

**Cracking Down on the Down and Out:
The Criminalization of Homelessness
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It's one thing to read about injustice and inequality in society, but another to witness it firsthand. My Shepherd internship with the DC Public Defender Service allowed me to become involved in the lives of citizens suffering from the flaws in our country's legal system. I learned that generally those living in poverty have a greater need for legal services but fewer resources with which to get them. This results in a criminal justice system that prosecutes the poor more harshly than the affluent citizens. I realized that citizens with fewer financial means are treated worse in every aspect of American life, whether in the health care system, our political processes, or the country's educational system.

One client I worked with in particular illustrates this point well. James was a homeless man who spent his days panhandling and wandering around the city. One day, after refusing to talk to police and walking quickly away from them, he was detained. When the police searched his bag, they found a crowbar and someone else's day planner. The police had no proof that James had actually stolen anything, but his appearance and condition left him at a disadvantage. James was arrested for theft.

In cities around the country, police and municipal governments are cracking down on loiterers, panhandlers, and trespassers in order to "clean up the streets." Citizens of American cities are uncomfortable as they pass homeless men and women on their way to work, lunch, or shop. Local businesses fear that these people deter customers, and tourists cringe at the sight of the often dirty or mentally ill street people. In order to remove them from sight, legislation and other policies that are not directly targeted at homeless people

serve to criminalize homelessness by prohibiting certain activities in public spaces. While James' case is not related to this type of legislation, it helped to open my eyes to the unfairness of the legal system with regards to the homeless. Both unequal enforcement of laws and unjust legislation create unfair situations for homeless Americans. Both will be discussed.

THE HOMELESS:

Who exactly are the homeless? The general definition of a homeless individual used by the United States government and passed by Congress claims that a person is considered homeless when he or she is:

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

The demographic groups that make up most of the homeless population are predominantly African American and Caucasian individuals between the ages of 31 and 50 years old.

However, a large portion of the homeless are also children under the age of 18 and the elderly. In addition to race and age, female-headed families and single males also make up large numbers of the destitute, while most people who are impoverished, addicted to drugs, or mentally ill have a greater chance of becoming homeless than other demographic groups.²

¹Legal Information Institute. "Title 42 Chapter 119, Subchapter I, § 11302" *U.S. Code Collection* Retrieved 20 Mar 2005. http://assembler.law.cornell.edu/uscode/42/usc_sec_42_00011302----000-.html.

² "Who is Homeless? NCH Fact Sheet # 3." National Coalition for the Homeless. May 2004. Retrieved 20 Mar. 2005 <http://www.nationalhomeless.org/who.html>.

It is difficult to determine the actual number of homeless Americans due to the transient nature of the problem and because many different variables must be used to account for the types of homelessness. For example, there is a difference between the temporarily homeless and the chronically homeless. The best estimate, however, comes from a 2000 study by the Urban Institute which concludes that in any given year one percent of the American population or 2.3 million citizens are likely to experience homelessness.³ The Urban Institute also reports that on any day 800,000 homeless citizens can be found around the nation.⁴ These statistics are overwhelming. The 2004 National Council of Mayors Survey on Hunger and Homelessness determined that emergency shelter requests increased by an average of 7% in 78 % of cities since 2003. Other homeless advocacy groups use similar statistics to show that the number of homeless people has increased over the past two decades. They suggest that this is due to the high amount of unemployment and the decreasing number of available, affordable housing units. This increase in homelessness has made it more visible to city residents, and has provided municipalities with a new resolve to do something to eliminate it.

ANTI-HOMELESS LEGISLATION:

While seeking to clean up their cities, municipal governments seek to reduce the visibility of homelessness through anti-homeless legislation, but not to solve the problem through constructive solutions. A study by the National Coalition for the Homeless finds that:

³ Shukla, R. "America's Homeless II: Populations and Services." *Urban Institute*. 1 Feb. 2001. Retrieved 21 Mar. 2005 <http://www.urban.org/Presentations/AmericasHomelessII/sld002.htm>.

⁴ Burt, M. R. "What will it take to end homelessness?" *Urban Institute*. 1 Oct. 2001. Retrieved 21 Mar. 2005 <http://www.urban.org/Template.cfm?Section=ByTopic&NavMenuID=62&template=/TaggedContent/ViewPublication.cfm&PublicationID=7281>

The passage of laws that target behaviors associated with the state of being homeless, such as sleeping, bathing, sitting, cooking, lying down, urinating, or storing personal belongings in public spaces are unconstitutional because collectively, *they target people based on their housing status, not for behaviors that, in and of themselves are criminal* (4).⁵

This is detrimental to the community as it is only a short-term remedy. If we do not find another remedy, Americans must accept “incarceration and homelessness as part of life for the most vulnerable population among us”⁶ says Ohio Congressman Ted Strickland, as quoted in *The Economist*.

What is perhaps the most disturbing aspect of this problem is the treatment of the homeless as inferior citizens. Because they often do not own property or pay taxes, anti-homeless legislation has restricted their access to public space. The privilege of business owners and tourists to feel comfortable and make profit overshadows the civil rights of the less fortunate members of the community. However, the violation of the rights of “down and out” citizens is not a matter of mere inconvenience; it is a matter of survival. It is easy to forget that homeless peoples’ daily activities and life sustaining behaviors take place in public spaces.

The legislation that this paper examines bars them from fulfilling basic needs. This paper considers what sorts of legislation criminalizes homelessness, discusses the moral and legal implications of such action, and offers constructive solutions to benefit both the homeless and the other residents of cities.

