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ABSTRACT

Homelessness is a perennial problem in the United States and has been analyzed using many theoretical frameworks. The issue has also been a contentious one for courts and continues to be the subject of numerous suits today. Many jurisdictions in the United States have enacted laws that prevent homeless people from legally existing within those jurisdictions; these laws effectively criminalize being homeless. These statutes have spawned lawsuits alleging violations of homeless people's rights. This Comment examines homelessness and its interaction with the law through the lens of citizenship. It argues that the legal paradigm in the United States denies homeless people full citizenship and membership in communities. Court decisions that rule on rights-based challenges to these laws reinforce the exclusion of the homeless from the public, even when they ostensibly rule for homeless plaintiffs, by restricting homeless people's ability to take advantage of these decisions and denying homeless people the same menu of rights that exist for people with residences.

I. INTRODUCTION

"As citizens of this democracy, you are the rulers and the ruled, the law-givers and the law-abiding, the beginning and the end."

-Adlai Stevenson[1]

¶1 During the past few years, homelessness in the United States has fluctuated and has experienced an increase following the foreclosure crisis.[2] This increase has reinvigorated the many controversial debates surrounding homelessness that have existed for so long and have inevitably evaded solutions.[3] The discourse surrounding

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[1] ADLAI E. STEVENSON, THE WIT AND WISDOM OF ADLAI STEVENSON 9 (1965).

[2] *See* Ian Urbina, *Running in the Shadows: Recession Drives Surge in Youth Runaways*, N.Y. TIMES, Oct. 26, 2009, at A1; Peter S. Goodman, *Victims of Foreclosure Turn to Shelters*, N.Y. TIMES, Oct. 19, 2009, at A1; Leslie Kaufman, *Record Number of Families Seeking Refuge in Shelters*, N.Y. TIMES, Oct. 30, 2008, at A35.

[3] Stewart B. McKinney Homeless Assistance Act, 42 U.S.C. § 11302(a) (2000). The McKinney Act defines homeless as:

> **(1)** an individual who lacks a fixed, regular, and adequate nighttime residence; and
>
> **(2)** an individual who has a primary nighttime residence that is—

homelessness has taken many forms. Sociologists, for example, have often focused on the causes of homelessness, particularly whether homelessness is the result of individual behavior and choices or is socially and structurally driven.[4] Others have attempted to quantify issues surrounding homelessness[5] or discuss the social or charitable programs in place to deal with homelessness.[6] This Comment does not deal with the causes of homelessness, but rather addresses the legal structure and theoretical discourses that contribute to defining homelessness.

¶2 This Comment will offer a unique perspective on homelessness and the law through the lens of citizenship and political identity. The legal discourse surrounding homelessness does not consider theoretical discussions of citizenship or community. Even those legal challenges to anti-homeless measures that have been successful do not shift the legal paradigm that excludes the homeless from political community and effective citizenship. Instead, they reinforce the exclusion of the homeless from public space and from the definition of public itself.

¶3 Part II of this Comment is a survey of the laws and legal challenges to laws that affect the homeless. Part III will consider theories in citizenship and the relationship between citizenship, social class, and property. Part IV will argue that the homeless are denied full citizenship in the United States, that the legal system and jurisprudence surrounding "the home" fundamentally disfavor the homeless, and that the rights-based remedies courts have employed are insufficient to shift the paradigm that denies citizenship to the homeless.

¶4 Finally, Part V of this Comment will consider whether the economic crisis may have, at least briefly, acted to shift that paradigm by altering the concept of the "other"—that which is excluded from the social definition of belonging or "us"—in relation to homelessness, and as a result altered the inclusion of the homeless in citizenship.

¶5 This Comment will argue that legal challenges are unsuccessful in addressing homelessness and serve instead to reinforce the exclusion of the homeless from political community or citizenship. While the courts are restrained to a certain extent in their ability to restore citizenship to the homeless, courts may be able to help create space for the homeless in citizenship by acknowledging the legitimacy of alternatives to traditional residences.

> (A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
> (B) an institution that provides a temporary residence for individuals intended to be institutionalized; or
> (C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

Id.

[4] *See, e.g.*, Thomas Main, *How to Think about Homelessness: Balancing Structural and Individual Causes*, 7 J. SOC. DISTRESS & HOMELESS 41 (1998); *see also* DISAFFILIATED MAN—ESSAYS AND BIBLIOGRAPHY ON SKID ROW, VAGRANCY, AND OUTSIDERS (H.M. Bahr ed., 1970).

[5] *See* THE U.S. CONFERENCE OF MAYORS-SODEXO, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICAN CITIES 71–90 (2005), *available at* http://www.usmayors.org/hungersurvey/2005/HH2005FINAL.pdf.

[6] *See* MARTHA R. BURT ET AL., HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE (1999), *available at* http://www.urban.org/UploadedPDF/homelessness.pdf.

II. LAWS AND CHALLENGES

¶6 Laws that disproportionately affect homeless people come in a variety of forms. Vagrancy laws, which criminalized certain categories of people, provide one historical example. While these laws never used the term "homeless," by imposing fines or imprisonment on groups such as "rogues and vagabonds, or dissolute persons who go about begging," "common night walkers," and "persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, [and] disorderly persons," vagrancy laws ensured that homeless people were classified as criminals and punished for their lack of a residence.[7]

¶7 Another example, loitering laws, prohibit behavior rather than criminalizing types of people, but have a similar effect on homeless people. Some loitering laws specifically target certain behavior ("[l]oiters, remains or wanders about in a public place for the purpose of begging"),[8] while others simply prohibit prolonged or purposeless presence in public areas.[9] Other laws prohibit behavior that is associated with homelessness, like begging or panhandling.[10] Many recent laws, referred to as "anti-camping" ordinances, prohibit standing, sitting, or lying in public areas.[11] Unlike vagrancy laws, which made the criminalization of the homeless (or "vagrants") explicit, newer laws do not reference any particular target group. These laws can be seen as anti-homeless because they are perceived to covertly target the homeless and because enforcement of these laws disproportionately affects the homeless.[12] Moreover, these laws are anti-homeless because while they may be phrased in less offensive terms than the now defunct vagrancy laws, they nevertheless criminalize the lack of a home in much the same way.

¶8 In addition to statutes that disproportionately affect the homeless, homeless people may also be subject to selective or disproportionate enforcement of laws by the police. Challenges to measures that adversely and disproportionately affect the homeless have come in various forms, including procedural due process, substantive due process, equal protection, and First Amendment, Fourth Amendment, and Eighth Amendment challenges.[13] Groups have brought suits challenging statutes that single out the homeless both on their face[14] and as applied.[15] This Part discusses anti-homeless measures, the wide variety of legal challenges that have been used to attempt to overturn them, and their respective successes in the courts. This Comment focuses primarily on the most recent successful challenges: those based on the Eighth Amendment's prohibition of criminalizing status.[16]

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[7] Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).
[8] N.Y. Penal Law § 240.35 (1) (2005).
[9] *See* U.S. *ex. rel.* Newsome v. Malcolm, 492 F.2d 1166 (2d Cir. 1974).
[10] *See, e.g.*, Young v. N.Y.C. Transfer Auth., 903 F.2d 146 (2d Cir. 1990).
[11] *See, e.g.*, L.A., CAL., MUN. CODE §§ 11.00(m), 41.18(d) (2005).
[12] For example, one would assume that a family picnicking in a public park would not be arrested or charged under this kind of law.
[13] See *infra* Sections II.A.–II.F.1.
[14] *See, e.g.*, Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996) (challenging an ordinance prohibiting sitting or lying in public under the First Amendment).
[15] S*ee, e.g.*, Pottinger v. Miami, 810 F. Supp. 1551 (S.D. Fla. 1992) (challenging anti-homeless ordinances and their enforcement in Miami); *see* text accompanying *infra* note 33.
[16] See *infra* Section Part II.A.1.

A. Procedural Due Process

¶9 Challenges to anti-homeless ordinances and their enforcement often claim that these ordinances deny the homeless procedural due process. Challenges under the Due Process Clause have generally taken one of the following two forms: vagueness or overbreadth.

1. Vagueness

¶10 In the 1972 case *Papachristou v. City of Jacksonville*, the Supreme Court struck down a Jacksonville vagrancy ordinance, which characterized and criminalized, in broad terms, a series of groups as "vagrants" subject to arrest, fines, and imprisonment.[17] The statute identified more than twenty groups as vagrants, including "rogues and vagabonds," "common drunkards," "persons wandering or strolling around from place to place without any lawful purpose or object," and "persons able to work but habitually living upon the earnings of their wives or minor children."[18] The Court found that the ordinance was unconstitutionally vague under the Due Process Clause of the Fourteenth Amendment:

> This ordinance is void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and because it encourages arbitrary and erratic arrests and convictions.[19]

¶11 In holding that the law was unconstitutional, the Court found that the criminalization of select groups undermined the rule of law.[20] In rejecting the statute, the opinion credited non-conforming behaviors like wandering with promoting American values and the right to dissent[21] and went so far as to poeticize famous wanderers and quasi-homeless figures, including Walt Whitman and Henry David Thoreau, who embodied that dissenting spirit.[22] The Court concluded that the law was "not compatible

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[17] Papachristou v. City of Jacksonville, 405 U.S. 156, 158 n.1 (1972).

> Jacksonville Ordinance Codes 26–57 provided at the time of these arrests and convictions as follows: 'Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.'

