

## STUDENT WORK

# LEGAL SHELTER: A CASE FOR HOMELESSNESS AS A PROTECTED STATUS UNDER HATE CRIME LAW AND ENHANCED EQUAL PROTECTION SCRUTINY

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### I. INTRODUCTION

On June 12, 2006, Norris Gaynor was brutally killed by two young men with baseball bats while he slept on a park bench in Ft. Lauderdale, Florida.<sup>1</sup> Mr. Gaynor was homeless. Two other homeless men were critically injured in this unprovoked predawn attack, which the lawyers concluded was fueled by a desire to “mess with some homeless people.”<sup>2</sup>

Seven months later, in St. Petersburg, Florida, city officials raided a homeless encampment, slashing makeshift tents with scissors and box cutters while the homeless remained sleeping inside.<sup>3</sup> Homeless advocates claimed the encampments were used

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\* © 2011, Sarah Finnane Hanafin. All rights reserved. J.D. Candidate, Stetson University College of Law, 2011; B.A., *magna cum laude*, University of Notre Dame, 2003. This Article would not have been possible without the encouragement and support of my husband, Brian, inspiration from my son, Patrick, and the guidance of my faculty advisor, Dean Emeritus Bruce Jacob, and my Notes and Comments Editor, Natalie Saginor. I would also like to thank Dean Kristen Adams for instituting Stetson’s Homeless Advocacy Internship and Kirsten Clanton of Southern Legal Counsel for her unwavering advocacy for the homeless. Finally, I would like to thank my parents for always believing in me and encouraging me to follow my passions.

1. Tonya Alanez, *SunSentinel.com*, *Attacked Homeless Man in Fort Lauderdale Testifies Teens Laughed as They Hit Him*, <http://www.sun-sentinel.com/news/broward/sfl-flbhomeless0911sbsep11,0,4563713.story> (Sept. 11, 2008).

2. *Id.*

3. Abhi Raghunathan & Alisa Ulferts, *St. Petersburg Times*, *Police Slash Open Tents to Rouse the Homeless*, [http://www.sptimes.com/2007/01/20/Southpinellas/Police\\_slash\\_open\\_ten.shtml](http://www.sptimes.com/2007/01/20/Southpinellas/Police_slash_open_ten.shtml) (Jan. 20, 2007). City police and firefighters raided two “tent city” encampments, seizing more than twenty tents in less than ten minutes. *Id.* City officials

for protection from violent attacks; the encampments provided safety in numbers.<sup>4</sup> Although officials claimed the tents violated the city's fire code, the provisions officials cited did not technically apply to the tents occupied by the homeless since they were of a different size than tents covered by the code.<sup>5</sup> The raid occurred two days after two homeless men were killed, leading many in the homeless community to question why the city deployed resources for alleged fire-code violations instead of finding the perpetrators of the murders.<sup>6</sup>

These two vignettes merely scratch the surface of the growing violence and injustice experienced by the homeless in our society. Communities across the country have seen increased violence against the homeless resulting from both an increasing homeless population and rising sentiment against those unfortunate Americans who are relegated to life on the streets.<sup>7</sup> Because of the discrimination and violence the homeless suffer, this Article argues that homelessness should be a protected class under federal and state hate crimes statutes, and that courts should employ an enhanced version of rational basis scrutiny, known as "rational basis with bite," to equal protection claims advanced by homeless individuals.<sup>8</sup> There are two main arguments for this proposition. First, the homeless should be afforded protection under hate crime law because they have been victims of targeted crimes as a result of their status in society.<sup>9</sup> Second, due to the

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slashed the tents of those homeless individuals who refused to get out of their tents during the raid. *Id.* "The tents were retained [by city officials as] evidence," leaving homeless individuals without any form of shelter. *Id.* Homeless individuals often form encampments—or "tent cities"—as a means of protection from targeted violence. *Id.*

4. *Id.*

5. *Id.* Public officials pointed to a provision in the St. Petersburg city code that required a permit for tents larger than 120 square feet. *Id.* According to reports, however, most tents involved in this incident were smaller than 120 square feet. *Id.*

6. *Id.*

7. Natl. Coalition for the Homeless, *Hate, Violence, and Death on Main Street USA 2008*, at 9–12, [http://www.nationalhomeless.org/publications/hatecrimes/hate\\_report\\_2008.pdf](http://www.nationalhomeless.org/publications/hatecrimes/hate_report_2008.pdf) (Aug. 2009) [hereinafter *Hate Crimes Report*]. According to a National Coalition for the Homeless report, twenty-two states and fifty-five cities reported violent, targeted crimes against homeless people in 2008. *Id.* at 25–26.

8. Courts currently employ the default-level rational basis scrutiny to equal-protection claims involving the homeless. *Infra* pt. IV. Rational basis with bite scrutiny lies between rational basis and intermediate scrutiny, requiring an *actual* legitimate purpose for proposed legislation as opposed to any *conceivable* legitimate purpose. *Infra* pt. IV(B) (discussing rational basis with bite scrutiny).

9. Raegan Joern, Student Author, *Mean Streets: Violence against the Homeless and*

growing popularity of anti-homeless ordinances that criminalize the day-to-day activities of homeless individuals, the homeless have been “relegated to such a position of political powerlessness as to command extraordinary protection” from unfair and discriminatory laws.<sup>10</sup> Accordingly, inclusion in hate crime law will protect the homeless from targeted violence by private actors while enhanced equal protection scrutiny should prevent the harmful criminalization of homelessness by public actors.

Part II of this Article examines the historical background of homelessness, including what homelessness is, who experiences homelessness, and characteristics and causes of homelessness. Part III surveys recent developments in the law and society such as the criminalization of homelessness, targeted violence against the homeless, and state and federal efforts to include the homeless as a protected class under hate crime statutes. Part IV provides an overview of the traditional levels of judicial scrutiny, and argues that homelessness should be included as a protected class in hate crime law; as a result, the homeless should be afforded enhanced rational basis scrutiny under equal protection claims. And finally, Part V provides a brief conclusion.

## II. A HISTORY OF HOMELESSNESS IN AMERICA

### A. What Is Homelessness?

On the most basic level, a person is homeless when he or she does not have adequate housing. According to the McKinney–Vento Homeless Assistance Act, amended by Congress in 2009, a person is considered homeless if an individual lacks

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*the Makings of a Hate Crime*, 6 Hastings Race & Pov. L.J. 305, 306 (2009).

10. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)). The *Pottinger* court found the City of Miami’s anti-homeless ordinance, which made it unlawful to sleep, eat, or lie down in public, unconstitutional. *Id.* at 1583. The court noted that although classifications based upon wealth alone are not suspect, the homeless may have “traditional indicia of suspectness” warranting heightened scrutiny. *Id.* at 1578. But in *Joel v. City of Orlando*, the Eleventh Circuit affirmed the validity of a City of Orlando ordinance prohibiting camping on public property under rational-basis review. 232 F.3d 1353, 1358–1359 (11th Cir. 2000). The *Joel* court noted that homeless persons are “not a suspect class” and even if a higher degree of scrutiny should be applied, a facially neutral law does not violate the Equal Protection Clause unless a discriminatory purpose can be proven. *Id.* at 1359.

a fixed, regular, and adequate nighttime residence; and . . . has a primary nighttime residence that is—a supervised publicly or privately operated shelter . . . ; an institution that provides a temporary residence for individuals intended to be institutionalized; or . . . a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.<sup>11</sup>

The Department of Housing and Urban Development (HUD) interprets this definition to include persons living on the streets, persons residing in shelters, and persons facing imminent eviction from a private dwelling or institution and having no subsequent housing.<sup>12</sup>

Several socioeconomic forces have contributed to the problem of homelessness over the past several decades. Although the economic decline during the Great Depression affected American home life and resulted in widespread homelessness,<sup>13</sup> World War II and the postwar boom created a robust housing market, giving many Americans the opportunity to find affordable housing.<sup>14</sup> But the 1960s ushered in a new era of urban revitalization and with it a reduction in the availability of affordable housing.<sup>15</sup> Urban

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11. 42 U.S.C. § 11302 (2006). When passed in 1987, the McKinney-Vento Act represented an unprecedented federal response to the growing problem of homelessness in America. Natl. Coalition for the Homeless, *McKinney-Vento Act*, <http://www.nationalhomeless.org/publications/facts/McKinney.pdf> (June 2006). Originally designed to provide the homeless with emergency shelter, healthcare, and other basic services, the Act has been broadened and strengthened by amendment. *Id.*

12. Natl. Coalition for the Homeless, *Who Is Homeless?* <http://www.nationalhomeless.org/factsheets/who.html> (July 2009) [hereinafter *Who*]. HUD's definition of homelessness is not comprehensive, as it fails to recognize homelessness in nonurban settings. For example, rural communities may not have shelters and individuals may be more likely to live with relatives. *Id.*

13. The Library of Congress, *Great Depression and World War II: 1929–1945*, <http://memory.loc.gov/learn//features/timeline/depwwii/depress/depress.html> (updated Sep. 26, 2002). During the Great Depression, many destitute Americans lived in “Hoovervilles,” or cardboard shacks. *Id.* Hundreds of thousands of Americans also roamed on foot and in boxcars in search of employment. *Id.*

14. Natl. Alliance to End Homelessness, *Chronic Homelessness Brief*, <http://www.endhomelessness.org/content/article/detail/1060> (Mar. 12, 2007). A growing economy, tax incentives, and increased homebuilding resulted in remarkable homeownership rates after World War II. According to the Census Bureau, the homeownership rate in 1940 was 43.6%, compared to 61.9% in 1960. U.S. Census Bureau, *Census of Housing: Historical Census of Housing Tables*, <http://www.census.gov/hhes/www/housing/census/historic/owner.html> (accessed Jan 17, 2011).

15. Natl. Alliance to End Homelessness, *Chronic Homelessness Brief*, *supra* n. 14. Urban revitalization, or gentrification, is a process in which land in depressed urban areas

renewal projects from the 1960s to the 1980s resulted in the conversion of low-priced, single-occupancy housing units to higher-priced housing, cooperatives, and condominiums, making it impossible for some Americans to afford a place to call home.<sup>16</sup>

The closure of hospitals for the mentally ill also contributed to the increase in homelessness during this period.<sup>17</sup> Like those urban dwellers who lost their homes to revitalization, many mental-health patients had nowhere to turn and were forced to a life on the streets once the hospitals closed.<sup>18</sup>

Recently, communities have been unable to accommodate the growing demands of individuals who are unable to afford the increased cost of housing. One study estimates that there is a shortage of 5.2 million affordable housing units in this country.<sup>19</sup> While some low-income Americans are able to find alternative housing arrangements, many others are left with no choice but to live on the streets. Therefore, a growing number of Americans are feeling the breadth and impact of homelessness.

### B. Who Is Homeless?

Approximately 3.5 million Americans will experience homelessness in any given year.<sup>20</sup> Children, families, the mentally ill, veterans, victims of domestic abuse, people with disabilities, and people of color make up the fabric of the homeless population.<sup>21</sup> In

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is purchased and “renewed” by wealthier individuals. *Black’s Law Dictionary* 755 (Bryan A. Garner ed., 9th ed., West 2009). Revitalized land increases in value, often forcing lower-income individuals and families to move out of the area. *Id.*

16. See generally Jon C. Teaford, *Urban Renewal and Its Aftermath*, 11 Hous. Policy Debate 443 (2000) (available at [http://www.knowledgeplex.org/programs/hpd/pdf/hpd\\_1102\\_teafor.pdf](http://www.knowledgeplex.org/programs/hpd/pdf/hpd_1102_teafor.pdf)) (discussing the adversities in housing presented in the 1960s and 1980s).

17. *Id.*

18. John A. Talbott, *Deinstitutionalization: Avoiding the Disasters of the Past*, 55 Psychiatric Servs. 1112, 1113 (2004) (available at <http://psychservices.psychiatryonline.org/cgi/reprint/55/10/1112>).

19. Natl. Alliance to End Homelessness, *Chronic Homelessness Brief*, *supra* n. 14 (referencing *The State of the Nation’s Housing: 2005*, a study conducted by the Joint Center for Housing Studies at Harvard University in spring 2005); *infra* nn. 61–67 (discussing the lack of affordable housing in the United States).

20. Natl. Coalition for the Homeless, *How Many People Experience Homelessness?* [http://www.nationalhomeless.org/factsheets/How\\_Many.html](http://www.nationalhomeless.org/factsheets/How_Many.html) (July 2009) [hereinafter *How Many*].

