CITY OF BROTHERLY LOVE?: USING THE FOURTEENTH AMENDMENT TO STRIKE DOWN AN ANTI-HOMELESS ORDINANCE IN PHILADELPHIA

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INTRODUCTION

I wish the rent was heaven sent. 2

As the nation continues to experience unprecedented economic growth, 3 the unemployment rate sits at the lowest level in thirty years, 4 and the stock market remains at a record level, 5 750,000 people are homeless each night. 6 At any given time, at least 230,000 people use shelters and soup kitchens. 7 Low-wage income earners are increas-
ingly "being priced out of the housing market as rents rise." For every one hundred households at or below thirty percent of the average household's median income, there were only thirty-six units both affordable and available for rent.10

In the City of Brotherly Love, Philadelphia, this scenario is no different. While the city's economy11 and reputation12 continue to improve, the impoverished of the city remain in dire straits. Approximately 351,000 Philadelphians, a number larger than the total population of Pittsburgh, live under the federal poverty level.13 On any single night in October 1999, more than 350 people slept on the city's streets between midnight and 4 a.m., and “[t]hat doesn’t include all areas of the city or abandoned buildings.”14 This situation has created tension between businesses and the homeless in the
downtown area of Philadelphia, known as Center City. While businesses have attempted to take advantage of the regional and national economic booms, the homeless still struggle to survive. As a part of this struggle, homeless persons must go to the area where people are likely to be and likely to have money: the business and tourist districts. At the same time, businesses believe that business is best if homeless persons and their possessions remain far from their storefronts.

In January 1999, Philadelphia joined forty-nine other cities in passing ordinances that restrict the activities and the mere presence of homeless persons in the downtown area. The Philadelphia "Sidewalk Behavior Ordinance" prohibits many activities in which segments of the homeless population often engage:

- panhandling within eight feet of a building entrance or vending truck or within twenty feet of a bank entrance or an automated-teller machine,
- lying on the public sidewalk (except in a medical emergency), sitting on the sidewalk for more than thirty minutes in a two-hour period, and, in certain instances, aggressive panhandling.

Arguing that the bill was anti-homeless, one city councilwoman who voted against the ordinance called it "the most negative and anti-American bill I've ever seen."
This article outlines a possible constitutional attack on the Philadelphia Sidewalk Behavior Ordinance, as a model for attacking similar ordinances, under the Fourteenth Amendment. Although there already exists a broad range of cases and scholarship on laws adversely affecting the homeless, there has been neither a thorough attempt to assess any such law under the Fourteenth Amendment nor an assessment of the constitutionality of the Philadelphia ordinance. In fact, when dealing with such laws, courts often do not address cer-

ordinance actually benefits the homeless. See Cynthia Burton, Street’s Sidewalk-Behavior Bill Brings Fire From Colleagues, PHILA. INQUIRER, June 4, 1998, at B1. This argument fails to incorporate two facts: one, a law may be unconstitutional even if perceived to benefit an allegedly disadvantaged group; and, two, the city can provide these services without enforcing the allegedly unconstitutional parts of the ordinance (these services could be provided in a different bill).


27 Similar ordinances have been scrutinized under the First and Eighth amendments. In Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984), the Supreme Court ruled that the government may ban sleeping in public parks even though the act of sleeping in a park to draw attention to the homeless situation may constitute political speech under the First Amendment. If, on the other hand, a homeless individual has no place to sleep, punishing the individual for being homeless may be cruel and unusual punishment. See, e.g., Rob Teir, Restoring Order in Urban Public Spaces, 2 TEX. REV. L. & POL. 255, 266 (1998) ("[P]unishing the act of sleeping in public, by someone who truly has no other choice, could punish the combination of both being and not having the shelter." (emphasis in original)). Although arguments alleging that anti-homeless laws violate the Eighth Amendment’s prohibition against penalizing a person for their status have seen some success at the trial court level, see, e.g., Pottinger v. City of Miami, 810 F. Supp. 1551, 1561-65 (S.D. Fla. 1992) (extending the protections of the Eighth Amendment to limit the criminal prohibition of “innocent conduct” derivative of a certified class’ status as homeless), most courts have rejected this argument. See, e.g., Joyce v. City and County of San Francisco, 846 F. Supp. 843, 849 (N.D. Cal. 1994) (rejecting Eighth Amendment attack); Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995) (holding that no Eighth Amendment violation existed for enforcement of camping ordinance). Ordinances such as the Sidewalk Behavior Ordinance seem more susceptible to First Amendment arguments, however. See Amster v. City of Tempe, 99-72-PHX-SMM (D. Ariz. Jan 26, 2000) (unpublished), at http://www.public.asu.edu/~aldous/permanent.html (holding that a Tempe, Arizona, ordinance forbidding sitting on the city’s sidewalks during certain hours of the day violates the First Amendment). See also Loper v. New York City Police Dept., 999 F. Supp. 699, 704 (2d Cir. 1993) (holding that begging constitutes “communicative activity of some sort” and that a New York Penal Law that rendered a person guilty of loitering when he remained in a public place in order to beg violated the First Amendment); Benefit v. City of Cambridge, 679 N.E.2d 184 (Mass. 1997) (holding that statute prohibiting public begging without a license violated the First Amendment). But see, Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (holding that neither the California nor the United States constitutions invalidated a statute making aggressive begging or soliciting a misdemeanor). It seems clear that certain parts of the ordinance, see, e.g., 10-611(4)(a),(b), would be subject to more stringent analysis due to their restriction on speech in a public forum. See Loper v. New York City Police Dept., 999 F. Supp. 699, 703-04 (2d Cir. 1993) (holding that the sidewalks of New York City are a “category of public property traditionally held open to the public for expressive activity” on which the regulation of speech is subject to “the highest scrutiny”). See also Ledford v. State, 652 So. 2d 1254 (Fla. Dist. Ct. App. 1995) (holding that city ordinance prohibiting begging for money upon public way was unconstitutional as overbroad and vague since the ordinance restricted speech on traditional public forum and was more intrusive than necessary). This article focuses on the Fourteenth Amendment because of the perception that the Fourteenth Amendment champions the rights of the politically and economically powerless, and because this article is less concerned with restrictions on speech in a public forum than on restrictions on strictly being in that public forum.
tain Fourteenth Amendment protections, such as substantive due process. This analysis begins, in Part I, with a discussion of the literature describing homelessness in the United States and a brief description of the homeless population in Philadelphia. Part II discusses the history of so-called “anti-homeless” laws. Part III presents the Philadelphia Sidewalk Behavior Ordinance. Part IV discusses two recent court decisions dealing with similar ordinances and compares those ordinances to the Philadelphia ordinance. Part V analyzes the ordinance under the Fourteenth Amendment, concluding that while it does not violate procedural due process rights or infringe upon a fundamental right protected by the Equal Protection Clause of the Fourteenth Amendment, the ordinance violates the personal liberty guaranteed under the Due Process Clause of the Fourteenth Amendment and may unconstitutionally target the homeless population. Part VI addresses the Philadelphia public interest community’s apparent decision not to challenge the ordinance. Lastly, the discussion concludes by raising specific concerns about the failure to challenge the Philadelphia Sidewalk Behavior Ordinance.

I. WHO ARE THE HOMELESS?

We are the desperate
Who do not care,
The hungry
Who have nowhere
To eat,
No place to sleep,
The tearless
Who cannot
Weep.30

Homelessness results from a variety of societal and personal factors, as well as economic ones.31 The societal factors include a combination of a lack of affordable housing,32 insufficient income to pay

28 See infra Part V.
31 See Robert Hayes, Litigating on Behalf of Shelter for the Poor, 22 HARV. C.R.-C.L. L. REV. 79, 80 (1987) (“Homelessness, of course, is nothing more than the most radical symptom of everything else that has not worked, the most dire example of poverty caused by any number of things—bad housing, bad education, bad industrial development and so on.”).
for basic expenses, and insufficient government and community services to either remedy this situation or help the homeless remedy it on their own. The personal problems may include, among others, mental illness, alcoholism, and family difficulties.

In spite of the widely held belief that the homeless are jobless, forty-four percent of homeless Americans work at least part time. Evidently, the economic boom of the nineties has left many people behind. Stuck in the lowest of low-paying jobs, they cannot find even low-rent housing. Moreover, "[t]hey work, they try to save, but they can never accumulate the hundreds of dollars they need for the first month’s rent and security deposit on even a modest apartment." As a result, at least 425,000 people in this country must sleep in public spaces, and at least 700,000 have no place to go during the day except public spaces. In twenty-nine major cities, the homeless population exceeds the number of shelter beds provided to them.

