The Negative Right to Shelter

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For over forty years, scholars and advocates have responded to the criminalization of homelessness by calling for a "right to shelter." As traditionally conceived, the right to shelter is a positive right—an enforceable entitlement to have the government provide or fund a temporary shelter bed for every homeless individual. However, traditional right-to-shelter efforts have failed. Despite the continuing prominence of right-to-shelter rhetoric, only four U.S. jurisdictions have embraced such a right. Moreover, the shelter systems in these jurisdictions are troublingly inadequate, mired in administrative bureaucracy and cabined by strict eligibility limits. The right-to-shelter movement has even proven pernicious. Centering a positive right to shelter in the discourse surrounding homelessness has rendered the weaknesses in shelter offerings invisible, and courts increasingly reify temporary emergency shelters as a justification for criminalizing unsheltered homelessness.

This Article proposes an alternative conception of the right to shelter as a negative right. It outlines a framework for recognizing a fundamental, constitutional right to shelter oneself without government interference. Self-sheltering activities, in this sense, would include everything from the simple use of blankets or bedding to the erection of temporary encampments in public spaces. It situates this new right within the traditions of constitutional due process jurisprudence premised on respecting human dignity. As the Article details, human dignity in the constitutional sense is understood both as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships, and as protecting against group-based subordination of disfavored

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classes. These interests are inescapably implicated by the decision to self-shelter while homeless. Recognizing a negative right to shelter is therefore an essential step to protect the dignity of homeless individuals while dismantling the plethora of criminal laws that currently plague them.

INTRODUCTION

At age seventeen, I was homeless. As homelessness goes, I had it better than most.[1] For one thing, I had a car—a decade-old, two-door import that I had purchased with my earnings from a high school fast-food job. My car was my most essential piece of personal property; it protected me from the elements, provided me the luxury of mobility, and ensured some measure of physical safety.[2] Importantly, it also secured my few other belongings, mostly clothes, blankets, a few music CDs, photographs, and school yearbooks.[3] At night, I parked my car in one of my hometown's nicer residential neighborhoods, where I hoped that I would be less likely to be harassed or attacked while unsheltered.

In other ways, my homelessness was typical. Like nearly half of those experiencing homelessness, my circumstances were a product of a turbulent family environment.[4] And like the majority of those individuals, I was confident that it was a temporary setback that I would overcome.[5] I did not want—and indeed would have refused—government assistance, including a bed in a shelter, had one been available.[6] In fact, I was too proud to even tell friends of my

1. Among other things, I had the social privileges of a cisgender, heterosexual, White male. For information on the role of race, gender, and sexuality in the experience of homeless youths, see Jama Shelton, Jonah DeChants, Kim Bender, Hsun-Ta Hsu, Diane Santa Maria, Robin Petering, Kristin Ferguson, Sarah Narendorf & Anamika Barman-Adhikari, *Homelessness and Housing Experiences Among LGBTQ Young Adults in Seven U.S. Cities*, 20 CITYSCAPE 9 (2018).

2. Studies have consistently found high rates of victimization among homeless adolescents—more often physical abuse for males and sexual abuse for females. *See* Angela J. Stewart, Mandy Steiman, Ana Mari Cauce, Bryan N. Cochran, Les B. Whitbeck & Dan R. Hoyt, *Victimization and Posttraumatic Stress Disorder Among Homeless Adolescents*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 325, 329 (2004). Homeless youths report high rates of hypervigilance and avoidance as strategies to reduce the risks of victimization, likely at the expense of long-term psychological and emotional health. *See id.* at 329–30.

3. Individuals experiencing homelessness frequently must carry all their belongings with them, a burden that can impede their sense of autonomy and even hinder their ability to find work. *See, e.g.*, Zarina Khairzada, *This Backpack Isn't for Sale, but It's Helping the Homeless*, SPECTRUM NEWS 1 (Aug. 16, 2019), https://spectrumnews1.com/ca/la-west/news/2019/08/15/this-backpack-isn-t-for-sale--but-it-s-helping-the-homeless [https://perma.cc/VY62-C9QP]. Even something as simple as a high-quality backpack "makes a difference and this creates a sense of dignity, a sense of safety." *Id.* (internal quotation omitted).

4. E.C. HEDBERG & BILL HART, A NEW LOOK: A SURVEY OF ARIZONA'S HOMELESS POPULATION 7–9 (2013), https://morrisoninstitute.asu.edu/sites/default/files/newlook-homelesssurvey.pdf [https://perma.cc/MW7N-KUNC].

5. Despite popular perceptions of homelessness as a chronic and persistent condition, the more common experience is for individuals to experience homelessness in brief, transitional episodes. *See* Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOCIO. INQUIRY 343, 345 (2015). A 2017 report from the U.S. Department of Housing and Urban Development found that only about 24 percent of individuals experiencing homelessness nationally had chronic patterns of homelessness. MEGHAN HENRY, RYAN WATT, LILY ROSENTHAL & AZIM SHIVJI, U.S. DEP'T OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 62 (2017), https://www.huduser.gov/portal/sites/default/files/pdf/2017-AHAR-Part-1.pdf [https://perma.cc/2PQU-H4S9].

6. Phoenix Community Action Response Engagement Services (CARES) statistics indicate that nearly 75 percent of people refused services when contacted. *See* Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, AZ CENTRAL (May 7, 2019),

situation, though they undoubtedly would have offered me a couch or some food. Instead, I parked my car every night facing east, woke at sunrise, and began my day collecting the fallen change from fast-food drive-throughs in order to pay for the day's meal or for a gallon of gas.

There is one other key way in which my experience was typical: I was a criminal.[7] My crime—frequently called "urban camping"[8]—is just one of the countless criminal violations that individuals experiencing homelessness commit every day, often through no fault of their own.[9] Though there are subtle variations between cities, urban camping ordinances typically prohibit sleeping, preparing to sleep, or storing belongings on public property.[10] This includes sleeping in private vehicles parked on a public road.[11]

Urban camping ordinances prevent homeless individuals from taking the most fundamental steps to shelter themselves from their environment. Tents, bedding, and even blankets become telltale signs of criminal activity when used to protect oneself, whether from the elements or from other people.[12] These ordinances are part of a suite of criminal prohibitions aimed at removing tragic poverty from public view.[13] Although urban camping laws ostensibly regulate the allocation of shared public spaces, I could not help but notice the irony that although my car was permitted to occupy the street—I was not permitted to occupy it.

Had I been arrested for urban camping, my car may have been impounded, the status of my worldly possessions uncertain.[14] The impound and storage fees—the cost of having the government protect the very property they had taken

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https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/ [https://perma.cc/J3AJ-3EHP].

7. *See generally* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 110 (2019) ("Bans on sleeping in vehicles—the thin tin line that separates a human being from the street—increased by a staggering 143% nationwide since 2006.") (citing TRISTIA BAUMAN, JANET HOSTETLER, JANELLE FERNANDEZ, ERIC TARS, MICHAEL SANTOS, JENIFER BREWER, ELIZABETH DENNIS, RUTH EL & MARIA FOSCARINIS, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 11 (2018), https://web.archive.org/web/20190331135117/https://nlchp.org//wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf).

8. Boehm, *supra* note 6.

9. Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 955 (2020) (noting that typical laws criminalizing homelessness include "loitering in parks, resting at bus stops, obstructing sidewalks, pitching tents, asking for money, asking for work, and sleeping just about anywhere").

10. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30(B) (defining "camping" to include "sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings").

11. *See, e.g.*, *id.* § 23-30(A).

12. *See, e.g.*, *id.* § 23-30(B).

13. *See* Rankin, *supra* note 7, at 102 ("Key drivers for the criminalization of homelessness are increasingly popular laws and policies that seek to expel visibly poor people from public space.").

14. *See* Matt Tinoco, *It's (Still) Against the Law to Sleep in Your Car in LA*, LAIST (Aug. 1, 2019), https://laist.com/news/los-angeles-homeless-sleeping-car-rv [https://perma.cc/W6KD-5FZV].

from me—would potentially be greater than the fine for the violation itself.[15] And, of course, those fines and fees would have exacerbated my already-vulnerable position by conditioning my very freedom on my ability to turn over the resource I lacked most: money. Crucially, a misdemeanor conviction also would have sabotaged my ability to pull myself out of homelessness. It would have appeared on background checks for housing and employment.[16] It would have impacted my eligibility for social services and governmental assistance programs.[17] I would have been required to disclose it when applying for a college education,[18] and again for law school.[19] My entire professional career potentially hung in the balance.

For over forty years, advocates have responded to the criminalization of homelessness by calling for a "right to shelter."[20] The right to shelter has traditionally been understood in positive terms: an enforceable right to have the government provide or fund a temporary shelter bed for every homeless individual.[21] Understood this way, the right to shelter ensures a physical location where individuals can escape the threat of the criminal law. However, only four U.S. states have embraced this positive conception of the right to shelter, two via litigation under state constitutions and two via express legislative enactments.[22] The remaining states continue to criminalize urban camping despite not recognizing shelter as a right guaranteed to homeless individuals.

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15. *See id.* ("The fine for sleeping in your car in an off-limits zone starts at $25 for first-time offenders.").

16. *See generally* Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313, 1313 (2012) ("The consequences of these convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or education opportunities.").

17. Rankin, *supra* note 7, at 108 ("Once individuals are saddled with a misdemeanor or a warrant, they are often rendered ineligible to access shelter, food, services, and other benefits that might support their ability to emerge from homelessness.").

18. *See* Judith Scott-Clayton, *Thinking "Beyond the Box": The Use of Criminal Records in College Admissions*, BROOKINGS (Sept. 28, 2017), https://www.brookings.edu/research/thinking-beyond-the-box-the-use-of-criminal-records-in-college-admissions/ [https://perma.cc/D2FF-3ZZ7] ("Three national surveys of institutional admissions practices, conducted in 2009, 2010, and 2014 by separate research teams, indicate that 60 to 80 percent of private institutions and 55 percent of public institutions require undergraduate applicants to answer criminal history questions as part of the admissions process.").

19. *See, e.g.*, *Applying with a Criminal Record*, YALE L. SCH., https://law.yale.edu/centers-workshops/law-school-access-program/applying-criminal-record [https://perma.cc/XVN9-8CNP].

20. *See infra* Part II.

21. The distinction between "positive" and "negative" rights is generally traced to Isaiah Berlin's seminal lecture, *Two Concepts of Liberty* (1958), reprinted in THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS 191, 194 (Henry Hardy & Roger Hausheer eds., 1997). "Positive" rights are typically portrayed as those requiring affirmative action to fulfill a specific entitlement—for example, they may best be characterized as a right *to* something, rather than a right to the be free *from* something. *See generally Positive and Negative Liberty*, STAN. ENCYCLOPEDIA OF PHIL. (Nov. 19, 2021), https://plato.stanford.edu/entries/liberty-positive-negative [https://perma.cc/7WHW-A9S4].

22. *See infra* Part II.A–B.

Courts, however, have recently flipped the script on the right to shelter. In 2018, the Ninth Circuit Court of Appeals ruled that the Eighth Amendment prohibits criminalizing urban camping unless alternative shelter is reasonably available.[23] While ostensibly a victory for homeless advocates, the ruling ties the provision of government-funded shelters to the justifications for criminalizing homelessness.[24] This result obscures the true motivations for criminalization, transforming the narrative from punishing visible poverty to punishing the failure of homeless individuals to use government resources. It also complicates the efforts of right-to-shelter advocates. Securing additional shelter services from the government now authorizes more extensive criminal enforcement against homeless individuals who do not, or cannot, utilize those services.[25]

This Article proposes an alternative conception of the right to shelter as a negative right. Recognizing that government-funded shelter services are not a universal solution to the social problem of homelessness, it outlines a framework for recognizing an essential right to *shelter oneself* without government interference.[26] Self-sheltering activities, in this sense, would include everything from the simple use of blankets or bedding to the erection of temporary encampments in public spaces. Essentially, the Article presents a roadmap for decriminalizing urban camping as it has been traditionally understood.

The Article upends the traditional conception of a right to shelter by focusing on the right to human dignity guaranteed by the U.S. Constitution's due process clauses.[27] Legally, dignity is understood as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships.[28] That capacity has been undermined by centering right-to-shelter efforts in both legal and political discourse surrounding homelessness. The positive right to shelter has eventually come to justify, rather than constrain, the criminalization of unsheltered homeless individuals.[29]

Part I examines the criminalization of urban camping and related forms of self-sheltering. It explores the consequences of relying on criminal laws to resolve deep-seated social problems. And it details the long, and largely ineffective, history of constitutional challenges to criminalization. Part II chronicles the history of legislative and litigative efforts to secure a positive "right to shelter" for homeless individuals. Although the most noteworthy of

23. Martin v. City of Boise, 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

24. *See infra* Part II.C.

25. *See* Cameron Baskett, Note, *Cruel and Unusual Camping*, 109 KY. L.J. 593, 604 (2020) (describing how proposals to construct "large, centralized facilities that are available to the homeless twenty-four hours a day" would undercut the impact of the *Martin* decision).

26. *See infra* Part IV.

27. Although the word "dignity" does not appear in the due process clauses of either the Fifth or Fourteenth Amendments, much of the Supreme Court's due process jurisprudence over the past half-decade has identified human dignity as a core value protected by those clauses. *See infra* Part IV.A.

28. *See infra* Part IV.A.

29. *See infra* Part II.C.

these efforts took place in the 1980s and 1990s, this Part considers how the rhetoric demanding a positive right to government-run or government-funded shelter may continue to infect constitutional litigation about the rights of the homeless. Part III offers a deep exploration of the myriad considerations that inform whether homeless individuals elect to use available shelter services. It demonstrates that some homeless individuals may rationally prefer "self-sheltering"—making do on streets, in public spaces, or in homeless encampments—to the forms of shelter traditionally offered by the state. Part IV then constructs an alternative vision of the "right to shelter" as a negative right to be free from government interference while self-sheltering. It situates this right within the traditions of constitutional due process jurisprudence premised on human dignity. Fundamentally, this Article argues that a proper respect for human dignity requires tolerating the individual preference to self-shelter in public spaces. In a brief coda, Part IV also explores three forms of state regulation of homeless self-sheltering that may survive constitutional scrutiny.

I.
CRIMINALIZING SELF-SHELTERING

On any given night in the United States, an estimated 580,000 people are without a home.[30] About six in ten will utilize some form of officially recognized "shelter."[31] Some of them will find refuge in temporary emergency shelters provided by the state. Others may benefit from transitional housing or privately run shelters, which are frequently funded with the help of religious charities.[32] But the remaining 226,000 will exist "unsheltered," living in places not designed for human habitation—tents, vehicles, makeshift encampments, or simply exposed to the elements.[33] Unsheltered homelessness is rapidly increasing. It is up more than 30 percent over the past five years, while sheltered homelessness decreased almost 10 percent during the same period.[34]

Even these numbers do not capture the enormity of the problem. Point-in-time counts do not include homeless individuals who are sleeping on floors or couches of family and friends, those who intentionally seek to avoid detection,

30. MEGHAN HENRY, TANYA DE SOUSA, CAROLINE RODDEY, SWATI GAYEN & THOMAS JOE BEDNAR, U.S. DEP'T OF HOUS. & URB. DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 6 (Jan. 2021), https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf [https://perma.cc/Y2T6-YQ8E] [hereinafter HUD 2020 AHAR].

31. *Id.*

32. NAT'L ALL. TO END HOMELESSNESS, FAITH-BASED ORGANIZATIONS: FUNDAMENTAL PARTNERS IN ENDING HOMELESSNESS 2 (May 2017), http://endhomelessness.org/wp-content/uploads/2017/06/05-04-2017_Faith-Based.pdf [https://perma.cc/3VKN-AGKN] ("In 2016, as a conservative estimate, faith-based organizations provided over 41 percent of the emergency shelter beds for single adults and nearly 16 percent of beds for families.").

33. HUD 2020 AHAR, *supra* note 30, at 8.

34. *See* HUD 2020 AHAR, *supra* note 30, at 6 (providing point-in-time estimates of 391,440 sheltered and 173,268 unsheltered individuals in 2015, compared to 354,386 sheltered and 226,080 unsheltered individuals in 2020).

and the temporarily incarcerated.[35] Because many people transition into and out of homelessness episodically, anywhere from one to five million Americans may experience homelessness in a given year.[36] More than twenty million—about one in sixteen people—are expected to experience homelessness in their lifetime.[37]

Most Americans are closer to homelessness than they realize. The United States has a well-documented deficit of affordable housing.[38] Nationally, rents are rising at a record rate.[39] Combined with a stagnant minimum wage, the affordable housing deficit has left roughly seven million American renters spending more than 50 percent of their income just on shelter.[40] For these folks, it takes only a minor shift in circumstances to make a rent payment impossible.[41]

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35. DARRELL STANLEY, MARIA FOSCARINIS & JENNIFER WANG, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 28 (2017), https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf [https://perma.cc/KTK6-WVSH]. Point-in-time counts are administered by the U.S. Department of Housing and Urban Development through its Continuum of Care (COC) programs, which counts sheltered and unsheltered homeless individuals at a "point-in-time"—typically a day. *Id.* at 8, 10. The point-in-time, or the length of the count, varies, however. While most COCs conduct the count in a single night, some conduct it over several. *Id.* at 10.

36. *See* Stephen Metraux, Dennis Culhane, Stacy Raphael, Matthew White, Carol Pearson, Eric Hirsch, Patricia Ferrell, Steve Rice, Barbara Ritter & Stephen J. Cleghorn, *Assessing Homeless Population Size Through the Use of Emergency and Transitional Shelter Services in 1998: Results from the Analysis of Administrative Data from Nine U.S. Jurisdictions*, 116 PUB. HEALTH REPS. 344, 344 (2001) (finding that the annual number of homeless individuals is 2.5 to 10.2 times greater than can be obtained using a point-in-time count). Estimating the number of individuals who experience homelessness annually has proven challenging because homelessness is typically temporary and cyclical. *See* Lippert & Lee, *supra* note 5, at 345. The most-commonly cited estimate of homelessness is the Department of Housing and Urban Development's Point-in-Time Count, which captures only visible homelessness on a single (or a couple) night(s) of the year. *See* Lillian Kilduff & Beth Jarosz, *How Many People in the United States Are Experiencing Homelessness?*, PRB (Sept. 22, 2020), https://www.prb.org/resources/how-many-people-in-the-united-states-are-experiencing-homelessness [https://perma.cc/RD4A-PLJB].

37. Researchers have found that about 6 percent of a studied population from the Baby Boomer demographic experienced homelessness in their lifetime. *See* Vincent A. Fusaro, Helen G. Levy & Luke H. Shaefer, *Racial and Ethnic Disparities in the Lifetime Prevalence of Homelessness in the United States*, 55 DEMOGRAPHY 2119, 2123 (2018) (finding that approximately 6.2 percent of Baby Boomer adults have experienced at least a single spell of homelessness). If that rate holds across populations, then roughly 20.4 million living Americans should be expected to experience homelessness at least once in their lifetimes.

38. *See The Gap: A Shortage of Affordable Rental Homes*, NAT'L LOW INCOME HOUS. COAL., https://reports.nlihc.org/gap/about [https://perma.cc/Q3HE-42LV].

39. Abha Bhattarai, Chris Alcantara & Andrew Van Dam, *Rents Are Rising Everywhere. See How Much Prices Are up in Your Area*, WASH. POST (Apr. 21, 2022), https://www.washingtonpost.com/business/interactive/2022/rising-rent-prices/ [https://perma.cc/845S-JNYS].

40. *Id.*

41. The COVID-19 pandemic in 2020 has made this reality evident. An estimated twenty to forty million workers lost their jobs as business shut down or paused. *See* Eric Morath, *How Many U.S. Workers Have Lost Jobs During the Coronavirus Pandemic? There Are Several Ways to Count*, WALL ST. J. (June 3, 2020), https://www.wsj.com/articles/how-many-u-s-workers-have-lost-jobs-during-coronavirus-pandemic-there-are-several-ways-to-count-11591176601 [https://perma.cc/9UGJ-DHGJ]. In 2020, federal and state governments passed temporary eviction moratoriums that restricted landlords from filing new eviction actions based on non-payment of rent. *See, e.g.*, Coronavirus Aid, Relief, and

In fact, there is no longer any corner of the country where a minimum wage worker can comfortably afford their own apartment.[42] It is no surprise, therefore, that as many as 25 percent of homeless people report that they cannot afford housing despite working full- or part-time.[43]

The societal response to this heartbreaking fact has been to meet homelessness with criminalization. Cities and states across the country have passed laws prohibiting acts intrinsically connected to the condition of homelessness.[44] These laws outlaw sitting, lying, sleeping, or loitering in public places, as well as more attenuated conduct such as asking for food, asking for money, and asking for work.[45] Legal scholars have long denounced criminalization as an ineffective solution to the social problem of homelessness.[46] Much of what constitutes the "policing" of individuals experiencing homelessness are simply orders to decamp and relocate, backed up by the threat of arrest.[47] Arrests, when they do happen, tend to retrench poverty, making escaping homelessness even harder.[48]

This Part surveys the criminal response to homelessness, with a particular emphasis on laws outlawing self-sheltering activities, such as urban camping ordinances. It begins by detailing both the origins of criminal laws against homelessness and the recent proliferation of such laws. It then examines the

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Economic Security Act, H.R. 748, 116th Cong. (2020) ("CARES Act"), Sec. 4024; A.B. 3088 (Cal. 2020); New York Covid-19 Emergency Eviction and Foreclosure Prevention Act, S.B. 9114 (N.Y. 2020). As those moratoriums expired, millions of individuals were suddenly at risk of eviction. Michael Casey, *'A Lot of People Will Be Displaced': Tenants Prepare for End of Federal Eviction Moratorium*, USA TODAY (July 31, 2021), https://www.usatoday.com/story/money/2021/07/31/millions-tenants-face-evictions-homelessness-federal-eviction-moratorium-ends/5442925001/ [https://perma.cc/VY8B-SC3Y]. Early estimates predicted that as many as forty million people could become homeless at the expiration of these moratoriums. *See* Marc Ramirez, Sarah Taddeo & Tiffany Cusaac-Smith, *The Federal Eviction Moratorium Expires in January. It Could Leave 40 Million Americans Homeless*, USA TODAY (Dec. 24, 2020), https://www.usatoday.com/story/news/nation/2020/12/24/covid-eviction-moratoriums-could-eventually-leave-americans-homeless/4018226001/ [https://perma.cc/9YHE-VMBH].

42. ANDREW AURAND, ABBY COOPER, DAN EMMANUEL, IKRA RAFI & DIANE YENTEL, OUT OF REACH 2 (2019) (explaining that there is no metropolitan area in the country in which a minimum wage worker working forty hours per week can afford market rent for a two-bedroom apartment).

43. Veronica Harnish, *I've Been Homeless 3 Times. The Problem Isn't Drugs or Mental Illness—It's Poverty*, VOX (Mar. 8, 2016), https://www.vox.com/2016/3/8/11173304/homeless-in-america [https://perma.cc/DQ7B-6ENB].

44. TRISTIA BAUMAN, RAJAN BAL, KARIANNA BARR, MARIA FOSCARINIS, BRANDY RYAN, ERIC TARS, TAYLOR DE LAVEAGA, JOY KIM, DARREN O'CONNOR & SCOTT PEASE, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12–14 (2019), https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [https://perma.cc/GDC3-3CA2] [hereinafter NLCHP, HOUSING NOT HANDCUFFS].

45. *Id.*

46. *See, e.g.*, Rankin, *supra* note 7, at 122.

47. *See, e.g.*, Chris Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penality: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC. PROBS. 131, 137 (2020); Tony Robinson, *No Right to Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness*, 55 URB. AFFS. REV. 41, 64 (2019).

48. McJunkin, *supra* note 9, at 962.

substantial human toll criminal responses inflict on those who are subjected to them. Lastly, this Part reviews the history of legal challenges that have been levied against criminal responses to homelessness, focusing on constitutional arguments grounded in the Fifth, Eighth, and Fourteenth Amendments.

A. The Proliferation of Criminal Laws

Laws against homelessness have existed since the country's founding.[49] Early American legislatures typically outlawed "vagrancy," an ill-defined concept that encompassed various forms of existing in public without obvious means of support.[50] Historical vagrants included not only the homeless, as we might understand them today, but also "rogues and vagabonds," "common gamblers," "common drunkards," "habitual loafers," and "persons able to work but habitually living upon the earnings of their wives or minor children."[51] Ostensibly, the goal of early American vagrancy laws was not to punish poverty, but rather to distinguish individuals worthy of social services from those whose needs seemed self-inflicted.[52] The laws also empowered discretionary policing as a prophylactic measure to prevent other, future crimes.[53]

The justifications for early American vagrancy laws fostered specific stigmas about homelessness that persist to this day.[54] By focusing on the idle but able-bodied, vagrancy laws perpetuated the view that homelessness is primarily caused by laziness or substance abuse—a consequence of individuals who are simply unwilling to work, or who are voluntarily too drunk or high to function productively.[55] These laws also contributed to the belief that homeless

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49. *See, e.g.*, *An Act for Suppressing and Punishing of Rogues, Vagabonds, Common Beggars, and Other Idle, Disorderly, and Lewd Persons*, *in* THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 411 (2d ed., 1801) (1788), https://books.google.com/books?id=ADw4AAAAIAAJ [https://perma.cc/F6ZK-2SZK].

50. Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 633–34 (1992).

51. *See* Forrest W. Lacey, *Vagrancy and Other Crimes of Personal Condition*, 66 HARV. L. REV. 1203, 1208–09 (1953); *see also* Papachristou v. City of Jacksonville, 405 U.S. 156, 156 n.1 (1972) (providing an example of a city's vagrancy ordinance).

52. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 215–16 (1989). The roots of American vagrancy legislation run all the way back to fifteenth century attempts at wage stabilization in England following the Black Death. *See* Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603, 615–16 (1956). However, the adoption and enforcement of vagrancy laws in America also reflects the country's racist history. *See* KELLY LYTLE HERNÁNDEZ, CITY OF INMATES: CONQUEST, REBELLION, AND THE RISE OF HUMAN CAGING IN LOS ANGELES, 1771-1965, at 36 (2017) (explaining that nineteenth century municipal codes in California were primarily enforced against Indigenous populations).

53. *See* Lacey, *supra* note 51, at 1217 ("Though vagrancy statutes no longer have the aim of forcing the idle to work or reducing the cost of poor relief, they very definitely do retain their historic purpose as a method of preventing crime."); Foote, *supra* note 52, at 614 ("Administratively, vagrancy-type statutes are regarded as essential criminal preventives, providing a residual police power to facilitate the arrest, investigation and incarceration of suspicious persons.").

54. *See* Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 21–24 (2016) (discussing the contemporary stigmas that homelessness is self-inflicted and indicative of future criminality).

55. *See* McJunkin, *supra* note 9, at 970.

individuals are merely criminals in waiting.[56] Under the guise of preventing more serious crime, vagrancy rose to become one of the most common causes of arrest nationally.[57]

The constitutionality of vagrancy laws drew heightened attention in the 1960s and 1970s, in part because of a series of police abuses.[58] "Vagrancy law became a tool for policing political dissidents, gay men and lesbians, Beatniks, civil rights activists, interracial couples, antiwar protestors, and hippies, along with gangsters and petty criminals."[59] This new wave of challenges drove major court decisions that ultimately forced American legislatures to disaggregate the crime of vagrancy. Most notably, in *Papachristou v. City of Jacksonville*, the Supreme Court invoked its "vagueness" jurisprudence to strike down a relatively typical ordinance prohibiting vagrancy.[60] It concluded that the historical definition of vagrancy "makes criminal activities which by modern standards are normally innocent."[61] Citing no less authorities than Walt Whitman and Vachel Lindsay, the Supreme Court declared that vagrancy ordinances infringed upon the "unwritten amenities" of life.[62] The broad proscriptions of the typical vagrancy ordinance required "poor people, nonconformists, dissenters, [and] idlers" to live a lifestyle deemed appropriate by police and the courts, rather than one dictated by their individual consciences.[63]

Around the same time, however, public attention crystalized on the blight of visible poverty.[64] Prior to 1970, the homeless population had been largely obscured from public view—homeless individuals often sheltered in cheap hotels, flophouses, or single room occupancy hotels (SROs) concentrated within skid rows, rather than occupying streets and public places.[65] By 1980, the United

56. These narratives were even accepted legally. *See, e.g.*, District of Columbia v. Hunt, 163 F.2d 833, 835 (D.C. Cir. 1947) ("A vagrant is a probable criminal; and the purpose of the statute is to prevent crimes which may likely flow from his mode of life."); *see generally* William O. Douglas, *Vagrancy and Arrest on Suspicion*, 70 YALE. L.J. 1 (1960) (criticizing vagrancy laws for permitting arrests on mere suspicion of criminality).

57. Foote, *supra* note 52, at 614 ("[V]agrancy-type crime accounts for more than one third of all arrests tabulated in the Uniform Crime Reports.").

58. *See* Debra A. Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 596 (1997).

59. Laura Weinrib, *The Vagrancy Law Challenge and the Vagaries of Legal Change*, 43 LAW & SOC. INQUIRY 1669, 1670 (2018).

60. 405 U.S. 156, 162 (1972).

61. *Id.* at 163.

62. *Id.* at 164.

63. *Id.* at 170. It is worth noting that four of the *Papachristou* defendants contended that their arrest was motivated by their racial composition—Black men driving in a car with White women. *See* Petitioner's Brief at 5–7, Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (No. 70-5030), 1971 WL 133167.

64. *See, e.g.*, Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 J.L. SOC'Y 515, 515–16 (2012) (explaining that rising homelessness in the early 1980s "resulted in the emergence of homelessness as a serious national crisis affecting a broad range of the population and the country").

65. *Id.*; NAT'L ACADS. OF SCIS., ENG'G, & MED., PERMANENT SUPPORTING HOUSING: EVALUATING THE EVIDENCE FOR IMPROVING HEALTH OUTCOMES AMONG PEOPLE EXPERIENCING

States would experience a confluence of social, economic, and political changes like gentrification, deinstitutionalization, and a reduction in affordable housing options that would serve to alter and exacerbate homelessness across the nation.[66]As a result, homelessness almost tripled between 1981 and 1989.[67] These compounding socioeconomic forces diversified the homelessness population, and by the 1980s, the average homeless individual was markedly younger, poorer, and more at risk for illness and addiction.[68] Increasingly, homelessness afflicted people of color,[69] who now comprise about 68 percent of the contemporary homeless population.[70] Homeless women and families also appeared in significant numbers for the first time.[71]

As the demographics of homelessness changed, so did its visibility. Because governments refused to fund homeless assistance and actively cut back on social welfare spending, this generation experienced "'literal homelessness' with no access to conventional dwellings, such as houses, apartments, mobile homes, rooming houses, or SROs."[72] Charities became the primary providers for emergency aid and shelter services.[73] Consequently, shelter provisions across the country differed drastically in capabilities and capacity.[74]

Legislatures responded to this reality by passing a plethora of criminal laws tailored to more narrowly target conduct associated with homelessness.[75] Although it undoubtedly had some substantive benefit, the Supreme Court's *Papachristou* decision effectively invited overcriminalization as a means of salvaging the police's longstanding discretion to supervise the socially "undesirable." In the place of a single vagrancy statute, a typical city may now have a dozen or more "public order" ordinances, separately punishing

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CHRONIC HOMELESSNESS 175–76, 178 (2018) [hereinafter THE HISTORY OF HOMELESSNESS IN THE UNITED STATES].

66. THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 176 (internal citation omitted).

67. *How Many People Experience Homelessness?*, NAT'L COAL. FOR THE HOMELESS (July 2009) (internal citation omitted), https://www.nationalhomeless.org/factsheets/How_Many.html [https://perma.cc/BQQ3-YACW].

68. THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 178.

69. Katie J. Wells, *Policy-Failing: A Repealed Right to Shelter*, 41 URB. GEOGRAPHY 1139, 1143 (2019).

70. Rankin, *supra* note 7, at 101.

71. Wells, s*upra* note 69, at 1143.

72. *Id.;* THE HISTORY OF HOMELESSNESS IN THE UNITED STATES, *supra* note 65, at 178 (internal citation omitted).

73. *See* Leon Lazaroff, *Shelters Go Private: Is It a Help or Hinderance?*, CHRISTIAN SCI. MONITOR (July 8, 1998), https://www.csmonitor.com/1998/0708/070898.us.us.3.html [https://perma.cc/7UKM-KF6Y] (explaining that "privately run shelters under the management of groups such as the Salvation Army and Volunteers of America are characteristic of most cities and rural communities").

74. *See* Maria Foscarinis, *Beyond Homelessness: Ethics, Advocacy, and Strategy*, 12 ST. LOUIS U. PUB. L. REV. 37, 44 (1993).

75. *See* Livingston, *supra* note 58, at 601–06 (detailing the legislative responses to *Papachristou* and similar court cases).

individuals for standing, sitting, sleeping, eating, begging, or sheltering themselves from the elements.[76] Indeed, the number of such ordinances has rapidly increased over recent years as cities continue to expand their arsenal for dictating public order.[77]

In the contemporary regime, the most essential forms of criminalizing homelessness are bans on what is known as "urban camping." These broad prohibitions punish people for devising any form of living arrangement in public spaces.[78] Urban camping encompasses both things as elaborate as pitching a tent or constructing a makeshift shelter and things as simple as laying down blankets for bedding or sleeping in one's car.[79] Camping ordinances can cover both public and private land, leaving virtually no space in a city for unhoused persons to take shelter.[80] The National Law Center on Homelessness and Poverty now estimates that 72 percent of America's major cities have at least one ban on urban camping.[81] Moreover, urban camping ordinances have increased by 15 percent nationwide in just the last five years.[82]

Punishments for urban camping vary. At the lighter end, some cities enforce urban camping ordinances with purely civil penalties—at least for first-time offenders—consisting of tickets and fines.[83] At the most severe end, these laws can authorize incarceration of up to six months.[84] In many cases, police leverage the threat of arrests to relocate homeless individuals via "move along" orders.[85] These orders are hard to track because they leave no paper trail, but surveys indicate that between 80 and 90 percent of homeless individuals will experience at least one such order in a given year.[86] The constant displacement of homeless individuals disrupts social relationships, complicates employment and treatment opportunities, and increases the risk of physical violence.[87]

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76. *See, e.g.*, PHX., ARIZ. CITY CODE §§ 23-7 (aggressive solicitation), 23-8 (loitering), 23-9 (obstructing sidewalks), 23-11 (nuisance), 23-30 (urban camping), 33-2 (pitching tents), 36-131.01 (soliciting employment), 36-401(4) (remaining at a transit station).

77. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 37 ("Our research reveals that laws punishing the life-sustaining conduct of homeless people have increased in every measured category since that time, and in some cases dramatically so.").

78. *See id.* at 38.

79. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30(B) (defining camping to include: "sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities").

80. *See, e.g.*, GLENDALE, ARIZ. MUN. CODE art. VIII § 25-90(a) (2018) ("It shall be unlawful for any person to camp upon any public or private land, whether or not such camping takes place in a motor vehicle.").

81. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 38.

82. *Id.*

83. *Id.* at 50.

84. *Id.*

85. *Id.* at 53.

86. *Id.*

87. *Id.*

Criminal responses to the social problem of homelessness are largely motivated by ignorance of homelessness's causes and long-standing prejudice against the individuals experiencing it.[88] Socially, homelessness is frequently—and inaccurately—attributed to poor personal choices, including voluntary drug use and alcoholism.[89] In fact, "the top five causes of homelessness are lack of affordable housing, lack of a living wage, domestic violence, medical bankruptcy, and untreated mental illness."[90] Instinctive responses to confronting homelessness typically range from fear and anger to disgust and distancing.[91] These psychological responses contribute to a persistent stigma that renders individuals experiencing homelessness among the most disfavored of all marginalized groups.[92]

Public misperceptions of homelessness have a direct impact on homeless communities because criminal enforcement frequently follows civilian complaints.[93] Civilian complaints about homelessness are multiplying at rates outpacing the growth of homelessness itself.[94] These complaints put pressure on cities to use public resources to minimize homeless visibility, especially in wealthy or attractive city districts.[95] Business owners and homeowners associations, in particular, drive civilian complaints because they view the presence of homelessness as antithetical to their financial interests.[96] Likewise, other government actors, including street cleaners and public park managers, frequently coordinate with law enforcement to remove homeless individuals.[97] With public tolerance of visible homelessness waning, police interventions

88. *Id.* at 15.

89. *See* Rankin, *supra* note 7, at 123–24 (citing NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2015), https://homelesslaw.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf [https://perma.cc/T634-SWKU]).

90. Rankin, *supra* note 7, at 123.

91. *Id.* at 122.

92. *Id.*

93. *See* Christopher Herring, Cruel Streets: Criminalizing Homelessness in San Francisco 43 (2020) (Ph.D. dissertation, University of California, Berkeley), https://escholarship.org/uc/item/39k7400g [https://perma.cc/3SNX-CXQ2] (explaining that, in San Francisco, an estimated "90% of police and homeless interactions across the city are initiated through complaints").

94. Sarah Holder, *Why Calling the Police About Homeless People Isn't Working*, BLOOMBERG (Sept. 25, 2019), https://www.bloomberg.com/news/articles/2019-09-25/should-you-call-to-report-a-homeless-person [https://perma.cc/53H5-DD7A].

95. *See* Herring, *supra* note 93, at 34 ("[S]cholars have characterized quality of life ordinances and their associated policing as cornerstones of the carceral city and urban revanchism aimed at purifying the streets and sidewalks of visible poverty for businesses, tourists, and wealthier residents under the banner of reclaiming the public space for bourgeois consumption.") (internal citations omitted).

96. *Id.* at 44–45; McJunkin, *supra* note 9, at 971–72; Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E. Brown, *Out of Sight - Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. POVERTY L. & POL'Y 145, 162 (1999).

97. *See, e.g.*, Herring, *supra* note 93, at 97–98.

with—and criminal responses to—unsheltered homeless populations should only increase.

B. Criminalization's Consequences

The legal response to homelessness often differs substantially from the social one. As just noted, the goal of criminalization in many instances is not to sanction morally culpable behavior, but instead to authorize police interventions with homeless populations.[98] And the nature of police intervention is rapidly changing.[99] While many cities have outlawed urban camping, some are nevertheless more tolerant of homeless encampments than others. During the coronavirus pandemic, several cities and police departments publicly adopted a "hands-off" approach to dealing with homeless communities.[100] In other cities, relocation is considered the first response before criminal enforcement.[101] Homeless encampments may be tolerated in some areas of the city, but not in others, with police actively shepherding homeless individuals to the preferred parts of town.[102] A few cities have even created designated homelessness areas, either formally or informally, such as Los Angeles's famous Skid Row.[103]

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98. Rankin, *supra* note 7, at 106–07; *see also* Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 589 (2021) ("For cities, criminalization is the common default. It empowers the most immediate, albeit temporary, removals of homeless people from public view and creates the short-term illusion that the problem has been mitigated.").

99. *See* KEVIN MORISON, RACHEL ARIETTI, ALLISON HEIDER, SARAH MOSTYN, DAN ALIOTO, JAMES MCGINTY, JASON CHENEY & CRAIG FISCHER, THE POLICE RESPONSE TO HOMELESSNESS 3 (2018).

100. *See, e.g.*, Joel Grover & Josh Davis, *Homeless Encampments Spread to Beaches, Golf Courses as City Takes Hands-Off Approach*, NBC L.A. (Sept. 4, 2020), https://www.nbclosangeles.com/investigations/omeless-encampments-spread-to-beaches-golf-courses-as-city-takes-hands-off-approach/2423332/ [https://perma.cc/TCC3-4R5X] ("City officials have publicly stated that during the pandemic, no one who is homeless will be moved from their current location, citing CDC guidance, which says moving anyone could help spread COVID."); Eric Marotta, *Akron to Start Clearing Homeless Camps, Citing "Housing First" Policy*, AKRON BEACON J. (June 20, 2021), https://www.beaconjournal.com/story/news/2021/06/20/adoping-housing-first-policy-akron-begins-clearing-homeless-camps-monday/7731457002/ [https://perma.cc/K8D3-989A] ("During the pandemic, the city chose a hands-off approach to the city's homeless, as shelter space was scarce due to population restrictions on group settings, and many homeless were fearful of being grouped up in such settings.").

101. *See* Bryan Gallion, Brenda Wintrode, Julia Lerner, Maya Pottiger, Nick McCool, Lilian Eden, Katy Seiter, Megan Calfas, Joe Dworetzky, Vanessa Ochavillo, Everitt Rosen & Jonmaesha Beltran, *As the Wealthy Move in, Homeless People Are Pushed out*, CAP. NEWS SERV. MD. (July 13, 2020), https://homeless.cnsmaryland.org/2020/07/13/as-the-wealthy-move-in-homeless-people-are-pushed-out [https://perma.cc/DP9R-9J8T].

102. *See id.*

103. *See, e.g.*, Brittany Scott, *Is Urban Policy Making Way for the Wealthy? How a Human Rights Approach Challenges the Purging of Poor Communities from U.S. Cities*, 45 COLUM. HUM. RTS. L. REV. 863, 884–89 (2014) (discussing Los Angeles's Skid Row). Phoenix lawmakers recently proposed a designated homeless encampment area. Jessica Boehm, *Bill Would Establish Homeless Camping Areas, Make It Illegal for People to Sleep on the Street in Arizona*, AZ CENTRAL (Apr. 1, 2021), https://www.azcentral.com/story/news/politics/legislature/2021/04/01/arizona-bill-would-ban-street-camping-create-sanctioned-homeless-camps/4837941001/ [https://perma.cc/G88D-R7SQ].

Nevertheless, the criminalization of homelessness has increased the connection between unhoused individuals and the criminal justice system. Nationally, an individual experiencing homelessness is up to eleven times more likely to be arrested than a housed individual.[104] "Disproportionate arrests of homeless people contribute to the problem of mass incarceration, the criminalization of poverty, and racial inequality."[105] And quasi-criminal interventions—everything from civil citations to "move along" orders backed by the threat of arrest—continue to impact homeless individuals as debilitating forms of state punishment.[106]

Meanwhile, criminal responses do nothing to actually combat homelessness. Police have a limited arsenal of tools at their disposal—citations, arrests, and the threat of physical force.[107] None of these tools improve the condition of homeless individuals or reduce the number of people experiencing homelessness. The criminal justice system is also not designed to accommodate homeless individuals. For example, written notices containing essential court dates are frequently mailed, an ineffective way of notifying those without a permanent mailing address.[108] Court hearings also pose challenges related to transportation and temporarily securing accumulated property.[109] The result is that citations given to homeless individuals lead to arrest warrants at a disproportionate rate.[110]

These criminal responses to homelessness tend to entrench poverty, often burdening homeless individuals with fines and fees that can total in the thousands of dollars.[111] These fines and fees divert money from personal necessities like food, medicine, and transportation, and make it harder for homeless individuals

104. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 50.

105. *Id.* at 51.

106. *See* Sara K. Rankin, *Civilly Criminalizing Homelessness*, 56 HARV. C.R.-C.L. L. REV. 367, 406–08 (2021).

107. *See* MORISON ET AL., *supra* note 99, at 5–7 (explaining that the police tools of arrest and incarceration should be a last resort and encouraging other agencies' involvement with homeless populations).

108. *See, e.g.*, Allison Frankel, Scout Katovich & Hillary Vedvig, *Forum: Forced into Breaking the Law*, NEW HAVEN REG. (Nov. 17, 2016), https://www.nhregister.com/columnists/article/Forum-Forced-into-breaking-the-law-11319038.php [https://perma.cc/N4SZ-3FEF].

109. *See* Melissa Hellmann, *For Homeless Seattleites, A Reprieve from the Debilitating Burden of Warrants*, SEATTLE WKLY. (Jan. 10, 2018), https://www.seattleweekly.com/news/for-homeless-seattleites-a-reprieve-from-the-debilitating-burden-of-warrants/ [https://perma.cc/7WCK-27TS] (citing transportation, illness, and mental health as additional factors that reduce homeless attendance at court dates).

110. *See* Ethan Corey & Puck Lo, *The "Failure to Appear" Fallacy*, APPEAL (Jan. 9, 2019), https://theappeal.org/the-failure-to-appear-fallacy/ [https://perma.cc/CFH5-NPBY] (explaining that a disproportionate number of failures to appear can be attributed to individuals who are homeless or mentally ill).

111. In Phoenix, urban camping is a Class 1 misdemeanor, punishable by up to six months in jail and up to a $2500 fine. AM. C.L. UNION OF ARIZONA, HOMELESS IN PHOENIX: KNOW YOUR RIGHTS 3, https://www.acluaz.org/sites/default/files/field_documents/homeless_rights_in_phoenix.pdf [https://perma.cc/CNR4-R3EQ].

to find stability.[112] When criminal activity involves a vehicle, such as sleeping in one's car, police may tow and impound the vehicle, depriving individuals of their property and tallying up additional fees.[113] Further, criminal warrants and convictions can render individuals ineligible for housing, employment, and other needed social services.[114]

As I have detailed elsewhere, arrests are particularly destructive to homeless individuals.[115] In addition to the loss of liberty and dignity, custodial arrests threaten the physical safety of homeless individuals in numerous ways, including by heightening the risk of sexual assault.[116] Custodial arrests also interfere with homeless individuals' already limited property rights.[117] Personal possessions left behind during arrests—ranging from bedding and clothing to medicine and legal documents—are subject to theft or destruction.[118]

The costs of policing homelessness through uniformed officers, courts, and jails diverts public money from organizations that could provide genuine services to homeless individuals.[119] Cities and states that have embraced housing-first and public-service models for addressing homelessness have been rewarded with significant decreases in their homeless populations.[120] The commitment to housing-first solutions has recently waned, however, and the federal government backed away from housing-first strategies during the Trump

112. *See* MADELINE BAILEY, ERICA CREW & MADZ REEVE, NO ACCESS TO JUSTICE: BREAKING THE CYCLE OF HOMELESSNESS AND JAIL 7, VERA INST. OF JUST. (Aug. 2020), https://www.safetyandjusticechallenge.org/wp-content/uploads/2020/08/homelessness-brief-web.pdf [https://perma.cc/89Y8-4MTW] (finding that homeless individuals burdened with legal debt "experienced nearly two additional years of homelessness, after considering the effects of race, age, and gender").

113. *See* Jessica Guynn, *"Hidden Homeless Crisis": After Losing Jobs and Homes, More People Are Living in Cars and RVs and It's Getting Worse*, USA TODAY (Feb. 15, 2021), https://www.usatoday.com/story/money/2021/02/12/covid-unemployment-layoffs-foreclosure-eviction-homeless-car-rv/6713901002/ [https://perma.cc/VY9W-68E3]; Edwin Caro, *Homelessness and Health Justice*, 30 ANNALS HEALTH L. ADVANCE DIRECTIVE 143, 144 (2020).

114. Hellmann, *supra* note 109.

115. McJunkin, *supra* note 9, at 963–68 (describing the punitive and costly nature of custodial arrest).

116. *Id.* at 965–66.

117. *Id.* at 965.

118. *Id.*

119. *See* Rankin, *supra* note 7, at 109 ("Several studies show it is far more expensive to criminalize poverty and homelessness than it is to pursue non-punitive alternatives such as permanent supportive housing, and mental health and substantive abuse treatment.").

120. Audrey Jensen, Jill Ryan, Chloe Jones & Madeline Ackley, *Two Cities Tried to Fix Homelessness, Only One Succeeded*, CRONKITE NEWS (Dec. 14, 2020), https://cronkitenews.azpbs.org/howardcenter/caring-for-covid-homeless/stories/homeless-funding-housing-first.html [https://perma.cc/GWJ4-NA4N] (documenting reductions in homeless populations in Houston and San Diego); *Supportive Housing Reduces Homelessness—And Lowers Health Care Costs by Millions*, RAND CORP. (June 27, 2018), https://www.rand.org/blog/rand-review/2018/06/supportive-housing-reduces-homelessness-and-lowers.html [https://perma.cc/V2FV-XZFE]. *But see* Stephen Eide, *Housing First and Homelessness: The Rhetoric and the Reality*, MANHATTAN INST. (Apr. 21, 2020), https://www.manhattan-institute.org/housing-first-effectiveness [https://perma.cc/944W-DQYR] (explaining that housing-first models are more effective on the individual, rather than community, level).

Administration.[121] In their place, cities and states have developed new versions of the criminal response, centered on policing and punishment.[122]

C. Legal Challenges to Criminalization

Ordinances prohibiting urban camping have survived varied legal challenges over the years. As mentioned above, early litigants emphasized procedural defects with the ordinances, such as vagueness and overbreadth. *Papachristou v. City of Jacksonville* is illustrative. The ordinance at issue was exceptionally broad, criminalizing more than twenty classes of individuals as "vagrants."[123] In striking down the ordinance as vague, the Supreme Court explained that classifying individuals in general terms, such as "habitual loafers" and "disorderly persons," would allow criminality to be defined by the whims of the police, an outcome "not compatible with our constitutional system."[124]

Victories, however, were often short-lived. Ordinances struck down on such grounds were easily repaired and reenacted, resulting in little lasting change in the lived experience of homelessness. Following the *Papachristou* decision, Jacksonville—like many cities with similar ordinances—recast its prohibitions to focus on more discrete conduct, such as camping, loitering, begging, or creating nuisances.[125] These laws proliferated while the sphere of homeless liberty largely remained unchanged.

More recently, legal challenges to camping bans have turned their attention to the Eighth Amendment. The Supreme Court has held that the Eighth Amendment "imposes substantive limits on what can be made criminal."[126] In

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121. In September 2019, the Council of Economic Advisors released a white paper advocating increased policing and "quality of life" ordinances to reduce unsheltered homelessness by making living on the streets less "tolerab[le]." *See* COUNCIL OF ECON. ADVISORS, THE STATE OF HOMELESSNESS IN AMERICA 18–19 (2019), https://www.nhipdata.org/local/upload/file/The-State-of-Homelessness-in-America.pdf [https://perma.cc/2YCE-ED7A].

122. Baskett, *supra* note 25, at 601 (describing cities' widespread adoption of the "velvet hammer" approach to homelessness, which involves "stripping away social services and criminalizing [behaviors] that 'enable' homelessness").

123. Papachristou v. City of Jacksonville, 405 U.S. 156, 158 (1972). The city's ordinance outlawed the following:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children.

Id. at 158 n.1.

124. *Id.* at 166–69.

125. *See* Liz Daube, *The Rules of Being Homeless*, JACKSONVILLE DAILY REC. (Aug. 10, 2006), https://www.jaxdailyrecord.com/article/rules-being-homeless [https://perma.cc/P868-Z468].