Class D offenses at the time of these arrests and convictions were punishable by ninety days of imprisonment, a $500 fine, or both. *Id.*

[18] *Id*.

[19] *Id*. at 162 (internal citations omitted).

[20] *Id*. at 163.

[21] *Id*.

[22] *Id*. at 164.

with our constitutional system"[23] and would subject people to punishment based on the whims of the police.[24] Finally, the Court analogized this kind of vagrancy law to oppressive systems of punishment in Russia.[25]

¶12 When the Supreme Court delivered its decision in *Papachristou*, vagrancy laws were common in nearly every state, although groups had begun to challenge them on a number of different grounds.[26] Since *Papachristou*, states and municipalities have employed new methods of criminalizing homelessness, including, "anti-camping" ordinances, which ostensibly punish conduct rather than groups of people.[27] These laws usually are challenged under similar theories to vagrancy laws.[28]

¶13 For example, loitering laws became common after *Papachristou*. Since then, general loitering laws have also been found to be unconstitutionally vague. In *United States* ex rel. *Newsome v. Malcolm*, the Second Circuit found that a statute stating that a person who "loiters, remains or wanders" without apparent reason, under suspicious circumstances, and refuses to identify oneself to the police was unconstitutionally vague for failing to distinguish licit from illicit behavior and for failing to provide sufficient enforcement guidelines.[29] Loitering ordinances directed at more specific behavior or limited to certain time periods, however, have generally been upheld. Anti-nuisance laws

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> These unwritten amenities have been in part responsible for giving our people the feeling of independence and self-confidence, the feeling of creativity. These amenities have dignified the right of dissent and have honored the right to be nonconformists and the right to defy submissiveness. They have encouraged lives of high spirits rather than hushed, suffocating silence.

Id. The court's acceptance, and even celebration, of homelessness and incident behaviors as an alternative lifestyle has not survived in more recent decisions regarding laws that impact the homeless. *See* Anderson v. City of Portland, 2009 WL 2386056, at *10 (D. Or. July 31, 2009). The District Court in *Anderson*, while finding for the homeless class of plaintiffs, insisted that the plaintiffs homelessness be both involuntary and not constitute behavior that society has an interest in preventing (whether or not that behavior is otherwise illegal). *Id.* The court's insistence on these criteria probably stems, at least in part, from a desire to limit the reach of the Eighth Amendment's prohibition on the criminalization of status. However, any narrative validating a homeless lifestyle as a choice has undoubtedly been lost. *See also* Pottinger v. Miami, 810 F. Supp. 1551, 1555, 1565 (S.D. Fla. 1992) (relying on the involuntariness of the homeless plaintiffs' conduct in finding that the city had violated the Eighth Amendment by arresting them for behavior such as sleeping, eating, and bathing).

[23] *Papachristou*, 405 U.S. at 168–69.

[24] *Id.* at 166–67 ("Where the list of crimes is so all-in-clusive and generalized as the one in this ordinance, those convicted may be punished for no more than vindicating affronts to police authority.").

[25] *Id.* at 169.

[26] *See, e.g.*, Goldman v. Knecht, 295 F. Supp. 897 (D. Colo. 1969) (finding a vagrancy ordinance unconstitutionally vague and a violation of the Equal Protection Clause and substantive due process under the Fourteenth Amendment); Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969); Smith v. Hill, 285 F. Supp. 556 (E.D.N.C. 1968) (finding a vagrancy law from a North Carolina town that disallowed "tramps, vagrants, persons under suspicion who shall be found with no visible means of support" from public places unconstitutionally vague for failing to sufficiently define the conduct that it criminalized).

[27] *See* Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515 (2009).

[28] *See, e.g.*, Pottinger v. Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992); *see infra* text accompanying note 33.

[29] 492 F.2d 1166, 1173–74 (2d Cir. 1974); *see also* Kolender v. Lawson, 461 U.S. 352, 357–58 (1983) (finding a California statute requiring people loitering or wandering on the streets to provide "credible and reliable" identification was unconstitutionally vague for failing to sufficiently define "credible and reliable"); City of Akron v. Effland, 174 N.E.2d 285 (Ohio Ct. App. 1960) (finding an anti-loitering law unconstitutional as applied to people waiting on the street).

that limit loitering only on Government property, and not in public, may also be more likely to be upheld.[30]

2. Overbreadth

¶14 In addition to vagueness claims, courts have also considered theories of overbreadth under procedural due process claims. This claim is more limited in constitutional scope than vagueness claims, is brought less often, and is less often successful. Overbreadth challenges are usually seen in the First Amendment context, which may explain why they are more rarely used to challenge most anti-homeless laws. To be upheld, a facial overbreadth challenge must be directed at laws that touch some constitutionally protected conduct.[31] A statute is overbroad if it substantially burdens constitutionally protected conduct and is not sufficiently narrowly tailored.[32]

¶15 In *Pottinger v. City of Miami*, a class of homeless plaintiffs brought a § 1983 suit against the City of Miami alleging that the city had a "custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life—including sleeping and eating-in the public places where they are forced to live."[33] The plaintiffs additionally alleged that the city arrested homeless people under various Miami and Florida statutes for participating in the same types of life-sustaining conduct.[34] The plaintiffs challenged the application of these statutes on a number of constitutional grounds under both the Federal and Florida Constitutions.[35] These challenges included a substantive due process argument under the Fifth and Fourteenth Amendments,[36] a Fourteenth Amendment equal protection claim,[37] an unreasonable search and seizure claim under the Fourth Amendment,[38] fundamental rights challenges,[39] including the right to travel, an Eighth Amendment challenge alleging cruel and unusual punishment and the criminalization of status,[40] and a state claim of malicious abuse of process.[41] The conduct that the plaintiffs sought to enjoin included arrests, sweeps designed to get homeless people out of plain sight, and the burning or general destruction of their personal property.[42]

¶16 The court ultimately found that the plaintiffs' rights had been violated under the Eighth, Fourth, Fifth, and Fourteenth Amendments and granted an injunction based on five of the plaintiffs theories:

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[30] *See, e.g.*, United States v. Cassiagnol, 420 F.2d 868 (4th Cir. 1970).
[31] Broadrick v. Oklahoma, 413 U.S. 601 (1973).
[32] *Id.*
[33] *Pottinger*, 810 F. Supp. at 1554.
[34] *Id.* These statutes criminalized behavior such as standing, loitering, walking, sleeping, and obstructing passage on public land. *Id.* at 1560.
[35] The plaintiffs did not challenge the statutes in question on their face, but instead only sought to enjoin the city from arresting homeless people for "inoffensive conduct" that they are "forced to perform in public." *Id.*
[36] *Id.* at 1572.
[37] *Id.* at 1577.
[38] *Id.* at 1569.
[39] *Id.* at 1578.
[40] *Id.* at 1561–62.
[41] *Id.* at 1565.
[42] *Id.* at 1555–56.

> First, plaintiffs have shown that the City has a pattern and practice of arresting homeless people for the purpose of driving them from public areas. . . .
>
> Second, the City's practice of arresting homeless individuals for harmless, involuntary conduct which they must perform in public is cruel and unusual in violation of the Eighth Amendment to the United States Constitution. . . .
>
> Third, such arrests violate plaintiffs' due process rights because they reach innocent and inoffensive conduct. . . .
>
> Fourth, the City's failure to follow its own written procedure for handling personal property when seizing or destroying the property of homeless individuals violates plaintiffs' fourth amendment rights. . . .
>
> Fifth, the City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the equal protection clause.[43]

¶17 Unlike many vagrancy challenges, the procedural due process claim of the plaintiffs in *Pottinger* did not include a vagueness claim.[44] Instead, the plaintiffs alleged that the application of the statutes in question was overbroad and the action authorized under them extended beyond the reach of police power.[45] Because the conduct for which the police had arrested plaintiffs was constitutionally protected (in other words, it implicated the Eighth and Fourteenth Amendments), the court found that the statute was overbroad as applied because the arrests of the plaintiffs were for "harmless, inoffensive conduct that they are forced to perform in public places."[46]

¶18 Most courts, however, have rejected due process overbreadth claims. In *Whiting v. Town of Westerly*, for example, the First Circuit found that a law prohibiting sleeping in public areas was not overbroad because sleeping is not a constitutionally protected activity.[47] The court noted that sleeping might sometimes implicate the First Amendment, but without an expressive element, mere sleeping was not constitutionally protected conduct.[48]

B. Substantive Due Process Challenges

¶19 Substantive due process challenges have claimed that anti-homeless measures violate a number of fundamental rights under the Fourteenth Amendment, including the

[43] *Id.* at 1554.
[44] *Id.* at 1576.
[45] *Id.*
[46] *Id.* at 1577.
[47] Whiting v. Westerly, 942 F.2d 18, 21–22 (1st Cir. 1991); *see also* Seattle v. Webster, 802 P.2d 1333 (Wash. 1990); People v. Trantham, 208 Cal. Rptr. 535 (Cal. App. Dep't Super. Ct. 1984).
[48] *Whiting*, 942 F.2d at 21–22.

right to privacy. Courts have generally rejected substantive due process challenges, although some have been successful. For example, in *Roulette v. City of Seattle*, the court rejected the plaintiffs' facial substantive due process claim, as well as their First Amendment claim.[49] The plaintiffs alleged that the Seattle statute that criminalized sitting or lying on sidewalks during certain hours was merely a veiled attempt to remove homeless people from Seattle's commercial areas.[50] The court found that because the plaintiffs challenged the statute on its face and not its application, and because the city presented legitimate public safety reasons for the ordinance, the plaintiffs' substantive due process claims failed.[51]

