

# Jailbirds in the Sunshine State: Defending Crimes of Homelessness



*Published May 2016*





FOUNDATION SUPPORT



SOUTHERN LEGAL COUNSEL

1229 NW 12th Avenue
Gainesville, FL 32601
(352) 271-8890

www.southernlegal.org

Written by Kirsten Clanton
Director of Ending Homelessness Project

Edited by Jodi Siegel
Executive Director

Funding for this project provided
by the Herb Block Foundation

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SLC's Ending Homelessness Project is a statewide project in Florida to remove legal barriers that cause and perpetuate homelessness. SLC utilizes impact litigation, policy advocacy, community education and outreach to protect the civil and human rights of homeless persons and their advocates.

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Robert A. Rush
Tom Scarritt
Robert F. Spohrer
The Hon. William A. Van Nortwick, Jr.

ACKNOWLEDGMENTS

The following individuals provided guidance and invaluable input during the development of this manual:

Bennett Brummer, Board Member of Southern Legal Counsel and former Public Defender (Eleventh Judicial Circuit)
Raine Johns, Former Homeless Outreach Attorney/Director of Baker Acts/ Director of Mobile Medical Unit/ Assistant Public Defender (Sixth Judicial Circuit) and current Executive Director of the Pasco Coalition for the Homeless
Marie Marino, Assistant Public Defender (Thirteenth Judicial Circuit)
Stacy Scott, Public Defender (Eighth Judicial Circuit)
Whitney Untiedt, former Misdemeanor Court Supervisor/Assistant Public Defender (Eighth Judicial Circuit) and current Director of Pro Bono Initiatives at Akerman LLP
Taylor Williams, Assistant Public Defender (Thirteenth Judicial Circuit)

A special thanks to the interns, law clerks, and pro bono volunteers with Southern Legal Counsel who provided hundreds of hours of research assistance:

Simone Chriss (JD, Univ. of Fla. Levin College of Law 2016)
Melanie Franco (JD, Univ. of Fla. Levin College of Law 2015)
Randall Harper (JD, Univ. of Fla. Levin College of Law 2015)
Richard Hatch (B.A., Furman Univ. 2015)
Alex Longo (JD, Univ. of Fla. Levin College of Law 2016)
Tina O'Rourke (JD, Univ. of Fla. Levin College of Law 2016)
Kelsey Peña (JD candidate, Univ. of Fla. Levin College of Law 2017)
Irene Sepúlveda (JD candidate, Univ. of Fla. Levin College of Law 2017)
Justin Sigtermans (JD candidate, Univ. of Fla. Levin College of Law 2017)
Zachary Ullman (JD, University of Florida Levin College of Law 2013)



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## ABOUT THIS MANUAL

Jailbirds in the Sunshine State: Defending Crimes of Homelessness examines common laws used to arrest and jail homeless people for conduct essential to their survival and provides detailed analysis of constitutional and other legal defenses specific to representing homeless clients charged with such crimes. The target audience for this training manual is public defenders and pro bono criminal

defense lawyers in the state of Florida, although the manual contains information that may be useful to civil lawyers in bringing lawsuits to protect the rights of homeless clients. Because the target audience is lawyers in Florida, there is a primary focus on legal precedent from Florida and the Federal Eleventh Circuit. This manual is not intended as a substitute for legal advice.



# Introduction

Instead of investing in proven solutions to end homelessness, Florida leads the nation in using the criminal justice system to punish homeless people for conduct they need to do to survive such as sleeping, camping, bathing, public urination, trespass, sitting/lying down, loitering, storage of belongings, and asking for money. These charges clog court dockets across the state as some of our most vulnerable residents, often charged with patently unconstitutional ordinances, face an endless cycle of arrest, jail, and homelessness. These misguided policies come at tremendous cost to taxpayers, and create barriers to accessing the very things needed to exit homelessness—housing, jobs, and public benefits—due to lengthy arrest records and criminal debt.

Public defender's offices find themselves on the front lines of this misguided war against homeless people. This training manual is designed to provide needed reinforcements to the lawyers who are the last line of defense in stopping this cycle of arrest, jail, and the streets (repeat). This manual examines common laws used to arrest and jail homeless people in Florida and provides detailed analysis of constitutional and other legal defenses specific to representing homeless clients charged with such crimes. It is not intended as a treatise on constitutional law, for example, but instead examines constitutional doctrines from the perspective of how they apply to the legal and factual circumstances of homeless people.

**Chapter 1** (“Homeless & Hungry, Please Help!”) is a detailed analysis of First Amendment jurisprudence as it relates to panhandling (or soliciting employment, or engaging in street performance), which is protected speech. Recent developments out of the Supreme Court have led to a reexamination of panhandling ordinances and many are being struck down by the courts as unlawful content-based restrictions on speech. This line of cases is essential knowledge for any public defender's office as similar laws, with similar constitutional deficiencies, are on the books in every judicial circuit in Florida.

**Chapter 2** (“Sleeping Like A Criminal”) analyzes the legal implications of criminalizing the basic, life-sustaining conduct of sleep which is an unavoidable part of the condition of being human. This chapter discusses Eighth Amendment jurisprudence related to prohibitions against status crimes and recent legal filings by the U.S. Department of Justice arguing that sleeping ordinances, as applied to homeless persons who have no alternative to sleeping outside, violate the Eighth Amendment's proscription against cruel or unusual punishment. Also in this chapter is a discussion of the necessity defense and its application when defending homeless people charged with sleeping or other conduct essential to survival.

**Chapter 3** (“Move Along ... Move Along”) discusses violations of a homeless person's freedom of movement, including an analysis of the

fundamental right to intrastate travel in Florida and the constitutionality of loitering laws.

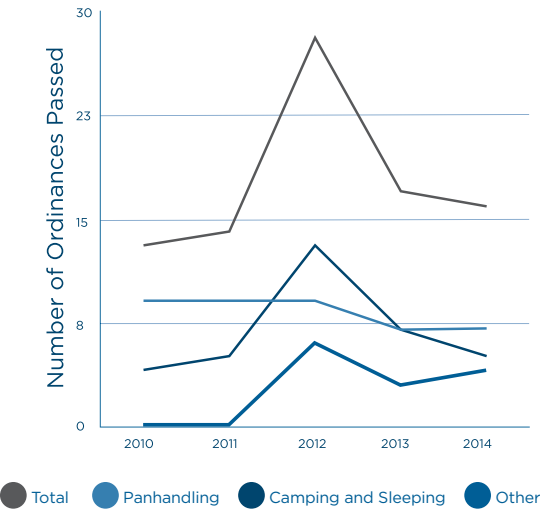
**Chapter 4** (“No Rest for the Weary”) analyzes potential legal challenges to “Sit/Lie” ordinances including vagueness, First Amendment, Substantive Due Process, Right to Travel, Equal Protection, and the Eighth Amendment. This chapter also includes a discussion of potential violations of the Americans with Disabilities Act caused by “Sit/Lie” ordinances.

**Chapter 5** (“Homeless Prohibited”) is devoted to trespass, which is a particularly harmful use of the criminal justice system because it involves banning physical presence. At a certain point, homeless people have no right to exist, simply because there is no place where they can lawfully be. This chapter discusses the use of trespass warnings to exclude homeless people from public places (such as city parks), examines common factual defenses to trespass charges, and provides tips on preparing a defense.

**Chapter 6** (“The Good Samaritan Goes to Jail”) highlights a new twist in the government's quest to eliminate the visibility of homelessness from public space: criminalizing the efforts of people who wish to share food with homeless people in public spaces either as political protest, as an act of charity, or as an exercise of their religion. This chapter discusses the evolving caselaw in this area.



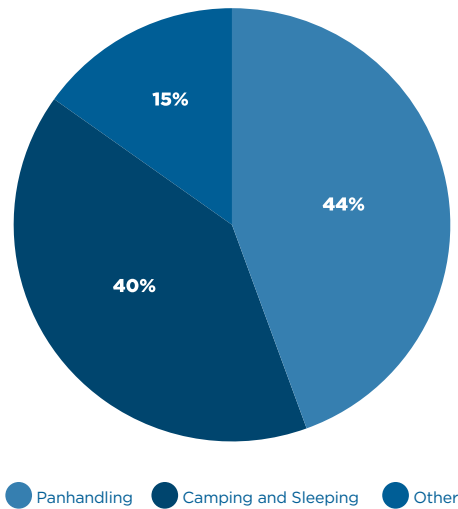
### Anti-Homeless Ordinances Per Year



**Florida, County, and Municipality Ordinances, 2010-2014**

From 2010-2014, 79 new anti-homeless ordinances were passed. These ordinances were classified as either anti-panhandling, anti-camping/sleeping, or other. Here it is shown how many of each type of ordinance passed in a given year.

### Anti-Homeless Ordinances



**Florida, County, and Municipality Ordinances, 2010-2015**

88 new anti-homeless ordinances were passed by Florida counties and municipalities from January 2010- September 2015. The majority of the ordinances dealt primarily with camping/sleeping and panhandling/soliciting with the remaining ordinances prohibiting public urination/defecation, sitting/lying down, public feedings, and obstruction of sidewalks.

**Chapter 7** (“Home, Sweet Home”) provides an explanation of the tenancy rights of nontransient motel residents. Although legal advocacy regarding tenancy rights is traditionally the domain of civil lawyers, it has important intersections with criminal law in the areas of Fourth Amendment privacy rights, and whether arrests for trespass or as “undesirable guests” under Chapter 509 of the Florida Statutes are lawful.

**Chapter 8** (“Hands Off My Property”) is dedicated to the Fourth Amendment and unreasonable searches as applied to homeless people, their personal property, and the places where they tend to reside. This chapter contains a detailed discussion of a homeless person’s expectation of privacy in personal effects, tents, housing shared

with others, hotels/motel rooms, homeless shelters, and cars. This chapter also provides information about unlawful seizures that do not involve searches, and avenues for redressing permanent destruction of property rights.

**Chapter 9** (“Prohibition Era Revisited”) discusses defenses to open container and possession of alcohol charges. This chapter also analyzes the connection between alcoholism and homelessness, and the implications for the criminal justice system.

**Chapter 10** (“Homes, Not Handcuffs”) provides policy advocacy talking points and resources for use in advocating for constructive solutions to end homelessness (homes) rather than destructive policies of arrest and incarceration (handcuffs).

*In addition to providing this manual to public defender’s offices and pro bono criminal defense lawyers in the state of Florida, Southern Legal Counsel’s Ending Homelessness Project is available to provide technical assistance and training in developing strategies, defenses, and constitutional challenges similar to the ones described in this manual. The criminalization of homelessness thrives on expedient disposition of cases, ensuring the facts and legal grounds of such charges are never challenged in court. Our organization is ready to stand with you to convince communities that our clients need homes, not handcuffs. And if we cannot convince them, we will fight together to defend our clients’ rights in court.*





# Chapter 1

## Homeless & Hungry, Please Help!

### SEC. 1 RIGHT TO SOLICIT ASSISTANCE

Understanding the First Amendment is critical in defending homeless people charged with crimes. Most cities and counties use local ordinances and state statutes to restrict homeless people from asking for money. Measures include: blanket bans on panhandling; permitting schemes for solicitation; restrictions on aggressive panhandling; prohibitions on panhandling during particular times or places; and the use of broader laws such as traffic, loitering or disorderly conduct laws to prohibit standing in the right of way, begging, or other related conduct. In addition to restricting an individual's ability to ask for money, cities and counties also try to prohibit people from engaging in street performance, vending, or soliciting employment.

Such laws can be challenged under the First and Fourteenth Amendments of the U.S. Constitution. Cities and counties are permitted to regulate protected speech, but only through constitutionally proscribed means. Many ordinances that are used to arrest and incarcerate homeless people today are unconstitutional on their face and only remain in use because they have not yet been challenged in criminal or civil courts. In particular, recent U.S. Supreme Court developments have led to lower courts striking down panhandling ordinances across the country that are similar to ones on the books all across Florida. Even if an ordinance is constitutional on its face, the factual circumstances and how the police enforce a panhandling ordinance can make it unconstitutional as-applied to a particular person.

#### **Panhandling is Protected Speech**

While the Supreme Court has not “directly decided the question of whether the First Amendment protects soliciting alms when done by an individual, the Court has held—repeatedly—that the First Amendment protects charitable solicitation performed by organizations.” *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013). Charitable solicitation is treated differently from commercial speech because it does more than inform economic decisions. *Village of Schamburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980). The Court explains:

Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

*Id.*

A number of federal circuit courts of appeal have directly decided that panhandling and begging are forms of charitable solicitation and therefore are protected speech under the First Amendment. *Smith v. City of Ft. Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) (“Like other charitable solicitation, begging is speech entitled to First Amendment protection.”); *Loper v. New York City Police Dep’t*, 999 F.2d 699, 706 (2d Cir. 1993); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013), *abrogation recognized by Cahaly v. Larosa*, 708 F.3d 549 (4th Cir. 2015); *Speet*, 726 F.3d at 878; *Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000).

Courts have reasoned that begging itself not only communicates a message, but that it is also accompanied by other speech related to the request for assistance that is protected by the First Amendment:

Begging frequently is accompanied by speech indicating the need for food, shelter, clothing, medical care or transportation. Even without particularized speech, however, the presence of an unkempt and disheveled person holding out his or her hand or a cup to receive a



donation itself conveys a message of need for support and assistance. We see little difference between those who solicit for organized charities and those who solicit for themselves in regard to the message conveyed. The former are communicating the needs of others while the latter are communicating their personal needs. Both solicit the charity of others. The distinction is not a significant one for First Amendment purposes.

*Loper*, 999 F.2d at 704.

Beggars at times may communicate important political or social messages in their appeals for money, explaining their conditions related to veteran status, homelessness, unemployment and disability, to name a few. Like the organized charities, their messages cannot always be easily separated from their need for money. While some communities might wish all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support.

*Gresham*, 225 F.3d at 904; *see also McLaughlin v. City of Lowell*, Case No. 14-10270-DPW, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6453144, at \*3 (D. Mass. Oct. 23, 2015) (“Panhandling is not merely a minor, instrumental act of expression. ... at stake is ‘the right to engage fellow human beings with the hope of receiving aid and compassion.’”) (*quoting Benefit v. City of Cambridge*, 424 Mass. 918, 679 N.E.2d 184, 190 (Mass. 1997)).

Courts also have recognized that solicitation of employment is protected speech under general rule that solicitation is protected speech. *See Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (solicitation of employment is protected speech because a solicitation is where “the solicitor communicates, in some fashion, his desire that the person solicited do something, such as give money, join an organization, transact business, etc.”) (quotations omitted).

Florida courts have recognized that begging or panhandling is entitled to First Amendment protection. *Ledford v. State*, 652 So. 2d 1254, 1256 (Fla. 2d DCA 1995) (“begging is communication entitled to some degree of First Amendment protection”); *C.C.B. v. Florida*, 458 So. 2d 47 (Fla. 1st DCA 1984) (First Amendment right for individuals to beg or solicit alms for themselves).

Because panhandling is protected under the First Amendment, ordinances or statutes that restrict panhandling must pass constitutional scrutiny. A city or county cannot ban panhandling completely without violating the Constitution. *C.C.B.*, 458 So. 2d 47 (total prohibition of begging or solicitation of alms for oneself held unconstitutional).

### **Street Performance is Protected Speech**

Street performance is a form of expression protected by the First Amendment of the U.S. Constitution. *Horton v. City of St. Augustine, Fla.*, 272 F.3d 1318, 1333 (11th Cir. 2001); *see also State v. O’Daniels*, 911 So. 2d 247, 251 (Fla. 3d DCA 2005) (street performance and art vending entitled to full constitutional protection under First Amendment). Because street performance is protected, ordinances that restrict it must pass constitutional scrutiny. A city or county cannot ban street performance completely without violating the Constitution. *Id.* at 253 (total prohibition of street performance on all public property held unconstitutional for lack of narrow tailoring).

### **Newspaper Vending is Protected Speech**

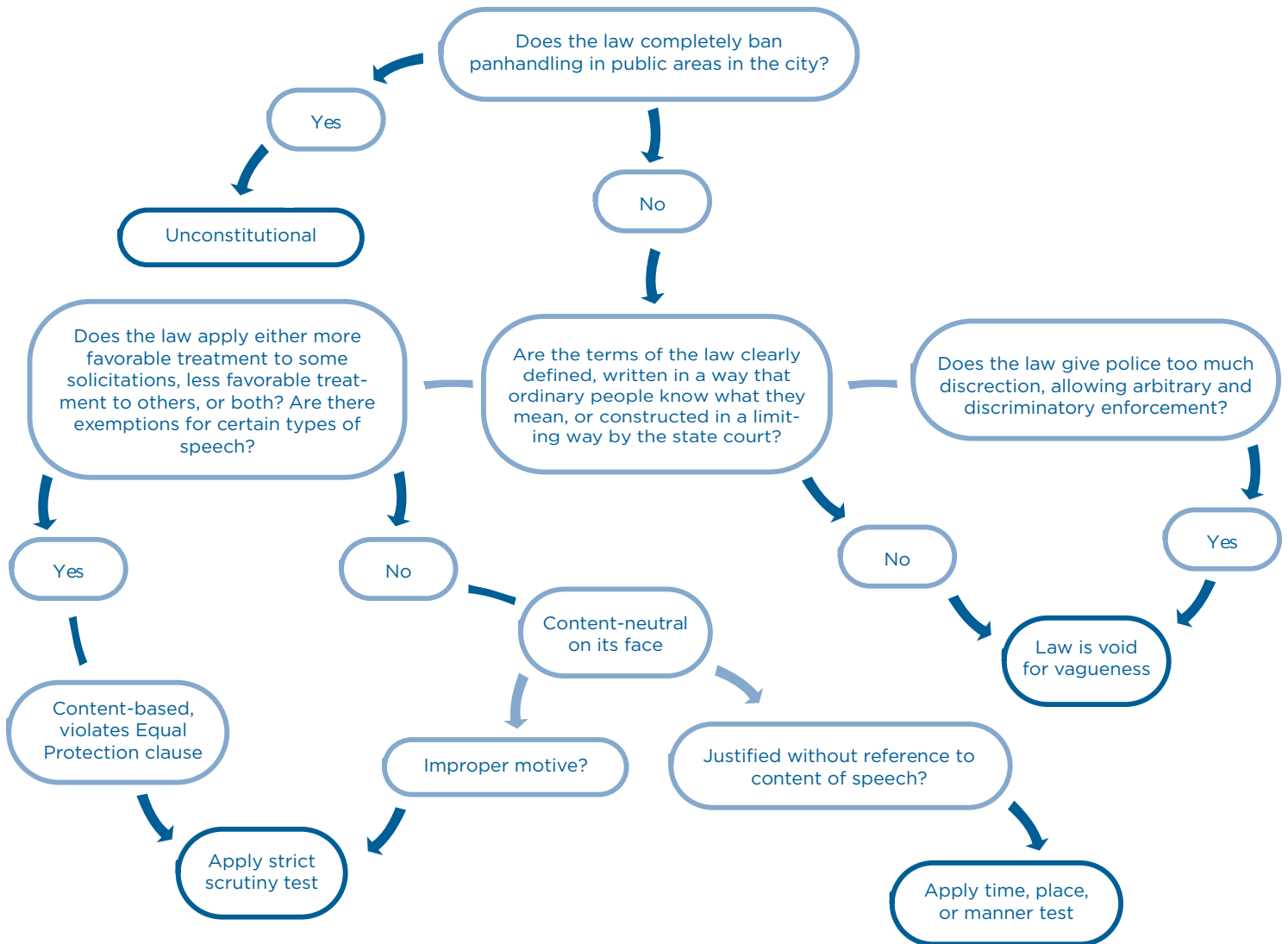
In a number of cities, homeless people are employed to distribute newspapers for sale. In addition to working for traditional news outlets, some cities have “street” papers that are often written by and published by homeless people themselves and are provided in exchange for a donation or a set sale price. It is well settled that liberty of circulation is inextricably intertwined with freedom of the press. There is therefore a First Amendment “right to distribute and circulate printed materials, even when such literature is offered for sale.” *News & Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891, 898 (S.D. Fla. 1988).

## **SEC. 2 ANALYZING FIRST AMENDMENT VIOLATIONS**

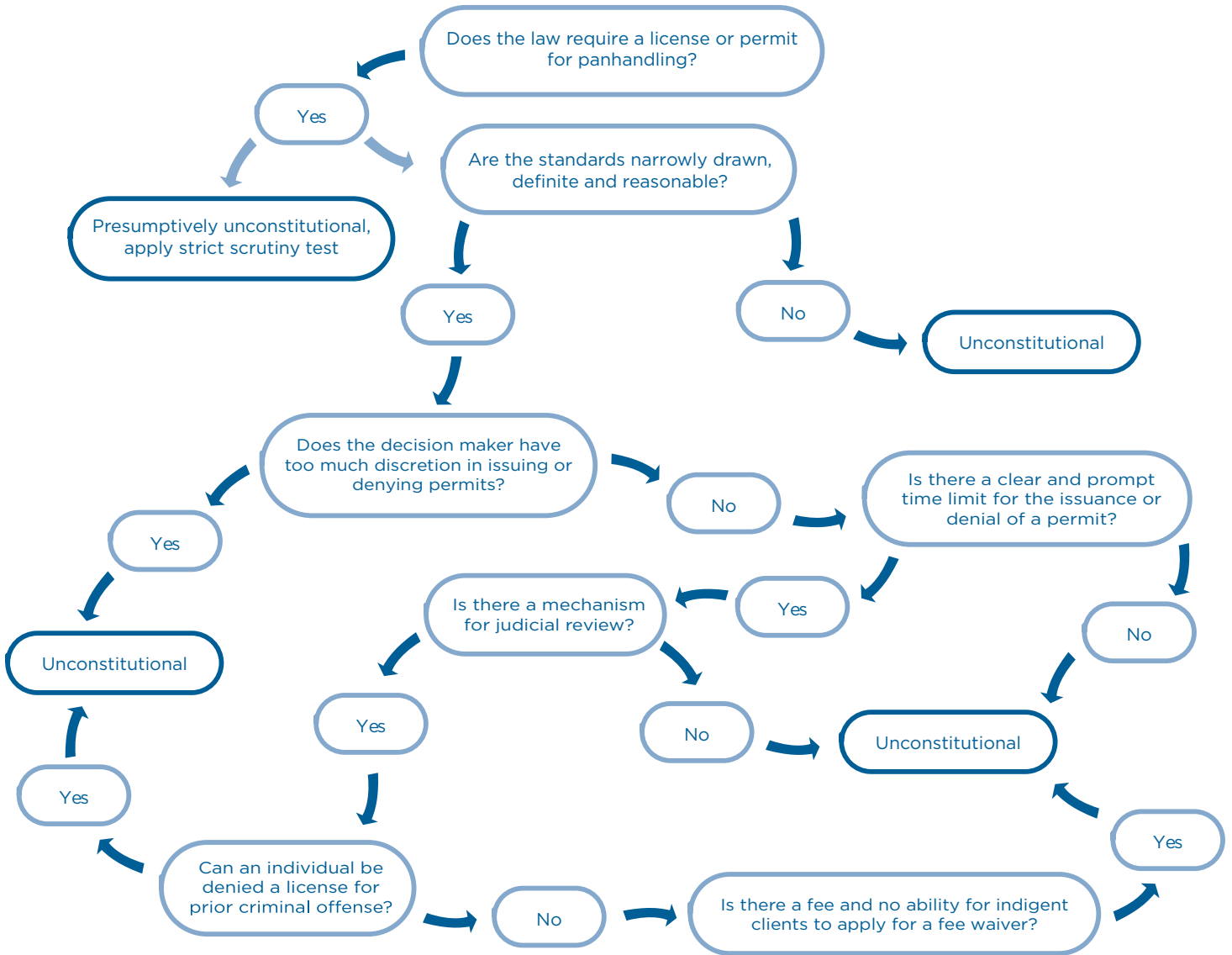
The flow chart on the next two pages details a step-by-step analysis to assist practitioners in analyzing the constitutionality of a panhandling ordinance (and determining the relevant doctrines implicated by the ordinance under review). All of the constitutional doctrines referred to on the chart will be discussed in this section with references to legal citation.<sup>1</sup>

<sup>1</sup> This is intended to be a tool to guide an independent analysis by a legal practitioner and is not intended as legal advice.





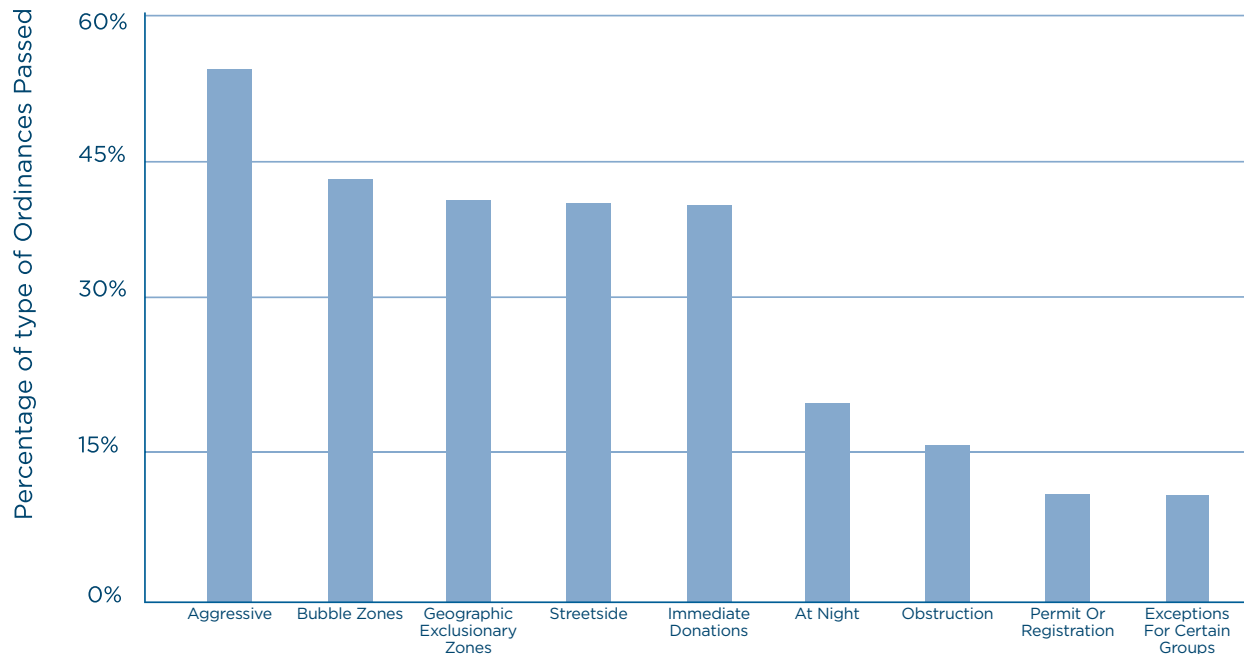
**HOW TO ANALYZE PANHANDLING ORDINANCES FLOW CHART**



### HOW TO ANALYZE PERMIT SCHEMES FLOW CHART



## Panhandling and Soliciting Ordinances



### Florida, County, and Municipal Ordinances 2010-2015

The anti-panhandling ordinances were further classified in a number of sub-categories. Often a single ordinance would fit into multiple categories, such as an ordinance that bans both aggressive panhandling as well as panhandling at night.

### Public Forum Analysis

When a regulation restricts access to public property as a forum for expression, the first step is to determine the nature of the government property involved. *U.S. v. Frandsen*, 212 F.3d 1231, 1237 (11th Cir. 2000); see also *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 44 (1983) (“The existence of right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.”). There are several categories of government-owned property for First Amendment analysis: (1) traditional public forum; (2) designated public forum; (3) limited public forum; and (4) nonpublic forum. See *Crowder v. Hous. Auth. of City of Atlanta*, 990 F.2d 586, 590 (11th Cir. 1993); *Walker v. Texas Div., Sons of Confederate Veterans*, 135 S. Ct. 2239, 2250 (2015).

A traditional public forum is an area that has “historically been open to the public for speech activities.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014); see also *U.S. v. Grace*, 461 U.S. 171, 177 (1983) (streets, sidewalks and parks are considered to be public forums). The government’s ability to restrict

speech in traditional public fora is “very limited.” *Id.* Three federal circuits have held that medians are traditional public fora. *Cutting v. Portland, Me.*, 802 F.3d 79 (1st Cir. 2015); *Warren v. Fairfax Cnty.*, 196 F.3d 186 (4th Cir. 1999) (en banc); *Satawa v. Maccomb Cnty. Rd. Comm’n*, 689 F.3d 506 (6th Cir. 2012).

A designated public forum is created when the government opens property not traditionally regarded as a public forum for that purpose. *Walker*, 135 S. Ct. at 2250. A restriction on speech in a designated public forum is subject to same level of scrutiny as that which applies to a traditional public forum. *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009).

A limited public forum exists where a government has reserved a forum for certain groups or for the discussion of certain topics. *Id.* at 469-70. Once the government has opened a limited public forum, it may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).



A nonpublic forum is a forum which is not by tradition or designation open for public communication and limits on access must only meet a reasonableness standard. *Intn'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992).

### **Determining the Level of Scrutiny**

To analyze the constitutionality of a government regulation restricting speech in a traditional public forum, courts must first determine the level of scrutiny that applies. The level of scrutiny that applies depends on whether the ordinance is content based or content neutral.

### **Content-Based Analysis**

The Supreme Court has instructed that there is a two-step analysis in determining whether a restriction on speech is content based and, therefore, whether strict scrutiny applies. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015) (“Because strict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based, a court must evaluate each question before it concludes that the law is content neutral and thus subject to a lower level of scrutiny.”).

#### **(1) Does regulation “on its face” draw distinctions based on message a speaker conveys?**

In the Supreme Court’s analysis:

Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

*Reed*, 135 S. Ct. at 2227 (internal citations omitted).

Government discrimination among viewpoints is “the regulation of speech based on ‘the specific motivating ideology or the opinion or perspective of the speaker’” and is a blatant form of content-based discrimination. *Id.* at 2230. However, a

regulation can be content based even if it does not discriminate among viewpoints within that subject matter. *Id.* (“For example, a law banning the use of sound trucks for political speech—and only political speech—would be a content-based regulation even if it imposed no limits on the political viewpoints that could be expressed.”).

Distinctions drawn based on the identity of the speaker are often “simply a means to control content” and are therefore subject to strict scrutiny when the government’s speaker preference reflects a content preference. *Id.* at 2230; *see also Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1265 (11th Cir. 2005) (“sign code exemptions that pick and choose the *speakers* entitled to preferential treatment are no less content based than those that select among subjects or messages”).

A common type of content-based panhandling restriction are statutes that prohibit soliciting funds for oneself but allows soliciting funds for charitable organization. *See Loper v. N.Y. City Police Dep’t*, 999 F.2d 699, 705 (2d Cir. 1993) (state statute is content based where it allows individuals to solicit for charitable organizations but prohibits soliciting funds for themselves); *Bischoff v. Florida*, 242 F. Supp. 2d 1226 (M.D. Fla. 2003) (same).

