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Homelessness and the Impossibility to Obey the Law

Terry Skolnik

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HOMELESSNESS AND THE IMPOSSIBILITY TO OBEY THE LAW

*Terry Skolnik**

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INTRODUCTION

Beginning in the mid-1980s and continuing throughout the early 1990s, a widely enforced city of Miami ordinance prohibited people from sleeping in public and on the private property of others without their consent.¹ Around that time, there were roughly 6000 homeless people, but only enough shelter space for fewer than 700 people.² And these were the statistics before the first winds of Hurricane Andrew began to blow and the first house collapsed. The storm eventually ripped through the south of Florida on an unprecedented path of destruction, leaving upwards of 200,000 people homeless in its catastrophic aftermath.³ At the time the public-sleeping ordinance was enforced, the vast majority of the city's homeless population had nowhere to sleep.⁴ It was impossible for them to obey the law.

In this Article, the central issue is how difficult—and sometimes impossible—it can be for homeless people to obey the law on a consistent basis, compared to those with access to housing, and why this is objectionable. Examining this issue is of fundamental importance because imposing laws which people may not be able to consistently avoid breaking undermines the legitimacy of holding people accountable for their behavior through punishment, disregards their dignity and autonomy, and undermines the law.⁵

1. *See* *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 n.11 (S.D. Fla. 1992).

2. *Id.* at 1553, 1558.

3. *Id.* at 1158–59.

4. *Id.* at 1580–81.

5. *See* H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 22–24 (2d ed. 2008).

This Article is focused on prohibitions against conduct the homeless may not be able to avoid engaging in as part of their existence, such as sleeping in public, begging, and loitering.⁶ It is not concerned with laws that are impossible for the entire population to obey, which, as Lon Fuller once observed, “no sane lawmaker, not even the most evil dictator, would have any reason to enact.”⁷ Instead, the analysis is more focused on the selective enforcement of laws against the homeless and whether they may not be able to avoid breaking certain laws that regulate conduct characteristic of their condition.⁸

The law can be practically impossible for the homeless to obey in three contexts. First, some individual laws—like the Miami city ordinance mentioned earlier that banned sleeping in public—comprehensively prohibit behaviors which homeless people cannot avoid engaging in as part of their daily existence because of a lack of alternatives that would make obeying the law possible.⁹

Second, in some cases, the law imposes narrow prohibitions against certain behavior which, individually, may each be possible to obey. However, the cumulative effects of these ordinances as well as property laws can amount to the near-equivalent of a comprehensive ban on prohibited activities where few legal alternatives exist.¹⁰ My contention is that in such contexts it can be extremely difficult, if not impossible, for the homeless to exist without being penalized even though people with access to housing would have no such problems.

6. See Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, 29 ANTIPODE 303, 307 (1997); David M. Smith, Note, *A Theoretical and Legal Challenge To Homeless Criminalization as Public Policy*, 12 YALE L. & POL’Y REV. 487, 492 (1994).

7. LON L. FULLER, *THE MORALITY OF LAW* 70 (1964).

8. See Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight-Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL’Y 145, 147 (1999); Tami Iwamoto, Note, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 522–23 (2007).

9. See Smith, *supra* note 6, at 492 (citing examples of behaviors related to the daily existence of homeless persons that are illegal).

10. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 315–16 (1991); James Duncan, Editor’s Note, *Men Without Property: The Tramp’s Classification and the Use of Urban Space*, THE URBAN SOCIOLOGY READER 225 (Jan Lin & Christopher Mele eds., 2013) (discussing constant police surveillance); see also Marie-Eve Sylvestre & Céline Bellot, *Challenging Discriminatory and Punitive Responses to Homelessness in Canada*, ADVANCING SOCIAL RIGHTS IN CANADA 171–72 (Martha Jackman & Bruce Porter eds., 2014) (noting how the visibility of the homeless renders them more likely to be penalized).

Third, quality of life offenses can regulate nearly every act the homeless engage in, including their movement, presence in different places, and even their sleep.¹¹ Because the homeless are constantly in the jurisdiction where these laws are enforced, it may be impossible for them to avoid a selective or discretionary enforcement of the laws against them, even though people with access to housing would not have comparable difficulty.

This Article has four parts. Part I briefly examines why it is important for individuals to be able to follow the laws to which they are subjected. In light of those reasons, Part II looks at examples of individual prohibitions that may be impossible to obey, including laws comprehensively prohibiting sleeping in public, camping in public, and panhandling. Part III demonstrates that the homeless may not be able to avoid breaking cumulative individual prohibitions against different conducts in addition to laws which are selectively enforced. This Article concludes by considering the legal consequences of these laws. Notably, in Part IV, I build on the work of Jeremy Waldron and argue that the defense of necessity should generally not be invoked in cases where it is practically impossible to obey the law.¹² Rather, invoking the issue of practical impossibility can be the foundation for contesting the constitutionality of laws, can lead to granting injunctions against the enforcement of laws disproportionately affecting the homeless, and can stimulate policy change in how laws are applied against the homeless.

I. THE IMPORTANCE OF BEING ABLE TO OBEY THE LAW

A. Impossibility, Autonomy, and Self-Determination

Discussions regarding the importance of being able to obey the law can be traced as far back as Roman law.¹³ More recently, several prominent contemporary legal theorists have addressed the issue in different contexts. Lon Fuller has argued that a fundamental characteristic of the law is that it should not require those subjected to it to do, or refrain from doing, the impossible.¹⁴ In his view, the

11. See Iwamoto, *supra* note 8, at 522–23.

12. See generally Jeremy Waldron, *Why Indigence Is Not a Justification*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW (William C. Heffernan & John Kleinig eds., 2000) [hereinafter *Why Indigence Is Not a Justification*].

13. See e.g., David Daube, *Greek and Roman Reflections on Impossible Laws*, 12 NAT'L L. F. 1, 4 (1967); Robert Henle, *Principles of Legality: Qualities of Law—Lon Fuller, St. Thomas Aquinas, St. Isidore of Seville*, 39 AM. JURIS. 47, 60–62 (1994).

14. FULLER, *supra* note 7, at 162.

issue of impossibility is not limited to laws which generally cannot be observed by the entire population, but rather, adopting an individual capacity-oriented approach, extends the principle to “rules that require conduct beyond the powers of the affected party.”¹⁵ More directly, he ties the importance of being able to obey the law to the notions of autonomy and dignity.¹⁶

With respect to autonomy, in Fuller’s view the law ought to treat individuals as responsible and autonomous agents, meaning that the law recognizes their capacity to shape their own future and act as rational agents in making decisions.¹⁷ This implies that the law must recognize how individuals live their lives and shape their own futures in accordance with the rules that guide the legality of their behavior.¹⁸ For example, H.L.A. Hart analogized the law to a choosing system in which the population is informed of the rules in advance, made aware of the consequences of breaking them, and punished for choosing to violate them.¹⁹ In such a system, individual freedom is maximized because people can weigh the consequences of breaking the law, with the choice of doing so being left up to them.²⁰ But when laws are impossible to obey, people never know when they will be punished and it makes it far more difficult to plan their lives.²¹ The fact that breaking an impossible law is inevitable also makes the enforcement of these rules a sort of unexpected ambush,²² where individuals lose peace of mind as they wait to be punished for a situation they cannot avoid. Such rules demean one’s capacity for self-determination because they send the message that no matter how rationally one behaves or how hard one tries to obey the rules in place, they will inevitably fail and it can lead to negative consequences. Arresting or punishing people for violating these types of rules implies that individuals who are not able to obey the law are in fact making conscious and rational choices to break it. To draw an analogy described by Martha Nussbaum, the rules disingenuously treat those who are starving as if they have food but are choosing to fast.²³

15. FULLER, *supra* note 7, at 39.

16. *Id.* at 162.

17. *Id.* at 39, 162.

18. HART, *supra* note 5, at 22–23.

19. *Id.* at 22–23.

20. *Id.* at 23.

21. *Id.* at 23–24.

22. See John Gardner, *Wrongs and Faults*, APPRAISING STRICT LIABILITY 70 (A.P. Simester ed., 2005).

23. See Martha C. Nussbaum, *Capabilities and Human Rights*, 66 FORDHAM L. REV. 273, 289 (1997).

B. Impossibility, Dignity, and Opportunities

That it is impossible for only some people—or certain groups of people—to obey the law also raises important dignity-related concerns. Dignity implies that all individuals have inherent worth as members of the human community and are deserving of respect and concern as moral beings.²⁴ As Jeremy Waldron has argued, it can be construed as a type of normative status recognizing the “high and equal rank of every human person”²⁵ and that people’s freedom should not be limited as an unwilling means to the ends of others.²⁶ Dignity is therefore closely tied to the notion of equality.²⁷ For instance, the Supreme Court of Canada has recognized that dignity is an important aspect of the constitutional right to equal treatment before the law.²⁸ Dignity celebrates what makes individuals different from one another and strives to treat them as equals, rather than using these differences as a justification for treating them as if they were less worthy of respect or concern.²⁹ Together, the notions of dignity and equality set a sort of floor for how people should be treated in a way that recognizes their high value as rational human beings of equal worth.³⁰

If the law takes these notions seriously, it must recognize that there are people in our society who do not have the same basic capacities and opportunities to obey the law like everyone else.³¹ Hart famously explained the moral objection to punishing those who did not have the basic capacities (physical and mental) and opportunities to obey the law when he argued:

What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair

24. See JEREMY WALDRON, DIGNITY, RANK AND RIGHTS 49 (Meir Dan-Cohen ed., 2012) (citing *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, ¶ 51 (Can.)); Rex D. Glensy, *The Right to Dignity*, 66 COLUM. HUM. RTS. L. REV. 65, 76 (2011) (describing Kant’s traditional notion of dignity).

25. WALDRON, *supra* note 24, at 14.

26. AHARON BARAK, HUMAN DIGNITY: THE CONSTITUTIONAL VALUE AND THE CONSTITUTIONAL RIGHT 27–28 (2015).

27. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 198–99 (1977).

28. See *Andrews v. Law Soc’y of B.C.*, [1989] 1 S.C.R. 143, 171 (Can.) (finding the constitutional right under Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11, § 15 (U.K.)); *Egan v. Canada*, [1995] 2 S.C.R. 513, 571–72 (Can.) (same).

29. See *Andrews*, 1 S.C.R. 143 at 171.

30. WALDRON, *supra* note 24, at 29.

31. See HART, *supra* note 5, at 153.

opportunity to exercise these capacities. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity, etc., the moral protest is that it is morally wrong to punish because ‘he could not have helped it’ or ‘he could not have done otherwise’ or ‘he had no real choice’.³²

But there are other problems with impossible laws which extend beyond the mere fact that the person cannot do what is asked of them and it is wrong to blame them for acts they could not avoid engaging in and that may be morally innocent in nature.³³ Notably, I am concerned with how requiring people to follow impossible rules negatively impacts their dignity and equality interests. The fact that someone does not have the basic capacities or opportunities to obey the law like everyone else should not mean that they lose their dignity or right to be treated equally; it should not detract from their inherent worth as people or mean that they are less worthy of respect or consideration.³⁴ If lack of basic opportunities diminished a person’s inherent value as a member of the human community, the law can be used as a tool to allow the majority to act as masters over those with fewer opportunities and who are perceived as less desirable.³⁵ If one accepts Nussbaum’s capabilities approach—where individuals must benefit from certain capabilities in order to have a basic quality of life as human beings³⁶—the law should punish people for failing to avail themselves of the basic opportunity to obey the law, instead of punishing people for failing to have the basic opportunity to obey the law.³⁷

An important aspect of being a dignified member of the human community also entails being able to stand up for oneself and assert one’s rights in an unapologetic manner.³⁸ The central problem with impossible laws is that when a person stands up for themselves by asserting their rights, demanding their inherent value as a rational being be recognized, and morally protesting the fact that it is

32. HART, *supra* note 5, at 152.

33. See R. v. Ruzic, [2001] 1 S.C.R. 687, at ¶¶ 29, 40 (Can.) (citing Perka v. The Queen, [1984] 2 S.C.R. 232 (Can.)).

34. See MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 18–19, 24 (2011).

35. BARAK, *supra* note 26, at 27–28.

36. NUSSBAUM, *supra* note 34, at 34.

37. A.P. Simester, *A Disintegrated Theory of Culpability*, THE SANCTITY OF LIFE AND THE CRIMINAL LAW: THE LEGACY OF GLANVILLE WILLIAMS 184 (Dennis J. Baker & Jeremy Horder eds., 2013) (making an analogous argument with respect to capacity).

38. See WALDRON, *supra* note 24, at 29.

impossible for them to obey the law even though other people have no problem doing so, the operation of the law suggests that none of this matters.³⁹ As I argue throughout the Article, these types of laws send a message that the life and preferences of those subjected to impossible laws are worth less than those who are afforded basic opportunities. Furthermore, as I discuss in Part II, trying to follow certain rules when people do not have the capacities or opportunities to obey them can in fact harm certain members of society as well as disregard the sanctity of their life and security interests.⁴⁰

C. Lack of Fair Opportunities and Lack of Complementarity

My concern is that by precluding the homeless from engaging in certain behaviors in public without the provision of reasonable and legal alternatives, there is a lack of fair and consistent opportunity to obey the law.⁴¹ Waldron has explored where the lack of a fair opportunity for the homeless to obey the law stems from, concluding that the combination of property law rules and quality of life offenses result in the homeless being governed by the law differently than people with access to housing.⁴² He argues that if everyone had access to a home, it would be fair to regulate certain life-sustaining conducts undertaken in public, such as urinating and sleeping, because they could be restricted to the private realm.⁴³ Because of this possibility, public spaces could be regulated to preclude such activities that were undertaken complementarily to activities that those with homes would normally do in their own homes.⁴⁴ This is what Waldron calls the “Complementarity Thesis.”⁴⁵ However, when people have no access to private places because they are homeless, they are not undertaking these life-sustaining conducts in a complementary way. Rather, it can be the primary and only place they can perform them.⁴⁶ As a result, public spaces and the conduct of the homeless must be regulated in light of this fundamental difference: the lack of complementarity. In Waldron’s words:

39. FULLER, *supra* note 7, at 162–63.

40. *See Victoria (City) v. Adams*, [2009] 100 B.C.L.R. 4th 28, ¶ 110 (Can. B.C.).

41. *See Waldron, supra* note 10, at 322 (discussing homeless persons’ lack of fair opportunity).

42. *See* Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 397 (2000).

43. *Id.* at 394.

44. *Id.*

45. *Id.*

46. *Id.* at 395.

