

# PLEASE DON'T FEED THE HOMELESS: *POTTINGER* REVISITED

By Shirley D. Howell\*

In 1988, Miami's homeless population filed a class action, *Pottinger v. City of Miami*,<sup>2</sup> alleging that city officials acted in concert to deprive them of their civil rights. While the *Pottinger* litigation was ongoing, Hurricane Andrew struck Miami, leaving 200,000 additional homeless in its wake<sup>3</sup> and creating what the *Pottinger* court termed "a worst possible" scenario.<sup>4</sup> It was the first time that a hurricane figured into homelessness litigation, and it is likely that the outcome of the case was in fact affected by the hurricane. The court held Miami officials liable for violations of 42 U.S.C. § 1983,<sup>5</sup> the Eighth Amendment,<sup>6</sup> the Fourth Amendment,<sup>7</sup> the Due Process Clause,<sup>8</sup> and the right to travel,<sup>9</sup> perhaps in part because the tragedy of mass homelessness was showcased by Hurricane Andrew. In the face of so great a homeless population, the Court could not dismissively assume that people were homeless as a result of a perverse desire to be so, nor would it ignore the multiple violations of their constitutional rights.

The similarities between the homelessness scenarios created by Hurricanes Andrew and Katrina are startling, each storm leaving behind an unassimilated, newly homeless population to join the already burgeoning ranks of America's homeless population. While compassion has worn thin, evacuees have been ousted from temporary lodging. If adequate societal measures are not taken to house these evacuees, they will be forced to live in the streets, parks, and under bridges, as were the *Pottinger* plaintiffs.

This article will explore the relevance of *Pottinger* as the national homeless population rises to approximately five million in the twenty first century. Part I summarizes the demographics and causes of mass homelessness and addresses negative public reactions to the increased visibility of the homeless in major American cities. Part II outlines and discusses the successful causes of action brought by the homeless in *Pottinger*. Part III concludes by setting forth proposals that would reinvigorate incentives to construct additional affordable housing, revisit America's regressive tax schedule, and afford the homeless suspect classification.

## OVERVIEW OF HOMELESSNESS BEFORE HURRICANE KATRINA

In 2000, an estimated two million Americans were homeless on any given night.<sup>10</sup> Between 2.5 and 3.5 million Americans experienced homelessness every year,<sup>11</sup> and 30% of the homeless had been without homes for more than two years.<sup>12</sup> These numbers do not include the indeterminate number of indi-

viduals who had no homes and were "doubled up"<sup>13</sup> living with friends or relatives. Only those persons "who lack a permanent address and sleep in places not designed to be sleeping accommodations for human beings... and those living in shelters"<sup>14</sup> were considered homeless. Thus, those living under the roofs of their families and friends did not meet the definition.

Adult males constituted 44% of the homeless population before Hurricane Katrina.<sup>15</sup> Women<sup>16</sup> accompanied by minor children<sup>17</sup> were the fastest growing segment of the chronically homeless<sup>18</sup> and made up 36% of the homeless population.<sup>19</sup> Some 750,000 children were homeless<sup>20</sup> before Katrina and 1.5 million elderly had "worst case housing needs."<sup>21</sup> Fifty percent of the homeless were African Americans, 35% White Americans,

12% Latinos, 2% Native Americans, and 1% were Asian Americans.<sup>22</sup> The causes of America's rising homelessness rate have been debated for decades. Some contend that personal deficiencies such as mental illness,<sup>23</sup> substance abuse,<sup>24</sup> incarceration,<sup>25</sup> and an intergenerational

dependence upon welfare<sup>26</sup> are the primary causes of homelessness. Others cite macroeconomic factors such as loss of low-income housing,<sup>27</sup> unemployment and underemployment,<sup>28</sup> and a regressive tax structure.<sup>29</sup> Notably, neither school of thought considers the impact of natural disasters.

