A Theoretical and Legal Challenge To Homeless Criminalization as Public Policy

David M. Smith
NOTES

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You are homeless. All day you have looked for a place to sleep indoors for the night. Your search is urgent, for tonight will be bitterly cold. As the sun sets, the temperature falls into the single digits. Unfortunately, your city has no homeless shelters. As doors close, you head toward your hideaway, an abandoned apartment house with a side door that is usually unlocked. You do not go there every night—another homeless person might discover your secret and beat you to it on some freezing or snowy night. Instead, you save it for emergencies. Tonight you can either take shelter there or risk freezing to death. You enter the cold, empty building, cover yourself with newspapers and cardboard, and go to "bed." Although the abandoned building is not heated, at least you are not outside. The next morning you are awakened by a police officer, who promptly arrests you for trespassing.

Your story is based on a true one. A few years ago, in Long Beach, New York, Benjamin Franklin Pierce was arrested the morning after he had spent the night in an abandoned apartment building. Pierce, a forty-four-year-old man, had been homeless for seven years and lived in a community that had no homeless shelters. He had sought shelter when the wind-chill-adjusted temperature dropped to twenty-four degrees below zero.¹

Pierce's story is not unusual. Every year, police arrest men, women, and children who engage in activities necessary to preserve their lives.² Increasingly, communities are using the criminal law to cleanse their streets of homeless survivors.³ These criminal law responses punish homeless offenders of certain

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² See, e.g., Pottinger v. City of Miami, 810 F. Supp. 1551, 1560 (S.D. Fla. 1992) ("The testimony and the documentary evidence regarding the arrests of the homeless... support plaintiffs' claim that there is no public place where they can perform basic, essential acts such as sleeping without the possibility of being arrested.").

³ See, e.g., Joyce v. City of San Francisco, 846 F. Supp. 843, 845-46 (N.D. Cal. 1994) (describing city program that "contemplates a rigorous law enforcement component aimed at those violations of state and municipal law which arguably are committed predominantly by the homeless"); Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386 (Cal. Ct. App.) (outlining city's plan for homelessness problem that included development of new ordinances and strict enforcement of existing ones), review granted, 872 P.2d 559 (Cal. 1994).
low-level crimes for conduct that is essentially involuntary. Because these laws present homeless persons with a “choice” between compliance and survival, criminal law should excuse homeless offenders if they opt for the latter.

Homeless advocates have brought constitutional challenges against laws used to criminalize homeless survival behavior. Constitution claims include charges that antihomeless laws violate equal protection, due process, the right to travel, the right against cruel and unusual punishment, and the right to privacy. Sometimes these constitutional challenges are successful, but sometimes they are not. This Note proposes that homeless advocates invoke an exculpatory duress defense where constitutional challenges to antihomeless laws have failed.

Even if ultimately unsuccessful in the courtroom, the rationale for exculpation can be used in policy debates and information campaigns. The argument against punishing virtually involuntary conduct is a powerful one and need not be contained to the domain of litigation.

Part I of this Note presents the various strategies used by homeless persons to survive. Part II explains how some of these behaviors constitute criminal violations and rejects the alleged state interests in criminalizing reasonable conduct that is essential for survival. Part III considers the application of a modified duress defense to criminalized homeless survival strategies.

I. SURVIVING ON THE STREETS

Despite the diversity of their views, scholars of homelessness agree on some points. The number of homeless persons in America has grown in the last fifteen years. They are a diverse class of people, exhibiting considerable

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7. Exculpating homeless survival is not a solution to the problem of homelessness. The argument that duress ought to exculpate homeless offenders of certain low-level crimes is an immediate, incomplete response to the problem as it exists today. Its shortcomings are significant: most homeless persons arrested for their survival do not go to trial, see, e.g., Pottinger, 810 F. Supp. at 1554 (“[T]he arrested [homeless] plaintiffs are released without further official process . . . .”), making it impossible ever to raise an exculpating defense. Still, some cases involving homeless offenders do go to trial: any of the many cases involving constitutional challenges to anti-homeless laws have homeless plaintiffs. One successful case is all that is needed to make an impact. As homeless advocates and law enforcement agencies become aware of successful cases, the balance of power between homeless survivors and police may begin to shift.
9. Martha R. Burt & Barbara E. Cohen, AMERICA’S HOMELESS 76 (1989); Ellickson, supra note 8, at 60; cf. Paul Koegel et al., Subsistence Adaptation Among Homeless Adults in the Inner City of Los Angeles, J. SOC. ISSUES, 1990, at 83, 89 (noting that different patterns of homelessness “highlight the danger of assuming that one can easily divide homeless people into unidimensional categories”).
variation on most demographic factors. Although most homeless persons have an extremely low income and few human capital resources, such as a college education, other stereotypes of the "typical" homeless person are easily rebutted. For instance, homeless persons are not all substance abusers, mentally ill, or jobless.

For homeless persons, simple survival is a vital concern. A collection of shelters, missions, agencies, and charities help them. But not all homeless persons use these services. Many just survive on the streets. Homeless survival behaviors, as distinguished from mere coping behaviors, are those strategies that homeless persons employ to maintain their bare existence on the streets. Survival behaviors directly enhance survival prospects by securing basic necessities of life like food, shelter, waste elimination, and safety. It is this survival behavior for which a duress defense is appropriate. Because "the most overwhelming consequence of homelessness is that homeless

10. For a good demonstration of this variation, see BLAU, supra note 8, at 24-30.
11. BURT & COHEN, supra note 9, at 76.
12. Id.
13. BLAU, supra note 8, at 26-27 (estimating that only one-third of the homeless population are substance abusers); BURT & COHEN, supra note 9, at 51 (reporting that one-third of their homeless sample had been in "detox" or alcohol and drug treatment program).
14. BLAU, supra note 8, at 27 (estimating that one-fourth to one-third of homeless persons have severe mental illness); BURT & COHEN, supra note 9, at 48 (reporting that 19% of their homeless sample indicated history of mental hospitalization); FEDERAL TASK FORCE ON HOMELESSNESS AND SEVERE MENTAL ILLNESS, U.S. DEPT OF HEALTH AND HUM. SERVICES & U.S. DEPT OF HOUSING AND URB. DEV., OUTCASTS ON MAIN STREET 7 (1992) (estimating that one-third of single adult homeless population have severe mental illness).
15. BLAU, supra note 8, at 28 (citing survey that 24% of homeless persons engage in full or part-time work); Koegel et al., supra note 9, at 97 ("Work . . . is a regular part of many homeless individuals' lives . . . .").
17. For mention of why some homeless persons may not use these services, see infra notes 38, 90, 161 and accompanying text. Even those who use the available services will most likely still face challenges that require survival strategies. DAVID A. SNOW & LEON ANDERSON, DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE 144 (1993) (noting that public assistance is inadequate for survival).
19. Although "survival strategies" is a term borrowed from Snow and Anderson's case study of street homeless persons in Austin, Texas, in the mid-1980s, supra note 17, at 110, the term has a more limited meaning here than in that study. Snow and Anderson used the term to encompass all activity geared towards improving the material, social, and psychological facets of individual homeless lives. Id. at 77-109. This paper, on the other hand, limits the term only to those behaviors which are aimed at securing life essentials. As with Snow and Anderson, this paper uses the terms "subsistence strategy, behavior, or conduct" interchangeably with "survival strategy, behavior, or conduct."
20. Deciding whether a given behavior secures a "basic necessity of life" is necessarily subjective. As with all line drawing, reasonable people may disagree as to where to precisely draw the line. See Joyce v. City of San Francisco, 846 F. Supp. 843, 851 (N.D. Cal. 1994) (noting difficulty of exact enumeration of what is and is not "life-sustaining activity"). While I may submit my view as to what constitutes a survival behavior, the reader should note that the exculpatory argument to be presented below leaves this question to the jury.
individuals cannot count on basic necessities of existence,"21 these individuals have to adopt subsistence strategies.

These innovative strategies address matters of personal maintenance like sleeping, eating, and defecation. From a survey of homeless individuals in downtown Los Angeles, researchers have identified a "hunting-and-gathering subsistence strategy, in which mainstream society's detritus—abandoned buildings, scavenged food, discarded clothing, or recyclable goods—is mined for its subsistence potential, or in which urban fixtures not intended for subsistence use—freeway overpasses, dumpsters, and transportation waiting rooms—are put to this end."22 Sleeping may occur in creative shelters,23 in public,24 or, when the elements are especially bad, in vacant buildings.25 In a national sample of homeless adults, researchers found that three-fourths of homeless persons have only two meals per day or less and that thirty-six percent go without food one or more days per week.26 One strategy for obtaining food is scavenging.27 Street homeless persons rely heavily on trash and handouts as a source of food.28 Of course, eating inevitably necessitates defecation. When public facilities are unavailable, the survival process necessarily includes some mode of public defecation.29

21. Koegel et al., supra note 9, at 83; accord Donald E. Baker, Comment, "Anti-Homeless Legislation: Unconstitutional Efforts to Punish the Homeless," 45 U. MIAMI L. REV. 417, 419 n.10 (1990-91) ("The vast majority of homeless persons lack a place in which to perform basic life activities.").
22. Koegel et al., supra note 9, at 102.
23. Id. at 89 (finding that shelters included, among other locations, cars, all-night theaters, and homes of family or friends).
24. CARL I. COHEN & JAY SOKOLOVSKY, OLD MEN OF THE BOWERY 93 (1989). "Carrying the banner" is homeless slang for living on the streets. Id.
25. Id. at 92, 94-95; ATLANTA TASK FORCE FOR THE HOMELESS, THE CRIMINALIZATION OF POVERTY 4, 10 (1993).
26. BURT & COHEN, supra note 9, at 54.
27. COHEN & SOKOLOVSKY, supra note 24, at 89; Koegel et al., supra note 9, at 89.
28. BURT & COHEN, supra note 9, at 68.
29. The unavailability of toilets open to the public fosters public defecation by homeless persons: Now the toilets are only for the employees. So one day this man goes behind this building to take a leak. The officer said to him "Why did you pick this park to urinate?" He said, "When you have to go you have to go." He says the toilet over there should be open. It's closed and if a man wants to move his bowels or take a leak where can he go 'cause everything is closed? And the officer gave him a summons. This morning I had to go to the bathroom very bad, the bathhouses were closed on Sunday and Monday, the toilet down at Delancey and Allen Street is closed, BRC don't open til nine o'clock. It's rough all over.
COHEN & SOKOLOVSKY, supra note 24, at 96 (quoting from interview with homeless person); accord ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 10 (noting that adequate public restroom facilities are "practically non-existent"); see infra text accompanying note 39.

