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In re Eichorn: The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness

Antonia K. Fasanelli

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In re Eichorn: The Long Awaited Implementation of the Necessity
Defense in a Case of the Criminalization of Homelessness

NOTE

IN RE EICHORN: THE LONG AWAITED
IMPLEMENTATION OF THE NECESSITY
DEFENSE IN A CASE OF THE
CRIMINALIZATION OF HOMELESSNESS

ANTONIA K. FASANELLI*

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INTRODUCTION

On December 30, 1998, the Court of Appeal in California found that a trial court should have allowed a homeless man cited for violating the City of Santa Ana's anti-camping ordinance to assert the necessity defense.¹ In an earlier decision, the California Supreme

* Note and Comment Editor, *American University Law Review*; J.D. Candidate, 2001, *American University, Washington College of Law*; B.A., 1996, *Barnard College*. I would like to thank Professor Susan Bennett and my editor, Adrienne R. Turner, both of whom provided advice and comment throughout the preparation of this Note.

1. *In re Eichorn*, 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998) (permitting a homeless man, arrested for sleeping in a public location, to raise the necessity defense).

Court found the anti-camping ordinance constitutional.² The supreme court left open, however, the possibility for homeless defendants to assert the “necessity defense,”³ as a justification for violating the law.⁴ This defense provides a potentially valid reason for breaking the law—out of necessity.⁵ In response to the creation of this option, a number of legal scholars analyzed the application of the necessity defense.⁶ Their analyses included the consideration of many factors, including an individual defendant’s efforts to eliminate his or her homeless condition, and lack of available resources provided by the locality.⁷ *In re Eichorn* is the first case to apply the necessity defense to the violation of an anti-camping ordinance by a homeless person,⁸ and provides advocates and scholars with their first glimpse into the role that this defense may play in homeless advocacy.

This Note asserts that the necessity defense demonstrates the

2. See *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1161-69 (Cal. 1995) (finding the ordinance facially constitutional as it does not violate the right to travel or punish status, and is not vague or overbroad).

3. See *id.* at 1155 (recognizing the possibility that defendants may raise “a due-process-based necessity defense”).

4. See 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 5.4(a) (1986) [hereinafter *SUBSTANTIVE CRIMINAL LAW*] (explaining that “one who, under the pressure of circumstances, commits what would otherwise be a crime may be justified by ‘necessity’ in doing as he did and so not be guilty of the crime in question”).

5. See *Eichorn*, 81 Cal. Rptr. 2d at 539 (explaining that the necessity defense requires that the defendant be faced with a threatening situation such that no other legal courses of action exist).

6. See Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a “Kinder and Gentler” America*, 19 HASTINGS CONST. L.Q. 783, 809 (1992) (discussing the application of five common law elements of the necessity defense to the crime of begging); Robert C. McConkey III, “*Camping Ordinances and the Homeless: Constitutional and Moral Issues Raised by Ordinances Prohibiting Sleeping in Public Areas*,” 26 CUMB. L. REV. 633, 658-59 (1995-1996) (discussing potential factors that courts could utilize in determining the application of the necessity defense); Donald E. Baker, Comment, “*Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless*,” 45 U. MIAMI L. REV. 417, 452-53 (1991) (applying a hypothetical example of a homeless woman arrested for sleeping on the street to the four traditional elements of the necessity defense. *But see* David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL’Y REV. 487, 508 (1994) (advocating for the application of the defense of duress to anti-homeless ordinances over the defense of necessity).

7. See McConkey, *supra* note 6, at 658 (suggesting that a defendant asserting the defense of necessity needs to prove that he or she had nowhere else to sleep and that the defendant may not rely solely on evidence that the number of available shelter beds is insufficient compared to the homeless population).

8. See Burns, *supra* note 6, at 808-09 & n.139 (mentioning that Professor Alan Levine, Hofstra University School of Law, sought to assert the defense of necessity where police arrested a homeless man for trespassing in an abandoned apartment building, but the prosecution withdrew the charges); *see also* *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (noting that members of the class of plaintiffs could not raise the defenses of necessity or duress to contest an ordinance that criminalized sleeping and eating in public places because authorities released the arrested plaintiffs from custody without being charged).

inutility of anti-camping and sleeping ordinances in removing homeless people from public areas and in serving the broader social goal of eliminating homelessness altogether. The recent application of the necessity defense constitutes a shift toward focusing on available alternatives and the strict balancing of harms analysis,⁹ and away from the theory of voluntarism.¹⁰ Courts thereby place the burden on local governments to address the lack of resources available to homeless people.¹¹ This Note discusses potential policy implications resulting from the application of the necessity defense, including the potential for a large number of lawsuits. Both the far-reaching policy implications and the numerous possible lawsuits prove that in the interest of judicial efficiency, such ordinances should be abolished.

Part I of this Note provides national statistics on homeless people, and discusses causes of homelessness and the lack of affordable housing and other services. In addition, this section focuses on specific barriers to services and housing in cities implementing anti-camping ordinances and how a homeless plaintiff may use these barriers in asserting a necessity defense. Part II presents an overview of the case law on anti-camping and sleeping ordinances. Part III discusses the development of the necessity defense and its use today. Part IV presents *In re Eichorn* and discusses the court's analysis of the application of the necessity defense where police cited a homeless man for violating an anti-camping and sleeping ordinance.

I. HOMELESSNESS IN THE UNITED STATES

In an effort to address the presence of homeless people¹² living on

9. Balancing of harms, or comparing harms, is exemplified by the Model Penal Code § 3.02(1)(a), which states that “the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.” Model Penal Code § 3.02(1)(a) (1962); *see also* John T. Parry, *The Virtue of Necessity: Reshaping Culpability and the Rule of Law*, 36 HOUS. L. REV. 397, 417-19 (1999) (discussing the balance-of-harms approach in the context of justification).

10. “The theory of voluntarism holds that defendants are morally culpable and may be punished if they had the capacity and opportunity to conform to the law—that is, at a minimum, if they could have acted differently had they chosen to do so.” Parry, *supra* note 9, at 421.

11. *See* Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 560-61 (1997) (arguing that “police cannot perform substantial order maintenance tasks without legal authority” and in order to address the inappropriate emphasis on improved “quality of life” through police enforcement, “there is a need for renewed focus upon those political, administrative, and other ‘subconstitutional’ controls that might assist in constraining arbitrary police enforcement”).

12. The Stewart B. McKinney Homeless Assistance Act defines a homeless person as:

(1) an individual who lacks a fixed, regular, and adequate nighttime

the street,¹³ many jurisdictions have enacted laws that ban activities primarily attributed to homeless people, such as sleeping and camping in public.¹⁴ Such laws affect a small portion of the 700,000 people who are homeless on any given night.¹⁵ For instance, conservative estimates indicate that in Washington, D.C., there are 7,500 homeless people,¹⁶ but only between 700 and 1,800 live on the

residence; and

(2) an individual who has a primary nighttime residence that is—

(A) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);

(B) an institution that provides a temporary residence for individuals intended to be institutionalized; or

(C) a public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

42 U.S.C. § 11302 (1994). The Stewart B. McKinney Homeless Assistance Act is the only major federal legislation addressing homelessness. *See id.* § 11301 (designating that the purpose of the Act is to address, on a federal level, the “immediate and unprecedented crises” of homelessness in our nation).

In addition to the McKinney Act definition of a homeless person, localities such as Washington, D.C., also consider a family or individual who has lived for any period of time with another person who is the owner or controller of the residence to be homeless. Such a condition is called “doubling up.” *See* MARTHA BURT, *OVER THE EDGE* 8 (1992) (noting that doubling up may occur when households want to share costs when housing becomes unaffordable); *see also* Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 *YALE L. & POL’Y REV.* 1, 7 (1996) (“Many homeless individuals and families double up with relatives or friends before reaching the streets or shelters . . .”).

13. *See* Rob Teir, *Restoring Order in Urban Public Spaces*, 2 *TEX. REV. L. & POL.* 255, 256 (1998) (discussing the “national trend to re-establish a semblance of order, comfort, and security in urban public spaces”); *see also* Elisabeth Bumiller, *In Wake of Attack, Giuliani Cracks Down on Homeless*, *N.Y. TIMES*, Nov. 20, 1999, at A1 (reporting on Mayor Rudolph Giuliani’s decision that police will arrest homeless people if found on the street after a homeless man attacked a woman).

14. *See, e.g.*, Cal. Penal Code § 647(j) (West 1999) (mandating that “[e]very person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (j) Who lodges in any building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it”).

15. *See* James D. Wright & Joel A. Devine, *Housing Dynamics of the Homeless: Implications for a Count*, 65 *AM. J. ORTHOPSYCHIATRY* 320, 323, 328-29 (1995) (analyzing the U.S. Bureau of Census’ S-Night count of homeless people, which totaled 228,372 people, and concluding that it is more likely that there are between 734,000 and 1,300,000 homeless people in the United States on a given night); *see also* Martha R. Burt, *Critical Factors in Counting the Homeless: An Invited Commentary*, 65 *AM. J. ORTHOPSYCHIATRY* 334, 335 (1995) (supporting Wright and Devine’s point-in-time figure of 700,000 homeless people and suggesting that the 1,300,000 figure falls short of the likely 2-3 million people who are homeless annually).

16. *See* THE COMMUNITY PARTNERSHIP FOR THE PREVENTION OF HOMELESSNESS, 1997-1998 REPORT TO THE COMMUNITY 9 & n.9 (1999) [hereinafter *COMMUNITY PARTNERSHIP*] (noting, however, that other estimates show that there are over 10,000 persons permanently housed with District and Federal “homeless” dollars each day). A recent article notes the increase of homelessness in the District of Columbia as reported by homeless service providers critical of the Community Partnership’s conclusion that homelessness had declined since 1996. *See* Serge F. Kovaleski & Sewell Chan, *Indicators Show D.C. Homelessness Getting Worse*, *WASH. POST*, Feb. 14,

street.¹⁷

National and local statistics on homelessness and resources available to homeless people provide a background to the impact anti-sleeping and camping ordinances have on homeless people. The lack of shelter, affordable housing, and income resources in U.S. cities indicate that homeless people often have no place to go and have little opportunity to find housing in the near future. For homeless persons sleeping on the street, the lack of opportunity to find and maintain housing inevitably translates into continued violations of city anti-camping and sleeping ordinances.

Violations of these ordinances affect a wide cross section of individuals because the national homeless population is diverse. In 1999, the U.S. Conference of Mayors published *A Status Report on Hunger and Homelessness in America's Cities: 2000*, that analyzed surveys on hunger and homelessness in twenty-five U.S. cities.¹⁸ Of the cities surveyed, the report found that 36% of the homeless population were families with children;¹⁹ 22% were mentally ill; 37% were substance abusers; 26% were employed; and 15% were veterans.²⁰

The causes of homelessness are equally diverse. Martha Burt, in her book *Over the Edge*, argues that the two direct causes of homelessness are housing and income.²¹ The housing factor includes two variables—rental vacancy rate and the ratio of low-income renters

2001, at A1. *But see* Mary Otto, *Area Counts 12,850 Homeless in a Day*, WASH. POST, Apr. 12, 2001 at A1 (reporting that a recent study from the Metropolitan Washington Council of Governments found that 7,058 homeless people live in Washington, D.C. and 5,792 homeless people live in the surrounding suburbs in Maryland and Virginia).

17. *See id.* at 7 (discussing a National Institute for Drug Abuse study conducted in 1992, which found 1,800 homeless people living on the streets and the Community Partnership's study, which found 700 people who remain on the streets for a period of at least 90 days, which the organization considers only an "informed estimate").