Years before Hurricane Katrina created the largest homeless population in American history, the public had developed "compassion fatigue" with homelessness.<sup>30</sup> San Francisco enacted a series of ordinances through its so-called Matrix Program to criminalize sleeping in a park, begging near a highway, or blocking a sidewalk.<sup>31</sup> Eleven thousand of San Francisco's poorest people were incarcerated as a result of the Matrix Program.<sup>32</sup> In Santa Anna, the homeless were rounded up, transported to a football stadium, physically marked with numbers, chained for hours, and ultimately released to a different location.<sup>33</sup> Massachusetts has imposed criminal sanctions upon those who "move about from place to place begging."<sup>34</sup> Alabama has made it a criminal act to wander about "in a public place for the purpose of begging."<sup>35</sup>

In response to increasing homelessness in 1984,<sup>36</sup> during which thousands of individuals were sleeping in Bicentennial Park<sup>37</sup> and other public venues, Miami police were directed "to identify food sources for the poor and to arrest and/or force an extraction of the undesirables from the area."<sup>38</sup> To keep the homeless moving and effectively "sanitize"<sup>39</sup> the parks and streets, police were relentless in raiding the campsites of the homeless,<sup>40</sup> summarily destroying all on-site belongings.<sup>41</sup> His-

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*Your house is your larger body  
It grows in the sun and sleeps  
In the stillness of the night;  
And it is not dreamless.*<sup>1</sup>

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tory is repeating itself. In July 2006, Las Vegas enacted an ordinance to ban the giving of food to the homeless.<sup>42</sup> A violation of the ordinance can be punished by a maximum fine of \$1,000 and a jail term of up to six months.

### POTTINGER REVISITED

If America's Post-Katrina response to the unprecedented surge of homelessness is to harass the homeless by jailing them or jailing those who feed homeless, the issues and remedies addressed in *Pottinger* become relevant again. These issues and remedies are addressed below.

### THE EIGHTH AMENDMENT

The most sensitive issue in homelessness litigation concerns the voluntariness of the homeless defendant's actions. Purely involuntary acts cannot properly or morally be condemned as crimes under the Eighth Amendment. To punish a person for his or her involuntary act would be cruel.<sup>43</sup> The question then is whether a homeless person's acts are voluntary. A homeless person who commits rape cannot reasonably assert homelessness as justification for the misdeeds. In that case, status as a homeless person is irrelevant, and society cannot reasonably be expected to tolerate such behavior. The question is more complex when a homeless defendant with nowhere else to go is prosecuted for harmless acts such as sleeping in a park. Is a public action "voluntary" when the homeless defendant must perform it to survive, and he has no private place in which to perform the action?

The *Pottinger* court resolved the question by asking another: is the defendant voluntarily homeless?<sup>44</sup> If a defendant has voluntarily chosen to be homeless, he could be legally and morally deemed to have voluntarily assumed the risk of having to break the law to survive. It is unreasonable for society to lower its expectation of public conduct in order to accommodate a private and voluntary choice of that character. However, if the defendant's homelessness is involuntary, a just society should not prosecute him for the indicia that attach to the fact of his or her homelessness. The success of the *Pottinger* case rested in large part upon the plaintiffs' ability to prove that they were suffering an involuntary<sup>45</sup> state of homelessness and were compelled to perform life-sustaining acts in public view.<sup>46</sup>

The United States Supreme Court in *Robinson v. California*<sup>47</sup> held that a defendant could not be criminally punished for mere status as a drug addict, finding that a statute that made it punishable to be addicted to narcotics constituted cruel and unusual punishment.<sup>48</sup> In *Powell v. Texas*,<sup>49</sup> the Supreme Court addressed a similar issue of whether an alcoholic could be jailed for appearing drunk in public.<sup>50</sup> The Court held that Powell had not been jailed for merely being addicted to alcohol, but for his active conduct of appearing in public in a drunken state.<sup>51</sup> *Powell* is often cited by municipalities that arrest the homeless for the proposition that the homeless are not being punished for being homeless, but for their actions in violation of the law. Such arguments miss the point when the defendant is involuntar-

ily homeless. The alcoholic, theoretically, can restrict his drinking to his home and avoid punishment, but the homeless have no homes in which to perform what are usually private acts.<sup>52</sup> Sleeping in parks, sitting on sidewalks, and begging are perfect examples. To criminalize such actions when they are unavoidable is tantamount to prosecuting the homeless for existing, and the Eighth Amendment prohibition against cruel and unusual punishments is impermissibly violated.

The plaintiffs have historically borne the burden to establish that their public actions were, in fact, unavoidable. In *Pottinger*, the plaintiffs met that burden with statistical evidence and expert testimony.<sup>53</sup> The plaintiffs offered irrefutable statistical evidence of the severe shortage of beds in homeless shelters in Miami when they were arrested.<sup>54</sup> The expert witnesses also testified that people seldom choose to be homeless.<sup>55</sup> However, public policy that requires the homeless to bear the burden of proving the voluntariness of their status is inherently flawed.