⁵ The National Coalition for the Homeless and the National Law Center on Homelessness & Poverty. (2002, November). *Illegal to be homeless: the criminalization of homelessness in the United States*. Retrieved 18 February 2005 <http://www.nationalhomeless.org/>.

⁶ “Prisons have replaced hospitals as the main home for the mentally ill.” (2003, November Professor 15). *The Economist*, 369 (8350). pp 56.

Laws against the homeless fall into two main categories: anti-begging laws and laws against loitering and sleeping in public. Many other laws fall under these categories, claims Madeleine Stoner, author of *The Civil Rights of Homeless people*, “a survey of anti-homelessness actions in 16 cities found that 80 laws had been passed against begging, sleeping, camping, loitering, destruction of property, vagrancy, and unequal enforcement.”⁷ Stoner discusses instances where homeless citizens, like James, are rounded up. While these laws are certainly different in many ways, they can all be labeled by municipal governments as “quality of life ordinances” in order to package them as beneficial legislation for citizens.

Why do these laws exist? Many claim that enacting such legislation is a sign of decreased public sympathy for the poor. In fact, one article in the *Patriot Ledger*, a Massachusetts newspaper, describes a crackdown on “publicly foul” behavior, and states, “To that extent, the city's most well-known homeless shelter, Father Bill's Place on Broad Street, has become an easy scapegoat that in reality is likely not a major source of the problem.” In such cases, the homeless may be unjustly targeted as troublemakers.⁸ Others argue that such laws are the product of a society which seeks to decrease idleness, which is also illustrated by the new welfare policy of the 1990s.⁹ Studies have shown, however, that idleness is not actually a major cause of homelessness. Yet another reason why anti-homeless legislation has become a greater problem in the past decade may be the increased amount of homeless citizens around the country. As more people begin living in public

⁷ Stoner, M. R. *The civil rights of homeless people: law, social policy, and social work practice*. New York: Aldine de Gruyter, 1995. p. 135

⁸ Walker, C. “Panel will investigate vagrancy problems: mayor appoints task force to clean up Quincy Center.” *The Patriot Ledger* 3 Dec. 2002.

⁹ Feldman, L. C. (2004). *Citizens without shelter: homelessness, democracy, and political exclusion*. Ithaca : Cornell University Press. p. 36

spaces, more communities decide that such behavior worsens their financial prospects. Others claim it presents problems for public health and safety.

American cities choose to implement at least some portion of anti-homeless legislation to protect business owners rather than provide aid to the down and out. Shopkeepers complain of the detrimental effects homeless can have on a neighborhood's commerce. When pedestrians and shoppers see many homeless people sitting on sidewalks and in doorways, shopkeepers claim that buyers avoid the area because they do not wish to be solicited for money or come into contact with the unkempt, disabled, or troubled. Stoner comments, "The presence of large numbers of homeless people in public places presents both a misperceived threat, and a real threat to other persons who wish to use public places. A number of academic critics have defended 'street justice' as a means of keeping homeless and other disorderly people in line."¹⁰ Often times, "sweeps," or the rounding up and removal of unwanted homeless citizens, are conducted in downtown areas before events like sports games or entertainment shows in order to clean up the cities appearance and therefore make attendees feel more at-ease and encourage commerce and tourism.¹¹

Because economic growth is important to all citizens, this line of reasoning may have some validity. On the other hand, arresting homeless citizens for carrying out in life-sustaining activities in the only places available to them is unfair. These cities pass legislation evicting the destitute from public places without having anywhere for them to go. In fact, according to a 2003 article in the *Arkansas-Democrat Gazette*, there may have been over 2,600 homeless citizens living in central Little Rock, and business leaders

¹⁰ Stoner, M. R. *The civil rights of homeless people: law, social policy, and social work practice*. p. 151

¹¹ The National Coalition for the Homeless and the National Law Center on Homelessness & Poverty. (2002, November). *Illegal to be homeless: the criminalization of homelessness in the United States*. p. 4

rejected the renovation of a downtown building for a relocated homeless shelter.¹² The shelter continued its plans to relocate, but this illustrates that some business leaders' do not wish to solve the problem, but would rather push the homeless out of sight.

Anti-Homeless legislation is also justified by claims that it ensures public safety.

According to a 1993 Washington Post article, this is a legitimate reason:

But it is the panhandlers who block sidewalks, cursing, threatening and occasionally attacking people for not giving them change, who have drawn the most criticism. Angelo Pace, owner of Anna Maria's restaurant near Dupont Circle, is still nursing his broken jaw, cracked in two places when a panhandler who had refused to move away from his front door followed him inside, slugged him and then fled.¹³

It makes perfect sense for municipal governments to want to protect their citizens from harm, but by labeling an entire group as dangerous because their presence is unpleasant is as distasteful as racial profiling. Most city governments do not see it this way, however. If an individual is taking part in an activity that could be detrimental to the well-being of a community, the other members want to stop it from happening. Public urination and panhandling are examples of two such activities.

Many might wonder how an ordinance against public urination could be construed as an attack on the homeless instead of a piece of beneficial legislation that is necessary to clean up the public or commercial areas of a city. The laws are not biased any more against a homeless man squatting in an alley than against a drunken college student relieving himself on the sidewalk, one might argue. Where the inequality comes in, however, is that the drunken college student should be able to obey the law because theoretically he has a home with a private restroom or can afford to be a patron in an establishment with its own

¹² Demillo, A. "Homelessness on rise: group calls for action." *Arkansas Democrat-Gazette* 13 Aug. 2003 p.11. retrieved from Lexis Nexis Academic on 2 Mar. 2005.

