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## Homelessness at the Cathedral

Marc L. Roark

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## Homelessness at the Cathedral

Marc L. Roark\*

### ABSTRACT

*This Article argues that legal restraints against homeless persons are resolved by applying certain nuisance-like approaches. By drawing on nuisance restraints that adopt property-based and social-identity information, courts and decision-makers choose approaches that create conflict between homeless identities and adopted social identities. These approaches tend to relegate the social choice of whether to tolerate homeless persons to one of established social order (property) or broadly conceived notions of liberty (constitutional rights or due process rights). This Article argues for a broader conception of social identity, which may force parties to internalize certain costs of action, tolerate certain uses, or abate the full range of property rights that the law would otherwise allow in different social settings. Considering the question of “undesirable” uses of space – both on private and public land – helps articulate a narrative of property that moves beyond the rhetoric of economics-bound entitlements and affords a broader, more honest characterization. Conceived in this way, property entitlements represent information about how society defines, refines, enforces, and rejects its collective identity through the legal recognition of property entitlements.*

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## INTRODUCTION

The law of property is entrenched with information – information about markets, information about wealth, and information about social identity.<sup>1</sup> It is well regarded as a catalyst for economic stability through systematic transfer of information.<sup>2</sup> It is shaped by political power and expectations of social entrenchment.<sup>3</sup> It communicates what is important by being the canvas of our creativity.<sup>4</sup> It says something about what we value by how we manage it when it's scarce<sup>5</sup> and how we do not when it's plentiful.<sup>6</sup> We remember why

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1. As Nicholas Blomley wrote, [P]roperty more generally is far from a self-evident category. It is . . . a “social relation that defines the property holder with respect to something of value . . . against all others.” To an anthropologist, it is a “network of social relations that governs the conduct of people with respect to the use and disposition of things.” Marx pointed to “the relations of individuals to one another with reference to the material, instrument and product of labor.”

NICHOLAS BLOMLEY, *UNSETTLING THE CITY: URBAN LAND AND THE POLITICS OF PROPERTY* 2 (2004) [hereinafter BLOMLEY, *UNSETTLING THE CITY*] (citing DANIEL W. BLOMLEY, *ENVIRONMENT AND ECONOMY: PROPERTY RIGHTS AND PUBLIC POLICY* (1991); E.A. HOEBEL, *ANTHROPOLOGY: THE STUDY OF MAN* 424 (1966); 5 KARL MARX & FRIEDRICH ENGELS, *COLLECTED WORKS* 32 (1975)); see also CAROL M. ROSE, *PROPERTY AND PERSUASION: NEW PERSPECTIVES ON LAW, CULTURE, AND SOCIETY* 199-200 (Robert W. Gordon & Margaret J. Radin eds., 1994) (describing property relationships as formed by clear and unclear rules of transactions and legal claims); Joseph William Singer, *No Right to Exclude: Public and Private Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1455-56 (1996) (describing property relationships as those governed by shared responsibilities).

2. See, e.g., HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 15-17 (2000).

3. See, e.g., HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 55 (1989) (stating that mass intrusion of unoccupied public lands by impoverished Peruvians is explainable because “people are capable of violating a system which does not accept them, not so they can live in anarchy but so that they can build a different system which respects a minimum of essential rights”).

4. See, e.g., Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1243 (2005) (articulating the freedom-promoting conception of property as one which intermingles notions of property and freedom. The standpoint conceptualizes property as an ever-evolving institution in relation to various resources. Freedom interplays with the property view from a functional perspective of human creativity. “[I]t asks what they are able to do, which forms of human potential they have turned into actual capabilities that they can in fact exercise.”).

5. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356 (1967) (describing conditions in which property rights become more prominent when resources are scarce). See generally Haochen Sun, *Toward a New Social-Political Theory of the Public Trust Doctrine*, 35 VT. L. REV. 563, 564 (2011) (proposing a new model of the public trust doctrine – which relies only on government actors as sole trustees of public resources – and taking an aggressive view of resource

we acquired it and tell stories about why it remains meaningful.<sup>7</sup> Property captivates our attention as a measure of prosperity and as a signal of power (and its opposite – powerlessness).<sup>8</sup> It remains – as Blackstone noted – a catalyst of our imaginations and our emotions, whether acquired by hook or crook, and then honored as the thing that validates our social life.<sup>9</sup> The law of property reflects our collective identity – what we value, what we do not and why we think it matters.

Property, at its core, is also about social approval of one’s occupancy of space.<sup>10</sup> The law of property reflects a collective identity of the society that recognizes its resource value, enforceability, or import. Laws and decisions relating to land-use, whether criminal, contractual, or tort-based, reflect society’s approval or disapproval of individual or group actions in public and private spaces.<sup>11</sup> As a broad matter, space allocation is important because socie-

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management that involves the participation of the judiciary and citizens asserting fundamental rights over public space as well).

6. See Demsetz, *supra* note 5, at 349 (noting that when the costs of property rights are low and resources are available, property rights are likely to emerge).

7. See U.S. on Behalf of Zuni Tribe of N.M. v. Platt, 730 F. Supp. 318, 323-24 (D. Ariz. 1990) (finding an easement by prescription arose in favor of the Zuni Indians, whose traditional periodic pilgrimage crossed private lands).

8. Cheryl I. Harris, *Whiteness As Property*, 106 HARV. L. REV. 1709, 1714-15 (1993) (articulating the role of being white as a threshold towards other social access – such as property ownership, political access, and increased mobility). Similarly, *Acting White*, by Devon Carbado and Mitu Gulati, suggests that the “trespass” on whiteness by other minority groups created the status-based phenomenon of reducing the social salience of their racial identity. See DEVON CARBADO & MITU GULATI, *ACTING WHITE? RETHINKING RACE IN POST-RACIAL AMERICA* 43 (2013).

9. 2 WILLIAM BLACKSTONE, *COMMENTARIES* \*3.

10. BLOMLEY, *UNSETTLING THE CITY*, *supra* note 1, at 7 (describing the important effects of ownership on property as “underpinn[ing] a particular and consequential view of property, power, and social life”). As Blomley goes on to say, “[O]nly certain relations are named ‘property,’ and certain social actors recognized as viable owners.” *Id.* Don Mitchell also describes the way systems of public and private property have shaped expectations that result in hostility towards homeless persons in the form of ordinances and other criminal sanctions designed to preserve private property interests. See Don Mitchell, *The Annihilation of Space by Law: The Roots and Implications of Anti-Homeless Laws in the United States*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE* 17 (Nicholas Blomley et al. eds., 2001) [hereinafter Mitchell, *The Annihilation of Space by Law*]. Mitchell also describes in another one of his works how law becomes the backdrop for movements of legalized capital that shape property expectations. See DON MITCHELL, *THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* 29 (2003) [hereinafter MITCHELL, *THE RIGHT TO THE CITY*].

11. I call public space “property” based on the way the properties are responsive to other entitlements. Blomley writes that “the ownership model [creates] ‘a certain cultural myopia’ towards other forms of property” – like public property – due to the power that private property has in the social framework. See BLOMLEY, *UNSETTLING THE CITY*, *supra* note 1, at 8. Carol Rose has also observed this point that public

ty collectively recognizes one person's entitlement over another's to space.<sup>12</sup> It is also important because in recognizing property entitlements, property systems say something about our collective identity – a cultural contract so-to-speak.<sup>13</sup> Cases involving homeless persons demonstrate the way collective identity shapes court decisions.

In homelessness cases, courts allocate space (and take away space) according to how they perceive the purported use in relation to collective identities.<sup>14</sup> Those cases also speak to our collective identity by relating society's choices to not recognize an entitlement to space.<sup>15</sup> Tacking on another layer, the actual use of a space, whether constituting property or not, is often shaped by collective social judgments that reflect a social identity.<sup>16</sup> In other words, it may not be just the creation of the legal entitlement that tells us something

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property's complexity, amorphous quality, and tendency to be viewed as communitarian rather than isolationist leads to the wrong conclusion that public property "do[es] not look like property at all . . . ." Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 132-33, 140 (1998). Thus the governance of space sometimes reaches to police who should occupy spaces in the guise of policing activities in that space. See GARY BLASI & UCLA SCH. OF LAW FACT INVESTIGATION CLINIC, POLICING OUR WAY OUT OF HOMELESSNESS? THE FIRST YEAR OF THE SAFER CITIES INITIATIVE ON SKID ROW 6-7 (2007), available at <http://www.lafla.org/pdf/policinghomelessness.pdf> (describing the significantly higher number of vagrancy and jay-walking citations in the skid row area of Los Angeles, than in other parts of the city).

12. See e.g., Gregg W. Kettles, *Formal Versus Informal Allocation of Land in a Commons: The Case of the MacArthur Park Sidewalk Vendors*, 16 S. CAL. INTERDISC. L.J. 49, 82 (2006) (discussing space allocation and perceived entitlement to space among street vendors in Los Angeles, California).

13. Recognizing the legal toleration for uses of property also recognizes the law's tolerance for the identity that leads to the uses. Davina Cooper describes this as the "cultural contract" in which an "imaginary settlement through which the consent of [the] community to a particular set of social and governance relations is identified." See Davina Cooper, *Out of Place: Symbolic Domains, Religious Rights and the Cultural Contract*, in THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE, *supra* note 10, at 43.

14. See generally Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL'Y 197 (2014).

15. DAVID SIBLEY, GEOGRAPHIES OF EXCLUSION: SOCIETY AND DIFFERENCE IN THE WEST 78 (1995) (observing that "difference[s] will register as deviance, a source of threat to be kept out through the erection of strong boundaries, or expelled"). Sibley argues that the necessity for purification and cleanliness will result in anything contrary to being excluded. *Id.*

16. *Id.* at 73 ("Place . . . always involves an appropriation and transformation of space and nature that is inseparable from the reproduction and transformation of society in time and space. As such, place is characterized by the uninterrupted flux of human practice – and experience thereof – in time and space." (quoting Allan Pred, *The Social Becomes the Spatial, the Spatial Becomes the Social: Enclosure, Social Change and the Becoming of Places in Skane*, in SOCIAL RELATIONS AND SPATIAL STRUCTURES 337-65 (Derek Gregory & John Urry eds., 1985))).

about our collective values. It may be the collective judgment to reject a particular use in a particular place that tells us the most about our social identity.

Calabresi and Melamed's iconic *One View of the Cathedral*,<sup>17</sup> describes property decisions as those that advance individual ownership by preserving one's power of marketable exclusion (property rules),<sup>18</sup> shift individual ownership by implementing an objective damages rule (liability rules),<sup>19</sup> or limit transfers through state action (inalienability rules).<sup>20</sup> At the core of these rules is the conception of an entitlement – what Calabresi and Melamed describe as the state's choice of which interest to prefer in the face of conflict.<sup>21</sup> But this conceptual framework is merely the extension of other broader principles through forced means.<sup>22</sup> That is, legal entitlements reflect perceptions of shared consensus for how a particular space should be used and who should get to decide.<sup>23</sup> This shared consensus constitutes information about what society values, what it doesn't value, and how it chooses to express those values.

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17. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). This Article refers to the classic Calabresi and Melamed article as “One View” because of the significant progeny of scholarship that their article created.

18. *Id.* at 1092. Property rules are those that further the entitlement holder's right to demand a price for shifting the entitlement to another person. *Id.* For example, trespass is often treated as a property rule because it reinforces the right of the owner to demand a price (or no price at all) to allow a third party access to his property. See *Jacques v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 160 (Wis. 1997) (enforcing punitive damages for intentional trespass despite only actual nominal damages because of “society's interest in preventing intentional trespass to land”).

19. Calabresi & Melamed, *supra* note 17, at 1092 (discussing how liability rules allow for an individual to destroy an entitlement by paying an objective price).

20. *Id.* at 1092-93 (discussing how inalienability rules prevent the transfer of a property entitlement through either property or liability rules).

21. *Id.* at 1090 (“[T]he fundamental thing that the law does is to decide which of the conflicting parties will be entitled to prevail.”); see also *id.* at 1090 n.4 (“The use by the state of feelings of obligation and rules of morality as means of enforcing most entitlements is not only crucial but terribly efficient.”). Calabresi and Melamed argue that without the state's intervention, individuals could form their own rules to entitlement (obligations), but their own conduct would be in conformity with their individual agreements without any acknowledgement of a greater force (the state). *Id.* at 1090-91.

22. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1605 (1985).

23. The relation of state recognition of entitlements and the creation of power relationships through markets, legal constraints, and creation of social validity has long been recognized. See Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 495 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)) (“In the midst of every transaction sits the state, determining the relative bargaining power of the parties, and hence, to a large extent, the structure of ‘private’ relations.”).

Sometimes, that consensus conveys information that the space is reserved for public use.<sup>24</sup> For example, scholars have attempted to explain why the law recognizes public space in the face of systems that prefer private ownership.<sup>25</sup> Within that sphere, groups seek to carve out their own identity against the backdrop of collective approval. The presence of “informal norms,” the recognition of rules, and the choices to occupy one space over another reflect more broadly a collective choice to tolerate or not tolerate an individual or group’s occupation of a particular space.<sup>26</sup> And sometimes, the consensus is found in the limitation of certain undesirable groups from accessing the public space.<sup>27</sup>

This Article describes how space-claiming in both private and public spheres functions as a means of defining our collective identity. In particular, how our choices to limit one claimant’s occupation or use of particular space imports a collective identity through rule recognition. Rule recognition is the information that reflects one’s validity to use space.<sup>28</sup> For example, homeless

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24. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 724 (1986) [hereinafter Rose, *The Comedy of the Commons*] (describing the development of public trust doctrines that protect the public access to property in the face of private ownership). Carol Rose has described other ways in which property serves as a social ordering communication. See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76 (1985) (describing the role of possession as a “clear act” as a means of creating clear and supportable claims to space and things).

25. We build consensus for how space becomes public and what that means. Carol Rose has described the rationales underlying the creation of public space – the merging of commerce and togetherness. She writes:

[T]he public’s claim had to be superior to that of the private owner, because the propert[y] [itself was] most valuable when used by indefinite and unlimited numbers of persons – by the public at large. Publicness created the “rent” of the property, and public property doctrines – like police power doctrines – protected that publicly created rent from capture through private holdout.

Rose, *The Comedy of the Commons*, *supra* note 24, at 774.

26. See generally Kettles, *supra* note 12.

27. See SIBLEY, *supra* note 15, at xiv (stating that certain state action might be “compared with many instances of exclusion where boundaries are drawn discretely between dominant and subordinate groups”). Citing Mike Davis, Sibley describes how exclusion based on race, class, and wealth converge in the homeless streets of Los Angeles:

Talking to a black, homeless man in downtown Los Angeles, Davis comments: “In front of us, tens of thousands of poor people, homeless people; at back opulence, affluence, Bunker Hill, the new L.A.” He then asks: “could you walk up there?” and the man replies, “If they were to catch me in that building, they would have so much security on my ass, I would probably be in jail in five minutes.” Again exclusion is felt acutely, but the homeless are rendered invisible to the affluent downtown workers by the spatial separations of city centre development[,] which keep the underclass at a distance.

*Id.* (citing MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE OF LOS ANGELES 231 (1990)).

28. See Kettles, *supra* note 12, at 78-79.



persons may occupy territories according to hierarchies established by might and bargaining.<sup>29</sup> But the lack of a legal entitlement to occupy the space leaves these individuals subject to society's choice to no longer tolerate either their occupancy of certain space or the means by which they deny others the right to share the space.<sup>30</sup>

Likewise, courts allow property owners freedom to use their property in whatever manner they may choose – until those expectations interfere with a different collective judgment for how far a property owner's right should extend.<sup>31</sup> Courts can stop the harmful acts, require compensation to continue the acts, approve of the acts with no compensation, or approve of the act subject to compensation.<sup>32</sup> Courts may also decide that the property owner's right can't interfere with a different collective right.<sup>33</sup> In all these instances, collective identity is reflected in the actions that courts and legislatures will tolerate in a particular space.

Rule recognition (or choices of one entitlement over another) reflect collective norms of the society and locality where applied. Collective norm-creation performs three primary functions for society: (1) it represents sectional interests as universal interests; (2) it denies or transmutes contradictions; and (3) it naturalizes or reifies existing social structures.<sup>34</sup> This Article argues that these three strands of norm-creation appear in homelessness cases relating to control of space.

First, space control tends to reflect collective expectations for space-use through both behavioral norms and formal rules that are respected or not respected within that particular space.<sup>35</sup> For example, in every setting there are behaviors that are condoned by the dominant culture of the space, and there

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29. As described previously, they may indeed self-police or prescribe their own rules for resolving conflict in a certain space; they acknowledge informal rules that shape their occupancy of certain places; and they claim space in non-legal ways, seeking validation for their occupancy of that space and demonstrating that validation by enforcing rules that exclude others from occupying the same space. *See* BLOMLEY, *UNSETTLING THE CITY*, *supra* note 1, at 18-19 (noting the role of localism in shaping claims to territory and communal identity).

30. *See, e.g.*, Richard T. Ford, *Law's Territory (A History of Jurisdiction)*, in *THE LEGAL GEOGRAPHIES READER: LAW, POWER, AND SPACE*, *supra* note 10, at 209-10 (describing jurisdiction as a means of describing power relationships enforcing status on territory).

31. Calabresi & Melamed, *supra* note 17, at 1090 (“The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them . . .”).

32. *See id.* at 1090-92.

33. *See id.* at 1092-93.

34. ANTHONY GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE AND CONTRADICTION IN SOCIAL ANALYSIS* 66-67 (1979).

35. *See* Kettles, *supra* note 12, at 51-53.

are behaviors that are not.<sup>36</sup> Sometimes, the rules are formally applied, and, other times, the rules are merely acted upon by participants in the space, with no overt acknowledgement of the rules' existence.<sup>37</sup> When norms and behaviors that are associated with an area are conformed to, the individual becomes part of a group whose identity is linked to the geographic space they occupy.<sup>38</sup> Much of this conforming happens informally and is usually acknowledged only when a breach of the decorum becomes apparent.<sup>39</sup> For example, in *Occupy Nashville v. Haslam*, protestors staged overnight demonstrations at Nashville's War Memorial Plaza (the "Plaza"), which was under no stated curfew.<sup>40</sup> The court said "the Old Rules permitted overnight use of the Plaza . . ." though the local government encouraged the passage of new rules "to reduce urination, defecation, and vandalism from homeless individuals who, at times, used the Plaza as a 'sanctuary' for overnight accommodation."<sup>41</sup> The local government eventually passed new rules that limited Occupy Nashville's ability to remain in the Plaza overnight.<sup>42</sup> This combination of formal rules (the curfew) and informal purpose (reducing homeless presence in the

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36. For example, train commuters create private space in public by placing objects in seats, averting their gaze, or sitting in an outside aisle seat. See Gary W. Evans & Richard E. Wener, *Crowding and Personal Space Invasion on the Train: Please Don't Make Me Sit in the Middle*, 27 J. ENVTL. PSYCHOL. 90, 91 (2007); Gary W. Evans, *Design Implications of Spatial Research*, in RESIDENTIAL CROWDING AND DESIGN 198 (John R. Aiello & Andrew Baum eds., 1979). However, placing feet on seats is generally viewed as a social *faux pas*. For example, in San Francisco, riders of the Bay Area Rail Transit set up a Facebook page to post pictures of rude behavior by other commuters. See *BART Idiot Hall of Fame*, FACEBOOK, <https://www.facebook.com/groups/179216652183323/> (last visited Mar. 9, 2015). In some locales, the no feet on the seats rule is more than just an informal norm, and actually is enforced by law enforcement. See Ben Muessig, "No Feet on Seats" Rule Is in Effect on Trains – Even at 2:30 AM, GOTHAMIST (Dec. 27, 2009, 10:10 AM), [http://gothamist.com/2009/12/27/no\\_feet\\_on\\_seats\\_rule\\_remains\\_in\\_ef.php](http://gothamist.com/2009/12/27/no_feet_on_seats_rule_remains_in_ef.php).

37. See, e.g., Kettles, *supra* note 12, at 56, 60.

38. See *id.* at 62-63.

39. See *id.*

40. *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 784-85 (M.D. Tenn. 2013) (denying, in part, summary judgment for government officials in a Section 1983 action against the City of Nashville relating to enforcement at the Occupy Nashville site), *rev'd*, 796 F.3d 434 (6th Cir. 2014). The Tennessee Department of General Services ("DGS") did not amend the Old Rules in response to Metro's urging. *Id.* "The defendants argue[d] that the DGS had legitimate reasons for not amending the rules as requested by Metro Nashville, particularly Metro Nashville's request to permit it (as opposed to the state police) to enforce those rules on the Plaza." *Id.* at 786 n.7. The court said, "Whatever the merits of this position, the relevant point is that the State was on notice of a 'curfew gap' in the Old Rules well before the Occupy Nashville protest took place in October 2011." *Id.* "Here, the Old Rules in effect through October 27, 2011 permitted the plaintiffs to utilize the Plaza, which is a traditional public forum, for overnight free speech activity." *Id.* at 799.

41. *Id.* at 786.

42. *Id.* at 787-89.

Plaza) became infused when the identity of the occupy group shifted from protestor to public nuisance. Thus, the occupants of the Plaza were aligned with the negative features of vandalism, public urination, indecent exposure, and the like through the import of a new rule and a broader collective judgment on the space.<sup>43</sup> In those cases, the offensive behavior is rarely categorized as an offense to any one individual, but rather as an offense to the collective, even if only a few people care.<sup>44</sup>

Second, norms relating to space-use tend to obscure or confuse contradictions that might otherwise be present were the norms not present. For example, in *Isbell v. City of Oklahoma City*, the plaintiff in an action to enjoin the removal of tents from the Occupy Oklahoma City site stated that “sleeping tents constitute a visual representation of the group’s message; living in tents signifies poor and homeless people in a battle with Wall Street and government as a result of economic events, such as mortgage foreclosures and the financial crisis.”<sup>45</sup> These visualizations were condoned and accepted so long as they were not actually representative of poor and homeless people, but rather were merely symbolic.<sup>46</sup> But when Occupy Oklahoma City disbanded, leaving only homeless persons occupying the park space, the city quickly removed the tents, thus covering over the contradictory message.<sup>47</sup>

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43. *See id.* at 786-87. The court stated:

Indeed, if the defendants actually understood the Old Rules to mean otherwise, they would not have needed to adopt a new law to drive the protestors off of the Plaza at night. Of course, the fact that the plaintiffs had a clearly established First Amendment right to utilize the Plaza for their overnight speech activity does not mean that they could do so while violating *existing* laws of neutral application, such as laws against vandalism, public urination, indecent exposure, and the like. Thus, for example, the plaintiffs could have been arrested for urinating on the [P]laza or for vandalizing the Plaza by causing structural damage, breaking lights, etc.

*Id.* at 799.

44. *See* GIDDENS, *supra* note 34, at 103 (“The level of normative integration of dominant groups within social systems may be a more important influence upon the overall continuity of those systems than how far the majority have ‘internalized’ the same value-standards.”).

45. No. CIV-11-1423-D, 2011 WL 6152852, at \*4 (W.D. Okla. Dec. 12, 2011).

46. The notion of invisibility through condoned living structures was explored by Stephen Schnably in an article titled *Property and Pragmatism*. *See* Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin’s Theory of Property and Personhood*, 45 STAN. L. REV. 347, 378 (1993). Schnably wrote: “Finally, when the home becomes a haven or refuge, privacy can mean invisibility; and the distance from the private home to the invisible homeless is not great. Typically, anti-homeless legislation aims to keep the homeless out of public view or out of public spaces.” *Id.* Noting that the spirit of most anti-homeless ordinances are aimed at keeping living “private” only adds to the “valorization of the private home as the exclusive area of personal growth and development.” *Id.* at 379.

47. The court in *Isbell* recited the facts relating to the city’s decision to not renew the permit:

Lastly, space-claiming, when respected, solidifies the identity of those claiming the space through the physical occupation of the space and the means for which they choose to occupy it.<sup>48</sup> At a certain point, the space is not only defined by the participants occupying it, but the space also begins to define the participants.<sup>49</sup> Thus, homeless persons are those that occupy public space without permanent housing.<sup>50</sup> This observation was made by Robert Park when looking at the way groups interact in cities:

It is in the urban environment – in a world that man himself has made – that mankind first achieved an intellectual life and acquired those characteristics which most distinguish him from the lower animals and from primitive man. For the city and the urban environment represent man’s most consistent and on the whole, his most successful attempt to remake the world he lives in more to his heart’s desire. But if the city is the world which man created, it is the world in which he is

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On November 28, 2011, a collective decision was made by responsible city officials, including Chief City and Mr. Berry, that Occupy OKC’s permit should not be renewed. The decision was based on several factors. Mr. Berry recommended that camping activity be stopped but daytime use of Kerr Park be allowed to continue, so long as park conditions and renovation plans allowed. Chief City was concerned that organizers of Occupy OKC were no longer staying in Kerr Park at night and could not be reached when problems arose; in his view, there was a lack of accountability for incidents that occurred. Tents erected by Occupy OKC were largely unoccupied and provided an open invitation for homeless persons unaffiliated with the group to stay there. Police officers patrolling the area reported deteriorating conditions and a stench coming from the park. Other concerns included complaints that the tents were obstructing the park, were discouraging others from using the park, and that the encampment was aesthetically damaging.

2011 WL 6152852, at \*6.

48. See NICHOLAS K. BLOMLEY, LAW, SPACE, AND THE GEOGRAPHIES OF POWER 30 (Michael Dear et al. eds., 1994) (“Every social collectivity . . . ‘includes two ideas, a people and its land, the first unthinkable without the other.’”) (quoting Ellen Churchill Semple, *The Influences of Geographic Environment on Law, State, and Society*, in 3 EVOLUTION OF LAW: FORMATIVE INFLUENCES OF LEGAL DEVELOPMENT 216 (Albert Kocourek & John H. Wigmore eds., 1918)).