¶20 Other courts, however, have sometimes accepted substantive due process claims even in the face of government interests like public safety. *Pottinger v. City of Miami* is such a case, which also presents a number of other successful legal theories.[52]

¶21 In *Pottinger*, the plaintiffs brought substantive due process claims alleging that the application of local and state ordinances against, for example, sleeping, violated their fundamental right to travel and to "engage in life sustaining activities in public."[53] The court rejected that "engaging in life sustaining activities" was a fundamental right.[54] However, it recognized that the right to travel was guaranteed by the Constitution and found that arresting people for sleeping in public violated the fundamental rights to travel and to freedom of movement.[55] The ordinances penalized travel by denying plaintiffs the "necessities of life" and a place where they can lawfully be.[56] The court held that the city had a legitimate but not compelling interest in the aesthetics of its public spaces, crime prevention and promoting business, but that its ordinances and the methods of enforcing them were not the least intrusive manner of enforcing that interest.[57] The court also rejected crime prevention as a possible compelling interest, holding that criminality could not be ascribed to the homeless by virtue of their homelessness.[58]

¶22 Claims alleging violations of the fundamental right to travel or to exercise freedom of movement (as the Plaintiffs' claim in *Pottinger* did) are some of the most common and most frequently successful claims brought under substantive due process theories. The Supreme Court has recognized numerous times that the right to interstate travel is a fundamental right subject to strict scrutiny.[59] Both the Supreme Court and many lower

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[49] Roulette v. City of Seattle, 97 F.3d 300, 306 (9th Cir. 1996).
[50] *Id.*
[51] *Id.*
[52] Pottinger v. Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).
[53] *Id.* at 1578.
[54] *Id.*
[55] *Id.* at 1580.
[56] *Id.* at 1563. *Cf.* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974) (holding that denying medical care burdens the fundamental right to travel).
[57] *Id.* at 1581–82.
[58] *Id.* at 1582. As the court writes:

> The City further argues that it would be disingenuous to ignore the criminal element among the homeless. However, there is a criminal element among all of society, not just among the homeless. The United States Supreme Court, in rejecting the idea that criminality can be ascribed to the unfortunate, stated that no one can seriously contend that a person without funds and without a job constitutes a 'moral pestilence.'

Id. (citing Edwards v. California, 314 U.S. 160, 177 (1941)).
[59] *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314

courts, however, have been more reluctant to find that anti-homeless measures violate the fundamental right to travel. In *Anderson v. Portland*, while the district court denied a motion to dismiss the plaintiffs' Eighth Amendment and unequal application under the Equal Protection Clause claims, it granted summary judgment to dismiss their fundamental right to travel claim, stating:

> I fail to discern how the alleged actions of the City interfere with plaintiffs' constitutional right to travel. Plaintiffs allege that police officers have told them to "move along" when sleeping in public and conducted camp clean-ups and seized their property. However, plaintiffs do not allege that the City has attempted to restrain their movement, prevented them from traveling to or from the City, or excluded them from certain areas of the City.[60]

¶23 Other courts, however, have accepted challenges to statutes or practices directed at the homeless under right to travel theories.[61] In *Streetwatch v. National Railroad Passenger Corporation*, the district court for the Southern District of New York granted a preliminary injunction of the arrests of people in a New York Amtrak station based in part on the implication of the fundamental right to freedom of movement in the arrests.[62] The court found that a policy of the Amtrak police to eject or arrest people without explanation who had been "hanging around the station for too long," unconstitutionally infringed on the fundamental right to travel.[63]

C. Equal Protection Challenges

¶24 The Supreme Court has never ruled on whether the homeless comprise a protected class that warrants heightened scrutiny for the purposes of the Fourteenth Amendment Equal Protection Clause. However, it has ruled that classifications based on wealth[64] or tenancy[65] do not constitute protected classes under the Fourteenth Amendment. As a result, even facial classifications based on homelessness or wealth need only pass a rational basis test. While challenges to anti-homeless measures continue to be brought under the Equal Protection Clause, they are largely unsuccessful.[66]

U.S. 160 (1941) (Couglas, William J., concurring); Smith v. Turner, 48 U.S. 283 (1849) (Taney, J., dissenting).

[60] Anderson v. City of Portland, 2009 WL 2386056, at *10 (D. Or. July 31, 2009).

[61] *See, e.g.*, Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 392–94 (Cal. Ct. App. 1994), *rev'd*, 892 P.2d 1145 (Cal. 1995); *Pottinger*, 810 F. Supp. at 1554.

[62] Streetwatch v. Nat'l R.R. Passenger Corp., 875 F. Supp. 1055, 1064 (S.D.N.Y. 1995).

[63] *Id.*

[64] *See* Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450 (1988) (holding that a classification based on wealth does not merit heightened scrutiny under the Equal Protection Clause and, thus, that a statute charging a flat fee for elementary school bus service did not violate the Equal Protection Clause); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (holding that an elementary school financing system based on property taxes was not unconstitutional under the Equal Protection Clause).

[65] *See* Lindsey v. Normet, 405 U.S. 56 (1972) (holding that a forcible entry and detainer act was not unconstitutional under the Equal Protection Clause, and that distinctions based on home ownership or tenancy do not receive heightened scrutiny).

[66] Some lower courts have found that vagrancy laws, for example, violate the Equal Protection Clause because they are arbitrary and unequally enforced. *See, e.g.*, Goldman v. Knecht, 295 F. Supp. 897 (D.

¶25 In *Davison v. City of Tucson*, for example, the plaintiffs alleged that the homeless as a class were being discriminated against through selectively enforced criminal trespass laws.[67] These laws were only enforced against a particular encampment of homeless people who had been camping on city property for more than ten years.[68] Relying on the state supreme court's rejection of wealth and housing as legitimate bases for suspect classifications, the court found that the homeless were not a protected class for the purposes of the Fourteenth Amendment.[69] The Court further held that based on the city's legitimate interests in preventing crime, maintaining health and sanitation, and avoiding liability, it was unlikely that the city's actions would fail the rational basis test.[70]

D. First Amendment Challenges

¶26 Challenges to measures that allegedly violate the homeless' right to free speech often apply to a broader group than just the homeless. Challenges to panhandling or soliciting laws based on the right to free political speech under the First Amendment, for example, are not limited to the homeless alone.

¶27 Two Second Circuit cases illustrate typical free speech challenges brought against panhandling or soliciting laws. In *Young v. New York City Transit Authority*, the Second Circuit held that New York City's prohibition on panhandling in subways did not violate the First Amendment because panhandling was commercial, not political, speech, and the city had an interest in preventing fear on the subway.[71] However, three years later, the same court held in *Loper v. New York City Police Department* that begging was communicative or expressive, provided that it is conducted in a traditional public forum (outside of the subway system).[72] Further, the court held that the city did not present a compelling interest sufficiently narrowly tailored to pass muster under the First Amendment.[73] Because the Supreme Court has held that the First Amendment protects solicitation of charitable donations.[74] As a result, many challenges focus on the issue of whether panhandling is expressive or symbolic speech versus merely commercial speech.[75]

¶28 At least one First Amendment challenge focused on provisions directed specifically at homeless people. In *Roulette v. City of Seattle*, a group of homeless persons and their advocates invoked § 1983 to challenge the constitutionality of a law that forbade sitting or lying down on the sidewalk between 7:00 a.m. and 9:00 p.m.[76] The

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Colo. 1969) (holding that a vagrancy ordinance violated the Equal Protection Clause without determining whether poverty or homelessness are protected classes deserving of heightened scrutiny).

[67] Davison v. City of Tuscon, 924 F. Supp. 989, 993 (D. Ariz. 1996).

[68] *Id*. at 991.

[69] *Id*. at 993 (citing Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450 (1988) and Lindsey v. Normet, 405 U.S. 56 (1972)).

[70] *Davison*, 924 F. Supp. at 993.

[71] Young v. N.Y.C. Transit Auth., 903 F.2d 146 (2d Cir. 1990).

[72] Loper v. N.Y.C. Police Dep't, 999 F.2d 699, 704 (2d Cir. 1993).

[73] *Id.*

[74] Schaumburg v. Citizens for Better Env't, 444 U.S. 620 (1980).

[75] *See* Tracy A. Bateman, Annotation, *Laws Regulating Begging, Panhandling, or Similar Activity by Poor or Homeless Persons*, 7 A.L.R. 5TH 455 (2006).

[76] Roulette v. City of Seattle, 97 F.3d 300, 302 (9th Cir. 1996).

plaintiffs claimed that the statute was unconstitutional on both free speech and substantive due process grounds.[77]

¶29 Their free speech claim alleged that the statute was a facial violation of the First Amendment; that is, that the ordinance itself—not just particular applications of it—violated the protection of symbolic speech articulated in *Spence v. Washington*.[78] The Ninth Circuit rejected the plaintiffs' claim that the statute violated the First Amendment on its face, finding that sitting and lying down were not integrally connected to expression.[79] Because almost any conduct can be expressive in some situation, for a facial attack to succeed the challenged statute must narrowly target the expressive behavior.[80] The court did not, however, foreclose an as applied challenge.

