Please Don't Feed the Homeless:

Pottinger Revisited

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Preface
Your house is your larger body
It grows in the sun and sleeps
In the stillness of the night;
And it is not dreamless [2]

Summary:

In the late 1980's, major cities began relentless campaigns to rid the streets and parks of the homeless. Thousands of homeless families and individuals were subjected to arrest and summary destruction of their possessions for minor offenses such as jaywalking and dropping a leaf on the ground. In 1988 the homeless brought action against the City of Miami alleging numerous violations of constitutional rights. While the *Pottinger* litigation was pending, Hurricane Andrew left over 200,000 additional individuals homeless in Miami.

In 2005, Hurricane Katrina added approximately 1.5 million members to America's homeless population, bringing the total to approximately five million. During the one-year since Hurricane Katrina struck, Americans have begun to show unmistakable signs of compassion fatigue.

Las Vegas has already passed an ordinance which imposes maximum fines of $1,000.00 for feeding the homeless in a public park. This Article explores the relevance of *Pottinger* in Post-Hurricane Katrina society.

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[2] Kahlil Gibran, The Prophet, 31 (1996)

Introduction

In 1998, Miami's homeless population filed a class action, Pottinger v. City of Miami,[3] alleging that city officials acted in concert to deprive them of their civil rights. While the Pottinger litigation was ongoing, Hurricane Andrew struck Miami, leaving 200,000 additional homeless in its wake [4] in what the Pottinger court termed "a worst possible" [5] scenario. It was the first time that a hurricane figured in homelessness litigation, and it is likely that the outcome of the case was in fact affected by the hurricane. The court held Miami officials liable for violations of 42 U.S.C. 1983,[6] the Eighth Amendment,[7] the Fourth Amendment,[8] the Due Process Clause,[9] and the Right to Travel,[10] perhaps in part because the tragedy of mass homelessness was showcased by Hurricane Andrew. In the face of so great a homeless population, the Court could not dismissively assume that people were homeless as a result of a perverse desire to be so, nor would it ignore the multiple violations of their constitutional rights.

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

This article will explore the relevance of Pottinger as the homeless population rises to approximately five million in the twenty first century. Part I summarizes the demographics and causes of mass homelessness. Part I also addresses negative public reactions to the increased visibility of the homeless in major American cities.

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[3] Pottinger v. Miami, 810 F. Supp. 1551 (1992), [hereinafter, *Pottinger*]
[4] *Id*. at 1558
[5] *Id.*
[6] *Id.* At 1560
[7] *Id.* At 1565
[8] *Id.* At 1573
[9] *Id.* At 1577
[10] *Id.* At 1582

Part II articulates the thesis of the Article. Part III outlines and discusses the successful causes of action brought by the homeless in Pottinger v. Miami. And Part IV, the conclusion, sets forth proposals that would reinvigorate incentives to construct additional affordable housing, revisit America's regressive tax schedule, and afford the homeless suspect classification.

I.
Overview of Homelessness Before Hurricane Katrina
a.
Demographics

In 2000, an estimated two million Americans were homeless on any given night.[11] Between 2.5 and 3.5 million Americans experienced homelessness every year,[12] and thirty percent of the homeless had been without homes for more than two years.[13] These numbers do not include the indeterminate number of individuals who had no homes and were "doubled up"[14] living with friends or relatives. Only those persons "who lack a permanent address and sleep in places not designed to be sleeping accommodations for human beings…and those living in shelters"[15] were considered homeless; thus, those living under the roofs of their families and friends did not meet the definition.

