THE CRIMINALIZATION OF HOMELESSNESS

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PROFESSOR STEPHEN J. SCHNABLY
http://osaka.law.miami.edu/~schnably/HomelessnessSeminarSyllabus.html
E-mail: *schnably@law.miami.edu*

Office: G472
Tel.: 305-284-4817

READINGS, Parts I, II, III & IV

Part I

Part II

ROBINSON *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, LOS ANGELES COUNTY.

No. 554. Argued April 17, 1962.—Decided June 25, 1962.

A California statute makes it a misdemeanor punishable by imprisonment for any person to "be addicted to the use of narcotics," and, in sustaining petitioner's conviction thereunder, the California courts construed the statute as making the "status" of narcotic addiction a criminal offense for which the offender may be prosecuted "at any time before he reforms," even though he has never used or possessed any narcotics within the State and has not been guilty of any antisocial behavior there. *Held:* As so construed and applied, the statute inflicts a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. Pp. 660–668.

Reversed.

Samuel Carter McMorris argued the cause and filed briefs for appellant.

William E. Doran argued the cause for appellee. With him on the brief were *Roger Arnebergh* and *Philip E. Grey.*

MR. JUSTICE STEWART delivered the opinion of the Court.

A California statute makes it a criminal offense for a person to "be addicted to the use of narcotics." [1] This

[1] The statute is § 11721 of the California Health and Safety Code. It provides:

"No person shall use, or be under the influence of, or be addicted to the use of narcotics, excepting when administered by or under the direction of a person licensed by the State to prescribe and administer narcotics. It shall be the burden of the defense to show that it comes within the exception. Any person convicted of violating any provision of this section is guilty of a misdemeanor and shall be sentenced

appeal draws into question the constitutionality of that provision of the state law, as construed by the California courts in the present case.

The appellant was convicted after a jury trial in the Municipal Court of Los Angeles. The evidence against him was given by two Los Angeles police officers. Officer Brown testified that he had had occasion to examine the appellant's arms one evening on a street in Los Angeles some four months before the trial.[2] The officer testified that at that time he had observed "scar tissue and discoloration on the inside" of the appellant's right arm, and "what appeared to be numerous needle marks and a scab which was approximately three inches below the crook of the elbow" on the appellant's left arm. The officer also testified that the appellant under questioning had admitted to the occasional use of narcotics.

Officer Lindquist testified that he had examined the appellant the following morning in the Central Jail in Los Angeles. The officer stated that at that time he had observed discolorations and scabs on the appellant's arms,

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to serve a term of not less than 90 days nor more than one year in the county jail. The court may place a person convicted hereunder on probation for a period not to exceed five years and shall in all cases in which probation is granted require as a condition thereof that such person be confined in the county jail for at least 90 days. In no event does the court have the power to absolve a person who violates this section from the obligation of spending at least 90 days in confinement in the county jail."

[2] At the trial the appellant, claiming that he had been the victim of an unconstitutional search and seizure, unsuccessfully objected to the admission of Officer Brown's testimony. That claim is also pressed here, but since we do not reach it there is no need to detail the circumstances which led to Officer Brown's examination of the appellant's person. Suffice it to say, that at the time the police first accosted the appellant, he was not engaging in illegal or irregular conduct of any kind, and the police had no reason to believe he had done so in the past.

and he identified photographs which had been taken of the appellant's arms shortly after his arrest the night before. Based upon more than ten years of experience as a member of the Narcotic Division of the Los Angeles Police Department, the witness gave his opinion that "these marks and the discoloration were the result of the injection of hypodermic needles into the tissue into the vein that was not sterile." He stated that the scabs were several days old at the time of his examination, and that the appellant was neither under the influence of narcotics nor suffering withdrawal symptoms at the time he saw him. This witness also testified that the appellant had admitted using narcotics in the past.

The appellant testified in his own behalf, denying the alleged conversations with the police officers and denying that he had ever used narcotics or been addicted to their use. He explained the marks on his arms as resulting from an allergic condition contracted during his military service. His testimony was corroborated by two witnesses.

The trial judge instructed the jury that the statute made it a misdemeanor for a person "either to use narcotics, or to be addicted to the use of narcotics . . . .[3] That portion of the statute referring to the 'use' of narcotics is based upon the 'act' of using. That portion of the statute referring to 'addicted to the use' of narcotics is based upon a condition or status. They are not identical. . . . To be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is

[3] The judge did not instruct the jury as to the meaning of the term "under the influence of" narcotics, having previously ruled that there was no evidence of a violation of that provision of the statute. See note 1, *supra*.

chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms. The existence of such a chronic condition may be ascertained from a single examination, if the characteristic reactions of that condition be found present."

The judge further instructed the jury that the appellant could be convicted under a general verdict if the jury agreed *either* that he was of the "status" *or* had committed the "act" denounced by the statute.[4] "All that the People must show is either that the defendant did use a narcotic in Los Angeles County, or that while in the City of Los Angeles he was addicted to the use of narcotics . . . ." [5]

Under these instructions the jury returned a verdict finding the appellant "guilty of the offense charged."

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[4] "Where a statute such as that which defines the crime charged in this case denounces an act and a status or condition, either of which separately as well as collectively, constitute the criminal offense charged, an accusatory pleading which accuses the defendant of having committed the act and of being of the status or condition so denounced by the statute, is deemed supported if the proof shows that the defendant is guilty of any one or more of the offenses thus specified. However, it is important for you to keep in mind that, in order to convict a defendant in such a case, it is necessary that all of you agree as to the same particular act or status or condition found to have been committed or found to exist. It is not necessary that the particular act or status or condition so agreed upon be stated in the verdict."

[5] The instructions continued "and it is then up to the defendant to prove that the use, or of being addicted to the use of narcotics was administered by or under the direction of a person licensed by the State of California to prescribe and administer narcotics or at least to raise a reasonable doubt concerning the matter." No evidence, of course, had been offered in support of this affirmative defense, since the appellant had denied that he had used narcotics or been addicted to their use.

An appeal was taken to the Appellate Department of the Los Angeles County Superior Court, "the highest court of a State in which a decision could be had" in this case. 28 U. S. C. § 1257. See *Smith* v. *California,* 361 U. S. 147, 149; *Edwards* v. *California,* 314 U. S. 160, 171. Although expressing some doubt as to the constitutionality of "the crime of being a narcotic addict," the reviewing court in an unreported opinion affirmed the judgment of conviction, citing two of its own previous unreported decisions which had upheld the constitutionality of the statute.[6] We noted probable jurisdiction of this appeal, 368 U. S. 918, because it squarely presents the issue whether the statute as construed by the California courts in this case is repugnant to the Fourteenth Amendment of the Constitution.

The broad power of a State to regulate the narcotic drugs traffic within its borders is not here in issue. More than forty years ago, in *Whipple* v. *Martinson,* 256 U. S. 41, this Court explicitly recognized the validity of that power: "There can be no question of the authority of the State in the exercise of its police power to regulate the administration, sale, prescription and use of dangerous and habit-forming drugs . . . . The right to exercise this power is so manifest in the interest of the public health and welfare, that it is unnecessary to enter upon a discussion of it beyond saying that it is too firmly established to be successfully called in question." 256 U. S., at 45.

Such regulation, it can be assumed, could take a variety of valid forms. A State might impose criminal sanctions, for example, against the unauthorized manufacture, prescription, sale, purchase, or possession of narcotics within its borders. In the interest of discouraging the viola-

[6] The appellant tried unsuccessfully to secure habeas corpus relief in the District Court of Appeal and the California Supreme Court.

tion of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics.[7] Such a program of treatment might require periods of involuntary confinement. And penal sanctions might be imposed for failure to comply with established compulsory treatment procedures. Cf. *Jacobson* v. *Massachusetts,* 197 U. S. 11. Or a State might choose to attack the evils of narcotics traffic on broader fronts also—through public health education, for example, or by efforts to ameliorate the economic and social conditions under which those evils might be thought to flourish. In short, the range of valid choice which a State might make in this area is undoubtedly a wide one, and the wisdom of any particular choice within the allowable spectrum is not for us to decide. Upon that premise we turn to the California law in issue here.

It would be possible to construe the statute under which the appellant was convicted as one which is operative only upon proof of the actual use of narcotics within the State's jurisdiction. But the California courts have not so construed this law. Although there was evidence in the present case that the appellant had used narcotics in Los Angeles, the jury were instructed that they could convict him even if they disbelieved that evidence. The appellant could be convicted, they were told, if they found simply that the appellant's "status" or "chronic condition" was that of being "addicted to the use of narcotics." And it is impossible to know from the jury's verdict that the defendant was not convicted upon precisely such a finding.

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[7] California appears to have established just such a program in §§ 5350–5361 of its Welfare and Institutions Code. The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.

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The instructions of the trial court, implicitly approved on appeal, amounted to "a ruling on a question of state law that is as binding on us as though the precise words had been written" into the statute. *Terminiello* v. *Chicago,* 337 U. S. 1, 4. "We can only take the statute as the state courts read it." *Id.,* at 6. Indeed, in their brief in this Court counsel for the State have emphasized that it is "the proof of addiction by circumstantial evidence . . . by the tell-tale track of needle marks and scabs over the veins of his arms, that remains the gist of the section."

This statute, therefore, is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the "status" of narcotic addiction a criminal offense, for which the offender may be prosecuted "at any time before he reforms." California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there.

It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. See *Francis* v. *Resweber,* 329 U. S. 459.

We cannot but consider the statute before us as of the same category. In this Court counsel for the State recognized that narcotic addiction is an illness.[8] Indeed, it is apparently an illness which may be contracted innocently or involuntarily.[9] We hold that a state law which imprisons a person thus afflicted as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment. To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

We are not unmindful that the vicious evils of the narcotics traffic have occasioned the grave concern of government. There are, as we have said, countless fronts on

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[8] In its brief the appellee stated: "Of course it is generally conceded that a narcotic addict, particularly one addicted to the use of heroin, is in a state of mental and physical illness. So is an alcoholic." Thirty-seven years ago this Court recognized that persons addicted to narcotics "are diseased and proper subjects for [medical] treatment." *Linder* v. *United States*, 268 U. S. 5, 18.

[9] Not only may addiction innocently result from the use of medically prescribed narcotics, but a person may even be a narcotics addict from the moment of his birth. See Schneck, Narcotic Withdrawal Symptoms in the Newborn Infant Resulting from Maternal Addiction, 52 Journal of Pediatrics 584 (1958); Roman and Middelkamp, Narcotic Addiction in a Newborn Infant, 53 Journal of Pediatrics 231 (1958); Kunstadter, Klein, Lundeen, Witz, and Morrison, Narcotic Withdrawal Symptoms in Newborn Infants, 168 Journal of the American Medical Association 1008 (1958); Slobody and Cobrinik, Neonatal Narcotic Addiction, 14 Quarterly Review of Pediatrics 169 (1959); Vincow and Hackel, Neonatal Narcotic Addiction, 22 General Practitioner 90 (1960); Dikshit, Narcotic Withdrawal Syndrome in Newborns, 28 Indian Journal of Pediatrics 11 (1961).

which those evils may be legitimately attacked. We deal in this case only with an individual provision of a particularized local law as it has so far been interpreted by the California courts.

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, concurring.

While I join the Court's opinion, I wish to make more explicit the reasons why I think it is "cruel and unusual" punishment in the sense of the Eighth Amendment to treat as a criminal a person who is a drug addict.

In Sixteenth Century England one prescription for insanity was to beat the subject "until he had regained his reason." Deutsch, The Mentally Ill in America (1937), p. 13. In America "the violently insane went to the whipping post and into prison dungeons or, as sometimes happened, were burned at the stake or hanged"; and "the pauper insane often roamed the countryside as wild men and from time to time were pilloried, whipped, and jailed." Action for Mental Health (1961), p. 26.

As stated by Dr. Isaac Ray many years ago:

> "Nothing can more strongly illustrate the popular ignorance respecting insanity than the proposition, equally objectionable in its humanity and its logic, that the insane should be punished for criminal acts, in order to deter other insane persons from doing the same thing." Treatise on the Medical Jurisprudence of Insanity (5th ed. 1871), p. 56.

Today we have our differences over the legal definition of insanity. But however insanity is defined, it is in end effect treated as a disease. While afflicted people

may be confined either for treatment or for the protection of society, they are not branded as criminals.

Yet terror and punishment linger on as means of dealing with some diseases. As recently stated:

> ". . . the idea of basing treatment for disease on purgatorial acts and ordeals is an ancient one in medicine. It may trace back to the Old Testament belief that disease of any kind, whether mental or physical, represented punishment for sin; and thus relief could take the form of a final heroic act of atonement. This superstition appears to have given support to fallacious medical rationales for such procedures as purging, bleeding, induced vomiting, and blistering, as well as an entire chamber of horrors constituting the early treatment of mental illness. The latter included a wide assortment of shock techniques, such as the 'water cures' (dousing, ducking, and near-drowning), spinning in a chair, centrifugal swinging, and an early form of electric shock. All, it would appear, were planned as means of driving from the body some evil spirit or toxic vapor." Action for Mental Health (1961), pp. 27–28.

That approach continues as respects drug addicts. Drug addiction is more prevalent in this country than in any other nation of the western world.[1] S. Rep. No. 1440, 84th Cong., 2d Sess., p. 2. It is sometimes referred to as "a contagious disease." *Id.*, at p. 3. But those living in a world of black and white put the addict in the cate-

[1] Drug Addiction: Crime or Disease? (1961), p. XIV. ". . . even if one accepts the lowest estimates of the number of addicts in this country there would still be more here than in all the countries of Europe combined. Chicago and New York City, with a combined population of about 11 million or one-fifth that of Britain, are ordinarily estimated to have about 30,000 addicts, which is from thirty to fifty times as many as there are said to be in Britain."

gory of those who could, if they would, forsake their evil ways.

The first step toward addiction may be as innocent as a boy's puff on a cigarette in an alleyway. It may come from medical prescriptions. Addiction may even be present at birth. Earl Ubell recently wrote:

> "In Bellevue Hospital's nurseries, Dr. Saul Krugman, head of pediatrics, has been discovering babies minutes old who are heroin addicts.
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> "More than 100 such infants have turned up in the last two years, and they show all the signs of drug withdrawal: irritability, jitters, loss of appetite, vomiting, diarrhea, sometimes convulsions and death.
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> " 'Of course, they get the drug while in the womb from their mothers who are addicts,' Dr. Krugman said yesterday when the situation came to light. 'We control the symptoms with Thorazine, a tranquilizing drug.
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> " 'You should see some of these children. They have a high-pitched cry. They appear hungry but they won't eat when offered food. They move around so much in the crib that their noses and toes become red and excoriated.'
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> "Dr. Lewis Thomas, professor of medicine at New York University-Bellevue, brought up the problem of the babies Monday night at a symposium on narcotics addiction sponsored by the New York County Medical Society. He saw in the way the babies respond to treatment a clue to the low rate of cure of addiction.
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> " 'Unlike the adult addict who gets over his symptoms of withdrawal in a matter of days, in most cases,' Dr. Thomas explained later, 'the infant has to be treated for weeks and months. The baby continues to show physical signs of the action of the drugs.

> " 'Perhaps in adults the drugs continue to have physical effects for a much longer time after withdrawal than we have been accustomed to recognize. That would mean that these people have a physical need for the drug for a long period, and this may be the clue to recidivism much more than the social or psychological pressures we've been talking about.' " N. Y. Herald Tribune, Apr. 25, 1962, p. 25, cols. 3–4.

The addict is under compulsions not capable of management without outside help. As stated by the Council on Mental Health:

> "Physical dependence is defined as the development of an altered physiological state which is brought about by the repeated administration of the drug and which necessitates continued administration of the drug to prevent the appearance of the characteristic illness which is termed an abstinence syndrome. When an addict says that he has a habit, he means that he is physically dependent on a drug. When he says that one drug is habit-forming and another is not, he means that the first drug is one on which physical dependence can be developed and that the second is a drug on which physical dependence cannot be developed. Physical dependence is a real physiological disturbance. It is associated with the development of hyperexcitability in reflexes mediated through multineurone arcs. It can be induced in animals, it has been shown to occur in the paralyzed hind limbs of addicted chronic spinal dogs, and also has been produced in dogs whose cerebral cortex has been removed." Report on Narcotic Addiction, 165 A. M. A. J. 1707, 1713.

Some say the addict has a disease. See Hesse, Narcotics and Drug Addiction (1946), p. 40 *et seq.*

Others say addiction is not a disease but "a symptom of a mental or psychiatric disorder." H. R. Rep. No. 2388, 84th Cong., 2d Sess., p. 8. And see Present Status of Narcotic Addiction, 138 A. M. A. J. 1019, 1026; Narcotic Addiction, Report to Attorney General Brown by Citizens Advisory Committee to the Attorney General on Crime Prevention (1954), p. 12; Finestone, Narcotics and Criminality, 22 Law & Contemp. Prob. 69, 83–85 (1957).

The extreme symptoms of addiction have been described as follows:

> "To be a confirmed drug addict is to be one of the walking dead . . . . The teeth have rotted out; the appetite is lost and the stomach and intestines don't function properly. The gall bladder becomes inflamed; eyes and skin turn a billious yellow. In some cases membranes of the nose turn a flaming red; the partition separating the nostrils is eaten away—breathing is difficult. Oxygen in the blood decreases; bronchitis and tuberculosis develop. Good traits of character disappear and bad ones emerge. Sex organs become affected. Veins collapse and livid purplish scars remain. Boils and abscesses plague the skin; gnawing pain racks the body. Nerves snap; vicious twitching develops. Imaginary and fantastic fears blight the mind and sometimes complete insanity results. Often times, too, death comes—much too early in life . . . . Such is the torment of being a drug addict; such is the plague of being one of the walking dead." N. Y. L. J., June 8, 1960, p. 4, col. 2.

Some States punish addiction, though most do not. See S. Doc. No. 120, 84th Cong., 2d Sess., pp. 41, 42. Nor does the Uniform Narcotic Drug Act, first approved in 1932 and now in effect in most of the States. Great Britain, beginning in 1920 placed "addiction and the

treatment of addicts squarely and exclusively into the hands of the medical profession." Lindesmith, The British System of Narcotics Control, 22 Law & Contemp. Prob. 138 (1957). In England the doctor "has almost complete professional autonomy in reaching decisions about the treatment of addicts." Schur, British Narcotics Policies, 51 J. Crim. L. & Criminology 619, 621 (1961). Under British law "addicts are patients, not criminals." *Ibid.* Addicts have not disappeared in England but they have decreased in number (*id.*, at 622) and there is now little "addict-crime" there. *Id.*, at 623.

The fact that England treats the addict as a sick person, while a few of our States, including California, treat him as a criminal, does not, of course, establish the unconstitutionality of California's penal law. But we do know that there is "a hard core" of "chronic and incurable drug addicts who, in reality, have lost their power of self-control." S. Rep. No. 2033, 84th Cong., 2d Sess., p. 8. There has been a controversy over the type of treatment—whether enforced hospitalization or ambulatory care is better. H. R. Rep. No. 2388, 84th Cong., 2d Sess., pp. 66–68. But there is little disagreement with the statement of Charles Winick: "The hold of drugs on persons addicted to them is so great that it would be almost appropriate to reverse the old adage and say that opium derivatives represent the religion of the people who use them." Narcotics Addiction and its Treatment, 22 Law & Contemp. Prob. 9 (1957). The abstinence symptoms and their treatment are well known. *Id.*, at 10–11. Cure is difficult because of the complex of forces that make for addiction. *Id.*, at 18–23. "After the withdrawal period, vocational activities, recreation, and some kind of psychotherapy have a major role in the treatment program, which ideally lasts from four to six months." *Id.*, at 23–24. Dr. Marie Nyswander tells us that normally a drug addict

must be hospitalized in order to be cured. The Drug Addict as a Patient (1956), p. 138.

The impact that an addict has on a community causes alarm and often leads to punitive measures. Those measures are justified when they relate to acts of transgression. But I do not see how under our system *being an addict* can be punished as a crime. If addicts can be punished for their addiction, then the insane can also be punished for their insanity. Each has a disease and each must be treated as a sick person.[2] As Charles Winick has said:

> "There can be no single program for the elimination of an illness as complex as drug addiction, which

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[2] "The sick addict must be quarantined until cured, and then carefully watched until fully rehabilitated to a life of normalcy." Narcotics, N. Y. Leg. Doc. No. 27 (1952), p. 116. And see the report of Judge Morris Ploscowe printed as Appendix A, Drug Addiction: Crime or Disease? (1961), pp. 18, 19–20, 21.

"These predilections for stringent law enforcement and severer penalties as answers to the problems of drug addiction reflect the philosophy and the teachings of the Bureau of Narcotics. For years the Bureau has supported the doctrine that if penalties for narcotic drug violations were severe enough and if they could be enforced strictly enough, drug addiction and the drug traffic would largely disappear from the American scene. This approach to problems of narcotics has resulted in spectacular modifications of our narcotic drug laws on both the state and federal level. . . .

. . . . . .

"Stringent law enforcement has its place in any system of controlling narcotic drugs. However, it is by no means the complete answer to American problems of drug addiction. In the first place it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences. The belief that fear of punishment is a vital factor in deterring an addict from using drugs rests upon a superficial view of the drug addiction process and the nature of drug addiction. . . .

". . . The very severity of law enforcement tends to increase the price of drugs on the illicit market and the profits to be made therefrom. The lure of profits and the risks of the traffic simply challenge the

> carries so much emotional freight in the community. Cooperative interdisciplinary research and action, more local community participation, training the various healing professions in the techniques of dealing with addicts, regional treatment facilities, demonstration centers, and a thorough and vigorous post-treatment rehabilitation program would certainly appear to be among the minimum requirements for any attempt to come to terms with this problem. The addict should be viewed as a sick person, with a chronic disease which requires almost emergency action." 22 Law & Contemp. Prob. 9, 33 (1957).

The Council on Mental Health reports that criminal sentences for addicts interferes "with the possible treatment and rehabilitation of addicts and therefore should be abolished." 165 A. M. A. J. 1968, 1972.

The command of the Eighth Amendment, banning "cruel and unusual punishments," stems from the Bill of Rights of 1688. See *Francis* v. *Resweber,* 329 U. S. 459, 463. And it is applicable to the States by reason of the Due Process Clause of the Fourteenth Amendment. *Ibid.*

The historic punishments that were cruel and unusual included "burning at the stake, crucifixion, breaking on the wheel" (*In re Kemmler,* 136 U. S. 436, 446), quartering, the rack and thumbscrew (see *Chambers* v. *Florida,* 309 U. S. 227, 237), and in some circumstances even solitary confinement (see *Medley,* 134 U. S. 160, 167–168).

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ingenuity of the underworld peddlers to find new channels of distribution and new customers, so that profits can be maintained despite the risks involved. So long as a non-addict peddler is willing to take the risk of serving as a wholesaler of drugs, he can always find addict pushers or peddlers to handle the retail aspects of the business in return for a supply of the drugs for themselves. Thus, it is the belief of the author of this report that no matter how severe law enforcement may be, the drug traffic cannot be eliminated under present prohibitory repressive statutes."

The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present.[3] A punishment out of all proportion to the offense may bring it within the ban against "cruel and unusual punishments." See *O'Neil* v. *Vermont,* 144 U. S. 323, 331. So may the cruelty of the method of punishment, as, for example, disemboweling a person alive. See *Wilkerson* v. *Utah,* 99 U. S. 130, 135. But the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

The Eighth Amendment expresses the revulsion of civilized man against barbarous acts—the "cry of horror" against man's inhumanity to his fellow man. See *O'Neil* v. *Vermont, supra,* at 340 (dissenting opinion); *Francis* v. *Resweber, supra,* at 473 (dissenting opinion).

By the time of Coke, enlightenment was coming as respects the insane. Coke said that the execution of a madman "should be a miserable spectacle, both against law, and of extreame inhumanity and cruelty, and can be no example to others." 6 Coke's Third Inst. (4th ed. 1797), p. 6. Blackstone endorsed this view of Coke. 4 Commentaries (Lewis ed. 1897), p. 25.

We should show the same discernment respecting drug addiction. The addict is a sick person. He may, of course, be confined for treatment or for the protection of society.[4] Cruel and unusual punishment results not from confinement, but from convicting the addict of a crime. The purpose of § 11721 is not to cure, but to penalize.

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[3] See 3 Catholic U. L. Rev. 117 (1953); 31 Marq. L. Rev. 108 (1947); 22 St. John's L. Rev. 270 (1948); 2 Stan. L. Rev. 174 (1949); 33 Va. L. Rev. 348 (1947); 21 Tul. L. Rev. 480 (1947); 1960 Wash. U. L. Q., p. 160.

[4] As to the insane, see *Lynch* v. *Overholser,* 369 U. S. 705; note, 1 L. R. A. (N. S.), p. 540 *et seq.*

Were the purpose to cure, there would be no need for a mandatory jail term of not less than 90 days. Contrary to my Brother CLARK, I think the means must stand constitutional scrutiny, as well as the end to be achieved. A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well. Indeed, in § 5350 of the Welfare and Institutions Code, California has expressly provided for civil proceedings for the commitment of habitual addicts. Section 11721 is, in reality, a direct attempt to punish those the State cannot commit civilly.[5] This prosecution has no relationship to the curing

[5] The difference between § 5350 and § 11721 is that the former aims at treatment of the addiction, whereas § 11721 does not. The latter cannot be construed to provide treatment, unless jail sentences, without more, are suddenly to become medicinal. A comparison of the lengths of confinement under the two sections is irrelevant, for it is the purpose of the confinement that must be measured against the constitutional prohibition of cruel and unusual punishments.

Health and Safety Code § 11391, to be sure, indicates that perhaps some form of treatment may be given an addict convicted under § 11721. Section 11391, so far as here relevant, provides:

"No person shall treat an addict for addiction except in one of the following:

"(a) An institution approved by the Board of Medical Examiners, and where the patient is at all times kept under restraint and control.

"(b) A *city or county jail.*

"(c) A state prison.

"(d) A state narcotic hospital.

"(e) A state hospital.

"(f) A county hospital.

"This section does not apply during emergency treatment or where the patient's addiction is complicated by the presence of incurable disease, serious accident, or injury, or the infirmities of old age." (Emphasis supplied.)

Section 11391 does not state that any treatment is required for either part or the whole of the mandatory 90-day prison term imposed by § 11721. Should the necessity for treatment end before the 90-day

of an illness. Indeed, it cannot, for the prosecution is aimed at penalizing an illness, rather than at providing medical care for it. We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action.

MR. JUSTICE HARLAN, concurring.

I am not prepared to hold that on the present state of medical knowledge it is completely irrational and hence unconstitutional for a State to conclude that narcotics addiction is something other than an illness nor that it amounts to cruel and unusual punishment for the State to subject narcotics addicts to its criminal law. Insofar as addiction may be identified with the use or possession of narcotics within the State (or, I would suppose, without the State), in violation of local statutes prohibiting such acts, it may surely be reached by the State's criminal law. But in this case the trial court's instructions permitted the jury to find the appellant guilty on no more proof than that he was present in California while he was addicted to narcotics.* Since addiction alone cannot

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term is concluded, or should no treatment be given, the addict clearly would be undergoing punishment for an illness. Therefore, reference to § 11391 will not solve or alleviate the problem of cruel and unusual punishment presented by this case.

*The jury was instructed that "it is not incumbent upon the People to prove the unlawfulness of defendant's use of narcotics. All that the People must show is *either* that the defendant did use a narcotic in Los Angeles County, *or* that while in the City of Los Angeles he was addicted to the use of narcotics." (Emphasis added.) Although the jury was told that it should acquit if the appellant proved that his "being addicted to the use of narcotics was administered [*sic*] by or under the direction of a person licensed by the State of California to prescribe and administer narcotics," this part of the instruction did not cover other possible lawful uses which could have produced the appellant's addiction.

reasonably be thought to amount to more than a compelling propensity to use narcotics, the effect of this instruction was to authorize criminal punishment for a bare desire to commit a criminal act.

If the California statute reaches this type of conduct, and for present purposes we must accept the trial court's construction as binding, *Terminiello* v. *Chicago,* 337 U. S. 1, 4, it is an arbitrary imposition which exceeds the power that a State may exercise in enacting its criminal law. Accordingly, I agree that the application of the California statute was unconstitutional in this case and join the judgment of reversal.

MR. JUSTICE CLARK, dissenting.

The Court finds § 11721 of California's Health and Safety Code, making it an offense to "be addicted to the use of narcotics," violative of due process as "a cruel and unusual punishment." I cannot agree.

The statute must first be placed in perspective. California has a comprehensive and enlightened program for the control of narcotism based on the overriding policy of prevention and cure. It is the product of an extensive investigation made in the mid-Fifties by a committee of distinguished scientists, doctors, law enforcement officers and laymen appointed by the then Attorney General, now Governor, of California. The committee filed a detailed study entitled "Report on Narcotic Addiction" which was given considerable attention. No recommendation was made therein for the repeal of § 11721, and the State Legislature in its discretion continued the policy of that section.

Apart from prohibiting specific acts such as the purchase, possession and sale of narcotics, California has taken certain legislative steps in regard to the status of being a narcotic addict—a condition commonly recognized as a threat to the State and to the individual. The

Code deals with this problem in realistic stages. At its incipiency narcotic addiction is handled under § 11721 of the Health and Safety Code which is at issue here. It provides that a person found to be addicted to the use of narcotics shall serve a term in the county jail of not less than 90 days nor more than one year, with the minimum 90-day confinement applying in all cases without exception. Provision is made for parole with periodic tests to detect readdiction.

The trial court defined "addicted to narcotics" as used in § 11721 in the following charge to the jury:

> "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. Does he use them habitually. To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

There was no suggestion that the term "narcotic addict" as here used included a person who acted without volition or who had lost the power of self-control. Although the section is penal in appearance—perhaps a carry-over from a less sophisticated approach—its present provisions are quite similar to those for civil commitment and treatment of addicts who have lost the power of self-control, and its present purpose is reflected in a statement which closely follows § 11721: "The rehabilitation of narcotic addicts and the prevention of continued addiction to narcotics is a matter of statewide concern." California Health and Safety Code § 11728.

Where narcotic addiction has progressed beyond the incipient, volitional stage, California provides for commitment of three months to two years in a state hospital.

California Welfare and Institutions Code § 5355. For the purposes of this provision, a narcotic addict is defined as

> "any person who habitually takes or otherwise uses *to the extent of having lost the power of self-control* any opium, morphine, cocaine, or other narcotic drug as defined in Article 1 of Chapter 1 of Division 10 of the Health and Safety Code." California Welfare and Institutions Code § 5350. (Emphasis supplied.)

This proceeding is clearly civil in nature with a purpose of rehabilitation and cure. Significantly, if it is found that a person committed under § 5355 will not receive substantial benefit from further hospital treatment and is not dangerous to society, he may be discharged—but only after a minimum confinement of three months. § 5355.1.

Thus, the "criminal" provision applies to the incipient narcotic addict who retains self-control, requiring confinement of three months to one year and parole with frequent tests to detect renewed use of drugs. Its overriding purpose is to cure the less seriously addicted person by preventing further use. On the other hand, the "civil" commitment provision deals with addicts who have lost the power of self-control, requiring hospitalization up to two years. Each deals with a different type of addict but with a common purpose. This is most apparent when the sections overlap: if after civil commitment of an addict it is found that hospital treatment will not be helpful, the addict is confined for a minimum period of three months in the same manner as is the volitional addict under the "criminal" provision.

In the instant case the proceedings against the petitioner were brought under the volitional-addict section. There was testimony that he had been using drugs only four months with three to four relatively mild doses a

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week. At arrest and trial he appeared normal. His testimony was clear and concise, being simply that he had never used drugs. The scabs and pocks on his arms and body were caused, he said, by "overseas shots" administered during army service preparatory to foreign assignment. He was very articulate in his testimony but the jury did not believe him, apparently because he had told the clinical expert while being examined after arrest that he had been using drugs, as I have stated above. The officer who arrested him also testified to like statements and to scabs—some 10 or 15 days old—showing narcotic injections. There was no evidence in the record of withdrawal symptoms. Obviously he could not have been committed under § 5355 as one who had completely "lost the power of self-control." The jury was instructed that narcotic "addiction" as used in § 11721 meant strongly disposed to a taste or practice or habit of its use, indicated by the use of narcotics often or daily. A general verdict was returned against petitioner, and he was ordered confined for 90 days to be followed by a two-year parole during which he was required to take periodic Nalline tests.

The majority strikes down the conviction primarily on the grounds that petitioner was denied due process by the imposition of criminal penalties for nothing more than being in a status. This viewpoint is premised upon the theme that § 11721 is a "criminal" provision authorizing a punishment, for the majority admits that "a State might establish a program of compulsory treatment for those addicted to narcotics" which "might require periods of involuntary confinement." I submit that California has done exactly that. The majority's error is in instructing the California Legislature that hospitalization is the *only treatment* for narcotics addiction—that anything less is a punishment denying due process. California has found otherwise after a study which I suggest was more extensive than that conducted by the Court.

Even in California's program for hospital commitment of nonvolitional narcotic addicts—which the majority approves—it is recognized that some addicts will not respond to or do not need hospital treatment. As to these persons its provisions are identical to those of § 11721—confinement for a period of not less than 90 days. Section 11721 provides this confinement as treatment for the volitional addicts to whom its provisions apply, in addition to parole with frequent tests to detect and prevent further use of drugs. The fact that § 11721 might be labeled "criminal" seems irrelevant,* not only to the majority's own "treatment" test but to the "concept of ordered liberty" to which the States must attain under the Fourteenth Amendment. The test is the overall purpose and effect of a State's act, and I submit that California's program relative to narcotic addicts—including both the "criminal" and "civil" provisions—is inherently one of treatment and lies well within the power of a State.

However, the case in support of the judgment below need not rest solely on this reading of California law. For even if the overall statutory scheme is ignored and a purpose and effect of punishment is attached to § 11721, that provision still does not violate the Fourteenth Amendment. The majority acknowledges, as it must, that a State can punish persons who purchase, possess or use narcotics. Although none of these acts are harmful to society *in themselves,* the State constitutionally may attempt to deter and prevent them through punishment because of the grave threat of future harmful conduct which they pose. Narcotics addiction—including the incipient, volitional addiction to which this provision speaks—is no different. California courts have taken judicial notice that "the inordinate use of a narcotic drug tends

*Any reliance upon the "stigma" of a misdemeanor conviction in this context is misplaced, as it would hardly be different from the stigma of a civil commitment for narcotics addiction.

to create an irresistible craving and forms a habit for its continued use until one becomes an addict, and he respects no convention or obligation and will lie, steal, or use any other base means to gratify his passion for the drug, being lost to all considerations of duty or social position." *People* v. *Jaurequi,* 142 Cal. App. 2d 555, 561, 298 P. 2d 896, 900 (1956). Can this Court deny the legislative and judicial judgment of California that incipient, volitional narcotic addiction poses a threat of serious crime similar to the threat inherent in the purchase or possession of narcotics? And if such a threat is inherent in addiction, can this Court say that California is powerless to deter it by punishment?

It is no answer to suggest that we are dealing with an involuntary status and thus penal sanctions will be ineffective and unfair. The section at issue applies only to persons who use narcotics often or even daily but not to the point of losing self-control. When dealing with involuntary addicts California moves only through § 5355 of its Welfare Institutions Code which clearly is not penal. Even if it could be argued that § 11721 may not be limited to volitional addicts, the petitioner in the instant case undeniably retained the power of self-control and thus to him the statute would be constitutional. Moreover, "status" offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones ed. 1916), 170. A ready example is drunkenness, which plainly is as involuntary after addiction to alcohol as is the taking of drugs.

Nor is the conjecture relevant that petitioner may have acquired his habit under lawful circumstances. There was no suggestion by him to this effect at trial, and surely the State need not rebut all possible lawful sources of addiction as part of its prima facie case.

The argument that the statute constitutes a cruel and unusual punishment is governed by the discussion above.

Properly construed, the statute provides a treatment rather than a punishment. But even if interpreted as penal, the sanction of incarceration for 3 to 12 months is not unreasonable when applied to a person who has voluntarily placed himself in a condition posing a serious threat to the State. Under either theory, its provisions for 3 to 12 months' confinement can hardly be deemed unreasonable when compared to the provisions for 3 to 24 months' confinement under § 5355 which the majority approves.

I would affirm the judgment.

MR. JUSTICE WHITE, dissenting.

If appellant's conviction rested upon sheer status, condition or illness or if he was convicted for being an addict who had lost his power of self-control, I would have other thoughts about this case. But this record presents neither situation. And I believe the Court has departed from its wise rule of not deciding constitutional questions except where necessary and from its equally sound practice of construing state statutes, where possible, in a manner saving their constitutionality.[1]

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[1] It has repeatedly been held in this Court that its practice will not be "to decide any constitutional question in advance of the necessity for its decision . . . or . . . except with reference to the particular facts to which it is to be applied," *Alabama State Federation* v. *McAdory*, 325 U. S. 450, 461, and that state statutes will always be construed, if possible, to save their constitutionality despite the plausibility of different but unconstitutional interpretation of the language. Thus, the Court recently reaffirmed the principle in *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, 370: "When that claim is litigated it will be subject to review, but it is not for us now to anticipate its outcome. '"Constitutional questions are not to be dealt with abstractly". . . . They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. . . . Nor will we assume in advance that a State will so

I am not at all ready to place the use of narcotics beyond the reach of the States' criminal laws. I do not consider appellant's conviction to be a punishment for having an illness or for simply being in some status or condition, but rather a conviction for the regular, repeated or habitual use of narcotics immediately prior to his arrest and in violation of the California law. As defined by the trial court,[2] addiction *is* the regular use of narcotics and can be proved only by evidence of such use. To find addiction in this case the jury had to believe that appellant had frequently used narcotics in the recent past.[3] California is entitled to have its statute and the record so read, particularly where the State's only purpose in allowing prosecutions for addiction was to supersede its own venue requirements applicable to prosecutions for the use of narcotics and in effect to allow convictions for use

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construe its law as to bring it into conflict with the federal Constitution or an act of Congress.' *Allen-Bradley Local* v. *Wisconsin Board,* 315 U. S. 740, at 746."

[2] The court instructed the jury that, "The word 'addicted' means, strongly disposed to some taste or practice or habituated, especially to drugs. In order to inquire as to whether a person is addicted to the use of narcotics is in effect an inquiry as to his habit in that regard. . . . To use them often or daily is, according to the ordinary acceptance of those words, to use them habitually."

[3] This is not a case where a defendant is convicted "even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there." The evidence was that appellant lived and worked in Los Angeles. He admitted before trial that he had used narcotics for three or four months, three or four times a week, usually at his place with his friends. He stated to the police that he had last used narcotics at 54th and Central in the City of Los Angeles on January 27, 8 days before his arrest. According to the State's expert, no needle mark or scab found on appellant's arms was newer than 3 days old and the most recent mark might have been as old as 10 days, which was consistent with appellant's own pretrial admissions. The State's evidence was that appellant had used narcotics at least 7 times in the 15 days immediately preceding his arrest.

where there is no precise evidence of the county where the use took place.[4]

Nor do I find any indications in this record that California would apply § 11721 to the case of the helpless addict. I agree with my Brother CLARK that there was no evidence at all that appellant had lost the power to control his acts. There was no evidence of any use within 3 days prior to appellant's arrest. The most recent marks might have been 3 days old or they might have been 10

[4] The typical case under the narcotics statute, as the State made clear in its brief and argument, is the one where the defendant makes no admissions, as he did in this case, and the only evidence of use or addiction is presented by an expert who, on the basis of needle marks and scabs or other physical evidence revealed by the body of the defendant, testifies that the defendant has regularly taken narcotics in the recent past. See, *e. g., People* v. *Williams,* 164 Cal. App. 2d 858, 331 P. 2d 251; *People* v. *Garcia,* 122 Cal. App. 2d 962, 266 P. 2d 233; *People* v. *Ackles,* 147 Cal. App. 2d 40, 304 P. 2d 1032. Under the local venue requirements, a conviction for simple use of narcotics may be had only in the county where the use took place, *People* v. *Garcia, supra,* and in the usual case evidence of the precise location of the use is lacking. Where the charge is addiction, venue under § 11721 of the Health and Safety Code may be laid in any county where the defendant is found. *People* v. *Ackles, supra,* 147 Cal. App. 2d, at 42–43, 304 P. 2d, at 1033, distinguishing *People* v. *Thompson,* 144 Cal. App. 2d 854, 301 P. 2d 313. Under California law a defendant has no constitutional right to be tried in any particular county, but under statutory law, with certain exceptions, "an accused person is answerable only in the jurisdiction where the crime, or some part or effect thereof, was committed or occurred." *People* v. *Megladdery,* 40 Cal. App. 2d 748, 762, 106 P. 2d 84, 92. A charge of narcotics addiction is one of the exceptions and there are others. See, *e. g.,* §§ 781, 784, 785, 786, 788, Cal. Penal Code. Venue is to be determined from the evidence and is for the jury, but it need not be proved beyond a reasonable doubt. *People* v. *Megladdery, supra,* 40 Cal. App. 2d, at 764, 106 P. 2d, at 93. See *People* v. *Bastio,* 55 Cal. App. 2d 615, 131 P. 2d 614; *People* v. *Garcia, supra.* In reviewing convictions in narcotics cases, appellate courts view the evidence of venue "in the light most favorable to the judgment." *People* v. *Garcia, supra.*

days old. The appellant admitted before trial that he had last used narcotics 8 days before his arrest. At the trial he denied having taken narcotics at all. The uncontroverted evidence was that appellant was not under the influence of narcotics at the time of his arrest nor did he have withdrawal symptoms. He was an incipient addict, a redeemable user, and the State chose to send him to jail for 90 days rather than to attempt to confine him by civil proceedings under another statute which requires a finding that the addict has lost the power of self-control. In my opinion, on this record, it was within the power of the State of California to confine him by criminal proceedings for the use of narcotics or for regular use amounting to habitual use.[5]

The Court clearly does not rest its decision upon the narrow ground that the jury was not expressly instructed not to convict if it believed appellant's use of narcotics was beyond his control. The Court recognizes no degrees of addiction. The Fourteenth Amendment is today held to bar any prosecution for addiction regardless of the degree or frequency of use, and the Court's opinion bristles with indications of further consequences. If it is "cruel and unusual punishment" to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict. It is significant that in purporting to reaffirm the power of the States to deal with the narcotics traffic, the Court does not include among the obvious powers of the State the power to punish for the use of narcotics. I cannot think that the omission was inadvertent.

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[5] Health and Safety Code § 11391 expressly permits and contemplates the medical treatment of narcotics addicts confined to jail.

The Court has not merely tidied up California's law by removing some irritating vestige of an outmoded approach to the control of narcotics. At the very least, it has effectively removed California's power to deal effectively with the recurring case under the statute where there is ample evidence of use but no evidence of the precise location of use. Beyond this it has cast serious doubt upon the power of any State to forbid the use of narcotics under threat of criminal punishment. I cannot believe that the Court would forbid the application of the criminal laws to the use of narcotics under any circumstances. But the States, as well as the Federal Government, are now on notice. They will have to await a final answer in another case.

Finally, I deem this application of "cruel and unusual punishment" so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty. If this case involved economic regulation, the present Court's allergy to substantive due process would surely save the statute and prevent the Court from imposing its own philosophical predilections upon state legislatures or Congress. I fail to see why the Court deems it more appropriate to write into the Constitution its own abstract notions of how best to handle the narcotics problem, for it obviously cannot match either the States or Congress in expert understanding.

I respectfully dissent.

POWELL *v.* TEXAS.

APPEAL FROM THE COUNTY COURT AT LAW NO. 1 OF TRAVIS COUNTY, TEXAS.

No. 405. Argued March 7, 1968.—Decided June 17, 1968.

Appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Art. 477 of the Texas Penal Code. He was tried in the Corporation Court of Austin, and found guilty. He appealed to the County Court of Travis County, and after a trial *de novo*, he was again found guilty. That court made the following "findings of fact": (1) chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive use of alcohol, (2) a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism, and (3) appellant is a chronic alcoholic who is afflicted by the disease of chronic alcoholism; but ruled as a matter of law that chronic alcoholism was not a defense to the charge. The principal testimony was that of a psychiatrist, who testified that appellant, a man with a long history of arrests for drunkenness, was a "chronic alcoholic" and was subject to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence." *Held:* The judgment is affirmed. Pp. 517–554.

MR. JUSTICE MARSHALL, joined by THE CHIEF JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN, concluded that:

1. The lower court's "findings of fact" were not such in any recognizable, traditional sense, but were merely premises of a syllogism designed to bring this case within the scope of *Robinson* v. *California*, 370 U. S. 660 (1962). P. 521.

2. The record here is utterly inadequate to permit the informed adjudication needed to support an important and wide-ranging new constitutional principle. Pp. 521–522.

3. There is no agreement among medical experts as to what it means to say that "alcoholism" is a "disease," or upon the "manifestations of alcoholism," or on the nature of a "compulsion." Pp. 522–526.

4. Faced with the reality that there is no known generally effective method of treatment or adequate facilities or manpower

for a full-scale attack on the enormous problem of alcoholics, it cannot be asserted that the use of the criminal process to deal with the public aspects of problem drinking can never be defended as rational. Pp. 526–530.

5. Appellant's conviction on the record in this case does not violate the Cruel and Unusual Punishment Clause of the Eighth Amendment. Pp. 531–537.

(a) Appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion, and thus, as distinguished from *Robinson* v. *California, supra,* was not being punished for a mere status. P. 532.

(b) It cannot be concluded, on this record and the current state of medical knowledge, that appellant suffers from such an irresistible compulsion to drink and to get drunk in public that he cannot control his performance of these acts and thus cannot be deterred from public intoxication. In any event, this Court has never articulated a general constitutional doctrine of *mens rea,* as the development of the doctrine and its adjustment to changing conditions has been thought to be the province of the States. Pp. 535–536.

MR. JUSTICE BLACK, joined by MR. JUSTICE HARLAN, concluded:

1. Public drunkenness, which has been a crime throughout our history, is an offense in every State, and this Court certainly cannot strike down a State's criminal law because of the heavy burden of enforcing it. P. 538.

2. Criminal punishment provides some form of treatment, protects alcoholics from causing harm or being harmed by removing them from the streets, and serves some deterrent functions; and States should not be barred from using the criminal process in attempting to cope with the problem. Pp. 538–540.

3. Medical decisions based on clinical problems of diagnosis and treatment bear no necessary correspondence to the legal decision whether the overall objectives of criminal law can be furthered by imposing punishment; and States should not be constitutionally required to inquire as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was the result of a "compulsion." Pp. 540–541.

4. Crimes which require the State to prove that the defendant actually committed some proscribed act do not come within the scope of *Robinson* v. *California, supra,* which is properly limited to pure status crimes. Pp. 541–544.

5. Appellant's argument that it is cruel and unusual to punish a person who is not morally blameworthy goes beyond the Eighth Amendment's limits on the use of criminal sanctions and would create confusion and uncertainty in areas of criminal law where our understanding is not complete. Pp. 544–546.

6. Appellant's proposed constitutional rule is not only revolutionary but it departs from the premise that experience in making local laws by local people is the safest guide for our Nation to follow. Pp. 547–548.

MR. JUSTICE WHITE concluded:

While *Robinson* v. *California, supra,* would support the view that a chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or being drunk, appellant's conviction was for the different crime of being drunk in a public place; and though appellant showed that he was to some degree compelled to drink and that he was drunk at the time of his arrest, he made no showing that he was unable to stay off the streets at that time. Pp. 548–554.

Don L. Davis argued the cause for appellant, *pro hac vice.* With him on the briefs was *Tom H. Davis.*

David Robinson, Jr., argued the cause for appellee. With him on the briefs were *Crawford C. Martin,* Attorney General of Texas, *George M. Cowden,* First Assistant Attorney General, *R. L. Lattimore* and *Lonny F. Zwiener,* Assistant Attorneys General, and *A. J. Carubbi, Jr.*

Peter Barton Hutt argued the cause for the American Civil Liberties Union et al., as *amici curiae,* urging reversal. With him on the brief was *Richard A. Merrill.*

Briefs of *amici curiae,* urging reversal, were filed by *Paul O'Dwyer* for the National Council on Alcoholism, and by the Philadelphia Diagnostic and Relocation Services Corp.

MR. JUSTICE MARSHALL announced the judgment of the Court and delivered an opinion in which THE CHIEF

JUSTICE, MR. JUSTICE BLACK, and MR. JUSTICE HARLAN join.

In late December 1966, appellant was arrested and charged with being found in a state of intoxication in a public place, in violation of Texas Penal Code, Art. 477 (1952), which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas, found guilty, and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. His counsel urged that appellant was "afflicted with the disease of chronic alcoholism," that "his appearance in public [while drunk was] . . . not of his own volition," and therefore that to punish him criminally for that conduct would be cruel and unusual, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

The trial judge in the county court, sitting without a jury, made certain findings of fact, *infra*, at 521, but ruled as a matter of law that chronic alcoholism was not a defense to the charge. He found appellant guilty, and fined him $50. There being no further right to appeal within the Texas judicial system,[1] appellant appealed to this Court; we noted probable jurisdiction. 389 U. S. 810 (1967).

I.

The principal testimony was that of Dr. David Wade, a Fellow of the American Medical Association, duly certificated in psychiatry. His testimony consumed a total of 17 pages in the trial transcript. Five of those pages were taken up with a recitation of Dr. Wade's qualifica-

[1] Tex. Code Crim. Proc., Art. 4.03 (1966).

tions. In the next 12 pages Dr. Wade was examined by appellant's counsel, cross-examined by the State, and re-examined by the defense, and those 12 pages contain virtually all the material developed at trial which is relevant to the constitutional issue we face here. Dr. Wade sketched the outlines of the "disease" concept of alcoholism; noted that there is no generally accepted definition of "alcoholism"; alluded to the ongoing debate within the medical profession over whether alcohol is actually physically "addicting" or merely psychologically "habituating"; and concluded that in either case a "chronic alcoholic" is an "involuntary drinker," who is "powerless not to drink," and who "loses his self-control over his drinking." He testified that he had examined appellant, and that appellant is a "chronic alcoholic," who "by the time he has reached [the state of intoxication] . . . is not able to control his behavior, and [who] . . . has reached this point because he has an uncontrollable compulsion to drink." Dr. Wade also responded in the negative to the question whether appellant has "the willpower to resist the constant excessive consumption of alcohol." He added that in his opinion jailing appellant without medical attention would operate neither to rehabilitate him nor to lessen his desire for alcohol.

On cross-examination, Dr. Wade admitted that when appellant was sober he knew the difference between right and wrong, and he responded affirmatively to the question whether appellant's act of taking the first drink in any given instance when he was sober was a "voluntary exercise of his will." Qualifying his answer, Dr. Wade stated that "these individuals have a compulsion, and this compulsion, while not completely overpowering, is a very strong influence, an exceedingly strong influence, and this compulsion coupled with the firm belief in their mind that they are going to be able to handle it from now on causes their judgment to be somewhat clouded."

Appellant testified concerning the history of his drinking problem. He reviewed his many arrests for drunkenness; testified that he was unable to stop drinking; stated that when he was intoxicated he had no control over his actions and could not remember them later, but that he did not become violent; and admitted that he did not remember his arrest on the occasion for which he was being tried. On cross-examination, appellant admitted that he had had one drink on the morning of the trial and had been able to discontinue drinking. In relevant part, the cross-examination went as follows:

"Q. You took that one at eight o'clock because you wanted to drink?

"A. Yes, sir.

"Q. And you knew that if you drank it, you could keep on drinking and get drunk?

"A. Well, I was supposed to be here on trial, and I didn't take but that one drink.

"Q. You knew you had to be here this afternoon, but this morning you took one drink and then you knew that you couldn't afford to drink any more and come to court; is that right?

"A. Yes, sir, that's right.

"Q. So you exercised your will power and kept from drinking anything today except that one drink?

"A. Yes, sir, that's right.

"Q. Because you knew what you would do if you kept drinking, that you would finally pass out or be picked up?

"A. Yes, sir.

"Q. And you didn't want that to happen to you today?

"A. No, sir.

"Q. Not today?

"A. No, sir.

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"Q. So you only had one drink today?

"A. Yes, sir."

On redirect examination, appellant's lawyer elicited the following:

"Q. Leroy, isn't the real reason why you just had one drink today because you just had enough money to buy one drink?

"A. Well, that was just give to me.

"Q. In other words, you didn't have any money with which you could buy any drinks yourself?

"A. No, sir, that was give to me.

"Q. And that's really what controlled the amount you drank this morning, isn't it?

"A. Yes, sir.

"Q. Leroy, when you start drinking, do you have any control over how many drinks you can take?

"A. No, sir."

Evidence in the case then closed. The State made no effort to obtain expert psychiatric testimony of its own, or even to explore with appellant's witness the question of appellant's power to control the frequency, timing, and location of his drinking bouts, or the substantial disagreement within the medical profession concerning the nature of the disease, the efficacy of treatment and the prerequisites for effective treatment. It did nothing to examine or illuminate what Dr. Wade might have meant by his reference to a "compulsion" which was "not completely overpowering," but which was "an exceedingly strong influence," or to inquire into the question of the proper role of such a "compulsion" in constitutional adjudication. Instead, the State contented itself with a brief argument that appellant had no defense to the charge because he "is legally sane and knows the difference between right and wrong."

Following this abbreviated exposition of the problem before it, the trial court indicated its intention to disallow appellant's claimed defense of "chronic alcoholism." Thereupon defense counsel submitted, and the trial court entered, the following "findings of fact":

> "'(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism."

Whatever else may be said of them, those are not "findings of fact" in any recognizable, traditional sense in which that term has been used in a court of law; they are the premises of a syllogism transparently designed to bring this case within the scope of this Court's opinion in *Robinson* v. *California,* 370 U. S. 660 (1962). Nonetheless, the dissent would have us adopt these "findings" without critical examination; it would use them as the basis for a constitutional holding that "a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease." *Post,* at 569.

The difficulty with that position, as we shall show, is that it goes much too far on the basis of too little knowledge. In the first place, the record in this case is utterly inadequate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle. We know very little about the circumstances surrounding the drinking bout which re-

sulted in this conviction, or about Leroy Powell's drinking problem, or indeed about alcoholism itself. The trial hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases. The State put on only one witness, the arresting officer. The defense put on three—a policeman who testified to appellant's long history of arrests for public drunkenness, the psychiatrist, and appellant himself.

Furthermore, the inescapable fact is that there is no agreement among members of the medical profession about what it means to say that "alcoholism" is a "disease." One of the principal works in this field states that the major difficulty in articulating a "disease concept of alcoholism" is that "alcoholism has too many definitions and disease has practically none." [2] This same author concludes that *"a disease is what the medical profession recognizes as such."* [3] In other words, there is widespread agreement today that "alcoholism" is a "disease," for the simple reason that the medical profession has concluded that it should attempt to treat those who have drinking problems. There the agreement stops. Debate rages within the medical profession as to whether "alcoholism" is a separate "disease" in any meaningful biochemical, physiological or psychological sense, or whether it represents one peculiar manifestation in some individuals of underlying psychiatric disorders.[4]

Nor is there any substantial consensus as to the "manifestations of alcoholism." E. M. Jellinek, one of the outstanding authorities on the subject, identifies five

[2] E. Jellinek, The Disease Concept of Alcoholism 11 (1960).

[3] *Id.*, at 12 (emphasis in original).

[4] See, *e. g.*, Joint Information Serv. of the Am. Psychiatric Assn. & the Nat. Assn. for Mental Health, The Treatment of Alcoholism—A Study of Programs and Problems 6–8 (1967) (hereafter cited as Treatment of Alcoholism).

different types of alcoholics which predominate in the United States, and these types display a broad range of different and occasionally inconsistent symptoms.[5] Moreover, wholly distinct types, relatively rare in this country, predominate in nations with different cultural attitudes regarding the consumption of alcohol.[6] Even if we limit our consideration to the range of alcoholic symptoms more typically found in this country, there is substantial disagreement as to the manifestations of the "disease" called "alcoholism." Jellinek, for example, considers that only two of his five alcoholic types can truly be said to be suffering from "alcoholism" as a "disease," because only these two types attain what he believes to be the requisite degree of physiological dependence on alcohol.[7] He applies the label "gamma alcoholism" to "that species of alcoholism in which (1) acquired increased tissue tolerance to alcohol, (2) adaptive cell metabolism . . . , (3) withdrawal symptoms and 'craving,' i. e., physical dependence, and (4) loss of control are involved." [8] A "delta" alcoholic, on the other hand, "shows the first three characteristics of gamma alcoholism as well as a less marked form of the fourth characteristic—that is, instead of loss of control

[5] Jellinek, *supra*, n. 2, at 35–41.

[6] For example, in nations where large quantities of wine are customarily consumed with meals, apparently there are many people who are completely unaware that they have a "drinking problem"—they rarely if ever show signs of intoxication, they display no marked symptoms of behavioral disorder, and are entirely capable of limiting their alcoholic intake to a reasonable amount—and yet who display severe withdrawal symptoms, sometimes including delirium tremens, when deprived of their daily portion of wine. M. Block, Alcoholism—Its Facets and Phases 27 (1965); Jellinek, *supra*, n. 2, at 17. See generally *id.*, at 13–32.

[7] Jellinek, *supra*, n. 2, at 40.

[8] Jellinek, *supra*, n. 2, at 37.

there is inability to abstain." [9] Other authorities approach the problems of classification in an entirely different manner and, taking account of the large role which psycho-social factors seem to play in "problem drinking," define the "disease" in terms of the earliest identifiable manifestations of any sort of abnormality in drinking patterns.[10]

Dr. Wade appears to have testified about appellant's "chronic alcoholism" in terms similar to Jellinek's "gamma" and "delta" types, for these types are largely defined, in their later stages, in terms of a strong compulsion to drink, physiological dependence and an inability to abstain from drinking. No attempt was made in the court below, of course, to determine whether Leroy Powell could in fact properly be diagnosed as a "gamma" or "delta" alcoholic in Jellinek's terms. The focus at the trial, and in the dissent here, has been exclusively upon the factors of loss of control and inability to abstain. Assuming that it makes sense to compartmentalize in this manner the diagnosis of such a formless "disease," tremendous gaps in our knowledge remain, which the record in this case does nothing to fill.

The trial court's "finding" that Powell "is afflicted with the disease of chronic alcoholism," which "destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol" covers a multitude of sins. Dr. Wade's testimony that appellant suffered from a compulsion which was an "exceedingly strong influence," but which was "not completely overpowering" is at least more carefully stated, if no less mystifying. Jellinek insists that conceptual clarity can only be achieved by distinguishing carefully between "loss of control" once an individual has commenced to drink and "inability to abstain"

[9] *Id.*, at 38.

[10] See Block, *supra*, n. 6, at 19–49.

from drinking in the first place.[11] Presumably a person would have to display both characteristics in order to make out a constitutional defense, should one be recognized. Yet the "findings" of the trial court utterly fail to make this crucial distinction, and there is serious question whether the record can be read to support a finding of either loss of control or inability to abstain.

Dr. Wade did testify that once appellant began drinking he appeared to have no control over the amount of alcohol he finally ingested. Appellant's own testimony concerning his drinking on the day of the trial would certainly appear, however, to cast doubt upon the conclusion that he was without control over his consumption of alcohol when he had sufficiently important reasons to exercise such control. However that may be, there are more serious factual and conceptual difficulties with reading this record to show that appellant was unable to abstain from drinking. Dr. Wade testified that when appellant was sober, the act of taking the first drink was a "voluntary exercise of his will," but that this exercise of will was undertaken under the "exceedingly strong influence" of a "compulsion" which was "not completely overpowering." Such concepts, when juxtaposed in this fashion, have little meaning.

Moreover, Jellinek asserts that it cannot accurately be said that a person is truly unable to abstain from drinking unless he is suffering the physical symptoms of withdrawal.[12] There is no testimony in this record that Leroy Powell underwent withdrawal symptoms either before he began the drinking spree which resulted in the conviction under review here, or at any other time. In attempting to deal with the alcoholic's desire for drink in the absence of withdrawal symptoms, Jellinek is re-

[11] Jellinek, *supra*, n. 2, at 41–42.

[12] *Id.*, at 43.

duced to unintelligible distinctions between a "compulsion" (a "psychopathological phenomenon" which can apparently serve in some instances as the functional equivalent of a "craving" or symptom of withdrawal) and an "impulse" (something which differs from a loss of control, a craving or a compulsion, and to which Jellinek attributes the start of a new drinking bout for a "gamma" alcoholic).[13] Other scholars are equally unhelpful in articulating the nature of a "compulsion." [14]

It is one thing to say that if a man is deprived of alcohol his hands will begin to shake, he will suffer agonizing pains and ultimately he will have hallucinations; it is quite another to say that a man has a "compulsion" to take a drink, but that he also retains a certain amount of "free will" with which to resist. It is simply impossible, in the present state of our knowledge, to ascribe a useful meaning to the latter statement. This definitional confusion reflects, of course, not merely the undeveloped state of the psychiatric art but also the conceptual difficulties inevitably attendant upon the importation of scientific and medical models into a legal system generally predicated upon a different set of assumptions.[15]

II.

Despite the comparatively primitive state of our knowledge on the subject, it cannot be denied that the destructive use of alcoholic beverages is one of our prin-

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[13] *Id.*, at 41–44.

Dr. Wade did not clarify matters when he testified at trial that a chronic alcoholic suffers from "the same type of compulsion" as a "compulsive eater."

[14] See, *e. g.*, Block, *supra*, n. 6, at 40, 55, 308; Treatment of Alcoholism 6–8; Note, Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 112–114 (1966).

[15] See *Washington* v. *United States*, —— U. S. App. D. C. ——, ——–——, 390 F. 2d 444, 446–456 (1967).

cipal social and public health problems.[16] The lowest current informed estimate places the number of "alcoholics" in America (definitional problems aside) at 4,000,000,[17] and most authorities are inclined to put the figure considerably higher.[18] The problem is compounded by the fact that a very large percentage of the alcoholics in this country are "invisible"—they possess the means to keep their drinking problems secret, and the traditionally uncharitable attitude of our society toward alcoholics causes many of them to refrain from seeking treatment from any source.[19] Nor can it be gainsaid that the legislative response to this enormous problem has in general been inadequate.

There is as yet no known generally effective method for treating the vast number of alcoholics in our society. Some individual alcoholics have responded to particular forms of therapy with remissions of their symptomatic dependence upon the drug. But just as there is no agreement among doctors and social workers with respect to the causes of alcoholism, there is no consensus as to why particular treatments have been effective in particular cases and there is no generally agreed-upon approach to the problem of treatment on a large scale.[20] Most psychiatrists are apparently of the opinion that alcoholism is far more difficult to treat than other forms of behavioral disorders, and some believe it is impossible

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[16] See generally Block, *supra*, n. 6, at 19–30, 43–49.

[17] See Treatment of Alcoholism 11.

[18] Block, *supra*, n. 6, at 43–44; Blum & Braunstein, Mind-altering Drugs and Dangerous Behavior: Alcohol, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 29, 30 (1967); Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[19] See Block, *supra*, n. 6, at 74–81; Note, 2 Col. J. Law & Soc. Prob. 109 (1966).

[20] See Treatment of Alcoholism 13–17.

to cure by means of psychotherapy; indeed, the medical profession as a whole, and psychiatrists in particular, have been severely criticised for the prevailing reluctance to undertake the treatment of drinking problems.[21] Thus it is entirely possible that, even were the manpower and facilities available for a full-scale attack upon chronic alcoholism, we would find ourselves unable to help the vast bulk of our "visible"—let alone our "invisible"—alcoholic population.

However, facilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country.[22] It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even the opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate

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[21] *Id.*, at 18–26.

[22] Encouraging pilot projects do exist. See President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Drunkenness 50–64, 82–108 (1967). But the President's Commission concluded that the "strongest barrier" to the abandonment of the current use of the criminal process to deal with public intoxication "is that there presently are no clear alternatives for taking into custody and treating those who are now arrested as drunks." President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 235 (1967). Moreover, even if massive expenditures for physical plants were forthcoming, there is a woeful shortage of trained personnel to man them. One study has concluded that:

"[T]here is little likelihood that the number of workers in these fields could be sufficiently increased to treat even a large minority of problem drinkers. In California, for instance, according to the best estimate available, providing all problem drinkers with weekly contact with a psychiatrist and once-a-month contact with a social worker would require the full time work of *every* psychiatrist and *every* trained social worker in the United States." Cooperative Commission on Study of Alcoholism, Alcohol Problems 120 (1967) (emphasis in original).

such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading "hospital"—over one wing of the jailhouse.[23]

One virtue of the criminal process is, at least, that the duration of penal incarceration typically has some outside statutory limit; this is universally true in the case of petty offenses, such as public drunkenness, where jail terms are quite short on the whole. "Therapeutic civil commitment" lacks this feature; one is typically committed until one is "cured." Thus, to do otherwise than affirm might subject indigent alcoholics to the risk that they may be locked up for an indefinite period of time under the same conditions as before, with no more hope than before of receiving effective treatment and no prospect of periodic "freedom." [24]

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[23] For the inadequate response in the District of Columbia following *Easter* v. *District of Columbia,* 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966), which held on constitutional and statutory grounds that a chronic alcoholic could not be punished for public drunkenness, see President's Commission on Crime in the District of Columbia, Report 486–490 (1966).

[24] Counsel for *amici curiae* ACLU et al., who has been extremely active in the recent spate of litigation dealing with public intoxication statutes and the chronic inebriate, recently told an annual meeting of the National Council on Alcoholism:

"We have not fought for two years to extract DeWitt Easter, Joe Driver, and their colleagues from jail, only to have them involuntarily committed for an even longer period of time, with no assurance of appropriate rehabilitative help and treatment. . . . The euphemistic name 'civil commitment' can easily hide nothing more than permanent incarceration. . . . I would caution those who might rush headlong to adopt civil commitment procedures and

Faced with this unpleasant reality, we are unable to assert that the use of the criminal process as a means of dealing with the public aspects of problem drinking can never be defended as rational. The picture of the penniless drunk propelled aimlessly and endlessly through the law's "revolving door" of arrest, incarceration, release and re-arrest is not a pretty one. But before we condemn the present practice across-the-board, perhaps we ought to be able to point to some clear promise of a better world for these unfortunate people. Unfortunately, no such promise has yet been forthcoming. If, in addition to the absence of a coherent approach to the problem of treatment, we consider the almost complete absence of facilities and manpower for the implementation of a rehabilitation program, it is difficult to say in the present context that the criminal process is utterly lacking in social value. This Court has never held that anything in the Constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects, and it can hardly be said with assurance that incarceration serves such purposes any better for the general run of criminals than it does for public drunks.

Ignorance likewise impedes our assessment of the deterrent effect of criminal sanctions for public drunkenness. The fact that a high percentage of American alcoholics conceal their drinking problems, not merely by avoiding public displays of intoxication but also by shunning all forms of treatment, is indicative that some powerful deterrent operates to inhibit the public revela-

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remind them that just as difficult legal problems exist there as with the ordinary jail sentence."

Quoted in Robitscher, Psychiatry and Changing Concepts of Criminal Responsibility, 31 Fed. Prob. 44, 49 (No. 3, Sept. 1967). Cf. Note, The Nascent Right to Treatment, 53 Va. L. Rev. 1134 (1967).

tion of the existence of alcoholism. Quite probably this deterrent effect can be largely attributed to the harsh moral attitude which our society has traditionally taken toward intoxication and the shame which we have associated with alcoholism. Criminal conviction represents the degrading public revelation of what Anglo-American society has long condemned as a moral defect, and the existence of criminal sanctions may serve to reinforce this cultural taboo, just as we presume it serves to reinforce other, stronger feelings against murder, rape, theft, and other forms of antisocial conduct.

Obviously, chronic alcoholics have not been deterred from drinking to excess by the existence of criminal sanctions against public drunkenness. But all those who violate penal laws of any kind are by definition undeterred. The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. Certainly no effort was made at the trial of this case, beyond a monosyllabic answer to a perfunctory one-line question, to determine the effectiveness of penal sanctions in deterring Leroy Powell in particular or chronic alcoholics in general from drinking at all or from getting drunk in particular places or at particular times.

III.

Appellant claims that his conviction on the facts of this case would violate the Cruel and Unusual Punishment Clause of the Eighth Amendment as applied to the States through the Fourteenth Amendment. The primary purpose of that clause has always been considered, and properly so, to be directed at the method or kind of

punishment imposed for the violation of criminal statutes; the nature of the conduct made criminal is ordinarily relevant only to the fitness of the punishment imposed. See, *e. g., Trop* v. *Dulles,* 356 U. S. 86 (1958); *Louisiana ex rel. Francis* v. *Resweber,* 329 U. S. 459 (1947); *Weems* v. *United States,* 217 U. S. 349 (1910).[25]

Appellant, however, seeks to come within the application of the Cruel and Unusual Punishment Clause announced in *Robinson* v. *California,* 370 U. S. 660 (1962), which involved a state statute making it a crime to "be addicted to the use of narcotics." This Court held there that "a state law which imprisons a person thus afflicted [with narcotic addiction] as a criminal, even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment . . . . " *Id.,* at 667.

On its face the present case does not fall within that holding, since appellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson;* nor has it attempted to regulate appellant's behavior in the privacy of his own home. Rather, it has imposed upon appellant a criminal sanction for public behavior which may create substantial health and safety hazards, both for appellant and for members of the general public, and which offends the moral and esthetic sensibilities of a large segment of the community. This seems a far cry from convicting one for being an addict, being a chronic alcoholic, being "mentally ill, or a leper . . . ." *Id.,* at 666.

[25] See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635 (1966).

Robinson so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.

It is suggested in dissent that *Robinson* stands for the "simple" but "subtle" principle that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Post*, at 567. In that view, appellant's "condition" of public intoxication was "occasioned by a compulsion symptomatic of the disease" of chronic alcoholism, and thus, apparently, his behavior lacked the critical element of *mens rea*. Whatever may be the merits of such a doctrine of criminal responsibility, it surely cannot be said to follow from *Robinson*. The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, "involuntary" or "occasioned by a compulsion."

Likewise, as the dissent acknowledges, there is a substantial definitional distinction between a "status," as in *Robinson*, and a "condition," which is said to be involved in this case. Whatever may be the merits of an attempt to distinguish between behavior and a condition, it is perfectly clear that the crucial element in this case, so far as the dissent is concerned, is whether or not appellant can legally be held responsible for his

appearance in public in a state of intoxication. The only relevance of *Robinson* to this issue is that because the Court interpreted the statute there involved as making a "status" criminal, it was able to suggest that the statute would cover even a situation in which addiction had been acquired involuntarily. 370 U. S., at 667, n. 9. That this factor was not determinative in the case is shown by the fact that there was no indication of how Robinson himself had become an addict.

Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility. In dissent it is urged that the decision could be limited to conduct which is "a characteristic and involuntary part of the pattern of the disease as it afflicts" the particular individual, and that "[i]t is not foreseeable" that it would be applied "in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery." *Post*, at 559, n. 2. That is limitation by fiat. In the first place, nothing in the logic of the dissent would limit its application to chronic alcoholics. If Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a "compulsion" to kill, which is an "exceedingly strong influence," but "not completely overpowering." [26] Even if we limit our consideration to chronic alcoholics, it would seem impossible to confine the principle within the arbitrary bounds which the dissent seems to envision.

It is not difficult to imagine a case involving psychiatric testimony to the effect that an individual suffers

[26] Cf. *Commonwealth* v. *Phelan*, 427 Pa. 265, 234 A. 2d 540 (1967), cert. denied, 391 U. S. 920 (1968).

from some aggressive neurosis which he is able to control when sober; that very little alcohol suffices to remove the inhibitions which normally contain these aggressions, with the result that the individual engages in assaultive behavior without becoming actually intoxicated; and that the individual suffers from a very strong desire to drink, which is an "exceedingly strong influence" but "not completely overpowering." Without being untrue to the rationale of this case, should the principles advanced in dissent be accepted here, the Court could not avoid holding such an individual constitutionally unaccountable for his assaultive behavior.

Traditional common-law concepts of personal accountability and essential considerations of federalism lead us to disagree with appellant. We are unable to conclude, on the state of this record or on the current state of medical knowledge, that chronic alcoholics in general, and Leroy Powell in particular, suffer from such an irresistible compulsion to drink and to get drunk in public that they are utterly unable to control their performance of either or both of these acts and thus cannot be deterred at all from public intoxication. And in any event this Court has never articulated a general constitutional doctrine of *mens rea*.[27]

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral

[27] The Court did hold in *Lambert* v. *California*, 355 U. S. 225 (1957), that a person could not be punished for a "crime" of omission, if that person did not know, and the State had taken no reasonable steps to inform him, of his duty to act and of the criminal penalty for failure to do so. It is not suggested either that *Lambert* established a constitutional doctrine of *mens rea*, see generally Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107, or that appellant in this case was not fully aware of the prohibited nature of his conduct and of the consequences of taking his first drink.

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accountability of an individual for his antisocial deeds.[28] The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States.

Nothing could be less fruitful than for this Court to be impelled into defining some sort of insanity test in constitutional terms. Yet, that task would seem to follow inexorably from an extension of *Robinson* to this case. If a person in the "condition" of being a chronic alcoholic cannot be criminally punished as a constitutional matter for being drunk in public, it would seem to follow that a person who contends that, in terms of one test, "his unlawful act was the product of mental disease or mental defect," *Durham* v. *United States,* 94 U. S. App. D. C. 228, 241, 214 F. 2d 862, 875 (1954), would state an issue of constitutional dimension with regard to his criminal responsibility had he been tried under some different and perhaps lesser standard, *e. g.,* the right-wrong test of *M'Naghten's Case.*[29] The experimentation of one jurisdiction in that field alone indicates the magnitude of the problem. See, *e. g., Carter* v. *United States,* 102 U. S. App. D. C. 227, 252 F. 2d 608 (1957); *Blocker* v. *United States,* 107 U. S. App. D. C. 63, 274 F. 2d 572 (1959); *Blocker* v. *United States,* 110 U. S. App. D. C. 41, 288 F. 2d 853 (1961) (*en banc*); *McDonald* v. *United States,* 114 U. S. App. D. C. 120, 312 F. 2d 847 (1962) (*en banc*); *Washington* v. *United States,* — U. S. App. D. C. —, 390 F. 2d 444 (1967). But formulating a constitutional rule would reduce, if not eliminate, that fruitful

[28] See generally Sayre, Mens Rea, 45 Harv. L. Rev. 974 (1932).

[29] 10 Cl. & Fin. 200, 8 Eng. Rep. 718 (1843).

experimentation, and freeze the developing productive dialogue between law and psychiatry into a rigid constitutional mold. It is simply not yet the time to write into the Constitution formulas cast in terms whose meaning, let alone relevance, is not yet clear either to doctors or to lawyers.

Affirmed.

MR. JUSTICE BLACK, whom MR. JUSTICE HARLAN joins, concurring.

While I agree that the grounds set forth in MR. JUSTICE MARSHALL'S opinion are sufficient to require affirmance of the judgment here, I wish to amplify my reasons for concurring.

Those who favor the change now urged upon us rely on their own notions of the wisdom of this Texas law to erect a constitutional barrier, the desirability of which is far from clear. To adopt this position would significantly limit the States in their efforts to deal with a widespread and important social problem and would do so by announcing a revolutionary doctrine of constitutional law that would also tightly restrict state power to deal with a wide variety of other harmful conduct.

I.

Those who favor holding that public drunkenness cannot be made a crime rely to a large extent on their own notions of the wisdom of such a change in the law. A great deal of medical and sociological data is cited to us in support of this change. Stress is put upon the fact that medical authorities consider alcoholism a disease and have urged a variety of medical approaches to treating it. It is pointed out that a high percentage of all arrests in America are for the crime of public drunkenness and that the enforcement of these laws constitutes a tremendous burden on the police. Then it is argued that

there is no basis whatever for claiming that to jail chronic alcoholics can be a deterrent or a means of treatment; on the contrary, jail has, in the expert judgment of these scientists, a destructive effect. All in all, these arguments read more like a highly technical medical critique than an argument for deciding a question of constitutional law one way or another.

Of course, the desirability of this Texas statute should be irrelevant in a court charged with the duty of interpretation rather than legislation, and that should be the end of the matter. But since proponents of this grave constitutional change insist on offering their pronouncements on these questions of medical diagnosis and social policy, I am compelled to add that, should we follow their arguments, the Court would be venturing far beyond the realm of problems for which we are in a position to know what we are talking about.

Public drunkenness has been a crime throughout our history, and even before our history it was explicitly proscribed by a 1606 English statute, 4 Jac. 1, c. 5. It is today made an offense in every State in the Union. The number of police to be assigned to enforcing these laws and the amount of time they should spend in the effort would seem to me a question for each local community. Never, even by the wildest stretch of this Court's judicial review power, could it be thought that a State's criminal law could be struck down because the amount of time spent in enforcing it constituted, in some expert's opinion, a tremendous burden.

Jailing of chronic alcoholics is definitely defended as therapeutic, and the claims of therapeutic value are not insubstantial. As appellee notes, the alcoholics are removed from the streets, where in their intoxicated state they may be in physical danger, and are given food, clothing, and shelter until they "sober up" and thus at least regain their ability to keep from being run over by

automobiles in the street. Of course, this treatment may not be "therapeutic" in the sense of curing the underlying causes of their behavior, but it seems probable that the effect of jail on any criminal is seldom "therapeutic" in this sense, and in any case the medical authorities relied on so heavily by appellant themselves stress that no generally effective method of curing alcoholics has yet been discovered.

Apart from the value of jail as a form of treatment, jail serves other traditional functions of the criminal law. For one thing, it gets the alcoholics off the street, where they may cause harm in a number of ways to a number of people, and isolation of the dangerous has always been considered an important function of the criminal law. In addition, punishment of chronic alcoholics can serve several deterrent functions—it can give potential alcoholics an additional incentive to control their drinking, and it may, even in the case of the chronic alcoholic, strengthen his incentive to control the frequency and location of his drinking experiences.

These values served by criminal punishment assume even greater significance in light of the available alternatives for dealing with the problem of alcoholism. Civil commitment facilities may not be any better than the jails they would replace. In addition, compulsory commitment can hardly be considered a less severe penalty from the alcoholic's point of view. The commitment period will presumably be at least as long, and it might in fact be longer since commitment often lasts until the "sick" person is cured. And compulsory commitment would of course carry with it a social stigma little different in practice from that associated with drunkenness when it is labeled a "crime."

Even the medical authorities stress the need for continued experimentation with a variety of approaches. I cannot say that the States should be totally barred from

one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem. From what I have been able to learn about the subject, it seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that *any* use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

II.

I agree with MR. JUSTICE MARSHALL that the findings of fact in this case are inadequate to justify the sweeping constitutional rule urged upon us. I could not, however, consider any findings that could be made with respect to "voluntariness" or "compulsion" controlling on the question whether a specific instance of human behavior should be immune from punishment as a constitutional matter. When we say that appellant's appearance in public is caused not by "his own" volition but rather by some other force, we are clearly thinking of a force that is nevertheless "his" except in some special sense.[1] The accused undoubtedly commits the proscribed act and the only question is whether the act can be attributed to a part of "his" personality that should not be regarded as criminally responsible. Almost all of the traditional purposes of the criminal law can be significantly served by punishing the person who in fact committed the proscribed act, without regard to whether his action was "compelled" by some elusive "irresponsible" aspect of his personality. As I have already indicated, punishment of such a defendant can clearly be justified

[1] If an intoxicated person is actually carried into the street by someone else, "he" does not do the act at all, and of course he is entitled to acquittal. *E. g., Martin* v. *State*, 31 Ala. App. 334, 17 So. 2d 427 (1944).

in terms of deterrence, isolation, and treatment. On the other hand, medical decisions concerning the use of a term such as "disease" or "volition," based as they are on the clinical problems of diagnosis and treatment, bear no necessary correspondence to the legal decision whether the overall objectives of the criminal law can be furthered by imposing punishment. For these reasons, much as I think that criminal sanctions should in many situations be applied only to those whose conduct is morally blameworthy, see *Morissette* v. *United States*, 342 U. S. 246 (1952), I cannot think the States should be held constitutionally required to make the inquiry as to what part of a defendant's personality is responsible for his actions and to excuse anyone whose action was, in some complex, psychological sense, the result of a "compulsion." [2]

III.

The rule of constitutional law urged by appellant is not required by *Robinson* v. *California*, 370 U. S. 660 (1962). In that case we held that a person could not be punished for the mere status of being a narcotics

[2] The need for a cautious and tentative approach has been thoroughly recognized by one of the most active workers for reform in this area, Chief Judge Bazelon of the United States Court of Appeals for the District of Columbia Circuit. In a recent decision limiting the scope of psychiatric testimony in insanity defense cases, Judge Bazelon states:

"[I]t may be that psychiatry and the other social and behavioral sciences cannot provide sufficient data relevant to a determination of criminal responsibility no matter what our rules of evidence are. If so, we may be forced to eliminate the insanity defense altogether, or refashion it in a way which is not tied so tightly to the medical model. . . . But at least we will be able to make that decision on the basis of an informed experience. For now the writer is content to join the court in this first step." *Washington* v. *United States* — U. S. App. D. C. —, —, n. 33, 390 F. 2d 444, 457, n. 33 (1967) (expressing the views of Chief Judge Bazelon).

addict. We explicitly limited our holding to the situation where no conduct of any kind is involved, stating:

> "We hold that a state law which imprisons a person thus afflicted as a criminal, *even though he has never touched any narcotic drug within the State or been guilty of any irregular behavior there,* inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment." 370 U. S., at 667. (Emphasis added.)

The argument is made that appellant comes within the terms of our holding in *Robinson* because being drunk in public is a mere status or "condition." Despite this many-faceted use of the concept of "condition," this argument would require converting *Robinson* into a case protecting actual behavior, a step we explicitly refused to take in that decision.

A different question, I admit, is whether our attempt in *Robinson* to limit our holding to pure status crimes, involving no conduct whatever, was a sound one. I believe it was. Although some of our objections to the statute in *Robinson* are equally applicable to statutes that punish conduct "symptomatic" of a disease, any attempt to explain *Robinson* as based solely on the lack of voluntariness encounters a number of logical difficulties.[3] Other problems raised by status crimes are in no way involved when the State attempts to punish for conduct, and these other problems were, in my view, the controlling aspects of our decision.

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[3] Although we noted in *Robinson,* 370 U. S., at 667, that narcotics addiction apparently is an illness that can be contracted innocently or involuntarily, we barred punishment for addiction even when it could be proved that the defendant had voluntarily become addicted. And we compared addiction to the status of having a common cold, a condition that most people can either avoid or quickly cure when it is important enough for them to do so.

Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes.[4] In fact, one eminent authority has found only one isolated instance, in all of Anglo-American jurisprudence, in which criminal responsibility was imposed in the absence of any act at all.[5]

The reasons for this refusal to permit conviction without proof of an act are difficult to spell out, but they are nonetheless perceived and universally expressed in our criminal law. Evidence of propensity can be considered relatively unreliable and more difficult for a defendant to rebut; the requirement of a specific act thus provides some protection against false charges. See 4 Blackstone, Commentaries 21. Perhaps more fundamental is the difficulty of distinguishing, in the absence of any conduct, between desires of the day-dream variety and fixed intentions that may pose a real threat to society; extending the criminal law to cover both types of desire would be unthinkable, since "[t]here can hardly be anyone who has never thought evil. When a desire is inhib-

[4] As Glanville Williams puts it, "[t]hat crime requires an act is *invariably* true if the proposition be read as meaning that a private thought is not sufficient to found responsibility." Williams, Criminal Law—the General Part 1 (1961). (Emphasis added.) For the requirement of some act as an element of conspiracy and attempt, see *id.*, at 631, 663, 668; R. Perkins, Criminal Law 482, 531–532 (1957).

[5] Williams, *supra*, n. 4, at 11.

ited it may find expression in fantasy; but it would be absurd to condemn this natural psychological mechanism as illegal." [6]

In contrast, crimes that require the State to prove that the defendant actually committed some proscribed act involve none of these special problems. In addition, the question whether an act is "involuntary" is, as I have already indicated, an inherently elusive question, and one which the State may, for good reasons, wish to regard as irrelevant. In light of all these considerations, our limitation of our *Robinson* holding to pure status crimes seems to me entirely proper.

IV.

The rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law, and any possible limits proposed for the rule would be wholly illusory. If the original boundaries of *Robinson* are to be discarded, any new limits too would soon fall by the wayside and the Court would be forced to hold the States powerless to punish any conduct that could be shown to result from a "compulsion," in the complex, psychological meaning of that term. The result, to choose just one illustration, would be to require recognition of "irresistible impulse" as a complete defense to any crime; this is probably contrary to present law in most American jurisdictions.[7]

The real reach of any such decision, however, would be broader still, for the basic premise underlying the argument is that it is cruel and unusual to punish a person who is not morally blameworthy. I state the proposition in this sympathetic way because I feel there is much to be said for avoiding the use of criminal sanctions in many

[6] *Id.*, at 2.

[7] Perkins, *supra*, n. 4, at 762.

such situations. See *Morissette* v. *United States, supra.* But the question here is one of constitutional law. The legislatures have always been allowed wide freedom to determine the extent to which moral culpability should be a prerequisite to conviction of a crime. *E. g., United States* v. *Dotterweich,* 320 U. S. 277 (1943). The criminal law is a social tool that is employed in seeking a wide variety of goals, and I cannot say the Eighth Amendment's limits on the use of criminal sanctions extend as far as this viewpoint would inevitably carry them.

But even if we were to limit any holding in this field to "compulsions" that are "symptomatic" of a "disease," in the words of the findings of the trial court, the sweep of that holding would still be startling. Such a ruling would make it clear beyond any doubt that a narcotics addict could not be punished for "being" in possession of drugs or, for that matter, for "being" guilty of using them. A wide variety of sex offenders would be immune from punishment if they could show that their conduct was not voluntary but part of the pattern of a disease. More generally speaking, a form of the insanity defense would be made a constitutional requirement throughout the Nation, should the Court now hold it cruel and unusual to punish a person afflicted with any mental disease whenever his conduct was part of the pattern of his disease and occasioned by a compulsion symptomatic of the disease. Such a holding would appear to overrule *Leland* v. *Oregon,* 343 U. S. 790 (1952), where the majority opinion and the dissenting opinion in which I joined both stressed the indefensibility of imposing on the States any particular test of criminal responsibility. *Id.,* at 800–801; *id.,* at 803 (Frankfurter, J., dissenting).

The impact of the holding urged upon us would, of course, be greatest in those States which have until now

refused to accept any qualifications to the "right from wrong" test of insanity; apparently at least 30 States fall into this category.[8] But even in States which have recognized insanity defenses similar to the proposed new constitutional rule, or where comparable defenses could be presented in terms of the requirement of a guilty mind (*mens rea*), the proposed new constitutional rule would be devastating, for constitutional questions would be raised by every state effort to regulate the admissibility of evidence relating to "disease" and "compulsion," and by every state attempt to explain these concepts in instructions to the jury. The test urged would make it necessary to determine, not only what constitutes a "disease," but also what is the "pattern" of the disease, what "conditions" are "part" of the pattern, what parts of this pattern result from a "compulsion," and finally which of these compulsions are "symptomatic" of the disease. The resulting confusion and uncertainty could easily surpass that experienced by the District of Columbia Circuit in attempting to give content to its similar, though somewhat less complicated, test of insanity.[9] The range of problems created would seem totally beyond our capacity to settle at all, much less to settle wisely, and even the attempt to define these terms and thus to impose constitutional and doctrinal rigidity seems absurd in an area where our understanding is even today so incomplete.

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[8] See Model Penal Code § 4.01, at 160 (Tent. Draft No. 4, 1955).

[9] *Durham* v. *United States*, 94 U. S. App. D. C. 228, 214 F. 2d 862 (1954). Some of the enormous difficulties encountered by the District of Columbia Circuit in attempting to apply its *Durham* rule are related in H. R. Rep. No. 563, 87th Cong., 1st Sess. (1961). The difficulties and shortcomings of the *Durham* rule have been fully acknowledged by the District of Columbia Circuit itself, and in particular by the author of the *Durham* opinion. See *Washington* v. *United States*, *supra*.

V.

Perceptive students of history at an early date learned that one country controlling another could do a more successful job if it permitted the latter to keep in force the laws and rules of conduct which it had adopted for itself. When our Nation was created by the Constitution of 1789, many people feared that the 13 straggling, struggling States along the Atlantic composed too great an area ever to be controlled from one central point. As the years went on, however, the Nation crept cautiously westward until it reached the Pacific Ocean and finally the Nation planted its flag on the far-distant Islands of Hawaii and on the frozen peaks of Alaska. During all this period the Nation remembered that it could be more tranquil and orderly if it functioned on the principle that the local communities should control their own peculiarly local affairs under their own local rules.

This Court is urged to forget that lesson today. We are asked to tell the most-distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. This Court, instead of recognizing that the experience of human beings is the best way to make laws, is asked to set itself up as a board of Platonic Guardians to establish rigid, binding rules upon every small community in this large Nation for the control of the unfortunate people who fall victim to drunkenness. It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary—

it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow. I suspect this is a most propitious time to remember the words of the late Judge Learned Hand, who so wisely said:

> "For myself it would be most irksome to be ruled by a bevy of Platonic Guardians, even if I knew how to choose them, which I assuredly do not." L. Hand, The Bill of Rights 73 (1958).

I would confess the limits of my own ability to answer the age-old questions of the criminal law's ethical foundations and practical effectiveness. I would hold that *Robinson* v. *California* establishes a firm and impenetrable barrier to the punishment of persons who, whatever their bare desires and propensities, have committed no proscribed wrongful act. But I would refuse to plunge from the concrete and almost universally recognized premises of *Robinson* into the murky problems raised by the insistence that chronic alcoholics cannot be punished for public drunkenness, problems that no person, whether layman or expert, can claim to understand, and with consequences that no one can safely predict. I join in affirmance of this conviction.

MR. JUSTICE WHITE, concurring in the result.

If it cannot be a crime to have an irresistible compulsion to use narcotics, *Robinson* v. *California*, 370 U. S. 660, rehearing denied, 371 U. S. 905 (1962), I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless *Robinson* is to be abandoned, the use of narcotics by an

addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. The statute involved here, which aims at keeping drunks off the street for their own welfare and that of others, is not challenged on the ground that it interferes unconstitutionally with the right to frequent public places. No question is raised about applying this statute to the nonchronic drunk, who has no compulsion to drink, who need not drink to excess, and who could have arranged to do his drinking in private or, if he began drinking in public, could have removed himself at an appropriate point on the path toward complete inebriation.

The trial court said that Powell was a chronic alcoholic with a compulsion not only to drink to excess but also to frequent public places when intoxicated. Nothing in the record before the trial court supports the latter conclusion, which is contrary to common sense and to common knowledge.[1] The sober chronic alcoholic has no

[1] The trial court gave no reasons for its conclusion that Powell appeared in public due to "a compulsion symptomatic of the disease of chronic alcoholism." No facts in the record support that conclusion. The trial transcript strongly suggests that the trial judge merely adopted proposed findings put before him by Powell's counsel. The fact that those findings were of no legal relevance in the trial judge's view of the case is very significant for appraising the extent to which they represented a well-considered and well-supported judgment. For all these reasons I do not feel impelled to accept this finding, and certainly would not rest a constitutional adjudication upon it.

compulsion to be on the public streets; many chronic alcoholics drink at home and are never seen drunk in public. Before and after taking the first drink, and until he becomes so drunk that he loses the power to know where he is or to direct his movements, the chronic alcoholic with a home or financial resources is as capable as the nonchronic drinker of doing his drinking in private, of removing himself from public places and, since he knows or ought to know that he will become intoxicated, of making plans to avoid his being found drunk in public. For these reasons, I cannot say that the chronic alcoholic who proves his disease and a compulsion to drink is shielded from conviction when he has knowingly failed to take feasible precautions against committing a criminal act, here the act of going to or remaining in a public place. On such facts the alcoholic is like a person with smallpox, who could be convicted for being on the street but not for being ill, or, like the epileptic, who could be punished for driving a car but not for his disease.[2]

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[2] Analysis of this difficult case is not advanced by preoccupation with the label "condition." In *Robinson* the Court dealt with "a statute which makes the 'status' of narcotic addiction a criminal offense . . . ." 370 U. S., at 666. By precluding criminal conviction for such a "status" the Court was dealing with a condition brought about by acts remote in time from the application of the criminal sanctions contemplated, a condition which was relatively permanent in duration, and a condition of great magnitude and significance in terms of human behavior and values. Although the same may be said for the "condition" of being a chronic alcoholic, it cannot be said for the mere transitory state of "being drunk in public." "Being" drunk in public is not far removed in time from the acts of "getting" drunk and "going" into public, and it is not necessarily a state of any great duration. And, an isolated instance of "being" drunk in public is of relatively slight importance in the life of an individual as compared with the condition of being a chronic alcoholic. If it were necessary to distinguish between "acts" and "conditions" for purposes of the Eighth Amendment, I would adhere to the concept of "condition" implicit

The fact remains that some chronic alcoholics must drink and hence must drink *somewhere*.[3] Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.

It is also possible that the chronic alcoholic who begins drinking in private at some point becomes so drunk that

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in the opinion in *Robinson;* I would not trivialize that concept by drawing a nonexistent line between the man who appears in public drunk and that same man five minutes later who is then "being" drunk in public. The proper subject of inquiry is whether volitional acts brought about the "condition" and whether those acts are sufficiently proximate to the "condition" for it to be permissible to impose penal sanctions on the "condition."

[3] The opinion of MR. JUSTICE MARSHALL makes clear the limitations of our present knowledge of alcoholism and the disagreements among doctors in their description and analysis of the disease. It is also true that on the record before us there is some question whether Powell possessed that degree of compulsion which alone would satisfy one of the prerequisites I deem essential to assertion of an Eighth Amendment defense. It is nowhere disputed, however, that there are chronic alcoholics whose need to consume alcohol in large quantities is so persistent and so insistent that they are truly compelled to drink. I find it unnecessary to attempt on this record to determine whether or not Powell is such an alcoholic, for in my view his attempt to claim the Eighth Amendment fails for other reasons.

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he loses the power to control his movements and for that reason appears in public. The Eighth Amendment might also forbid conviction in such circumstances, but only on a record satisfactorily showing that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue.

These prerequisites to the possible invocation of the Eighth Amendment are not satisfied on the record before us.[4] Whether or not Powell established that he could

[4] A holding that a person establishing the requisite facts could not, because of the Eighth Amendment, be criminally punished for appearing in public while drunk would be a novel construction of that Amendment, but it would hardly have radical consequences. In the first place, when as here the crime charged was being drunk in a public place, only the compulsive chronic alcoholic would have a defense to both elements of the crime—for his drunkenness because his disease compelled him to drink and for being in a public place because the force of circumstances or excessive intoxication sufficiently deprived him of his mental and physical powers. The drinker who was not compelled to drink, on the other hand, although he might be as poorly circumstanced, equally intoxicated, and equally without his physical powers and cognitive faculties, could have avoided drinking in the first place, could have avoided drinking to excess, and need not have lost the power to manage his movements. Perhaps the heavily intoxicated, compulsive alcoholic who could not have arranged to avoid being in public places may not, consistent with the Eighth Amendment, be convicted for being drunk in a public place. However, it does not necessarily follow that it would be unconstitutional to convict him for committing crimes involving much greater risk to society.

Outside the area of alcoholism such a holding would not have a wide impact. Concerning drugs, such a construction of the Eighth Amendment would bar conviction only where the drug is addictive and then only for acts which are a necessary part of addiction, such as simple use. Beyond that it would preclude punishment only when the addiction to or the use of drugs caused sufficient loss of physical and mental faculties. This doctrine would not bar con-

not have resisted becoming drunk on December 19, 1966, nothing in the record indicates that he could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street. Indeed, the evidence in the record strongly suggests that Powell could have drunk at home and made plans while sober to prevent ending up in a public place. Powell had a home and wife, and if there were reasons why he had to drink in public or be drunk there, they do not appear in the record.

Also, the only evidence bearing on Powell's condition at the time of his arrest was the testimony of the arresting officer that appellant staggered, smelled of alcohol, and was "very drunk." Powell testified that he had no clear recollection of the situation at the time of his arrest. His testimony about his usual condition when drunk is no substitute for evidence about his condition at the time of his arrest. Neither in the medical testimony nor elsewhere is there any indication that Powell had reached such a state of intoxication that he had lost the ability to comprehend what he was doing or where he was. For all we know from this record, Powell at the time knew precisely where he was, retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere.

It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled

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viction of a heroin addict for being under the influence of heroin in a public place (although other constitutional concepts might be relevant to such a conviction), or for committing other criminal acts.

to drink and that he was drunk at the time of his arrest. He made no showing that he was unable to stay off the streets on the night in question.[5]

Because Powell did not show that his conviction offended the Constitution, I concur in the judgment affirming the Travis County court.

MR. JUSTICE FORTAS, with whom MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and MR. JUSTICE STEWART join, dissenting.

Appellant was charged with being found in a state of intoxication in a public place. This is a violation of Article 477 of the Texas Penal Code, which reads as follows:

> "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars."

Appellant was tried in the Corporation Court of Austin, Texas. He was found guilty and fined $20. He appealed to the County Court at Law No. 1 of Travis County, Texas, where a trial *de novo* was held. Appellant was defended by counsel who urged that appellant was "afflicted with the disease of chronic alcoholism which has destroyed the power of his will to resist the constant, excessive consumption of alcohol; his appear-

[5] I do not question the power of the State to remove a helplessly intoxicated person from a public street, although against his will, and to hold him until he has regained his powers. The person's own safety and the public interest require this much. A statute such as the one challenged in this case is constitutional insofar as it authorizes a police officer to arrest any seriously intoxicated person when he is encountered in a public place. Whether such a person may be charged and convicted for violating the statute will depend upon whether he is entitled to the protection of the Eighth Amendment.

ance in public in that condition is not of his own volition, but a compulsion symptomatic of the disease of chronic alcoholism." Counsel contended that to penalize appellant for public intoxication would be to inflict upon him cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

At the trial in the county court, the arresting officer testified that he had observed appellant in the 2000 block of Hamilton Street in Austin; that appellant staggered when he walked; that his speech was slurred; and that he smelled strongly of alcohol. He was not loud or boisterous; he did not resist arrest; he was cooperative with the officer.

The defense established that appellant had been convicted of public intoxication approximately 100 times since 1949, primarily in Travis County, Texas. The circumstances were always the same: the "subject smelled strongly of alcoholic beverages, staggered when walking, speech incoherent." At the end of the proceedings, he would be fined: "down in Bastrop County, it's $25.00 down there, and it's $20.00 up here [in Travis County]." Appellant was usually unable to pay the fines imposed for these offenses, and therefore usually has been obliged to work the fines off in jail. The statutory rate for working off such fines in Texas is one day in jail for each $5 of fine unpaid. Texas Code Crim. Proc., Art. 43.09.

Appellant took the stand. He testified that he works at a tavern shining shoes. He makes about $12 a week which he uses to buy wine. He has a family, but he does not contribute to its support. He drinks wine every day. He gets drunk about once a week. When he gets drunk, he usually goes to sleep, "mostly" in public places such as the sidewalk. He does not disturb the peace or interfere with others.

The defense called as a witness Dr. David Wade, a Fellow of the American Medical Association and a former President of the Texas Medical Association. Dr. Wade is a qualified doctor of medicine, duly certificated in psychiatry. He has been engaged in the practice of psychiatry for more than 20 years. During all of that time he has been especially interested in the problem of alcoholism. He has treated alcoholics; lectured and written on the subject; and has observed the work of various institutions in treating alcoholism. Dr. Wade testified that he had observed and interviewed the appellant. He said that appellant has a history of excessive drinking dating back to his early years; that appellant drinks only wine and beer; that "he rarely passes a week without going on an alcoholic binge"; that "his consumption of alcohol is limited only by his finances, and when he is broke, he makes an effort to secure alcohol by getting his friends to buy alcohol for him"; that he buys a "fifty cent bottle" of wine, always with the thought that this is all he will drink; but that he ends by drinking all he can buy until he "is . . . passed out in some joint or out on the sidewalk." According to Dr. Wade, appellant "has never engaged in any activity that is destructive to society or to anyone except himself." He has never received medical or psychiatric treatment for his drinking problem. He has never been referred to Alcoholics Anonymous, a voluntary association for helping alcoholics, nor has he ever been sent to the State Hospital.

Dr. Wade's conclusion was that "Leroy Powell is an alcoholic and that his alcoholism is in a chronic stage." Although the doctor responded affirmatively to a question as to whether the appellant's taking the first drink on any given occasion is "a voluntary exercise of will," his testimony was that "we must take into account" the fact that chronic alcoholics have a "compulsion" to drink which "while not completely overpowering, is a

very strong influence, an exceedingly strong influence," and that this compulsion is coupled with the "firm belief in their mind that they are going to be able to handle it from now on." It was also Dr. Wade's opinion that appellant "has an uncontrollable compulsion to drink" and that he "does not have the willpower [to resist the constant excessive consumption of alcohol or to avoid appearing in public when intoxicated] nor has he been given medical treatment to enable him to develop this willpower."

The trial judge in the county court, sitting without a jury, made the following findings of fact:

> "(1) That chronic alcoholism is a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol.
>
> "(2) That a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism.
>
> "(3) That Leroy Powell, defendant herein, is a chronic alcoholic who is afflicted with the disease of chronic alcoholism." [1]

[1] I do not understand the relevance of our knowing "very little about the circumstances surrounding the drinking bout which resulted in this conviction, or about Leroy Powell's drinking problem." (Opinion of MARSHALL, J., *ante*, at 521–522). We do not "traditionally" sit as a trial court, much less as a finder of fact. I submit that we must accept the findings of the trial court as they were made and not as the members of this Court would have made them had they sat as triers of fact. I would add, lest I create a misunderstanding, that I do not suggest in this opinion that Leroy Powell had a constitutional right, based upon the evidence adduced at his trial, to the findings of fact that were made by the county court; only that once such findings were in fact made, it became the duty of the trial court to apply the relevant legal principles and to declare that appellant's conviction would be constitutionally invalid. See *infra*, at 567–570.

I confess, too, that I do not understand the relevance of our knowing very little "about alcoholism itself," given what we do

The court then rejected appellant's constitutional defense, entering the following conclusion of law:

> "(1) The fact that a person is a chronic alcoholic afflicted with the disease of chronic alcoholism, is not a defense to being charged with the offense of getting drunk or being found in a state of intoxication in any public place under Art. 477 of the Texas Penal Code."

The court found appellant guilty as charged and increased his fine to $50. Appellant did not have the right to appeal further within the Texas judicial system. Tex. Code Crim. Proc., Art. 4.03. He filed a jurisdictional statement in this Court.

I.

The issue posed in this case is a narrow one. There is no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular. This case does not concern the infliction of punishment upon the "social" drinker—or upon anyone other than a "chronic alcoholic" who, as the trier of fact here found, cannot "resist the constant, excessive consumption of alcohol." Nor does it relate to any offense other than the crime of public intoxication.

The sole question presented is whether a criminal penalty may be imposed upon a person suffering the disease of "chronic alcoholism" for a condition—being "in a state of intoxication" in public—which is a characteristic part of the pattern of his disease and which, the trial court found, was not the consequence of appellant's volition but of "a compulsion symptomatic of the disease of chronic alcoholism." We must consider whether the Eighth Amendment, made applicable to the States through the

know—that findings such as those made in this case are, in the view of competent medical authorities, perfectly plausible. See *infra*, at 560–562.

Fourteenth Amendment, prohibits the imposition of this penalty in these rather special circumstances as "cruel and unusual punishment." This case does not raise any question as to the right of the police to stop and detain those who are intoxicated in public, whether as a result of the disease or otherwise; or as to the State's power to commit chronic alcoholics for treatment. Nor does it concern the responsibility of an alcoholic for criminal *acts*. We deal here with the mere *condition* of being intoxicated in public.[2]

II.

As I shall discuss, consideration of the Eighth Amendment issue in this case requires an understanding of "the disease of chronic alcoholism" with which, as the trial court found, appellant is afflicted, which has destroyed his "will power to resist the constant, excessive consumption of alcohol," and which leads him to "appear in public [not] by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." It is true, of course, that there is a great deal that remains to be discovered about chronic alcoholism. Although many aspects of the disease remain obscure, there are some hard facts—medical and, especially, legal facts—that are accessible to us and that provide a context in which the instant case may be analyzed. We are similarly woefully deficient in our medical, diagnostic, and therapeutic

[2] It is not foreseeable that findings such as those which are decisive here—namely that the appellant's being intoxicated in public was a part of the pattern of his disease and due to a compulsion symptomatic of that disease—could or would be made in the case of offenses such as driving a car while intoxicated, assault, theft, or robbery. Such offenses require independent acts or conduct and do not typically flow from and are not part of the syndrome of the disease of chronic alcoholism. If an alcoholic should be convicted for criminal conduct which is not a characteristic and involuntary part of the pattern of the disease as it afflicts him, nothing herein would prevent his punishment.

knowledge of mental disease and the problem of insanity; but few would urge that, because of this, we should totally reject the legal significance of what we do know about these phenomena.

Alcoholism [3] is a major problem in the United States.[4] In 1956 the American Medical Association for the first time designated alcoholism as a major medical problem and urged that alcoholics be admitted to general hospitals for care.[5] This significant development marked the acceptance among the medical profession of the "disease concept of alcoholism." [6] Although there is some prob-

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[3] The term has been variously defined. The National Council on Alcoholism has defined "alcoholic" as "a person who is powerless to stop drinking and whose drinking seriously alters his normal living pattern." The American Medical Association has defined alcoholics as "those excessive drinkers whose dependence on alcohol has attained such a degree that it shows a noticeable disturbance or interference with their bodily or mental health, their interpersonal relations, and their satisfactory social and economic functioning."

For other common definitions of alcoholism, see Keller, Alcoholism: Nature and Extent of the Problem, in Understanding Alcoholism, 315 Annals 1, 2 (1958); O. Diethelm, Etiology of Chronic Alcoholism 4 (1955); T. Plaut, Alcohol Problems—A Report to the Nation by the Cooperative Commission on the Study of Alcoholism 39 (1967) (hereafter cited as Plaut); Aspects of Alcoholism 9 (1963) (published by Roche Laboratories); The Treatment of Alcoholism—A Study of Programs and Problems 8 (1967) (published by the Joint Information Service of the American Psychiatric Association and the National Association for Mental Health) (hereafter cited as The Treatment of Alcoholism); 2 R. Cecil & R. Loeb, A Textbook of Medicine 1620, 1625 (1959).

[4] It ranks among the top four public health problems of the country. M. Block, Alcoholism—Its Facets and Phases (1962).

[5] American Medical Association: Report of Reference Committee on Medical Education and Hospitals, Proceedings of the House of Delegates, Seattle, Wash., Nov. 27–29, 1956, p. 33; 163 J. A. M. A. 52 (1957).

[6] See generally E. Jellinek, The Disease Concept of Alcoholism (1960).

lem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by something other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him. Today most alcohologists and qualified members of the medical profession recognize the validity of this concept. Recent years have seen an intensification of medical interest in the subject.[7] Medical groups have become active in educating the public, medical schools, and physicians in the etiology, diagnosis, and treatment of alcoholism.[8]

Authorities have recognized that a number of factors may contribute to alcoholism. Some studies have pointed to physiological influences, such as vitamin deficiency, hormone imbalance, abnormal metabolism, and hereditary proclivity. Other researchers have found more convincing a psychological approach, emphasizing early environment and underlying conflicts and tensions. Numerous studies have indicated the influence of socio-cultural factors. It has been shown, for example, that the incidence of alcoholism among certain ethnic groups is far higher than among others.[9]

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[7] See, *e. g.*, H. Haggard & E. Jellinek, Alcohol Explored (1942); O. Diethelm, Etiology of Chronic Alcoholism (1955); A. Ullman, To Know the Difference (1960); D. Pittman & C. Snyder, Society, Culture, and Drinking Patterns (1962).

[8] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 113 (1966).

[9] See Alcohol and Alcoholism 24–28 (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). "Although many interesting pieces of evidence have been assembled, it is not yet known why a small percentage of those who use alcohol develop a destructive affinity for it." The Treatment of Alcoholism 9.

The manifestations of alcoholism are reasonably well identified. The late E. M. Jellinek, an eminent alcohologist, has described five discrete types commonly found among American alcoholics.[10] It is well established that alcohol may be habituative and "can be physically addicting." [11] . It has been said that "the main point for the nonprofessional is that alcoholism is not within the control of the person involved. He is not willfully drinking." [12]

Although the treatment of alcoholics has been successful in many cases,[13] physicians have been unable to discover any single treatment method that will invariably produce satisfactory results. A recent study of available treatment facilities concludes as follows: [14]

> "Although numerous kinds of therapy and intervention appear to have been effective with various kinds of problem drinkers, the process of matching patient and treatment method is not yet highly developed. There is an urgent need for continued experimentation, for modifying and improving exist-

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[10] See E. Jellinek, The Disease Concept of Alcoholism 35–41 (1960).

[11] Alcoholism 3 (1963) (published by the Public Health Service of the U. S. Department of Health, Education, and Welfare). See also Bacon, Alcoholics Do Not Drink, in Understanding Alcoholism, 315 Annals 55–64 (1958).

[12] A. Ullman, To Know the Difference 22 (1960).

[13] In response to the question "can a chronic alcoholic be medically treated and returned to society as a useful citizen?" Dr. Wade testified as follows:

"We believe that it is possible to treat alcoholics, and we have large numbers of individuals who are now former alcoholics. They themselves would rather say that their condition has been arrested and that they remain alcoholics, that they are simply living a pattern of life, through the help of medicine or whatever source, that enables them to refrain from drinking and enables them to combat the compulsion to drink."

[14] The Treatment of Alcoholism 13.

> ing treatment methods, for developing new ones, and for careful and well-designed evaluative studies. Most of the facilities that provide services for alcoholics have made little, if any, attempt to determine the effectiveness of the total program or of its components."

Present services for alcoholics include state and general hospitals, separate state alcoholism programs, outpatient clinics, community health centers, general practitioners, and private psychiatric facilities.[15] Self-help organizations, such as Alcoholics Anonymous, also aid in treatment and rehabilitation.[16]

The consequences of treating alcoholics, under the public intoxication laws, as criminals can be identified with more specificity. Public drunkenness is punished as a crime, under a variety of laws and ordinances, in every State of the Union.[17] The Task Force on Drunkenness of the President's Commission on Law Enforcement and Administration of Justice has reported that "[t]wo million arrests in 1965—one of every three arrests in America—were for the offense of public drunkenness." [18] Drunkenness offenders make up a large percentage of the population in short-term penal institutions.[19] Their arrest and processing place a tremendous burden upon the police, who are called upon to spend a large amount of time

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[15] *Id.*, at 13–26. See also Alcohol and Alcoholism 31–40; Plaut 53–85.

[16] See A. Ullman, To Know the Difference 173–191 (1960).

[17] For the most part these laws and ordinances, like Article 477 of the Texas Penal Code, cover the offense of being drunk in a public place. See Task Force Report: Drunkenness 1 (1967) (published by The President's Commission on Law Enforcement and Administration of Justice) (hereafter cited as Task Force Report).

[18] *Ibid.*

[19] See Alcoholism, Public Intoxication and the Law, 2 Col. J. Law & Soc. Prob. 109, 110 (1966).

in arresting for public intoxication and in appearing at trials for public intoxication, and upon the entire criminal process.[20]

It is not known how many drunkenness offenders are chronic alcoholics, but "[t]here is strong evidence . . . that a large number of those who are arrested have a lengthy history of prior drunkenness arrests." [21] "There are instances of the same person being arrested as many as forty times in a single year on charges of drunkenness, and every large urban center can point to cases of individuals appearing before the courts on such charges 125, 150, or even 200 times in the course of a somewhat longer period." [22]

It is entirely clear that the jailing of chronic alcoholics is punishment. It is not defended as therapeutic, nor is there any basis for claiming that it is therapeutic (or indeed a deterrent). The alcoholic offender is caught in a "revolving door"—leading from arrest on the street through a brief, unprofitable sojourn in jail, back to the street and, eventually, another arrest.[23] The jails, overcrowded and put to a use for which they are not suit-

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[20] See Task Force Report 3–4.

[21] *Id.*, at 1.

[22] F. Allen, The Borderland of Criminal Justice 8 (1964). It does not, of course, necessarily follow from the frequency of his arrests that a person is a chronic alcoholic.

[23] See D. Pittman & C. Gordon, Revolving Door: A Study of the Chronic Police Case Inebriate (1958). See also Pittman, Public Intoxication and the Alcoholic Offender in American Society, Appendix A to Task Force Report.

Dr. Wade answered each time in the negative when asked:

"Is a chronic alcoholic going to be rehabilitated by simply confining him in jail without medical attention?

"Would putting a chronic alcoholic in jail operate to lessen his desire for alcohol when he is released?

"Would imposing a monetary fine on a chronic alcoholic operate to lessen his desire for alcohol?"

able, have a destructive effect upon alcoholic inmates.[24]

Finally, most commentators, as well as experienced judges,[25] are in agreement that "there is probably no drearier example of the futility of using penal sanctions to solve a psychiatric problem than the enforcement of the laws against drunkenness." [26]

> "If all of this effort, all of this investment of time and money, were producing constructive results, then we might find satisfaction in the situation despite its costs. But the fact is that this activity accomplishes little that is fundamental. No one can seriously suggest that the threat of fines and jail sentences actually deters habitual drunkenness or alcoholic addiction. . . . Nor, despite the heroic efforts being made in a few localities, is there much reason to suppose that any very effective measures of cure and therapy can or will be administered in the jails. But the weary process continues, to the detriment of the total performance of the law-enforcement function." [27]

III.

It bears emphasis that these data provide only a context for consideration of the instant case. They should not dictate our conclusion. The questions for this Court are not settled by reference to medicine or penology. Our task is to determine whether the principles embodied in the Constitution of the United States place any limitations upon the circumstances under which punishment

[24] See, *e. g.*, MacCormick, Correctional Views on Alcohol, Alcoholism, and Crime, 9 Crime & Delin. 15 (1963).

[25] See, *e. g.*, Murtagh, Arrests for Public Intoxication, 35 Fordham L. Rev. 1 (1966).

[26] M. Guttmacher & H. Weihofen, Psychiatry and the Law 319 (1952).

[27] F. Allen, The Borderland of Criminal Justice 8–9 (1964).

may be inflicted, and, if so, whether, in the case now before us, those principles preclude the imposition of such punishment.

It is settled that the Federal Constitution places some substantive limitation upon the power of state legislatures to define crimes for which the imposition of punishment is ordered. In *Robinson* v. *California,* 370 U. S. 660 (1962), the Court considered a conviction under a California statute making it a criminal offense for a person to "be addicted to the use of narcotics." At Robinson's trial, it was developed that the defendant had been a user of narcotics. The trial court instructed the jury that "[t]o be addicted to the use of narcotics is said to be a status or condition and not an act. It is a continuing offense and differs from most other offenses in the fact that [it] is chronic rather than acute; that it continues after it is complete and subjects the offender to arrest at any time before he reforms." *Id.,* at 662–663.

This Court reversed Robinson's conviction on the ground that punishment under the law in question was cruel and unusual, in violation of the Eighth Amendment of the Constitution as applied to the States through the Fourteenth Amendment. The Court noted that narcotic addiction is considered to be an illness and that California had recognized it as such. It held that the State could not make it a crime for a person to be ill.[28] Although Robinson had been sentenced to only 90 days in prison for his offense, it was beyond the power of the State to prescribe such punishment. As MR. JUSTICE STEWART, speaking for the Court, said: "[e]ven one day

[28] "We would forget the teachings of the Eighth Amendment if we allowed sickness to be made a crime and permitted sick people to be punished for being sick. This age of enlightenment cannot tolerate such barbarous action." 370 U. S., at 678 (DOUGLAS, J., concurring).

in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U. S., at 667.

Robinson stands upon a principle which, despite its subtlety, must be simply stated and respectfully applied because it is the foundation of individual liberty and the cornerstone of the relations between a civilized state and its citizens: Criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change. In all probability, Robinson at some time before his conviction elected to take narcotics. But the crime as defined did not punish this conduct.[29] The statute imposed a penalty for the offense of "addiction"—a condition which Robinson could not control. Once Robinson had become an addict, he was utterly powerless to avoid criminal guilt. He was powerless to choose not to violate the law.

In the present case, appellant is charged with a crime composed of two elements—being intoxicated and being found in a public place while in that condition. The crime, so defined, differs from that in *Robinson*. The statute covers more than a mere status.[30] But the essen-

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[29] The Court noted in *Robinson* that narcotic addiction "is apparently an illness which may be contracted innocently or involuntarily." *Id.*, at 667. In the case of alcoholism it is even more likely that the disease may be innocently contracted, since the drinking of alcoholic beverages is a common activity, generally accepted in our society, while the purchasing and taking of drugs are crimes. As in *Robinson*, the State has not argued here that Powell's conviction may be supported by his "voluntary" action in becoming afflicted.

[30] In *Robinson*, we distinguished between punishment for the "status" of addiction and punishment of an "act":

"This statute . . . is not one which punishes a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration. It is not a law which even purports to provide or require medical treatment. Rather, we deal with a statute which makes the 'status'

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tial constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. The trial judge sitting as trier of fact found, upon the medical and other relevant testimony, that Powell is a "chronic alcoholic." He defined appellant's "chronic alcoholism" as "a disease which destroys the afflicted person's will power to resist the constant, excessive consumption of alcohol." He also found that "a chronic alcoholic does not appear in public by his own volition but under a compulsion symptomatic of the disease of chronic alcoholism." I read these findings to mean that appellant was powerless to avoid drinking; that having taken his first drink, he had "an uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.[31]

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of narcotic addition a criminal offense, for which the offender may be prosecuted 'at any time before he reforms.' California has said that a person can be continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State, and whether or not he has been guilty of any antisocial behavior there." *Id.*, at 666.

[31] I also read these findings to mean that appellant's disease is such that he cannot be deterred by Article 477 of the Texas Penal Code from drinking to excess and from appearing in public while intoxicated. See n. 23, *supra*.

Finally, contrary to the views of MR. JUSTICE WHITE, *ante*, at 549–551, I believe these findings must fairly be read to encompass the facts that my Brother WHITE agrees would require reversal, that is, that for appellant Powell, "resisting drunkenness" and "avoiding public places when intoxicated" on the occasion in question were "impossible." Accordingly, in MR. JUSTICE WHITE's words, "[the] statute is in effect a law which bans a single act for which [he] may not be convicted under the Eighth Amendment—the act of getting drunk." In my judgment, the findings amply show that "it was not feasible for [Powell] to have made arrangements to prevent his being in public when drunk and that his extreme drunkennesss sufficiently deprived him of his faculties on the occasion in issue."

Article 477 of the Texas Penal Code is specifically directed to the accused's presence while in a state of intoxication, "in any public place, or at any private house except his own." This is the essence of the crime. Ordinarily when the State proves such presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed. But here the findings of the trial judge call into play the principle that a person may not be punished if the condition essential to constitute the defined crime is part of the pattern of his disease and is occasioned by a compulsion symptomatic of the disease. This principle, narrow in scope and applicability, is implemented by the Eighth Amendment's prohibition of "cruel and unusual punishment," as we construed that command in *Robinson*. It is true that the command of the Eighth Amendment and its antecedent provision in the Bill of Rights of 1689 were initially directed to the type and degree of punishment inflicted.[32] But in *Robinson* we recognized that "the principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." 370 U. S., at 676 (MR. JUSTICE DOUGLAS, concurring).[33]

The findings in this case, read against the background of the medical and sociological data to which I have referred, compel the conclusion that the infliction upon appellant of a criminal penalty for being intoxicated in

[32] See, *e. g.*, *Trop* v. *Dulles*, 356 U. S. 86 (1958); *Weems* v. *United States*, 217 U. S. 349 (1910). See generally Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 636–645 (1966).

[33] Convictions of chronic alcoholics for violations of public intoxication statutes have been invalidated on Eighth Amendment grounds in two circuits. See *Easter* v. *District of Columbia*, 124 U. S. App. D. C. 33, 361 F. 2d 50 (1966); *Driver* v. *Hinnant*, 356 F. 2d 761 (C. A. 4th Cir. 1966).

a public place would be "cruel and inhuman punishment" within the prohibition of the Eighth Amendment. This conclusion follows because appellant is a "chronic alcoholic" who, according to the trier of fact, cannot resist the "constant excessive consumption of alcohol" and does not appear in public by his own volition but under a "compulsion" which is part of his condition.

I would reverse the judgment below.

BAXTER, Associate Justice.

I. BACKGROUND

In October 1992, Santa Ana added article VIII, section 10–400 et seq. (the ordinance) to its municipal code. The declared purpose of the ordinance was to maintain public streets and other public areas in the city in a clean and accessible condition. Camping and storage of personal property in those areas, the ordinance recited, interfered with the rights of others to use those areas for the purposes for which they were intended.

The ordinance provides:

"Sec. 10–402. Unlawful Camping.
"It shall be unlawful for any person to camp, occupy camp facilities or use camp paraphernalia in the following areas, except as otherwise provided:
"(a) any street;
"(b) any public parking lot or public area, improved or unimproved.

"Sec. 10–403. Storage of Personal Property in Public Places.
"It shall be unlawful for any person to store personal property, including camp facilities and camp paraphernalia, in the following areas, except as otherwise provided by resolution of the City Council:
"(a) any park;
"(b) any street;
"(c) any public parking lot or public area, improved or unimproved."[1]

Plaintiffs in these consolidated actions are: (1) homeless persons and taxpayers who appealed from a superior court order which struck "to live temporarily in a camp facility or outdoors" from the ordinance, but otherwise denied their petition for writ of mandate by which they sought to bar enforcement of the ordinance (Tobe), and (2) persons who, having been charged with violating the ordinance, demurred unsuccessfully to the complaints and thereafter sought mandate to compel the respondent municipal court to sustain their demurrers (Zuckernick).

Plaintiffs offered evidence to demonstrate that the ordinance was the culmination of a four-year effort by Santa Ana to expel homeless persons. There was evidence that in 1988 a policy was developed to show "vagrants" that they were not welcome in the city. To force them out, they were to be continually moved from locations they frequented by a task force from the city's police and recreation and parks departments; early park closing times were to be posted and strictly enforced; sleeping bags and accessories were to be disposed of; and abandoned shopping carts were to be confiscated. Providers of free food were to be monitored; sprinklers in the Center Park were to be turned on often; and violations of the city code by businesses and social service agencies in that area were to be strictly enforced. This effort led to a lawsuit which the city settled in April 1990.

Santa Ana then launched an August 15, 1990, sweep of the civic center area arresting and holding violators for offenses which included blocking passageways, drinking in public, urinating in public, jaywalking, destroying vegetation, riding bicycles on the sidewalk, glue sniffing, removing trash from a bin, and violating the fire code. Some conduct involved nothing more than dropping a match, leaf, or piece of paper, or jaywalking. The arrestees were handcuffed and taken to an athletic

[1] Section 10–401 of the ordinance defines the terms:
"(a) *Camp* means to pitch or occupy camp facilities; to use camp paraphernalia.
"(b) *Camp facilities* include, but are not limited to, tents, huts, or temporary shelters.
"(c) *Camp paraphernalia* includes, but is not limited to, tarpaulins, cots, beds, sleeping bags, hammocks or non-city designated cooking facilities and similar equipment.
"(d) *Park* means the same as defined in section 31–1 of this Code.
"(e) *Store* means to put aside or accumulate for use when needed, to put for safekeeping, to place or leave in a location.
"(f) *Street* means the same as defined in section 1–2 of this Code."

field where they were booked, chained to benches, marked with numbers, and held for up to six hours, after which they were released at a different location. Homeless persons among the arrestees claimed they were the victims of discriminatory enforcement. The municipal court found that they had been singled out for arrest for offenses that rarely, if ever, were the basis for even a citation.

In October 1990, Santa Ana settled a civil action for injunctive relief, agreeing to refrain from discriminating on the basis of homelessness, from taking action to drive the homeless out of the city, and from conducting future sweeps and mass arrests. That case, which was to be dismissed in 1995, was still pending when the camping ordinance was passed in 1992.

Evidence in the form of declarations regarding the number of homeless and facilities for them was also offered. In 1993 there were from 10,000 to 12,000 homeless persons in Orange County and 975 permanent beds available to them. When National Guard armories opened in cold weather, there were 125 additional beds in Santa Ana and another 125 in Fullerton. On any given night, however, the number of shelter beds available was more than 2,500 less than the need.

The Court of Appeal majority, relying in part on this evidence, concluded that the purpose of the ordinance—to displace the homeless—was apparent. On that basis, it held that the ordinance infringed on the right to travel, authorized cruel and unusual punishment by criminalizing status, and was vague and overbroad. The city contends that the ordinance is constitutional on its face. We agree. We also conclude that, if the Tobe petition sought to mount an as applied challenge to the ordinance, it failed to perfect that type of challenge.

II. PRELIMINARY CONSIDERATIONS

A. Facial or As Applied Challenge.

Plaintiffs argue that they have mounted an as applied challenge to the ordinance as well as a facial challenge. While they may have intended both, we conclude that no as applied challenge to the ordinance was perfected. The procedural posture of the Zuckernick action precludes an as applied challenge, which may not be made on demurrer to a complaint which does not describe the allegedly unlawful conduct or the circumstances in which it occurred. The Tobe plaintiffs did not clearly allege such a challenge or seek relief from specific allegedly impermissible applications of the ordinance. Moreover, assuming that an as applied attack on the ordinance was stated, the plaintiffs did not establish that the ordinance has been applied in a constitutionally impermissible manner either to themselves or to others in the past.

Because the Court of Appeal appears to have based its decision in part on reasoning that would be appropriate to a constitutional challenge based on a claim that, as applied to particular defendants, the Santa Ana ordinance was invalid, we must first consider the nature of the challenge made by these petitioners.

1. The Tobe petition.

[A]n as applied challenge assumes that the statute or ordinance violated is valid and asserts that the manner of enforcement against a particular individual or individuals or the circumstances in which the statute or ordinance is applied is unconstitutional. All of the declarants who had been cited under the ordinance described conduct in which they had engaged and that conduct appears to have violated the ordinance. None describes an impermissible means of enforcement of the ordinance or enforcement in circumstances that violated the constitutional rights the petition claimed had been violated. None demonstrated that the circumstances in which he or she was cited affected the declarant's right to travel. None states facts to support a conclusion that any punishment, let alone cruel and unusual punishment proscribed by the Eighth Amendment, had been imposed. Since no constitutionally impermissible pattern, or even single instance, of constitutionally impermissible enforcement was shown, no injunction against such enforcement could be issued and none was sought by plaintiffs.

Because the Tobe plaintiffs sought only to enjoin *any* enforcement of the ordinance and did not demonstrate a pattern of unconstitutional enforcement, the petition must be considered as one which presented only a facial challenge to the ordinance.

2. The Zuckernick petition.

None of the complaints in the Zuckernick proceedings included any allegations identifying the defendant as an involuntarily homeless person whose violation of the ordinance was involuntary and/or occurred at a time when shelter beds were unavailable. Although the petition for writ of mandate included allegations regarding Santa Ana's past efforts to rid the city of its homeless population, those allegations, even if true, were irrelevant to the legal sufficiency of the complaints.

Therefore, while we are not insensitive to the importance of the larger issues petitioners and amici curiae seek to raise in these actions, or to the disturbing nature of the evidence which persuaded the Court of Appeal to base its decision on what it believed to be the impact of the ordinance on homeless persons, the only question properly before the municipal and superior courts and the Court of Appeal for decision was the facial validity of the ordinance.

This court's consideration will, therefore, be limited to the facial validity of the ordinance.

B. Motive of Legislators.

The Court of Appeal also considered the evidence of Santa Ana's past attempts to remove homeless persons from the city significant evidence of the purpose for which the ordinance was adopted. It then considered that purpose in assessing the validity of the ordinance. While the intent or purpose of the legislative body must be considered in construing an ambiguous statute or ordinance, the motive of the legislative body is generally irrelevant to the validity of the statute or ordinance.

The Court of Appeal relied in part on *Pottinger v. City of Miami* (S.D.Fla.1992) 810 F.Supp. 1551, 1581, for its assumption that consideration of the motives of the Santa Ana City Council may be considered in assessing the validity of the ordinance. That is not the rule in this state, but even were it so, *Pottinger* was not a challenge to the facial validity of the Miami ordinance in question there. Moreover, the district court's conclusion that the ordinance was invalid as applied was not based on the motives of the legislators in enacting the ordinance. The court considered internal memoranda and evidence of arrest records as evidence of the purpose underlying *enforcement* of the ordinance against homeless persons.

Absent a basis for believing that the ordinance would not have been adopted if the public areas of Santa Ana had been appropriated for living accommodation by any group other than the homeless, or that it was the intent of that body that the ordinance be enforced only against homeless persons, the ordinance is not subject to attack on the basis that the city council may have hoped that its impact would be to discourage homeless persons from moving to Santa Ana.

We cannot assume … that the sole purpose of the Santa Ana ordinance was to force the homeless out of the city. The city had agreed to discontinue such attempts when it settled the prior litigation. The record confirms that the city faced a problem common to many urban areas, the occupation of public parks and other public facilities by homeless persons. Were we to adopt the approach suggested by the dissent, any facially valid ordinance enacted by a city that had once acted in a legally impermissible manner to achieve a permissible objective could be found invalid on the basis that its past conduct established that the ordinance was not enacted for a permissible purpose. Absent evidence other than the enactment of a facially valid ordinance, we cannot make that assumption here.

III. FACIAL VALIDITY OF THE SANTA ANA ORDINANCE

A. Right to Travel.

Although no provision of the federal Constitution expressly recognizes a right to travel among and between the states, that right is recognized as a

fundamental aspect of the federal union of states. "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." (*Passenger Cases* (1849) 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702 (dis. opn. of Taney, C.J.).)

In the *Passenger Cases, supra,* 48 U.S. (7 How.) 283 the court struck down taxes imposed by the States of New York and Massachusetts on aliens who entered the state from other states and countries by ship. The basis for the decision, as found in the opinions of the individual justices, was that the tax invaded the power of Congress over foreign and interstate commerce. The opinion of Chief Justice Taney, in which he disagreed with the majority on the commerce clause issue, also addressed the tax as applied to citizens of the United States arriving from other states. That tax he believed to be impermissible. Some later decisions of the court trace recognition of the constitutional right of unburdened interstate travel to that opinion. (See, e.g., *Shapiro v. Thompson* (1969) 394 U.S. 618, 630. And, relying on the dissenting opinion of the Chief Justice in the *Passenger Cases,* the court struck down a tax on egress from the State of Nevada in *Crandall v. Nevada* (1867) 73 U.S. (6 Wall.) 35, 18 L.Ed. 745, holding that the right of interstate travel was a right of national citizenship which was essential if a citizen were to be able to pass freely through another state to reach the national or a regional seat of the federal government.

Other cases find the source of the right in the privileges and immunities clause. In *Paul v. Virginia* (1868) 75 U.S. (8 Wall.) 168, 19 L.Ed. 357, the court rejected a challenge predicated on the privileges and immunities clause made by a corporation to a tax imposed by the State of Virginia on out-of-state insurance companies. In so doing, it recognized interstate travel as a right guaranteed to citizens. "It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; *it gives them the right of free ingress into other States, and egress from them;* it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws." (*Id.,* at p. 180, italics added.)

In the *Slaughter–House Cases* (1872) 83 U.S. (16 Wall.) 36, the court equated the rights protected by the privileges and immunities clause to those in the corresponding provision of the Articles of Confederation which provided that the inhabitants of each state were to have " 'the privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State....' "

The privileges and immunities clause was also the source of the right of interstate travel as an incident of national citizenship. The right to travel, or right of migration, now is seen as an aspect of personal liberty which, when united with the right to travel, requires "that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement."

In a line of cases originating with *Shapiro v. Thompson,* the court has considered the right to travel in the context of equal protection challenges to state laws creating durational residency requirements as a condition to the exercise of a fundamental right or receipt of a state benefit. In those cases the court has held that a law which *directly* burdens the fundamental right of migration or interstate travel is constitutionally impermissible. Therefore a state may not create classifications which, by imposing burdens or restrictions on newer residents which do not apply to all residents, deter or penalize migration of persons who exercise their right to travel to the

state.

In *Shapiro,* where public assistance was denied residents who had lived in the state for less than one year, the court held that durational residence as a condition of receiving public assistance constituted invidious discrimination between residents, and that if a law had no other purpose than chilling the exercise of a constitutional right such as that of migration of needy persons into the state the law was impermissible. Further, "any classification which serves to penalize the exercise of [the right of migration], unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional."

Next, durational residence requirements for voting were struck down by the court in *Dunn v. Blumstein* (1972) 405 U.S. 330.

The court's focus on whether the law directly burdened, by penalizing, interstate travel continued in *Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250, in which a durational residence requirement for indigent, nonemergency medical care at county expense was challenged. The court held that the restriction denied newcomers equal protection, impinged on the right to travel by denying basic necessities of life, and penalized interstate migration.

In each of these cases the court had before it a law which denied residents a fundamental constitutional right (voting) or a governmental benefit (public assistance, medical care) on the basis of the duration of their residence. The law created two classes of residents. In *Zobel v. Williams* (1982) 457 U.S. 55, where the right to share in oil revenues was based on the duration of residence in Alaska, the court noted that the right to travel analysis in those cases, which did not create an actual barrier to travel, was simply a type of equal protection analysis. "In addition to protecting persons against the erection of actual barriers to interstate movement, the right to travel, when applied to residency requirements, protects new residents of a state from being disadvantaged because of their recent migration or from otherwise being treated differently from longer term residents. In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer term residents."

The right of intrastate travel has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution.

Neither the United States Supreme Court nor this court has ever held, however, that the incidental impact on travel of a law having a purpose other than restriction of the right to travel, and which does not discriminate among classes of persons by penalizing the exercise by some of the right to travel, is constitutionally impermissible.

By contrast, in a decision clearly relevant here, a zoning law which restricted occupancy to family units or nonfamily units of no more than two persons was upheld by the Supreme Court, notwithstanding any incidental impact on a person's preference to move to that area, because the law was not aimed at transients and involved no fundamental right. (*Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 7.

Courts of this state have taken a broader view of the right of intrastate travel, but have found violations only when a direct restriction of the right to travel occurred.

This court has also rejected an argument that any legislation that burdens the right to travel must be subjected to strict scrutiny and sustained only if a compelling need is demonstrated.

We do not question the conclusion of the Court of Appeal that a local ordinance which forbids sleeping on public streets or in public parks and other public places may have the effect of deterring travel by persons who are unable to afford or obtain other accommodations in the location to which they travel. Assuming that there may be some state actions short of imposing a direct barrier to migration or denying benefits to a newly arrived resident which violate the right to travel, the ordinance does not do so. It is a nondiscrimi-

natory ordinance which forbids use of the public streets, parks, and property by residents and nonresidents alike for purposes other than those for which the property was designed. It is not constitutionally invalid because it may have an incidental impact on the right of some persons to interstate or intrastate travel.

As we have pointed out above, to succeed in a facial challenge to the validity of a statute or ordinance the plaintiff must establish that " 'the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional provisions.' " All presumptions favor the validity of a statute. The court may not declare it invalid unless it is clearly so.

Since the Santa Ana ordinance does not on its face reflect a discriminatory purpose, and is one which the city has the power to enact, its validity must be sustained unless it cannot be applied without trenching upon constitutionally protected rights. The provisions of the Santa Ana ordinance do not inevitably conflict with the right to travel. The ordinance is capable of constitutional application. The ordinance prohibits "any person" from camping and/or storing personal possessions on public streets and other public property. It has no impact, incidental or otherwise, on the right to travel except insofar as a person, homeless or not, might be discouraged from traveling to Santa Ana because camping on public property is banned. An ordinance that bans camping and storing personal possessions on public property does not directly impede the right to travel. Even assuming that the ordinance may constitute an incidental impediment to some individuals' ability to travel to Santa Ana, since it is manifest that the ordinance is capable of applications which do not offend the Constitution in the manner suggested by petitioners and the Court of Appeal, the ordinance must be upheld.

Our conclusion that the Santa Ana ordinance does not impermissibly infringe on the right of the homeless, or others, to travel, finds support in the decision of the United States District Court in *Joyce v. City and County of San Francisco* (1994) 846 F.Supp. 843. The plaintiffs, on behalf of a class of homeless individuals, sought a preliminary injunction to prevent implementation of a program of enforcement (the Matrix Program) of state and municipal laws which were commonly violated by the homeless residents of the City. Among the laws to be enforced were those banning "camping" or "lodging" in public parks and obstructing sidewalks. It was claimed, inter alia, that the Matrix Program infringed on the right to travel. The court rejected that argument and refused to require the City to show a compelling state interest to justify any impact the program might have on the right of the class members to travel. It noted that the program was not facially discriminatory as it did not distinguish between persons who were residents of the City and those who were not. In so doing, the court suggested that the opinion of the Court of Appeal in this case was among those which constituted extensions of the right to travel that appeared to be "unwarranted under the governing Supreme Court precedent." We agree.

The right to travel does not, as the Court of Appeal reasoned in this case, endow citizens with a "right to live or stay where one will." While an individual may travel where he will and remain in a chosen location, that constitutional guaranty does not confer immunity against local trespass laws and does not create a right to remain without regard to the ownership of the property on which he chooses to live or stay, be it public or privately owned property.

Moreover, lest we be understood to imply that an as applied challenge to the ordinance might succeed on the right to travel ground alone, we caution that, with few exceptions, the creation or recognition of a constitutional right does not impose on a state or governmental subdivision the obligation to provide its citizens with the means to enjoy that right. Santa Ana has no constitutional obligation to make accommodations on or in public property available to the transient homeless to facilitate their exercise of the right to travel. and on the Mall in the nation's capital violated the First Amendment rights of the demonstrators. The

court held that it did not, as other areas were available for the purpose. *Clark* dealt with an affirmative right—that of free speech—which could be restricted in public fora only by reasonable, content-neutral time, place and manner restrictions. (*Id.* at p. 293, 104 S.Ct. at p. 3069). The court expressly recognized the authority of the National Park Service "to promulgate rules and regulations for the use of the

The Court of Appeal erred in holding that the Santa Ana ordinance impermissibly infringes on the right of the homeless to travel.

B. Punishment for Status.

The Court of Appeal invalidated the ordinance for the additional reason that it imposed punishment for the "involuntary status of being homeless." On that basis the court held the ordinance was invalid because such punishment violates the Eighth Amendment prohibition of cruel and unusual punishment, and the ban on cruel or unusual punishment of article I, section 17 of the California Constitution. We disagree with that construction of the ordinance and of the activity for which punishment is authorized. The ordinance permits punishment for proscribed conduct, not punishment for status.

The holding of the Court of Appeal is not limited to the face of the ordinance, and goes beyond even the evidence submitted by petitioners. Neither the language of the ordinance nor that evidence supports a conclusion that a person may be convicted and punished under the ordinance solely on the basis that he or she has no fixed place of abode. No authority is cited for the proposition that an ordinance which prohibits camping on public property punishes the involuntary status of being homeless or, as the Court of Appeal also concluded, is punishment for poverty. *Robinson v. California* (1962) 370 U.S. 660, on which the court relied, dealt with a statute which criminalized the status of being addicted to narcotics. The court made it clear, however, that punishing the conduct of using or possessing narcotics, even by an addict, is not impermissible punishment for status.

A plurality of the high court reaffirmed the *Robinson* holding in *Powell v. State of Texas* (1968) 392 U.S. 514, where it rejected a claim that punishment of an alcoholic for being drunk in public was constitutionally impermissible. "The entire thrust of *Robinson's* interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus.* It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.'"

[T]he Supreme Court has not held that the Eighth Amendment prohibits punishment of acts derivative of a person's status. Indeed, the district court questioned whether "homelessness" is a status at all within the meaning of the high court's decisions. "As an analytical matter, more fundamentally, homelessness is not readily classified as a 'status.' Rather, as expressed for the plurality in *Powell* by Justice Marshall, there is a 'substantial definitional distinction between a "status" ... and a "condition"....' While the concept of status might elude perfect definition, certain factors assist in its determination, such as the involuntariness of the acquisition of that quality (including the presence or not of that characteristic at birth), and the degree to which an individual has control over that characteristic."

The declarations submitted by petitioners in this action demonstrate the analytical difficulty to which the *Joyce* court referred. Assuming arguendo the accuracy of the declarants' descriptions of the circumstances in which they were cited under the ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.

The Court of Appeal erred, therefore, in concluding that the ordinance is invalid because it permits punishment for the status of being indi-

gent or homeless.

C. Vagueness and Overbreadth.

The Court of Appeal concluded that the Santa Ana ordinance was vague and overbroad. It based its vagueness conclusion on the nonexclusive list of examples of camping "paraphernalia" and "facilities" in the definitions of those terms. Those definitions were so unspecific, the court reasoned, that they invited arbitrary enforcement of the ordinance in the unfettered discretion of the police. The overbreadth conclusion was based on reasoning that the ordinance could be applied to constitutionally protected conduct. In that respect the court held that the verb "store" was overbroad as it could be applied to innocent conduct such as leaving beach towels unattended at public pools and wet umbrellas in library foyers.

1. Vagueness.

The Tobe respondents and the People, real party in interest in the Zuckernick matter, argue that the Court of Appeal failed to apply the tests enunciated by the United States Supreme Court and this court in applying the vagueness doctrine. It has isolated particular terms rather than considering them in context. We agree.

A penal statute must define the offense with sufficient precision that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." "The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of 'life, liberty, or property without due process of law,' as assured by both the federal Constitution (U.S. Const., Amends. V, XIV) and the California Constitution (Cal. Const., art. I, § 7)."

To satisfy the constitutional command, a statute must meet two basic requirements: (1) the statute must be sufficiently definite to provide adequate notice of the conduct proscribed; and (2) the statute must provide sufficiently definite guidelines for the police in order to prevent arbitrary and discriminatory enforcement. Only a reasonable degree of certainty is required, however. The analysis begins with "the strong presumption that legislative enactments 'must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. [Citations.] A statute should be sufficiently certain so that a person may know what is prohibited thereby and what may be done without violating its provisions, but it cannot be held void for uncertainty if any reasonable and practical construction can be given to its language.' "

The Court of Appeal erred in holding that the ordinance is unconstitutionally vague. The terms which the Court of Appeal considered vague are not so when the purpose clause of the ordinance is considered and the terms are read in that context as they should be. Contrary to the suggestion of the Court of Appeal, we see no possibility that any law enforcement agent would believe that a picnic in a public park constituted "camping" within the meaning of the ordinance or would believe that leaving a towel on a beach or an umbrella in a library constituted storage of property in violation of the ordinance.

The stated purpose of the ordinance is to make public streets and other areas readily accessible to the public and to prevent use of public property "for camping purposes or storage of personal property" which "interferes with the rights of others to use the areas for which they were intended." No reasonable person would believe that a picnic in an area designated for picnics would constitute camping in violation of the ordinance. The ordinance defines camping as occupation of camp facilities, living temporarily in a camp facility or outdoors, or using camp paraphernalia. The Court of Appeal's strained interpretation of "living," reasoning that we all use public facilities for "living" since all of our activities are part of living, ignores the context of the ordinance which prohibits living not in the sense of existing, but dwelling or residing on public property. Picnicking is not living on public property. It does not involve occupation of "tents, huts, or temporary shelters" "pitched" on public property or residing on public property.

Nor is the term "store" vague. Accumulating or putting aside items, placing them for safekeeping, or leaving them in public parks, on public streets, or in a public parking lot or other public area is prohibited by the ordinance. When read in light of the express purpose of the ordinance—to avoid interfering with use of those areas for the purposes for which they are intended—it is clear that leaving a towel on a beach, an umbrella in the public library, or a student backpack in a school, or using picnic supplies in a park in which picnics are permitted is not a violation of the ordinance.

The ordinance is not vague. It gives adequate notice of the conduct it prohibits. It does not invite arbitrary or capricious enforcement. The superior court properly rejected that basis of the Tobe plaintiffs' challenge to the ordinance. The Court of Appeal erred in reversing that judgment on that ground.

2. Overbreadth.

The Court of Appeal reasoned that the ordinance was broader than necessary since it banned camping on all public property. There is no such limitation on the exercise of the police power, however, unless an ordinance is vulnerable on equal protection grounds or directly impinges on a fundamental constitutional right.

If the overbreadth argument is a claim that the ordinance exceeds the police power of that city, it must also fail. There is no fundamental right to camp on public property; persons who do so are not a suspect classification; and neither of the petitions claims that the ordinance is invidiously discriminatory on its face. The Legislature has expressly recognized the power of a city "to regulate conduct upon a street, sidewalk, or other public place or on or in a place open to the public" and has specifically authorized local ordinances governing the use of municipal parks. Adoption of the ordinance was clearly within the police power of the city, which may "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." As the more than 90 cities and the California State Association of Counties that have filed an amicus curiae brief in this court have observed, a city not only has the power to keep its streets and other public property open and available for the purpose to which they are dedicated, it has a duty to do so.

The Court of Appeal also failed to recognize that a facial challenge to a law on grounds that it is overbroad and vague is an assertion that the law is invalid in all respects and cannot have *any* valid application, or a claim that the law sweeps in a substantial amount of constitutionally protected conduct. The concepts of vagueness and overbreadth are related, in the sense that if a law threatens the exercise of a constitutionally protected right a more stringent vagueness test applies.

Neither the Tobe plaintiffs nor the Zuckernick petitioners have identified a constitutionally protected right that is impermissibly restricted by application or threatened application of the ordinance. There is no impermissible restriction on the right to travel. There is no right to use of public property for living accommodations or for storage of personal possessions except insofar as the government permits such use by ordinance or regulation. Therefore, the ordinance is not overbroad, and is not facially invalid in that respect. It is capable of constitutional application.

Since the ordinance is not unconstitutionally overbroad, and the facial vagueness challenge must fail, the Court of Appeal erred in ordering dismissal of the complaints in the Zuckernick prosecution and enjoining enforcement of the ordinance.

IV. DISPOSITION

The judgment of the Court of Appeal is reversed.

Robert MARTIN; Lawrence Lee Smith; Robert Anderson; Janet F. Bell; Pamela S. Hawkes; and Basil E. Humphrey, Plaintiffs-Appellants,

v.

CITY OF BOISE, Defendant-Appellee.

No. 15-35845

United States Court of Appeals, Ninth Circuit.

Argued and Submitted July 13, 2017 Portland, Oregon

Filed April 1, 2019

Background: Homeless persons brought § 1983 action challenging city's public camping ordinance on Eighth Amendment grounds. The United States District Court for the District of Idaho, Ronald E. Bush, United States Magistrate Judge, 834 F.Supp.2d 1103, entered summary judgment in defendants' favor, and plaintiffs appealed. The Court of Appeals, 709 F.3d 890, reversed and remanded. On remand, defendants moved for summary judgment, and the District Court, Bush, United States Magistrate Judge, 993 F.Supp.2d 1237, granted motion in part and denied it in part. Appeal was taken.

Holdings: On denial of panel rehearing and rehearing en banc, the Court of Appeals, Berzon, Circuit Judge, held that:

(1) homeless persons had standing to pursue their claims even after city adopted protocol not to enforce its public camping ordinance when available shelters were full;

(2) plaintiffs were generally barred by *Heck* doctrine from commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions;

(3) *Heck* doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction;

(4) *Heck* doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's ordinance; and

(5) Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter.

Reversed and remanded.

Opinion, 902 F.3d 1031, superseded.

Owens, Circuit Judge, filed opinion concurring in part and dissenting in part.

Berzon, Circuit Judge, filed opinion concurring in the denial of rehearing en banc.

M. Smith, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Callahan, Bea, Ikuta, Ben-

nett, and R. Nelson, Circuit Judges, joined.

Bennett, Circuit Judge, filed opinion dissenting from the denial of rehearing en banc, in which Bea, Ikuta, and R. Nelson, Circuit Judges, joined, and in which M. Smith, Circuit Judge, joined in part.

1. Federal Courts ⚿3675

On appeal from grant of summary judgment for city on § 1983 claims against it, the Court of Appeals would review the record in light most favorable to plaintiffs. 42 U.S.C.A. § 1983.

2. Federal Civil Procedure ⚿103.2, 103.3

For plaintiff to have Article III standing, he must demonstrate an injury that is concrete, particularized, and actual or imminent, fairly traceable to the challenged action, and redressable by a favorable ruling. U.S. Const. art. 3, § 1 et seq.

3. Federal Civil Procedure ⚿103.2

While concept of "imminent" injury, such as plaintiff must demonstrate to establish his Article III standing, is concededly somewhat elastic, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes, i.e., that the injury is certainly impending. U.S. Const. art. 3, § 1 et seq.

4. Constitutional Law ⚿699

Plaintiff need not await an arrest or prosecution to have constitutional standing to challenge the constitutionality of criminal statute. U.S. Const. art. 3, § 1 et seq.

5. Constitutional Law ⚿699

Plaintiff should not be required to await and undergo a criminal prosecution as the sole means of challenging the constitutionality of statute, but will have standing to seek immediate determination on that issue, where plaintiff has alleged an intention to engage in course of conduct arguably affected with a constitutional interest but proscribed by statute, and where there exists a credible threat of prosecution thereunder. U.S. Const. art. 3, § 1 et seq.

6. Federal Civil Procedure ⚿2467

To defeat a motion for summary judgment premised on alleged lack of standing, plaintiffs need not establish that they in fact have standing, but only that there is genuine question of material fact as to the standing elements. U.S. Const. art. 3, § 1 et seq.

7. Federal Civil Procedure ⚿2491.5

Even assuming that homeless shelters within city accurately self-reported when they were full, genuine issues of material fact as to whether, due to limits on number of consecutive days on which homeless people could obtain housing at shelters, or due to deadlines by which people had to request accommodation at shelters, people might be without any available housing in city even on nights when not all shelters reported as being full, precluded entry of summary judgment for city on § 1983 claim that its public camping ordinance violated homeless persons' Eighth Amendment rights, on theory that homeless persons no longer had standing to pursue their claims once city adopted protocol not to enforce ordinance when available shelters were full. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

8. Constitutional Law ⚿1374
Vagrancy ⚿6

Consistent with the Establishment Clause of the First Amendment, city could not, via the threat of prosecution under its public camping ordinance, coerce homeless individuals into participating in religion-based programs at city shelters. U.S. Const. Amend. 1.

9. Civil Rights ⚿1088(5)

Under *Heck* doctrine, in order to recover damages for allegedly unconstitutional conviction or imprisonment or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by state tribunal authorized to make such determination, or called into question by federal court's issuance of writ of habeas corpus. 42 U.S.C.A. § 1983.

10. Civil Rights ⚿1454
Declaratory Judgment ⚿84

Heck doctrine bars § 1983 suits even when the relief sought is prospective, injunctive or declaratory relief, if success in that action would necessarily demonstrate the invalidity of plaintiff's confinement or its duration. 42 U.S.C.A. § 1983.

11. Civil Rights ⚿1088(5)

Homeless persons who not only failed to file direct appeal challenging, on Eighth Amendment grounds, their convictions under city's public camping ordinance, but also expressly waived right to do so as condition of their guilty pleas, were barred by *Heck* doctrine from later commencing § 1983 action to obtain retrospective relief based on alleged unconstitutionality of their convictions. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

12. Civil Rights ⚿1088(5)

Heck doctrine had no application to homeless persons whose citations under city's public camping ordinance were dismissed before the state obtained a conviction, as the pre-conviction dismissal of citations meant that there was no conviction or sentence that could be undermined by grant of relief to these persons on their § 1983 claim that city's criminalization of sleeping in public parks or on public sidewalks by persons, like them, who allegedly had no available shelter violated their Eighth Amendment rights. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

13. Sentencing and Punishment ⚿1435, 1452, 1482

Cruel and Unusual Punishments Clause of the Eighth Amendment limits not only the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to severity of crime, but also imposes substantive limits on what can be made criminal and punished as such. U.S. Const. Amend. 8.

14. Sentencing and Punishment ⚿1452

Cruel and Unusual Punishments Clause of the Eighth Amendment, by imposing substantive limits on what can be made criminal and punished as such, governs the criminal law process as whole, and not only the imposition of punishment postconviction. U.S. Const. Amend. 8.

15. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

In order for homeless persons to mount an Eighth Amendment challenge to city's public camping ordinance, on theory that it was cruel and unusual for city to criminalize the sleeping in public parks and on public sidewalks by those who had no alternative shelter, homeless persons needed to demonstrate only initiation of criminal process against them, not convictions. U.S. Const. Amend. 8.

16. Civil Rights ⚿1454

Heck doctrine did not apply to prevent homeless persons allegedly lacking alternative types of shelter from pursuing § 1983 action to obtain prospective relief preventing enforcement of city's public camping ordinance against them on Eighth

Amendment grounds. U.S. Const. Amend. 8; 42 U.S.C.A. § 1983.

17. Civil Rights ⚿1454

Heck doctrine serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge.

18. Civil Rights ⚿1454

Claims for future relief, which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration, are distant from the "core" of habeas corpus with which *Heck* doctrine is concerned, and are not precluded by *Heck* doctrine.

19. Sentencing and Punishment ⚿1435

Cruel and Unusual Punishments Clause of the Eighth Amendment circumscribes the criminal process in three ways: (1) by limiting the type of punishment that government may impose; (2) by proscribing punishment that is grossly disproportionate to severity of crime; and (3) by placing substantive limits on what government may criminalize. U.S. Const. Amend. 8.

20. Sentencing and Punishment ⚿1452

Even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold. U.S. Const. Amend. 8.

21. Sentencing and Punishment ⚿1452

While the Cruel and Unusual Punishments Clause places substantive limits on what the government may criminalize, such limits are applied only sparingly. U.S. Const. Amend. 8.

22. Sentencing and Punishment ⚿1452

Under the Cruel and Unusual Punishment Clause of the Eighth Amendment, criminal penalties may be inflicted only if accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. U.S. Const. Amend. 8.

23. Sentencing and Punishment ⚿1452

Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being. U.S. Const. Amend. 8.

24. Sentencing and Punishment ⚿1453
Vagrancy ⚿6

Eighth Amendment prohibited the imposition of criminal penalties for sitting, sleeping, or lying outside on public property on homeless individuals who could not obtain shelter; while this was not to say that city had to provide sufficient shelter for the homeless, as long as there were a greater number of homeless individuals in city than the number of available beds in shelters, city could not prosecute homeless individuals for involuntarily sitting, lying, and sleeping in public on the false premise they had some choice in the matter. U.S. Const. Amend. 8.

Appeal from the United States District Court for the District of Idaho, Ronald E. Bush, Chief Magistrate Judge, Presiding, D.C. No. 1:09-cv-00540-REB

Michael E. Bern (argued) and Kimberly Leefatt, Latham & Watkins LLP, Washington, D.C.; Howard A. Belodoff, Idaho Legal Aid Services Inc., Boise, Idaho; Eric Tars, National Law Center on Homelessness & Poverty, Washington, D.C.; Plaintiffs-Appellants.

Brady J. Hall (argued), Michael W. Moore, and Steven R. Kraft, Moore Elia Kraft & Hall LLP, Boise, Idaho; Scott B. Muir, Deputy City Attorney; Robert B.

Luce, City Attorney; City Attorney's Office, Boise, Idaho; for Defendant-Appellee.

Before: Marsha S. Berzon, Paul J. Watford, and John B. Owens, Circuit Judges.

Concurrence in Order by Judge Berzon;

Dissent to Order by Judge Milan D. Smith, Jr.;

Dissent to Order by Judge Bennett;

Partial Concurrence and Partial Dissent by Judge Owens

ORDER

The Opinion filed September 4, 2018, and reported at 902 F.3d 1031, is hereby amended. The amended opinion will be filed concurrently with this order.

The panel has unanimously voted to deny the petition for panel rehearing. The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

Future petitions for rehearing or rehearing en banc will not be entertained in this case.

BERZON, Circuit Judge, concurring in the denial of rehearing en banc:

I strongly disfavor this circuit's innovation in en banc procedure—ubiquitous dissents in the denial of rehearing en banc, sometimes accompanied by concurrences in the denial of rehearing en banc. As I have previously explained, dissents in the denial of rehearing en banc, in particular, often engage in a "distorted presentation of the issues in the case, creating the impression of rampant error in the original panel opinion although a majority—often a decisive majority—of the active members of the court . . . perceived no error." *Defs. of Wildlife Ctr. for Biological Diversity v. EPA*, 450 F.3d 394, 402 (9th Cir. 2006) (Berzon, J., concurring in denial of rehearing en banc); *see also* Marsha S. Berzon, *Dissent, "Dissentals," and Decision Making*, 100 Calif. L. Rev. 1479 (2012). Often times, the dramatic tone of these dissents leads them to read more like petitions for writ of certiorari on steroids, rather than reasoned judicial opinions.

Despite my distaste for these separate writings, I have, on occasion, written concurrences in the denial of rehearing en banc. On those rare occasions, I have addressed arguments raised for the first time during the en banc process, corrected misrepresentations, or highlighted important facets of the case that had yet to be discussed.

This case serves as one of the few occasions in which I feel compelled to write a brief concurrence. I will not address the dissents' challenges to the *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), and Eighth Amendment rulings of *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), as the opinion sufficiently rebuts those erroneous arguments. I write only to raise two points.

First, the City of Boise did not initially seek en banc reconsideration of the Eighth Amendment holding. When this court solicited the parties' positions as to whether the Eighth Amendment holding merits en banc review, the City's initial submission, before mildly supporting en banc reconsideration, was that the opinion is quite "narrow" and its "interpretation of the [C]onstitution raises little actual conflict with Boise's Ordinances or [their] enforcement." And the City noted that it viewed

prosecution of homeless individuals for sleeping outside as a "last resort," not as a principal weapon in reducing homelessness and its impact on the City.

The City is quite right about the limited nature of the opinion. On the merits, the opinion holds only that municipal ordinances that criminalize sleeping, sitting, or lying in *all* public spaces, when *no* alternative sleeping space is available, violate the Eighth Amendment. *Martin*, 902 F.3d at 1035. Nothing in the opinion reaches beyond criminalizing the biologically essential need to sleep when there is no available shelter.

Second, Judge M. Smith's dissent features an unattributed color photograph of "a Los Angeles public sidewalk." The photograph depicts several tents lining a street and is presumably designed to demonstrate the purported negative impact of *Martin*. But the photograph fails to fulfill its intended purpose for several reasons.

For starters, the picture is not in the record of this case and is thus inappropriately included in the dissent. It is not the practice of this circuit to include outside-the-record photographs in judicial opinions, especially when such photographs are entirely unrelated to the case. And in this instance, the photograph is entirely unrelated. It depicts a sidewalk in Los Angeles, not a location in the City of Boise, the actual municipality at issue. Nor can the photograph be said to illuminate the impact of *Martin* within this circuit, as it predates our decision and was likely taken in 2017.[1]

But even putting aside the use of a pre-*Martin*, outside-the-record photograph from another municipality, the photograph does not serve to illustrate a concrete effect of *Martin*'s holding. The opinion clearly states that it is not outlawing ordinances "barring the obstruction of public rights of way or the erection of certain structures," such as tents, *id.* at 1048 n.8, and that the holding "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place," *id.* at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

What the pre-*Martin* photograph *does* demonstrate is that the ordinances criminalizing sleeping in public places were never a viable solution to the homelessness problem. People with no place to live will sleep outside if they have no alternative. Taking them to jail for a few days is both unconstitutional, for the reasons discussed in the opinion, and, in all likelihood, pointless.

The distressing homelessness problem—distressing to the people with nowhere to live as well as to the rest of society—has grown into a crisis for many reasons, among them the cost of housing, the drying up of affordable care for people with mental illness, and the failure to provide adequate treatment for drug addiction. *See, e.g.*, U.S. Interagency Council on Homelessness, *Homelessness in America: Focus on Individual Adults* 5–8 (2018), https://www.usich.gov/resources/?uploads/asset_library/HIA_Individual_Adults.pdf. The crisis continued to burgeon while ordi-

1. Although Judge M. Smith does not credit the photograph to any source, an internet search suggests that the original photograph is attributable to Los Angeles County. *See Implementing the Los Angeles County Homelessness Initiative*, L.A. County, http://homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/ [https://web.archive.org/web/?20170405225036/homeless.lacounty.gov/implementing-the-los-angeles-county-homeless-initiative/#]; *see also* Los Angeles County (@CountyofLA), Twitter (Nov. 29, 2017, 3:23 PM), https://twitter.com/CountyofLA/status/936012841533894657.

nances forbidding sleeping in public were on the books and sometimes enforced. There is no reason to believe that it has grown, and is likely to grow larger, because *Martin* held it unconstitutional to criminalize simply sleeping *somewhere* in public if one has nowhere else to do so.

For the foregoing reasons, I concur in the denial of rehearing en banc.

M. SMITH, Circuit Judge, with whom CALLAHAN, BEA, IKUTA, BENNETT, and R. NELSON, Circuit Judges, join, dissenting from the denial of rehearing en banc:

In one misguided ruling, a three-judge panel of our court badly misconstrued not one or two, but three areas of binding Supreme Court precedent, and crafted a holding that has begun wreaking havoc on local governments, residents, and businesses throughout our circuit. Under the panel's decision, local governments are forbidden from enforcing laws restricting public sleeping and camping unless they provide shelter for every homeless individual within their jurisdictions. Moreover, the panel's reasoning will soon prevent local governments from enforcing a host of other public health and safety laws, such as those prohibiting public defecation and urination. Perhaps most unfortunately, the panel's opinion shackles the hands of public officials trying to redress the serious societal concern of homelessness.[1]

I respectfully dissent from our court's refusal to correct this holding by rehearing the case en banc.

1. With almost 553,000 people who experienced homelessness nationwide on a single night in January 2018, this issue affects communities across our country. U.S. Dep't of Hous. & Urban Dev., Office of Cmty. Planning & Dev., The 2018 Annual Homeless Assessment Report (AHAR) to Congress 1 (Dec. 2018), https://www.hudexchange.info/resources/documents/2018-AHAR-Part-1.pdf.

I.

The most harmful aspect of the panel's opinion is its misreading of Eighth Amendment precedent. My colleagues cobble together disparate portions of a fragmented Supreme Court opinion to hold that "an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them." *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018). That holding is legally and practically ill-conceived, and conflicts with the reasoning of every other appellate court [2] that has considered the issue.

A.

The panel struggles to paint its holding as a faithful interpretation of the Supreme Court's fragmented opinion in *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). It fails.

To understand *Powell*, we must begin with the Court's decision in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). There, the Court addressed a statute that made it a "criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 660, 82 S.Ct. 1417 (quoting Cal. Health & Safety Code § 11721). The statute allowed defendants to be convicted so long as they were drug addicts, regardless of whether they actually used or possessed drugs. *Id.* at 665, 82 S.Ct. 1417. The Court struck

2. Our court previously adopted the same Eighth Amendment holding as the panel in *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), but that decision was later vacated. 505 F.3d 1006 (9th Cir. 2007).

down the statute under the Eighth Amendment, reasoning that because "narcotic addiction is an illness . . . which may be contracted innocently or involuntarily . . . a state law which imprisons a person thus afflicted as criminal, even though he has never touched any narcotic drug" violates the Eighth Amendment. *Id.* at 667, 82 S.Ct. 1417.

A few years later, in *Powell*, the Court addressed the scope of its holding in *Robinson*. *Powell* concerned the constitutionality of a Texas law that criminalized public drunkenness. *Powell*, 392 U.S. at 516, 88 S.Ct. 2145. As the panel's opinion acknowledges, there was no majority in *Powell*. The four Justices in the plurality interpreted the decision in *Robinson* as standing for the limited proposition that the government could not criminalize one's status. *Id.* at 534, 88 S.Ct. 2145. They held that because the Texas statute criminalized conduct rather than alcoholism, the law was constitutional. *Powell*, 392 U.S. at 532, 88 S.Ct. 2145.

The four dissenting Justices in *Powell* read *Robinson* more broadly: They believed that "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Although the statute in *Powell* differed from that in *Robinson* by covering involuntary conduct, the dissent found the same constitutional defect present in both cases. *Id.* at 567–68, 88 S.Ct. 2145.

Justice White concurred in the judgment. He upheld the defendant's conviction because Powell had not made a showing that he was unable to stay off the streets on the night he was arrested. *Id.* at 552–53, 88 S.Ct. 2145 (White, J., concurring in the result). He wrote that it was "unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place." *Id.* at 553, 88 S.Ct. 2145.

The panel contends that because Justice White concurred in the judgment alone, the views of the dissenting Justices constitute the holding of *Powell*. *Martin*, 902 F.3d at 1048. That tenuous reasoning—which metamorphosizes the *Powell* dissent into the majority opinion—defies logic.

Because *Powell* was a 4–1–4 decision, the Supreme Court's decision in *Marks v. United States* guides our analysis. 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977). There, the Court held that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who *concurred* in the judgments on the narrowest grounds.' " *Id.* at 193, 97 S.Ct. 990 (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (plurality opinion)) (emphasis added). When *Marks* is applied to *Powell*, the holding is clear: The defendant's conviction was constitutional because it involved the commission of an act. Nothing more, nothing less.

This is hardly a radical proposition. I am not alone in recognizing that "there is definitely no Supreme Court holding" prohibiting the criminalization of involuntary conduct. *United States v. Moore*, 486 F.2d 1139, 1150 (D.C. Cir. 1973) (en banc). Indeed, in the years since *Powell* was decided, courts—including our own—have routinely upheld state laws that criminalized acts that were allegedly compelled or involuntary. *See, e.g.*, *United States v. Stenson*, 475 F. App'x 630, 631 (7th Cir. 2012) (holding that it was constitutional for the defendant to be punished for violating the terms of his parole by consuming alcohol because he "was not punished for his status as an alcoholic but for his conduct");

Joshua v. Adams, 231 F. App'x 592, 594 (9th Cir. 2007) ("Joshua also contends that the state court ignored his mental illness [schizophrenia], which rendered him unable to control his behavior, and his sentence was actually a penalty for his illness .... This contention is without merit because, in contrast to *Robinson*, where a statute specifically criminalized addiction, Joshua was convicted of a criminal offense separate and distinct from his 'status' as a schizophrenic."); *United States v. Benefield*, 889 F.2d 1061, 1064 (11th Cir. 1989) ("The considerations that make any incarceration unconstitutional when a statute punishes a defendant for his status are not applicable when the government seeks to punish a person's actions.").[3]

To be sure, *Marks* is controversial. Last term, the Court agreed to consider whether to abandon the rule *Marks* established (but ultimately resolved the case on other grounds and found it "unnecessary to consider ... the proper application of *Marks*"). *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 1772, 201 L.Ed.2d 72 (2018). At oral argument, the Justices criticized the logical subset rule established by *Marks* for elevating the outlier views of concurring Justices to precedential status.[4] The Court also acknowledged that lower courts have inconsistently interpreted the holdings of fractured decisions under *Marks*.[5]

Those criticisms, however, were based on the assumption that *Marks* means what it says and says what it means: Only the views of the Justices concurring in the judgment may be considered in construing the Court's holding. *Marks*, 430 U.S. at 193, 97 S.Ct. 990. The Justices did not even think to consider that *Marks* allows dissenting Justices to create the Court's holding. As a *Marks* scholar has observed, such a method of vote counting "would paradoxically create a precedent that contradicted the judgment in that very case."[6] And yet the panel's opinion flouts that common sense rule to extract from *Powell* a holding that does not exist.

What the panel really does is engage in a predictive model of precedent. The panel opinion implies that if a case like *Powell* were to arise again, a majority of the Court would hold that the criminalization of involuntary conduct violates the Eighth Amendment. Utilizing such reasoning, the panel borrows the Justices' robes and adopts that holding on their behalf.

