A Circuit Split Involving Ten Federal Circuits: Why Copyright Infringement Actions Should Be Allowed to Proceed After an Application for a Copyright is Filed

Morgan Johnson

In 2010, the Supreme Court’s decision of Reed Elsevier, Inc. v. Muchnick addressed the subject matter jurisdiction of a trademark infringement claim. Not only did this avoid the larger question of when a trademark is “registered” under § 411(a), but it lead to further division among the circuit courts. Section 411(a) sets forth the requirements for a trademark infringement suit to be filed; most importantly that it must be “registered.” The registration approach has determined that a trademark is only registered when a party receives an affirmative or negative response, directly from the Copyright Office. The application approach, however, finds the trademark to be “registered” whenever the application has been submitted, along with the accompanying fees and forms.

Since the Reed Elsevier case, four more federal circuits have been forced to decide when a trademark is registered. This has led to a five-to-five circuit split regarding the two approaches. This note determines that the application approach is the appropriate interpretation of the registration requirement. This will be shown through: (II) a brief description of the opposing viewpoints, (III) the reasoning for the registration approach, (IV) the reasoning for the application approach, and finally (V) why the application approach is superior to the registration approach. Finally, this article calls upon the Supreme Court to finally decide the issue of registration, so as to clarify at least one aspect of trademark rights.

Homeless Bill of Rights: how Legislators Get to Feel Pro-Homeless Without Effort or Money

Hailey Rehberg

In 2013, Illinois became the second state in the nation to enact a homeless bill of rights to protect homeless persons from discrimination in the right to use and move freely in public spaces in the same manner as any other
person, the right to equal treatment by State and municipal agencies, the
right not to register to vote and to vote, the right to have personal
information protected, and the right to have a reasonable expectation of
privacy in his or her personal property. Though legislation to protect the
rights of homeless people is necessary, the Illinois Homeless Bill of Rights
does not do what is needed to combat homelessness. After some background
information about the history of homelessness in America and the
similarities and differences between the three homeless bills of rights that
have been enacted, this Comment argues that the Illinois Homeless Bill of
Rights does not provide any new protection for people struggling with
homelessness, but, through its limiting language, instead gives the homeless
population rights that they have already possessed. This Comment also
advocates alternative measures to prevent homelessness and stop the
criminalization of the homeless by looking at methods implemented in other
places around the country.
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*Member, National Conference of Law Reviews*
A Circuit Split Involving Ten Federal Circuits: Why Copyright Infringement Actions Should Be Allowed to Proceed After an Application for a Copyright is Filed

MORGAN L. JOHNSON*

In 2010, the Supreme Court’s decision of Reed Elsevier, Inc. v. Muehnick addressed the subject matter jurisdiction of a trademark infringement claim. Not only did this avoid the larger question of when a trademark is “registered” under § 411(a), but it lead to further division among the circuit courts. Section 411(a) sets forth the requirements for a trademark infringement suit to be filed; most importantly that it must be “registered.” The registration approach has determined that a trademark is only registered when a party receives an affirmative or negative response, directly from the Copyright Office. The application approach, however, finds the trademark to be “registered” whenever the application has been submitted, along with the accompanying fees and forms.

Since the Reed Elsevier case, four more federal circuits have been forced to decide when a trademark is registered. This has led to a five-to-five circuit split regarding the two approaches. This note determines that the application approach is the appropriate interpretation of the registration requirement. This will be shown through: (II) a brief description of the opposing viewpoints, (III) the reasoning for the registration approach, (IV) the reasoning for the application approach, and finally (V) why the application approach is superior to the registration approach. Finally, this article calls upon the Supreme Court to finally decide the issue of registration, so as to clarify at least one aspect of trademark rights.

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* Northern Illinois University College of Law, Juris Doctor Candidate, May 2015.
I would like to thank my family and friends for support during the writing process, as well as the Northern Illinois University Law Review staff for their assistance throughout the publishing process.
Imagine creating a copyrightable work, submitting the application to the Copyright Office, and knowing the copyright will be granted as soon as an agent reviews the application. Meanwhile, you have to helplessly watch as others infringe your work for years. In addition to defenselessly watching others infringe your work, you must cross your fingers and hope that the Copyright Office makes a final decision within three years of submitting your application. If your copyright is not granted within the three years, you may never be able to recover for the infringement. The damages resulting from a person willfully infringing your creations would forever be outside of your grasp. Unfortunately, the current split among the federal circuits creates just this situation in over half of the circuits.

A three-year statute of limitations on copyright infringement claims brought under Chapter 17 of the United States Code presents this very real issue in copyright law today. In an era of ever increasing intellectual property and copyrighted material, and with current backlogs of up to eight months before receiving an actual decision from the Copyright Office, it is foreseeable that in the near future the three-year statute of limitations could

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be a serious bar to a person seeking to protect their copyrightable material.\(^3\) This has the potential to be further exacerbated by issues within the government itself.\(^4\)

There are two prevalent interpretations of 17 U.S.C. § 411 (the institution of a civil copyright infringement case), which lead to different conclusions as to what is the appropriate point in time to file a claim for copyright infringement. Central to this debate is the presence of a sharp divide between the federal circuit courts, with an equal number of circuits supporting each approach. The differences between these two interpretations will be discussed in further detail in parts III and IV of this Article, but the two approaches are generally referred to as the application approach and the registration approach.\(^5\) The division among these approaches has led to at least five circuits (or district courts within those circuits) adopting the application approach,\(^6\) and at least five adopting the registration approach.\(^7\)

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4. Due to the government shutdown (lapse in government funding) in October of 2013, the Copyright Office was closed for fourteen days. A notice on the Copyright Office homepage stated that submissions would not be reviewed or processed until the office reopened. Potentials for government shutdown or interruptions add further delay to the potential eight month waiting period to receiving a certificate of copyright registration. The notice that was present in 2013 read:

   Due to the lapse in government funding, the U.S. Copyright Office is closed, as is the greater Library of Congress. As such, the office is unable to update the information on this website, respond to inquiries, or process transactions. Registration submissions will be accepted for the purpose of securing date of receipt, but will not be processed. Website updates and all normal business activity will resume when the government reopens. If you would like to file a copyright registration online, the online registration system is available. Filing your claim now will help ensure the earliest possible effective date of registration, although copyright registrations will not be processed until the Copyright Office reopens.


The main argument regarding § 411 centers around § 411(a), which states that a person cannot file a civil action for infringement of a copyright until there is preregistration or registration of the copyright in accordance with the Copyright Act.\(^8\) While this may seem straightforward, the federal circuits are split over the meaning of “registration” within this statute.\(^9\) The registration approach interprets § 411 to mean that a copyright is only “registered” when the party receives an affirmative or negative response from the Copyright Office,\(^10\) while the application approach interprets § 411 to mean that, for purposes of a copyright infringement claim, a copyright is “registered” when an application has been submitted (accompanied by the appropriate fees and forms).\(^11\)

This Article agrees with the five federal circuits that have come to the conclusion that the application approach is the correct interpretation of § 411. Registration, such that an owner may protect their copyrightable material through infringement actions, is affected upon submission of the application and accompanying documents to the Copyright Office. In addition to this, this Article recognizes that within the last several years, and since the Supreme Court’s opinion in Reed Elsevier,\(^12\) many more circuits have been forced to choose which approach to adopt. Post-Reed Elsevier, many more

\(^8\) 17 U.S.C.A. § 411(a) (LexisNexis 2008). Section 411(a) in full reads:

Except for an action brought for a violation of the rights of the author under section 106A(a), and subject to the provisions of subsection (b), no civil action for infringement of the copyright in any United States work shall be instituted until preregistration or registration of the copyright claim has been made in accordance with this title. In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights. The Register may, at his or her option, become a party to the action with respect to the issue of registrability of the copyright claim by entering an appearance within sixty days after such service, but the Register's failure to become a party shall not deprive the court of jurisdiction to determine that issue.


\(^11\) Cosmetic Ideas, 606 F.3d at 615.

\(^12\) Reed Elsevier, Inc. v. Muchnick, 559 U.S. 154 (2010) was a 2010 opinion by the United States Supreme Court which addressed the jurisdictional requirements to hear a § 411 copyright infringement case. The implications of this decision, and how it changed the discussion of § 411 will be addressed in Section II.
courts have chosen to subscribe to the interpretation of the application approach over that of the registration approach.

What follows will be an overview of how the application and registration approaches have developed over the years and a discussion of the circuits (or district courts within each circuit) who have adopted each approach. Included in this background will be a detailed discussion of each approach, found in part III and IV, especially focused on the views of the four most recent circuit courts to have adopted their respective approaches in the last three years. The Article will then conclude in part V with a discussion of why the application approach is the correct statutory interpretation.

## II. The Circuit Split

Chapter twenty-eight of the United States Code grants original and exclusive jurisdiction over copyright claims to the federal district courts.\(^\text{13}\) The first issue that arose within these district courts, with respect to § 411, was whether the federal courts had subject matter jurisdiction over copyright infringement claims, for copyrights that had yet to receive formal approval from the Copyright Office.\(^\text{14}\) The original split between the circuits was at what point a party had a recognizable claim under § 411, such that the district court possessed jurisdiction to hear the infringement claim.\(^\text{15}\) Under the registration approach, no lawsuit for copyright infringement may be brought until an affirmative or negative ruling on the copyright is received. Under the application approach, no lawsuit may be brought until the application for the copyright is submitted. This issue remained unaddressed by the Supreme Court until 2010.

The Supreme Court finally looked to address this split between the circuits in their 2010 decision of Reed Elsevier.\(^\text{16}\) One question reviewed by the Court was whether a copyright was registered such that a federal court would have jurisdiction to decide a case of infringement.\(^\text{17}\) While the Court avoided the larger issue of the circuit split between the application and registration approaches mentioned previously, it clarified that the issue is not one of jurisdiction.\(^\text{18}\) The Supreme Court held that the federal courts have subject matter jurisdiction to hear an infringement case, even if the item has

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15. Reed Elsevier, 559 U.S. at 159; see La Resolana, 416 F.3d 1195.
16. Reed Elsevier, 559 U.S. at 159-60.
17. Id. at 163.
18. Id. at 164.
not been “registered” as required by § 411(a).\textsuperscript{19} While this would seem to resolve the issues between the two approaches, after the 2010 decision of Reed Elsevier the contemporary issue has become whether the court’s interpretation of “registered” means that a copyright infringement case can withstand a motion to dismiss for failure to state a claim.\textsuperscript{20} The split between the circuits regarding the registration and application approaches essentially remained undisturbed, with the minor difference being that courts now evaluate each approach for purposes of a motion to dismiss for failure to state a claim, as opposed to a motion to dismiss for lack of subject matter jurisdiction.\textsuperscript{21} The courts now have jurisdiction simply to determine if an infringement action is registered, such that there is a legitimate claim for infringement, and the case may move forward. Because the opinion did little to change the debate, circuits which had previously adopted either the registration or application approach have simply reaffirmed their belief in their respective approach post-Reed Elsevier.\textsuperscript{22}

III. THE REGISTRATION APPROACH

The registration approach posits that a claim for copyright infringement may only be brought upon an affirmative or negative decision from the Copyright Office of the application for a copyright.\textsuperscript{23} While some of the courts that follow this approach have suggested that the plaintiff must have a physical copy of the grant or denial of the copyright to file a claim,\textsuperscript{24} the consensus is that there simply must be a decision from the Copyright Office.\textsuperscript{25} These courts will grant a motion to dismiss for failure to state a claim (or previously a motion to dismiss for lack of jurisdiction) if the applicant has only filed his or her application with the Copyright Office before bringing suit.\textsuperscript{26}

One basic rationale for this approach is that in a situation in which an owner’s application for copyright is refused, 17 U.S.C. § 411(a) still allows for an infringement claim to be filed so long as notice is served on the Copy-
yright Office Register.27 Other courts adopting the registration approach focus on the seemingly plain language of § 411.28 In addition to the plain language of § 411, these courts will look to the surrounding sections (primarily §§ 408 and 410) for how these sections use the words “registration” and “application.”29

Only the Tenth and Eleventh Circuits have conclusively adopted the registration approach in their circuit courts.30 Both of these circuit decisions were rendered before the *Reed Elsevier* opinion from the Supreme Court, and thus discuss the registration approach in the context of jurisdiction.31 Despite this, both circuits have reaffirmed their reasoning and belief in the registration approach in a post-*Reed Elsevier* reading of § 411.32 The other three circuits that have adopted the registration approach have only had their decisions reach the district courts within those circuits, but there is every indication that their circuit courts would rule in favor of the registration approach.33

A. THE TENTH CIRCUIT: LA RESOLANA ARCHITECTS

In the Tenth Circuit case of *La Resolana Architects v. Clay Realtors Angel Fire*, the plaintiff, an architectural firm, had drawn plans for a potential townhouse project, the Angel Fire project, in the year 1997.34 The project was ultimately abandoned.35 In 2003, an employee of the architectural firm visited a building site of the defendant and recognized the townhouses as similar to the ones designed for the abandoned Angel Fire project.36 Less than a month later, the plaintiff filed a copyright for the drawings of the townhouses from the Angel Fire project, and filed a lawsuit for copyright infringement thirteen days after filing for a copyright.37 The court contemplated a motion to dismiss because the plaintiffs only had a letter from the

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29. *Id.* at 1200-01.
30. *La Resolana*, 416 F.3d at 1195; M.G.B. Homes v. Ameron Homes, 903 F.2d 1486, 1489 (11th Cir. 1990).
31. *M.G.B. Homes*, 903 F.2d at 1489; *La Resolana*, 416 F.3d 1195.
32. *See* Enter. Mgmt. Ltd. v. Warrick, 717 F.3d 1112, 1119-20 (10th Cir. 2013); Kernel Records Oy v. Mosley, 694 F.3d 1294, 1302 n.8 (11th Cir. 2012).
34. *La Resolana*, 416 F.3d at 1197.
35. *Id.*
36. *Id.*
37. *Id.*
Copyright Office stating that the copyright was approved for registration (which had been received nearly five months into the litigation), but a certificate of registration had not yet been issued by the Copyright Office.\footnote{38} The copyright registration was to be effective the day before the initiation of the lawsuit, as soon as the certificate of registration was finally received.\footnote{39} The court eventually granted the defendant’s motion to dismiss for lack of jurisdiction, finding that the plaintiff had not satisfied the “registration” requirement of \textsection\textsection \footnote{40} 411.

The court generally found that, because the registration of a copyright is a voluntary action, which allows a party to enforce their copyright in an infringement suit, the legislature meant to incentivize parties to register their copyrightable material in order for that party to take advantage of the ability to file an infringement claim.\footnote{41}

The court aligned itself with the registration approach based upon the “[a]ct’s seemingly plain language.”\footnote{42} It found that the statute in question contained affirmative steps that had to be taken, by both the applicant and the Copyright Office, before “registration” was complete.\footnote{43} The court seemingly found the most important affirmative acts to be the purported requirement from \textsection\textsection 410(a) and 410(b).\footnote{44} Section 410(a) requires the Register to “‘examine,’ to ‘register,’ and then to ‘issue’ the certificate of registration” before a copyright is registered,\footnote{45} and \textsection 410(b) alternatively requires the Register to “determine[] . . . the material deposited does not constitute copyrightable subject matter” before refusing the registration.\footnote{46}

While the court in \textit{La Resolana} suggested that the letter the architectural firm had received from the Copyright Office (stating that the copyright had been approved, but the certificate may be delayed) would be sufficient for an infringement claim, the case was ultimately dismissed because the lawsuit was brought before any such letter or affirmative response from the Copyright Office had been received.\footnote{47}

As noted previously, the Tenth Circuit has impliedly upheld their adoption of the registration approach after the \textit{Reed Elsevier} decision.\footnote{48}
More directly, several district courts within the Tenth Circuit have explicitly continued the use of the registration approach after 2010.