126. Ingraham v. Wright, 430 U.S. 651, 667 (1977).

particular, crimes that target "status" rather than conduct are considered an impermissible use of the government's police power.[127]

Initially, the status-crimes doctrine appeared to be a viable theory for dismantling general vagrancy statutes. In the 1962 case of *Robinson v. California*, the Supreme Court overturned a law that premised criminal punishments on the status of addiction.[128] In *Robinson*'s wake, courts across the country overturned vagrancy laws that purported to punish statuses, such as joblessness.[129] But just four years later, a plurality of the Court narrowed *Robinson*'s holding to the uncontroversial proposition that "criminal penalties may be inflicted only if the accused has committed some act."[130]

Homeless advocates had comparatively less success leveraging the status-crimes doctrine to reach contemporary prohibitions on urban camping. Relying on the tenuous distinction between a "status" and an "act," many courts have rejected Eighth Amendment challenges to camping ordinances, because the act of camping is deemed to be volitional, rather than an inescapable incident of homelessness as a status.[131] Other courts have rejected the notion that homelessness is a status at all, finding that it is insufficiently permanent or unavoidable.[132]

One place where Eighth Amendment arguments have recently gained traction, however, is in the Ninth Circuit. In 2006, a panel of that court overturned a Los Angeles camping ban, concluding that homelessness was sufficiently analogous to addiction despite neither being "innate or immutable," nor "a disease, such as drug addiction or alcoholism."[133] That case was ultimately resolved by settlement, however, and the opinion was vacated.[134] In 2018, the court evaluated a similar camping ban in Boise, reaching a similar conclusion. The case—*Martin v. City of Boise*—was widely lauded by homeless advocates for its holding that sleeping in public reflects status rather than conduct whenever alternatives, such as government-provided shelter beds, are not practically available.[135] As I discuss more fully below, however, *Martin* reflects a rather narrow way of thinking about the constitutional implications of urban camping.

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127. *See generally* Robinson v. California, 370 U.S. 660 (1962) (holding unconstitutional a state statute that punished the "status" of drug addiction).

128. *Id.* at 667. The law at issue was a California statute that made it a criminal offense to "be addicted to the use of narcotics." *Id.* at 660 (internal citation omitted).

129. *See, e.g.*, Headley v. Selkowitz, 171 So. 2d 368, 370 (Fla. 1965); Alegata v. Commonwealth, 231 N.E.2d 201, 207 (Mass. 1967); Wheeler v. Goodman, 306 F. Supp. 58, 64 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

130. Powell v. Texas, 392 U.S. 514, 533 (1968).

131. *See, e.g.*, Tobe v. City of Santa Ana, 892 P.2d 1145, 1166–67 (Cal. 1995); Joel v. City of Orlando, 232 F.3d 1353, 1362 (11th Cir. 2000).

132. *See, e.g.*, Joyce v. City of San Francisco, 846 F. Supp. 843, 857 (N.D. Cal. 1994).

133. Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006).

134. *See* Jones v. City of Los Angeles, 505 F.3d 1006 (9th Cir. 2007).

135. Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018); *see, e.g.*, Baskett, *supra* note 25, at 596 (noting that "*Martin v. City of Boise* has been celebrated as a victory against these ordinances"); Rankin, *supra* note 98, at 562 (noting that "homeless rights advocates celebrated" the *Martin* decision);

Of all legal challenges to urban camping ordinances, substantive due process arguments have been perhaps the least successful. Initially, this seems surprising; the conventional understanding of substantive due process is that it demarcates a sphere of personal liberty within which criminal regulation is constitutionally impermissible.[136] This would seem to be fertile ground for direct challenges to particular acts of criminalization. The reason may be, as Professor Heather Gerken has observed, that "[s]ubstantive due process is a topic better suited for religious scholars or philosophers than pragmatic lawyers."[137] In the last twenty-five years, the only substantive due process challenges to urban camping ordinances that have reached federal circuit courts of appeals have been rejected.[138] A small number of cases have fared better at the trial level or when brought under state constitutional provisions.[139] But the trend is overwhelmingly negative.

Historically, such challenges have been rejected due to weaknesses in the briefing or chosen argument, rather than the inapplicability of substantive due process more generally. A few examples are illustrative. In 1996, the Ninth Circuit rejected a due process challenge to a Seattle ordinance that criminalized sitting or lying on sidewalks.[140] Several homeless plaintiffs had brought a civil rights action against the city alleging that the purpose of the ordinance was to exclude homeless individuals from the city's commercial districts.[141] But a Ninth Circuit panel rejected the argument in substantial part because the plaintiffs had leveled a facial challenge to the ordinance, rather than an as-applied challenge.[142] The choice of challenge eased the burden on the defendant city—in response to the facial challenge, Seattle needed only to show that some legitimate public safety reason supported the ordinance.[143]

Press Release, *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, NAT'L HOMELESSNESS L. CTR. (Feb. 8, 2021), https://homelesslaw.org/settlement-martin-v-boise-case [https://perma.cc/ZFT6-KGVQ] (noting that "[a]dvocates have hailed" the *Martin* decision).

136. As the Supreme Court has explained, substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." Reno v. Flores, 507 U.S. 292, 302 (1993) (emphasis in original) (citations omitted).

137. Heather K. Gerken, *Larry and* Lawrence, 42 TULSA L. REV. 843, 849 (2007).

138. *See* Joel v. City of Orlando, 232 F.3d 1353, 1359–62 (11th Cir. 2000); Roulette v. City of Seattle, 97 F.3d 300, 315–16 (9th Cir. 1996).

139. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992); Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 949 (E.D. Mo. 1994); *see generally* Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances as Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413 (2006) (arguing that anti-homeless ordinances are most effectively challenged under due process clauses of state constitutions).

140. *Roulette*, 97 F.3d at 300.

141. *Id.* at 306.

142. *Id.*

143. *Id.*

In 2000, the Eleventh Circuit rejected a due process challenge to an urban camping ordinance.[144] The defendant, however, argued primarily that the ordinance was impermissibly vague, both facially and in application.[145] Although the defendant had made a "cursory" substantive due process argument, the panel dismissed it as substantially identical to the vagueness challenge.[146]

Of the few successful substantive due process challenges, many have relied on the fundamental right to travel.[147] As the argument goes, ordinances that seek to restrict homeless individuals from occupying public spaces impede their liberty to travel throughout the city.[148] However, that right is also frequently self-defeating. "Travel" implies movement, and many courts have struggled to reconcile the right to free movement with a desire to remain encamped.[149]

The history of legal challenges to urban camping ordinances reveals an ever-shifting patchwork of constitutional arguments that homeless advocates may deploy for temporary expediency, but which fail to capture the foundational harms of criminalization. The injustice of urban camping ordinances runs deeper than procedural defects, such as vagueness and overbreadth. Nor is it encapsulated by the counterintuitive right to travel. What individuals experiencing homelessness have so far lacked is a constitutional principle that captures the lived experience of existing at the mercy of the criminal regulatory state.

II.
"RIGHT TO SHELTER" EFFORTS

As early as the early 1970s, homeless advocates began to turn their attention from constitutional arguments for decriminalization to securing a positive "right

144. Joel v. City of Orlando, 232 F.3d 1353, 1359–62 (11th Cir. 2000). The defendant also unsuccessfully challenged the ordinance under the Constitution's Equal Protection Clause and Eighth Amendment.

145. *Id.* at 1359.

146. *Id.* at 1359 n.3.

147. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1580 (S.D. Fla. 1992); Johnson v. Bd. of Police Comm'rs, 351 F. Supp. 2d 929, 949 (E.D. Mo. 2004). The Supreme Court has recognized on numerous occasions that the right to interstate travel is "fundamental," and is therefore subject to strict scrutiny when infringed upon by the government. *See, e.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972); Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); United States v. Guest, 383 U.S. 745 (1966).

148. *See, e.g.*, Streetwatch v. Nat'l R.R. Passenger Corp., 875 F. Supp. 1055, 1064 (S.D.N.Y. 1995).

149. *See, e.g.*, Anderson v. City of Portland, No. 08-1447-AA, 2009 WL 2386056, at *10 (D. Or. July 31, 2009) (explaining that plaintiffs "allege that police officers have told them to 'move along' when sleeping in public and conducted camp clean-ups and seized their property," but that such allegations do not demonstrate "that the City has attempted to restrain their movement"); Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996) ("The Defendants' action does not impede the travel of any of the named plaintiffs because they do not seek to *travel* anywhere; they seek only to remain.") (emphasis in original).

to shelter."[150] The goal of these efforts was to secure for homeless individuals a legal entitlement to adequate shelter provided, or at least funded, by the government.[151] Despite early setbacks, the campaign to recognize a right to shelter exploded in the 1980s against a backdrop of increasing and evolving homelessness.[152] Importantly, however, the campaign to establish a right to shelter was neither concerted in its effort nor undertaken by the actual homeless population.[153] Rather, the right-to-shelter movement describes a patchwork of developments born out of housed advocates dominating the discourse in the 1980s about how to aid the homeless.[154]

Right-to-shelter advocates advanced on two fronts. They found some limited success in the courts, where they primarily attempted to find a legal hook for the right to shelter in a variety of disparate state constitutional provisions and federal funding contracts.[155] As discussed below, New York City became the archetype for establishing the right to shelter through litigation. The right to shelter similarly found some small successes in legislative politics, where Massachusetts and the District of Columbia managed to adopt new laws straightforwardly guaranteeing temporary emergency shelter.[156]

Despite decades of effort, only four United States jurisdictions currently recognize an enforceable right to shelter, all of which are grounded in legal or political developments between 1979 and 1990.[157] Moreover, even these states can hardly be called success stories. The implementation of a right to shelter is typically mired in layers of administrative bureaucracy and is frequently tied to burdensome eligibility criteria that obstruct access to the right.[158] The result is that, even in right-to-shelter states, shelter is available to some homeless people, some of the time, and under conditions that are far-too-often onerous for shelter residents.

This Part first details the twin efforts of the right-to-shelter movement before exploring a curious consequence of securing government-provided shelter—increasingly, and counterproductively, courts have cited the availability of such shelter as an additional justification for criminalizing urban camping.

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150. *See* Lindsey v. Normet, 405 U.S. 56, 73 (1972) (arguing for the "need for decent shelter" and the "right to retain peaceful possession of one's home").

151. Dennis D. Hirsch, *Making Shelter Work: Placing Conditions on an Employable Person's Right to Shelter*, 100 YALE L.J. 491, 491 (1990) ("One of the major responses by members of the legal community has been to argue for a right to shelter that would obligate the government (generally state or local) to provide housing to all homeless persons who request it.").

152. *See, e.g.*, *id.*; Kevin P. Sherburne, Comment, *The Judiciary and the Ad Hoc Development of A Legal Right to Shelter*, 12 HARV. J.L. & PUB. POL'Y 193, 202–15 (1989).

153. Ben Holtzman, *When the Homeless Took over*, SHELTERFORCE (Oct. 11, 2019), https://shelterforce.org/2019/10/11/when-the-homeless-took-over/ [https://perma.cc/5RAL-RNN6].

154. *Id.*

155. *See infra* Part II.A.

156. *See infra* Part II.B.

157. *See infra* Part II.A–B.

158. *See infra* Part II.A–B.

A. Litigating a Right to Shelter

Beginning in the early 1970s, the right-to-shelter movement took to the courts, with little success. Focusing initially on constitutional litigation, homeless advocates contended that the due process and equal protection clauses of the Fifth and Fourteenth Amendments should be construed to require government-provided shelter for individuals experiencing homelessness.[159] But the theory was soundly defeated in the Supreme Court. Writing for a five-justice majority, Justice White proclaimed that "the Constitution does not provide judicial remedies for every social and economic ill."[160] In particular, the Court could find no basis for a "constitutional guarantee of access to dwellings of a particular quality."[161] The Court declared "the assurance of adequate housing" to be exclusively a legislative function.[162]

Despite failure on the federal level, homeless advocates brought similar lawsuits based on state constitutional provisions that are arguably broader than the federal Constitution.[163] The most successful of such cases arose in New York, where Wall Street lawyer Robert Hayes filed a class action lawsuit on behalf of homeless men in New York City, requesting that the city provide shelter to any homeless man that asked for it.[164] Hayes based the request for shelter, in part, on a provision of the state constitution that declares: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[165]

In 1979, the New York State Supreme Court ordered the city and state to provide shelter for all "needy, indigent men" in a landmark decision, *Callahan v. Carey*.[166] However, *Callahan* was far from a conclusive victory. While the court's order ensured that shelters would have sufficient beds to meet demand, it did little to guarantee habitable conditions inside the shelters. "Conditions

159. *See* Lindsey v. Normet, 405 U.S. 56, 58 (1972).

160. *Id.* at 74.

161. *Id.*

162. *Id.*

163. *See, e.g.*, Hilton v. City of New Haven, 661 A.2d 973, 984 (Conn. 1995) (rejecting plaintiffs' claim to an affirmative right to shelter under three unique provisions of the Connecticut Constitution); *see also* Sherburne, *supra* note 152, at 220 (citing ALA. CONST. art. IV. § 88 (authorizing legislature to require counties to provide for poor individuals); KAN. CONST. art. 7, § 4 (requiring counties to provide aid to misfortunate individuals); MONT. CONST. art. XII, § 3(3) (requiring legislature to provide economic assistance to needy individuals); OKLA. CONST. art. 17, § 3 (requiring counties to provide for persons in need); GA. CONST. art. IX, § V (empowering counties to provide support for poor individuals); HAW. CONST. art. IX, § 3 (empowering the state to provide aid to needy individuals)).

164. *See* Callahan v. Carey, No. 79-42582 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent decree).

165. N.Y. CONST. art. XVII, § 1.

166. Kim Hopper, *The Ordeal of Shelter: Continuities and Discontinuities in the Public Response to Homelessness*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 301, 318 (1990) (citing Callahan v. Carey, 188 N.Y.L.J., Dec. 11, 1979, at 10, col. 4 (N.Y. Sup. Ct. Dec. 5, 1979)).

. . . remained dismal and the treatment of the men harsh and degrading."[167] So even if there were enough beds in a shelter, the conditions were so horrendous that homeless individuals were often deterred from seeking shelter.[168]

Faced with a wealth of testimony detailing the gross insufficiency of shelters and the intolerable conditions inside shelters, New York City and the state entered prolonged negotiations with the plaintiffs.[169] The result was a consent decree in August of 1981 that reaffirmed the right to shelter and established baseline standards of decency that shelters had to maintain.[170] New York City thus became the first jurisdiction in the nation to recognize a state-protected right to shelter.[171]

Despite the broad guarantee of shelter in *Callahan*, eligibility criteria in New York significantly narrow the types of individuals and families that can access the government-provided shelter services. At the state level, services are run through the Office of Temporary and Disability Assistance's Housing and Support Services program.[172] That agency administers an alphabet soup of support programs with different eligibility criteria, including "Solutions to End Homelessness Program (STEHP), New York State Supportive Housing Program (NYSSHP), Housing Opportunities for Persons with AIDS Program (HOPWA), Emergency Needs for the Homeless Program (ENHP), [and the] Operational Support for AIDS Housing Program (OSAH)."[173] Among other things, every applicant for shelter needs valid original identification and proof of their recent place of residence.[174] These details can make accessing shelter difficult for some homeless individuals, particularly those who are not U.S. citizens, who may not have had a consistent prior place of residence, or who are escaping an abusive partner that withheld vital documentation as a form of control.

In New York City, shelter services are provided through the Department of Homeless Services (DHS), under the Department of Social Services.[175] At the time of writing, the DHS website stated that "DHS *requires* shelter clients to gain employment, connect to work supports and other public benefits, save their income, and search for housing, to better prepare for independent living."[176] New York City shelters have a specific on-site police-type force, established in 1993,

167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. Wells, *supra* note 69, at 1143.
172. *Housing and Support Services*, OFF. TEMP. & DISABILITY ASSISTANCE, https://otda.ny.gov/programs/housing/#header [https://perma.cc/ZPE4-UHAV].
173. *Id.*
174. *Frequently Asked Questions*, N.Y.C. DEP'T HOMELESS SERVS., https://www1.nyc.gov/site/dhs/about/frequently-asked-questions.page [https://perma.cc/RR2S-9N4Y].
175. *Inside DHS*, N.Y.C. DEP'T OF HOMELESS SERVS., https://web.archive.org/web/20220124150115/https://www1.nyc.gov/site/dhs/about/inside-dhs.page.
176. *Id.*

called "Peace Officers,"[177] who maintain the basic powers of police.[178] DHS cites Peace Officers as the reason shelters are safe places in NYC, yet the presence of law enforcement may also deter eligible individuals from utilizing available shelter services.

New York is not the only state to have found a right to shelter through litigation. West Virginia courts have similarly recognized an enforceable right to temporary emergency shelter in limited circumstances. Under West Virginia law, the state's Department of Welfare is authorized to institute proceedings to abate any abuse or neglect of a vulnerable adult or to abate an emergency situation.[179] An "emergency situation" covers any "set of circumstances which presents a substantial and immediate risk of death or serious injury to a vulnerable adult."[180] A vulnerable adult is one who is "unable to independently carry on the daily activities of life necessary to sustaining life and reasonable health and protection."[181] In a path-marking 1983 case, *Hodge v. Ginsberg*, the West Virginia Supreme Court held that homelessness was an emergency situation that the Department of Welfare must work to abate.[182] The Court granted a writ of mandamus to homeless individuals seeking adult protective services on this basis, requiring the "Commissioner of the Department of Welfare to provide emergency shelter, food and medical care to the petitioners and other similarly situated persons."[183]

Pursuant to *Hodge*, the assistance provided to homeless individuals in West Virginia must be such as "will meet the individual's needs with the least necessary restrictions on his liberty and civil rights."[184] The Court also dictated that the Department of Welfare "is required to provide such services as are 'appropriate in the circumstances' . . . and which 'meet the individual's needs.'"[185] The Court, however, did not specify particular resources, programs, or benefits that must be provided beyond finding that "[t]he lack of shelter, food and medical care . . . poses a substantial and immediate risk of death or serious permanent injury."[186]

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177. *Frequently Asked Questions*, *supra* note 174.

178. N.Y. CRIM. PROC. LAW § 2.20(1) (McKinney 2005). These powers include *inter alia*:

> (a) The power to make warrantless arrests pursuant to section 140.25 of this chapter.
>
> (b) The power to use physical force and deadly physical force in making an arrest or preventing an escape pursuant to section 35.30 of the penal law.
>
> (c) The power to carry out warrantless searches whenever such searches are constitutionally permissible and acting pursuant to their special duties.

Id.

179. W. VA. CODE § 9-6-4.

180. W. VA. CODE § 9-6-1(6).

181. W. VA. CODE § 9-6-1(5).

182. 303 S.E.2d 245, 251 (W.Va. 1983).

183. *Id.*

184. *Id.* (internal quotation omitted).

185. *Id.*

186. *Id.*

In practical terms, the mandate of *Hodge* is limited. West Virginia programs based on the *Hodge* decision require an individual seeking assistance to be over the age of eighteen, to meet a specific definition of "homeless," and to "lack sufficient resources to obtain needed emergency shelter, food or medical care" in order to be eligible for services.[187] They also require that the individual is not merely a "transient," a person capable of being helped with more limited Emergency Assistance.[188]

The West Virginia Department of Health and Human Resources provides a Homeless Services Policy manual.[189] This manual explains that *Hodge v. Ginsberg* mandates that the Department provide services, but also indicates that a homeless person "who has decision-making capacity . . . has the option of accepting or refusing certain intervention and services when offered."[190] The policy manual recognizes that homelessness is precipitated primarily by external factors, such as "unemployment/underemployment; personal and family difficulties; alcoholism; drug abuse; family abuse; the lack of affordable housing; inappropriate behavior; mental disorders; or a combination of these or other factors."[191] The policy manual explicitly states, however, that homeless individuals are accountable for their behavior and the "policy is not intended to mandate benefits to those who are homeless as a result of their unwillingness to change [inappropriate] behavior."[192]

The federal Department of Health and Human Services notes that West Virginia faces unique challenges in combatting homeless due to the rural nature of the state.[193] The federal government provides West Virginia with funding for Projects for Assistance in Transition from Homelessness (PATH) services, which are run through a variety of grantee organizations.[194] West Virginia allows independent nonprofit organizations to apply for funding when they meet certain qualifications.[195] According to HomelessShelterDirectory.org, which is among the best sources for finding existing shelter placements across the nation,[196] West

187. W. VA. DEP'T OF HEALTH & HUM. RES., FUNDING ANNOUNCEMENT FOR HOMELESS SERVICES 3–4 (2019), https://dhhr.wv.gov/bcf/Providers/Documents/Homeless%20Services%20Announcement.pdf [https://perma.cc/A7CT-C762].

188. W. VA. DEP'T OF HEALTH & HUM. RES., HOMELESS SERVICES POLICY 10 (2016), https://dhhr.wv.gov/bcf/policy/Documents/Homeless Policy.pdf [https://perma.cc/K73F-WFR2].

189. *Id.*

190. *Id.* at 3.

191. *Id.* at 8.

192. *Id.*

193. *West Virginia PATH Program Addresses Rural Homelessness*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Apr. 30, 2020), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/path-program-rural-homelessness [https://perma.cc/UB29-Z5N2].

194. *Id.*

195. *See* W. VA. DEP'T OF HEALTH & HUM. RES., *supra* note 187, at 7–9.

196. The Department of Housing and Urban Development also has a "Resource Locator" feature, although it is significantly less user-friendly. *See Homeless Information: West Virginia*, U.S. DEP'T OF

Virginia has emergency shelters, general homeless shelters, and limited transitional housing opportunities.[197] They also note that many shelters now have long waiting lists.[198] This is particularly problematic, given that it is difficult to find any information about how to apply for a shelter in advance of simply showing up.[199] Overall, the West Virginia network of homeless shelters resembles that of the District of Columbia, discussed below.

B. Legislating a Right to Shelter

Inspired by the successful litigation in New York, Mitch Snyder—former Wall Street broker and once-homeless founder of the Community for Creative Nonviolence (CCNV)—sought to achieve recognition of the right to shelter in Washington, D.C.[200] However, in contrast to the New York Supreme Court opinion, the D.C. courts were less receptive to the idea of judicial pronouncement of a positive right to shelter. Two courts ultimately agreed that "the government assumes no obligation to house and feed indigent people and "there is not 'a constitutional or other legal right to city-provided shelter.'"[201]

Thus, in 1983, Snyder and CCNV launched an initiative to put the right to shelter on the ballot.[202] If litigation could not achieve a right to shelter, then perhaps legislation would. CCNV circulated petitions throughout D.C. to put "The Right to Overnight Shelter Initiative 17" on the 1984 ballot.[203] Despite opposition and a counter-campaign by then-Mayor Marion Berry, CCNV garnered enough support for the initiative to make it onto the ballot.[204] On November 6, 1984, 72 percent of the D.C. voters approved the right to shelter initiative, and four months later, the right to shelter became law.[205]

The success of Snyder and CCNV's efforts would ultimately be short-lived. This first incarnation of the right to shelter only remained on the books in D.C. for five years.[206] Faced with the city's ongoing resistance to the law, consistent refusal to implement the initiative, and persistent court challenges, the D.C.

HOUS. & URB. DEV., https://www.hud.gov/states/west_virginia/homeless [https://perma.cc/TG57-K5LT].

197. *See West Virginia Homeless Shelters*, HOMELESS SHELTERS DIRECTORY, https://www.homelessshelterdirectory.org/westvirginia.html [https://perma.cc/AWU2-PVLR]

198. *Id.*

199. *See, e.g.*, *Homeless Information: West Virginia*, *supra* note 196.

200. Wells, *supra* note 69, at 1143–45.

201. *Id.* at 1144 (internal citations omitted).

202. *Id.* at 1145.

203. *Id.*

204. *Id.* As researcher Katie Wells has reported: "The apex of CCNV's activism in 1984 was a vow to fast until the federal government agreed to renovate a federal building in Washington, D.C. in which CCNV sheltered 850 people each night. After CCNV's most prominent member, Mitch Snyder, fasted for 51 days, federal officials agreed to the demand. That night a *60 Minutes* television segment covered the story. The timing of the fast no doubt helped to ensure the passage of the right to shelter initiative three days later." *Id.* at 1147.

205. *Id.*

206. *Id.*

Council eventually nullified the right to shelter, thereby undoing the CCNV's year-long campaign to recognize a right to shelter through legislation.[207]

D.C.'s right to shelter was ultimately replaced with the D.C. Emergency Overnight Shelter Amendment Act of 1990. The Act created a statutory right to shelter that depends on environmental factors; it exists only during hypothermic conditions.[208] The original sections of the Act were later repealed and replaced with even narrower language, including that "[n]o provision of this act shall be construed to create an entitlement (either direct or implied) on the part of any individual or family to any services within [DC homelessness services], other than shelter in severe weather conditions[.]"[209]

D.C. Law 21-141, the Homeless Shelter Replacement Act of 2016 ("2016 Act"), provided the Mayor with authority to appropriate funds to create additional space and resources for the DC General Family Shelter, which houses families experiencing homelessness.[210] In the text of the legislation, the D.C. Council made findings of fact, including that "[t]he DC General Family Shelter is antiquated and inadequate, and its current conditions limit the District's ability to provide necessary services[.]"[211] But the 2016 Act's plan to create short-term family housing in each of the city's wards failed to deliver the promised results in a timely manner.[212] Ward Two still lacks any family housing, and its housing for women closed due to maintenance issues that were not resolved until 2022.[213]

Currently, shelters in D.C. are operated by nonprofit organizations under contract with the Department of Human Services.[214] There are programs for transitional housing for single adults and families, and year-round shelter available for eligible families.[215] Some, but not all, contracted nonprofits are parochial in nature, spanning various denominations of primarily Christian faith.[216] The variance among these programs, including divergent eligibility criteria, create a confusing web of obstacles for those seeking services to navigate.

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207. *Id.* at 1148.

208. *Id.* at 1149–50.

209. D.C. CODE § 4-755.01(a) (2005).

210. D.C. LAW 21-141 (2016).

211. *Id.* at § 2(3).

212. Ward 1's shelter just finished construction in early 2021 and was projected to start serving families around March 2021, at the earliest. *See* Jenny Gathright, *D.C. Completes Ward 1 Family Homeless Shelter, Capping Years-Long Effort*, NPR (Feb. 4, 2021), https://www.npr.org/local/305/2021/02/04/964014402/d-c-completes-ward-1-family-homeless-shelter-capping-years-long-effort [https://perma.cc/MT3H-2J4W].