Applying the test in *Reed*, courts across the country are holding that restricting requests for donations of money but allowing other types of requests is content based. *Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015) (rehearing) (banning oral requests for money now but not regulating requests for money later is a form of content discrimination); *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 553 (4th Cir. 2013) (ordinance plainly distinguishes among types of solicitations on its face), *abrogation recognized by Cahaly v. Larosa*, 708 F.3d 549 (4th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *judgment vacated, remanded for further consideration in light of Reed* by 135 S. Ct. 2887 (2015), *on remand* Case No. CV 13-40057-TSH, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (recognizing virtually all courts post-*Reed* have found similar panhandling ordinances to be content based); *Browne v. City of Grand Junction*, 27 F. Supp. 3d 1161 (D. Colo. 2014) (ordinance prohibiting soliciting employment, business or contributions is content based); *Browne v. City of Grand Junction*, Case No. 14-cv-00809, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 5728755 (D. Colo. Sept. 30, 2015) (*Reed* confirms court’s prior conclusion that ordinance prohibiting requests for money or other items of value is content based); *McLaughlin v. City*



of *Lowell*, Case No. 14-10270, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6453144 (D. Mass. Oct. 23, 2015) (city ordinance banning vocal panhandling, defined as solicitation of any item of value through a request for an immediate donation, was content-based restriction on speech). *But see* *Watkins v. City of Arlington*, Case No. 4:14-cv-381-0, 2015 WL 4755523 (N.D. Tex. Aug. 12, 2015) (ordinance that regulates interactions between pedestrians and occupants of a vehicle stopped at traffic lights is content neutral).

The dissenting justice in the now vacated Seventh Circuit opinion in *Norton* illustrates why these types of ordinances are content based:

A police officer seeking to enforce the City's ordinance must listen to what the speaker is saying in order to determine whether the speaker has violated the ordinance. Indeed, the officer must determine on which side of at least three different verbal distinctions the speech falls when evaluating whether the ordinance has been violated. First, the officer must determine whether the speech is a request for money or other gratuity (potentially a violation) or merely a request for the listener's time, signature, or labor (not a violation). Second, the officer must determine whether the speech is a request for an immediate transfer of money (potentially a violation) or merely a request for the transfer of money at a future date (not a violation). Third, the officer must determine whether the speech is a request for a charitable donation (potentially a violation) or merely a request for a commercial transaction (not a violation). The officer cannot answer any of these questions without listening to and understanding what the speaker is saying. That is precisely the sort of situation that the Supreme Court said involves a content-based regulation.

*Norton v. City of Springfield, Ill.*, 768 F.3d 713, 721 (7th Cir. 2014) (Manion, J., dissenting), *vacated on rehearing* 806 F.3d 411 (7th Cir. Aug. 7, 2015). See also *Norton v. City of Springfield*, Case No. 15-3276, 2015 WL 8023461 (C.D. Ill. Dec. 4, 2015); Cf. *ACLU of Nevada v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006).

## (2) Was regulation adopted for improper motive or animus towards message conveyed?

“Our precedents have also recognized a separate and additional category of laws that, though facially content neutral, will be considered content-based regulations of speech: laws that cannot be justified without reference to the content of the regulated speech, or that were adopted by the government ‘because of disagreement with the message [the speech] conveys.’” *Reed*, 135 S. Ct. at 2227 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted)). These laws must meet strict scrutiny. However, an improper purpose or discriminatory intent is required; it is not enough to show that a content-neutral law disproportionately affects speech on certain topics. *McCullen*, 134 S. Ct. at 2531.

It is important to note that the government's justification or motive is only relevant if the regulation is facially content neutral. *Reed*, 135 S. Ct. at 2228. The first step in the analysis is whether the law is content neutral on its face. *Id.* “A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of ‘animus toward the ideas contained’ in the regulated speech.” *Id.* (“In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.”).





### Strict Scrutiny

Content-based restrictions on speech must survive strict scrutiny “which requires the government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest.” *Reed*, 135 S. Ct. at 2231 (citations omitted). Whether an interest is “compelling” is determined based on the circumstances of the case. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 584 (2000) (“That determination is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the aspect of fairness, privacy, etc., addressed by the law at issue is highly significant.”).

Traffic safety or aesthetics have not been recognized as “compelling” interests. *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267-68 (11th Cir. 2005) (citing *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981)). Even if the government’s interest in aesthetics and traffic safety could be considered compelling interests within the context of a particular case, the government must demonstrate how those interests are served by the content-based restrictions on speech. *Solantic*, 410 F.3d at 1267; see *Bischoff v. Florida*, 242 F. Supp. 2d 1226 (M.D. Fla. 2003) (assuming without deciding traffic safety is a compelling interest, the statute’s content-based distinction on roadside solicitation does not have “any bearing whatsoever on road safety”).

Likewise, protecting citizens from mere annoyance has not been recognized as a compelling interest. *C.C.B. v. State*, 458 So. 2d 47 (Fla. 1st DCA 1984). A function of speech in our society, as the Supreme Court has stated, is to invite dispute. “It may indeed best serve its high purposes when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” *Terminiello v. Chicago*, 337 U.S. 1, 4, 69 S. Ct. 894, 895 (1979).

When the government’s interests “affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive.” *Brown v. Entertainment Merchants Ass’n*, 131 S. Ct. 2729, 2741-42 (2011). A restriction that is “overinclusive” is overbroad, and therefore not narrowly tailored, to achieve the government’s interests. *Id.* at 2742. A restriction that is “underinclusive” also fails the narrow tailoring requirement because it “diminish[es] the credibility of the government’s rationale for restricting speech in the first place.” *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994). The reason for this is that “a law cannot be regarded as protecting an interest of the highest order, and thus as justifying

a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited.” *Reed*, 135 S. Ct. at 2232 (quotations omitted).

Even where courts have accepted “public safety” as a compelling interest, content-based panhandling restrictions have failed strict scrutiny because the ordinances are overinclusive in that they prohibit protected speech that poses no threat to public safety. See *Browne*, 2015 WL 5728755, at \*12-13 (City failed to show that restrictions on panhandling at night, within 20 feet of a bus stop or ATM, from people waiting in line or sitting at a sidewalk café, from people in a parking garage, or restrictions on making repeated requests for money, necessarily threatens public safety or are inherently dangerous to the public). Although panhandling may be accompanied at times on threatened behavior, “the correct solution is not to outlaw panhandling. The focus must be on the threatening behavior.” *Id.* at \*13 (“In attempting to combat what it sees as threatening behavior that endangers public safety, Grand Junction has passed an ordinance that sweeps into its purview non-threatening conduct that is constitutionally protected.”). See also *McLaughlin*, 2015 WL 6453144 (City fails to demonstrate its restrictions on continuing to panhandle from an individual who has already given a negative response, panhandling in groups of two or more, or panhandling within 20 feet of a bank, ATM, telephone, bus stop, or outdoor café, are narrowly tailored to address the City’s public safety concerns); *Thayer*, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (adopting analysis in *Browne* and *McLaughlin* in holding similar content-based panhandling restrictions fail strict scrutiny).

The District Court of Massachusetts provided additional instruction to cities that may need to revise their ordinances in light of the Supreme Court’s decision in *Reed*:

Post *Reed*, municipalities must go back to the drafting board and craft solutions which recognize an individual[’s] [right] to continue to solicit in accordance with their rights under the First Amendment, while at the same time, ensuring that their conduct does not threaten their own safety, or that of those being solicited. In doing so, they must define with particularity the threat to public safety they seek to address, and then enact laws that precisely and narrowly restrict only that conduct which would constitute such a threat.

*Id.* at \*14.



### Intermediate Scrutiny

The government may enact a content-neutral regulation that reasonably restricts the time, place or manner of protected speech so long as the regulation is narrowly tailored to serve a significant governmental interest and the regulation allows for ample alternative channels for communication of the restricted speech. *Ward*, 491 U.S. at 791. To satisfy the narrow tailoring requirement, the regulation must not burden substantially more speech than is necessary to serve the governmental purpose. *Id.* at 799.

#### (1) Government's Interests

"In the intermediate scrutiny context, the Court ordinarily does not supply reasons the legislative body has not given." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring). Courts "must be astute to examine the effect of the challenged legislation and must weigh the circumstances and ... appraise the substantiality of the reasons advanced in support of the regulation." *Id.* at 163 (majority) (citations omitted).

Traffic control and safety has been recognized as a legitimate government interest under intermediate

scrutiny of a content-neutral ordinance. *News & Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891, 900 (S.D. Fla. 1988) ("It requires neither towering intellect nor an expensive 'expert' study to conclude that mixing pedestrians and temporarily stopped motor vehicles in the same space at the same time is dangerous.") (citation omitted). Courts also have recognized a number of interests as "significant" in analyzing content-neutral ordinances. See, e.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (recognizing government's substantial interest in "maintaining the parks in the heart of our Capital in an attractive and intact condition"); *Chad v. City of Fort Lauderdale, Fla.*, 861 F. Supp. 1057 (S.D. Fla. 1994) ("City has a legitimate interest in eliminating nuisance activity on its famous beach and providing citizens and patrons with a safe, aesthetic, pleasant environment in which recreational opportunity can be maximized"); *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999) (City's interest in creating "aesthetic ambiance which will attract tourists to the historic Art Deco district—which it considers 'the economic lifeblood of the city—is a substantial interest, especially where, as here, a designated historic area is at issue.").



## (2) Narrow tailoring

The regulation need not be the least restrictive or least intrusive means of serving the government's interests, but "by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." *McCullen*, 134 S. Ct. at 2534-35. "To meet the requirements of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 2540. See, e.g., *News & Sun-Sentinel Co.*, 702 F. Supp. 891 (state statute that banned commercial activity including newspaper sales by anyone at any time on every roadway, including sidewalks, is not narrowly tailored to meet government's interests).

Some courts have held that the government has to prove that content-neutral roadside solicitation ordinances further the government's interests in traffic safety. See *Reynolds v. Middleton*, 779 F.3d 222 (4th Cir. 2015) (County ordinance prohibiting standing or sitting in medians to solicit donations is not narrowly tailored because City failed to produce evidentiary support sufficient to justify county-wide sweep of ordinance in locations where it would not be dangerous); *Cutting*, 802 F.3d 79 (ordinance banning median strips in entire City is geographically over-inclusive when measured against City's evidence of its public safety interests); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936 (9th Cir. 2011) (en banc), *overruling ACORN v. City of Phoenix*, 798 F.2d 1260 (9th Cir. 1986) (City ordinance that prohibited standing on street or highway to solicit contributions or employment from motor vehicles was not narrowly tailored to meet government's interest in promoting traffic flow and safety because ordinance applied citywide to all streets and sidewalks yet City introduced evidence of traffic problems only for a small number of major streets and medians).

Other courts, when presented with evidence that roadside solicitation is inherently dangerous, have found such evidence can justify a content-neutral city or county wide ban. See *Traditionalist Amer. Knights of the Ku Klux Klan v. City of Desloge, Mo.*, 775 F.3d 969 (8th Cir. 2014) (ordinance banning roadside solicitation on all city roads was narrowly tailored because expert testimony indicated solicitation was generally dangerous and no known techniques could make it safe); *Intn'l Soc. for Krishna Consciousness of New Orleans, Inc. v. City of Baton Rouge*, 876 F.2d 494 (5th Cir. 1989) (accepted that roadside solicitation ordinance was

narrowly tailored because the evidence supports the conclusion that "there is no way that such activities can be made safe").

Courts have found that the government does not have to wait for traffic accidents to occur to regulate potentially dangerous activity. *Cosac Found., Inc. v. City of Pembroke Pines*, Case No. 12-62144-CV, 2013 WL 5345817, at \*18 (S.D. Fla. Sep. 21, 2013), *citing ACORN v. St. Louis Cnty.*, 930 F.2d 591, 596 (8th Cir. 1991); see also *Sun Sentinel Co. v. City of Hollywood*, 274 F. Supp. 2d 1323 (S.D. Fla. 2003) (state statute prohibiting persons from standing in the road for soliciting business that was used to prohibit distribution of newspapers was constitutional restriction on speech).

Courts have held that content-neutral ordinances that restrict panhandling or street performance in certain zones to be narrowly tailored. See, e.g., *Smith v. City of Fort Lauderdale*, 177 F.3d 954 (11th Cir. 1999) (City's regulation prohibiting begging on a five-mile strip of beach and two adjoining sidewalks does not violate the First Amendment because it is narrowly tailored to serve the City's legitimate interests); *Horton v. City of St. Augustine*, 272 F.3d 1318, 1333-34 (11th Cir. 2001) (ordinance prohibiting street performance in four-block area of historic district is narrowly tailored); *Gresham v. Peterson*, 225 F.3d 899 (7th Cir. 2000) (upholding ordinance prohibiting begging in certain areas of City as narrowly tailored where parties agreed it was content neutral and intermediate scrutiny applied).

## (3) Ample alternatives

The ample alternatives must be adequate. See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.") (citations omitted).

In determining whether there are adequate ample alternatives, the Supreme Court has considered whether: (1) the location of the protected speech is intertwined with the person's message; (2) restrictions on an economical form of communication has no practical substitute for persons of modest means or limited mobility; and (3) the intended audience could be reached by other means. See *Ladue*, 512 U.S. at 56-57 (no ample alternatives to displaying sign from one's own residence because it communicates a distinct message from placing sign somewhere else, it is





unusually cheap and convenient with no practical substitute, and the intent is often to communicate with neighbors, an audience that could not be reached by other means).

### **Prior Restraints**

Regulations that require an individual to first apply for and receive permission from a government official prior to engaging in protected expression constitute a prior restraint on speech. *U.S. v. Frandsen*, 212 F.3d 1231, 1236-37 (11th Cir. 2000). Prior restraints on speech are presumptively unconstitutional. *Id.* at 1237. To pass constitutional scrutiny, a prior restraint must pass scrutiny depending on whether it is content neutral or content based and provide adequate procedural safeguards to avoid unconstitutional censorship. *Id.* at 1239 n.7. Permitting schemes to engage in panhandling are typically struck down by the courts. See, e.g., *Chase v. City of Gainesville*, Case No. 1:06-cv-044SPM/AK, 2006 WL 2620260 (N.D. Fla. Sept. 11, 2006) (permitting scheme that allowed charitable organizations to solicit but completely foreclosed individuals from soliciting funds for themselves held unconstitutional).

### **Procedural Safeguards**

The Supreme Court has outlined three procedural safeguards for a content-based prior restraint on speech: “(1) the burden of going to court to suppress the speech, and the burden of proof once in court, must rest with the government; (2) any restraint prior to a judicial determination may only be for a specified brief time period in order to preserve the status quo; and (3) an avenue for prompt judicial review of the censor’s decision must be available.” *Frandsen*, 212 F.3d at 1239 (citing *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965)).

However, in subsequent cases, the Supreme Court has not required all three safeguards in every situation, see *id.* 1238 n.6, and has held that a content-neutral regulation does not have to contain all of the procedural safeguards set forth in *Freedman*. *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 322 (2002). A content-neutral time, place or manner regulation still must contain adequate procedural safeguards to guide the licensing official in determining whether to grant/deny a permit and provide an avenue for judicial review. *Id.* at 323. See *Bischoff*, 242 F. Supp. 2d at 1237 (charitable solicitation permit scheme held unconstitutional for lack of procedural safeguards).

### **Objective Standards**

A permitting scheme must contain “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); see also *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir. 1999) (“An ordinance that gives public officials the power to decide whether to permit expressive activity must contain precise and objective criteria on which they must make their decisions; an ordinance that gives too much discretion to public officials is invalid.”). Likewise, failure to provide time limits for review of the permit application or for the grant or denial of the permit also renders the permitting scheme unconstitutional. *Id.* (ordinance allowing public officials to effectively deny an application by sitting on it indefinitely is invalid).

A previous criminal conviction, even relating to key elements of the licensing scheme, is not an acceptable reason to deny a permit to engage in protected First Amendment expression. See *Fla. Cannabis Action Network v. City of Jacksonville*, 130 F. Supp. 2d 1358, 1368 (M.D. Fla. 2001).

### **Spontaneous Speech**

Prior restraints also raise constitutional concerns when “there is a significant amount of spontaneous speech that is effectively banned by the ordinance.” *Watchtower Bible*, 536 U.S. at 167. Prior restraints are found to be particularly burdensome when they apply to individuals and small groups than when applied to large groups because “[i]ndividuals and small groups, by contrast, frequently wish to speak off the cuff, in response to unexpected events or unforeseen stimuli.” *Boardley v. U.S. Dep’t of Interior*, 615 F.3d 508, 523 (D.C. Cir. 2010). See also *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1255 n.13 (11th Cir. 2004) (striking permit requirement for demonstration applied to small groups of 5 or more people); *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 608 (6th Cir. 2005) (ordinance lacked narrow tailoring because two or more persons walking on a public right of way with a common goal or purpose were required to obtain a permit).

### **License Fees**

Generally, “[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution.” *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943). But a licensing fee used to defray administrative costs is permissible only to the extent that the fees are necessary. *Fernandes v.*



*Limmer*, 663 F.2d 619, 633 (5th Cir. Unit A 1981). Failure to have a fee waiver for a person who is indigent and therefore unable to pay the fee is unconstitutional. *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1523-24 (11th Cir. 1985) (granting of license permit on basis of ability of person to pay without providing for an alternative means of exercising First Amendment rights is unconstitutional).

The fee must not be calculated in an arbitrary manner so as to allow content-based decision-making. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992). The Eleventh Circuit has ruled that such costs must be “nominal” when the use of city streets and parks for First Amendment purposes are at issue.<sup>2</sup> *Cent. Fla. Nuclear Freeze Campaign*, 774 F.2d at 1523. The reasonableness of the fee (and whether it is considered “nominal”) can depend on the context of size of the events to which they are applied. See *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1323 (11th Cir. 2000).

Courts have found requirements to obtain insurance coverage unconstitutional for similar reasons. See, e.g., *Pritchard v. Mackie*, 811 F. Supp. 665 (S.D. Fla. 1993) (requirement to obtain \$1,000,000 liability insurance coverage prior to holding rally was not nominal or related to administrative costs and denied indigent people an equal opportunity to be heard); but see *CAMP Legal Defense Fund v. City of Atlanta*, 451 F.3d 1257, 1281 (11th Cir. 2006) (liability insurance requirement limited to festivals with over 10,000 attendees is necessary, content neutral, there is no evidence it is excessive and the public has ability to assemble without a festival permit).

### **Overbreadth Doctrine**

A regulation may be invalidated on its face when it is substantially overbroad when judged in relation to its “plainly legitimate sweep.” *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). See also *Speet v. Schuette*, 726 F.3d 867 (6th Cir. 2013) (striking down on overbreadth grounds complete prohibition of begging on public property). The overbreadth doctrine also allows a challenge to a regulation by “a litigant whose own activities are unprotected ... by showing that it substantially abridges the First Amendment rights of other parties not before

<sup>2</sup> The Eleventh Circuit has not reconsidered this decision but noted in a subsequent opinion that the majority of its sister circuits have ruled a permit ordinance may impose a fee which is more than nominal so long as it is reasonably related to the expense of administration and maintenance of public order for the permitted event. See *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1323 n.16 (11th Cir. 2000).

the court.” *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 634 (1980).

Florida courts have used the overbreadth doctrine to strike down begging ordinances, particularly ones that completely ban begging or panhandling in all public places in the City. See *C.C.B.*, 458 So. 2d 47 (complete prohibition of begging in city is overbroad); *Ledford v. State*, 652 So. 2d 1254 (Fla. 2d DCA 1995) (ordinance that bans begging in “any public way” overbroad because it fails to distinguish between “aggressive” and “passive” begging).

### **Free Speech protection under Florida’s State Constitution**

Florida’s constitution also contains a free speech clause. Fla. Const. Art. I § 4. The state constitutional provision provides the same protection as the First Amendment of the U.S. Constitution. *Dep’t of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982). Florida state cases interpreting Art. I § 4 of the Florida Constitution and federal cases interpreting the First Amendment of the U.S. Constitution are generally cited interchangeably in Florida courts. See *State v. Globe Comm’n Corp.*, 622 So. 2d 1066, 1075 (Fla. 4th DCA 1993).

### **Void for Vagueness Doctrine**

A vagueness challenge arises under the Fourteenth Amendment of the U.S. Constitution but has special application in cases involving First Amendment rights. Due process “requires the invalidation of laws that are impermissibly vague.” *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (“void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way”). In cases involving speech, “rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” *Id.*

Courts in Florida have entertained vagueness challenges, sometimes reaching different results. Compare *Ledford*, 652 So. 2d 1254 (ordinance is vague because does not define “beg” or “begging” nor is intent expressed), with *Chad v. City of Ft. Lauderdale*, 66 F. Supp. 2d 1242 (N.D. Fla. 1998) (ordinance not vague for failing to define begging, panhandling, and solicitation; these are common words known to everyone with ordinary intelligence).



The Seventh Circuit rejected a vagueness challenge to aggressive panhandling language in the ordinance. *Gresham v. Peterson*, 225 F.3d 899, 907-09 (7th Cir. 2000). Because violations of the ordinance were punishable only with a fine, the Court considered it a civil infraction and held it to a lesser standard of clarity. *Id.* The court declined to rule on the vagueness claim, suggesting that state courts could adopt constitutional interpretations of the challenged panhandling provisions and that it would not interfere with their right to do so. *Id.* In reaching this conclusion, the court suggested several narrowing constructions that would need to be adopted. *Id.*

### Equal Protection

A restriction on speech can also run afoul of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution when the government discriminates based on the content of speech. See *Carey v. Brown*, 447 U.S. 455, 463 (1980) (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”). Equal protection violations based on deprivations of a fundamental right, such as free speech, are subject to strict scrutiny and courts will uphold the challenged law only if it is narrowly tailored to serve a compelling governmental interest. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). For example, regulations that prohibit begging or panhandling on behalf of oneself but allow solicitation of funds on behalf of charitable organizations violate the equal protection clause. *Bischoff*, 242 F. Supp. 2d at 1236.

## SEC. 3 PRACTITIONER’S TIPS

### Failure to Charge a Crime

Florida’s Second District Court of Appeal held that a panhandling conviction was fundamental error because the information failed to charge a criminal offense. *Lawshea v. State*, 99 So. 3d 603 (Fla. 2d DCA 2012). The information alleged that Lawshea violated a Sarasota panhandling ordinance by unlawfully soliciting and receiving an immediate donation of money and cited to the definitions section of the ordinance. The court held that the information was defective for failing to allege the specific nature of the violation and citing the specific section of the ordinance that included the missing element (for example, it did not allege that he panhandled in a prohibited manner, place or time contrary to other sections of the ordinance).

Although Lawshea did not raise the issue below, the court found the information was “fundamentally defective” and properly raised on appeal. The court also reversed the conviction for resisting without violence because the police officer’s mistaken view of the law—that it was illegal to panhandle anywhere in the City—could not support a finding that he was engaged in the lawful execution of a legal duty when he ordered Lawshea to stop.

### Obstruction of Public Streets

Thousands of citations are still issued every year for obstruction of public streets under a state statute that has been declared unconstitutional by two federal courts and the Florida Attorney General has opined that the Florida Legislature should act to fix the constitutional infirmities present on the face of the statute.

In pertinent part, § 316.2045 made it unlawful “for any person or persons willfully to obstruct the free, convenient and normal use of any public street, highway or road ...” § 316.2045 (1), Fla. Stat. The law further provided it was unlawful “without proper authorization or a lawful permit, for any person or persons willfully to obstruct the free, convenient, and normal use of any public street, highway, or road ... in order to solicit ....” § 316.2045(2), Fla. Stat. However, the law specifically exempted 501(c) (3) organizations or persons involved in political campaigning from the permit requirement. § 316.2045(2) & (4), Fla. Stat.

In 2003, religious activists challenged the constitutionality of § 316.2045, Fla. Stat. *Bischoff v. State*, 242 F. Supp. 2d 1226 (M.D. Fla. 2003). While protesting Walt Disney’s alleged support of homosexuality, three activists were arrested for violating § 316.2045—obstruction of traffic without a permit—which caused the remaining plaintiffs to refrain from exercising their First Amendment rights. *Id.* at 1229-30.

The court found § 316.2045 unconstitutional because: (1) the law was content based and vague, and (2) the law was overbroad and was not narrowly tailored to meet the state’s compelling interest of ensuring public safety on the roads. *Id.* at 1235-37. Specifically, by facially preferring speech of 501(c)(3) charities and those involved in political speech, the Florida law impermissibly “prohibit[ed] others from assembling or speaking on the basis of what they intend to say.” *Id.* at 1236.

The law was too ambiguous because it failed to provide sufficient warning as to what conduct was prohibited. *Id.* And “[n]othing in the § 316.2045’s content- based charity — non-charity distinction or



political nonpolitical distinction ha[d] any bearing whatsoever on road safety or uniformity.” *Id.* Finally, the permitting scheme suggested an impermissible prior restraint on speech because there were no procedural safeguards in place “to ensure against undue suppression of protected speech.” *Id.* at 1237.

Accordingly, the court declared § 316.2045 facially unconstitutional and invalid. *Id.* at 1238. In 2006, the Northern District of Florida adopted the holding in *Bischoff* and found § 316.2045 unconstitutional. *Chase v. City of Gainesville*, Case No. 1:06-cv-044SPM/AK, 2006 WL 2620260, at \*1 (N.D. Fla. Sept. 11, 2006).

After the decisions in *Bischoff* and *Chase*, section 316.2045 was amended in 2007 by the “Iris Roberts Act.” Ch. 2007-43, Laws of Fla. Only subsection (3) of the statute was amended; the remaining subsections of the statute were not altered by the new amendments. *Id.*

The amendments provided in subsection (3) explicitly exempted 501(c)(3) charitable organizations from local requirements for issuing a permit to solicit under this section under certain conditions. *Id.* For example, the following information must be provided to the local government: names and addresses of solicitors and organization to benefit from the solicitation; a safety plan for those participating in the solicitation; details regarding the location and hours of solicitation; proof of general liability insurance; and proof of registration with the Dept. of Agriculture and Consumer Services. *Id.*

Furthermore, solicitations may not exceed 10 cumulative days in one year; solicitations must occur in daylight hours; activities may not interfere with safety of public or movement of traffic; solicitors may not continue if solicitation has been denied; no harassing tactics or sound amplifying devices may be used; solicitors must be over the age of 18 and have picture identification; notice of solicitation must be posted at least 500 feet before the site of solicitation; and the local government may stop activities if conditions or requirements are not met. *Id.*

These amendments took effect on July 1, 2007, and are still current law. The 2007 amendments failed to cure the constitutional infirmities of the statute because they merely provided additional conditions for 501(c)(3) charitable organizations to qualify for exemptions as opposed to eliminating the exemptions altogether. The Florida Attorney General has opined that the exemption for charitable, religious, educational or benevolent organizations in

§ 316.2045, as amended, could subject the statute to a First and Fourteenth Amendment challenge. Fla. AGO 2007-50 (Nov. 8, 2007) (“I would strongly suggest that the Florida Legislature revisit this statute to consider the First Amendment problems raised by the *Bischoff* case.”).

### **Unlawful Use of Right-of-Way**

Even though the right-of-way statute has been declared unconstitutional by two federal courts and the Florida Legislature has not amended it to fix the constitutional infirmities, it is still being enforced across the state.

In pertinent part, § 337.406 made it unlawful to use the “right-of-way of any state transportation facility, including appendages thereto, outside of an incorporated municipality in any manner that interferes with the safe and efficient movement of people and property from place to place on the transportation facility.” § 337.406, Fla. Stat. (amended 2005). Prohibited uses included “solicitation for charitable purposes.” *Id.* In 1988, a newspaper publisher challenged the City of Ft. Lauderdale’s enforcement of § 337.406, Fla. Stat. *News & Sun-Sentinel Co. v. Cox*, 702 F. Supp. 891 (S.D. Fla. 1988). According to the City, § 337.406 authorized the City to “regulate vending that takes place on the street in a manner that creates a traffic hazard.” *Id.* at 894 n.5.

The court declared § 337.406 unconstitutional, finding that although the law was content neutral and alternative channels of communication were available, the law was not “narrowly tailored” to “target and eliminate no more than the exact source of the ‘evil’ it seeks to remedy.” *Id.* at 900. The court recognized the government’s interest in maintaining safety and ensuring the flow of traffic, but found the statute was too broad by including all “commercial” activity on sidewalks, rest areas and other traffic-neutral locations. *Id.* at 900-01. The court granted plaintiffs a permanent injunction against the city’s enforcement of the law.

After the decision in *News & Sun-Sentinel Co.*, § 337.406 was amended in 2005. Ch. 2005-281, Laws of Fla. Only subsection (1) of the statute was amended; the remaining subsections of the statute were not altered by the new amendments. *Id.*

To describe who has the authority to issue permits for temporary use of the right-of-way of a state transportation facility for otherwise prohibited uses, the new amendments eliminated the language “[w]ithin incorporated municipalities, the local government entity” and replaced it with “local



government entities.” *Id.* The following sentence was also included: “The permitting authority granted in this subsection shall be exercised by the municipality within incorporated municipalities and by the county outside an incorporated municipality.” *Id.* Finally, in detailing the limits of authorized activities, “the Interstate Highway System” was eliminated and replaced with “any limited access highway.” *Id.* The amended version of this law was challenged in *Chase* and the Court adopted the reasoning in *News & Sun-Sentinel Co.* in holding the statute unconstitutional. *Chase v. City of Gainesville*, Case No. 1:06-cv-044SPM/AK, 2006 WL 2620260, at \*1 (N.D. Fla. Sept. 11, 2006).

The statute was amended again in 2010; however, the amendments did not modify the language of the 2005 statute but instead added a new subsection (4) to prohibit “camping” “on any portion of the right-of-way of the State Highway System that is within 100 feet of a bridge, causeway, overpass, or ramp.” Ch. 2010-225, Laws of Fla.