E. Fourth Amendment Challenges

¶30 The Fourth Amendment prohibition on unreasonable searches and seizures has been used to challenge a number of anti-homeless measures. Generally, this theory cannot be used to attack anti-camping ordinances on their face because these ordinances do not directly contemplate searches. However, in enforcing these ordinances and other policies or statutes, law enforcement officers often appropriate or destroy the belongings of the homeless, leading to potentially viable Fourth Amendment claims.

¶31 Police action may only be classified as a "search" for Fourth Amendment purposes if (1) the person has demonstrated a subjective expectation of privacy surrounding the object of the search; and (2) the expectation is one that society is willing to recognize as reasonable.[81]

¶32 The majority of courts considering the constitutionality of police searches and the collection or destruction of the property of the homeless have held that these actions do not constitute a violation of the Fourth Amendment because the homeless have no reasonable expectation of privacy. In *Whiting v. State*, for example, the Maryland Court of Appeals held that while the homeless defendant demonstrated a subjective expectation of privacy in the building in which he was squatting, that expectation was not one that society recognizes as reasonable.[82] The court cited lack of possessory interest, lack of power to exclude, and lack of exclusive control in the property as factors in its decision.[83]

¶33 Some courts have found that the homeless have a reasonable expectation of privacy in homeless shelters, or at least in certain areas of homeless shelters.[84] However,

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[77] *Id.* at 302, 305.
[78] *Id.* at 302–303 ("The First Amendment protects not only the expression of ideas through printed or spoken words, but also symbolic speech—nonverbal 'activity . . . sufficiently imbued with elements of communication.'").
[79] *Id.* at 305.
[80] *Id.*
[81] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). A person has demonstrated a subjective expectation of privacy when she exhibits an intention to keep objects, activities or statements private. *Id.*
[82] Whiting v. State, 885 A.2d 785, 799–801 (Md. 2005).
[83] *Id.*
[84] *See* Cmty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Serv., 791 F. Supp. 1 (D.D.C. 1992).

many courts have not been willing to extend Fourth Amendment protection to closed containers (like lockers) used only by the plaintiff or defendant in homeless shelters.[85]

¶34 There are very few courts that have found that the Fourth Amendment covers personal property outside of homeless shelters. Most courts have held that the homeless have no reasonable expectation of privacy on public property or on private property where they have no lawful right to be.

¶35 The *Pottinger* court, however, found the city of Miami liable on Fourth Amendment grounds due to its treatment of the homeless plaintiff's belongings.[86] The court held that "the gathering and destruction of class members' personal property is a meaningful interference with their possessory interest in that property."[87] In addition, the court also held that: (1) the plaintiffs demonstrated a subjective expectation of privacy in their belongings by arranging and protecting them so as to distinguish them from abandoned property; and, (2) that that expectation of privacy was reasonable, even though the property in question was on public land, because the property of the homeless is often the last "trace of privacy" they have and is also often located in places they consider home.[88]

F. Eighth Amendment Challenges

¶36 Eighth Amendment challenges alleging cruel and unusual punishment have been almost universally unsuccessful. In *Davison v. City of Tucson*, a class of plaintiffs challenged a resolution disbanding "Mountain Homeless Campground and Other Homeless Encampments" that had existed on public lands for ten years.[89] The plaintiffs asked the court for a preliminary injunction to prevent the destruction of their homes. The plaintiffs alleged violations of their Eighth Amendment rights and the Equal Protection Clause of the Fourteenth Amendment.[90] The court summarily disposed of the Eighth Amendment claim, finding that the plaintiffs had not been convicted of crimes so they could not invoke the Eighth Amendment's protection against cruel and unusual punishment.[91]

1. Eighth Amendment Prohibition on the Criminalization of Status

¶37 Because the Supreme Court found in *Papachristou* that vagrancy laws are unconstitutionally vague,[92] municipalities have shifted the ways in which they exclude the homeless. Instead of laws that criminalize broad groups of people by labeling them "vagrants," cities began to criminalize a broad list of behavior using statutes often

[85] *See* People v. McClain, 814 N.Y.S.2d 738 (N.Y. 2006) (holding that the defendant did not have a reasonable expectation of privacy in his locker because the shelter's guidelines permitted searches and the guidelines were posted).
[86] Pottinger v. Miami, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992).
[87] *Id.*
[88] *Id.* at 1571–72.
[89] Davison v. City of Tuscon, 924 F. Supp. 989, 991 (D. Ariz. 1996).
[90] *Id.*
[91] *Id.* at 992–93.
[92] Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972); *see supra* text accompanying notes 17–25.

referred to as "anti-camping" ordinances.[93] These laws usually prohibit sleeping, sitting, and lying down, among other things, during certain times or in certain areas of the city. The most restrictive of these laws prohibit all of these activities at all times anywhere within the city limits.[94] Rather than criminalizing amorphous behaviors, they bring about the physical exclusion of the homeless from numerous and, in some cases all, public spaces.[95]

¶38 These anti-homeless measures have led to legal challenges based on new legal arguments. The most successful of these new arguments utilizes the prohibition of the criminalization of status under the Eighth Amendment.[96] The Supreme Court has held that the Eighth Amendment limits the types of punishments a state may impose[97] and their proportional severity,[98] and also "*imposes substantive limits on what can be made criminal*."[99] For example, behavior, such as drug possession, may be criminalized while status, such as drug addiction, may not.[100] While Eighth Amendment cruel and unusual punishment challenges to anti-homeless statutes have generally failed,[101] challenges under the prohibition of criminalization of status have been somewhat more successful.[102] For example, the Eighth Amendment prohibition on the criminalization of status was used successfully to challenge vagrancy laws.[103] These statutes, which criminalize drunkards, walkers, rogues and vagabonds, were explicitly directed toward statuses and not behaviors (in other words, the statutes target drunkards, not drinking).[104] The use of Eighth Amendment theories for anti-camping ordinances or other more modern statutes, however, stretch the Eighth Amendment jurisprudence to apply to certain conduct (like sleeping), and is therefore much more controversial.[105] While this theory still fails more

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[93] *See, e.g.*, cases cited *infra* note 106.

[94] *See* Jones v. Los Angeles, 444 F.3d 1118, 1123 (9th Cir. 2006) (vacated).

> No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.
>
> The provisions of this subsection shall not apply to persons sitting on the curb portion of any sidewalk or street while attending or viewing any parade permitted under the provisions of Section 103.111 of Article 2, Chapter X of this Code; nor shall the provisions of this subsection supply [sic] to persons sitting upon benches or other seating facilities provided for such purpose by municipal authority by this Code...
>
> A violation of section 41.18(d) is punishable by a fine of up to $1000 and/or imprisonment of up to six months.

L.A., CAL., MUN. CODE §§ 11.00(m), 41.18(d) (2005).

[95] *See, e.g.*, L.A., CAL., MUN. CODE §§ 11.00(m), 41.18(d).

[96] *See, e.g.*, Robinson v. California, 370 U.S. 660 (1962); *see* discussion *infra* Section II.F.1.a.

[97] Weems v. United States, 217 U.S. 349 (1910).

[98] Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002).

[99] Ingraham v. Wright, 430 U.S. 651, 667 (1977) (emphasis added).

[100] *See generally* Robinson v. California, 370 U.S. 660 (1962).

[101] *See supra* Section F.

[102] *See* Jones v. Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006); Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); Pottinger v. Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).

[103] Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969) (finding that a vagrancy statute was unconstitutional under the Eighth Amendment because it criminalized status).

[104] *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972).

[105] *See, e.g.*, Alegata v. Commonwealth, 231 N.E.2d 201, 207 (Mass. 1967) ("Idleness and poverty should not be treated as a criminal offence."); Parker v. Municipal Judge of Las Vegas, 427 P.2d 642, 644 (Nev.

than it succeeds, it has been accepted by a number of courts and continues to be used to challenge anti-camping ordinances.[106]

i) Robinson v. California, the Supreme Court, and the Criminalization of Status

¶39 The criminalization of status was not held unconstitutional until the Supreme Court's 1962 decision, *Robinson v. California*.[107] In *Robinson*, the Supreme Court found that criminalizing a status violated the Eighth Amendment's prohibition of cruel and unusual punishment. The California statute in question criminalized addiction to narcotics, even if the suspect had never used or possessed narcotics within the state.[108] The Court concluded that any law that criminalized a status rather than an act could not stand under the Eighth and Fourteenth Amendments.[109] However, six years later in *Powell v. State of Texas*, the Court made it clear that this prohibition extended only to status, and that behavior connected to a status could be criminalized.[110] Subsequently, courts that have found that anti-camping statutes violate the Eighth Amendment and that have extended the *Robinson* rule to apply to conduct integral to status have universally limited their holdings to involuntary conduct.[111] The most recent challenges to anti-camping ordinances under the Eighth Amendment were brought in Portland and Sacramento.[112]

ii) Jones v. Los Angeles: The Ninth Circuit

¶40 In *Jones v. Los Angeles*, a circuit court found, for the first time, that the Eighth Amendment's prohibition on the criminalization of status extended to anti-camping ordinances.[113] The Ninth Circuit held that the limits on the criminalization of status from *Robinson* extended to conduct that is an "integral aspect of that status."[114] The court relied on the Supreme Court's decisions in *Robinson* and *Powell*, finding that the dissent

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1967) ("It simply is not a crime to be unemployed, without funds, and in a public place. To punish the unfortunate for this circumstance debases society."); *see also* Martin R. Gardner, *Rethinking* Robinson v. California *in The Wake of* Jones v. Los Angeles*: Avoiding The "Demise Of The Criminal Law" by Attending to "Punishment"*, 98 J. CRIM. L. & CRIMINOLOGY 429 (2008).