This is perhaps a good place to mention a distinction that will be detailed later, infra part III.B.4.b., between reasonable survival behaviors and unreasonable survival behaviors. This distinction, to use an example in the public defecation context, is the difference between urinating in the middle of an open park filled with strollers and picnickers, and urinating in an empty alley behind a dumpster. Although both these scenarios involve behavior necessary to subsist, the subsistence conduct considered by this paper is of the reasonable variety.

What constitutes "reasonable" survival behaviors is as subjective as what constitutes "survival behaviors," and again, this is a question that would ultimately be decided by a jury considering a
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In addition to personal maintenance, another important survival concern of homeless individuals is personal safety. Studies of homeless persons repeatedly produce reports of substantial victimization. As with personal maintenance, homeless individuals adopt a variety of strategies to survive this disproportionate threat to their safety. These strategies include sleeping in vacant buildings, carrying weapons, and congregating with other homeless individuals.

These survival behaviors, in addition to being verified by empirical research, have received judicial acknowledgement. In Pottinger v. City of Miami, a federal district court declared unconstitutional Miami’s practice of police sweeps and arrests of homeless people. In so holding, the court repeatedly characterized homeless survival behavior as “essential, life-sustaining acts” and “harmless, involuntary conduct which they must perform in public.”

To summarize, street homeless persons face a variety of subsistence
challenges and, in response, they adopt a variety of survival strategies in order to maintain their bare existence. These subsistence challenges are even more formidable to street homeless persons with no access to urban services, such as the rural homeless and distrustful homeless persons who choose not to use available services.

II. CRIMINALIZING SURVIVAL

I had to pee, so I went down an alley behind a dumpster, and I pulled down my pants, but the police came by and arrested me for that and took me to jail.

The daily quest for food, shelter, and protection—the struggle to survive—is not all that street homeless persons must worry about. Very often, successful survival is rewarded with arrest. Survival strategies regularly constitute criminal conduct, whether sleeping outdoors on public property, loitering, scavenging, public nuisance, congregating, other low-level crimes, or even trespass or burglary.

36. There is no single way to cope; rather, a variety of creative strategies are adopted. COHEN & SOKOLOVSKY, supra note 24, at 90 (noting "considerable heterogeneity" in the way men fulfilled their needs); SNOW & ANDERSON, supra note 17, at 168 ("Most of the homeless regularly pursue a limited range of strategies rather than the entire gamut."); Koegel et al., supra note 9, at 84 ("[H]omeless people juggle the scarce resources at their disposal in creative, innovative, and constantly changing ways.").

37. BLAU, supra note 8, at 11; Koegel et al., supra note 9, at 102.

38. In Los Angeles, 14% of the downtown homeless population completely avoid service use. Koegel et al., supra note 9, at 102. There are several reasons why certain street homeless persons may avoid urban services directed towards them. For example, repeated victimization leads to an "ever-present fear and distrust of others." Fischer, supra note 30, at 104-05. Cohen and Sokolovsky identify suspicions and fears, lack of initiative, and physical disabilities as possible reasons for avoiding services that provide food. COHEN & SOKOLOVSKY, supra note 24, at 89. Another factor may be a general negativity toward all institutions in the "miseries business." JACQUELINE P. WISEMAN, STATIONS OF THE LOST 252 (1970); see also Christopher P. Gilkerson, Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories, 43 HASTINGS L.J. 861, 885 n.86 (1992) ("Due to the oppressive physical and regulatory conditions of shelters, many homeless persons find they have no choice but to seek alternative forms of shelter and assistance.").

39. SNOW & ANDERSON, supra note 17, at 310 (quoting homeless woman’s testimonial) (internal quotation marks omitted).

40. See Baker, supra note 21, at 418-19 (noting that arrests for homeless activity occur with "increasing frequency in cities across the country").

41. ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 19.

42. Id.

43. Simon, supra note 5, at 632 n.1 (reporting arrest of homeless person for removing trash from bin).

44. BLAU, supra note 8, at 4.

45. For an example of an anti-congregation law that could reasonably be applied to homeless persons, see Henrichs v. Hildreth, 207 N.W.2d 805, 808 (Iowa 1973) (holding constitutional ordinance prohibiting congregation and loitering that "obstruct[s] free and open use of public walkways").

46. For example, "[o]n a rainy night in January, Santa Ana [California] police cited dozens of homeless people for covering themselves with blankets," in violation of an ordinance prohibiting covering oneself with a blanket or sleeping bag in a public space. Sachs, supra note 4, at 38.
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The following examples demonstrate how the city of Santa Ana, California, used a single “camping” ordinance to “clean up its neighborhoods and force out the vagrant population” in a single police sting.48

Wilfred J. is a 58 year old who has lived in Santa Ana for seven years and became homeless when the truck he used for hauling jobs was stolen. Mr. J. receives no “general relief” or social security and is looking for work. He lives alongside railroad tracks. Sometimes when it rains, he is unable to board the bus for the armory because of overcrowding. It was full on January 14, 1993, when he was ticketed for “camping” near a building opposite the police station even though he obeyed police orders to move on . . . .

Jack K. is 52, has been in Santa Ana for five years, and has been homeless most of that time. He has lived in the Civic Center for the past two years. The only public assistance he receives is food stamps. The last time he attempted to stay at the armory, he was turned away. On the evening of January 14, 1993, Jack K. was reading a book in his sleeping bag in the doorway of a public building. He chose that location for lack of any other place to go and for reasons of personal safety. Six officers approached and cited him under the camping ordinance . . . .

James E. declared he is 45 and a 10-year resident of Santa Ana. He lost his job a year ago and has been on the streets since. He stays in the Civic Center because “it is convenient to food sources, and there’s safety in numbers.” He was cited under the camping ordinance while in his sleeping bag . . . .

Romaldo C. generally works as a gardener or in construction, but becomes homeless when he is out of a job. He missed the bus for the armory on January 14, 1993, while looking for work and was cited while attempting to sleep in the Civic Center.49

These examples illustrate how activities necessary to live—in these cases, sleeping50—can constitute criminal conduct.

Empirical studies of criminal activity among the homeless generally confirm that compared to the general arrest population a disproportionate number of homeless persons are arrested for low-level crimes, like Santa Ana’s “camping” ban.51 Researchers have concluded that “criminal arrest and

47. Analyzing data from five cities and one state, Snow et al. found that a plurality of homeless persons arrested for burglary were breaking into warehouses or abandoned and unused buildings primarily for the purpose of sleeping or escape from the elements. Snow et al., supra note 30, at 538.


49. Id. at 390-91.

50. See id. at 392 (characterizing sleep as “essential human need”).

51. See ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 10-11. “[W]hile homeless males are arrested more frequently than non-homeless males, most of their offenses are relatively minor and victimless. While involvement in crime by the homeless is fairly extensive, the preponderance of it is not the kind of crime that poses a direct threat to domiciled citizens.” Snow et al., supra note 30, at 539; Tobe, 27 Cal. Rptr. 2d at 389 (noting that majority of homeless arrestees in police sting operation had no serious criminal arrest history); cf. Pamela J. Fischer, Criminal Activity Among the
conviction [of street homeless persons] . . . often resulted from the condition of homelessness itself and the secondary adaptations individuals developed to survive on the streets."52 Thus, the very strategies used to survive often constitute criminal conduct.53

One obvious interpretation of the data analyzed by these various studies is that to the extent surviving on the streets results in arrest, homelessness has been criminalized.4 Thus, one scholar has concluded that homeless persons arrested for survival activity "may be thought to be criminally homeless rather than homeless criminals."55 This criminalization of homelessness has been repeatedly acknowledged by courts.56 It is especially worth noting that homeless survival is often the intended target of some strict liability crimes that do not require any mens rea. For example, a city may pass an ordinance making it unlawful to store personal property on city land, regardless of any criminal intent. Such ordinances, which criminalize behavior that is well known by everyone to be associated with the street homeless, are likely aimed at the homeless.57 Indeed, it is fair to label these varieties of ordinances "homeless" or "antihomeless" laws.58

In addition, an equal application and enforcement of other laws not specifically intended to target the homeless occasionally results in the arrest of street homeless persons for their survival behavior. This is perhaps most likely

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52. SNOW & ANDERSON, supra note 17, at 278.
53. Fischer, supra note 51, at 49; see also Snow et al., supra note 30, at 546 ("It is our sense that what prompts many criminal activities among the homeless has little to do with such traditional criminological precipitants as cultural goals, subcultural values and norms, or social attachments, but instead is related to the absence or inaccessibility of alternative survival strategies.").
54. Baker, supra note 21, at 424; Fischer, supra note 51, at 49-50 ("criminalizing a subsistence pattern"); Simon, supra note 5, at 647; Snow et al., supra note 30, at 543 ("[P]ursuit of rather routine behaviors in public places can result in the criminalization of those behaviors.").
55. Fischer, supra note 30, at 104.
56. Pottinger v. City of Miami, 810 F. Supp. 1551, 1554, (S.D. Fla. 1992) (finding that Miami has "pattern and practice of arresting homeless people"); Wyche v. State, 619 So. 2d 231, 239 (Fla. 1993) ("In this country, . . . the objects of the [loitering and vagrancy] statutes have been minorities, the homeless, and the powerless."); see supra note 3 and text accompanying note 48; Derby v. Town of Hartford, 599 F. Supp. 130, 131-32 (D. Vt. 1984) (finding that unconstitutional vagrancy ordinance was meant to combat "lingerers"); State v. Kemp, 429 So. 2d 822, 824 (Fla. Dist. Ct. App. 1983) (holding loitering ordinance constitutional where, "unlike traditional vagrancy and loitering ordinances," it did not purport to penalize status).
57. "Cities are trying to use police to manage the homeless people," and accordingly have passed laws in response to the rise in homelessness. Sachs, supra note 4, at 38 (quoting UCLA School of Law Professor Gary Blasi).
58. For example:
In the past two years, the Atlanta City Council has passed three ordinances that are being used specifically to target homeless people for arrest. These "homeless" ordinances include laws that (1) prohibit an individual from remaining [in] or crossing a public parking lot, (2) restrict panhandling and (3) forbid an individual from lying down on a public park bench.