Adult males constituted 44% of the homeless population before Hurricane Katrina.[16] Women[17] accompanied by minor children[18] were the

[11] http://www.policyalmanac.org/social_welfare.html 2/21/05 (last visited Sept. 7, 2005) [hereinafter, *Policyalmanac*
[12] Jonathan L. Hafety, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 Fordham Urb. L. J. 1215, 1219 (2003)
[13] *Policyalmanac, supra* note10
[14] Beth C. Weitzman, James R. Knickman & Marybeth Shinn, *Pathways to Homelessness Among New York Families*, 46 J. Soc. Issues 127, 133 (1990)
[15] 42 U.S.C. 11301 (1995) (The Stewart B. McKinney Act)
[16] *Policyalmanac*, *supra* note 10
[17] Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. Pol'y 237 (1994) "Fifty percent of the homeless women in America were fleeing domestic violence." See, Leonara M. Lapedus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 Am. U. J. Gender Soc., Pol'y L. 377 (2003) A battered woman residing in publicly subsidized housing was evicted because she reported having been battered by her husband. See, also, Eliza Hurst, Note: The Housing Crisis for Victims of Domestic Violence, 10 Geo. J. Poverty Law & Pol'y 131 (2003) "Because women are disproportionately the victims of domestic violence, public housing authorities that evict families for criminal activity may punish women, as a class, for the acts of their abusers."
[18] Deborah M. Thompson, Breaking the Cycle of Poverty: Models of Legal Advocacy to Implement the Educational Promise of the McKinney Act for Homeless Children and Youth, 31 Creighton L. Rev. 1209 (1998) "For Children, homelessness not only threatens their stability and security, it poses a tremendous barrier to the one thing that may give them hope for a better life – a better education."

fastest growing segment of the chronically homeless[19] and made up 36% of the homeless population.[20] Some 750,000 children were homeless[21] before Katrina and 1.5 million elderly had "worst case housing needs."[22] Fifty percent of the homeless were African-American, 35% White, 12% Hispanic, 2% Native American, and 1% were Asian Americans.[23]

b.

The Causes

The causes of America's rising homelessness rate have been debated for decades. Some contend that personal deficiencies such as mental illness,[24] substance abuse,[25] incarceration,[26] and an intergenerational dependence upon welfare[27] are the primary causes of homelessness. Others cite macro economic factors such as loss of low-income housing,[28] unemployment and underemployment,[29] and a regressive tax structure.[30] Neither theory considered natural disasters.

c.

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[19] *Policyalmanac*, *supra* note 10
[20] *Id.*
[21] Thompson at 1209
[22] http://www.huduser.org/publications/affhsg/worstcase/finding6.html. (Last visited March 15, 2005)
[23] *Policyalmanac, supra* note 10
[24] See, e.g., Marybeth Shinn, *Homelessness: What is A Psychologist to Do?*, 20 Am. J. Community Psycho.3 (1992) In one sample of homeless individuals treated at a psychiatric facility, some 97% had been previously treated for psychiatric problems. But see, Martha L. Burt & Barbara E. Cohen, Differences Among Homeless Single Women, Women with Children, and Single Men, 36 Soc. Probs. 508, 516 (1989), finding that mental illness is more often the result of homelessness that the actual cause.
[25] See, e.g., Crystal Mills & Hira Ota, *Homeless Women with Minor Children in the Detroit Metropolitan Area*, 34 Soc. Work 485, 487 (1989) A study of eighty-seven sheltered homeless in Detroit revealed only a 9.2% history of substance abuse. But see, Alice S. Baum & Donald W. Burnes, A Nation in Denial: The Truth About Homelessness, 49 – 52, (1993)
[26] Prior incarceration does seem to predispose newly released former inmates to homelessness insofar as federal regulations disqualify them for publicly subsidized housing for a lengthy period. 24 C.F.R. 960.203 (c) (2001).
[27] Some researchers have found support for the theory that intergenerational dependence upon welfare promotes ultimate homelessness. See, Ellen L. Bassuk & Lynn Rosenberg, *Why Does Family Homelessness Occur? A Case Control Study*, 78 Am. J. Pub. Health 783, 787. (1988) Other studies show that many of the homeless have significant work histories and no dependence on welfare.
[28] A study in New York City indicated that almost 50% of homeless families had never been able to afford a place of their own. Weitzman, Knickman, & Shinn, *supra,* note 13 at 135.
[29] Lelia M. Reyes & Laura DeKoven Waxman, U.S. Conference of Mayors, *The Continuing Growth of Hunger, Homelessness, and Poverty in America's Cities* at 47 (1987) Plant closings and loss of blue collar work for Americans produces significant unemployment.
[30] Changes in tax laws beginning in the late seventies have increased tax burdens upon the poor and middle class while creating tax loopholes for the rich. See, Lawrence Miskel & David M. Frankel, *The State of Working America* at 55 (1991)