The homeless, by definition, are persons with extremely limited resources, and they are not entitled to state-appointed attorneys in civil litigation in defense of their rights. But for the *pro bono* advocacy of the American Civil Liberties Union,<sup>56</sup> the *Pottinger* plaintiffs would have lacked the resources to amass statistics proving Miami's shelters were inadequate to house the homeless population. They also would not have been able to procure the experts<sup>57</sup> who were pivotal in establishing that people are seldom homeless by choice.<sup>58</sup> The better public policy would allow the plaintiff to meet the burden of a *prima facie* case by establishing the actions committed by the state or municipality in violation of his or her rights and the fact of his homelessness at the time of arrest. The burden should then shift to the defendants to establish by a preponderance of evidence that the plaintiff is voluntarily homeless and thus, answerable for his or her public actions. This policy would serve dual meritorious purposes: (i) to enhance the ability of the homeless plaintiff to find counsel who would accept his or her case, and (ii) to motivate states and their municipalities to cease efforts to harass the homeless out of their towns, and instead explore serious options for providing adequate affordable housing.

### THE FOURTH AMENDMENT

The homeless are gravely concerned about the conservation of those meager resources that they still have. In Miami, the police frequently destroyed the on-site belongings of the homeless<sup>59</sup> as though the property were public rubbish. In one particularly notorious raid, the Miami police handcuffed a group of homeless individuals, piled their clothing, medications, and a Bible together, and burned them while the homeless watched.<sup>60</sup> The homeless contended that the police seized and destroyed their property without due process of law in direct violation of the Fourth Amendment.<sup>61</sup>

While a seizure of property occurs when there is a "meaningful interference" with an individual's interest in that property,<sup>62</sup> a seizure of property is unreasonable only if the state's legitimate interests in the seizure do not outweigh the

individual's legitimate expectation of privacy in the object of the search.<sup>63</sup> The question then is whether the plaintiffs have a legitimate expectation of privacy in personal property that may appear to others to be public rubbish. Determining the nature of any legitimate expectation of privacy in personal property involves two separate inquiries. First, the court inquires whether the individual has a subjective expectation of privacy in the objects.<sup>64</sup> Second, the court must determine whether that expectation is one that society should be prepared to recognize as reasonable.<sup>65</sup> If the homeless make efforts to protect their belongings by attempting to shelter them from public view, stacking them in organized piles, or designating another homeless person to guard them, there is evidence of subjective expectation of privacy.

The second inquiry is more difficult. Should the public recognize the homeless person's right to privacy when his or her property is littering the streets or public parks? In *Rakas v. Illinois*,<sup>66</sup> the Supreme Court offered guidelines for determining the legitimacy of a plaintiff's privacy interests. As a trespasser or one who leaves property accessible to the public, the plaintiff may lose his or her privacy interests in the property; whereas one who is lawfully on property and shields it from public view may retain a subjective expectation in privacy that the public will recognize. The term *trespasser* is turned on its head "when there is nowhere" private that a homeless person may lawfully be.<sup>67</sup>

The Court has not specifically addressed the issue of whether a homeless person living outdoors has a privacy interest in their property that the public would find reasonable, but a Connecticut court has addressed the issue in part. Based on society's established deferential treatment of closed containers, the court in *State v. Mooney*<sup>68</sup> recognized a right of privacy in the closed duffel bags of the homeless. The court elaborated:

[T]he interior of these items is, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case.<sup>69</sup>

Does a homeless person have a lesser interest in his clothing or medications because he has no duffel bag in which to enclose them? From the perspective of the homeless, the answer is self-evident. However, municipalities also have a legitimate interest in the sanitation and safety of public spaces,<sup>70</sup> which can be compromised by the accumulation of rubbish. The *Pottinger* court balanced the conflicting interests, holding that the homeless had a legitimate expectation of privacy in their property, so long as the property did not create a public danger.<sup>71</sup> The court held that the city was free to confiscate items such as mattresses with exposed springs because such items posed a clear danger. However, the court enjoined the destruction of non-harmful possessions such as Bibles, clothing, eyeglasses, medications, and

personal identification, and declared such destruction a violation of the Fourth Amendment.<sup>72</sup>

### PROCEDURAL DUE PROCESS

Ordinances that prohibit the homeless from performing innocent, necessary functions in public often fail for vagueness or overbreadth. A statute is vague when it fails to give fair notice of the forbidden conduct.<sup>73</sup> The Supreme Court held void vagrancy ordinances in *Papachristou v. City of Jacksonville* because the statutes did not give sufficiently clear notice of the behavior that was prohibited.<sup>74</sup> Loitering statutes have suffered the same fate. In 1983, the Supreme Court overturned California's loitering statute that required citizens wandering the streets to produce identification upon a police officer's request.<sup>75</sup> Although the homeless plaintiffs in *Pottinger* did not attack Miami's ordinances on a vagueness theory, the plaintiffs did focus on the unconstitutional overbreadth of the ordinances when they were applied to innocent conduct of the homeless.