B. THE ELEVENTH CIRCUIT: M.G.B. HOMES

The Eleventh Circuit case of *M.G.B. Homes v. Ameron Homes* also involved plans for a housing development. The plaintiff, M.G.B. Homes, filed suit against the defendant, a rival homebuilder, for allegedly copying the floor plan found on one of M.G.B.’s flyers. Despite the main issue being the scope of the copyright received by M.G.B., the court did briefly address the registration approach in all but name.

M.G.B. filed for a copyright on May 5, 1986 but did not receive a certificate of registration until several months later on July 28, 1986. M.G.B. filed a copyright infringement complaint a few weeks before receiving its certificate of registration, on July 3, 1986. However, because M.G.B. had not yet received an affirmative action from the Copyright Office at the time of the initiation of the lawsuit, the court dismissed the case. M.G.B. eventually refiled the lawsuit and amended the complaint after they had received the certificate, in order to comply with the district court’s reading of § 411. The Eleventh Circuit, on appeal, condoned the fact that the district court had waited to exercise jurisdiction until M.G.B. had actually received a certificate of registration. While this court did not explicitly state that it was adopting the registration approach, a subsequent opinion, and many district courts within this circuit, have interpreted the language in *M.G.B.* to have done exactly that. Although the subsequent decision by the circuit court decision was decided before *Reed Elsevier*, at least one district court

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50. *M.G.B. Homes v. Ameron Homes, 903 F.2d 1486, 1487 (11th Cir. 1990).*

51. *Id. at 1487-88.*

52. *Id. at 1488-89.*

53. *Id. at 1489.*

54. *Id.*

55. *M.G.B. Homes v. Ameron Homes, 903 F.2d 1486, 1489 (11th Cir. 1990).*

56. *Id.*

57. *Id. at 1489-90.*

58. *Brewer-Giorgio v. Producers Video, Inc., 216 F.3d 1281, 1285 (11th Cir. 2000).*

within the Eleventh Circuit has continued to uphold the registration approach precedent post-\textit{Reed Elsevier}.\textsuperscript{60}

\section*{C. DISTRICT COURTS WITHIN THE SIXTH, THIRD, AND EIGHT CIRCUITS}

While the Eighth, Sixth, and Third Circuit Courts have not affirmatively made a decision to follow the registration approach, many district courts within these circuits have begun to adopt the registration approach.

District courts in the Eighth Circuit first adopted the registration approach in 2006.\textsuperscript{61} In \textit{TVI, Inc.}, the court, like many other courts adopting the registration approach, opted for a reading of the “plain language.”\textsuperscript{62} A separate district within the Eighth Circuit, previous to \textit{Reed Elsevier}, also found that the Eight Circuit would likely opt for a plain reading approach to the statute, and favor the registration approach.\textsuperscript{63}

District courts in the Sixth Circuit began to adopt the registration approach slightly before the \textit{Reed Elsevier} opinion.\textsuperscript{64} The court in \textit{Hawaiian Village Computer Inc.} found that although the Sixth Circuit had declared registration to be “a prerequisite to filing a copyright infringement suit,”\textsuperscript{65} the circuit court had not yet addressed the registration or application approaches.\textsuperscript{66} This court found that, because of the language of a prior decision, the Sixth Circuit would give considerable deference to the plain language of the statute.\textsuperscript{67} As plain language analysis is central to the registration approach, the court in \textit{Hawaiian Village} determined “that the Sixth Circuit would favor the registration approach.”\textsuperscript{68} At least one subsequent district court decision has affirmed the analysis done by this court.\textsuperscript{69}

\begin{footnotesize}
\begin{itemize}
\item[60.] See \textit{Marc Anthony Builders}, 2011 U.S. Dist. LEXIS 74706, at *5.
\item[61.] \textit{TVI, Inc. v. InfoSoft Techs., Inc.}, No. 4:06cv00697JCH, 2006 U.S. Dist. LEXIS 71240 (E.D. Mo. Sept. 29, 2006).
\item[62.] See \textit{ibid}.
\item[65.] \textit{Hawaiian Vill. Computer, Inc.}, 501 F. Supp. 2d at 953 (citing Murray Hill Publ’ns, Inc. v. ABC Commc’n’s., 264 F.3d 622, 630 (6th Cir. 2001)).
\item[66.] \textit{Hawaiian Vill. Computer, Inc.}, 501 F. Supp. 2d at 953.
\item[67.] \textit{Id.} at 954. The previous case of \textit{Murray Hill} from the Sixth Circuit analyzed derivatives works under the Copyright Act. \textit{Murray Hill}, 264 F.3d 622. The \textit{Hawaiian Village} court chose to follow the Murray Hill court’s method of analysis, whose first step involved looking at the plain language of the statute.
\item[68.] \textit{Hawaiian Vill. Computer, Inc.}, 501 F. Supp. 2d at 954.
\item[69.] \textit{Teevee Toons}, 501 F. Supp. 2d at 968.
\end{itemize}
\end{footnotesize}
Finally, two years ago, and after the Reed Elsevier decision, district courts in the Third Circuit began to align themselves with the registration approach. In *Patrick Collins, Inc.* the court found the statute unambiguous and opted for a plain reading of the statute. With little additional rationale, the court emphatically stated that “[i]n enacting 17 U.S.C. § 411(a), Congress chose the registration approach, and we must abide by that decision.” In 2013, a district court within the Third Circuit again recognized that the circuit court had yet to adopt either approach. This court, instead of relying on *Patrick Collins*, decided to consult “case law in the Third Circuit decided post-Reed Elsevier.” After reviewing these cases, the court determined that the adoption of the registration approach in the Third Circuit was likely, going so far as to say that the plaintiffs could not have a valid claim for copyright infringement until they actually held a certificate of copyright registration.

**IV. THE APPLICATION APPROACH**

The application approach, on the other hand, posits that a claim of copyright infringement may be brought at any point after the application has been submitted to the Copyright Office. This is based upon two main ideas. The first idea is that, because copyrights are backdated to the date of application, plaintiffs should be able to defend themselves from infringement at any point after this date. Several courts have also pointed to the fact that under the registration approach, the statute of limitations, coupled with potential backlogs at the Copyright Office, could create a situation in which a person could never defend against a clear infringement. The second main reason for allowing infringement suits after an application is submitted to the Copyright Office is based on a contextual statutory analysis. Many of these courts point to the language of surrounding sections to buttress their use of the application approach. For example, courts point to the language of 17 U.S.C. § 408, which states that registration can be obtained immediately on submission of the application.

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71. *Id.* at 570.
73. *Id.* at *6.
74. *See id.* at *6-7. This diverges slightly from the consensus of courts adopting the registration approach. Typically any notice by the Copyright Office that the registration is imminent, or a certificate is forthcoming, is sufficient to show registration. *See, e.g.*, La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195, 1201 (10th Cir. 2005).
75. *Cosmetic Ideas, Inc.* v. IAC/InteractiveCorp, 606 F.3d 612 (9th Cir. 2010).
76. *See, e.g.*, *id.* at 620.
once a party delivers all of the relevant documents (such as the application, fee, etc.) to the Copyright Office.\textsuperscript{77}

The Ninth Circuit has most definitively adopted the application approach,\textsuperscript{78} while decisions from the Fifth\textsuperscript{79} and Seventh\textsuperscript{80} Circuits have been interpreted to have adopted the application approach. While all of these decisions were made before the \textit{Reed Elsevier} opinion, they have since been reaffirmed. In addition to these circuits, district courts within the First and Fourth Circuits have sided with the application approach in the last several years.\textsuperscript{81}

A. \textsc{The Ninth Circuit: \textit{Cosmetic Ideas} v. IAC}

The most thorough analysis of the application approach was done in the Ninth Circuit case of \textit{Cosmetic Ideas}. This case involved a dispute between Cosmetic and the parent company of The Home Shopping Network (IAC) over a piece of jewelry designed by Cosmetic.\textsuperscript{82} Cosmetic began selling the piece around 1999, and claimed that around 2005, IAC began selling a “virtually identical’ necklace.”\textsuperscript{83} It was not until after IAC began selling the alleged copy that Cosmetic filed the paperwork for a copyright with the Copyright Office in 2008.\textsuperscript{84} Cosmetic filed suit less than two weeks after receiving a notice from the Copyright Office that it had received the application and all of the necessary documents.\textsuperscript{85}

The court first analyzed the plain language of the statute in question, § 411, because when a statute is unambiguous, there is generally no need for

\begin{footnotes}
\item[77] In relevant portion, 17 U.S.C. § 408(a) reads: [T]he owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.
\item[78] \textit{Cosmetic Ideas}, 606 F.3d 612.
\item[79] Apple Barrel Prods. v. Beard, 730 F.2d 384 (5th Cir. 1984).
\item[80] Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624 (7th Cir. 2003).
\item[82] Cosmetic Ideas, 606 F.3d 612.
\item[83] \textit{Id.} at 614.
\item[84] \textit{Id.}
\item[85] \textit{Id.}
\end{footnotes}
further analysis. The court found the language of § 411 to be unclear as to the implication of “registration,” and that the accompanying definitions for Title 17 provided even less clarification for what “registration” is meant to entail. Because of this, the court then looked at the Act “as a whole,” in order to determine the statutory intent and context.

The court acknowledged the fact that some of the provisions, § 410(a) and the end of § 411(a), described the actions and steps that must be undertaken by the Register of Copyrights. Section 410(a) states that “the Register shall register the claim and issue . . . a certificate of registration,” and § 411(a) states that when filing an infringement suit, after an application is initially rejected, a copy must be served on the Register of Copyrights. While this may seem to suggest that “registration” is not effected upon the receipt of an application, the court found that in the overall context of Title 17, the application approach more appropriately conformed to the congressional intent.

Specifically, the court pointed to the fact that § 408 only states that a party “may obtain registration . . . by delivering” the appropriate paperwork to the Copyright Office. In addition to this, § 411(a) allows a party to file a copyright infringement suit even if the Copyright Office rejects the copyright outright. Finally, the court noted that by the time of the opinion, Cosmetic had in fact received a certificate of registration, which had an effective date dating back to several weeks before the initiation of the lawsuit. Thus, for purposes of this specific lawsuit, the issue of IAC’s motion to dismiss for failure to state a claim had become moot.

Despite this analysis, the court was not satisfied that “the plain language of the Act unequivocally support[ed] either the registration or application approach.” This led the court to do a historical and contextual anal-

86. Id. at 616 (citing United States v. Cruz-Gramajo, 570 F.3d 1162, 1167 (9th Cir. 2009)).
88. Cosmetic Ideas, 606 F.3d at 616.
89. Id. at 617.
90. Id.
91. Id. (citing 17 U.S.C.A. §§ 410(a) (LexisNexis 2014), 411(a) (LexisNexis 2008)).
92. See Cosmetic Ideas, 606 F.3d at 617.
93. Id. (citing 17 U.S.C.A. § 408(a) (LexisNexis 2005)).
95. Id. at 616.
96. The court determined that although the issue of the motion was moot, it would still definitively decide whether to adopt the registration or application approach in the circuit. The court found that the problem presented in the case was “capable of repetition yet evading review” as well as being an unsettled issue among the district courts within the circuit. Cosmetic Ideas, 606 F.3d at 616.
97. Id. at 618.
ysis of § 411 beginning at its inception.\textsuperscript{98} After this review, the court found that the application approach “better fulfills Congress’s purpose of providing broad copyright protection while maintaining a robust federal register.”\textsuperscript{99}

Perhaps most importantly, the leading treatise on copyrights best summarized the policy reasons behind the court’s adoption of the application approach when it said, “[g]iven that the claimant . . . will ultimately be allowed to proceed regardless of how the Copyright Office treats the application, it makes little sense to create a period of ‘legal limbo’ in which suit is barred.”\textsuperscript{100}

**B. THE FIFTH CIRCUIT: APPLE BARREL PRODUCTIONS**

The Fifth Circuit, in *Apple Barrel Productions*, dealt with a battle between two children’s country music programs.\textsuperscript{101} The court, pre-Reed Elsevier, dispatched with the issue of when a copyright is registered with little more than one sentence. The *Apple Barrel* court cited to the previously mentioned leading treatise on copyright infringement actions,\textsuperscript{102} and simply said, “One need only prove payment of the required fee, deposit of the work in question, and receipt by the Copyright Office of a registration application.”\textsuperscript{103}

Several district courts within the Fifth Circuit have addressed this issue, post-Reed Elsevier, and have determined that the application approach is still applicable within the Fifth Circuit.\textsuperscript{104} The court in *Compound Stock Earnings* addressed another criticism of the application approach that is not always as prevalent in the argument over which approach is the correct interpretation of § 411. One of the issues that the court wrestled with was whether only requiring an application would create a situation in which a party, with no legitimate claim to the copyrightable work or who had not actually filed the application, could rely on the previously filed application, and maintain an action for copyright infringement. While the likelihood of this scenario would be rare, the court still decided to address this potential issue of the application approach. It ultimately looked to other case law in the circuit, and noted that courts generally review the application to ensure

\begin{footnotes}
\footnotetext[98]{Id. at 619.}
\footnotetext[99]{Id.}
\footnotetext[100]{Id. at 620 (citing 2 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.16[B][1][a][i] (2008)).}
\footnotetext[101]{Apple Barrel Prods. v. Beard, 730 F.2d 384, 385 (5th Cir. 1984).}
\footnotetext[102]{NIMMER, supra note 100.}
\footnotetext[103]{Apple Barrel Prods., 730 F.2d at 386-87.}
\end{footnotes}
that it was filed by the party who had instituted the suit, and to perform a preliminary analysis of the sufficiency of the application.\(^{105}\)

C. THE SEVENTH CIRCUIT: A TREND TOWARDS THE APPLICATION APPROACH

The Seventh Circuit has at worst been a circuit that flip-flops between each approach, most recently aligning with the application approach, and at best is a circuit which has recognized that post-Reed Elsevier, use of the application approach is the appropriate standard.

The first major decision from the Seventh Circuit regarding the application versus registration approach debate did not come until 2003.\(^{106}\) Like many other circuits, the Seventh Circuit looked to the leading treatise on copyright for their analysis of the requirements of § 411.\(^{107}\) The court stated that “an application for registration must be filed before the copyright can be sued upon.”\(^{108}\)

The Seventh Circuit then followed this decision, only a year later, with a case that seemed to directly conflict with that reading.\(^{109}\) Curiously, the court in Gaiman believed this question to be unanswered by Chicago Board of Education, and determined that application alone was insufficient under § 411.\(^{110}\) The court determined that an affirmative or negative action must be taken by the Copyright Office before a lawsuit can be brought, which is exactly what is required under the registration approach.\(^{111}\)

No other significant decision took place until after the decision in Reed Elsevier, and post-Reed Elsevier only the Northern District of Illinois has addressed this contradiction. Only one of these district court opinions, TriTeq Lock, has found that the precedent in the Seventh Circuit requires a following of the registration approach.\(^{112}\) As suggested above, the most recent trend within the Seventh Circuit is an adoption of the application approach. Notably, the two most recent decisions in the Seventh Circuit’s District Courts have adopted the application approach explicitly, and not found Gaiman or TriTeq Lock to mandate anything to the contrary.

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105. Id. at ¶¶ 14-15.
110. Id. at 655.
111. Id. The court’s exact language was that “an application to register must be filed, and either granted or refused, before suit can be brought.” (emphasis added). Id.
First, at the beginning of 2013, the court in *Leventhal v. Schenberg* specifically pointed to *Chicago Board of Education* and *Reed Elsevier* as requiring only that the application be “filed before the copyright can be sued upon.”113 The court found the attached letter of receipt from the Copyright Office to be sufficient to allow the litigation to proceed.114

In August of 2013, the Northern District of Illinois, in *Panoramic Images*, again decided to side with *Chicago Board of Education* and adopt the application approach.115 This court explicitly acknowledged that *Gaiman* and *TriTeq Lock* seemed to have adopted the registration approach within the Seventh Circuit, but instead pointed to *Leventhal* and *Hard Drive Productions*116 for the trend of using the application approach within the circuit.117 While the Seventh Circuit court has not clarified this discrepancy between their opinions, the trend among the district courts tends to support an adoption of the application approach within the Seventh Circuit.118

D. DISTRICT COURTS WITHIN THE FIRST AND FOURTH CIRCUITS

Similar to the Seventh Circuit, the First and Fourth Circuits have trended towards an adoption of the application approach. Additionally, the decisions to come out of these circuits have almost entirely been rendered after the decision in *Reed Elsevier*, tending to suggest that the application approach is gaining more momentum after the Supreme Court’s opinion.