18. THE U.S. CONFERENCE OF MAYORS, *A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES i* (2000) [hereinafter U.S. CONFERENCE OF MAYORS] (assessing the status of hunger and homelessness in American cities by surveying 26 major cities where the mayors were members of the Task Force on Hunger & Homelessness).

19. *Id.* at ii; *see also* HOMES FOR THE HOMELESS, 1994-95 ANNUAL REPORT 1 (1995) (asserting that there are 600,000 homeless families each year).

20. *See* U.S. CONFERENCE OF MAYORS, *supra* note 18, at ii (providing statistics concerning the demographics of America's homeless population).

21. *See* BURT, *supra* note 12, at 162 (determining that a city's homelessness rate is most directly affected by housing and income variables); *see also* U.S. CONFERENCE OF MAYORS, *supra* note 18, at ii, 67 (finding that survey cities report that the lack of affordable housing is the most significant factor that causes homelessness). The U.S. Conference of Mayors notes that other causes of homelessness include "low paying jobs;" "substance abuse and the lack of needed services;" "mental illness and the lack of needed services;" "domestic violence;" "poverty;" "changes in cuts in public assistance programs;" and "the lack of access to affordable healthcare." *Id.* at 67.

to affordable units.²² The second factor, income, includes the particular geographic area's poverty rate and per capita income.²³ Burt also presents indirect factors, such as benefits affecting homelessness via income, the number of persons in a household who can work, the locality's unemployment rate, and the cost of living.²⁴

A. *Housing, Income, and Shelter Statistics*

The shortage of affordable housing is a significant barrier to housing for a homeless person or family.²⁵ In March 1999, the Department of Housing and Urban Development reported that, although there is "record growth in the economy," rental housing is too expensive for low-income persons²⁶ and there is a "dramatic loss" of affordable housing.²⁷ Those persons who do not receive housing

22. See BURT, *supra* note 12, at 162 (noting that a low vacancy rate results in more homelessness as does a high ratio of low-income renters).

23. See *id.* at 162, 164. The Census Bureau determines the poverty rate based upon "a set of money income thresholds that range by family size and composition to detect who is poor." See U.S. Census Bureau, *Current Population Survey (CPS)—Definitions and Explanations* (visited Sept. 14, 2000), at <http://www.census.gov/population/www/cps/cpsdef.html>.

24. See BURT, *supra* note 12, at 164-65. Burt shows that all indirect resources also affect homelessness directly. See *id.* at 164.

25. See U.S. DEP'T OF HEALTH & HUMAN SERVS. & U.S. DEP'T OF HOUS. & URBAN DEV., PRACTICAL LESSONS: THE 1998 NATIONAL SYMPOSIUM ON HOMELESSNESS RESEARCH vii (1999) ("Receipt of affordable housing is the single greatest predictor of formerly homeless persons' ability to remain in housing.").

26. See U.S. DEP'T OF HOUS. & URBAN DEV., WAITING IN VAIN: AN UPDATE ON AMERICA'S RENTAL HOUSING CRISIS 14 (1999) [hereinafter WAITING IN VAIN] (determining that, based on the Consumer Price Index for Residential Rent, rents rose at a rate almost double that of inflation between 1996 and 1998). HUD also finds that based upon Bureau of Labor Statistics figures between 1995-1997 "rents slightly outpaced income . . . for the 20% of U.S. households with the lowest incomes." *Id.* at 15; see also NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, OUT OF SIGHT—OUT OF MIND ii (1998) [hereinafter OUT OF SIGHT] (finding that a survey of 50 U.S. cities revealed that between 17 and 37% of individuals "are unable to afford the fair market rent for an efficiency apartment in their metropolitan area").

27. See WAITING IN VAIN, *supra* note 26, at 15 (finding that the number of housing units that rent for less than \$300 decreased by 13% between 1996 and 1998). HUD indicates that lack of access to housing for low-income persons is precipitated also by the lack of housing assistance provided by HUD as a result of a withdrawal of Government support. See *id.* at 16. A further hurdle to the provision of affordable housing is the failure of owners of project-based Section 8 housing to renew their contracts with HUD, where there is little financial incentive to do so because HUD cannot offer competitive market rents. See *id.* at 16-17.

The Center on Budget and Policy Priorities found that the number of low-income renters exceeded the number of low-income housing units by 4.4 million. See *Center on Budget and Policy Priorities, Press Release, In Search of Shelter: The Growing Shortage of Affordable Rental Housing* (visited Nov. 7, 1999), at <http://www.cbpp.org/615housing-pr.htm>. Although low-income households should pay only 30% of their income on housing, 82% of these families used more than 30% of their income for housing. See *id.* Where low-income people are required to maintain housing with more than one-third of their income, finding and retaining affordable housing while homeless is a significant challenge. See *id.*

assistance promptly due to this shortage are placed on waiting lists that may result in a wait anywhere between a few months to several years for housing.²⁸ Some of the longest wait times are in large urban areas, such as New York where the wait time for public and Section 8 housing²⁹ is eight years.³⁰ Other cities have refused to accept applications for at least one affordable housing program because of the length of the existing wait lists.³¹

Earnings from employment may assist homeless people in obtaining basic necessities and, in some cases, housing, but homelessness is not solved through work alone. The National Law Center on Homelessness & Poverty explains that a person working forty hours per week at minimum wage still cannot afford fair market rent³² for an efficiency apartment in any of the fifty cities analyzed.³³ Some homeless people work as day laborers or hold part-time or even full-time jobs.³⁴ As many as 44% of homeless people work,³⁵ but often

28. See WAITING IN VAIN, *supra* note 26, at 7-8 (finding that in 1998 the average waiting time nationwide for public housing was eleven months and for Section 8 housing was twenty-eight months).

29. HUD provides two types of Section 8 housing. The first, and most common form, is the Section 8 rental voucher program, where voucher recipients may lease privately owned housing and pay approximately 30% of their income for that housing. HUD then provides the difference between the tenant's share of rent and the total rent charged by the landlord. See U.S. Dep't of Hous. & Urban Dev., *Section 8 Program Fact Sheet* (visited Sept. 17, 2000), at <http://www.hud.gov/section8.html>. The second type of Section 8 housing, project-based Section 8, provides a subsidy to owners of buildings who reserve units for Section 8 holders. Forty percent of all units designated for recipients of Section 8 assistance are reserved for families at or below 30% of the local area median income. See U.S. DEP'T OF HOUS. & URBAN DEV., RENTAL HOUSING ASSISTANCE—THE WORSENING CRISIS 9 (2000) [hereinafter THE WORSENING CRISIS].

30. See WAITING IN VAIN, *supra* note 26, at 8 (finding that, in addition to the lengthy wait in New York, wait times for public housing in other cities include "6 years in Oakland, and up to 5 years in Washington, D.C. and Cleveland," and that Section 8 housing waiting times are 5 years in Memphis, up to 5 years in Chicago, 7 years in Houston, up to "10 years in Newark, and 10 years in Los Angeles"); see also COMMUNITY PARTNERSHIP, *supra* note 16, at 7-8 (finding that 267 homeless families remain on the wait list for family emergency shelter in the District of Columbia).

31. See U.S. CONFERENCE OF MAYORS, *supra* note 18, at 88 (noting that 44% of survey cities stopped accepting applications for assisted housing programs).

32. HUD determines the fair market rent (FMR) of housing by "estimat[ing] . . . rent plus the cost of utilities, except telephone. [FMRs] are housing market wide estimates of rents that provide opportunities to rent standard quality housing throughout the geographic area in which rental housing units are in competition FMRs are set at the 40th percentile rent—the dollar amount below which 40% of standard quality rental housing units rent." 24 C.F.R. § 888.113 (2000).

33. See OUT OF SIGHT, *supra* note 26, at i. The National Law Center also suggests that a person subsisting on Supplemental Security Income (a benefit for blind, elderly, or people with disabilities) will not be able to afford housing at the fair market rent in any of the cities surveyed. See *id.* at 2.

34. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DUE CREDIT 3 (1998) [hereinafter DUE CREDIT] (discussing six studies that show that homeless people work in both full-time and part-time jobs).

they only earn enough funds to last one day.³⁶ As a result, homeless people have little to no surplus income to set aside as savings.³⁷ Consequently, they cannot secure housing.

In addition, the unemployment rate has increased in many cities. In contrast to the national decreased rate of joblessness,³⁸ the Department of Housing and Urban Development found that one in six "central cities"³⁹ has an unemployment rate at 50% above the national average.⁴⁰ The report also found that one in twelve cities has an unemployment rate that is 75% or more above the national average and one in fifteen cities has an unemployment rate that is 100% above the national average.⁴¹

35. See THE URBAN INSTITUTE ET AL., *THE FORGOTTEN AMERICANS—HOMELESSNESS: PROGRAMS AND THE PEOPLE THEY SERVE* 29 (1999) (prepared for Interagency Council on the Homeless) (finding that based on a survey of 76 metropolitan and non-metropolitan areas, 44% of the homeless persons interviewed conducted paid work during the 30 day period before being interviewed). But see U.S. CONFERENCE OF MAYORS, *supra* note 18, at ii (finding that in a survey of 25 cities, 26% of homeless people are employed).

36. See DUE CREDIT, *supra* note 34, at 2 (discussing that homeless people cannot accumulate savings because they often must resort to day labor, panhandling, selling junk, and other forms of activity that provide inconsistent income in order to survive each day). Some homeless individuals and families may qualify for the federal Earned Income Tax Credit, which would enable them to use their tax refund to pay for housing, transportation, clothing, or medical needs. See *id.* at 6 (discussing the use of the Earned Income Tax Credit by homeless people).

37. See *id.* (explaining that homeless people are rarely able to save enough funds to pay for housing).

38. See Mary Williams Walsh, *Unemployment Falls to 4.1%, Best in 30 Years*, L.A. TIMES, Nov. 6, 1999, at A1 (discussing the recent decline in the unemployment rate to 4.1%, the lowest level since January 1970).

39. A central city is defined as:

- A. The city with the largest population in the [Metropolitan Statistical Area];
- B. Each additional city with a population of at least 250,000 or with at least 100,000 persons working within its limits;
- C. Each additional city with a population of at least 25,000, an employment/residence ratio of at least .75, and at least 40 percent of its employed residents working in the city;
- D. Each city of 15,000 to 24,999 population that is at least one-third as large as the largest central city, has an employment/residence ratio of at least .75, and has at least 40 percent of its employed residents working in the city;
- E. The largest city in a secondary noncontiguous urbanized area, provided it has at least 15,000 population, an employment/residence ratio of at least .75, and has at least 40 percent of its employed residence working in the city;
- F. Each additional city in a secondary noncontiguous urbanized area that is at least one-third as large as the largest central city of that urbanized area, that has at least 15,000 population and an employment/residence ratio of at least .75, and that has at least 40 percent of its employed residents working in the city.

U.S. DEP'T OF HOUS. & URBAN DEV., *NOW IS THE TIME: PLACES LEFT BEHIND IN THE NEW ECONOMY* 41 (1999).

40. See *id.* at 2.

41. See *id.*

Moreover, the number of shelter spaces woefully fails to meet demand. The U.S. Conference of Mayors found that although the number of shelter spaces for homeless people increased by 15%,⁴² the unmet need is great. The study found that 23% of shelter requests by homeless people went unmet during the last year⁴³ even though shelter requests increased by 15%.⁴⁴ The Law Center reports that none of the 50 cities surveyed have enough shelter spaces for the number of homeless people in that city on any given day.⁴⁵ In Washington, D.C., for example, a family must often wait over six months for shelter.⁴⁶

Therefore, in a great number of cities in the United States, homeless people often do not have any other choice but to live on the street.⁴⁷ Until the needs of homeless people are met through social services, arresting and citing homeless people will not relieve homelessness and certainly will not reduce the presence of homeless people in public places. If judicial responses to these ordinances identify these deficiencies, localities may consider alternative means to eliminating homelessness.

