

RESTORING ORDER IN URBAN PUBLIC SPACES

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I. QUALITY OF LIFE ISSUES IN THE URBAN LANDSCAPE

New York City experienced a drastic reduction in crime after cracking down on fare-beating and panhandling in its subways, "squeegee-men" intimidating motorists, and camping in Manhattan's parks.¹ Las Vegas is bringing people back to its downtown after prohibiting handbilling, vending, and begging on Fremont Street, its main thoroughfare.² Seattle has stemmed the decline of its downtown through a series of order maintenance ordinances addressing how its sidewalks are used.³ These efforts, paralleling those in cities from Portland, Maine to Portland, Oregon, are part of a national trend to re-establish a semblance of order, comfort, and security in urban public spaces.⁴

These efforts have arisen from a growing consensus that communities benefit from public spaces that are sufficiently attractive to act as public meeting places and as places where people voluntarily spend their time. Such places also facilitate commerce, enable community interaction, and make cities of

1. See GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* 153 (1996) ("In 1995 citizens are less likely to be victimized [by crime] than at any time since 1970").

2. See LAS VEGAS, NEV., CODE § 11.68.100 (1995); Susan Greene, *Pressure on Partlianders*, LAS VEGAS REV. J., Jan. 3, 1997, at 1B; Interview with Mark Paris, Fremont Street Experience, Las Vegas, Nev. (Jan. 1996).

3. Interview with Mark Sidran, Seattle City Attorney (Jan. 1996); Interview with Kate Joncas, President of Downtown Seattle Association (Jan. 1996).

4. See generally KELLING & COLES, *supra* note 1, at 1-9.

any size more desirable places to live, work, recreate, and shop. In short, the safety and attraction of public spaces is central to the quality of urban life in America.⁵

Urban life therefore suffers when city sidewalks are obstacle courses of beggars, drunks, and vagrants or when urban parks are littered with trash, human waste, or the belongings of addicts. Yet, many "homeless advocates" and civil libertarians have championed the "right" to live on the street, sleep in the public place of one's choosing, beg in any place and in any manner one pleases, and to essentially be exempt from standards of conduct that apply to others.⁶ Such "rights" enable harmful lifestyles and substance abuse and do nothing to steer individuals to recovery and responsibility. Their claims invite the judiciary to usurp power from city councils and communities and, if successful, withdraw the vitality of residential and commercial areas. While the homeless continue to suffer in cities that do nothing about their public spaces, host communities are harmed, neighborhoods deteriorate, and people gradually abandon urban centers.

In the cities that have not taken action to restore order to public spaces, such as New Orleans or San Francisco, a walk down a commercial street, or a seat at an outdoor restaurant, can mean confronting a steady stream of people cadging spare change.⁷ With rising substance abuse and an increase in numbers, beggars are becoming more aggressive.⁸ The result is an

5. *See id.* at 222. The authors' examinations of New York, Seattle, Baltimore, and San Francisco revealed a common cause throughout the efforts of these cities to use "order maintenance" to maintain the community and the community institutions and public places included within it *See id.*

6. To name just one, the American Civil Liberties Union ("ACLU") has sponsored a number of suits against these types of city ordinances portraying the homeless as society's victims and subject to unconstitutional harassment by city authorities. *See, e.g., Patton v. Baltimore*, No. S-93-2389, slip op. at 4 (D. Md. Sept 14, 1994).

7. *See, e.g., Kenneth J. Garcia, The Homeless Encroachment; Park, Activists Wrangle Over Vagrant Population*, S.J. CHRON., July 28, 1997, at A10 ("In any given week there are as many as 1,000 homeless people camping in the park, according to surveys conducted by supervisors and gardeners. And city officials say that since the homeless population began to grow about four years ago, there have been significant increases in crime, drug use, harassment of park visitors and damage to the plants and forest"); **Susan Finch & Coleman Warner, Destitute Pose Dilemma in Tourist Town**, TIMES PICAYUNE, Jan. 21, 1996, at A1 ("The question of how to confront homelessness is rattling city officials because of a spreading belief that panhandling and foul-smelling denizens of the street are driving tourists away from the Quarter and hurting trade in the Central Business District").

8. *See, e.g., Jeff Lyon, Social Change: Negotiating the Mine Field (and Mine Field) of Urban Want*, CHI. TRIB., May 30, 1993, at 10 (describing the increasing fear and hostility toward Chicago's homeless population because of the aggressive begging tactics of

intimidating blockade of sidewalks and many stores, forcing customers and pedestrians away.

In many urban parks, visitors may find themselves competing for a spot on a bench with someone sleeping there surrounded by bags and carts filled with personal belongings. Children in these parks may find anything from crack vials and used needles to discarded condoms and human feces. Many urban parks have been diverted from their purpose of providing a common meeting ground where all people feel comfortable to a place that is avoided whenever possible.⁹

Such a decline in street order maintenance causes direct and indirect harms. Face-to-face solicitations for money are often intimidating, harassing, and cumbersome. Urban camping can colonize parks intended for general use, blockade sidewalks, and leave litter and health hazards in their wake.¹⁰

Furthermore, these problems affect the quality of urban life, the general feeling of comfort, aesthetics, security, and freedom people should have in their urban public spaces. When these feelings decline, the vitality of a city's commercial and residential life is affected, as is its desirability as a place to work, live, or raise a family. Property values fall, and businesses close. Office and residential properties remain vacant for increasingly longer periods of time.¹¹

panhandlers). "At least some of it (fear and hostility) is based on negative experience with street people who, driven by anger and desperation, have become increasingly aggressive." *Id.* See also Tom Daykin & Meg Kissinger, *Philadelphia, a Model for Downtown Proposal Would Aim to Make Central Business Area Cleaner, Safer*, MILWAUKEE J. & SENTINEL, Feb. 3., 1997, at 1 (describing an increase in aggressive begging with an increase in the homeless population).

9. See, e.g., Finch & Warner, *supra* note 7 (noting the impact on Lafayette Park in New Orleans).

10. In San Francisco,

Gardeners and patrol officers say it is not uncommon to find dozens, if not hundreds, of hypodermic needles left behind by drug users, including needles left inside the Children's Playground, where some addicts inject their drugs.

Some of the bathrooms have become such health and safety hazards that they have been closed by the police department including a brand-new facility at Alvord Lake mat was shut down after being deemed too disgusting and dangerous for visitors.

Garcia, *supra*, note 7.

11. See Steven R. Paisner, *Compassion, Politics, and the Problems Lying on Our Sidewalks: A Legislative Approach for Cities to Address Homelessness*, 67 *TEMP. L. RBV.* 1259, 1272-73 (1994) (observing that the presence of homeless persons in downtown areas may make people go to the suburbs to shop and dine, and gives an unfavorable impression to businesses seeking to locate offices there); William L. Mitchell, II, Comment, "Secondary Effects Analysis": A Balanced Approach to the Problems of Prohibitions on Ag-

Street-level disorder also leads to more violent crime. The "Broken Windows" theory, originally advanced by Professors James Q. Wilson and George Kelling, explains that if public spaces are disorderly, unkept, or intimidating, people avoid them, thereby making them inviting areas for predators.¹² On the other hand, when places appear welcoming and comfortable, the law-abiding public takes them as their own, and crime goes down.¹³ Whether it is in the subways of New York or the streets of San Francisco, this theory has proven to be more than merely academic.¹⁴

Many of these problems arise from a city's vagrant population, often referred to as the "homeless." It is this population that is often seen rummaging through trash cans, wandering around drunk in the park, or trying to convince people stopped at a red light or riding public transportation to turn over some money. American cities initially responded to their homeless problem by spending millions of dollars on shelters and other social services.¹⁵ Yet vagrancy remains in these cities, even in

gressioe Panhandling 24 U. BALT. L. REV. 291, 294-95 (1995) (describing the effect of aggressive panhandling on the downtown businesses of Baltimore). "[W]hen public areas . . . suddenly become areas of frequent intimidation and intrusion, they quickly become areas that are shunned by the general public. City residents go elsewhere to shop or spend the day." *Id.* at 294. See also Dayltin & Kissinger, *supra* note 8, at 11 (reporting on the complaints of downtown retailers that aggressive begging is frightening away customers).

12. See George L. Kefling & James Q. Wilson, *The Police and Neighborhood Safety*, ATLANTICMONTHLY, Mar. 1982, at 29,31-32.

13. See David Cazares, *Safety is Concern in Downtown, Visitors to Hollywood want Fewer Homeless. More Police in the Area*, SUN-SENTINEL (Ft Lauderdale, FL), July 16, 1997, at 1 ("before the area (downtown) can become the destination city commissioners hope for, the city **likely** will have to address a persistent perception mat parts of downtown aren't safe"); see also Dayken & Kissinger *supra* note 8, at 1 (pointing out that in Philadelphia more visitors are being drawn to downtown as a result of the city's clean-up program).

14. See, e.g., Alan Finder, *Qmnge Found in Subways: PanhandlmgisDown,NX.TIMES*, Mar. 19,1995, at 37 (describing how the New York Transit Authority reduced the aggressive begging and panhandling on New York's subways); William Bratton, *Follow the leader: How Ox D.C. Police Department Can Replicate New York's Success*, WASH. POST., Mar. 23,1997, at C1 (reporting that crime has fallen by nearly 75% on New York's Subways); see also Gerald D. Adams, Lisa M. Krieger, George Raine, Louis Trager and Jim Herron Zamora, *How's He doing? Jordan pulls a "C" at Halfway Mark, Critics Find Mayor Falling Short of Promises*, SJ?. EXAMINER, Jan. 2,1994, at A1. (describing the popularity of San Francisco's program to stop aggressive panhandling and camping with local business owners).