¹³ Wheeler, L. "Panhandlers tap deep pockets of resentment." *Washington Post*. 9 May 1993. B1. Retrieved from Lexis Nexis Academic 6 Mar. 2005.

private facilities. The homeless man has no where else to go. This idea is underscored by Anatole France's ironic statement, "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."¹⁴ Because it is not necessary for both the rich and poor to sleep in public or panhandle, the law is obviously not majestically equal.

This summer, I was window shopping in the Dupont Circle neighborhood of Washington, D.C. I quickly realized when I needed to go to the restroom that I would have to buy a coke, hamburger, or find a friend who lived nearby because there were no public restrooms in the area. I have the financial means to do so, but if there are no public restroom facilities in a neighborhood and a citizen does not have the resources to pay to use one, a practical law against public urination is unjust. But there are other possible solutions.

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Other municipal legislation regarding sleeping, loitering, and panhandling is even more targeted to "eliminate homeless people, not homelessness."¹⁵ Displaced families and citizens are shuffled away from business areas by the threat of jail. With nowhere to go, they are forced out of the downtown areas of cities into the outlying commercial zones. Then as anti-homeless legislation grows outward from the cities' centers, the homeless are pushed from one city into another.¹⁶ As more legislation gets passed, this problem only increases. In one instance, after San Francisco enacted more anti-homeless legislation, the surrounding California communities experienced an influx of displaced homeless people. And in an article from the *Salt Lake City Weekly* a Salt Lake resident states "There's a

¹⁴ France, A. *The Red Lily*. New Yorks: Grosset & Dunlap, 19--.

¹⁵ Mitchell, D. (2003). *The Right to the City: Social Justice and the Fight for Public Space*. New York, NY: Guilford Press. p. 167

¹⁶ Stoner, M. R. p. 164

growing number of homeless people in the city, but at the same time there is a shrinking number of places where they can stop and rest.”¹⁷

This situation seems even worse when one realizes that bodily functions like urinating, sleeping, and eating are necessary for one’s survival, but are made illegal by such legislation. But does this mean that we want the downtrodden urinating and sleeping outside of our elementary schools and national banks? If the answer is no, then we must ask whether citizens would rather have the homeless sleeping and urinating on their private property, for example, in their backyards. I venture that this answer would also be no.

Jeremy Waldron explains:

The rules of property prohibit the homeless person from doing any of these acts in private, since there is no private place that he has a right to be. And the rules governing public places prohibit him from doing any of these acts in public, since that is how we have decided to regulate the use of public places. So what is the result? Since private places and public places between them exhaust all the places that there are, there is nowhere that these actions may be performed by the homeless person.¹⁸

While a universal claim should not be made, we can assume that if many homeless people had an adequate supply of private places to sleep or to use the restroom, they would take advantage of them. However, in many cities across the nation there are not enough emergency shelters or public restrooms.

Maria Foscarinis, Executive Director of the National Law Center on Homelessness and Poverty and author of “The Criminalization of Homelessness” writes, “Emergency shelters, the primary source of assistance, do not provide sufficient space to meet the need even for temporary overnight accommodations.”¹⁹ In fact, she goes on to say the same

¹⁷ Johnson, S. “Street hassles: businesses press cops to take futile action against the marginalized.” *Salt Lake City Weekly*, 25 Dec. 2003. Retrieved on 3 Mar. 2005

http://www.slweekly.com/editorial/2003/city_2003-12-25.cfmCity Beat - December 25, 2003

¹⁸ Waldron, J. “Essay: homelessness and the issue of freedom.” *UCLA Law Review*. 295 (1991).

¹⁹ Foscarinas, M. *The Criminalization of Homelessness*

number of people sleeping in shelters can be found sleeping in public places each night. A 2004 study by the United States Conference of Mayors found that an average of 23% of requests for emergency shelter made by homeless people cannot be met.²⁰ Many shelters across the United States cannot respond properly when they have limited beds or space. When shelters are full or overcrowded, many homeless citizens must be turned away, even in life-threatening weather. Sometimes the rejected receive hotel vouchers, while others simply sleep on the streets. In Nashville, surveys report that the severely aggressive or mentally ill are often left out in the cold, and in Providence, Rhode Island even victims of domestic abuse are refused a bed if the shelters are full. Denver reports that when female homeless people must be rejected due to space constraints, “Many stay with men they would prefer not to be with just to have shelter and keep warm.”²¹

If a city does not provide enough places for displaced people to go, can it legally or morally outlaw their private use of public property? In her paper, “Downward Spiral,” Foscarinis explains that many judges say no.²² One municipal court required “safe zones” to be created, making it illegal for the homeless to be arrested in these parts of the city most likely on the grounds that it violates the Eighth Amendment. By setting aside public property accessible to the homeless and forbidding the homeless to reside in other areas, municipalities are at least not entirely restricting their life-sustaining activities. But setting such boundaries still does not reduce the instances of homelessness; rather, it only decreases its visibility.

