

## NOTE

### HOMELESS, HUNGRY, AND TARGETED: A LOOK AT THE VALIDITY OF FOOD-SHARING RESTRICTIONS IN THE UNITED STATES

#### I. INTRODUCTION

Imagine you are homeless. After a cold, sleepless night you hear about food being given out at a nearby public park.<sup>1</sup> When you arrive, you see volunteers with pounds of food set up on tables.<sup>2</sup> To your relief, you now know that you will at least have one meal today.<sup>3</sup> However, when you reach the line where the volunteers are serving the food, police arrive.<sup>4</sup> The police order the volunteers to stop serving the food, dismantle the tables, and leave. When these volunteers refuse and continue serving the food to you and others, they are arrested.<sup>5</sup> This is the scenario that many homeless people and activists face against city ordinances restricting food sharing with the homeless around the United States.<sup>6</sup>

Since food-sharing restrictions do not affect most middle-class people in the United States, many may ask, “What are food-sharing restrictions?” Food-sharing restrictions are regulations made by a city to prevent organizations from giving out food to the homeless in public

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1. See, e.g., Kathryn Varn, *Seven Arrested While Serving Food to Homeless in Tampa Without a Permit*, TAMPA BAY TIMES (Jan. 9, 2017), <http://www.tampabay.com/news/local-government/seven-arrested-while-serving-food-to-homeless-in-tampa/2308868> (noting seven “Food Not Bombs” activists were arrested and charged with trespassing and operating in the city-owned park without the required permit while serving food to the homeless in Tampa, Florida).

2. *Id.*

3. *Id.*; see also NAT’L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4 (2014), <http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf> [hereinafter SHARE NO MORE].

4. See, e.g., Varn, *supra* note 1.

5. See, e.g., *id.*

6. See, e.g., Kevin Conlon & Catherine E. Shoichet, *90-Year-Old Florida Man Charged for Feeding Homeless People*, CNN (Nov. 5, 2014, 3:34 PM), <http://www.cnn.com/2014/11/04/justice/florida-feeding-homeless-charges>; *Food Feud: More Cities Block Meal-Sharing for Homeless*, NBC NEWS (May 27, 2014, 2:25 PM), <https://www.nbcnews.com/news/us-news/food-feud-more-cities-block-meal-sharing-homeless-n113271>; Varn, *supra* note 1.

spaces such as parks and downtown areas.<sup>7</sup> Supporters of food-sharing restrictions claim that there is a need for food safety standards<sup>8</sup> requiring that food be prepared in an approved location, or that organizations apply for food permits.<sup>9</sup> However, strict preparation standards for food coupled with requirements of long applications and fees only successfully impede organizations.<sup>10</sup> These laws restrict the access of organizations to public spaces to distribute food collected for the homeless, and inhibit access to food for the homeless community.<sup>11</sup> Cities have constructed these laws for many reasons, but mostly to deter the homeless community from living in certain cities or town areas and to obstruct volunteer organizations from being able to successfully follow the strict guidelines to provide food to the homeless in certain areas.<sup>12</sup>

The federal government has not taken action to protect homeless communities who are targeted by these food-sharing laws.<sup>13</sup> Instead, homeless communities are left at the mercy of localities, which allow the homeless to become easy targets of city ordinances aimed to relocate the homeless population out of sight.<sup>14</sup> These ordinances deliberately target the homeless and obstruct organizations that spend many volunteer

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7. See SHARE NO MORE, *supra* note 3, at 4, 10 (providing an example of a Manchester, New Hampshire, law that does not allow organizations to share food with people experiencing homelessness on public property). From 2013–2014, fifty-seven U.S. cities have attempted to restrict, ban, or relocate food sharing. *Id.* at 5. Food-sharing restrictions are not to be conflated with the fight to end homelessness; these regulations have been called a fight against the homeless. Robbie Couch, 33 *U.S. Cities Have Restricted Feeding the Homeless in Past Year Alone: Report*, HUFFINGTON POST (June 10, 2014, 3:26 PM), [http://www.huffingtonpost.com/2014/06/10/bans-on-feeding-the-homeless\\_n\\_5479450.html](http://www.huffingtonpost.com/2014/06/10/bans-on-feeding-the-homeless_n_5479450.html).

8. See SHARE NO MORE, *supra* note 3, at 14–15 (providing examples of requirements). Some cities require a permit to share food with people experiencing homelessness in a public park on the grounds of food safety. *Id.* City Manager Greg Burris commented on the Springfield, Missouri, proposed legislation stating, “We’re not trying to stop these well-intentioned groups from feeding people. We are only trying to provide food safety to those receiving the food, who are also our citizens and deserve this public health service, and accountability to those providing the food.” *Id.* Salt Lake City, Utah, introduced similar legislation to require food safety training with the potential to deter volunteers. *Id.*

9. *Id.* (citing Jed Kim, *No More Home-Cooked Donations at Thanksgiving Meal for Pasadena Homeless*, 89.3 KPCC (Nov. 26, 2013), <http://www.scpr.org/news/2013/11/26/40619/no-more-home-cooked-donations-at-thanksgiving-meal>). Pasadena, California, requires that hot meals served to the homeless must be prepared in approved locations. Kim, *supra*.

10. SHARE NO MORE, *supra* note 3, at 11; see Varn, *supra* note 1. Tampa organizations are prohibited from distributing food to the public without written approval from the city. Varn, *supra* note 1. These organizations must also obtain a permit, which the organization must apply for, and includes fees, deposits, and liability insurance coverage of at least one million dollars. *Id.*

11. SHARE NO MORE, *supra* note 3, at 8.

12. See *id.* at 8–10.

13. See *infra* Part II.A.

14. See SHARE NO MORE, *supra* note 3, at 4; *infra* Part II.

hours collecting food and coming together to help feed homeless people.<sup>15</sup> Laws prohibiting food sharing are a problem in American society because they target a politically unpopular group in the community and create hardships for organizations that donate food.<sup>16</sup>

Although these laws target the homeless and the people who seek to help them, under many states' antidiscrimination laws the homeless are not considered a protected class.<sup>17</sup> A few states have moved in the direction of protecting homeless communities through Homeless Bill of Rights Acts.<sup>18</sup> Many of the states with these protections do not have cities with restrictive food-sharing laws.<sup>19</sup> However, current social rights solutions exist only at the state and local levels and face significant legislative hurdles if they are to be mirrored by federal law.<sup>20</sup> Thus, in order to protect homeless communities, the federal government should instead enact a law that requires supermarkets to donate food that would be going to waste, to charities.<sup>21</sup> These charities can use this donated food to better feed the homeless and stop food insecurity in the homeless communities.<sup>22</sup> Another option discussed later in this Note is the ratification<sup>23</sup> of the International Covenant on Economic, Social and Cultural Rights ("ICESCR").<sup>24</sup> Ratification would better protect our nation's homeless who suffer from food insecurity because it would supersede bans on feeding the homeless around the country.<sup>25</sup> Therefore,

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15. See *infra* Part II.

16. See SHARE NO MORE, *supra* note 3, at 4. For more discussion on the constitutional questions presented by food-sharing restrictions, see *infra* Part III.

17. Joel v. City of Orlando, 232 F.3d 1353, 1357 (11th Cir. 2000) (holding that homelessness is not a suspect class); D'Agunno v. Gallagher, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (same); Kreimer v. Bureau of Police, 958 F.2d 1242, 1269 n.36 (3d Cir. 1992) (same); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) (same). For more discussion on the classification of homeless individuals in American society, see *infra* Part II.

18. See Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step from State to State*, 19 PUB. INTEREST L. RPTR. 8, 11-12 (2013).

19. *Id.*

20. See *id.* Homeless Bill of Rights protections are likely unable to be created at the federal level; the states have control over many social issues concerning their citizens and the extra rights these citizens may enjoy. See *infra* Part II.A.3. Since the homeless are not a federally protected class they have no specific additional constitutional protections—it is up to the states to provide extra protections as they see fit. See *infra* Part II.

21. See *infra* Part IV.

22. See *infra* Part IV.

23. See *infra* Part IV.

24. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx> [hereinafter ICESCR].

25. See *infra* Part IV.

charities could focus on solving the hunger problem in the U.S. rather than hurdling red tape preventing them from doing good.<sup>26</sup>

This Note will begin with a discussion of the history to the right to food, both in the U.S. and internationally, laying a foundation for a better understanding of where the world stands on such a right.<sup>27</sup> Further, this history provides an overview of the issues that face the homeless community today and the classification of the homeless community in the United States.<sup>28</sup> This Note argues that food-sharing restrictions violate both domestic and international law.<sup>29</sup> Finally, this Note proposes solving this issue by requiring businesses to donate unsold food that would be going to waste, or by ratifying and adopting the ICESCR.<sup>30</sup>

## II. THE RIGHT TO FOOD: A BRIEF HISTORY

The right to food has been considered earlier in U.S. history.<sup>31</sup> Many suggest that the right to food was contemplated by Franklin Delano Roosevelt's "Four Freedoms" message to the 77th Congress on January 6, 1941.<sup>32</sup> While anecdotal, the right to food has previously been envisioned as a right that should be realized in the United States.<sup>33</sup>

This Note examines the international and domestic posture on the right to food and discusses the status of homeless people in the context of discrimination laws in the United States.<sup>34</sup> Although the U.S. Constitution does not recognize a substantive right to food, other sources of international human rights law declare such a right.<sup>35</sup> Internationally, the right to food is recognized and applies to everyone.<sup>36</sup> Around the

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26. SHARE NO MORE, *supra* note 3, at 4-5; *see infra* Part IV.

27. *See infra* Part II.

28. *See infra* Part II.

29. *See infra* Part III.

30. *See infra* Part IV.

31. *See, e.g., Excerpt from President Franklin D. Roosevelt's Message to Congress, Powers of Persuasion*, NAT'L ARCHIVES (Jan. 6, 1941), [https://www.archives.gov/exhibits/powers\\_of\\_persuasion/word\\_document/pres\\_roosevelts\\_address.txt](https://www.archives.gov/exhibits/powers_of_persuasion/word_document/pres_roosevelts_address.txt) [hereinafter *Roosevelt's Message*] ("[F]reedom from want--which . . . means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants . . .").

32. *Id.*

33. CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 100-08 (2004).

34. *See infra* Part II.

35. *See infra* Part II; *see also* General Comment 12, U.N. Comm. on Economic, Social and Cultural Rights, 20th Sess., Agenda Item 7, P 11, U.N. Doc. E/C.12/1999/5 (1999) [hereinafter General Comment 12] (recognizing "the right of everyone to an adequate standard of living for himself and his family, including adequate food").

