

10-2019

The De-Criminalization of Homelessness

Seth Lemings

Follow this and additional works at: <https://scholarship.law.uci.edu/ucilr>



Part of the [Law Commons](#)

Recommended Citation

Seth Lemings, *The De-Criminalization of Homelessness*, 10 U.C. IRVINE L. REV. 287 (2019).
Available at: <https://scholarship.law.uci.edu/ucilr/vol10/iss1/9>

This Note is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Law Review by an authorized editor of UCI Law Scholarly Commons.

THE DE-CRIMINALIZATION OF HOMELESSNESS

Seth Lemings*

INTRODUCTION	287
I. THE STATISTICS.....	288
A. PITs	289
B. HMIS and Other Data.....	289
II. THE CRIMINALIZATION OF THE HOMELESS.....	291
A. Case Law Background	291
B. The Municipal Code of Santa Ana.....	295
C. Other Examples of the Criminalization of the Homeless.....	296
D. Orange County Policy Regarding the Santa Ana Riverbed.....	300
E. Individual Accounts of Criminalization Under Orange County Policy	302
III. THE DE-CRIMINALIZATION OF THE HOMELESS.....	304
A. Recent Judicial Action	304
B. Local Initiatives.....	306
1. Fourth and Eighth Amendment Challenges.....	306
2. Legislative Changes to the Code and Changes in Police Practices	307
C. Housing-First Model.....	309
CONCLUSION	313

INTRODUCTION

This Note seeks to explore the issue of homelessness in Santa Ana, California, and in Orange County, California. This Note proposes solutions to both the current criminalization of the homeless by city law enforcement and to the shortage of housing options for the homeless.

This Note will begin with an outline of the statistical findings relating to the homeless population in Orange County. These findings demonstrate that homelessness is an increasingly problematic issue in Orange County. This Note will then lay out the underlying constitutional jurisprudence relating to the issue of homelessness and the mandates of the status crimes doctrine. Subsequently, this

Note will look at the Municipal Code of Santa Ana as an illustration of a currently problematic scheme for regulation of the homeless population. Finally, this Note will outline and evaluate approaches that have been and are being used in Orange County and in other cities that are facing issues relating to homelessness. This Note's goal is to recommend some of these strategies utilized by other cities for implementation in Santa Ana and Orange County to end or lessen the criminalization of the homeless.

I. THE STATISTICS

To establish that the issue of homelessness is becoming increasingly problematic in Santa Ana and Orange County, it is helpful to look at available statistics on the prevalence of homelessness and characteristics of those who are homeless.

The first step in analyzing such data is understanding who can be considered "homeless" for the purpose of the study. Borrowing from the *Orange County Ten-Year Plan to End Homelessness*, a "homeless" individual can be defined as

"[a] person . . . [who] lacks a fixed, regular, and adequate nighttime residence and sleeps in a variety of places not fit for human habitation or meets certain other requirements. Homeless persons include, but are not limited to, those sleeping in: [c]ars, parks, campgrounds, sidewalks, railroad tracks, alleys, storm drains, freeway underpasses, abandoned buildings, [] [e]mergency shelters, or [t]ransitional housing for homeless persons who originally came from the streets or emergency shelters."¹

In compiling data to understand the extent of homelessness in Orange County, two main sources play a role. First, the Point-In-Time Homeless Count and Survey (PIT), is a federally mandated program used to identify the number of homeless individuals at a single point in time during the last ten calendar days of January every two years.² This study requires a large number of people to count every visible homeless individual. Second, the Orange County Homeless Management Information System (HMIS) "tracks client demographic and service information on homeless and at risk clients served by participating Orange County service providers."³ HMIS is a comprehensive system that seeks to count the number of homeless individuals, describe the nature and attendant circumstances of

* B.S. 2015, Biola University; J.D. 2019, University of California, Irvine School of Law. I would like to thank my wife Annie for her constant support throughout all of my studies and the writing of this paper.

1. ORANGE CTY. TEN YEAR PLAN WORKING GRP., ORANGE COUNTY TEN-YEAR PLAN TO END HOMELESSNESS 8–9 (2012), <http://ochmis.org/documents/10YrPlan.pdf> [<https://perma.cc/ME8E-8XX4>].

2. *Id.* at 25.

3. *About HMIS*, ORANGE COUNTY HOMELESS MGMT. INFO. SYS., <http://ochmis.org/about-hmis/> [<http://ochmis.org/about-hmis/>] (last visited Sept. 29, 2019).

homelessness, analyze how the homeless are using available services and programs, and gauge the success of services available to the homeless.⁴ To accomplish its goals, HMIS collects demographic and personal identifying information and records this information into a database used by current and future service providers.

A. PITs

Looking at the most recent PIT survey, which was conducted in 2017, the number of homeless individuals in Orange County has increased 7.6% since the last PIT study was conducted in January 2015 (12.72% since the 2013 PIT study).⁵ In numeric terms, the population has increased from 4251 in 2013, to 4452 in 2015, and to 4792 in 2017. The PIT study was further broken down by type of shelter. In the 2017 PIT study, 53.9% of homeless individuals counted were unsheltered, and the remaining 46.1% were sheltered in some way. Of those homeless individuals who were sheltered, 56.5% were housed in emergency shelters, and the remaining 43.5% were housed in transitional shelters.⁶ Emergency shelters for the purposes of the PIT study include a “short-term stay.”⁷ These emergency shelters are generally limited to ninety-day stays and come with some services.⁸ On the other hand, transitional housing programs usually offer longer term stays and more supportive services.⁹ Transitional housing can be defined as “[a] project that is designed to provide housing and appropriate supporting services to homeless persons to facilitate movement to independent living within [twenty-four] months as defined by [the Department of Housing and Urban Development].”¹⁰

The exact number of homeless individuals in the county is difficult to ascertain, since a factor as simple as the weather may have a large impact on the results of this test. However, even the raw data is enough to demonstrate that homelessness is a rapidly growing issue in Orange County.

B. HMIS and Other Data

HMIS is able to provide key information apart from statistics solely focused on the homeless population. For example, reports have been compiled in HMIS

4. *Id.*

5. *Orange County Point in Time Count 2017*, CTY. OF ORANGE, <http://www.ocgov.com/civicax/filebank/blobdload.aspx?BlobID=64596> [https://perma.cc/479S-82PZ] (last visited Sept. 29, 2019).

6. *Id.*

7. Tracey Bennett et al., Focus Strategies, *Orange County Continuum of Care: 2017 Homeless Count & Survey Report*, 2-1-1 ORANGE COUNTY 16 (July 2017), <http://ochmis.org/wp-content/uploads/2012/10/PIT-Final-Report-2017-07.24.17.pdf> [https://perma.cc/3VGF-SR3Q].

8. *Id.* at 34.

9. 24 C.F.R. § 91.5 (2019).

10. Tracey Bennett et al., *supra* note 7, at 35.

about the inventory of beds available for homeless individuals in Orange County.¹¹ This data is broken down and analyzed in many different ways including family status, “chronic” status, veteran status, and age. Furthermore, the total inventory of beds is broken down by bed provider, which conveniently provides a list of programs working to house the homeless in Orange County.¹²

Apart from database findings, it is also helpful to consider some statistics provided by programs that have been interacting with the homeless community and working to provide housing and services. These statistics provide a clear picture of the costs of homelessness as well as the benefits of getting homeless individuals housed. According to David Snow, a Distinguished Professor of Sociology at the University of California, Irvine, Orange County spends \$299 million annually on its homeless population.¹³ Further, the cost to leave the top ten percent (10%) of the homeless on the streets is approximately \$440,000 per person in that category per year.¹⁴ In contrast, the most costly 10% of individuals that were housed and given additional services cost about \$55,000 per person per year.¹⁵ Costs can also be broken down by whether the individual is “chronically” homeless. “The estimated average annual cost of services per capita for permanent supportive housing clients is [fifty percent] lower than for the chronically street homeless (\$51,587 versus \$100,759).”¹⁶ Criminal and health related costs also decline steeply when individuals are housed.¹⁷

This data illustrates several crucial points. First, the problem of homelessness is rising in Orange County. Second, as mentioned below, there are many housing providers seeking to contribute to the solution of homelessness through the providing of beds, homeless housing developments, affordable housing development, and services. Third, the benefits of housing homeless individuals are not limited to keeping sidewalks, alleys, and other public areas clear. Rather, the benefits relate to medical costs, housing costs, law enforcement costs, and more. With these findings in mind, it is also easy to see how issues surrounding the criminalization of the homeless and provision of housing for the homeless are taking on increasing importance as the homeless population continues to grow.

11. HUD 2017 Continuum of Care Homeless Assistance Programs Housing Inventory Count Report, U.S. DEP'T OF HOUS. & URBAN DEV. EXCH. 1 (2017), https://www.hudexchange.info/resource/reportmanagement/published/CoC_HIC_CoC_CA-602-2017_CA_2017.pdf [<https://perma.cc/923D-VXKV>].