15. See AUCBS. BAUM & DONALD W. BURNES, A NATION IN DENIAL: THE TRUTH ABOUT HOMELESSNESS 75 (1993) ("By 1988, as a nation we were spending \$1.6 billion a year for emergency shelters, two-thirds from, public, governmental sources and one-third from private sources—more than five times the amount spent in 1984.").

the face of available shelter beds and services.¹⁶

These problems are hardly the exclusive domain of large cities as a growing number of smaller communities are grappling with loitering, public intoxication, and pedestrian interference.¹⁷ Many of these cities want to take action to ensure that their public spaces do not soon resemble those in Washington, D.C., San Francisco, or Miami.

The potential for street disorder exists in all urban centers. In the face of this, cities have two choices. They can choose to do nothing, letting their public spaces deteriorate and the exodus of their tax-paying population continue. Many cities choose this route due to inertia, a feeling that doing anything else challenges their traditional liberalism, or because they are under the sway of litigious advocacy groups that strenuously oppose nearly all standards of public conduct.¹⁸

Other cities work to reverse this trend. With a combination of proper legislation, fair-minded law enforcement, and a "tough love" approach by social service providers for the homeless, urban communities are reclaiming their public spaces as both safe and civil, where residents and visitors alike will voluntarily spend their time. These communities have decided to cease tolerating everything that any deviant wants to do. They want to re-establish order without a return to the discrimination and arbitrariness of the past, and they are doing so while respecting the constitutional rights Americans hold dear.

This Article examines the legislative response and legal challenges to the following three urban quality of life problems: urban camping, sidewalk use, and panhandling.¹⁹ The

16. Though the number of shelters grew enormously, few of them provided the rehabilitative services needed to break the cycle of homelessness. *See id.*

17. *See, e.g., John D. Cramer, Expert Praises Roanoke's Downtown, RDANOKE TIMES*, Mar. 10, 1998, at C4 (showing Roanoke's response to these problems); Dana Dworin, *Council Delays Final Vote on Camping Ban, AUSTIN AM-STATSMAN*, Dec 8, 1995, at B9; **Wendy Wagner, A Visit to Indianapolis Area leaders Learn How City Defeated Decay and Despair, TIME&DISPATCH** (Richmond, va.), May 12, 1997, at A1 (reporting on a visit by the area leaders of Richmond to Indianapolis to learn how one small city successfully dealt with its urban decay problems).

18. "As Kent Scheidegger of the Criminal Justice Legal Foundation correctly prophesied: 'When a city decides to do something about public order, the first question is 'will we get sued?*' The answer, inevitably, is yes/" *KHLLING & COUBS, supra* note 1, at 4.

19. Many other urban quality of life problems have generated both municipal reform and constitutional challenges. New public spaces restrictions recently upheld include those on excessive noise, handbuling, vendor restrictions/ regulations on

legal discussion is preceded by a brief description of the homeless population and the problems that bring them to the streets. Only with a clear understanding of the vagrant population can cities and lawyers make sense of the challenges to the laws that affect this deeply troubled population. My legal discussion is followed by an examination of the basic fairness of these new urban quality of life measures, concluding that these measures are constitutional, beneficial, and fair.

n. THE FACTUAL BACKGROUND

A. *What Homelessness is Not*

One of the crucial problems cities confront in defending urban quality of life initiatives is that judges, and the general public, often misunderstand the nature and causes of homelessness. Too often, they have accepted the homeless advocates' line that the problem lies with the economy or the lack of "affordable housing."²⁰ This leads to a belief that the homeless are all victims of economic dislocation, or even an inevitable feature of market capitalism. This prompts many to resist any law that moves the homeless from the public spaces where they chose to locate.

The reality is far different, as anyone who regularly works with or confronts homeless people can tell you. Declines in the supply of low-income housing may cause cities to evaluate their rent control and tax policies; but, economic dislocation, at the personal or market level, drives stunningly few people to live on heating grates.²¹ In fact, when homeless individuals or families are placed in housing without first addressing the problems that underlie their inability to maintain themselves, they often leave and return to the streets or shelters within short periods of time.²²

newspaper boxes, and restrictions on the location of sexually-oriented businesses.

20. See Brief for *Amicus Curiae*, National Law Center on Homelessness and Poverty, Berkeley Community Health Project v. Berkeley, 119 R3d 794 (9th Cir. 1997); see also DAVID A. SNOW & LEON ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE 237 (1993) ("Between 1973 and 1979 alone, 91% of the nearly one million housing units renting for \$200 per month or less nationally disappeared from the rental market").

21. See BAUM & BURNES, *supra* note 15, at 137.

22. See ANDREW M. CUOMO, THE WAY HOME: A NEW DIRECTION IN SOCIAL POLICY 5 (1992). "In short, simply providing housing is not the primary solution to the problem. of homelessness because the lack of affordable housing is *not* the primary cause.

Just as the provision of housing is not workable as the solution to the problem of homelessness, neither is the legal advocates' argument that, absent housing, people should be permitted to live on the streets. Permitting seriously troubled people to live and camp on the streets amounts to a public provision of rent-free and unsafe housing, a viable option to seeking help, and a subsidization of debilitating substance abuse habits.²³ And, as we have noted/ it is a serious drain on the vitality of the host community.

Furthermore, granting such "rights" seriously undermines efforts of both public and private service agencies to address the complex problems and needs of homeless people. These "rights" also hinder the ability of cities to exercise their legitimate prerogative to protect the well-being of the entire community.

B. *Who Are the Homeless?*

Homeless advocacy groups, in legislation and litigation battles, repeatedly equate homelessness with poverty, trailing such images as the poor immigrants of the late nineteenth and early twentieth centuries, the "Okie's," and the victims of the Great Depression.²⁴ This paints a picture that is seriously misleading.

In fact, the people urban residents and visitors see on the streets are there because of serious personal problems. This population appears to have severed all ties with friends, family, and colleagues. Why? National data from over one hun-

Without help for their many disabling conditions, most of the homeless will continue to be unable to maintain themselves in permanent housing." BAUM & BURNES, *supra* note 15, at 137.

23. See Gordon Berlin & William McAllister, *Homelessness, in SETTING DOMESTIC PRIORITIES: WHAT GOVERNMENT CAN DO* 63, 95-96 (Henry J. Aaron & Charles L. Schultze eds., 1992). It is a misconception to assume that it is always the homeless who are panhandling for money. A report on homelessness and panhandling in Baltimore notes that in a 25-day observation of panhandling, only a small percentage of the panhandlers were confirmed homeless." Memorandum from the Downtown Partnership of Baltimore, *Panhandling in Downtown Baltimore*, 6 (1994) (on file with author). Similarly, in a survey of panhandlers in Philadelphia, 48% of the respondents indicated that they lived "in apartments, with relatives, or in rooming houses." *Id.* at 8 (quoting Press Release from N. Goldenberg, Center City District Releases Survey of Panhandlers p e c 9,1993) (on file with author)). In short not everyone engaging in street disorder is homeless. Many people appear to simply prefer to hang-out on the streets, avoid supervision or responsibility, or use the guise of homelessness to engage in predatory conduct

24. See BAUM & BURNES, *supra* note 15, at 108.

dred studies show that at least sixty-five to eighty-five percent, and likely more, of all street people suffer from alcoholism, drug addiction, some form of mental illness, or a combination of the three.²⁵ My observation, after working in dozens of cities on these issues, is that the visible vagrant population, which includes just about all of the people engaging in the anti-social and disorderly conduct discussed in this Article, are nearly one hundred percent alcohol or drug dependent, or severely mentally ill.

Viewing the homeless as merely poor not only tends to lead to both bad law and bad social policy, it also demeans the poor and damages the political consensus behind anti-poverty programs. Authors Donald Burnes and Alice Baum note that

By perpetuating the myth that the homeless are merely poor people in need of housing, the advocates reinforce and promote the most pernicious stereotypes about poverty in America. Poor people in America do not live on the streets, under bridges, or in parks, do not carry all of their belongings in shopping carts or plastics bags, wear layers of tattered clothing, pass out or sleep in doorways, urinate or defecate in public places, sleep in their cars or in encampments, do not harass or intimidate others, ask for money on the streets, physically attack dry workers and residents, and do not wander the streets shouting at visions and voices. This, [however,] is what the public sees when they see the homeless.²⁶

Rather, it is a different group, addicted vagrants, that engages in these behaviors. It is this group, regardless of its access to shelter, that is inhabiting city sidewalks, parks, and bus stops. And, it is the problems created by this troubled population that fair-minded and compassionate cities—acting with their heads as well as their hearts—are trying to address. These efforts do not, contrary to the rhetoric of some opponents, criminalize homelessness or ignore their plight, but fos-

25. See *id.* Other numbers vary, but tell the same story. A Brookings Institution study estimated that one third of all homeless people suffer from mental illness and 48% "reported using illegal drugs or having been treated for drug abuse." Berlin & McAllister, *supra* note 23, at 65-66. Reporting similar results, a 27-month survey by the U.S. Conference of Mayors concluded that 25% of homeless people are mentally ill and 44% are substance abusers. David Whitman, Dorian Friedman, & Laura Thomas, *The Return of Skid Row*, U.S. NEWS AND WORLD REP., Jan. 15, 1990, at 27-29. These authors also point out that "chronic alcoholics and drug abusers are now the fastest growing group among those living in the streets and in shelters." *Id.*

26. *Aff. of Dr. Donald Biimesfe Alice Bauriv Joyce v. San Francisco*, 846 F.Supp. 843 (N.D. Cal. 1994), *vacated as moot*, 87 F.3d 1320 (9th Cir. 1996).

ter the quality of urban life by prohibiting certain behavior in certain public places. These measures assume that almost all people are capable of being good citizens and are capable of obeying these new laws. Indeed, the experience of cities across the country demonstrates that vagrants, like everyone else, can and will obey a city's laws. It often seems that only their lawyers see them as helpless and inherently anti-social.