[106] *See, e.g.,* Jones v. City of Los Angeles, 444 F.3d 1118 (9th Cir. 2006); Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056 (D. Or. July 31, 2009); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218 (E.D. Cal. 2009).

[107] 370 U.S. 660 (1962).

[108] CAL., HEALTH & SAFETY CODE § 11721 (1964) (repealed 1972).

[109] *Robinson*, 370 U.S. at 666 ("But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.").

[110] Powell v. Texas, 392 U.S. 514, 532–33 (1968) (declining to extend the holding in *Robinson* to acts that stem from conditions or statuses). The Court held that the act of being drunk in public, although it might be considered incident to the status of alcoholism (assuming alcoholism is a status), could constitutionally be criminalized and did not affect an Eighth or Fourteenth Amendment violation. *Id.*

[111] *See Jones*, 444 F.3d at 1137; Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); Pottinger v. Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).

[112] *See* Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056 (D. Or. July 31, 2009); Lehr v. City of Sacramento, 624 F. Supp. 2d 1218 (E.D. Cal. 2009).

[113] *Jones*, 444 F.3d. at 1137.

[114] *Id*. at 1132 ("The City could not expressly criminalize the status of homelessness by making it a crime to be homeless without violating the Eighth Amendment, nor can it criminalize acts that are an integral aspect of that status.").

and the concurrence in *Powell* both suggested that, in certain circumstances, criminalizing conduct connected to status would also be unconstitutional under the Eight and Fourteenth Amendments.[115] Los Angeles could not criminalize being homeless as a status, nor could it criminalize "sitting, lying, or sleeping on public streets and sidewalks at all times and in all places within Los Angeles's city limits."[116]

¶41 The court rested its holding on the fact that the homeless appellants had no choice but to be and sleep on the streets and thus concluded, "[e]ven if Appellants' past volitional acts contributed to their current need to sit, lie, and sleep on public sidewalks at night, those acts are not sufficiently proximate to the conduct at issue here for the imposition of penal sanctions to be permissible."[117] The court's decision in *Jones* is novel for its interpretation of the Eighth Amendment, but it also set the stage for later challenges by homeless people based on the criminalization of status. The court recognized the harm anti-camping statutes can inflict on homeless people. However, by couching its decision within a requirement of involuntariness, the court limited both the conditions under which plaintiffs could succeed and the extent to which the city was required to treat homeless people as free members of its community. Other cases would follow suit.

iii) Anderson v. City of Portland

¶42 In *Anderson v. City of Portland*, the District Court of Oregon denied a motion to dismiss a suit challenging Portland's anti-camping ordinance which prohibited establishing or maintaining a temporary place to live.[118] The plaintiffs, labeled by the court as "involuntarily homeless," challenged the enforcement.[119] The ordinance prohibited camping for the purpose of the statute as authorized by an Executive Order issued by the Chief of Police to dismantle any established campsites.[120] The plaintiffs brought claims under the Eighth Amendment's prohibition on the criminalization of status and the rights of travel, movement, freedom, and equal protection under the Fourteenth Amendment.[121]

¶43 The court held that the Eighth Amendment extended protection to conduct integral to status.[122] However, it diverged from the reasoning of the *Jones* court and other district courts that held that anti-camping ordinances violated the Eighth Amendment.[123] Instead,

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[115] *Id.* at 1135 ("[F]ive Justices in *Powell* understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.").
[116] *Id.* at 1120.
[117] *Id.* at 1137. In *Pottinger v. City of Miami*, the plaintiffs also brought a successful Eighth Amendment claim. The district court found that ordinances that criminalized life sustaining activities constituted cruel and unusual punishment under the Eighth Amendment by criminalizing "involuntary conduct that is inextricably related to that status." Pottinger v. Miami, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992). The court emphasized that the plaintiffs "[had] no realistic choice but to live in public places." *Id.*
[118] Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *1 (D. Or. July 31, 2009) (citing P.C.C. § 14A.50.020 (A)(1)).
[119] *Id.*
[120] *Id.* at *2.
[121] *Id.*
[122] *Id.* at *6–*7
[123] *Id.* at *6; *see also* Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000); Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla.1992).

the *Anderson* court demanded that, in order to be found unconstitutional under the Eighth Amendment prohibition on the criminalization of status, the targeted conduct must be involuntary, sufficiently related to the status, and the court must examine the extent to which the ordinance in question criminalizes "conduct that society has an interest in preventing."[124]

¶44 After applying this rubric, the court then found that the "City's enforcement of the anti-camping and temporary structure ordinances criminalizes them for being homeless and engaging in the involuntary and innocent conduct of sleeping on public property" and therefore the plaintiffs stated a claim under the Eighth Amendment and survived the motion to dismiss.[125] While the Oregon court accepted the plaintiff's Eight Amendment claim, it imposed more stringent requirements than previous courts by limiting *Robinson*'s applicability to both involuntary *and* innocent behavior.[126]

iv) Lehr v. City of Sacramento

¶45 Another district court, however, recently rejected any expansion of the *Robinson* doctrine and held that even criminalization of broad categories of behavior almost exclusively associated with homelessness are not unconstitutional because these criminalizations apply to *conduct*, and not *being homeless* itself.[127] In *Lehr v. City of Sacramento*, the district court for the Eastern District of California granted summary judgment for the City of Sacramento on an Eighth Amendment challenge to the city's anti-camping ordinance.[128] The plaintiffs, a diverse group of homeless people and advocates, challenged the city's application of its anti-camping ordinance as a violation of the Eighth Amendment prohibition of the criminalization of status.[129] The city's ordinance criminalized "camping," which was defined expansively as camping or living outdoors on all public property.[130] Among the city's stated rationales for the statute were protection of public health, welfare, and safety, and the protection of private property and the "lawful and ordinary" uses for which the spaces were intended.[131]

¶46 The court rejected the reasoning of the Ninth Circuit in the then-vacated *Jones* decision. It found that the reach of *Robinson* and *Powell* was limited only to status and did not extend to conduct society has an interest in preventing, or derivative conduct of any kind.[132] The court concluded that because the statute at issue targeted conduct and did not punish homeless people for *being* homeless, it was not unconstitutional under the Eighth Amendment as a matter of law.[133]

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[124] *Anderson*, 2009 WL 2386056, at *7.
[125] *Id.* In addition, the court denied the defendants' motion to dismiss under the Equal Protection Clause, but granted it for the plaintiffs' right to travel, freedom of movement, and substantive due process claims. *Id.* at *8–*10.
[126] *Id.*
[127] Lehr v. City of Sacramento, 624 F. Supp. 2d 1218 (E.D. Cal. 2009).
[128] *Id.* The court denied the defendants' motion for summary judgment on the plaintiffs' claims under the Fourth and Fourteenth Amendments. *Id.* at 1235–36.
[129] *Id.* at 1222.
[130] *Id.* at 1224–25.
[131] *Id.* at 1225.
[132] *Id.* at 1231–32.
[133] *Id.* at 1234.

G. Conclusions

¶47 Of the few jurisdictions that have analyzed anti-camping ordinances under the *Robinson* doctrine, few have accepted the theory.[134] In *Joel v. City of Orlando*, for example, the Eleventh Circuit rejected homeless plaintiffs' claim that an anti-camping ordinance unconstitutionally criminalized status.[135] The court found that even if the *Robinson* doctrine extended to behavior integral to status, as the *Pottinger* court had held, camping was not such a behavior because there was sufficient shelter space to house the city's entire homeless population.[136] In addition, these types of challenges have been met with criticism from commentators who have suggested that enjoining ordinances that criminalize conduct integral to homelessness creates a slippery slope when drawing the line regarding what kind of conduct can be prohibited.[137]

¶48 The Eighth Amendment jurisprudence surrounding homelessness limits the relief the homeless can obtain from statutes that exclude them from public space. Rather than prohibit statutes that target homeless behavior (standing, sitting, and particularly sleeping in public areas), the courts have only struck down this kind of government action when the homeless would be effectively banished if a statute were allowed to stand.[138] Even those cases that result in a win for the homeless plaintiffs do so only in the limited context of involuntariness.

III. THEORETICAL FRAMEWORKS: CITIZENSHIP AND LIBERTY

¶49 Having considered the legal landscape of anti-homeless measures and the litigation challenging them, this Comment will now turn to a discussion of the theoretical frameworks that inform its analysis. This Section will focus on theories of citizenship from Thomas Humphrey Marshall's essay *Citizenship and Social Class* and the work of Kathleen Arnold on homelessness and citizenship. These theories give an extra-legal context for homelessness and help to delineate the consequences of the way in which the legal system deals with homelessness, beyond wins and losses in court. Through these theories, this Comment will argue that even when homeless people win in court, they are denied full membership in their communities and excluded from what it means to be a citizen.