Although numerous organizations exist to help the homeless, it is generally understood that these organizations lack enough resources to do little more than treat the symptoms. Thus, these organizations often can offer only emergency relief, such as shelters, soup kitchens, or legal advice. According to a government report, sixty percent of homeless persons living alone and seventy percent of homeless persons living with families are able to leave shelters when they receive "needed services," such as housing subsidies, health care, substance-abuse treatment, education, and job training. Regardless, there is

they can’t afford to pay the rent.

See National Alliance to End Homelessness, Facts About Homelessness, at http://www.endhomelessness.org/back/factsus.html (last visited Sept. 4, 2000). These are not the sole factors; rather, they "are the systemic or underlying factors which cause homelessness." Id.

See Teir, supra note 27, at 262-63 (noting that numerous studies show that nationally sixty-five to eighty-five percent of all street people suffer from alcoholism, drug addiction, mental illness, or some combination of the three). See also Foscarinis, supra note 6, at 8-12 (describing the most frequent causes of homelessness). Although scholars disagree as to the precise cause, it is safe to assume that, at a minimum, homelessness results from a mixture of societal, economic, and personal problems.


See id.

See id.

Foscarinis, supra note 6, at 14.

Id.


See id.

See Foscarinis, supra note 6, at 12 (“To date, the primary societal response to homelessness has been emergency relief.”). In Philadelphia, the Homeless Advocacy Project provides direct legal services to homeless persons. See Homeless Advocacy Project, at http://www.libertyneL.org/hap/ (describing the organization’s mission to provide "free legal services through volunteers to homeless people, and to non-profit community groups developing affordable housing and other services for the homeless.") (last visited Oct. 8, 2000).

in adequate funding for such services. 44

In Philadelphia, the streets see approximately 6,500 homeless persons on any given day, ten percent of whom live entirely on the streets. 45 Over eighty percent of the “accounted for” homeless are African-American, ten percent are white, and five percent are Hispanic. 46 The two largest groups constitute single adult males between the ages of twenty and forty and single women in their twenties and thirties with small children. 47 Even though homeless services have increased in recent years, in many cases, “homeless people aren’t allowed into most programs without identification [and] in many cases, homeless people lose their identification and don’t have jobs with which to earn money to pay the four-dollar fee for a birth certificate, or the nine-dollar fee for a Pennsylvania non-driver’s license.” 48

As this all suggests, the homeless and the rest of society are inextricably linked. Society’s economic and sociological shortcomings help cause and perpetuate homelessness, while—as will be shown below—homelessness is perceived as an obstacle to revival of the modern downtown area of cities.

II. THE HISTORY OF ANTI-HOMELESS LAWS 49

There are words like Freedom
Sweet and wonderful to say.
On my heart-strings freedom sings
All day everyday.
There are words like Liberty
That almost make me cry.
If you had known what I knew
You would know why. 50

Laws disproportionately affecting the homeless are not new. In colonial times, vagrancy laws punished those displaying the characteristics of homeless persons. 51 Throughout the nineteenth century and

44 Id.
46 Id.
47 Id.
48 Id.
49 Jones, supra note 14.
51 Harry Simon, Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to
much of the twentieth century, vagrancy laws were used in conjunction with loitering laws and laws inhibiting the movement of poor persons from one state to another. These laws went virtually unchallenged in this country until the Supreme Court made attorneys available for the indigent in criminal proceedings. Although many anti-loitering and vagrancy laws have since been declared unconstitutional, the 1990's saw a sharp increase in the number of laws adversely affecting homeless persons. Professor Robert Ellickson contends, convincingly, that at the end of the 1980s and during the past decade what is popularly known as "compassion fatigue" hit the nation. This is the idea that people began to believe "the street person is...overusing scarce public space...[and] has not sought out employment, family assistance, or public aid"—in other words, "enough's enough." This has also been referred to as "[w]eariness with the homeless on the streets." Another possible explanation, and a much more straightforward one, is that this frustration stemmed from the "skyrocketed" numbers of homeless persons at the end of the early eighties, which made the homeless more visible.

Regardless of its origin, homeless persons and others on the street have suffered and continue to suffer a backlash from "the tide favoring social inclusion" of the eighties.


53. See Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) ("[i]n federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived."). See generally City of Chicago v. Morales, 527 U.S. 41, 54 (1999) (noting that vagrancy laws that were patterned on "Elizabethan poor laws" stood unchallenged until the Supreme Court's decision in Gideon v. Wainwright).


55. Cities cite several different reasons for passing this legislation. See Foscarinis, supra note 6, at 23-24 ("Some cities associate homeless people with crime or equate them with 'criminal elements,' others associate activities such as begging with crime. Others express concern about public health and sanitation problems associated with people living in public; or about the health and safety of homeless people living on the streets. Cities also frequently cite concerns that the presence of homeless people or beggars adversely affects businesses or tourism. Another type of purpose is 'preserving the appearance' of public areas and facilities. Some cities simply express concern about 'homeless people wandering around.'" (citations omitted)).


57. Id.

58. Id.

59. Parker, supra note 40.

60. Simon, supra note 51, at 646.

61. See Ellickson, supra note 49, at 1214. According to Ellickson, the attitude in the 1990's toward homeless persons was the "culmination" of "a larger ideological shift" in which "the
The National Law Center on Homelessness & Poverty has determined that fifty of the country’s largest cities have anti-homeless laws or policies that result in “anti-homeless” measures taken pursuant to those policies. Critics contend that, in effect, these cities are “criminalizing homelessness.” Among the measures used are laws or policies that prohibit: “the mere presence of homeless people in the city;” sleeping in all or certain public places; sitting or lying on sidewalks in certain areas; or begging (panhandling) in certain areas. The Philadelphia Sidewalk Behavior Ordinance fits neatly within the latter two categories.

The passing of an ordinance such as the Sidewalk Behavior Ordinance does not result in a clear demarcation of good versus evil. As with many government restrictions, some “good” seemingly can be found on either side of the argument. As one judge has written, litigation to combat these laws:

In essence... results from an inevitable conflict between the need of the homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets. The issues raised in [these types of cases] reveal various aspects of this conflict which, unfortunately, has
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[sic] become intensified due to the overwhelming increase in the number of homeless people in recent years and a corresponding decrease in federal aid to cities.

Litigation challenging laws that disproportionately affect the homeless has been rare and success has been limited. In the meantime, the number of homeless persons in this country continues to rise.

III. THE PHILADELPHIA SIDEWALK BEHAVIOR ORDINANCE

The Philadelphia Sidewalk Behavior Ordinance did not pass quietly into law. According to one observer, then City Council President—now Mayor—John F. Street “took about as much flak as he has ever taken” during the legislative process. J. Wyatt Mondeshire, President of the Philadelphia chapter of the NAACP, said that the bill was a “spawn of ‘fear and frustration,’ as well as of Street’s ambitions to be mayor.” Councilman Street defended the bill as an effort to promote more civil behavior on the sidewalk, which would encourage commerce and tourism, and make the city a “better” place to live. Opponents of the bill said in rebuttal that “[t]his bill does so much to hurt so many people,” and that it “treats homelessness as a crime—not as a human condition.” The Sidewalk Behavior Ordinance finally came into effect on October 8, 1998, while protesters carried signs reading “The City of Brotherly WHAT?” and chanted “stop the war on the poor.”

70 Pottinger is the only published decision that is an outright legal victory challenging the constitutionality of an “anti-homeless” law. See Part IV.A, infra. See also Amster v. City of Tempe, 99-72-PHE-SMM (D. Ariz. Jan 26, 2000) (unpublished), at http://www.public.asu.edu/~aldous/permanent.html (last visited Aug. 28, 2000) (holding that a Tempe, Arizona ordinance forbidding sitting on the city’s sidewalks during certain hours of the day violates the First Amendment). It must be noted, however, that success may have been had without challenging the statute in court, or local homeless advocates may have settled for close police monitoring or found other ways of toning down the laws through negotiation with government officials. See Associated Press, ‘Sidewalk-Behavior’ Law Rapped, HARRISBURG PATRIOT, Jan. 20, 1999, at B4.
71 Parker, supra note 40.
72 Burton, supra note 24.
73 Id.
74 See Rick Sarlat, City Council Becomes Battleground Over Sidewalk Bill, PHILA. TRIB., June 5, 1998, at 1A (arguing that “the economic, social, and cultural life of the city could not survive without the ability of pedestrians to use the public sidewalk for safe and unobstructed passages.”).
75 See Barnes, supra note 24, at 1A. (“[The bill] makes the city a more pleasant place for those who live, work and visit Philadelphia.”).
76 Sarlat, supra note 74.
77 Burton, supra note 24 (quoting former head of the Philadelphia Housing Authority, John F. White, Jr.).
78 The bill passed by a twelve to four vote. See Barnes, supra note 24.
The Sidewalk Behavior Ordinance proscribes a wide range of activities on the sidewalk, some applying city-wide, and others only within Center City, and the surrounding area. The homeless are adversely affected by the following prohibitions of the ordinance:

- lying on the public sidewalk, or on any object placed on the public sidewalk;
- sitting on the public sidewalk, or on any object placed on the public sidewalk for more than twenty minutes in a two-hour period;
- placing or maintaining any bench, planter, fixture or other street furniture on the public sidewalk without a permit;
- sitting, standing, lying or otherwise using the public sidewalk or placing one's belongings or other objects upon the public sidewalk, in such a manner as to unreasonably and significantly impede or obstruct the free passage of pedestrians;
- allowing his or her belongings or other objects to remain unattended on the sidewalk for more than fifteen minutes;
- soliciting money for any purpose within eight feet of a building entrance, or vending cart, or within twenty feet of a bank entrance or automatic teller machine;
- soliciting money for any purpose on the public sidewalk in an aggressive manner, or accompanied by conduct such as repeated begging, insistent panhandling, retaliatory comments, blockage of free passage, and confrontations which are “likely to cause a reasonable person to fear bodily harm to oneself or another, or damage to or loss of property.”