49. See *id.*

50. This is reflected in a number of statutory provisions. See, e.g., 42 U.S.C. § 11302 (a)(1)-(2) (2012) (“[A]n individual or family who lacks a fixed, regular, and adequate nighttime residence; . . . an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings . . .”). These descriptions of homelessness purport to define a homeless identity only by its most common attribute – the lack of permanent housing. Sociologists have long understood these definitions to be over-inclusive and lacking in sufficient depth in order to truly understand who is homeless and why. See DAVID A. SNOW & LEON ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE 7-8 (1993) (describing at least three typologies for understanding homeless persons – residential, familial, and role-based dignity).

henceforth condemned to live. Thus, indirectly, and without any clear sense of the nature of his task, in making the city, man has remade himself.<sup>51</sup>

Man's most extensive creation of space is the city, where mankind attempts to create a world closer to his own desires.<sup>52</sup> Humans replicate this behavior in smaller spaces, seeking to forge their identities onto the smaller spaces they occupy.<sup>53</sup> Collectively, these identities become forged together to identify the space by people's behaviors, culture, and customs. The ability to claim an identity based on occupancy of space has certain benefits. Identity may lead to privileged access to scarce resources.<sup>54</sup> Identity in space may be tied to intangible qualities, such as the preservation of cultural memory<sup>55</sup>

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51. ROBERT PARK, *The City as Social Laboratory*, in HUMAN COMMUNITIES: THE CITY AND HUMAN ECOLOGY 73 (1952).

52. *Id.*

53. Various sociological, social geographies, and cultural histories have described how space and identity merge in religious immigrant identity, *see generally* ROBERT A. ORSI, *THE MADONNA OF 115TH STREET: FAITH AND COMMUNITY IN ITALIAN HARLEM, 1880-1950* (2d ed. 2002) (describing the relation of community identity to the shrine of the Madonna at 115<sup>th</sup> Street in Harlem); ROBERT A. ORSI, *THANK YOU, ST. JUDE: WOMEN'S DEVOTION TO THE PATRON SAINT OF HOPELESS CAUSES* (1996) (describing the relationship of Chicago immigrants to the Shrine of St. Jude); THOMAS A. TWEED, *OUR LADY OF THE EXILE: DIASPORIC RELIGION AT A CUBAN CATHOLIC SHRINE IN MIAMI* (1997), nudists at nude beaches, *see generally* CARELLIN BROOKS, *WRECK BEACH* (2007) (describing the particularized identity of Wreck Beach participants and the way their identity was shaped by the space); JACK A. DOUGLAS ET AL., *THE NUDE BEACH* (1977) (describing the role of geography in defining nude beach goers), Los Angelinos, *see generally* WILLIAM DAVID ESTRADA, *THE LOS ANGELES PLAZA: SACRED AND CONTESTED SPACES* (2008) (describing the convergence of immigrant and non-immigrant populations around the Los Angeles Plaza public space), and surfers, *see generally* PETER HELLER, *KOOK: WHAT SURFING TAUGHT ME ABOUT LOVE, LIFE, AND CATCHING THE PERFECT WAVE* (2010) (describing surfing culture and the tension between surfing tribes, localism, and other identity and geography intersections).

54. *See, e.g.*, WILLIAM CRONON, *CHANGES IN THE LAND: INDIANS, COLONISTS, AND THE ECOLOGY OF NEW ENGLAND* 13-14 (1983) (comparing the property systems of early New England Colonists with Algonquian Indians of the Northeast as identifiers of their political and ecological values); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 287-96 (Peter Laslett ed., 1967); Eduardo Moisés Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 *ECOLOGY L.Q.* 227, 246 (2004) (describing different rationales supporting property rules in the western legal tradition).

55. *See, e.g.*, *U.S. on Behalf of Zuni Tribe of N.M. v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990). In *Platt*, the defendant landowner, Platt, tried to prevent the Zuni Indian tribe from crossing his land.

The Zuni Indians, as part of their religion, make a regular periodic pilgrimage at the time of the summer solstice, on foot or horseback, from their reservation in northwest New Mexico to the mountain area the tribe calls Kohlu/wala:wa which is located in northeast Arizona. It is believed by the Zuni Indians that

or the instigation of creativity.<sup>56</sup> And identity tied to space may be related to personal security.

Part I of this Article draws on explanations of collective identity as a source for understanding how individuals interact with legal actions. Part I defines collective identity similar to the Calabresi and Melamed's notion of entitlement, incorporating the critical perspectives of power *vis-à-vis* property ownership and moral superiority as metrics for understanding when collective action happens.<sup>57</sup> Part I argues that collective identities, specifically those that rely on the adoption of subjective understandings of identity, are particularly prone to exclude underrepresented communities' expectations of identity, such as homeless persons.<sup>58</sup> Throughout Part I, homeless identities are referred to as a counter example to the dominant collective identity.

Part II of the Article considers types of homelessness cases and their relation to physical space. Homeless legal disputes interact with physical space in three broad classes of cases. One class is where the dispute relates to homeless occupation of public space – sleeping in public areas or leaving personal goods in public places. The second class of cases relates to activities of homeless persons that impact public and private spaces – such as public drunkenness, panhandling, recycling, and supposed moral hazards, such as public sex or public urination and defecation. Finally, the third class of cases relate to the impact of properties that attract homeless persons on other properties. Part II describes each of these categories of cases by illustrating various approaches courts take to each type of dispute.

Part III of the Article considers how these space-based homelessness cases relate to Calabresi and Melamed's rule formulation to explain how identity emerges in those decisions. In Part III, the Article articulates nuisance in the framework of Calabresi and Melamed's entitlement shifting scheme – employing property rules, liability rules, and inalienability – focusing primarily on property rules and inalienability.<sup>59</sup> The Article argues that collective identity emerges as a latent value underlying decision makers'

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Kohlu/wala:wa is their place of origin, the basis for their religious life, and the home of their dead.

*Id.* The court granted the Zuni Indians a prescriptive easement to cross Platt's land. *Id.* at 324.

56. See generally Charles J. Ten Brink, *Gayborhoods: Intersections of Land Use Regulation, Sexual Minorities, and the Creative Class*, 28 GA. ST. U. L. REV. 789 (2012) (describing the role of space and association that spurs creativity). But property does not always spur creativity. See Sanford Levinson, *Thomas Ruffin and the Politics of Public Honor: Political Change and "Creative Destruction" of Public Space*, 87 N.C. L. REV. 673, 692-99 (2009) (describing the tendency towards creative destruction that property can create).

57. Calabresi & Melamed, *supra* note 17, at 1091.

58. See MARIANA VALVERDE, *EVERYDAY LAW ON THE STREET: CITY GOVERNANCE IN AN AGE OF DIVERSITY* 207 (John M. Conley & Lynn Mather eds., 2012) (describing the tendency to leave out vulnerable populations from city governance matters).

59. Calabresi & Melamed, *supra* note 17, at 1091.

choices to apply a specific rule. In homelessness cases, this often means that vested property interests are pitted against individual human interests. Many times, homeless identity is rarely accounted for in legal decisions because homeless persons lack a source of legal relief outside of associating with universal claims. On the other hand, property owners and space constituents often can assert their subjective expectations for collective identity through their control of space. In these cases, the question is not whether the behavior is morally problematic, but rather to which identity the legislative, constitutional, or legal protection extends.

### PART I: COLLECTIVE IDENTITY IN LEGAL ACTION

Sociologists and legal scholars turn to collective identity as a way to explain resource mobilization and political process.<sup>60</sup> In sociological literature, collective identity has been used to explain how actors in a social movement come to adopt a shared sense of the movement as a collective actor, despite having individual identities within the collective movement.<sup>61</sup> In legal scholarship, collective identity means the overall identity of the state through its actions (through laws and ordinances), representing the community for whom it acts.<sup>62</sup> Collective identity, in its legal sense, is undergirded by two primary concepts – deliberative democracy<sup>63</sup> and entitlements.<sup>64</sup> In both instances, collective identity becomes a way of explaining collective action even when some actors do not fit perfectly within the descriptions that support the identity. In these cases, collective identity draws upon notions of dialogical creation and structural power to support the fiction of a collective whole.

Collective identity at the governance level is often manifested through the corporate and social construction of state actors.<sup>65</sup> Corporate identity is the collection of constituents governed.<sup>66</sup> “Social identities are [the] sets of meanings that an actor attributes to [herself] while taking the perspective of others.”<sup>67</sup> Imagine a public space in a large metropolitan area, containing a tourist attraction, a culturally significant public space, and a merchant plaza. If the homeless who also occupy this area are viewed as a threat to the other

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60. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1499-1500 (1988); see also Francesca Polletta & James M. Jasper, *Collective Identity and Social Movements*, 27 ANN. REV. OF SOC. 283 (2001).

61. See Dorothy Holland et al., *Social Movements and Collective Identity: A Decentered, Dialogic View*, 81 ANTHROPOLOGY Q. 95 (2008); Polletta & Jasper, *supra* note 60, at 285.

62. Michelman, *supra* note 60, at 1502, 1513-14.

63. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 15 (2001).

64. Calabresi & Melamed, *supra* note 17, at 1091-92.

65. Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 385 (1994).

66. *Id.*

67. *Id.*

constituents' use of the space, the other bodies that are vested in the collective identity surrounding the space (those formed by merchants and governing bodies) will reduce the role that homeless social identities play in the collective identity formation process. This may happen because merchants and state actors will attribute a social identity of illegitimacy to the homeless. To the extent that homeless are given social identities in the governing process, the identity is usually based on basic characteristics (i.e., lack of permanent housing) or on identities governing bodies already identified as problems (i.e., drug users, nuisance, vagrants, gang members, etc.).<sup>68</sup> Thus, homeless persons sit as those subjected to urban governance, but with little expressed identity in the legal and political process.

In the sociological frame, much concern is laid towards the role that individual actors play in establishing their own identity and contributing to the collective identity of the movement they are a part of (origin).<sup>69</sup> Sometimes, legal systems adopt the individual social identity that actors associate with themselves; sometimes, legal systems project a social identity on actors.<sup>70</sup> This leads to inexact, relational strains, such as disparities in treatment for legal claims based on nuisance as applied to property owners versus those deemed to be social problems.<sup>71</sup> Legal claims for nuisance arising from environmental harms are shaped by collective regulation of space; thus, the presence of a validating identity, such as property ownership, often becomes the most visible arm protecting a collective interest.<sup>72</sup> This disparity reflects the reality that legal regulations depend on notions of authority and validity as touchstones of their enforceability.

Some sources of both authority and validity are relationships and identities formed in the political and legal environment.<sup>73</sup> Because "legal powers and legal knowledges appear . . . as always already distinguished by scale[.]" identity formation in space has the greatest impact on *urban* and *local* legal regulations.<sup>74</sup> Most legal scholars tend to overlook individual identity, assuming that individual identity is fully expressed within either the bounds of the legal interest being protected<sup>75</sup> or through the availability of the political process.<sup>76</sup> Legal scholars, therefore, preferring a functionalist focus to prob-

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68. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1186-87 (1996).

69. See ANTHONY GIDDENS, *MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE* 1-2 (1991).

70. See Polletta & Jasper, *supra* note 60, at 287.

71. Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 LAW & SOC'Y REV. 277, 291-92 (2011).

72. See *id.* at 294.

73. See *id.* at 287.

74. Mariana Valverde, *Jurisdiction and Scale: Legal 'Technicalities' as Resources for Theory*, 18 SOC. & LEGAL STUD. 139, 141 (2009).

75. See, e.g., Calabresi & Melamed, *supra* note 17, at 1094.

76. See, e.g., SUNSTEIN, *supra* note 63, at 9-10.



lem-solving in disputed spaces, often overlook social identities that seemingly challenge existing projected identities – such as property owners or economic interests.<sup>77</sup>

As Calabresi and Melamed describe it, choosing which side to favor amongst competing legal interests is a core function of resolving entitlement shifts; this is reflected in what has become known as the entitlement theory of legal enforcement where law decides which competing legal interests to favor.<sup>78</sup> This deference to judgments based on “who is most deserving” reduces valuations of individual identity to hierarchies of preference, often preferring established conventional interests, such as property ownership over individual identity interests. Likewise, notions of deliberative democratic<sup>79</sup> process suggest that the enforcement or abatement of entitlements through legal means is one that represents the view of the collective because individuals had access to participate in the political process.<sup>80</sup> Importantly, both entitlement theory and theories of deliberative democracy fail to take account of social identities that fall outside of legally enforceable interests, such as identities of the homeless. Homeless persons’ lack of access to a recognizable legal entitlement to enforce claims to space along with their absence from the political process often gives urban and local governments license to treat homeless persons as problems to be governed from an authoritative perspective.<sup>81</sup> The alternative, engaging in a relational problem-solving paradigm that takes account of differing identities, is abandoned or overlooked.<sup>82</sup> It is precisely this failure to identify the foundation of land-use restrictions in urban spaces that has led to “crypto-functionalist tendenc[ies]” that purport to govern land-use but actually target vulnerable groups, such as the homeless.<sup>83</sup>

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77. See, e.g., Valverde, *supra* note 71, at 279. Functionalist legal views often prefer the realism of law on the ground as a means to an end. As stated by Brian Tamanaha:

Karl Llewellyn, Jerome Frank, Felix Cohen, and other Legal Realists, assumed a more radical stance than Pound, but on the instrumental view of law they were in complete agreement. In Llewellyn’s characterization, the Legal Realists “view rules, they view law, as means to end.” This was the “major tenet” of Legal Realism, supplemented by the insistence that law must be seen as it actually functions, not as an abstract body of rules, concepts and principles.

Dr. Michael Wilkinson, *Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism*, 2010 WIS. L. REV. 673, 687 (2010) (citing BRIAN Z. TAMANAHA, *THE PERILS OF PERVASIVE LEGAL INSTRUMENTALISM* 28 (2005)).

78. Calabresi & Melamed *supra* note 17, at 1090.

79. Deliberative democracy is the phrase through which legal scholars describe the ends of democracy being the access to deliberation, not the outcomes or results from legal processes. SUNSTEIN, *supra* note 63, at 6-8.

80. *Id.* at 7.

81. JAMES C. SCOTT, *SEEING LIKE A STATE: HOW CERTAIN SCHEMES TO IMPROVE THE HUMAN CONDITION HAVE FAILED* 1-3 (1998).

82. Valverde, *supra* note 71, at 280-81.

83. *Id.* at 279.

The choice by urban governments to only recognize the most visible identity of homeless persons also deprives homeless persons of any meaningful relational process to reconcile their identities with public space. As has been explored in other areas, the law's non-recognition of nuanced identity reduces access of individuals to legal and political remedies or rights.<sup>84</sup> Likewise, homeless persons have been deemed to be powerless problems for cities to respond to – not constituents to be heard.<sup>85</sup> This lack of power also means that, in a relational construct, other interested entities in space will have better access to legal and political means than homeless persons. The ways that certain constituents are able to influence government action stands in direct contrast to the powerlessness with which homeless persons are able to seek protections for their own interests. Urban economic interests regularly mobilize support to do something about the homeless problem.<sup>86</sup> The mobilization motive has been described by numerous observers of urban life and is a stalwart rationale for controlling street behavior that the collective deems undesirable. Merchants and “citizens” urge government officials to take action against chronic homelessness because of the economic drain on the merchant community.<sup>87</sup> For example, proponents of the broken windows hypothesis often point to homelessness as a precursor to greater criminal tendencies for an area.<sup>88</sup> This leads cities to create what William H. Whyte describes as the “defensive” city center, or one manufactured to deter undesirables.<sup>89</sup>

Indeed, merchants, residents, and other persons with economic interests promote political mobilization to create defensive hedges around the city center that treat homeless persons as a collective group, rather than by personal identifiers.<sup>90</sup> Much of the animus around these defensive efforts is towards eliminating visible signs of disorder to deter more serious crime.<sup>91</sup>

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84. See, e.g., Marc S. Poirier, *Microperformances of Identity: Visible Same-Sex Couples and the Marriage Controversy*, 15 WASH. & LEE J. OF CIVIL RTS. & SOC. JUST. 3, 68 (2008).

85. See Mitchell, *The Annihilation of Space by Law*, *supra* note 10, at 16-17.

86. See, e.g., Associated Press, *Homeless Ousted from a Skid Row*, N.Y. TIMES (June 6, 1987), <http://www.nytimes.com/1987/06/06/us/homeless-ousted-from-a-skid-row.html>.

87. See Polletta & Jasper, *supra* note 60, 283-84.

88. GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 12 (1998).

89. WILLIAM H. WHYTE, *CITY: REDISCOVERING THE CENTER* 156 (1988).

90. See, e.g., Paul Ades, *The Unconstitutionality of “Antihomeless” Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CALIF. L. REV. 595, 595-96 (1989); Dennis P. Culhane, *Tackling Homelessness in Los Angeles’ Skid Row: The Role of Policing Strategies and the Spatial Deconcentration of Homelessness*, 9 CRIMINOLOGY & PUB. POL’Y 851, 851-52 (2010).

91. Ellickson, *supra* note 68, at 1177-78; Dan M. Kahan, *Between Economics and Sociology: The New Path of Deterrence*, 95 MICH. L. REV. 2477, 2479 (1997) [hereinafter Kahan, *Between Economics and Sociology*]; Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 351 (1997) [hereinafter

Often, these pressures lead to privatizing formerly public spaces and removing the “homeless problem” as the space begins to be shaped and reshaped by what the dominant collective power structure deems that social identity to be.<sup>92</sup> What this often means is legislating and policing spaces based on group exclusion, rather than personal entitlement to occupy.<sup>93</sup> Notably, this privatization of public space is undergirded by government-created “property entitlements” that give the authority in charge the power to exclude whomever they choose.<sup>94</sup> As one author suggests, this privatization is more than a change in the delivery system of a public amenity: it reflects how open space is “redefined and reshaped in the context of changing socio-economic and political relationships.”<sup>95</sup>

### *A. Collective Identity in Legal and Sociological Terms*

#### 1. Establishing Social Identity Through Rule Creation

Creating rules – particularly legal rules – reflects a conflation of identities, ideologies, and power-relationships. When a city seeks to control a specific group of people, such as the homeless, the rules imposed reflect not only the city’s perception of the group identity, but also the city’s own identity, ideology, and its ability to carry out those rules.

##### a. Social Identity Creation

The mere fact that persons external to a group categorize the group in some way suggests meaning is imposed on the group and on to persons associated as a part of the group.<sup>96</sup> Meanings are “linguistic categories that define

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Kahan, *Social Influence*]; Tracy L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 212 (1998).

92. Anastasia Loukaitou-Sideris, *Privatization of Public Open Space: The Los Angeles Experience*, 64 TOWN PLAN. REV. 139, 160 (1993).

93. *Id.* at 155.

94. *Id.* at 154.

95. *Id.* at 160.

96. *See, e.g., id.* at 154-55. For example, consider Alice Braum and Donald Burne’s reaction to categorizing homeless persons as “poor persons”:

By perpetuating the myth that the homeless are merely poor people in need of housing . . . advocates reinforce and promote the most pernicious stereotypes about poverty in America. The vast majority of poor people in America are not homeless. Poor people do not live on the streets, under bridges, or in parks; do not carry all of their belongings in shopping carts or plastic bags; do not wear layers of tattered clothing and pass out or sleep in doorways; do not urinate or defecate in public places; do not sleep in cars or in encampments; do not harass or intimidate others; do not ask for money on the streets; do not physically attack city workers and residents; and do not wander the streets shouting at visions and voices . . . .

the objects to which we are oriented and thus constitute our reality and influence our action towards those objects.”<sup>97</sup> An important “meaning” imposed on groups is the creation of rules that are enforceable based on broad identifiers. Meanings necessarily incorporate the ideologies of the group conferring meaning and the rules by which those ideologies emerge.<sup>98</sup> External group identity provides a convenient, though perhaps inaccurate, depiction of group norms for society.<sup>99</sup>

#### b. Ideology

Inherent in collective norm-creation is the manifestation of ideology within collective groups through rule-creation and rule-following.<sup>100</sup> As one group of researchers argues, “[A]ny study of ideology necessarily examines how symbolic orders sustain forms of domination and identifies ‘the basic structural elements which connect signification and legitimation in such a

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KELLING & COLES, *supra* note 88, at 65 (quoting ALICE S. BRAUM & DAVID W. BURNES, ANALYSES OF ISSUES IN *JOYCE ET AL. V. CITY AND COUNTY OF SAN FRANCISCO* 14 (1994)). The intent to differentiate homeless persons from persons who are merely indigent suggests that these activities are ones that homeless persons by definition engage in. *See id.*

97. JOHN LOFLAND ET AL., ANALYZING SOCIAL SETTINGS: A GUIDE TO QUALITATIVE OBSERVATION AND ANALYSIS 132 (4th ed. 2006).

98. *Id.* at 132-33.

99. *Id.* Sometimes, the identification of a person as homeless may be done to prejudice that person as to other persons. *See, e.g.,* *People v. Chapman*, No. A122393, 2010 WL 127595, at \*6 (Cal. Ct. App. Jan. 14, 2010) (claiming prosecutorial misconduct when prosecutor referenced Defendant’s status as homeless in front of the jury) (citing *People v. Herring*, 20 Cal. App. 4th 1066, 1074-75 (1993)). The *Chapman* court clarified that the prosecutor in *Herring* had not actually referred to the defendant as “homeless.” *Id.* at \*7. The court stated in a footnote:

Actually, the word “homeless” was never used in the *Herring* opinion. However, the defendant there was characterized by the prosecutor as “a parasite [who] never works,” which the Court of Appeal treated as clear misconduct because these remarks “had nothing to do with the crimes alleged and inferred that people who do not work . . . are bad people and more likely to do criminal acts. This argument directed at appellant’s character invited the jury to decide the case based upon its own value judgment and not on the law.” Nevertheless, it requires no great leap of imagination to discern how this argument could easily be adjusted to explicitly refer to a defendant who is homeless.

*Id.* at \*7 n.10 (internal citations omitted).

100. *See* Jonathan H. Turner, *The Theory of Structuration*, 91 AM. J. SOC. 969, 972 (1986).

way as to favor dominant interests.”<sup>101</sup> In short, we learn what motivates the rule-makers by examining the rules and to whom the rules are targeted.<sup>102</sup>

### c. Power Relationships

An important feature of collective identity and group identification is the role of power relationships and how those relationships continue to define the members of different groups. In any group dynamic, certain individuals and constituencies have power and others do not.<sup>103</sup> How those with power interact with the powerless can be described as a duality between identity and the rules (or structures) that form the identity.<sup>104</sup> For example,

[p]ower is an important facet of the duality of structure. Giddens maintained that individuals can carve out spaces of control in their daily interaction; however, their control is limited by ideological meaning formations. Control, then, is not a monolithic, irresistible structure determining the actions of agents. Individuals who are discursively conscious can defy the dominant ideology in various ways, including through the dialectic of control, or in Giddens’ words: “how the less powerful manage resources in such a way as to exert control over the most powerful in established power relationships.”<sup>105</sup>

When laws are passed or enforced, they not only confer a meaning about the group at which the law is directed, but they also confer a meaning about the group who seeks to enforce the law.<sup>106</sup> Law becomes a means for understanding the ideology of the “collective,” as law is the set of rules enforced by society.<sup>107</sup> When laws are directed at a specific group, the homeless for example, the ideology of the collective towards an identified group may be revealed.<sup>108</sup> Notably, it is not important or even relevant that not everyone shares the ideological views that certain laws import. Instead, the nature of law as a byproduct of deliberative democratic tendencies suggests that law is

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101. Lynn M. Harter et al., *The Structuring of Invisibility Among the Hidden Homeless: The Politics of Space, Stigma, and Identity Construction*, 33 J. APPLIED COMM. RES. 305, 308 (2005) (quoting GIDDENS, *supra* note 34, at 192).

102. See VIVIENNE JABRI, DISCOURSES ON VIOLENCE: CONFLICT ANALYSIS RECONSIDERED 70 (1996); see also Turner, *supra* note 100, at 972.

103. Jeffery W. Lucas & Amy R. Baxter, *Power, Influence, and Diversity in Organizations*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 49, 49-51 (2012).

104. *Id.* at 58; see also Turner, *supra* note 100, at 973.

105. Harter et al., *supra* note 101.

106. See Turner, *supra* note 100, at 972.

107. Ideologies often center on questions of how participants bring the scheme into play in defining or repairing some problematic topic or issue. Thus, in the instance of the homeless, we can understand a collective ideology by the methods and structures employed in facing the “homeless problem.” See Ellickson, *supra* note 68, at 1177-78.

108. See *id.*

subject to power-relationships that have the capacity to influence and shape the law's imposition on certain groups.<sup>109</sup>

## 2. Establishing Group Identity Through Rule-Enforcement

There are two tangible examples of how this identity – ideology – power relationship dynamic plays out with homeless persons. The first, and more common, is the tendency for local “economic interests” to mobilize support to “do something about the homeless problem.”<sup>110</sup> The mobilization motive has been described by numerous observers of urban life and is a stalwart rationale for controlling street behavior the collective deems undesirable.<sup>111</sup> At the urging of merchants and “citizens,” government officials are urged to take action against chronic homelessness because of the economic drain on the merchant community.<sup>112</sup> For example, proponents of the broken window hypothesis often point to homelessness as a precursor to greater criminal tendencies for an area.<sup>113</sup> This leads cities to create what William H. Whyte

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109. *Id.* For example Robert Ellickson writes in his article *Controlling Chronic Misconduct in City Spaces* that four interrelated reasons motivate collective action, which, though trivial to any one pedestrian, becomes severe in the collective:

First because the annoying act occurs in a public place, it may affect hundreds or thousands of people per hour. (Contrary to what some might assert, views of offensive street conduct cannot be avoided simply by turning one's eyes.) Second, as hours blend into days and weeks, the total annoyance accumulates. Third, a prolonged street nuisance may trigger broken-windows syndrome. As time passes, unchecked street misconduct, like unerased graffiti and unrecovered litter signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder. For example, designers of a downtown office building who anticipate bench squatting may place spikes in building ledges. These spikes then serve as architectural embodiments of a social unraveling, accentuating the broken-windows signal. Fourth, some chronic street offenders violate informal time limits. In open-access public spaces suited to rapid turnover, norms require individual users to refrain from long-term stays that prevent others from exercising their identical rights to the same space.