213. *Id.*

214. *See, e.g.*, *How to Access Shelter*, DEP'T OF HUM. SERVS., https://dhs.dc.gov/page/how-access-shelter [https://perma.cc/5JG7-FX7Z].

215. *Services for Individuals Experiencing Homelessness*, DEP'T OF HUM. SERVS., https://dhs.dc.gov/page/services-individuals-experiencing-homelessness [https://perma.cc/Q5VC-77XB].

216. *Id.*

Around the same time as D.C., the right to shelter movement reached Massachusetts. In 1983, then-Governor Michael Dukakis signed legislation mandating that every municipality must provide temporary emergency shelter to any family who is eligible for services, every night.[217] Despite the breadth of this promise, the reality is far less rosy. The Massachusetts Department of Housing and Community Development, the agency responsible for providing shelter services, typically denies about 40 percent of all applications for shelter.[218]

One reason for this discrepancy is that Massachusetts has narrow criteria for shelter eligibility, requiring individuals to prove that their homelessness is due to a preapproved reason.[219] Preapproved reasons for homelessness include fire or other natural disaster, a current living situation that poses a threat to their health or safety, or income eligibility for homeless families with children.[220]

Such narrow grounds for eligibility pose evident problems. For example, the eligibility rules exclude those who own property worth over $2,500.[221] The ban on property ownership effectively forces homeless families with a car to choose between either living in that car or getting rid of it to become eligible for services. Under these rules, I arguably would have been ineligible during my period of homelessness.

Shelter services also deny residents any control over their location. Although Massachusetts has a preference for providing individuals a shelter placement within twenty miles of their hometown, individuals could be offered shelter anywhere in the state if a better placement is unavailable.[222] For those who wish to remain in closer proximity to their support systems, including children's schools, this lack of choice can be a dealbreaker.[223] At the same time, the state's location preference rules make it easier for abusive partners to hunt

217. MASS. GEN. LAWS ch. 450 (1983) (amended 2014). *But cf.* Laticia Walker-Simpson, *Life Raft or Quicksand?: Emergency Assistance's Role in Greater Boston's Homeless Crisis*, 64 BOS. BAR J. 23, 23 (2020) (mentioning that Massachusetts' eligibility requirements are much more restrictive than they first appear).

218. *Basic Facts on Homelessness and Housing in Massachusetts*, MASS. COAL. FOR THE HOMELESS, https://mahomeless.org/basic-facts/ [https://perma.cc/Z767-738Q].

219. Lucy Ellis, *Massachusetts Family Homelessness System*, BOS. FOUND. (Feb. 22, 2017), https://www.tbf.org/old-blog/2017/february/massachusetts-family-homelessness-system [https://perma.cc/PZ9W-6K4L].

220. Ruth Bourquin, *Basic Shelter Rights (Emergency Assistance)*, MASSLEGALHELP (Jan. 2011), https://www.masslegalhelp.org/income-benefits/basic-shelter-rights [http://perma.cc/6EGU-4RP9]. The income level eligibility determination for Emergency Assistance is based on a comparison of family size with monthly and yearly total salary. *Emergency Assistance Income Limits*, MASSLEGALHELP (Jan. 2022), https://www.masslegalhelp.org/income-benefits/emergency-assistance-income-limits [https://perma.cc/3SRX-5HAW].

221. Bourquin, *supra* note 220.

222. *Id.*

223. *See, e.g.*, Sascha Brodsky, *Choosing Between Shelter and School*, ATLANTIC (Dec. 8, 2016), https://www.theatlantic.com/education/archive/2016/12/shelter-versus-school/509825/ [https://perma.cc/H792-4P8P].

down people who might prefer to relocate to more distant shelters.[224] Unfortunately, a homeless person or family cannot refuse a shelter placement without being banned from receiving shelter services for twelve months.[225]

The shelter services provided are of dubious quality. The Department of Housing and Community Development (DHCD) outlines four types of potential shelter for eligible families and pregnant women: scattered sites, co-shelter sites, congregate sites, and hotels.[226] According to the Massachusetts Coalition for the Homeless, "[o]n any given night in Massachusetts, the approximately 3,000 shelter beds for individuals usually are full or beyond capacity (supplemented by cots and sleeping bags)."[227]

Most recently, California's Legislature considered—but ultimately rejected—a right to shelter. Following Governor Gavin Newsom's announcement in 2019 that he would prioritize helping the homeless, Newsom convened his Council of Regional Homeless Advisors, who suggested a "right to shelter" plan modeled after New York City.[228] Sacramento Mayor Darrell Steinberg, in particular, advocated for an "aggressive" strategy that would pair a

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224. *See, e.g.*, Alexa Gagosz, *She Took Her Daughter and Ran from an Abusive Relationship. Now They're Homeless*, BOS. GLOBE (Oct. 21, 2021), https://www.bostonglobe.com/2021/10/21/metro/she-took-her-daughter-ran-an-abusive-relationship-now-theyre-homeless/ [https://perma.cc/YCC6-ZP7K].

225. Bourquin, *supra* note 220.

226. *Overview of the Department of Housing and Community Development*, MASS.GOV, https://www.mass.gov/info-details/overview-of-the-department-of-housing-and-community-development [https://perma.cc/PTK8-MM8D].

Their website defines the types of housing as follows:

> Scattered site: Pregnant women and families live in an apartment where they have their own bedroom/s, bathroom, kitchen, and living room. This accommodation can be in a multifamily home or in an apartment building. These buildings may also house families that are not in the EA program.
>
> Co-shelter site: Pregnant women and families share an apartment with another woman or family in the EA program. They have their own bedroom/s but share common areas that include a living room, kitchen, and bathroom. These apartments are located in multifamily buildings, which may contain other units that are not part of the EA program.
>
> Congregate site: Each pregnant woman or family lives in their own room at the shelter and shares communal spaces such as living rooms, dining rooms, and kitchens with the other resident families. Some of these facilities may also include residential and day programs other than the EA program.
>
> Hotel: Pregnant women and families live in hotel rooms with a refrigerator, microwave, and toaster oven; bathroom; and sleeping area. The Commonwealth has reduced the reliance on hotels and now shelters all pregnant women and families in the EA program in the same hotel.

Id.

227. MASS. COAL. FOR THE HOMELESS, *supra* note 218.

228. *Governor's Council of Regional Homeless Advisors Convenes in LA*, CNTY. OF L.A., https://ridley-thomas.lacounty.gov/index.php/governors-regional-homeless-advisory-council-convenes-in-la/ [https://perma.cc/5K9X-QG6L]; Matt Levin & Jackie Botts, *Cities Should Act on Homelessness or Face Lawsuits, Newsom Task Force Says*, CAL MATTERS (Jan. 14, 2020), https://calmatters.org/housing/2020/01/gavin-newsom-homelessness-task-force/ [https://perma.cc/8GPZ-VYAK].

right to shelter with an obligation to use it, backed by criminalization.[229] He emphasized that "[l]iving on the streets should not be considered a civil right."[230]

Ultimately, the Council put forward a moderate plan calling for an amendment to the California Constitution.[231] The amendment would have created a legally enforceable mandate against California cities and municipalities to reduce their homeless populations.[232] Failure to meet the mandated goals in a timely manner would result in a public official having the capability to file suit against that city or municipality in order to compel them to take appropriate actions.[233] Professor Erwin Chemerinsky was among those who supported the plan.[234]

In February 2020, Assembly Bill 3269 was introduced in the California Legislature to enact the Council's plan.[235] The bill would have created a ballot measure in the November 2020 election, seeking citizen approval to amend the California Constitution to address homelessness in a number of ways, including the creation of a right to shelter.[236] However, after countless revisions, the bill was sidelined at the end of the 2020 legislative session and never reached California's voters.[237]

C. Right to Shelter as a Condition to Criminalization

Right-to-shelter efforts have centered government-provided or government-funded shelter beds in the public discourse about how best to resolve the problem of homelessness. Likewise, two recent decisions by the Ninth Circuit have similarly centered the provision of shelter beds in the legal debates over the criminalization of homelessness. These decisions interpret the Eighth Amendment to prohibit enforcing urban camping laws unless a bed in a local shelter is reasonably available. When a shelter bed is available, these decisions

229. Darrell Steinberg, *Op-Ed: Building More Permanent Housing Alone Won't Solve Homelessness in California*, L.A. TIMES (July 17, 2019), https://www.latimes.com/opinion/story/2019-07-16/op-ed-building-more-permanent-housing-alone-wont-solve-homelessness-in-california [https://perma.cc/UR2G-SRCW].

230. *Id.*

231. Anita Chabria, Benjamin Oreskes, & Taryn Lunca, *Voters Could Decide if California Cities Will Be Punished for Not Reducing Homelessness*, L.A. TIMES (Jan. 13, 2020), https://www.latimes.com/california/story/2020-01-13/homeless-housing-task-force-california-constitutional-amendment [https://perma.cc/SEA2-ARPU].

232. *Id.*

233. Andrea Noble, *California Plan to Reduce Homelessness Forces Cities, Counties to Step up*, ROUTE FIFTY (Jan. 24, 2020), https://www.route-fifty.com/health-human-services/2020/01/california-plan-reduce-homelessness-forces-cities-counties-step/162653/ [https://perma.cc/5DRJ-8QKG].

234. Chabria et al., *supra* note 231.

235. A.B. 3269, State Leg., Reg. Sess. (Cal. 2020).

236. Patrick McGreevy, *No Deal Yet in Sacramento to Help Struggling California Renters*, L.A. TIMES (Aug. 20, 2020), https://www.latimes.com/california/story/2020-08-20/no-deal-yet-on-help-california-renters-evictions-housing [https://perma.cc/KB8X-UVRM].

237. *See Bill Status, AB-3269 State and Local Agencies: Homelessness Plan*, CAL. LEGIS. INFO., https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201920200AB3269 [https://perma.cc/4VL7-GCSG].

support criminalizing urban camping as a morally culpable "choice" made by homeless individuals. This narrative whitewashes the history of urban camping laws and transforms their justifications in a way that threatens to entrench the criminalization of homeless individuals.

As noted above, early Eighth Amendment challenges to urban camping ordinances found some limited success with the argument that punishing urban camping means punishing the "status" of homelessness.[238] The seeds for linking the status-crimes doctrine to the availability of shelter beds were likely sown innocently enough. In the well-known class action litigation, *Pottinger v. City of Miami*, for example, the U.S. District Court made a number of dramatic factual findings about the plight of homeless individuals in Miami.[239] The case involved a class of homeless plaintiffs who challenged Miami's systematic removal of homeless individuals from tourist and business districts.[240] Notably, the court's findings included that the city had nearly ten times as many homeless individuals as shelter beds.[241] Based on this finding, the *Pottinger* court held that the plaintiffs "do not have a single place where they can lawfully be," and thus "the challenged ordinances . . . effectively punish them for something for which they may not be convicted under the [E]ighth [A]mendment—sleeping, eating, and other innocent conduct."[242]

Although the direct effects of the *Pottinger* ruling were limited,[243] the shelter-based rationale for Eighth Amendment protection that it articulated has taken root. Courts in recent years have increasingly followed *Pottinger*'s approach, pointing to the unavailability of shelter beds as a justification for upholding Eighth Amendment challenges.[244] In these courts' views, the absence

238. *See, e.g.*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992) ("As long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances, as applied to them, effectively punish them for something for which they may not be convicted under the eighth amendment—sleeping, eating and other innocent conduct."); Johnson v. City of Dallas, 860 F. Supp. 344, 351 (N.D. Tex. 1994) ("[A]s long as the homeless have no other place to be, they may not be prevented from sleeping in public."); Jones v. City of Los Angeles, 444 F.3d 1118, 1137 (9th Cir. 2006) ("Undisputed evidence in the record establishes that at the time they were cited or arrested, Appellants had no choice other than to be on the streets.").

239. *Pottinger*, 810 F. Supp. at 1557–60.

240. *Id.* at 1554.

241. *Id.* at 1564.

242. *Id.* at 1565. The Eighth Amendment claim was one of many constitutional victories for the plaintiff class. The Court also ruled that Miami's practices violated the Due Process and Equal Protection clauses, as well as the Fourth Amendment's prohibition on unreasonable searches and seizures. *Id.* at 1583.

243. The case eventually settled after multiple appeals and nearly ten years of litigation. *See* Pottinger v. City of Miami, 359 F. Supp. 3d 1177, 1179 (S.D. Fla. 2019). Since the terms of settlement are binding only on the municipality that is a party to the litigation, the District Court's constitutional rulings have no precedential value, even in that District. McJunkin, *supra* note 9, at 977. As I have noted elsewhere, the frequency of settlement, combined with the protracted nature of these class-action suits, makes constitutional litigation an ineffective tool for broad decriminalization efforts by homeless advocates. *Id.* at 977–79.

244. *See, e.g.*, Jones v. City of Los Angeles, 444 F.3d 1118, 1136–38 (9th Cir. 2006).

of available shelter beds in a city meant that criminalization punished inescapable incidents of the status of homelessness, rather than punishing freely chosen—hence culpable—criminal conduct.[245]

In 2006, a panel of the Ninth Circuit resolved *Jones v. City of Los Angeles* and concluded that the defendants had not made an "informed choice" to sleep in public because of the lack of shelter availability.[246] Six homeless individuals had sought injunctive relief against a Los Angeles city ordinance prohibiting urban camping.[247] Reversing the trial court's grant of summary judgment in favor of the defendant city, the Ninth Circuit panel reasoned that homelessness is "a chronic state that may have been acquired 'innocently or involuntarily.'"[248] Consequently, the mere act of sleeping in public, without more, may not be punished under the Eighth Amendment because it may reflect status, rather than conduct.[249] The "more," of course, related to the availability of shelter beds. In *Jones*, the record revealed that Los Angeles's Skid Row had a homeless population that outnumbered its shelter beds by about one thousand each night.[250] Ultimately, the case settled, but the court's reasoning stood as a precursor of what was to come.

In 2018, the Ninth Circuit again confronted the issue of homeless ordinances in *Martin v. City of Boise*.[251] Six plaintiffs brought suit against the city of Boise for being subjected to urban camping and disorderly conduct ordinances.[252] The plaintiffs argued that their arrests were unconstitutional because shelters—even when not full—were not practically available to them, given residency limitations and religious program requirements.[253] The Ninth Circuit panel agreed, holding that the Eighth Amendment bars "imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter."[254]

The initial response to *Jones* and *Martin* was largely positive.[255] And, to be sure, the cases lightened the weight of criminalization borne by individuals

245. *See id.* at 1132 ("Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless.").

246. *Id.* at 1137, 1123.

247. *Id.* at 1120.

248. *Id.* at 1136.

249. *Id.* at 1132.

250. *Id.* at 1122.

251. Martin v. City of Boise, 902 F.3d 1031 (9th Cir. 2018), *amended by* 920 F.3d 584 (9th Cir. 2019) (en banc).

252. *Martin*, 902 F.3d at 1035.

253. *Id.* at 1036–37, 1041.

254. *Id.* at 1048.

255. *See, e.g.*, Press Release, *Appeals Court Ruling Ends the Criminalization of Homelessness*, AM. C.L. UNION (Apr. 14, 2006), https://www.aclu.org/press-releases/aclu-southern-california-wins-

experiencing homelessness. In at least some cities, police departments developed new procedures to check shelter availability in advance of citing or arresting unsheltered individuals.[256] In others, departments elected to stop enforcing their urban camping laws altogether.[257]

But academic commentators soon noticed the limitations of the *Martin* opinion. Professor Sara Rankin recently dismantled the *Martin* decision for simply giving the criminalization of homelessness a "makeover."[258] Rankin describes a process she labels "transcarceration," whereby cities achieve the goals of criminalization—a reduction in visible homelessness—by hiding and confining homeless individuals through compulsory shelter use and involuntary commitment.[259]

According to Rankin, the *Martin* holding has accelerated the transcarceration of homeless individuals in three ways. First, cities such as Seattle have embraced "more frequent and less regulated encampment sweeps as a pipeline to confinement."[260] Sweeps tend to operate on a theory of perpetual displacement—they do little to advance the interests or well-being of homeless individuals, while also destroying property, disrupting communities, and unwittingly ensnaring individuals in criminal justice and mental health systems.[261] Second, there has been a "renewed interest in involuntary commitment and conservatorship" as a response to the homelessness of those with mental illnesses and substance abuse disorders.[262] Involuntary commitment and conservatorship laws typically authorize physical confinement of those who "cannot secure their own food, clothing, or shelter" due to serious mental illness or chronic substance abuse.[263] Third, several West Coast cities have begun experimenting with "partnering a 'right to shelter' in giant FEMA-style tents or similar mass shelters with a legal obligation to use it."[264] These "shelters"

historic-victory-homeless-rights-case [https://perma.cc/JMU9-7TK6]; *Settlement Reached in Groundbreaking* Martin v. City of Boise *Case*, *supra* note 135.

256. *See* Erasmus Baxter, *Phoenix's Draft Homelessness Plan Raises Hopes and Concerns*, PHX. NEW TIMES (July 7, 2020), https://www.phoenixnewtimes.com/news/phoenix-draft-homeless-plan-hopes-portal-advocates-community-gallego-11478370 [https://perma.cc/D276-MLZ6].

257. *See* Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protestors Say*, AZ MIRROR (Jan. 9, 2020), https://www.azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say [https://perma.cc/8EV6-F26C] (reporting that Glendale and Tempe have stopped enforcing urban camping laws).

258. Rankin, *supra* note 98, at 566.

259. *See id.* at 580. "Sociologists sometimes refer to this dynamic of interchangeability between mental hospitals and incarceration as transcarceration because vulnerable people are transferred between carceral confinement and other forms of forced institutionalization." *Id.* at 583.

260. *Id.* at 565, 590–94.

261. *Id.* at 592–94.

262. *Id.* at 594–98.

263. *Id.* at 595.

264. *Id.* at 598–99.

succeed in hiding the blight of visible poverty, but do little else to benefit homeless residents.[265]

Transcarceration efforts of these sorts are enabled by certain key limitations in the *Martin* opinion. For one thing, the *Martin* holding does not dictate any standards for the adequacy or beneficence of government-provided shelter before justifying criminalization. On the pure logic of the *Martin* opinion, even mass shelters in emergency tents suffice to transform urban camping from an inescapable incident of "status" to a voluntary "choice" for unsheltered homeless populations.[266] Moreover, by prohibiting criminal enforcement only when shelter beds are unavailable, the opinion implicitly denies any broader constitutional protections for homeless individuals from consequences like involuntary commitment.[267] The opinion also explicitly accommodated the government's right to "clear homeless camps, arrest those who refuse to leave, and force those arrested to show that shelters are full."[268] Rankin paints *Martin* as a "missed opportunity" to embrace a more de-carceral framework for responding to homelessness—cities need to adopt nonpunitive measures and supportive ways to integrate, rather than hide, homeless individuals in the community.[269]

Rankin's account of "transcarceration" aligns with how marginalized groups have historically been excluded, surveilled, and regulated within public spaces as a means of reinforcing existing social and status hierarchies. In her essay, *Policing Marginality in Public Space*, Professor Jamelia Morgan reveals how the policing of unsheltered individuals is part of a long history of criminal regulation of public spaces.[270] According to Morgan, "quality of life" offenses—including those that have long criminalized behaviors attendant to homelessness—"confine, segregate, and impede movement of otherized and oft-racialized bodies in public places."[271] These vague and broad offenses have historically been used by more privileged segments of a community to define their community's legitimate boundaries—they define who can access public spaces, who can occupy those spaces free from interference, and which behaviors

265. *Id.* at 600–02.

266. *See* Baskett, *supra* note 25, at 605. "Because the cornerstone of Director Marbut's 'velvet hammer' approach is the construction of large, centralized facilities that are available to the homeless twenty-four hours a day, there may be very few instances in which no alternative sleeping space is available and, therefore, little protection for the homeless population against the criminalization of persons sleeping outside on public property." *Id.* at 604.

267. R. George Wright, *Homelessness, Criminal Responsibility, and the Pathologies of Policy: Triangulating on a Constitutional Right to Housing*, 93 ST. JOHN'S L. REV. 427, 436–37 (2019).

268. *Eighth Amendment – Criminalization of Homelessness – Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completely Banning Sleeping and Camping in Public.* – Martin v. City of Boise, *920 F.3d 584 (9th Cir. 2019)*, 133 HARV. L. REV. 699, 704 (2019).

269. *See* Rankin, *supra* note 98, at 612–13.

270. *See* Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045, 1045 (2020).

271. *Id.* at 1047.

are permitted in those spaces.[272] By regulating who has access to, and use of, public spaces, states and privileged segments of the community reinforce existing hierarchies and relegate marginalized groups to positions of inferiority.[273]

Morgan's work highlights how constitutional protections that prohibit status crimes do little to prevent the overcriminalization of marginalized groups. Morgan specifically attacks the *Martin* decision as an example of inadequate constitutional rulemaking. Despite focusing on individual "choice" as a prerequisite for criminalization, the *Martin* court neglected to grapple with the social and cultural conditions that drive these choices.[274] Furthermore, Morgan argues that centering the criminalization of homelessness on a rhetoric of "choice" ignores the underlying function of criminal law—public ordering.[275] Under *Martin*, a city can still regulate unsheltered populations in accessing and occupying public spaces so long as the city can show that a "choice" for shelter—however unrealistic or impracticable—exists for the unsheltered population. According to Morgan, only by centering how public ordering of public spaces is used to subordinate marginalized groups and reinforce existing hierarchies can the harms of quality-of-life policing be better accounted for in constitutional decisions.[276]

Under the reasoning of cases like *Jones* and *Martin*, the availability of shelter beds is the dispositive issue in distinguishing between impermissibly punishing status and permissibly punishing voluntary conduct. Other courts have similarly pointed to the availability of shelter beds as a reason for dispensing with Eighth Amendment challenges to camping ordinances.[277] The logic of these opinions elevates shelters as an escape from the "status" of homelessness. When shelter is available, it is compulsory, backed by the threat of criminal sanctions.[278] The decision not to use it is painted as morally culpable.

One of the more pernicious consequences of the *Martin* and *Jones* decisions is that the opinions shift the legal discourse about the criminalization of homelessness. Cities and states that have criminalized urban camping have

272. *Id.* at 1053–54.

273. *See id.*

274. *Id.* at 1059–60. For instance, the Court fails to address how the quality of homeless shelter or the location of a homeless shelter may factor into whether a shelter is considered "practically available." *Id.*

275. *Id.* at 1060.

276. *Id.* at 1062–63.

277. *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1361–62 (11th Cir. 2000) (finding that the ordinance challenged did not criminalize involuntary behavior as shelter beds were available).

278. *See* Martin v. City of Boise, 902 F.3d 1031, 1048 n.8 (9th Cir. 2018) ("Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.") (emphasis in original).

typically done so unconditionally.[279] The actual motivations behind such laws involve empowering police to physically control access to public spaces.[280] The goal is to remove the blight of poverty from public view.[281] The immanent justifications for the practice have nothing to do with shelter use or shelter avoidance.

Martin and *Jones* shift this discourse by creating a narrative in which eschewing available shelter is a conscious "choice," and therefore is a permissible target of criminal sanctions. Rather than grapple with the constitutionality of the law's actual motivations, these opinions frame criminalization as a matter of punishing voluntary decisions by individuals experiencing homelessness.[282] This new discourse echoes early narratives about self-inflicted homelessness that motivated some of the earliest vagrancy laws.[283] Those laws targeted the able-bodied but unemployed for criminal sanction and furthered decades of damaging social discourse about chosen or voluntary homelessness.[284]

By holding that criminal ordinances only punish the "status" of homelessness when shelter beds are unavailable, these decisions depict homelessness as a status that is escaped by a seemingly simple choice to seek shelter. The opinions never grapple with whether the compulsory requirement to use shelters, at the risk of criminal enforcement, is also a form of social punishment that targets homelessness as a status. The opinions make no effort to justify the imposition of criminal punishment on individuals who rationally choose not to utilize available shelter services.

III.
THE CHOICE TO USE SHELTERS

One of the primary costs of centering temporary emergency shelters in the discourse about homelessness is that doing so tends to elide discussion about the deficiencies of many shelters. When shelters are valorized as an end goal of litigation or legislation—as with the right-to-shelter movements discussed above—they hold a revered place in the discourse that does not permit of nuance. They are held up broadly as the solution to the problem of homelessness, rather

279. *See, e.g.*, PHX., ARIZ. CITY CODE § 23-30 (criminalizing urban camping without regard to shelter availability).

280. *See* Morgan, *supra* note 270, at 1053 ("[L]ocal jurisdictions and communities have used a number of criminal laws . . . to police access to use and enjoyment of public space."); Rankin, *supra* note 98, at 589 (noting that "narratives generally frame the visibility of homeless people as the problem . . . [s]o rather than prioritize solutions to homelessness, cities continue to excise homeless people").

281. Rankin, *supra* note 98, at 589 ("[Criminalization] empowers the most immediate, albeit temporary, removals of homeless people from public view and creates the short-term illusion that the problem has been mitigated.").

282. *See Martin*, 902 F.3d at 1048 & n.8.

283. *See* Adler, *supra* note 52, at 215–16.

284. *See supra* text accompanying notes 54–55.

than as a temporary offering designed to alleviate the circumstances of some people some of the time. We see this cost most clearly in the judicial treatment of shelters under the Eighth Amendment. In concluding that urban camping laws no longer punish "status" when shelter services are available, courts have reified shelters as a one-size-fits-all solution to elevating individuals out of homelessness.

The reality is far less rosy. Estimates are that 77 percent of homeless individuals would prefer living unsheltered rather than occupying temporary emergency shelters provided by the state.[285] Individuals experiencing homelessness may choose to avoid shelters for a myriad of rational reasons, including ensuring their physical safety, navigating their need for accessibility, protecting their property, and maintaining contact with their community and social support network.[286] Some scholars have suggested that the strength of these reasons should be considered when assessing whether shelter is "practically available" under the Eighth Amendment analysis mandated by *Martin*.[287] But adopting this approach would still reduce a complex set of personal trade-offs to a judicially determined binary conclusion: shelter is either available, in which case it is mandatory, or unavailable, in which case it is not.