²⁰ The United States Conference of Mayors. (2004). *A Status Report on Hunger and Homelessness in America's Cities*. Retrieved Mar. 24, 2005
<http://www.usmayors.org/uscm/hungersurvey/2004/onlinereport/HungerAndHomelessnessReport2004.pdf>

²¹ The United States Conference of Mayors. (2004). *A Status Report on Hunger and Homelessness in America's Cities*. Retrieved Mar. 24, 2005 from
<http://www.usmayors.org/uscm/hungersurvey/2002/onlinereport/HungerAndHomelessReport2002.pdf>

²² Foscarinis, M. “Downward Spiral: homelessness and its criminalization” *Yale Law and Policy Review* 14.1 (1996). p. 2

There may be instances where incarcerating or fining street people actually exacerbates homelessness. If a homeless man is employed and gets arrested for obstructing the sidewalk or disobeying a curfew law in a public park, he could likely lose his job for being unreliable. The arrest could also make unemployed people even less employable.

If we do not allow the homeless to use public property, how can we address the issues homelessness causes? In order to gain a more concrete understanding of what sorts of anti-homeless legislation exists, we can examine specific ordinances in different cities. By focusing on San Francisco, California; Atlanta, Georgia; Cincinnati, Ohio; and Manchester, New Hampshire, we can grasp a variety of laws and the reasons they were enacted. I selected these specific localities because The National Coalition for the Homeless reports that these are some of the least friendly cities for the homeless, and they are found in different parts of the country.²³

In order to be labeled one of the “meanest cities,” the Coalition reviews a city’s number of anti-homeless laws, severity of penalties, and other criteria. Atlanta, ranked number two, has an executive order issued by the mayor against feeding the homeless in public. Anti-camping, panhandling, and sleeping laws exist to deter visible homelessness, and “Ambassadors” or off-duty policemen wake the homeless and force them to move along their way around 6:30 AM. An average of 1,200 homeless people were arrested for such “quality of life” offences each month in Atlanta in 2004 making it quite unfriendly to the down and out.²⁴

Cincinnati, ranked third by the Coalition, passed resolutions in 2003 prohibiting camping under bridges and overpasses, and allows seventy-two hours for people living in

²³ The National Coalition for the Homeless. *Illegal to be homeless: the criminalization of homelessness in the United States*. Nov. 2004. Retrieved 18 February 2005, <http://www.nationalhomeless.org/>. p.15

²⁴ The National Coalition for the Homeless, 2004. p. 19

homeless camps to move out. There are also laws against aggressive panhandling, or solicitation after dark or before dawn. In addition, the city requires that beggars carry a license with them at all times in order to be able to solicit funds from pedestrians, and if they are caught without one, they can be taken to jail or fined \$250.

As the eighth city on the list, San Francisco's legislation and enforcement heavily burden its homeless population. The Coalition reports that, "In a two month period, the San Francisco Police Department issued over 3,500 citations for illegal lodging and used the threat of citations to keep countless others from sleeping, eating, and sitting in public places."²⁵ The study also discusses Proposition M, an anti-panhandling law, now in effect, which allows patrolmen to give citations to beggars and gives the police the power to make them leave certain areas. After three citations are issued, the receiver may be sentenced to jail time or community service. Also, street cleaners and water trucks make patrols with policemen three times a day to spray the streets and sidewalks with water, dousing the homeless who do not move fast enough and getting their belongings wet. Many advocates for the homeless consider this to be harassment, but the city claims it is "cleaning the streets" while at the same time, forcing the homeless off of the sidewalks.

Manchester's laws are enforced arbitrarily against the homeless, the Coalition's report claims. Although it is the twentieth on the list of the least friendly cities, it still has harsh penalties and ruthless enforcement of anti-homeless legislation. Claims have been made that homeless citizens are given citations for sleeping in public, storing their belongings, and curfew violations, while other citizens are overlooked. Also, homeless citizens in encampments are harassed and forced to move into wooded areas, but a new program where weeds and shrubs are removed, seeks to "weed" out the coverage provided

²⁵ The National Coalition for the Homeless, 2004. p. 28

by such plant life in order to discourage camping. By “cleaning up” old homeless camps, there are fewer and fewer places for the destitute to live, making survival nearly impossible.²⁶

Are these municipal laws constitutional? Are they and other laws equitably enforced? An examination of personal freedoms and constitutional rights will help us to understand how such unequal enforcement infringes upon the already down-and-out. According to The National Law Center on Homelessness and Poverty, legislation that criminalizes homelessness may violate four different amendments to the Constitution.²⁷ When municipal governments allow for solicitation by organizations like churches or firefighters but restrict panhandling by the homeless, freedom of speech may be limited which may violate the First Amendment. In *Loper v. New York City Police Department*, the court struck down a law prohibiting loitering with intent to panhandle because begging is protected as a charitable solicitation. The wording of the ordinances affects how judges rule, however. In *Patton v. Baltimore City*, courts have ruled that the First Amendment is not violated because it was narrowly tailored to outlaw “begging with intent to intimidate” rather than a blanket ban on all panhandling.²⁸ Furthermore, advocates claim that laws which punish homeless citizens for performing life-sustaining functions in public like sleeping or urinating, are violations of the Eighth Amendment, which prohibits cruel and unusual punishment. Foscarinis and Herz mention that in *Pottinger v. City of Miami* and *Johnson v. City of Dallas*, courts struck down laws outlawing such behavior because the homeless citizens of these cities had no choice but to sleep, eat, and bathe in public.²⁹

²⁶ The National Coalition for the Homeless, 2004. p. 34

²⁷ Foscarinis, M. “Downward Spiral: homelessness and its criminalization.” p 4.