21. *Who*, *supra* n. 12; see Natl. Coalition for the Homeless, *Who is Homeless?* <http://www.nationalhomeless.org/factsheets/who.html> (July 2009) (detailing statistics on the homeless population).

2003, the National Law Center on Homelessness and Poverty estimated that children under the age of eighteen accounted for 39% of the homeless population, while people between the ages of twenty-five and thirty-four accounted for 25% of the homeless population.<sup>22</sup> A 2002 study conducted by the American Journal of Public Health found that 11% to 35% of homeless adolescents identified themselves as gay or lesbian.<sup>23</sup>

Families with children are among the fastest-growing segments of the homeless population, comprising between 23% and 41% of the homeless population.<sup>24</sup> While families can become homeless at any time during the year, cities note a “summer surge” when children are out of school and families can move more easily.<sup>25</sup> New York City saw a 34% increase in homeless families during the summer of 2009, a trend demonstrated in cities across the country.<sup>26</sup> The influx of homeless families has been so great that cities like New York have, on occasion, resorted to housing homeless families in empty jails.<sup>27</sup>

Minorities are represented disproportionately within the homeless population.<sup>28</sup> In 2007, a Public Broadcasting Service study showed a shocking discrepancy between the proportion of

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22. *Who, supra* n. 12. Educating homeless youth has also been a problem for states across the country. See Educ. Dev. Ctr., *Educating Homeless Children*, [http://www.edc.org/newsroom/articles/educating\\_homeless\\_children](http://www.edc.org/newsroom/articles/educating_homeless_children) (July 31, 2003) (discussing strategies for improving access to public education for homeless children).

23. Natl. Coalition for the Homeless, *Minorities and Homelessness*, <http://www.nationalhomeless.org/factsheets/minorities.html> (July 2009) [hereinafter *Minorities and Homelessness*] (citing Bryan N. Cochran et al., *Challenges Faced by Homeless Sexual Minorities: Comparison of Gay, Lesbian, Bisexual, and Transgender Homeless Adolescents with Their Heterosexual Counterparts*, 92 Am. J. Pub. Health 773, 773–777 (2002)).

24. *Id.* (citing a 2006 National Alliance to End Homelessness study that found families with children comprise 41% of the homeless population); *Who, supra* n. 12 (citing a 2007 United States Conference of Mayors survey that found families with children comprise 23% of the homeless population in American urban cities).

25. Julie Bosman, *Summer Brings a Wave of Homeless Families*, N.Y. Times A1 (July 7, 2009) (available at: <http://www.nytimes.com/2009/07/07/nyregion/07summer.html>).

26. Coalition for the Homeless, Advoc. Dept., *New York City Homeless Municipal Shelter Population, 1983–Present*, <http://coalhome.bluestatedigital.com/page/-/NYCHomelessShelterPopulation1983-Present.pdf> (accessed Jan. 17, 2011). The Coalition for the Homeless' numbers indicate that 1,914 new families entered the shelter system in August 2009, compared to 1,428 new families in August 2008. *Id.* As of November 2009, a total of 10,374 homeless families and 16,499 homeless children were living in New York City shelters. *Id.*

27. Bosman, *supra* n. 25. In 2002, in response to the summer surge, New York City officials placed some homeless families in an empty jail in the Bronx. *Id.* The jail was later found to be contaminated with lead paint. *Id.*

28. *Minorities and Homelessness, supra* n. 23.

certain minority groups in the general population and their presence in the homeless population:

- African-Americans make up only 11% of the general population but account for approximately 40% of the homeless population;
- Hispanics make up 9% of the general population but account for 11% of the homeless population;
- Native Americans make up only 1% of the general population but account for 8% of the homeless population.<sup>29</sup>

These alarming statistics reveal the distressing reality that minorities are more likely to be forced to live on the streets.

Veterans are also disproportionately represented in the homeless population. According to the Department of Veterans Affairs (VA), veterans comprise nearly one-third of the homeless population.<sup>30</sup> Other estimates suggest that between 130,000 and 200,000 veterans are homeless on any given night.<sup>31</sup> More than two-thirds of homeless veterans served our country for at least three years, and one-third were stationed in a war zone.<sup>32</sup> Almost half of the homeless veteran population served during the Vietnam War.<sup>33</sup> Approximately 40% of homeless men are veterans, of whom 45% suffer from mental illness and 50% have substance-abuse problems.<sup>34</sup> Distinct from the general population of homeless individuals, many homeless veterans also suffer from post-traumatic stress disorder.<sup>35</sup> Although the VA provides services to veterans, it is unable to serve everyone; more than 160,000 home-

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29. *Id.*

30. U.S. Dept. Veterans Affairs, *Homeless Veterans, Overview of Homelessness*, <http://www1.va.gov/HOMELESS/Overview.asp> (updated Mar. 10, 2010).

31. Natl. Coalition for the Homeless, *Homeless Veterans*, <http://www.nationalhomeless.org/factsheets/veterans.html> (Sept. 2009).

32. *Id.*

33. *Id.* According to the VA, the number of homeless Vietnam veterans has surpassed the number of service men and women who died during the war. *Id.*

34. *Id.* Almost all homeless Vietnam veterans are male—only 3% of homeless veterans are female. *Id.*

35. Natl. Coalition for Homeless Veterans, *Facts & Media, Background Statistics, FAQ about Homeless Veterans*, <http://www.nchv.org/background.cfm> (accessed Jan. 17, 2011). According to the National Coalition for Homeless Veterans, “a large number of displaced and at-risk veterans live with lingering effects of post-traumatic stress disorder and substance abuse, which are compounded by a lack of family and social support networks.” *Id.*

less veterans lack needed services due to the VA's limited resources and funding.<sup>36</sup>

Data regarding the number of homeless undocumented immigrants is virtually nonexistent. While this population attracts political vitriol, little has been written about the number of homeless undocumented immigrants in America.<sup>37</sup> Some scholars hypothesize that little is known about them because their numbers may be small, or they may be unwilling to identify themselves for fear of being deported.<sup>38</sup> Because of the lack of reliable data on the number of homeless immigrants, this group is not accurately represented in current estimates of the total homeless population.<sup>39</sup>

### C. Characteristics and Causes of Homelessness

While the face of homelessness is varied and diverse, many homeless individuals share similar characteristics. According to the Substance Abuse and Mental Health Services Administration, 20% to 25% of homeless individuals suffer from some form of severe mental illness.<sup>40</sup> Mental illness is such a pervasive problem that it represents the third-largest cause of homelessness for sin-

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36. *Id.* Through its homeless outreach program, the Department of Veterans Affairs serves nearly 100,000 homeless veterans each year. The remaining 160,000 homeless veterans must seek assistance from other agencies and organizations due to the VA's limited funding. *Id.*

37. Robert Rosenheck, Ellen Bassuk & Amy Salomon, *U.S. Department of Health and Human Services, Assistant Secretary for Planning and Evaluation, Special Populations of Homeless Americans*, <http://aspe.hhs.gov/progsys/homeless/symposium/2-Spclpop.htm> (accessed Jan. 17, 2011).

38. *Id.*

39. Anecdotal evidence proves their existence. For example, the town of Huntington, New York, demolished a wooded encampment of homeless immigrant men, forcing them to live on the streets during one of the coldest weeks of winter. *Out of the Woods*, N.Y. Times A30 (Jan. 19, 2010) (available at 2010 WLNR 1120263). Although charitable individuals helped provide some of the men with food and a warm place to sleep, the local homeless shelter does not accept immigrants without papers. *Id.*

40. Natl. Coalition for the Homeless, *Mental Illness and Homelessness*, [http://www.nationalhomeless.org/factsheets/Mental\\_Illness.pdf](http://www.nationalhomeless.org/factsheets/Mental_Illness.pdf) (July 2009) [hereinafter *Mental Illness*]. Examples of mental disorders include mood disorders such as depressive disorder or bipolar disorder; schizophrenia; and anxiety disorders such as panic disorder, post-traumatic stress disorder, and social phobia. Natl. Inst. of Mental Health, *The Numbers Count: Mental Health Disorders in America*, <http://www.nimh.nih.gov/health/publications/the-numbers-count-mental-disorders-in-america/index.shtml#Intro> (updated Jan. 12, 2011).



gle adults.<sup>41</sup> Studies indicate that half of the mentally ill homeless population also suffers from substance abuse, rendering an already debilitating condition much more difficult to treat—especially when those in need of treatment are on the streets.<sup>42</sup> The homeless are also afflicted with other disabilities, as 13% of homeless individuals are physically disabled.<sup>43</sup>

Homeless individuals are three to six times more likely to become ill than housed people, and three to four times more likely to die prematurely than those in the general population.<sup>44</sup> Common diseases that afflict the homeless include heart disease, cancer, liver disease, kidney disease, skin infections, HIV/AIDS, pneumonia, and tuberculosis.<sup>45</sup> Ailments such as frostbite, hypothermia, and immersion foot are also common.<sup>46</sup> The average life expectancy of a homeless individual is between forty-two and fifty-two years, compared to seventy-eight years for the general population.<sup>47</sup>

Mental illness and poor health also make it more difficult for a homeless individual to get off the streets. A chronically homeless individual generally spends months or years cycling between homeless shelters, hospitals, jails, and other institutional settings, and often has a complex medical problem, substance-abuse

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41. *Mental Illness*, *supra* n. 40.

42. *Id.*

43. *How Many*, *supra* n. 20. Examples of physical disabilities that commonly affect the homeless include arthritis, rheumatism, joint problems, problems walking, loss of a limb, and back and spine injuries. Natl. Health Care for the Homeless Council, *Dealing with Disability: Physical Impairments and Homelessness*, 6 Healing Hands (newsltr. of Health Care for the Homeless Clinicians' Network) 1 (Oct. 2002) (available at [http://www.nhchc.org/Network/HealingHands/2002/hh.10\\_02.pdf](http://www.nhchc.org/Network/HealingHands/2002/hh.10_02.pdf)).

44. Natl. Coalition for the Homeless, *Health Care and Homelessness*, <http://www.nationalhomeless.org/factsheets/health.html> (July 2009) [hereinafter *Health Care*] (citing a National Health Care for the Homeless Council study conducted in 2008).

45. *Id.*

46. *Id.* Frostbite occurs when tissue freezes due to exposure to below-freezing temperatures. Depending upon the exposure, frostbite can result in permanent tissue damage. Emedicine Health, *Frostbite*, [http://www.emedicinehealth.com/frostbite/article\\_em.htm](http://www.emedicinehealth.com/frostbite/article_em.htm) (accessed Jan. 17, 2011). Hypothermia is an abnormally low body temperature, resulting from extended exposure to cold temperatures. Emedicine Health, *Hypothermia*, [http://www.emedicinehealth.com/hypothermia/article\\_em.htm](http://www.emedicinehealth.com/hypothermia/article_em.htm) (accessed Jan. 17, 2011). Immersion foot (or trench foot) occurs when feet are wet for long periods of time, which can result in tissue atrophy and numbness. Ctrs. for Disease Control and Prevention, *Emergency Preparedness and Response, Trench Foot or Immersion Foot*, <http://www.bt.cdc.gov/disasters/trenchfoot.asp> (updated Sept. 8, 2005).

47. *Health Care*, *supra* n. 44.

problem, or serious mental illness.<sup>48</sup> Each year in the United States, there are approximately 150,000 to 200,000 chronically homeless individuals who consume more than 50% of community resources allocated for the entire homeless population.<sup>49</sup> Common characteristics of the chronically homeless include the presence of a disabling condition, multiple medical problems, frequent use of homeless-assistance systems, and disengagement from communities and treatment systems.<sup>50</sup> The needs of the chronically homeless tend to span multiple support systems, and these discrete services are unable to provide the comprehensive support these individuals require.<sup>51</sup>

The increase in poverty and erosion of work opportunities in the United States has only exacerbated the problem of homelessness.<sup>52</sup> A National Academy of Science (NAS) study reports the poverty rate at 15.8%; this means one in every six Americans lives in poverty.<sup>53</sup> According to the NAS study, 47.4 million Americans live in poverty—seven million more than previously estimated by the Census Bureau.<sup>54</sup> Furthermore, rising unemployment has played a significant role in this sharp increase in poverty.<sup>55</sup> The United States Bureau of Labor Statistics reports that unemployment was at a nine-year high in October 2009—up

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48. Natl. Alliance to End Homelessness, *Fact Sheet: Chronic Homelessness*, <http://www.endhomelessness.org/content/article/detail/1623> (Jan. 24, 2010) [hereinafter *Fact Sheet*]. HUD defines a chronically homeless person as “an unaccompanied disabled individual who has been continuously homeless for over one year,” noting that this is a working definition HUD is using as it continues to study the characteristics of the chronically homeless and develop appropriate support mechanisms. United States Dept. Hous. & Urb. Dev., *Chronic Homelessness*, <http://www.hud.gov/offices/cpd/homeless/chronic.cfm> (May 27, 2009).