In this Section, I highlight these considerations to drive home a different point: respect for homeless individuals as persons ought to require us to defer to their intimate personal choices about how best to live their lives in the face of overwhelming constraints. This Section surveys just a few of the various considerations that individuals must weigh in deciding whether shelter services are appropriate for them. It does so to emphasize both the complexity and the intimacy of the choices that face individuals experiencing homelessness.

A. Physical Safety Considerations

One of the most central considerations for individuals deciding whether to use available shelter services is whether the shelter increases their physical safety. Life for unsheltered homeless individuals involves a considerable amount

285. LINDSEY DAVIS, COAL. FOR THE HOMELESS, VIEW FROM THE STREET: UNSHELTERED NEW YORKERS AND THE NEED FOR SAFETY, DIGNITY, AND AGENCY 11 (2021) ("Seventy-seven percent of respondents stated that they have tried the municipal shelter system and instead choose to stay on the streets."); *see also* Jeremy Jojola & Katie Wilcox, *We Asked 100 Homeless People if They'd Rather Sleep Outside or in a Shelter*, 9 NEWS (Nov. 21, 2017), https://www.9news.com/article/news/investigations/we-asked-100-homeless-people-if-theyd-rather-sleep-outside-or-in-a-shelter/73-493418852 [https://perma.cc/FK2A-L3V5] (conducting informal survey of one hundred homeless individuals in Denver and finding that 70 percent prefer sleeping on the streets to shelter services).

286. *See infra* Part III.A–D.

287. Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals' Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1176–84 (2020) (exploring the lack of choice for individuals experiencing homelessness—even when shelter is "available").

of interpersonal violence.[288] In addition, individuals living on the street have increased risks of physical ailments and diseases.[289] But utilizing shelter services does not necessarily ameliorate these risks to physical safety. In fact, shelters can exacerbate them for some people, lowering the overall physical safety of shelter residents.

Violence within shelters is always a concern.[290] The typical temporary emergency shelter comprises a single, open-air room, or a series of large rooms, filled with individual cots.[291] Physical space is at a premium, in order to maximize the number of nightly residents.[292] Beds are often no more than a few inches apart.[293] No walls, doors, or locks separate residents, meaning that people need to trust absolute strangers.[294] Reported rates of physical violence vary, but conservative estimates are that roughly half of shelter residents will experience some form of abuse during their stay.[295]

Apart from actual rates of violence, the perceived risk of physical violence may also deter many homeless individuals—especially women—from utilizing shelter services.[296] Studies have found that as many as 90 percent of homeless women have been victims of severe physical or sexual violence at some point in

288. Joshua T. Ellsworth, *Street Crime Victimization Among Homeless Adults: A Review of the Literature*, 14 VICTIMS & OFFENDERS 96, 112 (2019) ("When pooled, extant data on homeless street crime victimization indicates that assault occurs roughly 11 times more frequently; incidence of robbery may be more than 12 times more prevalent, while theft may occur more than 20 times as frequently as in the general population.").

289. INST. OF MED. COMM. ON HEALTH CARE FOR HOMELESS PEOPLE, *Health Problems of Homeless People*, *in* HOMELESSNESS, HEALTH, AND HUMAN NEEDS 39, 41 (1988) ("Homelessness increases the risk of developing health problems such as diseases of the extremities and skin disorders; it increases the possibility of trauma, especially as a result of physical assault or rape.").

290. *See* JASON ALBERTSON, DAISY ANARCHY, RACHEL BRAHINSKY, JENNIFER FRIEDENBACH, CHANEL KENNEDY, JONATHON HOOTMAN, BOB OFFER-WESTORT, TOMAS PICARELLO & BRENT SIPES, SHELTER SHOCK: ABUSE, CRUELTY, AND NEGLECT IN SAN FRANCISCO'S SHELTER SYSTEM 7 (May 2007), https://www.cohsf.org/wp-content/uploads/2014/08/ShelterShock.pdf [https://perma.cc/LA98-YC4L] ("More than half of respondents, or 55%, reported experiencing abuse inside the shelter," 14% percent reported experiencing physical violence, 4% reported experiencing sexual abuse, and "one-third (32%) of respondents reported they did not feel safe [inside a shelter].").

291. *See* LEONARD C. FELDMAN, CITIZENS WITHOUT SHELTER: HOMELESSNESS, DEMOCRACY, AND POLITICAL EXCLUSION 96 (Cornell Univ. Press 2004).

> Degrading conditions, extensive rules, lack of privacy, and surveillance by emergency shelter staff demonstrate certain values and conceptions. Minimal provisions (a cot and a blanket) and minimal privacy (rows of cots in large undivided warehouse spaces) express a vision of the homeless as bare life, as beings stripped of human personhood and individual identity[.]

292. *See id.*

293. *See id.*

294. *See id.*

295. ALBERTSON ET AL., *supra* note 290, at 7 ("More than half of respondents, or 55%, reported experiencing abuse inside the shelter.").

296. *See* Janny S. Li & Lianne A. Urada, *Cycle of Perpetual Vulnerability for Women Facing Homelessness near an Urban Library in a Major U.S. Metropolitan Area*, 17 INT'L J. ENV'T RSCH. & PUB. HEALTH (SPECIAL ISSUE) 7 (Aug. 18, 2020), https://www.mdpi.com/1660-4601/17/16/5985/htm [https://perma.cc/KCD5-K72S] ("Women's only accommodations were said to be important because of the safety issues that women may feel among men, particularly for women escaping intimate partner violence or traveling with children.").

their lives.[297] A history of physical trauma can make individuals less comfortable in exposed environments like temporary emergency shelters, particularly mixed-gender shelters.[298] Physical violence is one of the reasons commonly given for disparities in rates of shelter use between women and men.[299]

In early 2020, the coronavirus pandemic highlighted another way in which the traditional shelter structure threatens the physical health of residents. Coronavirus is a respiratory virus that spreads from infected persons to healthy ones through the accumulation of airborne droplets in enclosed spaces.[300] Among the Centers for Disease Control's primary recommendations to reduce transmission of coronavirus were maintaining at least six feet of distance between persons and wearing masks indoors.[301] Shelters—particularly temporary emergency shelters—were not well suited to meet these requirements.[302] Some shelters reduced capacity to try to meet physical distancing guidelines.[303] Others were unable to do so or chose not to do so, in

297. Amaka Uchegbu, *Homeless Women Find Sexual Violence Part of Life on the Street*, PITTSBURGH POST-GAZETTE (Aug. 17, 2015), https://www.post-gazette.com/news/health/2015/08/18/Homeless-women-find-sexual-violence-part-of-life-on-the-street/stories/201507130149 [https://perma.cc/S99N-YQQD].

298. *See* Kathleen Guarino & Ellen Bassuk, *Working with Families Experiencing Homelessness: Understanding Trauma and Its Impact*, SIGNAL, Jan.–Mar. 2010, at 14, 16, https://perspectives.waimh.org/wp-content/uploads/sites/9/2017/05/5-Working-with-Families-Experiencing-Homelessness.-Understanding-Trauma-and-its-Impact.pdf [https://perma.cc/CKN5-36LJ] ("As a result of these challenges, women who are homeless and have experienced chronic trauma have considerable difficulties trusting others and accessing help and support for themselves and their children.").

299. Instead of going to shelters, women are more likely than men to turn to families, friends, or acquaintances as a means of finding shelter. *See* Paula Mayock, Sarah Sheridan, & Sarah Parker, *'It's Just Like We're Going Around in Circles and Going Back to the Same Thing': The Dynamics of Women's Unresolved Homelessness*, 30 HOUS. STUD. 877, 880 (2015); *see also id.* at 894 (noting that because of intimate partner violence, women attempted to resolve homelessness "independently, primarily because they had lost faith in the ability of 'the system' to find a resolution to their situations").

300. *Coronavirus Disease (COVID-19): How Is It Transmitted?*, WORLD HEALTH ORG. (Dec. 23, 2021), https://www.who.int/news-room/q-a-detail/coronavirus-disease-covid-19-how-is-it-transmitted [https://perma.cc/J4QQ-UL7K].

301. *Id.*

302. *See* Marissa J. Lang, Justin Wm. Moyer & Nitasha Tiku, *Cities Struggle to Protect Vulnerable Homeless Populations as Coronavirus Spreads*, WASH. POST (Mar. 20, 2020), https://www.washingtonpost.com/local/cities-struggle-to-protect-vulnerable-homeless-populations-as-coronavirus-spreads/2020/03/20/1144249c-67be-11ea-b5f1-a5a804158597_story.html [https://perma.cc/K6Q2-GMUA].

> In some shelters, people share rooms and sleep in bunk beds. In others, mats line the floor of empty rooms to squeeze in as many people as possible during the winter months . . . Many shelters do not have room to isolate someone for an extended period. Some already are running low on cleaning supplies, hand sanitizer, food and volunteers to relieve overworked staff. Others have told volunteers to stay home—an effort to limit the number of people in and out of shelters at a time when experts say even asymptomatic people can spread the coronavirus.

Id.

303. Daniella Silva, *With Winter Approaching, Homeless Shelters Face Big Challenges Against Coronavirus*, NBC NEWS (Dec. 5, 2020), https://www.nbcnews.com/news/us-news/winter-approaching-homeless-shelters-face-big-challenges-against-coronavirus-n1249906

order to maximize the number of beds available.[304] Few were able to effectively enforce mask mandates, especially while residents slept.[305]

Throughout the year, coronavirus rapidly spread within shelters. Estimated transmission rates were upwards of 67 percent.[306] By contrast, individuals living in homeless encampments fared relatively well. In one study, experts estimated that only about 3 percent of self-sheltered individuals contracted coronavirus, a rate dramatically lower than those occupying shelters.[307]

Coronavirus provides a poignant example of a broader point. Crowded shelters dramatically increase the transmission risk of many common diseases.[308] Colds, flus, airborne infections like tuberculosis, and skin infections like scabies all tend to pass through shelters at substantially increased rates relative to the population as a whole.[309] Compounding the situation, individuals experiencing homelessness tend to have an increased risk of contracting infectious diseases due to compromised immune systems.[310] Together, these realities highlight the physical risks associated with the decision to utilize shelter services, when available.

[https://perma.cc/SV92-E8Y5] ("Homeless shelters have had to adapt this year, with most reducing the number of people allowed inside to limit virus exposure for guests and staff members.").

304. Sarah Holder & Kriston Capps, *No Easy Fixes as COVID-19 Hits Homeless Shelters*, BLOOMBERG (Apr. 17, 2020), https://www.bloomberg.com/news/articles/2020-04-17/no-easy-fixes-as-covid-19-hits-homeless-shelters [https://perma.cc/7BWN-PWX7] (observing that "some shelters aren't necessarily eagerly welcoming state or local government interventions to reduce crowding").

305. Matt Leseman, *As the Mask Order Rolls out, Homeless Shelters Ask for Flexibility*, KTUU (June 29, 2020), https://www.alaskasnewssource.com/content/news/As-the-mask-order-rolls-out-homeless-shelters-ask-for-flexibility-571557301.html [https://perma.cc/3QZH-GQR3] ("Asking someone to leave for not wearing a mask runs counter to the goal of providing them with a temporary home.").

306. *See* Lloyd A.C. Chapman, Margot Kushel, Sarah N. Cox, Ashley Scarborough, Caroline Cawley, Trang Q. Nguyen, Isabel Rodriguez-Barraquer, Bryan Greenhouse, Elizabeth Impert & Nathan C. Lo, *Comparison of Infection Control Strategies to Reduce COVID-19 Outbreaks in Homeless Shelters in the United States: A Simulation Study*, 19 BMC MED. 2 (2021), https://bmcmedicine.biomedcentral.com/articles/10.1186/s12916-021-01965-y#MOESM1 [https://perma.cc/JL3G-JZHK] (reporting data from several cities, including San Francisco, Boston, Seattle, Atlanta, and Los Angeles).

307. Ed Susman, *Homeless Camps Less Risky Than Shelters for COVID-19*, MEDPAGE TODAY (Oct. 27, 2020), https://www.medpagetoday.com/meetingcoverage/idweek/89353 [https://perma.cc/CX8H-B8CR] (reporting results from Denver).

308. *See* Michelle Moffa, Ryan Cronk, Donald Fejfar, Sarah Dancausse, Leslie Acosta Padilla & Jamie Bartram, *A Systematic Scoping Review of Environmental Health Conditions and Hygiene Behaviors in Homeless Shelters*, 222 INT'L J. HYGIENE & ENV'T HEALTH 335, 342 (2019) (finding that, although less than 20 percent of the shelters they surveyed qualified as "overcrowded," over half of the shelters surveyed reported shelter clients had tuberculosis likely due to crowding and poor ventilation).

309. Sékéné Badiaga, Didier Raoult & Philippe Brouqui, *Preventing and Controlling Emerging and Reemerging Transmissible Diseases in the Homeless*, 14 EMERGING INFECTIOUS DISEASES 1353, 1354 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2603102/ [https://perma.cc/MC7U-G3P5] ("The primary health concerns for this population are the overcrowded living conditions that expose them to airborne infections, especially TB, and the lack of personal hygiene and clothing changes that expose them to scabies, infestation with body lice, and louse-borne diseases.") (internal citation omitted).

310. Kim, *supra* note 287, at 1178.

B. Accessibility Considerations

Many shelters also have barriers to use that complicate the decision of whether an individual might benefit from them. For those with mental and physical disabilities, shelters are often intolerable, if not outright inaccessible. Shelter buildings frequently lack basic accessibility accommodations required under federal law—such as ramps, elevators, handrails, and automatic doors.[311] Further, medical issues may necessitate special diets, which require access to cooking equipment not generally available, or may be exacerbated by things like air quality, requiring a rare air-conditioned space.[312] In New York City, which has roughly sixty thousand residents in state-run shelters, only thirty-two beds are estimated to be fully accessible.[313]

Shelters may be similarly inaccessible to those with mental health and substance abuse issues. An estimated 21 percent of homeless individuals have a severe mental health condition, and an estimated 17 percent have a chronic substance abuse disorder.[314] Such individuals may be expelled or barred from shelters if their conditions are considered disruptive to the greater population.[315] Mental health crises are a common basis for shelter resident expulsion.[316] Moreover, the crowded shelter environment can be a trigger for certain mental health conditions, including schizophrenia and post-traumatic stress disorder.[317]

C. Personal Property Considerations

Property loss is another key consideration for individuals deciding whether to utilize shelter services. For individuals experiencing homelessness, the accumulation and retention of personal property is a constant struggle.[318] In addition to essentials, such as food, clothing, and medicine, many individuals must carry birth certificates, social security cards, or medical and legal

311. Nikita Stewart, *As Shelter Population Surges, Housing for Disabled Comes up Short*, N.Y. TIMES (Sept. 16, 2016), https://www.nytimes.com/2016/09/17/nyregion/as-residents-surge-in-new-york-shelters-housing-for-disabled-comes-up-short.html [https://perma.cc/26BB-ZY2X].

312. *See id.*

313. *Id.*

314. U.S. DEP'T OF HOUS. & URB. DEV, HUD 2020 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS 2 (Dec. 15, 2020), https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2020.pdf [https://perma.cc/G74H-84DD] (finding that, out of a sample of 580,455 homeless persons, 120,642 were severely mentally ill and 98,646 had a chronic substance abuse disorder).

315. Kim, *supra* note 287, at 1179–82.

316. *See, e.g.*, *id.* at 1180 & n.188 (internal citation omitted).

317. *See* NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 70 ("Being surrounded by strangers at nighttime can also induce stress in people with mental health conditions.").

318. *See, e.g.*, Lu Zhao, *Losing Things: Holding on to Possessions Is a Daily Struggle, with Deeper Symbolism, for Homeless People*, SOC. JUST. NEWS NEXUS (June 27, 2019), https://sjnnchicago.medill.northwestern.edu/blog/2019/06/27/losing-things-holding-on-to-possessions-is-a-daily-struggle-with-deeper-symbolism-for-homeless-people/ [https://perma.cc/68LA-ZN9K].

paperwork.[319] The unsheltered must also juggle blankets, bedding, and other items, such as tents or tarps, used to shelter themselves from the elements.[320]

The typical shelter model prevents people from bringing these possessions into the shelter.[321] Storage space at shelters is often limited, and size restrictions are strictly enforced.[322] At New York shelters, for example, each shelter resident is limited to two bags of personal belongings.[323] In North Carolina, all personal items must fit into provided dresser drawers.[324]

Individuals deciding whether to use shelter services must often weigh the value of lost property against the value of a roof for a night. Because many shelters operate on a night-by-night model, a consistent bed in a shelter is not always guaranteed.[325] Indeed, some shelters limit the number of consecutive nights an individual can stay.[326]

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319. *See* Rick Paulas, *Encampment Sweeps Take Away People's Most Important Belongings*, VICE (Mar. 4, 2020), https://www.vice.com/en/article/v74pay/encampment-sweeps-take-away-homeless-peoples-most-important-belongings [https://perma.cc/SP3V-5KBY] ("[The police] give you 15 minutes to get what you want . . . 'They ended up taking my birth certificate, my Social Security card, my mother's necklace that her mother gave her, the only pictures of my brother and my dad, both of who are no longer here.'").

320. *Cf. id.* ("Sometimes they lose tents or beds, or basic necessities like clothing or toiletries.")

321. *See* EVE GARROW & JULIA DEVANTHÉRY, "THIS PLACE IS SLOWLY KILLING ME": ABUSE AND NEGLECT IN ORANGE COUNTY EMERGENCY SHELTERS 67 (Mar. 2019), https://www.aclusocal.org/sites/default/files/aclu_socal_oc_shelters_report.pdf [https://perma.cc/4MK4-FJ2G] ("Residents are subjected to tolls when they come in to the shelter, the staff destroys or takes their belongings when they are evicted without notice, and the staff forces residents to throw away their property as a price of admission to shelter."); Jessica Boehm, *Garbage Bins and Zip Ties Create 'Lifesaver' Storage Program for Phoenix Homeless Population*, AZ CENTRAL (Feb. 10, 2022), https://www.azcentral.com/story/news/local/phoenix/2022/02/10/phoenix-homelessness-new-storage-program-lifesaver/6585998001/ [https://perma.cc/9JF2-SGQH] ("Schwabenlender said many people miss appointments or refuse to stay in the shelter because there are limits on how many items they can bring inside."); Jerusalem Demas, *Los Angeles's Quixotic Quest to End Homelessness*, VOX (May 14, 2021), https://www.vox.com/22420753/homelessness-los-angeles-skid-row-judge-carter-housing-crisis-zoning [https://perma.cc/9NRJ-8G9T] ("Tars tells Vox that shelters frequently don't allow homeless people to bring their possessions with them, even though they're often the only items people have been able to keep safe since becoming homeless.").

322. *See* GARROW & DEVANTHÉRY, *supra* note 321, at 67 (noting that staff forces residents to throw away their property as a price of admission to shelter).

323. N.Y.C. DEP'T OF HOMELESS SERVS., STATEMENT OF CLIENT RIGHTS AND CLIENT CODE OF CONDUCT 2, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/DHS-Statement-of-Client-Rights-and-Client-Code-of-Conduct2009.pdf [https://perma.cc/N9GY-QJ6A].

324. ONSLOW CMTY. OUTREACH, INC., HOMELESS SHELTER STANDARD OPERATING PROCEDURES (2020), https://onslowco.org/sites/onslowco.org/files/Shelter%20Standard%20Operating%20Procedures.pdf [https://perma.cc/6PCK-TEMX].

325. Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020), https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-don't-go-to-shelters [https://perma.cc/45ZC-LG2A].

326. *Id.* ("Some shelter stays are for one night at a time, forcing people to leave when the sun comes up. Other shelters allow stays for longer periods, generally maxing out at around 90 days. But these spaces never provide a space you can truly call your own.").

Homelessness takes a variety of forms, and so the kinds of property that individuals accumulate also can take many forms.[327] Many homeless individuals are employed full- or part-time and require access to work uniforms, tools, or equipment that might not comply with shelter property rules and limits.[328] For example, a carpenter may need hammers, saws, or knives that are banned as dangerous weapons.[329] Many people lacking homes still have bikes or cars that they would prefer not to leave unguarded in order to spend the night in a shelter.[330] Similarly, many temporary emergency shelters do not allow animals.[331] Although this is a reasonable restriction from the perspective of the shelter, homeless individuals may be unwilling to give up their pets—and potentially only companions—in exchange for a temporary bed.[332]

Even if a person decides to take a shelter bed, theft is unfortunately rampant. One formerly homeless individual described how stories of shoe theft kept him from using shelter services for a long time.[333] When he finally took up residence in a shelter, he in fact had his shoes stolen.[334] As another individual explained, "If I could get into a place where it was quiet and clean and a place that I could actually lay my head down and not worry about my stuff getting

327. *See* Trevor Wilhelm, *For Windsor's Homeless, Taking Shelter Can Mean Leaving Belongings Behind*, WINDSOR STAR (Feb. 1, 2019), https://windsorstar.com/news/local-news/for-windsors-homeless-taking-shelter-can-mean-leaving-belongings-behind [https://perma.cc/B69X-XWFM] ("A tattered tarp, some old clothes and a grimy tin of shoe polish may not seem like much, but for John Rollo, they're worth the risk of frostbite and hypothermia. Rollo, who has been living on the streets for several years, said many homeless people face a difficult decision when temperatures plunge: abandon their few belongings for a spot in a warm shelter, or freeze with them outside.").

328. *See* Emma Woolley, *How Many People Experiencing Homelessness Are Employed?*, HOMELESS HUB (July 15, 2016), https://www.homelesshub.ca/blog/how-many-people-experiencing-homelessness-are-employed [https://perma.cc/C6HV-QJUQ] ("A 2013 story in *The New York Times* interviewed people working full-time jobs (sometimes more than one) and estimated that 28% of families experiencing homelessness included at least one working adult, and 16% of homeless individuals had jobs.").

329. *See, e.g.*, N.Y.C. DEP'T OF HOMELESS SERVS., POLICY AND PROCEDURE NO. AS 98-401, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/control-and-confiscation-of-contraband-DHS-policy-AS-98-401.pdf [https://perma.cc/2EEF-TLCS] (listing the following as prohibited "contraband": knives, sticks, bats, scissors, box cutters, sharpened tools or utensils, hammers, screwdrivers, and razors).

330. *See, e.g.*, Thacher Schmid, *Vehicle Residency: Homelessness We Struggle to Talk About*, NATION (Nov. 11, 2021), https://www.thenation.com/article/society/homelessness-vehicle-residency-housing/ [https://perma.cc/M9XU-VZ6Y] (explaining that vehicle residents are "the nation's fastest-growing homeless subpopulation").

331. *See, e.g.*, Paulas, *supra* note 325 (noting shelters in Oakland do not allow people with pets).

332. *See* Nick Kerman, *What Can Be Done to Better Support People Experiencing Homelessness with Pets?*, HOMELESS HUB (Dec. 1, 2020), https://www.homelesshub.ca/blog/what-can-be-done-better-support-people-experiencing-homelessness-pets [https://perma.cc/76KC-23BY] ("Given the strength of the human-animal bond and the importance of this relationship, it is perhaps unsurprising then that many pet owners say they 'would never go' to a shelter if they could not bring their animals.").

333. Ari Shapiro, David Pritie, James Greene & Kathy Sibert, *Why Some Homeless Choose the Streets over Shelters*, NPR (Dec. 6, 2012), https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters [https://perma.cc/H2UH-UE6E].

334. *Id.*

stolen right underneath my nose, then yeah I would love to go inside."[335] One study found that rates of theft in shelters were more than twice the rates of theft for those residing on the streets.[336]

D. Interpersonal Considerations

Another significant, but often overlooked, consideration for those considering whether to use available shelters is the loss of interpersonal connections.[337] Homeless encampments commonly develop because individuals find safety and security in a familiar community.[338] Physical and sexual violence is reduced within encampments relative to those individuals living alone and unsheltered.[339] Theft is likewise reduced in encampments.[340] Particularly long-standing and highly organized encampments may even establish rotating security patrols in addition to mutually enforced norms of behavior.[341]

But as these social bonds form and flourish, the connections grow beyond the expediency of physical safety to create something akin to a family.[342] It has long been recognized that these social relationships critically influence individual and community health and well-being.[343] Becoming homeless is a

335. Jojola & Wilcox, *supra* note 285.

336. EMILY SPENCE-ALMAGUER, GABRIANNA SAKS & SANDY HOGAN, "IT HAPPENS OUT HERE": THE VICTIMIZATION EXPERIENCES AND HEALTH CHALLENGES OF WOMEN WHO ARE HOMELESS 16 (July 16, 2013), https://www.ahomewithhope.org/wp-content/uploads/HWHVS-Final-Report-to-the-Communityx.pdf [https://perma.cc/6RW7-DQEQ] (finding, in a study of 150 women, 22 percent stated that someone had stolen something from them outside, compared to almost 52 percent in a shelter).

337. *See, e.g.*, Paulas, *supra* note 325.

338. *See* Emily Alpert Reyes, Benjamin Oreskes & Doug Smith, *Why Did So Many Homeless People Die While Staying at One Hotel Used in Project Roomkey?*, L.A. TIMES (June 28, 2021), https://www.latimes.com/homeless-housing/story/2021-06-28/la-homeless-people-died-after-entering-covid-hotel-why [https://perma.cc/TJ9B-CSJA] ("Orendorff said the clearing of encampments also broke up some of the familiar networks that people relied on for safety.").

