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An Intersectional Approach to Homelessness: Discrimination and Criminalization

AN INTERSECTIONAL APPROACH TO HOMELESSNESS: DISCRIMINATION AND CRIMINALIZATION

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The purpose of this essay is to address discrimination against homeless people. First of all, the theory of intersectionality will be explained and then applied as a method of analysis. The complexity of defining homelessness will be tackled, focusing on the difficulties encountered when approaching this concept. I will discuss notions of protected ground and immutability of personal characteristics, then outline an intersectional approach to homelessness. Intersectional discrimination has not yet been applied by many courts and tribunals, but Canada has proven to be a vanguard in this area. For this reason, Canadian case law has been chosen as the main example in this research. I will explore stereotyping, prejudices, and social profiling in connection to homelessness. In addition, I will touch on a peculiar aspect of homelessness that is concerned with the representation of different minority groups (such as race, mentally-ill and so on) within the homeless population. Different laws and other legal sources concerned with criminalizing specific conducts against public order will be analyzed applying the outlined intersectional method. Specifically this work will concentrate on quality of life regulations and anti-homeless regulations. This paper will then establish that homelessness is a ground worthy of protection and then it will argue that the aforementioned kind of legislation results in direct and indirect discrimination. In conclusion, the arguments in favor of including homelessness or social condition as a ground of discrimination will be laid out, with reference to Canadian, European, and international law sources.

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TABLE OF CONTENTS

I. AN INTERSECTIONAL APPROACH TO DISCRIMINATION

Kimberlé Crenshaw, Afro-American activist and legal scholar, first introduced the concept of intersectional discrimination in the 80s.[1] Crenshaw analyzed different cases, which dealt with discrimination of black women both in the labor market[2] and in the area of domestic violence.[3] She argued that a single-axis model of identity failed black women because their experience of discrimination was unique and therefore could not be captured by looking at gender and race separately.[4] Criticizing the idea of identity politics, Crenshaw stressed the potential of a theory that could explain how different identities interact to create complex identities.[5]

On one hand, of the main issues with conceiving discrimination law, as focused on one ground at the time, is that it neglects the role that *power* plays in relationships.[6] On the other hand, early approaches to intersectionality as the one formulated by Crenshaw focused on the creation of new groups, such as black women.[7] The aim of this kind of approach was "to reflect specific intersectional experiences," but for this reason they were subject to the criticism of creating the possibility of an excessive proliferation of protected categories and subjects.[8]

According to more recent intersectionality theories, which will be applied in this analysis, discrimination needs to be conceived as *structural*, i.e. "focus on relationships of power in order to determine who to protect and how."[9] The focus of this method of analysis is not on the personal characteristic shared by a group of individuals but on *society's reaction* to the person. The uniqueness of this kind of approach is that importance is given to the so-called "historical disadvantage," which was experienced by

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1. *See* Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989).

2. *Id.* at 141.

3. Kimberle Crenshaw, *Mapping The Margins: Intersectionality, Identity Politics, And Violence Against Women Of Color*, 43 STAN. L. REV. 1241, 1242 (1991).

4. Crenshaw, *supra* note 1, at 140.

5. *Id.*

6. SANDRA FREDMAN, INTERSECTIONAL DISCRIMINATION IN EU GENDER EQUALITY AND NON-DISCRIMINATION LAW 8 (Luxembourg: Publ'n Off., 2016).

7. *Id.*

8. *Id.*

9. *Id.*

a group of people.[10] Furthermore, the advantage of this method is that it does not require that people identify themselves into "rigid compartments or categories" and that it acknowledges that discrimination is often "systemic, environmental and *institutionalized*."[11] Applying an intersectional method of investigation allows us to link discrimination to factors belonging to the social environment, such as homelessness, which are not directly covered by most discrimination law sources.[12] A ground of discrimination must then be understood as a channel "to describe different power relationships."[13]

Canadian Courts have proved to be a vanguard in using an intersectional approach to discrimination. *Egan v. Canada*,[14] a landmark case decided by the Canadian Supreme Court, recognized sexual orientation as a prohibited ground of discrimination under Article 15 of the Canadian Charter of Rights and Freedoms.[15] Judge L'Heureux-Dubé wrote in the majority opinion that:

> As this Court has frequently acknowledged, the essence of discrimination is its impact, not its intention. . . . *We will never address the problem of discrimination completely, or ferret it out in all its forms, if we continue to focus on abstract categories and generalizations rather than on specific effects*. . . . By looking at the grounds for the distinction instead of at the impact of the distinction on particular groups, we risk undertaking an analysis that is distanced and desensitized from real people's real experiences. . . . More often than not, *disadvantage arises from the way in which society treats particular individuals,* rather than from any characteristic inherent in those individuals.[16]

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10. ONT. HUM. RTS. COMM'N, AN INTERSECTIONAL APPROACH TO DISCRIMINATION: ADDRESSING MULTIPLE GROUNDS IN HUMAN RIGHTS CLAIMS 2 (2001).

11. *Id.* at 5 (emphasis added).

12. *See* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (2012); *see also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.); *see also* Equality Act 2010, c. 15 (Eng.).

13. Fredman, *supra* note 5, at 8.

14. [1995] 2 S.C.R. 513 (Can.).

15. *Id.* at 522.

16. *Id.* at 551-52. (emphasis added).

The aforementioned case was not the only one where the topic of intersectionality was touched upon by Canadian Courts. In *Law v. Canada*,[17] the Supreme Court stated that "there is no reason in principle . . . why a discrimination claim positing an intersection of grounds cannot be understood as analogous to, or as a synthesis of, the grounds listed in s. 15(1)."[18] In *Corbiére v. Canada*,[19] Judge L'Heurex-Dubé stated that, when the Court's inquiry is to recognize whether a ground of discrimination can be considered as analogous or not, stereotyping, prejudice or denials of human dignity and worth need to be considered.[20] She affirmed that the Court should recognize "that personal characteristics may overlap or intersect" and that grounds of discrimination should "reflect changing social phenomena or new or different forms of stereotyping or prejudice."[21]

To conclude, the intersectional method is the best fit for this investigation because it requires an analysis of *contextual factors*. A contextual analysis entails: "[E]xamining the discriminatory stereotypes; the purpose of the legislation, regulation or policy; [and] the nature of and/or situation of the individual at issue, and the social, political and legal history of the person's treatment in society."[22] These elements will be tackled in the following paragraphs.

II. HOMELESSNESS AS A GROUND OF DISCRIMINATION

A. The Complexity of Homelessness

Homelessness is a multifaceted concept and number of difficulties might arise when it is approached. It is hard to refer to homelessness as a ground of discrimination if we consider a traditional, single ground approach to discrimination as the one used today by most legislators and national/international courts.[23] In his book, *A Theory of Discrimination Law*, Tarunabh

17. [1999] 1 S.C.R. 497 (Can.). (The case dealt with pension benefits and discrimination on the ground of age.)

18. *Id.* at 555. (In Canadian equality case law, the concept of analogous grounds of discrimination has been used to extend protection against discrimination based on grounds that are not enumerated in the Canadian Charter.)

19. [1999] 2 S.C.R. 203 (Can.) (This case dealt with discrimination experienced by Aboriginal people who did not live in a reserve.)

20. *Id.* at 216.

21. *Id.* at 253.

22. ONT. HUM. RTS. COMM'N, *supra* note 10, at 28.

23. "There's no explicit mention [to multiple discrimination] in the legislation of

Keithan builds the architecture of discrimination law on three elements: protectorate, duty bearers, and duties.[24] The protectorate is a group of individuals that is classified as such by specific characteristics called grounds.[25] The protected ground, in order to be called so, must possess two requirements, the first being that the ground must be a personal characteristic that classifies "persons into groups with a significant advantage gap between them" and, second, "[i]t must be either immutable or it must constitute a fundamental choice."[26]