Public Reaction

Years before Hurricane Katrina created the largest homeless population in American history, the public had developed compassion fatigue[31] with homelessness. San Francisco enacted a series of ordinances through its so-called Matrix Program that criminalized sleeping in a park, begging near a highway, and blocking a sidewalk.[32] Eleven thousand of San Francisco's poorest people were incarcerated as a result of the Matrix Program[33] alone. In Santa Anna, the homeless were rounded up, transported to a football stadium, physically marked with numbers, chained for hours, and ultimately released to a different location.[34]

Massachusetts imposed criminal sanctions upon those who "move about from place to place begging."[35] Alabama made it a criminal act to wander about "in a public place for the purpose of begging."[36]

In Florida, which was the venue for Pottinger, homelessness had increased dramatically in Miami since 1984.[37] Thousands of homeless individuals were sleeping in Bicentennial Park[38] and other public venues where they kept their meager belongings, which typically included blankets, clothing, food, identification, eyeglasses, and sometimes medications.[39] City police were directed "to identify *food* sources for the poor and to arrest and/or force an extraction of the undesirables from the area."[40] The police were to keep the homeless moving in order "to sanitize"[41] the parks and streets. Raids upon the campsites of the homeless were relentless, and their belongings were often summarily destroyed at the site.[42]

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[31] See, Nancy A. Millich, *"Compassion Fatigue and the First Amendment: Are the Homeless Constitutional Castaways?"* 27 U.C. Davis L. Rev. 255 (1994)
[32] Nancy Wright, *"Not in Anyone's Backyard: End the 'Contest of Non-Responsibility' and Implementing Long-Term Solutions to Homelessness,"* 2 Geo. J. on Fighting Poverty 163, 199 (1995)
[33] *Id.*
[34] Tobe v. City of Santa Ana, 32 Cal. App. 4th 941, 948 (1994)
[35] Mass. Gen. L.ch. 272§63 (1992)
[36] Ala. Code §13-A-11-9 (a) (1) (West 1994)
[37] *Pottinger, supra* note 2 at 1158
[38] *Id.* at 1560
[39] *Id.* at 1571
[40] *Id*. at 1567
[41] *Id.*
[42] *Id.* at 1560

History is repeating itself. On July 28, 2006, the New York Times in an article entitled "Please Don't Feed the Homeless in Parks"[43] reported that Las Vegas had enacted an ordinance banning giving food to the homeless. A violation of the ordinance can be punished by a maximum fine of $1,000.00 and a jail term of up to six months.

II.
Thesis

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

III.
Pottinger Revisited
a.
The Eighth Amendment

The most sensitive issue in homelessness litigation concerns the voluntariness of the homeless defendant's actions. Purely involuntary acts cannot properly or morally be condemned as crimes under the Eighth Amendment. To punish a person for his involuntary act would be cruel. The question then is whether a homeless person's acts are voluntary. A homeless person who commits rape cannot reasonably assert his homelessness as justification for his misdeeds. In that case his status as a homeless person is irrelevant, and society cannot reasonably be expected to tolerate such behavior. The question is more complex when a homeless defendant with nowhere else to go is prosecuted for harmless acts such as sleeping in a park. Is a public action "voluntary" when the homeless defendant must perform it to survive, and he has no private place in which to perform the action? The Pottinger court resolved the question by asking another question: Is the defendant voluntarily homeless?[44] If a defendant has voluntarily chosen to be homeless, he could be legally and morally deemed to have voluntarily assumed the risk of having to break the law to survive. It is unreasonable for society to lower its expectation of public conduct in order to accommodate a private and voluntary choice of that character. On the other hand, the defendant's homelessness is involuntary, a just society should not prosecute