339. *See* REBECCA COHEN, WILL YETVIN & JILL KHADDURI, UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES 5 (Jan. 7, 2019), https://www.huduser.gov/portal/sites/default/files/pdf/Understanding-Encampments.pdf [https://perma.cc/3WEU-UTMA] ("People who stay in encampments may see them as offering greater safety and protection . . . from assaults . . . than if they were unsheltered on their own. This sense of 'safety in numbers' may be particularly prevalent in long-standing and highly organized encampments, in which residents have established around-the-clock security patrols and mutually enforced norms and standards for behavior.") (internal citations omitted).

340. *Id.*

341. *Id.*

342. *Why People Experiencing Homelessness Don't Accept Shelter*, PALLET (May 20, 2020), https://www.palletshelter.com/blog/2020/5/20/why-the-homeless-dont-accept-shelter [https://perma.cc/CA7W-YQXH] ("Every homeless encampment or gathering on the street is a community of its own with residents that look out for each other. For the homeless without family or a traditional support network, their fellow friends on the street act as their 'family,' and in some cases are their only safety net they have in times of trouble.").

343. Micheal L. Shier, Marion E. Jones & John R. Graham, *Social Communities and Homelessness: A Broader Concept Analysis of Social Relationships and Homelessness*, 21 J. HUM. BEHAV. SOC. ENV'T 455, 455 (2011).

destabilizing experience. Homelessness is not just the loss of a home, but also the loss of social ties, resources, and a sense of belonging.[344] Losing one's home often results in undermined identity, self-esteem, and autonomy, which in turn engenders anxiety, depression, and decreased social and functional abilities that are critical to psychosocial well-being.[345] A sense of belonging both can improve community health by decreasing vulnerabilities to anxiety and depression and can increase access to material resources by providing a forum through which individuals develop social networks.[346]

By contrast, shelters do not tend to be long-term spaces for people, which means that individual residents have little control over who they see and how often.[347] "Residence in a shelter is usually provided only for limited periods of time. Often, rules determine when one can and cannot use shelter facilities to eat, bathe, and relax."[348] Consequently, studies have found that many homeless individuals often choose to stay in encampments rather than shelters, even when shelter beds are readily accessible.[349] Relative to shelters, encampments allow for increased autonomy over one's chosen community.[350] "Social networks formed and facilitated by participation in the community become the source of the emotional and material support that were once provided by friends and family prior to the onset of homelessness."[351]

Romantic relationships also frequently inform the choice of whether to utilize shelter services.[352] It is well-documented that romantic relationships engender life satisfaction and contribute to individuals' overall well-being.[353] On the streets, homeless couples build intimacy by "searching for resources, panhandling, and just waiting for tomorrow" together.[354] However, most

344. Lisa M. Vandemark, *Promoting the Sense of Self, Place, and Belonging in Displaced Persons: The Example of Homelessness*, 21 ARCHIVES PSYCHIATRIC NURSING 241, 243 (2007).

345. *Id.* at 241–42.

346. *Id.* at 244–45.

347. *See* Stacy Rowe, *Panhandlers and Sidewalk Encampments: Social Networks for the Homeless in Los Angeles*, 11 PRACTICING ANTHRO. 14, 14 (1989).

348. *Id.* at 15.

349. *See* COHEN ET AL., *supra* note 339, at 4.

350. *See* Rowe, *supra* note 347, at 14.

351. *Id.* at 15.

352. *See* Rachel L. Rayburn & Jay Corzine, *Your Shelter or Mine? Romantic Relationships Among the Homeless*, 31 DEVIANT BEHAV. 756, 758 (2010) (noting that "[r]omantic relationships are one of the most important components of life satisfaction and well-being throughout a person's life"); *id.* at 764 ("Some participants had been in relationships before they became homeless and were trying to work things out while they were living at the homeless shelter."); *id.* at 766 (noting that for a woman who was not allowed to have male guests in her room at the women's shelter, "she just spends the night at another shelter or a friend's house when she wanted to [be sexually active].").

353. *See id.* at 760 ("When individuals enter committed relationships, the way they exercise, go to the doctor, and eat change for the better.").

354. *Will You Still Be Mine? Couples Experiencing Homelessness*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (July 31, 2019), https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/couples-experiencing-homelessness [https://perma.cc/BFY5-EXSM].

temporary emergency shelters are segregated on the basis of sex.[355] Although seemingly rational, sex-segregation policies create difficult choices for homeless couples and families.[356] Physical separation of homeless couples in shelters can undermine and place an enormous strain on their relationships, as distance between the couples may incite mistrust, "particularly around the use of drugs and fidelity."[357]

Many homeless couples thus prefer to sleep on the streets rather than to separate their family.[358] In one study, homeless individuals reported going to great lengths to be alone with their romantic partners when such an arrangement was not available or permitted at shelters—this included sleeping in a car, sleeping on a beach or street, and even buying a tent and camping equipment to camp out in a park.[359] In a different study, nearly all the couples interviewed reported that they would not use homeless shelters because they would be separated.[360]

Shelter policies can also separate homeless parents from their children.[361] Establishing and securing a firm parent-child relationship is integral to child development.[362] The challenges of homelessness already burden a parent's ability to offer consistent, stable, and sensitive support to their child. But homeless parents face the additional fear that their children will be taken from them if they were to utilize shelter services.[363] "Some family shelters may not admit all members of a family because they lack space, while others do not allow men—and adolescent boys—to stay with their female companions/relatives and children."[364] Moreover, the heightened scrutiny inherent within shelters can lead homeless families to experience increased encounters with the child welfare

355. NLCHP, HOUSING NOT HANDCUFFS, *supra* note 44, at 34.

356. *See* Greg C. Cheyne, *Facially Discriminatory Admissions Policies in Homeless Shelters and the Fair Housing Act*, 1 U. CHI. LEGAL F. 459, 468 (2009) (noting how such policies may lead to "increase [of] the proportion of female headed households among homeless families," the "dissolution of low-income families," or the "plac[ing] [of] children in foster care").

357. Caral Stevenson & Joanne Neale, *'We Did More Rough Sleeping Just to Be Together'—Homeless Drug Users' Romantic Relationships in Hostel Accommodation*, 19 DRUGS: EDUC., PREVENTION & POL'Y, 234, 240 (2012).

358. *Will You Still Be Mine? Couples Experiencing Homelessness*, *supra* note 354.

359. *See* Stevenson & Neale, *supra* note 357, at 239.

360. Amy M. Donley & James D. Wright, *Safer Outside: A Qualitative Exploration of Homeless People's Resistance to Homeless Shelters*, 12 J. FORENSIC PSYCH. PRAC. 288, 299 (2012).

361. Namkee G. Choi & Lidia Snyder, *Voices of Homeless Parents: The Pain of Homelessness and Shelter Life*, 2 J. HUM. BEHAV. SOC. ENV'T 55, 57 (2008).

362. Elizabeth R. Anthony, Aviva Vincent & Yoonkyung Shin, *Parenting and Child Experiences in Shelter: A Qualitative Study Exploring the Effect of Homelessness on the Parent-Child Relationship*, 23 CHILD & FAM. SOC. WORK 8, 9 (2017).

363. *See* Becca Savransky, *A Lot of Homeless People Referred to Shelters in Seattle Don't Go. These Are Some Reasons Why*, SEATTLE PI, (Oct. 10, 2019), https://www.seattlepi.com/homeless_in_seattle/article/A-lot-of-homeless-people-the-city-refers-to-14504490.php [https://perma.cc/9XJ6-KP92].

364. Choi & Snyder, *supra* note 361.

system.[365] Many homeless parents become involuntarily separated from their children as a result of child welfare services orders.[366]

Even when a parent is not separated from their child, parenting inside homeless shelters carries its own array of obstacles that might make staying in a shelter unappealing and impracticable. In one study, participants with infant children and toddlers reported that living in an emergency shelter negatively impacted their children in a number of ways, including causing "confusion, sadness, anxiety or depression, withdrawal, altered relationships with food, aggression, disregard for authority, and developmental regressions."[367] Aside from psychological and emotional well-being, children staying in a shelter can also experience negative physiological consequences.[368] Parenting in homeless shelters can also negatively affect the parents. Study participants have reported that dealing with these challenging child behaviors in tandem with the shelter's rules and regulations contributed to feelings of parental disempowerment.[369]

Make no mistake, the use of government-run or government-funded shelter services is the right decision for some individuals some of the time. What this Part endeavors to show is not that these shelter services are universally insufficient. Rather, it highlights that they are not the universal, one-size-fits-all solution to homelessness that they are sometimes portrayed as. By centering shelter services in the political and legal discourses surrounding homelessness, both the right-to-shelter efforts of previous generations and the recent constitutional rulings of the Ninth Circuit have elided the complicated set of trade-offs entailed in individual decisions about how best to seek shelter while homeless. Ultimately, the choice between using available shelter services and self-sheltering is intimate, highly contextual, and deeply personal—an expression of one's autonomous decision-making as a free individual.

IV.
WHAT DIGNITY DEMANDS

What if homeless advocates have been misperceiving the right to shelter? If government-funded shelter services are not a universal solution for homeless individuals, perhaps it is time to consider an alternative conception of the right to shelter—the right to shelter as a negative right. Such a right would protect the decision of homeless individuals to undertake self-sheltering activities—from the simple use of blankets or bedding to the erection of temporary encampments in public spaces—free from the threat of criminalization. A negative right to

365. *See* Marybeth Shinn, Jessica Gibbons-Benton & Scott R. Brown, *Poverty, Homelessness, and Family Break-Up*, 94 CHILD WELFARE 105, 105 (2015).

366. *See id.* at 112–13.

367. Anthony, Vincent & Shin, *supra* note 362, at 11.

368. *Id.* at 12 ("Several mothers talked about how their children lost weight while staying at the shelter: '. . . he barely ate their food because, I don't know, it would give him the runs, and so yeah, so he lost a lot of weight.'").

369. *Id.*

shelter would ensure that homeless individuals have the freedom to choose where and how to find shelter, to protect themselves and their property, and to build meaningful connections with others.[370]

Because it is founded on respect for the right of the individual to a specific form of self-determination, a negative right to shelter is perhaps most at home as an outgrowth of the right to human dignity guaranteed by the U.S. Constitution's due process clauses.[371] Human dignity is a contested concept. In moral philosophy, its contours are unsettled.[372] In political philosophy, it seems to simultaneously ground more specific rights and yet also be something that one has a right *to*.[373] But human dignity has increasing purchase in American constitutional decision-making. Despite not appearing in the U.S. Constitution, dignity has been mentioned in more than nine hundred Supreme Court opinions.[374] With increasing frequency, dignity has been understood as a central component of the guarantee of due process.[375]

The dignity guaranteed by substantive due process is best understood as ensuring a specific capacity for self-determination, particularly with respect to bodily autonomy and interpersonal relationships, and as opposed to the subordinating effects of criminalization. This Part outlines the due process dimensions of constitutional dignity and examines their implications for individuals experiencing homelessness. It begins with a reexamination of the 2003 decision in *Lawrence v. Texas*,[376] an opinion that began to establish the complicated double-helix of the Court's recent "equal dignity" jurisprudence.[377] This Part then proceeds to draw an analogy between the decriminalizing logic of *Lawrence* and the individual choice of whether to self-shelter. It concludes with

370. In recent years, some homelessness advocates have advanced a similar idea under the rubric of a "right to rest." *See* HEATHER MAREK, KATIE SAWICKI, ZOE LA DU, CORRINE FLETCHER, ELENA STROSS & FRANZ BRUGGEMEIER, DECRIMINALIZING HOMELESSNESS: WHY RIGHT TO REST LEGISLATION IS THE HIGH ROAD FOR OREGON 23 (2017), https://aclu-or.org/sites/default/files/field_documents/aclu-decriminalizing-homelessness_full-report_web_final.pdf [https://perma.cc/Q63R-PTCS] (explaining that a right to rest would ideally include the rights of homeless individuals to "(1) move freely and sleep in public spaces without discrimination, (2) sleep in a parked vehicle, (3) eat and exchange food in public, and (4) have 24-hour access to hygiene facilities"). To date, however, efforts to legislate a right to rest have fallen far short of a true right to self-shelter in public spaces. *See, e.g.*, H.B. 3115, 81st Leg., Reg. Sess. (Or. 2021) (permitting homeless individuals an affirmative defense in prosecutions for urban camping if the law is "not objectively reasonable").

371. Although the word "dignity" does not appear in the due process clauses of either the Fifth or Fourteenth Amendments, the Supreme Court's recent due process jurisprudence has identified human dignity as a core value protected by those clauses. *See infra* Part IV.A.

372. *See* Christopher McCrudden, *In Pursuit of Human Dignity: An Introduction to Current Debates*, *in* UNDERSTANDING HUMAN DIGNITY 1, 8–10 (Christopher McCrudden ed., 2013) (reviewing scholars' theories of dignity).

373. *See* JEREMY WALDRON, DIGNITY, RANK, & RIGHTS 212 (Meir Dan-Cohen ed., 2012).

374. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011).

375. *See infra* Part IV.A.

376. 539 U.S. 558 (2003).

377. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17 (2015).

a brief coda examining specific ways that the government may plausibly continue to regulate homeless individuals even following the recognition of a negative right to shelter.

A. Dignity as Due Process

Nearly twenty years later, it can be easy to forget just how revolutionary the Supreme Court's decision in *Lawrence* was. Consensual sodomy was criminalized in thirteen states.[378] Public opinion about homosexuality was fractured.[379] Although there was a growing acceptance of LBGTQ persons socially,[380] a majority of Americans believed that same-sex sodomy was always wrong.[381] And a brief seventeen years earlier, the Court had upheld criminal statutes outlawing substantially the same conduct that was being challenged as within a state's prerogative to legislate in the interest of health, safety, and morals.[382]

By now, the facts are well-understood. John Geddes Lawrence, an older White man, was arrested along with Tyron Garner, a younger Black man, for engaging in consensual sodomy in Lawrence's Texas apartment.[383] Police had been responding to an anonymous call reporting a weapons disturbance.[384] Upon entering the apartment, the officers observed the two men engaging in sex acts.[385] Lawrence and Garner were charged with misdemeanors under Texas's anti-sodomy law and fined two hundred dollars, but each contested the constitutionality of their convictions.[386]

Court watchers at the time predicted a narrow decision. If the defendants should win, the majority opinion was expected to vindicate a formal equality guaranteed by the Fourteenth Amendment's Equal Protection Clause.[387] After

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378. Brief of Petitioners, Lawrence v. Texas, 539 U.S. 558 (2003) (No. 02-102), 2003 WL 152352, at *23 & n.17 (collecting case law repealing sodomy laws after Bowers).

379. *See* Pew Rsch. Ctr., *Religious Beliefs Underpin Opposition to Homosexuality* 1–3 (Nov. 18, 2003), https://www.pewresearch.org/politics/2003/11/18/religious-beliefs-underpin-opposition-to-homosexuality/ [https://perma.cc/L2SM-M6SM] (concluding that, while the public had shifted from the 1980s and now widely opposed discrimination against same-sex couples, backlash was growing).

380. ANDREW R. FLORES, NATIONAL TRENDS IN PUBLIC OPINION ON LGBT RIGHTS IN THE UNITED STATES 10, 15 (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Public-Opinion-LGBT-US-Nov-2014.pdf [https://perma.cc/4W47-J7Q8].

381. TOM W. SMITH, CROSS-NATIONAL DIFFERENCES IN ATTITUDES TOWARDS HOMOSEXUALITY 19 (Apr. 2011), https://gss.norc.org/Documents/reports/cross-national-reports/CNR%2031.pdf [https://perma.cc/3HBP-7M6P] (reporting results from the International Social Survey Program).

382. *See* Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

383. Dale Carpenter, *The Unknown Past of* Lawrence v. Texas, 102 MICH. L. REV. 1464, 1477 (2004)

384. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

385. *Id.* at 563. *But see* Carpenter, *supra* note 383, at 1478–91 (detailing the conflicting accounts of the arrests, and reasoning that officers were unlikely to have witnessed the sex acts at issue).

386. Lawrence v. State, 41 S.W.3d 349, 350 (Tex. App. 2001), *rev'd*, 539 U.S. 558 (2003).

387. *See* Katherine Franke, Comment, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1339, 1401 (2004) ("While it was widely expected that the Court would find the Texas

all, the Texas statute at issue criminalized only sodomy performed by same-sex sexual partners, rather than all sodomy.[388] Indeed, Justice O'Connor wrote just such an opinion, as a concurrence.[389]

An alternative outcome—less likely, but still plausible—was that the *Lawrence* Court would vindicate the privacy interest in sexual activity behind closed doors. Drawing from decisions like *Griswold v. Connecticut* and *Eisenstadt v. Baird*, the defendants had argued that governments ought not be policing private bedrooms for evidence of deviant sex.[390]

Writing for five members of the Court, however, Justice Kennedy eschewed these narrow grounds in favor of a broader opinion grounding sexual freedom in a robust account of liberty, autonomy, and, ultimately, human dignity. The first paragraph of the opinion opens expansively: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and in its more transcendent dimensions."[391] It closes similarly sweepingly:

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.[392]

Together, these paragraphs establish the contours of the twin pillars upon which the *Lawrence* decision primarily rests: respecting a robust version of individual autonomy (controlling one's destiny) and denouncing group subordination (not demeaning one's existence). The lesson from *Lawrence*'s discussion of autonomy is that human dignity demands a certain capacity to direct the course of one's life. The right to engage in relationships free from state interference is an artifact of a broader entitlement to something like self-government.[393] Moreover, the case's anti-subordination themes were a unique evolution in the Court's substantive due process jurisprudence.

Between those two passages, the Court was surprisingly vague about whether the conduct at issue was a "fundamental right"—though the Court used

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sodomy law unconstitutional, the sweeping—indeed moving—language that Justice Kennedy uses in the majority's opinion came as quite a surprise.").

388. *See Lawrence*, 539 U.S. at 564.

389. *Id.* at 579–85 (O'Connor, J., concurring).

390. Brief of Petitioners, *supra* note 378, at *9 (arguing that governments ought not to be policing private bedrooms given *Griswold v. Connecticut* and *Eisenstadt v. Baird*).

391. *Lawrence*, 539 U.S. at 562.

392. *Id.* at 578.

393. *See* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1905 (2004) (explaining that allowing the state the power to regulate sexual relationships "would have drained those relationships of their unique significance as expressions of self-government").

the word "fundamental" no less than eight times in the majority opinion.[394] Fundamental rights are most commonly identifiable by their deep roots in the nation's history and traditions,[395] a claim that could scarcely be made about legal recognition of same-sex sexual intercourse. Compounding the confusion, the *Lawrence* Court declared that the Texas statute at issue would fail even under rational basis review,[396] leading some—including the dissenters—to cabin the opinion as a relatively narrow holding.[397]

But the Court's prolonged exploration of the "transcendent" dimensions of due process should leave no doubt that it was articulating the contours of a fundamental right. As Professor Larry Tribe observed in *Lawrence*'s immediate wake, Justice Kennedy took a novel approach to defining the right at issue. Rather than seek a historical grounding for the particular practice that the defendants had engaged in—the approach taken by the *Bowers* Court years earlier[398]—Justice Kennedy traced a line between prior rights identified as fundamental and the conduct at issue to connect shared themes, including the importance of self-definition.[399] As Tribe explains of the *Lawrence* majority opinion:

> It treated the substantive due process precedents invoked by one side or the other not as a record of the inclusion of various activities in—and the exclusion of other activities from—a fixed list defined by tradition, but as reflections of a deeper pattern involving the allocation of decision-making roles, not always fully understood at the time each precedent was added to the array.[400]

The fundamental right articulated by *Lawrence* is grounded in a respect for individual self-definition or self-governance and centered on intimate personal choices. This right, though framed by reference to the Constitution's invocation of "liberty," more closely tracks contemporary definitions of human dignity. For example, Professor Gregory Alexander defines human dignity as "both a potential for autonomy [conceived of as self-authorship] and a right to develop that potential."[401]

Lawrence's version of this self-definition right had two further essential features. First, Justice Kennedy took pains to emphasize the role of interpersonal

394. *See Lawrence*, 539 U.S. at 565–67.

395. *See* Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

396. *Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.").

397. *See id.* at 586 (Scalia, J., dissenting) ("Most of the rest of today's opinion has no relevance to its actual holding—that the Texas statute 'furthers no legitimate state interest which can justify' its application to petitioners under rational-basis review.").

398. Bowers v. Hardwick, 478 U.S. 186, 191–92 (1986).

399. Tribe, *supra* note 393, at 1898–99.

400. *Id.* at 1899.

401. Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 1005 (2019).

relationships in providing meaning to life.[402] Although the anti-sodomy laws at issue "purport[ed] to do no more than prohibit a particular sexual act," Kennedy noted that they in fact "s[ought] to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."[403] As a general rule, Kennedy admonished, the state should not attempt "to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects."[404]

Second, *Lawrence*'s origins are grounded in Supreme Court opinions that emphasize the intimacy of personal decisions broadly protecting bodily autonomy. Consider *Griswold v. Connecticut*, the seminal Supreme Court case striking down Connecticut's law outlawing the use of contraception,[405] which Justice Kennedy identified as "the most pertinent beginning point" for the Court's analysis.[406] While often reduced to a singular observation about the "sacred precincts of marital bedrooms,"[407] the opinion in fact resolves the legality of medical doctors prescribing contraceptive devices or medications for their patients' medical use.[408] The connection between contraception and bodily autonomy became even more evident in the subsequent case of *Eisenstadt v. Baird*.[409] In *Eisenstadt*, the majority opinion decoupled marital privacy, recasting it as the combined rights of two individuals, who each have a liberty interest in being "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[410]

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402. *Lawrence*'s vision of liberty was admittedly less liberal than some scholars of gender and sexuality had hoped. Noting that the opinion emphasized personal relationships, rather than sexual activity, Professor Katherine Franke described the liberty principle articulated as "less expansive, rather geographized, and, in the end, domesticated." Franke, *supra* note 387, at 1401.

403. *Lawrence*, 539 U.S. at 567; *cf.* Roberts v. U.S. Jaycees, 468 U.S. 609, 617–18 (1984) ("[C]hoices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.").

404. *Lawrence*, 539 U.S. at 567.

405. Griswold v. Connecticut, 381 U.S. 479 (1965).

406. *Lawrence*, 539 U.S. at 564.

407. *Griswold*, 381 U.S. at 485.

408. *Id.* at 480.

409. Eisenstadt v. Baird, 405 U.S. 438 (1972).

410. *Id.* at 453. Arguably, that liberty interest reached its apex in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), since overruled by *Dobbs v. Jackson Women's Health Organization*, No. 19-1392, 597 U.S. __ (June 24, 2022). In *Casey*, the Court explained that both the decision to carry a child to term and the decision to terminate a pregnancy involve physical and emotional burdens that are "too intimate and too personal for the State to insist, without more, upon its own vision of the woman's role." 505 U.S. at 852. Indeed, the *Casey* Court famously proclaimed, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." *Id.* at 851. Although the current Court has since rejected the view that the right to terminate a pregnancy is "fundamental," a faithful recounting of the *Lawrence* decision must acknowledge the role that this precedent played in constructing the case for the decriminalization of sodomy. *See Lawrence*, 539 U.S. at 574 (quoting *Casey*'s "mystery of human life" passage at length).

The strongest connection to human dignity in the *Lawrence* opinion, however, comes not from the Court's embrace of a self-definition right, but from its recognition that the criminal law is frequently used to subordinate unpopular social groups. In eschewing the more formalistic and technocratic Equal Protection analysis advanced by Justice O'Connor's concurrence, Justice Kennedy argued that the Court must not leave unexamined the denigrating social stigma of criminalization, even where the law technically extends universally.[411] This is not to say that Kennedy ignored equality concerns. Instead, he observed, "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantee of liberty are linked in important respects, and a decision on the latter point advances both interests."[412]

The dignity analysis of *Lawrence* thus casts inequality concerns as a matter of substantive subordination, rather than formal equality.[413] It also emphasizes the distinctive harms of lending an official imprimatur to existing social dislike for marginalized groups: "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."[414] Even if the crime in question is a misdemeanor, as was the crime in *Lawrence*, "it remains a criminal offense with all that imports for the dignity of the persons charged."[415]

This intermingling of both substantive liberty—liberty as self-definition—and substantive equality—equality as anti-subordination—defines what Professor Tribe has coined as the Supreme Court's jurisprudence of "equal dignity."[416] As he observes:

> *Lawrence*, more than any other decision in the Supreme Court's history, both presupposed and advanced an explicitly equality-based and relationally situated theory of substantive liberty. The "liberty" of which the Court spoke was as much about equal dignity and respect as it was about freedom of action—more so, in fact.[417]

To be clear, *Lawrence*'s conception of dignity as due process is not exclusively an invention of Justice Kennedy's jurisprudence. Dating back to 1923, the Supreme Court has frequently blurred the formalist distinctions between equality and liberty in its analysis of substantive due process, rendering decisions that, with the benefit of hindsight, should be best understood as

411. Lawrence v. Texas, 539 U.S. 558, 575 (2003).

412. *Id.*

413. This commitment to substantive equality mirrors the work of Professor Catherine MacKinnon elsewhere. *See, e.g.*, Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 MINN. L. REV. 1 (2011).

414. *Lawrenc*e, 539 U.S. at 575.