A. Thomas Humphrey Marshall: Citizenship and Social Class

¶50 In 1949, sociologist Thomas Humphrey Marshall authored a seminal article on citizenship theory entitled *Citizenship and Social Class*.[139] While his article dealt specifically with the development of citizenship in Great Britain, his theoretical framework proved influential in the development of citizenship theory generally. While

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[134] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000); Joyce v. City & County of S.F., 846 F. Supp. 843 (N.D. Cal. 1994).
[135] *Joel*, 232 F.3d at 1362.
[136] *Id.*
[137] *See* Gardner, *supra* note 105.
[138] *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006); Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); Pottinger v. Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).
[139] THOMAS HUMPHREY MARSHALL, CITIZENSHIP AND SOCIAL CLASS (1950).

this theoretical framework is primarily sociological, not legal, it bears parallels to the legal theories of citizenship, discussed briefly below.[140]

¶51 Marshall frames his issue by attempting to define the interactions and parallels between social class and citizenship, beginning with economist Alfred Marshall's essay *The Future of the Working Classes*.[141] In discussing Alfred Marshall's work, Thomas Humphrey Marshall states:

> Such, I think, is the sociological hypothesis latent in Marshall's essay. It postulates that *there is a kind of basic human equality associated with the concept of full membership of a community* or—or, as I should say, of citizenship—which is not inconsistent with the inequalities which distinguish the various economic levels in the society. In other words, the inequality of the social class system may be acceptable provided the equality of citizenship is recognized.[142]

¶52 Building off of Alfred Marshall's "latent hypothesis," T.H. Marshall sets out the principle question he wishes to answer: "Is it still true that basic equality, when enriched in substance and embodied in the formal rights of citizenship, is consistent with the inequalities of social class?"[143]

¶53 Marshall defines three elements that create citizenship: civil, political, and social rights.[144] Civil rights are comprised of "the rights necessary for individual freedom."[145] Political rights involve the right to exercise political power, to hold political office, or to elect a person to office.[146] Marshall's definition of the social element of rights is somewhat more nebulous, but is basically analogous to positive liberties.[147] Marshall refers to social rights as "the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society."[148]

¶54 Marshall traces the development of civil rights in the Eighteenth Century to the recognition of the right to work: "In the economic field the basic civil right is the right to work, that is to say the right to follow the occupation of one's choice in the place of one's choice, subject only to legitimate demands for preliminary technical training."[149] The idea of economic independence is essential to Marshall's conceptualization of citizenship

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[140] *See infra* text accompanying note 157.
[141] MARSHALL, *supra* note 139, at 8.
[142] *Id.* (emphasis added).
[143] *Id*. at 9. Marshall also sought to explore the relationship of the free market and basic equality and the shift from an emphasis on duty-based citizenship to rights-based citizenship. *Id.*
[144] *Id*. at 10.
[145] *Id.*
[146] *Id.* at 11.
[147] Positive liberties refer to the right to some benefit (such as welfare or education), whereas negative rights refer to the right to be free from government intrusion or abuse. *See* David Abraham, *Are Rights the Right Thing? Individual Rights, Communitarian Purposes and America's Problems*, 25 CONN. L. REV. 947 (1993). The United States' guarantees of rights are usually described as a system of negative liberties. *See* Bohen v. City of E. Chicago, 799 F.2d 1180, 1189 (7th Cir. 1986) (Posner, J., concurring) ("[T]he Constitution (with immaterial exceptions) is a charter of negative rather than positive liberties.").
[148] MARSHALL, *supra* note 139, at 11.
[149] *Id.*at 15–16.

and is extremely important to the discussion of the relationship between homelessness and citizenship. Once liberty is linked to economic status, the exclusion of those without real property or a steady income from the national identity is guaranteed.

¶55 Marshall ties the development of political rights to the nineteenth century. Political rights did not involve the creation of new rights, but the distribution of existing rights to broader sectors of the population.[150] The suffrage act in the twentieth century solidified political rights as rights of citizenship along with civil rights.[151] The right to political participation was the last element of modern citizenship recognized for men in England. While political and civil rights developed in a different sequence for different groups, the combination of these rights has come to be seen as the elements necessary for citizenship.[152]

¶56 Finally, Marshall discusses the development of social rights beginning in the nineteenth century and culminating in the twentieth.[153] There existed a division between the rights of citizens on the one hand, and social rights and their position as an alternative to, rather than as a guarantee of citizenship, on the other.[154] Under the Poor Law and other similar statutes, a person taking advantage of the protection of the government was forced to forfeit civil and political rights. Those that took advantage of the Poor Law were interned in workhouses (eliminating the ability to choose one's occupation, Marshall's idea of the quintessential civil right) and lost franchise and other political rights that they had.[155] Early improvements to working conditions were limited to protections for women and children, who did not hold citizenship. Those who enjoyed full citizenship had to forgo the protection of the government.[156]

B. Social Class and Citizenship in the United States

¶57 Marshall's definition of citizenship in terms of civil and political rights parallels the basic nature of full citizenship in the United States.[157] The Fourteenth Amendment to the United States Constitution ties citizenship directly to civil liberties.[158] The Fifteenth

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[150] *Id*. at 19.
[151] *Id*. at 20.
[152] *See, e.g.*, Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947 (2002) (discussing the development of citizenship for women in the United States through the Nineteenth and Fourteenth Amendments—in other words, political and civil rights).
[153] MARSHALL, *supra* note 139, at 21–22.
[154] *Id*. at 24.
[155] *Id.*
[156] *Id*. at 24–25.
[157] Marshall tracks the development of citizenship from civil to political to social rights. This timeline is certainly not universal. Women's liberties in the United States, for example, developed in a different order. As Marshall points out, women had social rights before they had rights of citizenship. In addition, women gained political rights before they gained civil rights. However, it is the structure of the theory, and not its historical development in a particular place, on which this Comment builds.
[158] U.S. CONST. amend. XIV, § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor 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.

Amendment links it to political liberties.[159] The structure of citizenship under the Constitution follows Marshall's framework, and enforces the dual concepts of civil and political liberties as defining citizenship. The struggle of black Americans during the nineteenth century to gain civil and political equality is synonymous with a struggle for citizenship, which these Reconstruction Amendments recognized.

¶58 For homeless people, social rights still bear a high cost in the United States. Homeless people are often forced to participate in social programs that relieve the more tangible challenges they face, but deny them membership within collective identities and communities that constitute elements of citizenship. Similarly, legal decisions that depend on a finding of involuntary homelessness deprive the homeless of the economic independence that is a foundational element of citizenship. Courts insist that the homeless be without economic options before they are willing to strike down laws that criminalize homelessness or conduct incident to homelessness.[160] While it may be reasonable to argue that the bounds of the Constitution and the Eighth Amendment in particular limit the courts' discretion in addressing issues of homelessness, it is nonetheless true that homeless plaintiffs must function within a system in which to be homeless is either to be a criminal or to be a charity case, neither of which is compatible with citizenship. Marshall argues that economic independence is a central civil right and the foundation of citizenship. Dependence on the state has historically been an indicator of being less than a citizen.[161] Requiring homeless people to accept the charity of the state denies them the right to occupy their time as they choose. If the choice between sleeping outside and sleeping in a shelter is eliminated, by being required to sleep in a shelter, homeless people become a group that does not enjoy independence or the full rights of the rest of the community.

¶59 Perhaps the most relevant portion of Marshall's essay is his exploration of the relationship and conflict between citizenship and social class. Marshall defines citizenship briefly as "a status bestowed on those who are full members of a community."[162] "All who possess the status are equal with respect to the rights and duties with which the status is endowed."[163] In contrast, social class is a "system of inequality."[164] While it would seem that social class and universal citizenship would be incompatible within a governmental system, Marshall instead argues that the equalization of status created by citizenship allowed for continued and culturally normalized social disparities.[165]

¶60 The development of governmental methods to deal with the "more unpleasant" aspects of social inequality legitimized social inequality.[166] Welfare programs that

[159] U.S. CONST. amend. XV, § 1 ("The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.").
[160] *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006); Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009); Pottinger v. Miami, 810 F. Supp. 1551, 1561 (S.D. Fla. 1992).
[161] MARSHALL, *supra* note 139, at 24.
[162] *Id.* at 28.
[163] *Id.* at 28–29.
[164] *Id.* at 29.
[165] *Id.*
[166] *Id.* at 32.

provided the bare minimum of support prevented the poor from complaining that they were denied rights and allowed a system of inequality to continue. Rather than eliminating class distinctions, these class-abatement measures enforced a system of social class and, by eliminating its most objectionable elements, minimized the potential for criticism of it. Furthermore, governmental aid was not a benefit of citizenship, but a replacement for it. By employing social benefits or rights to eliminate social inequality, the government took on what had traditionally been the role of private charities.[167] The social benefit was bestowed not as a matter of right, but out of benevolence.[168]

¶61 Instead of any kind of positive assurance of social equality, civil rights developed as the core of citizenship.[169] Unlike social rights, civil rights were compatible and even necessary to the maintenance of social inequalities. Civil rights granted economic independence and freedom to compete in the market economy.[170] The system of social rights informed by economic independence both defined citizenship and perpetuated systems of disparate social class. In a capitalist economy, a full citizen cannot be economically dependent on others in society or on the government. This paradigm, however, guarantees nothing more than equality of status. The shift from disparities of status to citizenship, which established one universal status, created a "foundation of equality on which the structure of inequality could be built."[171] By alleviating or at least obscuring the elements of poverty that most starkly demonstrated social injustice, social programs legitimized a system of citizenship based on civil, and primarily economic, rights.[172]