[43] Randal C. Archibold, *"Please Don't Fee Homeless in Parks, Las Vegas Says in Ordinance,"* N.Y. Times, July 28, 2006

[44] *Pottinger, supra* note 2 at 1558

him for the indicia that attach to the fact of his homelessness. The success of the Pottinger case rested in large part upon the plaintiffs' ability to prove that they were suffering an involuntary[45] state of homelessness and were compelled to perform life-sustaining acts in public view.[46]

The U.S. Supreme Court in Robinson v. California[47] held that a defendant could not be criminally punished for his mere status as a drug addict, finding that a statute that made it punishable to be addicted to narcotics constituted cruel and unusual punishment.[48] In Powell v. Texas[49] the Supreme Court addressed a similar issue of whether an alcoholic could be jailed for appearing drunk in public.[50] The Supreme Court held that Powell had not been jailed for merely being addicted to alcohol, but for his active conduct of appearing in public in a drunken state.[51] Powell is often cited by municipalities that arrest the homeless. The argument is that the homeless are not being punished for being homeless, but for their actions in violation of the law. Such arguments miss the point when the defendant is involuntarily homeless. The alcoholic, theoretically, can restrict his drinking to his home and avoid punishment, but the homeless have no homes in which to perform what are usually private acts.[52] Sleeping in parks, sitting on sidewalks, and begging are perfect examples. To criminalize such actions when they are unavoidable is tantamount to prosecuting the homeless for existing, and the Eighth Amendment prohibition against cruel and unusual punishments is impermissibly infringed.

The burden has historically been upon the plaintiffs to establish that their public actions were in fact unavoidable. In Pottinger the plaintiffs met that burden with statistical evidence and expert testimony.[53] The plaintiffs offered irrefutable statistical evidence of the severe shortage of beds in homeless shelters[54] in Miami when they were arrested. The expert witnesses also testified that people seldom choose to be homeless.[55] However, a public

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[45] *Id.*
[46] *Id.* at 1574
[47] 370 U.S. 660 (1962)
[48] *Id.* at 666
[49] 392 U.S. 514 (1968)
[50] *Id.*
[51] *Id.* at 532
[52] Powell, 392 U.S. at 511, Justice White in his concurrence voiced concern about whether a *homeless* alcoholic could be punished for public drunkenness without violation of the Eighth Amendment.
[53] *Pottinger, supra* note 2 at 1565
[54] *Id.* at 1558
[55] *Id.* at 1557

policy that requires the homeless to bear the burden of proving the voluntariness of their status is inherently flawed. The homeless, by definition, are persons with extremely limited resources, and they are not entitled to state appointed attorneys in civil litigation in defense of their rights. But for the pro bono advocacy of the American Civil Liberties Union,[56] the Pottinger plaintiffs would have lacked the resources to amass statistics proving Miami's shelters were inadequate to house the homeless population. Nor would the homeless have been able to procure the experts[57] who were pivotal in establishing that people are seldom homeless by choice.[58] The better public policy would allow the plaintiff to meet the burden of a prima facie case by establishing the actions committed by the state or municipality in violation of his rights and the fact of his homelessness at the time of his arrest. The burden should then shift to the defendants to establish to a preponderance that the plaintiff is voluntarily homeless and thus answerable for his public actions. This policy would serve dual meritorious purposes: The homeless plaintiff would be enhanced in his ability to find counsel who would accept his case, and the states and their municipalities would have greater motivation to cease their efforts to harass the homeless out of their towns and instead explore serious options for providing adequate affordable housing.

b.