II. EIGHTH AMENDMENT CHALLENGES TO ORDINANCES BANNING SLEEPING IN PUBLIC

In an effort to remove homeless people from desirable locations,⁴⁸

42. See U.S. CONFERENCE OF MAYORS, *supra* note 18, at 51 (noting that 52% of the cities surveyed had an increase in shelter beds). Family shelter beds increased by 26%. See *id.*

43. See *id.* at 61 (identifying that 27% of requests by homeless families also went unmet).

44. See *id.* at ii.

45. See OUT OF SIGHT, *supra* note 26, at 1-2; see also Nina Bernstein, *Shelter Population Reaches Highest Level Since 1980's*, N.Y. TIMES, Feb. 8, 2001, at A27 (reporting that an increase in homeless people applying for shelter in New York City pushed the number of people in the shelter to system to its highest point since the late 1980s with the system overflowing with about 500 families per night); U.S. CONFERENCE OF MAYORS, *supra* note 18, at 62, 64 (noting that 68% of survey cities "may have to turn away homeless families" and 56% of cities "may have to turn away homeless people other than families because of a lack of resources").

46. See COMMUNITY PARTNERSHIP, *supra* note 16, at 6-7 (discussing barriers to providing assistance to homeless people and noting that 267 homeless families remain on a wait list for shelter).

47. This assertion is not made with the intent to address statements, made by proponents of anti-camping and sleeping ordinances, suggesting that homeless advocates want to establish a right to live on the street. See Teir, *supra* note 13, at 257 ("[M]any 'homeless advocates' and civil libertarians have championed the 'right' to live on the street, sleep in the public place of one's choosing, beg in any place and in any manner one pleases, and to essentially be exempt from standards of conduct that apply to others.").

48. The motivation behind ordinances that ban camping, sleeping, begging and other activities in public locations ranges from creating more aesthetic urban areas to preventing crime. See Teir, *supra* note 13, at 291 (suggesting that ordinances

many city governments have enacted ordinances banning activities that constitute basic daily activities for homeless people.⁴⁹ Advocates for homeless people have brought constitutional claims against local governments⁵⁰ under the right to travel,⁵¹ vagueness,⁵² the Equal

which combat "street-level disorder," including panhandling and sleeping in public, are aimed at reducing crime and making public places more desirable for the general population); *see also* E. J. Dionne, Jr., *A Broken-Windows Approach to Crime*, WASH. POST, Dec. 29, 1996, at C7 (discussing Kelling and Coles' "Broken Windows" approach to "aggressive panhandling, and preventing public parks from being taken over by homeless people"). The "broken windows" approach to urban renewal derives its name from the following analogy:

If a factory or office window is broken, passersby observing it will conclude that no one cares or no one is in charge. In time, a few will begin throwing rocks to break more windows. Soon all the windows will be broken, and now passersby will think that, not only is no one in charge of the building, no one is in charge of the street on which it faces. Only the young, the criminal, or the foolhardy have any business on an unprotected avenue, and so more and more citizens will abandon the street to those they assume prowl it. Small disorders lead to larger and larger ones, and perhaps even to crime.

James Q. Wilson, *Foreword* to GEORGE L. KELLING & CATHERINE M. COLES, *FIXING BROKEN WINDOWS* xv (1996). Nevertheless, attempts to create order in urban areas by attacking homeless people through the use of anti-camping, sleeping and begging ordinances are misplaced. *See* Maria Foscarinis, *Wrong Approach to Homelessness*, WASH. POST, Jan. 13, 1997, at A16 (stating that the "broken windows" approach obscures the issue of homelessness). As Foscarinis asserts in her response to an editorial supporting the application of the "broken windows" theory on homeless people's presence in public places, "[p]eople must be somewhere, and as long as they have no private space, they will be in public. At most, criminalizing their use of public space will move them temporarily into jails and prisons—only to be released back onto the streets." *Id.* Therefore, the only approach to addressing the presence of homeless people in public places is to provide such basic services as shelter, housing, and income assistance that will prevent people from being forced to live on the streets. *See id.* (suggesting that a more effective way than the "broken windows" approach is for communities to guarantee that all its members have a place to go).

49. *See* OUT OF SIGHT, *supra* note 26, at ii (finding that between 1996 and 1998, 12% of the 49 cities surveyed enacted ordinances banning begging and 18% of the cities enacted ordinances prohibiting certain conduct in public places, including begging). As of December 1998, 86% of the cities participating in the Law Center survey banned begging and 73% banned certain behaviors in public places. *See id.* at i-iii. The survey cities included Denver, CO; Fort Worth, TX; Oklahoma, OK; Portland, OR; Long Beach, CA; Kansas City, MO; Virginia Beach, VA; Charlotte, NC; Tucson, AZ; Albuquerque, NM; Atlanta, GA; St. Louis, MO; Sacramento, CA; Fresno, CA; Tulsa, OK; Oakland, CA; Honolulu, HI; Miami, FL; Pittsburgh, PA; Cincinnati, OH; Minneapolis, MN; Omaha, NE; Toledo, OH; Buffalo, NY; New York, NY; Los Angeles, CA; Chicago, IL; Houston, TX; Philadelphia, PA; San Diego, CA; Dallas, TX; Phoenix, AZ; Detroit, MI; San Antonio, TX; San Jose, CA; Indianapolis, IN; San Francisco, CA; Baltimore, MD; Jacksonville, FL; Columbus, OH; Milwaukee, WI; Memphis, TN; Washington, DC; Boston, MA; El Paso, TX; Seattle, WA; Cleveland, OH; Nashville, TN; Austin, TX; and New Orleans, LA. *See id.* at 3-4.

50. *See generally* Maria Foscarinis & Richard Herz, *The Criminalization of Homelessness: An Overview of Litigation Theories and Strategies*, 29 CLEARINGHOUSE REV. 719, 719-24 (1996) (providing a guide to challenges of anti-homeless ordinances); Foscarinis, *supra* note 12, at 36-38 (discussing constitutional challenges to local ordinances and policies that criminalize homelessness and public policy implications for such laws and policies).

51. *See* Pottinger v. Miami, 810 F. Supp. 1551, 1580-81 (S.D. Fla. 1992) (finding that arresting homeless people violates the fundamental right to travel); *see also*

Protection Clause,⁵³ and overbreadthness.⁵⁴ Although these legal theories proved somewhat successful in challenging anti-camping ordinances, the most successful argument relies on the Eighth Amendment⁵⁵ prohibition against punishment for status.⁵⁶

The notion of a status crime originated in the Supreme Court case of *Robinson v. California*⁵⁷ where the Court examined a California statute that made it a crime to “be addicted to the use of narcotics.”⁵⁸ The Court found that where a statute could make “the ‘status’ narcotic addiction a criminal offense, for which the offender may be prosecuted ‘at any time before he reforms,’”⁵⁹ such a statute is “an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”⁶⁰

Six years later, the Supreme Court considered the application of *Robinson* to *Powell v. Texas*,⁶¹ where the petitioner was convicted of

Davidson v. Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) (discussing the plaintiffs’ claim that the anti-camping ordinance violated their right to travel, a fundamental constitutional right).

52. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating a vagrancy ordinance on the basis of vagueness because the rule fails to give notice and encourages arbitrary convictions and arrests); see also *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1167 (Cal. 1995) (finding that the lower court erred in finding that an ordinance was unconstitutionally vague); cf. Nina Bernstein, *A Homeless Man Challenges New York City Crackdowns*, N.Y. TIMES, Nov. 22, 1999, at A1 (discussing *Betancourt v. Guiliani*, a federal class-action lawsuit brought by a homeless man against Mayor Rudolph Guiliani for arresting him and twenty-five other homeless people under an ordinance they argue is impermissibly vague); David Rohde, *Judge Upholds Policy on Arresting the Homeless Who Sleep in Boxes*, N.Y. TIMES, Dec. 29, 2000, at B1 (stating that the court dismissed all of Augustine Betancourt’s claims except a claim that he had been improperly searched).

53. See *Pottinger*, 810 F. Supp. at 1577-78 (responding to, but not deciding, the assertion raised by homeless plaintiffs that homelessness is a suspect class and therefore an ordinance would be subject to strict scrutiny).

54. See *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494 (1982) (determining that a challenge to a statute based on overbreadthness is limited to those statutes that covered “a substantial amount of constitutionally protected conduct”); see also *Tobe*, 892 P.2d at 1168-69 (determining that a lower court’s determination that an “ordinance was broader than necessary since it banned camping on all public property” was incorrect because the ban would be unconstitutional only if it violated equal protection or impinged a fundamental right).

55. The Eighth Amendment states that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

56. See Juliette Smith, Comment, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 319-20 (1996) (noting that courts have upheld the proposition that anti-sleeping ordinances unconstitutionally criminalize status).

57. 370 U.S. 661 (1962).

58. See *id.* at 661.

59. *Id.* at 666.

60. *Id.*

61. 392 U.S. 514 (1968).

public drunkenness.⁶² Petitioner claimed that his conviction constituted a violation of the Eighth Amendment as cruel and unusual punishment.⁶³ The Court distinguished Powell's claim from the holding in *Robinson* by finding that Powell was arrested and convicted for being drunk in public and not for being an alcoholic.⁶⁴ Thus, the Court found that the Texas public drunkenness statute was constitutional, as it did not punish status,⁶⁵ but acts and behaviors that require "the moral accountability of an individual for his antisocial deeds."⁶⁶

In 1992, the United States District Court for the Southern District of Florida decided the seminal case in the field of homeless rights—*Pottinger v. City of Miami*.⁶⁷ The court found that the City of Miami's practice of arresting homeless persons for engaging in basic activities of daily life—including sleeping and eating—constituted cruel and unusual punishment under the Eighth Amendment as punishment for status.⁶⁸ The court distinguished the life situations of homeless class members from the petitioner in *Powell*, suggesting that homelessness rarely, if ever, is a choice.⁶⁹ In addition, the court found that the *Powell* plurality did not consider homeless people in its analysis, specifically those people who cannot find shelter.⁷⁰ Justice White, however, addressed this issue in his concurrence in *Powell*:

Although many chronics have homes, many others do not. 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 and no place else to be when they are drinking*. This is more a function of economic station than of disease, although the disease may lead to destitution

62. See *Powell*, 392 U.S. at 517 (stating that the appellant Powell was arrested and charged for being intoxicated).

63. See *id.* at 532 (asserting that his condition of chronic alcoholism paralleled that of the drug-addicted defendant in *Robinson*, where a California state law was deemed unconstitutional because it made the "status" of being a drug addict a crime, rather than the actual possession or use of an illegal drug).

64. See *id.*

65. See *id.* (stating that Texas has not sought to punish a status, but rather has imposed a criminal sanction for certain types of public behavior).

66. *Id.* at 535-36 (noting that the court is unwilling to ignore common law tradition of imposing criminal punishments for acts deemed to be antisocial or immoral).

67. 810 F. Supp. 1551 (S.D. Fla. 1992).

68. See *id.* at 1565 (holding that the ordinances cannot be used to punish the homeless plaintiffs for sleeping, eating, and other innocent conduct).

69. See *id.* at 1563 ("Rather, homelessness is due to various economic, physical or psychological factors that are beyond the homeless individual's control.").