415. *Id.*

416. Tribe, *supra* note 393, at 1898–99.

417. *Id.* at 1898.

sounding in the sort of dignity that *Lawrence* makes central.[418] This line of decisions has been particularly applied to marginalized communities. As Professor Kenji Yoshino has explained, "The Court has long used the Due Process Clauses to further equality concerns, such as those relating to indigent individuals, national origin minorities, racial minorities, [and] religious minorities."[419]

Nor does it stop with *Lawrence*. That decision is the focus of this Section because it provides particularly analogous tools for the dismantling of criminalization based on social status. But the Supreme Court has since extended its dignity jurisprudence, and its more recent cases are instructive for understanding the scope of the principles at play. In *United States v. Windsor*, the Court relied on the principle of human dignity in striking down a key provision of the Defense of Marriage Act (DOMA).[420] In *Obergefell v. Hodges*, the Court extended its dignity jurisprudence to recognize a nationwide right to same-sex marriage.[421]

Windsor explained that dignity can be conferred—and, by implication, denied—by the government's provision of statutory rights. The Court claimed that providing the right to marry to cross-sex couples "enhanced the recognition, dignity, and protection of the class in their own community."[422] DOMA, on the other hand, prevented individual states from deeming same-sex relationships "worthy of dignity in the community equal with all other marriages."[423] The *Windsor* Court concluded that this interference with dignity was the very "essence" of DOMA, rendering it an unconstitutional interference with liberty under the Fifth Amendment.[424] As Justice Kennedy explained, "the Fifth Amendment itself withdraws from Government the power to degrade or demean in the way this law does."[425]

Obergefell's depiction of dignity emphasized the anti-subordination dimensions of due process introduced in *Lawrence* and extended in *Windsor*. The *Obergefell* Court explained that the Due Process Clause of the Fourteenth Amendment protected "fundamental liberties," including "certain personal

418. *See* Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under* Casey/Carhart, 117 YALE L.J. 1694, 1696 (2008); Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1506–08 (2002); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749 (2011).

419. Yoshino, *supra* note 418, at 749–50.

420. United States v. Windsor, 570 U.S. 744, 775 (2013) ("The federal statute is invalid, for no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.").

421. Obergefell v. Hodges, 576 U.S. 644, 681 (2015) ("They ask for equal dignity in the eyes of the law. The Constitution grants them that right.").

422. *Windsor*, 570 U.S. at 768.

423. *Id.* at 769.

424. *See id.* at 746.

425. *Id.* at 774.

choices central to individual dignity and autonomy."[426] The history of criminalization of same-sex intimacy had long denied homosexuals "dignity in their own distinct identity."[427] *Lawrence*, alone, had been insufficient to heal these dignitary wounds because same-sex couples remained subordinated in other respects, including through the denial of the right to marriage.[428] Professor Yoshino dubbed the *Obergefell* approach "antisubordination liberty," describing the Court's self-styled "synergy" between equal protection and traditional substantive due process concerns that serve to better identify and define fundamental constitutional rights.[429]

Given this history, it may be tempting to see the Supreme Court's dignity jurisprudence as exclusively about the stages of political legitimization for those who identify as LGBTQIA+. *Lawrence* decriminalized same-sex sodomy, *Windsor* undermined DOMA, and *Obergefell* extended the privilege of marriage to all. Even *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission* involved Justice Kennedy invoking dignity as a means to recognize the "community-wide stigma" that might affect gay couples who are denied services.[430]

But there are strong reasons to believe that dignity extends beyond this narrow context. For one, consider the pains that the *Lawrence* majority took to reframe the nature of the rights claim. *Bowers v. Hardwick* had seemingly resolved the constitutionality of same-sex sodomy laws less than two decades prior to *Lawrence*. It had done so by denying that the Constitution "confers a fundamental right upon homosexuals to engage in sodomy."[431] The *Lawrence* majority pilloried this characterization, explaining that reducing relational autonomy to specific sex acts "demeans the claim the individual put forward."[432] As framed by the Court, the issue in *Lawrence* was "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment to the Constitution."[433] The criminalization of sex acts, the Court would go on to explain, has dignitary consequences that sound in not only the right to sexual liberty, but also in the freedom of association and the protections of the home.[434]

Nor are *Lawrence*'s predecessors limited to cases exclusively focusing on sexual intimacy and its consequences. As Justice Souter observed in his

426. *Obergefell*, 576 U.S. at 663.

427. *Id.* at 660; *see also id.* at 660–61 ("[T]he argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions.").

428. *Id.* at 666–67.

429. *See* Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 172, 174 (2015); *see also Obergefell*, 576 U.S. at 673.

430. Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

431. Bowers v. Hardwick, 478 U.S. 186, 190 (1986).

432. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

433. *Id.* at 564.

434. *See id.*

concurring opinion in *Washington v. Glucksberg*, "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body."[435] The "liberty" protected by the Due Process clauses of the Fifth and Fourteenth Amendment is as equally offended when the state seeks evidence by forcibly invading a defendant's body as when the state criminalizes intimate sexual choices.[436] The Court has held that substantive liberty is similarly implicated by a patient's decision whether to proceed with or decline medical treatment.[437]

Lawrence itself then shifts this narrower discussion of bodily integrity into a broader principle of interpersonal associative freedoms. In *Lawrence*, the Court emphasized that the physical act of sexual intercourse is "but one element in a personal bond that is more enduring."[438] It described its prior precedent as protecting "personal decisions" relating to everything from familial relationships to child rearing.[439] This realm of decisional autonomy appears in the *Lawrence* decision to serve as a recognition that interpersonal relationships are multifaceted, and that criminalizing any single course of conduct may unconstitutionally burden an individual's ability to express relational bonds.

In sum, the *Lawrence* decision recast constitutional "liberty" as something more than a narrow right to sexual autonomy. The dignitary dimensions of the decision both cabin and contextualize the rights claim at issue, which allows the case to serve as a touchstone for future interpretations of the Fifth and Fourteenth Amendments. At its core, *Lawrence* counsels in favor of decriminalization when laws burden intimate personal decisions that implicate fundamental interests in bodily integrity and interpersonal relationships, including familial relationships. Further, *Lawrence* demonstrates the sensitivity of due process analysis to the role that criminalization plays in subordinating populations. When the criminal law operates to stigmatize and subordinate a group defined by its intimate personal choices about how best to craft a life worthy of meaning, substantive due process stands as a bulwark against the tyranny of the majority.

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435. Washington v. Glucksberg, 521 U.S. 702, 777 (1997) (Souter, J., concurring) (internal citation omitted).

436. *See* Rochin v. California, 342 U.S. 165, 173 (1952) (holding that due process was violated when police directed a doctor to pump the defendant's stomach to retrieve evidence of drug use).

437. Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) ("The principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."); Washington v. Harper, 494 U.S. 210, 229 (1990) ("The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty."); Vitek v. Jones, 445 U.S. 480, 494 (1980) (transferring a person to a mental hospital coupled with mandatory behavior modification treatment implicated liberty interests); Parham v. J.R., 442 U.S. 584, 600 (1979) ("[A] child, in common with adults, has a substantial liberty interest in not being confined unnecessarily for medical treatment.").

438. *Lawrence*, 539 U.S. at 567.

439. *Id.* at 573–74.

Last term, however, in *Dobbs v. Jackson Women's Health Organization*,[440] the Supreme Court cast doubt on the future of *Lawrence*'s dignity jurisprudence. Applying a unique interpretive methodology,[441] Justice Alito asserted that fundamental rights "*must* be 'deeply rooted in this Nation's history and tradition' *and* 'implicit in the concept of ordered liberty.'"[442] By contrast, *Lawrence* explicitly stated that "[h]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."[443] While Alito's historical account has been subject to extensive criticism,[444] the demand that fundamental rights be historically grounded is seemingly at odds with *Lawrence*'s constellation-of-interests approach, which recognized that rights can *become* fundamental as society evolves.[445] Commentators immediately latched onto this tension and questioned whether *Lawrence* itself might withstand a second look by the current Court.[446]

Nevertheless, the *Dobbs* decision formally leaves *Lawrence* undisturbed.[447] Helpfully, it does so for reasons that have nothing to do with history or tradition. Rather, *Dobbs* declares that abortion may be "sharply" distinguished from other exercises of personal autonomy because abortion alone involves the destruction of a "potential life."[448] Indeed, the opinion explains that this singular, "critical distinction" supports the possibility in other cases that the Court may recognize

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440. No. 19-1392, 597 U.S. __ (June 24, 2022).

441. As numerous commentators have noted, Justice Alito's opinion in *Dobbs* should not properly be considered "originalist," despite its emphasis on history and tradition. *See, e.g.*, Ilan Wurman, *Opinion: Hard to Square* Dobbs *and* Bruen *with Originalism*, DENVER POST (July 12, 2022), https://www.denverpost.com/2022/07/12/roe-vs-wade-originalism-dobbs-bruen-abortion-guns/ [https://perma.cc/87XD-JV5V]; Cass Sunstein, The Alito Draft (May 23, 2022) (preliminary draft), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4117446 [https://perma.cc/6N57-9SE9].

442. *Dobbs*, No. 19-1392, slip op. at 5 (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)) (emphasis added).

443. *Lawrence*, 539 U.S. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring) (internal quotation marks omitted)).

444. *See, e.g.*, Leslie J. Reagan, *What Alito Gets Wrong About the History of Abortion in America*, POLITICO (June 2, 2022), https://www.politico.com/news/magazine/2022/06/02/alitos-anti-roe-argument-wrong-00036174 [https://perma.cc/6BP3-Q9AL]; Lawrence Hurley, *Alito's Abortion History Lesson in Dispute*, REUTERS (May 6, 2022), https://www.reuters.com/legal/government/us-supreme-court-justice-alitos-abortion-history-lesson-dispute-2022-05-06/ [https://perma.cc/GPG8-BAQR]; Gillian Brockell, *Abortion in the Founders' Era: Violent, Chaotic, and Unregulated*, WASH. POST (May 15, 2022), https://www.washingtonpost.com/history/2022/05/15/abortion-history-founders-alito/ [https://perma.cc/87AT-NPQK].

445. *See Lawrence*, 539 U.S. at 572 (citing an "emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"). Note that Justice Alito quite explicitly challenges this approach to jurisprudence, claiming that recognizing "a broader right to autonomy" "could license fundamental rights to illicit drug use, prostitution, and the like." *Dobbs*, No. 19-1392, slip op. at 32.

446. *See e.g.*, Kathryn Rubino, *The Supreme Court Has Only Scratched the Surface of Awful*, ABOVE THE LAW (May 3, 2022), https://abovethelaw.com/2022/05/the-supreme-court-has-only-scratched-the-surface-of-awful/ [https://perma.cc/GXM7-KQX4].

447. *Dobbs*, No. 19-1392, slip op. at 66 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

448. *Id.* at 32.

a substantive sphere of liberty that is not constrained by "the specific practices of the States at the time of the adoption of the Fourteenth Amendment."[449] Meanwhile, three dissenting members of the Court openly embraced the analytical approach reflected in *Lawrence*, noting that the last half century of substantive due process decisions has woven a "constitutional fabric, protecting autonomous decision making over the most personal of life decisions."[450] These arguments thus leave some (small) room for optimism that the dignitary dimensions of due process have not (yet) been extinguished.

B. The Dignity in Self-Sheltering

Like the right to make choices about one's sexual relationships, the ability to make autonomous choices about how best to navigate periods of housing instability protects and promotes essential human dignity. As the previous Section illustrated, the form of dignity protected by constitutional due process is intimately connected to notions of self-definition and self-governance. It is principally concerned with respecting the most intimate choices of an individual, regardless of that individual's membership in a disfavored social group.[451] In fact, the imprimatur of official disfavor cast by criminalization is relevant to the antisubordination components of constitutional dignity.

Laws criminalizing urban camping threaten a homeless individual's interest in bodily integrity and intimate associations by dictating the outcome of one of the most intimate decisions that a homeless individual must make—when and whether to utilize available shelter services. The choice of where to shelter is a sensitive, key decision central to one's existence, family life, community welfare, and their development of human personality. Urban camping laws take away from homeless individuals the freedom to make the decision—based upon their values, their assessment of their self-interest, and their personal relationships with others—about where best to build a life under extreme constraints. Absent some exceptional need, the state ought not to interfere in this personal and important decision about individuals' private lives.

State regulation of urban camping implicates the well-recognized liberty interest in bodily integrity.[452] Control over one's own body is fundamentally at stake in the decision of where and how to find shelter. As detailed above, that decision involves, among other things, considerationabout where one will be physically safest from private violence, where one will be physically healthiest, including most protected from disease, and where one will face reduced risks of sexual assault. These decisions are profoundly personal, analogous to the already recognized liberty interests in whether to engage in sexual relationships[453] and

449. *See id.* at 32–33 (quoting *Casey*, 505 U.S. at 848) (internal quotation marks omitted).
450. *Id.* at 5 (Breyer, J., Sotomayor, J., and Kagan, J., dissenting).
451. *See* Note, *Equal Dignity—Heeding Its Call*, 132 HARV. L. REV. 1323, 1329 (2019).
452. *See supra* text accompanying notes 401–06, 431–33.
453. *See, e.g.*, *Lawrence*, 539 U.S. at 57–79.

whether to accept or decline medical procedures.[454] States invade this liberty interest when they dictate that citizens may not find shelter anywhere other than in locations approved by the legislature.

Moreover, the Supreme Court's substantive due process jurisprudence has recognized that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[455] "[T]he constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."[456] The essential associational freedom here is the freedom to define one's relevant living community. As detailed above, homeless individuals living in encampments find considerable value in their community ties to other encampment residents.[457] And shelter residents must frequently make the unconscionable decision to separate from family in order to utilize available shelter. Urban camping ordinances thus impinge upon fundamental freedoms by making shelter use compulsory, backed by the threat of criminal sanction.

Existing urban camping ordinances place homeless individuals in a double bind. Either the individual must subject themself to shelter services that may negatively impact their physical well-being, property rights, and established community ties, or the individual must risk criminal sanctions for choosing to construct a life unsheltered. Bodily health, property, and community are not merely isolated considerations, though essential in their own right, but combine to reflect the "rational continuum" of liberty ensured by the Constitution.[458]

In arriving at the correct constitutional balance, we must also remember that criminal law both stigmatizes and subordinates. Cities and states with urban camping prohibitions are enforcing their preference for shelter services using the full power of the criminal law. Individuals who are caught self-sheltering are subject to arrest and incarceration, loss of property, and separation from their community. The social stigma against homeless individuals is cemented by laws and ordinances that denounce as "criminal" behaviors that are essential to survival in desperate circumstances.

The depiction of dignity that emerges from the Supreme Court's recent Due Process jurisprudence contains a strong antisubordination norm. Professor Reva Siegel has noted that "the case law is rich with diverse expressions of

454. *See, e.g.*, Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

455. Roberts v. United States Jaycees, 468 U.S. 609, 617–18 (1984).

456. *Id.* at 619.

457. *See supra* text accompanying notes 337–69.

458. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

antisubordination values."[459] These cases are "concerned with the material and dignitary injuries inflicted on members of particular social groups by public actions."[460] Dignity's antisubordination norm arguably cabins the application of this branch of substantive due process doctrine.[461] Although nearly every claim that a fundamental right was denied can be framed as a matter of equality, dignity is only properly invoked where unequal treatment at the hands of the law "has the result of further entrenching stigma against the group on the basis of its differentiating characteristic."[462]

By casting self-sheltering activities as criminal, the state automatically brands homeless individuals, and their attempts to craft some meaningful existence out of a deeply unequal situation, as inferior to those who build meaning within the structures of established privilege. Criminalization creates a lens through which the social denigration of the indigent can be legitimately channeled. People of means need not attempt to justify condemning poverty if they are free to condemn criminal *activities*, such as camping, loitering, urinating, or begging—activities that they are able to psychologically distance themselves from by dint of their own circumstances.

Troublingly, criminalization is animated by social stigma grounded in inaccurate characterizations of poverty and vagrancy. Like homosexuality, homelessness has long been targeted by criminal laws that are motivated by moral condemnation and denigration, rather than public safety. The earliest laws against "vagrancy" targeted characteristics, rather than conduct.[463]

One of the things that *Lawrence* makes clear is that the criminalization of homelessness cannot be insulated from scrutiny by the glib observation that such laws apply "equally" to the housed and unhoused alike. Had such an approach been endorsed in *Lawrence*, Texas would have been able to preserve its sodomy laws by modifying them to also reach opposite-sex participants. That result would have ignored the targeted discrimination and stigmatization that, at least partially, animated Justice Kennedy's substantive due process analysis.[464] Rather, *Lawrence* highlighted "how the very fact of criminalization . . . can cast already misunderstood or despised individuals into grossly stereotyped roles,

459. Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 353 (1992). Kenji Yoshino has similarly described the Court's more recent cases as articulating a vision of "antisubordination liberty." *See* Yoshino, *supra* note 429, at 174.

460. Siegel, *supra* note 459, at 353.

461. *See* Yoshino, *supra* note 429, at 174–75 ("What *Obergefell* does is to drive this idea further to the surface—asserting that in the common law adjudication of new liberties, the effect on those subordinated groups should matter.").

462. *Equal Dignity*, *supra* note 451, at 1334.

463. *See supra* notes 49–63 and accompanying text.

464. *See* Lawrence v. Texas, 539 U.S. 558, 575 (2003); Tribe, *supra* note 393, at 1896, 1910–14 (explaining how the *Lawrence* decision recognized that the "social and cultural meaning of the ban on sodomy operates to deny the equal worth and equal liberty" of same-sex couples).

which become the source and justification for treating those individuals less well than others."[465]

A popular interpretation of *Lawrence*, however, posits that the Court subtextually relied on something like the classic principle of desuetude. This is the version of *Lawrence* advocated by Professor Cass Sunstein.[466] Desuetude is the idea that laws lose legitimacy over time if they can no longer claim to have strong moral support in the relevant community.[467] To Sunstein, *Lawrence*—like several of its predecessors—is a case reflecting an uncommon enforcement of a statute that has lost its moral basis.[468] "In those circumstances, the statutory ban was a recipe for arbitrary and even discriminatory action, in a way that does violence to democratic ideals . . . because a law plainly lacking public support is nonetheless invoked to regulate private conduct."[469]

One of the central concerns of a desuetude interpretation of *Lawrence* is that it substantially narrows the future applications of the liberty principles the case announced. To some—like Sunstein—this is a virtue.[470] The breadth of the liberty-endorsing language in *Lawrence* would arguably justify judicial interrogation of many existing criminal laws, especially those involving private sexual choices.[471] By contrast, a desuetude-based reading of *Lawrence* would limit its precedential power to challenging laws that are both frequently underenforced—rendering any particular prosecution arbitrary—and grounded in anachronistic moral reasoning no longer supported by the general populace.[472]

On this view, the moral grounding of laws prohibiting urban camping becomes a fundamental inquiry. To be sure, such laws are currently popular with legislatures. Homeless advocacy organizations that track the proliferation of criminal prohibitions have consistently found that the number of such laws has increased over the past decade.[473] But the presence of laws on the books does not necessarily equate with overriding public support. The latter is an empirical question that remains to be answered. Moreover, a secondary question lingers about the moral sentiment behind any public support. Homelessness scholars have long documented how the animating motivation for criminalizing

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465. Tribe, *supra* note 393, at 1896.

466. *See* Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, 49 ("These points suggest that the Court's decision was less about sexual autonomy, as a freestanding idea, and closer to a kind of due process variation on the old common law idea of desuetude.").

467. *See, e.g.*, MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY: A STUDY OF LAWFUL DEPARTURES FROM LEGAL RULES 129–31 (1973).

468. Sunstein, *supra* note 466, at 49–50 (citing *Griswold v. Connecticut* as another example of desuetude).

469. *Id.* at 50.

470. *See id.* at 49 ("A simple autonomy reading would have consequences that the Court did not likely intend.").

471. *Id.* (citing incest and bestiality as examples).

472. *Id.* at 50.

473. *See supra* notes 76–77 and accompanying text.

homelessness is to empower police to remove offending conduct from public view, by force if necessary. Criminalization is not primarily motivated by a shared agreement that offenders have done something morally culpable that is worthy of public sanction.

Thus, even on a desuetude view of *Lawrence*, one may plausibly question the defensibility of criminalizing essential activities like urban camping. We know that urban camping ordinances are inconsistently enforced. In practice, the criminal sanction frequently operates as a background threat, inducing compliance with simple orders to "move along."[474] In many cities, first-order policing strategies include driving unsheltered homeless individuals to government-funded shelters, or even relocating them into other jurisdictions to resolve the "problem" of visible homelessness. And if public support of urban camping ordinances is more grounded in the practical convenience provided by the implicit threat of incarceration—rather than, say, a strong moral conviction that urban camping is condemnable conduct—that would certainly raise concerns that urban camping laws, to borrow Sunstein's phrase, provide "a recipe for arbitrary and even discriminatory action, in a way that does violence to democratic ideals."[475]

One common rejoinder to the rights claim that I am making is that *Lawrence*'s own conception of liberty was explicitly confined to private spaces. Articulating a list of potential exceptions to the sexual liberty just established, Justice Kennedy included the fact that *Lawrence* did not involve "public conduct."[476] Few would argue that *Lawrence*'s logic compels a right to engage in public sex, despite the decision's soaring rhetoric about the intimacy and dignity of personal sexual choices. By contrast, urban camping is a right that necessarily gets exercised in public spaces. It is fundamentally "public conduct." To succeed, then, my argument depends not only on the strength of the analogy between sexual decision-making and urban camping, but also on distinguishing *Lawrence*'s private-space limitation.

The answer to this rejoinder can be found in assessing the state's justifications for interfering with personal liberty. We must begin by accepting, as *Lawrence* dictates, that personal autonomy is a right of such importance that it implicates not only sexual decision-making, but also fundamental questions about the mysteries of human life.[477] To curtail that right in public spaces, the

474. *See supra* note 85 and accompanying text.

475. *Id.* at 50.

476. Lawrence v. Texas, 539 U.S. 558, 560 (2003). *But see id.* at 562 (describing "other spheres of our lives and existence, outside the home, where the State should not be a dominant presence").

477. *See id.* at 574, 588 (explaining that "[p]ersons in a homosexual relationship may seek autonomy" for purposes that include "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life") (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

state's justifications must be particularly weighty.[478] In the case of public sex, a weighty government interest may very well exist. Criminal prohibitions on indecent exposure or public lewdness are "intended to prohibit the display of body parts or sex acts before *nonconsenting* observers."[479] While the extent of the harm from nonconsensual observation of body parts or sex acts is debatable,[480] there can be little question that Western societies have a long and deeply held taboo against lewd nudity.[481] Public sex is viewed as dangerous, disruptive, and infectious.[482]

No similar potential for causing third-party harm derives from urban camping—from merely *existing* in public spaces. As discussed, the best understanding of laws against urban camping is that they exist to remove unimaginable poverty from public view, either by coercing homeless individuals into shelters or by empowering police to physically remove them from streets.[483] Merely exposing poverty to nonconsenting viewers, in contrast to exposing sex acts or sex organs, neither generates harm nor violates strong moral norms. At most, it generates strong feelings of disgust and discomfort, which are generally considered insufficient grounds for criminal interventions, and which may in fact be valuable in motivating social change.[484]

An alternative justification that is occasionally offered in support of urban camping ordinances is that homeless individuals unfairly convert shared public spaces. A homeless encampment, the charge goes, transforms a parcel of public land into an effectively private one, available solely for the use and enjoyment of its occupants. Although there is some logic to this claim, public spaces exist to be occupied, and homeless individuals are no less a part of the "public" to

478. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972) ("Of course, if we were to conclude that the Massachusetts statute impinges upon fundamental freedoms . . . the statutory classification would have to be not merely *rationally related* to a valid public purpose, but *necessary* to the achievement of a *compelling* state interest.").

479. Stuart P. Green, *To See and Be Seen: Reconstructing the Law of Voyeurism and Exhibitionism*, 55 AM. CRIM. L. REV. 203, 211 (2018) (emphasis in original).

480. Lior Jacob Strahilevitz, *Consent, Aesthetics, and the Boundaries of Sexual Privacy After* Lawrence v. Texas, 54 DEPAUL L. REV. 671, 689–90 (2005).

481. *See* Lawrence M. Friedman & Joanna L. Grossman, *A Private Underworld: The Naked Body in Law and Society*, 61 BUFF. L. REV. 169, 174, 180 (2013) (distinguishing between simple nudity and lewd nudity, the latter of which is "overtly sexual, and is thought of as perverse, or threatening").

482. *Id.* at 207. This view is shared by such thinkers as John Stuart Mill and H.L.A. Hart. *See* JOHN STUART MILL, ON LIBERTY 90 (Batoche Books 2001) (1859) ("Of this kind are offenses against decency; on which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so."); H.L.A. HART, LAW, LIBERTY, AND MORALITY 45 (1963) ("Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency.").

483. *See* Rankin, *supra* note 98, at 589; *see generally* Foscarinis et al., *supra* note 96 (surveying criminal laws designed to reduce the visibility of homelessness without addressing root causes).

484. *See* Rankin, *supra* note 98, at 568 ("If constituents can literally 'see' changes in unsheltered homelessness on the street, they are more likely to support investments in solutions for homelessness broadly.").

whom these spaces are dedicated than anyone else. By definition, physical spaces occupied by any member of the public cannot be simultaneously occupied by others. Many accepted everyday activities "convert" public spaces in this way: setting up chairs and shade at a beach, spreading out a blanket in the park, etc.

The true concern is not that homeless individuals are occupying public spaces—it is that they are putting public spaces to undesirable uses. Consider laws against "loitering." Typically defined as remaining in a particular public place without a "lawful purpose," loitering laws preclude homeless individuals from existing in public spaces for prolonged periods.[485] But what is evident in the language of loitering laws is that those same public spaces may be occupied so long as individuals have a "lawful purpose." Loitering laws are therefore not about the allocation of limited public spaces, but about limiting the kinds of purposes to which those spaces may be put. The defining characteristic of loitering laws is that they seek to remove unproductive forms of existing in public—existence that serves no further end. These laws function to isolate and punish unproductive individuals in a capitalist system.[486]

Or take, for example, my own personal experience with homelessness that opened this Article. Under the relevant city ordinance, sleeping in a vehicle parked on a public residential street is defined as an illegal "use" of a vehicle for dwelling.[487] Note that my car was lawfully allowed to be parked on the residential street—it was adequately licensed, registered, and insured—provided that I did not "dwell" inside it. Again, the argument about converting public spaces fails: there were no restrictions on the time limits for which I could have remained parked in that space. My violation was in using the space I was otherwise entitled to occupy in the wrong way. It was a violation of propriety and social expectations, not an improper allocation of limited public resources.