49. *Fact Sheet*, supra n. 48.

50. Natl. Alliance to End Homelessness, *Chronic Homelessness Brief*, supra n. 14.

51. U.S. Dept. Health & Human Servs., *Ending Chronic Homelessness: Strategies for Action*, <http://aspe.hhs.gov/hsp/homelessness/strategies03/index.htm> (Mar. 2003).

52. Natl. Coalition for the Homeless, *Why Are People Homeless?*, <http://www.nationalhomeless.org/factsheets/why.html> (July 2009) [hereinafter *Why*].

53. Hope Yen, *AP*, *Revised Formula Puts 1 in 6 Americans in Poverty*, <http://www.informationclearinghouse.info/article23769.htm> (Oct. 20, 2009).

54. David Muir & Sadie Bass, *ABC News*, *1 in 6 Americans Live below the Poverty Line*, <http://abcnews.go.com/WN/census-bureau-report-shows-americans-live-poverty/story?id=8875374> (Oct. 20, 2009). The Census Bureau revised its previous estimate and accepted the NAS formula to calculate poverty in America. *Id.* Under the Census Bureau’s previous formula, any household (of four or more) making less than \$22,050 per year was considered to be below the poverty line. *Id.* The NAS formula accounts for other factors such as where people live, medical expenses, and childcare costs. Of those living in poverty, 13.3 million are children. *Id.*

55. *Why*, supra n. 52.

6.3% from October 2000.<sup>56</sup> With more Americans experiencing both poverty and unemployment, the risk of homelessness increases.<sup>57</sup>

Widespread home foreclosure has been particularly problematic, forcing many individuals and families to resort to homelessness.<sup>58</sup> In a recent survey conducted by the National Coalition for the Homeless, providers of services for the homeless indicated that an average of 10% of their clients had become homeless as a result of the recent foreclosure crisis.<sup>59</sup> In the wake of this crisis, many homeless shelters have reached capacity and often must turn people away.<sup>60</sup>

Over the past twenty years, an increasing shortage of affordable housing<sup>61</sup> has forced many Americans to become homeless.<sup>62</sup> According to the National Low Income Housing Coalition, only 6.1 million affordable rental units were available to extremely-low-income (ELI) renters in 2008.<sup>63</sup> That means for every hundred ELI renters, only thirty-seven affordable rental units were available in 2008.<sup>64</sup> Furthermore, the Fair Market Rent (FMR) of a one-bedroom apartment in 2009 was \$779, representing a 41%

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56. U.S. Bureau of Lab. Statistics, *Database: Labor Force Statistics from the Current Population Survey*, [http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data\\_tool=latest\\_numbers&series\\_id=LNS14000000](http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=LNS14000000) (accessed Jan. 17, 2011). The unemployment rate was calculated at 10.1% in October 2009, 6.6% in October 2008, 4.7% in October 2007, and 3.9% in October 2000. *Id.*

57. *Why*, *supra* n. 52.

58. Natl. Coalition for the Homeless, *Foreclosure to Homelessness 2009: The Forgotten Victims of the Subprime Crisis (Report)* 2–3, <http://www.nationalhomeless.org/advocacy/ForeclosuretoHomelessness0609.pdf> (June 2009) [hereinafter *Foreclosure*]; see also Bosman, *supra* n. 25 (reporting on New York's increase in homeless families during the summer months).

59. *Foreclosure*, *supra* n. 58, at 5.

60. Jamie Michael Charles, Student Author, "America's Lost Cause": *The Unconstitutionality of Criminalizing Our Country's Homeless Population*, 18 B.U. Pub. Int. L.J. 315, 317–318 (2009) (detailing a HUD report indicating there was a shortfall of more than 300,000 emergency and transitional year-round beds nationwide); see also Pottinger, 810 F. Supp. at 1558 (noting that at the time of trial, the City of Miami had fewer than 700 beds available for the homeless, forcing many of Miami's homeless to live on the streets).

61. According to HUD, "affordable housing" is defined as costing a household no more than 30% of its annual income. HUD, *Community Planning and Development, Affordable Housing*, <http://www.hud.gov/offices/cpd/affordablehousing/> (updated Jan. 17, 2011).

62. *Why*, *supra* n. 52.

63. Danilo Pelletiere, *National Low Income Housing Coalition, Preliminary Assessment of American Community Survey Data Shows Housing Affordability Gap Worsened for Lowest Income Households from 2007 to 2008*, <http://www.nlihc.org/doc/Prelim-Assess-Rental-Affordability-Gap-State-Level-ACS-12-01.pdf> (Nov. 30, 2009).

64. *Id.*

increase in price from 2000.<sup>65</sup> In order to afford rent for a one-bedroom apartment in 2009, a household had to earn an annual income of at least \$31,146.<sup>66</sup> To be able to afford FMR, a household had to earn \$14.97 per hour and work at least forty-one hours per week; if earning only the federal minimum wage of \$6.55, the household had to work ninety-one hours per week.<sup>67</sup> Not only is there a shortage of affordable housing units available in the United States, but fewer Americans are able to afford the rent of any housing that may be available.

The causes of homelessness are just as varied as the homeless population itself. But while homelessness may be a temporary condition for some Americans, it is also a chronic and disabling condition for many others. Unexpected life events—such as losing a job, suffering from an illness, or returning from military service without adequate assistance—can force those teetering on the edge of survival to life on the streets. We must take measured and thoughtful action to reduce the causes of homelessness and stop this societal inequity.

### III. RECENT TRENDS

#### A. The Criminalization of Homelessness

Over the last twenty-five years, governmental entities have increasingly relied upon the criminal justice system to address the problem of homeless people living in public places.<sup>68</sup> Cities across the country have instituted anti-homeless ordinances that make it illegal for homeless individuals to perform life-sustaining activities such as sleeping, camping, eating, sitting, and begging in public.<sup>69</sup> Those who support anti-homeless ordinances cite pub-

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65. Natl. Low Income Hous. Coalition, *Out of Reach 2009: U.S. Statistics*, [http://www.nlihc.org/oor/oor2009/OOR\\_US-Fact-Sheet.pdf](http://www.nlihc.org/oor/oor2009/OOR_US-Fact-Sheet.pdf) (accessed Jan. 17, 2011).

66. *Id.*

67. *Id.* In a household that has one wage-earner making the federal minimum wage, the household can only afford \$341 in monthly rent. *Id.*

68. Charles, *supra* n. 60, at 317; Natl. Coalition for the Homeless, *Homes Not Handcuffs: The Criminalization of Homelessness in U.S. Cities*, <http://www.nationalhomeless.org/factsheets/criminalization.html> (July 2009) [hereinafter *Criminalization*].

69. Charles, *supra* n. 60, at 315–317; Andrew J. Liese, Student Author, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 Vand. L. Rev. 1413, 1420–1421 (2006); *Criminalization*, *supra* n. 68 (finding that out of 235 cities surveyed, 33% prohibit camping in certain public areas, 30% prohibit sitting or

lic health and safety concerns as the motive,<sup>70</sup> while opponents claim the real motive behind criminalizing daily activities of the homeless is to “sanitize” city streets of “undesirables.”<sup>71</sup>

Florida has played a particularly prominent role in the criminalization of homelessness: four Florida cities top the National Coalition for the Homeless’ “Top 10 Meanest Cities List” due to the number of anti-homeless laws, the severity of the penalties imposed by the laws, the rate of enforcement, and general political attitudes toward the homeless.<sup>72</sup> For example, the City of Miami has banned the homeless from high-traffic public areas<sup>73</sup> and prohibited the homeless from engaging in basic activities of daily life—such as sleeping and eating—in the very places where the homeless are forced to live.<sup>74</sup> The City of St. Petersburg issued a trespass warning that prohibited a twenty-three-year-old homeless man from walking on a sidewalk outside a downtown park, using the park’s public restroom, or sitting in a bus shelter outside the park; police arrested the homeless man ten times for violating the warning.<sup>75</sup>

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lying in certain public areas, and 47% prohibit begging in certain areas).

70. *First Vagabonds Church of God v. City of Orlando*, 578 F. Supp. 2d 1353, 1360 (M.D. Fla. 2008).

71. *Pottinger*, 810 F. Supp. at 1567.

72. *Criminalization*, *supra* n. 68. The four Florida cities that make the Top 10 Meanest Cities List include St. Petersburg (2), Orlando (3), Gainesville (5), and Bradenton (9). *Id.* Other cities that made the list include Los Angeles, California (1), Atlanta, Georgia (4), Kalamazoo, Michigan (6), San Francisco, California (7), Honolulu, Hawaii (8), and Berkeley, California (10). *Id.*

73. *Liese*, *supra* n. 69, at 1421.

74. *Pottinger*, 810 F. Supp. at 1554.

75. *Catron v. City of St. Petersburg*, 2009 WL 3837789 at \*2 (M.D. Fla. 2009). According to the city, the homeless man violated an ordinance within a city park and therefore was permanently banned “curb to curb” from all city parks. *Id.* For a firsthand account of the impact of the criminalization of homelessness in St. Petersburg, see Raquel Rolnik, Poor Peoples Economic Human Rights Campaign, *The Criminalization of American Homelessness: Testimony Presented to U.N. Special Rapporteur on Adequate Housing*, <http://old.economichumanrights.org/m4ol/dailyreport/labels/UN%20Special%20Rapporteur%20Raquel%20Rolnik.html> (Dec. 8, 2009). GW Rolle, a formerly homeless man who lived on the streets in St. Petersburg, Florida, for five years and is now director of the Faces of Homelessness Speakers Bureau, testified before the United Nations Special Rapporteur on Affordable Housing:

The five years that I was homeless in St Petersburg, I was arrested five times. I was arrested two times for trespassing in attempts to shelter myself and three times for possession of an open container.

I served nine days in jail at various intervals. Every time I went to jail I lost my job, or position in the day labor pool and had to start over. Truthfully, I had no idea of what was to become of me because I had no way to accumulate the vast amount of

In addition to direct criminal sanctions, cities target homeless persons indirectly by placing restrictions on providers serving food to poor and homeless persons in public places.<sup>76</sup> For example, a City of Orlando ordinance made it illegal to serve food to more than twenty-five people within the Greater Downtown Park District.<sup>77</sup> Anyone wishing to conduct a “large group feeding”—a common practice to help feed the homeless—had to first obtain a permit; however, only two permits were granted per park within a twelve-month period.<sup>78</sup> Criminal penalties, including possible jail time, could be imposed if anyone conducted food-sharing events without a permit.<sup>79</sup> First Vagabonds Church of God challenged the ordinance as violating the First and Fourteenth Amendments.<sup>80</sup> In support of the ordinance, the City of Orlando cited the following concerns: public safety (increase in crime), public health (litter and garbage), and overuse of the City’s parks.<sup>81</sup> The court found that the City failed to show evidence of crimes committed on the days of feedings, an increase in litter or garbage, or overuse of the park facilities.<sup>82</sup> Instead, the court suggested the “real,

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money needed for lodging. Every cent I made went towards maintaining my existence. Not having a job upon release from incarceration forced me to engage in even more illegal actions such as panhandling and further trespassing.

*Id.*

76. *Criminalization*, *supra* n. 68.

77. Orlando City Code (Fla.) § 18A.09-2 (2006). Orlando’s ordinance titled “Large Group Feeding in Parks and Park Facilities Owned or Controlled by the City in the Greater Downtown Park District (GDPD)” provided that

[e]xcept for activities of a governmental agency within the scope of its governmental authority, or unless specifically permitted to do so by a permit or approval issued pursuant to this Chapter or by City Council: (a) It is unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park . . . .

*Id.* The ordinance defined a large group feeding as an event attracting twenty-five or more people. *First Vagabonds Church of God*, 578 F. Supp. 2d at 1357.

78. *First Vagabonds Church of God*, 578 F. Supp. 2d at 1357.