But the Court has repeatedly discouraged us from making such predictions when construing precedent. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989). And, for good reason. Predictions about how Justices will rule rest on unwarranted speculation about what goes on in their minds. Such amateur fortunetelling also precludes us from considering new insights on the issues—difficult as they may be in the case of 4–1–4 decisions like *Powell*—that have arisen since the Court's fragmented opinion. *See E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 135 n.26, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977) (noting "the wisdom of allowing difficult issues to mature through

3. That most of these opinions were unpublished only buttresses my point: It is uncontroversial that *Powell* does not prohibit the criminalization of involuntary conduct.

4. Transcript of Oral Argument at 14, *Hughes v. United States*, —— U.S. ——, 138 S.Ct. 1765, 201 L.Ed.2d 72 (2018) (No. 17-155).

5. *Id.* at 49.

6. Richard M. Re, *Beyond the* Marks *Rule*, 132 Harv. L. Rev. (forthcoming 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3090620.

full consideration by the courts of appeals").

In short, predictions about how the Justices will rule ought not to create precedent. The panel's Eighth Amendment holding lacks any support in *Robinson* or *Powell*.

B.

Our panel's opinion also conflicts with the reasoning underlying the decisions of other appellate courts.

The California Supreme Court, in *Tobe v. City of Santa Ana*, rejected the plaintiffs' Eighth Amendment challenge to a city ordinance that banned public camping. 892 P.2d 1145 (1995). The court reached that conclusion despite evidence that, on any given night, at least 2,500 homeless persons in the city did not have shelter beds available to them. *Id.* at 1152. The court sensibly reasoned that because *Powell* was a fragmented opinion, it did not create precedent on "the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 1166 (quoting *Powell*, 392 U.S. at 533, 88 S.Ct. 2145). Our panel—bound by the same Supreme Court precedent—invalidates identical California ordinances previously upheld by the California Supreme Court. Both courts cannot be correct.

The California Supreme Court acknowledged that homelessness is a serious societal problem. It explained, however, that:

> Many of those issues are the result of legislative policy decisions. The arguments of many amici curiae regarding the apparently intractable problem of homelessness and the impact of the Santa Ana ordinance on various groups of homeless persons (e.g., teenagers, families with children, and the mentally ill) should be addressed to the Legislature and the Orange County Board of Supervisors, not the judiciary. Neither the criminal justice system nor the judiciary is equipped to resolve chronic social problems, but criminalizing conduct that is a product of those problems is not for that reason constitutionally impermissible.

Id. at 1157 n.12. By creating new constitutional rights out of whole cloth, my well-meaning, but unelected, colleagues improperly inject themselves into the role of public policymaking.[7]

The reasoning of our panel decision also conflicts with precedents of the Fourth and Eleventh Circuits. In *Manning v. Caldwell*, the Fourth Circuit held that a Virginia statute that criminalized the possession of alcohol did not violate the Eighth Amendment when it punished the involuntary actions of homeless alcoholics. 900 F.3d 139, 153 (4th Cir. 2018), *reh'g en banc granted* 741 F. App'x 937 (4th Cir. 2018).[8]

7. Justice Black has also observed that solutions for challenging social issues should be left to the policymakers:

> I cannot say that the States should be totally barred from one avenue of experimentation, the criminal process, in attempting to find a means to cope with this difficult social problem .... [I]t seems to me that the present use of criminal sanctions might possibly be unwise, but I am by no means convinced that any use of criminal sanctions would inevitably be unwise or, above all, that I am qualified in this area to know what is legislatively wise and what is legislatively unwise.

Powell, 392 U.S. at 539–40, 88 S.Ct. 2145 (Black, J., concurring).

8. Pursuant to Fourth Circuit Local Rule 35(c), "[g]ranting of rehearing en banc vacates the previous panel judgment and opinion." I mention *Manning*, however, as an illustration of other courts' reasoning on the Eighth Amendment issue.

The court rejected the argument that Justice White's opinion in *Powell* "requires this court to hold that Virginia's statutory scheme imposes cruel and unusual punishment because it criminalizes [plaintiffs'] status as homeless alcoholics." *Id.* at 145. The court found that the statute passed constitutional muster because "it is the act of possessing alcohol—not the status of being an alcoholic—that gives rise to criminal sanctions." *Id.* at 147.

Boise's Ordinances at issue in this case are no different: They do not criminalize the status of homelessness, but only the act of camping on public land or occupying public places without permission. *Martin*, 902 F.3d at 1035. The Fourth Circuit correctly recognized that these kinds of laws do not run afoul of *Robinson* and *Powell*.

The Eleventh Circuit has agreed. In *Joel v. City of Orlando*, the court held that a city ordinance prohibiting sleeping on public property was constitutional. 232 F.3d 1353, 1362 (11th Cir. 2000). The court rejected the plaintiffs' Eighth Amendment challenge because the ordinance "targets conduct, and does not provide criminal punishment based on a person's status." *Id.* The court prudently concluded that "[t]he City is constitutionally allowed to regulate where 'camping' occurs." *Id.*

We ought to have adopted the sound reasoning of these other courts. By holding that Boise's enforcement of its Ordinances violates the Eighth Amendment, our panel has needlessly created a split in authority on this straightforward issue.

C.

One would think our panel's legally incorrect decision would at least foster the common good. Nothing could be further from the truth. The panel's decision generates dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.

The panel opinion masquerades its decision as a narrow one by representing that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Martin*, 902 F.3d at 1048 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006)).

That excerpt, however, glosses over the decision's actual holding: "We hold only that . . . as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property." *Id.* Such a holding leaves cities with a Hobson's choice: They must either undertake an overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night, or abandon enforcement of a host of laws regulating public health and safety. The Constitution has no such requirement.

* * *

Under the panel's decision, local governments can enforce certain of their public health and safety laws only when homeless individuals have the choice to sleep indoors. That inevitably leads to the question of how local officials ought to know whether that option exists.

The number of homeless individuals within a municipality on any given night is not automatically reported and updated in real time. Instead, volunteers or government employees must painstakingly tally the number of homeless individuals block by block, alley by alley, doorway by doorway. Given the daily fluctuations in the homeless population, the panel's opinion would require this labor-intensive task be done every single day. Yet in massive cit-

ies such as Los Angeles, that is simply impossible. Even when thousands of volunteers devote dozens of hours to such "a herculean task," it takes three days to finish counting—and even then "not everybody really gets counted."[9] Lest one think Los Angeles is unique, our circuit is home to many of the largest homeless populations nationwide.[10]

If cities do manage to cobble together the resources for such a system, what happens if officials (much less volunteers) miss a homeless individual during their daily count and police issue citations under the false impression that the number of shelter beds exceeds the number of homeless people that night? According to the panel's opinion, that city has violated the Eighth Amendment, thereby potentially leading to lawsuits for significant monetary damages and other relief.

And what if local governments (understandably) lack the resources necessary for such a monumental task?[11] They have no choice but to stop enforcing laws that prohibit public sleeping and camping.[12] Ac-

9. Matt Tinoco, *LA Counts Its Homeless, But Counting Everybody Is Virtually Impossible*, LAist (Jan. 22, 2019, 2:08 PM), https://laist.com/2019/01/22/los_angeles_homeless_count_2019_how_volunteer.php. The panel conceded the imprecision of such counts in its opinion. *See Martin*, 902 F.3d at 1036 n.1 (acknowledging that the count of homeless individuals "is not always precise"). But it went on to disregard that fact when tying a city's ability to enforce its laws to these counts.

10. The U.S. Department of Housing and Urban Development's 2018 Annual Homeless Assessment Report to Congress reveals that municipalities within our circuit have among the highest homeless populations in the country. In Los Angeles City and County alone, 49,955 people experienced homelessness in 2018. The number was 12,112 people in Seattle and King County, Washington, and 8,576 people in San Diego City and County, California. *See supra* note 1, at 18, 20. In 2016, Las Vegas had an estimated homeless population of 7,509 individuals, and California's Santa Clara County had 6,556. Joaquin Palomino, *How Many People Live On Our Streets?*, S.F. Chronicle (June 28, 2016), https://projects.sfchronicle.com/sf-homeless/numbers.

11. Cities can instead provide sufficient housing for every homeless individual, but the cost would be prohibitively expensive for most local governments. Los Angeles, for example, would need to spend $403.4 million to house every homeless individual not living in a vehicle. *See* Los Angeles Homeless Services Authority, Report on Emergency Framework to Homelessness Plan 13 (June 2018), https://assets.documentcloud.org/documents/4550980/LAHSA-ShelteringReport.pdf. In San Francisco, building new centers to provide a mere 400 additional shelter spaces was estimated to cost between $10 million and $20 million, and would require $20 million to $30 million to operate each year. *See* Heather Knight, *A Better Model, A Better Result?*, S.F. Chronicle (June 29, 2016), https://projects.sfchronicle.com/sfhomeless/shelters. Perhaps these staggering sums are why the panel went out of its way to state that it "in no way dictate[s] to the City that it must provide sufficient shelter for the homeless." *Martin*, 902 F.3d at 1048.

12. Indeed, in the few short months since the panel's decision, several cities have thrown up their hands and abandoned any attempt to enforce such laws. *See, e.g.*, Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year. Now It Has Stopped Citing Campers*, Sacramento Bee (Sept. 18, 2019, 4:27 PM), https://www.sacbee.com/news/local/homeless/article218605025.html ("Sacramento County park rangers have suddenly stopped issuing citations altogether after a federal court ruling this month."); Michael Ellis Langley, *Policing Homelessness*, Golden State Newspapers (Feb. 22, 2019), http://www.goldenstatenewspapers.com/tracy_press/news/policing-homelessness/article_5fe6a9ca-3642-11e9-9b25-37610ef2dbae.html (Sheriff Pat Withrow stating that, "[a]s far as camping ordinances and things like that, we're probably holding off on [issuing citations] for a while" in light of *Martin v. City of Boise*); Kelsie Morgan, *Moses Lake Sees Spike in Homeless Activity Following 9th Circuit Court Decision*, KXLY (Oct. 2, 2018, 12:50 PM), https://www.kxly.com/news/moses-lake-sees-spike-in-homeless-activityfollowing-9th-circuit-court-decision/

cordingly, our panel's decision effectively allows homeless individuals to sleep and live wherever they wish on most public property. Without an absolute confidence that they can house every homeless individual, city officials will be powerless to assist residents lodging valid complaints about the health and safety of their neighborhoods.[13]

As if the panel's actual holding wasn't concerning enough, the logic of the panel's opinion reaches even further in scope. The opinion reasons that because "resisting the need to ... engage in [ ] life-sustaining activities is impossible," punishing the homeless for engaging in those actions in public violates the Eighth Amendment. *Martin*, 902 F.3d at 1048. What else is a life-sustaining activity? Surely bodily functions. By holding that the Eighth Amendment proscribes the criminalization of involuntary conduct, the panel's decision will inevitably result in the striking down of laws that prohibit public defecation and urination.[14] The panel's reasoning also casts doubt on public safety laws restricting drug paraphernalia, for the use of hypodermic needles and the like is no less involuntary for the homeless suffering from the scourge of addiction than is their sleeping in public.

It is a timeless adage that states have a "universally acknowledged power and duty to enact and enforce all such laws ... as may rightly be deemed necessary or expedient for the safety, health, morals, comfort and welfare of its people." *Knoxville Iron Co. v. Harbison*, 183 U.S. 13, 20, 22 S.Ct. 1, 46 L.Ed. 55 (1901) (internal quotations omitted). I fear that the panel's decision will prohibit local governments from fulfilling their duty to enforce an array of public health and safety laws. Halting enforcement of such laws will potentially wreak havoc on our communities.[15] As we have already begun to witness, our neighborhoods will soon feature "[t]ents ... equipped with mini refrigerators, cupboards, televisions, and heaters, [that] vie with pedestrian traffic" and "human waste appearing on sidewalks and at local playgrounds."[16]

801772571 (''Because the City of Moses Lake does not currently have a homeless shelter, city officials can no longer penalize people for sleeping in public areas.''); Brandon Pho, *Buena Park Residents Express Opposition to Possible Homeless Shelter*, Voice of OC (Feb. 14, 2019), https://voiceofoc.org/2019/02/buena-park-residents-express-opposition-to-possible-homeless-shelter/ (stating that Judge David Carter of the U.S. District Court for the Central District of California has ''warn[ed] Orange County cities to get more shelters online or risk the inability the enforce their anti-camping ordinances''); Nick Welsh, *Court Rules to Protect Sleeping in Public: Santa Barbara City Parks Subject of Ongoing Debate*, Santa Barbara Indep. (Oct. 31, 2018), http://www.independent.com/news/2018/oct/31/court-rules-protect-sleeping-public/?jqm (''In the wake of what's known as 'the Boise decision,' Santa Barbara city police found themselves scratching their heads over what they could and could not issue citations for.'').

13. In 2017, for example, San Francisco received 32,272 complaints about homeless encampments to its 311-line. Kevin Fagan, *The Situation On The Streets*, S.F. Chronicle (June 28, 2018), https://projects.sfchronicle.com/sf-homeless/2018-state-of-homelessness.

14. *See* Heater Knight, *It's No Laughing Matter—SF Forming Poop Patrol to Keep Sidewalks Clean*, S.F. Chronicle (Aug. 14, 2018), https://www.sfchronicle.com/bayarea/heatherknight/article/It-s-nolaughing-matter-SF-forming-Poop-13153517.php.

15. *See* Anna Gorman and Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://www.theatlantic.com/health/archive/2019/03/typhus-tuberculosismedieval-diseases-spreading-homeless/584380/ (describing the recent outbreaks of typhus, Hepatitis A, and shigellosis as ''disaster[s] and [a] public-health crisis'' and noting that such ''diseases spread quickly and widely among people living outside or in shelters'').

A Los Angeles Public Sidewalk

II.

The panel's fanciful merits-determination is accompanied by a no-less-inventive series of procedural rulings. The panel's opinion also misconstrues two other areas of Supreme Court precedent concerning limits on the parties who can bring § 1983 challenges for violations of the Eighth Amendment.

A.

The panel erred in holding that Robert Martin and Robert Anderson could obtain prospective relief under *Heck v. Humphrey* and its progeny. 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). As recognized by Judge Owens's dissent, that conclusion cuts against binding precedent on the issue.

The Supreme Court has stated that *Heck* bars § 1983 claims if success on that claim would "necessarily demonstrate the invalidity of [the plaintiff's] confinement or its duration." *Wilkinson v. Dotson*, 544 U.S. 74, 82, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005); *see also Edwards v. Balisok*, 520 U.S. 641, 648, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) (stating that *Heck* applies to claims for declaratory relief). Martin and Anderson's prospective claims did just that. Those plaintiffs sought a declaration that the Ordinances under which they were convicted are unconstitutional and an injunction against their future enforcement on the grounds of unconstitutionality. It is clear that *Heck* bars these claims because Martin and Anderson necessarily seek to demonstrate the invalidity of their previous convictions.

The panel opinion relies on *Edwards* to argue that *Heck* does not bar plaintiffs' requested relief, but *Edwards* cannot bear the weight the panel puts on it. In *Ed-*

16. Scott Johnson and Peter Kiefer, *LA's Battle for Venice Beach: Homeless Surge Puts Hollywood's Progressive Ideals to the Test*, Hollywood Reporter (Jan. 11, 2019, 6:00 AM), https://www.hollywoodreporter.com/features/las-homeless-surge-puts-hollywoods-progressive-ideals-test-1174599.

wards, the plaintiff sought an injunction that would require prison officials to date-stamp witness statements at the time received. 520 U.S. at 643, 117 S.Ct. 1584. The Court concluded that requiring prison officials to date-stamp witness statements did not necessarily imply the invalidity of previous determinations that the prisoner was not entitled to good-time credits, and that *Heck*, therefore, did not bar prospective injunctive relief. *Id.* at 648, 117 S.Ct. 1584.

Here, in contrast, a declaration that the Ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. According to data from the U.S. Department of Housing and Urban Development, the number of homeless individuals in Boise exceeded the number of available shelter beds during each of the years that the plaintiffs were cited.[17] Under the panel's holding that "the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property" "as long as there is no option of sleeping indoors," that data necessarily demonstrates the invalidity of the plaintiffs' prior convictions. *Martin*, 902 F.3d at 1048.

B.

The panel also erred in holding that Robert Martin and Pamela Hawkes, who were cited but not convicted of violating the Ordinances, had standing to sue under the Eighth Amendment. In so doing, the panel created a circuit split with the Fifth Circuit.

The panel relied on *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), to find that a plaintiff "need demonstrate only the initiation of the criminal process against him, not a conviction," to bring an Eighth Amendment challenge. *Martin*, 902 F.3d at 1045. The panel cites *Ingraham*'s observation that the Cruel and Unusual Punishments Clause circumscribes the criminal process in that "it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 1046 (citing *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401). This reading of *Ingraham*, however, cherry picks isolated statements from the decision without considering them in their accurate context. The *Ingraham* Court plainly held that "Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions." 430 U.S. at 671 n.40, 97 S.Ct. 1401. And, "the State does not acquire the power to punish with which the Eighth Amendment is concerned until *after* it has secured a formal adjudication of guilt." *Id.* (emphasis added). As the *Ingraham* Court recognized, "[T]he decisions of [the Supreme] Court construing the proscription against cruel and unusual punishment confirms that it was designed to protect those *convicted* of crimes." *Id.* at 664, 97 S.Ct. 1401 (emphasis added). Clearly, then, *Ingraham* stands for the proposition that to challenge a criminal statute as violative of the Eighth Amendment, the individual must be convicted of that relevant crime.

The Fifth Circuit recognized this limitation on standing in *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995). There, the court confronted a similar action brought by homeless individuals challenging a sleeping in public ordinance. *John-*

17. *See* U.S. Dep't of Hous. & Urban Dev., PIT Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018-PITCounts-by-CoC.xlsx; U.S. Dep't of Hous. & Urban Dev., HIC Data Since 2007, https://www.hudexchange.info/resources/documents/2007-2018HIC-Counts-by-CoC.xlsx. Boise is within Ada County and listed under CoC code ID-500.

son, 61 F.3d at 443. The court held that the plaintiffs did not have standing to raise an Eighth Amendment challenge to the ordinance because although "numerous tickets ha[d] been issued . . . [there was] no indication that any Appellees ha[d] been convicted" of violating the sleeping in public ordinance. *Id.* at 445. The Fifth Circuit explained that *Ingraham* clearly required a plaintiff be convicted under a criminal statute before challenging that statute's validity. *Id.* at 444–45 (citing *Robinson*, 370 U.S. at 663, 82 S.Ct. 1417; *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401).

By permitting Martin and Hawkes to maintain their Eighth Amendment challenge, the panel's decision created a circuit split with the Fifth Circuit and took our circuit far afield from "[t]he primary purpose of (the Cruel and Unusual Punishments Clause) . . . [which is] the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (quoting *Powell*, 392 U.S. at 531–32, 88 S.Ct. 2145).

III.

None of us is blind to the undeniable suffering that the homeless endure, and I understand the panel's impulse to help such a vulnerable population. But the Eighth Amendment is not a vehicle through which to critique public policy choices or to hamstring a local government's enforcement of its criminal code. The panel's decision, which effectively strikes down the anti-camping and anti-sleeping Ordinances of Boise and that of countless, if not all, cities within our jurisdiction, has no legitimate basis in current law.

I am deeply concerned about the consequences of our panel's unfortunate opinion, and I regret that we did not vote to reconsider this case en banc. I respectfully dissent.

BENNETT, Circuit Judge, with whom BEA, IKUTA, and R. NELSON, Circuit Judges, join, and with whom M. SMITH, Circuit Judge, joins as to Part II, dissenting from the denial of rehearing en banc:

I fully join Judge M. Smith's opinion dissenting from the denial of rehearing en banc. I write separately to explain that except in extraordinary circumstances not present in this case, and based on its text, tradition, and original public meaning, the Cruel and Unusual Punishments Clause of the Eighth Amendment does not impose substantive limits on what conduct a state may criminalize.

I recognize that we are, of course, bound by Supreme Court precedent holding that the Eighth Amendment encompasses a limitation "on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977) (citing *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962)). However, the *Ingraham* Court specifically "recognized [this] limitation as one to be applied sparingly." *Id.* As Judge M. Smith's dissent ably points out, the panel ignored *Ingraham*'s clear direction that Eighth Amendment scrutiny attaches only after a criminal conviction. Because the panel's decision, which allows pre-conviction Eighth Amendment challenges, is wholly inconsistent with the text and tradition of the Eighth Amendment, I respectfully dissent from our decision not to rehear this case en banc.

I.

The text of the Cruel and Unusual Punishments Clause is virtually identical to Section 10 of the English Declaration of

Rights of 1689,[1] and there is no question that the drafters of the Eighth Amendment were influenced by the prevailing interpretation of Section 10. *See Solem v. Helm*, 463 U.S. 277, 286, 103 S.Ct. 3001, 77 L.Ed.2d 637 (1983) (observing that one of the themes of the founding era "was that Americans had all the rights of English subjects" and the Framers' "use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection"); *Timbs v. Indiana*, 586 U.S. ——, 139 S.Ct. 682, 203 L.Ed.2d 11 (2019) (Thomas, J., concurring) ("[T]he text of the Eighth Amendment was 'based directly on . . . the Virginia Declaration of Rights,' which 'adopted verbatim the language of the English Bill of Rights.' " (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989))). Thus, "not only is the original meaning of the 1689 Declaration of Rights relevant, but also the circumstances of its enactment, insofar as they display the particular 'rights of English subjects' it was designed to vindicate." *Harmelin v. Michigan*, 501 U.S. 957, 967, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Scalia, J., concurring).

Justice Scalia's concurrence in *Harmelin* provides a thorough and well-researched discussion of the original public meaning of the Cruel and Unusual Punishments Clause, including a detailed overview of the history of Section 10 of the English Declaration of Rights. *See id.* at 966–85, 111 S.Ct. 2680 (Scalia, J., concurring). Rather than reciting Justice Scalia's *Harmelin* discussion in its entirety, I provide only a broad description of its historical analysis. Although the issue Justice Scalia confronted in *Harmelin* was whether the Framers intended to graft a proportionality requirement on the Eighth Amendment, *see id.* at 976, 111 S.Ct. 2680, his opinion's historical exposition is instructive to the issue of what the Eighth Amendment meant when it was written.

The English Declaration of Rights's prohibition on "cruell and unusuall Punishments" is attributed to the arbitrary punishments imposed by the King's Bench following the Monmouth Rebellion in the late 17th century. *Id.* at 967, 111 S.Ct. 2680 (Scalia, J., concurring). "Historians have viewed the English provision as a reaction either to the 'Bloody Assize,' the treason trials conducted by Chief Justice Jeffreys in 1685 after the abortive rebellion of the Duke of Monmouth, or to the perjury prosecution of Titus Oates in the same year." *Ingraham*, 430 U.S. at 664, 97 S.Ct. 1401 (footnote omitted).

Presiding over a special commission in the wake of the Monmouth Rebellion, Chief Justice Jeffreys imposed "vicious punishments for treason," including "drawing and quartering, burning of women felons, beheading, [and] disemboweling." *Harmelin*, 501 U.S. at 968, 111 S.Ct. 2680. In the view of some historians, "the story of The Bloody Assizes . . . helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual Punishments." *Furman v. Georgia*, 408 U.S. 238, 254, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Douglas, J., concurring).

More recent scholarship suggests that Section 10 of the Declaration of Rights was motivated more by Jeffreys's treatment of Titus Oates, a Protestant cleric and convicted perjurer. In addition to the pillory, the scourge, and life imprisonment, Jeffreys sentenced Oates to be "stript of [his] Canonical Habits." *Harmelin*, 501 U.S. at

1. 1 Wm. & Mary, 2d Sess., ch. 2, 3 Stat. at Large 440, 441 (1689) (Section 10 of the English Declaration of Rights) ("excessive Baile ought not to be required, nor excessive Fines imposed; nor cruell and unusuall Punishments inflicted.").

970, 111 S.Ct. 2680 (Scalia, J., concurring) (quoting Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685)). Years after the sentence was carried out, and months after the passage of the Declaration of Rights, the House of Commons passed a bill to annul Oates's sentence. Though the House of Lords never agreed, the Commons issued a report asserting that Oates's sentence was the sort of "cruel and unusual Punishment" that Parliament complained of in the Declaration of Rights. *Harmelin*, 501 U.S. at 972, 111 S.Ct. 2680 (citing 10 Journal of the House of Commons 247 (Aug. 2, 1689)). In the view of the Commons and the dissenting Lords, Oates's punishment was " 'out of the Judges' Power,' 'contrary to Law and ancient practice,' without 'Precedents' or 'express Law to warrant,' 'unusual,' 'illegal,' or imposed by 'Pretence to a discretionary Power.' " *Id.* at 973, 111 S.Ct. 2680 (quoting 1 Journals of the House of Lords 367 (May 31, 1689); 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

Thus, Justice Scalia concluded that the prohibition on "cruell and unusuall punishments" as used in the English Declaration, "was primarily a requirement that judges pronouncing sentence remain within the bounds of common-law tradition." *Harmelin*, 501 U.S. at 974, 111 S.Ct. 2680 (Scalia, J., concurring) (citing *Ingraham*, 430 U.S. at 665, 97 S.Ct. 1401; 1 J. Chitty, Criminal Law 710–12 (5th Am. ed. 1847); Anthony F. Granucci, *Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*, 57 Calif. L. Rev. 839, 859 (1969)).

But Justice Scalia was careful not to impute the English meaning of "cruell and unusuall" directly to the Framers of our Bill of Rights: "the ultimate question is not what 'cruell and unusuall punishments' meant in the Declaration of Rights, but what its meaning was to the Americans who adopted the Eighth Amendment." *Id.* at 975, 111 S.Ct. 2680. "Wrenched out of its common-law context, and applied to the actions of a legislature ... the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed." *Id.* at 976, 111 S.Ct. 2680.

As support for his conclusion that the Framers of the Bill of Rights intended for the Eighth Amendment to reach only certain punishment methods, Justice Scalia looked to "the state ratifying conventions that prompted the Bill of Rights." *Id.* at 979, 111 S.Ct. 2680. Patrick Henry, speaking at the Virginia Ratifying convention, "decried the absence of a bill of rights," arguing that "Congress will loose the restriction of not ... inflicting cruel and unusual punishments. ... What has distinguished our ancestors?—They would not admit of tortures, or cruel and barbarous punishment." *Id.* at 980, 111 S.Ct. 2680 (quoting 3 J. Elliot, Debates on the Federal Constitution 447 (2d ed. 1854)). The Massachusetts Convention likewise heard the objection that, in the absence of a ban on cruel and unusual punishments, "racks and gibbets may be amongst the most mild instruments of [Congress's] discipline." *Id.* at 979, 111 S.Ct. 2680 (internal quotation marks omitted) (quoting 2 J. Debates on the Federal Constitution, at 111). These historical sources "confirm[ ] the view that the cruel and unusual punishments clause was directed at prohibiting certain *methods* of punishment." *Id.* (internal quotation marks omitted) (quoting Granucci, 57 Calif. L. Rev. at 842) (emphasis in *Harmelin*).

In addition, early state court decisions "interpreting state constitutional provisions with identical or more expansive wording (i.e., 'cruel or unusual') concluded that these provisions ... proscribe[d] ... only certain modes of punishment." *Id.* at 983, 111 S.Ct. 2680; *see also id.* at 982, 111

S.Ct. 2680 ("Many other Americans apparently agreed that the Clause only outlawed certain *modes* of punishment.").

In short, when the Framers drafted and the several states ratified the Eighth Amendment, the original public meaning of the Cruel and Unusual Punishments Clause was "to proscribe . . . methods of punishment." *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction. Incorporation, of course, extended the reach of the Clause to the States, but worked no change in its meaning.

II.

The panel here held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018). In so holding, the panel allows challenges asserting this prohibition to be brought in advance of any conviction. That holding, however, has nothing to do with the punishment that the City of Boise imposes for those offenses, and thus nothing to do with the text and tradition of the Eighth Amendment.

The panel pays only the barest attention to the Supreme Court's admonition that the application of the Eighth Amendment to substantive criminal law be "sparing[ ]," *Martin*, 902 F.3d at 1047 (quoting *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401), and its holding here is dramatic in scope and completely unfaithful to the proper interpretation of the Cruel and Unusual Punishments Clause.

"The primary purpose of (the Cruel and Unusual Punishments Clause) has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401 (internal quotation marks omitted) (quoting *Powell v. Texas*, 392 U.S. 514, 531–32, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968)). It should, therefore, be the "rare case" where a court invokes the Eighth Amendment's criminalization component. *Jones v. City of Los Angeles*, 444 F.3d 1118, 1146 (9th Cir. 2006) (Rymer, J., dissenting), *vacated*, 505 F.3d 1006 (9th Cir. 2007).[2] And permitting a pre-conviction challenge to a local ordinance, as the panel does here, is flatly inconsistent with the Cruel and Unusual Punishments Clause's core constitutional function: regulating the *methods* of punishment that may be inflicted upon one convicted of an offense. *Harmelin*, 501 U.S. at 977, 979, 111 S.Ct. 2680 (Scalia, J., concurring). As Judge Rymer, dissenting in *Jones*, observed, "the Eighth Amendment's 'protections do not attach until after conviction and sentence.' "[3] 444 F.3d at 1147 (Rymer, J., dis-

2. *Jones,* of course, was vacated and lacks precedential value. 505 F.3d 1006 (9th Cir. 2007). But the panel here resuscitated *Jones*'s errant holding, including, apparently, its application of the Cruel and Unusual Punishments Clause in the absence of a criminal conviction. We should have taken this case en banc to correct this misinterpretation of the Eighth Amendment.

3. We have emphasized the need to proceed cautiously when extending the reach of the Cruel and Unusual Punishments Clause beyond regulation of the methods of punishment that may be inflicted upon conviction for an offense. *See United States v. Ritter,* 752 F.2d 435, 438 (9th Cir. 1985) (repeating *Ingraham*'s direction that "this particular use of the cruel and unusual punishment clause is to be applied sparingly" and noting that *Rob-*

senting) (internal alterations omitted) (quoting *Graham v. Connor*, 490 U.S. 386, 392 n.6, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).[4]

The panel's holding thus permits plaintiffs who have never been convicted of any offense to avail themselves of a constitutional protection that, historically, has been concerned with prohibition of "only certain modes of punishment." *Harmelin*, 501 U.S. at 983, 111 S.Ct. 2680; *see also United States v. Quinn*, 123 F.3d 1415, 1425 (11th Cir. 1997) (citing *Harmelin* for the proposition that a "plurality of the Supreme Court . . . has rejected the notion that the Eighth Amendment's protection from cruel and unusual punishment extends to the type of offense for which a sentence is imposed").

Extending the Cruel and Unusual Punishments Clause to encompass pre-conviction challenges to substantive criminal law stretches the Eighth Amendment past its breaking point. I doubt that the drafters of our Bill of Rights, the legislators of the states that ratified it, or the public at the time would ever have imagined that a ban on "cruel and unusual punishments" would permit a plaintiff to challenge a substantive criminal statute or ordinance that he or she had not even been convicted of violating. We should have taken this case en banc to confirm that an Eighth Amendment challenge does not lie in the absence of a punishment following conviction for an offense.

* * *

At common law and at the founding, a prohibition on "cruel and unusual punishments" was simply that: a limit on the types of punishments that government could inflict following a criminal conviction. The panel strayed far from the text and history of the Cruel and Unusual Punishments Clause in imposing the substantive limits it has on the City of Boise, particularly as to plaintiffs who have not yet even been convicted of an offense. We should have reheard this case en banc, and I respectfully dissent.

BERZON, Circuit Judge:

"The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."

— Anatole France, *The Red Lily*

We consider whether the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to. We conclude that it does.

The plaintiffs-appellants are six current or former residents of the City of Boise ("the City"), who are homeless or have recently been homeless. Each plaintiff alleges that, between 2007 and 2009, he or she was cited by Boise police for violating one or both of two city ordinances. The first, Boise City Code § 9-10-02 (the "Camping Ordinance"), makes it a misdemeanor to use "any of the streets, sidewalks, parks, or public places as a camping place at any time." The Camping Ordinance defines "camping" as "the use of public property as a temporary or perma-

inson represents "the rare type of case in which the clause has been used to limit what may be made criminal"); *see also United States v. Ayala*, 35 F.3d 423, 426 (9th Cir. 1994) (limiting application of *Robinson* to crimes lacking an actus reus). The panel's holding here throws that caution to the wind.

4. Judge Friendly also expressed "considerable doubt that the cruel and unusual punishment clause is properly applicable at all until after conviction and sentence." *Johnson v. Glick*, 481 F.2d 1028, 1032 (2d Cir. 1973).

nent place of dwelling, lodging, or residence." *Id.* The second, Boise City Code § 6-01-05 (the "Disorderly Conduct Ordinance"), bans "[o]ccupying, lodging, or sleeping in any building, structure, or public place, whether public or private ... without the permission of the owner or person entitled to possession or in control thereof."

All plaintiffs seek retrospective relief for their previous citations under the ordinances. Two of the plaintiffs, Robert Anderson and Robert Martin, allege that they expect to be cited under the ordinances again in the future and seek declaratory and injunctive relief against future prosecution.

In *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007), a panel of this court concluded that "so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds [in shelters]" for the homeless, Los Angeles could not enforce a similar ordinance against homeless individuals "for involuntarily sitting, lying, and sleeping in public." *Jones* is not binding on us, as there was an underlying settlement between the parties and our opinion was vacated as a result. We agree with *Jones*'s reasoning and central conclusion, however, and so hold that an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them. Two of the plaintiffs, we further hold, may be entitled to retrospective and prospective relief for violation of that Eighth Amendment right.

I. Background

[1] The district court granted summary judgment to the City on all claims. We therefore review the record in the light most favorable to the plaintiffs. *Tolan v. Cotton*, 572 U.S. 650, 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014).

Boise has a significant and increasing homeless population. According to the Point-in-Time Count ("PIT Count") conducted by the Idaho Housing and Finance Association, there were 753 homeless individuals in Ada County — the county of which Boise is the seat — in January 2014, 46 of whom were "unsheltered," or living in places unsuited to human habitation such as parks or sidewalks. In 2016, the last year for which data is available, there were 867 homeless individuals counted in Ada County, 125 of whom were unsheltered.[1] The PIT Count likely underestimates the number of homeless individuals in Ada County. It is "widely recognized that a one-night point in time count will undercount the homeless population," as many homeless individuals may have access to temporary housing on a given night, and as weather conditions may affect the number of available volunteers and the number of homeless people staying at shelters or accessing services on the night of the count.

1. The United States Department of Housing and Urban Development ("HUD") requires local homeless assistance and prevention networks to conduct an annual count of homeless individuals on one night each January, known as the PIT Count, as a condition of receiving federal funds. State, local, and federal governmental entities, as well as private service providers, rely on the PIT Count as a "critical source of data" on homelessness in the United States. The parties acknowledge that the PIT Count is not always precise. The City's Director of Community Partnerships, Diana Lachiondo, testified that the PIT Count is "not always the ... best resource for numbers," but also stated that "the point-in-time count is our best snapshot" for counting the number of homeless individuals in a particular region, and that she "cannot give ... any other number with any kind of confidence."

There are currently three homeless shelters in the City of Boise offering emergency shelter services, all run by private, nonprofit organizations. As far as the record reveals, these three shelters are the only shelters in Ada County.

One shelter — "Sanctuary" — is operated by Interfaith Sanctuary Housing Services, Inc. The shelter is open to men, women, and children of all faiths, and does not impose any religious requirements on its residents. Sanctuary has 96 beds reserved for individual men and women, with several additional beds reserved for families. The shelter uses floor mats when it reaches capacity with beds.

Because of its limited capacity, Sanctuary frequently has to turn away homeless people seeking shelter. In 2010, Sanctuary reached full capacity in the men's area "at least half of every month," and the women's area reached capacity "almost every night of the week." In 2014, the shelter reported that it was full for men, women, or both on 38% of nights. Sanctuary provides beds first to people who spent the previous night at Sanctuary. At 9:00 pm each night, it allots any remaining beds to those who added their names to the shelter's waiting list.

The other two shelters in Boise are both operated by the Boise Rescue Mission ("BRM"), a Christian nonprofit organization. One of those shelters, the River of Life Rescue Mission ("River of Life"), is open exclusively to men; the other, the City Light Home for Women and Children ("City Light"), shelters women and children only.

BRM's facilities provide two primary "programs" for the homeless, the Emergency Services Program and the New Life Discipleship Program.[2] The Emergency Services Program provides temporary shelter, food, and clothing to anyone in need. Christian religious services are offered to those seeking shelter through the Emergency Services Program. The shelters display messages and iconography on the walls, and the intake form for emergency shelter guests includes a religious message.[3]

Homeless individuals may check in to either BRM facility between 4:00 and 5:30 pm. Those who arrive at BRM facilities between 5:30 and 8:00 pm may be denied shelter, depending on the reason for their late arrival; generally, anyone arriving after 8:00 pm is denied shelter.

Except in winter, male guests in the Emergency Services Program may stay at River of Life for up to 17 consecutive nights; women and children in the Emergency Services Program may stay at City Light for up to 30 consecutive nights. After the time limit is reached, homeless individuals who do not join the Discipleship Program may not return to a BRM shelter for at least 30 days.[4] Participants in the Emergency Services Program must return to the shelter every night during the applicable 17-day or 30-day period; if a resident fails to check in to a BRM shelter each night, that resident is prohibited from staying overnight at that shelter for 30

2. The record suggests that BRM provides some limited additional non-emergency shelter programming which, like the Discipleship Program, has overtly religious components.

3. The intake form states in relevant part that "We are a Gospel Rescue Mission. Gospel means 'Good News,' and the Good News is that Jesus saves us from sin past, present, and future. We would like to share the Good News with you. Have you heard of Jesus? . . . Would you like to know more about him?"

4. The parties dispute the extent to which BRM actually enforces the 17- and 30-day limits.

days. BRM's rules on the length of a person's stay in the Emergency Services Program are suspended during the winter.

The Discipleship Program is an "intensive, Christ-based residential recovery program" of which "[r]eligious study is the very essence." The record does not indicate any limit to how long a member of the Discipleship Program may stay at a BRM shelter.

The River of Life shelter contains 148 beds for emergency use, along with 40 floor mats for overflow; 78 additional beds serve those in non-emergency shelter programs such as the Discipleship Program. The City Light shelter has 110 beds for emergency services, as well as 40 floor mats to handle overflow and 38 beds for women in non-emergency shelter programs. All told, Boise's three homeless shelters contain 354 beds and 92 overflow mats for homeless individuals.

A. The Plaintiffs

Plaintiffs Robert Martin, Robert Anderson, Lawrence Lee Smith, Basil E. Humphrey, Pamela S. Hawkes, and Janet F. Bell are all homeless individuals who have lived in or around Boise since at least 2007. Between 2007 and 2009, each plaintiff was convicted at least once of violating the Camping Ordinance, the Disorderly Conduct Ordinance, or both. With one exception, all plaintiffs were sentenced to time served for all convictions; on two occasions, Hawkes was sentenced to one additional day in jail. During the same period, Hawkes was cited, but not convicted, under the Camping Ordinance, and Martin was cited, but not convicted, under the Disorderly Conduct Ordinance.

Plaintiff Robert Anderson currently lives in Boise; he is homeless and has often relied on Boise's shelters for housing. In the summer of 2007, Anderson stayed at River of Life as part of the Emergency Services Program until he reached the shelter's 17-day limit for male guests. Anderson testified that during his 2007 stay at River of Life, he was required to attend chapel services before he was permitted to eat dinner. At the conclusion of his 17-day stay, Anderson declined to enter the Discipleship Program because of his religious beliefs. As Anderson was barred by the shelter's policies from returning to River of Life for 30 days, he slept outside for the next several weeks. On September 1, 2007, Anderson was cited under the Camping Ordinance. He pled guilty to violating the Camping Ordinance and paid a $25 fine; he did not appeal his conviction.

Plaintiff Robert Martin is a former resident of Boise who currently lives in Post Falls, Idaho. Martin returns frequently to Boise to visit his minor son. In March of 2009, Martin was cited under the Camping Ordinance for sleeping outside; he was cited again in 2012 under the same ordinance.

B. Procedural History

The plaintiffs filed this action in the United States District Court for the District of Idaho in October of 2009. All plaintiffs alleged that their previous citations under the Camping Ordinance and the Disorderly Conduct Ordinance violated the Cruel and Unusual Punishments Clause of the Eighth Amendment, and sought damages for those alleged violations under 42 U.S.C. § 1983. *Cf. Jones*, 444 F.3d at 1138. Anderson and Martin also sought prospective declaratory and injunctive relief precluding future enforcement of the ordinances under the same statute and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–2202.

After this litigation began, the Boise Police Department promulgated a new

"Special Order," effective as of January 1, 2010, that prohibited enforcement of either the Camping Ordinance or the Disorderly Conduct Ordinance against any homeless person on public property on any night when no shelter had "an available overnight space." City police implemented the Special Order through a two-step procedure known as the "Shelter Protocol."

Under the Shelter Protocol, if any shelter in Boise reaches capacity on a given night, that shelter will so notify the police at roughly 11:00 pm. Each shelter has discretion to determine whether it is full, and Boise police have no other mechanism or criteria for gauging whether a shelter is full. Since the Shelter Protocol was adopted, Sanctuary has reported that it was full on almost 40% of nights. Although BRM agreed to the Shelter Protocol, its internal policy is never to turn any person away because of a lack of space, and neither BRM shelter has ever reported that it was full.

If all shelters are full on the same night, police are to refrain from enforcing either ordinance. Presumably because the BRM shelters have not reported full, Boise police continue to issue citations regularly under both ordinances.

In July 2011, the district court granted summary judgment to the City. It held that the plaintiffs' claims for retrospective relief were barred under the *Rooker-Feldman* doctrine and that their claims for prospective relief were mooted by the Special Order and the Shelter Protocol. *Bell v. City of Boise*, 834 F.Supp.2d 1103 (D. Idaho 2011). On appeal, we reversed and remanded. *Bell v. City of Boise*, 709 F.3d 890, 901 (9th Cir. 2013). We held that the district court erred in dismissing the plaintiffs' claims under the *Rooker-Feldman* doctrine. *Id.* at 897. In so holding, we expressly declined to consider whether the favorable-termination requirement from *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), applied to the plaintiffs' claims for retrospective relief. Instead, we left the issue for the district court on remand. *Bell*, 709 F.3d at 897 n.11.

Bell further held that the plaintiffs' claims for prospective relief were not moot. The City had not met its "heavy burden" of demonstrating that the challenged conduct — enforcement of the two ordinances against homeless individuals with no access to shelter — "could not reasonably be expected to recur." *Id.* at 898, 901 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)). We emphasized that the Special Order was a statement of administrative policy and so could be amended or reversed at any time by the Boise Chief of Police. *Id.* at 899–900.

Finally, *Bell* rejected the City's argument that the plaintiffs lacked standing to seek prospective relief because they were no longer homeless. *Id.* at 901 & n.12. We noted that, on summary judgment, the plaintiffs "need not establish that they in fact have standing, but only that there is a genuine issue of material fact as to the standing elements." *Id.* (citation omitted).

On remand, the district court again granted summary judgment to the City on the plaintiffs' § 1983 claims. The court observed that *Heck* requires a § 1983 plaintiff seeking damages for "harm caused by actions whose unlawfulness would render a conviction or sentence invalid" to demonstrate that "the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal ... or called into question by a federal court's issuance of a writ of habeas corpus." 512 U.S. at 486–87, 114 S.Ct. 2364. According to the district court, "a judgment finding the Ordinances uncon-

stitutional . . . necessarily would imply the invalidity of Plaintiffs' [previous] convictions under those ordinances," and the plaintiffs therefore were required to demonstrate that their convictions or sentences had already been invalidated. As none of the plaintiffs had raised an Eighth Amendment challenge as a defense to criminal prosecution, nor had any plaintiff successfully appealed their conviction, the district court held that all of the plaintiffs' claims for retrospective relief were barred by *Heck*. The district court also rejected as barred by *Heck* the plaintiffs' claim for prospective injunctive relief under § 1983, reasoning that "a ruling in favor of Plaintiffs on even a prospective § 1983 claim would demonstrate the invalidity of any confinement stemming from those convictions."

Finally, the district court determined that, although *Heck* did not bar relief under the Declaratory Judgment Act, Martin and Anderson now lack standing to pursue such relief. The linchpin of this holding was that the Camping Ordinance and the Disorderly Conduct Ordinance were both amended in 2014 to codify the Special Order's mandate that "[l]aw enforcement officers shall not enforce [the ordinances] when the individual is on public property and there is no available overnight shelter." Boise City Code §§ 6-01-05, 9-10-02. Because the ordinances, as amended, permitted camping or sleeping in a public place when no shelter space was available, the court held that there was no "credible threat" of future prosecution. "If the Ordinances are not to be enforced when the shelters are full, those Ordinances do not inflict a constitutional injury upon these particular plaintiffs . . . ." The court emphasized that the record "suggests there is no known citation of a homeless individual under the Ordinances for camping or sleeping on public property on any night or morning when he or she was unable to secure shelter due to a lack of shelter capacity" and that "there has not been a single night when all three shelters in Boise called in to report they were simultaneously full for men, women or families."

This appeal followed.

II. Discussion

A. Standing

We first consider whether any of the plaintiffs has standing to pursue prospective relief.[5] We conclude that there are sufficient opposing facts in the record to create a genuine issue of material fact as to whether Martin and Anderson face a credible threat of prosecution under one or both ordinances in the future at a time when they are unable to stay at any Boise homeless shelter.[6]

[2–6] "To establish Article III standing, an injury must be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (citation omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury

5. Standing to pursue retrospective relief is not in doubt. The only threshold question affecting the availability of a claim for retrospective relief — a question we address in the next section — is whether such relief is barred by the doctrine established in *Heck*.

6. Although the SAC is somewhat ambiguous regarding which of the plaintiffs seeks prospective relief, counsel for the plaintiffs made clear at oral argument that only two of the plaintiffs, Martin and Anderson, seek such relief, and the district court considered the standing question with respect to Martin and Anderson only.

is not too speculative for Article III purposes — that the injury is *certainly* impending." *Id.* (citation omitted). A plaintiff need not, however, await an arrest or prosecution to have standing to challenge the constitutionality of a criminal statute. "When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (citation and internal quotation marks omitted). To defeat a motion for summary judgment premised on an alleged lack of standing, plaintiffs " need not establish that they in fact have standing, but only that there is a genuine question of material fact as to the standing elements." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002).

[7] In dismissing Martin and Anderson's claims for declaratory relief for lack of standing, the district court emphasized that Boise's ordinances, as amended in 2014, preclude the City from issuing a citation when there is no available space at a shelter, and there is consequently no risk that either Martin or Anderson will be cited under such circumstances in the future. Viewing the record in the light most favorable to the plaintiffs, we cannot agree.

Although the 2014 amendments preclude the City from enforcing the ordinances when there is no room available at any shelter, the record demonstrates that the City is wholly reliant on the shelters to self-report when they are full. It is undisputed that Sanctuary is full as to men on a substantial percentage of nights, perhaps as high as 50%. The City nevertheless emphasizes that since the adoption of the Shelter Protocol in 2010, the BRM facilities, River of Life and City Light, have never reported that they are full, and BRM states that it will never turn people away due to lack space.

The plaintiffs have pointed to substantial evidence in the record, however, indicating that whether or not the BRM facilities are ever full or turn homeless individuals away *for lack of space*, they *do* refuse to shelter homeless people who exhaust the number of days allotted by the facilities. Specifically, the plaintiffs allege, and the City does not dispute, that it is BRM's policy to limit men to 17 consecutive days in the Emergency Services Program, after which they cannot return to River of Life for 30 days; City Light has a similar 30-day limit for women and children. Anderson testified that BRM has enforced this policy against him in the past, forcing him to sleep outdoors.

[8] The plaintiffs have adduced further evidence indicating that River of Life permits individuals to remain at the shelter after 17 days in the Emergency Services Program only on the condition that they become part of the New Life Discipleship program, which has a mandatory religious focus. For example, there is evidence that participants in the New Life Program are not allowed to spend days at Corpus Christi, a local Catholic program, "because it's ... a different sect." There are also facts in dispute concerning whether the Emergency Services Program itself has a religious component. Although the City argues strenuously that the Emergency Services Program is secular, Anderson testified to the contrary; he stated that he was once required to attend chapel before being permitted to eat dinner at the River of Life shelter. Both Martin and Anderson have objected to the overall religious at-

mosphere of the River of Life shelter, including the Christian messaging on the shelter's intake form and the Christian iconography on the shelter walls. A city cannot, via the threat of prosecution, coerce an individual to attend religion-based treatment programs consistently with the Establishment Clause of the First Amendment. *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007). Yet at the conclusion of a 17-day stay at River of Life, or a 30-day stay at City Light, an individual may be forced to choose between sleeping outside on nights when Sanctuary is full (and risking arrest under the ordinances), or enrolling in BRM programming that is antithetical to his or her religious beliefs.

The 17-day and 30-day limits are not the only BRM policies which functionally limit access to BRM facilities even when space is nominally available. River of Life also turns individuals away if they voluntarily leave the shelter before the 17-day limit and then attempt to return within 30 days. An individual who voluntarily leaves a BRM facility for any reason — perhaps because temporary shelter is available at Sanctuary, or with friends or family, or in a hotel — cannot immediately return to the shelter if circumstances change. Moreover, BRM's facilities may deny shelter to any individual who arrives after 5:30 pm, and generally will deny shelter to anyone arriving after 8:00 pm. Sanctuary, however, does not assign beds to persons on its waiting list until 9:00 pm. Thus, by the time a homeless individual on the Sanctuary waiting list discovers that the shelter has no room available, it may be too late to seek shelter at either BRM facility.

So, even if we credit the City's evidence that BRM's facilities have never been "full," and that the City has never cited any person under the ordinances who could not obtain shelter "due to a lack of shelter capacity," there remains a genuine issue of material fact as to whether homeless individuals in Boise run a credible risk of being issued a citation on a night when Sanctuary is full and they have been denied entry to a BRM facility for reasons other than shelter capacity. If so, then as a practical matter, no shelter is available. We note that despite the Shelter Protocol and the amendments to both ordinances, the City continues regularly to issue citations for violating both ordinances; during the first three months of 2015, the Boise Police Department issued over 175 such citations.

The City argues that Martin faces little risk of prosecution under either ordinance because he has not lived in Boise since 2013. Martin states, however, that he is still homeless and still visits Boise several times a year to visit his minor son, and that he has continued to seek shelter at Sanctuary and River of Life. Although Martin may no longer spend enough time in Boise to risk running afoul of BRM's 17-day limit, he testified that he has unsuccessfully sought shelter at River of Life after being placed on Sanctuary's waiting list, only to discover later in the evening that Sanctuary had no available beds. Should Martin return to Boise to visit his son, there is a reasonable possibility that he might again seek shelter at Sanctuary, only to discover (after BRM has closed for the night) that Sanctuary has no space for him. Anderson, for his part, continues to live in Boise and states that he remains homeless.

We conclude that both Martin and Anderson have demonstrated a genuine issue of material fact regarding whether they face a credible risk of prosecution under the ordinances in the future on a night when they have been denied access to Boise's homeless shelters; both plaintiffs therefore have standing to seek prospective relief.

B. *Heck v. Humphrey*

We turn next to the impact of *Heck v. Humphrey* and its progeny on this case. With regard to retrospective relief, the plaintiffs maintain that *Heck* should not bar their claims because, with one exception, all of the plaintiffs were sentenced to time served.[7] It would therefore have been impossible for the plaintiffs to obtain federal habeas relief, as any petition for a writ of habeas corpus must be filed while the petitioner is "in custody pursuant to the judgment of a State court." *See* 28 U.S.C. § 2254(a); *Spencer v. Kemna*, 523 U.S. 1, 7, 17–18, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998). With regard to prospective relief, the plaintiffs emphasize that they seek only equitable protection against *future* enforcement of an allegedly unconstitutional statute, and not to invalidate any prior conviction under the same statute. We hold that although the *Heck* line of cases precludes most — but not all — of the plaintiffs' requests for retrospective relief, that doctrine has no application to the plaintiffs' request for an injunction enjoining prospective enforcement of the ordinances.

1. The *Heck* Doctrine

A long line of Supreme Court case law, beginning with *Preiser v. Rodriguez*, 411 U.S. 475, 93 S.Ct. 1827, 36 L.Ed.2d 439 (1973), holds that a prisoner in state custody cannot use a § 1983 action to challenge the fact or duration of his or her confinement, but must instead seek federal habeas corpus relief or analogous state relief. *Id.* at 477, 500. *Preiser* considered whether a prison inmate could bring a § 1983 action seeking an injunction to remedy an unconstitutional deprivation of good-time conduct credits. Observing that habeas corpus is the traditional instrument to obtain release from unlawful confinement, *Preiser* recognized an implicit exception from § 1983's broad scope for actions that lie "within the core of habeas corpus" — specifically, challenges to the "fact or duration" of confinement. *Id.* at 487, 500, 93 S.Ct. 1827. The Supreme Court subsequently held, however, that although *Preiser* barred inmates from obtaining an injunction to restore good-time credits via a § 1983 action, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the *prospective* enforcement of invalid prison regulations." *Wolff v. McDonnell*, 418 U.S. 539, 555, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974) (emphasis added).

[9] *Heck* addressed a § 1983 action brought by an inmate seeking compensatory and punitive damages. The inmate alleged that state and county officials had engaged in unlawful investigations and knowing destruction of exculpatory evidence. *Heck*, 512 U.S. at 479, 114 S.Ct. 2364. The Court in *Heck* analogized a § 1983 action of this type, which called into question the validity of an underlying conviction, to a cause of action for malicious prosecution, *id.* at 483–84, 114 S.Ct. 2364, and went on to hold that, as with a malicious prosecution claim, a plaintiff in such an action must demonstrate a favorable termination of the criminal proceedings before seeking tort relief, *id.* at 486–87, 114 S.Ct. 2364. "[T]o recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, de-

7. Plaintiff Pamela Hawkes was convicted of violating the Camping Ordinance or Disorderly Conduct Ordinance on twelve occasions; although she was usually sentenced to time served, she was twice sentenced to one additional day in jail.

clared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." *Id.*

Edwards v. Balisok, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997) extended *Heck*'s holding to claims for declaratory relief. *Id.* at 648, 117 S.Ct. 1584. The plaintiff in *Edwards* alleged that he had been deprived of earned good-time credits without due process of law, because the decisionmaker in disciplinary proceedings had concealed exculpatory evidence. Because the plaintiff's claim for declaratory relief was "based on allegations of deceit and bias on the part of the decisionmaker that necessarily imply the invalidity of the punishment imposed," *Edwards* held, it was "not cognizable under § 1983." *Id. Edwards* went on to hold, however, that a requested injunction requiring prison officials to date-stamp witness statements was not *Heck*-barred, reasoning that a "prayer for such *prospective* relief will not 'necessarily imply' the invalidity of a previous loss of good-time credits, and so may properly be brought under § 1983." *Id.* (emphasis added).

[10] Most recently, *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), stated that *Heck* bars § 1983 suits even when the relief sought is prospective injunctive or declaratory relief, "if success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Id.* at 81–82, 125 S.Ct. 1242 (emphasis omitted). But *Wilkinson* held that the plaintiffs in that case *could* seek a prospective injunction compelling the state to comply with constitutional requirements in parole proceedings in the future. The Court observed that the prisoners' claims for future relief, "if successful, will not necessarily imply the invalidity of confinement or shorten its duration." *Id.* at 82, 125 S.Ct. 1242.

The Supreme Court did not, in these cases or any other, conclusively determine whether *Heck*'s favorable-termination requirement applies to convicts who have no practical opportunity to challenge their conviction or sentence via a petition for habeas corpus. *See Muhammad v. Close*, 540 U.S. 749, 752 & n.2, 124 S.Ct. 1303, 158 L.Ed.2d 32 (2004). But in *Spencer*, five Justices suggested that *Heck* may not apply in such circumstances. *Spencer*, 523 U.S. at 3, 118 S.Ct. 978.

The petitioner in *Spencer* had filed a federal habeas petition seeking to invalidate an order revoking his parole. While the habeas petition was pending, the petitioner's term of imprisonment expired, and his habeas petition was consequently dismissed as moot. Justice Souter wrote a concurring opinion in which three other Justices joined, addressing the petitioner's argument that if his habeas petition were mooted by his release, any § 1983 action would be barred under *Heck*, yet he would no longer have access to a federal habeas forum to challenge the validity of his parole revocation. *Id.* at 18–19, 118 S.Ct. 978 (Souter, J., concurring). Justice Souter stated that in his view "*Heck* has no such effect," and that "a former prisoner, no longer 'in custody,' may bring a § 1983 action establishing the unconstitutionality of a conviction or confinement without being bound to satisfy a favorable-termination requirement that it would be impossible as a matter of law for him to satisfy." *Id.* at 21, 118 S.Ct. 978. Justice Stevens, dissenting, stated that he would have held the habeas petition in *Spencer* not moot, but agreed that "[g]iven the Court's holding that petitioner does not have a remedy under the habeas statute, it is perfectly clear ... that he may bring an action under 42 U.S.C. § 1983." *Id.* at 25, 118 S.Ct. 978 n.8 (Stevens, J., dissenting).

Relying on the concurring and dissenting opinions in *Spencer*, we have held that the "unavailability of a remedy in habeas corpus because of mootness" permitted a plaintiff released from custody to maintain a § 1983 action for damages, "even though success in that action would imply the invalidity of the disciplinary proceeding that caused revocation of his good-time credits." *Nonnette v. Small*, 316 F.3d 872, 876 (9th Cir. 2002). But we have limited *Nonnette* in recent years. Most notably, we held in *Lyall v. City of Los Angeles*, 807 F.3d 1178 (9th Cir. 2015), that even where a plaintiff had no practical opportunity to pursue federal habeas relief while detained because of the short duration of his confinement, *Heck* bars a § 1983 action that would imply the invalidity of a prior conviction if the plaintiff could have sought invalidation of the underlying conviction via direct appeal or state post-conviction relief, but did not do so. *Id.* at 1192 & n.12.

2. Retrospective Relief

[11] Here, the majority of the plaintiffs' claims for *retrospective* relief are governed squarely by *Lyall.* It is undisputed that all the plaintiffs not only failed to challenge their convictions on direct appeal but expressly waived the right to do so as a condition of their guilty pleas. The plaintiffs have made no showing that any of their convictions were invalidated via state post-conviction relief. We therefore hold that all but two of the plaintiffs' claims for damages are foreclosed under *Lyall.*

[12] Two of the plaintiffs, however, Robert Martin and Pamela Hawkes, also received citations under the ordinances that were dismissed before the state obtained a conviction. Hawkes was cited for violating the Camping Ordinance on July 8, 2007; that violation was dismissed on August 28, 2007. Martin was cited for violating the Disorderly Conduct Ordinance on April 24, 2009; those charges were dismissed on September 9, 2009. The complaint alleges two injuries stemming from these dismissed citations: (1) the continued inclusion of the citations on plaintiffs' criminal records; and (2) the accumulation of a host of criminal fines and incarceration costs. Plaintiffs seek orders compelling the City to "expunge[ ] . . . the records of any homeless individuals unlawfully cited or arrested and charged under [the Ordinances]" and "reimburse[ ] . . . any criminal fines paid . . . [or] costs of incarceration billed."

With respect to these two incidents, the district court erred in finding that the plaintiffs' Eighth Amendment challenge was barred by *Heck*. Where there is no "conviction or sentence" that may be undermined by a grant of relief to the plaintiffs, the *Heck* doctrine has no application. 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).

[13, 14] Relying on *Ingraham v. Wright*, 430 U.S. 651, 664, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977), the City argues that the Eighth Amendment, and the Cruel and Unusual Punishments Clause in particular, have no application where there has been no conviction. The City's reliance on *Ingraham* is misplaced. As the Supreme Court observed in *Ingraham*, the Cruel and Unusual Punishments Clause not only limits the types of punishment that may be imposed and prohibits the imposition of punishment grossly disproportionate to the severity of the crime, but also "imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667, 97 S.Ct. 1401. "This [latter] protection governs the criminal law process as a whole, not only the imposition of punishment postconviction." *Jones*, 444 F.3d at 1128.

[15] *Ingraham* concerned only whether "impositions outside the criminal process" — in that case, the paddling of schoolchildren — "constituted cruel and unusual punishment." 430 U.S. at 667, 97 S.Ct. 1401. *Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted. If conviction were a prerequisite for such a challenge, "the state could in effect punish individuals in the preconviction stages of the criminal law enforcement process for being or doing things that under the [Cruel and Unusual Punishments Clause] cannot be subject to the criminal process." *Jones*, 444 F.3d at 1129. For those rare Eighth Amendment challenges concerning the state's very power to criminalize particular behavior or status, then, a plaintiff need demonstrate only the initiation of the criminal process against him, not a conviction.

3. Prospective Relief

[16] The district court also erred in concluding that the plaintiffs' requests for prospective injunctive relief were barred by *Heck*. The district court relied entirely on language in *Wilkinson* stating that "a state prisoner's § 1983 action is barred (absent prior invalidation) ... no matter the relief sought (damages or equitable relief) ... *if* success in that action would necessarily demonstrate the invalidity of confinement or its duration." *Wilkinson*, 544 U.S. at 81–82, 125 S.Ct. 1242. The district court concluded from this language in *Wilkinson* that a person convicted under an allegedly unconstitutional statute may never challenge the validity or application of that statute after the initial criminal proceeding is complete, even when the relief sought is prospective only and independent of the prior conviction. The logical extension of the district court's interpretation is that an individual who does not successfully invalidate a first conviction under an unconstitutional statute will have no opportunity to challenge that statute prospectively so as to avoid arrest and conviction for violating that same statute in the future.

Neither *Wilkinson* nor any other case in the *Heck* line supports such a result. Rather, *Wolff*, *Edwards*, and *Wilkinson* compel the opposite conclusion.

Wolff held that although *Preiser* barred a § 1983 action seeking restoration of good-time credits absent a successful challenge in federal habeas proceedings, *Preiser* did not "preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid ... regulations." *Wolff*, 418 U.S. at 555, 94 S.Ct. 2963. Although *Wolff* was decided before *Heck*, the Court subsequently made clear that *Heck* effected no change in the law in this regard, observing in *Edwards* that "[o]rdinarily, a prayer for ... prospective [injunctive] relief will not 'necessarily imply' the invalidity of a *previous* loss of good-time credits, and so may properly be brought under § 1983." *Edwards*, 520 U.S. at 648, 117 S.Ct. 1584 (emphasis added). Importantly, the Court held in *Edwards* that although the plaintiff could not, consistently with *Heck*, seek a declaratory judgment stating that the procedures employed by state officials that deprived him of good-time credits were unconstitutional, he *could* seek an injunction barring such allegedly unconstitutional procedures in the future. *Id.* Finally, the Court noted in *Wilkinson* that the *Heck* line of cases "has focused on the need to ensure that state prisoners use only habeas corpus (or similar state) remedies *when they seek to invalidate the duration of their confinement*," *Wilkinson*, 544 U.S. at 81, 125 S.Ct. 1242 (emphasis added), allud-

ing to an existing confinement, not one yet to come.

[17, 18] The *Heck* doctrine, in other words, serves to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge. In context, it is clear that *Wilkinson*'s holding that the *Heck* doctrine bars a § 1983 action "no matter the relief sought (damages or equitable relief) ... if success in that action would necessarily demonstrate the invalidity of confinement or its duration" applies to equitable relief concerning an existing confinement, not to suits seeking to preclude an unconstitutional confinement in the future, arising from incidents occurring after any prior conviction and stemming from a possible later prosecution and conviction. *Id.* at 81–82, 125 S.Ct. 1242 (emphasis added). As *Wilkinson* held, "claims for *future* relief (which, if successful, will not necessarily imply the invalidity of confinement or shorten its duration)" are distant from the "core" of habeas corpus with which the *Heck* line of cases is concerned, and are not precluded by the *Heck* doctrine. *Id.* at 82, 125 S.Ct. 1242.

In sum, we hold that the majority of the plaintiffs' claims for retrospective relief are barred by *Heck*, but both Martin and Hawkes stated claims for damages to which *Heck* has no application. We further hold that *Heck* has no application to the plaintiffs' requests for prospective injunctive relief.

C. The Eighth Amendment

At last, we turn to the merits — does the Cruel and Unusual Punishments Clause of the Eighth Amendment preclude the enforcement of a statute prohibiting sleeping outside against homeless individuals with no access to alternative shelter? We hold that it does, for essentially the same reasons articulated in the now-vacated *Jones* opinion.

[19] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., amend. VIII. The Cruel and Unusual Punishments Clause "circumscribes the criminal process in three ways." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401. First, it limits the type of punishment the government may impose; second, it proscribes punishment "grossly disproportionate" to the severity of the crime; and third, it places substantive limits on what the government may criminalize. *Id.* It is the third limitation that is pertinent here.

[20, 21] "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Robinson v. California*, 370 U.S. 660, 667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962). Cases construing substantive limits as to what the government may criminalize are rare, however, and for good reason — the Cruel and Unusual Punishments Clause's third limitation is "one to be applied sparingly." *Ingraham*, 430 U.S. at 667, 97 S.Ct. 1401.

Robinson, the seminal case in this branch of Eighth Amendment jurisprudence, held a California statute that "ma[de] the 'status' of narcotic addiction a criminal offense" invalid under the Cruel and Unusual Punishments Clause. 370 U.S. at 666, 82 S.Ct. 1417. The California law at issue in *Robinson* was "not one which punishe[d] a person for the use of narcotics, for their purchase, sale or possession, or for antisocial or disorderly behavior resulting from their administration"; it punished addiction itself. *Id.* Recognizing narcotics addiction as an illness or disease — "apparently an illness which may be contracted innocently or involuntarily" — and observing that a "law which made a criminal offense of ... a disease would doubtless be universally thought to be an infliction of

cruel and unusual punishment," *Robinson* held the challenged statute a violation of the Eighth Amendment. *Id.* at 666–67, 82 S.Ct. 1417.

As *Jones* observed, *Robinson* did not explain at length the principles underpinning its holding. *See Jones*, 444 F.3d at 1133. In *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968), however, the Court elaborated on the principle first articulated in *Robinson*.

Powell concerned the constitutionality of a Texas law making public drunkenness a criminal offense. Justice Marshall, writing for a plurality of the Court, distinguished the Texas statute from the law at issue in *Robinson* on the ground that the Texas statute made criminal not alcoholism but *conduct* — appearing in public while intoxicated. "[A]ppellant was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion. The State of Texas thus has not sought to punish a mere status, as California did in *Robinson*; nor has it attempted to regulate appellant's behavior in the privacy of his own home." *Id.* at 532, 88 S.Ct. 2145 (plurality opinion).

[22] The *Powell* plurality opinion went on to interpret *Robinson* as precluding only the criminalization of "status," not of "involuntary" conduct. "The entire thrust of *Robinson*'s interpretation of the Cruel and Unusual Punishment Clause is that criminal penalties may be inflicted only if the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some actus reus. It thus does not deal with the question of whether certain conduct cannot constitutionally be punished because it is, in some sense, 'involuntary' . . . ." *Id.* at 533, 88 S.Ct. 2145.

Four Justices dissented from the Court's holding in *Powell*; Justice White concurred in the result alone. Notably, Justice White noted that many chronic alcoholics are also homeless, and that for those individuals, public drunkenness may be unavoidable as a practical matter. "For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. . . . For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment — the act of getting drunk." *Id.* at 551, 88 S.Ct. 2145 (White, J., concurring in the judgment).

[23] The four dissenting Justices adopted a position consistent with that taken by Justice White: that under *Robinson*, "criminal penalties may not be inflicted upon a person for being in a condition he is powerless to change," and that the defendant, "once intoxicated, . . . could not prevent himself from appearing in public places." *Id.* at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). Thus, five Justices gleaned from *Robinson* the principle that "that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Jones*, 444 F.3d at 1135; *see also United States v. Robertson*, 875 F.3d 1281, 1291 (9th Cir. 2017).

[24] This principle compels the conclusion that the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter. As *Jones* reasoned, "[w]hether sitting, lying, and sleeping are

defined as acts or conditions, they are universal and unavoidable consequences of being human." *Jones*, 444 F.3d at 1136. Moreover, any "conduct at issue here is involuntary and inseparable from status — they are one and the same, given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping." *Id.* As a result, just as the state may not criminalize the state of being "homeless in public places," the state may not "criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets." *Id.* at 1137.

Our holding is a narrow one. Like the *Jones* panel, "we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets ... at any time and at any place." *Id.* at 1138. We hold only that "so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters]," the jurisdiction cannot prosecute homeless individuals for "involuntarily sitting, lying, and sleeping in public." *Id.* That is, as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.[8]

We are not alone in reaching this conclusion. As one court has observed, "resisting the need to eat, sleep or engage in other life-sustaining activities is impossible. Avoiding public places when engaging in this otherwise innocent conduct is also impossible. ... 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 [E]ighth [A]mendment — sleeping, eating and other innocent conduct." *Pottinger v. City of Miami*, 810 F.Supp. 1551, 1565 (S.D. Fla. 1992); *see also Johnson v. City of Dallas*, 860 F.Supp. 344, 350 (N.D. Tex. 1994) (holding that a "sleeping in public ordinance as applied against the homeless is unconstitutional"), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995).[9]

Here, the two ordinances criminalize the simple act of sleeping outside on public property, whether bare or with a blanket or other basic bedding. The Disorderly

8. 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. Nor do we suggest that a jurisdiction with insufficient shelter can *never* criminalize the act of sleeping outside. Even where shelter is unavailable, an ordinance prohibiting sitting, lying, or sleeping outside at particular times or in particular locations might well be constitutionally permissible. *See Jones*, 444 F.3d at 1123. So, too, might an ordinance barring the obstruction of public rights of way or the erection of certain structures. Whether some other ordinance is consistent with the Eighth Amendment will depend, as here, on whether it punishes a person for lacking the means to live out the "universal and unavoidable consequences of being human" in the way the ordinance prescribes. *Id.* at 1136.

9. In *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000), the Eleventh Circuit upheld an anti-camping ordinance similar to Boise's against an Eighth Amendment challenge. In *Joel*, however, the defendants presented unrefuted evidence that the homeless shelters in the City of Orlando had never reached capacity and that the plaintiffs had always enjoyed access to shelter space. *Id.* Those unrefuted facts were critical to the court's holding. *Id.* As discussed below, the plaintiffs here have demonstrated a genuine issue of material fact concerning whether they have been denied access to shelter in the past or expect to be so denied in the future. *Joel* therefore does not provide persuasive guidance for this case.

Conduct Ordinance, on its face, criminalizes "[o]ccupying, lodging, or sleeping in *any* building, structure or place, whether public or private" without permission. Boise City Code § 6-01-05. Its scope is just as sweeping as the Los Angeles ordinance at issue in *Jones*, which mandated that "[n]o person shall sit, lie or sleep in or upon any street, sidewalk or other public way." 444 F.3d at 1123.

The Camping Ordinance criminalizes using "any of the streets, sidewalks, parks or public places as a camping place at any time." Boise City Code § 9-10-02. The ordinance defines "camping" broadly:

> The term "camp" or "camping" shall mean the use of public property as a temporary or permanent place of dwelling, lodging, or residence, or as a living accommodation at anytime between sunset and sunrise, or as a sojourn. Indicia of camping may include, but are not limited to, storage of personal belongings, using tents or other temporary structures for sleeping or storage of personal belongings, carrying on cooking activities or making any fire in an unauthorized area, or any of these activities in combination with one another or in combination with either sleeping or making preparations to sleep (including the laying down of bedding for the purpose of sleeping).

Id. It appears from the record that the Camping Ordinance is frequently enforced against homeless individuals with some elementary bedding, whether or not any of the other listed indicia of "camping" — the erection of temporary structures, the activity of cooking or making fire, or the storage of personal property — are present. For example, a Boise police officer testified that he cited plaintiff Pamela Hawkes under the Camping Ordinance for sleeping outside "wrapped in a blanket with her sandals off and next to her," for sleeping in a public restroom "with blankets," and for sleeping in a park "on a blanket, wrapped in blankets on the ground." The Camping Ordinance therefore can be, and allegedly is, enforced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements. We conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter.

III. Conclusion

For the foregoing reasons, we **AFFIRM** the judgment of the district court as to the plaintiffs' requests for retrospective relief, except as such claims relate to Hawkes's July 2007 citation under the Camping Ordinance and Martin's April 2009 citation under the Disorderly Conduct Ordinance. We **REVERSE** and **REMAND** with respect to the plaintiffs' requests for prospective relief, both declaratory and injunctive, and to the plaintiffs' claims for retrospective relief insofar as they relate to Hawkes' July 2007 citation or Martin's April 2009 citation.[10]

OWENS, Circuit Judge, concurring in part and dissenting in part:

I agree with the majority that the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994), bars the plaintiffs' 42 U.S.C. § 1983 claims for damages that are based on convictions that have not been challenged on direct appeal or invalidated in state post-conviction relief. *See Lyall v. City of Los Angeles*, 807 F.3d 1178, 1192 n.12 (9th Cir. 2015).

I also agree that *Heck* and its progeny have no application where there is no "con-

10. Costs shall be awarded to the plaintiffs.

viction or sentence" that would be undermined by granting a plaintiff's request for relief under § 1983. *Heck*, 512 U.S. at 486–87, 114 S.Ct. 2364; *see also Wallace v. Kato*, 549 U.S. 384, 393, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007). I therefore concur in the majority's conclusion that *Heck* does not bar plaintiffs Robert Martin and Pamela Hawkes from seeking retrospective relief for the two instances in which they received citations, but not convictions. I also concur in the majority's Eighth Amendment analysis as to those two claims for retrospective relief.

Where I part ways with the majority is in my understanding of *Heck*'s application to the plaintiffs' claims for declaratory and injunctive relief. In *Wilkinson v. Dotson*, 544 U.S. 74, 125 S.Ct. 1242, 161 L.Ed.2d 253 (2005), the Supreme Court explained where the *Heck* doctrine stands today:

> [A] state prisoner's § 1983 action is barred (absent prior invalidation)—no matter the relief sought (damages or equitable relief), no matter the target of the prisoner's suit (state conduct leading to conviction or internal prison proceedings)—*if* success in that action would necessarily demonstrate the invalidity of confinement or its duration.

Id. at 81–82. Here, the majority acknowledges this language in *Wilkinson*, but concludes that *Heck*'s bar on any type of relief that "would necessarily demonstrate the invalidity of confinement" does not preclude the prospective claims at issue. The majority reasons that the purpose of *Heck* is "to ensure the finality and validity of previous convictions, not to insulate future prosecutions from challenge," and so concludes that the plaintiffs' prospective claims may proceed. I respectfully disagree.

A declaration that the city ordinances are unconstitutional and an injunction against their future enforcement necessarily demonstrate the invalidity of the plaintiffs' prior convictions. Indeed, any time an individual challenges the constitutionality of a substantive criminal statute under which he has been convicted, he asks for a judgment that would necessarily demonstrate the invalidity of his conviction. And though neither the Supreme Court nor this court has squarely addressed *Heck*'s application to § 1983 claims challenging the constitutionality of a substantive criminal statute, I believe *Edwards v. Balisok*, 520 U.S. 641, 117 S.Ct. 1584, 137 L.Ed.2d 906 (1997), makes clear that *Heck* prohibits such challenges. In *Edwards*, the Supreme Court explained that although our court had recognized that *Heck* barred § 1983 claims challenging the validity of a prisoner's confinement "as a substantive matter," it improperly distinguished as not *Heck*-barred *all* claims alleging only procedural violations. 520 U.S. at 645, 117 S.Ct. 1584. In holding that *Heck* also barred those procedural claims that would necessarily imply the invalidity of a conviction, the Court did not question our conclusion that claims challenging a conviction "as a substantive matter" are barred by *Heck*. *Id.*; *see also Wilkinson*, 544 U.S. at 82, 125 S.Ct. 1242 (holding that the plaintiffs' claims could proceed because the relief requested would only "render invalid the state *procedures*" and "a favorable judgment [would] not 'necessarily imply the invalidity of [their] conviction[s] or sentence[s]' " (emphasis added) (quoting *Heck*, 512 U.S. at 487, 114 S.Ct. 2364)).

Edwards thus leads me to conclude that an individual who was convicted under a criminal statute, but who did not challenge the constitutionality of the statute at the time of his conviction through direct appeal or post-conviction relief, cannot do so in the first instance by seeking declaratory or injunctive relief under § 1983. *See Abusaid v. Hillsborough Cty. Bd. of Cty.*

Comm'rs, 405 F.3d 1298, 1316 n.9 (11th Cir. 2005) (assuming that a § 1983 claim challenging "the constitutionality of the ordinance under which [the petitioner was convicted]" would be *Heck*-barred). I therefore would hold that *Heck* bars the plaintiffs' claims for declaratory and injunctive relief.

We are not the first court to struggle applying *Heck* to "real life examples," nor will we be the last. *See, e.g.*, *Spencer v. Kemna*, 523 U.S. 1, 21, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (Ginsburg, J., concurring) (alterations and internal quotation marks omitted) (explaining that her thoughts on *Heck* had changed since she joined the majority opinion in that case). If the slate were blank, I would agree that the majority's holding as to prospective relief makes good sense. But because I read *Heck* and its progeny differently, I dissent as to that section of the majority's opinion. I otherwise join the majority in full.

Gloria JOHNSON; John Logan, individuals, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

CITY OF GRANTS PASS, Defendant-Appellant.

Nos. 20-35752, 20-35881

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 6, 2021 San Francisco, California

Filed September 28, 2022

Background: Individuals experiencing homelessness brought putative class action against city, challenging constitutionality of city ordinances which precluded use of a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within city's limits and which provided for civil fines, exclusion orders, and criminal prosecution for trespass. After certifying class, 2019 WL 3717800, the United States District Court for the District of Oregon, Mark D. Clarke, United States Magistrate Judge, 2020 WL 4209227, granted partial summary judgment to individuals and issued permanent injunction prohibiting enforcement of some of the ordinances. City appealed.

Holdings: The Court of Appeals, Silver, District Judge, held that:

(1) city's alleged reduction in enforcement of ordinances did not render action moot;

(2) relief sought was within limits of Article III;

(3) district court acted within its discretion in finding that commonality requirement for class certification was met; and

(4) ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep.

Affirmed in part, vacated in part, and remanded.

Collins, Circuit Judge, filed dissenting opinion.

1. Federal Courts ⚿3581(1), 3585(2)

Standing and mootness are questions of law that Court of Appeals reviews de novo.

2. Federal Civil Procedure ⚿103.2

Federal Courts ⚿2073

Federal courts must determine that they have jurisdiction before proceeding to merits, and plaintiffs must demonstrate

standing as necessary component of jurisdiction.

3. Federal Civil Procedure ⚿103.2, 103.3

To have Article III standing, plaintiff must show (1) concrete and particularized injury, (2) caused by challenged conduct, (3) that is likely redressable by favorable judicial decision. U.S. Const. art. 3, § 2, cl. 1.

4. Injunction ⚿1505

For purposes of injunctive relief, abstract injury is not enough to support Article III standing; plaintiff must have sustained or be in immediate danger of sustaining some direct injury as result of challenged law. U.S. Const. art. 3, § 2, cl. 1.

5. Constitutional Law ⚿977

City's alleged reduction in enforcement of ordinances challenged as unconstitutional by individuals experiencing homelessness did not render individuals' challenge moot, in case involving ordinances which provided for civil fines, exclusion orders, and criminal prosecution for trespass, where, even if rate of enforcement of ordinances had decreased, it was undisputed that enforcement continued to some degree.

6. Federal Courts ⚿2109

A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court.

7. Federal Courts ⚿2114

Voluntary cessation of challenged practices rarely suffices to moot a case.

8. Federal Courts ⚿2114, 2202

To support an argument of mootness based on voluntary cessation of challenged practice, defendant bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.

9. Constitutional Law ⚿2500, 2543

Municipal Corporations ⚿622

Relief sought by individuals experiencing homelessness, in their action challenging constitutionality of city ordinances which included trespass and anti-camping provisions, was within limits of Article III, despite city's argument that any possible relief would inappropriately intrude upon matters of policy best left to executive and legislative discretion; court could grant limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. U.S. Const. art. 3, § 2, cl. 1.

10. Constitutional Law ⚿977

Death of one class representative during pendency of city's appeal of district court's issuance of permanent injunctive relief in favor of individuals experiencing homelessness did not moot individuals' class claims as to constitutionality of city's park-exclusion, criminal trespass, and anti-camping ordinances, where surviving class representatives had standing in their own right.

11. Constitutional Law ⚿695, 705

Individual experiencing homelessness had standing for pre-enforcement challenge to constitutionality of city ordinances which provided that a person with multiple violations of anti-camping and anti-sleeping provisions could be excluded from city parks or charged with criminal trespass, even though individual lived in her car, where there was little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. U.S. Const. art. 3, § 2, cl. 1.

12. Constitutional Law ⚿695

Individual experiencing homelessness had standing for pre-enforcement chal-

lenge to constitutionality of city ordinances that included anti-camping and anti-sleeping provisions, even though individual stated he usually slept in his truck just outside of city limits, where individual had previously slept in city and been awoken by police officers and ordered to move, and individual stated that, but for the challenged ordinances, he would sleep in the city. U.S. Const. art. 3, § 2, cl. 1.

13. Federal Civil Procedure ⚿164.5

For a class representative to pursue the live claims of a properly certified class, without the need to remand for substitution of a new representative, even after his own claims become moot, class must be properly certified or representative must be appealing denial of class certification, and class representative must be a member of the class with standing to sue at the time certification is granted or denied, the unnamed class members must still have a live interest in the matter throughout the duration of the litigation, and the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired.

14. Federal Courts ⚿3785

Remand was required for determination of whether a substitute class representative was available as to challenge to constitutionality of city ordinance precluding sleeping in certain public places, after death of class representative in action against city by individuals experiencing homelessness, which challenged multiple ordinances, where deceased class representative was the only representative with standing in her own right to challenge that particular ordinance, parties had not moved to substitute a class representative, and Court of Appeals was unsure of its jurisdiction to consider challenge to the ordinance at issue.

15. Federal Courts ⚿3585(3)

Court of Appeals reviews district court's order granting class certification for abuse of discretion, but Court of Appeals gives district court noticeably more deference when reviewing grant of class certification than when reviewing denial. Fed. R. Civ. P. 23.

16. Federal Courts ⚿3585(3)

Factual findings underlying class certification are reviewed for clear error. Fed. R. Civ. P. 23.

17. Federal Civil Procedure ⚿171

Assessing the initial requirements for class certification involves rigorous analysis of the evidence. Fed. R. Civ. P. 23(a).

18. Federal Civil Procedure ⚿163

For purposes of numerosity requirement for class certification, impracticability of joinder of all members does not mean impossibility but only difficulty or inconvenience of joining all members of class. Fed. R. Civ. P. 23(a)(1).

19. Federal Civil Procedure ⚿163

There is no specific number of class members required to satisfy numerosity requirement for class certification; however, proposed classes of less than 15 are too small while classes of more than 60 are sufficiently large. Fed. R. Civ. P. 23(a)(1).

20. Federal Civil Procedure ⚿181

District court acted within its discretion in finding that numerosity requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though city police officer asserted in declaration that there were less than 50 individuals in city who did not have access to any shelter; point-in-time (PIT) counts conducted by non-profit organization indi-

cated there were at least 600 such individuals, and there was general understanding that PIT counts routinely undercounted. Fed. R. Civ. P. 23(a)(1).

21. Federal Civil Procedure ⇐165

Class satisfies commonality requirement for certification if there is at least one question of fact or law common to the class. Fed. R. Civ. P. 23(a)(2).

22. Federal Civil Procedure ⇐165

To satisfy commonality requirement for class certification, class members' claims must depend upon a common contention such that determination of its truth or falsity will resolve an issue that is central to the validity of each claim in one stroke. Fed. R. Civ. P. 23(a)(2).

23. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that commonality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, where individuals' claims presented at least one question and answer common to the class, which was whether city's custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws against involuntarily homeless individuals violated the Eighth Amendment. U.S. Const. Amend. 8; Fed. R. Civ. P. 23(a)(2).

24. Federal Civil Procedure ⇐176

A "fail safe class" is one that includes only those individuals who were injured by the allegedly unlawful conduct; such classes are prohibited because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment. Fed. R. Civ. P. 23.

See publication Words and Phrases for other judicial constructions and definitions.

25. Federal Civil Procedure ⇐181

Definition of class as "[a]ll involuntarily homeless individuals living in [city]" did not create an impermissible fail-safe class, in action against city by individuals experiencing homelessness, challenging constitutionality of multiple city ordinances precluding conduct including camping in public parks; class would consist of exactly the same population whether city won or lost on merits, and class population would not change if a court determined that one or more ordinances were unconstitutional but that other ordinances were not. Fed. R. Civ. P. 23.

26. Federal Civil Procedure ⇐164

The typicality requirement for class certification is a permissive standard. Fed. R. Civ. P. 23(a)(3).

27. Federal Civil Procedure ⇐164

Typicality requirement for class certification refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought. Fed. R. Civ. P. 23(a)(3).

28. Federal Civil Procedure ⇐181

District court acted within its discretion in finding that typicality requirement for class certification was met, in action against city by individuals experiencing homelessness, challenging constitutionality of city ordinances precluding conduct including camping in public parks, even though some class representatives lived in vehicles while some class members lived on streets or in parks; class representatives asserted that city could not enforce the challenged ordinances against them when they had no shelter, the defenses

that applied to class representatives and class members were identical, and sleeping in vehicle rather than on ground would only result in violation of ordinances in different manner. Fed. R. Civ. P. 23(a)(3).

29. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance allowing citation of individuals for use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public could violate the Cruel and Unusual Punishments Clause even though citation at issue was a civil citation, where, under totality of city ordinances, if an individual violated the anti-camping ordinance twice, she could be issued a park-exclusion order, and if the individual was subsequently found in a park, she could be cited for criminal trespass. U.S. Const. Amend. 8.

30. Municipal Corporations ⚿622
Sentencing and Punishment ⚿1453

City's "anti-camping" ordinance precluding the use of bedding supplies, such as a blanket, pillow, or sleeping bag, when sleeping in public violated the Cruel and Unusual Punishments Clause as applied to individuals who were involuntarily experiencing homelessness and who had no shelter in which to lawfully sleep; ordinance prohibited individuals from engaging in activity they could not avoid, given lack of other shelter options and fact that, due to city being cold in winter, use of rudimentary protection from elements was a life-preserving imperative. U.S. Const. Amend. 8.

31. Courts ⚿90(2)

The narrowest position which gained the support of five justices is treated as the holding of the Supreme Court.

32. Sentencing and Punishment ⚿1453

Under the Cruel and Unusual Punishments Clause, it is unconstitutional to punish simply sleeping somewhere in public if one has nowhere else to do so; "sleeping" includes sleeping with rudimentary forms of protection from the elements. U.S. Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the District of Oregon, Mark D. Clarke, Magistrate Judge, Presiding, D.C. No. 1:18-cv-01823-CL

Aaron P. Hisel (argued), Law Offices of Montoya Hisel and Associates, Salem, Oregon; Gerald L. Warren, Law Office of Gerald L. Warren, Salem, Oregon, for Defendant-Appellant.

Edward Johnson (argued) and Walter Fonseca, Oregon Law Center, Portland, Oregon, for Plaintiffs-Appellees.

Eric S. Tars, National Homelessness Law Center, Washington, D.C.; Tamar Ezer, Acting Director; David Berris, Joe Candelaria, and Lily Fontenot, Legal Interns; David Stuzin, Student Fellow; University of Miami School of Law, Human Rights Clinic, Coral Gables, Florida; Leilani Farha, Former United Nations Special Rapporteur on the Right to Adequate Housing and Global Director, The Shift #Right2Housing, Ottawa, Ontario, Canada; for Amici Curiae University of Miami School of Law, Human Rights Clinic and National Homelessness Law Center.

Kelsi B. Corkran and Seth Wayne, Institute for Constitutional Advocacy & Protection, Washington, D.C., for Amicus Curiae Fines and Fees Justice Center.

John He, Leslie Bailey, and Brian Hardingham, Public Justice, Oakland, California; John Thomas H. Do, ACLU Foundation of Northern California, San Francisco, California; for Amici Curiae Public Justice,

ACLU of Northern California, ACLU of Southern California, ACLU of Oregon, Institute for Justice, National Center for Law and Economic Justice, and Rutherford Institute.

Nicolle Jacoby, Dechert LLP, New York, New York; Tristia M. Bauman, National Homelessness Law Center, Washington, D.C.; for Amici Curiae National Homelessness Law Center, Homeless Rights Advocacy Project at the Korematsu Center for Law and Equality at Seattle University School of Law, and National Coalition for the Homeless.

Before: RONALD M. GOULD and DANIEL P. COLLINS, Circuit Judges, and ROSLYN O. SILVER,* District Judge.

Opinion by Judge SILVER;

Dissent by Judge COLLINS

OPINION

SILVER, District Judge:

The City of Grants Pass in southern Oregon has a population of approximately 38,000. At least fifty, and perhaps as many as 600, homeless persons live in the City.[1] And the number of homeless persons outnumber the available shelter beds. In other words, homeless persons have nowhere to shelter and sleep in the City other than on the streets or in parks. Nonetheless, City ordinances preclude homeless persons from using a blanket, a pillow, or a cardboard box for protection from the elements while sleeping within the City's limits. The ordinances result in civil fines up to several hundred dollars per violation and persons found to violate ordinances multiple times can be barred from all City property. And if a homeless person is found on City property after receiving an exclusion order, they are subject to criminal prosecution for trespass.

In September 2018, a three-judge panel issued *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), holding "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* at 1048. Approximately six weeks after the initial *Martin* panel opinion, three homeless individuals filed a putative class action complaint against the City arguing a number of City ordinances were unconstitutional. The district court certified a class of "involuntarily homeless" persons and later granted partial summary judgment in favor of the class.[2] After the plaintiffs vol-

* The Honorable Roslyn O. Silver, United States District Judge for the District of Arizona, sitting by designation.

1. During this litigation the parties have used different phrases when referring to this population. For simplicity, we use ''homeless persons'' throughout this opinion.

2. Persons are involuntarily homeless if they do not ''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.'' *See Martin*, 920 F.3d at 617 n.8. However, someone who has the financial means to obtain shelter, or someone who is staying in an emergency shelter is not involuntarily homeless. *See id.* at 617 n.8. Contrary to the City's argument, this definition of involuntary homelessness is not the same as the definition of ''homeless'' found in regulations for the Department of Housing and Urban Development, 24 C.F.R. § 582.5, or the McKinney-Vento Act, 42 U.S.C. § 11434a(2), the federal law regarding the right of homeless children to a public education. For example, the McKinney-Vento Act includes as ''homeless children and youths'' persons who may not qualify as involuntarily homeless under *Martin*, such as children and youths ''living in emergency or transitional shelters.'' 42 U.S.C. § 11434a(2). Though the district court noted in part that Plaintiffs met the definition of homelessness set forth in 24 C.F.R. § 582.5, the district court also relied on the specific definition of unsheltered homeless persons set forth in the

untarily dismissed some claims not resolved at summary judgment, the district court issued a permanent injunction prohibiting enforcement against the class members of some City ordinances, at certain times, in certain places. The City now appeals, arguing this case is moot, the class should not have been certified, the claims fail on the merits, and Plaintiffs did not adequately plead one of their theories. On the material aspects of this case, the district court was right.[3]

I.

This case involves challenges to five provisions of the Grants Pass Municipal Code ("GPMC"). The provisions can be described as an "anti-sleeping" ordinance, two "anti-camping" ordinances, a "park exclusion" ordinance, and a "park exclusion appeals" ordinance. When the district court entered judgment, the various ordinances consisted of the following.

First, the anti-sleeping ordinance stated, in full

> *Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited*
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.

GPMC 5.61.020. A violation of this ordinance resulted in a presumptive $75 fine. If unpaid, that fine escalated to $160. If a violator pled guilty, the fines could be reduced by a state circuit court judge to $35 for a first offense and $50 for a second offense. GPMC 1.36.010(K).

Next, the general anti-camping ordinance prohibited persons from occupying a "campsite" on all public property, such as parks, benches, or rights of way. GPMC 5.61.030. The term "campsite" was defined as

> any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed, established, or maintained for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.

GPMC 5.61.010. A second overlapping anti-camping ordinance prohibited camping in public parks, including "[o]vernight parking" of any vehicle. GPMC 6.46.090. A homeless individual would violate this parking prohibition if she parked or left "a vehicle parked for two consecutive hours [in a City park] . . . between the hours of midnight and 6:00 a.m." *Id.* Violations of either anti-camping ordinance resulted in a fine of $295. If unpaid, the fine escalated to

Department of Housing and Urban Development's regulations regarding point-in-time counts: "persons who are living in a place not designed or ordinarily used as a regular sleeping accommodation for humans must be counted as unsheltered homeless persons." 24 C.F.R. § 578.7(c)(2)(i).

3. Our dissenting colleague's strong disagreement with the majority largely arises from his disapproval of *Martin*. *See, e.g.,* Dissent 813–14 ("Even assuming *Martin* remains good law . . ."); Dissent 830 ("... and the gravity of *Martin*'s errors."); Dissent 831 (claiming, without evidence, that "it is hard to deny that *Martin* has 'generate[d] dire practical consequences' ") (modification in original and citation omitted). But *Martin* is controlling law in the Ninth Circuit, to which we are required to adhere.

$537.60. However, if a violator pled guilty, the fine could be reduced to $180 for a first offense and $225 for a second offense. GPMC 1.36.010(J).

Finally, the "park exclusion" ordinance allowed a police officer to bar an individual from all city parks for 30 days if, within one year, the individual was issued two or more citations for violating park regulations. GPMC 6.46.350(A). Pursuant to the "park exclusion appeals" ordinance, exclusion orders could be appealed to the City Council. GPMC 6.46.355. If an individual received a "park exclusion" order, but subsequently was found in a city park, that individual would be prosecuted for criminal trespass.

Since at least 2013, City leaders have viewed homeless persons as cause for substantial concern. That year the City Council convened a Community Roundtable ("Roundtable") "to identify solutions to current vagrancy problems." Participants discussed the possibility of "driving repeat offenders out of town and leaving them there." The City's Public Safety Director noted police officers had bought homeless persons bus tickets out of town, only to have the person returned to the City from the location where they were sent. A city councilor made clear the City's goal should be "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." The planned actions resulting from the Roundtable included increased enforcement of City ordinances, including the anti-camping ordinances.

The year following the Roundtable saw a significant increase in enforcement of the City's anti-sleeping and anti-camping ordinances. From 2013 through 2018, the City issued a steady stream of tickets under the ordinances.[4] On September 4, 2018, a three-judge panel issued its opinion in *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018).[5] That case served as the backdrop for this entire litigation.

In *Martin*, six homeless or recently homeless individuals sued the city of Boise, Idaho, seeking relief from criminal prosecution under two city ordinances related to public camping. *Martin*, 920 F.3d 584, 603–04 (9th Cir. 2019). As relevant here, *Martin* held the Cruel and Unusual Punishment Clause of the "Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* at 616. *Martin* made clear, however, that a city is not required to "provide sufficient shelter

4. The City issued the following number of tickets under the anti-sleeping and anti-camping ordinances:

2013: 74 total tickets
2014: 228 total tickets
2015: 80 total tickets
2016: 47 total tickets
2017: 99 total tickets
2018: 46 total tickets

5. Following the opinion, the City of Boise petitioned for rehearing en banc. On April 1, 2019, an amended panel opinion was issued and the petition for rehearing was denied. Judge M. Smith, joined by five other judges, dissented from the denial of rehearing en banc. He argued the three-judge panel had, among other errors, misinterpreted the Supreme Court precedents regarding the criminalization of involuntary conduct. *Martin*, 920 F.3d at 591–92 (M. Smith, J., dissenting from denial of rehearing en banc). Judge Bennett, joined by four judges, also dissented from the denial of rehearing en banc. Judge Bennett argued the three-judge panel's opinion was inconsistent with the original public meaning of the Cruel and Unusual Punishment Clause. *Id.* at 599 (Bennett, J., dissenting from denial of rehearing en banc). The merits of those dissents do not alter the binding nature of the amended *Martin* panel opinion. Unless otherwise indicated, all citations to *Martin* throughout the remainder of this opinion are to the amended panel opinion.

for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets . . . at any time and at any place." *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)) (omission in original).

The formula established in *Martin* is that the government cannot prosecute homeless people for sleeping in public if there "is a greater number of homeless individuals in [a jurisdiction] than the number of available" shelter spaces. *Id.* (alteration in original). When assessing the number of shelter spaces, *Martin* held shelters with a "mandatory religious focus" could not be counted as available due to potential violations of the First Amendment's Establishment Clause. *Id.* at 609–10 (citing *Inouye v. Kemna*, 504 F.3d 705, 712–13 (9th Cir. 2007)).

In October 2018, approximately six weeks after the *Martin* opinion, Debra Blake filed her putative class action complaint against the City. The complaint alleged enforcement of the City's anti-sleeping and anti-camping ordinances violated the Cruel and Unusual Punishment Clause of the Eighth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Due Process Clause of the Fourteenth Amendment. The complaint was amended to include additional named plaintiffs and to allege a claim that the fines imposed under the ordinances violated the Excessive Fines Clause of the Eighth Amendment. On January 2, 2019, a few months after the initial complaint was filed, and before Plaintiffs filed their class certification motion, the City amended its anti-camping ordinance in an attempt to come into compliance with *Martin*. Prior to this change, the anti-camping ordinance was worded such that " 'sleeping' in parks . . . automatically constitut[ed] 'camping.' " According to the City, "in direct response to *Martin v. Boise*, the City amended [the anti-camping ordinance] to make it clear that the act of 'sleeping' was to be distinguished from the prohibited conduct of 'camping.' " The City meant to "make it clear that those without shelter *could* engage in the involuntary acts of sleeping or resting in the City's parks." Shortly after the City removed "sleeping" from the "camping" definition, Plaintiffs moved to certify a class. Plaintiffs requested certification of a class defined as

> All involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by [the City] as addressed in this lawsuit.

Plaintiffs' class certification motion was accompanied by a declaration from the Chief Operating Officer and Director of Housing and Homeless Services for United Community Action Network ("UCAN"), a nonprofit organization that serves homeless people in Josephine County, the county where the City is located.[6] UCAN had recently conducted a "point-in-time count of homeless individuals in Josephine County."[7] Based on that count, the Chief Oper-

6. The Department of Housing and Urban Development regulations impose obligations on the "continuum of care," which is defined as "the group composed of representatives of relevant organizations . . . that are organized to plan for and provide, as necessary, a system of outreach, engagement, and assessment . . . to address the various needs of homeless persons and persons at risk of homelessness for a specific geographic area." 24 C.F.R. § 576.2.

7. As the "continuum of care" in the City, UCAN was required to conduct point-in-time counts ("PIT counts") of homeless persons within that geographic area. 24 C.F.R. § 578.7(c)(2). PIT counts measure the number of sheltered and unsheltered homeless individuals on a single night. 24 C.F.R.

ating Officer's declaration stated "[h]undreds of [homeless] people live in Grants Pass," and "almost all of the homeless people in Grants Pass are involuntarily homeless. There is simply no place in Grants Pass for them to find affordable housing or shelter. They are not choosing to live on the street or in the woods."

The City opposed class certification, arguing Plaintiffs had not provided sufficient evidence to meet any of the requirements for certifying a class. The district court disagreed and certified the class proposed by Plaintiffs. The parties proceeded with discovery and filed cross-motions for summary judgment.

At the time the parties filed their summary judgment motions, there were only four locations in the City that temporarily housed homeless persons, which proved inadequate. One location was run by the Gospel Rescue Mission, an explicitly religious organization devoted to helping the poor. The Gospel Rescue Mission operated a facility for single men without children, and another facility for women, including women with children. These two facilities required residents to work at the mission six hours a day, six days a week in exchange for a bunk for 30 days. Residents were required to attend an approved place of worship each Sunday and that place of worship had to espouse "traditional Christian teachings such as the Apostles Creed." Disabled persons with chronic medical or mental health issues that prevented them from complying with the Mission's rules were prohibited.[8]

In addition to the Gospel Rescue Mission, the City itself operated a "sobering center" where law enforcement could transport intoxicated or impaired persons. That facility consisted of twelve locked rooms with toilets where intoxicated individuals could sober up. The rooms did not have beds. The City also provided financial support to the Hearts with a Mission Youth Shelter, an 18-bed facility where unaccompanied minors aged 10 to 17 could stay for up to 72 hours, and could stay even longer if they had parental consent.

Finally, on nights when the temperature was below 30 degrees (or below 32 degrees with snow), UCAN operated a "warming center" capable of holding up to 40 individuals. That center did not provide beds. The center reached capacity on every night it operated except the first night it opened, February 3, 2020. Between February 3 and March 19, 2020, the warming center was open for 16 nights. The center did not open at all during the winter of 2020–2021.

Presented with evidence of the number of homeless persons and the shelter spaces available, the district court concluded "[t]he record is undisputed that Grants Pass has far more homeless individuals than it has practically available shelter beds." The court then held that, based on the unavailability of shelter beds, the City's enforcement of its anti-camping and anti-sleeping ordinances violated the Cruel and Unusual Punishment Clause. The fact that *Martin* involved criminal violations while the present case involved initial civil violations that matured into criminal violations made "no difference for Eight

§ 578.7(c)(2). The *Martin* court relied on PIT counts conducted by local non-profits to determine the number of homeless people in the jurisdiction. *See Martin,* 920 F.3d at 604. Courts and experts note that PIT counts routinely undercount homeless persons, but they appear to be the best available source of data on homelessness. *See, e.g., id.*

8. Multiple class members submitted uncontested declarations to the district court stating they did not stay at the Gospel Rescue Mission because they suffer from disqualifying disabilities and/or were unwilling to attend church.

Amendment purposes." Next, the court held the system of fines violated the Eighth Amendment's Excessive Fines Clause.[9] Finally, the court held the appeals process for park exclusions violated procedural due process under the Due Process Clause of the Fourteenth Amendment.

In reaching its decision the district court was careful to point out that, consistent with *Martin*, the scope of its decision was limited. The court's order made clear that the City was not required to provide shelter for homeless persons and the City could still limit camping or sleeping at certain times and in certain places. The district court also noted the City may still "ban the use of tents in public parks," "limi[t] the amount of bedding type materials allowed per individual," and pursue other options "to prevent the erection of encampments that cause public health and safety concerns."[10]

Approximately one month after the summary judgment order, the district court issued a judgment which included a permanent injunction that provided a complicated mix of relief. First, the district court declared the ordinance regarding the appeals of park exclusions failed to provide "adequate procedural due process," but that ordinance was not permanently enjoined. Instead, the district court enjoined only the enforcement of the underlying park exclusion ordinance. Next, the district court declared enforcement of the anti-sleeping and anti-camping ordinances against class members "violates the Eighth Amendment prohibition against cruel and unusual punishment" and "violates the Eighth Amendment prohibition against excessive fines." Without explanation, however, the district court did not enjoin those ordinances in their entirety. Rather, the district court entered no injunctive relief regarding the anti-sleeping ordinance. But the district court permanently enjoined enforcement of the anti-camping ordinances, as well as an ordinance regarding "criminal trespassing on city property related to parks," in all City parks at night except for one park where the parties agreed the injunction need not apply.[11] The district court also permanently enjoined enforcement of the anti-camping ordinances during daytime hours unless an initial warning was given "at least 24 hours before enforcement." Accordingly, under the permanent injunction, the anti-camping ordinances may be enforced under some circumstances during the day, but never at night.

The City appealed and sought initial en banc review to clarify the scope of *Martin*.

9. Part of the City's argument on this issue was that the fines are not mandatory because state court judges retain discretion not to impose fines. This is inconsistent with the text of the ordinances and not supported by the record. The provision of the municipal code defining penalties for ordinance violations clarifies that the fines are mandatory. It provides, the fines "*shall* be $295" and "*shall* be $75." GPMC 1.36.010(J)–(K) (emphasis added). Conversely, it is only discretionary to reduce fines because the relevant ordinance provides that, "[u]pon a plea of guilty . . . the penalty *may* be reduced" to the amount listed for a first or second offense. *Id.* (emphasis added). After a second citation, there is no authority within the municipal code that permits judges to reduce fines, and there is no evidence in the record demonstrating circuit court judges have reduced fines except pursuant to GPMC 1.36.010.

10. The district court denied summary judgment on other claims brought by Plaintiffs. Those claims were subsequently voluntarily dismissed.

11. The City ordinance regarding "criminal trespass" was never at issue in the litigation until the permanent injunction. Plaintiffs explain it was included in the injunction "[b]y agreement of the parties."

The petition for initial hearing en banc was denied.

II.

The core issue involving enforcement of the anti-camping ordinances is governed in large part by *Martin.* While there are some differences between *Martin* and the present case, the City has not identified a persuasive way to differentiate its anti-camping ordinances from the questioned ordinances in *Martin.* Therefore, the district court's ruling that the Cruel and Unusual Punishment Clause bars enforcement of the anti-camping ordinances will be mostly affirmed. We need not address the potential excessiveness of the fines issue or whether Plaintiffs adequately pled their due process challenge.

Our analysis proceeds in five parts. First, we reject the City's argument that the district court lacked jurisdiction.[12] Second, we find no abuse of discretion in the district court's certification of a class of involuntarily homeless persons. Third, we agree with the district court that at least portions of the anti-camping ordinance violate the Cruel and Unusual Punishment clause under *Martin.* Fourth, we conclude there is no need to resolve whether the fines violate the Excessive Fines clause. Fifth, we hold it is unnecessary to decide Plaintiffs' procedural due process claim.

A.

[1–4] Standing and mootness are questions of law that we review de novo. *Hartman v. Summers*, 120 F.3d 157, 159 (9th Cir. 1997); *Foster v. Carson*, 347 F.3d 742, 745 (9th Cir. 2003). "Federal courts must determine that they have jurisdiction before proceeding to the merits," and plaintiffs must demonstrate standing as a necessary component of jurisdiction. *Lance v. Coffman*, 549 U.S. 437, 439, 127 S.Ct. 1194, 167 L.Ed.2d 29 (2007). To have Article III standing, a plaintiff must show (1) a concrete and particularized injury, (2) caused by the challenged conduct, (3) that is likely redressable by a favorable judicial decision. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). For purposes of injunctive relief, "[a]bstract injury is not enough"—the plaintiff must have sustained or be in immediate danger "of sustaining some direct injury as the result of the challenged" law. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) (quotation marks and citation omitted).

[5] The City's appellate briefing makes two standing arguments. First, the City argues Plaintiffs' claims are now moot because Plaintiffs no longer face a risk of injury based on the City's changed behavior after *Martin.* Second, the City argues Plaintiffs have not identified any relief that is within a federal court's power to redress. Both arguments are without merit.

[6, 7] A claim becomes moot, and no longer justiciable in federal court, if it has been remedied independent of the court. *See Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72, 133 S.Ct. 1523, 185 L.Ed.2d 636 (2013). There is abundant evidence in the record establishing homeless persons were injured by the City's enforcement actions in the past. The City argues, however, that it made changes after *Martin* such that there is no longer a threat of future injury. The problem for the City is that voluntary cessation of challenged practices rarely suffices to moot a

12. However, we vacate summary judgment and remand as to the anti-sleeping ordinance to afford the district court the opportunity to substitute a class representative in place of Debra Blake, who passed away while this matter was on appeal.

case and, in any event, there is evidence the challenged practices have continued after *Martin*.

[8] "It is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth*, 528 U.S. at 189, 120 S.Ct. 693 (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982)). This is so "because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307, 132 S.Ct. 2277, 183 L.Ed.2d 281 (2012). Thus, the City "bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. Instead of the City making it "absolutely clear" it has stopped enforcement activities, the record shows ongoing enforcement.

The parties diverge substantially on how to characterize the degree of enforcement after *Martin* was issued in September 2018. The City argued in its briefing and at oral argument that it has largely complied with *Martin*, noting the 2019 amendment to an anti-camping ordinance, that citations were issued "sparingly" in 2019, and in particular it says it issued only two citations during the late evening and early morning since *Martin*. The City supports its petition with a declaration from a City police officer stating "[i]t is the regular practice of every officer I know of on this department to enforce these Ordinances sparingly and in recognition of the different circumstances we encounter." As for Plaintiffs, they offered evidence showing enforcement continued after *Martin* such that class members received citations and exclusion orders for camping or sleeping and were prosecuted for criminal trespass between the point the lawsuit was filed and the close of discovery.

Although the record does show the rate of enforcement of the various ordinances decreased since *Martin*, even accepting the City's position the evidence is undisputed that enforcement continued.[13] It is plainly inaccurate for the City to claim all enforcement ceased. The ongoing enforcement activities establish the City did not meet its "formidable burden" of showing the challenged activities will not recur. *Friends of the Earth*, 528 U.S. at 190, 120 S.Ct. 693. The City's mootness argument fails.[14]

13. The City also argues "there was no evidence that anyone was ever cited for the simple act of sleeping in a City park" after *Martin*. But the citation issued to Dolores Nevin in late December 2019 pursuant to the City's "criminal trespass" ordinance included a narrative explaining, "[d]uring an area check of Riverside Park, Dolores Nevin was found *sleeping* during closed hours. Nevin, who has been warned in the past, was issued a citation for Trespass on City Property." (emphasis added). And on September 11, 2019, Grants Pass Police Officer Jason McGinnis issued citations to Debra Blake and Carla Thomas for being in Riverside Park at approximately 7:30 a.m. with sleeping bags and belongings spread around themselves. Other individuals cited for camping in a city park in 2019 include class members: Gail Laine, William Stroh, Dawn Schmidt, Cristina Trejo, Kellie Parker, Colleen Bannon, Amanda Sirnio, and Michael and Louana Ellis.

14. Mootness was also considered during the *Martin* litigation. *See Bell v. City of Boise*, 709 F.3d 890, 898, 900–01 (9th Cir. 2013). The City of Boise argued that a combination of an amended definition of "camping" in the ordinance and a "Special Order," prohibiting police officers from enforcing the ordinances when a person is on public property and there is no available overnight shelter, mooted the case. *Id.* at 894–95. We rejected the argument that the change to the definition of "camping"

[9] The City's other jurisdictional argument is that Plaintiffs' claims are not redressable. According to the City, any possible relief intrudes inappropriately upon matters of policy best left to executive and legislative discretion. We disagree. Consistent with *Martin*, the district court granted limited relief enjoining enforcement of a few municipal ordinances at certain times, in certain places, against certain persons. None of the cases cited by the City credibly support its argument that the district court injunction overstepped the judiciary's limited authority under the Constitution. Contrary to the City's position, enjoining enforcement of a few municipal ordinances aimed at involuntarily homeless persons cannot credibly be compared to an injunction seeking to require the federal government to "phase out fossil fuel emissions and draw down excess atmospheric CO2." *Juliana v. United States*, 947 F.3d 1159, 1164–65 (9th Cir. 2020). The relief sought by Plaintiffs was redressable within the limits of Article III. *See Renee v. Duncan*, 686 F.3d 1002, 1013 (9th Cir. 2012) (holding a plaintiff's burden to demonstrate redressability is "relatively modest") (citation omitted).

[10] Finally, we raise *sua sponte* the possibility that the death of class representative Debra Blake while this matter was on the appeal has jurisdictional significance. *Cf. Fort Bend Cty. v. Davis*, —— U.S. ——, 139 S.Ct. 1843, 1849, 204 L.Ed.2d 116 (2019) (holding courts must raise issues of subject matter jurisdiction *sua sponte*). We hold Blake's death does not moot the class's claims as to all challenged ordinances except possibly the anti-sleeping ordinance. As to that ordinance, we remand to allow the district court the opportunity to substitute a class representative in Blake's stead.

[11, 12] With respect to the park exclusion, criminal trespass, and anti-camping ordinances, the surviving class representatives, Gloria Johnson [15] and John Logan,[16]

rendered the case moot because "[m]ere clarification of the Camping Ordinance does not address the central concerns of the Plaintiffs' Eighth Amendment claims"—that the ordinance "effectively criminalized their status as homeless individuals." *Id.* at 898 n.12. And we held the adoption of a "Special Order" did not moot the case because the Special Order was not a legislative enactment, and as such it "could be easily abandoned or altered in the future." *Id.* at 901.

15. The dissent suggests Gloria Johnson does not have standing to challenge the park exclusion and criminal trespass ordinances. Dissent 821–22. The dissent concedes, however, Johnson has standing to challenge the anti-camping ordinances, GPMC 5.61.030, 6.46.090. But the dissent does not provide a meaningful explanation why it draws this distinction between the ordinances that work in concert. It is true Johnson has not received a park exclusion order and has not been charged with criminal trespass in the second degree. However, there is little doubt that her continued camping in parks would lead to a park exclusion order and, eventually, criminal trespass charges. Johnson is positioned to bring a pre-enforcement challenge against the park exclusion and criminal trespass ordinances, because they will be used against her given the undisputed fact that she remains involuntarily homeless in Grants Pass. She established a credible threat of future enforcement under the anti-camping ordinances which creates a credible threat of future enforcement under the park exclusion and criminal trespass ordinances.

16. The dissent claims John Logan has not established standing. Dissent 820–21. During the course of this case, Logan submitted two declarations. At the class certification stage, his declaration stated he "lived out of [his] truck on the streets in Grants Pass for about 4 years." During that time, he was "awakened by City of Grants Pass police officer and told that I cannot sleep in my truck anywhere in the city and ordered to move on." To avoid those encounters, Logan "usually sleep[s] in [his] truck just outside the Grants Pass city limits." However, Logan stated "[i]f there was some place in the city where [he] could legally

have standing in their own right. Although they live in their cars, they risk enforcement under all the same ordinances as Blake and the class (with the exception of the anti-sleeping ordinance, GPMC 5.61.020, which cannot be violated by sleeping in a car) and have standing in their own right as to all ordinances except GPMC 5.61.020.

[13] With respect to the anti-sleeping ordinance, the law is less clear. Debra Blake is the only class representative who had standing in her own right to challenge the anti-sleeping ordinance. Under cases such as *Sosna v. Iowa*, 419 U.S. 393, 401, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), and *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976), a class representative may pursue the live claims of a properly certified class—without the need to remand for substitution of a new representative [17]—even after his own claims become moot, provided that several requirements are met.[18] *See Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc). If Debra Blake's challenge

sleep in [his] truck, [he] would because it would save valuable gas money and avoid . . . having to constantly move.'' Logan also explained he has ''met dozens, if not hundreds, of homeless people in Grants Pass'' over the years who had been ticketed, fined, arrested, and criminally prosecuted ''for living outside.'' At summary judgment, Logan submitted a declaration stating he is ''currently involuntarily homeless in Grants Pass and sleeping in [his] truck at night at a rest stop North of Grants Pass.'' He stated he ''cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed and charged with Criminal Trespass.'' The dissent reads this evidence as indicating Logan failed to ''provide[ ] any facts to establish'' that he is likely to be issued a citation under the challenged ordinances. Dissent 820–21. We do not agree. The undisputed facts establish Logan is involuntarily homeless. When he slept in Grants Pass, he was awoken by police officers and ordered to move. His personal knowledge was that involuntarily homeless individuals in Grants Pass often are cited under the challenged ordinances and Grants Pass continues to enforce the challenged ordinances. And, but for the challenged ordinances, Logan would sleep in the city. Therefore, as the district court found, it is sufficiently likely Logan would be issued a citation that Logan's standing is established. That is especially true given the Supreme Court's instruction that a plaintiff need not wait for ''an actual arrest, prosecution, or other enforcement action'' before ''challenging [a] law.'' *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). Finally, even if Logan had not demonstrated standing, the dissent's analysis regarding Logan is irrelevant because this case could proceed solely based on the standing established by Gloria Johnson and the class. *See Bates v. United Parcel Serv., Inc.*, 511 F.3d at 985 (9th Cir. 2007) (en banc).

17. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553 (''[W]e believe that the test of Rule 23(a) is met.''); *id.* at 416–17, 95 S.Ct. 553 (White, J., dissenting) (''It is claimed that the certified class supplies the necessary adverse parties for a continuing case or controversy . . . The Court cites no authority for this retrospective decision as to the adequacy of representation which seems to focus on the competence of counsel rather than a party plaintiff who is a representative member of the class. At the very least, the case should be remanded to the District Court.'').

18. The class must be properly certified, *see Franks*, 424 U.S. at 755– 56, 96 S.Ct. 1251, or the representative must be appealing denial of class certification. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980). The class representative must be a member of the class with standing to sue at the time certification is granted or denied. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553. The unnamed class members must still have a live interest in the matter throughout the duration of the litigation. *See Franks*, 424 U.S. at 755, 96 S.Ct. 1251. And the court must be satisfied that the named representative will adequately pursue the interests of the class even though their own interest has expired. *See Sosna*, 419 U.S. at 403, 95 S.Ct. 553.

to the anti-sleeping ordinance became moot before she passed away, she could have continued to pursue the challenge on behalf of the class under the doctrine of *Sosna*. But we have not found any case applying *Sosna* and *Franks* to a situation such as this, in which the death of a representative causes a class to be unrepresented as to part (but not all) of a claim. The parties did not brief this issue and no precedent indicates whether this raises a jurisdictional question, which would deprive us of authority to review the merits of the anti-sleeping ordinance challenge, or a matter of Federal Rule of Civil Procedure 23, which might not.

[14] Because Plaintiffs have not moved to substitute a class representative pursuant to Federal Rule of Appellate Procedure 43(a) or identified a representative who could be substituted, because no party has addressed this question in briefing, and because we are not certain of our jurisdiction to consider the challenge to the anti-sleeping ordinance, we think it appropriate to vacate summary judgment as to the anti-sleeping ordinance and remand to determine whether a substitute representative is available as to that challenge alone. *See Cobell v. Jewell*, 802 F.3d 12, 23–24 (D.C. Cir. 2015) (discussing substitution of a party during appeal). Substitution of a class representative may significantly aid in the resolution of the issues in this case. Remand will not cause significant delay because, as we explain below, remand is otherwise required so that the injunction can be modified. In the absence of briefing or precedent regarding this question, we do not decide whether this limitation is jurisdictional or whether it arises from operation of Rule 23.

We therefore hold the surviving class representatives at a minimum have standing to challenge every ordinance except the anti-sleeping ordinance. As to the anti-sleeping ordinance, we vacate summary judgment and remand for the district court to consider in the first instance whether an adequate class representative, such as class member Dolores Nevin, exists who may be substituted.

B.

[15, 16] The City's next argument is the district court erred in certifying the class. We "review a district court's order granting class certification for abuse of discretion, but give the district court 'noticeably more deference when reviewing a grant of class certification than when reviewing a denial.' " *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1275 (9th Cir. 2019) (internal citation omitted) (quoting *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1115 (9th Cir. 2017)). Factual findings underlying class certification are reviewed for clear error. *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014).

[17] A member of a class may sue as a representative party if the member satisfies Federal Rule of Civil Procedure 23(a)'s four prerequisites: numerosity, commonality, typicality, and adequacy of representation. Fed. R. Civ. P. 23(a); *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir. 2012). Assessing these requirements involves "rigorous analysis" of the evidence. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011) (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

If the initial requirements of Rule 23(a) are met, a putative class representative must also show the class falls into one of three categories under Rule 23(b). Plaintiffs brought this suit under Rule 23(b)(2), seeking injunctive or declaratory relief based on the City having "acted or refused to act on grounds that apply generally to

the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

The district court found the Rule 23(a) requirements satisfied and certified a class under Rule 23(b)(2). The City's arguments against this class certification are obscure. It appears the City's argument is that class certification was an abuse of discretion because the holding of *Martin* can only be applied after an individualized inquiry of each alleged involuntarily homeless person's access to shelter.[19] The City appears to suggest the need for individualized inquiry defeats numerosity, commonality, and typicality. While we acknowledge the *Martin* litigation was not a class action, nothing in that decision precluded class actions.[20] And based on the record in this case, the district court did not err by finding Plaintiffs satisfied the requirements of Rule 23 such that a class could be certified.

[18–20] To satisfy the numerosity requirement a proposed class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). For purposes of this requirement, " 'impracticability' does not mean 'impossibility,' but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Ests., Inc.*, 329 F.2d 909, 913–14 (9th Cir. 1964) (quotation omitted). There is no specific number of class members required. *See Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). However, proposed classes of less than fifteen are too small while classes of more than sixty are sufficiently large. *Harik v. Cal. Teachers Ass'n*, 326 F.3d 1042, 1051–52 (9th Cir. 2003).

When the district court certified the class on August 7, 2019, it found there were at least 600 homeless persons in the City based on the 2018 and 2019 PIT counts conducted by UCAN. The City does not identify how this finding was clearly erroneous. In fact, the City affirmatively indicated to Plaintiffs prior to the class certification order that the number of homeless persons residing in Grants Pass for the past 7 years was "unknown." Further, the only guidance offered by the City regarding a specific number of class members came long after the class was certified. A City police officer claimed in a declaration that he was "aware of less than fifty individuals total who do not have access to any shelter" in the City. The officer admitted, however, it "would be extremely difficult to accurately estimate the population of people who are homeless in Grants Pass regardless of the definition used."

The officer's guess of "less than fifty" homeless persons is inconsistent with the general understanding that PIT counts routinely undercount homeless persons. *See Martin*, 920 F.3d at 604 ("It is widely recognized that a one-night point in time count will undercount the homeless population.") (internal quotation marks omitted). But even accepting the officer's assessment that there were approximately fifty

19. There is no reason to believe the putative class members are voluntarily homeless. To the contrary, at least 13 class members submitted declarations to the district court indicating that they are involuntarily homeless.

20. Other courts have certified similar classes. *See e.g., Lehr v. City of Sacramento,* 259 F.R.D. 479 (E.D. Cal. 2009) (addressing numerosity, commonality, and typicality for homeless persons in Sacramento); *Joyce v. City & Cty. of S.F.,* 1994 WL 443464 (N.D. Cal. Aug. 4, 1994), *dismissed as moot,* 87 F.3d 1320 (9th Cir. 1996) (finding typicality despite some differences among homeless class members); *Pottinger v. City of Miami,* 720 F.Supp. 955, 960 (S.D. Fla. 1989) (certifying a class of homeless persons).

homeless persons in the City, the numerosity requirement is satisfied. Joining approximately fifty persons might be impracticable and especially so under the facts here because homeless persons obviously lack a fixed address and likely have no reliable means of communications.[21] At the very least, the district court did not abuse its discretion in concluding the numerosity requirement was met.

[21–23] A class satisfies Rule 23's commonality requirement if there is at least one question of fact or law common to the class. *Wang v. Chinese Daily News, Inc.*, 737 F.3d 538, 544 (9th Cir. 2013). The Supreme Court has said the word "question" in Rule 23(a)(2) is a misnomer: "What matters to class certification ... is not the raising of common 'questions'—even in droves—but rather, the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)) (emphasis and omission in original). "[C]lass members' claims [must] 'depend upon a common contention' such that 'determination of its truth or falsity will resolve an issue that is central to the validity of each [claim] in one stroke.' " *Mazza*, 666 F.3d at 588 (quoting *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541).

As correctly identified by the district court, Plaintiffs' claims present at least one question and answer common to the class: "whether [the City's] custom, pattern, and practice of enforcing anti-camping ordinances, anti-sleeping ordinances, and criminal trespass laws ... against involuntarily homeless individuals violates the Eighth Amendment of the Constitution." An answer on this question resolved a crucial aspect of the claims shared by all class members.

[24, 25] The City argues the commonality requirement was not met because some class members might have alternative options for housing, or might have the means to acquire their own shelter.[22] But

21. Moreover, there is a well-documented correlation between physical and mental illness and homelessness. *See, e.g.*, Sara K. Rankin, *Punishing Homelessness*, 22 N. Crim. L. Rev. 99, 105 (2019) (''Psychiatric disorders affect at least 30 to 40 percent of all people experiencing homelessness.''); Stefan Gutwinski et al., *The prevalence of mental disorders among homeless people in high-income countries: An updated systematic review and meta-regression analysis*, 18(8) PLoS Med. 1, 14 (Aug. 23, 2021), (''Our third main finding was high prevalence rates for treatable mental illnesses, with 1 in 8 homeless individuals having either major depression (12.6%) or schizophrenia spectrum disorders (12.4%). This represents a high rate of schizophrenia spectrum disorders among homeless people, and a very large excess compared to the 12-month prevalence in the general population, which for schizophrenia is estimated around 0.7% in high-income countries.''); Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 Psychiatric Servs. 170, 170 (2008) (''Homeless individuals may also be more likely to have health conditions ... Severe mental illness is also more prevalent among homeless people than in the general population.''); Ctr. for Disease Control & Prevention, Homelessness as a Public Health Law Issue: Selected Resources (Mar. 2, 2017) (''Homelessness is closely connected to declines in physical and mental health; homeless persons experience high rates of health problems such as HIV infection, alcohol and drug abuse, mental illness, tuberculosis, and other conditions.'').

22. The dissent adapts the City's argument that enforcement of the anti-camping ordinances depends on individual circumstances and is therefore not capable of resolution on a common basis. Dissent 824–25. That misunderstands how the present class was structured. The dissent attempts to reframe the common question as a very general inquiry. It appears the dissent interprets the question whether an

this argument misunderstands the class definition. Pursuant to the class definition, the class includes only *involuntarily* homeless persons.[23] Individuals who have shelter or the means to acquire their own shelter simply are never class members.[24] Because we find there existed at least one question of law or fact common to the class, the district court did not abuse its discretion in concluding commonality was satisfied.

[26–28] Typicality asks whether "the claims or defenses of the representative parties are typical" of the class. Fed. R. Civ. P. 23(a)(3). Typicality is a "permissive standard[ ]." *Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (citation omitted). It "refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought." *Parsons*, 754 F.3d at 685 (citation omitted).

The class representatives' claims and defenses are typical of the class in that they are homeless persons who claim that the City cannot enforce the challenged ordinances against them when they have no shelter. The defenses that apply to class representatives and class members are identical. The claims of class representa-

Eighth Amendment violation must be determined by an individualized inquiry as whether each individual is ''involuntarily homeless.'' To assess that, a court would have to conduct an individualized inquiry and determine if an individual was ''involuntarily homeless.'' But that is not the common question in this case. Rather, the question is whether the City's enforcement of the anti-camping ordinances against all involuntarily homeless individuals violates the Eighth Amendment. This question is capable of common resolution on a prospective class-wide basis, as the record establishes.

23. The dissent argues this created a prohibited ''fail safe'' class. That is erroneous. As noted in a recent en banc decision, ''a 'fail safe' class . . . is defined to include only those individuals who were injured by the allegedly unlawful conduct.'' *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, 31 F.4th 651, 669 n.14 (9th Cir. 2022) (en banc). Such classes are prohibited ''because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.'' *Id. See also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 (9th Cir. 2016) (noting a fail safe class ''is one that is defined so narrowly as to preclude[ ] membership unless the liability of the defendant is established''). No such class is present here. The class was defined, in relevant part, as ''[a]ll involuntarily homeless individuals living in Grants Pass.'' Membership in that class has no connection to the success of the underlying claims. Put differently, the class would have consisted of exactly the same population whether Grants Pass won or lost on the merits. The obvious illustration of this is the class population would not change if a court determined the anti-camping ordinance violated the Eighth Amendment while the anti-sleeping ordinance did not. In that situation, class members would not be ''defined out of the class.'' *Olean*, 31 F.4th at 669 n.14 (citation omitted). Rather, class members would be ''bound by the judgment'' regarding the anti-sleeping ordinance. *Id.* In any event, the dissent's concerns regarding individualized determinations are best made when the City attempts to enforce its ordinances. *Cf. McArdle v. City of Ocala*, 519 F.Supp.3d 1045, 1052 (M.D. Fla. 2021) (requiring that officers inquire into the availability of shelter space before an arrest could be made for violation of the City's ''open lodging'' ordinance). If it is determined at the enforcement stage that a homeless individual has access to shelter, then they do not benefit from the injunction and may be cited or prosecuted under the anti-camping ordinances. Moreover, as we noted above, several classes of homeless individuals have been certified in this past. *See supra* note 18.

24. We do not, as the dissent contends, ''suggest[ ] that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as 'involuntarily homeless.' '' Dissent 827. It is unclear where the dissent finds this in the opinion. To be clear: A person with access to temporary shelter is not involuntarily homeless unless and until they no longer have access to shelter.

tives and class members are similar, except that some class representatives live in vehicles while other class members may live on streets or in parks, not vehicles. This does not defeat typicality. The class representatives with vehicles may violate the challenged ordinances in a different manner than some class members—*i.e.*, by sleeping in their vehicle, rather than on the ground. But they challenge the same ordinances under the same constitutional provisions as other class members. *Cf. Staton*, 327 F.3d at 957 ("[R]epresentative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical.") (citation omitted). The district court did not abuse its discretion in finding the typicality requirement met.

The City does not present any other arguments regarding class certification, such as the propriety of certifying the class as an injunctive class under Rule 23(b)(2). We do not make arguments for parties and the arguments raised by the City regarding class certification fail.

C.

[29] Having rejected the City's jurisdictional arguments, as well as its arguments regarding class certification, the merits can be addressed. The City's merits arguments regarding the Cruel and Unusual Punishment Clause take two forms. First, the City argues its system of imposing civil fines cannot be challenged as violating the Cruel and Unusual Clause because that clause provides protection only in criminal proceedings, after an individual has been convicted. That is incorrect. Second, the City argues *Martin* does not protect homeless persons from being cited under the City's amended anti-camping ordinance which prohibits use of any bedding or similar protection from the elements. The City appears to have conceded it cannot cite homeless persons merely for sleeping in public but the City maintains it is entitled to cite individuals for the use of rudimentary bedding supplies, such as a blanket, pillow, or sleeping bag "for bedding purposes." *See* GPMC 5.61.010(B). Again, the City is incorrect. Here, we focus exclusively on the anti-camping ordinances.

According to the City, citing individuals under the anti-camping ordinances cannot violate the Cruel and Unusual Punishment Clause because citations under the ordinances are civil and civil citations are "categorically not 'punishment' under the Eight Amendment."[25] The City explains "the simple act of issuing a civil citation with a court date [has never] been found to be unconstitutional 'punishment' under the Eighth Amendment." While not entirely clear, the City appears to be arguing the Cruel and Unusual Punishment Clause provides no protection from citations categorized as "civil" by a governmental authority.[26]

25. This position is in significant tension with the City's actions taken immediately after *Martin* was issued. As noted earlier, the City amended its anti-camping ordinance "in direct response to *Martin v. Boise*" to allow for "the act of 'sleeping'" in City parks. If the City believed *Martin* has no impact on civil ordinances, it is unclear why the City believed a curative "response" to *Martin* was necessary.

26. The primary support for this contention is *Ingraham v. Wright*, 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977). In *Ingraham*, the Supreme Court addressed whether the Cruel and Unusual Punishment Clause was implicated by corporal punishment in public schools. The Court stated the Cruel and Unusual Punishment Clause limits "the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the

Plaintiffs' focus on civil citations does involve an extra step from the normal Cruel and Unusual Clause analysis and the analysis of *Martin*. Usually, claims under the Cruel and Unusual Clause involve straightforward criminal charges. For example, the situation in *Martin* involved homeless persons allegedly violating criminal ordinances and the opinion identified its analysis as focusing on the "criminal" nature of the charges over ten times. 920 F.3d at 617. Here, the City has adopted a slightly more circuitous approach than simply establishing violation of its ordinances as criminal offenses. Instead, the City issues civil citations under the ordinances. If an individual violates the ordinances twice, she can be issued a park exclusion order. And if the individual is found in a park after issuance of the park exclusion order, she is cited for criminal trespass. *See* O.R.S. 164.245 (criminal trespass in the second degree). Multiple City police officers explained in their depositions this sequence was the standard protocol. The holding in *Martin* cannot be so easily evaded.

Martin held the Cruel and Unusual Punishment clause "prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." 920 F.3d at 616. A local government cannot avoid this ruling by issuing civil citations that, later, become criminal offenses. A recent decision by the en banc Fourth Circuit illustrates how the Cruel and Unusual Punishment Clause looks to the eventual criminal penalty, even if there are preliminary civil steps.

The disputes in *Manning v. Caldwell for City of Roanoke*, 930 F.3d 264 (4th Cir. 2019) (en banc) arose from a Virginia law which allowed a state court to issue a civil order identifying an individual as a "habitual drunkard." *Id.* at 268. Once labeled a "habitual drunkard," the individual was "subject to incarceration for the mere possession of or attempt to possess alcohol, or for being drunk in public." *Id.* at 269. A group of homeless alcoholics filed suit claiming, among other theories, the "habitual drunkard" scheme violated the Cruel and Unusual Punishment Clause. In the plaintiffs' view, the scheme resulted in criminal prosecutions based on their "status," *i.e.* alcoholism. *See id.* at 281.

Using reasoning very similar to that in *Martin*, the Fourth Circuit found the statutory scheme unconstitutional because it provided punishment based on the plaintiffs' status. Of particular relevance here, the Fourth Circuit reasoned the fact that Virginia's "scheme operate[d] in two steps" did not change the analysis. *Id.* 283. Issuing a civil order first, followed by a criminal charge, was a "two-pronged statutory

severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such.'' *Id.* at 667, 97 S.Ct. 1401. The Court interpreted the challenge to corporal punishment as, in effect, asserting arguments under only the first or second limitation. That is, the challenge was whether ''the paddling of schoolchildren'' was a permissible amount or type of punishment. *Id.* at 668, 97 S.Ct. 1401. The *Ingraham* decision involved no analysis or discussion of the third limitation, *i.e.* the ''substantive limits on what can be made criminal.'' *Id.* at 667, 97 S.Ct. 1401. Thus, it was in the context of evaluating the amount or type of punishment that *Ingraham* stated ''Eighth Amendment scrutiny is appropriate only after the State has complied with the constitutional guarantees traditionally associated with criminal prosecutions.'' *Id.* at 671, 97 S.Ct. 1401 n.40. When, as here, plaintiffs are raising challenges to the ''substantive limits on what can be made criminal,'' *Ingraham* does not prohibit a challenge before a criminal conviction. *See Martin*, 920 F.3d at 614 (''*Ingraham* did not hold that a plaintiff challenging the state's power to criminalize a particular status or conduct in the first instance, as the plaintiffs in this case do, must first be convicted.'').

scheme" potentially "less direct" than straightforwardly criminalizing the status of alcohol addiction. *Id.* But the scheme remained unconstitutional because it "effectively criminalize[d] an illness." *Id.* The fact that Virginia "civilly brands alcoholics as 'habitual drunkards' before prosecuting them for involuntary manifestations of their illness does nothing to cure the unconstitutionality of this statutory scheme." *Id.*

[30] The same reasoning applies here. The anti-camping ordinances prohibit Plaintiffs from engaging in activity they cannot avoid. The civil citations issued for behavior Plaintiffs cannot avoid are then followed by a civil park exclusion order and, eventually, prosecutions for criminal trespass. Imposing a few extra steps before criminalizing the very acts *Martin* explicitly says cannot be criminalized does not cure the anti-camping ordinances' Eighth Amendment infirmity.

The City offers a second way to evade the holding in *Martin.* According to the City, it revised its anti-camping ordinances to allow homeless persons to sleep in City parks. However, the City's argument regarding the revised anti-camping ordinance is an illusion. The amended ordinance continues to prohibit homeless persons from using "bedding, sleeping bag, or other material used for bedding purposes," or using stoves, lighting fires, or erecting structures of any kind. GPMC 5.61.010. The City claims homeless persons are free to sleep in City parks, but only without items necessary to facilitate sleeping outdoors.[27]

The discrepancy between sleeping without bedding materials, which is permitted under the anti-camping ordinances, and sleeping with bedding, which is not, is intended to distinguish the anti-camping ordinances from *Martin* and the two Supreme Court precedents underlying *Martin, Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962) and *Powell v. Texas*, 392 U.S. 514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). Under those cases, a person may not be prosecuted for conduct that is involuntary or the product of a "status." *See Martin*, 920 F.3d at 617 (citation omitted). The City accordingly argues that sleeping is involuntary conduct for a homeless person, but that homeless persons can choose to sleep without bedding materials and therefore can be prosecuted for sleeping *with* bedding.

In its order granting summary judgment, the district court correctly concluded the anti-camping ordinances violated the Cruel and Unusual Punishment Clause to the extent they prohibited homeless persons from "taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available." The only plausible reading of *Martin* is that it applies to the act of "sleeping" in public, including articles necessary to facilitate sleep. In fact, *Martin* expressed concern regarding a citation given to a woman who had been found sleeping on the ground, wrapped in blankets. 920 F.3d at 618. *Martin* noted that citation as an example of the anti-camping ordinance being "en-

27. The Grants Pass ordinance does not specifically define "bedding" but courts give the words of a statute or ordinance their "ordinary, contemporary, common meaning" absent an indication to the contrary from the legislature. *See Williams v. Taylor,* 529 U.S. 420, 431, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (citation omitted). The Oxford English Dictionary defines "bedding" as "[a] collective term for the articles which compose a bed." OXFORD ENGLISH DICTIONARY. And "bed" is defined as "a place for sleeping." MERRIAM-WEBSTER COLLEGIATE DICTIONARY 108 (11th ed.). The City's effort to dissociate the use of bedding from the act of sleeping or protection from the elements is nonsensical.

forced against homeless individuals who take even the most rudimentary precautions to protect themselves from the elements." *Id.* *Martin* deemed such enforcement unconstitutional. *Id.* It follows that the City cannot enforce its anti-camping ordinances to the extent they prohibit "the most rudimentary precautions" a homeless person might take against the elements.[28] The City's position that it is entitled to enforce a complete prohibition on "bedding, sleeping bag, or other material used for bedding purposes" is incorrect.

The dissent claims we have misread *Martin* by "completely disregard[ing] the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required." Dissent 826. The dissent concedes that pursuant to *Martin*, the City cannot impose criminal penalties on involuntarily homeless individuals for sitting, sleeping, or lying outside on public property. Dissent 816–17. Thus, our purported "complete disregard[ ]" for *Martin* is not regarding the central holding that local governments may not criminalize involuntary conduct. Rather, the dissent believes, based on its interpretation of the Supreme Court opinions underlying *Martin*, that the Eighth Amendment provides only "a case-specific affirmative defense" that can never be litigated on a class basis. Dissent 824. To reach this counterintuitive conclusion, the dissent reads limitations into *Robinson*, *Powell*, and *Martin* that are nonexistent.

In *Robinson*, the Supreme Court struck down, under the Eighth Amendment, a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics.' " *Robinson*, 370 U.S. at 666, 82 S.Ct. 1417. The law was unconstitutional, the Court explained, because it rendered the defendant "continuously guilty of this offense, whether or not he has ever used or possessed any narcotics within the State." *Id.*

Six years later, in *Powell*, the Court divided 4-1-4 over whether Texas violated the Eighth Amendment under *Robinson* by prosecuting an alcoholic for public drunkenness. In a plurality opinion, Justice Marshall upheld the conviction of Leroy Powell on the ground that he was not punished on the basis of his status as an alcoholic, but rather for the *actus reus* of being drunk in public. *Powell*, 392 U.S. at 535, 88 S.Ct. 2145. Four justices dissented, in an opinion by Justice Fortas, on the ground that the findings made by the trial judge—that Powell was a chronic alcoholic who could not resist the impulse to drink—compelled the conclusion that Powell's prosecution violated the Eighth Amendment because Powell could not avoid breaking the law. *Id.* at 569–70, 88 S.Ct. 2145 (Fortas, J., dissenting). Justice White concurred in the judgment. He stressed, "[i]f it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion." *Id.* at 549, 88 S.Ct. 2145 (White, J., concurring). However, the reason for Justice White's concurrence was that he felt *Powell* failed to prove his status as an alcoholic compelled him to violate the law by appearing in public. *Id.* at 553, 88 S.Ct. 2145 (White, J., concurring).

[31] Pursuant to *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51

28. Grants Pass is cold in the winter. The evidence in the record establishes that homeless persons in Grants Pass have struggled against frostbite. Faced with spending every minute of the day and night outdoors, the choice to use rudimentary protection of bedding to protect against snow, frost, or rain is not volitional; it is a life-preserving imperative.

L.Ed.2d 260 (1977), the narrowest position which gained the support of five justices is treated as the holding of the Court. In identifying that position, *Martin* held: "five Justices [in *Powell*] gleaned from *Robinson* the principle that 'that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.' " *Martin*, 920 F.3d at 616 (quoting *Jones*, 444 F.3d at 1135). *Martin* did not—as the dissent alleges—hold that *Powell*'s "controlling opinion was Justice White's concurrence." Dissent 816. *See id.*, 920 F.3d at 616–17. It would have violated the rule of *Marks* to adopt portions of Justice White's concurrence that did not receive the support of five justices. The dissent claims Justice White's concurrence requires that the individual claiming a status must prove the status compels the individual to violate the law—here, that each homeless individual must prove their status as an involuntarily homeless person to avoid prosecution.[29] Dissent 815–17. The dissent claims this renders class action litigation inappropriate. But no opinion in either *Powell* or *Martin* discussed the propriety of litigating the constitutionality of such criminal statutes by way of a class action.[30]

The law that the dissent purports to unearth in Justice White's concurrence is not the "narrowest ground" which received the support of five justices. *No* opinion in *Powell* or *Martin* supports the dissent's assertion that *Powell* offers exclusively an "affirmative 'defense' " that cannot be liti-

29. The dissent's attempt to create a governing holding out of Justice White's concurrence is erroneous. By citing a word or two out of context in the *Powell* dissenting opinion (*e.g.*, "constitutional defense") our dissenting colleague argues both Justice White and the dissenting justices in *Powell* agreed any person subject to prosecution has, at most, "a case-specific affirmative 'defense.' " Dissent 815, 824. We disagree. Though status was litigated as a defense in the context of Leroy Powell's prosecution, no opinion in *Powell* held status may be raised only as a defense. The *Powell* plurality noted trial court evidence that Leroy Powell was an alcoholic, but that opinion contains no indication "status" may only be invoked as "a case-specific affirmative 'defense.' " As for Justice White, the opening paragraph of his concurrence indicates he was primarily concerned not with how a status must be invoked but with the fact that certain statuses should be beyond the reach of the criminal law:

> If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion. Unless Robinson is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law. Similarly, the chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.

Powell, 392 U.S. at 548–49, 88 S.Ct. 2145 (White, J., concurring) (internal citation omitted). Finally, neither the remainder of Justice White's concurrence nor the dissenting opinion explicitly indicates one's status may only be invoked as a defense. Rather, Justice White and the dissenters simply agreed that, if Powell's status made his public intoxication involuntary, he could not be prosecuted. There is no conceivable way to interpret *Martin* as adopting our dissenting colleague's position that one's status must be invoked as a defense. But even assuming the burden must be placed on the party wishing to invoke a status, the class representatives established there is no genuine dispute of material fact they have the relevant status of being involuntarily homeless.

30. Federal courts have certified classes of homeless plaintiffs in the past, *see supra* note 18, which counsels against the City's and the dissent's position that such classes are impermissible under Rule 23.

gated in a class action.[31] Dissent 815, 824. Although the dissent might prefer that these principles find support in the controlling law, they do not. We thus do not misread *Martin* by failing to apply the principles found solely in Justice White's concurrence. Rather, we adhere to the narrow holding of *Martin* adopting the narrowest ground shared by five justices in *Powell*: a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status.

In addition to erecting an absolute bar to class litigation of this sort, the dissent would also impose artificial limitations on claims brought pursuant to *Martin.* The dissent concedes Gloria Johnson has standing to bring individual challenges to most of the City's ordinances. But the dissent then speculates that Gloria Johnson may, in fact, not be involuntarily homeless in the City. The dissent would insist that Gloria Johnson, for example, leave the City to camp illegally on federal or state lands, provide the court an accounting of her finances and employment history, and indicate with specificity where she lived before she lost her job and her home. Dissent 827–29. There, of course, exists no law or rule requiring a homeless person to do any of these things. Gloria Johnson has adequately demonstrated that there is no available shelter in Grants Pass and that she is involuntarily homeless.

The undisputed evidence establishes Gloria Johnson is involuntarily homeless and there is undisputed evidence showing many other individuals in similar situations. It is undisputed that there are at least around 50 involuntarily homeless persons in Grants Pass, and PIT counts, which *Martin* relied on to establish the number of homeless persons in Boise, revealed more than 600. *See Martin*, 920 F.3d at 604. It is undisputed that there is no secular shelter space available to adults. Many class members, including the class representatives, have sworn they are homeless and the City has not contested those declarations. The dissent claims this showing is not enough, implying that Plaintiffs must meet an extremely high standard to show they are involuntarily homeless. Even viewed in the light most favorable to the City, there is no dispute of material fact that the City is home to many involuntarily homeless individuals, including the class representatives. In fact, neither the City nor the dissent has demonstrated there is even one *voluntarily* homeless individual living in the City.[32] In

31. As noted above, *Martin* did not hold homeless persons bear the burden of demonstrating they are involuntarily homeless. *See supra* note 29. Because the record plainly demonstrates Plaintiffs are involuntarily homeless, there similarly is no reason for us to determine what showing would be required. We note, however, that some district courts have addressed circumstances in which the question of burden was somewhat relevant. *See, e.g., McArdle,* 519 F.Supp.3d at 1052 (requiring, based in part on *Martin,* that officers inquire into the availability of shelter space before making an arrest for violation of the City's "open lodging" ordinance); *Butcher v. City of Marysville,* 2019 WL 918203, at *7 (E.D. Cal. Feb. 25, 2019) (holding plaintiffs failed to make the "threshold showing" of pleading that there was no shelter capacity and that they had no other housing at the time of enforcement).

32. The dissent claims we have "shifted the burden to the City to establish the voluntariness of the behavior targeted by the ordinances." Dissent 828–29 n.13 (emphasis omitted). To the contrary, as we have explained, we do not decide who would bear such a burden because undisputed evidence demonstrates Plaintiffs are involuntarily homeless. Rather, without deciding who would bear such a burden if involuntariness were subject to serious dispute, we note Plaintiffs have demonstrated involuntariness and there is no evidence in the record showing any class member has adequate alternative shelter.

light of the undisputed facts in the record underlying the district court's summary judgment ruling that show Plaintiffs are involuntarily homeless, and the complete absence of evidence that Plaintiffs are voluntarily homeless, we agree with the district court that Plaintiffs such as Gloria Johnson are not voluntarily homeless and that the anti-camping ordinances are unconstitutional as applied to them unless there is some place, such as shelter, they can lawfully sleep.[33]

Our holding that the City's interpretation of the anti-camping ordinances is counter to *Martin* is not to be interpreted to hold that the anti-camping ordinances were properly enjoined in their entirety. Beyond prohibiting bedding, the ordinances also prohibit the use of stoves or fires, as well as the erection of any structures. The record has not established the fire, stove, and structure prohibitions deprive homeless persons of sleep or "the most rudimentary precautions" against the elements.[34] Moreover, the record does not explain the City's interest in these prohibitions.[35] Consistent with *Martin*, these prohibitions may or may not be permissible. On remand, the district court will be required to craft a narrower injunction recognizing Plaintiffs' limited right to protection against the elements, as well as limitations when a shelter bed is available.[36]

33. Following *Martin,* several district courts have held that the government may evict or punish sleeping in public in some locations, provided there are other lawful places within the jurisdiction for involuntarily homeless individuals to sleep. *See, e.g., Shipp v. Schaaf,* 379 F.Supp.3d 1033, 1037 (N.D. Cal. 2019) (''However, even assuming (as Plaintiffs do) that [eviction from a homeless encampment by citation or arrest] might occur, remaining at a particular encampment on public property is not conduct protected by *Martin,* especially where the closure is temporary in nature.''); *Aitken v. City of Aberdeen,* 393 F.Supp.3d 1075, 1082 (W.D. Wash. 2019) (''*Martin* does not limit the City's ability to evict homeless individuals from particular public places.''); *Gomes v. Cty. of Kauai,* 481 F.Supp.3d 1104, 1109 (D. Haw. 2020) (holding the County of Kauai could prohibit sleeping in a public park because it had not prohibited sleeping on other public lands); *Miralle v. City of Oakland,* 2018 WL 6199929, at *2 (N.D. Cal. Nov. 28, 2018) (holding the City could clear out a specific homeless encampment because ''*Martin* does not establish a constitutional right to occupy public property indefinitely at Plaintiffs' option''); *Le Van Hung v. Schaaf,* 2019 WL 1779584, at *5 (N.D. Cal. Apr. 23, 2019) (holding *Martin* does not ''create a right for homeless residents to occupy indefinitely any public space of their choosing''). Because the City has not established any realistically available place within the jurisdiction for involuntarily homeless individuals to sleep we need not decide whether alternate outdoor space would be sufficient under *Martin.* The district court may consider this issue on remand, if it is germane to do so.

34. The dissent claims we establish ''the right to use (at least) a tent.'' Dissent 830 n.15. This assertion is obviously false. The district court's holding that the City may still ''ban the use of tents in public parks'' remains undisturbed by our opinion.

35. The dissent asserts, ''it is hard to deny that *Martin* has 'generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein.' '' Dissent 831 (quoting *Martin,* 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc)) (modification in original). There are no facts in the record to establish that *Martin* has generated ''dire'' consequences for the City. Our review of this case is governed only by the evidence contained in the record.

36. The district court enjoined the park exclusion ordinance in its entirety. The parties do not address this in their appellate briefing but, on remand, the district court should consider narrowing this portion as well because the park exclusion ordinance presumably may be enforced against Plaintiffs who engage in prohibited activity unrelated to their status as homeless persons.

D.

The district court concluded the fines imposed under the anti-sleeping and anti-camping ordinances violated the Eighth Amendment's prohibition on excessive fines. A central portion of the district court's analysis regarding these fines was that they were based on conduct "beyond what the City may constitutionally punish." With this in mind, the district court noted "[a]ny fine [would be] excessive" for the conduct at issue.

The City presents no meaningful argument on appeal regarding the excessive fines issue. As for Plaintiffs, they argue the fines at issue were properly deemed excessive because they were imposed for "engaging in involuntary, unavoidable life sustaining acts." The permanent injunction will result in no class member being fined for engaging in such protected activity. Because no fines will be imposed for protected activity, there is no need for us to address whether hypothetical fines would be excessive.

E.

The final issue is whether Plaintiffs properly pled their challenge to the park exclusion appeals ordinance. GPMC 6.46.355. That ordinance provided a mechanism whereby an individual who received an exclusion order could appeal to the City Council. Subsequent to the district court's order, the City amended its park exclusion appeals ordinance. Therefore, the district court's determination the previous ordinance violated Plaintiffs' procedural due process rights has no prospective relevance. Because of this, we need not decide if Plaintiffs adequately pled their challenge to the previous ordinance.

III.

We affirm the district court's ruling that the City of Grants Pass cannot, consistent with the Eighth Amendment, enforce its anti-camping ordinances against homeless persons for the mere act of sleeping outside with rudimentary protection from the elements, or for sleeping in their car at night, when there is no other place in the City for them to go. On remand, however, the district court must narrow its injunction to enjoin only those portions of the anti-camping ordinances that prohibit conduct protected by *Martin* and this opinion. In particular, the district court should narrow its injunction to the anti-camping ordinances and enjoin enforcement of those ordinances only against involuntarily homeless person for engaging in conduct necessary to protect themselves from the elements when there is no shelter space available. Finally, the district court on remand should consider whether there is an adequate representative who may be substituted for Debra Blake.

[32] We are careful to note that, as in *Martin*, our decision is narrow. As in *Martin*, we hold simply that it is "unconstitutional to [punish] simply sleeping *somewhere* in public if one has nowhere else to do so." *Martin*, 920 F.3d at 590 (Berzon, J., concurring in denial of rehearing en banc). Our decision reaches beyond *Martin* slightly. We hold, where *Martin* did not, that class certification is not categorically impermissible in cases such as this, that "sleeping" in the context of *Martin* includes sleeping with rudimentary forms of protection from the elements, and that *Martin* applies to civil citations where, as here, the civil and criminal punishments are closely intertwined. Our decision does not address a regime of purely civil infractions, nor does it prohibit the City from attempting other solutions to the homelessness issue.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

COLLINS, Circuit Judge, dissenting:

In *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), we held that "the Eighth Amendment's prohibition on cruel and unusual punishment bars a city from prosecuting people criminally for sleeping outside on public property when those people have no home or other shelter to go to." *Id.* at 603. Even assuming that *Martin* remains good law, today's decision—which both misreads and greatly expands *Martin*'s holding—is egregiously wrong. To make things worse, the majority opinion then combines its gross misreading of *Martin* with a flagrant disregard of settled class-certification principles. The end result of this amalgamation of error is that the majority validates the core aspects of the district court's extraordinary injunction in this case, which effectively requires the City of Grants Pass to allow all but one of its public parks to be used as homeless encampments.[1] I respectfully dissent.

I

Because our opinion in *Martin* frames the issues here, I begin with a detailed overview of that decision before turning to the facts of the case before us.

A

In *Martin*, six individuals sued the City of Boise, Idaho, under 42 U.S.C. § 1983, alleging that the City had violated their Eighth Amendment rights in enforcing two ordinances that respectively barred, *inter alia*, (1) camping in public spaces and (2) sleeping in public places without permission. 920 F.3d at 603–04, 606. All six plaintiffs had been convicted of violating at least one of the ordinances, *id.* at 606, but we held that claims for retrospective relief based on those convictions were barred by the doctrine of *Heck v. Humphrey*, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). *See Martin*, 920 F.3d at 611–12 (noting that, under *Heck*, a § 1983 action may not be maintained if success in the suit would necessarily show the invalidity of the plaintiff's criminal conviction, unless that conviction has already been set aside or invalidated). What remained, after application of the *Heck* bar, were the claims for retrospective relief asserted by two plaintiffs (Robert Martin and Pamela Hawkes) in connection with citations they had received that did *not* result in convictions, and the claims for prospective injunctive and declaratory relief asserted by Martin and one additional plaintiff (Robert Anderson). *Id.* at 604, 610, 613–15; *see also id.* at 618–20 (Owens, J., dissenting in part) (dissenting from the majority's holding that the prospective relief claims survived *Heck*). On the merits of those three plaintiffs' Eighth Amendment claims, the *Martin* panel held that the district court had erred in granting summary judgment for the City. *Id.* at 615–18.

Although the text of the Eighth Amendment's Cruel and Unusual Punishments Clause states only that "cruel and unusual *punishments*" shall not be "inflicted," U.S. CONST., amend. VIII (emphasis added), the *Martin* panel nonetheless held that the Clause "places substantive limits" on the government's ability to *criminalize* "sitting, sleeping, or lying outside on public property," 920 F.3d at 615–16. In reaching this conclusion, the *Martin* panel placed dispositive reliance on the Supreme Court's decisions in *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962), and *Powell v. Texas*, 392 U.S.

1. The majority's decision is all the more troubling because, in truth, the foundation on which it is built is deeply flawed: *Martin* seriously misconstrued the Eighth Amendment and the Supreme Court's caselaw construing it. *See infra* at 830–31. But I am bound by *Martin*, and—unlike the majority—I faithfully apply it here.

514, 88 S.Ct. 2145, 20 L.Ed.2d 1254 (1968). I therefore briefly review those two decisions before returning to *Martin*.

Robinson held that a California law that made "it a criminal offense for a person to 'be addicted to the use of narcotics,' " 370 U.S. at 660, 82 S.Ct. 1417 (quoting CAL. HEALTH & SAFETY CODE § 11721 (1957 ed.)), and that did so "even though [the person] has never touched any narcotic drug within the State or been guilty of any irregular behavior there, inflicts a cruel and unusual punishment in violation of the Fourteenth Amendment," *id.* at 667, 82 S.Ct. 1417. The California statute, the Court emphasized, made the " '*status*' of narcotic addiction a criminal offense," regardless of whether the defendant had "ever *used or possessed* any narcotics within the State" or had "been guilty of any antisocial *behavior* there." *Id.* at 666, 82 S.Ct. 1417 (emphasis added).

In *Powell*, a fractured Supreme Court rejected Powell's challenge to his conviction, under a Texas statute, for being "found in a state of intoxication in any public place." 392 U.S. at 517, 88 S.Ct. 2145 (quoting TEX. PENAL CODE art. 477 (1952)). A four-Justice plurality distinguished *Robinson* on the ground that, because Powell "was convicted, not for being a chronic alcoholic, but for being in public while drunk on a particular occasion," Texas had "not sought to punish a mere status, as California did in *Robinson*." *Id.* at 532, 88 S.Ct. 2145 (plurality). The plurality held that *Robinson* did not address, much less establish, that "certain *conduct* cannot constitutionally be punished because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.* at 533, 88 S.Ct. 2145 (emphasis added).

Justice White concurred in the judgment on the narrower ground that Powell had failed to establish the "prerequisites to the possible invocation of the Eighth Amendment," which would have required him to "satisfactorily show[ ] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Id.* at 552, 88 S.Ct. 2145 (White, J., concurring). And because, in Justice White's view, the Eighth Amendment at most provided a case-specific affirmative "defense" to application of the statute, *id.* at 552, 88 S.Ct. 2145 n.4, he agreed that the Texas statute was "constitutional insofar as it authorizes a police officer to *arrest* any seriously intoxicated person when he is encountered in a public place," *id.* at 554, 88 S.Ct. 2145 n.5 (emphasis added). Emphasizing that Powell himself "did not show that *his* conviction offended the Constitution" and that Powell had "made no showing that *he* was unable to stay off the streets on the night in question," Justice White concurred in the majority's affirmance of Powell's conviction. *Id.* at 554, 88 S.Ct. 2145 (emphasis added).

The four dissenting Justices in *Powell* agreed that the Texas statute "differ[ed] from that in *Robinson*" inasmuch as it "covers more than a mere status." 392 U.S. at 567, 88 S.Ct. 2145 (Fortas, J., dissenting). There was, as the dissenters noted, "no challenge here to the validity of public intoxication statutes in general or to the Texas public intoxication statute in particular." *Id.* at 558, 88 S.Ct. 2145. Indeed, the dissenters agreed that, in the ordinary case "when the State proves such [public] presence in a state of intoxication, this will be sufficient for conviction, and the punishment prescribed by the State may, of course, be validly imposed." *Id.* at 569, 88 S.Ct. 2145. Instead, the dissenters concluded that the application of the statute to Powell was unconstitutional "*on the occasion in question*" in light of the Texas trial court's findings about Powell's inability to

control his condition. *Id.* at 568, 88 S.Ct. 2145 n.31 (emphasis added). Those findings concerning Powell's "constitutional defense," the dissenters concluded, established that Powell "was powerless to avoid drinking" and "that, once intoxicated, he could not prevent himself from appearing in public places." *Id.* at 558, 568, 88 S.Ct. 2145; *see also id.* at 525, 88 S.Ct. 2145 (plurality) (describing the elements of the "*constitutional defense*" that Powell sought to have the Court recognize).

While acknowledging that the plurality in *Powell* had "interpret[ed] *Robinson* as precluding only the criminalization of 'status,' not of 'involuntary' conduct," the *Martin* panel held that the controlling opinion was Justice White's concurrence. 920 F.3d at 616. As I have noted, Justice White concluded that the Texas statute against public drunkenness could constitutionally be applied, even to an alcoholic, if the defendant failed to "satisfactorily show[ ] that it was not feasible for him to have made arrangements to prevent his being in public when drunk and that his extreme drunkenness sufficiently deprived him of his faculties on the occasion in issue." *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring).[2] Under *Marks v. United States*, 430 U.S. 188, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977), this narrower reasoning given by Justice White for joining the *Powell* majority's judgment *upholding* the conviction constitutes the Court's holding in that case. *See id.* at 193, 97 S.Ct. 990 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.' " (citation omitted)); *see also United States v. Moore*, 486 F.2d 1139, 1151 (D.C. Cir. 1973) (en banc) (Wilkey, J., concurring) (concluding that the judgment in *Powell* rested on the overlap in the views of "four members of the Court" who held that Powell's acts of public drunkenness "were punishable without question" and the view of Justice White that Powell's acts "were punishable so long as the acts had not been proved to be the product of an established irresistible compulsion").

The *Martin* panel quoted dicta in Justice White's concurrence suggesting that, if the defendant could make the requisite "showing" that "resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible," then the Texas statute "[a]s applied" to such persons might violate "the Eighth Amendment." 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 551, 88 S.Ct. 2145 (White, J., concurring)). These dicta, *Martin* noted, overlapped with similar statements in the dissenting opinion in *Powell*, and from those two opinions, the *Martin* panel derived the proposition that "five Justices" had endorsed the view that "the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Id.* (citation omitted). Applying that principle, *Martin* held that "the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter." *Id.* Because "human beings are biologically compelled to rest, whether by sitting, lying, or sleeping," *Martin* held

2. Justice White, however, did not resolve the further question of whether, if such a showing *had* been made, the Eighth Amendment would have been violated. He stated that the Eighth Amendment "*might* bar conviction" in such circumstances, but he found it "unnecessary" to decide whether that "novel construction of that Amendment" was ultimately correct. 392 U.S. at 552–53 & n.4, 88 S.Ct. 2145 (emphasis added).

that prohibitions on such activities in public cannot be applied to those who simply have "no option of sleeping indoors." *Id.* at 617.

The *Martin* panel emphasized that its "holding is a narrow one." *Id. Martin* recognized that, if there are sufficient available shelter beds for all homeless persons within a jurisdiction, then of course there can be no Eighth Amendment impediment to enforcing laws against sleeping and camping in public, because those persons engaging in such activities cannot be said to have "no option of sleeping indoors." *Id.* But "so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters, the jurisdiction cannot prosecute homeless individuals for *involuntarily* sitting, lying, and sleeping in public." *Id.* (simplified) (emphasis added). Consistent with Justice White's concurrence, the *Martin* panel emphasized that, in determining whether the defendant was being punished for conduct that was "involuntary and inseparable from status," *id.* (citation omitted), the specific individual circumstances of the defendant must be considered. Thus, *Martin* explained, the panel's "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." *Id.* at 617 n.8. But *Martin* held that, where it is shown that homeless persons "do not have a single place where they can lawfully be," an ordinance against sleeping or camping in public, "as applied to them, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified). Concluding that the remaining plaintiffs had "demonstrated a genuine issue of material fact" as to their lack of any access to indoor shelter, *Martin* reversed the district court's grant of summary judgment to the City. *Id.* at 617 n.9; *see also id.* at 617–18.

B

With that backdrop in place, I turn to the specific facts of this case.

In the operative Third Amended Complaint, named Plaintiffs Debra Blake, Gloria Johnson, and John Logan sought to represent a putative class of "all involuntarily homeless people living in Grants Pass, Oregon" in pursuing a variety of claims under 42 U.S.C. § 1983 against the City of Grants Pass. In particular, they asserted that the following three sections of the Grants Pass Municipal Code ("GPMC"), which generally prohibited sleeping and camping in public, violated the Eighth Amendment's Cruel and Unusual Punishments Clause and its Excessive Fines Clause:

> **5.61.020 Sleeping on Sidewalks, Streets, Alleys, or Within Doorways Prohibited**
>
> A. No person may sleep on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety.
>
> B. No person may sleep in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk.
>
> C. In addition to any other remedy provided by law, any person found in violation of this section may be immediately removed from the premises.
>
> **5.61.030 Camping Prohibited**
>
> No person may occupy a campsite in or upon any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property

or under any bridge or viaduct, [subject to specified exceptions].[3]

6.46.090 Camping in Parks

A. It is unlawful for any person to camp, as defined in GPMC Title 5, within the boundaries of the City parks.

B. Overnight parking of vehicles shall be unlawful. For the purposes of this section, anyone who parks or leaves a vehicle parked for two consecutive hours or who remains within one of the parks as herein defined for purposes of camping as defined in this section for two consecutive hours, without permission from the City Council, between the hours of midnight and 6:00 a.m. shall be considered in violation of this Chapter.

Plaintiffs' complaint also challenged the following "park exclusion" ordinance as a violation of their "Eighth and Fourteenth Amendment rights":

6.46.350 Temporary Exclusion from City Park Properties

An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from all City Park properties for a period of 30 days, if within a one-year period the individual:

A. Is issued 2 or more citations for violating regulations related to City park properties, or

B. Is issued one or more citations for violating any state law(s) while on City park property.[4]

In an August 2019 order, the district court certified a class seeking declaratory and injunctive relief with respect to Plaintiffs' Eighth Amendment claims, pursuant to Federal Rule of Civil Procedure 23(b)(2).[5] As defined in the court's order, the class consists of "[a]ll involuntarily homeless individuals living in Grants Pass, Oregon, including homeless individuals who sometimes sleep outside city limits to avoid harassment and punishment by Defendant as addressed in this lawsuit."

After the parties filed cross-motions for summary judgment, the district court in July 2020 granted Plaintiffs' motion in relevant part and denied the City's motion. The district court held that, under *Martin*, the City's enforcement of the above-described ordinances violated the Cruel and Unusual Punishments Clause. The court further held that, for similar reasons, the ordinances imposed excessive fines in violation of the Eighth Amendment's Excessive Fines Clause.

After Plaintiffs voluntarily dismissed those claims as to which summary judg-

3. The definition of ''campsite'' for purposes of GPMC 5.61.030 includes using a ''vehicle'' as a temporary place to live. *See* GPMC 5.61.010(B).

4. This latter ordinance was amended in September 2020 to read as follows:

> An individual may be issued a written exclusion order by a police officer of the Public Safety Department barring said individual from a City park for a period of 30 days, if within a one-year period the individual:
>
> A. Is issued two or more citations in the same City park for violating regulations related to City park properties, or
>
> B. Is issued one or more citations for violating any state law(s) while on City park property.
>
> The foregoing exclusion order shall only apply to the particular City park in which the offending conduct under 6.46.350(A) or 6.46.350(B) occurred.

5. At the time that the district court certified the class, the operative complaint was the Second Amended Complaint. That complaint was materially comparable to the Third Amended Complaint, with the exception that it did not mention the park-exclusion ordinance or seek injunctive relief with respect to it.

ment had been denied to both sides, the district court entered final judgment declaring that the City's enforcement of the anti-camping and anti-sleeping ordinances (GPMC §§ 5.61.020, 5.61.030, 6.46.090) violates "the Eighth Amendment prohibition against cruel and unusual punishment" and its "prohibition against excessive fines." Nonetheless, the court's final injunctive relief did not prohibit all enforcement of these provisions. Enforcement of § 5.61.020 (the anti-sleeping ordinance) was not enjoined at all. The City was enjoined from enforcing the anti-camping ordinances (GPMC §§ 6.46.030 and 6.46.090) "without first giving a person a warning of at least 24 hours before enforcement." It was further enjoined from enforcing those ordinances, and a related ordinance against criminal trespass on city property, in all but one City park during specified evening and overnight hours, which varied depending upon the time of year. Finally, the City was enjoined from enforcing the park-exclusion ordinance.[6]

The City timely appealed from that judgment and from the district court's subsequent award of attorneys' fees.

II

Before turning to the merits, I first address the question of our jurisdiction under Article III of the Constitution. *Plains Com. Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324, 128 S.Ct. 2709, 171 L.Ed.2d 457 (2008) (holding that courts "bear an independent obligation to assure [them]selves that jurisdiction is proper before proceeding to the merits").

"In limiting the judicial power to 'Cases' and 'Controversies,' Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law." *Summers v. Earth Island Inst.*, 555 U.S. 488, 492, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). "The doctrine of standing is one of several doctrines that reflect this fundamental limitation," and in the context of a request for prospective injunctive or declaratory relief, that doctrine requires a plaintiff to "show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Id.* at 493, 129 S.Ct. 1142. The requirement to show an actual threat of *imminent* injury-in-fact in order to obtain prospective relief is a demanding one: the Supreme Court has "repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact, and that allegations of *possible* future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 133 S.Ct. 1138, 185 L.Ed.2d 264 (2013) (simplified).