*Id.*

110. *See, e.g.,* Ades, *supra* note 90, at 595-96.

111. *See, e.g.,* Andy Hobbs, *Downtown Olympia: Taking Back the Streets*, OLYMPIAN (Sept. 28, 2014), [http://www.theolympian.com/2014/09/28/3341617\\_downtown-olympia-taking-back-the.html?rh=1](http://www.theolympian.com/2014/09/28/3341617_downtown-olympia-taking-back-the.html?rh=1).

112. *See* Culhane, *supra* note 90, at 851.

113. *See* KELLING & COLES, *supra* note 88, at 12 (citing street begging in San Francisco as a reason citizens withdrew from streets); *id.* at 15 (noting one aspect of disorder is the obstruction of public spaces). Kelling and Coles draw a distinction between homeless who choose to be homeless and those who are made homeless by other causes. *Id.* at 65-66. This distinction, however, does not reach some of the animus that might cause a homeless person to reasonably choose to live on the streets rather than in a shelter. *Why Some Homeless Choose the Streets Over Shelters*, NAT'L PUB. RADIO (Dec. 6, 2012, 1:00 PM), <http://www.npr.org/2012/12/06/166666265/>

describes as the “defensive” city center or one manufactured to deter undesirables:

Out of an almost obsessive fear of their presence, civic leaders worry that if a place is made attractive to people it will be attractive to undesirable people. So it is made defensive. There is to be no loitering . . . and . . . no eating, no sleeping. So it is that benches are made too short to sleep on, that spikes are put on ledges . . . .<sup>114</sup>

Indeed, merchants, residents, and other persons with economic interests tend to create a political mobilization to create defensive hedges around the city center.<sup>115</sup> Much of the animus around these defensive efforts is the avoidance or remedying of “broken windows” syndrome – or the idea that eliminating visible signs of disorder deters more serious crime.<sup>116</sup> Often, these pressures lead to privatizing formerly public spaces and removing the “homeless problem” as the space begins to be shaped and reshaped by what the dominant collective power structure deems that identity to be.<sup>117</sup> As one

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why-some-homeless-choose-the-streets-over-shelters. For example, choosing to live on the streets because the person believes the shelter is unsafe seems quite reasonable. *Id.* It also does not account for the fact that most cities do not have sufficient resources to provide all of the homeless in their area with overnight shelter. Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL’Y REV. 1, 1-2 (1996).

114. WHYTE, *supra* note 89, at 156.

115. See KELLING & COLES, *supra* note 88, at 13 (describing how Seattle residents filed an amicus brief in support of the city to support “restrictive ‘street civility laws’” including an ordinance making it illegal to sit or lie down on public streets in the downtown and neighborhood commercial areas from 7 a.m. to 9 p.m.); Ades, *supra* note 90, at 595 (citing Associated Press, *supra* note 86 (describing efforts on June 4, 1987 to remove homeless individuals from streets spurred by local merchants and individuals)); Culhane, *supra* note 90, at 851 (noting the influence of shop keepers, local chambers of commerce, tourism officials, and their advocates in government to eliminate the appearance of homelessness in the modern American city).

116. The broken windows theory was proposed by sociologists James Q. Wilson and George Kelling. See George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY (Mar. 1 1982, 12:00 PM), [http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single\\_page=true](http://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/?single_page=true). Notably the broken windows theory has been accepted by a number of prominent legal scholars as supporting a need for collective action in cities. See, e.g., Ellickson, *supra* note 68, at 1177-78; Kahan, *Between Economics and Sociology*, *supra* note 91, at 2488; Kahan, *Social Influence*, *supra* note 91, at 369-70; Meares, *supra* note 91, at 191-92.

117. Loukaitou-Sideris, *supra* note 92, at 156. Noting the trend towards privatization, Loukaitou-Sideris writes:

Downtown open-spaces, like these under discussion, can be found today in almost every North American city. They are part of a city’s redevelopment efforts, which more often than not are based on a corporate centre’s strategy. Investment priorities are transforming the ageing core into the modern corpo-

author suggests, this privatization is more than a change in the delivery system of a public amenity: it reflects how open space is “redefined and reshaped in the context of changing socio-economic and political relationships.”<sup>118</sup>

A second example of this power-ideology dynamic is where homeless persons themselves are able to constitutionally challenge local attempts to remove them from the streets.<sup>119</sup> Here the dynamic is fraught with the difficult burden of bringing a challenge on the facial constitutionality of land use controls aimed at them. Constitutional remedies offer persons limited power since they are not specific to any one person or group of people. Thus, even successful claims represent only marginal changes in policy. As described in the next section, the social structure remains intact, continuing to enable and constrain action based on group definition. This discourse leaves politically powerless individuals, such as the homeless, with few opportunities to challenge seemingly valid acts of the collective as long as they fall within the category of regulated persons. Said differently, because homeless persons are not participants in defining their social identity, rules that target that social identity are difficult to challenge absent a basis for associating with a broader collective ethic, such as a constitutional claim.

### *B. How Space Exclusion Leads to Collective Identity*

Just as rule enforcement often relies on establishing group identity, rule enforcement also helps establish the identity of the enforcers. In other words, the enforcement of rules that exclude homeless individuals from common spaces also serves as an identifier of the group on whose behalf the homeless are excluded.

While safety and resource allocation might be the animating principles that lead homeless populations to claim one space over another, different animating principles are at play when homeless persons are excluded from certain areas. Homeless populations are particularly vulnerable to a municipal decision to alter the economic image of a particular space. When city officials choose to alter the economic landscape of certain areas, homeless populations are seen as collective obstacles, not individual stakeholders. In these scenarios, homeless populations are often dispersed to less concentrated

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rate image, with emphasis on commercialization rather than reindustrialization, and orientation toward financial/administrative services and luxury consumption. Genuine public spaces, whether parks, squares, playgrounds or recreational facilities, have been consistently devalued as amenities and redefined as planning problems to be eliminated or privati[z]ed.

*Id.* at 156-57.

118. *Id.* at 160.

119. *See, e.g.*, *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 572 (2d Cir. 2002).



areas.<sup>120</sup> One primary means of doing so is by making the areas where homeless tend to congregate less attractive by making valued resources harder to obtain.<sup>121</sup> Sometimes this happens by increasing police enforcement of low-level offenses against homeless persons.<sup>122</sup> Sometimes this happens by reducing the amount of available space for comfortable occupation. This is the exclusionary effect on non-entitled space at work.

Reclaiming public space from homeless persons highlights the expression of collective identity. Sociologists and legal scholars identify two animating rationales underlying the reclaiming of space from homeless persons: purification<sup>123</sup> and re-establishment of order.<sup>124</sup>

Purification of public space from homeless persons is often described as removing persons who are viewed as carriers of disease or harbingers of criminal activity from an area.<sup>125</sup> Collectively, communities draw distinctions for uses of space that are either “salutary” or “noxious.”<sup>126</sup> “Salutary [spaces include] those to which access is valued and which are generally welcomed in residential neighborhoods . . . [including] parks, ‘good’ schools, and libraries.”<sup>127</sup> Noxious spaces are those that “by virtue of their attributes, design, function, and client population, generate actual and/or perceived

120. See, e.g., Daniel B. Wood, *Los Angeles Aims To Conquer Homelessness*, CHRISTIAN SCI. MONITOR (Apr. 17, 2006), <http://www.csmonitor.com/2006/0417/p02s01-ussc.html> (describing plan by Los Angeles municipal authorities to open homeless shelters outside the “high[ly] visible” downtown area to outlying areas). Dispersing homeless populations on outlying areas received mixed scrutiny. For example, Michale Touhey, Mayor Pro-Tem of the City of West Covina, one of the localities where one such shelter was planned said: “We think they are trying to force a giant center on us because they are not adequately taking care of their problem . . . We are concerned with taking everyone else’s problem.” *Id.*; see also Jean Calterone Williams, *The Politics of Homelessness: Shelter Now and Political Protest*, 58 POL. RES. Q. 497, 502 (2005) (noting the impact of an intentional relocation of homeless persons from the “easily accessible” city center to a place only accessible by bus).

121. See, e.g., *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1151 (Cal. 1995) (describing activities by law enforcement to drive the homeless away, including turning on the sprinklers in Central Park more often).

122. Deborah A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 556-57 (1997). Police enforcement of laws restricting or prohibiting activities like panhandling, sleeping in streets and parks, and even public urination has likewise been the subject of critical scrutiny, at least to the extent that such enforcement seems aimed at banishing homeless populations, rather than at assisting neighborhoods in maintaining a sometimes tenuous sense of public order. *Id.*

123. See Timothy Zick, *Constitutional Displacement*, 86 WASH. U. L. REV. 515, 521 (2009).

124. See Kelling & Wilson, *supra* note 116.

125. See Zick, *supra* note 123, at 521-22 (describing efforts by municipalities to remove homeless communities as an “evolving Geography of Purification”).

126. Alan Burnett & Graham Moon, *Community Opposition to Hostels for Single Homeless Men*, 15 AREA 161, 161-62 (1983).

127. *Id.*

negative effects and are often the subject of community resentment and opposition.”<sup>128</sup> For example, one study demonstrated that homeless shelters catering to single men have been subject to community disapproval by local neighbors who oppose placement of homeless shelters near their homes.<sup>129</sup> Some of the reasons provided for opposing the shelter included generic descriptions of clientele as “‘degenerate’, ‘undesirable’, ‘a fraternity which includes alcoholics, drug addicts . . .’, ‘delinquents’ and ‘drunkards’”<sup>130</sup> illuminating fears of adverse consequences to the population. As summarized by the researchers, “[O]bjectors argued that the type of person to be housed was not to the ‘betterment of the area or the safety of the residents.’”<sup>131</sup>

The restriction of space occupation based on noxious activity is usually accomplished by a combination of criminal actions against the users and civil actions for public nuisance against individuals facilitating the use. Robert Ellickson goes so far as to combine these two concepts, describing the notion of a chronic street nuisance as occurring when “a person regularly behaves in a public space in a way that annoys – but no more than annoys – most other users, and persists in doing so over a protracted period.”<sup>132</sup> In this way, the chronic public nuisance is like the private nuisance in that the principal remedy being sought when ordinances are enforced is the prevention of the behavior.<sup>133</sup> The difference, of course, is that public nuisance is usually enforced via criminal sanction, rather than through civil entitlement resolutions.

Another basis for reclaiming space is the restoration of “order” as a collective goal. Order as an animating principle of exclusionary space may be more compelling to certain political and business leaders. For example, some have argued that “the mere presence of street homeless in the public sphere has the effect of unraveling the social order, leading to an increase in crime

128. *Id.*; see also Nancy Wright, *Not in Anyone’s Backyard: Ending the “Contest of Nonresponsibility” and Implementing Long-Term Solutions to Homelessness*, 2 GEO. J. ON FIGHTING POVERTY 163, 164-65 (1995) (describing an American “compassion fatigue” with the homeless problem as producing characterizations of homeless as “pathological predators who spoil downtown areas and threaten suburbia”).

129. Burnett & Moon, *supra* note 126, at 164.

130. *Id.*

131. *Id.*

The amenity and safety of local residents was a theme of many letters. Children would be “molested,” “exposed to a bad example” and “at risk.” (Sonia (aged 8) expressed her own fears: “I am frightened because Mummy told me that naughty men may soon move here and I will not be able to play outside.”) Guest house proprietors feared “alienated” visitors and [that the impact of the hostel] would be “fatal to trade.” The lowering of property values was explicitly mentioned by six objectors, while others emphasized environmental pollution including “cider bottles everywhere” and disturbance on Sundays.

*Id.*

132. Ellickson, *supra* note 68, at 1168-69.

133. See, e.g., *Gresham v. Peterson*, 225 F.3d 899, 901 (7th Cir. 2000) (hearing challenge to ordinance banning aggressive panhandling as a misdemeanor offense); *L.A. Alliance for Survival v. City of L.A.*, 993 P.2d 334, 336, 365 (Cal. 2000) (same).

and thereby driving middle- and upper-class consumers out of downtown areas and into the suburbs.”<sup>134</sup>

Yet, order is often a subjective conclusion underscored by subjective rationales. For example, in 2003, six homeless persons sued the City of Los Angeles alleging that city ordinances criminalize certain natural human behaviors.<sup>135</sup> In *Jones v. City of Los Angeles*, the court found portions of the ordinance unenforceable; importantly, it announced that the ordinance amounted to criminalizing the status of being homeless.<sup>136</sup> The court said in *Jones*:

The City and the dissent apparently believe that Appellants can avoid sitting, lying, and sleeping for days, weeks, or months at a time to comply with the City’s ordinance, as if human beings could remain in perpetual motion. That being an impossibility, by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants’ status as homeless individuals.<sup>137</sup>

In striking down portions of the ordinance, the court distinguished between things that were already criminal, such as public urination.<sup>138</sup> Yet, the criminalization of loitering requires law enforcement officials to make “judgments about people’s criminal propensity.”<sup>139</sup> As one scholar notes, “[Loitering acts] embody legislative [or judicial] predictions about the likeli-

134. Donald Saelinger, *Nowhere To Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 553 (2006). Kelling and Wilson state:

Social psychologists and police officers tend to agree that if a window in a building is broken and *is left unrepaired*, all of the rest of the windows will soon be broken. . . . [One] unrepaired broken window is a signal that no one cares, and so breaking more windows costs nothing. . . . We suggest that “untended” behavior also leads to the breakdown of community controls.

Kelling & Wilson, *supra* note 116 (emphasis added). Notably, the broken windows theory seems to have some flaws. For example, Dorothy Roberts points out that the broken windows theory does not necessarily correlate to other behaviors. See Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 796-99 (1999).

135. *Jones v. City of L.A.*, 444 F.3d 1118, 1125 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

136. *Id.*; see also Tanene Allison, *Confronting the Myth of Choice: Homelessness and Jones v. City of Los Angeles*, 42 HARV. C.R.-C.L. L. REV. 253, 254 (2007) (“As a homeless individual I was suddenly viewed by default as representing what is wrong in society. I had spent years working with children and youth, but when I sat on the steps of a school near the shelter, I was instantly seen as a threat, deserving a call to the local police. If I sat in a park, I was not enjoying a sunrise (or, more realistically, occupying the only place that I could at that hour), I was a threat to public comfort.”).

137. *Jones*, 444 F.3d at 1136-37.

138. *Id.* at 1131-32.

139. Roberts, *supra* note 134, at 783.

hood that people engaged in certain activities, bearing certain characteristics, or belonging to certain groups will engage in criminal activity.”<sup>140</sup> These subjective predictions inevitably tend to target minority or unpopular groups as inherently suspect, and infer a judgment of group identity that differs from the collective identity.

Recently, other efforts have been implemented under the guise of restoring order. For example, in 2010, Los Angeles police issued an injunction against John Does – eighty known drug dealers and 300 others with any potential connection around the Skid Row area.<sup>141</sup> While local merchants and residents praised the effort as a means to clean up the area from a known criminal operation, critics suggested that the order used criminal activity as a guise to force homeless persons out of the area.<sup>142</sup> This type of injunction has been employed in other areas where groups that contradict the city’s sense of propriety occupy public space. Principally, gang injunctions have allowed police to use loose-fitting criteria to reclaim space in the name of order.<sup>143</sup> Such loose-fitting criteria validate beat officers’ guttural reaction to whether the officer believes someone has a propensity for criminal activity – not whether that person has actually committed a crime or deviated from other collectively enforceable norms. As so called “John Doe” injunctions are aimed at homeless areas, the specter of criminalizing homelessness as a status – rather than actual criminal activity – becomes a mechanism for asserting a broad collective identity over a space under the guise of maintaining order.

Sociologists have suggested that collective norm-creation performs three primary functions for society: (1) it represents sectional interests as universal interests; (2) it denies or transmutes contradictions; and (3) it naturalizes or reifies existing social structures.<sup>144</sup> Ironically, one legal scholar has suggested that politicians, business leaders, and academics point to three corresponding rationales for the enforcement of anti-nuisance laws aimed at the homeless: “(1) to increase and maintain public safety; (2) to improve the image of the city for tourists, businesses, and other potential investors; and (3) to reflect the growing ‘compassion fatigue’ of the city’s middle- and upper-class inhabitants.”<sup>145</sup> Indeed, these rationales for reclaiming space affirm sociologists’ observations – in reclaiming the space (i.e. excluding homeless from space), society undertakes norm-creating functions. Society elevates certain sectional interests over others (in this case, the interests of homed-persons and merchants over homeless persons); it seeks to cover up the existence of

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140. *Id.*

141. See, e.g., Kate Linthicum, *Crackdown to Target L.A. Skid Row Drug Dealers*, L.A. TIMES (Apr. 7, 2010), <http://articles.latimes.com/2010/apr/07/local/la-me-skidrow-drugs8-2010apr08>.

142. *Id.*

143. See Thomas Watkins, *Injunction Would Bar Gang Members from Skid Row*, HUFFINGTON POST (June 7, 2010, 5:12 AM), [http://www.huffingtonpost.com/2010/04/07/injunction-would-bar-gang\\_n\\_528912.html](http://www.huffingtonpost.com/2010/04/07/injunction-would-bar-gang_n_528912.html).

144. GIDDENS, *supra* note 34, at 193-95.

145. Saelinger, *supra* note 134, at 553.

the homeless, denying or transmuting the seeming contradictions that the homeless represent to the accepted community image; and it communicates to citizens that homelessness and poverty fatigue is an acceptable attitude towards the poor, naturalizing and reifying bias towards these citizens.

In short, collective identity emerges as a natural outgrowth of controlling space. In Part II, this Article considers how collective identity emerges in homelessness cases.

## PART II: THE VISIBLE YET *LEGALLY* INVISIBLE HOMELESS

Homelessness cases relating to space can be divided into three broad categories of legal restraints – first, homeless use of public space; second, homeless activities impacting public and private space; and third, other properties that attract homeless persons’ impact on private space.

### A. *Homeless in Public Spaces*

Homeless persons occupy public spaces for a variety of reasons. As Teresa Gowan described, homeless persons living around the San Francisco neighborhood known as the “Haight” were drawn towards the neighborhood by a variety of attractions: the availability of acid-based drugs, excellent social services, a critical mass of other homeless persons who provided protection from police action, and obscure yet accessible spaces that offered greater privacy than open areas.<sup>146</sup> Parks, libraries, and sidewalks tend to be the congregations of homeless persons, who, not welcomed in other spaces, seek shelter, comfort and quiet escapes.

City ordinances that attempt to reclaim these areas draw on, as scholars David Snow and Leon Anderson observed, the residential dimension of homeless identity.<sup>147</sup> As a descriptor, it is the broadest conceptualization of homelessness and lacks nuances that attempt to actually capture individual identity of homeless problems.<sup>148</sup> City reclaiming of public spaces from homeless persons tend to relate to three broad categories: enforcement of anti-camping laws and other similar constraints in public places like parks, sidewalks, streets, and depots; enforcement of hygiene rules in public places;

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146. TERESA GOWAN, *HOBOS, HUSTLERS, AND BACKSLIDERS: HOMELESS IN SAN FRANCISCO* 249-56 (2010).

147. See SNOW & ANDERSON, *supra* note 50, at 7; see also LORNA FOX, *CONCEPTUALISING HOME: THEORIES, LAWS AND POLICIES* 491-92 (2007) (describing privacy’s interaction in the home as a tension between the European Convention’s Article on Human Rights and property rights of the individual); SIBLEY, *supra* note 15, at 78, 99 (noting that control of public spaces is largely targeted to reduce the visible signs of homelessness from public view).

148. SNOW & ANDERSON, *supra* note 50, at 7-8. For example, identifying homeless persons only by the residential dimension fails to capture other dimensions, such as the familial support dimension or the role-based dignity and moral worth dimension. *Id.*

and seizure of homeless property under the guise of public health. Importantly, these reclaiming ordinances focus on controlling the visual and other sensual encounters with the residential dimension of homeless persons. That is, these ordinances control how pervasively the public is confronted with where a person sleeps (anti-camping ordinances) and how extensions of the homeless person's identity must be dealt with in public places (rules relating to hygiene and personal property).

### 1. Trespass and Anti-Camping Ordinances as Protections of Property

Cities regularly enact ordinances aimed at preventing homeless persons from sleeping in public spaces.<sup>149</sup> These ordinances are premised on the local government interests in promoting aesthetics, preserving access, ensuring proper sanitation, and promoting public health.<sup>150</sup> Jurisdictions have split on whether such ordinances interfere with homeless persons' equal protection rights or Eighth Amendment rights.<sup>151</sup> In general, the legal questions relating to anti-camping ordinances are whether city officials may proscribe limits on

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149. Yamiche Alcindor, *Cities' Homeless Crackdown: Could It Be Compassion Fatigue?*, USA TODAY (June 10, 2012, 7:24 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-06-10/cities-crack-down-on-homeless/55479912/1> (stating that more than fifty cities in the U.S. have passed anti-camping ordinances).

150. See *Joel v. City of Orlando*, 232 F.3d 1353, 1358-59 (11th Cir. 2000); *Anderson v. City of Portland*, No. CIV 08-1447-AA, 2009 WL 2386056, at \*1 (D. Or. July 31, 2009). One court stated the purpose of the city's anti-camping ordinance in significant detail:

The streets and public areas within the city should be readily accessible and available to residents and the public at large. The use of these areas for camping purposes or storage of personal property interferes with the rights of others to use the areas for which they were intended. Such activity can constitute a public health and safety hazard which adversely impacts neighborhoods and commercial areas. Camping on private property without the consent of the owner, proper sanitary measures and for other than a minimal duration adversely affects private property rights as well as public health, safety, and welfare of the city. The purpose of this chapter is to maintain streets, parks and other public and private areas within the city in a clean, sanitary and accessible condition and to adequately protect the health, safety and public welfare of the community, while recognizing that, subject to reasonable conditions, camping and camp facilities associated with special events can be beneficial to the cultural and educational climate in the city. Nothing in this chapter is intended to interfere with otherwise lawful and ordinary uses of public or private property.

*Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1224-25 (E.D. Cal. 2009). Other reasons cities cite for enacting an anti-camping ordinance have included the desire to force homeless persons into service centers and restricting public resources to homeless persons with ties to the locality. See *Porto v. City of Laguna Beach*, No. SACV 12-00501-DOC, 2012 WL 3810475 (C.D. Cal. Aug. 7, 2012).

151. See Sarah Gerry, *Jones v. City of Los Angeles: A Moral Response to One City's Attempt to Criminalize, Rather Than Confront, Its Homelessness Crisis*, 42 HARV. C.R.-C.L. L. REV. 239, 240 (2007).

use of public space (a property rule oriented view) or whether homeless persons have inalienable rights to be free from status-based sanctions or due process failures (an inalienable entitlement view).

In *City of Providence v. John Doe*, the City of Providence sought a permanent injunction against “unknown defendants,” known as “John Does,” for trespassing on certain city-owned land.<sup>152</sup> The complaint alleged that these unknown defendants<sup>153</sup> were camping by erecting tents and other unknown structures without permission from the city. The city also claimed that the encampment had “no clean water, no garbage facilities, no electricity, no sanitation or bathroom facilities.”<sup>154</sup> The Rhode Island Superior Court granted the city’s injunction over the homeless defendants’ claim that the court lacked subject matter jurisdiction.<sup>155</sup> The homeless defendants alleged that the proper forum for resolving this dispute was the district court because Rhode Island General Law Section 8-8-3(a)(2) gave exclusive jurisdiction of “[a]ll actions between landlords and tenants . . . and all other actions for possession of premises” to the district court.<sup>156</sup> The court rejected the defendants’ subject matter jurisdiction argument because the court held the “action sounded in nuisance and trespass and was not an action predicated on rights arising from a consent-based landlord-tenant relationship.”<sup>157</sup> The Rhode Island Supreme Court agreed, finding that the action was one primarily arising from trespass, not from a legal relationship between two vested property holders.<sup>158</sup> Underlying the court’s jurisdictional analysis lay the fact that the

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152. *City of Providence v. Doe*, 21 A.3d 315, 316-17 (R.I. 2011). The complaint alleged that “the encampment consisted of ‘various tents, shelters and other structures’ set up without securing the permission of the City of Providence and in violation of [various] municipal ordinances . . . .” *Id.*

153. The court described the members of the encampment as “part of a community of likewise homeless individuals providing common support and security. Members of said community named the encampment ‘Camp Runamuck.’” *Id.* at 317 n.1.

154. *Id.* at 317. A similar matter involved the State of Florida Department of Transportation alleging that the City of Miami “created, allowed or facilitated the taking up of permanent residence by [homeless persons under the Miami Julia Tuttle Causeway Bridge], and that due to the lack of electricity or facilities for these residents, several violations of the City of Miami Code, as well as health risks, ha[d] resulted.” *Dep’t of Transp. v. City of Miami*, 20 So. 3d 908, 909-10 (Fla. Dist. Ct. App. 2009). The dwellings were described as “makeshift” and as a “shantytown.” *Id.* at 910.

155. *Doe*, 21 A.3d at 317.

156. *Id.* at 317-18.

157. *Id.* at 317.

