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Down and out in San Antonio: The Constitutionality of San Antonio's Anti-Homeless Ordinances.

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COMMENTS

DOWN AND OUT IN SAN ANTONIO: THE CONSTITUTIONALITY OF SAN ANTONIO'S ANTI-HOMELESS ORDINANCES

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† St. Mary's University School of Law, Candidate for J.D., May 2006; Texas A&M University, B.S. Industrial Distribution. First and foremost I would like to thank the people who selflessly help those that are less fortunate; their sacrifices make the world a better place. I would also like to thank my parents, Greg and Elizabeth Cook, for seeing the best in me when I could not and for their unconditional love and support. My grandmother for her grace, love, and compassion in raising my mother and uncle and persevering under life's greatest challenges. I want to thank Elizabeth Elkins for her guidance and her help in making my paper the best it could be. Finally, I would like to extend a special thanks to Cathy Casiano for her patience and insight; I'm a better writer because of you.

I. INTRODUCTION

Martha Cordero has lived in San Antonio her whole life. She spent most of her childhood in various foster families and group homes, but today she is homeless. Some nights she is able to stay with friends; occasionally she is able to stay at a local shelter. Unfortunately, on this night she is unable to get in touch with her friends and the shelter is full. Now she is looking for a place to spend the night. With no alternatives, Martha decides to camp on a park bench in downtown San Antonio. As she is preparing her bed of cardboard and blankets, a police officer approaches her. The officer looks at her personal belongings and then issues Martha a citation for camping in public. He tells her to move on. Frustrated, Martha asks, "Where should I go?"[1]

Unfortunately, Martha's story is not uncommon. The population of San Antonio, Texas is growing and as of 2003, was estimated to be 1,214,725;[2] of those, some 22,000 people are estimated to be homeless.[3] Recognizing the seriousness of this situation, Ed Garza, Mayor of San Antonio, established a task force to address the problem of homelessness in San Antonio.[4]

Responding to the mayor's charge, the task force developed a ten-year plan to end chronic homelessness in the City of San Antonio.[5] The Ten-Year Plan's objective stated: "By the year 2014, all individuals facing chronic homelessness in the greater San Antonio area will have alternatives and access to safe, decent and affordable housing and the resources and supports needed to sustain housing."[6] On January 13, 2005, the Mayor's Task Force on homelessness presented its findings to the city

1. Interview with Martha Cordero, in San Antonio, Tex. (Feb. 2, 2005).

2. U.S. Census Bureau Website, State & County QuickFacts, San Antonio, http://quickfacts.census.gov/qfd/states/48/4865000.html (last visited Feb. 22, 2006).

3. Abraham Mahshie, *Like a Rolling Stone*, SAN ANTONIO CURRENT, Oct. 9, 2003, http://www.zwire.com/site/printerFriendly.cfm?brd=2318&dept_id=484045&newsid=10288895.

4. TEN-YEAR PLAN TO END CHRONIC HOMELESSNESS, MAYOR'S TASK FORCE ON HUNGER AND HOMELESSNESS, CITY OF SAN ANTONIO, TEXAS i (2005), *available at* http://www.sanantonio.gov/comminit/pdf/Plan_to_End_Homelessness.pdf. [hereinafter TEN-YEAR PLAN].

5. *Id.*

6. *Id.* at 1.

council; the plan was approved.[7] However, less than one month later the city council supported a far different proposal.[8] On February 3, 2005 local businessman and City Councilman Roger Flores presented the city council with four ordinances that directly affect San Antonio's homeless population.[9]

Though the ordinances seemed to contradict the city's Ten-Year Plan, the city council approved them with only one dissenting voice. The ordinances provided as follows:

> Ordinance 100378 – Prohibits sitting or lying down in the right-of-way in public places; and providing for a criminal fine in an amount not to exceed $500.00 for violation of this ordinance.
> Ordinance 100379 – Prohibits camping in public places without lawful permission or permit; and providing for a criminal fine in an amount not to exceed $500.00 for violation of this ordinance.
> Ordinance 100380 – Prohibits aggressive solicitation in public areas and certain businesses; and providing for a criminal fine in an amount not to exceed $500.00 for violation of this ordinance.
> Ordinance 100381 – Prohibits urinating and defecating in public; and providing for a criminal fine in an amount not to exceed $500.00 for violation of this ordinance.[10]

Historical background may shed some light on the bases for these contrasting approaches. Traditionally, there has been a tension between the local downtown businesses and the homeless population because the downtown area businesses perceive the area homeless to be a threat to their economic livelihood. It was in response to this perceived threat that Councilman Flores stressed the importance of the enactment of the four ordinances.[11]

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7. *Reg. Meeting of the City Council of the City of San Antonio, Held in the Council Chambers* (Jan. 13, 2005), *available at* http://www.sanantonio.gov/clerk/minutes/2005/20050113.htm.

8. *Reg. Meeting of the City Council of the City of San Antonio, Held in the Council Chambers* (Feb. 3, 2005), *available at* http://www.sanantonio.gov/clerk/minutes/2005/20050203.htm [hereinafter *Meeting*] (noting that the approval of the Ten-Year Plan was followed by the enactment of an ordinance that targeted the city's homeless population).

9. *See id.*; *see also The Other San Antonio* (KSAT 12 News television broadcast Dec. 20, 2005) (on file with *The Scholar*) (stating that Roger Flores was the architect of the ordinances).

10. *Meeting, supra* note 8 (citing *The Other San Antonio*, *supra* note 9 (noting that homeless in San Antonio complain about how the new ordinances adversely affect them)). Council members Flores, Segovia, Barrera, Hall, Schubert, Haass, and Garza voted in favor of the four ordinances while Councilwoman Radle was the sole vote against them. Four council members were absent and did not vote.

11. *The Other San Antonio, supra* note 9.

Immediately after these ordinances were passed, advocates for San Antonio's local homeless population criticized the new ordinances.[12] Supporters for the homeless argued that the ordinances do little more than criminalize a person's status as homeless.[13] In fact, even some members of San Antonio's City Council were perplexed by the ordinances. Patti Radle, Councilwoman for District 5, stated that the ordinances directly undermined the city's goals by implementing the Ten-Year Plan.[14] Councilwoman Radle noted the city's own admission that San Antonio did not have sufficient facilities or shelter space to care for the homeless.[15] She added: "We were acknowledging that homeless people did not have alternatives, and then we were punishing the homeless for behavior that they could not help."[16]

Failing to address this obvious inconsistency, proponents for the city ordinances argue for their necessity in order to maintain the economic health of area businesses.[17] In fact, Roger Flores stated that the purpose of the ordinances was to increase the earning potential of the city's downtown businesses.[18] To the contrary, homeless advocates argue that the city's ordinances leave the homeless with no options.[19] They note that without enough shelter space or public restrooms, the city has essentially criminalized behavior that the homeless are incapable of controlling.[20] Adding weight to this argument is the fact that the current mayor of San Antonio, Phil Hardberger, stated that the City of San Antonio had not done enough to provide for its homeless citizens and specifically stated that the city needed a twenty-four hour shelter.[21]

San Antonio is not the first municipality to enact ordinances that target the homeless. Within the last two decades, laws that target the homeless have become increasingly common in large metropolitan areas in the

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12. KSAT.com, *Critics Blast City's New Homeless Rules*, Mar. 17, 2005, *available at* http://www.ksat.com/print/4293759/detail.html (turning the homeless into criminals).

13. *Id.*

14. Telephone Interview with Patti Radle, City Representative, Council District 5, City of San Antonio, in San Antonio, Tex. (Jan. 26, 2006).

15. *Id.*

16. *Id.*

17. Jennifer Hodulik, Comment, *The Drug Court Model as a Response to "Broken Windows" Criminal Justice for the Homeless Mentally Ill*, 91 J. CRIM. L. & CRIMINOLOGY 1073, 1079 (2001) (citing Maria Foscarinis, Kelly Cunningham-Bowers & Kristin E. Brown, *Out of Sight – Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 154 (1999).

18. *The Other San Antonio, supra* note 9.

19. KSAT.com, *supra* note 12.

20. *Id.*

21. *The Other San Antonio, supra* note 9.