HL THE CONSTITUTIONALTY OF URBAN CAMPING RESTRICTIONS

New York *City's* Thompkins Square Park was the venue of a tent-city populated by the homeless and their hangers-on. As a result, nearby residents avoided it as much as possible. The park, supported by the city's taxpayers, was considered an unusable, hostile territory.²⁷

Countless other parks in urban centers are the same way, denying communities valuable green space. The impact of a loss of a park is most keenly felt by the poor and middle class members of the community. The affluent can be presumed to have access to reliable and comfortable green spaces when they want it, such as country clubs. In most urban areas, it is the rest of the community that uses and benefits from public parks, large and small.

In order to make urban parks welcoming and usable by all, cities have begun to prevent their colonization by prohibiting "urban camping."²⁸ These measures typically prohibit sleeping with the accouterments of camping and thus allow for a casual park bench snooze. At the same time, they prevent people from taking parks and other public spaces over for use as their bedrooms, bathrooms, and kitchens.²⁹

27. See *Tent City in Tomptdas Square Park Is Dismantled by Police*, N.Y. TIMES Dec. 15, 1989, at B1 (describing the removal of die homeless from Thompkms Square Park).

28. See, e.g., MIAMI, FLA., CODE § 37-63 (1990) fg)k shall be unlawful for any person to sleep on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof); N.Y.C PARKS AND RECREATION RULES, Article iii, § 19 (1984) (prohibiting the use a park bench in a way that "interfere^] with its use by other people"); PHOENIX, ARIZ., CITY CODE § 23-48.01 (1981) ("(i)t shall be unlawful for any person to use a public street,... sidewalk (or) other right-of-way, for lying, sleeping or otherwise remaining in a sitting position thereon, except in the case of a physical emergency....").

29. See Rebecca Trounson, *Times Orange County Poll: Poverty Seen as a Sign of Personal Weakness; Government's Role Should be Limited in Caring for the Less Fortunate, Residents Say. The Poor Are Largely Invisible to Many*, L.A. TIMES, Nov. 15, 1995, at A1 (describing the favorable reaction of residents in Santa Ana, California to an anti-camping ordinance).

Urban camping ordinances are attacked on both political and legal grounds. However, these measures rest on a solid constitutional foundation. Urban parks and squares are public property intended for specific uses. To ensure that they can fulfill their function, cities have the authority to regulate parks.³⁰ Park closure times, for example, are a way in which cities regulate park use to ensure that they are clean and safe.³¹

Many other parks regulate consumption of alcohol, where sports can occur, if skateboarding or pets are allowed, or when protests and other large gatherings can occur.³² Prohibiting people from sleeping or camping in parks (or determining in which parks they may sleep) is likewise a regulation well within a city's prerogative.

In *Clark v. Community for Creative Nonviolence*³³ the Supreme Court determined that the government interest in regulating parks is sufficiently compelling to ban overnight sleeping in them even though, under the peculiar facts of that case, the sleeping may have constituted political speech.³⁴

Prohibitions on camping in city parks is a less demanding regulation and, therefore, well within the constitutional authority established in *Clark*. Outright prohibitions on all public sleeping, however, are broader than the park-specific prohibitions in *Clark*, and may be more constitutionally troublesome.

A. Bans on Sleeping and the Eighth Amendment

Most cities that have set out to control urban camping have not prohibited all public sleeping. Rather, they have aimed their ordinances at sleeping in inappropriate places or have prohibited "camping," usually defined as sleeping with the

30. See, e.g., *Simmons v. Los Angeles*, 63 Cal. App. 3d 455, 468 (1976) (stating that a city "has inherent authority to control, govern and supervise its own parks").

31. See *People v. Tranmam*, 161 Cal. App. 3d Supp. 1 (1984) (holding that park closure ordinances are a legitimate exercise of authority in regulating the use of public space). In many cities in the United Kingdom, the parks are owned and controlled by the adjoining property owners. Many of these parks are closed at night. All are well-kept.

32. See, e.g., ATLANTA, GA., CODE § 110-60 (1997) (prohibiting the use of parks between 11:00 p.m. and 6:00 a.m.); *id.* § 110-70 (permitting the presence of only leashed pets in public parks).

33. 468 U.S. 288 (1984).

34. See *id.* at 294.

accountenments of camping.³⁵ These urban camping ordinances prohibit setting up camps in public paries, including tents or other structures, as well as using public parks for unauthorized cooking and storage of personal belongings.³⁶ These measures do not prevent dozing off; they prohibit moving in.

A blanket prohibition on all public sleeping runs into constitutional trouble because humans have to sleep. And, if one does not own, rent, or have lawful access to private property, one must then sleep in public. If that person *is* also involuntarily homeless, the prohibition against public sleeping would criminalize behavior that was entirely involuntary.

Consequently, punishing the act of sleeping in public, by someone who *truly has no other choice*, could punish the combination of both being and not having shelter. This may be a status crime prohibited under the Eighth Amendment according to *Robinson v. California*.³⁷

In *Robinson*, the appellant was convicted of being addicted to narcotics, without any evidence that he had performed any act—such as buying or selling drugs—within the state.³⁸ The United States Supreme Court overturned the conviction on the ground that punishment based on the status of addiction violates the Eighth Amendment's proscription on cruel and unusual punishment³⁹

The Supreme Court's subsequent holding in *Powell v. Texas*,⁴⁰ emphasized the difference between crimes of being and crimes of action. In *Powell*, the Court was asked to find the conviction of a chronic alcoholic for public intoxication to be a violation of the Eighth Amendment, using the logic of *Robinson*.⁴¹ The Court, in a plurality opinion, upheld the conviction and narrowed the holding of *Robinson* stating that "criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has

35. See, e.g., ATLANTA, GA., CODE g 106-12 (d) (1997); COCOA BEACH, FLA., g 15-17 (b) (1997) (prohibiting camping in Fischer and Shepard parks); DENVER, COL., REV. CODE g 39-7 (a)-(b) (1997).

36. For example, Denver prohibits the building or placing any "tent building, shack, booth, stand, or other structure." See DENVER, COL., REV. CODE § 39-7 (b) (1997).

37. 370 U.S. 660 (1962).

38. See *id.* at 665.

39. See *id.* at 667; U.S. CONST, amend- Vm.

40. 392 U.S. 514 (1968) (plurality decision).

41. See *id.*

committed some *actus reus*.⁴²

Thus, even though many alcoholics find refraining from drinking to be extremely onerous, the Court upheld the prohibition because the law reached an act. Such laws, it appears, are constitutional regardless of compulsion or addiction because there is at least some opportunity to comply with these laws. Thus, just as the defendant in *Robinson* argued that he could not, at the moment of his arrest, avoid being an addict, truly homeless individuals, with literally with no choice but to be in public, cannot avoid sleeping in public. Under this view, only those for whom there is not a private property owner willing to allow them onto his or her property to sleep can take solace in *Robinson*.

B. Defending Sleeping Prohibitions

1. Volition

States and cities need not limit their criminal law to voluntary conduct, "Involuntariness" was irrelevant to the *Robinson* decision. Indeed, Justice Marshall, the author of the plurality opinion in *Powell*, expressly warned against extending *Robinson* to create a constitutional theory that "involuntary" behavior could not be punished consistent with the Eighth Amendment.⁴³ Justice Marshall stated that

the most troubling aspect of this case, were *Robinson* be extended to meet it, would be the scope and content of what could only be a constitutional doctrine [of "involuntariness" or "compulsion," which would be fundamentally inconsistent with] . . . traditional common-law concepts of personal accountability and essential considerations of federalism.⁴⁴

Robinson and its Eighth Amendment doctrine instead focuses on *physical impossibility*.⁴⁵ Subsequent cases have emphasized that even a helplessly addicted drug user may constitutionally be punished for drug use, even if the compulsion to use drugs is severe.⁴⁶ *Powell* and *Robinson* thus do not prevent the state

42. Mat533.

43. *See id.*

44. fiat534-35.

45. *See generally* *Robinson v. California*, 370 U.S. 660 (1962).

46. *See, e.g.*, *United States v. Moor*?, 486 R2d 1139 (D.G Cir. 1973) ("[I]t is the craving which may not be punished under the Eighth Amendment and not the acts which give rise to that craving").

from punishing overt acts that are contrary to the public interest, even if the acts are made more likely because of a person's status.

Furthermore, to be covered *by* any Eighth Amendment necessity defense, one must be truly homeless. If someone has an option of a place to go, the essential element of involuntariness vanishes. Rejecting shelters because they demand sobriety, insist upon prayer, require nominal fees, require helping out in the kitchen, or impose a curfew should not count. The availability of such places make it possible to obey the law. This is all the Eighth Amendment requires, even at its most expansive judicially-accepted interpretation.

2. Slippery Slope

However, the above argument is not the only answer to the constitutional question arising from prohibitions on public sleeping. Cities could argue that sleeping is an "actus reus" and that there is no obligation to provide people with a taxpayer-funded place to sleep. Such prohibitions apply, moreover, to all who sleep in public spaces, be they homeless or not. Additionally, eating is also a necessary human function. Consequently, laws against theft could, at times, punish the combination of being and not having goods, money, or labor to exchange for food.

Indeed, if the "involuntariness" of homelessness means a *carte blanche* exception to the reach of the criminal law, then the cat may truly be let out of the bag. Drinking to excess is also lawful if done privately, as is performing natural bodily functions and, in many states, having consensual sex. If the involuntary status of homelessness calls upon certain people to engage in these activities in public as well, it would seemingly leave each jurisdiction with a constitutional requirement to have two sets of laws, one for the domiciled and one for the homeless.