158. *Id.* at 318-19. Defendants argued that the term “other” as used in the statute “plainly references any and all other actions for possession of premises *not* involving a landlord/tenant relationship between the parties . . . .” *Id.* at 318 (internal quotation marks omitted). The Rhode Island Supreme Court rejected that theory suggesting that a plain reading of the landlord-tenant action inferred that the statute applied to only the landlord-tenant relationship. *Id.* at 318-19.

city had the right to control the spaces that it possessed; and that homeless people had no property relationship that interacted with that space.

Similarly, in *Benson v. City of Chicago*, a homeless person challenged the city's anti-trespass ordinance after she was cited for sleeping in a chair at O'Hare International Airport.<sup>159</sup> The court, after considering various constitutional arguments towards vagueness, found that the trespass ordinance did not constitute cruel and unusual punishment under the Eighth Amendment.<sup>160</sup> The court, citing a prior Ninth Circuit decision, *Jones v. City of Los Angeles*, stated, "Chicago does not prohibit sitting, lying or sleeping in any public place at any time and in any circumstances, but only requires that a person leave the property of another when notified to do so."<sup>161</sup> Like *City of Providence*, *Benson* represented a court's consideration of the state as property holder – and found that the property right to exclude was valid, enforceable, and did not interfere with other rights.<sup>162</sup>

In the absence of property relationships, homeless persons and advocates have attempted to articulate a constitutional basis for invalidating city ordinances relating to camping. These constitutional arguments stem from a variety of sources including equal protection claims under 42 U.S.C. § 1983; constitutional arguments that homeless persons are deprived of due process in application of ordinances; and deprivation of constitutional liberties under different constitutional amendments. Broadly conceived, cases can be divided into periods marked by two cases: *Pottinger v. City of Miami* and *Jones v. City of Los Angeles*.<sup>163</sup>

The first real challenge to a city's application of ordinances against homeless persons was the 1989 opinion in *Pottinger v. City of Miami*.<sup>164</sup> The action, brought by several homeless persons, alleged several due process and constitutional violations by the City of Miami's Police Department in enforcement of the ordinances.<sup>165</sup> Specifically, the claimants alleged: (1) that the city violated their Eighth Amendment rights to be free of cruel and unusual punishment; (2) that the city abused its use of official process to remove homeless persons from public view; (3) that the city violated the Fourth Amendment by engaging in pretextual arrests that amounted to unreasonable search and seizure; (4) that the city's seizure of homeless possessions were unreasonable and violated the Fourth, Fifth, and Fourteenth Amendments; (5) that the city's arrest of homeless persons in carrying out essential life-sustaining activities violated homeless rights to decisional autonomy and

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159. *Benson v. City of Chicago*, No. 06 C 1123, 2006 WL 2949521, at \*1 (N.D. Ill. Oct. 12, 2006).

160. *Id.* at \*2-3.

161. *Id.* at \*3.

162. *Id.* at \*2.

163. See Elizabeth M. M. O'Connor, Note, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability Into the Proportionality Principle*, 12 TEX. J. C.L. & C.R. 233, 256 (2007).

164. 810 F. Supp. 1551 (S.D. Fla. 1992).

165. *Id.* at 1554.



privacy under the Fourteenth Amendment; and (6) that the right to carry out life-sustaining activities is fundamental and entitled to Fifth and Fourteenth Amendment protections.<sup>166</sup>

The district court, drawing on a Supreme Court case, *Robinson v. California*, articulated that city ordinances that attacked homeless activities really were prohibitions against their status as homeless persons, not mere controls of public space.<sup>167</sup> The court, in linking *Robinson* and others to homeless ordinances, wrote:

In sum, class members rarely choose to be homeless. They become homeless due to a variety of factors that are beyond their control. In addition, plaintiffs do not have the choice, much less the luxury, of being in the privacy of their own homes. Because of the unavailability of low-income housing or alternative shelter, plaintiffs have no choice but to conduct involuntary, life-sustaining activities in public places. The harmless conduct for which they are arrested is inseparable from their involuntary condition of being homeless. Consequently, arresting homeless people for harmless acts they are forced to perform in

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166. *Id.* at 1555. In their complaint, the claimants alleged six counts:

[1] that the ordinances under which the City arrests class members for engaging in essential, life-sustaining activities – such as sleeping, eating, standing and congregating – are used by the City to punish homeless persons based on their involuntary homeless status in violation of the protection against cruel and unusual punishment found in the Eighth Amendment to the United States Constitution; . . . [2] that the City has used its legitimate arrest powers for the unlawful purpose of “pest control,” that is, “sanitizing” its streets by removing unsightly homeless individuals, which amounts to malicious abuse of process; . . . [3] that the arrests of homeless individuals are pretextual and amount to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution and Article I, Section 12 of the Florida Constitution; . . . [4] that the City’s seizures of plaintiffs’ property lack probable cause, are unreasonable and violate the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution; . . . [5] that the City’s arrests of homeless individuals for essential, life-sustaining activities violate their right to due process, privacy and decisional autonomy in violation of the Fourteenth Amendment to the United States Constitution and corresponding provisions of the Florida Constitution; and . . . [6] that the right of homeless persons publicly to engage in essential activities such as sleeping, eating, bathing and congregating is “fundamental” for purposes of equal protection under the Fifth and Fourteenth Amendments to the United States Constitution; that arresting the homeless infringes upon these fundamental rights and other fundamental rights, such as the right to travel, and burdens the homeless as a suspect class; and that the City has no compelling interest in making these arrests.

*Id.*

167. *Id.* at 1562 (citing *Robinson v. California*, 370 U.S. 660 (1962)). The court also pointed to other decisions that overturned “vagrancy laws” and laws that made it a crime to be unemployed. *Id.* (citing *Robinson*, 370 U.S. 660; *Wheeler v. Goodman*, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971); *Headley v. Selkowitz*, 171 So. 2d 368 (Fla. 1965)).

public effectively punishes them for being homeless. This effect is no different from the vagrancy ordinances which courts struck because they punished “innocent victims of misfortune” and made a crime of being “unemployed, without funds, and in a public place.” . . . Therefore, just as application of the vagrancy ordinances to the displaced poor constitutes cruel and unusual punishment, . . . arresting the homeless for harmless, involuntary, life-sustaining acts such as sleeping, sitting or eating in public is cruel and unusual.<sup>168</sup>

This description of criminalizing the status of homelessness as a secondary effect to the ordinance ultimately swayed the court to enjoin the enforcement of ordinances against homeless persons in particular areas of the city.

Despite *Pottinger*'s compelling rationale, many courts refused to follow *Pottinger*'s theory of status-based punishment.<sup>169</sup> Instead, many courts held that city ordinances were facially neutral<sup>170</sup> or that litigants lacked standing to challenge those ordinances.<sup>171</sup> Other courts held that as applied, similar ordinances represented no unreasonable interference with homeless persons' rights of process, their constitutional rights, or equal protection rights under the law.<sup>172</sup>

Homeless persons challenging city ordinances after *Pottinger* faced the difficulty of proving facts as extreme as *Pottinger* to show that a city's ordinances were facially problematic. For example, in another district court opinion, *Roulette v. City of Seattle*, the Western District of Washington held that similar ordinances did not violate homeless persons' constitutional or due process rights because the ordinances were facially neutral and not targeted at “expel[ling] homeless persons.”<sup>173</sup> The district court said the ordinance in *Roulette*, unlike in *Pottinger*, contained no legislative record suggesting that the city intended to enforce these ordinances as a way to expel homeless persons.<sup>174</sup> The court also noted that the city's substantial interest in promoting the economic health of the city, its aesthetics, and access to downtown public areas warranted the imposition of limitations on homeless persons sitting and laying down on sidewalks before 9 p.m. and after 7 a.m.<sup>175</sup> The Ninth Circuit, reviewing the district court opinion agreed, holding that the same ordinances did not pose a threat to either the First Amendment right to expression

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168. *Id.* at 1564 (citing *Headley*, 171 So. 2d at 370).

169. *See, e.g.*, *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1107 (E.D. Cal. 2012); *Anderson v. City of Portland*, No. Civ. No. 08-1447-AA, 2009 WL 2386056, at \*7 (D. Or. July 31, 2009).

170. *See Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 858 (N.D. Cal. 1994).

171. *See Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996).

172. *See Joel v. City of Orlando*, 232 F.3d 1353, 1360 (11th Cir. 2000); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

173. 850 F. Supp. 1442, 1448, 1450 (W.D. Wash. 1994).

174. *Id.* at 1448.

175. *Id.*

or to the due process guarantees to homeless persons.<sup>176</sup> Similarly, the Northern District of California went so far as to suggest that a San Francisco ordinance differed from the one in *Pottinger* because the aim was to assist homeless persons:

the programs operated by Miami and San Francisco are not, as plaintiffs suggest, “virtually identical.” In *Pottinger*, the court found the Eighth Amendment violated when the City punished “sleeping, eating and other innocent conduct.” . . . The court emphasized that “plaintiffs [had] not argued that the City should not be able to arrest them for public drunkenness or any type of conduct that might be harmful to themselves or to others.” . . . Similarly, the court in *Tobe* was exclusively concerned with a “camping ordinance” limiting the permissible uses of public streets and areas. In contrast to these measures, the Matrix Program is addressed in large part at prohibiting such conduct which is unmistakably “harmful” to plaintiffs or others.<sup>177</sup>

Courts following *Pottinger* tended to treat similar ordinances as facially neutral, absent proof (such as a legislative record) that the ordinances were specifically targeted towards homeless persons.<sup>178</sup> This focus on legislative deference, absent evidence of specified targeting, allowed courts to avoid dealing with the question of secondary effects that city ordinances produced. Courts’ refusals to find that anti-camping ordinances created undue hurdles for those with no actual place to go suggest that homeless persons, even after *Pottinger*, were socially invisible yet targeted as social problems.<sup>179</sup>

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176. *Roulette v. City of Seattle*, 97 F.3d 300, 305-06 (9th Cir. 1996). Though the majority declined to acknowledge *Pottinger*, the dissent noted the court’s finding in *Pottinger* that a municipality’s interest in promoting tourism and business and in developing downtown did not rise to the level of a compelling interest and at most presented a substantial interest. *Id.* at 309 n.4.

177. *Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 856 n.6 (1994).

178. *See Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 (Cal. 1995) (choosing not to create an inference of a due process violation based on the “necessity” of violating the anti-camping ordinances by those persons with no place to go). *But see Joel v. City of Orlando*, 232 F.3d 1353, 1358 (11th Cir. 2000) (stating that “actual motivations of the enacting governmental body are entirely irrelevant . . . . The proper inquiry is concerned with the existence of a conceivably rational basis, not whether that basis was actually considered by the legislative body.”).

179. For example, many homeless persons who also were convicted of sexual crimes are not permitted in homeless shelters, thus finding themselves literally with no place to go, yet in daily violation of city anti-camping restraints. *See Robinson v. Flowers*, No. 1:11-cv-24-MP-GRJ, 2012 WL 4088862, at \*6 (N.D. Fla. May 23, 2012) (hearing tort suit by a homeless man alleging false arrest against officer when detained after listing a homeless shelter as a permanent address, but since the homeless man could not stay at the homeless shelter because he was a sex offender, he slept outside the shelter at nights); *Commonwealth v. Wilgus*, 40 A.3d 1201, 1208 (Pa. 2012) (holding that homeless persons were not exempt from disclosing permanent address as required for state sex offender registry); *Poe v. Snyder*, 834 F. Supp.

A second challenge homeless persons faced after *Pottinger* was that cities might leave citations issued under various ordinances unprosecuted. This left homeless persons without standing to challenge ordinances that targeted homeless persons' activities – such as camping. For example, in *Johnson v. City of Dallas*, the district court found that Dallas city ordinances that prohibited sleeping in public areas of the city “failed to pass constitutional muster”;<sup>180</sup> like in *Pottinger*, the court found that the ordinances violated the Eighth Amendment's prohibition against cruel and unusual punishment.<sup>181</sup> However, the Fifth Circuit overturned the district court stating that the cases failed to present a “case and controversy” under the standing requirements.<sup>182</sup> The court said:

We have thoroughly examined the designated record on appeal. While we find that numerous tickets have been issued, we find no indication that any Appellees have been convicted of violating the sleeping in public ordinance. “If none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any member of the class.”<sup>183</sup>

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2d 721 (W.D. Mich. 2011) (hearing suit by homeless persons and non-profit shelters against state to prevent enforcement of sex offender registry restrictions, where plaintiffs filed their complaint after the death of a homeless sex offender who was forced to sleep outside because overnight shelter located within 1000 feet of a school denied him access and, additionally, two other plaintiffs had been issued written warnings by law enforcement to cease using shelters within 1000 feet of a school, but, on the basis of the evidence, court provided declaratory relief that homeless persons do not violate the Michigan Sex Offender Residential Restrictions when staying in an overnight shelter); *Dye v. State*, 943 N.E.2d 928, 931 (Ind. Ct. App. 2011) (describing increased burden on homeless sex offenders in finding shelter due to residential restriction requirements); *State v. Dinkins*, 794 N.W.2d 236, 241-42 (Wis. Ct. App. 2010) (describing state's argument that state sex offender registry as applied to homeless persons is reasonable: “The State counters that Dinkins, like everyone, knows that he must sleep somewhere, and WIS. STAT. § 301.45(2)(a)5 and (e)4 merely requires incarcerated sex offenders to identify and report the address or nearest address of the place where they plan to sleep at least ten days prior to their release – even if the place is a park bench or similar on-the-street location”); *State v. Adams*, 91 So. 3d 724, 738-39 (Ala. Crim. App. 2010) (holding that Alabama statute requiring homeless sex offenders to register their residences and sanctioning those that were homeless unconstitutionally criminalized their status as homeless persons); *People v. Annin*, 15 Cal. Rptr. 3d 278, 281 (Cal. Ct. App. 2004); *People v. North*, 5 Cal. Rptr. 3d 337, 340 (Cal. Ct. App. 2003).

180. *Johnson v. City of Dallas, Tex.*, 61 F.3d 442, 443 (5th Cir. 1995)

181. *Id.*

182. *Id.* at 445.

183. *Id.* (citing *O’Shea v. Littleton*, 414 U.S. 488, 494 (1974)).

Indeed, after *Pottinger*, cities found themselves able to obtain the effect of their anti-homeless ordinances without subjecting the ordinances to legal challenge.<sup>184</sup>

These tactics of avoiding constitutional challenges seemed to come to a head in *Jones v. City of Los Angeles*.<sup>185</sup> *Jones*, like *Pottinger*, challenged an ordinance providing that “[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way.”<sup>186</sup> In *Jones*, the City of Los Angeles lacked sufficient shelter space to house all of the homeless persons that resided within the city, forcing persons to sleep on sidewalks, benches, and stairways.<sup>187</sup> The question the court confronted was whether the city could continue to enforce anti-camping ordinances, in light of the fact that homeless persons literally had no where to go. Unlike prior courts, *Jones* turned the rhetorical war on the homeless on its head, shifting the conversation from choices of the “service resistant homeless” to choices of the city to enforce restraints, despite insufficient social service availability. *Jones* did so by confronting the two problems that courts wrestled with after *Pottinger*: standing and secondary effects.<sup>188</sup>

First, the court disagreed with the city’s argument that homeless persons who had not been prosecuted under the city ordinance lacked standing.<sup>189</sup> The court held that the plaintiffs satisfied the case and controversy requirements because they were seeking an injunction for prospective injunctive relief.<sup>190</sup> The majority wrote: “The plaintiff need only establish that there is a reasonable expectation that his conduct will recur, triggering the alleged

184. *See, e.g.*, *Church v. City of Huntsville*, 30 F.3d 1332, 1344 (11th Cir. 1994) (describing a city policy in which the city avoided arresting homeless persons though they continued to disrupt their ordinary existence); *State v. Sturch*, 921 P.2d 1170, 1180 (Haw. Ct. App. 1996).

185. *Jones v. City of L.A.*, 444 F.3d 1118, 1132 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

186. *Id.* at 1123 (citing L.A., CAL., MUN. CODE § 41.18(d) (2005)). A violation of the ordinance was punishable by a fine of up to \$1000 and/or imprisonment of up to six months. *Id.* (citing L.A., CAL., MUN. CODE §11.00 (2005)).

187. *Id.* at 1122-23 (citing U.S. CONFERENCE OF MAYORS, A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA’S CITIES 101, 105 (2002)). The court described one comment from a city official noting that “the gap between the homeless population needing a shelter bed and the inventory of shelter beds is severely large.” *Id.* at 1122 (internal quotation marks omitted). The court also cited a news article quoting the Los Angeles Police Department chief who said, “If the behavior is aberrant, in the sense that it breaks the law, then there are city ordinances . . . you arrest them, prosecute them, and put them in jail. And if they do it again, you arrest them, prosecute them, and put them in jail. It’s that simple.” *Id.* (quoting Cara Mia DiMassa & Stuart Pfeifer, 2 *Strategies on Policing Homeless*, L.A. TIMES (Oct. 6, 2005), <http://articles.latimes.com/2005/oct/06/local/me-dumping6>).

188. *Id.* at 1126, 1137.

189. *Id.* at 1130.

190. *Id.* at 1127-30.

harm; he need not show that such recurrence is probable.”<sup>191</sup> The court then noted: “Avoiding illegal conduct may be impossible when the underlying criminal statute is unconstitutional.”<sup>192</sup> Looking to the facts of the homeless’ claims, the court said:

Appellants have demonstrated both past injuries and real and immediate threat of future injury: namely, they have been and are likely to be fined, arrested, incarcerated, prosecuted, and/or convicted for involuntarily violating the [city anti-camping ordinance] at night in Skid Row. These law enforcement actions restrict Appellants’ personal liberty, deprive them of property, and cause them to suffer shame and stigma.<sup>193</sup>

The court also found that the ability to raise a necessity defense did not cure other effects of the ordinance’s enforcement – namely the loss of possessions.<sup>194</sup> The court held that plaintiffs had standing to sue for injunctive relief relating to violations of unconstitutional ordinances regardless of the city’s failure to prosecute.<sup>195</sup> This allowed the court to get to the merits of the as-applied constitutional claim, whereas previous courts never considered similarly situated claims because of the procedural bar to homeless plaintiffs.<sup>196</sup>

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191. *Id.* at 1127.

192. *Id.*

193. *Id.*

194. *Id.* at 1131. The court in rejecting the possibility of raising a necessity defense as a bar to standing noted that the defense may relieve homeless persons from culpability, but they “are unlikely to subject themselves to further jail time and a trial when they can plead guilty in return for a sentence of time served and immediate release.” *Id.* In addition, “[t]he loss of . . . possessions when they are arrested and held in custody is particularly injurious because they have so few resources and may find that everything they own has disappeared by the time they return to the street.” *Id.* Risking raising a necessity defense would only further delay homeless persons’ release, making the chances of their property still existing upon release significantly lower. *See id.*

195. *Id.* at 1130. “[A]ll that is required for standing is some direct injury – for example, a deprivation of property, such as a fine, or a deprivation of liberty, such as an arrest – resulting from the plaintiff’s subjection to the criminal process due to violating the statute.” *Id.* at 1129. Citing other cases that permitted standing without conviction – *Joyce v. City and County of San Francisco* and two other similarly situated cases – the court suggested that the homeless had standing to bring claims for injuries without having suffered a conviction. *Id.* at 1129 (citing *Church v. City of Huntsville*, 30 F.3d 1332, 1335 (11th Cir. 1994); *Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 854 (N.D. Cal. 1994); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992)).

196. *See, e.g., Johnson v. City of Dallas, Tex.*, 61 F.3d 442, 445 (5th Cir. 1995) (holding that homeless persons had no standing because no conviction existed).

Having sidestepped the standing hurdle, *Jones* turned to whether the ordinances or their application passed constitutional muster.<sup>197</sup> Like *Pottinger*, the *Jones* court focused on the role of status as described by earlier Supreme Court cases *Powell* and *Robinson*.<sup>198</sup> But, unlike *Pottinger*, the court focused its attention on the involuntary circumstances of becoming homeless rather than the affirmative actions of the city.<sup>199</sup> The court described how conditions of becoming homeless may have occurred “innocently or involuntarily,” leading to the chronic condition of being forced to sleep on the streets of Skid Row.<sup>200</sup> The court wrote:

Whether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public. . . . Appellants have made a substantial showing that they are “unable to stay off the streets on the night[s] in question.”<sup>201</sup>

The *Jones* majority sided with the *Powell* dissenters and Justice White, holding that the Eighth Amendment prohibits punishing individuals for involuntary acts or conditions directly tied to one’s status – such as sleeping on the streets.<sup>202</sup> The court then more explicitly pointed out the limitation of its

197. *Jones*, 444 F.3d at 1148-49.

198. *Id.* at 1132-37. In *Robinson*, the Supreme Court considered a statute that criminalized an addiction. *Robinson v. California*, 370 U.S. 660, 667 (1962). *Jones* says about *Robinson*, “At a minimum, *Robinson* establishes that the state may not criminalize ‘being’; that is, the state may not punish a person for who he is, independent of anything he has done.” *Jones*, 444 F.3d at 1133. In *Powell v. Texas*, the court considered whether *Robinson* should be extended. 392 U.S. 514, 521 (1968). *Powell* involved a man who suffered from alcoholism and was charged with violating a statute that made it a crime to be drunk in a public place. *Id.* at 517. Both cases considered the effect of criminal sanctions as to the status of a person. The four dissenting judges in *Powell* stated that “[c]riminal penalties may not be inflicted on a person for being in a condition he is powerless to change.” *Id.* at 567 (Fortas, J., dissenting).

199. *Jones*, 444 F.3d at 1136-37. The court stated that a person “may become homeless based on factors both within and beyond his immediate control, especially in consideration of the composition of the homeless as a group . . . . That [they] may obtain shelter on some nights and may eventually escape from homelessness does not render their status at the time of arrest any less worthy of protection than a drug addict’s or an alcoholic’s.” *Id.* at 1137.

200. *Id.* at 1136.

201. *Id.* at 1136.

202. *Id.* “[T]he conduct at issue here is involuntary and inseparable from status – they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping.” *Id.* “The cases the dissent cites do not control our reading of *Robinson* and *Powell* where, as here, an Eighth Amendment challenge concerns the *involuntariness* of a criminalized act or condition inseparable from status.” *Id.* “[B]y criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants’ status as homeless individuals.” *Id.* at 1137.

holding – that “so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce [its anti-camping ordinance] . . . against homeless individuals for involuntarily sitting, lying, and sleeping in public.”<sup>203</sup>

Courts after *Jones* would continue to assert that homeless persons lacked standing to challenge city ordinances where there was no clear prosecution. For example, a Central District of California case, *Porto v. City of Laguna Beach*, considered claims arising from citations issued to homeless persons for sleeping in public.<sup>204</sup> The plaintiff argued that placing conditions on homeless persons’ ability to stay in the city’s homeless shelter (such as prohibitions on possessions) made application of the no-sleeping-in-public ordinance unconstitutional.<sup>205</sup> Distinguishing the issue of standing in *Jones* (and later decisions) the court said, “[P]laintiffs suffered meaningful injuries under the ordinances, such as arrest, jail time, fines, or property loss while under arrest.”<sup>206</sup> The court further stated that he had “not . . . yet suffered any tangible harm related to the anti-camping ordinance; rather he allege[d] only that he [had] been warned against violating the ordinance and that he is fearful he will be cited under it.”<sup>207</sup> The court found that two warnings by police without citations also did not “demonstrate a ‘real and immediate’ risk of citation or other injury” which would give rise to prospective injunctive relief – such as in *Jones*.<sup>208</sup>

But it was the last limitation asserted by *Jones* that would have the greatest impact on homelessness cases to follow. The Ninth Circuit’s opinion in *Jones* demonstrated an as-applied failure of the city’s ordinances when directed towards homeless persons. The combination of a deficiency of shelter space, with the court’s view that many homeless persons were homeless “innocently or involuntarily,” meant that homeless persons were being criminalized by virtue of status with no means of avoiding the criminal sanction.<sup>209</sup> But by predicating its holding on the city’s responsiveness to the homeless problem (i.e., by providing adequate shelter for the homeless population), *Jones* created avenues for future courts to uphold city ordinances by distin-

203. *Id.* at 1138.

204. *Porto v. City of Laguna Beach*, No. SACV 12-00501-DOC, 2012 WL 3810475, at \*2 (C.D. Cal. Aug. 7, 2012).

205. *Id.* at \*1. In *Porto*, the plaintiff attacked the constitutionality of the city homeless shelter policies arguing that they required “guests to sign a liability waiver and demonstrate residency in Laguna Beach . . . .” *Id.*

206. *Id.* at \*7.

207. *Id.*

208. *Id.* In *Jones*, homeless persons were prevented from, “at all times and places . . . involuntarily sitting, lying, and sleeping in public.” *Jones v. City of L.A.*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007). The *Jones* court found that “[a]ppellants are entitled at a minimum to a narrowly tailored injunction against the City’s enforcement” of the statute preventing a person from sitting, lying, or sleeping in public. *Id.*

209. *Jones*, 444 F.3d at 1136.



guishing itself from *Jones*.<sup>210</sup> Thus, like cases that followed *Pottinger*, where courts distinguished city actions by comparing city motives against the City of Miami's targeting intent – courts began to distinguish *Jones* by pointing out that when the city's stock of homeless shelter space is greater than the number of homeless persons, there would be no constitutional violation.