United States.[22] Anti-vagrancy laws that punish those who appear to be homeless can be traced back to colonial times.[23] These laws were not successfully challenged until the 1972 Supreme Court case of *Papachristou v. City of Jacksonville.*[24] Since the Court's ruling in *Papachristou,* there has been an on-going battle between advocates for the homeless and cities who wish to address the problems associated with homelessness through legislation.[25]

This comment will focus on the constitutionality of two San Antonio ordinances:
1.) Ordinance 100379 which prohibits camping in public and, 2.) Ordinance 100380 which prohibits aggressive panhandling. This comment will then present the legal history of similar ordinances in the United States. The last section will analyze and apply those holdings to the newly-enacted homeless ordinances in San Antonio.

II. THE EIGHTH AMENDMENTS PROHIBITION ON CRIMINALIZING STATUS

Ordinance 100379 prohibits camping in public places without lawful permission.[26] San Antonio is not the first municipality to enact such legislation; municipal governments around the country have enacted similar ordinances that prevent public camping, sleeping, or both.[27] Advocates for the homeless argue that local governments are motivated by a desire to force homeless people out of economically-desirable locations within a

22. *See generally* Kristen Brown, *Outlawing Homelessness*, SHELTERFORCE ONLINE, July/Aug. 1999, http://www.nhi.org/online/issues/106/brown.html (citing laws against the homeless that various cities have enacted in recent years); *see also* Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 648 (1992).

23. Jason Leckerman, Comment, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 546 (2001) (citing Simon, *supra* note 22, at 638 (noting that vagrancy legislation in America started in colonial times and closely followed English models)).

24. *See generally* Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

25. Simon, *supra* note 22, at 647 (explaining that with the invalidation of vagrancy and loitering laws, cities have adopted new methods to communicate the message that the homeless and poor are not welcome in their communities).

26. *Meeting, supra* note 8; *see also* SA Homeless Action, New San Antonio Laws (Feb. 13, 2005), *available at* http://sa-homeless.blogspot.com/2005/02/new-san-antonio-laws.html.

27. Brown, *supra* note 22 (stating that in a survey of the fifty largest cities in the United States, seventy-three percent of them had laws which either restricted or prohibited camping or sleeping).

city.[28] Laws that prohibit sleeping in public places, or in defined public areas at certain times, are known as public use restrictions.[29] Advocates for the homeless have successfully challenged many public use restrictions by utilizing the Eighth Amendment's prohibition against cruel and unusual punishment.[30]

A. *Historical Perspective*

The Eighth Amendment to the United States Constitution provides that "cruel and unusual punishments [cannot be] inflicted."[31] Prior to 1910, the Supreme Court did not give serious consideration to the meaning of the Eighth Amendment's cruel and unusual punishment prohibition.[32] From 1789 to 1910, it appears that American judges were guided by the principle that the Eighth Amendment was only a prohibition against specific forms of physical punishment.[33] During this time, some argued that the scope of the Eighth Amendment should extend to proscribe punishments that were unfairly disproportionate to the crime committed, but such arguments were rejected by the courts.[34] As a result, the Eighth Amendment was largely considered boilerplate and believed by legal scholars to be obsolete.[35] However, in 1910, the United States Supreme Court held that the purpose for the Eighth Amendment was not only to prevent certain physical punishments, but also to prevent the abuse of governmental power.[36]

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28. Antonia K. Fasanelli, Note, 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, 331-32 (2001).

29. Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1237 (2003).

30. Juliette Smith, Comment, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 319 (1996).

31. U.S. CONST. amend. VIII.

32. John B. Wefing, *Cruel and Unusual Punishment*, 20 SETON HALL L. REV. 478, 483 (1990).

33. Smith, *supra* note 30, at 306 (noting that courts "certainly prohibited 'quartering, disemboweling alive, gibbeting (hanging in chains to starve to death), burning alive, crucifixion, breaking on the wheel, strangling to death, burying alive, boiling alive in water, oil or lead, and blowing [a person] from a cannon's mouth," among other methods (citing LARRY C. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 9-10 (1975))).

34. Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 842 (1969) (citing 1 T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 694 (8th ed. 1927)).

35. *Id.* at 842.

36. *See generally* Weems v. United States, 217 U.S. 349 (1910); *see also* Smith, *supra* note 30, at 307.

In *Weems v. United States*,[37] the Supreme Court used the Eighth Amendment as a basis for overturning an excessively long, hard-labor sentence as punishment for forgery of a cash book.[38] After the *Weems* decision, the Court again utilized the Eighth Amendment to overturn punishments including banishment, expatriation, and even the failure to provide adequate medical care for prisoners.[39] However, these holdings were limited in their effect because the Eighth Amendment was not made applicable to the states until 1962.[40] In 1962, the Supreme Court, in *Robinson v. California*,[41] held that the Eighth Amendment also prohibited laws that criminalize a person's status.[42] As author Edward J. Walters noted, this holding has become significant to advocates for the homeless, because after it was handed down, many states overturned laws that prohibited "joblessness and purposelessness as unconstitutionally based on status, thus extending Eighth Amendment protection to many homeless people."[43]

B. *The Robinson Doctrine*

In *Robinson v. California* a police officer testified that he arrested the defendant after observing track marks on the defendant's arms.[44] Although he witnessed no affirmative act of drug use on the part of the defendant, based on his years of experience with the police force, the officer concluded that the defendant was a drug user.[45] The defendant was convicted under a California state law that made drug addiction a

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37. *See Weems*, 217 U.S. 349.

38. *Id.*; *see also* Smith, *supra* note 30, at 307.

39. Smith, *supra* note 30, at 308 (citing Trop v. Dulles, 356 U.S. 86 (1958); Dear Wing Jung v. United States, 312 F.2d 73, 76 (9th Cir. 1962); Collins v. Schoonfield, 344 F. Supp. 257, 278 (D. Md. 1972)).

40. *See* Wefing, *supra* note 32, at 483 (citing Robinson v. California, 370 U.S. 660, 667 (1962)) (holding that a state law that imprisons a person for being a drug addict inflicts cruel and unusual punishment in violation of the Fourteenth Amendment); *see also* THOMAS E. PATTERSON, WE THE PEOPLE: A CONCISE INTRODUCTION TO AMERICAN POLITICS 91 (4th ed. 2002), *available at* http://www.everything2.com/index.pl?node=Amendment%20XIV (The significance of the Fourteenth Amendment is to guarantee "civil liberties of individual Americans and to protect these individual rights from action by state and local government.").

41. Robinson v. California, 370 U.S. 660 (1962).

42. *Id.* at 666; *see also* Smith, *supra* note 30, at 308. Status crimes are defined as those offenses that punish people for who they are rather than what they do. *See generally id.*; Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1619 (1995).

43. Walters, *supra* note 42, at 1632.

44. *See Robinson*, 370 U.S. at 661.

45. *Id.* at 661-62.

criminal offense, even in the absence of a criminal act.[46] The Supreme Court reversed the defendant's conviction and held that the state law was cruel and unusual and a violation of the Eighth Amendment for two reasons. First, an addiction could be acquired without a conscious choice; and second, no affirmative act was involved in the alleged crime.[47] Simply stated, *Robinson* established both an act test and a culpability test.[48] Thus, a law would be unconstitutionally cruel and unusual if a defendant was penalized solely because of his or her mental state absent an affirmative action (act test), or for an act the defendant could not avoid (culpability test).[49]

Specifically, the *Robinson* Doctrine has been used as a basis to challenge laws that target the homeless by prohibiting sleeping or camping in public.[50] There has been some success associated with the argument that because sleeping or camping in public is an involuntary act for a homeless person, and that punishing a person for this act is equivalent to criminalizing a person's status of being homeless.[51] However, municipal governments have successfully cited *Powell v. Texas,*[52] a later Supreme Court case which expounded upon the *Robinson* Doctrine, to establish that laws prohibiting public camping or public sleeping are not a violation of the Constitution.[53]

C. Powell v. Texas

In the case of *Powell v. Texas*, the Supreme Court moved away from its earlier definition of status crime.[54] In *Powell*, the defendant was arrested for being drunk in public.[55] The defendant argued that he was an alcoholic and could not control his drinking, and that punishing him for this conduct would violate the Eighth Amendment's prohibition against cruel and unusual punishment as applied in *Robinson*.[56] However, the Court