Regarding the first six violations listed above, the ordinance provides that a police officer may not issue a violation or take any coer-

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80 The provisions that apply citywide include those related to parking a motorized vehicle, gambling, selling unlicensed goods or services, "unreasonable obstructions," littering, creating excessive noise, and not keeping the sidewalk on one's private property clear of litter or obstructions and in good repair. See PHILA., PA., CODE § 10-611(1) (a) (1998).
81 The area known as Center City in Philadelphia "runs two miles from the Delaware River west to the Schuylkill [River] and one mile from South Street north to Vine Street." Ferrick, supra note 15, at 7.
82 Those sidewalk activities proscribed within the specified zone include riding a bicycle, scooter, roller skates, or skateboard; unloading or loading a vehicle where safety does not necessitate obstructing the sidewalk; lying on the sidewalk or placing any object on the sidewalk, sitting on the public sidewalk or on any object on the sidewalk for more than one hour in any two-hour time period; placing or maintaining a bench without a license; leaving any belongings unattended; allowing dogs, guard cats, or pigs to go without a leash; allowing snakes outside of a cage; and not muzzling any animal with a "vicious propensity." PHILA., PA., CODE § 10-611(1)(a) § 10-611(1)(b) (1998).
83 Id. at (2) (g).
84 Id. at (2) (h).
85 Id. at (2) (k).
86 Id. at (2) (l).
87 Id. at (2) (m).
88 Id. at (2) (n).
89 Id. at (4) (b).
90 Id. at (4) (a).
cive action against an individual without first issuing a verbal warning, and, to those who refuse to comply, a written warning.91 The officer also must determine if the person allegedly in violation of the provision needs medical assistance or social service assistance, such as mental health or drug treatment.92 If so, he or she must contact an "Outreach Team"93 to deal with the individual and offer assistance.94 The ordinance does not address, however, what would happen if the person refuses the help of the Outreach Team. Violations of numbers six and seven of the prohibitions listed are subject to a fine of no more than one hundred dollars.95 Violations of prohibitions one through five are subject to a twenty-dollar fine.96 The ordinance does not provide for prison terms.97

Homeless advocates consider the final version of the ordinance a compromise with the city.98 Many agree that the number of homeless persons on downtown streets has dropped by twenty-five percent or more since the implementation of the ordinance and the new services for the homeless that came with it.99 Nonetheless, the much touted "benefit," that the ordinance would bring increased services to homeless persons, seems not to be materializing.100

IV. OUTCOMES OF LITIGATION CHALLENGING ORDINANCES SIMILAR TO THE PHILADELPHIA SIDEWALK BEHAVIOR ORDINANCE

Although no court has analyzed the Philadelphia ordinance, courts have analyzed other similar "sidewalk ordinances." A look at the outcomes of those cases will help assess the Philadelphia ordinance.

91 Id. at (7)(a)(1).
92 Id. at (7)(a)(2).
93 Id. at (7)(d). An Outreach Team is "a group of mental health or drug and alcohol counselors authorized and designated by the Department of Public Health . . . ." Id.
94 Id. at (7)(a)(2).
95 Id. at (8)(b).
96 Id. at (8)(a).
97 The absence of possible prison confinement for violators of the ordinance does not contradict the argument that the ordinance criminalizes being homeless: subjecting homeless persons to penalties, such as a fine, constitutes a form of criminalization. See § 10-611(8) (imposing penalties for violations of the ordinance).
99 See Editorial, Fewer Homeless, PHILA. INQUIRER, June 15, 1999, at A18 ("Homeless advocates and the Center City District agree the number of homeless on downtown streets has dropped by twenty-five percent.").
100 See Laura J. Bruch, The Other Side of a Law: Homes for the Homeless, PHILA. INQUIRER, Feb. 17, 1999, at B1. Because the city did not directly link the Sidewalk Behavior Ordinance's implementation of the new social services with programs designed to help the homeless, these programs in and of themselves fail to make the ordinance a "pro-homeless" law. Instead, the new programs take some of the sting out of the ordinance.
A. Pottinger v. City of Miami

In December of 1988, a class of over six thousand homeless persons filed an action in federal court under section 1983 of the United States Code against the city of Miami, Florida, alleging that the city had "a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities of daily life—including sleeping and eating—in the public places where they are forced to live." The plaintiff class further alleged that "the City ha[d] arrested thousands of homeless people for such life-sustaining conduct under various City of Miami ordinances and Florida Statutes," and that the City "routinely [seized and destroyed] their property." The plaintiffs did not challenge the facial validity of the various ordinances and statutes; rather, they asked for an injunction against the City, preventing it "from arresting homeless individuals for inoffensive conduct, such as sleeping or bathing, that they are forced to perform in public." The laws at issue were:

Sec. 37-53.1 prohibiting "any number of persons to so stand, loiter or walk upon any street or sidewalk in the city so as to obstruct free passage over, on or along said street or sidewalk after a request by a law enforcement officer to move on so as to cease blocking or obstructing free passage thereon;"

Section 37-63 stating "[i]t shall be unlawful for any person to sleep on any of the streets, sidewalks, public places, or upon the private property of another without the consent of the owner thereof;" Section 37-34 prohibiting "any person to loiter or prowl in a place, at a time or in a manner not usual for law abiding individuals, under circumstances that warrant a justifiable and reasonable alarm for the safety of persons or property in the vicinity." Such alarm must result from "specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant a finding that a breach of the peace

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102 42 U.S.C. §1983 (1996) provides that:

   Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

105 Pottinger, 810 F. Supp. at 1554.
104 Id.
103 Id.
106 Id.
108 Id.
109 Id. at § 37-34(D). See also Pottinger, 810 F. Supp. at 1560 n.13.
is imminent or the safety of persons or property is threatened;"\textsuperscript{110}

Section 38-3 providing “that public parks shall be closed to the general public from 10:00 p.m. to 7:00 a.m.;”\textsuperscript{111}

Section 37-35 prohibiting loitering;\textsuperscript{112} and

Sections 810.08-09 which the Pottinger court interpreted as prohibiting sleeping, sitting or standing in public buildings, as trespass.\textsuperscript{113}

The court granted the injunction, citing five reasons in support of its decision. First, the court found that the City knew or should have known of the alleged arrests and violations of the plaintiffs' rights and took no steps to stop such conduct; therefore, there existed a pattern and practice intended to drive the homeless out of the city.\textsuperscript{114} Next, the court stated that arrests violated the Eighth Amendment's prohibition against cruel and unusual punishment because police made the arrests as punishment for activities that the homeless had to perform in public.\textsuperscript{115} The court also ruled that the City had violated homeless persons' procedural due process rights because the ordinances were overbroad, reaching innocent and inoffensive conduct.\textsuperscript{116} The fourth finding concluded that the City had continuously violated the Fourth Amendment prohibition against unreasonable searches and seizures of property.\textsuperscript{117} The final reason given by the court was that “the City's practice of arresting homeless individuals for performing essential, life-sustaining acts in public when they have absolutely no place to go effectively infringes on their fundamental right to travel in violation of the Equal Protection [C]lause.”\textsuperscript{118} The court's analysis demonstrates the breadth of protection that the Fourteenth Amendment can offer the homeless.\textsuperscript{119}

\textsuperscript{110} See also Pottinger, 810 F. Supp. at 1560 n.13.
\textsuperscript{111} Id. at 1560 n.12 (summarizing MIAMI, FLA., CODE § 38-3 (1990)).
\textsuperscript{113} FLA. STAT. § 810.08-09. See also Pottinger, 810 F. Supp. at 1560.
\textsuperscript{114} See Pottinger, 810 F. Supp. at 1561 (holding that the city's failure to prevent improper police conduct even though the city had knowledge of the conduct is actionable under § 1983).
\textsuperscript{115} Id. at 1554.
\textsuperscript{116} Id.
\textsuperscript{117} Id.
\textsuperscript{118} Id.
\textsuperscript{119} Id.