### Content-Based Panhandling Ordinances

Panhandling ordinances across the country have been declared content based due to unlawful definitions of the prohibited speech, particularly after the Supreme Court’s decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Following are examples of problematic language contained in panhandling ordinances that courts have determined are content-based restrictions on speech:

- Charlottesville’s ordinance provides that “[s]olicit means to request an immediate donation of money or other thing of value from another person, regardless of the solicitor’s purpose or intended use of the money or other thing of value. A solicitation may take the form of, without limitation, the spoken, written, or printed word, or by other means of communication (for example: an outstretched hand, an extended cup or hat, etc.)” *Clatterbuck v. City of Charlottesville*, 708 F.3d 549 (4th Cir. 2013), *abrogation recognized by Cahaly v. Larosa*, 708 F.3d 549 (4th Cir. 2015) (“The Ordinance plainly distinguishes between types of solicitations on its face. Whether the Ordinance is violated turns solely on the nature or content of the solicitor’s speech: it prohibits solicitations that request immediate donations of things of value, while allowing other types of solicitations, such as those that request future donations, or those that request things which may have no ‘value’—a signature or a kind word, perhaps.”).
- Springfield’s ordinance “defines panhandling as an oral request for an immediate donation of money.” *Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015) (Post-*Reed*, “[a]ny law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification”).
- City of Grand Junction’s ordinance bans attempts to “solicit employment, business, or contributions of any kind.” *Browne v. City of Grand Junction, Colo.*, 27 F. Supp. 3d 1161 (D. Colo. 2014) (“It does not prohibit people from offering motorists political or religious literature, asking for directions, or engaging in speech on any topic other than requests for money, employment, or other ‘contributions.’ This provision, ‘by its very terms, singles out particular content for differential treatment’ and thus constitutes a content-based restriction on speech.”).
- Worcester’s ordinance makes it unlawful to “beg, panhandle or solicit in an aggressive manner.” Begging and panhandling are defined as “asking for money or objects of value with the intention that the money or object be transferred at that time and at that place.” Soliciting “include[s] using the spoken, written, or printed word, bodily gestures, signs, or other means of communication with the purpose of obtaining an immediate donation of money or other thing of value the same as begging or panhandling and also include the offer to immediately exchange and/or sell any goods or services.” *Thayer v. City of Worcester*, Case No. CV 13-40057-TSH, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6872450 (D. Mass. Nov. 9, 2015) (“Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, i.e., solicitation of donations.”).
- Lowell’s ordinance defines panhandling as “solicitation of any item of value through a request for an immediate donation.” *McLaughlin v. City of Lowell*, Case No. 14-10270, \_\_\_ F. Supp. 3d \_\_\_, 2015 WL 6453144 (D. Mass. Oct. 23, 2015) (ordinance is content based because “a police officer would have to listen to a person’s solicitation and determine whether he was asking for an immediate donation before finding a violation”).
- Las Vegas’s ordinance defines solicitation as “to ask, beg, solicit or plead, whether orally,



or in a written or printed manner, for the purpose of obtaining money, charity, business or patronage, or gifts or items of value for oneself or another person or organization.” *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784 (9th Cir. 2006) (ordinance is content based where “handbills that simply offer information, or offer information and a contact number, are permitted, but handbills requesting that the recipient ‘join us’ or soliciting future donations are prohibited”).

- New York’s ordinance prohibits loitering where a person “[l]oiterers, remains or wanders about in a public place for the purpose of begging.” *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993) (ordinance is content based because it prohibits all speech related to begging but allows charitable or religious organizations to solicit funds for themselves).
- Florida statute prohibits obstructing the road without a permit in order to solicit, while exempting 501(c)(3) organizations. *Bischoff v. Florida*, 242 F. Supp. 2d 1226 (M.D. Fla. 2003) (Florida statute prefers speech by registered charities and political campaigners but restricts discussion of all other issues and subjects).



### Unlawful Permit Restrictions

Below is a checklist of constitutional defects commonly found in permit schemes that regulate panhandling. If any one of the restrictions listed below are present in a permit scheme regulating speech, then the constitutional defect is likely fatal to the ordinance:

- Singles out solicitation (e.g. permit required to solicit business or money but not required for other types of speech) or types of solicitation (e.g. permit required for soliciting “immediate donations of money” but not required for all other types of solicitation) for regulation while allowing other types of speech.
- Exempts certain persons or groups from permit requirements (e.g. requires a permit to solicit on behalf of oneself and exempts 501(c)(3) organizations).
- Requires payment of fee or requires person to obtain liability insurance with no opportunity for an indigent fee waiver and/or the associated fees are higher than “nominal,” are based on arbitrary standards, or are not reasonably related to the City’s costs associated with the activity.
- Decision to grant/deny permit is discretionary and not based on narrow, objective, and definite standards (i.e. this should be a ministerial decision and virtually any amount of discretion is suspect).
- Fails to contain concrete deadline by which government must grant or deny permit (if lack of time limit could allow impermissible pocket veto of disfavored messages).
- Prior arrest or conviction is grounds for denying or revoking permit.
- Applies to as few as one individual and fails to allow spontaneous speech (i.e. without a permit).
- Contains no mechanism for review/appeal of grant/denial of permit.



# Chapter 2

## Sleeping Like A Criminal

### SEC. 1 STATUS CRIMES

Many cities and states have statutes or ordinances that prohibit sleeping or camping on public property, which effectively criminalize sleeping out-of-doors, a crime many individuals experiencing homelessness must commit in order to survive. Many of these so-called “anti-camping” ordinances criminalize not only activities typically associated with camping, such as pitching a tent and making a fire, but also merely covering oneself with a blanket, a jacket, or a piece of cardboard to keep warm. Because sleep is a basic human need, essential for survival, the impact of criminalizing sleep (in the absence of alternatives for homeless people to meet this need) is to make the status of being homeless a crime.

#### Cruel or Unusual Punishment

In a Statement of Interest filed by the U.S. Department of Justice (DOJ) in a federal court case challenging the constitutionality of a Boise anti-camping ordinance, the government argued that such ordinances violate the Eighth Amendment. *Bell v. Boise*, Case No. 1:09-cv-00540-REB, Doc. 276 (U.S. Statement of Interest) (D. Idaho Aug. 6, 2015). The DOJ filed the Statement of Interest because of conflicting lower court case law in this area to make clear its position that the Ninth Circuit’s decision in *Jones v. City of Los Angeles* provides the proper framework for analyzing Eighth Amendment challenges to sleeping or camping ordinances. *Bell*, Doc. 276, at 3-4, citing *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) (*vacated per settlement*, 505 F.3d 1006 (9th Cir. 2007)).

The DOJ stated that, under the *Jones* framework, “the Court should consider whether conforming one’s conduct to the ordinance is possible for people who are homeless.” *Bell*, Doc. 276, at 4. If there is insufficient shelter space or certain restrictions that disqualify groups of homeless individuals from accessing shelter, “then it would be impossible for some homeless individuals to comply with these ordinances.” *Id.* The DOJ argued that “in those circumstances enforcement of the ordinances amounts to the criminalization of homelessness, in violation of the Eighth Amendment.” *Id.*

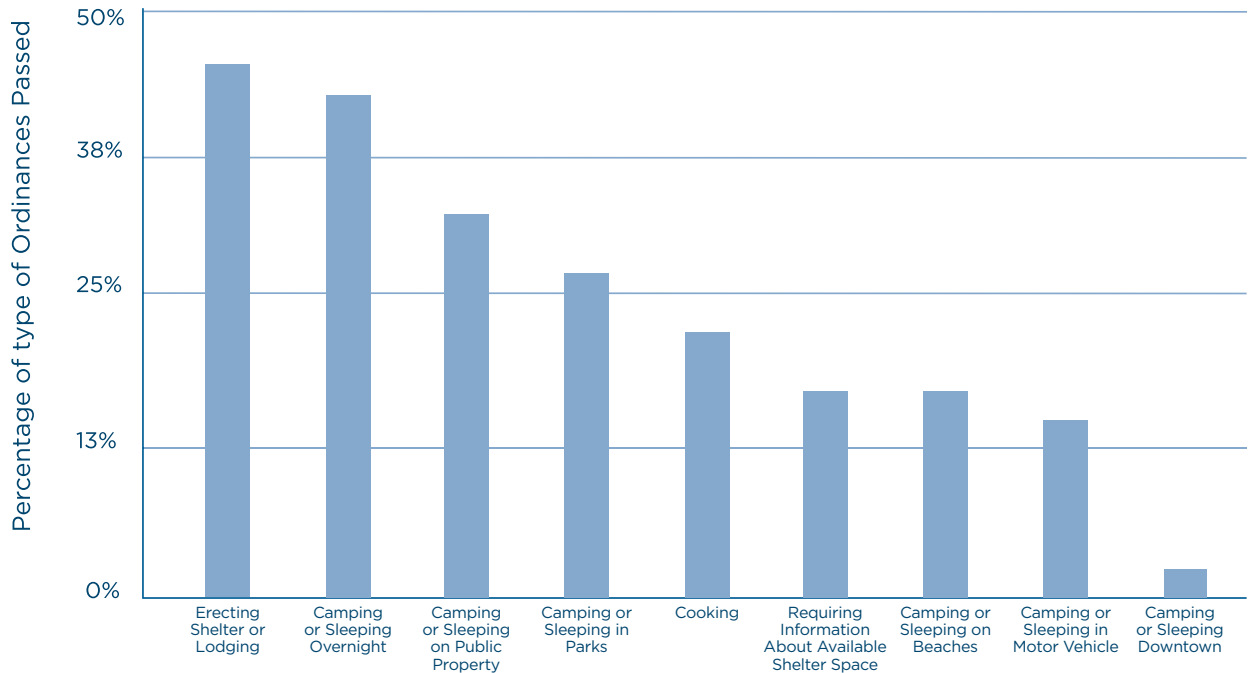


Photo by  
Mark Watson

The Eighth Amendment states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. Amend. VIII. The Supreme Court has interpreted the Eighth Amendment as limiting punishment imposed through the criminal process in three distinct ways: “(1) [the Eighth Amendment] limits the kind of punishment that can be imposed on those convicted of crimes; (2) it proscribes punishment grossly disproportionate to the severity of the crime; and (3) it imposes substantive limits on what can be made criminal and punished as such.” *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).



### Camping and Sleeping Ordinances



**Newly Enacted Florida County and Municipal Ordinances, 2010-2015**  
 The anti-camping/sleeping ordinances were further classified in a number of sub-categories. Often a single ordinance would fit into multiple categories, such as an ordinance that bans both erecting a shelter as well as cooking.

Rooted in this third limitation, the Supreme Court has ruled that it is beyond the power of the government to punish individuals based on their involuntary status alone. *Robinson v. California*, 370 U.S. 660 (1962) (criminalizing the status of drug addiction violates the Eighth Amendment). The Court reasoned that the “chronic condition” of addiction was one which could be contracted innocently, or involuntarily. *Id.* at 667.

In *Powell v. Texas*, the Supreme Court held that a public intoxication law did not punish the status of being a chronic alcoholic. 392 U.S. 514 (1968). As the Southern District of Florida noted, “[a]lthough the law is well-established that a person may not be punished for involuntary status, it is less settled whether involuntary conduct that is inextricably related to that status may be punished.” *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1563 (S.D. Fla. 1992). While a majority of *Powell* Justices agreed in affirming *Powell*’s conviction, only four Justices joining the plurality opinion interpreted *Robinson* to prohibit the criminalization of pure status alone, and not to limit the criminalization of involuntary conduct proximate to the status. *Jones*, 444 F.3d at 1133. The plurality concluded that *Robinson* did not control the outcome of the particular case because *Powell* was

subject to criminal sanctions “not for being a chronic alcoholic, but for being in public while drunk on a particular occasion.” *Powell*, 392 U.S. at 532.

The legal support for the protection of involuntary conduct that is inextricably related to status is based in Justice White’s concurring opinion and agreement with Justice White from the four justices in the dissenting opinion. See *Jones*, 444 F. 3d at 1135 (citing *Powell*, 392 U.S. at 548, 550 n.2, 551 (White J., concurring in the judgment); *id.* at 567 (Fortas, J., dissenting)).

In his concurrence, Justice White determined that “[t]he proper subject of inquiry is whether volitional acts brought about the ‘condition’ and whether those acts are sufficiently proximate to the ‘condition’ for it to be permissible to impose penal sanctions on the ‘condition.’” *Id.* at 550 n. 2 (White, J., concurring). Most significantly, Justice White specifically joined the majority in the judgment affirming *Powell*’s conviction only because he found that “*Powell* showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest.” *Id.* at 553-54. *Powell* “made no showing that he was unable to stay off the streets on the night in question.” *Id.* at 554.





Justice White specifically distinguished Powell's case from a hypothetical case of alcoholics who are homeless, who "must drink somewhere" and if they "have no place else to go and no place else to be when they are drinking" then they will do so on the "public streets" that are their homes. *Id.* at 551. For such persons, "resisting drunkenness is impossible and [ ] avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk." *Id.*

In *Jones*, the Ninth Circuit explicitly rejected that the "only relevant inquiry is whether the ordinance at issue punishes status as opposed to conduct" and instead determined that close "analysis of *Robinson* and *Powell* instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment." 444 F.3d at 1132. The Court adopted as "persuasive authority" the reasoning of five justices in *Powell* (Justice White and four dissenting justices) who "understood *Robinson* to stand for the proposition that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* at 1135. After a fact intensive discussion, the *Jones* court held that the City's ordinances prohibiting sitting, lying or sleeping in public at night as applied to homeless persons violated the Eighth Amendment because there was substantial and undisputed evidence that the shelter resources available were vastly outstripped by the need. *Id.* at 1138. Thus, the Eighth Amendment prohibits criminalizing the acts of sitting, lying or sleeping at night were the "unavoidable consequence of being human and homeless without shelter in the City of Los Angeles." *Id.*

Other courts have split on this issue. Some courts have held that the Eighth Amendment prohibits the criminalization of involuntary conduct such as sleeping arising out of the status of homelessness. See, e.g., *Pottinger*, 810 F. Supp. at 1565 ("As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct."); *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex.

1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995) ("Because being does not exist without sleeping, criminalizing the latter necessarily punishes the homeless for their status as homeless, a status forcing them to be in public.").

As the Southern District of Florida reasoned:

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 public effectively punishes them for being homeless.

*Pottinger*, 810 F. Supp. at 1564. See also *City of Daytona Beach v. William Bradford Carter*, 19 Fla. L. Wkly. Supp. 578a (Fla. 7th Cir. Ct. Feb. 10, 2012) (because defendants are homeless and must involuntarily sleep in public, ordinance that criminalizes such conduct is cruel and unusual in violation of the Eighth Amendment of the U.S. Constitution).

Other courts have held that the Eighth Amendment is inapplicable where a statute criminalizes conduct and not status. See, e.g., *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218 (E.D. Cal. 2009). In *Joyce v. City & Cnty. of San Francisco*, a district court rejected the idea that homelessness was a status cognizable under the Eighth Amendment. 846 F. Supp. 843, 856-58 (N.D. Cal. 1994).

Other courts have resolved these issues differently based on the facts. For example, in *Joel v. City of Orlando*, the Eleventh Circuit did not reach the legal issue of whether the Eighth Amendment reaches conduct that is inextricably intertwined with status because the factual record in that case demonstrated that there was available shelter space. 232 F.3d 1353, 1362 (11th Cir. 2000) (ordinance "does not criminalize involuntary behavior" because "the availability of shelter space means that Joel had an opportunity to comply with the ordinance"); see also *Anderson v. City of Portland*, Case No. 08-1447-AA, 2011 WL 6130598, at \*2-4 (D. Ore. Dec. 7, 2011) (factual record failed to "establish, as a matter of law, that defendants'



enforcement actions criminalize status as opposed to conduct in violation of the Eighth Amendment”).

Against this legal background, the DOJ filed its Statement of Interest in *Bell* to clarify the standard from the federal government’s perspective.

The DOJ first took the position in two amicus briefs filed in the mid-1990s “that criminalizing sleeping in public when no shelter is available violates the Eighth Amendment by criminalizing status.” *Bell*, Doc. 276, at 9-10. The DOJ sets out a comprehensive analysis of the relevant jurisprudence and advocates for the district court to adopt the framework set forth in *Jones*.

The DOJ assured the court that applying the *Jones* approach would not trigger the concerns raised by the *Powell* plurality about a slippery slope in extending the Eighth Amendment prohibition to the punishment of involuntary conduct. *Id.* at 13. The DOJ explained:

But these concerns are not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely. Thus, the Court need not constitutionalize a general compulsion defense to resolve this case; it need only hold that the Eighth Amendment outlaws the punishment of unavoidable conduct that we know to be universal. Moreover, unlike the hypothetical hard cases that concerned the *Powell* plurality, the conduct at issue in the instant case is entirely innocent. Its punishment would serve no retributive purpose, or any other legitimate purpose. As the plurality in *Powell* itself noted, “the entire thrust of *Robinson’s* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act [or] has engaged in some behavior *which society has an interest in preventing.*” *Powell*, 392 U.S. at 533 (emphasis added).

*Id.* at 13-14.

The DOJ reasoned that the realities facing homeless people each day support its position. *Id.* Homelessness is a pervasive problem and communities nationwide are suffering from a shortage of affordable housing. *Id.* Emergency shelters are underfunded and overcrowded. *Id.* Additionally, “[c]riminalizing public sleeping in

cities with insufficient housing and support for homeless individuals does not improve public safety outcomes or reduce the factors that contribute to homelessness.” *Id.* at 15. In fact, it can create additional obstacles to overcoming homelessness including barriers to employment and participation in permanent housing programs, and it also imposes further burdens on scarce judicial resources. *Id.* at 15-16.

The DOJ concluded by stating, “Thus, criminalizing homelessness is both unconstitutional and misguided public policy, leading to worse outcomes for people who are homeless and for their communities.” *Id.* at 16.

## SEC. 2 OTHER LEGAL CHALLENGES TO SLEEPING ORDINANCES

Challenges to sleeping or camping ordinances have been brought, with varying degrees of success, under the federal and state constitutions alleging violations of due process (vagueness), substantive due process, equal protection, overbreadth, and free speech.

### Void for Vagueness (Due Process)

The void for vagueness doctrine is rooted in the Due Process Clause of the Fourteenth Amendment and ensures people will not be charged with crimes in the absence of “ascertainable standards of guilt.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 165 (1972) (striking down vagrancy ordinance due to unfettered discretion it places in hands of police due to imprecise terms of the ordinance). Vagueness may invalidate a law for two independent reasons: (1) law fails to provide notice that will enable ordinary people to understand what conduct it prohibits; and (2) law authorizes and even encourages arbitrary and discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999).

The Florida Second District Court of Appeal struck down on vagueness grounds a City of St. Petersburg ordinance that stated: “No person shall sleep upon or in any street, park, wharf or other public place.” *State v. Penley*, 276 So. 2d 180 (Fla. 2d DCA 1973), *cert. den.*, 281 So. 2d 504 (Fla. 1973). The court held the ordinance was void due to vagueness because it failed to give a person of ordinary intelligence fair notice that his conduct was prohibited and the ordinance may result in arbitrary and erratic arrest and convictions. The court reasoned this “draws no distinction between conduct that is calculated to harm and that which is essentially innocent.” *Id.* at 181.



The Florida Fourth District Court of Appeal similarly struck down on vagueness grounds a City of Pompano Beach municipal ordinance that prohibited lodging or sleeping in vehicles. *City of Pompano Beach v. Capalbo*, 455 So. 2d 468 (Fla. 4th DCA 1984), cert. den., 474 U.S. 824 (1985). The proscription against sleeping is the source of the ordinance's constitutional infirmity. Although the ordinance gave ample notice of conduct that is proscribed, it is void for vagueness because it leaves to the unbridled discretion of the police officer whether or not to arrest one asleep in a motor vehicle on a public street or way or parking lot. *Id.* at 470.

Similar to loitering or vagrancy laws, a wide range of persons may violate the statute (a child asleep in his car seat, a truck driver asleep in the bunk of a parked tractor-tailor, etc.) and it is left to police to decide whether to enforce the ordinance. The court suggests in dicta that it may have reached a different conclusion if the ordinance only proscribed "lodging" in a vehicle and in the Motion for Rehearing clarified that it did not say that cities may not proscribe lodging in vehicles under the reasoning set forth in the opinion. *Id.* at 469, 472-73. Cf. *Hershey v. City of Clearwater*, 834 F.2d 937 (11th Cir. 1987) (ordinance prohibiting lodging and sleeping in motor vehicles not unconstitutionally vague if prohibition against sleeping were stricken).

The Ninth Circuit held a city ordinance prohibiting the use of vehicles "as living quarters either overnight, day-by-day, or otherwise" was void for vagueness where ordinance did not define living quarters, or specify how long, or when was "otherwise." *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014). The ordinance was broad enough to cover any driver in the city who ate food or transported personal belongings in his or her vehicle, and members of the city police department interpreted the ordinance in different ways.

The court also found the enforcement guidelines substantially reduced the likelihood that the ordinance will be subject to arbitrary and discriminatory enforcement. *Id.* But see *City of Daytona Beach*, 19 Fla. L. Wkly. Supp. 578a (striking down on vagueness grounds ordinance that prohibits sleeping in public between 11pm and 6am; distinguishing *Joel* on grounds that there are no enforcement guidelines to channel discretion of police); *Thomas Day, et al. v. City of Sarasota*, 12 Fla. L. Wkly. Supp. 120a (Fla. 12th Cir. Ct. Nov. 19, 2004) (striking down on vagueness grounds sleeping ordinance where there are no guidelines that deter arbitrary and discriminatory

enforcement; law could be applied to a person jogging who fell asleep on a bench while sitting on a newspaper or someone camping in a backyard).

### Overbreadth Doctrine

Courts have also overturned sleeping ordinances after finding them overbroad. See, e.g., *Capalbo*, 455 So. 2d 468 (Ordinance is overbroad because it criminalizes conduct which is beyond the reach of the City's police power as it "brings within its sweep conduct that cannot conceivably be criminal in purpose or effect"); *Penley*, 276 So. 2d at 181 (sleeping ordinance "draws no distinction between conduct that is calculated to harm and that which is essentially innocent"); *Thomas Day*, 12 Fla. L. Wkly. Supp. 120a (sleeping ordinance overbroad because it allows homeless individuals to be arrested for harmless, inoffensive conduct that they are forced to perform in public); *City of Daytona Beach*, 19 Fla. L. Wkly. Supp. 578a (sleeping ordinance overbroad for criminalizing "essentially innocent conduct that every member of the animal kingdom must do each day: sleep").

However, the Eleventh Circuit observed that an overbreadth challenge, as a matter of federal constitutional law, only applies to an ordinance that reaches a substantial amount of constitutionally protected conduct. *Hershey*, 834 F.2d at 940 n.5 (overbreadth challenge to sleeping ordinance probably would fail because it does not reach a substantial amount of constitutionally protected conduct, and probably reaches no constitutionally protected conduct at all).

In *Pottinger*, the Southern District of Florida distinguished the Eleventh Circuit's overbreadth analysis in *Hershey*. See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1577 (S.D. Fla. 1992). The court recognized that "[t]he acts of sleeping, sitting down, or eating in themselves are not constitutionally protected." *Id.* However, unlike *Hershey*, the court found that under the unique circumstances of *Pottinger*, "arresting plaintiffs for performing innocent conduct in public places—in particular, for being in a park or on public streets at a time of day when there is no place where they can lawfully be—most definitely interferes with their right under the constitution to be free from cruel and unusual punishment and ... their right to freedom of movement." *Id.* The court therefore held that the challenged ordinances, as applied to homeless plaintiffs, "are overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places." *Id.*



Despite the court's analysis in *Pottinger*, the Supreme Court has not recognized an "overbreadth" doctrine outside of the context of the First Amendment. *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). To the extent that an overbreadth challenge is raised (outside of the First Amendment context) because an ordinance prohibits "innocent" and "lawful" conduct, the Supreme Court has instructed that this type of claim is more properly brought either as a vagueness challenge or as a denial of substantive due process. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 n.9 (1982). If the claim is that a person cannot determine whether the ordinance regulates otherwise lawful conduct, then it is properly brought as a vagueness challenge. *Id.* If the claim is that the ordinance prohibits innocent conduct, then it is properly brought as a substantive due process claim. *Id.*

However, Florida state courts have not been as precise in their distinction among these doctrines and, as discussed above, have held sleeping ordinances unconstitutional for being "overbroad" in that they prohibit innocent conduct, even where no First Amendment rights are implicated.

### **Substantive Due Process**

Substantive due process includes protections of most of the Bill of Rights and also a more general protection against "certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them." *DeKalb Stone, Inc. v. Cnty. of DeKalb, Ga.*, 106 F.3d 956, 959 (11th Cir. 1997); see also *State v. Robinson*, 873 So. 2d 1205, 1213 (Fla. 2004). Once it has been established that an ordinance deprives an individual of life, liberty, or property, the basic test for a violation of substantive due process is whether the state can justify the infringement upon personal rights and liberties. *Id.* at 1214 ("A statute must not be unreasonable, arbitrary, or capricious, and must have a 'reasonable and substantial relation' to a legitimate governmental objective."). The test is virtually identical to rational basis scrutiny under the equal protection clause where no fundamental rights are at stake. *Id.* When the statute infringes on a fundamental right, the statute must be narrowly tailored to achieve the state's purpose. *Id.*

While it may be a violation of substantive due process to prohibit sleeping *per se*, courts have been reluctant to strike down ordinances on substantive due process grounds where the ordinance provides an opportunity for a homeless person to comply by seeking alternative shelter. See *Joel v. City of Orlando*, 232 F.3d 1353, 1359

n.3 (11th Cir. 2000) (suggesting in dicta that an ordinance that outlaws sleeping *per se* may violate substantive due process, but rejecting claim where ordinance "at most outlaws sleeping in public when there are alternative places to sleep"); *City of Sarasota v. McGinnis*, 13 Fla. L. Wkly. Supp. 371a (Fla. 12th Cir. Ct. Dec. 28, 2005) (ordinance does not make sleeping illegal, it makes lodging illegal, and coupled with requirement that police officer must transport person to a public shelter in lieu of a citation, eliminates any alleged substantive due process violation). *But see City of Daytona Beach*, 19 Fla. L. Wkly. Supp. 578a (Fla. 7th Cir. Ct. Feb. 10, 2012) (sleeping ordinance violates substantive due process because government goals of protecting safety, sanitation, and aesthetics are too far attenuated from prohibiting sleeping which is neither unsafe or unsanitary).

### **Equal Protection**

The Eleventh Circuit has ruled, as a matter of federal constitutional law, that homelessness is not a suspect class and that sleeping out-of-doors is not a fundamental right. *Joel*, 232 F.3d 1353. Equal protection claims are judged under the rational basis test where the ordinance does not infringe on a fundamental right or target a suspect class. *Id.* at 1357. For rational basis review, the ordinance must be rationally related to the achievement of a legitimate governmental purpose. The court looks to whether there is a legitimate purpose the government could have been pursuing and the actual motivations of the enacting government body are irrelevant. *Id.* at 1358. The ordinance is entitled to a strong presumption of validity. *Id.* In other words, this standard of review is very deferential and courts will supply reasons that the government did not even consider in enacting the ordinance.

The court identified a legitimate governmental interest that the City *could* have been pursuing (here "the City could have been seeking to promote aesthetics, sanitation, public health, and safety"). The court found "a rational basis exists for believing that prohibiting sleeping out-of-doors" would further those interests. *Id.*; see also *McGinnis*, 13 Fla. L. Wkly. Supp. 371a (lodging ordinance does not violate equal protection because rational basis exists for believing that prohibiting lodging out-of-doors on public or private property would further public health, sanitation, safety and aesthetics).

The court also rejected the argument that the ordinance had a disproportionate impact on homeless people (98 percent of people arrested under ordinance were homeless) because



homelessness is not a suspect class. *Joel*, 232 F.3d at 1359. Even if a group is entitled to heightened protection, Joel had failed to prove the ordinance was enacted for the purpose of discriminating against homeless people and therefore ordinance does not violate Equal Protection. *Id.*

### **Expressive Conduct**

Although the First Amendment literally protects “speech,” the Supreme Court has recognized that “its protection does not end at the spoken or written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). There also is protection for conduct that is “sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.” *Spence v. State of Wash.*, 418 U.S. 405, 409 (1974). To determine whether conduct contains sufficient elements of communication, the Court asks: (1) whether there is an “intent to convey a particularized message”; and (2) whether “the likelihood was great the message would be understood by those who viewed it.” *Johnson*, 491 U.S. at 404. The conduct must also be “inherently expressive,” without the necessity of explanatory speech. *Rumsfeld v. FAIR*,

547 U.S. 47, 66 (2006).

The Supreme Court has assumed, without deciding, that sleeping within the context of a political demonstration in a national park to protest plight of the homeless was expressive conduct protected to some extent by the First Amendment. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (upholding park regulation banning sleeping in certain areas of park as reasonable restriction on expressive conduct); see also *Hershey*, 834 F.2d at 940 (assuming sleeping can be expressive conduct); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1327-28 (M.D. Fla. 2011) (occupation of public park which involved sleeping and camping to bring awareness to concerns about political process and economic policy was expressive conduct protected by the First Amendment).

However, just because a court may consider sleeping (under particular factual circumstances) to be expressive conduct, the government may regulate it. Expressive conduct may be regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to



further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. *Clark*, 468 U.S. at 293, citing *U.S. v. O'Brien*, 391 U.S. 367 (1968) (four-factor *O'Brien* test for regulation of expressive conduct “is little, if any, different” from the standard applied to time, place or manner restrictions). See *Clark*, 468 U.S. at 295 (park regulation constitutional where “Park Service neither attempts to ban sleeping generally nor to ban it everywhere in the parks”); *Hershey*, 834 F.2d at 940 (ordinance prohibiting lodging in vehicles in public areas is a reasonable time, place, and manner regulation within the police power of the City).

### SEC. 3 THE NECESSITY DEFENSE

The necessity defense has been formulated as follows: “The pressure of natural physical forces sometimes confronts a person in an emergency with a choice of two evils: either he may violate the literal terms of the criminal law and thus produce a harmful result, or he may comply with those terms and thus produce a greater or equal or lesser amount of harm. For reasons of social policy, if the harm which will result from compliance with the law is greater than that which will result from violation of it, he is by virtue of the defense of necessity justified in violating it.” W.R. LaFave, 2 *Subst. Crim. L.* § 10.1 (2d ed.) (2015).

In *Lehr v. City of Sacramento*, the Eastern District of California rejected a civil challenge to a sleeping ordinance under the Eighth Amendment of the U.S. Constitution, observing that Plaintiffs’ claim “is better couched in terms of a defense to a criminal conviction than as a constitutional argument.” 624 F. Supp. 2d 1218, 1233 n.6 (E.D. Cal. 2009) (necessity defense allows individual inquiry into whether each then-defendant actually had viable options for shelter or was, instead, on the street involuntarily).

#### Elements of Necessity Defense

In Florida, the essential elements required to assert the defense of “necessity” (which exists at common law rather than by statute) are:

1. Defendant reasonably believed that his action was necessary to avoid an imminent threat of death or serious bodily injury to himself or others;
2. Defendant did not intentionally or recklessly place himself in a situation in which it would be probable that he would be forced to choose the criminal conduct;

3. There existed no other adequate means to avoid the threatened harm except the criminal conduct;
4. The harm sought to be avoided was more egregious than the criminal conduct perpetuated to avoid it; and
5. Defendant ceased the criminal conduct as soon as the necessity or apparent necessity for it ended.

*Bozeman v. State*, 714 So. 2d 570, 572 (Fla. 1st DCA 1998).

Generally, the necessity defense is available to a person who acted in the reasonable belief that an emergency existed and that there were no alternatives available, even if that belief is mistaken. Florida requires that the defendant be judged based on the circumstances by which he was surrounded at the time the crime was committed. See *Fla. Std. Jury Instr. (Crim.)* 3.6(k).

To successfully argue that the defendant committed the crime charged out of duress or necessity, the jury must find the following six elements:

1. The defendant reasonably believed a danger or an emergency existed which was not intentionally caused by [himself] [herself].
2. The danger or emergency threatened significant harm to [himself] [herself] [a third person].
3. The threatened harm must have been real, imminent, and impending.
4. The defendant had no reasonable means to avoid the danger or emergency except by committing the crime charged.
5. The crime charged must have been committed out of duress or necessity to avoid the danger or emergency.
6. The harm that the defendant avoided must outweigh the harm caused by the crime charged.

*Fla. Std. Jury Instr. (Crim.)* 3.6(k).