For example, in *Bell v. City of Boise*, the District Court of Idaho held that the Boise Police Department's choice to not enforce the city ordinance when the shelters were full meant that the ordinance did not constitute cruel and unusual punishment.<sup>211</sup> The Special Order stated,

“[O]fficers have discretion to enforce camping/sleeping in public ordinances *except* when, [1] Person is on public property and [2] There is no available overnight shelter.” . . . To ensure that officers know when shelters are full, shelter personnel agreed to call the Boise Police Department around 11 p.m. if the shelter is full. . . . The Boise State University Dispatch office, which has a contract with the Boise Police Department for law enforcement services at the university, then distributes the information via Department-wide e-mail and records the information. . . . Thus, the Boise police officers who would otherwise enforce the Camping and Sleeping Ordinances are directed not to do so when shelter space is unavailable, and the City has devised a way to obtain this information directly from the shelters.<sup>212</sup>

Other courts considered whether the availability of shelter inventory meant that enforcement of a no-sleeping and anti-camping ordinance crimi-

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210. *See, e.g.*, *Benson v. City of Chicago*, No. 06 C 1123, 2006 WL 2949521, at \*2-3 (N.D. Ill. Oct. 12, 2006) (distinguishing the *Jones* opinion's severity by pointing out that Chicago did not prohibit sleeping, sitting or lying under all circumstances).

211. *Bell v. City of Boise*, 834 F. Supp. 2d 1103, 1111-12 (D. Idaho 2011) (“[T]he Eighth Amendment Claims are mooted in part and otherwise fail as a matter of law: the undisputed facts reflect that the homeless may sleep in the parks during the day (whether or not shelter space is available) and may sleep in the parks at night in the event shelter space is unavailable.”), *rev'd*, 709 F.3d 890 (9th Cir. 2013).

212. *Id.* at 1111-12; *see also Bell*, 709 F.3d at 901 (holding that the adoption of a special order rather than a legislative policy did not render the city policy moot in regard to plaintiff's suit for prospective relief). The district court also described “available overnight shelter” as:

“a public or private shelter, with an available overnight space, open to an individual or family unit experiencing homelessness at no charge. To qualify as available, the space must take into account sex, marital and familial status, and disabilities.” . . . The Special Order further explains that otherwise available shelter space is *not* considered available to a particular individual if it “is not suitable to meet the individual's disability needs, or the individual has exceeded the maximum allowable stay [at the shelter].” . . . This individual exception expressly excludes “voluntary actions such as intoxication, drug use or unruly behavior.” . . . The Special Order also clarifies that “sleeping in a public park during park hours is not prohibited.”

*Bell*, 834 F. Supp. 2d at 1111.

nalized status, with mixed results.<sup>213</sup> For example, in *Catron v. City of St. Petersburg*, the city unsuccessfully argued that the presence of inventory meant that the application of a no-sleeping ordinance was constitutionally valid.<sup>214</sup> But these arguments seemed to run into obstacles in the Ninth Circuit, where, as in other circuits, courts embraced the available inventory argument as valid city theory.<sup>215</sup>

And even in the Ninth Circuit, courts found room to disagree with the *Jones* view that a lack of inventory equated to an Eighth Amendment violation. In *Lehr v. City of Sacramento*, the plaintiffs alleged that, like in *Jones*,

the vast majority of homeless people on the streets at any given time have neither a legal place to go nor sufficient resources to obtain one. This is allegedly true absent any decisions they might make over whatever resources they do control, except perhaps in the very long term and with the assistance of multiple programs or institutions. While no generalization can adequately describe the diverse population of homeless people in Sacramento, most of these individuals and families are poor, and without resources to pay for stable housing. A large percentage are disabled, either physically or mentally, and, in addition, have problems with substance abuse.<sup>216</sup>

Yet despite the similarities between *Jones* and the plaintiffs in *Lehr*, the Eastern District of California declined to follow the Ninth Circuit's earlier view, on the basis that the judgment was vacated as part of a settlement with the city.<sup>217</sup> Noting the pervasive problems that homelessness presents, the

213. Courts before *Jones* noted that the lack of shelter inventory created strains on the city's ability to enforce anti-camping ordinances. *See, e.g., Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at \*1 (E.D. Cal. Dec. 8, 2006).

214. *See Catron v. City of St. Petersburg*, No. 8:09-cv-923-T-23EAJ, 2009 WL 3837789, at \*3 n.6 (M.D. Fla. Nov. 17, 2009) (citing presence of internal ordinance application memos as evidence of ordinance's sufficiency):

The memoranda advise an officer to educate the individual that is observed sleeping "in the right of way" about the ordinance and "afford the [individual] the opportunity to voluntarily comply . . . by vacating the right of way." . . . The memoranda further advise that if no shelter space exists an officer should not charge the individual with a violation of the ordinance.

*Id.*

215. *See, e.g., Catron v. City of St. Petersburg*, 658 F.3d 1260, 1272 (11th Cir. 2011).

216. *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1222 (E.D. Cal. 2009).

217. *Id.* at 1231. "[A]s a threshold matter, the Court notes that, not only was the *Jones* decision subsequently vacated, it was issued by a panel split 2-1, and was accompanied by a powerful dissent." *Id.* at 1227. "The parties have filed a joint motion informing us that they have settled this action and seeking dismissal of the appeal, remand, and withdrawal of our opinion . . ." *Jones v. City of L.A.*, 505 F.3d 1006 (9th Cir. 2007).

court declined to expand the horizons of the Eighth Amendment.<sup>218</sup> Instead, the court held that the Supreme Court constrained a status based punishment theory to those cases that involve conduct that society has no interest in preventing.<sup>219</sup> In the court's view, the *Lehr* ordinances targeted conduct, not status.<sup>220</sup>

After *Pottinger* and *Jones*, courts found safe harbors in both the procedural limitations and the substantive distinctions of city actions. Standing continued to bar plaintiffs from bringing claims while allowing cities to continue enforcement and receive the effect of enforcement. After *Pottinger*, the limitation was expressed by the failure to show "prosecution," despite suffering the effect of the citation.<sup>221</sup> After *Jones* the limitation was expressed by suggesting that the "injury" was not as severe as the one that gave rise to standing in *Jones*, or that plaintiffs didn't lose property, were not arrested, or cited.<sup>222</sup> Similarly, courts also found safe harbors by pointing to the fact that the city action in their cases was not as severe as the action in either *Jones* or *Pottinger*.<sup>223</sup> That is, as long as cities did not create legislative records showing an intent to treat the status of homeless persons differently, or as long as the total inventory of empty beds was greater than the number of homeless persons in the city, ordinances survived constitutional challenges despite criminalizing the status of being homeless.<sup>224</sup>

## 2. Hygiene Ordinances and Rules as Means of Excluding Homeless Persons

A second category of public area restraints against homeless persons involves so-called hygiene ordinances. Like the anti-camping ordinances in public places, the hygiene-based provisions pitted homeless persons' constitutional rights to access a particular place against the state's choice to enforce limitations on those rights, primarily in a First Amendment and equal protection context. Unlike the anti-camping ordinances, the hygiene cases presented the question of when a subjective interpretation of seemingly neutral rules are enforceable and when they are not. Arguably, the cases present two types

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218. *Lehr*, 624 F. Supp. 2d at 1231.

219. *Id.*

220. *Id.* at 1231-32.

221. See discussion *supra* notes 189-196 and accompanying text (citing *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995); *Church v. City of Huntsville*, 30 F.3d 1332, 1336 (11th Cir. 1994)); see also *State v. Sturch*, 921 P.2d 1170, 1172 (Haw. Ct. App. 1996).

222. See, e.g., *Lehr*, 624 F. Supp. 2d at 1227, 1235 (rejecting plaintiffs' standing as a status-based class).

223. See discussion *supra* notes 184-220 and accompanying text.

224. See, e.g., *Bell v. City of Boise*, 834 F. Supp. 2d 1103, 1107-08 (D. Idaho 2011), *rev'd*, 709 F.3d 890 (9th Cir. 2013); *Anderson v. City of Portland*, No. Civ. 09-1447-AA, 2011 WL 6130598, at \*2 (D. Or. Dec. 7, 2011).

of subjective valuations – one that is enforceable in the clothing of objective rule-making, and one that is not.

In *Kreimer v. Bureau of Police for the Town of Morrison*, the Third Circuit considered the enforcement of code of conduct rules enforced by the local public library against a homeless patron.<sup>225</sup> Specifically, a homeless man was expelled from the library under the auspices of the following provisions in the library's code of conduct:

1. Patrons shall be engaged in normal activities associated with the use of a public library while in the building. Patrons not engaged in reading, studying, or using library materials may be asked to leave the building. Loitering will not be tolerated.

...

9. Patron dress and personal hygiene shall conform to the standard of the community for public places. This shall include the repair or cleanliness of garments.<sup>226</sup>

After being expelled, the New Jersey office of the American Civil Liberties Union sent a letter to the Morristown Library, indicating several provisions were violations of the Due Process Clause of the Fourteenth Amendment because they were vague.<sup>227</sup> The ACLU pointed to provisions relating to annoying behavior as being “constitutionally infirm.”<sup>228</sup> It also alleged that provisions prohibiting loitering were too imprecise.<sup>229</sup> The ACLU also suggested that the rule allowing the exclusions of patrons based on “personal dress and hygiene [that did not] conform to the ‘community standards’” was “equally offensive.”<sup>230</sup> Lastly, the ACLU pointed out that these provisions were vague in their enforcement because they allowed library officials to use their own discretion for interpretation of whether the rules had been violated.<sup>231</sup>

In response to the ACLU's letter, the library's board amended the rules, specifically Rule Nine, to provide: “[p]atrons shall not be permitted to enter the building without a shirt or other covering of their upper bodies or without shoes or other footwear. Patrons whose bodily hygiene is offensive so as to constitute a nuisance to other persons shall be required to leave the building.”<sup>232</sup> The ACLU communicated a continued displeasure with the hygiene

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225. 958 F.2d 1242, 1246 (3d Cir. 1992).

226. *Id.* at 1247.

227. *Id.* at 1247-48.

228. *Id.* at 1248.

229. *Id.* at 1247-48.

230. *Id.* at 1248.

231. *Id.*

232. *Id.* The Board also changed Rules One and Five, as well as two unnumbered paragraphs following Rule Nine. *Id.* Rule One was changed from *asking* those who

rules because the discretion afforded library staff “will result in discriminatory treatment of the homeless by virtue of their status.”<sup>233</sup> Subsequently, Richard Kreimer was expelled from the premises for failure to comply with the hygiene requirements.<sup>234</sup>

Kreimer brought suit against the library, alleging the rules were “vague and overbroad, both on their face and as applied by library employees, in violation of the plaintiffs [sic] rights under the First Amendment and plaintiff’s right to due process of law guaranteed by the Fourteenth Amendment to the United States Constitution,” as well as a violation of equal protection.<sup>235</sup> The equal protection claim asserted that plaintiff could not meet the library’s “subjective (and vague) standards . . . because of [his] homeless status or because of an involuntary physical condition.”<sup>236</sup> In response, the library

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were not engaged in library activities to leave the building to *requiring* that those who were not engaged in library activities to leave the building. *Id.* Rule Five’s amendment resulted in stronger language and more specifics. *Id.* A person could not “harass or annoy” others; in the previous Rule Five, the word “harass” was absent. *Id.* In addition, a person could not stare or follow another person “with the intent to annoy that person . . .” *Id.* The amended Rule Five included that a person could not sing or talk in monologues or “behav[e] in a manner which reasonably [could] be expected to disturb,” whereas before, a person could not sing or talk to oneself or behave in a way that would result in disturbance. *Id.* This amendment resulted in the requirement that a person had to have a reasonable expectation that his or her behavior would disturb others, a subjective factor that was determined by the audience. *Id.* In addition to the Rule Nine amendment, the Rule also stated, “Any patron not abiding by these or other rules and regulations of the library shall be asked to leave the library premises. Library employees shall contact the Morristown Police if deemed advisable.” *Id.* In other words, the library was declaring its intent to contact police. *Id.* Also, the rules stated that “[a]ny patron who violate[d] the Library rules and regulations shall be denied the privilege of access to the Library by the Library Board of Trustees, on recommendation of the Library Director.” *Id.* The library had the authority, under this amendment to the rules, to ban a person from entering the library. *Id.*

233. *Id.* (internal quotation marks omitted).

234. *Id.*

235. *Id.* (alteration in original) (internal quotation marks omitted). Kreimer’s original complaint was filed *pro se* for “pain and suffering, emotional distress, humiliation, negligence, violation of . . . civil rights to enter a public building, [F]irst [A]mendment rights violations, harassment, defamation of character, and discrimination because of [his] homeless status” as a result of being banished from the library. *Id.* at 1248-49 (internal quotation marks omitted). Kreimer then amended his complaint to include more defendants: the Morristown Chief of Police, the President of the library, and the Morristown Business Administrator. *Id.* at 1249. Kreimer filed another amendment to include more defendants, including the former and then-current mayors of Morristown, the then-current mayor and business administrator of Morris Township, another police officer, two library employees, and the President of the Board. *Id.* Approximately four months later, appointed counsel for Kreimer filed an additional and final complaint, which is quoted in the text of this Article. *Id.*

236. *Id.*

filed a counter claim that sought an injunction against Kreimer from entering the library or harassing patrons.<sup>237</sup> The district court found in favor of Kreimer's motion for summary judgment against the library.<sup>238</sup> The district court ruled that Rules One and Nine were null on their face, and enjoined the library from enforcing the rules.<sup>239</sup> The Third Circuit on review reversed, finding no violation of due process in the rules.<sup>240</sup>

After finding that the First Amendment encompasses a right to access information at a public library, the Third Circuit turned to consider the facial and applied validity of the rules in question.<sup>241</sup> The court decided the library was a limited public forum and then considered whether the rules in question were facially problematic or applied in an unconstitutional way.<sup>242</sup>

237. *Id.*

238. *Id.* at 1249-50. The library counterclaimed and asked "the court [to] issue an order 'restraining and enjoining [Kreimer] from entering . . . [the Library and] . . . restraining and enjoining . . . Kreimer from harassing the patrons and employees of the Library in or about the Library premises including the sidewalks and streets abutting the Library,'" and also for attorney's fees and costs. *Id.* at 1249 (alterations in original). Then the library filed a motion to dismiss or for summary judgment that would declare the library rules valid, while Kreimer sought to dismiss the counterclaim and summary judgment declaring the rules invalid under the First and Fourteenth Amendments. *Id.* at 1249-50. The District Court ruled for Kreimer, holding the rules "null and void." *Id.* at 1250 (internal quotation marks omitted).

239. *Kreimer v. Bureau of Police for Town of Morristown*, 765 F. Supp. 181, 197-98 (D.N.J. 1991), *rev'd*, 958 F.2d 1242 (3d Cir. 1992). The court held that the rules were subject to First Amendment analysis due to their restrictions of access to "public reading material." *Id.* at 186. The court reasoned that "[t]he policy does not condition exclusion [of persons] upon an actual or imminent disruption or disturbance as a result of [annoying] behavior or hygiene, and hence, the policy does not reasonably effectuate its stated goal of preserving the good order of the library." *Id.* at 189. The court further noted that the last two paragraphs of Rule Nine were not narrowly tailored and, therefore, violated the First Amendment. *Id.* The court found the rules "[did] not provide for alternative channels of communication" to those who did not have access to the library, holding that both Rules One and Five violated the First Amendment and were overly broad. *Id.* Finally, the court found that Rule Nine was vague as it was "especially susceptible to arbitrary and discriminatory enforcement." *Id.* at 194.

240. *Kreimer*, 958 F.2d at 1270-71.

241. *Id.* at 1255.

242. *Id.* at 1250, 1259. The court first determined the "nature of the forum, because the extent to which the Government may limit access depends on whether the forum is public or nonpublic." *Id.* at 1255 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 797 (1985)). This court analyzed this issue by using the forum analysis from *Perry Education Association v. Perry Local Educators' Association*. *Id.* at 1255-56 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983)). The *Perry* Court found three different classes of government fora for evaluating the existence of First Amendment protections: (1) places that traditionally have been a forum for assembly and debate, (2) public property that is a place for "expressive activity," and (3) nonpublic places where the government

As a facial matter, the court said Rule Nine's hygiene limitation was sufficiently narrow to promote the significant government interest of ensuring that "all patrons of the [Library] [can] use its facilities *to the maximum extent possible* during its regularly scheduled hours."<sup>243</sup> On whether this rule created a disparate treatment of homeless individuals, the court said:

While the district court was probably correct that the rule may disproportionately affect the homeless who have limited access to bathing facilities, this fact is irrelevant to a facial challenge and further would not justify permitting a would-be patron, with hygiene so offensive that it constitutes a nuisance, to force other patrons to leave the Library, or to inhibit Library employees from performing their duties. Moreover, we do not face the more difficult scenario in which one individual possesses First Amendment rights and others do not. Here, if the First Amendment protects the right to reasonable access to a public library, as we hold it does, this is a right shared equally by all residents of Morristown and Morris Township. . . . Kreimer's right has no lesser, or greater, significance than that of other residents. According-

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can enact time, place, and manner restrictions as long as the restriction is reasonable and not intended "to suppress expression." *Id.* at 1255 (quoting *Perry*, 473 U.S. at 45-46). The court found, in the context of *Perry*, that "[i]t is clear to us that a public library . . . is sufficiently dissimilar to a public park, sidewalk or street that it cannot reasonably be deemed to constitute a traditional public forum." *Id.* at 1256. The court went on to determine if the library is a designated public forum by analyzing the traditional test and the modern developments through Supreme Court decisions of similar cases. *Id.* at 1256-59 (citing *United States v. Kokinda*, 497 U.S. 720 (1990); *Cornelius*, 473 U.S. 788; *Widmar v. Vincent*, 454 U.S. 263 (1981); *Madison Joint Sch. Dist. v. Wis. Emp't Relations Comm'n.*, 429 U.S. 167 (1976); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)). The court found that the library is a type of designated public forum, a limited public forum, which leads to analyzing the government intent of the library space, the extent of use, and the nature of the space. *Id.* at 1259-61. The fact that the library is open to the public does not avail the library to all First Amendment activities. *Id.* at 1261 n.21. Therefore, the court limited its ruling, finding "the Library is obligated only to permit the public to exercise rights that are consistent with the nature of the Library and consistent with the government's intent in designating the Library as a public forum." *Id.* at 1262.

243. *Id.* at 1264 (alteration in original) (internal quotation marks omitted). When determining whether Rule Nine was narrowly tailored, the court noted that the rule does not have to be the "least-restrictive or least-intrusive means" of furthering the government's interest." *Id.* (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989)). The court found that Rule Nine was narrowly tailored and advanced the library's interest in requiring "non-offensive bodily hygiene" to prevent disturbing another person's "use and enjoyment of the Library;" the rule did so while also promoting the interest of "maintaining [the library's] facilities in a sanitary and attractive condition." *Id.*

ly, his right to reasonable access to the Library cannot be expanded to such an extent that it denies others the same guarantee.<sup>244</sup>

Similarly, the court dismissed the proposition that the rule failed to meet constitutional muster due to vagueness concerns:

Although we agree that the “nuisance” standard contained in this rule is broad, in our view it is necessarily so, for it would be impossible to list all the various factual predicates of a nuisance. As Professor Tribe has noted, “in any particular area, the legislature confronts a dilemma: to draft with narrow particularity is to risk nullification by easy invasion of the legislative purpose; to draft with great generality is to risk ensnarement of the innocent in a net designed for others.” . . . In this case, however, the rule’s broad sweep is not synonymous with vagueness. The determination of whether a given patron’s hygiene constitutes a “nuisance” involves an objective reasonableness test, not an annoyance test.<sup>245</sup>

Considering the equal protection claim, the court declined to find that the rules imposed any *legally* significant burden on homeless persons. The court said: “Further, in any event, as the homeless do not constitute a suspect class, the rules need only survive the lowest standard of review for equal protection purposes. Our previous discussion forecloses any serious contention that they do not pass muster under this standard.”<sup>246</sup>

Importantly, *Kreimer’s* application of the library’s hygiene standard passed constitutional muster because it drew upon a supposed objective standard – when a patron’s presence constituted a “nuisance” under New Jersey law.<sup>247</sup> That nuisance standard allowed the library to attach its objective determinations of nuisance to any particular patron’s subjective discomfort due to the presence of a homeless person.<sup>248</sup>

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244. *Id.* at 1264-65.

245. *Id.* at 1268. Similarly, the court also dismissed the proposition that Rule Five and Rule One were vague. *Id.* at 1267-68. The court found that the subjective portion of the “annoyance test” was overcome by Rule Five’s listing of specific behavior that is annoying (that of staring at or following another person), therefore, Rule Five was not vague. *Id.* at 1268. Likewise, Rule One was not found to be unconstitutionally vague, because the rule provided notice to library users that they were required to make use of the library activities in order to be able to remain in the library. *Id.* at 1267. The library officials were accorded a certain amount of deference to eject those who were not engaging in library activities (quiet contemplation is included as a library activity). *Id.* Justice White recognized the discretion that library officials had by noting that a library could proscribe “loafing” or other library activities that are not “normal.” *Id.* at 1267 n.33 (citing *Brown v. Louisiana*, 383 U.S. 131, 150-51 (1966) (White, J., concurring)).

246. *Id.* at 1269 n.36.

247. *Id.* at 1269-70.

248. *Id.* at 1268.



Nearly ten years later, a similar case involving a homeless patron being expelled from a public library came before the District of Columbia District Court. In *Armstrong v. District of Columbia Public Library*, the plaintiff was expelled from the Martin Luther King Public Library for failure to pass the appearance standards promulgated by the library.<sup>249</sup> The plaintiff tried to enter the library “wearing a shirt, shoes, pants, several sweaters, and two winter jackets to stave off the cold weather.”<sup>250</sup> When the plaintiff attempted to enter the library, he was turned away by a security guard who told plaintiff that he needed to “clean up” before entering the building.<sup>251</sup>

Unlike in *Kreimer*, the court in *Armstrong* found that the regulation went beyond the application of an objective nuisance test, defined as “unduly [interfering] with the exercise of the common right.”<sup>252</sup> Specifically, the lack of a legal standard or a specific definition of “objectionable appearance,” called for the exercise of a subjective interpretation of the objectionable characteristics.<sup>253</sup> The court noted that the lack of specific objective standards for

249. The library maintained a policy that provided for the exclusion of patrons based on “[o]bjectionable appearance (barefooted, bare-chested, body odor, filthy clothing, etc.) . . .” 154 F. Supp. 2d 67, 70 n.2 (D.D.C. 2001). The policy was originally promulgated with a title which included the phrase “Loiterers and Vagrants.” *Id.* at 70. That phrase was deleted in 1982, though the substance of the policy remained unchanged. *Id.* As the court noted, the policy was passed because “a proliferation of more street people and more homeless” in 1979 “precipitated the need for [the] policy.” *Id.* (internal quotation marks omitted).

250. *Id.* Bundling clothing is a common homeless strategy that serves numerous functions. First, it is a protection against the weather elements, as the plaintiff in *Armstrong* indicated. *Id.* Second, clothing can serve as a type of “armor” against violent attacks. See *A Primer on Homeless Behavior*, STATESMAN (July 31, 2010, 10:35 PM), <http://www.statesman.com/news/news/local/a-primer-on-homeless-behavior/nRwjf/>. Third, bundling clothing helps ensure that homeless persons will not lose items of property because they are left unattended – specifically clothing that is essential to stave off winter elements. See Kevin Bundy, Note, “Officer, Where’s My Stuff?”, 1 HASTINGS RACE & POVERTY L. J. 57, 68-69 (2003).

251. *Armstrong*, 154 F. Supp. 2d at 70.

252. *Id.* at 77-79.

253. *Id.* at 77-78. The court noted there are many examples of how the subjective interpretation of the “objectionable appearance” bar to the library was difficult to apply and often left the library security guards consistently questioning whether or not to bar someone from the library. *Id.* at 78. The chief of security at the library stated that, “no training and no written materials are available to the guards or other personnel to instruct them how to apply the regulation,” and in attempting to apply the regulation, the security guards often had to “contact Mr. Williams or other supervisors, only to be instructed to apply the appearance provision based not simply on its plain language, but in accordance with the way Mr. Williams personally intend[ed] that the regulation be applied.” *Id.* Mr. Williams admitted that he could not describe over phone or radio whether or not a person was barred based upon a description from the guards. *Id.* Mr. Williams went further to state that “when he [could not] respond to the calls . . . the D.C. Metropolitan police, who [were] also not trained in interpreting

defining exclusion criteria caused the regulation to fail for vagueness.<sup>254</sup> In short, the rules in *Kreimer* represented objective determination of “offensive behavior” because library employees merely enforced other patrons’ subjective expectations, while *Armstrong* represented the public library employee’s subjective judgment alone.<sup>255</sup> Thus, like in so many other instances of legal interactions involving homeless persons, even so-called “objective determinations” are based on someone’s subjective judgment.

### 3. Seizure of Homeless Property

In addition to the question of whether homeless persons can occupy a public place, another question has come under scrutiny in various courts: whether homeless persons’ possessions may exist in a public space. Cities have seized homeless persons’ possessions left in public under various theories, such as cleaning the streets from environmental harms,<sup>256</sup> guarding against criminal activity,<sup>257</sup> or acting as a guardian for abandoned items in order to return personal property to the right owner.<sup>258</sup>

Early cases considering the seizure of homeless property tended to navigate between the city’s responsibility as finder of personal property and its obligations not to carry out unreasonable searches and seizures under the Fourth Amendment. For example, in *Joyce v. City and County of San Fran-*

or applying the barring regulation, [were] often called to assist the Library personnel in applying the regulation.” *Id.*

254. *Id.* In comparing this case to *Kreimer*, the court noted that this regulation “necessarily falls short of the objective standard required to survive a vagueness challenge,” because unlike *Kreimer*, there was no “cognizable legal definition to clarify exactly what appearances, or degrees of filth and odor are meant to be prohibited.” *Id.*

255. *Id.*; see also *Lu v. Hulme*, No. CA 12-11117-MLW, 2013 WL 1331028, at \*5 (D. Mass. Mar. 30, 2013). In *Lu v. Hulme*, the homeless plaintiff was excluded from the Boston Public Library under a policy that forbade patrons from “bringing non-assistive ‘wheeled devices’ into the Library, including ‘shopping carts,’ as well as ‘garbage, articles with a foul odor, or articles which, alone or in their aggregate, impede the use of the library by other users.’” *Lu*, 2013 WL 1331028, at \*2. Plaintiff alleged in his complaint that the library personnel instructed plaintiff that “homeless people cannot come in with belongings.” *Id.* (internal quotation marks omitted). Later the director of the library conveyed that “there had been ‘a homeless guy, who could not come in with his belongings [who] later found two suitcases and put everything in the suitcases. We then allowed him to come in with the suitcases.’” *Id.* The district court found that the plaintiff demonstrated a plausible as-applied challenge to the library policy, without having to evaluate the content of the policy. *Id.* at \*7.