36. General Comment 12, *supra* note 35 ("The human right to adequate food is of crucial importance for the enjoyment of all rights. It applies to everyone . . . [and] does not imply any limitation upon the applicability of this right to individuals . . .").

world, 815 million people suffer from hunger,<sup>37</sup> and while a majority of those people live in the developing world,<sup>38</sup> starvation exists even in the most developed countries.<sup>39</sup> Nations that are parties to the ICESCR, which the U.S. signed in 1977, but has not ratified,<sup>40</sup> recognize that there is a fundamental right for everyone to be free from hunger.<sup>41</sup>

#### A. *The History of the Right to Food in the United States*

The U.S. is thought of as a country of freedoms, rights and protections. However, this nation does not believe there is a right to food.<sup>42</sup> In 2014, United States Deputy Representative to the United Nations Economic and Social Council, Terri Robl, explained the position of the U.S. on the right to food as follows: “[W]e view the right to food as a desirable policy goal; it is our objective to achieve a world where everyone has adequate access to food. We do not, however, treat the right to food as an enforceable obligation.”<sup>43</sup>

The U.S. has not ratified the ICESCR.<sup>44</sup> Ratification of the covenant would mean that the country’s poor and homeless would receive protections via treaty; therein would be an obligation not to act inconsistent with its goals and purpose.<sup>45</sup> The problem is that the federal government does not recognize food as a fundamental right.<sup>46</sup> Neither

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37. *Zero Hunger*, WORLD FOOD PROGRAMME, <http://www1.wfp.org/zero-hunger> (last visited Feb. 15, 2018).

38. *Where We Work*, WORLD FOOD PROGRAMME, <http://www1.wfp.org/zero-hunger> (last visited Feb. 15, 2018).

39. *11 Facts About Hunger in the U.S.*, DO SOMETHING, <https://www.dosomething.org/facts/11-facts-about-hunger-us> (last visited Feb. 15, 2018) (citing Alisha Coleman-Jensen, et al., *Household Food Security in the United States in 2013*, USDA ECON. RES. SERV. (2014), <https://www.ers.usda.gov/webdocs/publications/84973/err-237.pdf?v=42979> (finding in a 2013 study that 17.5 million households in the U.S. were food insecure)).

40. Ann M. Piccard, *The United States’ Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR 231, 233 (2010) (noting that the U.S. has not ratified the covenant, but comments that if the U.S. is to ratify a human rights treaty it should be this covenant); see also *Status of Ratification Interactive Dashboard*, U.N. HUM. RTS. OFF. OF THE HIGH COMMISSIONER, <http://indicators.ohchr.org> (last visited Feb. 15, 2018).

41. General Comment 12, *supra* note 35; Piccard, *supra* note 40, at 231, 236-37.

42. U.S. CONST. amend. V; Piccard, *supra* note 40, at 232-33.

43. Terri Robl, U.S. Deputy Representative to the U.N. Econ. and Soc. Council, Explanation of Position on Agenda Item 68(b), L.42: Right to Food (Nov. 25, 2014), <https://usun.state.gov/remarks/6295>.

44. *Status of Ratification Interactive Dashboard*, *supra* note 40. Although the U.S. has not ratified the ICESCR, it is a signatory, meaning that the covenant was signed by a U.S. representative but has not been given consent by the Senate and incorporated into domestic law. Piccard, *supra* note 40, at 232-33.

45. See Piccard, *supra* note 40, at 251-52.

46. See *id.* at 263-64.

the U.S. nor Australia—two large, developed countries—recognizes the right to food.<sup>47</sup> The only American law providing for a substantive right to food arises through cases involving involuntary hospitalization or restraint.<sup>48</sup> In such circumstances, the person is entitled to substantive rights that include adequate food, shelter, clothing, and medical care.<sup>49</sup>

### 1. Government Food Stamps Programs with Respect to the Right to Food

Since the U.S. does not recognize a substantive right to food, federally funded food stamps may not appear to fit into the U.S. framework.<sup>50</sup> These programs are designed to combat hunger, but do not obligate the government to ensure universal access to food.<sup>51</sup> Although the U.S. created the food stamp program in 1964 in an effort to alleviate hunger among the people in need, the program alone likely would not meet the minimum standards that the ICESCR requires.<sup>52</sup> Food programs such as Supplemental Nutrition Assistance Program (“SNAP”),<sup>53</sup> also known as food stamps, are helping combat food insecurity in the U.S., but are being defunded rapidly and need to be protected by additional legislation.<sup>54</sup>

While food assistance programs are helpful for people in need, eligibility is determined based on household income.<sup>55</sup> This tends to not help homeless people that may be eligible, because many do not know

47. Mariana Chilton & Donald Rose, *A Rights-Based Approach to Food Insecurity in the U.S.*, 99 AM. J. PUB. HEALTH 1203, 1210 (2009).

48. *Consiglio v. King*, No. 115CV00969BAMPC, 2016 WL 4000001, at \*2 (E.D. Cal. July 25, 2016) (citing *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982)).

49. *Id.* at \*2.

50. *See, e.g.*, SUNSTEIN, *supra* note 33, at 106 (noting the United States’ hostility towards government intervention on economic, social, and cultural matters); Chilton & Rose, *supra* note 47, at 1203. It is possible that the U.S. food stamp program could represent minimum compliance with Article 2 of the ICESCR. *See* ICESCR, *supra* note 24 (requiring that each party to the covenant must undertake steps to maximize available resources with the *intent* to satisfy the covenant).

51. Chilton & Rose, *supra* note 47, at 1204 (noting the U.S. definition, which lacks any governmental obligation to provide food).

52. *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 529 (1973).

53. *Food Assistance*, USA.GOV, <https://www.usa.gov/food-help>. SNAP is a federally funded food assistance program that provided benefits loaded on an Electronic Benefits Transfer (“EBT”) card. *Id.* Eligibility is determined based on income and expenses, and applications are submitted with the state in which the individuals reside and eligibility is determined. *Id.* These benefits must be used to purchase food. *Id.*

54. Chilton & Rose, *supra* note 47, at 1203 (suggesting that the U.S. adopt a new human rights framework, since it spends fifty billion dollars per year for these programs and food insecurity still exists); *see also* Jordan Bailey, Note, *Homelessness in American Cities*, 23 GEO. J. POVERTY L. & POL’Y 273, 288 (2016) (discussing SNAP as an alternative to criminalizing food sharing).

55. *See Moreno*, 413 U.S. at 529.

about these programs, or may assume benefits can be denied to them because they are homeless.<sup>56</sup> Although such programs have been a good start to ensure access to food, the U.S. has much further to go to combat the negative impact food-sharing restrictions have on the issue of food insecurity in homeless communities.<sup>57</sup>

## 2. The United States' Criminalization of the Current State of Homelessness

To be homeless in the U.S. is to be a criminal in many cases, due to cities illegalizing the things most homeless people need to do to survive.<sup>58</sup> Cities have directed their police to conduct sweeps of homeless camps.<sup>59</sup> Cities have constructed laws that restrict sleeping in public via anti-camping laws.<sup>60</sup> Some cities had restrictions on begging and panhandling in specific circumstances, though a general ban on panhandling has since been found to be unconstitutional.<sup>61</sup> Centrally,

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56. See U.S. DEP'T OF AGRIC., SUPPLEMENTAL NUTRITION ASSISTANCE PROGRAM (SNAP): FACTS ABOUT SNAP (2017), <https://www.fns.usda.gov/snap/facts-about-snap>. People experiencing homelessness are eligible to receive food stamps or snap benefits even if they live in a shelter and cannot be denied because they do not have a fixed housing location. See *id.*

57. Chilton & Rose, *supra* note 47, at 1203.

58. See Maria Foscarinis et al., *Out of Sight-Out of Mind?, The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. POVERTY L. & POL'Y 145, 148-50 (1999) [hereinafter Foscarinis et al., *Out of Sight-Out of Mind?*] (discussing the existence of ordinances and enforcement trends that prevent homeless people from sleeping in certain areas and begging in certain areas); see also Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 16, 22-24 (1996) (discussing three forms of criminalization of homeless communities: (1) regulation or restriction of the homeless community's presence in public places; (2) restrictions or regulations on solicitation of money or aid; and (3) restrictions on organizations or individuals providing aid or services to the homeless community). This article further discusses the trend of criminalizing homelessness by city actions and restrictions for the purpose of moving homeless out of sight. Foscarinis, *supra*.

59. NAT'L COAL. FOR THE HOMELESS & NAT'L L. CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 17 (2006). Sweeping of homeless camps have occurred in many areas across the United States. See, e.g., Farida Ali, *Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. POVERTY L. & POL'Y 197, 198, 215 (2014). These sweeps aim to remove the homeless from where they have been living, and attempt to relocate them somewhere else where they will be out of sight to the public. *Id.* at 215.

60. See, e.g., ATLANTA, GA., CODE OF ORDINANCES § 106-12 (1996) (stating that a person may not "urban camp," meaning it is illegal to reside in, or use a public street, sidewalk, or park for private living accommodations, such as erecting tents or other temporary structures or objects providing shelter; sleep in a single place for any substantial prolonged period; regularly cook or preparing meals; or other similar activities). *But see* State v. Wicks, No. Z711742 & Z711743, at 32-41 (Or. Mult. Cir. Ct. Sept. 28, 2000) (finding an ordinance which prohibited camping anywhere on public property in the city unconstitutional as cruel and unusual punishment, a violation of equal protection and a violation of the right to travel).

61. See, e.g., C.C.B v. State, 458 So.2d 47, 48, 50 (Fla. Dist. Ct. App. 1984) (discussing the invalidation of an ordinance that prohibited all forms of begging or soliciting); Bailey, *supra* note 54, at 277 & n.38 (citing Speet v. Schuette, 889 F. Supp. 2d 969, 972 (W.D. Mich. 2012), *aff'd*, 726

some cities restrict food-sharing organizations from giving out food to the homeless.<sup>62</sup>

Cities enact laws prohibiting sharing food for a multitude of reasons.<sup>63</sup> The cities that enact food-sharing laws believe that by not feeding the homeless, they will no longer be present in city areas.<sup>64</sup> They believe that feeding homeless people who are starving enables them to remain homeless, and that the food provided to homeless people is duplicative due to the availability of food programs.<sup>65</sup> However, the National Homeless Coalition calls these reasons “myths.”<sup>66</sup> It argues that charity providers of food throughout the country are overwhelmed and do not have enough resources.<sup>67</sup> These regulations over the last quarter century have targeted homeless communities, and are designed to move the homeless away from these cities and out of sight.<sup>68</sup> Many suggest that these actions violate the constitutional right to equal protection under the Fourteenth Amendment.<sup>69</sup>

### 3. Homelessness and Suspect Classification

Over time, case law has defined classes of people who are afforded higher scrutiny under equal protection analysis.<sup>70</sup> Class specification is

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F.3d 867, 880 (6th Cir. 2013) (discussing the invalidation of a statute that criminalized begging in a public place on constitutional grounds).