70. See *id.* (stating that the plurality in *Powell* did not have to factor homeless people into its analysis).

and perpetuate that condition.⁷¹

Despite the court's findings in *Pottinger*, other courts have declined to extend the *Robinson* protection to similar ordinances.⁷² *Tobe v. City of Santa Ana* is one of the most recent decisions rejecting Eighth Amendment protection to homeless people arrested under such ordinances.⁷³

The ordinance at issue in *Tobe*⁷⁴ barred camping and storing personal belongings in public places.⁷⁵ Plaintiffs launched a multi-prong attack on the ordinance, arguing that it: was unconstitutional as an impermissible restriction on the right to travel; punished

71. *Powell*, 392 U.S. at 551 (emphasis added).

72. See *Joyce v. San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (finding that the "Matrix" program of enforcing anti-homeless ordinances did not violate the Eighth Amendment, as homelessness is not a status); cf. *Johnson v. Dallas*, 61 F.3d 442, 443-44 (5th Cir. 1995) (finding that the plaintiffs lacked standing to appeal an anti-sleeping ordinance because they had not been arrested under the statute); *Davison v. Tucson*, 924 F. Supp. 989, 992 (D. Ariz. 1996) (denying a preliminary injunction to homeless plaintiffs because they did not meet their burden of proving probable success on the merits of their Eighth Amendment and Equal Protection claims).

73. 892 P.2d 1145, 1150 (Cal. 1995) (finding that the ordinance "does not impermissibly restrict the right to travel, does not permit punishment for status, and is not constitutionally vague or overbroad . . .").

74. The *Tobe* ordinance was not the city of Santa Ana's first attempt to remove homeless people from the city. See *id.* at 1151. The plaintiffs in *Tobe* argued "that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons." *Id.* A 1988 policy of removing homeless people from certain locations, disposing of sleeping bags and other belongings, and confiscating shopping carts resulted in a lawsuit that the city settled in 1990. See *id.* In a memorandum, a Santa Ana city official wrote "[t]he City Council has developed a policy that the vagrants are no longer welcome in the City of Santa Ana." *Id.* at 1177 (Mosk, J., dissenting). For an in-depth discussion of the city's actions that led to the *Tobe* case, see Harry Simon, *The Criminalization of Homelessness in Santa Ana, California: A Case Study*, 29 CLEARINGHOUSE REV. 725, 725-28 (1996).

75. Santa Ana Municipal Code § 10-402 on Unlawful Camping states: "It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided: (a) any street; (b) any public parking lot or public areas, improved or unimproved." SANTA ANA, CAL., CODE § 10-402 (1992), reprinted in *Tobe*, 892 P.2d 1150. Section 10-403 on Storage of Personal Property in Public Places states: "It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council: (a) any park; (b) any street; (c) any public parking lot or public area, improved or unimproved." SANTA ANA, CAL., CODE § 10-403 (1992), reprinted in *Tobe*, 392 P.2d at 1150-51. The ordinance defines camp, camp facilities, and camp paraphernalia under § 10-401 as,

(a) Camp means to pitch or occupy camp facilities; to use camp paraphernalia;

(b) Camp facilities include, but are not limited to, tents, huts, or temporary shelters;

(c) Camp paraphernalia includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.

SANTA ANA, CAL., CODE § 10-401(a)-(c) (1992), reprinted in *Tobe*, 392 P.2d at 1151 n.2.

homeless people for their status; and was vague and overbroad.⁷⁶ The court rejected all of plaintiff's claims.⁷⁷ The court distinguished the case from *Robinson* and concluded that the Santa Ana municipal ordinance was punishing conduct, not status.⁷⁸ The *Tobe* court, however, suggested that the defense of necessity might be available for "persons whose violation of the ordinance is involuntary."⁷⁹ The court seemingly provided this "exception" in response to an assertion made at oral argument by the senior deputy district attorney that "truly homeless" persons may be able to assert the defense of necessity.⁸⁰ The court suggested that the statute should not be enforced against "persons who have no alternative to 'camping' or placing 'camp paraphernalia' on public property."⁸¹ It is this window

76. See *Tobe*, 892 P.2d at 1150 (detailing the plaintiffs' constitutional claims that the ordinance restricted the right to travel, was vague, punished status, and was overbroad).

77. See *id.* at 1166-69 (finding that the ordinance punished conduct, not status; clearly specified the conduct it prohibited; and was a constitutional imposition of police power).

78. See *id.* at 1167 ("Assuming arguendo that the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.").

79. *Id.* at 1155.

80. See *id.* at 1155 n.8 (stating that a senior deputy district attorney conceded that a necessity defense might be available to persons who have no alternative to "camping" on public property).

81. See *id.* (listing the senior deputy district attorney's comments at oral argument). Professor Fred Bosselman suggests that the *Tobe* court may have been influenced by the Northern District of Texas' decision in *Johnson v. Dallas*, 860 F. Supp. 344 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995). See Fred P. Bosselman, *Camping By the Homeless as a Use of Land*, 34 A.L.I.-A.B.A. 1119, 1123 (1995) (stating that an issue left unresolved in *Tobe* was the subject of the *Johnson* case). In *Johnson*, the court found that the ordinance violated the Eighth Amendment and that "at any given time there are persons in Dallas who have no place to go, who could not find shelter even if they wanted to—and many of them do want to—and who would be turned away from shelter for a variety of reasons." See *id.* (citing *Johnson*, 860 F. Supp. at 350).

The California Supreme Court's use of the necessity defense to avoid unconstitutional applications of this ordinance is similar to the same court's creation of a constitutional defense for chronic alcoholics to an ordinance that prohibited public drunkenness. See *Sundance v. Municipal Ct.*, 729 P.2d 80, 89 (Cal. 1986). The court upheld a trial court's ruling that the defense would be available:

[I]f he proves by a preponderance of the evidence that he is "(1) unable to refrain from drinking alcohol to the point where he is unable to care for himself and others, and (2) unable (a) by reason of the disease, or (b) indigency, to refrain from being in public while intoxicated."

Id. To the extent that homelessness becomes a chronic condition when a city, such as Santa Ana, does not provide sufficient resources to assist homeless people in moving into housing, the two defenses are analogous. Compare *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 (Cal. 1995) (suggesting that an involuntary violation of the anti-camping ordinance may create a due-process-based necessity defense), with *Sundance*, 729 P.2d at 89 (upholding a trial court's criteria for a constitutional defense that may be used by a chronic alcoholic).

of relief that allows the use of the necessity defense for homeless people. Building on this idea from *Tobe*, the *In re Eichorn* court further addressed the necessity defense where police arrested a homeless man under the same ordinance contested in *Tobe*.⁸²

III. THE NECESSITY DEFENSE

Although not codified in some jurisdictions,⁸³ the necessity defense, justification, or choice of evils doctrine can be traced to 19th Century England.⁸⁴ The defense promotes the notion that although the harm caused should be avoided, the “harm is outweighed by the need to avoid an even greater harm and to further a greater societal interest.”⁸⁵ Although the number and content of the elements to the necessity defense differ among jurisdictions,⁸⁶ California requires the

82. See *In re Eichorn*, 81 Cal. Rptr. 2d 535, 539 (Ct. App. 1998) (noting that the prosecution in *Tobe* assured the court that a necessity defense might be available and that prosecutorial discretion would be used in cases involving “truly homeless” persons).

83. “California appellate courts have recognized the necessity defense ‘despite the absence of any statutory articulation of this defense and rulings from the California Supreme Court that the common law is not part of the criminal law in California.’” *Id.* at 538 (quoting *People v. Garziano*, 281 Cal. Rptr. 307, 308 (Ct. App. 1991)).

84. See, e.g., *The Queen v. Dudley & Stephens*, 14 Q.B.D. 273, 288 (1884) (finding that the necessity defense was not available to an incident of cannibalism upon a ship lost at sea where there was no threat to life except imminent starvation).

85. 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 24(a) (1984).

86. See ALA. CODE § 13A-3-21(a) (1994 & Supp. 1999) (“Except as otherwise expressly provided, justification or excuse under this article is a defense.”); ALASKA STAT. § 11.81.320(a) (Michie 1998 & Supp. 1999) (“Conduct which would otherwise be an offense is justified by reason of necessity to the extent permitted by common law”); ARK. CODE ANN. § 5-2-604(a) (Michie 1997 & Supp. 1999) (“Conduct which would otherwise constitute an offense is justifiable when: (1) The conduct is necessary as an emergency measure to avoid an imminent public or private injury; and (2) The desirability and urgency of avoiding the injury outweigh, according to ordinary standards of reasonableness, the injury sought to be prevented by the law proscribing the conduct.”); COLO. REV. STAT. § 18-1-702(1) (2000) (“[C]onduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no conduct of the actor, and which is of sufficient gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh a desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.”); CONN. GEN. STAT. ANN. § 53a-16 (West 1994 & Supp. 2000) (“In any prosecution for an offense, justification . . . shall be a defense.”); DEL. CODE ANN. tit. 11, § 463 (1999) (“[C]onduct which would otherwise constitute an offense is justifiable when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the defendant, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in

its general application or with respect to its application to a particular class of cases arising thereunder.”); GA. CODE ANN. § 16-3-20 (1999 & Supp. 2000) (“The fact that a person’s conduct is justified is a defense to prosecution for any crime based on that conduct. The defense of justification can be claimed: . . . (6) In all other instances which stand upon the same footing of reason and justice as those enumerated in this article.”); HAW. REV. STAT. § 703-302(1) (1999) (“Conduct which the actor believes to be necessary to avoid an imminent harm or evil to the actor or to another is justifiable provided that: (a) The harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”); 720 ILL. COMP. STAT. ANN. 5/7-13 (West 1993 & Supp. 2000) (“Conduct which would otherwise be an offense is justifiable by reason of necessity if the accused was without blame in occasioning or developing the situation and reasonably believed such conduct was necessary to avoid a public or private injury greater than the injury which might reasonably result from his own conduct.”); KY. REV. STAT. ANN. § 503.030(1) (Banks-Baldwin 1995) (“[C]onduct which would otherwise constitute an offense is justifiable when the defendant believes it to be necessary to avoid an imminent public or private injury greater than the injury which is sought to be prevented by the statute defining the offense charged”); ME. REV. STAT. ANN. tit. 17-A, § 103(1) (West 1983 & Supp. 1999) (“Conduct which the actor believes to be necessary to avoid imminent physical harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the crime charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute.”); MO. ANN. STAT. § 563.026 (West 1999) (“Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute any crime other than a class A felony or murder is justifiable and not criminal when it is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability of avoiding the injury outweighs the desirability of avoiding the injury sought to be prevented by the statute defining the crime charged.”); N.H. REV. STAT. ANN. § 627:3 (1996 & Supp. 1999) (“Conduct which the actor believes to be necessary to avoid harm to himself or another is justifiable if the desirability and urgency of avoiding such harm outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the statute defining the offense charged. The desirability and urgency of such conduct may not rest upon considerations pertaining to the morality and advisability of such statute, either in its general or particular application.”); N.J. STAT. ANN. § 2C:3-2(a) (West 1995 & Supp. 2000) (“Conduct which would otherwise be an offense is justifiable by reason of necessity to the extent permitted by law and as to which neither the code nor other statutory law defining the offense provides exceptions or defenses dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear.”); N.Y. PENAL LAW § 35.05 (McKinney 1997) (“Unless otherwise limited by the ensuing provisions of this article defining justifiable use of physical force, conduct which would otherwise constitute an offense is justifiable and not criminal when . . . [s]uch conduct is necessary as an emergency measure to avoid an imminent public or private injury which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding such injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. The necessity and justifiability of such conduct may not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder. Whenever evidence relating to the defense of justification under this subdivision is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a