256. See, e.g., *Love v. City of Chicago*, No. 96 C 0396, 1998 WL 60804, at \*1 (N.D. Ill. Feb. 6, 1998).

257. See, e.g., *Justin v. City of L.A.*, No. CV0012352LGBAIJX, 2000 WL 1808426, at \*8 (C.D. Cal. Dec. 5, 2000); *Joyce v. City & Cnty. of S.F.*, 846 F. Supp. 843, 847, 863-64 (N.D. Cal. 1994).

258. See, e.g., *Joyce*, 846 F. Supp. at 863-64.

*cisco*, the plaintiffs alleged (and the court agreed) that the police department failed to comply with either state law or police department procedures when confiscating and destroying found property.<sup>259</sup> However, the district court refused to grant the plaintiffs' injunction because the city recently enacted new policies for the retention of found or abandoned property in public areas.<sup>260</sup>

Some courts found that procedural bars prevented homeless persons from articulating a claim for injunctive relief against the seizure of personal property. In *Lehr v. City of Sacramento*, the court dismissed the Fourth and Fourteenth Amendment claims of all homeless persons who had not alleged that they actually had property confiscated by the city.<sup>261</sup> In other cases though, the mere prospect that a seizure and destruction of property occurred was a valid basis to allow homeless plaintiffs to proceed in making their

259. *Id.* at 863.

260. The court described the city's arguments as follows:

The City argue[d] that, while the law protect[ed] unabandoned property left in public places, neither state nor local laws protect[ed] abandoned property. The City argues the distinction between abandoned and unabandoned property involves a "difficult determination," and that in order to insure that unabandoned property is stored and held for possible return to its owner, "the City recently has promulgated policies to address this issue." Specifically, the City cites the practice of the Department of Public Works which directs that property of value found in encampment or other public places is to be bagged, tagged and held at a dispatch office for its owner within ninety days.

*Id.* at 863-64.

261. 624 F. Supp. 2d 1218, 1235-36 (E.D. Cal. 2009). The court agreed with defendants' argument that the plaintiffs had not "allege[d] or attempt[ed] to show that any of the individual Defendants ever confiscated their property," therefore, the plaintiffs had no evidence and no standing for the violation of plaintiffs' Fourth and Fourteenth Amendment rights. *Id.* The court continued, stating, "The entities in this case claim to suffer injury by way of the confiscation of Plaintiffs' property because these entities task themselves with replacing those items. That injury is simply too attenuated, not to mention voluntarily inflicted, to suffice to establish standing here." *Id.* at 1235 n.7.

The *Lehr* court explicitly rejected the *Jones v. City of Los Angeles* majority's analysis of the Eighth Amendment, stating that its rationale was "tenuous at best." *Id.* at 1231. "[D]espite any similarities between *Jones* and the instant case, this Court is not now bound by the majority's rationale and cannot today accept its logic. Rather, this Court finds the *Jones* dissent to be the more persuasive and well-reasoned opinion." *Id.* The court continued, stating that upholding the Eighth Amendment claim would require "the existence of some form of *mens rea* [as] a constitutional prerequisite to a criminal conviction . . . [and the court] finds such a holding, even to the extent it may have followed from *Jones*, to be contrary to both the spirit and the letter of the law." *Id.* at 1234. "It would potentially provide constitutional recourse to anyone convicted on the basis of conduct derivative of a condition he is allegedly 'powerless to change[.]' . . . A decision in favor of Plaintiffs today would be dangerous bordering on irresponsible." *Id.* The court found that the plaintiffs' Eighth Amendment claims failed as a matter of law. *Id.*

case.<sup>262</sup> In *Justin v. City of Los Angeles*, the court noted that homeless persons in the Skid Row area have a “known practice of leaving possessions momentarily” and the known high “value they place on the few possessions they do have” is sufficient to warrant continuation of the case despite the fact they may have failed to identify possessions seized or identities of city officials who seized their property.<sup>263</sup>

A city’s seizure of personal property of homeless persons has received the most scrutiny when the seizure violates a substantive due process right. For example, two recent cases each found that homeless plaintiffs stated claims for relief from seizures that violated plaintiffs’ due process rights relating to life and property. In *Sanchez v. City of Fresno*, the Eastern District of California found that homeless plaintiffs adequately stated a claim for relief when city sweeps by the City of Fresno destroyed temporary homeless shelters in known encampments.<sup>264</sup> Citing the “danger creation” liability doctrine, the court held that the city could be liable for “creating or exposing

262. *Justin*, 2000 WL 1808426, at \*9.

263. *Id.* at \*10. See also *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992) (holding that the “property of homeless individuals is due no less protection under the [F]ourth [A]mendment than that of the rest of society”). The Court in *Pottinger* allowed plaintiffs to present evidence of belongings seized by the police and the forced abandonment of possessions by homeless persons. *Id.* The court also found that the city’s interest in having clean parks was outweighed by the interests of the homeless plaintiffs in their belongings. *Id.*

264. 914 F. Supp. 2d 1079 (E.D. Cal. 2012). This is not the first case in the city of Fresno involving the seizure and destruction of homeless persons’ property. See *Kincaid v. City of Fresno*, 244 F.R.D. 597 (E.D. Cal. 2007). In *Kincaid*, after a class action lawsuit was filed against the city, the parties agreed to a settlement on the eve of the trial. See *Kincaid v. City of Fresno*, AM. CIVIL LIBERTIES UNION OF N. CAL. (May 21, 2009), <https://www.aclunc.org/our-work/legal-docket/kincaid-v-city-fresno>. The City agreed to pay over a million dollars to the class, which would be allocated in small allowances and to third parties providing living accommodations, as well as the attorneys’ fees and costs of the class action counsel. *Id.* (contained in link entitled “Settlement Agreement with City of Fresno and Settlement Plan”). In the agreement that had a time period of five years, the City of Fresno was required to give notice before any clean up (unless there was an immediate threat to health or safety). *Id.* The city, in cleaning up, was also required to acknowledge “the fact that property is unattended does not necessarily mean that it has been discarded . . . [any] [r]easonable doubt about whether property is ‘trash or debris’ or valuable property should be resolved in favor of the conclusion that the property is valuable and should not be discarded.” Fresno, Cal., Garbage Removal; Clean-Up of Temporary Shelters; and Code Enforcement Abatement Procedures (Aug. 30, 2007) (also referred to as “Fresno Administrative Order 6-23”); see also *Sanchez*, 914 F. Supp. 2d at 1092-93 (discussing the settlement agreement in *Kincaid* and Fresno Administrative Order 6-23). In 2011, the City of Fresno “set in motion a plan to eradicate a number of small shelters used by homeless individuals” and continued the destruction even after the city was informed that it would result in “the destruction of valuable personal property and the demolition of entire tents and shelters.” *Sanchez*, 914 F. Supp. 2d at 1093.

individuals to danger that they otherwise would not have faced.”<sup>265</sup> The court noted that the allegations against the city and city officials were sufficient to raise a claim under the danger creation doctrine.<sup>266</sup> Specifically, the court found that the city “timed the demolition of [plaintiffs’] shelter and personal property . . . to occur at the onset of the winter months that would bring cold and freezing temperatures, rain, and other difficult physical conditions”<sup>267</sup> and that the city “knew or should reasonably have known that their conduct” threatened plaintiff’s survival.<sup>268</sup> Acting contrary to these considerations “created [a] substantial risk to [plaintiffs’] ability to continue to survive and [was] shocking to the conscience.”<sup>269</sup>

Similarly, in *Lavan v. City of Los Angeles*, the Ninth Circuit affirmed the Central District of California’s finding that seizure of homeless possessions constituted a violation of Fourth and Fourteenth Amendment rights against forfeiture of property.<sup>270</sup> In *Lavan*, the City of Los Angeles claimed that homeless persons abandoned their personal property, leaving it in the streets and sidewalks.<sup>271</sup> The city argued that it was forced to seize and destroy the homeless plaintiffs’ possessions to facilitate cleaning the streets in the name of environmental health.<sup>272</sup> The court disagreed.<sup>273</sup> Addressing the Fourth Amendment claim, the court stated, “[B]y seizing and destroying [plaintiffs’] unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with [plaintiffs’] possessory interests in that property.

265. *Sanchez*, 914 F. Supp. 2d at 1101-02 (citing *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989)); *see also* *Munger v. City of Glasgow Police Dep’t*, 227 F.3d 1082, 1086 (9th Cir. 2000); *Penilla v. City of Huntington Park*, 115 F.3d 707, 710 (9th Cir. 1997); *L.W. v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992).

266. *Sanchez*, 914 F. Supp. 2d at 1102.

267. *Id.* at 1100.

268. *Id.*

269. *Id.*

270. *Lavan v. City of L.A.*, 693 F.3d 1022, 1033 (9th Cir. 2012). “The City does not deny that it has a policy and practice of seizing and destroying homeless persons’ unabandoned possessions.” *Id.* at 1025. The City of Los Angeles had previously seized homeless persons’ unabandoned possessions despite a temporary restraining order against the city prohibiting it from “[c]onfiscating the personal property of the homeless when it has not been abandoned and destroying it without notice . . . .” *Justin v. City of L.A.*, No. CV0012352LGBAIX, 2000 WL 1808426, at \*13 (C.D. Cal. Dec. 5, 2000).

271. *Lavan v. City of L.A.*, 797 F. Supp. 2d 1005, 1012 (C.D. Cal. 2011). The City of Los Angeles claimed that “the Fourth Amendment’s protections coincide with the distance that a homeless person is from his or her property.” *Id.* The court held that “[t]here is no legal justification for this rule which is demeaning as it places no value on the homeless’ property and is not honest because the ‘rule’ purports to transmogrify obviously valuable property into trash.” *Id.* (quoting *Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at \*36 (E.D. Cal. Dec. 8, 2006)).

272. *Id.* at 1015.

273. *Id.* at 1016.

No more is needed to trigger the Fourth Amendment's reasonableness requirement."<sup>274</sup> Noting that even if the city's seizure of property had been held reasonable, the city's choice to destroy homeless persons' possessions rendered the city's action unreasonable.<sup>275</sup>

The Ninth Circuit in *Lavan* also held that the city action constituted a deprivation of property without due process.<sup>276</sup> After deciding that the possessory interest in homeless property was not limited by individual status,<sup>277</sup> the court described the limitations on government depriving an individual of a property interest:

As we have repeatedly made clear, "[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." . . . This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart. The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. As the district court recognized, the logic of the City's suggestion would also allow it to seize and destroy cars parked in no-parking zones left momentarily unattended.<sup>278</sup>

Finding that homeless property survived momentary violations of city ordinances, the court held that the *Lavan* plaintiffs maintained a due process challenge to city actions.<sup>279</sup>

### *B. Homeless Activities in Public Spaces*

Controls on public space do not just interact with the basic identifiers of homeless persons, they also define what homeless persons may do in the con-

274. *Lavan*, 693 F.3d at 1030.

275. *Id.* By destroying the property of homeless persons, the seizure is rendered unconstitutional. *Id.* "[A] seizure lawful at its inception can nevertheless violate the Fourth Amendment because its manner of execution unreasonably infringes possessory interests protected by the Fourth Amendment's prohibition on 'unreasonable seizures.'" *Id.* (quoting *United States v. Jacobsen*, 466 U.S. 109, 124-25 (1984)).

276. *Id.* at 1032.

277. *Id.* at 1032-33 ("We reject the City's suggestion that we create an exception to the requirements of due process for the belongings of homeless persons.").

278. *Id.* at 1032 (quoting *Clement v. City of Glendale*, 518 F.3d 1090, 1093 (9th Cir. 2008)).

279. *Id.* ("Because homeless persons' unabandoned possessions are 'property' within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them."). The city had not provided notice or due process to the plaintiffs, therefore, their Fourteenth Amendment claims stood. *Id.*

text of a political environment in which their actions are already perceived as suspect.<sup>280</sup> This interaction is described by one scholar as “political pedestrianism,” in which “two equally placed rights-bearing strangers[] encounter[] each other in public space” creating a “dyadic relationship.”<sup>281</sup> Prevalent in ordinances relating to homeless persons’ behavior is the presumption that one of those rights-bearing strangers (the homeless person) fails to live up to their bargain to respect the individual rights of the other stranger.<sup>282</sup> Thus, conduct-oriented ordinances (like panhandling restrictions, public urination statutes, loitering, and jaywalking restrictions) place the burden of identity change on homeless persons with minimal or no social support for changing the conditions that give rise to the identity.

Ordinances that control aggressive panhandling serve as a primary example of how conduct-oriented ordinances fail to accurately understand homeless identity. These ordinances pit the mobile commuter against the static homeless person. As one scholar has noted,

the balance [in panhandling ordinances] is between the right of the panhandler to “engage” and that of the pedestrian to be secure against an “intrusion” of their personal space . . . into an area where they no longer feel content. Such “intrusions” are seen as violating a “sense of safety.” Characterized in highly spatialized terms, the balance between the two turns on the decision of the pedestrian (who, it should be noted, is in motion) to exercise autonomous control over their “personal space.” Their territory must be respected.<sup>283</sup>

The state’s choice to enforce the rights of the commuter in this encounter does more than control the conduct of the other participant – it suggests that controlling the homeless person’s conduct can, in effect, reclaim the space on behalf of the state.<sup>284</sup> For example, one court described panhandling as the “archetypal expression of disorder.”<sup>285</sup>

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280. See *supra* Parts I.A-B.

281. NICHOLAS BLOMLEY, RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW 96 (2011).

282. See *supra* Part II.A.

283. Nicholas Blomley, *The Right to Pass Freely: Circulation, Begging, and the Bounded Self*, 19 SOC. & LEGAL STUD. 331, 338 (2010).

284. Mitchell, *The Annihilation of Space by Law*, *supra* note 10, at 16-17.

285. *Looper v. N.Y.C. Police Dep’t*, 802 F. Supp. 1029, 1030 & n.1 (S.D.N.Y. 1992) (“One of the earliest discussions of the disorder caused by poverty and begging is found in *The Plutus* by Aristophanes, which was first performed around 388 B.C. Against the background of the emergence of the new god, Plutus (Wealth), in the Greek Pantheon, Aristophanes constructs a debate between the anthropomorphized character of Poverty and the central protagonist of Plutus, Chremylus. Poverty argues eloquently for the virtues of poverty and begging but is rejected by Chremylus as the source of human misery and social chaos.”) (citing ARISTOPHANES, *THE PLUTUS* 629, 635-36 (Benjamin B. Rogers trans., 1952)), *aff’d*, 999 F.2d 699 (2d Cir. 1993). The

Most courts have found that homeless persons in general do not state a First Amendment challenge to solicitation ordinances in the absence of some expressed prohibition on speech, vague prohibitions by the city, or an as-applied problem in enforcement.<sup>286</sup> In general, courts uphold solicitation ordinances, finding that homeless solicitations are no different from other types of solicitations that occur in public.<sup>287</sup> Thus, courts generally uphold ordinances that limit solicitations by manner<sup>288</sup> or place<sup>289</sup> restrictions, unless

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court, while noting that the tension between the First Amendment rights of the panhandler were illusory toward society's greater interests, said:

Since the early days of western civilization, people have sought to define the conduct that violates society's sense of order and that which society permits or even encourages. Yet, as civilization as a whole has moved forward, people have learned time and again that suppressing speech and conduct deemed contrary to a society's sense of order merely masks the underlying disorder.

*Id.* (citing ARISTOTLE, *POLITICS* (Benjamin Jowett trans., 1984); PLATO, *THE LAWS* (A.E. Taylor trans., 1963); PLATO, *THE REPUBLIC* (Paul Shorey trans., 1963); SOPHOCLES, *ANTIGONE* (Sir Richard Jebb ed., 1932); THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 143-51, 156-64, 236-45 (M.I. Finley ed., Rex Warner trans., 1954)); *see also* 4 WILLIAM BLACKSTONE, *COMMENTARIES* \*169 ("The court also of Areopagus at Athens punished idleness, and exerted a right of examining every citizen in what manner he spent his time."); AESCHYLUS, *AGAMEMNON* (G.M. Cookson trans., 1952) (Clytaemnestra's silencing the public speech of Cassandra); THUCYDIDES, *supra* note 285, at 156-64 (role and transformation of speech as both cause and effect of the disintegration of social relationships and individual character in the face of the collapse of the state)

286. *See, e.g.*, *Speet v. Schuette*, 726 F.3d 867, 878 (6th Cir. 2013).

287. For example, in *Doucette v. City of Santa Monica*, homeless plaintiffs brought challenges to the city enforcement of ordinances prohibiting, amongst other things, solicitation. 955 F. Supp. 1192, 1198-99 (C.D. Cal. 1997).

288. *Id.* at 1201. The ordinance in *Doucette* prohibited "abusive solicitation":

"Abusive solicitation" means to do one or more of the following while engaging in solicitation or immediately thereafter:

- (1) Coming closer than three feet to the person solicited unless and until the person solicited indicates that he or she wishes to make a donation;
- (2) Blocking or impeding the passage of the person solicited;
- (3) Following the person solicited by proceeding behind, ahead or alongside him or her after the person solicited declines to make a donation;
- (4) Threatening the person solicited with physical harm by word or gesture;
- (5) Abusing the person solicited with words which are offensive and inherently likely to provoke an immediate violent reaction;
- (6) Touching the solicited person without the solicited person's consent; . . . .

*Id.*

289. *Id.* at 1201-02. Additionally, the ordinance prohibited place-based solicitations at:

- (a) Bus stops;
- (b) Public transportation vehicles or facilities;
- (c) A vehicle on public streets or alleyways;
- (d) Public parking lots or structures;
- (e) Outdoor dining areas of restaurants or other dining establishments serving food for immediate consumption;



they present other constitutional problems, such as vagueness or as-applied due process problems.<sup>290</sup> Courts express this alignment by suggesting that homeless persons have the same tools at their disposal as other speech participants, or that homeless persons are similarly situated as others.<sup>291</sup>

For instance, in *Doucette v. Santa Monica*, the court held that homeless persons could utilize other avenues of speech, such as leaving a pamphlet with directions where individuals could send donations – despite the fact those homeless persons may not have addresses themselves.<sup>292</sup> Moreover, the ordinances did not reflect a disagreement of point of view between the city and homeless persons because homeless persons were not restrained from speaking in general – they were only restrained from asking for money or other donations.<sup>293</sup> Similarly, in *Gresham v. Peterson*, the court upheld an aggressive panhandling statute, rejecting an argument by the ACLU that the statute was specifically targeted towards homeless persons.<sup>294</sup> The court said that the ordinance “applies with equal force to anyone who would solicit a charitable contribution . . . . It would punish street people as well as Salvation Army bell ringers outside of stores at Christmas, so long as the appeal involved a vocal request for an immediate donation.”<sup>295</sup>

In contrast, some courts suggest there are vast, rather than minor, differences that warrant different treatment.<sup>296</sup> For example, in *Young v. New York City Transit Authority*, the Second Circuit distinguished between constitutionally protected solicitations, as described by the Supreme Court in *Village of Schaumburg v. Citizens for a Better Environment*, and panhandling:

Both the reasoning of *Schaumburg* and the experience of the TA point to the difference between begging and solicitation by organized charities. In the instant case, the difference must be examined not from the imaginary heights of Mount Olympus but from the very real context of the New York City subway. While organized charities serve community interests by enhancing communication and disseminating ideas, the conduct of begging and panhandling in the subway amounts to nothing less than a menace to the common good. . . . The lone dissent in *Schaumburg* recognized this difference stating: “Nothing in the United States Constitution should prevent residents of a community from making the collective judgment that certain worthy charities may

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(f) Within fifty feet of an automated teller machine; or

(g) A queue of five or more persons waiting to gain admission to a place or vehicle, or waiting to purchase an item or admission ticket.

*Id.*

290. See *Gresham v. Peterson*, 225 F.3d 899, 907 (7th Cir. 2000).

291. See *Id.* at 904; *Doucette*, 955 F. Supp. at 1199-200.

292. 955 F. Supp. at 1205.

293. *Id.* at 1201.

294. *Gresham*, 225 F.3d at 901.

295. *Id.* at 903.

296. See *Young v. N.Y.C. Transit Auth.*, 729 F. Supp. 341, 355-56 (S.D.N.Y. 1990), *vacated*, 903 F.2d 146 (2d Cir. 1990).

solicit . . . while at the same time insulating themselves against panhandlers, profiteers, and peddlers.<sup>297</sup>

Moreover, the court, citing a 1988 public health study, stated, “[B]egging contributes to a public perception that the subway is fraught with hazard and danger.”<sup>298</sup> While finding that a total ban on panhandling would violate First Amendment rights, the ban on subway panhandling was narrowly tailored to meet a substantial public interest.<sup>299</sup>

Lastly, some aspects of homeless activity demonstrate the visible/invisible quality of homeless existence. This manifests itself in both over-policing and under-servicing homeless persons, yet placing the burden of internalizing the effects directly on homeless persons. Gary Blasi conducted a citations study of Skid Row finding that persons in Skid Row were substantially more likely to be cited for minor infractions, such as jaywalking and loitering, than persons in other areas of the city.<sup>300</sup> This over-policing of homeless activities created greater burdens on homeless persons, who are less likely to be able to pay court fines or may lose property due to jail time.<sup>301</sup>

Likewise, a two-year study of environmental hazards in the Skid Row area revealed toxic conditions due to the prevalence of human waste.<sup>302</sup>

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297. 903 F.2d 146, 156 (2d Cir. 1990); *see* VALVERDE, *supra* note 58, at 207 (noting that “[e]xisting structures tend to favor self-appointed leaders, organized mainly around home owning, and they systematically exclude renters, young people, and, to some extent, racialized groups . . .”).

298. *Young*, 903 F.2d at 149.

299. *Id.* at 160.

300. *See* Blasi, *supra* note 11.

301. *Id.*

302. *See* CNTY. OF L.A. PUB. HEALTH DEP’T, REPORT OF FINDINGS – REQUEST FROM CITY OF LOS ANGELES TO ADDRESS PUBLIC HEALTH ISSUES IN THE SKID ROW AREA OF DOWNTOWN LOS ANGELES (2012) (on file with author) (noting findings of small piles of feces and urine on the sidewalks and grass areas of the majority of streets surveyed (8 out of 10 blocks) and of three restrooms reported, one was inoperable and one was unsanitary); CNTY. OF L.A. PUB. HEALTH DEP’T, REPORT OF FINDINGS – REINSPECTION REPORT OF FINDINGS – REQUEST FROM CITY OF LOS ANGELES TO ADDRESS PUBLIC HEALTH ISSUES IN THE SKID ROW AREA OF DOWNTOWN LOS ANGELES (2012) (on file with author) (noting a 76% reduction in urine and feces on sidewalks since May 21, 2012 inspection, which coincided with all three public restrooms becoming operable, with only one noted as having trash present); CNTY. OF L.A. PUB. HEALTH DEP’T, REPORT CURRENT STATUS OF CONDITIONS ON SKID ROW (2012) (on file with author) (noting significant reduction of environmental problems, compliance with environmental concerns, and all restroom facilities as operable); CNTY. OF L.A. PUB. HEALTH DEP’T, REPORT CURRENT STATUS OF CONDITIONS ON SKID ROW (2012) (on file with author); CNTY. OF L.A. PUB. HEALTH DEP’T, FOLLOW-UP REPORT REGARDING CURRENT STATUS OF CONDITIONS ON SKID ROW (2013) (on file with author) (noting that upon reinspection urine and feces were found in fourteen

Those studies also revealed that in the twelve-block area of Skid Row (which houses more than 6,000 persons) only four public restrooms are available – three of which were inoperable during various re-inspection times.<sup>303</sup> The City of Los Angeles claimed that the environmental state of the area required street cleaning, which led to the confiscation and destruction of homeless belongings, and ultimately a civil rights lawsuit on behalf of homeless persons.<sup>304</sup> While homeless persons prevailed in the suit, many of the conditions that led to the city’s preferred means of cleaning the streets remain – insufficient facilities for the population who needs them.<sup>305</sup> Homeless persons internalize these conditions by living them out.<sup>306</sup>

### C. Homeless Control and the “Not in My Backyard” Mentality

Finally, some legal decisions may impose controls indirectly on the homeless by restricting the places that homeless service providers may operate. “Not in My Backyard” (“NIMBY”) rhetoric, often tends to flow from self-appointed leaders (usually homeowners) who often have greater access, more resources, and better political inroads to advance a particular view.<sup>307</sup> Notably, NIMBY approaches have been described as being particularly exclusive of marginalized groups – “especially [towards] those who are poor and/or live in rental housing.”<sup>308</sup> This is particularly evident in cases involving private owners alleging that providers attract homeless persons who create a nuisance on their property.<sup>309</sup> Others present challenges to other legal processes that would validate their presence – such as funding programs or violations of behavioral or zoning ordinance.<sup>310</sup> Lastly, some cases reflect government attempts to disrupt service providers on the basis of claiming the

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blocks of Skid Row and that three of four public restrooms in the area were inoperable).