62. See SHARE NO MORE, *supra* note 3, at 8-10 (discussing cities such as Houston, Texas, requiring written consent to feed the homeless; Shawnee, Oklahoma, requiring permits to occupy public space; Chico, California, requiring permits for distribution of free meals in parks and further requires groups to pay \$40 reservation fee valid for a three-month duration). These restrictions on organizations giving out food to the homeless make it more difficult to reach the homeless and help eradicate hunger. *Id.*

63. SHARE NO MORE, *supra* note 3, at 7 (noting the myths and motivations that lead to the creation of these ordinances such as “[s]haring food with people enable the homeless to remain homeless,” “[t]here are more than enough existing meal programs and they waste unused food,” and “[i]f you stop feeding them, they will disappear”). Further, discussion exists citing anti-homeless ordinances due to cities apprehension of homeless communities’ effect on economic issues, and aesthetic concerns as it relates to tourism in the city. See Foscarinis et al., *Out of Sight-Out of Mind?*, *supra* note 58, at 154-55.

64. SHARE NO MORE, *supra* note 3, at 7.

65. *Id.*

66. *Id.*

67. *Id.* With continual federal cuts in meal programs nationwide, there has been a dramatic increase in the people who are in need of food security. *Id.* (“As of November 1st, 2013 the SNAP budget was cut by 6% . . . [and] [a]s the federal food assistance program continues to be reduced, the need for meal programs, nationwide, will only increase.”).

68. *Criminalization of Homelessness*, NAT’L COAL. FOR THE HOMELESS, <http://nationalhomeless.org/issues/civil-rights> (last visited Feb. 15, 2018); see also Foscarinis et al., *Out of Sight-Out of Mind?*, *supra* note 58, at 152.

69. *Why Is This an Issue?*, NAT’L COAL. FOR THE HOMELESS, <http://nationalhomeless.org/issues/civil-rights> (last visited Feb. 15, 2018).

70. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (discussing that the



important because it determines which standard a court will use when reviewing a potential violation of equal protection.<sup>71</sup> In order for an individual to be protected under the highest level (“strict scrutiny”), the ordinance must infringe upon a fundamental right or target some judicially defined protected class.<sup>72</sup> Suspect classes include race, alienage, and national origin,<sup>73</sup> while gender and illegitimacy are considered quasi-suspect classes.<sup>74</sup> Groups of people covered by higher standards of review under equal protection are more likely to succeed on claims of discrimination because it is more difficult for the government to explain why the targeted group of individuals must be treated differently from others based on their belonging to a certain group.<sup>75</sup> Without suspect classifications, laws are reviewed at a much lower standard (“rational basis”).<sup>76</sup> Under the rational basis standard, laws made by the states are presumed to be valid if rationally related to a legitimate state interest.<sup>77</sup> The homeless and poor are a group of people not currently considered to be a suspect class.<sup>78</sup> However, there are signs

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courts over time have found that race, alienage, national origin, and to a lesser degree, gender and illegitimacy, are suspect classes but classifications based on wealth alone are not suspect).

71. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-40 (1985) (explaining the Court’s involvement by noting that absent congressional guidance, the Court devises standards for equal protection analysis as the Court determines the validity of state legislation or other official action that is challenged as denying equal protection using certain standards based on classification).

72. *Joel v. City of Orlando*, 232 F.3d 1353, 1357 (11th Cir. 2000) (citing *Bannum, Inc., v. City of Fort Lauderdale*, 157 F.3d 819, 822 (11th Cir. 1998)).

73. *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1108 (E.D. Cal. 2012).

74. *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980) (noting the standard for intermediate scrutiny (quasi-suspect classification) is that the state law being challenged must “serve important governmental objectives and that the discriminatory means employed must be substantially related to the achievement of those objectives”). Quasi-suspect classifications, such as gender and illegitimacy are subject to “intermediate scrutiny.” *See Craig v. Boren*, 429 U.S. 190, 219-21 (1976) (laying the foundation for intermediate scrutiny).

75. *Cleburne Living Ctr.*, 473 U.S. at 432.

76. *Joel*, 232 F.3d at 1357 (explaining the rational basis test means the government need only show that the challenged classification is rationally related to serving a legitimate state interest); *see Bannum, Inc.*, 157 F.3d at 822.

77. *Romer v. Evans*, 517 U.S. 620, 632-33 (1996) (requiring that the classification bear a rational relationship to an independent and legitimate legislative purpose ensures that the classification is not drawn to disadvantage the group burdened by the law); *Cleburne Living Ctr.*, 473 U.S. at 440; *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973); *see, e.g., Nordlinger v. Hahn*, 505 U.S. 1, 10-13 (1992) (discussing the treatment between newer and older owners regarding California real property tax increase, stating that under the rational basis standard, the laws made by states are presumed to be valid, these laws will be allowed to stand if the classification drawn by the statute is rationally related to a legitimate state interest).

78. *Joel*, 232 F.3d at 1357 (holding that homeless is not a suspect class); *see also Harris v. McRae*, 448 U.S. 297, 323 (1980) (holding poverty, standing alone, is not a suspect class); *D’Aguanno v. Gallagher*, 50 F.3d 877, 879 n.2 (11th Cir. 1995) (being homeless is not a suspect class); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992) (same); *Davison v.*

that homelessness may one day be seen as suspect and thereafter be afforded additional protections under the law.<sup>79</sup> Even if the Supreme Court declines to rule that homelessness is a suspect class, cases discussed later in this Note suggest that the homeless may be protected against food-sharing restrictions regardless of their classification.<sup>80</sup>

### B. *The History of International Recognition of the Right to Food*

The international community generally recognizes a right to food.<sup>81</sup> The ICESCR “recognizes the right of everyone to an adequate standard of living . . . including adequate food.”<sup>82</sup> The ICESCR, however, is not the only source of international consensus on the right to food.<sup>83</sup> More than 120 sources of international law since 1920 have explicitly included the right to food; it is also included as part of the domestic constitutions of twenty-two countries.<sup>84</sup>

#### 1. Food-Sharing Restrictions Reaching Beyond the United States

Research suggests the U.S. is the only country in which sharing food with the homeless has been found to be illegal.<sup>85</sup> Not only are these attitudes on sharing food with the homeless affecting the culture in the U.S., they also affect cultures abroad.<sup>86</sup> One French McDonald’s franchise forbade its employees from giving earned meals to “vagrants.”<sup>87</sup> The situation caused outcry and both McDonald’s and the

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City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) (same).

79. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992) (indicating in dicta that homelessness may be a protected class one day).

80. See *infra* Part III. For a discussion on whether these food-sharing restrictions violate international or domestic laws, see *infra* Part III.

81. ICESCR, *supra* note 24, art. 11.

82. *Id.*

83. See, e.g., WORLD FOOD SUMMIT, [http://www.fao.org/wfs/index\\_en.htm](http://www.fao.org/wfs/index_en.htm) (last visited Feb. 15, 2018) (“We, the Heads of State and Government . . . reaffirm the right of everyone to have access to safe and nutritious food, consistent with the right to adequate food and the fundamental right of everyone to be free from hunger.”); see also Universal Declaration of Human Rights, G.A. Res. 217 (III), U.N. Doc. 1/777 at art. 1 (1948) [hereinafter Universal Declaration of Human Rights] (“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food . . .”).

84. NAT’L COAL. FOR THE HOMELESS & NAT’L L. CTR. ON HOMELESSNESS & POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 3 (2010) [hereinafter A PLACE AT THE TABLE]; see also *Right to Food Fact Sheet*, FOOD AND AGRIC. ORG. OF THE U.N., <http://www.fao.org/WorldFoodSummit/english/fsheets/food.pdf> (last visited Feb. 15, 2018).

85. See SHARE NO MORE, *supra* note 3, at 22.

86. See *McDonald’s Sorry for Banning French Workers from Feeding Homeless People*, GUARDIAN (Aug. 12, 2015), <https://www.theguardian.com/business/2015/aug/12/mcdonalds-apologises-banning-french-homeless>.

87. *Id.* The notice to the employees reportedly read: “After an incident on July 25th, it is

French franchise apologized for the statement and those it offended, rectifying the situation by later claiming that its stores are dedicated to serving all without discrimination.<sup>88</sup>

## 2. Actions Taken Recognizing the Right to Food

Nations have expressed in small and large ways their support for the right to food.<sup>89</sup> An example of this this type of support is found in an Italian Supreme Court of Cassation decision, which indicated that the right to survival prevails over a store's property.<sup>90</sup> The court overturned a decision where a homeless man was convicted of stealing food because he was starving.<sup>91</sup>

Further, other countries such as France and Italy have passed laws aimed at creating relationships between businesses and charity organizations that help the hungry by utilizing food that would be going to waste.<sup>92</sup> French law forbids supermarkets from throwing away food with expiration dates that have not yet been reached, and requires these businesses to enter into agreements with charity organizations to which

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absolutely forbidden to provide food to vagrants, as a reminder, the team's meals should be eaten on the premises. Meals for team members are a personal benefit and are to be enjoyed only by the worker in question." *Id.* It went on to say: "McDonald's is not in the business of feeding all the hungry people in the land," and concluded that "[a]ny diversion from the procedure cited above will result in sanction that could lead to dismissal." *Id.*

88. *Id.*

89. *See supra* Part II.

90. Cass., sez. un., 02 dicembre 2015, n. 18248, *Giur. Pen. V.* 2016 (It.); Gaia Pianigiani & Sewell Chan, *Can the Homeless and Hungry Steal Food? Maybe, an Italian Court Says*, N.Y. TIMES (May 3, 2016), [http://www.nytimes.com/2016/05/04/world/europe/food-theft-in-italy-may-not-be-a-crime-court-rules.html?\\_r=0](http://www.nytimes.com/2016/05/04/world/europe/food-theft-in-italy-may-not-be-a-crime-court-rules.html?_r=0) (translating from Italian that "[t]he condition of the defendant and the circumstances in which the merchandise theft took place proved that he took possession of that small amount of food in the face of the immediate and essential need for nourishment, acting therefore in a state of need," and therefore the theft "does not constitute a crime"). Gherardo Colombo, a former member of the Supreme Court of Cassation, said the court appeared to rely on an Italian legal doctrine: "*Ad impossibilia nemo tenetur*" which means "[n]o one is expected to do the impossible." Pianigiani & Chan, *supra*.