A statute is overbroad when it reaches constitutionally protected conduct or conduct which is beyond the power of the state to regulate.<sup>76</sup> A challenge based upon overbreadth will be upheld if the enactment reaches "a substantial amount"<sup>77</sup> of constitutionally protected conduct. Prior to *Pottinger*, there was no precedent for acts such as eating, sleeping, and sitting to enjoy constitutional protection, unless such acts could be characterized as expressive conduct.<sup>78</sup> For the most part, however, when the homeless eat, sleep, and sit in public, they intend no expressive conduct. They are performing those acts for the same reasons the housed perform them: they are necessary to survival. However, the *Pottinger* court held that when an involuntarily homeless person performs such acts in public "at a time of day when there is no place they can lawfully be,"<sup>79</sup> the statute becomes overbroad for punishing innocent conduct, and the Fourteenth Amendment due process clause is impermissibly infringed.<sup>80</sup>

### THE RIGHT TO TRAVEL

The Supreme Court has recognized the right to travel as a fundamental right in *Edwards v. California*<sup>81</sup> and reaffirmed it in *Shapiro v. Thompson*.<sup>82</sup> In striking down a Connecticut statute denying public assistance to persons who had not been residents of the state for one year, the *Shapiro* decision reasoned that the statute discouraged travel by the poor by withholding benefits from those who would have otherwise qualified to receive them.<sup>83</sup> In 1972, the Supreme Court in *Memorial Hospital v. Maricopa County*<sup>84</sup> struck down a statute that conditioned free medical care upon a one-year residency requirement.<sup>85</sup> This case is especially significant in homelessness cases because the Court specifically denounced the statute for denying indigents "the basic necessities of life"<sup>86</sup> and for the deterrent effect such statutes have on the rights of the poor to migrate.

Because the right to travel is a fundamental right, statutes or ordinances infringing that right must be in furtherance of a com-

elling state interest.<sup>87</sup> They must also represent the least intrusive method for furthering those state interests.<sup>88</sup> State interests such as maintaining public spaces in order to promote tourism, business, and developing inner-city downtown and park areas are not compelling interests. The Supreme Court has held that such interests are substantial but not compelling.<sup>89</sup> Further, the practice of arresting the homeless is not narrowly tailored to achieving the goals of promoting tourism or developing business. The involuntarily homeless arrested under such laws have no recourse but to return to their public lives upon their release from custody. Thus, nothing is ultimately accomplished by the arrests. If cities wish to promote their attractiveness to business and tourism, they must address both short-term and permanent housing for their homeless populations.

### **CIVIL RIGHTS PROTECTIONS UNDER 42 U.S.C. § 1983**

In 1961, the Supreme Court reinvigorated civil rights protections that had largely remained dormant for some ninety years. In *Monroe v. Pape*,<sup>90</sup> the Court concluded that a party injured by the unconstitutional actions of police officers could recover damages in federal court under § 1983. The police broke into the Monroe home, roused them from bed, and ransacked the house.<sup>91</sup> Mr. Monroe was arrested, but was not allowed to call his attorney and was not promptly arraigned.<sup>92</sup> Monroe claimed that he suffered an unlawful search and seizure in Violation of the Fourth Amendment.<sup>93</sup> He further claimed that his constitutional rights had been violated by the detention. Reversing the lower court's dismissal of the claims against the police officers,<sup>94</sup> the Supreme Court opined that police conduct may be actionable when it is in violation of constitutional rights.

Municipalities may also be held liable for the actions of city officials when those officials act to execute a "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."<sup>95</sup> In § 1983 litigation, the homeless plaintiffs also bear the burden of establishing that the actions were both persistent and widespread.<sup>96</sup> Evidence that the actions were isolated would be legally insufficient to warrant relief against the municipality,<sup>97</sup> though the offending officers might remain liable for the actions.