Unfortunately, it is not appropriate for the regulation of public places in a society where there are large numbers of homeless people. In such a society, public spaces have to be regulated on a somewhat different basis. They have to be regulated in light of the recognition that some people have no private space - not even the temporary privacy that public shelters or public toilets would afford - to come out of or to return to. Fairness demands that public spaces be regulated in light of the recognition that large numbers of people have no alternative but to be and remain and live *all their lives* in public. For such persons, there is an unavoidable failure of the complementarity between the use of private space and the use of public space, and unless we are prepared to embrace the most egregious unfairness in the way our community polices itself in public, we are simply not in a position to use that complementarity as a basis for regulation.⁴⁷

The lack of fair opportunity for the homeless to obey the law created by the lack of complementarity between public and private also raises important concerns relating to punishment for breaking impossible laws. On the one hand, because a person could not choose to obey the law even if they wanted, they risk being punished despite the fact that they may be morally innocent.⁴⁸ In light of this, retribution cannot justify holding actors accountable through punishment in these cases, because people do not deserve to be punished for behavior they cannot avoid, or for which they are morally innocent.⁴⁹ On the other hand, the problem with enforcing laws that people cannot avoid breaking is that they fail in deterring the future breach of the same rules.⁵⁰ This is particularly the case with respect to prohibitions against public acts that the homeless must do as part of their existence and cannot avoid, such as sleeping or urinating. If a person has nowhere to lawfully sleep or urinate but in public, punishing them for doing these things in public will not prevent a reoccurrence, even if the punishment is harsh.⁵¹ As a result, the enforcement of these ordinances will necessarily be ineffective.⁵² As one author has put it:

47. *Id.*

48. *See e.g.*, *R. v. Sault Ste. Marie*, [1978] 2 S.C.R. 1299, 1310 (Can.); *R. v. Ruzic*, [2001] 1 S.C.R. 687, ¶¶ 29, 40 (Can.).

49. *See Smith*, *supra* note 6, at 495–96.

50. *See Maria Foscarinis*, *Downward Spiral: Homelessness and its Criminalization*, 14 *YALE L. & POL'Y REV.* 1, 43 n.331 (1996).

51. *See Smith*, *supra* note 6, at 496 (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

52. Jane B. Baron, *Homelessness as a Property Problem*, 36 *URB. LAW.* 273, 287 (2004).

[A]n anti-camping ordinance, however well it passes muster under existing law, will be flat out ineffective to stop public sleeping if homeless people have no rights to be in private spaces. The same can be said for statutes designed to regulate begging or loitering; the effectiveness of such statutes will depend directly on whether alternatives to the proscribed acts are realistically available. Ordinances designed to eliminate or curtail behaviors found offensive to those who are not homeless must deal with the options that are, or more accurately, *are not* available to the homeless.⁵³

II. INDIVIDUAL LAWS THAT CAN BE IMPOSSIBLE TO OBEY

Many individual laws only restrict certain behaviors of homeless people in certain places or between specified times, and may be entirely possible to obey.⁵⁴ The concerns that I will address in this section, however, relate to the extreme difficulty and impossibility in obeying comprehensive bans—or bans which amount to comprehensive prohibitions—on certain behaviors in which the homeless inevitably engage as part of their existence because little or no reasonable alternatives exist.⁵⁵ These are cases of chronic impossibility, where both the lack of alternatives and breach of legal rules are persistent. In this section, I discuss two particular comprehensive prohibitions: those that ban sleeping or camping in public places and those that prohibit panhandling.

A. Anti-Public Sleeping Laws and Lack of Shelter

1. *Anti-Public Sleeping Laws*

The first example of laws that can be impossible for the homeless to obey on a consistent basis due to lack of alternatives involves comprehensive bans on sleeping in public or public camping when there is insufficient shelter space and access to housing. Every person needs to sleep as part of her existence, and depriving oneself of sleep is harmful.⁵⁶ As Waldron argues, the impossibility of obeying

53. *Id.*

54. See Jamie Michael Charles, Note, “America’s Lost Cause”: *The Unconstitutionality of Criminalizing Our Country’s Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 319 (2009).

55. See *e.g.*, NAT’L L. CTR. ON HOMELESSNESS AND POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 17–18 (2014) [hereinafter NO SAFE PLACE].

56. Michelle A. Short & Siobhan Banks, *The Functional Impact of Sleep Deprivation, Sleep Restriction, and Sleep Fragmentation*, SLEEP DEPRIVATION AND

comprehensive bans against sleeping in public is largely rooted in a lack of access to both public and private places where one can lawfully sleep.⁵⁷ To paraphrase his words, every act that a person engages in has to be undertaken somewhere: either in public or on private property.⁵⁸ Homeless people may not have access to their own private property or place where they can lawfully sleep. The only way they can sleep on the private property of another is with the owner's permission,⁵⁹ even though in some cases, the law forbids staying on another's private property even with permission. For example, in Placerville, California, it is an offense for a property owner to allow someone to camp on their private property for more than five consecutive days, even with permission.⁶⁰

If a person does not have access to his or her own private property or the private property of another to lawfully sleep, their only option is to sleep on public property. However, when there is a comprehensive ban on sleeping on public property, this option is also removed.⁶¹ Because homeless people can neither sleep on private property nor on public property, there may be nowhere they can lawfully sleep—there may be no alternative. As one author has noted, even though these laws appear to be neutral by banning public sleeping for everyone, “the impact of these laws fall almost exclusively on the homeless, because they are the only societal group with no alternative to sleeping outdoors.”⁶² The cumulative effect of the lack of possibility to sleep lawfully in either public or private spaces is that the act of sleeping becomes entirely prohibited for the homeless and effectively excludes them from the jurisdiction, even if there is no law which comprehensively bans the activity in both public and private.⁶³

Cities have imposed comprehensive bans on sleeping in public even though there was insufficient shelter space. This was the case with the

DISEASE: EFFECTS ON THE BODY, BRAIN AND BEHAVIOR 13 (Matt T. Bianchi ed., 2014).

57. Waldron, *supra* note 10, at 315.

58. *Id.* at 296.

59. *See id.* at 304; *see also* Mitchell, *supra* note 6, at 310.

60. PLACERVILLE, CAL., CITY CODE, § 6-19-3 (2014); *see also* NO SAFE PLACE, *supra* note 55, at 18 (citing the Placerville code).

61. *See* Waldron, *supra* note 10, at 315.

62. Charles, *supra* note 54, at 340.

63. *See* Waldron, *supra* note 42, at 397; *see also* 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, 618–19 (1989).

Miami ordinance mentioned in the beginning of this Article, which prohibited sleeping “on any of the streets, sidewalks, public places or upon the private property of another without the consent of the owner thereof.”⁶⁴ At the time when the ordinance was enforced, between 500 and 700 of the city’s 6000 homeless people had access to shelter space.⁶⁵ Even when the city of Miami stopped enforcing the ordinance prohibiting public sleeping after another Florida court “called into question the validity of a similar ordinance,”⁶⁶ arrest records showed that the police began selectively enforcing trespass, loitering, and park closure ordinances to arrest and punish people who slept in public.⁶⁷ The ordinance was eventually challenged in a class action suit in *Pottinger v. Miami*.⁶⁸ The plaintiffs who represented the nearly 6000 homeless people in the city claimed that the ordinances violated their Eighth Amendment rights and resulted in cruel and unusual punishment because they had no alternatives but to sleep in public and had not chosen to be homeless.⁶⁹ They also argued that the laws violated their Fourteenth Amendment right to equal protection.⁷⁰

The court recognized that the state of homelessness was rarely, if ever, chosen and accepted.⁷¹ Expert evidence showed that it was the result of different factors beyond a person’s control, including financial difficulties, as well as mental and physical illnesses.⁷² The court also noted that the ordinances were overbroad in that they allowed the homeless to be arrested for “harmless, inoffensive conduct that they are forced to undertake in public places.”⁷³ Ultimately, the court in *Pottinger* concluded that the city’s practice of arresting the homeless for engaging in innocent acts like sleeping in public constituted a cruel and unusual punishment and violated a

64. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1559 n.11 (S.D. Fla. 1992). Moreover, the city also mandated the closing of parks between 10 PM and 7 AM. See *id.* at 1560 n.12.

65. See *id.* at 1564. Notably, although there were approximately 700 beds in the city’s homeless shelters, 200 were reserved for people who qualified through certain programs. *Id.*

66. *Id.* at 1558 n.8 (citing *Hershey v. City of Clearwater*, 834 F.2d 937, 940 (11th Cir. 1987)).

67. *Id.* at 1566–67.

68. See generally *id.*

69. *Id.* at 1561.

70. *Id.* at 1578.

71. *Id.* at 1563–64.

72. *Id.* at 1558, 1564–65.

73. *Id.* at 1577.

person's right to equal protection under the law.⁷⁴ Moreover, the court enjoined the city from arresting the homeless and from enforcing laws that punish the homeless for innocent public conduct, beyond their control, which they must engage in as part of their existence.⁷⁵ Following the decision, a settlement referred to as the "Pottinger Agreement" was reached which prevented violations based on "life-sustaining conduct" except in certain circumstances where available alternatives to the conduct were made known to the homeless person and that person refused it.⁷⁶

A similar law which comprehensively banned public sleeping existed in Los Angeles until it was struck down as unconstitutional in 2006.⁷⁷ The next year, a settlement was reached which limited its enforcement between certain hours.⁷⁸ The ordinance originally stated: "No person shall sit, lie or sleep in or upon any street, sidewalk or other public way," and made it an offense punishable by a \$1000 fine or six months in prison.⁷⁹ At the time, there were roughly 1000 more homeless people than available shelter spaces in Skid Row alone.⁸⁰ In the entire county of Los Angeles, there were roughly 50,000 more homeless people than available beds.⁸¹ Despite these cases, some American cities continue to prohibit sleeping in public.

According to the National Law Center on Homelessness and Poverty (NLCHP), roughly eighteen percent of American cities impose city-wide bans on public sleeping.⁸² For example, a Dallas ordinance states: "A person commits an offense if he . . . sleeps or dozes in a street, alley, park, or other public place."⁸³ Although the law was originally struck down as unconstitutional in 1994 because

74. *Id.* at 1583–84. Notably, the court concluded that ordinances which punish acts like public sleeping and eating when the individual has nowhere else to go violate the individual's fundamental right to travel. *Id.* at 1580.

75. *Id.* at 1584.

76. See generally *History of the Pottinger Agreement*, ACLU OF FLA., <https://aclufl.org/pottinger/history> [<https://perma.cc/X45X-4FQM>]. Following the Pottinger Agreement, a homeless person can only be ticketed for life-sustaining conduct if a shelter has available space, the person was offered access to that shelter, refused to go, and subsequently committed one of the listed offenses. *Id.*

77. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1122 (9th Cir. 2006).

78. See *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007).

79. *Jones*, 444 F.3d at 1123.

80. *Id.* at 1122.

81. *Id.*

82. NO SAFE PLACE, *supra* note 55, at 7.

83. DALLAS, TEX., MUNICIPAL CODE, § 31-13; see also *Johnson v. City of Dallas*, 61 F.3d 442, 445 (5th Cir. 1995) (overruling the District Court's preliminary injunction enjoining enforcement of the ordinance for lack of standing).

the trial court ruled that being convicted of the offense constituted cruel and unusual punishment,⁸⁴ the decision was reversed on appeal one year later.⁸⁵ The rationale behind upholding the law was that none of the plaintiffs had actually been convicted of the offense, and therefore lacked the requisite standing to contest the law as being a cruel and unusual punishment.⁸⁶

In 2004, despite the failure of the constitutional challenge, roughly 36% of Dallas' homeless population did not have access to some form of shelter.⁸⁷ This meant that Dallas' homeless population could continue to be arrested for sleeping in public provided they were not prosecuted and convicted for the offense even though there was insufficient shelter space to accommodate them.⁸⁸ Despite having substantially reduced the number of chronic homeless people in the city, a 2015 Point in Time (PIT) count estimated that 363 of the roughly 3141 homeless people were unsheltered, and that the number of chronically homeless people had increased from the previous year.⁸⁹

Some state penal codes also have provisions which penalize sleeping in public. For instance, a California Penal Code provision creates the misdemeanor offense of disorderly conduct for "lodg[ing] in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the

84. See *Johnson v. City of Dallas*, 860 F. Supp. 344, 359 (N.D. Tex. 1994).

85. See *Johnson*, 61 F.3d at 445.

86. *Id.* at 444–45.

87. See AUSTIN/TRAVIS CTY. HEALTH & HUM. SERVS. DEP'T, A COMPARISON OF HOMELESS SERVICES AMONG FIVE CITIES UTILIZING EXISTING DATA: AUSTIN, DALLAS, HOUSTON, SAN ANTONIO, AND SEATTLE 6 (2005), <http://canatx.org/homeless/documents/HomelessServiceComparisonFiveCities.pdf> [<https://perma.cc/CN49-VZ3M>] [hereinafter COMPARISON OF HOMELESS SERVICES]; see also Justin Cook, *Down and Out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances*, 8 SCHOLAR 221, 223 (2006) (citing COMPARISON OF HOMELESS SERVICES). All five cities studied had insufficient shelter space to accommodate the homeless. Cook, *supra*, at 223.

88. See Eric Nicholson, *Dallas Police Are Now Rounding Up Homeless People for "Sleeping in Public" Downtown*, DALLAS OBSERVER (Feb. 5, 2014), <http://www.dallasobserver.com/news/dallas-police-are-now-rounding-up-homeless-people-for-sleeping-in-public-downtown-7121564> [<https://perma.cc/Q3RG-JLQG>].

89. METRO DALLAS HOUS. ALL., 2015 POINT-IN-TIME HOMELESS COUNT AND SURVEY REPORT 6 (2015), <http://www.mdhadallas.org/wp-content/uploads/2014/08/2015-PIT-Report-FINAL.pdf> [<https://perma.cc/947D-FQMH>]; see also Eric Nicholson, *Dallas' Neverending Crackdown on Sleeping While Homeless*, DALLAS OBSERVER (Jan. 29, 2016), <http://www.dallasobserver.com/news/dallas-neverending-crackdown-on-sleeping-while-homeless-7971590> [<https://perma.cc/372J-XN4>].

possession or in control of it.”⁹⁰ Yet according to 2012 statistics, only 35% of homeless persons in the state have shelter on a particular night.⁹¹ If the homeless sleep on public property, they can be ticketed or arrested for disorderly conduct.⁹² Yet if they sleep on another person’s private property without their permission, they can be ticketed for trespassing.⁹³ Even homeless persons themselves may be unaware of a public place where they can sleep without being penalized. In a 2013 survey, only a quarter of the homeless persons surveyed stated they knew of a public place where they could legally and safely sleep.⁹⁴

2. *Anti-Public Camping Laws*

Other laws do not specifically ban sleeping in public, but forbid camping or erecting temporary shelters in public despite a lack of available shelter space.⁹⁵ Without these temporary shelters, homeless people are unable to sleep outside without exposing themselves to low temperatures, rain, wind, or snow.⁹⁶ In 2005, the city of San Antonio approved a city ordinance which banned camping in any public place, unless the person had permission or paid for a daily permit.⁹⁷ Around that time, there were roughly only enough emergency shelter spaces for half of the homeless population.⁹⁸

90. CAL. PENAL CODE § 647(e) (West 2013); *see also* BERKELEY LAW POLICY ADVOCACY CLINIC, CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE, 7 (2015) [hereinafter CALIFORNIA’S NEW VAGRANCY LAWS].