91. Pianigiani & Chan, *supra* note 90.

92. Loi 2016-138 du 3 février 2016 relative à la lutte contre le gaspillage alimentaire [Law 2016-138 of February 11, 2016 relating to the fight against food waste], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANCAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE] Feb. 11, 2016 [hereinafter French Fight Against Food Waste Law]; Willa Frej, *It's Now Illegal for Supermarkets to Waste Food in France*, HUFFINGTON POST (Feb. 2, 2016), [http://www.huffingtonpost.com/entry/france-supermarkets-food-waste\\_us\\_56b4ba4de4b04f9b57d93f53](http://www.huffingtonpost.com/entry/france-supermarkets-food-waste_us_56b4ba4de4b04f9b57d93f53) (discussing France's new food waste legislation); *see also* Legge 19 agosto 2016, n.166, G.U. Aug 30, 2016, n.202 (It.); *Italy Adopts New Law to Slash Food Waste*, BBC (Aug. 3, 2016), <http://www.bbc.com/news/world-europe-36965671> (discussing Italy's attempt to combat food waste by eliminating hurdles many businesses faced when trying to reduce waste in the past); *The BCFN Reveals the Results of the Food Sustainability Index (FSI)*, BARILLA CTR. FOR FOOD & NUTRITION (BCFN) FOUND. (Dec. 1, 2016), [https://www.barillacfn.com/en/press\\_area/the-bcfn-reveals-the-results-of-the-food-sustainability-index-fsi](https://www.barillacfn.com/en/press_area/the-bcfn-reveals-the-results-of-the-food-sustainability-index-fsi).

they will donate any excess food.<sup>93</sup> This law protects the homeless and hungry by further prohibiting stores from pouring chemicals—such as bleach—over food items to prevent homeless people from eating the unsold food that is left out in the trash area of the supermarket.<sup>94</sup> This law helps charities collect food in order to provide nourishment services to the homeless and other individuals in need.<sup>95</sup>

The second recognition of the right to food is found in the ICESCR.<sup>96</sup> Countries that have ratified the ICESCR participate in the United Nations Human Rights Council inspections of countries' compliance with the ICESCR, which produces a Report of the Special Rapporteur on the right to food.<sup>97</sup> The report makes suggestions on how to improve food security and proposes changes that should be made to adopt a food insecurity strategy.<sup>98</sup> Canada's report suggested the Special Rapporteur was concerned about the growing gap between Canada's international commitment and its domestic implementation, and lack of national food policy or strategy.<sup>99</sup>

Canada, a country that permits food-sharing activities with the homeless, was notified by the report that it had to improve food policies as contemplated by its status as a party to the ICESCR.<sup>100</sup> One can only imagine that if a report by the United Nations Human Rights Special Rapporteur Unit were conducted today in the U.S., the Unit would find a reprehensible violation of the ICESCR due to food-sharing restrictions against the homeless.<sup>101</sup>

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93. French Fight Against Food Waste Law, *supra* note 92.

94. Frej, *supra* note 92.

95. *See id.*

96. ICESCR, *supra* note 24, art. 11.

97. *See generally Special Rapporteur on the Right to Food*, U.N. HUM. RTS. COUNCIL, <http://www.ohchr.org/EN/Issues/Food/Pages/FoodIndex.aspx>.

98. *See* OLIVIER DE SCHUTTER, U.N. SPECIAL RAPPORTEUR ON THE RIGHT TO FOOD: VISIT TO CAN. FROM 6 TO 16 MAY 2012, at 3-4 (2012), [http://www.srfood.org/images/stories/pdf/officialreports/201205\\_canadaprelim\\_en.pdf](http://www.srfood.org/images/stories/pdf/officialreports/201205_canadaprelim_en.pdf).

99. *Id.* at 3-4.

100. *See id.* at 3, 5; *see also* Angelica Montgomery, *Free Leftovers? Quebec City Restaurant's Plan to Feed the Hungry Draws Visit from Inspectors*, CBC NEWS (Feb. 10, 2003), <http://www.cbc.ca/news/canada/montreal/quebec-city-limoilou-soupe-et-company-refridgerator-ministry-1.3941044>. A Quebec restaurant set up a refrigerator as alternative to dumpster diving for hungry people in need. *Id.* The Quebec Ministry of Agriculture, Fisheries and Food ("MAPAQ") investigated the restaurant's actions and found that "there is no permit required nor specific regulations surrounding food donations" *Id.* After an investigation, the MAPAQ told the restaurant that the food donation refrigerator could stay. *Id.*

101. *See, e.g.,* DE SCHUTTER, *supra* note 98, at 5; U.N. HUM. RTS. COUNCIL, *supra* note 97 (noting that under the ICESCR states are prohibited from taking retrogressive action, such as deliberate measures which result in the deterioration of current levels of fulfillment of the right to food).

### III. DO FOOD-SHARING RESTRICTIONS IN THE UNITED STATES VIOLATE INTERNATIONAL LAW?

Food-sharing laws are a problem—not only do these laws target homeless communities specifically, but it has been argued that they limit the rights of charities to provide food in certain areas for the homeless and do not solve the overall problem of hunger in homeless communities.<sup>102</sup> Organizations such as Food Not Bombs<sup>103</sup> have brought cases and challenged ordinances in court that inhibit the ability to share food with homeless people arguing that these types of ordinances violate their constitutionally protected rights.<sup>104</sup>

#### A. Food-Sharing Restrictions and Customary International Law

In the U.S., some cities have laws that prohibit food-sharing and the right to give out food to the homeless, but little if any protection for people who need access to food.<sup>105</sup> This Subpart discusses why these food-sharing laws go against customary international law and why they need to be repealed and replaced with new regulations.<sup>106</sup>

Customary international law obligations to support the right to food likely do not bind the United States.<sup>107</sup> “[The] United States is not a party to the International Covenant on Economic, Social and Cultural Rights, and joining consensus on this resolution does not recognize any change in the current state of conventional or customary international law regarding rights related to food.”<sup>108</sup> However, customary international law may bind nations if two elements discussed in the *North Sea Continental Shelf Cases*<sup>109</sup> can be established.

102. See *First Vagabonds Church of God v. City of Orlando*, 638 F.3d 756, 759 (11th Cir. 2011) (arguing unsuccessfully that city ordinance restrictions on food sharing was a violation of rights including the First Amendment); *SHARE NO MORE*, *supra* note 3, at 7 (noting food-sharing laws do not solve the homelessness and starving issues, since people are homeless for many reasons, such as lack of affordable housing, mental health issues, disabilities, and lack of job opportunity).

103. *FAQ*, FOOD NOT BOMBS, [http://foodnotbombs.net/new\\_site/faq.php](http://foodnotbombs.net/new_site/faq.php) (last visited Feb. 15, 2018).

104. See *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1026, 1028, 1049 (9th Cir. 2006) (challenging unsuccessfully several Santa Monica ordinances that established a permitting process for community events held in public spaces, implementing requirements such as an indemnification agreement including insurance and a nonrefundable fee).

105. *SHARE NO MORE*, *supra* note 3, at 9-13.

106. See *infra* Part III.

107. See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 38(1), 59 Stat. 1055, 33 U.N.T.S. 993 (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law . . .”).

108. *Robl*, *supra* note 43.

109. See, e.g., *North Sea Continental Shelf* (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J.

If the ICESCR is considered customary international law, then the U.S. may not act inconsistently with its mandate.<sup>110</sup> An example of customary law application appears in the *North Sea Continental Shelf Cases*.<sup>111</sup> In this consolidated ruling, the International Court of Justice discussed which method was proper to determine boundaries of a physical area in dispute; the court ruled on whether the method alleged was settled practice, carried out in a way that was evidence of a belief that this practice is rendered mandatory by the existence of a legal obligation.<sup>112</sup> This case described that in order for a law to become “customary” two elements need to be satisfied: (1) state practice and (2) *opinio juris*.<sup>113</sup> State practice means that the ordinary practice of nation states.<sup>114</sup> *Opinio juris* means that the practice is done out of a sense of some legal obligation.<sup>115</sup>

Another way to form customary international law is by treaty, where a treaty is so widely subscribed that its provisions can be said to crystallize into custom.<sup>116</sup> An example of this is the 1969 Vienna Convention on the Law of Treaties.<sup>117</sup> Courts have treated parts of the treaty as codified customary international law although only forty-five nations have signed it, while 115 are parties.<sup>118</sup> Seventy-one nations have ratified the ICESCR, and many nations have incorporated it into their constitutions.<sup>119</sup> Thus, with so many nations party to the covenant, it can be argued that the covenant has become binding customary

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3, at 29 (Feb. 20).

110. *See, e.g., id.* at 29. If the source of law correctly sets down, or “codifies” customary international law it would be binding on all nation states because these sources of law, over time have come to reflect custom. *Id.*

111. *See, e.g., id.*

112. *Id.* at 44.

113. *Id.* The International Court of Justice decided that for a custom to become binding as international law, it must amount to a settled practice and must be rendered obligatory by a rule requiring it. *Id.*

114. *Id.*

115. *Id.*

116. Michael P. Scharf, *Accelerated Formation of Customary International Law*, 20 ILAA J. INT’L & COMP. L. 305, 327 (2014).

117. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

118. *Treaty Collection, Chapter XXIII: Law of Treaties*, UNITED NATIONS, <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> (last visited Feb. 15, 2018) [hereinafter *Treaty Collection*]. The United States has also not ratified the Vienna Convention on the Law of Treaties; however, the official statement reads that it “considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.” *See FAQ Vienna Convention on the Law of Treaties*, U.S. DEP’T. OF STATE, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Feb. 15, 2018).

119. ICESCR, *supra* note 24 (discussing parties that have signed, and ratified with objections, territorial applications, declarations, and reservations to the treaty).

international law, even without U.S. ratification.<sup>120</sup> If the ICESCR should be considered customary international law, then it follows that the U.S. must not take action to prevent access to food.<sup>121</sup> To the contrary, the U.S. would have to ensure that the states do not deprive someone of their access to food and take proactive action to increase access thereto.<sup>122</sup> Food-sharing laws fundamentally restrict access to food for the homeless.<sup>123</sup> These restrictions are likely in violation of the ICESCR because they limit access to food and act inconsistently with the goal to eradicate hunger through individuals' right to food.<sup>124</sup>

However, unfortunately, it is unlikely that the ICESCR has not risen to the level of customary international law.<sup>125</sup> This is due to the fact that the U.S. has been careful not to comply with the ICESCR as a matter of state practice, and has affirmatively rejected any legal obligation to do so.<sup>126</sup> Thus, the ICESCR does not today impose any legal obligation on the United States.<sup>127</sup>

*B. Food-Sharing Restrictions Against the Homeless Are a Constitutional Attack Based on a Bare Congressional Desire to Harm a Politically Unpopular Group*

In *Department of Agriculture v. Moreno*,<sup>128</sup> the Supreme Court struck down an amendment to the Food Stamp Act<sup>129</sup> ("FSA"), which would have prevented people not living with related family members

120. See, e.g., Treaty Collection, *supra* note 118.

121. See, e.g., U.S. DEP'T. OF STATE, *supra* note 118.

122. A PLACE AT THE TABLE, *supra* note 84, at 3 (citing General Comment 12, *supra* note 35, at 4-6); see also GEORGE KENT, FREEDOM FROM WANT: THE HUMAN RIGHT TO ADEQUATE FOOD 56 (Geo. U. Press 2005) (discussing level of obligations required by parties to the covenant).

