



3-1-2013

Ordinances Targeting the Homeless: Constitutional or Cost-effective?

Ellen M. Marks

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Recommended Citation

Ellen M. Marks, *Ordinances Targeting the Homeless: Constitutional or Cost-effective?*, 19 Wash. & Lee J. Civ. Rts. & Soc. Just. 437 (2013).

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Ordinances Targeting the Homeless: Constitutional or Cost-effective?

*Ellen M. Marks**

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* J.D., 2014 Washington and Lee University School of Law, B.A., 2009 Loyola Marymount University. I would like to thank Speedy Rice for advising me on this Note, and on countless other matters; I would also like to thank my parents for their support.

Now in contiguous drops the flood comes down,
Threatening with deluge this devoted town...
Here various kinds, by various fortunes led,
Commence acquaintance underneath a shed.¹
-Jonathan Swift, Description of a City Shower

Jonathan Swift's *Description of a City Shower* demonstrates that homelessness and poverty have been an issue in society since some of the earliest writings in the English language.² The homeless consistently struggle to survive as society attempts to alleviate their troubles. They also often face legal difficulties. California, which houses a substantial homeless population, is representative of the United States' management of the homeless and their legal rights. This Note explores various California ordinances and their legal effects on the homeless population. First, this Note gives background information about homelessness historically and in the United States today and discusses the homeless population's legal issues. Second, this Note discusses California statutes as they intertwine the homeless population and the legal system. Finally, this Note proposes two solutions to the homeless population's legal issues: more housing for the homeless as a preventive measure and committed lawyering as a remedial measure.

I. History and Issues of Homelessness

European countries have been coping with homelessness and poverty since before the United States became a nation.³ In England, for example, the Elizabethan Poor Law of 1601 imposed a tax on residents to support provisions for the indigent who had lived in a community for at least three years.⁴ Although there were taxes to support the homeless, there were also laws requiring the expulsion of vagrants from communities that lacked

1. JONATHAN SWIFT, *Description of a City Shower*, in MISCELLANIES IN PROSE AND VERSE 404 (1711) (describing a downpour in London in the 1700's during which all classes of wealth and political preference are forced to mingle in order to escape the rain).

2. *See id.* (commenting on class division and homelessness in the 1700's).

3. *See* RUSSEL K. SCHUTT & STEPHEN M. GOLDFINGER, HOMELESSNESS, HOUSING AND MENTAL ILLNESS 49 (2011) (codifying provisions for the poor in England's Elizabethan Poor Law of 1601).

4. *See id.* at 49 ("Many larger towns and cities used poorhouses to provide lodging to paupers and to ensure some control over their circumstances.").

housing for them.⁵ Communities often permitted members to register their houses for lodging these vagrants and receive funds to support dependent boarders.⁶ These provisions were adopted in the American colonies and remained in force until the early nineteenth century.⁷

Despite the above, homelessness continues to be an issue today. The plight of America's homeless has only become worse as a result of the Nation's financial crisis and the rise of home foreclosures and evictions.⁸ Current statistics show that 5 percent of United States adults report an episode of homelessness lasting a week or more.⁹ Each year between two and three million people in the United States experience an episode of homelessness,¹⁰ or a separate, distinct, and sustained stay on the streets and/or in an emergency shelter.¹¹

Administrative data now makes it possible to describe the demographic character of the homeless.¹² Each year, the U.S. Department of Housing and Urban Development analyzes Homeless Management Information System (HMIS) data provided by a nationally representative sample of communities and produces a report to Congress called the Annual Homeless Assessment Report (AHAR).¹³ The most recent data

5. *See id.* ("The 1662 Law of Settlement and Removal required expulsion of vagrants from communities after forty days unless they paid ten pounds per year.").

6. *See id.* (explaining the earliest provisions for the poor in England).

7. *See id.* ("Both poorhouses and station houses had been abandoned as lodging options for indigent persons by the twentieth century.").

8. *See Crimes Against America's Homeless: Is the violence growing?: Hearing before the Subcommittee on Crime and Drugs on the Committee of the Judiciary*, Serial No. J-111-112, 9 (Sept. 29, 2010) (explaining that the plight of the homeless continues to be a struggle for tireless advocates for the homeless).

9. ROBERT ROSENHECK, *Service Models and Mental Health Problems: Cost-Effectiveness and Policy Relevance*, in *HOW TO HOUSE THE HOMELESS* 17 (Ingrid Gould Ellen & Brendan O'Flaherty eds., 2010).

10. AMERICAN PSYCHOLOGY ASSOCIATION, *Psychosocial Factors and Homelessness*, APA.ORG, <http://www.apa.org/pi/ses/resources/publications/homelessness-factors.aspx> (last visited Oct. 16, 2012).

11. *See Helping Families Save Their Homes Act of 2009*, P.L. 111-22, 123 Stat 1632, S. 896-38 (May 20, 2009) ("The term 'chronically homeless' means, with respect to an individual or family, that the individual or family—(i) is homeless and lives or resides in a place not meant for human habitation, a safe haven, or in an emergency shelter. . . ."); *see generally* U.S. DEP'T OF HOUS. AND URBAN DEV., <http://portal.hud.gov/hudportal/HUD>.

12. *See* JILL KHADDURI, *Residential Subsidies: Reducing Homelessness*, in *HOW TO HOUSE THE HOMELESS* 61 (Ingrid Gould Ellen & Brendan O'Flaherty eds., 2010) (describing the recent developments and efficiencies in data collection on homeless).

13. *See id.* at 61 ("With some exceptions, administrative data do not describe people who are homeless on the street. However, most people who live on the street come into shelters periodically.").

shows that 48 percent of those who use a homeless shelter at some time during the course of a year are individual men, 18 percent are individual women, and 32 percent are members of families.¹⁴ Generally, the majority of the sheltered homeless are in principal cities.¹⁵ In many states, a large proportion of the homeless people are in the state's largest city.¹⁶ In California for example, 44 percent of the homeless population are in the county of Los Angeles.¹⁷ Skid Row, in Los Angeles, has one of the highest concentrations of homeless people in the country.¹⁸

The homeless population suffers an abundance of problems. Because shelter is their primary issue, there are various systems and residential programs for the homeless in the United States. These programs include emergency shelters, transitional housing programs, and permanent supportive housing, sometimes called supported housing.¹⁹ According to the Department of Housing and Urban Development's latest report to Congress, approximately 640,000 persons were homeless on any given night in 2009, and roughly 1.5 million people, or one out of every 200 Americans, spent at least one night in a shelter during 2009.²⁰ Regardless of emergency shelters, transitional housing programs, and permanent supportive housing, many homeless still spend their nights on the street.²¹

Along with their primary housing issues, many homeless suffer from medical problems. Certain health problems are antecedents or even causes of homelessness, such as schizophrenia or degenerative diseases that

14. *Id.* at 62.

15. *See id.* ("More than three-quarters of sheltered homeless people are in principal cities of metropolitan regions.")

16. *Id.* (noting that 41 percent of all homeless people in Illinois are in Chicago and that 82 percent of all homeless people in New York state are in New York City).

17. *Id.* (basing this data on one-night counts).

18. *See* Editorial, *The Constitution on Skid Row*, N.Y. TIMES, Sept. 8, 2012, at SR12, available at http://www.nytimes.com/2012/09/09/opinion/sunday/the-constitution-on-skid-row.html?_r=0 (mentioning that this is the site of extended legal battles over the rights of individuals to live on the streets).

19. *Id.* at 63 ("People are still considered homeless during their stays in emergency shelters and transitional housing.")

20. *See generally Crimes Against America's Homeless: Is the violence growing?: Hearing before the Subcommittee on Crime and Drugs on the Committee of the Judiciary*, Serial No. J-111-112 (Sept. 29, 2010) (statement of Benjamin L. Cardin, Senator) (presenting various perspectives and statistical analysis on treatment of the homeless).

21. *See* EDGAR O. OLSEN, *Fundamental Housing Policy Reforms to End Homelessness*, in HOW TO HOUSE THE HOMELESS 89 (Ingrid Gould Ellen & Brendan O'Flaherty eds., 2010) ("The failure to offer assistance to all who become homeless is a major defect of the current system of low-income housing assistance.")

accompany old age.²² Once homeless, a person is more likely to experience a new assortment of health issues, such as malnutrition and trauma.²³ Homelessness may also exacerbate or complicate the treatment of many health problems.²⁴ In this sense, homelessness has many causes, but also many effects, making homelessness cyclical. In whatever setting studied, alcoholism is the most frequent single disorder diagnosed.²⁵ Combined, the total percentage of homeless suffering from mental illness or substance abuse is 83 percent.²⁶ Because the causal relationship between the homeless and alcohol abuse is so complex, the homeless population's medical problems are difficult to solve.²⁷

On top of housing obstacles and medical problems, the homeless are poorly perceived in the community. Homeless persons are often the most marginalized, disadvantaged, and disenfranchised in society.²⁸ Social isolation is particularly severe among persons with serious mental illness who are homeless.²⁹ There is a strong tendency for the public to link homelessness to deviant status.³⁰

With these community perceptions, abuse of the homeless has been problematic. Whether abuse of the homeless is on the rise in the United States is currently debated.³¹ The Senate's Congressional Subcommittee on

22. See AM. INST. OF MED., *Homelessness Health and Human Needs*, 39-40 (1988) (listing various illnesses that lead to homelessness).