The parties settled in December, 1997. Miami agreed to implement a training program to sensitize city police officers to the plight and legal rights of the homeless. Also, the city agreed to provide guidelines to its officers in handling encounters. If an officer observes a person violating a city law by engaging in “life sustaining conduct,” she must first inform the homeless person of available shelter and offer transportation to the shelter before arrest. National Law Center on Homelessness and Poverty, Civil Rights Update, at http://www.nlchp.org/legal.htm (last visited Jan. 10, 2000). Further, the settlement prohibits the destruction of homeless persons' property, requires detailed records of encounters with homeless persons, and creates a compensation fund to those who brought suit. Id.
B. Roulette v. City of Seattle

On October 4, 1993, the Seattle, Washington, City Council enacted the following ordinance, known as the Seattle Sitting Ordinance:

No person, after having been notified by a law enforcement officer that he or she is in violation of the prohibition in this section, shall sit or lie down upon a public sidewalk, upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during hours between seven a.m. and nine p.m. in the following zones:

1. The Downtown Zone,...

2. Neighborhood Commercial Zones...

A person found in violation exposes himself to a fifty-dollar fine or community service.

At the district court level, the plaintiffs challenged the ordinance as well as an ordinance that prohibited "aggressive begging." Plaintiffs claimed that the Sitting Ordinance violated numerous constitutional protections: procedural due process protections against vague laws that give law enforcement officers too much discretion and laws that do not give proper notice to possible violators, substantive due process rights guaranteed by the Fourteenth Amendment, the right to travel, and the Equal Protection Clause of the Fourteenth Amendment.

121 SEATTLE, WASH., MUN. CODE § 15.48.
123 SEATTLE, WASH., MUN. CODE § 15.48.050.
124 The plaintiffs consisted of a group of homeless persons, people who provided services to and advocated for the homeless, a registrar of voters, a street musician, and various political, social, and community organizations. See Roulette, 850 F. Supp. at 1444.
125 SEATTLE, WASH., MUN. CODE § 12A.12.015(A)(1). The court ruled that this ordinance did not violate the First Amendment, as long as it was interpreted to apply to only "those threats which would make a reasonable person fearful of harm to his or her person or property." Roulette, 850 F. Supp. at 1453.
126 The plaintiffs argued that since "lawful activity" did not violate the Sitting Ordinance until the police decided to give notice of a violation, the Sitting Ordinance failed to establish the necessary minimum guidelines for law enforcement personnel required by Papachristou v. City of Jacksonville, 405 U.S. 156 (1965). Roulette, 850 F. Supp. at 1445.
127 Id. at 1446.
128 The plaintiffs argued that substantive due process protected sitting on a sidewalk and that such innocent activity cannot be rationally related to any sort of legitimate government interest. Id. at 1447.
129 The plaintiffs alleged that the Sitting Ordinance impeded their ability to travel to and remain in the specified areas of the city and that the city's reasons for such impositions were not sufficiently compelling enough to survive strict scrutiny under the Constitution. Id.
130 The plaintiffs alleged two equal protection violations: first, they argued that the Sitting Ordinance unconstitutionally restricted their fundamental rights to free speech, due process, and travel; second, they argued that, in passing the ordinance, the city unconstitutionally targeted and discriminated against the homeless. Id.
The district court, in granting the City's motion for summary judgment, declared the law constitutional on its face.\textsuperscript{131} As to the procedural due process challenge, the court rejected the vagueness argument, stating that the ordinance "very clearly describes the proscribed behavior . . . [and] does not leave police officers with unfettered discretion."\textsuperscript{132} It also rejected the argument that the ordinance did not give adequate notice to citizens. The court emphasized that under the ordinance no citation would be issued unless an officer first warned the potential violator.\textsuperscript{133}

The plaintiffs' substantive due process arguments were also unsuccessful. They argued that the prohibition against sitting on the sidewalk, an innocent activity, bears no rational relation to a legitimate government interest.\textsuperscript{134} The court, seemingly accepting the plaintiffs' claim that sitting constitutes a substantive due process liberty interest, however, found the government's stated purposes—ensuring pedestrian safety and safeguarding the economic vitality of commercial area—legitimate and the sidewalk prohibitions rationally related to that end.\textsuperscript{135}

In addition, the court found no violation of the right to travel. The court distinguished \textit{Pottinger v. City of Miami}\textsuperscript{136} on three grounds: the city of Seattle, unlike the city of Miami, did not enact the ordinance "to expel homeless individuals from its commercial areas;"\textsuperscript{137} the ordinance "leaves open numerous options of places to sit or lie down [and] does not impair individuals' ability to come into commercial areas to take advantage of needed services;"\textsuperscript{138} and the ordinance only prohibits lying down or sitting from 7 a.m. to 9 p.m.\textsuperscript{139}

Moreover, the court rejected the equal protection challenge, noting that "the sidewalk ordinance neither infringes on a constitutionally protected right [i.e., the right to travel] nor discriminates against a suspect or protected class."\textsuperscript{140} Thus, because Seattle had a rational basis for distinguishing between sidewalk sitters and other users of the sidewalk, the court upheld the law.\textsuperscript{141}

\textsuperscript{131} Id. at 1454.
\textsuperscript{132} Id. at 1446.
\textsuperscript{133} Id. at 1446-47.
\textsuperscript{134} Id. at 1447.
\textsuperscript{135} Id.
\textsuperscript{137} \textit{Roulette}, 850 F. Supp. at 1448.
\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 1450.
\textsuperscript{141} Id. The court also denied plaintiffs' First Amendment challenge to the ordinance because: the act of sitting or lying is not necessarily related or inextricably linked to the speech or expressive conduct. The homeless can still beg, the voter registrar can still register votes, and the political and other community groups can still solicit support without sitting or lying down as a necessary part of their communicative endeavors. 
\textit{Id.} at 1449.
On appeal, plaintiffs narrowed the basis of their challenge to First Amendment grounds and substantive due process grounds. The Court of Appeals for the Ninth Circuit rejected both claims. The court engaged in a cursory substantive due process analysis—consisting of a mere two paragraphs—concluding that "the record make[s] clear that the statute at issue would be constitutional as applied in a large fraction of cases;" therefore, the plaintiffs' facial challenge failed.

C. The Philadelphia Sidewalk Behavior Ordinance in Light of Pottinger and Roulette

Although the Philadelphia Sidewalk Behavior Ordinance resembles both the ordinances at issue in Pottinger and the sitting ordinance at issue in Roulette, various factors distinguish the Philadelphia Ordinance from its Miami and Seattle counterparts. Unlike the ordinances and policies challenged in Pottinger, the Philadelphia ordinance does not seem to be the result of a blatant systematic effort to expel the homeless from the city. After all, Philadelphia increased funding for social services for the homeless within the city at the same time it passed the ordinance. Moreover, the Pottinger court focused on the fact that the ordinances applied city-wide. The Philadelphia ordinance applies to only specified areas; thus, the ordinance allows the restricted activities to occur within the city's borders. Furthermore, unlike the Philadelphia ordinance, the Miami ordinances did not require that law enforcement officers first issue a warning to a suspected offender. Nevertheless, the Philadelphia ordinance, like the ordinances at issue in Pottinger, reaches inoffensive activity such as prolonged sitting on a public bench or lying on a sidewalk without interfering with foot traffic.