12. *Id.*

13. DAVID A. SNOW & RACHEL E. GOLDBERG, ORANGE COUNTY UNITED WAY, HOMELESSNESS IN ORANGE COUNTY: THE COSTS TO OUR COMMUNITY 6 (2017), <https://www.unitedwayoc.org/wp-content/uploads/2017/08/united-way-cost-study-homelessness-2017-report.pdf> [<https://perma.cc/J78R-Y6A5>].

14. *Id.* at 8. Note that the “top 10%” refers to those homeless individuals who have accrued the most costs for the county in dealing with their homelessness and attendant circumstances.

15. *Id.*

16. *Id.* at 8.

17. *Id.* at 7.

II. THE CRIMINALIZATION OF THE HOMELESS

The criminalization of the homeless refers to the phenomenon occurring in Santa Ana, California, Orange County, California, and other cities around the nation where homeless individuals are punished criminally for “status crimes” that are an unavoidable consequence of being homeless.¹⁸

A. Case Law Background

Status crimes were first mentioned by the Supreme Court of the United States in *Robinson v. California*.¹⁹ In that case, the focus was on a California statute that imposed criminal penalties on anyone “addicted to the use of narcotics.”²⁰ Specifically, the statute stated that “[n]o person shall use, or be under the influence of, or be addicted to the use of narcotics.”²¹ The legislation went on to penalize violators of this section with a misdemeanor and between ninety days and one year in jail.²² The charges against the defendant were based on an officer’s observation of scar tissue and other marks on the defendant’s arm.²³ At no time did the officer witness the defendant using drugs, but rather, the charges were based on the officer’s understanding of what drug use and addiction looked like. The jury was instructed that the defendant could be convicted “if they found simply that the appellant’s ‘status’ or ‘chronic condition’ was that of being ‘addicted to the use of narcotics.’”²⁴ Ultimately, the Supreme Court read the California statute as one criminalizing status crimes, of which an individual could be charged “at any time before he reforms.”²⁵ The Court distinguished such status crimes from “conduct” crimes where an individual takes a willful, freely chosen action. Moving forward, the *Robinson* decision stands for the idea that punishment of a status that an individual can come to assume “innocently or involuntarily” is a violation of the Eighth Amendment prohibition against cruel and unusual punishment, whereas punishment of “conduct” crimes is permissible.²⁶

A later Supreme Court case, *Powell v. Texas*, applied the *Robinson* ruling in another context.²⁷ Powell was charged with being found in a state of intoxication in a public place.²⁸ This conduct violated the Texas Penal Code which stated in relevant part that “[w]hoever shall get drunk or be found in a state of intoxication

18. *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006).

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

20. *Id.* at 662-63.

21. *Id.* at 660 n.1 (citing CAL. HEALTH & SAFETY CODE § 11721).

22. *Id.*

23. *Id.* at 661.

24. *Id.* at 665.

25. *Id.* at 666.

26. *Id.* at 667. Note that the Court extended Eighth Amendment protection to the states by operation of the Fourteenth Amendment.

27. *Powell v. Texas*, 392 U.S. 514 (1968).

28. *Id.* at 517.

in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars.”²⁹ The Court distinguished this case from *Robinson*, finding that the criminalization here was not status-based but related to the fact that the individual in question was in public while he was drunk. The Court found the state to have criminalized public behavior that could create “substantial health and safety hazards.”³⁰ While a plurality of the Court found the statute did not punish a status crime, the reasoning revolves around the definitions of, and scientific basis for, alcoholism and its effects on an individual’s volition. Therefore, despite the holding in *Powell*, *Robinson* is still good law and states are prohibited from arresting and charging individuals with criminal activity that they cannot avoid due to their “status.”³¹

In discussing the issue of criminalizing homelessness as a status, Edward J. Walters writes about the status offense doctrine as it evolved through the *Robinson* and *Powell* decisions.³² Walters notes that the Supreme Court’s analysis in *Powell* tried to limit the operation of *Robinson* by refusing to apply the status crimes doctrine to acts.³³ *Robinson* held that punishing an individual based on status, apart from any criminal act, amounted to a per se violation of the Eighth Amendment as cruel and unusual punishment.³⁴ Walters writes that the decision in *Powell* created a very narrow reading of *Robinson*, such that “if the defendant committed an act, even one so unobtrusive as going outside, that defendant forfeited any Eighth Amendment protection under *Robinson*’s status crimes doctrine.”³⁵ However, the problem with this rationale as it applies to the issue of homelessness is that the homeless are often outside since they lack private dwellings. They are in “the public” in most cases, and thus any reliance on Eighth Amendment protection could become misplaced under such a narrow reading of *Robinson* and *Powell*. Considering the concurrences and dissents in the case, a majority of the Court rejected this narrow construction of *Robinson*.³⁶ In the end, Walters notes that due to the Court

29. *Id.*

30. *Id.* at 532.

31. An example of status crimes are the laws that were referred to in the 19th and 20th Century as “Ugly Laws” in the United States. These laws aimed to reduce begging by the disabled but did so indirectly. For example, Chicago’s law stated, “[a]ny person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly or disgusting object, or an improper person to be allowed in or on the streets, highways, thoroughfares or public places in this city shall not therein or thereon expose himself or herself to public view under penalty of one dollar for each offense.” SUSAN M. SCHWEIK, *THE UGLY LAWS: DISABILITY IN PUBLIC* 1-2 (2009).

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

33. *Id.* at 1620.

34. *Id.* at 1621.

35. *Id.* at 1625.

36. *Id.* at 1626.

split in the *Powell* case, *Robinson* remains binding authority for cases dealing with criminalizing the status of homelessness.³⁷

Another important case regarding the criminalization of the homeless is *Jones v. City of Los Angeles*, decided by the Ninth Circuit Court of Appeals in 2006.³⁸ The named plaintiffs were all homeless individuals who lacked shelter and resided in the Skid Row area of Los Angeles.³⁹ The Ninth Circuit noted, “Skid Row has the highest concentration of homeless individuals in the United States.”⁴⁰ In fact, at the time of the holding, there were approximately 50,000 more homeless people than available beds for them to use each night in Los Angeles County.⁴¹ Additionally, the financial assistance available to these individuals was inadequate and the waitlist for certain housing benefits was up to ten years in some cases.⁴²

With these facts in mind, the court considered the constitutionality of Los Angeles Municipal Code Section 41.18(d) as applied to the homeless population of the city during nighttime hours. This Section provided, “No person shall sit, lie or sleep in or upon any street, sidewalk or other public way.”⁴³ Among all such similar laws in cities across the United States, the Los Angeles Code was uniquely harsh in its application as it did not come with mitigating qualifiers such as hours of applicability, conduct requirements, or zones of regulation. Rather, the Los Angeles Code was broadly applicable to anyone “who merely sits, lies, or sleeps in a public way at any time of day.”⁴⁴ Individuals were searched, ordered to leave, ticketed, arrested, charged, and occasionally convicted under the Code for doing nothing other than being visibly homeless.

The court found that the ordinance violated the Eighth Amendment and concluded that “the state may not make it an offense to be idle, indigent, or homeless in public places. Nor may the state criminalize conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets of Los Angeles’s Skid Row.”⁴⁵ The rule of this case was that as long as there was a deficit in the number of beds available to needy homeless individuals, the City could not in the future enforce the Municipal Code section in question.⁴⁶

37. *Id.* at 1627.

38. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1118 (9th Cir. 2006).

39. *Id.* at 1120.

40. *Id.* at 1121.

41. *Id.* at 1122.

42. *Id.*

43. *Id.* at 1123.

44. *Id.*

45. *Id.* at 1137.

46. *Id.* at 1138. Note that the holding in this case was subsequently vacated because the parties to the case settled. Though the holding may no longer have the force of law, it is still valuable for homelessness advocates, and those seeking policy reform relating to the decriminalization of the homeless and housing availability for the homeless.

A final case worth mentioning is *Tobe v. City of Santa Ana*, decided by the Supreme Court of California in 1995.⁴⁷ The underlying ordinance in this case was the Santa Ana Municipal Code Article VIII, Section 10-400 et seq.⁴⁸ The relevant code sections follow. Section 10-402 then stated, “It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided: (a) any street; (b) any public parking lot or public area, improved or unimproved.”⁴⁹ Section 10-403 stated, “It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as provided by resolution of the City Council: (a) any park; (b) any street; (c) any public parking lot or public area, improved or unimproved.”⁵⁰ Plaintiffs in this case were homeless, and they alleged and provided evidence that, beginning in 1988, the City of Santa Ana had acted on the problem of homelessness through an affirmative program meant to rid the city of its homeless population. The methods employed included frequent police activity to move the individuals to different locations, strict policing of the smallest of offenses, taking and destroying possessions, frequently arresting and releasing individuals in different locations, and other forms of discriminatory enforcement.⁵¹

The California Supreme Court found that the code sections punished on the basis of conduct rather than status and were therefore permissible. Troubling was the court’s finding that homelessness likely should not even be considered a status.⁵² Therefore, the justices essentially doubted whether a status crime could ever be committed against someone based on their homelessness. If this holding were to have force, it would end all Eighth Amendment claims under a status crimes theory. Finally, the ruling cast doubt upon whether the homeless plaintiffs in this case could bring a status crime claim even if homelessness was to be considered a status. In the court’s opinion, it was likely the case that the plaintiffs had the opportunity to avoid homelessness through alternative life choices.⁵³

The view taken by the *Tobe* court—that homelessness is not a status worthy of recognition—is very damaging to the homeless community. This view holds that the homeless are not entitled to legal help or assistance because any trouble that they are facing is a result of their own bad choices. However, time has shown that rising housing costs, low wages, and lack of effective services make homelessness unavoidable for some. In the decade between the decisions in *Tobe* and *Jones*, affordable housing efforts and the rate of homelessness continued to proliferate. As

47. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069 (1995).