defendant to meet six elements: (1) the defendant must have acted to prevent a significant evil; (2) there were no adequate alternatives to performing the act; (3) the harm caused by the act was not disproportionate to the harm avoided; (4) the defendant had a good faith belief that the act was necessary; (5) the defendant's "objective belief was reasonable under all the circumstances; and (6) he did not substantially contribute to creating the emergency."⁸⁷ The defense is codified in the Model Penal Code, which does not discuss specific

defense."); N.D. CENT. CODE § 12.1-05-01 (1997) ("Except as otherwise expressly provided, justification or excuse under this chapter is a defense."); OR. REV. STAT. § 161.200 (1999) ("Unless inconsistent with other . . . defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when: (a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and (b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue. (2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."); 18 PA. CONS. STAT. § 503(a) (1998) ("Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable if: (1) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . ."); TENN. CODE ANN. § 39-11-609 (1999) ("[C]onduct is justified if: (1) The person reasonably believes the conduct is immediately necessary to avoid imminent harm; and (2) The desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct."); TEX. PENAL CODE ANN. § 9.22 (West 1994) ("Conduct is justified if: (1) the actor reasonably believes the conduct is imminently necessary to avoid imminent harm; (2) the desirability and urgency of avoiding the harm clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct; and (3) a legislative purpose to exclude the justification claimed for the conduct does not otherwise plainly appear."); WIS. STAT. § 939.47 (1996) ("Pressure of natural physical forces which causes the actor reasonably to believe that his or her act is the only means of preventing imminent public disaster, or imminent death or great bodily harm to the actor or another and which causes him or her so to act, is a defense to a prosecution for any crime based on that act, except that if the prosecution is for first-degree intentional homicide, the degree of the crime is reduced to 2nd-degree intentional homicide."); *see also* SUBSTANTIVE CRIMINAL LAW, *supra* note 4, § 5.4(d), at 634 (finding that the six general elements of the necessity defense are: (1) a harm avoided, which may be harm to the defendant or to others; (2) a harm done; (3) an intention to avoid harm; (4) the resulting harm must be less than the harm avoided; (5) pending disaster must be immediate; and (6) the defendant must not be responsible for creating the danger); *see also* Burns, *supra* note 6, at 806 (citing WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 5.4(d) (1986) (stating that there are five elements to the necessity defense)); Laura J. Schulkind, Note, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 82 (1989) (suggesting that almost all common law requirements for the necessity defense contain the same 3 elements: "(1) the actor has acted to avoid a significant evil; (2) there are no adequate legal means to escape the harm; and (3) the remedy is not disproportionate to the evil sought to be avoided").

87. *People v. Slack*, 258 Cal. Rptr. 702, 704 (Ct. App. 1989).

elements of the defense.⁸⁸

Historically, the defense of necessity was distinguishable from that of duress,⁸⁹ but this distinction no longer exists in modern case law.⁹⁰ The pre-eminent federal authority on the use of the necessity defense is *United States v. Bailey*,⁹¹ where the Supreme Court analyzed the use of the necessity defense in a prison escape case.⁹² The Court recognized that whether under the defense of necessity or duress, if a reasonable legal alternative exists such that the defendant could have avoided violating the law, both defenses will fail.⁹³

88. See MODEL PENAL CODE § 3.02 (1962). The rule, titled "Justification Generally: Choice of Evils," states:

1) Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

- a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
- b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
- c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

2) When the actor was reckless or negligent in bringing about the situation requiring a choice of harms or evils or in appraising the necessity for his conduct, the justification afforded by this Section is unavailable in a prosecution for any offense for which recklessness or negligence, as the case may be, suffices to establish culpability.

Id. (emphasis added).

89. The defense of duress is defined as:

A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress . . . to the crime in question unless that crime consists of intentionally killing an innocent third person.

SUBSTANTIVE CRIMINAL LAW, *supra* note 4, § 5.3, at 614. The Model Penal Code § 2.09 defines duress as:

An affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

MODEL PENAL CODE § 2.09 (1962).

90. See, e.g., *United States v. Bailey*, 444 U.S. 394, 410 (1980) (maintaining that modern cases tend to blur the distinction between the defenses of duress and necessity such that courts may decide to disregard the distinctions and instead examine the underlying policies of the defenses).

91. 444 U.S. 394 (1980).

92. See *id.* at 409-14 (analyzing the elements for the defenses of duress and necessity in regard to the evidence of the respondent's jail conditions and the respondent's reasons for not returning to custody after escaping the allegedly coercive conditions).

93. See *id.* at 410, 410-11 n.8 (maintaining that courts have consistently denied the defenses of duress and necessity when there exists a reasonable alternative to breaking the law, such as refusing to do the criminal act or avoiding the harm); see, e.g., *R.I. Recreation Ctr., Inc. v. Aetna Cas. & Sur. Co.*, 177 F.2d 603, 605 (1st Cir.

When raising the defense of necessity in the context of homelessness, attorneys may be concerned with whether to characterize a homeless client's situation as "involuntary."⁹⁴ Voluntariness is, of course, a relative term. A homeless person may have made some type of choice months or years prior to living on the street that in some way resulted in a loss of housing. It is, however, hard to say that living on the street is "voluntary" because of its relationship to a previous choice.⁹⁵ Although some commentators suggest that volition is an unnecessary element in determining the constitutional application of anti-homeless ordinances,⁹⁶ the concept continues to appear in case law.⁹⁷

1949) (denying the defense of duress where a man committed a crime under a death threat to his relative because he had the opportunity to contact the police, but did not).

94. See Wes Daniels, "Derelicts," *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 708-15 (1997) (explaining that although lawyers won some important cases by portraying their homeless clients as "unfortunate victims of forces beyond their control," this approach may cause significant risks of defeat, especially when judges believe that homelessness is a lifestyle choice).

95. See Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities at 28, 31; *In re Eichorn*, 81 Cal. Rptr. 2d 535 (Ct. App. 1998) (No. G022777) [hereinafter Petition for Writ] (arguing that the trial court was in error in finding that defendant's homelessness "was the result of personal choice" because the defendant had been homeless since 1982). "It may be that for many, homelessness is at some level 'voluntary.' But the range of choices available to homeless individuals may be so narrow and so unsatisfying that a condition many of us cannot imagine being freely chosen is indeed the least of all possible evils." Daniels, *supra* note 94, at 716.

An illustration of choices that could confuse the issue of voluntariness is found in the story of a woman and her boyfriend who have lived in a van in San Francisco for approximately two years. See Evelyn Nieves, *Living in a Balky Van, Trying to Move Ahead*, N.Y. TIMES, Dec. 19, 1999, at NE25. The couple became homeless when the boyfriend's relatives evicted them to sell the property. See *id.* At the time, the woman was enrolled in travel school and her boyfriend had just quit his job. See *id.* Because of her debt, the woman moved into her van because she could not afford housing and invited her boyfriend to join her. See *id.* She dropped out of school and now works two jobs, while her boyfriend receives income through a city program that helps steer unemployed persons into jobs. See *id.* Their funds are used to pay outstanding debt and to buy bare necessities. See *id.* Because living in a vehicle is illegal in San Francisco, police have called the couple habitual offenders. See *id.* The couple's alternatives are limited, however, given that the number of homeless people in San Francisco has been estimated at 11,000 to 16,000 persons and there are generally only 1,359 emergency shelter spaces with 250-280 additional spaces in the winter. See OUT OF SIGHT, *supra* note 26, at 4.

The point at which one choice can be said to have caused the couple's current situation is unclear. Excessive debt that accrued over time is too gradual to constitute a choice. Although the couple chose to live in the van, the story suggests that the lack of shelter space may have made that choice their only adequate option.

96. See Tier, *supra* note 13, at 267 (maintaining that states and cities do not need to limit their criminal laws to voluntary conduct, but rather, states and cities may include involuntary acts as causes for convictions).

97. See *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 (Cal. 1995) (arguing that an involuntary violation of an ordinance may result in a due-process-based necessity

Voluntariness is inherent to the necessity defense.⁹⁸ To raise the defense, a defendant must have chosen between two acts and, in doing so, must have chosen the “lesser evil.”⁹⁹ The *Tobe* court’s use of the term involuntary indicates that the necessity defense would be available only to persons whose “violation of the ordinance is involuntary.”¹⁰⁰ This statement sets up an interesting contradiction in which a defendant who “voluntarily” chooses the lesser of two harms renders his or her decision involuntary.¹⁰¹ In addition, the *Tobe* court emphasized that a trial court first must determine that a person is “involuntarily homeless” before deciding whether the defendant “involuntarily” violated the ordinance.¹⁰²

Professor John Parry¹⁰³ asserts that the theory of voluntarism “is an inadequate explanation of criminal responsibility”¹⁰⁴ and that determining whether the defendant acted with volition requires the fact finder to evaluate the defendant’s conduct.¹⁰⁵ Professor Parry argues that this evaluation is paramount to consequentialism, or the

defense).

98. See Schulkind, *supra* note 86, at 85 (maintaining that the purpose of the necessity defense is to promote results that are socially desirable, and as a result this defense evaluates the quality and wisdom of a defendant’s voluntary choices); Lawrence P. Tiffany & Carl A. Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DENV. U. L. REV. 839, 841 (1975) (“The necessity defense always involves a voluntary choice on the part of the actor.”).

99. See Robinson, *supra* note 85, at 83 (suggesting that burning a field to fire block a raging forest fire would satisfy all the elements of arson, but the fire starter would likely have a complete defense if his actions saved 10,000 lives, as his action is the “lesser evil”).

100. See *Tobe*, 892 P.2d at 1155 (holding that a due-process-based necessity defense may occur when violation of the ordinance is involuntary); *id.* at 1155-56 n.8 (“A senior deputy district attorney expressed his opinion at oral argument before this court that a necessity defense might be available to ‘truly homeless’ persons and said that prosecutorial discretion would be exercised.”).

101. Such a distinction is not without foundation, as the following passage indicates:

[T]he word “necessity” is only used by the defence [sic] to a charge of crime in what is the vain hope of making the criminal deed appear to have been the result either of involuntary conduct, or of some irresistible external compulsion, instead of what it really was, the result of a voluntary choice of that alternative which the accused felt to be the less disagreeable to himself.

1 SIR WILLIAM OLDNALL RUSSELL, *RUSSELL ON CRIME* 93 (J.W. Cecil Turner ed., 12th ed. 1964), formerly titled *A TREATISE ON CRIMES AND MISDEMEANORS* (1819), *cited in* Tiffany & Anderson, *supra* note 98, at 841 n.2.

102. See *Tobe*, 892 P.2d at 1157 (determining that, because none of the petitioners in the second action addressed in *Tobe* alleged that they were involuntarily homeless and that their violation of the ordinance was involuntary, the claim would not succeed).