46. *Id.* at 662.
47. *Id.* at 666-68; *see also* Walters, *supra* note 42, at 1622.
48. Walters, *supra* note 42, at 1627.
49. *Id.* at 1627.
50. Smith, *supra* note 30, at 319.
51. *Id.*
52. Powell v. Texas, 392 U.S. 514 (1968).
53. Walters, *supra* note 42, at 1624.
54. *Id.*
55. *See Powell*, 392 U.S. at 517.
56. *Id.* (noting, that the trial court made three findings of fact that the appellant was a chronic alcoholic, however the Court held that these were not findings of fact in a traditional sense, but rather were syllogisms transparently designed to bring the case within the scope of the Court's holding in Robinson v. California, 370 U.S. 660 (1962)).

made a distinction between public intoxication and alcoholism, and ultimately affirmed the defendant's conviction.[57]

In *Powell*, the Court held that the appellant had not been punished for his status as an alcoholic, but instead, for committing the act of being drunk in public.[58] Specifically, the Court held that the purpose of the holding in *Robinson* was not to determine whether a person's conduct was "in some sense involuntary," rather, its holding was intended to prevent a person from being punished for a crime if they did not commit an act.[59] Within this reasoning, the plurality in *Powell* created an "act-excluding" test, intended to identify status crimes: if the defendant had committed an act, any act, then that defendant lost any Eighth Amendment protection under the *Robinson* Doctrine.[60] As a result, if a court uses *Powell* as the basis of its holding, then the "act-excluding" test provides protection for those ordinances that target the homeless.[61] A court relying on *Powell's* plurality opinion will hold that the act itself, (in this case, sleeping or camping in public) is being punished, and not the status of being homeless.[62]

Furthermore, the plurality in *Powell* provided municipalities yet another instrument to use to protect their anti-sleeping or camping ordinances from the *Robinson* Doctrine by distinguishing between a person's "status" and a person's "condition."[63] The distinction that has evolved in cases following *Powell* is as follows: "status" is something that is gained involuntarily, such as characteristics acquired at birth; a condition on the other hand, is something that is attained through a person's actions.[64] The argument put forth is that homelessness itself is not status, but rather

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57. *Id.* at 532 (pointing out that the defendant was not convicted for being a chronic alcoholic, but instead was convicted of public drunkenness, which unlike addiction, is an affirmative act).

58. *Id.*; *see also Robinson*, 370 U.S. at 667 (explaining that on its face the present case does not fall within the holding of *Robinson* since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion).

59. *See Powell*, 392 U.S. at 533.

60. Walters, *supra* note 42, at 1624.

61. *See generally* Tobe v. City of Santa Ana, 892 P.2d 1145 (1995); *see also* Joyce v. City and County of San Francisco, 846 F. Supp. 843, 857 (1994).

62. *See Tobe,* 892 P.2d at 1166-67 (noting that 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, it does not deal with the question of whether certain conduct cannot be constitutionally be punished because it is, in some sense involuntary); *see Joyce,* 846 F. Supp. at 857 (explaining that the Court in *Powell* had refused to extend Eighth Amendment protection to acts attendant to a status).

63. *See Powell,* 392 U.S. at 533 (noting that there was a definitional distinction between a status as in *Robinson* and a condition, which is involved in this case).

64. *See Tobe,* 892 P.2d at 1166 (citing Robinson v. California, 370 U.S 660, 665-69, 667 fn.9 (1962)).

a condition that was acquired through a person's actions, thereby making the *Robinson* Doctrine inapplicable.[65]

However, any discussion of *Powell* necessitates a close reading of Justice White's concurring opinion. Justice White seems to suggest that the holding in *Powell* would not be applicable to homeless people.[66] He noted that many chronic alcoholics have homes and choose to drink in the privacy of their homes.[67] However, he went on to note that many chronic alcoholics do not have homes outside the public streets.[68] For homeless alcoholics, therefore, there is no choice but to consume alcohol in public.[69] Justice White argued that for those individuals, the law in *Powell* might be shown to violate the Eighth Amendment.[70] Although the issue of homelessness was not addressed specifically by the court, Justice White's concurring opinion lends some authority to the proposition that even though a law punishes an act, it may still unfairly affect the homeless and thereby implicate the Eighth Amendment if it is impossible for those persons to comply with the law.

D. *Inadequate Shelter Space and the Eighth Amendment*

In San Antonio, it is estimated that there are 3306 homeless men, women, and children looking for shelter at any one time.[71] Unfortunately, there are only two main shelters in the city, which together provide 1617 beds.[72] Essentially, in a city lacking adequate shelter space, such as San Antonio, a homeless person has only two options: to commit trespass by falling asleep on private property; or to violate an anti-sleeping ordinance by sleeping on public property.[73] In San Antonio, Ordinance 100379 prohibits camping in public places without lawful permission.[74] As a result, it is impossible for a homeless person in San Antonio to avoid committing a crime in order to satisfy the basic human need for sleep.[75] Advocates for

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65. *Id.*

66. *See Powell,* 392 U.S. at 550 (noting that for some alcoholics resisting drunkness in public is impossible because they do not have homes, therefore the law in *Powell* as applied to them violates the Eighth Amendment).

67. *Id.* at 551.

68. *Id.*

69. *Id.*

70. Powell v. Texas, 392 U.S. 514, 551 (1968).

71. AUSTIN/TRAVIS COUNTY HEALTH AND HUMAN SERVS. DEP'T, A COMPARISON OF HOMELESS SERVICES AMONG FIVE CITIES UTILIZING EXISTING DATA: AUSTIN, DALLAS, HOUSTON, SAN ANTONIO, AND SEATTLE, (2005), *available at* http://www.caction.org/Issue Areas/Homelessness/HomelessServiceComparisonFiveCities.pdf.

72. *Id.*

73. Smith, *supra* note 30, at 293.

74. *Meeting, supra* note 8; *see also* SA Homeless Action, *supra* note 26.

75. Smith, *supra* note 30, at 93.

the homeless contend that anti-sleeping ordinances, combined with a lack of adequate shelter space, amount to a violation of the Eighth Amendment.[76]

The Supreme Court has not dealt with whether insufficient shelter space combined with an anti-sleeping ordinance is a violation of the Eighth Amendment. This has lead to vastly different holdings in the lower courts. *Powell* was a plurality opinion and did not specifically overrule *Robinson*, therefore, the lower courts have discretion to choose whether to apply the holding in *Robinson* or the plurality opinion of *Powell*.

This problem was recognized by the majority in *Pottinger v. City of Miami*,[77] which stated: "[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."[78] A court's decision to apply the holding in *Robinson* or the decision in *Powell* as controlling precedent is often the determining factor in whether an anti-homeless ordinance will survive a constitutional attack based on the Eighth Amendment. The following is a discussion of four cases that have used the holdings of *Robinson* and *Powell* to determine whether inadequate shelter space, combined with anti-camping or sleeping laws violate the Eighth Amendment.[79]

1. *Pottinger v. City of Miami*

The plaintiffs in *Pottinger v. City of Miami*, filed a class action suit, seeking an injunction against the City of Miami.[80] The law at issue in that case, substantially similar to one recently passed in San Antonio, prohibited "any person to sleep on any of the streets, sidewalks, public places, or upon the private property of another person without the consent of the owner thereof."[81] Both the Miami and San Antonio ordinances prevent sleeping in public places.[82] Although the court cited to both *Robinson*

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76. Maria Foscarinis, *Downward Spiral: Homelessness and it's Criminalization*, 14 YALE L. & POL'Y REV. 1, 36 (1996).

77. Pottinger v. City of Miami, 810 F. Supp. 1551 (S.D. Fla. 1992).

78. *Id.* at 1563.

79. Joel v. City of Orlando, 232 F.3d 1353 (11th Cir. 2000); Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*, Johnson v. Dallas, 61 F.3d 442 (5th Cir. 1995).

80. Leckerman, *supra* note 23, at 552.

81. *Id.* (citing Miami, Fla., Code § 37-63 (1990)).