23. See *id.* at 41 (describing health problems that are a result of homelessness).

24. See *id.* at 60 (mentioning that alcohol has historically been associated with homelessness).

25. See *id.* (mentioning the causes and effects of homelessness on health).

26. See *id.* at 56 (tallying various statistical studies).

27. See *id.* at 62 (“[P]recise knowledge of [the causal relationships between problems with alcohol and homelessness] may not be possible or even as... relevant as one might hope.”).

28. See Philip Lynch, *Critique and Comment: Understanding and Responding to Begging*, 29 *Melb. U. L. Rev.* 518, 522 (2005) (describing the demographic profile of people who beg and the causes and consequences of begging).

29. See RUSSEL K. SCHUTT & STEPHEN M. GOLDFINGER, *supra* note 3, at 49 (describing social relations among the homeless, particularly once they have withdrawn from others in society).

30. See Wes Daniels, *Derelicts, Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 *BUFF. L. REV.* 687, 717 (1997) (“A majority (53.5 percent) of people surveyed . . . agreed with at least one of the following statements: homeless people are ‘more dangerous than other people,’ are ‘more likely to commit violent crimes than other people,’ or ‘should be kept from congregating in public places for public safety.’”).

31. See *generally id.*; see also Deborah A. Schmedemann, *Thorns and Roses* 107 (2010) (describing a homeless man's experience being kicked, punched and knocked over by

Crime and Drugs recently convened to question whether legislative action should be taken in order to prevent this abuse from continuing.³² The Committee expressed concern about hatred against the homeless³³ in the United States.³⁴ Overall, due to public perception of the homeless, along with their housing struggles and medical misfortunes, there is great potential for the abridgment of their rights. The homeless, as with any party asserting a legal claim, need legal representation.

Homeless representation in the court system is a fairly recent development. The age of litigation concerning the rights of homeless individuals predates 1979³⁵ with *Callahan v. Carey*.³⁶ *Callahan* marks the beginning of an era in which lawyers consciously set out to use lawsuits to improve the living conditions for homeless individuals.³⁷ *Callahan* paved the way to the expansion of emergency shelter options for the homeless.³⁸ *O'Connor v. Donaldson*³⁹ and *Foucha v. Louisiana*⁴⁰ built upon the beginning of this litigation and refined the recognition of homeless population's constitutional rights. Both cases examine the involuntary confinement and subsequent deprivation of constitutional freedoms.⁴¹

the police).

32. See generally *Crimes Against America's Homeless: Is the violence growing?: Hearing before the Subcomm. on Crime and Drugs on the Comm. on the Judiciary*, Serial No. J-111-112 (Sept. 29, 2010) (statement of Benjamin L. Cardin, Senator) (meeting and debating whether there is a current escalation in abuse of the homeless).

33. See *id.* at 1 (statement of Senator Cardin) ("When I hear the horrific stories about murders, assaults, and rapes committed against our Nation's homeless, I ask myself: Is this really America?").

34. Statistics show that California and Florida are the states where homeless abuse occurs most frequently. See *id.* at 163 (according to the National Health Service).

35. See Daniels, *supra* note 30, at 689 (explaining the age of homeless litigation as an impetus in establishing the homeless population's rights).

36. See *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979) (holding that consent decree required city to furnish plaintiffs' counsel with copies of shelter termination sanction notices when such notices were issued to residents of homeless shelters).

37. See Daniels *supra* note 30 at 689 (explaining that lawyers consciously used lawsuits to improve living conditions for homeless individuals).

38. See *id.* (describing *Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979) and its effects).

39. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975) (vacating a judgment and remanding to determine damages for an unconstitutional 15-year involuntary confinement of a mentally stable man since he is capable of surviving safely in freedom).

40. See *Foucha v. Louisiana*, 504 U.S. 71 (1992) (reversing a judgment that permitted the State to perpetuate confinement if it is proven that someone is not dangerous to himself or others).

41. See Latisha R. Brown, *The McKinney Act: Revamping Programs Designed to*

O'Connor deals with involuntary confinement of an individual that was never mentally ill and never in need of mental treatment.⁴² *Foucha* addresses the continued involuntary confinement of someone that needed mental treatment at one time but had become mentally stable.⁴³ *Foucha* led to broader implications encompassing the right of due process before deprivation of life, liberty, or property.⁴⁴ These foundational cases are often used to litigate against the imprisonment of the homeless.⁴⁵ More specific freedoms have been established and homeless citizens' rights have been tailored over time through cases. *Nelson v. Board of Supervisors of San Diego County*, for example, struck the requirement of a permanent address for a homeless person's procurement of benefits.⁴⁶ Similarly, *Eisenheim v. Board of Supervisors*⁴⁷ invalidated the requirement that applicants provide a birth certificate or driver's license before receiving emergency shelter. *Eisenheim* also invalidated quota systems controlling the number of persons receiving emergency shelter.⁴⁸

These cases, beginning in 1979, have made progress toward the recognition of certain inevitable and inherent aspects of a homeless person's condition. Poverty and homelessness have been documented as a proven struggle for centuries with the homeless today remaining an underrepresented class whose constitutional rights are oftentimes compromised. These cases recognize that our constitutional rights do not

Assist the Mentally Ill Homeless, 33 COLUM. J.L. & SOC. PROBS. 235, 247 (2000) (referring to major precedent and decisions regarding homeless rights).

42. See *O'Connor*, 422 U.S. at 580 ("There can be no doubt that involuntary commitment to a mental hospital, like involuntary confinement of an individual for any reason, is a deprivation of liberty[,] which the State cannot accomplish without due process of law.").

43. See *Foucha*, 504 U.S. at 71 ("[T]he Louisiana statute violates the Due Process Clause because it allows an insanity acquittee to be committed to a mental institution until he is able to demonstrate that he is not dangerous to himself and others, even though he does not suffer from any mental illness.").

44. See *id.* at 72 ("[T]he Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'").

45. Brown, *supra* note 41, at 247.

46. See *Nelson v. Bd. of Supervisors*, 235 Cal. Rptr. 305 (Ct. App. 1987) ("The statute does not exclude those indigent residents without addresses. In defining residence, section 17101 does not mention a dwelling address or otherwise exclude persons without addresses.").

47. See *Eisenheim v. Board of Supervisors No. C-27953* (Cal. App. Dep't Super. Ct. Dec. 19, 1983) (challenging identification requirements for emergency housing benefits).

48. See *id.* (continuing to establish homeless person's rights).

guarantee a right to housing, but they do guarantee the right of privacy,⁴⁹ due process,⁵⁰ and the right to move about freely.⁵¹

Because homelessness issues are prevalent in California, and because the highest concentration of homeless persons in the United States' is in Los Angeles,⁵² California is an exemplar for the United States homelessness issues. Other cities, such as New York, Chicago, and Dallas, have ordinances similar to those in California, which target the homeless population.⁵³ These issues arise from municipal and statewide laws, with the homeless raising claims at the municipal, as well as state, level. Sometimes the homeless are dismissed from court whereas other times they successfully assert their legal rights. This clash between homeless persons and California laws should and can be prevented with permanent housing options for the homeless. Once in the courtroom, their rights should be asserted with effective legal counsel.

II. Homeless Problems in California

There are a variety of laws that target the homeless specifically, as is apparent through an examination of California codes and ordinances.⁵⁴ There are three areas of California law that tend to lock-in the homeless: the Penal Code, the California Business and Professions Code, and various Municipal Codes.

49. See generally *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965) (noting that the First Amendment has a penumbra that protects individual privacy from governmental intrusion).

50. U.S. CONST. amend. XIV; U.S. CONST. amend. V (requiring that no person be deprived of life, liberty or property without due process of law).

51. See *Brown*, *supra* note 41, at 235, n. 67 (2000) ("The law is well settled that there is no federal constitutional right to receive treatment for mental illness at public expense.").

52. See *The Constitution on Skid Row*, *supra* note 18 (mentioning that this is the site of extended legal battles over the rights of individuals to live on the streets).

53. See Rania Khalek, *12 Most Absurd Laws Used to Stifle the Occupy Wall St. Movement Around the Country*, ALTERNET.ORG, Oct. 14, 2011, http://www.alternet.org/story/152743/12_most_absurd_laws_used_to_stifle_the_occupy_wall_st_movement_around_the_country?page=0%2C2 ("Although laws and municipal ordinances vary from city to city, there is a consistency in the tactics being used to stifle the [Occupy] movement.").