123. See SHARE NO MORE, *supra* note 3, at 9-13 (requiring organizations wanting to feed the homeless to pay fees for renting public space, requiring certain food cooking standards that are unattainable by organizations donating their time to feed the homeless and all together bans on giving out food in public areas).

124. *Id.* With these extensive requirements of organizations that are trying to feed the homeless, regulations end up inhibiting the homeless from receiving food they may count on. *Id.*; see, e.g., ICESCR, The Nature of the States Obligation Under the ICESCR on its Fifth Session: General Comment 3, 1990, U.N. Doc. INT\_CESCR\_GEC\_4758\_E, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4758&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4758&Lang=en) [hereinafter, ICESCR Comment No. 3].

125. See, e.g., North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. 3, at 29 (Feb. 20). An example of the discussion within the International Community of whether customary international law applied. *Id.*

126. See *supra* text accompanying note 108.

127. See, e.g., A PLACE AT THE TABLE, *supra* note 84 at 18.

128. 413 U.S. 528 (1973).

129. Food Stamp Act of 1964, Pub. L. No. 88-525, 78 Stat. 703.

from participating in the food stamp program.<sup>130</sup> The purpose of the FSA was expressed in the congressional declaration of policy, however, the Court looked at other means to interpret whether there was another purpose.<sup>131</sup> The Court looked at the legislative history of the FSA to determine its meaning.<sup>132</sup> The legislative history suggested the FSA was created with the purpose of banning hippie communes from receiving food stamps, even if they were otherwise eligible to receive them.<sup>133</sup> The Court found that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.”<sup>134</sup> Although the court did not define a “politically unpopular group” they did find that the hippie commune was a politically unpopular group in this decision.<sup>135</sup> A law that solely discriminates against hippies cannot be the purpose of that law without some reference to an independent consideration in the public interest.<sup>136</sup> Thus, by allowing the amendment of the FSA to disqualify hippie communes, due to their politically unpopular status, the law would be discriminatory and violate equal protection of the law under the Due Process Clause.<sup>137</sup>

In order for the Court to have decided that the amendment is proper, the government had to prove it had a legitimate interest.<sup>138</sup> The government’s only argument for disqualifying hippie communes by amending the FSA was to attempt to avoid potential administration fraud.<sup>139</sup> The Court was not persuaded that the state

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130. *Id.* at 537-38.

131. *Id.* at 533-34 (noting that the true purpose of the act was “to safeguard the health and well-being of the Nation’s population and raise levels of nutrition among low-income households”).

132. *Id.* at 534 (noting although there was little legislative history to look at, the available legislative history indicated the purpose of this amended act).

133. *Id.* at 534-35.

134. *Id.*

135. *See id.* at 534. Although the Court did not define what constitutes a politically unpopular group in this case, it offered the example of hippie communes. *Id.* Some authors suggest that political unpopularity is akin to being a societal pariah. *See* Daniel A. Farber & Suzanna Sherry, *The Pariah Principle*, 13 CONST. COMMENT. 257, 276-77 (1996). *Moreno* laid down the foundation for the idea that politically unpopular groups need protection. *See* *Romer v. Evans*, 517 U.S. 620, 634-35 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446-47 (1985).

136. *Moreno*, 413 U.S. at 534-35 (finding the government had a legitimate governmental interest to minimize fraud in the administration of food stamps).

137. *Id.* at 538.

138. *Id.* (holding that the related household condition on receiving food stamps is unconstitutional). In its opinion, the Court included an explanation by the California Director of Social Welfare, explaining that some people cannot rearrange their living situations and give up the shared cost of housing in order to receive food stamps. *Id.* Thus, by limiting the program to only related people living in a household, the law intentionally excludes hippie communes. *Id.*

139. *Id.* at 535-37. The Court did not agree with this fraud argument, the hippies were all otherwise eligible household to receive federal food stamps. *Id.* The Court even included discussion regarding financial inability to change ones living arrangements to comply with the new law. *Id.*



government had a legitimate government interest, and thus found the amendment unconstitutional.<sup>140</sup>

Further, under the Equal Protection Clause, in *Romer v. Evans*, the Court ruled that an amendment to the Colorado Constitution did not satisfy the weakest level of scrutiny.<sup>141</sup> In this case, homosexuals in Colorado were being expressly denied protection of rights under the law.<sup>142</sup> The Court struck down an amendment to the Colorado Constitution in violation of the Equal Protection Clause that was “too narrow and too broad,” targeting individuals by denying them protections of the government due to their sexual orientation.<sup>143</sup> The amendment bans, among other things, the specific protections of homosexuals from claiming discrimination based on their sexual orientation.<sup>144</sup> Colorado argued that it put all persons, homosexual or not, in the same positions as all other persons.<sup>145</sup> The Court rejected this argument, and found the amendment unconstitutional: “First, the amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group” and “[s]econd, its sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class it affects.”<sup>146</sup>

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Therefore, the government’s interest in stopping fraud did not outweigh the recipient’s right to food stamps. *Id.*

140. *Id.* at 538 (noting the government needed to prove that the amendment had a purpose beyond what was stated in the declaration of policy).

141. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

142. *Id.* at 624. Colorado adopted an amendment that denied protections under law to all persons based on their sexual orientation, conduct, practices, or relationships. *Id.*

143. *Id.* (finding that “[i]t identifies persons by a single trait and then den[ies] them the possibility of protection across the board”). Therefore, there is a violation of equal protection because it does not bear a rational relationship to a legitimate governmental purpose. *Id.*

144. COLO. CONST. art. II, § 30b; *Romer*, 517 U.S. at 635-36. The repealed provision stated that

[n]either the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

COLO. CONST. art. II, § 30b.

145. *Romer*, 517 U.S. at 626 (arguing that the law against homosexuals did nothing more than deny homosexuals special rights).

146. *Id.* at 626, 632-33. Here, the court found that the law imposed a disability on homosexuals that it did not impose on people of other sexualities. *Id.* The court noted that “[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.” *Id.*

In *Romer*, the Court looked at the same standard it articulated in *Moreno*, finding that the concept of equal protection of the laws, at the very least, must be understood to mean that a “bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>147</sup> Therefore, the Court found the amendment unconstitutional.<sup>148</sup>

Similarly, in *City of Cleburne v. Cleburne Living Center, Inc.*,<sup>149</sup> the Court found that a city ordinance requiring a special permit to be filed for homes of the mentally ill was unconstitutional under the Equal Protection Clause.<sup>150</sup> The Court again followed *Moreno*'s lead and looked at the objectives of the permit requirement stating once again that “a bare . . . desire to harm a politically unpopular group” cannot be a legitimate state interest.<sup>151</sup> Although the court refused to acknowledge mentally ill people as a “quasi-suspect” class, the Court found that even under the lesser standard of scrutiny<sup>152</sup> the city ordinance was still invalid and unconstitutional.<sup>153</sup> The City of Cleburne argued that it denied the permit acting pursuant to a municipal zoning ordinance, which requires that applicants have permits for homes for the mentally ill.<sup>154</sup> The Court noted that the city required a permit specifically for operations housing the mentally ill, while no other housing complexes required such a special permit.<sup>155</sup> Thus, the Court found that this permit requirement did not have a rational government interest and ruled the permit requirement invalid.<sup>156</sup>

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147. *Id.* at 634-35 (citing *Dep't of Agric. v. Moreno*, 413 U.S. 537 (1973)).

148. *Id.* (reasoning that making a broad blanket rule against all of a specific classification of people without a narrow reasoning as to a legitimate government interest was invading these individuals' right). The Court noted that the connection to the reason why the state wanted the amendment did not have a rational relationship to legitimate state interest. *Id.* And here, the Court could not agree with the interest the government claimed because it simply appeared that the only reason for the states action was animosity toward this specific group of people. *Id.*

149. 473 U.S. 432 (1985).

150. *Id.* at 450.

151. *Id.* at 446-47 (quoting *Moreno*, 413 U.S. at 534).

152. *Id.* at 446. For an in-depth explanation of scrutiny analysis, see *supra* Part II.A.3.

153. *Cleburne Living Ctr.*, 473 U.S. at 450.

154. *Id.* at 435.

155. *Id.* at 447. When looking at the validity of the ordinance the Court looked at the City of Cleburne and noted that it did not require a special use permit to be acquired for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged private clubs or fraternal orders, and others specified, except there is a special permit required for housing for the mentally ill, housing for alcoholics, and drug addicts. *Id.*

156. *See id.* at 450 (holding that the requirement of a special permit for the group home did not have any rational basis on record for believing that a group home for the mentally ill would pose any special threat to the city's legitimate interests and merely an irrational prejudice against the mentally ill. Thus the requirement violated the Equal Protection Clause).

Although this next case did not specifically cite the “politically unpopular group” standard, *Plyler v. Doe*<sup>157</sup> is another case where the Court denied to impose a higher level of scrutiny yet still struck down a law under the rational basis standard.<sup>158</sup> The state sought to deny illegal alien children free public education within the state.<sup>159</sup> The Court found that the state could not justify why this precisely tailored law—aimed at illegal alien children—served a legitimate government interest acceptable to deny the class access to education.<sup>160</sup>

Scholars such as the late Victor Rosenblum have called the *Plyler* and *Cleburne Living Center* decisions “rational basis with teeth,” which is sometimes referred to as a fourth tier of scrutiny under the Equal Protection Clause.<sup>161</sup> He noted that this is an expansion of equal protection.<sup>162</sup> Other commenters have also suggested that the Court in these cases “went considerably further than past cases in its application of the rational relationship test to social and economic legislation.”<sup>163</sup> Therefore, food-sharing restrictions very well may also be reviewed under the “rational basis test with teeth” standard and found unconstitutional due to a potential failure to state a legitimate governmental interest.<sup>164</sup>

Applying this framework to the issue of food-sharing restrictions, a court may find that food-sharing laws that target the homeless must not be motivated by a bare legislative desire to harm a politically unpopular group, because this cannot constitute a legitimate government interest.<sup>165</sup> First, the court must assess whether the homeless are a politically unpopular group.<sup>166</sup> Under the “pariah principle,” homeless people may

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157. 457 U.S. 202 (1982).

158. *Id.* at 230.

159. *Id.* at 206.

160. *Id.* at 209-10.

161. Farber & Sherry, *supra* note 135, at 260 (citing David Stewart, *Supreme Court Report: A Growing Equal Protection Clause?*, 71 A.B.A. J. 108, 112, 114 (1985) (quoting Victor Rosenblum)).