79. *Id.* Eric Montanez, a member of the political organization Orlando Food Not Bombs (OFNB), was arrested by Orlando police for violating the ordinance by providing free food to hungry and homeless individuals within the Greater Downtown Park District. OFNB is a political organization that regularly serves food to the homeless in Lake Eola Park, located in downtown Orlando. *Id.* at 1357; *see also Criminalization*, *supra* n. 68 (noting that restrictions on the serving of food to the homeless in public areas are on the rise).

80. *First Vagabonds Church of God*, 578 F. Supp. 2d at 1355.

81. *Id.* at 1360.

82. *Id.*

though unstated” reason for the ordinance was for “discouraging the homeless from congregating in downtown . . . .”<sup>83</sup>

As a result of the imposition of criminal sanctions via anti-homeless ordinances, the homeless are being pushed out of public areas, have fewer places to perform life-sustaining activities, and are more likely to be incarcerated.<sup>84</sup> Cities and states are passing the buck by outlawing conduct that is neither immoral nor dangerous to the public and relying on ineffective measures to address the underlying problem of homelessness.<sup>85</sup> Instead of concentrating resources on affordable housing and community services—which would effectively address the core issues of homelessness—many cities spend their limited budgets on arresting, fining, and detaining homeless people.<sup>86</sup> Relying on the criminal justice system comes at a great cost to the public, to law enforcement, and to an already overburdened judiciary.<sup>87</sup> Furthermore, these measures unfairly target a disadvantaged segment of our population: anti-homeless ordinances and laws attempt to criminalize a condition that many homeless individuals have no control over—most homeless individuals live on the streets because they have no other place to call home.<sup>88</sup> The result is a lose-lose situa-

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83. *Id.*

84. Joern, *supra* n. 9, at 319; see also Jesse McKinley, *Cities Deal with a Surge in Shantytowns*, N.Y. Times A1 (Mar. 26, 2009) (available at: <http://www.nytimes.com/2009/03/26/us/26tents.html>) (reporting on the nationwide increase in shantytowns used to house homeless individuals).

85. Liese, *supra* n. 69, at 1446–1447.

86. Kristen Brown, *Natl. Hous. Inst., Shelterforce Online, Outlawing Homelessness*, <http://www.nhi.org/online/issues/106/brown.html> (July/Aug 1999) (outlining why the criminalization of homelessness is bad public policy).

87. See Jonathan Abel, *Justice Slows, Pushing up Pinellas Jail Costs*, St. Petersburg Times 1A (Sept. 6, 2008) (available at <http://www.tampabay.com/news/courts/criminal/article798940.ece>) (discussing the high cost of housing detainees awaiting trial in Pinellas County).

88. In *Powell v. Texas*, Justice White concurred with the majority’s opinion that a Texas statute prohibiting public intoxication was not cruel and unusual punishment but acknowledged the possibility that the law would impose cruel and unusual punishment for those who have no choice but to be in public:

For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go . . . . I would think a showing could be made that . . . avoiding public places . . . is also impossible. As applied to them this statute is in effect a law [that] bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

392 U.S. 514, 551 (1968) (White, J., concurring); see also *Robinson v. Cal.*, 370 U.S. 660, 667 (1962) (finding unconstitutional a statute that criminalized the status of narcotic

tion: homeless people are punished for simply performing daily activities to survive and the public spends a great deal of money trying to enforce unfair and ineffective ordinances.

### B. Targeted Violence against the Homeless

Along with the growing trend of criminalizing homelessness, there has been a surge of unprovoked crimes targeting the homeless. This surge includes the “sport killing” of the homeless by youth offenders.<sup>89</sup> Florida is no stranger to this growing phenomenon: the state leads the nation in attacks against the homeless, as evidenced by the beating death of Norris Gaynor while he slept on a park bench in Ft. Lauderdale.<sup>90</sup> In a 2008 study conducted by the National Coalition for the Homeless, 73% of those arrested and accused of violently attacking the homeless were under the age of twenty-five and 43% were between the ages of thirteen and nineteen.<sup>91</sup>

The surge in violent attacks by young people has been linked to the popularity of videotapes of thrill crimes such as “bum bashing”<sup>92</sup> or “bum hunting.”<sup>93</sup> Bum fighting videos show homeless individuals—coerced with small amounts of money and alcohol—fighting each other and engaging in self-destructive behavior such as lighting themselves on fire, branding themselves, or pulling out their own teeth with pliers.<sup>94</sup> In a popular video, a character named “The Bum Hunter” dresses in safari gear and hunts home-

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addiction because it inflicted cruel and unusual punishment in violation of the Fourteenth Amendment).

89. Joern, *supra* n. 9, at 321; see Terri Day, *Bumfights and Copycat Crimes . . . Connecting the Dots: Negligent Publication or Protected Speech?* 37 *Stetson L. Rev.* 825, 826 (2008) (noting a “frightening trend” of bum-bashing as a sport).

90. Eric Lichtblau, *N.Y. Times*, *Attacks on Homeless Bring Push on Hate Crime Laws*, <http://www.nytimes.com/2009/08/08/us/08homeless.html> (Aug. 7, 2009); Alanez, *supra* n. 1.

91. *Hate Crimes Report*, *supra* n. 7, at 20. Over a ten-year period—from 1999 to 2008—78% of those arrested for attacking the homeless were under the age of twenty-five and 58% were between the ages of thirteen and nineteen. *Id.*

92. Day, *supra* n. 89, at 825; see *id.* at 825–831 (explaining that the phenomenon of videotaped violence against the homeless depicted in the “Bumfights” series has led to an increase in random violence against the homeless).

93. Joern, *supra* n. 9, at 322; see *id.* at 321–323 (claiming that the “Bumfights” and “The Bum Hunter” video series encourage violence that “dehumanize[s] homeless people and exploit[s] them for entertainment”).

94. Joern, *supra* n. 9, at 321; see also Day, *supra* n. 89, at 825 (arguing that bum fighting should not be protected under the First Amendment because the First Amendment does not protect criminal activity).



less people by attacking them in their sleep.<sup>95</sup> The Bum Hunter engages in such repulsive attacks as duct-taping the mouth of homeless individuals while they sleep; tying a homeless man in netting and throwing him into the back of a van; and tying a homeless man to a tree, removing his clothes, and scrubbing him with a mop.<sup>96</sup>

According to the National Coalition for the Homeless, housed individuals committed 880 acts of violence against the homeless from 1999 to 2008.<sup>97</sup> These acts of violence resulted in the deaths of 244 homeless individuals.<sup>98</sup> In 2008 alone, 106 violent attacks against the homeless were reported, including twenty-seven homicides.<sup>99</sup> This means the homeless were victims of homicide more often than any group protected under hate crime law: in 2008, there were only seven homicides for all protected classes combined.<sup>100</sup> Of the seventy-nine nonlethal attacks against the homeless in 2008, nine were rapes or sexual assaults, three involved setting a homeless person on fire, fifty-four were beatings, eight were shootings, and five involved police brutality.<sup>101</sup>

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95. Day, *supra* n. 89, at 826–827; Joern, *supra* n. 9, at 321–322.

96. Joern, *supra* n. 9, at 321–322. More than 300,000 copies of the Bumfights series have been sold. Due to the success of the series, the Bumfights creators sold rights to the series for \$1.5 million. *Id.* at 321.

97. *Hate Crimes Report*, *supra* n. 7, at 18.

98. *Id.*

99. *Id.* at 19.

100. FBI, *2008 Hate Crimes Statistics: Incidents and Offenses 4*, <http://www2.fbi.gov/ucr/hc2008/documents/incidentsandoffenses.pdf> (Nov. 2009) (stating that of the 5,542 hate crimes reported, there were only seven murders and eleven forcible rapes for all protected classes, including sexual orientation); Brian Levin & Michael Stoops, *CNN, Beating the Homeless is Cruel, Not Cool*, <http://www.cnn.com/2009/CRIME/08/12/levin.homeless.hate/index.html> (Aug. 12, 2009) (citing a National Coalition for the Homeless and Center for the Study of Hate and Extremism study indicating that nearly two-and-a-half times more homeless people have been killed in America in bias-based homicides than the total number of all murders based upon race, religion, national origin, disability, and sexual orientation).

101. *Hate Crimes Report*, *supra* n. 7, at 19. Headlines from news stories reporting on attacks against the homeless include: “16 Year-old Boy Beats Homeless Man to Death with Baseball Bat,” “Homeless Veteran Killed in Middle of Marketplace during the Day,” “Homeless Man Robbed and Set on Fire,” “Homeless Men Violently Harassed with Chainsaw on Numerous Occasion,” and “Homeless Man Beaten with Nail Studded Board.” *Id.* at 9.

### C. Efforts to Include Homelessness As a Protected Class under Hate Crime Law

Due to the heinous violence homeless individuals have endured, some public officials are working to include homelessness as a protected class under hate crime law. A hate crime is a discriminatory crime whereby an offender targets the victim because of “actual or perceived membership in a particular group.”<sup>102</sup> Hate crimes are distinguished from other crimes by the offender’s motivation for selecting the victim.<sup>103</sup> The focus is on the offender’s motive—if the offender intentionally selects the victim because of a characteristic protected by hate crime law, then the act of violence qualifies as a hate crime.<sup>104</sup>

Over the course of forty years, hate crime law has evolved to include protection for crimes based upon race, color, ethnicity, religion, disability, or sexual orientation. The first hate crimes bill—which was passed in 1968 and applied only to federally protected activities such as voting or attending public school—defined a hate crime as one in which the defendant intentionally selects a victim because of his or her race, color, or national origin.<sup>105</sup> In 1990, Congress passed the Hate Crimes Statistics Act, which authorized the Department of Justice to collect data from law enforcement agencies about crimes that “manifest evidence of prejudice based upon race, religion, sexual orientation, or ethnicity.”<sup>106</sup> The Hate Crimes Sentencing Enhancement Act (HCSEA)

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102. Joern, *supra* n. 9, at 313 (quoting Brian Levin, *Hate Crimes: Worse by Definition*, 15 J. Contemp. Crim. Just. 6, 6–7 (1999)). “All hate crime laws consider the intent of the offender to be an integral part of the making of a hate crime. . . . [T]he prohibited motive must manifest in an illegal act committed against the victim to constitute a hate crime.” *Id.* at 313–314.

103. *Id.* Under the discriminatory selection model, a hate crime is defined based upon the offender’s discriminatory selection of a victim regardless of why the selection was made. *Id.* at 314.

104. *Id.*

105. 18 U.S.C. § 245 (2006). The first hate crimes legislation was limited to activities of violence and intimidation while one was voting, serving on a jury, or enjoying federal lands. *Id.* at § 245(b). No significant changes to the statute have occurred since 1968.

106. Hate Crime Statistics Act, Pub. L. No. 101-275, 104 Stat. 140, 140 (1990).

Under the authority of section 534 of title 28, United States Code, the Attorney General shall acquire data . . . about crimes that manifest evidence of prejudice based on race, religion, sexual orientation, or ethnicity, including where appropriate the crimes of murder, non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage[,] or vandalism of property.

of 1994—enacted as a section of the Violent Crime Control and Law Enforcement Act—extended the definition of a hate crime to include “a crime in which the defendant intentionally selects a victim . . . because of the actual or perceived race, color, religion, national origin, ethnicity, gender, disability, or sexual orientation of any person.”<sup>107</sup> HCSEA resulted in stiffer penalties for hate crimes violations, but only applied to crimes committed on federal property or while performing a federally protected activity.<sup>108</sup>

The Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, passed by Congress and signed into law by President Obama in October 2009, expands the 1968 federal hate crime law to include sexual orientation as a protected status.<sup>109</sup> The result is the inclusion of crimes motivated by a victim’s actual or perceived gender, sexual orientation, gender identity, or disability.<sup>110</sup> The Bill also removes the prerequisite that the victim engage in a federally protected activity, such as voting or going to school; gives federal authorities greater ability to engage in hate crimes investigations that local authorities choose not to pursue; provides \$5 million per year in funding for fiscal years 2010–2012 to help state and local agencies pay for investigating and prosecuting hate crimes; and requires the Federal Bureau of Investigation to track statistics on hate crimes against transgender people.<sup>111</sup>

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*Id.*

107. Pub. L. No. 103-322, § 280003, 108 Stat. 2096 (1994).

108. U.S. Sentencing Guidelines Manual § 3A1.1(a) (2009); *see also* Natl. Coalition for the Homeless, *Hate Crimes and Violence against People Experiencing Homelessness*, <http://www.nationalhomeless.org/factsheets/hatecrimes.html> (Aug. 2010) [hereinafter *Violence*] (discussing the history of violence against the homeless and current hate crimes statutes).