48. *Id.* at 1080.

49. *Id.* at 1081.

50. *Id.*

51. *Id.* at 1082.

52. *Id.* at 1105 (stating that “[a]s an analytical matter, more fundamentally, homelessness is not readily classified as a ‘status’”).

53. *Id.*

the homeless community grows, the approach taken by the court in *Tobe* grows outdated.

This case law serves as the background upon which the current struggle against homelessness must be evaluated. In fighting against the decision in *Tobe*, advocates for the homeless community are increasingly pushing for a recognition of homelessness as a status, and a recognition that this status is being criminalized. Additionally, as discussed below, U.S. District Court Judge David Carter, who is presiding over current litigation relating to homelessness in Orange County, seems to agree with this philosophy. During the course of the litigation, Judge Carter has pushed local lawmakers to come up with alternatives to criminalizing the homeless. However, despite positive current trends and case law that forbids criminalization based on status, the city codes and municipal ordinances of many Orange County cities are plagued by harmful and problematic language, as illustrated below. What follows is a brief look at the municipal code of Santa Ana, which is representative of other municipal codes that are mentioned throughout this Note.

B. The Municipal Code of Santa Ana

As mentioned in the discussion above of *Tobe v. City of Santa Ana*, the Santa Ana Municipal Code contains multiple provisions that are problematic for homeless individuals. In addition to Sections 10-402 and 10-403 mentioned above, other sections are similarly disadvantageous to the homeless community. For example, Section 10-550 bars living or staying in the Civic Center, stating in relevant part that “[n]o person shall camp in the Civic Center.”⁵⁴ Many people who are homeless in Santa Ana have been disadvantaged by such laws because they have congregated in the open spaces downtown, such as in the Civic Center.

Other sections of the Municipal Code prove problematic for homeless individuals, including regulations relating to garbage (Section 16-1 prohibits any placing, depositing, or dumping of any trash in “any public or private alley or street, or in or upon any public or private property or watercourse within the city, or cause the same to be done, except in such places and in the manner prescribed by the council”);⁵⁵ regulations relating to drunkenness (Section 31-2-1 prohibits all persons from having or drinking alcoholic beverages in a park; also prohibiting any

54. SANTA ANA, CAL., ORD. § 10-550(d) (2019), https://library.municode.com/ca/santa_ana/codes/code_of_ordinances?nodeId=PTIITHCO_CH10CRMILAENPR_ARTXCICERE_S10-550CACICE [<https://perma.cc/FK9R-38MY>] (dealing with camping in the Civic Center which has become a primary encampment for homeless individuals in Santa Ana).

55. SANTA ANA, CAL., ORD. § 16-1 (2019), https://library.municode.com/ca/santa_ana/codes/code_of_ordinances?nodeId=PTIITHCO_CH16GATRWE [<https://perma.cc/VG5C-M92Q>].

intoxicated person from entering or remaining in a park);⁵⁶ regulations relating to animals or pets (Section 5-76 requires dogs have access to buildings with weatherproofing, level flooring, clean bedding, sanitary conditions, free of waste and parasites);⁵⁷ and regulations relating to shopping carts (Section 33-211 describes shopping carts removed from shopping centers as nuisances needing abatement).⁵⁸ Each of these code sections penalize crucial aspects of many homeless individuals' lives. As Walters noted, when faced with laws that criminalize a status, the subject individual is left with a choice: either obey the law and die or break the law and risk arrest.⁵⁹

C. Other Examples of the Criminalization of the Homeless

According to the National Coalition for the Homeless, there are many ways that the homeless community can be criminalized; however, some are more prevalent than others. For example, methods frequently used to criminalize the homeless include: (1) performing police sweeps in city areas known to house homeless individuals, (2) criminalizing panhandling, (3) criminalizing food-sharing with homeless persons in public spaces through municipal codes, and (4) “[e]nforcing a ‘quality of life’ ordinance relating to public activity and hygiene.”⁶⁰ The Coalition notes that these anti-homeless regulations are most typically challenged under theories of First Amendment free speech rights, Fourth Amendment prohibition against unreasonable searches and seizures, Eighth Amendment prohibition on cruel and unusual punishment, and Fourteenth Amendment requirements of due process (prohibiting vague laws).⁶¹

First, regarding police sweeps in city areas known for homelessness, lawsuits have recently been filed in the United States District Court for the Central District of California seeking to end Orange County’s practice of sweeping homeless camps and evicting individuals.⁶² Specifically, plaintiffs in this case allege that a handful of Orange County cities have taken affirmative steps to remove the homeless

56. SANTA ANA, CAL., ORD. § 31-2-1 (2019), https://library.municode.com/ca/santa_ana/codes/code_of_ordinances?nodeId=PTIITHCO_CH31REPAPL_S31-2.1ALDR [https://perma.cc/87W9-RB5X].

57. SANTA ANA, CAL., ORD. § 576(a) (2019), https://library.municode.com/ca/santa_ana/codes/code_of_ordinances?nodeId=PTIITHCO_CH5AN [https://perma.cc/WD3S-3BHS].

58. SANTA ANA, CAL., ORD. § 33-211 (2019), https://library.municode.com/ca/santa_ana/codes/code_of_ordinances?nodeId=PTIITHCO_CH33STSIPUWO_ARTIXSHCARE_S33-211FIPU [https://perma.cc/FT2Z-KAB8]. Note that shopping cart laws such as this can be classified as “quality of life” crimes, which are discussed in more detail below.

59. See Walters, *supra* note 32, at 1620.

60. *Issues: Criminalization*, NAT'L COALITION FOR HOMELESS, <http://nationalhomeless.org/issues/civil-rights/> [https://perma.cc/L5SM-R3UE] (last visited Sept. 29, 2019).

61. *Id.*

62. Complaint, Orange Cty. Catholic Worker v. Orange County, No. 8:18-cv-00155 (C.D. Cal. Jan. 29, 2018), <https://www.courtlistener.com/recap/gov.uscourts.cacd.699754/gov.uscourts.cacd.699754.1.0.pdf> [https://perma.cc/XXM2-MHUH].

population from the Santa Ana riverbed area.⁶³ Additionally, the plaintiffs' brief argues that a primary method of achieving the cities' goal of removing the homeless is through "seizing and destroying homeless people's property" and through chasing them out of town, whether that be Santa Ana, Anaheim, Costa Mesa, or any other town.⁶⁴ Time has shown, the plaintiffs argued, that the only sure thing in this fight against homelessness is that the cities of Orange County will take quicker action to increase police enforcement against the homeless than they will to get the homeless housed or rehabilitated. This sentiment was echoed by Samir Junejo from the Seattle University School of Law Homeless Rights Advocacy Project, who wrote: "[T]oo many local governments are focused on ending the visibility of homelessness rather than on ending homelessness itself."⁶⁵ These types of sweeps are incredibly destructive and disruptive to homeless individuals and do not necessarily lead to the "swept" individuals living in shelters.⁶⁶

Second, laws can work to target the homeless population by criminalizing the act of panhandling, which can be necessary to survival for individuals without income. When the focus of panhandling laws is on "aggressive" panhandling, they are usually upheld.⁶⁷ The League of Cities has argued that for panhandling laws to have their intended effect, cities need to be actively discouraging individuals from giving money to panhandlers.⁶⁸ Essentially, this guidance would have a similar effect to that of the anti-food-sharing laws mentioned in the next paragraph. Although there would be no criminalization of individuals for giving money to panhandlers, these individuals could still be effectively deterred from giving to the homeless through "public education."⁶⁹ Cities in Orange County have also adopted similar

63. *Id.* at 3.

64. *Id.* at 7. For a more comprehensive look at what has occurred in Santa Ana, refer to the section below on case studies relating to Santa Ana and Orange County which contains more details on the issue of "sweeps" being conducted on homeless encampments.

65. Samir Junejo et al., *No Rest for the Weary: Why Cities Should Embrace Homeless Encampments*, SEATTLE UNIV. SCH. OF LAW, HOMELESS RIGHTS ADVOCACY PROJECT 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776425 [<https://perma.cc/2FY4-FHSC>].

66. Heidi Groover, *City Officials Admit Homeless Encampment Sweeps Fail to Get Most People Into Shelter*, STRANGER (Jan. 19, 2016), <https://www.thestranger.com/blogs/slog/2016/01/19/23446636/city-officials-admit-homeless-encampment-sweeps-fail-to-get-most-people-into-shelter> [<https://perma.cc/HX24-D4SK>].