54. See CAL. BUS. PROF'L CODE § 2435.2(a) (making it illegal to possess a shopping cart).

A. The California Penal Code, Business & Professions Code, and Municipal Codes

The California Penal Code makes it an offense for anyone to lodge “in any building, structure, vehicle or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.”⁵⁵ The homeless and other squatters are the only persons affected by such a statute. This law opens the door for legal charges of disorderly conduct or misdemeanors for any homeless person at any given time,⁵⁶ operating as a legal basis for police questioning and searches that often lead to arrest. California demonstrates a trend seen in other states. New Jersey towns,⁵⁷ for example, have enacted laws against sleeping in public, and cities in Florida have decided to remove park benches to deter the homeless from sleeping there.⁵⁸

The California Business & Professions Code make it unlawful to remove a shopping cart or laundry cart from the premises of the parking area of a retail establishment with the intent to temporarily or permanently deprive the owner or retailer of possession of the cart.⁵⁹ Though this law applies to the public generally, the homeless are targeted due to their common use of shopping carts for work⁶⁰ and for storage of their personal belongings. Once again, California is not alone in its shopping cart theft law. Other states have similar laws, including Maryland, which is

55. CAL. PENAL CODE § 647(e) (making an offender of anyone “[w]ho lodges in any building, structure, vehicle or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it.”).

56. *See id.* (“[E]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor.”).

57. *See* CBS New York, *N.J. Town Outlaws Sleeping In Public*, CBSLOCAL.COM (Nov. 6, 2010) <http://newyork.cbslocal.com/2010/11/16/nj-town-outlaws-sleeping-in-public/> (“‘This ordinance was amended to help assist the police in addressing the increasing problem of homeless people sleeping on benches,’ [Police Chief Paul] Morrison said.”).

58. *See* J. David McSwane, *To Chill Homeless, Sarasota Pulls Park Benches*, HERALD-TRIBUNE.COM (May 17, 2011), <http://www.heraldtribune.com/article/20110517/ARTICLE/110519529>.

59. CAL. BUS. PROF’L CODE § 2435.2(a); *see also* Cal. Bus. Prof. Codes § 22435(a) (“‘Shopping cart’ means a basket which is mounted on wheels or a similar device generally used in a retail establishment by a customer and for the purpose of transporting goods of any kind.”).

60. *See* Points and Authorities In Support of Continuing and Modifying Probation, *State v. Smith*, No. M076149 (Super. Ct. of Cal. filed June 29, 2011) (on file with Washington & Lee Journal of Civil Rights and Social Justice) (describing one man’s work routine as involving the transportation of recyclables from public trashcans to the local grocery store where he would be paid for them).

considering raising the penalty from a \$25 fine to a \$100 fine for shopping cart theft.⁶¹

Similar to the California Penal Code provision on intoxication, the California Business Professions Code makes it illegal to be in possession of “any can, bottle, or other receptacle containing any alcoholic beverage that has been opened, or a seal broken, or the contents of which have been partially removed, in any city, county, or city and county owned park or other city, county, or city and county owned public place.”⁶² This provision does not apply when an individual is in possession of an alcoholic container for the purpose of recycling or other related activity.⁶³ As is the issue with the penal code intoxication provision, many homeless with alcoholism have no other location to drink. Their addiction does not stop simply because they are outside. Many other states have an ordinance similar to California’s. “Every state has an outright ban on open containers except for Georgia, Louisiana, Missouri, Montana, Nevada, and Pennsylvania.”⁶⁴

Along with these statewide codes, municipal codes target or disproportionately affect the homeless in various cities and counties in California. The San Diego Municipal Code includes provisions that mainly affect the homeless.⁶⁵ Open alcoholic beverages at posted premises are prohibited.⁶⁶ The code also makes it illegal to camp or sleep overnight on any beach or in a park unless specifically authorized by the city.⁶⁷ Such a provision affects homeless more than any other class of persons. Because of fiscal, health, or shelter concerns, many homeless have no other option but to sleep on the streets.

61. See Hannah Anderson, *Maryland Lawmakers Question Outdated Shopping Cart Theft Law*, TIMES-NEWS.COM (Jan. 31, 2013), <http://times-news.com/local/x964891674/Maryland-lawmakers-question-outdated-shopping-cart-theft-law> (“The bill would increase the fine from \$25 to \$100.”).

62. CAL. BUS. PROF’L CODE § 25620(a).

63. *Id.* at § 25620(c).

64. OPEN CONTAINER LAWS, <http://www.opencontainerlaws.com> (last visited Sept. 1, 2013).

65. See generally SAN DIEGO MUN. CODE § 56.55, § 55.56, and § 63.20.11.

66. See SAN DIEGO MUN. CODE § 55.56 (defining premises as any residence or other private property, place, or premises, including any commercial or business premises).

67. See *id.* at § 63.20.11 (“Unless specifically authorized by license or lease from the City, it is unlawful for any person to remain overnight, or to erect, maintain, use, or occupy any tent, lodge, shelter, or structure on any public beach in this City, unless the tent, lodge, shelter, or structure has two sides open and there is an unobstructed view of the interior from the outside on at least two sides.”).

The Los Angeles Municipal Code prohibits anyone from leaving baggage or personal property on any sidewalk.⁶⁸ Though this provision may apply to shopkeepers or retail businesses, it is directed at a homeless person's belongings on public sidewalks. Similarly, the Laguna Beach Municipal Code prohibits unlawful sleeping or camping in public.⁶⁹ Again, this municipal ordinance targets the homeless as it is unlikely that anyone would choose to sleep on the streets.

The Penal Code, the California Business Profession Codes, and the Municipal Codes are enforced in various ways. One common mechanism is a Stay Away Order.⁷⁰ Stay Away Orders temporarily ban homeless persons from the area where the misdemeanor occurred.⁷¹ Other enforcement mechanisms include temporary probation and imprisonment.⁷² Because these laws target the homeless population, Stay Away Orders, temporary probation, and imprisonment are common to many homeless people in California, and in turn, throughout the United States.

B. California Laws Impose Heavy Burdens on Homeless Persons

These state and municipal laws play out daily in many peoples' lives around California. A few specific cases demonstrate the clash between these distinctly tailored laws and homeless people. Some homeless persons' claims are successful in fighting these laws whereas other legal claims only demonstrate a continuing fight to assert constitutional rights.

68. See L.A. MUN. CODE § 56.11 ("No person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk.").

69. See LAGUNA BEACH MUN. CODE § 8.30.030(b)(1) ("It is unlawful for any person to sleep in the following public areas: In any public park or beach during the period from one-half hour after sunset to five a.m. of the following day.").

70. See BLACK'S LAW DICTIONARY 1548 (9th ed. 2009) ("Stay away orders are most often issued in criminal cases.").

71. See Points and Authorities In Support of Continuing and Modifying Probation, State v. Smith, No. M076149 (Super. Ct. of Cal. June 29, 2011) (on file with Washington & Lee Journal of Civil Rights and Social Justice) (involving a Stay Away Order from a city park); see also Defendant's Statement in Mitigation, State v. Smith, No. M** (Super. Ct. of Cal. 2012) (arguing the Stay Away Order prevented the defendant from using a public restroom and was unreasonable).

72. See Defendant's Statement in Mitigation, State v. Smith, No. M** (Super. Ct. of Cal. 2012) (stating that a 90-day probation sentence is overly punitive and that the costs of imprisonment do not outweigh the benefit).

i. Mr. Smith in San Diego

Mr. Smith is a 67-year-old homeless man in San Diego.⁷³ He was issued a Stay Away Order for violating California Penal Code 647(e)⁷⁴ when he was sleeping in public.⁷⁵ This Stay Away Order led to multiple criminal causes of action with the city.⁷⁶

Mr. Smith works in the business of recycling cans.⁷⁷ His route begins at one end of the boardwalk. As he walks, he collects cans throughout his day.⁷⁸ He then makes his way to the closest can collection location and uses his earnings at the cheapest nearby grocery store.⁷⁹ He takes the most direct route, which involves passing a park in order to cross the bridge that leads him to the cheapest grocery store in the area. In his usual route, Mr. Smith violated his Stay Away Order by crossing one of the parks on his way to the grocery store. He argued that the Stay Away Order was too broad and prevented him from carrying on his job.⁸⁰ He relied on *In re White*,⁸¹ which held that there is an overall requirement of reasonableness in relation to the seriousness of the offense for which a defendant is

73. See Points and Authorities In Support of Continuing and Modifying Probation, State v. Smith, No. M076149 at 8 (Super. Ct. of Cal. June 29, 2011) (on file with Washington & Lee Journal of Civil Rights and Social Justice) (“[Mr. Smith] is sixty-seven years old and his health is frail and failing.”).

74. See CAL. PENAL CODE § 647(e), *supra* note 55.

75. See generally Defendant’s Statement in Mitigation, State v. Smith, No. M** (Super. Ct. of Cal. 2012); Motion for Judgment of Acquittal; Argument in Support Thereof, State v. Smith, No. M** (Super. Ct. of Cal. Aug. 2011) (on file with Washington & Lee Journal of Civil Rights and Social Justice).