The Fourth Amendment

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

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[56] Benjamin Waxman, *"Homeless in Miami,"* http://www.acluFL.org. (1998)
[57] *Pottinger, supra* note 2 at 1557
[58] *Id.*
[59] *Id.* at 1560
[60] *Id.* at 1573
[61] *Id.*

While a seizure of property occurs when there is a "meaningful interference" with an individual's interest in that property,[62] a seizure of property is unreasonable only if the state's legitimate interests in the seizure do not outweigh the individual's legitimate expectation of privacy in the object of the search.[63] The inquiry then is whether the plaintiffs have a legitimate expectation of privacy in personal property that may appear to others to be public rubbish. Determining the nature of any legitimate expectation of privacy in personal property involves two separate inquiries: first, whether the individual has a subjective expectation of privacy in the objects;[64] and, second, whether that expectation is one that society should be prepared to recognize as reasonable.[65] If the homeless make efforts to protect their belongings by attempting to shelter them from public view, stacking them in organized piles, or designating another homeless person to guard them, there is evidence of subjective expectation of privacy. The second inquiry is more difficult. Should the public recognize the homeless person's right to privacy when her property is littering the streets or public parks? In Rakas v. Illinois[66] the United States Supreme Court offered guidelines for determining the legitimacy of a plaintiff's privacy interests. If the plaintiff is a trespasser or he leaves his property accessible to the public, he may lose his privacy interests in his property; whereas, one who is lawfully upon property and shields his property from public view may retain a subjective expectation in privacy that the public will recognize. The term *trespasser* is turned on its head, and loses its definition "when there is nowhere"[67] private that a homeless person can lawfully be and so he remains upon public property.

The Supreme Court has not specifically spoken to the issue of whether a homeless person living outdoors has a privacy interest in their property that the public would find reasonable, but a Connecticut court has addressed the issue in part. In State v. Mooney,[68] the court recognized a right of privacy in the closed duffel bags of the homeless deriving from society's previous deferential treatment in closed containers, stating:

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[62] United States v. Jacobsen, 466 U.S. 103, 126 (1984)
[63] Maryland v. Buie, 494 U.S. 325, 331 (1990)
[64] Wells v. State, 402 So. 2d 402, 404 (Fla. 1981) (Citing Smith v. Maryland, 442 U.S. 735) (1979)
[65] Rakas v. Illinois, 439 U.S. 128, 143-144 (1979)
[66] *Id.* (Persons asserting neither a property nor a possessory interest in a vehicle have no legitimate expectation of privacy in property in the glove compartment)
[67] *Pottinger, supra* note 2 at 1577
[68] 588 A.2d 145 (1991)

> [the interior of [these items is, in effect, the defendant's last shred of privacy from the prying eyes of outsiders, including the police. Our notions of custom and civility, and our code of values, would include some measure of respect for that shred of privacy, and would recognize it as reasonable under the circumstances of this case.[69]

Does a homeless person have a lesser interest in his clothing or medications because he has no duffel bag in which to enclose them? From the perspective of the homeless, the answer is self- evident. Correspondingly, however, the municipalities also have a legitimate interest in the sanitation and safety of public spaces,[70] which can be compromised by the accumulation of rubbish. The Pottinger court balanced the conflicting interests, holding that the homeless had a legitimate expectation of privacy in their property so long as the property did not create a public danger.[71] The court held that the city was free to confiscate items such as mattresses with exposed springs because such items posed a clear danger. However, the practice of destroying the non-harmful possessions such as Bibles, clothing, eyeglasses, medications, and personal identification was enjoined and declared in violation of the Fourth Amendment.[72]

c.

Procedural Due Process

Ordinances that prohibit the homeless from performing innocent, necessary functions in public often fail for vagueness or overbreadth. A statute is vague when it fails to give fair notice of the forbidden conduct.[73] Vagrancy ordinances were held void in Papachristou v. City of Jacksonville[74] by the U.S. Supreme Court in 1972 because the statutes did not give sufficiently clear notice of the behavior that was prohibited.[75] Loitering statutes have suffered the same fate. In 1983, the U.S. Supreme Court overturned California's loitering statute that required citizens wandering the streets to produce identification upon the request of a police officer.[76]

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[69] *Id.* at 161 (The court analogized the property inside a homeless person's duffel bag to property behind the locked door of a home)
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)
[74] *Id.*
[75] *Id.*
[76] Kolender v. Lawson, 461 U.S. 352, 261 (1983)

Oddly, the homeless plaintiffs did not attack Miami's ordinances on a vagueness theory. Instead the plaintiffs focused upon the unconstitutional overbreadth of the ordinances when they were applied to innocent conduct of the homeless.