82. *Compare* San Antonio, Tex., Ordinance 100379 (Feb. 3, 2005) *with* Miami, Fla., Code § 37-63 (1990).

and *Powell*, the court distinguished the situation of the plaintiffs in *Pottinger* from that of the plaintiffs in *Powell*.[83]

The court in *Pottinger* stated that the *Powell* plurality was not confronted with the same situation. The majority in *Pottinger* used the reasoning in Justice White's concurring opinion stating that although the average intoxicated person may have a choice in where they consume alcohol, a homeless person has "no realistic choice, but to live in public places."[84] The court in *Pottinger* also relied on expert witness testimony that homeless people rarely have a choice in their homelessness; rather, they are homeless due to a number of factors, including physical disabilities, economic conditions, or psychological problems that they are powerless to control.[85]

The City of Miami attempted to rebut this testimony with the argument that, even if homelessness is an involuntary condition, a person still has some control over their status as being homeless.[86] The city, in attempting to establish the voluntary nature of homelessness, contrasted it with a truly involuntary situation, such as a natural disaster resulting in loss the of home.[87] However, the majority in *Pottinger* rejected the city's distinction and stated that when a person becomes homeless because of mental infirmities or economically hard times, the situation is no less involuntary and that person has no more control over such situations than individuals displaced by natural disasters.[88] The district court in *Pottinger* granted the injunction, holding that the ordinance punished homeless people for innocent acts, such as sleeping and eating, for which they had no choice but to perform in public.[89] As a result, the *Pottinger* court ordered the city of Miami to create specific locations called safe zones, where the homeless could go and perform daily activities without fear of criminal prosecution.[90] The next two cases cite and expand on the holding in *Pottinger*.[91]

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83. *See Pottinger,* 810 F. Supp. at 1563 (holding that unlike the *Powell* case, homeless are unable to make a choice as to whether to live on public property).

84. *Id.*

85. *Id.* at 1563.

86. *Id.* at 1564.

87. *Id.*

88. *See Pottinger,* 810 F. Supp. at 1564-65 (rejecting the city's arguments as there are no reasonable alternatives).

89. *Id.* at 1560.

90. Maria Foscarinis, Kelly Cunningham-Bowers & Kristin E. Brown, *Out of Sight – Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 154 (1999).

91. *See* Joel v. City of Orlando, 232 F.3d 1353, 1356 (11th Cir. 2000); *see also* Johnson v. City of Dallas, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*, Johnson v. Dallas, 61 F.3d 442 (5th Cir. 1995).

2. *Johnson v. City of Dallas*

Johnson v. City of Dallas[92] is significant for homeless advocates in San Antonio because it was decided in, and impacted Dallas, Texas, which is a similar major metropolitan area in Texas.[93] The City of Dallas enacted an ordinance that criminalized the act of sleeping in public, even if an individual was homeless and had no alternative place to rest.[94] Citing *Robinson* and *Powell,* the majority in *Johnson* held that the City of Dallas's anti-sleeping ordinance violated the Eighth Amendment.[95] The court held that in order to maintain life, a person must engage in certain acts, one of which is sleep.[96] The court noted that the plaintiffs in *Johnson* had no alternative place to sleep, because the city of Dallas had insufficient shelter space.[97] The court noted that homelessness was involuntary and that the homeless of Dallas had no place to live other than public property.[98] The court went on to hold that, although the city was not required to provide shelter space, it could not enforce an anti-sleeping ordinance if it failed to provide its homeless citizens with an alternative to sleeping in public.[99]

3. *Joel v. City of Orlando*

In *Joel v. City of Orlando*,[100] attorneys for the homeless challenged an ordinance that prevented camping on public property.[101] The advocates in *Joel* also cited the Eighth Amendment's prohibition against cruel and unusual punishment as the basis for their argument.[102] The plaintiff in *Joel* cited *Robinson* and argued that the law punished a person's status of being homeless, thereby making it unconstitutional.[103] In addition, the plaintiff in *Joel* relied on the *Pottinger* and *Johnson* decisions.[104] The *Joel*

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92. *See Johnson,* 860 F. Supp. at 344.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 350.
97. *See Johnson,* 860 F. Supp. at 350.
98. *Id.* at 350.
99. Alexandar Tsesis, *Eliminating the Destitution of America's Homeless: A Fair, Federal Approach*, 10 TEMP. POL. & CIV. RTS. L. REV. 103, 116 (2000).
100. Joel v. City of Orlando, 232 F.3d 1353, 1356 (11th Cir. 2000).
101. *Id.* at 1356.
102. *Id.* at 1361 (noting that the plaintiff, Joel, argued that Section 43.52 of the city ordinance violated his Eighth Amendment right to be free of cruel and unusual punishment because it punishes his homeless status).
103. *Id.*
104. *Id.* (noting that the plaintiff Joel relied on *Pottinger* where a district court held that the City of Miami's practice of arresting homeless individuals for such basic activities as sleeping and eating in public places constituted cruel and unusual punishment. Plaintiff

court distinguished the Orlando ordinance from the ordinances in *Pottinger* and *Johnson* and ultimately upheld the City of Orlando's ordinance.[105]

The *Joel* court noted that the courts in *Pottinger* and *Johnson* held that the lack of homeless shelter space made sleeping in public involuntary.[106] *Pottinger* and *Johnson* held that "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."[107] The *Joel* court cited the availability of homeless shelter space in Orlando to distinguish the situation in *Pottinger* and *Johnson*. The majority in *Joel* noted that there was a large homeless shelter in the City of Orlando that had "never reached its maximum capacity and that no individual had been turned away because there was none."[108] The *Joel* court stated that "[t]he city is constitutionally allowed to regulate where 'camping' occurs, and the availability of the shelter space means that Joel had an opportunity to comply with the ordinance."[109]

The distinguishing factor between *Joel* and *Johnson* was the availability of shelter space. As noted above, the City of Orlando in *Joel* was able to show that there was sufficient space available to homeless residents, thereby allowing them an alternative to sleeping in public. Also noted above, the advocates for the homeless in *Johnson* were able to show that there was not adequate shelter space in the City of Dallas, thus, the city was criminalizing conduct which was involuntary.

4. *Tobe v. City of Santa Ana*

While a court may hold that a municipality has insufficient homeless shelter space, such a finding of fact does not guarantee that ordinances, which prevent public camping and sleeping, will be found invalid.[110] In *Tobe v. City of Santa Ana*,[111] the California Supreme Court upheld a statute that prevented public camping, even though a lower court found that the city had only enough shelter for 332 of its estimated 3,000 home-

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also relied on *Johnson* which held that a sleeping in public ordinance as applied to the homeless was unconstitutional).

105. *See Joel,* 232 F.3d at 1362.

106. *Id.*

107. *Id.* (citing Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992)); *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex 1994) ("As long as the homeless have no other place to be, they may not be prevented from sleeping in public.").

108. *Joel*, 232 F.3d at 1362.

109. *Id.*

110. Walters, *supra* note 42, at 1636 (citing Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 387-88 (Cal. Ct. App. 1994)).

111. *See* Tobe v. City of Santa Ana, 892 P.2d 1145 (1995).

less.[112] The lower court in *Tobe,* citing insufficient shelter space, found that the ordinance punished the "involuntary status of being homeless" therefore violating the Eighth Amendment's prohibition against cruel and unusual punishment.[113]

However, the California Supreme Court reversed the holding and held that the ordinance neither punished the "involuntary status of being homeless" nor punished a person for the condition of living in poverty.[114] The California Supreme Court noted that the holding in *Powell* stated that the *Robinson* Doctrine was only applied where a criminal penalty was inflicted upon a person who had not committed an act, not on whether a law could constitutionally punish someone because in some way their act was involuntary.[115] The Supreme Court of California failed to recognize the condition of someone's homelessness as a status, holding that there was a difference between status and condition.[116] The court in *Tobe* noted that the Supreme Court has yet to hold that the Eighth Amendment forbids punishment of acts that are derived from a person's status.[117] The Supreme Court of California also cited that it was unclear whether the plaintiffs had any alternatives to their condition of homelessness, and whether they had contributed conduct that led to their homelessness.[118]

The City of San Antonio often lacks sufficient homeless shelter space to meet the city's needs.[119] Shelter space for homeless men overflows when the temperature drops below forty degrees, and family shelters turn away parents and their children almost every night.[120] The city, by its own admission in the Ten-Year Plan, stated that it did not have sufficient shelter space.[121] In addition, the City of San Antonio does not have a twenty-four hour shelter that gives homeless people a place to go during the daytime.[122] A court confronted by the situation in San Antonio, where there is insufficient shelter space and the city has enacted a law that prevents public sleeping or camping, should apply *Robinson's* culpability test rather than *Powell's* act-excluding test. If a court applies *Powell*