Perhaps even more problematically, the lack of volition argument calls upon the courts to inquire into the availability of shelter and housing as well as the nature of the problems of the person who claims that he has no option but to sleep on the streets. This embroils the courts in a mass of often conflicting social science data and subjects them to grossly exaggerated claims. Worse, it has the courts functionally testing the level of

public housing and shelter spending in the jurisdiction, an entirely inappropriate task for the judiciary.

Sleeping prohibitions, in sum, can be constitutionally defended. At the very least, the Eighth Amendment defense should be limited to particular individuals who can demonstrate that they had no choice but to violate a sleeping ordinance. Such an ordinance would remain facially constitutional and could be applied to anyone who had an alternative place to sleep.⁴⁷

The issue may be purely one of constitutional debate. Most jurisdictions are likely to conclude that sleeping prohibitions go too far.⁴⁸ I am left to wonder about the public purpose of preventing a four-year-old from falling asleep in her crib, or calling for the arrest of a businesswoman who dozes off after eating her lunch on a park bench.

My recommendation to cities is to address the problem they actually are confronting. If the problem is camping, prohibit camping. If it is sleeping in downtown parks, prohibit that. Prohibiting all public sleeping seems like over-stepping, and avoiding such measures helps avoid many constitutional trip wires.

C. A More Tailored Approach: Urban Camping Ordinances

1. Camping Ordinances and the Eighth Amendment

Urban camping ordinances and prohibitions on camping in specific parks or public spaces are on firmer constitutional ground. Simply put, they do not violate the Eighth Amendment. These measures, rather than reach potentially innocuous behavior, are aimed at conditions that overwhelm public spaces, preventing them from being used for the purposes for which the taxpayers created them. True, one must sleep, but

47. Finally, in order to evoke the Eighth Amendment at all, one must be the subject of a criminal prosecution and punishment. An Eighth Amendment violation cannot be created merely by passing an ordinance, and there can be no valid facial challenges to alleged "status offenses." Rather, an individual must not only be devoid of any choice, but also must violate the ordinance and be actually "punished" before raising a claim. This standing requirement frustrates those eager to rush into federal court. See *O'Shea v. Littleton*, 414 *U.S.* 488, 494 (1974) ("If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any member of the class.").

48. *But see* DALLAS, TEX., CODE § 331-13(a) (1994); *Johnson v. Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on standing grounds*, 61 R3d 442 (5th Cir. 1995).

one can choose where to sleep. Constitutional challenges quickly run into another brick wall no one need camp.

There is no constitutional right to sleep in the public place of one's choice. If this were not the case, the closing time at Arlington National Cemetery and the National Zoo would be unconstitutional, as would the fence around the White House. The convenience of Union Square in San Francisco, Jackson Square in New Orleans, or the grass underneath a downtown freeway in Dallas does not require these cities to make these places available to the street population for sleeping. Cities are allowed to regulate *where* sleeping occurs, even if there are those who must sleep in public because they have no choice.

Similarly, one must sleep, but one need not do so with the accouterments of camping, such as shopping carts filled with belongings, bedrolls, or make-shift tents. It is these items which give the appearance of colonized parks and shantytowns, while preventing the use of parks by others. Thus, anti-camping ordinances should survive Eighth Amendment scrutiny, as indeed they have.⁴⁹

The necessity argument implicit in the Eighth Amendment challenges only applies to the act of sleeping, not to camping. The Supreme Court of California in *Tobe v. Santa Ana*,⁵⁰ and a federal district court in *Joyce v. San Francisco*,⁵¹ have both reached this conclusion.

In *Joyce*, San Francisco's Matrix Program involved enforcing numerous quality of life ordinances against such things as camping on public lands, obstruction of sidewalks, public urination and defecation.⁵² In response to the plaintiff's arguments that homelessness was a 'status' in the sense that it was caused by a variety of involuntary factors, the *Joyce* court concluded that depicting homelessness as a status "is by no means self-evident" and of "questionable merit in light of concerns implicating federalism and the proper role of the Court in such adjudications."⁵³ The Court eventually declined to answer that

49. See *Tobe v. Santa Ana*, 892 P.2d 1145 (1995).

50. *See id.*

51. 846 F. Supp. 843, 857 (N.D. Cal. 1994), *vacated as moot*, 87 E3d 1320 (9th Cir. 1996). The district court in *Joyce* upheld San Francisco's Matrix Program against several constitutional challenges in two decisions, one rejecting a preliminary injunction, and one granting the City summary judgment *See id.*

52. *See id.*; KELLING & COLES, *supra* note 1, at 209.

53. *Joyce*, 846 F. Supp. at 856.

question, ruling that sleeping at parks where sleeping is prohibited is conduct and, therefore, subject to regulation.⁵⁴

In *Tobe*, the California Supreme Court reviewed the constitutionality of a Santa Ana city ordinance that prohibited "urban camping" and the storage of personal property by private individuals in designated public areas.⁵⁵ The state Court of Appeals had previously sided with the plaintiffs and invalidated the ordinance, holding that the ordinance violated the Eighth Amendment because it imposed punishment for the "involuntary status of being homeless."⁵⁶

The California Supreme Court reasoned that neither the language of the Santa Ana camping ordinance nor the evidence in the case supported the claim that a person may be convicted just because he was homeless or was stricken by poverty.⁵⁷ Instead, the Court found the ordinance to punish conduct, which individuals can control, rather than the status of homelessness.⁵⁸ Following the precedents set by the Supreme Court in *Robinson* and *Powell*, the Court held that the Eighth Amendment does not prohibit punishment of acts derivative of a person's status.⁵⁹

Notably, the Court distinguished a constitutional right to pursue the necessities of life, such as sleeping, which it agreed is protected under the Eighth Amendment, from the manner in which these necessities are pursued.⁶⁰ The latter is subject to individual control and choice and even the conduct of the homeless can be regulated under the state's police power.⁶¹

The distinction between sleeping and camping also explains, in part, why San Francisco and Santa Ana prevailed in court, but Miami did not. In *Pottinger v. Miami*,⁶² a federal district court in Florida enjoined the Miami police from arresting the homeless for "acts such as sleeping, eating, lying down or sit-

54. See *id.* at 857. While the Matrix program was upheld as constitutional, the program was suspended by Mayor Willie Brown upon his taking office as Mayor of San Francisco. This led the Ninth Circuit to vacate the district court decision as moot and dismiss the case. See *Joyce*, 87 F3d at 1320.

55. See *Tobe*, 892 P.2d at 1150-51.

56. *U.* at 1166.

57. See *id.*

58. See *id.*

59. See *id.*

60. See *id.*

61. See *id.* at 1169.

62. 810 F. Supp. 1551 (S.D. Fla. 1992).

ting" in all areas of the city.⁶³

Crucial to the court's holding was an observation that enforcement of the ordinances "bans homeless individuals from all public areas and denies them a single place where they can be without violating the law."⁶⁴ To the contrary, under the Santa Ana Ordinance and San Francisco's Matrix Program, the homeless remained free to use public property on the same terms as other members of the community. These camping prohibitions, and those like them, do not prevent anyone from entering public property or from merely falling asleep.

In sum, restrictions on where public camping may occur regulate only conduct, not status. These ordinances reflect a local government's traditional role of regulating public conduct and public spaces to protect and enhance the general welfare of the citizenry. Enforcement of these laws in a non-discriminatory manner falls squarely within *Pmoell* and does not offend the Eighth Amendment.

Although more tailored camping prohibitions avoid the crux of the Eighth Amendment argument, they do not avoid the anger or litigiousness of those who want more public money spent on shelter space. These advocates can be expected to continue to argue that people cannot be punished on the basis of their "status" of homelessness, regardless of the conduct proscription at issue. In doing so, they exaggerate the Eighth Amendment limitation, using it in contexts that unhinge it from its logical foundation.

2. The Right to Travel and Urban Camping Legislation

Restrictions on urban camping are also challenged as a violation of the right to travel.⁶⁵ Such an argument offends not only clear precedent interpreting this judicially discovered right, but in associating the term "travel" with what can only be referred to as "lying dormant," the argument offends the English language as well.

The right to travel, unenumerated in the Constitution, has

63. *Id.* at 1584.

64. *Id.* at 1581. The decision, albeit limited, may be of no precedential value anyway. The Eleventh Circuit has consistently declined to approve it and has sent the case back to the district court on two occasions so far. *Fottinger v. Miami* 73 F.3d 1154 (11th Cir. 1996).

65. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons From American Cities*, 66 TUL. L. REV. 631 (1992).

been used by the Supreme Court since the Civil War era to strike down measures that directly restrict or punish interstate movement⁶⁶ as well as measures that discriminate against recent migrants to a state.⁶⁷ It does not "endow citizens with a 'right to live or stay where one will.' [The right to travel] does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay..."⁶⁸

Camping restrictions treat all people the same, regardless of when they moved into a state. Although the existence of such laws may affect the desirability of a city as a place to move to, this does not implicate the right to travel.⁶⁹

Indeed, if it were otherwise, everything from gun control laws to the quantity of welfare benefits to sodomy laws would violate the right to travel because some people's decision whether to move into a state may depend upon the existence (or absence) of these laws. Cities with camping ordinances are still open to all people willing to obey the rules.