²⁸ Foscarinis M. & Herz R. The criminalization of homelessness: an overview of litigation theories and strategies. *Clearinghouse Review*. Nov 1999. p. 720

²⁹ Foscarinis M. & Herz R. p. 729

The Fourth Amendment which restricts the government from unlawful search and seizure, may be violated if during a sweep of homeless camps and parks their belongings are discarded by the police without sufficient warning. Lastly, the Fourteenth Amendment, or the equal protection clause may be violated by police discretion and unjust legislation. If police arrest the homeless for loitering on a street corner but do not do the same to high school students hanging around waiting for friends, then this may be challenged on such grounds. According to *Patton v. Baltimore City* the use of unjust singling out of specific groups as grounds for a suit are only viable if the plaintiff can prove that police are only arresting the destitute citizens.³⁰

UNEQUAL ENFORCEMENT OF LAWS

In his book, *Reasons for Welfare*, Robert Goodin, a moral philosopher, argues against discretion in public assistance, which I believe is applicable to the discussion of anti-homeless legislation in two ways.³¹ One relates to the unjust nature of the laws, and the other to the unfair enforcement of the laws by police.

Before we fully examine how Goodin's ideas can be applicable, we must first determine how the two types of usages of discretion are different. To begin, discretionary rules governing public assistance are used to determine which people need or deserve the most government aid. Goodin argues that discretion regarding public assistance should not exist, but rules regarding public assistance should be means tested and very generous in order to protect all of the vulnerable from exploitation. He argues that we have a moral obligation to provide this aid and protection. With anti-homeless legislation on the other

³⁰ Foscarinis M. & Herz R. p. 720.

³¹ Goodin, R.E. (1988). *Reasons for Welfare*. Princeton, NJ: Princeton University Press.

hand, discretion which results is simply unjust because the legislation is unjust. The laws do not provide help to those who need it, and goes a step farther by preventing the needy from undertaking basic life functions.³² If one acknowledges this and still allows such laws to be enacted, then unjust discretion is inevitable.

Goodin claims that two of the problems that arise from discretion stem from exploitation and manipulation of the vulnerable “by imposing standards...not imposed on the rest of the community.”³³ An example of such a standard is a work requirement for welfare recipients. In this instance, poor single mothers are required to hold steady jobs, while their wealthier counterparts have the luxury of staying at home. The exploitation which comes from discretion can be directly related to our discussion about anti-homeless laws. For example, destitute citizens are prohibited from sleeping in public or loitering by laws banning these activities, which suggests that all citizens, including the down-and-out, should have private places to rest or business to conduct at all times. As already discussed, these types of laws which restrict people from carrying out life-sustaining functions are inherently unjust, and therefore should be eliminated.

Goodin’s discussion of discretion can be applied not only to the unjust anti-homeless legislation that has already been discussed, but is also helpful when coupled with an assessment of unfair discretion used by police to enforce the equitable legislation. It would be ridiculous to argue for the elimination of all laws which may infringe upon the rights of the homeless. To get rid of laws against public exposure, for instance, would not

³²The implications for discretion regarding public assistance and legislation are different. Goodin does not explicitly argue that discretion is something that should be avoided at all costs or eliminated in all instances. With regard to public assistance, Goodin believes that discretion harms the exploitable. Goodin mentions that officials must have discretion, but that the major problems (arbitrariness, unpredictability, etc) make the exploitable vulnerable. In instances dealing with police and homelessness, discretion must be used carefully and rationally.

³³ Goodin, R.E. p. 194.

be practical. But when a great deal of discretion is given to police to enforce these laws, a system where law enforcement officers have the authority to either incarcerate the homeless or put them out of sight so that business owners, tourists, and pedestrians believe their city is orderly and clean is created.

Because the term “loitering” allows a great deal of discretion to be used by police in order to clean up city streets, law enforcement officials issue citations or arrest the homeless in public places whether or not they are obeying the law. In addition, the label “quality of life” laws, also gives police and security guards leeway to treat the homeless poorly in order to protect the lifestyles of the wealthier citizens. Goodin goes on to say that other problems with discretion arise because it allows for manipulation, exploitation, and is arbitrary in nature, which creates “uncertainty, unpredictability, and insecurity” for the recipient.³⁴ The fourth problem with discretion is that it opens doors for intrusions to privacy. This last problem is not significant to the discourse, although the first three are very important.

In addition to unfair legislation, prejudiced police officers often cite ridiculous actions as instances of the homeless disobeying the law. For example, one study reports that a man was written a citation in Nashville, Tennessee for “blowing snot out of his nose onto sidewalk plaza.”³⁵ It seems that rather than waging a war on poverty, American cities are waging a war against the homeless. In one instance in Escondido, California, one homeless woman was given a ticket for eating ice cream on a blanket in park, while another woman was ticketed for drawing with her kindergarten-aged daughter one

³⁴ Goodin, R.E. p. 204.

³⁵ National Coalition for the Homeless. 2004. p. 30.

afternoon.³⁶ One could guess that a well-dressed business man or a doe-eyed college student would not receive this same treatment.