In *Pottinger*, discovery revealed internal memoranda that were "directed to high-ranking police department officials"<sup>98</sup> regarding the need to oust the homeless from Miami's public areas. The persistent and widespread nature of the attacks on the homeless was a matter of public record. Over 3,500 homeless individuals had been arrested in Miami when the suit was filed. The city could not escape liability under § 1983 for its acts of purposeful harassment of the homeless.<sup>99</sup>

### **EQUAL PROTECTION**

In *Harper v. State Board of Elections*,<sup>100</sup> the Supreme Court opined that "wealth, like race, creed, or color is not germane to one's ability to participate in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."<sup>101</sup> Nonetheless, the Supreme Court has

declined every opportunity to grant the homeless the suspect classification that is afforded to other historically victimized groups. This status is critical to the homeless population since only those state laws that discriminate against suspect groups are subjected to strict scrutiny<sup>102</sup> and cannot stand unless the state demonstrates a compelling interest that is furthered by a narrowly tailored policy.<sup>103</sup>

The Supreme Court has adopted the following criteria in its suspect-class analysis: (i) whether the disadvantaged class is defined by a trait that frequently bears no relationship to ability to contribute to society; (ii) whether the class has been saddled with unique disabilities because of prejudice and inaccurate stereotypes; and (iii) whether the trait defining the class is immutable.<sup>104</sup> The homeless can make a strong claim to a suspect or quasi-suspect class.

The homeless are a class defined by their abject poverty, and that state of poverty frequently bears no relationship to an actual inability to contribute to society. Many of the homeless have strong work histories<sup>105</sup> and were rendered homeless by events beyond their control.<sup>106</sup> One has only to review the acts perpetrated against the homeless in Miami and San Francisco to be persuaded of the dangerous prejudice of the public against the homeless.

The last prong of analysis proves more challenging. Do the homeless have defining, immutable characteristics? If the term means literally "a characteristic that cannot be changed," the homeless must fail in their attempts to achieve suspect classification. The judicial history of the term does not, however, suggest so rigid a definition. Aliens, who enjoy protection as a suspect class, can become citizens, thereby changing their "immutable" characteristic. Gender, which is protected, can be altered surgically, thus altering the gender characteristic. By analogy, the mere fact that the homeless can again become housed does not alter the fact that, while one is in fact homeless, it is physically apparent to society.

The Supreme Court in *Lyng*<sup>107</sup> adopted a broader interpretation of immutability, including an inquiry as to whether the class members "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."<sup>108</sup> The homeless have glaringly distinguishing characteristics: they reside under bridges, sleep in parks, shelters and other public places, and they beg.

### **POTTINGER'S IMPACT**

Litigation in *Pottinger* spanned a decade. Ultimately, the court enjoined the city of Miami from arresting its homeless so long as they are not engaged in conduct harmful to others or themselves.<sup>109</sup> Miami was ordered to establish "safe zones"<sup>110</sup> in areas where the homeless could access food programs and health services. The parties ultimately negotiated a financial settlement for the homeless plaintiffs.<sup>111</sup>

The impact of the case was immediate. Both the city of Miami and other private entities constructed shelters for the homeless while the case was on appeal.<sup>112</sup> As word spread

about the decision in Miami, other cities took stock of their own practices. Fort Lauderdale, Florida stopped its “bum sweeps”<sup>113</sup> and began encouraging its officers to refer the homeless to social services in lieu of making arrests.<sup>114</sup>

## CONCLUSION

As America’s homeless population reaches five million after Hurricane Katrina, *Pottinger*-type abuses such as those in Las Vegas are to be anticipated unless society becomes proactive. Congress must reinforce incentives for constructing affordable housing and raise the minimum wage. Meanwhile, “safe areas” must be available to those who have nowhere else to go, and human resources must be provided to patrol those

areas to protect homeless men, women, and children from the violence of the streets.

As America’s most vulnerable population, the homeless must be afforded a “suspect class” designation. They are easily identified and despised for characteristics they cannot readily change. They have suffered the deprivation of the most fundamental rights because their very existence frightens the greater population on a visceral level. The goal, however, is not only to place the homeless in a better position to defend their constitutional rights, but to create a society that rejects “compassion fatigue” in favor of indefatigable compassion and commitment<sup>115</sup> to the welfare of even its poorest citizen.

## ENDNOTES

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<sup>1</sup> Kahlil Gibran, *The Prophet*, 31 (1996).

<sup>2</sup> *Pottinger v. Miami*, 810 F. Supp. 1551 (1992).