A statute is overbroad when it reaches constitutionally protected conduct or conduct which is beyond the power of the state to regulate.[77] A challenge based upon overbreadth will be upheld if the enactment reaches "a substantial amount"[78] of constitutionally protected conduct. Prior to Pottinger there was no precedent for acts such as eating, sleeping, and sitting to enjoy constitutional protection, unless such acts could be characterized as expressive conduct.[79] For the most part, however, when the homeless eat, sleep, and sit in public, they intend no expressive conduct. They are performing those acts for the same reasons the housed perform them: they are necessary to survival. However, the Pottinger court held that when an involuntarily homeless person performs such acts in public "at a time of day when there is no place they can lawfully be,"[80] the statute becomes overbroad when it punishes innocent conduct, and the Fourth Amendment due process clause is impermissibly infringed.[81]

d.

The Right to Travel

The United States has recognized the right to travel as a fundamental right in 1941 in Edwards v. California.[82] The U.S. Supreme Court reaffirmed the Edwards decision in Shapiro v. Thompson,[83] striking down a Connecticut statute denying public assistance to persons who had not been residents of the state for one year, opining that the statute discouraged travel by the poor by withholding benefits from those who would otherwise qualified to receive them.[84] In 1972, the Supreme Court in Memorial Hospital v. Maricopa County[85] struck down a statute that conditioned free

[77] Sawyer v. Sandstrom, 614 F 2d 311, 318 (5th Cir. 1980), striking down Dade County's loitering statute as overbroad because it punished innocent associations in violation of first amendment associational rights.
[78] Village of Hoffman Estates v. Flipside, 455 U.S. 489, 494 (1982)
[79] People v. Davenport, 176 Col. App. 3rd Supp. 10 (Cal. Super. 1985), cert denied, 475 U.S. 1141 (1986)
[80] *Pottinger, supra* note 2 at 1577
[81] *Id.*
[82] Edwards v. California, 314 U.S. 160, 171 (1941) The U.S. Supreme Court struck down California's statute making it a misdemeanor to transport an indigent person into California.
[83] 394 U.S. 618 (1969)
[84] *Id* at 634
[85] 415 U.S. 250 (1974)

medical care upon a one-year residency requirement.[86] This case is especially significant in homelessness cases because the Supreme Court specifically denounced the statute for denying indigents "the basic necessities of life"[87] and for the deterrent affect such statutes have on the rights of the poor to migrate.

Because the right to travel is a fundamental right, statutes or ordinances infringing that right must be in furtherance of a compelling state interest[88] and they must represent the least intrusive method for furthering those state interests.[89] State interests such as maintaining public spaces in order to promote tourism, business, and developing inner city downtown and park areas are not compelling interests. The United States Supreme Court has held that such interests are substantial,[90] but not compelling. Further, the practice of arresting the homeless is not narrowly tailored to achieving the goals of promoting tourism or developing business. The involuntarily homeless arrested under such laws have no recourse but to return to their public lives upon their release from custody, and nothing is ultimately accomplished by the arrests. If cities wish to promote their attractiveness to business and tourism, they must address both short-term and permanent housing for their homeless populations.

e.

42 U.S.C. 1983

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

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[86] *Id.* at 250

[87] *Id.* (Memorial Hospital argued that treating the homeless and other indigents over-burdened the tax base of Arizona's taxpayers. The court held that "a state may not protect the public finances by drawing an invidious distinction between classes of its citizens," effectively discriminating by wealth and property. See, Jane B. Barron, "The 'No Property' Problem: Understanding Poverty by Understanding Wealth," 102 Mich. L. Rev. 1000, (2004)

[88] Personnel Administrators v. Feeney, 942 U.S. 256, 266 (1979)

[89] City of Cleburne v. Cleburne Living Ctr. 473 U. S. 432, 439-440 (1985)