Definitions of homelessness vary between different countries and scholars or policy makers. In a strict and rather simplistic interpretation, homelessness can be described as "a lack, or inadequacy, of housing arrangements" but, in fact, it is a much more complex concept.[27] If we take into consideration the so-called *personal ground condition*,[28] it can be argued that this condition is missing if we look at the diversity of individuals that lack an adequate housing arrangement. Indeed, in the opinion of *Tanudjaja v. Canada*,[29] Judge Lederer of the Ontario Superior Court of Justice dismissed an application that claimed a violation of Section 7 and Section 15 of the Canadian Charter of Rights and Freedoms caused by changes in legislation which gave rise to an increase in inadequate housing and homelessness.[30] One

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21 of the [European] States [Belgium, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Hungary, Iceland, Ireland, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Norway] covered. . . . National experts report very little case law, whether or not States have an explicit provision for multiple discrimination. Indeed, out of the countries with explicit provision, only Austria, Germany and Italy point to cases before the courts where there is even a suggestion of multiple discrimination. Where there have been cases, the full implications of intersectionality are rarely developed." FREDMAN, *supra* note 5, at 53.

24. TARUBABH KHAITAN, A THEORY OF DISCRIMINATION LAW 50 (Oxford University Press, 2015).

25. *Id.*

26. *Id.* at 50.

27. Marie-Eve Sylvestere & Céline Bellot, *Challenging Discriminatory and Punitive Responses to Homelessness in Canada*, *in* ADVANCING SOCIAL RIGHTS IN CANADA, (Martha Jackman and Bruce Porter ed., Irwin Law, 2014).

28. KHAITAN, *supra* note 21, at 29.

29. [2013], 116 O.R. 3d 574, 2 (Can. Ont. Sup. Ct. J.).

30. *Id.* at 2, 51; *see Canadian Charter of Rights and Freedoms,* Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11, §§ 7, 15 (U.K.). ("Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice. . . . Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, color, religion, sex, age or mental or physical disability.")

individual reported that Judge Lederer argued that homelessness could not be considered as an analogous ground of discrimination because it lacked *definability* and therefore it was not fit to indicate who belonged to that specific group and who did not.[31] Hence, if we look at a *traditional* ground of discrimination, such as race, it can be argued that it lacks definability as well as there are no specific requirements (such as a specific level of dark skin or an ethnic background) set in order to qualify as a member of the group.[32] Therefore, the heterogeneity of homelessness cannot be considered an obstacle to consider it as a protected ground. Homelessness can be rightly addressed only if it is conceived as a multi-dimensional concept: "[R]ights violation, social exclusion and inclusion, poverty and discrimination" must be included.[33] The Canadian Observatory on Homelessness provided that:

> Homelessness describes the situation of an individual or family without stable, permanent, appropriate housing, or the immediate prospect, means and ability of acquiring it. It is the result of systemic or societal barriers, a lack of affordable and appropriate housing, the individual/household's financial, mental, cognitive, behavioral [sic] or physical challenges, and/or racism and discrimination.[34]

Homelessness cannot be defined in terms of immutability, either. Immutability has always played an important role in antidiscrimination.[35] For instance, it has been one of the key points of the US Supreme Court's jurisprudence on equal protection.[36] But it does not work with the concept of homelessness, which is "a rather fluid experience."[37] It is not an

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31. Joshua Sealy-Harrington, *Should Homelessness be an Analogous Ground? Clarifying the Multi Variable Approach to Section 15 of the* Charter, ABLAWG: THE UNIVERSITY OF CALGARY FACULTY OF LAW BLOG, 1, (Dec. 19, 2013), https://ablawg.ca/wp-content/uploads/2013/12/Blog_JSH_Tanudjaja_v_AG_December-2013.pdf [https://perma.cc/6Q7G-RCE6].

32. *Id.* at 4.

33. Sylvester & Bellot, *supra* note 27, at 5.

34. Stephen Gaetz, et. al., *Canadian Definition of Homelessness*, CANADIAN OBSERVATORY ON HOMELESSNESS, 1, (2012), http://homelesshub.ca/sites/default/files/COHhomelessdefinition.pdf.

35. Jessica A. Clarke, *Against Immutability*, 125 YALE L. J. 2, 2 (2015).

36. *Id.* at 4-5.