The First Circuit has discussed this issue after *Reed Elsevier*, but provided no guidance as to what their understanding of “registration” is.119 The First District Court within the First Circuit to decide this issue did so in 2003.120 The court looked at §§ 408(a), 410(d), and 411(a) to determine

114. Id. at 844-45.
118. It seems that the Northern District of Illinois at first decided on the application approach (*Hard Drive Productions*), reversed course to the registration approach (*TriTeq*), and then decided the application approach was in fact correct (*Leventhal and Panoramic Images*).
119. *Airframe Sys. v. L-3 Commc’ns Corp.*, 658 F.3d 100, 105 (1st Cir. 2011) (stating that “proof of registration” is still an element, but not providing what constitutes either “proof” or “registration”); *Latin Am. Music Co. v. Media Power Grp.*, Inc., 705 F.3d 34, 42-43 (1st Cir. 2013) (same).
how the Act as a whole treated the word “registrations.”\textsuperscript{121} The court was most persuaded by § 410(d), which states the effective date of the registration is that the date that the application was received.\textsuperscript{122} The court then quickly chose to adopt the application approach within that district.\textsuperscript{123} Since then, only one other district court has addressed this issue.\textsuperscript{124}

Before Reed Elsevier, at least one district court within the Fourth Circuit determined that the use of the application approach was a proper reading of § 411.\textsuperscript{125} In Iconbazaar, the court looked to the history of the statute to determine what the intent of Congress was, as well as looking at the overall context of the provision in question (§ 411).\textsuperscript{126} Upon this analysis, the court determined that the application approach was the best way to realize congressional intent. It also found that the plaintiff’s attached letter from the Copyright Office, stating that they had received all appropriate documents and payments, was sufficient to show registration under § 411.\textsuperscript{127} After Reed Elsevier, one more district decided in favor of the application approach.\textsuperscript{128} The court followed much of the same reasoning as in Iconbazaar, and recognized a trend within the district courts of the Fourth Circuit.\textsuperscript{129}

Both the First Circuit and the Fourth Circuit have had district courts adopt the application approach within the last two years.\textsuperscript{130} This has been accompanied by district courts within the Seventh Circuit, in the last several years, reversing course and again adopting the application approach.\textsuperscript{131} It seems that these three circuits will soon align themselves with both the Fifth and Ninth Circuits’ use of the application approach.

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 77.
\textsuperscript{123} Id.
\textsuperscript{124} Alicea v. Machete Music, No. 10CV30002-MAP, 2012 U.S. Dist. LEXIS 22596, at *5 (D. Mass. Feb. 23, 2012) (declining to choose because the plaintiff would fail to satisfy the test under both the application and registration approaches). The court noted that Foraste might suggest a trend towards the application approach. Id.
\textsuperscript{125} Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004); see also Pure Country Weavers v. Bristar, Inc., 410 F. Supp. 2d 439, 444 (W.D.N.C. 2006) (stating that it did not have to pick a side, but the analysis suggesting that the application approach would be acceptable).
\textsuperscript{126} Iconbazaar, 308 F. Supp. 2d at 634.
\textsuperscript{127} Id. at 634 n.3.
\textsuperscript{129} Id. at *34-35.
\textsuperscript{131} Leventhal v. Schenberg, 917 F. Supp. 2d 837, 844 (N.D. Ill. 2013) (quoting Chicago Bd. of Educ. v. Substance, Inc., 354 F.3d 624, 631 (7th Cir. 2003)).
V. ANALYSIS

The above analysis and interpretation by the courts clearly indicates that only one approach can be correct, and leaves little common ground between the two approaches. Much like the court in Prunte, this Article finds the application approach to be the correct interpretation and “joins Judge Kennedy, the leading copyright treatise, and those courts that have held that an infringement suit may be brought when a copyright application is completed and submitted to the United States Copyright Office.”132 The analysis that follows will further elaborate the reasoning for the application approach being the correct interpretation and application of § 411.

This analysis will first discuss the issues and flaws present in the reasoning of the courts adopting the registration approach, followed by the justifications for a “plain language” analysis leading to an adoption of the application approach, and finally why, if a plain language analysis alone is not persuasive, the application approach is still the appropriate interpretation of § 411.

A. WHY THE REGISTRATION APPROACH IS THE IMPROPER INTERPRETATION OF § 411

The Eleventh Circuit was the first Circuit court to adopt the registration approach.133 In 1990, when it was decided, the question was approached as solely a jurisdictional question due to the decision being rendered pre-Reed Elsevier.134 This circuit court performed little analysis of the statute in question other than determining that previous case law required “registration,” which is now recognized as a somewhat ambiguous term in the Copyright Act.135 The court then ratified the lower court’s finding that a party must have the certificate of registration in-hand in order to file a copyright infringement suit.136 The Eleventh Circuit, and the district courts within that Circuit, have yet to provide insight into how and why the cursory analysis should still be applicable almost twenty-five years later.

The only circuit court to provide their analysis before adopting the registration approach was the Tenth Circuit.137 The analysis of this specific decision will be particularly scrutinized due to the prevalence of its reason-

134. Id.
135. Id.
136. See id. at 1489.
137. La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005).
ing in other opinions that have adopted the registration approach and proponents of such an approach. The reasoning of this particular opinion also deserves heightened exploration because of the serious weight that this reasoning is given when arriving at a conclusion in favor of registration in other courts throughout the United States. The Tenth Circuit adopted the registration approach by supposedly using the “plain language” of the provision in question (§ 411). However, the court’s “plain reading” of the language contained in § 411 ventured into an analysis of other sections of the Copyright Act, particularly § 410. This court, when venturing into other sections, failed to recognize that these sections did not purport to be for the purpose of analyzing when a civil infringement claim may be brought. This is in stark contrast to § 411 of the Copyright Act, which is explicitly entitled “Registration and civil infringement actions,” and meant to be consulted for purposes of these issues.

The court encountered this exact problem when trying to use § 410 to support the choice of the registration approach. It determined that § 410(a), which states that the Copyright Office can issue a “Certificate of Registration” after reviewing the submitted materials, suggested that the submission of the application materials and the point of registration are two separate events. However, this court then partially undermined its reasoning by acknowledging that § 411 (the provision in question) does not contain any reference to a “certificate” when discussing the requirements for bringing a copyright infringement suit. Based upon this, the Tenth Circuit’s use of § 410 to justify its interpretation of § 411 seems to be, at best, misguided.

Much like other courts adopting the registration approach, the Tenth Circuit then suggested two different policy rationales for interpreting the

139. La Resolana, 416 F.3d at 1202.
140. Id. at 1203.
143. 17 U.S.C. § 410(a) reads:
When, after examination, the Register of Copyrights determines that...the material deposited constitutes copyrightable subject matter and that the other legal and formal requirements of this title have been met, the Register shall register the claim and issue to the applicant a certificate of registration under the seal of the Copyright Office.
144. La Resolana, 416 F.3d at 1203.
145. Id.
statute as it had done. The first reason was that Congress had “created significant incentives” for an owner to copyright their material, and that this was a carrot-and-stick approach to coax the owner into copyrighting their work.\(^{146}\) The court declared that this carrot-and-stick rationale was paramount to the underwriting of this statute.\(^{147}\) Despite claiming that its rationale was founded upon the “plain meaning” of the statute, this court as well as many others, without any citation to legislative intent, decided that the congressional intent of § 411 was to use it as a “‘carrot’ to induce registration.”\(^{148}\) While \textit{La Resolana Architects} as well as several other cases did spend a portion of their opinions addressing several of the amendments, they have not gleaned any meaningful intent from the actual legislature itself.\(^{149}\)

As many cases adopting the registration approach have simply stated that they agree with the statutory history analysis done in \textit{La Resolana Architects}, some deconstruction of the specific steps taken in that part of the analysis is appropriate. \textit{La Resolana Architects} first pointed to a 1988 amendment in which Congress sought to align United States law with an international convention known as the Berne Convention.\(^{150}\) Because Congress, instead of rewriting the entirety of Title 17 to comply with this new convention, simply placed an exception in § 411,\(^{151}\) the court interpreted this to mean that Congress intended “registration” to be required for all domestic suits.\(^{152}\) This exception was meant to ensure that foreign works did not have to undergo the formalities required by United States law, as it was in conflict with a main objective of the Berne Convention that formalities (such as registration) would not be a prerequisite for a work to be copyrighted.\(^{153}\) The court in \textit{La Resolana} suggested that by not exempting domestic works from “registration” under § 411, Congress had expressed their intent that domestic works would still be required to receive actual notice of registration before a copyright owner could pursue infringement actions.\(^{154}\) This, however, begs the question. To find that not exempting domestic

\begin{itemize}
  \item \(^{146}\) \textit{Id.} at 1204-05.
  \item \(^{147}\) \textit{Id.}
  \item \(^{149}\) \textit{La Resolana}, 416 F.3d at 1205
  \item \(^{150}\) \textit{Id.}
  \item \(^{151}\) At the time the exception read: “[E]xcept for actions for infringement of copyright in Berne Convention works whose country of origin is not the United States . . . .” 17 U.S.C.A. § 411 (LexisNexis 2008).
  \item \(^{152}\) \textit{La Resolana}, 416 F.3d at 1206.
  \item \(^{153}\) \textit{Id.} at 1205-06.
  \item \(^{154}\) \textit{Id.}
\end{itemize}
works requires use of the registration approach presupposes that the registration approach is in fact the correct interpretation of the word “registration.” The interpretation of this word, and its surrounding language, is fundamental to the debate between the two approaches.\textsuperscript{155} Nothing in the legislative history of the 1988 amendment indicates that congressional action was meant to help alleviate these starkly conflicting approaches throughout its inaction.\textsuperscript{156}

The Tenth Circuit then pointed to opportunities in 1993 and 2005 to remove the word “registration,” where the language was ultimately left in.\textsuperscript{157} This analysis, cited by many courts adopting the registration approach, does nothing to further the debate over the definition of “registration” or show the intent of congress in this respect. While it is true that the federal courts must interpret statutes to “give effect to the intent of Congress,”\textsuperscript{158} implicit in this charge is the principle that that courts shall not manufacture policy rationales which are not shown to be the intent of Congress.\textsuperscript{159} Although the court found that “Congress . . . took up the question of whether to eliminate registration as a prerequisite to filing suit for infringement” and did not adopt either of the amendments,\textsuperscript{160} inaction by Congress should not be interpreted to be an affirmation of one interpretation of a present ambiguity. As a recent study by the Brookings Institute has shown, the last three congressional sessions (110th-112th) have concluded with fewer than twelve percent of the total bills introduced eventually becoming law.\textsuperscript{161} During the 100th congressional session, which declined to adopt the amendments suggested to be important by \textit{La Resolana}, the passage rate was slightly higher at 16.9%.\textsuperscript{162} Still, with passage rates well below twenty percent, failure to adopt an amendment should not be pointed to as definitive congressional intent for that statute. Additionally, the differing interpretation of the application and registration approach existed at the

\begin{itemize}
\item \textsuperscript{155} Supra notes 8-11.
\item \textsuperscript{156} See \textit{La Resolana}, 416 F.3d at 1206.
\item \textsuperscript{157} Id.
\item \textsuperscript{158} TVI, Inc. v. InfoSoft Techs., Inc., No. 4:06cv00697JCH, 2006 U.S. Dist. LEXIS 71240, at *2 (E.D. Mo. 2006) (quoting United States v. McAllister, 225 F.3d 982, 986 (8th Cir. 2000)).
\item \textsuperscript{159} See id.
\item \textsuperscript{160} \textit{La Resolana}, 416 F.3d at 1206.
\item \textsuperscript{162} Id.
\end{itemize}
time of these proposed amendments.\textsuperscript{163} Congress’ failure to change the language of a statute that was contemporaneously being interpreted in two different manners should clearly not be viewed as congressional support for either of the approaches.

While eventually siding with the registration approach, the court in \textit{Patrick Collins} clearly acknowledged that its “own policy views do not give [it] license to rewrite an unambiguous statute.”\textsuperscript{164} Although this court’s view of the statute is in conflict with this Article’s position, this court correctly recognized that policy rationales should not be the main purpose for the adoption of either of the approaches.\textsuperscript{165}

Although several courts have relied heavily on policy reasons for adopting the registration approach, still more have focused on the plain language of the statute. The real problem with adopting the registration approach based on this rationale is the analysis that is done while looking at the “plain language” of § 411.

\textbf{B. WHY THE APPLICATION APPROACH IS THE CORRECT “PLAIN LANGUAGE” ANALYSIS OF § 411}

Almost universally, courts determining whether the application or registration approach is appropriate discuss the “plain language” of § 411. The analysis of the plain language of § 411 strays to other sections under both approaches. The Supreme Court has deemed plain language analysis appropriate for statutory construction when an ambiguous term can be clarified in the broader context of the statute.\textsuperscript{166} Statutory construction such as this is a “holistic endeavor.”\textsuperscript{167} However, “[w]hen examining statutory language, the court should generally give words their ordinary, contemporary, and common meaning.”\textsuperscript{168} The sections of the Copyright Act that are typically consulted to better understand the meaning of “registration” within § 411 are

\begin{footnotesize}
\begin{enumerate}
\item[163.] See, e.g., M.G.B. Homes v. Ameron Homes, 903 F.2d 1486, 1489 (11th Cir. 1990); Apple Barrel Prods. v. Beard, 730 F.2d 384 (5th Cir. 1984).
\item[165.] See id.
\item[166.] A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme--because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.
\item[167.] Id.
\end{enumerate}
\end{footnotesize}
§§ 408-412. However, the majority of the focus is spent on §§ 408, 410, and other parts of 411.

The usefulness of § 410 (specifically § 410(a)) can be dispatched with most easily. Proponents of the registration approach point to § 410(a) for the idea that affirmative action must be taken by the Copyright Office in order to effect registration. However, as the Iconbazaar court noted, there is no suggestion that § 410(a) is meant to impose limitations on the institution of a copyright infringement claim. Part (a) only discusses when a certificate of registration may be issued to the applicant, and is placed in the Act so that the Register of Copyrights’ ultimate determination about the application is required in order to issue that certificate.

Perhaps the only pertinent part of § 410 would be subpart (d). As noted by several courts, this section could be used in support of either approach. The most succinct explanation of how this section supports both approaches comes from the Ninth Circuit.

Because this subsection dates a later-approved registration as of the date of its application, it supports the interpretation that application is the critical event [supporting the application approach]. However, because this back-dating does not occur until after the Copyright Office or a court has deemed the registration acceptable, the statute could be read to require action by the Register to effect registration [supporting the registration approach].