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ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 3-4.
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true for the more serious crimes that require some sort of mens rea. For example, the crime of trespass was not created solely with the street homeless in mind, yet the crime may sometimes encompass a particular survival behavior like sleeping in an abandoned building during a winter storm.

Even when a law has not been passed with the homeless in mind, it may be purposely invoked against them. In Pottinger v. City of Miami, for example, the federal district court concluded that Miami had a “pattern and practice of arresting homeless people for the purpose of driving them from public areas.” Researchers report that “neighborhood assertions [about the dangerous criminality of homeless persons] drowned out the actual facts, pressuring the police into greater vigilance toward the homeless.” The police respond with stricter enforcement of ordinances that can be applied to the homeless. Thus, regardless of whether the original purpose of such laws was in fact to criminalize street homelessness, the reason for their enforcement frequently is to criminalize homelessness. Criminalization, then, is often an intentional public policy response to the problem of homelessness.

The supposed public interests that criminalization is purported to serve are dubious at best. Perhaps the most often cited governmental interest in the criminalization of homeless survival is the prevention of crime. Although crime prevention is certainly a substantial public interest, it is only tenuously connected, if at all, to a policy of arrest sweeps.

Homeless crimes are less violent than crimes of the general population.

59. 810 F. Supp. at 1554.
60. SNOW & ANDERSON, supra note 17, at 99.
61. Id. at 100; see also Tobe v. City of Santa Anna, 27 Cal. Rptr. 2d 386, 389 (Cal. Ct. App.) (noting prior court’s unappealed finding that “the homeless . . . had indeed been singled out for arrest for offenses that rarely, if ever, even drew citations in Santa Ana”), review granted, 872 P.2d 559 (Cal. 1994). “Only the homeless were targeted; two arrestees who had homes were released. The officers used ‘cheat sheets’ to recall little known offenses.” Id.
62. See supra note 9.
63. The following critique of criminalizing homeless survival is from a public policy perspective and is intended simply to problematize the quick, usual justifications for arresting homeless persons. A philosophical argument against criminalization, based on the exculpatory theory of excuse, is saved for Part III.
64. Crime prevention was cited by Miami as a justification for their policy of homeless arrest sweeps. Pottinger v. City Of Miami, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992). According to Dennis Mitchem, chairman of the Phoenix, Arizona Downtown Crime Task Force, “[t]he homeless as a group represent a menace . . . [partly] because of the high crime rate which exists among them . . . .” BLAU, supra note 8, at 3 (quoting Mitchem). Significant numbers of citizens in communities throughout the country act as if the homeless are “criminally inclined” and threatening. Snow et al., supra note 30, at 533. “The city that coddles lawless vagrants ends up as a magnet for derelicts. Law enforcement should be part of any plan that addresses homelessness . . . .” Debra J. Saunders, Feeble Measure, Feeble Mayor, S.F. CHRON., Apr. 9, 1993, at A26 (editorial). Concern with the “dangerous criminality” among the homeless has been with us since England’s fifteenth-century Tudor period. SNOW & ANDERSON, supra note 17, at 11.
65. ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 10-11; Snow et al., supra note 30, at 538-39 (“Thus, with an arrest rate for violent offenses significantly lower than that for domiciled males, it would appear that the homeless certainly are no more, and probably less, likely to commit crimes of violence than the general population.”); cf. Baker, supra note 21, at 434 (noting that homeless
The fear of homeless crime that prompts police sweeps is grossly disproportionate to the levels of homeless crime suggested by available empirical evidence.\textsuperscript{66} Furthermore, as has been shown, many homeless persons are arrested for sleeping and other entirely innocent conduct.\textsuperscript{67} Substituting empirical evidence for popular stereotypes and fears reveals the weakness of the connection between crime prevention and homeless arrest sweeps. As stated by a Florida court, "just concerns of the public regarding crime must take rational expression and not become a mindless fear . . . ."\textsuperscript{68}

Regardless of the rationality of governmental arguments based on perceptions of homeless criminality, it is not likely that arrest sweeps pose any deterrent to the criminalized behavior.\textsuperscript{69} After arrest and processing, a street homeless person will undoubtedly "choose" to subsist on the street when it again becomes necessary despite his or her exposure to the supposed deterrence of criminal sanction. Prior arrest cannot prevent the body from feeling sleepy or needing to defecate.\textsuperscript{70}

Other public interests in criminalization are simple aesthetics\textsuperscript{71} and a better business environment for street-front merchants.\textsuperscript{72} Of course, criminalization can result in "cleaner" streets and prettier business fronts. Aesthetic and pecuniary interests are served by arrest sweeps insofar as homeless persons are thereby kept out of certain areas.\textsuperscript{73} But it is deeply troubling to find a
do not commit more crimes than general population).

\textsuperscript{66} See SNOW & ANDERSON, supra note 17, at 98 (Police in Austin, Texas are "keenly aware that neighborhood claims and fears [regarding homeless criminality] had little empirical substance.").

\textsuperscript{67} Pottinger, 810 F. Supp. at 1554 (finding that homeless persons in Miami are arrested for "innocent and inoffensive conduct"); see, e.g., Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 389 (Cal. Ct. App.), review granted, 872 P.2d 559 (Cal. 1994) (noting arrest of homeless person for dropping leaf); cf. Baker, supra note 21, at 434 (commenting that it is impossible to commit crimes while sleeping); Fischer, supra note 51, at 49 ("Details drawn from the narrative reports of arrests of homeless persons suggest that relatively minor infractions often resulted in serious charges.").


\textsuperscript{69} Although survival behavior, virtually by definition, cannot be deterred, it can arguably be deterred in certain areas. That is, the criminal law cannot stop sleeping, but it can stop it (through vigorous enforcement of an antisleeping ordinance) in area x. Thus, a proponent of arrest sweeps can reasonably argue that such sweeps serve the important function of containment to certain areas (or dispersion out of certain areas) of criminalized survival activity. This valid point is noted and will be addressed infra text accompanying notes 74-77.

\textsuperscript{70} Pottinger, 810 F. Supp. at 1565 ("[R]esisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible.").

\textsuperscript{71} Pottinger admits the "inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets." 810 F. Supp. at 1554.

\textsuperscript{72} ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 11 (reporting correlation between staging of conventions and arrests of homeless people in Atlanta); BLAU, supra note 8, at 4 (finding that political conventions and football games entail revival of littering and public nuisance statutes).

\textsuperscript{73} For example:
The police arrive without warning with 6-8 patrol cars and block off the street. They then announce that the residents have only 5 or 10 minutes to collect whatever possessions they can
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community valuing these interests more than the survival of street people. 74 Moreover, police dispersion and harassment tactics use the legitimate arrest process for the purpose of purging homeless individuals from certain streets and parks. 75 That is, the arrest sweeps are being used for a purpose other than that intended by law, to "'keep the homeless out of the face of other citizens.'"76 Thus, although criminalization may be an effective strategy for making certain streets and business fronts prettier, it involves the arguably illegitimate use of arrest for the ulterior purpose of making the street homeless effectively "invisible."77

In summary, the connection between public interests and the criminalization of homeless survival is by no means certain. The threat of homeless crime is exaggerated and the costly criminalization strategy cannot deter a person's will to survive. Arrest sweeps may deter subsistence in certain areas by harassing the homeless out of those areas, 78 and thereby achieve prettier streets and business fronts. But the use of the arrest process for the ulterior motive of carry and move along. City workers then sweep all that has been left behind into the street and bulldozers scrape everything into dumpsters which are then carried away and presumably dumped.


Pottinger specifically held that such interests are not sufficiently compelling to justify punishing survival behavior:

The City has a legitimate interest in having aesthetically pleasing parks and streets and in maintaining facilities in public areas. However, this interest is not compelling, especially in light of the necessity of homeless persons to be in some public place when no shelter is available. The Supreme Court has recognized the governmental interest in park maintenance as being only "substantial," . . . .

810 F. Supp. at 1581; see also Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 395 ("[A] minority may not be entirely suppressed in the name of otherwise laudable public purposes."), review granted, 872 P.2d 559 (Cal. 1994).

75. COHEN & SOKOLOVSKY, supra note 24, at 95 (noting that it is "not uncommon for police to harass men out of certain areas").

76. SNOW & ANDERSON, supra note 17, at 100 (quoting Austin, Texas, police officer). "'Cities are trying to use police to manage the homeless people, to try to make them go away.'" Sachs, supra note 4, at 38 (quoting UCLA School of Law Professor Gary Blasi).

77. Thus, Pottinger concluded that "the internal police memoranda and the testimony presented at trial support plaintiffs' claim that the City used the arrest process for the ulterior purpose of harassing and dissipating the homeless." Pottinger v. City of Miami, 810 F. Supp. 1551, 1568 (S.D. Fla. 1992). "Whether the [police] harassment [of homeless persons] was attributable to officially formulated policy or to overzealous and unconstrained police officers is unclear. That it occurred, though, seems incontestable. Not only was it felt by the homeless, but we [the researchers] too observed it rather frequently." SNOW & ANDERSON, supra note 17, at 100.

78. Police activity "made the homeless more circumspect about where they roamed, hung out, and slept." SNOW & ANDERSON, supra note 17, at 102.

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“purging” may be an abuse of that process.  

III. EXCULPATING SURVIVAL

15 years ago, Legal Aid was trying to fight against sub-standard housing. Five years ago, we were trying to fight for any kind of housing at all. Now, we are fighting to prevent homeless people from being arrested and jailed.  

Excuse theory holds that punishment of coerced and reasonable behavior is unjust. A logical modification of duress that more closely aligns that defense doctrine with its underlying excuse rationale ought to exculpate homeless offenders of certain laws and ordinances that criminalize survival.