<sup>3</sup> *Id.* at 1558.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 1560.

<sup>6</sup> *Id.* at 1565.

<sup>7</sup> *Id.* at 1573.

<sup>8</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).

<sup>9</sup> *Id.* at 1582.

<sup>10</sup> Almanac of Policy Issues, available at [http://www.policyalmanac.org/social\\_welfare.html](http://www.policyalmanac.org/social_welfare.html) 2/21/05 (last visited Sept. 7, 2005) [hereinafter, *Policyalmanac*].

<sup>11</sup> Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 *FORDHAM URB. L. J.* 1215, 1219 (2003).

<sup>12</sup> *Policyalmanac*, *supra* note 10.

<sup>13</sup> Beth C. Weitzman, James R. Knickman & Marybeth Shinn, *Pathways to Homelessness Among New York Families*, 46 *J. SOC. ISSUES* 125, 134 (1990).

<sup>14</sup> 42 U.S.C. 11301 (1995) (The Stewart B. McKinney Act).

<sup>15</sup> *Policyalmanac*, *supra* note 10.

<sup>16</sup> see Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 *J.L. POL’Y* 237 (1994) (“Fifty percent of the homeless women in America were fleeing domestic violence.”); See also Leonara M. Lapedus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 *AM. U. J. GENDER SOC., POL’Y L.* 377 (2003) (A battered woman residing in publicly subsidized housing was evicted because she reported having been battered by her husband); See also Eliza Hurst, Note: *The Housing Crisis for Victims of Domestic Violence*, 10 *GEO. J. ON POVERTY LAW & POL’Y* 142 (2003) (“Because women are disproportionately the victims of domestic violence, public housing authorities that evict families for criminal activity may punish women, as a class, for the acts of their abusers.”).

<sup>17</sup> Deborah M. Thompson, *Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth*, 31 *CREIGHTON L. REV.* 1209, 1211 (1998) (“For children, homelessness not only threatens their stability and security, it poses a tremendous barrier to the one thing that may give them hope for a better life – a better education.”).

<sup>18</sup> *Policyalmanac*, *supra* note 10.

<sup>19</sup> *Policyalmanac*, *supra* note 10.

<sup>20</sup> Thompson *supra* note 17, at 1209.

<sup>21</sup> HUD, available at <http://www.huduser.org/publications/affhsg/worstcase/finding6.html> (last visited March 24, 2007).

<sup>22</sup> *Policyalmanac*, *supra* note 10.

<sup>23</sup> See, e.g., Marybeth Shinn, *Homelessness: What is A Psychologist to Do?*, 20 *AM. J. COMMUNITY PSYCHO.* 3 (1992) (finding that in one sample of homeless

individuals treated at a psychiatric facility, some 97% had been previously treated for psychiatric problems); but see Martha L. Burt & Barbara E. Cohen, *Differences Among Homeless Single Women, Women with Children, and Single Men*, 36 *SOC. PROBS.* 508, 516 (1989) (finding that mental illness is more often the result of homelessness than the actual cause).

<sup>24</sup> See, e.g., Crystal Mills & Hira Ota, *Homeless Women with Minor Children in the Detroit Metropolitan Area*, 34 *SOC. WORK* 485, 487 (1989) (a study of eighty-seven sheltered homeless in Detroit revealed only a 9.2% history of substance abuse); but see Alice S. Baum & Donald W. Burnes, *A Nation in Denial: The Truth About Homelessness*, 49–52 (1993).

<sup>25</sup> Prior incarceration does seem to predispose newly released former inmates to homelessness insofar as federal regulations disqualify them for publicly subsidized housing for a lengthy period. 24 C.F.R. 960.203 (c) (2001).

<sup>26</sup> Some researchers have found support for the theory that intergenerational dependence upon welfare promotes ultimate homelessness. See Ellen L. Bassuk & Lynn Rosenberg, *Why Does Family Homelessness Occur? A Case Control Study*, 78(4) *AM. J. PUB. HEALTH* 783, 787. (1988). Other studies show that many of the homeless have significant work histories and no dependence on welfare.

<sup>27</sup> Weitzman, Knickman, & Shinn, *supra* note 14 at 135. A study in New York City indicated that almost half of homeless families requesting shelter had never been able to afford a place of their own.

<sup>28</sup> Lelia M. Reyes & Laura DeKoven Waxman, U.S. Conference of Mayors, *The Continuing Growth of Hunger, Homelessness, and Poverty in America’s Cities* at 47 (1987). Plant closings and loss of blue collar work for Americans produces significant unemployment.