The following definitions apply to this defense:

- “Imminent and impending” means the danger or emergency is about to take place and cannot be avoided by using other means. A threat of future harm is not sufficient to prove this defense. Nor can the defendant use the defense of duress or necessity if [he]



[she] committed the crime after the danger from the threatened harm had passed. The reasonableness of defendant's belief that a danger or an emergency existed should be examined in the light of all the evidence.

- In deciding whether it was necessary for the defendant to commit the crime charged, you must judge the defendant by the circumstances by which [he] [she] was surrounded at the time the crime was committed.
- The danger or emergency facing the defendant need not have been actual; however, to justify the commission of the crime charged, the appearance of the danger or emergency must have been so real that a reasonably cautious and prudent person under the same circumstances would have believed that the danger or emergency could only have been avoided by the crime charged. Based upon appearances, the defendant must have actually believed that the danger or emergency was real.
- If you have a reasonable doubt as to whether the defendant committed the crime charged out of necessity or duress, you should find the defendant not guilty.

### Application of Necessity Defense in Florida

A defendant who relies upon a defense of duress or necessity has the burden of going forward with the evidence that the affirmative defense exists, but the ultimate burden of proving guilt beyond a reasonable doubt never shifts from the State. *Smith v. State*, 826 So. 2d 1098, 1099 (Fla. 5th DCA 2002). See also *Wright v. State*, 442 So. 2d at 1060 (defendant has burden of providing evidence that affirmative defense exists, yet once competent evidence of existence of defense has been established, State must prove the *nonexistence* of the defense beyond a reasonable doubt) (emphasis added).

It has been established in Florida that, in certain circumstances, defendants charged with or convicted of using medical marijuana can rely on the defense of necessity, specifically "medical necessity." See *Jenks v. State*, 582 So. 2d 676 (Fla. 1st DCA 1991) (where defendants who were convicted of cultivating cannabis for treatment of the nausea they suffered in connection with their contraction of AIDS presented sufficient evidence supporting their defense of medical necessity; namely, that the defendants did not intentionally contract AIDS, that the nausea was so debilitating that, if not controlled,

defendants could die, and thus their lives were in danger, and that no other drug treatment was available to effectively diminish the nausea).

The necessity defense has been deemed available to a defendant convicted of felony driving while his license was suspended, revoked, or cancelled. See *Bozeman*, 714 So. 2d at 571-73 (defendant was entitled to have jury instructed on necessity defense when he did not intentionally place himself in position of having to drive his friends' vehicle, but had no viable alternative to driving her car once realizing she was too intoxicated to continue driving).

The necessity defense was available to a defendant for resisting arrest without violence and criminal mischief. See *McCoy v. State*, 928 So. 2d 503 (Fla. 4th DCA 2006) (reversing defendant's conviction due to trial judge's failure to instruct jury on defense of necessity when defendant's testimony, if believed, could have established elements of necessity: he suffers from a health condition causing shortness of breath, so while locked in a squad car with no air, he broke a window to avoid suffocating).

The majority of case law in Florida that involves a court rejecting or denying jury instruction on the necessity defense involves a balancing of the harms which results in a finding that the harm caused was greater than the harm avoided. For example, the necessity defense was rejected by the Florida Supreme Court in the case of a defendant who murdered an abortion clinic physician and volunteers, as legal abortion is not a "harm" that can be used to invoke the necessity defense, and thus defendant could not present evidence concerning abortion, nor his views on the subject, to establish the necessity defense. *Hill v. State*, 688 So. 2d 901, 905-06 (Fla. 1996).

A defendant was not entitled to a necessity instruction for a third-degree felony DUI charge, despite his belief that the illegal act of driving under the influence was necessary to avoid an imminent threat of danger to the passenger's cat. *Brooks v. State*, 122 So. 3d 418 (Fla. 2d DCA 2013) (necessity defense is not available to a DUI charge in Florida when asserted emergency involved threat of harm to an *animal* rather than to a person, despite defendant having produced evidence that the cat was very ill, that there was a veterinary clinic nearby, and that the cat died shortly after the defendant's arrest).

A defendant who was pulled over for a traffic infraction while driving with a revoked license, claiming that he drove out of necessity because of a medical emergency, was not entitled to



the necessity defense. *Mickell v. State*, 41 So. 3d 960, 961-62 (Fla. 4th DCA 2010). The defendant claimed he had no other choice but to drive illegally because the driver of the car had suffered an asthma attack and needed medical attention. However, the defendant extended the length of the traffic stop by 20 minutes by providing a fake name to the officer multiple times, thus the court found that it was unlikely that a real medical emergency existed. *Id.* Two essential elements of the necessity defense are that the defendant reasonably believed a danger or emergency existed, and that the threatened harm be real, imminent, and impending. The defendant's conduct, which extended the amount of time in which his friend was allegedly experiencing breathing difficulties, made both of these elements unlikely. *Id.* at 262.

A lack of evidence demonstrating the impending harm defendant sought to avoid by violating the law is also a ground upon which Florida courts have rejected the necessity defense. See *Butler v. State*, 14 So. 3d 269 (Fla. 1st DCA 2009). The court held that the defendant, convicted of trespass and criminal mischief, was not entitled to a jury instruction on the necessity defense, as there was no evidence to establish defendant's reasonable belief that an immediate threat existed when he broke into an occupied dwelling. *Id.* The immediate threat defendant sought to prove was that he was being chased by men whom he owed money, and in an effort to prove such threat he introduced the testimony of a woman who stated that he rang her doorbell, appearing very afraid, and asked her to call the police. *Id.* at 270. He also introduced the testimony of a man who saw the defendant at a party, but did not witness defendant being slapped or chased, as defendant claimed. *Id.* The court rejected defendant's request for jury instruction on the necessity defense based on the fact that no witnesses saw defendant being chased and defendant did not testify as to his alleged belief, thus the elements of the defense were not satisfied. *Id.* at 271.

### **Defending The Necessity of Sleep**

A homeless man was convicted in California of a misdemeanor violation of a Municipal Code, that banned "unlawful camping," for sleeping in the Santa Ana Civic Center with more than fifteen other homeless individuals, each of whom also received a citation from the police. *In re Eichorn*, 69 Cal. App. 4th 382 (Cal. 4th DCA 1998). The trial court held that Eichorn was not entitled to assert the necessity defense because he did not avoid a "significant, imminent evil" by sleeping in the Civic Center, and

because he was not "involuntarily homeless" on the night in question. The court determined the issue of his "voluntary homelessness" based on the belief that he chose not to go to the city's homeless shelter, that he should have sought housing from his relatives, and that he should have applied for public benefits.

Similar to the elements in Florida, in California an instruction on the defense of "necessity" is required when there is evidence sufficient to establish that the defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a danger greater than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency. *Id.* at 389. The defense of necessity is founded upon public policy and provides a justification distinct from the elements required to prove the crime. *Eichorn*, 69 Cal. App. 4th at 389. Necessity does not negate any element of the crime, but represents the public policy decision not to punish an individual faced with an emergency situation, threatened by physical harm who lacks an alternative legal course of action *despite* proof of the crime. *Id.*

The California Court of Appeal held that Eichorn could raise the necessity defense to a violation of the municipal anti-camping ordinance, a conclusion the court reached by focusing on the adequacy of alternatives, which turns on the balancing of harms. *Id.* The court relied on dicta from a California Supreme Court case to support the proposition that the necessity defense should be available to "truly homeless" persons and that prosecutorial discretion should be exercised when dealing with individuals who have no alternative to "camping" on public property. *Id.* at 388 (*citing Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995)).

The homeless defendant introduced sufficient evidence to present the necessity defense as on the night of the violation every shelter bed within the city was occupied, and he was involuntarily homeless (i.e. he had done everything in his power to alleviate his condition, yet due to circumstances beyond his control, he was not able to find work that paid enough to allow him to find an alternative place to sleep). *Id.* at 384, 389. Additionally, the harm he sought to avoid by violating the anti-camping ordinance was, undoubtedly, a "significant evil." As demonstrated by the evidence at trial, sleep is not an option, but rather a physiological need for humans, and sleep deprivation results in both mental and physical problems. *Id.* at 389-90.





*In re Eichorn* was the first case to apply the defense of necessity to a homeless individual's violation of an anti-camping ordinance, and it provided advocates with their first glimpse into the role that the necessity defense may play in homeless advocacy. Antonia K. Fasanelli, *In Re Eichorn: The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 Am. U. L. Rev. 323 (2000). *In re Eichorn* demonstrates a shift away from focusing on the voluntariness of the individual's homelessness, and toward focusing on available alternatives and the balancing of harms. *Id.* at 325. The result of this shift is placing the burden on local governments to address the lack of resources available to homeless individuals. Attorneys have lost cases based on individual judge's beliefs that homelessness is a "lifestyle choice." Shifting the focus from voluntariness to balancing of harms (consequentialism) provides attorneys advocating for homeless individuals an opportunity to present alternatives to the violation, and such alternatives (harms) avoided might include sleep deprivation. *Id.* at 343.

In *Tobe*, the California Supreme Court emphasized that a trial court must first determine that a person is "involuntarily homeless" before determining whether the defendant "involuntarily" violated the ordinance. *Id.* at 342. Thus, there are two distinct elements of "involuntariness" at issue when a homeless individual seeks to assert the necessity defense: (1) whether the individual has done everything in his power to alleviate his condition of homelessness; and (2) whether the individual had any reasonable, legal options on the night in question other than sleeping in public or covering oneself for warmth or shelter, in violation of the anti-camping or sleeping ordinance at issue.

Voluntariness is a relative term; an individual may have made a choice of sorts months or years prior to living on the streets that, in some way, contributed to their ultimate loss of housing, but, arguably, the relationship to a previous choice does not classify being homeless as "voluntary." Because the public policy purpose of the necessity defense is to promote socially desirable results, voluntariness is inherent to the necessity defense, and to raise the defense the defendant must demonstrate that they chose the "lesser evil." *Id.* at 342. This "lesser evil" element requires a balancing of the harms. However, this balancing of harms is an imperfect test, as there is no guide as to what harms should be balanced or how to balance them. *Id.* at 343.

The Florida Standard Jury Instructions require a balancing of social harms when an actor believes his conduct is justified as necessary to avoid a harm

or evil. The reasonableness of the decision made by defendant in balancing the harms is a jury question, as is the determination of whether defendant had reasonable grounds to believe there was a threat of danger he needed to avoid. See *Muro v. State*, 445 So. 2d 374, 376-77 (Fla. 3d DCA 1984).

Cases involving Eighth Amendment challenges are instructive for the level of proof required to show that sleeping outside was involuntary for purposes of raising the necessity defense. Ordinances violate the Eighth Amendment rights of homeless people only where there was evidence of the lack of shelter space available, which made sleeping in public *involuntary* conduct for those who could not get in a shelter. *Pottinger*, 810 F. Supp. at 1564 ("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."); *Johnson v. City of Dallas*, 860 F. Supp. 344, 351 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995) ("[A]s long as the homeless have no other place to be, they may not be prevented from sleeping in public.").

By contrast, in *Joel v. City of Orlando*, the Eleventh Circuit found for the City on all counts based on the evidence provided by the City showing that there was shelter space available to the defendant on the night in question, and that the local shelter never turned people away. 232 F.3d 1353, 1362 (11th Cir. 2000). The City submitted an unrefuted affidavit from the local shelter. The court concluded, based on this evidence, that the defendant had other reasonable, legal options and had the opportunity to comply with the ordinance.

As noted above in the discussion of the *In re Eichorn* case, the success of the necessity defense applied to a homeless individual who violated an anti-camping ordinance turned on the proof offered at trial establishing that Eichorn's actions were involuntary. In advocating for homeless individuals charged with violating similar ordinances in Florida, it is instructive to analyze the evidence and testimony used to establish the element of involuntariness in that case.

### Proof of Involuntariness of Homelessness

- A University of California professor testified as an expert witness regarding his study on homelessness. He testified that there were more than 3,000 homeless individuals in Orange County and inadequate affordable housing to meet the needs of these individuals.



- Testimony was provided by the Executive Director of the Orange County Homeless Issues task force on the disparity between the number of homeless people in Santa Ana and the number of shelter beds available for single men like Eichorn. He also testified that, on the night Eichorn was cited, these shelters were full, as was routine.
- Defendant Eichorn testified about being a Vietnam veteran and how losing his job in a machine shop led to his homelessness. He testified about how hard he tried to seek employment, yet despite saving money when he could find work, there was no affordable housing or motels. Eichorn stated that seeking help from his family was not an option, and denied any problem with drugs or alcohol.
- The program manager for food stamps and general relief for the county testified that from 1989-1993 Eichorn regularly received food stamps and that he received general relief through his involvement in a work program. His most recent applications for continued general relief were denied, leaving him without any financial assistance.

#### Proof of Involuntariness of Conduct on that Night

- The court judicially noticed that the walk between the civic center and the Armory (a homeless shelter several miles away) was through a very dangerous area of town.
- The county's homeless coordinator testified that the Armory was only available as a shelter on cold winter nights, that Eichorn had spent approximately 20 nights there in December and January, and that on the night in question the Armory was 13 persons over capacity, and thus not an available option for Eichorn that night.
- Defendant Eichorn testified that he slept in the Civic Center in violation of the ordinance because there was "safety in numbers" and he was less likely to be robbed or attacked while he slept; additionally, he had no reasonable legal alternatives on the night in question.

## SEC. 4 PRACTITIONER'S TIPS

### Danger Ahead

In Florida, in order to assert the affirmative defense of necessity, a homeless defendant must prove that

the harm sought to be avoided was more egregious than the criminal conduct perpetuated to avoid it. What this means, in effect, is that the defendant must produce evidence supporting that the act of, for example, sleeping outside or covering himself with something to keep warm caused *less harm* than would have been caused to him by staying awake or sleeping in the cold.

#### Dangers of Sleep Deprivation

According to the American Psychological Association, sleep is essential for a person's health and wellbeing.<sup>1</sup> While everyone's individual sleep needs vary, most adults are built for 16 hours of wakefulness, and thus need approximately 8 hours of sleep per night.

A study by the National Center for Biotechnology Information at the U.S. National Library of Medicine found that the consequences of sleep deprivation include mortality, morbidity, accidents and injuries, errors in judgment, decreases in functioning and quality of life, and health issues such as obesity, hypertension, diabetes, depression, heart attack, and stroke. Research over the past decade has shown that sleeping less than 7 hours per night has wide-ranging effects in the long-term on the cardiovascular, endocrine, immune, and nervous system. Adults with chronic sleep loss report excess mental distress, depressive symptoms, anxiety, and alcohol use.<sup>2</sup>

The Center for Disease Control and Prevention has concluded that "sleep is critical for basic survival," as it helps to balance hormones and other vital brain and body chemicals, as well as converting the day's experiences into usable permanent memory and cleansing the brain of toxic chemicals.<sup>3</sup>

#### Dangers of Hypothermia

Hypothermia is a condition that occurs when a person's core body temperature falls below 95 degrees Fahrenheit, and the symptoms of hypothermia include exhaustion, numbness, shivering, decreased hand coordination, slurred speech, and confusion, among other things.<sup>4</sup> Hypothermia also commonly leads to heart, brain,

1 Amer. Psychological Ass'n, *Importance of Sleep*, available at [apa.org/topics/sleep/why.aspx](http://apa.org/topics/sleep/why.aspx).

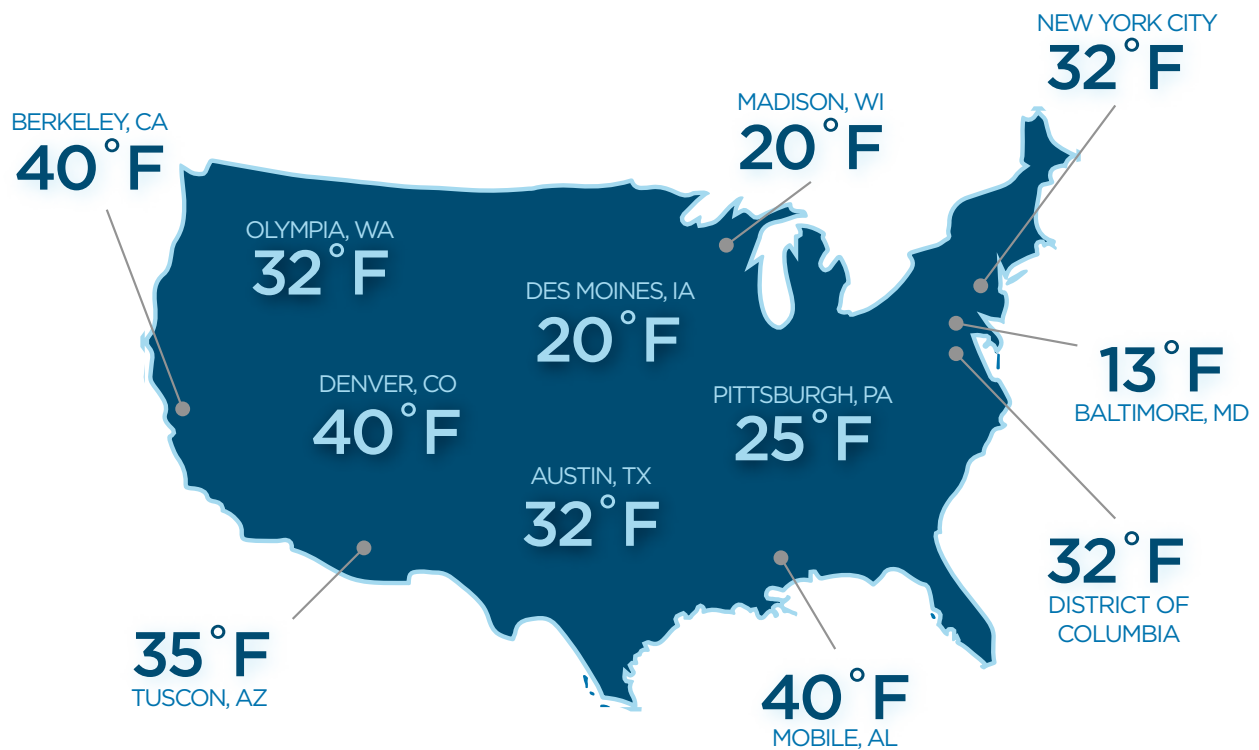
2 Inst. of Medicine, *Sleep Disorders & Sleep Deprivation* (2006), available at <http://www.ncbi.nlm.nih.gov/books/NBK19960/>.

3 Nat'l Healthcare for the Homeless Council, *Sufficient Sleep: A Necessity, Not a Luxury*, Vol. 18, No. 2 (2014), available at [nhhc.org/wp-content/uploads/2014/03/spring2014healinghands.pdf](http://nhhc.org/wp-content/uploads/2014/03/spring2014healinghands.pdf).

4 Nat'l Coalition for the Homeless, *Winter Homeless Services: Bringing our Neighbors in from the Cold* (2010), available at [http://nationalhomeless.org/wp-content/uploads/2014/02/Winter\\_weather\\_report.pdf](http://nationalhomeless.org/wp-content/uploads/2014/02/Winter_weather_report.pdf).



# HOW COLD DOES IT NEED TO BE BEFORE WINTER SHELTERS OPEN?



**LIFE THREATENING HYPOTHERMIA CAN SET IN BETWEEN 32° F - 50° F. BUT MANY EMERGENCY WINTER SHELTERS DON'T OPEN UNTIL IT IS MUCH COLDER.**

A MESSAGE FROM THE NATIONAL COALITION FOR THE HOMELESS





and kidney malfunction and sometimes death. The homeless population is at greatly increased risk for hypothermia and other cold-related conditions, and their risk of death from future unrelated conditions is greatly increased by their constant exposure to cold weather.

According to the National Coalition for the Homeless report, seven hundred people experiencing homelessness are killed from hypothermia annually in the United States. Hypothermia is one of the leading (and preventable) causes of injury and death among homeless individuals. The risk of death from hypothermia and frostbite is further exacerbated by the fact that many homeless people also have inadequate clothing, decreased body fat, lack of fitness, pre-existing medical conditions, suffer from malnutrition, have underlying infections, and many struggle with alcohol and drug addictions, which increase their susceptibility to hypothermia.

Hypothermia occurs not only when temperatures fall below a certain threshold, but also when wind or rain cause the body to lose heat more quickly than normal. For instance, wet clothing causes a 20-fold increase in heat loss, according to the National Coalition for the Homeless, and homeless individuals disproportionately suffer from wet clothing. Dr. James J. O'Connell from the Boston Health Care for the Homeless Program reported in the National Coalition for the Homeless report that the most dangerous and life-threatening cases of hypothermia occur not when the temperature is below freezing, but rather when the days are warm and the nighttime temperature drops to the mid-30s.

Homeless people are at a higher risk for frostbite and hypothermia, especially during the winter months or rainy periods, conditions that increase the risk of death from other causes eightfold. Homeless people are also three to four times more likely to die than the general population, as the average life expectancy in the homeless population is between 42 and 52 years, while for the general population is it 78 years. As illustrated by the report, housing is actually the first form of treatment for homeless people with medical issues.

### **Inadequacy of Cold Night Shelters**

The National Coalition for the Homeless' Winter Report from January 2010, "Winter Homeless Services: Bringing Out Neighbors in from the Cold," includes the results from a study on nearly 100 homeless shelters in 60 cities and counties through 40 states and the District of Columbia.<sup>5</sup> The report

<sup>5</sup> *Supra* note 4.

explains that few communities have city-wide cold-weather response plans to protect homeless individuals from exposure-related conditions such as hypothermia.

The majority of shelters and organizations surveyed by the National Coalition for the Homeless only offer expanded winter services during certain months or only when the temperature falls below a pre-determined and arbitrary cut-off temperature. For instance, one shelter in Nome, Alaska, opens its doors only when the temperature falls below -10°F with wind chill. Even in conditions under which the most dangerous cases of hypothermia occur, including when the temperature is above the cut-off number yet it is raining, many cities do not offer resources to help homeless people survive the conditions. Additionally, even cities with additional cold-night shelters frequently do not allow individuals to enter and escape the cold during the day, leaving them without shelter. In many cases, even when services are available consistently during the winter, the services are restricted to people who meet specific criteria, for instance many prohibit homeless individuals who are inebriated.

Dr. O'Connell suggests in this report that, in order to protect our homeless citizens from the dangers associated with extreme cold, cities must fund and organize a winter response plan before cold weather arrives, temperature cut-offs must be avoided, cold-night shelters must be open 24 hours during winter months, and restrictions on who is allowed in homeless shelters must be lifted when the temperature is below 40°F.

### **Other Involuntary Conduct**

A similar analysis to the one detailed above in defending homeless individuals charged with violating sleeping/camping ordinances can be undertaken for other such status crimes typically associated with homelessness. For instance, urinating in public is illegal in most jurisdictions, whether by a law that explicitly prohibits the act or charged under more broad regulations, such as "public nuisance" or "disorderly conduct." While urinating and defecating in public are objectively more of a nuisance than the act of mere sleeping outside, they are equally involuntary when homeless individuals are left with no alternatives, and should not be treated as criminal conduct. Typically there are no public restrooms available 24 hours a day, 7 days a week. The negative consequences associated with holding one's urine include a stretching of the bladder, growth of bacteria in the bladder leading to infections in the



# Restrooms For guests Only

kidneys, urinary tract infections, kidney stones, and other health risks.

A report from the U.N. Special Rapporteur on extreme poverty and human rights found that the criminalization of basic bodily functions leaves homeless people with “no viable place to sleep, sit, eat or drink ... [and] can thus have serious adverse physical and psychological effects on persons living in poverty, undermining their right to an adequate standard of physical and mental health and even amounting to cruel, inhuman or degrading treatment.”<sup>6</sup>

A 2011 report by the U.N. Special Rapporteur on the human right to safe drinking water and sanitation found that evacuation of the bowels and bladder is a necessary biological function and denial of opportunities to do so in a lawful and dignified manner can both compromise human dignity and cause suffering.<sup>7</sup>

## Available Shelter Space?

Every Continuum of Care (CoC)<sup>8</sup> must participate in the federal Homeless Management Information System (HMIS) to assist in accurately counting and

reporting on patterns of use and service to assist in preparing needs analyses and funding priorities. 42 U.S.C. § 11360a(f)(3). The CoC is responsible for establishing a system that complies with the U.S. Department of Housing and Urban Development’s (HUD) data collection, management, and reporting standards and is used to collect client-level data and data on the provision of housing and services to homeless individuals and families and persons at-risk of homelessness. 42 U.S.C. § 11360a(f)(3); 24 C.F.R. §§ 576.2 & 578.3. HMIS is a way to understand availability of shelter space, and service utilization of a particular shelter on a particular night can be ascertained from this data. Additionally, with a release from the client, a lawyer can obtain the client’s HMIS records that would include information about the individual’s service utilization that may assist in proving (or disproving) necessity of sleeping outside.

CoCs also compile an annual Point-in-Time Count<sup>9</sup> which can provide a snapshot of the homeless population and availability of homeless shelters in a community. In addition, a CoC application for federal funding to HUD contains assessments of unmet needs, including availability of shelter space. Finally, a community’s Consolidated Plan is another report that contains information about the housing needs and inventory in a particular community.

Even if a particular shelter has beds available on a given night, it is important to inquire further (particularly about the shelter’s eligibility requirements and policies) to determine if it was available and accessible to the client:

- What are the general eligibility requirements?

<sup>6</sup> The Secretary-General, *Report by Magdalena Sepúlveda Carmona, Special Rapporteur on extreme poverty and human rights*, ¶ 36, delivered to the General Assembly, U.N. Doc. A/66/265 (Aug. 4, 2011), available at <http://www.ohchr.org/Documents/Issues/EPoverty/A.66.265.pdf>

<sup>7</sup> U.N. Human Rights Council, *Report of the U.N. Special Rapporteur on the Human Right to Safe Drinking Water & Sanitation, Catarina de Albuquerque, Addendum: Mission to U.S.A.* ¶ 58, A/HRC/18/33/Add.4 (2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf)

<sup>8</sup> A CoC is a program that is authorized by subtitle C of title IV of the McKinney-Vento Homeless Assistance Act (42 U.S.C. §§ 11381-11389) and is a framework for a comprehensive and seamless array of emergency, transitional, and permanent housing, and services to address the various needs of homeless persons and persons at risk for homelessness. 24 C.F.R. §§ 576.2, 578.1, 578.3; § 420.624, Fla. Stat. (2015).

<sup>9</sup> A Point-in-Time count is conducted by a CoC of sheltered and unsheltered homeless persons that meets HUD requirements and is carried out on one night in the last 10 calendar days of January at least biennially or at such other time as required by HUD. 24 C.F.R. §§ 578.3 & 578.7(c)(2).



Is a specific individual eligible to be admitted to a particular shelter?

- Is there a cost to stay at the shelter? Some shelters cost \$5 or more per night, placing it out of reach for many homeless individuals.
- Does the individual have a disability that requires the shelter to provide accommodations? For example, an individual may have a colostomy bag and the shelter has a policy of not admitting persons with that type of medical condition. Or the shelter may not be able to accommodate someone in a wheelchair. Therefore, even if there is space available at the shelter, that shelter is not accessible to the individual with a disability.<sup>10</sup>
- Are there religious requirements to stay at the shelter that conflict with the individual's personal beliefs? Some shelters require mandatory prayers or bible studies as a condition of staying there.
- Are the beds actually available to a person who walks in off the street? Some shelters have a number of beds reserved for law enforcement or for other purposes and even though they may be empty on a given night, they would not have been available to an individual who walks in.
- Are there a maximum number of days a person can stay at the shelter? For example, a shelter may have a maximum number of 21 consecutive days and then a requirement that a person stay out of the shelter for 14 days after reaching the maximum (or if the person misses one night) before re-applying for admission. Even if a particular shelter has available space, a specific individual may not be eligible for admission.
- Has the person received a trespass warning for any shelters? Homeless shelters may issue trespass warnings so that a person cannot utilize services at the shelter (or even set foot on the grounds of the shelter) without penalty of arrest for trespassing.
- How far is the shelter? Does the person have the ability to travel there and back? Even if there is shelter bed availability at a particular shelter, consider the factual circumstances of the individual client. For example, if a person

has a job at night and misses the check-in time for an emergency shelter, then even if there was available space at the shelter, it was not available to that person.



### **Go to a Shelter, or Be Arrested?**

In response to *Pottinger*, and to avoid similar Eighth Amendment claims, many cities and counties have written their sleeping ordinances in such a way as to require a homeless individual to seek shelter space. A violation of such an ordinance typically occurs only if there is available shelter space, and the homeless individual refuses to travel there (or be transported by a law enforcement officer). However, such ordinances can cause other constitutional problems as illustrated by *State v. Folks*, Case No.: 96-19569 MM (Fla. Duval Cnty. Ct. 1996).

In *Folks*, the defendant was charged with violation of a Jacksonville ordinance that prohibited sleeping outside. The police officer instructed the defendant to go to a shelter; the defendant went to the shelter and after seeing people laying everywhere and smelling a "stench," he left the facility and did not want to return. The court granted defendant's motion to dismiss, finding the ordinance was unconstitutionally vague; was cruel or unusual punishment for banning innocent conduct of sleeping or lodging; violated due process by prohibiting such conduct; allowed arbitrary discretion to prohibit that are not nuisances; and was overbroad by placing restrictions on constitutionally protected activities.

Specifically, the court was concerned that there is no timeframe in the ordinance to specify what must be done prior to arrest. The court observed:

The police officer must inform the person of a shelter and even provide transportation. Nowhere is it stated the person must either go in the shelter or, once in, must remain or for how long. In the instant case, the un rebutted evidence is that the Defendant did go in, found it unpleasant and then exited. It appears to this Court that if in fact the ordinance requires a person to remain in a shelter for an unspecified period or time or be arrested, this amounts to incarceration in the shelter without a violation of law having been committed.

<sup>10</sup> This may also be a violation of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act and a civil lawyer should be consulted in such a case.



# Chapter 3

## Move Along ... Move Along

### SEC. 1 RIGHT TO INTRASTATE TRAVEL

The Supreme Court has long recognized interstate travel as a fundamental right guaranteed by the U.S. Constitution. *Shapiro v. Thompson*, 394 U.S. 618, 630-31 (1969), *overruled in part on other grounds*, *Edelman v. Jordan*, 415 U.S. 651 (1974). However, it has not addressed whether there is a constitutional distinction between interstate and intrastate travel. *Memorial Hosp. v. Maricopa Co.*, 415 U.S. 250, 255-56 (1972). The federal circuits are split on this issue. Compare, e.g., *Wright v. City of Jackson, Miss.*, 506 F.2d 900 (5th Cir. 1975) (rejecting argument that *Shapiro* extends to intrastate as well as interstate travel); with *King v. New Rochelle Mun. Hous. Auth.*, 442 F.2d 646 (2d Cir. 1971) (recognizing right to intrastate travel).

The Florida Supreme Court has explicitly recognized that individuals possess a fundamental right to intrastate travel under the Florida Constitution. *State v. J.P.*, 907 So. 2d 1101, 1113 (Fla. 2004). All Florida citizens have a right under the Florida Constitution to chat on a public street stroll aimlessly, and saunter down a sidewalk. *Id.* Any statute or ordinance that burdens the right to intrastate travel is subject to strict scrutiny and must be narrowly tailored to meet a compelling government interest in the least restrictive means available. *Id.* at 1116.