67. *L.A. Alliance for Survival v. City of Los Angeles*, 22 Cal. 4th 352, 379 (2000) (upholding the city's aggressive panhandling laws on First Amendment grounds); *see* L.A., CAL., MUN. CODE § 41.59 (2001) (prohibiting any person from "solicit[ing], ask[ing], or beg[ging] in an aggressive manner in any public place"); BERKELEY, CAL., MUN. CODE § 13.37.020 (1994) (prohibiting solicitation "in any public place . . . [in any manner which coerces, threatens, hounds, or intimidates the person solicited . . . [w]ithin ten feet of any automatic teller machine in the City").

68. MARCO A. MARTINEZ & CHRISTINE DIETRICK, LEAGUE OF CAL. CITIES, ENFORCEMENT OF AGGRESSIVE PANHANDLING AND LOCAL CAMPING AND SLEEPING ORDINANCES 14 (2013), <https://www.cacities.org/UploadedFiles/LeagueInternet/63/632f0c5c-aea1-45a9-80f7-3ad21373582d.pdf> [<https://perma.cc/LV8J-TYK6>].

69. *Id.* at 2. Note that the League does not give any indication of what this public education should look like, but it seems easy to imagine that any such program would likely have a public shaming

laws.⁷⁰ Ultimately, if the homeless need to eat to live, they are at some point going to need money to buy that food, and for various reasons, employment may not be available. As a result, such anti-panhandling laws may cause the impermissible choice that has already been mentioned: obeying the law and dying or disobeying the law and getting arrested.

Third, another destructive source of criminal law relating to homelessness is the criminalization of those who would seek to assist the homeless through food distribution. Law professor Marc-Tizoc González takes an in-depth look at the history and current practices that criminalize food distributors.⁷¹ González's discussion provides analysis of the Santa Monica Municipal Code and its treatment of food distribution. Specifically, Section 5.06.020 restricted passing out food on the public streets and sidewalks,⁷² and Section 5.06.010 required compliance with permitting and approval requirements.⁷³ The effect of these codes was to criminalize the actions of good Samaritans who could only meet and assist the homeless community in public places like the streets and sidewalks. As seen with other criminalizing laws, the true motive of punishing the homeless is masked by a pretextual motive of clearing the streets for public safety. In this case, the plaintiffs were a collection of organizations and individuals dedicated to feeding the poor and

aspect for those desiring to give money to panhandlers. Also, it is important to note, for purposes of this research, the League's finding that there is no known correlation between panhandling and homelessness. This means that even though this sort of legislation doubtlessly impacts some homeless individuals, the impacts are also likely felt by a large number of people who have never been homeless. Therefore, this sort of statute may be less problematic than similar types of laws relating to camping, sleeping, public urination or defecation, and other laws already mentioned relating to pets, bicycles, etc.

70. ORANGE, CAL., MUN. CODE § 9.34.020 (2019); TUSTIN, CAL., MUN. CODE § 5831 (2019); COSTA MESA, CAL., MUN. CODE § 11-178 (2019); ANAHEIM, CAL., MUN. CODE § 7.30.030 (2019).

71. Marc-Tizoc González, *Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?*, 7.2 UC IRVINE L. REV. 291 (2017) [hereinafter González, *Criminalizing Charity*]. Note also that González has noted elsewhere the circuit split in the United States regarding the issue of anti-food sharing laws. Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23:2 J. GENDER, SOC. POLY & L. 231, 259–60 (2015).

72. *Id.* at 313 (citing SANTA MONICA, CAL., MUN. CODE § 5.06 (amended Feb. 24, 2004) which states, “[n]o person shall distribute or serve food to the public on a public street or sidewalk without City authorization . . . Any person violating this Section shall be guilty of a misdemeanor which shall be punishable by a fine not exceeding one thousand dollars per violation, or by imprisonment in the County Jail for a period not exceeding six months, or by both such fine and imprisonment.”).

73. *Id.* Here the Code states, “Persons who serve or distribute food to the public in City parks or on the City Hall lawn must comply with: (a) Applicable State health and safety standards regulating food service and distribution, including, but not limited to, the requirements of obtaining and displaying a valid permit from the Los Angeles County Department of Health for distributing food at a location approved by the City pursuant to State guidelines administered by Los Angeles County and guidelines adopted by the City; (b) All applicable requirements of the City of Santa Monica’s Community Events Law; and (c) The City’s Park Maintenance Code, which protects park facilities and foliage and ensures that the parks are a shared resource available to all members of the public.”

homeless of Santa Monica.⁷⁴ Ultimately, the plaintiffs' challenge to the code sections was effective and resulted in a change to the Santa Monica Code that mooted their arguments.⁷⁵

González argues that whether the public seeks to help the homeless for political reasons or for religious reasons, each camp should be allowed under First Amendment protections to continue its work unbothered by criminalization under the Municipal Code.⁷⁶ Specifically, González calls on city legislatures to embrace the “charity” or “solidarity” motives put forward by religious and political activists and allow the community to be part of the solution for a problem that is only becoming more serious through inequitable police enforcement.⁷⁷

Fourth, “quality of life” ordinances are those that bring additional police enforcement to small crimes that normally would not receive this strict of treatment.⁷⁸ Crimes falling under this category can include vagrancy laws; anti-camping, anti-solicitation, and anti-sitting/lying ordinances; and shopping cart ordinances. The purpose of such laws is to ensure a certain standard of life for the public of the city where the ordinance is passed. In some cases, the ordinance involved may even relate to hygiene.⁷⁹ As with other laws that have been mentioned in this Note, these ordinances may leave the members of the homeless community without the ability to obey the law. For example, homeless individuals—both sheltered and unsheltered—may need a shopping cart to transport their property; may need to use the restroom without access to facilities; may not have frequent opportunities to bathe; may have nowhere else to live but within the public's view; and may need money for food. Quality of life laws that work to take away shopping carts, punish public urination,⁸⁰ criminalize poor hygiene, and/or prohibit panhandling may restrict activities that are essential to the homeless individual's life.

Advocates attempting to come up with strategies to end the criminalization of the homeless face innumerable issues and ordinances that address a wide range of human activity. Accordingly, the approaches needed will change in each geographical area as the issues facing each city are unique. To apply this idea to the current situation in Santa Ana, it is helpful to consider a comprehensive

74. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1030–31 (9th Cir. 2006).

75. *Id.* at 1032 (resulting in the plaintiffs being able to distribute food as desired).

76. González, *Criminalizing Charity*, *supra* note 71, at 339.

77. *Id.*

78. *Issues: Criminalization*, *supra* note 60.

79. *Id.*

80. Note that I am mainly thinking about individuals in areas like the Santa Ana riverbed, where, for all intents and purposes, the individual's public urination does not have the same impact as that of someone on a city street. It is hard to imagine how enforcement of such a law against a homeless individual residing out of the public eye, such as in the Santa Ana riverbed, serves any purpose of improving the quality of life of the general public.

narrative of what has been occurring there and what the legislative, judicial, and advocacy responses have looked like.

*D. Orange County Policy Regarding the Santa Ana Riverbed*⁸¹

The circumstances in Santa Ana must be set against a backdrop of an increasing lack of affordable housing, a stale working wage for many in Orange County, a lack of effectiveness in legislative responses to these problems, and a rise in police enforcement in areas known to be home to the homeless.⁸² As a beginning note, petitioners' brief in the recent Orange County litigation has stated that "the primary response of the County and the Cities has been to invest in approaches that address the visible presence of homeless people as a blight, without significantly reducing the number of residents on the street each night."⁸³ To this end, the cities have criminalized the homeless through city ordinances prohibiting loitering and sleeping in public at night, and physical action has been taken by seizing and disposing of personal property.⁸⁴

The issues affecting the Santa Ana riverbed began in earnest in February 2017 when *Schuler v. County of Orange* was settled.⁸⁵ As a result of that case, the county agreed to stop all practices that were violating the constitutional rights of individuals living in the Santa Ana riverbed.⁸⁶ Over the next four months, the city did little to provide basic necessities to those living in the riverbed, and proposals made in June 2017 to provide drinking water, mobile showers, and night access to a public restroom were defeated in order to deter camping in the riverbed.⁸⁷ In certain areas of the riverbed, Santa Ana city officials decided to place large, jagged rocks where tents used to sit to dissuade the homeless community from sleeping there.⁸⁸ On multiple occasions, Orange County and cities within the county have vetoed plans to address the deficit in affordable housing, and even those that have been

81. Please note that much the basis for this factual study comes from plaintiffs' brief in the case of *Orange County Catholic Worker v. Orange County* cited above in footnote 62. This brief was filed by a team of attorneys comprising some of the foremost authority on issues of homelessness in Orange County. This team consists of Carol Sobel, Brooke Weitzman, Paul Hoffman, Catherine Sweetser, and more.

82. Complaint, *Orange County Catholic Worker v. Orange County*, No. 8:18-cv-00155, 4-5 (C.D. Cal. Jan. 29, 2018).

83. Complaint, *Orange County Catholic Worker v. Orange County*, No. 8:18-cv-00155, 7 (C.D. Cal. Jan. 29, 2018).

84. *Orange County Catholic Worker*, No. 8:18-cv-00155, at 7.

85. *Schuler v. County of Orange*, No. 8:17-cv-00259 DOC KES (C.D. Cal. Feb. 24, 2017).