37. Stephen Gaetz et. al., *supra* note 34, at 1.

innate characteristic of the individual and the nature of the housing condition or the duration of the homelessness itself may vary in time.[38] It includes different physical living conditions which can be divided into different typologies: (1) "unsheltered" is described as people who are absolutely homeless and, therefore, are living in the street or in a place that is not adequate for human habitation; (2) "emergency sheltered" are people who live in shelters that could be either temporary, occasional, or permanent; (3) "provisionally accommodated" are people who are staying in an accommodation that is transitional and temporary (including prisons or mental health institutions); (4) "at risk of homelessness" are people who are not homeless yet (strictly speaking), but who are living in a precarious economic housing situation or in an inadequate one because it lacks safety, is unaffordable, or overcrowded.[39]

B. The Intersectionality of Homelessness: Stereotypes, Stigma and Social Profiling

Having addressed the difficulties or critics that might arise when dealing with homelessness as a ground of discrimination in a traditional approach, it is now possible to look at homelessness from an intersectional point of view. Intersectionality has been defined as an "intersectional oppression [that] arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone."[40] What homeless people have in common is that they have all been subjected to a unique kind of discrimination characterized by social exclusion, social profiling, historic stigma, and prejudice. They have always been placed last in the entire social, political, and legal structure of our society. The focus of courts and tribunals when they intervene, should be the effects that provision has on a group of individuals based upon the position of that group in our society.

Another problem related to homelessness and intersectionality is that "marginalized groups are disproportionately represented in the homeless population, and are therefore, disproportionately targeted by the ordinances that

38. *Id.*

39. *Id.*

40. Mary Eaton, *Patently Confused: Complex Inequality and Canada v. Mossop*, 1 REV. CONST. STUD. 203, 229 (1994).

criminalize homelessness."[41] In 2014, there was approximately 3.5 million people who were homeless in the United States.[42] Of those 3.5 million homeless people, 42% of them were African American, despite being only 12% of the population, and 20% of them were Hispanic, who make up 12% of the overall population.[43] Additionally, 20-40% of the homeless population identify as LGBTQ (lesbian, gay, bisexual, transgender, queer) compared to only making up 5-10% of the overall population.[44] Approximately 30% of the homeless population has a mental disability.[45] This phenomenon of overrepresentation does not apply only to the United States. If we look at mental health, for example, around 30% of the homeless population in Europe (150,000 people) also experiences severe, chronic mental illness.[46]

In a psychiatric study conducted in Toronto (home to the largest homeless population in Canada), researchers found how discrimination according to homelessness was perceived as qualitatively different than discrimination on the ground of race.[47] The stigma of being homeless causes deep shame because homelessness is "situational and subject to at least some potential for change, and . . . can be hard to hide from others."[48] When the stigmatized identity is perceived by the public as "controllable, group-based discrimination has a more harmful effect on well-being than discrimination directed against those with an uncontrollable stigma (such as race or gender) . . . Because housing status is perceived as somewhat under an individual's control . . . the homeless are often considered to be responsible for their lack of adequate housing . . . ."[49]

The result of the overrepresentation of marginalized group in

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41. Kaya Lurie & Breanne Schuster, *Discrimination At The Margins: The Intersectionality Of Homelessness & Other Marginalized Group*, SEATTLE U. SCH. OF L.: HOMELESS RTS. ADVOC. PROJECT, iv, (May 2015).

42. *Id.* at iv (citing RACIAL DISCRIMINATION IN HOUSING AND HOMELESSNESS IN THE UNITED STATES, NAT'L LAW CTR. ON HOMELESSNESS & POVERTY (2014)).

43. *Id.*

44. *Id.* at v.

45. *Id.* at vi.

46. *Access to Services by People with Severe Mental Health Problems Who Are Homeless*, MENTAL HEALTH EUR., 1, (Sept. 2013).

47. Suzanne Zerger et al., *Differential Experiences of Discrimination Among Ethnoracially Diverse Persons Experiencing Mental Illness and Homelessness*, 14 BMC PSYCHIATRY 353, 362 (2014).

48. *Id.* at 366.