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112. Walters, *supra* note 42, at 1636 (citing *Tobe*, 27 Cal. Rptr. 2d at 387-88).
113. *See Tobe,* 892 P.2d at 1166.
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *See Tobe,* 892 P.2d at 1167.
119. Dick J. Reavis, *Agony of Homelessness Grows in S.A.*, MySA.com, Apr. 20, 2003 at http://www.mysanantonio.com/global-includes/printstory.jsp?path/=News/metro/stories/983475.html.
120. *Id.*
121. TEN-YEAR PLAN, *supra* note 4.
122. *The Other San Antonio*, *supra* note 9.

to a law that targets the homeless by preventing public sleeping or camping, it will lead to logical inconsistencies, as evidenced in the *Tobe* case.[123]

The *Tobe* court, in applying *Powell,* made the argument that homelessness is not a status, but a condition.[124] The court in *Tobe* noted that it was difficult to define status, but that certain factors should be considered, including the involuntariness of that acquisition and whether or not the characteristic was present at birth.[125] The court in *Tobe* went on to note that many homeless might have committed acts that contributed to their status.[126] Relying on this logic alone, the court in *Tobe* failed to realize that many people who are homeless are born into that status.[127]

As Edward J. Walters points out, another problem with *Powell's* act-excluding test is that nearly every status manifests itself in some action, therefore *Powell's* act excluding test makes it easy for a state to punish a person's status "by simply punishing the acts inherent to it."[128] Take the example of a person that is a diabetic. If a state outlawed the taking of insulin, it would be criminalizing an act, but this would indirectly and unfairly punish the status of being a diabetic.

Because it is likely that the plurality in *Powell* would hold that punishing a person for being homeless is unconstitutional, it then logically follows that it would be cruel and unusual to punish a person for acts that the status of homelessness necessitates, such as sleeping in public.[129] Sleeping is an act, but as the court in *Pottinger* affirmed that the need for sleep is essential to sustain life.[130] Given that a city with insufficient shelter space has not provided a homeless person an alternative to sleeping in public, a homeless person must choose whether to violate the law or to perform a basic function of life. Forcing an innocent person into making such a choice is both cruel and unusual.

One of the reasons that the plurality in *Powell* created the "act test" was out of fear that a broad interpretation of *Robinson* would discourage

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123. Walters, *supra* note 42, at 1629-31 (noting that *Powell's* act excluding test is logically flawed and difficult to apply).

124. *See* Tobe v. City of Santa Ana, 892 P.2d 1145, 1166 (Cal. 1995).

125. *Id.* (citing Robinson v. California, 370 U.S. 660, 665-69 (1962)).

126. *Id.* at 1105 (noting that it was far from clear whether the homeless had any alternatives to either the condition or the conduct that led to homelessness and ultimately to the ticket).

127. Walters, *supra* note 42, at 1639 (noting that the Supreme Court based its ruling in *Robinson* on the fact that one might acquire a drug addiction involuntarily at birth, the court in *Joyce* failed to see this problem in the homelessness context).

128. *Id.* at 1628.

129. *See* Edward J. Walters, Comment, *No Way Out: Eighth Amendment Protection for Do-or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1631 (1995).

130. Pottinger v. City of Miami, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

traditional notions of criminal culpability.[131] The court used the example that, if the holding of *Robinson* were extended, it might be hard for a state to criminally punish someone for murder if they had an uncontrollable urge to kill.[132] This problem is not faced when *Robinson's* culpability test is applied to a city that has insufficient shelter space and has enacted an anti-sleeping or camping ordinance that is directed at the homeless.[133]

A court confronted with this situation would make a factual determination as to whether the city has sufficient homeless shelter space. If the city does have sufficient space, the ordinance will likely be upheld. If not, then it is likely that the challenged ordinance will be overturned. In this way, cities can be free to restrict where a person sleeps and still protect vital economic development, if they uphold their civic responsibility in providing an alternative to sleeping in public.

III. THE CONSTITUTIONALITY OF AGGRESSIVE PANHANDLING STATUTES

San Antonio Ordinance 100380 prohibits aggressive solicitation in public places.[134] The Supreme Court has not specifically dealt with the issue of whether aggressive soliciting statutes, especially in the context of a person who begs, are constitutional; in fact the Court has not even decided whether panhandling is protected free speech.[135] Therefore, it is important to take a step-by-step approach in analyzing whether the City of San Antonio's ordinance preventing "aggressive" solicitation will be upheld in light of a constitutional challenge. This section of the paper will analyze the constitutionality of San Antonio's aggressive solicitation ordinance in relation to a homeless person who panhandles or begs for money.

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131. Powell v. Texas, 392 U.S. 514, 534 (1968). The Court points out that the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. The Court further used the example that if the plaintiff could not be convicted of public intoxication, it is difficult to see how a State could convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a compulsion to kill. *Id.*

132. *Id.*

133. Walters, *supra* note 129, at 1641-49 (explaining that a court should invalidate a law as cruel and unusual that prohibits acts that people have absolutely no choice but to do. Further explaining that this approach is narrow in scope, so there is little chance of opening the floodgates feared by many.).

134. *Meeting, supra* note 8.

135. Darryl C. Delmonico, Comment, *Aggressive Panhandling Legislation and the Constitution: Evisceration of Fundamental Rights – or Valid Restrictions Upon Offensive Conduct?*, 23 HASTINGS CONST. L.Q. 557, 559 (1996) (noting that the Supreme Court has not even considered the constitutionality of passive panhandling statutes.).

Many lower courts have decided cases involving soliciting statutes in relation to panhandling, the first step will be to determine how these courts have classified panhandling in general; and whether the courts held that a general ban on panhandling was content neutral or content based, in relation to First Amendment case law. Determining whether a law is content based or content neutral is important because a law that is a content based restriction will be subject to a much stricter form of review by a court and therefore is less likely to be upheld.[136] The next step will look at how courts have ruled on statutes that prevent "aggressive" panhandling.

A. *General Prohibitions on Panhandling*

1. Content Neutral

An important step in predicting how a court might rule on a statute banning all panhandling is to determine whether a general ban on panhandling is content neutral under the First Amendment.[137] Content neutral statues will apply to all types of speech and do not prevent any particular subject matter from being expressed.[138]

If a court determines a law is content neutral, there are two tests it may apply: the *O'Brien* Test or the Time, Place, Manner Test.[139] These two tests are utilized by a court applying mid-level scrutiny analysis to a government ordinance, but again only if the ordinance is content neutral.[140] If an ordinance is deemed to be content based neither test will be used.[141]

The *O'Brien* test has four factors and courts have applied it to city ordinances that combine both speech and non-speech components.[142] The *O'Brien* test provides that:

> Governmental regulation is sufficiently justified [1] if it is within the constitutional power of the government; [2] if it furthers an impor-

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136. ALLAN IDES & CHRISTOPHER N. MAY, CONSTITUTIONAL LAW 307 (Editorial Advisory Board ed., Aspen Law & Business 2001) (1949).

137. Delmonico, *supra* note 135, at 564 (citing Spence v. Washington, 418 U.S. 405 (1974)).

138. National Coalition Against Censorship, NCAC Art Law Library Glossary, http://www.ncac.org/art-law/glossary.cfm (last visited March 14, 2005).

139. IDES & MAY, *supra* note 136, at 297 ("The O'Brien test is nothing more than the standard time, place and manner test. . . that the Court generally applies to content-neutral regulations of speech" (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 & n.8 (1984))).

140. *Id.*

141. *Id.*

142. Charles Mitchell, Note, *Aggressive Panhandling legislation and Free Speech Claims: Begging for Trouble*, 39 N.Y.L. SCH. L. REV. 697, 703 (1994) (quoting O'Brien v. United States, 391 U.S. 367, 376 (1968)).