162. Stewart, *supra* note 161, at 112. Under the rational basis standard, legislation that is being challenged has appeared to put an end to the robotic pass of legislation with practically no scrutiny. *See, e.g., id.* Under this theory, “rational basis with bite,” although a rational basis is a minimal standard for all, it may evolve into new application of equal protection for all. *Id.*

163. *Summary, Analysis, and Comment*, 9 MENTAL & PHYSICAL DISABILITY L. REP. 242, 242 (1985).

164. *See, e.g., Zobel v. Williams*, 457 U.S. 55, 65 (1982) (holding an Alaskan law unconstitutional, which based benefits on the amount of time an individual has lived in the state); Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779, 785-86 (1987).

165. *See, e.g., Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973).

166. *See, e.g., Romer v. Evans*, 517 U.S. 620, 635 (1996); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985); *Moreno*, 413 U.S. at 534.

be classified as a politically unpopular group due to legislation ousting them from sight in an attempt to hide them from society.<sup>167</sup> This principle is described as governmental targeting of people based on their status of being homeless, rather than what they do.<sup>168</sup> Based on this principle, a court may find that homeless communities are a politically unpopular group because they are being targeted by food-sharing restrictions based on who they are, not what they are doing.<sup>169</sup>

Second, the court must address whether food-sharing laws were enacted with the intent to serve a legitimate government interest.<sup>170</sup> Thus, the intent of these food-sharing laws must be scrutinized irrespective of scrutiny.<sup>171</sup> Although it appears to many organizations that these laws were made with the intent to target the homeless, some indeed mention the homeless specifically in their regulations against sharing food.<sup>172</sup> Cities would argue they had a legitimate government interest of wanting to ensure the quality of food, or wanting to clean up the area where homeless reside by not allowing donations of food, and perhaps not enabling homelessness.<sup>173</sup> This reasoning on its face may suffice for a legitimate government interest, but perhaps not enough to pass the “rational basis with teeth” review, creating the potential to be struck down under the Equal Protection Clause.<sup>174</sup>

The Supreme Court has also looked to other factors when deciding the intent of the law to determine whether there existed a legitimate government interest.<sup>175</sup> If food-sharing regulations were being evaluated

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167. See, e.g., Farber & Sherry, *supra* note 161, at 273.

168. See, e.g., *id.* at 274.

169. See, e.g., *id.* at 271, 274. The “pariah principle” is the use of improper caste legislation to discriminate against a group of undesirable people. *Id.* Another factor this principle considers when assessing whether the challenged legislation discriminates is if it encourages or creates pariah status. *Id.*

170. See, e.g., *Moreno*, 413 U.S. at 535-36.

171. See *id.* at 536-37 (discussing the legislative history to determine the intent of the law in evaluating whether it served a legitimate public interest).

172. SHARE NO MORE, *supra* note 3, at 11-12. Regulation in Hayward, California, only permits organizations and individuals that meet the other several requirements to hold no more than one event per month regardless of the location of the event, and no location may host more than one event per month. See, e.g., HAYWARD, CAL., MUNICIPAL CODE art. 13-09, §§ 4-13.00, 4-13.35 (2013). The regulation additionally addresses the homeless in the findings and purpose section of the regulation and states that “[n]o food sharing event shall be permitted to last more than three (3) hours in duration.” *Id.*

173. See *supra* Part II.

174. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 580 (2003) (O’Connor, J., concurring) (“When a law exhibits such a desire to harm a politically unpopular group, we have applied a more searching form of rational basis review to strike down such laws under the Equal Protection Clause.”).

175. See, e.g., *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

from the perspective of *Romer v. Evans*,<sup>176</sup> an examining court may look at the factor of undifferentiated disability on the targeted group versus other individuals.<sup>177</sup> From this perspective the court may decide that food-sharing laws do not create an undifferentiated disability on the rest of the public as it does with respect to homeless communities.<sup>178</sup> The court may then suggest that food-sharing laws would therefore lack a connection to a legitimate government interest.<sup>179</sup>

Third, it must be determined whether food-sharing laws harm homeless communities.<sup>180</sup> These laws appear to harm the homeless by making it illegal to feed the homeless in certain cities or by making it extremely difficult for organizations that feed the homeless to get permission to do so.<sup>181</sup> Organizations who bring food to the homeless are an important part of society and sometimes these organizations are the only access a homeless individual may have to safe food for extended periods.<sup>182</sup>

#### IV. PROHIBITING FOOD WASTE IN BUSINESSES & RATIFICATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS: A UNIQUE SOLUTION TO THE TARGETING OF HOMELESS COMMUNITIES' FOOD SOURCES

This Note addresses two possible solutions to the widespread food-sharing restriction laws that have become a movement across the United States.<sup>183</sup> These restrictions come at a time where over ten percent of the individuals who receive food from Feeding America,<sup>184</sup> are homeless.<sup>185</sup>

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176. *Id.* at 620.

177. *Id.* at 632.

178. *See, e.g., id.*

179. *See, e.g., id.* at 633; *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *SHARE NO MORE*, *supra* note 3, at 7 (discussing reasons cities cite in support of food-sharing laws).

180. *Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973) (finding the principle that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest).

181. *See, e.g., CITY OF HOUS., TEX., ORDINANCE*, No. 2012-269, §§ 20-252, 20-254, 20-255, 20-257 (2012) (requiring volunteers to obtain written consent to feed those in need on public or private property and to provide the health department information in order to use the property); *see also SHARE NO MORE*, *supra* note 3, at 10 (citing a Manchester, New Hampshire, ordinance that prohibits organizations from sharing food with people experiencing homelessness on public property in downtown Manchester; and citing an Olympia, Washington, ordinance which prohibits organization from sharing food with people experiencing homelessness in a public parking lot without obtaining a permit for temporary use).

182. *See SHARE NO MORE*, *supra* note 3, at 6.

183. *See infra* Part IV.

184. FEEDING AMERICA, <http://www.feedingamerica.org> (last visited Feb. 15, 2018). Feeding America is one of the largest non-governmental food providers in the United States. *Id.*

185. *See generally* NAT'L COAL. FOR THE HOMELESS, HUNGER AND FOOD INSECURITY (2011),

This means that homeless people depend on organizations such as Feeding America for a safe and reliable source of food.<sup>186</sup> With many of the homeless depending on organizations for nutritious meals, this Note proposes two distinct solutions to combat food-sharing laws that target the homeless.<sup>187</sup>

The first solution to food-sharing restrictions is a law that prohibits discarding food waste from certain businesses around the country.<sup>188</sup> This could help solve the issue of starving homeless communities just by not throwing away food that would normally become trash.<sup>189</sup> The second solution is the ratification and implementation of legislation regarding the ICESCR or the acceptance and treatment of the ICESCR as customary international law.<sup>190</sup> The U.S. has expressed that it is not a party to the ICESCR, thus the covenant has no effect on domestic law.<sup>191</sup> If the U.S. chose to ratify the ICESCR followed by enactment of implementing legislation, it would likely be obligated to ban these food-sharing restrictions because allowing these food-sharing restrictions would be inconsistent with the ICESCR.<sup>192</sup>

#### A. *Federal Bill Prohibiting Food Waste by Businesses*

A 2013 study conducted by Business for Social Responsibility (“BSR”) on behalf of the Food Waste Reduction Alliance found that the “restaurant section” disposed of 84.3% of their food waste, recycled 14.3%, and only donated 1.4%.<sup>193</sup> The problem of cities enacting food-sharing restrictions may best be solved by the legislature crafting a law that would require certain businesses, such as supermarkets, grocery stores, and restaurants to donate food that would be going to waste, or face heavy fines.<sup>194</sup> The U.S. would not be the first country to require

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<http://www.nationalhomeless.org/factsheets/hunger.html>. The National Coalition for the Homeless further states that the reported people who receive food from these services are “biased considerably downwards due to the omission of the homeless from the survey, which is based on household addresses.” *Id.*

186. *See, e.g., id.*

187. *See infra* Part IV.

188. *See infra* Part IV.A.

189. *See, e.g.,* French Fight Against Food Waste Law, *supra* note 92 (noting that France’s food waste law prohibits food going to waste by requiring businesses to work with charities to give excess food that would be going to waste).

190. *See, e.g.,* ICESCR, *supra* note 24; *see also* Piccard, *supra* note 40, at 232-33.

191. Robl, *supra* note 43.

192. *See infra* Part IV.B; *see also* ICESCR, *supra* note 24.

193. THE FOOD WASTE REDUCTION ALLIANCE, ANALYSIS OF U.S. FOOD WASTE AMONG FOOD MANUFACTURERS, RETAILERS, AND RESTAURANTS 19 (2014), [http://www.foodwastealliance.org/wp-content/uploads/2014/11/FWRA\\_BSR\\_Tier3\\_FINAL.pdf](http://www.foodwastealliance.org/wp-content/uploads/2014/11/FWRA_BSR_Tier3_FINAL.pdf).

194. *See, e.g.,* French Fight Against Food Waste Law, *supra* note 92.

supermarkets and specific businesses to donate excess food that would be thrown away to charity.<sup>195</sup> This proposed food waste law would look similar to France's food waste law that requires food that would be going to waste from supermarkets to be donated to charities, thus addressing both environmental issues and social welfare concerns with one law.<sup>196</sup>

### 1. Implementation of the Bill Prohibiting Food Waste

One American business, Starbucks, is ahead of the curve.<sup>197</sup> Starbucks has recently become a leader in the community vowing to donate unsold food, to food banks.<sup>198</sup> The company aims to donate roughly fifty million meals a year by expanding the program to all stores by 2021.<sup>199</sup> Other restaurants in the U.S. have made strides to prevent food waste as well, donating their unserved food to various charitable organizations.<sup>200</sup>

France is a country that recently adopted a law prohibiting food waste.<sup>201</sup> United States legislatures should investigate the adoption of a similar law requiring stores to donate food in order to better supply charity organizations with a safe, continuous food source.<sup>202</sup> Food going to waste eliminates a large portion of the food supply that would be available for people to eat who are currently left without food in the United States.<sup>203</sup> The U.S. has the ability to adopt a food waste law similar to France's in two of the following capacities: (1) through federal government action under the Commerce Clause; or (2) through state representatives enacting local laws requiring donation of food that will

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195. *Id.* Qualifying grocery stores in France are required to donate food that would be going to waste; if owners refuse to donate, their stores could be assessed heavy fines. *Id.*

196. *Id.*

197. Leanna Garfield, *Starbucks Is Trying a New Initiative to Stop Wasting So Much Food*, BUS. INSIDER (Aug. 25, 2016), <http://www.businessinsider.com/starbucks-to-donate-unsold-food-2016-8>; *Starbucks Leads Nationwide Effort to Donate Food*, STARBUCKS (Mar. 22, 2016), <https://news.starbucks.com/news/starbucks-food-donation-program>.

198. *Starbucks Leads Nationwide Effort to Donate Food*, *supra* note 197.