109. Pub. L. No. 111-84, §§ 4701–4713, 123 Stat. 2190, 2835–2844 (2009). Congress based its power to pass such a law upon its power to regulate interstate commerce. *Id.* Specifically, Congress cited the following concerns: movement of members of targeted groups is impeded; members of targeted groups may be forced to move across state lines; members of targeted groups are prevented from participating in commercial activity; perpetrators cross state lines to commit acts of violence; instrumentalities of commerce are used to commit acts of violence; and the acts of violence use articles that have traveled in interstate commerce. *Id.* at § 4702(6); *but see United States v. Lopez*, 514 U.S. 549, 601–602 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress’ authority to regulate states under the Commerce Clause and improperly allowed Congress to exercise a general police power retained by the states).

110. 123 Stat. at 2835; Perry Bacon, Jr., *Wash. Post*, *After 10-Year Dispute, Expansion of Hate Crimes Law to Gays Signed*, <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/28/AR2009102804909.html> (Oct. 29, 2009); Ben Feller, *AP*, *Obama Hails Expansion of Hate Crimes Legislation*, [http://www.breitbart.com/article.php?id=D9BKDBLG0&show\\_article=1](http://www.breitbart.com/article.php?id=D9BKDBLG0&show_article=1) (Oct. 28, 2009).

111. 123 Stat. at 2836–2843.

Upon signing the Bill, President Obama declared, “We must stand against crimes that are meant not only to break bones, but to break spirits; not only to inflict harm, but to instill fear.”<sup>112</sup>

The current trend is to expand hate crimes legislation to include homelessness as a protected class. Recognizing that homeless people are among the most vulnerable in our society to hate crimes—particularly because they live in public spaces and may be unable to find safety if attacked—legislators are working to provide them much-needed protection.<sup>113</sup> At the federal level, the United States House of Representatives is considering the Hate Crimes Act against the Homeless Statistics Act, which was introduced by Representative Eddie Bernice Johnson in July 2009.<sup>114</sup> In October 2009, Senators Benjamin L. Cardin and Susan M. Collins introduced the Hate Crimes against the Homeless Statistics Act in the United States Senate, also calling for the quantification of crimes against the homeless.<sup>115</sup>

Several states have been more proactive and productive in including homelessness as a protected class under hate crime statutes. Maine added crimes against the homeless as an aggravating factor in sentencing in 2006.<sup>116</sup> In 2008, Alaska included

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112. Feller, *supra* n. 110.

113. See Sen. Benjamin L. Cardin, *Southern Maryland Online, Hate Crimes against the Homeless*, <http://somed.com/news/headlines/2010/12572.shtml> (Oct. 7, 2010) (advocating for inclusion of the homeless in the federal hate crimes data collection law because the homeless are often the most vulnerable members of our society); Lee Logan, *Miami Herald, Homeless Could Be Added to Florida's Hate Crimes Law*, <http://www.miamiherald.com/2010/04/21/1589541/homeless-could-be-added-to-floridas.html> (Apr. 21, 2010) (reporting that Florida's inclusion of the homeless in the state's hate crimes law was motivated by legislators' desire to protect this vulnerable population who have no place to retreat to).

114. H.R. 3419, 111th Cong. (July 30, 2009). This Bill proposes to amend the Hate Crimes Statistics Act to include crimes against the homeless. *Id.* It was referred to the subcommittee on Crime, Terrorism, and Homeland Security and is pending review. *Id.*

115. Sen. 1765, 111th Cong. (Oct. 8, 2009). This proposed legislation, which mirrors the House bill, has been referred to the Judiciary Committee and is pending review. *Id.*

116. 17-A Me. Rev. Stat. Ann. § 1151(8)(B) (2006 & Supp. 2008). Maine's law provides protection for individuals who have been selected “by the defendant . . . because of the race, color, religion, sex, ancestry, national origin, physical or mental disability, sexual orientation or homelessness of that person . . .” *Id.* Maine was the first state to employ a model in which the judge has the discretion to consider a victim's homeless status and whether the crime was motivated by hate when determining if the perpetrator deserves a harsher sentence. *Hate Crimes Report, supra* n. 7, at 43. Thus, Maine's law allowed the judge to consider a victim's homelessness as an aggravating factor in sentencing but did not expressly classify attacks against the homeless as hate crimes. *Id.* For more information on Maine's legislation, see Seattle Human Rights Commission, *2007 Homeless Taskforce Updates, Maine Legislation*, <http://www.cityofseattle.net/humanrights/Documents/MaineLEGISLATION.pdf> (summarizing and discussing Maine's Campaign to

the homeless in a law protecting Alaska's vulnerable populations.<sup>117</sup> Maryland and the District of Columbia were the first to recognize homelessness expressly in hate crimes legislation when they did so in 2009,<sup>118</sup> followed by Florida and Rhode Island in 2010.<sup>119</sup> California, Ohio, South Carolina, Massachusetts, Nevada, and Texas are all considering similar measures to include homelessness in their hate crimes statutes.<sup>120</sup>

Although progress has been made, more action is required—on both the federal and state levels—to address the senseless violence that homeless individuals experience as a consequence of their status in society.<sup>121</sup> As of November 2010, only Maryland, Florida, Rhode Island, and the District of Columbia have formally recognized the homeless as a protected class under hate crime statutes.<sup>122</sup> Progress has been limited for a number of reasons, including Congress' failure to incorporate homelessness in federal hate crime legislation.<sup>123</sup> States may also be reticent to expand

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End Hate Violence against Homeless People).

117. *Violence*, *supra* n. 108.

118. *Id.* Maryland's legislation marked the first nondiscretionary addition of homelessness to hate crime law. *Id.*; Associated Press, *msnbc.com*, *Attacks on Homeless Become a Hate Crime in Md.*, <http://www.msnbc.msn.com/id/30627072/> (May 7, 2009).

119. Fla. Stat. § 775.085 (2010). Effective October 1, 2010, Florida extended hate crime protection to any crime based on "race, color, ancestry, ethnicity, religion, sexual orientation, national origin, homeless status, mental or physical disability, or advanced age of the victim." Homeless status is defined as lacking a "fixed, regular, and adequate nighttime residence; or [h]as primary nighttime residence that is: [a] supervised publicly or privately operated shelter designed to provide temporary living accommodations; or [a] public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings." *Id.* By recognizing violence against the homeless as a hate crime, the Florida law effectively increases the maximum sentence a judge can impose on convicted offenders of such crimes. For example, a first-degree misdemeanor, which imposes a sentence of one year in jail and a fine of \$1,000, will result in the more serious charge of a third-degree felony if classified as a hate crime. Deborah Circelli, *Daytona Beach News-Journal*, *Crist Adds Homeless Attacks as Hate Crime*, <http://www.news-journalonline.com/news/local/east-volusia/2010/05/13/crist-adds-homeless-attacks-as-hate-crime.html> (May 13, 2010). A third-degree felony can result in up to five years in jail and a \$5,000 fine. *Id.* In 2010, Rhode Island included homelessness to the state's hate crimes definition for reporting purposes. *Violence*, *supra* n. 108.

120. Lichtblau, *supra* n. 90; *Hate Crimes Report*, *supra* n. 7, at 11. On May 6, 2010, California's Assembly approved a measure to include targeted violence against homeless people in its State's hate crime law. The measure must still be approved by the California Senate. Jim Sanders, *Sacramento Bee*, *Assembly Approves Protection for Homeless*, <http://www.sacbee.com/2010/05/07/2733721/assembly-approves-protection-for.html> (May 7, 2010).

121. *Hate Crimes Report*, *supra* n. 7, at 12.

122. *Violence*, *supra* n. 108.

123. See Cardin, *supra* n. 113 (discussing Senator Cardin's efforts to introduce legisla-

hate crime law without a full understanding of the motivation behind such crimes; for example, there is a debate as to whether crimes against the homeless are motivated by intentional selection or merely because homeless people are visible.<sup>124</sup> Finally, some legislators have philosophical and political reasons for not supporting the inclusion of homelessness as a protected status under hate crime law—namely, that hate crime law should exist to protect *all* people regardless of historical discrimination based on race, religion, nationality, disability, sexual orientation, or gender.<sup>125</sup> While obstacles remain, the efforts of those states that have been successful in this campaign demonstrate that these barriers are not insurmountable.

#### IV. WHY THE HOMELESS DESERVE MORE PROTECTION UNDER HATE CRIME LAW AND EQUAL PROTECTION SCRUTINY

This Article advances two distinct yet interrelated arguments in favor of providing more protections for the homeless in our society. First, this Article advocates for the inclusion of homelessness as a protected status under hate crime law. Such protection—which would result in stiffer penalties for convicted offenders—is warranted because homeless people have been subjected to brutal, targeted attacks based solely upon their membership in a particular group. Second, this Article argues that because governmental entities have criminalized the day-to-day activities of the homeless, courts should apply enhanced rational basis scrutiny—“rational basis with bite”—to equal protection claims brought by homeless individuals. Currently, the homeless are afforded only the default level of rational basis scrutiny when bringing equal protection challenges to ordinances that criminalize homelessness.<sup>126</sup> Hate crime protections and enhanced

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tion that includes homelessness as a protected status under federal hate crime law).

124. *All Things Considered*, Radio Broad., “Debating Homeless Hate Crimes” (Natl. Pub. Radio Oct. 18, 2009) (transcript available at <http://www.npr.org/templates/story/story.php?storyId=113916951>).

125. Scott Steiner, *Habitations of Cruelty: The Pitfalls of Expanding Hate Crimes Legislation to Include the Homeless*, 45 No. 5 *Crim. L. Bull.* Art. 4 (Fall 2009).

126. *See Joel*, 232 F.3d at 1357–1359 (applying the default-level rational basis scrutiny to a City of Orlando ordinance prohibiting camping on public property on the grounds that the homeless are not a suspect class and camping is not a fundamental right).

judicial scrutiny are warranted because the homeless have been “relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>127</sup>

### A. Why Hate Crime Protection?

Hate crime law is rooted in the notion that “intentionally selecting a crime victim due to a socially recognizable status characteristic” should be a distinct, chargeable offense or an aggravating factor that can increase a perpetrator’s sentence.<sup>128</sup> In the beginning, almost every state protected victims on the basis of race, religion, and ethnicity, but over time states recognized that their hate crime laws excluded other vulnerable groups “singled out for prejudice related violence” including sexual orientation and disability.<sup>129</sup> States should now expand hate crime protections to include the homeless as well.

Violence against the homeless, like violence against other protected classes under hate crime law, is “motivated by a specific, personal, and group-based reason: the victim’s real or perceived membership in a particular group.”<sup>130</sup> Like those who experience violence based upon their race, ethnicity, religion, disability, or sexual orientation, the homeless are victims of targeted crimes fueled by discrimination.<sup>131</sup> In fact, the homeless are more frequent targets of bias-motivated murder than any currently protected class.<sup>132</sup>

Traditionally, hate crime law has focused on “immutable characteristics”—that is, those features that a person cannot change.<sup>133</sup> Although being homeless is not an immutable characteristic like race or ethnicity, not all protected classes have immutable characteristics.<sup>134</sup> For instance, religion and sexual

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127. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

128. *Hate Crimes Report*, *supra* n. 7, at 35; *see supra* pt. III(C) (discussing the evolution of hate crime law in the United States and efforts to include homelessness as a protected class under state and federal hate crime statutes).

129. *Hate Crimes Report*, *supra* n. 7, at 35.

130. Joern, *supra* n. 9, at 323.

131. *Hate Crimes Report*, *supra* n. 7, at 10.