C. National Identity and the Home

¶62 According to Marshall's hypothesis, citizenship is more than legally holding the same rights as all other citizens. Rather, citizenship involves membership in a community, or as Marshall states, "a kind of basic human equality."[173] The connection between citizenship and membership in a community, or more specifically, national identity, is developed in both Marshall's work and the work of Kathleen Arnold.[174] Arnold's book, *Homelessness, Citizenship, and Identity*, deals with the denial of citizenship to the homeless by excluding them from political identities.[175] Arnold focuses on national identity and its connection to the home.[176]

¶63 First, Marshall discusses national identity as an extension of the community membership that is integral to citizenship. For Marshall, citizenship requires "a direct sense of community membership based on loyalty to a [civilization] which is a common possession."[177] National consciousness developed in concurrence with civil rights. As

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[167] *Id*. at 33.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id*. at 34.
[172] *Id.* at 32.
[173] *Id.* at 8; *see supra* text accompanying note 142.
[174] KATHLEEN R. ARNOLD, HOMELESSNESS, CITIZENSHIP, AND IDENTITY: THE UNCANNINESS OF LATE MODERNITY (2004); MARSHALL, *supra* note 139, at 40.
[175] ARNOLD, *supra* note 174.
[176] *Id*. at 35.
[177] MARSHALL, *supra* note 139, at 40–41.

civil rights expanded and were enjoyed by a greater number of people, a collective identity also developed as a result of the benefits of those rights.[178] Marshall notes that a lack of political power prevented collective identity from translating into social equality immediately, but instead was used as a collective bargaining tool by unions.[179] The national identity that developed allowed citizens, particularly workers, to use civil rights as a tool in the economic sphere. Collective bargaining, based not just on free market economic forces but on collective identity and rights, allowed workers as a class to demand social rights as a matter of entitlement.[180] The same concept translates more broadly to the political sphere.[181]

¶64 Arnold, like Marshall, finds that economic independence is essential to citizenship.[182] For Arnold, the formal elements of citizenship are either birthright citizenship or blood citizenship and political membership in a sovereign system to the exclusion of other groups.[183]

¶65 Building on this last category, Arnold also identifies less legalistically formal elements of citizenship. Nationalism or national identity is embodied in a "homogenous ideal" under which those representing difference are othered.[184] Movements challenging that homogeneity are thought to infringe upon national identity rather than representing another facet of it. Historically, the exclusion from the ideal (whether national identity or political or economic power) has been legitimized by defining "others" as naturally unfit for political participation or citizenship.[185] This theory is compatible with Marshall's analysis of social rights.[186] Those who require support (from the state, from their husbands, from their parents, etc.) are denied the same status granted to autonomous, economically independent sector of the citizenry.[187] Under Arnold's and Marshall's theories, membership in national identity has become inextricably linked with citizenship.

¶66 Like Marshall, Arnold also ties autonomy to citizenship.[188] For example, laws designed to protect women may paradoxically result in restricting women's autonomy, thus denying them full citizenship.[189] For Arnold, having a home is a precondition for freedom and a "symbol of self and self-identity."[190] Regardless of the home's actual ability to provide stability or privacy, it is symbolic of the homogenous ideal.[191] Arnold postulates that the growing of homelessness might actually solidify the line drawn between citizens and the homeless because concepts of the home/homeland are constructed to exclude, and national identity depends on "the other."[192]

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[178] *Id*. at 41.
[179] *Id*. at 42.
[180] *Id*. at 43.
[181] *Id*. at 44.
[182] ARNOLD, *supra* note 174.
[183] *Id*. at 35.
[184] *Id*.
[185] *Id*. at 38.
[186] *See supra* notes 153–156.
[187] *Id*.
[188] ARNOLD, *supra* note 174, at 43.
[189] *Id*.
[190] *Id*. at 58.
[191] *Id*. at 60.
[192] *Id*. at 137

¶67 For Arnold, the solution to the "othering" of the homeless and to their systemic exclusion from citizenship lies in shifting the concepts of "home." Arnold insists on a more fluid definition of "home," and as a result, of "us."[193] The politics of homelessness, that Arnold suggests, would loosen the connection between the home and national identity and give the homeless a voice in the political process.[194]

IV. DEPRIVATION OF CITIZENSHIP

¶68 Under the legal structures discussed above, the homeless are legally disabled in a number of ways. They are restricted in the rights they can exercise and in the resources they can access. Lack of property in and of itself is a lack of liberty.[195] By virtue of being without real property (owned or rented) the homeless are outside of the whole system of property rights and their protections. Additionally, rights that seem unconnected to property are also diminished or eliminated based on a lack of homeownership. For example, because the homeless do not possess a traditional dwelling, their right to privacy will never carry the same weight as a homeowner's. The homeless will always be more vulnerable to police searches and seizures, and the activities in which they can engage will be diminished.[196] In the context of Fourth Amendment doctrine, a reasonable expectation of privacy may exist outside of the home,[197] but privacy expectations are always greater in a residence.[198] Despite the Supreme Court's admonition in *Katz v. United States* that the Fourth Amendment applies to people, not places, certain places are afforded less protection. For example, there is no reasonable expectation of privacy in open fields,[199] but the area surrounding a house is entitled to extra protection.[200] Therefore, the space of homeless people receives less constitutional protection. The Fourth Amendment rights of the homeless are less meaningful.

¶69 Lack of a traditional residence also diminishes the right and the ability of the homeless to participate in the political process. States implement residency duration requirements, mailing address requirements, and/or identifying documentation requirements in order to vote. Some states strike voters who fail to respond to mailed confirmations from their voting lists.[201] While a home cannot be a legal requirement in

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[193] *Id.* at 161.
[194] *Id*. at 61.
[195] *See* Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 287 (2004).
[196] *See, e.g.,* Katz v. United States, 389 U.S. 347 (1967). While the Supreme Court has held since *Katz* that the Fourth Amendment "protects people, not places," *id.* at 351, there is always a greater expectation of privacy for homes. *See also* Oliver v. U.S., 466 U.S. 170 (1984) (delineating the extent of the curtilage, or the area immediately surrounding the home that is afforded the heightened protection of the home); Kyllo v. United States, 533 U.S. 27 (2001) (disallowing the use of technology to expose details of a home that would otherwise have been concealed).
[197] *See Katz*, 389 U.S. 347.
[198] Silverman v. United States, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.").
[199] Oliver v. United States, 466 U.S. 170 (1984)
[200] United States v. Dunn, 480 U.S. 294 (1987); *Oliver*, 466 U.S. 170.
[201] THE CIVIL RIGHTS PROGRAM OF THE NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, VOTER REGISTRATION AND VOTING: ENSURING THE VOTING RIGHTS OF HOMELESS PERSONS (2008), *available at* http://www.nlchp.org/content/pubs/2008_Voting _Report _final2.pdf; s*ee also* NAT' LAW CTR. ON

order to vote, these legal obstacles often effectively eliminate the ability of the homeless to participate in the voting process in practice. Both civil and political liberties, then, are diluted for those who do not have homes.

¶70 Despite the serious limitations that these obstacles pose to both the civil and political rights of the homeless, they are not traditionally viewed as eliminating the rights or citizenship of the homeless. Because the United States has developed a system of rights, based exclusively on negative liberties, failure to exercise a right or the inability to exercise a right is not seen as eliminating it. Even if a right is meaningless to an entire group, at least in part because of the actions of the state, as long as the state does not eliminate or infringe upon the right facially, the rights of that group are not considered to have been violated. The First Amendment right to free speech is not a right to speak but a right against government infringement on speech. The Fourteenth Amendment right to equal protection does not guarantee that protected classes will receive the same compensation, employment, or educational attainment. It only guarantees that the government will not deliberately prevent protected classes from engaging in certain activities. In addition, the United States does not guarantee a right to food, water, housing, education, or many other benefits.[202] Rights are defined by a lack of government involvement, and that is all any person is entitled to, no matter what conditions result in his or her inability to exercise that right successfully. Nonetheless, the practical and even definitional limitations that the legal structure imposes on the rights of the homeless place them in a position of arguing for hollow rights or for second-class citizenship at best.

¶71 In addition, the de facto limitations on civil and political rights of the homeless deny citizenship to the homeless in more subtle ways. Under Marshall's and Arnold's theories, economic independence is an essential component of citizenship.[203] A lack of economic independence coupled with a total exclusion from political and national identity results in non-citizenship. The homeless are essentially stateless. Their lack of economic independence and of a home removes them from the political process. Not only are the homeless excluded from civil and political rights, but our conception of the "us" entitled to those rights, in other words citizens, also excludes the homeless. Criminalizing sleeping in public spaces, for example, delegitimizes the voice of the homeless, the people who would sleep in public spaces, in the political process. The politics of such a statute only considers the uses of those spaces by, for example, business people, dog walkers, or picnickers who will then return to their private residences. Public space is only public for those who have houses. Those who do not may be excluded, not only from public space itself, but from the very definition of "public."

¶72 Court decisions that refuse to provide relief from the criminalization of homelessness underpin the home as central to membership in local and national communities. By sanctioning cities' prohibition of all behaviors associated with homelessness, the courts sanction the exclusion of the homeless not only from cities' parks and sidewalks, but from their citizenry. In *Lehr v. City of Sacramento*, the City of

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HOMELESSNESS & POVERTY, PHOTO IDENTIFICATION BARRIERS FACED BY HOMELESS PERSONS: THE IMPACT OF SEPTEMBER 11 (2004).