76. See *id.* (“A man walked across a street when he should have crossed the exact same street two blocks to the north.... This is the lowest level of crime....Furthermore, though Mr. Smith was in violation of a court order, he carried no weapons, he was pleasant and respectful to the police officer, even giving a gracious nod to the officer during his in-court testimony....He complied with all commands, but the one ordering him to cross a street further to the north.”).

77. See Points and Authorities In Support of Continuing and Modifying Probation, State v. Smith, No. M076149 (Super. Ct. of Cal. June 29, 2011) (on file with Washington & Lee Journal of Civil Rights and Social Justice) (arguing that the Stay Away Order was overbroad).

78. See *id.* (describing Mr. Smith’s daily routine).

79. See *id.* (explaining that Mr. Smith must take this route because it offers the best financial incentives).

80. See *id.* (mentioning Mr. Smith cannot survive without his daily income from recycling cans).

81. See *In Re White* 97 Cal. App. 3d 141, 141 (holding that probation for a woman convicted of soliciting an act of prostitution was unreasonable, unduly harsh and oppressive for conduct that was not criminal).

convicted.⁸² A conviction is invalid if it: (1) has no relationship to the crime of which the offender was convicted; (2) relates to conduct which is not in itself criminal; and (3) requires or forbids conduct which is not reasonably related to future criminality.⁸³ Mr. Smith's presence around the public park where his Stay Away Order was issued did not relate to future criminality. It was merely on his daily route to earn money. Here, the city imposed a punishment on Mr. Smith that affects him more severely than necessary, resulting in a jail sentence. Because he violated his Stay Away Order, Mr. Smith is subject to further punishment.

Mr. Smith was later arrested for using a restroom that he was not permitted to use due to this overbroad Stay Away Order.⁸⁴ His punishment was 35 days in jail, but the prosecution sought an additional 225 days.⁸⁵ The use of a Stay Away Order in this case prevented a homeless man, who most needs the use of a public restroom, from using it. The result of an overly-broad Stay Away Order, given because Mr. Smith violated a law geared at homeless persons, led to Mr. Smith's incarceration. In response to the violation of a broad Stay Away Order, Mr. Smith argued that incarceration does not solve the problem. After incarceration, Mr. Smith will return to the streets, only to be cited and released again and again, in perpetuity.⁸⁶

A narrowly tailored Stay Away Order could have kept Mr. Smith from sleeping in a park while still allowing him access to the public restroom. Overly-broad Stay Away Orders can lead to inevitable jail time and eventual release. The cycle simply repeats itself once Mr. Smith, or any other homeless person served with a Stay Away Order, is released from confinement and once again attempts to earn a living.

82. *See id.* ("No case has been called to our attention upholding such a broad condition which completely prohibits mere presence in a geographical area *at all times* as contrasted with the prohibition of entry into selected and particularized places . . . with reasonable restrictions as to time.").

83. *See generally* *People v. Lent*, 15 Cal.3d 481, 486 (1975) ("The Legislature has placed in trial judges a broad discretion in the sentencing process, including the determination as to whether probation is appropriate and, if so, the conditions thereof.").

84. *See* Statement in Mitigation, *State v. Smith*, No. M** (Super. Ct. of Cal. 2012) ("The public restroom is within a roughly ten block area where [Mr. Smith] is not permitted to go.").

85. *See id.* (responding to the prosecution's argument for the 225-day extension).

86. *See id.* (mentioning this as a possible chain effect of the San Diego Municipal Code and its implementation).

The root of Mr. Smith's jail time is the Stay Away Order for Sleeping In Public.⁸⁷ This law targets homeless persons more than anyone else. Though the state may not criminalize one for their state of being or punish a person independent of anything he has done,⁸⁸ charging a homeless person for sleeping in public does criminalize a person for their status, independent of anything he or she has done.

Whether Mr. Smith's jail sentence for violating a broad Stay Away Order is an appropriate punishment can be answered by exploring the general objectives of sentencing as codified by California statute.⁸⁹ These include: (1) the protection of society; (2) the punishment for an unlawful action; (3) the encouragement of a criminal defendant to lead a law-abiding life in the future; (4) the deterrence of others from similar criminal conduct by demonstrating the consequences of a certain set of actions; (5) the prevention of the criminal defendant from committing new crimes by quarantining him for a period of time; and (6) the achievement of uniformity in sentencing.⁹⁰

Sentencing Mr. Smith to jail does not fulfill these objectives. Society is not safer as a result. Neither Mr. Smith nor others are deterred from criminal conduct, because Mr. Smith did not act with criminal intent deserving of such consequences. Similarly, sentencing Mr. Smith to jail advances neither governmental nor societal interests. Mr. Smith is targeted because of his lifestyle and state of being. While collecting cans, walking to the grocery store, and using a public restroom, Mr. Smith violated California laws, at both the municipal and the state level. His incarceration does not serve general objectives of sentencing because society was never endangered by his acts. Mr. Smith's predicament, caught between being a law-abiding citizen and being homeless, is not uncommon.

Mr. Smith's case presents legal issues that he faces in his daily routine. Many homeless persons' lives on the street are interrupted by jail time as a result of laws that target them. Aside from their rotation between the street and jail, homeless persons also encounter procedural issues in the courtroom. Procedural roadblocks often prevent recovery, or even

87. See Motion for Judgment of Acquittal; Argument in Support Thereof, *State v. Smith*, No. M** (Super. Ct. of Cal. Aug. 2011)(on file with Washington & Lee Journal of Civil Rights and Social Justice).

88. See Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 394 (2000) (citing *Robinson v. California*, 370 U.S. 660 (1962)) (“[T]he court struck down legislation criminalizing defendant’s condition.”).

89. See CAL R. OF CT. 410.

90. See *id.*

advancement, of a claim. With the help of counsel, homeless persons can scale these procedural obstacles and win in court.

*ii. Porto v. City of Laguna Beach*⁹¹

In *Porto v. City of Laguna Beach*,⁹² a homeless plaintiff argued that citation of the homeless for sleeping in public violated his constitutional rights. The Plaintiff was charged with violating section 8.30.030⁹³ of the municipal code, which prohibits sleeping in public. He proceeded *pro se*⁹⁴ to assert his constitutional rights.⁹⁵ Additionally, he claimed that his citations under section 8.30.030 and section 647(e) are used only against homeless persons sleeping in public. He maintained they were used to “harass [the homeless] and encourage them to leave Laguna Beach.”⁹⁶ His claim was based on the notion that there are no legitimate government interests at stake. He slept “in constant fear and anxiety of being awakened... by the police.”⁹⁷ His argument was based on the notion that the ordinance targeted him as a homeless person, based on his social status.

The Plaintiff sought “injunctive relief preventing defendants from enforcing the anti-camping ordinance against homeless persons,”⁹⁸ but admitted he had not yet been personally harassed.⁹⁹ The court dismissed his claim. This claim alone demonstrates one homeless man’s voice against laws that discriminate against him as a person, solely because of his social condition.

91. See *Porto v. Laguna Beach*, SACV 12-00501-DOC, 2012 WL 3810475, at 8-9 (C.D. Cal. Aug. 7, 2012) (report and recommendation adopted, SACV 12-00501-DOC, 2012 WL 3810982) (C.D. Cal. Sept. 4, 2012) (holding that a homeless plaintiff failed to state a claim because he did not show he was personally harassed by the police in Laguna Beach).

92. See *id.*, at 1 (discussing whether police citations of homeless persons for sleeping in public violates their constitutional and the *Sipprelle* agreement).

93. See LAGUNA BEACH MUN. CODE § 8.30.030 (prohibiting camping in any public area, sleeping in any public park or beach at night, or sleeping on any public street or in any public building at any time).

94. See BLACK’S LAW DICTIONARY 1548 (9th ed. 2009) (defining *pro se*: “one proceeding for himself and on their own behalf, in person”).

95. See *Porto*, 2012 WL 3810475, at 1 (“Plaintiff claims that Defendants’ practice of citing homeless persons for sleeping in public violates both his constitutional rights and the *Sipprelle* Agreement.”).

96. *Id.* at 2.

97. *Id.*

98. *Id.* at 6.

99. See *id.* at 2 (“[H]e alleges that on two occasions he was warned by . . . [an] officer that he would be cited if he were found sleeping in his vehicle.”).