303. See sources cited *supra* note 302.

304. *Lavan v. City of L.A.*, 693 F.3d 1022, 1023-24 (9th Cir. 2012).

305. See *id.* at 1033.

306. See *supra* Part I.A.

307. VALVERDE, *supra* note 58, at 207. Peter Margulies describes this effect in relation to human service providers: “Defects in human inference account for much popular opposition to community human service facilities. Human inference runs on heuristics and biases which guide and simplify thought. Unfortunately, these devices magnify the perceived risks of association with those labeled as outsiders, including human service clients.” Peter Margulies, *Building Communities of Virtue: Political Theory, Land Use Policy, and the “Not in My Backyard” Syndrome*, 43 SYR. L. REV. 945, 954-55 (1992).

308. VALVERDE, *supra* note 58, at 207; see, e.g., *Young v. N.Y.C. Transit Auth.*, 903 F.2d 146, 156 (2d Cir. 1990).

309. See, e.g., *Kum Man Jhae v. City of Pasadena*, No. B244435, 2013 WL 5492572, at \*1 (Cal. Ct. App. Oct. 3, 2013).

310. See, e.g., *Franklinton Coal. v. Open Shelter, Inc.*, 469 N.E.2d 861, 862, 864-65 (Ohio Ct. App. 1983).

operations constitute a “nuisance.”<sup>311</sup> In both instances, homeless persons are *legally* invisible – that is, the rights being asserted relate to the property owners’ right to either be free of the effect that homeless persons produce on their land or the property owners’ right to provide services to homeless persons.<sup>312</sup>

### 1. Homeless Persons as Nuisances to Property Owners

Property owners in numerous cases allege that the operation of a facility that attracts homeless people constitutes a nuisance.<sup>313</sup> The allegations range from increased frequency of transients to actual allegations of violence. At least one court has found that a homeless service provider could be a private nuisance to neighboring homeowners. In *Armory Park v. Episcopal Community Services in Arizona*, a neighboring homeowners’ association brought a claim against the center claiming that homeless patrons disrupt their neighborhood.<sup>314</sup> The complaint alleged that the presence of the food center had changed the character of their neighborhood.<sup>315</sup> Notably, the association claimed that before the center opened, there were few small businesses; that the opening of the center increased the traffic of “transients” through the neighborhood; that these transients began lining up near the neighborhood before the center was opened and lingered afterwards; that crime had increased since the center’s opening and that residents were frightened by the transients.<sup>316</sup> Finding that the center could be held derivatively liable for the

311. *See, e.g.*, *Armory Park Neighborhood Ass’n v. Episcopal Cmty. Servs.* in *Ariz.*, 712 P.2d 914, 915-16 (Ariz. 1985) (en banc).

312. *See infra* Part II.C.

313. *See* N.C. Grp. L.L.C. v. Macerich Co., No. CV-08-158-PHX-ROS, 2009 WL 692310, at \*1 (D. Ariz. Mar. 17, 2009) (Plaintiff alleged against neighboring property owner that nuisance arose because the parcel “fell into disrepair and became a ‘haven for graffiti, homeless people, drug abusers, and other sundry criminal activity’”); *DeStefano v. Emergency Hous. Grp., Inc.*, 722 N.Y.S.2d 35, 37 (N.Y. App. Div. 2001) (alleging that the maintenance of an adult shelter was a public nuisance because it was a “magnet” inducing nonresidents to live in the town without proper screening or supervision); *Franklinton Coal.*, 469 N.E.2d at 867-68 (finding that the operation of a shelter, absent actual evidence of harm, was insufficient to constitute a nuisance).

314. *Armory Park Neighborhood Ass’n*, 712 P.2d at 915. “On December 11, 1982, . . . Episcopal Community Services in Arizona . . . opened the St. Martin’s Center . . . in Tucson, Arizona.” *Id.* at 915. The center was located along Arizona Avenue, which served as the western boundary for the Amory Park Historical Residential District. *Id.* Two years after operating in this location, the homeowners’ association filed a law suit to enjoin the Center’s free food distribution center. *Id.*

315. *Id.* at 915-16.

316. *Id.* at 916. The court described the neighborhood complaint in the following way:

[b]efore the Center opened, the area had been primarily residential with a few small businesses. When the Center began operating in December 1982, many transients crossed the area daily on their way to and from the Center. Although the Center was only open from 5:00 to 6:00 p.m., patrons lined up well

actions of its patrons, the Arizona Supreme Court held that the presence of the center directly related to the inconvenience of the property owners.<sup>317</sup> The court stated that it was the practice of “offering free meals, which ‘set in motion’ the forces resulting in injury to the Amory Park residents.”<sup>318</sup> Despite recognizing the social utility of the center, the Arizona Supreme Court found that the burden to property owners was too great.<sup>319</sup> By defining the actions of homeless persons as a nuisance, the court found that the utility of the center was not sufficient enough to outweigh the burdens suffered by neighbors.<sup>320</sup>

In contrast, most courts analyzing nuisance relating to homeless service providers do so under a public nuisance theory. For example, in *Pilgrim v.*

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before this hour and often lingered in the neighborhood long after finishing their meal. The Center rented an adjacent fenced lot for a waiting area and organized neighborhood cleaning projects, but the trial judge apparently felt these efforts were inadequate to control the activity stemming from the Center. Transients frequently trespassed onto residents’ yards, sometimes urinating, defecating, drinking and littering on the residents’ property. A few broke into storage areas and unoccupied homes, and some asked residents for handouts. The number of arrests in the area increased dramatically. Many residents were frightened or annoyed by the transients and altered their lifestyles to avoid them.

*Id.*

317. *Id.* at 920.

318. *Id.*

319. *Id.* at 921. The Supreme Court of Arizona found the following statement by the trial judge to be “illuminating” and quoted the statement in its opinion:

It is distressing to this Court that an activity such as defendants [sic] should be restrained. Providing for the poor and the homeless is certainly a worthwhile, praiseworthy [sic] activity. It is particularly distressing to this Court because it [defendant] has no control over those who are attracted to the kitchen while they are either coming or leaving the premises. However, the right to the comfortable enjoyment of one’s property is something that another’s activities should not affect, the harm being suffered by the Armory Park Neighborhood and the residents therein is irreparable and substantial, for which they have no adequate legal remedy.

*Id.* The Supreme Court of Arizona expressed a similar lament:

The common law has long recognized that the usefulness of a particular activity may outweigh the inconveniences, discomforts and changes it causes some persons to suffer. We, too, acknowledge the social value of the Center. Its charitable purpose, that of feeding the hungry, is entitled to greater deference than pursuits of lesser intrinsic value. It appears from the record that [Episcopal Community Services’] purposes in operating the Center were entirely admirable. However, even admirable ventures may cause unreasonable interferences. . . . We do not believe that the law allows the costs of a charitable enterprise to be visited in their entirety upon the residents of a single neighborhood. The problems of dealing with the unemployed, the homeless and the mentally ill are also matters of community or governmental responsibility.

*Id.*

320. *Id.*

*Our Lady of Victories Church*, the neighboring landowner alleged that several properties she owned suffered damage as a result of the defendant's shelter.<sup>321</sup> The plaintiff alleged that acts of violence, vandalism, noise, and general vulgar behavior stem from the shelter and its residents.<sup>322</sup> She also alleged that one of her tenants was the victim of a breaking and entering from a resident of the shelter, and that another tenant's guest was physically assaulted.<sup>323</sup> In assessing her claim as a public nuisance, the court said "[t]he harm she alleges is essentially a communal one," and that she "failed to allege facts . . . 'different in kind' from the harm the rest of the community has purportedly suffered."<sup>324</sup>

## 2. Claims That Other Government Ordinances Render the Homeless Service Provider a Nuisance

Citizens have tried to enjoin homeless service providers and businesses that cater to homeless persons on theories that the establishment was operating contrary to a specific city ordinance or exceeded its government license.<sup>325</sup> At the heart of these actions is a claim that the service provider or business constitutes a nuisance.<sup>326</sup> However, where the decision to authorize

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321. *Pilgrim v. Our Lady of Victories Church*, No. 12-P-685, 2013 WL 1759415, at \*1 (Mass. App. Ct. Apr. 25, 2013).

322. *Id.*

323. *Id.*

324. *Id.* at \*2.

325. *See* *W. 97th-W. 98th Sts. Block Ass'n v. Volunteers of Am. of Greater N.Y.*, 581 N.Y.S.2d 523, 524 (N.Y. Sup. Ct. 1991) (dismissing claims by local property owners' association that government project failed to require compliance of shelter with State Environmental Quality Review Act); *Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 986 (N.Y. Sup. Ct. 1989) (involving action by local property owners' association against city-funded shelter operated by church arguing that shelter operation met the definition of hotel and thus the city improperly failed to require compliance with the State Environmental Quality Review Act ("SEQRA")); *Franklinton Coal. v. Open Shelter, Inc.*, 469 N.E.2d 861, 862, 864-65 (Ohio Ct. App. 1983) (denying claim by plaintiff that city zoning board improperly applied the city zoning code to allow a homeless shelter and kitchen under the city code definition of "hotel").

326. For example, in an action by a Business Improvement District ("BID") to alter the city's Conditional Use Permit to a shelter to require compliance with SEQRA, BID alleged several nuisance-like claims:

the proximity of the drop-in center to [BID] members harms them in a manner not experienced by the public in general . . . ; their sidewalks and/or properties are being used as "bathrooms"; and their customers are being harassed, scared and/or intimidated. . . . [Additionally] there are homeless criminals and/or Level 3 Sex Offenders that are frequently housed at the drop-in center without any monitoring or supervision, thus presenting further safety concerns to BID members.

a service provider's operation is a land-use decision, courts tend to defer to the decisions of permitting and zoning boards, absent some other evidence of nuisance.<sup>327</sup>

For example, in *Mercer Island Citizens for Fair Process v. Tent City 4*, a group of citizens brought a claim to enjoin a church's operation of a temporary homeless encampment on the theory that the city code did not permit temporary encampments in single-family residential areas.<sup>328</sup> The city issued a temporary use permit to the church on the belief that the city would be unable to prevent the church from operating such an encampment.<sup>329</sup> The city then entered into a temporary use agreement that ensured all city code provisions were adhered to, including requirements that the encampment provide: visual buffers, restrictions on lighting, restraints for the maximum number of residents, warrant and sex offender status checks on residents, parking, code of conduct, and other legal compliance.<sup>330</sup> The court rejected the citizens' group claims alleging due process violations and nuisance on the basis of the zoning decision.<sup>331</sup>

In contrast, the California Court of Appeals in *Kum Man Jhae v. City of Pasadena* adjudicated a liquor store as a public nuisance for failing to comply with directives from the California Department of Alcoholic Beverage Control.<sup>332</sup> At the core of the complaints were several allegations by neighbors that the store had a detrimental effect on the neighborhood by attracting homeless persons to the area.<sup>333</sup> One neighbor testified that the liquor store "attracts loiterers and drunks and contributes to littering, pan-handling, public drunkenness, public urination and other nuisance activities."<sup>334</sup> Another neighbor testified "there was a 'big problem' with sales of liquor at 6:30 a.m. because the homeless shelters 'let out' at 7:00 a.m."<sup>335</sup> "He testified that the homeless people 'come' to the liquor store to get their 'drunk on' for the day."<sup>336</sup>

Lastly, some courts have taken up the question of whether government programs that sponsor homeless shelters impose too great of a burden on community resources. For example, in *Greentree at Murray Hill Condomin-*

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*White Plains Downtown Dist. Mgmt. Ass'n, Inc. v. Spano*, 833 N.Y.S.2d 868, 871-72 (N.Y. Sup. Ct. 2007) (holding that BID had standing to assert claim relating to SEQRA claim, but not for nuisance action or Equal Protection claim).

327. See PACE UNIV. SCH. OF LAW LAND USE LAW CTR., BEGINNER'S GUIDE TO LAND USE LAW 9 (2014), available at <http://www.law.pace.edu/sites/default/files/LULC/LandUsePrimer.pdf>.

328. 232 P.3d 1163, 1164-65 (Wash. Ct. App. 2010).

329. *Id.* at 1165.

330. *Id.*

331. *Id.* at 1165, 1169.

332. No. B244435, 2013 WL 5492572, at \*1 (Cal. Ct. App. Oct. 3, 2013).

333. *Id.* at \*4.

334. *Id.* at \*3.

335. *Id.* at \*4.

336. *Id.*

*ium v. Good Shepherd Episcopal Church*, a local condominium association brought claims against a shelter and the City of New York seeking to enjoin its operations on the basis of non-compliance with State Environmental Regulations.<sup>337</sup> In *Greentree*, the total state funding amounted to less than seventeen percent of its operating budget and less than three percent of its total budget.<sup>338</sup> Under a prior determination that an emergency situation existed in the state, the court held that the Environmental Quality Review Act did not apply to this particular shelter.<sup>339</sup>

Sometimes, these claims of insufficient resources included allegations that the homeless themselves would be insufficiently served or would be subject to similar nuisance like conditions.<sup>340</sup> In *Spring-Gar Community Civic Association, Inc. v. Homes for the Homeless, Inc.*, property owners asserted that burdening a town of 3,000 with a homeless shelter that caters to populations over 750 was too great of a burden and would result in nuisance to the local property owners.<sup>341</sup> The property owners association alleged that the creation of this program would “constitute a menace to the public health, safety, moral and general welfare and well-being of the residents of Springfield Gardens and to the homeless people who would reside at [the] facility, thereby creating a public and private nuisance.”<sup>342</sup> Capturing this sentiment, the court noted in concluding its opinion that, though constrained to deny plaintiffs’ claims,<sup>343</sup> the problem expressed by plaintiffs contained legitimate concerns – whether raised genuinely or not:

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337. 550 N.Y.S.2d 981, 984-85 (N.Y. Sup. Ct. 1989).

338. *Id.* at 983.

339. *Id.* at 986-87.

340. *See, e.g.*, *Spring-Gar Cmty. Civic Ass’n, Inc. v. Homes for the Homeless, Inc.*, 135 Misc. 2d 689, 699 (N.Y. Sup. Ct. 1987).

341. *See id.* at 691, 693. The plan called for the creation of a center from an old hotel to provide 200 units, one family per room. The plan anticipated 450 children, of which approximately 200 would be teenagers. *Id.* The plan also called for comprehensive social services including job training, child care assistance, family counseling, and help in locating permanent housing. *Id.* at 692.

342. *Id.* at 693 (emphasis added).

343. In doing so, the court admonished the New York State Legislature to comprise a legitimate plan for resolving the New York homeless problem:

[t]hough this court is constrained to decide the case as it did, the court does so with a heavy heart. The court does not believe that overburdening a community, as will be done here, is just. Accordingly, it asks the Legislature to address the issue. At the very least, the Legislature should promulgate laws that will provide the community with the right to a hearing on any proposed homeless shelter, rather than mere notice of intent to act, when such action is planned. The Legislature should also establish laws that would prevent large numbers of homeless from being placed into any one particular area. In fact, a City Council Committee, the Select Committee on the Homeless, has recommended to the Mayor of the City of New York that no shelter should contain more than 100 families. Such recommendation should be enacted into law. It is for the Legislature, not for the courts, to so act.

*Id.* at 699. The court also offered at least one solution:



[I]astly, this court is concerned not only about the people of Springfield Gardens, but also the homeless as well. This court is not unmindful that the housing being provided to the homeless at the Saratoga, though far from the least desirable, is also far from ideal. It is concerned that families are being placed into a room for the homeless which is immediately surrounded on three sides by commercial and industrial plants including freight forwarders and cargo terminals, with trucks going in, out, and around, all the time. On the fourth side lies Rockaway Boulevard, a major roadway that is now considered part of the Nassau-Queens Expressway. This court views this location as being highly dangerous for its residents who desire to leave the premises by foot. Further, the fact that families must share one room, including children sleeping with their parents, and children of the opposite sex sleeping together, is certainly not healthy, and cries out for relief. Moreover, the fact that the housing is merely transitory does not insure continuity and stability in the education of children.<sup>344</sup>

In each of these examples – like in the previous section – the presence of homeless people animated the charge of nuisance from neighbors. The question of nuisance, though, was resolved by reference to whether the local government endorsed the activity.<sup>345</sup> In the *Mercer Island* case, the negotiation of a temporary use agreement shielded the Tent City operation from nuisance liability.<sup>346</sup> In *Kum Man Jhae*, the supposed failure by the liquor store to control its premises led to the determination that the store presented a public nuisance.<sup>347</sup> And in *Greentree* and *Spring-Gar*, the nuisance arose

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The Comptroller of the City of New York, the Honorable Harrison J. Goldin, in a report dated April 23, 1987 entitled, *Room to Spare But Nowhere to Go*, set forth a better solution of this problem wherein he stated: “The City owns approximately 3700 occupied buildings which it seized for nonpayment of taxes; they contain about 4000 vacant apartments. We inspected 445 of these apartments in 85 different occupied rem buildings; it would cost under 9 million dollars to rehabilitate them all”. This would give permanent housing to the homeless, it would stop shunting families and children from one inhumane shelter to another. These people by temporary housing are denied stable environments. Temporary housing fragments social and educational needs. The city needs an intensive city-wide rehabilitation program to meet the problem on a permanent basis. In the long run, this would save more money by addressing the problem head on.

*Id.* at 700.

344. *Id.* at 699-700.

345. See *Mercer Island Citizens for Fair Process v. Tent City 4*, 232 P.3d 1163, 1164 (Wash. Ct. App. 2010).

346. *Id.* at 1168.

347. *Kum Man Jhae v. City of Pasadena*, No. B244435, 2013 WL 5492572, at \*9 (Cal. Ct. App. Oct. 3, 2013).

through the combination of homeless presence and the municipality providing insufficient support for homeless service.<sup>348</sup>

### 3. Government Acts Towards Property Owners Attracting Homeless Persons

Finally, sometimes control of homeless providers occurs through direct government action.<sup>349</sup> The source of these actions articulate similar claims as private owners – that the providing of services to homeless persons constitutes a nuisance on public resources or use of space which must be guarded.<sup>350</sup> Some of the cases involve direct police action, such as *Fifth Avenue Presbyterian Church v. City of New York*, where police enacted a policy to physically prevent homeless persons from sleeping on church property, despite the church’s permission.<sup>351</sup> Other cases involve the administrative approval of zoning boards to approve, or not approve, institutions serving as shelters.<sup>352</sup> In both instances, like the other issues of space allocation, the issue relates less to homeless persons and their right to be in space, and more to the right of others to allow homeless persons to occupy space.

#### a. The Right to House Homeless Persons

In *Fifth Avenue Presbyterian Church v. City of New York*, the City Police engaged in a policy of dispersing homeless persons sleeping on the steps of the church.<sup>353</sup> Specifically, the police informed the church that homeless persons would not be allowed to sleep on the steps any longer; they later “formed a cordon in the front of the [c]hurch” to prevent homeless persons from accessing the steps.<sup>354</sup> The city claimed that the allowance of the church

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348. *Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church*, 550 N.Y.S.2d 981, 984-85 (N.Y. Sup. Ct. 1989); *Spring-Gar Cmty. Civic Ass’n, Inc. v. Homes for the Homeless, Inc.*, 540 N.Y.S.2d 453, 453-54 (N.Y. App. Div. 1989).

349. *See, e.g., Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 572-73 (2d Cir. 2002).

350. *See id.* at 573.

351. *Id.* at 572.

352. *See, e.g., Turning Point, Inc. v. City of Caldwell*, 74 F.3d 941 (9th Cir. 1996).

353. 293 F.3d at 573.

354. *Id.* at 572. Considering cross-motions for summary judgment, the trial court discussed the police action:

“[T]he police came onto Church property and told the Church representatives . . . and the Homeless Neighbors, that the Homeless Neighbors would not be permitted to sleep outside the Church, and that if they lay down on the ground, or remained beyond the time permitted by the police, they would be arrested. The police formed a cordon in front of the Church . . . to block the front steps of the Church . . . . All of the Homeless Neighbors who came to the Church that night to sleep were intimidated by police threats, including threats of arrest, into leaving the Church property that night instead of sleeping there . . . .”

to use its steps constituted “an inadequate provision of shelter ‘in a civilized society.’”<sup>355</sup> In the district court opinion that followed the Second Circuit’s order to remand, this description of inadequate shelter was described in terms relating to nuisance: amongst the contention that the homeless persons that choose to sleep on the church steps are “service resistant,”<sup>356</sup> the city claimed:

(1) homeless persons who sleep on Church property have no access to Church toilet facilities between the hours of 9 p.m. and 5:30 a.m. and relieve themselves in public in violation of §§ 143.03, 131.01, and 153.09 of the New York City Health Code, and § 16–118(b) of the New York City Administrative Code; (2) the Church operates a *de facto* shelter that fails to maintain minimum habitability standards; (3) allowing homeless persons to sleep on Church property is not a proper accessory use and thus violates New York City Zoning Regulation § 12–10; and (4) homeless persons’ activities create a public nuisance.<sup>357</sup>

The city’s approach treated all homeless persons as sources of problems despite the lack of evidence that *actual* problems arose from homeless occupancy of the church steps.<sup>358</sup> For example, the city stated as a reason for the total prohibition that the police could not remove just one bad actor, but that it “must be all or none.”<sup>359</sup> The district court said in response:

It is also troubling that the City adopted a group approach to individual violations of the law, taking adverse action against all homeless persons who wished to sleep on Church property based upon individuals’ misconduct. . . . The City has thus left no room for homeless persons who sleep on Church property without violating any laws in the process, a fact that is constitutionally problematic.<sup>360</sup>

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The police informed the Church . . . that [it] would not [sic] longer be allowed to permit anyone to sleep . . . on the Church Steps . . . and that anyone who attempts to do so . . . will be arrested . . .”

Fifth Ave. Presbyterian Church v. City of N.Y., No. 01 CIV. 11493 (LMM), 2004 WL 2471406, at \*5 (S.D.N.Y. Oct. 29, 2004), *aff’d*, 177 F. App’x 198 (2d Cir. 2006).

355. *Fifth Ave. Presbyterian Church*, 293 F.3d at 573.

356. *Fifth Ave. Presbyterian Church*, 2004 WL 2471406, at \*3.

The record indicates that some portion of the homeless persons who sleep on Church property do so because they are “service resistant,” and would be as unlikely to stay in an indoor church shelter as in a City shelter. . . . Effectively requiring the Church to forgo its work with service resistant homeless persons would force the Church to modify its religious activity; a result that is entirely improper.

*Id.*

357. *Id.* at \*4.

358. *Id.* at \*8-9.

359. *Id.* at \*6.

360. *Id.*

The over-breadth of the city's actions, together with the First Amendment right of the church to exercise its religious beliefs (through service to the poor) rendered the city action problematic.<sup>361</sup> Notably though, it was the church's right to exercise its First Amendment entitlement, and not the homeless persons' rights to be someplace, that shaped both the district court and Second Circuit analysis.<sup>362</sup>

#### b. Administrative Limitations on Housing Homeless Persons

Administrative matters, such as compliance with zoning schemes and buildings codes, can present challenges to housing homeless persons. These extra costs create barriers to serving as many persons as homeless providers would like to serve.<sup>363</sup> Often in the underfunded, underserved world of homeless service providers, service that is available occurs in ill-equipped buildings, which were not originally designed to serve the homeless populations.<sup>364</sup> Because most service providers themselves are not well funded, choices must be made to serve the populations that they can in the inadequate facilities to which they have access.<sup>365</sup> All others must be turned away.<sup>366</sup>

In *Turning Point, Inc. v. City of Caldwell*, the Ninth Circuit considered a claim by a homeless shelter against the city, and the city zoning and planning commission, regarding issuance of a special use permit as a condition for operating its shelter.<sup>367</sup> The shelter claimed that the language of the ordinance that gave the board the "authority to determine whether the use 'would cause any damage, hazard, nuisance or other detriment to persons or property

361. *Id.* at \*5-6.

362. *Id.* at \*2 ("That the Church's practice of allowing homeless persons to sleep out-of-doors on its property is an 'exercise of sincerely held religious beliefs,' . . . cannot be seriously disputed.") (quoting *Fifth Ave. Presbyterian Church v. City of N.Y.*, 293 F.3d 570, 574 (2d Cir. 2002)).

363. Courts have drawn distinctions between city zoning provisions designated for safety of inhabitants (such as maximum occupancy standards) with those purely designed to exclude by status. *See, e.g., City of Edmunds v. Oxford House, Inc.*, 514 U.S. 725 (1995) (Ginsburg J.) (holding that while Fair Housing exemptions apply to maximum occupancy restrictions, defining "family" by the number of unrelated persons that could inhabit a building did not reach safety rationale for the Fair Housing standards).

364. *See* Marcus Baram, *Los Angeles Struggles with Homeless Crisis, Lack of Shelters*, HUFFINGTON POST (Feb. 16, 2012, 11:34 AM), [http://www.huffingtonpost.com/2012/02/16/homeless-shelters-los-angeles-america\\_n\\_1280909.html](http://www.huffingtonpost.com/2012/02/16/homeless-shelters-los-angeles-america_n_1280909.html) (describing challenges in converting buildings to shelters in Los Angeles).

365. *See* Kaitlin Schroeder, *After Multiple Delays, Franklin County's First Homeless Shelter to Open Monday*, MORNING SENTINEL (Nov. 9, 2013), [http://www.onlinesentinel.com/news/After\\_multiple\\_delays\\_\\_Franklin\\_County\\_s\\_first\\_homeless\\_shelter\\_to\\_open\\_Monday\\_.html](http://www.onlinesentinel.com/news/After_multiple_delays__Franklin_County_s_first_homeless_shelter_to_open_Monday_.html) (noting that the shelter's compliance with sprinkler system mandate, which it could not afford, held up the approval).

366. *See* Baram, *supra* note 364.