The Eleventh Circuit held that homeless plaintiffs stated a claim for relief under the Florida Constitution for violation of their right to intrastate travel. *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1270 (11th Cir. 2011). The court held that the City burdened plaintiffs' right to intrastate travel, as defined by the Florida Supreme Court, if (as alleged by plaintiffs) the City has a policy of enforcing its trespass ordinance to ban persons from being present on public sidewalks and waiting for buses at bus stops on public sidewalks surrounding public parks. *Id.* As the City asserted no interest in this alleged enforcement of the trespass ordinance, the court could not conclude (based on allegations and arguments before it) that the trespass ordinance passed strict scrutiny as required by Florida law. *Id.* at 1271.

<sup>1</sup> This decision is binding precedent in the Eleventh Circuit. See *Bonner v. Prichard*, 661 F.2d 1206, 1210 (11th Cir. 1981) (en banc).

In *Pottinger*, the Southern District of Florida held that the City of Miami violated plaintiffs' right to travel. 810 F. Supp. at 1580-81 ("enforcing ordinances against the homeless when they have absolutely no place to go effectively burdens their right to travel"). The court reasoned, relying on *Memorial Hospital*, that "laws penalize travel if they deny a person a necessity of life such as free medical care." *Id.* at 1580. The court observed:

Similarly, preventing homeless individuals from performing activities that are "necessities of life," such as sleeping, in any public place when they have nowhere else to go effectively penalizes migration. Indeed, forcing homeless individuals from sheltered areas or from public parks or streets affects a number of "necessities of life"—for example, it deprives them of a place to sleep, of minimal safety and of cover from the elements.

*Id.* at 1580. Finding that the evidence "overwhelmingly shows that plaintiffs have no place to be without facing the threat of arrest," the court found that enforcement of the challenged ordinances significantly impacted freedom of movement by: (1) preventing homeless people from coming into the City, and (2) expelling those already present from the City. *Id.* at 1581. The court applied strict scrutiny to find that the City's interests in promoting tourism and in developing the downtown area were at most substantial, and even if they were compelling, the City could address them "through some manner that is less intrusive than arresting homeless individuals." *Id.* at 1581-82. *But see Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1338-39 (M.D. Fla. 2011) (rejecting claim that there is a fundamental right to lounge where, when, and for how long plaintiffs wish in a public park or to meet in a public park during hours it is closed to the public).

### SEC. 2 LOITERING

Cities and states often utilize loitering laws as a means of targeting homeless people and keeping them out of public places, which is a seemingly effective tool, as loitering statutes and ordinances proscribe a broad scope of behaviors. The



Supreme Court, however, has found loitering laws unconstitutional under the void-for-vagueness doctrine due to a failure to establish standards for the police and public which are sufficient to guard against the arbitrary deprivation of liberty interests. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). Our country has long recognized an individual's choice to remain in a public place and the freedom to move to whatever place he should choose as protected liberty interests which cannot be arbitrarily infringed at the whim of any law enforcement officer.

The Supreme Court held that an Illinois loitering ordinance violated the due process clause of the Fourteenth Amendment of the U.S. Constitution because of impermissible vagueness. *City of Chicago v. Morales*, 527 U.S. 41, 51 (1999). The ordinance stemmed from commendable intentions, as it was aimed toward reducing the violence, murder and drug related crimes in the city of Chicago by keeping gang members from loitering in public places and intimidating other law-abiding citizens from entering those areas. *Id.* at 46. However, the ordinance failed to provide adequate notice of prohibited conduct and failed to establish minimal guidelines for enforcement. *Id.* at 60.

Commission of the offense under the Illinois ordinance required: a) that the officer reasonably believe that at least one of the two or more persons present in the public place is a "criminal street gang member"; b) that the persons are "loitering"; c) that the officer order "all" of the persons to disperse and remove themselves from the area; and d) that the person disobey the officer's order. *Id.* at 47. If any person, gang member or ordinary law-abiding citizen, disobeys the officer's order, that person is guilty of violating the ordinance. *Id.* The ordinance gave law enforcement officers unbridled discretion in determining who constituted a gang member and what constituted the offense of loitering. "[This] is a criminal law that contains no mens rea requirement, and infringes on constitutionally protected rights .... When vagueness permeates the text of such a law, it is subject to facial attack." *Id.* at 55.

The Supreme Court similarly held that a California

loitering statute was unconstitutionally vague on its face, in violation of the Due Process Clause, because it encouraged arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. *Kolender v. Lawson*, 461 U.S. 352, 361. The statute required anyone loitering or wandering on the streets to provide "credible and reliable" identification and to account for their presence when requested by a law enforcement officer with reasonable suspicion of criminal activity sufficient to justify a *Terry* stop. *Id.* at 355-56; see *Terry v. Ohio*, 392 U.S. 1 (1968) (a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for the purpose of questioning and a brief "frisk" to search for weapons). The Court held that the statute failed to adequately explain what a suspect must do in order to satisfy its requirements, and vested complete discretion in the hands of the enforcing officers. 461 U.S. at 358. The statute, though admirably aimed at combating the "epidemic of crime that plagues our Nation," could not be justified as it failed to meet constitutional standards for definiteness and clarity. *Id.* at 361.

As demonstrated by the above cases (which provide a mere snapshot of the case law surrounding loitering laws), ordinances and statutes that criminalize loitering are generally unconstitutionally vague. See, e.g., *Wyche v. State*, 619 So. 2d 231 (Fla. 1993) (loitering statute unconstitutionally vague, criminalizes innocent conduct); *Holliday v. City of Tampa*, 619 So.2d 244 (Fla. 1993) (ordinance making it unlawful to loiter while manifesting purpose of using, possessing or selling drugs is unconstitutionally vague); *City of West Palm Bch. v. Chatman*, 112 So. 3d 723 (Fla. 4th DCA 2013) (ordinance prohibiting loitering with intent to commit prostitution is unconstitutionally vague and overbroad). In general, loitering laws do not proscribe *particular* conduct, the "criminal" activity or conduct they seek to prevent is that which an ordinary person would deem innocent (i.e. standing, walking, remaining in a public space), and they place unbridled discretion in the hands of the officers tasked with enforcing them, therefore failing to provide the constitutionally required due process of law.





## Vagrancy

A Jacksonville, Florida, vagrancy ordinance was deemed unconstitutional by the Supreme Court upon a finding that the ordinance was void for vagueness under the Due Process Clause of the Fourteenth Amendment. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

The ordinance failed to give a person of ordinary intelligence fair notice that his or her contemplated conduct was forbidden by the statute, and also encouraged arbitrary and erratic arrests and convictions. *Id.* “The Jacksonville Ordinance made criminal activities which, by modern standards, are normally innocent,” such as ‘night walking.’” *Id.* at 163. The statute additionally placed unfettered discretion in the hands of the police and encouraged arbitrary and discriminatory enforcement of the laws, particularly in situations involving poor and unpopular members of our society. *Id.* at 168-70.





# Chapter 4

## No Rest for the Weary

### SEC. 1 SIT/LIE ORDINANCES

Another tool that local governments are utilizing to regulate public space is the enforcement of “Sit/Lie” ordinances. While “Sit/Lie” ordinances appear facially neutral, they are usually enacted and enforced primarily against homeless people. The objective is to regulate where, when and how people are allowed to sit down, lie down, lounge, recline, or perform similar conduct on public property (including use of park benches). A number of cities in Florida have these on the books, including Orlando, Panama City, Clearwater, and St. Petersburg.

There is no evidence that these ordinances have any meaningful effect to increase economic activity or improve access to services to homeless people, two justifications often proffered by local governments.<sup>1</sup> And there is evidence that enforcement of “Sit/Lie” can have profound negative impacts on homeless people.<sup>2</sup> There is limited caselaw on challenges to “Sit/Lie” Ordinances, although typically facial challenges have not been successful. In a criminal defense, there is an opportunity to show, as-applied to the criminal defendant, why a particular ordinance is unconstitutional.

#### Vagueness

The Middle District of Florida held unconstitutional a portion of an ordinance prohibiting “loitering or boisterousness” which was defined, in part, as to “protractedly lounge on the seats, benches, or other areas” in a city park. *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1337-38 (M.D. Fla. 2011). An ordinance “is void on its face if it is so vague that persons ‘of common intelligence must necessarily guess as to its meaning and differ as to its application.’” *Id.* at 1336 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). There was no definition of “protractedly lounge” in the

ordinance and the court noted that an “allcases” computer search failed to show one case where the term had been used. *Id.* at 1338. The court held that “there is no established meaning to ‘protractedly lounge’ which would advise a person of ordinary intelligence when he or she was required to vacate the seat, bench, or other area in a City park.” *Id.*

Other vagueness challenges to “Sit/Lie” ordinances have not been successful. *See, e.g., Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1442), *aff’d on other grounds*, 97 F.3d 300 (9th Cir. 1996) (sidewalk ordinance clearly describes proscribed behavior of sitting or lying down on sidewalk in commercial districts between 7am and 9pm); *Seeley v. State*, 655 P.2d 803 (Ariz. Ct. App. 1982) (“Lying, sleeping or sitting is conduct capable of being understood by any individual of normal intelligence and therefore is not vague.”).

The Middle District of Florida found that an ordinance prohibiting reclining on a right-of-way during daylight hours was not vague, reasoning that the purpose of ordinance was preventing obstruction of sidewalks. *Catron v. City of St. Petersburg*, Case No. 8:09-cv-923-T-23EAJ, 2009 WL3837789 (M.D. Fla. Nov. 17, 2009) (“Whether ‘recline’ means ‘to lounge,’ ‘to lean,’ or ‘to assume a recumbent posture,’ the ordinance is sufficiently specific to alert any ordinary person that the prohibited conduct consists of obstructing a right of way during the day.”).

The Northern District of California dismissed plaintiffs’ facial challenge (relying on *Roulette*), but allowed leave to amend plaintiffs’ as-applied vagueness challenge. *Ashbaucher v. City of Arcata*, Case No. CV 08-2840 MHP (NJV), 2010 U.S. Dist. LEXIS 126627, \*57-58 (N.D. Cal. Aug. 19, 2010), *adopted in its entirety* by 2010 U.S. Dist. LEXIS 126590 (N.D. Cal. Dec. 1, 2010). Plaintiffs alleged “that the prohibition on sitting or lying down on a public sidewalk, curb or street in the downtown business district lacks guidelines differentiating between sitting or lying on the sidewalk when obstructing pedestrian flow and when it is harmless.” *Id.* Because the plaintiffs did not have supporting factual allegations to support its as-applied challenge on this basis, the court dismissed the claim with leave to amend. *Id.*

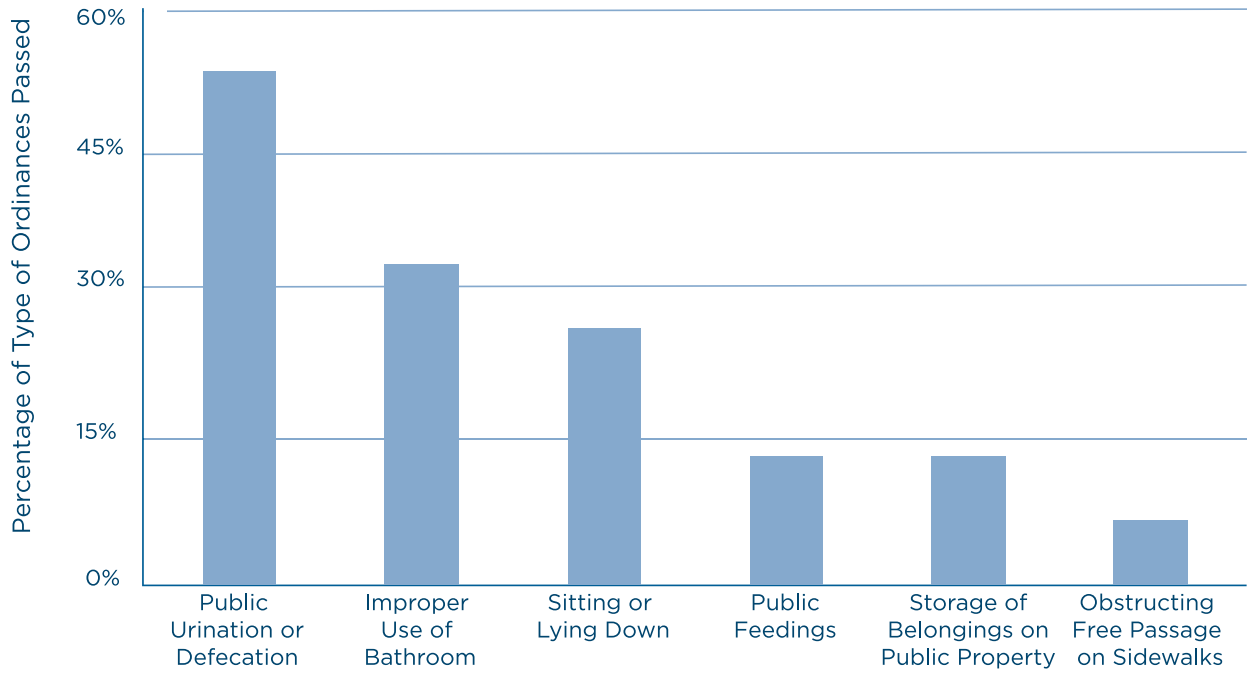
1 See Cooter, J., Meanor, E., Soli, E. & Selbin, J., Does *Sit-Lie Work: Will Berkeley’s ‘Measure S’ Increase Economic Activity & Improve Services to Homeless People?* (Oct. 22, 2012) available at SSRN: <http://ssrn.com/abstract=2165490>.

2 See Univ. of Hawai’i at Manoa, Dep’t of Urban & Regional Planning, *The Effects of City Sweeps & Sit-Lie Policies on Honolulu’s Homeless*. (June 2015), available at [http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report\\_small\\_.pdf](http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report_small_.pdf).





### Other Ordinances



**Newly Enacted Florida County and Municipal Ordinances 2010-2015**

There were 15 ordinances that did not concern panhandling/soliciting or camping/sleeping. These include popular ordinances such as “sit/lie” laws, and laws against public feeding.

#### First Amendment

In *Roulette*, the Ninth Circuit affirmed the District Court’s denial of summary judgment that Seattle’s “Sit/Lie” ordinance violated the First Amendment. The Ninth Circuit observed that sitting can be expressive under certain circumstances:

Plaintiffs observe that posture can sometimes communicate a message: Standing when someone enters a room shows respect; remaining seated can show disrespect. Standing while clapping says the performance was fabulous; remaining seated shows a more restrained enthusiasm. Sitting on the sidewalk might also be expressive, plaintiffs argue, such as when a homeless person assumes a sitting posture to convey a message of passivity toward solicitees.

97 F.3d 300, 303 (9th Cir. 1996). The court, however, stated that even though sitting can “possibly be expressive,” it was rejecting plaintiffs’ facial challenge because the ordinance did not prohibit “forms of conduct integral to, or commonly associated with, expression.” *Id.* at 305. See also *Amster v. City of Tempe*, 248 F.3d 1198 (9th Cir. 2001) (compelled by *Roulette* to reject plaintiff’s facial challenge to “Sit/Lie” ordinance).

By contrast, prior to *Roulette*, the Northern District of California held that the “Sit/Lie” ordinance under review violated the First Amendment. *Berkeley Cmty. Health Project v. City of Berkeley*, 902 F. Supp. 1084 (N.D. Cal. 1995). The court found that plaintiffs had demonstrated, as applied to conduct of sitting, that there are numerous instances in which the ordinance burdens their First Amendment rights:

Plaintiffs demonstrate that Plaintiffs Stanley, Catano and Berkeley Community Health Project’s solicitors’ ability to engage in the protected speech of solicitation depends on being permitted to sit due to their physical disabilities, which preclude standing for long periods. These Plaintiffs and the street musician declarant further demonstrate that sitting against a building significantly aids their ability to engage in solicitation, by protecting their health and safety while soliciting, by making them visible and audible to passersby, and by permitting them to avoid blocking traffic, an act prohibited by a separate ordinance.

*Id.* at 1092. The court held that the ordinance was not narrowly tailored and did not leave open adequate alternative channels for communication,



finding the interests of the City could have been met by passing ordinances targeted at specific conduct it wished to prevent (littering, blocking sidewalk, public urination, public intoxication, and drug dealing). *Id.* at 1094-95.

### **Substantive Due Process**

The Ninth Circuit rejected a facial substantive due process challenge to a “Sit/Lie” ordinance in *Roulette*. 97 F.3d 300, 306 (9th Cir. 1996). Plaintiffs argued that the City’s ordinance was targeted at driving “unsightly homeless people from Seattle’s commercial district” but the court declined to reach the merits of the claim because it was a facial challenge that would be constitutional as applied in a large fraction of cases. *Id.*

The Washington Court of Appeals rejected a substantive due process challenge to a “Sit/Lie” ordinance. *City of Seattle v. McConahy*, 937 P.2d 1133, 1138-39 (Wash. Ct. App. 1997). The court ruled that the City had a valid interest in “promoting pedestrian safety and economic vitality and in reducing petty crime.” *Id.* The Court found that “[p]rohibiting people from sitting on the sidewalks during busy work and shopping hours makes Seattle’s core retail areas safer for pedestrians” and also promotes “economic revitalization.” *Id.* The court reasoned that “the City’s ordinance furthers a legitimate police power interest in a manner that infringes only minimally on appellants’ concededly important freedom of movement. This ordinance is limited in scope, and alternative places to sit and rest are available.” *Id.* at 1339.

### **Right to Travel**

In the context of ruling on a broader set of ordinances and policies, the Southern District of Florida held that prohibiting eating, sleeping, sitting, or lying down in public violated the homeless plaintiffs’ right to travel because they made it impossible for homeless persons to live within the city. See *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

Right to travel challenges to “Sit/Lie” ordinances have failed in other jurisdictions. See, e.g., *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1442), *aff’d on other grounds*, 97 F.3d 300 (9th Cir. 1996) (sidewalk ordinance does not violate right to travel because it “does not impede migration into commercial areas by making it impossible for individuals to carry out essential activities in those areas” nor is there evidence

that City was “motivated by a desire to expel homeless individuals from its commercial areas”); *Seeley v. State*, 655 P.2d 803, 808 (Ariz. Ct. App. 1982) (purpose of ordinance “is not to prohibit movement, but to encourage it. It is the sedentary activities of ‘lying, sleeping and sitting’ which are prohibited.”); *City of Seattle v. McConahy*, 937 P.2d 1133, 1141-42 (Wash. Ct. App. 1997) (Sit/Lie ordinance did not prohibit homeless people from living on the streets or make it more difficult to migrate and therefore did not violate right to travel).

### **Equal Protection**

The Western District of Washington rejected an equal protection challenge to Seattle’s “Sit/Lie” ordinance. *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1442), *aff’d on other grounds*, 97 F.3d 300 (9th Cir. 1996).

Based on the record in this case, the court finds no evidence that the Seattle City Council was targeting homeless people in a hostile and discriminatory fashion. Nor is there any evidence that the City Council acted under the influence of an improper motive. The targets of the sidewalk ordinance are those individuals who engage in certain conduct, namely sitting or lying on sidewalks in commercial areas during business hours.

*Id.* at 1450.

In *Ashbaucher v. City of Arcata*, the Northern District of California denied defendant’s motion to dismiss plaintiffs’ equal protection claim against a Sit/Lie ordinance. Case No. CV 08-2840 MHP (NJV), 2010 U.S. Dist. LEXIS 126627, at \*42-48 (N.D. Cal. Aug. 19, 2010), *adopted in its entirety* by 2010 U.S. Dist. LEXIS 126590 (N.D. Cal. Dec. 1, 2010) (“Plaintiffs alleged that they have been ‘singled out for enforcement of laws that are not enforced against people who do not appear homeless’ and that Defendants’ selective enforcement of its ‘policies, practices and conduct’ against the homeless violates the Equal Protection Clause of the Fourteenth Amendment.”). Plaintiffs did not argue homelessness is a suspect class, but that the challenged ordinances were adopted and implemented with a discriminatory purpose and were being selectively enforced. *Id.* at \*44-45. The court stated that plaintiffs should be provided an opportunity to rebut the facts underlying defendants’ asserted rationale for drawing a classification, and to show the challenged classification could be reasonably viewed to



further the asserted purpose, or to show that defendants' purported rational basis is a pretext for an impermissible motive. *Id.* at \*48.

An Arizona state court declined to reach the issue of whether “inebriates and transients” count as a cognizable class in an equal protection challenge to an ordinance banning sitting, lying down, or sleeping in public places. *Seeley v. State*, 655 P.2d 803, 807 (Ariz. Ct. App. 1982) (“The fact that transients, because they may not have anywhere else to live, sleep or sit except on the public right-of-ways, are subjected to enforcement of the ordinance with greater frequency than residents of the community does not result in unconstitutional discrimination.”). The court also found persuasive that intoxicated people were not charged under City’s guidelines for enforcement. Therefore, the court found there was not a claim of unconstitutional discrimination. *Id.* at 808. *But see Parr v. Mun. Court for Monterey-Carmel Jud. Distr. of Monterey Cnty.*, 479 P.2d 353 (Cal. 1971), *cert. den.*, 404 U.S. 869 (1971) (violation of equal protection where there was a discriminatory purpose underlying creation and passage of Sit/Lie ordinance against influx of “undesirable and unsanitary visitors” known as “hippies”).

### **Eighth Amendment**

The Ninth Circuit held a Los Angeles ordinance unconstitutional that prohibited sitting, lying down or sleeping 24 hours a day on public property. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), vacated per settlement, 505 F.3d 1006 (9th Cir. 2007). As discussed in Chapter 2, the Ninth Circuit held this ordinance unconstitutional because “the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles.” *Id.* at 1138 (“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 section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public”).

## **SEC. 2 SITTING AS A “REASONABLE ACCOMMODATION”**

According to the Florida Council on Homelessness, 28% of the homeless persons in Florida have a physical disability and 33% have a mental illness.<sup>3</sup> Application of “Sit/Lie” ordinances to people, without regards to the reason why they are sitting or lying down on public property could constitute disability discrimination. Even if a homeless person does not have a physical disability, living on the streets is associated with poor health outcomes that could require the need to rest more than a person in good health. For example, a person with pneumonia or recovering from a serious illness may be able to raise the necessity defense to charges brought under a “Sit/Lie” ordinance (particularly where there is no alternative). For a discussion of the necessity defense, see Chapter 2.

In 2010, a Texas advocacy group, House the Homeless, Inc. worked with a coalition of other advocacy organizations to pressure the Austin City Council to amend its “Sit/Lie” ordinance to allow persons with a disability to sit or lie down for 30 minutes prior to enforcement of the ordinance. House the Homeless conducted a survey of 501 persons experiencing homeless in the Austin area and 48% reported they are so disabled so as to be unable to work with ailments ranging from diabetes to congestive heart failure. People were getting tickets, for example, while waiting in line for health clinics. In 2010, more than 3,000 tickets were issued for violations of the ordinance.

House the Homeless obtained a legal memo from Texas Rio Grande Legal Aid regarding the City’s obligations to make “reasonable accommodations” to its Sit/Lie ordinance for persons with disabilities covered under the Americans with Disabilities Act. The group advocated for the City Council to reconsider this issue and resulted in changes to the ordinance, including an exemption for anyone (not just persons with disabilities) in line for goods or services. Previously, the only exemptions were for people in wheelchairs, but the group’s advocacy resulted in all people with medical problems to be able to sit or lie down for up to

<sup>3</sup> Fla. Council on Homelessness. *2015 Annual Report*, at 33, available at <http://www.dcf.state.fl.us/programs/homelessness/docs/Council-on-Homelessness-2015%20-Report.pdf>.



30 minutes. Additionally, there was a defense built into the ordinance for people charged with a violation so they could prove to the court they have a disability and were experiencing a medical problem that forced them to rest at that moment.<sup>4</sup>

Although the Americans with Disabilities Act provides for a civil right of action, and not a defense in a criminal case, the advocacy of House the Homeless is instructive as to other avenues for challenging “Sit/Lie” ordinances. Public defender’s offices have an insight into how these ordinances are being enforced, and against whom, and can partner with civil legal aid to develop

policy advocacy and civil litigation including for disability discrimination under the Americans with Disabilities Act.

In addition, it is important to investigate the relevant factual circumstances, including a person’s medical condition or physical disability, surrounding a “Sit/Lie” violation to determine availability of defenses. Other factual circumstances that are important include the availability of alternative locations to sit down or lie down in the area. Many cities, in conjunction with passing “Sit/Lie” ordinances, also remove park benches or pass other ordinances or park rules that regulate similar conduct, severely restricting the ability to lawfully rest. Some “Sit/Lie” ordinances have a defense built in for medical emergencies, and there is also the possibility of raising the necessity defense.

<sup>4</sup> House the Homeless, Inc. Press Release & Survey (Austin, Tex. 2010) (on file with the author); “New Rules allow homeless people with disabilities to sit on sidewalks,” Statesman (Apr. 30, 2011) available at <http://www.statesman.com/news/news/local/new-rules-allow-homeless-people-with-disabilities/>.







# Chapter 5

## Homeless Prohibited

### SEC. 1 THE NEW BANISHMENT

Cities across the country are using trespass law as a tool to ban homeless people from public places such as public buildings and city parks. Homeless individuals are issued a trespass warning or exclusion order that has the practical effect of operating as an injunction, prospectively prohibiting the person from returning to public places under penalty of arrest for trespass after warning. These cases usually appear in criminal courts when homeless people are facing charges for violating the trespass warning because they had entered or remained on property from which they were banned.<sup>1</sup>

Some courts have found that the ability of a governmental entity to ban people from public places is limited by the Fourteenth and First Amendments, although the jurisprudence in this area is still developing. Although trespass from private property does not implicate a person's constitutional rights in the same way that trespass from public property does, homeless individuals constantly face threat of arrest because they must be physically present somewhere. The use of trespass laws to prosecute homeless people is widespread<sup>2</sup> and therefore a discussion of pertinent defenses is provided below.

#### Exclusion from Public Space

Banishment, or “the legal compulsion to leave specified geographic areas for extended periods of time,” is a historical form of punishment. Banishment features extensively in the Old Testament, and was used in ancient Greece and Rome, during colonial times and early American history. Today, it is considered archaic, yet it is

reemerging in the form of trespass warnings or exclusion orders to ban people from certain public spaces (such as parks or public buildings) that are otherwise open to members of the public.<sup>3</sup>

Although this use of trespass is less extreme than historical forms of banishment (which included legal expulsion from a person's town or country), social scientists Katherine Beckett and Steve Herbert use the term banishment in their study of Seattle trespass exclusion orders for four reasons: (1) to underscore the coercive power of the state to achieve this form of spatial segregation; (2) to demonstrate how trespass is used as a punishment (like banishment) and although is issued in the civil context, it is used to enhance the scope and authority of criminal law (i.e. leave or risk arrest and incarceration); (3) to describe experiences of people issued exclusion orders who experienced social separation and segregation similar to historical forms of banishment; and (4) to highlight the extent to which this tool is expansionary and people who are homeless or undesirable are usually the subject of numerous exclusionary bans.<sup>4</sup>

The civil-criminal legal hybrid at work here cannot be understated. Trespass warnings or exclusion orders are often issued through a process separate and apart from the criminal justice system. Cities sometimes establish trespass warning policies through ordinances, or simply through a parks policy or other internal memorandum. A wide range of City officials, including police officers, parks department employees, or anyone else, have been authorized with the power to ban an individual for public space. A person can be banned from public places for virtually any reason, ranging from arrests in a city park to a city official's discretionary decision to exclude that person for ranges of time from one day to five years or more. And, often, this occurs without any right to challenge the basis or the scope of the exclusion order.

In *Catron v. City of St. Petersburg*, homeless plaintiffs challenged a City trespass ordinance that authorized city officials, including police officers, to issue trespass warnings excluding them from city parks for periods of time ranging from one year

1 ABA Comm'n on Homelessness & Poverty White Paper, “No Such Place as ‘Away’: Why Banishment is a Wrong Turn on the Path to Better & Safer Cities” (Feb. 2010) available at [http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA\\_CHP\\_Banishment\\_White\\_Paper\\_February\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA_CHP_Banishment_White_Paper_February_2010.authcheckdam.pdf).

2 Florida's Council on Homelessness reports in 2015 that stricter enforcement of trespass ordinances make street homelessness less visible and therefore it is harder to find and count those individuals during the annual point-in-time count. Fla. Council on Homelessness, *2015 Annual Report*, at 11, available at <http://www.dcf.state.fl.us/programs/homelessness/docs/Council-on-Homelessness-2015%20-Report.pdf>.

3 Beckett, K. & Herbert, S., *Banished: The New Social Control in Urban Amer.*, at 10-11. (2009).

4 *Supra* note 3, at 11-12.



Williams Park in St. Petersburg, Florida

or longer for violations of city ordinances, state statutes, or any other reason in that person's sole discretion. 658 F.3d 1260 (11th Cir. 2011). One of the plaintiffs had been banned permanently from all city parks. If the plaintiffs entered the park in violation of the warning, they could be arrested for violation of the state statute for trespass after warning. The plaintiffs alleged that the City violated the due process clause of the Fourteenth Amendment because the City had no process for them to contest the basis of the trespass warning or the scope.

The Eleventh Circuit held that homeless plaintiffs had a constitutionally protected liberty interest to be in public places of their choosing that is lawfully open to the public. *Id.* at 1267. The court held that the plaintiffs had stated a plausible claim for relief that the City's trespass ordinance violated the Fourteenth Amendment of the U.S. Constitution by authorizing City officials to exclude them from city parks without providing them due process. *Id.* at 1267-69. Because due process requires notice and an opportunity to be heard, the City was required to provide a hearing in connection with issuing the trespass warning (apart from any criminal prosecution if that person later violates the trespass warning and is arrested for trespassing). *Id.*

The import of *Catron* is that if an individual is banned from a city park and is no longer able to access that park when it is generally open to the public, then the City must provide due process in connection with issuing the trespass warning or exclusion order that authorizes the ban. See also *Kennedy v. Cincinnati*, 595 F.3d 327 (6th Cir.

2010) (City pool member, who had been barred by city from entering property deemed a part of city's recreational system, had due process liberty interest in remaining in public places of his choice); *Yeakle v. City of Portland*, 322 F. Supp. 2d 1119 (D. Ore. 2004) (trespass exclusion order from public property violated due process).

Procedural due process requires, at a minimum, notice and an opportunity to be heard incident to the deprivation of life, liberty or property by the government. *Grayden v. Rhodes*, 345 F.3d 1225, 1232 (11th Cir. 2003). Constitutionally adequate notice is "[a]n elementary and fundamental requirement of due process" and is defined as "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

Due process is flexible, and the procedural protections that are required for a constitutionally adequate hearing process depend on the particular situation. Courts apply a balancing test to determine the process that is due: (1) the private interest affected; (2) risk of erroneous deprivation through procedures used and probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the function involved and the fiscal and administrative burdens the substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Therefore, even if a City has added a process to contest a trespass warning, there may still be a legal argument that the City has failed to



provide constitutionally adequate process either in the form of deficient notice or an inadequate hearing process.