91. *See* Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL’Y 197, 201 (2014) (citing U.S. DEP’T OF HOUS. & URBAN DEV. OFF. OF COMM. PLAN. AND DEV., THE 2012 POINT-IN-TIME ESTIMATES OF HOMELESSNESS: VOLUME I OF THE 2012 ANNUAL HOMELESS ASSESSMENT REPORT 3 (2012)).

92. PENAL CODE § 647(e).

93. *See* Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J. LEGAL & SOC. PROBS. 293, 321 n.168 (1996).

94. *See* NO SAFE PLACE, *supra* note 55, at 16.

95. *See id.* at 18–19.

96. *See* Victoria (City) v. Adams, [2009] 100 B.C.L.R. 4th 28, para. 28 (Can. B.C.).

97. Cook, *supra* note 87, at 223 (citing SAN ANTONIO, TEX., CODE OF ORDINANCES, §§ 21–28 (2005)). Moreover, the cost of an overnight permit for camping in a public area is \$20 and requires a reservation. SAN ANTONIO, TEX., CODE OF ORDINANCES, §§ 22–25 (2016).

98. Cook, *supra* note 87, at 230 (noting there were roughly 3300 homeless persons yet only approximately 1617 shelter beds in the year 2004); *see also* COMPARISON OF HOMELESS SERVICES, *supra* note 87.

Two similar situations occurred in the province of British Columbia, Canada. The first occurred in the city of Victoria, where there were over 1000 homeless persons but only 141 regular shelter spaces, and 326 shelter spaces in cases of extreme weather.⁹⁹ At the time, bylaws prohibited setting up tents or shelters in public parks or on streets.¹⁰⁰ Experts testified at trial that if people tried to sleep without shelter, they exposed themselves to the elements and associated risks of developing skin infections, frostbite, hypothermia, and certain communicable diseases.¹⁰¹ According to the monthly weather averages for the city, the average low temperature was below ten degrees Celsius (fifty-one degrees Fahrenheit) for eight months of the year.¹⁰² When the City obtained an injunction to enforce the bylaws which would result in the dismantling of the camp, a group of homeless persons brought a constitutional challenge to the bylaws so as to enjoin their enforcement.¹⁰³ Notably, they contended that obeying the bylaws exposed them to the risk of injury and death by preventing them from erecting shelter which would otherwise protect them from the elements.¹⁰⁴ They argued that the ordinances deprived them of their right to life, liberty, and security of the person guaranteed by Section 7 of the Canadian Charter and in a manner that was not in accordance with principles of fundamental justice.¹⁰⁵

In Canadian law, establishing a violation of a Section 7 constitutional right entails a two-step analysis, where the court must first conclude that a person's constitutional right to either life, liberty,

99. See *Adams*, 100 B.C.L.R. 4th 28, at para. 28.

100. See *id.* at paras. 22–23 (citing City of Victoria, B.C., Parks Regulation Bylaw No. 07-059 §§ 14(1)(d), 16(1) (Can.) (prohibiting “taking up a temporary abode overnight” in parks and erecting tents in public parks without the council’s permission)); City of Victoria, B.C., Streets and Traffic Bylaw, No. 92-84 §§ 73, 74 (Can.) (creating an offense for erecting temporary shelters on streets); see also Sarah Buhler, *Cardboard Boxes and Invisible Fences: The Homeless and Public Space in City of Victoria v. Adams*, 27 WINDSOR Y.B. ACCESS TO JUST. 209, 211–13 (2009).

101. See *Victoria (City) v. Adams*, [2008] B.C.S.C. 1363, paras. 67–68 (Can.).

102. See *Victoria, B.C. Weather and Climate*, TOURISM VICTORIA (2012), <http://www.tourismvictoria.com/plan/climate/> [<https://perma.cc/M2JM-H6VK>].

103. See *Adams*, [2008] B.C.S.C. 1363, para. 2.

104. See *id.* at para. 108.

105. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11, § 7 (U.K.), provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” See also Sarah E. Hamill, *Private Property Rights and Public Responsibility: Leaving Room for the Homeless*, 30 WINDSOR REV. LEGAL & SOC. ISSUES 91, 108–09 (2011).

or security of the person was violated.¹⁰⁶ If this is satisfied, the court must then examine whether the deprivation breached a principle of fundamental justice.¹⁰⁷ Principles of fundamental justice “are about the basic values underpinning [Canada’s] constitutional order”¹⁰⁸ and are “found in the basic tenets . . . of [the country’s] legal system,”¹⁰⁹ and include the principles that laws cannot be arbitrary,¹¹⁰ overbroad,¹¹¹ or vague,¹¹² amongst others.

The Court concluded that the provisions were a form of state action that impaired a homeless person’s ability to protect themselves from the elements and from different forms of harm, and therefore resulted in a deprivation of their right to life, liberty, and security of the person.¹¹³ Moreover, they concluded that the deprivation breached the principle of fundamental justice and that parts of the law were overbroad.¹¹⁴ In their words:

The prohibition on shelter contained in the Bylaws is overbroad because it is in effect at all times, in all public places in the City. There are a number of less restrictive alternatives that would further the City’s concerns regarding the preservation of urban parks. The City could require the overhead protection to be taken down every morning, as well as prohibit sleeping in sensitive park regions.¹¹⁵

As a result, the portions of the law which prevented the homeless from erecting overnight temporary shelters in parks were rendered inoperative due to their unconstitutionality.¹¹⁶

The second situation occurred in the city of Abbotsford, British Columbia. In *Abbotsford v. Shantz*, a series of bylaws prohibited people from erecting temporary shelters in public areas.¹¹⁷ At the

106. See Reference re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486, paras. 105–06 (Can.).

107. *Id.* at para. 105.

108. Canada (Att’y General) v. Bedford, [2013] 3 S.C.R. 1101, para. 96 (Can.).

109. See Reference re B.C. Motor Vehicle Act [1985] 2 S.C.R. 486, 487 (Can.).

110. See R. v. Malmö-Levine; R. v. Caine, [2003] 3 S.C.R. 571 (Can.).

111. See *Bedford*, 3 S.C.R. 1101, at paras. 112–13 (Can.).

112. See R. v. Levkovic, [2013] 2 S.C.R. 204 (Can.).

113. Victoria (City) v. Adams, [2009] 100 B.C.L.R. 4th 28, paras. 82–89 (Can. B.C.).

114. *Id.* at paras. 114–16, 166.

115. *Id.* at para. 116.

116. See *id.* at para. 166 (finding the law unconstitutional pursuant to Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, ch. 11, § 7 (U.K)).

117. See *Abbotsford (City) v. Shantz*, [2015] B.C.S.C. 1909, para. 124 (Can. B.C.); *Abbotsford, B.C., Good Neighbor Bylaw*, Bylaw No. 1256-2003 (Can.); *Abbotsford, B.C., Consolidated Parks Bylaw*, Consolidated Parks Bylaw, 1996, Bylaw No. 160-95 (Can.).

time the ordinances were enforced, there were roughly 151 homeless people, but only roughly 25-30 emergency shelter beds at the local Salvation Army, as well as roughly 100 other beds available at abstinence-based addiction treatment centers.¹¹⁸ The Salvation Army was frequently over capacity.¹¹⁹ Individuals were often turned away, could not stay for more than thirty consecutive days, could only enter and stay if they were sober, and were banned for minor rule violations.¹²⁰ This presented a particular problem for many of the city's homeless, who suffered from drug or alcohol addictions.¹²¹ Other types of shelter had monthly rents costing over \$375 per month and which the homeless could not afford.¹²² This led the trial judge to reject the notion that the homeless people of the city were choosing to live in public and conclude:

In addition, to assert that homelessness is a choice ignores realities such as poverty, low income, lack of work opportunities, the decline in public assistance, the structure and administration of government support, the lack of affordable housing, addiction disorders, and mental illness. I accept that drug and alcohol addictions are health issues as much as physical and other mental illnesses. Nearly all of the formerly homeless witnesses called by DWS gave evidence relating to some combination of financial desperation, drug addiction, mental illness, physical disability, institutional trauma and distrust, physical or emotional abuse and family breakdown which led, at least in part, the witness becoming homeless.

Given the personal circumstances of the City's homeless, the shelter spaces that are presently available to others in the City are impractical for many of the City's homeless. They simply cannot abide by the rules required in many of the facilities that I have discussed above, and lack the means to pay the required rents at others. While some of those who are amongst the City's homeless have declined available shelter, I am satisfied that at the present time there is insufficient accessible shelter space in the City to house all of the City's homeless persons.¹²³

Similar to the *Adams* case, the court concluded that the bylaws deprived the homeless of their constitutional right to life, liberty, and security of the person in a way that breached the principle of

118. *Shantz*, [2015] B.C.S.C. 1909, at paras. 34, 52, 61–62.

119. *Id.* at paras. 52–53.

120. *Id.* at para. 54.

121. *Id.* at para. 74.

122. *Id.* at paras. 57–60.

123. *Id.* at paras. 81–82.

fundamental justice that laws cannot be overbroad.¹²⁴ As a result, the court declared portions of the laws which prevented the homeless from lawfully establishing overnight shelter to be unconstitutional, rendering them inoperative.¹²⁵ Ultimately, the decision resulted in the homeless being allowed to erect temporary shelters between 7 PM and 9 AM.¹²⁶

When laws impose comprehensive bans on conduct, such as public sleeping even though no alternatives are available, there is drastic disparity in the ability to obey the law on a consistent basis between those who have access to housing and those who do not. In these cases, adherence to the law by the homeless on a consistent basis becomes the exception rather than the rule, whereas adherence to the law would be the rule for those with access to housing. Moreover, the possibility to adhere to the law is largely a matter of chance. One could conclude that, although it is not outright impossible for every homeless person to obey a law which comprehensively bans sleeping in public, the fact that only a percentage of them could obey it on a consistent basis renders adherence to it particularly difficult, arbitrary, and random.

B. City-Wide Anti-Begging Laws and Lack of Sufficient Income

1. Homelessness and Panhandling

Laws which penalize the homeless often prohibit begging or panhandling.¹²⁷ As I argue, these laws can be impossible to respect because in some cases, there may be no other reasonable means for the homeless to obtain enough money to survive without resorting to begging.¹²⁸ This lack of reasonable alternative means that in some

124. *Id.* at para. 204 (concluding that the provisions violated the principle of fundamental justice that laws cannot produce grossly disproportional effects in pursuing the objective in question, explaining “[g]ross disproportionality describes state actions or legislative responses to a problem that are so extreme as to be disproportionate to any legitimate government interest. This principle is infringed if the impact of the restriction on the individual’s life, liberty or security of the person is grossly disproportionate to the object of the measure.”) (citing *Can. (Att’y General) v. PHS Comm. Servs. Soc’y*, [2011] S.C.R. 44, para. 133 (Can.)).

125. *Id.* at paras. 279–80.

126. *Id.*

127. *See* NO SAFE PLACE, *supra* note 55, at 20–21; Damian Collins & Nicholas Blomley, *Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities*, in *NEW PERSPECTIVES ON THE PUBLIC—PRIVATE DIVIDE* 40–41 (Law Comm’n of Can. ed., 2003).

128. *See, e.g.*, the testimony presented by the defendant in *In re Eichom*, 69 Cal. Rptr. 2d 535, 540 (Ct. App. 1998) (homeless veteran successfully raised the necessity

contexts, they will either beg and break the law, or, endanger their wellbeing by having insufficient money for food, clothing, emergency shelter, transportation, or other necessities.¹²⁹

Not all persons who panhandle are homeless.¹³⁰ There are different estimates regarding the percentage of homeless people who resort to begging to earn their money and little data on the subject is available following the 2008 economic crash. Some survey studies undertaken in the late 1980s in different American cities estimated the number of homeless people resorting to begging to range from anywhere between the low single-digits to numbers as high as thirty-four percent in some cities.¹³¹

More recently, Stephen Gaetz and Bill O'Grady conducted a survey-type study published in 2002, which examined how homeless people under the age of twenty-four earned money in the city of Toronto, Canada.¹³² Roughly twelve percent of those surveyed identified panhandling as their primary income-generating activity.¹³³ In a 2002 survey-study conducted by Rohit Bose and Stephen Hwang in Toronto, and with the admittedly small sample size of fifty-four panhandlers, approximately sixty-five percent reported being homeless.¹³⁴ The researchers suggested that the majority of

defense to an anti-camping ordinance, testifying that after having lost his job, he usually only had access to a motel when he had enough money).

129. See Antonia K. Fasanelli, Note, *In Re: Eichorn: The Long Awaited Implementation of the Necessity Defence in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 330, n.36 (2001) (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DUE CREDIT 2 (1993)) (noting that the homeless often have to panhandle to make enough money in order to survive).

130. See Stephen Moss, *Who Hails the Get-Up-and-Go Spirit of the Beggar on 50k a Year?*, THE GUARDIAN (June 6, 2013), <http://www.theguardian.com/commentisfree/2013/jun/06/beggar-50k-year-london> [<https://perma.cc/Q3CB-8XWQ>] (describing a London, England area beggar who made roughly 50,000 GBP per year begging, spent his money gambling or in amusement arcades, lived in a council flat, and was not homeless); Louisa R. Stark, *From Lemons to Lemonade: An Ethnographic Sketch of Late Twentieth Century Panhandling*, in HOMELESSNESS: NEW ENGLAND AND BEYOND 341–43 (Padraig O'Malley ed., 1992); Derek Thompson, *Should You Give Money to Homeless People*, THE ATLANTIC (Mar. 22, 2011), <http://www.theatlantic.com/business/archive/2011/03/should-you-give-money-to-homeless-people/72820> [<https://perma.cc/5YDR-42FZ>].

131. See Stark, *supra* note 130, at 342–43 (summarizing studies).

132. Stephen Gaetz & Bill O'Grady, *Making Money: Exploring the Economy of Young Homeless Workers*, 16 WORK, EMP., & SOC'Y 433 (2002).

133. *Id.* at 441.