If I am correct about the essential liberty interest involved in deciding to camp in public, then much more is needed from the state's justifications. A bare majoritarian desire to remove poverty from public view is insufficient. Arguments about allocating scarce public resources are unsubstantiated. In truth, the criminalization of urban camping is driven by the voting majority's negative attitudes toward homelessness, including disgust, discomfort, and condemnation.[488] Laid bare, this is not a substantially different set of motivations

485. *See, e.g.*, CAL. PENAL CODE §§ 647(a), 647(c)–(f). Such laws may also include existing on *private* property—even if one just wanders upon it. *See* CAL. PENAL CODE § 647(h).

486. Professor Dorothy Roberts has argued that the vague definitions of acceptable purposes in loitering laws "incorporate[] racist notions of criminality and legitimate[] police harassment of Black citizens." Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 790 (1999).

487. L.A., CAL. MUN. CODE § 85.02 (regulating the use of vehicles for dwelling). This provision imposed a blanket prohibition on sleeping in vehicles dating back to 1983, Desertrain v. City of Los Angeles, 754 F.3d 1147, 1149 (9th Cir. 2014), but was recently amended following a successful vagueness challenge. *See id.* at 1157.

488. *See* Rankin, *supra* note 7, at 122–23 ("These deeply rooted 'psychological mechanisms' compel us to prevent contact with homeless people because we implicitly associate them with disease,

than those criminalizing same-sex sodomy in *Lawrence*.[489] The *Lawrence* Court noted that historical discrimination against a marginalized minority cannot be "the ending point of the substantive due process inquiry."[490] Likewise, *Obergefell* explained that new rights may arise "from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[491] Such motivations may not even meet the minimal requirement that criminal legislation be rationally related to a legitimate state interest.[492]

C. The Scope of Decriminalization

Decriminalization is not without its limits. Even if urban camping ordinances are held unconstitutional for impinging upon the dignity of individuals experiencing homelessness, the state retains a plethora of options for regulating visible homelessness, which I would expect to be the next frontier of legal challenges. This Section examines three such options, each of which I believe would be likely to withstand constitutional scrutiny. The first option is zoning. If cities are no longer permitted to respond to urban camping with blanket criminalization, they may nevertheless be able to control the spaces in which visible homelessness exists through the reasonable exercise of zoning powers. Second, cities may retain the power to criminalize harm-causing behaviors by individuals experiencing homelessness. A lynchpin of the argument for decriminalizing urban camping is that the laws serve insufficiently substantial government interests because the behavior causes no third-party harms. Decriminalization therefore likely fails to extend to conduct, such as violent crime, drug use, and arguably public urination or defecation, which all have a claim to third-party harms.[493] Lastly, governments may retain the power

perceiving them as 'pathogenic threats' we must avoid through 'physical distancing' to avoid potential contamination."); *see also* Rankin, *supra* note 98, at 584 ("Studies show that humans react to traditional markers of unsheltered chronic homelessness with unparalleled rates of negativity and disgust, which may become even more pronounced when the stigma of homelessness inevitability intersects with other prejudices."); *cf.* Mayor of New York v. Miln, 36 U.S. 102, 142 (1837) (announcing that it is "as competent and as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against physical pestilence").

489. *See* Lawrence v. Texas, 539 U.S. 558, 570 (2003) (explaining that criminalization of same-sex sodomy was primarily motivated by centuries-old moral condemnation of the practice).

490. *Id.* at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, 857 (1998)).

491. Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015).

492. *See Lawrence*, 539 U.S. at 578 ("The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."); *see also* Robin Yeamans, *Constitutional Attacks on Vagrancy Laws*, 20 STAN. L. REV. 782, 784–85 (1968) ("[W]here the offense consists merely in being idle, indigent, or itinerant, as in most statutes that retain in some form the common-law crime of vagrancy, the legitimacy of the state's interest in imposing criminal sanctions is not clear.")

493. Although public urination or defecation less obviously *harm* third parties and may be necessarily connected to the protected conduct of self-sheltering, I nevertheless acknowledge that dignity in the constitutional sense—rather than the moral sense—may not extend far enough to decriminalize these behaviors. *See infra* notes 523–528 and accompanying text.

to engage in civil enforcement efforts designed to protect public safety and health. These efforts include sweeps and uninvited cleanups of homeless encampments that tend to displace self-sheltered homeless individuals.

Zoning has been a foundational power of local governments for roughly a century.[494] Despite well-documented flaws, ex ante zoning regulation has obvious efficiency benefits over piecemeal, ex post nuisance litigation.[495] Moreover, the legitimate ends of zoning regulation have been broadly construed to include the "spiritual as well as physical, aesthetic as well as monetary."[496] As a result, zoning boards—as agents of legislators—have considerable latitude to control the various uses of both public and private property within municipal borders.

In 1977, the Supreme Court declared that the power of local governments to zone may not trample upon fundamental due process rights. In *Moore v. City of East Cleveland*, the Court held that an East Cleveland housing ordinance violated the Due Process Clause of the Fourteenth Amendment when it purported to limit dwelling occupancy to members of a single, nuclear family.[497] In so doing, the zoning ordinance made it illegal for a grandson to reside with his grandmother, denying him access to East Cleveland schools, which were resisting integration, and subjecting her to criminal charges.[498] The Court concluded that the restrictive nature of the city's statute was not narrowly tailored to serve the purposes identified by the state.[499]

In a now-famous concurring opinion,[500] Justice Brennan affirmed that "the zoning power is not a license for local communities to enact senseless and arbitrary restrictions which cut deeply into private areas of protected family life."[501] He explained that a preference for nuclear families—the "pattern so often found in much of white suburbia"—may not be elevated at the expense of patterns of living that, "under the goad of brutal economic necessity," provide "a

494. In 1922, the U.S. "Commerce Department promulgated the Standard Zoning Enabling Act," intended as model authorizing legislation for states to empower local government zoning. Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 755 (2020). In 1926, the Supreme Court upheld the practice of local zoning against a constitutional attack. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 397 (1926).

495. Serkin, *supra* note 494, at 758.

496. Berman v. Parker, 348 U.S. 26, 33 (1954) ("It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.").

497. Moore v. City of East Cleveland, 431 U.S. 494, 506 (1977) (plurality opinion).

498. *Id.* at 496.

499. *Id.* at 499–500.

500. *See* Angela Onwuachi-Willig, *Extending the Normativity of the Extended Family: Reflections on* Moore v. City of East Cleveland, 85 FORDHAM L. REV. 2655, 2659 (2017) ("Justice Brennan's concurrence became the subject of longstanding praise in legal academia because it acknowledged how notions of family can be raced and classed.").

501. *Moore*, 431 U.S. at 507 (Brennan, J., concurring).

means of survival for large numbers of the poor and deprived minorities of our society."[502]

Despite *Moore*'s affirmation that cities may not use zoning to deny individuals certain fundamental rights, courts have upheld as reasonable zoning schemes that merely incidentally burden such rights.[503] Courts have generally distinguished between zoning regulations that have "a direct and substantial impact" on fundamental rights and those that operate more tangentially.[504] The adjudication of residency restrictions for sex offenders is illustrative. When faced with challenges to sex offender restrictions, federal circuit courts have taken pains to define the scope of fundamental rights narrowly.[505] In particular, if an ordinance merely "restricts where a residence may be located," it is unlikely to be viewed as directly and substantially impacting protected rights.[506]

Consequently, cities will likely retain the power to regulate the location of public homeless encampments within their borders, notwithstanding a fundamental right to self-shelter. To date, a handful of cities have already experimented with establishing specifically designated zones for homeless residents.[507] The most famous of these may be Los Angeles's Skid Row. While not officially zoned for homeless encampments, skid rows have traditionally been a place where homelessness was tolerated and the police role, if any, has been to contain disorder to pre-established boundaries.[508] In other prominent examples, however, cities have installed public facilities and provided social services in "campuses" specifically designed to attract homeless residents.[509]

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502. *Id.* at 508.

503. *See, e.g.*, Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2005) ("Thus, the reasoning of the *Moore* plurality does not require strict scrutiny of a regulation that has an incidental or unintended effect on the family . . . or that 'affects or encourages decisions on family matters' but does not force such choices.").

504. State v. Seering, 701 N.W.2d 655, 663 (Iowa 2005).

505. *See Miller*, 405 F.3d at 710.

506. *Id.* at 710; *see also* Weems v. Little Rock Police Dep't, 453 F.3d 1010, 1014–15 (8th Cir. 2006) (holding that sex offender residency restrictions do not unconstitutionally violate substantive due process, equal protection, or the fundamental right to travel).

507. Mary Kay Thill, *Zoning out the Homeless People*, NW. COMPASS (Apr. 1, 2017), https://northwestcompass.org/zoning-homeless-people/ [https://perma.cc/3CKJ-B9JQ].

508. *See, e.g.*, Egon Bittner, *The Police on Skid-Row: A Study of Peace Keeping*, 32 AM. SOCIO. REV. 699, 704 (1967); s*ee also* CHARLES HOCH & ROBERT A. SLAYTON, NEW HOMELESS AND OLD: COMMUNITY AND THE SKID ROW HOTEL 105 (1989) ("[T]he job of the patrolman was primarily to maintain the spatial order by seeing that the accepted boundaries of Skid Row were maintained. This was done by confining the men to their specific neighborhood and prohibiting spillover into middle-class sections.") (internal quotations omitted). *But see* Nicole Stelle Garnett, *Relocating Disorder*, 91 VA. L. REV. 1075, 1102 (2005) ("As skid row declined, however, police officers, faced with more severe social deviancy and greater societal hostility, felt pressure to exercise a greater amount of control within skid row as well.").

509. *See* Garnett, *supra* note 508, at 1085–88 (discussing the phenomenon of homeless campuses).

Campuses of this sort may increasingly become part of cities' comprehensive zoning plans.[510]

While zoning of this sort may be legally permissible, it primarily functions to concentrate and obscure extreme poverty, which can be damaging to the individuals subjected to it.[511] Zoning laws have a long history of being used to exclude and marginalize already vulnerable populations.[512] And cities have shown little appetite for tolerating even sheltered homelessness—exclusionary zoning schemes designed to limit homeless shelters or the provision of homeless services are frequent.[513] We should expect, then, that many cities' responses to recognizing a negative right to shelter will involve concentrating self-sheltering activities in undesirable and underserved areas, to the detriment of homeless residents.[514]

Beyond zoning, cities and states will likely also retain the ability to criminalize behaviors attendant to homelessness to the extent that those behaviors cause third-party harms. Laws against vagrancy and urban camping have long been justified as prophylactic measures designed to empower police to prevent more serious crimes.[515] These laws, and others like them,[516] are touted as tools to identify and incapacitate crime-prone individuals. Crime rates among the homeless are the subject of considerable debate.[517] But many people equate the presence of unsheltered homelessness with increased risks of serious crime, including violent assaults, property theft, and drug use.[518] Moreover, urban

510. *See* Serkin, *supra* note 494, at 758 (explaining that, under the Standard Zoning Enabling Act, zoning ordinances must be part of a comprehensive city plan).

511. *See* Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227, 1227 (2006) (explaining how concentrated poverty has negative effects on education, safety, and children).

512. *See, e.g.*, Serkin, *supra* note 494, at 754–60.

513. Foscarinis et al., *supra* note 96, at 147 n.2.

514. Many years ago, Professor Robert Ellickson suggested that zoning laws should be used to concentrate disorder, including homelessness, into specifically designated public spaces akin to skid rows. Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165, 1220–23 (1996).

515. *See, e.g.*, Papachristou v. City of Jacksonville, 405 U.S. 156, 169 (1972) ("Future criminality, however, is the common justification for the presence of vagrancy statutes.").

516. Roberts, *supra* note 486, at 783 (examining loitering laws as a prophylactic measure to fight crime and maintain public order).

517. *Compare* Randeep Ramesh, *A Fifth of All Homeless People Have Committed a Crime to Get off the Streets*, GUARDIAN (Dec. 22, 2010), https://www.theguardian.com/society/2010/dec/23/homeless-committing-crimes-for-shelter [https://perma.cc/YFK4-YKYN], *with* Thacher Schmid, *No Link. Between Homeless Villages and Crime Rates, Guardian Review Suggests*, GUARDIAN (May 23, 2018), https://www.theguardian.com/us-news/2018/may/23/homeless-villages-crime-rate-seattle-portland [https://perma.cc/J5V9-UD42]. *See generally* John J. Ammann, *Addressing Quality of Life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion*, 44 ST. LOUIS U. L.J. 811, 815 (2000) ("While the current effort in cities focuses on prosecution of the homeless for their crimes, it is, in fact, the poor and homeless who are more likely to be the victims of crime than they are to be the criminals.").

518. *See* Sara Shortt, *We Don't Need Protection from the Homeless. They Need Protection from Us*, L.A. TIMES (Oct. 15, 2018), https://www.latimes.com/opinion/op-ed/la-oe-shortt-homeless-victims-20181015-story.html [https://perma.cc/S8E5-Y453].

camping raises concerns about certain bodily necessities, including urination, defecation, and sexual activity, that are currently criminal when done in public.[519]

Under the Supreme Court's well-established framework, even fundamental rights must bend to accommodate narrowly tailored laws that serve compelling state interests.[520] While *Lawrence* rejected moralistic justifications for criminal prohibitions, preventing third-party harms has traditionally been recognized as a compelling government interest.[521] Thus, the decriminalization of urban camping would not affect direct prohibitions on more serious conduct—such as violent crime and drug use[522]—that prophylactic justifications targeted circuitously.

A more interesting question arises with respect to conduct that engenders substantial disdain or disgust, but that less obviously *harms* third parties. Here, I am thinking particularly of public urination and defecation, along with public sex. Unlike other forms of crime among the unsheltered homeless, these activities may be thought of as intimately connected to the protected conduct of self-sheltering. Moreover, a robust theory of dignity grounded in moral philosophy would likely view such conduct as an inescapable component of public existence.[523] Nevertheless, I think there are legitimate doubts that dignity in the constitutional—rather than moral—sense extends to decriminalize these behaviors.

As noted earlier, there are at least nontrivial arguments for keeping human nudity and certain bodily activities from non-consenting viewers.[524] Public sex

519. Anya Zoledziowski, *Homeless People Have Nowhere to Go to the Bathroom Because of Coronavirus*, VICE (Apr. 8, 2020), https://www.vice.com/en/article/dygqna/homeless-people-have-next-to-zero-bathrooms-because-of-coronavirus [https://perma.cc/4GTU-Z2CV].

520. *See* Eisenstadt v. Baird, 405 U.S. 438, 447 n.7 (1972).

521. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 756–57 (1982).

522. Although drug use does not, alone, implicate third-party harms, some members of the Supreme Court have indicated that it is a sufficiently serious criminal matter to qualify as a "compelling" interest. *See* Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 904–05 (1990) (O'Connor, J., concurring). Individuals experiencing homelessness are often stigmatized as drug users, saddled with the unstated implication that drug use is a primary cause of their homelessness, a barrier to escaping homelessness, or both. *See, e.g.*, Melanie B. Abbott, *Homelessness and Substance Abuse: Is Mandatory Treatment the Solution?*, 22 FORDHAM URB. L.J. 1, 2 (1994). While homeless individuals experience drug and alcohol abuse at roughly twice the rate of housed individuals, *see* Rankin, *supra* note 7, at 105, it is the criminal response to drug use that most threatens the security of homeless drug users. An emerging consensus recognizes the failures of American drug policy. *see* GLENN GREENWALD, DRUG DECRIMINALIZATION IN PORTUGAL: LESSONS FOR CREATING FAIR & SUCCESSFUL DRUG POLICIES (2009), https://www.tni.org/files/publication-downloads/greenwald_whitepaper.pdf [https://perma.cc/VW4G-ACLN]; *see generally* GLOB. COMM'N ON DRUG POL'Y, TIME TO END PROHIBITION 7–11 (2021), https://www.globalcommissionondrugs.org/wp-content/uploads/2021/12/Time_to_end_prohibition_EN_2021_report.pdf [https://perma.cc/DF7R-43W7] (bolstering the consensus with the examples of countries that have decriminalized drug use).

523. *See, e.g.*, Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205, 234 (2020) ("In the United States, and much of the Western world, the ability to use the bathroom in private is synonymous with dignity.").

524. *See supra* notes 471–476, and accompanying text.

involves complicated questions about the line between immorality, offensiveness, and genuine harm.[525] Public urination and defecation raise additional questions about health and safety, in addition to offensiveness when observed.[526] "Exposure to urine and feces can result in . . . shigella, hepatitis, tapeworm, and hookworm."[527] These concerns may very well rise to the level of "compelling" in the due process analysis dictated by the Supreme Court's jurisprudence.[528]

Those who fear that the decriminalization of urban camping will necessitate tolerating increased crimes of violence, drug use, or acts of public indecency can therefore rest easy.[529] The recognition of a fundamental right to self-shelter will scarcely affect the plethora of criminal laws available to police the conduct of those existing in public. The cost of decriminalization, such as it is, may merely be the inability to use public existence as a catch-all proxy for other forms of crime that may be more difficult to police directly. It is the loss of prophylactic justifications and a public reckoning with our assumptions about the link between homelessness and deeper crime.

Lastly, and perhaps most troublingly, recognizing a negative right to shelter likely leaves unaffected the government's power to sweep, deconstruct, or relocate homeless encampments in furtherance of health and sanitation goals. Sweeps of this nature have long been part of communities' responses to the creation of homeless encampments.[530] Even where urban camping itself is tolerated, specific homeless encampments can interfere with essential rights of

525. *See* Strahilevitz, *supra* note 480, at 689–90; *see also* Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 13 (2008) ("[T]hose who do not want to observe the sex in question—individuals whom we can refer to as 'unwilling gazers'—have a legitimate interest in not having sex thrust upon them.").

526. *See* People v. McDonald, 40 Cal. Rptr. 3d 422, 434–35 (Cal. Ct. App. 2006) (discussing justifications for laws against public urination and defecation).

527. Hochbaum, *supra* note 523, at 236.

528. An interesting possibility is that such activities, while not decriminalized as a violation of Due Process, may be protected by the Eighth Amendment as involuntary incidents of the status of homelessness when inadequate public restrooms are provided by the state.

529. Meanwhile, those of us who fear that the policing of these crimes will continue to be disproportionately directed at homeless populations must embrace the reality that there will be more work to do to truly ensure the dignity of these populations.

530. *See, e.g.*, Kevin Bundy, *"Officer, Where's My Stuff?": The Constitutional Implications of a De Facto Property Disability for Homeless People*, 1 HASTINGS RACE & POVERTY L.J. 57, 59 (2003).

way,[531] pose threats to public health,[532] raise sanitation issues,[533] or otherwise contribute to public nuisance.[534]

Encampment sweeps motivated by these concerns are civil, rather than criminal, undertakings.[535]

> While there are specific quirks for each municipality, the general process is largely the same. A notice is posted nearby with an allotted time frame, usually three days or so, during which people need to vacate the area. (Sometimes notices don't appear at all.) At some point after that time elapses (if it's raining or if there is a protest, the sweep may be delayed a few days), a combination of police officers and sanitation workers invade. Police escort those living in the tents away, and may fence off the area. Once the area is "secure," sanitation workers begin throwing everything into the idling garbage truck.[536]

While they still must comport with the dictates of due process,[537] civil regulations in pursuit of health and sanitation arguably do not raise the specter of subordinating effects that animated the dignity-based analysis offered above.

To be sure, the effects of encampment sweeps can be truly devastating to those individuals affected.[538] "Instead of improving homelessness, sweeps destroy property and disrupt fragile communities, often leaving unsheltered people more likely to remain homeless."[539] And cities nationwide have

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531. *See* ANDRÉE TREMOULET, ELLEN BASSETT & ALLISON MOE, HOMELESS ENCAMPMENTS ON PUBLIC RIGHT-OF-WAY: A PLANNING AND BEST PRACTICES GUIDE (2012), https://ppms.trec.pdx.edu/media/137530914651f98d5a443e9.pdf [https://perma.cc/N9VB-Z3VB]; Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR (Jan. 10, 2020), https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues [https://perma.cc/TV98-T44K].

532. Elizabeth Chou, *LA Activists, Public Health Experts Fear Revived Encampment Sweeps Could Spread Coronavirus*, L.A. DAILY NEWS (Sept. 10, 2021), https://www.dailynews.com/2021/09/10/l-a-activists-public-health-experts-fear-revived-encampment-sweeps-could-spread-coronavirus/ [https://perma.cc/KD7Y-AJSS] (detailing the spread of COVID-19within homeless encampments).

533. Benjamin Oreskes & David Zahniser, *Minority of Sanitation Workers Report Being Vaccinated, Worrying Homeless Advocates*, L.A. TIMES (Sept. 30, 2021), https://www.latimes.com/homeless-housing/story/2021-09-30/la-doesnt-know-if-most-sanitation-works-are-vaccinated-but-theyre-still-cleaning-encampments [https://perma.cc/K9TQ-4MF5] (explaining the sanitation justification for encampment sweeps in Los Angeles).

534. Nadra Nittle, *Surprise Homeless Sweeps Aren't Just Disruptive, Say Activists—They Aren't Working*, CURBED L.A. (Apr. 26, 2019), https://la.curbed.com/2019/4/25/18516026/homeless-sweeps-encampments-clean-streets [https://perma.cc/7BSK-SQTV] (explaining that one justification for encampment sweeps in Los Angeles is to remove sidewalk obstructions in order to maintain compliance with the Americans with Disabilities Act).

535. Rankin, *supra* note 98, at 590–91 ("By justifying sweeps as necessary for public health or safety, cities attempt to distinguish such practices from the criminal punishment *Martin* rejects.").

536. Paulas, *supra* note 319.

537. Cities, however, should be mindful that encampment sweeps may arguably violate due process to the extent that they put homeless individuals at increased risk of danger, such as from extreme weather conditions. *See* Sanchez v. City of Fresno, 914 F. Supp. 2d 1079, 1102 (E.D. Cal. 2012).

538. Rankin, *supra* note 98, at 593–94.

539. *Id.* at 594.

increasingly come under scrutiny for the arbitrary manners in which such sweeps are sometimes affected.[540] I therefore worry deeply about the pervasive abuse of sanitation sweeps to needlessly disrupt homeless communities following the recognition of a negative right to shelter.

But there are also real health and safety concerns at the heart of many sweeps. When these interests genuinely motivate encampment sweeps—rather than pretextually provide cover for sweeps in service of other interests, such as aesthetic concerns or housed citizen satisfaction[541]—those sweeps at least arguably comport with the due process requirement that they be narrowly tailored to serve a compelling government interest. While we must be sensitive to the many constraints and challenges facing our homeless neighbors, I admit to finding satisfying the symmetry between a negative right to shelter, on the one hand, and a corresponding responsibility to conduct one's public affairs in a dignified manner, on the other. The right to exist in public spaces is an essential component of personhood. But it is not—indeed, cannot be—untethered from our responsibilities as citizens to care for ourselves and others within our communities. The three options just discussed, while each prone to excesses that must be jealously guarded against, in theory comprise an obligation that those who exercise a negative right to shelter do so in a reasonably controlled manner: in appropriate locations, free from crime, and in as safe and sanitary a manner as available constraints allow.

CONCLUSION

For over forty years, advocates have responded to the criminalization of homelessness by calling for a "right to shelter." But these calls have been about the wrong right to shelter. Attempts to frame shelter as a positive right—an enforceable entitlement to have the government provide or fund a temporary shelter bed for every homeless individual—have largely floundered. Moreover, the prominence of this right-to-shelter rhetoric in the discourse surrounding homelessness has had pernicious consequences, eliding weaknesses in shelter offerings and reifying temporary emergency offerings as the solution to a truly intractable problem.

This Article takes a different tack. It has articulated and defended a negative right to shelter as a fundamental right to shelter oneself free from government interference, especially criminalization. This new right to shelter emerges from

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540. *See, e.g.*, Jessica Boehm, *Homeless Encampment Cleanups in DOJ Probe Were Unanimously Approved by Phoenix City Council*, AZ CENTRAL (Sept. 8, 2021), https://www.azcentral.com/story/news/local/phoenix/2021/09/08/phoenix-doj-investigation-homeless-camp-cleanups-were-unanimously-approved/5572425001 [https://perma.cc/FV7S-DTKB] (detailing a Department of Justice investigation into Phoenix encampment sweeps); Paulas, *supra* note 319 (noting a class action lawsuit challenging Los Angeles sweeps).

541. *See* Foscarinis et al., *supra* note 96, at 156 ("Government policies that attempt to 'sweep' homeless people from public areas are quick-fix measures offered by politicians in response to pressure from a vocal minority of businesses or residents to 'do something' about homelessness.").

our constitutional due process jurisprudence premised on maintaining and defending human dignity. To be clear, I have little hope that the Supreme Court, as currently constituted, would have an appetite for recognizing a negative right to shelter. But I think that a faithful adherence to existing precedent—and, in particular, to the potential for *Lawrence v. Texas* to have applications beyond the realms of sex and sexuality—reveals a path to identifying such a negative right that may hold sway in lower courts. Substantive due process has long protected the human capacity for self-determination while rejecting group-based subordination enshrined through criminalization.

Respect for homeless individuals as persons ought to require us to defer to their intimate personal choices about how best to live life in the face of overwhelming constraints. This means learning to confront, rather than hide, the realities of visible poverty. It means protecting the decisions of those homeless individuals who rationally prefer to undertake self-sheltering activities—from the use of blankets or bedding to the erection of temporary encampments in public spaces—from the threat of criminalization. True decriminalization would ensure that homeless individuals have the freedom to choose where and how to find shelter, to protect themselves and their property, and to build meaningful connections with one another.