As "an indispensable part of the plaintiff's case," each of these elements of Article III standing "must be supported in the

6. The district court's summary judgment order and judgment also declared that a separate ordinance (GPMC § 6.46.355), which addressed the procedures for appealing park-exclusion orders under § 6.46.350, failed to provide sufficient procedural due process. The parties dispute whether this claim was adequately raised and reached below, but as the majority notes, this claim for purely prospective relief has been mooted by the City's subsequent amendment of § 6.46.355 in a way that removes the features that had led to its invalidation. *See* Opin. at 813. Accordingly, this aspect of the district court's judgment should be vacated and remanded with instructions to dismiss as moot Plaintiffs' challenge to § 6.46.355.

same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). Because, as in *Lujan*, this case arises from a grant of summary judgment, the question is whether, in seeking summary judgment, Plaintiffs " 'set forth' by affidavit or other evidence 'specific facts' " in support of each element of standing. *Id.* (citation omitted). Moreover, "standing is not dispensed in gross," and therefore "a plaintiff must demonstrate standing for *each* claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352–53, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (emphasis added) (citation omitted).

Plaintiffs' operative complaint named three individual plaintiffs as class representatives (John Logan, Gloria Johnson, and Debra Blake), and we have jurisdiction to address the merits of a particular claim if any one of them sufficiently established Article III standing as to that claim. *See Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) ("Since the State of California clearly does have standing, we need not address the standing of the other [plaintiffs], whose position here is identical to the State's."); *see also Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (en banc) ("In a class action, standing is satisfied if at least one named plaintiff meets the requirements."). Accordingly, I address the showing made by each named Plaintiff in support of summary judgment.

In my view, Plaintiff John Logan failed to establish that he has standing to challenge any of the ordinances in question. In support of his motion for summary judgment, Logan submitted a half-page declaration stating, in conclusory fashion, that he is "involuntarily homeless in Grants Pass," but that he is "sleeping in [his] truck at night at a rest stop North of Grants Pass." He asserted that he "cannot sleep in the City of Grants Pass for fear that [he] will be awakened, ticketed, fined, moved along, trespassed[,] and charged with Criminal Trespass." Logan also previously submitted two declarations in support of his class certification motion. In them, Logan stated that he has been homeless in Grants Pass for nearly seven of the last 10 years; that there have been occasions in the past in which police in Grants Pass have awakened him in his car and instructed him to move on; and that he now generally sleeps in his truck outside of Grants Pass. Logan has made no showing that, over the seven years that he has been homeless, he has ever been issued a citation for violating the challenged ordinances, nor has he provided any facts to establish either that the threat of such a citation is "certainly impending" or that "there is a substantial risk" that he may be issued a citation. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014) (citation and internal quotation marks omitted). At best, his declarations suggest that he would *prefer* to sleep in his truck within the City limits rather than outside them, and that he is subjectively deterred from doing so due to the City's ordinances. But such "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 13–14, 92 S.Ct. 2318, 33 L.Ed.2d 154 (1972). Nor has Logan provided any facts that would show that he has any actual intention or plans to stay overnight in the City. *See Lopez v. Candaele*, 630 F.3d 775, 787 (9th Cir. 2010) ("[W]e have concluded that pre-enforcement plaintiffs who failed to allege a concrete intent to

violate the challenged law could not establish a credible threat of enforcement."). Even if his declarations could be generously construed as asserting an intention to stay in the City at some future point, "[s]uch 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that [the Court's] cases require." *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130; *cf. Driehaus*, 573 U.S. at 161, 134 S.Ct. 2334 (permitting pre-enforcement challenge against ordinance regulating election-related speech where plaintiffs' allegations identified "specific statements they intend[ed] to make in future election cycles"). And, contrary to what the majority suggests, *see* Opin. at 800–01 n.16, Logan's vaguely described knowledge about what has happened to *other* people cannot establish his standing. Accordingly, Logan failed to carry his burden to establish standing for the prospective relief he seeks.

By contrast, Plaintiff Gloria Johnson made a sufficient showing that she has standing to challenge the general anti-camping ordinance, GPMC § 5.61.030, and the parks anti-camping ordinance, GPMC § 6.46.090. Although Johnson's earlier declaration in support of class certification stated that she "often" sleeps in her van outside the City limits, she also stated that she "*continue[s]* to live without shelter in Grants Pass" and that, consequently, "[a]t any time, I could be arrested, ticketed, fined, and prosecuted for sleeping outside in my van or for covering myself with a blanket to stay warm" (emphasis added). Her declaration also recounts "dozens of occasions" in which the anti-camping ordinances have been enforced against her, either by instructions to "move along" or, in one instance, by issuance of a citation for violating the parks anti-camping ordinance, GPMC § 6.46.090. Because Johnson presented facts showing that she continues to violate the anti-camping ordinances and that, in light of past enforcement, she faces a credible threat of future enforcement, she has standing to challenge those ordinances. *Lujan*, 504 U.S. at 564, 112 S.Ct. 2130. Johnson, however, presented no facts that would establish standing to challenge either the anti-sleeping ordinance (which, unlike the anti-camping ordinances, does not apply to sleeping in a vehicle), the park-exclusion ordinance, or the criminal trespass ordinance.[7]

Debra Blake sufficiently established her standing, both in connection with the class

7. The majority concludes that Johnson's standing to challenge the anti-camping ordinances necessarily establishes her standing to challenge the park-exclusion and criminal-trespass ordinances. *See* Opin. at 800 n.15. But as the district court explained, the undisputed evidence concerning Grants Pass's enforcement policies established that "Grants Pass first issues fines for violations and *then* either issues a trespass order or excludes persons from all parks *before* a person is charged with misdemeanor criminal trespass" (emphasis added). Although Johnson's continued intention to sleep in her vehicle in Grants Pass gives her standing to challenge the anti-camping ordinances, Johnson has wholly failed to plead any facts to show, *inter alia*, that she intends to engage in the *further* conduct that might expose her to a "credible threat" of prosecution under the park-exclusion or criminal trespass ordinances. *Driehaus*, 573 U.S. at 159, 134 S.Ct. 2334 (citation omitted). Johnson's declaration states that she has been homeless in Grants Pass for three years, but it does not contend that she has ever been issued, or threatened with issuance of, a trespass order, a park-exclusion order, or a criminal trespass charge or that she has "an intention to engage in a course of conduct" that would lead to such an order or charge. *Id.* (citation omitted). Because "standing is not dispensed in gross," *see DaimlerChrysler*, 547 U.S. at 353, 126 S.Ct. 1854 (citation omitted), Johnson must separately establish her standing with respect to each ordinance, and she has failed to do so with respect to the park-exclusion and criminal-trespass ordinances.

certification motion and the summary judgment motion. Although she was actually living in temporary housing at the time she submitted her declarations in support of class certification in March and June 2019, she explained that that temporary housing would soon expire; that she would become homeless in Grants Pass again; and that she would therefore again be subject to being "arrested, ticketed and prosecuted for sleeping outside or for covering myself with a blanket to stay warm." And, as her declaration at summary judgment showed, that is exactly what happened: in September 2019, she was cited for sleeping in the park in violation of GPMC § 6.46.090, convicted, and fined. Her declarations also confirmed that Blake's persistence in sleeping and camping in a variety of places in Grants Pass had also resulted in a park-exclusion order (which she successfully appealed), and in citations for violation of the anti-sleeping ordinance, GPMC § 5.61.020 (for sleeping in an alley), and for criminal trespass on City property. Based on this showing, I conclude that Blake established standing to challenge each of the ordinances at issue in the district court's judgment.

However, Blake subsequently passed away during this litigation, as her counsel noted in a letter to this court submitted under Federal Rule of Appellate Procedure 43(a). Because the only relief she sought was prospective declaratory and injunctive relief, Blake's death moots her claims. *King v. County of Los Angeles*, 885 F.3d 548, 553, 559 (9th Cir. 2018). And because, as explained earlier, Blake was the only named Plaintiff who established standing with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances that are the subject of the district court's classwide judgment, her death raises the question whether we consequently lack jurisdiction over those additional claims. Under *Sosna v. Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975), the answer to that question would appear to be no. Blake established her standing at the time that the class was certified and, as a result, "[w]hen the District Court certified the propriety of the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [Blake]." *Id.* at 399, 95 S.Ct. 553. "Although the controversy is no longer alive as to [Blake], it remains very much alive for the class of persons she [had] been certified to represent." *Id.* at 401, 95 S.Ct. 553; *see also Nielsen v. Preap*, —— U.S. ——, 139 S. Ct. 954, 963, 203 L.Ed.2d 333 (2019) (finding no mootness where "there was at least one named plaintiff with a live claim when the class was certified"); *Bates v. United Parcel Service, Inc.*, 511 F.3d 974, 987–88 (9th Cir. 2007) (en banc).

There is, however, presently no class representative who meets the requirements for representing the certified class with respect to the anti-sleeping, park-exclusion, and criminal trespass ordinances.[8] Although that would normally re-

8. Because—in contrast to the named representative in *Sosna,* who had Article III standing at the time of certification—Johnson and Logan *never* had standing to represent the class with respect to the anti-sleeping ordinance, they may not represent the class as to such claims. *See Sosna,* 419 U.S. at 403, 95 S.Ct. 553 (holding that a *previously proper* class representative whose claims had become moot on appeal could continue to represent the class for purposes of that appeal); *see also Bates,* 511 F.3d at 987 (emphasizing that the named plaintiff "had standing at the time of certification"); *B.K. ex rel. Tinsley v. Snyder,* 922 F.3d 957, 966 (9th Cir. 2019) (stating that "class representatives must have Article III standing"); *cf. NEI Contracting & Eng'g, Inc. v. Hanson Aggregates Pac. SW., Inc.,* 926 F.3d 528, 533 (9th Cir. 2019) (holding that, where the named plaintiffs never had stand-

quire a remand to permit the possible substitution of a new class member, *see Kuahulu v. Employers Ins. of Wausau*, 557 F.2d 1334, 1336–37 (9th Cir. 1977), I see no need to do so here, and that remains true even if one assumes that the failure to substitute a new class representative might otherwise present a potential jurisdictional defect. As noted earlier, we have jurisdiction to address all claims concerning the two anti-camping ordinances, as to which Johnson has sufficient standing to represent the certified class. And, as I shall explain, the class as to those claims should be decertified, and the reasons for that decertification rest on cross-cutting grounds that apply equally to all claims. As a result, I conclude that we have jurisdiction to order the complete decertification of the class as to all claims, without the need for a remand to substitute a new class representative as to the anti-sleeping, park-exclusion, and criminal trespass ordinances. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that, where "a merits issue [is] dispositively resolved in a companion case," that merits ruling could be applied to the other companion case without the need for a remand to resolve a potential jurisdictional issue).

III

I therefore turn to whether the district court properly certified the class under Rule 23 of the Federal Rules of Civil Procedure. In my view, the district court relied on erroneous legal premises in certifying the class, and it therefore abused its discretion in doing so. *B.K.*, 922 F.3d at 965.

A

"To obtain certification of a plaintiff class under Federal Rule of Civil Procedure 23, a plaintiff must satisfy both the four requirements of Rule 23(a)—'numerosity, commonality, typicality, and adequate representation'—and 'one of the three requirements listed in Rule 23(b).'" *A.B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828, 834 (9th Cir. 2022) (quoting *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345, 349, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011)). Commonality, which is contested here, requires a showing that the class members' claims "depend upon a common contention" that is "of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541. In finding that commonality was satisfied with respect to the Eighth Amendment claims, the district court relied solely on the premise that whether the City's conduct "violates the Eighth Amendment" was a common question that could be resolved on a classwide basis. And in finding that Rule 23(b) was satisfied here, the district court relied solely on Rule 23(b)(2), which provides that a "class action may be maintained" if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). That requirement was satisfied, the district court concluded, because (for reasons similar to those that

ing, the class "must be decertified"). The majority correctly concedes this point. *See* Opin. at 801–02. Nonetheless, the majority wrongly allows Johnson and Logan to represent the class as to the park-exclusion and criminal-trespass ordinances, based on its erroneous conclusion that they established standing to challenge those ordinances. *See supra* at 820–22 & n.7.

underlay its commonality analysis) the City's challenged enforcement of the ordinances "applies equally to all class members." The district court's commonality and Rule 23(b)(2) analyses are both flawed because they are based on an incorrect understanding of our decision in *Martin.*

As the earlier discussion of *Martin* makes clear, the Eighth Amendment theory adopted in that case requires an individualized inquiry in order to assess whether any individuals to whom the challenged ordinances are being applied "*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." 920 F.3d at 617 n.8. *See supra* at 816–17. Only when persons "do not have a *single place* where they can lawfully be," can it be said that an ordinance against sleeping or camping in public, "*as applied to them*, effectively punish[es] them for something for which they may not be convicted under the Eighth Amendment." *Id.* at 617 (simplified) (emphasis added).

Of course, such an individualized inquiry is not required—and no Eighth Amendment violation occurs under *Martin*—when the defendant can show that there is adequate shelter space to house all homeless persons in the jurisdiction. *Id.* But the converse is not true—the mere fact that a city's shelters are full does *not* by itself establish, without more, that any particular person who is sleeping in public does "not have a single place where [he or she] can lawfully be." *Id.* The logic of *Martin*, and of the opinions in *Powell* on which it is based, requires an assessment of a person's individual situation before it can be said that the Eighth Amendment would be violated by applying a particular provision against that person. Indeed, the opinions in *Powell* on which *Martin* relied—Justice White's concurring opinion and the opinion of the dissenting Justices—all agreed that, at most, the Eighth Amendment provided a case-specific affirmative defense that would require the defendant to provide a "satisfactor[y] showing that it was not feasible for him to have made arrangements" to avoid the conduct at issue. *Powell*, 392 U.S. at 552, 88 S.Ct. 2145 (White, J., concurring); *id.* at 568, 88 S.Ct. 2145 n.31 (Fortas, J., dissenting) (agreeing with Justice White that the issue is whether the defendant "on the occasion in question" had shown that avoiding the conduct was "impossible"); *see also supra* at 815.[9]

In light of this understanding of *Martin*, the district court clearly erred in finding that the requirement of commonality

9. The majority incorrectly contends that the dissenters in *Powell* did not endorse Justice White's conclusion that the *defendant* bears the burden to establish that his or her conduct was involuntary. *See* Opin. at 809–11. On the contrary, the *Powell* dissenters' entire argument rested on the affirmative "constitutional defense" presented at the trial in that case and on the findings made by the trial court in connection with that defense. *See* 392 U.S. at 558, 88 S.Ct. 2145 (Fortas, J., dissenting). The majority's suggestion that I have taken that explicit reference to Powell's defense "out of context," *see* Opin. at 810 n.29, is demonstrably wrong—the context of the case was precisely the extensive affirmative defense that Powell presented at trial, including the testimony of an expert. *See id.* at 517–26, 88 S.Ct. 2145 (plurality) (summarizing the testimony). And, of course, in *Martin,* the issue was raised in the context of a § 1983 action in which the plaintiffs challenging the laws bore the burden to prove the involuntariness of their relevant conduct. The majority points to nothing that would plausibly support the view that *Powell* and *Martin* might require the *government* to carry the burden to establish *voluntariness*. *See* Opin. at 811 n.31 (leaving this issue open). The majority claims that it can sidestep this issue here, but that is also wrong: the burden issue is critical both to the class-certification analysis and to the issue of summary judgment on the merits. *See infra* at 824–30.

was met here. "What matters to class certification is not the raising of common 'questions'—even in droves—but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart*, 564 U.S. at 350, 131 S.Ct. 2541 (simplified). Under *Martin*, the answer to the question whether the City's enforcement of each of the anti-camping ordinances violates the Eighth Amendment turns on the individual circumstances of each person to whom the ordinance is being applied on a given occasion. That question is simply not one that can be resolved, on a common basis, "in one stroke." *Id.* That requires decertification.

For similar reasons, the district court also erred in concluding that the requirements of Rule 23(b)(2) were met. By its terms, Rule 23(b)(2) is satisfied only if (1) the defendant has acted (or refused to act) on grounds that are generally applicable to the class as whole and (2) as a result, final classwide or injunctive relief is appropriate. As the Supreme Court has observed, "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' " *Wal-Mart*, 564 U.S. at 360, 131 S.Ct. 2541. It follows that, when the *wrongfulness* of the challenged conduct with respect to any particular class member depends critically upon the individual circumstances of that class member, a class action under Rule 23(b)(2) is not appropriate. In such a case, in which (for example) the challenged enforcement of a particular law may be lawful as to some persons and not as to others, depending upon their individual circumstances, the all-or-nothing determination of wrongfulness that is the foundation of a (b)(2) class is absent: in such a case, it is simply not true that the defendant's "conduct is such that it can be enjoined or declared unlawful *only* as to *all* of the class members or as to *none* of them.' " *Id.* (emphasis added).

Because *Martin* requires an assessment of each person's individual circumstances in order to determine whether application of the challenged ordinances violates the Eighth Amendment, these standards for the application of Rule 23(b)(2) were plainly not met in this case. That is, because the applicable law governing Plaintiffs' claims would entail "a process through which highly individualized determinations of liability and remedy are made," certification of a class under Rule 23(b)(2) is improper. *Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 499 (7th Cir. 2012). Moreover, the mere fact that the district court's final judgment imposes sweeping across-the-board injunctive relief that disregards individual differences in determining the defendant's liability does *not* mean that Rule 23(b)(2) has been satisfied. The rule requires that any such classwide relief be rooted in a determination of *classwide liability*—the defendant must have acted, or be acting, unlawfully "on grounds that apply generally to the class, *so that* final injunctive or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2) (emphasis added). That requirement was not established here, and the class must be decertified.[10]

10. The majority wrongly concludes that the City has forfeited any argument concerning Rule 23(b)(2) because it did not specifically mention that subdivision of the rule in its opening brief. Opin. at 805–06. This "Simon Says" approach to reading briefs is wrong.

B

The majority provides two responses to this analysis, but both of them are wrong.

First, the majority contends that *Martin* established a bright-line rule that "the government cannot prosecute homeless people for sleeping in public"—or, presumably, for camping—"if there 'is a greater number of homeless individuals in [a jurisdiction] than the number of available' shelter spaces." *See* Opin. at 795 (quoting *Martin*, 920 F.3d at 617). Because, according to the majority, *Martin* establishes a simple "formula" for determining when all enforcement of anti-camping and anti-sleeping ordinances must cease, it presents a common question that may be resolved on a classwide basis. *See* Opin. at 795; *see also* Opin. at 802–03, 804. As the above analysis makes clear, the majority's premise is incorrect. *Martin* states that, if there are insufficient available beds at shelters, then a jurisdiction "cannot prosecute homeless individuals for '*involuntarily* sitting, lying, and sleeping in public.' " 920 F.3d at 617 (emphasis added). The lack of adequate shelter beds thus merely eliminates a *safe-harbor* that might otherwise have allowed a jurisdiction to prosecute violations of such ordinances *without* regard to individual circumstances, with the result that the jurisdiction's enforcement power will instead depend upon whether the conduct of the individual on a particular occasion was "involuntar[y]." *Id. Martin* confirms that the resulting inquiry turns on whether the persons in question "*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." *Id.* at 617 n.8; *see also id.* at 617 (stating that enforcement is barred only if the persons in question "do not have a single place where they can lawfully be" (citation omitted)). And the majority's misreading of *Martin* completely disregards the *Powell* opinions on which *Martin* relied, which make unmistakably clear that an individualized showing of involuntariness is required.

Second, the majority states that, to the extent that *Martin* requires such an individualized showing to establish an Eighth Amendment violation, any such individualized issue here has been eliminated by the fact that "[p]ursuant to the class definition, the class includes only *involuntarily* homeless persons." *See* Opin. at 805. As the majority acknowledges, "[p]ersons are involuntarily homeless" under *Martin* only "if they do not 'have access to adequate temporary shelter,' " such as, for example, when they lack " 'the means to pay for it' " and it is otherwise not " 'realistically available to them for free.' " Opin. at 792 n.2 (quoting *Martin*, 920 F.3d at 617 n.8). Because that individualized issue has been shifted into the class definition, the majority holds, the City's enforcement of the challenged ordinances against *that* class can in that sense be understood to present a "common question" that can be resolved in one stroke. According to the majority, because the class definition requires that, at the time the ordinances are applied against them, the class members must be "involuntarily homeless" in the sense that *Martin* requires, there is a common question as to whether "the City's enforcement of the anti-camping ordinances against all

The *substance* of the argument is contained in the opening brief, in which the City explicitly contended that *Martin* requires "a more individualized analysis" than the district court applied and that, as a result, "neither FED. R. CIV. P. 23 nor *Martin* provide plaintiffs the ability to establish the type of sweeping classwide claims advanced in this case." Indeed, Plaintiffs themselves responded to this argument, in their answering brief, by explaining why they believe that the requirements of Rule 23(b)(2) were met.

involuntarily homeless individuals violates the Eighth Amendment." *See* Opin. at 804 & n.22.

The majority cites no authority for this audacious bootstrap argument. If a person's individual circumstances are such that he or she has *no* "access to adequate temporary shelter"—which necessarily subsumes (among other things) the determination that there are no shelter beds available—then the *entire* (highly individualized) question of the City's liability to that person under *Martin*'s standards has been shifted into the class definition. That is wholly improper. *See Olean Wholesale Grocery Coop. v. Bumble Bee Foods*, 31 F.4th 651, 670 n.14 (9th Cir. 2022) (en banc) ("A court may not ... create a 'fail safe' class that is defined to include only those individuals who were injured by the allegedly unlawful conduct."); *see also Ruiz Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1138 n.7 (9th Cir. 2016) (stating that it would be improper to define a class in such a way "as to preclude membership unless the liability of the defendant is established" (simplified)).

The majority nonetheless insists that "[m]embership in the class" here "has no connection to the success of the underlying claims." *See* Opin. at 805 n.23. That is obviously false. As I have explained, *Martin*'s understanding of when a person "involuntarily" lacks "access to adequate temporary shelter" or to "a single place where [he or she] can lawfully be," *see* 920 F.3d at 617 & n.8 (citations omitted), requires an individualized inquiry into a given person's circumstances at a particular moment. By insisting that a common question exists here *because Martin*'s involuntariness standard has been folded into the class definition, the majority is unavoidably relying on a fail-safe class definition that improperly subsumes this crucial individualized merits issue into the class definition. The majority's artifice renders the limitations of Rule 23 largely illusory.[11]

To the extent that the majority instead suggests that the class definition requires only an involuntary lack of access to regular or permanent shelter to qualify as "involuntarily homeless," its argument collapses for a different reason. Because *Martin*'s Eighth Amendment holding applies only to those who involuntarily lack "access to adequate temporary shelter" on a given occasion, *see* 920 F.3d at 617 n.8, such an understanding of the class definition would *not* be sufficient to eliminate the highly individualized inquiry into whether a particular person lacked such access at a given moment, and the class would then have to be decertified for the reasons I have discussed earlier. *See supra* at 823–26. Put simply, the majority cannot have it both ways: either the class definition is co-extensive with *Martin*'s involuntariness concept (in which case the class is

11. The majority contends that, despite the presence of a liability-determining individualized issue in the class definition, there is no fail-safe class here because one or more of the claims might still conceivably fail on the merits for *other* reasons. *See* Opin. at 805 n.23. But the majority does not identify any such other reasons and, of course, under the majority's view of the substantive law, there are none. But more importantly, the majority is simply wrong in positing that the *only* type of class that would qualify as an impermissible fail-safe class is one in which *every* conceivable merits issue in the litigation has been folded into the class definition. What matters is whether the class definition folds within it *any* bootstrapping merits issue (such as the "injur[y]" issue mentioned in *Olean*) as to which "a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment." *Olean*, 31 F.4th at 670 n.14. To the extent that the central individualized merits issue in this case has been folded into the class definition, that defect is present here.

an improper fail-safe class) or the class definition differs from the *Martin* standard (in which case *Martin*'s individualized inquiry requires decertification).

IV

Given these conclusions as to standing and class certification, all that remains are the individual claims of Johnson for prospective relief against enforcement of the two anti-camping ordinances. In my view, these claims fail as a matter of law.

Johnson's sole basis for challenging these ordinances is that they prohibit her from sleeping in her van within the City. In her declaration in support of class certification, however, Johnson specifically stated that she has "often" been able to sleep in her van by parking *outside* the City limits. In a supplemental declaration in support of summary judgment, she affirmed that these facts "remain true," but she added that there had also been occasions in which, outside the City limits, county officers had told her to "move on" when she "was parked on county roads" and that, when she parked "on BLM land"—*i.e.*, land managed by the federal Bureau of Land Management—she was told that she "could only stay on BLM for a few days."

As an initial matter, Johnson's declaration provides no non-conclusory basis for finding that she lacks *any* option other than sleeping in her van. Although her declaration notes that she worked as a nurse "for decades" and that she now collects social security benefits, the declaration simply states, without saying anything further about her present economic situation, that she "cannot afford housing." Her declaration also says nothing about where she lived before she began living "on the street" a few years ago, and it says nothing about whether she has any friends or family, in Grants Pass or elsewhere, who might be able to provide assistance.[12] And even assuming that this factual showing would be sufficient to permit a trier of fact to find that Johnson lacks any realistic option other than sleeping in her van, we cannot affirm the district court's summary judgment in Johnson's favor without holding that her showing was so overwhelming that she should prevail as a matter of law. Because a reasonable trier of fact could find, in light of these evidentiary gaps, that Johnson failed to carry her burden of proof on this preliminary point, summary judgment in her favor was improper.[13]

12. The majority dismisses these questions about the sufficiency of Johnson's evidentiary showing as "artificial limitations" on claims under *Martin*, *see* Opin. at 810–11, but the standard for establishing an Eighth Amendment violation under *Martin* and the *Powell* opinions on which it relies is a demanding and individualized one, and we are obligated to follow it. Indeed, in upholding Powell's conviction for public drunkenness, the controlling opinion of Justice White probed the details of the record as to whether, in light of the fact that Powell "had a home and wife," he could have "made plans while sober to prevent ending up in a public place," and whether, despite his chronic alcoholism, he "retained the power to stay off or leave the streets, and simply preferred to be there rather than elsewhere." 392 U.S. at 553, 88 S.Ct. 2145.

13. The majority errs by instead counting all gaps in the evidentiary record against the City, faulting it for what the majority thinks the City has failed to "demonstrate[ ]," *See* Opin. at 811–12 & n.32. That is contrary to well-settled law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (holding that a movant's summary judgment motion should be granted "against a [nonmovant] who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial"). The majority's analysis also belies its implausible claim that it has not shifted the burden to the City to establish the *volun-*

But even assuming that Johnson had established that she truly has no option other than sleeping in her van, her showing is still insufficient to establish an Eighth Amendment violation. As noted, Johnson's *sole* complaint in this case is that, by enforcing the anti-camping ordinances, the City will not let her sleep in her van. But the sparse facts she has presented fail to establish that she lacks any alternative place where she could park her van and sleep in it. On the contrary, her factual showing establishes that the BLM will let her do so on BLM land for a "few days" at a time and that she also has "often" been able to do so on county land. Given that Johnson has failed to present sufficient evidence to show that she lacks alternatives that would allow her to avoid violating the City's anti-camping ordinances, she has not established that the conduct for which the City would punish her is involuntary such that, under *Martin* and the *Powell* opinions on which *Martin* relies, it would violate the Eighth Amendment to enforce that prohibition against her.

In nonetheless finding that the anti-camping ordinances' prohibition on sleeping in vehicles violates the Eighth Amendment, the majority apparently relies on the premise that the question of whether an individual has options for avoiding violations of the challenged law must be limited to alternatives that are *within the City limits.* Under this view, if a large homeless shelter with 1,000 vacant beds were opened a block outside the City's limits, the City would *still* be required by the Eighth Amendment to allow hundreds of people to sleep in their vans in the City and, presumably, in the City's public parks as well. Nothing in law or logic supports such a conclusion. *Martin* says that anti-sleeping ordinances may be enforced, consistent with the Eighth Amendment, so long as there is a "*single place* where [the person] can lawfully be," 920 F.2d at 617 (emphasis added) (citation omitted), and Justice White's concurrence in *Powell* confirms that the Eighth Amendment does not bar enforcement of a law when the defendant has failed to show that avoiding the violative conduct is "*impossible*," 392 U.S. at 551, 88 S.Ct. 2145 (emphasis added).[14] Nothing in the rationale of this Eighth Amendment theory suggests that the inquiry into whether it is "impossible" for the defendant to avoid violating the law must be artificially constrained to only those particular options that suit the defendant's geographic or other preferences. To be sure, Johnson states that having to drive outside the City limits costs her money for gas, but that does not provide any basis for concluding that the option is infeasible or that she has thereby suffered "cruel and unusual punishment."

Finally, because the district court's reliance on the Excessive Fines Clause was predicated on the comparable view that the challenged ordinances punish "status and not conduct" in violation of *Robinson*, that ruling was flawed for the same reasons. And because Johnson provides no other basis for finding an Excessive Fines violation here, her claims under that clause also fail as a matter of law.

V

Accordingly, I would remand this case with instructions (1) to dismiss as moot the claims of Debra Blake as well as Plaintiffs' claims with respect to GPMC § 6.46.355;

tariness of the behavior targeted by the ordinances. *See supra* at 824 n.9.

14. The majority complains that this standard is too high, *see* Opin. at 811–12, but it is the standard applied in *Martin* and in the *Powell* opinions on which *Martin* relied.

(2) to dismiss the claims of John Logan for lack of Article III standing; (3) to dismiss the remaining claims of Gloria Johnson for lack of Article III standing, except to the extent that she challenges the two anti-camping ordinances (GPMC §§ 5.61.030, 6.46.090); (4) to decertify the class; and (5) to grant summary judgment to the City, and against Johnson, with respect to her challenges to the City's anti-camping ordinances under the Eighth Amendment's Cruel and Unusual Punishments Clause and Excessive Fines Clause. That disposes of all claims at issue, and I therefore need not reach any of the many additional issues discussed and decided by the majority's opinion or raised by the parties.[15]

VI

Up to this point, I have faithfully adhered to *Martin* and its understanding of *Powell*, as I am obligated to do. *See Miller v. Gammie*, 335 F.3d 889, 899–900 (9th Cir. 2003) (en banc). But given the importance of the issues at stake, and the gravity of *Martin*'s errors, I think it appropriate to conclude by noting my general agreement with many of the points made by my colleagues who dissented from our failure to rehear *Martin* en banc.

In particular, I agree that, by combining *dicta* in a concurring opinion with a *dissent*, the panel in *Martin* plainly misapplied *Marks*' rule that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken *by those Members who concurred in the judgments* on the narrowest grounds.' " 430 U.S. at 193, 97 S.Ct. 990 (emphasis added) (citation omitted). Under a correct application of *Marks*, the holding of *Powell* is that there is no constitutional obstacle to punishing conduct that has *not* been shown to be involuntary, and the converse question of what rule applies when the conduct *has* been shown to be involuntary was left open. *See Martin*, 920 F.3d at 590–93 (M. Smith, J., dissenting from denial of rehearing en banc) (explaining that, under a proper application of *Marks*, " 'there is definitely no Supreme Court holding' pro-

15. Two of the majority's expansions of *Martin* nonetheless warrant special mention. First, the majority's decision goes well beyond *Martin* by holding that the Eighth Amendment precludes enforcement of anti-camping ordinances against those who involuntarily lack access to temporary shelter, if those ordinances deny such persons the use of whatever materials they need "to keep themselves warm and dry." *See* Opin. at 808. It seems unavoidable that this newly declared right to the necessary "materials to keep warm and dry" while sleeping in public parks must include the right to use (at least) a tent; it is hard to see how else one would keep "warm and dry" in a downpour. And the majority also raises, and leaves open, the possibility that the City's prohibition on the use of other "items necessary to facilitate sleeping outdoors"—such as "stoves," "fires," and makeshift "structures"—"may or may not be permissible." *See* Opin. at 807–08, 812. Second, the majority indirectly extends *Martin*'s holding from the strictly criminal context at issue in that case to civil citations and fines. *See* Opin. at 806–07. As the district court noted below, the parties vigorously debated the extent to which a "violation" qualifies as a crime under Oregon law. The majority, however, sidesteps that issue by instead treating it as irrelevant. The majority's theory is that, even assuming *arguendo* that violations of the anti-camping ordinances are only civil in nature, they are covered by *Martin* because such violations *later* could lead (after more conduct by the defendant) to criminal fines, *see* Opin. at 807–08. But the majority does not follow the logic of its own theory, because it has not limited its holding or remedy to the enforcement of the ultimate criminal provisions; on the contrary, the majority has enjoined *any* relevant enforcement of the underlying ordinances that contravenes the majority's understanding of *Martin*. *See* Opin. at 813.

hibiting the criminalization of involuntary conduct" (citation omitted)).

Moreover, the correct answer to the question left open in *Powell* was the one provided in Justice Marshall's plurality opinion in that case: there is no federal "constitutional doctrine of criminal responsibility." 392 U.S. at 534, 88 S.Ct. 2145. In light of the "centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds," including the "doctrines of *actus reus, mens rea*, insanity, mistake, justification, and duress," the "process of adjustment" of "the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man" is a matter that the Constitution leaves within "the province of the States" or of Congress. *Id.* at 535–36, 88 S.Ct. 2145. "There is simply no indication in the history of the Eighth Amendment that the Cruel and Unusual Punishments Clause was intended to reach the substantive authority of Congress to criminalize acts or status, and certainly not before conviction," and the later incorporation of that clause's protections vis-à-vis the States in the Fourteenth Amendment "worked no change in its meaning." *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc); *see also id.* at 599 (explaining that *Martin*'s novel holding was inconsistent with the "text, tradition, and original public meaning[ ] [of] the Cruel and Unusual Punishments Clause of the Eighth Amendment"). Consequently, so long as "the accused has committed some act, has engaged in some behavior, which society has an interest in preventing, or perhaps in historical common law terms, has committed some *actus reus*," the Eighth Amendment principles applied in *Robinson* have been satisfied. *Powell*, 392 U.S. at 533, 88 S.Ct. 2145 (plurality). The Eighth Amendment does not preclude punishing such an act merely "because it is, in some sense, 'involuntary' or 'occasioned by a compulsion.' " *Id.*; *see also Martin*, 920 F.3d at 592 n.3 (M. Smith, J., dissenting from denial of rehearing en banc) ("*Powell* does not prohibit the criminalization of involuntary conduct.").

Further, it is hard to deny that *Martin* has "generate[d] dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people that reside therein." *Id.* at 594 (M. Smith, J., dissenting from denial of rehearing en banc). Those harms, of course, will be greatly magnified by the egregiously flawed reconceptualization and extension of *Martin*'s holding in today's decision, and by the majority's equally troubling reworking of settled class-action principles. With no sense of irony, the majority declares that no such harms are demonstrated by the record in this case, even as the majority largely endorses an injunction effectively requiring Grants Pass to allow the use of its public parks as homeless encampments. Other cities in this circuit can be expected to suffer a similar fate.

In view of all of the foregoing, both *Martin* and today's decision should be overturned or overruled at the earliest opportunity, either by this court sitting en banc or by the U.S. Supreme Court.

* * *

I respectfully but emphatically dissent.

No.

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

AARON P. HISEL
CAPITOL LEGAL SERVICES
901 Capitol Street NE
Salem, OR 97301

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
SAMUEL ECKMAN
DANIEL R. ADLER
PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

In *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), the Ninth Circuit held that the Cruel and Unusual Punishments Clause prevents cities from enforcing criminal restrictions on public camping unless the person has "access to adequate temporary shelter." *Id.* at 617 & n.8. In this case, the Ninth Circuit extended *Martin* to a classwide injunction prohibiting the City of Grants Pass from enforcing its public-camping ordinance even through civil citations. That decision cemented a conflict with the California Supreme Court and the Eleventh Circuit, which have upheld similar ordinances, and entrenched a broader split on the application of the Eighth Amendment to purportedly involuntary conduct. The Ninth Circuit nevertheless denied rehearing en banc by a 14-to-13 vote.

The question presented is:

Does the enforcement of generally applicable laws regulating camping on public property constitute "cruel and unusual punishment" prohibited by the Eighth Amendment?

RELATED PROCEEDINGS

United States District Court (D. Or.)

Blake v. *City of Grants Pass*
No. 18-cv-1823 (Aug. 26, 2020)
(judgment entered)

United States Court of Appeals (9th Cir.)

Johnson v. *City of Grants Pass*
Nos. 20-35752, 20-35881 (July 5, 2023)
(amended opinion upon denial of rehearing)

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PETITION FOR A WRIT OF CERTIORARI

The City of Grants Pass, Oregon, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The Ninth Circuit's amended opinion, together with its order denying the City's petition for panel rehearing or rehearing en banc (App., *infra*, 1a-162a), is reported at 72 F.4th 868. The district court's order on the parties' cross-motions for summary judgment (App., *infra*, 163a-205a) is not reported but is available at 2020 WL 4209227. An earlier order of the district court on class certification (App., *infra*, 206a-

220a) is not reported but is available at 2019 WL 3717800.

JURISDICTION

The Ninth Circuit issued its original opinion on September 28, 2022, and issued an amended opinion and order denying rehearing on July 5, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

Relevant ordinances are reproduced in the appendix to the petition. App., *infra*, 221a-224a.

INTRODUCTION

The Ninth Circuit has decided that enforcement of commonplace restrictions on public camping constitutes "cruel and unusual punishment" within the meaning of the Eighth Amendment. When the Ninth Circuit first announced this rule in *Martin* v. *City of Boise*, 902 F.3d 1031 (9th Cir. 2018), amended on denial of reh'g, 920 F.3d 584 (9th Cir. 2019), six judges criticized the decision as a constitutional aberration that deviated from this Court's decisions and split from the lower courts. They also predicted that *Martin* would paralyze cities across the West in addressing urgent safety and public-health risks created by an ever-growing sprawl of tents and makeshift structures. The panel in *Martin* responded that its ruling was "narrow" and would leave ample leeway to cities on the frontlines of the homelessness crisis. 920 F.3d

at 617. Five years under *Martin* has proved the dissenters right—and then some.

This case offered the Ninth Circuit an opportunity to correct course. Instead, it doubled down on *Martin*, extending that ruling to civil citations and affirming a classwide injunction against the City of Grants Pass's enforcement of its ordinance prohibiting camping on public property. The full Ninth Circuit then denied rehearing en banc by the slimmest of margins—14 to 13—over the objections of 17 active and senior judges, who explained that the Ninth Circuit should have reconsidered this ill-conceived judicial experiment.

The Ninth Circuit's decisions have no foundation in the Constitution's original meaning or our Nation's history and traditions. The Cruel and Unusual Punishments Clause (as its name suggests) prohibits "'*methods* of punishment'" that inflict unnecessary pain and have fallen out of use. *Martin*, 920 F.3d at 601 (Bennett, J., dissenting from denial of rehearing en banc). As Judge O'Scannlain explained, that provision does not have "anything to do with the jurisprudence" the Ninth Circuit has created for public-camping ordinances. App., *infra*, 122a (statement respecting denial of rehearing en banc). There is nothing cruel or unusual about a civil fine for violating commonplace restrictions on public camping.

Consistent with that original meaning, this Court has recognized that the "'primary purpose'" of the Cruel and Unusual Punishments Clause "'has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes.'" *Ingraham* v. *Wright*, 430 U.S. 651, 667 (1977). Only once has this Court held that the Eighth Amendment imposes a substantive

limit on *what* can be made a crime as opposed to *how* a crime could be punished. In *Robinson* v. *California*, 370 U.S. 660 (1962), this Court decided that the Eighth Amendment forbids punishing the *status* of being a drug addict, even if it permits prosecutions for the *act* of using drugs.

The Ninth Circuit concluded that the Cruel and Unusual Punishments Clause protects the conduct of camping on public property through a misreading of *Robinson* and the splintered decision in *Powell* v. *Texas*, 392 U.S. 514 (1968). In *Powell*, Justice Marshall, writing for a four-Justice plurality, rejected an Eighth Amendment defense because the defendant was punished for the act of being drunk in public, not the status of being an alcoholic. Justice Fortas's dissent (also for four Justices) advanced a diametrically opposed view: that *Robinson* prohibits punishing behavior that a defendant has no power to change. Concurring in the judgment, Justice White opined that the Eighth Amendment might prohibit enforcement of the challenged law if the defendant had no place else to go, but explained that it was unnecessary to decide that issue because the defendant had not proved he had no choice but to be drunk in public on the night in question.

In *Martin* and this case, the Ninth Circuit read the *Powell* dissent together with Justice White's dicta to create the rule that the Eighth Amendment prohibits punishment for conduct that purportedly flows from a status. That dissent-plus-concurrence-dicta approach is impossible to square with *Marks* v. *United States*, 430 U.S. 188 (1977), which directs lower courts interpreting fractured decisions to examine only the views of Justices *concurring* in the judgment. And regardless of which opinion is controlling on lower

courts under *Marks*, the Ninth Circuit's understanding of *Powell* is at odds with both the Eighth Amendment's focus on methods of punishment and this Court's consistent recognition that Justice Marshall's plurality opinion—not Justice White's concurrence or the dissent—embodies the true statement of constitutional principles.

In deciding that the enforcement of public-camping ordinances constitutes cruel and unusual punishment, the Ninth Circuit has parted ways with the California Supreme Court and the Eleventh Circuit, both of which have upheld virtually identical ordinances against similar challenges. The Ninth Circuit's holding that the Eighth Amendment protects conduct related to status also deepened a longstanding divide among the lower courts. On one side, seven circuits and 17 state courts of last resort have held that the government may punish *acts* (like drug use and sex with minors) even if they cannot punish mere *status* (like being a drug addict or pedophile). On the other side, the Ninth and Fourth Circuits, as well as two state courts, have extended the Eighth Amendment to conduct that purportedly follows from a status.

Time is of the essence for this exceptionally important question. The Ninth Circuit, though nearly evenly split, has made clear that it will not clean up its outlier decisions on its own. But these decisions have erected a judicial roadblock preventing a comprehensive response to the growth of public encampments in the West. The consequences of inaction are dire for those living both in and near encampments: crime, fires, the reemergence of medieval diseases, environmental harm, and record levels of drug overdoses and deaths on public streets. The decision below,

which reaffirms and extends *Martin*, will further hamstring cities at the worst possible time.

The Ninth Circuit's arrogation of quintessential policymaking authority over public health and safety has struck a blow not only to the principle of democratic governance, but also to the practical ability of cities to address the growth of public encampments. Only this Court can end this misguided project of federal courts dictating homelessness policy under the banner of the Eighth Amendment.

STATEMENT

A. The Ninth Circuit's creation of a right to public camping under the Cruel and Unusual Punishments Clause began two decades ago in Los Angeles. In *Jones* v. *City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), people living on Skid Row brought an Eighth Amendment claim against an ordinance that prohibited sitting, lying, or sleeping on streets, sidewalks, and other public ways. *Id.* at 1123-1125. The district court upheld the ordinance "because it penalizes conduct, not status." *Id.* at 1125. A divided panel of the Ninth Circuit reversed, holding that the Eighth Amendment protects "involuntary conduct" (such as sleeping on public property) that is "inseparable from [the] status" of homelessness. *Id.* at 1136. The majority arrived at this rule by combining two separate *Powell* opinions—Justice White's concurrence and Justice Fortas's dissent. *Id.* at 1134-1136. Dissenting, Judge Rymer objected that this "extension of the Eighth Amendment to conduct that is derivative of status takes the substantive limits on criminality further than *Robinson* or its progeny support." *Id.* at 1143. After Los Angeles sought rehearing en banc, the parties settled the case, and the Ninth Circuit

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

The Ninth Circuit resurrected the *Jones* rationale soon enough. In *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), people living on the streets of Boise claimed that punishing public camping with fines or short jail stints violates the Eighth Amendment. *Id.* at 606. The Ninth Circuit held that any punishment for public camping, no matter how small, would be cruel and unusual if the plaintiffs had "no access to alternative shelter," repeating "essentially the same reasons articulated in the now-vacated *Jones* opinion." *Id.* at 615.

The Ninth Circuit again read Justice White's concurrence and Justice Fortas's dissent in *Powell* together to establish that "'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" 920 F.3d at 616. That rule meant that Boise could not enforce its public-camping ordinance "'so long as there is a greater number of homeless individuals in a jurisdiction than the number of available beds in shelters.'" *Id.* at 617 (brackets omitted). The court also disregarded open beds in religiously affiliated shelters out of perceived Establishment Clause concerns. *Id.* at 609-610. The Ninth Circuit stated, however, that its decision left open the possibility of enforcement against "individuals who *do* have access to adequate temporary shelter" but "choose not to use it." *Id.* at 617 n.8.

The Ninth Circuit denied rehearing en banc over two separate dissents. Judge Milan Smith explained that *Martin* misapplied *Powell* and invalidated the ordinances of "countless, if not all, cities within" the Ninth Circuit. 920 F.3d at 590-594, 599. He also

predicted that the "overwhelming financial responsibility to provide housing for or count the number of homeless individuals within their jurisdiction every night" would force cities to "abandon enforcement of a host of laws regulating public health and safety." *Id.* at 594. Judge Bennett separately canvassed the "text, tradition, and original public meaning" of the Cruel and Unusual Punishments Clause and found no authority for courts to impose "substantive limits on what conduct a state may criminalize." *Id.* at 599-602. In his view, *Martin* "stretche[d] the Eighth Amendment past its breaking point." *Id.* at 603.

Boise petitioned this Court for a writ of certiorari. No. 19-247. Expressing concern about the widespread impact of *Martin*, dozens of amici argued in favor of review, including seven States and 45 counties, cities, and local homeless service providers. After the plaintiffs claimed that *Martin* would "leave[] cities with a powerful toolbox to address encampments" and urged this Court "to await the contours of [*Martin*'s] rule to be elucidated in subsequent cases," Br. in Opp. 29-30, this Court denied the petition, *City of Boise* v. *Martin*, 140 S. Ct. 674 (2019).

B. The effects of *Martin* immediately reverberated throughout the Ninth Circuit, as the dissenting judges and amici had predicted. Three days after the Ninth Circuit's initial September 2018 ruling, a plaintiff filed a follow-on suit against Portland. Compl., *O'Callaghan* v. *City of Portland*, No. 3:18-cv-1641-YY (D. Or. Sept. 7, 2018). Over the ensuing months, more plaintiffs pursued *Martin* theories. *E.g.*, Compl., *Miralle* v. *City of Oakland*, No. 4:18-cv-6823 (N.D. Cal. Nov. 9, 2018).

1. This wave affected cities big and small. Just six weeks after the Ninth Circuit handed down

Martin, three people brought *Martin* claims against Grants Pass, a city of 38,000 in southern Oregon. App., *infra*, 13a.

Like many cities and towns across the country, Grants Pass protects public health and safety by regulating the public's ability to camp or sleep overnight in its outdoor spaces, including parks, trails, and sidewalks. App., *infra*, 221a-224a. Grants Pass has adopted three ordinances related to public sleeping and camping. The first prohibits sleeping "on public sidewalks, streets, or alleyways at any time as a matter of individual and public safety." Grants Pass Municipal Code § 5.61.020(A). The second prohibits "[c]amping" on "any sidewalk, street, alley, lane, public right of way, park, bench, or any other publicly-owned property or under any bridge or viaduct," with a "[c]ampsite" defined as "any place where bedding, sleeping bag, or other material used for bedding purposes, or any stove or fire is placed." §§ 5.61.010(B), 5.61.030. And the third prohibits camping specifically in the City's parks. § 6.46.090.

Grants Pass enforces these ordinances through civil citations, not through criminal fines or jail terms. App., *infra*, 44a, 175a. If a person has twice been cited for violating park regulations, city officers also have authority to issue an exclusion order barring that person from a City park for 30 days. Grants Pass Municipal Code § 6.46.350.

As relevant here, the plaintiffs claimed that the City's public-sleeping, public-camping, and park-exclusion ordinances violate the Cruel and Unusual Punishments Clause. App., *infra*, 19a. They also promptly moved to certify a class of "[a]ll involuntarily homeless individuals living in Grants Pass." *Id.* at 20a.

2. The district court certified the proposed class. App., *infra*, 206a-220a. According to the court, the Eighth Amendment claim concerned "city-wide practice[s]" in enforcing the public-sleeping and public-camping ordinances. *Id.* at 214a-215a. The court also believed that all class members could prove that they were "involuntarily" homeless under *Martin* solely because "[t]here are more homeless individuals than shelter beds in the City of Grants Pass." *Id.* at 216a.

On cross-motions for summary judgment, the district court ruled for the plaintiffs on their claim that enforcement of the City's ordinances constitutes cruel and unusual punishment. App., *infra*, 163a-205a. The court understood *Martin* to establish a "mathematical ratio" that prevents the City from enforcing its ordinances unless a shelter bed within the City's borders is available for every homeless person. *Id.* at 179a. After finding that 602 class members qualified as homeless, the court concluded that *zero* shelter alternatives satisfied *Martin*, discounting 138 beds at Gospel Rescue Mission due to "substantial religious requirements," nearby campgrounds on federal land, a warming shelter, and a sobering center. *Id.* at 179a-183a.

The district court also extended *Martin* in two ways. First, the court held that *Martin* protects not only sleeping on public property, but also camping with "bedding." App., *infra*, 177a-179a. Second, the court (citing decisions applying the Excessive Fines Clause) concluded that the Cruel and Unusual Punishments Clause prohibits even *civil* enforcement of the City's ordinances. *Id.* at 183a-187a.

The district court subsequently entered a judgment enjoining Grants Pass from enforcing its public-camping ordinances during daytime hours without

first giving a 24-hour warning, and at nighttime hours entirely. App., *infra*, 24a-25a.

3. A divided panel of the Ninth Circuit affirmed the district court's rulings in large part and remanded for further proceedings. App., *infra*, 13a-58a (amended opinion issued upon denial of rehearing).

a. In an opinion authored by Judge Silver (D. Ariz.) and joined by Judge Gould, the majority affirmed the district court's determination that the Cruel and Unusual Punishments Clause invalidates Grants Pass's public-camping ordinances. App., *infra*, 42a-55a. The majority reasoned that "the number of homeless persons outnumber the available shelter beds" in "secular shelter space." *Id.* at 13a, 53a. The majority also held that this Eighth Amendment claim could be decided on a classwide basis even though Grants Pass had argued that the class lacked commonality "because some class members might have alternative options for housing, or might have the means to acquire their own shelter." *Id.* at 39a. According to the majority, the class definition eliminated such individualized issues because "the class includes only *involuntarily* homeless persons," meaning that people with access to alternative shelter "simply are never class members." *Id.* at 39a-41a. The majority also approved the district court's extension of *Martin* to civil citations and to camping with bedding. *Id.* at 44a-47a.

The majority remanded with instructions for the district court to consider whether to narrow the injunction to allow Grants Pass to enforce its public-camping ordinances against the use of stoves and fires. App., *infra*, 55a. The majority also vacated summary judgment as to only the public-sleeping ordinance and remanded for the district court to

consider whether to substitute a new class representative for a plaintiff who passed away while the case was on appeal—the only one of the three who had standing to challenge the public-sleeping regulation. *Id.* at 25a n.12, 30a-32a.

b. Dissenting, Judge Collins criticized *Martin* for "combining *dicta* in a concurring opinion with a *dissent*" to mint a new constitutional rule—that the Eighth Amendment forbids punishment for any act that "is, in some sense, involuntary or occasioned by a compulsion"—in conflict with this Court's precedents. App., *infra*, 93a-95a (quotation marks omitted). That decision has had "'dire practical consequences'" for hundreds of cities and millions of people over the past five years. *Id.* at 95a.

Judge Collins further explained that the majority had manipulated the class definition to reduce *Martin* "to a simplistic formula": "whether the number of homeless persons . . . exceeds the number of available shelter beds." App., *infra*, 84a-86a. The majority's "egregiously flawed reconceptualization and extension of *Martin*'s holding," he feared, would mean that other cities could come under classwide injunctions "effectively requiring" them to "allow the use of [their] public parks as homeless encampments." *Id.* at 95a. Judge Collins called for the Ninth Circuit or this Court to overrule *Martin* and the present decision "at the earliest opportunity." *Ibid.*

4. The Ninth Circuit denied Grants Pass's petition for rehearing en banc over the dissent of 13 active judges (one short of a majority). App., *infra*, 12a.

a. All 13 dissenting active judges and four senior judges joined five separate opinions calling for en banc review. App., *infra*, 117a-162a.

Judge O'Scannlain, joined by 14 judges, explained that the Ninth Circuit has departed from the Constitution's original meaning, this Court's precedents, and decisions of other appellate courts, none of which has been "bold enough to embrace an Eighth Amendment doctrine that effectively requires local communities to surrender their sidewalks and other public places to homeless encampments." App., *infra*, 122a-131a (O'Scannlain, J., respecting denial of rehearing en banc). He also blamed *Martin* for both "paralyzing local communities from addressing the pressing issue of homelessness, and seizing policymaking authority that our federal system of government leaves to the democratic process"—twin problems that "will be greatly worsened by the doctrinal innovations introduced" in this case. *Id.* at 117a, 131a-133a.

Judge Milan Smith, joined by eight judges, denounced the "status quo" under *Martin* that "fails both those in the homeless encampments and those near them," as crime, drug use, and disease proliferate. App., *infra*, 138a-139a (M. Smith, J., dissenting from denial of rehearing en banc). He pointed out that this decision "doubles down on *Martin*—crystallizing *Martin* into a crude population-level inquiry, greenlighting what should be (at most) an individualized inquiry for class-wide litigation, and leaving local governments without a clue of how to regulate homeless encampments without risking legal liability." *Id.* at 142a; see *id.* at 146a-151a. And after reviewing litigation against cities such as San Francisco and Phoenix, he observed that *Martin* has "require[d] unelected federal judges" to act "like homelessness policy czars" instead of "Article III judges applying a discernible rule of law." *Id.* at 151a-156a.

Judge Collins reiterated his critiques of *Martin* and stated that Judges O'Scannlain and Smith had "further cogently explain[ed] the multiple serious errors in the panel majority's opinion." App., *infra*, 157a.

Judge Bress, joined by 11 judges, wrote that the Constitution grants "local leaders—and the people who elect them—the latitude to address on the ground the distinctly local features of the present crisis of homelessness and lack of affordable housing," and that the Ninth Circuit's "expanding constitutional common law" of the Eighth Amendment "adds enormous and unjustified complication to an already extremely complicated set of circumstances." App., *infra*, 161a-162a (Bress, J., dissenting from denial of rehearing en banc).

Judge Graber criticized the panel for extending "*Martin* to *classwide* relief" and "enjoining *civil* statutes." App., *infra*, 135a (Graber, J., respecting denial of rehearing en banc). Although she largely agreed with *Martin*, she also said that, "given the widespread nature of the homelessness crisis in our jurisdiction," it was "crucial" for the Ninth Circuit to rehear this case to "get it right." *Id.* at 136a-137a.

b. The panel majority filed a joint statement responding to Judges O'Scannlain and Smith and defending their decision as "modest" and "exceptionally limited." App., *infra*, 96a-116a. In his dissent from denial of rehearing, Judge Collins disputed those characterizations and explained that "the panel majority's statement confirms and illustrates the layers of self-contradiction that underlie its opinion in this case." *Id.* at 158a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit has now repeatedly held that enforcement of restrictions on public camping constitutes "cruel and unusual punishment" under the Eighth Amendment. By contrast, the California Supreme Court and the Eleventh Circuit have upheld public-camping ordinances against similar constitutional challenges. The Fifth Circuit, too, has rejected such a challenge on the ground that the Eighth Amendment does not apply at all to citations for public camping but only to punishment following a conviction.

This dispute over restrictions on public camping is part of a larger conflict over the Eighth Amendment's scope. A few courts, including the Ninth and Fourth Circuits, have interpreted this Court's decisions in *Robinson* and *Powell* as holding that the government cannot punish conduct that necessarily follows from a status. In contrast, seven federal courts of appeals and 17 state courts of last resort have rejected that approach, drawing a bright line between conduct (which can be punished) and status (which cannot).

The minority view has no foundation in the Eighth Amendment's text, history, and tradition. As this Court has long held, the Cruel and Unusual Punishments Clause prohibits certain *types* of punishments. With the lone exception of *Robinson*, the Court has never held that the Eighth Amendment sets substantive limits on what can be a crime in the first place. That one-off holding should be limited to punishment for mere status, not expanded to conduct that arguably follows from a status.

To extend *Robinson* to purportedly involuntary conduct related to a status, the Ninth Circuit relied on dicta in Justice White's *Powell* concurrence as a basis to adopt the rule advocated by Justice Fortas in dissent. But that approach takes the wrong path through *Powell* and so arrives at the wrong destination. In *Marks*, this Court held that lower courts should rely on the opinions of the Justices *concurring* in the judgment. And since *Powell*, this Court has repeatedly applied Justice Marshall's plurality opinion and never even hinted that the correct interpretation of the Eighth Amendment lay hidden in Justice White's dicta and Justice Fortas's dissent.

The question presented in this case is indisputably important. Across the West, cities face a growing humanitarian tragedy. Hundreds of thousands of people camp in public, their tents and belongings overtaking sidewalks, parks, and trails. Cities want to help those in encampments get the services they need while ensuring that our communities remain safe, but they find themselves hamstrung in responding to public encampments and the drug overdoses, murders, sexual assaults, diseases, and fires that inevitably accompany them. Even when coupled with offers of shelter and other services, efforts to enforce commonsense camping regulations have been met with injunctions. Restoring to local governments their rightful authority to address this pressing and complex crisis and get people the help they desperately need is a critical step to solving this crisis.

I. THE NINTH CIRCUIT'S DECISION ENTRENCHES A CONFLICT AMONG THE LOWER COURTS

A. The Ninth Circuit alone recognizes a "constitutional 'right' to encamp on public property." App., *infra*, 128a (opinion of O'Scannlain, J.). The

California Supreme Court, Eleventh Circuit, and Fifth Circuit have rejected similar challenges under the Eighth Amendment.

1. The federal and state courts in California—home to half of the Nation's unsheltered homeless population—are divided on the question presented. In *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), plaintiffs challenged an ordinance prohibiting "'any person to camp, occupy camp facilities or use camp paraphernalia in . . . any street [or] any public parking lot or public area.'" *Id.* at 1150. The California Court of Appeal invalidated the ordinance under *Robinson* as "punishment for the 'involuntary status of being homeless.'" *Id.* at 1166. But the California Supreme Court reversed, explaining that "[t]he ordinance permits punishment for proscribed conduct, not punishment for status." *Ibid.* California courts have continued to uphold public-camping ordinances under the act/status distinction. *E.g.*, *Allen* v. *City of Sacramento*, 234 Cal. App. 4th 41, 59-60 (2015).

The Eleventh Circuit reached a similar result in *Joel* v. *City of Orlando*, 232 F.3d 1353 (11th Cir. 2000). There, homeless plaintiffs challenged an ordinance prohibiting unauthorized camping "on all public property." *Id.* at 1356. The Eleventh Circuit upheld the ordinance because it "target[ed] conduct, and d[id] not provide criminal punishment based on a person's status." *Id.* at 1362. The Eleventh Circuit also suggested that "homelessness is not a 'status' within the meaning of the Eighth Amendment" in any event. *Ibid.*

The Fifth Circuit rejected another challenge at an earlier step of the analysis. In *Johnson* v. *City of Dallas*, 61 F.3d 442 (5th Cir. 1995), a district court enjoined the enforcement of a public-sleeping ordinance against homeless people who had been ticketed for

violations. *Id.* at 443. The Fifth Circuit reversed on the ground that the Eighth Amendment applies only to punishment following a conviction. *Id.* at 445. Although the Fifth Circuit labeled the defect as a lack of Article III standing, its analysis focused on the Eighth Amendment's scope. *Id.* at 444-445 (relying on *Ingraham* v. *Wright*, 430 U.S. 651 (1977)).

2. The Ninth Circuit's precedents conflict with these decisions. In contrast to the California Supreme Court's and Eleventh Circuit's adoption of the act/status distinction, the Ninth Circuit has now twice invalidated public-camping ordinances under "the principle that 'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being.'" App., *infra*, 50a (quoting *Martin*, 920 F.3d at 616). The Ninth Circuit also held that such Eighth Amendment challenges may be raised *before* conviction, breaking with the Fifth Circuit's decision in *Johnson*. *Martin*, 920 F.3d at 613-614.

B. More broadly, the Ninth Circuit is "locked in a deep and varied intercircuit split over how to read the Eighth Amendment in light of *Robinson* and *Powell*." App., *infra*, 130a (opinion of O'Scannlain, J.). That split is even deeper when one considers state courts of last resort. In total, 24 courts have held the line at the act/status distinction, and only four subscribe to the view that the Eighth Amendment protects involuntary conduct linked to a supposed status.

1. In *Robinson*, this Court confronted an unusual California statute providing that "'[n]o person shall . . . be addicted to the use of narcotics.'" 370 U.S. at 660 n.1. This statute "ma[de] the 'status' of narcotic addiction a criminal offense" even absent "proof of the actual use of narcotics within the State's

jurisdiction." *Id.* at 665-666. Although this Court held that the defendant's 90-day sentence for addiction was cruel and unusual punishment, this Court explained that California *could* prohibit "manufacture, prescription, sale, purchase, or possession of narcotics within its borders"—even by drug addicts—so long as the law didn't penalize "the 'status' of narcotic addiction." *Id.* at 664-667.

This Court revisited the act/status distinction in *Powell*, where an alcoholic sought to extend *Robinson* to purportedly involuntary conduct: his public drunkenness. Justice Marshall, writing for a four-Justice plurality, explained that *Robinson* stands for the proposition that "criminal penalties may be inflicted only if the accused has committed some act" that "society has an interest in preventing"—or put in "historical common law terms, has committed some *actus reus*." 392 U.S. at 533. To forestall "this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility," the plurality rejected the defendant's proposed extension of *Robinson* from status to conduct that "is, in some sense, 'involuntary' or 'occasioned by a compulsion.'" *Ibid.*

Justice Black concurred to underscore the "sound" distinction between "pure status crimes" and "crimes that require the State to prove that the defendant actually committed some proscribed act." *Powell,* 392 U.S. at 542-544.

Justice White, who concurred only in the result, ventured that the Eighth Amendment might protect public drunkenness when alcoholics "have no place else to go and no place else to be when they are drinking," but found this admittedly "novel construction" of the Amendment "unnecessary to pursue at this point"

because the defendant hadn't proved his alcoholism made him "unable to stay off the streets on the night in question." *Powell*, 392 U.S. at 551-554 & n.4.

Finally, Justice Fortas penned a four-Justice dissent advancing the theory that *Robinson* immunizes a person from punishment for "being in a condition he is powerless to change." *Powell*, 392 U.S. at 567.

2. Seven circuits have followed the *Powell* plurality in holding that *Robinson* applies only to status crimes and does not immunize conduct supposedly associated with a status:

- In this precise context of a public-camping ordinance, the Eleventh Circuit agreed with the *Powell* plurality that "[a] distinction exists between applying criminal laws to punish conduct, which is constitutionally permissible, and applying them to punish status, which is not." *Joel*, 232 F.3d at 1361-1362.
- In *United States* v. *Sirois*, 898 F.3d 134 (1st Cir. 2018), the First Circuit rejected a defendant's argument that a district court committed plain error under the Eighth Amendment when revoking supervised release for drug use that was "compelled by his addiction." *Id.* at 137-138.
- In *United States* v. *Black*, 116 F.3d 198 (7th Cir. 1997), the Seventh Circuit rejected an Eighth Amendment defense by a defendant with a compulsive desire to collect child pornography. *Id.* at 201. The court reasoned that "*Robinson* is simply inapposite on its face because the statutes involved here do not criminalize the statuses of pedophile or ephebophile," but rather the "conduct of

receiving, possessing and distributing child pornography," and that Justice White's concurrence "need not be discussed further" because "no other Justice joined in that opinion." *Id.* at 201 & n.2.

- In *Yanez* v. *Romero*, 619 F.2d 851 (10th Cir. 1980), the Tenth Circuit held that "[a] reading of the decision in *Robinson* and that in *Powell* makes clear" that States can prohibit drug possession even by addicts. *Id.* at 852.
- In *United States* v. *Moore*, 486 F.2d 1139 (D.C. Cir. 1973) (en banc), a majority of a fractured D.C. Circuit endorsed the *Powell* plurality in rejecting an "Eighth Amendment defense for the addict-possessor" of drugs. *Id.* at 1153-1154 (plurality opinion); *id.* at 1197-1198 (Leventhal, J., concurring).
- In *Smith* v. *Follette*, 445 F.2d 955 (2d Cir. 1971), the Second Circuit agreed with the *Powell* plurality that *Robinson* "was in no way intended to stand for the proposition that those who affirmatively commit crimes because of their condition may not be punished"—there, for drug possession that "was the result in some degree of a socially developed compulsion." *Id.* at 961.
- In *United States ex rel. Mudry* v. *Rundle*, 429 F.2d 1316 (3d Cir. 1970) (per curiam), the Third Circuit held that *Robinson* and *Powell* allow States to forbid drug possession by addicts. *Id.* at 1316.

In addition to those seven circuits, 17 state courts of last resort have limited *Robinson* to status crimes. They, like the *Powell* plurality, have rejected claims

that the Eighth Amendment protects conduct associated with homelessness,[1] alcoholism,[2] drug addiction,[3] and sexual compulsions.[4]

3. The Ninth Circuit sees *Robinson* and *Powell* in a very different light. According to the Ninth Circuit, those decisions overrode the act/status distinction and compelled the conclusion that "a person may not be prosecuted for conduct that is involuntary or the product of a 'status.'" App., *infra*, 47a (citing *Martin*, 920 F.3d at 617); *id.* at 109a (statement of Gould and Silver, JJ.).

Among the federal courts of appeals, only the Fourth Circuit has joined the Ninth Circuit in extending *Robinson* to conduct that flows from a status. Its initial foray was *Driver* v. *Hinnant*, 356 F.2d 761 (4th Cir. 1966), where the Fourth Circuit reasoned that if *Robinson* forbids punishment for the status of being an alcoholic, then the Eighth Amendment should also forbid punishment for "an involuntary symptom of a

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[1] *Tobe*, 892 P.2d at 1166.

[2] *Rosser* v. *Housewright*, 664 P.2d 961, 962-963 (Nev. 1983) (per curiam); *Loveday* v. *State*, 247 N.W.2d 116, 121 (Wis. 1976); *Vick* v. *State*, 453 P.2d 342, 343-344 (Alaska 1969); *Shelburne* v. *State*, 446 P.2d 58, 59 (Okla. Crim. App. 1968); *People* v. *Hoy*, 158 N.W.2d 436, 445 (Mich. 1968); *City of Seattle* v. *Hill*, 435 P.2d 692, 698-699 (Wash. 1967).

[3] *State* v. *Robinson*, 254 P.3d 183, 191 & n.41 (Utah 2011); *State* v. *Smith*, 355 A.2d 257, 259-260 (Conn. 1974); *State* v. *Smith*, 219 N.W.2d 655, 657 (Iowa 1974); *Wheeler* v. *United States*, 276 A.2d 722, 726 (D.C. 1971); *Steeves* v. *State*, 178 N.W.2d 723, 726 (Minn. 1970); *Rangel* v. *State*, 444 S.W.2d 924, 925-926 (Tex. Crim. App. 1969); *State* v. *Mendoza*, 454 P.2d 140, 141 (Ariz. 1969); *State* v. *Margo*, 191 A.2d 43, 44 (N.J. 1963) (per curiam).

[4] *State* v. *Little*, 261 N.W.2d 847, 851-852 (Neb. 1978); *People* v. *Jones*, 251 N.E.2d 195, 198 (Ill. 1969).

status—public intoxication." *Id.* at 764-765. Justice Fortas cited *Driver* with approval in his dissent in *Powell*, 392 U.S. at 569 n.33, but the plurality rejected *Driver*'s holding, drawing a clear line between status and conduct, *id.* at 533-534. Nevertheless, the Fourth Circuit recently reaffirmed *Driver* on the theory that the controlling *Powell* opinion under *Marks* is Justice White's concurrence, including his dictum that the Eighth Amendment might protect truly involuntary conduct. *Manning* v. *Caldwell*, 930 F.3d 264, 280-283 & n.13 (4th Cir. 2019) (en banc); see *id.* at 282 n.17 (agreeing with *Martin*).

Like the Ninth and Fourth Circuits, the Pennsylvania Supreme Court has "combine[d]" Justice White's concurrence and Justice Fortas's dissent "to produce an amplification of *Robinson*"—namely, that the Eighth Amendment immunizes "anti-social *acts* flowing from an uncontrollable 'status.'" *In re Jones*, 246 A.2d 356, 362 (Pa. 1968).

A state intermediate appellate court has also expressly aligned itself with the Ninth Circuit's approach for conduct that follows from status. In *State* v. *Adams*, 91 So. 3d 724 (Ala. Crim. App. 2010), a sex offender argued that he could not be punished for failing to provide an address upon his release because he could not afford rent and had nowhere else to stay. *Id.* at 729-730. The Alabama Court of Criminal Appeals, in analyzing this claim, incorporated wholesale pages of *Jones*, the Ninth Circuit's vacated predecessor to *Martin*. *Id.* at 745-753 (quoting *Jones*, 444 F.3d at 1131-1138). *Robinson* and *Powell*, on this reading, "forbid[] punishing criminally not only a person's pure status, but also a person's involuntary conduct that is inseparable from that person's status." *Id.* at 753. And that understanding of the Eighth

Amendment invalidated the reporting requirement because the defendant's failure to provide an address was "involuntary conduct that was inseparable from his status of homelessness" given the lack of space in shelters that housed sex offenders. *Id.* at 754.

* * *

The Ninth Circuit alone has upheld Eighth Amendment challenges to generally applicable public-camping ordinances. Even though a chorus of judges across eight separate opinions in *Martin* and this case has criticized this interpretation from every possible angle, the Ninth Circuit has refused to change course and instead has further entrenched a long-recognized and "sharp split of opinion throughout the legal profession concerning the meaning of *Powell*" for the act/status distinction this Court adopted in *Robinson*. *Moore*, 486 F.2d at 1239 n.178 (Wright, J., dissenting). That split stands little chance of resolving itself after the Ninth Circuit denied rehearing en banc over 17 judges' objections and the en banc Fourth Circuit adhered to its outlier position in *Manning*. This Court should grant certiorari to restore uniformity to the interpretation of the Cruel and Unusual Punishments Clause.

II. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S DECISIONS.

As Judges O'Scannlain, Smith, and Collins explained below, the Ninth Circuit has departed from this Court's precedents and the Eighth Amendment's original meaning.

A. *Martin* and the decision below find no support—and indeed never claim the pretense of support—in the "text, history, or tradition of the Eighth Amendment." App., *infra*, 119a (opinion of

O'Scannlain, J.). Under this Court's decisions, however, original meaning and history are critical to the Cruel and Unusual Punishments Clause. *E.g.*, *Bucklew* v. *Precythe*, 139 S. Ct. 1112, 1123-1124 (2019); *Ingraham*, 430 U.S. at 664-666.

The Eighth Amendment provides that "cruel and unusual punishments" shall not be "inflicted." U.S. Const. amend. VIII. The Framers borrowed this language verbatim from the English Declaration of Rights of 1689. *Martin*, 920 F.3d at 599-600 (Bennett, J., dissenting from denial of rehearing en banc). And the text and its common-law backdrop show that the Cruel and Unusual Punishments Clause is "directed to *modes of punishment*." App., *infra*, 122a (opinion of O'Scannlain, J.). As this Court has explained, the "original and historical understanding" is that the Eighth Amendment outlaws only "methods" of punishment that unnecessarily "'superadd[]'" pain (cruel) and have "long fallen out of use" (unusual). *Bucklew*, 139 S. Ct. at 1122-1123; accord *Harmelin* v. *Michigan*, 501 U.S. 957, 976 (1991) (opinion of Scalia, J.). Such cruel and unusual punishments include, for example, "burning at the stake, crucifixion, [and] breaking on the wheel." *In re Kemmler*, 136 U.S. 436, 446 (1890).

Under *Bucklew*, there is nothing cruel or unusual about the modes of punishment in *Martin* (one-day jail sentences and criminal fines) and this case (civil citations). 920 F.3d at 606; App., *infra*, 44a. These low-level penalties are not "marked by savagery and barbarity" and have not fallen out of "common use." App., *infra*, 123a (opinion of O'Scannlain, J.). To the contrary, countless jurisdictions across the Nation have adopted such routine measures to protect public

health and safety. *Martin*, 920 F.3d at 599 (M. Smith, J., dissenting from denial of rehearing en banc).

Nor does text or history suggest that the Cruel and Unusual Punishments Clause "arrogate[s] the substantive authority of legislatures to prohibit 'acts' like those at issue here." App., *infra*, 122a (opinion of O'Scannlain, J.) (quoting *Martin*, 920 F.3d at 602 (Bennett, J., dissenting from denial of rehearing en banc)). Even Justice White, whose dictum in *Powell* about involuntary conduct now governs jurisdictions throughout the Ninth and Fourth Circuits, stated that *Robinson* itself involved an "application of 'cruel and unusual punishment' so novel that I suspect the Court was hard put to find a way to ascribe to the Framers of the Constitution the result reached today rather than to its own notions of ordered liberty." *Robinson*, 370 U.S. at 689 (dissenting opinion). Whatever the merits of *Robinson*, there is no basis to extend the Cruel and Unusual Punishments Clause yet further to prevent even issuing a citation for conduct that supposedly flows from a status. In fact, no court suggested that the Eighth Amendment or a state equivalent could invalidate public-camping restrictions until the early 1990s—two centuries after the Founding. *Pottinger* v. *City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992).

Plaintiffs in the Ninth Circuit appear to have pursued their inventive theory under the Eighth Amendment because "a Fourteenth Amendment claim" would have "prove[d] unavailing." *Jones*, 444 F.3d at 1147 (Rymer, J., dissenting) (emphasis omitted). There is no serious argument that a right to camp on public property is "'deeply rooted in this Nation's history and tradition.'" *Washington* v. *Glucksberg*, 521 U.S. 702, 720-721 (1997). But this Court's decisions

have consistently made clear that the original meaning of the Eighth Amendment matters, too. Under that approach, *Martin* and the decision below have no footing in the Cruel and Unusual Punishments Clause.

B. In keeping with text and history, this Court has long recognized that the Cruel and Unusual Punishments Clause is primarily "'directed at the *method or kind of punishment* imposed for the violation of criminal statutes'" and does not apply to "impositions outside the criminal process." *Ingraham*, 430 U.S. at 667-668 (emphasis added) (quoting *Powell*, 392 U.S. at 531-532 (plurality opinion)). This Court has also held that certain punishments can become cruel and unusual if they are excessively disproportionate to the crime committed. *Solem* v. *Helm*, 463 U.S. 277, 288-289 (1983). Even so, this Court's focus has always remained on the mode of punishment with the lone exception of *Robinson*, where this Court held that the Eighth Amendment prohibited States from criminalizing status irrespective of the method of criminal punishment. 370 U.S. at 667. This Court has cautioned this limitation is "to be applied sparingly" and has never again invalidated a crime on this basis. *Ingraham*, 430 U.S. at 667.

As Judge O'Scannlain explained, the Ninth Circuit misread *Robinson* and *Powell* in holding that the Eighth Amendment prohibits the enforcement of public-camping ordinances. App., *infra*, 126a-127a. *Robinson* distinguished between status and conduct for Eighth Amendment purposes. 370 U.S. at 664-665. The *Powell* plurality reaffirmed this act/status distinction in rejecting the extension of *Robinson* to conduct that "is, in some sense, 'involuntary.'" 392 U.S. at 533. And in the half century since *Powell*, this

Court has relied on only Justice Marshall's plurality opinion and Justice Black's concurrence, and has never endorsed the views expressed in Justice White's concurrence in the result, let alone Justice Fortas's dissent. *E.g.*, *Ingraham*, 430 U.S. at 659; see *Manning*, 930 F.3d at 289 (Wilkinson, J., dissenting) (collecting cases).

An illustrative example is *Kahler* v. *Kansas*, 140 S. Ct. 1021 (2020), which presented the question whether the Due Process Clause guaranteed a defendant's right to claim insanity based on his inability to tell right from wrong. In rejecting that contention, this Court understood Justice Marshall's analysis of the Eighth Amendment to set forth the proper framework for constitutional challenges to the "paramount role of the States in setting 'standards of criminal responsibility.'" *Id.* at 1028 (quoting *Powell*, 392 U.S. at 533). Respect for that role means that the people's representatives, rather than the courts, get to decide "when a person should be held criminally accountable for 'his antisocial deeds.'" *Ibid.* (quoting *Powell*, 392 U.S. at 535-536). Judges simply aren't equipped to dictate "rigid" constitutional rules in this context, *ibid.* (citing *Powell*, 392 U.S. at 536-537), or to "balanc[e] and rebalanc[e] over time complex and oft-competing ideas about 'social policy' and 'moral culpability,'" *ibid.* (quoting *Powell*, 392 U.S. at 538 (Black, J., concurring)). *Powell* thus stands for the principle that "'doctrine[s] of criminal responsibility' must remain 'the province of the States.'" *Ibid*. (quoting *Powell*, 392 U.S. at 534, 536 (plurality opinion)).

The Ninth Circuit has read *Powell* the polar opposite way from *Kahler*. Rather than follow the *Powell* plurality's properly cabined approach, the Ninth Circuit has developed its own constitutional doctrine of

criminal responsibility for involuntary conduct related to status—all "by stitching together *dicta* in a lone concurrence with a *dissent*." App., *infra*, 119a (opinion of O'Scannlain, J.). Judges Smith and Collins explained that this dissent-plus-concurrence-dicta approach conflicts with this Court's decision in *Marks*, which instructs courts to consider "[o]nly the views of the Justices *concurring* in the judgment." *Martin*, 920 F.3d at 592-593 (M. Smith, J., dissenting from denial of rehearing en banc) (emphasis added); accord App., *infra*, 93a-94a (Collins, J., dissenting). Typically, "'comments in a dissenting opinion' about legal principles and precedents 'are just that: comments in a dissenting opinion.'" *Georgia* v. *Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1511 (2020) (brackets omitted) (quoting *Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 177 n.10 (1980)). But the Ninth Circuit's upside-down *Marks* analysis of *Powell* means that one Justice's dictum has transformed Justice Fortas's dissenting comments into the law of the land for the western United States.

In short, the Ninth Circuit's rule that the Eighth Amendment prohibits punishing "'a person for being in a condition he is powerless to change'" turns a constitutional provision that is ostensibly directed to the kinds of *criminal punishments* into a sweeping doctrine of *criminal responsibility*. *Martin*, 920 F.3d at 616 (quoting *Powell*, 392 U.S. at 567 (Fortas, J., dissenting)). This interpretation, as Justice Marshall explained, discards "[t]raditional common-law concepts of personal accountability and essential considerations of federalism." *Powell*, 392 U.S. at 534-536. But in the absence of a majority decision settling the issue, parties have sought to extend the radical logic of the *Powell* dissent to all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that

could be characterized as involuntary or compulsive. *Supra*, at 20-22. This Court should reject the *Powell* dissent once and for all.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

When the Ninth Circuit declined to rehear *Martin* en banc, six judges warned of "dire practical consequences for the hundreds of local governments within our jurisdiction, and for the millions of people" living there. 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc). The past five years under *Martin* have been, if anything, more disastrous than even its fiercest critics predicted.

Martin has "paralyz[ed] local communities from addressing the pressing issue of homelessness." App., *infra*, 117a (opinion of O'Scannlain, J.). As a formal matter, cities purportedly retain the authority to enforce public-camping laws against people who "'have access to adequate temporary shelter'" or the "financial means to obtain shelter." *Id.* at 14a n.2 (majority opinion). But those standards are unworkable in practice. There is no reliable way for an officer in the field to determine whether a person is "involuntarily" homeless, let alone assess how many people need shelter in total and how much shelter is currently available at that exact moment. Nor has the Ninth Circuit offered any guideposts for what qualifies as "'*adequate* temporary shelter'" (other than that religiously affiliated shelters don't qualify). *Id.* at 19a (emphasis added). That ambiguity has empowered courts to ignore available shelter for a growing list of reasons—for example, because a shelter lacks beds (which sidewalks and parks also lack), *id.* at 22a, or is outdoors (like sidewalks and parks), *Warren* v. *City of Chico*, 2021 WL 2894648, at *3-4 (E.D. Cal. July 8, 2021).

Some district judges have observed that "the practical ramifications for the community are much more complex" than the Ninth Circuit's singular focus on "practically-available shelter." *Warren*, 2021 WL 2894648, at *4 & n.4. Still, given the difficulties of administering a shelter-based approach, district courts applying *Martin* have hamstrung cities in enforcing public-camping laws against *anyone* unless and until they have enough "secular shelter space" for *everyone*—a near-impossible task, especially because the number of homeless people surpasses the shelter available in every major western city and continues to climb. App., *infra*, 53a.

For example, San Francisco has attempted to clean up public encampments under threat of law enforcement only after offering "'appropriate shelter'" to the encampment's residents. *Coalition on Homelessness* v. *City & County of San Francisco*, 2022 WL 17905114, at *4-7 (N.D. Cal. Dec. 23, 2022). Given the high resistance to social services, "55% of homeless individuals rejected shelter when offered it."[5] Yet a district court still enjoined San Francisco from enforcing its public-camping ordinance "as long as there are more homeless individuals in San Francisco than there are shelter beds available." *Id.* at *28.

The story is much the same for Phoenix, which has instructed its police officers to "make individualized assessments before citing individuals" for sleeping on sidewalks and other public ways. *Fund for Empowerment* v. *City of Phoenix*, 2022 WL 18213522, at *2-3 (D. Ariz. Dec. 16, 2022). After one encampment in 2022 alone witnessed "1,097 calls for emergency

[5] Editorial Board, *Why San Francisco Is a Homeless Mecca*, Wall St. J. (Aug. 6, 2023), https://tinyurl.com/5cx5cr7v.

medical help, 573 fights or assaults, 236 incidents of trespassing, 185 fires, 140 thefts, 125 armed robberies, 13 sexual assaults and four homicides," as well as 16 other deaths "from overdoses, suicides, hypothermia or excessive heat," Phoenix tried to clean up the encampment.[6] Again, however, a district court enjoined Phoenix from enforcing its public-camping ordinance "as long as there are more unsheltered individuals in Phoenix than there are shelter beds available." *Id.* at *9.

The logic of *Martin*—that governments cannot regulate "'universal and unavoidable consequences of being human,'" 920 F.3d at 617—also hasn't stopped at public camping, but has "inevitably" extended to "public defecation and urination." *Id.* at 596 (M. Smith, J., dissenting from denial of rehearing en banc). A district court has held that the Eighth Amendment right under *Martin* "to be free from punishment for involuntary conduct" includes "eliminating" (a euphemism for defecating) "in public if there is no alternative to doing so." *Mahoney* v. *City of Sacramento*, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020); see App., *infra*, 155a (opinion of M. Smith, J.).

The status quo under *Martin* has harmed local governments, surrounding residents, and—most of all—the homeless themselves by contributing to the growth of encampments across the West. See App., *infra*, 139a (opinion of M. Smith, J.). These lawsuits, though brought "in the name of compassion and decriminalizing homelessness[,] had the effect of surrounding the homeless in criminality and predation, not to mention fires, filth, disease, and fentanyl and

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[6] Eli Saslow, *A Sandwich Shop, a Tent City and an American Crisis*, N.Y. Times (Mar. 31, 2023), https://tinyurl.com/yh42zzrh.

meth."[7] The results have been tragic, if predictable: skyrocketing rates of fatal drug overdoses;[8] "increasingly volatile behavior on the streets" for those who live near encampments;[9] a shocking rise in homicides and sexual assaults committed against the homeless;[10] a resurgence of "medieval" diseases (such as typhus and tuberculosis) in encampments;[11] a series of fires in major cities, some of which burned out of

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[7] Sam Quinones, *Skid Row Nation: How L.A.'s Homelessness Crisis Response Spread Across the Country*, L.A. Mag. 131 (Oct. 6, 2022).

[8] Thomas Fuller, *Death on the Streets*, N.Y. Times (Apr. 25, 2022), https://nyti.ms/3DpJsKs (deaths among the homeless are up 200% in Los Angeles County); Christal Hayes, *'The World Doesn't Care': Homeless Deaths Spiked During Pandemic, Not from COVID. From Drugs.*, USA Today (May 28, 2022), https://tinyurl.com/523wex3p (Seattle and Portland experienced a record number of deaths in 2021 among the homeless).

[9] Michael Corkery, *Fighting for Anthony: The Struggle to Save Portland, Oregon*, N.Y. Times (July 29, 2023), https://tinyurl.com/3zvxpss3.

[10] *Recent Killings in Los Angeles and New York Spark Anger, Raise Risk for Homeless People*, KTLA (Jan. 28, 2022), https://tinyurl.com/y97jbayw; Eric Leonard, *LAPD Concerned About Increase in Sexual Violence Against Women Experiencing Homelessness*, NBC4 (Feb. 27, 2020), https://tinyurl.com/4ccfrb6v.

[11] Anna Gorman & Kaiser Health News, *Medieval Diseases Are Infecting California's Homeless*, The Atlantic (Mar. 8, 2019), https://tinyurl.com/53k3h44z.

control for days;[12] and massive amounts of debris, such as needles and excrement, polluting the environment.[13]

The Ninth Circuit's decision in this case exacerbates all of these problems. If "*Martin* handcuffed local jurisdictions as they tried to respond to the homelessness crisis," this decision "now places them in a straitjacket." App., *infra*, 143a (opinion of M. Smith, J.). Cities can't issue even *civil* citations for public camping if there are any potential downstream criminal consequences. *Id.* at 44a-46a (majority opinion). And having collapsed the individualized voluntariness inquiry under *Martin* from the merits into the class definition, the Ninth Circuit has charted a path for the routine issuance of classwide injunctions under which cities must assess on a case-by-case basis (facing the threat of contempt) whether public camping is sufficiently "involuntary" for Eighth Amendment protection. *Id.* at 39a-41a & n.23. As the Ninth Circuit's judge-made rules become more and more elaborate, and as the costs of both complying and litigating continue to rise, more cities will be forced "to surrender the use of many of their public spaces (including

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[12] Natalie O'Neill, *Blazes That Begin in Homeless Camps Now Account for Nearly Half the Fires in Portland*, Willamette Week (Nov. 2, 2022), https://tinyurl.com/ykw69dtf (Portland firefighters extinguish six fires a day that start in encampments); Jennifer Medina, *Los Angeles Fire Started in Homeless Encampment, Officials Say*, N.Y. Times (Dec. 12, 2017), https://nyti.ms/3sPyXLv.

[13] Quinones, *supra*, *Skid Row Nation* at 112 (noting that the cleanup of the Echo Park Lake encampment in Los Angeles generated "35 tons of debris, 723 pounds of biological waste, and 300 pounds of needles and other drug paraphernalia").

sidewalks) to homeless encampments." *Id.* at 133a (opinion of O'Scannlain, J.).

The homelessness crisis is an exceptionally difficult public-policy challenge. No one argues that *Martin* is "an on/off-switch entirely responsible for" this crisis, which stems from "a complex mix of economic, mental-health, and substance-abuse factors, and appears to resist any easy solution." App., *infra*, 140a-141a, 143a (opinion of M. Smith, J.). But if the past five years have proved nothing else, it is that courts not only lack the legal authority, but also the practical competence, to serve as "homelessness policy czars" superintending every major city in the Ninth Circuit on today's paramount policy issue. *Id.* at 157a.

Public-camping laws are a critical (and constitutional) backstop as cities attempt to stop the growth of encampments and start to make progress on the underlying causes of homelessness. Cities on the frontlines of this crisis should be allowed "to make tough policy choices unobstructed by court-created mandates that lack any sound basis in law" and have "add[ed] enormous and unjustified complication to an already extremely complicated set of circumstances." App., *infra*, 163a (opinion of Bress, J.). Only this Court's intervention can return this issue to the people's representatives—where it has belonged all along.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

AARON P. HISEL
CAPITOL LEGAL SERVICES
901 Capitol Street NE
Salem, OR 97301

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
SAMUEL ECKMAN
DANIEL R. ADLER
PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

August 22, 2023

No. 23-175

IN THE

Supreme Court of the United States

CITY OF GRANTS PASS, OREGON,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

Edward Johnson
OREGON LAW CENTER
522 SW Fifth Ave.
Suite 812
Portland, OR 97204

Walter Fonseca
OREGON JUSTICE RESOURCE CENTER
P.O. Box 5248
Portland, OR 97208

Kelsi Brown Corkran
Counsel of Record
Shelby Calambokidis
Joseph W. Mead
William Powell
INSTITUTE FOR CONSTITUTIONAL ADVOCACY AND PROTECTION, GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6607
kbc74@georgetown.edu

Counsel for Respondents

QUESTION PRESENTED

In an effort to push its homeless residents into neighboring jurisdictions, the City of Grants Pass, Oregon, began aggressively enforcing a set of ordinances that make it unlawful to sleep anywhere on public property with so much as a blanket to survive cold nights, even if shelter is unavailable.

The question presented is whether the ordinances transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such," *Ingraham v. Wright*, 430 U.S. 651, 667 (1977), by effectively punishing the City's involuntarily homeless residents for their existence within city limits.

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INTRODUCTION

In 2013, the City of Grants Pass, Oregon, decided that the solution to its "vagrancy problem" was to drive its homeless residents into neighboring jurisdictions by making it impossible for them to live in Grants Pass without facing civil and criminal penalties. City leaders adopted a plan to aggressively enforce a set of ordinances that make it illegal to sleep anywhere in public at any time with so much as a blanket to survive cold nights. "[T]he point," the city council president explained, was "to make it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." ER 368.

Because there are no homeless shelters in Grants Pass and the two privately operated housing programs in town serve only a small fraction of the City's homeless population, most of the City's involuntarily homeless residents have nowhere to sleep but outside. Given the universal biological necessity of sleeping and of using a blanket to survive in cold weather, the City's enforcement of its ordinances meant that its homeless residents could not remain within city limits without facing punishment. The City had, in other words, "criminalized their existence in Grants Pass." Pet. App. 208a.

The Ninth Circuit correctly concluded that the City's efforts to punish involuntarily homeless persons for simply existing in Grants Pass transgress the Eighth Amendment's "substantive limits on what can be made criminal and punished as such." *Ingraham v. Wright*, 430 U.S. 651, 667 (1977). As *Robinson v. California*, 370 U.S. 660 (1962), explains, the Cruel and Unusual Punishments Clause prohibits punishing

people for having an involuntary status, and the logic of *Robinson* necessarily includes unavoidable biological reactions to such a status: If "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," *id.* at 667, the same must be true for symptoms like coughing or sneezing. Whatever disagreement the Justices had in *Powell v. Texas*, 392 U.S. 514 (1968), over that principle's application to harmful compulsive behavior arising from addiction, it certainly prohibits jurisdictions from punishing people for universal biological necessities like sleeping and using a blanket to survive cold temperatures when they have no choice but to be outside.

The City's purported circuit splits are based on false premises. The first is that the Ninth Circuit recognized "a constitutional right to encamp on public property." Pet. 16 (internal quotation marks omitted). To the contrary, the panel emphasized that the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a (internal quotation marks and alterations omitted). The panel held only that the Eighth Amendment prohibits the City from punishing homeless persons for engaging in the unavoidable biological function of sleeping with the minimal bedding necessary to survive cold nights when shelter is unavailable. *Id.* at 48a & n.28, 57a. None of the decisions cited in the petition disagree.

The second false premise is that the Ninth Circuit's holding forecloses the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30. The City does not identify any decision relying on Ninth Circuit precedent for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a universal and unavoidable consequence of being human.

The City's exceptional importance argument similarly turns on the false claim that the decision below deprives cities of the ability to dismantle homeless encampments. Again, the panel explicitly recognized the right of jurisdictions to clear encampments and to criminalize the use of tents on public property. Indeed, Grants Pass itself has continued to actively dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below. The district court decisions cited by the City and its amici confirm the same.

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate. The City and its amici's claims to the contrary are nothing more than an exercise in political expediency. For years, political leaders have chosen to tolerate encampments as an alternative to meaningfully addressing the western region's severe housing shortage. As the homelessness crisis has es-

calated, these amici have faced intense public backlash for their failed policies, and it is easier to blame the courts than to take responsibility for finding a solution.

Finally, the petition suffers from numerous vehicle problems. First, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents not only under the Cruel and Unusual Punishments Clause, but also on the independent ground that the ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. The City has not and cannot seek this Court's review of the Excessive Fines Clause ruling because it forfeited that issue on appeal.

Second, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping and staying warm outside. Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it would be a waste of this Court's resources to further review a local enforcement scheme that the state legislature has rejected.

Third, the Ninth Circuit directed the district court to narrow its injunction on remand, making it unclear what injunction this Court would review if it granted certiorari now.

Finally, while this case was on appeal, the only named plaintiff with standing to challenge one of the ordinances passed away. The Ninth Circuit thus vacated the district court's grant of summary judgment as to that ordinance and remanded for the substitution of a new class representative. Accordingly, if the Court grants review now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

The Court should deny the petition.

STATEMENT OF THE CASE

I. Factual Background

Like many west coast cities, Grants Pass has experienced a population explosion in the past 20 years, growing from 23,000 residents in 2000 to 38,000 in 2020. Pet. App. 165a, 167a. The development of affordable housing in Grants Pass has not kept up with the population growth. *Id.* Grants Pass has a vacancy rate of one percent, and rental units that cost less than $1,000 a month "are virtually unheard of." *Id.* at 167a. As a result, hundreds of Grants Pass residents have become homeless. *See id.* at 167a–168a. A 2019 point-in-time count in Grants Pass counted 602 homeless people and another 1,045 individuals that were "precariously housed." *Id.*

In March 2013, the Grants Pass City Council held a public meeting to "identify solutions to current vagrancy problems." *Id.* at 168a. Participants focused on strategies for pushing homeless residents into neighboring jurisdictions and "leaving them there." *Id.* at 17a. The Public Safety Director noted that officers "had at times tried buying [homeless persons] a bus

ticket" out of town, but they later "returned to Grants Pass with a request from the other location to not send them there." ER 368. The council president proposed instead "mak[ing] it uncomfortable enough for [homeless persons] in our city so they will want to move on down the road." *Id.*

City leaders thus decided to aggressively enforce a set of ordinances that make it impossible for involuntarily homeless people to exist within city limits without facing civil and criminal penalties. Pet. App. 17a, 42a–55a. Two "anti-camping" ordinances prohibit "occupy[ing] a campsite" on "any … publicly-owned property" at any time, with "campsite" defined expansively as "any place where bedding, sleeping bag, or other material used for bedding purposes … is placed … for the purpose of maintaining a temporary place to live." *Id.* at 221a–222a. The ordinances also prohibit sleeping in a car in a parking lot for two or more consecutive hours between midnight and 6:00 am. *Id.* at 223a. And an "anti-sleeping" ordinance prohibits sleeping "on public sidewalks, streets, or alleyways at any time" or "in any pedestrian or vehicular entrance to public or private property abutting a public sidewalk." *Id.* at 221a–222a.

These ordinances collectively "prohibit individuals from sleeping in any public space in Grants Pass while using any type of item that falls into the category of 'bedding' or is used as 'bedding'"—language that extends far beyond "camping" to prohibit sleeping with so much as a blanket or "a bundled up item of clothing as a pillow." *Id.* at 177a–178a.

Grants Pass does not have any shelters where a homeless person can show up and stay for the night.

Id. at 169a–170a; SER 20–21, 46–49. The only transitional housing program in the City is run by a religious organization that has the capacity to serve a maximum of 138 people, who are required, among other things, to participate in chapel services twice a day. Pet. App. 21a, 169a, 179a–180a. There is one other 18-bed facility that serves only unaccompanied minors aged 10–17. *Id.* at 22a.[1] The lack of shelter space in Grants Pass combined with the City's enforcement of its anti-homeless ordinances meant that the City's involuntarily homeless residents could not survive within city limits without facing punishment when they succumbed to sleep using any sort of makeshift pillow or blanket to stay warm. *Id.* at 178a, 182a–183a. The City had, in other words, "criminalized their existence in Grants Pass." *Id.* at 208a.

II. District Court Proceedings

In October 2018, respondents filed this suit on behalf of themselves and all other involuntarily homeless persons in Grants Pass, seeking to enjoin the City from punishing them for the biological necessity of sleeping outside with as little as a blanket to survive the cold, when shelter is unavailable. *See* ER 412–14. As relevant here, respondents alleged that the City's imposition of civil and criminal penalties under these

[1] From February to March 2020, a non-profit organization briefly opened a "warming center" that held up to 40 individuals on nights when the temperature was either below 30 degrees or below 32 degrees with snow, which amounted to 16 days. *See* Pet. App. 22a. The center did not have beds, and it turned people away almost every night. *Id.*; ER 195–96. The center did not open at all during the winter of 2020-2021. Pet. App. 22a.

circumstances violates the Eighth Amendment's prohibitions on cruel and unusual punishment and excessive fines. *See* Pet. App. 19a.

Following class certification and extensive discovery, the parties filed cross-motions for summary judgment. The evidentiary record included an analysis of 615 citations and 541 incident reports issued pursuant to the challenged ordinances. *Id.* at 175a; SER 129–31. It also established that class members were, on a daily and nightly basis, awakened, threatened with punishment, moved along, cited, fined, and prosecuted for criminal trespass for simply lying down or sleeping outside in Grants Pass. SER 6–21; ER 198–204, 361–66, 380–411.

The district court granted summary judgment to respondents on their Eighth Amendment claims. Pet. App. 163a–164a. The court first held that the City's "policy and practice of punishing homelessness" violates the Cruel and Unusual Punishments Clause. *Id.* at 176a. The court relied on *Martin v. Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which held that the government cannot, consistent with the Eighth Amendment, punish involuntarily homeless persons for sleeping outside when it is physically impossible for them to avoid doing so. Pet. App. 176a.

The district court rejected the City's claim that the Cruel and Unusual Punishments Clause is inapplicable because the ordinances punish "violations" rather than crimes. *Id.* at 183a. Citing *Austin v. United States*, 509 U.S. 602 (1993), and *Timbs v. Indiana*, 139 S. Ct. 682 (2019), the court observed that this Court has repeatedly rejected the notion that the

Eighth Amendment is limited to criminal punishments. Pet. App. 183a–185a. Rather, the Eighth Amendment "cuts across the division between the civil and the criminal law." *Id.* at 183a (quoting *Austin*, 509 U.S. at 610). Moreover, the court noted, the City's enforcement scheme does involve criminal punishment: Repeat violations result in arrest and prosecution for criminal trespass. *Id.* at 186a–187a.

The district court also held that the City's enforcement of the ordinances violates the Eighth Amendment's Excessive Fines Clause. *Id.* at 187a–191a. The court began by identifying the "two-step inquiry in analyzing an excessive fines claim: (1) is the fine punitive, and if so, (2) is it excessive?" *Id.* at 187a (citing *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)). The evidentiary record established that the fines are punitive because they serve "no remedial purpose" and are "intended to deter homeless individuals from residing in Grants Pass." *Id.* at 189a. The ordinances also describe the fines as "punishment." *Id.* (citing GPMC 1.36.010(c)).

The record likewise established that the fines are excessive. The two camping ordinances carry a presumptive fine of $295, and the fine for illegal sleeping is $75. *Id.* at 188a. When unpaid, the fines increase to $537.60 and $160 respectively. *Id.* The court found these fines "grossly disproportionate to the gravity of the offense." *Id.* at 190a (internal quotation marks omitted). Moreover, given that class members "do not have enough money to obtain shelter," they "likely cannot pay these fines." *Id.* When the fines remain unpaid, class members face collection efforts and damaged credit, "mak[ing] it even more difficult for them to find housing." *Id.*

The district court further noted this Court's recognition in the cruel and unusual punishment context that "'even one day in prison would be cruel and unusual punishment for the "crime" of having a common cold.'" *Id.* (quoting *Robinson v. California*, 370 U.S. 660, 667 (1962)). In other words, the district court explained, "[a]ny fine is excessive if it is imposed on the basis of status and not conduct." *Id.* Here, the conduct for which the class members face punishment—"sleep[ing] outside beneath a blanket because they cannot find shelter"—is "inseparable from their status as homeless individuals, and therefore, beyond what the City may constitutionally punish." *Id.*

The court concluded by emphasizing what it had *not* held: "The holding in this case does not say that Grants Pass must allow homeless camps to be set up at all times in public parks." *Id.* at 199a. To the contrary, "[t]he City may implement time and place restrictions for when homeless individuals may use their belongings to keep warm and dry and when they must have their belonging[s] packed up." *Id.* The City may also "ban the use of tents in public parks without going so far as to ban people from using any bedding type materials to keep warm and dry while they sleep." *Id.* at 199a–200a. And the City may "limit[] the amount of bedding type materials allowed per individual in public places." *Id.* at 200a. Moreover, the court noted, its holding did not limit the City's "ability to enforce laws that actually further public health and safety, such as laws restricting littering, public urination or defecation, obstruction of roadways, possession or distribution of illicit substances, harassment, or violence." *Id.* In short, the City "retain[ed] a large

toolbox for regulating public space without violating the Eight[h] Amendment." *Id.*

The district court then issued a permanent injunction that, as relevant here, enjoined the City from enforcing the "anti-camping" ordinances against class members in city parks at night. The order permitted the City to enforce the ordinances during daytime hours so long as a warning is given twenty-four hours in advance. ER 4–6. Although the order declared the "anti-sleeping" ordinance unconstitutional under the Eighth Amendment, the injunction did not contain any language enjoining that ordinance. *Id.*

III. Court Of Appeals Proceedings

The Ninth Circuit affirmed in part and vacated in part. Pet. App. 13a–58a.

The court of appeals first rejected the City's challenge to the district court's class certification determination. *Id.* at 34a–42a. The panel noted, however, that one of the three class representatives, Debra Blake, had died while the appeal was pending, a development of "possib[le] … jurisdictional significance" because Blake was the only class representative with standing to challenge the anti-sleeping ordinance. *Id.* at 30a–32a. Although it is well established that a class representative may pursue the live claims of a properly certified class even if her own claims become moot, the panel could not find any cases applying that precedent in a situation where "the death of a representative causes a class to be unrepresented as to part (but not all) of a claim." *Id.* at 33a. The panel thus deemed it appropriate to vacate summary judgment

as to the anti-sleeping ordinance and remand "to determine whether a substitute representative is available as to that challenge alone." *Id.* at 34a.

The panel then addressed the City's merits arguments. Like the district court, the panel found *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), directly on point. *Martin*, it explained, relied on *Robinson v. California*, 370 U.S. 660 (1962), and *Powell v. Texas*, 392 U.S. 514 (1968), for the proposition that "a person cannot be prosecuted for involuntary conduct if it is an unavoidable consequence of one's status." Pet. App. 52a. Although the City argued that its ordinances are distinguishable because they permit involuntarily homeless persons to sleep outside if they do not use a blanket, the panel observed that in a city as cold as Grants Pass, the "rudimentary protection of bedding" to avoid freezing "is not volitional; it is a life-preserving imperative." *Id.* at 48a n.28.

The panel agreed with the City, however, that the ordinances are permissible to the extent that they prohibit conduct beyond having the minimal protections necessary to survive outside. *Id.* at 55a. The panel observed that the record did not establish that the ordinance's "fire, stove, and structure prohibitions" deprived respondents of their "limited right to protection against the elements." *Id.* And, it held, the ordinances should be enforceable "when a shelter bed is available." *Id.* The panel thus ordered the district court on remand to "craft a narrower injunction" recognizing these limitations on respondents' rights. *Id.*

The panel noted that although the district court had also concluded that the fines imposed under the

ordinances violate the Eighth Amendment's Excessive Fines Clause, the City "present[ed] no meaningful argument on appeal regarding the excessive fines issue." *Id.* at 56a. The panel also found it unnecessary to reach the issue, as it had already largely upheld the injunction as necessary under the Cruel and Unusual Punishments Clause. *Id.*

Judge Collins dissented from the panel decision, explaining that in his view *Martin* requires an individual inquiry into the involuntariness of each homeless person's lack of shelter, and that in any event, *Martin* was wrongly decided. *Id.* at 59a–95a.

The Ninth Circuit denied the City's petition for rehearing en banc by a 14-13 vote, with several judges authoring statements and dissents respecting the denial. *Id.* at 96a–162a.

REASONS FOR DENYING THE PETITION

I. The Ninth Circuit's Decision Aligns With This Court's Precedent.

The Eighth Amendment prohibits the infliction of "cruel and unusual punishments." U.S. Const. amend. VIII. *Ingraham v. Wright*, 430 U.S. 651 (1977), explains that this prohibition "circumscribes the criminal process in three ways: First, it limits the kinds of punishment that can be imposed on those convicted of crimes; second, it proscribes punishment grossly disproportionate to the severity of the crime; and third, it imposes substantive limits on what can be made criminal and punished as such." *Id.* at 667 (citations omitted).

The Ninth Circuit correctly held that the City's anti-homeless ordinances implicate the third category: By rendering it unlawful to sleep anywhere on public property with so much as a blanket to survive the cold, the ordinances effectively punish the City's involuntarily homeless residents for their existence in Grants Pass, transgressing the Cruel and Unusual Punishments Clause's substantive limits. In so holding, the Ninth Circuit relied on its earlier decision in *Martin v. City of Boise*, 920 F.3d 584 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which in turn relied on *Robinson v. California*, 370 U.S. 660 (1962).

Robinson struck down a California statute that made it a crime to "be addicted to the use of narcotics," reasoning that it "would doubtless be universally thought to be an infliction of cruel and unusual punishment" if the government were "to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease." *Id.* at 660, 666 (internal quotation marks omitted). "[N]arcotic addiction," the Court concluded, is "of the same category." *Id.* at 667. The Court acknowledged that the ninety-day sentence imposed by the California law was "not, in the abstract, a punishment which is either cruel or unusual." *Id.* But just as "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold," so, too, did the Eighth Amendment prohibit punishing the defendant for having a narcotics addiction. *Id.*

As the Ninth Circuit recognized, *Robinson* stands most obviously for the proposition that the Eighth Amendment prohibits punishing people for having an involuntary status. Being involuntarily homeless is

such a status, and when shelter is unavailable, it is a status that means you have nowhere to exist but outside. "[S]leep[ing] outside beneath a blanket because they cannot find shelter" is thus "inseparable from [respondents'] status as homeless individuals," and "beyond what the City may constitutionally punish." Pet. App. 190a.

The City's primary response is that "original meaning and history" demonstrate that the Cruel and Unusual Punishments Clause circumscribes the criminal process in just one way: It "outlaws only methods of punishment that unnecessarily superadd pain (cruel) and have long fallen out of use (unusual)." Pet. 25 (internal quotation marks and alteration omitted). The City did not even mention this argument before the district court or Ninth Circuit panel, however, let alone present the historical evidence that would be necessary to adjudicate it. Pet. App. 105a (Silver & Gould, JJ., statement regarding denial of rehearing) (noting that the "historical inquiry," which "may require the parties retain experts," was never briefed).

The City, moreover, makes no attempt to reconcile its cramped view of the Eighth Amendment with this Court's statement of the law in *Ingraham*. And its only response to *Robinson* is to dismiss it as a "one-off holding" that should not be "expanded." Pet. 15, 27. But *Robinson*'s reasoning necessarily includes involuntary biological reactions to a status: If "having a common cold" is unpunishable, so too are symptoms like coughing or sneezing.

Five Justices endorsed this reading of *Robinson* in *Powell v. Texas*, 392 U.S. 514 (1968), a case addressing whether the Eighth Amendment prohibited the criminalization of public intoxication where the defendant was an alcoholic. Notably, contrary to the City's position here, every Justice in *Powell* embraced *Robinson*'s holding that the Eighth Amendment proscribes punishment for an involuntary status. Justice Marshall, in an opinion joined by three other Justices, expressed the view that the Eighth Amendment did not, however, prevent the State from punishing the defendant "for being in public while drunk on a particular occasion." *Id.* at 532 (plurality opinion). Justice Marshall reasoned that, unlike in *Robinson*, the State "ha[d] not sought to punish a mere status," and the State had not "attempted to regulate [the defendant's] behavior in the privacy of his own home." *Id.*

In an opinion also joined by three other Justices, Justice Fortas argued that "the essential constitutional defect" with the defendant's conviction was "the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid." *Id.* at 567–68 (Fortas, J., dissenting). He interpreted the trial court's finding to mean that the defendant "was powerless to avoid drinking" and, after taking "his first drink, he had an uncontrollable compulsion to drink to the point of intoxication," at which point "he could not prevent himself from appearing in public places." *Id.* at 568 (internal quotation marks omitted).

Justice White cast the deciding vote. In a lone concurrence, he agreed with Justice Fortas that "the chronic alcoholic with an irresistible urge to consume

alcohol should not be punishable for drinking or for being drunk." *Id.* at 549 (White, J., concurring in the result). To adopt a contrary reading of *Robinson*, he explained, would be "like forbidding criminal conviction for being sick with flu or epilepsy but permitting punishment for running a fever or having a convulsion." *Id.* at 548. On the facts of the case before the Court, however, Justice White thought that "nothing in the record indicate[d] that [the defendant] could not have done his drinking in private or that he was so inebriated at the time that he had lost control of his movements and wandered into the public street." *Id.* at 553. Because the defendant "made no showing that he was unable to stay off the streets on the night in question," Justice White concluded that he "did not show that his conviction offended the Constitution." *Id.* at 554.

Like Justice White and the dissenting Justices in *Powell*, the Ninth Circuit "gleaned from *Robinson* the principle … that the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being." *Martin*, 920 F.3d at 616 (internal quotation marks omitted). And whatever disagreement the Justices had about the application of that principle to harmful compulsive behavior arising from addiction, the Ninth Circuit reasoned that it certainly prohibits jurisdictions from punishing involuntarily homeless persons for the universal biological necessity of sleeping outside when no shelter is available. *Id.* The decision below recognizes that holding's application to the City's infliction of punishment for using a blanket to

survive cold temperatures, also "a life-preserving imperative." Pet. App. 48a n.28.[2]

Indeed, as Judges Silver and Gould observed in their statement regarding the rehearing denial, a contrary view would empower jurisdictions to "avoid *Robinson* by tying 'statuses' to inescapable human activities." *Id.* at 108a–109a. Rather than criminalizing the condition of being addicted to narcotics, for example, California could have "ma[de] it a criminal offense for a person addicted to the use of narcotics to fall asleep." *Id.* at 109a (internal quotation marks omitted). "Reading *Robinson* as allowing such simple evasion is absurd." *Id.*

The City does not contest that its position permits this end run around *Robinson*. Instead, it argues that the Ninth Circuit's holding has its own absurd consequence of foreclosing the criminalization of "all sorts of harmful conduct (such as public camping, drug use, and sexual assaults) that could be characterized as involuntary or compulsive." Pet. 29–30.

[2] The City's argument regarding *Marks v. United States*, 430 U.S. 188 (1977), *see* Pet. 4–5, 28–29, is wrong for the reasons identified by the panel, *see* Pet. App. 49a–52a, and a sideshow in any event. As Judge Collins recognized, even if the City's application of *Marks* were correct, it would at most establish that *Powell* "left open" whether "conduct [that] *has* been shown to be involuntary" is punishable. Pet. App. at 93a–94a. *Kahler v. Kansas*, 140 S. Ct. 1021 (2020), does not help the City, *see* Pet. 28, as it merely cites the *Powell* plurality for the uncontroversial proposition that States play a "paramount role … in setting standards of criminal responsibility," 140 S. Ct. at 1028 (internal quotation marks omitted).

The City does not identify any decision relying on *Martin* or the decision below for the proposition that the Eighth Amendment forecloses punishment for harmful compulsive behavior, and for good reason: Unlike the addiction-related conduct that divided the *Powell* Court, sleeping is not a harmful compulsion, but rather a "universal and unavoidable consequence[] of being human." *Martin*, 920 F.3d at 617 (internal quotation marks omitted). Using a blanket to survive a cold night is likewise a universal necessity for human survival when shelter is unavailable. *See* Pet. App. 47a–48a. City leaders acknowledged as much when they decided to enforce the challenged ordinances for the express purpose of forcing the City's involuntarily homeless residents to leave—i.e., to *stop existing* in Grants Pass. *See supra* pp. 5–6. The Eighth Amendment does not and need not equate laws prohibiting harmful compulsive conduct with the City's efforts to "criminalize[] [its homeless residents'] existence." Pet. App. 208a.

Although the City flags a footnote in *Manning v. Caldwell*, 930 F.3d 264 (4th Cir. 2019) (en banc), citing *Martin* for the proposition that "the controlling *Powell* opinion … is Justice White's concurrence," Pet. 23, *Manning* does not otherwise cite *Martin* as supporting its holding that the Eighth Amendment limits the criminalization of alcohol consumption by "habitual drunkards."[3] Judge Wilkinson's dissent explicitly

[3] The panel majority correctly notes in its statement regarding the rehearing denial that Judge O'Scannlain's position, if adopted, would conflict with *Manning*, Pet. App. 113a: If the

recognizes the distinction: While the majority's decision to strike down the habitual drunkard law was, in Judge Wilkinson's view, "at odds" with *Robinson*, striking down a law that punishes homeless people for engaging in "essential bodily functions" such as "eat[ing] or sleep[ing]" is "simply a variation of *Robinson*'s command that the state identify conduct in crafting its laws, rather than punish a person's mere existence." *Manning*, 930 F.3d at 289–90 (Wilkinson, J., dissenting) (citing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992)).

The United States likewise recognized the difference between universal biological necessities and harmful compulsive behaviors in its Statement of Interest in *Martin*: "[T]he knotty concerns raised by the *Powell* plurality" regarding whether addiction-related conduct is truly involuntary are "not at issue when, as here, they are applied to conduct that is essential to human life and wholly innocent, such as sleeping. No inquiry is required to determine whether a person is compelled to sleep; we know that no one can stay awake indefinitely." Statement of Interest of the United States at 12–13, *Bell v. City of Boise*, No. 1:09-cv-00540-REB (D. Idaho Aug. 6, 2015), ECF No. 276.

Fourth Circuit is right that Virginia's habitual drunkard law transgressed the Eighth Amendment because it criminalized compulsive alcohol consumption, then it is necessarily true that the City's ordinances transgress the Eighth Amendment by criminalizing universal, biologically necessary functioning. But that does not mean that the latter conclusion necessitates the former.

Like a law criminalizing breathing outside by homeless persons, the City's ordinances punish respondents for simply existing within City limits. "It should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment." *Id.* at 11 (internal quotation marks and alteration omitted).

II. Neither *Martin* Nor The Decision Below Implicate Any Division Of Authority.

The City does not identify any case in conflict with *Martin* or the decision below.

The City first argues that by recognizing "a constitutional right to encamp on public property," the Ninth Circuit has parted ways with the Eleventh Circuit, the Fifth Circuit, and the California Supreme Court, which "have rejected similar challenges under the Eighth Amendment." Pet. 16–17 (internal quotation marks omitted).

The City's argument fails at the outset because the Ninth Circuit unequivocally *rejected* a right to encamp on public property. *See* Pet. App. 23a–24a (noting with approval that, "consistent with *Martin*," the district court's injunction left the City free to "ban the use of tents in public parks, limit the amount of bedding type materials allowed per individual, and pursue other options to prevent the erection of encampments that cause public health and safety concerns" (internal quotation marks and alterations omitted)). The panel held only that the Eighth Amendment prohibits the City from punishing involuntarily homeless persons for engaging in the unavoidable biological function of sleeping with "rudimentary forms of pro-

tection" to survive cold nights when shelter is unavailable. *Id.* at 57a. None of the cases cited in the petition are to the contrary.

The City characterizes *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), as rejecting the homeless plaintiff's Eighth Amendment challenge to an anti-sleeping ordinance "because it 'targeted conduct'" rather than "'status.'" Pet. 17 (alteration omitted) (quoting *Joel*, 232 F.3d at 1362). The City omits that the Eleventh Circuit reached that conclusion based on "unrefuted evidence" that a local shelter "ha[d] never reached its maximum capacity," which "distinguish[ed]" the plaintiff's challenge from those where the lack of shelter beds meant that the anti-sleeping ordinance effectively "criminalize[d] involuntary behavior." *Joel*, 232 F.3d at 1362. This is precisely the same line drawn by the Ninth Circuit: Where sleeping outside is not a biological necessity because other options are available, an anti-sleeping ordinance targets only the conduct of choosing to sleep outside rather than in a shelter, and not the status of being involuntarily homeless. *See Martin*, 920 F.3d at 617 & n.8.

As the City acknowledges, *Johnson v. City of Dallas*, 61 F.3d 442 (5th Cir. 1995), does not address the question presented here—i.e., whether the Eighth Amendment constrains the ability of jurisdictions to punish involuntarily homeless persons for sleeping outside when shelter is unavailable. *See* Pet. 17 (describing *Johnson* as involving "an earlier step of the analysis"). The Fifth Circuit held only that the plaintiffs lacked standing to challenge Dallas's anti-sleeping ordinance because they had not been convicted of violating it. *Johnson*, 61 F.3d at 443–45. The City does not raise the issue of respondents' standing in its

petition, but rather asks this Court to decide only whether its ordinances violate the Eighth Amendment. *See* Pet. i. As such, *Johnson* is not a basis for the Court to grant the petition.

Tobe v. City of Santa Ana, 892 P.2d 1145 (Cal. 1995), involved a facial challenge to an ordinance barring camping and storage on public property. Accordingly, the only question addressed by the California Supreme Court was whether "there were *no circumstances* in which the ordinance could be constitutionally applied." *Id.* at 1157 (emphasis added). The court expressly declined to reach whether the ordinance would survive an as-applied challenge by "an involuntarily homeless person who involuntarily camps on public property." *Id.* at 1166 n.19. As respondents challenge the City's ordinances only as applied to involuntarily homeless residents who have nowhere else to sleep, *Tobe* is inapposite.

The City's second purported split "'over how to read the Eighth Amendment,'" Pet. 18 (quoting Pet. App. 130a), is even more illusory. According to the City, "24 courts have held the line at the act/status distinction," purportedly in contrast to *Martin* and the decision below. *Id.* Aside from *Tobe* and *Joel* (distinguished above, *supra* pp. 22–23), all of the City's cases involve allegedly compulsive sexual behavior or addiction, with many holding that the conduct was not in fact involuntary.[4] None hold that a jurisdiction

[4] *See, e.g.*, *United States v. Black*, 116 F.3d 198, 201 (7th Cir. 1997) (possession of child pornography was not "involuntary or uncontrollable"); *United States v. Moore*, 486 F.2d 1139, 1151

can punish universal biologically necessary "acts" like sleeping or using a blanket to survive in the cold, and none express any disagreement with the Ninth Circuit's application of *Robinson* to strike down such laws.

III. The City's Exceptional Importance Argument Is Unrelated To The Ninth Circuit's Actual Holding.

A. The City's exceptional importance argument turns entirely on the false claim that the Ninth Circuit has deprived cities of the "practical ability" to address the "growth of public encampments," Pet. 6, and the "fires, filth, disease, and fentanyl and meth" that allegedly accompany them, *id.* at 32-33 (internal quotation marks omitted).

Again, *see supra* pp. 21–22, neither *Martin* nor the decision below prevents cities from clearing or otherwise regulating encampments. To the contrary, both decisions explicitly recognize the right of jurisdictions to criminalize the use of tents on public property. *See* Pet. App. 55a n.34 (describing it as "obviously false" that the panel decision limits the City's ability to "'ban the use of tents'"); *Martin*, 920 F.3d at 589 (Berzon, J., concurring in denial of rehearing en banc) ("The opinion clearly states that it is not outlawing ordinances 'barring the obstruction of public rights of way or the erection of certain structures,' such as tents, and that the holding 'in no way dictates to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or

(D.C. Cir. 1973) (plurality opinion) (drug possession is a "freely willed" act even for people with drug addiction).

sleep on the streets at any time and at any place.'" (alterations and citations omitted)).

Jurisdictions, rather, "remain free to address the complex policy issues regarding homelessness in the way [they] deem fit," including by restricting sleeping to "certain times and in certain places," "ban[ning] the use of tents in public parks, limi[ting] the amount of bedding type materials allowed per individual, and pursu[ing] other options to prevent the erection of encampments that cause public health and safety concerns." Pet. App. 23a–24a, 98a (internal quotation marks omitted).

Indeed, numerous district courts have rejected Eighth Amendment challenges to encampment sweeps, *see id.* at 54a n.33 (collecting cases), and Grants Pass itself has continued to dismantle encampments throughout this litigation, as it is free to do under the district court's injunction and the decision below, *see, e.g.*, City Manager's Weekly Report 7 (Nov. 9, 2023), *available at* https://perma.cc/6JNE-UHQS (twenty-nine encampments cleared the previous week).

The district court decisions cited by the City likewise confirm that jurisdictions retain the power to clear encampments:

San Francisco. The City claims that a district court enjoined San Francisco from "clean[ing] up public encampments" even though it "offer[ed] appropriate shelter to the encampment residents." Pet. 31. This is false. As an initial matter, the record established that, in violation of its own policies, San Francisco was *not* offering shelter before imposing criminal penalties against homeless people for "sitting,

sleeping, or lying outside on public property" when they had no option of sleeping indoors. *See Coal. on Homelessness v. City & County of San Francisco*, 647 F. Supp. 3d 806, 833–37 (N.D. Cal. 2022). Because that practice of making it impossible for homeless persons to exist in San Francisco ran afoul of the Eighth Amendment, the district court entered a narrow preliminary injunction to that effect. *Id.* at 842.

The court explicitly recognized, however, San Francisco's authority to enforce its laws "directed at conduct *beyond* sitting, lying, or sleeping outside." *Id.* at 841 n.19 (emphasis added). The only constitutional constraint on encampment sweeps that the court identified is the Fourth Amendment's requirement that San Francisco comply with its own "bag and tag policy" of storing personal property it seizes during sweeps, *id.* at 837, 842—a modest obligation that the city had already imposed on itself and that in any event had nothing to do with *Martin* or this case. Indeed, San Francisco has conducted massive encampment clearances under the injunction.[5]

Phoenix. Involuntarily homeless residents of Phoenix challenged city ordinances that were "essentially identical to the ordinances at issue in *Martin*,"—i.e., they effectively criminalized sleeping anywhere on public property. *Fund for Empowerment v. City of Phoenix*, 646 F. Supp. 3d 1117, 1124 (D. Ariz. 2022). The district court thus enjoined Phoenix from

[5] *See* Alexander Hall, *Newsom Trashed for Admitting San Francisco Was Cleaned Up for China Summit*, Fox News (Nov. 13, 2023), https://www.foxnews.com/media/newsom-trashed-admitting-san-francisco-cleaned-up-china-summit-slap-face.

enforcing these anti-sleeping ordinances "against individuals who practically cannot obtain shelter." *Id.* at 1132.

The City's assertion that the district court also enjoined Phoenix from cleaning up a large encampment, Pet. 31–32, is false: Although the court held that the Fourth and Fourteenth Amendments require Phoenix to provide notice before seizing or destroying property (again for reasons unrelated to *Martin* or this case), 646 F. Supp. 3d at 1126, it expressly allowed the city to implement its plan to clean up the encampment (called "The Zone"), citing numerous other cases where courts had rejected Eighth Amendment challenges to encampment sweeps, *id.* at 1127–28. And when local businesses sued Phoenix for nonetheless failing to clean up The Zone, the state court likewise recognized that neither *Martin* nor this case prevented the city from doing so. *Brown v. City of Phoenix*, No. CV 2022-010439, slip op. at 19–20 (Maricopa Cnty. Super. Ct. Mar. 27, 2023), https://perma.cc/NFT2-4F9N. Consistent with these decisions, Phoenix has now eliminated The Zone altogether.[6]

The district court cases cited by amici are equally unhelpful to the City. In *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075 (W.D. Wash. 2019), the district court *rejected* the plaintiffs' challenge to an Aberdeen ordinance allowing encampment sweeps, explaining

[6] Jack Healy, *Phoenix Encampment Is Gone, but the City's Homeless Crisis Persists*, N.Y. Times (Nov. 4, 2023), https://www.nytimes.com/2023/11/04/us/phoenix-tent-camp-homelessness.html.

that "*Martin* does *not* limit the City's ability to evict homeless individuals from particular places." *Id.* at 1081–82 (emphasis added). The court noted several other district court decisions reaching the same conclusion. *Id.* Moreover, although the court temporarily restrained Aberdeen from enforcing another ordinance that made "camping" punishable on essentially all public property, it did so to give the parties an opportunity to develop an evidentiary record regarding "how the ordinances … actually apply to Plaintiffs." *Id.* at 1083. The court emphasized that *Martin* involved "total homelessness criminalization," and indicated that it would follow other courts in not "stretch[ing] the ruling beyond its context." *Id.* at 1081. The Court subsequently vacated the temporary injunction, *see* Minute Order, *Aitken v. City of Aberdeen*, No. 3:19-cv-05322 (Sept. 13, 2019), ECF No. 70, and the plaintiffs dropped their case, *see* ECF No. 72–73.

Many of amici's other examples similarly illustrate *Martin*'s narrow scope:

- In *Quintero v. City of Santa Cruz*, No. 5:19-cv-01898-EJD, 2019 WL 1924990, at *1 (N.D. Cal. Apr. 30, 2019), the district court *rejected* an Eighth Amendment challenge to encampment sweeps.
- In *Sacramento Homeless Union v. County of Sacramento*, 617 F. Supp. 3d 1179, 1199 (E.D. Cal. 2022), the district court found that *Martin* "ha[d] no bearing" on the plaintiffs' challenge to Sacramento's encampment sweeps.
- In *Boring v. Murillo*, No. LA CV 21-07305-DOC (KES), 2022 WL 14740244, at *6 (C.D. Cal.

Aug. 11, 2022), the district court simply declined to dismiss the complaint at the pleading stage so that the parties could develop the evidentiary record on whether a "geographic limitation" in Santa Barbara's anti-sleeping ordinance "mean[s] the ban does not violate the Eighth Amendment."

- In *Warren v. City of Chico*, No. 2:21-CV-00640-MCE-DMC, 2021 WL 2894648, at *3–4 (E.D. Cal. July 8, 2021), the district court enjoined Chico only from enforcing an ordinance imposing criminal penalties on homeless persons for resting anywhere on public property, after concluding that Chico's plan to force its homeless residents to move to an airport tarmac did not solve the Eighth Amendment problem.

Amici's other examples have nothing to do with the Eighth Amendment at all, let alone *Martin* or the decision below. *E.g.*, *Garcia v. City of Los Angeles*, 11 F.4th 1113, 1118 (9th Cir. 2021) (seizure of plaintiff's property likely violated Fourth Amendment); *Santa Cruz Homeless Union v. Bernal*, 514 F. Supp. 3d 1136, 1140–41, 1146 (N.D. Cal. 2021) (enjoining encampment sweep on Fourteenth Amendment grounds during a COVID surge).[7]

In short, in jurisdictions where encampments exist without interference, that is a policy choice, not a judicial mandate under *Martin* or this case. Why, then,

[7] The City's claim that *Martin* has "'inevitably' extended to 'public defecation and urination,'" Pet. 32, rests on one line of dictum in an unpublished district court decision rejecting the

have so many politicians and public officials filed amicus briefs misattributing the encampments in their cities to court decisions?

The answer is simple: Political deflection. For years, western cities forewent investments in shelter capacity, housing, mental-health services, and addiction treatment, in favor of "'tolerant containment'—basically [pushing] the unhoused to certain neighborhoods of squalor such as San Francisco's Tenderloin or Los Angeles' Skid Row, and then selectively prosecuting them for living on the streets."[8]

But as housing costs have skyrocketed across the western region in recent years, so, too, has its homeless population, to a point that is no longer containable or tolerable to voters. The encampments that many amici actively encouraged are now the focus of intense public backlash, and it is easier to blame the

plaintiffs' challenge to Sacramento's decision to remove a portable toilet from public property, *see Mahoney v. City of Sacramento*, No. 2:20-cv-00258, 2020 WL 616302, at *3 (E.D. Cal. Feb. 10, 2020). The district court in this case affirmatively recognized the City's authority "to enforce laws that actually further public health and safety, such as laws restricting … public urination or defecation." Pet. App. 200a. The Ninth Circuit panel majority agreed. *Id.* at 101a–103a (Silver & Gould &, JJ., statement regarding rehearing denial).

[8] Greg Rosalsky, *How California Homelessness Became a Crisis*, NPR (June 8, 2021), https://www.npr.org/sections/money/2021/06/08/1003982733/squalor-behind-the-golden-gate-confronting-californias-homelessness-crisis.

courts than to take responsibility for finding a solution. The two encampment crises cited by the City prove the point:

California Governor Gavin Newsom and San Francisco Mayor London Breed publicly claimed for months that the injunction in *Coalition on Homelessness* prohibited San Francisco from clearing encampments,[9] and they each filed amicus briefs urging this Court to review the decision below on that ground. In mid-November, however, they abruptly switched course and ordered a massive encampment sweep ahead of a visit by President Biden and Chinese President Xi Jingpin. Although Breed claimed that "a recent clarification" from the Ninth Circuit allowed the city to resume its sweeps,[10] all the Ninth Circuit did was *decline* to modify the injunction because the parties *already agreed* in relevant part on its scope. *See* Order, No. 23-15087 (9th Cir. Sept. 5, 2023), Dkt. 88 (noting that "the parties agree[d]" on "the sole issue" raised by the city's motion to modify, namely, "the definition of 'involuntarily homeless'"). Newsom was more candid: "I know folks are saying, 'Oh they're just

[9] *See, e.g.*, Barnini Chakraborty, *Gavin Newsom Blames Progressive Advocates and Judges for California's Homelessness Crisis*, Wash. Exam'r (Aug. 30, 2023), https://www.washingtonexaminer.com/news/newsom-california-homelessness-democrats-blame-judges.

[10] London Breed, *Injunction Update: Our Path Forward*, Medium (Sept. 25, 2023), https://perma.cc/7Q4B-8RHE.

cleaning up this place because all those fancy leaders are coming to town.' That's true, because it's true."[11]

Meanwhile, in Phoenix, city leaders "transport[ed] homeless people from other locations in Phoenix *into* The Zone," and then refused to address the encampment's dangerous and inhumane conditions on the ground that "its hands are tied by the *Martin* ruling," essentially "exploit[ing] … the rulings in this case and in *Martin*, as excuses for inaction." Goldwater Institute Amicus Br. 11–12, 15. As noted above, Phoenix has now cleared The Zone after a state court rejected the city's claim that *Martin* and the decision below prohibited it from doing so. *Supra* p. 27.

Although the Goldwater Institute's amicus brief is wrong about much, it gets this right: The public handwringing by politicians over this case is largely opportunistic—"a device whereby city officials can excuse" their inaction and distract from their failed policies by claiming that the Ninth Circuit has constrained them far beyond what *Martin* and the decision below actually say. Goldwater Institute Amicus Br. 11. There is no reason for the Court to engage with this political theater.

B. *Martin* and the decision below hold only that jurisdictions cannot punish involuntarily homeless persons for *sleeping* on public property when shelter is unavailable and there is nowhere else to sleep, or for using "the rudimentary protection of bedding" to survive cold nights. Pet. App. 23a–24a, 47a–48a &

[11] Hall, *supra* note 5.

n.28; *Martin*, 920 F.3d at 604. For all the City's insistence on misdescribing its ordinances as "commonplace restrictions on public camping," Pet. 2, it does not dispute that the ordinances effectively make it biologically impossible for its involuntarily homeless residents to stay in Grants Pass without facing punishment.

As the Ninth Circuit recognized, there is nothing "commonplace" about punishing involuntarily homeless persons for existing. Nor can the City seriously claim that its efforts to do so are necessary "to make progress on the underlying causes of homelessness." *Id.* at 35. Empirical evidence confirms what logic dictates: "[C]riminalization does not reduce the number of people experiencing homelessness."[12] To the contrary, punishing people for involuntarily sleeping outside simply imposes "fines they cannot afford" and "jail time that puts jobs in jeopardy and sends people back out to the streets, where their new criminal records will only make it harder to find housing and jobs."[13]

The City may well want to punish its homeless residents for living in Grants Pass anyway, if only to "make it uncomfortable enough" to force them out of town and into neighboring jurisdictions. ER 368. But what happens when those jurisdictions push them back by imposing an even more "uncomfortable" set of

[12] Jeff Olivet, *Collaborate, Don't Criminalize: How Communities Can Effectively and Humanely Address Homelessness*, U.S. Interagency Council on Homelessness (Oct. 26, 2022), https://perma.cc/MMR2-SJNP.

[13] *Id.*

penalties, setting off an escalating banishment race among municipalities across the West Coast? Neither the City nor its amici say.

IV. The Petition Presents Numerous Vehicle Problems.

Finally, even if the Court were interested in reviewing the question presented, the petition suffers from several serious vehicle problems.

First, and most fatally, this Court's resolution of the question presented would have no bearing on the legal rights of the parties. The district court granted summary judgment to respondents on two independently sufficient grounds: (1) the ordinances violate the Cruel and Unusual Punishments Clause by imposing punishment for merely existing outside with nowhere else to go, and (2) the fines imposed under those ordinances violate the Excessive Fines Clause by imposing monetary sanctions grossly disproportionate to the severity of the offense. Pet. App. 176a–191a.

The petition asks this Court to review only the Cruel and Unusual Punishments Clause's application to the ordinances. Pet. i. This is not an oversight. The City cannot seek review of the Excessive Fines Clause ruling because it forfeited that issue on appeal. As the Ninth Circuit observed, "[t]he City present[ed] no meaningful argument on appeal regarding the excessive fines issue." Pet. App. 56a. Accordingly, even if this Court were to reject the Ninth Circuit's application of the Cruel and Unusual Punishments Clause, the injunction would remain intact on grounds the City has not adequately preserved.

Second, on July 1, 2023, before the City filed its petition for certiorari, a new Oregon statute went into effect that restrains municipalities from criminalizing homelessness by punishing people for involuntarily sleeping outside or using a blanket to survive. The statute provides that "[a]ny city or county law that regulates the acts of sitting, lying, sleeping or keeping warm and dry outdoors on public property that is open to the public must be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." Or. Rev. Stat. Ann. § 195.530(2). And it grants persons "experiencing homelessness" a cause of action to "bring suit for injunctive or declaratory relief to challenge the objective reasonableness" of a covered city or county ordinance. *Id.* § 195.530(4). Governor Tina Kotek, who as Speaker of the Oregon House of Representatives was the primary sponsor of the bill, testified, "[t]his bill is the product of a workgroup process to operationalize and affirm the principles" of *Martin* to "ensure that individuals experiencing homelessness are protected from fines or arrests for sleeping or camping on public property when there are no other options."[14]

Although it would be premature to say that the statute moots this litigation, as no court has yet had an opportunity to decide how it would apply to the City's ordinances, it appears likely that the statute

[14] *Hearing on H.B. 3115 Before the H. Comm. on the Judiciary*, 2021 Reg. Sess. at 4:29 (Or. 2021) (statement of Rep. Tina Kotek), https://olis.oregonlegislature.gov/liz/mediaplayer?clientID=4879615486&eventID=2021031014&startStreamAt=269#conten,mt (last visited Dec. 4, 2023).

constrains the City's enforcement of its ordinances as much as, if not more than, the injunction in this case.[15] It would be a waste of this Court's resources to review the constitutionality of local ordinances that the state legislature has already rejected.

Third, the Ninth Circuit determined that the district court's injunction was too broad, and thus remanded with instructions to "craft a narrower injunction" that reflects the "limited" nature of respondents' "right to protection against the elements, as well as limitations when a shelter bed is available." Pet. App. 55a. In the absence of a final determination from the lower courts on the scope of the injunction, the case is not ripe for this Court's consideration.

Fourth, Debra Blake, the only named plaintiff with standing to challenge the anti-sleeping ordinance, passed away while this case was on appeal. *Id.* at 30a–34a. The Ninth Circuit explained that her death raised a complicated question about its ability to review the district court's resolution of a claim that no living class representative had standing to pursue. *Id.* at 33a. Because it had no briefing on that issue, the Ninth Circuit vacated the district court's grant of summary judgment as to the anti-sleeping ordinance and remanded for the district court to determine

[15] In the first challenge brought under the new statute, the state court preliminarily enjoined Portland's anti-camping ordinance on exclusively state law grounds. *See* Order, *Duncan v. City of Portland*, No. 23CV39824 (Multnomah Cnty. Cir. Ct. Nov. 9, 2023); Complaint at 17–19, *id.* (Sept. 29, 2023) (stating only state-law claims).

whether a new class representative could be substituted. *Id.* at 34a. Accordingly, if the Court were to grant certiorari now, it may not be able to resolve the question presented as to the entire constellation of relevant ordinances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Edward Johnson
OREGON LAW CENTER
522 SW Fifth Ave.
Suite 812
Portland, OR 97204

Walter Fonseca
OREGON JUSTICE
RESOURCE CENTER
P.O. Box 5248
Portland, OR 97208

Kelsi Brown Corkran
Counsel of Record
Shelby Calambokidis
Joseph W. Mead
William Powell
INSTITUTE FOR
CONSTITUTIONAL ADVOCACY
AND PROTECTION,
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Ave., NW
Washington, DC 20001
(202) 661-6607
kbc74@georgetown.edu

DECEMBER 6, 2023

No. 23-175

IN THE
Supreme Court of the United States

CITY OF GRANTS PASS,

Petitioner,

v.

GLORIA JOHNSON AND JOHN LOGAN, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

AARON P. HISEL
CAPITOL LEGAL SERVICES
901 Capitol Street NE
Salem, OR 97301

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
SAMUEL ECKMAN
DANIEL R. ADLER
PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Twenty-five briefs supporting certiorari filed by a diverse array of amici confirm what the 17 judges urging rehearing en banc below made clear: The Ninth Circuit's decision, which extends its Eighth Amendment ruling in *Martin* v. *City of Boise*, 920 F.3d 584 (9th Cir. 2019), is unprincipled, unworkable, and irreconcilable with decisions of this Court, as well as other courts of appeals and state supreme courts. Respondents deny that the Ninth Circuit's decisions have worsened the homelessness crisis, but the experiences of amici—which include 20 States, California's governor, dozens of cities ranging from Phoenix and San Francisco to Seattle and Anchorage, and myriad

community and business groups—prove the real and tangible effects of *Martin*.

The Ninth Circuit squarely held below that the Cruel and Unusual Punishments Clause of the Eighth Amendment prohibits cities from regulating purportedly "involuntary" public camping, even through civil citations. Respondents' attempts to minimize the scope and impact of that holding, which "inevitably" extends to "public defecation and urination," defy reality. *Martin*, 920 F.3d at 596 (M. Smith, J., dissenting from denial of rehearing en banc). In *Martin*, this Court heard similar assurances that the Ninth Circuit's ruling was narrow and would leave local governments with adequate tools to enforce basic health and safety laws. That was an empty promise, as the unprecedented coalition of amici reflects. The Court should grant review and reject the Ninth Circuit's untenable reading of the Eighth Amendment.

I. THE NINTH CIRCUIT'S DECISION ENTRENCHES A CONFLICT.

A. Respondents attempt to downplay the Ninth Circuit's recognition of a right to "encamp" on public property. Opp. 21. But their objection is semantic. As respondents' own reformulation shows, the decision below holds that "involuntarily homeless persons" have a right to live and sleep on public property with "'rudimentary forms of protection.'" Opp. 21-22. The Ninth Circuit reached that conclusion by embracing "the principle that 'the Eighth Amendment prohibits the state from punishing an involuntary act or condition if it is the unavoidable consequence of one's status or being'" and then affirming a sweeping classwide injunction. Pet. App. 50a, 57a (quoting *Martin*, 920 F.3d at 616). That decision—however respondents

label it—creates a constitutional right to camp on public property.

Respondents' distortion of the decision below cannot mask the direct conflict with *Tobe* v. *City of Santa Ana*, 892 P.2d 1145 (Cal. 1995), and *Joel* v. *City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), which rejected similar challenges to public-camping ordinances. Pet. 17. Respondents argue that those decisions are factually distinguishable because the Eleventh Circuit also mentioned available shelter beds and the California Supreme Court confronted a facial challenge. Opp. 22-23. But neither distinction diminishes the clash with those courts' legal conclusion that the Cruel and Unusual Punishments Clause forbids "punishment for status" simpliciter, *not* for the "proscribed conduct" of public camping. *Tobe*, 892 P.2d at 1166-1167; accord *Joel*, 232 F.3d at 1361-1362; but see Pet. App. 50a.

B. Respondents barely engage with the broader split on the Eighth Amendment's application to involuntary conduct. Seven federal courts of appeals and 17 state courts of last resort have properly interpreted *Robinson* v. *California*, 370 U.S. 660 (1962), to prohibit only pure status crimes; only the Ninth and Fourth Circuits and one state supreme court reject that consensus. Pet. 18-24. Respondents alone refuse to recognize that "sharp split" on the meaning of this Court's precedent, which judges on both sides have long acknowledged. *United States* v. *Moore*, 486 F.2d 1139, 1239 n.178 (D.C. Cir. 1973) (en banc) (Wright, J., dissenting); see Pet. App. 130a-131a (O'Scannlain, J., respecting denial of rehearing en banc).

Respondents' only rejoinder (Opp. 19, 23-24) is that the prohibited conduct in other cases (drug use, public intoxication, sexual assaults, etc.) is more

"harmful" than public camping. But the ultimate question here is *who decides*—the people's representatives or federal judges—whether conduct is sufficiently harmful to warrant prohibition. And even the Ninth Circuit did not embrace respondents' invented distinction. Instead, it relied on decisions involving drug addiction (*Robinson*) and public intoxication (*Powell* v. *Texas*, 392 U.S. 514 (1968)). Pet. App. 47a.

II. THE DECISION BELOW IS WRONG.

Respondents primarily argue (Opp. 13-21) that the Ninth Circuit's expansive interpretation of the Cruel and Unusual Punishments Clause is correct. The Court should consider that important question with the benefit of full merits briefing. In any event, respondents cannot square the decision below with the Constitution and controlling precedent.

A. Respondents never deny that *Martin* and the decision below lack any support in the "text, history, or tradition of the Eighth Amendment." Pet. App. 119a (opinion of O'Scannlain, J.). After all, no serious argument can be made applying these traditional tools of constitutional interpretation that the short jail sentences and fines in *Martin*—let alone the civil citations here—are cruel and unusual modes of punishment. Pet. 24-27.

Respondents try to sidestep first principles by contending that the Eighth Amendment's original meaning, history, and tradition are off-limits because the City did not canvass the "historical evidence" or "'retain experts'" below. Opp. 15 (citation omitted). That is not how preservation (or constitutional interpretation) works. This Court has repeatedly held that, "[o]nce a federal claim is properly presented, a party can make any argument in support of that

claim" and is "not limited to the precise arguments [it] made below." *Citizens United* v. *FEC*, 558 U.S. 310, 330-331 (2010) (citations omitted). Respondents' contrary view would undermine inquiry into "original meaning, as demonstrated by its historical derivation," which has long been a touchstone of this Court's decisions construing the Eighth Amendment and other constitutional provisions. *Ingraham* v. *Wright*, 430 U.S. 651, 670 n.39 (1977); see, *e.g.*, *Kennedy* v. *Bremerton School District*, 142 S. Ct. 2407, 2428 (2022).

B. Respondents' merits argument rests on their misreading of three decisions of this Court: *Robinson*, which they ask the Court to extend; the splintered opinions in *Powell*; and a sentence fragment from *Ingraham*. Opp. 14-18. None supports the Ninth Circuit's transformation of the Cruel and Unusual Punishments Clause into a font of judicial power to micromanage municipal housing and land-use policy.

Respondents begin with *Robinson*, which held that States cannot punish "the 'status' of narcotics addiction" but recognized that States may punish drug possession by addicts. 370 U.S. at 664-667. Respondents urge the Court to extend *Robinson*'s status-only holding to include "involuntary" conduct that stems from "a status." Opp. 15. That unwarranted expansion finds no support in the Eighth Amendment's text, history, or tradition. Pet. 25. At this stage, though, what matters is that seven circuits and 17 state supreme courts have refused to extend *Robinson* in this way. Pet. 20-22.

Respondents promptly retreat to *Powell*, claiming that Justice Fortas's dissent and Justice White's concurrence "endorsed" respondents' "reading of *Robinson*." Opp. 16. But the *Court* has only ever applied

Justice Marshall's plurality opinion and Justice Black's concurrence, both of which upheld the "paramount role of the States in setting 'standards of criminal responsibility.'" *Kahler* v. *Kansas*, 140 S. Ct. 1021, 1028 (2020) (quoting *Powell*, 392 U.S. at 533 (plurality opinion)); see Pet. 27-28. Tellingly, respondents also retreat from the Ninth Circuit's rationale for bypassing the *Powell* plurality opinion: its view that *Marks* v. *United States*, 430 U.S. 188 (1977), requires fidelity to a dissent and dicta in a concurrence. Pet. App. 49a-50a; see, *e.g.*, Pet. 28-29; San Francisco Br. 13-19. Respondents now call the ground on which they prevailed below a "sideshow" because properly applying *Marks* would mean *Powell* "'left open'" the question presented here. Opp. 18 n.2. But without *Powell*, the foundation of respondents' merits argument crumbles.

Finally, respondents repeatedly try (Opp. i, 1, 13, 15) to transform a snippet from *Ingraham* into a broad Eighth Amendment rule, but that decision undermines their position. Respondents quote *Ingraham*'s observation that the Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such." 430 U.S. at 667. But *Ingraham*'s only example was *Robinson*, whose prohibition on pure status crimes doesn't support respondents. *Ibid.* *Ingraham* further underscored that this "limitation," disconnected from the "'primary purpose of the Cruel and Unusual Punishments Clause,'" must "be applied sparingly." *Ibid.* The Ninth Circuit's extension of *Robinson* has been anything but sparing.

III. THE QUESTION PRESENTED IS EXCEPTIONALLY IMPORTANT.

Despite more than two dozen amicus briefs, respondents attempt to downplay the stakes, insisting

that the "narrow scope" of the Ninth Circuit's decision will not interfere with cities' efforts to "clea[r] or otherwise regulat[e] encampments." Opp. 24, 28. That prediction should sound familiar: This Court heard the same assurances four years ago, when the *Martin* plaintiffs insisted that any "policy concerns are dramatically overstated" because the decision had "limited practical consequence." Opp. 25-28, No. 19-247. As dozens of amici in this case—including many government officials charged with complying with the Ninth Circuit's decisions—have explained, those assurances proved disastrously wrong.

A. Cities, counties, and States all agree that *Martin* has "wreaked practical havoc in courts and on the ground in municipalities across the Ninth Circuit." San Francisco Br. 6; see, *e.g.*, California Counties Br. 12-14; States Br. 5-11. That decision exacerbated the homelessness crisis, prevented comprehensive and swift responses to encampments, and undermined the "core mandate for every municipality" to "keep its public space safe and accessible to all its residents." Los Angeles Br. 19.

Contrary to respondents' assertion (Opp. 31-32), San Francisco's limited cleanup of encampments in advance of President Xi's visit illustrates the severe burdens the Ninth Circuit's decisions inflict. San Francisco began preparations months in advance merely to clear a part of the South of Market neighborhood.[1] That San Francisco's months-long partial cleanup of a neighborhood made national news is a

[1] David Sjostedt, *San Francisco 'Cleaned Up' Streets Ahead of APEC. But How and What, Exactly, Did It Do?*, S.F. Standard (Nov. 14, 2023), https://tinyurl.com/2ba9ucw4.

disheartening sign of the new normal under *Martin*.[2] And within weeks, the "homeless encampments have returned," as two-thirds of their inhabitants (162 of 244) rejected San Francisco's offers of shelter.[3]

The Ninth Circuit's open-ended standards also foist on local governments frequent actual and potential litigation over such issues as what constitutes adequate shelter, *e.g.*, Los Angeles Br. 14-15, and where and when cities may enforce restrictions, *e.g.*, Phoenix Br. 23. As Governor Newsom observes (Br. 12), the test's opacity puts public officials in a no-win situation where "[a]ny attempt to move unhoused persons out of encampments," or to regulate "the place or manner in which unhoused persons can sleep, will at best subject the community to litigation and at worst result in a broad injunction." Los Angeles likewise reports (Br. 21) that "the chaos of defending lawsuits from both sides over whether or how to enforce public space regulations creates paralysis and diverts limited public resources from the homeless population that needs it most." Absent this Court's intervention, the paralysis will only worsen now that the Ninth Circuit has blessed the routine certification of sweeping *Martin* classes. Pet. 34.

B. The Ninth Circuit's novel framework is also unworkable. For example, *Martin* and the decision below apply to the "involuntarily homeless." Opp. 33. That test inevitably invites confusion for law enforcement and other officials tasked with "determin[ing]

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[2] *E.g.*, Heather Knight, *Before World Leaders Arrive, San Francisco Races to Clean Up*, N.Y. Times (Nov. 10, 2023), https://tinyurl.com/bdfjcpjh.

[3] Sergio Quintana, *Here's What San Francisco's Streets Look Like 3 Weeks After APEC*, NBC Bay Area (Dec. 11, 2023), http://tinyurl.com/3tmt9bpj.

voluntariness on the ground and in the course of interactions with persons experiencing homelessness." San Francisco Br. 11.

Cities also must undertake the "monumentally difficult" task of counting "available shelter beds" and "homeless residents" on a *nightly* basis and making sure officers in the field know the latest count. Los Angeles Br. 13-14. Even then, cities have no good way "to determine whether someone has declined an offer of shelter, let alone document every interaction." San Francisco Br. 11. No wonder cities across the Ninth Circuit have been compelled to "abandon enforcement of a host of laws regulating public health and safety"—precisely as the *Martin* dissenters predicted. 920 F.3d at 594 (M. Smith, J., dissenting from denial of rehearing en banc).

C. The *Martin* plaintiffs insisted that the burdens and unworkability of the Ninth Circuit's approach that the petitioner there highlighted were "reason for this Court to wait" to grant review until those problems "actually materialize." Opp. 29-31, No. 19-247. Respondents here cannot reprise that response now that *Martin*'s harms have materialized. They instead seek to distract by invoking politics, accusing elected officials of "blam[ing] the courts" for problems they have failed to solve. Opp. 30-31.

Respondents' scapegoating theory is contradicted by the chorus of governmental amici who disagree on much but agree that this Court's intervention is necessary. Amici hale from every State in the Ninth Circuit (plus many others), state and local governments, and both major political parties. These amici hold different policy views on how to address the homelessness crisis—for example, by "lift[ing] impediments" to "creating shelter and housing," Los Angeles Br. 4;

"remov[ing] tents from the sidewalk" to allow for "enhanced cleanings" of encampment areas, Phoenix Br. 15-17; "devoting billions of dollars in funds and resources," San Francisco Br. 1; and setting aside areas of public spaces to be used as outdoor homeless shelters, Chico Br. 16. But they all agree that the Ninth Circuit's decisions stand in the way of solutions to this complex problem and harm the very people they were intended to help. Amici also have put their money where their mouths are. For example, California has "invested more than $15 billion toward homelessness issues." Newsom Br. 9; see also, *e.g.*, Arizona Legislature Br. 19. The crisis has worsened *despite* these efforts, not in the absence of them.

Respondents' narrative is also incoherent. If the crisis of encampments truly were a product of "political expediency" by officials who prefer to blame courts for policy problems, Opp. 3, then amici would have little reason to ask this Court to grant review and reverse the Ninth Circuit's decision, which would eliminate their supposed excuse. The reality is simpler: Public officials have come in droves to this Court not to take part in "[p]olitical theater," Opp. 32, but to seek the return of policy questions the Ninth Circuit wrongly answered under the Eighth Amendment to their rightful place with the people's representatives.

IV. THIS PETITION IS AN IDEAL VEHICLE.

Respondents' supposed vehicle problems (Opp. 34-37) are makeweights and pose no obstacle to review.

A. Respondents contend that the district court's grant of summary judgment under the Eighth Amendment's Excessive Fines Clause is an "independently sufficient groun[d]" for the injunction. Opp. 34. But

the excessive-fines claim was not even a ground for the decision below because the Ninth Circuit did not "resolve whether the fines violate the Excessive Fines clause" and affirmed the injunction solely under the Cruel and Unusual Punishments Clause. Pet. App. 25a-26a, 55a. The excessive-fines claim also was not independent, but instead an afterthought that rose or fell with the *Martin* claim. See *id.* at 56a. A vestigial issue that the Ninth Circuit did not reach is no impediment to reviewing its actual decision.

B. Respondents cite a newly enacted Oregon statute that requires public-camping regulations to "be objectively reasonable as to time, place and manner with regards to persons experiencing homelessness." Opp. 35 (quoting Or. Rev. Stat. Ann. § 195.530(2)). But they do not contend that the new law poses any jurisdictional impediment, expressly declining to argue "that the statute moots this litigation." *Ibid.* Nor have respondents claimed that the Oregon statute justifies vacating the injunction they won below. And the statute's objective-reasonableness standard departs from *Martin*, which puts the City in an "objectively *un*reasonable constitutional straitjacket." Pet. App. 159a-160a (Collins, J., dissenting from denial of rehearing en banc). Because Ninth Circuit precedent sets a higher constitutional floor, Oregon's reasonableness standard is irrelevant.

Respondents also overlook the irony of asserting a vehicle problem when the Oregon statute was a response to *Martin*. Opp. 35. States should serve "as laboratories for devising solutions to difficult legal problems," but the Ninth Circuit has wrongly attempted to constitutionalize one particular policy. *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). *Martin*'s one-size-fits-all rule has hindered legislative efforts in

California, Arizona, Idaho, Montana, and Alaska. Newsom Br. 9-11; Arizona Legislature Br. 19; States Br. 12-16. Given the limits on legislative action imposed by *Martin*, the question presented remains exceptionally important in Oregon and across the Ninth Circuit.

C. Respondents argue (Opp. 36) that this Court should not review the decision below until the district court reconsiders whether to enjoin the City from prohibiting "the use of stoves or fires, as well as the erection of any structures." Pet. App. 55a. But the question presented will determine whether any injunction is warranted at all. And the injunction the Ninth Circuit affirmed—which prevents the City from regulating camping with bedding—cleanly presents the Eighth Amendment question. See *ibid.* Respondents do not dispute this Court's jurisdiction to review an operative injunction that currently restricts the City's ability to regulate camping on public property. See, *e.g.*, *Honig* v. *Doe*, 484 U.S. 308, 316-317 (1988) (reviewing permanent injunction that the Ninth Circuit affirmed with "slight modifications"). Nothing would be gained by waiting for the district court to fine-tune the injunction at the margins when a proper reading of the Cruel and Unusual Punishments Clause would preclude injunctive relief altogether.

D. Finally, respondents note (Opp. 36-37) that the Ninth Circuit affirmed the injunction only as to the public-camping ordinances because the named plaintiff with standing to challenge the separate public-sleeping ordinance had since passed away. Pet. App. 30a-34a. But respondents never challenge this Court's jurisdiction to review the constitutionality of the two ordinances that the Ninth Circuit invalidated. The absence of a respondent with standing to challenge

another ordinance is beside the point, particularly because the Ninth Circuit held that the Eighth Amendment applies to public camping and public sleeping in the same way. *Id.* at 46a-48a.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

JONATHAN C. BOND
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

AARON P. HISEL
CAPITOL LEGAL SERVICES
901 Capitol Street NE
Salem, OR 97301

THEANE D. EVANGELIS
Counsel of Record
BRADLEY J. HAMBURGER
SAMUEL ECKMAN
DANIEL R. ADLER
PATRICK J. FUSTER
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000
tevangelis@gibsondunn.com

December 20, 2023

WARDLAW, Circuit Judge:

I. FACTS AND PROCEDURAL BACKGROUND

The facts underlying this appeal are largely undisputed.[1] Appellees are homeless persons living on the streets of the Skid Row district of Los Angeles. Skid Row's inhabitants include the highest concentration of homeless persons in the City of Los Angeles; this concentration has only increased in recent years. Appellees occupy the sidewalks of Skid Row pursuant to a settlement agreement we approved in 2007. *See Jones v. City of Los Angeles,* 444 F.3d 1118 (9th Cir.2006), *vacated due to settlement,* 505 F.3d 1006 (9th Cir.2007). The settlement agreement limits the City's ability to arrest homeless persons for sleeping, sitting, or standing on public streets until the City constructs 1250 units of permanent supportive housing for the chronically homeless, at least 50 percent of which must be located within Skid Row or greater downtown Los Angeles. *See* Settlement Agreement, *Jones v. City of Los Angeles,* No. 03–CV–01142 (C.D.Cal. Sept. 15, 2008).

Like many of Skid Row's homeless residents, Appellees stored their personal possessions—including personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets—in mobile containers provided to homeless persons by social service organizations. Appellees Tony Lavan, Caterius Smith, Willie Vassie, Shamal Ballantine, and Reginald Wilson packed their possessions in EDAR mobile shelters. Appellees Ernest Seymore, Lamoen Hall, and Byron Reese kept their possessions in distinctive carts provided by the "Hippie Kitchen," a soup kitchen run by the Los Angeles Catholic Worker.

On separate occasions between February 6, 2011 and March 17, 2011, Appellees stepped away from their personal property, leaving it on the sidewalks, to perform necessary tasks such as showering, eating, using restrooms, or attending court. Appellees had not abandoned their property, but City employees nonetheless seized and summarily destroyed Appellees' EDARs and carts, thereby permanently depriving Appellees of possessions ranging from personal identification documents and family memorabilia to portable electronics, blankets, and shelters. *See Lavan,* 797 F.Supp.2d at 1013–14. The City did not have a good-faith belief that Appellees' possessions were abandoned when it destroyed them. Indeed, on a number of the occasions when the City seized Appellees' possessions, Appellees and other persons were present, explained to City employees that the property was not abandoned, and implored the City not to destroy it. *Id.* at 1013. Although "the City was in fact notified that the property belonged to Lamoen Hall and others, ... when attempts to retrieve the property were made, the City took it and destroyed it nevertheless." *Id.* at 1014.

The City does not deny that it has a policy and practice of seizing and destroying homeless persons' unabandoned possessions. Nor is the practice new: The City was previously enjoined

[1] Public critics of the district court's ruling have mischaracterized both the breadth of the district court's order and the substance of the City's appeal. *See, e.g.,* Carol Schatz, "Enabling homelessness on L.A.'s skid row," *L.A. Times,* April 9, 2012; Estela Lopez, "Skid row: Hoarding trash on sidewalks isn't a right," *L.A. Times,* Feb. 28, 2012, *available at* http://opinion.latimes.com/opinionla/2012/02/skid-row-trash-sidewalks-blowback.html. The injunction does not require the City to allow hazardous debris to remain on Skid Row, nor does the City quibble with the contours of the order. Rather, the City seeks a broad ruling that it may seize and immediately destroy any personal possessions, including medications, legal documents, family photographs, and bicycles, that are left momentarily unattended in violation of a municipal ordinance.

from engaging in the precise conduct at issue in this appeal.

The City maintains, however, that its seizure and disposal of items is authorized pursuant to its enforcement of Los Angeles Municipal Code ("LAMC") § 56.11, a local ordinance that provides that "[n]o person shall leave or permit to remain any merchandise, baggage or any article of personal property upon any parkway or sidewalk."

On April 5, 2011, Appellees sued the City under 42 U.S.C. § 1983, claiming that the City's practice of summarily confiscating and destroying the unabandoned possessions of homeless persons living on Skid Row violated the Fourth, Fifth, and Fourteenth Amendments of the United States Constitution. On April 18, 2011, Appellees filed an ex parte application for a temporary restraining order (the "TRO"), seeking an injunction preventing the City from seizing and destroying Appellees' possessions without notice.

On April 22, 2011, the district court granted Appellees' application for the TRO, concluding that "Plaintiffs have sufficiently established a likelihood of success on the merits for, at the least, their Fourth Amendment and Fourteenth Amendment claims against the City," that the City's conduct, unless enjoined, would irreparably injure Plaintiffs, and that the TRO served the public interest, as it allowed the City to "lawfully seize and detain property, as opposed to unlawfully seizing and immediately destroying property." The district court fashioned an order encompassing all unabandoned property on Skid Row, reasoning that "it would likely be impossible for the City to determine whose property is being confiscated—i.e. whether it is one of the named Plaintiffs or another homeless person." *Id.* at *4. The terms of the TRO bar the City from:

> 1. Seizing property in Skid Row absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband; and
>
> 2. Absent an immediate threat to public health or safety, destruction of said seized property without maintaining it in a secure location for a period of less than 90 days.

The City is also "directed to leave a notice in a prominent place for any property taken on the belief that it is abandoned, including advising where the property is being kept and when it may be claimed by the rightful owner."

On June 23, 2011, the district court issued a preliminary injunction (the "Injunction") on the same terms as the TRO. After weighing the evidence before it, the district court found that the Appellees had "clearly shown that they will likely succeed in establishing that the City seized and destroyed property that it knew was not abandoned," and held that Appellees had shown a strong likelihood of success on the merits of their claims that the City violated their Fourth Amendment and Fourteenth Amendment rights. Explaining that Appellees "have a legitimate expectation of privacy in their property," the district court further held that "[t]he property of the homeless is entitled to Fourth Amendment protection." The district court also concluded that Appellees "personal possessions, perhaps representing everything they own, must be considered 'property' for purposes of [Fourteenth Amendment] due process analysis." *Id.* at 1016. Because Appellees had shown a strong likelihood of success on their claims that the seizure and destruction of their property was neither reasonable under the Fourth Amendment nor comported with procedural due process, the district court enjoined the City from continuing to engage in its practice of summarily destroying Appellees' unattended personal belongings.

The district court made clear that under the terms of the injunction, "[t]he City [is] able to lawfully seize and detain property, as well as remove hazardous debris and other trash." *Id.* at 1019. It emphasized that "issuance of the injunction ... merely prevent[s the City] from unlawfully seizing and destroying personal prop-

erty that is not abandoned without providing any meaningful notice and opportunity to be heard." *Id.* This appeal followed.

III. DISCUSSION

The City's only argument on appeal is that its seizure and destruction of Appellees' unabandoned property implicates neither the Fourth nor the Fourteenth Amendment. Therefore, the City claims, the district court relied on erroneous legal premises in finding a likelihood of success on the merits. Because the unabandoned property of homeless persons is not beyond the reach of the protections enshrined in the Fourth and Fourteenth Amendments, we affirm the district court.

A. *The Fourth Amendment's Protection Against Unreasonable Seizures*

The City argues that the Fourth Amendment does not protect Appellees from the summary seizure and destruction of their unabandoned personal property. It bases its entire theory on its view that Appellees have no legitimate expectation of privacy in property left unattended on a public sidewalk in violation of LAMC § 56.11. Relying on Justice Harlan's concurrence in *Katz v. United States,* the City asserts that the Fourth Amendment protects only persons who have both a subjectively and an objectively reasonable expectation of privacy in their property. 389 U.S. 347, 361, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J. concurring). As the Supreme Court has recently made very clear in *United States v. Jones,* 565 U.S. ——, 132 S.Ct. 945, 950, 181 L.Ed.2d 911 (2012), however, the City's view entirely misapprehends the appropriate Fourth Amendment inquiry, as well as the fundamental nature of the interests it protects. The reasonableness of Appellees' expectation of privacy is irrelevant as to the question before us: whether the Fourth Amendment protects Appellees' unabandoned property from unreasonable seizures.

The Fourth Amendment "protects two types of expectations, one involving 'searches,' the other 'seizures.' A 'search' occurs when the government intrudes upon an expectation of privacy that society is prepared to consider reasonable. A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen,* 466 U.S. 109, 113 (1984). Appellees need not show a reasonable expectation of privacy to enjoy the protection of the Fourth Amendment against *seizures* of their unabandoned property. Although the district court determined that Appellees had a reasonable expectation of privacy in their EDARs and carts, we need not decide that question because the constitutional standard is whether there was "some meaningful interference" with Plaintiffs' possessory interest in the property.[2]

To the extent that Justice Harlan's *Katz* concurrence generated the mistaken impression that the Fourth Amendment protects only privacy interests, the Supreme Court has clarified that the Fourth Amendment protects possessory and liberty interests even when privacy rights are not implicated. *Soldal v. Cook County,* 506 U.S. 56, 63–64 & n. 8. As the Court explained, while *Katz* and its progeny may have shifted the emphasis in Fourth Amendment law from property to privacy, "[t]here was no suggestion that this shift in emphasis had snuffed out the previously recognized protection for property under the

[2] Although the question is not before us, we note that Appellees' expectation of privacy in their unabandoned shelters and effects may well have been reasonable. When determining whether an expectation of privacy is reasonable, "we must keep in mind that the test of legitimacy is ... whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." As our sane, decent, civilized society has failed to afford more of an oasis, shelter, or castle for the homeless of Skid Row than their EDARs, it is in keeping with the Fourth Amendment's "very core" for the same society to recognize as reasonable homeless persons' expectation that their EDARs are not beyond the reach of the Fourth Amendment. *See generally State v. Mooney,* 218 Conn. 85, 588 A.2d 145, 161 (1991) .

Fourth Amendment." Indeed, even in the *search* context, where privacy is the principal protected interest, the Supreme Court has recently reiterated that a reasonable expectation of privacy is not required for Fourth Amendment protections to apply because "Fourth Amendment rights do not rise or fall with the *Katz* formulation." *Jones,* 565 U.S. at ——, 132 S.Ct. at 950.

Following *Soldal,* we recognized that a reasonable expectation of privacy is not required to trigger Fourth Amendment protection against seizures. We held that the seizure was subject to the Fourth Amendment's reasonableness standard because "[t]he Fourth Amendment protects against unreasonable interferences in property interests regardless of whether there is an invasion of privacy."

Thus the dissent's nearly exclusive focus on the *Katz* "reasonable expectation of privacy" standard is misguided. We need not make any conclusion as to expectations of privacy because that is not the standard applicable to a "seizure" analysis.

Even if we were to assume, as the City maintains, that Appellees violated LAMC § 56.11 by momentarily leaving their unabandoned property on Skid Row sidewalks, the seizure and destruction of Appellees' property remains subject to the Fourth Amendment's reasonableness requirement. Violation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property. Were it otherwise, the government could seize and destroy any illegally parked car or unlawfully unattended dog without implicating the Fourth Amendment.[3]

Here, by seizing and destroying Appellees' unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees' possessory interests in that property. No more is necessary to trigger the Fourth Amendment's reasonableness requirement. Thus, the district court properly subjected the City's actions to the Fourth Amendment's reasonableness requirement, even if the City was acting to enforce the prohibitions in LAMC § 56.11.

The district court properly balanced the invasion of Appellees' possessory interests in their personal belongings against the City's reasons for taking the property to conclude that Appellees demonstrated a strong likelihood of success on the merits of their claim that by collecting and destroying Appellees' property on the spot, the City acted unreasonably in violation of the Fourth Amendment. The district court was correct in concluding that even if the seizure of the property would have been deemed reasonable had the City held it for return to its owner instead of immediately destroying it, the City's destruction of the property rendered the seizure unreasonable.

The City does not—and almost certainly could not—argue that its summary destruction of Appellees' family photographs, identification pa-

[3] The dissent's analogy between the factual scenario presented by this case and that of a government official's seizure of a traveler's unattended bag in an airport terminal or train station is inapt. The City has not challenged the district court's clearly correct conclusion that the City's immediate destruction of Plaintiffs' unabandoned property was unreasonable. Even if the City had raised this issue on appeal, however, the dissent's suggestion that the government has the same interest in destroying EDARs and homeless persons' family photographs and identification papers found on public sidewalks as it does in destroying suspicious unattended luggage discovered in transportation hubs fails to recognize the unique nature of the security risks that exist at airports and train stations. The Fourth Amendment remains applicable at such transportation hubs; the nature of the security risks there (and, similarly, at border crossings) gives the government broader leeway in the reasonableness standard. As far as we are aware, Skid Row has never been the target of a terrorist attack, and the City makes no argument that the property it destroyed was suspicious or threatening. And, in any event, the very injunction that the City is challenging in this appeal expressly allows the City to act *immediately* to remove and destroy threats to public health or safety.

pers, portable electronics, and other property was reasonable under the Fourth Amendment; it has instead staked this appeal on the argument that the Fourth Amendment simply does not apply to the challenged seizures. We reject the City's invitation to impose this unprecedented limit on the Fourth Amendment's guarantees.

B. *The Fourteenth Amendment's Due Process Requirement*

The Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1. "Any significant taking of property by the State is within the purview of the Due Process Clause."