134. Rohit Bose & Stephen Hwang, *Income and Spending Patterns Among Panhandlers*, 167 CAN. MED. ASS'N J. 477, 477 (2002). See also Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Tickets . . . and More Tickets: A Case Study of the Enforcement of the Ontario Safe Streets Act*, 39 CAN. PUB. POL'Y 541, 546 (2013) (citing *Panhandling Charges Soar in 2007: Toronto Police*, CBC NEWS (Aug. 17,

panhandlers they came in contact with “are homeless and living in extreme poverty” and made roughly \$300 a month from panhandling, for a total average monthly income of roughly \$640 in the year 2001.¹³⁵ The authors suggested that for those who panhandled and had access to some form of shelter—such as a rented room or subsidized housing—loss of panhandling income risked sending them back on the streets, as it would make rent payments infeasible.¹³⁶ One of the most recent surveys regarding the number of beggars who reported being homeless was conducted by the Union Square Business Improvement District in San Francisco.¹³⁷ In a survey of 120 panhandlers, roughly eighty-two percent reported being homeless.¹³⁸ Therefore, in certain areas, an important number of panhandlers may, in fact, be homeless.

2. *Comprehensive Bans on Panhandling*

According to the NLCHP, approximately one quarter of cities that they tracked had a city-wide ban on begging in public.¹³⁹ But this statistic can be misleading, because many of the cities classified as prohibiting panhandling city-wide only impose city-wide bans against *aggressive* forms of begging. In some of these cities, peaceful forms of panhandling are actually permitted in different parts of the city. For example, Santa Barbara is listed as a city which imposes a city-wide ban on panhandling.¹⁴⁰ Yet peaceful panhandling is allowed within the city, including in parks and in areas of the city not otherwise restricted. Only aggressive forms of panhandling and soliciting a captive audience (e.g., where one solicits a person within a

2007), <http://www.cbc.ca/news/canada/toronto/story/2007/08/17/panhandlers-police.html> [<https://perma.cc/K3VS-V6A3>] (noting that police estimated that roughly ninety percent of tickets issued under the *Safe Streets Act* for prohibited forms of panhandling were given to persons with no fixed address).

135. Bose & Hwang, *supra* note 134, at 478.

136. *See id.* at 478–79.

137. *See* Union Square Business Improvement District, *Survey of Panhandlers In The Union Square Area*, GLS RESEARCH (March 2013), http://californiadowntown.com/wp-content/uploads/2015/03/SocialEquity_Flood.pdf [<https://perma.cc/W9PL-DTFM>] [hereinafter *Survey of Panhandlers*]; *see also* Heather Knight, *The City's Panhandlers Tell Their Own Stories*, S.F. CHRON. (Oct. 27, 2013), <http://www.sfgate.com/bayarea/article/The-city-s-panhandlers-tell-their-own-stories-4929388.php> [<https://perma.cc/4QML-VVPV>].

138. *Survey of Panhandlers*, *supra* note 137, at 6.

139. NO SAFE PLACE, *supra* note 55, at 9.

140. *Id.* at Appendix A.

certain distance of an ATM, bus stop, etc.) is forbidden city-wide.¹⁴¹ The same is true of an ordinance in Gainesville, Florida, which imposes a city-wide ban on panhandling even though people are able to peacefully beg on city corners, sidewalks, and in parks.¹⁴²

Some cities, however, do impose comprehensive bans on begging in public. Chula Vista in California makes it an offense:

[F]or any person at any place within the City to beg or solicit alms or any other thing or money for his support or for the support of anyone else, or for any other purpose, or to make a business of begging or soliciting alms, money, or thing of value, either by word or act or combination thereof, as hereinafter defined.¹⁴³

A law in Oakland, California, states that: “No person shall solicit contributions for himself or herself in or upon any public street or public place in the city.”¹⁴⁴ In the past, other American cities have also imposed similar bans.¹⁴⁵ In Canada, comprehensive bans on begging have also existed.¹⁴⁶ For instance, in the city of Ottawa, a municipal bylaw enacted in 1991 banned begging in any public place, punishable by a fine of up to \$5000.¹⁴⁷ The law was ultimately repealed in the year 2000.¹⁴⁸

141. SANTA BARBARA, CAL., MUN. CODE § 9.50.020(C) (2015) (defining abusive panhandling to involve begging in a way that threatens persons, blocks their path, or involves touching or following them). SANTA BARBARA, CAL., MUN. CODE § 9.50.030(B) (2015) (prohibiting active panhandling in restricted locations, such as within a certain distance of bus stops, ATMs, and on buses).

142. GAINESVILLE, FLA., CODE OF ORDINANCES §§ 19-79, 19-81(c)(1)-(2), 19-82(h) (2015); NO SAFE PLACE, *supra* note 55, at Appendix A.

143. CHULA VISTA, CAL., MUNICIPAL CODE § 9.21.010 (2016), <http://www.codepublishing.com/CA/chulavista/> [<https://perma.cc/YVD6-JT89>]; *see also* CALIFORNIA’S NEW VAGRANCY LAWS, *supra* note 90, at 39 (citing the municipal code).

144. OAKLAND, CAL., MUNICIPAL CODE § 5.18.030 (2016); NO SAFE PLACE, *supra* note 55, at Appendix A.

145. *See* Pottinger v. City of Miami, 810 F. Supp. 1551, 1576 n.33 (S.D. Fla. 1992) (citing MIAMI, FLA., CODE § 37-17 (1990)) (including within the offense of “disorderly conduct” those who were found begging); *see also* ST. AUGUSTINE, FLA., CODE § 18-8(b)(4) (stating that it shall be unlawful for any person within the city to “[p]anhandle, solicit or beg on any sidewalk, highway, street, roadway, right-of-way, parking lot, park, or other public or semi-public area or in any building lobby, entranceway, plaza or common area in the prohibited public area.” (2010)).

146. *See* CITY OF OTTAWA, ON, BY-LAW NO. 117-91, A BY-LAW OF THE CORPORATION OF THE CITY OF OTTAWA RESPECTING PUBLIC NUISANCES (Canada) (May 15, 1991); *see also* Dina Graser, *Panhandling for Change in Canadian Law*, 15 J. L. & SOC. POL’Y 45, 48 (2000).

147. Graser, *supra* note 146, at 74.

148. *Id.* at 53.

3. *Panhandling, Lack of Reasonable Alternatives, and Lack of Opportunity*

The problem with comprehensive bans on begging is that for a variety of reasons, including criminal convictions, some homeless people are unable to access unemployment or welfare benefits, which may render securing shelter and satisfying other basic needs impossible without panhandling.¹⁴⁹ Even if they do have access to welfare benefits, it may fall short of what is minimally required to access reasonable long-term housing options, let alone food and clothing.¹⁵⁰ Begging may, therefore, be necessary to fill the gap between social assistance and the need for shelter and food.¹⁵¹ For instance, in Skid Row, Los Angeles, the cheapest available long term housing option was single-room-occupancy housing (SRO).¹⁵² In 1999, the monthly rent for an SRO was approximately \$379 per month, even though monthly welfare checks amounted to only \$221.¹⁵³ Moreover, the waiting time to access public housing was between three and ten years long.¹⁵⁴

There may also be a variety of internal factors inherent to homeless individuals which make them unable to access the formal economy.¹⁵⁵ The homeless may lack the education or skills to be formally

149. STEPHEN GAETZ & BILL O'GRADY, THE JOHN HOWARD SOCIETY OF ONTARIO, *THE MISSING LINK: DISCHARGE PLANNING, INCARCERATION, AND HOMELESSNESS* 40–41 (2006); PATRICIA ALLARD, *LIFE SENTENCES: DENYING WELFARE BENEFITS TO WOMEN CONVICTED OF DRUG OFFENSES* 1–9 (2002), http://www.sentencingproject.org/doc/publications/women_lifesentences.pdf [<https://perma.cc/R93S-XNLT>].

150. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. L. & CRIMINOLOGY 643, 651 (2009); Stephan Baron, *Street Youth Labour Market Experiences and Crime*, 38 CAN. REV. SOC'Y & ANTHROPOLOGY 189, 190, 196 (2001).

151. See Jackie Esmonde, *Criminalizing Poverty: The Criminal Law Power and the Safe Streets Act*, 17 J. L. & SOC. POL'Y 63, 69 (2002). One study of homeless Toronto youth noted that, due to a constant lack of availability of food, panhandling or squeegeeing was often necessary to generate enough income for meals. However, even then, the amount of income generated by these informal economic activities was never enough to consistently meet any of the youths' daily food needs. See Naomi Dachner & Valerie Tarasuk, *Homeless "Squeegee Kids": Food Insecurity and Daily Survival*, 54 SOC. SCI. & MED. 1039, 1044–46 (2002).

152. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1121 (9th Cir. 2006) (explaining SRO's are "multi-unit housing for very low income persons typically consisting of a single room with shared bathroom").

153. *Id.* at 1122.

154. *Id.*

155. See Stephen Gaetz, *Safe Streets for Whom? Homeless Youth, Social Exclusion, and Criminal Victimization*, 46 CAN. J. CRIMINOLOGY & CRIM. JUST. 423, 430 (2004) (discussing barriers to employment of homeless youth).

employable,¹⁵⁶ may possess a criminal record severely reducing their chances of employment,¹⁵⁷ may be unhygienic or otherwise unpresentable,¹⁵⁸ may have a mental or physical disability making it difficult to be employed,¹⁵⁹ may be addicted to alcohol or to drugs,¹⁶⁰ or may have a combination of these different factors which would preclude formal employment.¹⁶¹ Because “housing and successful employment are directly related,” even the homeless seeking stable formal employment can be at a net disadvantage.¹⁶² Together, these factors have led some to the conclusion that “for the uneducated and unskilled, begging may be the only viable alternative to charity and welfare in depressed labor markets.”¹⁶³

Several combined factors may also suggest that, due to the lack of financial resources available to homeless persons, including insufficient income from social security, the homeless panhandle because it is their only available means to make money.¹⁶⁴ Although there are media reports of some individuals making exorbitant

156. See Kristin M. Ferguson et al., *Employment Status and Income Generation Among Homeless Young Adults: Results From a Five-City, Mixed-Methods Study*, 44 YOUTH & SOC'Y 385, 387 (2012) (discussing how low education levels and limited work histories can reduce employability of young homeless persons).

157. See Helen Lam & Mark Harcourt, *The Use of Criminal Record in Employment Decisions: The Rights of Ex-Offenders, Employers and the Public*, 47 J. BUS. ETHICS 237, 241–42 (2003) (explaining how a criminal record “reduce[s] the prospect of getting a job”). Furthermore, even having been accused of certain crimes but subsequently acquitted can drastically reduce a person’s prospect of employment. See Jessica S. Henry & James B. Jacobs, *Ban the Box to Promote Ex-Offender Employment*, 6 CRIMINOLOGY & PUB. POL'Y 755, 756 (2007).

158. Sylvestre & Bellot, *supra* note 10, at 172 (citing Christine Campbell & Paul Eid, LA JUDICIARISATION DES PERSONNES ITINÉRANTES A MONTRÉAL: UN PROFILAGE SOCIAL 89 (CDPDJ 2009), http://www.cdpedj.qc.ca/publications/itinerance_avis.pdf [<https://perma.cc/H8FR-PTWG>]).

159. *Survey of Panhandlers*, *supra* note 137, at 7 (finding that in a survey of 120 beggars near Union Square, San Francisco, the large majority of whom were homeless, 56% reported being physically disabled, 49% reported chronic depression, and 43% reported suffering from a chronic physical illness).

160. See NAT'L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS (2009), <http://www.nationalhomeless.org/factsheets/addiction.pdf> [<https://perma.cc/GB39-78ED>] (estimating that, in 2003, roughly 38% of homeless persons were dependent on alcohol and roughly 26% abused drugs).

161. See Patricia K. Smith, *The Economics of Anti-Begging Regulations*, 64 AM. J. ECON. & SOC. 549, 555, 559–60 (2005).

162. Michael L. Shier, Marion E. Jones & John R. Graham, *Employment Difficulties Experienced by Employed Homeless People*, 16 J. POVERTY 27, 29 (2012).

163. Smith, *supra* note 161, at 555.

164. See Esmonde, *supra* note 151, at 66–69; see also Bose & Hwang, *supra* note 134, at 477 (identifying characteristics of panhandlers in a 2001 Toronto study).

amounts of money from begging,¹⁶⁵ some studies have shown that those who beg tend to earn little income.¹⁶⁶ Other research shows that those who panhandle tend to spend most of their money quickly, generally to purchase food.¹⁶⁷ They are often humiliated and feel that constantly asking others for money is degrading.¹⁶⁸ Some studies suggest that most people do not enjoy panhandling.¹⁶⁹ When all of these different factors are considered together, it begs the question of why people would panhandle—unless it is one of their only ways of making money.

My concern is that comprehensively banning begging when there is no reasonable alternative demeans the dignity of the homeless by removing their opportunity to earn income and acquire property like other people. For instance, Nussbaum has recognized that the ability to own property and have “property rights on an equal basis with others” is an essential capability to have a minimal standard of living.¹⁷⁰ As some property law theorists have noted, property can perhaps be construed as constituting an integral aspect of our personhood by allowing us to have some control over our future through the control of our property.¹⁷¹ In order to flourish on a comparable level to other human beings, it is not sufficient that people are abstractly capable of owning or acquiring property, but rather that they have “the material resources required to nurture those capabilities.”¹⁷²

165. See Moss, *supra* note 130 (describing a London, England area beggar who made roughly 50,000 GBP per year begging, spent his money gambling or in amusement arcades, lived in a council flat, and was not homeless); Ron Dicker, *Panhandler Shane Warren Speegle Says He Made \$60,000 A Year Begging On Street*, HUFFINGTON POST (July 23, 2012), http://www.huffingtonpost.com/2012/07/23/shane-warren-speegle-says_n_1694577.html [<https://perma.cc/N3X5-S8LF>].

166. For a summary of studies on this matter, see Smith, *supra* note 161, at 555–58, and Bose & Hwang, *supra* note 134, at 478 (reporting that the average monthly income from panhandling in the city of Toronto was \$300).

167. See Barrett A. Lee & Chad R. Farrell, *Buddy Can You Spare a Dime? Homelessness, Panhandling, and the Public*, 38 URB. AFF. REV. 299, 304 (2003); Bose & Hwang, *supra* note 134, at 478.

168. See Bose & Hwang, *supra* note 134, at 478; Gaetz & O’Grady, *supra* note 132, at 441.

169. See Bose & Hwang, *supra* note 134, at 478; Stephen E. Lankenau, *Stronger than Dirt: Public Humiliation and Status Enhancement Among Panhandlers*, 28 J. CONTEMP. ETHNOGRAPHY 288, 298 (1999); Smith, *supra* note 161, at 558.