103. John T. Parry, Assistant Professor of Law, *University of Pittsburgh School of Law*.

104. See Parry, *supra* note 9, at 421.

105. See *id.* at 422 (explaining that the fact finder should weigh the defendant’s conduct in comparison to the alternatives to determine whether the defendant’s conduct was justified).

balancing of social harms,¹⁰⁶ and thus voluntarism becomes less significant.¹⁰⁷ The balancing of harms is, however, an imperfect test because there is no guide as to what harms should be balanced or how to balance them.¹⁰⁸ Where a conflict in values exists, the weight given to each harm is unclear.¹⁰⁹

Nevertheless, the theoretical move to consequentialism is crucial for attorneys representing homeless people. Professor Wes Daniels¹¹⁰ argues that advocates must escape the realm of proving that their clients are involuntarily homeless.¹¹¹ He notes that cases have been lost because “judges are convinced that homelessness is a ‘lifestyle choice.’”¹¹² Although the balancing of harms test is somewhat ambiguous, it allows the defense attorney to present alternatives to the violation.¹¹³ The alternatives, or harms avoided, might include sleep deprivation¹¹⁴ or the risk of personal harm in going from shelter

106. The Model Penal Code requires a balancing of social harms. *See id.* at 415 (stating that the Model Penal Code requires weighing and balancing “to determine whether the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”); Frank Menetrez, *Consequentialism, Promissory Obligation, and the Theory of Efficient Breach*, 47 UCLA L. REV. 859, 863 (2000) (“Consequentialism is not easy to define concisely, but its central tenet is that acting morally is simply a matter of acting so as to maximize the production of a certain kind of outcome or consequence. The idea is that some states or affairs are objectively better than others, and that one morally ought always to act so as to bring about the best possible state of affairs.”); *see also supra* note 88 (delineating the justifications for choosing between evils, as stated in § 3.02 of the Model Penal Code).

107. *See Parry, supra* note 9, at 422 (explaining that voluntarism engages in the same act of interpretative construction as does consequentialism and thus, once someone must make normative evaluations of the good or reasonable, voluntarism is left behind).

108. *See id.* at 415 (arguing, for example, that the Model Penal Code ignores that selecting “what harms to weigh, and how to weigh them,” is essential to the defense of necessity).

109. *See id.* at 417 (suggesting, for example, in a case of assisted suicide, that the competing values of the decedent’s choice and protecting terminally ill people or refusing to allow a human to determine whether another lives or dies, attempts to reconcile values that may appear to be irreconcilable).

110. Wes Daniels, Professor, *University of Miami School of Law*.

111. *See Daniels, supra* note 94, at 715 (claiming that recent cases were lost because judges believe homelessness is a lifestyle choice); *see also Joyce v. City of San Francisco*, 846 F. Supp. 843, 856-58 (N.D. Cal. 1994) (explaining that previous courts have declined to conclude that homeless people have no realistic choice but to live in public places).

112. Daniels, *supra* note 94, at 715.

113. *See In re Eichorn*, 81 Cal. Rptr. 2d 535, 539 (Ct. App. 1998) (noting that the defense of necessity can be applied in situations where “the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”).

114. *See id.* (asserting that sleep deprivation is an inadequate alternative to sleeping in public because sleep deprivation can result in a host of physical and mental problems, such as mood irritability, energy drain and low motivation, slow reaction time, and the inability to concentrate and process information).

to shelter in search of a bed.¹¹⁵ These harms can be used to prove the elements of the necessity defense.¹¹⁶

At trial, evaluation of the necessity defense is a jury question.¹¹⁷ Although proffered testimony supporting each of the elements of the necessity defense only need meet a minimum standard,¹¹⁸ many courts do not allow the defense to reach the jury where the court finds that the defendant has failed to meet one or more of the elements.¹¹⁹ The tension between a judge's role in determining whether the necessity defense should be allowed and the jury's role in determining the applicability of the defense was the foundation for the appeal in *In re Eichorn*.¹²⁰

115. See Return to the Petition for Writ of Habeas Corpus; Memorandum of Points and Authorities at 16-17, *In re Eichorn*, 81 Cal. Rptr. 2d 535 (Ct. App. 1998) (No. G022777) [hereinafter Return to the Petition for Writ] (discussing, for example, the testimony of James Wendel Meeker, Ph.D., who stated that there was gang presence between the Armory, one of the City's shelters, and the Civic Center where the defendant was arrested).

116. See *People v. Pepper*, 48 Cal. Rptr. 2d 877 (Ct. App. 1996); *People v. Pena*, 197 Cal. Rptr. 264 (Ct. App. 1983), cited in *Eichorn*, 81 Cal. Rptr. 2d at 539 (requiring the defense of necessity to contain evidence that the "defendant violated the law (1) to prevent a significant evil, (2) with no adequate alternative, (3) without creating a greater danger than the one avoided, (4) with a good faith belief in the necessity, (5) with such belief being objectively reasonable, and (6) under circumstances in which he did not substantially contribute to the emergency").

117. See 75A AM. JUR. 2D *Trial* § 833 (1991) (submitting that "[t]he danger and necessity under which the accused acted are for the jury to determine"); see also *People v. Lovercamp*, 118 Cal. Rptr. 110, 116 (1974) ("Whether any of the conditions requisite to this defense exist is a question of fact to be decided by the trier of fact after taking into consideration all the surrounding circumstances.").

118. See *United States v. Bailey*, 444 U.S. 394, 415 (1980) (stating that the minimum standard is such that "if a jury finds it to be true, it would support an affirmative defense"); cf. Schulkind, *supra* note 86, at 86 (discussing the difficulty in determining how much evidence is needed to support the low burden of meeting the elements of the necessity defense).

119. See *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985) (explaining that when the evidence does not establish all the elements of the defense, a judge does not have to submit the defense to the jury and may exclude the evidence offered in support of the defense). A court's failure to allow the necessity defense, where a defendant met all the elements of the defense, may constitute a violation of the Sixth Amendment of the United States Constitution. The Sixth Amendment states that

[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. amend. VI.

120. See *In re Eichorn*, 81 Cal. Rptr. 2d 535, 536, 538 (Ct. App. 1998) (noting that the petitioner appealed his conviction on several grounds including the trial judge's rejection of his offer of proof on the first element of the necessity defense).

IV. IN RE EICHORN AND APPLICATION OF THE NECESSITY DEFENSE

James Eichorn was convicted of a misdemeanor violation of the Santa Ana Municipal Code Article VIII, § 10-402,¹²¹ which bans “Unlawful Camping.”¹²² Mr. Eichorn was one of fifteen homeless people police cited on January 25, 1994, for sleeping in the Santa Ana Civic Center.¹²³ All of the homeless individuals cited demurred to the complaints against them except for Mr. Eichorn.¹²⁴ Through various appeals, the same group of homeless individuals became the plaintiffs in *Tobe*¹²⁵ and the City of Santa Ana stayed their prosecution.¹²⁶ In 1995, the city reinstated these cases, but the cases were dismissed on grounds of lack of speedy trial or other arrangements because the city failed to enter a formal stay.¹²⁷ Mr. Eichorn’s case was the only one of 15 cases to go to trial.¹²⁸

The trial court ruled that Mr. Eichorn could not utilize the necessity defense because he failed to prove that he avoided a “significant, imminent evil,”¹²⁹ the first element of the necessity defense, by sleeping in the Santa Ana Civic Center on January 25, 1993.¹³⁰ The court found that Mr. Eichorn was “not involuntarily homeless on the night in question”¹³¹ because he chose not to go to

121. See SANTA ANA, CAL., CODE § 10-402 (1992) (pertaining to unlawful camping).

122. *In re Eichorn*, 69 Cal. Rptr. 2d at 536 n.1.

123. See Petition for Writ, *supra* note 95, at 32, *Eichorn* (No. G022777) (detailing the history of the case).

124. See *id.*

125. See *id.* (explaining that the homeless defendants police cited with Mr. Eichorn filed a petition for writ of mandate to determine the constitutionality of the Unlawful Camping Ordinance in *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995)).

126. See *id.* at 5 n.10.

127. See *id.*

128. See *id.* at 5 (explaining that due to the dismissal of the other defendants’ cases, the City of Santa Ana only brought Mr. Eichorn’s to trial for unlawful camping).

129. *In re Eichorn*, 81 Cal. Rptr. 2d 535, 536 (Ct. App. 1998). In attempting to prove avoidance of a “significant, imminent evil,” the defendant requested funds for an expert witness to testify on the adverse effects of sleep deprivation. In denying the request the judge held:

I’m inclined to deny the request for the physician because I think that the area the physician will testify to as you proposed in the motion is something that jurors are well aware of. I mean, it doesn’t take an expert to tell us that, to convince a person, that there are ill effects that arise from sleep deprivation. I don’t need the doctor to tell me that the defendant had to sleep somewhere.

Petition for Writ, *supra* note 95, at 35, *Eichorn* (No. G022777) (citing Petitioner’s Appendix 217).

130. See *Eichorn*, 81 Cal. Rptr. 2d at 536-37 (explaining that the offer of proof did not support the necessity defense because the first element of this defense was not satisfied by the claim of harm caused by sleep deprivation).

131. *Id.* at 538.

the city's shelter.¹³² The court also found that the defendant should have attempted to obtain housing from relatives and applied for public benefits.¹³³

The Court of Appeal for the Fourth District of California rejected the trial court's determination that the defendant did not avoid a significant evil by sleeping at the Civic Center, and as a result, found that the defendant should have been allowed to assert the necessity defense at trial.¹³⁴ Although the court delineated six elements to the necessity defense,¹³⁵ the court focused only briefly on the first element in response to the trial court's ruling.¹³⁶ The court found that by sleeping in the civic center, the defendant may have been avoiding the "significant evil" of sleep deprivation.¹³⁷

The importance of the opinion, however, derives from the court's recognition of housing barriers faced by Eichorn and other homeless persons due to a lack of resources in Santa Ana,¹³⁸ and how such barriers permitted the invocation of a necessity defense for violation of the ordinance. The court examined the trial testimony presented by several advocates for homeless people and local agency officials, each of whom explained what few resources Eichorn had available both prior to and on the night he was cited.¹³⁹ The testimony

132. *See id.* (noting Mr. Eichorn's failure to see if there was room at the Armory, a homeless shelter open on cold winter nights).

133. *See id.* at 538 (noting the trial court's belief that Mr. Eichorn should have sought assistance from his family and he should have applied for general relief (e.g., through the food stamp or work program), as these options were available and may have helped to get him off the streets).

134. *See id.* at 538-40 (explaining that reasonable minds would differ on whether Mr. Eichorn acted to prevent a significant evil; and, therefore, the issue of the necessity defense should have been heard by a jury).

135. *See supra* note 87 and accompanying text (listing the elements of the necessity defense). The court notes that the defense of necessity is not statutory in California, but that courts continue to apply the defense regardless of "rulings from the California Supreme Court that the common law is not a part of the criminal law in California." *Eichorn*, 81 Cal. Rptr. 2d at 538 (quoting *People v. Garziano*, 281 Cal. Rptr. 307, 308 (Ct. App. 1991)).

136. *See id.* at 536 n.2 (explaining the trial court's decisions and suggesting that the trial court's questions and comments such as "what do you mean 'bodily harm?' Like tired eyelids or blood?; [I]f he didn't sleep here, he'd lose sleep and this would be a horrible physical thing to impose on him?" show that the trial court did not understand the seriousness of the defendant's situation).

137. *See id.* at 539 (explaining that definitions of what prevents "significant evil" differ, but that "[s]leep is a physiological need, not an option for humans . . . [because] loss of sleep produces a host of physical and mental problems.").

138. *See id.* at 540 n.4 (noting that the city's "economic forces were primarily to blame for [Eichorn's] predicament," which could not be resolved by requiring him to sleep in nearby churches, covered stairwells, buildings or other private and public property).