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169. Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 617 (9th Cir. 2010).
170. Id.
171. This subsection instructs the Register of Copyrights to issue a “certificate of registration” upon a finding that all legal and formal requirements are met by the materials that have been submitted for copyright registration. 17 U.S.C.A. § 410(a) (LexisNexis 2014).
173. “[T]his statute could be read to apply only to the requirements for issuance of a registration certificate, not to the requirements for instituting an action for infringement.” Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004).
174. 17 U.S.C.A. § 410(a) (LexisNexis 2014); see Iconbazaar, 308 F. Supp. 2d at 634.
175. “The effective date of a copyright registration is the day on which an application, deposit, and fee, which are later determined by the Register of Copyrights or by a court of competent jurisdiction to be acceptable for registration, have all been received in the Copyright Office.” 17 U.S.C.A. § 410(d) (LexisNexis 2014).
176. Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 618 (9th Cir. 2010).
177. Id.
178. Id. (internal citations omitted).
Regardless of which approach uses this subsection as support, the end result is still that the copyright registration date will be backdated to when the application was accepted by the Copyright Office. Due to the registration date being that of the receipt of the application, a party is entitled to file suit against any infringement that has taken place on the date of the application or forward. This should be seen to bolster the position of the application approach because the registration approach would create a sort of dead-time after the effective date of registration but before receipt of the registration certificate. Infringements during this dead-time can ultimately be litigated, but the copyright holder must likely wait in excess of eight months to take any action if one subscribes to the registration approach. Despite this, some courts have still found that this section can be “read in two ways” and does not “unequivocally support” either approach. To address this, courts will sometimes continue to look to other sections for the broader context of this statute.

Addressing the broader context of the statute, § 408 helps to show why the application approach is the most appropriate interpretation of § 411; specifically, § 408(a). As noted previously, “If the statute is unambiguous and if the statutory scheme is coherent and consistent, [the] inquiry ends there.” This section clearly states that registration of a copyright claim can be obtained by delivering the application with the appropriate fees. It should be reiterated that the ultimate question is at what point “Registration of the copyright claim” is made, for purposes of filing an infringement claim under § 411. This language in § 408(a) would seem to end the inquiry, but still courts march forward in their analysis.

Lastly, courts will look to the surrounding language of § 411(a). Section 411(a) provides an applicant the opportunity to file an infringement suit even if the application was rejected. Some courts which adopt the

179. Iconbazaar, 308 F. Supp. 2d at 634.
180. Cosmetic Ideas, 606 F.3d at 618.
181. E.g., Cosmetic Ideas, 606 F.3d at 618; Iconbazaar, 308 F. Supp. 2d at 634.
182. See Iconbazaar, 308 F. Supp. 2d at 634.
183. In relevant part, this section reads:

[T]he owner of copyright or of any exclusive right in the work may obtain registration of the copyright claim by delivering to the Copyright Office the deposit specified by this section, together with the application and fee specified by sections 409 and 708. Such registration is not a condition of copyright protection.

registration approach find that the backdating done under § 410(d) is sufficient to satisfy any unfair prejudice that would result by having to wait to file an infringement suit, because regardless of the outcome a suit may eventually be filed. Additionally, some courts have found this mechanism in § 411(a), which requires notice of the suit be provided to the Copyright Office, to merely be a chance for the Copyright Office to defend their ultimate denial of the copyright. Specifically, courts have looked to a Senate report for the idea that this ability to file a claim after copyright rejection “merely provides . . . the [Copyright] Office . . . a second opportunity to express its views on the claim's validity . . . .” Because of this, § 411(a) should not be interpreted as merely another mechanism through which an applicant may institute an infringement suit after waiting months for a decision from the Copyright Office, as some courts have suggested. Instead this provision is merely a safeguard which allows the applicant to challenge the validity of the Copyright Office’s rejection without having to postpone the owners copyright infringement litigation, and potentially ultimately forfeiting any damages they may receive.

During statutory interpretation, in addition to analyzing individual sections, the Supreme Court has continually stated that laws must be given a “sensible construction” and that an application “which would lead to absurd consequences, should be avoided whenever a reasonable application can be given to it . . . .” As mentioned in the introduction, construction of § 411 in accordance with the registration approach has the potential to lead to an absurd consequence as a result of following the approach.

The statute of limitations for an infringement action is three years, but a suit cannot be brought until it is registered. Conceivably, a situation

In any case, however, where the deposit, application, and fee required for registration have been delivered to the Copyright Office in proper form and registration has been refused, the applicant is entitled to institute a civil action for infringement if notice thereof, with a copy of the complaint, is served on the Register of Copyrights.

89. Brooks-Ngwenya v. Indianapolis Pub. Sch., 564 F.3d 804, 806-07 (2009). This analysis by registration approach courts undermines their own idea that the applicant can file an infringement suit regardless of the outcome, as long as they wait for a decision. This reasoning suggests that filing an infringement suit after denial is a ‘last ditch effort,’ and not simply a situation in which the applicant has to wait to file their claim, as suggested by the court.
90. Id. at 807 (citing S. Rep. No. 100-352, at 14 n.2 (1988)).
91. Id. at 806-07.
could arise under the registration approach in which an owner could not protect their copyrightable materials because registration could be so delayed that an owner would not have time to institute an infringement action.\textsuperscript{196} If “registration” is not effected until a certificate of registration is received, the owner must wait on the Copyright Office and the delays of the federal government. If application affects the registration, the owner is not punished for the backlogs and stalemates within the federal government. As there is a reasonable application of § 411 which would not result in this absurd outcome, the application approach more appropriately follows the Supreme Court’s methods of statutory construction.\textsuperscript{197}

C. WHY THE APPLICATION APPROACH IS THE CORRECT ANALYSIS OF § 411 EVEN IF A PLAIN LANGUAGE APPROACH IS UNSATISFACTORY

Even if a court were not persuaded by the plain language of § 411 and its surrounding sections, the application approach is still the most appropriate approach to align with the congressional intent of § 411. In statutory construction, if plain language analysis is inconclusive, legislative intent is an appropriate place to look for clarification.\textsuperscript{198}

This argument is not purely academic, as several courts have found the plain language of the statute inconclusive or unconvincing, yet have still made ultimate findings as to which approach is appropriate.\textsuperscript{199} The court in \textit{Performance Sales} stated that § 411(a), because of the existence of § 410(d), is ambiguous.\textsuperscript{200} This court then determined that the congressional intent was not to place the owner in “legal limbo” while the Copyright Off-

\textsuperscript{196} See Iconbazaar, L.L.C. v. Am. Online, Inc., 308 F. Supp. 2d 630, 634 (M.D.N.C. 2004); supra note 4 and accompanying text. While the delay in an affirmative action by the Copyright Office may be one source of problems, the filing of an infringement suit in practice also requires several information gathering and preparatory steps before the suit is actually filed. Even if the action by the Copyright Offices does not take the full three years, a delay near three years may, in practice, prevent recovery of damages from infringers.

\textsuperscript{197} See \textit{Katz}, 271 U.S. at 357.

\textsuperscript{198} The Court in \textit{Katz} stated that a court could look to the “legislative scheme or plan by which the general purpose of the act is to be carried out[,]” in order to ascertain the appropriate application of the statute. \textit{Katz}, 271 U.S. at 357.

\textsuperscript{199} See, e.g., Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 618 (9th Cir. 2010); Performance Sales & Mktg. LLC v. Lowe’s Cos., No. 5:07CV00140-RLV-DLH, 2012 U.S. Dist. LEXIS 131394, at *33 (W.D.N.C. Sept. 14, 2012).

\textsuperscript{200} \textit{Performance Sales}, 2012 U.S. Dist. LEXIS 131394, at *33. Section 410(d) says “The effective date of a copyright registration is the day on which an application, deposit, and fee . . . have all been received in the Copyright Office.” 17 U.S.C.A. 410(d) (LexisNexis 2014).
Office reviewed the application.\textsuperscript{201} This court also found the application approach to be the best policy because “the Copyright Office typically registers approximately ninety-eight to ninety-nine percent of claims submitted to it.”\textsuperscript{202}

Likewise, the Ninth Circuit was “not persuaded that the plain language of the Act unequivocally supports either the registration or application approach.”\textsuperscript{203} However, this court noted that a needless delay is presented by the registration approach due to the fact that a party is allowed to litigate a claim for copyright infringement regardless of whether the Copyright Office ultimately rejects the application.\textsuperscript{204} It noted that “legal limbo” can be avoided by subscribing to the application approach.\textsuperscript{205} Additionally, the Ninth Circuit pointed out that many of the courts adopting the registration approach confess that “construing the statute this way leads to an inefficient and peculiar result.”\textsuperscript{206} The Ninth Circuit Court in \textit{Cosmetic} seemed to, at worst, suggest that both approaches were appropriate interpretations of § 411, but because of the “legal limbo” presented by the registration approach, the application approach was the best choice to align with congressional intent.\textsuperscript{207} Based upon the systematic rejection of arguments made by courts adopting the registration approach, this court seems to have determined definitively that the application approach is the only logical result because it “best effectuate[s] the interests of justice and promote[s] judicial economy.”\textsuperscript{208}

\section*{VI. Conclusion}

While the issue of when a copyright infringement claim can be filed has been an issue with diverging conclusions for some time, it has become a larger issue in recent times. The number of circuits (or district courts within those circuits) deciding these issues as a case of first impression is now occurring at a staggering rate. More importantly, since the 2010 Supreme Court decision in \textit{Reed Elsevier}, more courts have chosen to align themselves with the application approach than the registration approach.

\begin{itemize}
\item \textsuperscript{201} \textit{Performance Sales}, 2012 U.S. Dist. LEXIS 131394, at *34.
\item \textsuperscript{202} \textit{Id.} (citing \textit{Nimmer}, supra note 100).
\item \textsuperscript{203} \textit{Cosmetic Ideas}, 606 F.3d at 618.
\item \textsuperscript{204} See 17 U.S.C.A. § 410(a) (LexisNexis 2014); \textit{id.} at 619.
\item \textsuperscript{205} \textit{Cosmetic Ideas}, 606 F.3d at 620.
\item \textsuperscript{207} \textit{Cosmetic Ideas}, 606 F.3d at 619-22.
\item \textsuperscript{208} \textit{See id.} at 621 (quoting Int’l Kitchen Exhaust Cleaning Ass’n v. Power Washers of N. Am., 81 F. Supp. 2d 70, 72 (D.D.C. 2000) (internal quotation marks omitted)).
\end{itemize}
The courts that have adopted the registration approach have first done so in: 1990, 2005, 2006, 2007, and 2013. Only one Circuit has chosen to adopt the registration approach post-Reed Elsevier. While the remainder of the Circuits that adopted the registration approach before Reed Elsevier have continued to follow the precedent within the circuit, the Eighth Circuit has not rendered a decision which would indicate if it will continue to follow the registration approach.

In direct contrast to this, circuits adopting the application approach for the first time have done so in: 1984, 2004, 2010, 2012, and 2013. Three of the five circuits have chosen to adopt the application approach post-Reed Elsevier. Similar to those courts that adopted the registration approach before 2010, all of the circuits which adopted the application approach before Reed Elsevier have since reaffirmed their approach.

Of the circuits that have weighed in to the discussion post-Reed Elsevier, a clear majority (a three-to-one ratio) have subscribed to the application approach. This suggests that as copyright law is brought into the twenty-first century, and as courts take a more thorough look at § 411(a), the application approach is becoming more heavily favored.

As more circuit courts (and not simply their district courts with each circuit) take a definitive stance on this issue, the Supreme Court will likely have to address this issue; unlike how the Court sidestepped a decision on the two approaches in Reed Elsevier. While there seems to be a near-even

210. La Resolana Architects v. Clay Realtors Angel Fire, 416 F.3d 1195 (10th Cir. 2005).
214. Id.
215. While the Eight Circuit did render an opinion in 2010 stating that it would continue to follow the registration approach, this was before the final decision was issued for Reed Elsevier. Charles F. Vatterott Constr. Co. v. Esteem Custom Homes, LLP, 686 F. Supp. 2d 934 (E.D. Mo. 2010).
218. Cosmetic Ideas, Inc. v. IAC/InteractiveCorp, 606 F.3d 612, 616 (9th Cir. 2010).
221. The 2010 decision of Cosmetic was rendered after Reed Elsevier, thus has not needed to be reaffirmed.
division among the circuits, the trend of recent decisions provide credence to the conclusion that the application approach is the most correct application of the congressional intent for § 411.

When not bound by precedent with their respective circuits, courts should take note of the extensive history and argument levied by proponents of each approach. Construing § 411 and its surrounding sections pursuant to the appropriate judicial methods should result in a clear shift towards adoption of the application approach. A continued surge in courts deciding these cases as an issue of first impression should begin to put more pressure on the Supreme Court to once again address this issue. If the current trend holds true, and the Supreme Court does not sidestep the issue again, the next few years should finally yield guidance from the Supreme Court clearly adopting the application approach.
Homeless Bill of Rights: How Legislators Get to Feel Pro-Homeless Without Effort or Money

COMMENT

HAILEY REHBERG*

In 2013, Illinois became the second state in the nation to enact a homeless bill of rights to protect homeless persons from discrimination in the right to use and move freely in public spaces in the same manner as any other person, the right to equal treatment by State and municipal agencies, the right not to register to vote and to vote, the right to have personal information protected, and the right to have a reasonable expectation of privacy in his or her personal property. Though legislation to protect the rights of homeless people is necessary, the Illinois Homeless Bill of Rights does not do what is needed to combat homelessness. After some background information about the history of homelessness in America and the similarities and differences between the three homeless bills of rights that have been enacted, this Comment argues that the Illinois Homeless Bill of Rights does not provide any new protection for people struggling with homelessness, but, through its limiting language, instead gives the homeless population rights that they have already possessed. This Comment also advocates alternative measures to prevent homelessness and stop the criminalization of the homeless by looking at methods implemented in other places around the country.

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* Juris Doctor Candidate, May 2015, Northern Illinois University College of Law, and Lead Articles Editor of the Northern Illinois University Law Review. I would like to thank my family, especially Randy, Stacy, Logan, and Taylor Rehberg, and my fiancé, Brian Witt, for their unending support and encouragement through all stages of the writing process. I would also like to thank Professor Mark Cordes for helping work through the constitutional law portions of my Comment, and Professor Robert Jones and Kaitlin Barclay, Notes and Comments Editor, for their guidance during the writing and editing process. Finally, I would like to recognize the Northern Illinois University Law Review Board of Editors and Staff for their hard work and dedication throughout the course of editing.
I. INTRODUCTION

“In January 2014, there were 578,424 people experiencing homelessness on any given night in the United States.”¹ Of that number, 216,197 were people in families.² In Illinois, in 2012, there were 14,144 homeless.³

² Id.
up from the 2011 statistics in which there were 14,009.\textsuperscript{4} Chicago was ranked number ten on a list of cities with the largest numbers of homeless people, with 6,710.\textsuperscript{5}

Picture a homeless person in your head. What do you see? Our picture of the homeless tends to be of an old, bearded, white derelict leaning up against a building drinking a bottle of booze out of a paper bag, much like Steve Buscemi’s character from \textit{Big Daddy}.\textsuperscript{6} However, this stereotype does not hold true. Today, the homeless include the elderly, mentally disabled, minorities, young, single men and women with minimal education and few job skills, and more and more families with children.\textsuperscript{7} Homeless families make up about a third of the total homeless population.\textsuperscript{8} One in forty-five children experience homelessness in America each year.\textsuperscript{9}

Another stereotype about homeless people is that they are only homeless because they are too lazy to work.\textsuperscript{10} Again, this is a stereotype that does not ring true.\textsuperscript{11} Homelessness is caused by a combination of lack of affordable housing, extreme poverty, decreasing government support, decrease in the amount of jobs available, domestic violence, and fractured social supports among other things.\textsuperscript{12} Making it easier for a homeless person to get a job is not enough to fix the problem.\textsuperscript{13}

Though most of us worry about where homeless people are going to sleep at night, whether they have enough food, and how they are going to get medical attention, legislators in Rhode Island, Illinois, Connecticut, and other states are more worried about how to appear pro-homeless without

\begin{thebibliography}{13}
\bibitem{usdephousing} \textit{The U.S. Dep’t of Hous. and Urban Dev., The 2012 Point-in-Time Estimates of Homelessness} 7 (2012).
\bibitem{bigdaddy} \textit{Big Daddy} (Columbia Pictures 1999).
\bibitem{natchool} \textit{Nat’l Coal. for the Homeless, Who is Homeless?} (2007), \textit{available at} \url{http://www.nationalhomeless.org/publications/facts/Whois.pdf}.
\bibitem{emplecture} \textit{See Hous. and Urban Dev. Emp’r Lecture Series-Lecture #6 Pamphlet, Homelessness and Hiring: Emp’r Perspectives 8, \textit{available at} \url{https://www.onecpd.info/resources/documents/AudioLecture6_Pamphlet.pdf}.
\bibitem{id} \textit{See id.}
\bibitem{id} \textit{The Nat’l Ctr. on Family Homelessness, The Characteristics and Needs, supra note 8.}
\bibitem{id} \textit{See id.}
\end{thebibliography}
spending any money.\textsuperscript{14} The answer they have come up with is the Homeless Bill of Rights.\textsuperscript{15} These statutes essentially limit the ability of employers, landlords, and others to discriminate based on homelessness.\textsuperscript{16}

This Comment argues that the Homeless Bill of Rights does not do what is needed to battle homelessness. Part II considers some background information including the history of homelessness in America, especially past legislation, ordinances, and court cases, and examines the similarities and differences of the Illinois, Rhode Island, and Connecticut statutes. Part III discusses why legislators believed that a Homeless Bill of Rights was necessary. Answering this question requires an examination of the Equal Protection Clause, which typically governs discrimination, and explains that the Clause does not encompass homelessness. Part IV takes a closer look at a few provisions of the Illinois Homeless Bill of Rights, namely those protecting the rights to move freely and use public places, not to face discrimination in employment, and to vote. This section will consider the laws that are already in place for these rights and whether the Homeless Bill of Rights provisions provide any new protection. Part V looks at alternative measures that Illinois could take, by looking at what other places around the country have been doing to prevent homelessness and stop the criminalization of the homeless.