Let us be clear about the property interest at stake in this appeal: The district court did not recognize, and we do not now address, the existence of a constitutionally-protected property right to leave possessions unattended on public sidewalks. Instead, the district court correctly recognized that this case concerns the most basic of property interests encompassed by the due process clause: Appellees' interest in the continued ownership of their personal possessions.

The City maintains that "no constitutionally protected property interest is implicated by the City's purported conduct" because "there is no law establishing an individual's constitutionally protected property interest in unattended personal property left illegally on the public sidewalk." Therefore, the City contends, no process is required before the City permanently deprives Appellees of their unattended possessions.

To determine whether Appellees have a protected property interest in the continued ownership of their unattended possessions, we look to "existing rules or understandings that stem from an independent source such as state law-rules or understandings." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972), While "[t]he Court has ... made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," this appeal concerns only the core property interest that derives from actual ownership of chattels. California law recognizes the right of ownership of personal property, a right that is held by "[a]ny person, whether citizen or alien." Cal. Civ.Code §§ 655, 663, 671. It is undisputed that Appellees owned their possessions and had not abandoned them; therefore,

As we have repeatedly made clear, "[t]he government may not take property like a thief in the night; rather, it must announce its intentions and give the property owner a chance to argue against the taking." This simple rule holds regardless of whether the property in question is an Escalade or an EDAR, a Cadillac or a cart. The City demonstrates that it completely misunderstands the role of due process by its contrary suggestion that homeless persons instantly and permanently lose any protected property interest in their possessions by leaving them momentarily unattended in violation of a municipal ordinance. As the district court recognized, the logic of the City's suggestion would also allow it to seize and destroy cars parked in no-parking zones left momentarily unattended.

Even if Appellees had violated a city ordinance, their previously-recognized property interest is not thereby eliminated. Even if the City had seized Appellees' possessions in accordance with the Fourth Amendment, which it did not, due process requires law enforcement "to take reasonable steps to give notice that the property has been taken so the owner can pursue available remedies for its return." And even if LAMC § 56.11 provided for forfeiture of property, which it does not, the City is required to provide procedural protections before permanently depriving Appellees of their possessions. *See Greene,* 648 F.3d at 1019 ("An agency ... violates the Due Process Clause of the Fourteenth Amendment when it prescribes and enforces forfeitures of property '[w]ithout underlying [statutory] authority and competent procedural protections.' ") (quoting *Vance v. Barrett,* 345 F.3d 1083, 1090 (9th Cir.2003)).

Because homeless persons' unabandoned possessions are "property" within the meaning of the Fourteenth Amendment, the City must comport with the requirements of the Fourteenth Amendment's due process clause if it wishes to take and destroy them. The City admits that it failed to provide any notice or opportunity to be heard for Tony Lavan and other Appellees before it seized and destroyed their property. The City's decision to forego any process before permanently depriving Appellees of protected property interests is especially troubling given the vulnerability of Skid Row's homeless residents: "For many of us, the loss of our personal effects may pose a minor inconvenience. However, ... the loss can be devastating for the homeless." *Pottinger v. City of Miami,* 810 F.Supp. 1551, 1559 (S.D.Fla.1992). The City does not argue, nor could it, that the district court erred in holding that the City's "practice of on-the-spot destruction of seized property.... presents an enormous risk of erroneous deprivation, which could likely be mitigated by certain safeguards such as adequate notice and a meaningful opportunity to be heard."

We reject the City's suggestion that we create an exception to the requirements of due process for the belongings of homeless persons. The district court did not abuse its discretion when it found a likelihood of success on Appellees' Fourteenth Amendment claims, as the City admits it failed utterly to provide any meaningful opportunity to be heard before or after it seized and destroyed property belonging to Skid Row's homeless population.

IV. CONCLUSION

This appeal does not concern the power of the federal courts to constrain municipal governments from addressing the deep and pressing problem of mass homelessness or to otherwise fulfill their obligations to maintain public health and safety. In fact, this court would urge Los Angeles to do more to resolve that problem and to fulfill that obligation. Nor does this appeal concern any purported right to use public sidewalks as personal storage facilities. The City has instead asked us to declare that the unattended property of homeless persons is uniquely beyond the reach of the Constitution, so that the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society. Because even the most basic reading of our Constitution prohibits such a result, the City's appeal is **DENIED.**

CALLAHAN, Circuit Judge, dissenting:

I respectfully dissent. I disagree that Plaintiffs are likely to succeed on the merits of their claims that the City of Los Angeles (the "City") violated their protected interests under the Fourth Amendment and under the due process clause of the Fourteenth Amendment. The pivotal question under both Amendments is not whether Plaintiffs had a property interest in the items seized—they may very well have had such an interest—but whether that interest is one that society would recognize as reasonably worthy of protection where the personal property is left unattended on public sidewalks. Because under the due process standard, society does not recognize a property interest in unattended personal property left on public sidewalks, the City's health and safety concerns allow it to seize and dispose of such property.

In this case, Plaintiffs left their personal property unattended on the sidewalks. They did so despite the numerous 10593 signs blanketing Skid Row that specifically warned that personal property found on the sidewalks in violation of the Los Angeles Municipal Code section 56.11 (the "Ordinance" or "LAMC § 56.11") would be seized and disposed of during scheduled clean-ups. The majority impermissibly stretches our Fourth Amendment jurisprudence to find that Plaintiffs had a protected interest in their unattended personal property. In addition, because Plaintiffs have not demonstrated a protected property interest, I would reverse the district court's ruling that Plaintiffs established a likelihood of success on the merits of their claim under the Fourteenth Amendment.

II. Analysis

B. Plaintiffs Lacked an Objectively Reasonable Expectation of Privacy in Their Unattended Personal Property under the Fourth Amendment.

Plaintiffs do have a right to use the public sidewalks, but this does not mean that they may leave personal property unattended on the sidewalk, particularly where the Ordinance prohibits it and multiple signs expressly warn the public that unattended personal property "is subject to disposal by the City of Los Angeles."[3] The issue is not whether Plaintiffs illegally occupied the sidewalks; they did not. However, Plaintiffs violated the law. They left their personal property unattended on the City's sidewalks, in clear violation of the City's Ordinance prohibiting that conduct. In other words, by leaving their property unattended in violation of the City's Ordinance and in the face of express notice that their property would be removed during the scheduled clean-ups, Plaintiffs forfeited any privacy interest that society recognizes as objectively reasonable.

The [most] apt comparison is leaving an unattended bag in the airport terminal or a train station, where travelers are warned that such unattended personal property may be immediately seized and destroyed.[6] In the hypothetical of an illegally parked vehicle, there is no warning that the vehicle, in addition to being ticketed and towed, will be destroyed. Here, just as in the airport hypothetical, the City has a legitimate interest in immediately destroying personal property left on the streets rather than storing it for health and safety reasons.[7] Unfortunately, in light of the incidents of domestic terrorism, the City must be concerned with potential dangers arising from a cart, box, bag, or other container left unattended in a public place as they could easily contain bombs, weapons, or bio-hazards.[4]

[4] The majority does not really argue that a City may not seize an illegally parked car or an unlawfully unattended dog. Thus, it would appear that the majority's real concern is not with the constitutionality of the City's seizure of the unattended personal property but with the disposal of the property. Indeed, the district court's injunction allows the City to continue to seize property where it has "an objectively reasonable belief that it is abandoned." But it is difficult for the City to determine whether personal items are unattended or abandoned. Furthermore, legitimate concerns for public safety and health require that the City search and remove unattended property on its public sidewalks. I would hold that the fact that a cart is apparently unattended on a public sidewalk where warning signs are prominently displayed allows the City to search and seize the property.

C. Plaintiffs Did Not Have a Property Interest in their Unattended Personal Property Under the Fourteenth Amendment.

Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

The Eleventh Circuit has held that there is no "constitutional right to store one's personal belongings on public lands" regardless of subjective expectations. *Church,* 30 F.3d at 1345. Similarly, in this case, there do not appear to be any "existing rules or understandings" that provide Plaintiffs with an objectively protected interest that allows them to leave their belongings unattended on public sidewalks, even if temporarily.

California Penal Code section 647c provides that cities have the power to "regulate conduct upon a street, sidewalk, or other place or in a place open to the public." Although this law is not definitive, it does suggest that California's "existing rules or understandings" weigh in favor of the City. The courts should be reluctant to find a protected property interest where, as here, the result has far-sweeping implications for cities across the country, including their basic responsibility for public health and safety.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DISPOSED OF

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO: 15-220 AC

LOWER COURT NO: M15013370

ANDREW TOOMBS,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.
_____/

Opinion filed: July 11, 2017.

An Appeal from the County Court for Miami-Dade County, Florida, Judge Robin Faber.

John Eddy Morrison, Assistant Public Defender, for Appellant.

K. Philip Harte, Assistant State Attorney, for Appellee.

Before, ELLEN SUE VENZER, MARISA TINKLER MENDEZ, MIGUEL M. DE LA O, JJ.

DE LA O, J.

Appellant, Andrew Toombs ("Toombs"), appeals his conviction for violating a City of Miami ("City")[1] ordinance, section 37-8 of the Miami Municipal Code Part II, which prohibits "soliciting, begging or panhandling" in the "Downtown Business District" ("Ordinance"). This appeal concerns only the constitutionality of the Ordinance.[2]

[1] After Toombs filed his notice of appeal, the City intervened in this appeal.

[2] The parties do not dispute the facts which resulted in Toombs' conviction. Toombs was approaching vehicles begging for money within the "Downtown Business District," but never obstructed traffic. Toombs pled no contest and preserved his constitutional challenge for appeal.

We review the constitutional challenge to the Ordinance *de novo*. *City of Fort Lauderdale* v. *Dhar*, 185 So. 3d 1232, 1234 (Fla. 2016). Because panhandling is speech protected by the First Amendment, *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 632 (1980),[3] and because city streets and sidewalks are recognized as "quintessential public forum[s]," *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983), we first determine if the Ordinance is content-neutral, then apply the level of scrutiny commensurate with the answer.

With over 200 years of constitutional jurisprudence to guide us, we do not typically write on a clean slate when discussing the First Amendment. Here, the slate comes to us especially filled with the binding precedent of the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). One court has described *Reed* as working a "sea change in First Amendment law." *Blitch v. City of Slidell*, 2017 WL 2840009, at *7 (E.D. La., June 22, 2017).

Although the ordinance in *Reed* addressed outdoor signs rather than panhandling, it clarified the analysis courts must apply in determining whether a statute violates the First Amendment.

> Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed. This commonsense meaning of the phrase "content based" requires a court to consider whether a regulation of speech "on its face" draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.

Reed, 135 S. Ct. at 2227 (citations omitted).

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[3] *See Gresham v. Peterson*, 225 F.3d 899, 904-05 (7th Cir. 2000) ("[w]hile some communities might wish for all solicitors, beggars and advocates of various causes be vanished from the streets, the First Amendment guarantees their right to be there, deliver their pitch and ask for support."). *See also Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection.").

The analytical framework adopted in *Reed* has resulted in the invalidation of panhandling statutes similar to the one at issue here. In the immediate aftermath of *Reed,* the Seventh Circuit granted rehearing in *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and reversed its ruling upholding the constitutionality of Springfield's panhandling ordinance.[4]

> The Town of Gilbert, Arizona, justified its sign ordinance in part by contending, as Springfield also does, that the ordinance is neutral with respect to ideas and viewpoints. The majority in *Reed* found that insufficient: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of 'animus toward the ideas contained' in the regulated speech." 135 S. Ct. at 2228. It added: "a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter." *Id.* at 2230.
>
> . . . The majority opinion in *Reed* effectively abolishes any distinction between content regulation and subject-matter regulation. Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification.

Norton v. City of Springfield, 806 F.3d 411, 412 (7th Cir. 2015) (citations omitted). Other courts have applied *Reed* to strike down panhandling ordinances nationwide, as the federal district court noted in *Thayer v. City of Worchester*, 144 F. Supp. 3d 218 (D. Mass. 2015):

> As to Ordinance 9-16 [the panhandling ordinance], a protracted discussion of this issue is not warranted as substantially all of the Courts which have addressed similar laws since *Reed* have found them to be content based and therefore, subject to strict scrutiny. Simply put, *Reed* mandates a finding that Ordinance 9-16 is content based because it targets anyone seeking to engage in a specific type of speech, *i.e.*, solicitation of donations.

Id. at 233 & n.2. Neither the State nor the City could direct us to any decision post-*Reed* upholding a law criminalizing panhandling. Every single decision after *Reed* has struck down panhandling

[4] It is important to note that Springfield's Ordinance also prohibited panhandling in its Downtown Historic District, although the statute was more narrowly drawn than the City's.

laws similar to the City's Ordinance.[5] *See Blitch v. City of Slidell*, 2017 WL 2840009 (E.D. La., June 22, 2017); *Champion v. Commonwealth*, 2017 WL 636420 (Ky., Feb. 16, 2017); *City v. Willis*, 375 P.3d 1056 (Wash. 2016); *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882 (M.D. Fla., Aug. 5, 2016); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177 (D. Mass. 2015); and *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276 (D. Colo. 2015).

Perhaps the court in *Champion* explained best why the City's Ordinance is unconstitutional as a content-based speech restriction:

> On its face, Ordinance 14-5 singles out speech for criminal liability based solely on its particularized message. Only citizens seeking financial assistance on public streets and intersections face prosecution. For example, someone standing at a prominent Lexington intersection displaying a sign that reads "Jesus loves you," or one that says "Not my President" has no fear of criminal liability under the ordinance. But another person displaying a sign on public streets reading "Homeless please help" may be convicted of a misdemeanor. The only thing distinguishing these two people is the content of their messages. Thus, to enforce Ordinance 14-5, law enforcement would have to examine the content of the message conveyed to determine whether a violation has occurred. This then, in effect, prohibits public discussion in a traditional public forum of an entire topic. And as a result, this ordinance is unambiguously content-based and is presumptively unconstitutional.

Champion, 2017 WL 636420 at *4.

Having concluded that the Ordinance is content-based, it can be deemed constitutional only if it passes strict scrutiny analysis. However, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 818 (2000) (citations omitted).

> When the Government seeks to restrict speech based on its content, the usual presumption of constitutionality afforded Congressional enactments is reversed. Content-based regulations are presumptively invalid and the Government bars the burden to rebut that presumption.

[5] *Cf. Watkins v. City of Arlington*, 123 F. Supp. 3d 856, 860 (N.D. Tex. 2015) (ordinance which regulates all interactions between pedestrians and the occupants of vehicles stopped at traffic lights is content neutral).

Id. at 816.

The City claims the purpose of the Ordinance is to protect tourism, encourage expansion of the City's economic base, and protect the City's economy, as set forth in the preamble to the Ordinance. Although no evidence was introduced at trial to support these assertions, we would reject these claims as insufficient to survive strict scrutiny even if the City or the State had introduced evidence at trial to support them.

> . . . [T]he promotion of tourism and business has never been found to be compelling government interest for the purposes of the First Amendment. *See Pottinger v. City of Miami*, 810 F. Supp. 1551, 1581 (S.D. Fla. 1992) ("The City's interest in promoting tourism and business and in developing the downtown area are at most substantial, rather than compelling, interests.").
>
> * * *
>
> The mechanism by which Lowell's ban on panhandling downtown would promote tourism flies in the face of the First Amendment. The First Amendment does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed. It is core First Amendment teaching that on streets and sidewalks a person might be "confronted with an uncomfortable message" that they cannot avoid; this "is a virtue, not a vice." Just as speech cannot be burdened "because it might offend a hostile mob," *Forsyth Cnty., Ga. v. Nationalist Movement,* 505 U.S. 123, 135 (1992), it cannot be burdened because it would discomfort comparatively more comfortable segments of society.
>
> For First Amendment purposes, economic revitalization might be important, but it does not allow the sensibilities of some to trump the speech rights of others.

McLaughlin v. City of Lowell, 140 F. Supp. 3d 177, 189-90 (D. Mass. 2015) (citations omitted).

Moreover, *Reed* makes clear that benign motives will not shield a facially content-based speech abridgement.

> A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral

> justification, or lack of "animus toward the ideas contained" in the regulated speech. *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). We have thus made clear that "'[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment,'" and a party opposing the government "need adduce 'no evidence of an improper censorial motive.'" *Simon & Schuster, [Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105,] 117 [(1991)]. Although "a content-based purpose may be sufficient in certain circumstances to show that a regulation is content based, it is not necessary." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 642 (1994). In other words, an innocuous justification cannot transform a facially content-based law into one that is content neutral.

Reed, 135 S. Ct. at 2228.

The City argues that it does not discriminate among viewpoints, that no one is allowed to solicit funds whether they are homeless or members of the girl scouts. This is an outdated view of First Amendment jurisprudence which was rendered obsolete by *Reed*. In *Reed*, the Circuit Court of Appeals had upheld the sign ordinance because it did "not mention any idea or viewpoint, let alone single one out for differential treatment." *Reed v. Town of Gilbert, Ariz.*, 587 F.3d 966, 977 (9th Cir. 2009). The Court firmly rejected this argument.

> This analysis conflates two distinct but related limitations that the First Amendment places on government regulation of speech. Government discrimination among viewpoints – or the regulation of speech based on "the specific motivating ideology or the opinion or perspective of the speaker" – is a "more blatant" and "egregious form of content discrimination." *Rosenberger v. Rector and Visitors of Univ. of Va., 515* U.S. 819, 829 (1995). But it is well established that "[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Consolidated Edison Co.* v. *Public Serv. Comm'n*, 447 U.S. 530, 537 (1980).
>
> Thus, a speech regulation targeted at specific subject matter is content based even if it does not discriminate among viewpoints within that subject matter. *Id.*

Reed, 135 S. Ct. at 2229-30.

Consequently, we **REVERSE** the trial court's finding that the Ordinance is constitutional, and **REMAND** this matter to the trial court for proceedings consistent with this opinion.

ELLEN SUE VENZER and MARISA TINKLER MENDEZ, J.J., concur.

ELLEN SUE VENZER
Circuit Judge

MARISA TINKLER MENDEZ
Circuit Judge

MIGUEL M. DE LA O
Circuit Judge

Mark MESSINA, et al., Plaintiffs,

v.

CITY OF FORT LAUDERDALE, FLORIDA, a Florida municipal corporation, Defendant.

CASE NO. 21-cv-60168-ALTMAN/Hunt

United States District Court, S.D. Florida.

Signed 06/23/2021

Background: County residents brought § 1983 action against city, challenging city's panhandling regulations under First Amendment. Residents moved for preliminary injunction.

Holdings: The District Court, Roy K. Altman, J., held that:

(1) residents had Article III standing;

(2) panhandling ordinance was content-based restriction of speech, and thus subject to strict scrutiny under First Amendment;

(3) residents were likely to succeed on merits;

(4) residents established that they would suffer irreparable injury in absence of preliminary injunction; and

(5) balance of harms and public interest considerations weighed in favor of granting motion.

Motion granted.

1. Federal Civil Procedure ⚿103.2

When individual is subject to threatened enforcement of law, actual arrest, prosecution, or other enforcement action is not prerequisite for standing to challenge law. U.S. Const. art. 3, § 2, cl. 1.

2. Constitutional Law ⚿699

Person has standing to bring pre-enforcement suit when he has alleged intention to engage in course of conduct arguably affected with constitutional interest, but proscribed by statute, and there exists credible threat of prosecution. U.S. Const. art. 3, § 2, cl. 1.

3. Constitutional Law ⚿855

County residents sufficiently alleged injury necessary to establish Article III standing to bring facial challenge under First Amendment to city ordinance forbidding "aggressive panhandling," including requesting donation after person has given negative response to initial request, blocking individuals or groups from passage, touching another without permission, and intimidating conduct; although residents did not allege that they intended to intimidate pedestrians or to touch others without consent, they alleged that want to do certain things that "aggressive panhandling" provisions arguably forbade, and that their

speech was chilled because they feared prosecution under ordinance. U.S. Const. art. 3, § 2, cl. 1; U.S. Const. Amend. 1.

4. Constitutional Law ⚿1163

First Amendment's "overbreadth doctrine" allows a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though as applied to him the statute would be constitutional. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

5. Constitutional Law ⚿1521

Under First Amendment's "overbreadth doctrine," if plaintiff can show that challenged law punishes substantial amount of protected free speech, judged in relation to statute's plainly legitimate sweep, court may invalidate all enforcement of that law, until and unless limiting construction or partial invalidation so narrows it as to remove seeming threat or deterrence to constitutionally protected expression. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

6. Injunction ⚿1092

To prevail on motion for preliminary injunction, plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits, (2) they will suffer irreparable injury unless the injunction is granted, (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party, and (4) the injunction would not be adverse to the public interest.

7. Injunction ⚿1096

For purposes of motion for preliminary injunction, a substantial likelihood of success on the merits requires a showing of only likely or probable, rather than certain, success.

8. Injunction ⚿1096

Substantial likelihood of success on the merits is generally the most important factor in the preliminary injunction analysis.

9. Injunction ⚿1246

When the government is the opposing party to a motion for a preliminary injunction, the balance of harms and public interests factors merge.

10. Injunction ⚿1563

Plaintiffs bear the burden of proving their entitlement to a preliminary injunction.

11. Constitutional Law ⚿1880

Panhandling is protected speech under the First Amendment. U.S. Const. Amend. 1.

12. Constitutional Law ⚿1739

The government may regulate protected speech in traditional public fora, but the legality of any such regulation turns on its justification and the degree to which the regulation is tailored to that justification. U.S. Const. Amend. 1.

13. Constitutional Law ⚿1739

If a law regulating protected speech in traditional public fora limits speech based on its communicative content, i.e., a content-based restriction, then it is subject to strict scrutiny. U.S. Const. Amend. 1.

14. Constitutional Law ⚿1053

Laws subject to strict scrutiny are presumptively unconstitutional, and government must prove that they are narrowly tailored to serve compelling state interests. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1739

A law regulating protected speech in traditional public fora which imposes reasonable and content-neutral restrictions, i.e., on the time, place, or manner of

speech, must withstand only intermediate scrutiny, which requires both that the regulation be narrowly tailored to serve a significant governmental interest and that it leave open ample alternative channels for communication of the information. U.S. Const. Amend. 1.

16. Constitutional Law ⚿1517

Regulation of speech is "content-based," and therefore subject to strict scrutiny, if it applies to particular speech because of topic discussed or idea or message expressed. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

17. Constitutional Law ⚿1518

If law regulating speech expressly draws distinctions based on communicative content, law will be subject to strict scrutiny regardless of government's benign motive, content-neutral justification, or lack of animus towards ideas contained in regulated speech. U.S. Const. Amend. 1.

18. Constitutional Law ⚿1517

Some facial distinctions are obvious, insofar as they define speech by particular subject matter, whereas others are more subtle, defining regulated speech by its function or purpose, but both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny. U.S. Const. Amend. 1.

19. Constitutional Law ⚿1513, 1517

Laws may be facially neutral, but still content based and therefore subject to strict scrutiny, if they cannot be justified without reference to content of regulated speech or if they were adopted by government because of disagreement with message speech conveys. U.S. Const. Amend. 1.

20. Constitutional Law ⚿1880

City's panhandling ordinance was content-based restriction of speech, and thus subject to strict scrutiny on First Amendment challenge by county residents; ordinance regulated solicitations made in person requesting immediate donation of money or other thing of value, but did not cover other topics of discussion. U.S. Const. Amend. 1.

21. Civil Rights ⚿1457(7)

Under strict scrutiny analysis applicable to content-based restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's panhandling ordinance, which prohibited solicitations made in person requesting immediate donations of money or other things of value in certain kinds of locations throughout city, as required for preliminary injunction blocking enforcement of ordinance; city's stated economic interest in limiting panhandling was not compelling, advancing comfort of residents was not compelling interest, and city failed to show that ordinance was designed to further its compelling interest in public safety, since ordinance was both over- and under-inclusive in that regard. U.S. Const. Amend. 1.

22. Constitutional Law ⚿1150

Allowing uncomfortable messages is a virtue, not a vice, of the First Amendment. U.S. Const. Amend. 1.

23. Constitutional Law ⚿1504

Public safety is a compelling governmental interest for purposes of regulating speech. U.S. Const. Amend. 1.

24. Statutes ⚿1161

When a statute includes a list of terms or phrases followed by a limiting clause, the limiting clause should ordinarily be read as modifying only the noun or phrase that it immediately follows.

25. Constitutional Law ⚿1880

City's panhandling ordinance prohibiting persons from standing on any portion

of designated rights-of-way and selling or advertising for sale service or item, or asking for donation, was content-based restriction of speech, and thus subject to strict scrutiny on First Amendment challenge by county residents, where ordinance did not prevent anyone from standing in same spot and communicating other messages. U.S. Const. Amend. 1.

26. Civil Rights ⇐1457(7)

Under strict scrutiny analysis applicable to content-based restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting persons from standing on any portion of designated rights-of-way and selling or advertising for sale service or item or asking for donation, as required for preliminary injunction blocking enforcement of ordinance; ordinance did not promote city's stated goal of promoting traffic safety by banning pedestrian-driver interactions, since ordinance did not preclude people from standing in same portions of rights-of-way and talking to pedestrians or drivers about any other topic. U.S. Const. Amend. 1.

27. Civil Rights ⇐1457(7)

Under intermediate scrutiny analysis applicable to content-neutral restrictions of speech, county residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting persons from standing on any portion of designated rights-of-way and engaging in hand-to-hand transmissions with persons in motor vehicles, as required for preliminary injunction blocking enforcement of ordinance; city failed to provide evidence that ordinance was least intrusive means of advancing its stated interest in maintaining or improving traffic flow, or that city investigated issue, what evidence it collected, or extent to which it entertained other regulatory options. U.S. Const. Amend. 1.

28. Civil Rights ⇐1457(7)

County residents were likely to succeed on merits of their First Amendment challenge to city's ordinance prohibiting canvassers from holding signs which violated general city sign ordinance on any portion of designated public rights-of-way, where city offered no justification of ordinance, and to extent that city argued that law should only be enforced on private property, city's police were nevertheless enforcing it on public rights-of-way. U.S. Const. Amend. 1.

29. Civil Rights ⇐1457(1)

The loss of First Amendment freedoms, for even minimal periods of time, constitutes irreparable injury for purposes of preliminary injunction analysis. U.S. Const. Amend. 1.

30. Civil Rights ⇐1457(7)

County residents established that they would suffer irreparable injury in absence of preliminary injunction barring enforcement of city's panhandling regulations, in action challenging regulations under First Amendment; residents established likelihood of success on merits of claim that regulations abridged their free speech rights, and money damages would not compensate them for past deprivation of their constitutional rights, particularly in light of fact that residents relied on panhandling as only means of subsistence. U.S. Const. Amend. 1.

31. Civil Rights ⇐1457(7)

Balance of harms and public interest considerations weighed in favor of granting county residents' motion for preliminary injunction against enforcement of city's panhandling regulations; residents established likelihood of success on merits of claim that regulations abridged their free speech rights, and public had no interest in enforcing unconstitutional law. U.S. Const. Amend. 1.

32. Injunction ⚿1253

The public, when the state is a party asserting harm, has no interest in enforcing an unconstitutional law, for purposes of the preliminary injunction analysis; enforcing unconstitutional laws not only wastes valuable public resources, but also disserves the public interest.

Dante Pasquale Trevisani, Raymond J. Taseff, Florida Justice Institute, Miami, FL, F. Jahra McLawrence, The McLawrence Law Firm, Tamarac, FL, Mara Shlackman, Law Offices of Mara Shlackman, P.L., Fort Lauderdale, FL, for Plaintiffs.

Michael Thomas Burke, Hudson Carter Gill, Johnson Anselmo Murdoch Burke Piper & Hochman PA, Fort Lauderdale, FL, for Defendant.

ORDER

ROY K. ALTMAN, UNITED STATES DISTRICT JUDGE

Mark Messina and Bernard McDonald are men of limited means. To survive, they hold signs and panhandle in the City of Fort Lauderdale—sometimes on sidewalks, sometimes along public roads. The City enacted (and its police have been enforcing) two ordinances that chill these activities. The first ordinance bans solicitation in designated areas—at bus stops and garages, for instance, or near ATMs and sidewalk cafés—and it prohibits so-called "aggressive panhandling" anywhere within the City's limits. The second ordinance makes it illegal to solicit donations along certain arterial roads—including via hand-to-hand exchanges with motorists—and it forbids canvassers from standing on those roads and holding signs that violate the City's sign regulations. Both ordinances are punishable by fines and imprisonment.

Messrs. Messina and McDonald (our Plaintiffs) have sued the City under 42 U.S.C. § 1983 for past and ongoing injuries to their rights under the First Amendment to the U.S. Constitution. As redress, they've asked us to enjoin both ordinances. After a hearing and a careful review of the record, we conclude that the Plaintiffs are likely to succeed on the merits of their claims and that they've satisfied the other requirements for preliminary injunctive relief. We therefore **GRANT** their motion for a preliminary injunction.

Background

In May 2012, the Fort Lauderdale City Commission enacted Ordinance No. C-12-10, which it later codified as § 16-82 of the City Code (we'll refer to this Ordinance as "§ 16-82" or the "Panhandling Ordinance"). *See* Complaint [ECF No. 1] ¶ 1. About two-and-a-half years later, the Commission enacted Ordinance No. C-14-38, which it later codified as § 25-267 of the City Code (we'll refer to this Ordinance as "§ 25-267" or the "Right-of-Way Ordinance"). *Id.* ¶ 22. These are the two Ordinances the Plaintiffs challenge in this case, so we'll take a moment to describe each in detail.[1]

The Panhandling Ordinance bans two activities. *First*, it prohibits "panhandling" in certain *kinds* of locations throughout the City—at bus stops and transportation facilities; in parking lots and City parks; anywhere within 15 feet of sidewalk cafés, ATMs, or entrances to commercial or government buildings; and on private property. § 16-82(b). The Ordinance defines "panhandling" as any request for "an immediate donation of money or thing of value," or an exchange in which one person receives an item of "little or no mone-

1. For full-text versions, see Appendices A & B. Both Ordinances and the entire City Code are available at https://library.municode.com/fl/fort_lauderdale/codes/code_of_ordinances.

tary value in exchange for a donation," such that "a reasonable person would understand that the transaction is in substance a donation." § 16-82(a). Panhandling *doesn't* include "passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person." *Id.*

Second, the Panhandling Ordinance forbids "aggressive panhandling" *anywhere* within City limits. § 16-82(c). "Aggressive panhandling" is a form of panhandling that includes the following: (1) approaching someone in a manner that would lead a "reasonable person to believe" that he is "being threatened with either imminent bodily injury or the commission of a criminal act upon the person"; (2) requesting a donation after a person has "given a negative response to the initial request"; (3) blocking individuals or groups from passage; (4) touching another without permission; or (5) "[e]ngaging in conduct that would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands." § 16-82(a).

Section 25-267, the Right-of-Way Ordinance, identifies and regulates a distinct category of panhandler whom the provision refers to as the "right-of-way canvasser or solicitor." This person does any of the following three things on a "right-of-way"[2] : he (1) sells items or services of any kind, or advertises for sale anything or service of any kind; (2) seeks a "donation of any kind"; or (3) "personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind" to a motorist on any street or roadway, whether the motorist's vehicle is temporarily stopped or not. § 25-267(a). The Ordinance makes it illegal to act "as a right-of-way canvasser or solicitor"—that is, to engage in one of the three listed activities—on any portion of certain specified public rights-of-way. § 25-267(b). It's also illegal for a right-of-way canvasser "to hold, carry, possess or use any sign or other device of any kind, within any portion of the public right-of-way contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations." § 25-267(d).[3]

The penalties for violating the Panhandling Ordinance or the Right-of-Way Ordinance are set forth in § 1-6 of the City Code and include fines of up to $500, a term of imprisonment of up to 60 days, or both. § 16-82(d); § 25-267(f).

The Plaintiffs are residents of Broward County. *See* Complaint ¶¶ 7–8. They've either lived without permanent housing or struggled to pay for basic needs and expenses, and they rely on donations for their subsistence. *Id.* Mr. Messina solicits pedestrians for donations, typically on city sidewalks near commercial areas or outdoor cafés—though sometimes he stands on the medians or shoulders of roads to ask for donations from motorists who are temporarily stopped in traffic. *Id.* ¶ 36. He often holds a sign with a religious message and sometimes distributes pamphlets, hoping for donations in return. *Id.* ¶ 37. When Mr. Messina panhandles in the City, he is

2. The term "right-of-way" is borrowed from § 25-97 of the City Code, and it means "the surface and space above and below any real property in which the city has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, or bridge."

3. Section 47-22 is the City's sign regulation, which is generally applicable on private property. *See* § 47-22-1(c) ("This section regulates the time, place and manner in which a sign is erected, posted, or displayed on private property[.]").

"regularly harassed by [City] officers who will drive up to where he is standing and yell at him to leave the area immediately and warn him that if they see him again, they will arrest him." *Id.* ¶ 38. On several occasions, he's seen the police arrest *other* panhandlers. *Id.* ¶ 39. Mr. Messina panhandles a few times a week and would like to do so more often, but he doesn't because of his fear of arrest. *Id.* ¶ 39.

Mr. McDonald likewise panhandles at several locations in the City, standing on sidewalks adjacent to the street or on the medians or shoulders of City roads. *Id.* ¶ 43. He displays a sign that reads "Homeless, please help me if you can," *id.*, and—like Mr. Messina—he's been "repeatedly harassed" and threatened with arrest by the police, *id.* ¶ 44. Those experiences have deterred him from panhandling more frequently. *Id.* ¶ 45.[4]

In this lawsuit, the Plaintiffs assert two counts under the First Amendment—one for each Ordinance—and ask for the following relief: (1) declarations that §§ 16-82 and 25-267 violate the First Amendment, facially and as applied to the Plaintiffs; (2) a preliminary and permanent injunction prohibiting the City from enforcing §§ 16-82 and 25-267; (3) money damages; and (4) attorneys' fees and costs. *Id.* ¶¶ 47–63.

Procedural History

Soon after the Plaintiffs filed their Complaint, they moved for a preliminary injunction, arguing that they've been irreparably harmed by having their speech chilled and that preliminary relief is equitable insofar as the City has no valid interest in enforcing unconstitutional laws. *See generally* Motion for Preliminary Injunction ("Motion") [ECF No. 5]. The City subsequently moved to dismiss the Complaint for lack of subject matter jurisdiction, *see* Defendant City's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Motion to Dismiss") [ECF No. 12], contending that the Plaintiffs lack Article III standing because (1) they haven't been arrested or cited for violating the Ordinances and (2) their general allegations of "harassment" don't suffice to state a concrete injury, *id.* ¶¶ 2–3. Nor, according to the City, can the Plaintiffs *really* allege that their speech has been "chilled" because (as they acknowledge) they continue to panhandle in the City. *Id.*[5]

After both motions were fully briefed,[6] the Court scheduled a preliminary injunction hearing and asked the parties whether they intended to call witnesses or present additional evidence. *See* Order [ECF No. 26]. The City submitted an excerpt of Mr. McDonald's deposition testimony from another case—which it used to challenge his Article III standing—and a copy of the sign ordinance, § 47-22. *See* Joint Notice [ECF No. 27]. In their Reply, the Plaintiffs sought to introduce an updated arrest

4. The Plaintiffs allege that, since 2018, more than 100 people have been arrested or cited with a notice to appear in court for violations of the two Ordinances, and they claim that "the predominant reason for [these] arrests or citations was solicitation of donations." *Id.* ¶ 33.

5. The City didn't challenge the Plaintiffs' standing to attack any of the Ordinances' *specific* provisions; it argued only that their speech hasn't been chilled *generally—i.e.,* that they haven't suffered any Article III injury. *See generally* Motion to Dismiss.

6. *See* Defendant City of Fort Lauderdale's Response to Plaintiff's Motion for Preliminary Injunction ("Response") [ECF No. 11]; Plaintiffs' Reply to Defendant City of Fort Lauderdale's Response to Plaintiffs' Motion for Preliminary Injunction ("Reply") [ECF No. 21]; *see also* Plaintiffs' Response and Memorandum of Law in Opposition to Defendant City's Motion to Dismiss for Lack of Subject Matter Jurisdiction ("Response to Motion to Dismiss") [ECF No. 20]; Defendant City's Reply in Support of Motion to Dismiss ("Reply to Motion to Dismiss") [ECF No. 22].

report. *See id.* At the Hearing, we sustained the City's objection to this report—which, after all, the Plaintiffs had only submitted in Reply. *See* Apr. 9, 2021 Hr'g. The Plaintiffs also introduced copies of the Ordinances, the arrest records, and a letter signed by various organizations asking the City Commission to repeal the Ordinances. *See* Motion, Exs. 1–6.

At the Hearing, we denied the City's Motion to Dismiss,[7] explaining that Article III standing is "loosened" for First Amendment challenges to laws that are broadly applicable to the public. *See Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001); *see also Hallandale Pro. Fire Fighters Loc. 2238 v. City of Hallandale*, 922 F.2d 756, 762 n.5 (11th Cir. 1991) ("[T]he broader the first amendment right and . . . the more likely it is that a governmental act will impinge on the first amendment, the more likely it is that the courts will find a justiciable case when confronted with a challenge to the governmental act."). And we found that the Plaintiffs' specific claims of police harassment—coupled with their concrete allegations about personally seeing the police arrest *others* for panhandling—were more than sufficient to raise an inference that their speech had been chilled and that they'd suffered an injury in fact. *See generally* Apr. 9, 2021 Hr'g. Alleging standing at the pleading stage is, we noted, relatively easy. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (explaining that "general factual allegations of injury" suffice at the pleading stage and that plaintiffs must substantiate general claims with "specific facts" *only* at later stages of the case); *see also Bennett v. Spear*, 520 U.S. 154, 171, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (noting that the burden to *plead* standing is "relatively modest").

We noted, moreover, that the Plaintiffs didn't have to be arrested or prosecuted to raise a facial challenge to the Ordinances under the First Amendment; they only needed to do precisely as they did: allege that they (1) intended to engage in the banned activity and (2) faced a credible threat of prosecution. *See, e.g., Pittman*, 267 F.3d at 1283–84 (holding that, to establish standing, "the plaintiff must show that he or she had an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution" (cleaned up)). In other words, the Plaintiffs had only to demonstrate that their decision to refrain from protected speech was objectively reasonable—which is to say, that it wasn't an injury they'd manufactured. We also rejected the near-frivolous argument that the Plaintiffs' injury claims were belied by their decision to continue panhandling. *See* Apr. 9, 2019 Hr'g. The concept of "chilled speech," we explained, isn't an either-or proposition. *Id.* It doesn't require the Plaintiffs to cease their protected activities entirely—so long as they can show that they reduced *the frequency* of their speech *because of* a credible fear of arrest. *Id.* In that way, we held, the Plaintiffs suffered (and continue to suffer) an Article III injury.

At the argument on the Plaintiffs' request for a preliminary injunction, the City raised three new issues. *First*, it suggested that § 25-267(d) proscribes sign-holding only on *private* property, and not on public rights-of-way—though it eventually conceded that the provision was "poorly drafted" and, at best, ambiguous as to whether

7. We later issued a written order to that effect. *See* Order Denying Motion to Dismiss [ECF No. 31].

it applied on public or private land. Because City police officers were enforcing the provision on *public* sidewalks, though—and because the Plaintiffs often hold signs while panhandling on sidewalks—the City agreed to issue a memorandum directing its officers *not* to enforce that provision on *public* rights-of-way. *Second*, the City at least implied that the Plaintiffs lacked standing to challenge the aggressive panhandling provision in § 16-82 because they hadn't alleged that, as part of their panhandling activities, they routinely threaten, touch, or block pedestrians. *Third*, the City contended that the hand-to-hand clause in the Right-of-Way Ordinance was a distinct, content-neutral prohibition, which could be isolated from the other proscriptions and evaluated separately. Because the City hadn't advanced any of these arguments before, we invited supplemental briefing. Now that the parties have submitted those additional papers,[8] we address the Plaintiffs' Motion—and, for the following reasons, we **GRANT** it in full.

Standing

As we've explained, at the Hearing—and after we'd found that the Plaintiffs had sufficiently alleged an Article III injury—the City launched a renewed attack on the Plaintiffs' standing to advance a facial challenge against the Panhandling Ordinance's "aggressive panhandling" provisions. Specifically, the City claimed that the Plaintiffs lacked standing to pursue that aspect of their claims because they failed to allege that they engaged (or intended to engage) in conduct that falls within the ambit of those provisions—intimidating pedestrians, for example, or touching others without consent. *See* Apr. 9, 2021 Hr'g. The City didn't say much more on the subject; nor has it briefed the issue, either before or after the Hearing. *See generally* Motion to Dismiss; Supplemental Response. We address it anyway, though, because it's "the Court's responsibility to 'zealously insure that jurisdiction exists over a case.' " *Sully v. Scottsdale Ins. Co.*, 533 F.Supp.3d 1242, 1251 (S.D. Fla. 2021) (Altman, J.) (quoting *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001)).

[1, 2] "When an individual is subject to [the threatened enforcement of a law], an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014). So, a person may bring a pre-enforcement suit when he "has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution[.]" *Id.* (citation omitted); *see also ACLU v. The Florida Bar*, 999 F.2d 1486, 1494 & n.13 (11th Cir. 1993) (explaining that a plaintiff must have an objectively reasonable belief about the likelihood of disciplinary action).

[3–5] The Plaintiffs (it's true) haven't alleged that they intend to intimidate pedestrians or to touch others without consent. *See generally* Complaint. But it's still reasonable to infer—at least at this stage of the case—that (1) they want to do certain things the "aggressive panhandling" provisions arguably forbid, *and* that (2) their speech has been chilled because they

8. *See* Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Supplemental Brief") [ECF No. 32]; Defendant City's Supplemental Response to Plaintiff's Motion for Preliminary Injunction ("Supplemental Response") [ECF No. 40]; Plaintiffs' Reply to Defendant City of Fort Lauderdale's Response to Plaintiffs' Supplemental Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction ("Supplemental Reply") [ECF No. 47].

fear prosecution. So, for example, by standing on a narrow sidewalk and asking strangers for donations (even in areas not covered by § 16-82(b)), it's likely that the Plaintiffs will end up making a second request after a first refusal or that they'll accidentally "block" (or even touch) others on the sidewalk. And it's undisputed that the Plaintiffs *could* be subject to arrest in either of those scenarios. *See* § 16-82(a)(2), (3) (prohibiting second requests after initial refusal and penalizing panhandlers for "blocking" pedestrians). Unsurprisingly, then, the Plaintiffs allege that they (subjectively) fear arrest under both Ordinances. *See* Complaint ¶ 40. And, given the breadth of the "aggressive panhandling" provisions, their decision to chill their own speech seems reasonable in the circumstances. Indeed, the Plaintiffs allege that, while panhandling, police officers have harassed them and threatened them with arrest, *see id.* ¶¶ 38, 44, and that they've seen officers arrest *other* panhandlers, *see id.* ¶ 39—claims they've corroborated by appending to their Motion a stack of arrest and citation records, showing (they say) that the City's police officers continue to arrest panhandlers for violating the "aggressive panhandling" provisions. *See* Arrest Records [ECF No. 5-6] at 8, 14, 33 (citations for "aggressive panhandling").[9] The Plaintiffs, in short, have standing to advance their facial challenge to the "aggressive panhandling" provisions.

Preliminary Injunction

[6–10] To prevail here, the Plaintiffs must establish that: (1) they have a substantial likelihood of success on the merits; (2) they will suffer irreparable injury unless the injunction is granted; (3) the harm from the threatened injury outweighs the harm the injunction would cause the opposing party; and (4) the injunction would

9. This evidence of third-party arrests—together with the scope of the "aggressive panhandling" provisions—*may* bring this case within the ambit of the First Amendment's "overbreadth doctrine." That doctrine allows "a litigant whose own conduct is unprotected to assert the rights of third parties to challenge a statute, even though 'as applied' to him the statute would be constitutional." *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 967 n.13, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). If a plaintiff can show that the challenged law punishes a "substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep," the court may "invalidate *all* enforcement of that law, until and unless a limiting construction or partial invalidation so narrows it as to remove the seeming threat or deterrence to constitutionally protected expression[.]" *Virginia v. Hicks*, 539 U.S. 113, 118–19, 123 S.Ct. 2191, 156 L.Ed.2d 148 (2003) (cleaned up). The Supreme Court has "provided this expansive remedy out of concern that the threat of enforcement of an overbroad law may deter or 'chill' constitutionally protected speech—especially when the overbroad statute imposes criminal sanctions." *Id.* at 119, 123 S.Ct. 2191.

Because the Plaintiffs' activities are arguably proscribed by the "aggressive panhandling" provisions, and because—at this stage—the Plaintiffs have plausibly alleged a reasonable fear of prosecution, we don't need to dive into the murky waters of overbreadth standing. We note, though, that the "standing" concerns the City raised at the Hearing are perhaps better suited for a merits-based evaluation. *See Munson*, 467 U.S. at 958–59, 104 S.Ct. 2839 ("The Secretary's [standing] concern ... is one that is more properly reserved for the determination of Munson's First Amendment challenge on the merits. The requirement that a statute be 'substantially overbroad' before it will be struck down on its face is a 'standing' question only to the extent that if the plaintiff does not prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it, the statute is unconstitutional, it has no 'standing' to allege that, as applied to others, the statute might be unconstitutional."). We, of course, address that merits question below. For now, though, it suffices to say that the Plaintiffs have standing to proceed through this initial phase of the case.

not be adverse to the public interest. *See, e.g., Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1270–71 (11th Cir. 2020). The first factor, "a substantial likelihood of success on the merits," requires a showing of "only *likely* or probable, rather than *certain*, success." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005). It's worth noting, too, that this first factor is "generally the most important" of the four. *Id.* One last thing on these factors: the third and fourth factors " 'merge' when, as here, the [g]overnment is the opposing party." *Gonzalez*, 978 F.3d at 1270–71 (quoting *Swain v. Junior*, 961 F.3d 1276, 1293 (11th Cir. 2020)). And, of course, the Plaintiffs bear the burden of proving their entitlement to a preliminary injunction. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000).

I. Likelihood of Success on the Merits

A. The First Amendment

[11] The First Amendment, applicable to the States through the Fourteenth, prohibits the enactment of laws "abridging the freedom of speech." U.S. Const. amend I. The City concedes, as it must, that panhandling is protected speech under the First Amendment. *See generally* Response; *see also Vill. of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632, 100 S.Ct. 826, 63 L.Ed.2d 73 (1980) (holding that a request for charity or gifts, whether "on the street or door to door," is protected First Amendment speech); *Reynolds v. Middleton*, 779 F.3d 222, 225 (4th Cir. 2015) ("There is no question that panhandling and solicitation of charitable contributions are protected speech."); *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999) ("Like other charitable solicitation, begging is speech entitled to First Amendment protection."). The City also acknowledges—or at least it doesn't contest—that both Ordinances regulate activities in "traditional public fora" (*e.g.*, sidewalks and public parks). *See generally* Response; *see also Bloedorn v. Grube*, 631 F.3d 1218, 1231 (11th Cir. 2011) ("Traditional public fora are public areas such as streets and parks that, since 'time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983))).

[12–15] The government may, of course, regulate protected speech in traditional public fora. But the legality of any such regulation turns on its justification and the degree to which the regulation is tailored to that justification. The state's burden in this regard depends on the regulation's features. If the law limits speech based on its communicative content—sometimes referred to as a content-based restriction—then it is subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015). Laws subject to strict scrutiny are "presumptively unconstitutional," which means that the government must prove that they are "narrowly tailored to serve compelling state interests." *Id.* By contrast, a regulation imposing reasonable and content-*neutral* restrictions—on the time, place, or manner of speech—must withstand only intermediate scrutiny, which requires *both* that the regulation be narrowly tailored to serve a significant governmental interest *and* that it "leave open ample alternative channels for communication of the information." *McCullen v. Coakley*, 573 U.S. 464, 477, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014); *see also Bloedorn*, 631 F.3d at 1231 ("[A] time, place, and manner restriction can be placed on a traditional public forum only if it is content neutral, narrowly tailored to achieve a significant government interest, and leaves open ample alternative channels of communication." (cleaned up)).

[16–19] So, how do we know if a law is content based or content neutral? Fortunately, the Supreme Court recently answered this question in *Reed*. A regulation of speech is content based if it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163, 135 S.Ct. 2218. In so holding, *Reed* clarified that courts must take the "crucial first step" of determining "whether the law is content neutral *on its face*," which means evaluating whether the law "expressly draws distinctions based on . . . communicative content." *Id.* at 165, 135 S.Ct. 2218 (emphasis added). If it does, the law will be subject to strict scrutiny "*regardless* of the government's benign motive, content-neutral justification, or lack of animus towards the ideas contained in the regulated speech." *Id.* (emphasis added & cleaned up). Some facial distinctions will be "obvious" insofar as they define speech "by particular subject matter," whereas others "are more subtle, defining regulated speech by its function or purpose." *Id.* at 163, 135 S.Ct. 2218. But "[b]oth are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny." *Id.* A separate category of laws may be facially neutral—but still content based—if they can't be "justified without reference to the content of the regulated speech" or if they were "adopted by the government 'because of disagreement with the message [the speech] conveys.' " *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). Applying this paradigm in *Reed*, the Court found that a town's sign ordinance was content based *on its face* because it exempted from certain permitting requirements three categories of signs—ideological signs, political signs, and temporary-event signs—which were exempted based only on the contents of the messages they expressed. *Id.* at 164–65, 135 S.Ct. 2218.

We can see *Reed*'s impact in two opinions—one before *Reed*, the other after—the Seventh Circuit issued in a case called *Norton v. City of Springfield, Illinois*. In its initial decision—issued before *Reed*—the Seventh Circuit recognized that "[t]he [Supreme] Court [had] classified two kinds of regulations as content based. One [was] regulation that restricts speech because of the ideas it conveys. The other [was] regulation that restricts speech because the government disapproves of its message." *Norton v. City of Springfield, Ill.*, 768 F.3d 713, 717 (7th Cir. 2014), *on reh'g*, 806 F.3d 411 (7th Cir. 2015). Based on that typology, the Seventh Circuit found it "hard to see an anti-panhandling ordinance as entailing either kind of discrimination." *Id.*

But that all changed after *Reed*. As the Seventh Circuit explained in reversing itself on rehearing, *Reed* held that "regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Norton v. City of Springfield, Ill.*, 806 F.3d 411, 412 (7th Cir. 2015) (quoting *Reed*, 576 U.S. at 163, 135 S.Ct. 2218). In other words, the Seventh Circuit read *Reed* as holding that an ordinance is content based if it distinguishes between *topics* of speech—even if it's neutral with respect to ideas or viewpoints. *Id.* Under this new framework, the Seventh Circuit vacated its prior opinion and reversed and remanded the case for the district court to enjoin an ordinance that prohibited panhandling in a city's historic district. *Id.* In his concurrence, Judge Manion predicted that "[f]ew regulations will survive [*Reed*'s] rigorous standard." *Id.* at 413 (Manion, J., concurring); *cf. Reed*, 576 U.S. at 180, 135 S.Ct. 2218 (Kagan, J., concurring) ("Given the Court's analysis, many sign ordinances of that kind are now in jeopardy.").

Judge Manion was right. Since 2015, several courts have found that panhandling

ordinances like the City's—especially general bans on panhandling in large swaths of a city, such as commercial zones or historic districts, or near bus stops and sidewalk cafés—are content based and (thus) unconstitutional. *See Rodgers v. Bryant*, 942 F.3d 451, 456 (8th Cir. 2019) (affirming a preliminary injunction barring enforcement of an anti-loitering law because the law was "a content-based restriction [insofar as] . . . it applie[d] only to those asking for charity or gifts, not those who are, for example, soliciting votes, seeking signatures for a petition, or selling something"—*i.e.*, "its application depend[ed] on the 'communicative content' of the speech"); *Ind. C.L. Union Found., Inc. v. Superintendent, Ind. State Police*, 470 F. Supp. 3d 888, 895, 908 (S.D. Ind. 2020) (preliminarily enjoining an ordinance that banned panhandling (1) at various locations—including bus stops, parking facilities, and within 50 feet of ATMs or entrances to certain buildings; (2) while touching another without consent; and (3) while blocking another's path); *Blitch v. City of Slidell*, 260 F. Supp. 3d 656, 673 (E.D. La. 2017) (permanently enjoining an ordinance that required panhandlers to register with the chief of police and to wear identification before asking for money); *Homeless Helping Homeless, Inc. v. City of Tampa, Fla.*, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016) (permanently enjoining a general ban on panhandling in front of sidewalk cafés, within 15 feet of ATMs, and in other designated areas); *Browne v. City of Grand Junction, Colo.*, 136 F. Supp. 3d 1276, 1288–94 (D. Colo. 2015) (permanently enjoining a panhandling ban to the extent it (1) limited the times during which a person could panhandle; (2) prevented solicitation after a first refusal; and (3) banned panhandling on public buses or in parking garages, parking lots, or similar facilities); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 182 (D. Mass. 2015) (declaring unconstitutional (1) a ban on panhandling in certain areas of the city and (2) a ban on "aggressive panhandling").

As students of constitutional law will recognize, the application of strict scrutiny *usually* sounds the death knell for a challenged ordinance, particularly in the arena of the First Amendment. There are, of course, notable exceptions. *See Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 455, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015) (holding that a canon of judicial conduct was "narrowly tailored to serve a compelling government interest" and that "the First Amendment pose[d] no obstacle to its enforcement"). But, so far anyway, there don't appear to be exceptions in the panhandling context. Carefully applying strict scrutiny, the courts in the cases we've cited above all came out the same way, concluding that the ordinances failed (or would likely fail) strict scrutiny. And, for that reason, we won't review the strict-scrutiny analysis in each case, other than to make two general observations. The first is that, in some cases, a city may not even be able to articulate the "compelling" interests that animated its decision to enact a panhandling prohibition. *See, e.g., Homeless Helping Homeless*, 2016 WL 4162882, at *2 (government conceding that it lacked any compelling interest in passing the panhandling law). A city may try to justify its ordinance by invoking a general interest in making its residents and tourists *feel* more "comfortable." But the Supreme Court has explained that a state has no compelling interest in banning uncomfortable (or unpleasant) speech. Indeed, as the Court has pointed out, allowing "uncomfortable message[s]" is a "virtue, not a vice" of the First Amendment. *McCullen*, 573 U.S. at 476, 134 S.Ct. 2518; *see also McLaughlin*, 140 F. Supp. 3d at 189 (noting that "the promotion of tourism and business has never been found to be a compelling government interest for the

purposes of the First Amendment" and that the First Amendment "does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed"); *Ind. C.L. Union*, 470 F. Supp. 3d at 904 ("[S]imply stating that individuals may not want to be approached for a solicitation is not enough to show a compelling interest.").

Our second observation is that public safety, as a general matter, is a compelling government interest. But when a city attempts to justify a panhandling ordinance by reference to public safety, it still has a steep hill to climb—even where, as here, the ordinance targets so-called "aggressive panhandling," which (at the very least) sounds dangerous. That's because "aggressive panhandling" ordinances often sweep in much more speech than is necessary to promote public safety—including speech that is entirely innocuous—while omitting conduct that's genuinely threatening. Where that's true—*viz.*, that the law is both under- and over-inclusive—then it's not narrowly tailored to accomplish the state's compelling interests, however provocatively it's titled. *See, e.g., Blitch*, 260 F. Supp. 3d at 670 ("Panhandling may be annoying to the residents of Slidell, but that does not establish that all panhandling is a threat to public safety. And at best, the City's summary judgment evidence demonstrates that the City is presently having some difficulty identifying aggressive panhandlers and the ordinance would aid Slidell in enforcing its law. That is an insufficient showing to justify such a sweeping registration requirement on prospective panhandlers."); *Browne*, 136 F. Supp. 3d at 1293–94 ("[T]he problem in this case is that Grand Junction has taken a sledgehammer to a problem that can and should be solved with a scalpel. In attempting to combat what it sees as threatening behavior that endangers public safety, Grand Junction has passed an ordinance that sweeps into its purview non-threatening conduct that is constitutionally protected.").

With that legal framework in mind, we turn to the Plaintiffs' arguments.

B. The Panhandling Ordinance, § 16-82

i. *The Panhandling Ordinance is Content Based*

[20] As the above summation should make clear, the Plaintiffs have shown that the Panhandling Ordinance is content based.[10] Like the panhandling laws that, in the wake of *Reed*, have been enjoined by federal courts across the country, our Panhandling Ordinance identifies certain *topics* that a panhandler may not discuss when addressing another person in designated areas. "Panhandling," under the Ordinance, is "[a]ny solicitation made in person *requesting an immediate donation of money or other thing of value*." § 16-82(a) (emphasis added). In that way, the law limits in-person, vocal solicitations for money or things of value. But it *doesn't* touch other topics of discussion. So, for instance, people are free to solicit pedestrians—in person and vocally—for advice, for directions, for their prayers, for a signature on a petition, to read a treatise by John Locke, to join a political party, to visit a restaurant, to come to church, to put on Tefillin, to shake a Lulav, to kiss an Etrog, to join a softball team, etc. As long

10. The City essentially (and accidentally) conceded this point at the Hearing by acknowledging that the Panhandling Ordinance is somewhat "more" directed towards the content of speech than the Right-of-Way Ordinance is. *See* Apr. 9, 2021 Hr'g. After *Reed*, though, if an ordinance discriminates based on content *at all*, it's content based.

as the speaker doesn't say something to the effect of "I'm poor, please help" or "Do you have some spare change?" he may approach a stranger anywhere in the City and utter any *other* message. Because the Panhandling Ordinance prohibits one topic and allows all others, it is content based.

The City nonetheless argues that the law is content neutral because a person can still receive donations by "passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person." Response at 7 (quoting § 16-82(a)). Here, the City simply misses the point. The First Amendment doesn't care that the City allows panhandlers to *receive money* by doing *something else*, such as sitting passively with a sign or singing. As *Reed* explained, the First Amendment prohibits government, in the realm of speech, from picking winners and losers—from discriminating against certain classes (or topics) of discussion. And that's precisely what the City has tried to do here.[11]

In this respect, we note that whether the Panhandling Ordinance "leave[s] open ample alternative channels for communication of the information," *McCullen*, 573 U.S. at 477, 134 S.Ct. 2518, has to do with whether, in the world of intermediate scrutiny, an ordinance is narrowly tailored. But it doesn't answer the "crucial" threshold question we have here—which is whether the Ordinance, on its face, is content based. The sign ordinance in *Reed* was content based, after all, even though Pastor Reed *could have* used some alternative means to invite people to his church—say, by sending emails or by taking out an ad in the local paper. What mattered, the Supreme Court said, was that Pastor Reed wanted to put a up a sign but couldn't—not because of some general proscription on signs but because of a regulation that discriminated against *the specific topic* he intended his sign to convey. Our Plaintiffs face a similar quandary: They (and, presumably, other panhandlers) may not want to "sing" for money or sit passively and wait for donations; they'd prefer to communicate their message by *speaking* to pedestrians—which is something anyone else can do anywhere in the City, so long as they have a different kind of message to communicate.

The City's content-neutrality cases are wholly inapposite. The City relies, for ex-

11. We also reject the City's cursory, one-line suggestion that § 16-82 should be subjected to less rigorous scrutiny because it regulates only "commercial speech." Response at 7 n.1. The Supreme Court has said that charitable solicitation is not *purely* economic in nature, even though the speaker requests goods or currency. As the Court explained:

> [S]olicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Furthermore, because charitable solicitation does more than inform private economic decisions and is not primarily concerned with providing information about the characteristics and costs of goods and services, it has not been dealt with in our cases as a variety of purely commercial speech.

Schaumburg, 444 U.S. at 632, 100 S.Ct. 826. Drawing from this passage, the lower courts have uniformly held that panhandling is *not* commercial speech. *See Henry v. City of Cincinnati, Ohio*, 2005 WL 1198814, at *6 (S.D. Ohio Apr. 28, 2005) (collecting cases and explaining that, "[a]fter *Schaumburg*, lower federal courts and state courts have equated panhandling to charitable solicitations, [ ] analyzed them under the same framework," and found that "panhandling, like charitable solicitation, is more than mere commercial speech").

ample, on *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164 (11th Cir. 2018), a post-*Reed* case, which involved an ordinance preventing adult businesses (*i.e.*, ones that "regularly feature[ ] sexual devices") from operating within a certain distance of residential districts, places of worship, parks, or public libraries. *Id.* at 1168. The Eleventh Circuit treated the regulations as content-neutral time, place, and manner restrictions and, accordingly, subjected them to intermediate scrutiny. *See id.* at 1173–74. Out of context, it's true, that holding might seem to support the City's position here. But courts have always handled adult-entertainment ordinances differently—both before and after *Reed*. *See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, Ga.*, 703 F. App'x 929, 933 (11th Cir. 2017) ("On their face, the ordinances may appear to be content based because they target adult entertainment; *so if we were applying general principles of First Amendment law, the ordinances would be subjected to strict scrutiny*. Yet under equally well-established Supreme Court and Eleventh Circuit precedent, *adult-entertainment ordinances are not treated like other content based regulations*." (emphases added & internal citation omitted)). There's only one way to read this passage from *Flanigan's*: outside the special case of adult entertainment, we apply strict scrutiny to regulations that discriminate between *topics* of speech.

As for the City's other cases, they were *all* decided before 2015 and, thus, likely won't survive *Reed*. In *One World One Family Now v. City of Miami Beach*, 175 F.3d 1282 (11th Cir. 1999), for example, the court addressed a regulation that limited nonprofits from setting up portable tables on sidewalks, but which exempted full-service restaurants from the same restrictions. *Id.* at 1284–85. Although it recognized that setting up tables to distribute information was a form of protected speech, the Eleventh Circuit held that the regulation was nonetheless content neutral. *Id.* at 1286–87. When we dig deeper, though, we can see that the Eleventh Circuit deployed a rationale *Reed* later rejected. The court, for instance, noted that the plaintiffs didn't challenge "the city's stated intent" or show that the city meant to "control any particular message." *Id.* at 1287. Certainly, discriminatory *intent*—if established—would be *sufficient* to demonstrate that a law is content based. But, after *Reed*, it isn't *necessary*. As *Reed* made plain, a law may be content based even if, in enacting that law, the government wasn't motivated by some preference (nefarious or otherwise) for a particular message or viewpoint. If, *on the face of the regulation*, there's any differential treatment of communicative content, then the law is content based and subject to strict scrutiny. In *One World*, by contrast, the Eleventh Circuit concluded that, "[a]lthough there is differential treatment between restaurants on the one hand, and other commercial and nonprofit entities in terms of the placement of tables, such a distinction between nonprofit and commercial tables does not turn the ordinance into a content based one." *Id.* That conclusion, we think, no longer stands.

We needn't say more on whether the Ordinance is content based or content neutral, because the very heavy weight of authority supports the Plaintiffs. The ordinances at issue in the post-2015 panhandling cases we've cited bear striking similarities to the Panhandling Ordinance we have here, and our sister courts have unanimously enjoined those laws precisely because they were content based. So, as the Plaintiffs note, in *Homeless Helping Homeless*, 2016 WL 4162882, at *6, the court permanently enjoined a general ban on panhandling in designated areas, such as in front of sidewalk cafés and within 15 feet of ATMs. Our law's panhandling bans

are almost identical. *See* § 16-82(b)(3), (6) (banning panhandling within 15 feet of sidewalk cafés or ATMs). Similarly, in *McLaughlin*, 140 F. Supp. 3d at 182, the court declared unconstitutional a ban on panhandling in certain areas of the city and a general ban on aggressive panhandling. Again, our ban does the same thing. *See* § 16-82(a), (b) (banning panhandling in several types of locations throughout the City and "aggressive panhandling" altogether). And the court in *Browne*, 136 F. Supp. 3d at 1288–94, permanently enjoined an ordinance that (1) prevented solicitation after a first refusal and (2) banned panhandling on public buses or in parking garages, lots, or other parking facilities. Our regulation works a similar prohibition. *See* § 16-82(a), (b)(1), (b)(2), (b)(5) (banning panhandling in similar facilities and locations—and banning "aggressive panhandling" throughout the City). Finally, in *Indiana Civil Liberties Union*, 470 F. Supp. 3d at 895, the court preliminarily enjoined an ordinance that criminalized panhandling (1) at bus stops and parking facilities, (2) on the sidewalk dining area of a restaurant, (3) within 50 feet of entrances to certain commercial buildings or ATMs, and (4) while touching an individual without consent, while blocking the paths of solicited persons, or while behaving in a way that would cause a reasonable person to fear for his safety. If the *Indiana Civil Liberties Union* ordinance sounds familiar, that's because it's almost identical to the Ordinances we have here. *See* § 16-82(a)(3)–(5), (b)(1)–(4), (b)(6)–(7) (banning panhandling in similar facilities and locations and prohibiting all "aggressive panhandling"—defined, in relevant part, as panhandling coupled with unwanted touching, blocking, and behavior that "would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands"). The City, by contrast, fails to point us to any post-*Reed* authority upholding similar panhandling bans as content neutral. *See generally* Response.

ii. The Panhandling Ordinance Will Likely Fail Strict Scrutiny

Under strict scrutiny, the Panhandling Ordinance is presumptively unconstitutional and survives only if the City can prove that its regulatory scheme "furthers a compelling governmental interest and is narrowly tailored to that end." *Reed*, 576 U.S. at 171, 135 S.Ct. 2218. Based on the arguments and evidence presented thus far, the City will likely fail this exacting test.[12]

[21] We start our strict-scrutiny analysis by asking whether the City had a "compelling" justification for passing the Ordinance. At this first step, the City offers two such justifications—only one of which requires much attention here. *First*, it says that "[u]nlimited direct vocal panhandling" posed a "significant problem to the economic interest of the City." Response at 16. But that's not a sufficiently compelling reason to curtail protected speech. *See McLaughlin*, 140 F. Supp. 3d at 189 (explaining that "the promotion of tourism and business has never been found to be a compelling government interest for the purposes of the First Amendment"); *Ind. C.L. Union*, 470 F. Supp. 3d at 904 ("[S]imply stating that individuals may not want to be approached for a solicitation is not enough to show a compelling interest.").

[22] *Second*, the City claims that it enacted the Panhandling Ordinance to pro-

12. Relying on the faulty premise that § 16-82 is content neutral, the City spends most of its time working within the intermediate-scrutiny paradigm. *See* Response at 7–13. The City does (in fairness) argue, in the alternative, that the law can survive strict scrutiny. *See id.* at 15–16. But its contentions in this regard are perfunctory and unconvincing.

tect residents and tourists "from aggressive panhandling ... which results in unwanted touching, impeding, intimidation and fear of persons who are constantly confronted with vocal requests or demands for monetary donations." Response at 16. But, if the law's purpose is to make people more comfortable—*i.e.*, less "intimidated" or "fearful"—then it fails strict scrutiny because, while advancing the comfort of residents may be a *significant* interest, it isn't a *compelling* one. As we've explained, allowing "uncomfortable message[s]" is a "virtue, not a vice" of the First Amendment. *See McCullen*, 573 U.S. at 476, 134 S.Ct. 2518; *see also McLaughlin*, 140 F. Supp. 3d at 189 (explaining that the First Amendment "does not permit a city to cater to the preference of one group, in this case tourists or downtown shoppers, to avoid the expressive acts of others, in this case panhandlers, simply on the basis that the privileged group does not like what is being expressed").

[23] Public safety, on the other hand, *is* a compelling governmental interest. *See McLaughlin*, 140 F. Supp. 3d at 191 ("[T]he Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety."); *Browne*, 136 F. Supp. 3d at 1292 ("The Court does not question that 'public safety' is a compelling governmental interest."). But it's not clear that the Panhandling Ordinance—which the City now says was designed to prevent "unwanted touching" and "impeding"—was *really* promulgated to promote the public's safety. The City argues that the "restricted areas [listed in the Panhandling Ordinance, § 16-82(b)] present circumstances where the alarm or immediate concern for the safety of individuals by unwanted touching, detaining, impeding or intimidation would be exacerbated (automatic teller machines, parks, sidewalk cafés, public transportation vehicles and parking pay stations) by vocal requests or demands for donations." Response at 9. But it offers no further explanation as to why safety concerns are "exacerbated" in those areas, and it certainly hasn't proffered any *evidence* in support of this public-safety rationale. It hasn't shown (or even suggested), for example, that there's been an uptick in attacks by panhandlers—much less that any such attacks occurred more frequently in the areas the Ordinance singles out for special treatment. Nor has it pointed to police reports or studies demonstrating that panhandlers tend to be more violent in front of sidewalk cafés than in other, uncovered parts of the City. *See Ind. C.L. Union*, 470 F. Supp. 3d at 904 (preliminarily enjoining a panhandling law because the state hadn't "presented any evidence demonstrating that panhandling threatens" public interests—for example, by "showing that panhandling typically escalates to criminal behavior").

Even if it had shown these things, though, the City's public-safety arguments would likely fail on the merits. And that's because, if public safety were *really* the goal, the Panhandling Ordinance would seem to be a very bad way of achieving it. As an example, the law prevents solicitation at bus stops (§ 16-82(b)), where constant crowds might be expected to deter dangerous conduct, but it says nothing about solicitation in back-alleys, where there are fewer people to prevent or deter violent attacks. *See McLaughlin*, 140 F. Supp. 3d at 195 (explaining that panhandling at bus stops, "where people are essentially captive audiences for panhandlers ... may be more bothersome, and even in some sense more coercive, for a person to be panhandled when they cannot, or find it difficult to leave," but it is "not demonstrably more dangerous"); *Browne*, 136 F. Supp. 3d at 1293 (finding that the city "has not shown—and the Court does not believe—that a solicitation for money or other thing of value is a threat to public safety simply because it takes place in a public parking garage, parking lot, or oth-

er parking facility"). The same is true of sidewalk cafés. In these areas, perhaps, panhandling is more *irritating*. But there's no reason to think it any more *dangerous*—and, again, the City shows us no evidence that it is. *See McLaughlin*, 140 F. Supp. 3d at 196 ("No theory or evidence has been offered as to how pedestrians walking near an outdoor café are unusually threatened by panhandlers."). Ultimately, then, the character of the areas the City chose to regulate strongly suggests that the City was motivated, not by any great desire to protect the public from dangerous crimes, but by an understandable (if insufficient) interest in preventing its residents' discomfort.

As for the "aggressive panhandling" aspect of § 16-82, some courts have recognized that comparable laws *can* serve compelling interests. *See id.* at 191 ("[T]he Aggressive Panhandling provisions were enacted in furtherance of a compelling state interest: public safety."). But the City has indisputably banned substantial amounts of protected (and harmless) activities in a way that doesn't seem likely to avert dangerous encounters. For example, § 16-82(a) prohibits a person from "[r]equesting money or something else of value after the person solicited has given a negative response to the initial request." Since the City has chosen not to defend that restriction specifically, *see generally* Response, it (again) hasn't presented any evidence that such second requests tend to lead to violence. In any case—warning: we're about to operate in an evidentiary vacuum—we see nothing inherently dangerous about a person asking a second question after an initial rejection. A once-rejected panhandler might want to "explain that the change is needed because she is unemployed" or to "state that she will use it to buy food." *McLaughlin*, 140 F. Supp. 3d at 193. Indeed, the panhandler's ability to communicate "the nature of poverty"—which she may decide to do only after a rejection—"sit[s] at the heart of what makes panhandling protected expressive conduct in the first place." *Id.*; *see also Browne*, 136 F. Supp. 3d at 1293 (finding the city's anecdotal evidence of second-request solicitations unpersuasive because "in neither instance [did] it appear that the safety of the person being solicited was threatened simply because the person doing the soliciting had made a second request after the initial request was refused," and noting that the court did "not believe ... that a repeated request for money or other thing of value necessarily threatens public safety").

The "aggressive panhandling" provision of the Panhandling Ordinance *does* prohibit other behavior that *could* lead to precarious encounters, such as intimidating or "[t]ouching a solicited person without explicit permission." § 16-82(a). But the State has already criminalized assault and battery, *see* FLA. STAT. §§ 784.011 *et seq.*, and the City doesn't explain why a batterer should receive *enhanced* penalties solely because, before the assault, he asked the victim for change. And, if the answer to that question isn't at first glance obvious, think for a moment about how underinclusive the provision is: Those enhancements, after all, would apply to the batterer who first asked for pennies but *not* to the activist who, before the assault, asked the victim to join the Communist Party or the Ku Klux Klan. In the end, "[t]he City may not deem criminal activity worse because it is conducted in combination with protected speech, and it certainly may not do so in order to send a message of public disapproval of that speech on content based grounds." *McLaughlin*, 140 F. Supp. 3d at 193.[13]

13. In *McLaughlin,* the court distilled ten different "aggressive panhandling" prohibitions into three categories—two of which are relevant here. The first category encompassed

Nor is the City likely to show that the law is narrowly tailored to serve a compelling state interest. As we've hinted, when it comes to promoting public safety—the only compelling interest the City has identified—the law is both over- *and* under-inclusive. We've already seen how under-inclusive it is—and it isn't hard to conjure a hundred other examples of its under-inclusivity. But, by sweeping in the speech activities of countless panhandlers who will never act violently towards another, the law is also woefully—and unconstitutionally—over-inclusive. *See, e.g., Browne*, 136 F. Supp. 3d at 1292–94 (striking down panhandling bans that were "over-inclusive" because "they prohibit[ed] protected speech that pose[d] no threat to public safety"). Here, again, the City hasn't told us what percentage of its targeted panhandlers is likely to turn violent—so we can safely assume that the percentage is unacceptably small. The City, in short, has failed to demonstrate that the law constitutes the least restrictive means of promoting public safety. It will, of course, have the chance to make its case later on. For now, though, we find that the Plaintiffs are likely to prevail in their First Amendment challenge to the Panhandling Ordinance.

provisions that duplicated existing sanctions but were "directed specifically at panhandling." 140 F. Supp. 3d at 182. One subsection, for instance, criminalized panhandling "intended or likely to cause a reasonable person to fear bodily harm to oneself"—which was really just an assault under Massachusetts law. *Id.* The second relevant category included those provisions that prohibited non-criminal, but "coercive," behavior. *Id.* at 183. "Coercive" behavior included, for example, continuing to solicit a person after that person has "given a negative response to such soliciting." *Id.*

The court concluded that neither of these two categories of prohibitions could survive strict scrutiny. Starting with the so-called "duplicate" provisions, the court found that "[t]he City ha[d] not demonstrated that public safety requires harsher punishments for panhandlers than others who commit assault or battery or other crimes." *Id.* at 193. Here, the court relied on the Supreme Court's decision in *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992), for the proposition that a state may not treat criminal activity more harshly simply because it's conducted in combination with protected speech. As for the second category, the court found that "bans on following a person and panhandling after a person has given a negative response are not the least restrictive means available." *McLaughlin*, 140 F. Supp. 3d at 194.

C. The Right-of-Way Ordinance, § 25-267

The Right-of-Way Ordinance presents more challenging questions, some of which were first raised at the Hearing. The Court therefore invited supplemental briefing on whether the "hand-to-hand exchange" prohibition in § 25-267(a) is content based and on the scope of § 25-267(d), which incorporates the City's general sign ordinance. We address these issues in turn.

i. *Selling and Advertising or Requesting Donations*

The Right-of-Way Ordinance prevents people, while standing on "any portion" of a designated arterial road, from (1) selling anything or offering a service of any kind, or advertising things or services of any kind; (2) seeking donations of any kind; or (3) engaging in any hand-to-hand exchange with a driver, even one who is temporarily stopped. § 25-267(a), (b). The first two prohibitions are clearly content based. The third we'll address in a separate section below.

The City takes a different approach than we do. Rather than address each of the three prohibitions in isolation, it treats the entire provision as one "all[-]encompassing" ban on "all manner of interactions

between pedestrian solicitors and the drivers and occupants of motor vehicles engaged in traffic." Supplemental Response at 5. According to the City, it is "[i]mplicit in § 25-267 . . . that the pedestrian solicitor is attempting to sell something to the occupant of a motor vehicle, obtain a donation from the occupant of a motor vehicle and/or exchange anything else (leaflet, advertising, etc.) by hand with the driver or occupant of a motor vehicle engaged in traffic." *Id.* The provision (the City would have us believe) is thus nothing more than a ban on walk-up interactions with drivers on designated roads—and, in that way, *doesn't* discriminate based on content. We disagree.

Let's "start with the text." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, —— U.S. ——, 139 S. Ct. 1652, 1661, 203 L.Ed.2d 876 (2019). The provision reads, in pertinent part, as follows:

> *Right-of-way canvasser or solicitor* shall mean any person who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, or who seeks any donation of any kind, or who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

§ 25-267(a). Read plainly, the provision doesn't apply *only* to interactions with motorists, as the City suggests. Instead, it prohibits three different kinds of activities a panhandler might engage in while standing on any portion of a public right-of-way—*regardless* of whether one approaches a motorist. We know this because the prepositional phrase at the end of the provision—"to any person who operates or occupies a motor vehicle of any kind"—modifies *only* the third activity (hand-to-hand transmissions) but not the first two. A person thus unmistakably violates § 25-267(a)–(b) by standing in the crosswalk of an arterial road and asking a *pedestrian* for a donation. The Ordinance, in other words, can be broken out as follows *without* changing any of its meaning:

> *Right-of-way canvasser or solicitor* shall mean any person
>
> **[1]** who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, *or*
>
> **[2]** who seeks any donation of any kind, *or*
>
> **[3]** who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind, whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

§ 25-267(a) (emphases and numbers added). Those three activities are then banned on "any portion of [certain] public right[s]-of-way." § 25-267(b).

[24] Our conclusion—that the prepositional phrase at the end of the third provision modifies only hand-to-hand exchanges with motorists—flows naturally from five mutually-reinforcing principles of textual interpretation. *First*, a "[a] timeworn textual canon" provides that, when a statute "include[s] a list of terms or phrases followed by a limiting clause," the limiting clause "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S.Ct. 958,

194 L.Ed.2d 48 (2016) (cleaned up); *see also* BLACK'S LAW DICTIONARY 1532–33 (10th ed. 2014) ("[Q]ualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context or the spirit of the entire writing."); A. SCALIA & B. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 144 (2012) (noting that, under the "last antecedent" rule, limiting phrases should be read as modifying only the words and phrases that immediately precede them). *Second*, each of the three activities the Right-of-Way Ordinance proscribes is introduced with the relative pronoun "who" and is separated from the others by the disjunctive "or"—thereby cordoning off each clause and isolating the third activity with its *own* prepositional phrase. *Cf.* SCALIA & GARNER at 148 (explaining that the "typical way in which syntax would suggest no carryover modification is that a determiner (*a*, *the*, *some*, etc.) will be repeated before the second element"). *Third*, the prepositional phrase doesn't match up grammatically with the second activity—requesting donations. Recall the phrasing: "*Right-of-way canvasser or solicitor* shall mean any person ... who seeks any donation of any kind ... *to* any person who operates or occupies a motor vehicle of any kind." § 25-267(a) (emphasis added). A person seeks donations *from* others, not *to* them. The only natural explanation for this grammatical incongruity is that, contra the City's position, the prepositional phrase *isn't* meant to modify the second clause. *Fourth*, the label "right-of-way canvasser" suggests that the Commission intended to define this type of panhandler by reference to his *location* (*i.e.*, on the right-of-way), rather than by his *conduct* (*viz.*, whether he interacts with motorists). *Fifth*, if the City Commission had, in fact, intended to enact a universal ban on driver-motorist interactions, it could have done that—with far fewer (and simpler) words.

[25] When read properly, then, the statute clearly prohibits two speech activities—our first two "subsections" above—based on their communicative content. A person may not stand on any portion of one of the designated rights-of-way and (1) sell (or advertise for sale) a service or item, or (2) ask for a donation. Nothing on the face of the Right-of-Way Ordinance, though, prevents a person from standing in precisely the same spot and communicating *other* messages, such as "Vote for Jones," "Join the Nazis," or "Read John Locke." In that way, those first two clauses are content based and subject to strict scrutiny.

[26] And, for many of the same reasons we've already given, those clauses are unlikely to survive strict scrutiny. The clauses prohibit someone from standing on "any portion" of a designated right-of-way, such as a median or crosswalk, and "requesting a donation." But why would it be more dangerous to stand on that crosswalk and ask for a donation than, say, to stand in that same place and talk to pedestrians about politics, religion, books, ideas, sports, or *anything else*? Again, we needn't speculate on what the answer to this question might be because the City (notably) doesn't offer one—which is reason enough to find that the law isn't narrowly tailored to the City's goal of promoting traffic safety.

Even accepting the City's argument that it *meant* the two clauses to act *only* as a ban on pedestrian-driver interactions (on designated roads), *see* Supplemental Response at 6, the clauses would still be content based *on its face* as to the first two activities. That's because a person walking up to the car *cannot* sell or advertise goods or services and *cannot* request a donation, but he *can* walk up to a car for a chat about John Locke, Jack Nicklaus, or

Joe Biden. *Cf. Fernandez v. St. Louis Cnty., Mo.*, 461 F. Supp. 3d 894, 898 (E.D. Mo. 2020) (finding that a law banning people from "stand[ing] in a roadway for the purpose of soliciting a ride, employment, charitable contribution or business from the occupant of any vehicle" was content based). Why are the latter three topics of conversation *less* dangerous than the former? The City doesn't say. As a result, even if we bought the City's position about what it *intended* the two clauses to do—for which we haven't a shred of evidence—the clauses still wouldn't survive strict scrutiny.

ii. *Hand-to-Hand Transmission*

[27] On the Ordinance's third clause, the parties find some common ground: They agree that this hand-to-hand transmission clause (the one we've isolated as the third activity) is content neutral and subject to *intermediate* scrutiny. *See* Supplemental Brief at 1; Supplemental Response at 1. Although that agreement alleviates the City's burden *somewhat*, the City must still show *both* that the provision is "narrowly tailored to achieve a significant government interest" *and* that it "leaves open ample alternative channels of communication." *Bloedorn*, 631 F.3d at 1231 (cleaned up). In *McCullen v. Coakley*, the Supreme Court added that, to survive intermediate scrutiny, the government must demonstrate that it "seriously undertook to address the problem with less intrusive tools readily available to it" and "considered different methods that other jurisdictions have found effective." 573 U.S. at 494, 134 S.Ct. 2518. The City fails to meet this less rigorous standard here.

Rather than describe protracted investigation, factfinding, and legislative debate, the City says simply that it "operat[ed] under the premise" that it could promote traffic safety by extending the Right-of-Way Ordinance to arterial roads, which are "heavily travelled and operating beyond their capacity." Supplemental Response at 2. Based on that premise, the City explains, it concluded that "prohibiting solicitors from interacting with motorists engaged in travel, either from a median, sidewalk or the roadway itself, furthers the City's interest in trying to maintain or improve traffic flow on these overcapacity and heavily travelled roadway segments." *Id.* at 3. Although these aren't entirely unreasonable assumptions, they're just that—*assumptions*. At trial, the City will bear the *evidentiary* burden of proving that the provision is narrowly tailored in a way that satisfies intermediate scrutiny; for now, though, it must show (at the very least) that it will be able to carry its burden down the road. *See Ashcroft v. ACLU*, 542 U.S. 656, 666, 124 S.Ct. 2783, 159 L.Ed.2d 690 (2004) ("As the Government bears the burden of proof on the ultimate question of [a statute's] constitutionality, respondents must be deemed likely to prevail [on the merits] unless *the Government has shown* that respondents' proposed less restrictive alternatives are less effective than [the challenged statute]." (emphasis added)); *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009) (explaining that, when considering the likelihood-of-success element of a request for a preliminary injunction, "the district court should have inquired whether there is a sufficient likelihood the State will ultimately fail to prove its regulation constitutional," and having "little difficulty in concluding that appellants are likely to succeed on their claim *because the State has not shown* its ability to justify the statutes' constitutionality" (emphasis added)).[14] In

14. *See also S.O.C., Inc. v. Cnty. of Clark,* 152 F.3d 1136, 1147 (9th Cir. 1998) (remanding for entry of a preliminary injunction where "there is no evidence that an outright ban on commercial canvassing is necessary to meet the asserted interests of the County"); *Chase v. Town of Ocean City,* 825 F. Supp. 2d 599,

other words, the City must point to some evidence (e.g., traffic reports, baseline studies, citizen complaints, etc.) that its Ordinance was justified by some significant government interest.

That's important here for at least two reasons. *First*, the City's "premises" aren't unassailable, even if they aren't facially unreasonable. For example, it may be, as the Plaintiffs suggest, that "[a] person lawfully standing on the sidewalk who accepts a donation from a motorist who is stopped at a light in the lane next to the sidewalk poses no greater danger than a person standing on the sidewalk who is holding a sign." Supplemental Reply at 2. Or it may be that there's never been a single accident in the City involving (or caused by) a hand-to-hand exchange between a panhandler and a temporarily stopped motorist. Or it may be that accidents have happened only when the panhandler walks out into the middle of the street, whereas hand-to-hand exchanges from the *sidewalk* have proven to be relatively safe. In any of these three (quite reasonable) scenarios, the City would have had less intrusive ways of promoting traffic safety. And, as should be obvious, under any of these three hypotheticals, our law would be both over- and under-inclusive: over-inclusive because it penalizes panhandlers whose conduct is not dangerous; under-inclusive because it punishes only the panhandler and not the driver.

Second, and more problematic, is the lack of *any* evidence to justify the law. As we've suggested, that evidentiary lacuna seems to confirm the Plaintiffs' view that the City operated off of assumptions and didn't (as the Supreme Court requires) "seriously [endeavor] to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. Again, the City has said nothing about whether it investigated the issue, what evidence it collected, or the extent to which it entertained other regulatory options. The City can't so completely curtail a citizen's First Amendment rights based only on what amounts to speculation.

For those two reasons, *Cosac Foundation v. City of Pembroke Pines*, 2013 WL 5345817 (S.D. Fla. Sept. 21, 2013), doesn't help the City here. There, Judge Rosenbaum—then on the district court—concluded that a similar ordinance survived intermediate scrutiny precisely because the city *had* submitted evidence of narrow tailoring. *See id.* at *18 (explaining that the city tailored its law based on "information from a variety of sources," including police reports "mapping traffic accidents at City intersections," Florida Department of Safety and Motor Vehicles data on "crashes involving pedestrians in the state," and news reports "on fatal and non-fatal accidents involving right-of-way canvassers nationwide, which revealed three such accidents that occurred in South Florida and involved roadway newspaper vendors"). As we've said, our City passed the Right-of-Way Ordinance without doing (or collecting) any of this.

In passing, it's true, Judge Rosenbaum added that, "even if the City had not introduced such detailed evidence into the record, 'common sense and logic' would still support the City's determination that canvassing and soliciting drivers on heavily trafficked streets presents substantial traffic flow and safety hazards both to pedes-

617 (D. Md. 2011) (concluding, at the preliminary injunction stage of a First Amendment case, that the city carried its burden of persuasion under intermediate scrutiny); *cf. Ezell v. City of Chicago*, 651 F.3d 684, 708–09 (7th Cir. 2011) (where a city had the trial burden to justify a firearm regulation, it didn't—at the preliminary injunction stage—''come close to satisfying this standard'' because ''the City presented no data or expert opinion to support'' the regulation and its public safety concerns were ''entirely speculative'').

trians and motorists." *Id.* We agree in principle that there's *some* logical fit between the banning of hand-to-hand transmissions on busy streets and traffic safety.[15] But that doesn't answer the questions presented here: whether solicitation by sidewalk panhandlers is comparatively safe or whether, as we've said, our regulation is under-inclusive insofar as it penalizes solicitors but not motorists. Those questions may not have been raised in *Cosac*. In any event, in the years since *Cosac*, the Supreme Court has held that a governmental entity bears the evidentiary burden of demonstrating that it "seriously undertook to address the problem with less intrusive tools readily available to it." *McCullen*, 573 U.S. at 494, 134 S.Ct. 2518. That evidentiary requirement, it goes without saying, supersedes Judge Rosenbaum's *obiter dictum*, such as it is, that an ordinance can survive intermediate scrutiny on "common sense and logic" alone. And the City here has only common sense to go on. It explicitly admits, in fact, that it operated only under certain "premises" (read: assumptions); and it points to *no* evidence that it investigated, studied, or even solicited reports on the issue—any one of which might have shown that it seriously undertook to address the problem by less intrusive means.

The Plaintiffs, in short, are likely to succeed on the merits of this claim.

iii. *The Sign Ordinance, § 25-267(d)*

The City continues to maintain, as it did at the Hearing, that § 25-267(d) "deals almost exclusively with signage on private property that *can be viewed from* the public right of ways" and that it is "difficult to conjure a scenario in which the provision would have any application to the Plaintiffs or other pedestrian solicitors who may be carrying a sign to facilitate their activities." Supplemental Response at 6 (emphasis added). To the extent that City officers were, in practice, relying on this provision to arrest canvassers who were standing on *public* rights-of-way, the City represented that, in consultation with the Plaintiffs, it would draft a memorandum, telling its officers to desist from any such future arrests. *See* April 9, 2021 Hr'g. The City later promised to file a notice by April 30, 2021, indicating whether it had issued that enforcement moratorium. *See* Response at 6. As of this writing, however, the City has filed no such notice—and there's no indication in the record that it has ordered its officers to stop enforcing this provision on public rights-of-way. *See generally* Docket. We therefore address the provision and, as with the others, enjoin its enforcement.

We begin, as we must, with the text of § 25-267(d). Contra the City's arguments, that provision unambiguously applies to canvassers who hold signs on *public* rights-of-way. The provision reads as follows:

> It is a violation of this section for any *right-of-way* canvasser or solicitor to hold, carry, possess or use any sign or other device of any kind, *within any portion of the public right-of-way* contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations.

§ 25-267(d) (emphases added). As the text makes pellucid, the City Commission simply incorporated the "terms and provisions" of its general sign ordinance—things like dimensional requirements and display characteristics—into a *different* ordinance, which regulates solicitors and canvassers on *public* rights-of-way. And that make sense: Why reinvent the legislative wheel when you can simply borrow

15. Given the trajectory of Judge Rosenbaum's career since her decision in *Cosac,* we couldn't really say otherwise.

from another law? The City's reading, by contrast, makes no sense—as the City itself acknowledged at the Hearing, when it conceded that, given its construction, the subsection had no "viable application." Apr. 9, 2019 Hr'g. The truth is that the City doesn't need panhandling proscriptions to prevent panhandlers from entering private property for two obvious reasons: *one*, it already has trespassing laws that do that; and *two*, panhandlers don't generally canvas on private property because there are orders of magnitude more people to solicit—motorists and pedestrians—on *public* property.

To the extent the City's arguing that it needed to regulate *signage* on private property, we know that isn't true either, because the sign ordinance, by its terms, already regulates the size and structure of signs on private property. *See* § 47-22-1(c) ("This section regulates the time, place and manner in which a sign is erected, posted, *or displayed* on private property[.]" (emphasis added)). The City's reading would thus render § 25-267(d) entirely superfluous—a cardinal sin of statutory interpretation. *See Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (recognizing that "one of the most basic interpretive canons" is that a "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant"); SCALIA & GARNER at 174 ("If possible, every word and every provision is to be given effect (*verba cum effectu sunt accipienda*). None should be ignored. None should needlessly be given an interpretation that causes it to duplicate another provision or to have no consequence."). We note, too, that, if the City Commission didn't actually intend for this law to apply on public property, then the City's police officers—who are trained to carry out the City Commission's will—didn't get the memo. They, after all, have consistently used this provision to cite and arrest canvassers on *public* rights-of-way. *See, e.g.*, Arrest Report at 32 (police report stating that canvasser had been cited under Right-of-Way Ordinance because the officer saw him "hold, carry, possess and use a sign *within a portion of the public right of way*" (emphasis added)).

[28] It is, of course, possible that § 25-267(d) incorporates only content-neutral time, place, and manner sign restrictions, such that it *could* withstand intermediate scrutiny. Oddly, however, the City has chosen not to defend the Sign Ordinance on those grounds: it never argues that the Ordinance is content-neutral, offers no legitimate governmental interest, and adduces no evidence that the Ordinance is in any way tailored to that interest. *See generally* Response; Supplemental Response. It's thus waived any such arguments. *See In re Egidi*, 571 F.3d 1156, 1163 (11th Cir. 2009) ("Arguments not properly presented in a party's initial brief or raised for the first time in the reply brief are deemed waived."). The City concedes—albeit for different reasons—that the Ordinance *shouldn't* be enforced on public rights-of-way. *See* Apr. 9, 2019 Hr'g. Nevertheless, as we've said, its police officers have been enforcing the law as if it did apply there. Because the City hasn't directed its officers to stop enforcing the law—and given that it hasn't justified the law on any other ground—the Plaintiffs are entitled to a preliminary injunction.[16]

16. Because the provision applies to panhandlers who hold signs on *public* property—and given that our Plaintiffs do precisely that, *see* Complaint ¶¶ 37, 43 (alleging that the Plaintiffs hold signs while panhandling on sidewalks)—the Plaintiffs have standing to challenge the provision facially.

II. The Remaining Elements

[29] The Plaintiffs easily satisfy the remaining elements of a preliminary injunction. *First*, it's well established that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1271–72 (11th Cir. 2006) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976)). In *KH Outdoor*, the city cited a local sign ordinance in denying the plaintiff's application for outdoor advertisements and billboards. *See id.* at 1264. Although the district court didn't make any findings about irreparable injury, the Eleventh Circuit explained that the sign ordinance's direct penalization—rather than "incidental inhibition"—of protected speech, standing alone, established irreparable injury. *Id.* at 1272. It thus concluded that the district court "did not abuse its discretion on those grounds, because the injury (categorically barring speech by prohibiting noncommercial billboards) was of a nature that could not be cured by the award of monetary damages." *Id.*

[30] Our Plaintiffs' free-speech rights have been similarly abridged, and their claim to irreparable injury is no less straightforward. Money damages, after all, won't compensate them for the past deprivation of their constitutional rights. *See Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) (noting that "chilled free speech . . . [cannot] be compensated for by monetary damages"). Indeed, our Plaintiffs may feel this "chilling" effect more acutely than most because they've staked their livelihoods to the outcome of this case. Our Plaintiffs, recall, don't panhandle for fun; they canvass the streets because it's their only means of subsistence. Were we to push off our injunction until the end of the case, therefore, we'd be preventing them (perhaps for six months or more) from collecting the donations they need to survive. That, we think, is precisely what the law means when it speaks of irreparable injury.

The City counters that "there is no assertion that the challenged regulations have even been applied to [the Plaintiffs], through an arrest or citation." Response at 13. But that's really just a rehash of its standing objection, which we've rejected already—and which, in any event, is foreclosed by the many decisions granting, in similar circumstances, pre-enforcement preliminary injunctions. *See, e.g., KH Outdoor*, 458 F.3d at 1271–72; *Ashcroft*, 542 U.S. at 663, 124 S.Ct. 2783; *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 870 (11th Cir. 2020).

We find even less persuasive the related argument that the Plaintiffs cannot establish irreparable injury because they continue to panhandle—despite the Ordinances. *See* Response at 13. As we've said, whether a plaintiff continues to engage in prohibited speech is immaterial where he has alleged—as the Plaintiffs have here, *see* Complaint ¶¶ 39, 45—that, were it not for the offending ordinance, he would have engaged in more of the conduct the ordinance proscribes. That reticence to exercise one's free-speech rights lies at the very heart of our irreparable-injury jurisprudence. *Cf. Towbin v. Antonacci*, 885 F. Supp. 2d 1274, 1295 (S.D. Fla. 2012) ("[T]he Court rejects the notion that Plaintiff is not entitled to an injunction either because her injury (a slight intrusion into her speech and associational rights) or its duration . . . are minimal.").

[31, 32] *Second*, the harm from the threatened injury outweighs any harm to the public interest. *See Gonzalez*, 978 F.3d at 1270–71. A temporary infringement of First Amendment rights "constitutes a serious and substantial injury," whereas

"the public, when the state is a party asserting harm, has *no interest* in enforcing an unconstitutional law." *Scott v. Roberts*, 612 F.3d 1279, 1297 (11th Cir. 2010) (emphasis added). Enforcing unconstitutional laws not only wastes valuable public resources; it "disserves" the public interest. *Id.* at 1290, 1297; *see also Otto*, 981 F.3d at 870 ("The nonmovant is the government, so the third and fourth requirements—'damage to the opposing party' and 'public interest'—can be consolidated. It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance."); *KH Outdoor*, 458 F.3d at 1272–73 ("As for the third requirement for injunctive relief, the threatened injury to the plaintiff clearly outweighs whatever damage the injunction may cause the city ... [because] the city has no legitimate interest in enforcing an unconstitutional ordinance. For similar reasons, the injunction plainly is not adverse to the public interest. The public has no interest in enforcing an unconstitutional ordinance.").

The City correctly notes that the "less certain the district court is of the likelihood of success on the merits, the more plaintiffs must convince the district court that the public interest and balance of hardships tip in their favor." Response at 14 (quoting *Scott*, 612 F.3d at 1297). And, the City says, we shouldn't be "certain" here because the Plaintiffs haven't cited Eleventh Circuit or Supreme Court cases overturning similar panhandling ordinances under *Reed*. But *Reed*'s teachings are clear, and we have no trouble applying it to the facts of this case. The Plaintiffs, moreover, have cited several cases from *other* circuits—*q.v.*, Part I.A.—applying *Reed* and enjoining similar ordinances. The City, by contrast, has cited not a single post-*Reed* case (within or outside this Circuit) that directly supports its position. Instead, as we've seen, it continues to rely on *Stardust* and its progeny, which dealt with a distinct area of free-speech jurisprudence: the "secondary effects" of adult businesses. It relies on these cases despite the Eleventh Circuit's unambiguous, post-*Reed* admonition that "adult-entertainment ordinances are *not* treated like other content based regulations." *Flanigan's*, 703 F. App'x at 933 (emphasis added). The Plaintiffs, in short, plainly have the better side of this argument.

* * *

For all these reasons, the Plaintiffs' Motion [ECF No. 5] is **GRANTED**. The City is **PRELIMINARILY ENJOINED** from enforcing §§ 16-82 and 25-267 of the City Code.

DONE AND ORDERED in Fort Lauderdale, Florida, this 23rd day of June 2021.

Appendix A

Sec. 16-82. - Panhandling, begging or solicitation.

(a) Definitions. The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section.

Aggressive panhandling, begging or solicitation means:

(1) Approaching or speaking to a person in such a manner as would cause a reasonable person to believe that the person is being threatened with either imminent bodily injury or the commission of a criminal act upon the person or another person, or upon property in the person's immediate possession;

(2) Requesting money or something else of value after the person solicited has given a negative response to the initial request;

(3) Blocking, either individually or as part of a group of persons, the passage of a solicited person;

(4) Touching a solicited person without explicit permission; or

Appendix A—Continued

(5) Engaging in conduct that would reasonably be construed as intended to intimidate, compel or force a solicited person to accede to demands.

Panhandling means:

(1) Any solicitation made in person requesting an immediate donation of money or other thing of value for oneself or another person or entity; and

(2) Seeking donations where the person solicited receives an item of little or no monetary value in exchange for a donation, under circumstances where a reasonable person would understand that the transaction is in substance a donation.

Panhandling does not mean the act of passively standing or sitting, performing music, or singing with a sign or other indication that a donation is being sought, but without any vocal request other than a response to an inquiry by another person.

(b) Prohibited areas of panhandling, begging or solicitation. It shall be unlawful to engage in the act or acts of panhandling, begging or solicitation when either the solicitation or the person being solicited is located in, on, or at any of the following locations:

(1) Bus stop or any public transportation facility;

(2) Public transportation vehicle;

(3) Area within fifteen (15) feet, in any direction, of a sidewalk café[;]

(4) Parking lot, parking garage, or parking pay station owned or operated by the city;

(5) Park owned or operated by the city;

(6) Area within fifteen (15) feet, in any direction, of an automatic teller machine;

(7) Area within fifteen (15) feet, in any direction, of the entrance or exit of a commercial or governmental building; or

(8) Private property, unless the person panhandling has permission from the owner of such property.

(c) It shall be unlawful to engage in the act of aggressive panhandling in any location in the city.

(d) Penalty. Any person found guilty of violating this section shall, upon conviction, be penalized as provided in section 1-6 of this Code.

Appendix B

Sec. 25-267. - Right-of-way solicitors and canvassers.

(a) *Definition.* The following words, terms and phrases, when used in this article, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

Right-of-way canvasser or solicitor shall mean any person who sells or offers for sale anything or service of any kind, or advertises for sale anything or service of any kind, or who seeks any donation of any kind, or who personally hands to or seeks to transmit by hand or receive by hand anything or service of any kind,

Appendix B—Continued

whether or not payment in exchange is required or requested, to any person who operates or occupies a motor vehicle of any kind, which vehicle is engaged in travel on or within any portion of any of the streets or roadways in the city, whether or not such vehicle is temporarily stopped in the travel lanes of the road.

Right-of-way shall have the same definition as provided in section 25-97 of the Code of Ordinances.

(b) *Prohibition of right-of-way canvassers and solicitors*. It shall be unlawful for any person to act as a right-of-way canvasser or solicitor on any portion of a public right-of-way with a functional classification of arterial on the Broward County Highway Functional Classifications Map and a Broward County Metropolitan Planning Organization Roadway 2012 Peak Level of Service (LOS) designation of D, E or F. (See Exhibit "A" following § 25-267)

(c) *Prohibition of storage of goods, merchandise and other materials*. It shall be unlawful for any person to store or exhibit any goods, merchandise or other materials on any portion of the public street, including the median, or bicycle lane.

(d) It is a violation of this section for any right-of-way canvasser or solicitor to hold, carry, possess or use any sign or other device of any kind, within any portion of the public right-of-way contrary to any of the terms and provisions of section 47-22, of the Unified Land Development Regulations.

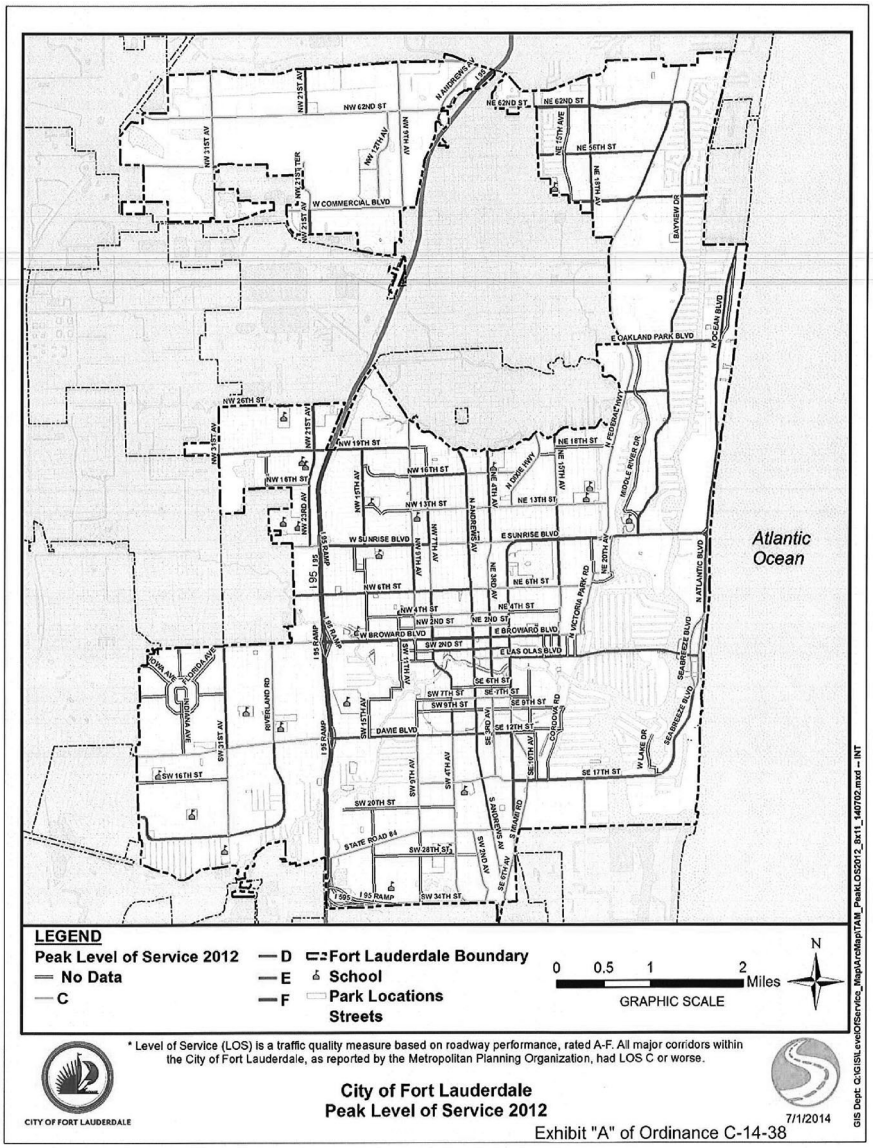
(e) Nothing in this section shall be construed to apply to:

(1) Licensees, lessees, franchisees, permittees, employees or contractors of the city, county or state authorized to engage in inspection, construction, repair or maintenance or in making traffic or engineering surveys.

(2) Any of the following persons while engaged in the performance of their respective occupations: firefighting and rescue personnel, law enforcement personnel, emergency medical services personnel, health care workers or providers, military personnel, civil preparedness personnel, emergency management personnel, solid waste or recycling personnel; public works personnel or public utilities personnel.

(3) Use of public streets, alleys, sidewalks or other portions of the public right-of-way in areas which have been closed to vehicular traffic for festivals or other events or activities permitted by the city.

(f) Violations of this section shall be punishable as provided in section 1-6 of this Code.



Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes*, 96 J. Crim. L. & Criminology 329 (2005)

TWO CONFLICTING READINGS OF ROBINSON AND POWELL

In spite of the Powell plurality's apparent neutralization of Robinson, the collective meaning of Robinson and Powell remains ambiguous, in large part because the concurring opinion of Justice White in Powell --the same Justice White who dissented in Robinson --seemed to disagree with the plurality on its limitation of the earlier case. White cast the fifth and deciding vote in Powell, but in his concurrence he emphasized that his vote was limited to the facts of the case:

> [T]he chronic alcoholic with an irresistible urge to consume alcohol should not be punishable for drinking or for being drunk.
>
> Powell's conviction was for the different crime of being drunk in a public place. Thus even if Powell was compelled to drink, and so could not constitutionally be convicted for drinking, his conviction in this case can be invalidated only if there is a constitutional basis for saying that he may not be punished for being in public while drunk. In other words, Powell's crime was not being drunk; rather it was leaving a private space where his drunkenness could not be subjected to criminal liability.

As White pointed out, if Powell stayed home, he would not have been criminally liable. Powell was not convicted of being an alcoholic, or even of being drunk: he was convicted of being drunk in public. Thus, the constitutionally punishable crime of public intoxication would seem to involve a spatial or contextual element that transforms innocent behavior into culpable conduct. If the state may punish conduct, but may not punish status, then this contextual element, which arose in Powell but not in Robinson, blurs the distinction between status and conduct. As an illustration, what if a state made it illegal to walk around outside while being addicted to drugs? Walking around outside is conduct, but being addicted to drugs is a status. A person would not be criminally liable for addiction to drugs until he stepped outside of his house. As a technical matter, that contextual law would pass the Robinson test for constitutionality. As noted below, however, Justice White's Powell concurrence raises, without explicitly articulating, the complicating factor of the contextual element.

As a doctrinal matter, it remains unclear whether White's vote should count towards the plurality's holding that the State may punish any conduct so long as it is not punishing mere status--or, alternatively, whether his vote should count towards the dissent's interpretation of Robinson, under which the State may punish only volitional conduct, that is, conduct which the defendant has the power to prevent.[1]

At the time Powell was decided, advocates for reforming the criminal justice system's treatment of addicts, including Powell's lawyers, developed the volitional reading, claiming to have lost "on the facts of [Powell's] case, but [to have] won on the law." They claimed that Powell and Robinson collectively stand for the principle that the

[1] For the purposes of this Comment, I will refer to the Powell plurality's interpretation of the Robinson doctrine as the "status/act reading" and the dissent's interpretation as the "volitional reading." However, this dichotomy between the status/act and volitional readings is not meant to foreclose additional readings of the doctrine, including the one endorsed by this Comment. See infra Part VI. Indeed, scholars have suggested alternative ways of understanding conflicting interpretations of the doctrine. For example, a contemporary analysis of Robinson argued that the status/act holding of the case could be read in one of three ways. The Cruel and Unusual Punishment Clause, supra note 3, at 646. First, one could argue that the holding proscribes only "pure status" crimes--i.e., laws that punish membership in a status that is not predicated on any conduct, as opposed to laws that punish statuses, membership in which requires certain conduct (for example, being a "common thief," while a status, is predicated on one's having committed theft). Id. at 646-47. Second, the holding may be read to proscribe only "involuntary" status crimes--i.e., laws that punish, for example, drug addicts who are "born to mothers who are addicts" or whose addiction "may result from medical prescription." Id. at 648-49. Finally, the holding may be read to proscribe punishment of "innocent" status crimes--i.e., laws that punish membership in a "status one cannot change." Id. at 648. Under this reading, the state would not be permitted to punish an addict--even one who has become addicted through conduct that is entirely voluntary--once he is addicted. Id. Building on these three readings of the "constitutional principles underlying the Robinson holding," a more recent commentator has added a fourth reading, which she labels the "'human dignity' rationale for Robinson." Smith, supra note 4, at 314. According to this reading, derived from Justice Brennan's concurrence in Furman v. Georgia, imprisoning addicts is tantamount to treating "members of the human race as nonhumans" and thus is cruel and unusual. Id. at 313-14 (quoting Furman v. Georgia, 408 U.S. 238, 272-73 (Brennan, J., concurring)). However, this commentator acknowledges that, "because the definition of 'inhuman' treatment depends on one's own moral conscience... this rationale does not offer much help toward developing a conceptual rubric with which to guide future applications of Robinson." Id. at 314.

state may not criminally sanction non-volitional conduct. History, however, has not entirely borne out the success of the volitional reading, as "the more common [judicial] interpretation has been to treat the plurality opinion as controlling and Robinson as limited to a proscription of status criminality." Nevertheless, some judges have read White's opinion in Powell as controlling and have applied it to factual situations involving punishment for non-volitional conduct, as opposed to mere status.

It is worth noting as well that the volitional reading has manifested itself outside of American courthouses. The Model Penal Code suggests a voluntary act requirement as an element of every offense: "A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable." Several states have incorporated this voluntary act requirement into their criminal codes. Further, the highest court of Canada has judicially recognized the requirement, albeit through the due process provisions of its Charter of Rights and Freedoms.

White's concurrence in Powell is considered by many to be the closest the U.S. Supreme Court has come to consummating its "flirtation with the possibility of a constitutional criminal law doctrine" that would have mandated a voluntary act requirement. However, the status/act reading remains the dominant judicial interpretation of Robinson and Powell, and the seemingly bright line the status/act reading draws is frequently cited as a rationale for giving it preference over the volitional reading. . .

V. Policy Implications of Applying the Robinson Doctrine to Camping Ordinances

Whether courts apply a status/act or a volitional reading of Robinson and Powell, they ought to recognize the policies behind laws targeting innocent conduct. The two primary policy rationales for camping ordinances--which punish sleeping, eating and other victimless activities when performed in public--are fairly intuitive, although one is considered by many to be legitimate, while the other remains unspoken.

The first rationale includes camping ordinances in a crime-reduction scheme that has come to be known as "quality-of-life enforcement," and which is designed to create "increased police-citizen contact as a way to create and maintain order in our urban streets and to decrease serious crime." Proponents of this scheme--which is also known as the "order-maintenance approach" or the "Broken Windows" theory--"affirmatively promote youth curfews, anti-gang loitering ordinances, and order-maintenance crackdowns as milder alternatives to the theory of incapacitation and increased incarceration." The premise underlying these quality-of-life measures is that cracking down on minor offenses will create an appearance of order in public spaces, which will deter "serious criminal activity."

The second, more hidden, rationale for camping ordinances is that, by allowing the police to harass the homeless through "removal or targeted arrest campaigns" to the point where the homeless can no longer live in a given city, elected officials appear to be "doing something" about the homeless problem in their cities. In other words, camping ordinances, particularly when they become part of a police campaign, eliminate homeless people from the view of the populace by making it illegal for the homeless to live in the city. This rationale is cosmetic--unlike the quality-of-life rationale, it does not target the homeless by way of nominally deterring serious crimes. A policy of cosmetic removal leads to one of two outcomes. The first is a "domino effect": if the homeless cannot live in one city, they are simply forced to move to a more tolerant city. The second is a costly cycle of "arrest, prosecution, and court enforced-service planning."

The second outcome played out in the San Diego Police Department's treatment of Thomas Kellogg.[2] In addition to raising constitutional questions, Kellogg's case is indicative of why a pure status/act reading of Robinson and Powell, under which camping ordinances are upheld because they nominally punish conduct, lead to unfavorable outcomes from a public policy standpoint. Somewhat paradoxically, the policy implications of applying the status/act reading to homeless persons are most evident in Justice Haller's majority opinion when she is expressing her own sympathy for Kellogg, and describing the compassion of Kellogg's jailers and arresting officers.

[2] [Kellogg, a homeless alcoholic, had been arrested several times for public intoxication and sentenced to 180 days in jail.[90] He appealed his conviction, arguing that, because he was both homeless and an alcoholic, he had no choice but to appear drunk in public, and therefore punishing him was cruel and unusual. The California Appeals court rejected an Eighth Amendment challenge to his conviction, characterizing it as for conduct—creating a safety hazard by blocking a public way. People v. Kellogg, 14 Cal. Rptr. 3d 507 (Cal. Ct. App. 2004)]

Judging from the facts in the opinion, the police who arrested Kellogg, and his jailers, were apparently kind to him. Moreover, this kindness seems to be the result of official police procedures: the officer who arrested Kellogg for the first time, Heidi Hawley, is "a member of the [city's] Homeless Outreach Team," which "consists of police officers, social services technicians, and psychiatric technicians," which, on prior occasions had approached Kellogg to offer him assistance, and which once before had taken Kellogg to the hospital for medical care. In jail, Kellogg received a variety of medical attention, including assistance for alcohol withdrawal. At trial, a physician testifying for the prosecution testified that Kellogg's condition improved in jail.

While the compassionate police treatment of Kellogg is heartening, it suggests a gap between the state of the law of public intoxication as applied to homeless alcoholics and public policy considerations. In short, the law allows the homeless to be arrested, and then obliges the police to care for them. However, as Kellogg contended, because he was a "chronic" or "serial" alcoholic, he was apparently ineligible for "the option of civil detoxification." The facts of Kellogg's case are not only suggestive of the cruel reality that people like Thomas Kellogg are perpetually exposed to criminal liability; they also attest to the futility of applying camping ordinances compassionately.

Meanwhile, as one scholar has suggested, abandoning a regime of camping ordinances not only will oblige cities to "[d]eliver[] comprehensive services to homeless people," but will lead to "more effective and cheaper" means for cities to address the homeless problem. At any rate, courts should not remain complicit in legislative efforts to keep homeless people out of sight of the voting public. Simply put, courts should not hide behind slavish status/act readings of the Robinson doctrine to enable legislators to appease their constituents. Not only is such an application of the Robinson doctrine a distortion of the principle underlying Robinson v. California, it leads to cosmetic and ineffectual methods of dealing with a widespread and substantial social problem and allows cities to "pass the buck" to cities making good-faith efforts to solve the homeless problem.

VI. The Behavioral/Contextual Reading: A New, Fairer Principle for Applying the Robinson Doctrine

How, then, can courts strike down camping ordinances and other laws that for all practical purposes punish status, without neutering municipalities' police power? The answer may well lie in the Robinson doctrine.

Even many of those who reject a volitional reading of the Robinson doctrine still recognize intuitively that there is something wrong with branding someone a criminal for doing something that it is beyond their power to avoid doing. On the other hand, courts have found it difficult to assert a limiting principle that would prevent lawmakers from targeting innocent conduct like sleeping in public, while allowing them to punish truly culpable--or at least harmful--conduct, such as buying or using drugs.

To date, proponents of the volitional reading have adopted or attempted to formulate tests that rely on overly subjective or factually burdensome standards of analysis. One scholar, for instance, has suggested a test for applying the Robinson doctrine to "symptomatic acts":

> If the case involves symptomatic acts [derived from status], then a test should be applied based on the homelessness paradigm. The following would have to be established for the Robinson doctrine to apply to symptomatic acts: (a) the "act" would have to be involuntary, (b) the status would have to be one that "cannot be changed" through individual volition except with significant outside assistance and (c) the "act" would have to be inextricably related to the status such that, as with the homelessness case, criminalization of the act obviously criminalized the status.

Unfortunately, this test--while it will result in a finding that camping ordinances are unconstitutional--leaves open to manipulation the definition of such terms as "involuntary," "cannot be changed," "inextricably," and "obviously," and remains vulnerable to Justice Marshall's slippery slope argument in Powell.

The court in Pottinger devised a more objective test, but one that would require defendants employing Robinson defenses to obtain factual information that may be difficult to obtain, and at any rate may not convince an unsympathetic court that their conduct was unavoidable. The Pottinger test essentially requires a homeless litigant to prove that the number of homeless persons living in the city on the night when he or she was arrested exceeded the number of available shelter beds. That proof would be difficult for a homeless litigant to establish, not least because calculating homeless populations usually involves a degree of estimation that courts may simply reject on evidentiary grounds.

The tests described above are derived from volitional readings of the Robinson doctrine, and thus are likely to be rejected by any court attracted to the seemingly bright-line status/act reading. However, these strict status/act readings--which claim legitimacy based on the purportedly self-evident difference between a status and an act--are

equally susceptible to uncertainty. Furthermore, these readings strip the Robinson doctrine of its fundamental substance, that the criminal law should strive, to the extent possible, to punish only the culpable.

The Robinson and Powell Courts clearly did not contemplate the homeless epidemic that would arise in the 1980s, and that may be severely exacerbated by Hurricane Katrina. However, given the "evolving standards of decency" rationale of the Court's Eighth Amendment jurisprudence--and invoked by Justices Stewart and Douglas in Robinson --one can argue that the Robinson majority would not have tolerated a law making it a crime simply to be without a home. Similarly, it is likely that the Robinson Court would have frowned upon criminalization of the innocent acts of homeless persons. Thus, to reduce the Robinson doctrine to a strict status/act reading--in addition to creating a false and easily malleable dichotomy between status and act--is also a clear undermining of Robinson's holding, which, although difficult to articulate, remains good law.

Courts could solve the dilemma of how to articulate the Robinson doctrine-- while not edging down the slippery slope as Justice Marshall and others have feared--simply enough by distinguishing between innocent and culpable conduct. The test for determining whether conduct is innocent or culpable would be this: is the targeted conduct only unlawful in a particular context? If so, then the conduct is innocent, and if the defendant is unable either to escape the context, or avoid performing the conduct, it would violate the Eighth Amendment to hold him criminally liable.

To understand this contextual reading, one must draw a distinction between laws that criminalize specific conduct in all spacial and temporal contexts--such as theft, homicide, rape, assault, and buying or possessing drugs--and laws that criminalize conduct only when performed in certain contexts, that is, in certain times and places, or under certain circumstances. The latter category includes the various forms of disturbing the peace and public indecency. Because very few people, if any, are unable to refrain from disturbing the peace, a defendant invoking a contextual reading of the Robinson doctrine as a defense to one of these charges would be unsuccessful.

On the other hand, a homeless litigant charged with sleeping in public--a contextual crime--can argue that he does not have a home and had nowhere else to sleep. Under a status/act reading of the Robinson doctrine, the argument would fail, because sleeping is an act. Under a volitional reading, his argument is correct, but, as Justice Marshall argued, so would be the argument of a person charged with homicide who "suffers from a compulsion to kill." No homicide defendant could employ the contextual reading as a defense, since his conduct is culpable regardless of the context in which he has committed it.

There are several acts, of course, whose culpability is a function of the context in which they are performed--and a contextual reading of the Robinson doctrine accommodates criminalization of these acts. For instance, a person who has a valid driver's license, but whose blood alcohol level is above the legal limit, is prohibited from driving. His conduct (driving) is unlawful only in a certain context (when he is intoxicated). Unless he is an alcoholic, a driver can avoid becoming drunk, and therefore he is liable for driving drunk. Even if the drunk driver is an alcoholic, he is not compelled to drive.[3]

The contextual reading of the Robinson doctrine has three benefits. First, it would quell the fears of adherents of the status/act reading, who warn that if the volitional reading is adopted, the State would lose the ability to punish even the compulsive killer for his act of homicide. In all jurisdictions in the United States, homicide is a crime whenever and wherever (within the jurisdiction) it is committed. Thus, under a contextual reading, punishing homicide would not violate the Eighth Amendment.

The second benefit of the contextual reading is that it would avoid arbitrary distinctions between status and act, because status is not the focal point of the analysis. As we have seen, judicial discussions of whether homelessness is a status under the meaning of Robinson lead to contrary conclusions. Such analyses, whatever their conclusions, neglect to mention that under the "evolving standards of decency" principle invoked by Robinson, the question of whether or not homelessness is a status is irrelevant: no state in 2006 would pass a law making it illegal simply to be

[3] Of course, a class of laws--sometimes known as "quasi-criminal" laws--has come to be accepted as a legitimate exercise of state power to regulate morally neutral aspects of public welfare. See Erik Luna, The Overcriminalization Phenomenon, 54 Am. U. L. Rev. 703, 708 (2005). This class--which includes strict liability or "malum prohibitum" offenses lacking a mens rea element and carrying light penalties--should perhaps be excepted from the contextual reading of the Robinson doctrine advocated by this comment, because they often involve innocent conduct that can't be avoided by the offender. However, this exception is acceptable given the minimal stigma attached to these offenses. See Catherine L. Carpenter, On Statutory Rape, Strict Liability, and the Public Welfare Offense Model, 53 Am. U. L. Rev. 313, 319 (2003).

without a home.

Similarly, such an analysis would allow judges to avoid making ad hoc determinations of what defines conduct. Some courts put life-sustaining activity on the status side of the status/act divide, while others adhere to the principle that any action that can be described by a verb (unless, apparently, that verb is "to be") is conduct. A person's culpability should not come down to such linguistic niceties. Under the contextual reading the determination of culpability is made objectively, by reference to the state's penal code: if the conduct is criminalized by the state in all contexts, it is culpable.

The third benefit of the contextual reading is that it would continue to allow legislatures to ameliorate social ills through the criminal law, for example by creating "safe zones" for the homeless. Under such a scheme, the legislature could target socially undesirable conduct because the homeless would be able to avoid liability by moving to a designated safe zone. Under a contextual reading of the Robinson doctrine, a homeless person arrested for sleeping outside of the safe zone would not be able to mount a successful Robinson defense.

Although such a solution may seem distasteful--it effectively "quarantines" the homeless in designated areas--it is at least preferable to "quarantining" the homeless in jails and subjecting them to criminal liability. The scheme would also be fiscally beneficial to municipalities that lack adequate funding for social services. Moreover, delivering social services to the homeless may prove far simpler in a safe-zone city than in a city whose homeless population is widely dispersed. Finally, as sociologist Jane Jacobs described, whether by design or not, cities by their very nature tend to breed areas in which "unwelcome users" congregate, but which are not officially arrest-free zones.

However difficult it has been to encapsulate in a rule, Robinson's holding was designed to prevent branding people as criminals because of who they are (as opposed to what they do), and distinguishing between status and conduct has not furthered this goal. Because the Robinson doctrine has been controversial and subject to differing interpretations, those who favor the doctrine's continuing utility would be well-served by an expression of the doctrine that is maximally neutral, rigid, and objective.

Wayne Wagner, Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property is a Condition Precedent to the Full Enjoyment of Rights under the U.S. Constitution, 35 U. Haw. L. Rev. 197 (2013)

V. HOMELESS AS SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE

As argued earlier, many of the prejudices against the homeless are likely rooted to some extent in the federal Constitution's prejudices against the propertyless. The Constitution originally reserved full citizenship rights to free land-owning white males. When one separates "free land-owning white male" into its four constituent elements, it becomes apparent that most of those who have been excluded for lacking these characteristics—slaves, blacks, other non-whites, and women—have received substantial constitutional redress either through Amendments or Supreme Court decisions. But the same does not hold true for those who lack real property. Granted, non-propertied individuals have received expanded constitutional protection of the right to vote, like women and non-whites.[173] Beyond this, however, non-propertied individuals do not enjoy the same equal protection rights that blacks/non-whites [174] and women now possess. Thus, of the

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[171] *Id.* at 14-20.

[172] *Id.* at 37-38. The only choice that suggested respondent's control was "lack of education or skills." *Id.*

[173] The 15th Amendment enfranchised black males in 1870, though blacks and other racial and ethnic minorities had to wait for the Voting Rights Act of 1965 for substantial protection against discriminatory voting practices. The 19th Amendment enfranchised women in 1920. The 24th Amendment, ratified in 1964, prohibited poll taxes in federal elections. Soon thereafter, the Supreme Court held that the poll tax for state elections were a violation of the Equal Protection Clause in *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

[174] *See, e.g.*, Bowman, *supra* note 152, at 1753 (discussing problems with the Supreme Court's use of the White-Black binary, then White-Non-white binary, in school desegregation jurisprudence); RICHARD J. PAYNE, GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE 136 (1998).

original classifications at the heart of the Constitution's earliest requirements for full citizenship, only the non-propertied still seem to be excluded.[175]

To redress this inequality, we ought to consider to what extent homeless individuals can look to the equal protection doctrine for fuller citizenship rights. The doctrine encompasses not only the 14th Amendment's Equal Protection Clause, which declares that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws,"[176] but also the 5th Amendment's Due Process Clause, which the U.S. Supreme Court interpreted in *Bolling v. Sharpe*[177] as creating the same equal protection standard for the federal government.[178]

Equal protection jurisprudence develops in part from the famous footnote four in *United States v. Carolene Products Co.*[179] In footnote four, Justice Stone wrote that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[180] This footnote signaled an intent to scrutinize statutes that "affect socially isolated minorities which have no reasonable hope of redress through the (formally available but, to them, useless) political processes."[181] But the footnote left for another day the specific contours of the standard of review.[182]

Subsequently, the Court decided that unless a group is a "discrete and insular minority," or that the law interferes with a fundamental right, courts must defer to the legislature by applying minimal scrutiny.[183] Thus, suspect classification, which can be seen as shorthand for a court's analysis of

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[175] I do not treat the classification of "slave" because the 13th Amendment abolished slavery in 1865, rendering the status categorically illegal. U.S. CONST. amend. XIII.

[176] U.S. CONST. amend. XIV, § 1. In *Bolling v. Sharpe*, 347 U.S. 497 (1954), the Supreme Court held that equal protection applies to the federal government through the Fifth Amendment's Due Process Clause.

[177] 347 U.S. 497 (1954).

[178] *Id.*

[179] United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

[180] *Id.*

[181] Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093, 1103 (1982).

[182] *Carolene Products*, 304 U.S. at 152 n.4 (1938) ("It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.").

[183] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 678 (3d ed. 2006).

whether a group is a "discrete and insular minority" worthy of heightened protection, becomes key to homeless rights. Unfortunately, neither the U.S. nor Hawai'i Supreme Court[184] has answered whether or not homeless persons constitute a suspect class. Moreover, lower courts have used this lack of precedent perfunctorily to deny that the homeless are a suspect class.[185]

I argue that those who lack real property—the homeless—deserve some form of heightened scrutiny either as a suspect or quasi-suspect class[186] for

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[184] The Intermediate Court of Appeals did state that homeless are not a suspect class in *State v. Sturch*, 82 Hawaii 269, 276, 921 P.2d 1170, 1177 (Haw. Ct. App. 1996). Then-ICA Judge Acoba wrote, "[f]or purposes of equal protection analysis, we note at the outset that the statute in question does not discriminate on the basis of suspect categories and Defendant does not belong to any suspect class." *Id.* In reaching this conclusion, he cited the Hawai'i Supreme Court's statement of suspect classification in *Nachtwey v. Doi*, 59 Haw. 430, 434 n. 5, 583 P.2d 955, 958 n. 5 (1978) (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)):

> [a] suspect classification exists where the class of individuals formed has been "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Sturch, 82 Hawaii at 276, 921 P.2d at 1177 n.8. Acoba problematically conflates homeless people with poor people in citing to this quotation, which arguably makes a strong case for homeless as a suspect class, as discussed below.

[185] *See, e.g.*, Joel v. City of Orlando, 232 F.3d 1353, 1357-58 (11th Cir. 2000); Kreimer v. Bureau of Police for the Town of Morristown, 958 F.2d 1242, 1269 n.36 (3rd Cir. 1992) (though the *Kreimer* court provided no discussion for holding that homeless are not a suspect class, eight cases cited *Kreimer* for support); Garber v. Flores, No. CV 08-4208DDPRNB, 2009 WL 1649727, at *10 (C.D. Cal. June 10, 2009). For cases that denied homeless suspect classification based on the Supreme Court's conclusion that wealth does not create a suspect classification; see, for example, Davison v. City of Tucson, 924 F. Supp. 989, 993 (D. Ariz. 1996). *But see*, Pottinger v. City of Miami, 810 F. Supp. 1551, 1578 (S.D. Fla. 1992):

> This court is not entirely convinced that homelessness as a class has none of these "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted.

[186] It is more likely that courts will grant homeless quasi-suspect class status versus suspect class status. The difference in status depends on whether the government may have legitimate reasons for treating members of a group differently than other people. The Supreme Court has extended suspect classification to race, national origin, and state discrimination against alienage. However, for discrimination against gender and non-marital children, the Court has applied intermediate scrutiny. According to Erwin Chemerinsky:

> the Court's choice of strict scrutiny for racial classifications reflects its judgment that race is virtually never an acceptable justification for government action. In contrast, the Court's use of intermediate scrutiny for gender classifications reflects its view that the biological differences between men and women mean that there are more likely to

two reasons: First, unlike other groups, homeless by definition lack a fundamental buffer against arbitrary governmental interference—real property. Second, the homeless satisfy the factors that courts have used to determine suspect classification, but only when the third factor, immutability, is reformulated to better accord with current understandings of identity politics and with footnote four's process-based concerns.

In one sense, homeless deserve greater Equal Protection Clause solicitude because their lack of real property uniquely exposes them to governmental interference. Regardless of whether the Constitution should impose affirmative duties on the government, at the very least, the Constitution provides individuals with "negative liberties," which protect them from certain forms of governmental interference. Harking back to the earlier discussion of real property as fundamental to political liberty, the purpose of the Constitution aligns with the purpose of real property to the extent that both "house" liberty from governmental interference. As Charles Reich wrote in *The New Property*:

> Property is a legal institution the essence of which is the creation and protection of certain private rights in wealth of any kind. The institution performs many different functions. One of these functions is to draw a boundary between public and private power. Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. It is as if property shifted the burden of proof; outside, the individual has the burden; inside, the burden is on government to demonstrate that something the owner wishes to do should not be done. . . . Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.[187]

Because homeless persons generally reside in public zones, where government exercises more regulatory power, they are exposed to greater risk of governmental interference than people who can retreat into the sanctity of their homes. Without the real property that not only serves a parallel function to the Bill of Rights in protecting liberty, but also enables an individual to access the benefits of the Bill of Rights fully, the homeless suffer the unique disadvantage of being doubly exposed to greater governmental interference.

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be instances where sex is a justifiable basis for discrimination.

CHEMERINSKY, *supra* note 183, at 672-73. For a discriminatory law to survive intermediate scrutiny, it "must serve important governmental objectives and must be substantially related to those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976).

[187] Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 771 (1964).

This lack of real property also makes the homeless better candidates for suspect classification than the poor. This is a necessary distinction because lower courts have generally denied suspect classification to the homeless by applying the U.S. Supreme Court's holding in *San Antonio Independent School District v. Rodriguez*[188] that the poor do not constitute a suspect class.[189] In rejecting the district court's holding that wealth was a suspect classification,[190] the *Rodriguez* majority suggested that two questions were vital to determining whether the poor constitute a suspect class: 1) "whether . . . the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms"; and 2) "whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence."[191] The majority linked the two questions by concluding that a class might be identified by the fact that its members experienced an absolute deprivation because of a shared trait, such as the inability to pay for a desired benefit.[192] Because the plaintiffs could only allege the relative deprivation of having less ability to pay for an education, the majority refused to find the plaintiffs constituted a "definable category of 'poor' people."[193] *Rodriguez* suggested that the poor have failed to achieve suspect class status because poverty is an inherently relative term.[194] As a relative term, poverty creates an amorphous and unwieldy class unless there is an absolute deprivation to limit and frame the class. In contrast to the category of "poor," however, the homeless are a discrete and identifiable class to the extent that their lack of real property creates an

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[188] San Antonio Indep. Sch. Dist. v. Rodriguez,411 U.S. 1, 28 (1973); *see also* Harris v. McRae, 448 U.S. 297, 323 (1980) (citing Maher v. Roe, 432 U.S. 464, 470-71 (1977) ("this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis").

[189] *Rodriguez* involved a class action lawsuit brought by the San Antonio School District on behalf of families residing in poor districts. Texas's school system relied on local property taxes, which lead to great disparities in education funds between wealthy and poor districts. Plaintiffs alleged that this system discriminated against the poor and violated the Fourteenth Amendment's Equal Protection Clause. *San Antonio v. Rodriguez*, 411 U.S. at 1.

[190] Rodriguez v. San Antonio Indep. Sch. Dist., 337 F. Supp. 280, 282-84 (W.D. Tex. 1971) *rev'd*, 411 U.S. 1 (1973).

[191] *San Antonio v. Rodriguez*, 411 U.S. at 19.

[192] *Id.* at 20, 25 (The Court concluded that "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education-the disadvantaged class is not susceptible of identification in traditional terms.").

[193] *Id.* at 25.

[194] *See* JEAN BAUDRILLARD, THE CONSUMER SOCIETY: MYTHS AND STRUCTURES (1998), a seminal work arguing that modern consumer society relies on a logic of difference in defining affluence and poverty. Thus, poverty is always a relative term that is unintelligible by itself.

absolute deprivation of the rights conditioned on real property. For this very reason, the homeless are better candidates for suspect classification than the poor.

To determine suspect classification, courts generally have applied some combination of the following criteria: 1) whether a particular group has suffered a history of discrimination;[195] 2) whether the group is politically powerless;[196] and 3) whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic . . . ."[197]

The first two factors patently favor suspect classification for the homeless. First, the homeless have suffered a well-documented history of discrimination, with courts recognizing that "discrimination against the homeless is likely to be a function of deep-seated prejudice."[198] As discussed above, there is considerable evidence of state and municipal governments continuing to engage in long-standing practices of discrimination against the homeless, both through harassing sweeps and various kinds of anti-homeless legislation.

Second, by almost any measure, homeless people lack political power.[199] Justice Marshall so noted when he wrote that:

> the homeless are politically powerless inasmuch as they lack the financial resources necessary to obtain access to many of the most effective means of persuasion. Moreover, homeless persons are likely to be denied access to the vote since the lack of a mailing address or other proof of residence within a State disqualifies an otherwise eligible citizen from registering to vote.[200]

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[195] Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (citing *San Antonio v. Rodriguez*, 411 U.S. at 28).

[196] *Id.*

[197] Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[198] *See, e.g.*, Johnson v. City of Dallas, 860 F. Supp. 344, 356 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (citing 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, 635–45 (1992)).

[199] According to Kenji Yoshino, the Court has used three tests for political powerlessness. In *Carolene Products*, the Court analyzed whether groups were "discrete and insular minorities." A plurality in *Frontiero* asked whether a group was underrepresented in the "[n]ation's decisionmaking councils." And the Court in *Cleburne* looked to whether the group was unable "to attract the attention of the lawmakers." Yoshino, *supra* note 151, at 565. For a discussion of the homeless' lack of participation in the political process, see Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 338 (2000).

[200] Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 304 n.4 (1984) (Marshall, J., dissenting).

Justice Marshall acknowledged an obvious truth—that homeless cannot participate effectively in the political processes because they lack two main conditions for political participation: genuine voting power and money. Anti-homeless legislation such as Honolulu's "sidewalk law" further erodes the already attenuated ability of homeless to vote by putting them at considerable risk of losing identification and voting documents. Moreover, several states have recently scaled back voting procedures that homeless people especially rely upon, such as third-party registration, same-day voting and registration, and provisional ballots.[201] To the extent that homeless are effectively disenfranchised, one can argue that homeless share the same characteristic that the Supreme Court used in *Graham v. Richardson*[202] to extend suspect classification to aliens—the inability to protect themselves via the political process because of their inability to vote.[203]

The third factor has arguably garnered the most attention (and contention) in its focus on whether a potential suspect class possesses an immutable trait.[204] This factor has been savaged by scholars for its many flaws,[205] the first of which is that the word itself is highly misleading in that "immutability's" substantive legal definition does not match its lay definition of "unalterable."[206] Despite this, and despite not being a requirement, but a factor that courts have at times excluded,[207] immutability deserves in-depth treatment because it serves an important gatekeeping function to exclude potential groups. And so many courts have refused to surrender this factor.[208]

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[201] *See* Letter from Neil Donovan, Exec. Dir., National Coalition for the Homeless, to Eric H. Holder, Jr., Attorney Gen. of the United States (Aug. 17, 2011), *available at* http://www.nationalhomeless.org/projects/vote/NCH_HolderLetter_Aug11.pdf.

[202] 403 U.S. 365 (1971).

[203] *Id.* at 367.

[204] *See, e.g.*, M. Katherine Baird Darmer, *"Immutability" and Stigma: Towards A More Progressive Equal Protection Rights Discourse*, 18 Am. U. J. Gender Soc. Pol'y & L. 439, 448 (2010) ("While the Supreme Court has 'never held that only classes with immutable traits' can achieve suspect classification status, the Court has 'often focused on immutability' in its equal protection jurisprudence.").

[205] *See infra* note 226 & accompanying text.

[206] *See* THE NEW SHORTER OXFORD ENGLISH DICTIONARY 1317 (Thumb Indexed Edition 1993).

[207] Darmer, *supra* note 204, at 448-49; *see also* Tiffany C. Graham, *The Shifting Doctrinal Face of Immutability*, 19 Va. J. Soc. Pol'y & L. 169, 172 n.16 (2011); *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973) (not listing immutability as one of the "traditional indicia of suspectness"); Able v. United States, 968 F. Supp. 850, 863 (E.D.N.Y. 1997) *rev'd*, 155 F.3d 628 (2d Cir. 1998) (noting that the Supreme Court has declined to apply immutability on several occasions).

[208] Yoshino, *supra* note 151, at 558.

Because the current inquiry is analytically problematic but jurisprudentially useful, immutability likely will not be abandoned by the courts. But it should be revised. If the immutability inquiry must ask for a deep-seated trait, I argue that this inquiry should look at the trait as a prejudice held by the majoritarian society rather than as an inherent part of an individual. But before offering my alternative form of immutability, I begin by discussing the current form of immutability, specifically the considerations that shape it and the problems that discredit it.

The Court first introduced immutability in *Frontiero v. Richardson*[209] to explain why the classification of sex deserved heightened scrutiny:

> [S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . ..' And what differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members.[210]

The passage states that a central consideration of the Court's immutability analysis is whether the trait is within one's control.[211] The Court claims that this concern is borne out of a commitment to fairness expressed in the principle "legal burdens should bear some relationship to individual responsibility."[212] However, courts that have used the lack of immutability to disqualify a group show that the underlying rationale is none other than fault.[213] Such courts countenance majoritarian discrimination through the

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[209] 411 U.S. 677 (1973).

[210] *Id.* at 686-87 (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972)).

[211] *See* Watkins v. U.S. Army, 875 F.2d 699, 726 (9th Cir. 1989). In *Watkins*, Judge Norris suggested three possible interpretations of immutability: 1) "strictly immutable"; "effectively immutable"; and what Kenji Yoshino refers to as "personhood immutability." *Id.*; Yoshino, *supra* note 151, at 494. However, Judge Norris argued that the Supreme Court could not have intended "strict immutability," or the inability to change, because people can have sex-change operations, aliens can naturalize, and blacks may "pass" or change their racial appearance through pigment injections. *Watkins*, 875 F.2d at 726. Instead, Judge Norris argued that the Supreme Court implicitly adopted the "effectively immutable" interpretation because "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity." *Id.*

[212] *Id.*

[213] *See infra* note 246 & accompanying text.

"prism of fault"[214] by exposing their willingness to withhold suspect status from groups who theoretically can change the trait-in-question. This is tantamount to a court announcing its unwillingness to help those that do not help themselves. Unfortunately for the homeless, courts are well-equipped to find against the homeless under this lack of control/fault-based rationale by resorting to longstanding beliefs that individuals are ultimately homeless because they have made poor decisions.[215]

Another consideration that disfavors homeless immutability is whether the trait exists within the individual class member—hence, courts have based immutability on the presence of permanent and visible biological traits comparable to race and sex that are said to inhere in the individual.[216] With race and sex as paradigms for immutability, homelessness again fails as a rationale for immutability, because although homelessness may in some cases be an "accident of birth," homelessness is not seen as biologically fixed like one's skin color or sex.

There are two considerations under the current immutability analysis that may or may not favor homeless immutability. The first is visibility, which courts have sometimes analyzed by construing the third factor as "an "obvious, immutable, or distinguishing characteristic."[217] Visibility, as a factor, encompasses at least two variations: "social visibility," or the power to attract political support[218] and "corporeal visibility," which describes a conspicuous physical trait that allows dominant groups to identify and harass minority groups.[219] On first glance, homeless should fare well under either form of visibility because the group has little power to attract political support and, as discussed earlier, there is a visual bias that skews the perception of homeless individuals as all exhibiting such negative traits as filth, mental disease, irresponsibility, and crime.[220] Moreover, homeless are more visible than other groups insofar as they predominantly reside in

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[214] Graham, *supra* note 202, at 185.

[215] *See* Wes Daniels, *"Derelicts," Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687 (1997).

[216] Yoshino, *supra* note 151, at 498; *see, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[217] *See, e.g.*, Bowen, 483 U.S. at 602 (asking whether the group is differentiated by an "obvious, immutable, or distinguishing characteristic"); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Witt v. Dep't of Air Force, 527 F.3d 806, 809 (9th Cir. 2008).

[218] Yoshino, *supra* note 151, at 494-95 (citing Frontiero v. Richardson, 411 U.S. 677, 686 (1973), which defined "visibility" in part as the amount of representation a group has in government).

[219] *Id.*

[220] *See supra* Part IV.C & Lee, *infra* note 248.

public spaces. However, as Professor Yoshino notes, courts have tended to require a specific form of corporeal visibility—i.e., visibly immutable traits such as skin or male/female physical characteristics.[221] To this extent, visibility does not favor homeless suspect classification because homelessness is not identifiable with any physical traits individuals are born with.

The second consideration that may go either way is whether the characteristic "frequently bears no relation to ability to perform or contribute to society."[222] Courts use this inquiry to differentiate between "such non-suspect statuses as intelligence or physical disability,"[223] which may be legitimate bases for differentiation, and such statutes as race or gender, which are illegitimate bases for differential treatment. This rationale disfavors homeless if based on the very prejudices that homeless are incompetent, incapable, and/or insane. Rid of these prejudices, homeless as a class only possesses one trait that qualifies them as homeless, with that trait much more neutral as to homeless individual's ability to perform: the simple lack of real property. That said, courts are not immune to those negative stereotypes, as the court in *Love v. Chicago* showed,[224] and so it is difficult to predict how the homeless would fare under this consideration.

In sum, homelessness is seen as behavioral rather than corporeal, and to that extent, it fails arguably the two most important considerations under the current test: whether group members lack control over their trait and whether the trait exists in the individual as a corporeal trait.[225] Thus, under the current form of immutability, it is no surprise that homeless are still a group on the outside looking in when it comes to suspect classification.

But the present test is a mistake, as shown by over two decades of scholarly criticism of immutability.[226] In fact, the calls for immutability's

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[221] Yoshino, *supra* note 151, at 499.

[222] Frontiero v. Richardson, 411 U.S. 677, 686-87 (1973).

[223] *Id.*

[224] Love v. Chicago, No. 96 C 0396, 1998 WL 60804 (N.D. Ill. Feb. 6, 1998); see *supra* note 142 & accompanying text.

[225] These considerations are arguably the most important because they enable a court to narrow the spectrum of groups that could qualify for suspect status. *Cf.* Yoshino, *supra* note 151, at 557 (arguing that courts have retained the immutability factor because of its vital gatekeeping function in excluding potentially suspect classes).

[226] *See, e.g*, JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-16 (1994); Marc R. Shapiro, Comment, *Treading the Supreme Court's Murky Immutability Waters*, 38 GONZ. L. REV. 409 (2003).

demise have been so compelling that Kenji Yoshino analogized further critique of immutability as "tantamount to cataloguing new ways to flog a dying horse."[227] For example, Laurence Tribe has pointed out the ways in which "features like immutability are neither sufficient nor necessary."[228] Immutability in itself is insufficient to determine whether a group deserves suspect classification when one considers that "[i]ntelligence, height, and strength are all immutable for a particular individual, but legislation that distinguishes on the basis of these criteria is not generally thought to be constitutionally suspect."[229] Immutability is unnecessary, as Professor Tribe goes on to explain, "[because] even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who choose to remain black or female would properly remain constitutionally suspect."[230] Additionally, other scholars have criticized how courts have pegged immutability's criteria to the pre-existing suspect classifications of race and gender, thus rigging immutability to deny new candidate groups. [231] As a result, immutability has "evolved without a definite substantive definition because the [U.S. Supreme C]ourt tended to define 'immutability' by analogizing it to race or gender."[232]

Indeed, the U.S. Supreme Court itself has even questioned the wisdom of immutability. In *City of Cleburne, Tex. v. Cleburne Living Ctr.*,[233] the Court admitted to doubts about whether immutability provided a principled way to determine which groups merited heightened scrutiny:

> if the large and amorphous class of the mentally retarded were deemed quasi-suspect . . . it would be difficult to find a principled way to distinguish a

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[227] Yoshino, *supra* note 151, at 491.

[228] Tribe, *supra* note 226, at 1073.

[229] *Id.* at 1080 n.51.

[230] *Id.*; *see also*, e.g., Graham v. Richardson, 403 U.S. 365 (1971) (applying heightened scrutiny to alienage even though it is not immutable).

[231] ELY, *supra* note 226, at 150 ("[N]o one has bothered to build the logical bridge, to tell us exactly why we should be suspicious of legislatures that classify on the basis of immutable characteristics. Surely one has to feel sorry for a person disabled by something he or she can't do anything about, but I'm not aware of any reason to suppose that elected officials are unusually unlikely to share that feeling. Moreover, classifications based on physical disability and intelligence are typically accepted as legitimate, even by judges and commentators who assert that immutability is relevant. The explanation, when one is given, is that those characteristics (unlike the one the commentator is trying to render suspect) are often relevant to legitimate purposes. At that point there's not much left of the immutability theory, is there?"); *see also* Yoshino, *supra* note 151, at 559. According to Kenji Yoshino, "tracing the immutability and visibility factors to their roots demonstrates that they were formulated in an attempt to isolate the commonalities between the paradigm groups of race and sex in the early 1970s." *Id.* at 559.

[232] Shapiro, *supra* note 226, at 437.

[233] 473 U.S. 432 (1985).

> variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. One need mention in this respect only the aging, the disabled, the mentally ill, and the infirm.[234]

Worryingly, the Court appears less concerned with the risk of excluding deserving classes and more concerned with potentially including underserving classes. As Kenji Yoshino states, "it can be read as an argument against "too much justice[.]"[235] This is further reason that it may be time to reformulate immutability, in light of immutability's failure to provide a principled way to determine suspectness and the Court's willingness to respond to this uncertainty by erring on the side of denying too many so as not to admit too many. Moreover, as the Supreme Court and many lower courts have failed to heed scholarly calls for immutability's demise, revising immutability perhaps offers a more realistic alternative than discarding immutability altogether.

What the immutability inquiry should ask is: to what extent is there a deep-seated—i.e., an immutable[236]—prejudice that the majoritarian society has created to identify and discriminate against a particular group? At its essence, this revised immutability still focuses on identifying a suspect trait, but simply situates the trait in the majoritarian society's prejudices rather than the minority's body. By doing so, this revised factor offers advantages

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[234] *Id.* at 445-46.

[235] Yoshino, *supra* note 151, at 491 (quoting McClesky v. Kemp, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting)).

[236] Though critics may claim that "deep-seated" is not the same as "immutable," courts have never actually used "immutable" in its strict sense as "changeless" or "unalterable." *See, e.g.*, Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal. L. Rev. 481, 506 (2004) ("The immutability requirement also finds itself in conflict with the factual reality that purportedly fixed traits, such as sex, are in fact more alterable and flexible than commonly presumed. Other characteristics deemed suspect or quasi-suspect, such as alienage and illegitimacy, may also be changed."); *see also* ELY, *supra* note 226, at 150 (criticizing the Court's reliance on immutable traits for suspect classification status, noting that "even gender is becoming an alterable condition"). The Ninth Circuit in *Watkins v. U.S. Army* has gone on record to state that "it is clear that by 'immutability' the [U.S. Supreme] Court has never meant strict immutability in the sense that members of the class must be physically unable to change or mask the trait defining their class" because no current suspect class, whether national origin, sex, alienage, illegitimacy, or even race—could satisfy that requirement." Watkins v. U.S. Army, 837 F.2d 1428, 1446 *superseded*, 847 F.2d 1329 (9th Cir. 1988) *opinion withdrawn on reh'g*, 875 F.2d 699 (9th Cir. 1989). The word "immutability" has been a misnomer as "the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty . . . ." *Id.* As such, "deep-seated" is appropriate because it more closely approaches the factor's focus on the difficulty, rather than the impossibility, of change.

over the current version of immutability: it moves away from a problematic fault-based model; it better fits with current understandings of identity politics; and it better serves the equal protection doctrine's promise, as suggested in footnote four of *Carolene Products*, of applying heightened scrutiny when "prejudice against discrete and insular minorities . . . [may] curtail the operation of political processes ordinarily to be relied upon to protect minorities[.]"[237]

The first reason for this shift is that current understandings of identity—racial, sex, and otherwise—require revised immutability. Cadres of scholars now accept that even race and gender are products of social construction.[238] It is society—not biology or nature—that identifies traits and instills them with meaning.[239] The so-called "accidents of birth"[240]—corporeal traits such as skin color or anatomy—are devoid of harmful meaning in themselves. The same is true of non-corporeal traits such as one's religion or country of origin. This understanding of identity reveals that focusing on a corporeal trait without reference to its social construction, as the current immutability analysis does, is like hearing a word but deciding to ignore its meaning. Instead, immutability analysis should focus on group traits as manifestations of social perception rather than biology realities, as revised immutability does.

Second, the version of immutability I propose also interlocks better with the vision laid out in footnote four of *Carolene Products*, which still merits our admiration despite the footnote's shortcomings.[241] Footnote four

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[237] *Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

[238] *See, e.g.*, IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996) (Lopez goes a step further by showing how laws actually helped to construct socio-racial identities in America in the 19th and 20th centuries); Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 Harv. C.R.-C.L. L. Rev. 1, 27, 28 (1994) ("Race must be viewed as a social construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization. . . . [A]s human constructs, races constitute an integral part of a whole social fabric that includes gender and class relations.").

[239] *See* Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 610 n.4 (1987) (recognizing belief among some in the scientific community that "racial classifications are for the most part sociopolitical, rather than biological, in nature"); *see also, e.g.*, Jayne Chong-Soon Lee, *Navigating the Topology of Race*, 46 Stan. L. Rev. 747, 777 (1994) ("Race cannot be self-evident on the basis of skin color, for skin color alone has no inherent meaning."); Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 Colum. L. Rev. 392 (2001) ("gender identity, rather than anatomy, is the primary determinant of sex")

[240] Frontiero v. Richardson, 411 U.S. 677, 686 (1973).

[241] *See, e.g.*, David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. Ill. L. Rev. 1251, 1265 (2010) (noting the footnote's disregard for "anonymous and diffuse" minorities who are likely to be more systematically disadvantaged than "discrete and insular" minorities);

expresses a vision of the court's role in a democratic society that can be summarized as follows: In a well-functioning democracy, majorities should be allowed to do what they choose. However, if illegitimate prejudice systematically barricades certain groups from effective participation in the political process, the court's role is to cure the defect, protect these groups, and, in doing so, to maintain the integrity of the democratic political process.[242] The existence of illegitimate prejudice is key to any analysis under footnote four because the footnote did not intend to simply protect minorities from majorities. Justice Stone, its author, understood that "there are winners and losers in the democratic process, and the losers should not be able to reverse their losses by appealing to the courts."[243] Footnote four thus regards a group's persistent failures in the democratic process as symptomatic of a defect in the democratic process only when those failures are caused by majoritarian "prejudice."

To be more specific, the problem with the current form of immutability is that it conceptualizes traits as inhering within individuals, but also separates these traits as a distinct third factor. Footnote four shows that isolating these "inherent" traits is an analytical mistake, and the footnote does so by coupling prejudice and "discrete and "insular" minorities under the same analysis. After all, it is not the inherent trait *per se* that makes a group "discrete and insular." Rather, it is the prejudice that makes the group "discrete" in the sense that the majoritarian society can identify the group, and "insular" in the sense that the prejudice prevents other groups from forming coalitions with the group, leaving it systematically isolated. Unlike current immutability analysis, revised immutability is faithful to footnote four's identification of the "defect" as really being the majoritarian prejudice, which is always relational in nature, and not the minority's inherent trait, which is supposed to exist independently within the individual.

Arguably, the first two factors for suspect classification—the lack of political powerlessness and the history of purposeful discrimination—are attuned to these process concerns, but perhaps not sufficiently so. These factors may, but do not require, a court to extrapolate the specific prejudice(s) that led to the discrimination, and therein lies the insufficiency.[244] By not forcing the court to identify the specific prejudices

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Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 Colum. L. Rev. 1087, 1090 (1982) (obversing that the footnote is not, nor was never intended to be, a fully developed theory of heightened scrutiny).

[242] Powell, Jr., *supra* note 241, at 1088-89.

[243] Strauss, *supra* note 241, at 1257.

[244] *See, e.g.*, Massachusetts Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (applying a cursory one-sentence review of the "history of purposeful unequal treatment to the aged"

that led to a process defect, the two factors lack the predictive power of this revised immutability to anticipate the strength and longevity of the discrimination. In this way, this revised immutability does not simply repeat the first and second factors but in fact improves the court's predictive power regarding what should be a central concern: what is the likelihood that the majority's discrimination of a group based on a particular prejudice or trait will continue into the future without the court's intervention?

Third and finally, revised immutability is desirable because it corrects the current version's fault-based orientation,[245] which has led courts to deny protection if they judged the victim to bear some responsibility, regardless of whether the majoritarian society was guilty of discriminating against the victim. Correction is all the more important because certain lower courts have applied an uncompromising fault-based test by misinterpreting the Supreme Court's own use of immutability. The Supreme Court has never stated that an immutable characteristic was necessary for suspectness—the presence or absence of an immutable trait is just a factor to be considered.[246] However, lower courts have read the Supreme Court's immutability jurisprudence to impose such a condition—as a result, disqualifying potential suspect classes like homosexuals and the homeless because the class could not prove that the trait in question was immutable.[247]

By requiring an immutable trait, and punishing those that do not have it, the lower courts use immutability as a barricade to minorities who seem complicit in the discrimination they suffer—the tortured reasoning being that a minority is responsible for any harm s/he suffers because of a trait, if that trait is possible to control, but s/he refuses to change it. The problem with such a fault-based model is crystal clear. Such an argument is akin to

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without considering the actual prejudices involved).

[245] *See, e.g.*, Graham, *supra* note 202, at 185.

[246] Frontiero v. Richardson, 411 U.S. 677, 686 (1973); *see also, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (listing immutability as a factor but not stating that it is a requirement for suspect class status); Plyler v. Doe, 457 U.S. 202, 220 (1982) (applying intermediate scrutiny despite finding that undocumented status is not immutable); Craig v. Boren, 429 U.S. 190, 212, n.2 (1976).

[247] *See, e.g.*, Andersen v. King County, 138 P.3d 963, 974 (2006); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) ("To be a 'suspect' or 'quasi-suspect' class, homosexuals *must* 1) have suffered a history of discrimination; 2) exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and 3) show that they are a minority or politically powerless.") (emphasis added); *see also* Johnson v. City of Dallas, 860 F. Supp. 344, 357 (N.D. Tex. 1994) *rev'd in part, vacated in part sub nom.* Johnson v. City of Dallas, Tex., 61 F.3d 442 (5th Cir. 1995) (noting that homeless satisfied a showing of a history of discrimination and perhaps political powerlessness, but had a weak case for suspectness because homelessness is not immutable).

saying that the perpetrator is innocent because the victim was asking for it. The revised factor shifts the "prism of fault" from the victim to the perpetrator, not to also shift punishment to the perpetrator, but to justify heightened protection of the victimized group.

Homeless as a class satisfy this revised immutability. They have been perpetual victims of deep-seated prejudices by the overarching society, which continues to associate the homeless with many of the same negative traits, like criminality, instability, mental illness, indolence, and filth, that have afflicted the homeless throughout America's history.[248] For example, in 1837, the U.S. Supreme Court, in upholding a law that allowed New York to deny admission to paupers arriving on ship, stated that it was "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 the physical pestilence, which may arise from unsound and infections articles . . . ."[249] This is but one instance in a long tradition of legislation, jurisprudence, and policies that at their core viewed vagrancy and homelessness as crimes of condition or behavior because they associated such people with the negative traits listed at the start of this paragraph.[250] To the extent that these specific stereotypes have endured, the homeless can claim that they suffer from "immutable" negative traits woven into the very social fabric of our country. Satisfying this revised immutability, and fulfilling the other two factors courts use to determine suspect classification, the homeless deserve heightened scrutiny under the equal protection doctrine.

Now is a good time to link the earlier part of this section, which argues that homeless *need* the equal protection doctrine's help because their lack of real property makes them uniquely vulnerable to arbitrary governmental interference, with the second part of this section, which argues that homeless *deserve* equal protection doctrine's help because they satisfy the factors that courts should use to determine a group's suspectness. One of the main observations in the earlier part of this section was that the

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[248] *See, e.g.*, Barrett A. Lee, Chad R. Farrell & Bruce G. Link, *Revisiting the Contact Hypothesis: The Case of Public Exposure to Homelessness*, 69 AM. SOCIOLOGICAL REV. 40, 42 (2004) ("The substantial percentages of survey respondents blaming homeless people for being homeless and attributing deviant properties (substance abuse, mental illness, dangerous-ness, etc.) to them would seem to confirm the public's negative view of the homeless") (citing Barrett A. Lee, Sue Hinze Jones, & David W. Lewis, *Public Beliefs About the Causes of Homelessness*. 69 SOCIAL FORCES 253 (1990).

[249] Mayor, Aldermen & Commonalty of City of New York v. Miln, 36 U.S. (11 Pet.) 102 (1837), *quoted in* Simon, *infra* note 250.

[250] *See, e.g.*, 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, 639 (1992).

Constitution discriminates against the homeless. Recognizing this constitutional discrimination, and recognizing that the equal protection doctrine prohibits both federal and state governments from arbitrary discrimination,[251] I wondered if the equal protection doctrine could not also be interpreted to impose a duty on the Constitution to purge itself of any discrimination against groups such as the homeless. The Constitution's "do as I say not as I do" approach to equal protection almost seems like a flawed contradiction. Almost. But the bottom line is that the Constitution does not require itself to adhere to the standards of equal protection. The equal protection doctrine, then, does not come along to erase the Constitution's preference for property, in general, even if the Fourteenth Amendment did help to erase the Constitution's preference for a specific type of property, slaves.[252]

Nonetheless, if scholars may not be able to argue that the equal protection doctrine revises the whole Constitution's discrimination against the propertyless, there is an argument that the Constitution's discrimination against the propertyless further intensifies an already strong claim by the homeless for suspect or quasi-suspect status under the equal protection doctrine. This constitutional discrimination makes the homeless uniquely deserving of equal protection solicitude in a few ways.

First, homeless are more vulnerable to government interference than perhaps any other groups because of their lack of real property, which translates into lesser constitutional protections. Second, homeless are uniquely deserving under the process-based concerns of *Carolene Products* footnote four and under revised immutability's concern with the immutability of social prejudices. For example, one critique of footnote four is that it seems to permanently extend heightened scrutiny to classes that eventually may not need it.[253] On this, Justice Powell once said, "Over our history many have been minorities, ineffective in politics, and often discriminated against. But these conditions do not remain static. Immigrant groups that once were neglected have become influential participants in the political process."[254] The two paradigmatic suspect classes—women and African Americans—are cited as groups with ever-increasing political participation and power,[255] perhaps in large part as a result of the equal

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[251] *See supra* note 10.

[252] *See* the "Reconstruction Amendments"—U.S. CONST. amends. XIII, XIV, XV.

[253] Strauss, *supra* note 241, at 1267.

[254] Powell, Jr., *supra* note 241, at 1091; Strauss, *supra* note 241, at 1267.

[255] Bruce A. Ackerman, *Beyond* Carolene Products, 98 Harv. L. Rev. 713, 744 (1985) ("Thanks largely to the achievements of the generation that looked to *Carolene* for inspiration, black Americans today are generally free to participate in democratic politics—and do so by the millions in every national election.").

protection doctrine. In contrast, it is hard to foresee homeless ever becoming "influential participants in the political process,"[256] in part, because the discrimination also remains interwoven into the constitutional fabric of the country, which is no longer the case for other suspect classes. Though the federal Constitution, and state constitutions such as Hawaii's, are not the only forms of official discrimination against the homeless, their durability and ideological and legal power leave no doubt that the homeless both *need* and *deserve* equal protection solicitude because the prejudices they face threaten to be immutable.

[256] Powell, Jr., *supra* note 241, at 1091.

August 30, 2018

Via E-mail & U.S. Mail

Mayor Dan Gelber &
Miami Beach City Commission
1700 Convention Center Drive
Miami Beach FL 33139

RE: Chapter 74, Article III (Panhandling on Public Property)

Dear Mayor Gelber and City Commissioners,

We write with respect to Chapter 74, Article III (Panhandling on Public Property) (the "Ordinance"). Since the landmark Supreme Court *Reed v. Gilbert* case in 2015, every panhandling ordinance challenged in federal court – at 25 of 25 to date – including many with features similar to the one in the City of Miami Beach ("the City"), has been found constitutionally deficient. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015)*; see, e.g. Norton v. City of Springfield, Ill.*, 806 F.3d 411 (7th Cir. 2015); *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014), *vacated*, 135 S. Ct. 2887 (2015), *declaring ordinance unconstitutional on remand*, 144 F. Supp. 3d 218, 238 (D. Mass. 2015). In Florida, the U.S. District Court for the Middle District declared a Tampa panhandling ordinance unconstitutional. *Homeless Helping Homeless, Inc. v. City of Tampa*, 2016 WL 4162882, at *6 (M.D. Fla. Aug. 5, 2016). Florida state courts have also followed this precedent in striking down panhandling ordinances. *Toombs v. State of Florida*, 25 Fla. L. Weekly Supp. 505a, Case No. 15-220 AC (Fla. 11th Jud. Cir. 2017) (holding City of Miami ordinance unconstitutional).

Other cities in Florida, such as the City of Gainesville, have stopped enforcement or repealed their panhandling ordinances when informed of the likely infringement on First Amendment rights. After a lawsuit was filed against it, the City of Pensacola repealed its ordinance almost immediately after passing it. As was the case with these other Florida cities, the City's ordinance almost certainly violates the constitutional right to free speech protected by the First Amendment to the United States Constitution.

In 2017, the ACLU Greater Miami Chapter wrote a letter to the City raising constitutional concerns about a proposed ordinance creating a "no panhandling zone". Although the City did not adopt a new ordinance at that time, it has done nothing to address the Ordinance that was already in place and that suffers from similar constitutional deficiencies. We call on the City to immediately repeal the Ordinance and instead consider more constructive alternatives.

The First Amendment protects peaceful requests for charity in a public place. *See, e.g., United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("Solicitation is a recognized form of speech protected by the First Amendment."). The government's authority to regulate such public speech is exceedingly restricted, "[c]onsistent with the traditionally open character of public streets and sidewalks…." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quotation omitted). As discussed below, the Ordinance is outside the scope of permissible government regulation.

The Ordinance overtly distinguishes between types of speech based on "subject matter … function or purpose." *See Reed*, 135 S.Ct. at 2227 (internal citations, quotations, and alterations omitted; *see, e.g.*, *Norton*, 806 F.3d at 412-13 ("Any law distinguishing one kind of speech from another by reference to its meaning now requires a compelling justification."). The Ordinance prohibits "all direct person-to-person requests for immediate contributions in the form of money or other thing of value" benefitting virtually any person or organization. *See* Sec. 74-76 (Definitions). This of course would clearly prohibit a request for spare change, or a cold drink on a blistering summer day. At the same time it would allow direct person-to-person interactions seeking signatures for a petition, recommendations for services, or directions to local amenities.

As a result, a court will likely hold the Ordinance is a "content-based" restriction on speech that is presumptively unconstitutional. *See Reed*, 135 S. Ct. at 2226; *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009). Courts use the most stringent standard – strict scrutiny – to review such restrictions. *See, e.g.*, *Reed*, 135 S. Ct. at 2226 (holding that content-based laws may only survive strict scrutiny if "the government proves that they are narrowly tailored to serve a compelling state interest"); *McCullen*, 134 S. Ct. at 2534. The Ordinance cannot survive strict scrutiny because neither does it serve any compelling state interest, nor is it narrowly tailored.

First, the Ordinance serves no compelling state interest. Distaste for a certain type of speech, or a certain type of speaker, is not even a legitimate state interest, let alone a compelling one. Shielding unwilling listeners from messages disfavored by the state is likewise not a permissible state interest. As the Supreme Court explained, the fact that a listener on a sidewalk cannot "turn the page, change the channel, or leave the Web site" to avoid hearing an uncomfortable message is "a virtue, not a vice." *McCullen*, 134 S. Ct. at 2529; *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992) ("The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed.").

Second, even if the City could identify a compelling state interest, there is no evidence to demonstrate that the Ordinance is "narrowly tailored" to such an interest. Theoretical discussion is not enough: "the burden of proving narrow tailoring requires the County to *prove* that it actually *tried* other methods to address the problem." *Reynolds v. Middleton*, 779 F.3d 222, 231 (4th Cir. 2015). The City may not "[take] a sledgehammer to a problem that can and should be solved with a scalpel." *Browne v. City of Grand Junction*, 136 F. Supp. 3d 1276, 1294 (D. Colo. 2015) (holding ordinance restricting time, place, and manner of panhandling was unconstitutional).

Though "public safety" is an important state interest, the Ordinance is not narrowly tailored to serve it. *Browne*, 136 F. Supp. 3d at 1292-94 (rejecting claims that the ordinance served public safety); *Cutting v. City of Portland*, 802 F.3d 79 (1st Cir. 2015) (requiring evidence to substantiate claims of public safety). The Ordinance, in prohibiting the solicitation of immediate contributions, singles out an entire category of speech while allowing other types of speech. There is nothing inherently dangerous to public safety in a request for contributions. As a result, the Ordinance cannot be said to further public safety.

Unsurprisingly, every court to consider a regulation that, like the Ordinance, bans requests for charity within an identified geographic area has stricken the regulation. *See, e.g.*, *Norton v. City of Springfield*, 806 F.3d 411, 413 (7th Cir. 2015); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 237 (D. Mass. 2015) ("[M]unicipalities must go back to the drafting board and craft solutions which recognize an individuals… rights under the First Amendment…); *McLaughlin v. City of Lowell*, 140 F. Supp. 3d 177, 189 (D. Mass. 2015); *Browne*, 136 F. Supp. 3d at 1293-94.

For these reasons, among others, the Ordinance cannot pass constitutional muster. Further, unlawful anti-panhandling ordinances such as Chapter 74, Article III are costly to enforce and only exacerbate problems associated with homelessness and poverty.