142 Roulette v. City of Seattle, 97 F.3d 300 (9th Cir. 1996) (denying rehearing en banc).
143 Id. Judge Pregerson dissented on First Amendment grounds. See id. at 306 (stating that the ordinance "aims at expressive conduct . . . "). Additionally, Judges Pregerson and Tashima joined Judge Norris’ dissent regarding the denial of rehearing en banc, based on First Amendment concerns. See id. at 311 (accusing the majority of “departing from the standard that conduct needs only ‘a significant expressive element’ to merit First Amendment protection.” (citation omitted)).
144 Id. at 306. The Seattle Sitting Ordinance was also challenged at the state level, surviving there as well. See City of Seattle v. McConahy, 957 P.2d 1153, 1136-37 (Wash. Ct. App. 1997) (holding that the Sitting Ordinance did not violate the Washington State Constitution or the First Amendment right to freedom of expression).
145 Roulette, 97 F.3d at 306.
146 See supra Part IV.A. Of course, it is impossible to know the underlying motivations of the members of City Council.
147 See supra note 99 and accompanying text.
148 See supra notes 80-82 and accompanying text.
149 See supra note 91 and accompanying text.
150 See supra text accompanying notes 83-84.
Likewise, the ordinance at issue in *Roulette* differs from the Sidewalk Behavior Ordinance in three key areas. First, the Seattle ordinance applied only from 9 a.m. to 7 p.m. The district court stressed this aspect of the ordinance in determining that it did not violate either the Equal Protection Clause or substantive due process protections of the Fourteenth Amendment. A second crucial difference is that the Seattle ordinance does not restrict begging in the specified zones. Thus, unlike the Philadelphia Sidewalk Behavior Ordinance, the Seattle ordinance allows certain life-sustaining activities in the specified zone. The final key difference between the ordinances is that the Philadelphia ordinance attempts to alleviate some of the possible harm the law may cause to homeless individuals—therefore displaying some degree of compassion. The Seattle ordinance does not do so. The primary similarity between the two ordinances is that both require that law enforcement officers warn a suspected violator before issuing a citation.

In the end, because the Sidewalk Behavior Ordinance is less abhorrent than those ordinances and policies at issue in *Pottinger*, and more restrictive than those at issue in *Roulette*, these decisions should not serve as persuasive authority when a court assesses a challenge to the ordinance.

Moreover, the differences between the Seattle and Philadelphia ordinances are sufficiently distinguishable to ensure that even if *Roulette* is persuasive, it would not preclude a court from striking down the Philadelphia law. Furthermore, the plaintiffs in both *Pottinger* and *Roulette* did not pursue certain legal arguments to which the Philadelphia Sidewalk Behavior Ordinance appears vulnerable. These arguments will now be examined.

V. CHALLENGING THE SIDEWALK ORDINANCE: ASSESSING THE CONSTITUTIONALITY OF THE PHILADELPHIA SIDEWALK BEHAVIOR ORDINANCE

Challenges to anti-homeless laws similar to the Philadelphia Sidewalk Behavior Ordinance have been virtually non-existent. In fact,
Pottinger and Roullette are the only published opinions that deal with such challenges. Thus far the public interest community in Philadelphia has not challenged the ordinance in court. As the following shows, however, if challenged, there exist persuasive legal arguments that the Sidewalk Behavior Ordinance violates the rights of homeless persons under the Fourteenth Amendment.

A. Procedural Due Process

A law violates procedural due process guaranteed by the Fourteenth Amendment when it meets the criteria of the void-for-vagueness doctrine or, possibly, is overbroad.

1. Void-for-Vagueness

In Kolender v. Lawson, the Supreme Court invalidated a statute forbidding loitering because it violated the First and Fourteenth Amendment. The Court declared that in order for a penal statute to withstand a void-for-vagueness attack the statute must "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." The Court also stated that "[a]lthough the doctrine focuses both on actual notice to citizens and arbitrary enforcement, ... the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'"

In Roulette v. City of Seattle, the district court ruled that the sidewalk ordinance did not violate guideline requirements of the Due Process Clause of the Fourteenth Amendment. The court declared that the notification requirement in the Seattle ordinance "operates to restrict police discretion rather than increasing police discretion to

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159 See discussion infra Part VI regarding this decision.
160 The Fourteenth Amendment provides that "[n]o State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.
162 Id.
163 Id. at 357 (citations omitted).
164 Id. at 357-58 (quoting Smith v. Goguen, 415 U.S. 566, 574 (1974)).
165 850 F. Supp. 1442 (W.D. Wash. 1994). See also supra Part IV.B.
166 Id. at 1447 ("Certainly the ordinance does not address every conceivable question concerning the applicability and enforcement of the ordinance which could arise. But if this were the standard, few laws, if any, would pass constitutional muster.").
define the prohibited conduct.¹⁶⁷ Because the Philadelphia ordinance includes a similar notification requirement,¹⁶⁸ this analysis seemingly holds for it as well. On the other hand, the Philadelphia ordinance gives law enforcement officers carte blanche in determining whether a person in violation needs medical or other assistance.¹⁶⁹ This discretion raises concerns that an officer may issue citations as a default, especially considering the time it would require to contact an Outreach Team, as required by the law.¹⁷⁰ Still, a court would likely not declare the ordinance unconstitutionally vague due to a lack of minimal guidelines for law enforcement since the ordinance requires the officer to warn the suspect prior to issuing him a citation. The ordinance ensures that, in the end, the homeless person controls whether or not he incurs any type of penalty.¹⁷¹

2. Overbreadth

The Supreme Court seems unclear as to whether all types of laws, or only laws that infringe on rights guaranteed under the First Amendment, can be void because they are overbroad. At one point, the Court declared that a “clear and precise enactment may nevertheless be ‘overbroad’ if in its reach it prohibits constitutionally protected conduct.”¹⁷² If this statement accurately reflects the law, the ordinance seems susceptible to a challenge as overbroad. In *Grayned v. City of Rockford*,¹⁷³ Justice Marshall stated that the “crucial question . . . is whether the ordinance sweeps within its prohibitions what may not be punished under the First or Fourteenth Amendments.”¹⁷⁴ The *Pottinger* court adopted this statement and declared the Miami ordinances overbroad.¹⁷⁵ The court reasoned that the challenged ordinances were “overbroad to the extent that they result in class members being arrested for harmless, inoffensive conduct that they are forced to perform in public places.”¹⁷⁶ In contrast to the Miami ordinances in question, however, the “anti-homeless” aspects of the Philadelphia Sidewalk Ordinance do not apply citywide. Thus, homeless persons have a place to perform the inoffensive conduct in public—they just do not have that right in all places. Regardless, this aspect of the *Pottinger* analysis seems to apply to the Sidewalk Behavior

¹⁶⁷ Id. at 1446.
¹⁶⁸ PHILA., PA., CODE § 10-611(7).
¹⁶⁹ Id. at (7) (a)(2).
¹⁷⁰ Id.
¹⁷³ Id.
¹⁷⁴ Id. at 114-15.
¹⁷⁵ *Pottinger*, 810 F. Supp. at 1577.
¹⁷⁶ Id.
Ordinance as well. In Grayned, the Court clearly stated that if Fourteenth Amendment liberties are impeded, then the law is overbroad. In Grayned, the Court clearly stated that if Fourteenth Amendment liberties are impeded, then the law is overbroad.\textsuperscript{177} Thus, much like the fundamental rights specific to an equal protection analysis,\textsuperscript{178} it seems that a law may violate the prohibition against an overbroad scope if it interferes with a separate constitutional right.\textsuperscript{179}

Unfortunately, this analysis may be based on a relic of the law. The Supreme Court has stated that outside of the First Amendment context, a law may not be challenged as overbroad.\textsuperscript{169} If this correctly represents the present state of the law, then, obviously, a court may not strike down the Sidewalk Behavior Ordinance as overbroad under the Fourteenth Amendment and the Pottinger court came to an incorrect conclusion.\textsuperscript{181}

B. Equal Protection

To violate the equal protection rights of an individual or a class of persons a law must treat similarly situated persons differently\textsuperscript{182} and not survive the level of constitutional scrutiny the Supreme Court requires.\textsuperscript{183} The higher the scrutiny level, the more likely a court will strike down the law. In order to invoke strict scrutiny, the highest scrutiny level,\textsuperscript{184} a law must target a suspect class of persons, or infringe upon a fundamental right of a class of persons.\textsuperscript{185} Since a law must be narrowly tailored to fulfill a compelling state interest in order to survive strict scrutiny,\textsuperscript{186} plaintiffs obviously want the court to apply strict scrutiny in order to increase the government's burden.\textsuperscript{187}

\textsuperscript{177} Grayned, 408 U.S. at 114-15.  
\textsuperscript{178} See discussion infra Part V.B.2.  
\textsuperscript{179} See discussion infra Part V.C.  
\textsuperscript{181} See supra text accompanying notes 117-19.  
\textsuperscript{182} See City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) ("The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." (citation omitted)).  
\textsuperscript{185} See id. (holding that a zoning ordinance prohibiting group homes for the mentally retarded was unconstitutional because it was not rationally related to a legitimate governmental interest).  
\textsuperscript{186} See Romer v. Evans, 517 U.S. 620, 631 (1996) ("We have attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").  
\textsuperscript{187} See Cleburne, 473 U.S. at 440 (noting that laws classifying by race, alienage, or national origin must be "suitably tailored" to meet the needs of a compelling government interest).  
\textsuperscript{188} The only case in which the Supreme Court has upheld a law subject to strict scrutiny is Korematsu v. United States, 390 U.S. 214 (1944), a case much criticized. In that case, the Supreme Court upheld the internment of United States citizens of Japanese ancestry even after the Court
If a court determines that a law does not target a suspect class, then the government needs to show only that the law is rationally related to the state's interest. In challenging the Sidewalk Behavior Ordinance, it is important to invoke a heightened level of scrutiny because the ordinance likely satisfies rational basis review. Since controlling "behavior" on the sidewalk is rationally related to the avowed purpose of the city in passing the ordinance—i.e., promoting commerce in the downtown area—the plaintiffs must invoke strict scrutiny in order for a court to strike down the law.