[90] Clark V. Community for Creative Non-Violence, 468 U.S. 288, 296 (1984)

In 1961 the United States Supreme Court reinvigorated civil rights protections that had largely remained dormant for some ninety years. In Monroe v. Pape[91] the Supreme Court concluded that a party injured by the unconstitutional actions of police offices could recover damages in federal court under 1983. The police broke into the Monroe home, rousted them from bed, and ransacked the house.[92] Mr. Monroe was arrested, but was not allowed to call his attorney.[93] He was not promptly arraigned. Monroe claimed that he suffered an unlawful search and seizure in Violation of the Fourth Amendment.[94] He further claimed that his constitutional rights had been violated by the detention. The Supreme Court reversed the lower court's dismissal of the claims against the police officers,[95] opining inter alia that actions of the police may be actionable when they are in violation of rights secured by the constitution.

Municipalities may also be held liable for the actions of city officials when those officials act to execute a "policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy."[96] In 1983 litigation the homeless plaintiffs also bear the burden of establishing that the actions were both persistent and widespread.[97] Evidence that the actions were isolated would be legally insufficient to warrant relief against the municipality,[98] though the offending officers might remain liable for the actions.

Discovery in Pottinger revealed internal memoranda that were "directed to high-ranking police department officials"[99] regarding the need to oust the homeless from Miami's public areas. The persistent and widespread nature of the attacks on the homeless was a matter of public record. Over thirty-five hundred homeless individuals had been arrested in Miami when suit was filed. The city could not escape liability under 1983 for its acts of purposeful harassment of the homeless.[100]

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[91] Monroe v. Pape, 365 U.S. 167 (1961)
[92] *Id.*
[93] *Id.*
[94] *Id.* at 170
[95] *Id* at 192
[96] Monell v. City of New York Dept. of Soc. Svcs., 436 U.S. 658, , (1978)
[97] City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988)
[98] *Id.*
[99] *Pottinger, supra* note 2 at 1561

[100] *Id.*

f.

Equal Protection:

In Harper v. State Board of Elections[101] the United States Supreme Court opined that "wealth, like race, creed, or color is not germane to ones ability to participate in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored."[102] Nonetheless, the Supreme Court has declined every opportunity to grant the homeless the suspect classification that is afforded to other historically victimized groups. This status is critical to the homeless population since only those state laws that discriminate against suspect groups are subjected to strict scrutiny,[103] and cannot stand unless the state demonstrates a compelling interest that is furthered by a narrowly tailored policy.[104]

The Supreme Court has adopted the following criteria in its suspect class analysis: (1) whether the disadvantaged class is defined by a trait that frequently bears no relationship to ability to contribute to society, (2) whether the class has been saddled with unique disabilities because of prejudice and inaccurate stereotypes; and (3) whether the trait defining the class is immutable.[105] The homeless can make a strong claim to being a suspect or quasi-suspect class.

The homeless are a class defined by their abject poverty, and that state of poverty frequently bears no relationship to an actual inability to contribute to society. Many of the homeless have strong work histories[106] and were rendered homeless by events beyond their control,[107] and one has only to review the acts perpetrated against the homeless in Miami, San Francisco, and San Diego to be persuaded of the dangerous prejudice of the public against the homeless. The last prong of the test is more difficult. Do the homeless have defining, immutable characteristics? If the term means literally "a characteristic that cannot be changed," the homeless must fail in their attempts to achieve suspect classification. The judicial history of the term does not, however, suggest so rigid a definition. Aliens, who enjoy

[101] 383 U.S. 663 (1966)
[102] *Id. Harper* at 668
[103] Feeney, *supra* note 87 at 266
[104] Cleburne, *supra* Note 88 at 440
[105] Lyng v. Castillo, 447 U.S. 635 at 638 (1986)
[106] Christina Victoria Tusan, note *"Homeless Families from 1980 – 1996: Casualties of Declining Support for the War on Poverty,"* 70 S. Cal. L. Rev. 1141, 1169 (1997)
[107] beyond control

protection as a suspect class, can become citizens, thereby changing their "immutable" characteristic. Gender, which is protected, can be altered surgically, thus altering the gender characteristic. The mere fact that the homeless can again become housed does not alter the fact that while one is in fact homeless, it is physically apparent to society.