In Central Florida, a study found that communities were spending more than $30,000 per year in jail and hospital costs alone for every chronically homeless person. The study projected that by investing in permanent supportive housing, the region would save hundreds of millions of dollars over the course of a decade. *See* THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA (2014), https://www.cfchomelessness.org/wp-content/uploads/2018/04/Eco-Impact-Report-LOW-RES-2.pdf. Numerous communities have created alternatives that are more effective, and leave all involved—homeless and non-homeless residents, businesses, city agencies, and elected officials—happier in the long run. *See* National Law Center on Homelessness and Poverty, HOUSING NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2016), https://www.nlchp.org/documents/Housing-Not-Handcuffs.

For example, Philadelphia, PA recently greatly reduced the number of homeless persons asking for change in a downtown subway station by donating an abandoned section of the station to a service provider for use as a day shelter. *See* Nina Feldman, *Expanded Hub of Hope homeless center opening under Suburban Station*, WHYY (Jan. 30, 2018) https://whyy.org/articles/expanded-hub-hope-homeless-center-opening-suburban-station/. In opening the Center, Philadelphia Mayor Jim Kenny emphasized "We are not going to arrest people for being homeless," stressing that the new space "gives our homeless outreach workers and the police a place to actually bring people instead of just scooting them along." These programs are how cities actually solve the problem of homelessness, rather than merely addressing its symptoms.

We can all agree that we would like to see a Miami Beach where homeless people are not forced to beg on the streets. But whether examined from a legal, policy, or fiscal standpoint, criminalizing any aspect of panhandling is not the best way to get to this goal. We request that Miami Beach cease enforcement, repeal this ordinance, and develop constructive approaches that will lead to the best outcomes for all the residents of Miami Beach, housed and unhoused alike.

We look forward to further discussing this matter with you, and we are hopeful to receive your response before October 1, 2018.

Sincerely,

/s/ Carlos J. Martinez
Public Defender
Eleventh Judicial Circuit

/s/ Kirsten Anderson
Director of Litigation
Southern Legal Counsel

/s/ Carey Haughwout
President
Florida Public Defender Association

/s/ Jacqueline Azis
Staff Attorney
ACLU of Florida

/s/ Eric Tars
Senior Attorney
National Law Center on Homelessness & Poverty

/s/ *Christopher Jones*
Executive Director
Florida Legal Services

/s/ Mara Shlackman
Vice President
National Lawyers Guild South Florida Chapter

/s/ *Natalie N. Maxwell*
Housing Umbrella Group Co-Chair
Florida Legal Services

/s/ Patrice Paldino
Housing Umbrella Group Co-Chair
Legal Aid Service of Broward County

Contact: Kirsten Anderson, Southern Legal Counsel, 1229 NW 12th Ave. Gainesville, FL 32601
(352) 271-8890 ♦ Kirsten.anderson@southernlegal.org

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www.aclusandiego.org

December 6, 2017

Morgan Foley, Esq.
City Attorney
City Attorney's Office
200 Civic Center Way
El Cajon, CA 92020
hsavage@cityofelcajon.us

Dear Mr. Foley,

I am writing on behalf of the American Civil Liberties Union of San Diego and Imperial Counties ("ACLU") to express concerns about the City of El Cajon's Urgency Ordinance No. 5066 ("Ordinance"), which was enacted on October 24, 2017.

The Ordinance notes that "the San Diego County public health officer declared a local public health emergency due to ongoing outbreak of the Hepatitis A virus" and states that its purpose includes "prohibiting any persons or organizations from sponsoring, promoting or engaging in food sharing events on City owned property until the public health emergency is lifted by the County of San Diego."[1] The term "[f]ood sharing event" means "a non-social gathering … where food is distributed or offered for charitable purposes." It excludes "social gatherings such as family reunions, birthday parties, baptisms, youth sport team celebrations, school field trips, wedding anniversaries and similar events."

I appreciate the importance of protecting public health, but the government may not pursue worthy ends through unconstitutional means. On its face, the Ordinance presents significant First Amendment concerns, because it singles out expressive conduct based on its content. "Non-verbal conduct implicates the First Amendment when it is intended to convey a 'particularized message' and the likelihood is great that the message would be so understood." *Nunez v. Davis*, 169 F.3d 1222, 1226 (9th Cir. 1999) (quoting *Texas v. Johnson*, 491 U.S. 397, 404 (1989)). If "charitable appeals for funds … are within the protection of the First Amendment," *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 632 (1980), the same is true for charitable giving, whether of money or food, which is necessarily intended to convey a particular message and reasonably understood as such. *See Save Westwood Vill. v. Luskin*, 233 Cal. App. 4th 135, 145 (2014) (like "a political campaign contribution … [t]he charitable donation made by the Foundation to UCLA is similarly an

[1] Although the Ordinance contains no language expressly making it unlawful to engage in "food sharing events," I presume it does in fact does prohibit such events.

expression of support for the university, and as such, constitutes conduct in furtherance of the constitutional right of free speech.").

By prohibiting food sharing only when done for "charitable purposes," the City is regulating food sharing because of its expressive content, punishing only those who share food to express their religious or political beliefs in ministry or charity but not those who share food for other purposes. Although "[t]he government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word," it may not "proscribe particular conduct *because* it has expressive elements." *Johnson*, 491 U.S. at 406 (emphasis in original). On its face, the Ordinance "is related to the suppression of free expression" in the form of charitable giving and therefore subject to "the most exacting scrutiny." *Id.* at 403, 412. Strict scrutiny applies regardless of the City's motives. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227-28 (2015). Under strict scrutiny, the Ordinance is unconstitutional unless it "furthers a compelling interest and is narrowly tailored to achieve that interest." *Id.* at 2231; *see also Boos v. Barry*, 485 U.S. 312, 321 (1988) (content-based restriction on speech in public forum is unconstitutional unless "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end").

The preservation of public health is a compelling interest, but the ban on food sharing for charitable purposes is likely not narrowly tailored to achieve that interest, for at least three reasons. First, to the extent the City is concerned with preventing transmission of disease, such transmission can also occur through non-charitable food sharing. Second, the ban is limited to municipal land, and there is no reason to believe the risk of disease transmission from food sharing is any lower on private land. Third, the City has less restrictive alternatives that would prevent disease transmission from food sharing or address "litter, trash and other debris left over from these food sharing events," such as an appropriate permitting and inspection program, proper sanitation and food handling requirements, and enforcement of existing laws against littering. Indeed, the Ordinance itself acknowledges the importance of "regulations that control the manner in which food is prepared, stored, transported, or served."

The Ordinance thus likely fails strict scrutiny because it is underinclusive with respect to its stated justifications and the City has less restrictive alternatives that would effectively protect public health. *See Reed*, 135 S. Ct. at 2232 ("The Town has offered no reason to believe that directional signs pose a greater threat to safety than do ideological or political signs…. In light of this underinclusiveness, the Town has not met its burden to prove that its Sign Code is narrowly tailored to further a compelling government interest."); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 802 (2011) (where state restricted violent video games but not other speech depicting violence, the "regulation is wildly underinclusive when judged against its asserted justification, which in our view is alone enough to defeat it. Underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint."); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 813 (2000) ("If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."); *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (content-based regulation invalid "if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve"); *cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 543 (1993) (ordinances violated Free Exercise Clause as "underinclusive" with respect to "protecting the public health and preventing

cruelty to animals," because "[t]hey fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than Santeria sacrifice does").

Alternatively, assuming the City's interests are "unrelated to the suppression of free expression" and the Ordinance is subject to "the standard applied to time, place, or manner restrictions," *Johnson*, 491 U.S. at 407, the Ordinance likely remains unconstitutional even if treated as "content neutral," because it is not "narrowly tailored to serve a significant government interest," since the City has obvious alternatives for "achieving its stated goals" through adoption or enforcement of "various other laws at its disposal" that would protect public health without prohibiting charitable food sharing on municipal land. *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 945, 949 (9th Cir. 2011) (en banc). "Even under the intermediate scrutiny 'time, place, and manner' analysis, we cannot ignore the existence of these readily available alternatives," and "[t]he Ordinance is not narrowly tailored" because "there are a number of feasible, readily identifiable, and less-restrictive means of addressing the City's concerns." *Id.* at 950.

I look forward to the City's response and hope this matter can be resolved without litigation. If you have any questions or concerns, please do not hesitate to call me at 619.398.4496.

Sincerely,

David Loy
Legal Director

cc: Barbara Luck
Assistant City Attorney
Bluck@cityofelcajon.us

Lindsey v. Normet, 405 U.S. 56 (1972)

Appellants, month-to-month tenants of appellee Normet, refused to pay their monthly rent unless certain substandard conditions were remedied, and appellee threatened eviction. Appellants filed a class action seeking a declaratory judgment that the Oregon Forcible Entry and Wrongful Detainer (FED) Statute was unconstitutional on its face, and an injunction against its continued enforcement. Appellants attacked principally (1) the requirement of trial no later than six days after service of the complaint unless security for accruing rent is provided, (2) the limitation of triable issues to the tenant's default, defenses based on the landlord's breach of duty to maintain the premises being precluded, and (3) the requirement of posting bond on appeal, with two sureties, in twice the amount of rent expected to accrue pending appellate decision, this bond to be forfeited if the lower court decision is affirmed. The District Court granted the motion to dismiss the complaint, concluding that the statute did not violate the Due Process or the Equal Protection Clause.

Mr. Justice WHITE delivered the opinion of the Court.

… We cannot agree that the FED Statute is invalid on its face under the Equal Protection Clause. It is true that Oregon FED suits differ substantially from other litigation, where the time between complaint and trial is substantially longer, and where a broader range of issues may be considered. But it does not follow that the Oregon statute invidiously discriminates against defendants in FED actions.

The statute potentially applies to all tenants, rich and poor, commercial and noncommercial; it cannot be faulted for over-exclusiveness or under-exclusiveness. And classifying tenants of real property differently from other tenants for purposes of possessory actions will offend the equal protection safeguard ‘only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective,’ or if the objective itself is beyond the State's power to achieve. It is readily apparent that prompt as well as peaceful resolution of disputes over the right to possession of real property is the end sought by the Oregon statute. It is also clear that the provisions for early trial and simplification of issues are closely related to that purpose. The equal protection claim with respect to these provisions thus depends on whether the State may validly single out possessory disputes between landlord and tenant for especially prompt judicial settlement. In making such an inquiry a State is ‘presumed to have acted within (its) constitutional power despite the fact that, in practice, (its) laws result in some inequality.’ ..

Appellants argue, however, that a more stringent standard than mere rationality should be applied both to the challenged classification and its stated purpose. They contend that the ‘need for decent shelter’ and the ‘right to retain peaceful possession of one's home’ are fundamental interests which are particularly important to the poor and which may be trenched upon only after the State demonstrates some superior interest. They invoke those cases holding that certain classifications based on unalterable traits such as race and lineage are inherently suspect and must be justified by some ‘overriding statutory purpose.’ They also rely on cases where classifications burdening or infringing constitutionally protected rights were required to be justified as ‘necessary to promote a compelling governmental interest.' …

We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions. Nor should we forget that the Constitution expressly protects against confiscation of private property or the income therefrom.

Since the purpose of the Oregon Forcible Entry and Wrongful Detainer Statute is constitutionally permissible and since the classification under attack is rationally related to that purpose, the statute is not repugnant to the Equal Protection Clause of the Fourteenth Amendment.

Ensuring the Right to Shelter:

The First Court Decision in *Callahan v. Carey* Requiring the Provision of Shelter for Homeless Men in New York City

Following is the text of the December 5, 1979, decision in Callahan v. Carey, the class action litigation brought by Coalition for the Homeless that established a legal right to shelter for homeless individuals in New York City. This decision by New York State Supreme Court Justice Tyler was the first time that the City and State governments were ordered to provide shelter from the elements for homeless individuals in New York City. The lawsuit was settled as a consent decree in August 1981.

"CALLAHAN v. CAREY – This is an application by three destitute and homeless men in behalf of all the destitute, homeless derelicts roaming the neighborhood of the Bowery for a temporary mandatory injunction directing state and city officials to furnish lodging and meals to the derelicts seeking lodging and shelter and meal at the 'Men's Shelter,' on the ground that such shelters for homeless men are mandated by the Constitutions of the United States and the State of New York, and that the failure to presently provide such relief will cause serious and permanent injury to some of the derelicts and possibly death to others during the winter cold.

"Defendants move to dismiss the action contending that the controversy is non-justiciable and that the complaint fails to state a cause of action.

"The number of derelicts on the Bowery and its environs vary, but no single statement by any responsible city or state official denies that there are derelicts on the Bowery. Nor do state and city officials offer one iota of proof that the Men's Shelter on the Bowery or its satellite 'hotels' are sufficient to house all of the destitute and homeless alcoholics, addicts, mentally impaired derelicts, flotsam and jetsam, and others during the winter months. Nor is there a scintilla of proof that the other 'hotels' vouchered at the Men's Shelter are sufficient to lodge these derelicts for the cold weather.

"Reverend Edward M. O'Brien, Executive Director of the Holy Name Centre for Homeless Men located at 18 Bleecker Street, New York, New York, states: 'During previous winters, indigent, homeless men living on or near the Bowery have suffered frostbite- including loss of limbs from frostbite- and in several instances death from exposure.' He further states that in his opinion this winter will be worse because of the closing down of several shelters that accommodate these derelicts during the winter months.

"State and city officials have not addressed themselves to the statement of Michael I. Drohan, an employee of Holy Name Centre: 'As part of my duties I identify at the New York City Morgue the bodies of certain persons who have died on the Bowery. On a number of occasions the cause of death for several of the persons whose bodies I identified was given as "hypothermia" (freezing)…'

" 'Since last winter, the number of beds available in Bowery lodging houses has decreased due to the closing of several of these lodging houses. The shortage of shelter for indigent homeless men living on or near the Bowery will be even more severe this winter than in previous winters.' Mr. Drohan sums it up by saying that in his opinion there will be more deaths from exposure than in previous years.

"The forthright statement of Calvin Reid, Director of the Men's Shelter at 8 East 3rd Street, Manhattan, states: 'The Men's Shelter is not primarily under budgetary restrictions in providing shelter care, since funding is open ended and all applicants can be given available services.' Mr. Reid then goes on to state that the problem is not monetary, but that lodging is in short supply: that the Men's Shelter utilizes lodging houses within a half-mile distance of the shelter to lodge the derelicts.

"Robert Trobe, Deputy Administrator of Family and Adult Services of the New York City Department of Social Services, suggests that the city and state provide more shelter space in accessible place, and this is a sensible contribution.

"Barbara B. Blum, Commissioner of the State Department of Social Services, states honestly that 'the group in question is extremely difficult to define,' falls within no specific category calling for public assistance, and that it is 'largely composed of individuals with histories of alcohol abuse, drug abuse, mental disorder or combinations thereof. These conditions are chronic and seriously preclude and prevent independent functioning.'

"It can thus be observed that every public official, from Governor Carey and Mayor Koch down to the Director of the Men's Shelter, is vitally concerned that no New Yorker (including the Bowery derelicts) freeze to death by reason of exposure to the cold of the winter, or starve to death due to deprivation of food. The difficulty is finding the necessary lodgings to accommodate them.

"The Court is of the opinion that the Bowery derelicts are entitled to board and lodging. However, there is no reason why these homeless and indigent men cannot be lodged and fed at institutions wherever

available in the State, and it is incumbent on those public officials responsible for caring for the needy to find such lodgings.

"Accordingly, the temporary injunction is granted to the extent noted above, and is otherwise denied. Defendants' motion and cross-motion to dismiss the action are denied.

"In the order to be entered hereon the defendants shall submit a plan to provide at least 750 beds (and board for 750 men) for the helpless and hopeless men of the Bowery, in addition to the Men's Shelter and its satellites, including LaGuardia.

"Under no circumstances shall the Department of Social Services close the Men's Shelter during the pendency of this action. Such action would be catastrophic.

"The application for counsel fees is referred to the trial court."

"*The legal authorities for the decision may be found in Article XVII, Sec. 1. of the New York State Constitution. Sections 61 (1) and (3) (1) and (3) of the Social Services Law. Section 604.1.0 (b) of the New York City Administrative Code. Matter of Jones vs. Berman, 37 N. Y. 2nd 42."

December 5, 1979

The *Callahan* Consent Decree

Establishing a Legal Right to Shelter for Homeless Individuals in New York City

Following is the complete text of the 1981 consent decree in Callahan v. Carey*, the class action litigation brought by Coalition for the Homeless that established a legal right to shelter for homeless individuals in New York City. The* Callahan *litigation was filed in 1979 on behalf of homeless men in New York City, and argued that a right to shelter for the homeless existed under the New York State Constitution. The right to shelter was extended to homeless women by* Eldredge v. Koch *(1983), also brought by Coalition for the Homeless, and to homeless families with children by* McCain v. Koch *(1983), brought by the Legal Aid Society.*

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ROBERT CALLAHAN, CLAYTON W. FOX, THOMAS DAMIAN ROIG, JAMES HAYES, JAMES SPELLMAN and PAULE E. TOOLE, on their own behalves and on behalf of all others similarly situated,

Plaintiffs,

-against-

HUGH L. CAREY, as Governor of the State of New York, BABARA BLUM, as Commissioner of the New York State Department of Social Service, EDWARD I. KOCH, as Mayor of the City of New York, JAMES A. KRAUSKOPF, as Commissioner of the New York City Human Resources Administration, and CALVIN REID, as Director of the Shelter Care Center for Men,

Defendants.

Index No. 42582/79

FINAL JUDGMENT BY CONSENT

Plaintiffs Robert Callahan, Clayton Fox and Thomas Roig, having brought this action on October 2, 1979 challenging the sufficiency and quality of shelter for homeless men in New York City, and plaintiffs Callahan, Fox, Roig, James Hayes, James Spellman and Paul Toole, having filed their Amended Complaint on March 31, 1980, and

defendants Hugh L. Carey, as Governor of the State of New York, and Barbara Blum, as Commissioner of the State of New York Department of Social Services (the "State defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and defendants Edward Koch, as Mayor of the City of New York, Stanley Brezenoff, as Administrator of the New York City Human Resources Administration, and Calvin Reid, as director of the Shelter Care Center for Men (the "Men's Shelter") (the "City defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and Plaintiffs and defendants by their respective attorneys, having consented to the entry of this Final Judgment without any final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any such issue:

NOW, therefore, without final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any issue, and upon consent of all parties, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Provision of Shelter

1. The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason to physical, mental or social dysfunction is in need of temporary shelter.

Shelter Standards

2. The City defendants shall provide shelter at facilities operated in accordance with the standards set forth in this paragraph as soon as practicable and not later than September 1, 1981. The term "shelter facility" refers to the Keener Building, Camp LaGuardia, the Men's Shelter and any other facility used by the City defendants to shelter homeless men. This paragraph does not apply to the Bowery lodging houses (Palace, Kenton, Union, Sunshine, Delevan and Stevenson) presently used by the City defendants to shelter homeless men (the "hotels"); if the City defendants choose to shelter homeless men in any additional Bowery lodging house, they will advise counsel for the plaintiffs and a good faith effort shall be made by plaintiffs and the City defendants to agree to operating standards for such facilities.

(a) Each resident shall receive a bed of a minimum of 30 inches in width, substantially constructed, in good repair an equipped with clean springs.
(b) Each bed shall be equipped with both a clean, comfortable, well-constructed mattress standard in size for the bed and a clean, comfortable pillow of average size.
(c) Each resident shall receive two clean sheets, a clean blanket, a clean pillow case, a clean towel, soap and toilet tissue. A complete change of bed linens and towels will be made for each new resident and at least once a week and more often as needed on an individual basis.
(d) Each resident shall receive a lockable storage unit.
(e) Laundry services shall be available to each resident not less than twice a week.
(f) A staff attendant to resident ratio of at least 2 per cent shall be maintained in each shelter facility at all times.
(g) A staff attendant trained in first aid shall be on duty in each shelter facility at all times.
(h) A minimum of ten hours per week of group recreation shall be available for each resident a each shelter facility.
(i) Residents shall be permitted to leave and to return to shelter facilities at reasonable hours and without hindrance.
(j) Residents of shelter facilities shall be provided transportation (public or private) to enable them to return to the site where they applied for shelter.
(k) Residents of shelter facilities shall be permitted to leave the facility by 7:00 a.m. if they so desire.
(l) Residents shall be permitted to receive and send mail and other correspondence without interception or interference.
(m) The City defendants shall make a good faith effort to provide pay telephones for use by the residents at each shelter facility. The City defendants shall bear any reasonable cost for the installation and maintenance of such telephones.

3. The capacity of shelter facilities shall be determined as follows:
(a) The capacity of newly constructed shelter facilities shall comply with the standards set forth in Appendix A, except in cases of emergency need as defined in Appendix B.
(b) The City defendants shall disclose to plaintiffs' counsel any plan to convert an existing structure to a shelter facility and the intended capacity for the facility at least 30 days in advance of the implementation or execution of any such conversion plan. A reasonable capacity for each such facility shall be established. The standards set forth in Appendix A shall be used as guidelines in determining whether the planned capacity of the City defendants is reasonable.

(c) Effective December 31, 1981, the capacity of the Keener Building shall not exceed _____ except in cases of emergency need as defined in Appendix B, in which case the maximum number of men who may be sheltered in the Keener Building is ____. Between the date of entry of this judgment and December 31, 1981, the capacity of the Keener Building shall not exceed____.

(d) The capacity of Camp LaGuardia shall comply — by construction of new dormitory buildings — with the standards set forth in Appendix A, except in cases of emergency need as defined in Appendix B, as soon as practicable and not later than December 31, 1982, except that the individual rooms in the "Main Building" may be used as sleeping rooms for one person each. The construction start of such new dormitory buildings shall occur no later than March 1, 1982.

Bowery Lodging Houses

4. Hotels presently used by the City defendants shall meet the following standards at the time of entry of this judgment and the City defendants shall maintain such standards thereafter:

(a) Each resident shall receive a bed, a clean mattress, two clean sheets, one clean blanket, one clean pillow and one clean pillow case. A complete change of bed linens (sheets and pillow case) shall be made for each new resident and at least once a week and more often as needed on as individual basis.

(b) Each resident shall be supplied with a clean towel, soap and toilet issue. A clean towel shall be provided to each new resident and towels shall be changed at least once a week and more often an needed on an individual basis.

(c) There shall be two trained security guards in the Palace Hotel between the hours of 8:00 p.m. and 4:00 a.m. and one trained security guard between the hours of 4:00 p.m. and 8:00 p.m., and 4:00 a.m. to 8:00 a.m. There shall be one trained security guard in the Kenton Hotel between the hours of 4:00 p.m. and 8:00 a.m. These security guards shall file with the City defendants incident reports on any incidents of violence or attempted violence occurring in the hotels.

(d) Showers shall be available at the Men's Shelter beginning at 7 a.m. and signs advising hotel residents of that fact shall be posted at the front desk in each hotel and at the door of each bathroom in each hotel. Persons showering at the Men's Shelter shall be provided adequate supervision (including safeguarding of personal property), a clean towel, soap and, if requested, a delousing agent.

(e) A lockable storage unit of adequate size to store personal property shall be available either at the Men's Shelter or at the hotels for each man sheltered by the City defendants at hotels.

(f) Heat shall be maintained in accordance with New York City guidelines for rental residences.
(g) Cleanliness shall be maintained throughout the hotels at all times.

Intake Centers

5. The City defendants shall accept applications for shelter at the Men's Shelter, 8 East Third Street, New York, New York and at 529 Eighth Avenue, New York, New York (the "central intake center"). Applications for shelter shall be accepted at all times at the Men's Shelter, and applications for shelter shall be accepted at 529 Eighth Avenue between the hours of 5:00 p.m. and 1:00 a.m., seven days per week. The City defendants shall provide direct transportation to shelter pursuant to paragraph 1, supra. The 529 Eighth Avenue intake center, shall be opened as a central intake center not later than September 1, 1981.

6. The City defendants shall operate additional satellite intake centers on a 24-hour basis Monday through Friday at the following locations:
(a) Harlem Hospital Center, 506 Lenox Avenue, New York, New York;
(b) King County Hospital Center, 451 Clarkson Avenue, Brooklyn, New York;
(c) Lincoln Hospital, 234 East 149th Street, Bronx, New York; and
(d) Queens Hospital Center, 82-69 164th Street, Jamaica, New York.
Men seeking shelter at the satellite intake centers shall be provided adequate fare for public transportation and clear written directions to either (i) a shelter facility, or (ii) a central intake center — according to the preference of the person seeking shelter. The City defendants shall provide direct transportation from the satellite intake centers to a shelter facility to all men who appear so physically or mentally disabled that they are unable to reach a shelter facility by public transportation. Satellite intake centers shall be opened not later than September 1, 1981. It is understood that the above satellite intake centers shall be operated in conjunction with borough crisis centers. In the event that the borough crisis center program is terminated, the City defendants may, in their discretion, reduce the hours of operation of the satellite intake centers to between 5 p.m. and 1 a.m.

7. The City defendants shall accept applications for shelter at shelter facilities providing that such applicants have applied for and have been found eligible for shelter by the City defendants within six months of the time of application at a shelter facility. Shelter facilities shall also provide shelter for one night to any person who has not previously applied for shelter who seeks shelter at a shelter facility after 8:00 p.m.

Community Participation

8. Each shelter facility, central intake center and satellite intake center, shall utilize the services of available community members to the maximum reasonable extent. These persons are not City employees or volunteers in a City sponsored program within the meaning of section 50(k) of the General Municipal Law and such persons shall execute statements to this effect.

Information

9. The City defendants shall provide applicants for shelter with clear written information concerning other public assistance benefits to which they may be entitled at the time applicants apply for shelter.

Compliance Monitoring

10. Defendant Krauskopf shall appoint qualified employees with no administrative responsibility for providing shelter to monitor defendants' shelter care program for men with respect to compliance with this decree.. These employees shall visit each shelter facility, central intake center, satellite intake center and hotel at least twice a month and will submit to defendant Krauskopf a written report at least twice a month describing compliance or lack thereof with each provision of the decree. These reports shall be made available to plaintiffs' counsel upon reasonable notice.

11. Plaintiffs' representatives shall have full access to all shelter facilities, central intake centers and satellite intake centers, and plaintiffs' counsel shall be provided access to any records relevant to the enforcement and monitoring of this decree.

12. Defendant Krauskopf shall deliver by hand each day to plaintiffs' counsel a statement listing:

(a) The number of men who applied for shelter at each central intake center and at each satellite intake center;

(b) The number of men who were provided shelter at each shelter facility or hotel;

(c) The number of men who were denied shelter at each shelter facility, central intake center and satellite intake center and the reason for each such denial;

(d) The number of men who were accepted for shelter at each central intake center and satellite intake center who did not reach a shelter facility; and

(e) The number of men who were provided direct transportation from each satellite intake center to a shelter facility.

13. It is the intention of defendant Krauskopf to conduct daily inspections of the Palace Hotel and to deliver reports of such inspections each day to plaintiffs. It is also the intention of defendant Krauskopf to conduct inspections of the other hotels used by defendants to shelter homeless men not less than three times per week and to deliver reports of such inspections not less than three times a week to plaintiffs' counsel. A sample of the inspection report form to be used is attached hereto as Exhibit C.

No Waivers

14. Nothing in this judgment permits any person, not-for-profit corporation, charitable organization, or governmental entity or subdivision to operate a shelter, as defined in New York Code of Rules and Regulations, Title 18, § 485.2(C), in violation of the requirements of the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

15. Nothing in this judgment should operate or be construed as res judicata or collateral estoppel so as to foreclose any signatory party from any claim or defense in any subsequent administrative or judicial proceeding.

16. Nothing in this judgment shall be deemed to authorize or to prevent the operation by the New York City Human Resources Administration of the Keener Building on Wards Island as a shelter or shelter facility after October 15, 1981, except in accord with a valid contract or agreement among the New York State Department of Social Services, the New York State Office of Mental Health and the New York City Human Resources Agency and with an operating certificate issued by the New York State Department of Social Services.

17. The Commissioner of the New York State Department of Social Services agrees to reimburse the New York City Human Resources Agency for the operation of a shelter facility or shelter facilities referred to in this judgment pursuant to New York Social Services Law 153, except if such shelter facility fails to comply with the requirements for shelters contained in the New York Social Services Law or the New York Code of Rules and Regulations, Title 18; provided that nothing in this judgment can or does obligate the Legislature of the State of New York to appropriate funds.

18. Nothing in this judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce and carry out her

duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

Continuing Jurisdiction

19. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any applicable provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

New York, New York
August 1981

Appendix A

Space Requirements for Shelters for Adults

(1) Every facility shall have space for dining and leisure activities.

(2) Sleeping areas shall not be considered as dining or leisure areas.

(3) Space provided for dining shall be:
(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds;
(ii) at least 12 square feet for each additional certified bed.

(4) Space provided for leisure areas shall be:
(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds.
(ii) at least 12 square feet per bed in facilities with a certified bed capacity of 10 or more beds

(5) When not in use, dining space may be used, with written approval from the New York State Department of Social Services ("Department"), as leisure space.

(6) An operator may request Department approval of a waiver to reduce the square footage requirements for dining and leisure space. A waiver shall be granted only upon demonstration by the operator that the food service and the program needs of residents can be met.

(7) Baths and Toilet Facilities
There shall be a minimum of one toilet and one lavatory for each six residents and a minimum of one tub or shower for each ten residents.

(8) Sleeping Rooms
(i) In single occupancy sleeping rooms, a minimum of 80 square feet per resident shall be provided;
(ii) In sleeping rooms for two or more residents, a minimum of 60 square feet per resident shall be provided;
(iii) A minimum of 3 feet, which is included in the per resident minima, shall be maintained between beds and for aisles;
(iv) Partitions separating sleeping areas from other areas shall be ceiling high and smoke tight;
(v) All bedrooms shall be:
(a) above grade level;
(b) adequately lighted;
(c) adequately ventilated;

(vi) light and ventilation for bedrooms shall be by means of windows in an outside wall;
(vii) bedrooms shall open directly into exit corridors;
(viii) bedrooms may not be used as a passageway, corridor or access to other bedrooms.

(9) Adequate storage space for cleaning supplies and equipment shall be provided.

Appendix B

Short term emergency shelter may be provided to a number of persons in excess of the capacity of the facility provided that all of the following conditions are met:

(1) Snow emergencies, excessive cold or other similar circumstances create an emergency need for additional shelter space;
(2) The operator is able to meet the food and shelter needs of all persons in residence;
(3) The facility remains in compliance with applicable local building, fire protection and health and sanitation codes;
(4) The operator advises plaintiffs' counsel of the maximum number of persons to be cared for during an emergency situation in any facility as soon as possible after an emergency situation develops;
(5) The operator provides shelter to additional persons no more than 30 days in any calendar year; and
(6) The operator maintains records which document adherence to these conditions.

James Welcome, Shocking the Conscience of the Court: The Case for a Right to Emergency Shelter for Families with Children in Connecticut, 8 Quinn. Health L.J. 1 (2004)

II. Background

State constitutions, even those having provisions identical to the U.S. Constitution's, provide for independent and sometimes greater protections of civil liberties than the U.S. Constitution. For the issue of a constitutional right to emergency shelter, poverty law advocates must look to state constitutions since the federal court has already spoken on the issue of a right to peaceful shelter. In Lindsey v. Normet, the Supreme Court held that the U.S. Constitution does not provide a right to shelter and further stated, "the Constitution does not provide judicial remedies for every social and economic ill." In Connecticut, as in other states, courts have recognized the role of the state constitution in protecting the civil liberties of its citizens, especially those low-income citizens in politically powerless groups who historically have experienced discrimination and neglect when seeking to exercise fundamental rights. For over twenty-five years, Connecticut courts have held that where both the state and federal constitutions have similar provisions for civil liberties, they have a "like meaning, although we fully recognize the primary independent vitality of the provisions of our own constitution."

Connecticut was one of a few states in the 1980s and early 1990s where poverty law advocates attempted to use the state constitution on behalf of their clients to establish that homeless people and people receiving general benefits had a constitutional right to shelter and/or welfare benefits. This advocacy was based upon a number of developments, including the recognition of state constitutions as independent and different documents from the U.S. Constitution and the landmark 1979 consent decree ruling in New York State, which determined that all homeless men have a state constitutional right to shelter. This case, Callahan v. Carey, and all the subsequent litigation in New York State establishing the right to shelter for other populations, is unique because of the clear language of the New York Constitution, which states, in relevant part, that:

> 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.

The Connecticut Constitution does not contain language similar to the New York Constitution.

Constitutional interpretation in Connecticut involves two unique applications of constitutional analysis that are entirely separate from federal constitutional analysis. The first doctrine of analysis involves the six "Geisler Factors," which have their origin in State v. Geisler.These factors are the legal framework to analyze constitutional claims under the Connecticut constitution. The factors are: (1) text, (2) holdings and dicta, (3) federal precedent, (4) other state decisions, (5) history in Connecticut, and (6) social and economic considerations (public policy). The second doctrine of analysis is found in Article First, 10 of the Connecticut Constitution. This section has been interpreted by the court as perpetuating any statutory or common law right that existed in the state prior to the adoption of the Constitution of 1818.

III. Discussion of the Right to Subsistence Cases in Connecticut

This section focuses on the background of the claims and the legal arguments used in both Hilton and Moore. Although both of these cases were transferred from the Appellate Court to the Connecticut Supreme Court, the cases presented very distinct legal arguments. A right to welfare benefits, or minimum subsistence, as argued in Moore is a much broader assertion for government protection for the poor than is a right to shelter, as argued in Hilton. A right to minimum subsistence argument essentially advocates for the recognition of this as a fundamental right as a means of obtaining a social policy objective. Such a broad argument seeks to blur the distinction between the functions of the legislative branch and the judicial branch as to the distribution of public welfare benefits.

A right to shelter should be considered separately from such a broad assertion of a right to minimum subsistence because it narrowly focuses on the specific denial of protection from emergency weather conditions for an individual or family. This assertion of a fundamental right to protection requires that the court articulate a standard that the legislature cannot fall below in its protection of homeless citizens who are unable to protect themselves from death or irreparable physical, mental, and emotional harm. Ideally, this argument incorporates all six Geisler factors to show Connecticut's history of protection for the poor and defenseless in true emergency situations.

Both Hilton and Moore were "facial challenges", as opposed to "as applied challenges," to legislative amendments to a statute involving emergency assistance for general assistance recipients. The choice to facially challenge the statute, instead of applying the statute to a particular plaintiff with a substantial factual record showing a life-threatening emergency situation of homelessness in severe winter weather, made it easier for the reviewing court to combine these two legal challenges into one broad argument at the Supreme Court.

A. Hilton v. City of New Haven

Originally brought in trial court before Judge Anthony DeMayo in 1989, the issue of a right to shelter in Connecticut revolved around Conn. Gen. Stat. 17-273 and 17-292, "which required that each town 'support' persons within the town who are in need." The court granted a permanent injunction and ordered the City of New Haven to provide shelter for "all homeless persons who request it." This decision was reconsidered in 1992, following a motion to reconsider by the City of New Haven, to address the revision of these two state statues by Public Act 92-16. The legislature adopted this public act in 1992 in order to limit the amount of support that towns were required to provide to homeless persons.

In hearing the motion to reconsider, the trial court, for the first time, dealt with the issue of a homeless person's constitutional right to shelter in Connecticut. The trial court found that the Connecticut Constitution does not provide for emergency shelter. The next motion, reconsidering the permanent injunction ordering the city to provide shelter to homeless persons, was denied. The defendant City of New Haven appealed the judgment and the plaintiff class of homeless persons cross-appealed. This case was then joined with Moore v. Ganim in an expedited appeal to be argued and decided on the same day.

The challenge forwarded by the plaintiff class of homeless persons was a facial challenge to a statutory scheme. The trial court stated that there exists "neither a common law duty nor an implicit right in the Connecticut Constitution that obligates the government to provide shelter to every indigent person." As noted previously, when the right to shelter argument was merged with the right to welfare argument, it became a broad assertion of a fundamental constitutional right to state assistance, as opposed to a more narrow "as applied" challenge to the constitutionality of a city denying homeless families shelter in emergency situations when they are without any other alternatives. The principle issue on appeal was "whether [the city] has an obligation to provide indigent individuals with shelter pursuant to Article first, 10, of the Connecticut Constitution or as an unenumerated right implicit in the state constitution" supported by the language in the preamble. In their complaint, the plaintiffs claimed the City of New Haven was abrogating its constitutional duty, "by limiting the provision of emergency shelter ... ."

Absent from the plaintiffs' claim was a factual record demonstrating detailed harm to the participants in this class of plaintiffs.

> We are hampered in our consideration of the plaintiffs' constitutional claims in this case because the plaintiffs did not seek a finding of facts from the trial court... . [a] party mounting a constitutional challenge tothe validity of a statute must provide an adequate factual record in order to meet its burden of demonstrating the statute's adverse impact on some protected interest of its own, in its own particular case, and not merely under some hypothetical set of facts as yet unproven.

When the court decided Hilton, therefore, it closed the door to future "hypothetical" cases claiming a violation of a fundamental right to shelter in Connecticut.

iii. The Hilton Plaintiffs

Justice Norcott discussed the testimony by the homeless plaintiffs from the record of a show cause hearing on April 26, 1989, in New Haven Superior Court concerning the plaintiffs' motion for a temporary injunction preventing the City of New Haven from closing its winter overflow shelter. Plaintiff Janet Cardin's testimony focused on her denial of shelter during summer nights and how she was forced to sleep on the New Haven Green. Bobby Walker and Thomas Sawyer testified that they slept in abandoned buildings or cars when they were denied shelter. Further testimony by some plaintiffs demonstrated how holding a job made it difficult to arrive at the shelter in time to reserve a space, since the overflow shelter operated on a first-come, first-served basis.

The court noted the testimony of Thomas Baines, a formerly incarcerated homeless man, who was denied shelter because he was found to have "inadequate documentation." He asserted a right to shelter based upon his fear that he would "return to his former life of selling drugs and living in abandoned buildings, cars or the graveyard." Robert Klopp was receiving veteran's benefits and was denied general assistance over his refusal to properly fill out a benefits application. Charles Beedy was a homeless man who obtained employment and subsequently became ineligible for general assistance. Mr. Beedy also noted that he hoped to obtain shelter in a privately funded shelter, and stated that he would be sleeping in the park or abandoned car if he was denied shelter.

Most notable was the testimony of Herbert Hilton, the named plaintiff. Mr. Hilton's testimony described a snowy, freezing night when he was denied a space in the shelter. Included in his testimony was a description of how he slept in an abandoned building, with only a blanket and a fire as protection from the cold weather. However, the Court's discussion of Mr. Hilton was merely in a footnote because this testimony was grouped with other plaintiffs "spending one or more nights on the streets, in parks or in abandoned buildings." For the purposes of the legal challenge, no seasonal distinction was ever made. The plaintiffs did not, through their arguments, appeal to the court to consider a relative scale of harm because, for purposes of the legal challenge before the court, an "emergency," was considered a situation where an individual was not receiving general assistance and would be forced to find other shelter once the overflow shelter was closed in the late spring. Unlike the Court's emphasis on certain plaintiffs in discussion of the facts, particularly Baines, Klopp, and Beedy for their inability to obtain general assistance benefits, the court barely mentions Mr. Hilton's testimony about sleeping in a building in the winter and how homeless people could face death. In addition, the court noted that the original testimony was provided to the trial court in 1989, and that the action for an injunction brought after the adoption of the Public Act in 1992 did not include new testimony "from individuals not currently living in the city shelters who were in need of shelter."

iv. The Court's Holding

The Court characterized the holding in Hilton as being "controlled by our decision today in Moore v. Ganim." The Court coupled a broad constitutional challenge in Moore with what potentially could have been a more narrow assertion of a constitutional right of a homeless person to shelter in Hilton. "Consistent with our reasoning and conclusions in [Moore v. Ganim], we conclude that the state does not have an obligation under the state constitution to provide subsistence benefits, including an obligation to provide shelter."

B. Moore v. Ganim

The plaintiffs brought this action in state trial court as a constitutional challenge to a statute limiting governmental general assistance to poor persons for a maximum of nine out of twelve months. The trial judge

denied the request for a temporary injunction against the implementation of this statute and the plaintiff class appealed. This case was then expedited to the Supreme Court along with Hilton.

The constitutional claim in Moore originally was phrased more broadly than in Hilton. The plaintiffs appealed to the court for recognition of "an affirmative obligation, under the Connecticut Constitution, to provide its indigent citizens with a minimal level of subsistence." Like Hilton, this was a facial challenge of a statute and the claim did not involve an "as applied" argument. The legislature essentially revised the statute governing state-administered general assistance to provide assistance to "an employable person ... [which] shall be limited to no more than nine months in a twelve-month period." The municipalities retained the discretion to extend this limit. The Court summarized the massive scope of the plaintiffs' arguments as follows: "the fundamental premise of the plaintiffs' claims is that the state has a constitutional obligation to supply them with subsistence level resources irrespective of the availability of food and shelter from family, friends, charitable organizations, religious **[*11]** institutions and other community sources. The court again commented on the lack of a factual record detailing actual harm to plaintiffs in this case to demonstrate "the adverse impact on some protected interest of its own."

iii. The Moore Plaintiffs

Surprisingly, the Court did not discuss the facts surrounding the struggles of the individual plaintiffs in Moore, except to note where they were living at the time of the litigation. This is a testament to the breadth of the actual relief the plaintiffs were seeking. Without individual facts, this becomes a hypothetical exercise in providing minimum subsistence to poor persons regardless of alternative sources of assistance and irrespective of the particular season in which they apply for benefits. The ultimate underlying question the court likely considered as it read the briefs and listened to arguments was what the actual scope of minimal subsistence should be. Based on this broad argument by the plaintiffs, it is tough to understand truly how they expected the Court to answer this question and to place limits on the extension of this right. To impress upon the Court the severity of the harm of each plaintiff, the plaintiffs could have included the individual circumstances of the lives of certain plaintiffs with a detailed description of the desperate circumstances of each person. They could have argued on behalf of the specific plights of each individual and applied the rich Connecticut history of supporting poor persons and showed how Connecticut's tradition had their exact situations in mind.

However, the legal argument in Moore was a facial challenge to the former Section 17-273b of the Connecticut General Statutes, which allowed for towns to discontinue benefits to recipients after nine months. The court's final holding is a reflection of the argument presented to the Court, as interpreted by the Court. The legal challenge by the plaintiffs in Moore failed to place on the record before the trial court an emphasis on the individual struggles of real indigent citizens and the ramifications of the State's decision to cut benefits to individuals who may not survive without these benefits. In the plaintiff's request to certify a class, the named plaintiffs were described as follows:

> The class of Bridgeport General Assistance recipients who are 'employable' as that term is used in General Statutes (Rev. to 1993) 17-273b; who have received or will receive benefits for a period of nine months; and who for said nine month period have or will have complied with all requirements of the General Assistance program.

Of the class of plaintiffs in this case, the court mentioned only William Simpson's testimony. Mr. Simpson, it was noted, was actually living in a shelter in Bridgeport while he was a named plaintiff in the action. Two other homeless witnesses, Ruben Sanchez and Michael Kennedy, were also living in the same shelter at the time of the action and were unable to afford rent. Testimony also included two low-income city residents who "expressed concern about their future ability to make rent payments." The Connecticut Supreme Court,

therefore, did not see any testimony in the trial court's record from the thousands of Connecticut citizens who could actually come in from the street to testify in court about the circumstances surrounding their inability to obtain minimum benefits for survival.

iv. The Court's Holding

The Moore Court decided that it was a purely legislative function to administer benefits to the poor. The court concluded that the Connecticut Constitution "does not compel the state to provide the cash assistance to which these plaintiffs claim to be entitled." The Court explained this holding by stating that the "scope of such a right, or of deciding what is the appropriate government response, illustrates the realistic limitations of a judicial decree in a case of this nature." Given the nature of such a broad facial challenge to the general assistance statute, without **[*13]** a factual finding of undeniable personal harm to any named plaintiff, the Court had no choice but to characterize this argument as a policy debate, better suited to the legislative arena. …

F. West Virginia - State ex rel. K.M. v. West Virginia Department of Health & Human Resources

The 1983 case of Hodge v. Ginsberg is the starting point for the development of a homeless person's right to shelter and welfare benefits in the state of West Virginia. Here, the claim was for both a statutory and a constitutional right to emergency shelter for homeless people in order to "sustain life and reasonable health." Although seemingly similar to the plaintiffs' arguments in Moore and Hilton, the plaintiffs in Hodge were defined as "individuals who [were] unable to provide for themselves adequate shelter necessary to sustain life and reasonable health." This narrow definition mirrors the legal approach of defining a right to shelter not as a general right, but as one essential to survival. In Hodge, the court never reached the issue of a right to emergency shelter because of the clear and protective language set forth in the West Virginia statute. This case, however, set the foundation for State ex rel. K.M. v. West Virginia Department of Health & Human Resources, a 2002 case declaring that the constitution of the state of West Virginia guarantees that "government has a moral and legal responsibility to provide for the poor."

State ex rel. K.M. was brought by a mother on behalf of her eight-year-old child to challenge the time limits of the state-administered Temporary Assistance to Needy Families ("TANF") welfare block grant program. Interestingly, the plaintiffs' advocates in this class action brought both a facial statutory challenge as well as a detailed "as applied" challenge to the state's administration of welfare benefits and adherence to federally mandated time limits. The plaintiffs were required to effectuate a finding of fact before a court appointed Special Commissioner. The West Virginia Supreme Court chose to review in great detail the testimony of three assistance recipients, including the mother of the eight-year-old child, so that they "might put a human face on the affected parties." Each recipient, ages 25, 27, and 40, detailed numerous problems, including clinical depression, physical disability, and a lack of available child care for young children. Based on this factual background, the women with children asserted a state constitutional guarantee to subsistence payments that was infringed by the statutory time limit sequence.

The West Virginia Supreme Court determined that the basis for a right to minimum subsistence, including a right to shelter, exists in the text of West Virginia's Constitution in the form of an "office of the Overseer of the Poor." Based upon the individual factual arguments, the historical arguments surrounding the adoption of the text, and the framers' attitudes toward the poor, the court found that the state had a moral and legal responsibility to provide for the poor. In contrast to the conclusion in Moore, the court here found the facts surrounding the lack of benefits to the children compelling and "of interest to every citizen of this State."

In State ex re. K. M., the court made numerous references to the circumstances that the children and families faced once these time limits were reached. This is far different from the sparse facts set forth in Moore and Hilton, where the court noted that the named petitioners had other benefits available to them and were all currently either renting an apartment or living in Prospect House shelter in Bridgeport.

G. Montana - Butte Community Union v. Lewis

Butte Community Union ("BCU") was a case heard by the Montana Supreme Court concerning a right to welfare in December 1985 and decided in January 1986. The arguments presented closely mirror those brought in Moore; however unlike Connecticut, Montana's Constitution contains a specific reference to welfare in Article XII. The challenge in BCU was brought by a group of community and civic organizations to contest a bill passed in the state house of representatives to the statute providing for general assistance to the state's indigent population. The legal argument centered on a facial challenge **[*26]** to the bill's proposed amendment to state administered general assistance; the court does not mention the potential impact of the changes to general assistance on the lives of individual poor and vulnerable recipients in its entire opinion.

At the trial court level, the court issued a preliminary injunction preempting Dave Lewis, the state director of the Department of Social and Rehabilitation Services (SRS), from implementing certain provisions of the bill. The court found that this bill was unconstitutional as a violation of Article XII. The Montana Supreme Court affirmed this injunction, but found that the constitutional language did not provide for a fundamental right to welfare in Montana. The Court held that the bill was subjected to heightened scrutiny, or a mid-tier standard of review, under an equal protection analysis, since the legislation was "discriminatory in nature" and since the "constitutional convention delegates deemed welfare to be sufficiently important to warrant reference in the Constitution." Without the language in Article XII of the Montana Constitution, the plaintiffs may not have fared differently than the plaintiffs in Moore.

BCU is unique from all the other decisions for two reasons: (1) the subsequent litigation and (2) the subsequent constitutional amendment. The second case, known as BCU II, was filed as a result of an attempt by the legislature to amend the general assistance statute to single out "able-bodied persons without dependent minor children ... for no more than two months of non-medical general relief assistance within a 12 month period." Following these two cases and other related litigation, BCU was overruled by a constitutional amendment to Article XII 3(3), which thereafter allowed the legislature to limit the distribution of general assistance to Montana's poor residents.

Bradley R. Haywood, The Right To Shelter as a Fundamental Interest under the New York State Constitution, 34 Colum. Hum. Rts. L. Rev. 157 (2002)

History of the New York State Welfare Amendment

"[S]tate constitutions are not exact replicas of the [F]ederal [C]onstitution. They differ in language, history, and in the values of the populace governed by them. A state court should take all of these considerations into account in interpreting its constitution." In New York's case, although its Equal Protection Clause is substantially the same as the federal version, the content of the rights protected by the state clause vary greatly from those protected by the federal version. In particular, the New York State Constitution recognizes an affirmative duty of the state to provide social welfare.

Article XVII, Section 1 of the New York State Constitution was passed in 1938, at New York's first post-Depression constitutional convention. The convention came on the heels of the Great Depression, obviously a time of economic and social instability in the United States; in New York, for example, total unemployment in the agricultural sector rose from 656,000 persons in 1930 to 2,061,000 in 1933. Without wages to support themselves, many of the unemployed lost their homes; the federal government estimated the total number of homeless in 1933 at one million persons, while experts and academics pegged the total at an even higher number, ranging from two to five million. With an increased burden on a social service scheme designed around local institutions, many of those affected by the Depression found themselves without aid. Lacking the institutional capacity to provide for their needy, the legislators shifted the burden of welfare responsibility to state institutions.

Led by then-Governor Franklin D. Roosevelt, New York sought to implement its welfare mandate through a variety of programs. In an address to the legislature, Roosevelt made clear what he felt the nature of any state sponsored solution must be: "Aid must be extended by the government--not as a matter of charity but as a matter of social duty." With that in mind, Roosevelt made welfare a part of "declared social policy" by establishing a temporary agency, funded by increased state income tax, to provide "home relief" to families in need. When Roosevelt left office to take office as President, his successor, Lieutenant Governor Herbert H. Lehman reinforced social welfare as an obligation of the State, based on the same philosophy as Roosevelt, that "social justice must never be confounded with charity." He shifted his focus from the temporary agency of the Roosevelt Administration to permanent reform, reorganizing the State Department of Social Welfare to be responsible for a large share of "home relief." At the time, however, the New York State Constitution likely barred the state from using its revenues for direct welfare services.

With this background, delegates convened in 1938 to consider amendments to the New York State Constitution that would allow for state financing of direct social welfare services. The proposed amendments ranged from affording the legislature complete discretion over welfare programs--including whether or not to implement them at all--to removing all discretion from their hands, describing not only the nature of the right, but also its content. The final version of the Welfare Amendment ratified by the convention struck a balance between the two extremes, affirming the mandatory character of social welfare by using words of obligation ("shall be provided"), while allowing the legislature discretion over the "manner" and "means" of its implementation. The language affording discretion to the legislature, however, does not allow it to determine whether or not to provide aid.

The legislative history affirms the mandatory character of the language in the Welfare Amendment. Notable among the statements of the delegates were the comments of the Chairperson of the

Social Welfare Committee, Edward Corsi, whose proposed amendment most closely mirrored the version finally approved by the delegates. A version of that amendment became Article XVII, Section 1. As a sponsor of the measure, his comments are entitled to "special weight" when attempting to discern intent.Among other things, Corsi noted that the measure codified "a concrete social obligation which no court may ever misread" and that "the obligation expressed in this recommendation is mandatory." Moreover, Corsi noted that the state "may . . . not shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government." Corsi went on to specifically mention the correlative to the state duty, and that which is most crucial to equal protection analysis--the fundamental right. Corsi emphasized that, in the scheme envisioned by the measure, "legislative discretion over the system of relief was subordinate to the 'fundamental right' of the poor to receive 'aid, care and support."'

Although the New York courts have since afforded a great deal of discretion to the state legislature in determining the "manner and means" of implementation, arguably more than the drafters of the provision intended, they remain steadfast to the idea of the mandatory nature of the welfare provision contained in Article XVII, Section 1 of the New York State Constitution. Tucker v. Toia is a particularly good exposition of the court's attitude towards the welfare provision. In Tucker, the plaintiffs challenged the validity of eligibility requirements for home relief, claiming that such regulations were "a substantive violation of Section 1 of Article XVII of the New York State Constitution."

The court's analysis of the constitutional question opened by stating that "the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution," a statement since affirmed in numerous subsequent cases. The court proceeded to uphold the rationale described in the recounting of the convention of 1938, namely that the purpose of the welfare provision was twofold: first, a welfare provision was necessary in order to protect state financing of public assistance from constitutional attack; and second, "it was intended as an expression of the existence of a positive duty upon the State to aid the needy." Furthermore, the court cited legislative history for support, looking to the statements of Chairman Corsi to affirm mandatory public assistance to the needy as "a definite policy of government, a concrete social obligation which no court may ever misread," and a responsibility "as fundamental as any responsibility of government." The Tucker court found in this legislative history an "affirmative duty to aid the needy." Clearly, the right to public assistance, and its mandatory and fundamental character, enjoy an explicit constitutional basis and judicial recognition.

It may be noted that, although public assistance is explicit within the text of the constitution, shelter is not. However, if the Welfare Amendment is to have any content at all, it must undoubtedly include some provision of shelter, one of the most basic human needs. It might even include provision of additional levels in the continuum of care, like transitional housing, permanent housing and supportive services.

* * *

Since Callahan, New York courts have upheld the obligation created by the consent decree to provide shelter for the homeless, extending it to cover other classes, including women and families. In McCain v. Koch, destitute families receiving emergency housing aid challenged arbitrary denials of shelter and, for those who did receive it, the quality of the accommodations provided by the City. The plaintiffs initially sought an injunction ordering "safe, suitable and adequate emergency housing." The Court of Appeals [held that] … a court could … require compliance with

minimal objective standards of adequacy for shelter [beyond what was in the consent decree]." The court ruled on only the limited question of whether a court can issue an injunction requiring the City, once it has undertaken to provide shelter, to provide shelter that satisfies minimal standards of adequacy. By limiting its scope of review, the court expressly avoided any resolution of the constitutional question about the right to shelter, or whether the standards embodied in the New York Department of Social Services (Department) regulations were in fact constitutionally inadequate or unreasonable. Instead, its reasoning rested on due process grounds--if the Department pledged to provide housing, it must abide by its own regulations. In reaching this decision, the court still left all discretion on establishing and promulgating standards to "legislative and executive prerogative."

The most recent challenge to the Callahan consent decree has involved Title 18, Section 352.35 of the New York Code. Section 352.35, a regulation promulgated by the New York Department of Social Services, required that individuals applying for or receiving shelter benefits comply with eligibility requirements, including an initial assessment, the development of and compliance with an "individual living plan," and workfare. Specifically, the regulation required that anyone seeking temporary shelter, "be it only for a night," had to undergo a series of complex eligibility assessments, with the immediate goal of creating an "independent living plan," and the ultimate goal of a transition to permanent housing. The assessments involved, among other things, an evaluation of housing availability, the need for temporary housing assistance, employment and educational needs, the need for protective or preventive services, the ability to live on one's own, and the need for health care, including treatment for substance abuse. The regulation also asserted, in plain terms, that emergency shelter was a "public assistance benefit," and thus, for an individual to receive emergency shelter, that person was required to comply with all of the eligibility conditions of public assistance programs, including participating in job training, rehabilitation, or child support programs, and any additional requirements for the receipt of social security income. Finally, the regulations charged the individual with the responsibility of undertaking an active job search and temporary housing search. Once the agency made its assessments, the individual had to comply with the independent living plan. Individuals or families who failed to comply were disqualified from receiving housing assistance "until the failure ceases, or for 30 days, whichever period is longer."

In McCain v. Giuliani, the appellate division addressed the facial constitutional validity of these regulations. Employing the rationality review standard established in Bernstein v. Toia and upheld in Eldredge v. Koch and McCain v. Koch, the court determined the regulations to be rationally related to the Department of Social Services's rulemaking objective of "assuring that temporary housing resources are not squandered on those having no real need of them" and to the related objective of reducing reliance on public benefits by encouraging work and independent living. Although the McCain court found Section 352.35 facially constitutional, the court with jurisdiction to enforce the consent decree has enjoined the city from enforcing the regulations. Most recently, the court noted that the regulation risked depriving needy persons of shelter, in contravention of the purpose of the consent decree. As a result, Section 352.35 remains enjoined due to its inconsistency with the Callahan consent decree.

In challenging the regulations as contrary to the consent decree, the plaintiffs relied partially on the first-hand accounts of those who might be affected by them. One of these persons was a homeless man named Damon Revells, a full-time cook who had been evicted by his landlord for missed rent. In an affidavit to the court, Revells described an arduous intake process that began on 1:00 a.m. on December 28, 1998, and did not conclude with an assignment until 6:00 p.m., a full seventeen hours later. Even after being assigned a bed, Revells had to travel by bus to the shelter. He arrived at midnight on December 29, ate a small meal, and went to bed at 1:00 a.m. Because of the long delay, Revells slept for only five hours. A similar process ensued each day he sought temporary shelter, with a long line for shelter bed assignment at the intake center, then a commute to the actual shelter placement. Because of the administrative delays, Revells attested to averaging roughly four hours of sleep a night while at the shelter. He also attested to sleeping at seven different city shelters in two weeks, throwing his transportation schedule into chaos. With his schedule unpredictable and his hours of sleep sharply limited, Revells additionally risked losing his job. [Another] example, described by a local homeless service organization, involved a Bellevue Men's Shelter resident named Johnny, a man in his forties, who was evicted with eleven others for violating a "minor rule-- smoking a cigarette in a non-smoking area." Following eviction, which was in accordance with strict shelter regulations and sanctions similar to Section 352.35, the evicted men spent seven days sleeping in public, on subways, park benches, and in hospitals. What was striking about Johnny's case, however, was that he was mentally retarded. He had been misdiagnosed by shelter staff upon intake. Had his condition been properly identified, he never would have faced such a sanction.

[Update from Coalition for the Homeless:[1]]

In October 2002, the City filed an appeal of the ruling, and in June 2003 the Appellate Division overturned the trial court's earlier ruling. In October 2003 the Court of Appeals denied a request to review the appellate court ruling on the grounds that that ruling was not a final decision.

Therefore, in late 2003 the City of New York began implementing shelter termination rules for homeless single adults, but was required by court order to provide Coalition for the Homeless and the Legal Aid Society with copies of each individual's shelter termination notice, allowing the Coalition and the Legal Aid Society to provide legal assistance, housing assistance, and social services to threatened homeless adults.

In 2006 the City initiated legal action to stop providing shelter termination notices to the Coalition and the Legal Aid Society. After three years of litigation and appeals, in 2009 the New York State Court of Appeals found for plaintiffs and the Coalition, and ordered the City and State to continue providing copies of termination notices.

December 2009, Coalition shelter monitors had witnessed hundreds of homeless men and women forced to sleep on the floors of waiting rooms, or transported in the middle of the night to distant shelter facilities only to get a few hours of sleep before being shipped

[1] http://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/

back. And due to the City's failure to plan, these crisis conditions existed even before the onset of winter.

On December 9, 2009, the Coalition and the Legal Aid Society, with the pro bono legal assistance of attorneys from Wilmer Cutler Pickering Hale LLP, filed a motion in New York State Supreme Court seeking enforcement of the *Callahan* consent decree. On December 20th, Justice Judith Gische issued two vital temporary orders that required the City (1) to shelter vulnerable men and women and (2) to halt the systemic, repeated use of overnight-only beds — thus banning the City's longstanding practice of "overnighting" hundreds of homeless men and women each night.

As a result of those orders, over the course of the 2009-2010 winter months the City was forced to add hundreds of shelter beds and to implement new procedures to ensure that homeless New Yorkers entering the shelter system get stable shelter placements. Indeed, by May 2010 when the motion was settled, the City had added more than 800 beds for homeless men and women to address a remarkable 12 percent increase in the adult shelter population.

In November 2011, Mayor Bloomberg launched the most aggressive attack on the legal right to shelter for homeless New Yorkers since the Giuliani and Pataki years. The Bloomberg administration proposed new shelter eligibility rules for homeless singe adults that would effectively deny shelter to thousands of homeless New Yorkers, including many living with mental illness and other serious health problems.

Coalition for the Homeless and the Legal Aid Society immediately filed a legal challenge seeking to block the shelter denial rules, and the City agreed not to implement the new rules pending the legal challenge. The Coalition and the Legal Aid Society argued that the proposed rules violated the *Callahan v. Carey* consent decree and that the City had failed to comply with New York City Charter provisions governing the issuance of new rules and policies. In late November, the New York City Council filed a similar legal challenge based on the same City Charter provisions. At a December hearing, New York State Supreme Court Justice Judith Gische declared that she would first rule on the City Charter issues and address the *Callahan* issues pending the outcome of the procedural claims.

On February 21, 2012, Justice Gische ruled for the plaintiffs and the City Council that the City had failed to comply with City Charter requirements regarding the issuance of rules, and declared the proposed shelter eligibility rules "a nullity." [The decision was upheld by the Court of Appeals.]

Thomas J. Main, Homelessness in New York City: Policymaking from Koch to de Blasio (2016)

Introduction

The jurisdiction that has developed the most ambitious policy to address the problem of homelessness is New York City. In April 2015, New York City sheltered 59,285 homeless people (including both single individuals and members of families), and an estimate based on a street survey done in February of that year indicates that there were an additional 3,182 persons living in public spaces. In fiscal year 2011 the city's Department of Homeless Services spent $1.47 billion. No other American city spends nearly as much on the homeless as New York or has close to as large a shelter system. The poor quality of life for at least some of the city's homeless has received wide attention. New York City's infamous welfare hotels were icons of the suffering of the urban poor. Just as disturbing are reports of a small population of homeless people who live in the city's tunnels and other underground spaces.

New York City is also the jurisdiction with the longest history of coping with homelessness. The plight of the so-called disaffiliated alcoholics of the Bowery was documented in the early 1960s and had been dealt with by the city in various ways for decades before then. The 1960s also saw the development of "hotel families," that is, families that had been burned out of or otherwise lost their housing and were put up in hotels at the city's expense. These episodes belong to what might be called the prehistory of homelessness policy in New York.

A whole new policy framework was created by the signing of a consent decree in the case of Callahan v. Carey on August 26, 1981. As a result of this and other litigation by advocates for the homeless, the city is one of the few local governments with a court-recognized and enforceable policy of providing shelter to anyone who requests it. New York City is therefore the main stage on which the pressing national problem of homelessness has been addressed.

In New York City, the process of establishing shelter as a right has gone through three distinct stages or moments.

Phase One: Entitlement

Simply establishing that there indeed is a right to shelter and then delivering on that entitlement is one of the central challenges to policy. The courts and various advocacy groups such as Coalition for the Homeless are primarily concerned with this aspect of homelessness policy. These interests push policy in the direction of developing a shelter system that is large, court supervised, and primarily concerned with service delivery. Establishing and implementing a right to shelter is one major theme in New York City's policy, a theme that was especially prominent in the early days—that is, through the eighties to the early nineties—of modern homelessness policy.

The right to shelter completely transformed the city's homelessness system. The system grew tremendously in the early eighties. While 7,584 individuals were sheltered in 1982, 21,154 were sheltered in 1985. Spending grew from $6.8 million in 1978, just before the litigation to establish a right to shelter began, to $100 million in 1985. To cope with the rapidly expanding demand, the city rushed to open large, barracks-style shelters where hundreds of clients would sleep in cots laid out in open spaces. During these years the city also relied on commercial welfare hotels to shelter

homeless families at the cost of $72 million in 1986. The shelter system during these years was satisfactory neither from a conservative nor from a liberal point of view. The right to shelter was absolute, and unbalanced by any requirements to work, participate in rehabilitation, or seek permanent housing. Moreover, shelter quality was often very poor, and few services were offered to clients. The city had created a system that guaranteed the right to free, low-quality shelter.

Phase Two: Paternalism

Entitlement is one axis around which New York City homelessness policy has spun. As time went by, however, the limits of this purely entitlement-based, emergency-oriented system showed themselves.

The unconditional right to shelter proved to be problematic in various ways. Behavioral problems—such as substance abuse, nonwork, and criminal activity—of some of the homeless required that the entitlement to shelter be conditioned on proper behavior, including participation in work and treatment programs. Strong conceptions of the rights of the mentally ill sometimes had to be limited in order to provide necessary protection and therapy. This set of challenges is of particular concern to mayors and administrators who, unlike the courts or advocates, are responsible for the actual operation of the shelter system. These bureaucracy-based actors therefore push policy in a paternalistic direction, one in which rights are conditioned on good behavior and on participation in programs such as drug treatment, work, and activities designed to move clients out of the shelters as soon as possible.

During the Giuliani administration, the shelter system was much changed from what it had been in the eighties and early nineties, mostly in a paternalistic direction. While in the 1980s most shelters were government run, the system was privatized or, more accurately, not-for-profitized. That change improved shelter quality. Not-for-profitization has also made it possible for the system to impose work or rehabilitation requirements on clients. The city still provided shelter to everyone who asked for it. But not-for-profit shelters can require their clients to work, or participate in rehabilitation, in order to stay in that particular shelter. (Clients who decline to participate are sent back to a city-run, general-intake shelter.) In other words, privatization made paternalism possible.

Beginning in the late Dinkins administration and continuing through the Giuliani administration and much of the Bloomberg administration, city homelessness policy developed in a paternalistic direction, one that emphasized the importance of getting homeless people who are able to do so to take responsibility for their housing situation. The drive to develop such a paternalistic policy has required the city to get itself out from under the constraints of the many lawsuits that drive the city's homelessness policy. The city has had to "reinvent" its Department of Homeless Services as a more decentralized and flexible system. In short, New York's homelessness system has evolved from its beginning as a centralized, highly constrained, and entitlement-based system to one that is much more decentralized and privatized and that emphasizes clients' responsibilities as well as their rights.

But paternalism turned out to have its limits, just as entitlement did. Paternalism greatly improved management of homeless services and responded to political demands for more responsibility on the part of recipients. What paternalism did not do was offer much hope of eventually "solving"

the problem of homelessness. Despite efforts to diagnose and then treat the "underlying causes" of homelessness, the number of people on the street and of families entering shelters remained frustratingly high. The overall shelter census continued to go up, as did the budget for services for the homeless. The paternalistic reforms, promoted under the Dinkins administration by a special commission led by Andrew Cuomo, and implemented with much fanfare during the Giuliani years, seemed not to be making a dent in these two fundamental measures of success. Paternalism had done a better job at managing homelessness but had failed as a strategy for solving homelessness.

Phase Three: Post-paternalism

The next moment in New York City homelessness policy had its origins in efforts to come up with a strategy that would "solve" homelessness. A crucial part of that effort was what amounted to a redefinition of the homelessness problem by the well-known researcher Dennis Culhane. In the late nineties, only 10 percent of the single homeless persons in New York—who were the most disabled and whom Culhane identified as the "chronic" homeless— accounted for almost half of the shelter days provided by the city. This discovery allowed the homelessness problem to be redefined in such a way that a "solution" seemed within reach: Focus on the relatively small chronic population, house them, thus making a disproportionate impact on reducing shelter use, and declare victory.

The question then became where to house the chronically homeless. … Sam Tsemberis, a psychologist experienced in outreach work to the street homeless and founder of the innovative service organization Pathways to Housing, came up with a response. His "Housing First" approach to outreach involved breaking with the paternalist quid pro quo and providing street dwellers with housing before asking them, or perhaps without asking them, for compliance with rehabilitation. Many single homeless people, it turned out, who had previously declined shelter on paternalistic terms were willing to take this deal.

Housing First was developed as an outreach strategy directed to street dwellers but also had an impact on policy toward homeless families. From the eighties to the mid-1990s, it was thought by some observers—including the present author—that homeless families were much more troubled than similar, nonhomeless poor families with problems such as drug use, mental illness, criminal activity, and "underclass" pathologies. Here again, the thought was that there was an underlying cause of the homelessness of many families. By the mid-1990s, research indicated that homeless families, though they suffered higher rate of such problems than similar poor families, were not as dramatically worse as had been thought. In any case, research also showed that whatever their problems, homeless families could generally stay stably placed in permanent housing even if they did not receive any rehabilitative services. The key to rapidly rehousing them was not services, but subsidies. Homeless families, whatever their troubles, could usually live outside the shelter system if they received access to public housing or Section 8 vouchers and other forms of rental subsidy. Thus, under the influence of the Housing First strategy for singles, policy for families began to move away from diagnosing underlying causes and providing appropriate services to planning for rapid rehousing of shelter families, with some form of subsidies being a prominent part of that plan.

The post-paternalistic features of the city's homelessness policy were broached during the early

Bloomberg years. It was under Bloomberg that, with much publicity and acclaim, a five-year plan was introduced, the expressed purpose of which was to "overcome" or end homelessness. Ending homelessness really meant having a disproportionate impact on the use of shelters and services by focusing on the chronically homeless, as Culhane had suggested, sending them to supportive housing, and doing so without demanding "good behavior" first, in keeping with the Housing First policy. Implementation of Housing First strategies proceeded apace under Bloomberg, as did the analogous family policy of rapid rehousing, which, in Bloomberg's first term, involved a reliance on various sorts of housing subsidies.

The results of post-paternalism have been mixed, perhaps because this policy philosophy has been incompletely implemented. The Housing First strategy for single homeless people has been effective in considerably reducing the city's population of street dwellers, by about 24 percent between 2005 and 2014. The situation with the shelter population was much different. The census in the shelter system rose throughout the Bloomberg years and was at an all-time high at the end of his final term. This may be the case because the Housing First strategy was never fully implemented for families. Rapid rehousing consisted mostly in planning to move families out of the shelter almost as soon as they entered, rather than waiting for various sorts of rehabilitative programs to take effect. But a signature Bloomberg policy for dealing with homeless families was "delinking," that is, ending priority access of homeless families to Section 8 vouchers and vacant public housing units. Such delinking was supposed to put an end to the "perverse incentive" of receiving subsidies upon becoming homeless, and was therefore expected to abate the flow of families into the shelter system. Also under Bloomberg, an important rent subsidy for homeless families, the Advantage program, came to an end under complicated circumstances. The delinking strategy and the end of rent subsidies were out of keeping with post-paternalism, which, when applied to families, implied reliance on rent subsidies to achieve rapid access to permanent housing.

We have, then, three stages in the development of homeless policy in New York City: entitlement, paternalism, and post-paternalism. Actually, these stages are more like facets or aspects. Paternalism did not end entitlement; paternalism assumed the homeless had a right to shelter but located the cause of homelessness in the homeless person and demanded that he or she "give something back" in return for shelter and services. Post-paternalism would have undermined paternalism, but has been incompletely implemented. The result is that paternalism has been imposed on top of entitlement, and postpaternalism on top of paternalism. The city's homeless policy is therefore quite complex, and is driven by three distinct "philosophies."

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976

Excerpts

PREAMBLE

The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Recognizing that these rights derive from the inherent dignity of the human person,

Recognizing that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights,

Considering the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms,

Realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant,

Agree upon the following articles:

PART I

Article 1

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

PART II

Article 2

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex,

language, religion, political or other opinion, national or social origin, property, birth or other status.

3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Article 3

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.

Article 4

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

Article 5

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.

2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 11

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

(a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;

(b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.

The Government of the Republic of South Africa et al. v. Grootboom (Constitutional Court of South Africa, Case CCT 11/00, Judgment of 4 October 2000):

Yacoob, J.

A. *Introduction*

The people of South Africa are committed to the attainment of social justice and the improvement of the quality of life for everyone. The Preamble to our Constitution records this commitment. The Constitution declares the founding values of our society to be "[h]uman dignity, the achievement of equality and the advancement of human rights and freedoms." This case grapples with the realisation of these aspirations for it concerns the state's constitutional obligations in relation to housing: a constitutional issue of fundamental importance to the development of South Africa's new constitutional order.

The issues here remind us of the intolerable conditions under which many of our people are still living. The respondents are but a fraction of them. It is also a reminder that unless the plight of these communities is alleviated, people may be tempted to take the law into their own hands in order to escape these conditions. The case brings home the harsh reality that the Constitution's promise of dignity and equality for all remains for many a distant dream. People should not be impelled by intolerable living conditions to resort to land invasions. Self-help of this kind cannot be tolerated, for the unavailability of land suitable for housing development is a key factor in the fight against the country's housing shortage.

The group of people with whom we are concerned in these proceedings lived in appalling conditions, decided to move out and illegally occupied someone else's land. They were evicted and left homeless. The root cause of their problems is the intolera-

ble conditions under which they were living while waiting in the queue for their turn to be allocated low-cost housing. They are the people whose constitutional rights have to be determined in this case.

Mrs. Irene Grootboom and the other respondents[13] were rendered homeless as a result of their eviction from their informal homes situated on private land earmarked for formal low-cost housing. They applied to the Cape of Good Hope High Court (the High Court) for an order requiring government to provide them with adequate basic shelter or housing until they obtained permanent accommodation and were granted certain relief. The appellants were ordered to provide the respondents who were children and their parents with shelter. The judgment provisionally concluded that "tents, portable latrines and a regular supply of water (albeit transported) would constitute the bare minimum." The appellants who represent all spheres of government responsible for housing challenge the correctness of that order.

The cause of the acute housing shortage lies in apartheid. A central feature of that policy was a system of influx control that sought to limit African occupation of urban areas. Influx control was rigorously enforced in the Western Cape, where government policy favoured the exclusion of African people in order to accord preference to the coloured community: a policy adopted in 1954 and referred to as the "coloured labour preference policy." In consequence, the provision of family housing for African people in the Cape Peninsula was frozen in 1962. This freeze was extended to other urban areas in the Western Cape in 1968. Despite the harsh application of influx control in the Western Cape, African people continued to move to the area in search of jobs. Colonial dispossession and a rigidly enforced racial distribution of land in the rural areas had dislocated the rural economy and rendered sustainable and independent African farming increasingly precarious. Given the absence of formal housing, large numbers of people moved into informal settlements throughout the Cape peninsula. The cycle of the apartheid era, therefore, was one of untenable restrictions on the movement of African people into urban areas, the inexorable tide of the rural poor to the cities, inadequate housing, resultant overcrowding, mushrooming squatter settlements, constant harassment by officials and intermittent forced removals. The legacy of influx control in the Western Cape is the acute housing shortage that exists there now. Although the precise extent is uncertain, the shortage stood at more than 100,000 units in the Cape Metro at the time of the inception of the interim Constitution in 1994. Hundreds of thousands of people in need of housing occupied rudimentary informal settlements providing for minimal shelter, but little else.

Mrs. Grootboom and most of the other respondents previously lived in an informal squatter settlement called Wallacedene. . . . The conditions under which most of the residents of Wallacedene lived were lamentable. . . . About half the population were children; all lived in shacks. They had no water, sewage or refuse removal services and only 5% of the shacks had electricity. The area is partly waterlogged and lies dangerously close to a main thoroughfare.

Many had applied for subsidised low-cost housing from the municipality and had been on the waiting list for as long as seven years. Despite numerous enquiries from

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[13] The respondents are 510 children and 390 adults. Mrs Irene Grootboom, the first respondent, brought the application before the High Court on behalf of all the respondents.

the municipality no definite answer was given. Clearly it was going to be a long wait. Faced with the prospect of remaining in intolerable conditions indefinitely, the respondents began to move out of Wallacedene at the end of September 1998. They put up their shacks and shelters on vacant land that was privately owned and had been earmarked for low-cost housing. They called the land "New Rust."

They did not have the consent of the owner and on 8 December 1998 he obtained an ejectment order against them in the magistrates' court. The order was served on the occupants but they remained in occupation beyond the date by which they had been ordered to vacate. Mrs. Grootboom says they had nowhere else to go: their former sites in Wallacedene had been filled by others. . . . The validity of the eviction order has never been challenged and must be accepted as correct. However, no mediation took place and on 18 May 1999, at the beginning of the cold, windy and rainy Cape winter, the respondents were forcibly evicted at the municipality's expense. This was done prematurely and inhumanely: reminiscent of apartheid-style evictions. The respondents' homes were bulldozed and burnt and their possessions destroyed. Many of the residents who were not there could not even salvage their personal belongings. . . . The respondents went and sheltered on the Wallacedene sports field under such temporary structures as they could muster.

[S]ection 26 of the Constitution . . . provides that everyone has the right of access to adequate housing. Section 26(2) imposes an obligation upon the state to take reasonable legislative and other measures to ensure the progressive realisation of this right within its available resources.

The [trial court] rejected an argument that the right of access to adequate housing under section 26 included a minimum core entitlement to shelter in terms of which the state was obliged to provide some form of shelter pending implementation of the programme to provide adequate housing. This submission was based on the provisions of certain international instruments. . . .[14]

D. *The relevant constitutional provisions and their justiciability*

The key constitutional provision[] at issue in this case [is] section 26:

(1) Everyone has the right to have access to adequate housing.
(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

These rights need to be considered in the context of the cluster of socio-economic rights enshrined in the Constitution. They entrench the right of access to land, to adequate housing and to health care, food, water and social security . . . and the right to education.

While the justiciability of socio-economic rights has been the subject of considerable jurisprudential and political debate, the issue of whether socio-economic rights are justiciable at all in South Africa has been put beyond question by the text of our Constitution. . . :

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[14] The International Covenant on Economic, Social and Cultural Rights, and the general comments issued by the United Nations Committee on Social and Economic Rights.

> [T]hese rights are, at least to some extent, justiciable. [M]any of the civil and political rights entrenched in the [constitutional text before this Court for certification in that case] will give rise to similar budgetary implications without compromising their justiciability. The fact that socio-economic rights will almost inevitably give rise to such implications does not seem to us to be a bar to their justiciability. At the very minimum, socio-economic rights can be negatively protected from improper invasion.

Socio-economic rights are expressly included in the Bill of Rights; they cannot be said to exist on paper only. Section 7(2) of the Constitution requires the state "to respect, protect, promote and fulfil the rights in the Bill of Rights" and the courts are constitutionally bound to ensure that they are protected and fulfilled. The question is therefore not whether socio-economic rights are justiciable under our Constitution, but how to enforce them in a given case. . . .

E. *Obligations imposed upon the state by section 26*

Our Constitution entrenches both civil and political rights and social and economic rights. All the rights in our Bill of Rights are inter-related and mutually supporting. There can be no doubt that human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter. Affording socio-economic rights to all people therefore enables them to enjoy the other rights enshrined in Chapter 2. The realisation of these rights is also key to the advancement of race and gender equality and the evolution of a society in which men and women are equally able to achieve their full potential.

The right of access to adequate housing cannot be seen in isolation. . . . The state is obliged to take positive action to meet the needs of those living in extreme conditions of poverty, homelessness or intolerable housing. . . .

Rights also need to be interpreted and understood in their social and historical context. The right to be free from unfair discrimination, for example, must be understood against our legacy of deep social inequality. . . .

ii) *The relevant international law and its impact*

Section 39 of the Constitution[15] obliges a court to consider international law as a tool to interpretation of the Bill of Rights. In *Makwanyane* Chaskalson P . . . said:

> . . . public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a

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[15] Section 39 of the Constitution provides:

"(1) When interpreting the Bill of Rights, a court, tribunal or forum -
  (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  (b) must consider international law; and
  (c) may consider foreign law.
(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
(3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights].

The relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

The *amici* submitted that the International Covenant on Economic, Social and Cultural Rights (the Covenant)[16] is of significance in understanding the positive obligations created by the socio-economic rights in the Constitution. [The Court cited Articles 2(1) and 11(1) of the Covenant.]

The differences between the relevant provisions of the Covenant and our Constitution are significant in determining the extent to which the provisions of the Covenant may be a guide to an interpretation of section 26. These differences, in so far as they relate to housing, are:

(a) The Covenant provides for a *right to adequate housing* while section 26 provides for the *right of access* to adequate housing.
(b) The Covenant obliges states parties to take *appropriate* steps which must include legislation while the Constitution obliges the South African state to take *reasonable* legislative and other measures.

The obligations undertaken by states parties to the Covenant are monitored by the United Nations Committee on Economic, Social and Cultural Rights (the committee). The *amici* relied on the relevant general comments issued by the committee concerning the interpretation and application of the Covenant, and argued that these general comments constitute a significant guide to the interpretation of section 26. In particular they argued that in interpreting this section, we should adopt an approach similar to that taken by the committee in paragraph 10 of general comment 3 issued in 1990, in which the committee found that socio-economic rights contain a minimum core:

10. On the basis of the extensive experience gained by the Committee, as well as by the body that preceded it, over a period of more than a decade of examining States parties' reports the Committee is of the view that minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education, is *prima facie*, failing to discharge its obligations under the

[16] The Covenant was signed by South Africa on 3 October 1994 but has as yet not been ratified.

> Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'etre. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps "to the maximum of its available resources". In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

It is clear from this extract that the committee considers that every State party is bound to fulfil a minimum core obligation by ensuring the satisfaction of a minimum essential level of the socio-economic rights, including the right to adequate housing. Accordingly, a state in which a significant number of individuals is deprived of basic shelter and housing is regarded as *prima facie* in breach of its obligations under the Covenant. A State party must demonstrate that every effort has been made to use all the resources at its disposal to satisfy the minimum core of the right. However, it is to be noted that the general comment does not specify precisely what that minimum core is.

It is not possible to determine the minimum threshold for the progressive realisation of the right of access to adequate housing without first identifying the needs and opportunities for the enjoyment of such a right. These will vary according to factors such as income, unemployment, availability of land and poverty. The differences between city and rural communities will also determine the needs and opportunities for the enjoyment of this right. Variations ultimately depend on the economic and social history and circumstances of a country. All this illustrates the complexity of the task of determining a minimum core obligation for the progressive realisation of the right of access to adequate housing without having the requisite information on the needs and the opportunities for the enjoyment of this right. . . .

[T]he real question in terms of our Constitution is whether the measures taken by the state to realise the right afforded by section 26 are reasonable. There may be cases where it may be possible and appropriate to have regard to the content of a minimum core obligation to determine whether the measures taken by the state are reasonable. However, even if it were appropriate to do so, it could not be done unless sufficient information is placed before a court to enable it to determine the minimum core in any given context. In this case, we do not have sufficient information to determine what would comprise the minimum core obligation in the context of our Constitution.

. . .

iii) *Analysis of section 26*

Subsection (1) aims at delineating the scope of the right. . . . Although the subsection does not expressly say so, there is, at the very least, a negative obligation placed upon the state and all other entities and persons to desist from preventing or impairing the right of access to adequate housing. The negative right is further spelt out in subsection (3) which prohibits arbitrary evictions. Access to housing could also be promoted if steps are taken to make the rural areas of our country more viable so

as to limit the inexorable migration of people from rural to urban areas in search of jobs.

The right delineated in section 26(1) is a right of "access to adequate housing" as distinct from the right to adequate housing encapsulated in the Covenant. This difference is significant. It recognises that housing entails more than bricks and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these, including the building of the house itself. For a person to have access to adequate housing all of these conditions need to be met: there must be land, there must be services, there must be a dwelling. Access to land for the purpose of housing is therefore included in the right of access to adequate housing in section 26. A right of access to adequate housing also suggests that it is not only the state who is responsible for the provision of houses, but that other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society. State policy dealing with housing must therefore take account of different economic levels in our society.

In this regard, there is a difference between the position of those who can afford to pay for housing, even if it is only basic though adequate housing, and those who cannot. For those who can afford to pay for adequate housing, the state's primary obligation lies in unlocking the system. . . . Issues of development and social welfare are raised in respect of those who cannot afford to provide themselves with housing. State policy needs to address both these groups.

Subsection (2) speaks to the positive obligation imposed upon the state. It requires the state to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However subsection (2) also makes it clear that the obligation imposed upon the state is not an absolute or unqualified one. . . .

Reasonable legislative and other measures

What constitutes reasonable legislative and other measures must be determined in the light of the fact that the Constitution creates different spheres of government: national government, provincial government and local government. The Constitution allocates powers and functions amongst these different spheres emphasising their obligation to co-operate with one another in carrying out their constitutional tasks. In the case of housing, it is a function shared by both national and provincial government. Local governments have an important obligation to ensure that services are provided in a sustainable manner to the communities they govern. A reasonable programme therefore must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available.

Each sphere of government must accept responsibility for the implementation of particular parts of the programme but the national sphere of government must assume responsibility for ensuring that laws, policies, programmes and strategies are adequate to meet the state's section 26 obligations. . . .

The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. . . . A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable.

The state is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. . . . The formulation of a programme is only the first stage in meeting the state's obligations. . . .

Progressive realisation of the right

The term "progressive realisation" shows that it was contemplated that the right could not be realised immediately. But . . . accessibility should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time. . . . The committee has helpfully analysed this requirement in the context of housing as follows:

> Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the *raison d'être,* of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.[17]

Within available resources

The third defining aspect of the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources.

There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable.

F. *Description and evaluation of the state housing programme*

In support of their contention that they had complied with the obligation imposed upon them by section 26, the appellants placed evidence before this Court of the legislative and other measures they had adopted. There is in place both national and provincial legislation concerned with housing. . . . The national Housing Act provides a framework which establishes the responsibilities and functions of each sphere of government with regard to housing. The responsibility for implementation is generally given to the provinces. Provinces in turn have assigned certain implementation

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[17] Para 9 of general comment 3, 1990.

functions to local government structures in many cases. All spheres of government are intimately involved in housing delivery and the budget allocated by national government appears to be substantial. . . . In addition, various schemes are in place involving public/private partnerships aimed at ensuring that housing provision is effectively financed.

What has been done in execution of this programme is a major achievement. Large sums of money have been spent and a significant number of houses has been built. Considerable thought, energy, resources and expertise have been and continue to be devoted to the process of effective housing delivery. It is a programme that is aimed at achieving the progressive realisation of the right of access to adequate housing.

A question that nevertheless must be answered is whether the measures adopted are reasonable within the meaning of section 26 of the Constitution. . . .

This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. . . .

. . . The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. Not only are the immediate crises not met. The consequent pressure on existing settlements inevitably results in land invasions by the desperate thereby frustrating the attainment of the medium and long term objectives of the nationwide housing programme. . . .

In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need. . . .

H. *Evaluation of the conduct of the appellants towards the respondents*

The final section of this judgment is concerned with whether the respondents are entitled to some relief in the form of temporary housing because of their special circumstances and because of the appellants' conduct towards them. . . . [W]e must also remember that the respondents are not alone in their desperation; hundreds of thousands (possibly millions) of South Africans live in appalling conditions throughout our country.

The respondents began to move onto the New Rust Land during September 1998 and the number of people on this land continued to grow relentlessly. I would have expected officials of the municipality responsible for housing to engage with these people as soon as they became aware of the occupation. I would also have thought that some effort would have been made by the municipality to resolve the difficulty on a case-by-case basis after an investigation of their circumstances before the matter got out of hand. The municipality did nothing and the settlement grew by leaps and bounds.

There is, however, no dispute that the municipality funded the eviction of the respondents. The magistrate who ordered the ejectment of the respondents directed a process of mediation in which the municipality was to be involved to identify some alternative land for the occupation for the New Rust residents. Although the reason for this is unclear from the papers, it is evident that no effective mediation took place.

The state had an obligation to ensure, at the very least, that the eviction was humanely executed. However, the eviction was reminiscent of the past and inconsistent with the values of the Constitution. The respondents were evicted a day early and to make matters worse, their possessions and building materials were not merely removed, but destroyed and burnt. I have already said that the provisions of section 26(1) of the Constitution burdens the state with at least a negative obligation in relation to housing. The manner in which the eviction was carried out resulted in a breach of this obligation.

At the hearing in this Court, counsel for the national and Western Cape government, tendered a statement indicating that the respondents had, on that very day, been offered some alternative accommodation, not in fulfilment of any accepted constitutional obligation, but in the interests of humanity and pragmatism. Counsel for the respondents accepted the offer on their behalf.

This judgment must not be understood as approving any practice of land invasion for the purpose of coercing a state structure into providing housing on a preferential basis to those who participate in any exercise of this kind.

I. *Summary and conclusion*

This case shows the desperation of hundreds of thousands of people living in deplorable conditions throughout the country. The Constitution obliges the state to act positively to ameliorate these conditions. The obligation is to provide access to housing, health-care, sufficient food and water, and social security to those unable to support themselves and their dependants. The state must also foster conditions to enable citizens to gain access to land on an equitable basis. Those in need have a corresponding right to demand that this be done.

I am conscious that it is an extremely difficult task for the state to meet these obligations in the conditions that prevail in our country. This is recognised by the Constitution which expressly provides that the state is not obliged to go beyond available resources or to realise these rights immediately. I stress however, that despite all these qualifications, these are rights, and the Constitution obliges the state to give effect to them. This is an obligation that courts can, and in appropriate circumstances, must enforce.

[S]ection 26 does oblige the state to devise and implement a coherent, co-ordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

Cass R. Sunstein, "Social and Economic Rights? Lessons from South Africa" (John M. Olin Program in Law and Economics Working Paper No. 124, 2001)

Here is one of the central differences between late eighteenth century constitutions and late twentieth century constitutions: The former make no mention of rights to food, shelter, and health care, whereas the latter tend to protect those rights in the most explicit terms. A remarkable feature of international opinion – firmly rejected in the United States – is that socio-economic rights deserve constitutional protection.

But should a democratic constitution really protect the right to food, shelter, and medical care? Do "socio-economic" rights of this sort belong in a Constitution? What do they have to do with citizenship? Do they promote or undermine democratic deliberation? If such rights are created, what is the role of the courts?

For many years, there has been a debate [on these questions] … The debate has occurred with special intensity in both Eastern Europe and South Africa. Of course the American Constitution, and most constitutions before the twentieth-century, protected such rights as free speech, religious liberty, and sanctity of the home, without creating rights to minimally decent conditions of life. But in the late twentieth century, the trend is otherwise, with international documents, and most constitutions, creating rights to food, shelter, and more.

Some skeptics have doubted whether such rights make sense from the standpoint of constitutional design. On one view, a constitution should protect "negative" rights, not "positive" rights. Constitutional rights should be seen as individual protections against the aggressive state, not as private entitlements to protection by the state. For people who share this view, a constitution is best understood as a bulwark of liberty, properly conceived; and a constitution that protects "positive" rights can be no such bulwark, because it requires government action, rather than creating a wall of immunity around individual citizens.

But there are many problems with this view. Even conventional individual rights, like the right to free speech and private property, require governmental action. Private property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such. So-called negative rights are emphatically positive rights. In fact all rights, even the most conventional, have costs. Rights of property and contract, as well as rights of free speech and religious liberty, need significant taxpayer support. In any case we might well think that the abusive or oppressive exercise of government power consists, not only in locking people up against their will, or in stopping them from speaking, but also in producing a situation in which people's minimal needs are not met. Indeed, protection of such needs might be seen as part of the necessary wall of immunity, and hardly as inconsistent with it.

If the central concerns are citizenship and democracy, the line between negative rights and positive rights is hard to maintain. The right to constitutional protection of private property has a strong democratic justification: If people's holdings are subject to ongoing governmental adjustment, people cannot have the security, and independence, that the status of citizenship requires. The right to private property should not be seen as an effort to protect wealthy people; it helps ensure deliberative democracy itself. But the same things can be said for minimal protections

against starvation, homelessless, and other extreme deprivation. For people to be able to act as citizens, and to be able to count themselves as such, they must have the kind of independence that such minimal protections ensure.

On the other hand, a democratic constitution does not protect every right and interest that should be protected in a decent or just society. Perhaps ordinary politics can be trusted; if so, there is no need for constitutional protection. The basic reason for constitutional guarantees is to respond to problems faced in ordinary political life. If minimal socio-economic rights will be protected democratically, why involve the Constitution? The best answer is that to doubt the assumption and to insist such rights are indeed at systematic risk in political life, especially because those who would benefit from them lack political power. It is not clear if this is true in every nation. But certainly it is true in many places.

Perhaps more interestingly, critics of socio-economic rights have made a point about democratic institutions. In particular, they have argued that socio-economic rights are beyond judicial capacities. On this view, courts lack the tools to enforce such guarantees. If they attempt to do so, they will find themselves in an impossible managerial position, one that might discredit the constitutional enterprise as a whole. How can courts possibly oversee budget-setting priorities? If a state provides too little help to those who seek housing, maybe it is because the state is concentrating on the provision of employment, or on public health programs, or on educating children. Is a court supposed to oversee the full range of government programs, to ensure that the state is placing emphasis on the right areas? How can a court possibly acquire the knowledge, or make the value judgments, that would enable it to do that? There is a separate point. A judicial effort to protect socio-economic rights might seem to compromise, or to preempt, democratic deliberation on crucial issues, because it will undermine the capacity of citizens to choose, in accordance with their own judgments, the kinds of welfare and employment programs that they favor. Of course some of these points hold for conventional rights as well. But perhaps social and economic rights are especially troublesome on this count, because they put courts in the position of overseeing largescale bureaucratic institutions.

It would be possible to respond to these institutional concerns in various ways. Perhaps constitutions should not include socio-economic rights at all. Perhaps such rights should be included, but on the explicit understanding that the legislature, and not the courts, will be entrusted with enforcement. Section IV of the Indian Constitution expressly follows this route, contained judicially unenforceable "directive principles" and attempting to encourage legislative attention to these rights without involving the judiciary.. [Could you mention the section(s) in the Indian Constitution?] The advantage of this approach is that it ensures that courts will not be entangled with administration of social programs. The disadvantage is that without judicial enforcement, there is a risk that the constitutional guarantees will be mere "parchment barriers," meaningless or empty in the real world. …

In *Grootboom*, the Constitutional Court of South Africa was confronted, for the first time, with the question of how, exactly, courts should protect socio-economic rights. The Court's approach suggests, also for the first time, the possibility of providing that protection in a way that is respectful of democratic prerogatives and the simple fact of limited budgets.

In making clear that the socio-economic rights are not given to individuals as such, the Court was at pains to say that the right to housing is not absolute. This suggestion underlies the Court's unambiguous suggestion that the state need not provide housing for everyone who needs it. What the constitutional right requires is not housing on demand, but a reasonable program for ensuring access to housing for poor people, including some kind of program for ensuring emergency relief. This approach ensures respect for sensible priority-setting, and close attention to particular needs, without displacing democratic judgments about how to set priorities. This is now the prevailing approach to the constitutional law of socio-economic rights in South Africa.

Of course the approach leaves many issues unresolved. Suppose that the government ensured a certain level of funding for a program of emergency relief; suppose too that the specified level is challenged as insufficient. The Court's decision suggests that whatever amount allocated must be shown to be "reasonable"; but what are the standards are resolving a dispute about that issue? The deeper problem is that any allocations of resources for providing shelter will prevent resources from going elsewhere – for example, for AIDS treatment and prevention, for unemployment compensation, for food, for basic income support. Undoubtedly the Constitutional Court will listen carefully to government claims that resources not devoted to housing are being used elsewhere. Undoubtedly those claims will be stronger if they suggest that some or all of the resources are being used to protect socio-economic rights of a different sort.

What is most important, however, is the Constitutional Court's adoption of a novel and highly promising approach to judicial protection of socio-economic rights. The ultimate effects of the approach remain to be seen. But by requiring reasonable programs, with careful attention to limited budgets, the Court has suggested the possibility of assessing claims of constitutional violations without at the same time requiring more than existing resources will allow. And in so doing, the Court has provided the most convincing rebuttal yet to those who have claimed, in the abstract quite plausibly, that judicial protection of socio-economic rights could not possibly be a good idea. We now have reason to believe that a democratic constitution, even in a poor nation, is able to protect those rights, and to do so without placing an undue strain on judicial capacities.

JORDAN, Circuit Judge:

In understanding what is going on around us, context matters. Food shared with company differs greatly from a meal eaten alone. Unlike a solitary supper, a feast requires the host to entertain and the guests to interact. Lady Macbeth knew this, and chided her husband for "not giv[ing] the cheer" at the banquet depicted in Shakespeare's play. As she explained: "To feed were best at home; From thence, the sauce to meat is ceremony. Meeting bare without it." William Shakespeare, The Tragedy of Macbeth, Act III, scene 4 (1606).

Fort Lauderdale Food Not Bombs, a non-profit organization, hosts weekly events at a public park in Fort Lauderdale, sharing food at no cost with those who gather to join in the meal. FLFNB's members set up a table and banner with the organization's name and emblem in the park and invite passersby to join them in sitting down and enjoying vegetarian or vegan food. When the City of Fort Lauderdale enacted an ordinance in 2014 that restricted this food sharing, FLFNB and some of its members (whom we refer to collectively as FLFNB) filed suit under 42 U.S.C. § 1983. They alleged that the ordinance and a related park rule violated their First Amendment rights of free speech and free association and were unconstitutionally vague.

The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 2016 WL 5942528 (S.D. Fla. Oct. 3, 2016) (final judgment). FLFNB appeals those rulings.

Resolving the issue left undecided in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc), we hold that on this record FLFNB's outdoor food sharing is expressive conduct protected by the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the City. On remand, the district court will need to determine whether the ordinance and park rule violate the First Amendment and whether they are unconstitutionally vague.

I

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness." D.E. 41 at 8.

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. *See* D.E. 40-23. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the

organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event. *See id*.

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" are

> [a]ny service[s] provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

D.E. 38-1, § 1.B.6. The Ordinance regulates "social service facilities," which include an "outdoor food distribution center." D.E. 38-1, § 1.B.8. An "outdoor food distribution center" is defined as

> [a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

D.E. 38-1, § 1.B.4.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. *See* D.E. 38-1 at 9. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee. *See id.*

Stranahan Park is zoned as a "Regional Activity Center—City Center," D.E. 38-34, and requires a conditional use permit. *See* D.E. 38-1 at 9. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in § 1.E of the Ordinance.

The City's "Parks and Recreation Rules and Regulations" also regulate social services. Under Park Rule 2.2,

> [p]arks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

D.E. 38-35.

The City has voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

II

FLFNB contends that the Ordinance and Park Rule 2.2 violate its rights to free speech and free association guaranteed by the First Amendment, which is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* D.E. 1 at 21; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). It also argues that the ordinance and regulation are unconstitutionally vague, both facially and as applied. *See* D.E. 1 at 27.

The City defends the district court's summary judgment ruling. It asserts that the food sharing events at Stranahan Park are not expressive conduct because the act of feeding is not inherently communicative of FLFNB's "intended, unique, and particularized message." *See* City's Br. at 35. Understanding the events, according to the City, depends on explanatory speech, such as the signs and banners, indicating that FLFNB's conduct is not inherently expressive.

We review the district court's grant of summary judgment *de novo*. *See Rodriguez v. City*

of Doral, 863 F.3d 1343, 1349 (11th Cir. 2017). The same plenary standard applies to questions of constitutional law. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc). In reviewing the parties' cross-motions for summary judgment, we "draw all inferences and review all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1318 (11th Cir. 2012) (quotation marks omitted and alteration adopted).

There is an additional twist to these standards of review in the First Amendment context. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace ... we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). *See also Flanigan's Enters., Inc. v. Fulton Cnty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (applying First Amendment independent review standard in a summary judgment posture).

III

Constitutional protection for freedom of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The First Amendment guarantees "all people [ ] the right to engage not only in 'pure speech,' but 'expressive conduct' as well." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). As one First Amendment scholar has explained, "[a] sharp line between 'words' and 'expressive acts' cannot ... be justified in Madisonian terms. The constitutional protection is afforded to 'speech,' and acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993).

Several decades ago, the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment: (1) whether "[a]n intent to convey a particularized message was present;" and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since then, however, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (citing *Spence*, 418 U.S. at 411, 94 S.Ct. 2727). So, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

A

On this record, we have no doubt that FLFNB intended to convey a certain message. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. Neither the district court nor the City suggest otherwise. *See* D.E. 49 at 1, 2; D.E. 78 at 24. As noted, the message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Food sharing in a visible public

space, according to FLFNB, is "meant to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." *Id*. at 2.

"Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The critical question, then, is "whether the reasonable person would interpret [FLFNB's conduct] as *some* sort of message." *Holloman*, 370 F.3d at 1270. In answering this question, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. *See* James E. Leahy, *Flamboyant Protest, the First Amendment, and the Boston Tea Party*, 36 Brook. L. Rev. 185, 210 (1970). *Cf.* Rodney A. Smolla, Free Speech in an Open Society 26 (1992) (maintaining that mass demonstrations "are perhaps the single *most* vital forms of expression in human experience"); Thomas I. Emerson, The System of Freedom of Expression 293 (1970) ("The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the 'expression.' ").

It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade. *See United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."). Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation. *See Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). And context divides simply "[b]eing in a state of nudity," which is "not an inherently expressive condition," from the type of nude dancing that is to some degree constitutionally protected. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation omitted). *Compare also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive conduct, although "only marginally so"), *with City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (noting that "recreational dancing" by clothed dance hall patrons is not sufficiently expressive).[11]

The district court concluded that "outdoor food sharing does not convey [FLFNB's] particularized message unless it is combined with other speech, such as that involved in [FLFNB's] demonstrations." D.E. 78 at 24. This focus on FLFNB's particularized message was mistaken. As *Holloman* teaches, the inquiry is

[1] *See also Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1501, 1505 (11th Cir. 1990) (holding that a school employee's "quiet and non-disruptive" early departure from a mandatory meeting communicated an objection to the superintendent's position).

whether the reasonable person would interpret FLFNB's food sharing events as "*some* sort of message." 370 F.3d at 1270.

B

The district court also failed to consider the context of FLFNB's food sharing events and instead relied on the notion that the conduct must be "combined with other speech" to provide meaning. *See* D.E. 78 at 24. As we explain, the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message. That puts FLFNB's food sharing events on the expressive side of the ledger.

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park. *Cf. Hurley*, 515 U.S. at 570, 115 S.Ct. 2338 (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched).

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications. *See* Mary Douglas, "Deciphering a Meal," in Implicit Meanings: Selected Essays in Anthropology 231 (1975) ("Like sex, the taking of food has a social component, as well as a biological one.").

Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. The parties agree that Stranahan Park is a traditional public forum. *See* D.E. 39 at ¶ 9; D.E. 49 at ¶ 9. That agreement is not surprising, for, public parks have, "time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). They are places "historically associated with the exercise of First Amendment rights." *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). And they are places that "commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Although the choice of location alone is not dispositive, it is nevertheless an important factor in the "factual context and environment" that we must consider. *See Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. *Cf. Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (concluding that a flag burning demonstration at Dallas City Hall conveyed an anti-government/lack of patriotism message).

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community. The City itself admits that its elected officials held a public workshop "on the Homeless Issue" in January of 2014, and placed the agenda and minutes of that meeting in the summary judgment record. *See* City's Br. at 12; D.E. 38 at ¶ 16; D.E. 38-19. That workshop included several "homeless issues, including public feedings in the C[ity's] parks and public areas." D.E. 38 at ¶ 16. It is also undisputed that the status of the City's homeless population attracted local news coverage beginning years before that 2014 workshop. We think that the local discussion regarding the City's treatment of the homeless is significant because it provides background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless. This background adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message. *See Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (noting that flag burning "coincided with the

convening of the Republican Party and its renomination of Ronald Reagan for President"); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (noting that the exhibition of a peace symbol taped on a flag "was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy"); *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (noting that a black armband was worn during the Vietnam War).

Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it. *See Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 571 n.3 (11th Cir. 1984) (explaining that, to be sufficiently expressive, "the actor must have reason to expect that his audience will recognize his conduct as communication") (citation omitted). In *Johnson*, for example, the Supreme Court explained the historical importance of our national flag, noting that it is "the one visible manifestation of two hundred years of nationhood" and that "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner." 491 U.S. at 405, 109 S.Ct. 2533 (quotations and citations omitted). Given this history, the American flag was recognized as a symbol for the United States, and its burning constituted expressive conduct. *See id*. at 405–06, 109 S.Ct. 2533. *See also Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (affirming the district court's determination on summary judgment that tattooing is protected activity, and relying in part on a historical analysis).

Like the flag, the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. *See Mark* 2:13–17; *Luke* 5:29–32. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth. President Abraham Lincoln established Thanksgiving as a national holiday in 1863, proclaiming it as a day of "Thanksgiving and Praise to our beneficent Father" in recognition of blessings such as "fruitful fields and healthful skies." John G. Nicolay & John Hay, 2 Abraham Lincoln: Complete Works 417–418 (1894). Americans have celebrated this holiday ever since, commonly joining with family and friends for traditional fare like turkey and pumpkin pie.

On this record, FLFNB's food sharing events are more than a picnic in the park. FLFNB has established an intent to "express[ ] an idea through activity," *Spence*, 418 U.S. at 411, 94 S.Ct. 2727, and the reasonable observer would interpret its food sharing events as conveying *some* sort of message. *See Holloman*, 370 F.3d at 1270.

C

The City, echoing the district court's analysis, relies on *FAIR*, in which the Supreme Court explained that "[t]he fact that [ ] explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." 547 U.S. at 66, 126 S.Ct. 1297. This language from *FAIR*, however, does not mean that conduct loses its expressive nature just because it is also accompanied by other speech. If it did, the fact that the paraders in *Hurley* were "carrying flags and banners with all sorts of messages" would have placed their conduct outside the realm of First Amendment protection. *See Hurley*, 515 U.S. at 569, 115 S.Ct. 2338. *See also Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) (considering the denial of a stay of an injunction in a case where members of the National Socialist Party of America sought to parade in uniforms displaying a swastika). The critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct.

In *FAIR*, a number of law schools claimed that

the Solomon Amendment—which denies federal funding to an institution that prohibits the military from gaining access to its campus and students " 'for purposes of military recruiting in a manner that is at least equal in quality and scope to access to campuses and to students that is provided to any other employer' "—violated their rights under the First Amendment. *See* 547 U.S. at 55, 126 S.Ct. 1297 (quoting 10 U.S.C. § 938(b)). Among other things, the schools asserted that their restriction of military recruiters' access to law students due to a disagreement with the government's then-existing policy excluding homosexuals from the military (such as, for example, requiring them to interview students on the undergraduate campus) was protected expressive conduct. *See id*. at 51, 126 S.Ct. 1297.

The Supreme Court held that it was not. *See id*. at 66, 126 S.Ct. 1297. It noted that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id*. at 66, 126 S.Ct. 1297. Such speech was necessary to provide explanation because "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.' An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id*. (citation omitted). Thus, the "explanatory speech" in *FAIR* was speech that was necessary to explain the law school's conduct. Without it, the conduct alone (requiring military recruiters to see students off-site) was not sufficiently expressive and the reasonable observer would not be likely to infer some message.

Explanatory speech is not necessary in this case. Although such speech cannot create expressive conduct, *see id.* at 66, 126 S.Ct. 1297, context still matters. Here, the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive. The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis. The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message." *See Holloman*, 370 F.3d at 1270 (holding that a "generalized message of disagreement or protest directed toward [a teacher], the school, or the country in general" is sufficient under the *Spence* test, as modified by *Hurley*) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338).

We decline the City's invitation, *see* City's Br. at 21, to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (a "narrow, succinctly articulable message is not a condition of constitutional protection"), and it is not appropriate for us to bring it back to life.

The district court expressed some concern that *FAIR* does not align with the understanding in "*Holloman*[ ] and perhaps also *Hurley*[ ] ... of a particularized message." D.E. 78 at 21. We do not believe that *FAIR* undermines *Hurley* or that it abrogates *Holloman*. *FAIR* does not discuss the need for a particularized message at all. Nor does it cite to how *Spence* phrased that requirement. *FAIR* did, however, discuss *Hurley*. The Supreme Court explained that "the law

schools' effort to cast themselves as just like ... the parade organizers in *Hurley* ... plainly overstates the expressive nature of their activity," and was therefore unavailing. *FAIR*, 547 U.S. at 70, 126 S.Ct. 1297. In our view, FLFNB's conduct here is more like that of the paraders in *Hurley* than that of the law schools in *FAIR*. The reasonable observer of the law schools' conduct in *FAIR* was not likely to infer *any* message beyond that the interview rooms were full or that the military preferred to interview elsewhere. *See id*. at 66, 126 S.Ct. 1297. FLFNB's food sharing events are markedly different. Due to the context surrounding them, the reasonable observer would infer some sort of message.

IV

"[T]he nature of [FLFNB's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [FLFNB] engaged in a form of protected expression." *Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. We therefore reverse the district court's grant of summary judgment in favor of the City.

We decline to address whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague. These issues are best left for the district court to take up on remand.[2]

REVERSED AND REMANDED.

[2] The district court stated that its rejection of FLFNB's vagueness challenges was affected, although "to a lesser extent," by its ruling that FLFNB's conduct was not protected by the First Amendment. *See* D.E. 78 at 27. Given our ruling that FLFNB's food sharing events constitute expressive conduct, we think that the district court is in the best position to reassess its ruling on the vagueness issues in the first instance.

Before LAGOA, HULL, and MARCUS, Circuit Judges.

MARCUS, Circuit Judge:

This case presents the second appellate skirmish in Fort Lauderdale Food Not Bombs's ("FLFNB") challenge to Fort Lauderdale's efforts to shut down the practice of sharing food with the homeless in downtown Stranahan Park. FLFNB hosts food-sharing events in order to communicate the group's message that scarce social resources are unjustly skewed towards military projects and away from feeding the hungry. In Round One, a panel of this Court held FLFNB's food sharing to be expressive conduct protected by the First Amendment and remanded the case to the district court to address whether the City's regulations actually violated the First Amendment. Now, in Round Two, we must decide whether Fort Lauderdale Park Rule 2.2, which requires City permission for social service food-sharing events in all Fort Lauderdale parks, can withstand First Amendment scrutiny as applied to FLFNB's demonstrations.

It cannot. The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing. As applied to FLFNB's protected expression, it violates the First Amendment. It is neither narrowly drawn to further a substantial government interest that is unrelated to the suppression of free expression, nor, as applied, does it amount to a reasonable time, place, and manner regulation on expression in a public forum. Accordingly, we reverse the district court's order granting summary judgment in favor of the City and remand for further proceedings consistent with this opinion.

…

II.

Before we can consider the merits of the Plaintiffs' claims, we are required to address three threshold matters. …

A.

First, the City argues that FLFNB, as an unincorporated association, is not a "person" that may bring suit under § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation to bar all unincorporated associations (other than unions) from being able to sue under § 1983.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.' " United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (citation omitted). When examining the phrase

"any citizen of the United States or other person," "person" must refer to something beyond individuals who are United States citizens; otherwise, the term would be redundant. See, e.g., Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (noting that "one of the most basic interpretive canons" is "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' ") (citation omitted and alteration accepted). At the very least, the phrase extends a § 1983 cause of action to non-citizen individuals. Congress enacted Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), the original version of what is now § 1983, in order to enforce the Fourteenth Amendment. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). The word "person" in the Fourteenth Amendment includes not only citizens but also non-citizens within the United States. E.g., Graham v. Richardson, 403 U.S. 365, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); see also Hague v. Comm. for Indus. Org., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Stone, J.) ("It will be observed that the cause of action, given by [Section 1 of the 1871 Civil Rights Act], extends broadly to ... those rights secured to persons, whether citizens of the United States or not, to whom the [Fourteenth] Amendment in terms extends the benefit of the due process and equal protection clauses."). We also know that the word "person" in § 1983 extends to corporations, both municipal and otherwise. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Indeed, in Monell, the Supreme Court observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Id. at 687, 98 S.Ct. 2018.

However, the Supreme Court has also ruled that Native American Tribes seeking to vindicate sovereign rights, States, State officers acting in their official capacities, Territories, and Territory officers acting in their official capacities are not "persons." Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003) (reasoning that § 1983 "was designed to secure private rights against government encroachment" to reach this conclusion in the case of a Tribe suing to vindicate its right to sovereign immunity from state process); Ngiraingas, 495 U.S. at 187–92, 110 S.Ct. 1737 (examining historical sources and the context surrounding amendments to § 1983 to reach this conclusion with respect to Territories and their officers); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on federalism concerns, the Eleventh Amendment, and the "often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it' " to reach this conclusion regarding States and their officials) (alterations accepted and citation omitted). Monell, Ngiraingas, and Will each interpreted the first use of the word "person" in § 1983, which relates to which entities may be proper § 1983 defendants -- "[e]very person" who under color of law causes a deprivation of federal rights shall be liable to the party injured. By contrast, today we interpret § 1983's second use of the word "person" -- "any citizen or other person" -- a phrase that delineates which entities may be proper § 1983 plaintiffs. But these cases are nonetheless instructive, because we "generally presume that 'identical words used in different parts of the same act are intended to have the same meaning.' " United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (citation omitted).

In order to decide whether FLFNB has a cause of action in this case, we must determine whether "other persons," in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations.

The words "other person," by themselves, do not definitively answer the question. Cf. Ngiraingas, 495 U.S. at 187, 110 S.Ct. 1737 ("[Section 1983] itself obviously affords no clue as to whether its word 'person' includes a Territory."). Unlike sovereign entities, there is no presumption that unincorporated associations are not persons. To the contrary, the ordinary meaning of "person" in legal contexts includes unincorporated associations. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 273 (2012) ("Traditionally the word person ... denotes not only natural persons (human beings) but also artificial persons such as corporations, partnerships, associations, and both public and private organizations.") (second emphasis added). Thus, the most natural reading of § 1983 extends a cause of action to unincorporated associations.

On the other hand, we "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton Cnty., —— U.S. ——–, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). And in 1871, unincorporated associations were not legal persons with the capacity to sue or be sued absent some express authorization. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385, 42 S.Ct. 570, 66 L.Ed. 975 (1922) ("Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."); Wesley A. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 383 (1924) (citing authorities dating as far back as 1884 to observe that "[t]he cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name").

Moreover, reading the word "person" to exclude unincorporated associations is fully consonant with the 1871 version of the Dictionary Act, which expressly limited "person" to "bodies politic and corporate." See, e.g., Will, 491 U.S. at 69 n.8, 109 S.Ct. 2304. The Dictionary Act -- a statute that provides general definitions for common terms used across the United States Code, see 1 U.S.C. § 1 -- did not expand to include "associations" until 1948. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 859 (1948); Lippoldt v. Cole, 468 F.3d 1204, 1214 (10th Cir. 2006). The 1871 Dictionary Act definition matches the definition of "person" found in the first edition of Black's Law Dictionary, published in 1891, which confirms that an entity needed some express authorization in positive law to achieve legal personhood. Person, Black's Law Dictionary (1891) ("Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called 'corporations' or 'bodies politic.' ").

What's more, the legislative history surrounding the adoption of the 1871 Civil Rights Act does not suggest any departure from the established legal meaning of "person" as it related to the capacity to sue in 1871. See Monell, 436 U.S. at 690, 98 S.Ct. 2018 (analyzing the legislative history of Section 1 to interpret § 1983). The drafters of Section 1 of the 1871 Civil Rights Act likely did not contemplate that unincorporated associations were "persons" under the Act. The Republican sponsors of the Civil Rights Act were aghast at reports of widespread vigilante violence against federal officials, northern transplants, Blacks, and Republicans in the post-war South. These attacks, they believed, were the work of recalcitrant Confederates, including individuals organized as the Ku Klux Klan, who faced only weak opposition from ineffectual state officials. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 320 (1871) (hereinafter "Globe") (Rep. Stoughton) ("There exists at this time in the southern States

a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion."); id. at 820 (Sen. Sherman) (observing that the bill was based on the fact that "an organized conspiracy, spreading terror and violence, murdering and scourging both white and black, both women and men, and pervading large communities of this country, now exists unchecked by punishment, independent of law, uncontrolled by magistrates" and that "of all the multitude of injuries not in a single case has redress ever been meted out to one of the multitude who has been injured").

Section 1 itself "was the subject of only limited debate and was passed without amendment." Monell, 436 U.S. at 665, 98 S.Ct. 2018. At most, read together with statements about the 1871 Act generally, floor discussions of Section 1 suggest that both proponents and opponents of the 1871 Act believed that the typical plaintiff would be an individual who suffered a violation of constitutional rights, especially the denial of the equal protection of the laws at the hands of state officials. Thus, for example, proponent Senator Dawes spoke of "citizen[s]" who suffered violations of their rights -- phrasing that implies a concern for the individual plaintiff. Globe at 477 ("I conclude ... [that] Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done ... [b]y giving him a civil remedy in the United States courts for any damage sustained in that regard."). For their part, Democrats who opposed the passage of Section 1 generally claimed that it was too broad, but notably did not argue that the word "person" did anything to expand the range of entities that could traditionally sue. They, too, seemed to envision individual plaintiffs. E.g., id. at 337 (Rep. Whithorne) (complaining that "any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution" would be able to sue and conjuring the hypothetical example of a drunk suing a police officer who had confiscated his pistol).

All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists today, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of "person" that may have informed Congress's decision to perpetuate that term across amended versions of § 1983. Indeed, the Supreme Court in Ngiraingas looked not only to the history of the 1871 Civil Rights Act but also to "the successive enactments of [§ 1983], in context" -- and to changes to the definition of "person" in the Dictionary Act -- in order to interpret the word "person." 495 U.S. at 189, 191 n.10, 110 S.Ct. 1737.

Congress amended the text of § 1983 twice after the 1948 amendment to the Dictionary Act -- which made clear that "person" in "any Act of Congress" includes "associations" and "societies" in addition to "corporations," "companies," "firms," "partnerships," "joint stock companies," and "individuals." See 62 Stat. at 859; 1 U.S.C. § 1. A congressional amendment in 1979 extended § 1983's coverage to injuries inflicted by those acting under the color of District of Columbia law; a 1996 amendment limited the availability of injunctive relief against judicial defendants. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (1979); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996). In neither re-enacted version of § 1983 did Congress narrow the definition of "person" in light of the intervening clarification in the Dictionary Act that associations are "persons" as that term is

used in federal statutes. Cf. United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]hen interpreting statutes, what Congress chose not to change can be as important as what it chose to change.").

Similarly, Congress enacted both of these amendments after the 1937 promulgation of Federal Rule of Civil Procedure 17(b), which provided "that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States." Parties, 1937 Rep. Advisory Comm. on Civ. Rules 47 (1937); see also Fed. R. Civ. P. 17(b)(3) (the Rule's current text remains nearly identical to that of the original version); Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 137 (E.D.N.Y. 2013) (relying on Rule 17(b)(3) to conclude that "an unincorporated association[ ] ha[d] legal capacity to bring [a § 1983] suit because all of its claims allege[d] violations of the United States Constitution"), aff'd, 868 F.3d 104 (2d Cir. 2017), and aff'd, 705 F. App'x 10 (2d Cir. 2017); Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R., 698 F. Supp. 401, 413–14 (D.P.R. 1988) (similar analysis regarding the unincorporated Puerto Rico Cable Television association), aff'd as modified on other grounds, 906 F.2d 25 (1st Cir. 1990).

And perhaps most significantly, the Supreme Court held in 1974 that an unincorporated union could "sue under 42 U.S.C. § 1983 as [a] person[ ] deprived of [its] rights secured by the Constitution and laws." Allee v. Medrano, 416 U.S. 802, 819 n.13, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). Thus, by the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were "persons" that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term "person" when it re-enacted amended versions of § 1983. See Pollitzer v. Gebhardt, 860 F.3d 1334, 1340 (11th Cir. 2017) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (emphasis added) (quoting Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Where words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.") (emphasis added) (quoting Lorillard, 434 U.S. at 583, 98 S.Ct. 866); Scalia & Garner, supra, at 322 ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction ... a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). Whatever "person" meant in 1871, its meaning included unincorporated associations by the time Congress "perpetuated" the word "person" in new versions of § 1983 in 1979 and 1996. See Scalia & Garner, supra, at 322.

Even setting these textual and historical considerations aside, Allee suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a "person" for § 1983 purposes. In Allee, individual organizers and a union brought a § 1983 action against Texas officials on behalf of a class of union members, alleging that law enforcement had threatened and harassed them for engaging in union organizing activities, including by bringing criminal charges in bad faith. 416 U.S. at 804–09, 94 S.Ct. 2191. A question arose as to whether there were pending state prosecutions against any of the plaintiffs -- if not, the plaintiffs' request for injunctive relief would be partially moot. Id. at 818, 94 S.Ct. 2191. The Supreme Court instructed that on remand, if there were indeed pending prosecutions against the unnamed class members, the district court

"must find that the class was properly represented" by the named plaintiffs in part because the named-plaintiff union was a "person[ ]" that could sue under § 1983 and that had standing to complain of the unlawful intimidation of its members. Id. at 819, 94 S.Ct. 2191 n.13; see also id. at 831, 94 S.Ct. 2191 (Burger, C.J., concurring in the result in part and dissenting in part) (acknowledging that the union plaintiff was unincorporated).

In holding that "[u]nions may sue under 42 U.S.C. § 1983 as persons," the Court in Allee did not rest on any distinctive features of unions or suggest that unions should be treated differently than any other kinds of unincorporated associations. Id. at 819, 94 S.Ct. 2191 n.13. The Court might have relied on, but did not so much as mention, characteristics surrounding unions that other types of unincorporated associations may not share, such as their affirmative recognition and privileges in federal and state law. See Coronado Coal Co., 259 U.S. at 385–90, 42 S.Ct. 570. Instead, the Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 "persons." The understanding of the meaning of the term "person" at the time the Civil Rights Act was passed in 1871 presented no obstacle to the result the Supreme Court reached in Allee. A union was neither an individual nor a corporation, yet the Supreme Court held that it still fell within the ambit of the term "other person."

In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a "person" under § 1983 have answered in the affirmative. In Barrett v. United States, the Second Circuit reasoned that an estate administratrix could bring a § 1983 suit on behalf of the estate beneficiaries because they were a group of individuals "associated for a special purpose." 689 F.2d 324, 333 (2d Cir. 1982) ("Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim."). The Second Circuit weighed in again in Jund v. Town of Hempstead, this time to hold that unincorporated local Republican committees were proper § 1983 defendants. 941 F.2d 1271, 1279–80 (2d Cir. 1991). And at least two district courts have adopted this reading. In Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., a court in the Southern District of Florida held that an "unincorporated, voluntary association of students" at a Florida high school was a § 1983 "person." 477 F. Supp. 2d 1246, 1248, 1249–51 (S.D. Fla. 2007). A court in the Northern District of Illinois similarly held that an unincorporated organization representing the interests of a public housing development could bring a § 1983 suit and noted that "[u]nincorporated organizations have been found to be 'persons' entitled to bring suit under § 1983." Cabrini-Green Loc. Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 WL 61467, at *3 (N.D. Ill. Jan. 10, 2005).

Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. See, e.g., First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (en banc) (Orlando Food Not Bombs); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031 (9th Cir. 2006) (Santa Monica Food Not Bombs); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (Students for Legal government, an unincorporated association of University of Oregon students); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 256–57 (6th Cir. 1993) (Citizens Against Tax Waste, an "unincorporated association of property owners in the Westerville City School District"); Marcavage v. City of New York, 918 F. Supp. 2d

266, 267 (S.D.N.Y. 2013) (Repent America, an unincorporated association dedicated to Christian evangelism); Occupy Fresno v. Cnty. of Fresno, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011) (Occupy Fresno, an unincorporated association of individuals who wished to assemble in a park); Good News Emp. Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743, at *1 (N.D. Cal. Feb. 14, 2005), aff'd, 223 F. App'x 734 (9th Cir. 2007) (unincorporated association organized to promote a faith-based concept of "Natural Family and Marriage"); Nat'l Ass'n of Alzheimer's Victims & Friends v. Pa. Dep't of Pub. Welfare, No. CIV.A. 88-2426, 1988 WL 29338, at *1 (E.D. Pa. Mar. 23, 1988) (National Association of Alzheimer's Victims & Friends, an "unincorporated association founded for the purpose of providing a mutual care and support group for persons suffering from Alzheimer's disease and their families and concerned friends"); Republican Coll. Council of Pa. v. Winner, 357 F. Supp. 739, 740 (E.D. Pa. 1973) (Republican College Council of Pennsylvania). The same is true of a historically significant set of § 1983 plaintiffs, the unincorporated local chapters of the NAACP. See N.A.A.C.P. v. Brackett, 130 F. App'x 648 (4th Cir. 2005).

This body of practice is not a body of holdings and, of course, cannot alter the meaning of the word "person" as used in the statute. But when combined with the ordinary meaning of the text, persuasive interpretations from other courts, and the body of law informing Congress's amendments to § 1983 -- all of which indicate that unincorporated associations are "persons" -- it at least underscores the need for compelling evidence before we adopt the City's contrary interpretation. See Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1697–98, 207 L.Ed.2d 111, (2020) (Thomas, J., dissenting) (protesting that when "presented with two competing statutory interpretations[,] one of which ma[de] sense of" the statute "without upending settled practice, and one of which significantly undermine[d the statute] by removing a vast swath of claims from its reach," the Supreme Court majority should have "justif[ied]" its choice of the latter interpretation and "candidly confront[ed] its implications"); Fowler v. U.S. Parole Comm'n, 94 F.3d 835, 840 (3d Cir. 1996) (While "a practice bottomed upon an erroneous interpretation of the law is not legitimized merely by repetition," "general acceptance of a practice must be considered in any reasoned [statutory interpretation] analysis.").

The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as "persons." See Lippoldt, 468 F.3d at 1216 (holding that Operation Save America, an unincorporated association devoted to anti-abortion advocacy, was not a "person" within the meaning of § 1983); see also Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013) (stating, in a single sentence devoid of analysis, that an unincorporated association was not a "person" subject to suit under § 1983), rev'd on other grounds, 617 F. App'x 724 (9th Cir. 2015). The Tenth Circuit's otherwise thorough discussion of the legislative history of the 1871 Civil Rights Act, the background law in 1871, and the 1871 Dictionary Act did not account for the fact that Congress re-enacted the word "person" in § 1983 twice after intervening developments in federal law clarified that unincorporated associations were "persons."

At bottom, in enacting § 1983, Congress "intended to give a broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685, 98 S.Ct. 2018. And the Supreme Court has instructed us that "Congress intended § [1983] to be broadly construed." Id. at 686, 98 S.Ct. 2018. "[A]ny plan to restrict the scope of § 1983 comes with a heavy burden of justification -- a burden that is both constitutional and historical." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or

Fade Away?, 60 N.Y.U. L. Rev. 1, 28 (1985). Absent some indication from the Supreme Court that unincorporated associations are not "persons," we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are "persons" that may sue under § 1983. See id. at 3 (warning "that any restriction of what has become a major symbol of federal protection of basic rights [should] not be made in irresponsible haste" and that absent strong historical evidence, the scope and "underlying principles of § 1983 liability should be secure"). We hold that FLFNB is a person that may bring suit under § 1983.

…

C.

The third, and last, of the threshold issues concerns Article III standing. The City argues that all of the Plaintiffs lack standing to assert damages claims based on the Ordinance and the Park Rule because these regulations, by the City's account, were not enforced against any of the Plaintiffs. According to the City, the Plaintiffs cannot prove a concrete injury connected to the Ordinance or the Park Rule. Like the district court before us, we remain unpersuaded. Both the Individual Plaintiffs and FLFNB have standing to bring damages claims against the City based on its enforcement of the Ordinance and the Park Rule. They also have standing to bring claims for declaratory and injunctive relief against the Park Rule.

…

1. Individual Plaintiffs. The City applied the Ordinance and the Park Rule to the Individual Plaintiffs insofar as they each participated in a November 7, 2014 FLFNB food-sharing event in Stranahan Park that the police broke up under their authority drawn from the Ordinance and the Park Rule. Plaintiff Nathan Pim, testifying on behalf of FLFNB, explained that the police "stopped" the event "short." We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression, and the City forced them to stop and disperse. Undeniably, the Ordinance and the Park Rule injured them by directly interfering with and barring their protected expression. "[E]very violation [of a right] imports damage."

In this way, the Individual Plaintiffs sustained an injury in fact sufficient to confer standing that does not depend on the arrests of their FLFNB colleagues at the same demonstrations. What's more, those arrests provide an additional basis for standing, even though the Individual Plaintiffs were not personally arrested or cited. "[S]tanding exists at the summary judgment stage when the plaintiff has submitted evidence indicating 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.' "

Each Individual Plaintiff has declared under penalty of perjury that he or she will continue to participate in FLFNB's protected food-sharing demonstrations in Stranahan Park, and there is no dispute that this conduct is arguably proscribed by the Park Rule (and was proscribed by the Ordinance when it was in effect). Of course, the threat of prosecution must be "genuine," not "imaginary" or "speculative," Leverett v. City of Pinellas Park, 775 F.2d 1536, 1538 (11th Cir. 1985), but the Individual Plaintiffs easily meet this requirement. Each directly witnessed the police arrest and/or cite their co-demonstrators or others under the Ordinance and the Park Rule. Citations issued to the Individual Plaintiffs' fellow demonstrators referenced both the Ordinance and the Park Rule. These arrests and citations of the Individual Plaintiffs' "companion[s]" render the threat of enforcement "non-chimerical."

2. FLFNB. FLFNB does not claim that it has associational standing to sue on behalf of its members; rather it claims "standing in its own right." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214

(1982). An advocacy organization like FLFNB suffers injury in fact when the defendant's conduct "perceptibly impair[s] [the organization's] ability" to carry out its mission, including by causing "drain on the organization's resources."

It is undeniable, as the district court found, that the City's enforcement of the Ordinance and the Park Rule "impair[ed]" FLFNB's "ability to engage in its projects" -- food-sharing demonstrations to criticize society's allocation of resources between food and war -- in a number of ways. Most directly, the police shut down an FLFNB food-sharing demonstration on November 7, 2014. This blocked FLFNB from holding its traditional post-meal organizational meeting in Stranahan Park and cut short an exercise of its chief means of advocacy. Moreover, the challenged regulations caused FLFNB to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance and the Park Rule. The threat of arrest also has practically hindered would-be volunteers from participating in FLFNB demonstrations. Thus, for example, FLFNB had to stop accepting high school volunteers because it did not want to risk subjecting them to criminal liability. These injuries will continue, because FLFNB continues to hold demonstrations under the threat of Park Rule enforcement.

FLFNB volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to advocacy activities such as attending City meetings and organizing protests against the Ordinance, as well as arranging for transportation and supplies for these events. FLFNB's Rule 30(b)(6) representative unambiguously testified that this "drew away time and resources from free time we would be spending on preparing for ... feedings."

Nor, as the City suggests, does the fact that FLFNB is an informal organization with no formative documents, formal leadership offices, or written proof of membership. The City has not offered any authority to suggest that an unincorporated association's informal structure somehow renders it incapable of sustaining actual and concrete injury. To the contrary, unincorporated associations by their nature lack a charter and often lack formal organizational structures. On this record as a whole, FLFNB's relaxed organizational style does not denude it of standing.

III.

B.

Finally, we come to the merits of the Plaintiffs' as-applied challenge to the Park Rule. Our review of the district court's summary judgment holding that the Park Rule was constitutional is de novo. FLFNB I, 901 F.3d at 1239. We draw all reasonable inferences in the light most favorable to the Plaintiffs, the non-moving parties. Id.

But first, we pause to clarify what is not up for debate in this appeal. In FLFNB I, a panel of this Court held that FLFNB's food-sharing demonstrations in Stranahan Park are expressive conduct protected by the First Amendment. Id. at 1245. This holding binds us under both the law of the case doctrine and our Court's prior precedent rule, Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021). The sole remaining question for us, then, is whether the Park Rule's regulation of this protected conduct passes First Amendment scrutiny.

To answer this question, we must first decide whether the Park Rule is content neutral or content based, for a content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 403–04, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Burk v. Augusta-Richmond Cnty., 365 F.3d 1247, 1255 (11th Cir. 2004). As we explain, the Park Rule

is content neutral. So, we only apply intermediate scrutiny. Specifically, we apply the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test for content-neutral regulations of expressive conduct and ask whether the Park Rule "is narrowly drawn to further a substantial governmental interest ... unrelated to the suppression of free speech." Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673).

Alternatively, we evaluate the Park Rule as a time, place, and manner restriction on expressive conduct. This sort of law also must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. These standards substantially overlap and yield the same result in this case. Either way, the Park Rule violates the First Amendment as applied to the Plaintiffs' food-sharing events.

1. Content Neutrality. Johnson instructs us that a regulation of expressive conduct is content neutral if the justification for the regulation is unrelated to the suppression of free expression. 491 U.S. at 403, 109 S.Ct. 2533. Even a content-neutral purpose, however, cannot save a regulation that " 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

The Park Rule does not draw content-based distinctions on its face:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The Rule applies not just to food sharing events but also to a host of other social services, including the provision of clothing, shelter, and medical care. These services usually do not involve expressive conduct. Even most social-service food sharing events will not be expressive. See FLFNB I, 901 F.3d at 1242 (holding that FLFNB's food sharing was protected expressive conduct only after a close examination of the specific context surrounding the events). That the Park Rule regulates a range of activity, most of which has no expressive content at all, suggests its application does not vary based on any message conveyed. The Rule does not single out messages which relate to food or the importance of sharing food with the homeless.

Instead, the Park Rule's application to food sharing (and other services) turns on whether the services are provided "in order to meet [the recipients'] physical needs." This distinction does not depend on the content of the message associated with any food sharing that happens to be expressive. The Park Rule (at least in the City's view) applies to FLFNB's sharing of low-cost food with the homeless in order to communicate a message about the societal allocation of resources between food and the military, but it would also apply to an organization that shared low-cost food with the homeless in order to communicate that the City's homeless shelters serve food that lacks vital nutrients. It would likewise apply to an organization that shared low-cost food with struggling veterans in order to emphasize the debt our society owes for their sacrifice, and so on. Indeed, it would apply to organizations that share food with those in need to communicate any number of messages. Simply put, the Rule does not "draw[ ] distinctions based on [any] message" food-sharers convey. Reed, 576 U.S. at 163, 135 S.Ct. 2218.

The Plaintiffs rely on Reed's allusion to the possibility that some facial distinctions might be content based because they define

"regulated speech by its function or purpose" to argue that the Park Rule's social-service-purpose distinction is content based. Id. at 163–64, 135 S.Ct. 2218. But we have characterized this language in Reed as "dicta." Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020). In any event, as just described, the purpose on which the regulatory definition turns -- sharing food to provide for physical welfare -- is not one that draws a distinction based on the content of any expression. See Recycle for Change v. City of Oakland, 856 F.3d 666, 671 (9th Cir. 2017) (holding, after Reed, that a regulation that applied to unattended donation boxes that collected personal items "for the purpose of distributing, reusing, or recycling those items" did not turn on "communicative content"); Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905, 915 (8th Cir. 2017) (regulation that applied to photography for commercial purposes, but not non-commercial purposes, was not content based under Reed). To be sure, it seems likely that most expressive food sharings subject to the Park Rule's regulation will involve some sort of message related to the importance of sharing food with those in need. "But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 573 U.S. 464, 480, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

Likewise, the City's justifications for the Park Rule do not relate to content. "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The City enacted the Park Rule, and the Ordinance designed to facilitate its enforcement, in order to address a series of problems associated with large group food events in public parks, including loitering and crowds, trash build-up, noise, and food safety issues, as well as to ensure that similar uses of public property did not concentrate in one area. Citizens had complained about some of these problems in connection with food-sharing events. In January 2014, the City Commission held a workshop on homelessness in the community where stakeholders debated public food distribution and related topics. More generally, the Ordinance states that its purpose is "to regulate social service facilities in order to promote the health, safety, morals and general welfare of the residents of the City of Fort Lauderdale." (This statement illuminates the Park Rule's purpose as well, since the City enacted the Ordinance so that it could resume enforcement of the Park Rule.)

These concerns, which boil down to an interest in maintaining public parks and other property in a pleasant, accessible condition, are not related to the suppression of the Plaintiffs' (or any other party's) expression, so they are content neutral. See First Vagabonds Church of God, 638 F.3d at 762 ("[T]he interest of the City in managing parks and spreading large group feedings to a larger number of [locations] is unrelated to the suppression of speech."); see also McCullen, 573 U.S. at 480–81, 134 S.Ct. 2518 (public safety, the need to protect security, and regulation of congestion are content-neutral concerns); Ward, 491 U.S. at 797, 109 S.Ct. 2746 ("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.").

One could phrase the City's motives in terms that are perhaps less flattering. The district court said the City was concerned "that food sharing as a social service attracts people who act in ways inimical to" keeping parks safe, clean and enjoyable; the Plaintiffs put a finer point on it and accuse the city of "deter[ring] homeless and hungry people from parks because of how they might act." Fort Lauderdale's elected officials seem to have decided that sharing food with large groups of homeless people in public parks causes problems that

make those parks less useful to the broader public. But even accepting these descriptions does not alter the First Amendment analysis, which at this stage asks only whether the City's desire to prevent groups of homeless people from gathering in public parks is a goal related to the content of the Plaintiffs' or any other party's expression. The First Amendment does not permit us to go further and comment upon whether this objective is virtuous public policy. We hold simply that the Park Rule is not related to expressive conduct; it has nothing to do with the Plaintiffs' critique of society's allocation of scarce resources between welfare and defense spending.

The Plaintiffs are wrong to say that the City's concern with the behavior of the crowds that gather at FLFNB expressive food-sharing events is a justification related to "[l]isteners' reaction to speech," which they correctly point out would not be "a content-neutral basis for regulation." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Forsyth and related cases stand for the principle that a city may not regulate speech because it "cause[s] offense or ma[kes] listeners uncomfortable," McCullen, 573 U.S. at 481, 134 S.Ct. 2518, or because it might elicit a violent reaction or difficult-to-manage counterprotests, Forsyth Cnty., 505 U.S. at 134, 112 S.Ct. 2395. The City is concerned not that FLFNB's expression will offend or cause violence, but that it will cause the gathering of crowds -- participants in the meals, rather than a bystander audience -- and associated logistical problems such as the accumulation of trash. Addressing the practical problems crowds pose is a content-neutral concern. See McCullen, 573 U.S. at 481, 134 S.Ct. 2518 ("Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks."); cf. Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1317–18 (11th Cir. 2000) (a regulation that distinguished between events based on whether they would require municipal services to "accommodate ... large public gatherings" was "justified without reference to the content of the regulated speech") (emphasis omitted).

2. Intermediate Scrutiny. Since the Park Rule is a content-neutral regulation of expressive conduct, it is subject only to intermediate scrutiny, not the more demanding requirements of strict scrutiny. Specifically, under United States v. O'Brien, the Park Rule may regulate the Plaintiffs' expressive food sharing only so long as food sharing "itself may constitutionally be regulated" (no one has suggested it may not) and the Park Rule "is narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." Clark, 468 U.S. at 294, 104 S.Ct. 3065 (1984) (citing O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

The City does have a "substantial interest in ensuring the ability of [its] citizens to enjoy whatever benefits the city parks have to offer." Ward, 491 U.S. at 797, 109 S.Ct. 2746. More specifically, the Park Rule seeks to further the City's "substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area." First Vagabonds Church of God, 638 F.3d at 762. As we have explained, the regulations are concerned with avoiding concentration of similar park uses and with sanitation and other logistical problems that crowded food distribution events cause -- substantial government interests that are unrelated to the suppression of free speech.

However, the Park Rule is not narrowly tailored to the City's interest in park maintenance. Under intermediate scrutiny, the regulation " 'need not be the least restrictive or least inclusive means' of serving the government's interests." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citation omitted). Rather, "the requirement of narrow tailoring is satisfied 'so long as

the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 799–800, 109 S.Ct. 2746 (citation omitted and alterations accepted).

Fatally, the Park Rule imposes a permitting requirement without implementing any standards to guide City officials' discretion over whether to grant a permit. The Rule bans social-service food sharings in City Parks "unless authorized pursuant to a written agreement with City." That's it. Under the terms of the Rule, a City official may deny a request for permission to hold an expressive food sharing event in the Park because he disagrees with the demonstration's message, because he doesn't feel like completing the necessary paperwork, because he has a practice of rejecting all applications submitted on Tuesdays, or for no reason at all. In a word, the complete lack of any standards allows for arbitrary enforcement and even for discrimination based on viewpoint.

Generally, subjecting protected expression to an official's "unbridled discretion" presents "too great" a "danger of censorship and of abridgment of our precious First Amendment freedoms." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). "[D]istaste for [such] censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Id. It comes as no surprise, then, that "a long line" of Supreme Court decisions makes it abundantly clear that a regulation which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

The facts of Shuttlesworth illustrate the point. A Birmingham, Alabama ordinance empowered the city commission to deny parade permits whenever they thought it necessary for "public welfare," "decency," "morals," or "convenience." Id. at 148–50, 89 S.Ct. 935. In 1963, city officials used this ordinance to arrest and prosecute participants in a peaceful civil rights march held without a license, including Rev. Fred Shuttlesworth. Id. But the Supreme Court invalidated Shuttlesworth's conviction. Id. at 159, 89 S.Ct. 935. The risk that the ambiguity in the licensing regime would permit officials to target individuals, like Shuttlesworth, on the basis of their disfavored expression was too great for the First Amendment to bear.

The reasoning of these prior restraint cases controls the as-applied narrow tailoring inquiry we conduct in this case: "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." Burk, 365 F.3d at 1256. The Park rule does not even supply malleable standards like those found in Shuttlesworth; it doesn't provide any standards at all. As applied to the Plaintiffs' protected expression, the Park Rule fails First Amendment scrutiny.

Moreover, the Park Rule's sweeping grant of discretion to City permitting officials is not necessary to further the City's interests in crowd control and park conservation. The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citations omitted). Of course, the mere availability of less restrictive alternatives will not cause a regulation to fail narrow tailoring scrutiny, and we may not "replace the City as the manager of its parks." First Vagabonds Church of God, 638 F.3d at 762 (citation omitted and alterations accepted). But an abundance

of targeted alternatives may indicate that a regulation is broader than necessary. See McCullen, 573 U.S. at 490–94, 134 S.Ct. 2518 (relying in part on available alternatives to conclude that a regulation of speech near abortion clinics burdened more speech than necessary).

The Park Rule amounts to an outright ban on public food sharing in all of Fort Lauderdale's parks; any exception is subject only to the standardless whims of City permitting officials. For a model of a narrower regulation targeting more or less the same interests, the City need only have looked 218 miles to the northwest. In First Vagabonds Church of God, we upheld an Orlando regulation that permitted public food distribution without a license in sixty-six parks. 638 F.3d at 761. For the group of forty-two parks in the central downtown district near City Hall, each organization was entitled to two licenses per year. Id. And the Orlando ordinance applied only to events likely to attract twenty-five or more people. Id. at 759.

Fort Lauderdale offers no reason it could not have similarly narrowed the Park Rule's permission requirement or tailored it in some other way. Thus, for example, in addition to adding "narrowly drawn, reasonable and definite standards" to guide officials' permitting discretion, Forsyth Cnty., 505 U.S. at 133, 112 S.Ct. 2395 (citation omitted), the City could have required permission only for events likely to attract groups exceeding a certain size. Or it could have required City permission only for certain parks. Central to the City's conclusion that public food distribution causes problems in parks is a collection of seven citizen and organizational complaints about food-sharing events. Six of these are specific to the downtown Fort Lauderdale area. The City could have required permission only in downtown parks or designated limited areas within parks for sharing food. See McCullen, 573 U.S. at 493, 134 S.Ct. 2518 (evidence of disruptive demonstrations at a single Boston clinic did not justify a statewide regulation of demonstrations at abortion clinics); see Clark, 468 U.S. at 295, 104 S.Ct. 3065 (rejecting challenge to a limited ban on camping in Washington, D.C.'s Lafayette Park as applied to an anti-homelessness demonstration; the Park Service allowed camping in designated areas in other parks); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999) (upholding ban on begging that applied only to a five-mile "designated, limited beach area" and did not ban begging in "many other public fora"). The City also might have allowed groups like FLFNB a limited annual number of food distribution events in Stranahan Park as of right. Again, we do not presume to tell the City exactly how it should manage its parks; all this is only to say that the Park Rule's utterly standardless permission requirement is "substantially broader than necessary to achieve" the City's interest in maintaining its parks. Ward, 491 U.S. at 782–83, 109 S.Ct. 2746. The Park Rule therefore cannot qualify as a valid regulation of the Plaintiffs' expressive conduct.

Alternatively, we evaluate the Park Rule under Clark's standard for time place, and manner restrictions. A content-neutral law regulating the time, place, and manner of expression in a public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. Stranahan Park is "an undisputed public forum." FLFNB I, 901 F.3d at 1238. We underscore that parks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." McCullen, 573 U.S. at 476, 134 S.Ct. 2518 (quotation omitted); United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (Public parks are "historically associated with the free exercise of expressive activities."); Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for

purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). "[T]he government's ability to permissibly restrict expressive conduct" in Stranahan Park is therefore "very limited." Grace, 461 U.S. at 177, 103 S.Ct. 1702. But the government nevertheless "may enforce reasonable time, place, and manner regulations" on expression in the park. See id.

As a practical matter, there is little difference between this standard and the O'Brien test we have just discussed, and, in any event, they yield the same result in this case. Clark, 468 U.S. at 298, 104 S.Ct. 3065 (observing that the O'Brien standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); see First Vagabonds Church of God, 638 F.3d at 761–62 (analyzing a similar ordinance under both standards). Both require that the regulation be narrowly tailored to serve a significant government interest. Clark, 468 U.S. at 293, 298, 104 S.Ct. 3065. Just as it does under O'Brien, the Park Rule's grant of standardless discretion to the City's permitting officials causes it to fail time, place, and manner scrutiny: "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " Forsyth Cnty., 505 U.S. at 130–31, 112 S.Ct. 2395 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); Burk, 365 F.3d at 1256 ("[T]ime, place, and manner regulations must contain narrowly drawn, reasonable and definite standards, to guide the official's decision and render it subject to effective judicial review.") (internal quotation marks and citations omitted). Since the Park Rule fails because it is not narrowly tailored, we need not address whether it leaves open ample alternative channels for the communication of the Plaintiffs' message.

The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we **REVERSE** the district court's summary judgment order and **REMAND** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HULL, Circuit Judge, with whom LAGOA, Circuit Judge, joins, concurring:

I concur in full in the panel opinion. I write separately to emphasize that this is the second appeal in this case and that our panel is bound by this Court's holding as to whether the plaintiff FLFNB's food-sharing conduct is sufficiently expressive to warrant First Amendment protection. See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

In that prior appeal, this Court held that, "on this record," the nature of the plaintiff FLFNB's weekly food-sharing activity in a public park, "combined with the factual context and environment in which it was undertaken," led to the conclusion that FLFNB's food sharing conduct "express[es] an idea through [that] activity," conveys "some sort of message" to a reasonable observer, and constitutes "a form of protected expression" under the First Amendment. Id. at 1240–45 (quotation marks omitted). This holding relied on a well-developed factual record about the plaintiff FLFNB's many years of food-sharing events (1) that are held in the City's Stranahan Park, a public forum where the homeless congregate, and (2) that are accompanied by FLFNB's banners and distribution of literature. Id. As the panel opinion points out, "most social-service food sharing events will not be expressive." Here, however, we are bound by the holding in the prior appeal that was based on a particular and extensive list of factual circumstances.

Aaron Leibowitz, Miami Beach police begin arresting homeless people under stricter 'camping' ban, Miami Herald, Dec. 19, 2023

Miami Beach police made a spate of arrests of homeless people in the days before Art Basel, enforcing for the first time a city law that officials revised in October to crack down on sleeping outdoors. Police arrested 20 people for "camping" in the city between Nov. 30 and Dec. 7, according to jail booking records and police reports reviewed by the Miami Herald. Most of the people arrested were lying on the sand under blankets or on top of beach chairs, police reports show. The camping charges they faced were coupled with charges of entering a park after hours, as the beach is closed to the public from 10 p.m. to 5 a.m. All of the arrests took place in South Beach. The police reports note that officers had been assigned to a detail to enforce the city law about entering the beach after hours, a response to "numerous complaints from residents and city officials [about] criminal activity occurring during the non-operational hours of the beach." A spokesperson for the Miami Beach police, Christopher Bess, told the Herald the enforcement was "based on residential needs and wants." He said the timing was unrelated to the influx of tourists visiting for Art Week.

Jose Montesino takes a nap in Lummus Park in South Beach on Jan. 10, 2019.

The arrests represent a new level of enforcement of the city's camping ban, which has been on the books for years but previously required police to provide a warning to give people an opportunity to relocate. Booking records show Miami Beach police charged just 75 people between 2015 and when it was updated in October.

The updated ordinance no longer requires a warning, but does say people must be offered a shelter bed before they can be arrested. If a person who is camping "volunteers that he or she has no home or other permanent shelter, he or she must be given an opportunity to enter a homeless shelter or similar facility, if available," the ordinance says. "If no such facility is available, an arrest may not be made."

Convictions for violations of the ordinance can result in a prison term of up to 60 days and a $500 fine.

IS THE ORDINANCE BEING FOLLOWED?

Police reports from the recent arrests say that, in some cases, officers asked people whether they wanted to receive "homeless outreach services" from the city or if they "wanted help seeking permanent shelter."

In other cases, officers said they asked if people wanted "assistance to get access to a homeless shelter."

It wasn't clear from the reports whether police provided details about available shelter beds. The reports also do not say whether police warned people they could be arrested if they declined a shelter placement.

The Miami Herald has requested body-worn camera footage from several of the arrests.

Miami Beach does not have any shelters. The city pays for use of more than 50 shelter beds at facilities in the City of Miami.

Bess, the police spokesperson, said the department also has three shelter beds reserved for its use.

Stephen Schnably, a University of Miami law professor who worked on the landmark Pottinger case that addressed homelessness in the City of Miami, reviewed the arrest reports and said they leave questions about whether the ordinance is being properly enforced.

"It's not at all clear that there's an offer of immediate housing," Schnably said. "Do [officers] say, 'You're violating this ordinance and you can be arrested for it, however, we have shelter, are you interested in that?'"

Bess said Tuesday that the department is working to respond to questions the Herald submitted Friday about the arrest reports. The Herald also asked how many people have accepted a shelter bed to avoid arrest.

Every officer was required to watch a 15-minute training video prepared by the city attorney's office before police began enforcing the revised ordinance, Bess said.

"Any questions they had were answered accordingly," he said.

"It doesn't accomplish anything about ending homelessness, and it just makes it harder for those individuals to ultimately find jobs and housing because it's more of an arrest record," said Schnably.

Advocates note there are many reasons why people may be resistant to go to a homeless shelter, including safety concerns, limits on how long people can stay, policies about abstaining from drug and alcohol use, curfews, and restrictions on bringing pets or certain personal belongings.

Some people have had bad past experiences in shelters that shape their views, said Valerie Navarrete, a Miami Beach real-estate agent who advocates for the city's homeless population through a nonprofit, Favela Miami.

"These people need to be treated with respect," Navarrete said. While she said she doesn't take a stance on the camping ordinance, "it's very important to remember that they are people."

In police reports, officers described how some people expressed their hesitancy to accept shelter. In one report, police said a woman told them, "I do not want to be around those type of people" in a shelter facility.

One man told officers, "I am homeless, not helpless," according to a police report.

The Herald has requested a copy of the training video.

CRIMINALIZATION OR ENCOURAGEMENT?

The updated ordinance reflects concerns from residents and elected officials about increased visibility of homeless people and a desire to take a "tough on crime" approach.

City officials modeled the change after an Orlando ordinance that bans sleeping outdoors on public property in most cases and was upheld in 2000 by the Atlanta-based U.S. Court of Appeals for the 11th Circuit.

"This is absolutely not about criminalizing the homeless," Commissioner Alex Fernandez said at the October meeting. "This is about making the homeless community accept services ... If this helps us encourage them, then we have to do this."

Miami Beach had an unsheltered homeless population of 152 in an overnight count in August by the Miami-Dade County Homeless Trust, down from 235 in January and 167 from the previous August.

The ordinance change sparked resistance from local homeless advocates, who have said it

unfairly criminalizes a vulnerable population and effectively makes it illegal to be unhoused in the city.

Court records show most of the people arrested were released without having to post bail. Most of the cases remain pending.

One man who was charged with camping and entering a park after hours has remained in jail since his Nov. 29 arrest after his bond was set at $1,000, jail records show. Police say they found him shortly before midnight Nov. 29 lying in a sleeping bag on a lifeguard tower near 13th Street, and arrested him after he "refused police assistance." Many of the cases are being charged by Miami Beach's municipal prosecution team rather than the Miami-Dade State Attorney's Office. The municipal team handles criminal cases that involve only city ordinance violations and no state or federal crimes.

Court records show judges have in some instances withheld adjudication of the camping charge, a form of probation that does not go on a person's record. Judges have also imposed "stay away orders" that restrict people from returning to particular locations.

Mitch Perry, *GOP lawmaker touts a 'carrot and stick' approach to dealing with the homeless in FL*, Florida Phoenix, Jan. 26, 2024

Clay County GOP Rep. Sam Garrison says he's advocating for a bill to address the homeless situation in Florida because he doesn't want the state to become like California.

"We're going to do a different model," he told a committee in the Florida House on Thursday. "It's a model that has both carrot and stick. We're going to provide the resources necessary for the COC's [Continuums of Care] in the communities to do the best for their communities. The best for their citizens. But we're also going to have a pretty hard line to say we are not going to allow the public space that we all enjoy that's essential for a thriving community be lost. We're just not going to do it. "

Speaking in support of the measure was one of Tallahassee's most influential lobbyists, Ron Book, who has served as chairman of the Miami-Dade County Homeless Trust for the past 25 years. Book mentioned that homelessness in Miami-Dade is remarkably lower than in other major urban areas around the country and says it's because his organization follows a plan that focuses on getting the homeless off the streets.

"We discourage encampments," he told lawmakers. "While other governments seem to think it's a good thing to do, we're supposed to make it harder for people to survive on the streets so that the continuums can bring them in off the streets and get them services and get them care and get them housed."

The veteran lobbyist testified in support of the proposal (HB 1365) that would prohibit any city or county in Florida from authorizing or permitting public sleeping or camping on public property, public buildings or public rights-of-way without a lawfully temporary permit.

According to the most recent "point in time" count conducted almost exactly a year ago in Florida, there were approximately 15,706 individuals who were unsheltered, which is defined as people sleeping in cars, park benches, abandoned buildings, or other places not meant for human habitation. That was a 34% increase from the year before, according to the Florida's Council on Homelessness' most recent annual report.

That same report said that overall, there were 30,839 homeless individuals in Florida last year, an increase from 25,959 in 2022, and an overall 9% increase since 2019. It also showed that 4,668 are children under the age of 18, and 8,646 are individuals over the age of 55.

Also under Garrison's bill, cities and counties would be allowed to continue to provide public spaces for the homeless, but the regulations would seem to make that a tough sell for most local governments. They must include the following: access to clean running water and bathroom facilities; 24-hour security; a ban on drug and alcohol use for all users and access to substance abuse and mental health treatment resources; and it may not be in a location where it "adversely and materially affects the value or security of existing residential or commercial properties."

The proposal was criticized in committee by homeless advocates, who say it does nothing to address the root causes of homelessness. In fact, they contend that it will only exacerbate the problem.

"The bill places an impossible mandate on local governments, burdening them with undue financial responsibilities without offering a long-time solution for those experiencing homelessness," said Jackson Oberlink with the group Florida Rising. "It does not address the housing crisis, and instead of providing housing, it criminalizes those who have no alternative but to sleep outdoors."

Tim Adams, who told the committee that he's been homeless in the past, said the measure would make it illegal to sleep outdoors. "If sleeping is a crime, then basically you're saying that being human is a crime," he said. "I think that's wrong, and I highly oppose anything that tries to criminalize being a human."

Similar bills have approved in recent years in Texas, Tennessee and Missouri, and all have been pushed as model legislation by the Texas-based Cicero Institute, a conservative think tank. Unlike some of those proposals, however, the Florida bill does not include any criminal penalties. That's why South Florida Democratic Rep. Mike Gottlieb said he supported it. "I'm hoping that there's no nefarious intent in the bill," he said.

The bill, however, does allow individuals to pursue civil penalties against a municipality if they are found to be in violation of the law.

A similar proposal filed by Lee County Senate Republican Jonathan Martin (SB 1530) will get its first committee hearing in that chamber next Monday.

In regard to the homeless situation in California that Garrison said he didn't want Florida to become, the Golden State had 171,521 people experiencing homelessness in 2022, according to the National Alliance to End Homelessness.

United States District Court
Central District of California
Western Division

JAMES TYSON, *et al.*,

Plaintiffs,

v.

CITY OF SAN BERNARDINO,

Defendant.

EDCV 23-01539 TJH (KKx)

Order and Preliminary Injunction

The Court has considered Plaintiffs' motion for a preliminary injunction [dkt. # 13] and motion for leave to file supplemental evidence in support of their motion for a preliminary injunction [dkt. # 57], together with the moving and opposing papers.

Plaintiffs Noel Harner, Lenka John, and James Tyson were experiencing homelessness in May, 2023, and June, 2023, when they were evicted, and their personal property was seized, by the City of San Bernardino ["the City"] from encampments at Perris Hill Park and Meadowbrook Park in the City. Harner, John, and Tyson have mobility related disabilities that cause them to use wheelchairs. Plaintiff SoCal Trash Army is a volunteer-run, non-profit, unincorporated association that focuses on, *inter alia*, people experiencing homelessness in the Inland Empire.

On November 8, 2023, Plaintiffs filed their First Amended Complaint alleging,

inter alia, that the City improperly seizes and destroys personal property belonging to people experiencing homelessness, and that the City fails to provide reasonable accommodations to people with disabilities who are experiencing homelessness during the cleanup and removal of homeless encampments. This case was not filed as a class action.

All Plaintiffs alleged claims against the City for: (1) Discrimination, in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ["ADA"]; (2) Failure to provide reasonable accommodations, in violation of the ADA; (3) Violation of § 504 of the Rehabilitation Act, 29 U.S.C. § 794; (4) Unreasonable search and seizure, in violation of the Fourth Amendment to the United States Constitution and Article I, § 13 of the California Constitution; and (5) Violation of due process guaranteed by the Fifth Amendment to the United States Constitution and Article I, § 7 of the California Constitution. Additionally, Plaintiffs Harner, John, and Tyson alleged a claim against the City for deliberate indifference, in violation of the ADA, and Plaintiffs Tyson and John alleged a claim against the City for improperly destroying personal property that belongs to people experiencing homelessness, in violation of Cal. Civ. Code § 2080, *et seq.*, and Cal. Gov't Code § 815.6.

The individual Plaintiffs' claims for unreasonable seizure and due process are premised on the broader fact that they are experiencing homelessness, and not specifically because they have disabilities. Likewise, SoCal Trash Army's claims for unreasonable seizure and due process are based on the fact that they work with people experiencing homelessness.

An organization can assert an ADA and/or Rehabilitation Act claim if it can demonstrate: (1) Frustration of its organizational mission; and (2) Diversion of its resources to combat the particular conduct in question. *See Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019). SoCal Trash Army was founded in July, 2020, to clean up trash around the City. Thereafter, it expanded its mission to include work with people experiencing homelessness. In November, 2020,

it held its first event focused on food distribution. Then, in January, 2021, SoCal Trash Army began providing, on a regular basis, food to people experiencing homelessness. Shortly thereafter, SoCal Trash Army learned that the City was destroying personal property that belonged to people experiencing homelessness, and was failing to provide reasonable accommodations to people with disabilities who were, also, experiencing homelessness and were evicted from encampments. SoCal Trash Army, then, began replacing personal property that was destroyed by the City, and began assisting people who were not able to move themselves or their personal property after being evicted from encampments. Thus, for purposes of the instant motion, SoCal Trash Army has established that it has standing to assert its ADA and Rehabilitation Act claims, here.

In September, 2022, the City implemented its Citywide Policy on Encampment Cleanups ["the Policy"]. This case was filed because, allegedly, the City is not complying with the Policy.

The Policy mandates that the personal property of people experiencing homelessness must not be treated differently than the property of other members of the public, and that Public Works personnel are not permitted to destroy or dispose of property belonging to people experiencing homelessness except in accordance with the Policy. The Policy requires Public Works personnel to post, at least 72 hours before a cleanup, a Notice of Cleanup stating the date and a three hour window during which the cleanup will start at each targeted encampment. The Policy distinguishes between attended and unattended property. The Policy defines unattended property as personal property left at the site following the 72-hour notice period, where the property owner is not present when City personnel arrive at a cleanup.

At the end of the 72-hour notice period, the Policy requires Public Works personnel to, *inter alia*: (1) Tag unattended property with a 24-Hour Notice of Intent to Store, which states that the City may seize and store the property if it is not removed within the following 24 hours; (2) Post a Notice of Storage with the date and time that

the property was seized, the case number, the phone number that the owner can call to obtain more information and to arrange retrieval of the seized property, and the time during which the property can be retrieved free of charge and without identification; and (3) Store the seized unattended property for 90 days.

The Policy, further, requires the City to provide reasonable accommodations in the form of additional time and/or resources to people experiencing homelessness who are unable to relocate during the cleanup of their encampment.

Since June, 2022, the City's Public Works Department has engaged Burrtec Industries, Inc. ["Burrtec"], a private waste management company under contract with the City, to clean up and remove homeless encampments within the City.

Since September, 2022, the City and/or Burrtec have, allegedly, cleaned up and evicted the occupants of over 2,000 encampments, and intend to continue those cleanups and evictions. Further, the alleged Policy violations during those cleanups have, allegedly, hindered SoCal Trash Army's work distributing food to people experiencing homelessness.

Plaintiffs, now, move for a preliminary injunction.

Requested Preliminary Injunction

Plaintiffs seek a preliminary injunction that enjoins the City and its contractors from removing individuals experiencing homelessness, and their attended and unattended personal property, from encampments within the City until the City submits, and the Court approves, a plan that:

(1) Requires the City to post adequate pre-seizure and post-seizure notices, and to implement lawful storage and documentation practices so that seized items are properly tagged and stored for post-seizure retrieval; and

(2) Requires the City to provide – in connection with park closures, encampment clearing, and related property seizure, disposal, and/or destruction – reasonable accommodations to people with disabilities who are, also, experiencing homelessness, including:

(A) A process that provides for the investigation of reasonable accommodation requests;

(B) Modifications to the City's programs and activities;

(C) Training for City employees and contractors who interact with people with disabilities; and

(D) A self-evaluation of the City's programs and activities within one year.

Standard for Injunctive Relief

Generally, to obtain a preliminary injunction, Plaintiffs must establish that: (1) They are likely to succeed on the merits; (2) They are likely to suffer irreparable harm in the absence of a preliminary injunction; (3) The balance of equities tips in their favor; and (4) An injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief is an extraordinary remedy that may be awarded only upon a clear showing that Plaintiffs are entitled to relief. *Winter*, 555 U.S. at 22.

Likelihood of Success on the Merits

1. Unreasonable Seizure of Personal Property

Plaintiffs seek an injunction to prohibit, *inter alia*, the illegal seizure of property. The Fourth Amendment's prohibition against unreasonable seizures of property applies to the City through the Fourteenth Amendment. *See Mapp v. Ohio*, 367 U.S. 643 (1961).

The Fourth Amendment prohibits the unreasonable seizure of personal property, even if the property is located in a public area. *See Recchia v. City of L.A. Dep't of Animal Servs.*, 889 F.3d 553, 558 (9th Cir. 2018). The destruction of personal property is a seizure. *United States v. Jacobsen*, 466 U.S. 109, 12425 (1984). Further, because a warrantless seizure is *per se* unreasonable, the City bears the burden of showing that a warrantless seizure falls within an exception to the Fourth Amendment's warrant requirement. *See Garcia v. City of L.A.*, 11 F.4th 1113, 1118

(9th Cir. 2021). In *Lavan v. City of L.A.*, the Ninth Circuit Court of Appeals concluded that a municipality's immediate destruction of personal property that belonged to people experiencing homelessness is an unreasonable seizure in violation of the Fourth Amendment. 693 F.3d 1022, 1031 (9th Cir. 2012).

Because private contractors engaged by a municipality are subject to the same Fourth Amendment prohibitions that limit the actions of the municipality, the Court will collectively consider the actions of the City and Burrtec. *See United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

The City acknowledged, here, that its encampment clean ups were done pursuant to neither a warrant nor a warrant exception. In recognition of *Lavan*, the City did not argue that it is reasonable, under the Fourth Amendment, to immediately destroy publicly stored personal property that belongs to people experiencing homelessness. Instead, the City's opposition was premised upon on its asserted practice of not immediately destroying personal property at clean up locations.

In support of the instant motion, Plaintiffs submitted twenty-two declarations from people who witnessed the City's recent encampment clearings. Some of the declarants described instances where the City seized and, then, immediately destroyed personal property that belonged to people experiencing homelessness, including some people who had disabilities.

As an example, Plaintiff John declared that, on May 18, 2023, a City employee informed her that she needed to vacate Meadowbrook Park. She, further, declared that, because she is disabled and relies on a wheelchair and service dog, she could not carry away all of her personal property; that she took two backpacks and a small suitcase with her and planned to return for the rest of her property; and that as she was leaving Meadowbrook Park, she saw a clean up crew throw the rest of her personal property, including her walker, a first-aid kit, a suitcase, and her medical records, into a trash truck.

As another example, Plaintiff Tyson declared that, in early June, 2023, a clean

up crew seized and discarded – without prior notice – his personal property, including, *inter alia*, clothes and hygiene supplies. In sum, Tyson declared that the City seized and immediately destroyed his personal property on five or six different occasions.

Plaintiffs, also, submitted a declaration from Kristen Malaby, the founder of SoCal Trash Army, who declared that SoCal Trash Army replaced hundreds of tents, tarps, and items of clothing that belonged to people experiencing homelessness in the City but were destroyed by the City during encampment clearings.

Declarations may form the basis for a preliminary injunction, unless the facts set forth in them consist largely of general assertions that are substantially controverted by counter-declarations. *See K-2 Ski Co. v. Head Ski Co.*, 467 F.2d 1087, 1089–90 (9th Cir. 1972). When considering declarations, the Court can give more or less weight to each declaration based on the declarant's personal knowledge and credibility. *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).

In opposition, the City submitted eight declarations from its employees to challenge the veracity of the declarations submitted by Plaintiffs. The Court takes note that the City did not submit any declarations from Burrtec employees.

To challenge the veracity of the declarations of John and Tyson, the City submitted a declaration from David Miller, a City Public Works supervisor. Miller declared that the City does not discard personal property that belongs to people experiencing homelessness during encampment clean ups, and that the City discards only trash. However, Miller did not declare that he was present at all of the clean ups identified in the declarations submitted by Plaintiffs, or at all of the 2,406 encampment clean ups conducted by the City and/or Burrtec between September, 2022, and June 30, 2023. Consequently, the Court does not give great weight to Miller's declaration regarding what actually happened at clean ups that he did not specifically declare that he personally supervised from beginning to end. *See Flynt Distributing Co., Inc.*, 734 F.2d at 1394.

After considering all of the declarations submitted by the parties, here, Plaintiffs'

declarations clearly established a *prima facie* case that the City and Burrtec, as the City's agent, seized and immediately destroyed personal property that belonged to people experiencing homelessness, including Plaintiffs John and Tyson. The Court finds that Plaintiffs' declarations were not substantially controverted by the declarations submitted by the City. *See K-2 Ski Co.*, 467 F.2d at 1089–90; *Flynt Distributing Co.*, Inc., 734 F.2d at 1394.

Thus, Plaintiffs have established a strong likelihood of success on the merits for their Fourth Amendment unreasonable seizure claim. *See Winter*, 555 U.S. at 20. Consequently, at this juncture, the Court need not, also, consider Plaintiffs' unreasonable seizure claim in the context of Article I, § 13 of the California Constitution, Cal. Civ. Code § 2080, *et seq.*, or Cal. Gov't Code § 815.6.

2. Due Process

Plaintiffs, here, seek, *inter alia*, an injunction to prohibit the illegal taking of property without due process. The Fourteenth Amendment to the United States Constitution prohibits a municipality from depriving a person of life, liberty, or property without due process; any significant taking of property by a municipality falls within the purview of the Fourteenth Amendment. *See Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

In *Lavan*, the Ninth Circuit set forth the due process rights of people experiencing homelessness related to the seizure of personal property. 693 F.3d at 1031–33. Specifically, due process requires the City to provide notice and an opportunity to be heard before ***and*** after it seizes personal property that belongs to people experiencing homelessness. *See Lavan*, 693 F.3d at 1033.

The City, here, did not dispute the due process rights of people experiencing homelessness. Instead, it argued that the Policy provides sufficient due process and that it acted in accordance with the Policy.