132. Levin & Stoops, *supra* n. 100.

133. Steiner, *supra* n.125.

134. Margaret Talbot, *The New Yorker*, *Is Sexuality Immutable?* <http://www.newyorker.com/online/blogs/newsdesk/2010/01/is-sexuality-immutable.html> (Jan. 25, 2010). Testi-

orientation are arguably not immutable characteristics, yet these classifications are protected under current hate crime statutes.<sup>135</sup>

What makes homelessness worthy of hate crime protection is its similarity to currently protected classifications—the homeless are victims of targeted violence based upon virulent discrimination and thus require additional protection from the legal and political process.<sup>136</sup>

Attacks on the homeless demonstrate a gruesome display of brutality: killing a wheelchair-bound homeless man by setting him on fire; beating a homeless man to death and then smearing the deceased's face with feces; and killing a sleeping homeless woman by pushing her off a dock into a river.<sup>137</sup> Unfortunately, violence against the homeless often goes unreported.<sup>138</sup> In many communities, the homeless have a tenuous relationship with law enforcement and fail to report acts of violence because of a perception that the police do not care what happens to the homeless.<sup>139</sup> The combination of gruesome and discriminatory attacks against the homeless, along with the perceived lack of protection by law enforcement, renders the homeless a vulnerable population in need of greater protection under hate crime law.

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mony for the Proposition 8 battle in California reveals that there is no consensus as to whether sexual orientation is an immutable characteristic. *Id.* Margaret Talbot refers to actress Anne Heche—who was in a lesbian relationship with Ellen DeGeneres but subsequently married a heterosexual male—as an example of someone whose sexual orientation changed. *Id.* Talbot suggests that immutability is not required for strict scrutiny review, as religion is not an immutable characteristic; people change religions, renew their faith, or stop practicing any religion. *Id.* House Minority Leader Representative John Boehner opposed the expansion of hate crime legislation because it includes non-immutable characteristics such as sexual orientation. Brian Montopoli, *CBS News, Why GOP Leader Opposes Hate Crimes Protections for Gays*, <http://www.cbsnews.com/blogs/2009/10/13/politics/politicalhotsheet/entry5381671.shtml> (Oct. 13, 2009). Representative Boehner suggested religion was an immutable characteristic but hate crime experts do not agree. *Id.* Northeastern University Professor Jack Levin suggested that “to use immutability as a criterion doesn’t make any sense at all. . . . Religion is clearly not ascribed. . . . People can change it at any time and people do.” *Id.*

135. Talbot, *supra* n. 134.

136. *See supra* pt. III(B) (discussing the growing trend of perpetrators targeting violence against homeless people simply because they are homeless).

137. Joern, *supra* n. 9, at 306–307.

138. *Id.* at 307.

139. *Id.*; *see Pottinger*, 810 F. Supp. at 1567 (finding that the city of Miami’s police department engaged in efforts to “sanitize” the city by removing vagrants and “undesirables”).



### B. Why Rational Basis with Bite Scrutiny?

The Fourteenth Amendment proclaims that no state may “deny to any person within its jurisdiction the equal protection of the laws.”<sup>140</sup> To ensure this promise of equal protection is met, courts scrutinize the challenged law to determine if the relationship between a government’s objectives and its legislative classifications is at least rational.<sup>141</sup> Judicial scrutiny of equal protection claims has historically taken the form of a three-tiered model: strict scrutiny for suspect classifications, intermediate scrutiny for quasi-suspect classifications, and rational basis scrutiny for all other classifications.<sup>142</sup> Recognizing the restrictiveness of this rigid, three-tiered approach, the Court has, at times, applied enhanced rational basis scrutiny to cases involving historically disadvantaged groups that do not fall within the suspect or quasi-suspect classes.<sup>143</sup>

Enhanced rational basis review falls between rational basis and intermediate scrutiny; rational basis with bite is a “more searching inquiry” than ordinary rational basis scrutiny but employs less-careful scrutiny than intermediate review.<sup>144</sup> According to Justice Marshall, “By invoking heightened scrutiny, the Court recognizes, and compels lower courts to recognize, that a group may well be the target of the sort of prejudiced, thoughtless, or stereotyped action that offends principles of equality found in the Fourteenth Amendment.”<sup>145</sup>

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140. U.S. Const. amend. XIV.

141. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174–175 (1980).

142. *City of Cleburne*, 473 U.S. at 440–442. Justice White’s opinion in *City of Cleburne* cogently describes the traditional standards of review for equal protection claims.

143. *Id.* at 456 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (suggesting that the majority employed a form of “heightened scrutiny” in striking down an ordinance that prevented the construction of a group home for the mentally retarded, even though the majority claimed the law was invalid on a “no ‘more exacting standard’ than ordinary rational-basis review”).

144. *Id.* at 471–472 (commenting that the “more searching inquiry, be it called heightened scrutiny or ‘second order’ rational-basis review, is a method of approaching certain classifications skeptically, with judgment suspended until the facts are in and the evidence considered”). “To be sure, the Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter be called ‘second order’ rational-basis review rather than ‘heightened scrutiny.’” *Id.* at 459.

145. *Id.* at 472.

1. *Traditional Levels of Judicial Scrutiny  
under Equal Protection*

The highest level of scrutiny applied by courts is strict scrutiny. Strict scrutiny is used when suspect classifications—such as race, religion, and national origin—are involved or there is an infringement of a fundamental constitutional right.<sup>146</sup> Under strict scrutiny, the government must prove the classification is *suitably or narrowly tailored* to accomplish a *compelling* government objective.<sup>147</sup> Justice Stone set forth the parameters of strict scrutiny in *United States v. Carolene Products*.<sup>148</sup> In his renowned footnote, Justice Stone considered three types of legislative classifications suitable for strict scrutiny: (1) those in facial conflict with constitutional rights; (2) those that inhibit the democratic process; and (3) those that classify on the basis of race, religion, national origin, or *membership in a “discrete and insular” minority*.<sup>149</sup>

Traditionally, a class of people is considered suspect if it is saddled with disabilities, subjected to a history of unequal treatment, or consigned to a position of political powerlessness requiring extraordinary protection from the political process.<sup>150</sup> Notably, however, when “wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages.”<sup>151</sup> In *San Antonio Independent School District v. Rodriguez*,<sup>152</sup> the Court found that low-income schoolchildren did not constitute a suspect class warranting strict scrutiny and thus upheld a law that financed public schools through a complex property tax that resulted in disproportionate funding in rural and low-income areas.<sup>153</sup> While the majority determined that poverty was not a suspect classification, Justice Marshall’s dissent suggested that discrimination on the basis of wealth may in fact create a suspect classification.<sup>154</sup> According to Justice Marshall,

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146. *City of Cleburne*, 473 U.S. at 440.

147. *Id.*

148. 304 U.S. 144 (1938).

149. *Carolene Products*, 304 U.S. at 152 n. 4 (emphasis added).

150. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

151. *Id.* at 24.

152. 411 U.S. 1.

153. *Id.* at 17–18.

154. *Id.* at 117 (Marshall & Douglas, JJ., dissenting) (noting that “[t]his Court has

discrimination based on a group's wealth deserves careful judicial scrutiny.<sup>155</sup> In light of Justice Marshall's dissent, some advocates argue that anti-homeless laws should be considered a wealth-based classification deserving suspect classification.<sup>156</sup>

The next level of scrutiny employed by courts is intermediate scrutiny. Intermediate scrutiny is used when quasi-suspect classes, such as gender or illegitimacy, are at issue.<sup>157</sup> Laws based upon quasi-suspect classifications are presumptively void.<sup>158</sup> The government bears the burden of proving that such classifications are *substantially* related to an *important* government objective.<sup>159</sup> Although clear rules for identifying a quasi-suspect class are elusive, courts are to consider "indicia of suspectness" such as the discreteness and insularity of the class.<sup>160</sup> The Court has announced that discrimination based on characteristics beyond a person's control that do not impact his or her contribution to society are subject to intermediate scrutiny.<sup>161</sup> Under this standard,

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frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny").

155. *Id.* at 122; *see also Goldberg v. Kelly*, 397 U.S. 254, 264–266 (1970) (finding that due process requires a hearing prior to termination of welfare benefits because a person's ability to obtain food, clothing, housing, and medical care is essential and outweighs the state's desire to minimize administrative costs).

156. Jennifer Watson, *When No Place Is Home: Why the Homeless Deserve Suspect Classification*, 88 Iowa L. Rev. 501, 511 (2003).

157. *City of Cleburne*, 473 U.S. at 440–441; *Craig v. Boren*, 429 U.S. 190, 197 (1976). In *Craig v. Boren*, the Court struck down an Oklahoma statute prohibiting the sale of beer with 3.2% alcohol content to males under the age of twenty-one and females under the age of eighteen. *Id.* at 191–192. The state contended that the gender-based distinction was necessary due to statistical evidence indicating that males were more likely to be involved in alcohol-related driving offenses. *Id.* at 200–201. While lauding the government's objective to ensure public health and safety, the Court nevertheless found a tenuous connection between the statistical evidence and gender-based distinction in the law. *Id.* at 199–200. Because the gender-based distinction was not substantially related to preventing alcohol-related accidents involving young adults, the law was found unconstitutional using intermediate scrutiny. *Id.* at 199–201. The Court stated:

In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.

*Id.* at 199.

158. *City of Cleburne*, 473 U.S. at 440–441.

159. *Id.*

160. Note, *Quasi-Suspect Classes and Discriminatory Intent: A New Model*, 90 Yale L.J. 912, 916 (March, 1981).

161. *City of Cleburne*, 473 U.S. at 440–441.

the Court has recognized gender and illegitimacy as quasi-suspect classes, but not mental retardation.<sup>162</sup>

The default level of equal protection judicial review is rational basis scrutiny.<sup>163</sup> Under this level of scrutiny, a court will deem a law or ordinance to be presumptively valid; the plaintiff must prove the classification does not *rationaly* advance a *legitimate* state objective.<sup>164</sup> Rational basis scrutiny requires only a conceivable basis for the law's enactment—the true objective need not be rationally related to the legislative classification so long as there could be a rationally related reason for the law.<sup>165</sup> This is the Court's most deferential level of scrutiny.<sup>166</sup>

Rational basis scrutiny arose out of the Court's desire to maintain independence and refrain from treading on the turf of lawmakers. In *Williamson v. Lee Optical of Oklahoma*,<sup>167</sup> the Court opined, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."<sup>168</sup> The Court noted that "[f]or protection against abuses by legislatures the people must resort to the polls, not to the courts."<sup>169</sup>

In the realm of economic regulation, the Court has preferred to remain aloof by applying rational basis scrutiny<sup>170</sup>—although not at all costs. In *United States Railroad Retirement Board v.*

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162. *Id.* at 442.

163. Calvin Massey, *American Constitutional Law: Powers and Liberties* 611 (2d ed., Aspen 2005).

164. *United States Dept. Agric. v. Moreno*, 413 U.S. 528, 533 (1973).

165. *Fritz*, 449 U.S. at 174.

166. *See Williams v. Pryor*, 240 F.3d 944, 948 (11th Cir. 2001) (noting that "[a]lmost every statute subject to the very deferential rational basis scrutiny standard is found to be constitutional").

167. 348 U.S. 483 (1955). At issue in *Williamson* was an Oklahoma law that barred opticians from making eyeglasses without a prescription. *Id.* at 485. The Court overturned the trial court's ruling that the ban was not rationally related to health and welfare; instead, the Court held that since the ban was not discriminatory, it should be upheld as long as there was any conceivable basis that the law was rationally related to a legitimate state goal. *Id.* at 489, 491.

168. *Id.* at 488.

169. *Id.* (quoting *Munn v. Ill.*, 94 U.S. 113, 134 (1876)).

170. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv. L. Rev. 1212, 1217 (1978) (explaining the tendency of unelected federal judges to exercise "restraint in the application of the equal protection clause to state regulatory and taxation measures").

*Fritz*,<sup>171</sup> the Court found constitutional Congress' fundamental restructuring of the railroad retirement system, which resulted in the elimination of railroad retirement benefits for certain employees.<sup>172</sup> According to the Court, "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution . . . ."<sup>173</sup> In so holding, the Court affirmed its earlier decision in *Williamson*: when plausible, rational reasons for congressional action exist, judicial inquiry must come to an end.<sup>174</sup> Notably, however, Justice Stevens' concurrence put forth that "[i]f the adverse impact on the disfavored class is an apparent aim of the legislature, its impartiality would be suspect."<sup>175</sup> Therefore, the Court opened the door to using enhanced rational basis scrutiny in the economic arena if the aim of legislation is to adversely affect a disfavored class.