A. Excuse Theory and Homeless Survival

The theory of excuse primarily involves two concepts: coercion and reasonableness. First, if an act, \( A \), was coerced, then \( A \) was not freely chosen by the offender, \( X \). Thus, “it will not do to say simply ‘\( X \) did \( A \)”’:\(^81\) excuse theory would exculpate \( X \). As stated by one commentator, “[i]t may be said in these cases that the person had no effective choice . . . ."\(^82\)

The second principle underlying excuse is reasonableness. According to this principle, \( X \) should be excused where “circumstances would have led even a reasonable, normally law abiding person to act in the same way.”\(^83\) Thus, in cases of this variety, an offender should be excused (exculpated) when “no reasonable and upright person could have done otherwise.”\(^84\) Reasonableness, not the laws of physics, compelled the offending action.\(^85\) Thus, the theory of excuse would exculpate those offenders who were not freely acting and who acted only as we expect everyone else would have acted under the same circumstances. This theory does not require us to admit that the criminal action was a “good” thing to do, but only that the particular offender should nevertheless be excused. The rationale for exculpation of excusable conduct is

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\(^{79}\) The governmental interests just in crime prevention, aesthetics, and better business are typically the litigation positions a community takes in court. One wonders whether these litigation positions accurately reflect a city’s real interest in criminalizing homeless survival. Cf. Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 392 n.4 (Cal. Ct. App.) (“After five years of litigation, the city has learned one lesson well: Do not document an intention to displace the homeless.”), review granted, 872 P.2d 559 (Cal. 1994).

\(^{80}\) Sachs, supra note 4, at 38 (quoting Legal Aid staff attorney) (internal quotation marks omitted).

\(^{81}\) J.L. Austin, A Plea for Excuses, 57 PROC. ARISTOTELIAN SOC’Y 1, 6 (1957).


\(^{83}\) Id. at 88.

\(^{84}\) Id.

\(^{85}\) Joshua Dressier, Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits, 62 S. CAL. L. REV. 1331, 1366 n.194 (1989) (“Sometimes we say of one acting under duress that ‘the actor had no choice.’ In fact, we really mean ‘the actor had no meaningful choice,’ or ‘the actor had no fair choice.’”); accord Kadish, supra note 82, at 88 (The statement “no reasonable and upright person could have done otherwise” is “metaphorically, not literally accurate.”).
Homeless Criminalization

retributivist: the offender is not morally culpable, and "justice requires the preclusion of blame where none is deserved."86 Stated differently, "no one should be punished who could not help doing what he did."87

By using these excuse concepts of coercion and reasonableness, recognizing the lack of moral culpability in the context of homeless survival is essentially a two-step process.88 To illustrate, suppose that J.R., a street homeless man, is arrested and convicted for trespassing after being found sleeping in a vacant building during a winter storm. Suppose further that J.R. had tried and failed to obtain shelter the night before, or that J.R.'s community has no homeless shelters at all.89

Now consider the coercion element of excuse theory. To put the matter very simply, demand for temporary shelter exceeds the supply.90 That is, not every homeless person who wants a shelter bed can get one. This predicament is J.R.'s coercive circumstance: J.R. is forced by the straightforward

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86. Kadish, supra note 82, at 88. This view equates punishment with blame; but some may argue that criminal judgments do not necessarily equal blame. According to Kadish:

[T]his is surely mistaken. Certainly not all criminal conduct is independently immoral . . . . But in either case criminal conviction charges a moral fault—if not the violation of a moral standard embodied in the criminal prohibition, then the fault of doing what the law has forbidden. The same principle that compels excuses in moral criticism also compels them in the criminal law.

Id. at 87.

87. H.L.A. Hart, Legal Responsibility and Excuses, in PUNISHMENT AND RESPONSIBILITY 28, 39 (1984). There are other rationales for excuse in addition to the retributivist one just presented. For example, a utilitarian would argue that because excusable conduct is by definition non-deterrable, punishment of excusable conduct would be an unnecessary evil. For a detailed argument that excuse respects humans as "choosing beings," see id. at 45-49.

88. The specific mechanics and legal questions involved in proving absence of moral culpability are considered infra, in part III.B. The argument here is theoretical: many homeless offenders had no genuine choice but to commit the offending act and therefore lack the requisite culpability for a valid application of the criminal law.

89. These facts are essentially the same facts reported supra text accompanying note 1. The authorities on this point are virtually unanimous. E.g., Joyce v. City of San Francisco, 846 F. Supp. 843, 849 (N.D. Cal. 1994) ("[T]he City has conceded the inadequacy of shelter for its homeless."); Pottinger v. City of Miami, 810 F. Supp. 1551, 1559 (S.D. Fla. 1992) ("[T]his court has no difficulty in finding that the majority of homeless individuals literally have no place to go."); Tober v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 393 n.7 (Cal. Ct. App.) ("The city admits it is shy about 2,668 shelter beds on any given night."); review granted, 872 P.2d 559 (Cal. 1994); ATLANTA TASK FORCE FOR THE HOMELESS, supra note 25, at 8 ("Due to the shortage of shelter space, the Task Force is unable to place over 30% of the people who request assistance."); BURT & COHEN, supra note 9, at 165 ("[E]xisting amounts of emergency food and shelter meet only about half the need."); Baker, supra note 21, at 422 n.24 (reporting that 59% of major city mayors surveyed say their cities' shelters must reject some homeless people because of lack of resources); Koegel et al., supra note 9, at 86 ("[T]he fact remains that each time a new facility opens in the Skid Row area, it almost immediately faces a demand greater than its resources."); Simon, supra note 5, at 663 (reviewing empirical evidence which demonstrates cities do not have enough shelter to house their homeless population and noting that "it belies common sense to believe that a substantial number of individuals voluntarily remain homeless").


The point here is not necessarily that we should build more shelters. Yale Law School Professor Robert Ellickson compellingly argues that building new shelters may actually increase the number of street homeless. Ellickson, supra note 8, at 50-52. The point here is only that current shelter demand exceeds shelter supply.
circumstance of “no room at the inn”—or perhaps no “inn” at all—to survive that night on the streets.

Turning to the reasonableness element, J.R.’s offending conduct, trespassing in the vacant building, seems reasonable, in that a reasonable person in J.R.’s circumstances would also likely enter the vacant building. In New York City alone, several dozen street homeless persons die every year from hypothermia. Thus, given a winter storm, J.R.’s trespass is not only reasonable but arguably compelled by the body’s biological needs and by the subconscious will to survive. No reasonable person in J.R.’s circumstances would choose possible hypothermia over survival.

Suppose it were summer, with no threat of dangerous weather, and suppose that shelter was again unavailable to J.R. This time, J.R. sleeps outdoors on a park bench and is arrested for public sleeping or unauthorized “camping.” Again, excuse theory would exculpate J.R. “No room at the inn” was his coercive circumstance, and sleeping was “reasonable” in that any person would eventually fall asleep.

Thus, because J.R. had no genuine choice but to trespass in the first hypothetical or sleep in public in the second, he lacks the moral culpability required for just punishment. The exculpation argument here is highly factspecific. J.R., however, is most likely not the only person forced to survive on the street those nights, and surely street homeless persons always “choose” survival. Exculpation, then, is potentially applicable in the case of many homeless offenders. Indeed, researchers have observed that police action towards the homeless “seemingly disregards the issue of culpability.” To the extent that it does, such police action is an unjust criminal law response to the homeless.
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B. Applying a Duress Defense to Homeless Survival

As the doctrinal derivative of excuse theory, the duress defense ought to exculpate homeless survival behavior. Traditional duress, however, contains certain limitations that would bar a typical homeless duress claim. Modifying duress so that these limitations are cautiously eased would more closely align duress with its underlying excuse rationale and satisfactorily exculpate homeless survival on the streets.

1. Why Duress?

The preliminary question for individual exculpation is which defense to use. One possibility is duress: J.R., our offender, should be exculpated because his conduct was coerced and reasonable. Another possibility is necessity: the offender should be exculpated because, in breaking the law, he chose the lesser of two evils. Invoking the necessity defense, one would argue that, for example, the dangerous health risks of exposure to a winter storm are a greater harm than the illegal occupation of a vacant or abandoned building; therefore, the defendant was justified in that he chose the lesser of two evils.

Use of the necessity defense may seem promising in this context, but duress may be more appropriate for several reasons. First, the necessity defense entails approval of the underlying offense; we want people to choose the lesser evil. Conversely, duress does not require us to approve of the offending conduct; we are required only to excuse it because we would have done the same thing in the same circumstances. Thus, application of duress lets us simultaneously affirm, for instance, that (1) public defecation is not appropriate behavior and should be against the law and (2) a homeless person turned away from a shelter should be excused for reasonable public defecation if no public toilets are open. The idea of duress maintains not that public defecation by an involuntarily homeless person is “right” and should be

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98. According to the Model Penal Code:

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

MODEL PENAL CODE § 2.09(1) (1985). Note that this defense is limited to coercion emanating from another person and does not apply to coercion by nonhuman circumstances.

99. MODEL PENAL CODE § 3.02 ("Conduct which the actor believes to be necessary to avoid harm or evil to himself or to another is justifiable, provided that [inter alia] the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . ."). Although this Note uses the term “necessity,” the MPC names this defense “justification.” Another synonymous term is the “choice of evils” defense.

100. See King, supra note 1, at B1 (reporting planned necessity defense for homeless man who trespassed to avoid freezing temperatures). Necessity may seem especially promising because unlike duress, it is not limited to circumstances involving unlawful human threats.
applauded, but only that it is excusable. ¹⁰¹

A second reason that duress may be preferred over necessity involves the philosophical rationales behind the two defense doctrines. ¹⁰² The concept of excuse applies to homeless survival because street homeless persons have no genuine choice but to survive, even if survival activities have been criminalized. ¹⁰³ The defense doctrine derived from excuse theory is duress, not necessity. ¹⁰⁴ For example, the Model Penal Code's articulate rationale for duress is clearly an excuse argument:

[[If the claimed excuse is based upon the incapacity of men in general to resist the coercive pressures to which the individual succumbed . . . [then] the essential principle is . . . that law is ineffective in the deepest sense, indeed that it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise. Condemnation in such a case is bound to be an ineffective threat; what is, however, more significant is that it is divorced from any moral base and is unjust.]