86. *Orange County Catholic Worker*, No. 8:18-cv-00155, at 8-9.

87. *Id.* at 9.

88. *Id.* at 10 (citing Jose Ochoa, *County Used Rock Riprap, Sand to Make Santa Ana Riverbank Less Desirable for Occupation*, VOICE OC (Aug. 30, 2017), <https://voiceofoc.org/2017/08/county-used-rock-riprap-sand-to-make-santa-ana-riverbank-less-desirable-for-occupation/> [<https://perma.cc/BAC5-RVVU>]).

committed to providing more housing have failed to materialize on their commitments and goals.⁸⁹

However, what the cities and county were able to do effectively was to coordinate law enforcement departments to come up with cooperative policing schedules and practices to heighten law enforcement in the Santa Ana riverbed.⁹⁰ In October of 2017, the cities began systematically closing different portions of the riverbed for various construction projects.⁹¹ Those who were homeless and unsheltered were then concentrated into a smaller geographic area. As a result of these actions, the area known as the “Injunction Area” under the *Schuler* holding rose steeply in population.⁹² From October 2017 to January 2018, Orange County and the cities of Orange and Anaheim had all hired private security firms to increase enforcement against the homeless in the riverbed.⁹³

Eventually, heightened police enforcement reached the Injunction Area established under *Schuler*. On January 8, 2018, the Orange County Public Works Department gave notice to homeless individuals residing in the Injunction Area that they would be forced to move by January 22, 2018, as the County needed to work on a bike trail.⁹⁴ The work area necessary for the bike trail construction project completely covered *Schuler’s* Injunction Area.⁹⁵ The plan was clear—after construction on the bike path was complete, the Injunction Area would remain off limits to the homeless community.⁹⁶ The plan immediately caused panic for the surrounding cities as they knew they would be forced to deal with the dispersing homeless community.⁹⁷ To abate the threat, the surrounding cities encouraged current citizens and tenants to report any homeless individuals they encountered, and Anaheim flatly barred the homeless from moving into the city.⁹⁸

Other tactics to remove unwanted homeless individuals from the county or cities, besides forced sweeps and evacuations, include “removal of benches that homeless individuals could lawfully sit on, restricting hours of parking to prevent homeless individuals living in their vehicles in the area, increasing police and private security presence, and other tactics to encourage people to leave the county.”⁹⁹

89. *Id.* at 10 (noting alternative plans to build luxury condos and failed attempts to provide more beds at new and existing facilities).

90. *Id.* at 10-11 (noting that throughout September, the county and cities came up with patrol schedules to coordinate the crime management of this area).

91. *Id.* at 11.

92. *Id.* at 12.

93. *Id.* at 12-13.

94. *Id.* at 13.

95. *Id.* at 13.

96. *Id.* at 13.

97. *Id.* at 14.

98. *Id.* at 13-14.

99. *Id.* at 18.

E. Individual Accounts of Criminalization Under Orange County Policy

First, a homeless, physically disabled, and destitute woman who was living in her car in Anaheim, was forced out of the city.¹⁰⁰ Through countless interactions with city police, she was told to leave the city and the city's parking laws were inequitably enforced against her such that she lost her car and home as a result.¹⁰¹ Now on the streets, she was forced to live with the fear of knowing that she could be arrested at any time for violating the city's ordinances prohibiting living in public spaces. Her case is typical of the dilemma facing many homeless individuals who are unable to avoid violating the law when there are no shelter beds available to them.

Second is the account of a man plagued by disabilities that require him to stay within walking distance of the UCI Medical Center in order to charge his medical devices.¹⁰² After losing his family and his car, which served as his home, the man moved to the riverbed to be free from police contact, which had become constant for him while he still had his vehicle.¹⁰³ Whether on the streets of Anaheim or in the riverbed, he was constantly assailed by the police, who informed him of "zero tolerance" policies toward the homeless and threatened him with citations.¹⁰⁴ If he had chosen to reside in Anaheim, he would have violated the city's anti-camping laws; but if he resided in the riverbed, he could have been found guilty of trespassing.¹⁰⁵ The man faced certain criminalization because no matter where he was, he would have been violating the law by way of living in that particular location.

Third is the account of a homeless woman residing in the Santa Ana riverbed.¹⁰⁶ Fortunately, the woman is able to maintain a part time job despite her homelessness.¹⁰⁷ The sole reason for her homelessness is the exorbitant pricing of housing and the lack of affordable housing in Orange County.¹⁰⁸ She was forced to move from Costa Mesa to Fountain Valley as a result of camping citations she received while sleeping in public at a location close to her job.¹⁰⁹ Her case is an example of how the law criminalizes the employed homeless because her work schedule prevents her from meeting shelter cutoff times for a bed each night.¹¹⁰ No matter where she turns to live, she will face the prospect of tickets and citations.

100. *Id.* at 19–20.

101. *Id.* at 19.

102. *Id.* at 21.

103. *Id.* at 20.

104. *Id.* at 21.

105. *Id.*

106. *Id.* at 22.

107. *Id.*

108. *Id.*

109. *Id.* at 22.

110. *Id.* at 23.

Fourth is the story of a veteran who suffers from combat-related disabilities. He was once employed but was laid off due to a difficult economic climate.¹¹¹ Although initially able to afford his rent payments through use of employment benefits and other sources, he was eventually forced to live in his vehicle.¹¹² Much like many homeless individuals in similar circumstances, the veteran soon ran into trouble with the authorities regarding the parking of his vehicle and his vehicle was subsequently towed.¹¹³ Tragically, before he could recover the car, it was sold with all of his tools that were essential to his employment as a construction worker inside.¹¹⁴ Soon, the man was living in the Santa Ana riverbed because his disability made living in overcrowded shelters unbearable.¹¹⁵

Next is the account of another homeless man that resided in the Injunction Area established by *Schuler*, whose struggles with physical and mental illness requires a service animal.¹¹⁶ When that area was soon-to-be evacuated, the man knew he had to return to the streets of Orange where he had previously been ticketed, subjected to arrests, and subjected to searches and seizures of his property.¹¹⁷

These types of stories are countless among the members of the homeless community living in the Santa Ana riverbed and on the streets of Orange County. While individual histories may vary, the common theme is that these individuals have nowhere to live. The Santa Ana riverbed is chosen by homeless individuals as a home because it is a place where they should be free from contact with the police. However, due to county and city efforts to remove the homeless, even in the riverbed, police contact in the Santa Ana riverbed has become frequent for the homeless community. The result of their lack of options for legal housing means that these individuals have no other choice but to interact with the police and be subjected to, or threatened with, citations, arrests, searches, or seizures. This is the definition of the criminalization of the homeless: the homeless community is stigmatized and subjected to criminal punishment simply for living and being in any place. Until the homeless community is given a meaningful opportunity at permanent housing, rehabilitation, and community support, all criminalization based on status should cease. The focus of the remainder of this Note is to survey what is currently being done in Orange County to solve or remedy the problem of homelessness. Ultimately, this Note seeks to propose a solution after evaluating the merits of current remedial efforts.

111. *Id.*

112. *Id.* at 23-24.

113. *Id.* at 24.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 25.

III. THE DE-CRIMINALIZATION OF THE HOMELESS

The de-criminalization of the homeless is possible. Current initiatives and developments make clear that solutions are being developed and, over time, the problem of homelessness can be abated. Whether the solution comes by way of amendment to municipal legislation, reform of police department practices and officer training, judicial decree, housing reform and creation, or adopting practices of other cities or states, the cities of Orange County need to change to provide better options for the homeless community.

A. Recent Judicial Action

Recent court proceedings are providing the homeless community and homeless advocates reasons to maintain hope for change. U.S. District Court Judge David Carter has been at the center of the fight between Orange County and its cities and homeless advocates, having taken multiple steps over the course of this struggle to protect the homeless community.¹¹⁸ For example, when the Santa Ana riverbed was set to be cleared, Judge Carter required that it be done “humanely and with dignity.”¹¹⁹ In addition to this mandate, Judge Carter issued a temporary restraining order to stop the police practice of arresting those who refused to leave their homes.¹²⁰ Judge Carter only lifted the restraining order and allowed the clearing to resume when county and city officials agreed to provide motel vouchers to those displaced, increase shelter capacity to provide more beds, and work with other departments to coordinate a plan.¹²¹ Judge Carter has taken a hard stance against city and county advocates, requiring them to match any efforts to criminalize homeless individuals and sweep homeless encampments with reciprocal efforts to house and rehabilitate.

Since Judge Carter’s recent mandates applied mainly to the north Orange County cities of Orange, Costa Mesa, Anaheim, and Santa Ana, Judge Carter has listened to the requests of council members of those cities who urge that his mandates be applied more broadly and equitably amongst the cities of Orange County.¹²² The northern cities are currently seeking to include the southern cities of

118. On June 14, 2019, defendants City of Aliso Viejo, City of San Juan Capistrano, and City of San Clemente’s motion to disqualify Judge Carter for potential bias based on allegations of *ex parte* communications was granted. *See* Order Granting Motion to Recuse, *Housing is a Human Right v. County of Orange*, No. SACV 19-388 DOC (JDEx), 8-9, (C.D. Cal. June 14, 2019).