367. 74 F.3d 941 (9th Cir. 1996).

in the vicinity” was overbroad and vague.<sup>368</sup> While the court disagreed on the vagueness point, the court did note that the requirement of an annual review as a part of the permit issuance was outside the board’s authority.<sup>369</sup> The court concluded that the “ordinary law of nuisance and the city’s power to declare and abate nuisances” was sufficient to police concerns the city had relating to continued overcrowding.<sup>370</sup>

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Courts responding to homelessness in space find themselves navigating disputes between those with property and those without. Cities often position themselves as property holders, and seek to foreclose homeless occupancy. Likewise, city constraints on what may be done in public often criminalize basic aspects of survival, such as finding safe places to rest, obtaining food, or maintaining presence. When homeless persons do have legal remedies, they are always constitutional in nature, often out of practical reach, and they are unlikely to engage the unique problems of homelessness. But even in those constitutionally-based actions, homeless persons still must internalize the inconvenience caused by cities’ and property owners’ preferred choices to exclude homeless persons from space.<sup>371</sup> Communication breaks down. Cities act without homeless participation. A lawsuit commences. Wash, lather, rinse, repeat.

### PART III: HOMELESSNESS AND INFORMATION

The impact of collective identity on space described in Part II begs the question, “How should space account for homeless persons’ identities?” Part II argued that courts often apply nuisance-like conceptions to addressing homeless occupancy of space. In traditional nuisance actions, two (or more) property owners quarrel about whether one’s use of land interferes with another’s enjoyment of land.<sup>372</sup> Unlike parties in traditional nuisance cases, homeless persons lack conventionally recognized property rights.<sup>373</sup> Thus, when faced with actions that are nuisance-like, it is not surprising that courts base their decisions on either one group’s property right (landowners, shelter providers, and governments) or the other groups’ inalienable rights (homeless persons and religious service providers). This means that courts, in choosing

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368. *Id.* at 944.

369. *Id.* at 945.

370. *Id.*

371. See discussion *supra* Part II.

372. See John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 265 (2001).

373. See Sarah E. Hamill, *Private Property Rights and Public Responsibility: Leaving Room for the Homeless*, 30 WINDSOR REV. OF LEGAL & SOC. ISSUES 91, 109 (2011) (describing one Canadian court’s response to homelessness as recognizing a limited right to remain in public space, but with the caveat that they would also have to “move somewhere else”).

entitlements that forge a collective identity, choose based on adopting the subjective understandings of landed persons, or the objective understandings of the whole community.

This choice between purely localized identity and universal identity creates a scale problem in which communities fail to account for the visible homeless in their presence.<sup>374</sup> This problem of “scale” leaves communities with few incentives to reconcile homelessness as a community problem. Instead, the problem is isolated as the homeless individual’s burden.<sup>375</sup> This part argues that this binary means of reconciling responsibilities and duties does not lead to community-based solutions. Rather, homeless individuals (or those in the least advantageous position) are expected to conform and reconcile to social spatial expectations. In short, in law and policy, homelessness is treated as an individual concern. By relying on purely subjective and purely objective ways of defining identity, courts and cities often fail to account for compromise solutions.<sup>376</sup>

This part describes in two strokes how subjective and objective identities populate homelessness decisions. First, embracing Guido Calabresi and Douglas Melamed’s classic *One View of the Cathedral*, collective identity emerges healthily in nuisance cases because courts have all three types of entitlement shifting mechanisms at their disposal.<sup>377</sup> This reduces problems of scale.<sup>378</sup> Second, incorporating a conceptual frame for understanding homeless persons as stakeholders to public space (outside of inalienable rights) affords courts and cities a more balanced approach to homeless solutions.<sup>379</sup>

### A. Homelessness at the Cathedral

As Part II describes in the case of homelessness, the power of exclusion is a primary means for asserting what entitlements society will tolerate.<sup>380</sup> Why we enforce an owner’s right to exclude and why we do not is a marker for understanding collective identity. The Cathedral, or the structure of entitlements throughout the common law, depends on society’s validation of one person’s claim for an entitlement over another’s.<sup>381</sup> But as Carol Rose so eloquently pointed out, it is often in the shadows of the Cathedral that we find the true meaning for which property entitlements stand.<sup>382</sup> Rose points out

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374. See discussion *supra* Part I.B.

375. See Valverde, *supra* note 74, at 148-49.

376. See discussion *supra* Part II.

377. Calabresi & Melamed, *supra* note 17, at 1093; see *infra* Part III.A.

378. See *id.*

379. See *infra* Part III.B.

380. See *supra* Part II.C.

381. Calabresi & Melamed, *supra* note 17, at 1092-93.

382. See generally Carol M. Rose, *The Shadow of the Cathedral*, 106 YALE L.J. 2175 (1997).

that the shadows of entitlements are often other socially animating principles – society’s choice to shift entitlements due to accidents that may arise or contracts that may be formed.<sup>383</sup> In each instance, society makes a choice to recognize the shifting entitlement because either the forced transfer of an accident is just, or the collaborative transfer of a contract is efficient.<sup>384</sup> Whether it is society’s initial choice to recognize the entitlement, or to shift the entitlement because such a choice is fair or efficient, the Cathedral and its shadows reflect a broader imprint of what society will acknowledge as valid uses of space.<sup>385</sup> In short, the Cathedral, its shadows, and the forces that rearrange them all suggest something about collective identity.

Calabresi and Melamed’s *One View of the Cathedral* describes shifts in entitlements as a tension between the state’s choice to honor voluntary transfer, forced transfer, and non-transfer.<sup>386</sup> These rationales for why entitlements shift are built around subjective, objective and subjective/objective perceptions of the entitlement.<sup>387</sup> Calabresi and Melamed call these perceptions property rules, liability rules, and inalienable entitlements.<sup>388</sup> Entitlements shift, according to Calabresi and Melamed, according to choices by society.<sup>389</sup> These choices are often predicated on whether society deems the act or entitlement to be one which is best protected by the bargaining powers of the parties (thereby enforcing a property rule) or best protected by the shifting of an entitlement subject to a party’s willingness to pay objective damages (a liability rule).<sup>390</sup> Carol Rose succinctly describes Calabresi’s and Melamed’s approach:

On their account, the example generates four “rules,” two favoring the residence owner and two favoring the factory. If the homeowner has the entitlement to be free of pollution, [Property] Rule 1 permits her to enjoin the factory’s pollution; but if her right is protected only by [Liability] Rule 2, she has to endure pollution so long as the factory pays damages. On the other hand, if the factory owner has the entitlement to pollute, protection through [Property] Rule 3 would allow him to do so freely. Finally, by the famous and hitherto unexplored [Liability] Rule 4, Calabresi and Melamed opined that the factory may be entitled to pollute, but the entitlement may be protected only by a liability rule

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383. *Id.* at 2176.

384. *See id.*; *see also* Jules L. Coleman, *Doing Away with Tort Law*, 41 *LOY. L.A. L. REV.* 1149, 1153 (2008) (describing Calabresi’s liability rules as a notion of forced transfers).

385. *See* Rose, *supra* note 382, at 2175-76.

386. *See* Calabresi & Melamed, *supra* note 17, at 1106-10.

387. *Id.* at 1105-06.

388. *Id.* at 1105.

389. *Id.*

390. *Id.* at 1105-06.

– so that the pollution entitlement can be bought by the resident at some measure of just compensation.<sup>391</sup>

Highlighting how these rules are validated in the court system helps articulate what types of interests society will collectively recognize and enforce.

“An entitlement is protected by a property rule to the extent that someone who wishes to remove the entitlement from the holder must buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller.”<sup>392</sup> Calabresi and Melamed suggest that this type of entitlement involves little state interaction except to enforce the entitlement holder’s veto power.<sup>393</sup> It also reflects the holder’s subjective value of the entitlement by honoring his choice to name his price.<sup>394</sup> Calabresi and Melamed note that the collective action in an entitlement, subject to a property rule, occurs initially by society’s recognition of the entitlement.<sup>395</sup>

On the other hand, Calabresi and Melamed suggest that some entitlements may be subject to objectively determined valuation.<sup>396</sup> “Whenever someone may destroy the initial entitlement . . . [by] pay[ing] an objectively determined value for it, an entitlement is protected by a liability rule.”<sup>397</sup> That objective value often pits the subjective expectations of the entitlement holder against more collective concepts such as burdens, utility, and efficiency.<sup>398</sup> In this instance, the entitlement holder may find the entitlement shifted despite his subjective perception of its value.<sup>399</sup>

Carol Rose describes the Calabresi Melamed Rule 2 as creating a “rhetorical puzzle” in the form of language – particularly around the term “liability rule”:

Consider the example for the liability rule’s “protection” of an entitlement. In the garden-variety liability rule case, Calabresi and Melamed’s Rule 2, the factory owner receives the right to pollute the nearby resident’s air, but must pay damages. Yet in this case, an observer might not think that the resident has an “entitlement protected by a liability rule” at all. Instead, she might think that the liability rule simply divides the entitlement differently and that the liability rule yields a different and diminished entitlement for the homeowner. Compare the liability rule regime with either property rule: In the latter, the entitlement holder has the whole meatball, so to speak, and the other party

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391. Rose, *supra* note 382, at 2177-78.

392. Calabresi & Melamed, *supra* note 17, at 1092.

393. *Id.*

394. *Id.*

395. *Id.*

396. *Id.*

397. *Id.*

398. *Id.*

399. *See id.*



has nothing – one has property, the other has zip. Under either of the two liability rules, on the other hand, the meatball gets split: The factory has an option to pollute (or once exercised, an easement), while the homeowner has a property right subject to an option (or easement). For the sake of simplicity, I will refer to this latter kind of right as a PRSTO (or PRSTE), for “property right subject to an option (or easement).”<sup>400</sup>

Rose’s alteration of language suggests that one effect of entitlements may be forcing property owners to absorb certain inconveniences. Problematically, the PRSTO is not free of its own limitations.<sup>401</sup> Options rarely arise absent affirmative acts of parties.<sup>402</sup> And easements, while they may arise on implied, expressed, prescriptive, or estoppel grounds, do not quite capture the essence of the liability intrusion.<sup>403</sup> The better rationale draws on Rose’s initial instincts that the shadows of accident best explain the liability rule.<sup>404</sup> In this regard, Rule 2 [liability] is best understood as a social mechanism for forcing transfers of property (whether they are rights to be free of intrusion, entitlement to damages for such intrusions, or both).<sup>405</sup> That is, society’s choice to prefer one entitlement above another is often based on the fact that the social identity at stake is conflicted.<sup>406</sup>

Liability rules engage collective identity and information in two ways. First, they often reflect broader conceptions of what universal burdens are fair to impose on entitlement holders in light of subjective capacities and understandings of parties.<sup>407</sup> For example, in *Boomer v. Atlantic Cement Co.*, the court, in opting for a liability rule approach, questioned the ability of a decision in *Boomer* to ameliorate air pollution problems endemic to the industry.<sup>408</sup> The court noted that the air pollution problem is one that is presently above one party’s capability to resolve due to technological and economic limitations, thus making a property rule approach inappropriate.<sup>409</sup> Second, identity-based policies might originate from legislative action but leave room for courts to apply a fair remedy to the parties.<sup>410</sup> In *Boomer*, the court’s resistance to applying a property rule was expressly predicated on leaving the collective identity making action to the legislature.<sup>411</sup> Nevertheless, it was

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400. Rose, *supra* note 382, at 2178-79.

401. *Id.* at 2179.

402. *Id.*

403. *Id.*

404. *Id.* at 2180.

405. *Id.*

406. *Id.*

407. Calabresi & Melamed, *supra* note 17, at 1092-93.

408. 257 N.E.2d 870, 871 (N.Y. 1970).

409. *Id.*

410. *See supra* note 343 and accompanying text.

411. 257 N.E.2d at 871.

fair for *Boomer* to internalize certain costs of this action.<sup>412</sup> In *Spur Industries, Inc. v. Del E. Webb Development Co.*, the court applied a different liability rule precisely because of the identity work that the legislature already undertook.<sup>413</sup> But after the identity choice was made, the court still had to decide how to fairly allocate burdens to the parties.<sup>414</sup>

Lastly, some entitlements may not be shifted. “An entitlement is inalienable to the extent that its transfer is not permitted between a willing buyer and a willing seller.”<sup>415</sup> Here, the state’s role is to determine two matters: who holds the entitlement and, if inalienable, to prevent its transfer.<sup>416</sup> For example, in *New York v. United States*, Congress could not impose an unconstitutional burden on states, even if they agreed to accept that burden.<sup>417</sup> These entitlements draw on purely objective applications of rights, regardless of whether parties bargained or courts otherwise decided.<sup>418</sup>

In a framework that considers shifting entitlements in relation to collective identity, entitlements that shift via property rules and inalienable entitlements represent opposite ends of the spectrum.<sup>419</sup> Property rules draw on purely subjective expectations of the entitlement. When property rules are applied, they represent the state’s choice to adopt one party’s particularized view.<sup>420</sup> Inalienable entitlements are not subjective.<sup>421</sup> In fact, inalienable entitlements do not shift at all because a broad collective identity establishes objective concerns to which entitlements must abate.<sup>422</sup> Liability rules tend to consider subjective expectations of all parties while crafting shifting rules that respond to concerns beyond the parties.<sup>423</sup>

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412. *See id.* at 875.

413. *See* 494 P.2d 700 (Ariz. 1972) (en banc).

414. *Id.* at 707-08.

415. Calabresi & Melamed, *supra* note 17, at 1092.

416. *Id.* at 1092-93.

417. *New York v. United States*, 505 U.S. 144, 181 (1992); *see also* Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1 (2010).

418. Calabresi & Melamed, *supra* note 17, at 1111-15.

419. *Id.* at 1105-06.

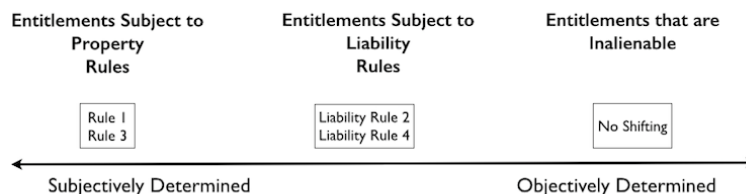
420. *Id.* at 1092.

421. *Id.* at 1111-12.

422. *Id.*

423. *Id.* at 1107.

Fig. I Collective Identity in Entitlements



In homelessness cases described in Part II, homeless persons' inability to articulate a property entitlement limited their legal relief to inalienable entitlements – the broadest and least specific of all entitlements.<sup>424</sup> On the other hand, cities, landowners, and even service providers were able to assert broader property-based entitlement rules to achieve a desired result.<sup>425</sup> In fact, by articulating the problem as one impacting a “property entitlement,” parties other than homeless persons are able to assert their individual identity into the space-resolution process, while homeless persons cannot.<sup>426</sup>

Additionally, this construct of entitlement shifting due to choice (rather than one due to accident) tends to reify our perceptions for why homeless persons remain homeless. That is, general policy surrounding homelessness tends to implicate individual actions of the homeless person that lead to her/his impoverished state.<sup>427</sup> The choice then leaves the homeless to lie in the beds they made. This binary view of homeless persons, without understanding the multiple causes leading to poverty, instability, and eventually homelessness, leads courts and local governments to measure homeless rights against those of responsible citizens who have paid their dues.<sup>428</sup>

This creates what Marianna Valverde has termed a problem of social scale or dimensionality.<sup>429</sup> Legal entitlements create different interactions amongst different orders – each with “its own scope, its own logic, and its own criteria for what is to be governed, as well as its own rules for how to govern . . . .”<sup>430</sup> This allocation of legal entitlements “organizes legal gov-

424. See sources cited *supra* Part II.

425. See discussion *supra* Part II.

426. This captures the essence of Nicholas Blomley's point that [p]eople who do not own property . . . are treated with a good deal of ambivalence, suspicion and even hostility. This treatment extends to whole categories of people who do not enjoy the full exercise of private property rights, whether they be renters, occupants of social housing, or at an extreme, homeless.

BLOMLEY, *UNSETTLING THE CITY*, *supra* note 1, at 4.

427. See discussion *supra* Part II.

428. See *supra* Part II.C.

429. Valverde, *supra* note 74, at 141.

430. *Id.*

ernance, initially, by sorting and separating.”<sup>431</sup> This means, as Valverde writes, that state-scale or global-scale constitutional rights are rarely coordinated and harmonized with low level regulations governing specific urban spaces.<sup>432</sup> When rights and regulations are coordinated, their impact is rarely transmitted or internalized.<sup>433</sup> Instead, because legal rules appear to be scaled, legal powers and legal knowledge obtained by watching other disputes still may not be meaningful in a jurisdiction applying similar constraints because the local scale suggests its action is different, appropriate, or validated by its own experience.<sup>434</sup>

Thus, as Part II described above in relation to anti-camping ordinances, cities after *Pottinger* and *Jones* still asserted claims to prevent homeless persons from camping on city property, believing that those decisions should not apply to their city’s rules.<sup>435</sup> A key component in the scale problem that homeless governance presents is the tension between the inherently local large-scale-interest of the property owner (whether individual or city) and the objective small-scale-interest of the homeless community.<sup>436</sup> Solving that scale problem requires looking beyond the legally adopted identities of property owners and homeless persons and instead to their actual identities.

#### *B. Asserting Subjective Homeless Identity in Legal Decision Making*

In the absence of homeless communities’ identities as a consideration in legal action, the homeless become invisible problems to be solved, rather than constituents impacted by city and court decisions.<sup>437</sup> Taking homelessness seriously requires relationship and community building that reaches beyond current economic obstacles.<sup>438</sup> It may mean, as Marianna Valverde has suggested, some prior organizational work to ensure that the consultation process does not further marginalize marginal groups.<sup>439</sup> This may require educating people about social and economic inequality, causes of homelessness, and the appropriate legal responses to homelessness.<sup>440</sup> At core, these educational efforts ultimately should aim at reducing the tendency of courts and lawmakers to treat homeless persons as a homogenous group. Instead courts should recognize the differences that are present amongst homeless populations when weighing “one size fit all” regulations.<sup>441</sup>

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431. *Id.*

432. *Id.*

433. *See supra* Part I.A.

434. Valverde, *supra* note 74, at 141.

435. *See supra* Part II.A.1.

436. *See generally* Valverde, *supra* note 74.

437. *See* VALVERDE, *supra* note 58, at 215.

438. *Id.*

439. *Id.*

440. *Id.*

441. *See* SNOW & ANDERSON, *supra* note 50, at 7 (describing differences in homeless identities).

It may also mean recognizing *legally* some form of relationship that homeless persons have to space. For example, Joseph Singer has advocated for a social relations model of property in which rights and interests in property and space are balanced towards the social propriety.<sup>442</sup> Singer's model invokes the dominant entitlement-shifting device as the liability rule, where subjective interests and objective interests intersect.<sup>443</sup> Relating to homeless persons, critiques might suggest that solutions granting homeless persons the right to "be" somewhere do not achieve this balancing since the right becomes diluted across the entire population.<sup>444</sup>

A third solution suggests that the community, having understood the nature of homelessness, asserts its interest in property to form an objective balancing of all competing interests. That is, when the community takes homelessness seriously, it may then, in turn, seek to assert its subjective expectation that ordinances and rules not be unfairly administered towards vulnerable populations. I argue that this last approach – community adoption of homeless perspectives – provides the greatest source for potentially finding homeless solutions. Importantly, it draws on Valverde's conception of relationship and scale by identifying the homeless interests as community interests, instead of as contrary interests.<sup>445</sup> Community interests invoke the power of local governance in combination with the individual rights of persons viewed as stakeholders.<sup>446</sup> Such a solution also draws on Singer's and Blomley's notions of property as a social system, responsive to the different kinds of demands that the community imposes.<sup>447</sup>

Communities can manifest their subjective understandings of homelessness by requiring projects to take into account the impact their projects will have on homeless communities.<sup>448</sup> State Environmental Quality Review Acts should incorporate environmental justice accounts, such as how building projects change resource management for homeless and poverty-related groups. By acknowledging that building projects may have impacts on vulnerable

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442. Joseph Singer pits the traditional ownership model of property against a more balanced social relations model. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 2-3, 6 (2000). Other scholars have similarly pointed to the dependence of the common law on ownership as its framing mechanism. See Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

443. See SINGER, *supra* note 442, at 3.

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

445. See VALVERDE, *supra* note 58, at 215.

446. See Valverde, *supra* note 74, at 143-44.

447. See Nicholas Blomley, *The Borrowed View: Privacy, Propriety, and the Entanglements of Property*, 30 LAW & SOC. INQUIRY 617, 639-40 (2005) (suggesting that even private property may have public entanglements); Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U. L. REV. 1283, 1412 (1996) (articulating property as a social system subject to shared responsibilities).

448. See VALVERDE, *supra* note 58, at 215.

populations, homeless identity can be injected into the dispute resolution process.<sup>449</sup> Only Connecticut, Maryland, and Guam require projects to evaluate their impact as to low income populations.<sup>450</sup> However, no other states with Environmental Impact Review Acts incorporate such requirements. These statements could serve as powerful reminders that space allocation should be cognizant of detrimental effects, particularly towards vulnerable groups. Ideally, it would also reshape our image of low income housing away from opportunities for capital investment in the gentrifying city, towards opportunities to invest in the social well-being of the humans that occupy them.<sup>451</sup>

Second, cities and courts should avoid labeling homeless persons as nuisances, or other dehumanizing terms. For example, one court described the

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449. See Alan Ramo, *Environmental Justice as an Essential Tool in Environmental Review Statutes: A New Look at Federal Policies and Civil Rights Protections and California's Recent Initiatives*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 41, 72 (2013). Professor Ramo notes:

It is therefore incorrect to say that “social justice” is separate from CEQA, that CEQA does not consider social factors, or that environmental justice has no place in the CEQA context. Environmental justice represents an insight into the relationship between social and economic factors on the one hand, and actual environmental impacts on people and their communities on the other. Environmental justice encapsulates this link between people and the way they treat each other and their environment. Thus, consideration of race and broader demographics of a potentially impacted community is crucial to a proper, thorough, and sensitive environmental review.

*Id.*

450. See CONN. GEN. STAT. ANN. § 22a-1b (West 2014) (“In the case of an action which affects existing housing, the evaluation shall also contain a detailed statement analyzing (A) housing consequences of the proposed action, including direct and indirect effects which might result during and subsequent to the proposed action by income group as defined in section 8-37aa and by race . . . .”); MD. CODE ANN., NAT. RES. § 1-301 (West 2014) (defining “Environmental effects report” as “a report on each proposed State action significantly affecting the environment, natural as well as *socioeconomic and historic*” (emphasis added)); 22 GUAM ADMIN. R. & REGS. § Appendix H (1997) (requiring “[d]escription of long term impacts directly caused by the project or through secondary effects such as income distribution, population growth or shifts, additional stress on services”).

451. Nevertheless, even cities that might attempt to account for the loss of low income housing may not be able to enforce their own land-use schemes. See *Palmer/Sixth St. Props., L.P. v. City of L.A.*, No. CV 07-1346 CAS (FMO), 2010 WL 1658963, at \*1, \*6-7 (C.D. Cal. Apr. 22, 2010). In *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, a real estate developer brought an action challenging a Los Angeles Municipal ordinance that required developers to replace certain low-income housing that previously existed prior to the development project. *Id.* at \*1. The developer filed two actions – a federal court action and a state court action seeking a mandamus to order the zoning board to lift the restraint on the project. *Id.* The state court ordered the zoning board to lift the project restraint under the Costa-Hawkins Rental Act, a California State legislative act that preserved property owners’ rights to self-determine rental rates for property. *Id.* (citing CAL. CIV. CODE § 1954.50-1954.535 (West 2013)).

homeless as *urban pariahs* that “coloniz[e] public space” forcing communities to evict them.<sup>452</sup> Other courts have used the term nuisance to describe homeless activities or presence on city land.<sup>453</sup> Associating homeless presence and survival activities as a social malfeasance does harm to individual homeless persons by implicating individuals to fictionalized group perceptions.<sup>454</sup> This, in turn, has a reifying effect in which all activities of homeless persons become problematic.<sup>455</sup> Homeless persons then become either projects to be pitied or problems to be solved, not persons with interests and social meaning. They become visible, yet legally invisible, while NIMBYistic tendencies prevail. Homeless persons, as vulnerable citizens, need cities, states, and courts to reclaim homeless identity not as social problems, but as constituents who are impacted by changing society.

### CONCLUSION

Communities addressing homelessness often treat homeless persons as problems rather than seeking to resolve underlying social problems that lead to homelessness. The lack of property identity leaves homeless persons vulnerable to misunderstanding, mistreatment, or mistaken purpose. It also leads to legal identity that is diluted and without direct relation to the individual’s personal identity. Homeless solutions necessitate injecting homeless persons’ individual identity into city and court discussions. Requiring states to take cognizance of the impact of projects and language on homeless populations serves to remind government actors of the human toll in balance. Moving forward, American prosperity should not only be reachable for all Americans, but should also reach back to ensure that the most vulnerable amongst us may, if not enjoy their prosperity, not be punished for not having it at all.

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452. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1179 (Cal. 1995) (describing homeless as “[t]oday’s pariahs . . . who are homeless largely by necessity . . .”); *People v. Chapman*, No. A122393, 2010 WL 127595, at \*6 (Cal. Ct. App. Jan. 14, 2010) (describing homeless as “[t]oday’s pariahs, an urban blight, given to colonizing public spaces, thereby provoking municipal crusaders to evict them . . .”) (internal quotation marks and citations omitted).

453. *See supra* Part II.A.1.

454. *See* MITCHELL, *THE RIGHT TO THE CITY*, *supra* note 10, at 163.

455. *Id.* at 163 (stating that city ordinances that “control behavior and space such that homeless persons cannot do what they must in order to survive” criminalize survival itself).