In Roanoke, Virginia, a middle aged woman was arrested for sleeping on a public park bench. She claimed that pushing her buggy with her belongings in it made her tired while the officer said that he arrested her because she was “unsightly.”³⁷ By allowing law enforcement officials to have such discretion over who is worthy of being issued a citation for loitering, or sleeping in public, or soliciting money illegally, we are allowing for a great deal of the uncertainty and insecurity that Goodin describes. Because the homeless are without shelter, kinship networks, or a stable income, it is unjust to exacerbate their insecurity. Perhaps the clearest example of the unequal enforcement of laws against the homeless is illustrated in a report by The National Coalition for the Homeless. It asserts that in Portland, Maine “solicitation of a motor vehicle” is not legal, but organizations like church groups who hold signs to promote car washes and other such fundraisers are not affected, while homeless panhandlers using signs are issued citations frequently.³⁸

However, those who are given discretion over the homeless by this legislation (police officers, security guards, or shopkeepers) can be equipped to use it reasonably and fairly. In addition, more rules could be created so those who apply discretion would face penalties if they succumb to the problems of arbitrariness and exploitation that Goodin mentions. If police officers and others who make arrests unjustly were punished, then James, my homeless client from the summer, might not have been detained. Training could be provided in order to teach officials how to exercise fair and just discretion. Also, if attorneys who represent the homeless argue that this type of discretion is a violation of

³⁶ The National Coalition for the Homeless. 2004. p. 50

³⁷ The National Coalition for the Homeless. 2004. p. 67.

³⁸ The National Coalition for the Homeless. 2004. p. 62

the Fourteenth Amendment, then courts might be inclined to strike down laws that allow for police to make such decisions.

James' situation illustrates that unequal enforcement due to discretion occurs. A report by the Coalition against homelessness suggests that in cities around the country, from Providence, Rhode Island, to Naples, Florida the growing number of homeless citizens being charged with crimes related to their situations is a problem, and the very existence of such laws creates more discretion for law enforcement officials. This in turn breeds insecurity and unequal treatment.

MORAL RIGHTS:

Creating laws which treat the least powerful members of American society as though they are criminals is unjust. By cracking down on the down and out, American cities are violating the rights to survival of some of their citizens. This is not only a legal argument. Denying the basic right to life of any fraction of adult, law abiding, United States citizens on the basis that they discourage commerce and make others uncomfortable is also immoral.

Illustrating this point, Henry Shue, moral philosopher and author of *Basic Rights*, discusses basic moral rights which should be protected. He defines a moral right as something that “provides (1) the rational basis for a justified demand (2) that the actual enjoyment of a substance be (3) socially guaranteed against standard threats” (13).³⁹ Because sleeping, eating, and urinating are basic functions which are necessary for survival, we can make claims that these are not only basic rights, or moral rights, but also subsistence rights. Shue argues that basic moral rights like subsistence rights should be

³⁹ Shue, H. *Basic Rights: subsistence, affluence, and U.S. foreign policy*. Princeton, N.J. : Princeton University Press, 1980.

socially guaranteed, and must be protected. It is not necessary, however, that other moral rights which are not essentially basic or subsistence be considered in our examination of anti-homeless legislation.

Because Shue claims that subsistence rights, which are basic moral rights should be guaranteed, legislation rendering the fulfillment of them illegal should then be considered immoral. Even economic reasons or a possible threat to public safety cannot justify these laws. Shue goes on to comment about moral rights:

One is required to sacrifice, as necessary, anything but one's basic rights in order to honor the basic rights of others...in fact, it is most unlikely that anyone would need to sacrifice anything other than preferences, to which one has no right of satisfaction and which are of no cultural value, in order to honor everyone's basic rights, provided everyone with the duty to make some sacrifice of preferences does so.⁴⁰

If one accepts Shue's argument, then restricting the use of public property because homelessness makes affluent citizens uncomfortable or perhaps even makes a community a more dangerous place is objectionable. Because the 'right to feel safe' is a moral right but is not necessarily either a basic or a subsistence right, the homeless citizens' right to sleep, urinate, or eat on public property trumps others' right to feel safe or witness unsightly behavior. Shue would argue that the importance of defending the subsistence rights, which are the basic moral rights of the impoverished and destitute, stands above the protection of all other non-basic, non-subsistence rights.

In his argument for subsistence rights, Shue acknowledges that many citizens are worried that if we currently provide subsistence rights to all citizens of the world, the population will grow uncontrollably, and thus create more starvation in the future than

⁴⁰ Shue, H. p. 119.

would occur in the present if we do not observe subsistence rights.⁴¹ With regards to homelessness, this can be translated to the mentality ‘if we satisfy the subsistence rights of the homeless now, we will not have the economic capacity in the future to satisfy their rights, or our own.’ Even if we do not consider the financial burden of fulfilling subsistence rights or basic moral rights for the homeless, this suggests that the public believes that by observing the rights of society’s homeless we forfeit our capacity to satisfy our own moral rights in the future. This can be illustrated with the example of public urination: a homeless man has the right to urinate, but because I have the right not to experience anyone urinating on my shoes on the sidewalk, laws should be created to infringe upon his right to do so. In this way, groups bar certain citizens from observing rights because they are afraid of losing other rights of their own.

Shue would argue that this is an unrealistic fear because citizens have alternatives to “both ignoring rights” and protecting the rights of the downtrodden while ignoring the rights of other citizens. He suggests in terms of subsistence rights that, “as soon as one appreciates that starvation is by no means the only—and hardly the most humane—effective form of population control, one realizes that, however urgent the danger of overpopulation, concern with overpopulation is by itself no reason at all to deny subsistence rights.”⁴² In terms of homelessness, while public urination is undesirable, the creation of laws banning it is not only immoral and ineffective, but also not the only way to reduce instances of such incidents. In fact, there are numerous alternative policies which may be implemented and actions which may be taken by citizens and governments in order to reduce homelessness and the objectionable public behavior that accompanies it.