Finally, a bit of common sense may be in order. Whatever the word "travel" might mean, it seems far-fetched to apply it to lying dormant on a public sidewalk or city park,⁷⁰

D. *Vagueness Challenges to Urban Camping Ordinances*

The third major source of constitutional challenges to camping ordinances is that they are impermissibly vague. Vagueness arguments are used most often when advocacy group lawyers run out of better ones. The courts have made it clear that all the Constitution requires is that a law be sufficiently clear so that a person may know what is prohibited and that a practical construction can be given to its language.⁷¹ In

66. See *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 46 (1868) (invalidating tax on traveling outside of state); *Edwards v. California*, 314 U.S. 160 (1941) (invalidating statute prohibiting assisting the migration of an indigent into California).

67. See *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969) (invalidating durational requirement for welfare benefits); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974) (invalidating durational requirement for free hospital care).

68. *Davison v. Tucson*, 924 F. Supp. 989, 994 (D. Ariz. 1996) (quoting *Tobe v. Santa Ana*, 892R2d 1145, 1165 (CaL 1995)).

69. See *Belle Terre v. Boras*, 416 U.S. 1 (1974) (upholding single-family zoning ordinance against right to travel challenge); see also *People v. Scott*, 26 CaL 2d 179 (1993) (upholding West Hollywood camping ordinance).

70. See BLACK'S LAW DICTIONARY 1500 (6th ed. 1990) (defining travel as going "from one place to another" and a "voluntary change of place").

71. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 684 (2d ed. 1986);

fact, city councils generally use words average people can understand. It seems, then, that vagueness challenges are posed by those who also know the meaning of the prohibition at issue but are desperate to use the courts to veto a legislative judgment.

Legislation, including anti-camping measures, must define terms so that the average citizen understands what is being prohibited and in a manner that provides law enforcement officers with reasonably clear guidelines.⁷² Camping ordinances easily meet this permissive standard.

In *Clark v. Community for Creative Nonviolence*, the Supreme Court ruled that the Park Service's definition of "camping," a word in the lexicon of many seven-year-olds, was not unconstitutionally vague.⁷³ Other courts have similarly supported the claim that "camping" can be adequately defined. For example, the D.C. Circuit Court of Appeals upheld the conviction of a person under a "no-camping" ordinance who had spent one night sleeping in a park.⁷⁴ This court affirmed that the conviction was a valid application of the camping ordinance and that a "reasonable fact finder" could ascertain the difference between someone "camping" in the park and someone using it for a picnic or an afternoon of relaxation.⁷⁵

The California Supreme Court agreed, finding that there was "no possibility that any law enforcement agent would believe that a picnic in a park constitutes 'camping'" within the meaning of a Santa Ana no-camping ordinance.⁷⁶

These precedents make it clear that it is quite simple to enact a urban camping legislation that avoids vagueness concerns. This, however, does not guarantee that opponents will not include a vagueness challenge in their laundry list of constitutional complaints.

Walker v. Superior Court 763 P.2d 852 (Cal. 1988).

72. See *Kolender v. Lawson*, 461 U.S. 352 (1983); see also *Papachristou v. Jacksonville*, 405 U.S. 156 (1972); *United States v. Harriss*, 347 U.S. 612 (1954); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

73. See 463 U.S. at 292 n.4,300.

74. See *United States v. Musser*, 873 R2d 1513 (D.C. Cir. 1989); *United States v. Thomas*, 864 R2d 188 (D.C Or. 1988).

75. See *Musser*, 873 F.2d at 1519. Another court found that a prohibition on erecting a "building, hut, hotel, shanty, tent, or other structure" is not vague. See *ACORN v. Tulsa*, 835 F.2d 735,742-44 (10th Cir. 1987); see also *People v. Davenport*, 222 Cal. Rptr. 736 (Cal. Ct. App. 1985), *cert denied*, 475 U.S. 1141 (1986) (upholding a no-camping ordinance against vagueness and overbreadth challenge).

76. See *Tobe v. Santa Ana*, 892 P.2d 1145,1168 (Cal. 1995).

E. Equal Protection Considerations

A final source of constitutional challenges to urban camping ordinances is the Equal Protection clause of the Fourteenth Amendment. This challenge is based on the argument that the ordinances are "targeted" at the homeless.⁷⁷ However, it appears to rely more upon wishful thinking than constitutional law.

First these ordinances apply to everyone equally. If camping is prohibited, that prohibition applies to families and Boy Scouts, as well as the homeless. Second, even if there is a disparate impact upon the homeless, it does not matter. Homelessness is not a suspect class.⁷⁸ Consequently, laws which place a greater burden upon the homeless receive only a rational basis review; they do not warrant heightened judicial scrutiny.⁷⁹

Urban camping and similar ordinances should easily survive equal protection scrutiny because they are rationally related to the interests of protecting the safety and economic vitality of an area as well as preserving parks and other public spaces for the uses for which they were intended. As one federal court has noted, these measures address real urban problems that come with homeless encampments, including drug sales, public elimination of bodily wastes, vandalism, litter, and "a host of other crimes by and against homeless people."⁸⁰

Upon reviewing all of the arguments advanced by opponents of camping ordinances, I am left wondering why the advocacy groups advance so many constitutional claims that have so little merit. It appears that they have decided to advance every conceivable argument in the hopes that at least one would stick. It is essential for these advocates to try and prevail in the federal judiciary because of the difficulties they have advancing their political agenda through traditional means. After all, generating public support for an agenda that

77. *Said*, at 1176 (Mosk, J., dissenting).

78. See *Carotene Products v. United States*, 304 U.S. 144, 152 n. 4 (1938) (noting that a "more searching judicial inquiry" may be warranted, when legislation targets "discrete and insular minorities").

79. See *Lindsey v. Normet*, 405 U.S. 56 (1972) (holding that housing-based classifications are not suspect); see also *Kadnans v. Dickenson Public Schools*, 487 U.S. 450 (1988) (finding wealth-based classifications not suspect); *San Antonio v. Rodriguez*, 411 U.S. 1 (1973) (taking same view).

80. *Joyce v. San Erandsco*, 846 F. Supp. 843 (N.D. CaL 1995), *vacated as moot*, 87 F3d 1320 (9th Cir. 1996).

includes give-aways, loitering, the colonization of once-beautiful parks, and the tolerance public intoxication is still a difficult proposition even in this permissive culture.

By challenging camping ordinances, these advocates seek to hold urban parks hostage. They expect a ransom of more spending on social programs, and unless that occurs, cities are told that they cannot have usable parks. In Atlanta, those challenging the city's camping ordinance made this threat explicit. They asked a federal court to either strike down Atlanta's camping ordinance or order the city to spend more money on causes preferred by the advocates.⁸¹

IV. THE CONSTRUCTION OF SIDEWALK USE ORDINANCES

An issue with similar implications to the anti-camping ordinances are prohibitions against sitting or lying down on dry sidewalks.⁸² Cities with such ordinances include Seattle, Atlanta, and Sacramento.⁸³ These ordinances are aimed at problems caused by people blocking busy city sidewalks. Pedestrians who walk around individuals obstructing the walkways often put themselves at risk by walking into the street. The risk is particularly great for the elderly, the blind, and those confined to wheelchairs. Sidewalk sitters also affect the economic vitality of an area. People who feel unsafe or uncomfortable in an area or come to think of it as an obstacle course, will often go elsewhere to meet, shop, and dine.

Many cities have long prohibited pedestrian interference, which generally makes it an offense to intentionally interfere with the passage of pedestrians. These older ordinances often prove to be difficult to enforce because a testifying witness is generally required and police rarely witness infractions, leaving them unable to act when someone is sprawled out on a sidewalk. In addition, they require a showing of a specific intent to block pedestrian passage, which may not exist in the

81. See Complaint at 20, *Richardson v. Atlanta*, No. 97-CV-2468 (N.D. GA 1997).

82. See *Roulette v. Seattle*, 850 F. Supp. 1442, 1445 (W.D. Wash. 1994), *aff'd*, 97 F.3d 300 (9th Cir. 1996) (pointing out that the purpose of the Seattle ordinance was to "facilitate the safe and efficient movement of pedestrians and goods on the public sidewalks of commercial areas").

83. See SEATTLE, WA., CODE § 15.48.040-.050 (1995) (prohibiting sitting or lying on the sidewalks of specified commercial districts between the hours of 7:00 a.m. and 9:00 p.m.); ATLANTA, GA., CODE § 106-81 (1997); MINNEAPOLIS, MINN., CODE § 385.65 (1998).

mind of someone sprawled on the sidewalk.

Seattle pioneered the modern sidewalk use ordinance in enacting an ordinance which prohibits a person from sitting or lying on a public sidewalk in commercial areas during business hours.⁸⁴ The Seattle ordinance was challenged by a group of plaintiffs, including homeless people and a street musician, who sometimes sat on sidewalks.⁸⁵ This group brought suit in federal court challenging the constitutionality of the sidewalk ordinance.⁸⁶ The constitutional challenge was rejected, both by the trial court⁸⁷ and by the Ninth Circuit.⁸⁸ Later, the plaintiffs took their case to state court, where they again lost in trial court and at the appellate level.⁸⁹

Obviously, there is no textual right in the Constitution to lay or sit on one's chosen public sidewalk. Therefore, the constitutional challenges to sidewalk use ordinances such as the one in Seattle consist of other claims. These assertions include alleged violations of substantive due process rights, the right to travel, free speech, equal protection, and procedural due process.⁹⁰

The most sweeping assertion by challengers to these measures is that they violate substantive due process requirements. The argument is that sidewalk use measures lack any legitimate governmental interest and prohibit only harmless conduct.⁹¹

Substantive due process rights, utilized by the Supreme Court to protect certain "fundamental rights" are created by the federal courts only sparingly⁹² and are largely limited to issues of reproduction, marriage, and family.⁹³ These rights are a far cry from impeding pedestrian traffic by lying or sitting down on busy urban sidewalks. The Supreme Court has never

84. See SEATTLE, WA., CODE § 15.48.040-.050 (1995).

85. See *Roulette*, 850 F.Supp. at 1444.

86. *See id.*

87. *See id. at 1442.*

88. See *Roulette v. Seattle*, 97 F.3d 300 (9th Cir. 1996).

89. See *Seattle v. McConahy*, 937 P.2d 1133 (Wash.Ct. App. 1977).

90. See *Roulette*, 850 F.Supp. at 1447-50.

91. *See Roulette*, 97 F.3d at 306.