1. Suspect Class

In order for the Sidewalk Behavior Ordinance to invoke strict scrutiny under equal protection analysis based upon the allegation that it targets a suspect class, it must meet two requirements: first, the legislative body must have exhibited an intent to discriminate against that class, and second, that class must be a "discrete and insular minority" (i.e., a suspect class).

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See Cleburne, 473 U.S. at 440 ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). This scrutiny is known as rational basis review.

Cf. Tobe v. City of Santa Ana, 892 P.2d 1145, 1180 n.17 (Cal. 1995) (Mosk, J., dissenting) ("We need not hold, therefore, that homeless persons are members of a 'suspect class' in order to invalidate the [camping] ordinance on equal protection grounds .... [T]he purpose of the ordinance—to banish a disfavored group—is plainly not a legitimate state interest.").

Thus, it is not alleged that the ordinance violates the requirement of equal protection under the law because of a "bare ... desire to harm a politically unpopular group.

The courts that have addressed this issue have answered this inquiry in the negative with little more than summary statement and no support other than that the Supreme Court has said so. See D'Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (noting that the lower court dismissed the equal protection claim for failing to state a claim because the plaintiffs were not a suspect class and the defendant's actions were related to a permissible government objection); Kreimer v. Bureau Police for Town of Morristown 958 F.2d 1242, 1269 n.36 (3d Cir. 1992) (noting that the defendants only need to meet the lowest standard of scrutiny because homeless persons are not a suspect class); Johnson v. City of Dallas, 860 F. Supp. 344, 355 (N.D. Tex. 1994) (maintaining that homeless persons should not be treated as a suspect class), rev'd on other grounds, 61 F.3d 442 (5th Cir. 1995); National Law Ctr. on Homelessness & Poverty v. Brown, Civ. A. No. 92-2257-LFO, 1994 WL 521334, at *8 (D.D.C. Sept. 15, 1994) (holding that homeless persons are not a suspect class).

See United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). Justice Stone's footnote has been called "the most celebrated footnote in constitutional law." Lewis Powell,
Not surprisingly, the City Council of Philadelphia did not state that the Sidewalk Behavior Ordinance was aimed at homeless persons. In fact, as already mentioned, City Council President Street publicly stated that the ordinance focused on certain types of "behavior" and not any class of persons. Nonetheless, the ordinance itself shows that the City Council intended the law to displace the homeless within the specified zones. For one, the ordinance forbids activities normally thought to be the modus operandi of homeless persons: lying on the sidewalk, maintaining one's belongings on the sidewalk, insistent panhandling, and begging. Secondly, the ordinance provides for social services and medical assistance for those violating the ordinance and those whom an officer deems in need of such services. This provision explicitly links the consequences of the legislation to a specified class, i.e., the homeless. That is, it recognizes that the law will affect persons in need of such social services—which, in accord with common sense, likely will be homeless persons.

This analysis is not affected by the fact that the ordinance is aimed at the actions of a number of groups in addition to the homeless persons. In order to satisfy the invidious intent requirement, as enunciated in Washington v. Davis, the discriminatory intent need not constitute the sole factor for passing the law; rather, it need only be a "motivating factor." The ordinance itself, as well as the fact that, along with passing the ordinance, the City Council provided for extra funds for social services dealing with the homeless, shows that displacing the homeless within the specified districts—that is, dealing with the homeless—in order to improve the business of the city, was a "motivating factor." Thus, the first part of the equal protection

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See supra Part II. It is clear that the ordinance was directed at various groups of people who use the sidewalk—movers, people who use rollerskates and skateboards, as well as homeless persons. This conclusion, however, does not immunize the ordinance.

PHILA., PA., CODE § 10-611 (g) (1998).

Id. at (2)(l) & (m).

Id. at (4)(a).

Id.

Id. at (7).


See Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 270 (1977) (holding that the fact that the legislature had a second, non-discriminatory motive does not immunize a statute from strict scrutiny).

This inclusion of social services is merely the most obvious acknowledgment of the ordinance's likely affect on the homeless population. Without the inclusion of the provision dealing with social services, the ordinance still would be directed at the homeless in part. This motivation was observed by the three councilpersons who voted against the ordinance, Councilwoman Jannie Blackwell, Councilman David Cohen, and Councilman Angel Ortiz. Joann Liviglio, Advocates Fight Philadelphia Sidewalk Law, PATRIOT LEDGER, Jan. 19, 1999, at 2. They argued that there were enough laws in Philadelphia to prevent aggressive panhandling and "camping" on the public sidewalks. Id. In addition, city officials, such as Estelle Richman, Public Health Commissioner, and John Timoney, Police Commissioner, acknowledged that the
To receive heightened scrutiny under suspect class analysis, the class targeted by the invidious law also must, in fact, be a suspect class. The Supreme Court has not considered whether homeless persons constitute a suspect class, or a quasi-suspect class, afforded heightened constitutional protections. Thus, no Supreme Court precedent exists denying homeless persons suspect class status. Nevertheless, every court that has addressed that question has ruled that the homeless do not constitute a suspect class. They have done so, however, without a detailed analysis. They merely assert that the Supreme Court has not yet ruled that the homeless constitute such a class.

Many of these lower courts have held, summarily, that homeless persons constitute an economic class—a class for which the Court requires only a rational relation to a legitimate government end.

To say that economics is solely responsible for homelessness belies the evidence of the many causes and characteristics of homelessness that show otherwise. One characteristic of the homelessness is, indeed, that homeless persons lack the money to buy a home. The homeless, however, are also disproportionately mentally ill, people of color, substance abusers, and people who historically have little political power. Moreover, the homeless are not distinguished from other classes based upon their incomes, as the plaintiffs in *Harris v. McCrae* were; they are persons who lack a permanent, or semi-
permanent, place of residence.\footnote{215} Homelessness is a state of being, not merely an economic class.

Of course, such existential reasoning does not have a place in constitutional law. This fact, however, does not mean that the homeless do not constitute a suspect class. On the contrary, this Comment avers that they do.

The Supreme Court has applied heightened scrutiny to legislation that disadvantages groups deemed "discrete and insular minorities"—those minorities that have been historically discriminated against, that have in common immutable or distinguishing characteristics, or are politically powerless.\footnote{216} The homeless constitute a "discrete and insular minority"\footnote{216} because they are politically powerless. Therefore, the homeless constitute a suspect class.\footnote{217}

As the Supreme Court has said, the purpose of determining whether a group constitutes a discrete and insular minority\footnote{218} is that the Equal Protection Clause requires that a court step in where there exists "a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities."\footnote{219} Homelessness constitutes such a condition for two reasons. First, the political process caters to those who vote. Homeless persons, however, have great difficulty in voting. Because the homeless often lack an education, they may not know how to go
about registering to vote. Even if they do, their transient existence may make it impossible to ensure that they will be near the place where they are registered to vote. Also, as Justice Marshall wrote, "homeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote."220

Second, the political process caters to those who have money. As Justice Marshall also has said, "[t]hough numerically significant, the homeless are politically powerless inasmuch as they lack the financial resources to obtain access to many of the most effective means of persuasion."221 Moreover, the Court has held that certain groups have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."222 For the reasons already stated, the homeless fit within this category.

Thus, because the homeless have historically had no political power and have not influenced the political process through either of the two means through which citizens can do so, the vote or the dollar, they constitute a discrete and insular minority.

Does the Philadelphia Sidewalk Ordinance survive heightened scrutiny? It clearly fails strict scrutiny, the requirement that a law be necessary to achieve a substantial government interest. The law's restrictions apply even where businesses will not be affected, such as in alleys or on the steps of an abandoned building. Thus, the City Council did not narrowly tailor the law to the interest the ordinance is alleged to protect (i.e., city commerce). When using a lesser standard of scrutiny, on the other hand, it is not immediately clear that the ordinance violates the Equal Protection Clause. A typical heightened scrutiny standard invoked by the Court requires that the legislation be "substantially related to a legitimate state interest." Although the interest in promoting commerce is "legitimate," the ordinance does not seem substantially related to that end in that it sweeps too broadly. The ordinance prevents inoffensive, life-sustaining activities, such as sleeping or asking for money, at all times in all of the specified instances within the only area of the city where these life-sustaining activities are feasible. To protect commerce, the ordinance could have been limited to those activities interfering with pedestrian traffic and those activities within a specified proximity of a place of business. As a result, the ordinance will likely fail intermediate scrutiny as well.