170. NUSSBAUM, *supra* note 34, at 34.

171. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 968 (1982).

172. Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 768 (2009).

In other words, rather than merely construing human dignity as a notion limited to recognizing the inherent worth of individuals, treating individuals with equal concern and respect also entails allowing them to have the opportunity to earn income as a means of acquiring the material resources which protect their “high and equal status” as members of the human community.¹⁷³ Of course, the act of begging can itself be considered undignified.¹⁷⁴ But if this is the only opportunity some homeless individuals have to acquire minimal necessary resources to live a life that they construe to be a meaningful existence, completely removing this opportunity without providing another demeans their dignity and ability to flourish even further.¹⁷⁵

III. COMBINED APPLICATION OF DIFFERENT LAWS

Thus far, I have examined the impact of comprehensive bans against certain public conduct engaged in by the homeless as part of their existence and why these bans are objectionable. In this Part, I build on the work of Jeremy Waldron and argue that, in some cases, the cumulative effect of different individual prohibitions, property law rules, the configuration of public spaces, and certain pragmatic realities make it extremely difficult—if not impossible in some cases—for the homeless to obey the law even though people with access to housing would have no comparable difficulty.¹⁷⁶

There are two particular contexts. First, as Waldron has argued, the law sometimes imposes a series of individual restrictions that, on their own, may individually be possible to obey.¹⁷⁷ However, the cumulative effect of these individual quality of life offenses and property law rules amount to a *de facto* comprehensive prohibition against the behavior in question by removing the alternatives.¹⁷⁸ To illustrate this concept, I examine the combined consequences of different laws that can amount to something very near to a comprehensive ban on loitering.

The second context involves the use of police discretion to enforce quality of life offenses, which can regulate nearly every aspect of a

173. *Id.*; see also WALDRON, *supra* note 24, at 14.

174. See Waldron, *supra* note 10, at 320 (noting how certain acts like publicly urinating or sleeping are not in themselves necessarily dignified, but that “there is certainly something deeply and inherently undignified about being prevented from doing so”).

175. See Waldron, *supra* note 10, at 320.

176. See *id.* at 316.

177. See *id.* at 316.

178. See *id.* at 315–16.

homeless person's life and behavior. As a result, no matter how precise an individual law prohibiting particular conduct is, police officers sometimes selectively enforce them in such a way that it can make breaking the law unavoidable for the homeless.¹⁷⁹

A. The Cumulative Effect of Different Individual Prohibitions

1. *Anti-Loitering Laws, Anti-Sitting Laws, and the Lack of Available Alternative Spaces*

In some cases, even where the law does not completely prohibit certain behavior, the combined effect of different laws amounts to a near comprehensive ban on the conduct in question, which can be extremely difficult to obey.¹⁸⁰ Loitering laws aim to limit the continued presence of persons in certain public spaces.¹⁸¹ Although American and Canadian courts have struck down certain loitering laws for vagueness and overbreadth concerns,¹⁸² cities often responded by enacting more narrowly tailored statutes which apply to

179. See generally Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 615–16 (1997); Marie-Ève Sylvestre, *Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion*, 31 URB. GEOGRAPHY 803, 804 (2010) [hereinafter *Repression (and Resistance)*].

180. Waldron, *supra* note 10, at 316.

181. Eileen Divringi, *Public Safety or Social Exclusion? Constitutional Challenges to the Enforcement of Loitering Offenses*, 8 DEPAUL J. FOR SOC. JUST. 1, 1 (2014).

182. See, e.g., *Kolender v. Lawson*, 461 U.S. 352 (1983) (striking down a California law prohibiting loitering in certain places and obliging loitering persons to give credible and reliable identification when demanded by a police officer for vagueness concerns related to the notion of what constituted “credible and reliable identification” and, thus, violated due process rights); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) (striking down a city ordinance prohibiting “persons wandering or strolling around from place to place without any lawful purpose or object, [and] habitual loafers” for vagueness concerns because the ordinance failed to give fair notice of the law to persons of reasonable intelligence); *Lazarus v. Faircloth*, 301 F. Supp. 266, 271 (S.D. Fla. 1969), *vacated*, 401 U.S. 987 (1971) (striking down a Florida Statute penalizing “wandering or strolling around without a lawful purpose or object” as well as persons who are “without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and misspend what they earn without providing for themselves or the support of their families,” for vagueness and over breadth concerns); *Goldman v. Knecht*, 295 F. Supp. 897 (D. Colo. 1969) (striking down a Colorado statute prohibiting loitering for vagueness, equal protection, and due process concerns); *State v. Father Richard*, 836 P.2d 622 (Nev. 1992) (striking down a Nevada statute and Las Vegas Municipal Code offense which prohibited loitering on private property for vagueness concerns); *R. v. Heywood*, [1994] 3 S.C.R. 761 (Can.) (striking down a statute prohibiting persons convicted of certain offenses from loitering in different areas for overbreadth concerns).

specific places or are enforceable between certain times.¹⁸³ These types of loitering offenses continue to be widely enforced in North America.¹⁸⁴ For instance, in the United States, thirty-three percent of cities studied by the NHCLP imposed city-wide bans on loitering, whereas sixty-five percent banned loitering in specific places.¹⁸⁵ Moreover, such ordinances are often enforced in conjunction with trespass offenses.¹⁸⁶ Even without a comprehensive ban against loitering, a combination of narrowly-tailored individual laws which may be possible to obey individually can collectively amount to a near-complete prohibition against loitering.¹⁸⁷

For instance, in addition to laws that specifically ban loitering, other statutes prohibit conduct amounting to loitering, such as “sitting or lying down in public,” especially on sidewalks.¹⁸⁸ An actively enforced San Francisco ordinance conceived in 2011, prohibited sitting or lying on sidewalks between 7 AM and 11 PM, with certain narrow exceptions, including medical emergencies.¹⁸⁹ Even though obeying this law may not be impossible and the ban is not comprehensive in the sense that homeless people can presumably sit in other places, it is important to consider how difficult it would be for the homeless to obey the law in light of the lack of alternatives.

Notably, as the New York Times reported, the city removed many public benches around the same time.¹⁹⁰ The number of homeless

183. See Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL'Y 545, 551 (2006).

184. See Smith, *supra* note 93, at 304. In Canada few, if any, narrowly-tailored loitering ordinances have been constitutionally challenged since the Supreme Court of Canada struck down the former vagrancy provision of the Criminal Code in *R. v. Heywood*, [1994] 3 S.C.R. 761 for overbreadth. As will be discussed further on, many narrowly drafted loitering laws continue to exist; for example, those governing loitering in subway stations.

185. NO SAFE PLACE, *supra* note 55, at 8.

186. *Id.* at 22.

187. See Waldron, *supra* note 10, at 315–16.

188. See NO SAFE PLACE, *supra* note 55, at 8 (finding that of the cities surveyed by the NLCHP, more than half prohibited sitting or lying on sidewalks).

189. SAN FRANCISCO, CAL., POLICE CODE, § 168. See Heather Knight, *Sit/Lie Law Primarily Enforced in Haight*, S.F. GATE (Apr. 23, 2013), <http://www.sfgate.com/news/article/Sit-lie-law-primarily-enforced-in-Haight-3763521.php> [<https://perma.cc/4YQ7-UF82>]. According to access to information requests, “422 formal warnings and 333 citations [were issued] in the first year.” *Id.* Moreover, “[e]ighteen times, repeat offenders have been arrested and booked into county jail.” *Id.* Full text of the ordinance available online at: http://sfgov2.org/ftp/uploadedfiles/elections/candidates/Nov2010_CivilSidewalks.pdf [<https://perma.cc/YKN7-779S>].

190. Zusha Elinson, *A Renewed Public Push for Somewhere to Sit Outdoors*, N.Y. TIMES (Jan. 28, 2012), <https://nyti.ms/2h7S1j3>.

shelters and drop-in centers was also reduced,¹⁹¹ and those that stayed open were closed for significant periods throughout the day, forcing those who used the services to leave.¹⁹² Entrance to coffee shops, restaurants, or other private spaces, are all subject to permission by the owner of the establishment, under penalty of being issued a trespassing ticket.¹⁹³ Even the homeless who stayed in public parks risked being punished. If they were so tired they fell asleep between the hours of 8 PM and 8 AM, they could be ticketed.¹⁹⁴

Physical disabilities can also play a role in making it more difficult for the homeless to obey loitering laws. They are often forced to carry all of their heavy belongings with them and as a result, they

191. Heather Knight, *A Decade of Homelessness: Thousands in S.F. Remain in Crisis*, S.F. CHRON. (June 27, 2014), <http://www.sfchronicle.com/archive/item/A-decade-of-homelessness-Thousands-in-S-F-30431.php> [<https://perma.cc/L5HQ-E8AJ>] (noting that compared to a decade earlier, the number of shelter beds was reduced by thirty percent and the number of drop-in centers was cut in half).

192. Many homeless shelters or resources centers are closed for different periods throughout the day. *See, e.g., Emergency Shelter for Single Adults in San Francisco*, HUMAN SERVS. AGENCY OF S.F.: DEP'T OF HUM. SERV. (Jan. 1, 2014), <http://www.sfhsa.org/82.htm> [<https://perma.cc/JPW7-7JYV>]. For example, the Resource Centre for the Homeless located at the Mission Neighborhood Health Center is closed on Sundays, open between 7 AM and 12 PM on Saturdays, and closes at 7 PM most weeknights. *See Location: Homeless Resource Center*, MISSION NEIGHBORHOOD HEALTH CTR., <http://www.mnhc.org/place-locations/homeless-resource-center/> [<https://perma.cc/T6JA-3M35>]. The Multi Service Centre (MSC), is the "largest homeless shelter in Northern California," offering shelter, food, and drop-in services to a maximum of 480 persons per day. *See MSC Shelter*, ST. VINCENT DE PAUL SOC'Y, S.F. (2016), <http://svdp-sf.org/what-we-do/msc-shelter/> [<https://perma.cc/A3FN-P9YB>]. However, clients who sleep in the shelter must leave by 8AM, and drop in services are only available between 9 AM and 2:30 PM. *See St. Vincent De Paul Society—Multi-Service Center South (MSC South)*, S.F. HOMELESS RESOURCE, [http://sfhomeless.wikia.com/wiki/St._Vincent_de_Paul_Society_-_Multi-Service_Center_South_\(MSC_South\)](http://sfhomeless.wikia.com/wiki/St._Vincent_de_Paul_Society_-_Multi-Service_Center_South_(MSC_South)) [<https://perma.cc/YEZ9-ESRT>].

193. Waldron, *supra* note 10, at 297, 301. *See also* S.F., CAL., POLICE CODE, art. 1, § 25 (2013), <http://police.sanfranciscocode.org/1/25> [<https://perma.cc/S6VA-WUC5>]; *see also* T.J. Johnston, *Thousands of Tickets Handed Out to Homeless*, S.F. PUB. PRESS (June 4, 2012), <http://sfpublicpress.org/news/2012-06/thousands-of-tickets-handed-out-to-homeless> [<https://perma.cc/K3X9-EUKN>] (describing the use of trespassing ordinances). An access to information request revealed that trespassing offenses were some of the most common quality of life offenses enforced, comprising nearly nineteen percent of the total in 2011. *See Dataset from Human Services Agency*, S.F. PUB. PRESS, <http://sfpublicpress.org/files/documents/hsa-homeless-citations-2006-2011.xls> [<https://perma.cc/ENU6-KWLA>].

194. S.F., CAL., PARK CODE, REGULATIONS, art. 1, § 3.13 (2013), <http://park.sanfranciscocode.org/3/3.13/> [<https://perma.cc/3CE7-RJK7>] (explaining that individuals can be ticketed if they have an outstanding citation, and do not accept social services offered by the city within thirty hours of its issuance).

frequently sustain injuries and experience chronic pain.¹⁹⁵ For instance, a survey conducted by the Union Square Business Improvement District in 2013 revealed that nearly half of the homeless people reported suffering from a physical disability.¹⁹⁶ Consequently, they may not be able to reach a park or some other location where it is lawful to sit or lie down without further harm to themselves. They may not be able to stand for long periods of time in places where it is forbidden to sit down. The lack of alternatives may also help explain why homeless people in San Francisco were most frequently ticketed for unlawfully sitting, lying, and resting in public compared with any other offense.¹⁹⁷ The difficulty in obeying the law is also illustrated by certain surveys demonstrating the frequency by which the homeless in San Francisco are either ticketed or told to move by the police.¹⁹⁸ Notably, in a survey of 351 homeless people in San Francisco, 88% of those who lived on the streets reported having recently been told to move from a public space by the police.¹⁹⁹ Furthermore, nearly 85% of those same respondents reported receiving a citation, most frequently for committing a quality of life offense.²⁰⁰ Nearly 40% of those surveyed who lived on the streets reported receiving five or more citations.²⁰¹

In other cities, different laws prohibit loitering in one way or another in a variety of places, greatly limiting the availability of legal alternatives. In the city of Montreal, a combination of municipal bylaws and transportation regulations are enforced to prohibit loitering.²⁰² Transportation regulations prohibit loitering in subway stations and bus shelters, including placing one's feet on a bench,²⁰³

195. See Jessica Mackelprang, Janessa Graves & Frederick P. Rivara, *Homeless in America: Injuries Treated in U.S. Emergency Departments, 2007–2011*, 21 INT. J. INJ. CONTROL & SAFETY PROMOTION 289, 295 (2014); see also Stephen W. Hwang et al., *Chronic Pain Among Homeless Persons: Characteristics, Treatment, and Barriers to Management*, 12 BMC FAMILY PRACTICE 73 (2011) (describing the chronic pain experienced by the homeless).

196. *Survey of Panhandlers*, *supra* note 137, at 7.

197. See CALIFORNIA'S NEW VAGRANCY LAWS, *supra* note 90, at 18.

198. S.F. COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 2 (2015).

199. *Id.* at 27.

200. *Id.* at 27, 33.

201. *Id.* at 27.

202. CELINE BELLOT ET AL., JUDICIARISATION ET CRIMINALISATION DES POPULATIONS ITINÉRANTES À MONTRÉAL 28 (Montreal, October 2005).