The Court demonstrated its willingness to use rational basis scrutiny to strike down legislation directed toward a class of disadvantaged people in *United States Department of Agriculture v. Moreno*,<sup>176</sup> finding the Food Stamp Act of 1964 unconstitutional.<sup>177</sup> Under the Food Stamp Act, Congress excluded benefits to any household containing an individual not related to any other member in the household.<sup>178</sup> The *Moreno* Court looked at the *purpose* of the law—to alleviate hunger and malnutrition—and found that distinguishing households with nonrelatives was not rationally related to the purpose of the law.<sup>179</sup> Instead, the law was aimed at

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171. 449 U.S. 166. In 1974, Congress passed a law denying "windfall" benefits to non-retired railroad workers unless the employee performed service for or had a "current connection" to the railroad industry in 1974, or had completed at least twenty-five years of service. *Id.* at 171–172. Former railroad workers whose benefits were eliminated sued, claiming that the statutory distinction violated equal protection. *Id.* at 173, 173 n. 8.

172. *Id.* at 178–180.

173. *Id.* at 175 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)).

174. *Id.* at 179.

175. *Id.* at 181 (Stevens, J., concurring).

176. 413 U.S. 528.

177. *Id.* at 538.

178. *Id.* at 529.

179. *Id.* at 533–535. The Court found that

[t]he challenged statutory classification (households of related persons versus households containing one or more unrelated persons) is clearly irrelevant to the stated purposes of the Act. As the District Court recognized, "[t]he relationships among persons constituting one economic unit and sharing cooking facilities have

discriminating against hippie communes.<sup>180</sup> The Court concluded that the law failed to exclude people who were likely to abuse the program—arguably a plausible and rational purpose that would normally be upheld under rational basis scrutiny—and instead discriminated against people who were so desperately in need of aid that they could not afford to alter their living arrangements.<sup>181</sup> Defining the limitations of rational basis scrutiny, the Court noted that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”<sup>182</sup>

## 2. What Is Rational Basis with Bite Scrutiny?

Although equal protection scrutiny is most often discussed in terms of the traditional three-tiered approach, not all Justices have approved this formulaic model.<sup>183</sup> According to Justice Marshall, “So long as the basis of the discrimination is clearly identified, it is possible to test it against the State’s purpose for such discrimination” regardless of the “precise identification of the particular individuals who compose the disadvantaged

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nothing to do with their abilities to stimulate the agricultural economy by purchasing farm surpluses, or with their personal nutritional requirements.”

*Id.* at 534 (quoting *Moreno v. United States Dept. of Agric.*, 345 F. Supp. 310, 313 (D.D.C. 1972)).

180. *Id.* at 534. Reviewing the legislative history, the Court noted that the law was intended to prevent hippies “from participating in the food stamp program. . . . As a result, [a] purpose to discriminate against hippies cannot, in and of itself and without reference to (some independent) considerations in the public interest, justify [the law].” *Id.* at 534–535 (quoting *Moreno v. United States Dept. of Agric.*, 345 F. Supp. at 313 n. 11).

181. *Id.* at 538.

182. *Id.* at 534 (emphasis in original).

183. *Dandridge*, 397 U.S. at 519–521 (Marshall & Brennan, JJ., dissenting). Disagreeing with the majority’s opinion that a state may cap the total amount of money any one family may receive under the Aid to Families with Dependent Children program, Justice Marshall declared:

This case simply defies easy characterization in terms of one or the other of these [traditional] “tests.” . . . The extremes to which the Court has gone in dreaming up rational bases for state regulation . . . may in many instances be ascribed to a healthy revulsion from the Court’s earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls. This case, involving the literally vital interests of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation.

*Id.* at 520.

class.”<sup>184</sup> Opposed to the strict three-tiered approach, Justice Marshall advocated for a sliding scale of considerations based “upon the character of the classification in question, the relative importance to individuals in the class discriminated against[,] . . . and the asserted state interests in support of the classification.”<sup>185</sup> In advocating for a flexible approach to equal protection review, as opposed to the traditional three-tiered model, Justice Marshall did not agree that such a standard would give the Court the appearance of being a super-legislature.<sup>186</sup> Instead, Justice Marshall believed a variable approach better secured the guarantees of the Constitution, particularly with respect to discrete and powerless minorities.<sup>187</sup> This variable approach—rational basis with bite—should be used when scrutinizing equal protection claims by homeless people.

Rational basis with bite was born out of the idea that strict adherence to the traditional levels of judicial scrutiny was undesirable, particularly when disadvantaged—but not suspect—classes were involved. This enhanced version of minimal scrutiny requires a “more searching inquiry” than rational basis but less than intermediate scrutiny.<sup>188</sup> The Court embraced this approach in *City of Cleburne v. Cleburne Living Center*<sup>189</sup> by finding unconstitutional a city ordinance requiring a special-use permit for group homes for the mentally retarded in certain zoning districts.<sup>190</sup> Although claiming to use rational basis scrutiny, the Court ultimately rejected the city’s purported rational basis by finding that “mere negative attitudes, or fear . . . are not permissible bases for treating . . . the mentally retarded differently . . . .”<sup>191</sup> As Justices Marshall, Brennan, and Blackmun noted in their separate opinion, this enhanced version of rational basis scrutiny “does not allow courts to second-guess reasoned legislative or professional judgments[,] . . . but it does seek to

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184. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 93 (Marshall & Douglas, JJ., dissenting).

185. *Id.* at 99 (quoting *Dandridge*, 397 U.S. at 520–521).

186. *Id.* at 109.

187. *Id.*

188. *City of Cleburne*, 473 U.S. at 472 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

189. 473 U.S. 432 (plurality).

190. *Id.* at 435.

191. *Id.* at 448.

assure that the hostility or thoughtlessness with which there is reason to be concerned has not carried the day.”<sup>192</sup>

Rational basis with bite has been employed in cases involving mental disabilities, sexual orientation, and illegal alien children.<sup>193</sup> For example, the Court held in *City of Cleburne* that mental retardation was not a quasi-suspect classification requiring an intermediate standard of review.<sup>194</sup> Nevertheless, the majority struck down an ordinance requiring a special-use permit for group homes for the mentally retarded, finding the ordinance was not rational because there was no special threat to the City’s legitimate interests.<sup>195</sup> In his opinion, Justice Marshall claimed the majority used a more searching version of rational basis scrutiny because the Court looked for an *actual* rational governmental purpose as opposed to a *conceivably* rational purpose.<sup>196</sup> In support of a more searching application of rational basis scrutiny, Justice Marshall suggested that “[w]henver evolving principles of equality . . . require that certain classifications be viewed as *potentially* discriminatory, and when history reveals systematic unequal treatment, more searching judicial inquiry than minimal rationality becomes relevant.”<sup>197</sup>

Classifications based upon sexual orientation have also been subject to rational basis with bite scrutiny. In *Romer v. Evans*,<sup>198</sup> the Supreme Court held that an amendment to Colorado’s constitution repealing a local ordinance banning discrimination against homosexuals was invalid under an enhanced version of rational

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192. *Id.* at 472 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

193. *Romer v. Evans*, 517 U.S. 620, 632–635 (1996); *City of Cleburne*, 473 U.S. at 435 (plurality); *Plyler v. Doe*, 457 U.S. 202, 223–224 (1982).

194. 473 U.S. at 442.

195. *Id.* at 450.

196. *Id.* at 458–459 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (noting that “under the traditional standard[,] we do not sift through the record to determine whether policy decisions are squarely supported by a firm factual foundation. . . . The refusal to acknowledge that something more than minimum rationality review is at work here is, in my view, unfortunate . . . .”); see also *San Antonio Indep. Sch. Dist.*, 411 U.S. at 125–126 (Marshall & Douglas, JJ., dissenting) (noting that “when interests of constitutional importance are at stake, the Court does not stand ready to credit the State’s classification with any conceivable legitimate purpose, but demands a clear showing that there are legitimate state interests [that] the classification was in fact intended to serve”) (footnote omitted).

197. *City of Cleburne*, 473 U.S. at 470 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part) (emphasis in original).

198. 517 U.S. 620.



basis scrutiny.<sup>199</sup> In the Court's analysis, given that the ordinance did not burden a fundamental right or target a suspect class, the classification should be valid "so long as it bears a rational relation to some legitimate end."<sup>200</sup> The amendment failed to meet this burden for two reasons: it imposed a broad and undifferentiated disability on a single named group, and the actual purpose of the amendment was animus toward homosexuals.<sup>201</sup> Therefore, the Court found that the ends—targeting a single group in an effort to make them unequal to all others and demonstrating animus toward a class or people—were not legitimate or rational purposes.<sup>202</sup>

The Court has also employed rational basis with bite scrutiny in cases involving children of undocumented immigrants. In *Plyler v. Doe*,<sup>203</sup> the Court rejected the notion that children of undocumented immigrants qualified as a suspect class but found that legislation targeting a classification over which an individual has no control did not "comport with fundamental conceptions of justice."<sup>204</sup> Accordingly, the Court determined that a law prohibiting illegal-alien children from public education cannot be *rational* unless it furthers some *substantial* goal of the state.<sup>205</sup> In so holding, the Court once again employed an enhanced version of rational basis scrutiny to strike down an otherwise conceivably rational law because the law targeted a disadvantaged class in a discriminatory way.<sup>206</sup>

There are detractors to this expanded approach to equal protection scrutiny.<sup>207</sup> Specifically, one critic claims that the

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199. *Id.* at 635–636.

200. *Id.* at 631.

201. *Id.* at 632.

202. *Id.* at 635. The Court noted that "[d]iscriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision." *Id.* at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37–38 (1928) (alteration in original)). "Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else." *Id.* at 635.

203. 457 U.S. 202.

204. *Id.* at 220.

205. *Id.* at 224, 230. The Court in *Plyler* looked for a *rational* relation to a *substantial* government interest, as opposed to a substantial relation to an important government interest as required under intermediate scrutiny. *Id.* at 224; see also *Craig*, 429 U.S. at 197 (describing the intermediate scrutiny standard).

206. See *Plyler*, 457 U.S. at 227 (explaining that "[t]he State must do more than justify its classification with a concise expression of an intention to discriminate").

207. E.g. Gayle Lynn Pettinga, *Rational Basis with Bite: Intermediate Scrutiny by Any*

triggering mechanism for rational basis with bite is the same as intermediate scrutiny—that the legislation burdens an important right of a group approaching at least quasi-suspect status—and rational basis with bite is simply intermediate scrutiny under another name.<sup>208</sup> Furthermore, there is concern that a liberal application of rational basis scrutiny gives courts too much leeway, creating a judicial branch that acts as a super-legislature.<sup>209</sup>

First, while the triggering mechanism for rational basis with bite is elusive, it is not equivalent to intermediate scrutiny.<sup>210</sup> The Court has applied a “more searching” scrutiny to groups of people who do not qualify as a quasi-suspect class but have been subjected to unfair treatment.<sup>211</sup> Second, critics of rational basis with bite fail to consider the error in strictly adhering to an archaic model of equal protection review. The Court has expressed its own dissatisfaction with the three-tiered approach to equal protection claims.<sup>212</sup> Indeed, “[t]he formal label under which an equal protection claim is reviewed is less important than careful identification of the interest at stake and the extent to which society recognizes the classification as an invidious one.”<sup>213</sup> Therefore, to truly guarantee equal protection under the law, it is incumbent upon the Court to examine carefully the classifications of legislation to ensure they are not based upon “impermissible assumptions or false stereotypes” regarding a class of people, as opposed to strict adherence to the three traditional tiers of equal protection scrutiny.<sup>214</sup>

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*Other Name*, 62 Ind. L.J. 779, 801 (1986–1987). Pettinga disapproves of the Court’s use of rational basis with bite because it “creates a limitless opportunity for the court to closely scrutinize legislation whenever it sees fit. This unbridled freedom . . . fosters lower court confusion as to what version of the rational basis test to apply in any given case.” *Id.* at 802.

208. *Id.*

209. *Id.* at 801–802.

210. See *City of Cleburne*, 473 U.S. at 446 (noting that the “refusal to recognize the retarded as a quasi-suspect class does not leave them entirely unprotected from invidious discrimination”).

211. Pettinga, *supra* n. 207, at 800.

212. In his concurrence in *City of Cleburne*, Justice Stevens stated, “I have never been persuaded that these so-called ‘standards’ adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or—as in this case—mental retardation, do not fit well into sharply defined classifications.” 473 U.S. at 451–452 (Stevens, J. & Burger, C.J., concurring) (footnote omitted).

213. *Id.* at 478 (Marshall, Brennan & Blackmun, JJ., concurring in the judgment in part and dissenting in part).