139. *See id.* at 537-38 (listing the specific names and testimony of these witnesses); *infra* notes 141-148 and accompanying text (describing the substance of testimony by these witnesses relating to the lack resources available to Eichorn on the night of his

addresses two of the factors that directly cause homelessness—lack of housing (including the lack of shelter) and income.¹⁴⁰

A. *Housing, Shelter, and Income*

At trial, various witnesses addressed homelessness in Santa Ana and Orange County and discussed the limited resources available to homeless individuals. First, Professor James Meeker from the University of California at Irvine, in citing his 1993 study on homelessness, stated that for the 3,000 homeless people in Orange County during January and February, the supply of affordable housing had continually decreased.¹⁴¹ Moreover, he explained that most of the homeless individuals in the county could not secure accommodations because they had “lost jobs and could not afford housing.”¹⁴² Second, Timothy Shaw, Executive Director of the Orange County Homeless Issues Task Force, testified that, in 1993, 1,500 homeless people lived within Santa Ana, yet the county only supplied 118 shelter beds year-round and an additional 125 beds when the armory opened during the winter.¹⁴³ Finally, Maria Mendoza, the county’s homeless coordinator, explained that on the night of Eichorn’s arrest, the armory was full beyond its capacity.¹⁴⁴ She further testified that Eichorn had spent twenty nights at the armory in December and January.¹⁴⁵

June Marcott, the program manager for the Orange County food stamps and general relief program, testified about the monetary resources available to Eichorn.¹⁴⁶ She found that when Eichorn was not employed, he could receive \$307 per month as part of a work

arrest).

140. See BURT, *supra* note 12, at 162 (analyzing how a city’s homelessness rate is immediately affected by housing, which includes vacancy rates and the ratio of affordable units to low income individuals, and income variables, which includes the poverty rate and income per capita).

141. See *Eichorn*, 81 Cal. Rptr. 2d at 537; see also Petition for Writ, *supra* note 95, at 32 n.74, *Eichorn* (No. GO22777) (stating that “in 1993, over 200,000 County residents in the very low income bracket were competing with one another for the 7,825 rental units available at under \$300 a month.”).

142. See *Eichorn*, 81 Cal. Rptr. 2d at 537 (noting that the problem particularly affected men as “they were less likely to receive the support of family, friends or governmental agencies”).

143. See *id.* Moreover, Shaw noted that these shelters were routinely full, thereby resulting in the lack of accommodations for over 1200 individuals. See *id.*

144. See *id.* (noting that the Armory exceed its capacity by thirteen individuals).

145. See *id.* at 537; see also Return to the Petition for Writ, *supra* note 115, at 18-19, *Eichorn* (No. G022777) (stating that the Armory was closed from December 12 to 16 and January 27 and 28, and exceeded its capacity on eighteen of the twenty-nine days it was open in January).

146. See *Eichorn*, 81 Cal. Rptr. 2d at 538 (discussing aspects of a work program for which Eichorn was eligible).

program if he worked nine days a month and submitted four job applications daily.¹⁴⁷ Eichorn, however, last received general relief in November 1990, but was terminated for failure to submit a job search report and his subsequent applications in March and June, 1992 were denied.¹⁴⁸

B. Application

In focusing its opinion on an element of the necessity defense, the California court changed the focus of the analysis from volition, as prescribed by *Tobe*,¹⁴⁹ to consequentialism. The court found that “[t]here was substantial if not uncontradicted evidence that [Eichorn] slept in the civic center because his alternatives were inadequate¹⁵⁰ and economic forces¹⁵¹ were primarily to blame for his

147. See *id.* at 538 (describing the requirements of the work program).

148. See *id.* At trial, Ms. Marcott testified she could not determine why the petitioner’s application for general relief was denied in June 1992. See Petition for Writ, *supra* note 95, at 17 n.28, *Eichorn* (No. G022777). Because there was no evidence that the petitioner received explanation of the reinstatement process, petitioner argued that “[g]iven that the county’s own expert could not determine the reasons for her office denying relief, Eichorn should hardly be penalized for failing to navigate properly the intricacies of this highly-regulated government program.” *Id.*

149. See *supra* notes 79-81 and accompanying text (discussing the *Tobe* court’s suggestion that the necessity defense could be used by homeless people who involuntarily violated the ordinance).

150. The trial court found that Eichorn had adequate alternatives because he could have slept in “other buildings, nearby churches,” “rear stairs, rear doors.” *Eichorn*, 81 Cal. Rptr. 2d at 540 n.4. The court also suggested that Eichorn travel to another city. See *id.* (“Is [it] a reasonable alternative . . . walking a mile or so [to a nearby city without a camping ordinance]? Stroll on a nice sunny day, find a cushy spot in Tustin, in a city park and make his home there.”).

The Court of Appeals responded that “neither trespassing on private property nor walking to a different city was an adequate alternative . . . an individual who has no reasonable alternative to sleeping in a public place in Santa Ana need not travel in search of streets and other public places where he can catch his 40 winks.” *Id.*

151. The acknowledgement of economic factors that led to Eichorn’s condition does not indicate necessarily that courts will begin to recognize the defense of economic necessity. In *State v. Moe*, the Supreme Court of Washington held that “[e]conomic necessity has never been accepted as a defense to a criminal charge.” 24 P.2d 638, 640 (Wash. 1933) (refusing to adopt the defense to charges of larceny and rioting). In *Moe*, the defendants, during a demonstration for a greater allowance of flour, raided a local grocery store after the Red Cross commissary chairman denied their request. See *id.* at 639. The court reasoned that “were [the economic necessity defense] ever countenanced, it would leave to the individual the right to take the law into his own hands.” See *id.* at 640. Although deciding to rest in a private or public place in order to avoid sleep deprivation could be analogized to stealing groceries from a store in an effort to avoid starvation, the *Eichorn* court does not appear to be making new law in this area. Eichorn’s economic situation constituted only one factor that led to his homelessness, and the court acknowledged this fact in determining that the defense of necessity should be allowed. See *Eichorn*, 81 Cal. Rptr. 2d at 540. The court did not state that it should be an element or basis for a defense. See *id.* (lacking language that an economic factor must be present to invoke the necessity defense).

predicament.”¹⁵² This statement by the court, the focus of which is the adequacy of alternatives, involved a balancing of harms. The trial court’s finding that Eichorn “was not involuntarily homeless on the night in question,”¹⁵³ is irrelevant to whether Eichorn could raise the necessity defense.¹⁵⁴ The court did not analyze why Eichorn was denied public assistance, why he was not working at the time he was cited, or why he did not contact relatives or travel to another location,¹⁵⁵ each of which may have been used to determine whether he was involuntarily homeless.¹⁵⁶ The court made clear that once Eichorn proved the basic elements of the necessity defense,¹⁵⁷ he could evoke such defense without inquiry into the causes of his homelessness.¹⁵⁸ Thus, if a defendant shows that: (1) the shelter was full, (2) there were more homeless people in the area than shelter space, and (3) he or she did not have funds to afford housing or a motel room, then any alternative to sleeping in public, such as staying awake and moving around, will be inadequate to rebut application of

152. *Eichorn*, 81 Cal. Rptr. 2d at 540.

153. *Id.* at 538.

154. The defense team argued that the causes of Eichorn’s homelessness were irrelevant in considering whether he could invoke the necessity defense at trial. *See* Petition for Writ, *supra* note 95, at 31, *Eichorn* (G022777) (asserting that in *Robinson*, the question did not involve whether a drug addict voluntarily chose to become addicted, but “whether the defendant’s present conduct is a proper object of the criminal laws”). In addition, Eichorn contended that when he (i) had required food stamps, (ii) was denied general assistance, (iii) had regularly sought employment, and (iv) could not stay with relatives, the obligation imposed on him to find housing became impossible to fulfill. *See id.* at 32-33 (arguing that these factors demonstrated Eichorn had no reasonable alternative but to sleep in public).

155. Eichorn, a veteran of the Vietnam War, testified that after losing a job he moved to Santa Ana and drove an ice cream truck. *See Eichorn*, 81 Cal. Rptr. at 537 (narrating how he had no place to live before he moved to Santa Ana). He lived in a motel room while driving the truck, but lost his job. *See id.* He then worked in the county’s casual labor office until that office closed. *See id.* He lived in the streets, usually near the civic center where other homeless people slept, when he did not have enough funds to stay in a motel. *See id.* (testifying that he lived in a motel only when he had saved enough money, but most inexpensive motels had raised prices). He could not recall whether he actually had attempted to sleep at a shelter the night of January 25, 1993, or whether he had believed it was full. *See id.* at 538. Nevertheless, he had been “turned away from the Armory in the past and had a ‘nervous walk’ back to the civic center.” *Id.* at 538. A “nervous walk” may refer to the presence of gangs in the area between the Armory and the civic center. *See* Return to the Petition for Writ, *supra* note 115, at 16-17, *Eichorn* (G022777) (discussing the testimony of James Wendel Meeker, Ph.D.).

156. *See* Parry, *supra* note 9, at 421 (determining that punishment for voluntary action will be imposed where a defendant “had the capacity and opportunity to conform to the law”).

157. *See* *People v. Slack*, 258 Cal. Rptr. 702, 704 (Ct. App. 1989) (outlining the six elements of the defense under California law).

158. *See Eichorn*, 81 Cal. Rptr. 2d at 540 (“The court must instruct if the evidence could result in a finding [that] defendant’s criminal act was justified by necessity.”).

the defense.¹⁵⁹ Less clear now is, if shelter space was available, but a defendant feared traveling to the shelter or thought the shelter was unsafe, whether the shelter space would be considered a viable alternative?¹⁶⁰ Regardless, the court's shift from volition to a balancing of harms and alternatives analysis through the application of the necessity defense provides a new opportunity for homeless advocates to defend their clients.

C. *Impact upon Other Cities*

Proponents of the Santa Ana ordinance now face the possibility that all persons cited under the ordinance will contest the violation by invoking the necessity defense. In other cities, where courts have upheld anti-camping and sleeping ordinances as constitutional, the necessity defense will be available to homeless people under the *Tobe/In re Eichorn* theory if the violator shows that more homeless people than shelter spaces exist and there is a lack of adequate income to pay for housing.¹⁶¹ According to a National Law Center on Homelessness & Poverty survey of fifty cities, each city examined had fewer shelter spaces than homeless people as well as inadequate income opportunities to assist homeless people in acquiring housing.¹⁶²

If other courts follow, and permit the necessity defense, legislatures will be forced to reconsider anti-camping and sleeping ordinances for

159. *See id.* at 536 (finding that Eichorn, in presenting these facts, presented sufficient evidence for a jury determination of whether his criminal violation was to prevent a significant evil). The court does not require the defendant to prove that he did not have friends or relatives in the area with whom he could not stay. *See id.* at 538. Although the defendant testified at trial that his mother and step-father lived in a nearby area, he would not stay with them because "he was 'an adult responsible for' himself," the Court of Appeal did not analyze this portion of Eichorn's testimony and did not mention the possibility that he had other relatives or friends in the area. *See id.* at 538 (lacking such discussion).

160. *See Daniels, supra* note 94, at 716-17 n.168 (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580 n.34 (S.D. Fl. 1992), for the proposition that shelter space may not be a viable alternative when "the shelter is dangerous, drug infested, crime-ridden or especially unsanitary" because a homeless person should not have to choose between his health and possession, a place to sleep and possible arrest); *see also Eichorn*, 81 Cal. Rptr. 2d at 540 (discussing only that Eichorn acted to prevent a significant evil). The court did not mention Eichorn's fear of harm as a possible prevention of locating a reasonable alternative place to sleep.

161. *See Tobe v. City of Santa Ana*, 892 P.2d 1145, 1155 n.8 (Cal. 1995) (relying upon a district attorney's belief that while the ordinance will still be applied against campers, the "truly homeless" will not be targeted due to prosecutorial discretion and that homeless people will likely invoke the defense); *see also Eichorn*, 81 Cal. Rptr. 2d at 539 (citing *Tobe* as declining to decide how an anti-camping ordinance may be unconstitutionally applied).