119. Christopher Goffard, *Meet the Judge at the Center of O.C. Riverbed Homeless Case Who Is Known for His Unconventional, Hands-On Approach*, L.A. TIMES (Feb. 20, 2018), <http://www.latimes.com/local/lanow/la-me-ln-judge-carter-profile-20180220-story.html> [<https://perma.cc/JM3J-6GNW>].

120. *Id.*

121. *Id.*

122. Nick Gerda, *Santa Ana Wants Irvine, Huntington Beach and Laguna Niguel Added to Homeless Lawsuit*, VOICE OC (Apr. 19, 2018), <https://voiceofoc.org/2018/04/santa-ana-wants-irvine-huntington-beach-and-laguna-niguel-added-to-homeless-lawsuit/> [<https://perma.cc/>]

Irvine, Huntington Beach and Laguna Niguel to pending lawsuits; however, the southern cities have fought such initiatives.¹²³ This move would apply Judge Carter's mandates to those regions as well. Speaking on this expansion, Judge Carter has vowed to apply the holding of the *Jones* case mentioned above to the southern cities and northern cities alike. The effect is that any city failing to provide "adequate shelter capacity" would be banned from enforcing any anti-camping ordinances it may currently have on the books.¹²⁴

Judge Carter's actions give homeless advocates hope because it may end the blame-shifting and lack of responsibility that cities are currently showing. The northern cities have, until recently, been forced to shoulder most of the burden of sheltering and policing people who are homeless. The common thread running through the responses of many Orange County cities is: we want the homeless problem to be fixed, just not in our city. The result of such an approach by various cities has been a state of insecurity for homeless individuals who are thrown back and forth among the cities by different police departments. Often this has led to "dumping" in the Santa Ana Civic Center, another large homeless encampment.¹²⁵ Judge Carter, through his mandates, has sought to require each city to house and care for its fair share of the homeless community, and that mandate may soon encompass the southern cities of Irvine, Huntington Beach, and Laguna Niguel as well.

What Judge Carter demonstrates is that consistent, practical efforts coordinated between cities can lead to a solution. Therefore, one effective way to de-criminalize the homeless population is for policy advocates to push the judiciary to take a tough stance against cities, using Judge Carter's legacy as a template. If city and county officials can be held to action through legitimate threats to enforce the law (the *Jones* case) by the bench, it is more likely that each city will indeed take responsibility and provide housing for its fair share of the homeless population.

PVD4-CKEJ]; see also Spencer Custodio, *Irvine, H.B. and Laguna Niguel to Sue County Over Homeless Shelters*, VOICE OC (Mar. 21, 2018), <https://voiceofoc.org/2018/03/irvine-h-b-and-laguna-niguel-to-sue-county-over-homeless-shelters/> [https://perma.cc/2RGN-7GH4].

123. *Id.*

124. *Gerda, supra* note 122.

125. Judge Carter has vowed to stop this practice and threatened future attempts with the prospect of DOJ investigations and the taking and playing of police body cameras. See Thy Vo & Spencer Custodio, *Federal Judge Expands OC Homeless Housing to Include Longtime Santa Ana Civic Center Camp*, VOICE OC (Mar. 17, 2018), <https://voiceofoc.org/2018/03/federal-judge-expands-oc-homeless-housing-to-include-longtime-santa-ana-civic-center-camp/> [https://perma.cc/39AP-AV9J].

*B. Local Initiatives**1. Fourth and Eighth Amendment Challenges*

Homeless policy advocates have been advancing the plight of their clients through Fourth and Eighth Amendment challenges to city and county actions. Much of the jurisprudence discussed above dealt with the constitutional basis for claims of cruel and unusual punishment under the Eighth Amendment. To recapitulate, what this case law shows is that it is impermissible for a state, county, or city to punish criminally an individual based on a status rather than willful action. Enforcing anti-camping ordinances raises constitutional questions because often the individuals subjected to the law are not able to afford housing accommodations and the city has not provided shelter.

First, Fourth Amendment challenges allege violations of the constitutional protections for “persons, houses, papers, and effects, against unreasonable searches and seizures.”¹²⁶ The Fourth Amendment’s purpose is to protect individuals’ reasonable expectation of privacy from unreasonable searches and seizures.¹²⁷ However, this purpose is applied with difficulty to the homeless population who often lack a reasonable expectation of privacy because they live in the public’s view.

The subject of many Fourth Amendment claims relating to homelessness deal with situations where the police have searched or seized the property of a homeless individual. The Fourth Amendment is often implicated when considering whether the homeless person has been given adequate notice as to the taking of their property so that they can try to recover it.¹²⁸ For example, plaintiff’s counsel in the *Schuler* decision was able to win a temporary restraining order against Orange County that required certain Fourteenth Amendment protections for the homeless community living in the Santa Ana riverbed.¹²⁹ Unless these Fourteenth Amendment protections were provided by the county, the county would violate the Fourth Amendment by seizing or destroying a homeless individual’s property.

Second, under Eighth Amendment challenges, homeless advocates argue that criminally punishing a homeless individual under any code or statute that relates to status is a cruel and unusual punishment.¹³⁰ As mentioned above, these codes and statutes often relate to sleeping in public spaces, public urination and defecation,

126. U.S. CONST. amend. IV.

127. *Katz v. United States*, 389 U.S. 347 (1967).

128. *Schuler v. County of Orange*, No. 8:17-cv-00259 DOC KES, 6 (C.D. Cal. Feb. 24, 2017) (citing *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1032 (9th Cir. 2012)).

129. *Id.* at 10-11. The temporary restraining order required the County to provide 24-hour notice before seizing or impounding property, to store any property seized for ninety days in a secure location before destroying it, to provide free transportation to the storage location if it is farther than one mile away from where it was seized, and to store “essential items” within one mile of where they were taken. “Essential items includ[e] tents, tarps, blankets, sleeping bags, identification and medical papers . . .” *Id.*

130. *Orange County Catholic Worker*, No. 8:18-cv-00155, at 34-35.

storing property, keeping pets, sleeping in vehicles, and drug¹³¹ and alcohol use. The theory behind an Eighth Amendment challenge is that it is cruel and unusual punishment to criminalize an individual for actions that are typically not criminalized in a home.¹³² With a traditional home, it is lawful to sleep, use the restroom, keep a pet,¹³³ park a vehicle, and drink alcohol.

Homeless advocates should be encouraged to continue bringing Fourth and Eighth Amendment challenges against city and county officials because courts have been receptive to them.¹³⁴ Advocates should continue to pressure the courts to enforce the mandates of *Jones* and provide adequate housing for the homeless community. Until that is done, Fourth and Eighth Amendment challenges ensure that the shelters and property of homeless individuals are not seized or destroyed without notice. Further, it ensures that the homeless will not be punished for simply living and storing their property in the only place available to them.

2. Legislative Changes to the Code and Changes in Police Practices

A major source of potential change lies in amendments to the municipal codes and legislative schemes of the cities involved.¹³⁵ Countless laws need to be changed. One source has projected that there were 111 anti-homeless regulations adopted across California in the 2000s, with another ninety-seven projected to be adopted by 2019.¹³⁶ These laws are comprehensive; and in the case of the homeless encampment in Santa Ana's Civic Center, criminalize things such as having spare bike parts, tents, lawn chairs, Bluetooth speakers, shopping carts, pallets, golf clubs, screwdrivers, mattresses, carpets, and recyclable materials among others.¹³⁷ Though the courts may already be responsive to such problematic laws, there is still plenty of room for advocacy to change laws that remain. As it stands today, the city of Santa Ana still maintains anti-camping, anti-sleeping, anti-storage, and other problematic ordinances.

It can also be helpful for legal advocates to look to what has been done elsewhere as a template for what may be successful in Orange County. For example,

131. Note that while drug use is usually illegal regardless of location, the *Robinson* court found criminalization of drug addicts to be counter-productive and potentially lacking a necessary mens rea element and equating to cruel and unusual punishment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

132. *Orange County Catholic Worker*, No. 8:18-cv-00155, at 35.

133. Note that while it is not per se illegal for a homeless individual to keep an animal with them, laws that set standards for pet housing, feeding, watering, and cleaning up after may not be able to be followed by homeless individuals and thus become a proxy for criminalizing homeless pet owners.

134. *Schuler*, No. 8:17-cv-00259, at 10-11.

135. For a more thorough look at the municipal codes in question, see *infra* Section III.B.

136. Caitlin Yoshiko Kandil, *Anti-Homeless Laws Crop Up in Santa Ana, in Line with a Statewide Trend*, CAL. HEALTH REP. (Jan. 25, 2018), <http://www.calhealthreport.org/2018/01/25/anti-homeless-laws-crop-santa-ana-line-statewide-trend/> [<https://perma.cc/C3CN-XN4E>].