The last facet of his complaint is equally telling. Porto contended that the city failed to train its police officers in proper treatment of homeless persons and that this lack of training resulted in the deprivation of constitutional rights. Plaintiff's claim was based on an improper custom in the police workplace. In dismissing his claim, the court relied on its finding that he did not prove there was a custom among the police. "A custom may be inferred from evidence of repeated constitutional violations for which the errant municipal officers were not discharged or reprimanded."¹⁰⁰ Federal Rule of Civil Procedure 8(a),¹⁰¹ requires "a 'showing' that the plaintiff is entitled to relief, rather than a blank assertion of entitlement to relief."¹⁰² Rule 8 does not require "detailed factual allegations," but it nevertheless "demands more than an unadorned, 'the defendant-unlawfully-harmed-me' accusation."¹⁰³

The court found that the plaintiff's complaint did not identify any underlying claim and that he did not suffer "injury by being shut out of court."¹⁰⁴ The court seemed comfortable using procedural safeguards in the Federal Rules of Civil Procedure. Though Plaintiff's claim was dismissed, his attempted lawsuit shows an unheard voice in the system. A single allegation of improper treatment by police officers should be sufficient to permit a *pro se* complaint to proceed. It is clear that the law affects the plaintiff's constitutional rights, and likely those of many other homeless persons in Laguna Beach.

iii. *Stewart v. St. Vincent de Paul*¹⁰⁵

As in *Porto*, the Plaintiff in *Stewart* proceeded *pro se*, alleging that his constitutional rights were violated when he was prohibited from assembling on the sidewalk with others.¹⁰⁶ He further alleged that the defendants used

100. *Id.* at 8.

101. FED. R. CIV. P. 8(a) ("A pleading that states a claim for relief must contain: . . . short and plain statement of the claim showing that the pleader is entitled to relief. . . .").

102. *Porto* at 2 (citing *Bell At. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

103. *Id.* (quoting *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)).

104. *Id.* at 6 (citing *Chirstopher v. Harbury*, 536 U.S. 403, 415 (2002)).

105. *See Stewart v. St. Vincent de Paul, Inc.*, 12-CV-642 BEN KSC, 2012 WL 3205576, 1 (S.D. Cal. Aug. 6, 2012) (holding that Plaintiff failed to prove that St. Vincent de Paul fulfilled the role of government actors).

106. *See id.*, at 1 ("Plaintiff alleges that Defendants have violated his constitutional rights by prohibiting him and others from assembling on the sidewalk in front of their properties.").

“threats, calls to police, denial of restroom access and free food and shelter to residents”¹⁰⁷ solely for congregating on the sidewalk outside St. Vincent de Paul, a shelter aimed at breaking the cycle of homelessness in San Diego.¹⁰⁸ The court held that Stewart lacked jurisdiction absent a showing of a colorful constitutional claim because he failed to show that the representations of St. Vincent de Paul constituted government action.¹⁰⁹ Procedural safeguards again barred the plaintiff from any recovery, because the defendants were not proven to be “government actors acting under state law”¹¹⁰ they were not required to abide by the Constitution. It is notable that he filed *pro se*, making it likely that he was unaware of the requirements for filing a proper claim.¹¹¹ If the plaintiff had legal representation, his claim may not have been dismissed. Once again, a homeless voice is heard through a complaint, but stifled from a public hearing and public scrutiny due to procedural roadblocks.

*iv. The Sipprelle Agreement*¹¹²

Not all claims by homeless persons are dismissed for procedural insufficiencies. The discord between homeless persons and the legal system is shown in the *Sipprelle* Settlement. The *Sipprelle* Settlement arose from a lawsuit seeking an injunction to prevent the city of Laguna Beach and other defendants from enforcing the city’s ordinance that prohibits sleeping in public.¹¹³ On December 23, 2008, plaintiffs, on behalf of five chronically homeless individuals, filed a complaint against The City of Laguna Beach and its police force in United States District Court. The complaint alleged, among other things, that the enforcement of Laguna

107. *Id.*

108. *See* SAINT VINCENT DE PAUL VILLAGE, <http://www.svdpv.org/> (last visited Jan. 8, 2013) (describing its mission as geared at breaking the cycle of homelessness).

109. *See Stewart*, 2012 WL 3205576, at 2 (“[T]here are flaws on the face of Plaintiff’s Complaint. They are not so serious, however, as to deprive the Court of jurisdiction to hear this case.”).

110. *See id.* at 3 (explaining that private conduct has different standard of review than government acts).

111. *See id.* at 1 (liberally construing the Plaintiff’s *pro se* complaint).

112. *See Sipprelle v. Laguna Beach, Settlement Agreement* (May 19, 2009), available at <http://lagunabeachcity.net/civica/filebank/blobload.asp?BlobID=5479> [hereinafter *Sipprelle Agreement*] (on file with Washington and Lee Journal of Civil Rights and Social Justice) (settling a claim by homeless persons against police officers for harassment charges).

113. *See id.* (explaining the basis for the action).

Beach Municipal Code section 18.04.020,¹¹⁴ disallowing the use of tents or covering over six feet high in public, violated the Eighth Amendment's ban on cruel and unusual punishment by criminalizing the involuntary condition of homelessness. The complaint also sought to prevent the enforcement of Section 647(e)¹¹⁵ of the California Penal Code, which makes it illegal to lodge in any building, structure or place without the permission of the owner. The litigation eventually ended in a settlement, with many of the details remaining confidential. From what was released, the settlement required plaintiffs' dismissal of the action in return for two years banning the use of Section 647(e),¹¹⁶ unless prior notice was given by the City of Laguna Beach.¹¹⁷

The *Sippelle* Settlement shows that some cases brought by the homeless do result in relief. The fact that the *Sippelle* claims were settled hints that there are facts that the City of Laguna Beach did not want publically released. The cruel and unusual punishment claim leads to further speculation as to what actually occurred between the City of Laguna Beach and the homeless. Overall, the *Sippelle* Settlement demonstrates that the homeless deserve and can be afforded relief from these discriminatory laws. Though settlement agreements do not necessarily indicate guilt, the modification of the city ordinances and temporary discontinuation of these ordinances suggests that there was some constitutional abridgment. The settlement represents a huge success for the homeless in Laguna Beach. Such a success would not have been achieved without effective legal advocacy.

114. See LAGUNA BEACH MUN. CODE 18.04.020 ("No person shall install, erect or maintain any canopy, awning, umbrella, tent or cover over six feet in height or wider than six feet square on or in any public beach, park, street, alley or passageway.").

115. See generally CAL. PENAL CODE § 647(e), *supra* note 55.

116. See *Sippelle* Agreement at 2 ("Except as otherwise provided below, and for a period of two (2) years following the Effective date of this Agreement, Defendants agree to furnish Plaintiffs' counsel with written notice at least thirty days (30) prior to the City's resumption of enforcement of . . . §647(e).").

117. "Prior to such time as Defendants may determine to resume enforcement of California Penal Code section 647(e), Defendants (including their officers, employees and agents), except as otherwise provided below, shall not rely on a violation of California Penal Code §647(e) with respect to lodging in any City public building, structure or place without the permission of the City for the purpose of establishing probable cause to believe that a person is engaged in or is about to engage in criminal activity."

*v. Lavan v. City of Los Angeles*¹¹⁸

Despite procedural hindrances, the homeless prevailed in the published opinion of *Lavan v. City of Los Angeles*. Nine homeless individuals living in the Skid Row district of Los Angeles charged that the City of Los Angeles violated their Fourth and Fourteenth amendment rights by seizing and immediately destroying their unabandoned personal possessions that were left on public sidewalks. The city seized the property while appellees attended to necessary tasks, such as eating, showering and using restrooms.

Everyone Deserves a Roof, an organization in Los Angeles, gave appellees mobile containers (EDARs) to store their documentation, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags, and blankets.¹¹⁹ City employees seized and destroyed appellees EDARs and carts without notice, thereby permanently depriving appellees of possessions and personal identification. The city did not have a good-faith belief that appellees' possessions were abandoned when it destroyed them.¹²⁰ If the city had considered the property abandoned, their destruction would not be unconstitutional.

These homeless, with the help of their lawyers, sought a narrow injunction to stop the city from seizing property on Skid Row¹²¹ absent an objectively reasonable belief that the property was abandoned, presented an immediate threat to public health or safety, or was reasonable evidence of a crime or contraband.¹²² The claim sought a requirement that the City of Los Angeles hold the property in a secure location for 90 days if it was

118. See *Lavan v. Los Angeles*, 11-56253, 2012 WL 3834659, 1023-24 (9th Cir. Sept. 5, 2012) (holding the Los Angeles violated the homeless persons Constitutional rights).

119. See *id.* at n.4 (“EDARs are small, collapsible mobile shelters provided to homeless persons by Everyone Deserves a Roof, a nonprofit organization.”).

120. See *id.* at 1025 (“[O]n a number of the occasions when the City seized Appellees’ possessions, Appellees and other persons were present, explained to City employees that the property was not abandoned, and implored the City not to destroy it.”).

121. See Steve Lopez, *Now Comes the Heavy Lifting*, L.A. TIMES, Oct. 23, 2005, <http://www.latimes.com/news/local/la-me-lopez23oct23-2005,0,7335318.column> (“No official count is available, but it’s safe to say thousands sleep on skid row. Some readers have challenged my reference to 10,000 street dwellers, but we know that roughly 3,000 are in shelters, with another several thousand in and out of single-room occupancy hotels and flophouses.”).