162. *See OUT OF SIGHT, supra* note 26, at i; *see also supra* note 49 (listing cities surveyed).

two main reasons. First, if a homeless defendant utilizes the necessity defense and succeeds, the utility of the ordinance in deterring homeless people from public areas¹⁶³ or from the city in general,¹⁶⁴ will be undermined.¹⁶⁵ The necessity defense defeats the goal of anti-camping and sleeping ordinances—to eliminate the presence of homeless people in public areas¹⁶⁶—by acknowledging that violating the ordinance presents the only reasonable choice for homeless people. A homeless person who asserts the necessity defense and is acquitted of the charge, will only continue to violate the ordinance until a reasonable alternative to sleeping outside materializes.¹⁶⁷ Therefore, the ordinance's intended deterrent effect fails to exist when a homeless defendant asserts the necessity defense.¹⁶⁸ When an ordinance ceases to have a deterrent value it constitutes bad public policy.¹⁶⁹ Thus, legislators will need to consider alternatives to the

163. Some reports find that anti-camping and sleeping ordinances have little deterrent effect regardless of the presence of the necessity defense. A recent article in the *New York Times*, profiling a homeless man's lawsuit against Mayor Guiliani for police "crackdowns on the homeless," states that "internal reports by the Department of Homeless Services reflect that homeless people routed from one place showed up somewhere else, or ebbed back to the old spot over time." Nina Bernstein, *Homeless Man Presses Legal Battle Against Backdrop of New Crackdown*, N.Y. TIMES, Nov. 22, 1999, at B5; see also Jonathan P. Hicks, *Hillary Clinton Attacks Arrests of the Homeless*, N.Y. TIMES, Dec. 1, 1999, at A1 (reporting that the First Lady criticized Mayor Guiliani for his campaign to arrest homeless people by stating "[l]ocking people up for a day will not take a single person off the streets").

164. See Foscarinis, *supra* note 50, at 22-25 (discussing the purposes of criminalizing acts by homeless people including "to drive homeless residents out of the city").

165. See *Sundance v. Municipal Ct.*, 729 P.2d 80, 94-95 (Cal. 1986) (finding that when an ordinance has no rehabilitative or deterrent effect upon chronic alcoholics, a constitutional attack under the Eighth Amendment may be available).

166. See Maria Foscarinis, *Out of Sight-Out of Mind? The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 147 n.6 (1999) (emphasizing that many cities, in enacting camping prohibitions, have expanded the definition of camping beyond traditional activities to encompass homeless sleepers). In fact, "73% of the 49 cities [from which information was available, see *supra* text accompanying note 49 (listing the cities)] currently have ordinances prohibiting or restricting sleeping or camping." *Id.* at 150. See also Tier, *supra* note 13, at 266 (describing how certain urban anti-camping ordinances prohibit erecting tents or other structures, cooking or storing personal items in public parks).

167. See Bernstein, *supra* note 163, at B5 (citing a New York Department of Homeless Services report that found when police or city officials move homeless people from one area they often travel back to the original location over time).

168. Invocation of the necessity defense eliminates the deterrent effect of an anti-camping ordinance if one assumes that full prosecution will be sought under the ordinance instead of the ordinance being used for mere citation purposes. See Smith, *supra* note 56, at 328 n.168 (claiming that the necessity defense may not frequently be employed because most "arrests of homeless people under anti-sleeping laws usually fall short of final adjudication").

169. See Foscarinis, *supra* note 50, at 59-60 ("Criminalizing homelessness is poor public policy for several reasons . . . Perhaps the most fundamental, criminalization responses do not and cannot work. Like all human beings, homeless people must eat, sleep and occupy space.").

ordinance.¹⁷⁰

Second, this cycle of continued violations leads to another consideration: the broader social purpose of eliminating homelessness. The availability of the necessity defense originates from a locality's lack of shelter space, income, and affordable housing.¹⁷¹ Proponents of quality of life programs that seek to improve urban landscapes must understand that when cities lack affordable housing, income, and shelter, anti-camping ordinances will cease to have any effect on the number of homeless people in a locality.¹⁷² Only an increase in affordable housing, income, and shelter, rather than enforcement of anti-camping or sleeping ordinances, will reduce homelessness.¹⁷³

Arrests and citations pursuant to anti-camping and sleeping ordinances, together with the use of the necessity defense, also serve to hinder judicial efficiency. The dissent in *Tobe* predicted that the requirement that a defendant prove, on a case-by-case basis, he or she was "truly homeless . . . would needlessly subject large numbers of homeless persons to the criminal justice system for wholly innocuous conduct and overwhelm our already strained judicial resources."¹⁷⁴

170. See *OUT OF SIGHT*, *supra* note 26, at 53-61 (describing programs used as alternatives to anti-camping and sleeping ordinances in Portland, OR; Omaha, NE; San Francisco, CA; Dallas, TX; Washington, DC; New York, NY; West Hollywood, CA; Seattle, WA; Glendale, CA; and Miami, FL.).

171. See *supra* text accompanying note 160.

172. For example, Rob Tier argues that because judges and advocates misperceive the lack of affordable housing to be the overarching cause of homelessness, their efforts to ensure the "right to live on the street, sleep in the public place of one's choosing, beg in any place and in any manner one pleases, and to essentially be exempt from standard of conduct that apply to all others" jeopardizes the quality of life in urban areas. Tier, *supra* note 13, at 261 (asserting that such efforts harm communities, deteriorate neighborhoods and force people to abandon urban centers due to the more aggressive behavior of homeless people). This argument ignores the other factors, such as lack of shelter space and income maintenance, which also cause homelessness. Furthermore, it assumes that homeless people, when subject to laws that restrict behavior, will become "good citizens . . . capable of obeying these new laws." *Id.* at 263 (arguing that addicts, rather than homeless people, engage in aggressive, anti-social behavior).

173. Enforcement of these ordinances substantially decreases public support for economic support for the homeless, thereby reducing the opportunity for homeless people to receive increased funding for housing and shelters. One advocate notes that "[t]hese regulations have a two-fold negative effect in that they both endanger the ability of homeless people to survive and they reduce the incentive and the opportunity for the public to respond to the needs of these people." See Nancy Wright, *Not in Anyone's Backyard: Ending the "Contest of Nonresponsibility" and Implementing Long-Term Solutions to Homelessness*, 2 *GEO. J. ON FIGHTING POVERTY* 163, 174 (1995) (describing how the diminution of economic funding for general assistance support, emergency shelters and low-income housing closely relates to the increasing use of anti-camping ordinances and panhandling statutes).

174. *Tobe v. City of Santa Anna*, 892 P.2d 1145, 1175 (Cal. 1995) (Mosk, J., dissenting) (suggesting that the majority's "case-by-case showing by each individual who is convicted under the ordinance that he or she was 'truly homeless'" defies the

For example, if police cited or arrested each homeless person in Washington, D.C.¹⁷⁵ for a violation of an anti-camping or sleeping ordinance and if those arrested were able to raise the necessity defense at trial, each trial would lead to a fourteen to thirty-six percent increase in the number of misdemeanor cases filed in D.C. Superior Court.¹⁷⁶ Thus, legislatures must reevaluate the ordinances to relieve the judiciary of the potential case load burdens.

Finally, the legislature must consider the effect that a citation under the ordinance has on a homeless person. The trial court ordered Eichorn to perform forty hours of community service.¹⁷⁷ Not only does such punishment prevent him from working,¹⁷⁸ but also it

notion of judicial efficiency); *cf.* Tier, *supra* note 13, at 268 (arguing that inquiry into the housing and shelter availability compels an inappropriate judicial involvement into “public housing and shelter spending in the jurisdiction”).

The notion that the ordinance will become insulated from meaningful review has proven to be an accurate prediction. Eichorn argued in his petition that the ordinance violated equal protection when it prevented him from engaging in life-sustaining acts. *See* Petition for Writ, *supra* note 95, at 37, *Eichorn* (No. G022777) (stating that “[t]he Ordinance does not pass constitutional muster” because the right to partake in life-sustaining activities is fundamental). He again argued the point lost in *Tobe*, that the underlying purpose of the ordinance is to remove homeless people from Santa Ana. *See id.* (“Despite the Ordinance’s facial neutrality, the Ordinance’s true and principle purpose is to drive the homeless out of Santa Ana and to prevent new homeless from entering the City.”); *see also Tobe*, 892 P.2d at 1159-60 (“We cannot assume . . . that the sole purpose of the ordinance is simply to drive the homeless out of Santa Ana.”).

The city, however, ignores these arguments in its Return to the Petition, as did the court. *See* Traverse to the People’s Return; Memorandum of Points and Authorities at 1, *In re Eichorn*, 81 Cal. Rptr. 2d 535 (Ct. App. 1998) (No. G022777) (“The People are . . . mysteriously quiet on the constitutional issue.”); *see also In re Eichorn*, 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998) (“[B]ecause Eichorn is entitled to raise a necessity defense to charges he violated the camping ordinance, we find no other constitutional violations under the circumstances of this case.”). In addition, Eichorn argued that the Santa Ana ordinance was distinguishable from the law in *Powell*, where Justice Black concurred in finding a statute punishing public drunkenness constitutional because it was consistent with the notions of deterrence, isolation, and treatment. *See* Petition for Writ, *supra* note 95, at 19, *Eichorn* (No. G022777) (citing *Powell v. Texas*, 392 U.S. 514, 540-41 (1968)). In this case, Eichorn could not be deterred because he had no choice but to sleep outside. He was not isolated by the citation because authorities released him on his own recognizance. Finally, he received 40 hours of community service, which seems misplaced given that community service does not relieve the cause of his homelessness—namely lack of housing, shelter, and income. *See id.* (justifying the punishment received by an alcoholic for public drunkenness).

175. Statistics cited in Part I of this Note show that between 700 and 1,800 homeless people live on the street in Washington, D.C. *See supra* text accompanying note 17.

176. *See* JOINT COMMITTEE ON JUDICIAL ADMINISTRATION, DISTRICT OF COLUMBIA COURTS, 1998 ANNUAL REPORT 70 (1999) (reporting that authorities filed 4,985 misdemeanor cases under District of Columbia law in 1998).

177. *See Eichorn*, 81 Cal. Rptr. 2d at 538.

178. *See* Petition for Writ, *supra* note 95, at 6, *Eichorn* (No. G022777) (“The ‘treatment’ that Eichorn received was 40 hours of community service, which obviously interferes with his ability to work at a paying job and become not

fails to deter or rehabilitate him from violating the ordinance again because the punishment does not relieve the cause of the violation—his homelessness. Legislators, in their attempt to sweep the streets of homeless people, fail to realize the exacerbating effect these ordinances have on the general causes of homelessness.

CONCLUSION

Ordinances that prohibit sleeping and camping in public are imperfect responses to addressing the presence of homeless people in public places. Prior to *In re Eichorn*, social service providers and legislators primarily adopted and addressed the issue. Judicial responsibility was limited to construction and constitutional application of the ordinance. After *Eichorn*, courts will have to make room for individual trials on the justification for each homeless person's violation of an ordinance. If courts begin hearing a large number of cases that contest anti-camping citations using the necessity defense, the utility of these ordinances will be limited. Furthermore, the *In re Eichorn* court's recognition of the lack of shelter space and other resources that assist homeless and other low-income people may create more support for social service programs and assist other localities in opposing the use of the ordinances. Localities must begin to consider alternatives to such ordinances before burdening the judicial system.

homeless.”).