The Supreme Court in Lyng[108] adopted a broader interpretation of immutability, including an enquiry as to whether the class members "exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group."[109] The homeless have glaringly distinguishing characteristics: They reside under bridges, sleep in parks, shelters and other public places, and they beg. Their identity is unmistakable: the best evidence the police had no trouble whatever identifying them in Miami, in San Francisco, and in San Diego.

The Aftermath

Litigation in Pottinger spanned a decade. Ultimately, the court enjoined the city of Miami from arresting its homeless so long as they ere not engaged in conduct harmful to others or themselves.[110] Miami was ordered to establish "safe zones"[111] in areas where the homeless could access food programs and health services. The parties ultimately negotiated a financial settlement for the homeless plaintiffs.[112]

The impact of the case was immediate. Both the city of Miami and other private entities constructed shelters for the homeless while the case was on appeal.[113] As word spread about the decision in Miami, other cities took stock of their own practices. Fort Lauderdale, Florida stopped its "bum sweeps"[114] and began encouraging its officers to refer the homeless to social services in lieu of making arrests.[115]

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[108] Lyng, *supra* note 105 at 638
[109] *Id.*
[110] *Pottinger, supra* note 2 at 1584
[111] *Id.*
[112] Waxman, *supra*, note 55
[113] *Id.*

[114] *"Ft. Lauderdale Learns a Lesson from Miami in Dealing with the Homeless,"* Reprinted from Law Enforcement News, May 2000
[115] *Id.*

IV
Conclusion

As America's homeless population reaches five million after Hurricane Katrina, Pottinger-type abuses such as those in Las Vegas are to be anticipated unless society becomes pro-active. Congress must reinforce incentives for constructing low-income housing and raise the minimum wage. Meanwhile, "safe areas" must be available to those who have nowhere else to go, and human resources must be provided to patrol those areas to protect homeless men, women, and children from the violence of the streets.

The homeless must be afforded a "suspect class" designation. The homeless are America's most vulnerable population. They are easily identified and despised for characteristics they cannot readily change. They have suffered the deprivation of the most fundamental rights because their very existence frightens the greater population on a visceral level. The goal, however, is not only to place the homeless in a better position to defend their constitutional rights, but to create a society that does not complain of "compassion fatigue," but instead is indefatigably compassionate and committed[116] to the welfare of even its poorest citizen.

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[116] America's largest religions all urge their followers to a commitment to the less fortunate.

> "A Muslim asserts his/her belief in the merciful and compassionate God by donating money or goods to those less fortunate. This idea is connected to the belief in Islam that all wealth ultimately belongs to God. We have it on loan to be used in God's path to do good deeds in this life." Dr. James Pavlin, "An Islamic View on Caring For Those in Need," IRF Newsletter #51-Spring 2003.
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> "The Jewish community has historically seen itself responsible to feed and house the hungry and the homeless. In fact in Hebrew times there is no word for charity. Rather, the caring for those in need is called Tzedaka, a derivative of the Hebrew term for righteousness." Rabbi N. I. Barowitz, "A Jewish View on Hunger and Homelessness," IRF Newsletter.
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> "When we give to others without any desire or expectation, when we let go of our attachments, we find ourselves relieved of the complications that worldly possessions often bring with them. This means while charity can be done for religious purposes, it should be done because the individual enjoys helping others and the benefits are self-satisfying."
> Netta Mehta, "A Hindu View on Hunger and Homelessness," IRF Newsletter #48-May/June 2002

"The Gospel call to be close to Christ who is "homeless" is an invitation to all the baptized to examine their own lives, and to trust their brothers and sisters with practical solidarity by sharing their hardships. By openness and generosity, as a community and as individuals, Christians can serve Christ present in the poor and bear witness to the Father's love." 1997 Lenten Message from Pope John Paul II