II. BACKGROUND

A. CRIMINALIZATION OF HOMELESSNESS

Franklin was a fifty-three-year-old man who served in the armed forces, and wanted to work.\textsuperscript{17} Every morning he put in applications to work at local businesses, one of which actually told him not to bother.\textsuperscript{18} He lived in the woods and after spending the mornings looking for work, he spent the afternoons asking for change, which is what he said he would continue to do until he gets put in jail.\textsuperscript{19} Franklin has had a total of four citations from a Florida statute that makes it illegal to ask for money from cars on an exit

\textsuperscript{14} See R.I. GEN. LAWS §§ 34-37.1-1 - 37.1-5 (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).

\textsuperscript{15} R.I. GEN. LAWS §§ 34-37.1-1 - 37.1-5 (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).

\textsuperscript{16} R.I. GEN. LAWS §§ 34-37.1-1 - 37.1-5 (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013); see infra Parts II.B, III.

\textsuperscript{17} Scott Keyes, The Problem with Criminalizing Homelessness, THINK PROGRESS (Sept. 19, 2013), http://thinkprogress.org/justice/2013/09/19/2629581/criminalizing-homelessness/.

\textsuperscript{18} Id.

\textsuperscript{19} Id.
ramp.\textsuperscript{20} Franklin has paid each of his tickets, but said he had to continue to violate the statute or he would not survive, which is made even harder by having to pay a ticket.\textsuperscript{21} Florida is not the only place with laws that virtually make it a crime to be homeless.\textsuperscript{22} More and more cities are enacting laws making it illegal to sleep in public or ask for change.\textsuperscript{23} The National Coalition for the Homeless and the National Law Center on Homelessness & Poverty have compiled a list of the twenty “meanest” cities based on

\begin{quote}
[The number of anti-homeless laws in the city, the enforcement of those laws and severities or penalties, the general political climate toward homeless people in the city, local advocate support for the meanest designation, the city’s history of criminalization measures, and the existence of pending or recently enacted criminalization legislation in the city.\textsuperscript{24}]
\end{quote}

Chicago, Illinois, is number twelve on the list.\textsuperscript{25} Many of the other “meanest” cities and the other cities with anti-homeless ordinances will be considered below.\textsuperscript{26}

No matter how inclusive or restrictive the ordinances are, the reality is that they make it a crime to be homeless.\textsuperscript{27} Just like Franklin, many people have to violate the statutes in order to have any chance of survival.\textsuperscript{28} Fining people who are homeless does not really change anything because people will either have to choose not to pay the fine because they cannot afford it

\begin{footnotes}
\textsuperscript{20} Id.; see Fla. Stat. § 316.130(18) (2008).
\textsuperscript{21} Keyes, supra note 17.
\textsuperscript{22} Id.
\textsuperscript{23} Id.\
\textsuperscript{26} Id.
\textsuperscript{27} See, e.g., CHICAGO, ILL., CODE § 8-4-025 (1990); MEMPHIS, TENN. CODE § 6-56 (2010).
\textsuperscript{28} See Keyes, supra note 17.
\end{footnotes}
or pay the fine with money earmarked for necessities, thus continuing the cycle of homelessness.29

1. Anti-begging Ordinances

Anti-begging ordinances are one type of ordinance that criminalizes the homeless. The free speech provisions of the U.S. Constitution dictate that only aggressive panhandling is illegal.30 Aggressive panhandling is the act of using force or the threat of force to ask for money.31 Nonaggressive requests for money remain protected as free speech.32 However, the distinction between aggressive and nonaggressive panhandling is often blurred by subjective perceptions of aggression to the point that many people support laws that would make all panhandling illegal.33 Many community groups have alternative plans for panhandling, such as giving the homeless things like vouchers for food, referral cards for services, or telling community members to “just say no” to giving money to the homeless.34 However, these plans will not solve the problem of homelessness, but just push homeless people from one community to another.35 Homeless advocates emphasize that people have a legal right to ask for money.36 There is no difference between a homeless person asking for change and a Girl Scout asking for donations or a non-profit making phone calls asking for support of a cause.37

Many cities are using anti-begging ordinances to authorize excessive police action against the homeless.38 One such city is Chicago, Illinois.39 In 2004 the Chicago City Council passed the “Aggressive Panhandling” ordinance.40 It was amended in 2009 to include additional provisions, but it generally prohibits panhandlers from asking for money within ten feet of a bus stop, ATM, or bank entrance; in any public transportation vehicle or facility; in a sidewalk café; while people are standing in line to enter an establishment; and when two or more people panhandle together, among

29. See id.
31. Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Supra note 30, at 138.
37. Supra note 30, at 138.
38. See, e.g., CHICAGO, ILL., CODE § 8-4-025 (1990).
39. Id.
other things.\footnote{C\textsc{hicago}, Ill., C\textsc{ode} § 8-4-025 (1990).} A violation of this provision is subject to a fifty dollar fine for a first or second offense, and a fine of one hundred dollars for a third or subsequent offense.\footnote{Id.} This ordinance was a response to a 2002 ordinance banning all panhandling, which was challenged in a class-action lawsuit and resulted in a settlement for the plaintiffs, as well as a repeal of the law.\footnote{\textsc{The Nat’l Coal. for the Homeless and The Nat’l Law Ctr. on Homelessness & Poverty}, supra note 24, at 36.} Ordinances such as this are common ways for cities to deal with panhandlers in a way that is not as restrictive as prior laws.\footnote{See Memphis, Tenn. Code § 6-56 (2010). Memphis adopted a law almost exactly the same as that in Chicago after previously having an ordinance that required all panhandlers to get a permit to beg in public places; Lynda Natali, Mem\textsc{phis} Turns Up Heat on Its Downtown Pan\textsc{handl}ers, L.A. Times, Feb. 16, 1994, http://articles.latimes.com/1994-02-16/news/mn-23584_1_downtown-memphis.}

Even when panhandling is not illegal, police officers will tell homeless people that it is illegal and threaten to arrest them.\footnote{\textsc{Huffington Post}, May 24, 2012, http://www.huffingtonpost.com/2012/05/24/panhandlers-sue-chicago-a_n_1542925.html.} In 2012 a group of panhandlers filed a class-action lawsuit seeking an injunction against Chicago police officers that habitually removed them from Michigan Avenue, even though it is legal to ask for money there.\footnote{Id.} Their attorney said that the police were segmenting the streets of Chicago; the police would tell poor people that they could not be on certain parts of Michigan Avenue where rich people could be.\footnote{Id.} The police do not usually arrest the beggars on Michigan Avenue, but just force them to go elsewhere.\footnote{Id.} The panhandlers’ attorney suspected that was because any arrests would be illegal.\footnote{Id.}

As stated previously, the United States Supreme Court has held that the First Amendment protects charitable solicitations.\footnote{See Schaumburg v. Citizens for a Better Env’t., 444 U.S. 620 (1980) (holding that an ordinance prohibiting solicitation of contributions by a charitable organization not using at least seventy-five percent of their receipts for “charitable purposes” was unconstitutionally overbroad in violation of the First and Fourteenth Amendments as charitable appeals for funds involve a variety of speech interests of which the ordinance would have a chilling effect).} There has been a diverse reaction of courts to the anti-begging ordinances that cities have
enacted. The poor or homeless persons challenging these statutes have alleged that these laws violated their rights to free speech under the state and federal constitutions. Some courts have rejected this argument and held that the statute at issue was valid, finding that begging did not constitute protected speech. For example, in Ulmar v. Municipal Court for Oakland-Piedmont, the California First District Court of Appeals said that “[b]egging and soliciting for alms do not necessarily involve the communications of information or opinion; therefore, approaching individuals for that purpose is not protected by the First Amendment.” Others found these laws invalid as violating the beggars’ free speech rights. In Blair v. Sh...
nahan, the United States District Court for the Northern District of California held that the state’s interest in avoiding annoyance was not sufficiently compelling to justify a restraint on the exercise of the right to free speech. The court further said that there can be no distinction between the right of a homeless person to solicit money and that of a charity. Challenges to these laws on the grounds of being unconstitutionally vague, have been unsuccessful because the courts found that the language of the statute was sufficient to put a reasonable person on notice as to what they were not allowed to do. The laws have also been held to be valid against challenges that they constituted an unreasonable exercise of police power, and that they conflicted with a state statute.

2. Ordinances Against Loitering and Sleeping in Public

Ordinances against loitering and sleeping in public also have the effect of criminalizing the homeless. While there are many excellent programs and services for those who are homeless, the demand far exceeds the supply everywhere. The shelter system falls so far short of need that people have no choice but to live on the streets and in parks. Yet, the same system that forces people to live on the streets is now arresting or harassing them when they get there. Most local governments are enacting laws targeting loitering in public places; others are adopting strategies to get the homeless out of public encampments and into alternative settings.

that ordinance prohibiting begging for money while on any public way infringed on free speech rights and was unconstitutional vague); New York v. Hoffstead, 905 N.Y.S.2d 736 (App. Term 2010) (holding a statute criminalizing loitering for purposes of begging violated freedom of speech guarantee).


57.  Id.

58.  See, e.g., Arizona ex rel. Williams v. City Court of Tucson, 520 P.2d 1166 (Ariz. 1974) (holding that the ordinance that proscribed the act of loitering combined with the purpose of begging put a reasonable person on notice as to what conduct was forbidden); Ulmer v. Mun. Court for Oakland-Piedmont Judicial Dist., 55 Cal. App. 3d 263 (1st Dist. 1976) (determining that the meaning connoted by accost in the statute was clear from the legislative comments and is sufficient to give warning of the conduct proscribed).

59.  See, e.g., Alegata v. Massachusetts, 231 N.E.2d 201 (Mass. 1967) (holding that a statute empowering police to examine persons abroad during nighttime whom they have reason to suspect of unlawful design was valid insofar as it permits a brief threshold inquiry in certain circumstances).

60.  See, e.g., Chad v. City of Ft. Lauderdale, 66 F. Supp. 2d 1242 (N.D. Fla. 1998).

61.  STONER, supra note 30, at 149.

62.  Id.

63.  Id.

64.  Id. at 150.
camping in public.\textsuperscript{65} Sarasota, Florida, winning the spot of the “meanest”
city, has made many attempts to make it illegal to sleep out-of-doors.\textsuperscript{66} The
City Commission approved an ordinance prohibiting lodging outdoors in
February 2005 after its previous no-camping rule was ruled unconstitutional
for being too vague and punishing innocent conduct.\textsuperscript{67} The February 2005
rule prohibited using any property for sleeping outside without permission
from the property owner.\textsuperscript{68} In order to mitigate the harsh affects, the law
required that police officers offer people who violate the law a ride to the
shelter instead of jail; however, this ride to the shelter was only to be of-
fered once a year.\textsuperscript{69} A few months after its enactment, this ordinance was
also found unconstitutional because it gave police officers too much discre-
tion in deciding who was a threat to public health and safety and who was
just taking a nap on the bench.\textsuperscript{70} Not ones to give up, the City passed anoth-
er ordinance, very similar to the other two, which did hold up in court and
is currently in force.\textsuperscript{71} The new law makes it a crime to sleep without pe-
mission on city or private property, to create a tent or makeshift shelter for
sleeping, or to lay down material for the purpose of sleeping.\textsuperscript{72} The ordi-
nance also includes a list of criteria to determine if a person violates the
law.\textsuperscript{73} One or more of the following five features must be observed in order
to make an arrest:

(1) Numerous items of personal belongings are present;

(2) The person is engaged in cooking activities;

(3) The person has built or is maintaining a fire;

(4) The person has engaged in digging or earth
breaking activities;

(5) The person is asleep and when awakened states
that he or she has no other place to live.\textsuperscript{74}

\textsuperscript{65} Id. at 152.
\textsuperscript{66} The Nat’l Coal. for the Homeless and The Nat’l Law Ctr. on
Homelessness & Poverty, supra note 24, at 25.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id.
\textsuperscript{70} Id.
\textsuperscript{71} Sarasota, Fla., Code § 34-41 (1986).
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id.
Many statutes forbidding loitering have been found to be constitutional. However, legislation directed only at loitering was unconstitutionally vague where they failed to give standards by which a reasonable person could determine who was loitering, especially where the term was not defined or the circumstances under which the statute would apply were not sufficiently set out. Such legislation was unconstitutionally overbroad where the law included conduct, which was constitutionally protected.

For example, in Kolender v. Lawson, the Supreme Court held that a loitering statute that required anyone who loitered or wandered on streets to provide “credible and reliable” identification and to account for their presence when requested by a police officer was unconstitutionally vague where “credible and reliable” identification was defined as “carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.” Further, in Pottinger v. City of Miami, the United States District Court for the Southern District of Florida held that ordinances prohibiting sleeping in public, being in a public park after hours, and loitering were overbroad as applied to homeless people, where homeless people were arrested for harmless, inoffensive conduct such as sleeping and bathing that they were forced to do in public places.

Loitering statutes have also been found unconstitutional where they in-
fringed on First Amendment rights, or the right against self-incrimination.\textsuperscript{80} Some courts invalidated loitering statutes on finding that they exceeded the government’s police power.\textsuperscript{81}

3. Homeless Arrest Campaigns

The backlash against the homeless is cruelest during homeless arrest campaigns and homeless sweeps.\textsuperscript{82} Homeless sweeps occur when the police raid areas inhabited by homeless people and force them to leave.\textsuperscript{83} The police often seize and destroy private property during these raids.\textsuperscript{84} Homeless people may even be arrested for scavenging trash.\textsuperscript{85}

The image of homeless sweeps is reminiscent of holocaust roundups in Nazi Germany.\textsuperscript{86} Probably the most shocking police sweep happened in 1990 in Santa Ana, California, where sixty-four homeless men were arrested.\textsuperscript{87} When the men were handcuffed, their arms were marked with identification numbers.\textsuperscript{88} They were then taken to the police station and chained to a bench for more than six hours.\textsuperscript{89} After six hours, they were all handed a ticket for one of four infractions: jaywalking, urinating in public, public drunkenness, or littering.\textsuperscript{90} A Santa Ana police spokeswoman said that they believe that some homeless might be responsible for an increase in crime reported in the months prior.\textsuperscript{91} A homeless sweep is a long way to go to prevent what might be responsible for an increase in crime.