92. See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that Georgia's sodomy law does not violate a fundamental right of homosexuals); *Washington v. Glucksberg*, 117 S. Ct 2258 (1997) (holding that Washington's ban on assisted suicide does not violate a fundamental liberty interest).

93. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973).

held that there is a constitutional right to engage in "innocuous activity."

Furthermore, there are legitimate interests addressed by these ordinances, namely pedestrian safety and the broader interest in the quality of urban life. The district court in Seattle went so far as to classify the governmental interest in sidewalk use ordinances as substantial.⁹⁴ Specifically, the court said that Seattle's substantial interest was "protecting public safety by keeping the sidewalks clear of pedestrian hazards" and "promoting the economic health of its commercial areas."⁹⁵ There seems to be little doubt that these measures have a constitutionally adequate governmental justification.⁹⁶

Another assertion used to challenge sidewalk use ordinances is that they infringe the constitutional right to travel.⁹⁷ Perhaps only lawyers can see "traveling" when someone is sprawled out on a sidewalk. The constitutional right to travel protects citizens against direct restrictions on, or punishment for, movement or migration between states as well as from discrimination against new entrants to a state.⁹⁸ None of those interests are implicated by a Seattle-style ordinance which treats residents and visitors alike and that places no burden on freedom of movement about the city.

Furthermore, sidewalk use ordinances that are limited to specific areas, like the one in Seattle, leave open other public places in which those who desire may sit or lie down without violating the law. In addition, in cities where sidewalk use ordinances are limited to business hours, people may sit on the sidewalks at night and on sidewalks in non-commercial areas.

Challengers to sidewalk use ordinances also claim that these laws restrict free speech rights because they restrict expressive activity.⁹⁹ Some opponents of sidewalk use ordinances argue that the mere presence of the homeless on sidewalks consti-

94. See *Roulette*, 850 F. Supp. 1442,1448 (citing *Seeley v. State*, 655 P.2d 803, 808 (Ariz. Ct. App. 1982)).

95. *Id.*

96. A federal district court in Nevada also recognized the strong public interest in maintaining the free flow of pedestrian traffic in denying a preliminary injunction in a challenge to a Clark County ordinance that prohibits handbilling on the Las Vegas Strip. See *S.O.C, Inc. v. Clark*, No. CV-S-97-0123-LDG D. Nev. Mar. 4,1997), *appeal pending* No. 97-15912 (9th Cir.).

97. See *Roulette*, 850 F. Supp. at 1447-48.

98. See *supra* Part III.C2.

99. See *Roulette*, 850 F. Supp. at 1448-49.

tutes speech because this conduct informs society of its alleged failure and recalcitrance to address certain social needs.¹⁰⁰

There are two direct, if not curt, responses to such assertions: first, they are wrong, and second, so what? It is highly doubtful that being sprawled out on the sidewalk is expression that rises to a level requiring protection by the First Amendment, even assuming anyone receives a message other than "gee, this person is really rude."

As the Supreme Court has noted, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down a street or meeting one's friend at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment"¹⁰¹ The district court in the Seattle litigation observed that "the act of sitting or lying is not necessarily related or inextricably linked to the speech or expressive conduct"¹⁰² Indeed, most people violating these ordinances are silent

In any event, this argument misconstrues the purpose of sidewalk use ordinances, which is not to stifle any message or rid the city of its homeless, but rather to safeguard the designated commercial districts.

In *Berkeley*, however, an activist federal judge accepted the bizarre First Amendment argument, holding that sitting on the sidewalk is speech, but lying on the sidewalk is not.¹⁰³ The Court never did say what was being expressed—Hior did the Court see fit to enlighten us as to why the act of sitting down on the sidewalk flows with expression, but lying down does not. Thankfully, however, this decision pre-dated the Ninth Circuit decision in the Seattle case and was subsequently vacated by the district court after the Ninth Circuit decision was announced.¹⁰⁴

People remain free to express themselves on any issue they please in cities with sidewalk use ordinances. Future free speech claims against these ordinances appear destined to fail.

100. *See id.* at 1448 (pointing out that "the act of sitting or lying is not necessarily related or inextricably linked to speech or expressive conduct").

101. *Dallas v. Slanglin*, 490 *US*. 19, 25 (1989).

102. *Roulette*, 850 *F.Supp.* at 1442,1449.

103. *Berkeley Community Health Project v. Berkeley*, 902 *F. Supp.* 1084 (N.D. Cal. 1995), *vacated*, 966 *F. Supp.* 941 (N.D. Cal. 1997), *dismissed*, 119 *F.3d* 794 (9th Cir. 1997).

104. *Compare id.* at 941, *with Roulette v. Seattle*, 97 *F.3d* 300 (9th Cir. 1996).

V. THE CONSTITUTIONALITY OF PANHANDLING CONTROLS

My third and final urban quality of life topic is panhandling. Residents and visitors to many urban centers confront beggars every day. A walk down a major street, in cities large or small, will likely result in at least one solicitation by a beggar seeking spare change.¹⁰⁵ Some city streets resemble an obstacle course, with citizens dodging and weaving in order to avoid confrontations with beggars in their path.

Some panhandlers go about their business in a passive manner, making a request or holding out a cup with coins. Others are much more aggressive, making loud, sometimes repeated demands, or persistently following the pedestrian down the street after a request has been denied. Additionally, some beggars choose to beg in places that are particularly intimidating, such as near ATM machines, at bus stops. Some even go so far as to confront motorists at red lights, washing their windshields without consent and then demanding payment.

Aggressive begging places the economic and social functions of streets and other public places at risk. Where aggressive panhandlers assemble, people are likely to feel unsafe. If people feel threatened, they are likely to avoid the area in the future, resulting in a decline in business and community life as well as making the area ripe for more serious crime.¹⁰⁶ The activity, therefore, places public spaces at a direct competitive disadvantage to shopping malls and other private spaces. In short, in addition to being personally harassing and intimidating, panhandling can directly threaten an area's community life and its economic vitality.

A. *Types of Panhandling Restrictions*

Many cities have adopted measures aimed at aggressive panhandling and panhandling where it is particularly intrusive.¹⁰⁷ Aggressive panhandling is often defined as: touching,

105. For a detailed examination of the history of legal controls on panhandling, see Robert Tefr, *Maintaining Safety and Ctoility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1993).

106. See George L. Kelling, *Measuring What Matters: A New Way of Ttinking About Crime and Public Order*, 2 CITY J. 21,21 (1992).

107. A 1996 survey supervised by the author determined that just over one third of the 504 largest cities in the United States had panhandling control ordinances as of mid-1996. Cities with panhandling control measures include Washington, D.C., Baltimore, Cincinnati, Atlanta, Seattle, San Frandisco, Sunnyvale, Santa Barbara, Los An-

following, standing in someone's way, asking again after a negative response has been given, and begging while intoxicated.¹⁰⁸

Other cities are going further in more recent ordinances, prohibiting direct solicitations for money where they would be particularly intrusive, such as on public transportation vehicles, near banks, public toilets, and near ATM machines.¹⁰⁹ These cities are also banning solicitations of people in cars, near entrances to buildings, on beaches and boardwalks.¹¹⁰ The cities are also prohibiting fraudulent panhandling that includes misrepresenting the intended use of the money and misrepresenting whether one is homeless.¹¹¹

B. Supreme Court Guidance

In *ViUage of Schaumburg v. Citizens for a Better Environment*,¹¹² the Supreme Court ruled that charitable solicitation is so closely intertwined with speech that "solicitation to pay or contribute money" is protected under the First Amendment.¹¹³ However, it has not been the case that all direct solicitations for cash have been diligently protected by the Supreme Court. Rather, the Court has come to view direct, in-person solicitation requests for money as fundamentally different from other forms of expression, prompting it to uphold restrictions on where direct solicitations for money can occur in three recent cases. Furthermore, the Court has never deemed mere begging

ges, Milwaukee, Boston, Philadelphia, New York, Phoenix, Seattle, San Francisco, Santa Barbara, Long Beach, Sacramento, Raleigh, New Haven, and Santa Cruz. The author helped draft many of these measures. See American Alliance for Rights & Responsibilities, Inc., *Approaches to Disorder in American Cities*, REPORT FOR THE NATIONAL INSTITUTE OF JUSTICE (1997).

108. See, e.g., ATLANTA, GA., CODE § 106-85 (1997); INDIANAPOLIS, IND., CODE § 20-8 (1995).

109. See *Chad v. Ft. Lauderdale*, 861 F. Supp. 1057, 1063 (S.D. Fla. 1994) (citing Ft. Lauderdale's panhandling ordinance); *Roulette v. Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994) (citing Seattle's ban on certain types of panhandling); KELLING & COLES, *supra* note 1, at 201 (citing Baltimore's "aggressive panhandling" ordinance).

110. See *id.*

111. Only one major jurisdiction in recent years, Dallas, has seen the City Council take up a panhandling control ordinance and decline to adopt it. The Dallas City Council voted down a measure because it included a prohibition against soliciting people in motor vehicles, based on the opposition of firefighter charities that raise funds in such a manner. See Robert Ingrassia, *Proposal to Ban Panhandling Dies in City Panel; Concern Raised Over How Otariiy Groups Would Fare*, DALLAS MORNING NEWS, Feb. 3, 1998, at 14A.