203. Montreal, Que., By-Law R-036, 2014, §§ 1(c), 4(d) (Can.) (providing that the regulations are applicable to subway stations and bus shelters).

lying across a bench,²⁰⁴ sitting or lying on the floor,²⁰⁵ loitering by behaving in a way that impedes the free flow of pedestrians,²⁰⁶ and refusing to circulate when ordered.²⁰⁷ In Montreal, the presence of the homeless in subways is, therefore, largely limited, and studies have reported that special constables responsible for patrolling the subway systems frequently expel the homeless or issue them tickets if they loiter.²⁰⁸

The number of places the homeless can lawfully go, especially in the winter, is therefore largely limited and contingent upon the permission of others to access private property.²⁰⁹

The availability of places to lawfully spend one's time is also constrained by the fact that parks are normally closed between midnight and 6 AM, and those loitering or sleeping in the parks during those hours can be ticketed.²¹⁰ Bylaws also prohibit the inappropriate usage of the urban landscape in an effort to prevent loitering, penalizing conduct such as sitting or sleeping on top of a picnic table instead of sitting at it, or lying across the ledge of a fountain not intended for that purpose.²¹¹ Loitering while intoxicated in public or on the street is also a punishable offense,²¹² and the criminal code penalizes any person who "loiters in a public place and in any way obstructs persons who are in that place."²¹³

Even when the police do not ticket offenders for breaching the loitering laws, they frequently expel them from public areas by

204. *Id.* § 4(c).

205. *Id.* § 4(c).

206. *Id.* § 4(a).

207. *Id.* § 4(f).

208. Céline Bellot & Marie-Marthe Cousineau, *Des pratiques controversées: la rencontre entre agents de surveillance et itinérants dans le métro*, 11 NOUVELLES PRATIQUES SOCIALES 25, 34–37 (1998).

209. See Waldron, *supra* note 10, at 304–06.

210. *Repression (and Resistance)*, *supra* note 179, at 810, 816.

211. See Sylvestre & Bellot, *supra* note 10, n.85.

212. COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE, LA JUDICIARISATION DES PERSONNES ITINÉRANTES À MONTRÉAL: UN PROFILAGE SOCIAL. FICHE 4: PORTRAIT DE LA SUR JUDICIAIRISATION DES PERSONNES ITINÉRANTES À MONTRÉAL” 3 (Montreal, 2009), http://www.cdpcj.qc.ca/publications/Fiche_4_portrait_surjudiciarisation.pdf [<https://perma.cc/234H-AMSO>] [hereinafter UN PROFILAGE SOCIAL]; Dominique Bernier et al., LA JUDICIARISATION DES PERSONNES EN SITUATION D'ITINÉRANCE À QUÉBEC: POINT DE VUE DES ACTEURS SOCIO-JUDICIAIRES ET ANALYSE DU PHÉNOMÈNE, 25-8 (The Canadian Homelessness Research Network Press: Toronto, 2011).

213. CRIMINAL CODE OF CANADA R.S.C. c C-26 § 175(1)(c) (1985) (Can.).

ordering them to move.²¹⁴ Some researchers have noted that in an effort to avoid interactions with the police or tickets, homeless persons in Montreal leave public areas voluntarily when they see the police or special constables.²¹⁵ Access to alternatives to loitering is limited by other logistical realities. For example, the city of Montreal installed benches offering only enough space for one person to sit.²¹⁶ Spending one's time in a shelter during the day is not a solution, as they are closed at different points, and when they are open, they have a limited capacity.²¹⁷

My concern is that the culmination of loitering prohibitions, property law rules, and the configuration of the urban landscape impacts the homeless in a unique way.²¹⁸ First, it reduces their ability to relax and exercise their autonomy in ways that do not affect those with access to housing. We rightfully recognize the importance of being able to relax for the sake of our mental and physical health.²¹⁹ Perhaps one can even construe relaxation as being a fundamental capability necessary to have a minimum standard of living, either encompassed within the notion of play or substantially similar to it.²²⁰ We can conceptualize relaxation as the exercise of a person's preference to do or not do something, in such a way that they have a sort of ownership of a moment in time which is insulated from the

214. Marie-Eve Sylvestre et al., *Le droit est aussi une question de visibilité: l'occupation des espaces publics et les parcours judiciaires des personnes itinérantes à Montréal et à Ottawa*, 26 CAN. J. L. & SOC'Y 531, 543-45 (2011).

215. Céline Bellot & Marie-Marthe Cousineau, *Le métro: espace de vie, espace de contrôle*, 20 DÉVIANCE ET SOCIÉTÉ 377, 382 (1996).

216. *Repression (and Resistance)*, *supra* note 179, at 810-11. Regarding the implementation of rules that prevent people from sitting on benches in the Montreal subway system, see Yves Poirier, *Des bancs contre les sans-abris?*, (TVA Nouvelles: Mar. 30, 2015), <http://tvanouvelles.ca/lcn/infos/regional/montreal/archives/2015/03/20150330-173600.html> [<https://perma.cc/4HTA-ED2Q>].

217. See Sylvestre & Bellot, *supra* note 10. For example, the Welcome Mission Hall only has a capacity of roughly 200 beds, and additional space for 200 persons in the cafeteria, although it is open twenty-four hours per day. See *Men's Services*, WELCOME HALL MISSION (2016), <http://welcomehallmission.com/services/mens-services/> [<https://perma.cc/PAD2-ZQB8>]. The Old Brewery Mission's Cafe Mission is only open on weekdays between 8 AM and 4 PM, and can accommodate roughly 150 people. See *Café Mission*, OLD MISSION BREWERY (2016), <http://www.oldbrewerymission.ca/en/programs-services/emergency/cafe-mission/> [<https://perma.cc/YLR9-HMQC>].

218. See Waldron, *supra* note 10, at 316.

219. Ruth Gavison, *Privacy and the Limits of the Law*, 89 YALE L. J. 421, 447 (1980).

220. See Alexander, *supra* note 172, at 805; NUSSBAUM, *supra* note 34, at 34.

unwanted interference of others.²²¹ Relaxation implies that one's existence is truly theirs, as they have control over how they use their bodies and temporarily isolate their own experience from unwanted intrusions, without having this choice constrained by others, judging it to be unworthy of consideration or respect.²²² An inherent aspect of the ability to relax is to be able to make use of one's time without having to constantly fear that the exercise of one's preference for relaxation will unexpectedly be interrupted by others.

The problem with the combined application of narrowly-tailored laws prohibiting loitering is that they cumulatively restrict the ability of the homeless to relax. These laws affect people with access to housing less because they can relax or do whatever would amount to loitering on their private property without the risk of being penalized for it. Furthermore, the fact that people have access to housing means that they do not have to worry about somebody granting them permission to relax in their homes. So, even if the law progressively eliminates the duration of time they can remain in certain public places, their homes provide them with the opportunity to relax as they wish while still obeying the loitering laws. The same is not true for the homeless. The combined threat of expulsion from private property and of being ticketed for loitering in public places removes not only the opportunity to relax as part of their public existence, but also the ability to do so without having to worry about moving elsewhere.

2. *Police Discretion and the Combined Effect of Different Laws*

In some cases, individual laws may objectively be possible to obey, but the broad use of police discretion may make it extremely difficult, if not impossible, to avoid breaking certain laws. Quality of life offenses do not regulate how people sleep, urinate, or relax in the privacy of their homes. Rather, quality of life offenses regulate the lawfulness of doing these things in public.²²³ Because the homeless live in public, they are constantly in the jurisdiction where quality of life offenses are enforced. My concern is how difficult it is for the homeless to obey the litany of different laws governing their daily public existence when police discretion is broadly used in a

221. See Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 42 (1976).

222. See *id.*

223. Jeremy Waldron, *Property and Community: For Those Who Have Neither*, 10 THEORETICAL INQUIRIES L. 161, 174 (2009).

discriminatory way to displace or punish them, even though the same laws are not enforced against those with access to housing.

For instance, in *Tobe v. City of Santa Ana*, one of the city's internal memos, describing how a new police task-force was formed with the specific objective of dealing with the city's homeless population, was adduced as evidence.²²⁴ It described how the mission of the task force was to "move all vagrants and their paraphernalia out of Santa Ana by continually removing them from the places that they are frequenting in the City."²²⁵ Similarly, in *Pottinger v. City of Miami*, internal memos revealed the city's policy of "driving the homeless from public areas."²²⁶ These memos included "elimination of food distribution as [a] strategy to disperse [the] homeless."²²⁷

Police discretion also played a central role in dispersing the homeless from parts of Miami. Notably, at one point, the police stopped enforcing an ordinance which prohibited sleeping in public where a similar ordinance in the nearby city of Clearwater was struck down as unconstitutional.²²⁸ But this did not prevent the police from arresting homeless people for sleeping in public. Arrest records, adduced as evidence at trial, demonstrated that the police used a combination of park-closure, trespass, and loitering laws as a means to achieve the same end.²²⁹ There have been similar complaints of discriminatory enforcement in other contexts. For instance, in a study involving roughly 240 street youth in Toronto, Gaetz and his colleagues observed that nearly one third of the participants complained of being ticketed when they had not committed an offense.²³⁰

As Professor Livingston argues, "[t]he problem with the quest for 'rules' in the formulation of public order laws and their application is that the task of maintaining order is itself inherently one of judgment."²³¹ After all, there are insufficient resources for the police to address every single instance where a quality of life offense is

224. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1177 (Cal. 1995).

225. *Id.*

226. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).

227. *Id.*

228. *Id.* at 1558 n.8 (citing *Hershey v. City of Clearwater*, 834 F.2d 937, 940 (11th Cir. 1987)).

229. *Id.* at 1566.

230. Bill O'Grady, Stephen Gaetz & Kristy Buccieri, *Policing Street Youth in Toronto*, YOUTH HOMELESSNESS IN CANADA: IMPLICATIONS FOR POLICY AND PRACTICE 345 (Stephen Gaetz et al. eds., 2013).

231. Livingston, *supra* note 179, at 613.

committed.²³² This means that the police must necessarily use their judgment regarding when and how to enforce these types of laws.²³³

In one scholar's words:

What begins to emerge is a model for law enforcement and police behavior quite at odds with that implicit in the bare bones of legislative enactment. A realistic conceptual scheme, at a minimum, must take into account the following premises: while the legislature defines the outer limits of proscribed conduct, the police department defines the actual limits. Within the actual limits, the police department—or worse, individual policemen—decides which laws shall be enforced actively and which passively.²³⁴

The difficulty that the homeless have in consistently obeying the law is that they are routinely exposed to the judgment of those applying the law because they are constantly in the jurisdiction where quality of life laws are enforced, and so many of their behaviors are regulated. When the homeless move, they are subject to selectively enforceable pedestrian and traffic safety laws, such as rules against jaywalking, even though the laws are less often enforced against non-marginalized persons who often break these laws right in front of police officers.²³⁵ When the homeless are stationary, whether sitting or lying somewhere to rest or eat, they are subject to laws prohibiting obstruction of sidewalks, loitering, or littering which are disproportionately applied to them.²³⁶ Sleep is even regulated by laws governing the usage of public spaces,²³⁷ park closures,²³⁸ anti-sleeping or camping laws,²³⁹ and transformations of the urban landscape.²⁴⁰

232. David Cole, *Foreword, Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059, 1064 (1999).

233. *Id.*

234. Joseph H. Tieger, *Police Discretion and Discriminatory Enforcement*, 1971 DUKE L.J. 717, 721 (1971).

235. See Foscarinis, *supra* note 50, at 19; Sylvestre & Bellot, *supra* note 10, at 172 (citing Christine Campbell & Paul Eid, *supra* note 158, at 90-96); see also Mary I. Coombs, *The Constricted Meaning of "Community" in Community Policing*, 72 ST JOHN'S L. REV. 1367, 1369-71 (1998).

236. Kathryn Hansel, Note and Comment, *Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J. L. & SOC. POL'Y 445, 447 (2011).

237. See, e.g., Montreal, Que., By-Law R-036, 2014 (Can.) (governing the legality of sleeping in subway stations, bus shelters, or aboard subway trains).

238. *Repression (and Resistance)*, *supra* note 179, at 810.

239. See generally Ades, *supra* note 63.

240. Mike Davis, *Afterword - A Logic Like Hell's: Being Homeless in Los Angeles*, 39 UCLA L. REV. 325, 331 (1991) (providing examples of implementing sprinkler systems in parks or constructing "bum-proof" benches).

Professor Sylvestre has argued that the more publicly visible the homeless are, the more likely they are to be punished by a variety of laws they cannot avoid breaking.²⁴¹ For example, in Skid Row, Los Angeles, which is known for its highly visible homeless population of between 11,000 and 12,000 people,²⁴² a recent report concluded that “the odds of a person receiving a pedestrian citation are between 48 and 69 times greater in Skid Row than in the rest of the City.”²⁴³

A brief survey of how laws have selectively been enforced against the homeless also demonstrates that where there is the will to penalize the homeless for behaviors related to their daily existence, or at least force them to move elsewhere, there is a way. A few examples demonstrating the ingenuity in applying such ordinances include citing homeless persons for “littering” when they placed a cardboard box beneath them to sleep,²⁴⁴ ticketing homeless persons for sitting on top of a picnic table instead of at it,²⁴⁵ unjustifiably ticketing homeless people in Toronto for provincial offenses despite insufficient evidence to warrant a citation,²⁴⁶ and disproportionately issuing jaywalking citations to disabled homeless persons who could not cross the street in time with their canes or walkers.²⁴⁷

IV. THE ROLE OF IMPOSSIBILITY

Thus far, I have explored contexts in which it may be extremely difficult, if not impossible, for the homeless to obey the law, even though those with access to housing have no comparable difficulty. In this Part, I explore what I view to be the legal significance and

241. Sylvestre & Bellot, *supra* note 10, at 171–72. See also Maya Nordberg, *Jails Not Homes: Quality of Life on the Streets of San Francisco*, 13 HASTINGS WOMEN’S L. J. 261, 276 (2002); UN PROFILAGE SOCIAL, *supra* note 212, at 10.

242. *Jones v. City of L.A.*, 444 F.3d 1118, 1122 (9th Cir. 2006).

243. Ellen Reese, Geoffrey Deverteuil, and Leanne Thach, ‘Weak-Center’ Gentrification and the Contradictions of Containment: Deconcentrating Poverty in Downtown Los Angeles, 34 INT. J. URB. REG. RES. 310, 319 (2010) (citing GARY BLASI ET AL., POLICING OUR WAY OUT OF HOMELESSNESS? THE FIRST YEAR OF THE SAFER CITIES INITIATIVE ON SKID ROW 6 (2007), http://www.ced.berkeley.edu/downloads/pubs/faculty/wolch_2007_report-card-policing-homelessness.pdf [<https://perma.cc/T42L-RL4Y>]).

244. Coombs, *supra* note 235, at 1374.

245. Sylvestre & Bellot, *supra* note 10, at n.85.

246. Stephen Spencer Davis, *Toronto Cop Preyed on Vulnerable People in Fake Ticket Scheme*, TORONTO STAR (Nov. 5, 2015), <http://www.thestar.com/news/gta/2015/11/05/toronto-cop-preyed-on-vulnerable-people-in-fake-ticket-scheme.html> [<https://perma.cc/NM2Z-75AU>].

247. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 35 (2011) [hereinafter CRIMINALIZING CRISIS].

consequences of the fact that some laws are practically impossible for the homeless to avoid breaking. In particular, I argue that although the homeless often invoke the necessity defense in such circumstances, it is far from an ideal mechanism of remedying their consistent lack of opportunities to obey the law. Instead, it would generally be preferable to invoke the issue of impossibility to obey the law in three principal contexts: stimulating policy change, constitutionally challenging the legality of certain laws, and acquiring injunctions enjoining the enforcement of laws that the homeless cannot consistently obey.

A. Why Defenses of Necessity Should Generally Not Be Invoked Despite Impossibility

Some have argued in favor of the homeless invoking the defense of necessity for prohibited life-sustaining conduct they cannot avoid, such as sleeping in public.²⁴⁸ In a few cases, the defense has succeeded.²⁴⁹ In other cases, courts have rejected it.²⁵⁰ Generally

248. Donald E. Baker, Comment, “*Anti-Homeless” Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 U. MIAMI L. REV. 417, 452–53 (1991) (advocating the invocation of the necessity defense against anti-public sleeping ordinances); Tony Naro, *Defending Against a Two-Front Attack: Homeless Persons Use of the Necessity Defense to Combat Nature and the Law*, 63 GUILD PRAC. 158, 158–59 (2006) (advocating the defense of necessity through the use of access to private property when nature and the elements threaten a person’s well-being). *See generally* William Heffernan, *Social Justice/Criminal Justice*, FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW (William C. Heffernan & John Kleinig eds., 2000) (advocating the possibility of a social justice-based claim of justification and its application through formal channels such as the Model Penal Code’s necessity defense, and through informal channels such as jury nullification and prosecutorial discretion); Smith, *supra* note 6 (proposing that although the invocation of the necessity defense is possible, perhaps a defense of duress is preferable).

249. *See In re: Eichorn*, 81 Cal. Repr. 2d 535 (Cal. Ct. App. 1998) (accepting the defense of necessity against the conviction of an ordinance which prohibited sleeping in public, where there was insufficient shelter space); Fasanelli, *supra* note 129; *see also* *People v. Porter*, No. T0212669M (Cal. Super. Ct. 2005) (accepting a defense of necessity against an ordinance punishing sleeping in public when the homeless shelter was temporarily closed for budgetary reasons); *People v. Robinson*, No. T0304959M (Cal. Super. Ct. 2003) (accepting the defense of necessity against a public camping ordinance because of the lack of shelter spaces in proportion to the number of homeless persons).

250. *See, e.g., City of Des Moines v. Webster*, 861 N.W.2d 878, 886 (Iowa Ct. App. 2014) (rejecting of the defense of necessity for homeless persons who established encampments under a bridge in violation of a city ordinance prohibiting the encroachment of public property belonging to the city); *Griffin v. United States*, 447 A.2d 776, 778 (D.C. 1982) (defense of necessity denied to a group of homeless men who failed to prove its required elements, namely “that they had exhausted all other legal alternatives”); *Southwark London Borough Council v. Williams* [1971] EWHC

speaking, practical impossibility ought not to be advanced as the basis of a defense of necessity for several reasons. First, if one accepts Waldron's description of justificatory defenses, they generally apply only in a particular and extreme circumstance,²⁵¹ rather than to general challenges to laws, the values underlying them, or their daily application.²⁵² An often quoted paradigmatic example of the necessity defense involves the lost alpinist who breaks into a home to avoid freezing to death in winter.²⁵³ As Waldron explains, if someone were to invoke the defense of necessity in such a case, such a claim challenges the over-inclusiveness of breaking and entering or trespassing laws in a particular instance, rather than the values or assumptions which govern property law, quality of life offenses, or the general enforceability of such rules.²⁵⁴ The only claim the lost alpinist advances is that it is in an exceptional and acute case where the rule is over-inclusive and it is wrong to be punished because of the lack of legal and reasonable alternatives.²⁵⁵

On the other hand, in cases in which laws are practically impossible for the homeless to obey, the basis of challenging such rules is that breaking the law is generally and continually unavoidable.²⁵⁶ Moreover, because the breach of such rules by the homeless are the norm rather than the exception, claiming practical impossibility does not challenge the specific application of the rule to some particular one-off circumstance; it challenges its general and continued application to the homeless. The fact that homelessness and its ensuing violation of laws are chronic rather than acute restricts the defense of necessity.²⁵⁷

(Ch) 734 (Eng.) (rejecting the defense of necessity after finding that it would open the floodgates and allow people to take the law into their own hands when due to the lack of housing available in London, the defendants had squatted in housing owned by the local housing authority).

251. Marie-Eve Sylvestre, *Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice*, 55 MCGILL L. J. 771, 779 (2010).

252. *Why Indigence Is Not a Justification*, *supra* note 12, at 103, 106.

253. *See* Perka v. The Queen, [1984] 2 S.C.R. 232, 249 (Can.).

254. *Why Indigence Is Not a Justification*, *supra* note 12.

255. Perka, 2 S.C.R. at 249–50.

256. *See e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1127 (9th Cir. 2006) (“[i]n the absence of any indication that the enormous gap between the number of available beds and the number of homeless individuals in Los Angeles generally and Skid Row in particular has closed, Appellants are certain to continue sitting, lying, and sleeping in public thoroughfares and, as a result, will suffer direct and irreparable injury from enforcement of section 41.18(d)”).

257. *See* R. v. Latimer, [2001] 1 S.C.R. 3, ¶ 38 (Can.); *Why Indigence Is Not a Justification*, *supra* note 12, at 102; Sylvestre, *supra* note 251, at 779.

The other reason for which necessity pleas will likely fail concerns the channel and method by which claimants challenge the application of rules. Normally, the appropriate channel to challenge the application of certain laws or their underlying values is by either contesting their constitutionality, or appealing to the legislature to change them, rather than to let defendants take the law into their hands and attempt to justify their conduct after the fact.²⁵⁸ Indeed, courts often reject the latter approach.²⁵⁹

Finally, there are pragmatic reasons which weigh heavily against the invocation of necessity for practically impossible laws applied against the homeless. Notably, “the homeless are especially unlikely to possess either the means for asserting such a defense or the motivation to do so when pleading guilty results in their immediate release.”²⁶⁰ In the Ninth Circuit’s words in *Jones v. City of Los Angeles*: “Homeless individuals, who may suffer from mental illness, substance abuse problems, unemployment, and poverty, are unlikely to have the knowledge or resources to assert a necessity defense to a section [of the law] . . . much less to have access to counsel when they are arrested and arraigned.”²⁶¹ Many may not even be aware of the extent of their rights or how to enforce them.²⁶² Necessity claims would also do nothing to prevent or remedy cases where the homeless are arrested or displaced without being ticketed or prosecuted.²⁶³ Also, a successful necessity plea will not lead to changes in the law for a large number of people; it will usually benefit only the individual for whom the defense was successfully invoked and perhaps “insulat[e] the ordinance from meaningful review.”²⁶⁴ Where the defense is invoked for actions that are truly exceptional, rather than constantly

258. See Malcolm Thorburn, *Criminal Law as Public Law*, PHILOSOPHICAL FOUNDATIONS OF CRIMINAL LAW 33 (R.A. Duff & Stuart Green eds., 2011); GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 792–94 (1978).

259. See Thorburn, *supra* note 258. See e.g., *City of Des Moines v. Webster*, 861 N.W.2d 878, 886 (Iowa Ct. App. 2014); *Southwark London Borough Council v. Williams* [1971] EWHC (Ch) 734 (Eng.).

260. Sarah Gerry, *Jones v. City of Los Angeles: A Moral Response to One City’s Attempt to Criminalize, Rather than Confront, Its Homelessness Crisis*, 42 HARV. C.R. - C.L. L. REV. 239, 243 (2007).

261. *Jones*, 444 F.3d at 1131.

262. See Tamara Walsh, *A Right to Inclusion? Homelessness, Human Rights and Social Exclusion*, 12 AUSTL. L. J. HUM. RTS. 185, 190 (2006).

263. Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1426 (2006); see also *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1553 (S.D. Fla. 1992).

264. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1175 (Cal. 1995).

reoccurring, the defense may still have merit.²⁶⁵ For instance, if the temperature drops below freezing and a person has no choice but to break into an abandoned building and sleep for the night to avoid death, the defense can apply in such an extraordinary case.²⁶⁶ But in cases where homeless individuals cannot avoid consistently breaking the law by engaging in conduct characteristic of their condition, the fact that the law is extremely difficult or impossible to avoid breaking should generally not be used as a foundation for repetitively invoking the defense of necessity.

B. Practical Impossibility as the Foundation for Policy Change, Constitutional Challenges, and Injunctions

1. Impossibility to Obey the Law and Constitutional Challenges

Given the limited use of the defense of necessity for repetitive and unavoidable breaches of the law for conduct essential to a person's existence, invoking the extreme difficulty or impossibility of obeying the law can serve as the foundation for other means which aim to better protect the rights of the homeless. These means include striking down ordinances penalizing conduct that is part of a person's daily existence as unconstitutional, preventing the enforcement of such laws through the issuance of injunctions, and stimulating policy change through public awareness of issues of practical impossibility.

Invoking the impossibility of obeying the law has successfully been advanced to lead to laws being struck down as unconstitutional where cities provide insufficient shelter space but still prohibit sleeping in public or erecting temporary shelter.²⁶⁷ The principal way that the finding of impossibility has been established is through reports documenting the number of homeless persons compared to shelter spaces and the testimony of experts.²⁶⁸ The advantage of employing

265. Smith, *supra* note 6, at 500–01.

266. *Id.*

267. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1138 (9th Cir. 2006); Pottinger, 810 F. Supp. at 1564, 1577; Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009) (ruling that an ordinance punishing sleeping in public and erecting temporary shelters is a violation of the Eighth Amendment right against cruel and unusual punishment); Abbotsford (City) v. Shantz, [2015] B.C.S.C. 1909 (Can. B.C.); Victoria (City) v. Adams, [2009] 100 B.C.L.R. 4th, 28 (Can. B.C.).

268. *See, e.g.*, Jones, 444 F.3d at 1121–22 (relying upon the Mayor's Task Force Executive Summary to establish the discrepancy between the number of homeless and available shelter space) (citing L.A. HOUSING CRISIS TASK FORCE, IN SHORT SUPPLY 6 (2000); MAYOR'S CITIZENS' TASK FORCE ON CENT. CITY EAST, TO BUILD A COMMUNITY 5 (1988)); Pottinger, 810 F. Supp. at 1564 (providing an example of a

such a quantitative analysis to support fundamental rights-based claims is that it involves minimal abstraction and is a relatively straightforward means of evaluating whether the law can be obeyed.²⁶⁹ For this reason, homeless advocacy organizations encourage the usage of such quantitative evaluations to support constitutional rights based claims.²⁷⁰ Indeed, where there is a lack of such empirical evidence to support claims of impossibility, courts may reject such an argument.²⁷¹

One recent innovative and low-cost way of determining the number of homeless persons in order to eventually advance such claims is by conducting coordinated volunteer-based surveys or censuses. For instance, in Montreal, the “I-Count” initiative involved the coordinated efforts of 600 volunteers walking through the streets of the city in order to count the number of homeless persons.²⁷² The survey, conducted on March 24, 2015, gathered information including the number of homeless people who slept outside, in transitional housing, in shelters, and other places like hospitals and detention centers.²⁷³ It also acknowledged the existence of hidden homeless

city calling in an expert witness to testify to the number of shelter spaces available for the number of homeless person in the city); *Victoria (City)*, [2009] B.C.C.A. 563, para. 27 (submitting the 2007 Mayor’s Task Force Report detailing the number of homeless persons and the availability of shelter space as evidence at trial and calling experts to testify on the availability of shelter space) (citing MAYOR’S TASK FORCE ON BREAKING THE CYCLE OF MENTAL ILLNESS, ADDICTIONS AND HOMELESSNESS, EXECUTIVE SUMMARY 7 (2007), http://www.victoria.ca/assets/City~Hall/Documents/tskfrc_brcycl_exctvs.pdf [<https://perma.cc/YMH5-F7TK>]).

269. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless People from American Cities*, 66 TUL. L. REV. 631, 663 (1992); see also NAT’L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: ADVOCACY MANUAL, 9–13 (2014) [hereinafter NO SAFE PLACE: ADVOCACY MANUAL]; *How YOU Can Help End Homelessness*, NAT’L COAL. FOR THE HOMELESS, (Nov. 4, 2013), http://nationalhomeless.org/want_to_help/ [<https://perma.cc/X8S2-3WPT>] (advocating education as a way to help end homelessness).

270. *How YOU Can Help End Homelessness*, *supra* note 269.

271. See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000) (refusing to strike down an anti-camping ordinance applicable on public property because the defendant failed to establish that there were cases where homeless persons were turned away from shelters due to lack of space); *Johnston v. Victoria (City)*, [2010] B.C.S.C. 1707, para. 64 (Can.) (denying a motion to strike down as unconstitutional a law forbidding erecting shelters during the day by failing to demonstrate the lack of available shelter spaces).

272. See Shari Okeke, *Montreal Homeless Census Aims to Identify Often-Hidden Needs*, CBC NEWS (Feb. 18, 2015). See generally ERIC LATIMER ET AL., I COUNT MTL 2015: COUNT AND SURVEY OF MONTREAL’S HOMELESS POPULATION ON MARCH 24, 2015 (2015), http://ville.montreal.qc.ca/pls/portal/docs/page/d_social_fr/media/documents/I_Count_MTL_2015_report.pdf [<https://perma.cc/2TVR-QDST>].

273. See LATIMER ET AL., *supra* note 272, at v.

people who could not be counted in the survey, including those staying in hotels, motels, or with friends on the night of the survey.²⁷⁴ The survey broke down the number of homeless people according to certain factors, including gender, birthplace, aboriginality, and the reasons for which they became homeless.²⁷⁵ The total number of homeless people counted on the night of the survey was roughly 3000—nearly one-tenth the number of what had previously been estimated in the decade prior.²⁷⁶ Not only do initiatives like these help inform local governments of the extent of homelessness so that they can better address the problem, but they also serve to raise awareness of homelessness amongst volunteers who participate, as well as the general public.