This excuse rationale for the duress defense is widely recognized by criminal law scholars. ¹⁰⁶ Conversely, the theoretical rationale for necessity is not excuse, but justification. ¹⁰⁷ To be consistent with excuse theory, then, one would use the duress defense. ¹⁰⁸

Finally, duress suggests an element of coercion that necessity does not. The circumstances of “no room at the inn,” or just “no inn,” when viewed as the coercive component of duress, remind us that those predicaments do not just “happen” but, like the duress paradigm of a gun to the head, are the result of another actor’s choices. In this case, the “actor” who decides not to provide

¹⁰¹ See supra note 97.
¹⁰² George P. Fletcher, Should Intolerable Prison Conditions Generate a Justification or an Excuse for Escape?, 26 U. C. A. L. Rev. 1355, 1355 (1979) (“The important preliminary question . . . is not which doctrinal label we should use, but whether the principle requiring consideration of the evidence is one of justification or excuse . . . . This basic question influences the contours of the defense.”).
¹⁰³ See supra part III.A.
¹⁰⁴ There is some confusion and disagreement on this point. Some criminal law scholars, for example, articulate a “choice of lesser evils” rationale for duress. See, e.g., WAYNE R. LAFAVRE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 433 (2d ed. 1986) (“The rationale of the defense of duress is that, for reasons of social policy, it is better that the defendant . . . choose to do the lesser evil . . . .”). The more common view, however, treats duress as an excuse, not a justification. See Dressler, supra note 85, at 1349 (“[M]ost [statutes] consider [duress] an excuse.”).
¹⁰⁵ MODEL PENAL CODE § 2.09 cmt. 2 (1985); see also Dressler, supra note 85, at 1366 (“At its core, the defense of duress requires us to determine what conduct we, a society of individual members of the human race, may legitimately expect of our fellow threatened humans.”).
¹⁰⁶ See, e.g., GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 624-25 (2d ed. 1983) (noting that rationale of duress is excuse, not justification); Dressler, supra note 85, at 1350 (“[D]uress is more satisfactorily viewed in excuse terms.”); Kadish, supra note 82, at 94; Fletcher, supra note 102, at 1356 (“The general trend . . . . is to treat duress as an excuse.”).
¹⁰⁷ Dressler, supra note 85, at 1348 (“As Blackstone and most modern statutes (including the MPC) define necessity, the plea is properly understood to be a justification defense . . . .”); accord Levine, supra note 94, at 729.
¹⁰⁸ See Whipple v. State, 523 N.E.2d 1363, 1373 (Ind. 1988) (“[D]efendant’s ‘lack of genuine choice’ argument closely parallels a duress defense . . . .”).

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enough shelter for its homeless population is a particular community. Also, using the duress defense helps us understand that inadequate shelter is indeed a coercive circumstance, forcing the street homeless to find innovative but criminal ways to survive.\textsuperscript{109}

2. \textit{Traditional Duress and Homeless Survival}

Traditionally, courts have sharply and severely limited the application of the duress defense so that the set of exculpated conduct is much smaller than that supported by duress's underlying excuse rationale.\textsuperscript{110} A seventeenth-century commentator noted that duress was available only during times of war.\textsuperscript{111} Courts and legislatures have gradually liberalized its application from that time, but with caution.\textsuperscript{112}

When a court removes a traditional limitation on duress, the pattern of argument is strikingly similar. The court notes the limitation, argues that it bars valid duress claims, and then eliminates it. Thus, in \textit{State v. Toscano}, the New Jersey Supreme Court removed the traditional duress limitation that the threatened harm must be immediate. It reasoned that “a \textit{per se} rule based on immediate injury may exclude valid claims of duress,"\textsuperscript{113} namely, claims of genuine coercion based in realistic threats of future harm. Similarly, in \textit{Knight v. State}, the Mississippi Supreme Court concluded that the requirement of an explicit threat would bar valid duress claims. It held that “[t]he question is not . . . whether an explicit threat was made, but whether a reasonable person under all of the circumstances would feel threatened for his personal safety.”\textsuperscript{114}

Legislatures have also removed certain limitations. The Model Penal Code dispensed with the requirement that the threat be one of death or great bodily harm since “no valid reason was perceived” for that limitation.\textsuperscript{115} At least three state legislatures—Indiana, North Dakota, and Texas—have significantly expanded the duress defense for non-felony crimes by arguably eliminating the

\textsuperscript{109} One quick warning: the matching of duress with homeless survival is a very uncomfortable fit because the defense traditionally requires the offender’s coercive circumstance to be the unlawful threats of another person (e.g., a gun to the head) rather than circumstances (e.g., involuntary homelessness). See supra note 98. Scholars similarly trying to apply duress to another atypical duress situation, prison escapes, have argued that a third defense is actually needed to “cover the cases of nonculpable reactions to situations of danger” not arising from the unlawful threats of another. Fletcher, supra note 102, at 1368-69. So, too, in the present context, an ideal solution would be a third defense covering nonculpable reactions to coercive circumstances. Because the rationale for such a defense would be so similar to the current duress defense, however, this Note will present a modification of duress rather than an entirely new defense.

\textsuperscript{110} Levine, supra note 94, at 729.

\textsuperscript{111} Id.

\textsuperscript{112} Id. (“In contemporary times . . . courts and law reform bodies have suggested new extensions for the defense.”).


\textsuperscript{114} 601 So. 2d 403, 405 (Miss. 1992).

\textsuperscript{115} MODEL PENAL CODE § 2.09 cmt. 3 (1985).
traditional requirement that the source of coercion must be another person.\textsuperscript{116} Such a modification brings the set of legally excusable conduct into much closer alignment with the set of morally excusable conduct.

This consistent evolution of duress has proceeded at different paces in different jurisdictions so that today the scope of the defense varies considerably from state to state.\textsuperscript{117} Still, the basic excuse concepts behind the various duress defenses are the same: coercion and reasonableness. According to the MPC, to establish the defense a defendant "must have been coerced in circumstances under which a person of reasonable firmness in his situation would likewise have been unable to resist."\textsuperscript{118}

Of the traditional limitations on duress that many modern statutes have kept,\textsuperscript{119} some arguably bar homeless duress claims\textsuperscript{120} while others do not, as indicated in Table 1.

The most common limitation on duress is that coercion must have its source in another person.\textsuperscript{121} It is also the most formidable one confronting any

\begin{itemize}
\item \textsuperscript{116} For example, Indiana's law provides:
\begin{quote}
With respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by force or threat of force. Compulsion under this section exists only if the force, threat, or circumstances are such as would render a person of reasonable firmness incapable of resisting the pressure.
\end{quote}
\textsc{Ind. Code Ann.} § 35-41-3-8 (Bums 1985) (emphasis added); \textit{accord N.D. Cent. Code} § 12.1-05-10 (1985); \textit{see also Tex. Penal Code Ann.} § 8.05 (West 1993) (not mentioning that "force or threat of force" must emanate from another person).

\item Court decisions in these three states applying duress to cases involving dangerous circumstances are scant. Thus, the possibility that these statutes might apply to coercive circumstances (as opposed to only coercion by another person) is grounded more in the words of the statute itself than in any state court decisions. Still, some decisions indirectly suggest the possibility of applying duress in situations of nonculpable danger arising from circumstances.

In an Indiana case involving the murder of two parents by their son, the son alleged in his defense that he was a victim of "an abusive or violent ongoing relationship" and killed his parents due to this "ongoing atmosphere of imminent danger or serious bodily harm." Whipple v. State, 523 N.E.2d 1363, 1367, 1366 (Ind. 1988). In other words, the son was alleging coercive circumstances ("atmosphere"), not coercion based in the immediate unlawful threats of another. The court held that the duress defense was not available for crimes against the person, but noted that "defendant's 'lack of genuine choice' argument closely parallels a duress defense," which suggests that the court would consider "lack of genuine choice" as a duress defense in an appropriate case.

\item North Dakota's highest court has held that the coercion in a duress defense must come from "an outside source," including "physical compulsion," suggesting that duress claims emanating from a "source" other than another human is possible. State v. Gann, 244 N.W. 746, 752 (N.D. 1976).

\item The main variations concern four major issues: the types of offenses to which duress is a defense, the "nature of the threatened injury that would suffice to establish duress," the immediacy of the threatened harm, and whether the actor's reasonable belief regarding how real the threat actually was is sufficient. \textsc{Model Penal Code} § 2.09 cmt. 1 (1985).

\item \textsc{Model Penal Code, supra} note 98, at explanatory note.

\item Table 1's list contains all the contemporary limitations on duress. Of course, some of these limitations (notably the last two) have been entirely eliminated in some jurisdictions. Except where noted by table footnotes, the source for the list is Levine, \textit{supra} 94, at 729.

\item A "homeless duress claim" is that a homeless person had no genuine choice but to engage in the conduct for which he or she was arrested. It assumes that the conduct was reasonable, the defendant did not choose to live on the street, and other facts to be discussed shortly.

\item \textsc{Model Penal Code} § 2.09 cmt. 4 (1985) ("Relatively few recent codes and proposals seem to permit a defense of 'compulsion' of natural causes . . . .").
\end{itemize}
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Traditional Duress Limitations
As Applied to Homeless Survival Behavior

Is the Limitation a Bar to Homeless Duress Claims?

<table>
<thead>
<tr>
<th>Requirement</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Coercion must have source in another person.</td>
<td>Yes</td>
</tr>
<tr>
<td>Offending conduct must be at the command of that person.</td>
<td>Yes</td>
</tr>
<tr>
<td>Reasonable person would have complied with coercion.</td>
<td>No</td>
</tr>
<tr>
<td>Duress cannot exculpate the killing of an innocent person.</td>
<td>No</td>
</tr>
<tr>
<td>Defendant must take advantage of any reasonably available alternative.</td>
<td>No</td>
</tr>
<tr>
<td>Threat must be present, imminent, and impending.</td>
<td>Sometimes</td>
</tr>
<tr>
<td>Threat must be of death or great bodily harm.</td>
<td>Sometimes</td>
</tr>
</tbody>
</table>

a. This limitation is the author's analytically analogous substitution for what Levine characterizes, *supra* note 94, as the requirement that the defendant's fear must be well-grounded.

b. This is an addition to Levine's list.