199. Garfield, *supra* note 197.

200. See Michal Addady, *How Olive Garden Is Fighting Hunger in the U.S.*, FORTUNE (Mar. 8, 2016), <http://fortune.com/2016/03/08/olive-garden-feeding-america>; see also Press Release, Olive Garden, Olive Garden Teams up with Feeding America to Feed Families in Need (Mar. 8, 2016), <https://www.prnewswire.com/news-releases/olive-garden-teams-up-with-feeding-america-to-feed-families-in-need-300231256.html#>.

201. French Fight Against Food Waste Law, *supra* note 92.

202. *Id.*; see FEEDING AMERICA, FIGHTING FOOD WASTE WITH FOOD RESCUE, <http://www.feedingamerica.org/about-us/how-we-work/securing-meals/reducing-food-waste.html> (last visited Feb. 15, 2018) [hereinafter FEEDING AMERICA FOOD RESCUE].

203. FEEDING AMERICA FOOD RESCUE, *supra* note 202.

be wasted.<sup>204</sup> In order for Congress to have the ability to create the bill prohibiting food waste, it must establish it has the power to do so.<sup>205</sup> One way Congress may do this is through the Commerce Clause.<sup>206</sup>

Although the sale of food and the waste from the non-sale of food is a local activity, food waste of companies may have an aggregated effect on interstate commerce.<sup>207</sup> In *Wickard v. Filburn*, the Court held that a farmer who grew wheat more than his allotted amount under the Federal Act for his personal use caused an aggregate effect on interstate commerce.<sup>208</sup> In other words, if everyone committed the same violation it would substantially affect interstate commerce.<sup>209</sup> Since food waste in the U.S. is a large problem, Congress may be able to create a bill prohibiting this type of waste due to it being in the best interest of the country.<sup>210</sup>

A new food waste law would likely need to accomplish three main goals: (1) limiting food waste by mandating donation of unsold wholesome food to charities; (2) producing uniform standards to measure food waste in the U.S. as well as uniform standards for donations; and (3) designating an agency to implement uniform food waste policies.<sup>211</sup> This law would help the U.S. meet a goal of limiting food waste by requiring businesses that primarily sell grocery items

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204. See U.S. CONST. art. I, § 8, cl. 3; *id.* amend. X. Due to the law's effect on interstate activity, state enactment of laws would trigger the Dormant Commerce Clause thus placing this decision back in the hands of Congress. See, e.g., *Cooley v. Board of Wardens*, 53 U.S. 299, 319 (1852) (finding that a Pennsylvania regulation mandating the hire of local pilots for ships entering and leaving Philadelphia did not violate the Commerce Clause; however, the court noted that regulations are exclusively federal when there is a need for uniformity across the country). This Note explores the federal component to enacting a law due to the likely need for uniformity. See, e.g., *infra* Part IV. Requiring donations of excess food to charities may cause economic concerns for businesses and inhibit new businesses from staying in states that require food donation rather than forming in states without the required food donations. See, e.g., *infra* Part IV.

205. See U.S. CONST. art. I, § 1.

206. See U.S. CONST. art. I, § 8, cl. 3.

207. See, e.g., *Wickard v. Filburn*, 317 U.S. 111, 133 (1942).

208. *Id.*

209. *Id.*

210. See FEEDING AMERICA FOOD RESCUE, *supra* note 202. Over seventy billion pounds of food go to waste in the U.S. each year, not including waste at home. *Id.* Organizations such as Feeding America have already paved the path for businesses to donate food to people in need. *Id.* In 2016, Feeding America successfully diverted two million pounds of food to people in need that would have been thrown out. *Id.*; see U.S. CONST. art. I, § 8, cl. 3 (expressing the congressional power to regulate matters effecting interstate commerce). In a situation where over seventy billion pounds of food are going to waste from around the country, it can be argued that Congress may have the power to impose a regulation on food waste matters because food traveling interstate has a substantial effect on food waste in the country. U.S. CONST. art. I, § 8.

211. See MARIE MOURAD, FRANCE MOVES TOWARD A NATIONAL POLICY AGAINST FOOD WASTE, NATURAL RES. DEF. COUNCIL 1, 4 (2015) (discussing highlights of the author's thirty-six proposals to the French Parliament concerning the mitigation and end to food waste in the country).



above a certain size to contract with charitable organizations to which they would donate non-sellable food.<sup>212</sup> This American food waste law would also require businesses that are in noncompliance with the law to pay a fine.<sup>213</sup>

Creating a completely new agency is not necessary to the success of this law, since the United States Department of Agriculture (“USDA”) has already assumed responsibilities for promoting the end of food waste.<sup>214</sup> Further, the USDA likely would be an appropriate location for food waste to be monitored due to its Food Safety and Inspection Services, which designates food expiration dates which can be helpful in the inspection of food going to charity.<sup>215</sup> This department may create regulations for food safety and require that unsold food no longer meeting sale quality be donated if still safe to consume.<sup>216</sup> However, this subsection of the USDA that would be dealing with food waste could consist of a panel of specialists in many areas such as of environmental waste management, economic, community, and social science backgrounds that would advise the USDA on successes and issues concerning food waste implementation.<sup>217</sup> This agency could hold a yearly food waste convention with interested organizations to supply ideas of growth in the future as well as collect ideas for compliance with these laws.<sup>218</sup> This panel would be charged with eliciting interested

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212. See, e.g., *id.* at 6 (discussing the proposed requirement of companies forming agreements with authorized charitable organizations). This proposal further discusses certain tax benefits to these companies for logistical costs and percentage of food value which would depend on whether the food was donated in a way it can actually be used, meaning the food must be donated more than one day before the food’s expiration date. *Id.*

213. See, e.g., *id.* at 5 (discussing proposed company involvement and legal obligation to reduce food waste, and noting the financial sanctions companies will face if they refuse to comply).

214. See, e.g., *id.* at 8 (discussing a proposed agency with an aspirational annual budget of \$33 million to \$43 million). This agency would conduct research, manage civil service contracts, and give out grants for specific projects. *Id.* Thus, following this model, it is likely that the U.S. would be able to replicate this type of agency subdivision within the USDA to meet similar food waste goals within a similar budget. See *id.*

215. See U.S. DEP’T OF AGRIC., FOOD SAFETY & INSPECTION SERV., FOOD PRODUCT DATING, <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/food-product-dating/food-product-dating> (last visited Feb. 15, 2018) [hereinafter USDA, FOOD PRODUCT DATING].

216. See, e.g., USDA, FOOD PRODUCT DATING, *supra* note 215. The Department states that “[m]anufacturers provide dating to help consumers and retailers decide when food is of best quality.” Thus, this food that has reached the sale date may still be donated and is encouraged to be donated if it will be unsold. *Id.*; see also *Surplus, Salvaged, and Donated Foods: Safety Tips*, U.S. FOOD & DRUG ADMIN. <http://www.fda.gov/Food/ResourcesForYou/Consumers/ucm197835.htm> (last visited Feb. 15, 2018).

217. See, e.g., MOURAD, *supra* note 211, at 10 (“[T]he European Commission has set up several groups of national experts to work toward the goal of reducing food waste by thirty percent by 2025.”).

218. See, e.g., *id.* at 11 (discussing the idea of integration of food waste into United Nations

organizations to submit recommendations and research to inform policymaking concerns with food waste restrictions and improvements to the food waste law.<sup>219</sup> This would build partnerships with organizations that could help face the inevitable challenges that will arise.<sup>220</sup> As seen in France's proposal for its bill, the benefits of enacting this type of law are enormous, thus a food waste law could have an effect on many areas that could better the future of not only the homeless community but also all U.S. citizens.<sup>221</sup> Although businesses may not see the immediate positive effects of this law, implementation will not come without benefits to businesses that would be required to donate just as there are benefits for business that currently choose to donate.<sup>222</sup>

## 2. United States Laws that Already Encourage Food Donation

Although the U.S. does not require businesses to donate food that would be going to waste, there are laws and tax benefits in place that encourage food to be donated.<sup>223</sup> The USDA supports efforts to limit food waste that could be going to feed people in need.<sup>224</sup> Food donation encouragement policies come with laws that release donating businesses of liability; one of these laws already established is the Bill Emerson Good Samaritan Food Donation Act.<sup>225</sup> However, some argue these laws do not offer enough protections or incentives.<sup>226</sup> Under the proposed new

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Climate Change Conference negotiations).

219. *See, e.g., id.* at 10 (discussing the proposal for establishing a common policy against food waste).

220. *See, e.g., id.* at 9 (discussing the manner in which this food waste law will build partnerships to help the French government overcome logistical challenges with the implementation of this law).

221. *See, e.g., id.* at 8 (noting benefits such as the opening of a thousand community service positions focused on food waste, tax benefits, and grants to encourage food waste innovation).

222. *See* DELOITTE FOOD DONATIONS, CHARITABLE CONTRIBUTIONS OF FOOD, FEEDING AMERICA 3-4 (2016).

223. Federal Food Donation Act of 2008, 42 U.S.C. § 1792. This encourages food donation by requiring that all federal contracts exceeding \$25,000 that involve provision, service, or sale of food in the U.S., or for the lease or rental of federal property to a private entity for events at which food is provided in the U.S. must include language encouraging donation of surplus food stuff to nonprofit organizations benefitting food-insecure people in the United States. *Id.* The Act states that the head of the executive agency involved does not assume responsibility for the costs and logistics of collecting, and transporting the food. *Id.*; *see also* 26 U.S.C. § 170 (allowing qualified corporations to be entitled to a tax deduction with respect to a contribution to a public charity).

224. *See* OFFICE OF THE ECONOMIST U.S. DEP'T OF AGRIC., RECOVERY/DONATIONS, <https://www.usda.gov/oce/foodwaste/resources/donations.htm> (last visited Feb. 15, 2018) [hereinafter OFFICE OF THE ECONOMIST U.S. DEP'T OF AGRIC.].

225. *See* Bill Emerson Good Samaritan Food Donation Act, 42 U.S.C. § 1791 (2012) (absolving any executive agency and any businesses that donate from liability on donations made).