122. See *Lavan*, at 1024 (“The City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash; issuance of the injunction ... merely prevent[s] the City] from *unlawfully* seizing and destroying personal property that is not abandoned.”).

confiscated.¹²³ In its defense, the City relied on Los Angeles Municipal Code Section 56.11, which provides that “no person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk.”¹²⁴ Despite this ordinance, the seizing of property while these people used the restroom, showered, and shaved seems to reach far beyond the municipal code’s intent. There are other modes the city could have used to deal with this. Temporary restraining orders are used to serve the public interest by allowing the City to “lawfully seize and detain property, as opposed to unlawfully seizing and immediately destroying property.”¹²⁵ Rather than taking a lawful approach, the city claimed that the appellees had no legitimate expectation of privacy in property that they left unattended on a public sidewalk in violation of the municipal code.¹²⁶ Such a defense undermines the fundamental right to property.¹²⁷

The court held that the city meaningfully interfered with appellees’ possessory interests.¹²⁸ This Ninth Circuit poignantly states: “government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking.”¹²⁹ “The city demonstrate[d] that it completely misunderst[ood] the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a

123. *See id.* (“The narrow injunction bars the City from: . . . Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.”).

124. L.A. MUN. CODE § 56.11.

125. *Lavan v. Los Angeles*, 11-56253, 2012 WL 3834659, 1026 (9th Cir. Sept. 5, 2012).

126. *See id.* at 1031 (describing the City’s claim that there is no law establishing an individual’s constitutionally protected property interest in unattended persona property left illegally on the public sidewalk).

127. This has been recognized by some of the United States’ greatest patriots: John Jay, “No power on earth has a right to take our property from us without our consent.”; Calvin Coolidge, “Ultimately property rights and personal rights are the same thing.”; Arthur Lee, “The Right of property is the guardian of every other Right, and to deprive the people of this, is in fact to deprive them of their Liberty.”

128. *See Lavan*, at 1028 (explaining the breadth of possessory interests).

129. *See The Constitution on Skid Row*, *supra* note 18 (“The city seized identification papers, family photographs and other personal belongings of homeless people, when they left their things momentarily as they stepped away to eat, shower, use a bathroom or tend to some other need.”).

municipal ordinance.”¹³⁰ Even if the city assumes that appellees violate §56.11 by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of appellee’s property remains subject to the Fourteenth amendment’s reasonableness requirement.¹³¹ This deprivation of property is especially troubling considering the vulnerability of Skid Row’s homeless residents.¹³² The City was directed “to leave notice in a prominent place for any property taken on belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner.”¹³³

There is discrimination in the California Penal Code, multiple municipal Codes, and the California Business & Profession Code because they apply almost exclusively to homeless people. When these codes intersect with the homeless population, the legislation’s shadowed target becomes more apparent. Despite the fact that many homeless persons’ claims are dismissed through procedural safeguards, there is abuse being reported.

vi. The Constitution: from Mr. Smith to Sipprelle

Cases such as *Lavan v. Los Angeles* and *Porto v. Laguna Beach* are the first step in recognizing flaws in our legal system. From Mr. Smith’s pleadings in San Diego to the *Sipprelle* Settlement in Laguna Beach, the homeless throughout California have brought a variety of challenges to violations of their constitutional rights. The Constitution applies to all citizens, and oftentimes noncitizens, in the United States, regardless of their financial or housing position. The claims asserted by many of California’s homeless population include the right to equal protection under the law, the right to remain free from cruel and unusual punishment, and the right to own property.

Mr. Smith’s case presents an equal protection problem. The Fourteenth Amendment commands that no person be denied equal protection of the law by any state.¹³⁴ The Equal Protection Clause

130. *Lavan*, at 1032.

131. *See id.* at 1036 (explaining the reasonableness requirement weighs in favor of the Plaintiffs).

132. *See id.* at 1032 (emphasizing the upsetting details of the case).

133. *Id.* at 1026.

134. U.S. CONST. amend XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”); *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803) (“[i]t cannot be presumed that any clause in the Constitution is intended to be

introduces the requirement that individuals who are similar to each other must be treated similarly.¹³⁵ This means that absent criminal or threatening behavior, the right to go about one's routine, free of government interference, is to be enjoyed by all. Because his stay away order was overly broad, Mr. Smith's right to go about his daily business without government interference was forfeited. Under the Equal Protection Clause, Mr. Smith should be treated the same as all other residents and visitors in San Diego; he should be permitted to walk freely through the City of San Diego.

Plaintiffs in the *Sipprelle Agreement* advanced their claim under the Eighth Amendment's¹³⁶ ban on cruel and unusual punishment. The standards for what constitutes cruel and unusual under the Constitution are determined by our ever-evolving society.¹³⁷ Because cruel and unusual punishment is defined by society, the question becomes whether an average member of society may find it cruel or unusual to be awoken in the night and imprisoned for sleeping on the street out of necessity. The notion of punishing a homeless person merely for sleeping on the street when they have no home seems inherently cruel. It is likely that this argument was fundamental in *Sipprelle*.

Plaintiffs in *Lavan* were successful in asserting their right to property when city employees deprived them of property without due process.¹³⁸ Though the definition of property can oftentimes be an issue in Fourteenth Amendment claims, it is unquestionable that the EDAR containers, plaintiffs' birth certificates, medications, and family memorabilia constitute property.

without effect. . . .").

135. See *Cleyburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 ("[A]ll persons similarly situated should be treated alike."); see also Giovonna Shay, *Similarly Situated*, 18 GEO. MASON L. REV. 581, 583 ("The words 'similarly situated' appeared in equal protection doctrine long before the advent of the modern, 'tiered' form of equal protection analysis, which employs varying levels of scrutiny based on the protected class.").

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

137. See Juliet L. Ream, *Capital Punishment for Mentally Retarded Offenders: Is It Morally and Constitutionally Impermissible?*, 19 SW. U. L. REV. 89, 132 (1990) ("What is cruel and unusual punishment does not change. It is the yardstick that is used to measure what is cruel and unusual punishment that changes. . . ."); see also *Trop v. Dulles*, 356 U.S. 86 (1958) ("The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

138. U.S. CONST. amend. XIV ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

Because the plaintiffs in *Lavan* were deprived of property, the government must prove that they were afforded due process. “The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures.”¹³⁹ There are different elements of the adversary process that may be required as a part of the “due process” that the government must afford an individual when it deprives him or life, liberty, or property.¹⁴⁰ Giving notice is one of the primary steps required before the government may deprive individuals of a constitutionally protected right.¹⁴¹ The facts in *Lavan* show that the city failed to give notice to the homeless persons on Skid Row before the deprivation and destruction of their property.

Equal protection, freedom from cruel and unusual punishment, and the right to possess property find harmony in personal autonomy. When considered more broadly, the Constitution is the means for rectifying a wide range of injustices.¹⁴² In promoting the ratification of the Constitution, the Federalist Papers¹⁴³ concentrated on the Constitution’s fundamental goal of justice; “[j]ustice...ever has been and ever will be pursued until it be obtained, or until liberty be lost in the pursuit.”¹⁴⁴

The California homeless population is entitled to the justice guaranteed under the Constitution. The abridgment of their constitutional rights can be rectified with both preventive measures and remedial measures. These constitutional claims may be prevented with more housing options and available legal counsel. Once in the courtroom, devoted legal counsel can work to remedy these injustices with zealous advancement of a homeless person’s rights.

139. *Cleveland Bd. of Educ. v. Loudermill* 105 S.Ct. 1487, 1493 n. 3 (1985).

140. *See id.* at 1493 n.3 (“The categories of substance and procedure [of the due process inquiry] are distinct.”).

141. *See Mullane v. Central Hanover Bank & Trust Co.* 70 S.Ct. 652, 657 (“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”).

142. *See Mortimer Adler, Robert Bork: The Lessons to be Learned*, 84 NW. U. L. REV. 1121, 1133 (1190) (“The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.”) (citing U.S. CONST. amend. IX).

143. J. Michael Martinez & William D. Richardson, *The Federalist Papers and Legal Interpretation*, 45 S.D. L. REV. 307, 312 (2000) (“Thomas Jefferson, a states’ rights champion and hardly a proponent of a large, powerful, centralized government, proclaimed The Federalist Papers as, “the best commentary on the principles of government which ever was written.”).

144. THE FEDERALIST NO. 51 (James Madison).

III. Addressing Legal Issues of the Homeless

Ending this conflict between the homeless and local ordinances requires a two-pronged approach. First, housing the homeless is a simple, preventive solution.¹⁴⁵ Second, the justice system may need to take a more active role in remedying the issues faced by many homeless in California and throughout the United States.