⁴¹ Shue, H. p. 92.

⁴² Shue, H. p. 100.

POSSIBLE SOLUTIONS:

Out of all the of the cities surveyed by the Mayors' Council in 2002, not one suggested that increasing the number of anti-homeless laws or incarcerating more people for aggressive behavior would solve the problem. Almost every city surveyed by the Mayors' Council, however, suggested some combination of the same three ways for the government to help reduce homelessness:

- 1) provide more funding and access for affordable housing;
- 2) increase access to programs that combat the major causes of homelessness, mental health, unemployment, and substance abuse;
- 3) increase the number of emergency shelters and amount of support they receive.⁴³

Such ideas are exactly the kinds of alternatives to criminalization that are necessary in American cities.

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Many different policy groups are dedicated to reducing homelessness while at the same time decriminalizing it. Alternative policies as well as legal remedies are suggested in order to truly aid the destitute. The National Coalition for the Homeless suggests five different subsets of recommendations to solve these problems, the most important being "Organizing for Change," "Legal Remedies," and "Policy Remedies."⁴⁴

Public policy requires that two governmental realms be discussed. Because most funding used to help the homeless comes from the national government and the legislation that directly affects them comes from municipal governments, both policies can be used to aid the homeless. Nationally, bills that increase the funding for additional affordable housing, healthcare, a living wage, and promote the civil rights of the homeless through

⁴³ The United States Conference of Mayors. (2002). *A Status Report on Hunger and Homelessness in America's Cities*. Retrieved Mar. 9, 2005 from <http://www.usmayors.org/uscm/hungersurvey/2000/hunger2000.pdf>.

⁴⁴ The National Coalition for the Homeless. *Illegal to be Homeless*. November 2004. p. 11.

different measures must be created and passed. The Bringing America Home Act, a house bill introduced by Democratic Congresswoman Julia Carson of Indiana which lobbies for all of these things is one example of a national public policy measure which, if passed, could eliminate homelessness.⁴⁵ Although it currently has fifty five congressional and even more national and local organizational sponsors, it is unlikely that the legislation will actually get passed in its entirety, if at all. However, many local governments concerned with rational and moral solutions to the problem of homelessness are implementing such programs refusing to wait on national efforts. In addition to action taken by local governments, grassroots movements can also be used to solve this problem. National Coalition for the Homeless provide examples of programs that seem to work to decriminalize homelessness using both types of local efforts are Philadelphia, Pennsylvania; Minneapolis, Minnesota; and Fort Lauderdale, Florida. By reviewing their programs, perhaps we can gain some insight into the solution.

Realistically, today's current national political climate is hostile to such policies, so it is doubtless that municipalities will have the most success through policy measures to reduce homelessness and eliminate criminalization laws. Local governments can increase the funding for additional affordable housing, public restrooms, and help build more emergency shelters to combat the increase in homelessness. By encouraging the passage of legislation that increases funding to drug rehabilitation programs and mental health organizations, major causes of homelessness can be combated, thereby striking at the root of the problem. Policies which create agencies to aid the homeless in their efforts to apply for government aid like social security, Medicaid, and disability insurance as well as

⁴⁵ *The Bringing America Home Act*. 4 Apr. 2005. Bringing America Home: The Campaign. Retrieved 25 Mar 2005 <http://www.bringingamericahome.org/act.html>.

section 8 housing vouchers and also make the benefits easier to receive could greatly reduce homelessness as well.

For example, the Minneapolis city government created a “Decriminalization Task Force” in order to review all policies and laws regarding homelessness and make recommendations to the City Council based on their findings.⁴⁶ The task force determined that the measures that needed to be taken by the city were repealing anti-homeless ordinances, police protocols, eliminating vagrancy charges, and incorporating public testimony of homeless citizens. While these recommendations have not been approved, they are exactly the steps that should be taken in order to decriminalize homelessness. These suggestions do not solve the homelessness problem, however.

The Council suggests grassroots methods to fight anti-homeless legislation as well. Through strengthening education and building avenues for communication, advocates for the homeless can empower their communities to work towards equitable treatment of the destitute. By monitoring arrests, citations, and harassment of the homeless and then documenting these incidents, advocates gain evidence to illustrate the magnitude and costs of the problem to other organizations as well as legislators. By “alerting” the general public, service providers, and legislators of the serious consequences, advocates can deter the implementation of these laws.