> tant or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; [4] and if the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of that interest.[143]

A case that illustrates a court's application of the *O'Brien* test in relation to panhandling is a case decided by the United States Court of Appeals for the Second Circuit, *Young v. New York City Transit Authority*.[144]

In *Young*, the New York City Transit Authority enacted an ordinance that prevented people inside the New York City subway system from begging for or soliciting money for any purpose.[145] Advocates for New York's homeless argued that begging was expressive conduct that warranted full protection under the First Amendment.[146] The court first had to determine whether begging was expressive conduct, so the court applied a test that asked whether "an intent to convey a *particularized message* was present, and whether the *likelihood was great* that the message would be understood by those who viewed it."[147] The majority in *Young* failed to recognize begging as expressive conduct, because it was not "intertwined with a 'particularized message.'"[148] The court in *Young* further explained that individuals who beg are doing so to collect money not to convey a social or political message.[149]

The plaintiffs, advocates for the homeless, argued that begging was not indistinguishable from charitable solicitation which the Supreme Court held was protected speech in *Schaumburg v. Citizens for a Better Environment*.[150] However, the court in *Young* was not persuaded by this argument and it held that while charitable organizations often disseminated ideas about political and social issues, begging in the subway communicated no such messages, but rather often amounted to "nothing less than a menace to the common good."[151] For these reasons, the court in *Young* found that begging was not expressive conduct although it went on to

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143. *Id.*; *see also* Young v. N.Y. City Transit Auth., 903 F.2d 146, 157 (2d Cir. 1990) (applying the O'Brien test).

144. *See Young,* 903 F.2d 146.

145. *Id.* at 147.

146. *Id.* at 152-53.

147. *Id.* at 153 (quoting Spence v. Washington, 418 U.S. 405, 410-11 (1974) (emphasis in original)).

148. Mitchell, *supra* note 142, at 702 (citing *Young*, 903 F.2d at 153 (quoting *Spence*, 418 U.S. at 410)).

149. *See Young*, 903 F.2d at 153.

150. *Id.* (citing Schaumburg v. Citizens for a Better Environment, 444 U.S. 620 (1980)).

151. *Id.* at 155-156.

assume that begging was some form of communication the *O'Brien* test and applied a more lenient standard of judicial scrutiny.[152]

In citing the *O'Brien* test, the *Young* court held that a subway was a non-public forum, and that there were alternate forums available for panhandlers.[153] In addition, the *Young* court held that the government had a strong governmental interest in providing a safe environment in the subway, therefore, the New York City Transit Authority was able to limit First Amendment protections.[154]

The *Young* case provides an example of how a city might regulate speech within a confined area, or in a non-public forum, but, in contrast, San Antonio's ordinance prevents panhandling in a public forum.[155] San Antonio's ordinance prevents aggressive solicitation in public areas. For this reason the *Young* court's rationale of being able to limit expressive conduct in a confined area does not apply to the San Antonio ordinance.[156] As a result, a court, if asked to review the constitutionality of the San Antonio ordinance would be incorrect if they decided to rely on *Young*. A case that addressed the situation of a city's attempt to proscribe panhandling in all public places was *Loper v. New York City Police Department*.[157]

2. Content Based Restrictions

In cases where a court decides a law is content based, the court will usually apply a strict scrutiny analysis.[158] Content based restrictions come about in many forms — a law could proscribe certain topics or subjects, it could involve a personal view point, or it could limit what a person says based upon his or her identity.[159] In *Loper*, the United States Court of Appeals for the Second Circuit seemed to reverse itself from its decision in *Young*, when confronted by a law that prevented peaceful begging throughout New York City.

The United States Court of Appeals for the Second Circuit in *Loper*, did not apply the *O'Brien* test, as it did in *Young*, because of the nature of the regulation that was before the court.[160] In *Young*, the regulation prevented begging in the confined atmosphere of the subway, where as in

152. *Id.* at 157.

153. Mitchell, *supra* note 142, at 703 (1994) (citing *Young*, 903 F.2d at 161).

154. *Id.* (citing *Young*, 903 F.2d at 158-60).

155. *Meeting, supra* note 8 ("[A] person cannot aggressively panhandle in *any public place*") (emphasis added).

156. *See Young,* 903 F.2d at 158.

157. Loper v. N.Y. City Police Dep't, 999 F.2d 699 (2d Cir. 1993).

158. IDES & MAY, *supra* note 136, at 307.

159. *Id.*

160. *See Loper,* 999 F.2d at 705.

Loper the ordinance prevented begging throughout the entire city of New York.[161] In *Loper*, the court held that in public forums, the government may not prohibit all forms of communicative activity.[162] The court then had to decide two questions: 1) whether begging was protected free speech; and 2) in what type of forum was the City of New York attempting to prevent begging.[163] To determine if begging was a form of communication the court relied on the reasoning in *Schaumburg v. Citizens for a Better Environment.*[164]

Schaumburg cited prior authorities that clearly established that solicitation of charitable causes is within the scope of First Amendment protection.[165] *Schaumburg* concluded that solicitation is subject to regulation, but courts must take into account that solicitation for money is intertwined with other forms of speech that seek support such as social, economic, or political issues, and that without solicitation, many forms of this communication would cease.[166] Relying on this reasoning, the court in *Loper* held that there was little difference between individuals who solicit for charity and individuals who solicit for themselves.[167]

Next, the court had to decide the forum within which the city was attempting to regulate First Amendment conduct.[168] The majority in *Loper* first applied the "public forum" analysis of the First Amendment, as outlined in *Perry Education Association v. Perry Local Educators' Association*,[169] to determine the type of public forum.[170]

The Supreme Court in *Perry* outlined three areas of public fora: property that has been traditionally available for public assembly; property in which the state's power to regulate as a non-public forum is equivalent to that of private owner of property; and, property the state has opened to use for public expressive activity.[171] *Loper* held that the New York City ordinance fit within the scope of the third category.[172] After holding that the ordinance attempted to prevent speech in a traditional public forum,

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161. *Id.* (noting that the outlaw of begging throughout New York City is not an incidental limitation of the First Amendment).

162. *Id.* at 704 (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

163. *Id.*

164. *Id.* at 704-05; Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).

165. *See Schaumburg,* 444 U.S. at 632.

166. *Id.*

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

168. *Id.*

169. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45-46 (1983).

170. *See Loper*, 999 F.2d at 702-03.

171. *Id.* at 704.

172. Mitchell, *supra* note 142, at 705.

the court noted that communication cannot be regulated to the same extent in public forum as it can be in a private forum.[173] The court held that the law was not content neutral because it prohibited all speech related to begging, but still chose to apply a mid-level strutiny test: the Time, Place, Manner test.[174]

The Time, Place, Manner test states that time, place, manner restrictions can be constitutional if they "'are [1] justified without reference to the content of the regulated speech, . . .[2] narrowly tailored to serve a significant government interest, and . . . [3] leave open ample alternative channels for communication of the information.'"[175] After applying the Time, Place, Manner test, the majority in *Loper* concluded that there was no governmental interest in preventing peaceful begging and the statute was not narrowly tailored to achieve a compelling state interest.[176] In addition, the *Loper* court found that the statute did not offer alternative avenues of communication for beggars to conduct their activity.[177] Therefore, the court held that the statute failed all aspects of the Time, Place, Manner test.[178]

Similar to the ordinance scrutinized by the *Loper* court, San Antonio Ordinance 100380 clearly states that an individual cannot "solicit" in a public place.[179] Although the *Young* and the *Loper* decisions applied different tests to determine whether ordinances that prevented panhandling were constitutional, it appears that the deciding factor was the forum in which the regulation took place.[180] A court will be more likely to say that a statute is content neutral if it proscribes speech in a specific location, such as the crowded confines of a subway. In contrast, a court is more likely to apply a content based restriction if the law prevents speech in all areas.

Because San Antonio's ordinance prevents aggressive soliciting in all public areas, the holding in *Loper* is more persuasive and provides a good starting point for a court to analyze an ordinance that prevents panhandling in public places. However, *Loper* was concerned with peaceful pan-

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

174. Mitchell, *supra* note 142, at 706.

175. IDES & MAY, *supra* note 136, at 348 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

176. Loper v. N.Y. City Police Dep't, 999 F.2d 699, 705 (2d Cir. 1993).

177. *Id.*

178. Mitchell, *supra* note 142, at 706.

179. *Meeting, supra* note 8 (San Antonio's ordinance prohibits solicitation in public places, *Loper* ordinance prohibits wandering about in a public place for the purpose of begging).

180. *See generally Loper,* 999 F.2d at 705; Young v. N.Y. City Transit Auth., 903 F.2d 146, 157 (2d Cir. 1990).

handling and San Antonio's ordinance proscribes aggressive solicitation and therefore, a court must delve further into the issue.