A. Policy

i. Providing Housing to the Homeless

Providing housing to the homeless is a viable solution. Research and experience over the past twenty years have shown that there is a cost-effective solution to homelessness known as “permanent supportive housing.”¹⁴⁶ In practice, providing permanent supportive housing to people experiencing homelessness saves taxpayers money.¹⁴⁷ Homeless people spend an average of four days longer per hospital visit than comparable non-homeless people, and they are likely to spend more time in jail or prison. These costs add up for municipalities.¹⁴⁸

The permanent supportive housing theory has been tested recently in Los Angeles. Providing permanent supportive housing for the homeless in Los Angeles could save taxpayers thousands of dollars.¹⁴⁹ According to a

145. See National Alliance to End Homelessness, *Chronic Homelessness: Policy Solutions* (2010), http://b3cdn.net/naeh/cf8a1ad949f1053993_4bm6iic9r.pdf (“Reductions in chronic homelessness are largely the result of coordinated and focused efforts by communities to provide permanent supportive housing for chronically homeless individuals.”).

146. See *id.* (“Communities across the country that have instituted that approach have reported a decline in the number of people living on the streets and in shelters.”).

147. See National Alliance to End Homelessness, *Cost of Homelessness*, ENDDHOMELESSNESS.ORG, available at http://www.endhomelessness.org/pages/cost_of_homelessness, (last visited Nov. 10, 2012) (citing statistics that hospitalization, medical treatment, jail time, and emergency shelter are costing cities more than permanent supportive housing would).

148. See *id.* (referring to studies showing admissions of homeless people add \$4 million to hospital costs in Hawaii, and each homeless person costs the state of Texas \$14,480 per year primarily for overnight jail).

149. See Nancy Martinez, *Study reveals cost of homelessness in LA*, DAILYTROJAN.COM, (Oct. 22, 2009), available at <http://dailytrojan.com/2009/10/22/study-reveals-cost-of-homelessness-in-la/>; see also United Way, *Homeless Cost Study* (Oct. 2009), available at <http://www.unitedwayla.org/wp-content/uploads/2012/02/Homeless-Cost-Study.pdf> [hereinafter United Way Homelessness Cost Study] (finding total public service costs at over \$187,000 before and dropping to just over \$107,000 after placement in

study conducted by the University of Southern California and the United Way of Greater Los Angeles,¹⁵⁰ taxpayers are spending about \$20,000 more in a two-year period for a person on the street than one in permanent housing.¹⁵¹ Taxpayers would save 43 percent of costs associated with homeless persons if the latter were offered a place to live.¹⁵² “After being placed in permanent housing, there was a decrease in their visits to the hospital, substance abuse, and jail time,”¹⁵³ said Michael Cousineau, an associate professor of preventive medicine research at Keck School of Medicine and the principal investigator for the report. On average, the total cost to serve one homeless person per month is \$2,897, whereas the cost to directly house a homeless person is reduced to \$605 per month.¹⁵⁴ These studies reflect similar findings in other parts of the country.¹⁵⁵

Other areas in California have begun to implement the results toward improving the status of their homeless population.¹⁵⁶ San Francisco found that people in supportive housing have lower service costs, with a 57 percent reduction in emergency room visits and a 45 percent reduction in inpatient admissions.¹⁵⁷ The city has since initiated a five-year plan to combat homelessness and its costs.¹⁵⁸ One of the first steps San Francisco considers is “increas[ing] the supply of permanent housing that is subsidized as required to be affordable to people who are experiencing

supportive housing).

150. See generally UNITED WAY OF GREATER LOS ANGELES, <http://www.unitedwayla.org/> (last visited Jan. 8, 2013).

151. United Way Homelessness Cost Study, *supra* note 149.

152. *Id.*

153. *Id.*

154. See LA Homelessness Examiner, *Housing Homeless People Reduces the Cost for Los Angeles Taxpayers* (Feb. 4, 2010), <http://www.povertyinsights.org/2010/02/04/import-1435/> (“[T]he public is paying nearly \$869 million per year.”).

155. See United Way, *Homeless Cost Study* (Oct. 2009), *supra* note 149, (“Other studies have shown that nights in psychiatric hospital or a night in jail are actually more costly than a night in permanent supportive housing.”).

156. See *id.* (“Many cities like San Francisco have done a lot like turning four crumbling hotels into permanent housing for homeless.”).

157. See San Francisco Local Homeless Coordinating Board: *Toward Ending Homelessness in San Francisco 2008-2013*, at 13 (2008), <http://www.sfgov3.org/ftp/uploadedfiles/lhcb/documents/SFCoCFinalPlan030308FULLPLAN.pdf> [hereinafter San Francisco Local Homeless Coordinating Board] (“Permanent supportive housing is a nationally-recognized practice that has been shown to be effective. . . .”).

158. See *id.* at 3 (describing a plan with six priorities: to increase permanent housing, support transitions, provide interim housing, improve access points, increase economic stability, and ensure coordinated Citywide action).

homelessness, that is accessible and that offers services to achieve housing stability.”¹⁵⁹

Requiring treatment or sobriety as a condition for housing keeps that housing away from people who need it most and considerably reduces housing retention rates.¹⁶⁰ Though alcoholism is an issue for the homeless population, their foremost concern is housing. Because of this, treatment and sobriety requirements should be abandoned in housing the homeless. Other necessary steps include providing interim housing in shelters to support access to permanent housing until it is available, and increasing economic stability through employment services, mainstream financial entitlements, and education.¹⁶¹ The anticipated outcomes of the permanent housing plans include homelessness prevention and reduction, and an overall drop in costs attributable to homelessness.¹⁶²

San Diego reports similarly high costs in supporting the homeless due to frequent ambulance rides, hospital visits, and police encounters.¹⁶³ San Diego has implemented Project 25, which provides housing, case management and social services for the most vulnerable among San Diego’s homeless population.¹⁶⁴ The project will track taxpayer savings achieved by housing the homeless on a quarterly basis and will fundamentally change the way homeless services work.¹⁶⁵

California, a paradigm for dealing with homelessness issues, is not the only state that can save money with housing options. In Texas, a single homeless person can cost taxpayers up to \$14,480 a year, primarily for overnight stays in jail.¹⁶⁶ Washington has found that homeless with medical and mental health issues cost \$2,449 less per month when staying in

159. *Id.*

160. INGRID GOULD ELLEN & BRENDAN O’FLAHERTY, *HOW TO HOUSE THE HOMELESS* 3 (2010).

161. *See* San Francisco Local Homeless Coordinating Board, *supra* n. 164, at 3 (explaining steps to alleviate homelessness issues in San Francisco).

162. *Id.* at 17.

163. Dylan Mann, *Homelessness: We Can’t Afford to Ignore It*, VOICEOF SAN DIEGO.ORG (July 5, 2011), http://www.voiceofsandiego.org/peoplespost/healthysandiego/article_a32d1446-a1ab-11e0-b45e-001cc4c002e0.html.

164. *Id.*; *see also* HOME AGAIN: ENDING CHRONIC HOMELESSNESS IN SAN DIEGO, <http://homeagainsd.org/> (last visited Jan. 9, 2013).

165. Home Again, *Ending Chronic Homelessness in San Diego: Project 25*, available at <http://homeagainsd.org/our-progress/project-25> (last visited Nov. 11, 2012) (describing the Project 25 plan).

166. *See* National Alliance to End Homelessness, *supra* note 147 (according to a University of Texas two-year survey of homeless individuals).

permanent supportive housing.¹⁶⁷ Five studies were conducted to measure the costs of services used by homeless persons both before and after they entered supportive housing programs. The results were dramatic. In Oregon, the cost dropped from \$42,075 a year to \$17,199 a year.¹⁶⁸ Massachusetts had similarly drastic results, with a drop from \$28,436 to \$6,056.¹⁶⁹ Maine, Rhode Island, and Colorado also experienced decreased spending between \$8,000 and \$14,000 per year.¹⁷⁰

Providing housing for the homeless is one option for preventing their legal and life dilemmas. Research shows that providing housing the homeless is not only effective in California, but in the United States as a whole. U.S. Department of Housing and Urban Development Secretary Shaun Donovan has stated “[I]t’s actually, not only better for people, but cheaper to solve homelessness... [b]ecause, at the end of the day...between shelters and emergency rooms and jails, it costs about \$40,000 a year for a homeless person to be on the streets.”¹⁷¹ With 150,000 homeless persons living in the United States, the cost is approximately \$10.95 billion annually.¹⁷² If these individuals were all permanently housed, the cost would drop to \$7.88 billion.¹⁷³ The government could easily invest in homeless shelters, putting both an end to homelessness and all the legal battles that accompany it.¹⁷⁴

ii. Counsel and Representation

Concurrent with the provision of housing options, it is important for lawyers to take an active part in changing injustices in our legal system. Before the homeless assert their rights, they need the assistance of counsel. As is demonstrated by the failed *pro se* claims in *Porto* and *Stewart*, “[t]he

167. *Id.*

168. Jann Swanson, *Homelessness Rife with Hidden Taxpayer Costs*, MORTGAGENEWSAILY.COM (Jul. 13, 2010), http://www.mortgagenewsdaily.com/07132010_homelessness_costs.asp.