Based on the declarations submitted by Plaintiffs, there were at least several instances where the City failed to provide people experiencing homelessness with an

opportunity to be heard before the City seized their personal property. Further, the Policy, on its face, does not provide for an opportunity for people experiencing homelessness to be heard post-seizure.

Thus, Plaintiffs have established a likelihood of success on the merits for their due process claim based on the Fourteenth Amendment. *See Winter*, 555 U.S. at 22. Consequently, at this juncture, the Court need not, also, consider Plaintiffs' due process claim in the context of Article I, § 7 of the California Constitution, Cal. Civ. Code § 2080, *et seq.*, or Cal. Gov't Code § 815.6.

3. ADA and Rehabilitation Act

To assert a claim against the City under § 504 of the Rehabilitation Act, Plaintiffs must, first, show that the City received federal financial assistance. *See Duvall v. County of Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001). To meet that burden, Plaintiffs submitted the City's adopted budget for the 2023 - 2024 fiscal year, which shows the receipt of federal funds from the Corona Virus State and Local Fiscal Recovery Fund, the Community Development Block Grant, the Emergency Solutions Grant, and the HOME Investment Partnership Program.

The ADA prohibits municipalities from discriminating against qualified individuals on account of their disabilities. 42 U.S.C. § 12132. The ADA requires the City to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless [it] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." *McGary v. City of Portland*, 386 F.3d 1259, 1265–66 (9th Cir. 2004). The failure of the City to provide such reasonable accommodations may constitute discrimination under Title II of the ADA and § 504 of the Rehabilitation Act. *See Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

Because Title II of the ADA was modeled after § 504 of the Rehabilitation Act, and their elements do not differ in any relevant respect, the Court can, and will, address those two claims together. *See Zukle v. Regents of Univ. of Cal.*, 166 F.3d

1041, 1045 (9th Cir. 1999).

To establish that the City violated Title II of the ADA and § 504 of the Rehabilitation Act, Plaintiffs, here, must satisfy the following four elements: (1) They have disabilities; (2) They were otherwise qualified to participate in or receive the benefit of the City's services, programs, or activities; (3) They were excluded from participation in, or denied the benefits of, the City's services, programs, or activities, or were otherwise discriminated against by the City; and (4) The exclusion, denial of benefits, or discrimination was by reason of their disabilities. *See Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002); *Duvall*, 260 F.3d at 1135–36.

Plaintiffs Harner, John, and Tyson appear to be qualified individuals with disabilities. Harner, John, and Tyson have mobility related disabilities that cause them to use wheelchairs. All of the individual Plaintiffs are qualified and entitled to receive the benefits of the City's programs, activities, and services. *See McGary*, 386 F.3d at 1269–70. Thus, Plaintiffs satisfied the first and second elements of their ADA and Rehabilitation Act claims.

Plaintiffs can satisfy the third element by showing that they were denied a reasonable accommodation needed to enjoy meaningful access to the benefits of the City's services. *See A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016). Generally, a person with disabilities must, first, make a request for a reasonable accommodation. *See Duvall*, 260 F.3d at 1139. A reasonable accommodation may, also, be required, without a request, if the accommodation was: (1) Obvious, or should have been obvious, to a public entity; or (2) Required by a statute or regulation. *See Duvall*.

The City's Policy does not set forth a process by which a person experiencing homelessness can make a request for a reasonable accommodation. Regardless, the City acknowledged that the American Civil Liberties Union, which represents Plaintiffs, here, provided Plaintiffs Harner, John, and Tyson with forms to request reasonable accommodations during the clean ups at Perris Hill Park and Meadowbrook

Park. Those Plaintiffs declared that they submitted requests for reasonable accommodations to the City but that the City never responded.

After a person submits a request for a reasonable accommodation based on a disability, or if the accommodation was obvious or required by a statute or regulation, the City is ***mandated*** to undertake a fact-specific investigation to determine what constitutes a reasonable accommodation for the situation. *See Duvall*. For a fact-specific investigation to be adequate, the City must have gathered sufficient information from the person with disabilities who made the accommodation request, as well as from qualified experts, so that it was able to determine whether the requested accommodation was reasonable. *See Wong v. Regents of Univ. of Cal.*, 192 F.3d 807, 818 (9th Cir. 1999). When evaluating whether a requested accommodation is reasonable, the City is obligated to consider the particular needs of the person who made the request. *See Duvall*, 260 F.3d at 1139–40. Further, the City could not have summarily concluded, without undertaking the required investigation, that a requested accommodation was neither reasonable nor feasible. *See Duvall*.

The declarations submitted by Plaintiffs describe several instances where the City failed to provide reasonable accommodations to people experiencing homelessness who were, also, disabled. By way of example, John and Tyson both declared that the City did not provide them with the requested assistance to pack and transport their personal property during the cleanup of Meadowbrook Park. Further, Harner declared that the City did not respond to her request to be relocated to a location where she could be with her service dog. Regardless of whether the City received requests, because Plaintiffs Harner, John, and Tyson have mobility related disabilities and use wheelchairs, it should have been obvious to the City that they needed reasonable accommodations to relocate. *See Duvall*, 260 F.3d at 1139.

Consequently, the Court finds that Plaintiffs have established that the City failed to provide people with disabilities, including Harner, John, and Tyson, with reasonable accommodations during the clean up and removal of homeless encampments in the

City. *See Duvall*.

Plaintiffs can satisfy the fourth element of their ADA and Rehabilitation Act claims by showing that the City's denial of access to benefits or services was based on the fact, or perception, that they have disabilities. *See Weinreich v. L.A. Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 979 (9th Cir. 1997).

To show that the discrimination was based on the fact, or perception, of Plaintiffs' disabilities, they may show that a facially neutral and consistently enforced policy burdened them in a manner different from, and greater than, non-disabled people experiencing homelessness. *See McGary*, 386 F.3d at 1265. To prevent undue burdens on people with disabilities, the ADA imposes an affirmative duty to provide special or preferred treatment as a reasonable accommodation. *McGary*, 386 F.3d at 1266.

Here, Harner, John, and Tyson declared that the City's actions burdened them in a manner different from, and greater than, people without disabilities. *See McGary*, 386 F.3d at 1265. Harner declared that, after the City evicted her from Perris Hill Park, she moved to the side of Perris Hill Park Road where there is no sidewalk. To get out of the dirt, Harner declared that she relies on a friend to push her wheelchair, or she crawls out and pulls her wheelchair behind her, to get to the sidewalk across the street. John declared that, after the City destroyed her walker, she struggles to move in situations where she cannot use her wheelchair. Finally, Tyson declared that, after the City seized his personal property from the parking lot near Meadowbrook Park, he moved to the adjacent ravine, and to get down to the ravine he has to throw his wheelchair down to the ravine and then slide down on his body.

Consequently, the Court finds that Plaintiffs have established a *prima facie* case that the City discriminates against people with disabilities, including Harner, John, and Tyson, based on the fact, or perception, of their disabilities. *See Weinreich*, 114 F.3d at 979.

Thus, Plaintiffs have established a likelihood of success on the merits for their

ADA and Rehabilitation Act claims. *See Winter*, 555 U.S. at 22.

Irreparable Harm

Generally, Plaintiffs must show that irreparable harm will continue in the absence of a preliminary injunction. *See Winter*, 555 U.S. at 2021. Plaintiffs seek an injunction based on both their constitutional and statutory claims, here.

A preliminarily established constitutional violation, as is the situation, here, constitutes irreparable harm in support of the issuance of a preliminary injunction. *See Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 140, 1412 (9th Cir. 1991).

In support of a preliminary injunction based on their ADA and Rehabilitation Act claims, Plaintiffs Harner, John, and Tyson declared that they submitted requests for reasonable accommodations to the City but that the City never responded. Further, Harner and Tyson declared that they are currently experiencing homelessness, and live in locations that are not wheelchair accessible after the City evicted them from Perris Hill Park and Meadowbrook Park. Because the City has plans to continue cleaning up and evicting the occupants of homeless encampments, Harner and Tyson are immediately threatened by additional discrimination based on the City's failure to provide reasonable accommodations. Consequently, if a preliminary injunction is not issued, Harner and Tyson are likely to continue to suffer irreparable harm before a decision on the merits is rendered. *See Herb Reed Enters., LLC v. Fla. Entm't Mgmt.*, 736 F.3d 1239, 1249 (9th Cir. 2013).

Accordingly, Plaintiffs have demonstrated that irreparable harm will continue in the absence of a preliminary injunction. *See Winter*, 555 U.S. at 2021.

Balance of Equities and the Public Interest

When considering a motion for a preliminary injunction, the Court must balance the equities by identifying the harm that an injunction may cause to the Defendant and weighing that against the risk of continuing injury to the Plaintiffs. *See Armstrong v. Mazurek*, 94 F.3d 566, 568 (9th Cir. 1996).

The Court must, also, consider whether the public interest would be furthered by the issuance of a preliminary injunction. *See Inst. of Cetacean Rsch. v. Sea Shepherd Conservation Soc.*, 725 F.3d 940 (9th Cir. 2013). Because a municipality's actions are, presumably, in the public's interest, the balance of equities analysis merges into the public interest analysis. *See Drakes Bay Oyster Co.*, 747 F.3d 1073, 1092 (2014).

Here, the City argued that a preliminary injunction would hamper its efforts to regulate public spaces. Thus, the Court must balance the City's interest in keeping public spaces clean against the constitutional rights of individuals experiencing homelessness to retain their personal belongings and their right to reasonable accommodations if they, also, have disabilities. However, the Court cannot give weight to the Policy, as it has preliminarily found the Policy to be unconstitutional and violative of the ADA. *See Garcia*, 481 F. Supp. 3d at 1050–51.

Further, the Court is, and should be, cognizant of the fact that people experiencing homelessness are members of the community, and their interests, too, must be included in assessing the public interest. *See Le Van Hung v. Schaff*, No. 19-cv-10436-CRB, 2019 WL 1779584 at 7 (N.D. Cal. 2019). Indeed, "[o]ur society as a whole suffers when we neglect the poor, the hungry, the disabled, or when we deprive them of their rights or privileges." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

In sum, the balance of equities, here, tips in the favor of Plaintiffs and the issuance of a preliminary injunction. Likewise, the public interest favors the issuance of a preliminary injunction.

Waiver of Bond

Usually, a bond is a condition precedent to the issuance of a preliminary injunction. Fed. R. Civ. P. 65(c). However, the Court may waive the bond when the Plaintiffs are unable to afford its cost or when there is little, or no, harm to the party being enjoined. *See Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir. 2003);

Barahona-Gomez v. Reno, 167 F.3d 1228, 1237 (9th Cir. 1999).

Plaintiffs failed to provide the Court with evidence of their current financial conditions, so the Court cannot consider whether any of them can afford the cost of a bond, though the Court presumes that the individual Plaintiffs who are currently experiencing homelessness cannot afford the cost of a bond. Regardless, the Court finds, here, that the City will not be harmed by the injunction, and that its lack of harm justifies the waiver of the bond requirement, as it did in *Lavan v. City of Los Angeles*, No. 11-cv-2874-PSG, 2011 WL 1533070 at 6 (C.D. Cal. 2011), where a similar injunction was issued.

Preliminary Injunction

Plaintiffs have established their entitlement to a preliminary injunction that enjoins the City, its contractors and agents, from removing individuals experiencing homelessness and/or their attended and/or unattended personal property from encampments within the City pending a final resolution of this case or further order of the Court.

The Court will consider vacating the preliminary injunction if the City crafts and presents a lawful revised Policy regarding homeless encampment clean up operations, and if that revised Policy is approved by the Court.

Plaintiffs' Request for Leave to File Supplemental Evidence

After Plaintiffs filed their motion for a preliminary injunction, they moved, pursuant to Fed. R. Civ. Proc. 65(a), for leave to file supplemental evidence in support of their motion for a preliminary injunction. The motion for leave to file supplemental evidence is, now, moot.

Accordingly,

It is Ordered that Plaintiffs' motion for a preliminary injunction be, and hereby is, **Granted**.

It is further Ordered that, pending a final resolution of this case or further order of the Court, the City of San Bernardino, and its employees, agents and contractors, be, and hereby are, **Preliminarily Enjoined**, forthwith, from conducting any operations involving or related to the removal of unhoused people and/or their attended and/or unattended personal property from parks and other publicly accessible locations in the City; the Court will consider vacating this Preliminary Injunction if the City crafts and presents a lawful revised Policy regarding homeless encampment clean up operations and that revised Policy is approved by the Court.

It is Further Ordered that the City shall, forthwith, deliver a copy of this Order and Preliminary Injunction to Burrtec and any other contractors and agents it may have.

It is Further Ordered that the bond for this Preliminary Injunction be, and hereby is, Waived.

It is further Ordered that this Order will serve as the findings of fact and conclusions of law in support of the issuance of this Preliminary Injunction.

It is Further Ordered that Plaintiffs' motion for leave to file supplemental evidence in support of their motion for a preliminary injunction be, and hereby is, Denied as moot.

Date: January 12, 2024

Terry J. Hatter, Jr.
Senior United States District Judge

THE CITY OF NEW YORK
LAW DEPARTMENT
100 CHURCH STREET
NEW YORK, NY 10007

HON. SYLVIA O. HINDS-RADIX
Corporation Counsel

JONATHAN PINES
Deputy Chief, General Litigation
o.: 212-356-2082
c: 917-370-3015
jpines@law.nyc.gov
(not for service)

May 23, 2022

Honorable Deborah Kaplan
Deputy Chief Administrative Judge
for the New York City Courts
Supreme Court, New York County, Civil Term
New York, New York 10007

Re: *Callahan v. Carey,* Index No. 42582/1979
Letter application for modification of provision of Final Judgment on Consent, dated August 26, 1981

Dear Justice Kaplan:

On behalf of Defendant The City of New York[1] ("City Defendant") and pursuant to the requirements of a post-judgment Order in the above-referenced matter, dated October 15, 1984 ("Post-Judgment Order") (annexed as Appendix 1), I am writing to seek the permission of this Court to move for relief from, and modification of, a provision of the Final Judgment on Consent, dated August 26, 1981 ("Judgment") (annexed as Appendix 2). Given the antiquity of this matter, commenced nearly 44 years ago, I provide the following background and context for the Court's benefit.

Plaintiffs commenced this action on October 2, 1979, challenging the adequacy of shelter then offered by the City Defendant to homeless men in New York City. With the issuance of the Judgment, the parties – Plaintiffs, the City Defendant, and New York State

[1] The City of New York was sued herein as Edward I. Koch, as Mayor of the City of New York; James A. Krauskopf, as Commissioner of the New York City Human Resources Administration; and Calvin Reid, as Director of the Shelter Care Center for Men.

defendant officials[2] – agreed to numerous substantive terms regarding the provision of shelter to homeless men and to specified standards applicable thereto.[3] Pursuant to Paragraph 19 of the Judgment, this Court retained jurisdiction "for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any appliable provisions thereof . . . ."

By the subsequent Order, dated October 15, 1984, this Court set forth the following process for any such application made under Paragraph 19 of the Judgment:

> [H]enceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion and, if so, schedule its submission.

Order at 1. The City Defendant submits this pre-motion letter for modification and relief as authorized by Paragraph 19 of the Judgment and in accordance with the process outlined in the Order, as set forth above.

For the purposes of the instant application, the substantive provision of the Judgment from which the City Defendant seeks relief is Paragraph 1, providing as follows:

> 1. The City defendants shall provide shelter and board to each homeless man who applies for it provided that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter.

---

[2] The Defendant State officials named in the caption were Hugh L. Carey, as Governor of the State of New York; and Barbara Blum, as Commissioner of the New York State Department of Social Services.

[3] The *Callahan* obligations for homeless men were subsequently extended to homeless women in a subsequent action. *Eldredge v. Koch,* 118 Misc. 2d 163 (Sup. Ct. N.Y. City, 1983), *rev'd in part on other grounds,* 98 A.D.2d 675 (1st Dep't 1983).

Callahan Judgment, Para. 1. The City Defendant requests an opportunity to move to amend Paragraph 1 as follows:

- Change "Paragraph 1" to "Paragraph 1(a)," and, within that sub-paragraph, replace "each homeless man" with "homeless single adults," consistent with *Eldridge*, *supra*; and

- Add a new Paragraph 1(b), providing for the staying of both Paragraph 1 obligations to homeless single adults, as well as similar (but not equivalent) obligations to adult families.[4]

The resulting provision would read as follows:

> 1(a) The City defendants shall provide shelter and board to each homeless ~~man~~ single adult who applies for it provided that (a) ~~the man~~ such single adult meets the need standard to qualify for the home relief program established in New York State; or (b) ~~the man~~ such single adult by reason of physical, mental or social dysfunction is in need of temporary shelter.
>
> 1(b) The obligations to provide shelter to both homeless adults and to adult families shall be stayed when the City of New York, acting through the New York City Department of Homeless Services ("DHS"), lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter.

Should the City Defendant be permitted to move for the above-described relief, it will provide affidavits from high-ranking City officials establishing the following facts:

> (1) Starting in April 2022, the City Defendant, through DHS, began experiencing an unprecedented increase in the number of single adults, adult families, and families with children seeking emergency shelter. The main driver of this increase was an influx of asylum-seekers arriving here from the southern border of the United States, in large part orchestrated by out-of-State actors seeking to score political points by exporting the responsibility and attendant fiscal burdens of caring for this population out of their state and, by political calculation, to the City of New York. These asylum-

[4] City Defendant, by this application, seeks no relief regarding its obligations to families with children. The provision of shelter to families with children has its roots in a judgment in a separate case, *Boston v. City of New York,* Index No. 402295/08 (Sup. Ct., N.Y. Cty. Dec. 12, 2008).

seekers arrived without housing and, in many cases, without any resources to care for themselves.

(2) Since the Spring of 2022, tens of thousands of asylum-seekers have arrived in the City and been provided a temporary place to stay in various City locations. By October of 2022, more than 17,000 asylum-seekers had entered the City's DHS shelter system. Last Summer, the State of Texas and the City of El Paso began chartering buses of migrants to various major cities, with by far the majority of this population sent to New York City. While El Paso has provided the City with scheduling and other basic information regarding the buses and their passengers, the State of Texas has refused any outreach by the City to coordinate this process. Consequently busloads of asylum-seekers arrive at the Port Authority Bus Terminal at unpredictable hours.

(3) By May 15, 2023, more than 65,000 asylum-seekers had arrived in the City, and currently, more than 44,000 asylum-seekers remain in locations provided by the City, with more arriving every day.

(4) This ongoing flood of asylum-seekers arriving in New York City from the southern border represents a crisis of national, indeed international dimension; yet, the challenges and fiscal burden of this national crisis have fallen almost exclusively upon the City. As the country's by-default backstop for international and national policy failures, as well as inter- and intra-state political maneuvering, all entirely outside of its control, the City is now facing an unprecedented demand on its shelter capacity. These unprecedented demands on the City's shelter resources confront the City Defendant with challenges never contemplated, foreseeable, or indeed even remotely imagined by any signatory to the *Callahan* Judgment.

(5) Notwithstanding that the influx of asylum-seekers from the border has been orchestrated in large measure by out-of-State actors without regard for the City's ability to provide care, the City has responded, to date, with compassionate concern for the welfare of migrant individuals and families who have endured unimaginable hardships before arriving here.

(6) The City has made extraordinary efforts to meet the needs of these tens of thousands of asylum-seekers, including the establishment of numerous DHS emergency shelters; the declaration of a state of emergency by Mayor Adams on October 7, 2022 (Emergency Executive Order Number 224)

(annexed as Appendix 3)[5]; the corresponding direction to city agencies to establish Humanitarian Emergency Response and Relief Centers to provide, among other things, immediate respite and sleeping accommodations to asylum-seeking individuals and families; and the recent urgent response by the New York City Office of Emergency Management to open Emergency Respite Centers. However, even as these emergency measures are undertaken, stretching the City's fiscal and personnel resources to the breaking point, waves upon waves of asylum-seekers continue to arrive, with those numbers only now increasing upon the expiration of the Title 42 Order.[6]

(7) Including both asylum-seekers and the City's "resident homeless" population, the City Defendant is currently providing shelter for over 93,000 individuals, over 81,000 of whom are being provided for by DHS. This represents an over 75 % increase in the DHS shelter population in a single year and far exceeds the City's previous highest-ever-recorded population of 61,000 individuals.

(8) While the City is endeavoring to enlist other localities within New York State to share the shelter burdens imposed almost exclusively upon the City by out-of-State actors, those efforts are meeting with local resistance including executive orders and related legal challenges that, even if of questionable merit, effectively hamstring the City's efforts at modest burden-sharing at a time when the City has reached the extended outer limits of its shelter capacity, both in terms of sites and staffing.

(9) The dire extremity of this crisis does not represent a failure of will or commitment on the City's part to asylum-seeking individuals and families seeking refuge from the peril and hardship in their countries of origin; rather it results precisely from that commitment: the City has done far more than many other – if not all – other jurisdictions in the United States for this desperate population. The unfortunate reality is that the City has extended itself further than its resources will allow, placing in jeopardy the City's obligations to manage its fisc in order to maintain critical infrastructure and services and provide for the well-being of all of its citizens.

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[5] Emergency Executive Order Number 224 has been extended by subsequent executive orders.

[6] Pursuant to sections 362 and 365 of the Public Health Services Act (42 U.S.C. §§ 362, 365) and the implementing regulation at 32 C.F.R. § 71.40, the Director of the United States Center for Disease Control ("CDC") issued the *Public Health Reassessment and Order Suspending the Right to Introduce Certain Persons from Countries Where a Quarantinable Communicable Disease Exists* (the "Title 42 Order").

Based upon the above summary, on behalf of the City Defendant, I respectfully request that Your Honor assign this 44-year-old matter to a newly-assigned justice for consideration of City Defendant's request for leave to move for partial relief from the Judgment. I thank Your Honor for your consideration of this application.

Very truly yours,

Jonathan Pines
Assistant Corporation Counsel

Copies (by email) to:

Adrienne Holder (AHolder@legal-aid.org)
Chief Attorney, Civil Practice
Josh Goldfein (JGoldfein@legal-aid.org)
Staff Attorney
The Legal Aid Society
Attorneys for Plaintiffs

Jennifer Levy (Jennifer.Levy@ag.ny.gov)
First Deputy Attorney General
Office of the New York State Attorney General
Attorneys for State Defendants

APPENDIX 1

Callahan 1984 Order

SUPREME COURT : STATE OF NEW YORK
TRIAL TERM : PART 23

ROBERT CALLAHAN, et al.,

Plaintiffs

- against -

HUGH L. CAREY, as Governor of the State of New York, et al.,

Defendants

Index No. 42582/79
10/15/87

WALLACH, RICHARD W., J.:

The parties are advised that henceforth no motions are to be made except with the permission of the court. Such permission is to be sought by letter from counsel addressed to the court briefly describing the relief needed and setting forth proposals for the submission of proof and argument. Responses from opposing counsel are also to be made by letter addressed to the court, and should be received by the court within two or three days thereafter. Should the party seeking leave to make a motion wish to reply, such will be received by the court if delivered to chambers within a day or two after delivery of the responding letter. In a written order the court will then determine whether to entertain the proposed motion, and, if so, schedule its submission.

Service of all papers herein is to be made in the same manner as delivery is effected upon the court.

In the event that there is a need for immediate, temporary relief pending the submission and decision of a motion, this too is to be sought by letter, clearly alerting that immediate, temporary relief is being sought and covering any affidavits or other evidentiary materials necessary to warrant the granting of immediate, temporary relief. Upon receipt thereof, the other sides should hold themselves ready to appear in chambers within 48 hours for argument on the question of whether immediate, temporary relief should be granted, bringing with them any evidentiary materials they deem appropriate for purposes of opposition. They may also bring with them a responding letter opposing submission of the proposed motion. The conference in chambers will be set up by way of telephone communications with chambers.

In the event the question of immediate, temporary relief is not resolved consensually in chambers, the court, by oral order dictated into the record, will decide whether to grant such relief; if so, the court will schedule the submission of formal proof and argument; if not, whether the proposed motion should be entertained at all will remain

an open question to be decided by the court in a subsequent written order.

Defendants are requested to respond forthwith to the letter dated October 15, 1984 from Mr. Hayes to the court.

The foregoing constitutes an order of the court made sua sponte pursuant to its inherent power of control over its own calendar and the disposition of business before it.

Dated: October 15, 1984

J.S.C.

APPENDIX 2

Callahan Order

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

ROBERT CALLAHAN, CLAYTON W. FOX, THOMAS DAMIAN ROIG, JAMES HAYES, JAMES SPELLMAN and PAUL E. TOOLE, on their own behalves and on behalf of all others similarly situated, Plaintiffs, -against- HUGH L. CAREY, as Governor of the State of New York, BARBARA BLUM, as Commissioner of the New York State Department of Social Services, EDWARD I. KOCH, as Mayor of the City of New York, JAMES A. KRAUSKOPF, as Commissioner of the New York City Human Resources Administration, and CALVIN REID, as Director of the Shelter Care Center for Men, Defendants.	Index No.: 42582/79 FINAL JUDGMENT BY CONSENT

Plaintiffs Robert Callahan, Clayton Fox and Thomas Roig, having brought this action on October 2, 1979 challenging the sufficiency and quality of shelter for homeless men in New York City, and plaintiffs Callahan, Fox, Roig, James Hayes, James Spellman and Paul Toole, having filed their Amended Complaint on March 31, 1980, and defendants Hugh L. Carey, as Governor of the State of New York, and Barbara Blum, as Commissioner of the State of New York Department

of Social Services (the "State defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and defendants Edward Koch, as Mayor of the City of New York, Stanley Brezenoff, as Administrator of the New York City Human Resources Administration, and Calvin Reid, as director of the Shelter Care Center for Men (the "Men's Shelter") (the "City defendants"), having filed their Amended Answer on January 19, 1981 therein denying the material allegations of the Amended Complaint, and plaintiffs and defendants by their respective attorneys, having consented to the entry of this Final Judgment without any final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any such issue:

NOW, therefore, without final adjudication of any issue of fact or law herein and without this Final Judgment constituting any evidence or admission by any party hereto with respect to any issue, and upon consent of all parties, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

Provision of Shelter

1. The City defendants shall provide shelter and board to each homeless man who applies for it provided

that (a) the man meets the need standard to qualify for the home relief program established in New York State; or (b) the man by reason of physical, mental or social dysfunction is in need of temporary shelter.

Shelter Standards

2. The City defendants shall provide shelter at facilities operated in accordance with the standards set forth in this paragraph as soon as practicable and not later than September 1, 1981. The term "shelter facility" refers to the Kaener Building, Camp LaGuardia, the Men's Shelter and any other facility used by the City defendants to shelter homeless men. This paragraph does not apply to the Bowery lodging houses (Palace, Kenton, Union, Sunshine, Delevan and Stevenson) presently used by the City defendants to shelter homeless men (the "hotels"); if the City defendants choose to shelter homeless men in any additional Bowery lodging house, they will advise counsel for the plaintiffs and a good faith effort shall be made by plaintiffs and the City defendants to agree to operating standards for such facilities.

(a) Each resident shall receive a bed of a minimum of 30 inches in width, substantially constructed, in good repair and equipped with clean springs.

(b) Each bed shall be equipped with both a clean, comfortable, well-constructed mattress standard in size for the bed and a clean, comfortable pillow of average size.

(c) Each resident shall receive two clean sheets, a clean blanket, a clean pillow case, a clean towel, soap and toilet tissue. A complete change of bed linens and towels will be made for each new resident and at least once a week and more often as needed on an individual basis.

(d) Each resident shall receive a lockable storage unit.

(e) Laundry services shall be available to each resident not less than twice a week.

(f) A staff attendant to resident ratio of at least 2 per cent shall be maintained in each shelter facility at all times.

(g) A staff attendant trained in first aid shall be on duty in each shelter facility at all times.

(h) A minimum of ten hours per week of group recreation shall be available for each resident at each shelter facility.

(i) Residents shall be permitted to leave and to return to shelter facilities at reasonable hours and without hindrance.

(j) Residents of shelter facilities shall be provided transportation (public or private) to enable them to return to the site where they applied for shelter.

(k) Residents of shelter facilities shall be permitted to leave the facility by 7:00 a.m. if they so desire.

(l) Residents shall be permitted to receive and send mail and other correspondence without interception or interference.

(m) The City defendants shall make a good faith effort to provide pay telephones for use by the residents at each shelter facility. The City defendants shall bear any reasonable cost for the installation and maintenance of such telephones.

3. The capacity of shelter facilities shall be determined as follows:

(a) The capacity of newly constructed shelter facilities shall comply with the standards set forth in Appendix A, except

in cases of emergency need as defined in Appendix B.

(b) The City defendants shall disclose to plaintiffs' counsel any plan to convert an existing structure to a shelter facility and the intended capacity for that facility at least 30 days in advance of the implementation or execution of any such conversion plan. A reasonable capacity for each such facility shall be established. The standards set forth in Appendix A shall be used as guidelines in determining whether the planned capacity of the City defendants is reasonable.

(c) Effective December 31, 1981, the capacity of the Keener Building shall not exceed 416 except in cases of emergency need as defined in Appendix B, in which case the maximum number of men who may be sheltered in the Keener Building is 450. Between the date of entry of this judgment and December 31, 1981, the capacity of the Keener Building shall not exceed 450.

(d) The capacity of Camp LaGuardia shall comply — by construction of new dormitory buildings — with the standards set forth in Appendix A,

except in cases of emergency need as defined in Appendix B, as soon as practicable and not later than December 31, 1982, except that the individual rooms in the "Main Building" may be used as sleeping rooms for one person each. The construction start of such new dormitory buildings shall occur no later than March 1, 1982.

Bowery Lodging Houses

4. Hotels presently used by the City defendants shall meet the following standards at the time of entry of this judgment and the City defendants shall maintain such standards thereafter:

(a) Each resident shall receive a bed, a clean mattress, two clean sheets, one clean blanket, one clean pillow and one clean pillow case. A complete change of bed linens (sheets and pillow case) shall be made for each new resident and at least once a week and more often as needed on an individual basis.

(b) Each resident shall be supplied with a clean towel, soap and toilet tissue. A clean towel shall be provided to each new resident and towels shall be changed at least once a week and more often as needed on an individual basis.

(c) There shall be two trained security guards in the Palace Hotel between the hours of 8:00 p.m. and 4:00 a.m. and one trained security guard between the hours of 4:00 p.m. and 8:00 p.m., and 4:00 a.m. to 8:00 a.m. There shall be one trained security guard in the Kenton Hotel between the hours of 4:00 p.m. and 8:00 a.m. These security guards shall file with the City defendants incident reports on any incidents of violence or attempted violence occurring in the hotels.

(d) Showers shall be available at the Men's Shelter beginning at 7 a.m. and signs advising hotel residents of that fact shall be posted at the front desk in each hotel and at the door of each bathroom in each hotel. Persons showering at the Men's Shelter shall be provided adequate supervision (including safeguarding of personal property), a clean towel, soap and, if requested, a delousing agent.

(e) A lockable storage unit of adequate size to store personal property shall be available either at the Men's Shelter or at the hotels for each man sheltered by the City defendants at hotels.

(f) Heat shall be maintained in accordance with New York City guidelines for rental residences.

(g) Cleanliness shall be maintained throughout the hotels at all times.

Intake Centers

5. The City defendants shall accept applications for shelter at the Men's Shelter, 8 East Third Street, New York, New York and at 529 Eighth Avenue, New York, New York (the "central intake centers"). Applications for shelter shall be accepted at all times at the Men's Shelter, and applications for shelter shall be accepted at 529 Eighth Avenue between the hours of 5:00 p.m. and 1:00 a.m., seven days per week. The City defendants shall provide direct transportation to shelter facilities from the central intake centers to all homeless men for whom the City defendants must provide shelter pursuant to paragraph 1, supra. The 529 Eighth Avenue intake center, shall be opened as a central intake center not later than September 1, 1981.

6. The City defendants shall operate additional satellite intake centers on a 24-hour basis Monday through Friday at the following locations:

(a) Harlem Hospital Center, 506 Lenox Avenue, New York, New York;

(b) Kings County Hospital Center, 451 Clarkson Avenue, Brooklyn, New York;

(c) Lincoln Hospital, 234 East 149th Street, Bronx, New York; and

(d) Queens Hospital Center, 82-68 164th Street, Jamaica, New York.

Men seeking shelter at the satellite intake centers shall be provided adequate fare for public transportation and clear written directions to either (i) a shelter facility, or (ii) a central intake center -- according to the preference of the persons seeking shelter. The City defendants shall provide direct transportation from the satellite intake centers to a shelter facility to all men who appear so physically or mentally disabled that they are unable to reach a shelter facility by public transportation. Satellite intake centers shall be opened not later than September 1, 1981. It is understood that the above satellite intake centers shall be operated in conjunction with borough crisis centers. In the event that the borough crisis center program is terminated, the City defendants may, in their discretion, reduce the hours of operation of the satellite intake centers to between 5 p.m. and 1 a.m.

7. The City defendants shall accept applications for shelter at shelter facilities providing that such applicants have applied for and have been found eligible for

shelter by the City defendants within six months of the time of application at a shelter facility. Shelter facilities shall also provide shelter for one night to any person who has not previously applied for shelter who seeks shelter at a shelter facility after 8:00 p.m.

Community Participation

8. Each shelter facility, central intake center and satellite intake center, shall utilize the services of available community members to the maximum reasonable extent. These persons are not City employees or volunteers in a City sponsored program within the meaning of section 50(k) of the General Municipal Law and such persons shall execute statements to this effect.

Information

9. The City defendants shall provide applicants for shelter with clear written information concerning other public assistance benefits to which they may be entitled at the time applicants apply for shelter.

Compliance Monitoring

10. Defendant Krauskopf shall appoint qualified employees with no administrative responsibility for providing shelter to monitor defendants' shelter care program for men with respect to compliance with this decree. These employees shall visit each shelter facility, central intake center, satellite intake center and hotel at least twice a month and will submit to defendant Krauskopf a written report at least

twice a month describing compliance or lack thereof with each provision of this decree. These reports shall be made available to plaintiffs' counsel upon reasonable notice.

11. Plaintiffs' representatives shall have full access to all shelter facilities, central intake centers and satellite intake centers, and plaintiffs' counsel shall be provided access to any records relevant to the enforcement and monitoring of this decree.

12. Defendant Krauskopf shall deliver by hand each day to plaintiffs' counsel a statement listing:

(a) the number of men who applied for shelter at each central intake center and at each satellite intake center;

(b) the number of men who were provided shelter at each shelter facility or hotel;

(c) the number of men who were denied shelter at each shelter facility, central intake center and satellite intake center and the reason for each such denial;

(d) the number of men who were accepted for shelter at each central intake center and satellite intake center who did not reach a shelter facility; and

(e) the number of men who were provided direct transportation from each satellite intake center to a shelter facility.

13. It is the intention of defendant Krauskopf to conduct daily inspections of the Palace Hotel and to deliver reports of such inspections each day to plaintiffs. It is also the intention of defendant Krauskopf to conduct inspections of the other hotels used by defendants to shelter homeless men not less than three times per week and to deliver reports of such inspections not less than three times a week to plaintiffs' counsel. A sample of the inspection report form to be used is attached hereto as Exhibit C.

No Waivers

14. Nothing in this judgment permits any person, not-for-profit corporation, charitable organization, or governmental entity or subdivision to operate a shelter, as defined in New York Code of Rules and Regulations, Title 18, § 485.2(c), in violation of the requirements of the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

15. Nothing in this judgment should operate or be construed as res judicata or collateral estoppel so as to foreclose any signatory party from any claim or defense in any subsequent administrative or judicial proceeding.

16. Nothing in this judgment shall be deemed to authorize or to prevent the operation by the New York City Human Resources Administration of the Keener Building on

Ward's Island as a shelter or shelter facility after October 15, 1981, except in accord with a valid contract or agreement among the New York State Department of Social Services, the New York State Office of Mental Health and the New York City Human Resources Agency and with an operating certificate issued by the New York State Department of Social Services.

17. The Commissioner of the New York State Department of Social Services agrees to reimburse the New York City Human Resources Agency for the operation of a shelter facility or shelter facilities referred to in this judgment pursuant to New York Social Services Law § 153, except if such shelter facility fails to comply with the requirements for shelters contained in the New York Social Services Law or the New York Code of Rules and Regulations, Title 18; provided that nothing in this judgment can or does obligate the Legislature of the State of New York to appropriate funds.

18. Nothing in this judgment shall prevent, limit or otherwise interfere with the authority of the Commissioner of the New York State Department of Social Services to enforce and carry out her duties under the New York Social Services Law, Title 18, of the New York Code of Rules and Regulations, or any other applicable law.

Continuing Jurisdiction

19. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction, modification, or termination of this entire judgment or of any applicable provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

Dated: New York, New York
August 26, 1981

David Weschler
The Legal Aid Society
Volunteer Division
125 Broad Street
New York, New York 10004
(212) 558-3575

By: Robert M. Hayes
Robert M. Hayes

Attorneys for Plaintiffs

Allen G. Schwartz
Corporation Counsel
100 Church Street
New York, New York 10007
(212) 566-1369

By: George Gutwirth
George Gutwirth
Assistant Corporation
Counsel

Attorney for the City Defendants

Robert Abrams
Attorney General
Two World Trade Center
New York, New York 10047
(212) 488-6770

By: _____
Amy Juvilet
Assistant Attorney General

Attorney for the State Defendants

So ordered:

_____
J.S.C.

Appendix A

Space Requirements for Shelters for Adults

(1) Every facility shall have space for dining and leisure activities.

(2) Sleeping areas shall not be considered as dining or leisure areas.

(3) Space provided for dining shall be:

(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds;

(ii) at least 12 square feet for each additional certified bed.

(4) Space provided for leisure areas shall be:

(i) at least 120 square feet in facilities with a certified bed capacity of less than 10 beds.

(ii) at least 12 square feet per bed in facilities with a certified bed capacity of 10 or more beds.

(5) When not in use, dining space may be used, with written approval from the New York State Department of Social Services ("Department"), as leisure space.

(6) An operator may request Department approval of a waiver to reduce the square footage requirements for dining and leisure space.

A waiver shall be granted only upon demonstration by the operator that the food service and the program needs of residents can be met.

(7) Baths and Toilet Facilities

There shall be a minimum of one toilet and one lavatory for each six residents and a minimum of one tub or shower for each ten residents.

(8) Sleeping Rooms

(i) in single occupancy sleeping rooms, a minimum of 80 square feet per resident shall be provided;

(ii) in sleeping rooms for two or more residents, a minimum of 60 square feet per resident shall be provided;

(iii) a minimum of 3 feet, which is included in the per resident minima, shall be maintained between beds and for aisles;

(iv) partitions separating sleeping areas from other areas shall be ceiling high and smoke tight;

(v) all bedrooms shall be:

(a) above grade level;

(b) adequately lighted;

(c) adequately ventilated;

(vi) light and ventilation for bedrooms shall be by means of windows in an outside wall;

(vii) bedrooms shall open directly into exit corridors;

(viii) bedrooms may not be used as a passageway, corridor or access to other bedrooms.

(9) Adequate storage space for cleaning supplies and equipment shall be provided.

Appendix B

Short term emergency shelter may be provided to a number of persons in excess of the capacity of the facility provided that all of the following conditions are met:

(1) Snow emergencies, excessive cold or other similar circumstances create an emergency need for additional shelter space;

(2) The operator is able to meet the food and shelter needs of all persons in residence;

(3) The facility remains in compliance with applicable local building, fire protection and health and sanitation codes;

(4) The operator advises plaintiffs' counsel of the maximum number of persons to be cared for during an emergency situation in any facility as soon as possible after an emergency situation develops;

(5) The operator provides shelter to additional persons no more than 30 days in any calendar year; and

(6) The operator maintains records which document adherence to these conditions.

APPENDIX 3

Emergency Executive Order No. 224

THE CITY OF NEW YORK
OFFICE OF THE MAYOR
NEW YORK, N.Y. 10007

EMERGENCY EXECUTIVE ORDER NO. 224

October 7, 2022

WHEREAS, over the past several months, thousands of asylum seekers have been arriving in New York City, from the Southern border, without having any immediate plans for shelter; and

WHEREAS, as of October 5, 2022, the asylum seekers who have entered the City's shelter system operated by the Department of Homeless Services (DHS Shelter System") include approximately 17,429 individuals, comprised of 2,896 families with children; 6,014 adults; and 734 adult families; and

WHEREAS, to date, the City has opened 42 DHS shelters in response to this influx of asylum seekers;

WHEREAS, the state of Texas, and the city of El Paso, have pledged to continue sending asylum seekers on buses to New York City, and

WHEREAS, Texas has not provided notice to New York City, and has indicated that it will continue not providing notice to New York City, regarding how many busloads of people will be arriving, or the dates and times of their arrival; and

WHEREAS, many of the buses arrive at the Port Authority Bus Terminal unannounced and unscheduled, in the early morning or late night hours; and

WHEREAS, many of the asylum seekers are coping with the effects of trauma and exhaustion, as well as other physical and mental health concerns; and

WHEREAS, the stress on the asylum seekers has been compounded by the additional days of travel to New York City, during which time it has been reported that many have been afforded limited food and water, and limited opportunities to leave the bus; and

WHEREAS, the DHS Shelter System is nearing its highest ever recorded population of over 61,000 individuals and is not designed to serve the influx of asylum seekers arriving to New York City from the Southern border;

WHEREAS, if asylum seekers continue to enter the City at the current rate, the total population within the DHS Shelter System will exceed 100,000 individuals next year;

NOW, THEREFORE, pursuant to the powers vested in me by the laws of the State of New York and the City of New York, including but not limited to the New York Executive Law, the New York City Charter and the Administrative Code of the City of New York, and the common law authority to protect the public in the event of an emergency:

Section 1. State of Emergency. A state of emergency is hereby declared to exist within the City of New York based on the arrival of thousands of individuals and families seeking asylum.

§2. Humanitarian Emergency Response and Relief Centers.

a. I hereby direct New York City Emergency Management (NYCEM) to coordinate with the New York City Health and Hospitals Corporation (H+H), the Department of Information Technology and Telecommunications, also known as the Office of Technology and Innovation (OTI), the Department of Design and Construction (DDC), the Mayor's Office of Immigrant Affairs, and other agencies as appropriate, to establish and operate temporary humanitarian relief centers to be known as "Humanitarian Emergency Response and Relief Centers" ("HERRCs") that will provide assistance for arriving asylum seekers, helping them by immediately offering respite, food, medical care, case work services, and assistance in accessing a range of settlement options, including through connections to family and friends inside and outside of New York City, in addition to, if needed, direct referrals to alternative emergency supports.

b. I hereby authorize the Deputy Mayor of Health and Human Services to enter into a memorandum of understanding with H+H concerning the establishment and operation of the HERRCs, which shall, among other things, provide for the establishment of policies and procedures for the operation of the HERRCs, provide for the confidentiality of information collected from the persons served in the HERRCs, and provide restrictions on disclosure of information about an individual's immigration status consistent with the policies set forth in Executive Order 34 (dated May 13, 2003) and Executive Order 41 (dated September 17, 2003).

§ 3. Cooperation of all agencies.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

I hereby direct all agency heads, including but not limited to the Mayor's Office of Immigrant Affairs, the New York City Emergency Management, the Department of Health and Mental Hygiene, the Mayor's Community Affairs Unit, the Fire Department, the Police Department, the Sheriff's Office, the Chief Privacy Officer, and the Departments of Buildings, Housing Preservation and Development, Sanitation, Social Services, Homeless Services, Environmental Protection, and Parks and Recreation, to take all appropriate and necessary steps to preserve health and public safety during this humanitarian crisis.

§ 4. Suspension of laws and rules.

a. I hereby direct that the following laws and rules related to the Uniform Land Use Review Procedure, and other procedures applicable to the City planning and land use review processes, to the extent they would apply to the siting, construction and operations of the HERRCs, impose limitations on the amount of time permitted for the holding of public hearings, the certification of applications, the submission of recommendations, any required or necessary voting, the taking of final actions, and the issuance of determinations, are suspended, and that any such time limitations are tolled for the duration of the State of Emergency: sections 195, 197-d, 203 , and 3020 and subdivisions (b) through (h) of section 197-c of the Charter, sections 25-303, 25-306, 25-308, 25-309, 25-310 and 25-313 of the Administrative Code, and sections 1-05.5 and 1-07.5 of Title 2 and sections 2-02 through 2-07 of Title 62 of the Rules of the City of New York.

b. I hereby direct that section 14-140 of the Administrative Code and section 12-10 of Title 38 of the Rules of the City of New York are suspended, to the extent they impact the disposition of personal property at the HERRCs.

§ 5. Effective date. The State of Emergency declared in section 1 of this Order shall remain in effect for 30 days and may be extended. The remaining provisions of this Order shall take effect immediately and shall remain in effect for five (5) days unless they are terminated or modified at an earlier date.

Eric Adams

Eric Adams
Mayor

The New York Times https://www.nytimes.com/2023/05/10/nyregion/nyc-right-to-shelter-migrants.html

Adams Weakens Right-to-Shelter Rules, Anticipating Migrant Surge

Saying New York City had "reached our limit," the Adams administration said it would loosen regulations that have protected homeless families seeking shelter.


By Emma G. Fitzsimmons and Andy Newman

May 10, 2023

New York City is temporarily suspending some of the rules related to its longstanding guarantee of shelter to anyone who needs it as officials struggle to find housing for migrants arriving from the southern border.

Under an executive order, the city is suspending rules that require families to be placed in private rooms with bathrooms and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

A spokesman for Mayor Eric Adams confirmed the decision on Wednesday night, saying that the city had "reached our limit" and ended up having to place newly arrived migrants in gyms last week.

"This is not a decision taken lightly," the spokesman, Fabien Levy, said in a statement, "and we will make every effort to get asylum seekers into shelter as quickly as possible, as we have done since Day 1."

Republican governors of border states have been sending buses of asylum seekers to New York and other Democrat-led cities since last spring, but the city's decision came as a federal pandemic-era rule that allowed the government to eject thousands of migrants, known as Title 42, is set to expire Thursday night. City officials have said they expect as many as 1,000 people a day to come after the rule is lifted.

Already people have been crossing into the United States from Mexico in anticipation of the change.

New York City has opened eight humanitarian relief centers as city officials have moved to help more than 61,000 migrants who have arrived over the last year.

New York is the only major city in the country that provides “right to shelter,” the result of a legal agreement that requires the city to provide a bed to anyone who needs one under certain conditions.

“We all hope that they never have to take any actions that would be in violation of these rules that they’re suspending,” said Joshua Goldfein, a staff lawyer for the Legal Aid Society, which represents the nonprofit that is the court-appointed monitor for the shelter system, the Coalition for the Homeless.

Under the nightly-deadline rule, homeless families with children who arrive at a shelter-system office by 10 p.m. must be given beds in a shelter the same night. Last July, as the number of migrants was accelerating, some families spent the night in chairs at the main office in the Bronx; it was the first time the nightly deadline had been violated since at least 2014.

“We know that they are working hard to avoid putting people in harm’s way,” Mr. Goldfein said, “but we have learned over and over again that putting families with children in congregate settings or leaving them in city offices for days on end is dangerous and harmful to children and their families.”

The city is also suspending protections for families who have been in emergency shelter hotels for more than 30 days, which officials say make it impossible to evict them without taking them to housing court.

Mr. Goldfein pushed back against that suspension, saying, “They want the ability to turn off their key cards and lock them out,” as the city did earlier this year to families who had been staying in a Lower Manhattan hotel since being displaced by Hurricane Ida in 2021.

As of Tuesday, there were 78,763 people in the city’s main shelter system, a record that has been broken nearly every day since October. Nearly half of them are migrants, the city says, spread among 120 emergency shelters and the eight larger centers.

Mr. Adams has said that housing the migrants is costing the city billions of dollars, warning last month that the city is "being destroyed" by the crisis and criticizing President Biden for his handling of the situation.

Still, the city is mandated by the longstanding legal settlement to observe the right to shelter, and Mr. Adams is likely to face criticism over his decision to reduce some of the protections. The right to shelter, rooted in court cases launched in 1979, is one reason New York City doesn't have the same level of street homelessness as some cities in California and elsewhere.

Mr. Levy, the mayoral spokesman, said that the city was doing the best it could under difficult circumstances, "but without more support from our federal and state partners, we are concerned the worst may be yet to come."

Raúl Vilchis contributed reporting.

Emma G. Fitzsimmons is the City Hall bureau chief, covering politics in New York City. She previously covered the transit beat and breaking news. @emmagf

Andy Newman writes about social services and poverty in New York City and its environs. He has covered the region for The Times for 25 years. @andylocal

A version of this article appears in print on , Section A, Page 16 of the New York edition with the headline: Officials Loosen Shelter Rules As City Runs Short of Housing

The New York Times https://www.nytimes.com/2023/05/23/nyregion/right-to-shelter-nyc.html

New York City Asks for Relief From Its Right-to-Shelter Mandate

City officials say that the arrival of 65,000 asylum seekers has presented the city "with challenges never contemplated, foreseeable or indeed even remotely imagined."

By Jeffery C. Mays

May 23, 2023

Mayor Eric Adams asked a judge for permission on Tuesday to relieve New York City of its unique and longstanding obligation to provide shelter for anyone who asks, asserting that the immense influx of asylum seekers has overwhelmed its ability to accommodate all those in need.

"Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border," Mr. Adams said in a statement. "Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share."

In a letter to Deborah Kaplan, the deputy chief administrative judge for New York City Courts, the city's lawyers asked for changes to the 1981 consent decree that set New York's requirement to provide shelter for anyone who applies for it.

The city asked that the wording be changed to allow it to deny shelter to homeless adults and adult families if it "lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter."

The city did not request relief from its obligations to provide shelter to families with children.

Mr. Adams said that he was not seeking to permanently end the right to shelter. But he said that the 1981 consent decree, issued in the Callahan v. Carey case, could not have anticipated "a mass influx of individuals entering our system — more than doubling our census count in slightly over a year."

The letter to Judge Kaplan underscored that theme, saying that the "unprecedented demands on the city's shelter resources confront the city defendant with challenges never contemplated, foreseeable or indeed, even remotely imagined."

City officials say more than 70,000 migrants have arrived since the spring and more than 40,000 are in the city's care. There are more than 81,000 people in the city's main shelter system.

The city has struggled to find places to house migrants, opening more than 150 sites to house the newcomers, including 140 hotels. Migrants have also been housed in a cruise ship terminal in Brooklyn and in tents on Randall's Island. A plan to place migrants in school gyms was quickly reversed last week after protests.

Mr. Adams says the city will spend as much as $4.3 billion through June 2024 to feed and house the asylum seekers. It has spent more than $1 billion so far. Camille Joseph Varlack, Mr. Adams's chief of staff, said during an interview Tuesday on NY1 that the city wanted to sit down with all of the parties in the consent decree and "revisit all of it," in light of the record number of people under the city's care during an "unprecedented humanitarian crisis."

This is the second time the Adams administration has sought relief from the right-to-shelter mandate. Earlier this month, the mayor issued an executive order that suspended rules requiring families to be placed in private rooms with bathrooms

and kitchens, not in group settings, and that set a nightly deadline for newly arriving families to be placed in shelters.

The Legal Aid Society, which filed the litigation that led to the right to shelter, and the Coalition for the Homeless issued a joint statement strongly opposing the city's move. The groups argued that the changes would hurt homeless New Yorkers as much as asylum seekers.

"The administration's request to suspend the long-established state constitutional right that protects our clients from the elements is not who we are as a city," the groups said. "New Yorkers do not want to see anyone, including asylum seekers, relegated to the streets. We will vigorously oppose any motion from this administration that seeks to undo these fundamental protections that have long defined our city."

Brad Lander, the city comptroller, said the Adams administration was not doing enough to relieve the pressure on the shelter system by moving people more quickly into permanent housing. Mr. Adams opposes legislation from the City Council that would eliminate a rule requiring people to be in shelter for 90 days before becoming eligible for city-funded housing vouchers.

"Attempting to rollback the Right to Shelter while lobbying against legislation that will help get more homeless New Yorkers into their own apartments is wrong," said Christine Quinn, the former City Council speaker and chief executive of WIN, a network of shelters for women and children that has housed more than 270 migrant families. "It is both bad policy and bad politics, and New Yorkers will not stand for it."

Jeffery C. Mays is a reporter on the Metro desk who covers politics with a focus on New York City Hall. A native of Brooklyn, he is a graduate of Columbia University. More about Jeffery C. Mays

A version of this article appears in print on , Section A, Page 20 of the New York edition with the headline: Adams Seeks To Reduce City's Role As a Shelter

Mayor Adams' Statement on New York City's Right to Shelter Law

May 23, 2023

NEW YORK – New York City Mayor Eric Adams today released the following statement after the New York City Department of Law filed an application for modification of provision of final judgment following a 1984 consent decree in *Callahan v. Carey* related to the city's Right to Shelter law:

"From the start, let us be clear, that we are in no way seeking to end the right to shelter. Today's action will allow us to get clarity from the court and preserve the right to shelter for the tens of thousands in our care — both previously unhoused individuals and asylum seekers. Given that we're unable to provide care for an unlimited number of people and are already overextended, it is in the best interest of everyone, including those seeking to come to the United States, to be upfront that New York City cannot single-handedly provide care to everyone crossing our border. Being dishonest about this will only result in our system collapsing, and we need our government partners to know the truth and do their share.

"For more than a year, New York City has — largely on its own — provided shelter, food, clothing, and more to over 70,000 migrants who have arrived in our city. We now have more asylum seekers in our care than New Yorkers experiencing homelessness when we came into office. When the original Callahan consent decree came down almost 40 years ago, no one could have contemplated, foresaw, or even remotely imagined a mass influx of individuals entering our system — more than doubling our census count in slightly over a year. Our city has done more to support asylum seekers than any other city in the nation, but the unfortunate reality is that the city has extended itself further than its resources will allow."

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Media Contact

Greg B. Smith & Gwynne Hogan, Adams Admin Takes Second Shot at Suspending 'Right to Shelter' in New Court Filing, The City, Oct. 3, 2023

Mayor Eric Adams on Tuesday asked a court to temporarily suspend the city's decades-old practice of offering shelter to any adult who asks, proposing that the protocol deserves an emergency pause while the city grapples with the still-ongoing wave of asylum seekers who have arrived in New York for more than a year.

HELP ran an intake system for single women entering the homeless shelter system, Oct. 3, 2023.

In a letter to Manhattan State Supreme Court, Assistant Corporation Counsel Daniel Perez asserted that if the court grants the city's request to suspend the 1980s court decree guaranteeing a right to shelter, "The City will simply have the same obligations as all other jurisdictions throughout New York State. And the City will have significantly more flexibility in its response to the present crisis."

The city's application outlines the conditions under which the right to shelter would be suspended: The governor or the mayor would have to declare a state of emergency, and the average number of single adults in city shelters would have to be 50% greater than the daily average over the past two years.

The modification, if approved by a judge, would mark the first major change to a practice that's been on the books since 1981 when the city agreed to settle a lawsuit filed by the Legal Aid Society to provide shelter to any adult who requested it.

The so-called right to shelter codified in the case, Callahan v. Carey, has emerged as a flashpoint after thousands of migrants first began flooding the city's shelter system in the spring of 2022, initially mostly from South and Central America and now from all over the world.

As of Tuesday, Mayor Adams said the total number of asylum seekers who've arrived in New York since the diaspora began has topped 122,000. The mayor has warned that the ongoing wave, which now amounts to about 3,000 new arrivals a week, will "destroy" the city if the federal government doesn't intervene to stem the flow and arrange for a more equitable distribution of migrants around the nation.

Adams' Department of Law argued that the right-to-shelter commitment agreed to 42 years ago is "outmoded and cumbersome" and "has unnecessarily deprived policy makers of much-needed flexibility" to confront a crisis that could not have been imagined in 1981.

Shortly after his Department of Law filed this request, Mayor Adams issued a statement emphasizing that the Callahan decree "was never intended to apply to the extraordinary circumstances our city faces today."

Now estimating the projected cost for city taxpayers to address this crisis at $12 billion over three years, he asserted, "It is abundantly clear that the status quo cannot continue." More conservative estimates from the city comptroller's office put the amount closer to $5.3 billion.

The filing by Perez took a different approach from the administration's previous approach.

Last year the Adams administration asked the court for a broad waiver to the right to shelter requirement to allow the city to determine whether it could provide shelter based on the resources it had at its disposal.

That motion reopened the decades-old case but was never resolved. Last week Adams announced he intended to file a new modification request, and the judge assigned to the case, Manhattan Supreme Court Justice Erika Edwards, ordered him to do so by Tuesday. She then recused herself from the case, stating that she wanted to avoid potential conflict because "it may appear" that she has an unspecified "motive to favor one party over another." A new judge has yet to be appointed to the case.

The Legal Aid Society and the Coalition for the Homeless issued a joint statement calling the city's move "the most significant and damaging attempt to retreat on its legal and moral obligation." They warned if granted by a judge, the move would allow the city to "end the Right to Shelter as we know it."

"The City would have the ability to declare an emergency, and effectively end the Right to Shelter for thousands of New Yorkers — including working poor individuals who rely on the shelter system and, alarmingly, individuals who rely on disability benefits," they said. "This abhorrent and unnecessary maneuver is a betrayal of the City's commitment towards ensuring that no one is relegated to living — or dying — on the streets of our city."

In his statement accompanying the request, Mayor Adams stated the modification "is not seeking to terminate" the agreement reached under the Callahan consent decree.

'Close the Borders'

The city's latest request comes as the number of people staying in shelters continues to climb to historic heights. As of Sept. 24, a record 115,200 people were staying in city shelters including 61,400 migrants, spread out all across the five boroughs in 210 emergency shelters.

In recent months, city officials have ramped up steps to try to discourage people from staying in shelters, including reducing the amount of time adult migrants could stay down to 60 days, then down to just 30 days, before they have to return to the intake center to seek another cot.

Adams and his top staff have resorted to increasingly alarmist rhetoric to describe the situation. Adams has said repeatedly migrants were "destroying" New York City and over the weekend, Chief Advisor Ingrid Lewis-Martin urged President Joe Biden to "close the borders."

"Until you close the borders you need to come up with a full on decompression strategy where you can take all of our migrants and move them throughout our 50 states," she said in an interview on Pix11. "The right to shelter was intended for our indigenous homeless population, so we argue that we should not have to shelter all of these immigrants."

At a press conference Tuesday, Adams walked back her remarks.

"We believe the borders should remain open. That's the official position of this city," he said.

While the city has taken steps to attempt to dissuade adult migrants from staying in shelters, the vast majority of migrants in city care are in

families with children. The latest tallies released to the City Council in August indicated that of nearly 60,000 migrants in city facilities, 44,148 were parents and children.

But thus far the city has refrained from issuing 60-day or 30-day notices to families with children, though officials have been mulling this as an option, THE CITY reported.

At Tuesday's press briefing Deputy Mayor Anne Williams-Isom said more than 400 people were waiting at the Roosevelt Hotel for a place to sleep and city officials said they expected more lines to form outside the migrant arrival center there in the coming days, as they had over the summer. Adams, who has announced plans to travel to Mexico, Ecuador and from Bogotá in Colombia to the Darién Gap to further dissuade migrants traveling to New York City, issued an ominous warning.

"New Yorkers are going to start to see visibly what being out of room means," he said, refusing to provide specifics. "We are out of room. We're getting ready to take a real shift in this whole crisis."

Emma Whitford, NYC Mayor's Latest Bid to Suspend Adult Shelter Rights Cools in Court, City Limits, Oct. 19, 2023

Mayor Eric Adams' administration is not proceeding with a formal request to suspend the right to a shelter bed for single adults in New York City—at least for now.

In a Manhattan courtroom on Thursday, following 90 minutes of closed-door discussions, New York State Supreme Court Judge Gerald Lebovits said attorneys for the city, state and homeless advocates will instead continue meeting in private, with an eye toward a possible settlement.

"The parties have agreed that for now there should not be a war of legal papers," Judge Lebovits said. "That for now, the solution is to try to settle the matter if possible and to solve any problem that may exist."

The news was welcome to the Legal Aid Society, which has been locked in negotiations for months on behalf of Coalition for the Homeless. Talks started in the late spring, after Mayor Adams first sought relief from the 1981 consent decree in Callahan v. Carey, a lawsuit that established the right to shelter for single men.

"We are very grateful that the court and the parties agreed that we should continue to discuss how to solve the problem," said Josh Goldfein of Legal Aid. "No one wants to see people on the streets of New York exposed to the elements."

New York City is uniquely obligated to provide a shelter bed to anyone in need, at least temporarily—part of a set of rules that grew from the Callahan decree and subsequent court decisions.

But the Adams Administration has argued that an influx of recently-arrived immigrants since early 2022 has pushed New York City's shelter system beyond capacity. There are now 118,000 people staying in city shelters—over 64,000 of whom are asylum seekers—compared to about 60,500 in January 2022, according to City Hall.

Advocates had condemned Adams' latest proposal to suspend shelter rights as extreme, arguing that it would result in people being turned out to the streets ahead of the cold winter months.

In an Oct. 11 letter to the court, Legal Aid included graphic images of frostbite sustained by a person who slept outside in freezing temperatures in Massachusetts, that had been submitted previously in the decades-old case.

Gov. Kathy Hochul, meanwhile, endorsed the mayor's proposal in a court filing, calling it a "measured and appropriate modification."

The request is distinct from city policies limiting stays to one or two months for recently-arrived immigrants in certain shelters—including, as of recently, for families with children.

While advocates say the time limits are unfairly disruptive, Legal Aid so far has not challenged them in court, saying shelter rights aren't violated so long as everyone has the option to land a new shelter bed once their time is up.

Reached by email, a spokesperson for Mayor Adams said the administration's latest petition to modify Callahan remains pending while the parties go into mediation.

"As we have said before, the Callahan decree—entered over 40 years ago, when the shelter population was a fraction of its current size—was never intended to apply to the extraordinary circumstances our city faces today as more than an average of 10,000 migrants continue to enter our city every month seeking shelter," they said.

A spokesperson for the governor's office reiterated support of the mayor's proposal for Callahan relief, and expressed hope for a "timely, appropriate resolution" through mediation.*

Before dismissing the parties Thursday, Judge Lebovits previewed private talks starting next week, in the "robing room" adjacent to his bench.

"The proper path forward is to discuss logistics and nuts and bolts confidentially in the robing room and that's what the court and the parties will be doing a lot of beginning next week," he said. "The public will not be able to attend."

Thursday marked Judge Lebovits' first appearance in Callahan. He stepped into the case after Judge Erika Edwards recused herself in September, citing concerns about perceived impartiality. A state supreme court judge since 2015, Lebovits first took the bench in New York City Housing Court, from 2001 to 2010.

Sateesh Nori, a clinical adjunct professor at NYU Law School, appeared before Judge Lebovits while working as a tenant lawyer at Legal Aid. He also co-authored a law journal article with the judge in 2009 called "Section 8: New York's Legal Landscape."

"He will take it very seriously and he's very knowledgeable about the issues," Nori said of Judge Lebovits' new role in the Callahan case. "He's a scholar of housing law and legal practice."

Asked what a judge with Lebovits' background might bring to a case about shelter rights, Goldfein of Legal Aid said housing court judges are used to negotiating resolutions between parties without getting into protracted litigation.

"Any judge comes to the courtroom with their own life experience," he said. "Certainly housing court is a forum where most cases are resolved and we are grateful that Justice Lebovits wants to use those skills to try to see if this case can also be resolved."

Gynne Hogan, New York's 'Right to Shelter' No Longer Exists for Thousands of Migrants, The City, Dec. 18, 2023

After 42 years, New York City's "right to shelter," which was supposed to guarantee a bed to anyone who sought one the same day, has functionally ended.

Mayor Eric Adams has warned for months this moment was approaching, and even went to court this past spring to try to have the city released from the consent decree it entered into decades ago.

Migrants wait in line outside the St. Brigid shelter reticketing site in the East Village. Dec. 13. 2023.

But the end of the right to shelter for adult migrants didn't come by way of a press release or a court order. Instead, it happened quietly.

For months, as the number of migrants arriving in New York climbed, city workers raced to open more and more shelters in increasingly ad hoc settings to accommodate them. Now that era has come to an end, with the Adams administration letting the chips, and the people, fall where they may.

That new reality is on stark display outside an East Village "reticketing center," where every morning for the past few weeks, hundreds of people — mostly men — have queued in the frigid pre-dawn hours in a line that snakes around the block.

The building, the former St. Brigid's Catholic School on East 7th Street, is now the centralized intake point for adult migrants who've run out their time in shelters — since the city has begun to put that on a clock — and are seeking a bed for another 30 days.

Those seeking a place to sleep are given a wristband with a number and a date scribbled in sharpie, indicating how many people are before them in line. The number of those waiting for cots, spread out across a network of emergency shelters across the city, is likely in the thousands, and it now takes more than a week to secure one.

Dozens of migrants told THE CITY over the past two weeks that they have been waiting more than seven days to get a shelter cot, with many spending their nights on the streets, in trains or they're directed to an increasingly overcrowded waiting room in The Bronx near Crotona Park overseen by the city's Office of Emergency Management.

As the number of those waiting for beds grew this week, and temperatures slumped below freezing, the city opened additional satellite waiting rooms, where migrants are not always allowed to lie down on the floor, have limited access to food, and nowhere to bathe.

"Why is the government letting us sleep in the streets? With this cold, it's really ugly," said 19-year-old Bryan Arriaga, from Mexico, who described being turned away from a mobbed shelter intake office on Dec. 7.

He then spent a night on the floor of a city waiting room in The Bronx and another few nights sleeping in a public restroom in Jamaica, Queens.

Migrant Bryan Arriaga waited in line outside the East Village shelter re-ticketing center, Dec. 13, 2023.

On Dec. 12, he returned to the East Village, along with hundreds of others in much the same situation. Perched on a park bench across from the throngs of people surrounding the intake site, he debated his next move.

"I want a place to sleep, a place to bathe, a place to lie down, sleep like eight hours," he said. "I'm really stressed, I'm sad."

The collapse of the city's right to shelter protections currently impacts adult migrants, who are now allotted just 30-days in a shelter before they have to seek a new placement and brave the line of hundreds at the intake center. While Adams has said repeatedly that the goal is never to have families with children sleeping on the streets, new restrictions are coming for thousands of migrant families with children too who account for a vast majority of migrants in shelters.

Thousands of 60-day eviction notices were scheduled to begin expiring in the weeks after Christmas, part of the city's multipronged efforts to deter more migrants from coming to New York and to encourage those in shelters here to leave.

City Hall didn't return a request for comment on the functional end to the city's right to shelter and the situation for thousands of migrants awaiting shelter.

'You're Killing Us'

At the East Village reticketing site, meals of sandwiches and fruit are provided for those who make it inside. While a lucky few get assigned a new cot each day, hundreds more are shooed away each night when the facility closes at 7 p.m., directed to a series of waiting rooms across the city with chairs, but no cots.

The main overnight waiting room where migrants have been sent each night The Bronx, an hour and a half commute away from the East Village site. Migrants told THE CITY it's increasingly cramped, smelly and dirty, with no shower on site. The only things available to eat there are crackers and tuna.

Migrants take shelter in the Bathgate waiting room in the Bronx, Dec. 11, 2023.

Some have abandoned the nightly schlep to The Bronx altogether. Nearly every night for the past two weeks, a group of migrants have set up camp outside the East Village site, a group that dwindles to under a dozen when temperatures dip particularly low, and has grown to as many as four dozen on warmer nights.

One evening last week, a group of them fortified shelters made of cardboard boxes, salvaged plastic tarps, and wooden slats from discarded bed-frames while trading tips on how to brave the cold. Some said they had too much luggage to carry halfway across the city, others said they preferred the sidewalk to the overcrowded waiting rooms.

"I'm wearing two pairs of gloves, three pairs of pants and four jackets," said Yaleiza Goyo, 55, from Venezuela, who said she'd spent four of the past five sleeping on the sidewalk outside the reticketing center. "I have to fight it out, because what else am I going to do?"

On Sunday night it rained, and city workers sent those sleeping outside to a NYPD gym in Gramercy Park but there, Goyo said, they were barred from laying on the floor and had to spend the rest of the night sitting up in folding chairs.

"You're killing us. How can you sleep sitting up? But it was raining. We had to stay," she said. As she put the finishing touches on the cardboard hut where she would spend another night, she chuckled. "You have to laugh at life, so as not to cry."

Goyo was one of an increasing number of women camping outdoors. Another Venezuelan migrant, 38-year-old Nailett Aponte, said she'd spent the past week waiting for a cot, sleeping outdoors on most nights.

"They don't have beds for couples. They don't have beds for single women. There's nothing," she said in Spanish.

Aponte later told THE CITY, she finally got a cot assignment on Wednesday, seven days since she began her wait for one.

Migrants who spoke with THE CITY said they'd lost jobs in restaurants and construction while waiting. They'd skipped appointments, scheduled weeks in advance, to get their NYC ID cards, a vital piece of identification, and feared they would end up without the paperwork — mailed by the federal government to their former shelters — that would allow them to work legally.

The days they'd spent trying to secure another cot, had likely set them back weeks in their effort towards being able to support themselves and move out of shelters for good.

"I should be working, not smoking cigarettes and drinking coffee outside here," said Krist Benitez, in Spanish, who said he'd lost work as a dishwasher in the days he'd been sleeping outside waiting for a shelter cot. Clasping a folder of paperwork, he said both his city ID and his Occupational Safety and Health Administration certification, needed to work most construction gigs, were set to be shipped to his old shelter, and he had no idea if he'd be able to get his hands on them.

"I don't understand it," he said.

Still countless others have already given up on the waiting. The lucky ones found a room to rent, or a couch to crash on. Others have accepted free tickets out of the city and are trying out life in other cities and states. Countless more have slipped into precarious living situations on the streets and subways. While city officials say only 20 percent of people evicted from shelters are returning for another placement, they have no data on where all the other people go.

One Venezuelan migrant, David, who declined to share his full name, said after his 30 days in shelters ran out, he'd given up on seeking another placement, having heard through the grapevine about the chaotic reticketing center.

In the days since, he's been sleeping in a friend's van.

"It's difficult," he told THE CITY in Spanish. "I'll stay here until I can find a room."

'New Yorkers Are Pissed'

The chaos over the past two weeks is the culmination of more than a year over which more than 140,000 migrants have made their way to New York City, many drawn by the city's right to shelter, that up until recently had meant they could count on some roof over their heads while they got on their feet.

For months, Mayor Adams has argued the city's "right to shelter" is an antiquated rule that was more than New Yorkers could afford to maintain on behalf of an unprecedented number of new arrivals.

When the 1981 legal consent decree establishing it was hammered out, it applied only to adult men and the city had to provide just 125 beds for homeless New Yorkers. Now there are more than 122,100 people living in shelters, including 65,000 migrants, a larger population than Hartford, Connecticut.

At a press conference in October, Adams put it bluntly:

> "There's two schools of thought in the city right now. One school of thought states you can come from anywhere on the globe and come to New York and we are responsible, on taxpayers limited resources, to take care of you for as long as you want: Food, shelter, clothing, washing your sheets, everything, medical care, psychological care for as long as you want. And it's on New York City taxpayer's dime," he said. "And there's another school of thought: that we disagree."

Other mayors, including Rudy Giulani and Michael Bloomberg, have tried to walk back the requirements of the 1981 Callahan decree, none successfully. In 2009, When shelter waiting rooms overflowed with men and women sleeping on the floors in 2009, the Legal Aid Society and the Coalition for the Homeless took the city to court, and a judge forced the city to open up hundreds more beds to homeless New Yorkers.

Over the past year, as tens of thousands of migrants made their way to New York, the rules laid out in the decree have been breached countless times. Longstanding protections under the decree — requiring beds to be spaced three feet apart, for example — were abandoned months ago. Over the summer the protections briefly collapsed altogether, with hundreds of migrants sleeping on the sidewalk for a week straight during a heat wave.

And for months Adams has been teasing an unspecified next phase where the city would identify large outdoor spaces, where migrants would get individual tents, and some kind of access to bathrooms and showers, in the absence of meaningful federal funds to federal immigration policy.

That next phase is here, albeit not in the form hinted at by the mayor. It started when the Adams administration quietly opened the East Village "reticketing sight" in October, and for the first time the city began explicitly telling migrants they were not guaranteed a cot, though they could get a plane ticket to any state or country. For several weeks, the number of cots freed up across shelters was enough to accommodate those seeking another 30-day stay within a reasonable amount of time.

But that tedious equilibrium collapsed over the Thanksgiving holiday, when the city saw another unexpected wave of migrant adults coming from the southern border. The city has been short hundreds of cots for adults every day since.

It's a moment Diane Enobabor, founder of the Black and Arab Migrant Solidarity Alliance, calls "organized abandonment." Some will wait it out, some will leave, untold others will fall through the cracks.

"Some will die. I don't think we should be shy about that," Enobabor said. "Some will die."

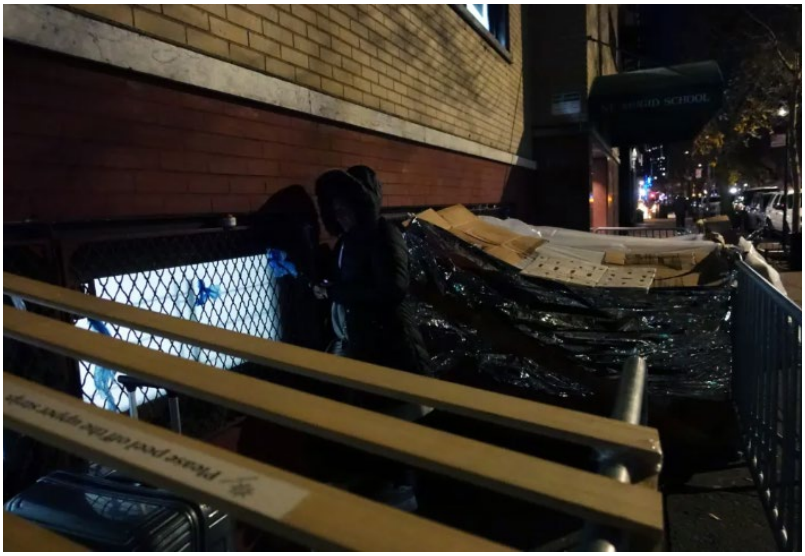
Attorney Joshua Goldfein with the Legal Aid Society, which represents Coalition for the Homeless, said while it may be currently impossible to secure a cot in a timely manner, it doesn't mean New Yorkers right to one is gone. Goldfein said he is in regular touch with city officials, pressuring them to uphold the rules.

"There is a court order and it is on the books and it remains in effect," he said. "I don't think anyone would deny that they are not in compliance. So the question is what is gonna be the remedy for that?"

'I Don't Have Deportation Powers'

While Adams has faced increasingly loud criticism from the progressive left, polls indicate he's not out of step with most New Yorkers, who are increasingly souring on the situation. The mayor has blamed the cost of migrant care for a surprise round of big mid-year budget cuts that would affect services including police, fire, sanitation, schools and libraries.

For the billions the city has spent on the crisis, the federal government has offered to reimburse just $159 million, though federal immigration policies that allow people to cross the border to seek asylum also prevent them from working legally for months.



Migrants sleep in makeshift shelters overnight outside the St. Brigid re-ticketing site in the East Village, Dec. 11, 2023.

While Adams has a record low approval rating, according to a Quinnipiac poll from early earlier this month, 62% of New Yorkers agreed with his assessment that migrants could destroy New York City — even as 66% of the respondents said they disapproved of how the mayor was handling the new arrivals.

Responding to the poll numbers at a press briefing Tuesday, Adams said people he talks to "are pissed off" and that he shared their anger:

"Why are you allowing the buses in, Eric? Why aren't you stopping them from coming in?," he said people ask him. His response: "I don't have deportation powers. I don't have the power to turn buses around. … And all I have the power to do is to balance the budget."

'No One Told Me the Truth'

Jesus Lopez, an 18-year-old from Venezuela, said he'd crossed the border alone around a month ago, and first got a free bus from Texas to Chicago, where he spent three weeks sleeping on the floor of a police precinct. From there he heard from other migrants things would be easier for him in New York, but when he arrived by bus he was lost, and wandered around the streets for about a week without a jacket, sleeping on the subways and any warm spot he could find.

Eventually, someone on a train told him about the main migrant intake center at Roosevelt Hotel in Midtown.

While city officials have said adults just arriving in New York get top priority for

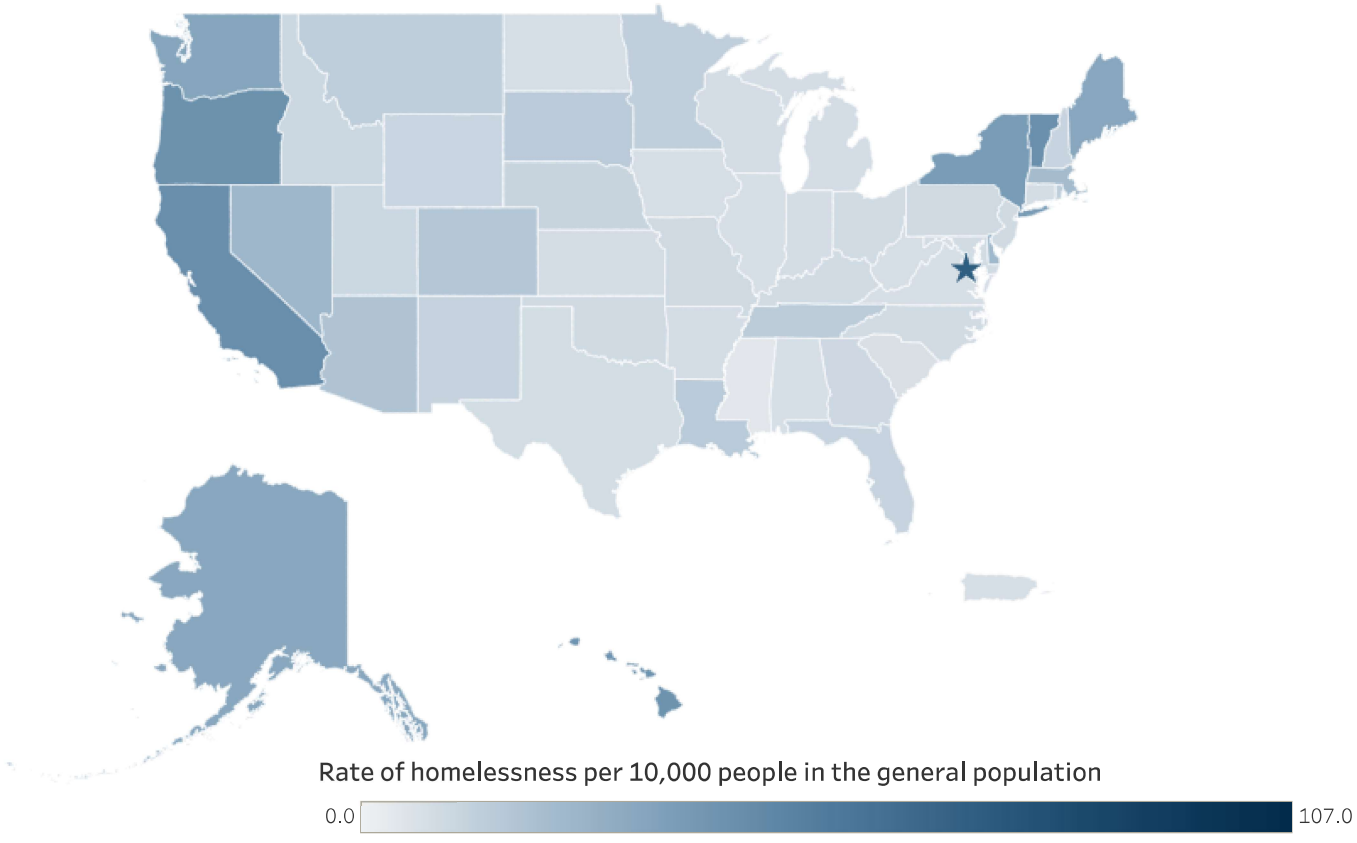
placements there, ahead of those who've already had their 30-days in shelters, Lopez said he was turned away and directed to the reticketing site, where he joined thousands of others seeking a 30-day stint. For the better part of the past week, Lopez said, he spent days in and out of the East Village waiting room, and nights in the waiting room in The Bronx, hardly sleeping or eating, and not showering at all.

His teeth rattled in the subzero temperatures Tuesday night, as he got some air outside the overcrowded overnight waiting room in The Bronx. Lopez said his time in New York had, thus far, been better than his experience in Chicago, but the ordeal was jarring just the same.

"No one told me the truth. I'm shocked," he said in Spanish, adding he'd been given the number 3,752 in line for a cot. "I don't know what to think. I'm speechless."

State of Homelessness: 2023 Edition

Click on your state to view detailed information on homeless statistics, bed inventory, and system capacity



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR); U.S. Census Bureau, 2022 Population Estimates.

Contents

KEY FACTS

The current edition of this report analyzes available data on homelessness for 2022 and over time. Key facts and data points include:

- Homelessness has been on the rise since 2017, experiencing an overall increase of 6 percent.
- In 2022, counts of individuals (421,392 people) and chronically homeless individuals (127,768) reached record highs in the history of data collection.
- Unsheltered rates are also trending upward, impacting most racial, ethnic, and gender subgroups.
- Homeless services systems continued to expand the availability of both temporary and permanent beds in 2022, but these resources still fall short of reaching everyone in need.

- Homelessness rose by a modest 0.3 percent from 2020 to 2022, a period marked by both pandemic-related economic disruptions and robust investments of federal resources into human services.

The State of Homelessness: 2023 Edition uses data from the U.S. Department of Housing and Urban Development (HUD) to provide an overview of the scope of homelessness in the U.S. on a given night in 2022, and illustrate emerging trends. Data in this report is pulled from HUD's 2022 Point-in-Time (PIT) Count data, as well as Housing Inventory Count data. Each section features interactive charts to display this data, with highlights discussed in the text of this report.

HOMELESSNESS IN 2022

According to the January 2022 PIT Count, **582,462 people** were experiencing homelessness across America. This amounts to roughly **18 out of every 10,000 people**[1]. The vast majority (72 percent) were individual adults, but a notable share (28 percent) were people living in families with children.

However, there is more to the story of homelessness in 2022. This section will delve deeper into questions of 1) who is experiencing homelessness, 2) where they are experiencing it, and 3) the degree to which people are living unsheltered.

Who is Experiencing Homelessness in 2022: Special Populations

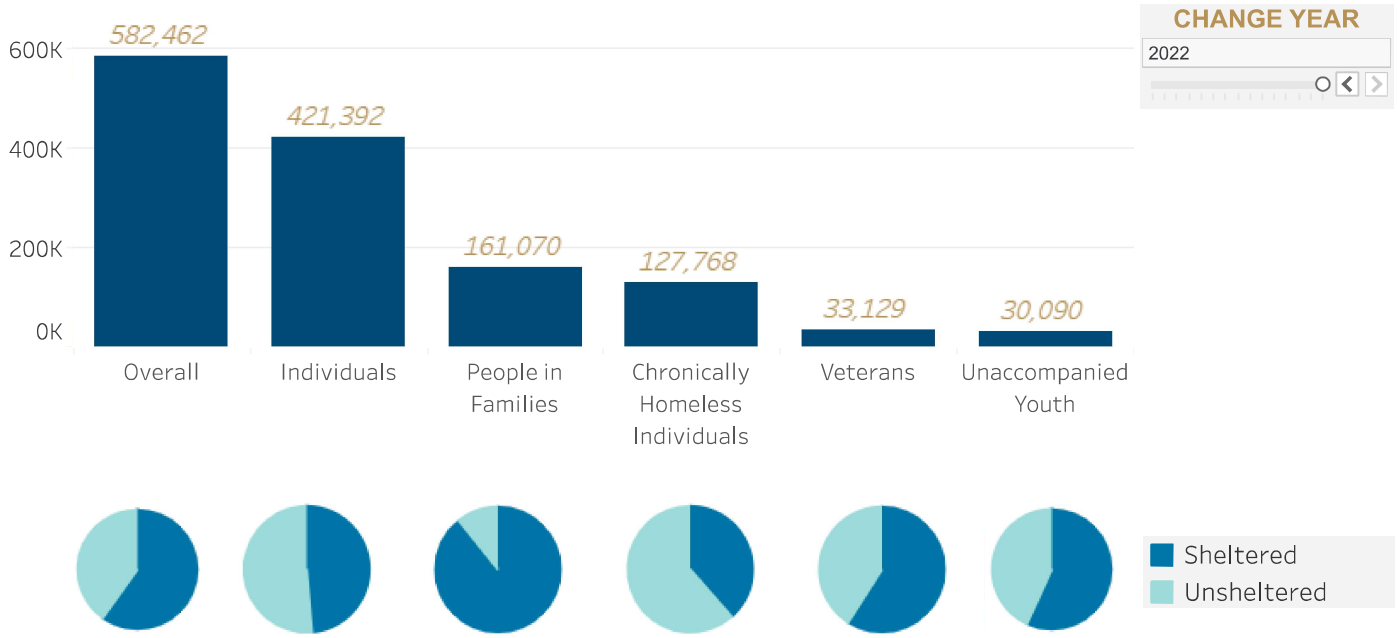
For reasons rooted in practice and policy, the homeless services world focuses on specific special populations. Of people experiencing homeless:

22 percent are **chronically homeless individuals** (or people with disabilities who have experienced long-term or repeated incidents of homelessness)

6 percent are **veterans** (distinguished due to their service to the country), and

5 percent are **unaccompanied youth** under 25 (considered vulnerable due to their age)

Total Number of People Experiencing Homelessness per Year by Type, 2007–2022

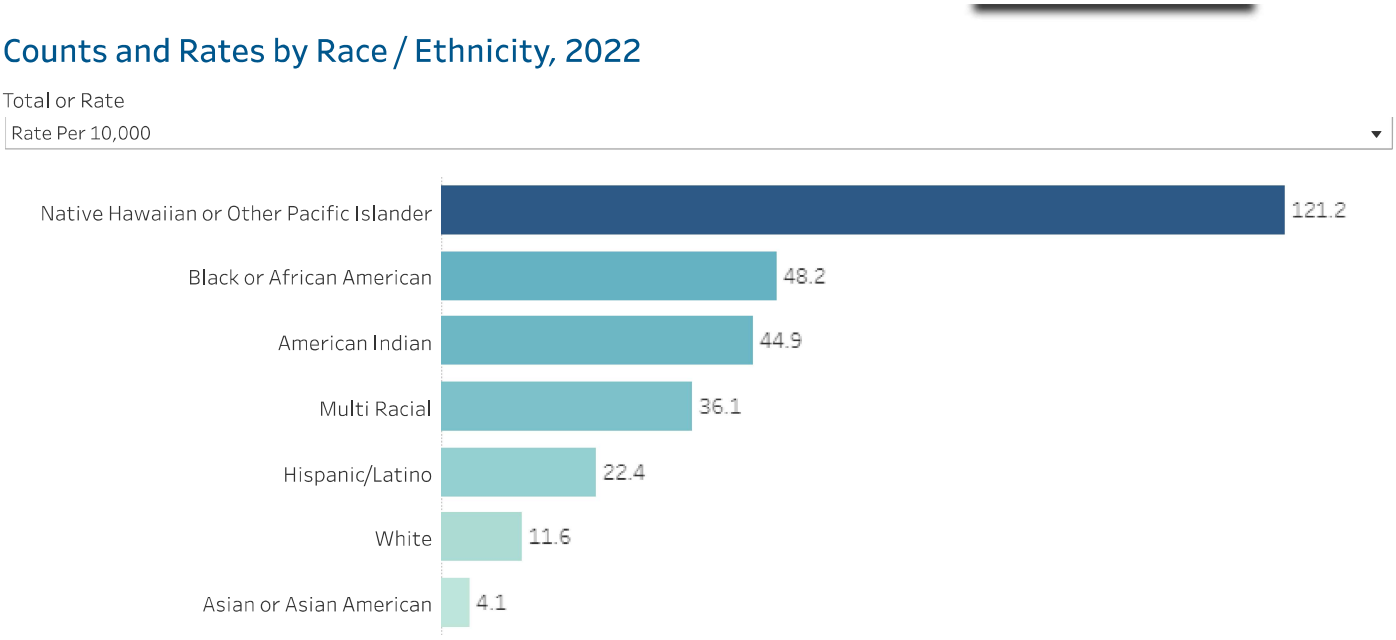


Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR). Note: The Covid-19 pandemic interrupted data collection in 2021 so data for that year is unavailable.

Who is Experiencing Homelessness in 2022: By Race/Ethnicity

Available data demonstrates that race and ethnicity are key determinants[2] that impact 1) who will become homeless and 2) the type and depth of rehousing barriers people will experience.

Within the 2022 PIT Count data, White people are numerically the largest racial group. They represent half (50 percent) of all people experiencing homelessness. However, issues of representation are more complicated than that data point would suggest.



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR); U.S. Census Bureau, 2022 Population Estimates.

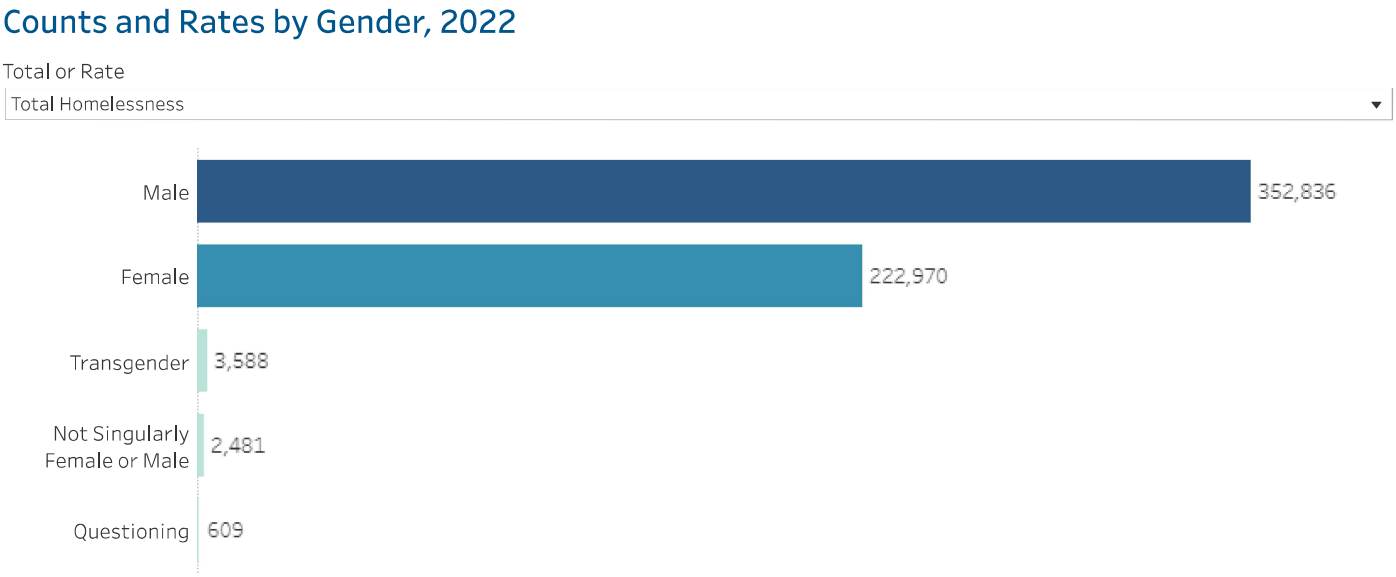
Most groups of color have higher rates of homelessness than their White counterparts—and, in some cases, far higher. Within the White group, 11 out of every 10,000 people experience homelessness. For Black people, that number is more than four times as large—48 out of every 10,000 people. Native Hawaiian or Pacific Islanders particularly stand out as having the highest rates, with 121 out of every 10,000 people experiencing homelessness.[3]

The racial and ethnic groups with the highest incidences of homelessness have extensive histories of experiencing oppression, including displacements from land and property and exclusions from housing opportunities. Effectively addressing homelessness will likely require invested partners to account for America's history, and that history's influence on current culture, policy, and practice.

Who is Experiencing Homelessness in 2022: By Gender

Gender also matters. Within the overall homeless population (which includes both adults and children), men, who are 68 percent of the individuals population, far outnumber women and are far more likely to experience homelessness. Serious systemic failures are occurring in relation to some of America's men, implicating holes in the social safety net, challenges within feeder systems, and barriers to rehousing.

Meanwhile, women (both those living as individuals and in families with children) and people who identify as transgender, nonbinary ("not singularly female or male," per HUD), and questioning are also notably represented within homelessness (see visualization below). They have unique barriers and needs that must also be addressed.



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR); U.S. Census Bureau, 2022 Population Estimates. Note: Rate information is unavailable for people who are Transgender, Not Singularly Female or Male, or Questioning.

Who is Unsheltered in 2022

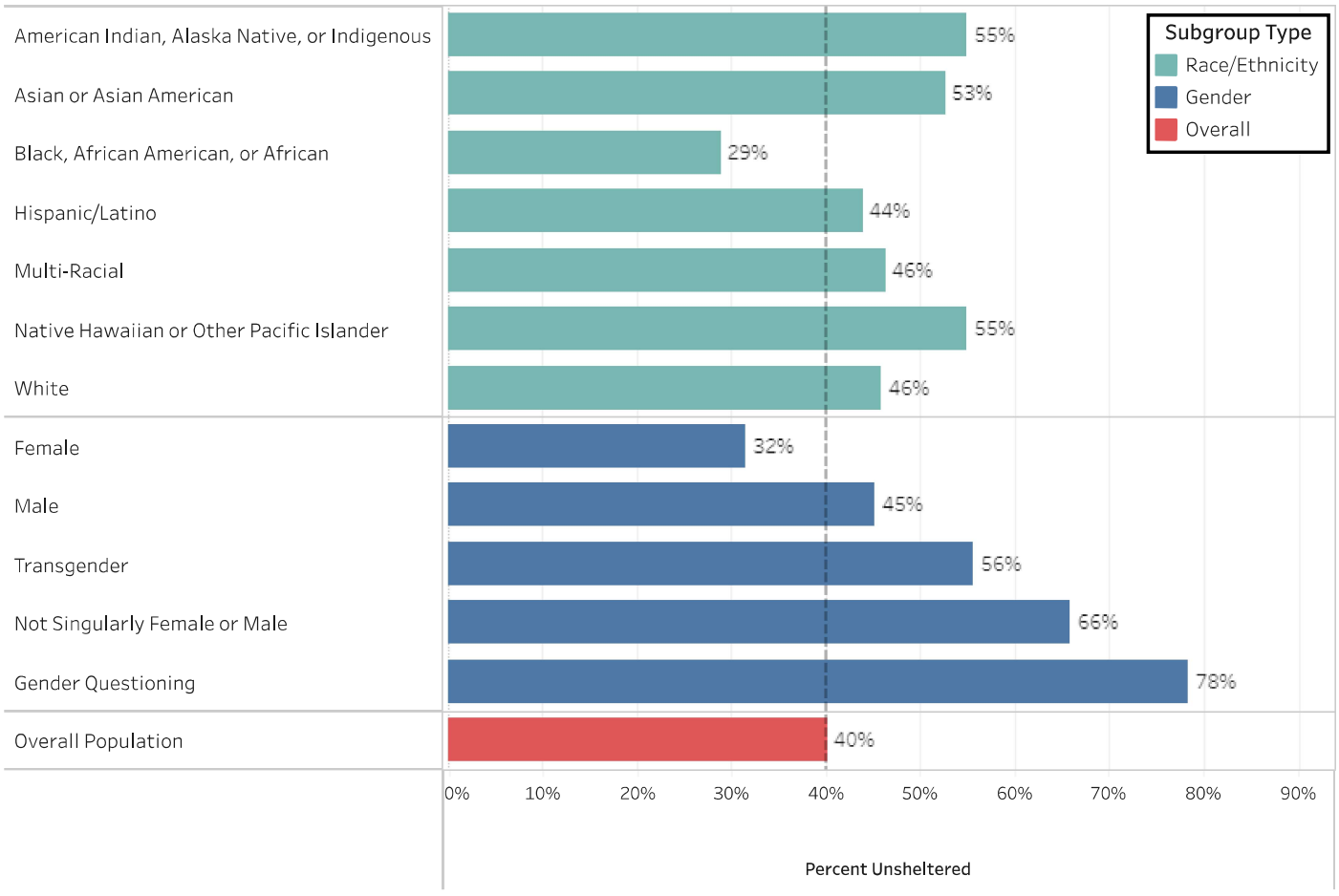
Throughout America, numerous dedicated workers use limited available resources to serve people experiencing homelessness. On a given night, the homeless services system provides shelter for 348,630 people. Despite these significant efforts, 40 percent of people experiencing homelessness live unsheltered, which means their primary nighttime residence is a place not suitable for human habitation (for example, a city sidewalk, vehicle, abandoned building, or park). Significantly, living unsheltered can impact a person's health and safety.

Individuals are particularly likely to be unsheltered. The majority of the group (51 percent) are sleeping in these settings. For the subset of individuals who are chronically homeless, the status quo is particularly dire—62 percent are unsheltered. Families with children, who are often prioritized for services, are least likely to live unsheltered—11 percent live in such ıations.

Race- and gender-based inequalities are readily evident in unsheltered homelessness (see visualization below). When subgroups are not accessing or utilizing shelter, it suggests they may not be equally benefitting from government investments in solutions to homelessness.

Members of the LGBTQ community accounted for in current data collection (i.e., people who identified on HUD surveys within the categories of transgender, gender questioning, or nonbinary), have particularly high rates of unsheltered homelessness. Many other populations also stand out, having levels of unsheltered homelessness that surpass those of the overall population. This includes **every racial, ethnic, and gender group** except women and Black people, whose levels of unsheltered homelessness are less than the overall population. The reasons for these disparities are worthy of further research and analysis.

Share of Subgroup Living Unsheltered, 2022



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

Locating Population Hot Spots in 2022

State and community stories of homelessness vary. Some are managing populations that are simply large; others have numbers that are larger than what would be expected given the size of their jurisdiction. Identifying locations with a disproportionately large homeless population is useful for at least two reasons: 1) it helps target resources to the places most in need of assistance, and 2) examining population variations across jurisdictions helps refine the field's understanding of homelessness causes and solutions. For example, jurisdictions with smaller-than-expected homeless populations may be implementing solutions worthy of replication in other parts of the country.

By Population Size. Among the states, homeless population sizes range from approximately 600 people to more than 170,000. Similar variations exist at the local level. For example, during the 2022 PIT Count, Salem County, New Jersey reported only 20 people experiencing homelessness, compared to more than 65,000 people identified in Los Angeles. Resource needs and system challenges can vary significantly according to these different homeless population sizes.

Homelessness is largely concentrated in certain areas of the country. Solving challenges in a few jurisdictions (those with the largest unhoused populations) would significantly advance the goal of ending homelessness. Just five states (California, New York, Florida, Washington, and Texas) account for 55 percent of people experiencing homelessness. And a mere 25 Continuums of Care (CoCs) account for 47 percent of all homelessness.

Many of these states and communities simply have a lot of residents and are generally populous. Thus, it is unsurprising that their subpopulations (including people experiencing homelessness) are also relatively large. To understand whether challenges exist beyond this dynamic, it is necessary to examine per capita experiences of homelessness.

Ranking by Rate and Total, 2022

Click the dropdown menu to select either Total Homeless or Rate of Homelessness Per 10,000. Click on the state abbreviation to filter the CoC List down to just the CoCs in that state or territory.

Total Homeless or Rate of Homelessness

Rate of Homelessness

States, Washington D.C., and U.S. Territories

Rank	Name	
1	DC	66
2	CA	44
3	VT	43
4	OR	42
5	HI	41
6	NY	37
7	WA	33
8	ME	32
9	AK	32
10	NV	24
11	DE	24
12	MA	22
13	AZ	19
14	CO	18
15	LA	16

CoCs

Rank	Name	
61	MN-501	31.5
62	CA-520	29.8
63	CA-511	29.4
64	PA-500	28.5
65	MN-509	27.9
66	MD-501	27.7
67	TN-504	27.2
68	CA-611	26.8
69	MI-501	26.7
70	GA-504	26.7
71	CA-505	26.6
72	CA-525	26.4
73	CA-518	26.1
74	CA-601	25.6
75	FL-517	25.4

Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR); U.S. Census Bureau, 2022 Population Estimates.

By Per Capita Experiences of Homelessness. Population size is important. But another critical question is: how common is it to experience homelessness within a jurisdiction? Per capita data answers this question by highlighting the share of the general population falling into the group.

Per capita experiences of homelessness vary greatly. For example, at the state level, Mississippi represents a low rate of homelessness, with only 4 people out of every 10,000 experiencing homelessness. Californians have the highest likelihood of being unhoused, however—44 out of every 10,000 residents. Similar variation exists at the local level, with Humboldt County, California reporting the highest per capita experiences of homelessness (121 out of every 10,000 people) and the CoC serving Dearborn, Michigan having the lowest (2 out of every 10,000 people).

Several major cities with high housing costs top the list of CoCs with the highest likelihood of homelessness, including San Francisco, New York City, Los Angeles

Boston, Washington, D.C., Portland, and Seattle. Implementing solutions to the housing affordability crisis in those areas would tremendously advance the goal of ending homelessness.

While housing costs and population size play into per capita experiences of homelessness, there are likely other factors contributing to high per capita rates. Researchers, data experts, and others should continue efforts to identify and unpack them.

HOMELESSNESS TRENDS OVER TIME

Homelessness in 21st century America has largely been defined by steady but modest progress since data collection began in 2007. Between 2007 and 2016, the population of people experiencing homelessness shrank most years. However, the overall reduction was only 15 percent during that nearly decade-long period.

This report was updated on January 5th, 2024 to correct an error in citing a 17% decrease in homelessness between 2007 and 2016. The accurate figure is 15%.

Prior to the COVID-19 pandemic, a new trend emerged: consistent annual increases in homelessness. And the unprecedented health crisis had the potential to further complicate matters. For people who were already unhoused, how would their health and economic security improvement efforts be impacted? And as businesses closed and unemployment rates rose, would new people seek help from shelters?

Tracking COVID-related population changes proved difficult. The pandemic disrupted data collection in 2021. By 2022, the full PIT Count resumed, and data showed that the homeless population had once again increased—but by only 0.3 percent. Given the unprecedented circumstances facing the nation, the shift could be characterized as being unexpectedly small. Federal policy likely impacted outcomes: COVID-19-related government interventions benefitted many people. Eviction moratoria and the federal Emergency Rental Assistance (ERA)

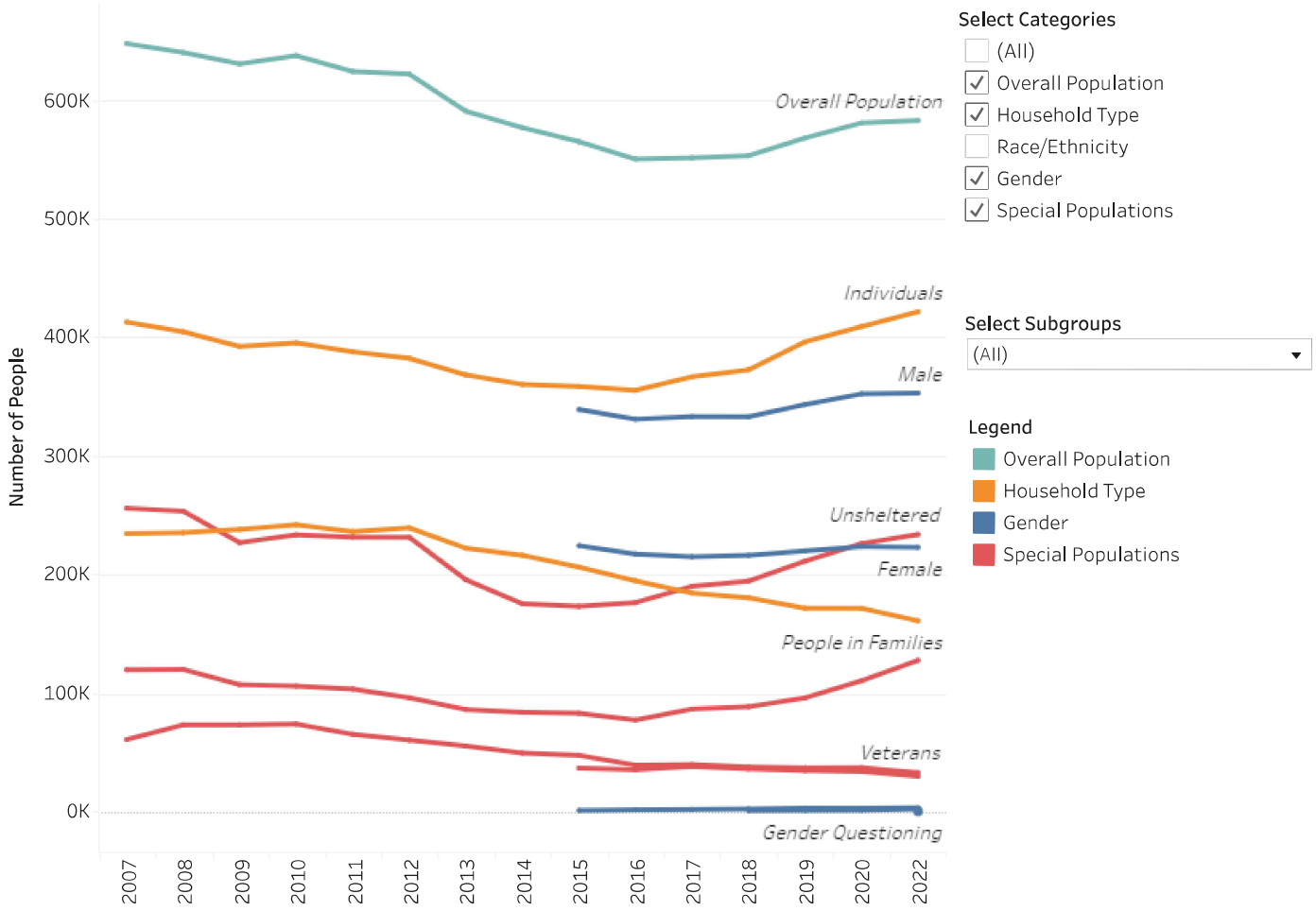
program kept (and are still keeping) many people housed. Additional investments were made in homeless assistance and housing vouchers targeted to people impacted by homelessness.

Homelessness Trends: Household Types and Special Populations

Progress in ending homelessness has been uneven across subgroups since data collection began in 2007. And although the overall homeless population increased slightly between 2020 and 2022, the same was not true for all subgroups. Some actually got smaller over that time period—1) families with children, 2) youth, and 3) veterans (see visualization below).

Subgroup Trends, 2007-2022

** Hover mouse over lines to see subgroup names and population size data.*

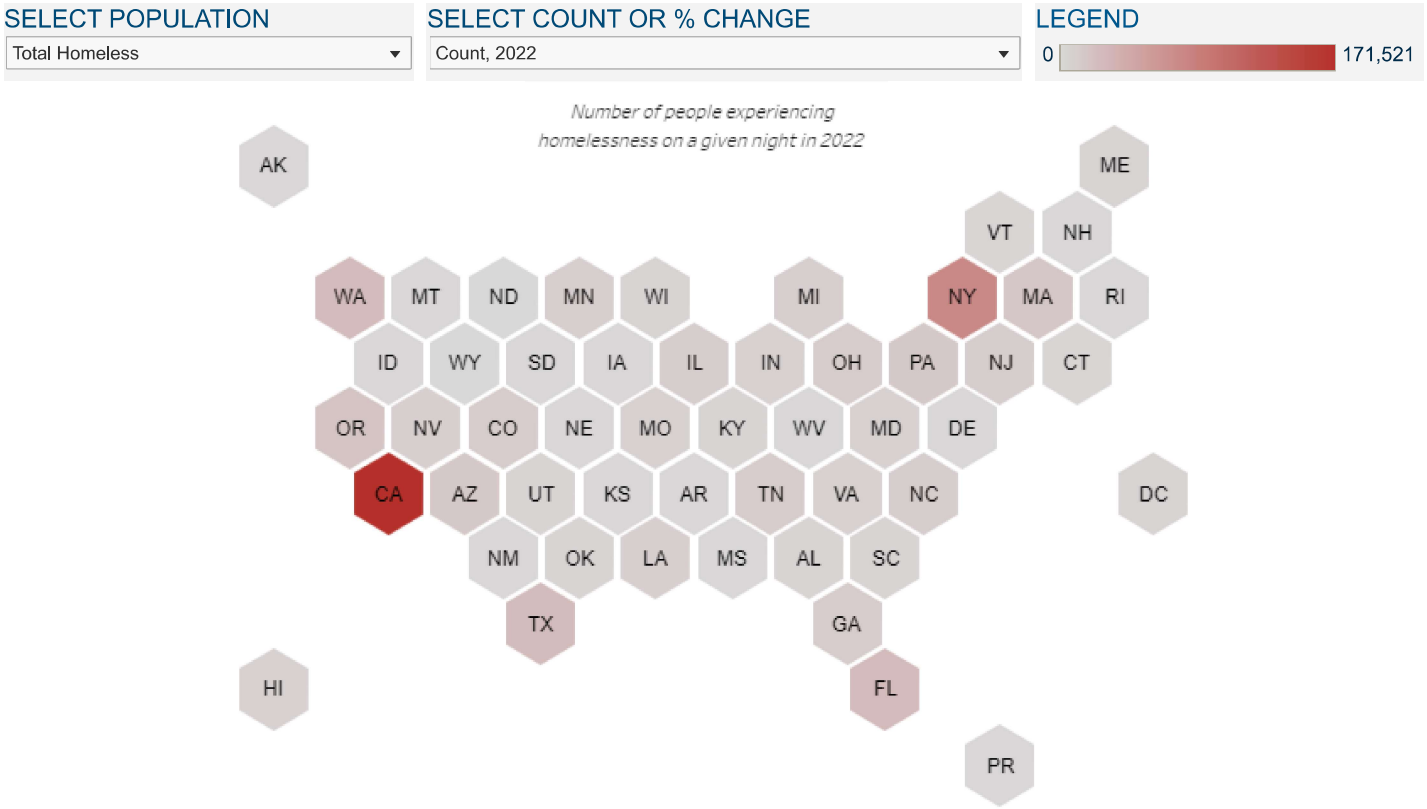


Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR). Note: The Covid-19 pandemic interrupted data collection in 2021 so data for that year is unavailable.

Due to factors such as vulnerability and history of military service, these groups are often targeted by both government and non-governmental interventions. Notably, the nation's progress on veteran homelessness has been particularly robust. The size of the group was cut in half over a decade-long period (2010-2020), decreasing by 50 percent. A total of 83 communities and 3 states have functionally ended veteran homelessness. Veterans have been the focus of concerted strategies and efforts (including governmental investments) that have been successful. Similar attention and resources could be extended to other subgroups in an effort to attain similar success.

The trends related to individuals experiencing homelessness are alarming. The 2022 Point-in-Time Count reflected record highs in the history data collection. The overall subpopulation of individuals reached 421,392 people, surpassing the previous record that existed in 2007. The count of chronically homeless individuals also surpassed all previous years. These trends reflect a notable shift after a period of population declines.

Count and Percent Change in Homelessness by State and Type, 2007-2022



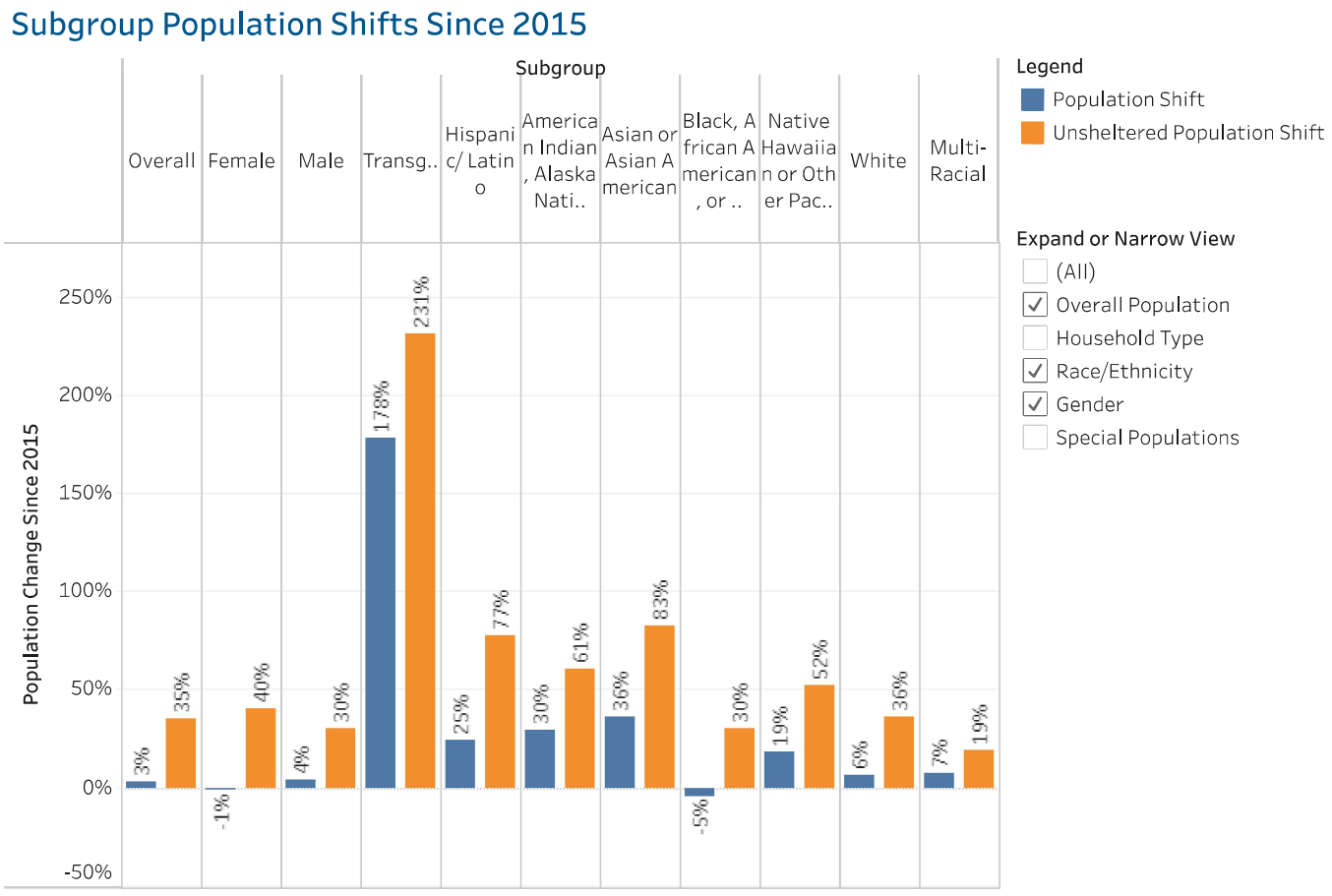
Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR). Note: Veteran data is unavailable before 2011. Youth data is unavailable before 2017.

Homelessness Trends: Race, Ethnicity, and Gender

In 2015, HUD began publishing homelessness data disaggregated by race, ethnicity, and certain gender categories. Although this isn't a long history of data reporting, it overlaps with the recent period of rising homelessness.

Uneven progress is evident between 2015 and 2022 among various identity groups. The above chart (Subgroup Trends, 2007-2022) illustrates that some subgroups have increased in size, while others have simply stagnated or gotten smaller. For example, the trend lines for White people and Hispanics/Latinos have been moving upward.

Digging a little deeper, the below chart (Subgroup Population Shifts Since 2015) highlights the extent of the changes occurring within each subgroup. It is clear that increases in homelessness have been particularly pronounced among people who are transgender (178 percent increase), Asian (36 percent increase), American Indian (30 percent increase), and Latino (25 percent increase).



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

Homelessness Trends: Shelter Utilization

Shelters are key components of America's response to homelessness. Since the beginning of the COVID-19 pandemic, certain trends have emerged in relation to this form of temporary housing:

Unsheltered Homelessness is On the Rise. The number of people living unsheltered decreased most years between 2007 and 2015. However, mirroring the pattern for individuals experiencing homelessness, that trend has recently made an about-face turn. The unsheltered population has grown yearly since 2015, amounting to a 35 percent increase over a seven-year span.

The impacts are not equal across groups. Since 2015, some populations have experienced growths in unsheltered homelessness that far surpass 35 percent. Of specific concern are people who are transgender (231 percent increase), Asian (83 percent increase), Latino (77 percent increase), and American Indian (61 percent increase). Challenges appear to be tied to western states (California, Oregon, Washington, and Hawaii) that are both diverse and highly immersed in affordable housing crises. Significant majorities of these homeless subgroup members live in these states.

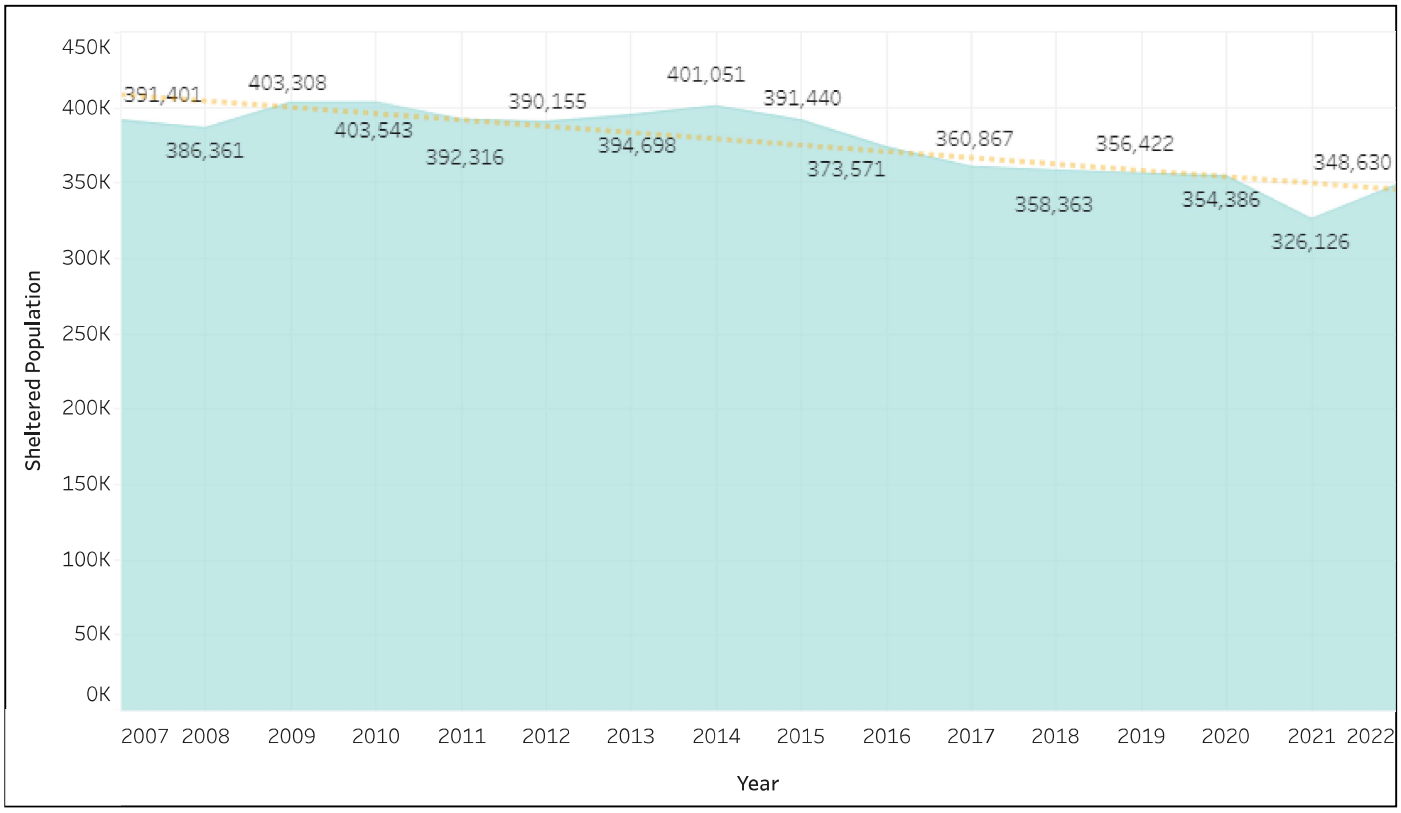
Systems Add More Shelter Beds in Response. As illustrated in the visualization below, the nation's shelter bed numbers have increased by 7 percent since 2019, indicating a slight increase in system capacity. Potential explanations include systems responding to increases in unsheltered homelessness, and/or the availability of pandemic relief dollars to create additional shelter beds.

Prior to this momentum, shelter bed numbers had been slowly trending downward as the number of permanent housing beds was greatly expanding. Such movements reflect fidelity to Housing First, a strategy that emphasizes stabilizing people in permanent housing as quickly possible.

Despite More Beds, Fewer People Are In Shelter. Even with the addition of more shelter beds, fewer people are staying in these facilities. The sh

been trending downward for several years, including 2021 (a year uniquely impacted by the COVID-19 pandemic, which necessitated a reduced congregate shelter capacity and consequent reduced inflow into shelter).

Overall Sheltered Trends, 2007 - 2022

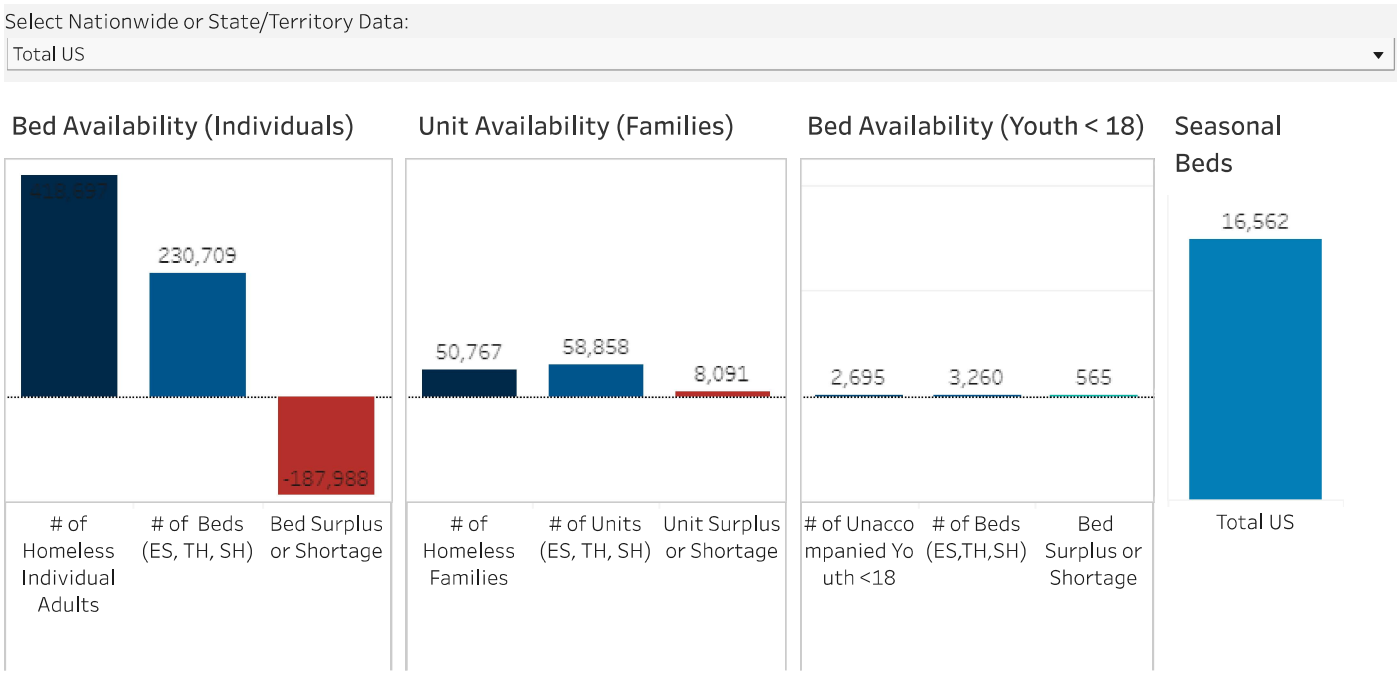


Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

HOMELESS ASSISTANCE IN AMERICA: USE OF RESOURCES AND CAPACITY

Homeless services systems often don't have the resources to house everyone in need. Thus, they make a host of difficult decisions related to 1) who to help and 2) how to budget available funds among temporary shelter and permanent housing options. This section provides a window into how homeless service systems are currently making limited government investments work for a growing population of people experiencing h

Availability of Temporary Shelter (Nationwide and By State/Territory), 2022



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

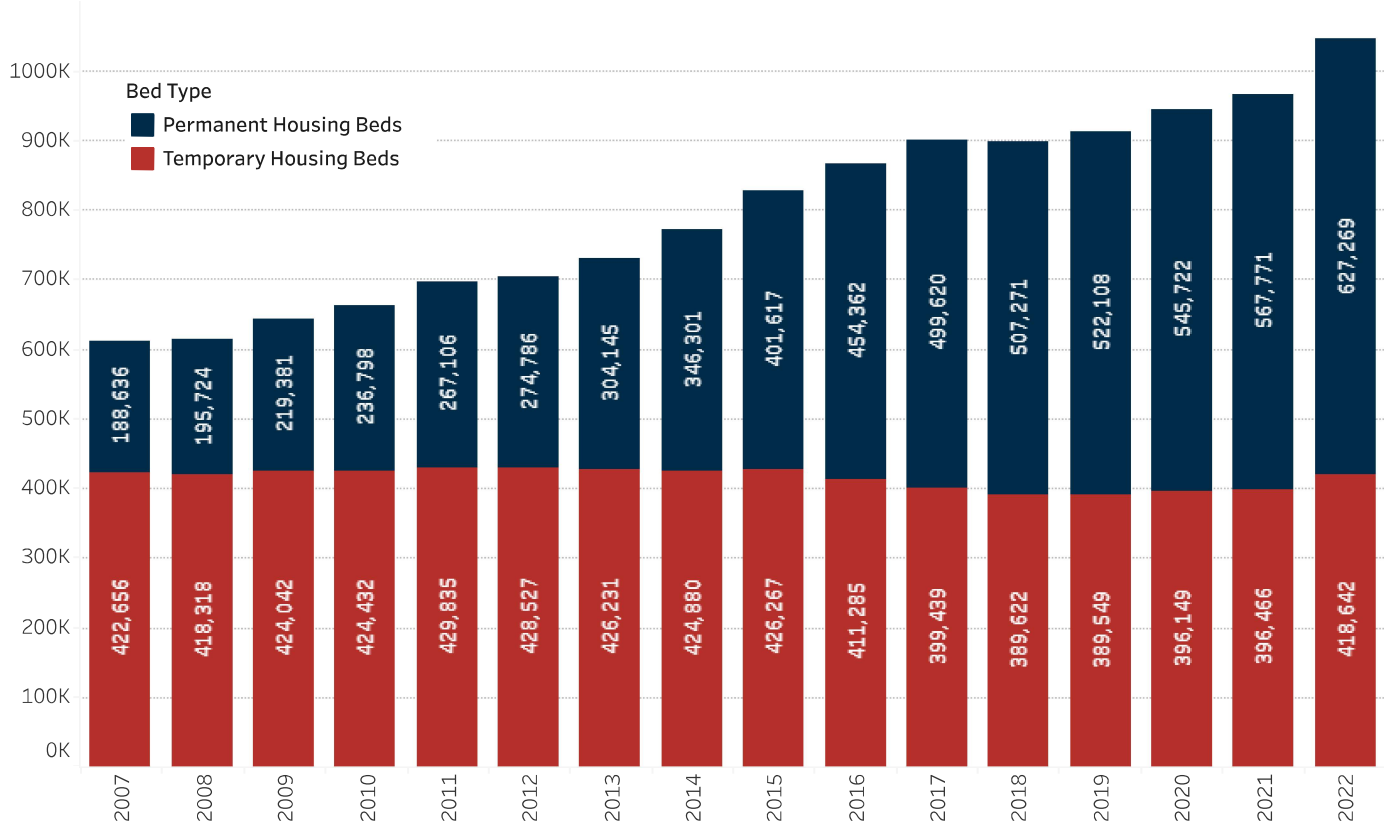
Shelter Beds

As noted in the section above, the number of people living unsheltered has been on the rise since 2015. Systems may be responding to this trend by expanding shelter capacity: after a few years of decreasing the availability of shelter beds, they expanded the total number by 7 percent over the last four years.

Importantly, a major contributor to unsheltered homelessness has been consistent and overwhelming shelter bed shortages since data collection began in 2007. At the high-water mark, there were 225,000 more people experiencing homelessness in America than existing shelter beds. Today, the gap has narrowed but remains vast, largely impacting individual adults.

In 2022, an examination of national-level data reveals a shortage of a little less than 188,00 year-round shelter beds for individual adults. There are only enough to reach 55 percent of the population. National-level data points to a surplus of available accommodations for families with children and unaccompanied youth.[4]

Permanent vs. Temporary Bed Inventory Trends, 2007-2022



Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

However, individual community circumstances vary. Thus, a specific town could have a shortage of available shelter units for families or a surplus of beds for individual adults.

Further, many communities set up temporary shelters during the winter months to prevent weather-related deaths. Thus, more people have spaces available to them than what is reflected by the year-round bed numbers.

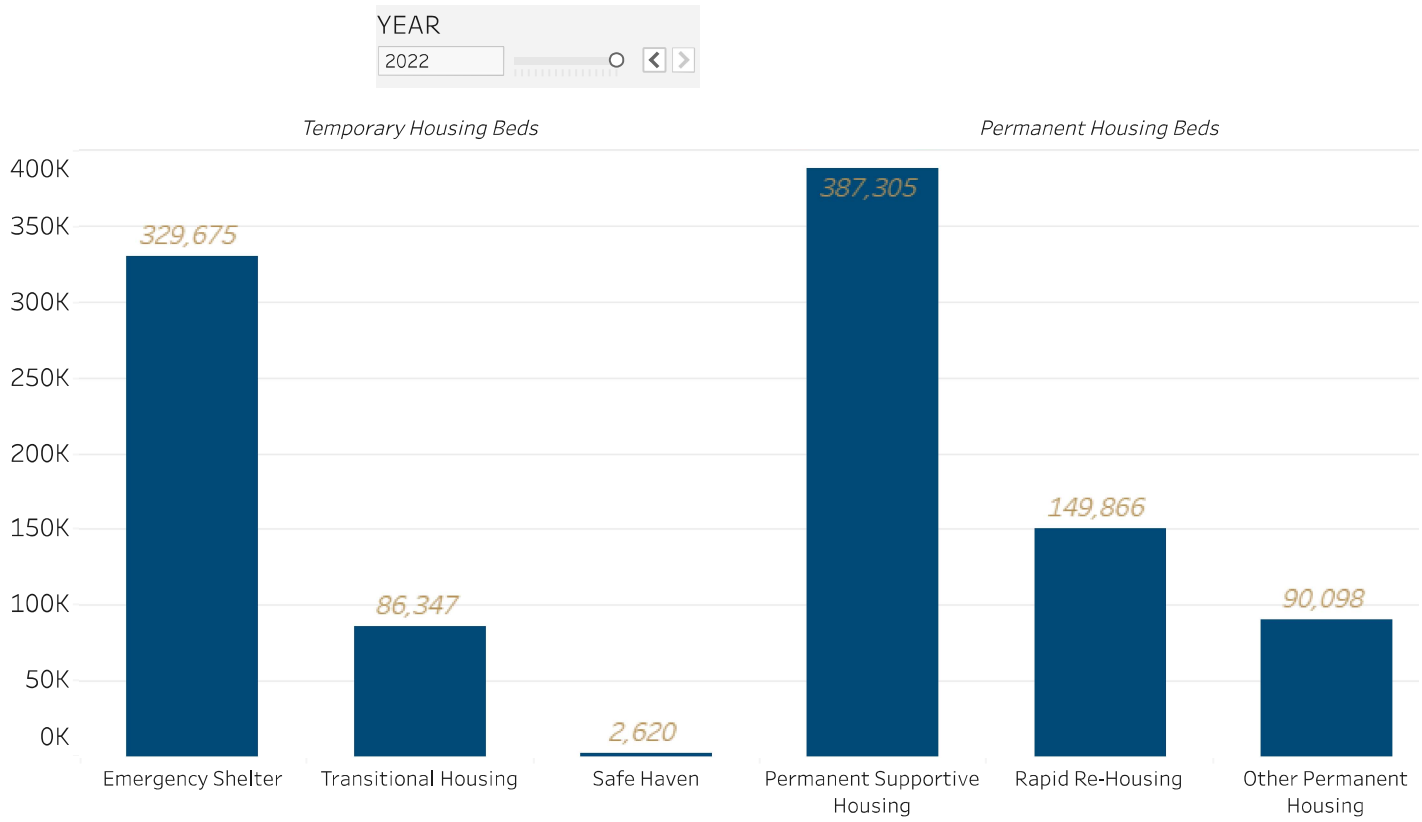
Permanent Housing Beds

Homeless services system investments suggest a prioritization of permanent housing options over temporary shelter. This is in line with Housing First, an approach to ending homelessness that emphasizes stabilizing people in permanent housing as quickly as possible while also making services available.

Permanent housing makes up 60 percent of all beds connected to homeless services systems. The number of such slots has consistently trended upwards since da , with a

26 percent growth over just the last five years. Despite these investments, homelessness (including unsheltered homelessness) is still on the rise. Available resources are simply not enough to ensure permanent housing for everyone who needs it.

Homeless Assistance Bed Inventory Trends, 2007-2022



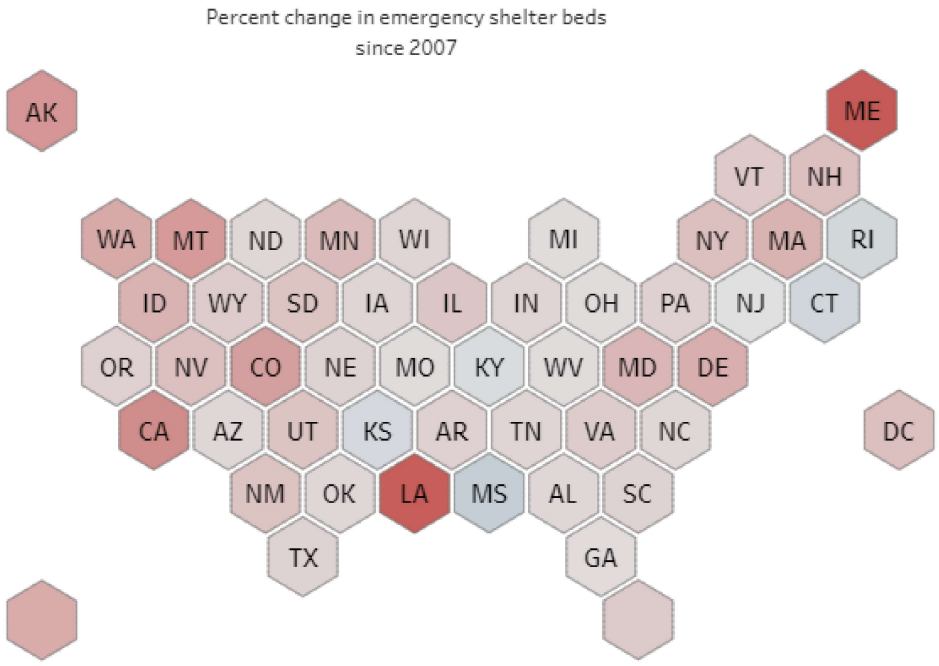
Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

Common Forms of Assistance

The top two forms of housing assistance are permanent supportive housing (37 percent of system beds) and emergency shelter (32 percent of system beds). The third most popular form of assistance (Rapid Re-Housing) is also the fastest growing: the number of beds in this category has grown by 60 percent over the last five years. Transitional housing is the only category on the decline. This model requires people to meet certain benchmarks before being awarded with permanent housing, and has fallen out of favor given growing adherence to the Housing First strategy, which is backed by research evidence.

State-by-State Trends in Homeless Assistance, 2007-2022

Category: Emergency Shelter | SELECT COUNT OR % CHANGE: Percent Change since 2007 | LEGEND: -55 to 274

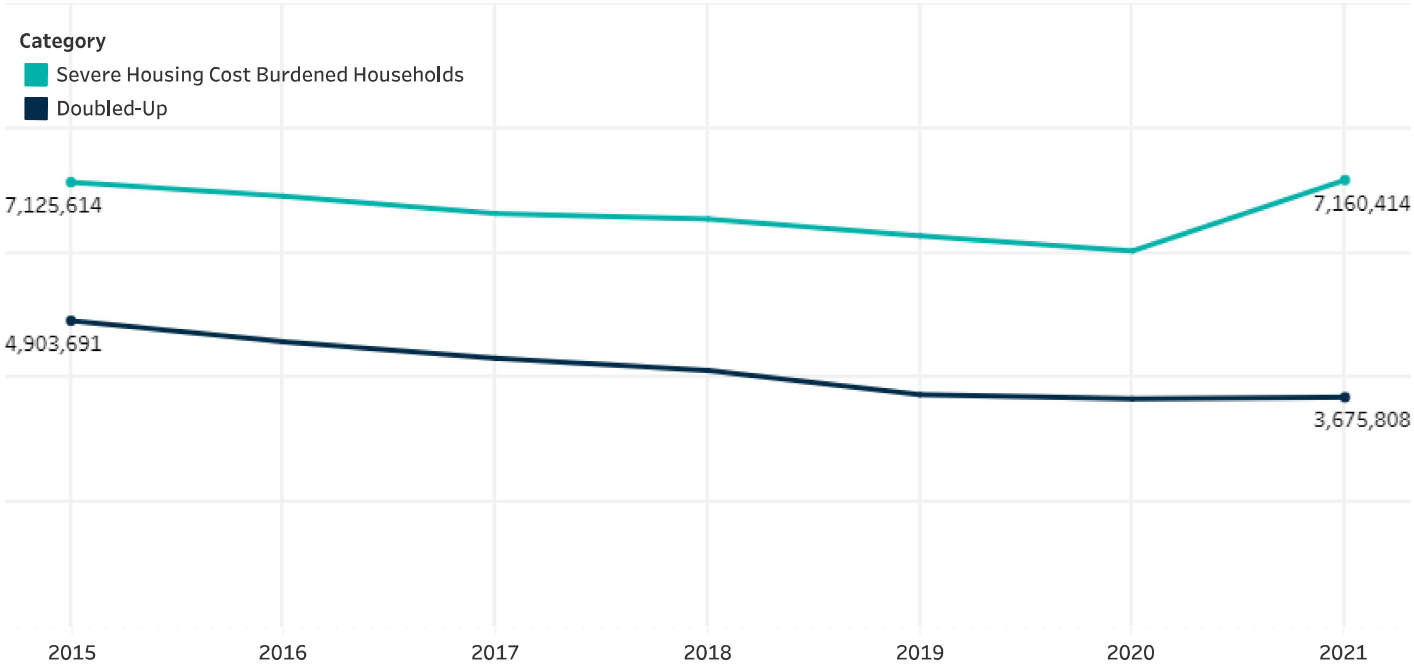


Source: U.S. Department of Housing and Urban Development, 2022 Annual Homeless Assessment Report to Congress (AHAR).

INDICATORS OF RISK

In the lead up to the pandemic, the nationwide poverty rate had decreased for five consecutive years. In 2020, that streak ended and the number of people living in poverty increased by approximately 3.3 million people. This trend continued into 2021 when nearly 41.4 million people, or 12.8 percent of the U.S. population, were counted in this group. Certain racial groups have even higher rates of poverty, including Black people (21.8 percent), American Indian and Alaska Native people (21.4 percent), and Hispanics/Latinos (17.5 percent). People living in poverty struggle to afford necessities such as housing, food, and medical care.

Populations at Risk of Homelessness over Time, 2015 - 2021

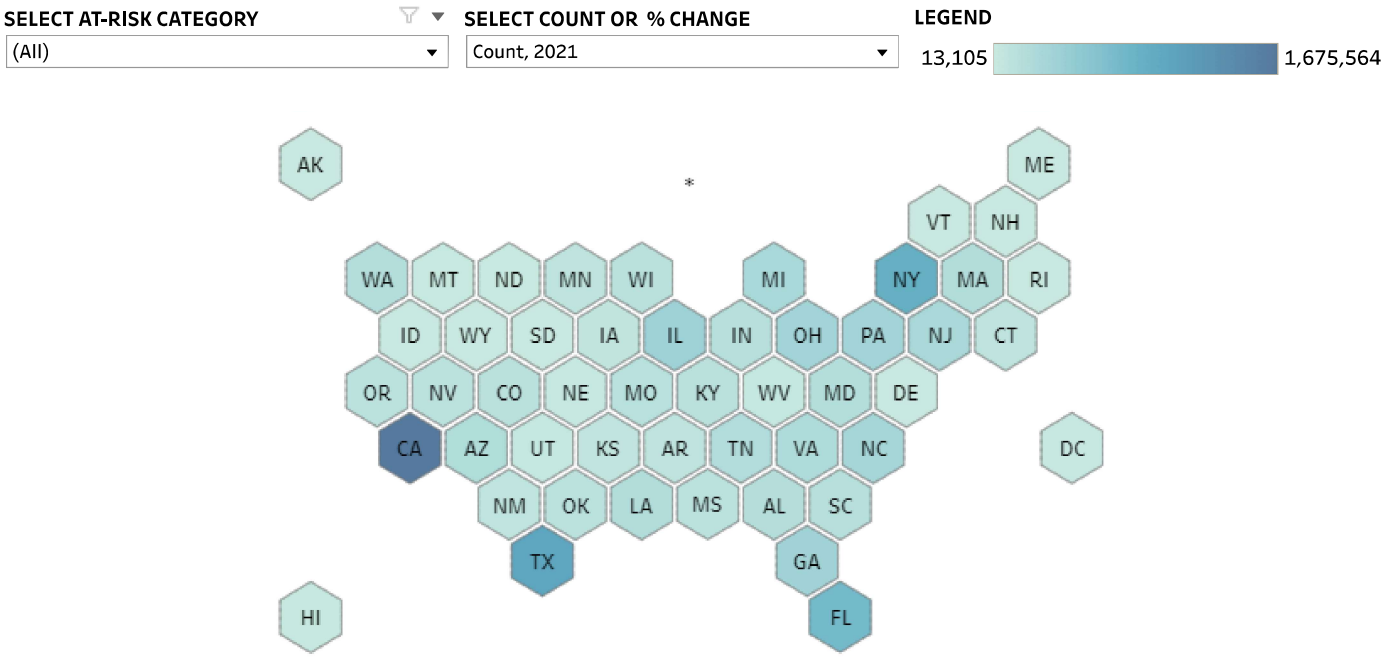


Source: 2007-2021 PUMS 1-Year, Accessed February 1, 2023 (Severe Housing Cost Burdened Households); Steven Ruggles, Sarah Flood, Matthew Sobek, Danika Brockman, Grace Cooper, Stephanie Richards, and Megan Schouweiler. IPUMS USA: Version 13.0 2015-2021 ACS PUMS 1-Year. Minneapolis, MN: IPUMS, 2023. https://doi.org/10.18128/D010.V13.0. Molly K. Richard, Julie Dworkin, Katherine Grace Rule, Suniya Farooqui, Zachary Glendening & Sam Carlson (2022): Quantifying Doubled-Up Homelessness: Presenting a New Measure Using U.S. Census Microdata, Housing Policy Debate, DOI: 10.1080/10511482.2021.1981976 (Doubled Up Population). Note: Doubled up data is not available before 2015.

In 2021, an estimated 7.1 million American households experienced severe housing cost burden, which means that they spent more than 50 percent of their income on housing. The overall size of this group had been gradually decreasing since 2014, but rose again in 2021. The number of severely cost-burdened American households is now 25 percent higher than it was in 2007, the year the nation began monitoring homelessness data. And more troublesome patterns may exist for notable subpopulations, including people with the lowest incomes and female-headed households.

"Doubling up" (or sharing the housing of others for economic reasons) is another measure of housing hardship and risk of homelessness. Approximately 3.7 million people across the country were in these situations in 2021. Some doubled up individuals and families have fragile relationships with their hosts or face other challenges in the home, putting them at risk of literal homelessness. Similar to severely housing cost burdened households, the number of people living doubled up had been decreasing but ticked upwards again in 2021. Currently, the doubled up population is 25 percent smaller than it was in 2015, the year in which utilized data came available.[5]

State-by-State Trends in Populations at Risk of Homelessness, 2007-2021



Source: 2007-2021 PUMS 1-Year, Accessed February 1, 2023 (Severe Housing Cost Burdened Households); Steven Ruggles, Sarah Flood, Matthew Sobek, Danika Brockman, Grace Cooper, Stephanie Richards, and Megan Schouweiler. IPUMS USA: Version 13.0 2015-2021 ACS PUMS 1-Year. Minneapolis, MN: IPUMS, 2023. https://doi.org/10.18128/D010.V13.0. Molly K. Richard, Julie Dworkin, Katherine Grace Rule, Suniya Farooqui, Zachary Glendening & Sam Carlson (2022): Quantifying Doubled-Up Homelessness: Presenting a New Measure Using U.S. Census Microdata, Housing Policy Debate, DOI: 10.1080/10511482.2021.1981976 (Doubled Up Population). Note: Doubled up data is not available before 2015.

National data on households who are housing cost burdened and doubled up do not tell the whole story, as certain regions across the country face more dire challenges than can be seen for the U.S. as a whole. Severe housing cost burdened households grew at higher rates than the national average in several states and the District of Columbia. For example, since 2007, severe housing cost burdened households grew by 155 percent in Wyoming, 87 percent in Nevada, 72 percent in Maryland, and 65 percent in Hawaii. Similarly, from 2015 to 2021, the number of people doubled up increased by 59 percent in South Dakota and 36 percent in Maine.

For over a decade, the nation has not made any real progress in reducing the number of Americans at risk of literal homelessness. Despite decreasing trends in people living doubled up overall, the rise in severe housing cost numbers are concerning. Even more troubling are the risks that inflation rising to a 40-year high in 2022, expiring eviction moratoria, and fading Emergency Rental Assistance dollars pose to those at risk of experiencing homelessness.

Data on **homelessness** are based on annual Point-in-Time (PIT) Counts conducted by Continuums of Care (CoCs) to estimate the number of people experiencing homelessness on a given night. The latest full counts (sheltered and unsheltered) are from January 2022. Point-in-Time data from 2007 to 2022 are available on HUD Exchange.

Rates of homelessness compare Point-in-Time Counts to state, county, and city population data from the Census Bureau's Population Estimates Program (Population and Housing Unit Estimates data tables, 2021 version). Rates for racial, ethnic, and gender demographic groups are drawn from the same source.

Data on **homeless assistance**, or bed capacity of homeless services programs on a given night, are reported annually by CoCs along with Point-in-Time Counts. These data are compiled in the Housing Inventory Count (HIC), which is also available on HUD Exchange for 2007 through 2022.

Estimates of **at-risk populations** are from analyses by the National Alliance to End Homelessness using the Census Bureau's 2021 American Community Survey 1-year microdata. Poor renter households with a severe housing cost burden are households whose total income falls under the applicable poverty threshold and who are paying 50 percent or more of total household income to housing rent. For people living doubled up, the Alliance has adopted the methodology developed by Molly K. Richard, Julie Dworkin, Katherine Grace Rule, Suniya Farooqui, Zachary Glendening, and Sam Carlson (Molly K. Richard, Julie Dworkin, Katherine Grace Rule, Suniya Farooqui, Zachary Glendening & Sam Carlson (2022): Quantifying Doubled-Up Homelessness: Presenting a New Measure Using U.S. Census M

Policy Debate, DOI: 10.1080/10511482.2021.1981976, Accessed from: https://nlihc.org/sites/default/files/Quantifying-Doubled-Up-Homelessness.pdf). Poverty is based on the composition and income of the entire household as compared to the poverty thresholds. A person is considered to be living doubled up based on their relationship to the household head and include: relatives for whom the household head does not take responsibility (based on their age and relationship) and nonrelatives who are not partners and not formally sharing responsibility for household costs (not roomers or roommates). Single adult children and relatives over 65 may be considered to be the householder's responsibility so they are included as doubling up only if the household is overcrowded. For more information, please consult the authors' study and methodology.

National Alliance to End Homelessness
1518 K Street NW, 2nd Floor, Washington, DC 20005 Privacy Policy
T: 202.638.1526 | F: 202.638.4664

Registered 501 (c)(3). EIN: 52-1299641

Alex F. Schwartz, Housing Policy in the United States (2014)

Homelessness

No housing problem is as profound as homelessness. Being homeless puts one at the mercy of the elements, charity, the kindness of family and friends, and the machinations of myriad social welfare agencies. Without a home, it is extremely difficult to find a job or to keep one. For children, it makes it difficult to attend school regularly and perhaps even more difficult to study and learn. Homelessness puts people at high risk of illness, mental health problems, substance abuse, and crime (Bratt 2000; Hoch 1998; Hopper 1997).

Although a portion of the U.S. population has perhaps always been homeless, the character and size of the homeless population began to change by the early 1980s. Until then, homelessness was chiefly associated with older, often alcoholic, single male denizens of a city's proverbial "skid row." Afterwards, the homeless population became much larger and more diverse, including an increasing number of women and families (Hopper 1997). Although many homeless, as before, struggle with alcoholism, drug addiction, or mental illness, many more homeless do not have these problems.

The Magnitude and Causes of Homelessness

Unlike other housing problems, homelessness is by its nature extremely difficult to quantify. Until recently, the homeless were not counted in the decennial census, the American Community Survey, the Current Population Survey, the American Housing Survey, or other studies of housing and households. National estimates of the homeless population only became regularly available in 2007 when HUD released its first annual homeless assessment report to Congress (HUD 2008). The data are based on counts and estimates of the sheltered and unsheltered homeless population provided by local and state agencies as part of their applications for federal funding for homeless services. To improve the quality of local estimates of homeless populations, HUD, in 2005, required these agencies to count the number

of sheltered and unsheltered homeless people on a single night in January at least every other year (HUD 2008). Since the 1980s, many localities had been tracking the number of beds available in homeless shelters and transitional housing facilities and estimating the number of unsheltered homeless living on the streets, in abandoned buildings, and other places not intended for human habitation, but now this information is collected more systematically across the nation. For example, the New York City government has mounted an annual "Homeless Outreach Population Estimate" since 2002. Staffed by hundreds of volunteers who spend an entire night searching randomly selected areas (groups of blocks and park areas as well as subway stations) for homeless individuals, the initiative attempts to estimate the total number of "street" (unsheltered) homeless (New York City Department of Homeless Services 2013). The results of this survey complement the city's homeless shelter intake statistics to gauge the city's overall homeless population.

Homelessness can be quantified in two ways. One is to count the number of people who are homeless at a single point in time. The other is to estimate the number of people who have been homeless one or more times during a specified time period, such as the preceding year. Both methods are difficult to carry out and are subject to different types of error and biases.

Point-in-time homeless counts have frequently been criticized for failing to provide a complete picture of the homeless. Using improved sampling techniques, methods of counting the homeless at a single point in time have undoubtedly become more sophisticated; however, the approach has inherent limitations. Most fundamentally, it fails to account for the fact that people differ in the length of time they are homeless. Homelessness is a long-term if not chronic condition for some people, but it is much more transitory for many more.

This difference has two consequences. First, point-in-time estimates will indicate that the extent of homelessness is much smaller than the size suggested by studies that look at the number of people who have experienced homelessness within a specified period of time. Second, point-in-time studies may not provide an accurate picture of the characteristics of the homeless. In other words, the longer someone is homeless, the more likely he or she will be covered in a point-in-time survey of the homeless. If people who are homeless for varying durations differ in other respects, such as mental health, substance abuse, education, or household status, point-in-time studies will overemphasize the characteristics of the more chronically homeless.

The limitations of this approach are illustrated by Phelan and Link (1998: 1334):

> Imagine a survey conducted in a shelter on a given night in December. If residents come and go during the month, the number on the night of the survey will be smaller than the number of residents over the month. If, in addition, length of stay varies, longer term residents will be oversampled (e.g., a person who stays all month is certain to be sampled while a person who stays one night has a 1 in 31 chance of being sampled). Finally,

if persons with certain characteristics (e.g., mental illness) stay longer than others, the prevalence of those characteristics will be overestimated.

The second approach for quantifying the homeless is to estimate the number of people who have been homeless over a specified period of time. Link and his colleagues (1994), for example, conducted a national telephone survey of 1,507 randomly selected adults in the 20 largest metropolitan areas to estimate the percentage who had ever experienced homelessness and who had been homeless at some point during the previous five years (1985 to 1990). The study concluded that 7.4% of the population had been homeless at some point in their lives and that 3.1% had been homeless at least once during the previous five years.

A still larger segment of the population had experienced homelessness when the definition was extended to include periods in which people had been doubled up with other households. Not surprisingly, low-income people reported the highest incidence of homelessness. Nearly one in five households that have ever received public assistance reported having been homeless at least once during their lifetimes.

Culhane and colleagues arrived at similar findings in their analysis of homeless shelter admission data in New York City and Philadelphia. They found that more than 1% of New York's population and nearly 1% of Philadelphia's had stayed in a public homeless shelter at least once in a single year (1992). Moreover, more than 2% of New York's and nearly 3% of Philadelphia's population had received shelter at least once during the previous three years (1990 to 1992). The incidence of homelessness was especially high among African Americans. For example, African Americans in New York City were more than 20 times more likely than Whites to spend one or more nights in a homeless shelter during a three-year period (Culhane, Dejowski, Ibanes, Needham, & Macchia 1999).

The most recent national estimates of the homeless population include figures for a single point in time and for people who had spent one or more nights within a homeless shelter during the previous 12 months. According to the 2012 Annual Homeless Assessment Report to Congress (HUD 2012a), a total of 633,782 people were homeless on a single night in January 2012 (see Table 2.16). In 2011, the latest year for which longitudinal data are available, more than twice as many people, 1.5 million, were in a homeless shelter or transitional housing facility for one or more nights during the year than were homeless on a single night in January. This figure does not include people who were homeless but did not enter the shelter system or people who stayed in shelters for victims of domestic violence (HUD 2012b). About one in every 201 persons in the United States stayed in a homeless shelter or transitional housing facility at some point between October 1, 2010 and September 30, 2011; however, a much larger proportion of the minority population experienced homelessness during the year—one in every 128 persons. The odds of a member of a minority group becoming homeless during the year are nearly double the risk of being diagnosed with cancer (HUD 2012b: 22).

Table 2.16 summarizes key trends in the homeless population. Most importantly, from 2005 to 2012 there was a decline of nearly 15% in the number of homeless persons. The decrease was largest among the chronically homeless (–42%), the unsheltered homeless (–24%), and individuals in families (–21%). From a longitudinal perspective, the magnitude of homelessness has also declined, but to a lesser degree. Table 2.16 shows that the number of people who stayed one or more nights in the shelter systems from October 1, 2010 to September 30, 2011 decreased by more than 5% compared to the number who utilized the shelter system for one or more nights from October 1, 2006 to September 30, 2007. However, this statistic masks a 13% increase in the number of people in families who were sheltered during the course of a year. (Fortunately, the figures for 2011 show a decrease in the number of homeless people in families from the previous year).

Some of the decrease in homelessness counts may stem from methodological improvements in how the homeless are counted, especially the unsheltered homeless (HUD 2008), but it probably also reflects increased resources allocated to permanent supportive housing and to a concerted effort by several hundred communities to reduce if not eliminate homelessness (see Chapter 10). It is remarkable

Table 2.16 Homelessness in the United States: Point-in-Time and Longitudinal Estimates of the Homeless Population

THE HOMELESS POPULATION ON A SINGLE NIGHT IN JANUARY							
	2005	2008	2011	2012	% DISTRIBUTION, 2012	CHANGE 2005–12	
						TOTAL	%
Total Homeless	744,313	664,414	636,017	633,782		–110,531	–14.9
Individuals	437,710	415,202	399,836	394,379	62	–43,331	–9.9
Persons in Familes	303,524	249,212	236,181	239,403	38	–64,121	–21.1
Chronically Homeless	171,192	124,135	107,148	99,894	16	–71,298	–41.6
Unsheltered	322,082	278,053	243,701	243,627	38	–78,455	–24.4
Sheltered	407,813	386,361	392,316	390,155	62	–17,658	–4.3
ESTIMATE OF SHELTERED HOMELESSNESS DURING A ONE-YEAR PERIOD							
	2007	2008	2009	2010	2011	CHANGE 2007–11	
						TOTAL	%
Total Homeless	1,588,595	1,593,794	1,558,917	1,593,150	1,502,196	–86,399	–5.4
Individuals	1,115,054	1,092,612	1,034,659	1,043,242	984,469	130,585	–11.7
Persons in Familes	473,541	516,724	535,447	567,334	537,414	63,873	13.49

Source: Sermons & Henry 2009: Table 1; HUD 2012a & 2012b.

that the incidence of homelessness continued to decrease after 2008 in the face of the Great Recession and the extremely slow recovery. While the number of households with severe housing affordability problems has increased sharply during this period, homelessness has declined.[5]

The causes of and remedies for homelessness have been subject to intense debate ever since homelessness emerged as a national issue in the 1980s (Burt 1991). Virtually all experts agree that homelessness is associated with extreme poverty, but there is much less consensus regarding the influence of mental illness, substance abuse, and social isolation as additional determinants of homelessness. Similarly, although some experts argue that stable, affordable housing is the best cure for homelessness, others claim that housing by itself is not sufficient and must be combined with case management and other supportive services (Cunningham 2009, Hoch 1998; Hopper 1997; Shinn, Baumohl, & Hopper 2001; Shinn, Weitzman et al. 1998; Wright & Rubin 1991). However, as discussed in Chapter 11, the dominant emphasis in homeless policy is shifting from policies and programs that emphasize transitional housing and supportive services as an intermediate step before placing them in permanent housing, to one that seeks to place the homeless in permanent housing as quickly as possible, and provide services afterwards if necessary. In part, disagreements over the causes and solutions for homelessness reflect the previously noted differences between point-in-time and longitudinal perspectives. Because individuals with mental illness, substance abuse histories, and other problems tend to be homeless for longer durations than other populations are, they are overrepresented in point-in-time surveys and have come to define the public face of homelessness. Disagreements over the causes and treatment of homelessness may also reflect the differences in the disciplinary backgrounds among researchers, advocates, and service providers. As Charles Hoch observes in his essay on homelessness for *The Encyclopedia of Housing* (1998: 234), "inquiry into the causes, conditions and prospects of the homeless follow different disciplinary pathways and so end up with different conclusions."

The Old Homeless and the New Homelessness in Historical Perspective

Peter H. Rossi

Department of Sociology and Social and Demographic Research Institute, University of Massachusetts/ Amherst

ABSTRACT: In the 1950s and 1960s homelessness declined to the point that researchers were predicting its virtual disappearance in the 1970s. Instead, in the 1980s, homelessness increased rapidly and drastically changed in composition. The "old homeless" of the 1950s were mainly old men living in cheap hotels on skid rows. The new homeless were much younger, more likely to be minority group members, suffering from greater poverty, and with access to poorer sleeping quarters. In addition, homeless women and families appeared in significant numbers. However, there were also points of similarity, especially high levels of mental illness and substance abuse.

Over the past decade, homelessness has received a great deal of popular attention and sympathy. The reasons for both appear to be obvious: Homelessness is clearly increasing, and its victims easily garner sympathetic concern. Our ideas about what constitutes a minimally decent existence are bound up inextricably with the concept of home. The Oxford Unabridged Dictionary devotes three pages to definitions of the word *home* and its derivatives; almost all of them stress one or more of the themes of safety, family, love, shelter, comfort, rest, sleep, warmth, affection, food, and sociability.

Homelessness has always existed in the United States, increasing in times of economic stress and declining in periods of prosperity (Monkkonen, 1984). Yet the problem has not received as much attention and sympathy in the past. Our current high level of concern reflects at least in part the fact that today's homeless are different and intrude more pointedly into everyday existence.

Before the 1980s the last great surge of homelessness occurred during the Great Depression in the 1930s. As in the present day, there were no definitive counts of the numbers of Depression-era homeless; estimates ranged from 200,000 to 1.5 million homeless persons in the worst years of the Depression.

As described in the social research of the time (Schubert, 1935), the Depression transient homeless consisted mainly of young men (and a small proportion of women) moving from place to place in search of employment. Many left their parental homes because they no longer wanted to be burdens on impoverished households and because they saw no employment opportunities in their depressed hometowns. Others were urged to leave by parents struggling to feed and house their younger siblings.

Homelessness After World War II

The entry of the United States into World War II drastically reduced the homeless population in this country, absorbing them into the armed forces and the burgeoning war industries (Hopper & Hamburg, 1984). The permanently unemployed that so worried social commentators who wrote in the early 1930s virtually disappeared within months. When the war ended, employment rates remained relatively high. Accordingly, homelessness and skid row areas shrank to a fraction of the 1930s experience. But neither phenomenon disappeared entirely.

In the first two postwar decades, the skid rows remained as collections of cheap hotels, inexpensive restaurants and bars, casual employment agencies, and religious missions dedicated to the moral redemption of skid row residents, who were increasingly an older population. Typically, skid row was located close to the railroad freight yards and the trucking terminals that provided casual employment for its inhabitants.

In the 1950s, as urban elites turned to the renovation of the central cities, what to do about the collection of unsightly buildings, low-quality land use, and unkempt people in the skid rows sparked a revival of social science research on skid row and its denizens. Especially influential were studies of New York's Bowery by Bahr and Caplow (1974), of Philadelphia by Blumberg and associates (Blumberg, Shipley, & Shandler, 1973), and of Chicago's skid row by Donald Bogue (1963).

All the studies of the era reported similar findings, with only slight local variations. The title of Bahr and Caplow's (1974) monograph, *Old Men: Drunk and Sober,* succinctly summarizes much of what was learned—that skid row was populated largely by alcoholic old men.

By actual count, Bogue (1963) enumerated 12,000

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homeless persons in Chicago in 1958, almost all of them men. In 1964, Bahr and Caplow (1974) estimated that there were about 8,000 homeless men living in New York's Bowery. In 1960, Blumberg et al. (1973) found about 2,000 homeless persons living in the skid row of Philadelphia. Clearly, despite the postwar economic expansion, homelessness persisted.

The meaning of homelessness as used by Bahr (1970), Blumberg et al. (1973), Bogue (1963), and other analysts of the era was somewhat different from current usage. In those studies, homelessness mostly meant living outside family units, whereas today's meaning of the term is more directly tied to the absolute lack of housing or to living in shelters and related temporary quarters. In fact, almost all of the homeless men studied by Bogue (1963) in 1958 had stable shelter of some sort. Four out of five rented cubicles in flophouse hotels. Renting for from $0.50 to $0.90 a night, a cubicle room would hardly qualify as a home, at least not by contemporary standards. Most of those not living in the cubicles lived in private rooms in inexpensive single-room occupancy (SRO) hotels or in the mission dormitories. Bogue reported that only a few homeless men, about 100, lived out on the streets, sleeping in doorways, under bridges, and in other "sheltered" places. Searching the streets, hotels and boarding houses of Philadelphia's skid row area in 1960, Blumberg et al. found only 64 persons sleeping in the streets.

As described by Bogue (1963), the median age of Chicago's homeless in the late 1950s was about 50 years old, and more than 90% were White. One fourth were Social Security pensioners, making their monthly $30–$50 minimum social security payments last through the month by renting the cheapest accommodations possible. Another fourth were chronic alcoholics. The remaining one half was composed of persons suffering from physical disability (20%), chronic mental illness (20%), and what Bogue called *social maladjustment* (10%).

Aside from those who lived on their pension checks, most skid row inhabitants earned their living through menial, low-paid employment, much of which was of an intermittent variety. The mission dormitories and municipal shelters provided food and beds for those who were out of work or who could not work.

All of the social scientists who studied the skid rows in the postwar period remarked on the social isolation of the homeless (Bahr, 1970). Bogue (1963) found that virtually all homeless men were unmarried, and a majority had never married. Although many had family, kinship ties were of the most tenuous quality, with few of the homeless maintaining ongoing contacts with their kin. Most had no one they considered to be good friends.

Much the same portrait emerged from other skid row studies throughout the country. All of the studies painted a similar picture in the same three pigments: (a) extreme poverty arising from unemployment or sporadic employment, chronically low earnings, and low benefit levels (such as were characteristic of Social Security pensions at the time); (b) disability arising from advanced age, alcoholism, and physical or mental illness; and (c) social disaffiliation, tenuous or absent ties to family and kin, with few or no friends.

Most of the social scientists studying skid rows expressed the opinion that they were declining in size and would soon disappear. Bahr and Caplow (1974) claimed that the population of the Bowery had dropped from 14,000 in 1949 to 8,000 in 1964, a trend that would end with the disappearance of skid row by the middle 1970s. Bogue (1963) cited high vacancy rates in the cubicle hotels as evidence that Chicago's skid row was also on the decline. In addition, Bogue claimed that the economic function of skid row was fast disappearing. With the mechanization of many low-skilled tasks, the casual labor market was shrinking, and with no economic function to perform, the skid row social system would also disappear.

Evidence through the early 1970s indeed suggested that the forecasted decline was correct; skid row was on the way out. Lee (1980) studied skid row areas of 41 cities and found that the skid row populations had declined by 50% between 1950 and 1970. Furthermore, in cities in which the market for unskilled labor had declined most precipitously, the loss of the skid row population was correspondingly larger.

By the end of the 1970s, striking changes had taken place in city after city. The flophouse and cubicle hotels had, for the most part, been demolished, and were replaced eventually by office buildings, luxury condominiums, and apartments. The stock of cheap SRO hotels, in which the more prosperous of the old homeless had lived, had also been seriously diminished (U.S. Senate, 1978). Skid row did not disappear altogether; in most cities, the missions still remained and smaller skid rows sprouted up in several places throughout the cities, where the remaining SRO hotels and rooming houses still stood.

The New Homelessness of the 1980s

The "old" homeless of the 1950s, 1960s, and 1970s—so ably described by many social scientists—may have blighted some sections of the central cities but, from the perspective of most urbanites, they had the virtue of being concentrated in skid row, a neighborhood one could avoid and hence ignore. Most of the old homeless on skid row had some shelter, although it was inadequate by any standards; very few were literally sleeping on the streets. Indeed, in those early years, if any had tried to bed down on the steam vents or in doorways and vestibules of any

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The author is Stuart A. Rice Professor of Sociology and Acting Director of the Social and Demographic Research Institute at the University of Massachusetts Amherst.

Correspondence concerning this article should be addressed to Peter H. Rossi, Social and Demographic Research Institute, University of Massachusetts, Amherst, MA 01003.

downtown business area, the police would have quickly trundled them off to jail.

The demise or displacement of skid row, however, and the many other trends and developments of the 1960s and 1970s, did *not* put an end to homelessness in American cities. Quite to the contrary: By the end of the 1970s, and certainly by the early 1980s, a new type of homelessness had begun to appear.

The "new" homeless could be seen sleeping in doorways, in cardboard boxes, in abandoned cars, or resting in railroad or bus stations or in other public places, indications of a resurgent homelessness of which hardly anyone could remain oblivious. The immediate evidence of the senses was that there were persons in our society who had no shelter and who therefore lived, literally, in the streets. This change reflected partially corresponding changes in local police practices following the decriminalization of public inebriation and other court-ordered changes in the treatment of "loitering" and vagrancy. The police no longer herded the homeless into their ghettos.

Even more striking was the appearance of homeless women in significant numbers. The skid rows of the 1950s and 1960s were male enclaves; very few women appeared in any of the pertinent studies. And thus, homelessness had come to be defined (or perhaps, stereotyped) as largely a male problem. Indifference to the plight of derelicts and bums is one thing; indifference to the existence and problems of homeless women is quite another.

Soon, entire families began showing up among the homeless, and public attention grew even stronger and sharper. Women and their children began to arrive at the doors of public welfare departments asking for aid in finding shelter, arousing immediate sympathy. Stories began to appear in the newspapers about families migrating from the Rustbelt cities to cities in the Sunbelt in old cars loaded with their meager belongings, seeking employment, starkly and distressingly reminiscent of the Okies of the 1930s.