112. 444 U.S. 620 (1980).

113. *Id.* at 633.

to be constitutionally protected.

In the first of these solicitation cases, only one year after *Village of Schaumburg*, the Supreme Court upheld a prohibition on the solicitation of funds at state fairgrounds, except by those with a licensed booth.¹¹⁴ Thus, any thought that *Schaumburg* provided for an absolute right to beg in any place one chooses was quickly laid to rest

In *United States v. Kokindap*¹¹⁵ the Court considered a postal service regulation prohibiting solicitation of contributions on sidewalks outside of post offices. The Court found that face-to-face solicitation could be prohibited at these locations as well, given its disruptive nature.¹¹⁶

Although the case did not directly deal with street panhandling, the Court nevertheless offered some rather clear views on the subject, commenting that "as residents of metropolitan areas know from daily experience, confrontation by a person asking for money disrupts passage and is more intrusive and intimidating than an encounter with a person giving out information."¹¹⁷

The Court thus firmly distinguished the dissemination of information, which contributes to the public discourse, from mere begging because of the absence of any substantive message and the disruption, obtrusiveness/ fear, and intimidation that begging causes.¹¹⁸

Moving from post offices to airports, the Court next upheld a regulation of the Port Authority of New York and New Jersey banning "solicitation and receipt of funds" in a "continuous or repetitive manner" within airport terminals.¹¹⁹ The plurality opinion, authored by Chief Justice Rehnquist, was centered on the conclusion of four Justices that the airport is not a "traditional public forum" because, unlike the public streets, the free exchange of ideas has never been considered one of the principal purposes of the Port Authority.¹²⁰

114. See *Heffron v. Int'l Soc. of Krishna Consciousness, Inc.*, 452 U.S. 640 (1981),

115. 497 U.S. 720 (1990).

116. *See id.* at 733-34.

117. *Id.* at 734.

118. *See id.* at 733-37. "Whether or not the [Postal] Service permits other forms of speech, which may or may not be disruptive, it is not unreasonable to prohibit solicitation on the ground that it is unquestionably a particular form of speech that is disruptive of business." *Id.* at 733.

119. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

120. *See id.* at 682-83.

Although the "public forum" category presumably applies to cities' parks and sidewalks, the plurality's basis for upholding the regulation as reasonable is relevant to the sidewalk panhandler: it found that face-to-face solicitation impedes pedestrian traffic and presents risks of coercion and fraud.¹²¹ These same risks are presented by the daily scourge of aggressive and intrusive panhandling.

Justice Kennedy, who disagreed with the plurality's public forum analysis, nonetheless viewed the ban on face-to-face solicitation as either a "narrow and valid regulation of the time, place, and manner of protected speech in this forum or else is a valid regulation of the non-speech element of expressive conduct."¹²² He characterized the restriction as a time, place, or manner restriction because it did not prohibit all speech that solicits funds, only "personal solicitations for immediate payment of money," and as a restriction of a nonspeech elements because, like street begging, it was "directed only at the physical exchange of money."¹²³

Furthermore, Justice Kennedy found the restriction to be content-neutral in that it was aimed at the conduct element of the exchange of money and not at any particular message.¹²⁴ This makes sense, as solicitation control ordinances apply to all speakers equally, regardless of their cause. He added that it was narrowly tailored in that it did not "burden any broader category of speech or expressive conduct than is the source of the evil sought to be avoided."¹²⁵

Thus the Supreme Court, although it has not heard a begging case, has strongly indicated that there is ample room for regulation on where panhandling is permitted. Cities have taken up this invitation, and other courts have not interfered.

C. Panhandling Restrictions and the Lower Federal Courts

1. The New York Cases

In 1990, the United States Court of Appeals for the Second Circuit upheld a New York City Transit Authority Regulation

121. See *id.* at 683-84.

122. *Id.* at 693 (Kennedy, J., concurring).

123. *Id.* at 705.

124. See *id.* at 706.

125. *Id.* at 707.

prohibiting begging and panhandling in the city's subway system.¹²⁶ The Circuit Court expressly held that panhandling is not speech protected by the First Amendment.¹²⁷ The Court viewed begging, not in terms of a spoken appeal, but rather as a physical transfer of money, stating that "[c]ommon sense tells us that begging is much more 'conduct' than it is 'speech.'"¹²⁸ It focused on the lack of an "intent to convey a particularized message" and the unlikely event that any message "would be understood by those who viewed it."¹²⁹

The *Young* court also covered its flank, offering that even if begging were protected expression under the standard enunciated in *United States v. O'Brien*,¹³⁰ the regulation would still be valid.¹³¹ Under the *O'Brien* test, a limitation of expression combined with conduct is valid if it is "'within the constitutional power of the government;' 'it furthers an important or substantial government interest;' 'the governmental interest is unrelated to the suppression of free expression;' and any 'incidental restriction on alleged First Amendment freedoms is no greater than needed to further that interest.'"¹³²

The Court implicitly recognized that the regulation was within the Transit Authority's power.¹³³ The second prong of the test led the court to proclaim, consistent with the daily experience of countless commuters, that begging in the subway "often amounts to nothing less than assault, creating in the passengers the apprehension of imminent danger" and was thus within the government's interest to protect.¹³⁴

The scope of *Young* did not prove to be very broad. In *Loper v. New York City Police Dept.*,¹³⁵ a separate panel of the same Court of Appeals ruled that a prohibition on all begging in the state to be unconstitutional.¹³⁶ At the same time, the trial court decision in *Loper* case not only left open the possibility that

126. *Young v. New York City Transit Authority*, 903 R2d 146,148 (2d Or. 1990) (citing 21 N.Y.C.R.R. § 1050.6).

127. *See id.* at 152-54.

128. *Id.* at 153.

129. *Id.* (quodng *Spence v. Washington*, 418 *US*. 405, 410-11 (1974)).

130. 391 *U.S.* 367(1968).

131. *See Young*, 903 F.2d at 157.

132. *Id.* (quoting *O'Brien*, 391 *U.S.* at 367).

133. *See id.* at 158.

134. *Id.*

135. 999 F.2d 699 (2d Or. 1993).

136. *See id.*

more narrowly tailored ordinances would pass constitutional scrutiny, it explicitly stated that "a ban on *aggressive* begging would probably survive scrutiny, as would a complete ban on begging in certain areas, such as outside of automatic teller machines."¹³⁷ The New York law before the Court, though, was rejected because it "cuts off all means of allowing beggars to communicate their message of solicitation."¹³⁸ New York City has since adopted a narrower panhandling ordinance targeted at aggressive panhandling.¹³⁹ It has not been challenged in court

2. Santa Monica and Fort Lauderdale

The City of Santa Monica, long a mecca for the homeless and those acting like them, rightly concluded that it was perfectly consistent to carry out its long-standing commitment to the less fortunate while at the same time imposing minimum standards of public conduct.¹⁴⁰ The city passed a panhandling control ordinance similar in scope to many others.

The Santa Monica ordinance included a variety of time, place, and manner restrictions, including prohibitions on solicitations of individuals in automobiles and prohibitions on soliciting within three feet of an individual unless they consent.¹⁴¹ The ordinance was challenged in federal court on First Amendment grounds, where plaintiffs argued that the ordinance was not content-neutral, that it was too broad, that it did not leave open sufficient alternative means of communication, and that it placed too much discretionary enforcement power in the hands of the police. The court rejected all of the plaintiffs contentions and upheld the ordinance.¹⁴²

Fort Lauderdale also successfully resisted a challenge to its park rule prohibiting solicitations on the city's beaches and the

137. *Loper v. New York City Police Dept.*, 802 F. Supp. 1029, 1040 (S.D.N.Y. 1992)(emphasis added).

138. *Id.*

139. NEW YORK, N.Y., ORD. NO. 456 (1994). Similarly; after the Supreme Judicial Court of Massachusetts struck down a statute (of Colonial Era heritage) that prohibiting all begging in the state, the Boston City Council adopted a modern panhandling control ordinance. See Judy Rakowsky, "Aggressive" Begging Barred by City Council, BOSTON GLOBE, Dec 18, 1997, at B12.

140. See SANTA MONICA, CAL., CODE §§ 4.54.010-454.040(1994).

141. See *id.*

142. See *Doucette v. Santa Monica*, 995 P. Supp. 1192 (CD. Cal. 1996).

abutting sidewalks.¹⁴³ The plaintiff in that case sought a preliminary injunction to prevent the enforcement of the park rule on the grounds that it violated the First Amendment.¹⁴⁴ The court rejected this contention. The court declared that the *City of Fort Lauderdale* had a valid interest in protecting the beach, stating that maintenance of "a safe beach or 'tourist zone' is of paramount concern to the financial future and growth of the City," that it is the "City's chief asset," and an "integral part in the City's economic development plans."¹⁴⁵

These two federal cases indicate that there is ample room for cities to circumscribe direct solicitation for money and that city councils need not feel abash about preserving the economic vitality of their community.

3. Berkeley

Berkeley, in response to a growing panhandling problem, passed one of the most far-reaching panhandling control ordinances in the country.¹⁴⁶ In addition to the standard controls included in many of the ordinances discussed above, Berkeley went a step farther and prohibited all panhandling in the city at night.¹⁴⁷ A federal district court found this provision to be unconstitutional under the California Constitution.¹⁴⁸ However, while the appeal was pending, there were changes in the composition of the Berkeley City Council and the new Council chose to revise its panhandling control measure in several respects, including the elimination of the prohibition on panhandling at night.¹⁴⁹

4. Baltimore and Portland: Equal Protection Challenges

Panhandling control measures in both Baltimore as well as Portland, Maine were successfully challenged on equal protection grounds.¹⁵⁰ In both cases, the cities had enacted panhan-

143. *See* *Chad v. Fort Lauderdale*, 861 F. Supp. 1057 (S.D. Fla. 1994).