Table I

homeless duress claim, which stems not from another person (e.g., someone holding a gun to one's head) but rather from the circumstances of living on the street (i.e., inadequate or nonexistent homeless shelter space). Duress also usually requires that the offending conduct be at the command of that person. That is, the offending conduct must be what the coercer commanded. As the requirement contained in the first limitation is a necessary circumstance for the requirement contained in the second, this limitation is also a bar to homeless duress claims. No one is commanding the homeless person's survival behavior.

Other requirements for the defense are not as problematic for excusing homeless survival activities. The requirement that a reasonable person would have complied with coercion is not a hindrance since "choosing" survival is
reasonable.\footnote{122} In fact, characterizing such behavior as "reasonable" probably understates the matter: "[R]esisting the need to eat, sleep or engage in other life-sustaining activities is impossible."\footnote{123} The requirement that duress cannot exculpate the killing of an innocent person is not implicated in homeless survival strategies. Duress also requires that a defendant take advantage of any reasonably available alternative. Thus, if the defendant could have, say, called the police for help, could have escaped, or had negligently put himself in a situation "in which it was probable that he would be subjected to duress,"\footnote{124} the defense is not available.\footnote{125} Assuming that a homeless defendant has no realistic escape from or alternative to living on the street, this requirement is not implicated.

Two final limitations on the defense could bar some homeless claims but not others. Duress requires that the threat be present, imminent, and impending. Not all threats to street survival meet this standard. For example, a homeless person who carries a weapon for self-protection is not subject to an immediate threat. Conversely, a street person seeking shelter from an impending winter storm is. Other subsistence strategies can reasonably be classified either way. For example, although holding back one's excretion is possible up to a point, the urge to defecate inevitably becomes quite imminent.\footnote{126}

Where courts require that the threat be of death or great bodily harm, a duress defense would not be available in some situations. To use the same examples, hypothermia would qualify as a grave threat, whereas violent street crime against a homeless individual, when discounted by its probability, perhaps would not. Sleeping and defecation could arguably be classified either way.\footnote{127}

3. \textit{Modifying Duress}

It is apparent that traditional duress, without modification, does not apply to homeless survival behaviors. The paradigmatic duress claim—a gun to the head—is different in obvious and important ways from surviving on the streets.

\footnote{122}{This concept of "reasonableness" will be complicated \textit{infra} part III.B.4.b.}
\footnote{123}{\textit{Pottinger}, 810 F. Supp. at 1565.}
\footnote{124}{\text{MODEL PENAL CODE} § 2.09(2) (1985).}
\footnote{125}{\textit{See infra} part III.B.4.a. for an elaboration of this point.}
\footnote{126}{This last example requires construing the "threat" as the physical hazards posed by not defecating. This may sound like a bit of a stretch. That it sounds like a stretch, however, is not because these hazards are not real, but because the body, without fail, involuntarily makes sure that it always escapes these hazards.}
\footnote{127}{\textit{See United States v. Semple}, 702 F. Supp. 295, 301 (D.D.C. 1988) (recognizing that overnight sleeping is "necessary for a human being to sustain his or her life over time in reasonably good health"); \text{Baker}, \textit{supra} note 21, at 445 ("When homeless individuals sleep outside . . . they do so to survive . . . .")}
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Namely, it is the lack of shelter space\textsuperscript{128} and not an unlawful human threat which coerces the homeless survival. Thus, a modified duress defense is needed if nonculpable homeless subsistence is to be exculpated.

Accordingly, this Note proposes that the duress defense can be cautiously expanded beyond the restrictive common law in the following manner so as to encompass valid duress claims that are currently barred: \textit{with respect to offenses other than felonies, it is a defense that the person who engaged in the prohibited conduct was compelled to do so by lack of a genuine choice, in that circumstances were coercive enough to compel a person of reasonable firmness to engage in the prohibited conduct.}

The elements of this proposed statute are the exact elements of its excuse rationale: coercion and reasonableness. Using this modified duress defense, defendants would argue they had no genuine choice about whether to commit the offending act because (1) their act was coerced and (2) no reasonable person could have resisted the coercion (i.e., their capitulation to the coercion was reasonable). The proposed standard uses the term “genuine choice” (as opposed to “choice”) in order to recognize that although it may have been \textit{physically possible} for the actor to choose otherwise, reasonable people would not have.

The most obvious change in the proposed modification is the elimination of the source-of-coercion requirement, that the coercion be the unlawful threats of another person. The rationale for this elimination is the same rationale used by courts and legislatures who have at times eliminated certain other common law limitations:\textsuperscript{129} that the limitation in question bars valid duress claims. The source-of-coercion requirement bars homeless duress claims and other claims based on nonculpable reactions to coercive \textit{circumstances}, including but not limited to coercive human threats.

Kadish and Schulhofer have pointed out the intuitive injustice of the old source-of-coercion requirement in their famous example of the car with no brakes:

Consider the following cases. (a) X is unwillingly driving a car along a narrow and precipitous mountain road which drops off sharply on both sides, under the command of Y, an armed escaping felon. The headlights pick out two drunken persons lying across the road in such a position as to make passage impossible without running them over. X is prevented from stopping by the threat of Y to shoot him dead . . . . [If X runs over the drunks, he] will be excused under [MPC]

\textsuperscript{128} See \textit{supra} note 90 and accompanying text.

\textsuperscript{129} See \textit{supra} notes 113-16 and accompanying text. Also, in \textit{People v. Harmon}, a prison escapee used duress to argue that he was escaping intolerable prison conditions, including the threat of same-sex rape. 220 N.W.2d 212 (Mich. Ct. App. 1974). The court accepted this defense even though traditional duress elements had not been met: the escapee was not commanded by anyone to escape, the time frame of the threats was not immediate, and the escapee could have arguably sought help from prison authorities rather than commit the crime of prison escape.
§ 2.09 [which keeps the source-of-coercion limitation] . . . (b) The same situation as above except that X is prevented from stopping by suddenly inoperative brakes. If X chooses to save his own life and kills the drunks, he will not be excused under § 2.09 . . . \(^{130}\)

In both cases (a) and (b), the \textit{ultimate} source of X’s coercion was X’s reasonable will to survive. In (a), the triggering coercive circumstance was the unlawful threat of another. In (b), the triggering coercive circumstance was the inoperative brakes. As the typical duress defense (including MPC § 2.09) only exculpates where the triggering source of coercion was the unlawful threat of another, X would be punished for (b), even though X’s conduct was as excusable as the conduct in (a): Namely, the conduct was coerced and reasonable. Herein lies the illogic of the source-of-coercion limitation.

Recall the other MPC defense doctrine, necessity.\(^{131}\) With necessity, it does not matter if the source of the avoided evil was another person or the circumstances; yet with duress, that source suddenly does matter. The MPC recognizes this discrepancy,\(^{132}\) but its response is feeble.\(^{133}\) Although admitting that coercion by circumstances is “arguably similar” to coercion by unlawful human threats, the MPC argues first that in cases involving coercion by circumstances, its necessity defense will usually (but admittedly not always) be available.\(^{134}\) Thus, according to the MPC, only a rare case of nonculpable conduct (such as the inoperative brakes case above\(^{135}\)) will be punished. In effect, the MPC openly admits that its limited duress defense leaves a hole that allows unjust and unnecessary punishment, but that this hole is tolerable because it is a very small hole.

This is a curious rationale for a justice system that prides itself on individualized justice, even assuming that such cases are indeed rare. It is probably little consolation to a defendant punished for excusable conduct that his or her case is not common, or that most people in his or her shoes are not punished. Punishing the driver in the case of the inoperative brakes presented above is unjust and unnecessary, no matter how rare. Again, such punishments may be few and far between, but that is quite irrelevant to the rightness or wrongness


\(^{131}\) See supra note 99.

\(^{132}\) MODEL PENAL CODE, supra note 105. This discrepancy undoubtedly has its origin not in the logic of excuse and justification, but rather in the common law. See infra text accompanying note 141. At least the MPC \textit{has} a response. The source-of-coercion limitation is so prevalent that its rationale is typically assumed rather than explained.

\(^{133}\) MODEL PENAL CODE, supra note 115.

\(^{134}\) The unlucky driver in situation (b) has no necessity defense because the deaths of the two drunks (loss of two lives) is not a \textit{lesser} evil than the deaths of the driver and the escaped felon (again, loss of two lives).
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of the punishment. 136

Second, the MPC argues that excusing X in Kadish's first case, (a), does not prevent us from punishing Y, the unlawful coercer; conversely, "if the actor is excused [in case (b)], no one is subject to the law's application." 137 This rationale, or ones similar to it, is probably the most common one advanced today for the traditional bar against duress claims stemming from circumstances rather than human threats. 138

Again, however, such a rationale is curious in a system of justice that aims quite strenuously to punish only the guilty. The appropriate response to the MPC's second argument is to demur. It is better to leave a crime unpunished rather than, simply because no culpable actor is available, punish an innocent actor. 139 What the MPC adopts in its second argument is a utilitarian argument for scapegoating: the basic interests of the law require that someone be punished, and since we cannot punish the inoperative brakes, we should therefore punish X. This argument contradicts the MPC's earlier argument that punishing excusable conduct "is divorced from any moral base and is unjust." 140

These traditional rationalizations are perhaps better viewed as post hoc

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136. One rebuttal to this criticism might be this analogy: the standard of "guilt beyond a reasonable doubt" (or any other standard below absolute certainty) inevitably entails punishing innocent people. These instances are rare, however, and are not reason enough to abandon the reasonable doubt standard. This "rarity of injustice" argument works well in this circumstance, so why can't it work well in defending the source-of-coercion limitation?