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221 Community for Creative Non-Violence, 468 U.S. at 304 n.4.
2. Fundamental Right

On the other hand, the Sidewalk Behavior Ordinance does not unconstitutionally inhibit a fundamental right in violation of the guarantee of equal protection under the law.

A right is fundamental under equal protection analysis when it is "explicitly or implicitly guaranteed by the Constitution." Implied fundamental rights include the right to vote, the right to counsel on a criminal appeal, and the right to travel. Of those fundamental rights recognized by the Supreme Court, only the right to travel at first glance seems to suffer from the Sidewalk Ordinance's restrictions. Upon closer examination, however, the ordinance does not interfere with the right to travel. The right to travel, under the Equal Protection Clause, thus far adopted by the Supreme Court involves the right of interstate travel—the right to travel freely from one state to another without state-implemented impediments and without suffering a penalty for taking advantage of that right to which other residents of the state are not subject. The Sidewalk Ordinance does not inhibit this right to interstate travel because it neither penalizes those who travel from another state to Pennsylvania nor inhibits a person from moving between states. Moreover, the ordinance does not treat similarly situated persons differently—it treats residents and non-residents alike. Therefore, it does not impinge on a right to travel in violation of the Equal Protection Clause of the Fourteenth Amendment.

C. Substantive Due Process

The above fundamental right analysis within an equal protection analysis, however, does not dispense with all right to travel arguments. The Sidewalk Ordinance violates the right to travel guaranteed by the Substantive Due Process Clause by forcing homeless per-
sons out of the designated areas of the city. In essence, it violates
their personal liberty interest\(^2\) in not traveling.

Summarizing its right to travel jurisprudence, the Supreme Court
has said, "[i]t protects the right of a citizen of one State to enter and
to leave another State, the right to be treated as a welcome visitor
rather than an unfriendly alien when temporarily present in the sec-
ond State, and, for those travelers who elect to become permanent
residents, the right to be treated like other citizens of that State.\(^2\)
This statement recognizes that the right to travel derives independ-
ently from three different sources: a substantive liberty interest (pro-
tected by the Due Process Clause), the right to the privileges and
immunities of the citizens in another state, and the aforementioned
equal protection right.

This Comment argues that the substantive due process protection
that guarantees the right to travel extends to the right to intrastate
travel as well as the right not to travel intrastate.

The Supreme Court has not yet considered a challenge to a law
based on a right to intrastate travel.\(^2\) Lower courts, however, have
recognized a right to intrastate travel. Most importantly, the Court of
Appeals for the Third Circuit, seated in Philadelphia, has stated that
the liberty interest protected by the Due Process Clause\(^2\) encom-
passes the right to intrastate travel: "[t]o the extent that the right to
travel is an aspect of personal liberty protected by substantive due
process, for example—and there is a clear line of cases cited in Sha-
piro at least suggesting that it is—the proposition . . . is unimpeach-
able."\(^2\) Recognizing the requirements for declaring a right funda-

\(^{2}\) Kent v. Dulles, 357 U.S. 116, 125 (1958) ("The right to travel is a part of the 'liberty' of
which the citizen cannot be deprived without the due process of law . . . .").

\(^{29}\) Saenz v. Roe, 526 U.S. 489, 500 (1999). The Court then stated, "[f]or the purposes of this
case, therefore, we need not identify the source of that particular right in the text of the Consti-
tution." Id. at 501.

\(^{2}\) The Court has denied at least one petition to issue a writ of certiorari in a case involving
1971) (holding that a residency requirement for admission to public housing violated the funda-
damental right to travel), cert. denied, 404 U.S 863 (1971).

Although substantive due process seems to have fallen out of favor with a majority of the
Court, the Court has continued to refer to the "liberty interest" of the Fourteenth Amendment.
Cf. Lutz v. City of York, 899 F.2d 255, 267 (3d Cir. 1990) ("The right to travel does not fit com-
fortably within this range of decisions . . . because '[t]he Court is most vulnerable and comes
nearest to illegitimacy when it deals with judge—made constitutional law having little or no
cognizable roots in the language or design of the Constitution." (quoting Bowers v. Hard%ick,
(Stevens, J.) ("Neither this history nor the scholarly compendia . . . persuades us that the right
to engage in loitering that is entirely harmless in both purpose and effect is not a part of the
liberty protected by the Due Process Clause.").

\(^{29}\) Lutz, 899 F.2d at 261. Moreover, the court stated:

Not all right to travel opinions have eschewed the burden of locating the right to travel
in some appropriate constitutional text. Various Justices at various times have suggested
no fewer than seven different sources: the Article IV Privileges and Immunities Clause,
the Fourteenth Amendment Privileges and Immunities Clause, a conception of national
citizenship said to be implicit in "the structural logic of the Constitution itself," the
mental, the Third Circuit stated, "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty' and 'deeply rooted in the Nation's history.'"

Many pronouncements of the Supreme Court seem in accord with this assertion. For instance, the Court has recognized that the liberty protected by the Due Process Clause includes the freedom to loiter for innocent purposes. The Court also has "expressly identified [the] 'right to remove from one place to another according to inclination' as 'an attribute of personal liberty' protected by the Constitution." Similarly, the Court has recognized the right to move "to whatsoever place one's own inclination may direct" and "the right to go from one place to another." These statements show that the Constitution protects the right to freedom of movement within a state and not just after a person has traveled between states. In that respect, the Due Process Clause is not like the Commerce Clause.

If there exists a right to intrastate travel under the liberty guarantees of the Fourteenth Amendment, then there exists a right not to engage in intrastate travel under those same guarantees—that is, there exists a right not to travel, or for lack of a better term, to stay put. The Sidewalk Ordinance, by forcing a person to move from where she is, regardless of whether she is actually interrupting foot traffic, tourism, or business, violates this right.

Indeed, the Supreme Court's jurisprudence contemplates as much. Accordingly, "an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of Commerce Clause, the Equal Protection Clause, and each of the Due Process Clauses.

Needless to say, these various provisions serve quite different purposes, and quite different doctrines have developed around each. Thus, the right to travel could have dramatically different scope and coverage depending on the constitutional provision from which it is derived, and the Court recently has provided precious little guidance on which of them presently give rise to a right to travel, and the respective scopes of each.

Compare Town of West Hartford v. Operation Rescue, 991 F.2d 1039, 1045 (2d Cir. 1993) (describing the right to travel as derived from national citizenship, and not from the Fourteenth Amendment), with Cole v. Housing Auth. of Newport, 435 F.2d 807 (1st Cir. 1970) (invalidating a two-year residency requirement for applicants to federally aided, low-rent, public housing based on the right to travel under the Equal Protection Clause). Other courts, however, have refused to recognize a fundamental right in intrastate travel. E.g., Andre v. Board of Trustees, 561 F.2d 48, 53 (7th Cir. 1977); Wardwell v. Board of Educ., 529 F.2d 625, 627 (6th Cir. 1976); Wright v. City of Jackson, Miss., 506 F.2d 900, 902-03 (5th Cir. 1975).

Lutz, 899 F.2d at 268.


See Morales, 527 U.S. at 53.

Saenz v. Roe, 526 U.S. 489, 500 (1999) ("It was the right to go from one place to another, including the right to cross state borders while en route, that was vindicated in Edwards v. California which invalidated a state law that impeded the free interstate passage of the indigent." (citation omitted)).

In fact, the Court has explicitly recognized "the constitutional right to freedom of movement." Kolender v. Lawson, 461 U.S. 352, 358 (1983).
movement inside frontiers that is 'a part of our heritage.' This liberty encompasses the right to move "to whatsoever place one's own inclination may direct." If a person can move at her inclination in a public place, she can be inclined not to move as well.

The idea that a personal right can be exercised both in invoking it and in not invoking it finds support in the Court's jurisprudence. As Justice Scalia has said:

We do not accept [the] criticism that this result "squashes" the liberty that consists of "the freedom not to conform." It seems to us that reflects the erroneous view that there is only one side to this controversy—that one disposition can expand a "liberty" of sorts without contracting an equivalent "liberty" on the other side. Such a happy choice is rarely available . . . . If Michael has a "freedom not to conform" (whatever that means), Gerald must equivalently have a "freedom to conform."

This liberty interest in choosing to act, or not to act, also can be seen in the due process cases dealing with decisional autonomy. The power to decide brings with it the power to choose not to exercise one's liberty interest. Similarly, the right to move in public areas brings with it the right not to move in public areas.

