provided no adequate alternatives for them to sleep and they were left with no choice but to break the law then imposing criminal liability on them in these cases would constitute cruel and unusual punishment under the Eighth Amendment. This was held to be the case by the District Court of Florida in *Pottinger v City of Miami*<sup>47</sup> (It has been reported that as a result of *Pottinger* the City of Miami was forced to pursue alternative routes to address the homelessness issue, and these routes went a long way to curbing the problem. After Miami focused on a housing first approach, it went from having 6000 homeless on the streets at the time of *Pottinger* in 1998 to approximately 361 in 2013.<sup>48</sup>) Sleeping is not just a constitutional right it is also simply a physiological need. By adopting the Weisburg approach cities across America will at the very least be forced to provide designated zones for the homeless to sleep. Alternatively, as in Miami after *Pottinger*, it may even force them to explore better options and tackle the social problem head on.

Although not as viable as the Weisburg approach in this author’s view, others argue that litigants could also contend that anti-sleeping and anti-camping ordinances

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<sup>46</sup> Ibid at 361

<sup>47</sup> 810 F.Supp. 1551 (1992)

<sup>48</sup> See H Post, 'Miami Homeless Would Lose Some Basic Protections Under New Settlement Between City, ACLU' (<http://www.huffingtonpost.com/> 2013) <[http://www.huffingtonpost.com/2013/12/13/miami-homeless-settlement\\_n\\_4439072.html](http://www.huffingtonpost.com/2013/12/13/miami-homeless-settlement_n_4439072.html)> accessed 12 April 2014

infringe on their constitutionally protected right to travel.<sup>49</sup> Ades theorizes that the right to travel must now be considered protected by the Equal Protection or Due Process clauses and thus this right should naturally extend to the homeless who partake in intrastate travel.<sup>50</sup> Ades argues that anti-sleeping ordinances deny this fundamental right to travel to the homeless because:

“In jurisdictions where no available” shelter exists, ordinances that prohibit overnight sleeping in all public areas burden travel because their primary effects and objectives are to ban the in-migration of homeless people and to force out those homeless people already in the jurisdiction. The homeless who live in such a jurisdiction face a "Hobson’s choice": they must exclude themselves from the jurisdiction or face arrest and prosecution for violating its anti-sleeping ordinance. A migrant homeless person will violate her municipality's anti-sleeping ordinance whenever she succumbs to her need for sleep. This barrier effectively prevents her from entering the jurisdiction for longer than she can remain awake.”<sup>51</sup>

Areas which bar the homeless sleeping overnight can often be home to the best social services available to help them. Forcing them to move to the outskirts of town is much like the anti-begging laws, simply sweeping the problem under the rug. Much like the passive begging laws, these anti-sleeping laws are also ripe for challenge in the nation’s highest court.

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<sup>49</sup> See Paul Ades, *The Unconstitutionality of Antihomeless Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 Cal. L. Rev. 595 (1989).

<sup>50</sup> *Ibid* at 606

<sup>51</sup> *Ibid* at 616

### 3) Anti-loitering provisions:

Out of all the laws used by cities to target the homeless populations, anti-loitering provisions have perhaps come under the most attack from courts across the United States. As examined above in *Papachristou*, the Supreme Court in the United States has shown disdain for these vagrancy and anti-loitering ordinances due to their often vague provisions and the fact that they are arbitrarily enforced against the homeless population. Despite this, 33 % of cities surveyed in 2014 had citywide laws outlawing “loitering”.

Numerous other challenges to loitering and vagrancy ordinances have been lodged in both Federal and State courts. In *City of Chicago v Morales*<sup>52</sup> the Supreme Court again found provisions of a loitering ordinance (this time the targets were suspected “gang members”) violated the Fourteenth Amendment for vagueness and its ability to be arbitrarily enforced by the police. The court held that the freedom to loiter in a public place for innocent purposes was part of the liberty protected by the due process clause of the Fourteenth Amendment. At the State level, several courts have also struck out ordinances which prohibit loitering and so precedent does exist for homeless litigants to challenge these ordinances up to the highest level, if the ordinance is sufficiently vague or arbitrarily enforced only against the homeless.<sup>53</sup>

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<sup>52</sup> *City of Chicago v. Morales*, 527 U.S. 41 (1999)

<sup>53</sup> See *City of Salida v. Edelstein*, Case No. 97CR62 (Colo. Dist. Ct. 1998) and *Johnson v. Athens - Clarke County*, 529 S.E.2d 613 (Ga. 2000).