The drawback to using impossibility as the basis for a constitutional challenge to a certain law is the possibility that other laws can be selectively enforced to fill the vacuum. The evidence tendered in the *Pottinger* case provides such an example, as arrest records demonstrated that trespass, loitering, and park closure ordinances were used to fill the vacuum left by a law against public sleeping which ceased to be applied.²⁷⁷ This shows the importance of obtaining arrest records or statistics regarding the number of citations issued to the homeless in a given area.²⁷⁸

2. *Impossibility to Obey the Law and the Use of Injunctions*

One particularly successful and versatile way to block both the application of laws targeting the homeless while limiting selective ticketing and arrests is through the issuance of injunctions enjoining the police from enforcing certain laws against the homeless except in narrow circumstances.²⁷⁹ In *Pottinger*, the plaintiffs represented a

274. See LATIMER ET AL., *supra* note 272, at v.

275. See *id.* at 13–25 (finding the most common reasons for becoming homeless were financial problems and drug or alcohol addiction).

276. See *id.* at v; see also *National Research Project to Find Sustainable Solutions for Homeless People with Mental Health Issues*, MENTAL HEALTH COMM'N OF CAN. (Nov. 23, 2009), <http://www.douglas.qc.ca/news/679?locale=en> [<https://perma.cc/6ZBD-ASLD>] (estimating Montreal's homeless population to be between 28,000 and 30,000).

277. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1566–67 (S.D. Fla. 1992).

278. See NO SAFE PLACE: ADVOCACY MANUAL, *supra* note 269, at 10–12.

279. See *e.g.*, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (issuing injunction preventing the enforcement of laws prohibiting sitting and lying on the sidewalk between certain hours); *Loper v. N.Y.C. Police Dep't*, 999 F.2d 699, 706 (2d Cir. 1993) (affirming injunction preventing the police from enforcing an anti-panhandling law which had previously been declared unconstitutional); *Cutting v. City of Portland*, No. 2:13-cv-359-GZS, 2014 WL 580155, at *11 (D. Me. Feb. 12,

group of 6000 homeless people in Miami.²⁸⁰ They petitioned the court to have an injunction issued which prevented the police from enforcing certain laws prohibiting conduct they could not avoid engaging in as part of their survival.²⁸¹ The court granted injunctive relief leading to the eventual establishment of the “Pottinger Agreement,” where the homeless could not be arrested or ticketed for such conduct unless the arresting officers informed the person of the existence of a shelter, the shelter had available space, and the homeless person still refused to go there.²⁸²

Empirical data concerning the lack of available alternatives to the homeless, such as shelter spaces, in addition to arrest or citation records demonstrating disproportional patterns of enforcement against the homeless, have successfully been invoked in order to have such injunctions granted.²⁸³ Indeed, the NLCHP has encouraged the acquisition of such statistics through independent reports, public records, and Access to Information Requests to support the eventual granting of such relief.²⁸⁴

3. *Impossibility to Obey the Law and Policy Change*

Lastly, establishing the impossibility of obeying the law can stimulate policy change and identify the extent to which homelessness is currently penalized. In Seattle, Washington, “trespass

2014) (issuing injunction against an ordinance prohibiting people from soliciting money while standing on a median); *Jefferson v. Rose*, 869 F. Supp. 2d 312, 319 (E.D.N.Y. 2012) (issuing injunction to prevent police from enforcing an anti-panhandling law which had already been declared unconstitutional yet had nonetheless been used to arrest the homeless); *Pottinger*, 810 F. Supp. at 1583–84 (granting of injunction preventing the enforcement of laws banning life-sustaining behavior unless certain conditions are met); *Engle v. Municipality of Anchorage*, No. 3AN-10-7047CI, at *10 (Alaska Super. Ct. Jan. 4, 2011) (issuing a preliminary injunction preventing the city from conducting police sweeps and destroying the property belonging to the homeless); see also NO SAFE PLACE: ADVOCACY MANUAL, *supra* note 269 (citing relevant cases).

280. *Pottinger*, 810 F. Supp. at 1553.

281. *Id.*

282. See *History of the Pottinger Agreement*, AM .C.L. UNION OF FLA., <https://aclufl.org/pottinger/history> [<https://perma.cc/44A5-SNXW>].

283. See *Jones*, 444 F.3d at 1125, 1127 (documenting how nearly four dozen homeless persons were arrested for violating an ordinance prohibiting sitting or lying across a sidewalk and would inevitably violate it in the future and introduced statements by the LAPD Police Chief who stated that such individuals would repeatedly be arrested if required); *Pottinger*, 810 F. Supp. at 1566–67 (using arrest records against the homeless to prove the extent to which they were arrested for quality of life offenses and for which other offenses were selectively enforced).

284. See *e.g.*, NO SAFE PLACE: ADVOCACY MANUAL, *supra* note 269, at 10 (putting forth suggestions).

admonishments” banned homeless people from accessing private property open to the public, such as stores, coffee shops, or entire business complexes.²⁸⁵ At the same time, conduct such as sitting or lying on sidewalks,²⁸⁶ camping in unauthorized areas,²⁸⁷ and obstructing sidewalks by making people take evasive action,²⁸⁸ were all prohibited. Persons who had unlawfully camped in parks or trespassed after closing hours could be issued orders which banned them from re-entering, leaving them with few other places to go.²⁸⁹ As the Seattle Times observed, “the homeless are sometimes penalized for their ‘existence’ not for their ‘behavior.’”²⁹⁰ Following advocacy initiatives in partnership with the NLCHP to reduce these restrictions, the city removed the “trespass admonishments” ban in 2010.²⁹¹ Moreover, the number of citations issued to the homeless has decreased significantly since that year.²⁹² Advocacy, therefore, brought about important policy initiatives to make obeying the law possible.

A similar policy change also occurred in New Brunswick, New Jersey through advocacy and political pressure. John Fleming, who begged from a wheelchair carrying a sign that read “Broke—Please Help—Thank you—God Bless You” was ticketed four times in two

285. CRIMINALIZING CRISIS, *supra* note 247, at 46. Moreover, persons could even be banned from entering bus shelters, property belonging to the Department of Public Transportation, shopping malls, and even hospitals. See KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 74–76 (2010).

286. See *e.g.*, SEATTLE WASH., MUNICIPAL CODE, § 15.48.040 (2013) (prohibiting sitting or lying on a sidewalk between 7 AM and 9 PM in the Downtown and other commercial districts); see also JUSTIN OLSON & SCOTT MACDONALD, WASHINGTON’S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT 10 (Sara K. Rankin ed., 2015) (noting that conduct such as sleeping in doorways was prosecuted under trespass provisions).

287. SEATTLE, WASH., MUNICIPAL CODE § 18.12.250 (2013).

288. *Id.* § 12A.12.015(B)(1) (2013). As noted in “related cases” at the bottom of the offense definition, the ordinance was upheld as constitutional in *Seattle v. Webster*, 802 P.2d 1333, 1341 (Wash. 1990).

289. SEATTLE, WASH., MUNICIPAL CODE § 18.12.278 (2013); see also SEATTLE, WASH., MUNICIPAL CODE § 18.12.250 (prohibiting camping in parks except in authorized areas); BECKETT & HERBERT, *supra* note 285, at 73–78.

290. See Taso Longos, *Using Imagination to Empower the Homeless*, SEATTLE TIMES (Dec. 24, 2010), <http://www.seattletimes.com/opinion/using-imagination-to-empower-the-homeless/> [<https://perma.cc/HQM2-VN39>].

291. CRIMINALIZING CRISIS, *supra* note 247, at 46.

292. OLSON & MACDONALD, *supra* note 286, at 15. One notable exception to this was continued penalization of parking a trailer or camper on the street, in violation of SEATTLE, WASH., MUNICIPAL CODE § 11.72.430.

months for panhandling on streets and sidewalks.²⁹³ The city ordinance banned begging “on any street or sidewalk within the city when not authorized to do so.”²⁹⁴ However, only organizations were able to obtain permits, which prevented homeless persons from lawfully being able to beg on the sidewalks or streets.²⁹⁵ Given the fact that Mr. Fleming was handicapped, it is unclear where he was supposed to lawfully beg in order to meet his basic needs, because the act of “repeated[ly] attempting to stop passers-by” in parks, streets, or any other public place was also penalized.²⁹⁶ Following mounting media coverage, and a complaint filed by the ACLU and the New Jersey Coalition to End Homelessness, the city decided to change the ordinance.²⁹⁷

Reports and research can also act as important ways of informing different levels of government about the different police and legislative practices which penalize the homeless, leading to concrete change.²⁹⁸ For instance, the research of Professor Sylvestre and the Quebec Human Rights Commission²⁹⁹ regarding the disproportionate practices of ticketing the homeless for largely unavoidable quality of life offenses in the city of Montreal has led to several important policy changes.³⁰⁰ For example, the Montreal police created a unit

293. See *ACLU-NJ and Homeless Group Challenge New Brunswick's Unconstitutional Ban on Begging*, AM. C.L. UNION (Dec. 19, 2014), <https://www.aclu-nj.org/news/2014/12/19/aclu-nj-and-homeless-group-challenge-new-brunswicks-unconsti> [<https://perma.cc/XLL9-6QAJ>].

294. See Verified Complaint, at 3, N.J. Coal. to End Homelessness v. City of New Brunswick (N.J. Super. Ct. Dec. 18, 2014), https://www.aclu-nj.org/files/8814/1900/9365/Verified_complaint_for_injunctive_and_declaratory_relief.pdf [<https://perma.cc/X9TM-TNC5>] (citing NEW BRUNSWICK, N.J., CODE OF ORDINANCES, § 9.04.050(A)(6) (2014)).

295. See *id.* at 4 (citing NEW BRUNSWICK, N.J., CODE OF ORDINANCES, § 5.32.050 (2014)).

296. See NEW BRUNSWICK, N.J., CODE OF ORDINANCES, §§ 9.08.020(A), 9.08.020(B)(1) (2016).

297. Seth Augenstein, *Under Pressure from Homeless Man, New Brunswick Agrees to Eliminate Its Begging Ban*, NJ.COM (Mar. 23, 2015), http://www.nj.com/middlesex/index.ssf/2015/03/new_brunswick_agrees_to_do_away_with_begging_ban_u.html [<https://perma.cc/R3D2-KGT3>].

298. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HUMAN RIGHTS TO HUMAN REALITY: A TEN-STEP GUIDE TO STRATEGIC HUMAN RIGHTS ADVOCACY 21 (2014), https://www.nlchp.org/documents/Human_Rights_to_Human_Reality [<https://perma.cc/GRZ6-TQYE>].

299. In Quebec, the human rights commission is referred to as the Commission des droits de la personne et de la jeunesse (CDPDJ), translated roughly to the Human and Youth Rights Commission.

300. See generally Sylvestre & Bellot, *supra* note 10; Campbell & Eid, *supra* note 158.

specializing in homelessness which involves pairing police officers with outreach workers in order to better help the homeless population while decreasing the number of tickets issued to them.³⁰¹ The city has also recently designated an ombudsman in charge of protecting the rights of the homeless and finding solutions to the problems they routinely face.³⁰²

CONCLUSION

I have argued that in three particular contexts, it can be extremely difficult—if not impossible—for the homeless to avoid breaking the law, even though people with access to housing would have no such trouble. First, individual laws may impose comprehensive bans against certain public behaviors, which the homeless cannot avoid engaging in as part of their existence. Second, even where the bans are not comprehensive, the combined effect of property laws and quality of life offenses may amount to a near comprehensive ban which can be extremely difficult, if not impossible, to obey.³⁰³ Third, the cumulative effect of the different laws which regulate nearly every aspect of a homeless person's public life can be discretionarily enforced to the point that breaking the law can become an inevitable part of their existence.

Furthermore, laws which are impossible for the homeless to obey are objectionable for several reasons. Notably, these types of laws ignore homeless persons' capacity for self-determination and demean their dignity and autonomy in different ways.³⁰⁴ When the homeless are arrested or punished for laws that are impossible to obey, the breach of legal rules is treated as if it were a conscientious decision despite the lack of available alternatives. These types of laws therefore disregard homeless persons' capacities as rational agents

301. *See Montreal Police Wrote a Record Number of Tickets for Homeless*, CTV NEWS MONTREAL, (Feb. 22, 2012), <http://montreal.ctvnews.ca/montreal-police-wrote-a-record-number-of-tickets-for-homeless-1.772044> [<https://perma.cc/6VAP-ASWP>]. For a description of the homelessness unit, see *Homelessness—EMRII*, SERV. DE POLICE DE LA VILLE DE MONTREAL (2014), <http://www.svvm.qc.ca/en/Pages/Discover-SPVM/Who-does-what/Homelessness—EMRII> [<https://perma.cc/A4JF-GPRU>].

302. *See Montreal's Homeless to Get Ombudsman in New Year*, CTV NEWS (Dec. 18, 2015), <http://montreal.ctvnews.ca/montreal-s-homeless-to-get-ombudsman-in-new-year-1.2706610> [<https://perma.cc/B6TD-C3PB>]; *see also* 2014–2017 MONTREAL ACTIVITY PLAN TO COMBAT HOMELESSNESS; BECAUSE THE STREET IS A DEAD END 9 (2014), http://ville.montreal.qc.ca/pls/portal/docs/page/d_social_fr/media/documents/plan_action_itinerance_v3.pdf [<https://perma.cc/D9ZP-8ZP4>].

303. *See* Waldron, *supra* note 10, at 316.

304. FULLER, *supra* note 7, at 162.

who assess rules in deciding how to live their daily lives and shape their futures. These laws may also ignore their limited opportunities to obey certain rules.³⁰⁵ Laws that are impossible for the homeless to obey fail to recognize how they are equally deserving of concern or respect like other members of the community. This is most notably the case where laws prohibit erecting temporary shelters even though adhering to such a rule would needlessly expose the homeless to physical and psychological harm.³⁰⁶ More generally, however, the law treats their inability to obey the law as something that does not matter or, perhaps, as an inconsequential trade-off in creating rules that govern public spaces.

Increasingly, the reality of how difficult it is for the homeless to obey the law on a consistent basis is being established through the acquisition of empirical data, such as surveys, reports, police records, and information obtained through Access to Information requests.³⁰⁷ Moreover, such information is notably being used as the foundation for constitutional rights based arguments, the granting of injunctions, and instituting policy changes, to underpin a variety of successful claims to better defend the homeless against laws they cannot avoid breaking.

Even though Anatole France famously and accurately remarked that “the law forbids rich and poor alike to sleep under bridges,” it is clear that the apparent neutrality of such legislation frequently does not extend into its application. While laws continue to ban acts such as sleeping or camping in public for both those with access to housing and those without it, the difference in ability to obey such a law is stark. Indeed, the gulf between the two may be as wide as the difference between doing the possible and impossible.

305. FULLER, *supra* note 7, at 162; HART, *supra* note 5, 22–23.

306. *Victoria (City) v. Adams*, [2009] 100 B.C.L.R. 4th 28, para. 39 (Can. B.C.).

307. *See generally* O’Grady, Gaetz & Buccieri, *supra* note 134.