There is useful contrast between Bogue's, 1958, Chicago study (Bogue, 1963) and the situation in Chicago today. Data on the contemporary Chicago homeless was obtained in a study conducted by my colleagues and myself in 1985 and 1986 (Rossi, 1989; Rossi, Fisher, & Willis, 1986; Rossi & Wright, 1987). In 1958, there were four or five mission shelters in the city, providing 975 beds. In our studies in 1985 and 1986, there were 45 shelters providing a total of 2,000 beds, primarily for adult homeless persons.

New types of sheltering arrangements have come into being to accommodate the rising number of homeless families. Some shelters now specialize in providing quasi-private quarters for family groups, usually in one or two rooms per family, with shared bathrooms and cooking facilities. In many cities, welfare departments have provided temporary housing for family groups by renting rooms in hotels and motels.

In some cities, the use of hotel and motel rooms rented by public welfare agencies to shelter homeless families is very widespread. For example, in 1986, New York City's welfare department put up an average of 3,500 families in so-called *welfare hotels* each month (Bach & Steinhagen, 1987; Struening, 1987).

Funds for the new homeless are now being allocated out of local, state, and federal coffers on a scale that would have been inconceivable two decades ago. Private charity has also been generous, with most of the emergency shelters and food outlets for the homeless being organized and run by private groups. Foundations have given generous grants. For example, the Robert Wood Johnson Foundation, in association with the Pew Charitable Trust, supports health care clinics for the homeless in 19 large cities, a $25 million venture. The states have provided funds through existing programs and special appropriations. And in spring 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act (P.L. 100-77), appropriating $442 million for the homeless in fiscal 1987 and $616 million in 1988, to be channeled through a group of agencies.

There can be little doubt that homelessness has increased over the past decade and that the composition of the homeless has changed dramatically. There are ample signs of that increase. For example, in New York City, shelter capacity has increased from 3,000 to 6,000 over the last five years, and the number of families in the welfare hotels has increased from a few hundred to more than 3,000 in any given month (Bach & Steinhagen, 1987; Struening, 1987). Studies reviewed by the U.S. General Accounting Office ([GAO]; 1985, 1988) suggest an annual growth rate of the homeless population somewhere between 10% and 38%.

The GAO figures and other estimates, to be sure, are not much more than reasoned guesses. No one knows for sure how many homeless people there are in the United States today or even how many there are in any specific city, let alone the rate of growth in those numbers over the past decade.

The many difficulties notwithstanding, several estimates have been made of the size of the nation's homeless population. The National Coalition for the Homeless, an advocacy group, puts the figure somewhere between 1.5 and 3 million (GAO, 1988). A much maligned report by the U.S. Department of Housing and Urban Development (1984), partially based on cumulating the estimates of presumably knowledgeable local experts, and partially on a survey of emergency shelters, put the national figure at somewhere between 250,000 and 300,000. A more recent national estimate by The Urban Institute (Burt & Cohen, 1988), based on direct counts in shelters and food kitchens leads to a current estimate of about 500,000 homeless persons.

No available study suggests a national total number of homeless on any given night of less than several hundred thousand, and perhaps it is enough to know that the nation's homeless are at least numerous enough to populate a medium-sized city. Although the "numbers" issue has been quite contentious, in a very real sense, it does not matter much which estimate is closest to the

truth. By any standard, all estimates point to a national disgrace.

Who Are the New Homeless?

Since 1983, 40 empirical studies of the homeless have been undertaken that were conducted by competent social researchers; the results provide a detailed and remarkably consistent portrait of today's homeless population. As in the 1950s and 1960s, the driving purpose behind the funding and conduct of these studies is to provide the information necessary to design policies and programs that show promise to alleviate the pitiful condition of the homeless. The cities covered in these studies range across all regions of the country and include all the major metropolitan areas as well as more than a score of smaller cities.

The cumulative knowledge about the new homeless provided through these studies is quite impressive, and the principal findings are largely undisputed. Despite wide differences in definitions of homelessness, research methods and approaches, cities studied, professional and ideological interests of the investigators, and technical sophistication, the findings from all studies tend to converge on a common portrait. It would not be fair to say that all of the important questions have been answered, but a reasonably clear understanding is now emerging of who the new homeless are, how they contrast with the general population, and how they differ from the old homeless of the 1950s.

Some of the important differences between the new homeless and the old have already been mentioned. Few of the old homeless slept in the streets. In stark contrast, the Chicago Homeless Study (Rossi, 1989; Rossi, Fisher, & Willis, 1986; Rossi & Wright, 1987) found close to 1,400 homeless persons out on the streets in the fall of 1985 and more than 500 in that condition in the dead of winter (early 1986). Comparably large numbers of street homeless, proportionate to community size, have been found over the last five years in studies of Los Angeles (Farr, Koegel, & Burnam, 1986); New York (New York State Department of Social Services, 1984); Nashville, Tennessee (Wiegand, 1985); Austin, Texas (Baumann, Grigsby, Beauvais, & Schultz, not dated); Phoenix, Arizona (Brown, McFarlane, Parades, & Stark, 1983); Detroit, Michigan (Mowbray, Solarz, Johnson, Phillips-Smith, & Combs, 1986); Baltimore (Maryland Department of Human Resources, 1986); and Washington, DC (Robinson, 1985), among others.

One major difference between the old homeless and the new is thus that nearly all of the old homeless managed, somehow, to find nightly shelter indoors, whereas large fractions of the new homeless sleep in the streets or in public places, such as building lobbies and bus stations. In regard to shelter, the new homeless are clearly worse off. *Homelessness today is a more severe condition of housing deprivation* than in decades past. Furthermore, the new homeless, whether sheltered or living on the streets, are no longer concentrated in a single skid row area. They are, rather, scattered more widely throughout downtown areas.

A second major difference is the presence of sizable numbers of women among the new homeless. In the 1950s and 1960s women constituted less than 3% of the homeless. In contrast, we found that women constituted 25% of the 1985–1986 Chicago homeless (Rossi et al., 1986), a proportion similar to that reported in virtually all recent studies (Hope & Young, 1986; Lam, 1987; Sullivan & Damrosch, 1987). Thus, all 1980s-era studies found that women compose a much larger proportion of the homeless than did studies of the old homeless undertaken before 1970.

A third contrast between the old homeless and the new is in age composition. There are very few elderly persons among today's homeless and virtually no Social Security pensioners. In the Chicago Homeless Study (Rossi et al., 1986), the median age was 37, sharply contrasting the median age of 50 found in Bogue's (1963) earlier study of that city. Indeed, today's homeless are surprisingly young; virtually all recent studies of the homeless report median ages in the low to middle 30s. Trend data over a 15-year period (1969–1984) from the Men's Shelter in New York's Bowery suggest that the median age of the homeless has dropped by about one half-year per year for the last decade (Rossi & Wright, 1987; Wright & Weber, 1987).

A fourth contrast is provided by employment patterns and income levels. In Bogue's (1963) 1958 study, excepting the aged pensioners, over one half of the homeless were employed in any given week, either full time (28%) or on an intermittent, part-time basis (25%), and almost all were employed at least for some period during a year. In contrast, among today's Chicago homeless, only 3% reported having a steady job and only 39% worked for some period during the previous month. Correspondingly, the new homeless have less income. Bogue estimated that the median annual income of the 1958 homeless was $1,058. Our Chicago finding (Rossi et al., 1986) was a median annual income of $1,198. Correcting for the intervening inflation, the current average annual income of the Chicago homeless (Rossi et al., 1986) is equivalent to only $383 in 1958 dollars, less than one third of the actual 1958 median. Thus, *the new homeless suffer a much more profound degree of economic destitution,* often surviving on 40% or less of a poverty-level income.

A final contrast is presented by the ethnic composition of the new and old homeless. The old homeless were predominantly White—70% on the Bowery (Bahr & Caplow, 1974) and 82% on Chicago's skid row (Rossi et al., 1986). Among the new homeless, racial and ethnic minorities are heavily overrepresented. In the Chicago study, 54% were Black, and in the New York men's shelter, more than 75% were Black, a proportion that has been increasing since the early 1980s (Wright & Weber, 1987). In most cities, other ethnic minorities, principally Hispanics and American Indians, are also found disproportionately among the homeless, although the precise ethnic mix is apparently determined by the ethnic composition

of the local poverty population. In short, minorities are consistently over-represented among the new homeless, compared with times past.

There are also some obvious continuities from the old homeless to the new. First, both groups share the condition of extreme poverty. Although the new homeless are poorer (in constant dollars), neither they nor the old homeless have (or had) incomes that would support a reasonable standard of living, whatever one takes *reasonable* to mean. The median income of today's Chicago homeless works out to less than $100 a month, or about $3 a day, with a large proportion (18%) with essential zero income (Rossi et al., 1986). Comparably low incomes have been reported in other studies.

At these income levels, even trivial expenditures loom as major expenses. For example, a single round trip on Chicago's bus system costs $1.80, or more than one half a day's median income. A night's lodging at even the cheapest flophouse hotel costs more than $5, which exceeds the average daily income (Hoch, 1985). And, of course, the median simply marks the income received by persons right at the midpoint of the income distribution; by definition, one half of the homeless live on less than the median and, in fact, nearly one fifth (18%) reported *no income at all.*

Given these income levels, it is certainly no mystery why the homeless are without shelter. Their incomes simply do not allow them to compete effectively in the housing market, even on the lowest end. Indeed, the only way most homeless people can survive at all is to use the shelters for a free place to sleep, the food kitchens and soup lines for free meals, the free community health clinics and emergency rooms for medical care, and the clothing distribution depots for something to put on their backs. That the homeless survive at all is a tribute to the many charitable organizations that provide these and other essential commodities and services.

The new homeless and the old also apparently share similar levels of disability. The one unmistakable change from the 1950s to the 1980s is the declining proportion of elderly, and thus a decline in the disabilities associated with advanced age. But today's homeless appear to suffer from much the same levels of mental illness, alcoholism, and physical disability as the old homeless did.

More has been written about the homeless mentally ill than about any other aspect of the problem. Estimates of the rate of mental illness among the homeless vary widely, from about 10% to more than 85%, but most studies report a figure on the order of 33⅓% (Bassuk, 1984; Snow, Baker, & Anderson, 1986). This is somewhat larger than the estimates, clustering between 15% and 25%, appearing in the literature of the 1950s and 1960s.

Physical disabilities also are widespread among the new homeless and the old. Some of the best current evidence on this score comes from the medical records of clients seen in the Johnson Foundation Health Care for the Homeless (HCH) clinics. Chronic physical disorders, such as hypertension, diabetes, heart and circulatory disease, peripheral vascular disease, and the like, are observed in 40% (compared with a rate of only 25% among urban ambulatory patients in general).

> In all, poor physical health plays some direct role in the homelessness of 21% of the HCH clients, and is a major (or single most important) factor in the homelessness of about 13%. Thus, approximately one homeless adult in eight is homeless at least in major part as a result of chronically poor physical health. (Wright & Weber, 1987, p. 113; see also Brickner, Scharar, Conanan, Elvy, & Savarese, 1985; Robertson & Cousineau, 1986)

Analysis of the deaths occurring among these clients showed that the average age at death (or in other words, the average life expectancy) of the homeless is only a bit more than 50 years.

All studies of the old homeless stress the widespread prevalence of chronic alcoholism, and here too, the new homeless are little different. Bogue (1963) found that 30% of his sample were heavy drinkers, defined as persons spending 25% or more of their income on alcohol and drinking the equivalent of six or more pints of whiskey a week.

A final point of comparability is that both the old homeless and the new are socially isolated. The new homeless report few friends and intimates, and depressed levels of contact with relatives and family. There are also signs of friction between the homeless and their relatives. Similar patterns of isolation were found among the old homeless.

Summary and Conclusions

The major changes in homelessness since the 1950s and 1960s involve an increase in the numbers of homeless persons, striking changes in the composition of the homeless, and a marked deterioration in their condition. The old homeless were older men living on incomes either from intermittent casual employment or from inadequate retirement pensions. However inadequate their incomes may have been, the old homeless had three times the income (in constant dollars) of the current homeless. The new homeless include an increasing proportion of women, often accompanied by their children, persons who are, on average, several decades younger. The old homeless were housed inadequately, but high proportions of the new homeless are shelterless.

Like the old homeless, the new have high levels of disabilities, including chronic mental illness (33%), acute alcoholism (33%), serious criminal records (20%), and serious physical disabilities (25%). Seventy-five percent have one or more of the disabilities mentioned.

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Ch. 2 Homelessness in America: Truths and Consequences

Growing Inequality in America: Race, Poverty and Polarization

The story of Housing First (HF) must be set within the larger historical context of homelessness, and homelessness exists within a larger context of growing inequality and housing insecurity. The two major eras of homelessness—during the Great Depression and the 1980s and continuing today—represent key milestones along an historic upward trajectory in income inequality in the United States (Quigley & Raphael, 2004). The usual suspects—outsourcing of jobs overseas, economic recessions, low service-economy wages—intensified after the 1970s. The post-World War II middle-class flight to the suburbs began to reverse itself with the return of young professionals to colonize and gentrify neighborhoods once a haven for singles and working class families. Unable to pay rising taxes and rents, the latter were funneled toward low-income neighborhoods and the inner city (Wilson, 2012). Thus, "concentrated disadvantage" intensified in American cities (Sampson, Raudenbush, & Earls, 1997, p. 918).

For down-on-their-luck residents facing eviction and homelessness, old standbys were getting harder to find. Public housing units had years-long waiting lists. In New York City, single-room occupancies (SROs) declined by 60% between 1975 and 1981 (Wright, 1989), a turning point in the availability of affordable housing repeated in cities around the country. The usual restoration of jobs at the tail end of the 1970s recession did little to benefit those most in need (Burt & Aron, 2000).

It would be an understatement to say that African Americans fared less well amidst shrinking economic opportunities. The undertow of racism is evident in segregation and discrimination at each juncture, from the initial requirement that public housing developments be segregated to the fierceness of white resistance to integration (Wilkerson, 2011). Related events contributed to racial polarization. For example, draconian drug laws led to widespread incarcerations for low-level offenses and harsher penalties for crack (as opposed to powder) cocaine. A prime example of the effects of intersectionality, race and gender converged to produce a "feminization of poverty" in which women, especially single mothers, bore a disproportionate burden of income deprivation (Brenner, 1987).

Rarely benign in its effects, race consciousness was a not-so-subtle subtext to how the homelessness problem was framed in the 1980s and beyond (Hopper, 2003). The downward and blocked mobility adversely affecting people of color was reproduced and intensified among the homeless. Members of racial and ethnic minorities constitute about one third of the U.S. population, one half of the poor, and almost two thirds of the homeless. African Americans constitute 12% of the U.S. population, about one half of the homeless, and up to 85% of the long-term or chronically homeless (U.S. Department of Housing and Urban Development, 2010). African American women are underrepresented in the homeless adult shelter system but overrepresented in shelters for families.

Sociologists William J. Wilson, Robert Sampson, and their colleagues described inner city neighborhoods of the 1990s as beset by a shrinking job market, high crime, rising rents, and a growing availability of drugs (Sampson et al., 1997; Wilson, 1997). Childhood was lacking in

security and stability—with one or both parents unable to support their families. Turbulent family life meant being on the move, living with relatives, foster parents, or friends. There have always been hardworking, law-abiding citizens living this way. But it was undeniable that more of these citizens were losing their grip on financial stability after the economic recessions of the 1970s.

What happened to make homelessness such a problem in the late 1980s? People have been evicted, succumbed to addiction, and run out of money for a long time without becoming homeless. Demographic changes in the U.S. population after World War II may have amplified the effects of increasing economic disparity (Culhane, Metraux, Byrne, Stino, & Bainbridge, 2013). The adult homeless of the 1980s were born at the tail end of the Baby Boom—one of the largest increases in birth rates in U.S. history. As economic opportunities shrank along with the usual safety net protections, the number of adults vulnerable to homelessness expanded.

Affordable Housing as Federal Government Responsibility

Federal government involvement in building and providing affordable housing began with the New Deal Public Works Administration and the Wagner-Stegall Housing Act of 1937. Cities took over vacant lands and built low-rise apartment complexes for poor and working class families—50,000 new units were built in 1939 alone. In New York City, the first public housing units—known as First Houses—opened in December 1935 in a ceremony presided over by Mayor Fiorello LaGuardia and First Lady Eleanor Roosevelt. Towering housing projects opened in large cities around the United States beginning in the 1940s, their height made possible by the invention of the elevator and architectural designs featuring steel frames and reinforced concrete rather than masonry and stone.

Although the New Deal was steeped in idealism about public works, the post-World War II era ushered in a contraction in government spending on housing. The return of military veterans and the Baby Boom gave rise to unprecedented demand for single-family homes and private developers obliged in meeting this demand as the suburbs spread farther from the city center. Meanwhile, the rising value of urban real estate ran up against growing concentrations of poor and near-poor in inner city areas, especially in the North where thousands of African Americans migrated to escape the Jim Crow South (Wilkerson, 2011).

By the 1950s, cities like Chicago, Milwaukee, Detroit, and Philadelphia were transformed, their European immigrant neighborhoods in demographic transition prompted by Southern migration and race-baited “white flight” to the suburbs. Earlier civic reforms bent on slum removal gave way to urban renewal as these same neighborhoods were targeted for demolition and population displacement. However, a civic duty to replace blight with livable neighborhoods was rarely in evidence; only a fraction of razed homes were replaced by new ones. Public housing developments were built on some of the cleared lands but the open space was more often used for new office buildings and highways linking suburbs and cities (Kusmer, 2003).

President Johnson’s War on Poverty breathed new life into the Federal government’s role in housing and community development—starting the cabinet-level Department of Housing and Urban Development (HUD) in 1965 was a key part of Johnson’s Great Society initiatives. Meanwhile, the endurance of Section 8 of the Housing Act of 1937, a Federal rental assistance

program, kept untold millions from becoming homeless.[1] This voucher program allowed tenants who qualified (had low income) to pay no more than 30% of their income toward rent assessed at fair market value. For some landlords, a Federal guarantee that rent would be paid was attractive but for others, visits from HUD housing inspectors, a cap on fair market rents, and resistance to poor families living in their properties were sufficient grounds for rejection.

Nixon's retrenchment policies and the economic recession of the 1970s put an effective halt to new public housing developments, and the Reagan years added an ideological hardening to this economic rationale. As neo-liberal policies[2] of the late 1970s and early 1980s gained traction, local and federal governments backed away from financing for public welfare—from income supports to affordable housing to health care. This ushered in an era of private market-driven federal housing and tax policies that contributed to homelessness then and up to the present day. Essentially, there was a sharp turn away from supporting public housing to supporting home ownership. Homeowners got deductions for mortgage interest, property taxes, exempted or deferred tax on capital gains from the sale of a home and other perquisites. In addition, real estate investors received deductions for tax-exempt housing bonds, depreciation, and other expenses. Simultaneously, there was a significant reduction in federal housing assistance expenditures such as development of low-income housing or rental assistance.

From 1976 to 2002, housing outlays rose from $7.2 billion to $32.1 billion and the housing assistance budget dropped from $55.6 billion to $27.6 billion (Dolbeare & Crowley, 2007). One of the few exceptions in the general decline of federal benefits has been the availability of disability income such as SSI (Supplemental Security Income) where growth in the number of recipients has been steady over the past four decades.

Disillusionment with urban renewal and high-rise public housing also hastened the decline in Federal investment. The infamous Pruitt-Igoe housing project in St. Louis, Missouri epitomized this. A 33-building complex built in 1954, Pruitt-Igoe became marred by crime, violence, and extreme segregation, its grand demolition televised in 1972 to international audiences. The equation of high-rise living with vandalism and crime was viewed as rendering public housing unsafe for children and families. The solution—to abandon public housing rather than invest to improve it—reaped profits for private developers. The net result was that working class families, the working poor, and individuals on fixed incomes were steadily displaced by upwardly mobile urbanites.

Notwithstanding long waiting lists, deteriorating conditions, and general neglect, public housing keeps many families from the streets and shelters where they might otherwise find themselves. Currently, there are about 1.2 million households in public housing overseen by 3,300 housing authorities (www.hud.gov). There has been no significant increase in public housing units in decades.

[1] The Section 8 program (now called Housing Choice) was a rare instance of government involvement in rental assistance for use in the private housing market. Though funded at levels far below need, such vouchers help millions of Americans to stay housed. For proponents of Housing First, the Section 8 program is a natural fit as it fosters scatter-site living in the private rental market.

[2] The word "neoliberal" is a term of reference for conservative governments of the Reagan–Thatcher era and their policies of market-driven capitalist expansion, deregulation, reduced social programs, and privatization. As non-Western governments adopt such policies, the impact of globalization and rising poverty is attributed to neoliberalism.

Homelessness as a Federal Government Responsibility

The reductions in affordable housing and rising rents permanently "priced out" of the rental market those living on fixed incomes such as disability payments, given that they would need almost 150% of their total income to simply afford a month's rent (O'Hara, 2007). Individuals working at full-time minimum wage jobs would have to hold 3.1 full-time jobs in order for the rent to comprise 30% of their income (Frazier, 2013). One need not be a mathematician to know that eviction is a real possibility for those living on fixed and low incomes—even homeowners without a mortgage must pay taxes, utilities, and insurance.

A pivotal event in Federal Government actions to address homelessness occurred in 1987 with the passage of the Stewart B. McKinney Homeless Assistance Act (renamed the McKinney–Vento Act by President Clinton in 2000 to honor Minnesota Senator Bruce Vento's work on behalf of the poor). The McKinney Act offered 350 million dollars in funds in its first year to enable states, along with public and private organizations, to open and operate emergency food and shelter programs for homeless persons.

Provisions of the Act included support for education of homeless adults and children, job training, demonstration projects in mental health and substance abuse for homeless persons, and sustainable funding for the pilot Health Care for the Homeless (HCH) program. This represented a fraction of what was needed to address the problem—and the bulk of funding was targeted to the needs of homeless families rather than single adults—but it was a start.

Last but not least, the Act included the creation of the United States Interagency Council on Homelessness (USICH), a consortium of 20 Federal agencies including HUD. The USICH was left unfunded and remained without staff under President Clinton and then HUD Secretary Andrew Cuomo; it was essentially dormant from 1988 until 2002. Then, in 2002, President G. W. Bush appointed Philip Mangano to head USICH. Mangano, a Massachusetts Republican and former director of the Massachusetts Housing and Shelter Alliance, had long advocated for the abolition of homelessness.

There were plenty of other distractions for the Bush administration, including the aftermath of the September 11 attacks and the war in Iraq, but this appointment reverberated widely among homeless advocates as an unusual sign of attention from the President. The Wall Street Journal referred to it as a "Nixon-goes-to-China" reversal of policy in which $4 billion annually was pledged to HUD and the effort to address homelessness (Vitullo–Martin, 2007). Ever the entrepreneur, Mangano used his bully pulpit for homeless advocacy and gave it a Federal imprimatur.

From Single-Room Occupancy to Emergency Shelters to Transitional Housing

In larger American cities, single-room occupancy buildings (SROs) were one of the few viable options for those living on the margins. An SRO is typically a large building consisting of dozens of small rooms containing a bed, a dresser, and a hot plate; the shared bathroom is down the hall. SROs afforded a place to keep one's possessions, stay warm in the winter, and have a bit of security and privacy at a low cost. The deterioration of SROs may have seemed inevitable given rising real estate prices and urban renewal, but their tarnished reputations and inadequate upkeep by their owners did little to endear them to city authorities. Moreover, as elderly SRO residents died off and some SROs became vacant, the buildings decayed further.

Without the SRO safety net (however tattered and shrunk in size by the 1980s), cities and communities grew desperate to address a problem that was no longer hidden from sight. Most cities set up temporary shelters and specialty programs such as outreach teams, drop-in centers, and safe havens to engage those among the homeless with psychiatric disabilities. In New York City, massive fortresses like the Fort Washington Armory—with a peak count of 1,000 men each night—were repurposed with cots lined up 18 inches apart on the vast open drill room floor. Such crowded conditions violated United Nations standards for refugee camps. Box 2.1describes the early days of the homelessness crisis in New York City.

Box 2.1 The New York City Experience in the 1980s

Land-scarce and surrounded by rivers and oceanfront, New York City has long endured shortages of housing and near-record occupancy rates. But the city in the 1970s suffered an acute case of urban decay, increasing crime and middle-class abandonment. Movies like Midnight Cowboy, Needle Park, Fort Apache, the Bronx, and The French Connection captured this gritty reality Hollywood-style. Graffiti-covered subways rumbled over- and underground, drug markets thrived on street corners, and the South Bronx looked like a postapocalyptic movie set. Along with San Francisco, New York was the epicenter of the AIDS epidemic of the 1980s, a plague that spread through the gay community and on to poor neighborhoods.

When drug dealers, faced with a glut of cocaine, developed a solid smokable form in the early 1980s, crack cocaine became one of the greatest successes in the history of drug marketing. Delivering an intense high at a low price (as little as $5 for a small “rock”) meant that cocaine now ceased being a drug solely for the affluent, who continued to buy it in powder form. Starting in Los Angeles and Miami, crack spread quickly to the populous cities of the North. Crack addiction was devastating to poor minority communities, contributing to a rise in violent crimes, thefts, and burglaries. Although oversold as a cause of urban problems of the 1980s, there is little doubt that crack addiction sent many poor Latinos and African Americans over the edge into homelessness (Bourjois, 1996).

Complementing public shelter provision was a network of churches and synagogues that organized volunteers to serve an evening meal and accommodate about a dozen homeless guests on any given night. The guests would sleep on cots in the vestibule or basement of the building and as in city shelters they were required to leave the premises by dawn. This private voluntary network offered smaller, less dangerous venues for women and the elderly, but these were few and far between and “guests” were carefully screened.

Visitors to the public shelters were also immediately struck by the clearly intended message of enforced transience. Cots were lined up in rows, there was no storage space for personal belongings, meals consisted of little more than hot coffee and a cold sandwich, and clean bathrooms were in short supply. Possessions had to be closely guarded under the cot or pillow and residents had to leave the shelter early each morning and were permitted to return only at night. Shelter staff and security guards had little training; reports of theft, sale of contraband, or violence were common.

With crowded, unsanitary, and dangerous conditions, frustrations rose and fights often broke out. Weaker residents were preyed upon. AIDS, hepatitis, and tuberculosis (TB) were common along with the usual respiratory problems, injuries, and skin infections. This was the environment

where a strain of treatment-resistant TB first appeared, alarming residents, staff, and the general public. These conditions led to a seemingly irrational but entirely reasonable choice to stay away from the city shelters except under dire circumstances, like a freezing-cold winter night.

However unpleasant they might have been, the shelters were filled to overflowing in the 1990s, a reflection of the numbers of new homeless, given that the majority of shelter residents stayed only a few days then found some place else to go. Those unable or unwilling to enter shelters sought help in other ways, visiting soup kitchens and crowded drop-in centers where they might take a shower, store some of their belongings, and nap on a chair.

Stability in funding for the shelter system was made possible by McKinney funds and dollars from state and local governments. A profound shift took place, however, in homeless services that allowed providers to go beyond emergency accommodations—not abandoning these altogether but supplementing them with longer-term housing combined with services. A stay in such a shelter was expected to last 30 days, more or less. Transitional housing could be offered for one or two years, sometimes longer (Ellen & O'Flaherty, 2010).

New York City and New York State led the way in making available new sources of funding for nonemergency supportive housing, but this came with a price. The historic 1990 New York–New York (NY/NY) Agreement called for 3,615 units of permanent and transitional housing for homeless mentally ill people in New York City. After delays prompted by disagreements over jurisdiction and funding, Mayor David Dinkins and Governor Mario Cuomo signed the agreement, an unprecedented collaboration between city and state. The price of such an agreement lay in its narrowing of eligibility to persons who are mentally ill among the homeless.

This was a politically strategic decision for a couple of reasons. First, the visibility of psychotic individuals on city streets, though hardly representative of all homeless persons, fueled public demands for more concerted action. Second, New York State's Office of Mental Health had a multibillion-dollar budget that was being reconfigured as state psychiatric hospitals were closed or being closed by the late 1980s. Although community mental health centers remained underfunded (and a few expensive upstate hospitals stayed open due to political pressure), there were state and city mental health dollars available when the political will was forthcoming.

The NY/NY agreement channeled state and city mental health funds to nonprofit organizations that won successful bids to build or renovate congregate residences with some additional scatter-site independent apartment units covered by rental subsidies. Prior to NY/NY, the State had mostly funded group homes, adult homes, and in some instances nursing homes for residents discharged from state psychiatric hospitals. Providing permanent housing with supports represented a new philosophical and practice approach for the state's outdated mental health services. The use of these state funds for capital improvement and the city's issuance of municipal bonds to build or renovate housing also marked a new era in government resourcefulness and cooperation in providing for the homeless.

Steeped in New York's traditional liberalism in public assistance, the NY/NY agreement met with little overt opposition. But public generosity did not always extend to the neighborhoods where these projects were slated to be developed, as local groups protested "not in my back yard" (NIMBY) and expressed concerns about safety and lower property values. The politically influential, wealthier neighborhoods were able to resist these programs; new projects were typically placed in mixed-use areas or low-income neighborhoods.

It is worth noting that the construction and occupancy of the NY/NY-funded units did not reduce the number of people who were homeless according to annual street counts. As soon as some left homelessness, there were new entrants to take their places—and more. Less obvious was the fact that these new supportive housing programs used admissions criteria that were very demanding. Initially, applicants were required only to have a history of homelessness and a serious mental illness. Because these criteria applied to a very large pool of applicants, however, providers saw a need to narrow the admissions criteria. Most were new operators of supportive housing but they fully understood that their program's survival depended on maintaining a full census.

Ensuring that applicants would be reliable tenants meant screening for those who would not create a nuisance, need to be evicted, or disturb others in the building. Thus the successful applicant was one who was in treatment, medication compliant, did not use substances, and was willing to abide by the program rules. This screening for well-behaved tenants increased the proportion of more troubled and addicted men and women remaining on the street. Housing providers had plenty of terms for these people: "not-housing-ready," "hard-to-house," "housing resistant," and "treatment resistant" among others. Eventually, such persons also came to be known as the "chronically homeless."

Box 2.2 New York City in the 1990s: Crime, Squeegee Men and Giuliani

By the mid-1990s, rising crime rates were equated with homelessness (despite the absence of data to support this notion) and patience in some quarters was wearing thin. New York City's Rudolf Giuliani staked his successful 1994 mayoral campaign on law and order, in particular promising to rid the city of "squeegee men," the mostly African American men who frequented the city's busy traffic intersections, performing unsolicited windshield washings and expecting cash in return. Newspapers inflamed public hostility with stories of aggressive panhandling and public attitudes toward the homeless were souring.

Guiliani's police crackdown focused on lifestyle offenses—fare beating, public intoxication and trespassing—based upon the famous "broken windows" theory of criminology (Kelling & Wilson, 1982). Research has since called this into question (Harcourt & Ludwig, 2006) but the perception that police crackdowns for small offenses also tamped down serious crimes has stuck around. For the homeless, this was less about crime-fighting than criminalization.

Criminalizing the Homeless

New York City Mayor Guiliani's law and order rhetoric and "broken windows" policing became popular in many cities in the United States in the 1990s (see Box 2.2 for more on this subject). Yet most of the crimes committed by the homeless were minor offenses necessitated by their condition: theft of service (e.g., jumping the turnstile to ride the subway); theft of goods (e.g., stealing groceries); indecent exposure (e.g., urinating in public); or trespassing (e.g., sleeping in a public space). Once homeless men or women are charged with one of these offenses, the criminal justice system sets up a cascade of events that do not bode well for them (O'Sullivan, 2012). First, the fine goes unpaid. With no fixed address, the defendant never receives the notice to appear in court and misses the hearing date. Next, a bench warrant is issued and on the next encounter with the police the person is arrested and jailed. Without the cash for bail (sometimes as little as $10) homeless persons spend weeks and months in jail (at a cost to taxpayers of several hundred dollars a day).

The criminalization of homelessness in combination with woefully inadequate mental health care transformed many city jails into de facto mental institutions for the homeless. Seeing erratic behavior on the street and having little to do besides make an arrest, police officers treat a jail stay as the least problematic response to local complaints. In contrast, the crimes to which the homeless were subjected—physical and sexual assault, theft, confiscation and destruction of their belongings—were of less public concern.

Cities found creatively punitive ways to discourage people from sleeping rough and an urban phenomenon of "hostile architecture" flourished in the United States and abroad (Quinn, 2014). Benches were redesigned with armrests or uneven surfaces to prevent reclining; low border walls had fencing or planters along their surfaces to prevent sitting. Use of security fencing, razor wire, and "no trespassing" signs went up as did security cameras and guard services. A social media storm erupted in June 2014 when a luxury apartment building and nearby grocery chain in London installed metal spikes on the surfaces of doorways and entrances to discourage "anti-social behavior." After petitions and online protests, the spikes were removed.

Under stricter antivagrancy laws, libraries and other public buildings forbade lingering too long or sleeping on the premises (although more tolerant communities resisted this). Public-access toilets became harder to find as shops and restaurants restricted use to paying customers. Abandoned buildings, attractive to squatters and the homeless, were sometimes violently vacated by fire departments or city officials.

Box 2.3 The Los Angeles Experience: Skid Row

Los Angeles's Skid Row, for over 100 years a destination for the poor, homeless, and addicted, was home to faith-based missions that provided charity as well as personal redemption. Located not far from the downtown business district, the area was largely left alone until the 1980s when the growing numbers of homeless led city officials to order police crackdowns and destruction of the camps. The rights-based litigation and advocacy that ensued kept Skid Row intact and the missions empowered as advocates and service providers.

This policy of containment and segregation continued as downtown LA began to gentrify and attract businesses and affluent residents in the 1990s. A few blocks from the vast canyons of sleek office buildings and luxury condominiums, Skid Row is unique. There is no greater concentration of homeless adults in America, about 5,000 give or take. Visitors—mostly social service workers and a few curious tourists—enter 50 square blocks of shopping carts and tents filled with personal belongings and hoardings, of people sitting or sleeping, intoxicated or sober, waiting in lines at the missions for food or services. Skid Row is predominantly African American even though African Americans comprise only 9.8% of the city's population.

Los Angeles's policy of segregating and corralling the homeless in Skid Row (see Box 2.3) represents a scaled-up version of 19th-century practices—tolerating a Bowery or run-down district where vagrancy and sleeping rough were allowed as long as these practices did not spread to other parts of the city. The more common response by cities was to disperse their homeless shelters and use assertive outreach teams to convince or cajole street homeless to go to these shelters. Of course, "dispersing" was not random—zoning ordinances and NIMBY-ism ensured that shelters were located in lower-income (or more tolerant) neighborhoods. Some communities complained of becoming service ghettos, hosting a disproportionate number of half-way houses, congregate residences, or mental health and methadone clinics.

Box 2.4 An American Way of Changing Policy: Litigation as Advocacy

A lesser-known benefit of the litigious bent in American society is the rapidity with which social change can be mandated by a court order. The U.S. Supreme Court's 1972 Roe v. Wade decision swept away most restrictions on abortion in the United States and its Brown v. Board of Education in 1954 mandated school desegregation. The 1979 Callahan v. Carey court decision was a defining moment for New York City's homeless, binding the city to a legal right to shelter that continues at this writing. This legacy of bringing about change via litigation has been a prime tactic of legal advocates such as the American Civil Liberties Union (ACLU).

A recent case in point is Miami, Florida and its strategy of using arrests as a means of evicting homeless men and women from its revitalizing downtown business district. Beginning in mid-2013, attorneys for the local ACLU challenged the city, citing a previous court decision designed to protect the rights of the homeless. This 1998 settlement (Pottinger et al. v. City of Miami) was the culmination of a class action lawsuit and a decade of litigation involving two trials, two appeals, and almost two years of mediation in which a federal court found intentional and systematic violations of the constitutional rights of homeless persons in Miami. The agreement afforded protection in carrying out "life-sustaining misdemeanors" such as sleeping, erecting a tent in a park, and urinating in public if a toilet was not available.

By 2013, the city's downtown business leaders were urging a clampdown on the hundreds of homeless men and women living in parks and on sidewalks. Miami police stepped up arrests for minor infractions—all violations of the Pottinger agreement—and seized and demolished campsites and belongings.[3] Negotiations between the ACLU and the city bogged down as the city proposed to bus homeless persons to a shelter miles away. Measuring the distance to a public toilet, a trash receptacle, or a shelter was the metric for determining whether an arrest could be made.

Ascertaining what constituted "available shelter" was a major sticking point. The city sought to expand the definition to include shelters that imposed mandatory mental health and drug addiction treatment (prohibited under the Pottinger agreement). Helping to support the city's case, a local religious shelter offered open-air mats for sleeping as appropriate for shelter referrals (along with treatment mandates).

The ACLU attorneys countered with "Housing First" as the evidence-based standard against which the city was falling short. The case drew to a close when a judge-mediated agreement was reached in November 2013. With some minor concessions, the Pottinger protections remain in place until 2016. For the longer-term, the Miami-Dade County Homeless Trust embarked on a major shift in strategy focusing on Housing First with the goal of ending chronic homelessness by the end of 2015.

A Homeless Services Institutional Complex (or a Homeless Service "Industry") is Born

The homelessness crisis of the 1980s and subsequent governmental response set the stage for explosive growth in outreach, shelters, transitional housing, and support services in American cities. Such largesse did not extend to the general population of the poor—Reagan-era cuts in entitlements were followed by Clinton-era welfare reform (known as "workfare") in the mid-1990s. In this context, it is remarkable that the homeless received a measure of public

[3] Information on the ACLU-Miami legal standoff—all public documents—was available through the first author's preparation as an expert witness.

sympathy and financial support, though conditionally given and temporary in nature. As described in Box 2.4, policy changes were not always prompted by legislative mandates. Indeed, the successful use of litigation on behalf of homeless persons could produce sweeping mandates.

The era of local responses to homelessness gave way to large-scale efforts and a vast industry of homeless services came into being. This was not a matter of planning or coordination; it was willy-nilly in its evolution but coalescent nonetheless. Closely resembling Willse's (2010) "non-profit industrial complex" and Stid's (2012) "social services industrial complex," this "homeless services institutional complex" comprised a self-perpetuating system (the term "institutional" used to indicate that levels of government and governmental organizations worked together with nonprofits in cross-institutional collaboration). Providing services to and for the homeless becomes an end in itself, sustaining thousands of jobs for those working in the "industry."

What began as service silos for various needs (e.g., mental illness, substance abuse, the lack of food and shelter) were joined together by a common thread of first temporary then stable streams of funding. State mental hospitals, public hospitals, community mental health clinics, and rehabilitation centers were joined by a burgeoning number of shelters, drop-in centers, soup kitchens, and food pantries. Along with jails and hospital emergency rooms, these became stopovers on an "institutional circuit" (Hopper, Jost, Hay, Welber, & Haugland, 1997) traversed by homeless men and women.

As the number of homeless adults increased, government agencies responded by aggregating temporary housing with services and supervision under (often literally) the same roof. New programs sprang up and existing ones grew to meet demand by building and renovating properties, while hiring more staff to secure grants and service contracts. This growth—in needs, in services, in jobs—was especially evident in large cities (U.S. Department of Housing and Urban Development, 2010). In the smaller cities and towns of America affected by homelessness, the "industry" emerged in the form of shelters, rescue missions, and soup kitchens.

Conclusion

The homeless services institutional complex had a cultural logic as well as norms and taken-for-granted behaviors. Owing much to institutional entrepreneurs with divergent motivations and constituencies, the complex evolved into an unwieldy yet curiously unified service system. The complex was fragmented enough to allow an innovative upstart such as Pathways to emerge but cohered sufficiently to present resistance to the changes wrought by the HF approach. Neo-institutional theory renders both action and reaction understandable but offers little in the way of predicting the course of change once the process is underway. . .

CHAPTER 5: CONTEMPORARY HOMELESSNESS IN MIAMI

After decades of research on the characteristics of persons who are homeless, one of the most common findings is the heterogeneity of the overall population (Burt et al. 1999; Burt et al. 1999; Rosenheck, Bassuk, and Salomon 1998). While persons who are homeless share the common traits of poverty, poor access to affordable housing, and personal difficulty, they are incredibly varied when it comes to demographics, backgrounds, and characteristics. The nationwide heterogeneity of the homeless population holds true in Miami as well, with the homeless population comprised of a diverse mix of race, ethnicity, gender, age, family status, and personal characteristics including traumatic backgrounds and substance abuse, mental health, and medical problems. Of course, one would probably expect Miami's homeless population to be particularly diverse, given that the Miami-Dade County area is one of the most racially and ethnically diverse counties in the country, with a majority minority population that is now 65% Hispanic, 15% black, and 19% white non-Hispanic. The majority (52%) of residents were born in a foreign country, with 94% of those from Latin America (Cruz and Hesler 2011). Yet, the homeless population is diverse in a different way, and is not reflective of the racial/ethnic breakdown of the overall county. Blacks are significantly overrepresented in this subpopulation, as are single males. This chapter examines the overall demographics and characteristics of the homeless population, focusing on single, adult males. It seeks to answer Research Question 1: In Miami-Dade County, do black and Hispanic men who are homeless or at risk of homelessness have different personal characteristics and different experiences in avoiding and/or exiting homelessness? Specific hypotheses to be tested address differences between blacks and Hispanics

regarding risk of becoming literally homeless; characteristics and needs, including disabilities; destination upon exiting programs; expressed needs; spatial distribution; and outcomes upon completing programs.

5.1 Overview of Miami-Dade Homeless Population

In 2011, more than 15,000 individuals were homeless in Miami-Dade County at some point during the year (Miami-Dade County Homeless Trust 2012b). This number represents the 15,077 unduplicated individuals who have records in the County's Homelessness Management Information System (HMIS), which means they were served at least one time by an agency providing emergency, transitional, or permanent supported housing. There are 27 agencies that receive some type of funding through the Miami-Dade County Homeless Trust and are required to enter data on clients served into this HMIS system. Thus, the 15,077 figure represents the number of persons served in Trust-funded agencies, but does not include those served by other provider agencies external to the continuum of care network, or individuals who have had no contact with the homelessness system at all. So, it can be assumed that the real number is actually higher. On the other hand, it is also possible that some of the HMIS client records are actually duplicates, as some providers may have failed to follow procedures for sharing records between agencies and may have created a second record when an individual changed programs. Nonetheless, this figure provides a good starting point for analysis.

Amongst those individuals served in 2011, 11,808 were male or female adults. For purposes here, the time frame for analysis was expanded to cover the time period from June 2010 through December 2011, limited to all single males who were served in an emergency, transitional, or permanent housing program. This 18-month period

includes everyone who was in a program for any period during that timeframe, whether they entered, exited, or simply remained in the program throughout the duration of those 18 months. The total number of duplicated subjects for the 18-month period was 8,940, which included 7,605 unduplicated subjects. A total of 88 records for individuals who did not fall into any of the targeted racial/ethnic groups represented less than 1% of the population and were removed rather than listed as "other."

Table 2 below shows the racial/ethnic breakdown of persons who are duplicated in the system because they entered a homeless program more than one time. This includes persons who entered the same program more than once (i.e., they moved in and out of emergency shelters over time).

Table 2: Repeat entries into homeless system for homeless males in Miami-Dade

Repeat Entries into System				
Entries into System	**Black**	**Hispanic**	**White**	**Total**
One entry	3580	1949	1037	6566
% within race/ethnicity	73.5%	72.1%	76.1%	73.4%
Two or more entries in programs*	571	323	145	1039
% within race/ethnicity	11.7%	11.9%	10.6%	11.6%
TOTAL	**54.6%**	**29.9%**	**15.5%**	**7605**

*Denotes that columns are significant with Chi-Square test $p<.05$
Source: Miami-Dade County HMIS Records, Homeless Males 2010-2011

Hispanics are more likely than blacks or whites to have entered the system more than once (with a Pearson Chi-Square significance $p<.01$), although the actual percentage difference is relatively small, at 11.9% versus 11.7% for blacks. Amongst persons who were entering the system for the second time, more than 80% were entering an emergency housing program, suggesting that the majority of these were not persons who

were moving up in the system, but rather were re-entering after having failed the first time.

Throughout this analysis, data regarding *individual* characteristics is drawn from the unduplicated count to provide an accurate depiction of the population served. Data relating to *program* participation and outcomes is drawn from the duplicated set, so that differences in program experience are captured. Thus, an individual who was served in an emergency program and then later in a treatment program would be counted once in the overall demographic analysis, but two times or more (once for each program) when reviewing program-level data.

In most cases, the national data utilized for comparison purposes are drawn from HUD's report (ABT Associates 2011) on the 2009-2010 nationwide HMIS data provided from every continuum, which includes the exact data set used for the Miami information. Thus, it provides an excellent means of comparison. In general, the demographics of the average homeless individual in Miami correlate with demographics of the homeless population at the national level, although in aggregate Miami's racial/ethnic disparities far exceed national rates.

5.2 Race and Ethnicity

Individuals were grouped into three racial/ethnic categories, by combining the separate variables for race and ethnicity. The three combined categories were: *Black* (includes all Black/African-Americans, including Hispanic); *Hispanic* (includes all Hispanic racial groups except for black); and *White* (non-Hispanic only). A small percentage of individuals (less than 1%) who did not fit into any of these categories, including those who refused to answer, were not included.

The racial/ethnic breakdown of single, homeless males was 54.6% black, 29.9% Hispanic, and 15.5% white. As shown by Table 3 below, this is extremely disproportionate from the overall racial/ethnic breakdown of the general population in Miami-Dade County, even when controlling for extreme poverty. It is also disproportionate from the nationwide population of single homeless adults, which is 34.5% black, 8.5% Hispanic, and 47.2% white (HUD ABT Associates 2011).

Miami provides a particularly extreme example of the steady increase in the over-representation of blacks as poverty increases. Blacks constitute 17.6% of the county's overall population and 29.7% of the population living in extreme poverty, yet constitute 54.6% of the homeless population. On the other hand, Hispanics comprise nearly 60% of the county's overall population and 50.6% of those living in extreme poverty, but only 30% of the homeless population. Whites are 21% of the county population but only 15% of the homeless population. Thus, it is clear that the safety net for blacks in Miami is not functioning as well as it does for other racial and ethnic groups.

Table 3: Racial/Ethnic Make Up of Miami-Dade Population Compared to Local and National Homeless Population

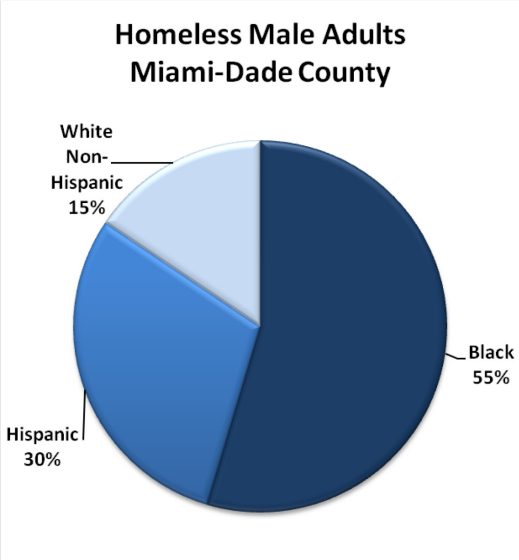
	White	Black	Hispanic (all races)	Other Minority	Total	Estimated Population
Miami-Dade County gen[1]	15%	17.2%	65%	2.8%	100%	2,434,465
Countywide Poverty (at/below 100%)[2]	13.7%	26.5%	58%	1.8%	100%	325,514 (13.7% pop)
Countywide Extreme Poverty (at/below 50%) [2]	17.7%	29.7%	50.6%	2.1%	100%	166,321 (7% of pop)
Miami-Dade Homeless Males [3]	15.5%	54.6%	29.9%	N/A	100%	7605 (18-mos)
Homeless Single Adults (national) [4]	47.2%	34.5%	8.5%	9.9%	100%	1,043,042 63% of homeless
National Poverty[4]	45.5%	22%	16%	16.6%	100%	

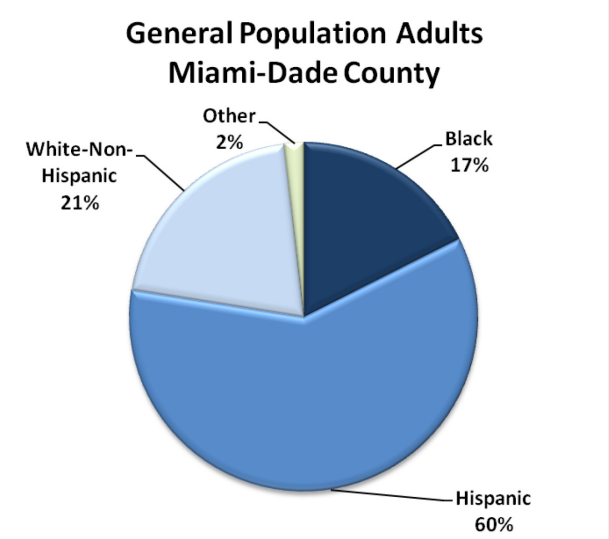
[1]US Census/American Community Survey 2010 – Miami-Dade County Summary (Cruz and Hesler 2011)
[2] US Census/ American Community Surveys 2005 (Ruggles et al. 2007)
[3] Miami-Dade County HMIS June 2010-December 2011. ("Other minority" < 1% so not included).
[4] US HUD Annual Assessment Report Oct 2009-Sep-2010. Figure includes male and female adults.

Disparities at the national level appear in a different manner. The proportion of whites within the poverty population is nearly identical to proportion in the homeless population. While the overall minority population is the same for poverty and homelessness, it diverges when separating blacks and Hispanics. In that case, as in Miami, blacks are overrepresented in the homeless population and Hispanics are underrepresented, compared to the poverty population. However, the disparity is at a much lower level than seen in Miami.

Figure 3 provides a visual illustration of the significant disproportion between the percentage of male and female adults in Miami-Dade County who are black or Hispanic, versus the percentage who become homeless.

Figure 3: Racial/Ethnic Make-Up of Miami-Dade Homeless Population Compared to General Population





[1] Source: Miami-Dade County HMIS 2010-2011

[2] Source: ACS 2010 Miami-Dade County

This disproves the null hypothesis (1A): Blacks are at greater risk of becoming literally homeless than are Hispanics, even when controlling for income level prior to homelessness. In fact, amongst the general population, blacks are 6.2 times more likely to become homeless than Hispanics. Amongst the population of persons living in extreme poverty, they are *3.1 times more likely to become homeless* than Hispanics. These figures regarding the disparity in likelihood of becoming homeless suggests that factors beyond poverty and income play a role in determining why blacks become homeless at a greater rate than Hispanics.

5.3 Characteristics and Disabilities

Age

The average age of a homeless male in Miami is 46. Ages range from 18 to 92. Two-thirds fall between the ages of 25-54, with more than a quarter (26%) being over 55. Hispanics are older than their black and white counterparts, with a mean age of 47.8, and over-representation amongst the elderly group over 55 (31.7%) (chi-square pearson test significant at $p<.001$). Miami's homeless population is clearly not a young population, having an average age of 46, with nearly a quarter being age 55 or older and only 6.8% under age 25. Miami's homeless population is also older than the national homeless population, which has only 17.1% over age 50 (ABT Associates 2011). The implications are that Miami may expect to see greater health needs and a higher level of disabilities that come with an aging population.

Table 4: Age Distribution of Homeless Men in Miami-Dade

	Black		Hispanic		White		Total	
Mean Age	45.5		47.8		46.8		46.4	
Range	18 - 86		18 - 92		18 - 85		18 - 92	
Age Groups	#	% within race	#	% within race	#	% within race	#	
18-25	311	7.5%	127	5.6%	76	6.4%	514	6.8%
26-54	2851	68.7%	1425	62.7%	788	66.7%	5604	66.6%
55-64	857	20.6%	523	23.0%	271	22.9%	1651	21.7%
65+	132	3.2%	197	8.7%	47	4.0%	376	4.9%
Total	4151	100%	2272	100%	1182	100%	7605	100%

Source: Miami-Dade County HMIS, Homeless Males 2010-2011

Veteran Status

The percentage of males who are veterans within Miami-Dade's homeless population (11.2%) is nearly the same as it is nationwide (11%) (National Alliance to End Homelessness 2012). Within the 7,605 HMIS cases, 119 were missing data; of the

remaining, 11.2% had marked that they were veterans. It is possible that in some of the records where "No" was answered, the question was not actually asked but the field still filled in.

Table 5: Veteran Status amongst Homeless Males in Miami-Dade, by Race/Ethnicity

Veteran Status	Black	Hispanic	White	Total
# Yes (frequency)	516	115	207	838
# No (frequency)	3572	2133	943	6648
Total Population	4088	2248	1150	7486
% YES within race/ethnicity*	12.6%	5.1%	18%	11.2%

*Denotes difference is significant at Pearson Chi-Square p<.001
Source: Miami-Dade County HMIS, Homeless Males, 2010-2011

The percentage of individuals who are veterans varies between all the racial/ethnic groups at a significance level of .001, with 18% of whites, 12.6% of blacks, and only 5.1% of Hispanics being veterans. The difference in veteran status is relevant to this study, as it affects an individual's access to veterans' benefits, including both cash and non-cash benefits. Whites are much more likely to be veterans than other racial groups within the homeless population, with nearly 1 in 5 white homeless persons being a veteran.

Disabilities

Single males who are homeless in Miami-Dade County suffer from serious disabilities in large proportions. More than three quarters (78%) have at least one serious disability. Data regarding prevalence of disabilities is drawn from the number of men who have at least one disability recorded in their HMIS record, with the disability being one of several that meet HUD's criteria: alcohol abuse, drug abuse, mental health disorder, medical/health problems (including HIV/AIDS), and/or other disabilities including developmental disabilities, vision, and hearing impairments.

When examining presence of disabilities, it is useful to separate out persons who are "sheltered" in an emergency, transitional, or institutional setting, compared to those who are living in a permanent supported housing program (See Table 6), because the way HUD categories persons in permanent housing is correlated with disability status. We would expect the number of persons with disabilities in permanent programs to be higher, as HUD requires the presence of a qualifying serious disability in order to live in many of its permanent programs. Typically, individuals who are ready to move into permanent housing but who lack a qualifying disabling condition would move into market-rate housing or housing subsidized by a non-homeless program, including HUD's Section 8 program, tax-credit funded affordable housing projects, or temporary rent-assistance programs. However, individuals who enter any of those program types are no longer tracked in the HMIS system and thus do not appear in this data set. Note that for the one-on-one interviews conducted for this study, discussed later in this chapter, formerly homeless individuals living in these non-homeless programs were included.

Table 6: Prevalence of Disabilities Amongst Miami-Dade Homeless Males, by Race/Ethnicity

	Black	Hispanic	White	Total
Sheltered in Emergency/Transitional (Non-Permanent)				
Any Disability	67.0%	64.3%	67.0%	66.2%
Alcohol Abuse*	26.0%	20.7%	32.5%	25.5%
Substance Abuse*	44.4%	29.7%	28.6%	37.6%
Mental Health*	29.5%	35.2%	31.4%	31.5%
Medical Problem	27.0%	27.5%	27.3%	27.2%
Living in Permanent Housing Program				
Any Disability	90.8%	93.0%	92.8%	91.8%
Alcohol Abuse*	31.7%	16.5%	27.6%	26.0%
Substance Abuse*	49.4%	23.0%	32.2%	38.3%
Mental Health*	54.2%	75.9%	74.3%	64.0%
Medical Problem	38.1%	32.8%	25.7%	34.9%

*Denotes difference is significant with Pearson Chi-Square P<.01
Source: Miami-Dade County HMIS, Homeless Males, 2010-2011

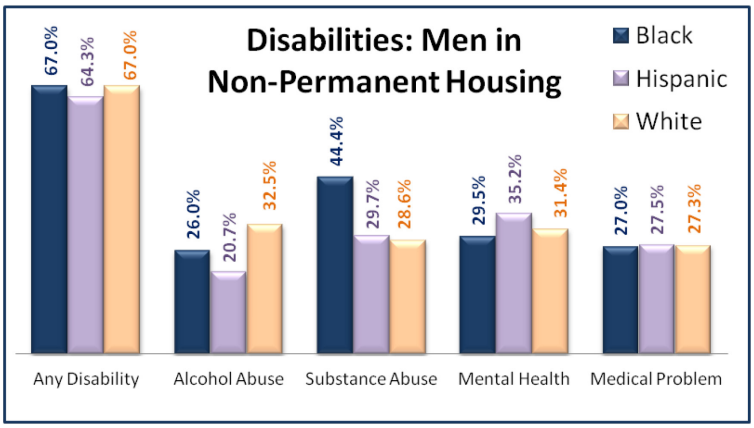
Nationwide, only 36.8% of homeless adults in shelters or non-permanent housing programs have a serious disabling condition (HUD ABT Associates 2011) compared to 66.2% in Miami. Homeless men in Miami are almost twice as likely as homeless individuals nationwide to have a disabling condition recorded in their HMIS record. For those in permanent housing programs, Miami has 91.8% compared to 78.8% nationwide.

While there is no significant difference between racial/ethnic groups regarding the likelihood that at least one disability will be present, we do see significant disparities in the disability *types* between racial/ethnic groups. For persons in emergency or transitional programs (i.e. non-permanent) each of the following test significant with Pearson Chi-Tests at p<.001 (See : Figure 4 and Figure 5)

- White are more likely to have an alcohol abuse problem than Hispanics or blacks, and Hispanics are less likely to abuse alcohol than blacks;

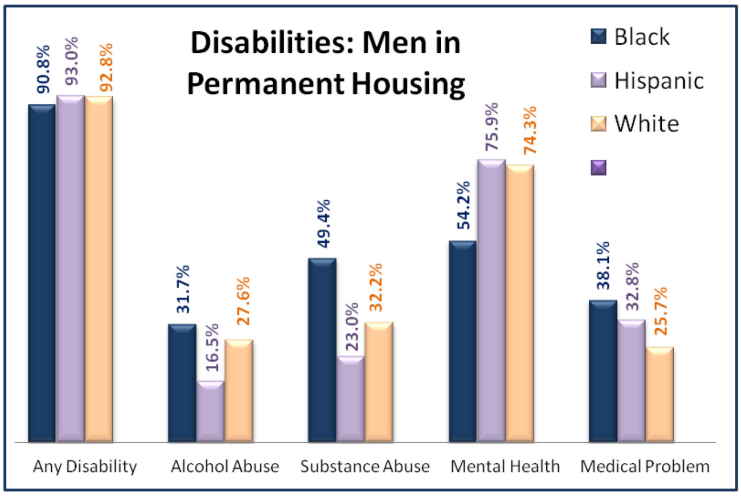
- Blacks are more like to have a substance abuse problem than Hispanics or whites;
- Hispanics are more likely to have a mental health disorder than are blacks or whites;
- There are no significant differences between those with medical or other disabilities.

Figure 4: Disabilities Amongst Men in Non-Permanent Housing Programs



Source: Miami-Dade County HMIS, Homeless Males, 2010-2011

Figure 5: Disabilities Amongst Men in Permanent Housing Programs



Source: Miami-Dade County HMIS, Homeless Males, 2010-2011

5.6 Program and Housing Outcomes

Considering that homeless men living in shelters, transitional, and permanent housing programs present with different demographics, disabilities, and needs, it is reasonable to ask whether they experience different outcomes. Table 9 describes where individuals went upon discharge from emergency shelters. The choices available in the HMIS system were condensed into seven categories: Street/Unknown; Emergency or Transitional Programs; Permanent Subsidized Housing (including supported homeless programs, Section 8 vouchers, or other subsidized options); Independent Housing (rental or ownership without a subsidy); Family; Treatment (substance abuse and

mental health treatment facilities); or Other (including hospitals, jails, or other). This table focuses on individuals leaving emergency shelters, as that is the first step in leaving the streets, and the destination upon leaving the shelter is vital to determining whether they will succeed in attaining permanent housing.

Table 9: Homeless Men's Destination Upon Exiting Emergency Shelter in Miami-Dade

	Black	Hispanic	White	TOTAL
	Count (% within race/ethnicity)			
Street/Unknown	1564 (47.5%)	877 (47.5%)	486 (51.0%)	2927 (48.1%)
Emerg/Trans Program	368 (11.2%)	202 (10.9%)	103 (10.8%)	673 (11.1%)
Permanent Subsidized	155 (4.7%)	89 (4.8%)	33 (3.5%)	277 (4.5%)
Independent*	**265 (8.1%)**	**189 (10.2%)**	**59 (6.2%)**	**513 (8.4%)**
Family*	**260 (7.9%)**	**195 (10.6)**	**91 (9.5%)**	**546 (9.0%)**
Other	387 (11.8%)	219 (11.9%)	137 (14.4%)	743 (12.2%)
Treatment*	**291 (8.8%)**	**74 (4.0%)**	**44 (4.6%)**	**409 (6.7%)**
TOTAL	3290	1845	953	6088
	100.0%	100.0%	100.0%	100.0%

*Denotes differences are significant with Chi-Square P<.01
Data Source: Miami-Dade County Homeless Trust HMIS records 2010-2011

Approximately half of men leaving shelters return to the streets, with no significant disparity amongst racial/ethnic groups. Significant differences do appear, however, in the group of men who transition into independent living or go to live with family, with Hispanics being more likely to access those options than blacks. Additionally, blacks are more than twice as likely as Hispanics (8.8% versus 4.0%) to enter a substance abuse treatment program.

These data disprove the null hypothesis, that single men exiting homeless programs in Miami-Dade County go to similar destinations when broken down race/ethnicity. Rather, it appears that Hispanics are more likely to go to independent living or to live with family, while blacks are more likely to go to a treatment program.

Given that blacks suffer from addiction at greater rates than Hispanics, the fact that more go to treatment programs is not surprising. However, it still suggests that further research may provide more detail regarding how the different resources of independent living and family are made available to Hispanics.

Reasons for Leaving Programs

The reason given when an individual leaves a program is also an opportunity for examining differences in the reasons minority males exit programs in Miami-Dade. The choices available for reason for leaving were condensed into five categories: Completed Program; Left On Own (for another housing opportunity); Discharged for Violation (breaking rules, criminal activity, failure to comply with case plan); Other; or Unknown/Disappeared (left without completing discharge interview, went AWOL overnight, etc.). Data was examined for those leaving emergency shelters, as well as for those leaving all other types of programs.

Table 10 below shows that there are actually very few major differences in reasons for leaving programs. However, the small differences do test as significant with Pearson Chi-Square values of $p<.05$. Whites are slightly more likely than blacks and Hispanics to leave an emergency shelter before completing the program, and blacks are the least likely to be discharged for a program violation. Within all non-emergency shelter programs, there are no significant differences in reasons for leaving a program.

Table 10: Homeless Men's Reasons for Leaving Programs in Miami-Dade

REASON FOR LEAVING	Black	Hispanic	White	Total
EMERGENCY HOUSING PROGRAM				
Completed Program*	**2108 (64.2%)**	**1147 (62.2%)**	**571 (60%)**	**3826 (62.9%)**
Left on Own*	**50 (1.5%)**	**35 (1.9%)**	**26 (2.7%)**	**111 (1.8%)**
Discharged for Violation*	**316 (9.6%)**	**211 (11.4%)**	**107 (11.2%)**	**634 (10.4%)**
Other*	**160 (4.9%)**	**104 (5.6%)**	**64 (6.7%)**	**328 (5.4%)**
Unknown/ Disappeared	652 (19.8%)	347 (18.8%)	184 (19.3%)	1183 (19.5%)
TOTAL	3286	1844	952	6082
	100.0%	100.0%	100.0%	100.0%
TRANSITIONAL AND PERMANENT HOUSING PROGRAMS				
Completed Program	(61.5%)	287 (60.4%)	190 (66.9%)	1066 (62.1%)
Left on Own	134 (14%)	76 (16%)	42 (14.8%)	252 (14.7%)
Discharged for Violation	132 (13.8%)	56 (11.8%)	37 (13%)	225 (13.1%)
Other*	**33 (3.4%)**	**33 (6.9%)**	**3 (1.1%)**	**69 (4%)**
Unknown/ Disappeared	69 (7.2%)	23 (4.8%)	12 (4.2%)	104 (6.1%)
TOTAL	957	475	284	1716
	100.0%	100.0%	100.0%	100.0%

*Difference is significant at Pearson Chi-Square $p<.05$
Source: Miami-Dade County HMIS 2010-2011

These data do not support the null hypotheses, although the variation is not large: Single men exiting homeless program in Miami-Dade County have slightly different outcomes regarding successful or non-successful program completion when broken down by race/ethnicity. The difference in outcomes is only true for men exiting emergency shelter programs; there is no significant difference when leaving transitional or permanent housing programs. The variations in reasons for leaving emergency shelter are fairly small in nature, but they do test significant (Pearson Chi-Square $p<.001$) given the large data set. Blacks are more likely than Hispanics or whites to complete a program (64.2% versus 62.2% and 60% respectively). Whites and Hispanics, on the other hand, are more likely to leave on their own or be discharged for a program violation. In this

area, there is room for further research to determine why blacks seem to be more program compliant than Hispanics or whites. It is possible that Hispanics and whites have other options and therefore do not have as much to lose in leaving a program early, or in being discharged for a violation. Have access to other resources could also explain why the difference disappears for transitional and permanent programs, as by the time an individual enters one of those longer-term programs, they likely do not have as many outside resources.

Nonetheless, in spite of the differences in backgrounds, disabilities, and program destinations, the final outcomes for men of different races and ethnicities are similar when exiting transitional or permanent programs. The similarity in outcomes is particularly true when looked at within a broader framework regarding whether the program was completed or not. While the details on where they go still varies slightly, there is almost no variation between rates of program completion and non-completion.

Defining Homelessness: Who Is Served

There is no single federal definition of what it means to be homeless, and definitions among federal programs that serve homeless individuals may vary to some degree. As a result, the populations served through the federal programs described in this report may differ depending on the program. The definition of "homeless individual" that was originally enacted in the McKinney-Vento Act is used by a majority of programs to define what it means to be homeless. The McKinney-Vento Act defined the term "homeless individual" for purposes of the programs that were authorized through the law (see Section 103 of McKinney-Vento), though some programs that were originally authorized through McKinney-Vento use their own, less restrictive definitions.[9] In 2009, the McKinney-Vento Act definition of homelessness was amended by the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act, enacted as part of the Helping Families Save Their Homes Act (P.L. 111-22).

Programs that use the definition in Section 103 of the McKinney-Vento Act are HUD's Homeless Assistance Grants, FEMA's Emergency Food and Shelter program, the VA homeless veterans programs, and DOL's Homeless Veterans Reintegration Program.[10] (Throughout this section of the report, the term "Section 103 definition" is used to refer to the original McKinney-Vento Act definition of homelessness.)

This section describes the original McKinney-Vento Act Section 103 definition of homeless individual, how the definition compares to those used in other programs, and how it has changed under the HEARTH Act and HUD's implementing regulations.

Original McKinney-Vento Act Definition of Homelessness

The definition of "homeless individual" in Section 103 of McKinney-Vento remained the same for years:

> [a]n individual who lacks a fixed, regular, and adequate nighttime residence; and a person who has a nighttime residence that is (a) a supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill); (b) an institution that provides a temporary residence for individuals intended to be institutionalized; or (c) a public or private place not designed for, nor ordinarily used as, a regular sleeping accommodation for human beings.

This definition was sometimes described as requiring one to be literally homeless in order to meet its requirements[11]—either living in emergency accommodations or having no place to stay. This contrasts with definitions used in some other federal programs, where a person may currently

[9] These include the Education for Homeless Children and Youths program and Health Care for the Homeless.

[10] The definition of *homeless veteran* is a veteran who is homeless as defined by Section 103(a) of McKinney-Vento. 38 U.S.C. §2002(1). This definition applies to VA programs for homeless veterans as well as the Homeless Veterans Reintegration Program.

[11] See, for example, the Department of Housing and Urban Development, *The Third Annual Homeless Assessment Report to Congress*, July 2008, p. 2, footnote 5, http://www.hudhre.info/documents/3rdHomelessAssessmentReport.pdf.

have a place to live but is still considered homeless because the accommodation is precarious or temporary.

Definitions Under Other Federal Programs

Education for Homeless Children and Youths: The Department of Education program defines homeless children and youth in part by reference to the Section 103 definition of homeless individuals as those lacking a fixed, regular, and adequate nighttime residence.[12] In addition, the ED program defines children and youth who are eligible for services to include those who are (1) sharing housing with other persons due to loss of housing or economic hardship; (2) living in hotels or motels, trailer parks, or campgrounds due to lack of alternative arrangements; (3) awaiting foster care placement; (4) living in substandard housing; and (5) children of migrant workers.[13]

Transitional Housing Assistance for Victims of Domestic Violence, Stalking, or Sexual Assault: The Violence Against Women Act definition of homelessness is similar to the ED definition.[14]

Runaway and Homeless Youth: The statute defines a homeless youth as either ages 16 to 22 (for transitional living projects) or ages 18 and younger (for short-term shelter) and for whom it is not possible to live in a safe environment with a relative or for whom there is no other safe alternative living arrangement.[15]

Health Care for the Homeless: Under the Health Care for the Homeless program, a homeless individual is one who "lacks housing," and the definition includes those living in a private or publicly operated temporary living facility or in transitional housing.[16]

Projects for Assistance in Transition from Homelessness: In the PATH program, an "eligible homeless individual" is described as one suffering from serious mental illness, which may also be accompanied by a substance use disorder, and who is "homeless or at imminent risk of becoming homeless." The statute does not further define what constitutes being homeless or at imminent risk of homelessness.

HEARTH Act Changes to the McKinney-Vento Act Section 103 Definition

The Section 103 definition of "homeless individual" was changed in 2009 as part of the Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act, enacted as part of the Helping Families Save Their Homes Act (P.L. 111-22). The HEARTH Act broadened the McKinney-Vento Section 103 definition and moved the definition away from the requirement for literal homelessness. On December 5, 2011, HUD released regulations that clarify some of the changes.[17] The changes are as follows:

- **Amendments to Original McKinney-Vento Act Language:** The HEARTH Act made minor changes to the existing language in the McKinney-Vento Act. The

[12] 42 U.S.C. §11434a.

[13] Migratory children are defined at 20 U.S.C. §6399.

[14] 34 U.S.C. §12291(a)(12), referring to 34 U.S.C. §12473(6).

[15] 34 U.S.C. §11279(3). The statute specifies that short-term shelters can serve youth older than age 18 if the center is located in a state or locality that permits this higher age.

[16] 42 U.S.C. §254b(h)(5)(A).

[17] U.S. Department of Housing and Urban Development, "Homeless Emergency Assistance and Rapid Transition to Housing: Defining 'Homeless'," 76 *Federal Register* 75994-76019, December 5, 2011.

law continues to provide that a person is homeless if they lack "a fixed, regular, and adequate nighttime residence," and if their nighttime residence is a place not meant for human habitation, if they live in a shelter, or if they are a person leaving an institution who had been homeless prior to being institutionalized. The HEARTH Act added that those living in hotels or motels paid for by a government entity or charitable organization are considered homeless, and it included all those persons living in transitional housing, not just those residing in transitional housing for the mentally ill as in prior law. The amended law also added circumstances that are not considered suitable places for people to sleep, including cars, parks, abandoned buildings, bus or train stations, airports, and campgrounds. When HUD issued its final regulation in 2011, it clarified that a person exiting an institution cannot have been residing there for more than 90 days and be considered homeless.[18] In addition, where the law states that a person "who resided in a shelter or place not meant for human habitation" prior to institutionalization, the "shelter" means emergency shelter and does not include transitional housing.[19]

- **Imminent Loss of Housing:** P.L. 111-22 added to the Section 103 definition those individuals and families who meet all of the following criteria:
    - They will "imminently lose their housing," whether it be their own housing, housing they are sharing with others, or a hotel or motel not paid for by a government or charitable entity. Imminent loss of housing is evidenced by an eviction requiring an individual or family to leave their housing within 14 days; a lack of resources that would allow an individual or family to remain in a hotel or motel for more than 14 days; or credible evidence that an individual or family would not be able to stay with another homeowner or renter for more than 14 days.
    - They have no subsequent residence identified.
    - They lack the resources or support networks needed to obtain other permanent housing.

  HUD practice prior to passage of the HEARTH Act was to consider those individuals and families who would imminently lose housing within seven days to be homeless.
- **Other Federal Definitions:** P.L. 111-22 added to the definition of "homeless individual" unaccompanied youth and homeless families with children who are defined as homeless under other federal statutes. The law did not define the term youth, so in its final regulations HUD defined a youth as someone under the age of 25.[20] In addition, the HEARTH Act did not specify which other federal statutes would be included in defining homeless families with children and unaccompanied youth. So in its regulations, HUD listed seven federal programs as those under which youth or families with children can be defined as homeless: the Runaway and Homeless Youth program; Head Start; the Violence Against Women Act; the Health Care for the Homeless program; the Supplemental Nutrition Assistance Program (SNAP); the Women, Infants, and Children

[18] Ibid., p. 76000.

[19] Ibid.

[20] Ibid., p. 75996.

nutrition program; and the McKinney-Vento Education for Children and Youths program.[21] Five of these seven programs (all but Runaway and Homeless Youth and Health Care for the Homeless programs) either share the Education for Homeless Children and Youths definition, or use a similar definition. Youth and families who are defined as homeless under another federal program must meet each of the following criteria:

- They have experienced a long-term period without living independently in permanent housing. In its final regulation, HUD defined "long-term period" to mean at least 60 days.
- They have experienced instability as evidenced by frequent moves during this long-term period, defined by HUD to mean at least two moves during the 60 days prior to applying for assistance.[22]
- The youth or families with children can be expected to continue in unstable housing due to factors such as chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment. Under the final regulation, barriers to employment may include the lack of a high school degree, illiteracy, lack of English proficiency, a history of incarceration, or a history of unstable employment.[23]

Communities are limited to using not more than 10% of Continuum of Care (CoC) program funds to serve families with children and youth defined as homeless under other federal statutes. The 10% limitation does not apply if the community has a rate of homelessness less than one-tenth of 1% of the total population.[24]

- **Domestic Violence:** Another change to the definition of homeless individual is that the HEARTH Act amendment considers homeless anyone who is fleeing a situation of "domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions in the individual's or family's current housing situation, including where the health and safety of children are jeopardized."[25] The law also provides that an individual must lack the resources or support network to find another housing situation. HUD's 2011 final regulation specified that the conditions either must have occurred at the primary nighttime residence or made the individual or family afraid to return to their residence.[26]

[21] Ibid.

[22] Ibid., p. 76017.

[23] Ibid.

[24] 42 U.S.C. §11382(j).

[25] 42 U.S.C. §11302(b).

[26] 76 *Federal Register,* p. 76014.

(a) In general

For purposes of this chapter, the terms "homeless", "homeless individual", and "homeless person" means--[1]

(1) an individual or family who lacks a fixed, regular, and adequate nighttime residence;

(2) an individual or family with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground;

(3) an individual or family living in a supervised publicly or privately operated shelter designated to provide temporary living arrangements (including hotels and motels paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, congregate shelters, and transitional housing);

(4) an individual who resided in a shelter or place not meant for human habitation and who is exiting an institution where he or she temporarily resided;

(5) an individual or family who--

(A) will imminently lose their housing, including housing they own, rent, or live in without paying rent, are sharing with others, and rooms in hotels or motels not paid for by Federal, State, or local government programs for low-income individuals or by charitable organizations, as evidenced by--

(i) a court order resulting from an eviction action that notifies the individual or family that they must leave within 14 days;

(ii) the individual or family having a primary nighttime residence that is a room in a hotel or motel and where they lack the resources necessary to reside there for more than 14 days; or

(iii) credible evidence indicating that the owner or renter of the housing will not allow the individual or family to stay for more than 14 days, and any oral statement from an individual or family seeking homeless assistance that is found to be credible shall be considered credible evidence for purposes of this clause;

(B) has no subsequent residence identified; and

(C) lacks the resources or support networks needed to obtain other permanent housing; and

(6) unaccompanied youth and homeless families with children and youth defined as homeless under other Federal statutes who--

(A) have experienced a long term period without living independently in permanent housing,

(B) have experienced persistent instability as measured by frequent moves over such period, and

(C) can be expected to continue in such status for an extended period of time because of chronic disabilities, chronic physical health or mental health conditions, substance addiction, histories of domestic violence or childhood abuse, the presence of a child or youth with a disability, or multiple barriers to employment.

(b) Domestic violence and other dangerous or life-threatening conditions

Notwithstanding any other provision of this section, the Secretary shall consider to be homeless any individual or family who is fleeing, or is attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions in the individual's or family's current housing situation, including where the health and safety of children are jeopardized, and who have no other residence and lack the resources or support networks to obtain other permanent housing.

(c) Income eligibility

(1) In general

A homeless individual shall be eligible for assistance under any program provided by this chapter, only if the individual complies with the income eligibility requirements otherwise applicable to such program.

(2) Exception

Notwithstanding paragraph (1), a homeless individual shall be eligible for assistance under title I of the Workforce Innovation and Opportunity Act[2].

(d) Exclusion

For purposes of this chapter, the term "homeless" or "homeless individual" does not include any individual imprisoned or otherwise detained pursuant to an Act of the Congress or a State law.

(e) Persons experiencing homelessness

Any references in this chapter to homeless individuals (including homeless persons) or homeless groups (including homeless persons) shall be considered to include, and to refer to, individuals experiencing homelessness or groups experiencing homelessness, respectively.

[1] So in original. Probably should be "mean--".

[2] 29 U.S.C.A. § 3111 et seq.

Subtitle VII-B of the McKinney-Vento Homeless Assistance Act (per Title IX, Part A of the Elementary and Secondary Education Act, as amended by the Every Student Succeeds Act), 42 U.S.C. § 11434a

For purposes of this part:

(1) The terms “enroll” and “enrollment” include attending classes and participating fully in school activities.

(2) The term “homeless children and youths”—

(A) means individuals who lack a fixed, regular, and adequate nighttime residence (within the meaning of section 11302(a)(1) of this title); and

(B) includes—

(i) children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; or are abandoned in hospitals;

(ii) children and youths who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings (within the meaning of section 11302(a)(2)(C) [1] of this title);

(iii) children and youths who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and

(iv) migratory children (as such term is defined in section 6399 of title 20) who qualify as homeless for the purposes of this part because the children are living in circumstances described in clauses (i) through (iii).

(3) The terms “local educational agency” and “State educational agency” have the meanings given such terms in section 7801 of title 20.

(4) The term “Secretary” means the Secretary of Education.

(5) The term “State” means each of the 50 States, the District of Columbia, and the Commonwealth of Puerto Rico.

(6) The term “unaccompanied youth” includes a homeless child or youth not in the physical custody of a parent or guardian.

HOMELESS TRUST CENSUS RESULTS & COMPARISON: JANUARY 27, 2022 to JANUARY 26, 2023

UNSHELTERED HOMELESS COUNT	# ON 1/27/22	# ON 1/26/23	Difference +/-	%
City of Miami-City of Miami, City Limits	591	608	17	**3%**
City of Miami Beach- Miami Beach	171	235	64	**37%**
Miami-Dade County-South Dade, South of Kendall Drive to Monroe County Line	62	49	-13	**-21%**
Miami-Dade County-Unincorporated Miami-Dade County, North of Kendall Drive to Broward County Line	146	166	20	**14%**
Subtotal- # of UNSHELTERED Homeless:	**970**	**1058**	**88**	**9%**

SHELTERED HOMELESS COUNT	# ON 1/27/22	# ON 1/26/23	Difference +/-	%
Total Homeless in Emergency Shelter	1,766	2,037	271	**15%**
Emergency Weather Placements	0	0	0	**0%**
Hotel/Motel	142	246	104	**73%**
Total Homeless in Transitional Housing	382	303	-79	**-21%**
Safe Haven	16	13	-3	**-19%**
Subtotal-SHELTERED Homeless:	**2306**	**2,599**	**293**	**13%**

TOTAL - SHELTERED AND UNSHELTERED HOMELESS:				
	3276	**3657**	**381**	**12%**

There was a 12% (n=381) overall increase in homelessness countywide when comparing the 2022 and 2023 PIT counts. The unsheltered count increased 9% (n=88), and the sheltered count increased 13% (n=293).

SUB-POPULATION COUNT	# ON 1/27/22	# ON 1/26/23	Difference +/-	%
Chronic Homeless Persons	762	939	177	**23%**
Family Households	328	381	53	**16%**
Veteran Households	131	93	-38	**-29%**
Unaccomapanied Youth Households (18-24 year old)	117	116	-1	**-1%**
Parenting Youth Households (18-24 year old)	52	53	1	**2%**
Senior Persons (55-64 year old)	N/A	612	N/A	N/A
Senior Households (65 and older)	N/A	501	N/A	N/A

MIAMI-DADE COUNTY HOMELESS TRUST

	# ON 1/27/22	# ON 1/26/23
Weather Conditions:	Partly Cloudy, High in the upper 60's	Partly Cloudy, High in the upper 60's

HOMELESS TRUST CENSUS RESULTS & COMPARISON: August 18, 2022 to August 24, 2023

UNSHELTERED HOMELESS COUNT	# ON 8/18/22	# ON 8/24/23	Difference +/-	%
City of Miami-City of Miami, City Limits	640	534	-106	**-17%**
City of Miami Beach- Miami Beach	167	152	-15	**-9%**
Miami-Dade County-South Dade, South of Kendall Drive to Monroe County Line	93	67	-26	**-28%**
Miami-Dade County-Unincorporated Miami-Dade County, North of Kendall Drive to Broward County Line	240	227	-13	**-5%**
Subtotal- # of UNSHELTERED Homeless:	**1140**	**980**	**-160**	**-14%**

SHELTERED HOMELESS COUNT	# ON 8/19/21	# ON 8/24/23	Difference +/-	%
Total Homeless in Emergency Shelter	1,876	2,053	177	**9%**
Emergency Weather Placements	0	0	0	**0%**
Hotel/Motel	128	302	174	**136%**
Total Homeless in Transitional Housing	411	368	-43	**-10%**
Safe Haven	11	17	6	**55%**
Subtotal-SHELTERED Homeless:	**2426**	**2,740**	**314**	**13%**

TOTAL - SHELTERED AND UNSHELTERED HOMELESS:				
	3566	**3720**	**154**	**4%**

There was a 4% (n=154) overall increase in homelessness countywide when comparing the 2022 and 2023 PIT counts. The unsheltered count decreased 14% (n=-160), and the sheltered count increased 13% (n=314).

MIAMI-DADE COUNTY HOMELESS TRUST

	# ON 8/18/22	# ON 8/24/23
Weather Conditions:	Partly Cloudy with Scatter Thunderstorms, High in the low 80s.	Partly Cloudy with a shower in spots, High in the upper 70s.

HOMELESS CENSUS RESULTS

Summary - Life - To - Date Census

	Actual Street Count	Multiplied By (2)*	Total Sheltered	Total Census Results
Feb-96				8000
Apr,97	2161	4322		4322
Oct,97	2138	4276		4276
Feb,98	2403	4806		4806
Oct,98	2490	4980	2220	7200
Apr,00	1737	3474	2093	5567
Nov,00	2141	4282	2708	6990
Jun,01	2604	5208	3050	8258
Nov,01	2001	4002	2873	6875
Apr,02	2094	4188	2912	7100
Nov,02	1960	3920	2969	6889
Apr,03	2211	4422	2998	7420
Dec,03	2231	4462	3165	7627
Apr,04	1982	3964	3093	7057
Jan-05	1989		3171	5160
Sep-05	2297		2759	5056
Jan-06	2182		2833	5015
Jul-06	1754		2955	4709
Jan-07	1380		3012	4392
Jul-07	1683		3151	4834
Jan-08	1347		3227	4574
Jan-09	994		3339	4333
Aug-09	1089		3067	4156
Jan-10	759		3120	3879
Sep-10	847		3083	3930
Jan-11	789		2988	3777
Jun-11	898		3011	3909
Jan-12	868		3108	3976
Aug-12	894		2769	3663
Jan-13	839		2963	3802
Aug-13	848		3103	3951
Jan-14	840		3316	4156
Aug-14	792		3349	4141
Jan-15	1007		3145	4152
Aug-15	1067		3000	4067
Jan-16	982		3253	4235
Aug-16	1126		2927	4053
Jan-17	1011		2836	3847
Aug-17	1133		2605	3738
Jan-18	1030		2486	3516
Aug-18	1105		2738	3843
Jan-19	1008		2620	3628
Aug-19	1148		2550	3698
Jan-20	1020		2540	3560
Aug-20	Census was cancelled due to COVID-19 pandemic			
Jan-21	892		2332	3224
Aug-21	929		2426	3355
Jan-22	970		2470	3440
Aug-22	1140		2598	3738
Jan-23	1058		2599	3657
Aug-23	980		2740	3720

Please note that there was no data collected for April 1997, October 1997 and February 1998.
The 1999 count was not used due to discrepancies in counting methodologies.
***The Multiplier was eliminated in 2005 per HUD guidance**

MIAMI-DADE COUNTY
HOMELESS TRUST

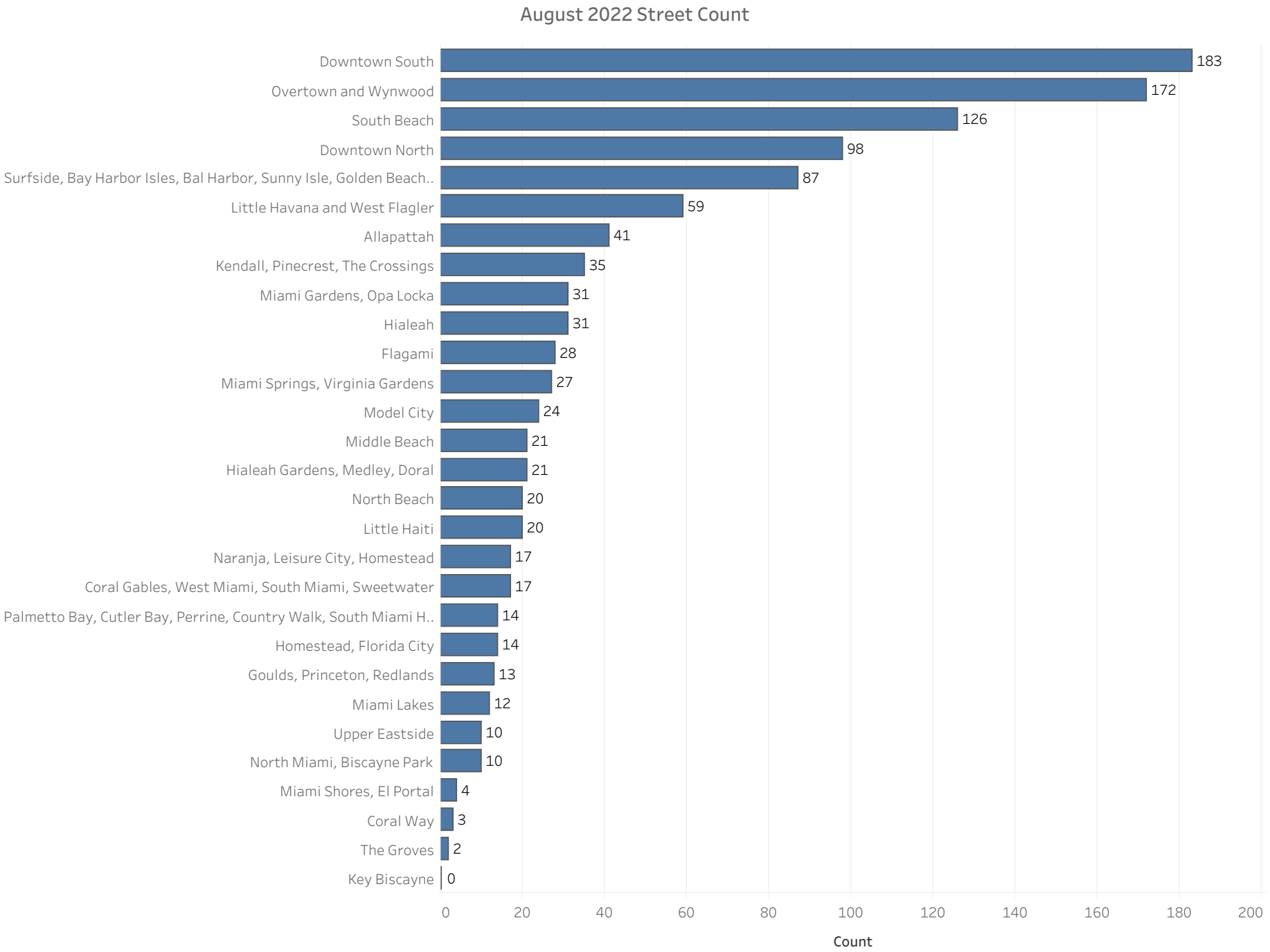
SUMMARY -ALL STREET COUNTS LIFE-TO-DATE

Outreach Providers	Miami Homeless Assistance Programs (City of Miami)	Formerly Douglas Gardens 4/03 City of Miami Beach (Miami Beach)	Formerly Metatherapy Institute Outreach-Camillus (South of Kendall Dr.) 12/05 (DHS Homeless Assistance Programs) 8/09 (City of Miami)	Formerly DHS Homeless Assistance Programs (balance of County)8/09 (City of Miami)	Subtotal	Total w/Multiplier of 2
1992*					6000	8000
Apr. 1997/Count # 1	1013	152	735	261	2161	4322
Number of Teams	7	2	5	4	18	
Oct. 1997/Count # 2	874	116	795	353	2138	4276
Number of Teams	8	2	5	5	20	
Feb. 1998/Count # 3	623	159	809	812	2403	4806
Number of Teams	9	2	5	8	24	
Oct. 1998/Count # 4	737	111	819	823	2490	4980
Number of Teams	6	1	5	8	20	
Apr. 2000/Count # 7	838	132	324	443	1737	3474
Number of Teams	8	2	4	9	23	
Nov. 2000/Count # 8	822	314	378	627	2141	4282
Number of Teams	8	2	4	9	23	
Jun. 2001/Count # 9	1157	277	353	817	2604	5208
Number of Teams	8	3	3	9	23	
Nov. 2001/Count # 10	867	281	432	421	2001	4002
Number of Teams	9	3	3	10	25	
Apr. 2002/Count # 11	926	255	209	704	2094	4188
Number of Teams	9	3	3	10	25	
Nov. 2002/Count # 12	980	310	173	497	1960	3920
Number of Teams	9	3	3	10	25	
Apr. 2003/Count # 13	1152	301	283	478	2214	4428
Number of Teams	9	3	3	10	25	
Dec. 2003/Count # 14	945	304	308	674	2231	4462
Number of Teams	10	4	3	10	27	
Apr. 2004/Count # 15	827	259	169	727	1982	3964
Number of Teams	10	4	3	10	27	
Jan. 2005/ Count #16	759	239	106	885	1989	
Number of Teams	10	4	4	11	29	
Sept. 2005/ Count #17	738	336	228	995	2297	
Number of Teams	10	5	3	11	29	
Jan. 2006/ Count #17	748	218	176	612	1754	
Number of Teams	10	4	4	10	28	
July. 2006/ Count #18	849	270	433	630	2182	
Number of Teams	10	4	4	9	27	
Jan. 2007/ Count #19	447	173	246	514	1380	
Number of Teams	10	3	4	9	26	
July. 2007/ Count #20	613	254	261	555	1683	
Number of Teams	10	4	4	9	27	
Jan. 2008/ Count #21	514	98	193	542	1347	
Number of Teams	9	4	4	9	26	
Jan. 2009/ Count #22	411	141	112	330	994	
Number of Teams	9	4	3	7	23	
Aug. 2009/ Count #23	674	232	85	98	1089	
Number of Teams	9	4	3	7	23	
Jan. 2010/ Count #24	512	149	65	33	759	
Number of Teams	9	4	3	7	23	
Sept. 2010/ Count #25	499	196	81	71	847	
Number of Teams	9	4	5	8	26	
Jan. 2011/ Count #26	487	177	58	67	789	
Number of Teams	9	5	5	10	29	
June. 2011/ Count #27	534	218	51	95	898	
Number of Teams	9	6	5	10	30	
Jan. 2012/ Count #28	535	173	72	88	868	
Number of Teams	9	5	5	10	29	
Aug. 2012/ Count #29	514	186	56	138	894	
Number of Teams	9	5	5	10	29	
Jan. 2013/ Count #30	511	138	66	124	839	
Number of Teams	9	7	5	10	31	
Aug. 2013/ Count #31	582	106	64	96	848	
Number of Teams	9	4	5	10	28	
Jan. 2014/ Count #32	577	122	71	70	840	
Number of Teams	9	4	5	10	28	
Aug. 2014/ Count #33	487	156	43	106	792	
Number of Teams	9	4	5	10	28	
Jan. 2015/ Count #34	616	193	61	137	1007	
Number of Teams	9	4	5	10	28	
Aug. 2015/ Count #35	667	196	75	129	1067	
Number of Teams	9	4	5	10	28	
Jan. 2016/ Count #36	640	156	68	118	982	
Number of Teams	9	4	5	10	28	
Aug. 2016/ Count #37	669	208	68	181	1126	

MIAMI-DADE COUNTY
HOMELESS TRUST

SUMMARY -ALL STREET COUNTS LIFE-TO-DATE

MIAMI-DADE COUNTY Outreach Providers	Miami Homeless Assistance Programs (City of Miami)	Formerly Douglas Gardens 4/03 City of Miami Beach (Miami Beach)	Formerly Metatherapy Institute Outreach-Camillus (South of Kendall Dr.) 12/05 (DHS Homeless Assistance Programs) 8/09 (City of Miami)	Formerly DHS Homeless Assistance Programs (balance of County)8/09 (City of Miami)	Subtotal	Total w/Multiplier of 2
Number of Teams	9	4	5	10	28	
Jan. 2017/ Count #38	**609**	**133**	**119**	**150**	**1011**	
Number of Teams	9	4	5	10	28	
Aug. 2017 / Count 39	**706**	**143**	**85**	**199**	**1133**	
Number of Teams	9	4	5	10	28	
Jan. 2018 / Count 40	**665**	**124**	**85**	**156**	**1030**	
Number of Teams	9	4	5	10	28	
Aug. 2018 / Count 41	**631**	**183**	**75**	**216**	**1105**	
Number of Teams	9	4	5	10	28	
Jan. 2019 / Count 42	**638**	**153**	**84**	**133**	**1008**	
Number of Teams	9	7	5	10	31	
Aug. 2019 / Count 43	**710**	**169**	**87**	**182**	**1148**	
Number of Teams	9	4	5	10	28	
Jan. 2020 / Count 44	**654**	**123**	**94**	**149**	**1020**	
Number of Teams	9	7	5	10	31	
Jan. 2021 / Count 45	**555**	**101**	**66**	**170**	**892**	
Number of Teams	9	3	3	10	25	
Aug. 2021 / Count 46	**510**	**183**	**64**	**172**	**929**	
Number of Teams	9	3	3	10	25	
Jan. 2022 / Count 47	**591**	**171**	**62**	**146**	**970**	
Number of Teams	9	3	3	10	25	
Aug. 2022 / Count 48	**640**	**167**	**93**	**240**	**1140**	
Number of Teams	9	3	3	10	25	
Jan. 2023 / Count 49	**608**	**235**	**49**	**166**	**1058**	
Number of Teams	9	3	3	10	25	
Aug. 2023 / Count 50	**534**	**152**	**67**	**227**	**980**	
Number of Teams	9	3	3	10	25	


August 2022 Street Count
Downtown South 183
Overtown and Wynwood 172
South Beach 126
Downtown North 98
Surfside, Bay Harbor Isles, Bal Harbor, Sunny Isle, Golden Beach.. 87
Little Havana and West Flagler 59
Allapattah 41
Kendall, Pinecrest, The Crossings 35
Miami Gardens, Opa Locka 31
Hialeah 31
Flagami 28
Miami Springs, Virginia Gardens 27
Model City 24
Middle Beach 21
Hialeah Gardens, Medley, Doral 21
North Beach 20
Little Haiti 20
Naranja, Leisure City, Homestead 17
Coral Gables, West Miami, South Miami, Sweetwater 17
Palmetto Bay, Cutler Bay, Perrine, Country Walk, South Miami H.. 14
Homestead, Florida City 14
Goulds, Princeton, Redlands 13
Miami Lakes 12
Upper Eastside 10
North Miami, Biscayne Park 10
Miami Shores, El Portal 4
Coral Way 3
The Groves 2
Key Biscayne 0
0 20 40 60 80 100 120 140 160 180 200
Count

EXECUTIVE SUMMARY

Crisis of homelessness and the PIT Count

Homelessness remains a national crisis, as stagnated wages, rising housing costs, and a grossly insufficient social safety net have left millions of people homeless or at-risk of homelessness.[1] It is important to have an accurate estimate of the number of people experiencing homelessness in this country if we want to enact effective laws and policies to address the homeless crisis. Each year the Department of Housing and Urban Development (HUD) releases an annual Point in Time (PIT) count of the homeless population in this country. This report is used throughout the country to measure progress on homelessness, to assess the efficacy of different policies, and to allocate federal funds, amongst other uses. This count includes a shelter count and a street count of unsheltered homeless individuals. In 2016 HUD reported that 549,928 people were homeless on a single night in January with 32% of those unsheltered.[2]

Flaws in the PIT Count

The annual PIT counts often mobilize large numbers of volunteers and serve to educate communities about homelessness. However, despite all the community effort and goodwill that goes into them, and due to no fault of the professionals and volunteers who carry them out, the counts are severely flawed.

Unfortunately, the methods used by HUD to conduct the PIT counts produce a significant undercount of the homeless population at a given point in time. In addition, regardless of their methodology or execution, point in time counts fail to account for the transitory nature of homelessness and thus present a misleading picture of the crisis. Annual data, which better account for the movement of people in and out of homelessness over time, are significantly larger: A 2001 study using administrative data collected from homeless service providers estimated 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.[3]

Inconsistent Methodology: Varies by COC and over time, making trends difficult to interpret or inaccurate

HUD issues guidelines for the Continuum of Care (COC) programs across the country to follow when conducting the PIT count. However, these guidelines change from year to year and are not applied in the exact same manner by each COC. This inconsistency results in trends that are difficult to interpret and often do not reflect the true underlying data. For instance, in 2013 homeless people in Rapid Rehousing (RRH) were separated from the Transitional Housing (TH) classification and were no longer included in the homeless count.[4] Therefore the reported number of homeless people declined from 2012 to 2013 even where there was no actual change in homeless population.

Most methodologies miss unsheltered homeless people

Individual COCs determine their own counting procedures using guidelines issued by HUD. Generally, the counts are conducted over a single night using volunteers, homeless service provider staff, advocates, and occasionally members of law enforcement. These types of visual street counts are problematic for several reasons. The first is that the people need to be seen in order to be counted, however, a study of shelter users in New York found that 31% slept in places classified as "Not-Visible" the night of the count.[5] This problem is exacerbated by the increase in laws that criminalize homelessness. As documented in *Housing Not Handcuffs*, the Law Center's 2016 report that reviewed the laws in 187 cities around the country, laws that criminalize necessary human activities performed in public places such as sitting, lying, sleeping, loitering, and living in vehicles are prevalent and increasing.[6]

Only some kinds of homelessness are counted

The definition of homelessness that HUD uses is narrow and does not measure the real crisis. It does not permit the inclusion of people that are "doubled up", meaning that they are staying with friends or family due to economic hardship. The PIT counts also exclude people in some institutions such as hospitals and jails; this may result in a disproportionate undercounting of racial and ethnic minorities, who are overrepresented in incarcerated populations. For example, separate from its HUD submission, the Houston COC also reports an "Expanded" count which includes individuals in county jails that reported they were homeless before arrest. This "Expanded" count increased the total number of homeless individuals in 2017 by 57% from 3605 to 5651.[7] This indicates that there is a significant homeless population that is incarcerated that is not being included in the HUD PIT count.

1 National Law Center on Homelessness and Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (2016).

2 Off. of Community Plan. & Dev., Dep't of Housing and Urban Development, The 2016 Annual Homeless Assessment Report to Congress (2016).

3 Stephen Metraux et al., *Assessing Homeless Population Size Through the Use of Emergency and Transitional Shelter Services in 1998: Results from the Analysis of Administrative Data from Nine US Jurisdictions*, 116 Pub. Health Rep. 344, (2001).

4 Kevin C. Corinth, *On Utah's 91 Percent Decrease in Chronic Homelessness*, Am. Enterprise Inst. (2016).

5 Kim Hopper et al., *Estimating Numbers of Unsheltered Homeless People Through Plant-Capture and Postcount Survey Methods*, 98 Am. J. Pub. Health 1438 (2008).

6 National Law Center on Homelessness and Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (2016).

7 Catherine Troisi et al., *Houston/Harris County/Fort Bend County/Montgomery County 2017 Point-in-Time Count Report,* The Way Home and Coalition for the Homeless (2017).

There are better methodologies

Several other independent studies have been dedicated to counting the homeless population. A 2001 study by Burt *et al.* used the 1996 National Survey of Homeless Assistance Providers and Clients (NSHAPC) to produce one-day, one-month, and one-year estimates of the homeless population.[8] Their methods involved making evidence based adjustments to the data using the assumptions that a certain number of homeless individuals do not visit available homeless assistance providers, some areas do not even have homeless assistance providers, and that people tend to move in and out of homelessness over time. It was also recognized that some individuals may use more than one homeless assistance service and therefore the data was also de-duplicated. The final estimate from their study was 2.3 to 3.5 million adults and children in the U.S. were homeless at some point during the year in 1996.[9]

Recommendations

This report highlights many of the issues associated with the accuracy of the HUD PIT counts and how they produce a significant undercount of the homeless crisis in this country. The results of the PIT counts—and even the trend data—are not necessarily accurate indicators of the success or failure of programs or policies that address homelessness.

Conduct a better count nationally. HUD's count should:

- Be nationally coordinated with a more consistent and more rigorous methodology. This and requires appropriate funding levels in order to get more useful data.
- Include estimation techniques designed and overseen by experts in order to quantify the number of homeless individuals that were missed during the count.
- Include all people experiencing homelessness, including individuals that are institutionalized in hospitals and jails or prisons
- Include a separate estimate of people who are doubled up due to economic hardship.
- Ensure that all data, from all subpopulations, is disaggregated by race and ethnicity.

Conduct a better count locally. Even without change from HUD COCs can:

- Include estimation techniques designed and overseen by experts in order to quantify the number of homeless individuals that were missed during the count.
- Include all people experiencing homelessness, including individuals that are institutionalized in hospitals and jails or prisons
- Separately estimate individuals who are doubled up with friends or family due to economic hardship.

How and when to use current PIT count data:

- Current PIT count data must always be used with the explicit recognition that the data represent significant undercounts.
- Usage of year-to-year trends must include scrutiny of any methodology or classification changes that may have also occurred over the time period.

8 Martha Burt et al., *Helping America's Homeless: Emergency Shelter or Affordable Housing, 24-53* (1st Ed. 2001).

9 *Id*.

INTRODUCTION

Crisis of homelessness

Homelessness remains a national crisis, as stagnated wages, rising housing costs, and a grossly insufficient social safety net have left millions of people homeless or at-risk of homelessness.[10] The U.S. Department of Housing and Urban Development (HUD) released its Annual Homeless Assessment Report to Congress (AHAR) in 2016, including the results of the HUD Point in Time (PIT) count and the Housing Inventory Count (HIC). A key finding for 2016 was that homelessness decreased nationally by 2.6% over the previous year and the unsheltered population fell by 10.2%.[11] Some individual states, however, saw dramatic increases over the same time period, including Colorado (6.0%), Washington (7.3%), Oklahoma (8.7%), and the District of Columbia (14.4%).[12]

In 2016, HUD reported that 549,928 people were homeless on a single night in January with 32% of those unsheltered.[13] These numbers may seem high, but the point in time count methods used by HUD are often argued to be significant undercounts.[14] A recent study of the Los Angeles County PIT count concluded that the current methods are insufficient to accurately identify year to year changes in the homeless population.[15] The PIT counts rely on HUD's narrow definition of homelessness that only includes people in emergency shelters, transitional housing, and in certain public locations. Excluded from their counts are people that are in the hospital, incarcerated, living "doubled up", or simply not visible to the people conducting the counts on the particular night of the survey.

In addition, regardless of their methodology or execution, point in time counts fail to account for the transitory nature of homelessness and thus present a misleading picture of the crisis. Annual data, which better account for the movement of people in and out of homelessness over time, are significantly larger: A 2001 study using administrative data collected from homeless service providers estimated 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.[16]

10 *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities, supra note 1.*
11 *The 2016 Annual Homeless Assessment Report to Congress, supra note 2.*
12 *Id*.
13 *Id.*
14 *See, e.g.*, Maria Foscarinis, *Homeless Problem Bigger Than Our Leaders Think*, USA Today, Jan. 16, 2014, https://www.usatoday.com/story/opinion/2014/01/16/homeless-problem-obama-america-recession-column/4539917/; Patrick Markee, *Undercounting the Homeless 2010*, Coalition for the Homeless, January 2010; Daniel Flaming & Patrick Burns, *Who Counts? Assessing Accuracy of the Homeless Count*, Economic Roundtable, (Nov. 2017).
15 *Id*.
16 Stephen Metraux et al., *Assessing Homeless Population Size Through the Use of Emergency and Transitional Shelter Services in 1998: Results from the Analysis of Administrative Data from Nine US Jurisdictions*, 116 Pub. Health Rep. 344, _(2001).
17 Metraux, *supra note 3*.
18 HUD is authorized to require COCs to conduct PIT counts through the McKinney-Vento Homeless Assistance Act Sec. 427 (b)(3).
19 Applied Survey Research, San Francisco Homeless Count & Survey 2017 Comprehensive Report (2017).

The results of a 2001 study using data collected from administrative records of homeless services providers estimated that the actual number of homeless individuals is 2.5 to 10.2 times greater than those obtained using a point in time count, which translates to an equivalent annual number of 1,374,820 to 5,609,265 homeless individuals for 2016.[17]

This report is in no way a criticism of the professionals and volunteers that conduct the PIT counts. Through the counts, they are able to increase public awareness of the homeless crisis and connect homeless individuals to services. The PIT counts are a valuable community engagement opportunity for volunteers and helps expose them to the work that service providers do and to homeless individuals themselves. Nonetheless, the PIT counts result in a significant undercount of the real homeless population in this country and should be improved in order to better guide policy and practice.

What is the PIT count and why is this important?

HUD administers the Point-in-Time (PIT) count of sheltered and unsheltered homeless individuals, as well as the Housing Inventory Count (HIC) of beds provided to serve the homeless population, through its Continuum of Care (COC) program. [18] COCs receive funds from HUD under the McKinney-Vento Homeless Assistance Act to provide direct services to homeless people in their communities. They are collaboratives typically composed of nonprofit service providers, state, and local governments agencies. HUD requires each of the COCs across the country to conduct a PIT count of sheltered and unsheltered homeless people and a HIC of shelter beds. HUD publishes guidelines and tools for the COC to utilize; however, these guidelines vary from year to year and provide a degree of latitude regarding the counting methodologies.

COCs are required to submit PIT count data with their Homeless Assistance Program applications. The first COC Homeless Populations and Subpopulations Report was produced in 2005, and 2007 is the first year for which national PIT count data are available. In 2016 there were 402 COCs spanning a range of population sizes in urban, suburban, and rural areas. The COCs rely heavily on volunteers to conduct their counts, many of whom receive as little as one hour of training.[19]

It is important to have an accurate estimate of the number of people experiencing homelessness in this country in order to have

an understanding of the scope and nature of the problem and, especially, the policy responses and funds needed to address it. These numbers are also used to determine funding allocations, the dividing up total funds among communities depending on population size. The size of the homeless population also contributes to the overall populations of states and local jurisdictions, affecting their political representation.

HUD refers to the data from the counts to inform Congress about the rates of homelessness in the U.S. and to measure the effectiveness of its programs and policies aimed at decreasing homelessness, and legislators frequently rely on the results of the counts to determine whether public policies are reducing homelessness. Rather than understanding that the PIT count represents only a portion of the homeless population, many interpret the count as a comprehensive depiction of the crisis and rely on it to inform policy design and implementation decisions. This can lead to policies that fail to address the homelessness crisis or may even exacerbate it.

FLAWS IN THE PIT COUNT

Methodology varies by COC & over time

HUD issues PIT count guidelines to be followed for each count, but specific procedures are determined by individual COC. The COCs vary widely from large urban cities to small rural towns. Even urban COCs can be quite different; for instance, the San Francisco COC is 47 square miles in area while the COC that contains Houston in 3,711 square miles.

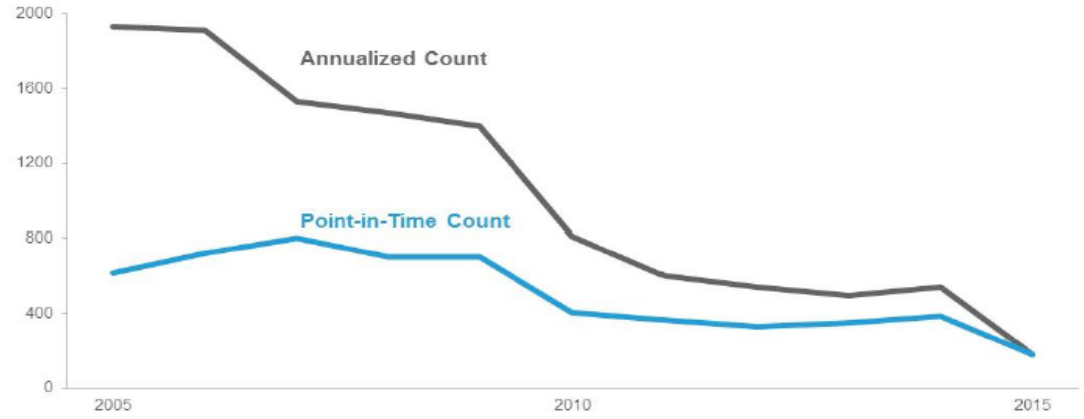
One difference in count procedures used by COCs includes the length of the count; most COCs conduct the count in a single night, however, some conduct it over several. For example, the San Francisco count is done on a single night, the Houston area count is done is over three consecutive nights, and the Greater Los Angeles COC conducts a three day street count followed by a 3-day youth count.[20] There also basic methodological differences, such as some COCs, while others Also, some COCs conduct annual counts, while other do them on odd years only.

Methods to upscale or annualize PIT counts can be used to more accurately portray homeless populations; however, they are not always applied consistently from year to year. One such example is in the reported 91 percent decrease in Chronic Homelessness in Utah from 2005 to 2015.[21] A 2016 review of the data and counting procedures by Kevin Corinth at the American Enterprise Institute revealed that changes to the way the homeless counts had been annualized accounted for at least a portion of the decrease in the number of chronically homeless people reported from 2005 to 2015. He showed that the 2009 annualized count is almost double the PIT count, while in 2015 the annualized count is identical to the PIT count (Figure 1). This indicates that there was likely a change in the methodology used to annualize the data from 2012 to 2015 and that the actual decline in chronically homeless people is most likely lower than reported.[22]

HUD counting and reporting guidelines change over the years, having an impact on the PIT counts and its interpretation of year to year trends. One example is the reclassification of Rapid Rehousing (RRH) in 2013. From 2011-2012, RRH was included in the Transitional Housing (TH) category and therefore classified as Sheltered Homeless. However, in 2013, RRH was separated from TH and was reclassified as Permanent Housing and no longer included in the homeless population count.[23] Therefore at least a portion in any decline in the homeless population count from 2012 to 2013 could be attributed to this change in classification.

Similarly, Utah reported a decline in chronically homeless people in 2010; however, at least a portion of this decline can be attributed to a change in classification. In 2009 Utah was including individuals in transitional housing in their chronic homeless totals, but this methodology was changed in 2010 when the count no longer included this population. Therefore the reported number of

Figure 2. Number of Chronically Homeless Individuals, Annualized and Point-in-Time, Utah 2005–15



Sources: Utah Department of Workforce Services, "Comprehensive Report on Homelessness: State of Utah 2014," https://jobs.utah.gov/housing/scso/documents/homelessness2014.pdf; Utah Department of Workforce Services, "Comprehensive Report on Homelessness: State of Utah 2015," October 2015, https://jobs.utah.gov/housing/scso/documents/homelessness2015.pdf; and US Department of Housing and Urban Development, Point-in-Time Counts of Homeless Persons.

Figure 1. Number of Chronically Homeless Individuals, Annualized and Point-in-Time, Utah 2005–15 (From Corinth, K., On Utah's 91 Percent Decrease in Chronic Homelessness, American Enterprise Institute, March 2016)

20 *See id.*; Markee, *supra* note 14.

21 Corinth, *supra* note 4.

22 *Id*.

23 *Id*.

chronically homeless people was reduced from 2009 to 2010 simply by removing those in transitional housing from the count.[24]

The changes in counting procedures can produce misleading conclusions. For example, nationally, the number of homeless people in families that were unsheltered decreased significantly from 2012 to 2013, but this may have been due to changes in the methods used to conduct their counts. In fact, HUD's 2013 report to Congress contained a warning regarding the validity of the results, stating:

"*The number of homeless people in families that were unsheltered has declined considerably in all three geographic categories between 2012 and 2013 ... However, in recent years many BoS or statewide CoCs have changed their enumeration methods to better account for the large geographic region, which could have affected the numbers considerably*."[25]

Finally, shifts in large cities—whether valid or not—can affect overall numbers and suggest national trends that may be misleading or inaccurate. For example, the 2009 PIT count showed a large decline in homelessness nationwide, primarily driven by the City of Los Angeles, in which the total count of homeless people dropped from 68,608 to 42,694 in a two year period. In fact, if the cities with the top three largest declines in the count of total homeless people are excluded, there was a 2.1 percent increase in the rest of the county from 2008 to 2009.[26] In its report to Congress, HUD stated:

"*The removal of these large cities from the PIT counts and the resulting shift in trends illustrates the need to interpret changes in one-night PIT counts carefully … one-night PIT counts are particularly sensitive to dramatic changes within the nation's largest cities and to evolving enumeration strategies*."[27]

These examples show that changes to the way that data is collected and classified can create the impression that there is a change in the number homeless individuals, even if there is no such trend in the underlying data.

Counting procedures systemically undercount unsheltered adults and youth

While actual counting procedures vary by COC, it is difficult to imagine that it would be possible to count every homeless individual in a given area in a single night. Typical counts are completed using volunteers supported by city staff, advocates, service providers, and occasionally local police enforcement. Volunteers are typically required to undergo 1 hour of training before they can participate in the count.[28] Some COC's must cover a large area with a relatively small number of volunteers. For instance, in 2017, the COC that contains Houston is 3,711 square miles in area and used 60 teams of volunteers and 150 people from the homeless service provider community, outreach teams, and VA staff to conduct the count over three nights.[29]

Volunteers are generally dispatched to predetermined areas in teams to conduct their counts. This requires knowledge of where homeless individuals are likely to be living on the night of the count, which may be obtained through consultation with homeless advocates, service providers, and previously homeless individuals.[30] This counting approach relies on homeless individuals residing in visual locations, an assumption that can be problematic; one study in New York found that 31% of the interviewed homeless people who slept outside on the night of the PIT count were in places classified as "Not-Visible".[31]

As documented in *Housing Not Handcuffs*, the Law Center's 2016 report that reviewed the laws in 187 cities around the country, laws that criminalize necessary human activities performed in public places are prevalent and increasing.[32] Laws prohibiting camping in public, sleeping in public, sitting or lying in public, loitering, and living in vehicles all potentially contribute to the undercount of homeless individuals as many would seek to avoid contact with those trying to count them. This would be especially true in the cases when city workers or police are involved in the counting procedure.

HUD training materials instruct volunteers to avoid areas that are deemed too dangerous to visit at night, such as abandoned buildings, large parks, and alleys, the very places where unsheltered homeless people are likely to be, especially if they are trying to protect themselves from the elements, crime, or police enforcing criminalization laws.

Some counts include a follow up interview with individuals counted in order to gain additional demographic information and to avoid double counting, while other counts are visual only. COCs that rely on visual only methods require the enumerators to make a judgment call on whether an individual is actually homeless or not. Volunteers are also sometimes instructed not to disturb homeless people residing inside of tents or vehicles. In such cases, they will have to make an educated guess at the number and description of

24 *Id.*
25 Off. of Community Plan. & Dev., Dep't of Housing and Urban Development, The 2013 Annual Homeless Assessment Report to Congress (2014).
26 Off. of Community Plan. & Dev., Dep't of Housing and Urban Development, The 2009 Annual Homeless Assessment Report to Congress (2010).
27 *Id.*
28 *See, e.g.*, *San Francisco Homeless Count & Survey 2017 Comprehensive Report supra* note 19; *2017 Greater Los Angeles Homeless Count Results, Los Angeles County and Continuum of Care, supra* note 20; Metro Denver Homeless Initiative, 2017 Point-In-Time Report: Seven-County Metro Denver Region (2017)..
29 Troisi, *supra* note 7.
30 *San Francisco Homeless Count & Survey 2017 Comprehensive Report, supra* note 19.
31 Hopper, *supra* note 5, 1440.
32 Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities, *supra* note 1.

people inside.[33]

HUD recognizes that accurately counting the unaccompanied homeless youth population is problematic because they often gather in different locations than adult populations, generally do not want to be found or even come in contact with adults, may not consider themselves to be homeless, and may be difficult to identify as homeless by an adult.[34]

Definition of homelessness is narrow and doesn't measure the real crisis

Doesn't include "doubled up"

HUD's definition of unsheltered homeless people for the PIT count includes individuals and families, "with a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings, including a car, park, abandoned building, bus or train station, airport, or camping ground." The sheltered count includes individuals and families, "living in a supervised publicly or privately operated shelter designated to provide temporary living arrangement (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state, or local government programs for low-income individuals)".[35] Neither of these definitions include individuals or families that are homeless but living "doubled up" meaning that they are staying with friends or extended family members due to economic hardship. This is particularly significant because the count is conducted each year on a night in January when the temperatures are typically cold. The intention of this is to maximize the participation in shelters where homeless individuals are easier to count, however, if the shelters are full (which is commonly the case),[36] individuals may temporarily "double up" with friends or family and will not be counted.

Doesn't include certain institutions, such as jail/prison

A 2008 national survey of 6953 jail inmates found that 15.3% were homeless at some point in the year before incarceration.[37] Another study found that 10 percent of people entering state and federal prison had recently been homeless and that 10 percent of those leaving prison go on to be homeless at some point.[38] Current and past HUD guidelines have no provisions for counting individuals that are in prison or jail regardless of the potential size of this population. Attempts to quantify this population are left up to individual COCs.

The Houston COC does not include incarcerated individuals in their homeless individual count submitted to HUD; however, they do separately report an "Expanded" count which includes individuals in county jails the night of the count if they stated they were homeless before arrest. The "Expanded" count increases the total number of homeless individual in the Houston COC in 2017 by 57% from 3,605 to 5,651.[39]

The San Francisco COC also conducts a count of the individuals that are in hospitals, residential rehabilitation facilities, and jails in their sheltered counts; however, they also exclude these individuals from the numbers they submit to HUD. This population amounts to 26% (641 people) of the sheltered count in 2017.[40] They also state that 5% of individuals surveyed reported being in jail/prison immediately prior to becoming homeless, and 20% had been in jail the previous 12 months.[41]

The Butte County 2017 Homeless Point in Time Count Report states that 21 individuals interviewed spent the night of the survey in jail. Furthermore, the County Sheriff's department reported that 26% of the jail population was homeless inmates, with 84% of the charges for felonies and 24% for misdemeanors.[42] 206 of the 1983 of the survey respondents cited incarceration as their cause of homelessness, and 265 said a criminal history was a primary barrier to ending their homelessness.[43] Additionally, their survey revealed that ordinances about sitting, lying, and storing property in public places led 181 people to be ticketed, 80 to be arrested, and nearly 50 to be incarcerated in the previous year.[44]

33 Focus Strategies, Orange County Continuum of Care 2017 Homeless Count & Survey Report (2017).

34 *Promising Practices for Counting Youth Experiencing Homelessness in the Point-in-Time Counts,* U.S. Department of Housing and Urban Development, November 2016.

35 Dep't of Housing & Urban Dev., Notice CPD-16-060 Notice for Housing Inventory Count (HIC) and Point-in-Time (PIT) Data Collection for Continuum of Care (CoC) Program and the Emergency Solutions Grants (ESG) Program (2016).

36 *See, e.g.* Brandon Marshall, *Nashville Homeless Shelters At Capacity*, News Channel 5, Jan. 6, 2017, http://www.newschannel5.com/news/nashville-homeless-shelters-at-capacity; Alasyn Zimmerman, *Homeless shelters at capacity as temperatures drop*, KOAA News 5, Sep. 20, 2017; http://www.koaa.com/story/36416084/homeless-shelters-at-capacity-as-temperatures-drop; Jake Zuckerman, *Front Royal homeless shelter at capacity*, Northern Virginia Daily, Dec. 2, 2016, http://www.nvdaily.com/news/2016/12/front-royal-homeless-shelter-at-capacity/; Esmi Careaga, Homeless shelters at full capacity, Local News 8, Dec. 15, 2016, http://www.localnews8.com/news/homeless-shelters-at-full-capacity/215333225; Dennis Hoey, *Portland homeless shelters reach capacity because of bitter weather*, Press Herald, Dec. 5, 2016, http://www.pressherald.com/2016/12/15/portland-homeless-shelters-reach-capacity-because-of-bitter-weather/.

37 Greg A. Greenberg & Robert A. Rosenheck, *Jail Incarceration, Homelessness, and Mental Health: A National Study*, 59 Psychiatric Serv. 170 (2008)

38 Caterina G. Roman & Jeremy Travis, *Where Will I Sleep Tomorrow? Housing, homelessness, and the returning prisoner*, 17 Housing Pol'y Debate 389, 395 (2006).

39 Troisi, *supra* note 7.

40 *San Francisco Homeless Count & Survey 2017 Comprehensive Report, supra* note 7.

41 *Id*.

42 Housing Tools, 2017 Homeless Point in Time Census & Survey Report: Butte Countywide Homeless Continuum of Care (2017).

43 *Id*.

44 *Id*.

These examples show that it is entirely possible to quantify the number of homeless individuals that are incarcerated during the night of the PIT count and that these populations are significant in numbers. Moreover, if the criminalization of homelessness continues—or increases—they will become even larger.

Current data indicate that homelessness disproportionately affects certain racial and ethnic minorities, the 2016 Annual Homeless Assessment Report to Congress states that 39% are African-Americans (despite being only 13% of the population overall); 22% Hispanic (19% overall); and 3% Native American (1% overall).[45] But because such minorities are also over-represented in the criminal justice system, in particular for the low-level "quality of life" violations typically used to criminalize homelessness,[46] by not counting homeless persons who are in jail or prison on the night of the count, the PIT count likely systemically *under*-counts the *over*-representation of homeless persons of color.

Within criminalized homeless populations, persons of color are disproportionately targeted by law enforcement. The United Nations Special Rapporteur on Racism specifically cited the example of Los Angeles' Skid Row during his 2008 visit to the United States.[47] 69% of the 4,500 homeless individuals in Skid Row are African American.[48] Beginning in September 2006, the City announced its "Safer City Initiative," bringing 50 new police officers to the area supposedly to target violent crime.[49] However, in the first year of the SCI program, the police confiscated only three handguns, while issuing an average of 1,000 citations per month, primarily for jaywalking violations by African Americans - 48 to 69 times the number of citations in the city at large.[50] Officers also enforce an ordinance which prohibits sitting, lying and sleeping on the sidewalk--one older African American woman, Annie, has been arrested more than 100 times for these violations since the beginning of the Initiative.[51]

Once arrested, unaffordable bail means that homeless persons are nearly always incarcerated until their trials occur – or until they agree to waive their trial rights in exchange for convictions. In a survey of homeless persons, 57% stated that bench warrants had been issued, leading to their arrest.[52] 49% of homeless people report having spent five or more days in a city or county jail.[53] In 87% of cases with bail of $1000 or less in New York City in 2008, defendants were not able to pay and were incarcerated pending trial.[54] The average length of pretrial detention was 15.7 days – more than two weeks, often for minor offenses.[55] This means significant numbers of homeless persons are spending significant amounts of time in jail, but they are homeless again as soon as they are released.

Indeed, because the rate of criminalization is increasing,[56] this disproportionate undercounting of incarcerated homeless persons of color may also be increasing. Thus, it is important not only to count the homeless individuals in jail, but also to ensure this data is disaggregated so we can continue to measure these impacts.

Department of Education counts appear to show different results

The U.S. Department of Education (ED) collects data on the number of homeless children and youth enrolled in our nation's public schools, in order ensure success of the Education for Homeless Children and Youth (EHCY) program, authorized under the McKinney-Vento Homeless Assistance Act.[57] This data provides an additional indicator of the scale of the homeless crisis. In the 2015-2016 school year, there were over 1.36 million homeless children counted in our public schools—a 70% increase since the inception of the housing foreclosure crisis in 2007 and more than double the number first identified in 2003 (602,000).[58] This is in part due to greatly improved identification, but is nonetheless significant. The other point is that except for a slight (less than 3%) decline from 2013-2014 to 2014-2015 school years, the ED numbers have gone up every single year since data was first collected in 2003. Contrast this with the PIT count which has decreased in recent years. This is significant because reliance on the HUD numbers would lead us to believe that things are getting better, when the trend from ED clearly shows things are getting worse and continue to get worse (despite the so-called end of the recession).

ED counts children that are homeless at any point during the school year, including those living "doubled up", staying in hotels/

45 *The 2016 Annual Homeless Assessment Report to Congress, supra* note 2.
46 *See, e.g.* Gary Blasi et.al, Policing Our Way Out of Homelessness? The First Year of the Safer Cities Initiative on Skid Row, (Sept. 2007).
47 U.N. Human Rights Council, Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intoler-ance, Doudou Diéne, Mission to the United States of America, U.N. Doc. A/HRC/11/36/Add.3 (2009).
48 Inter-University Consortium Against Homelessness, Ending Homelessness in Los Angeles, (2007).
49 Testimony of Gary Blasi , UCLA Professor of Law, University of California, Los Angeles, to State Legislators in Sacramento, CA (July 18, 2007).
50 Blasi, supra note 46.
51 Email from Becky Dennison, Los Angeles Community Action Network, Mar. 28, 2014, on file with authors.
52 Paul Boden, *Criminalizing the Homeless Costs Us All* (Mar. 1, 2012).
53 Picture the Homeless, *Homelessness and Incarceration: Common Issues in Voting Disenfranchisement, Housing and Employment.*
54 Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City*, at 2 (Dec. 3, 2010)
55 *Id*.
56 National Law Center on Homelessness & Poverty, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* (2016).
57 EDFacts Data Documentation, Homeless Student Enrollment Data by Local Educational Agency - School Year 2015-16 (2017).
58 *Number of Homeless Students Grows More than 70% since 2007-2008*, Nat'l Low Income Housing Alliance (Sept. 21, 2015), http://nlihc.org/article/number-homeless-students-grows-more-70-2007-2008; *Education for Homeless Children and Youth Program, Analysis of 2005-2006 Federal Data Collection and Three-Year Comparison,* National Center for Homeless Education, June 2007..

motels, abandoned in hospitals, or awaiting foster care placement. Figure 2 contains a comparison of the National, California, and San Francisco ED counts with the HUD PIT counts for 2016. While direct comparisons are not valid due to differing methodologies, it is noteworthy that the National ED count for homeless children is almost 2.5 times as large as HUD's PIT count of the entire homeless population (1,364,369 vs. 549,928) and 7 times as large as the HUD's PIT count of homeless people in families (1,364,369 vs. 194,716). And while a large portion of the ED numbers consist of children living doubled up, their national unsheltered homeless count is still more than double the HUD count of unsheltered homeless people in families (41,725 vs. 19,153). Similar relationships can be seen in the state of California and the city of San Francisco with ED counts being much larger than the HUD PIT counts. Again, these number cannot be compared directly due to differing methodologies, most notably the fact that the ED numbers are annual. However, the much larger ED totals compared to the HUD PIT counts illustrate the impact that counting methods and classifications have on the resulting counts.

	National	California	San Francisco
Ed – Total	1,364,369	251,155	2,368
Ed – Unsheltered	41,725	7,407	48
Ed - Doubled Up	987,702	212,275	1,348
HUD - Total Homeless	549,928	118,142	6,996
HUD - Unsheltered Homeless	176,357	78,390	4,358
HUD - Homeless People in Families	194,716	20,482	687
HUD - Unsheltered Homeless People in Families	19,153	4,450	33
HUD - Homeless Unaccompanied Children (Under 18)	3,824	847	131
HUD - Unsheltered Homeless Unaccompanied Children (Under 18)	1,606	634	119

Figure 2. Comparison of National, California, and San Francisco Homeless data from the Department of Education vs the Department of Housing and Urban Development for the year 2016. (Source: Homeless Student Enrollment Data by Local Educational Agency, School Year 2015-16, https://www2.ed.gov/about/inits/ed/edfacts/data-files/lea-homeless-enrolled-sy2015-16.csv and PIT and HIC Data Since 2007, https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/)

Count of sheltered population measures supply not demand

In some ways, the sheltered population count of the PIT count is the most accurate. But what that count tells us is limited. Most shelters in the United States are at capacity. The count of sheltered homeless individuals indicates a city's supply of shelter beds rather than the demand for shelter or housing, and therefore cannot be used by itself to assess the homeless crisis. This can be seen in the plot of Homeless Count and Housing Inventory Count for San Francisco, which has a high unsheltered to sheltered ratio for its homeless population (Figure 3). The trend of Sheltered Homeless from 2007 to 2016 generally tracks the trend of Total Year Round Beds, while the Total Homeless number can be seen to move sharply upwards in 2013 and then downward in 2014. One might see the large drop in Total Homeless count in 2014 as a positive indicator of the state of homelessness in the city; however, it is due entirely to a drop in the Housing Inventory Count and an accompanying drop in count of sheltered individuals as no unsheltered street count was conducted that year. This shows that a count of sheltered individuals alone does not give an accurate view of the state of homelessness in a city. Furthermore, where shelters are continually full, the count of sheltered individuals can only be viewed as a measure of a city's supply and not its demand.

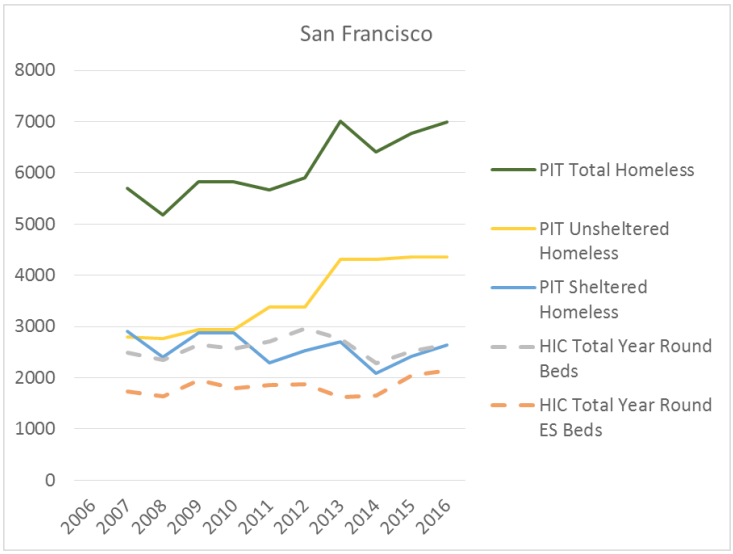


Figure 3. HUD PIT and HIC data for San Francisco (CA 501) from 2007 to 2016. (https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/)

ALTERNATIVE COUNTS

Survey at service providers sites over multiple days 1987, 1996

In 1989, Martha Burt and Barbara Cohen published the results of an Urban Institute survey in U.S. cities with populations above 100,000 over a month-long period in 1987.[59] This study did not include a street count and instead involved interviews at soup kitchens, meal distribution sites, and shelters. This methodology avoided many of the pitfalls that have been previously mentioned regarding counting an unsheltered population. The study produced a one-day estimate of 136,000 and a one-week estimate of 229,000 homeless individuals.[60] While the study likely did not capture everyone who is doubled up, the researchers were able to significantly improve the unsheltered count, finding that most unsheltered people were using at least one service center at least once a week. Furthermore, it illustrates the importance of conducting a study over a longer time period than one-day.

The 1996 National Survey of Homeless Assistance Providers and Clients (NSHAPC) was a comprehensive national survey of homeless service providers using methods similar to the 1987 Urban Institute study. The data was collected in two phases, the first phase was conducted from October 1995 to October 1996 and involved telephone surveys with staff at service providers such as soup kitchens and shelters. The second phase was conducted in October and November of 1996 and involved interviews with clients using services in the same types of locations as in phase one.[61] The interview questions used were designed to gather information regarding the frequency and length of time that individuals experienced homelessness. A 2001 study by Burt et al., used this NSHAPC data to create one-day, one-month, and one-year estimates of homeless individuals for the entire country.[62] Their methods involved making evidence-based adjustments using the assumptions that a certain number of homeless individuals do not visit available homeless assistance providers, some areas do not even have homeless assistance providers, and that people tend to move in and out of homelessness over time. It was also recognized that some individuals may use more than one homeless assistance service and therefore the data was also de-duplicated. The final estimate from their study was 2.3 to 3.5 million adults and children in the U.S. were homeless at some point during the year in 1996.[63] Once again, this study illustrates the importance of conducting a survey over a longer time period than a single point in time, and to recognition that people tend to move in and out of homelessness over time.

Measure and adjust for undercount of unsheltered

In an effort to increase the accuracy of the New York City estimate of its homeless population, researchers Kim Hopper et al. used two methods in conjunction with the annual PIT count.[64] One approach involved the Plant-Capture method where they "planted" decoys among the homeless population in various locations across the 5 boroughs to see if they were counted by enumerators during the PIT count. Plants at 17 of the 58 (29%) sites reported that they were missed during the count.[65]

The second approach the study used was to conduct interviews with individuals living in shelters following the PIT Count. They interviewed 1,171 people from 23 different sites and asked where they were residing the night of the count. They found that of the 314 respondents that reported being unsheltered, 31% said that they had slept in locations considered "Not-Visible."[66]

This study illustrates two flaws in the PIT count methodology, first that the enumerators cannot possibly be expected to cover the entirety of their areas of responsibilities as evidenced by the 29% of plants that reported to not being counted. Secondly, that many unsheltered homeless individuals were in "Not-Visible" locations, and thus were most likely missed by enumerators.

Expand the definition

Wilder Research conducts a study of the homeless population in Minnesota every three years, independently of the HUD PIT count. The study includes counts and estimates of the number of people who are homeless and a survey of homeless people. The count takes place every three years on the last Thursday in October in emergency shelters, domestic violence shelters, transitional housing programs, social service agencies, encampments, and abandoned buildings. As many as 1000 volunteers are used to conduct interviews in approximately 400 locations across the state. They also work with homeless service providers to obtain counts of the sheltered homeless population.[67]

The Wilder method uses an expanded definition of homelessness to include people who will imminently lose their housing (with eviction notices), people staying in hotels who lack the resources

59 Burt, *supra* note 8.
60 *Id*.
61 Steven Tourkin & David Hubble, *National Survey of Homeless Assistance Providers and Clients: Data Collection Methods, U.S. Census Bureau (1997).*
62 Burt, *supra* note 8.
63 Id.
64 Hopper, *supra note 5.*
65 *Id*.
66 *Id*.
67 *Frequently Asked Quest ons*, Wilder Research, http://mnhomeless.org/about/frequently-asked-questions.php (last visited 11, 1, 2017).

to remain for more than 14 days, or persons doubled up where there is evidence that they may have to leave within 14 days.[68] The definition is also expanded for youth who are not staying with their parents but are living with a friend or relative.[69]

A comparison of the count conducted by Wilder Research and the HUD PIT count for Hennepin Co. can be seen in Figure 4. The Wilder counts follow the same trend as the HUD PIT data in general, but are consistently higher, by as much as 24% in 2012. A portion of this difference is most likely due to the expanded definition of homelessness used by Wilder.

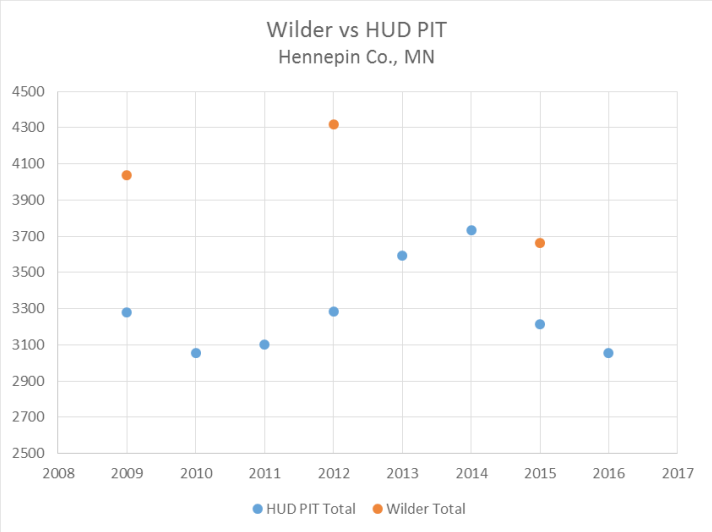


Figure 4. A comparison of the total homeless population count Hennepin Co., MN conducted by Wilder Research with the HUD PIT. (Source: Wilder Research, Homeless Study Detailed Data – Counts http://mnhomeless.org/minnesota-homeless-study/detailed-data-counts.php, https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/)

The Wilder study also includes an estimated number of homeless people in addition to the actual count. Their methods included weighting data collected from shelters using a one-night estimate based on findings from the U.S. General Accountability Office (GAO), a 1998 national study by the Research Triangle Institute, and a 2012 report from U.S. Department of Housing and Urban Development (HUD).[70] The U.S. GAO study found that for every child and youth in a shelter, 2.7 were doubled-up. The Research Triangle study found that 2.6 percent of all minors age 12 to 17 had been homeless for at least one night and had not used a shelter over the course of a year.[71] These two findings were averaged and then used to weight the sheltered youth count to produce an estimated total youth count. The HUD report stated that for every 100 single adults in shelters, there were 60 not in shelters, and for every 100 persons in families in shelters, there were 25 not in shelters. These findings were used to weight the sheltered count to provide an estimate of the total homeless adult population.[72]

They also produced an annual estimate based on a method in a 2001 report on homelessness by the Urban Institute.[73] This method assumes that people move in and out of homelessness and those that are homeless during the night of the survey are representative of others who may be homeless at any different night of the year. While the total count of homeless individuals at a given time might remain the same, specific individuals might change, making the total number of people experiencing homelessness in a year larger than the number counted.[74]

Figure 5 shows the Wilder count and its annual estimate of persons experiencing homelessness for the state of Minnesota by year from 1991 to 2015. The Wilder estimate in 2015 is more than 60% higher than their count.[75] Once again, this shows that the way that data is collected, classified, and processed can have a large impact on the reported estimates of homelessness and that the HUD PIT counts are a significant undercount.

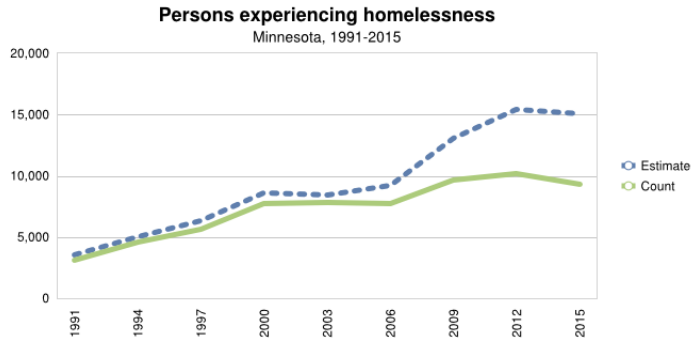


Figure 5. Count and Estimate of the Homeless persons in the state of Minnesota by Wilder Research. "Counts" of the number of people experiencing homelessness come from a census of all people staying in emergency shelters and other programs serving those experiencing homelessness, as well as a head count of those identified as homeless in non-shelter locations on the night of the survey. "Estimates" of the number of people experiencing homelessness are calculated by factoring in study-based estimates of those who are unsheltered, living temporarily with friends or family, and in detoxification centers. (Source: Wilder Research, Homelessness in Minnesota, http://mnhomeless.org/minnesota-homeless-study/homelessness-in-minnesota.php#1-3457-g)

68 Wilder Research, Homelessness in Minnesota - Findings from the 2015 Minnesota Homeless Study (2016).
69 *Id*.
70 *Id*.
71 *Id*.
72 *Id*.
73 *Id*.
74 *Id*.
75 *Id*.

CONCLUSIONS AND RECOMMENDATIONS

This report has highlighted many of the issues associated with the accuracy of the HUD PIT counts and how they produce a significant undercount of the homeless crisis in this country. We feel that the results of the PIT counts are not the best indicators of the success or failure of programs and policies that address homeless issues; therefore, the PIT counts as currently conducted should not be used to advise policy decisions.

Once again, this report does not intend to criticize the many professionals and volunteers that conduct the PIT counts but instead hopes to illuminate the shortcomings of the techniques and procedures required by HUD and their effect on the resulting counts.

Recommendations for the national count

Nationally coordinated, methodologically consistent count

Rather than depending on a single point-in-time count conducted by separate COC's across the country, we recommend a program that is nationally coordinated and consistent including input from service providers such as shelters and soup kitchens, the Department of Education, and correctional departments. This effort should be designed and its execution overseen by experts in such counting techniques.

The national program can learn from some of the more accurate studies that have been done. For example, it could include:

Periodic street counts which are conducted over longer periods than a single point in time.

Techniques such as plant and capture along with follow-up surveys to estimate and adjust for the number of individuals that are missed during the counts.

Annualized data and a more inclusive definition to show the true scope of the problem.

The Department of Education currently produces an annual count of homeless students and this data could be incorporated into a national count of all individuals. There is also a significant number of homeless individuals that are currently incarcerated in prisons and jails and any count of homeless individuals should include this population. This could be accomplished through coordination with correctional departments, as is currently done in COCs such as that in Butte.[76]

Ultimately, this would be the most effective long-term solution to addressing the flaws of the current point in time count system. This, however, would require commitment from government at all levels, service providers, and the public to work together. Of course, the real, and most important solution is to end homelessness.

Recommendations for the local counts

Even without change from HUD COCs can:

Include estimation techniques designed and overseen by experts in order to quantify the number of homeless individuals that were missed during the count.

Include all people experiencing homelessness, including individuals that are institutionalized in hospitals and jails or prisons

Separately estimate individuals who are doubled up with friends or family due to economic hardship.

Recommendations for using the PIT count data

Acknowledge it is an undercount

As shown above, the PIT count is a significant undercount of the homeless population, especially of those that are unsheltered, institutionalized, or doubled up. The data should never be used without the explicit acknowledgment of that fact, along with any available data that accounts for the scale of the undercount.

Acknowledge changes in methodology or classification

Particularly, year to year trends should include scrutiny of any methodological or classification changes that may have also occurred over the time period.

Use other data sources as comparison

It can be helpful to use both the HUD figures and the Department of Education (ED) report of homeless students. While the ED report is also an undercount and has its own challenges, it can show some indication of the broader problem because it uses a wider definition of homeless than HUD and produces annual estimates.

76 *2017 Homeless Point in Time Census & Survey Report: Butte Countywide Homeless Continuum of Care, supra* note

News

Even the mayor felt confused when San Francisco tried to count its homeless population

Mayor London Breed, right, passes a man in a wheelchair during the Department of Homelessness and Supportive Housing's Point-in-Time Count on Tuesday night. | Jason Henry for The Standard

Share

By **David Sjostedt**
Published Feb. 01, 2024 • 1:00pm

Volunteers and nonprofit workers fanned out across San Francisco on Tuesday night to count the number of homeless people on the streets, as the city does every other year. But hardly anyone, even Mayor London Breed, thinks they got an accurate number.

"How are we supposed to tell whether or not they're really unhoused?" Breed told The Standard after she spent several hours trawling the Tenderloin with the nonprofit Code Tenderloin as part of the Point-in-

Time Count. “You’ve got a lot of folks out here who are unfortunately suffering from mental illness and addiction, and that’s a big difference from being homeless.”

The one-night count, conducted by every major city across the country, is required by the federal government to determine how much homelessness funding to allocate. Two years ago, 4,397 people were counted as living on the streets of San Francisco.

Funding—and political futures—are on the line. A significant jump in the number of people counted could mean not only more money for San Francisco’s shelter and housing efforts but also political baggage for Breed and other incumbents facing reelection in November.

As the night began, Code Tenderloin founder Del Seymour went so far as to tell canvassers not to worry if they couldn’t tally every single homeless person.

“If you see you’re irritating someone, walk back and leave them alone. We ain’t got to count every single person,” said Seymour, who is locally known as the unofficial mayor of the Tenderloin.

Seymour later told The Standard he suspects the count underestimates the number of homeless people because many “double up” in the city’s supportive housing units.

A community ambassador hands Narcan to a man on Mission Street during Tuesday night's Point-in-Time Count of unhoused city residents. | Jason Henry for The Standard

Process Confusion?

Confusion was rife among various groups of counters as some deployed different tactics than others.

Breed said her group canvassing the Tenderloin was told not to engage with homeless people. Another group of five counters, which The Standard accompanied around the South of Market neighborhood, started a conversation with most of the homeless people they spotted.

The SoMa group was successful in engaging with people on the streets. But they weren't as good at counting them.

Around 9:40 p.m. on the corner of Eighth and Howard streets, the five fumbled around with their maps, trying to figure out which way to go, as a homeless person walked right past them, unnoticed.

Code Tenderloin community ambassadors try to figure out their maps during the Point-in-Time Count of homeless people in the city on Tuesday. | Jason Henry for The Standard

Just down the block, the group might have missed another homeless man who was tucked away in a corner if it hadn't been for The Standard's photographer pointing him out.

One of the volunteers told The Standard he lives in his car, but he didn't appear to count himself as homeless.

“There’s no process for how we’re supposed to do this,” Code Tenderloin employee Tyree Leslie said in frustration.

As the group navigated SoMa’s alleyways, one of the men asked where all the homeless people had gone. The surrounding streets were clean, and aside from a few scattered people using drugs, they were mostly empty.

“So they really cleaned it up?” asked Code Tenderloin employee Chuck Stubblefield.

“They moved it somewhere else. They didn’t clean it up,” said his co-worker, Brian Hudson.

That much was evident as the group turned a corner onto Eighth and Market streets, where the sidewalks were littered with trash and filled with dozens of people using drugs.

The block was outside Hudson and Stubblefield’s assigned zone, but some of the group’s members still stopped to offer people water, snacks and information about their nonprofit.

As the group of counters approached Seventh and Market streets, they saw hundreds of people buying and selling drugs and what appeared to be stolen goods in an illicit night market.

“There ain’t no counting that,” said Hudson, pointing at the crowd.

People sell items in front of the Proper Hotel on Market Street on Tuesday night. | Jason Henry for The Standard

Hudson estimated there were more than 120 homeless people in the crowd. However, the gathering was just outside the zone he was assigned to count.

“They’re not standing over there holding fellowship,” he said.

Breed told The Standard that during the daytime, the Tenderloin is “really, really clean.” However, she said increased drug activity at night is undermining the city’s efforts.

"It gives the impression that we're not out here working hard trying to clean up the streets and help people," Breed said.

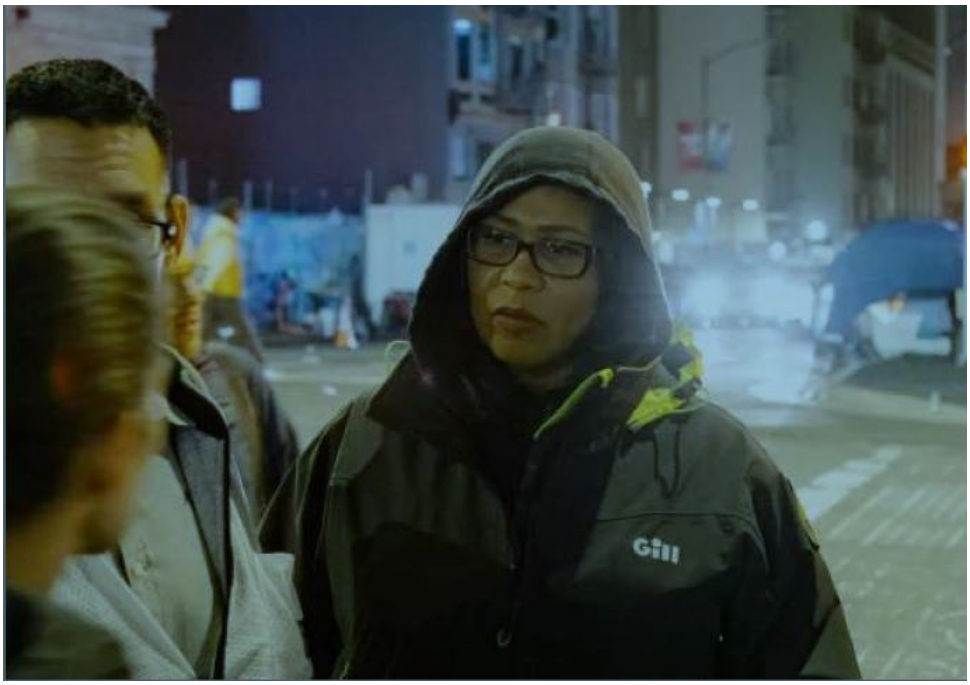
An Imperfect Count

Despite its shortcomings, the count provides a relatively consistent data point for the city, according to Emily Cohen, a spokesperson for the Department of Homelessness and Supportive Housing.

“While the count itself may be imperfect, it is relatively consistent and a good indicator of trends,” Cohen said.

However, many experts argue there are better methods of quantifying the crisis.

“The data wouldn’t get past an eighth-grade biology teacher,” said Paul Boden, executive director of the homelessness nonprofit Western Regional Advocacy Project. “The numbers are never used for anything except for public relations.”



San Francisco Mayor London Breed admitted she was confused about the process for counting the city's homeless residents.

Boden said the government would be better off measuring the demand for services in every city. In San Francisco, there were 77 people on a waitlist for shelter this week-though the list reached nearly 500 people long in August. There were 3,633 people in the city's homeless shelters this week.

In December, there were 238 homeless families-including 363 children-on a waitlist for shelter as Christmas approached.

An audit of the ci!J.'s street homelessness teams in November found that outreach workers encountered 3,641 unique clients on the street during fiscal year 2022.

Cohen said the homelessness department uses many data sets, not just the one-night count, to tabulate the number of homeless people in the city.

The department estimated in 2022 that as many as 20,000 people engage with the city's homelessness services over a year. Many are only temporarily homeless.

"It's an exercise in futility," Boden said. "We do all these plans, and we never, ever have seen a plan from the government that actually addresses what created this shit in the first place-wiping out affordable housing."

Cohen said the department will release the Point-in-Time Count data in the summer, and outreach workers are heading out again in the coming weeks to obtain demographic data on the city's homeless population.

David Sjostedt can be reached at david@sfstandard.com

CAMILLUS HOUSE, CAUSES OF HOMELESSNESS (www.camillus.org)

HOMELESSNESS BEGINS WITH A LACK OF RESOURCES: POVERTY

Homelessness and poverty are inextricably linked. People who are poor are frequently unable to pay for housing, food, child care, health care, and education.

Difficult choices must be made when limited resources cover only some of these necessities. Often it is housing, which absorbs a high proportion of income, that must be dropped. Being poor means being an illness, an accident, or a paycheck away from living on the streets.

In 2000, 11.3% of the U.S. population, or 31.1 million people, lived in poverty. *(US Bureau of the Census, 2001)* While the number of poor people has decreased a bit in recent years, the number of people living in extreme poverty has increased. In 2000, 39% of all people living in poverty had incomes of less than half the poverty level. This statistic remains unchanged from the 1999 level.

Forty percent of persons living in poverty are children; in fact, the 2000 poverty rate of 16.2% for children is significantly higher than the poverty rate for any other age group.

SHRINKING OPPORTUNITIES: ERODING WORK OPPORTUNITIES AND HOUSING

Declining wages have put housing out of reach for many workers: in every state, more than the minimum wage is required to afford a one- or two-bedroom apartment at Fair Market Rent. In Miami-Dade County a family needs to work 126 hours a week at minimum wage in order to afford a moderately priced two bedroom apartment.

In 1970 there were 300,000 more affordable housing units available, nationally, than there were low-income households who needed to rent them. By 1995, there were 4.4 million fewer available units than low-income households who needed to rent them.

DECLINE IN PUBLIC ASSISTANCE

The declining value and availability of public assistance is another source of increasing poverty and homelessness.

Welfare caseloads have dropped sharply since the passage and implementation of welfare reform legislation. However, declining welfare rolls simply mean that fewer people are receiving benefits — not that they are employed or doing better financially. Early findings suggest that although more families are moving from welfare to work, many of them are faring poorly due to low wages and inadequate work supports. Only a small fraction of welfare recipients' new jobs pay above-poverty wages; most of the new jobs pay far below the poverty line. (Children's Defense Fund and the National Coalition for the Homeless, 1998)

An illness or accident can change everything

For families and individuals struggling to pay the rent, a serious illness or disability can start a downward spiral into homelessness, beginning with a lost job, depletion of savings to pay for care, and eventual eviction. Nearly a third of persons living in poverty had no health insurance of any kind.

Homelessness severely impacts health and well-being. The rates of acute health problems are extremely high among people experiencing homelessness. With the exception of obesity, strokes and cancer, people experiencing homelessness are far more likely to suffer from every category of severe health problem.

Children without a home are in fair or poor health twice as often as other children, and have higher rates of asthma, ear infections, stomach problems, and speech problems. *(Better Homes Fund/1999)* They also experience more mental health problems, such as anxiety, depression, and withdrawal. They are twice as likely to experience hunger, and four times as likely to have delayed development. These illnesses have potentially deadly consequences if not treated early.

Total Number of Homeless Persons on the Street in Miami-Dade County on an average night: 1,347

DOMESTIC VIOLENCE

Domestic violence is the second leading cause of homelessness among women. Battered women who live in poverty are often forced to choose between abusive relationships and homelessness. Nationally, approximately half of all women and children experiencing homelessness are fleeing domestic violence.

MENTAL ILLNESS

Approximately 22% of the single adult homeless population suffers from some form of severe and persistent mental illness. (U.S. Conference of Mayors, 2001)

Despite the disproportionate number of severely mentally ill people among the homeless population, increases in homelessness are not attributable to the release of severely mentally ill people from institutions. Most patients were released from mental hospitals in the 1950s and 1960s, yet vast increases in homelessness did not occur until the 1980s, when incomes and housing options for those living on the margins began to diminish rapidly.

According to the Federal Task Force on Homelessness and Severe Mental Illness, only 5–7% of homeless persons with mental illness need to be institutionalized; most can live in the community with the appropriate supportive housing options. (Federal Task Force on Homelessness and Severe Mental Illness, 1992) However, many mentally ill homeless people are unable to obtain access to supportive housing and/or other treatment services. The mental health support services most needed include case management, housing, and treatment.

ADDICTION DISORDERS

The relationship between addiction and homelessness is complex and controversial. While rates of alcohol and drug abuse are disproportionately high among the homeless population, the increase in homelessness over the past two decades cannot be explained by addiction alone. Many people who are addicted to alcohol and drugs never become homeless, but people who are poor and addicted are clearly at increased risk of homelessness.

In the absence of appropriate treatment, addiction may doom one's chances of getting housing once on the streets. Homeless people often face insurmountable barriers to obtaining health care, including addictive disorder treatment services and recovery supports.

The following are among the obstacles to treatment for homeless persons: lack of health insurance; lack of documentation; waiting lists; scheduling difficulties; daily contact

requirements; lack of transportation; ineffective treatment methods; lack of supportive services; and cultural insensitivity. An in-depth study of 13 communities across the nation revealed service gaps in every community in at least one stage of the treatment and recovery continuum for homeless people. Source: National Coalition for the Homeless

WHO IS HOMELESS IN MIAMI-DADE COUNTY?

Most people who experience homelessness (83%) are homeless for a short period of time, and usually need help finding housing or a rent subsidy. A small portion (17%) is homeless for long periods of time or cycle in and out of homelessness. They need permanent supportive housing.

Australian Social Work
Vol. 61, No. 4, December 2008, pp. 342–356

Routledge
Taylor & Francis Group

Homelessness and Substance Abuse: Which Comes First?

Guy Johnson & Chris Chamberlain
RMIT University, Victoria, Australia

Abstract
The present paper uses a social selection and social adaptation framework to investigate whether problematic substance use normally precedes or follows homelessness. Clarifying temporal order is important for policy and program design. The paper uses information from a large dataset (N = 4,291) gathered at two services in Melbourne, supplemented by 65 indepth interviews. We found that 43% of the sample had substance abuse problems. Of these people, one-third had substance abuse problems before they became homeless and two-thirds developed these problems after they became homeless. We also found that young people were more at risk of developing substance abuse problems after becoming homeless than older people and that most people with substance abuse issues remain homeless for 12 months or longer. The paper concludes with three policy recommendations.

Keywords: Homelessness; Substance Abuse; Housing And Support

There is a common perception that substance abuse and homelessness are linked, but there is considerable contention about the direction of the relationship (Kemp, Neale, & Robertson, 2006; Mallett, Rosenthal, & Keys, 2005; Neale, 2001; Snow & Anderson, 1993). Does substance abuse typically precede or follow homelessness?

Correspondence to: Dr Guy Johnson, Australian Housing and Urban Research Institute, RMIT University, GPO Box 2476V, Melbourne, Vic. 3000, Australia. E-mail: guy.johnson@mit.edu.au

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Prevalence of Substance Abuse

The first task was to establish how many people in the sample had substance abuse problems. Studies that focus on the number of people with substance abuse problems are referred to as prevalence studies. A common finding is that homeless people have higher rates of problematic substance use than people in the general community (Teesson, Hodder, & Buhrich, 2003). In their recent study of 210 homeless people in Sydney, Teesson et al. (2003, p. 467) found that "homeless people were six times more likely to have a drug use disorder and 33 times more likely to have an opiate use disorder than the Australian general population". One welfare service in Melbourne reported that the prevalence rate of heroin use among its clients was "10 times greater than in the general community" (Horn, 2001, p. 8).

Although the empirical link between substance abuse and homelessness is well established, reported rates of problematic drug use among the homeless vary, with estimates ranging from 25% to 70% (Hirst, 1989; Jordon, 1995; Victorian Homelessness Strategy, 2002). Estimates vary because of different sampling procedures, as well as different definitions of problematic drug use and homelessness.

We found that 43% of our sample had substance abuse problems. The most common drug was heroin, but a minority identified alcohol or prescription drugs. Our findings are consistent with recent studies indicating that drugs have displaced alcohol as the most abused substance among the homeless, particularly among the young (Glasser & Zywiak, 2003; Johnson et al., 1997).

Substance Abuse as a Precursor to Homelessness

The first model we examine is the social selection approach. We start by identifying how many people in our sample had substance abuse issues prior to becoming homeless. Then, we identify three typical stages leading to homelessness for those with problematic drug use.

We found that 15% of the sample had substance abuse problems prior to becoming homeless for the first time. In the public domain, substance abuse is regularly seen as the main cause of homelessness, yet for most people in our sample other factors resulted in them becoming homeless. This finding is important for two reasons. First, when attributions of cause are incorrect, it can lead to inappropriate policy and program design. Second, by focusing on substance abuse as a causal factor, individuals are commonly blamed for the situation, diverting attention away from the structural factors that contribute to homelessness.

Many people in Australia use drugs for recreational purposes (Marks 1989; McAllister & Makkai, 2001), but here we describe the substance abuse pathway into homelessness. Studies of homeless pathways commonly point to a series of ruptures with mainstream life (Hartwell, 2003; Johnson et al., 2008; Keys, Mallett, & Rosenthal, 2006). We identify three stages in the substance abuse pathway. First, there is a break with the mainstream labour market; second, there is the loss of support from family and friends; and, finally, there is the acquisition of new social networks.

Substance Abuse as an Adaptation to Homelessness

Recently, more researchers have focused on substance abuse as adaptation. When people are homeless, they adapt in order to survive. Although responses may vary from person to person, using drugs is a common form of adaptation.

In the present study, 43% of the sample had substance abuse issues. Table 1 shows that two-thirds (66%) developed problematic substance use after they became homeless. Our data confirm that substance abuse is common among the homeless population, but, for many people, substance abuse follows homelessness. Drug use is an adaptive response to an unpleasant and stressful environment and drug use creates new problems for many people.

Table 1 Substance Abuse Identified Before or After Homelessness

	N	*%*
Substance abuse before homelessness	656	34
Substance abuse after homelessness	1,284	66
Total	1,940	100

There are two common explanations as to why people become involved in problematic substance use after they become homeless. First, some people take drugs as a way to cope with or escape the harsh, oppressive environment that confronts them (Neale, 2001). Toby said: "The only way I could deal with that place (a run down boarding house) was to use drugs and I did use them". David said that using heroin helped him to forget about his troubles: "Using smack was a way for me to hide . . . You just hide away from everything . . . You take your mind off everything else because the one thing you've got to do each day is make sure you get your hit."

For Cameron, the situation was similar. Cameron had tried a range of drugs before he became homeless, describing himself as an "on and off again" user. However, once homeless, Cameron's drug use worsened considerably as he tried to deal with his new circumstances. It soon got to the point where substance abuse was a major issue in Cameron's life: "I didn't realise how bad my drug use had got . . . my habit was climbing and climbing. Everything was pretty much out of control at that point."

The second reason for problematic substance use stems from increasing involvement in the homeless subculture, where drug use is a common and accepted social practice. Drug use is commonly a form of initiation into the homeless subculture (Auerswald & Eyre, 2002; Fitzpatrick, 2000). Tess said she started to use heroin "because everybody around me was using smack". Joan was more explicit about the influence of her homeless peers: "Just peer pressure, I suppose. People around me were doing it and I wanted to fit in."

Many homeless people strive for a sense of "belonging somewhere", particularly those who experience homelessness when they are young. As Goffman (1961, p. 280) noted, "Without something to belong to, we have no stable self . . . Our sense of being a person can come from being drawn into a wider social unit."

Regardless of whether substance abuse precedes or follows homelessness, it typically locks people into the homeless population. Table 3 uses three temporal classifications (short-term, medium-term, and long-term homelessness) to demonstrate that homeless people with substance abuse issues are more likely to get stuck in the homeless population. Table 3 shows that 82% of people who had substance abuse issues had been homeless for 12 months or longer. In contrast, only 50% of those who had no substance abuse issues had been homeless for that long. When people have substance abuse problems they become marginalised from mainstream institutions and getting out of homelessness becomes more difficult.

Not only do people with substance abuse problems face barriers to getting out of homelessness, but they also have difficulties remaining housed.

The Council of Economic Advisers, The State of Homelessness in America (Sept. 2019)

Executive Summary
September 2019

Due to decades of misguided and faulty policies, homelessness is a serious problem. Over half a million people go homeless on a single night in the United States. Approximately 65 percent are found in homeless shelters, and the other 35 percent—just under 200,000—are found unsheltered on our streets (in places not intended for human habitation, such as sidewalks, parks, cars, or abandoned buildings). Homelessness almost always involves people facing desperate situations and extreme hardship. They must make choices among very limited options, often in the context of extreme duress, substance abuse disorders, untreated mental illness, or unintended consequences from well-intentioned policies. Improved policies that address the underlying causes of the problem and more effectively serve some of the most vulnerable members of society are needed.

This report (i) describes how homelessness varies across States and communities in the United States; (ii) analyzes the major factors that drive this variation; (iii) discusses the shortcomings of previous Federal policies to reduce homeless populations; and (iv) describes how the Trump Administration is improving Federal efforts to reduce homelessness.

We first document how homelessness varies across the United States. Homelessness is concentrated in major cities on the West Coast and the Northeast. Almost half (47 percent) of all unsheltered homeless people are found in the State of California, about four times as high as California's share of the overall U.S. population. Rates of sheltered homelessness are highest in Boston, New York City, and Washington, D.C., with New York City alone containing over one-fifth of all sheltered homeless people in the United States.

In the context of a simple supply and demand framework, we analyze the major causes of this variation in homelessness across communities: (i) the higher price of housing resulting from overregulation of housing markets; (ii) the conditions for sleeping on the street (outside of shelter or housing); (iii) the supply of homeless shelters; and (iv) the characteristics of individuals in a community that make homelessness more likely.

The first cause we consider is the overregulation of housing markets, which raises homelessness by increasing the price of a home. Using external estimates of the effect of regulation on home prices and of home prices on homelessness, we simulate the impact of deregulation on homeless populations in individual metropolitan areas. We estimate that if the 11 metropolitan areas with significantly supply-constrained housing markets were deregulated, overall homelessness in the United States would fall by 13 percent. Homelessness

would fall by much larger amounts in these 11 large metropolitan areas, for example by 54 percent in San Francisco, by 40 percent in Los Angeles, and by 23 percent in New York City. On average, homelessness would fall by 31 percent in these 11 metropolitan areas, which currently make up 42 percent of the United States homeless population.

Second, more tolerable conditions for sleeping on the streets (outside of shelter or housing) increases homelessness. We show that warmer places are more likely to have higher rates of unsheltered homelessness, but rates are nonetheless low in some warm places. For example, Florida and Arizona have unsheltered homeless populations lower than what would be expected given the temperatures, home prices and poverty rates in their communities. Meanwhile, the unsheltered homeless population is over twice as large as expected—given the temperatures, home prices and poverty rates in their communities—in States including Hawaii, California, Nevada, Oregon, and Washington State. Policies such as the extent of policing of street activities may play a role in these differences.

A larger supply of substitutes to permanent housing through shelter provision also increases homelessness. Boston, New York City, and Washington, D.C. are each subject to right-to-shelter laws that guarantee shelter availability of a given quality. These places each have rates of sheltered homelessness at least 2.7 times as high as the rate in every other city, and this difference cannot be explained by their weather, home prices, and poverty rates. Boston, New York City, and Washington, D.C. also have substantially higher rates of overall homelessness than almost every other city, suggesting that most people being sheltered would not otherwise sleep on the street. While shelter is an absolutely necessary safety net of last resort for some people, right-to-shelter policies may not be a cost-effective approach to ensuring people are housed.

The final cause we consider is the prevalence of individual-level demand factors in the population. Severe mental illness, substance abuse problems, histories of incarceration, low incomes, and weak social connections each increase an individual's risk of homelessness, and higher prevalence in the population of these factors may increase total homelessness.

Drivers of Variation in Homelessness Across the United States

This section uses the model of supply and demand described in figure 1 to analyze the factors that explain why some places have higher rates of homelessness than others: (i) the higher price of housing resulting from overregulation of housing markets; (ii) the tolerability of sleeping on the street (outside of shelter or housing); (iii) the supply of homeless shelters; and (iv) the characteristics of individuals in a community that make homelessness more likely.

The Price of Housing

When housing prices rise, economic theory predicts that more people will have difficulty paying rent and in some cases end up homeless.

A central driver of higher home prices in some communities is the heavy regulation of housing markets by localities. For example, as stated in President Trump's Executive Order Establishing a White House Council on Eliminating Regulatory Barriers to Affordable Housing, such regulations include: "overly restrictive zoning and growth management controls; rent controls; cumbersome building and rehabilitation codes; excessive energy and water efficiency mandates; unreasonable maximum-density allowances; historic preservation requirements; overly burdensome wetland or environmental regulations; outdated manufactured-housing regulations and restrictions; undue parking requirements; cumbersome and time-consuming permitting and review procedures; tax policies that discourage investment or reinvestment; overly complex labor requirements; and inordinate impact or developer fees." These regulations reduce the supply of housing and as a result drive up home prices (e.g., Quigley and Raphael 2005; Quigley and Rosenthal 2005; Glaeser and Ward 2009; Saiz 2010; Gyourko and Molloy 2015).

Given that housing market regulations increase home prices and higher home prices are associated with higher rates of homelessness, areas with more regulated housing markets would be predicted to have higher rates of homelessness.