226. Eleanor Goldberg, *Restaurants Officially Have No Excuse Not to Donate Leftover Food*, HUFFINGTON POST (July 18, 2016), [http://www.huffingtonpost.com/entry/restaurants-that-dont-donate-because-of-liability-are-just-making-excuses-experts-say\\_us\\_577d6f92e4b0344d514dd20f](http://www.huffingtonpost.com/entry/restaurants-that-dont-donate-because-of-liability-are-just-making-excuses-experts-say_us_577d6f92e4b0344d514dd20f).

food waste law in this Note, tax benefits would increase for all businesses based on value of food that is donated to charities; there would be greater liability protections for donating businesses; and a uniform sanitation standard for donations.<sup>227</sup>

Since current laws merely encourage donation rather than require it, if there was a requirement to donate excess food it would generate a lot more food to be donated to charitable organizations to feed the homeless who are currently suffering from food insecurity.<sup>228</sup> A preventative food waste law can help charities feed the homeless, deter food-sharing restrictions, or even assist organizations to comply with strict food-sharing restrictions.<sup>229</sup> If large charities that collect millions of pounds of food are able to have a steady collection of food each year from companies, organizations could spend more of their time learning how to comply with their respective city's food-sharing restrictions or spend the time to find permanent locations in which they can give out the donated food.<sup>230</sup>

*B. Ratification and Implementation of the International Covenant on Economic, Social and Cultural Rights Can Eliminate Food-Sharing Restrictions in the United States*

This Part discusses how the ratification of the ICESCR may change the U.S. food-sharing restrictions, requirements under the ICESCR, and implementation of the ICESCR. The ICESCR is important because it recognizes a right to food, and requires signatory nations to show efforts made to fulfill these recognized goals.<sup>231</sup> Throughout the academic community, scholars have suggested that adopting a human rights approach to the U.S. homeless food insecurity problem can help eradicate food-sharing restrictions.<sup>232</sup> If the U.S. chose to ratify the

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227. See, e.g., *id.*

228. See, e.g., OFFICE OF THE ECONOMIST, U.S. DEP'T OF AGRIC., *supra* note 224 (listing a growing number of organizations established that are working to collect food for those in need).

229. See, e.g., SHARE NO MORE, *supra* note 3, at 23-24 (discussing the need for education concerning the homeless population and the lack of accessible nutritious food options). Participation in federal nutrition programs within the homeless community is low due to lack of knowledge of benefit programs. *Id.* It may be time to make a change from a very different point of view, starting with encouraging less food waste with a mandatory food donation law. *Id.* This could, in many ways, lead to solving issues of access to nutritious food and lead to a steady stream of food available for those in need. *Id.*

230. See, e.g., OFFICE OF THE ECONOMIST U.S. DEP'T OF AGRIC., *supra* note 224; SHARE NO MORE, *supra* note 3, at 6 (citing an increased need for food assistance across the country coupled with a reduction in amount of times people may be permitted to visit food pantries in certain cities).

231. ICESCR, *supra* note 24.

232. Chilton & Rose, *supra* note 47, at 1203 (suggesting that a human rights approach to food insecurity is not a new concept in the United States).

ICESCR it could solve the issue of food-sharing laws that target the homeless and inhibit the right for the homeless to receive food in public places.<sup>233</sup> If the United States chose to ratify the covenant, and implement legislation, it would then be held liable for its states violating the ICESCR. Allowing states to deprive homeless communities of their way to receive food is not acting pursuant with the right to a standard of living including the right to food and further seems as a retrogressive measure taken against the right to food for the homeless.<sup>234</sup> Thus, it is important to examine the requirements under the ICESCR and how implementation in the U.S. would work.<sup>235</sup>

### 1. Requirements Under ICESCR

The ICESCR requires that parties employ progressive measures to meet the treaty's requirements,<sup>236</sup> thus each nation that is a member to the treaty must take measures "to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures."<sup>237</sup> The ICESCR requires certain reporting obligations such as an initial report of progress to be submitted within two years of ratification.<sup>238</sup> Further, the nation must monitor these rights to ensure they are being abided by, and the nation must educate itself on the extent to which these rights are enjoyed by all of the citizens in the nation.<sup>239</sup> Barbara Stark, a professor at the Maurice A. Deane School of Law at Hofstra University, states that

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233. See, e.g., ICESCR, *supra* note 24; ICESCR Comment No. 3, *supra* note 124 (noting that retrogressive measures by a nation party to the ICESCR require full justification); see also Chilton & Rose, *supra* note 47, at 1203-04.

234. See, e.g., ICESCR, *supra* note 24; ICESCR Comment No. 3, *supra* note 124.

235. See *infra* Part IV.B.1-2.

236. ICESCR Comment No. 3, *supra* note 124 (discussing several obligations of state parties); see also International Covenant on Economic, Social and Cultural Rights, Reporting by States parties: General Comment 1, Third Session 1989, U.N. Doc INT\_CESCR\_GEC\_4756\_E [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4756&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fICESCR%2fGEC%2f4756&Lang=en) [hereinafter, ICESCR Comment No. 1].

237. ICESCR, *supra* note 24; see also ICESCR Comment No. 3, *supra* note 124 (explaining the general legal obligations under the covenant and clarifying the use of language used in the covenant).

238. ICESCR Comment No. 1, *supra* note 236.

239. *Id.* (noting several other objectives of the ICESCR reporting requirements by nation parties including self-diagnosis of whether these rights are being enjoyed, imposing the expectation on the nations to collect and monitor information to better understand and build upon shortcomings). The nation would be expected to solicit public scrutiny of the policies with respect to various rights covered under the ICESCR to encourage public involvement. *Id.* With this information, the nation will be required to facilitate an exchange of information among other nations to develop a better understanding of common problems faced by nations implementing the ICESCR. *Id.*

the U.S. would likely not have issues meeting the reporting information requirements under the ICESCR.<sup>240</sup> She goes on to explain that this is because the federal government, coupled with the state governments, already collect much of the data required for this type of reporting under the ICESCR.<sup>241</sup>

The ICESCR takes a self-governing approach, meaning the nation is expected to meet compliance with the covenant by setting its own benchmark goals, participating in self-reflection to evaluate progress, and outlining difficulties reaching these goals.<sup>242</sup> Not only does the ICESCR require action by the nation's government, but also the nation is expected to involve its citizens to facilitate public scrutiny of the nation's steps taken and progress on realizing the rights protected under the covenant.<sup>243</sup>

## 2. Implementation of the ICESCR

The ICESCR was constructed in a neutral, facilitating manner—making implementation of the ICESCR flexible to support virtually any program a nation chooses to promote these rights.<sup>244</sup> There are a variety of approaches a nation may take in implementing the ICESCR into domestic laws of that country, which further demonstrates the covenant's flexibility.<sup>245</sup> The reporting process for implementation of the ICESCR would consist of the United States affirmatively showing that the rights under ICESCR are protected, rather than requiring the wronged individual to prove that they are being denied these rights.<sup>246</sup> In

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240. Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79, 114-15 (1992). Professor Stark explains the requirements under the ICESCR to include a comprehensive study and "a general overview of the extent to which the right to adequate food has been realized in your country . . . [focusing on] the situation of especially vulnerable or disadvantaged groups." *Id.* at 114 (alteration in original) (quoting E.S.C. Res. 1985/17, U.N. Economic and Social Council (1985), reprinted in MANUAL ON HUMAN RIGHTS REPORTING UNDER SIX MAJOR INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 122, U.N. Doc. HR/PUB/91/1, U.N. Sales No. E.92.XIV.1 (1991)).

241. *Id.* at 114-15, 115 n.144 (noting that nongovernmental organizations may also be useful in collecting the additional information required by the ICESCR).

242. ICESCR Comment No. 1, *supra* note 236.

243. *Id.*; see also Stark, *supra* note 240, at 112-13 (explaining that the ICESCR not only encourages public participation in the process but requires it because it is required to report whether the ICESCR was subject to public debate).

244. International Covenant on Economic, Social and Cultural Rights, The Domestic Application of the Covenant: Comment 9, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fc.12%2f1998%2f24&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=E%2fc.12%2f1998%2f24&Lang=en) [hereinafter Comment No. 9] (explaining the process of domestic implementation); Stark, *supra* note 240, at 112.

245. See, e.g., Comment No. 9, *supra* note 244, at 2; Stark, *supra* note 240 at 106-11 (discussing the many ways the ICESCR may be implemented within the U.S. using state law to build upon a federal minimum "floor").

246. Stark, *supra* note 240, at 112.

whichever manner the U.S. chooses to adopt and implement the ICESCR, it would likely satisfy the obligations under the covenant as long as it is appropriately taken to produce results in line with the ICESCR.<sup>247</sup> The covenant merely requires that the adopted measures be the most effective way of ensuring the protection of human rights.<sup>248</sup> Although the covenant does not require the nation that has ratified the ICESCR to incorporate provisions into domestic law, the committee notes that it is desirable for a nation to do so.<sup>249</sup> As for the treatment of the covenant in domestic courts, the ICESCR requests that each party provide information as to whether the covenant's provisions "can be invoked before, and directly enforced by, the Courts, other tribunals or administrative authorities" thereby stating how domestic courts will treat the covenant.<sup>250</sup>

Some suggest the ICESCR may need to be internalized on a social level before ratification or legislation implementation can make a difference in the lives of the hungry.<sup>251</sup> However, since the ICESCR itself requires society involvement and the ICESCR was made to facilitate universal rights and change, it is likely that any steps in the right direction could make a difference.<sup>252</sup>

## V. CONCLUSION

Homeless people have a long history of facing persecution in the United States, and with the current trend of criminalizing the act of being homeless, and unfair treatment with no protections under the law, the homeless remain voiceless and powerless in society.<sup>253</sup> This Note explores food-sharing restrictions and whether these restrictions violate either domestic law or international law.<sup>254</sup> This Note proposes two solutions to the rampant targeting of the homeless community by food-sharing restrictions.<sup>255</sup> The first solution is the adoption of laws similar

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247. *Id.* at 111-12.

248. *See* Comment No. 9, *supra* note 244, at 2-3.

249. *Id.* at 3 (noting the committee's desire for incorporation because it would avoid issues that may arise due to translations of obligations and provide an ability for individuals to bring cases in national court).

250. *Id.* at 5 ("[D]omestic law should be interpreted as far as possible in a way that conforms to a State's international legal obligations. Thus, when a domestic decisionmaker is faced with a choice between an interpretation of domestic law that would place the state in breach of the covenant and one that would enable the State to comply with the covenant, international law requires the choice of the latter.").

251. *Id.* at 251-52.

252. *Id.* at 252.

253. *See supra* Part II.A.2.

254. *See supra* Part III.

255. *See supra* Part IV.

to France's food waste law, which will produce more food for the homeless community and help protect the homeless.<sup>256</sup> The second comes from the compliance with the ICESCR, either by way of customary international law or through ratification of the ICESCR.<sup>257</sup> Ratification will likely put a stop to these food-sharing restrictions across the United States.<sup>258</sup> The homeless have always been an easy target for cities; localities move them out of sight, and into other places with fewer regulations where they can live out their lives and receive the food they need to survive.<sup>259</sup> The validity of these food-sharing laws may be legal for now; however, new legislation or a decision protecting the homeless as a protected class may just change everything.<sup>260</sup>

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256. *See supra* Part IV.A.

257. *See supra* Part IV.B.

258. *See supra* Part IV.B.

259. *See supra* Part II.A.2.

260. *See supra* Part II.A.3.

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