Although this may be easily written off as something that happened in one U.S. city many years ago, it has actually been happening recently as

\textsuperscript{80} City of Hermosa Beach, 16 Cal. App. 3d 146; Ciccarelli v. City of Key West, 321 So. 2d 472 (Fla. Dist. Ct. App. 3d Dist. 1975); New York v. Hoffstead, 905 N.Y.S.2d 736 (App. Term 2010).
\textsuperscript{82} STONER, supra note 30, at 161.
\textsuperscript{83} Id.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Mike Reicher, Taking a Stance Against Scavengers, DAILY PILOT, Jan. 26, 2011.
\textsuperscript{87} STONER, supra note 30, at 161.
\textsuperscript{89} Id.
\textsuperscript{90} Id.
\textsuperscript{91} Id.
Police recently targeted around thirty homeless campsites in the woods in Portland, Oregon. Fifty to seventy-five people were removed from the woods, and their belongings were thrown into a forty-yard dumpster. A spokesman from the sheriff’s office said the sweep was “to improve the quality of the environment and restore the area and make it a better place for the community to come and enjoy.”

Many legal challenges to anti-homeless ordinances cited previously have implicitly challenged homeless arrests. Homeless arrest campaigns may violate many constitutional rights that people take for granted. One of the rights that these campaigns may violate is that of travel and freedom of movement. The Supreme Court in *Kolender v. Lawson* stated that an arrest for vagrancy without identification incriminated the constitutional rights of freedom of movement. The opposite of the freedom to travel is the freedom to stay in one place without being expelled.

Homeless sweeps that include the seizure of property may violate several constitutional provisions, as there are three limitations on the government’s right to seize and destroy property. First, the seizure must be reasonable. Second, the Fifth Amendment prohibits taking private property for public use without just compensation. Third, official seizure or destruction of personal property without notice may violate due process.

In *Pottinger v. City of Miami*, the United States District Court for the Southern District of Florida recognized that the homeless have an interest in maintaining the few possessions that they have and that this interest may outweigh that of the city in preserving its aesthetic appeal.

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93. *Id.*
94. *Id.*
95. *Id.*
97. STONER, supra note 30, at 167.
98. *Id.*
100. See *id.*
101. See U.S. CONST. amend. IV; U.S. CONST. amend. V.
102. U.S. CONST. amend. IV.
103. U.S. CONST. amend. V.
104. *Id.*
Those worried or shocked by the previous story of the men in Santa Ana will be happy to know that some of those homeless men received some redress.\textsuperscript{106} Seventeen of the homeless men seized by the police and chained up in the police station challenged the police of Santa Ana alleging that the city violated Equal Protection and Due Process rights of the homeless.\textsuperscript{107} The plaintiffs contended that they were singled out for arrest and prolonged detention as part of the city’s attempts to drive homeless people away from the city’s civic center.\textsuperscript{108} The parties reached a settlement agreement where the city said that they:

>[W]ill refrain from discriminating against individuals on the basis of their homelessness and will refrain from using excessive force and pretrial punishment in conducting arrests and pretrial detentions. Specifically, the city agrees not to engage in a plan to drive homeless persons away from Santa Ana or to detain individuals solely on the basis of their homeless status. Moreover, the city agrees not to mark the bodies of persons charged with minor offenses with numbers or other identifying symbols, transport arrested or detained persons away from areas where they were arrested or detained, or are known to reside, or fail to make reasonable efforts to advise persons cited for violations that they must appear in court.\textsuperscript{109}

Though this marked a victory for the homeless in one area of the country, many others face similar challenges everyday.\textsuperscript{110}

B. THE HOMELESS BILL OF RIGHTS: RHODE ISLAND, ILLINOIS, AND CONNECTICUT

The Rhode Island, Illinois, and Connecticut versions of the Homeless Bill of Rights all encompass the same basic rights, but with different levels of protection for homeless people.\textsuperscript{111} Each of them provide some version of the following rights: the right to use and move freely in public spaces in the

\textsuperscript{107} Id.
\textsuperscript{108} Id.
\textsuperscript{109} Id.
\textsuperscript{110} See STONER, supra note 30, at 167.
\textsuperscript{111} R.I. GEN. LAWS §§ 34-37.1 (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
same manner as any other person, the right to equal treatment by State and municipal agencies, the right not to face discrimination in employment, the right to emergency medical care, the right to register to vote and to vote, the right to have personal information protected, and the right to have a reasonable expectation of privacy in his or her personal property.\footnote{112}

Rhode Island was the first state to enact a homeless bill of rights,\footnote{113} and their statute is the most comprehensive.\footnote{114} The legislative intent of the act says, “\[N\]o person should suffer unnecessarily or be subject to unfair discrimination based on his or her homeless status. It is the intent of this chapter to ameliorate the adverse effects visited upon individuals and our communities when the state’s residents lack a home.”\footnote{115} Rhode Island’s statute is the only one of the three that amends another act, and the only one that includes a section to prohibit discrimination in retaining housing.\footnote{116}

The Illinois Act was the second one of these Acts to come into affect.\footnote{117} Illinois had the opportunity to make a statute that was the most comprehensive, and actually have some effect on homeless people, but instead drafted legislation that did none of those things.\footnote{118} House Bill 1878, was discarded in favor of Senate Bill 1210, which later became law, gave homeless people many different rights not included in the one that was passed, including: the right to live in any community which he or she could afford, the right to choose a type of living arrangement without harassment or interference, the right to employment and training opportunities that fit his or her interests, the right to manage his or her own finances, the right to not be coerced or penalized for not taking medication or not undergoing any medical treatment, the right of visitation, and the right to receive public services.\footnote{119} Not only did House Bill 1878 include so many other rights, it also gave the Department of Human Rights the ability to enforce the rights through the Illinois Human Rights Act, and amended the Illinois Human Rights Act to include “housing status” as a protected class for freedom from

\footnotesize{
\begin{itemize}
\item 119. \textit{Id.} at (a).
\end{itemize}
}
discrimination purposes. Further, the House Bill gave the Department of Commerce and Economic Opportunity the ability to establish priorities of eligibility for temporary rental or other housing assistance to homeless people. The House Bill would have done more to decrease the amount of homeless people that have to live on the streets than the bill that was adopted.

Though the Illinois Homeless Bill of Rights is minimal at best, the Connecticut Homeless Bill of Rights accomplishes even less. The Connecticut Act includes all of the rights the Rhode Island and Illinois statutes do, but in the most bare and broad way possible. The language varies widely from that used in the Illinois and Rhode Island statutes. It does not include examples, definitions, or language that would make it easy to understand what cases would actually fall under each of the rights listed. The Act also does not include a civil action clause for injunctive and declaratory relief, damages, attorney’s fees, or costs, which the Rhode Island and Illinois Acts do. Connecticut also had the option to improve their Homeless Bill of Rights through an amendment, but chose not to. The changes would have made the language of the Homeless Bill of Rights the same as that of Illinois, and included “housing status” as a protected class for purposes of Connecticut’s Fair Housing Act.

The biggest difference that sets the Rhode Island Act apart from the Illinois and Connecticut Acts is that it makes “housing status” a protected class for discrimination purposes under the Rhode Island Fair Housing Practices Act. “Housing status” is defined as the status of having or not having a fixed or regular residence, including living on the streets, homeless shelter, or temporary residence. Under the amendment to the Fair

120. Id. at (b), section 90.
121. Id. at section 15.
122. See id.
123. See CONN. GEN. STAT. ANN. § 1-500 (West 2015).
124. Id.
126. See id.
127. See id.
131. R.I. GEN. LAWS § 34-37-3(16) (2012). “Housing status” is defined the same way under the Illinois Homeless Bill of Rights, however, it is just included as a definition in the Homeless Bill of Rights itself as the Illinois Act does not amend any other acts.
Housing Practices Act, people cannot be denied equal opportunity in obtaining housing accommodations because of discriminatory practices based on housing status. The Illinois and Connecticut acts do not include housing status as a protected class; in fact the acts do not include any protection for homeless people against discriminatory practices in finding housing.

Another major difference between the statutes is the rights given for dealing with employment discrimination. Again, Rhode Island is the most inclusive, saying, “A person experiencing homelessness . . . [h]as the right not to face discrimination while seeking or maintaining employment due to his or her lack of permanent mailing address, or his or her mailing address being that of a shelter or social service provider.” The Illinois statute includes most of the same language, but does not include the right not to face discrimination while seeking employment, only while maintaining it. This means that an employer can discriminate against a homeless person in the hiring process, but cannot do so when the homeless person already has the job. This provision, in all reality, is no protection at all. If an employer is going to discriminate against an individual, it is more likely to do so when hiring for a position, rather than against a current employee.

As it is likely that those who hire homeless people know that they are homeless upfront, if they are giving a job to a person that is homeless, they must not have a problem with having homeless people work for them. The Connecticut statute is the least inclusive and most broad. All the Connecticut statute says is “[e]ach homeless person in this state has the right to . . . [h]ave equal opportunities for employment . . . .” The statute does not explain what “equal opportunities for employment” means, or how a homeless person would go about proving that they did not have equal opportunities for employment. None of the three statutes makes “housing status” a protected class for purposes of employment.

133. See CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
134. See R.I. GEN. LAWS § 34-37.1-3(3) (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
137. See id.
138. See id.
139. See id.
140. See id.
141. See CONN. GEN. STAT. ANN. § 1-500(b)(2) (West 2015).
142. Id.
143. See CONN. GEN. STAT. ANN. § 1-500 (West 2015).
144. See R.I. GEN. LAWS §§ 34-37.1 (2012); CONN. GEN. STAT. ANN. § 1-500 (West 2015); 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
III. THE NECESSITY OF LEGISLATION PROTECTING THE HOMELESS

Rhode Island, Illinois, and Connecticut were correct in their determination that the homeless need extra protection because discrimination against the homeless does not fall within any traditional federal protection. When it comes to matters dealing with discrimination by state or public actors, the Equal Protection Clause of the U.S. Constitution governs. The Equal Protection Clause states, “No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The Equal Protection Clause applies to discrimination made by state and public actors and the denial of a fundamental right. Equal Protection cases pose the question of whether the government can identify a sufficiently important objective for its discrimination. The sufficiency of the justification depends on the type of discrimination. There is a different level of analysis courts give based upon the discrimination that is being alleged. The three levels of scrutiny are strict scrutiny, intermediate scrutiny, and rational basis. Strict scrutiny is used for discrimination based on race or national origin; under this analysis the government must have a compelling reason for the discrimination and must not be able to achieve its objective without it. Usually the challenged practice will not be upheld under strict scrutiny. Intermediate scrutiny is used for classifications based on gender or against non-marital children, and under it the government’s reason for the classification must be important. Everything else falls under the rational basis test, which is the minimum level of scrutiny. Under rational basis, the law created must only be a rational way to accomplish what the government was trying to achieve.

Though there have so far only been very limited classifications added to strict or intermediate scrutiny, there are several criteria that have been considered in deciding what kind of analysis a certain classification will

145. See U.S. CONST. amend. XIV, § 1.
146. Id.
147. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 722-23 (3rd ed. 2009).
148. Id. at 718.
149. Id.
150. Id.
151. Id. at 719-20.
152. CHEMERINSKY, supra note 147 at 719.
153. Id.
155. CHEMERINSKY, supra note 147, at 719.
156. Id. at 720.
157. Id.
First, the Supreme Court has looked at whether the characteristic is one that a person cannot change, such as race or gender. Since the person did not choose to have a certain race or gender, they should not be penalized. Second, the Court looks at whether the group has the ability to protect themselves through the political process. For example, non-marital children do not have the ability to vote or represent themselves in government. The Court also considers the group’s history of discrimination.

There has not been any Supreme Court case that has used Equal Protection analysis to determine whether or not homelessness would be considered a suspect class, or what analysis is likely to be used. In fact, most appellate courts that have addressed the subject have concluded that homeless persons are not a suspect class and that sleeping is not a fundamental right. However, at least one court has determined that homelessness could be considered a suspect class. In Pottinger v. Miami, the United States District Court for the Southern District of Florida said:

“This court is not entirely convinced that homelessness as a class has none of these “traditional indicia of suspectness.” It can be argued that the homeless are saddled with such disabilities, or have been

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158. Id.
159. Id.; see, e.g., Fullilove v. Klutznick, 448 U.S. 448, 496 (1980).
160. CHEMERINSKY, supra note 147, at 720.
161. Id.
162. See id.
164. See, e.g., Joel v. City of Orlando, 232 F.3d 1353, 1355 (11th Cir. 2000); D’Aguanno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (holding that homelessness not a suspect class); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992).
165. See Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996); Johnson v. City of Dallas, 860 F. Supp. 344, 355 (N.D. Tex. 1994), rev’d on other grounds, 61 F.3d 442 (5th Cir. 1995); Joyce v. City and County of San Francisco, 846 F. Supp. 843, 859 (N.D. Cal. 1994) (declining to be the first court to recognize fundamental right to sleep), dismissed, 87 F.3d 1320 (9th Cir. 1996); Hawaii v. Sturch, 921 P.2d 1170, 1176 (Haw. Ct. App. 1996) (noting that there is “no authority supporting a specific constitutional right to sleep in a public place” unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights).
166. See Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (indicating in dicta that homeless might constitute a suspect class), remanded for limited purposes, 40 F.3d 1155 (11th Cir. 1994), and directed to undertake settlement discussions, 76 F.3d 1154 (1996).
subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.\textsuperscript{167}

However, the court then stated that the issue of whether homelessness was a suspect class was beyond the scope of the evidence and unnecessary since it determined that the City infringed on the plaintiffs’ fundamental right to travel.\textsuperscript{168}

If the Supreme Court were to address whether homelessness was a suspect class, it would likely find that it was not, using the criteria that were established above.\textsuperscript{169} It would first look at the fact that homelessness is not an immutable characteristic, like race or gender.\textsuperscript{170} Homelessness is something that can change.\textsuperscript{171} Second, they would look at whether homeless people have the ability to protect themselves through the political process.\textsuperscript{172} Though it is true that homeless people do not have representation in Congress, they can vote and do have many organizations arguing on their behalf, so it is likely that the Supreme Court would find that they do have a voice in the political process.\textsuperscript{173} Lastly, the Court would look at whether the class of people has had a history of discrimination.\textsuperscript{174} There is no doubt that there has been a history of discrimination against the homeless, however, as this is the only factor that would be met, it is likely that the Supreme Court would not find a suspect class.\textsuperscript{175} Also, though the Supreme Court has not decided whether homelessness would be a suspect class, they have held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.\textsuperscript{176}

\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} See id.
\textsuperscript{171} Indeed, it is difficult to develop a principled theory on why sex is immutable while homelessness is not; both seem to be classes that are difficult, but not impossible, to exit. However, an individual’s sex is undoubtedly assigned at birth, rendering it immutable for the purposes of the Equal Protection Clause.

\textsuperscript{172} See id.
\textsuperscript{173} See id.
\textsuperscript{174} See id.
\textsuperscript{175} See id.
\textsuperscript{176} See id.
Further, many of the laws and ordinances that could burden homeless people are those that have a discriminatory impact, not necessarily a discriminatory purpose. Ordinances that prohibit panhandling, camping, and public urination may have a more burdensome affect on the homeless than on others, but are probably not put into affect for the purpose of causing harm to homeless people. The Supreme Court has held that there must be proof of a discriminatory purpose for laws that are facially neutral to be treated as classifications. In Washington v. Davis, two African American police officers whose applications to become officers had been rejected, filed suit alleging that the department’s recruiting procedures discriminated on the basis of race because the test that they were required to take had the affect of excluding a disproportionately high number of African American applicants. The Court held that since the qualifications were racially neutral, they did not deprive the men of equal protection of the laws simply because a greater proportion of African Americans failed the test than whites.