Mobilizing the homeless also can have positive effects towards better their situations. When advocates and service providers educate the homeless about their rights, these citizens are more able to protect themselves from possible violations and harassment. Also, when community organizations, advocates, and service providers help homeless people enter the workforce or present information to help them find affordable housing;

⁴⁶ The National Coalition for the Homeless, 2004. p. 9

these people are much less likely to remain homeless, studies show.⁴⁷ Also when these same organizations and advocates arrange ways to place the destitute in programs that address their needs (job training, mental health counseling, or drug rehabilitation) it seems that they benefit the most. Similarly, Philadelphia has a program which works by refusing to arrest or detain beggars or loiterers hanging around the streets at night, and instead requires police to notify case managers, who respond within twenty minutes. The Council reports that by utilizing methods other than criminalization, and helping these people find housing, Philadelphia has reduced its visible homelessness by 75%.⁴⁸

Another example of advocacy and implementation of better services comes from Florida. The Council discusses the steps taken by Fort Lauderdale as positive measures to decriminalize homeless as well. In fact, this program seems to be the most comprehensive of the three cities and the most similar to the programs the Conference of Mayors report suggested. An outreach program of one formerly homeless citizen and one police officer assess currently homeless individuals and determine their needs. After assessment, the person is either enrolled in long-term treatment programs, referred to shelters, or given bus tickets to return to their families.⁴⁹ It is assumed that there are adequate numbers of programs and units of housing for these homeless people, and the study reports that this method has significantly reduced homelessness in Fort Lauderdale. By involving a formerly homeless citizen, Fort Lauderdale authorities continue their aid to these people even after they are no longer on the street.

The last remedy the Council suggests is only necessary in the short run or if the policy remedies do not work. As mentioned earlier, challenges have been made to the

⁴⁷ The National Coalition for the Homeless, 2004. p. 11.

⁴⁸ The National Coalition for the Homeless, 2004. p. 10.

⁴⁹ The National Coalition for the Homeless, 2004. p. 10.

constitutionality of these anti-homeless laws based on the First, Fourth, and Eighth Amendments in order to rid cities of such legislation. Legal groups and other civil rights advocates can challenge cities' anti-homeless legislation through the court system using these ideas, since many of these laws are unjust and biased against the down and out. Laws that are inherently biased should be altogether removed, but in instances when the laws are not unfair, the Fourteenth Amendment may be used to illustrate the importance of careful discretion. By using legal avenues to strike down the legislation, it no longer can be used to harass or arrest the homeless.

Although we have examined the alternatives to anti-homeless legislation and unfair enforcement of such laws, are these other options actually more appealing than making and enforcing laws? If the negative moral implications are not enough to convince legislators and affluent citizens of the deplorable nature of anti-homeless laws, then we must compare the rationality of the legislation versus the alternatives. One might wonder if the economic argument against fulfilling subsistence rights or basic moral rights comes into play at this point. In reality, this type of legislation makes very little fiscal sense. The National Coalition for the Homeless states that the cost of jail, police resources, and other resources that must be used to implement anti-homeless legislation or incarcerate unfairly accused homeless citizens falls between forty and one hundred and forty dollars a day per arrest made.⁵⁰ On the other hand, the average cost of counseling plus the meeting the basic needs of homeless equals about thirty dollars a day per person. Put in more specific terms, the *Denver Post* reminds readers that anti-homelessness ordinances will increase expenses for the police and the court system. By imposing fines on the homeless who most likely cannot

⁵⁰ The National Coalition for the Homeless and the National Law Center on Homelessness & Poverty. (2002, November). *Illegal to be homeless: the criminalization of homelessness in the United States*. Retrieved 18 February 2005, from <http://www.nationalhomeless.org/>. p. 20.

pay them, prosecuting these citizens in court, possibly issuing bench warrants when they do not show up, sending police officers to locate them, and then typically housing them in the jail the government will expend a great deal more money than if these ordinances were not passed and other means to deal with the issue were implemented.⁵¹

But financial feasibility is not the only reason to implement such programs. Not only is this type of legislation a waste of resources, taking hundreds of hours of police time away from dealing with other crimes but anti-homeless laws are simply unsuccessful. Dragging those who sleep, panhandle, or urinate in public to jail is not going to stop the homeless from needing to sleep, get money, or relieve themselves. If we do not want these actions to take place on public property, then we must provide private public spaces so that life-sustaining actions can be fulfilled.

Perhaps the most obvious way to decriminalize homelessness would be to repeal criminalizing legislation outlawing loitering, sleeping in public, and other such activities. To do this, citizens and legislators must understand that anti-homeless legislation is not a moral, or effective way to eradicate homelessness. Instead, it hides the problem of homelessness from the public eye, creating a false sense of security. In order to remove these dangerous policies and thereby sidestep these results, a political climate shift may also be necessary within these municipalities and around the country.

CONCLUSIONS:

Few people will argue that society either needs a greater amount of homelessness, or that homelessness is a problem that does not need to be addressed in some way. The implementation and enforcement of anti-homeless legislation is one way to rid city streets

⁵¹ Kulp, C. "Perspective." *Denver Post* 16 Jan. 2000. Retrieved from Lexis Nexis Academic 8 Mar 2005.

of the visibility of down-and-out citizens. As this paper reveals, the criminalization of homelessness is ineffective, immoral, and in many instances unconstitutional. Therefore, we have little choice but to make other decisions about how to solve the homelessness problem in American cities. Holistic programs provided by cooperation between the government, advocates, and social service providers which address and provide aid with housing, unemployment, legislation, mental health, drug treatment, appear to be the most effective. In order to generate these changes, attorneys can challenge unjust legislation and unfair treatment of homeless citizens and advocates should promote awareness and involvement by the people these policies will benefit the most.

My client, James, could have greatly benefited from programs such as these. Eventually, most of the charges against him were dropped because the prosecution's case was not compelling. Had careful discretion been used by the police, or were there better programs in place to address James's destitution, it is likely that he would never have even been arrested. He is but one example of a member of society who would benefit from the eradication of anti-homeless laws. In fact, everyone—shopkeepers, tourists, and panhandlers on the corners—can reap rewards from the reduction in homelessness that would result from following new holistic policies.