49. Melissa Johnstone et al., *Discrimination and Well-being Amongst the Homeless: The Role of Multiple Group Membership*, 6 FRONTIERS IN PSYCHOL. 1, 2 (2015).

the homeless population is a unique kind of discrimination that occurs as a consequence of the intersection of different types of disadvantages.[50] It is unique because not only is it perceived as legitimate but also because it is conducted by a much higher number of individuals.[51] This makes the homeless population different from every other minority group.[52] Homeless are discriminated from their own friends and family as well as from the mainstream.[53]

Punitive responses to homelessness have always been based on negative stereotyping and prejudices.[54] It is possible to identify three distinct sets of beliefs, which are wrongly connected to homelessness.[55] The first is the "moral depravation" belief, which portrays homeless individuals as morally inferior, lazy, and dishonest individuals.[56] The second being the "choice" belief, where homeless individuals are blamed for their own misfortune.[57] Thirdly, the "criminality" belief, which assumes that the homeless are "criminals or potential serious offenders needing to be repressed or confined."[58] The issue of freedom of choice and the question of immutability has been partially addressed in the previous section of this essay but it can be analyzed further. In general, "choices and options are extremely limited" for the homeless.[59] Life cannot be described as a dichotomy between choice and constraint since this choice does not reference how our actions are embedded in social structures and interactions.[60] The criminalization of homeless conduct led by governments in order to punish them and, thus, encouraging them to change their condition results only in further exclusion, rather than in deterrence.[61] The idea of homelessness by choice is more a myth than a proven fact.[62]

Social profiling is generated by an action taken against an individual based on the fact that, according to the individual's

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 3.
54. Sylvestere & Bellot, *supra* note 27, at 1.
55. *Id.* at 2.
56. *Id.* at 1-2.
57. *Id.* at 2.
58. *Id.*
59. *Id.* at 23.
60. *Id.* at 22.
61. *Id.* at 23.
62. *Id.* at 12.

appearance, they are perceived to be a member of an identified group of people.[63] Homeless are victims of social profiling based on their neglected appearance, on the status of their personal hygiene, or on their clothing.[64] Social profiling can be seen in broad interpretations of regulations resulting in criminalization of homelessness.[65]

In conclusion, due to stigma, stereotypes, and social profiling, homelessness involves much more than the absence of housing.[66] It becomes an "all-encompassing social identity or social label for individuals" that defines them in a way that is "socially constructed and difficult to change" as in "every part of society perceives and treats a person differently once they [are] homeless."[67]

C. Quality of Life and Anti-Homelessness Ordinances

At this point of the analysis, it is possible to apply intersectionality as a general theory of identity in order to examine the underlying structures of inequality that emerge from the criminalization of homelessness. One can distinguish different types of regulations that affect homelessness: anti-homelessness ordinances and quality of life ordinances.

First, anti-homeless ordinances are laws that prohibit activities such as standing, sitting and resting in public spaces and other daytime activities.[68] Such activities include sleeping, camping and lodging (including in vehicles and other nighttime activities), begging, panhandling, and food sharing.[69] Generally the regulation of public places has increased. Authorities in Canada prohibit antisocial behavior in public places, including parks, sidewalks, and subway stations.[70] In a survey conducted by the National Law Center on Homelessness & Poverty, of 187 cities in the United States, 34% of those cities prohibited camping in public, 57% prohibited camping in particular public spaces, 27% of these cities prohibits sleeping in particular public places,

63. *Id.* at 18.

64. *Id.*

65. *Id.*

66. *Id.* at 24.

67. *Id.*

68. Chris Herring & Dilara Yarbrough et al., *Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco,* COALITION ON HOMELESSNESS 6 (2015).