There is a crucial difference between the two doctrines. In the supposedly rare case where an innocent is mistakenly punished, the judge or jury has nevertheless determined to the best of their ability that the actor was guilty. Conversely, in the supposedly rare case where an innocent is punished for excusable conduct (as in the example of the inoperative brakes), we admit that the actor was innocent but respond with "tough luck." Whereas innocence is relevant to punishment in the former case (if innocence were later shown, the actor would surely be freed), innocence is not relevant in the latter case.

137. MODEL PENAL CODE, supra note 115.

138. For example, Robert Nozick argues that an offender coerced by another human is acting out the coercer's will (and therefore the offender's own will is not implicated), whereas an offender coerced by circumstances can hardly be said to be acting out the "will" of those circumstances and therefore must be acting according to his or her own will. See, e.g., ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 520 (1981) (In cases involving coercion by another human, "another's intentions might so closely link with one's action as to make it not fully one's own, less so than an act done in the face of equal costs due solely to inanimate nature."); see also Herbert Fingarette, Victimization: A Legalist Analysis of Coercion, Deception, Undue Influence, and Excusable Prison Escape, 42 WASH. & LEE L. REV. 65, 106 (1985) (arguing that since coercive circumstances involve no victimizer, there is no victim deserving our excuse).

139. See Joshua Dressler, Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code, 19 Rutgers L.J. 671, 713 (1988) ("Letting A off the hook need not always require putting B on the hook."). Similarly, the inability to punish the coercer (as in the case of coercive circumstances) need not require punishing the coerced.

140. See supra text accompanying note 105. Adding to the critique of the modern rationale for the human source limitation, Glanville Williams argues that there is no utilitarian justification for punishment in circumstances of nonhuman coercion: if the reason for excusing is futility of punishment, the same reason should support a defense where duress arises not from human threat but "from pressure or circumstances." WILLIAMS, supra note 106, at 634; see also Kadish, supra note 82, at 87 ("The same principle that compels excuses in moral criticism also compels them in the criminal law.").

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apologies for a limitation that has no better explanation than mere accident of history. The old English common law talked about "duress" in contexts involving human coercion and "necessity" in contexts involving natural circumstances.\(^{141}\)

Thus, the modified defense eliminates from traditional duress the most formidable current obstacle to homeless duress claims (i.e., the old source-of-coercion requirement). What matters in both excuse theory and the expanded defense is that the defendant was coerced; the source of that coercion is a mere detail. Said differently, the defendant's excusable conduct is excusable because he or she had no genuine choice, \textit{period}. Why he or she had no choice is irrelevant.\(^{142}\)

Whether the source of the coercion is a gun to the head or inoperative brakes, the fact remains that any reasonable person in the defendant's shoes would have done exactly the same thing. That is precisely why the defendant should be exculpated. Just as the source of the evil avoided does not matter for necessity (the point is that the defendant avoided the greater evil, whatever its source), the source of coercion ought not to matter for duress (the point is that the defendant was coerced, whatever its source). Thus, as other old common law restrictions on duress have been removed,\(^ {143}\) so, too, should the source-of-coercion restriction.

In keeping with the trend, the modified duress defense presented here also removes the requirement that the threat to the offender be of death or great bodily harm. As stated by the MPC, "no valid reason was perceived" for that limitation.\(^{144}\) An \textit{a priori} requirement of a grave threat ignores the gravity of the offense committed. Removing the grave threat limitation for nonfelonies (as the proposed defense does) introduces some proportionality into duress: while serious crimes require coercion by serious threats, less severe crimes require coercion by less severe threats. This proportionality logic is the corollary of the usual statement that serious crimes require more serious pressure: "'Nobody would dispute' that the greater the heinousness of the crime, the greater must be the pressure . . . ."\(^ {145}\)

The proposed duress defense also eliminates the imminence-of-threat requirement. As stated in \textit{State v. Toscano}, "a \textit{per se} rule based on immediate injury may exclude valid claims of duress,"\(^ {146}\) such as claims based on

\(^{141}\) See Levine, \textit{supra} note 94, at 730.

\(^{142}\) Why there was no choice is irrelevant \textit{assuming}, of course, that such defendants did not recklessly place themselves in the situation or, if negligence is sufficient to establish guilt, that they did not negligently place themselves in the situation. \textit{See MODEL PENAL CODE, supra} note 124. Thus, in the case of the inoperative brakes, we assume the driver was not reckless about maintaining his or her brakes in good repair.

\(^{143}\) See \textit{supra} notes 112-16, 129 and accompanying text.

\(^{144}\) \textit{MODEL PENAL CODE, supra} note 115.

\(^{145}\) Levine, \textit{supra} note 94, at 732 (quoting Lord Wilberforce in English case).

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certain criminalized homeless survival behaviors like carrying a weapon for self-protection. If a homeless person is forced (by no space at the shelter or no shelter at all) to sleep on the streets, then a jury may decide that carrying a (reasonable) weapon is a reasonable self-protection measure, especially if the given defendant has been a victim of violent street crime in the past.

The modified duress defense has now been presented. Its rationale is the rationale for excuse: to punish someone for committing an act that all of us would have done in the same circumstances is unjust. This proposed defense frees valid claims that are currently barred by the common law source-of-coercion limit, thereby bringing punishment into more accurate alignment with what moral theory tells us may properly be punished. Under this modified defense, Kadish and Schulhofer’s hapless driver on that narrow mountain road—forced by inoperative brakes to immediately choose between his life or the drunks on the road—would at last be excused, and according to moral theory, properly so.

4. Application

A critic of an expanded duress defense might argue that the new defense would start a slide down a slippery slope so that eventually poverty crimes generally and perhaps even crimes to fund a drug addiction are eventually excused. This section explains how the duress concepts of coercion and reasonableness would operate in the homeless context to limit invalid claims and stop any such slide. Any remaining skepticism could be allayed with administrative controls over the defense.

a. Coercion. A preliminary inquiry into the modified duress claim is whether the defendant had reasonable legal alternatives to committing the offense. This question can be applied in different ways: whether the defendant could have sought help from the authorities, whether the defendant negligently put him- or herself in the situation where coercion was probable, etc. In keeping with traditional duress, the defense proposed here would keep this limitation. Thus, the defense is not available if the homeless defendant negligently (or recklessly, if that is the offense’s required culpability) placed

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147. Duress is an available defense for both traditional mens rea offenses and also for the strict liability “public welfare” ordinances often enforced against the street homeless: “The recent codes and proposals that contain provisions on strict liability make clear that most general defenses are not eliminated.” MODEL PENAL CODE § 2.05(1) cmt. 2 (1985). Accordingly, the MPC does not bar the duress defense to strict liability crimes. See § 2.05(1); see also id. at cmt. 1 (“The term ‘absolute’ liability has been objected to as not properly descriptive of the fact that all defenses are not meant to be foreclosed when an offense is so classified.”). Also, in United States v. Santos, a federal appeals court provided two different schemes for distributing the burdens of proving duress: one for crimes which require mens rea, and one for crimes which do not. 932 F.2d 244, 249 (3d Cir. 1991).

148. See KADISH & SCHULHOFER, supra note 130, at 940 (noting fear that expanded duress defense might be abused).
him- or herself in the situation of street homelessness. The defendant must not have negligently caused the coercive circumstance of living on the street; his coercion must come from the circumstances, not himself.

A critic of the homeless duress claim may argue that expanding the duress defense to encompass homeless survival behavior is not worth the trouble because the great majority of homeless individuals could not meet this coercion requirement in that they are responsible for their circumstances (at least if you trace their individual histories back far enough). This criticism probably oversimplifies the matter. Given the diversity of homeless persons, such blanket statements are not easily defended. In the Stewart B. McKinney Homeless Assistance Act, Congress included as a specific finding that "the causes of homelessness are many and complex."

Any frustration with the homeless for not simply "getting a job" is another probable oversimplification, betraying an unawareness of the unique difficulties a homeless person has in attaining a job. The federal court in Pottinger had no difficulty in recognizing a class of thousands of "involuntarily" homeless individuals. If critics of homeless duress are still unconvinced, they should at least consider the merits of allowing a particular homeless individual to rebut the presumption of voluntariness or responsibility in court.

Even if the defendant’s homeless circumstance was not negligently created by the defendant him- or herself, the defendant must have exhausted all remedies for getting out of the street homeless situation. Homeless persons who unsuccessfully tried in good faith to obtain shelter the night before but were unable to have arguably exhausted alternatives to the street living that coerced their survival behavior.

Arguably, the duress claim would still be valid even if the defendant had not affirmatively sought shelter the night before. In such a case, the defendant would need to show he or she reasonably expected that no shelter would have been available had he or she sought it. This expectation could be shown, perhaps, by the defendant's previous consistent inability to obtain a shelter cot

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149. See supra notes 9-15 and accompanying text.
151. See BLAU, supra note 8, at 26-28; BURT & COHEN, supra note 9, at 76. Also, a substantial minority of homeless persons do have full or part-time jobs. Baker, supra note 21, at 442-43.
152. Pottinger v. City of Miami, 810 F. Supp. 1551, 1555 (S.D. Fla. 1992); see also Baker, supra note 21, at 442 n.144; see also Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994) (recognizing that "homelessness can be thrust upon an unwitting recipient, and . . . a person may be largely incapable of changing that condition . . . .").
153. Duress cannot be invoked by anyone who has "reasonable opportunity" to avoid doing the act without "undue exposure" to death or serious bodily harm. United States v. Wint, 974 F.2d 961, 968 (8th Cir.), cert. denied, 113 S. Ct. 1001 (1992).
154. Lack of shelter space, which is beyond the control of a homeless defendant, is a common reason for street homelessness. See supra note 90.
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in that city or, more easily, by the fact that the defendant's community had no homeless shelter at all.155

In short, it is probably inaccurate to say categorically either that homeless persons "choose" their coercive circumstances from a smorgasbord of options or that they do not. Instead, the coercive circumstances are likely a complex combination of factors—structural, personal, and circumstantial. The coercion element of the expanded duress claim operates to let street homeless persons explain how that complex combination might, in their particular case, constitute coercive circumstances in which they did not negligently place themselves. By presently withholding that opportunity, society conclusively presumes that all homeless persons are negligently responsible for their coercive circumstances.

b. Reasonableness. As has been mentioned, this Note only contemplates reasonable homeless survival. Thus, for example, using a gun to force oneself into another's private occupied home to escape a winter storm is probably not a valid duress claim in the homeless context because a jury would most likely decide that such behavior was unreasonable. But what is meant by "reasonable"?