Some courts have found that trespass warnings or bans from public fora can implicate the First Amendment. *See, e.g., id.* (trespass exclusion order from public property violated ability to be physically present in a traditional public forum that is essential to exercising free speech rights in that forum); *Brown v. City of Jacksonville*, Case No. 3:06-CV-122-J-20MMH, 2006 WL 385085 (M.D. Fla. Feb. 17, 2006) (banning plaintiff from attending city council meetings for seven cycles is unconstitutional restriction on speech); *Cuellar v. Bernard*, Case No. SA-13-CV-91-XR, 2013 WL 1290215 (W.D. Tex. Mar. 27, 2013) (trespass warning excluding plaintiff from City Hall implicates liberty interest in accessing public places and First Amendment rights).

The viability of raising these claims in the context of a defense to a criminal charge for trespass after warning is unclear, and may require collaboration with a civil attorney to challenge the underlying policy that is responsible for the person's trespass warning to get it rescinded. Otherwise, particularly for homeless people who do not have other places they are lawfully allowed to be, these clients will continue to be dragged into criminal court because they have no way to avoid violating the trespass warning.

## SEC. 2 THE ANATOMY OF A TRESPASS

### Elements

To convict a defendant of trespass after warning, the State must prove four elements:

1. The defendant willfully entered or remained on property;
2. Other than a structure or conveyance;
3. Without being authorized, licensed, or invited; and
4. When notice against entering or remaining had been given to the defendant.

*Seago v. State*, 768 So. 2d 498, 500 (Fla. 2d DCA 2000); *see also* § 810.08, Fla. Stat. (2015) (trespass in structure or conveyance); § 810.09, Fla. Stat. (2015) (trespass on property other than structure or conveyance); Fla. Std. Jury Instr. – Crim. 13.3 & 13.4. A review of some of the most common issues that arise in defending homeless persons on trespassing charges is set forth below.

### “Willfully”

The State must prove that the defendant entered or remained on property “willfully,” which is defined as “intentionally, knowingly, and purposely.” § 810.011(1), Fla. Stat. (2015); Fla. Std. Jury Instr. – Crim. 13.3 & 13.4; *Rozier v. State*, 403 So. 2d 539, 542-43 (Fla. 5th DCA 1981) (“Willfully” generally, as used in this trespass statute, refers to a general intent and merely means that, as in burglary, the entry or remaining be intentionally, knowingly and purposefully done.”).

Without proof of intent, a person cannot be properly convicted of the crime of trespassing. *K.S. v. State*, 840 So. 2d 1116, 1117 (Fla. 1st DCA 2003) (state failed to prove element of willfulness as there was no evidence that when appellant entered or remained on park property after hours as a passenger in a car, that he did so willfully); *A.L. v. State*, 675 So. 2d 703, 704 (Fla. 3d DCA 1996) (no evidence that A.L. purposefully or intentionally entered upon the forbidden premises when he obeyed police officer's orders to accompany police into store's parking lot).

### “Without Being Authorized, Licensed or Invited”

The Florida Supreme Court has interpreted the terms “authorized, licensed, or invited” in Florida's trespass statute as follows: “The dictionary definition of the term ‘authorize’ is ‘to endorse, empower, justify or permit.’ A ‘license’ is permission to enter. Finally, to ‘invite’ is ‘to request (one's) presence.’” *Downer v. State*, 375 So. 2d 840, 843 (Fla. 1979) (The words “authorized, licensed, or invited,” as used in the trespass statute, are of such common understanding and usage that persons of ordinary intelligence are able to determine what conduct is determined by such statutes, and thus the language is not unconstitutionally vague.).

“Authority to enter upon or remain in property need not be given in express words. It may be implied from the circumstances. It is lawful to enter or remain in the property of another if, under all the circumstances, a reasonable person would believe that [he] [she] had the permission of the owner or occupant.” Fla. Std. Jury Instr. – Crim. 13.3 & 13.4.

An individual was given notice by police officers against entering a neighborhood grocery store (the officers had been authorized by the store-owner to issue trespass notices). Evidence did not support a conviction for the offense of trespass on property other than structure or conveyance, absent any evidence that on the day in question that defendant's entry on property was not “authorized,



licensed, or invited” by store owner, even though police had previously warned him not to come on premises. *Seago*, 768 So. 2d at 500.

A landlord could not prohibit an individual from being on common areas of a housing project with his brother, who was a tenant, and thus the individual did not commit trespass after warning because he was an invitee of a lessee of the housing project. A landlord generally does not have the right to deny entry to persons who the tenant has invited to come onto his property. *L.D.L. v. State*, 569 So. 2d 1310, 1312 (Fla. 1st DCA 1990).

### “Notice” against entering or remaining

To be guilty of trespass, defendant must have been given notice against entering or remaining. Notice against entry on property other than a structure or conveyance may be accomplished by either “actual communication” or by properly “posting” the property.<sup>5</sup> The statutory requirements for posting are very specific, requiring signs placed at specific locations, at specific heights, and type of a certain size:

Notice not to enter upon property may be given by posting signs not more than 500 feet apart along and at each corner of the property’s boundaries. The signs must prominently state, in letters not less than two inches high, the words “No Trespassing.” The signs also must state, with smaller letters being acceptable, the name of the owner or lessee or occupant of the land. The signs must be placed so as to be clearly noticeable from outside the boundary lines and corners of the property. [If the property is less than five acres in area, and a dwelling house is located on it, it should be treated as posted land even though no signs have been erected.]

Fla. Std. Jury Instr. – Crim. 13.4; *see also* § 810.011(5), Fla. Stat. (2015); *Baker v. State*, 813 So. 2d 1044, 1045-46 (Fla. 4th DCA 2002) (in order for posted signs to provide required notice against entry and to give rise to probable cause to arrest for trespass, there must be evidence that the signs complied with section 810.011(5) and that the property was “posted” within the meaning of the statute); *Smith v. State*, 778 So. 2d 329, 330 (Fla. 2d DCA 2000) (convenience store was not “posted land” as defined by statute because the “no trespassing” sign was attached to the building rather than being posted along the lot’s boundaries); *In the Interest*

*of B.P.*, 610 So. 2d 625, 626 (Fla. 1st DCA 1993) (state did not prove that the land was “posted land” as it presented no proof that the owner’s name appeared on the “no trespassing” sign); *V.B. v. State*, 959 So. 2d 1252 (Fla. 3d DCA 2007) (state failed to prove strict compliance with statutory requisites for providing notice against entering or remaining on property by posting signs, as required to establish that juvenile had constructive notice against entering or remaining in a park; the only evidence presented was that there were signs posted throughout the park, and there was no evidence regarding the number of signs, the location of the signs, or the content and lettering size of the signs).

Notice must be given before a person can be found guilty of trespassing on the property, so individuals can be legally detained, or an investigatory stop conducted, only if they were first warned to leave the property. *Gestewitz v. State*, 34 So. 3d 832, 835 (Fla. 4th DCA 2010). In the absence of this prior warning by communication or “posting,” a police officer may initiate a consensual encounter to issue a trespass warning if he has been authorized to do so by the property owner, but may not detain or arrest for trespass. *D.T. v. State*, 87 So. 3d 1235, 1239-40 (Fla. 4th DCA 2012) (evidence did not support a finding that officer had probable cause to arrest juvenile for trespass at a shopping plaza, where there was no evidence that any prior “actual communication” of a trespass warning had been given to juvenile; photographs of, and testimony concerning, “no trespass” signs posted at front of building were insufficient to establish that property was “posted” within the meaning of Fla. Stat § 810.09(1)(a)).

In the absence of evidence of proof of notice to the defendant by either posting of the property or by actual communication, a police officer did not have probable cause to suspect the defendant of the crime of trespass, and therefore the officer’s search of the defendant was not justified on that basis, where the location of the alleged trespass was neither in a structure nor a conveyance. *Fabian v. State*, 710 So. 2d 114, 116 (Fla. 2d DCA 1998).

The state failed to show that a police officer had probable cause to arrest a juvenile for trespassing in a city park, where no evidence showed that the juvenile knew that park was closed or that the park’s hours of operation were posted, and the officer did not stop and advise juvenile to leave park because it was after dark. *L.J.S. v. State*, 905 So 2d 222, 225 (2005).

When an officer observed an individual in a

<sup>5</sup> Notice may also be given by cultivation or fencing of the property. Fla. Std. Jury Instr. – Crim. 13.4.



playground of a public housing project, warned him to leave, and told him that if he returned he would be arrested for trespass, the officer did not violate Fla. Stat § 810.09 when he arrested the individual for returning to the playground two days later. *W.J. v. State*, 18 So. 3d 1259, 1260 (Fla. 3d DCA 2009).

When an invitation has been extended to enter an open business, actual communication is necessary to put a person on notice that he is no longer welcome on the property and may be arrested for trespass. *K.M.B. v. State*, 69 So. 3d 311, 314 (Fla. 4th DCA 2011); see also *Smith*, 778 So. 2d at 331 (trespassing arrest unlawful because Smith had been invited on ‘quasi-public’ property and had no notice that he was not permitted to remain); *Collins v. State*, 115 So. 3d 1030, 1043 (Fla. 4th DCA 2013) (person’s mere presence on property is not sufficient to give rise to reasonable suspicion that crime of trespass is being committed).

#### “Person Authorized” to Issue Trespass Warnings

The term “authorized person” or “person authorized” means any owner, his or her agent, or a community association authorized as an agent for the owner, or any law enforcement officer whose department has received written authorization from the owner, his or her agent, or a community association authorized as an agent for the owner, to communicate an order to leave the property in the case of a threat to public safety or welfare. § § 810.08(3) & 810.09(3), Fla. Stat. (2015); Fla. Std. Jury Instr. – Crim. 13.3 & 13.4; see also *I.M. v. State*, 95 So. 3d 918, 921 (Fla. 2d DCA 2012) (State failed to establish that off-duty sheriff’s deputy had been given authority by chief librarian to issue trespass warnings at the library).

Simply asking a member of the public to leave an area does not amount to issuing a trespass warning. *I.M. v. State*, 95 So. 3d 918, 921 (Fla. 2d DCA 2012). If the sole reason for detaining an individual is to give them written warning not to re-enter a premises or property, there is no statutory or other lawful authority permitting the detention of the individual if there is no reasonable suspicion he committed the crime of trespass, since a trespass warning is a prerequisite to the crime. *Gestewitz*, 34 So. 3d at 835. Although a police officer may issue a trespass warning under the statute, he or she does not have the legal authority to conduct an investigatory stop or arrest for trespass unless the owner or his agent first warned the potential trespasser. *Id.* at 834.

A police officer who stops a person for purposes of issuing a trespass warning on behalf of a property owner, is considered a “consensual encounter.”

*Rodriguez v. State*, 29 So. 3d 310, 311 (Fla. 2d DCA 2009). Therefore, failure to provide accurate identification during such a stop would not be an arrestable offense. *Id.* at 313. See also *Gestewitz*, 34 So. 3d at 834 (“A detention for the purpose of issuing a trespass warning on behalf of a private owner—absent other circumstances giving rise to a reasonable suspicion of other criminal activity—is a consensual encounter.”).

## SEC. 3 PRACTITIONER’S TIPS

### Was Warning Legally Authorized?

Do not assume that a police officer had legal authorization to issue a warning to depart or leave the property at issue. Obtain copies of all instructional orders, standard operating procedures, memos, or directives on trespassing (both issuing warnings, and also arrests for trespass). These usually contain copies of forms (such as blanket trespass authorizations for private property, or warnings used for public property). Make sure you understand all policies and laws in the city or county that are used to issue trespass warnings or arrest people for trespassing. Often cities or counties have a mixture of policies (ordinances, state statutes, and management or parks policies).

For **private property**, if the landowner is not present at the time the officer issues the warning, the law enforcement agency must have a written authorization on file with the department authorizing the trespass warning. Otherwise, it was not a lawful warning under the Florida statutes.

- Obtain copy of written authorization from landowner authorizing police to issue trespass warnings (sometimes called a blanket authorization order). Do not assume the person who signed the authorization had the legal authority to do so. Florida law requires that it is the landowner or lessee.
- Contact the landowner or lessee to inquire into the reasons why they signed the form. In some cities, landowners only sign blanket trespass authorizations under threats that if they do not sign (and allow the police to use it to remove homeless people from the property) the police will not respond to public safety threats on their property, or the City will fine them for code enforcement violations.
- Obtain incident report from when the trespass warning for private property was



issued. Under the Florida Statutes, law enforcement officers are allowed to issue warnings only with written authorization of landowners and in cases of threats to “public safety and welfare.”

- Is property vacant or abandoned? If so, any trespass warning on file may not be from the current owner or lessee, or there may be no owner or lessee to authorize the trespass warning in the case of abandoned property.

For **public property** (e.g. public parks), there must be a city or county ordinance or policy that authorizes the trespass warnings to be issued, sets out the conditions under which they may be issued (and who within the city has the legal authority to do so, including whether police officers may issue warnings), and sets out a process by which a person can challenge the warnings.

- Was the person provided notice (written? verbal?) of the warning excluding him/her from public property? The notice should contain the reasons for the exclusion and notice of appeal rights. If these procedures were not followed, then the exclusion from public property was not lawful.
- Does the government’s trespass warning policy or ordinance fail to provide an opportunity for a hearing or contain other legal deficiencies (such as giving too much discretion to issue warnings)? The policy itself may be unconstitutional.
- If the City refuses to drop prosecutions or rescind warnings issued using unlawful procedures, then a civil attorney should be contacted to assist in challenging the policy for issuing warnings for public property.

### **Is Land Properly Posted?**

The requirements for posting are very specific and, if land is not properly posted consistent with the statute, then an essential element of the crime of trespass is not proven.

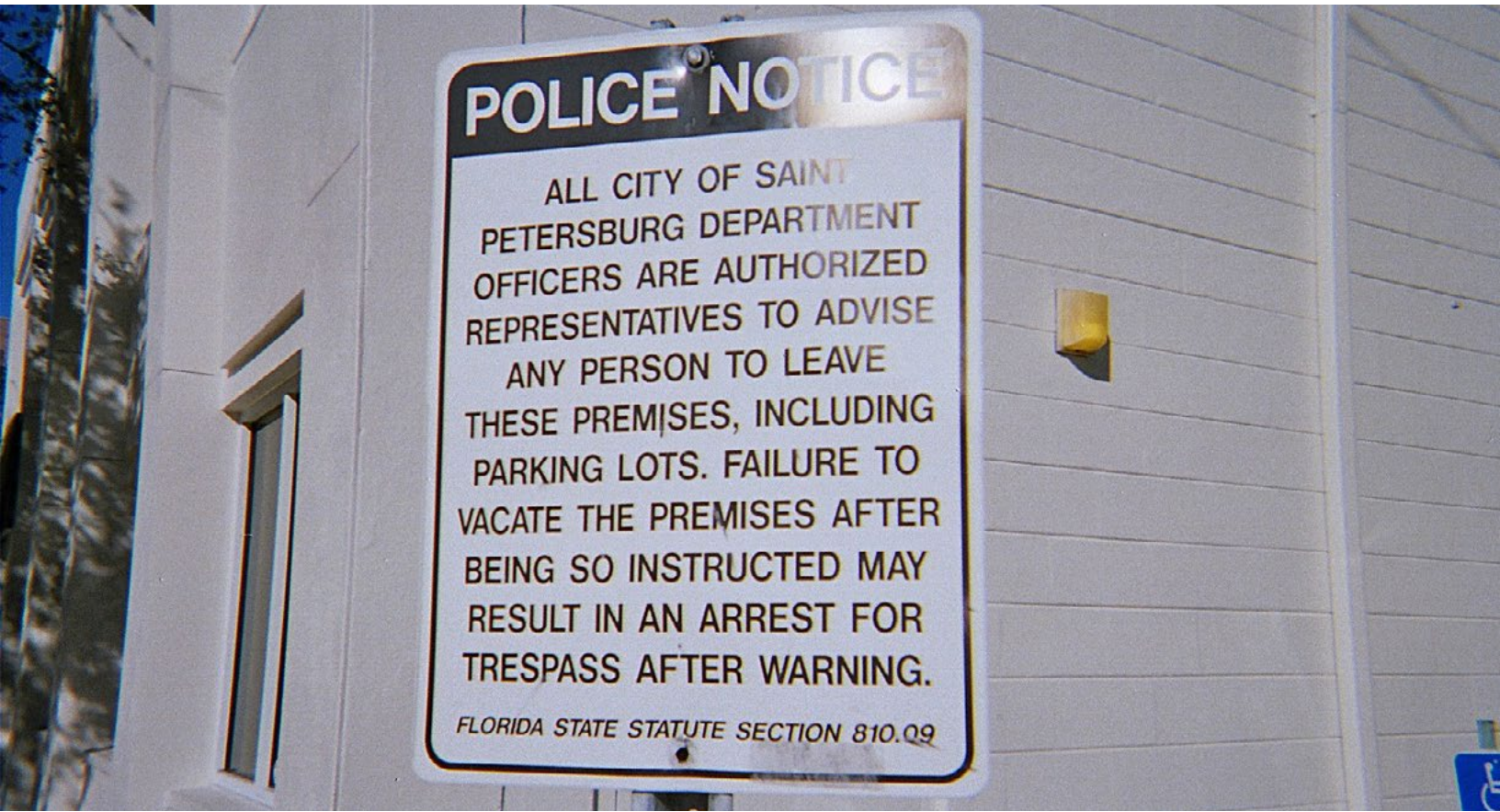
- “No Trespassing” must be printed on the sign in letters not less than two inches high. One public defender’s office took photographs of a “No Trespassing” sign using a ruler that was visible in the photograph to prove signs did

not meet this technical specification.

- Signs must be posted not more than 500 feet apart along and at each corner of the property’s boundaries.
- The signs must be placed so as to be *clearly noticeable* from outside the boundary lines and corners of the property.
- The signs also must state, with smaller than two-inch letters being acceptable, the name of the owner or lessee or occupant of the land. Do not assume that the owner on the sign is the actual owner or lessee of the land. Or, even if the owner of the land is on the sign, do not assume the owner has knowledge or consented to the sign. For example, in one city, the public defender’s office discovered that land on the side of the highway was posted as “DOT property” (Department of Transportation), but the DOT had no knowledge and never authorized trespassing homeless people from that location.

### **Was Trespass Necessary?**

Violations of trespass law may arise out of necessity. For example, in a number of cities trespass warnings for a city park also results in exclusion from the public bathrooms. Homeless individuals, with no other alternative, are faced with having to violate a law prohibiting public urination/defecation or violating trespass law by entering park after being warned that they are no longer authorized to do so. Or homeless individuals may be arrested for trespassing in a vacant or abandoned property where they are seeking shelter to sleep for the night. In cities where there are also laws prohibiting sleeping or camping (including sheltering oneself), homeless individuals may have no alternative but to violate trespass law to avoid violating other laws (or to avoid more serious harm related to not sleeping or seeking needed shelter from the elements). In such cases, the viability of raising the necessity defense should be considered. (See Chapter 2.)



**POLICE NOTICE**

ALL CITY OF SAINT  
PETERSBURG DEPARTMENT  
OFFICERS ARE AUTHORIZED  
REPRESENTATIVES TO ADVISE  
ANY PERSON TO LEAVE  
THESE PREMISES, INCLUDING  
PARKING LOTS. FAILURE TO  
VACATE THE PREMISES AFTER  
BEING SO INSTRUCTED MAY  
RESULT IN AN ARREST FOR  
TRESPASS AFTER WARNING.

FLORIDA STATE STATUTE SECTION 810.09



**NO  
TRESPASSING**

\*\*\* NO CAMPING \*\*\*

\*\*\* NO LOITERING \*\*\*

\*\*\* OVERNIGHT STAYS \*\*\*

CITY OF ST. PETERSBURG  
POLICE DEPARTMENT  
BLANKET NO TRESPASS ORDER

No.



# Chapter 6

## The Good Samaritan Goes to Jail

### SEC. 1 DO NOT FEED THE HOMELESS

Cities and counties are increasingly restricting sharing food with homeless people in public spaces as a response to the visibility of homelessness, particularly if large groups are gathering in public parks for purposes of sharing a meal together.<sup>1</sup> In a twist on the criminalization of homelessness, local governments are now arresting and citing people who wish to help homeless people. Such arrests are typically met with international outrage,<sup>2</sup> but that has not deterred some cities from continuing to prohibit sharing food with homeless and hungry people.

#### Food Sharing as Expressive Conduct

The Eleventh Circuit assumed, without deciding, that food sharing is expressive conduct prior to upholding Orlando's large group feeding ordinance as a reasonable restriction on speech. *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 760 (11th Cir. 2011). To determine whether conduct contains sufficient elements of communication, the Court asks: (1) whether there is an "intent to convey a particularized message"; and (2) whether "the likelihood was great the message would be understood by those who viewed it." *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The conduct must also be "inherently expressive," without the necessity of explanatory speech. *Rumsfeld v. FAIR*, 547 U.S. 47, 66 (2006).

The Eleventh Circuit originally ruled that sharing food was not protected by the First Amendment. *First Vagabonds Church of God v. City of Orlando*, 610 F.3d 1274 (11th Cir. 2010), *reh'g en banc granted, opinion vacated* by 616 F.3d 1229 (11th Cir. 2010), *opinion reinstated in part by First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756 (11th Cir. 2011). In Justice Barkett's dissenting opinion, she criticized the majority's decision, stating, "without any explanation, the majority dismisses

the act of sharing food as one that has no history of symbolic expression. However, sharing food has significant meaning both in this country's history (e.g., Thanksgiving) and in major world religions (e.g., Passover in the Jewish tradition, Communion in the Christian tradition)." 610 F.3d at 1295 n.7. After a rehearing en banc, the Court assumed without deciding that food sharing was entitled to protection under the First Amendment, but found the Orlando ordinance was a reasonable time, place or manner restriction on speech. 638 F.3d at 758.

The Eleventh Circuit held that there were ample channels of communication because the City did not ban large group feedings generally nor ban them everywhere in the parks. 638 F.3d at 761-62. The City required permits for certain parks within the downtown district within a two-mile radius of City Hall. *Id.* Although applicants were limited to 2 permits per park per year, the Court calculated that the groups could obtain permits for a total of 84 large group feedings a year at parks within the zone regulated by the ordinance. *Id.* The City also had no restrictions on this activity at any of the other 66 parks located outside the downtown district. *Id.*

#### Food Sharing as Religious Exercise

The Free Exercise Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment, prohibits the government from restricting the free exercise of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). However, Supreme Court precedent establishes that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* Such a law is subject to rational basis review, and is presumed constitutional. *First Vagabonds Church of God*, 610 F.3d at 1285. The person challenging the law has the burden to prove it is not rationally related to a legitimate government interest. *Id.*

The Eleventh Circuit held that Orlando's large-group feeding ordinance did not violate the Free Exercise Clause. *Id.* at 1267-68. It was undisputed by the parties that the ordinance was neutral and of general applicability in its restrictions on feeding.

1 See Nat'l Coalition for the Homeless, "Share No More: The Criminalization of Efforts to Feed People in Need" (Oct. 2014), available at <http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf>.

2 See, e.g., "Mayor Barraged with angry emails over homeless feeding arrest," Local 10 (Nov. 7, 2014), available at <http://www.local10.com/news/local/fort-lauderdale/mayor-barraged-with-angry-emails-over-homeless-feeding-arrest>.





Photo courtesy of Fort Lauderdale Food Not Bombs, Photo by Nathan Pim



*Id.* at 1267. The court accepted as legitimate the City’s interests “in improved preservation and management of its parks, including distributing among parks and their adjacent neighborhoods the impacts of large group feedings.” *Id.* The court held that the ordinance survived rational basis review:

[T]he record reveals that the court was unconvinced that distributing the impact of large group feedings to different parks really advanced the legitimate interest; instead of lessening the burden on the City’s parks, the district court indicated a belief that the City was just moving the problem around. And the district court stressed all the potential park-use problems the Ordinance failed to fix.

But it is far from irrational for the City to conclude that an overall reduction in the wear and tear of its park resources will result from rotating the park’s frequent large users among all available parks in the District. Although more effective means might be available to the City to accomplish its goal of park preservation, it is not for federal courts to judge the wisdom or effectiveness of an ordinance on rational basis review; we must uphold the law even if there is an ‘imperfect fit between means and ends.’

*Id.* at 1268.

Florida’s Religious Freedom Restoration Act (FRFRA), § 761.01 *et seq.*, Fla. Stat., allows a person whose religious exercise has been burdened to raise that violation as a claim or defense in a judicial proceeding. § 761.03(2), Fla. Stat. (2015). FRFRA provides:

(1) The government shall not substantially burden a person’s exercise of religion,<sup>3</sup> even if the burden results from a rule of general applicability, except that government may substantially burden a person’s exercise of religion only if it demonstrates<sup>4</sup> that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of

<sup>3</sup> “Exercise of religion” means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief. § 761.02(3), Fla. Stat. (2015).

<sup>4</sup> “Demonstrates” means to meet the burden of going forward with the evidence and of persuasion. § 761.02(2), Fla. Stat. (2015).

furthering that compelling governmental interest.

§ 761.03(1), Fla. Stat. (2015). FRFRA applies to any branch, department, or agency of the state and all municipalities and counties. § 761.02(1), Fla. Stat. (2015). FRFRA has the practical effect of restoring strict scrutiny review to free exercise claims even where the burden results from a rule of general applicability.

There are a handful of cases across the country analyzing the practice of sharing food with the homeless and the hungry as religious activity. *Abbott v. City of Fort Lauderdale*, 783 So. 2d 1213 (Fla. 4th DCA 2001) (remanding to trial judge to make a determination as to whether the alternative feeding site complies with the requirements of her order finding City in violation of FRFRA for prohibiting sharing food with homeless anywhere on public property); *Chosen 300 Ministries, Inc. v. City of Philadelphia*, Case No. 12-3159, 2012 WL 3235317 (E.D. Pa. Aug. 9, 2012) (under state RFRA, plaintiffs demonstrated that sharing food with homeless and hungry is an act of worship and an act of charity that is fundamental to their religion); *Big Hart Ministries v. City of Dallas*, Case No. 3:07-cv-0216-P, Doc. 163 (“Findings of Facts and Conclusions of Law”) (N.D. Tex. Mar. 25, 2013) (vacated per settlement) (under state RFRA, plaintiffs demonstrate feeding homeless is motivated by sincerely held religious belief that God and the Bible instruct mankind to feed the hungry). All of these cases resulted in verdicts for the plaintiffs, holding that the food sharing restrictions violated their rights under their state RFRA.

However, the Eleventh Circuit affirmed the district court’s ruling in *First Vagabonds Church* that Orlando’s ordinance did not violate FRFRA because it did not constitute a “substantial burden” on the church. 610 F.3d at 1289-92. The court ruled that:

FRFRA does not provide the Church with a right to conduct its services at any location it desires; it does not guarantee access to the City’s most desirable park (or, for that matter, any park at all.) At most, what the FRFRA does is ensure that the City may not, without a compelling interest, affirmatively forbid the Church from feeding its members as part of its religious services.

We assume only for the sake of argument that a congregation of indigents might present a unique problem under the



Photo courtesy of Fort Lauderdale Food Not Bombs by Juan Andres Morales

FRFRA because, if no public space is available to conduct religious services, a law may have the result, in fact, of prohibiting the congregation's religious exercise. But, in such a circumstance, the FRFRA at most might require the City to provide some alternative public place where religiously motivated feeding can occur that is "minimally suitable" to that function. See *Abbott v. City of Fort Lauderdale*, 783 So. 2d 1213, 1214-15 (Fla. 4th DCA 2001) (concluding that the trial judge, after determining that a park rule that prohibited feeding the homeless violated the FRFRA and ordering the city to provide an alternative space on public property where the feeding could occur,

had the authority to determine whether the alternative space was "minimally suitable for the purposes intended"). The record in this case reveals that several parks outside of the District—where the Ordinance is inapplicable—contain amenities that make those parks at least minimally suitable for feeding.

*Id.* at 1290-91. The major distinction between *First Vagabonds Church* and other RFRA cases involving feeding as burdening a religious exercise is that Orlando's ordinance allowed this practice to occur in most city parks without restriction, and only restricted it in the downtown area where they were required to obtain permits to share food no more than two times per year in those parks.



## SEC. 2 PRACTITIONER'S TIPS

### The Communicative Nature of Food Sharing

In raising a claim or defense that food sharing is expressive conduct, it is important to introduce legal argument and factual evidence of the communicative nature of food sharing to assist in bolstering the argument that this is inherently expressive conduct and that by sharing food not only is there an intent to convey a message, but that it is one that is likely to be understood by a reasonable person.

In the December 2014 issue of National Geographic, the magazine featured “The Joy of Food” and explored the critical importance of sharing food to the human story:

Food is more than survival. With it we make friends, court lovers, and count our blessings. The sharing of food has always been part of the human story. From Qesem Cave near Tel Aviv comes evidence of ancient meals prepared at a 300,000-year-old hearth, the oldest ever found, where diners gathered to eat together. Retrieved from the ashes of Vesuvius: a circular loaf of bread with scoring marks, baked to be divided. “To break bread together,” a phrase as old as the Bible, captures the power of a meal to forge relationships, bury anger, provoke laughter. Children make mud pies, have tea parties, trade snacks to make friends, and mimic the rituals of adults. They celebrate with sweets from the time of their first birthday, and the association of food with love will continue throughout life—and in some belief systems, into the afterlife.

Food is used for a society to engage in ritual, ceremony, and celebration through formal dinners, family reunions, birthday parties, religious ceremonies or holiday meals. Food communicates messages in every culture, and may be second only to speech in terms of its importance as a social communication system. Food is associated with home, family and security everywhere. Communicative functions accorded to food across

all cultures include the affirmation of social ties, the practice of religious beliefs, and the expression of national and ethnic identities. E.N. Anderson, “Me, Myself, and the Others: Food as Social Marker,” in *Everyone Eats: Understanding Food & Culture*, at 124-26 (2005).

Human beings often eat food in social settings, which therefore generates communicative associations between food and people. Sharing food with another individual communicates messages of intimacy, affirms social ties, and communicates group solidarity:

One main message of food, everywhere, is solidarity. Eating together means sharing and participating. The word “companion” means “bread sharer” (Latin *cum panis*). Buying dinner, or otherwise feeding a prospect, is so universal in courtship, business and politics that it is almost certainly grounded in inborn tendencies; we evolved as food sharers and feel a natural link between sharing food and being personally close and involved ... The other main message is separation. Food marks social class, ethnicity, and so on. Food defines families, networks, friendship groups, religions, and virtually every other socially institutionalized group. Naturally, one group can try to use food to separate itself while another is trying to use food to eliminate that separation.

*Id.* at 125.

An anthropologist or other social scientist could be offered as an expert witness to provide the evidentiary support useful in making this argument. See, e.g., *Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, Case No. 0:15-cv-60185, Doc. 40-28 (“Declaration of Richard Wilk”) (S.D. Fla.) (anthropologist tendered as an expert witness opining on the presence or absence of communication in the act of sharing and gifting food in support of Plaintiffs’ motion for summary judgment in challenge to Fort Lauderdale regulations prohibiting outdoor food distribution).