69. *Id.*

70. Sylvestere & Bellot, *supra* note 27, at 13.

76% prohibits begging in particular public spaces, 53% prohibits "sitting or lying down in particular public places" and so on.[71]

Similar ordinances can also be found throughout Europe.[72] These regulations are essentially criminalizing life-sustaining conduct of the homeless population.[73] Homeless people lack private spaces, they must use public spaces to meet their most basic needs.[74] Public spaces are the only spaces the homeless population can use, hence, they are directly being discriminated against.[75] Therefore, these regulations are highly ineffective because they only result in creating more obstacles for the homeless population.[76] Due to the criminalization of their survival strategies, not because of a higher display of criminal behaviors, homeless people are over-represented in prison population.[77]

Numerous examples of laws prohibiting activities of people experiencing homelessness, can be found throughout a variety of legal systems. In 1999, the province of Ontario (Canada) adopted the *Safe Streets Act, 1999.*[78] This Act prohibits solicitation in an "aggressive manner" and of a "captive audience."[79] Solicitation is defined as the action of "request[ing], in person, the immediate provision of money or another thing of value, regardless of whether consideration is offered or provided in return, using the spoken, written or printed word, a gesture or other means."[80] In England, the Vagrancy Act of 1824 punishes "[e]very person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms."[81] Further, it prohibits "wandering abroad and lodging in any barn or outhouse, or in any deserted or unoccupied building, or in the open air, or under a tent, or in any cart or wagon, not having any

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71. Tristia Bauman et. al., *No Safe Place: The Criminalization of Homelessness in U.S. Cities*, NATIONAL L. CTR. ON HOMELESSNESS & POVERTY (July 16, 2014), 7-8.

72. Guillem Fernández Evangelista, *Mean Streets: A Report on the Criminalisation of Homelessness in Europe*, EUR. FED'N OF NAT'L ORG. WORKING WITH THE HOMELESS, (June 2013), 15-16.

73. Sylvestere & Bellot, *supra* note 27, at 14.

74. *Id.*

75. *Id.*

76. Evangelista, *supra* note 72, at 10.

77. *Id.* at 66.

78. Safe Streets Act, 1999, R.S.O. 1999, c. P. 8 (Can.).

79. *Id.* at c. P. 8, art 2-3.

80. *Id.* at c. P. 8, art 1.

81. An Act for the Punishment of Iide and Disorderly Persons, Rogues, and Vagabonds 1824, 15 & 16 Geo. IV, c. 83, § 3 (Eng.).

visible means of subsistence and not giving a good account of himself or herself." [82]

If we look at the audience affected by this kind of law, it is evident that it is the homeless population. The only purpose of this law is to ban a set of actions that are carried out solely by the homeless.[83] The rationale behind it is termed the "broken-windows" theory.[84] This term refers to a theory in criminology that implies an absence of appropriate legal response to the initial unlawfulness might be interpreted as if that neighborhood tolerates crime.[85] It argues that in order to prevent vandalism, actions should be taken against the smallest example of disorder.[86] In addition, homeless people are seen as potential criminals who should be removed from public spaces to prevent more serious crime in local communities.[87] Measures directed at controlling public space are often created to make homelessness invisible.[88] Often the prohibition of homeless conduct is framed in terms of public order and, thus, it is taken away from the area of competence of "positive" social policies.[89]

Further, quality of life ordinances are those that regulate "low-level non-violent crimes of activities frequently considered nuisances and are mainly intended to regulate 'uncivil behavior' and 'public disorder' in public spaces."[90] The activities, which are listed in these kind of ordinances, are characterized by the fact that they would not be criminalized if they "occur[red] on private property or within one's home."[91] They include restrictions on drinking in public, littering, climbing trees, dogs not leashed and so on.[92] The problem of this set of ordinances is that they result in direct discrimination of those who do not have a home.[93] Such a facially neutral provision results in discrimination when

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82. *Id.* at § 4.

83. Sylvestere & Bellot, *supra* note 27, at 11-13.

84. *Id.*

85. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATL. MONTHLY, 29, 31 (Mar. 1982).

86. *Id.*

87. Sylvestere & Bellot, *supra* note 27, at 11.

88. *Id.* at 13.

89. Antonio Tosi, *Homelessness and the Control of Public Space – Criminalising the Poor?*, 1 EUR. J. OF HOMELESSNESS 225, 229 (2007).