First, "reasonable" refers to the specific situation rather than the homeless context as a whole. That is, in determining the reasonableness of the particular subsistence behavior, we take the perspective of the homeless person rather than the policy maker.156 This is consistent with "reasonableness" inquiries in other contexts, such as torts.

In deciding whether a homeless offender's subsistence was "reasonable," one could consider all the relevant subjective elements (e.g., whether the defendant was intoxicated, mentally ill, unreasonably but honestly fearful of street crime, etc.), or one could instead conduct an objective inquiry of what the ordinary reasonable person would have done in the defendant's situation, or one could use some decision rule in between these two poles of subjectivity and objectivity.

As "[t]here are controversies surrounding almost every aspect of the law

155. Note also that a homeless person may argue that for certain reasons (e.g., job hunting) he or she was not able to look for shelter. See Tobe v. City of Santa Ana, 27 Cal. Rptr. 2d 386, 390 (Cal. Ct. App.) ("A homeless person who has no shelter and no place to store his belongings has a complex existence which prevents him from securing housing, retaining that housing and taking advantage of what services might be available in the community.") (quoting expert testimony), review granted, 872 P.2d 559 (Cal. 1994).

156. For an example of the opposite analysis—was the action reasonable generally, as opposed to in the particular situation—see the infamous English cannibalism-for-survival case of Regina v. Dudley and Stephens. 14 Q.B.D. 273 (1884). There, Lord Coleridge admitted the defendants' actions were reasonable in their specific circumstances, id. at 288 ("We are often compelled to set up standards we cannot reach ourselves"), but nevertheless convicted them because the defendants' behavior was not reasonable from a public policy standpoint, id. (holding that acquittal might serve as future precedence for "unbridled passion and atrocious crime").
of duress,"¹⁵⁷ it is no surprise that commentators and courts disagree about the appropriate reasonableness inquiry in the duress context. Thus, while the Law Commission for England and Wales recommends that the decision maker should consider all relevant subjective elements,¹⁵⁸ many American courts enforce strict objective standards.¹⁵⁹

Each pole of the reasonableness inquiry pursues different values. Subjective analyses promote individualized justice, while objective analyses are in accord with the "reasonable person" excuse theory which rationalizes duress.¹⁶⁰ Perhaps the fairest inquiry strikes a balance somewhere in the middle: whether an ordinary reasonable person would have acted similarly in the defendant's shoes and given the defendant's circumstances.

This analysis particularizes the defense to a given situation without abandoning the "reasonable person" duress rationale. Thus, the decision maker would ask what a reasonably prudent person, if homeless, would have done in the exact same circumstances.¹⁶¹ The standard would remain objective but be flexible enough to take homeless circumstances into account. The standard is fair because it recognizes the handicapping effects of these circumstances. It requires the decision maker to consider that homeless circumstances are "extremely disturbing, and few people could be homeless for any length of time without it affecting their behavior."¹⁶²

Although a jury would ultimately decide what constitutes reasonable

¹⁵⁷. Levine, supra 94, at 731.
¹⁵⁸. Id.; see also Knight v. State, 601 So.2d 403, 407 (Miss. 1992) ("[T]here is infinite detail concerning this situation which bears on the rationality of Knight's fear under the circumstances.").
¹⁶⁰. The "reasonable person" excuse concept was presented supra notes 83-85. This theory (adopted by MPC's duress, supra text accompanying note 105) holds that it is unjust to punish when reasonable people would have committed the same offense as the defendant.
¹⁶¹. This standard does not create a "reasonable homeless person" standard, any more than tort law provides for, say, a "reasonable blind person" standard for blind defendants. With a disabled person, "the [reasonable person] standard remains essentially the same, but has the added flexibility for taking the actor's physical deficiencies into account." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32 (5th ed. 1984). Adopting tort law's approach to disability, the "reasonable person" standard in the context of homeless duress would ask what an ordinary reasonable person would have done in the same situation if he or she were homeless. See Memorial Hosp. v. Scott, 300 N.E.2d 50, 56 (Ind. 1973) ("The proper test to be applied in such cases is the test of a reasonable man under the same disabilities and infirmities in like circumstances.").
¹⁶². BLAU, supra note 8, at 18; Koegel et al., supra note 9, at 104 ("[H]omelessness is a sufficiently handicapping condition by itself [so] that each homeless person's adaptation suffers radically."); cf. Snow et al., supra note 30, at 541 ("[I]t appears that as time on the streets increases, so does the likelihood of involvement in criminal activity, [perhaps indicating that street living has detrimental effects on a person's ability to cope].").
behavior, this reasonableness element would most likely preclude any duress claims based on the compulsion to fund a drug addiction. An ordinary reasonable person (as opposed to, perhaps, a typical person) who was addicted to drugs arguably would seek help rather than funds to feed the addiction. Furthermore, a defendant would not succeed with an expanded duress claim by mere assertion that his behavior was reasonable; rather, he would have to convince an entire jury. Jurors, as presumed representatives of a community’s norms, are probably good guardians to protect those norms against the slippery slope of excused poverty and drug crimes feared by critics of an expanded duress claim.

c. Administrative limitations. The spectrum of possible combinations of administrative controls over an expanded duress defense is wide, from putting significant burdens on the state to disprove duress to putting significant burdens on the defendant to prove it. This question is largely an administrative (“second-order”) one, to be resolved after the theoretical and policy (“first-order”) arguments for allowing homeless duress claims have been accepted.

The resolution of this second-order question depends on how persuaded policy makers are by the first-order arguments, and by how much they fear the slippery slope identified earlier. Thus, for the reader who is completely persuaded by the theory and logic of allowing homeless duress claims and who is convinced that no jury would preside over a slide down the slippery slope towards excusing crimes to feed a drug addiction, placing the burden of disproving duress on the state is perhaps best. Skeptics, on the other hand, would reflect their concerns about the modified defense with burdens of proof on the defendant.

Similarly, the weight of the burden (preponderance of evidence through reasonable doubt) is also set according to the confidence in the rationale behind homeless duress and in the jury as a check against abuse of that rationale. A recent federal appeals court decision distributed the burdens in duress by requiring the defendant to introduce sufficient evidence to bring the duress issue into reasonable consideration, at which point the state must disprove the duress claim beyond a reasonable doubt.

Finally, the proposed defense keeps many traditional duress limitations. As modified, the defense requires offenders to show that circumstances compelled, not merely encouraged, their conduct. That is no trivial burden. Simply because a defendant alleges he or she had no genuine choice but to break the law will not make it so. In each case, the defendant’s credibility and evidence

163. United States v. Santos, 932 F.2d 244, 249 (3d Cir. 1991). But cf. United States v. Liu, 960 F.2d 449, 454 (5th Cir. 1992) (holding that defendant using affirmative defense of duress has burden to show he did not negligently or recklessly place himself in situation in which it was probable he would be forced to choose breaking law).
will be subject to the full scrutiny of the fact-finder.

In short, while it is appropriate to consider the potential of the slippery slope, one should note that successful and cautious expansions coupled with other limitations have been and are possible. In that vein, the skeptic should not forget that the modified duress defense proposed here keeps many modern duress limitations—really all of them except for the source-of-coercion requirement. Also, the proposed defense is limited to only minor crimes. With minor crimes, any harm to society for not punishing and deterring "harmless, involuntary conduct which they [the homeless] must perform in public" is more easily outweighed by the serious harm of unjust blaming.

5. Conclusion

J.L. Austin cautions that "we must not expect to find simple labels for complicated cases." Nevertheless, law sometimes requires that we do. Explaining the futility and injustice of punishing homeless survival strategies is not sufficient to exculpate a given offender. It is necessary to apply, however imperfectly, the available defenses to the given facts. As already explained, duress is probably the most appropriate defense to invoke here because its excuse rationale is precisely the same rationale for why reasonable homeless survival strategies should not be punished. The only problem is that the old common law restrictions on duress have so limited the excusable conduct exculpated by the defense that traditional duress is not applicable to the typical homeless offender.

Thus, it has been argued, to more perfectly align duress with its excuse rationale, we ought to remove (as three states have arguably done) the illogical requirement that the coercion which compelled the offense find its source in the unlawful threats of another. To check against competing concerns of deterrence and possible abuse, the removal of the limitation should perhaps be restricted to minor crimes.

Because the validity of a homeless duress claim is so dependent on the underlying facts of a given case, one can easily challenge these exculpatory arguments by identifying counter-examples in which we ought not to exculpate (e.g., the homeless person who defecates in an open park where toilets are available). Such retorts, however, miss the point, which is only that there are valid homeless duress claims—not that all homeless duress claims are valid.

164. This is in accord with most commentators and some statutes which provide for a wider duress defense for minor crimes. See supra note 116; WILLIAMS, supra note 106, at 625 (For minor crimes, "less terrible" coercion may result in "absolute discharge"); cf. MODEL PENAL CODE, supra note 105 ("Coercion should not exculpate in the most serious crimes . . . .") (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 448 (2d ed. 1960)).


166. Austin, supra note 81, at 21.
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Because arrests based on survival behavior are so many, so different, and so contextual, this analysis of homeless duress must proceed as a general matter, recognizing that there are instances of criminalized, coerced and reasonable survival behavior. Criminalized survival behavior that is coerced and reasonable ought to be exculpated by duress.

IV. CONCLUSION

The problem addressed by this Note is real. Street homeless people in the United States are arrested for conduct aimed at mere survival. The proper public policy response to this predicament of the street homeless is a matter of great controversy. Even assuming we had the necessary compassion and political will, perhaps no public policy could entirely eliminate the need for street survival strategies.

Still, if we are not going to eliminate the need for these survival behaviors, then the least we can do is excuse them. Thus, while the policy debate rages on, the criminal law should not be invoked to punish street survival. Such criminalization is not only arguably futile, but more importantly, it results in unjust punishment to the extent that homeless persons are “arrested for harmless, inoffensive conduct that they are forced to perform in public places.”