214. *Id.*

### 3. *Why Rational Basis with Bite Scrutiny Should Be Used in Equal Protection Claims Involving the Homeless*

The Court established long ago that “[e]qual protection of the laws is not achieved through indiscriminate imposition of inequalities.”<sup>215</sup> In keeping with this ideal, the Court has subtly moved away from a formulaic adherence to the traditional three-tiered approach to equal protection scrutiny. Instead, the Court has applied a variable standard of equal protection scrutiny to cases that involve questionable legislative classifications based upon discrimination or animus toward a disadvantaged class.<sup>216</sup> Because the homeless have been victims of gruesome violence based upon their status and subject to legislation that forces them into the shadows of society, courts should employ rational basis with bite scrutiny to equal protection claims involving the homeless.<sup>217</sup>

First, Congress’ attempt to include homelessness as a protected class under federal hate crime law indicates that the homeless are an insular minority requiring enhanced protection.<sup>218</sup> All other protected classes under hate crime law enjoy enhanced judicial scrutiny for equal protection claims. For example, crimes fueled by animus toward the victim’s race, national origin, or religion are considered hate crimes; equal protection claims involving race, national origin, or religion also enjoy strict scrutiny.<sup>219</sup> Similarly, crimes motivated by animus toward the victim’s gender are also considered hate crimes; equal protection

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215. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948).

216. *Romer*, 517 U.S. at 634. “[I]f the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” *Id.* (quoting *Moreno*, 413 U.S. at 534 (alterations and emphasis in original)).

217. The Author does not advocate for quasi-suspect or suspect status for homeless individuals because it is unlikely the Court would embrace such a drastic approach. Rational basis with bite scrutiny provides a sufficient level of judicial scrutiny because it gives the judiciary the opportunity to scrutinize the *actual* purpose of the proposed legislation, as opposed to any *conceivable* purpose, without infringing on the rights and powers of the legislature. As long as the legislature can articulate a valid and nondiscriminatory reason for the implementation of laws that affect homeless individuals, the Court should defer to the legislature’s judgment. Distaste of a marginalized group, however, cannot be a rational government interest.

218. H.R. 3419, 111th Cong. at § 2.

219. Pub. L. No. 103-322, § 280003, 108 Stat. 1796, 2096 (1994); Massey, *supra* n. 163, at 645–674.

claims involving gender enjoy intermediate scrutiny.<sup>220</sup> Finally, crimes motivated by animus toward the victim's sexual orientation or disability are considered hate crimes; equal protection claims involving sexual orientation or disability enjoy rational basis with bite scrutiny.<sup>221</sup>

The homeless share a story similar to those classes already protected under hate crime law, specifically sexual orientation and disability. First, the homeless have been subjected to a history of unfair treatment by the political majority.<sup>222</sup> This reality is evidenced by the plethora of anti-homeless ordinances targeting homeless individuals' day-to-day existence.<sup>223</sup> As with the laws struck down in *City of Cleburne* and *Romer*, anti-homeless ordinances impose broad and undifferentiated restrictions on a single group, demonstrating animus toward a disadvantaged group of people.<sup>224</sup> Second, the homeless are victims of targeted crimes based upon the victim's perceived association with a particular group.<sup>225</sup> In fact, the homeless are victims of more murders per year than all other classes protected by hate crime law combined.<sup>226</sup> Third, like sexual orientation and disability, homelessness is seldom a choice.<sup>227</sup> This quasi-involuntary status comes about in a variety of ways: lack of affordable housing,<sup>228</sup> disabilities,<sup>229</sup> and economic pressures<sup>230</sup> force unwilling individuals to live on the streets.

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220. 108 Stat. at 2096; Massey, *supra* n. 163, at 726–727.

221. 108 Stat. at 2096; *see generally Romer*, 517 U.S. 620 (applying enhanced rational basis scrutiny to a claim that the plaintiff was discriminated against based upon sexual orientation); *City of Cleburne*, 473 U.S. 432 (applying enhanced rational basis scrutiny to a claim that the plaintiff was discriminated against based on mental disability).

222. *See Pottinger*, 810 F. Supp. at 1578 (suggesting that “[i]t can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted”).

223. Liese, *supra* n. 69, at 1420–1433.

224. *Romer*, 517 U.S. at 632; *City of Cleburne*, 473 U.S. at 448–450.

225. *Hate Crimes Report*, *supra* n. 7, at 13; Levin & Stoops, *supra* n. 100.

226. FBI, *supra* n. 100; *Hate Crimes Report*, *supra* n. 7, at 10; Levin & Stoops, *supra* n. 100.

227. *Why*, *supra* n. 52 (citing the lack of affordable housing, eroding work opportunities, increase in foreclosure, and poverty as causes of homelessness).

228. *See Pottinger*, 810 F. Supp. at 1558, 1564–1565 (noting that shelters are often full, inaccessible, and leave the homeless with nowhere to go but public spaces); Charles, *supra* n. 60, at 317–318 (detailing a HUD report indicating there was a shortfall of more than 300,000 emergency and transitional year-round beds available nationwide).

229. *Mental Illness*, *supra* n. 40; *see Watson*, *supra* n. 156, at 529–533 (arguing that disabilities such as mental illness and substance abuse are diseases beyond one's control,

If Congress were to recognize homelessness under hate crime law, the courts would have a clearer indication that the homeless belong to a vulnerable class deserving of enhanced protection from the “majoritarian political process.”<sup>231</sup> Given the similarities between the homeless and other vulnerable classes protected by hate crime law, courts would be hard-pressed to find a rational reason why the homeless should not be afforded enhanced rational basis scrutiny under equal protection review, as is the case with sexual orientation or disability. The triggering mechanism for rational basis with bite scrutiny would be tied directly to the protection afforded the homeless under hate crime law. By recognizing the homeless as a protected class, Congress would send a message that this disadvantaged class suffers from targeted violence and discrimination, and thus deserves greater protection.

Second, the homeless have been subjected to anti-homeless ordinances that demonstrate patent discrimination toward this politically powerless group.<sup>232</sup> Anti-homeless ordinances are particularly abhorrent because they target the very essence of life on the streets—performing life-sustaining activities in public.<sup>233</sup> The homeless often have no other choice but to perform these regulated activities in public. Although poverty itself does not create suspect status, the circumstances of life on the streets—in which basic human survival is at stake—does create a “discrete and insular” minority in the homeless, making enhanced protections warranted.<sup>234</sup>

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making it effectively impossible to get off the streets).

230. *Pottinger*, 810 F. Supp. at 1564. “An individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster.” *Id.*

231. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 28.

232. *First Vagabonds Church of God*, 578 F. Supp. 2d at 1357; *Pottinger*, 810 F. Supp. at 1559–1561. The homeless are a politically powerless group because homeless individuals are often unable to vote in elections due to their inability to obtain a driver’s license or establish a mailing address. See Fla. Div. of Elections, *Register to Vote*, <http://election.dos.state.fl.us/voter-registration/voter-reg.shtml> (accessed Jan. 17, 2010) (detailing voter registration requirements in Florida).

233. See *Pottinger*, 810 F. Supp. at 1554 (describing the police practices of routinely arresting, harassing, and destroying the property of homeless individuals “for engaging in basic activities of daily life . . . in the public places where they are forced to live”).

234. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 105; see *id.* at 28 (explaining that relegation to a position of political powerlessness is one of the “traditional indicia of suspectness” that might “command extraordinary protection from the majoritarian political process”).

Furthermore, the popularity of anti-homeless ordinances throughout the country suggests the creation of “the kind of ‘class or caste’ treatment that the Fourteenth Amendment was designed to abolish.”<sup>235</sup> If equal protection under the law is to mean anything, surely it cannot stand for the ideal of targeting the most vulnerable groups in society and criminalizing the activities that sustain their very existence. Like the protected classes, the homeless have been saddled with disabilities and characteristics that are often beyond their control; have been subjected to a history of unequal treatment; and are politically powerless—the combination of which warrants extraordinary protection as a class. At a minimum, the homeless should be afforded greater protection from the unequal and unjust imposition of laws that target their existence. Rational basis with bite scrutiny offers a measured but appropriate means for the judiciary to respond to the cruel injustices suffered by the homeless population.

### C. Policy and Practical Ramifications

There are tangible practical and policy ramifications for enhanced protection for the homeless population, under both hate crime law and enhanced equal protection scrutiny. While critics may claim that broadening hate crime law to include protection for the homeless is unnecessary and unwarranted, this view fails to recognize the egregious and vicious oppression of a historically disadvantaged class. The fundamental concept of justice requires recognition of our society’s shortcomings by providing extra protection for those who experience discrimination based upon their association with a disadvantaged group. Critics may also renounce the application of a more liberal version of rational basis scrutiny to equal protection claims brought on behalf of homeless individuals for fear of opening the floodgates to judicial participation in the legislative process. This concern fails to consider the appropriate role of the judiciary—to ensure that laws are created and enforced fairly.<sup>236</sup> When laws are patently discriminatory and

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235. *Plyler*, 457 U.S. at 216 n. 14.

236. See *Sherman v. United States*, 356 U.S. 369, 380 (1958) (Frankfurter, Douglas, Harlan & Brennan, JJ., concurring) (explaining that, at least with regard to the administration of criminal justice, “the federal courts have an obligation to set their face against enforcement of the law by lawless means or means that violate rationally vindicated stan-

affect one's very survival, it is hard to argue that the judiciary has no business reviewing such laws with enhanced scrutiny. Therefore, including homelessness as a protected class under hate crime law and using rational basis with bite scrutiny in the homeless' equal protection claims results in a more constructive policy of embracing the very ideals this country was founded upon: equal justice for all.

Inclusion of homelessness as a protected status under hate crime law will not only protect the most vulnerable in our society but will also deter people from engaging in thrill crimes such as "bum fighting" and "bum hunting." Hate crime violations carry a sense of social and moral condemnation—as well as stiffer criminal penalties—encouraging potential perpetrators to think twice before engaging in violent conduct that is patently discriminatory.<sup>237</sup> Furthermore, hate crime protection will compel the government to collect information that is more accurate on violence against the homeless in order to craft responsive policies and programs to deal with the problem. Public awareness of the plight of the homeless will also be heightened; cities will be deterred from criminalizing homelessness and encouraged to help get the homeless off the streets rather than push them to the fringes of society.

Employing rational basis with bite scrutiny to equal protection claims involving the homeless will result in a more equitable examination of actions taken against this discrete and insular minority.<sup>238</sup> Currently, the courts only employ default-level rational basis scrutiny to equal protection claims involving the homeless.<sup>239</sup> By applying rational basis with bite scrutiny, the government will be required to show that a proposed law or ordinance has a *truly* legitimate purpose, not just any *conceivably* legitimate purpose. This extra layer of judicial protection will result in better policies at the local, state, and federal levels by ensuring that legislation affecting the homeless is not arbitrary,

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dards of justice, and to refuse to sustain such methods by effectuating them").

237. See Joern, *supra* n. 9, at 321, 331 (describing *Bumfights* and urging that violence against the homeless should be considered a hate crime because "criminal sanction carries with it a powerful social condemnation").

238. See *Carolene Products, Co.*, 304 U.S. at 153 n. 4 (suggesting that "more searching judicial scrutiny" may be needed to examine the special condition of "prejudice against discrete and insular minorities").

239. *Joel*, 232 F. 3d at 1357–1359.

capricious, or inherently unjust.<sup>240</sup> Furthermore, cities may be encouraged to better allocate their limited resources by making access to services for the homeless easier, not harder.

## V. CONCLUSION

Homelessness is a pervasive problem in America, but turning a blind eye to the bleak situation will not solve the problem—nor will tolerating violence targeting the homeless or public ordinances that push the homeless further toward the fringes of society. People have attempted to “sanitize” the streets by engaging in brutal attacks against the homeless,<sup>241</sup> and cities have passed anti-homeless ordinances that affect the most basic needs of some of our fellow Americans—such practices should not be tolerated. The Fourteenth Amendment promises more. Therefore, homelessness should be afforded protected status under hate crime law, and the courts should employ rational basis with bite scrutiny to equal protection claims brought by homeless individuals.

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240. Watson, *supra* n. 156, at 509. Watson’s article advocates exclusively for the incorporation of homeless as a suspect classification under the Equal Protection Clause of the Fourteenth Amendment. *Id.* Although this is distinguished from the Author’s argument that homelessness should be considered under the rational basis with bite standard, Watson’s article is instructive with regard to arguments that can be made in favor of enhanced protection.

241. *Pottinger*, 810 F. Supp. at 1567.