<sup>29</sup> Changes in tax laws beginning in the late seventies have increased tax burdens upon the poor and middle class while creating tax loopholes for the rich. See Lawrence Mishel & David M. Frankel, *The State of Working America* 55 (1991).

<sup>30</sup> See Nancy A. Millich, “Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?” 27 *U.C. DAVIS L. REV.* 255 (1994).

<sup>31</sup> Nancy Wright, “Not in Anyone’s Backyard: End the ‘Contest of Non-Responsibility’ and Implementing Long-Term Solutions to Homelessness,” 2 *GEO. J. ON FIGHTING POVERTY* 163, 180-81 (1995).

<sup>32</sup> *Id.* at 181.

<sup>33</sup> *Tobe v. City of Santa Ana*, 32 *Cal. App. 4th* 941, 948 (1994).

<sup>34</sup> *Mass. Gen. L.Ch.* 272§63 (1992).

<sup>35</sup> *Ala. Code* §13-A-11-9 (a) (1) (West 1994).

<sup>36</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1558 (1992).

<sup>37</sup> *Id.* at 1560.

<sup>38</sup> *Id.* at 1567.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 1571.

<sup>41</sup> *Id.* at 1560.

<sup>42</sup> Randal C. Archibold, *Please Don’t Feed Homeless in Parks, Las Vegas Says in Ordinance*, *N.Y. TIMES*, July 28, 2006.

<sup>43</sup> See *Robinson v. California*, 370 U.S. 660 (1962) (“(T)he Court held that punishment of a person for his involuntary status...was cruel and unusual in violation of the Eighth Amendment.”).

<sup>44</sup> *Pottinger*, 810 F. Supp. at 1558.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 1574.