Because homelessness would not warrant the application of strict or intermediate scrutiny, rational basis is the test that would be applied in cases of laws discriminating against homeless people. To reiterate, for rational basis scrutiny, the government only needs to show that the law is rationally related to a legitimate government purpose. There is a strong presumption in favor of the laws that are challenged under rational basis. At the very least, there is a legitimate purpose if a law protects safety, public health, or public morals. Because of this, it is likely that most ordinances or laws that would affect homeless individuals would pass rational basis scrutiny.

178. See, e.g., id.
179. See id.
180. Id. at 233.
181. Id. at 242.
182. CHERERINSKY, supra note 147, at 723. Again, the Equal Protection Clause analysis only applies to discriminatory practices of the state, federal, or local governments. It would apply if a law or ordinance discriminated against homeless people or if a homeless person was discriminated against when applying for a job with a government or public actor. It does not apply to private companies that could discriminate against homeless people when applying for jobs, that analysis will be discussed later on in this Article. See infra Part IV.B.
183. Id.
184. See McGowan v. Maryland, 366 U.S. 420, 425-26 (1961) (“State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.”).
185. CHERERINSKY, supra note 147, at 725.
186. See id.
places can be seen to promote public health and safety, and there could be a rational tie between the ordinance and the government purpose.  

**IV. A CLOSE LOOK AT SOME OF THE PROVISIONS IN THE ILLINOIS HOMELESS BILL OF RIGHTS**

Though up to this point all three of the Homeless Bill of Rights Acts have been considered, the rest of this Article will particularly discuss the Illinois legislation and impacts on the homeless population in Illinois.

**A. RIGHT TO USE AND MOVE FREELY IN PUBLIC SPACES IN THE SAME MANNER AS ANY OTHER PERSON**

The first right set forth in the Homeless Bill of Rights is the right to use and move freely in public spaces. 188 Phrased in this way, the Bill of Rights seems to allow homeless people free reign of parks, sidewalks, transportation systems, and other public spaces. 189 However, the right is qualified by the statement, “in the same manner as any other person.” 190 In essence the law says that a homeless person can use public places just as any person who is not homeless would use them, which does not give them any new right at all. 191 Perusing the hours of some of the parks in the Chicago area, it seems that the parks are open from six o’clock in the morning to eleven o’clock in the evening. 192 Municipalities can set the hours of their parks pursuant to home rule. 193 This gives people, homeless and not, the right to use the park only during waking hours, which significantly impacts homeless people in a negative manner, as many would use the parks for sleeping. 194

Under home rule a state legislative provision allocates some autonomy to local governments, conditional on the state’s acceptance of some terms, so that the local government can make some of its own rules. 195 “Home rule in the United States was sometimes envisioned in its early days as giving the cities to whom such rule was granted full-fledged sovereignty over local

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188. 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
189. See id.
190. Id.
191. See id.
193. See infra Part IV.B(1).
194. See id.
195. BLACK’S LAW DICTIONARY 802 (9th ed. 2009).
affairs, thus bringing about dual state and local sovereignty along the national plan of federal and state governments.”

Illinois grants automatic home rule status to local governments who exceed twenty-five thousand people. Then it provides referendum criteria for those units of local government with smaller populations wishing to become home rule units, as well as criteria for those that do not. No charters are required for home rule units in Illinois.

As stated previously, by using the statement “in the same manner as any other person” the Homeless Bill of Rights provision allowing homeless people to use public property in essence does not grant any exceptional right. Further, it does not take away the power of local governments to put restrictions on the use of public facilities under home rule. Courts in Illinois have held that ordinances adopted by home rule local governments prevail over conflicting state statutes adopted prior to the effective date of the home rule sections of the constitution. The Illinois legislature must specifically indicate its intent in any statute in which it means to exercise exclusive power over a particular home rule matter. In the Homeless Bill of Rights provision, there is no legislative intent to restrict local governments from putting restrictions on the use of public property. Because the provision allows homeless people to use the property only in the same manner as other people, and because it does not preempt local government ability to put restrictions on the use of public property, the provision is ineffective.

B. RIGHT NOT TO FACE BARRIERS WHILE MAINTAINING EMPLOYMENT

As discussed previously, the Illinois law protects the homeless from facing discrimination while maintaining employment, but not while trying
to find employment.\textsuperscript{206} This provision does not address the real problem, as homeless people are going to have a harder time finding employment. However, even the provision as written does not have any meat as it does not create a protected class, and therefore, the homeless are not subject to the employment discrimination test set out in the Illinois Human Rights Act.\textsuperscript{207}

Further, even if homelessness was a protected class and the Illinois law protected the homeless from facing discrimination in finding employment, like the Rhode Island statute, homeless people would still have a hard burden to prove that they were discriminated against because of their housing status.\textsuperscript{208}

1. Employment Discrimination Test

The Illinois Human Rights Act governs employment discrimination based on protected classes.\textsuperscript{209} Under this Act, a complainant trying to pursue a civil rights proceeding based on employment discrimination has the initial burden of proving, by a preponderance of the evidence, a prima facie case of unlawful discrimination.\textsuperscript{210} In order to establish such a case, the complainant must show (1) that he or she was a member of a group protected by law, (2) that he or she was treated in a certain manner by the employer, and (3) that he or she was treated differently from similarly situated employees who were not members of the protected class.\textsuperscript{211} Once the complainant establishes the prima facie case, there is a rebuttable presumption that the employer unlawfully discriminated against him or her.\textsuperscript{212} The employer may rebut this presumption by expressing, not proving, a genuine, nondiscriminatory reason for the adverse employment action.\textsuperscript{213} If the employer meets its burden of production, the presumption of discrimination falls away, and the complainant must prove that the employer’s reason was not its true reason, but rather just a pretext for discrimination by showing

\begin{itemize}
\item \textsuperscript{206} See id.
\item \textsuperscript{207} See 775 ILL. COMP. STAT. ANN. 5/2-102. (West 2015).
\item \textsuperscript{208} See id.; R.I. GEN. LAWS, §§ 34-37.1 (2012).
\item \textsuperscript{209} 775 ILL. COMP. STAT. 5/2-102 (West 2015).
\item \textsuperscript{210} See Loyola Univ. of Chi. v. Ill. Human Rights Comm’n, 149 Ill. App. 3d 8 (1st Dist. 1986).
\item \textsuperscript{211} See In re Toledo, 312 Ill. App. 3d 131 (1st Dist. 1986).
\item \textsuperscript{212} See id.
\end{itemize}
that a discriminatory purpose more than likely motivated the employer.\textsuperscript{214} Such pretext can be established by evidence that (1) there was an insufficient investigation into the given reason for the action, (2) the employee did not receive a hearing regarding the action, and (3) that the employee did not receive an opportunity to present his or her version of the story.\textsuperscript{215}

2. \textit{Homeless Discrimination Scenarios}

The next two paragraphs will apply the employment discrimination test set out in the previous section to two scenarios. In both scenarios Illinois has made homelessness a protected class.\textsuperscript{216} In the first scenario William is a homeless man who is thirty-years old, and he has been working for a business called A Shipping Company on the loading docks for five years. His manager, Boss, at A Shipping has recently informed him that there are going to be some cuts on the loading docks, and he is going to be let go. He is the only person on his shift that is fired, and he was the only homeless man on his shift. William thinks that he is being discriminated against because of his housing status. William clearly meets the test for the prima facie case.\textsuperscript{217} He is a member of a protected class since Illinois has made homelessness a protected class. He was fired by his employer, and there were other people on his shift that were not members of the class and were not fired. He has proven a rebuttable presumption of discrimination.\textsuperscript{218} However, Boss says that the company has decided that all employees must have the equivalent of an associate’s degree in order to increase the caliber of the company. William only graduated high school. This is likely to be considered a valid, nondiscriminatory reason for termination.\textsuperscript{219} Now, William is going to have to show that this reason is just a pretext for discrimination.\textsuperscript{220} If there were other people on William’s shift without an associ-


\textsuperscript{215} See, e.g., Irick, 311 Ill. App. 3d 929; Charles A. Stevens & Co. v. Human Rights Comm’n, 196 Ill. App. 3d 748 (1st Dist. 1990) (holding that the reasons articulated by the employer for discharging an employee were pretextual because the employer made no effort to comply with any of its termination-policy requirements of written warnings and meeting prior to terminating the manager).

\textsuperscript{216} See supra Part II.B.

\textsuperscript{217} See, e.g., Toledo, 312 Ill. App. 3d 131.

\textsuperscript{218} See id.

\textsuperscript{219} See, e.g., Cisco Trucking Co., Inc., 274 Ill. App. 3d 72; Vidal, 223 Ill. App. 3d 467.

\textsuperscript{220} See, e.g., Irick, 311 Ill. App. 3d 929; Charles A. Stevens & Co., 196 Ill. App. 3d 748 (holding that the reasons articulated by the employer for discharging an employee were pretextual because the employer made no effort to comply with any of its termination-policy requirements of written warnings and meeting prior to terminating the manager).
ate’s degree that did not get fired, if William was in the process of completing his associate’s degree, or if the processes for termination were not followed correctly, maybe William could win his case.\textsuperscript{221} However, if William was the only person without an associate’s degree and all the processes were followed correctly, he is likely to lose the case.\textsuperscript{222}

In the next scenario, Illinois still has homelessness as a protected class and has changed its Homeless Bill of Rights provision to include finding employment.\textsuperscript{223} Marilyn is a forty-year-old homeless woman who is looking for a job. She received a bachelor’s degree in accounting from The University fifteen years ago. Her family hit a rough patch when she lost her job three years ago, and she is trying to get back on her feet. She was one of ten to receive an interview at a business called New Accounting Firm that had just opened and was looking to hire ten accountants. After the interview the firm’s founder, President, told Marilyn what a great member of the team she would make. Marilyn was really excited and felt like she had gotten the job. A few days after the interview, Marilyn received a message at the shelter that she was staying at, from President. When she called President back, she was informed that she did not receive the job. Nine accountants were hired. Marilyn believes that she did not receive the job because President found out that she was living at a shelter. Like William, Marilyn could establish the prima facie case fairly easily.\textsuperscript{224} She is a member of a protected class, she was not hired by the employer, and others that interviewed were hired.\textsuperscript{225} But, President says that Marilyn’s resume and interview were not as good as the other candidates. President also said that they decided to only hire nine accountants to start and Marilyn was the least qualified. In Marilyn’s case it is going to be harder to prove that these reasons are just a pretext for discrimination than in William’s.\textsuperscript{226} If Marilyn could prove that President was going to hire her before he called and realized that she lived in a shelter, she could prove it is just a pretext.\textsuperscript{227} However, many hiring decisions are subjective. If President did not record the interviews, there is no way to show that everyone else did not interview better than Marilyn. President might be able to come up with some qualities that the other candidates had that he did not think Marilyn had. Further, the fact that the

\begin{footnotes}
\item [221] See, e.g., Irick, 311 Ill. App. 3d 929; Charles A. Stevens & Co., 196 Ill. App. 3d 748.
\item [222] See, e.g., Irick, 311 Ill. App. 3d 929; Charles A. Stevens & Co., 196 Ill. App. 3d 748.
\item [223] 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013); see supra Part IV.B.
\item [224] See, e.g., In re Toledo, 312 Ill. App. 3d 131 (1st Dist. 1986).
\item [225] See supra Part IV.B-1.
\item [226] See id.
\item [227] See, e.g., Irick, 311 Ill. App. 3d 929; Charles A. Stevens & Co., 196 Ill. App. 3d 748.
\end{footnotes}
company was just starting could be a reason to scale back on the amount of accountants that were hired at the beginning.

3. Barriers to Relief

As the previous two scenarios show, even if homelessness is considered a protected class, homeless people still have many barriers to cross to even win their case.228 Employers may be able to come up with good reasons to back their employment decisions, and might be able to hide the true, underlying discrimination.229 Just because it holds up in court does not mean that it is actually true. In this day and age, a lack of education is going to be a big reason for employers not to hire, which is definitely going to have a negative impact on the homeless.230

Another barrier is getting an attorney to take the case. Those that are homeless do not have the money to pay for an attorney. Though there are free clinics and attorneys that do pro bono work, those that are homeless are likely not to have access to the information of who to turn to. Even if they do they might not have the transportation to get there.

C. RIGHT TO VOTE

The Homeless Bill of Rights gives the homeless the right to vote, register to vote, and receive documentation necessary to prove identity for voting without discrimination due to his or her housing status.231 However, in many cases this is easier said than done.232 Though state and federal laws have eliminated some of the barriers that homeless people have while voting, such as requiring registrants to live in a “traditional dwelling,” other obstacles still remain.233 The two biggest issues are residency and mailing address requirements and identification.234

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228. See supra Part IV.B(2).
229. See id.
231. 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
233. Id.
234. Id.
1. Residency and Mailing Address Requirements

“When registering to vote, homeless voters only need to designate their place of residence, which can be a street corner, a park, a shelter, or any other location where an individual stays at night.”235 This is to make sure that the voter lives within the district in which he or she is trying to register.236 Most states also require a mailing address so that voter identification cards and other election materials can be sent to registered voters.237 The address can again be a variety of addresses including that of a “local advocacy organization, shelter, outreach center, or anywhere else willing to accept mail on behalf of a person registering to vote.”238

Though states have made the requirements to vote more accessible, it still provides many difficulties for the homeless.239 For one thing, providing a mailing address from a shelter or other organization does not guarantee that the person will get the voter information that comes in the mail.240 A homeless voter may only make their way to the organization every so often or may not frequent it at all.241 Further, many homeless voters may not be knowledgeable about these requirements.242 They may not know that they can put down another address, or they may not have the resources to find addresses that they could put down. Homeless people may not be able to register in time or get their voter registration card from the place that it was mailed in time for election; in Illinois registration must be done twenty-eight days before the election if done by mail or seven days before the election if done in person.243

“Although the requirement to live in a traditional dwelling has been eliminated, many states still maintain durational residency requirements for voter registration.”244 In Illinois, for example, a person must reside in the election district for thirty days before the election.245 “This makes voter registration for homeless people very difficult as they are often subject to circumstances that require them to frequently re-locate against their wishes.”246

235. Id.
236. Id.
238. Id.
239. See id.
240. See id.
241. See id.
242. See Voting Rights, supra note 232.
243. Id. at 48.
244. Id. at 42.
245. Id. at 48.
246. Id. at 42; see also, supra Part I.A.
2. Identification Issues

Pursuant to the Help America Vote Act (HAVA), “first-time registrants in all states who register by mail must provide a driver’s license number or the last four digits of their Social Security number on their voter registration form.” 247 If the registrant does not have either, he or she will be assigned a voter identification number once his or her registration is approved. 248 “In addition, first-time mail-in registrants must provide an identification document at the polls, unless a registrant submits either his or her driver’s license or the last four digits of his or her Social Security number when registering and the accuracy of the information has been verified . . . .” 249 Acceptable forms of identification include: photo identification, or a copy of a current utility bill, bank statement, government check, paycheck, or other government documents that show the voter’s name and address. 250 Homeless voters that do not have any of the forms of identification would have a better time registering in person at their local registration office. 251 This also provides potential problems as the homeless person will have to find a way to get to the voter registration office. 252

Thirty-three states have stricter requirements than HAVA, though Illinois is not one of them. 253 Nine states require all voters to present a form of photo identification at the polls. 254 Eight states request and highly recommend that voters bring a photo ID to the polls, but they have alternatives, such as affidavits swearing to the voter’s identity or allowing the voter to recite their date of birth and address. 255 Three states absolutely require all voters to present a form of identification at the polls, but do not require the ID to have a photo. 256 Thirteen states request and highly recommend voters bring an ID, either with a photo or without, to the polls, but they have more alternatives than strict non-photo ID states, such as the affidavits or swearing talked about previously. 257

Illinois requires a driver’s license number, state ID number, Social Security number, or the last four digits of a Social Security number when registering to vote by mail. 258 If the applicant does not have any of these num-

248. Id.
249. Id. at 42-43.
250. Id.
251. Id.
252. Voting Rights, supra note 232, at 43.
253. Id. at 53.
254. Id.
255. Id.
256. Id.
258. Id. at 60.
bers then a photocopy of an ID has to be submitted, either with a photo or a non-photo document. If any of these forms of identification is given at the time of registering to vote, then no ID is required at the time of voting. For an in-person registrant, two forms of ID must be presented at registration; one of which typically must show a residential address, but for homeless individuals must only show a mailing address. Voter registration in Illinois is less strict than that in other states and thus provides a greater opportunity for homeless persons to vote, with or without the provision added into the Homeless Bill of Rights.