B. *Aggressive Panhandling*

San Antonio's ordinance goes one step further and prevents "aggressive" panhandling.[181] The court in *Loper* stated that the ordinance in New York failed because it prevented all "peaceful" panhandling in the city.[182] After *Loper*, city governments began narrowing their ordinances to prevent "aggressive" panhandling.[183] The Supreme Court has not decided whether aggressive panhandling ordinances are constitutional, thus it will be helpful to look at how the lower federal courts have addressed and decided the issue.

Laws that proscribe aggressive panhandling have been attacked using both the void for vagueness and overbreadth doctrines. The void for vagueness doctrine states that a law can be voided for vagueness if "it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' and it encourages arbitrary and erratic arrests and convictions."[184] The overbreadth doctrine states that even if a law is clear, it may be overbroad if it "prohibits constitutionally protected conduct."[185] An example of overbreadth would be a law that prevented a person from communicating to another person a threat to commit any criminal act.[186] Although threatening a person would not be protected speech, threatening to commit a criminal act would include speech that amounts to nothing more than harmless expressions.[187] A case that illustrates the void for vagueness doctrine and the overbreadth doctrine is *Roulette v. City of Seattle*.[188]

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181. *Meeting, supra* note 8.

182. *See Loper,* 999 F.2d at 705.

183. William L. Mitchell, II, Comment, *Secondary Effects Analysis: A Balanced Approach to the Problem of Prohibitions on Aggressive Panhandling*, 24 U. BALT. L. REV. 291, 311 (1995) (explaining that anti-aggressive begging statutes and ordinances are fast becoming the weapon of choice for cities and municipalities in their fight to preserve public safety, societal order, and some semblance of a viable economic base).

184. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (quoting United States v. Harriss, 347 U.S. 612, 617 (1954) (citing Thornhill v. Alabama, 310 U.S. 88 (1940); Herndon v. Lowry, 301 U.S. 242 (1937))).

185. Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

186. Roulette v. City of Seattle, 850 F. Supp. 1442, 1452 (1994) (citing Wurtz v. Risley, 719 F.2d 1438 (9th Cir. 1983)).

187. *Id.*

188. *Id.* at 1453.

1. *Roulette v. City of Seattle*

In *Roulette*, the city of Seattle sought to criminalize "aggressive begging."[189] Advocates for the homeless in *Roulette* challenged the ordinance as overbroad and void for vagueness.[190]

The court in Roulette held that the statute was not overbroad or void for vagueness.[191] The majority in *Roulette* like the court in *Young* failed to recognize begging as expressive conduct.[192] *Roulette* also upheld the City of Seattle's statute because the ordinance had an intent element in its language which defined "aggressive begging" as an "intent to intimidate."[193] The court in *Roulette* held that the ordinance was sufficiently limited by the intent requirement and the definition section defining "intimidate" and therefore did not "reach speech protected by the First Amendment."[194] The statute also went on to state that intimidation was conduct which would make a "reasonable person fearful or feel compelled to give money or property."[195] Using this reasoning the *Roulette* court held that the statute did not implicate the First Amendment because threats are not protected speech.[196] The majority in *Roulette* held that the limiting nature of the ordinance and the language it targeted prevented the ordinance from violating the First Amendment.[197] The court in *Roulette*, after holding that the law was not overbroad, went on to hold that because of the limiting nature of the ordinance it did not implicate the void for vagueness doctrine.

To return to the focus of this section, San Antonio's "aggressive" soliciting ordinance can be distinguished from the above cited cases because there is no intent requirement in its statutory language.[198] The court in *Roulette* held that the City of Seattle's intent requirement prevented the

189. *Id.* at 1451. The Seattle ordinance went on to define aggressive begging as "to beg with the intent to intimidate another person into giving money or goods." *Id.* (citing SMC § 12A.12.015(A)(1)).

190. *Id.*

191. *See Roulette,* 850 F. Supp. at 1453.

192. *Id.* at 1451 (citing Riley v. Nat'l Fed'n of the Blind, 487 U.S. 781 (1988) (holding that begging did not implicate expressive conduct or communicative activity)).

193. *Id.* at 1453. The ordinance further defines "intimidate as conduct which would make a reasonable person fearful or feel compelled." *Id.* at 1451 (citing SMC § 12A.12.015(A)(2)).

194. *Id.*

195. *Id.* at 1447.

196. *Id.* at 1451 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).

197. *See generally* Roulette v. City of Seattle, 850 F. Supp. 1442 (1994); *see also* State v. Brown, 748 P.2d 276, 279 (Wash. Ct. App. 1988).

198. *Compare Meeting, supra* note 8, *with Roulette,* 850 F. Supp. at 1451 (citing SMC § 12A.12.015(A)).

ordinance from being vague, and thereby making it constitutional;[199] but a challenger to the City of San Antonio's ordinance, citing the lack of an intent element in the statute, could use the reasoning in *Roulette* to make a good argument that the ordinance is overbroad or vague.[200] As it stands, using *Roulette* as controlling precedent, it is likely that a court would strike down San Antonio's ordinance as vague or overbroad. The reasoning is because soliciting is a form of speech and aggressive is not adequately defined the statute could reach speech that is protected by the First Amendment.[201]

If the city of San Antonio rewrote its ordinance to include an intent element, would it still be possible to mount an attack on the ordinance? *Roulette* is persuasive authority and would be influential in analyzing an aggressive panhandling statute that included an intent element within it. If *Roulette's* holding were controlling it is likely that if San Antonio's ordinance were rewritten to include an intent element, it would survive an attack based on void for vagueness or overbreadth. However, *Roulette* is not the only court that has addressed an aggressive panhandling statute. Other courts have held that aggressive panhandling statutes were content based restrictions that were not narrowly tailed to achieve a compelling government interest.[202] In addition, courts have held that aggressive panhandling statutes violate a person's Fourteenth Amendment right to Equal Protection.[203]

C. *Equal Protection*

An argument used by advocates for the homeless are that aggressive panhandling statutes violate the Fourteenth Amendments right to equal protection.[204] One argument that has been used by advocates for the homeless is, the homeless constitute a suspect class and therefore any law that targets them should be subject to a strict scrutiny analysis.[205] However, do to the nature of defining the homeless in this context this argument has not met with much success.[206] An Equal Protection claim that

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199. *See Roulette,* 850 F. Supp. at 1449.

200. *Id.* at 1449; *see also Papachristou* at 158 (1972) (noting that a Florida statute was declared unconstitutional for not distinguishing conduct that is harmful from innocent conduct).

201. *See generally Roulette*, 850 F. Supp. at 1449.

202. *See generally* Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991).

203. *Id.* at 1324-25 (citing Carey v. Brown, 447 U.S. 455 (1980)).

204. *Id.*

205. *See* Leckerman, *supra* note 23, at 562-65.

206. Delmonico, *supra* note 135, at 559, (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (declaring that classifications drawn along economic lines "are traditionally disfavored;" however, stopping short of according "suspect" status to indigents)).

has met with greater success states that a law proscribes a fundamental right and in doing so treats similarly situated people differently.[207] A case that is especially helpful in analyzing San Antonio's ordinance is *Carey v. Brown,*[208] because it dealt with a law that involved the First Amendment, but not a suspect class.[209]

1. *Carey v. Brown*

In *Carey* residents were arrested for picketing in front of the mayor of Chicago's residence.[210] They were arrested for violating a state statute that prevented picketing in residential areas.[211] The statute had several exceptions; the law would not apply if a person picketed a residence that was used as a place of business, if the business was involved in a labor dispute, or the residence was commonly used as a place that was used to discuss "subjects of general public interest."[212] The Court held that because the ordinance prohibits peaceful picketing on a public street it regulates expressive conduct that falls under the First Amendment.[213] The Court overturned the ordinance because under this law speech concerning labor disputes was given special protection under the First Amendment.[214] The Court held that "selective exclusions from a public forum may not be based on content alone, and may not be referenced by content alone."[215] However the Court in *Carey* held that content-based restriction on fundamental First Amendment liberties may be a legitimate exercise of government police power in limited circumstances, and in these limited circumstances the municipality must regulate speech within a reasonable time, place, and manner.[216] A court case that dealt with an aggressive panhandling statute expanding upon the holding in *Carey* was *Blair v. Shanahan.*[217]

2. *Blair v. Shanahan*

In *Blair v. Shanahan*, the plaintiff brought a civil rights action against the city of San Francisco, protesting an ordinance enacted by the city to prevent persons from being accosted by those begging or soliciting for