137. *Id.*

Seattle University School of Law's Homeless Rights Advocacy Project (Project) has committed itself to the goal of "[a]dvocat[ing] for the repeal of laws that criminalize homelessness and poverty and for the pursuit of alternatives that better address the root problems of homelessness and poverty."¹³⁸ The Project has been working toward positive changes to laws relating to vehicles and parking,¹³⁹ bike racks as a method of "hostile architecture,"¹⁴⁰ fencing the underside of bridges,¹⁴¹ and abatement of citations and warrants.¹⁴² The Project has been effective in provoking thought leadership into considering more subtle forms of criminalization that are equally as destructive for homeless individuals as anti-camping and anti-storage ordinances.¹⁴³

Lawyers, judges, advocates, and the homeless community themselves should follow the lead of the Project and lobby for changes to laws—whether obvious or latent—that make the lives of the homeless community more difficult. Recent developments in the Santa Ana riverbed, spurred by the nudging of Judge Carter, seem to suggest that Orange County cities are finally beginning to take this growing problem more seriously. Officials in these cities appear to recognize that policies built on a foundation of enhanced police enforcement are not working. As mentioned above, the cost to Orange County of dealing with homelessness is \$300 million annually, part of which is law enforcement costs.

In fact, Newport Beach Police Officer Tony Yim, tasked with dealing with the homeless community, has witnessed firsthand the destructive impact of such policies.¹⁴⁴ Instead of encouraging other officers to have a zero-tolerance policy that was used when issues surrounding the Santa Ana riverbed began, he encourages

138. *Homeless Rights Advocacy Project*, SEATTLE UNIV. SCH. OF LAW, <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/homeless-rights-advocacy-project> [https://perma.cc/PWS9-K9AQ].

139. Vianna Davila, *Judge Rules Seattle Homeless Man's Truck Is a Home*, SEATTLE TIMES (Mar. 3, 2018), <https://www.seattletimes.com/seattle-news/homeless/judge-rules-seattle-homeless-mans-truck-is-a-home/> [https://perma.cc/2X8V-VHRN].

140. Tim Nelson, *A Conspicuous Bike Rack Gets Seattle Talking About Its Hostile Architecture*, ARCHITECTURAL DIG. (Feb. 15, 2018), <https://www.architecturaldigest.com/story/a-conspicuous-bike-rack-gets-seattle-talking-about-its-hostile-architecture> [https://perma.cc/YF35-JZMC].

141. Scott Greenstone, *Seattle Is Putting Fences Under Its Bridges to Keep Campers Out – and Some Say That's Wrong*, SEATTLE TIMES (Feb. 6, 2018), <https://www.seattletimes.com/seattle-news/seattle-is-putting-fences-under-its-bridges-to-keep-campers-out-and-some-say-thats-wrong/> [https://perma.cc/3XBM-U5SS].

142. Melissa Hellman, *For Homeless Seattleites, a Reprieve From the Debilitating Burden of Warrants*, SEATTLE WKLY. (Jan. 10, 2018), <http://www.seattleweekly.com/news/for-homeless-seattleites-a-reprieve-from-the-debilitating-burden-of-warrants/> [https://perma.cc/KVN2-SEAF].

143. Examples include things such as placing handrails on the sides of benches to make sleeping on them more difficult or placing bike racks as mentioned above.

144. See Theresa Walker, *Price Tag of Homelessness in Orange County Is Nearly \$300 Million, UCI Study Finds*, ORANGE COUNTY REG. (March 8, 2017), <https://www.ocregister.com/2017/03/08/price-tag-of-homelessness-in-orange-county-is-nearly-300-million-uci-study-finds/> [https://perma.cc/E97N-MG7Q].

and advocates for other reforms, such as officer training in equitable enforcement of the law.¹⁴⁵ This approach is important because it provides an avenue of relief for the homeless community in the event that advocates, lawyers, and judges do not or are not able to change the law. Therefore, even if the letter of the law is still discriminatorily worded against the homeless, proper police training in equitable enforcement and the harms of ongoing criminalization of the homeless population can result in less citations and arrests of homeless individuals and less searches and seizures of their property.

C. Housing-First Model

A final approach to ease criminalization is known as the housing-first model. Hope 4 Restoration, a nonprofit organization based in Anaheim, thoroughly sums up this approach:

Housing First is a homeless assistance approach that prioritizes providing permanent housing to people experiencing homelessness, thus ending their homelessness and serving as a platform from which they can pursue personal goals and improve their quality of life. This approach is guided by the belief that people need basic necessities like food and a place to live before attending to anything less critical, such as getting a job, budgeting properly, or attending to substance use issues.¹⁴⁶

The United States Interagency Council on Homelessness (USICH) elaborates, “Housing First is a proven approach . . . in which people experiencing homelessness are connected to permanent housing swiftly and with few to no treatment preconditions, behavioral contingencies, or other barriers.”¹⁴⁷ The USICH has also promulgated a checklist to help municipalities determine whether their approaches comply with a housing-first model.¹⁴⁸

The Housing First model has been gaining traction in Orange County, especially as a result of a University of California, Irvine study conducted on homelessness.¹⁴⁹ According to this study, Orange County spends almost \$300 million annually broken down across four sectors: municipalities, hospitals,

145. See Sara Hall, *Officials Speak Up on Homelessness Solutions*, NEWPORT BEACH INDEP. (January 11, 2019) <https://www.newportbeachindy.com/officials-speak-up-on-homelessness-solutions/> [<https://perma.cc/AWB3-RBGP>].

146. Tim Houchen, *Housing First*, HOPE 4 RESTORATION (Apr. 20, 2017), https://www.hope4restoration.org/housing_first.html [<https://perma.cc/PL9X-GU6J>].

147. *Housing First Checklist: Assessing Projects and Systems for a Housing First Orientation*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (2016), https://www.usich.gov/resources/uploads/asset_library/Housing_First_Checklist_FINAL.pdf [<https://perma.cc/T6JD-RA5R>].

148. *Id.* Among the factors to consider are (1) whether applicants are eligible for housing programs without a certain level of income; (2) whether the applicants are eligible even if they have substance abuse issues; (3) whether applicants are eligible with a criminal record; and (4) whether individuals housed under a program are subject to eviction for failing to complete programs attendant to their stay.

149. Snow & Goldberg, *supra* note 13.

counties, and housing agencies.¹⁵⁰ In a presentation on the same data as this study, Jamboree Housing (Jamboree) representative Helen C. Cameron broke down this total by the share attributable to the top ten percent of the homeless on the streets.¹⁵¹ According to the nonprofit's findings, the cost per person for the top ten percent of the homeless to live on the streets is \$440,000 per year. Demonstrating the effectiveness of the housing-first model, Jamboree found that the costs attributable to the same group of people declines to \$55,000 per person per year when they are given housing and services.¹⁵² In addition to these numerical findings, the study also found that the top two reasons the individuals surveyed ended up in a state of homelessness were insufficient wages and high rent.¹⁵³

The current efforts being made in Orange County demonstrate why the housing-first approach has already been effective at abating unsheltered homelessness and why such an approach should be encouraged.¹⁵⁴ First, Jamboree has been and is continuing to invest in individual construction projects meant to immediately house those who are homeless or are at risk of shortly becoming homeless. Jamboree has developed more than ninety properties containing more than 8500 units across California. These units house more than 17,500 residents, and that number is growing with each new development that is completed.¹⁵⁵ Within these developments, the nonprofit has set aside units for specific groups, such as veterans.¹⁵⁶ Many of these facilities are paired with services that are vital to residents. Further, the units are not free but require residents in most cases to contribute thirty percent to sixty percent of their income, which encourages financial responsibility and investment into their living accommodations.¹⁵⁷ Based on the numbers drawn from the PIT study in 2017, it is clear that if Jamboree and other agencies are able to continue their work, housing the county's homeless population is possible.¹⁵⁸

150. *Id.* at 6.

151. By top ten percent, the presentation was referring to that part of the homeless population that incurs the most costs, whether that be from the healthcare cluster, the law enforcement cluster, the housing cluster, or any other cluster. *Id.* at 43.

152. *Id.* at 8. Note, this total accounts for the housing and services provided.

153. *Id.* at 34.

154. Note that the three organizations here (Jamboree, WISEPlace, and Families Forward), are only three of a number of organizations currently seeing positive results through a housing-first model. A more comprehensive list of organizations can be found in the University of California, Irvine study just mentioned. *Id.* at 17.

155. *By the Numbers*, JAMBOREE HOUSING CORP., <https://www.jamboreehousing.com/about-jamboree-affordable-housing-developer/corporate-dashboard/by-the-numbers> [<https://perma.cc/7ZVA-PRWN>] (last visited Sept. 29, 2019).

156. *Permanent Supportive Housing: Housing First, Long-Term Solutions to Ending Homelessness*, JAMBOREE HOUSING CORP., <https://www.jamboreehousing.com/what-we-do/resident-services/permanent-supportive-housing> [<https://perma.cc/V4QN-ZXP3>] (last visited Sept. 29, 2019).

157. *Our Communities: Quality California Affordable Housing for Rent with Services*, JAMBOREE HOUSING CORP., <https://www.jamboreehousing.com/blogs/affordable-housing-communities> [<https://perma.cc/F88Y-JM3X>] (last visited Oct. 17, 2019).