169. *Id.*

170. *Id.*

171. *HUD Secretary Says A Homeless Person Costs Taxpayers \$40,000 a Year*, POLITIFACT.COM (Mar. 5, 2012) <http://www.politifact.com/truth-o-meter/statements/2012/mar/12/shaun-donovan/hud-secretary-says-homeless-person-costs-taxpayers/>.

172. *Cutting the Cost of Homelessness in the U.S.*, FORBES.COM, Aug. 28, 2006, http://www.forbes.com/2006/08/25/us-homeless-aid-cx_np_0828oxford.html.

173. *Id.*

174. See Martinez *supra* note 149 (“The costs of government would go down with the reduction of services.”).

deck is stacked if you don't have a lawyer, but if you can get access to representation, it makes it a fair fight, it makes all the difference in the world."¹⁷⁵ Had these plaintiffs had legal representation, their constitutional and statutory rights would have been asserted. Legal representation levels the playing field, giving the homeless a chance.¹⁷⁶

B. Effective Legal Strategy & Advocacy

Once an individual has legal representation, there are various theories on how lawyering can be truly effective for changing social policy.¹⁷⁷ Though there are many techniques to lawyering, this Note will explore two very different approaches. The first, "rebellious lawyering," takes a reformist approach. The second requires established lawyers to pool their resources in representing the underrepresented in *pro bono* work.

The first approach, "rebellious lawyering" or "regnant lawyering" requires that legal work be "anchored in the world... to help change."¹⁷⁸ Rebellious lawyering includes work with women, racial and sexual minorities, the poor, and the elderly.¹⁷⁹ It builds on an obligation to empower clients through mobilization, organization and deprofessionalization.¹⁸⁰ Rebellious lawyering seeks to change the inefficacy of intrasystemic remedies to achieve meaningful change in the lives of poor clients.¹⁸¹ This work must be grounded in the communities of the subordinated themselves.¹⁸² Progressive lawyers who care about social justice practice rebellious lawyering.¹⁸³ Their work often includes

175. Telephone Interview with Andra Greene, Partner, Irell & Manella LLP (Feb. 12, 2013) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

176. *See id.* describing the first step in helping the homeless) (on file with the Washington and Lee Journal of Civil Rights and Social Justice).

177. *See* Paul R. Tremblay, *Rebellious Lawyering, Regnant Lawyering, And Street-Level Bureaucracy*, HASTINGS L.J. 43, 947, 948 (1992) ("Different models have been offered in an effort both to outline the implementation of progressive practice and to craft theoretical bases for such practice. One significant school of thought urges a "rebellious" approach to lawyering for the subordinated.").

178. Gerald P. Lopez, *Rebellious Lawyering: One Chicano's Vision of Progressive Law Practice*, 412 (1992) (explaining legal approaches for changing social policy).

179. *Id.* (defining rebellious lawyering).

180. *See* Tremblay, *supra* note 177, at 948 (describing rebellious lawyering generally).

181. *See id.* at 953 ("[Rebellious lawyering] first proposes a restructuring of the attorney-client relationship.").

182. *See* Lopez, *supra* note 178, at 412 (establishing the roots of progressive, rebellious lawyering).

183. *See* Tremblay, *supra* note 177, at 953 ("Regnant lawyering is client-centered, but

cooperation and collaboration with a network of professionals and problem-solvers.¹⁸⁴

The concept of rebellious lawyering was helpful with Mr. Smith's various claims. Mr. Smith is an archetype for homeless persons around California, and even more generally, the United States. Fortunately, Mr. Smith had a lawyer to help him file his claims and defend himself against an overly broad stay away order. In his filings, Mr. Smith's lawyer argued against the use of overly broad Stay Away Orders and the targeting of homeless persons. By aiming not only to help Mr. Smith, but to improve the lives of many homeless persons in San Diego as well, Mr. Smith's lawyer practiced rebellious lawyering.

The second legal approach toward changing social policy works from within the outlines of the established legal system. The leader of the *Sipprelle* litigation, Andra Greene from Irell & Manella LLP, took this approach. Greene represented the homeless persons in *Sipprelle*¹⁸⁵ *pro bono* and secured a major victory on behalf of the homeless community in Laguna Beach, California.¹⁸⁶

This approach toward helping the homeless is not rebellious lawyering. Greene, as a lawyer, is considered part of the establishment. She works for a large firm in Laguna Beach, renowned for its litigation and transactional work. Greene's daily work does not seek to change the lives of the subordinated themselves, as a rebellious lawyer's work would. Rather, she learned of the issue in Laguna Beach from a client of hers who devotes much of his energy to helping the homeless.¹⁸⁷ Upon learning of the issue, she first tried to negotiate with the City to change the ordinance that she viewed unconstitutional.¹⁸⁸ The City was stubborn, so she partnered with the American Civil Liberties Union (ACLU) and Dean Erwin Chemerenski of the University of California at Irvine Law School to bring suit in federal court.

Their success was due in part to the power of pooling their resources. Working at a large law firm has great advantages and the coalition of Irell

in an instrumental way; it seeks to improve the lot of the disadvantaged by increasing their access to rights and to institutionally defined remedies.”).

184. See Lopez, *supra* note 178, at 412 (1992) (clarifying the definition of regnant lawyering).

185. See generally *Sipprelle* Agreement, *supra* note 79.

186. Irell & Manella LLP, *Irell Receives Social Justice Award*, IRELL & MANELLA LLP (June 2010), <http://www.irell.com/news-item-80.html>.

187. See Telephone Interview with Andra Greene, *supra* note 175.

188. *Id.*

& Manella, the ACLU, and Dean Chemerenski was very tough for the city to beat. Though Greene is not a rebellious lawyer by definition, she believes lawyers have a responsibility to the profession to do *pro bono* work and that this *pro bono* work can take many different forms. A large, established law firm is a great vehicle for successful *pro bono* advocacy.¹⁸⁹

The *Sipprelle* lawyers not only provided exemplary counsel in a complex case, but also “organized the homeless community, developed strong relationships with many of its members, educated them about their rights, and engaged city leaders to promote humane efforts to end homelessness.”¹⁹⁰ As a result of such successful and empowering advocacy, Greene was awarded the 2010 Social Justice Award from the American Civil Liberties Union Foundation of Southern California.¹⁹¹

“The ACLU has a long history of defending and preserving civil rights and liberties”¹⁹² and they continued to defend these rights in *Sipprelle*. Similar to rebellious lawyering, the ACLU focused on long-term strategies to end homelessness, rather than short-term quick fixes to keep the homeless out of sight.¹⁹³ Such a strategy, aiming for a long-term remedy that benefits all the homeless persons in Laguna Beach, coupled with gaining instant relief for all the parties, is successful for particular plaintiffs in the short-term and for the homeless population in Laguna Beach long-term.

Remedial measures for homeless persons’ rights require more representation. In order to assert their rights, or even to file a claim properly, the homeless need legal counsel. Once the homeless have counsel, there are various theories on how to successfully inspire social change. From full-time rebellious lawyering to established *pro bono* work when the opportunity presents itself, a victory for one homeless person can be considered a victory for homeless persons throughout the state of California, or throughout the United States as a whole.

189. *Id.*

190. See Irell & Manella LLP, *Irell Receives Social Justice Award*, *supra* note 195 (quoting Ramona Ripston, ACLU’s executive director).

191. *Id.*

192. See *id.* (quoting Andra Greene).

193. Am. Civil Liberties Union, *Beach City Agrees to Settlement of Lawsuit over Treatment of Chronically Homeless People*, ACLU-SC.ORG (June 25, 2009), <http://www.aclu-sc.org/beach-city-agrees-to-settlement-of-lawsuit-over-treatment-of-chronically-homeless-people/> (“We hope . . . [for] a long-term solution to chronic homelessness by providing shelters and supportive services. This will not only take people off the street but, as has been shown time and time again in communities across the country, provide taxpayers with a more cost-effective and humane way to treat homeless. . . .”).

IV. Conclusion

Homelessness has been and continues to be a societal issue. This deeply rooted public dilemma stems from an abundance of medical and economic causes. As an effect, homelessness leads to further health and economic issues for both the homeless themselves and for society in general. The intersection of personal circumstances with targeted California laws traps homeless persons in the California legal system. California is representative of the United States as a whole in this regard.

From a policy perspective, clashes between the homeless and the law can be prevented with more housing options. Studies show that providing housing for the homeless is both a beneficial option for the homeless and a fiscally favorable option for the state of California. This not only benefits California financially, but society is safer as a result. Again, California is an archetype for the United States. Housing the homeless cuts costs for taxpayers nationwide.

Lawyers have both a duty to prevent legal abuses suffered by the homeless and the means to remedy these abuses. This intersection between the homeless and the law can be remedied and abolished with more representation for the homeless, either through rebellious lawyering or established *pro bono* lawyering. By and large, homelessness is a complex issue with multi-faceted causes and effects, but many homeless issues, within and outside the legal system, can be avoided with more housing options and effective lawyering.