207. *See generally Blair*, 775 F. Supp. at 1315.
208. *See* Carey v. Brown, 447 U.S. 455, 460 (1980).
209. Delmonico, *supra* note 135, at 585.
210. *See Carey*, 447 U.S. at 457.
211. *Id.*
212. *Id.* (citing Ill. Rev. Stat., ch. 38 § 21.1-2 (1977)).
213. *Id.* at 460.
214. *Id.* at 466.
215. *See Carey,* 447 U.S. at 463.
216. *Id.* at 470.
217. *See* Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991).

money.[218] When arrested, the plaintiff, Blair, was unemployed and relied on begging as a source of income to support himself.[219]

The city, in its attempt to defend the statute, asserted that begging was not protected speech under the constitution and cited to *Young* for support of their argument.[220] The court, however, was not persuaded by the city's argument and noted that the statute in *Young* prevented panhandling within the crowded confines of a New York subway, whereas the ordinance in *Blair* proscribed begging on the city's streets.[221] The court in *Blair* noted that the *Young* court distinguished solicitation for charitable purposes and begging by stating "solicitors for charitable causes often convey clearly articulated information to their target about a particular cause or idea whereas beggars do not necessarily convey any such information to the target listener."[222] However, the court in *Blair* failed to follow this reasoning, noting that in recent Supreme Court cases, professional fund raisers were given full First Amendment protection.[223] In addition, the majority in *Blair* also held that because a beggar represents themselves when they ask for money, their speech should not be rendered unprotected.[224] In response to the city's argument that protecting its citizens from aggressive or intimidating conduct was an important goal, the court held that this goal could be achieved by another statute that did not violate the First Amendment.[225] The court provided several examples of content-neutral statutes which successfully accomplished the same goals.[226]

In addition, the court in *Blair* held that the San Francisco statute violated the Fourteenth Amendment right to equal protection because it discriminated "between lawful and unlawful conduct based upon the content of the communication."[227] The court in *Blair* held that if the statute banned all speech that related to approaching another person it would be

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218. *Id.* at 1317 (citing CAL. PENAL CODE § 647(c)).

219. *Id.*

220. *Id.* at 1324-26.

221. *Id.* at 1322.

222. *See Blair,* 775 F. Supp. at 1323 (citing Young v. N.Y. City Transit Auth., 903 F.2d 146, 153-54 (2d Cir. 1990).

223. *Id.* at 1322 (citing Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980)).

224. *Id.* at 1323.

225. *Id.* at 1324.

226. *Id.* (citing other California statutes preventing robbery, assault, and willful and malicious obstruction of public places).

227. *See Blair,* 775 F. Supp. at 1325 (citing Carey v. Brown, 447 U.S. 455, 460 (1980)).

upheld because it would treat all speech the same.[228] The city, to persuade the court of its position, stated the argument that the ordinance did not treat beggars differently under the law and therefore was not a violation of Equal Protection.[229] However the *Blair* majority held that this was not the issue, the issue was "whether all who approach others and speak to them are treated alike."[230]

A court reviewing San Antonio's aggressive panhandling ordinance should follow the holding of *Blair* and decide that San Antonio's ordinance is unconstitutional. The *Blair* court notes that the Supreme Court has held that charitable solicitation is protected speech.[231] It flows logically then that a person's speech should not go unprotected just because they solicit money for themselves.[232] It is true that San Antonio has a sufficient interest in protecting its citizens from threatening conduct, but as the court in *Blair* notes this can be proscribed by a statute that does not implicate the First Amendment.[233]

It appears that San Antonio's aggressive solicitation ordinance would survive a constitutional attack based on equal protection because on its face it bans all solicitation that is aggressive regardless of the reason for the solicitation. However in crafting the statute to avoid an equal protection claim San Antonio's aggressive panhandling statute is open to a void for vagueness and overbreadth attack, because it limits speech that is constitutionally protected.[234]

V. Conclusion and Proposal/Concluding Remarks

For William and Sue Kamstra, it took five months to lose everything. The couple and their three children were living in a three-bedroom home in Bellflower, Calif. They had a two-car garage and fruit trees in the backyard. He earned more than $40,000 a year working in customer service, providing operational support in the music division of Yamaha.

But then they were beset by personal financial problems, which caused them to miss house payments. Their home was foreclosed

228. Blair v. Shanahan, 775 F. Supp. 1315, 1321 (N.D. Cal. 1991) (holding that if the statute banned any "approach" where the alleged miscreant spoke to the victim first, its position would be strong).

229. *Id.* at 1325.

230. *Id.*

231. *See generally* Schaumburg v. Citizens for a Better Env't, 444 U.S. 620 (1980).

232. *See Blair,* 775 F. Supp. at 1323.

233. *See id.* at 1323; *see also* Tex. Penal Code Ann. § 20.02 (Vernon 1996 & Supp. 2005) (preventing unlawful restraint); Tex. Penal Code Ann. § 22.01 (Vernon 1996 Supp. 2005) (preventing assault).

234. *See* Grayned v. City of Rockford, 408 U.S. 104, 114 (1972).

upon. They planned to rent an apartment, but then William lost his job, and they were unable to get back on their feet. An accident left their van totaled, so they had no way to get around. They stored their belongings and moved to a hotel until their money ran out in June. Now, they spend their nights at the Union Rescue Mission, a Los Angeles shelter.

During the day, William looks for work while Sue takes the children to the library. In 20 years of marriage, this is the first time the Kamstras have been homeless.

"If he hadn't gotten laid off, we'd have rented an apartment. We would have been OK," Sue says. The children expect to resume school in the area this fall.

"This is horrendous. You have a feeling of such alienation," says William, 43. His daughter is 14, and his sons are 12 and 11. "You have this view of homeless people, but I have one beer a year on my birthday, and I don't do drugs. But there are a lot of families here, a lot of children and babies in strollers."[235]

The Kamstra's example is not out of the ordinary. With a lagging economy more and more workers and their families are a "paycheck away from losing their homes."[236] This problem is only exacerbated by a weak job market, rising credit card debt and the soaring prices of homes.[237] The face of homelessness is changing; it now reflects a harsh reality that many families either through a recent job loss or a stroke of bad luck are now without a home.[238] This is just one of the many reasons that we should care about laws that target those less fortunate than us.

Using the laws to remove homeless people from the economic areas of downtown brings about not only questionable constitutional issues, but also raises moral issues for a municipal government. Although advocates for the homeless in San Antonio have a chance for success in fighting San Antonio's homeless ordinances, the city could better serve its citizens if it provided resources to help its homeless population rather than expending resources fighting litigation.

The problem of homelessness is complex and there is no easy solution. The homeless are a diverse group of individuals with a broad-range of

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235. Stephanie Armour, *Homeless Grows as More Live Check-to-Check*, USA TODAY, Aug. 12, 2003, at A1, *available at* http://www.usatoday.com/money/economy/2003-08-11-homeless_x.htm.

236. *Id.*

237. *Id.*

238. *Id.*

special needs and problems.[239] However the City of San Antonio could start on the path to providing real solutions if they were to take the right steps. The first step would be to establish safe zones where homeless citizens could camp and not be subject to arrest or a fine. This could be an interim step until the City of San Antonio could provide real help to its homeless citizens by providing a twenty-four hour shelter. In addition to allowing homeless people to be off the streets during the day, a twenty-four hour shelter will allow homeless people to have a more regulated schedule allowing them to take showers and look for employment.[240] With the right security within the shelter homeless citizens will be able to have their belongings secured as they search for employment.[241] Additionally, a twenty-four hour shelter would allow a city to segregate its homeless citizens and determine which ones need drug counseling or medical help, and which ones are readily employable.

We should care because the sad fact is that we might find ourselves sharing the plight of the homeless.

239. Jennifer Hodulik, *The Drug Court Model as a Response to "Broken Windows" Criminal Justice for the Homeless Mentally Ill*, 91 J. CRIM. L. & CRIMINOLOGY 1073, 1081 (2001) (noting that the homeless encompass a broad spectrum of groups that are not homogeneous and do not require the same types of assistance to address their needs).

240. Press Release, Office of the Mayor, City and County of San Francisco, FY 2005-2006 Shelter Service Enhancements (June 29, 2005), http://www.sfgov.org/site/mayor_page.asp?id=33016.

241. *Id.*