90. Herring & Yarbrough, et al., *supra* note 68, at 6.

91. *Id.*

92. *Id.*

93. *Id.*

enforced.[94]

III. CONCLUSION

This analysis started with providing a new kind of approach to homelessness. What was argued is that it is possible to consider homelessness as a ground of discrimination if seen in an intersectional perspective. The fundamental element of intersectionality is power: it describes the specific and distinctive experience of those who are subjected to historical disadvantages because of society's reaction to them.[95] The different examples of regulations analyzed proved the fact that the homeless are subjected to systemic discrimination. Homelessness should not be defined only in terms of lack of housing, rather, it is the stigma of being homeless is what makes their condition unique.

Canada may be considered a leading example in the field of intersectionality.[96] Canadian courts have applied the analogous approach in order to expand the number of protected grounds under the Canadian Charter of Rights of Freedoms.[97] Section 15(1) of the Charter states: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[98] This article has been further interpreted by the courts in order to extend its application to grounds that are not expressly mentioned, the so-called analogous grounds or "insular minorities."[99] The Supreme Court of Canada affirmed in the *Andrews* decision that whether or not the protection granted by Section 15 could also be of a specific group is a:

> [D]etermination which is not to be made only in the context of the law which is subject to challenge but rather in the context of the place of the group in the entire social, political and legal fabric of our society.

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94. *See id.*

95. *See* FREDMAN, *supra* note 5; *see generally* Crenshaw, *supra* note 1.

96. *See generally* Egan at 514.

97. *See* The Law Society of British Columbia v. Andrews, [1989] 1 S.C.R. 143 (Can.).

98. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.).

99. Andrews, 1 S.C.R. at 3-4.

> While legislatures must inevitably draw distinctions among the governed, such distinctions should not bring about or re-inforce the disadvantage of certain groups and individuals by denying them the rights freely accorded to others.[100]

Since that decision, the Court has stretched the analogous grounds approach to include other grounds such as sexual orientation, marital status, and so on.[101] As emphasized at the beginning of this essay, the Court relied on the historical disadvantage suffered by members of this group.[102] The question whether homelessness or social condition should be considered as an analogous ground has not been settled yet by the Canadian Supreme Court.

If we look at sources of international law, Articles 2 and 26 of the International Covenant on Civil and Political Rights impose that all persons should enjoy equal protection of the laws regardless of social origin, property or other status.[103] Article 1 of the American Convention on Human Rights bans discrimination on the basis of "social origin . . . or any other social condition."[104]

Introducing homelessness or, more in general, social condition as a prohibited ground of discrimination "provides the potential of better reflecting the realities of discrimination in that it, in many ways, offers a means for recognizing the way social and economic disadvantage intersects with other grounds of discrimination . . . ."[105] Failing to recognize this kind of intersectional discrimination results in countless individuals falling through the cracks of anti-discrimination law. The discrimination that results from enforcement of quality of life and anti-homeless regulations is an example of this. The approach to discrimination used by courts and legislators should be an inclusive one, rather than the opposite. Social condition can intersect with numerous other relevant characteristics, such as race, gender, or ethnic origin and, therefore, result in aggravated

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100. Andrews [1989] 1 S.C.R. at 3.

101. Law v. Canada, [1999] 1 S.C.R. 497, 562 (Can.); Corbiére v. Canada, [1999] 2 S.C.R. 203, 252 (Can.).

102. *See* Egan v. Canada, [1995] 2 S.C.R. 513, 521 (Can.).

103. International Covenant on Civil and Political Rights, Dec. 19, 1966, 1976 U.N.T.S. 172, 173-79.

104. American Convention on Human Rights "Pact of San Jose, Costa Rica," Costa Rica-U.S., Nov. 22, 1969, O.A.S.T.S. No. 36.

105. WAYNE MACKAY & NATASHA KIM, ADDING SOCIAL CONDITION TO THE CANADIAN HUMAN RIGHT ACT 76 (2009).

discrimination. These people might seek and obtain justice on the base of a recognized ground. However, what is even more endangered is the position of those who do not fall into any of these categories and are being discriminated only because of their socio-economic status. Deprived of shelter and of the basic pillars of modern life, those without additional classifications are left without any kind of remedy to their plight.