[202] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[203] *See supra* text accompanying notes 169–171.

Sacramento made all living or camping outdoors, in all public spaces, a crime.[204] The city explicitly stated its intention to exclude homeless people from the community when it defined the homeless's use of public space as not "lawful and ordinary."[205] The city was willing to ensure, through the use of a criminal code, that the homeless' existence remained outside of normalized and state-sanctioned uses of public space. If living outdoors is criminal, only those with a home may be included in the law-abiding citizenry, and only their uses of public space are "lawful and ordinary."[206] The homeless are fundamentally not lawful, ordinary, or part of the "us" that uses public space in state-sanctioned ways. The state does not include the homeless when providing protections for those "ordinary" citizens. Instead, the homeless are grouped with criminals, simply because they do not possess homes.

¶73 Rather than undermine the denial of citizenship to the homeless, even those cases that are ostensibly in their favor tend to reinforce their exclusion from political identity.[207] In a negative rights paradigm, citizenship is conditioned on the forfeiting of social benefits.[208] As a result, the legal solutions that have been most successful in disturbing the laws that threaten the rights of the homeless to exist within certain spaces are unsuccessful in upsetting a paradigm that perpetually defines them as something less than citizens. Eighth Amendment challenges to anti-camping measures that assert an unconstitutional criminalization of status have not all been successful. Even when they have, courts have universally demanded that behavior like sleeping be involuntary before they will hold that it is integral to the status of homelessness.[209] In *Anderson*, for example, the court found that anti-camping ordinances are unconstitutional under the Eighth Amendment if there is insufficient shelter space for all of the homeless people in the city.[210] While this decision prohibits the *physical* exclusion of the homeless from public space under certain circumstances, it endorses a regime of symbolic exclusion. Cities are still allowed to criminalize all behavior associated with homelessness. They may define homelessness as fundamentally othered and outside of public spaces. They may eliminate any agency the homeless have within the political sphere.

¶74 Underlying the rationale in this and other similar decisions is the idea that behavior integral to homelessness can be criminalized if there is some kind of social rights scheme that provides, for example, housing available to the homeless. This scheme does not have to be provided by the state. The statistics that courts consider in determining whether or not there is enough shelter space available to the homeless do not distinguish

[204] Lehr v. City of Sacramento, 624 F. Supp. 2d 1218 (E.D. Cal. 2009); *see supra* discussion accompanying notes 127–133.
[205] *Lehr*, 624 F. Supp. 2d at 1225.
[206] The blame for the exclusion of the homeless from the "public" does not rest solely with the judiciary. Courts are constrained by legislation, precedent, and the structure of the judiciary itself. Indeed, as discussed above, conceptions of national identity and "us" contribute as much to this exclusion as much any other factor. *See* supra Section III.C. However, the courts' role is to legally approve the exclusion of the homeless as full citizens, and in that way courts are complicit in the denial of citizenship to the homeless.
[207] *See, e.g.*, Anderson v. Portland, No. 08-1447-AA, 2009 WL 2386056, at *7 (D. Or. July 31, 2009).
[208] *See supra* text accompanying note 154.
[209] *See* Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006); *Anderson*, 2009 WL 2386056, at *7.
[210] *Anderson*, 2009 WL 2386056, at 1.

between private and public shelter space.[211] A person who chooses not to enter a shelter because of religious beliefs, an opposition to its policies, or fear of their own safety has no recourse under the Eighth Amendment.[212] The homeless still may not choose to use public space. Instead, they are forced to accept social benefits as alternatives to full citizenship and autonomy.

¶75 The homeless are left in the untenable position of choosing between arrest and criminalization by a system that excludes them from community, national and political identity, and the proverbial "us," and surrendering full citizenship to accept "benefits" not extended to the economically independent and propertied. Court decisions striking down ordinances under the Eighth Amendment create temporary solutions for the criminalization of the homeless, but are complicit in the system that fails to include the homeless in citizenship and perpetually others them.

¶76 Under *Anderson*, the homeless may not make any meaningful decision regarding where they will sleep or live.[213] They may not use public space in the ways that they would choose to as members of the public, but only as wards for whom the state has failed to provide.[214] They have no more rights, no greater membership, and no more agency than the plaintiffs in *Lehr*.[215] The court gives them space (or at least the potential for space), but in a system that insists on real property as a requisite for membership, it cannot give them full citizenship.

¶77 The relationship between property and liberty figures heavily in this analysis. In the United States, the connection between property and liberty is especially close because of the extent to which our system has developed around negative liberties. The United States guarantees numerous freedoms from government intrusion, but rarely guarantees, as a fundamental liberty, some governmental benefit.[216] This negative liberty regime ensures that economic independence remains a central tenet of citizenship and that what might otherwise be considered positive or social rights instead remain alternatives to citizenship. Courts are undoubtedly confined by this regime in making decisions, and have further confined themselves to decisions that are unable to address the structural issues that drive the interaction between homelessness and citizenship.

¶78 However, courts are not completely unable to help change the structures that exclude the homeless from citizenship and national identity. The court in *Pottinger* came closest to recognizing the homeless as legitimate citizens and not outside of what is normal in its discussion of the plaintiffs' Fourth Amendment claims.[217] That court stated:

> [T]he interior of the bedrolls and bags or boxes of personal effects belonging to homeless individuals in this case is perhaps the last trace of privacy they have. In addition, the property of homeless individuals is

[211] *See Jones*, 444 F.3d at 1121 (9th Cir. 2006).
[212] A man who refused to apply for shelter space for religious and security reasons was not granted relief under the Eighth Amendment. Lehr v. City of Sacramento, 624 F. Supp. 2d 1220, 1233 (E.D. Cal. 2009).
[213] *See Anderson*, 2009 WL 2386056, at *7.
[214] *Id*.
[215] *Lehr*, 624 F. Supp. 2d 1220.
[216] *See* cases cited *supra* notes 64–65.
[217] Pottinger v. Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

> often located in the parks or under the overpasses that they consider their homes.[218]

¶79 Rather than depending on normalized expectations of what traditional residences are to determine when a person has a reasonable expectation of privacy, the *Pottinger* court credited the plaintiffs' use of alternative spaces as "home" or areas to be safeguarded and constitutionally protected.[219] This decision marks a step in the right direction for including the homeless in citizenship. The kind of respect the *Pottinger* court gave to the plaintiffs' alternative living situations has not appeared in Eighth Amendment challenges. Furthermore, courts may be reluctant to apply the Eighth Amendment because of the limits of the *Robinson* doctrine. However, if the courts begin to acknowledge alternative living situations as protectable or as "homes," citizenship may begin to lose its too-tight bond with traditional residences and the homeless may begin to be included in what we identify as "us."

V. CONCLUSIONS: THE ECONOMIC CRISIS

¶80 Solutions to the othering of the homeless are much more difficult in a system that rests on concepts of negative liberties. Particularly because the United States is fundamentally tied to a negative liberty regime, positive liberty solutions that guarantee certain benefits as part of, rather than instead of, citizenship may be unlikely.[220] Transforming social rights from a position of defining sub-citizenship to part of the definition of full citizenship would represent a structural shift for the American governmental system. In addition, unless political identity shifts along with positive rights strategies and parallel shifts in judicial decisions, these measures will continue to act as social rights that are alternatives to citizenship.

¶81 One interesting effect of the economic crisis, and particularly the rise in foreclosures, may be to enact such a shift in our conceptualizations of "us." The crisis has created new homeless who, until recently, owned homes and were undoubtedly included in our national identity.[221] Under the current economic conditions, it has become more difficult to draw self/other lines when it comes to homelessness. People with steady jobs and families who, until recently, owned their own homes, are now living in shelters or in their cars.[222] As the result of broad economic problems, both our concept of "us" and our concept of "home" may shift. This crisis of identity may help to create more fluid conceptualizations of "us" and allow homeless people to be embraced as full citizens.

¶82 Shifting the concept of "home" in legal and social contexts will be difficult. As this Comment argues, the legal structures that affect the homeless are difficult to

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[218] *Id.* at 1572.
[219] *Id.*
[220] Many commentators have suggested a positive rights-based approach to solving the problems of criminalizing the homeless. *See, e.g.*, Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem: Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, 35 W. ST. U. L. REV. 407 (2008).
[221] *See* Peter S. Goodman, *Foreclosures Force Ex-Homeowners to Turn to Shelters*, N.Y. TIMES, Oct. 19, 2009, at A1.
[222] *See id.*

challenge in court. Even those challenges to anti-homeless laws that are successful often accept the dominant discourse that excludes the homeless from national identity or any part in "the public." Under the theories of Marshall and Arnold, the Eighth Amendment decisions that grant the homeless relief exclude them from autonomous citizenship at the same time. The laws that infringe on the ability of the homeless to sleep, sit, stand, and even be in a city are never seen as laws infringing on members of the citizenry. Instead, these statutes are acceptable unless they eliminate the last option of the homeless. Only then will the courts step in, and even then they do not suggest that the homeless must be included in what it means to be public, but merely that if there are no other options the homeless may not be excluded from all public space. These statutes, decisions, and the discourse that informs them, place the homeless outside of "the public" and deny them effective citizenship. The economic crisis may help to shift what it means to be part of "the public" away from the home. Finally, courts may also be able to contribute to such a shift by legitimizing alternatives to traditional residences as worthy of legal protection.