# Chapter 7

## Home, Sweet Home

### SEC. 1 TENANCY RIGHTS OF MOTEL RESIDENTS

Thousands of low-income Floridians reside in motels as their primary residence because they cannot afford a permanent place to live. In 2011-2012, for example, more than 5,000 Florida children attending public schools lived in hotels and motels as their primary residence.<sup>1</sup> In Central Florida, data for the 2013-2014 year shows that more than 2,000 children lived in motels as their primary residence in Osceola, Orange and Seminole counties.<sup>2</sup> For these thousands of low-income residents, these motels and hotels are their homes and they are entitled to the protections of Florida's Residential Landlord-Tenant Act (FRLTA), Ch. 83, Fla. Stat. (2015).

Although tenancy rights are typically considered a matter for civil attorneys, criminal defense lawyers also need to understand tenancy rights of these individuals and families. Instead of availing themselves of the eviction process under the FRLTA, motel owners often call the police to improperly have undesirable non-transient guests ejected and arrested under Ch. 509 of the Florida Statutes or have non-transient guests arrested for trespassing if they refuse to leave after receiving verbal notice. There also are important implications for the purposes of analyzing reasonableness of searches under the Fourth Amendment.

A case out of the Middle District of Florida illustrates the connection between criminal law and the tenancy rights of motel residents as a matter of civil law. See *HSH Eastgate, LLC v. Sheriff of Osceola Cnty.*, Case No. 6:13-cv-1902-ORL-31GRK, 2015 WL 3465795 (M.D. Fla. June 1, 2015). In that case, an extended-stay public lodging establishment sued the Sheriff of Osceola County, alleging that the Sheriff was not properly enforcing Fla. Stat. § 509.141 by refusing to arrest guests



when deputies were called by the motel. *Id.* at \*1. The Sheriff argued, and the Court agreed, that his officers “have properly refused to arrest guests pursuant to Fla. Stat. § 509.141(4), because, after conducting investigations, the officers determined that the guests were nontransient and therefore were not subject to the expedited eviction process.” *Id.*

Fla. Stat. § 509.141 authorizes hotels and motels to remove “transient” guests by providing written notice to the guests that they must leave and refunding any prepayment. *Id.* Any guest who remains thereafter commits a second-degree misdemeanor and police assistance can be requested to eject the guest from the property by taking him or her into custody. *Id.* By contrast, to remove a “nontransient” guest, the landlord must file a civil eviction action under the FRLTA. *Id.* The determination as to whether a hotel guest is “transient” or “nontransient” requires weighing of the evidence:

<sup>1</sup> See Shimberg Ctr. for Hous. Studies, *2013 Hous. Needs of Homeless Families & Individuals in Fla.*, at 18, (2013) available at <http://www.floridahousing.org/FH-ImageWebDocs/Newsroom/Publications/MarketStudies/2013/2013%20Housing%20Needs%20of%20Homeless%20Families%20and%20Individuals%20in%20Florida.pdf>.

<sup>2</sup> Rethink Homelessness. *The Current State of Family Homelessness in Central Florida*. (2015) available at <http://rethinkhomelessness.org/wp-content/uploads/2015/10/CFL-FAMILY-HOMELESSNESS-SINGLE-PGS-lo-res-10-27-15.pdf>



The statute does not set forth concrete boundaries (such as length of stay or receipt of mail) that can be used to determine whether a particular guest should be considered “transient” or “nontransient.” “Transient” is defined as “a guest in transient occupancy;” “transient occupancy” is defined as “occupancy when it is the intention of the parties that the occupancy will be temporary.” Fla. Stat. § 509.013(13),(12). The definition of “transient occupancy” further provides that “[t]here is a rebuttable presumption that, when the dwelling unit occupied is not the sole residence of the guest, occupancy is transient.” Fla. Stat. § 509.013(12). The flipside definitions follow the same pattern. “Nontransient occupancy” is defined as “occupancy when it is the intention of the parties that the occupancy will not be temporary,” and there is a rebuttable presumption of nontransient occupancy when the dwelling unit is the sole residence of the guest.

*Id.* at \*3.

The FRLTA broadly applies to any rental of a dwelling unit,<sup>3</sup> including hotel and motel occupancies. § 83.42 (3), Fla. Stat. (2014); see *Fleming v. Master*, 18 Fla. L. Wkly. Supp. 688a (Fla. Duval Cnty. Ct. 2011) (FRLTA applies to nontransient hotel occupancy); *Freppon v. Lakeland Hospitality Inc.*, 12 Fla. L. Wkly. Supp. 783a (Fla. Polk Cnty. Ct. 2005) (hotel employee who resided at hotel for over a month was not a transient and must be removed by eviction under FRLTA); *Chandler v. Cone*, 3 Fla. L. Wkly. Supp. 369a (Fla. Broward Cnty. Ct. 1995) (residency in hotel for sixteen months was not transient and Chapter 83 of Florida Statutes applied); *Wheeler v. Blue Lantern, Inc.*, 50 Fla. Supp. 2d 158 (Fla. Lee Cnty. Ct. 1991) (although business was licensed to operate as a hotel, resident was not a transient occupant and thus FRLTA applied rather than Chapter 509); see generally J. Hauser, *Fla. Residential Landlord-Tenant Manual*, Ch. 12.04 (Supp. 2011).

A tenancy covered by the FRLTA may be created even if there is no written rental agreement and no specific duration to the tenancy. See §§ 83.46 & 83.57, Fla. Stat. (2015); see also *Ward v. Downtown Dev. Auth.*, 786 F.2d 1526, 1528-29 (11th Cir. 1986) (residential tenants with no lease and a month to

month duration were “tenants at will” under Florida law). Thus, Florida law treats nontransient residence in a hotel as a landlord-tenant relationship. *Fleming*, 18 Fla. L. Wkly. Supp. 688a (in housing nontransients, hotel and motel owners are placed under the same obligations as a residential landlord, even in the absence of a written lease for a specific period).

Chapter 509, and its process for summary removal and arrest of undesirable guests, applies “to transients only.” § 509.034, Fla. Stat. (2015). In chapter 509, the Florida Legislature set forth its clear intention that “[t]his chapter may not be used to circumvent the procedural requirements of the [FRLTA].” § 509.034, Fla. Stat. (2015). In doing so, the Legislature recognized and addressed exactly the danger that the Sheriff detected in *HSH Eastgate*: hotel owners, tempted by the expediency of the quick, easy removal procedure applicable to transient occupants under chapter 509, could attempt to circumvent rights provided to nontransient occupants under the FRLTA.

If a hotel resident is nontransient, then the FRLTA applies, and the resident has several rights and remedies that a transient occupant does not have under chapter 509. The most important of those rights is a judicial eviction procedure, which is significantly different from the process for summary removal and arrest provided in chapter 509. *Compare* § 83.59, Fla. Stat. (2014), with § 509.141, Fla. Stat. (2014). Under the FRLTA, except in a few specific circumstances, the hotel owner may only recover possession of the dwelling from the nontransient resident in a civil action in which the issue of the right of possession is determined. See § 83.59(3), Fla. Stat. (2014). In that civil action, the occupant may raise any legal or equitable defenses he or she may have. See § 83.60(1)(a), Fla. Stat. (2014).

The significance, for purposes of criminal law, is that a police officer does not have probable cause to arrest non-transient guests under chapter 509. *HSH Eastgate*, 2015 WL 3465795, at \*3 (Sheriff’s position that his officers must investigate and refuse to arrest guests who are non-transient motel residents “is required by the Fourth Amendment”). Similarly, “Florida law governing the duration and termination of a tenancy is relevant to the question whether appellant retained a legitimate privacy interest, for Fourth Amendment purposes” in analyzing the lawfulness of a search. *Morse v. State*, 604 So. 2d 496, 502 (Fla. 1st DCA 1992).

A non-transient motel guest cannot be lawfully evicted other than through the procedures set

<sup>3</sup> A “dwelling unit” is defined as a “structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household.” § 83.43(2)(a), Fla. Stat. (2015).



forth in the FRLTA and therefore retains his tenancy rights (right to occupy unit) and corresponding right to privacy until he is properly evicted. *Id.* at 500-51; see also § 83.67, Fla. Stat. (2015) (“Prohibited practices”); *Badaraco v. Suncoast Towers V Associates*, 676 So. 2d 502, 503 n.1 (Fla. 3d DCA 1996) (purpose of § 83.67, Fla. Stat. is to provide economic incentives to landlords to file an eviction action rather than circumventing the law by prohibiting landlords from engaging in coercive self-help practices such as shutting off utilities, preventing a tenant’s access, or removing a tenant’s property to dispossess a tenant).

## SEC. 2 PRACTITIONER’S TIPS

### “Nontransient” Residence Indicators

- Lack of permanent address elsewhere
- Receipt of mail at address of dwelling unit
- Identification, such as driver’s license, reflecting address of dwelling unit
- Registration for public benefits or social services using address of dwelling unit
- Children registered in school at address of dwelling unit (including whether school bus stops at motel to pick up children)
- Duration of residence (not dispositive)



# Chapter 8 Hands off My Property!

## SEC. 1 FREEDOM FROM UNREASONABLE SEARCHES

Although it is well-established that the Fourth Amendment of the U.S. Constitution<sup>1</sup> protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures,” how does the Fourth Amendment protect persons without a place to call home? The Southern District of Florida held that “[t]he property of homeless individuals is due no less protection under the Fourth Amendment than the rest of society.” *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1573 (S.D. Fla. 1992). However, as a practical matter, the unique circumstances of homeless people and their relationship to property requires a deeper analysis to understand how to prove their right to be secure from unreasonable searches and seizures is no different from the rest of society.

### The Expectation of Privacy

A Fourth Amendment search occurs: (1) when an individual manifests a subjective expectation of privacy in the object of the challenged search; and (2) society recognizes that expectation as reasonable. *Twilegar v. State*, 42 So. 3d 177, 193 (Fla. 2010).

### Personal Effects

In *Pottinger*, the Southern District of Florida held that homeless plaintiffs exhibited a subjective expectation of privacy in their belongings and personal effects in public areas where they live (e.g., parks, under bridges). 801 F. Supp. at 1571-72. The Court relied on evidence presented at trial and in earlier proceedings in the case to make the following factual findings that supported this holding:

Evidence presented at the March, 1991 hearing showed that the class members maintain their belongings—e.g., bags or

boxes of personal effects and bedrolls—in a manner strongly manifesting an expectation of privacy. See March 18, 1991 Order at 21. As this court previously found, property belonging to homeless individuals is reasonably identifiable by its appearance and its organization in a particular area. *Id.* Typical possessions of homeless individuals include bedrolls, blankets, clothing, toiletry items, food and identification, and are usually contained in a plastic bag, cardboard box, suitcase or some other type of container. In addition, homeless individuals often arrange their property in a manner that suggests ownership, for example, by placing their belongings against a tree or other object or by covering them with a pillow or blanket. *Id.* Such characteristics make the property of homeless persons reasonably distinguishable from truly abandoned property, such as paper refuse or other items scattered throughout areas where plaintiffs reside.<sup>2</sup> Additionally, when class members leave their living areas for work or to find food, they often designate a person to remain behind to secure their belongings. Thus, whether or not they are present at their living site, plaintiffs exhibit a subjective expectation that their property will remain unmolested until they return.

*Id.* at 1571. The second prong of the analysis—whether that society recognizes that expectation as reasonable—is the more difficult question. *Id.*

A relevant factor that courts have considered is whether the person occupying the property is a trespasser. *Id.*; see, e.g., *D’Aguzzo v. Gallagher*, 50 F.3d 877, 880 (11th Cir. 1995) (under facts of case, plaintiffs “cited no authority which recognizes a person’s right to privacy when he lives or stores his belongings on private property without the

<sup>1</sup> The Florida Constitution contains an almost identical provision to the Fourth Amendment of the U.S. Constitution. See Fla. Const. Art. I § 12. The state constitutional right is construed in conformity with the Fourth Amendment, as interpreted by the U.S. Supreme Court. *Id.*; see *Dean v. State*, 478 So. 2d 38, 41 (Fla. 1985).

<sup>2</sup> The test for abandonment is “whether a defendant voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.” *Twilegar v. State*, 42 So. 3d 177, 193 (Fla. 2010). There is no reasonable expectation of privacy in abandoned property. *Id.*







landowner's permission").<sup>3</sup> However, "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois*, 439 U.S. 128, 143 (1978); see also *Oliver v. U.S.*, 466 U.S. 170, 179 n.10 (1984) ("individual who enters a place defined to be 'public' for Fourth Amendment analysis does not lose all claims to privacy or personal security"); *Pottinger*, 810 F. Supp. at 1572 (emphasizing that whether a person asserting the privacy right is a trespasser or the place involved was public is relevant, but not dispositive, of the reasonableness inquiry).

The reasonableness of an expectation of privacy in a particular place or item differs according to context, and the court must look at the totality of the circumstances in any given case. See *O'Connor v. Ortega*, 480 U.S. 709, 716 (1987) (recognizing there is "no talisman that determines in all cases" the reasonableness of privacy expectations but that instead "the Court has given weight to factors such as the intention of the Framers of the Fourth Amendment, the uses to which the individual has put a location, and our societal understanding that certain areas deserve the most scrupulous protection from government invasion"); *State v. Suco*, 521 So. 2d 1100, 1102 (Fla. 1988) (use of property concepts in determining presence or absence of a reasonable expectation of privacy has not altogether been abandoned, but are "merely factors to be considered in conjunction with all the surrounding circumstances").

In *Pottinger*, the court observed that "the property of homeless individuals is often located in the parks or under the overpasses that they consider their homes." 810 F. Supp. 2d at 1572. The court found that "the interior of the bedrolls and bags or boxes of personal effects belonging to homeless individuals is perhaps the last trace of privacy they have." *Id.* ("Our notions of custom and civility, and our code of values, would include some measure

<sup>3</sup> It is important to note that this statement in *D'Aguanno* was in the context of determining whether qualified immunity applied, i.e. whether there was immunity from civil suit. *D'Aguanno* was not deciding, as a matter of constitutional law, that there is no right to privacy under these facts, but only held that the plaintiffs failed to cite legal authority to establish that there was a violation of "clearly established law" within the context of deciding whether to grant qualified immunity. See *Pearson v. Callahan*, 555 U.S. 223 (2009) (in resolving qualified immunity claims, courts are permitted to refrain from reaching constitutional question under facts of case and may consider first whether the violation was clearly established); *Cooper v. Rutherford*, 503 F. Appx. 672 (11th Cir. 2012) (plaintiffs carry burden in qualified immunity analysis to show that alleged constitutional violation was clearly established under Supreme Court, Eleventh Circuit, or state supreme court caselaw).

of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case," quoting *State v. Mooney*, 588 A.2d 145, 161 (Conn. 1991), cert. den., 502 U.S. 919 (1991).)

An individual generally enjoys a reasonable expectation of privacy in personal luggage. *U.S. v. McKennon*, 814 F.2d 1539, 1544 (11th Cir. 1987) (cautioning that "the mere placement of personal property into a closed container does not ensure that a subjective expectation of privacy will ultimately be judged by society as legitimate"). Florida courts have applied the "suitcase" rule to backpacks, finding there is no significant difference between a suitcase and a backpack. See, e.g., *Hicks v. State*, 852 So. 2d 954, 960 (Fla. 5th DCA 2003) (expectation of privacy in backpack of person even though he was a visitor or short-term invitee at residence and had no legitimate expectation of privacy with respect to the room where the backpack is located).

### Tents

In *Rolling v. State*, a defendant convicted of serial murders of college students argued the trial court erred in denying his motion to suppress evidence introduced at his sentencing trial because officers conducted a warrantless search of the interior of his tent located on university land. 695 So. 2d 278, 293 (Fla. 1997). The trial court denied the motion to suppress, but "the trial court first found that even though Rolling was a trespasser on university land, he had standing to challenge the search and seizure of items from his tent because he had a proprietary interest in the tent itself." *Id.* at 294. However, the trial court ultimately concluded, and the Florida Supreme Court affirmed, that the warrantless search and seizure was justified in light of the "exigent circumstances." *Id.*

In *U.S. v. Gooch*, the Ninth Circuit held that a person has a reasonable expectation of privacy on a closed tent pitched on a public campground where one is legally permitted to camp. 6 F.3d 673, 677 (9th Cir. 1993); see also *U.S. v. Sandoval*, 200 F.3d 659, 661 (9th Cir. 2000) (recognizing expectation of privacy in a tent on public land, noting that reasonable expectation of privacy does not turn on whether he had permission to camp on public land).

The Court of Appeals of Georgia likened a tent to a dwelling in holding a tent-dweller is entitled to a reasonable expectation of privacy:

Though a tent may not provide the sturdy protection against the winds, the rains, the heat, and the cold, which a customary



Photo by Mark Watson

house provides, the tent-dweller is no less protected from unreasonable government intrusions merely because his dwelling has walls of canvas rather than walls of stone. A dwelling place, whether flimsy or firm, permanent or transient, is its inhabitant's unquestionable zone of privacy under the Fourth Amendment, for in his dwelling a citizen unquestionably is entitled to a reasonable expectation of privacy.

*Kelley v. State*, 245 S.E.2d 872, 874-75 (Ga. App. 1978).

### Housing Shared with Others

The Supreme Court has recognized the "unremarkable proposition" that an overnight guest "may have a sufficient interest in a place other than his home to enable him to be free in that place from

unreasonable searches and seizures." *Minnesota v. Olson*, 495 U.S. 91, 98 (1990).

To hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share. Staying overnight in another's home is a longstanding social custom that serves functions recognized as valuable by society. We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, *when we are in between jobs or homes*, or when we house-sit for a friend. We will all be hosts and we will all be guests many times in our lives. From either perspective, we think that



society recognizes that a houseguest has a legitimate expectation of privacy in his host's home.

From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside. We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.

*Id.* at 98-99 (emphasis added). *But see Hicks*, 852 So. 2d at 959 ("While there are occasions where an overnight guest may have a legitimate expectation

of privacy in someone else's home, one who is merely present with the consent of a homeowner generally may not claim that expectation.") (internal citations omitted).

Depending on the totality of the circumstances, courts have reached varying determinations as to an individual's expectation of privacy in another's residence. *Compare Brady v. State*, 394 So. 2d 1073, 1075 (Fla. 4th DCA 1981) ("Brady was not only an overnight houseguest; she had moved all of her belongings into the apartment and expected to remain since she had no money, and had previously been allowed to stay in the apartment ... Brady had no home elsewhere. Under these circumstances, we believe she had a reasonable expectation of privacy in the premises that she was, in effect, sharing with her friend"), *with State v. Mallory*, 409 So. 2d 1222, 1224 (Fla. 2d DCA 1982) (Mallory had a permanent residence and was no more than a visitor who spent occasional nights as an overnight guest).



### Hotel/Motel Rooms

Generally, a hotel room is considered a private dwelling for Fourth Amendment purposes “if the occupant is there legally, has paid or arranged to pay, and has not been asked to leave.” *Turner v. State*, 645 So. 2d 444, 447 (Fla. 1994). For that reason, “constitutional rights and privileges that apply to occupants of private permanent dwellings also apply to motel guests.” *Id.*; see also *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964). A hotel manager has no power by consent or invitation to waive a guest’s Fourth Amendment rights. *Id.* at 489; see also *Wassmer v. State*, 565 So. 2d 856, 857 (Fla. 2d DCA 1990).

While it is generally true that the right to privacy “does not outlast the guest’s right to occupy the room,” see *Green v. State*, 824 So. 2d 311, 314 (Fla. 1st DCA 2002), the question of where the guest’s right to occupy the room begins and ends is more complex when dealing with non-transient guests who occupy motel rooms as their primary residence. Compare *Morse v. State*, 788 So. 2d 334 (Fla. 5th DCA 2001) (where motel resident had established a tenancy, motel owner had to evict resident using procedures in Ch. 83, Fla. Stat., and police could not rely on consent of manager who gave verbal “eviction” that was not valid to terminate resident’s tenancy), with *Green*, 824 So. 2d at 315 (right to room had terminated where hotel guest stayed a few days and had been given oral notice and ejected as “undesirable guest” under Ch. 509, Fla. Stat.).

For a resident who has an established tenancy such that the eviction procedures in Chapter 83 apply, the police cannot rely on the consent of a motel manager attempting to use claims of trespass, the ejection procedures in Chapter 509, or simply a “verbal eviction.” See *Morse*, 788 So. 2d at 501 (“Florida law governing the duration and termination of a tenancy is relevant to the question whether appellant retained a legitimate privacy interest, for Fourth Amendment purposes.”). See Chapter 7 for a more in-depth discussion of the tenancy rights of non-transient motel residents.

Areas outside of a hotel room, such as hallways, which are open to use by others may not reasonably be considered as private. See *Nelson v. State*, 867 So. 2d 534, 535 (Fla. 5th DCA 2004) (defendant did not have reasonable expectation of privacy in hotel hallway).

### Homeless Shelters

There is very little caselaw on the scope of legal protections afforded to residents of homeless shelters under the Fourth Amendment. There are no Florida or Eleventh Circuit cases on this issue and the factual circumstances related to the search and the shelter itself could vary widely, making it difficult to predict the scope of privacy protections available.

For example, New York courts have held that there is no expectation of privacy in lockers at a homeless shelter where individuals sign a consent allowing authorized personnel to search at any time. See, e.g., *People v. Alston*, 16 A.D. 3d 358 (N.Y. App. Div. 2005). New York courts also have held there is no reasonable expectation of privacy in communal living space in shelters. See, e.g., *People v. Nalbandian*, 188 A.D. 2d 328 (N.Y. App. Div. 1992). However, the Massachusetts Supreme Court has recognized a reasonable expectation of privacy in a transitional housing shelter that was more comparable to a boarding house or hotel. *Commonwealth v. Porter P.*, 465 Mass. 254 (Mass. 2010).

In a civil suit brought in the federal D.C. District Court, a homeless shelter and its residents sued claiming that the U.S. Marshals Service violated their Fourth Amendment rights when they conducted a pre-dawn “raid” of the shelter to execute an arrest warrant of a resident of the shelter and to search for any individuals who matched their lists of thousands of people for whom there were outstanding warrants within the City. *Cnty. for Creative Non-Violence v. Unknown Agents of U.S. Marshals Srvc.*, 797 F. Supp. 7 (D.D.C. 1992). The Marshals’ conduct included stopping every resident of the shelter (which included hundreds of people), demanded they produce identification, and checked their names against the warrant list. The court held that the Marshals violated the Fourth Amendment when executing the warrant in a way that was inconsistent with the fugitive’s use of that shelter as his home and that unreasonably infringed on the rights of innocent third parties who lived in the shelter. *Id.* at 13. (“Homeless citizens are entitled to no less and no more protection under the Fourth Amendment than those in our country who have housing.”).

### Cars

Due to lack of other alternative shelter, cars can become a *de facto* residence for homeless people. Even though a person may be using a car as his or her home, the reasonableness of a search under the Fourth Amendment will turn on whether the



facts indicate it reasonably appears to be capable of functioning. For cars used both as transportation and as a person's residence, it is likely that the vehicle exception to the warrant requirement will apply instead of the more stringent protections that apply to searches of a person's home. For cars that are not readily mobile (or not operational) and are being used as a residence, then it is likely that the vehicle exception will not justify the warrantless search.

The Supreme Court has established an exception to the warrant requirement for moving vehicles, due to the inherent exigency arising out of the likely disappearance of the vehicle, and allows warrantless searches of automobiles and containers within it based on probable cause that it contains contraband or evidence of a crime. *California v. Acevedo*, 500 U.S. 565, 579 (1991); see also *U.S. v. Watts*, 329 F.3d 1282, 1286 (11th Cir. 2003) (requirement of exigent circumstances is satisfied by "ready mobility" inherent in all automobiles that reasonably appear to be capable of functioning). All that is necessary to determine whether the automobile is "readily mobile" is "that the vehicle is operational." *Id.*

The Supreme Court applied the vehicle exception to a warrant requirement, rejecting the argument that a motor home should be treated as categorically distinct just "because it was *capable of functioning as a home*." *California v. Carney*, 471 U.S. 386, 393 (1985) (emphasis in original).

The Court explained:

In our increasingly mobile society, many vehicles used for transportation can be and are being used not only for transportation but for shelter, i.e., as a "home" or "residence." To distinguish between respondent's motor home and an ordinary sedan for purposes of the vehicle exception would require that we apply the exception depending upon the size of the vehicle and the quality of its appointments. Moreover, to fail to apply the exception to vehicles such as a motor home ignores the fact that a motor home lends itself easily to use as an instrument of illicit drug traffic and other illegal activity... We decline today to distinguish between "worthy" and "unworthy" vehicles which are either on the public roads and highways, or situated such that it is reasonable to conclude that the vehicle is not being used as a residence.

Our application of the vehicle exception has never turned on the other uses

to which a vehicle might be put. The exception has historically turned on the ready mobility of the vehicle, and on the presence of the vehicle in a setting that objectively indicates that the vehicle is being used for transportation.

*Id.* at 393-94. The Court observed that, under the circumstances of the case under review, it was not required "to pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence." *Id.* at 394 n. 3 ("Among the factors that might be relevant in determining whether a warrant would be required in such a circumstance is its location, whether the vehicle is readily mobile or instead, for instance, elevated on blocks, whether the vehicle is licensed, whether it is connected to utilities, and whether it has convenient access to a public road.").

Relying on *Carney*, the Middle District of Florida articulated the test for determining whether a vehicle exception applies to a motor home as follows: "the Government must establish both that (1) the vehicle was readily mobile and (2) it was located in a setting that objectively indicated it was being used for transportation." *U.S. v. Adams*, 845 F. Supp. 1531, 1536 (M.D. Fla. 1994). Therefore, the Court reasoned that "the vehicle exception should not apply to a motor home which is situated in such a way, or located in such a place, that objectively indicates it is being used as a residence." *Id.* (declining to apply vehicle exception to justify warrantless search where motor home was not being used as transportation but as a residence; motor home contained all of defendant's personal effects, was located in a rural area on a private wooded lot, connected to an electric generator, and had no convenient or easy access to a public road). As such, the Court found that exigent circumstances were the only viable exception available to a warrantless search of that particular motor home. *Id.* at 1537.

## SEC. 2 HMIS PRIVACY PROTECTIONS

Of particular importance to criminal defense lawyers is understanding the permissible uses and disclosures allowed under the Homeless Management Information System (HMIS). HMIS is a database that includes all records of individuals or families who apply for or receive assistance from a community's Continuum of Care (CoC). HMIS poses an additional complication when it comes to the privacy rights of homeless persons utilizing certain services, including staying at



homeless shelters. Federal regulations require that personally identifiable information be kept in a manner that is “secure and confidential.” 24 C.F.R. § 578.103(b). However, because HUD has only set certain baselines for privacy protections, the level of privacy an individual enjoys can vary widely depending on the privacy policy adopted by the CoC.<sup>4</sup>

HUD developed and published privacy and security requirements for HMIS. See Homeless Mgmt. Info. Sys. (HMIS); Data & Technical Standards Final Notice (Final Notice), 69 Fed. Reg. 45888 (July 30, 2004). The purpose of the privacy and security standards are “to protect the confidentiality of personal information while allowing for reasonable, responsible, and limited uses and disclosures of data.” *Id.* at 45927. HUD developed a “two-tiered approach” for its development of privacy standards. *Id.* at 45928. First, HUD developed “baseline standards that will be required of any organization (such as a CoC, homeless assistance provider, or HMIS software company) that records, uses or processes [protected personal information] on homeless clients for an HMIS.” *Id.* at 45927-28. Second, HUD identified “additional protocols or policies that organizations may choose to adopt to enhance further the privacy and security of information collected through HMIS.” *Id.* This two-tiered “approach provides a uniform floor of protection for homeless clients with the possibility of additional protections for organizations with additional needs or capacities.” *Id.*

The Final Notice defines “protected personal information (PPI)” as “[a]ny information maintained by or for a Covered Homeless Organization about a living homeless client or homeless individual that: (1) identifies, either directly or indirectly, a specific individual; (2) can be manipulated by a reasonably foreseeable method to identify a specific individual; or (3) can be linked with other available information to identify a specific individual.” *Id.* A “Covered Homeless Organization (CHO)” is “[a]ny organization (including its employees, volunteers, affiliates, contractors, and associates) that records, uses or processes PPI on homeless clients for an HMIS.” *Id.* A CHO is authorized “to use or disclose PPI only if the use or disclosure is allowed by [the Final Notice] and is described in its privacy notice.” *Id.* at 45930. “A CHO may use or disclose PPI from an HMIS under the following circumstances: (1) to provide or coordinate services to an individual; (2) for functions related to payment or reimbursement

for services; (3) to carry out administrative functions, including but not limited to legal, audit, personnel, oversight and management functions; or (4) to create de-identified PPI.” *Id.* at 45928.

CHOs are required to comply with the baseline privacy requirements set forth in the Notice, and they also “may adopt additional substantive and procedural privacy protections that exceed the baseline requirements for each of these areas.” *Id.* at 45929. A CHO is required to “comply with federal, state and local laws that required additional confidentiality protections.” *Id.* A CHO is required to “publish a privacy notice describing its policies and practices for the processing of PPI and must provide a copy of its privacy notice to any individual upon request.” *Id.* at 45930. The privacy notice must contain all additional privacy protections adopted by the CHO in its privacy notice, thereby committing the CHO to additional privacy protections consistent with HMIS requirements. *Id.* at 45929-45930. Of paramount importance, “[u]ses and disclosures not specified in the privacy notice can be made only with the consent of the individual or when required by law.” *Id.* at 45930.

All uses and disclosures set forth in the Notice are permissive, and not mandatory, “[e]xcept for first party access to information and any required disclosures for oversight and compliance with HMIS privacy and security standards.” *Id.*; see also *id.* at 45930. The Notice allows permissive uses and disclosures as follows: uses and disclosures (1) “required by law to the extent that the use or disclosure complies with and is limited to the requirements of the law;” (2) to avert a serious threat to health and safety; (3) to report victims of abuse, neglect, or domestic violence; (3) for academic research purposes; and (4) for law enforcement purposes. *Id.* at 45928-29. The Notice outlines the conditions and limitations on when such uses and disclosures may occur. *Id.*

Of the permissible uses and disclosures, the law enforcement authority is the most troubling as it relates to privacy interests of homeless individuals:

*Disclosures for law enforcement purposes.* A CHO may, consistent with applicable law and standards of ethical conduct, disclose PPI for a law enforcement purpose to a law enforcement official under any of the following circumstances:

- In response to a lawful court order, court-ordered warrant, subpoena or summons issued by a judicial officer, or a grand jury subpoena;

<sup>4</sup> A copy of the privacy policy will contain all uses and disclosures that are authorized. A person may or may not have reviewed this, particularly if the CoC is relying on implicit consent (i.e. not requiring consent, verbal or written).



- If the law enforcement official makes a written request for protected personal information that: (1) Is signed by a supervisory official of the law enforcement agency seeking the PPI; (2) states that the information is relevant and material to a legitimate law enforcement investigation; (3) identifies the PPI sought; (4) is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and (5) states that de-identified information could not be used to accomplish the purpose of the disclosure.
- If the CHO believes in good faith that the PPI constitutes evidence of criminal conduct that occurred on the premises of the CHO;
- In response to an oral request for the purpose of identifying or locating a suspect, fugitive, material witness or missing person and the PPI disclosed consists only of name, address, date of birth, place of birth, Social Security Number, and distinguishing physical characteristics; or
- If (1) the official is an authorized federal official seeking PPI for the provision of protective services to the President or other persons authorized by 18 U.S.C. 3056, or to foreign heads of state or other persons authorized by 22 U.S.C. 2709(a) (3), or for the conduct of investigations authorized by 18 U.S.C. 871 and 879 (threats against the President and others); and (2) the information requested is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought.