VI. SHOULD THE PHILADELPHIA PUBLIC INTEREST LEGAL COMMUNITY CHALLENGE THE SIDEWALK BEHAVIOR ORDINANCE?

The Philadelphia chapter of the ACLU and local civil rights lawyers, like the protesters in front of City Hall, have not allowed the Sidewalk Behavior Ordinance to pass into law quietly. Instead of challenging the ordinance, the ACLU-led civil rights group, on the

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240 Morales, 527 U.S. at 54 (quoting Kent v. Dulles, 357 U.S. 116, 126 (1958)).
241 Id. (quoting 1 William Blackstone, Commentaries *130).
243 See, e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) (affirming the right to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (upholding a married couple's right to use contraception); Roe v. Wade 410 U.S. 113 (1973) (upholding a woman's right to decide to have an abortion prior to the last trimester); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (striking down a law that prevented children from attending private or parochial schools); Meyer v. Nebraska, 262 U.S. 390 (1923) (striking down a law that prohibited teaching foreign languages in schools, based on the right to acquire knowledge). In this way, the right not to move may also be seen as a decisional privacy right. By forcing a person to move on, the state interferes with that person's right to decisional autonomy.
245 This right, like all rights available under the Due Process Clause, is not absolute, but may be interfered with only when the state has the requisite justification to do so.
246 See supra Part III.
same day that the ordinance took effect, filed a class action suit in federal court seeking to enjoin the harassment of homeless persons by the city police under the auspices of an "obstruction of the highway" statute. Under the statute, the city had subjected "hundreds" of homeless persons to arrests for "obstruction." According to an attorney involved in the suit, arrests of homeless persons for obstruction had grown exponentially between 1995 and 1999. Eventually, the City agreed to a settlement granting damage awards to the named plaintiffs, agreeing to cease any pretextual obstruction arrests, paying attorney’s fees and costs, and promising to provide additional training to police in dealing with the needs of the homeless population. According to the lead-counsel in the litigation, in the wake of the settlement, the ACLU-led team “made clear to the City” that they also had concerns regarding the constitutionality of the ordinance. Most likely, this “threat” has been one of the principle reasons that, to date, the city has made no arrests under the ordinance.

Should the Philadelphia public interest legal community challenge the ordinance in court?

Putting aside the strategy of the ACLU-led team, the factors weighing against challenging the law are few, but strong. As already mentioned, the homeless in this country have been under attack for some time. The Sidewalk Behavior Ordinance is a fairly mild manifestation of this resentment. After all, increased funding for social services benefiting the homeless came with the ordinance and the ordinance itself directs officers to first address the concerns of those persons seeming in need of an Outreach Team. Moreover, there

248 18 PA. CONS. STAT. § 5507 (1999). This information, as well as most of the information contained in this paragraph, was obtained from Paul Messing, Esq. Letter from Paul Messing, attorney and partner, Kairys, Rudovsky, Messing, Epstein, and Rau, to Jason Leckerman, author (June 10, 2000) (on file with author) [hereinafter referred to as “Letter from Paul Messing”]. Mr. Messing was lead counsel in the suit against the city seeking to enjoin the “pretextual” arrests against the homeless under 18 PA. CONS. STAT. sec. 5507 (the “obstructing the highway” statute).
249 18 PA. CONS. STAT. § 5507 (1999).
250 Id. See also Motion for Class Certification, Graham v. City of Philadelphia, Civ. No. 99-0255 (E.D. Pa., January 19, 1999).
251 See Letter from Paul Messing, supra note 248.
252 See Laura J. Bruch, Fewer Homeless on Center City Streets, PHILA. INQUIRER, Feb. 11, 2000, at B1 (addressing the effect of the sidewalk-behavior bill).
253 I acknowledge that second-guessing the strategy of the ACLU-team is a bit presumptuous. Nevertheless, I see much merit in doing so. For one, as an outsider, I am in a position to objectively analyze the strategy/decision. Also, civil rights lawyers who often deal with the city may be more willing to compromise with one cause, for the sake of future causes, because of the realistic need to negotiate with city officials in order achieve many of their goals (this notion of collaboration, on the other hand, may in fact best serve the proposed clients). Finally, adding a new voice to a debate—or perhaps rekindling that debate—is good in itself.
254 See supra Part II.
255 See supra Part IV.
has yet to be any known citations issued for violating the ordinance.\footnote{256} A challenge to the ordinance may result in backlash or a cry for more stringent enforcement of the Act. In addition, the realities of the present state of constitutional law in the federal courts may counsel patience in bringing a suit. With a conservative judiciary, especially on the Supreme Court, it may be best not to risk establishing precedent in favor of such law. Finally, it may be that a legal community with limited resources serves its clients better by focusing those limited resources elsewhere.\footnote{257}

On the other hand, there are many considerations that may weigh in favor of challenging the ordinance. For one, the issuing of citations is not the most repugnant aspect of the law. After all, the ordinance was not intended as a revenue builder; instead, it was a tool to keep the streets free from those considered to be obstacles in achieving economic good. The law allows law enforcement officers to restrict the liberty of homeless persons by preventing them from remaining in the area of the city where they are most likely to find food, receive charity, and be noticed by the community in general. By forcing homeless persons to sit and lie outside the downtown area, the city can effectively hide their plight from tourists and other visitors, business persons, and workers alike.

CONCLUSION

\begin{quote}
Looks like what drives me crazy
Don’t have no effect on you—
But I’m gonna keep at it
Till it drives you crazy, too.\footnote{258}
\end{quote}

Instead of focusing on alleviating the plight of the homeless, cities across the nation have decided to ostracize them. By limiting life-sustaining activities\footnote{259} in which the homeless can engage in the busiest and most wealth-concentrated areas of our cities, cities have shown their willingness to displace the homeless in an effort to increase tourism and downtown development. Most of these laws not only appear morally skewed, but also unconstitutional. Sidewalk ordinances, such as the Philadelphia Sidewalk Behavior Ordinance, violate the equal protection rights of homeless persons and unconstitutionally

\footnote{256} See Bruch, supra note 252. It is doubtful that this is due to a lack of possible plaintiffs. To meet standing requirements, a plaintiff in this instance need only to be forced out of the downtown. Since observers agree that the ordinance has, indeed, reduced the number of homeless persons on the streets of Center City, see id., it is clear such possible plaintiffs exist.

\footnote{257} That is, there may be more pressing areas of the law, such as welfare, where change would offer greater and more immediate benefits to the homeless.

\footnote{258} LANGSTON HUGHES, Evil, in SELECTED POEMS OF LANGSTON HUGHES 45 (1987).

\footnote{259} These include trying to obtain money through panhandling, sleeping, and resting.
infringe upon the liberty guaranteed to all persons by the due process clause of the Fourteenth Amendment.

Although homeless advocates in Philadelphia should not be criticized for not challenging the constitutionality of the Sidewalk Behavior Ordinance, by so doing, they may be sending a message that, in the long run, may result in greater harm to the homeless members of the city. Choosing not to challenge such ordinances when there are legal arguments making such challenges plausible, may send a message of acquiescence or agreement to the City Council and other members of the city's population that may in fact encourage more anti-homeless legislation. In fact, the supposed "success" of the Sidewalk Behavior Ordinance in Philadelphia, may, in fact, encourage similar ordinances elsewhere.260

Laws such as the Sidewalk Behavior Ordinance are repugnant to the ideal of the Fourteenth Amendment. They seek to restrict the freedom of a particular class of citizens: the homeless. The Fourteenth Amendment, however, protects all of us—the homeless as well as those with a home—from state laws that infringe upon our freedom and target us for being a member of a particular class. The Fourteenth Amendment is the sword of equality and liberty. With that sword, laws such as the Philadelphia Sidewalk Behavior Ordinance should be struck down.

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260 At a minimum, advocates should vigorously ensure that homeless persons in violation of the ordinance receive the social and medical services guaranteed by the ordinance and closely watch the manner in which the ordinance is applied. By doing this, even if the legal community definitively decides not to bring a facial challenge, as-applied challenges remain viable alternatives. The district court in Roulette stressed that the plaintiffs had brought a facial challenge to the Seattle ordinances, and acknowledged that an as-applied challenge still remained viable. Roulette, 850 F. Supp. at 1446. An as-applied challenge to the Sidewalk Behavior Ordinance under the Fourteenth Amendment seemingly could center on arbitrary or discriminatory enforcement of the Act, a continual failure to warn violators before issuing a citation, or consistent failure of law enforcement officers to properly assess when a violator needs the services of the Outreach Team. As the district court in Roulette v. City of Seattle stated, "[i]f police officers enforce the otherwise clear directives of the sidewalk ordinance in an arbitrary or discriminatory manner, then plaintiffs would certainly be justified in bringing a suit challenging the application of the ordinance." Id.