## ENDNOTES CONTINUED

- <sup>47</sup> 370 U.S. 660 (1962).
- <sup>48</sup> *Id.* at 666.
- <sup>49</sup> 392 U.S. 514 (1968).
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.* at 532.
- <sup>52</sup> *Powell*, 392 U.S. at 551. Justice White in his concurrence voiced concern about whether a *homeless* alcoholic could be punished for public drunkenness without violation of the Eighth Amendment.
- <sup>53</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1565 (1992).
- <sup>54</sup> *Id.* at 1558.
- <sup>55</sup> *Id.* at 1557.
- <sup>56</sup> Benjamin Waxman, *Homeless in Miami*, (ACLU, FL), May 1998 available at <http://www.aclufil.org/about%20/newsletters/1998/ben.cfm/>.
- <sup>57</sup> *Pottinger*, 810 F. Supp. at 1557.
- <sup>58</sup> *Id.*
- <sup>59</sup> *Id.* at 1560.
- <sup>60</sup> *Id.* at 1573.
- <sup>61</sup> *Id.*
- <sup>62</sup> *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).
- <sup>63</sup> *Maryland v. Buie*, 494 U.S. 325, 331 (1990).
- <sup>64</sup> *Wells v. State*, 402 So. 2d 402, 404 (Fla. 1981) (citing *Smith v. Maryland*, 442 U.S. 735 (1979)).
- <sup>65</sup> *Rakas v. Illinois*, 439 U.S. 128, 143-44 n.12 (1979).
- <sup>66</sup> *Id.* (Persons asserting neither a property nor a possessory interest in a vehicle have no legitimate expectation of privacy in property in the glove compartment).
- <sup>67</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).
- <sup>68</sup> 588 A.2d 145 (1991).
- <sup>69</sup> *Id.* at 161 (The court analogized the property inside a homeless person's duffel bag to property behind the locked door of a home).
- <sup>70</sup> *Id.*
- <sup>71</sup> *Id.*
- <sup>72</sup> *Id.*
- <sup>73</sup> *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).
- <sup>74</sup> *Id.*
- <sup>75</sup> *Kolender v. Lawson*, 461 U.S. 352, 361 (1983).
- <sup>76</sup> *See Sawyer v. Sandstrom*, 615 F.2d 311, 318 (5th Cir. 1980) (striking down Dade County's loitering statute as overbroad because it punished innocent associations in violation of first amendment associational rights).
- <sup>77</sup> *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 494 (1982).
- <sup>78</sup> *People v. Davenport*, 176 Cal. App. 3d Supp. 10 (Cal. Super. 1985), cert denied, 475 U.S. 1141 (1986).
- <sup>79</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1577 (1992).
- <sup>80</sup> *Id.*
- <sup>81</sup> *In Edwards v. California*, 314 U.S. 160, 173 (1941), the U.S. Supreme Court struck down California's statute making it a misdemeanor to transport an indigent person into California.
- <sup>82</sup> 394 U.S. 618 (1969).
- <sup>83</sup> *Id.* at 634.
- <sup>84</sup> 415 U.S. 250 (1974).
- <sup>85</sup> *Id.* at 250.
- <sup>86</sup> *Id.* (Memorial Hospital argued that treating the homeless and other indigents over-burdened the tax base of Arizona's taxpayers. The court held that "a state may not protect the public finances by drawing an invidious distinction between classes of its citizens," effectively discriminating by wealth and property); *See Jane B. Baron, "The 'No Property' Problem: Understanding Poverty by Understanding Wealth,"* 102 MICH. L. REV. 1000, (2004).
- <sup>87</sup> *Personnel Administrator v. Feeney*, 442 U.S. 256, 266 (1979).
- <sup>88</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985).
- <sup>89</sup> *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984).
- <sup>90</sup> *Monroe v. Pape*, 365 U.S. 167 (1961).
- <sup>91</sup> *Id.*
- <sup>92</sup> *Id.*
- <sup>93</sup> *Id.* at 170.
- <sup>94</sup> *Id.* at 192.
- <sup>95</sup> *Monell v. City of New York Dept. of Soc. Svcs.*, 436 U.S. 658, 659 (1978).
- <sup>96</sup> *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988).
- <sup>97</sup> *Id.*
- <sup>98</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1561 (1992).
- <sup>99</sup> *Id.*
- <sup>100</sup> 383 U.S. 663 (1966).
- <sup>101</sup> *Id.* at 668.
- <sup>102</sup> *Feeney*, 442 U.S. at 266.
- <sup>103</sup> *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985)
- <sup>104</sup> *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).
- <sup>105</sup> Christina Victoria Tusan, *Homeless Families from 1980 – 1996: Casualties of Declining Support for the War on Poverty*, 70 S. CAL. L. REV. 1141, 1169 (1997).
- <sup>106</sup> *Id.*
- <sup>107</sup> *Lyng*, 477 U.S. at 638.
- <sup>108</sup> *Id.*
- <sup>109</sup> *Pottinger v. Miami*, 810 F. Supp. 1551, 1584 (1992).
- <sup>110</sup> *Id.*
- <sup>111</sup> Waxman, *supra*, note 56.
- <sup>112</sup> Waxman, *supra*, note 56.
- <sup>113</sup> *Ft. Lauderdale Learns a Lesson from Miami in Dealing with the Homeless*, LAW ENFORCEMENT NEWS (John Jay College of Criminal Justice, New York, N.Y.), May 2000, available at <http://ci.ftlaud.fl.us/police/homeless3.html> (last visited Mar. 19.2007)
- <sup>114</sup> *Id.*
- <sup>115</sup> America's largest religions all urge their followers to a commitment to the less fortunate.
- "A Muslim asserts his/her belief in the merciful and compassionate God by donating money or goods to those less fortunate. This idea is connected to the belief in Islam that all wealth ultimately belongs to God. We have it on loan to be used in God's path to do good deeds in this life." Dr. James Pavlin, "An Islamic View on Caring For Those in Need," IRF Newsletter #51-Spring 2003.
- "The Jewish community has historically seen itself responsible to feed and house the hungry and the homeless. In fact in Hebrew there is no word for charity. Rather, the caring for those in need is called Tzedaka, a derivative of the Hebrew term for righteousness." Rabbi N. I. Barowitz, "A Jewish View on Hunger and Homelessness," IRF Newsletter.
- "When we give to others without any desire or expectation, when we let go of our attachments, we find ourselves relieved of the complications that worldly possessions often bring with them. This means while charity can be done for religious purposes, it should be done because the individual enjoys helping others and the benefits are self-satisfying." Netta Mehta, "A Hindu View on Hunger and Homelessness," IRF Newsletter #48-May/June 2002
- "The Gospel call to be close to Christ who is "homeless" is an invitation to all the baptized to examine their own lives, and to trust their brothers and sisters with practical solidarity by sharing their hardships. By openness and generosity, as a community and as individuals, Christians can serve Christ present in the poor and bear witness to the Father's love." 1997 Lenten Message from Pope John Paul II.