*Id.* at 45888-01, 45929.

In other words, HUD has authorized law enforcement disclosures of what is otherwise confidential information in situations not simply limited to a subpoena, court order, or warrant. See *id.* at 45896 (HUD response to public comment on uses and disclosures for law enforcement). And, because HUD does not require written consent for the collection of personal information from the individual or from a third party, an individual may not even be aware that this information is accessible to law enforcement.<sup>5</sup> Also, some law

5 However, HUD authorizes a CHO to “commit itself to additional privacy protections consistent with HMIS requirements, including, but not limited to ... obtaining oral or written consent from the individual for the collection of personal information from the individual or a third party.” Final Notice, 69 Fed. Reg. at 45929.

enforcement agencies are involved in providing services either through homeless outreach teams or actively running their own shelters. This is another potential avenue for abuse of HMIS where law enforcement agencies may be involved in policing the same people they are helping and have access to information in HMIS. Although there are no cases related to breach of a homeless person’s privacy rights under HMIS (including in the Fourth Amendment context), it is important to be aware of this law enforcement tool that may be operating outside of traditional judicial procedures (such as the requirement to obtain a warrant).

### SEC. 3 “SWEEPS” AS UNLAWFUL SEIZURES

In response to visible homeless encampments in a particular community, law enforcement or other government officials are sometimes involved in dismantling, seizing and destroying the personal property of homeless people. For example, the City of St. Petersburg slashed and destroyed tents while dismantling a homeless encampment in 2007.<sup>6</sup> The City of Titusville raided and destroyed tents of homeless veterans in 2011 and disposed of their personal property at the dump.<sup>7</sup> Although these are not “searches” in the sense that property is not being seized as evidence of a crime but instead seized and destroyed, these property seizures violate a homeless individual’s Fourth Amendment rights and are actionable under 42 U.S.C. § 1983. Homeless people are often arrested in connection with such sweeps (for trespassing, failure to appear, or other charges), and it is important to refer them to a civil lawyer who can file a lawsuit to redress the unlawful destruction of personal property.

#### Destruction of Property

A “seizure” of property occurs under the Fourth Amendment “when there is some meaningful interference with an individual’s possessory interests in that property.” *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984). The Fourth Amendment allows civil suits under 42 U.S.C. § 1983 to challenge unreasonable seizures of property in which the individual has a possessory interest even when a privacy or liberty interest is not at issue. *Soldal v. Cook Cnty., Ill.*, 506 U.S. 56, 56-57 (1992). Under these circumstances, the issue of whether an individual has an expectation of privacy is irrelevant to whether a seizure occurs.

6 “Police slash open tents to roust the homeless,” Tampa Bay Times (Jan. 20, 2007), available at [http://www.sptimes.com/2007/01/20/Southpinellas/Police\\_slash\\_open\\_ten.shtml](http://www.sptimes.com/2007/01/20/Southpinellas/Police_slash_open_ten.shtml).  
7 “Homeless veterans file suit against Titusville,” WFTV (March 7, 2013), available at <http://www.wftv.com/news/news/local/homeless-veterans-file-suit-against-titusville/nWkbT/>.





For example, in *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012), the Ninth Circuit upheld an injunction restraining the City of Los Angeles from seizing and destroying homeless persons' unabandoned property. The court rejected the City's argument that the Fourth Amendment did not protect the property because the owners had no legitimate expectation of privacy of property that was in public space. The court relied on *Soldal* to support its holding that Fourth Amendment protects possessory interests even when privacy rights are not implicated. *But see U.S. v. Bushay*, 859 F. Supp. 2d 1335 (N.D. Ga. 2012) (distinguishing *Soldal* and explaining that criminal defendants must show an expectation of privacy to challenge unlawful searches and seizures under the Fourth Amendment).

Other civil cases have successfully challenged seizure and destruction of homeless people's property (even when there was not an unlawful search or expectation of privacy) and if a homeless person suffers such an injury, he/she should be referred to a civil lawyer. *See, e.g., Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992) (finding violation of Fourth Amendment and right to travel where city had a custom of interfering with life-sustaining, daily activities of homeless persons, which included seizure and destruction of their personal property); *Kincaid v. Fresno*, 2006 WL 3542732 (E.D. Cal. 2006) (order issuing preliminary injunction, finding that City's practice of confiscating and destroying homeless individuals' personal property is an unlawful seizure under Fourth Amendment); *Justin v. City of Los Angeles*, 2000 WL 1808426 (C.D. Cal. 2000) (order granting TRO, finding that City's practice of confiscating and destroying homeless individuals' personal property violated the Fourth Amendment). *But see Love v. City of Chicago*, 1998 WL 60804 (N.D. Ill. 1998) (city's street cleaning procedures did not violate homeless plaintiffs' constitutional rights).

## SEC. 4 PRACTITIONER'S TIPS

### **Expectation of Privacy in HMIS**

Because information in HMIS is considered private and confidential under federal law, it seems obvious that a person has a reasonable expectation of privacy in their own records maintained by HMIS. In a case where law enforcement obtained information without a warrant from HMIS that led to an individual's arrest, here are some tips on documents to request to evaluate whether accessing that person's confidential information constituted an unreasonable search:

- CoC notice of privacy rights and how privacy information is disclosed to clients (many times it is available on request, but not provided to client at time of service).
- Whether a written or verbal consent was obtained from individual for use and disclosure of their personal information (which included information about law enforcement disclosures).
- Whether consent was obtained as condition for accessing services such that it was not voluntary.
- How law enforcement obtained access to data in HMIS and whether it was consistent with privacy policy.
- Even if law enforcement's access was consistent with privacy policy, does failure to obtain warrant fit under exceptions to warrant requirement (e.g. exigency)?

If none of the exceptions apply, an argument could be made that it was an unreasonable search in violation of the homeless individual's Fourth Amendment Rights.





# Chapter 9

## Prohibition Era Revisited

### SEC. 1 UNLAWFUL POSSESSION OF ALCOHOL

The enforcement of open container and possession of alcohol ordinances is a classic example of laws that disproportionately impact homeless people. It seems reasonable to regulate what is otherwise lawful activity (possession and consumption of alcohol) by allowing it to be consumed only in establishments that sell alcohol or in the privacy of one's own home while prohibiting it in public places. However, the enforcement of such laws against homeless people becomes a prohibition against drinking under all circumstances, simply because they have no place on private property to lawfully possess or consume alcohol.

These types of laws lend themselves to arbitrary and discriminatory enforcement. For example, a tourist may not be bothered (or at most will be cited) for open container while a homeless person will most certainly be arrested.<sup>1</sup> Here are some common issues that arise in defending homeless people charged with open container violations. A number of these cases arise in the context of motions to suppress where the arrest for open container led to more serious charges after a search incident to the arrest.

#### Establishing Possession or Consumption

Where an ordinance requires either possession or consumption of alcohol, the state must prove that the defendant in fact either possessed or consumed alcohol. Possession is not proven merely because an open container is sitting next to the defendant where the officers did not observe the defendant holding the container or drinking from it. See *Peterson v. State*, 578 So. 2d 749 (Fla. 2d DCA 1991).

In *Horsley v. State*, an officer saw the defendant walking on the sidewalk carrying a bottle wrapped in a brown paper bag. 734 So. 2d 525 (Fla. 2d DCA 1999). The officer could not see the label on the bottle or whether it contained

alcohol. A second officer responded and found the defendant ordering food at a take-out restaurant without a bottle in his hand. The officer found an open container of liquor on the ground ten feet away. The court found that an officer can only make a warrantless arrest when the violation of the ordinance is committed in front of him, and neither officer saw the defendant committing an open container violation. The defendant did not constructively possess the container of liquor because, although it was found ten feet away, the area was open and accessible to the public.

In addition to establishing possession of an open container, the state must also prove that the possession occurred in a prohibited area (e.g. within 500 feet of an establishment that sells alcohol or in a city park). See *Smith v. State*, 75 So. 3d 800 (Fla. 5th DCA 2001) (state failed to establish that defendant had an open container "in or upon any parking area" where there was no evidence that the grassy lot he was standing in was used for parking). But see *Ward v. State*, 548 So. 2d 186 (Fla. 5th DCA 1991) (ordinance prohibited possession of alcohol outside an establishment open to the public, and court disagreed with defendant's argument that walkway outside lounge was part of curtilage of motel as there was no such exception in ordinance).

#### Alcohol ... or is it?

An essential element inherent in all open container or possession of alcohol laws is proof that the container holds an alcoholic or illegal substance. The level of proof required can depend on the language of the ordinance at issue. For example, some ordinances contain very specific definitions of alcohol that require certain volume percentages. A public defender's office was successful in getting cases dismissed where the state was unable to prove alcohol volume because the police disposed of the evidence and they were unable to test the alcohol volume. Most ordinances, however, are not so specific, but, at a minimum, the state still must prove the container held alcohol.

<sup>1</sup> "At Key West Beach, Wondering Who's A Vagrant," *The New York Times* (Mar. 30, 2010), available at [http://www.nytimes.com/2010/03/31/us/31keywest.html?\\_r=0](http://www.nytimes.com/2010/03/31/us/31keywest.html?_r=0).



For example, in *S.C.S. v. State*, the court held the state presented insufficient evidence to establish a prima facie case of possession of alcohol by a minor under Florida Statutes § 562.111. 831 So. 2d 264 (Fla. 1st DCA 2002). Although the state has a low burden of proof in alcohol possession cases, the state failed to introduce evidence of the contents of the bottle possessed by the defendant, and the defendant did not admit to the contents of the container.

The fact that a defendant is holding a beer bottle is not enough to prove that it contains alcohol. *P.N. v. State*, 976 So. 2d 90 (Fla. 3d DCA 2008). A juvenile was charged with possession of alcohol by a minor when a police officer observed the juvenile holding a beer bottle. The officer testified the bottle was full of sand and salt water and that he threw away his bottle at the end of the shift. The juvenile did not admit that the beer bottle contained alcohol while he was in possession of it. The court observed that, to establish a prima facie case that a substance is alcoholic, a juvenile's admission or the testimony of an experienced officer will be sufficient. However, the state failed to introduce evidence that the beer bottle ever contained alcohol while the minor was in possession of it. Mere possession of a beer bottle that does not contain alcohol is not unlawful.

While an experienced officer's testimony about the "appearance and smell of illegal contraband" is enough to prove its illegal nature, an officer who does not take adequate steps to confirm liquid is alcohol will fail to meet the state's burden. *R.A.W. v. State*, 92 So. 3d 312 (Fla. 1st DCA 2012). In *R.A.W.*, the officer testified that he saw what appeared to be a beer can and that when the can fell over, a dark-colored liquid spilled out and foamed on the sand like beer would. Apart from these observations, the officer did not take additional steps to confirm the liquid was beer. The court found the officer was not an expert, nor did he have specialized experience or training on beer and its foaming qualities to allow him to testify that a liquid "appears to foam like beer." The officer therefore left open doubt as to the nature of the liquid even though typically only rudimentary means of observation and smell are sufficient to establish the liquid is alcohol. Smelling the liquid will not always confirm the liquid is illegal, but is an important evidentiary protocol not followed in this case.

Merely holding an opaque plastic cup and attempting to distance oneself from a law enforcement officer while not exhibiting any

drunken behavior is not enough to demonstrate reasonable suspicion of criminal activity. *Lugo v. State*, 889 So. 2d 949 (Fla. 5th DCA 2004). *But see State v. Hafer*, 773 So. 2d 1223 (Fla. 4th DCA 2001) (officer's experience and observation of amber-colored liquid in cup demonstrates reasonable suspicion of possession of open container, similar to when an officer finding a clear bag containing white powder may under suspicious circumstances have reason to investigate and detain a person).

## Sec. 2 Alcoholism and Homelessness

According to Florida's Council on Homelessness, more than 30% of Florida's homeless population report substance abuse problems.<sup>2</sup> A study from the University of South Florida explained that homelessness is a risk factor for alcoholism and alcoholism is a risk factor for homelessness. Alcoholism and other substance abuse disorders often co-occur with other risk factors for homelessness which can precipitate entering homelessness, worsen the experience of homelessness, and delay exiting from homelessness.

In turn, the authors found that homelessness can increase alcoholism or exacerbate its negative consequences, resulting in more severe forms of alcoholism than those who are housed. The study showed that substance abuse and homelessness are significantly associated with criminal justice involvement: one in two arrests of homeless persons are directly attributable to alcohol and drug use, with nearly one in four indirectly relating to substance abuse. This relationship is especially strong for those with co-occurring mental illnesses.<sup>3</sup>

Amidst this backdrop, repeatedly arresting homeless persons (particularly those with alcohol use disorders) is a vicious cycle that helps no one. It is extremely costly to repeatedly house homeless people in jail,<sup>4</sup> and it has tremendous human costs for an extremely vulnerable

2 Fla. Council on Homelessness, *2015 Annual Report*, at 33, available at <http://www.dcf.state.fl.us/programs/homelessness/docs/Council-on-Homelessness-2015%20-Report.pdf>.

3 Clark, C., Young, M.S., & Barrett, B, *A transactional model of homelessness & alcoholism: Developing solutions for complex problems*, Univ. of S. Fla. Louis de la Parte Fla. Mental Health Inst. (Nov. 15, 2011), available at <http://intra.cbcs.usf.edu/PublicationTracker/common/file/161/Homelessness%20and%20alcoholism.pdf>.

4 See, e.g., Rethink Homelessness, *The Cost of Long-Term Homelessness in Central Florida: The Current Crisis & the Economic Impact of Providing Sustainable Housing Solutions* (2014), available at <http://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf>.



population that requires public health solutions, not criminal justice ones. For these individuals, many of the homeless services do not fit their needs because many programs require individuals to be sober prior to entering these programs. This can perpetuate homelessness by keeping people locked in the cycle with no way to access the services they need to become stably housed.

The USF study found that there is an emerging body of research that demonstrates the effectiveness in “Housing First” programs which are considered “low demand” in that these programs have as their highest priority to house individuals regardless of their sobriety or mental health status. Research on these programs has demonstrated that residents who drink have comparable outcomes to their sober counterparts. Further, individuals in a Housing First program had comparable outcomes to those who received prior transitional services, demonstrating there was no benefit to such services prior to placement in housing, and the Housing First approach was associated with lower costs.

A public defender’s office can be a powerful voice in advocating for diversion of homeless people from the jails and into housing first programs or other services. Analyzing patterns of arrest of persons experiencing homelessness with alcohol use disorders can be a useful tool to demonstrate that communities can save money and achieve better outcomes by designing interventions that are more effective than handcuffs and a jail cell.

Justice White’s concurring opinion in *Powell v. Texas* (see Chapter 2) highlighted the injustice that can occur at the intersection of homelessness and alcoholism. 392 U.S. 514 (1968) (White, J., concurring). Justice White understood that a homeless person who is also an alcoholic “must drink somewhere” and if they “have no place else to go and no place else to be when they are drinking” then they will do so on the “public streets” that are their homes. *Id.* at 551. For such persons, “resisting drunkenness is impossible and [ ] avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment –the act of getting drunk.” *Id.*



There have been no cases successfully raising this argument on behalf of a homeless person who is alcoholic and charged with an open container or other alcohol related offenses. See, e.g., *Jackson v. Commonwealth of Va.*, 604 S.E. 2d 122 (Va. App. Ct. 2004) (statute criminalizing possession of alcohol did not criminalize status of alcoholism).<sup>5</sup> However, there can be no question that punishing a homeless person with alcoholism, particularly a severe alcohol use disorder, is a status crime. The question is whether courts, when presented with appropriate medical and other relevant evidence, will agree with Justice White as this doctrine applies to enforcement of open container laws at the intersection of alcoholism and homelessness.

<sup>5</sup> Although the defendant proffered he was homeless and the connection between alcoholism and lack of control or volition, the court found he did not introduce admissible evidence to support this argument.



# Chapter 10 Homes, Not Handcuffs

## SEC. 1 CRIMINALIZATION IS POOR PUBLIC POLICY

No one understands the profound fiscal and human costs of the criminalization of homelessness better than public defenders. As such, public defender's offices are uniquely positioned to collect data on the impacts of criminalization, advocate for cost-effective and research-based alternatives to address root causes of homelessness, and be a powerful voice for change. Here are some basic talking points to advocate for policies that provide homes, not handcuffs.

### Talking Points

*Does not address the root causes of homelessness:*

- There is no state in the country where a person earning minimum wage can afford fair market rent for a one or two bedroom apartment.
- Criminalizing acts of survival does not deter people from being poor and homeless. The primary cause of homelessness is lack of available, adequate, and affordable housing. Florida's Council on Homelessness reports other factors that lead to homelessness: lack of employment or employment skills, financial struggle or crisis, medical issues, issues related to substance abuse and mental health, family crisis and problems, lack of a safety net and structure of care for those in crisis, relocation, immigration, and natural disaster. Noticeably absent from the list are any factors that suggest people are choosing to become homeless such that criminal laws punishing homelessness would be an effective deterrent. Passing an ordinance that bans sleeping does not address the underlying reasons people have no other alternatives to sleeping outside.
- People suffering from mental illnesses, addiction, and other conditions need the stability of housing and related services, not frequent jail stays. The circumstances that lead individuals experiencing homelessness to entanglement with the criminal justice

system are typically health issues, not criminal ones. Service-based responses cost less and have better outcomes, while avoiding the harsh impacts of arrest and jail on a community's most vulnerable people.

*Makes it more difficult for people to exit homelessness:*

- Criminal history is a barrier to housing, employment, and even accessing social services. Many public housing authorities exclude from federally-assisted housing people with arrest records.
- Homeless people lack ability to pay court costs, fees, and fines. Criminal debt creates poor credit history (necessary for accessing housing) and liens on driver's license (barrier to employment).
- Cycling between jail and the streets makes it difficult to maintain employment, connect to necessary services, and move out of homelessness. Encounters with the justice system can disrupt care, increase exposure to trauma and violence and exacerbate health conditions. Homeless people's days and nights are consumed with finding places where they can lawfully exist.

*Wastes scarce public resources:*

- Homelessness itself costs money. Doing nothing about homelessness costs money. Criminalizing homelessness costs the most money.
- Policies that end homelessness, such as providing permanent supportive housing, redirects resources, resulting in significant cost savings.
- Central Florida projects that ending chronic homelessness would yield \$30 million in annual savings. The annual average cost to community for person experiencing chronic homelessness is \$31,065 compared with average annual cost of providing supportive housing at \$10,051.



“Criminalizing acts of survival is not a solution to homelessness and results in unnecessary public costs for police, courts, and jails.”

*Opening Doors: The Federal Plan to Prevent and End Homelessness (2010)*

### Criminalization Keeps People Locked in a Cycle of Homelessness





*Burdens the criminal justice system:*

- Criminalization results in costs to courts, police, jails, public defenders, state attorneys, and clerks of court, wasting precious resources.
- A study in Alachua County found that “the cost to arrest, transport, book, house and process a person through First Appearance is more than \$600 per incident.” Nearly 40% of all homeless arrests over a 20 month period were for ordinance violations.
- Monroe County Sheriff Rick Ramsay reported that his office spends approximately \$2 million per year incarcerating homeless people. “One-third of the jail population is homeless, picked up by the city.”

*Results in bad public relations for community:*

- Cities do not want to gain notoriety for taking homeless people’s blankets, or arresting church members for serving stew.
- Consumers are increasingly taking into account a tourist destination’s reputation for social and environmental responsibility when making travel choices.
- Millennials in particular value social responsibility and make choices as consumers based on values of business. Top causes include poverty.

*Violates legal rights:*

- Criminalization measures often violate constitutional and human rights.
- Can result in costly litigation—cost of defense and cost of attorneys’ fees for other side if local government loses litigation.

## SEC. 2 POLICY RESOURCES

### Reports on Homelessness in Florida

- Fla. Council on Homelessness. *2015 Annual Report* (2015), available at <http://www.dcf.state.fl.us/programs/homelessness/docs/Council-on-Homelessness-2015%20-Report.pdf>
- Shimberg Ctr. for Hous. Studies, *2013 Hous. Needs of Homeless Families &*

*Individuals in Fla.* (2013), available at <http://www.floridahousing.org/FH-ImageWebDocs/Newsroom/Publications/MarketStudies/2013/2013%20Housing%20Needs%20of%20Homeless%20Families%20and%20Individuals%20in%20Florida.pdf>

- Barbara Poppe and Associates and the Central Florida Commission on Homelessness. *The Path Forward: Rethinking Solutions for Homelessness in Florida* (2015), available at <http://rethinkhomelessness.org/wp-content/uploads/2015/09/Path-Forward-Final-LONG-LO-RES-9-16-15.pdf>
- Rethink Homelessness. *The Current State of Family Homelessness in Central Florida* (2015), available at <http://rethinkhomelessness.org/wp-content/uploads/2015/10/CFL-FAMILY-HOMELESSNESS-SINGLE-PGS-lo-res-10-27-15.pdf>
- Rethink Homelessness. *Finding Their Way Home: Rethinking Homelessness for Veterans in Central Florida* (2015), available at <http://rethinkhomelessness.org/wp-content/uploads/2015/03/Rethinking-Homelessness-Veterans.pdf>
- Annual Homeless Assessment Report. U.S. Dept. of Housing & Urban Development, available at <https://www.hudexchange.info/hdx/guides/ahar/>

### Reports on Criminalization Policies & Impacts

- Nat’l Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2014), available at [http://www.nlchp.org/documents/No\\_Safe\\_Place](http://www.nlchp.org/documents/No_Safe_Place).
- Nat’l Coalition for the Homeless, *Share No More: The Criminalization of Efforts to Feed People in Need* (Oct. 2014), available at <http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf>.
- Berkely L. Policy Advocacy Clinic, *California’s New Vagrancy Laws: The Growing Enactment & Enforcement of Anti-Homeless Laws in the Golden State* (Feb. 2015), available at <http://www.wraphome.org/images/reports/2015/BerkelyLawReportCANewVagrancyLaws.pdf>.
- Sacramento Regional Coalition to End Homelessness & WIND Youth Services, *Sacramento Homeless Criminalization*,





*Discrimination & Harassment Report: 2015-2016* (Jan. 2016), available at [http://media.wix.com/ugd/ee52bb\\_fc75a28d3e7845deb6e6beae00678abd.pdf](http://media.wix.com/ugd/ee52bb_fc75a28d3e7845deb6e6beae00678abd.pdf)

- San Francisco Coalition on Homelessness, *Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco* (2015), available at <http://www.cohsf.org/Punishing.pdf>.
- Hyatt, S. & Reed, J. Cal. Homeless Youth Project, *Adding Insult to Injury: The Criminalization of Homelessness & its Effects on Youth* (Sep. 2015), available at <http://cahomelessyouth.library.ca.gov/docs/pdf/CriminalizationOfYouthHomelessness.pdf>.
- Univ. of Hawai'i at Manoa, Dep't of Urban & Regional Planning, *The Effects of City Sweeps & Sit-Lie Policies on Honolulu's Houseless* (June 2015), available at [http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small\\_.pdf](http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf).
- Seattle Univ. Sch. of L. Policy Briefs:
  - Olson, J. & MacDonald, S., *Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances & Their Enforcement* (May 6, 2015), available at SSRN: <http://ssrn.com/abstract=2602318>.
  - Lurie, K. & Schuster, B., *Discrimination at the Margins: The Intersectionality of Homelessness & Other Marginalized Groups* (May 6, 2015), available at SSRN: <http://ssrn.com/abstract=2602532>
  - Ortiz, J. & Dick, M., *The Wrong Side of History: A Comparison of Modern & Historical Criminalization Laws* (May 6, 2015), available at SSRN: <http://ssrn.com/abstract=2602533>
- Denver Homeless Out Loud Publications, available at: <http://denverhomelessoutloud.org/>.
  - *No Right to Rest: Criminalizing Homelessness in Colorado* (Apr. 4, 2015), available at <http://issuu.com/denverhomelessoutloud/docs/report-final/4?e=7722969/12234987>.
  - *The Denver Camping Ban: A Report from the Street* (Apr. 3, 2013), available at <http://issuu.com/>

[denverhomelessoutloud/docs/surveyreport](http://denverhomelessoutloud/docs/surveyreport).

- Cooter, J., Meanor, E., Soli, E. & Selbin, J., *Does Sit-Lie Work: Will Berkeley's 'Measure S' Increase Economic Activity & Improve Services to Homeless People?* (Oct. 22, 2012), available at SSRN: <http://ssrn.com/abstract=2165490>.
- ABA Comm'n on Homelessness & Poverty White Paper, *No Such Place as 'Away': Why Banishment is a Wrong Turn on the Path to Better & Safer Cities* (Feb. 2010), available at [http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA\\_CHP\\_Banishment\\_White\\_Paper\\_February\\_2010.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/ABA_CHP_Banishment_White_Paper_February_2010.authcheckdam.pdf).
- Peterson, R. New York City Criminal Justice Agency. *Research Brief No. 37: Arrested and Homeless in NYC* (May 2015), available at <http://www.nycja.org/library.php>

### Cost Studies

- Rethink Homelessness, *The Cost of Long-Term Homelessness in Central Florida: The Current Crisis & the Economic Impact of Providing Sustainable Housing Solutions* (2014), available at <http://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf>.
- Howard, J. & Tran, D., Seattle Univ. Sch. of L., *At What Cost: The Minimum Cost of Criminalizing Homelessness in Seattle & Spokane* (May 6, 2015), available at SSRN: <http://ssrn.com/abstract=2602530>.
- Univ. of Tampa. *Cypress Landing Cost-Benefit Analysis Report* (2015), available at <http://thhi.org/wp-content/uploads/2015/08/Cypress-Landing-Cost-Benefit-Analysis.pdf>
- U.S. Interagency Council on Homelessness Solutions Database, "Cost-Effectiveness Studies," available at [http://usich.gov/usich\\_resources/research\\_and\\_evaluation/cost\\_effectiveness\\_studies/](http://usich.gov/usich_resources/research_and_evaluation/cost_effectiveness_studies/).

### Constructive Solutions

- U.S. Interagency Council on Homelessness, *Searching Out Solutions: Constructive Alternatives to the Criminalization of Homelessness* (2012), available at [http://usich.gov/resources/uploads/asset\\_library/RPT\\_SoS\\_March2012.pdf](http://usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf).



- Adams, Lucy, *In the Public Eye: Addressing the negative impact of laws regulating public space on people experiencing homelessness* (2013), available at [https://www.churchilltrust.com.au/media/fellows/Negative\\_impact\\_of\\_laws\\_regulating\\_public\\_space\\_on\\_homeless\\_people\\_Adams\\_Lucy\\_2013.pdf](https://www.churchilltrust.com.au/media/fellows/Negative_impact_of_laws_regulating_public_space_on_homeless_people_Adams_Lucy_2013.pdf).
- U.S. Interagency Council on Homelessness, *Ending Homelessness for People Living in Encampments: Advancing the Dialogue* (2015), available at <http://usich.gov/issue/human-rights/effective-community-based-solutions-to-encampments/>.
- Rethink Homelessness. *A Survey of Best Practices: Communities Making a Difference* (2014), available at <http://rethinkhomelessness.org/wp-content/uploads/2014/11/HOMELESS-PAPER-11-15-13.pdf>
- Rethink Homelessness. *Solutions for Homelessness: Creating Change through Innovation and Investment* (2015), available at <http://rethinkhomelessness.org/wp-content/uploads/2015/09/Best-Practices-Funding-Report.pdf>

### **ABA Resolutions on Decriminalization of Homelessness & Human Rights**

- Decriminalization of Homelessness (Feb. 2007), available at [http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/Decriminalization\\_of\\_homelessness\\_policy.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/homeless/PublicDocuments/Decriminalization_of_homelessness_policy.authcheckdam.pdf).
- Implementation of the Human Right to Adequate Hous. (Aug. 2013), available at [http://www.americanbar.org/content/dam/aba/administrative/homelessness\\_poverty/resolution117.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/homelessness_poverty/resolution117.authcheckdam.pdf).
- The Human Right to Adequate Food & Nutrition (Feb. 2014), available at [http://www.americanbar.org/content/dam/aba/images/abanews/2014mym\\_hodres/107.pdf](http://www.americanbar.org/content/dam/aba/images/abanews/2014mym_hodres/107.pdf).

### **Human Rights & Criminalization of Homelessness**

- U.N. Human Rights Comm. Calls U.S. Criminalization of Homelessness ‘Cruel, Inhuman, & Degrading’ (Mar. 27, 2014), available at [http://www.nlchp.org/U.N.\\_Human\\_Rights\\_Committee\\_Calls\\_U.S.\\_Criminalization\\_of\\_Homelessness\\_Cruel,\\_Inhuman,\\_and\\_Degrading.pdf](http://www.nlchp.org/U.N._Human_Rights_Committee_Calls_U.S._Criminalization_of_Homelessness_Cruel,_Inhuman,_and_Degrading.pdf).
- U.N. Comm. on Elimination of Racial Discrimination Condemns Criminalization of Homelessness (Sept. 2, 2014), available at [http://www.nlchp.org/press\\_releases/CERD2014](http://www.nlchp.org/press_releases/CERD2014).
- U.N. Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context*, U.N. Doc. A/HRC/31/54 (Dec. 30, 2015), available at [http://ap.ohchr.org/documents/dpage\\_e.aspx?si=A%2FHRC%2F31%2F54](http://ap.ohchr.org/documents/dpage_e.aspx?si=A%2FHRC%2F31%2F54)
- The Secretary-General, *Report by Magdalena Sepúlveda Carmona, Special Rapporteur on extreme poverty and human rights, delivered to the General Assembly*, U.N. Doc. A/66/265 (Aug. 4, 2011), available at <http://www.ohchr.org/Documents/Issues/EPoverty/A.66.265.pdf>
- U.N. Human Rights Council, *Report of the U.N. Special Rapporteur on the Human Right to Safe Drinking Water & Sanitation, Catarina de Albuquerque, Addendum: Mission to U.S.A.*, A/HRC/18/33/Add.4 (2011), available at [http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/18session/A-HRC-18-33-Add4_en.pdf)
- The State of Civil & Human Rights in the U.S.: Hearing before the Sen. Judiciary Subcomm. on the Const., Civil Rights, & Human “Statement for the Record: Criminalization of Homelessness,” submitted by Allard K. Lowenstein, Int’l Human Rights Clinic, Yale L. Sch., Rights (Dec. 9, 2014), available at [http://www.law.yale.edu/documents/pdf/2014\\_12\\_9\\_Senate\\_Hearing\\_on\\_Civil\\_and\\_Human\\_Rights--Lowenstein\\_Clinic\\_written\\_submission\\_20141208.pdf](http://www.law.yale.edu/documents/pdf/2014_12_9_Senate_Hearing_on_Civil_and_Human_Rights--Lowenstein_Clinic_written_submission_20141208.pdf)



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