D. OTHER RIGHTS

The Homeless Bill of Rights includes other provisions as well, such as the right to equal treatment by state and municipal agencies, the right to emergency medical care, the right to confidentiality of personal records and information, and the right to a reasonable expectation of privacy in personal property. The extent of these rights is beyond the purview of this Article. Nevertheless, it seems that these rights would be the same for all people, homeless or not. Further, as the Illinois law does not include homelessness as a protected status, nor does it include the ability to enforce this law through the Illinois Human Rights Act, it is unclear how these rights will actually get enforced.

V. ALTERNATIVE POLICY SUGGESTIONS

As this Article makes clear, the Illinois Homeless Bill of Rights does not do anything to solve the problem of homelessness. It may purport to make homelessness a little bit more comfortable, but does not address the underlying problem. There are other solutions that should be considered, which will be considered in detail in the following sections.

259. Id.
260. Id.
261. Id.
262. See Voting Rights, supra note 232, at 42.
263. 775 ILL. COMP. STAT. ANN. 45/1 – 45/99. (West 2013).
264. See id.
265. Id.
266. See id.; supra Part IV.
267. See supra Part IV.
A. HOUSING

The Illinois Homeless Bill of Rights does not address the problem of housing for the homeless.\textsuperscript{268} It is rather self-evident that in order for people not to be homeless they must find a home to live in. There are many directions that the state can take to address housing for the homeless, including: adding housing status as a protected class for the purposes of the sale and rental of property,\textsuperscript{269} creating and preserving affordable housing,\textsuperscript{270} and having a “Housing First” approach.\textsuperscript{271}

1. Housing Status as a Protected Class

As looked at previously,\textsuperscript{272} the Rhode Island Homeless Bill of Rights contains a provision that includes housing status as a protected class under the Rhode Island Fair Housing Practices Act.\textsuperscript{273} It provides that people cannot be denied equal opportunity in obtaining housing accommodations because of discriminatory practices based on housing status.\textsuperscript{274} This provision could prevent landlords from refusing to rent to people that do not have a past landlord to use as a reference, which would be a big benefit to many homeless trying to get back on their feet.\textsuperscript{275} Chicago, Illinois, has such a provision in its Human Rights Ordinance.\textsuperscript{276}

Though including housing status as a protected class for obtaining housing accommodations would have a benefit for those homeless looking to find homes, it is not enough.\textsuperscript{277} For one thing, it would only affect those homeless that have the money necessary to rent an apartment or house, and would not help those that do not. Also, much like including homelessness as a protected class for employment purposes, there would still be the long legal process in which the homeless person would actually have to prove that they were being discriminated against because of their housing sta-

\begin{itemize}
\item \textsuperscript{268} See id.
\item \textsuperscript{269} See ILL. CONST. 1970, art. 1, § 17.
\item \textsuperscript{271} See NAT’L ALLIANCE TO END HOMELESSNESS, Housing First, http://www.endhomelessness.org/pages/housing_first (last visited Jan. 3, 2014) [hereinafter Housing First].
\item \textsuperscript{272} See supra Part I.B.
\item \textsuperscript{273} R.I. GEN. LAWS. §§ 34-37.1 (2012).
\item \textsuperscript{274} Id.
\item \textsuperscript{275} See id.
\item \textsuperscript{276} See COOK COUNTY HUMAN RIGHTS ORDINANCE 93-0-13 (1993).
\end{itemize}
Not only would it require many legal costs, but there would also be no guarantee that the person would win the case and while fighting he or she is likely to have to continue to go without a home.\textsuperscript{279}

2. \textit{Creating and Preserving Affordable Housing}

The fundamental cause of homelessness is the widening housing affordability gap.\textsuperscript{280} At the same time that housing affordability has worsened, governments at every level have cut back on already inadequate housing assistance for low-income people and have reduced investments in building and preserving affordable housing.\textsuperscript{281} To address the housing affordability gap the Illinois and city governments must significantly increase investments in affordable rental housing, with a significant portion targeted to homeless families and individuals.\textsuperscript{282} Illinois must also strengthen rent regulation laws to preserve affordable housing and protect tenants.\textsuperscript{283}

The Chicago Housing Authority (CHA) provides many housing options for low-income families and senior citizens.\textsuperscript{284} The CHA’s Housing Choice Voucher Program helps low-income households pay for quality housing in the private market.\textsuperscript{285} With funding from the U.S. Department of Housing and Urban Development, the Program pays a portion of a family’s rent each month based on their adjusted income.\textsuperscript{286} However, there is an extensive wait list and lottery system so even though they do good work in providing housing for those who cannot afford it, the housing can only go so far; currently the CHA is not adding any additional names to most of their waitlists.\textsuperscript{287} Homeless people in Chicago and other Illinois cities and towns could greatly benefit from an increase in affordable housing.\textsuperscript{288}

\begin{itemize}
\item \textsuperscript{278} See supra Part IV.B.
\item \textsuperscript{279} See id.
\item \textsuperscript{280} Proven Solutions, supra note 270.
\item \textsuperscript{281} Id.
\item \textsuperscript{282} See id.
\item \textsuperscript{283} See id.
\item \textsuperscript{284} CH. HOUS. AUTH., Housing, http://www.thecha.org/residents/public-housing/find-public-housing/ (last visited Mar. 1, 2015).
\item \textsuperscript{285} CH. HOUS. AUTH., About the Housing Choice Voucher Program, http://www.thecha.org/residents/housing-choice-voucher-hcv-program/ (last visited Mar. 1, 2015).
\item \textsuperscript{286} Id.
\item \textsuperscript{287} See id.
\item \textsuperscript{288} See Proven Solutions, supra note 270.
\end{itemize}
3. “Housing First” Programs

Housing First is an approach to ending homelessness that centers on providing people experiencing homelessness with housing as quickly as possible, and then providing services as needed.\footnote{289}{Housing First, supra note 271.} These programs emphasize stable, permanent housing as a primary strategy for ending homelessness.\footnote{290}{Id.} All Housing First programs center on three elements: (1) a focus on helping individuals and families access and sustain permanent rental housing as quickly as possible without time limits; (2) a variety of services delivered to promote housing stability and individual well-being on an as-needed basis; and (3) a standard lease agreement for housing, as opposed to mandated therapy or services compliance.\footnote{291}{Id.}

Nashville, Tennessee, is one city using a Housing First approach.\footnote{292}{Id.} Through the program, approximately two hundred people were taken off the streets and housed in apartments and duplexes between June and October 2013.\footnote{293}{Id.} Under Nashville’s program, tenants are charged a minimum of fifty dollars a month and a maximum of thirty percent of their income, usually coming from Social Security payments.\footnote{294}{Id.} Many of the homeless that now have a place to live would not have been able to rent under a typical lease even if they had money because they have bad or no credit and many have been to prison.\footnote{295}{Id.} Homeless advocates anticipate that, with the help of social workers, three-quarters of the tenants will be able to keep a roof over their heads, though some will get evicted.\footnote{296}{Id.}

The Housing First model is based on a solid premise that Chicago and other cities and towns in Illinois should consider: homeless people should not have to earn a place to stay by conquering an addiction or other problem; housing should be the first step to getting their lives stabilized.\footnote{297}{Id.} Starting Housing First programs in conjunction with affordable housing initiatives would help to get a lot of Illinois’s homeless off the streets and into a place where they can start rebuilding their lives.\footnote{298}{See Proven Solutions, supra note 270; Housing First, supra note 271.}
B. ALTERNATIVES TO CRIMINALIZATION

Many are probably not sold on the idea of using taxpayer money to subsidize housing for homeless people when the economy is not doing very well as it is. However, there are better solutions than making it a crime to sleep in a park or arresting the homeless and dropping them off at the edge of town.299 While many cities have laws that target homeless people living in public spaces, some cities have programs and initiatives that work to serve the needs of homeless people in a more positive manner.300 Solutions include: street outreach programs,301 organized encampments,302 identification programs,303 and alternative justice systems.304

1. Street Outreach Programs

Many local governments devote resources to moving homeless people out of public areas, but this does not really fix the problem.305 This sort of remedy is only temporary and is also a primary reason that the homeless population distrusts law enforcement and the community in general.306 Forcing people to move, though not a solution, is often the only tool police officers have to fix the problem of homelessness in the area.307 Cities need to create “[c]ollaboration between law enforcement and behavioral health and social service providers” so that there can be “tailored interventions that connect people with housing, services, and treatment,” while at the same time meeting “the community’s goal of reducing the number of people inhabiting public spaces.”308

One city that has such a program is Minneapolis, Minnesota.309 Their Street Outreach Program works with the Minneapolis Police Department and the City Attorney’s Office to address the needs of homeless individua-
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Staff of the Street Outreach Program have access to the police department’s radio and can address any 911 calls that require a human services response instead of a criminal justice response. Because of the program, there was a fourteen percent reduction in the arrests of homeless individuals between 2007 and 2009, over 1,400 calls on homelessness were diverted from police time to more appropriate services, and about 350 people who were living on the street were provided with housing.

2. **Organized Encampments**

Most cities in the country do not have adequate shelter space or affordable housing to meet the need, thereby forcing many homeless individuals to live in public spaces. This frequently leads to many homeless persons being harassed for doing things they need to do to survive. The City of Puyallup, Washington, has created a temporary solution to such a problem. In 2010 the City passed an ordinance that allows organizations to set up temporary encampments for homeless individuals. The encampments are to have an occupancy rate of forty persons, are equipped with facilities for personal hygiene and trash collection, and residents agree to abide by a code that prohibits drugs, alcohol, and weapons.

While such encampments are clearly not a long-term solution, they provide a place for homeless people to stay without fear of being kicked out and provide a living space until a better solution comes along.

3. **Identification Programs**

As discussed briefly in the section on voting, lack of identification is a problem for many homeless individuals. Homeless people are at a disadvantage when trying to apply for identification due to the lack of a stable address. Without adequate photo identification, many homeless individuals are denied access to crucial public benefits, such as Supplemental Secu-

310. Id.
311. Id.
312. Id.
314. Id.
315. See *The Nat’l Law Ctr. on Homelessness & Poverty, supra* note 300, at 48.
316. Id.
317. Id.
318. See id.
319. See supra Part IV.
320. Id.
Rity Income and the Supplemental Nutrition Assistance Program that could help them transition out of homelessness.\textsuperscript{321}

Orlando, Florida, has created a model for helping homeless people get identification, which could be replicated in Illinois.\textsuperscript{322} Once a month the Department of Motor Vehicles, the Social Security Administration, the Health Department, and the Department of Veteran’s Affairs coordinate with local service providers to run an event called IDignity where poor and homeless individuals can come to apply for government identification, such as driver’s licenses, Social Security cards, or birth certificates.\textsuperscript{323} Some documents can be printed on-site, and IDignity hosts a weekly document distribution service where individuals can collect IDs.\textsuperscript{324} IDignity covers the costs of applying, and 6,500 people have been served over the past two years.\textsuperscript{325}

4. Alternative Justice Systems

Many homeless individuals are not able to find jobs or a place to live because of the myriad of legal issues that they deal with.\textsuperscript{326} “Additionally, mental illness, substance abuse disorders, and logistical difficulties, such as lack of transportation and inability to store or retrieve personal records, as well as the daily search to meet basic needs, present substantial barriers to complying with court orders and paying applicable fines.”\textsuperscript{327} Individuals that become homeless upon release from jail or prison are more likely to commit another crime.\textsuperscript{328} Further, as homeless people receive assistance through different public services without actually getting the help that they need, the cost to the state and government entities escalates.\textsuperscript{329}

There are many solutions to these problems that do not require putting the homeless back into prisons and jails and continuing a cycle that they cannot get out of.\textsuperscript{330} Such solutions include:

1.) Problem-solving courts, including homeless courts, mental health courts, drug courts and Veterans courts, that focus on the underlying causes of

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\textsuperscript{321} See The Nat’l Law Ctr. on Homelessness & Poverty, supra note 300, at 50.
\textsuperscript{322} Id.
\textsuperscript{323} Id.
\textsuperscript{324} Id.
\textsuperscript{325} Id. at 50-51.
\textsuperscript{326} U.S. Interagency Council on Homelessness, supra note 304, at 4.
\textsuperscript{327} Id.
\textsuperscript{328} See Corp. for Supportive Housing, Getting Out with Nowhere to Go 3 (2009), available at http://homeless.samhsa.gov/ResourceFiles/i4q3drbu.pdf.
\textsuperscript{329} U.S. Interagency Council on Homelessness, supra note 304, at 4.
\textsuperscript{330} See id.
\end{flushright}
illegal activities with the intention of reducing recidivism and encouraging reintegration into society;

2.) Citation dismissal programs that allow individuals who are homeless with low-level infractions to participate in service or diversion programs or link them with appropriate services in lieu of paying a fine;

3.) Create holistic public defender offices, enabling them to provide a range of social services in addition to standard legal services for populations with special needs;

4.) Volunteer legal projects and pro bono attorneys that provide essential legal services for homeless populations and for the agencies serving them;

5.) Reentry or transition planning to prepare people in prison or jail to return to the community by linking them to housing and needed services and treatment;

6.) Reentry housing, specialized housing with support services tailored to the needs of ex-offenders, designed to help them make a successful transition from incarceration back to the community;

7.) Reentry employment, transitional work and supportive employment services to individuals shortly after their release from jail or prison.\footnote{Id. at 5.}

These alternative justice solutions help resolve the legal needs of the homeless, while at the same time easing court backlogs and reducing vagrancy.\footnote{Id. at 30.} Though some of the solutions may be costly, they can also reduce the future costs of the homeless in the court and prison system.\footnote{Id.}
VI. Conclusion

Many of the alternative policy considerations offered in this Article may be easier said than done. Many involve a lot more money than the government or taxpayers are willing to put towards such a cause. Some people probably think that Illinois, Rhode Island, and Connecticut should be commended for actually considering the homeless enough to create legislation. However, the point of this Article is that it is going to take more than a quickly passed piece of legislation to solve the problem of homelessness.

As this Article shows, homeless people are at a major disadvantage. Not only do they not have a home and are forced to live on the streets, but much of what is necessary to keep them alive has been criminalized by governments. The homeless have been ostracized by communities. Many of the protections that we as humans have been given are not as readily available to the homeless, which is what the legislators who created the Homeless Bill of Rights realized.

It is going to take time, it is going to take money, and it is going to take resources, but the problem of homelessness can be solved. We cannot just see that the State has created legislation to help the homeless and then take it at face value that it is actually helping. As a society, we cannot sit idly by and praise the State for creating a piece of legislation assuming it is helpful. We need to look at it, analyze it, and criticize it, otherwise the legislation will never get better and homelessness will never be solved. No, it is not going to be easy. It is going to take a lot more money and resources than many are willing to spend. However, the reward is very great.

We cannot think of it only as how many zeros are going to come after that dollar sign, but as human lives. Not only are the lives of the homeless going to be bettered, but life for everyone. All the laws that criminalize the homeless by not allowing them to be in certain areas of the city or not allowing them to panhandle, were put in place because many say they do not like the aesthetic of homeless people on the street or do not want to be

334. See supra Part V.
336. See supra Parts II, IV.
337. See supra Part II.
338. See id.
339. See id.
bothered by people asking for money. The purest, best, and most long lasting way to fix this is to fix homelessness. Let us not put a bandage over the side effects, but cure the disease.

340. See id.