#### **4) Other areas of anti-homeless laws which can be constitutionally protected.**

##### **Food sharing**

The conduct of the city which inspired me to write this paper (Fort Lauderdale, Florida) can also be challenged under constitutional grounds. In Mr. Abbot's case, as he was a pastor and believed that it was his religious duty to help the poor and needy, he could have argued that the Ordinance infringed on his free practice of religion rights under the First Amendment. Another interesting angle to attack these food sharing bans was raised by Linnekin.<sup>54</sup> He suggests that banning food sharing activities infringes on the right to Freedom of Assembly rights, although it must be noted that this argument was rejected by a court in the 11<sup>th</sup> Circuit in Florida.<sup>55</sup> There are other challenges however being brought to these food sharing bans, with members of both political parties on the states agreeing that they may be going too far.<sup>56</sup> Like the statutes which ban passive begging, I expect to see this issue in front of the U.S. Supreme Court in the future. The court has strong grounds to declare these bans unconstitutional.

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<sup>54</sup> Linnekin, 'Bans on Feeding the Homeless Are Discriminatory and Unconstitutional' (<http://reason.com/> 2012) <<http://reason.com/archives/2012/06/09/bans-on-feeding-homeless-have-always-bee/1>> accessed 12 April 2015

<sup>55</sup> First Vagabonds Church of God v. City of Orlando 610 F.3d 1274 (2010)

<sup>56</sup> See Lohmann, Patrick. "Homeless Food Case Cost Albuquerque \$120,000." Albuquerque Journal. 12 Aug. 2013. Web. 15 Sept. 2014.

<http://www.abqjournal.com/245721/news/homeless-food-case-costs-city-120000.html> and Moreh B.D.K., 'Lawsuit filed against Fort Lauderdale anti-homeless feeding ordinance' (<http://www.mintpressnews.com/> 2015) <<http://www.mintpressnews.com/lawsuit-filed-fort-lauderdale-anti-homeless-feeding-ordinance/201865/>> accessed 12 April 2015

## **Sleeping in Cars in public areas.**

A law which has swept cities across the United States over the last few years is the ban on sleeping in your car. The 2014 report found that 43 % of cities surveyed had it on their books. Thankfully this one does not look like it will last very long and will not stand up in front on constitutional scrutiny from federal courts. The ninth circuit just last year struck down a 31 year old statute which made it illegal to use your car as your living quarters over-night. In *Desertain v. City of Los Angles*<sup>57</sup> Judge Pregerson struck out the ordinance for the “arbitrary and discriminatory enforcement” of the act.<sup>58</sup> Judge Pregerson suggests that the City of Los Angles should adopt an alternative approach to dealing with its homeless residents and shows us why access to their automobiles may be a lifeline for them:

“For many homeless persons, their automobile may be their last major possession—the means by which they can look for work and seek social services. The City of Los Angeles has many options at its disposal to alleviate the plight and suffering of its homeless citizens. Selectively preventing the homeless and the poor from using their vehicles for activities many other citizens also conduct in their cars should not be one of those options.”<sup>59</sup>

## **Alternative approaches and conclusion:**

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<sup>57</sup> *Desertrain v. City of Los Angles* [2014] (9th Circuit)

<sup>58</sup> *Ibid* at p 3

<sup>59</sup> *Ibid* at p 22

I have suggested that many of these laws are illegal and that the criminalization process is obsolete. So what is the alternative? The United States has to look no further than inside its very own borders.

The Housing First program implemented in Salt Lake City, Utah which I briefly mentioned above has been a resounding success. The State of Utah commissioned a report which was released last year from which much of the following information is derived.<sup>60</sup> Under the housing first approach, Salt Lake City simply gives the homeless person an apartment and a social worker with no strings attached. Each participant in the program uses the social worker to help them become self-sufficient, but they get to keep the apartment even if they fail. Since 2005 when the program was introduced, Salt Lake City has decreased its chronically homeless population by 72%. This program costs tax payers \$11,000 per chronic homeless person per year. Under the old methods each chronically homeless person cost a taxpayer \$16,670 per year. Similar programs in Phoenix, Arizona and Miami Florida have also resulted in huge net decreases in their chronic homeless populations.<sup>61</sup>

Salt Lake City has provided a blueprint for other States and cities across America to follow. The knock on effect of ending chronic homelessness and helping people to re-enter the workforce will make many of the laws which I have shown are arguably unconstitutional obsolete.

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<sup>60</sup> The full report can be found here

<https://jobs.utah.gov/housing/scso/documents/homelessness2014.pdf>

<sup>61</sup> National Law Center on Homelessness and Poverty , 'No Safe Place: The Criminalization of homelessness in US cities' [2014]

I believe we will look back on this era in years to come shaking our heads at trying to use the criminal law to tackle another social ill. It hasn't worked well in other areas and it's not going to work well here.

The final word can be left to Arnold Abbot himself. He continues to serve food to the homeless in Fort Lauderdale Florida in defiance of a constitutionally suspect and deeply unfair law.

“You cannot sweep the homeless under a rug ... There is no rug large enough for that.”<sup>62</sup>

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