158. Bennett, *supra* note 7, at 9.

WISEPlace is another nonprofit organization located in Santa Ana that is taking tangible steps toward ending the homelessness problem occurring in Orange County. WISEPlace is unique in that it only caters to adult, individual females, meaning that men and women with children are not eligible for housing with the organization.¹⁵⁹ Whereas Jamboree is a massive operation that continues to spread its reach, WISEPlace is narrower and focuses on a specific set of individuals. While this may seem like a less desirable approach, WISEPlace is able to achieve success at a very deep level by only taking in around ninety women per year.¹⁶⁰ Once partnered with the organization, these women receive intensive one-on-one treatment, which accounts for needs relating to housing, nutrition, financial responsibility, education, and employment assistance.¹⁶¹ As a result, WISEPlace seeks to succeed beyond the first step of a housing-first approach and addresses subsequent issues still faced by individuals who can be housed.

Finally, Families Forward is a nonprofit organization located in Irvine, California. Much like WISEPlace, Families Forward operates with a specific mission. Its mission is to rehabilitate families struggling with homelessness to financial stability.¹⁶² In 2017, the Organization was able to host over 200 homeless families across Orange County.¹⁶³ Follow-up studies of the families involved showed that after an average period of four to five months of assistance, the families were able to get back on their feet and ninety-five percent of those going through the program were able to find and maintain permanent housing.¹⁶⁴

While these more traditional housing programs have been successful, they are not the only housing programs that cities are experimenting with. One major effort made to house many homeless individuals quickly was a plan to convert the Fairview Developmental Center in Costa Mesa into a homeless shelter.¹⁶⁵ The facility could easily house over 130 individuals, as it is currently home to 133 patients suffering from various mental disabilities.¹⁶⁶ Unfortunately, soon after this proposal was considered, the Costa Mesa City Council unanimously rejected the idea as too

159. *Let Us Help: Women, Inspired, Supported, Empowered*, WISEPLACE, <https://www.wiseplace.org/about/let-us-help> [https://perma.cc/2AGJ-EPWD] (last visited Oct. 17, 2019).

160. *Id.*

161. *Id.*

162. *About*, FAMILIES FORWARD, <http://www.families-forward.org/about/#ffs-tabbed-11> [https://perma.cc/XBB8-HC5H] (last visited Sept. 29, 2019).

163. FAMILIES FORWARD, HOMELESSNESS IN ORANGE COUNTY, <https://www.families-forward.org/wp-content/uploads/2019/03/Families-Forward-Metrics-2016-2018.pdf> [https://perma.cc/BM8S-QKM6] (last visited Oct. 17, 2019).

164. *Id.*

165. Spencer Custodio, *Costa Mesa Opposes Homeless Shelter at Fairview Mental Facility*, VOICE OC (Mar. 29, 2018), <https://voiceofoc.org/2018/03/costa-mesa-opposes-homeless-shelter-at-fairview-mental-facility/> [https://perma.cc/XHX3-C3GA].

166. Luke Money, *Costa Mesa City Council Will Discuss Using Fairview Developmental Center as Homeless Shelter*, L.A. TIMES (Mar. 26, 2018), <http://www.latimes.com/socal/daily-pilot/news/tn-dpt-me-cm-fdc-homeless-advance-20180326-story.html> [https://perma.cc/4DNB-HTSM].

complicated, too expensive, and, most likely, against the desire of their citizens.¹⁶⁷ The denial of this proposal is stereotypical of the blame-shifting approach that occurs among Orange County cities where no city is willing to step up and account for its fair share of the homeless community.

Another interesting proposal builds on a limited system that has already been implemented in the aftermath of the clearing of the Santa Ana riverbed. In January 2018, the Los Angeles City Council committee considered a proposal that would repurpose select hotels and motels into housing units for the homeless community.¹⁶⁸ Like many of the nonprofit organizations that are developing housing, the motels and hotels that decide to take part in the program would coordinate the provision of services to the homeless individuals. This model would work for those who have been displaced from the Santa Ana riverbed, as many are already familiar with how it operates. After displacement from the riverbed, more than 600 individuals were given motel vouchers that expired in March 2018.¹⁶⁹ A program like this could be successful for multiple reasons. First, this system would centralize portions of the homeless community which could potentially make the administration of services easier. Additionally, motels and hotels that take part in the program could easily be subsidized for their efforts. Though these owners would be required to offer many units for low cost or no cost at all, Orange County could still save costs when compared to the \$300 million a year it is currently spending when this community is on the streets.

Each of these initiatives¹⁷⁰ and proposals works primarily to house individuals and families who have struggled with homelessness. However, each of these programs also continues in their mission by connecting individuals and families with

167. See Custodio, *supra* note 165.

168. City News Service, *LA Considers Allowing Hotels and Motels to Become Supportive Housing for Homeless*, L.A. DAILY NEWS (Jan. 17, 2018), <https://www.dailynews.com/2018/01/17/la-considers-allowing-hotels-and-motels-to-become-supportive-housing-for-homeless/> [<https://perma.cc/EWZ6-8C9A>].

169. Theresa Walker, *As Motel Voucher Expiration Dates Approach, Santa Ana River Homeless Lawsuit Hearing Moves from Federal Courthouse to City Hall*, ORANGE COUNTY REG. (Mar. 15, 2018), <https://www.oregister.com/2018/03/15/as-motel-voucher-expiration-dates-approach-santa-ana-river-homeless-lawsuit-hearing-moves-from-federal-courthouse-to-city-hall/> [<https://perma.cc/NZ8J-XC3U>].

170. Note that there are many additional methods of fighting homelessness currently being used. Gale Holland, *L.A. County Wants to Help Build Guest Houses in Backyards – for Homeless People*, L.A. TIMES (Apr. 11, 2018), <http://www.latimes.com/local/lanow/la-me-ln-homeless-tiny-house-20180411-story.html> [<https://perma.cc/3QE4-CZD8>] (paying private property owners to create housing for the homeless in their backyards); Otis R. Taylor Jr., *Sheds for Homeless in Oakland Are Proving to Be a Useful Tool*, S.F. CHRON. (Jan. 17, 2018), <https://www.sfchronicle.com/news/article/Sheds-for-homeless-in-Oakland-are-proving-to-be-a-12502634.php> [<https://perma.cc/6QD4-ZYZ4>] (constructing two-person shacks in secure, fenced-in parcels); Lori Weisberg & Gary Warth, *Ballot Initiative for Convention Center Expansion, Homelessness Launched*, SAN DIEGO UNION-TRIB. (Jan. 8, 2018), <http://www.sandiegouniontribune.com/business/tourism/sd-fi-convention-initiative-20180108-story.html> [<https://perma.cc/P2ZQ-WF9P>] (raising taxes on hotels rooms and using the funds to construct housing for the homeless).

support systems and service providers for any needs that they might have. It is easy to see how such an approach has a much different aim and effect than “enforcement-first” approaches that have become all too common across Orange County. Rather than focusing on where individuals are not supposed to be, a housing-first model seeks to create a space that homeless individuals and families can legally call home. As a result of housing the homeless community, these individuals and families are no longer in fear of being criminalized under anti-camping, anti-storage, and every other anti-homeless ordinance that has been discussed in this Note. This is a major reason why the housing-first model has been gaining so much traction recently with policy advocates, lawyers, judges, and the homeless community itself. The end goal of these initiatives is to change the plight of the homeless community and, in the process, change the public’s primary view of this community from a criminal community to a criminalized community.

CONCLUSION

Recent scholarship shows that changing the perception of Orange County policymakers and the public is the best way to proceed with the homelessness problem. Instead of subjecting the homeless community to the revolving door of the criminal justice system, lawyers, advocates, judges, and the homeless community are beginning to realize that a housing-first model is more effective and cost-efficient. When mixed with legislative reform, police department reform, judicial decree and effective lobbying, a housing-first approach has the potential to end the problem of homelessness in Orange County. After all, homelessness is primarily an issue of inadequate housing.

The problem of homelessness is pervasive in Orange County, and, to date, the problem is growing worse. As mentioned, David Snow estimated that Orange County has spent \$300 million annually on homelessness.¹⁷¹ Breaking down this figure, Snow estimated that \$121 million was spent on health care for the homeless and \$23 million was spent on criminal justice.¹⁷² Costs across all sectors are slashed when the homeless are housed.

With the homeless population increasing along with arrests, sweeps, seizures, and evacuations, there are plenty of reasons to doubt whether this is an issue that can be fixed. However, this Note has sought to demonstrate that there are methods that can be employed effectively and that may be taking on increasing significance and attention as a result of recent scholarship and study. If lobbying continues to target stubborn city councils, if housing developments continue to be constructed, if the police can be trained to view the homeless person as an ordinary individual, and if this issue can be reframed as serving an important community rather than separating them from everyone else, then the problem of homelessness can be abated. This is a goal that is out of reach only under current strategies and mindsets

171. Snow & Goldberg, *supra* note 13, at 6.

172. *Id.* at 7.

that are being employed by the cities of Orange County. But as the debate and public sentiment about the issue changes, and as effective results are achieved, cities may be more willing to change their stance, their municipal codes, and their policing practice in order to rehabilitate each individual in need. Ultimately, county and city representatives will realize that it is more cost-effective and efficient to rehabilitate these individuals through housing and services than it is to subject them to the revolving door of the criminal justice system.