144. *See id.* at 1057.

145. *Id.* at 1063.

146. *See* BERKELEY, CAL., CODE §13.37 (1997).

147. *See id.*

148. *Berkeley Community Health Project v. Berkeley*, 902 F. Supp. 1084 (N.D. Cal. 1995), *vacated*, 966 F. Supp. 941 (N.D. Cal. 1997), *dismissed*, 119 F.3d 794 (9th Cir. 1997).

149. *Berkeley Community Health Project v. Berkeley*, 966 F. Supp. 941 (N.D. Cal. 1997).

150. *Rudolph v. Portland, Maine*, No. 97-230-P-C (D. Me., July 21, 1997) (finding likelihood of success on equal protection challenge); *Pattern v. Baltimore*, No. S93-2389,

ding legislation that sought to allow solicitations by organized charities, while prohibiting the same types of solicitation when made by individuals.¹⁵¹ Both reviewing district courts found such a distinction to be untenable.¹⁵² Both cities have passed revised ordinances to eliminate the exemptions they had provided for organized charities.¹⁵³

D. Time, Place, and Manner: The Legal Standard

The lesson from these precedents is that panhandling can be controlled, provided that the solicitation control ordinance fulfills four requirements. Specifically, they must first be neutral in content; second, narrowly tailored; third, serve a significant governmental interest; and fourth, leave open ample alternative channels of communication.¹⁵⁴

1. Content Neutrality

The first—and often the most troublesome—requirement of regulations on speech is that they must be content-neutral. That is, they must be written so that they do not discriminate against a particular message. In *United States v. Kokinda*, the Supreme Court upheld a postal service regulation which prohibited the solicitation of donations on the sidewalks near the entrances to post offices.¹⁵⁵ The court previously determined that prohibitions on solicitation are content-neutral because they apply to anyone who solicits, and are not intended to target a particular message or exchange of ideas.¹⁵⁶

The legal precedents are supported by common sense. These ordinances apply to all solicitors equally, regardless of whether they are soliciting donations for a religious group, an AIDS services organization, or in order to purchase food. Provided that a solicitor abides by the time, place, and manner restrictions of the ordinance, he or she is free to solicit for any cause or to speak on any subject. No message is discriminated

slip op. at 49 (D. Md., Aug. 18, 1994).

151. *See id.*

152. *See id.*

153. *See, e.g.,* BALTIMORE MD., CODE art. 19, § 249 (1994).

154. *See* *United States v. O'Brien*, 391 U.S. 367 (1968); *Int'l Society for Krishna Conscioasness, Inc. v. Baton Rouge*, 876 R2d 494,497 (5th Cir. 1989).

155. *See* *United States v. Kokinda*, 497 U.S. 720 (1990).

156. *See* *Heffron v. Int'l Soc. of Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981).

against and ail speakers remain free to express themselves on any issue they choose. These measures are therefore content-neutral.

Additionally, the cities that have adopted solicitation restrictions, such as New Haven, Atlanta, Berkeley, Washington, D.C., and San Francisco, are hardly known for inhibitions on personal expression. These cities are simply saying that people must conduct themselves, in public, peacefully and civilly. They are not trying to stifle any message.

This message, though, is not getting through to courts in California. In Berkeley, the same federal court that accepted the bizarre First Amendment argument that sitting on the sidewalk is speech, also held that measures aimed at how direct solicitations for money are conducted are not content-neutral.¹⁵⁷ Similarly, in a case from Riverside, California, a federal district court struck down that city's controls on panhandling because of the deemed content based nature of the regulation.¹⁵⁸

Both of these decisions appear to be based on the state Constitution. Indeed, otherwise, these courts would be ignoring Supreme Court precedent in *Kokinda*. It may be that California constitutional law imposes a greater restraint on its cities because of its extremely narrow view of content neutrality than that confronted by cities in other states.¹⁵⁹ If so, jurisdictions in the state have less authority to protect their citizens and visitors from harassment and intimidation than authorities in the other 49 states and Canada.

2. Narrow Tailoring

In order to be considered narrowly tailored, a statute does not have to completely avoid placing any burden on other activities. "It is now well-settled that regulations restricting the

157. See *Berkeley Community Health Project v. Berkeley*, 902 F. Supp. 1084 (N.D. Cal 1995), *vacated*, 966 F. Supp. 941 (N.D. Cal 1997), *vacated*, 119 F.3d 794 (9th Cir. 1997).

158. See *Church of the Soldiers of the Cross of Christ v. Riverside*, 886 F. Supp. 721 (C.D. Cal 1995).

159. For example, a federal district court enjoined the enforcement of a solicitation ban at Los Angeles International Airport on California state constitutional grounds. See *Int'l Society of Krishna Consciousness, Inc. v. Los Angeles*, 966 F. Supp. 956 (C.D. Cal 1997). But see *Intl Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992) (ruling that similar restrictions at Port Authority of New York and New Jersey are permissible under federal constitutional law).

time, place or manner of expressive conduct do not violate the First Amendment simply because there is some imaginable alternative that might be less burdensome on speech."¹⁶⁰

Ordinances aimed at aggressive solicitation and solicitation where it is particularly intrusive reach only conduct that is harassing, coercing, intimidating, or threatening. Furthermore, they leave open ample opportunities for non-confrontational methods of solicitation, from an open palm to an outright demand, as long as the beggar does not make his appeal in the proscribed manner.

3. Governmental Interest

Solicitation controls are aimed at protecting the public from intimidation and in ensuring the vitality of urban life. Courts have no trouble finding these interests to be pressing and legitimate.¹⁶¹ A federal court in Baltimore found such an interest to be compelling.¹⁶² In sum, there is ample room for municipal regulation of soliciting, and cities across the country are turning to such controls.

Does this mean I am eager for the U.S. Supreme Court to hear a begging case? No. The current Court has shown a marked ignorance concerning the realities of the everyday life of most Americans. These socially-alloof justices are unlikely to understand the nature and causes of homelessness, the limited relationship between homelessness and panhandling, or the effect of panhandling on the vitality of an area. This makes it possible that the Supreme Court would consider upholding a solicitation control measure to be silencing the poor. This is hardly the case, of course, and any jurisdiction defending one of these ordinances will need to say so boldly, clearly, and without shame if they find itself before the high Court. At present, the current Supreme Court jurisprudence offers cities plenty of flexibility in dealing with the more serious panhandling problems.

160. *Young v. New York City Transit Authority*, 903 F-2d 146,159 (2d Cir. 1990) (quoting *United States v. Albertini*, 472 U.S. 675,689 (1985)).

161. See *Roulette v. Seattle*, 97 K3d 300 (9th Cir. 1996); *Ulmer v. Municipal Court* 27 CaL 445 (1976).

162. *Patton v. Baltimore*, No. S 93-2389, slip op. at 1 (D. Md, Aug. 18,1994).

VL SOME FINAL THOUGHTS ON FAIRNESS

Before concluding, I believe it is necessary to offer my perspective on the fairness and justice of these public order ordinances. It is quite common for the first reaction to this type of public space protection to be a cry of "unfair." There is nothing unfair or mean-spirited about wanting to be free from harassment and intimidation, wanting urban parks where children can play and adults can enjoy the green, and the quiet, or wanting urban paries that are not filled with litter, human waste, needles, bedrolls, drug users, and used condoms.

The measures discussed in this Article are not aimed at the homeless. Rather, they are aimed at and address *conduct*, and only those who choose to engage in the prohibited conduct fall within their reach. These rules, moreover, are set so that *all* people feel welcome in the public spaces. Those with Armani suits, and those with nose rings; elderly people and gay couples; residents and visitors; rich, middle, and struggling classes.

Most people in the cities that are adopting these measures can be assumed to care about the plight of those on their streets, and believe that it is not any kind of a life for anyone to remain there, neglected, with their addictions intact, until they die of their addiction or some disease that could have been prevented had continued life on the street been prevented.

At the same time, many understand that for the homeless caring does not mean permissiveness. Rather, sometimes, caring requires "tough love" and providing strong incentives to move from the street to more adoptive alternatives. Nor does caring mean lowering the threshold of public conduct because people are drunk, alcoholics, or drug addicts. Standards of conduct apply to all of us, for all of our benefit. It is inconsistent with both experience and the principal of equal human dignity to suggest that because someone has suffered hardships he or she cannot be held to standards that apply to the rest of us.

Nor are these measure unfair to the poor. As I noted in the initial section, the poor do not generally act in the manner proscribed by these measures. Moreover, it is not the affluent who reap the benefits of these measures. The rich, after all, can take care of themselves. They are not, speaking generally, dependent upon public parks for recreation. They usually live in se-

cured communities, and shop in safe and comfortable places. The well-off can also leave an area when it gets intolerable. Rather, it is the poor and middle-classes who depend upon the safety and civility of public spaces. They have fewer options about relocating, less options about schools, and less options about private recreational places.

VII. CONCLUSION

Restrictions on urban camping, lying or sitting on sidewalks, and aggressive panhandling are aimed at preserving the vitality of urban communities and the safety and civility of the public spaces that support it. Individuals may very well have the right to ask others for money or to sleep in public, but they do not have the right to do so in any way they choose or in a manner that infringes on the interests of others or of the community as a whole.

The ordinances discussed in this Article represent a balanced answer to pressing urban problems. These approaches are respectful of constitutional rights, conducive to the recovery of street addicts, and consistent with a compassionate approach to the less fortunate. These efforts are aimed at creating or preserving welcoming, attractive, and safe public spaces for all of us to use and enjoy.