The Tolerability of Sleeping on the Street

Just as increasing the price of being housed increases homelessness, increasing the tolerability of sleeping on the streets (outside of housing or shelter) increases homelessness as well. Increasing the tolerability of living on the streets shifts the demand for homes inward, and so the number of people living on the streets increases.

One important factor that helps determine the tolerability of sleeping unsheltered on the streets is climate. Sleeping on the streets is always harmful to one's health, and can be associated with higher rates of mortality (Roncarati et al. 2018). However, sleeping unsheltered is even more harmful when it is cold. Research consistently finds that colder climates are associated with lower rates of unsheltered homelessness (Byrne et al. 2013).

As Corinth and Lucas (2018) point out, rates of unsheltered homelessness are uniformly low in cold places. In other words, the difficulty of sleeping on the streets is so high during the winter in places like Minneapolis that unsheltered homelessness is extremely rare. However, there is wide variation in rates of unsheltered homelessness in warmer places. For example, Orlando, Las Vegas, and San Francisco all have average January temperatures of between 50 and 60 degrees Fahrenheit. But their rates of unsheltered homelessness are 2, 19 and 60 per 10,000 people respectively. In general, CoCs in California have higher rates of unsheltered homelessness than CoCs in Florida, despite similar January temperatures. It is clear that warm climates enable, but do not guarantee, high rates of unsheltered homelessness. Thus, factors beyond climate help determine rates of unsheltered homelessness in warm places.

A number of potential factors could help explain the remaining variation in rates of unsheltered homelessness. One potential factor is differences in city ordinances and policing practices, as these policies would directly affect the tolerability of living on the street and predict the aggregate number of unsheltered homeless people. Some States more than others engage in more stringent enforcement of quality of life issues like restrictions on the use of tents and encampments, loitering, and other related activities. Others have noted that policing may help determine rates of unsheltered homelessness as well. Of course, policies intended solely to arrest or jail homeless people simply because they are homeless are inhumane and wrong. At the same time, when paired with effective services, policing may be an important tool to help move people off the street and into shelter or housing where they can get the services they need, as well as to ensure the health and safety of homeless and non-homeless people alike. More research is needed to understand how different policing policies affect the outcomes of homeless people—including their ultimate destinations, mental health, drug use, employment and other dimensions of wellbeing—as well as outcomes for non-homeless people.

The Supply of Homeless Shelters

The third factor that explains variation in homelessness is the supply of substitutes to housing through homeless shelters. Expanding the supply of homeless shelters shifts the demand for homes inward and increases homelessness. A larger supply of shelter entails a higher shelter quality (i.e., characteristics of a shelter that make it more desirable for people who sleep there) at any given level of beds in the market. While shelter plays an extremely important role in bringing some people off the streets, it also brings in people who would otherwise be housed, thus increasing total homelessness.

Individual-Level Factors

Finally, a higher prevalence of individual-level risk factors for homelessness within the population reduces the demand for homes and thus increases homelessness in a community.

This is especially the case when the supply of homes is lower, and the supply of shelter and the tolerability of the streets is higher (see O'Flaherty 2004 for a discussion of the interaction between individual and community-level factors in determining homeless populations). A number of individual-level factors have been studied, including mental health, substance abuse, incarceration, poverty, and social ties.

According to the 2018 homeless point-in-time count, 111,122 homeless people (20 percent) had a severe mental illness and 86,647 homeless people (16 percent) suffered from chronic substance abuse (HUD 2018b). Among all adults who used shelter at some point in 2017, 44 percent had a disability (HUD 2018a). The extent to which these estimates accurately reflect the true proportion of the homeless population with these issues is unclear, given the varying methodologies used by CoCs to count and survey their homeless populations. However, other studies similarly suggest a high prevalence of mental illness and substance abuse in the homeless population. A national survey of homeless individuals conducted in 1996 found that among single adults, 39 percent experienced mental health problems, 26 percent experienced drug use problems, and 38 percent experienced alcohol use problems in the past month (Burt et al. 1999). A history of incarceration is also relatively common among homeless individuals. Among those adults entering a homeless shelter in 2017 from a non-homeless situation, 9 percent were identified as previously staying in a correctional facility (HUD 2018). Metraux and Culhane (2006) find that 17 percent of single adults in New York City shelters spent time in jail over the previous two years, and 8 percent had spent time in prison.

People experiencing homelessness generally have low incomes and relatively weaker social ties. According to a 1996 national survey of the homeless, mean incomes were around half of the poverty line both for single adults and for families (Burt et al. 1999). Corinth and Rossi-de Vries (2018) find that the lifetime incidence of homelessness is reduced by 60 percent for individuals with strong ties to family, religious communities, and friends. Among people who entered shelter in 2017 who were not already homeless, 51 percent had previously been staying with family or friends (HUD 2018a). This suggests that homelessness may result when these social ties are exhausted.

Although mental illness, substance abuse disorders, former incarceration, poverty, and weak social ties place individuals at a higher risk of homelessness, the vast majority of people with any of these issues is not homeless (even if all half a million homeless people faced all of these problems, there are millions of non-homeless Americans who face each problem as well). Thus, other factors are important as well in determining who becomes homeless. Among those with higher risk factors, homelessness is often a case of bad luck (O'Flaherty 2010). Still, addressing these individual-level factors could in part help reduce homeless populations, especially when pursued in conjunction with polices that address community level determinants of homelessness.

CHAPTER ONE

Baseline

Homelessness occupies a prominent place in American political life. Although less than one-fifth of 1 percent of the U.S. population experiences homelessness on a given night in the country, the issue receives considerable attention from policy makers and the general public. This spotlight is striking given the scale of the homelessness crisis when compared to other prominent social problems. That fifth-of-a-percent figure translates to about five hundred sixty-eight thousand people. To be sure, this number should feel large and unacceptable. But on an absolute basis, for example, homelessness pales in comparison to the nation's poverty crisis: Over thirty-four million Americans were living below the federal poverty line in 2019. Meanwhile, abundant evidence highlights the political preoccupation with homelessness. In 2020, a poll in Washington State revealed that voters ranked homelessness as the top priority for the state legislature—far above other common public concerns like transportation, the economy, the environment, and health care.[1] We observe a similar focus at the national level. As depicted in

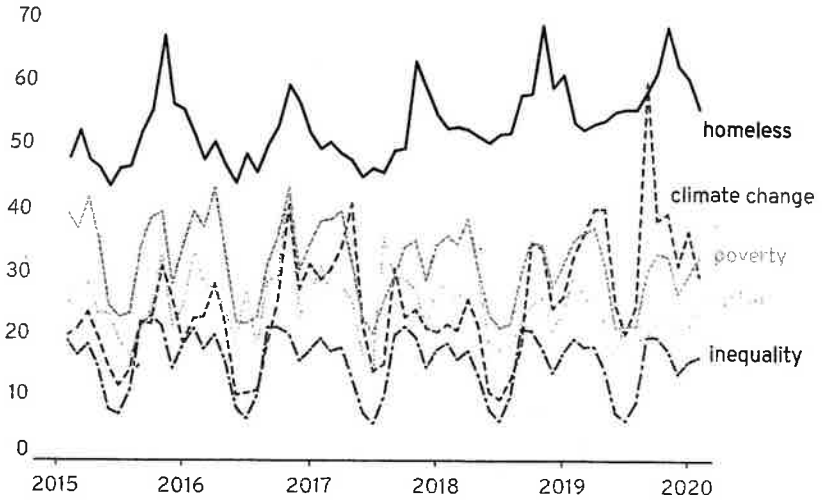

Figure 1. Public interest over time for five search terms. Data source: Google Trends

Figure 1, from January 2015 to January 2020, more people in the United States searched for the term *homeless* via Google than for *inequality*, *racism*, *poverty*, and *climate change*.[2]

How might we explain this seemingly disproportionate interest in the issue of homelessness? Two potential explanations come immediately to mind. First, maybe this interest isn't as disproportionate as it might initially appear. That is, maybe the numbers are wrong. Among astute observers, it is well understood that official point-in-time census estimates of homelessness underestimate the true size of the population experiencing homelessness on any given night.[3] For example, the federal definition excludes many precariously housed individuals and families who might be living with a friend or temporarily living in a motel room. The more expansive definition of homelessness used by the U.S. Department of Education suggests a population

of 1.35 million homeless students *without* counting their parents.[4] Furthermore, across greater spans of time—say, lifetimes—roughly 5 percent of the population experiences homelessness at least once.[5] In light of these figures, it is more accurate to consider homelessness as a problem that affects millions, rather than hundreds of thousands. But even the larger figure highlights the fact that only a small fraction of people living in poverty actually lose their housing.

More fundamentally, though, a second explanation for the intense interest in the topic may stem from the simple incongruity of a half million people living in shelters and on the street in the wealthiest country in the world. Reactions to this apparent paradox are diverse. For some, homelessness is a moral and political outrage indicting the capitalist system on which U.S. society is based; for others, homelessness is a scourge ruining the nation's largest and most dynamic cities. Other observers reside somewhere in the middle of this spectrum. What is uncontroversial is that homelessness elicits strong and emotional responses from all corners of society. From the perspective of the public, the intense focus on homelessness requires—and demands—an explanation. There is a strong desire to understand the causes of homelessness and where to assign blame. This book is in part concerned with the question of blame.

In January 2020, just weeks before the outbreak of the coronavirus pandemic in the United States, a long-simmering debate about the origins of and responsibility for the homelessness crisis erupted in public. Members of the federal government, including President Trump, argued vocally that the high rates of homelessness in many U.S. cities were a function of the local failings of Democratic leadership and policies. Referencing Democratic House Speaker Nancy Pelosi, the president said,

"She ought to go home and take care of her District, where the homeless is all over the place, and the tents and the filth and the garbage is eroding right into the Pacific Ocean and into their beaches."[6] In response to this finger-pointing, state and local policy makers—most notably California's governor, Gavin Newsom, a Democrat—argued that a lack of federal assistance had starved local communities of sorely needed resources, and housing instability and homelessness had flourished in turn.

Certainly, some of this political jostling is a product of the polarized nature of U.S. politics in the 2020s. From voting rights to climate change—issues that would appear at face value to be resoundingly nonpartisan but which often provoke party-line votes—policy responses to (and public perception of) the issues of our time are characterized by tribalism. Tailored media narratives and the so-called filter bubbles of social media add fuel to the flame of confirmation bias. It's harder than it should be to find fact-checked information, and it's even harder to internalize narratives that run counter to our beliefs. In this respect, homelessness is no different: It tends to provoke hyper-partisan diagnoses and prescriptions. And as with most cases of hyper-partisanship, neither argument above—Trump's nor Newsom's—sufficiently explains the state of homelessness in the country. If inadequate federal support alone accounts for the crisis, why does the rate of homelessness vary so substantially across cities? Presumably, all cities would be equally starved of resources if federal retrenchment were the cause. Yet while some cities have seen rates of homelessness rise over the last ten years, many others have seen rates fall. And if Democratic mayors and governors are the problem, how can we account for the many cities and states with both Democratic leadership and policies and relatively low rates of homelessness? Unsurprisingly,

the polarized plotlines are too simple, but they draw attention to essential questions about the nature and causes of the homelessness crisis.

As Ezra Klein writes in his recent book *Why We're Polarized*, one of the other phenomena driving polarization in the country is a grafting of our political identities onto national (as opposed to local) politics.[7] National politics, by definition, require a flattening of local variation—and in our de facto two-party system, with this flattening often comes a false dichotomization of many complex issues. This complicates the effort to respond to local issues that vary by geography—homelessness among them. In the United States, one of the most pressing and vexing questions about homelessness concerns the substantial *variation* in per capita rates of homelessness in cities across the country. Seattle and San Francisco, for example, have roughly four to five times the per capita homeless population of Chicago.[8] The stark differences between seemingly vibrant and healthy cities invite us (and many others) to ask: Why is homelessness so bad in cities like Seattle and San Francisco? Is this a failure of individuals, politicians, markets, or other structural forces? An understanding of variation might help us unlock the drivers of this crisis.

Many of us have, for good reason, struggled to identify a credible explanation for this variation. Accounts of and references to homelessness on television, online, in newspapers, and in scholarly sources offer a long list of potential causes of the issue; among them addiction, mental illness, poverty, domestic violence, eviction, high housing costs, racial discrimination, unemployment, and many others. Reports based on interviews with people experiencing homelessness highlight a wide range of potential causes, as well. A recent report from Seattle/King County for example, noted the following self-reported causes

of homelessness among respondents to the annual point-in-time homelessness census: job loss (24 percent of respondents), alcohol or drug use (16 percent), eviction (15 percent), divorce or separation (9 percent), rent increase (8 percent), argument with family or friend (7 percent), incarceration (6 percent), and family/domestic violence (6 percent).[9] Confronted with the question of why some cities have far greater per capita rates of homelessness than others, a reasonable, logical reaction might be to assume that higher levels of homelessness stem from higher incidences of these self-reported causal factors in these cities. In this book, we examine this logic.

While perusing any list of potential causes of homelessness, one can generally break the ostensible explanations down into two overarching categories. Some causes are individual in nature, and some are structural. The bifurcation is consistent with decades of research on poverty and homelessness. On one side of the debate are those who argue that poverty and homelessness are the result of individual factors, that vulnerabilities related to housing instability are fueled by illness, mental condition, laziness, or poor decision-making, including—for these observers—excessive drug and alcohol use. And in the central downtowns of cities like Los Angeles, San Francisco, or Seattle, thousands of unsheltered people experiencing homelessness may indeed be suffering from a substance use disorder, mentally ill, and/or unemployed. Following this logic, it is the disproportionate presence of people with these vulnerabilities in certain cities that explains the substantial variation in per capita homelessness rates around the country. Whether born in or attracted to these cities, *people* comprise the homelessness crisis, and so homelessness is an individual problem. (It is not uncommon for some to argue that homelessness is exclusively an individual choice.) On

the other side of the debate are those who argue that larger, structural forces, such as market conditions, housing costs, racism, discrimination, and inequality, causally explain the prevalence of homelessness. Under the structural explanation, homelessness is a consequence of broader and deeper societal factors driving people at the margins of society out of their housing.

Perhaps there is a middle road. The individual explanation is alluring—it's individual people who lose their housing, after all. Surely there must be systematic factors at play, though; otherwise, how could we possibly account for the dramatically different rates of homelessness around the country? Even if you were entirely convinced of the individual explanation, you would have to acknowledge that some kind of systemic variation—some combination of environmental, political, economic, and demographic trends—characterizes different places. In 2019, less than 1 in 1,000 residents were unhoused in Alabama and Mississippi, while California and Oregon had over five times that rate. Why? Existing research provides a helpful roadmap to navigate the seemingly complex and, at times, contradictory evidence about the causal drivers of homelessness. Homelessness researcher Brendan O'Flaherty, for example, suggests that to generate causal explanations of homelessness, one must consider the interaction between individual characteristics and the context in which that person resides. Either explanation alone is insufficient to explain or predict individual homelessness. By extension, he argues that people who lose their housing are effectively the wrong people in the wrong place.[10] This frame helps to provide a vantage point from which to consider the central question of this book: What explains the substantial regional variation in per capita homelessness rates in the United States?

To cut to the chase, the answer is on the cover of this book: *Homelessness Is a Housing Problem.* Regional variation in rates of homelessness can be explained by the costs and availability of housing. Housing market conditions explain why Seattle has four times the per capita homelessness of Cincinnati. Housing market conditions explain why high-poverty cities like Detroit and Cleveland have low rates of homelessness. Housing market conditions also explain why some growing cities, like Charlotte, North Carolina, are not characterized by the levels of homelessness that coastal boomtowns like Boston, Seattle, Portland, and San Francisco are. Variation in rates of homelessness is not driven by more of "those people" residing in one city than another. People with a variety of health and economic vulnerabilities live in every city and county in our sample; the difference is the local context in which they live. High rental costs and low vacancy rates create a challenging market for many residents in a city, and those challenges are compounded for people with low incomes and/or physical or mental health concerns.

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According to estimates from the U.S. Department of Housing and Urban Development (HUD), at least 567,715 people experienced homelessness on a single night in 2019.[11] But this aggregate figure masks significant geographic variation in the distribution of per capita homelessness across the country. The metropolitan areas of New York, Los Angeles, Washington, D.C., San Francisco, Seattle, and Boston alone account for over 29 percent of the homeless population in the country, despite being home to only about 7 percent of the general population. Regardless of one's view of the problem—and the political lens through which one considers homelessness—it is reasonable to wonder what

it is about these cities that produces (or, according to some, attracts) such large and disproportionate populations of people experiencing homelessness. To explore this phenomenon, we shift the unit of analysis away from the individual and turn our attention to the metropolitan area. From this perspective, we are not interested in predicting whether a given person will experience homelessness or why someone lost their housing in the past; we are interested in understanding why, for example, the crisis is so much more extreme in Boston than in Cleveland. This analytic pivot does not preclude individual explanations for homelessness; instead, it clarifies the object in which we are interested: the city-to-city variation itself.

Understanding this variance is critical to formulating an appropriate policy response. In cities with substantial unhoused populations, it is common for rival political factions to blame one another for the crisis—a microcosm of the Trump–Newsom sparring cited above—and for the issue to devolve into a political hot potato. Often caught in the middle of this dispute are municipal leaders who are tasked with "solving" the problem (with resources that many consider to be inadequate). Societal cleavages emerge in which compassionate responses to homelessness—those that stress social service provision and respect for the dignity and rights of people experiencing homelessness—are criticized by community members who advocate a tougher response to the crisis. Proponents of the latter approach argue that overly permissive local policies have incubated an underlying problem, all while individual desperation facilitates property crime, threatens public health, and abets a deterioration of a city's overall quality of life. The severity and polarization of homelessness is evident in public polling that identifies the problem as the highest-ranked public concern. In

the 2020 State of Washington poll of eligible voters mentioned earlier, 31 percent of voters ranked homelessness as Washington's top issue: an increase of ten percentage points over 2019.[12]

Accordingly, it is worth considering the relationship between perceptions of homelessness and its reality, not least because personal experience and anecdote play formidable roles in shaping opinions and perceptions about the issue. For housed city dwellers in Seattle, San Francisco, and Los Angeles, seeing and interacting with people experiencing homelessness is a daily occurrence. Tents dot the urban landscape; large encampments move (either voluntarily or forcibly) from neighborhood to neighborhood. There is a profound chasm in human experience in these cities, between new million-dollar condos and the tents and tarps that the unhoused use to protect themselves from the elements. And while large unsheltered populations in many coastal cities raise legitimate concerns about public safety and health—for the housed and unhoused alike—these visible reminders do not accurately reflect the homelessness problem as a whole. In most cities, the majority of people experiencing homelessness are not visible to the general population, because most people without housing sleep in shelters or other supportive housing facilities. On any given night in this country, the chronically unsheltered constitute only about one-tenth of the population experiencing homelessness. Yet the visibility—the literal conspicuousness—of the chronic, unsheltered population in many cities helps to cement a belief that people experiencing homelessness are mentally ill and/or addicted to a substance, as these conditions are disproportionately represented in the unsheltered population. Accordingly, the narrative about homelessness is often dominated by a focus on drugs and mental health, which may obscure other (often structural) explanations for the crisis.

In this book, we make an important distinction when considering the causal drivers of homelessness. First, we note *precipitating events* that can lead to a bout of homelessness. For example, in the survey of people experiencing homelessness in Seattle/King County, self-reported "primary reasons" for homelessness include divorce, domestic violence, and arguments with family or friends.[13] As they are identified in interviews with people then-without housing, we can indeed consider these events to have produced a spell of homelessness. But we can't consider each reason a *root cause* of a given housing crisis. If divorce is a cause of homelessness, for example, why don't far more people lose their housing after leaving a spouse? A key point to which we return in this book is that *under certain conditions*, a range of precipitating events (like divorce) can result in homelessness—but these events ought not be considered root causes of housing instability and loss. Underlying vulnerabilities matter.

Consider the following vignette about musical chairs, often deployed by homelessness researchers, to think through causality and homelessness. We use this example to highlight the difference between a precipitating event and a root cause:

> Ten friends decide to play a game of musical chairs and arrange ten chairs in a circle. A leader begins the game by turning on the music, and everyone begins to walk in a circle inside the chairs. The leader removes one chair, stops the music, and the ten friends scramble to find a spot to sit—leaving one person without a chair. The loser, Mike, was on crutches after spraining his ankle. Given his condition, he was unable to move quickly to find a chair during the scramble that ensued.

In other words, when housing is scarce, vulnerabilities and barriers to housing are magnified. Limited financial resources, mental illness, addiction, or interpersonal strife, under

a specific set of circumstances, could each precipitate a bout of homelessness—just as a sprained ankle might prevent one from finding a chair in musical chairs. But the fundamental question remains: Would we say that Mike's ankle injury *caused* him to lose the game? Under the specific conditions of the game (say, nine chairs and ten people), Mike's impairment prevented him from finding a chair. But under different conditions—ten chairs and ten people—Mike would have easily found one. One could argue, and we will in this book, that the fundamental *cause* of Mike's chairlessness—was a lack of chairs, not his ankle injury. The rules of the game meant that someone had to lose.

Over the course of this book, we illustrate that personal vulnerabilities may explain *who* becomes homeless within a given community under a specific set of circumstances—but that, in aggregate, these vulnerabilities do not adequately explain regional variation in homelessness. This finding suggests that broader structural explanations of homelessness—especially those that shape housing markets—may have more explanatory power than the precipitating events frequently cited in local surveys as the "primary causes" of homelessness. Policy responses ought to be tailored accordingly. This foundation guides this project as a whole. Our central argument—that the prevalence of homelessness is driven by structural forces—is not unique in its own right. Much research has identified a causal link between housing-market conditions and homelessness. But there is little evidence that these findings have altered and shaped public perceptions about the nature of the crisis; hence our desire to package a comprehensive analysis in a single volume.

Social science research frequently relies on complex statistical methods and expansive data sources to relay a credible causal

narrative about social phenomena for the subset of readers who are trained in these methods and have access to this content (usually via university journal subscriptions). For people outside of the academy, access to this information may be limited, both with respect to the specialized nature of academic social science and the expensive paywalls of academic journals. Understanding, then, is more frequently shaped by media narratives, experience, and anecdote. Cognitive dissonance is real, too. New findings from the academy may challenge deeply held ideology, and evidence doesn't always make a difference. Accordingly, in this book, we seek to present our research by means of intuitive appeals to first principles. We use geographic variation in rates of homelessness as the foundation from which to test a wide range of potential explanations for the crisis, using an accessible analytical methodology appropriate for a broad audience. In this manner, we address many of the common narratives about homelessness in a single work with relatively simple statistical methods. Basic causal reasoning allows us to dismiss several common explanations for higher rates of homelessness: If there is no fixed statistical evidence of a positive relationship between a potential cause and our outcome of interest (i.e., rates of urban homelessness), we have to conclude it does not bear on variation in this outcome in any straightforward manner. For example, if poverty rates are low in cities with high rates of homelessness, it is impossible to attribute regional variation in homelessness to differences in the relative presence of low-income households. Applied to all potential explanations in this book, this structure provides the basis from which we ultimately attribute varying rates of homelessness to the structure of housing markets—a finding corroborated by other research leveraging different data sources and methods.

HOMELESSNESS COUNTS AND TRENDS

To study variation in rates of homelessness, we shift the unit of analysis from individuals experiencing homelessness to metropolitan areas. This is a book about cities, not individual people. We seek to explain why certain geographic locations produce (or otherwise report) disproportionately high rates of homelessness. Because homelessness is largely an urban phenomenon, we focus our attention on the largest urban areas in the United States.

The first step in understanding variation in rates of homelessness is to understand the manners in which communities measure homelessness and deliver programming. In 1987, the U.S. Congress passed the McKinney-Vento Homeless Assistance Act, which created the contemporary administrative machinery behind the federal response to homelessness. A critical component of McKinney-Vento was the stipulation that federal money was to be distributed directly to jurisdictions to fund local service delivery. To facilitate the flow of funds from the federal government to local communities, HUD required states and municipalities to self-organize into units of geographic aggregation called Continuums of Care (CoC). Today, CoCs are the main administrative entities that manage homelessness programming, allocate federal funding to local service providers, and conduct the Congressionally mandated one-night census of homelessness. Virtually every locality in the country is covered by a CoC, but the construction and distribution of CoCs varies from state to state.[14] Most urban areas are covered by a single CoC, while smaller cities and rural areas might bundle together in a CoC that covers a large geographic area.

Ohio, for example, is divided into nine different CoCs (see Figure 2). Eight of the CoCs cover the most populous counties

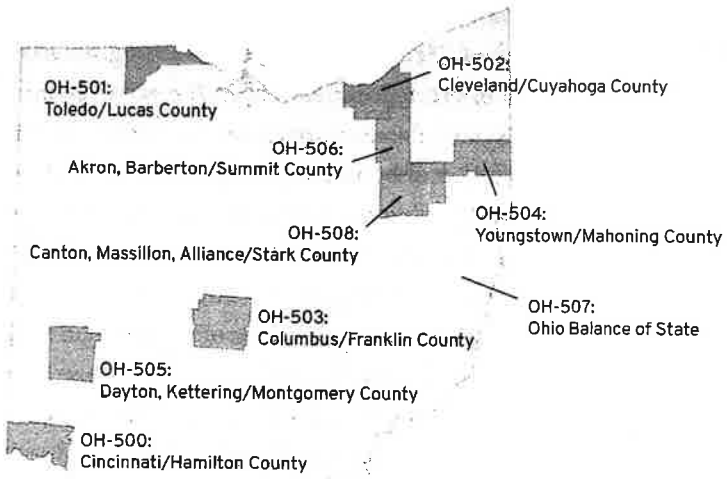


Figure 2. Ohio Continuum of Care map. The state is home to nine HUD CoCs: eight counties and the balance of state. Data source: HUD

in the state, including Cuyahoga County (Cleveland), Lucas County (Toledo), Franklin County (Columbus), and Hamilton County (Cincinnati). The largest CoC (in a geographic sense) is OH-507, which encompasses the entire balance of the state that is not covered by one of the other eight county-based CoCs. As CoCs administer their own one-night count of people experiencing homelessness—often conducted the last week of January and known as the Point-In-Time (PIT) count—the estimated unhoused population in Ohio, in the eyes of HUD, is the sum of Ohio's nine distinct CoC counts.

Relationships between CoC boundaries and other state and local boundaries can be messy. If we are interested in measuring homelessness in Cleveland, for example, the only geographic

unit available for analysis is the Cuyahoga County CoC, which includes both the city of Cleveland and its surrounding suburbs. Therefore, for those interested exclusively in the urban homelessness, Cleveland's homelessness rates as estimated by the Cuyahoga County CoC will be imprecise. Homelessness tends to be less prevalent in the suburbs.[15] Therefore, the rate of homelessness in county CoCs is, on average, lower than it is for CoCs that cover a single city. For example, the rate of homelessness in Cook County, Illinois (including the city of Chicago) in 2019 was 1.20 per 1,000 population. In the city of Chicago alone, the per capita rate was 1.96. Because major metropolitan areas correspond to a mix of city- and county-based CoCs, in this book we compare county-based CoCs to other county-based CoCs and city-based CoCs to other city-based CoCs.

To create our study sample, we began with a list of the thirty-five largest Metropolitan Statistical Areas (MSAs) in the United States. MSAs are geographic units of at least fifty thousand people that cover a major urban center plus its surrounding areas. For each MSA on the list, we identified the primary CoC in that MSA. We then excluded six MSAs because the primary CoC in question covered too large a geographic area. (For example, the CoC that includes Houston, Texas, encompasses five different counties—and won't be useful for understanding homelessness in the Houston metropolitan area alone.) Five other MSAs were excluded using similar criteria, including Riverside, California; Denver, Colorado; Orlando, Florida; Pittsburgh, Pennsylvania; and Kansas City, Missouri. After these exclusions, our sample covers twenty-nine of the thirty-five largest MSAs in the county. We ultimately include thirty CoCs, however, because of the unique case of Cook County, Illinois—which is divided into two CoCs, one for the city of Chicago, and one for the remainder of Cook County. Chicago is the only city in our sample with this structure. Accordingly, we include the Chicago CoC in the list of city-based CoCs, but we also separately aggregate the two CoCs to get a picture of homelessness for Cook County as a whole. We include Cook County in our list of county CoCs as well, leaving a final sample of nineteen county-based CoCs and eleven city-based CoCs. In 2019, the collection of thirty CoCs in our sample accounted for roughly 45 percent of all homelessness in the United States. We compare these regions every year from 2007 to 2019.

Returning to the regional differences that motivated this book, the following graphs offer a visual explanation of the variation in per capita rates of U.S. homelessness in the country over this time period.[16] Figures 3 and 4 show the per capita rates of homelessness in the city and county CoCs in 2007 and 2019—the beginning and ending years for our sample period.

As the figures illustrate, variation in rates of homelessness is not a new phenomenon: The 2007 figures show similarly wide-ranging dynamics as those from 2019. In our sample, we see single-night rates of homelessness anywhere between about 1 and 10 unhoused people per 1,000 population. The second key takeaway from these figures is that, generally speaking, high per capita locations in 2007 also saw high rates in 2019. Washington, D.C., New York City, Boston, San Francisco, King County (Seattle), Multnomah County (Portland), Los Angeles County, and Santa Clara County (San Jose) have persistently seen the highest rates of per capita homelessness over the thirteen years covered in this book. We are interested in what differentiates these cities from others. To the extent that policy choices, macroeconomic trends, or local cultural factors may drive variation in rates of homelessness, we want to know what differentiates Multnomah County, Oregon, from Maricopa County, Arizona.

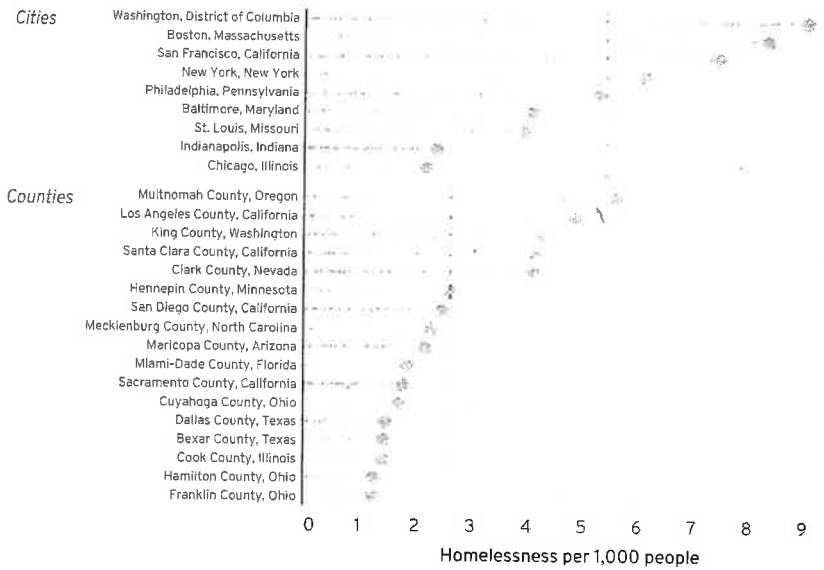


Figure 3. Per capita rates of homelessness in select U.S. regions, 2007. Dashed lines indicate city and country averages of per capita PIT counts. Data source: HUD

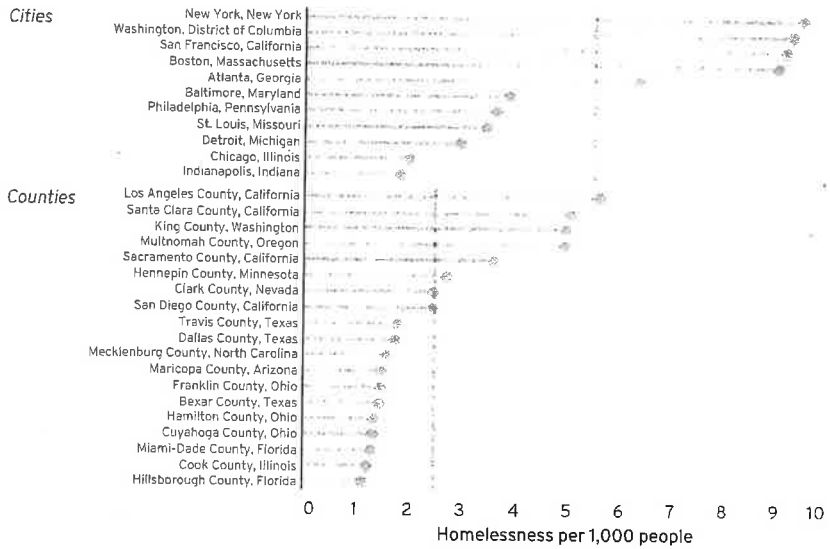


Figure 4. Per capita rates of homelessness in select U.S. regions, 2019. Dashed lines indicate city and country averages of per capita PIT counts. Data source: HUD

Throughout this book, to supplement our analyses of per capita homelessness in cities and counties, on occasion, we also deploy a simple indexing approach that allows us to compare city and county CoCs directly. To create an indexed value of homelessness intensity, we divide each measurement of city per capita homelessness by the largest observed city rate across the years in our sample (2007–2019), divide each measurement of county per capita homelessness by the largest observed county rate, and then combine the transformed values into a single measure. Doing so allows us to get a sense of how the severity of a given city's or county's homelessness crisis evolves over time, relative to other cities and counties. The indexing approach is a kind of ranking function. It's not superior to our bifurcated approach to presenting city and county rates; it complements it.

Using indexed values, Figure 5 below provides a comparison of the relative ranks of indexed rates of homelessness in each CoC in 2007 compared to 2019. (The CoCs with observations excluded in 2007 are removed from the analysis.) We observe some modest movement in the rank ordering of cities, but generally speaking, regions with high per capita homelessness in 2019 also had high rates a decade earlier.

Over the course of the book, we also make use of some core concepts from statistics to illustrate key points. The first of these is the *median*, a summary statistic that indicates the midpoint in a distribution of values. The median may differ meaningfully from

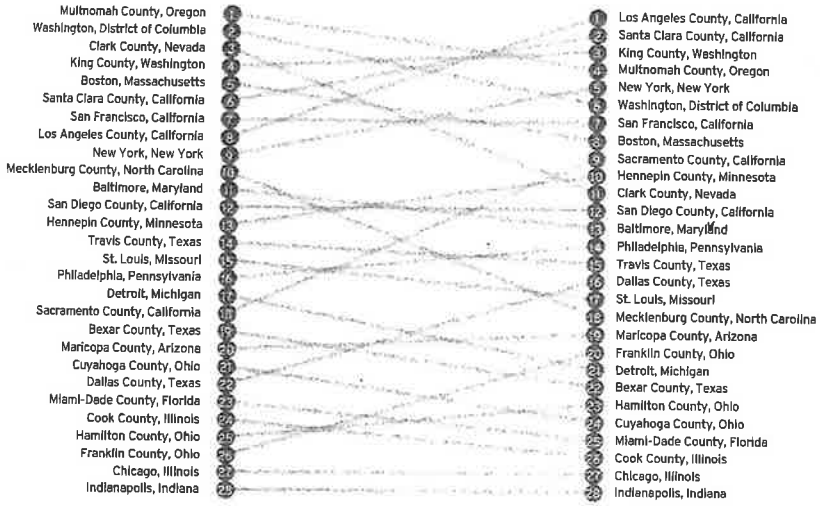


Figure 5. Rank of indexed rates of homelessness, 2010 v. 2019. Vertical position indicates rank of indexed per capita PIT counts for select U.S. regions. Data source: HUD

the average or *mean* of this distribution. Accordingly, we can understand the median as helping us understand the shape of a distribution in a manner that is less sensitive to large outliers—which drag up or down the mean. To further understand the shape of these distributions, we also measure a quantity known as the *variance*. The variance of a distribution measures how dispersed a set of values are around their mean. Mathematically, variance corresponds to the squared *standard deviation* of a distribution, a similar measure assessing dispersion. Small values for standard deviations and variance correspond to narrow distributions, while large values correspond to wide distributions. In this book, we use the word *variation* to mean "differences between measurements," while we use *variance* to indicate the mathematical quantity just described. Generally, the book attempts to

account for variation between regions by examining simple statistical models and evaluating the degree to which they explain the variance of the distributions in question.

Consider an example in which we analyze the relationship between age and height among children aged eighteen and under. The vertical axis on our chart measures height and the horizontal axis measures age. We can quantify this relationship using a scatterplot of dots, in which each dot represents one person and illustrates their height and age. After placing all dots in our data set on the scatterplot, we can assess what kind of relationship exists between the variables and how much of the variation in height can be explained by age. Because children become taller as they age, we might expect to see an upward sloping cloud of dots, but we probably wouldn't expect all the dots to fall along a perfectly straight line. Instead, we'd observe some variation. Some people are short, some are tall, some grow early, and some grow later. We can use statistics to measure the amount of variation in one variable (height) that's captured by variation in the other (age).

To do so, in several graphics throughout the book, we deploy a statistic known as the coefficient of determination, which for unfortunate mathematical reasons goes by the abbreviation R^2. This quantity (pronounced "R-squared") offers an estimate of the amount of variance that we might consider to be captured—that is, explained—by a line drawn through the scatterplot of points. In particular, we'll draw a line through the points that minimizes the total vertical distance between all the points on the plot and the line itself. That exercise represents a *linear regression*—a statement about one variable in terms of another, as characterized by that best-fit line. (The formula for calculating R^2 subtracts the proportion of variance *unexplained* by

this best-fit line from the number 1—leaving the proportion of *explained* variance.) R^2 tends to vary between 0 and 1, with values closer to 1 indicating a greater proportion of explained variance. There's no hard rule governing which values of R^2 imply small or large amounts of explained variance, but generally we might say that values of R^2 below 0.1 indicate very little explanation, while values above 0.3 indicate much stronger explanatory relationships. That is, it's important to note that R^2 doesn't tell us everything about these relationships. For example, on its own, it won't help us separate correlation from causality, it won't tell us if we're missing any important variables in our statistical model, and it won't tell us if we have enough data to draw solid conclusions. Nonetheless, it's a useful indicator of the coupling between two variables. Returning to our example of the relationship between age and height, it is likely that the R^2 would be high—age is a strong predictor of height among children—but it wouldn't be 1.0. There still exists plenty of variation in height among children that cannot be explained by age.

While the story about homelessness in major metropolitan areas has been generally consistent since 2007, some critical trends have emerged—see Figure 6. First, at a national level, overall levels of homelessness have fallen over this period—and this trend is apparent in the thirty CoCs in our sample.[17] While overall homelessness has fallen, the variance between different cities' rates of homelessness has increased. In practice, that means that while falling at a national level, homelessness has become increasingly concentrated in a few cities over this time period. Given the uneven progress toward reducing levels of homelessness, the task of understanding the drivers of regional variation is cast in an important light. If people and cities experience homelessness at increasingly different rates, it's worth asking why.

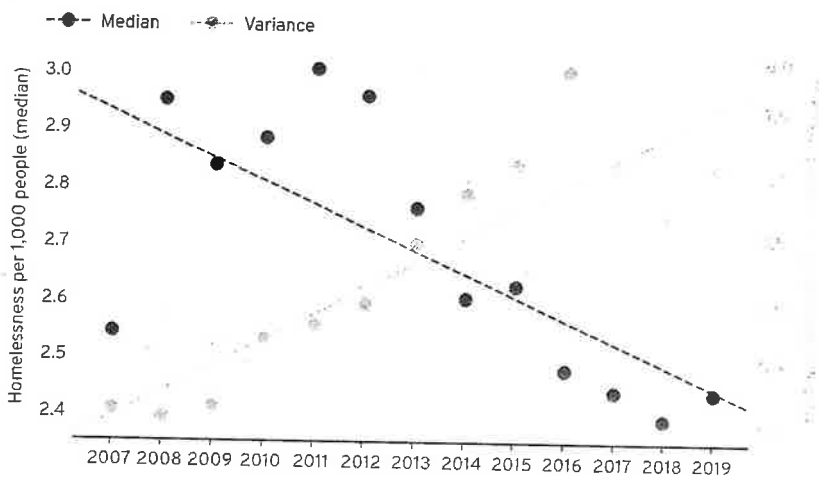


Figure 6. While median per capita homelessness has decreased over the last decade, its variance has increased. Dashed lines indicate linear regressions of year and median per capita PIT counts (and their variance) between 2007 and 2019 for a sample of U.S. regions. Data source: HUD

Over the course of writing this book, two major social events occurred with direct implications for understanding the issue of homelessness in the country. First, in March 2020, as the COVID-19 outbreak swept across the United States and residents went into lockdown, businesses and schools closed in the most immediate cessation of economic and social activity on record. The virus represented a particular concern for the most vulnerable in society, including elders, those with underlying health conditions, and people without permanent housing. Accordingly, many jurisdictions took extraordinary steps to protect the health of people experiencing homelessness—and limit community spread of the virus—by moving portions of their homeless population to hotels and motels.

In summer and autumn 2020, I (Gregg) partnered with colleagues from King County and the University of Washington to

evaluate the region's COVID-19 homelessness response. In the early days of the pandemic, the City of Seattle, King County, and their partner agencies moved over seven hundred people from congregate shelter settings into hotel rooms throughout the county—with the primary aim of adhering to public health guidelines and keeping a highly susceptible population safe. Our research—which included an analysis of quantitative data on infection rates, housing stability, exits to permanent housing, and 911 dispatch calls; as well as qualitative data from interviews with shelter residents who moved to hotels and agency staff—showed that the intervention wasn't just successful at limiting the spread of COVID-19, but also in producing other benefits on various measures of well-being, including improved health, better sleep, feelings of safety and security, less interpersonal conflict, and greater and more optimistic focus on the future (including education, employment, and permanent housing).[18] These results, in part, prompted King County Executive Dow Constantine to propose an additional sales tax to fund the purchase of hotels as supplementary housing for people experiencing homelessness.[19] In other words, in the Puget Sound region, out of crisis has come a major public investment in housing solutions for people experiencing homelessness.

The economic consequences of COVID-19 have also increased the risks of falling into homelessness for many precariously housed people around the country. Early estimates suggest that tens of millions of households could lose their housing as they struggle to make monthly rental payments due to loss of income.[20] In the early months of the crisis, many states and local jurisdictions enacted eviction moratoria to prevent people from losing their housing due to an inability to pay. In September 2020, the Centers for Disease Control and Prevention (CDC)

announced a national eviction moratorium, leveraging its broad authority to control the spread of the pandemic. As these eviction restrictions lapse, however, housing researchers and advocates offer dire predictions of a sharp rise in homelessness, since even under the CDC rules, renters are expected to pay any rent deferred under the moratorium.[21] Beyond the obvious public health consequences of COVID-19, this crisis highlighted the natural interconnectedness of larger, structural forces and the dynamics of homelessness.

In the midst of the country's early grappling with the novel coronavirus, the May 2020 killing of George Floyd in Minneapolis at the hands of the police ignited global protests of police violence and racial inequality. In the United States, these protests brought structural and systemic racism to the forefront of public and political discourse—and created the newest opportunity for substantive movement toward dismantling structural racism in the country. Racism is central to discussions that aim to reveal the causes and consequences of homelessness. Given their representation in the general U.S. population, Black, Native, and Hispanic/Latino individuals and families are disproportionately represented in the homeless population.[22] While Black people, for example, make up about 13 percent of the U.S. population, HUD reported to Congress in 2019 that almost 40 percent of the population experiencing homelessness was Black.[23] This fact alone ought to be unsurprising: A knot of conspicuous, racialized structural disadvantages—in housing, banking and lending practices, education, health care, employment, and policing and incarceration—readily amplify homelessness risk.

What's essential in these two extraordinarily salient crises —the coronavirus pandemic and the latest reckoning with structural and systemic racism—is the manner in which they

highlight whom we're talking about when we talk about homelessness risk. To the extent that this is a book about regional variation in homelessness, it is also a book about deck-stacking. Place is where it happens. If we want to understand the factors that cause people to lose their housing, we need to understand why and how those forces vary from city to city. For many, the pandemic and the Black Lives Matter movement have driven home the interconnectedness of U.S. society, not least because the health of one's neighbor is directly related to the health of oneself. But just as racism is not a monolith, homelessness is multifaceted, and households' experiences with housing vary with identity and geography. Here, we argue that an effective policy response to homelessness will only come from acknowledging and responding to these differences.

APPROACH

This book is split into three brief sections. We conclude the first section in the next chapter, in which we lay out the current state of knowledge about homelessness in the country. We provide an overview of existing academic social-science research on the topic and offer descriptive statistics about homelessness. The purpose of the second chapter is to place the reader in a position to engage critically with the specific causal arguments presented in the second section of the book.

In part 2, we consider the various potential explanations for the substantial variation in per capita homeless populations around the country. In chapter 3, we analyze a range of individual and household vulnerabilities and attributes and ask whether these common narratives explain regional variation. These data and analyses provide compelling evidence that the answer to that

question, most simply, is no. The homelessness crisis in coastal cities cannot be explained by disproportionate levels of drug use, mental illness, or poverty. In chapter 4, we then consider local culture and context, analyzing how variations in weather, local political climate, the mobility of low-income households, and the generosity of local welfare provision may influence rates of homelessness. Similarly, we find that these common explanations do not account for observed regional variation. Finally, we consider a third category of potential explanations: housing market conditions. In chapter 5, we consider housing costs, housing cost burdens, and housing availability as candidate explanations for intercity variation. In this analysis, two explanations emerge as credible factors: absolute rent levels and rental market vacancy rates. We argue that after eliminating a wide range of potential explanations for the variation in question, the descriptive and correlative findings in chapter 5 together offer the most compelling explanation of regional variation in rates of homelessness.

In part 3 of the book, we synthesize our findings in two policy-oriented chapters. In chapter 6, we propose a typology of cities to explain why certain cities—certain types of cities—experience elevated rates of homelessness; while other cities, relatively speaking, do not. Combining our data with principles from the field of urban economics, we construct a framework that, importantly, helps us understand why high-growth boomtowns don't always see significant rates of homelessness. Charlotte, for example, has grown as fast as San Francisco and Seattle, but because of a relatively robust housing supply response, the city has not faced the housing shortages that plague many coastal cities. The typology also demonstrates how population declines help to explain why a large, vibrant city like Chicago has relatively low rates of homelessness: A falling population

in Chicago has created higher rental market vacancy rates and lower prices, which produces a more accommodating housing market (relatively speaking) for vulnerable households.

In chapter 7, we conclude by presenting a broad proposal to end homelessness in the United States. Ultimately, in the long run, the prescription is simple: Policymakers must increase the number of affordable housing units and provide subsidies and rental assistance to households to ensure they can access housing. In the short run, competing demands and a lack of resources makes decision-making more challenging. Local jurisdictions must balance the needs for a more robust crisis response (i.e., greater emergency shelter capacity) with the desire to increase the supply of affordable housing. In reality, cities must devote resources to both of these responses.

To create a sustainable, robust response to homelessness, we argue that three interrelated steps are required. First, public perception of homelessness must change. As long as we continue to frame homelessness as an individual problem, we will struggle to make the structural investments needed to end it. Second, this crisis requires far greater resources from all levels of government. Existing investments, while substantial, are insufficient given the scale of the problem. Last, we encourage a broader systems approach to addressing homelessness. Focusing on three stages of the system—inflow, crisis response, and outflow—are necessary to move people out of homelessness and into stable, permanent housing. A lack of focus on any one of these stages will produce a system out of balance—and high levels of homelessness will persist.

Finally, a word on the motivation for this book. Both Gregg and Clayton are engaged in the study of and response to homelessness in the Puget Sound region. As one of the areas of the

country most affected by this crisis, understanding what drives homelessness in our region is a topic of great civic importance. In the years leading up to writing this book, we have been amazed that—despite our community wrestling with homelessness for many years—there is a lack of general understanding about the nature and causes of homelessness. Numerous narratives compete for the public's attention and, as a result, there is no consensus about the root causes of this crisis. Without a common understanding, it is impossible for elected leaders and the community at large to marshal the resources needed to end homelessness in our community. Much of the money spent on homelessness today constitutes a *response* to the crisis rather than an *alternative* to it. In the concluding chapter we share our vision—informed by thought leaders from around the country—for community-wide approaches that are required to prevent and limit homelessness. According to the United States Interagency Council on Homelessness, "An end to homelessness means that every community will have a comprehensive response in place that ensures homelessness is prevented wherever possible, or if it can't be prevented, it is a rare, brief, and one-time experience."[24] Fair enough. But without wrapping our head around the root of the crisis—its beginning—it'll be difficult to find its end.

SPARC

Supporting Partnerships for Anti-Racist Communities

Phase One Study Findings

MARCH 2018

Center for Social Innovation

Executive Summary

People of color are dramatically more likely than White people to experience homelessness in the United States. This is no accident; it is the result of centuries of structural racism that have excluded historically oppressed people—particularly Black and Native Americans—from equal access to housing, community supports, and opportunities for economic mobility.

In September 2016, the Center for Social Innovation launched SPARC (Supporting Partnerships for Anti-Racist Communities) to understand and respond to racial inequities in homelessness. Through research and action in six communities, SPARC has begun a national conversation about racial equity in the homelessness sector.

Through an ambitious mixed-methods (quantitative and qualitative) study, the SPARC team documented high rates of homelessness among people of color and began to map their pathways into and barriers to exit from homelessness. The team analyzed 111,563 individual records of people from HMIS (homeless management information systems) in SPARC partner communities (representing data aggregated across years 2013-2015); administered a provider workforce demographic survey; collected 148 oral histories of people of color experiencing homelessness; and conducted 18 focus groups in six communities across the United States.

Key findings include:

Demographics

The SPARC team analyzed HMIS data for each SPARC community as well as general population numbers and poverty population numbers in the United States and in each SPARC community. The results were astounding:

- Approximately two-thirds of people experiencing homelessness in SPARC communities were Black (64.7%), while 28.0% were White. 6.9% identified as Hispanic/Latinx*. In total 78.3% of people experiencing homelessness were people of color.
- By comparison, the general population of the U.S. was 73.8% White, 12.4% Black, and 17.2% Hispanic/Latinx.
- Black people were the most overrepresented among individuals ages 18-24 experiencing homelessness, accounting for 78.0% of this group. This group also had the highest over representation of people of color broadly with 89.1% of 18-24 year olds identifying as people of color.
- More than two-thirds (67.6%) of individuals over the age of 25 experiencing homelessness were Black, and 56.3% of individuals presenting as family members were Black.
- Rates of Native American homelessness were also disproportionately high. In SPARC communities, homelessness among American Indian/Alaskan Natives was three to eight times higher than their proportion of the general population.
- Poverty alone does not explain the inequity. The proportion of Black and American Indian and Alaska Native individuals experiencing homelessness exceeds their proportion of those living in deep poverty.

* Latinx is a gender-neutral form used in lieu of Latino and Latina.

Homeless Services Workforce

The homeless services workforce is not representative of the people it serves:

- Those working in senior management positions were 65.8% White, 12.6% Black, and 10.1% Hispanic/Latinx.
- Staff in all other jobs were 52.3% White, 22.1% Black, and 14.8% Hispanic/Latinx.

Key Domains Influencing Homelessness for People of Color

The oral histories revealed five major areas of focus regarding racial inequity and homelessness:

1. **Economic Mobility**. Lack of economic capital within social networks precipitates homelessness for many people of color.
2. **Housing**. The unavailability of safe and affordable housing options presents both risk of homelessness and barriers to permanently exiting homelessness.
3. **Criminal Justice**. Involvement in the criminal justice system, especially when such involvement results in a felony, can create ongoing challenges in obtaining jobs and housing.
4. **Behavioral Health**. People of color experience high rates of traumatic stress, mental health issues, and substance use. Behavioral health care systems are not responsive to the specific needs of people of color.
5. **Family Stabilization**. Multi-generational involvement in the child welfare and foster care systems often occur prior to and during experiences of homelessness, and people of color are often exposed to individual and community level violence.

Implications

This study is grounded in the lived experience of people of color experiencing homelessness, and it offers numerous insights for policy makers, researchers, organizational leaders, and community members as they work to address homelessness in ways that are comprehensive and racially equitable.

The demographics alone are shocking—the vast and disproportionate number of people in the homeless population in communities across the United States is a testament to the historic and persistent structural racism that exists in this country. Collective responses to homelessness must take such inequity into account.

Equitable strategies to address homelessness must include programmatic and systems level changes, and they must begin seriously to address homelessness prevention. It is not enough to move people of color out of homelessness if the systems are simply setting people up for a revolving door of substandard housing and housing instability. Efforts must begin to go upstream into other systems—criminal justice, child welfare, foster care, education, and healthcare—and implement solutions that stem the tide of homelessness at the point of inflow.

This brief report aims to present quantitative and qualitative findings from the SPARC study, examine what can be learned from these data, and begin crafting strategies to create a response to the homelessness crisis that is grounded in racial equity. Additional articles, reports, and other publications are forthcoming that will delve more deeply into specific insights gleaned from this project.

iCount Miami 2022

HIGHLIGHTS

About the iCount Miami:

- Each year Miami Homes For All, the University of Miami, The Homeless Trust, and The HOMY Collective: Helping Our Miami-Dade Youth partner to do the iCount Miami. This is our community's youth point-in-time census. The iCount Miami is directly after the general Point-In-Time count and lasts until the end of January. In 2022, it was from January 24 to January 31.
- The iCount Miami 2022 numbers are less compared to previous years due to the COVID-19 pandemic. In 2022, we surveyed over 329 youth experiencing homelessness. In 2022, engagement was lower and all strategies were implemented differently.
- The iCount is conducted all over the county through various magnet site partners (housing providers, service providers, libraries, parks, etc.) and youth leaders. All surveys were conducted over the phone, virtually, or in person.
- We raised awareness about the iCount through the leadership of our Youth Voice Action Council, partner agencies, social media, and news outlets. The following are some highlights. With these results, HOMY develops strategies to address youth homelessness in Miami-Dade County.

329 youth were counted as experiencing homelessness in Miami-Dade County!

We estimate that there may be 3,290 youth experiencing homelessness* under all definitions of youth homelessness**.

How old were they?

- **Unsheltered** youth are those living in places not meant for human habitation. This includes the street, sidewalks, or in a vehicle.
- **Sheltered** includes emergency shelter, transitional housing program, or were couch-surfing
- **Unstable** refers to youth experiencing housing insecurity but not involved in the systems involved. This includes couch surfing, group homes, and staying with a relative, etc.

Where did they sleep?

- 61% identified as Black or African-American
- 41% identified as Hispanic or Latinx

25% identified as LGBTQIA+

Their biggest barriers:

- Lack of transportation (40%)
- Did not know where to go for help (36%)
- Did not qualify for service (13%)

Regarding education + employment

- 38% were not in school
- 48% were unemployed

What is the main reason that they were on their own + experiencing housing struggles?

- Disagreement with parent(s)/legal guardian(s)
- They turned 18 and were asked to leave
- They left home to go to college or university
- They wanted to leave

Regarding foster care and families:

- 31% were placed in foster care
  - Of those, 68% said they left foster care and did not receive housing assistance
- 15% were pregnant/parenting
  - Of those, 56% have custody of their children

*This estimate is based on various reports describing the under count problem, including: Fleming, D. and P. Burns, Who Counts? Assessing Accuracy of the Homeless Count. 2017, Economic Roundtable: Los Angeles CA.

Thank you to our sponsors!

iCount Miami 2021

HIGHLIGHTS

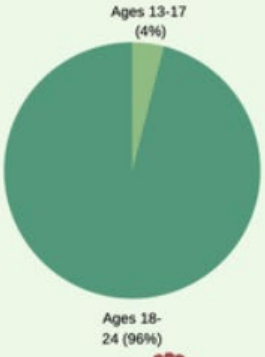
About the iCount Miami:

- Each year Miami Homes For All, the University of Miami, M-DCPS Project UP-START, The Homeless Trust, and The HOMY Collective: Helping Our Miami-Dade Youth partner to do the iCount Miami. This is our community's youth point-in-time census. The iCount Miami is directly after the general Point-In-Time count and lasts until the end of January. In 2021, it was from January 24 to January 31.
- The iCount Miami 2021 numbers are significantly less compared to previous years due to the COVID-19 pandemic. In 2020, we surveyed over 300 youth experiencing homelessness. In 2021, engagement was lower and all strategies were implemented differently.
- The iCount is conducted all over the county through various magnet site partners (housing providers, service providers, libraries, parks, etc.) and youth leaders. However, due to the pandemic, many of our partner agencies were closed. All surveys were conducted over the phone or virtually.
- We raised awareness about the iCount through the leadership of our Youth Voice Action Council, partner agencies, social media, and news outlets. The following are some highlights. With these results, HOMY develops strategies to address youth homelessness in Miami-Dade County.

206 youth were counted as experiencing homelessness in Miami-Dade County!

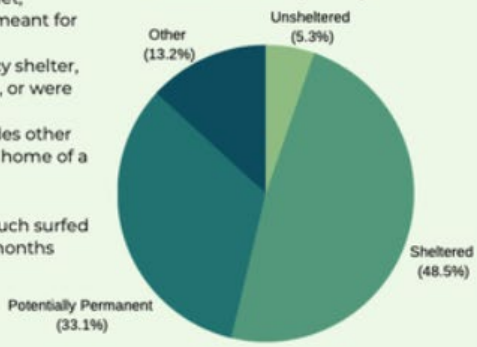
We estimate that there may be 2,000 youth experiencing homelessness* under all definitions of youth homelessness.**

How old were they?



- **Unsheltered** includes the street, sidewalk, or somewhere not meant for human habitation
- **Sheltered** includes emergency shelter, transitional housing program, or were couch-surfing
- **Potentially permanent** includes other relatives' home, group home, home of a significant other, or a dorm
- **44% (117)** of all youth survey participants said that they couch surfed at some point in the past 12 months

Where did they sleep?



25.8% identified as LGBTQIA+

- 65.2% identified as Black or African-American
- 35.4% identified as Hispanic or Latinx

Their biggest barriers:

- Did not know where to go for help
- Lack of transportation
- Did not have ID/personal documents

Regarding education + employment

- 51% were not in school
- 56.2% were unemployed

What is the main reason that they were on their own + experiencing housing struggles?

- Disagreement with parent(s)/legal guardian(s)
- There was physical, sexual, or mental abuse at home
- They turned 18 and were asked to leave
- They wanted to leave
- They left foster care/group home and had no place to go

Regarding foster care and families:

- 28.7% were placed in foster care
  - Of those, 70.7% said they left foster care and did not receive housing assistance
- 24.2% were pregnant/parenting
  - Of those, 65% have custody of their children

*This estimate is based on various reports describing the under count problem, including: Fleming, D. and P. Burns, Who Counts? Assessing Accuracy of the Homeless Count. 2017, Economic Roundtable: Los Angeles CA.

**There are various definitions of youth homelessness. As of January 2020, the Miami-Dade Continuum of Care adopted the Department of Housing & Urban Development's Category 3 definition. This means, they also recognize youth experiencing homelessness as per the Department of Education definition of youth homelessness.

Thank you to our sponsors!

iCount Miami 2020

HIGHLIGHTS

About the iCount Miami

Each year Miami Homes For All, the University of Miami, The Homeless Trust, and The HOMY Collective: Helping Our Miami-Dade Youth partner to do the iCount Miami. This is our community's youth point-in-time census. The iCount Miami is directly after the general Point-In-Time count and lasts until the end of January. In 2020, it was from January 24 to January 31.

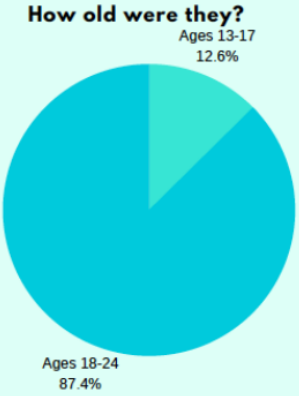
The iCount is conducted all over the county through various magnet site partners (housing providers, service providers, libraries, parks, etc.), youth leaders, and events. We raised awareness about the iCount through the leadership of our Youth Voice Action Council, partner agencies, social media, and news outlets. The following are some highlights. With these results HOMY develops strategies to address youth homelessness in Miami-Dade County.

336 young people are experiencing homelessness

We estimate that there may be 10x more -- up to 3,360 youth experiencing homelessness in Miami-Dade County!*

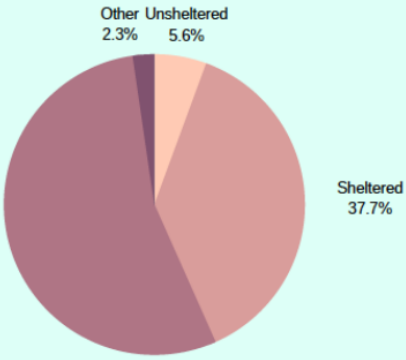
under all definitions of youth homelessness**

How old were they?



- **Unsheltered** includes the street, sidewalk, or somewhere not meant for human habitation
- **Sheltered** includes emergency shelter, transitional housing program, or were couch-surfing
- **Potentially permanent** includes other relatives' home, group home, home of a significant other, or a dorm
  - 32% youth said that they couch surfed at some point in the past 12 months

Where did they sleep?



15% identified as LGBTQIA+

- 50% identified as Black or African-American
- 42% identified as Hispanic or Latinx

Their biggest barriers:

- Lack of transportation
- Did not know where to go for help
- Did not have ID/personal documents

What is the main reason that they were on their own + experiencing housing struggles?

- Disagreement with parent(s)/legal guardian(s)
- Left home for college/university
- They wanted to leave
- They left foster care/group home and had no place to go
- There was physical, sexual, or mental abuse at home
- They turned 18 and were asked to leave

Regarding education + employment

- 21% were not in school
- 51% were unemployed

Regarding foster care and families:

- 15% were in foster care
  - 53% said they left foster care and did not receive housing assistance
- 14% were pregnant/parenting
  - 93% have custody of their children

*This estimate comes from various reports describing the under count problem, including: Fleming, D. and P. Burns, Who Counts? Assessing Accuracy of the Homeless Count. 2017, Economic Roundtable: Los Angeles CA.

**There are various definitions of youth homelessness. As of January 2020, the Miami-Dade Continuum of Care adopted the Department of Housing & Urban Development's Category 3 definition. This means, they also recognize youth experiencing homelessness as per the Department of Education definition of youth homelessness.

Thank you to our sponsors!

Miami Homes For All · University of Miami Engagement, Power, & Social Action Research Team EPSA · Miami-Dade County Homeless Trust · The Children's Trust · United Way of Miami-Dade · Educate Tomorrow · Winn-Dixie

JAN 25 - 31, 2019

iCOUNT MIAMI

MIAMI-DADE COUNTY'S YOUTH POINT-IN-TIME COUNT: CENSUS OF YOUTH EXPERIENCING HOMELESSNESS

WANT MORE INFO?
Miami Homes For All
(786) 584 - 6338
Homeless Trust
(305) 375 - 1490

Join the 2019 iCount team
audrey@miamihomesforall.org
www.icountmiami.com

714 SURVEYS

iCount Miami is a survey administered throughout the community by Youth Ambassadors, volunteers, and staff at locations that youth frequent.

287 were in shelters or on the street

390 were alone without a parent or legal guardian

323 were couch-surfing or doubling up

310 were unemployed and 227 were not in school

DIFFERENT DEFINITIONS

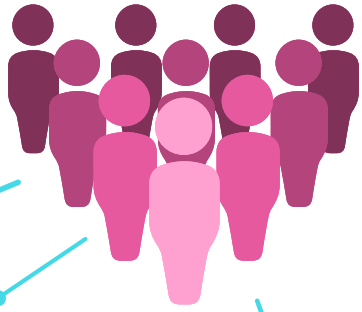
Youth experience housing instability in different ways:

- Living somewhere not meant for human habitation, like, parks, cars, or the street
- Fleeing from domestic violence
- At imminent risk of losing their residence
- Couch-surfing or doubling up, temporarily staying with multiple families

170 youth were in foster care or stayed in a group home

103 were pregnant and/or parenting youth.

462 youth were youth of color, of which, 245 were Hispanic or Latinx youth



44 youth were minors experiencing housing instability

227 youth were not in school

ALSO OF NOTE:

27% OF YOUTH EXPERIENCING HOUSING INSTABILITY IN MIAMI-DADE COUNTY ARE LGBTQ+

- **12 youth were told to leave home due to their sexual orientation or gender identity**
- **6 youth identified as transgender**
- **13 youth identified as genderqueer**
- **141 youth are queer, lesbian, or gay**

292

Youth cited the lack of transportation was a barrier in accessing resources and services.

209

Youth said they did not know where to go for help.

629

216

Youth shared that they have mental health issues; developmental disabilities; medical problems other than HIV/AIDS; or, drug or alcohol addiction issues.

Student Homelessness in America

School Years 2019-20 to 2021-22

Student Homelessness in America: School Years 2019-20 to 2021-22

National Center for Homeless Education
UNIVERSITY OF NORTH CAROLINA AT GREENSBORO

With funding from the U.S. Department of Education, the National Center for Homeless Education (NCHE) at the University of North Carolina at Greensboro provides critical information to those who seek to remove educational barriers and improve educational opportunities and outcomes for children and youth experiencing homelessness.

National Center for Homeless Education
5900 Summit Ave., #201
Browns Summit, NC 27214
NCHE Website: https://nche.ed.gov/

Student Homelessness in America

Overview

The purpose of Subtitle VII-B of the McKinney-Vento Homeless Assistance Act (McKinney-Vento Act) and funding provided by the American Rescue Plan (ARP-HCY)[1] is to ensure that students who experience homelessness have access to the education and other services they need to succeed academically. Each year, states submit information regarding the education of students who experienced homelessness to the U.S. Department of Education (ED) as a part of the ED*Facts* Initiative. Using the most recently available data, this brief examines the number of students who experienced homelessness, the type of housing they used when first identified by school districts, and subgroups of students who experienced homelessness. Additional information is provided on chronic absenteeism and the adjusted cohort graduation rates of students.[2] While the primary audiences for this report are state coordinators and local school district liaisons, the information in this report may be of interest to other administrators, policymakers, educators, and service providers.

Key findings in this brief include the following:

Enrollment Totals and Trends for Students Who Experienced Homelessness

- During School Year (SY) 2021-22, public schools identified 1,205,292 students who experienced homelessness. This represents 2.4% of all students enrolled in public schools (NCES, 2023).
- The total number of students who experienced homelessness in SY 2021-22 represents a 10% increase from SY 2020-21 and a 6% decrease from SY 2019-20. The impact of the COVID-19 pandemic may account for some of the variation, particularly for SYs 2019-20 and 2020-21.
- Between SYs 2004-05 and 2021-22, the number of students who experienced homelessness increased by 79%. The number of students identified as homeless increased by an average of 4% annually during that same period.
- The number of students who experienced homelessness was relatively evenly distributed across the grades, with 7% to 8% of homeless students enrolled in each grade starting with kindergarten. Grade 11 students and students who were aged three to five years old but not enrolled in kindergarten are exceptions at 6% and 3%, respectively. The split of students across grades has remained stable since SY 2013-14 (NCHE, 2017-2022).

[1] School Year (SY) 2021-22 was the first year of implementation of ARP-HCY for many LEAs.
[2] Additional data, including academic assessment data, are available at https://eddataexpress.ed.gov/.

Primary Nighttime Residence of Homeless Children and Youth at the Point of Identification

- The percentage of homeless students living in a particular type of housing remained relatively stable between SYs 2019-20 and 2021-22.
- In SY 2021-22, 76% of students who experienced homelessness lived in doubled-up situations, 11% lived in shelters/transitional housing, 9% stayed in hotels/motels, and 4% lived in unsheltered locations.

Demographic Subgroups of Students Who Experienced Homelessness

- Students with disabilities and English learners accounted for the largest two reported subgroups of students who experienced homelessness. These subgroups of students are also disproportionately represented among students who experienced homelessness. In the general population, the percentage of students with disabilities is 15%, whereas 20% of students who experienced homelessness were students with disabilities. Similarly, English learners make up 10% of the general population (Irwin et al., 2023), but 20% of students who experienced homelessness were English learners in SY 2021-22.[3]

Race and Ethnicity of Students Who Experienced Homelessness

- The largest subgroups of students by race and ethnicity included Hispanic or Latino students at 39%, followed by Black or African American students and White students at 25% each. Data for other racial and ethnic subgroups showed students with two or more races at 5%, Asian students at 2%, American Indian or Native Alaskan students at almost 2%, and Native Hawaiian or Pacific Islander students at less than 1%. With the exception of students who identified as Asian, students who experienced homelessness were disproportionately students of color compared to the overall student body.

Student Outcomes

- The four-year adjusted cohort graduation rate (ACGR) for students who experienced homelessness increased in nine states between SYs 2019-20 and 2020-21.
- The national four-year ACGR was 68.3% in SY 2021-22 for students who experienced homelessness.

[3] U.S. Department of Education, ED*Facts* file specification 118 (2023), SEA level.

Students Experiencing Homelessness and Educational Rights

The McKinney-Vento Act defines a student experiencing homelessness as one who lacks a fixed, regular, and adequate nighttime residence (42 U.S.C. Section 11434a(2), 2015). The McKinney-Vento Act requires public school districts to appoint a liaison to ensure the identification of students experiencing homelessness in coordination with other school personnel and community agencies (42 U.S.C. § 11432(g)(6)(A)(i)). It also outlines circumstances that fall under the definition of homelessness. While the list of circumstances described in the McKinney-Vento Act is not exhaustive, it helps liaisons determine which students are eligible for services under the law. Circumstances which meet the criteria of lacking fixed, regular, and adequate nighttime residence include:

- shared housing with others due to loss of housing, economic hardship, or a similar reason;
- hotels, motels, trailer parks, or camping grounds due to a lack of alternative, adequate housing;
- emergency or transitional shelters;
- public or private places not designed for humans to live; and
- cars, parks, bus or train stations, abandoned buildings, or substandard housing.

The definition also includes migratory students who are living in a situation that meets the homeless definition criteria (42 U.S.C. § 11434a(2)). Children and youth who are not in the physical custody of a parent or guardian are also eligible for services under the McKinney-Vento Act as unaccompanied youth if their housing meets the criteria for homelessness (42 U.S.C. § 11434a(6)).

Once identified, students have the right to remain in their school of origin or enroll in the local school where they are staying based on the student's best interest, receive transportation to the school of origin, receive free school meals, and receive educational and related supports under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA, 2015). The McKinney-Vento Act provides grants to state educational agencies, which make competitive subgrants to school districts to provide educationally related support services to students experiencing homelessness.[4]

Student Enrollment by State

States identified 1,205,292 students who experienced homelessness during SY 2021-22. Compared to the overall number of students enrolled in public schools, students who experienced homelessness accounted for 2.4% of enrolled students (NCES, 2023). The District of Columbia, the Bureau of Indian Education, and New York had the

[4] NCHE offers a number of resources and tools on implementing the McKinney-Vento Act, including webinars and issue briefs: https://nche.ed.gov/resources/.

highest rates of students who experienced homelessness at nearly 7% for the District of Columbia, and 5% for the Bureau of Indian Education and New York.

Table 1. Number of enrolled students who experienced homelessness by state with percent of all students, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12

State	Students experiencing homelessness SY 2019-20	Percent of all students SY 2019-20	Students experiencing homelessness SY 2020-21	Percent of all students SY 2020-21	Students experiencing homelessness SY 2021-22	Percent of all students SY 2021-22
United States[1]	**1,280,268**	2.5	**1,099,269**	**2.2**	**1,205,292**	2.4
Alabama	11,578	1.6	9,365	1.3	9,050	1.2
Alaska	3,126	2.4	2,578	2.0	3,092	2.4
Arizona[2]	17,386	1.5	13,920	1.3	18,040	1.6
Arkansas	13,336	2.7	11,871	2.4	13,718	2.8
Bureau of Indian Education	2,373	6.2	2,202	6.3	1,757	5.4
California	246,350	4.0	227,612	3.8	225,747	3.8
Colorado	20,821	2.3	15,176	1.7	16,540	1.9
Connecticut	4,183	0.8	3,310	0.7	3,979	0.8
Delaware	2,709	1.9	2,576	1.9	3,434	2.5
District of Columbia	6,332	7.0	5,026	5.6	5,871	6.6
Florida	79,357	2.8	62,971	2.3	77,203	2.7
Georgia	35,538	2.0	31,161	1.8	35,516	2.0
Hawaii	3,586	2.0	3,089	1.8	3,251	1.9
Idaho	7,835	2.5	7,358	2.4	8,428	2.7
Illinois	46,786	2.4	36,898	2.0	48,395	2.6
Indiana	17,324	1.6	15,373	1.5	16,334	1.6
Iowa	6,042	1.2	6,057	1.2	6,517	1.3
Kansas	7,650	1.5	5,632	1.2	6,688	1.4
Kentucky	21,620	3.1	18,697	2.8	21,034	3.2
Louisiana	15,533	2.2	11,771	1.7	17,375	2.5
Maine	2,302	1.3	2,142	1.2	3,087	1.8
Maryland	15,548	1.7	11,760	1.3	16,529	1.9
Massachusetts	22,648	2.4	19,954	2.2	21,388	2.3
Michigan	32,935	2.2	26,867	1.9	28,724	2.0
Minnesota	13,295	1.5	10,588	1.2	14,587	1.7
Mississippi[3]	7,973	1.7	7,754	1.8	5,556	1.3
Missouri	34,942	3.8	32,674	3.7	32,969	3.7
Montana	4,265	2.8	4,670	3.2	4,607	3.1
Nebraska	4,084	1.2	2,549	0.8	3,103	0.9
Nevada	18,277	3.7	15,119	3.1	16,476	3.4
New Hampshire	3,519	2.0	3,109	1.8	3,323	2.0
New Jersey	12,741	0.9	10,539	0.8	11,104	0.8
New Mexico	9,033	2.7	8,135	2.6	9,834	3.1
New York	143,329	5.3	126,343	4.8	133,578	5.2
North Carolina	27,073	1.7	22,682	1.5	28,631	1.9

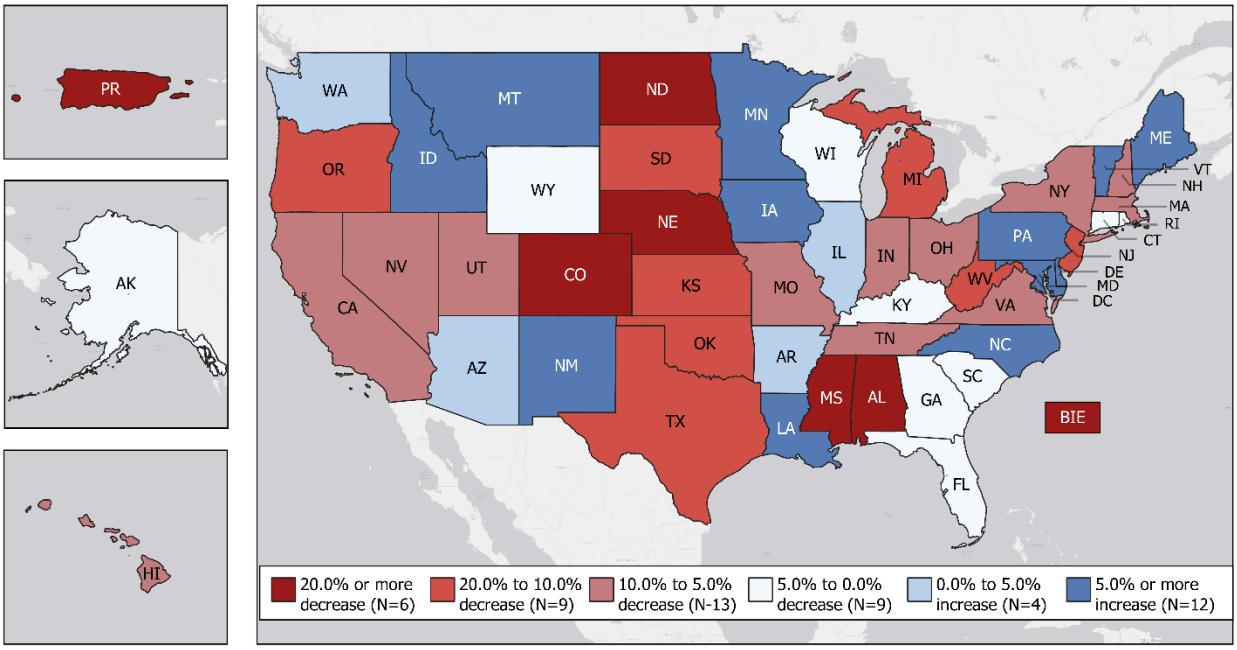
Table 1. Number of enrolled students who experienced homelessness by state with percent of all students, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12, continued

State	Students experiencing homelessness SY 2019-20	Percent of all students SY 2019-20	Students experiencing homelessness SY 2020-21	Percent of all students SY 2020-21	Students experiencing homelessness SY 2021-22	Percent of all students SY 2021-22
North Dakota	2,675	2.3	1,775	1.5	2,000	1.7
Ohio	30,060	1.8	24,699	1.5	27,333	1.6
Oklahoma	25,010	3.6	22,438	3.2	21,145	3.0
Oregon	22,336	3.7	18,485	3.3	18,475	3.3
Pennsylvania	31,876	1.8	27,235	1.6	34,043	2.0
Puerto Rico	4,058	1.4	2,424	0.9	2,661	1.0
Rhode Island	1,531	1.1	1,109	0.8	1,461	1.1
South Carolina	11,736	1.5	11,986	1.6	11,543	1.5
South Dakota	2,015	1.4	1,561	1.1	1,728	1.2
Tennessee	18,482	1.8	14,386	1.5	17,512	1.8
Texas	111,411	2.0	93,096	1.7	97,279	1.8
Utah	13,223	1.9	10,295	1.5	11,897	1.7
Vermont	883	1.0	1,006	1.2	1,312	1.6
Virginia	17,496	1.3	13,752	1.1	16,416	1.3
Washington	36,685	3.2	32,931	3.0	37,614	3.5
West Virginia	10,394	3.9	9,452	3.7	9,154	3.6
Wisconsin	17,221	2.0	13,450	1.6	16,487	2.0
Wyoming	1,747	1.8	1,661	1.8	1,734	1.9

[1] Enrolled students include those who were aged 3 through 5 but not in kindergarten, those enrolled in kindergarten through Grade 12, and those who are Ungraded. From SY 21-22, this table aligns with SEA education unit totals (EUT) reported via EDFacts and posted on ED Data Express (EDE). Please note that for past reporting years, previous NCHE reports may display somewhat different SEA totals because EUTs were not submitted, so NCHE aggregated age/grade totals for students experiencing homelessness.
[2] Arizona allowed LEAs to include students in more than one grade, resulting in duplicate counts during SY 2019-20.
[3] Mississippi does not include data on students who were identified as homeless but declined assistance from the schools (SYs 2018-19 and 2019-20).
NOTE: Any variation of state counts with ED Data Express (EDE) is because EDE uses SEA Education Unit Totals for homeless student enrollment. However, NCHE may use age/grade aggregate counts if they are higher, which occurs in subsequent report tables.
SOURCE: U.S. Department of Education, ED*Facts* file specification 118, SEA Level (2020, 2021, 2022); National Center for Education Statistics, Common Core of Data, *State nonfiscal public elementary/secondary education survey* (2020-21 v. 1a), SEA level.

Figure 1 displays the change in the number of students who experienced homelessness between SYs 2019-20 and 2021-22. Overall, 37 states showed a decrease in the number of students identified as homeless during this three-year period. By comparison, 49 states showed a decline during the previous three-year period (i.e., SYs 2018-19 to 2020-21), so fewer states are showing a decrease. Sixteen states identified more students in SY 2021-22 than SY 2019-20. In contrast, during the previous three-year period, only the Bureau of Indian Education, Mississippi, and Montana showed an increase in the number of students who experienced homelessness.

Figure 1. Percent change in enrolled students who experienced homelessness by state, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12

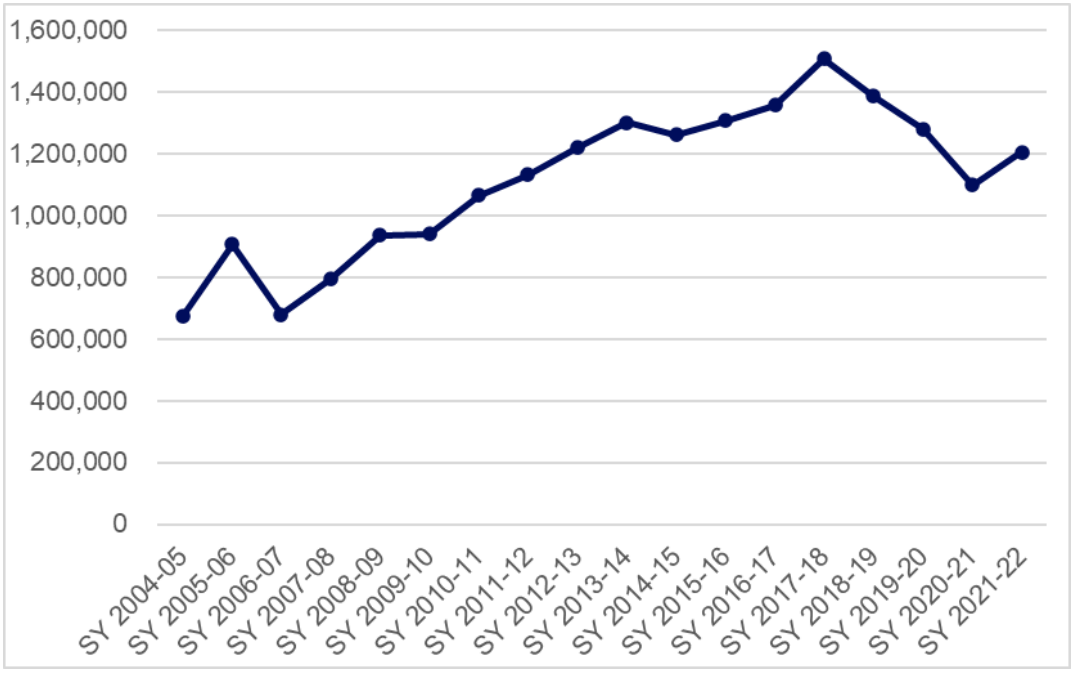


SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2023), SEA level.

Overall student enrollment decreased from 51,041,158 students in SY 2019-20 to 49,668,082 students in SY 2021-22 (NCES, 2022). This nearly 3% decrease in the overall number of students enrolled in public schools represents the largest single-year decline in school enrollment since 1943 (Irwin et al., 2022). Overall student enrollment dropped again in SY 2021-22 to 49,634,110 students (Irwin et al., 2023). Even as overall student enrollment has decreased, the percentage of students who experienced homelessness among all enrolled students remained relatively steady at 2.5% of all students in SY 2019-20 and 2.4% of all students in SY 2021-22.

Furthermore, during the 18 years in which these data have been collected, counts of students who experienced homelessness have increased steadily regardless of the overall well-being of the economy and other social impacts. Between SYs 2004-05 and 2021-22, the number of students who experienced homelessness increased by 79% overall or an average of 4% annually, as shown in Figure 2.

Figure 2. Enrolled students who experienced homelessness by state, SYs 2004-05 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12



SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2006-2023), SEA level.

Student Enrollment by Grade

The percentage of homeless students who were enrolled in each grade remained stable even as the number of students who experienced homelessness in a particular grade decreased. The number of students who experienced homelessness was relatively evenly distributed across the grades, with 7% to 8% of students who experienced homelessness enrolled in each grade starting with kindergarten. Grade 11 students and students who were aged three to five years old but not enrolled in kindergarten are exceptions at 6% and 3%, respectively. The split of students across grades has remained stable since at least SY 2013-14 (NCHE, 2017-2022).

Table 2. Number and percent change in enrolled students who experienced homelessness by grade, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12

Grade	SY 2019-20	SY 2020-21	SY 2021-22	Percent change SYs 2019-20 to 2021-22
Total[1]	**1,280,886**	**1,099,221**	**1,205,292**	**-5.9**
Age 3 through 5	51,170	30,241	38,879	-24.0
Kindergarten	98,673	79,227	93,439	-5.3
1st	101,289	86,564	88,093	-13.0
2nd	100,695	87,070	91,831	-8.8
3rd	100,548	86,694	92,394	-8.1

Table 2. Number and percent change in enrolled students who experienced homelessness by grade, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 12, continued

Grade	SY 2019-20	SY 2020-21	SY 2021-22	Percent change SYs 2019-20 to 2021-22
4th	99,151	85,670	91,563	-7.7
5th	98,709	84,969	90,425	-8.4
6th	97,076	82,582	88,239	-9.1
7th	91,151	80,542	86,497	-5.1
8th	87,402	79,089	87,528	0.1
9th	97,277	81,935	100,912	3.7
10th	83,289	77,106	82,844	-0.5
11th	75,762	69,979	76,969	1.6
12th	95,580	85,001	93,039	-2.7
Ungraded	3,114	2,552	2,640	-15.2

[1] The national totals in SY 2019-20 and SY 2020-21 differ slightly from those in Table 1 because the aggregation method is different. Rather than using EUTs, the totals reflect the SEA totals for each grade-level category.

NOTE: ED Data Express (EDE) contains data for 19 students in 13th grade across four states. Due to the inconsistent nature of reporting for 13th grade students, they are omitted from a separate line in this table.

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2022, 2023), SEA level.

Student Counts by Primary Nighttime Residence

States report data for the type of primary nighttime residence used by students at the point of identification by the school district liaison based on four categories: doubled-up, shelters and transitional housing, hotels or motels, and unsheltered. The *doubled-up* category includes students who are sharing housing with others due to loss of housing, economic hardship, or a similar reason. The *shelters and transitional housing* category includes all types of emergency and transitional shelters. The *hotels or motels* category includes students residing in hotels or motels due to a lack of alternative, adequate housing. The *unsheltered* category includes students who are staying in substandard housing, cars, parks, abandoned buildings, or other places not meant for humans to live. It also includes students staying in temporary trailers and campgrounds due to a lack of adequate, alternative housing. The percentage of homeless students living in a particular type of housing remained stable between SYs 2019-20 and 2021-22 despite changes in the number of students residing in each type of housing at the time they were identified. Seventy-six percent of students who experienced homelessness lived in doubled-up situations, 11% lived in shelters/transitional housing, 9% stayed in hotels/motels, and 4% lived in unsheltered locations.

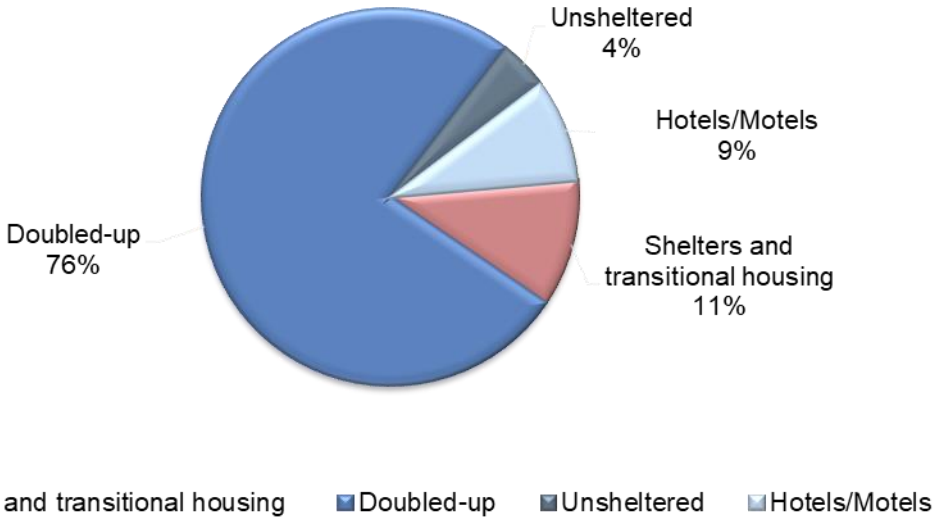
Table 3. Number of enrolled students who experienced homelessness and percent change by primary nighttime residence, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

Residence	SY 2019-20	SY 2020-21	SY 2021-22	Percent change SYs 2019-20 to 2021-22
Total[1]	**1,280,886**	**1,099,221**	**1,205,292**	**-5.8**
Doubled-up	991,300	844,245	915,578	-7.6
Shelters & transitional housing	146,769	119,934	131,051	-10.7
Hotels/Motels	88,663	85,422	106,621	20.3
Unsheltered	52,307	49,475	51,483	-1.6
Not Reported	1,847	145	559	-69.7

[1] Enrolled students include those aged 3 through 5 not in kindergarten, those enrolled in kindergarten through Grade 13, and those who were Ungraded. Grade 13 includes students who have successfully completed Grade 12 but stay in high school to participate in a bridge to higher education program.

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2022, 2023), SEA level.

Figure 3. Percentage of enrolled students who experienced homelessness by primary nighttime residence, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13



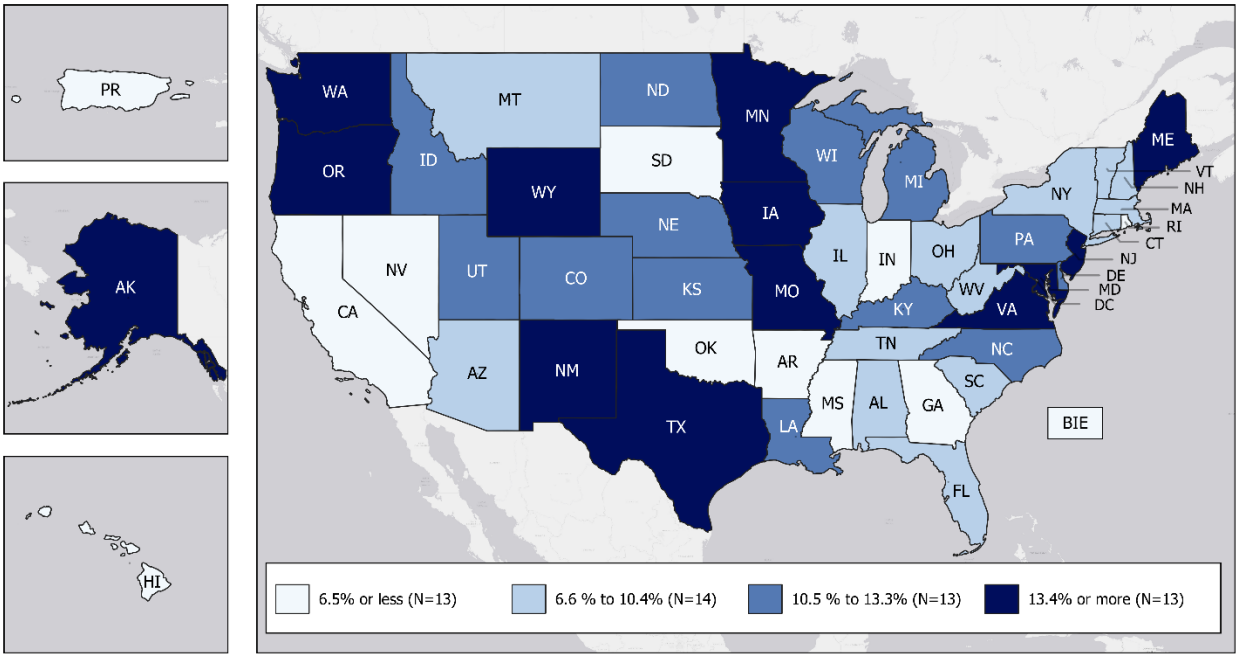
NOTE: Chart includes rounding to the nearest whole number. Grade 13 includes students who have successfully completed Grade 12 but stay in high school to participate in a bridge to higher education program.

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2022, 2023), SEA level.

Unaccompanied Homeless Youth

Unaccompanied homeless youth (UHY) are youth who are not in the physical custody of a parent or guardian and who meet the definition of homeless in the McKinney-Vento Act (42 U.S.C. § 11434a(6)). Students who are UHY can be of any age or grade. During all three school years included in this report, 9% of all students who experienced homelessness were unaccompanied. Ten states reported that 15% or more of the students who experienced homelessness were identified as UHY, while nine states reported less than 5% of its students were UHY.

Figure 4. Percent of children and youth experiencing homelessness who were unaccompanied, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13



NOTE: Grade 13 includes students who have successfully completed Grade 12 but stay in high school to participate in a bridge to higher education program.
SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2023), SEA level.

A lower percentage of UHY resided in shelters, transitional housing, and hotels or motels compared to the overall population of students who experienced homelessness. While 11% of students who experienced homelessness overall resided in shelters and transitional housing, 9% of UHY resided in shelters. Additionally, while 9% of students who experienced homelessness overall resided in hotels or motels, only 2% of UHY resided in hotels or motels. Four percent of both students who experienced homelessness overall and UHY lived in unsheltered situations. Finally, while 76% of students who experienced homelessness overall resided in doubled-up situations, 85% of UHY resided in doubled-up situations.

Table 4. Number and percent of enrolled UHY by primary nighttime residence, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

Residence	SY 2019-20	Percent of UHY	SY 2020-21	Percent of UHY	SY 2021-22	Percent of UHY	Percent change SYs 2019-20 to 2021-22
Total[1]	**112,822**	**100.0**	**94,363**	**100.0**	**110,664**	**100.0**	**-1.9**
Doubled-up	95,516	84.7	79,247	83.9	94,291	85.2	-1.3
Shelters & transitional housing	11,212	9.9	9,485	10.1	9,819	8.9	-12.4
Hotels/motels	1,578	1.4	1,711	1.8	2,035	1.8	29.0
Unsheltered	4,350	3.9	3,984	4.2	4,507	4.1	3.6
Not Reported	166	0.1	64	0.0	12	0.0	-92.8

[1] Enrolled students include those who were aged 3 through 5 but not enrolled in kindergarten, kindergarten through Grade 13, and Ungraded. Grade 13 includes students who have successfully completed Grade 12 but stay in high school to participate in a bridge to higher education program. The national totals in SY 2019-20 and SY 2020-21 differ slightly from those in Table 1 because the aggregation method is different. Rather than using EUTs, the totals reflect the SEA totals for each primary nighttime residence category.

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2022, 2023), SEA level.

Additional Subgroups of Enrolled Students Who Experienced Homelessness

In addition to reporting information about UHY, states report data on three additional subgroups of students who experienced homelessness, including students:

- who had disabilities;[5]
- who were English learners;[6] and
- who were migratory.[7]

Subgroups of students who experienced homelessness may belong to some, all, or none of the subgroups based on whether or not they meet the criteria for each subgroup. Between SYs 2019-20 and 2021-22, the percentage of students who were migratory and experienced homelessness remained stable at approximately 1% of all students who experienced homelessness. While the number of students with disabilities decreased by about 8,800, the percentage of students who experienced homelessness and also had a disability increased from 19% to 20%, indicating that the number of identified students decreased more than the number of students with disabilities who experienced homelessness. In contrast to other subgroups, English learners who experienced homelessness increased in both number and percentage. The increase of more than 18,000 students resulted in the percentage of students who were English learners and experienced homelessness changing from 17% in SY 2019-20 to 20% in SY 2021-22.

[5] As defined by the Individuals with Disabilities Education Act of 1975 (2004).
[6] As defined by the Elementary and Secondary Education Act of 1965 (2015).
[7] As defined by the Elementary and Secondary Education Act of 1965 (2015).

Students with disabilities and English learners not only accounted for the two largest subgroups of students who experienced homelessness, but the percentage of students who experienced homelessness and belonged to those subgroups was larger than the percentages of students in the general student body. Fifteen percent of students overall received special education services under the Individuals with Disabilities Education Act (IDEA) in SY 2020-21 versus 20% of students who experienced homelessness and were students with disabilities (Irwin et al., 2023). Similarly, while 10% of students overall were English learners, 18% of students who experienced homelessness were also English learners in SY 2020-21 (Irwin et al., 2022).

Table 5. Number and percent of students who experienced homelessness (SEH), by subgroup, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

Subgroup	Enrolled SEH[1] SY 2019-20	Percent of SEH SY 2019-20	Enrolled SEH SY 2020-21	Percent of SEH SY 2020-21	Enrolled SEH SY 2021-22	Percent of SEH SY 2021-22
Total[2]	**1,280,886**	**100.0**	**1,099,221**	**100.0**	**1,205,292**	**100.0**
Unaccompanied homeless youth	112,822	8.8	94,363	8.6	110,664	9.2
Migratory children/youth[3]	15,667	1.2	15,124	1.4	15,831	1.3
English learners	217,067	16.9	193,559	17.6	235,702	19.6
Children with disabilities (IDEA)	244,737	19.1	220,599	20.3	235,915	19.6

[1] SEH abbreviates "students who experienced homelessness."
[2] Counts include students aged 3 through 5 not in kindergarten, enrolled in kindergarten through Grade 13, and Ungraded. Grade 13 includes students who have successfully completed Grade 12 but stay in high school to participate in a bridge to higher education program. The national totals in SY 2019-20 and SY 2020-21 differ slightly from those in Table 1 because the aggregation method is different. Rather than using EUTs, the totals reflect the SEA totals for each subgroup.
[3] Connecticut, the District of Columbia, Puerto Rico, Rhode Island, and West Virginia do not operate migrant programs.
SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2021, 2022, 2023), SEA level.

Race and Ethnicity

Starting with SY 2019-20, states reported information to ED on the race and ethnicity of students who experienced homelessness. Although not all states could provide complete data that year, all states reported race and ethnicity data for SYs 2020-21 and 2021-22.

In SY 2021-22, Hispanic or Latino students made up the largest subgroup of students by race or ethnicity, at 39% of students who experienced homelessness. Both Black or African American and White students accounted for 25% of students who experienced homelessness. These same three subgroups were the largest based on race and ethnicity in SY 2019-20, but fewer Hispanic or Latino, Black or African American, and White students were identified in SY 2021-22 than in SY 2019-20 (NCHE, 2021).

Data for other race and ethnicity subgroups showed students with two or more races at 5%, Asian students at 2%, American Indian or Native Alaskan at 2%, and Native Hawaiian or Pacific Islander students at less than 1% of students who experienced homelessness. The number of students who experienced homelessness and were

identified as two or more races, American Indian or Alaskan Native, or Asian, increased in SY 2021-22 from SY 2019-20.

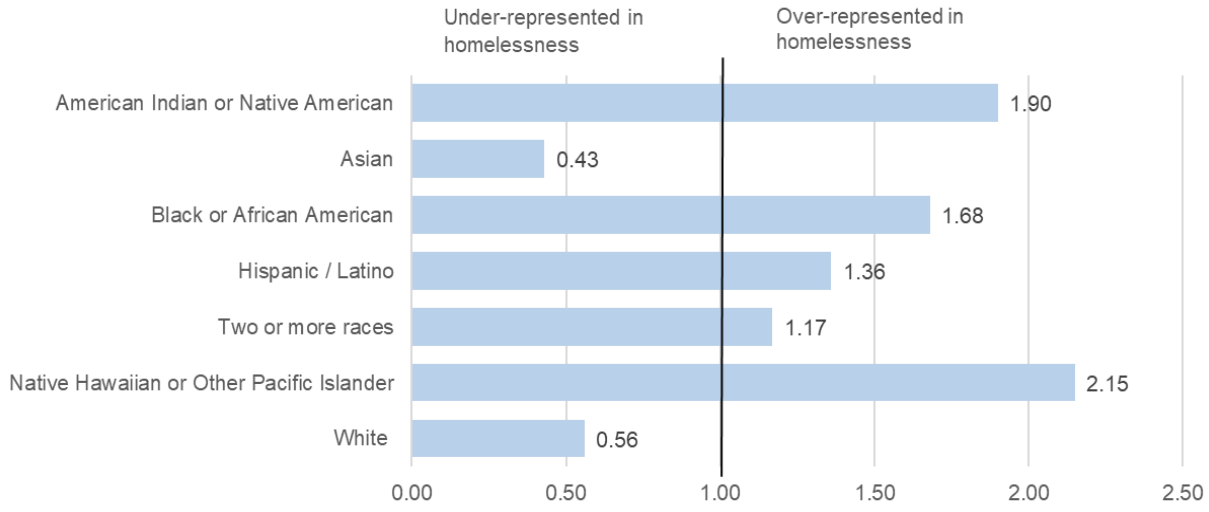
Table 6. Number of enrolled students by race, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

Race/ethnicity	Homeless students	Percent of homeless students	All students	Percent of all students
Total	**1,205,292**	**100.0**	**49,634,110**	**100.0**
Hispanic or Latino	473,309	39.3	14,262,450	28.7
Black or African American	306,381	25.4	7,381,626	14.9
White	300,830	25.0	22,325,966	45.0
Two or more races	64,967	5.4	2,328,808	4.7
Asian	27,640	2.3	2,657,629	5.4
American Indian or Alaskan Native	22,357	1.9	485,020	1.0
Native Hawaiian or other Pacific Islander	8,914	0.7	181,129	0.4
Not reported	894	0.1	11,482	0.0

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2023), SEA level; National Center for Education Statistics, Common Core of Data, *State nonfiscal public elementary/secondary education survey* (2021-22 v. 1a), SEA level.

Both Asian and White students were underrepresented among students who experienced homelessness. While White students accounted for 45% of all students enrolled in public schools, they represented 25% of students who experienced homelessness. Asian students accounted for 5% of students overall, but only 2% of students who experienced homelessness.

Figure 5. Ratio of students who experienced homelessness to total students by race, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13



SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2023), SEA level; National Center for Education Statistics, Common Core of Data, *State Nonfiscal Public Elementary/Secondary Education Survey* (2022-23 v.1a), SEA level.

Table 7. Number of enrolled students who experienced homelessness by race, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

State	American Indian or Alaska Native	Asian	Black or African American	Hispanic or Latino	Native Hawaiian or Other Pacific Islander	Two or more races	White
United States	**22,357**	**27,640**	**306,381**	**473,309**	**8,914**	**64,967**	**300,830**
Alabama	100	41	4,053	1,387	19	353	3,097
Alaska	904	55	160	251	360	569	793
Arizona	1,774	243	2,416	9,032	92	799	3,684
Arkansas	118	110	2,733	1,619	511	664	7,963
Bureau of Indian Education	1,757	—	—	—	—	—	—
California	1,788	8,986	17,811	165,064	1,271	8,788	22,039
Colorado	277	380	1,251	8,151	143	829	5,509
Connecticut	9	43	926	2,005	--	237	759
Delaware	19	16	1,870	491	5	283	750
District of Columbia	14	8	4,871	859	4	80	35
Florida	233	472	27,166	25,699	150	4,008	19,475
Georgia	88	182	19,061	4,714	39	2,153	9,279
Hawaii	4	314	21	614	1,807	381	110
Idaho	196	67	206	2,518	74	361	5,006
Illinois	140	414	22,287	10,310	35	2,135	13,074
Indiana	46	283	4,737	2,482	30	1,271	7,485
Iowa	92	108	1,598	1,391	196	537	2,595
Kansas	63	146	1,254	1,776	52	638	2,759
Kentucky	46	133	3,380	2,629	55	1,148	13,643
Louisiana	235	78	9,505	1,572	9	785	5,191
Maine	110	171	676	301	4	137	1,688
Maryland	53	129	7,938	4,627	15	1,071	2,696
Massachusetts	69	795	3,441	11,753	17	867	4,446
Michigan	388	183	8,009	3,365	45	2,196	14,538
Minnesota	1,202	471	5,151	2,079	23	2,515	3,146
Mississippi	16	24	3,250	422	5	299	1,540
Missouri	181	299	13,108	3,083	259	2,109	13,930
Montana	1,855	12	48	455	15	308	1,914
Nebraska	108	48	581	1,285	27	241	813
Nevada	188	263	4,734	6,346	362	1,455	3,128
New Hampshire	12	41	197	584	0	173	2,316
New Jersey	21	178	3,957	4,512	17	392	2,027
New Mexico	1,350	31	254	6,641	6	209	1,343
New York	1,258	8,104	38,627	69,153	384	2,666	13,386
North Carolina	235	166	14,721	5,250	53	1,985	6,221
North Dakota	554	14	283	298	20	167	664

Table 7. Number of enrolled students who experienced homelessness by race, SY 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13, continued

State	American Indian or Alaska Native	Asian	Black or African American	Hispanic or Latino	Native Hawaiian or Other Pacific Islander	Two or more races	White
Ohio	56	118	10,803	2,810	57	2,569	10,920
Oklahoma	2,541	387	3,214	4,833	126	3,076	6,968
Oregon	377	253	720	6,259	321	1,421	9,124
Pennsylvania	98	502	10,567	8,264	30	2,289	11,432
Puerto Rico	4	0	6	2,632	0	0	19
Rhode Island	32	11	226	423	3	143	623
South Carolina	17	44	4,385	1,938	8	848	4,303
South Dakota	760	6	118	307	5	181	351
Tennessee	35	100	5,303	3,069	40	963	8,002
Texas	336	1,247	24,381	52,772	194	3,293	15,056
Utah	754	177	330	4,594	511	562	4,969
Vermont	7	7	64	93	4	56	1,081
Virginia	52	518	6,371	4,608	21	1,175	3,671
Washington	995	838	3,400	13,806	1,456	3,598	13,521
West Virginia	4	30	508	382	4	448	7,778
Wisconsin	563	390	5,651	3,413	26	1,455	4,989
Wyoming	223	4	53	388	4	81	981

SOURCE: U.S. Department of Education, ED*Facts* file specification 118 (2023), SEA level.

Young Children Served by McKinney-Vento Subgrants

While most of this report focuses on students enrolled in public schools, states report additional information on the number of young children served by McKinney-Vento subgrants. These children may or may not be enrolled in public school as the ages of the students range from birth to five years old, but not yet enrolled in kindergarten. Data on school-aged children and youth served by the McKinney-Vento subgrants are not submitted to ED.

Table 8. Number of children from birth to age 5 but not enrolled in kindergarten served by McKinney-Vento subgrants: School Years 2019-20 through 2021-22

State	Served by subgrants SY 2019-20	Served by subgrants SY 2020-21	Served by subgrants SY 2021-22	Percentage change SYs 2017-18 to 2019-20
United States[1]	**64,788**	**48,694**	**58,433**	**-9.8**
Alabama	93	114	93	0.0
Alaska	52	16	26	-50.0
Arizona	129	86	99	-23.3
Arkansas	651	642	406	-37.6
Bureau of Indian Education	—	—	—	—
California	17,062	14,707	15,678	-8.1
Colorado	828	609	772	-6.8
Connecticut	78	52	93	19.2
Delaware	162	362	43	-73.5
District of Columbia	630	470	679	7.8
Florida	2,063	1,593	1,894	-8.2
Georgia	468	390	481	2.8
Hawaii	58	52	41	-29.3
Idaho	485	471	517	6.6
Illinois	2,985	1,610	2,580	-13.6
Indiana	109	107	115	5.5
Iowa	60	82	124	106.7
Kansas	650	329	504	-22.5
Kentucky	381	218	298	-21.8
Louisiana	666	331	734	10.2
Maine	19	32	22	15.8
Maryland	661	271	483	-26.9
Massachusetts	670	517	461	-31.2
Michigan	2,274	1,541	1,380	-39.3
Minnesota	440	380	395	-10.2
Mississippi	152	18	39	-74.3
Missouri	300	140	190	-36.7
Montana	436	337	359	-17.7
Nebraska	118	96	85	-28.0
Nevada	820	374	374	-54.4
New Hampshire	26	34	58	123.1
New Jersey	556	313	455	-18.2
New Mexico	194	583	762	292.8
New York	7,981	4,304	7,574	-5.1
North Carolina	824	468	911	10.6
North Dakota	136	177	74	-45.6
Ohio	2,430	1,946	1,946	-19.9
Oklahoma	423	308	281	33.6

Table 8. Number of children from birth to age 5 but not enrolled in kindergarten served by McKinney-Vento subgrants: School Years 2019-20 through 2021-22, continued

State	Served by subgrants SY 2019-20	Served by subgrants SY 2020-21	Served by subgrants SY 2021-22	Percentage change SYs 2017-18 to 2019-20
Oregon	896	622	271	-69.8
Pennsylvania	6,870	6,039	6,760	-1.6
Puerto Rico	34	11	34	0.0
Rhode Island	23	22	29	26.1
South Carolina	853	585	430	-49.6
South Dakota	305	251	308	-17.7
Tennessee	247	168	264	6.9
Texas	6,494	4,802	6,517	0.4
Utah	—	—	—	—
Vermont	26	20	30	15.4
Virginia	446	498	529	18.6
Washington	914	921	1,160	26.9
West Virginia	479	228	228	-52.4
Wisconsin	1,016	367	716	-29.5
Wyoming	115	80	131	13.9

[1] The United States total includes the Bureau of Indian Education, the District of Columbia, and Puerto Rico.
— Not available.
SOURCE: U.S. Department of Education, ED*Facts* file specification 194, SEA Level (2020, 2021, 2022).

Chronic Absenteeism

Research correlates chronic absenteeism with lower standardized test scores and grade point averages. Chronic absenteeism also correlates with higher rates of grade retention and dropping out (UEPC, 2012). Being present in school is a necessary precondition to receiving instruction and the needed supports to help master lessons. As a result, many states now use a measure of chronic absenteeism as a component in the accountability system to evaluate public schools each year. Additionally, states submit chronic absenteeism data annually through the ED*Facts* Initiative for students enrolled in kindergarten through Grade 12 and comparable ungraded students.

ED*Facts* data include students who miss 10% or more of the days in which they are expected to attend school, regardless of the reason the student missed school. Students who were enrolled in a school for at least 10 days are included in the count of students, while students enrolled in a state institution are included if they have been in attendance for 60 days.[8] Students also must participate in instruction or instruction-related activities for at least half of the school day to be considered in attendance. By basing the definition of chronic absenteeism on a percentage of the days a student is enrolled in school and the amount of time that a student participated in a school day, schools are able to consistently apply a standard for attendance that naturally accounts for students who attend more than one school during the year, intentionally planned half-days of school, and part-time.

[8] Examples of state institutions include department of health services schools and juvenile justice schools.

The first year for which the data are available using these criteria is SY 2016-17. Before this, the Office of Civil Rights (OCR) gathered data on chronic absenteeism using a different definition.[9] This report does not address the chronic absenteeism data collected previously by OCR and instead focuses on the newly available data.

Approximately 52%, or 632,129, of students who experienced homelessness were chronically absent during SY 2021-22. COVID-19 and its impact on school operations in SY 2019-20 and SY 2020-21 likely make it difficult to make comparisons over time. Idaho (21%), Missouri (34%), Tennessee (35%), Louisiana (36%), and Washington (36%) had the lowest rates of chronic absenteeism among students who experienced homelessness. The average state rate of students who were homeless and chronically absent was 55% in SY 2021-22. By comparison, the national average of chronically absent students for all students in public schools was 31%.

Table 9. Number and percent of students who experienced homelessness and chronic absenteeism, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13

	Students experiencing homelessness who were chronically absent					
	Number SY 2019-20	Percent SY 2019-20	Number SY 2020-21	Percent SY 2020-21	Number SY 2021-22	Percent SY 2021-22
United States	**351,702**	**33.1**	**459,972**	**41.9**	**632,129**	**51.7**
Alabama	2,643	22.8	2,542	27.1	4,085	44.8
Alaska	1,285	40.5	1,418	55.0	2,248	72.1
Arizona	6,777	37.8	8,144	58.5	11,015	59.5
Arkansas	4,895	36.7	3,304	27.8	5,534	40.3
Bureau of Indian Education	675	28.5	—	—	1,172	66.7
California	—	—	64,922	28.5	102,193	44.5
Colorado	10,132	47.3	8,787	57.9	9,723	54.1
Connecticut	1,439	33.5	1,716	51.8	2,042	50.5
Delaware	1,266	46.6	1,711	66.4	2,154	62.7
District of Columbia	2,462	37.8	2,330	46.4	3,622	59.1
Florida	35,645	44.6	38,689	61.4	49,841	63.5
Georgia	9,173	25	14,079	45.2	18,395	50.3
Hawaii	1,677	46.8	1,759	56.9	2,090	64.3
Idaho	1,582	19.5	1,983	27.0	1,839	20.9
Illinois	12,753	26.6	11,257	30.5	29,620	60.3
Indiana	5,205	29.6	8,073	52.5	9,691	58.3
Iowa	1,977	32.1	3,383	55.9	3,877	58.6
Kansas	2,697	32.8	2,339	41.5	3,531	49.7
Kentucky	5,345	24.1	9,682	51.8	8,802	41.0
Louisiana	3,487	22.1	5,050	42.9	6,164	35.5
Maine	971	41	1,149	48.8	1,590	50.6

[9] Information about data collected by OCR can be found at https://www2.ed.gov/about/offices/list/ocr/data.html. Furthermore, the 2015 CRDC data on chronic absenteeism is featured in a 2016 ED Data Story on *Chronic Absenteeism in the Nation's Schools*, available at https://www2.ed.gov/datastory/chronicabsenteeism.html.

Table 9. Number and percent of students who experienced homelessness and chronic absenteeism, SYs 2019-20 through 2021-22: Ungraded, 3- to 5-year-olds, and kindergarten to Grade 13, continued

	Students experiencing homelessness who were chronically absent					
State	Number SY 2019-20	Percent SY 2019-20	Number SY 2020-21	Percent SY 2020-21	Number SY 2021-22	Percent SY 2021-22
Maryland	7,775	49.2	6,866	58.4	11,291	67.4
Massachusetts[2]	7,361	30.7	9,025	45.2	11,552	52.1
Michigan	17,749	51.2	13,252	49.3	22,001	73.1
Minnesota	10,425	78.4	8,644	81.6	12,354	84.7
Mississippi	1,833	21	3,500	45.1	2,598	44.6
Missouri	7,697	22	6,561	20.1	11,432	33.8
Montana	1,570	36.3	2,514	53.8	3,092	65.4
Nebraska	1,735	42.2	1,332	52.3	1,762	56.3
Nevada	8,448	46.2	8,635	57.1	11,400	68.2
New Hampshire	1,549	44	1,918	61.7	2,331	69.0
New Jersey	2,753	21.6	3,660	34.7	4,342	38.2
New Mexico	2,934	32.5	3,691	46.5	4,683	47.6
New York	53,379	34.1	57,600	45.6	73,652	48.8
North Carolina	8,074	29.3	13,987	61.7	18,521	63.1
North Dakota	1,020	37.8	865	48.7	1,049	51.9
Ohio	11,488	38.4	14,124	57.2	16,783	61.6
Oklahoma	6,241	25	7,975	35.5	8,368	38.7
Oregon[2]	9,231	40.4	11,000	59.5	13,192	70.2
Pennsylvania	9,407	31.7	9,927	36.4	13,138	41.5
Puerto Rico	2,048	50.5	905	37.3	1,308	49.2
Rhode Island	849	54.8	728	65.6	1,016	69.0
South Carolina	3,008	25.3	5,109	47.9	5,946	50.6
South Dakota	803	39	1,034	66.2	1,184	68.0
Tennessee	4,108	21.4	5,091	35.4	6,540	35.4
Texas	23,812	20.8	32,783	35.2	48,540	48.7
Utah	3,066	23.2	4,084	39.7	6,031	50.7
Vermont	410	44.7	566	56.3	897	65.0
Virginia	4,917	27.7	4,627	33.6	6,422	38.6
Washington	12,380	32.8	16,583	50.4	13,880	35.8
West Virginia	3,596	34.6	2,431	25.7	4,345	47.5
Wisconsin	9,702	54.5	8,366	62.2	12,270	71.8
Wyoming	248	13.9	272	16.4	981	56.2

[1] From SY 21-22, the SEA counts in this table align with the counts posted on ED Data Express. Please note that in NCHE's previous report on chronic absenteeism, different national and SEA totals may be displayed because ED Data Express did not display SEA counts then, and NCHE aggregated SEA counts from school-level data. ED Data Express SEA counts reported through SY 21-22 are aggregated from privacy-protected school and LEA counts.
[2] Massachusetts and Oregon allow for non-binary gender, resulting in missing chronic absenteeism data.
-- Not available

NOTE: Due to altered school operations as a result of COVID-19, absenteeism data may be impacted by variability in school districts' capacity to track attendance accurately. This data may not accurately represent the actual chronic absenteeism numbers in SY 2019-20 and SY 2020-21.

SOURCE: U.S. Department of Education, ED Data Express SEA counts for file specification 195 (2023).

The percentage of students who experienced homelessness and chronic absenteeism represents an estimate; the actual percentage of students is likely lower. This is because chronic absenteeism data are only submitted at the school level, while enrollment data are submitted at the school district and state levels. As a result, a student who attended multiple schools may be included multiple times as a chronically absent student but only once as an enrolled student who was homeless. Starting with SY 2022-23, chronic absenteeism data will also be collected at the school district and state level, eliminating this issue.

In addition, the size of the population of students who experience homelessness is less stable than other groups of students. The number of students experiencing homelessness often increases or decreases more than other groups each year due to various economic, social, and environmental factors, while other groups of students remain relatively unchanged. For example, as a result of Hurricane Harvey in SY 2017-18, the number of students who experienced homelessness in Texas doubled compared to the previous year. During SY 2018-19, the number dropped to nearly the same level as in SY 2016-17. In contrast, the number of students enrolled in Texas public schools overall remained stable at 5.4 million in the fall of 2017 and the fall of 2018 (ED, 2021a and 2021b).

Adjusted Cohort Graduation Rate

Each state calculates an ACGR based on the number of students who graduate with a high school diploma within four years of when they first start high school.[10] A state may also adopt an extended-year ACGR (e.g., the number of students who graduate within five or six years of when they first start high school). Students who drop out of school or receive a GED/HiSET or other lesser credential may not be removed from a cohort (i.e., they are not counted as graduates but remain in the cohort). States may adjust their cohorts when a student has transferred out (and enrolls in a new school from which the student is expected to graduate), emigrated to another country, transferred to a prison or juvenile facility, or is deceased. To make the changes, the school must have written documentation that the student meets one of these criteria. The number of times a student has transferred and the time of year in which a student enrolls in school does not impact the student's status in the cohort. Even if a student is not on track to graduate on time, the student must be added to a cohort based on when the student enrolled in Grade 9 for the first time when they enroll in a new school.

All states must provide data on the number of students who graduated within four years for all students and each required subgroup, including students who experienced homelessness. Creating a cohort of students is straightforward for the general student population; all students are assigned to a cohort when they enroll in Grade 9 for the first time. When students transfer to a new school, they are still assigned to a cohort in the new school based on when they enrolled in Grade 9 for the first time. However, a student's status as homeless can change over time. In fact, it is common for students to experience multiple episodes of homelessness and to stay in

[10] Note that the ACGR includes students who receive a regular high school diploma or higher within four years or a student receiving an alternate diploma. It does not include a GED, certificate or completion or attendance, or similar lesser credential.

different nighttime living situations (Morton, Dworsky, and Samuels, 2017).[11] As a result, states must develop procedures to determine when a student will be included in the graduation rate cohorts for students who experience homelessness. For example, a common method used by states is to assign all students who experienced homelessness at any point during high school to the cohort. Another method used by some states is to include only those students who experienced homelessness during Grade 9 in the cohort.

As a result of differences across states in the definition of a high school diploma and how students are assigned to the cohort for students who experienced homelessness, caution should be used when comparing ACGRs across states.

The ACGR increased for students who were homeless in nine states (18%) between SYs 2019-20 and 2020-21. Overall, the ACGR for students who experienced homelessness decreased from 70% to 68% between SY 2019-20 and SY 2020-21. In nearly all states, the four-year ACGRs for all students are higher than those for economically disadvantaged students, which are higher than the four-year ACGR of students who experienced homelessness. This is true despite the fact that students experiencing homelessness most likely also meet the criteria for consideration as economically disadvantaged students and are included in the economically disadvantaged student ACGR. The four-year ACGR for students who experienced homelessness is higher than the four-year ACGR for students who were in foster care in all but four states.

[11] In the comprehensive prevalence survey completed by Morton, Dworsky, and Samuels (2017), half of youth experiencing homelessness within a year had experienced homelessness before.

Table 10. Four-year ACGR of students who experienced homelessness, were in foster care, were economically disadvantaged, and all students: School Years 2019-20 and 2020-21

State	Students who experienced homelessness		Students who were in foster care		Students who were economically disadvantaged		All students	
	SY 2019-20	SY 2020-21	SY 2019-20	SY 2020-21	SY 2019-20	SY 2020-21	SY 2019-20	SY 2020-21
Alabama	74	77	67	69	85.5	86.6	90.6	90.7
Alaska	58	51	54	45	72.3	69.9	79.1	78.2
Arizona	48.6	41.6	45	41	73.6	72.3	77.3	76.4
Arkansas	78	76	65	64	86.2	86.5	88.8	88.4
Bureau of Indian Education	73	—	—	—	65	—	65	—
California	69.6	67.8	58.2	55.7	81.2	80.4	84.3	83.6
Colorado	56.7	54	31	31	72.3	70.6	81.8	81.7
Connecticut	65	66	47	55	80.6	82.2	88.2	89.6
Delaware	73	57	74	45	82	70.8	89.0	80.5
District of Columbia	55	55	53	44	62	64	72.9	74.8
Florida	80.0	78.4	57	62	87.1	87.2	90.2	90.2
Georgia	65.8	63.6	—	45	79.6	80.6	83.8	83.7
Hawaii	69	69	69	67	81.5	81.1	86.2	86.0
Idaho	61	54	40	39	73.8	70.1	82.2	80.1
Illinois	—	—	—	—	—	—	—	—
Indiana	88	78	67	59	89.8	84.8	91.0	88.2
Iowa	76	65	64	62	85.6	82.3	91.9	90.2
Kansas	68	69	62	63	81.3	81.1	88.1	87.9
Kentucky	85	80	—	—	88.1	86.9	91.1	90.2
Louisiana	67	64	54	56	78.4	77.3	82.9	82.1
Maine	62	56	53	59	78.9	76.6	87.5	86.1
Maryland	66	65	50	57	79.2	79.0	86.8	87.2
Massachusetts	64	77	58	65	80.5	81.7	89.0	89.8
Michigan	60.0	54	40	40	71.6	68.8	82.1	80.5
Minnesota	50	45	—	37	71.6	70.3	83.8	83.3
Mississippi	75	71	65	60	85.9	90.0	87.7	88.4
Missouri	78	75	69	70	82.5	81.3	89.5	89.2
Montana	63	62	71	81	76.8	76.6	85.9	86.1
Nebraska	63	64	55	43	79.6	79.9	87.6	87.6
Nevada	75	73	50	43	79.1	79.0	82.6	81.3
New Hampshire[1]	58	58	43	45	74.9	72.2	88.1	87.1
New Jersey	74	68	55	47	85.0	82.1	91.0	88.5
New Mexico	59	62	39	37	71.7	72.3	76.9	76.6
New York	60.9	64.3	57	49	77.2	79.7	83.5	84.9
North Carolina	72.3	69.3	57	57	82.3	80.1	87.7	87.0
North Dakota	65	61	73	45	77	73	89.0	87.0
Ohio	58.6	57.4	57	59.4	74.4	75.4	84.4	85.3
Oklahoma	66	62	58	65	87.2	82.6	80.7	80.0

Table 10. Four-year ACGR of students who experienced homelessness, were in foster care, were economically disadvantaged, and all students: School Years 2019-20 and 2020-21, continued

State	Students experiencing homelessness SY 2019-20	Students experiencing homelessness SY 2020-21	Students in foster care SY 2019-20	Students in foster care SY 2020-21	Students who are economically disadvantaged SY 2019-20	Students who are economically disadvantaged SY 2020-21	All students SY 2019-20	All students SY 2020-21
Oregon	60.5	55.4	—	48	77.6	77.0	82.6	80.6
Pennsylvania	70	69	56	53	79.6	79.5	87.3	86.7
Puerto Rico	75	63	S	—	77.0	74.9	78.1	75.7
Rhode Island	57	61	57	49	75.9	76.3	83.6	83.7
South Carolina	64	62	44	38	76.2	75.5	82.2	83.3
South Dakota	53	40	43	38	69	69	84.3	82.9
Tennessee	78	73	60	54	84.4	82.1	90.4	89.3
Texas	—	79.2	—	61	—	86.7	—	90.0
Utah	—	—	—	—	78.3	77.8	88.2	88.1
Vermont	55	57	—	48	75	74	83.1	83.2
Virginia	62	65	54	55	82.5	83.3	88.8	89.8
Washington	69.4	—	50	—	75.2	—	83.1	—
West Virginia	82	77	—	63	87.1	85.4	92.1	91.1
Wisconsin	67	64	60	52	81.5	78.4	90.4	89.6
Wyoming	64	61	—	55	71.6	70.1	82.3	82.5

[1] New Hampshire counts only include those students who experienced homelessness by October 1.
— Not available.
S: Data suppressed to protect student privacy.
NOTE: Due to small student counts for graduating students in each group, many values in the table are rounded to the nearest whole number rather than the nearest tenth. The ACGR for groups with sufficiently large student counts is displayed rounded to the nearest tenth.
SOURCE: U.S. Department of Education, ED*Facts* file specification 118, SEA level (2022, 2023).

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Unhoused and Undercounted lead illustration. | *(Matt Manley for the Center for Public Integrity)*

DIVERSITY & EQUITY COMMUNITY & WRAPAROUND PROGRAMS FEDERAL POLICY AND REFORM

Hidden toll: Thousands of schools fail to count homeless students

Federal law promises homeless children an equal shot at education. Many fall through the cracks.

By Amy DiPierro, Center for Public Integrity and Corey Mitchell, Center for Public Integrity | November 15, 2022, 5:00am EST

REPUBLISH

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For months, Beth Petersen paid acquaintances to take her son to school — money she sorely needed.

They'd lost their apartment, her son bouncing between relatives and friends while she hotel-hopped. As hard as she tried to keep the 13-year-old at his school, they finally had to switch districts.

Under federal law, Petersen's son had a right to free transportation — and to remain in the school he attended at the time he lost permanent housing.

But no one told Petersen that.

"They should have been sending a bus for him. … He's missed so much school I can't believe it," Petersen said. "And school is stability."

Petersen was unaware of a federal law that would've allowed her son to remain in his district while they experienced houselessness. | (Zoë Meyers for the Center for Public Integrity)

A Center for Public Integrity analysis of district-level federal education data suggests roughly 300,000 students entitled to essential rights reserved for homeless students have slipped through the cracks, unidentified by the school districts mandated to help them.

Some 2,400 districts — from regions synonymous with economic hardship to big cities and prosperous suburbs — did not report having even one homeless student despite levels of financial need that make those figures improbable.

And many more districts are likely undercounting the number of homeless students they do identify. In nearly half of states, tallies of student homelessness bear no relationship with poverty, a sign of just how inconsistent the identification of kids with unstable housing can be.

The reasons include a federal law so little-known that people charged with implementing it often fail to follow the rules; nearly non-existent enforcement of the law by federal and state governments; and funding so meager that districts have little incentive to survey whether students have stable housing.

“It’s a largely invisible population,” said Barbara Duffield, executive director of SchoolHouse Connection, a Washington, D.C.-based nonprofit focused on homeless education. “The national conversation on homelessness is focused on single adults who are very visible in large urban areas. It is not focused on children, youth and families. It is not focused on education.”

Losing a home can be a critical turning point in a child’s life. That’s why schools are required to provide extra support.

Nationwide, homeless students graduate at lower rates than average, blunting their opportunities for stable jobs and increasing the risk of continued housing insecurity in adulthood.

The gap is often stark: In 18 states, graduation rates for students who experienced homelessness lagged more than 20 percentage points behind the overall rate in both 2017 and 2018.

The academic cost is not equally shared. Black and Latino children experience homelessness at disproportionate rates, Public Integrity’s analysis showed. Nationally, American Indian or Alaska Native students were also over-represented, as were students with disabilities.

Until recently, it was not clear from federal records which students were hit hardest by housing instability. Data disclosed in U.S. Department of Education reports revealed nothing about the race or ethnicity of students recognized by their school districts as homeless.

That changed in the 2019-20 school year when the federal government for the first time made public the race and ethnicity breakdowns for individual school districts. The pattern that emerged is a story of the country's sharp inequities, which put some families at far higher risk of homelessness than others.

The McKinney-Vento Homeless Assistance Act, first enacted in 1987 and expanded in 2001, requires that districts take specific actions to help unstably housed students complete school. Districts must waive enrollment requirements, such as immunization forms, that could keep kids out of the classroom. They must refer families to health care and housing services. And they must provide transportation so children can remain in the school they attended before they became homeless, even if they're now outside the attendance boundaries.

Earl Edwards, an assistant professor at Boston College's School of Education and Human Development, argues that McKinney-Vento was premised on an idea still pervasive in the policy debate on homelessness: Like a tornado that levels towns at random, housing misfortune has an equal chance of afflicting anyone, regardless of who they are.

In the 1980s, that rhetoric was a potent argument in favor of expanded federal support for homeless services. It was also wrong.

The McKinney-Vento Act started as an inadequate policy

The McKinney Act — later renamed — took shape at a time when the Reagan administration, if it acknowledged homeless people at all, regarded them as having chosen a life on urban skid rows, said Maria Foscarinis, who helped write the law.

Foscarinis, the founder of the National Homelessness Law Center, reframed homelessness as a broader structural problem impacting families, people of all races, even suburbanites. The outcome was a race-neutral solution, despite data at the time that went counter to that theory.

Foscarinis said the law's architects knew it was inadequate and planned to follow it with homeless prevention programs and housing. But they faced stiff resistance. It would have been better to include race-conscious language tracking the demographics of homeless children, she added, but doing so could have jeopardized the entire effort.

"Had we done that, it would have torpedoed the whole thing, which would have hurt Black communities even more," she said. "Then, we would have nothing at all."

Figures now available down to the school district show the consequences of homelessness policy that doesn't address race directly.

Nationally, Black students were 15% of public school enrollment but 27% of homeless students in 2019-20. In 36 states and Washington, D.C., the rate of homelessness among Black students was at least twice the rate of all other students that year.

Boston College's Edwards said the disconnect lies between the reality of housing inequality and the policies intended to address it.

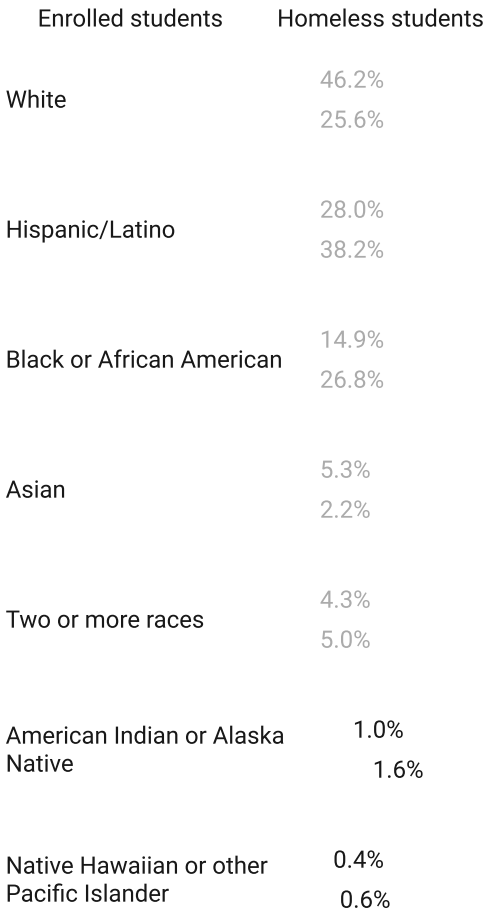
"If you don't recognize that Black people, during the time when you were establishing the actual policy, were disproportionately experiencing homelessness" — and that housing discrimination, urban renewal, blockbusting and other systemic factors pushing Black people out of housing were key drivers — "then you make a policy, and the policy doesn't have anything in place to prevent those things from persisting," Edwards said.

And under-identification of homelessness could impact Black students more than peers of other races.

In interviews with Black students who experienced homelessness while enrolled in Los Angeles County public school districts, Edwards found that many distrusted school personnel, who underestimated their academic ability, sent them to the principal's office for the smallest perceived slights, and threatened to call child protective services.

Race and homelessness in public schools

Black and Latino children were particularly over-represented among students identified as homeless nationwide in the 2019-20 school year, a reflection of the country's longstanding economic inequality.



Note: Data collection in 2019-20 was impacted by the Covid-19 pandemic. Includes the Bureau of Indian Education, the District of Columbia, and Puerto Rico. Some states did not provide complete data or provided counts that appeared to be in error.

Chart: Amy DiPierro, Center for Public Integrity • Source: National Center for Homeless Education analysis of Department of Education

As a result, Edwards found, many students went unidentified under McKinney-Vento because they feared that sharing their situation would only make things worse. They paid for transit passes out of pocket. They were forced out of their home districts. They navigated college admissions alone. If they were lucky, they found mentors outside of the school system.

Those experiences aren't an accident, Edwards argues, but the product of historical patterns. For example: "Calling child protective services would not be a severe threat to Black students if racial disparities within the institution itself were less pronounced."

Beneath the race-neutral veneer of McKinney-Vento, American Indian or Alaska Native students and Latino students also experience housing instability at higher rates than their peers in the majority of states.

In Capistrano Unified, a 44,000-student school district in southern California, the rate of homelessness among Latino students was roughly 24% in recent school years compared to about 2% among the rest of the student body.

"It's not anything that we've really done research on, so I wouldn't even be able to speculate" as to why, said Stacy Yogi, executive director of state and federal programs for the district.

Across California, Latino students are 56% of public school enrollment but 74% of homeless students.

A 2020 report from the University of California, Los Angeles, found that Black and Latino students who experience homelessness in the state are more than one and a half times as likely to be suspended from school as their non-homeless peers. They also miss more school days and are less prepared for college.

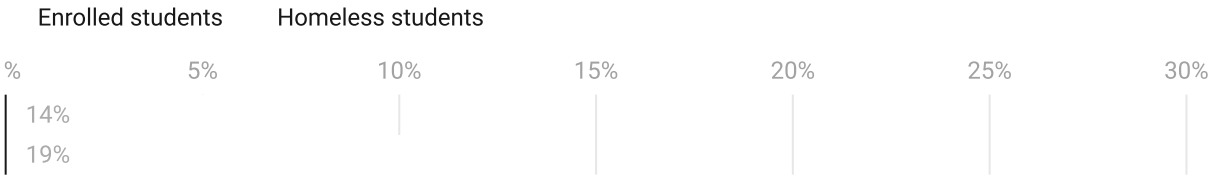
Public Integrity's analysis also found that students with disabilities have higher rates of homelessness than the rest of their peers in every state except Mississippi, suggesting that a significant share of students who already require additional support attend school uncertain of where they will sleep that night.

"They're experiencing trauma, and trauma has a pretty significant impact," said Darla Bardine, executive director of the National Network for Youth, a policy and advocacy group focused on youth homelessness. "You have to navigate an overly complicated system, and it's this competition for limited

resources where young people and children and families are just inherently disadvantaged."

Students with disabilities facing homelessness

Children with disabilities made up a greater share of homeless students in the 2019-20 school year than among the total student population.



Note: Data collection in 2019-20 was impacted by the Covid-19 pandemic.

EJ Valez, who has limited vision and requires large-print materials for reading and braille instruction, was among them.

Valez experienced housing instability for most of his youth, bouncing between homes and schools in the Bronx and Reading, Pennsylvania.

"I'm surprised I made it out of school," he said.

As a teenager, he said, he couch-surfed with friends and acquaintances after he became estranged from his family.

"Somehow I could retain information, but at no point in my childhood before full-on adulthood was there ever actual stability," said Valez, now a student at Albright College in Pennsylvania and a member of the National Network for Youth's National Youth Advisory Council. "No one cares about classes if we don't know where we're going to put our heads at night."

That, he said, is why extra help from schools is so critical.

Hidden homelessness in America

It might seem like common sense to assume that where more children experience poverty, more will experience homelessness, too.

But that's not what the data from school districts show. One of the most surprising patterns we found is that reported homelessness among students didn't mirror poverty in 24 states.

The finding runs counter to a growing body of empirical evidence supporting the connection between poverty and housing instability. Children born below 50% of the poverty line had a higher probability of eviction than higher-income peers, lower-income households are more likely to experience forced mobility, and renters who are forced to move end up in higher-poverty neighborhoods than renters who move voluntarily.

"There should be a stronger relationship between homelessness and poverty," said Jennifer Erb-Downward, director of housing stability programs and policy initiatives at the University of Michigan's Poverty Solutions, "and the fact that there's not supports that there's under-identification taking place."

Districts can tell teachers and staff to look for common signs of housing instability among students — fatigue, unmet health needs, marked changes in behavior. But those aren't always apparent.

If they're following the law, districts will survey families so they can self-identify as homeless. But some parents fear that acknowledging their housing struggles could prompt the government to take their kids away.

And then there's the gulf between what people commonly think of as homeless and the more expansive definition Congress uses for students. Living in a shelter, on the streets, in a vehicle or in a motel paid for by the government or a charitable organization are included, but that's not all.

More than 70% of children eligible for services were forced by economic need to move out of their homes — with or without their family — and in with relatives or friends, a practice that the U.S. Department of Education defines as "doubled up."

Research on doubled-up students shows there's good reason to provide them with help: They earned lower grades, for example, and were less likely to

graduate on time.

In Riverside County, California, Beth Petersen's son met the definition of doubled up for months, having lived temporarily with her sister and with friends.

Only Petersen didn't know it at the time.

Eventually, the two found housing outside the Temecula Valley Unified School District her son had attended for years. He switched districts, keeping up with the schoolwork but struggling to make friends.

Then a friend of Petersen's who works at a charter school told her that her son had the right to re-enroll in the Temecula Valley schools because the

McKinney-Vento law allows students to stay in the same school they attended before becoming homeless.

In early September, Petersen moved with her son into a two-bedroom apartment — still outside the district boundaries — paid for by a homeless prevention organization and shared with another family. Under federal law, her son is considered homeless because they live in transitional housing.

Petersen re-enrolled her son in Temecula Valley Unified but problems persisted. She said she pleaded with the district for weeks, trying to secure bus rides for the teenager. The district never responded to her emails, she said. He ultimately missed a month of classes, Petersen estimated, because she could not afford to continue paying acquaintances to transport her son every day.

The California Department of Education intervened in late September to ensure her son received transportation.

“This has been a teachable moment for the district and there are protocols and … barriers that have been removed to ensure the law is met,” an employee at the state agency wrote Petersen in an email.

A statement provided by Temecula Valley Unified in response to detailed questions regarding the Petersens said the district “does everything in its power to support our McKinney-Vento families experiencing homelessness” and has “highly responsive site and district teams,” but declined to comment further.

Experts think students like Petersen’s son are among those most likely to go unidentified and unassisted because their families don’t realize they qualify for help and schools too often fail to fill the information gap.

Petersen's son missed over a month of classes due to transportation issues with Temecula Valley Unified. | (Zoë Meyers for the Center for Public Integrity)

When that happens, "we're not even including most of our kids who are experiencing homelessness in the definition of who's homeless," said Charlotte Kinzley, supervisor of homeless and highly mobile services for the Minneapolis Public Schools. "So we haven't even named the problem."

In Minneapolis, the reported graduation rate for homeless students is at least 26 percentage points below the rate for all students. The district introduced programs in the last few years to help schools find more students experiencing housing instability and connect them with assistance. Lesson plans for teachers help high school students understand if they qualify.

Across Minnesota, districts generally reported homeless rates that loosely mirrored trends in free- or reduced-price lunch eligibility, suggesting some consistency in identification.

“It’s not a matter of getting the right count or getting the numbers,” said Melissa Winship, a Minneapolis schools counselor who works with students experiencing homelessness. “It’s a matter of those students and families having those supports and resources that they deserve.”

Data on student homelessness is collected by districts and funneled to the federal government by states, which can choose to leave out any districts that did not report having any homeless students. Our data adds those excluded districts back. We assume they identified no homeless students, since they’re not in federal data.

Our analysis focused on non-charter districts in the 2018-19 and 2019-20 school years. In addition to comparing poverty and reported homelessness, we applied a common benchmark used by education researchers and some public education officials — that one of every 20 students eligible for free- or reduced-price lunches experience homelessness under the federal definition.

In each school year we analyzed, more than 8,000 districts did not meet the one-in-20 guideline.

DeSoto County, Mississippi, for instance, identified fewer than 300 homeless students, according to state records Public Integrity reviewed. Its share of students eligible for free- or reduced-price lunches suggests the district has three times the number it reported.

That’s not the only reason to suspect an undercount. In 2018, local landlords filed more than 4,000 eviction cases, according to an estimate from Princeton University’s Eviction Lab.

By comparison, Mississippi’s Vicksburg Warren School District identified about as many homeless students as DeSoto despite having less than half as many children eligible for free- or reduced-price lunches.

The DeSoto County schools did not respond to requests for comment.

It's possible that some school districts genuinely have fewer homeless students than this benchmark predicts. But multiple researchers told us that they see the one-in-20 threshold as a conservative estimate.

J.J. Cutuli, a senior research scientist at Nemours Children's Health System, said the analysis bolsters the anecdotal experiences of school district staff, shelter personnel, and people who've lived through periods of homelessness.

"You're giving us a clue as to the magnitude of this problem. And that's really the important part here," he said.

The University of Michigan's Erb-Downward said the reason numbers are critical is because "we, somehow, as a society, have agreed that it is OK for the level of poverty and instability that children experience, from a housing perspective, to exist."

"If we don't actively track that, and have a conversation about what the level [of homelessness] really is, I don't think we're being forced to actually look at that decision that we've made societally," she said. "And we're not really being forced to say, 'Is this actually what makes sense? Is this actually what we want?'"

Why tracking homeless children in America is an 'uphill battle'

The federal government, state education departments, and families have few options to hold districts accountable if they fail to properly identify or provide assistance for students experiencing homelessness.

The U.S. Department of Education delegates enforcement to states. States where school districts fail to follow the law are subject to increased monitoring, but the federal agency would not say how often that happens. A spokesman said only that the agency "engages in monitoring and compliance activities that can include investigating alleged non-compliance."

Public Integrity reviewed dozens of lawsuits in which families and advocacy groups alleged that school districts denied students rights that are guaranteed

under the federal McKinney-Vento law.

Families experiencing homelessness have sometimes prevailed in their standoffs with education agencies, winning reforms like agreements to train school personnel in the law and, in one case, a toll-free number for parents and children to contact with questions about their rights.

“There’s not really a ton of capacity for actually investigating and dealing with these complaints,” said Katie Meyer Scott, senior youth attorney at the National Homelessness Law Center. “We have a problem where there’s not necessarily an investment in enforcement at either the federal or state level.”

As an extreme last resort, the U.S. Department of Education can cut funding — a step officials are loath to take because that would ultimately harm the very students the agency wanted to help. The agency said it has never penalized a state in this manner.

A 2014 investigation by the Government Accountability Office found that eight of the 20 school districts its staff interviewed acknowledged they had problems identifying homeless students. The watchdog agency found that the U.S. Department of Education had “no plan to ensure adequate oversight of all states,” with similar gaps in state monitoring of school districts.

State audits in California, Washington, and New York have also made the case that many school districts fail to identify a significant number of students who qualify for the rights guaranteed under federal law. Advocacy groups and researchers, too, have surfaced examples.

In Michigan, state Department of Education guidelines call for an investigation if school districts identify fewer than 10% of low-income students as homeless. Erb-Downward found that all but a handful of Detroit schools fell below this threshold in the 2017-18 school year.

Public Integrity’s analysis points to similar problems. Detroit’s public school district, the largest district in the state, identified 255 fewer homeless students

than the Kalamazoo Public Schools in 2018-19, despite having four times as many students and a much higher poverty rate.

Detroit school superintendent Nikolai Vitti said in a statement that the district's efforts to improve in recent years include adding full-time staff to its homeless student office, a residency questionnaire with its student enrollment form, referral systems, and public information about available services.

Homeless student numbers have tripled in the past several years, Vitti said. But, he added, "We are aware there is still an undercount."

Detroit's public school district, under Superintendent Vitti, have sought to improve its count of students experiencing homelessness. | (Nic Antaya for Chalkbeat)

A statewide review this year identified 120 Michigan school districts, roughly 20%, in need of additional monitoring, department spokesman Martin Ackley said. The state is asking those districts to provide evidence that they are in compliance with federal law.

The state expects to finish the reviews this winter and will provide technical support to districts struggling to meet federal requirements.

Districts in other parts of the country willing to explain likely undercounts offer a variety of reasons.

In the Chester-Upland School District outside of Philadelphia, interim homeless liaison Dana Bowser said many families consult district staff as a last resort when they can't find a solution to their housing troubles on their own. Language barriers make some parents reluctant to come forward, she added.

Florida's Broward County Public Schools described struggles to overcome limited funding, stigma, and fear of immigration services as "skyrocketing home prices and lack of regulation around rental fees have created an unfortunate climate in which more individuals and families are facing homelessness, including middle-class income families."

And in the Yuma Union High School District along Arizona's borders with both California and Mexico, where our benchmark predicted more than five times the number of homeless students than was reported in the 2019-20 school year, school officials said they do not report a child as homeless if they do not apply for and receive services under McKinney-Vento. The National Center for Homeless Education advises officials to count enrolled homeless children and youth even if they decline services available to them.

In Oklahoma, hundreds of districts report that no students experience homelessness. Tammy Smith, who oversees the state's homeless student programs, hears a common refrain from school leaders when she asks why.

"They tell me, 'We're going to take care of all of our students, whether we identify them as homeless or not,'" Smith said. "I remind them it's federal law, but it's kind of [an] uphill battle."

Leaving homeless children out of official records is a problem even if a district does manage to support them without properly counting them, said Amanda

Peterson, the director of educational improvement and support at the North Dakota Department of Public Instruction.

“If we are not able to tell the story, we’re not able to show that there’s discrepancies in the graduation rate, then what ends up happening is that it’s easy for legislators, community members, others to just close their eyes to the issue and just say, ‘Well, if it’s not reported, it doesn’t exist, and therefore we don’t need to worry about it,’” she said. “There’s harm if we just sort of push it under the rug.”

Yuma Union High School District does not count students as homeless if their family doesn’t apply for services under McKinney-Vento. | (David McNew / Getty Images)

‘Not enough money’ to support homeless students

Federal programs provide school districts little financial incentive to survey students’ housing situations more thoroughly. Money to serve these vulnerable children is limited and does not increase automatically as districts identify more of them, Public Integrity found.

Instead, the U.S. Department of Education awards funds to states using a formula that factors in poverty rates. States use their share to award competitive grants to districts.

Calling them paltry is an understatement.

The funding amounted to about $60 per identified homeless student nationwide before the pandemic. One state received less than $30 per student.

That's a fraction of what school districts actually spend to support homeless students, according to a recent study by the Learning Policy Institute, a nonpartisan research group. The four districts profiled by LPI spent between $128 and $556 per homeless student identified. In two of those districts, McKinney-Vento subgrants accounted for less than 14 cents on every dollar the district spent on homeless education programs.

Big need, little federal money

Nationally, federal funding for schools to assist homeless students as required by law amounted to just $60.12 per homeless student identified in the 2018-19 school year. Some states received far less.

Search in table

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State	Funding per homeless student
Washington	$29.44
Utah	$30.48
Oregon	$32.14
Missouri	$37.47
Nevada	$37.47
Colorado	$37.84
California	$38.90
Idaho	$39.93
District of Columbia	$40.03
Oklahoma	$42.94

Alabama's homeless count includes only students who were homeless on the last day of school. New Hampshire's homeless count includes only students identified by October 1, 2018.

And that's the districts awarded federal grants. Most get nothing.

Until a temporary funding influx during the pandemic, only one in four districts nationwide received dedicated funding. Washington state, which got the lowest amount in the 2018 fiscal year at $29 per identified student, passed a law in 2016 to provide additional support and resources.

“I would argue that a state like Washington has better identification, but it’s not reflected in how the feds dole out the money from McKinney-Vento,” said Duffield of SchoolHouse Connection.

Even in states that receive hundreds of dollars per student, the money does not stretch far, experts said. And it’s definitely not enough to provide long-term assistance for students without stable housing.

One sign of its inadequacy: Many districts don’t even bother applying for the federal money. In Oklahoma, just 25 of the state’s 509 districts requested funds.

Smith, who oversees the state’s homeless student programs, urges districts to apply. She said superintendents tell her, “There’s not a monetary benefit for us to identify them. So that’s not where we’re spending our time.”

In 2021, the American Rescue Plan made $800 million available to states and districts to identify and support homeless students, some of whom became disconnected from schools after the COVID-19 closures of 2020. The historic funding influx was seven times the annual budget awarded to schools to support their homeless students in 2022, making federal funds available to districts that had not previously received money.

In Wayne County, Michigan, where Detroit is located, the additional funding was sorely needed, said Steven Ezikian, the deputy superintendent of the Wayne County Regional Educational Service Agency, which helps train local districts to identify and support students experiencing homelessness.

“McKinney-Vento does not provide nearly enough funding,” he said. “Frankly, there’s just not enough money for them to do all the work for the amount of kids that we have.”

The traditional level of funding to support homelessness has left many districts struggling to fulfill the law's requirements.

"There [are] more and more students in crisis and the districts are not really getting more and more resources to help," said Scott, the senior youth attorney with the National Homelessness Law Center. "It comes down to resources rather than any kind of bad intent. The lack of investment in our schools over time is obviously hitting homeless students even harder."

In April, 92 members of the U.S. House of Representatives signed a "Dear Colleague" letter, urging the chairwoman and ranking member of the House Education Committee to renew the $800 million in funding, which represents 1% of the federal education budget, for the fiscal year that started Oct. 1. It would be money well spent, they argued.

"Investing in a young person's life will enable them to avoid chronic homelessness, intergenerational cycles of poverty, and pervasive instances of trauma," the letter read.

Budget bills from both chambers of Congress requested boosts in the program budget that are far short of what the House members requested. Federal budget negotiations will likely resume in December.

Temecula Valley Unified, the district Beth Petersen's son attends, received $56,000 to serve homeless students through the American Rescue Plan — about $470 per homeless student identified. District staff did not respond to questions regarding funding for homeless education programs. State financial records for the several years before the American Rescue Plan show the district received nothing.

Petersen watches from her apartment steps as her son leaves for the school bus. | (Zoë Meyers for the Center for Public Integrity)

Early on a Monday morning in October, Petersen sat at the kitchen table in her shared apartment, applying makeup under the glare of a bowl-shaped ceiling light. Her son emerged from the bathroom, barefoot but otherwise dressed for school. Petersen peered around the corner. Did he want anything for breakfast? He shrugged. No, he was fine.

But then he remembered an assignment that was due: a photo with his mom clearing him to attend a sexual education course. He stooped beside her and angled his laptop for a selfie. Beth could hardly remember the last time she needed to review any of his assignments. He was always a diligent student, even these last few months.

“Do not miss the bus coming home or we will be up a creek,” she said as the pair walked outside, the air crisp as morning haze yielded to blue sky.

At 7:02 a.m., a yellow school bus turned the corner. It slowed to a stop before them, the fruits of Petersen's long struggle to make the promise of the McKinney-Vento law a reality.

The doors opened, and her son was on his way.

Chalkbeat journalist Lori Higgins contributed to this article.

Amy DiPierro and Corey Mitchell are journalists with the Center for Public Integrity, a nonprofit newsroom that investigates inequality.

About our analysis

Public Integrity used a statistical modeling technique called simple linear regression to measure the strength of the association between the percent of students identified as homeless and, separately, three measures used to approximate the incidence of economic disadvantage or poverty:

- the percent of students eligible for free- or reduced-price meals
- the percent of school-age children under the poverty line
- the percent of school-age children in households that are under 50% of the poverty line.

We used federal data aggregated to the level of school districts and similar educational agencies, composing separate models by school year and state. We fit models for each state and the District of Columbia where there was sufficient data in the 2018-19 and 2019-20 school years.

We considered that a model showed a link between a variable we tested and homelessness if the model accounted for at least 20% of the variation in rates of homelessness and if the probability of coincidence driving results at least as extreme was relatively small. Twenty-four states failed this test on each of the three measures of economic disadvantage.

We assumed districts not included in federal data identified no homeless students. Districts may occasionally be left out in error. But we think our count is conservative in another way. That's because there are additional districts that

specifically told the Department of Education they have no homeless students, but the agency categorized them with districts reporting a low number of students and suppressed those figures.

SERVING OUR YOUTH 2015:

The Needs and Experiences of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth Experiencing Homelessness

Soon Kyu Choi
Bianca D.M. Wilson
Jama Shelton
Gary Gates

June 2015

The Palette Fund
TRUE COLORS FUND
the Williams INSTITUTE

EXECUTIVE SUMMARY

This report summarizes findings from the 2014 LGBTQ Homeless Youth Provider Survey, a survey of 138 youth homelessness human service agency providers conducted from March 2014 through June 2014 designed to better understand homelessness among LGBTQ youth. This report updates a similar report based on a survey conducted in 2011 (Durso & Gates, 2012). This new survey was designed to obtain greater detail on the similar and distinct experiences of sexual minority (lesbian, gay, bisexual, and questioning) and gender minority (transgender) youth experiencing homelessness. Recruitment was focused on agencies whose primary purpose is the provision of services to youth experiencing homelessness.

Similar to findings from the previous survey, a majority of providers of homeless youth services reported working with LGBTQ youth.

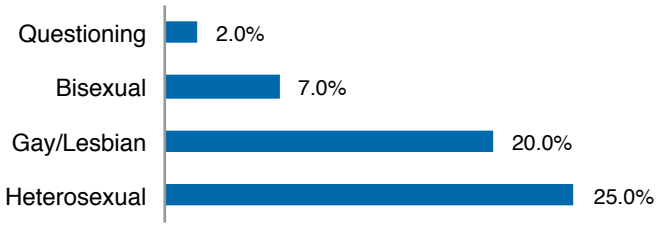
- Estimates of the percent of LGBTQ youth accessing their services indicate overrepresentation of sexual and gender minority youth among those experiencing homelessness. Of youth accessing their services, providers reported a median of 20% identify as gay or lesbian, 7% identify as bisexual, and 2% identify as questioning their sexuality. In terms of gender identity, 2% identify as transgender female, 1% identify as transgender male, and 1% identify as gender queer.[1]

- Youth of color were also reported to be disproportionately overrepresented among their LGBTQ clients accessing homelessness services. Respondents reported a median 31% of their LGBTQ clients identifying as African American/Black, 14% Latino(a)/Hispanic, 1% Native American, and 1% Asian/Pacific Islander.

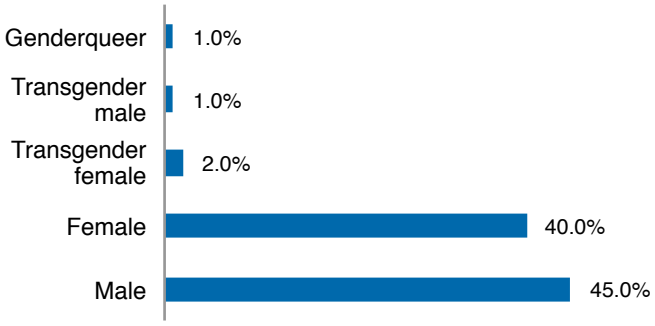
- Agency staff reported average increases in the proportion of LGBTQ youth they served over the past 10 years, and this change is higher for transgender youth.

- LGBTQ youth accessing these homelessness services were reported to have been homeless longer and have more mental and physical health problems than non-LGBTQ youth.

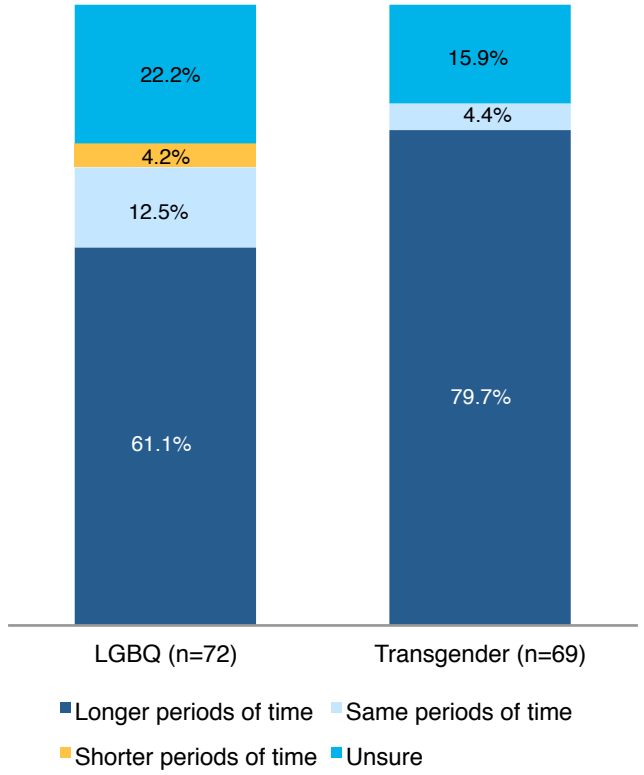
MEDIAN % OF YOUTH EXPERIENCING HOMELESSNESS BY SEXUAL ORIENTATION AS REPORTED BY PROVIDERS (N=83)



MEDIAN % OF YOUTH EXPERIENCING HOMELESSNESS BY GENDER IDENTITY AS REPORTED BY PROVIDERS (N=83)



DURATION OF HOMELESSNESS OF LGBTQ YOUTH COMPARED TO NON-LGBTQ YOUTH AS REPORTED BY PROVIDERS

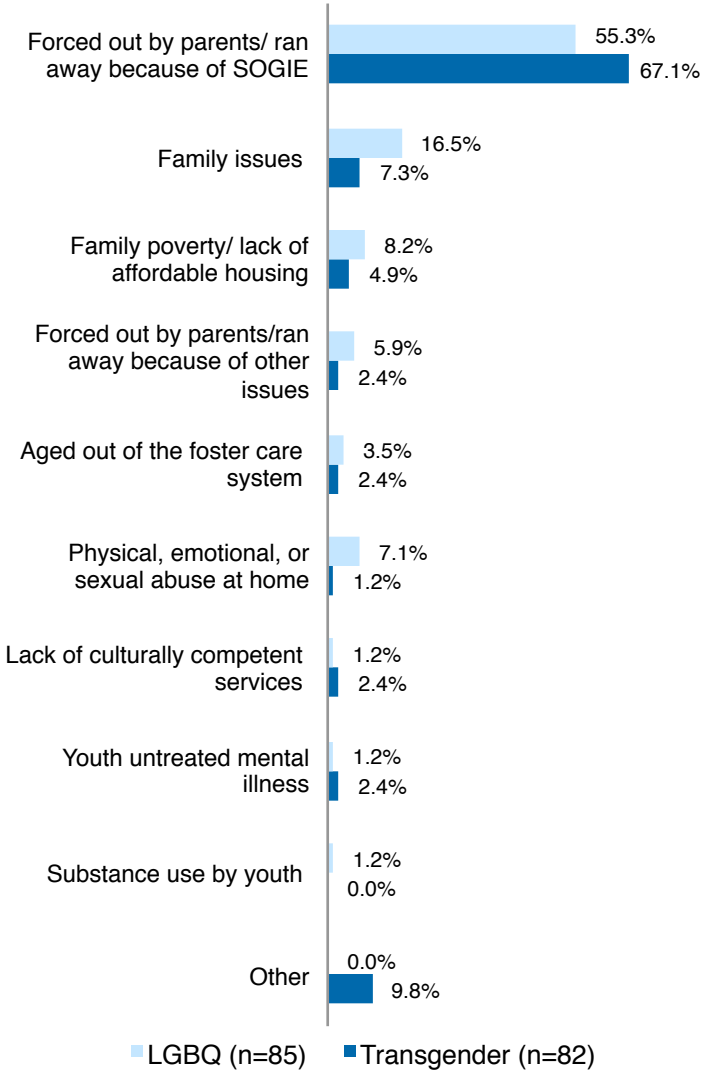


1 The median percent is reported to account for the wide range of responses and any outliers, therefore the sum will not equal 100%.

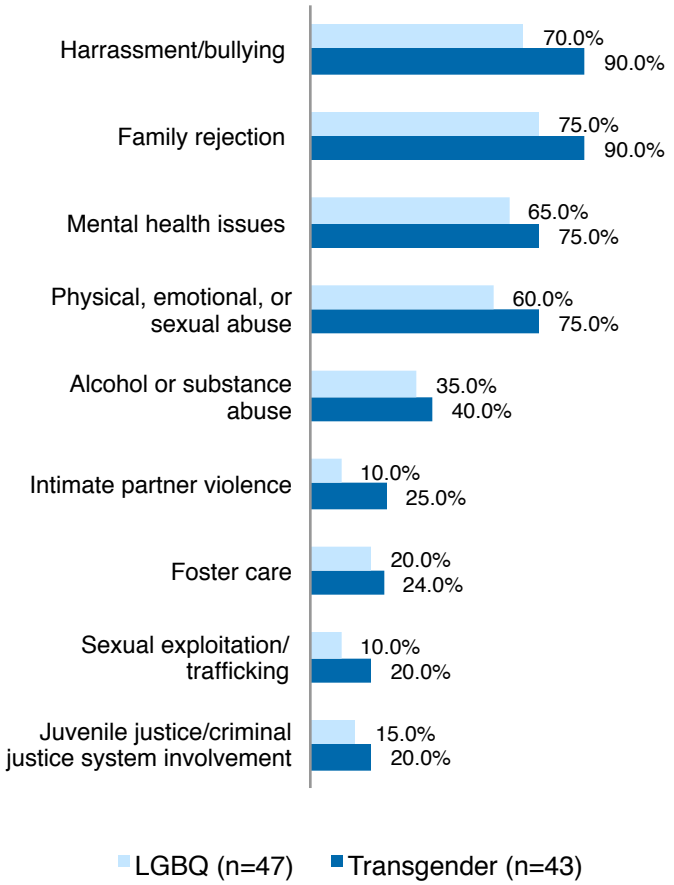
LGBQ and transgender youth were described as experiencing many similar issues leading to homelessness, but some of these issues were estimated by agency staff to be exaggerated for transgender youth.

- The most prevalent reason for homelessness among LGBTQ youth was being forced out of home or running away from home because of their sexual orientation or gender identity/expression.
- Transgender youth were estimated to have experienced bullying, family rejection, and physical and sexual abuse at higher rates than LGBQ youth.
- Both LGBTQ-specific and non-LGBTQ issues were cited as primary reasons for homelessness among LGBTQ youth.

PRIMARY REASON FOR HOMELESSNESS FOR LGBQ AND TRANSGENDER YOUTH AS REPORTED BY PROVIDERS



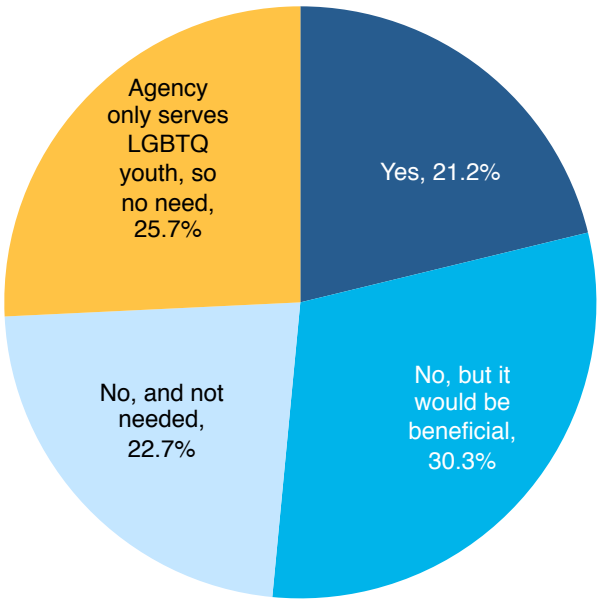
PROVIDER REPORTED MEDIAN % OF LGBTQ YOUTH EXPERIENCING HOMELESSNESS, BY REPORTED HISTORY



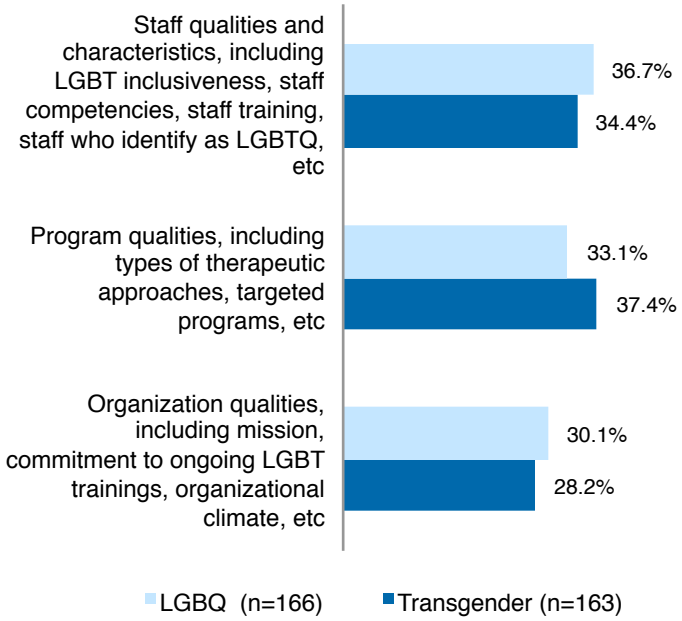
Several factors that continue to help or hurt existing efforts to address homelessness among LGBTQ youth were identified.

- After housing needs, acceptance of sexual identity and emotional support was the second most cited need for LGBQ youth experiencing homelessness. Whereas, transition services (access to healthcare specific to transgender youth, access to hormones, emotional support during transition, and legal support) was the second most cited need for transgender youth experiencing homelessness.
- Most survey respondents believed their agency staff was representative of the youth they served in terms of sexual orientation, race, and gender identity and expression. When asked if their agency employed a dedicated LGBTQ staff, 26% of the respondents reported that they worked exclusively with LGBTQ youth and 21% worked at agencies with dedicated LGBTQ staff. Less than a quarter reported they did not have dedicated LGBTQ staff and did not need one.

DOES YOUR AGENCY EMPLOY A DEDICATED LGBTQ STAFF? (N=66)



PROPORTION OF REASONS CITED BY PROVIDERS FOR SUCCESS IN SERVING LGBTQ YOUTH BY TOTAL NUMBER OF RESPONSES



- Similar to findings from the 2011 survey, lack of funding was identified as the biggest barrier to serving LGBTQ youth experiencing homelessness. This was followed by lack of non-financial resources such as lack of community support and lack of access to others doing similar work as barriers to serving youth experiencing homelessness. Between 26-37% of respondents also cited lack of training to address LGBTQ needs and difficulty identifying LGBTQ youth as a barrier.

- On the other hand, service providers attributed their successes in serving LGBTQ youth to their staff members, their programmatic approach, and their organizations' commitments to serving this population of young people.

    - About 7% of respondents cited the role of out LGBT staff as contributing to their success working with LGBTQ youth.

This study highlights the need to further understand not only the differences in experiences between LGBTQ youth and non-LGBTQ youth, but also differences between cisgender LGBQ and transgender youth. Further, the findings also indicate that a number of agencies are employing various strategies to address the unique needs of LGBTQ youth experiencing homelessness. Yet there are also many agencies that either do not see this population as a needed focus or reported the need for more help on how best to work with LGBTQ youth, including through training and organizational policies. The combination of findings that show many staff acknowledge that they received LGBT-related trainings and are aware of some existing policies with the results indicating a call for additional trainings and policies indicate that future research also needs to assess the actual effectiveness of current training and policy initiatives. Evaluations of the effects of what currently exists may help the field better understand how to fill in the gaps highlighted by this report.

DOMESTIC VIOLENCE HOUSING FIRST

The Intersection of Domestic Violence and Homelessness*

June 2013

Linda Olsen, MA, MSW
Chiquita Rollins, PhD
Kris Billhardt, MEd, EdS

*This is the first of a series of papers published by the Washington State Coalition Against Domestic Violence and the Volunteers of America Home Free Program in Portland, OR. These papers are designed to help organizations think about their role in providing housing stability services to DV survivors. Future papers will address the critical links between safe, stable housing and improved outcomes for survivors and their children, different approaches to permanent housing programs for DV survivors, organizational change information for those interested in these strategies, and developing and strengthening community partnerships.

Introduction

Battered women have long been among the hidden homeless in the United States. Efforts to find protection in safe and confidential locations have resulted in limited visibility for this population in the burgeoning numbers of homeless people. Because domestic violence (DV) survivors are affected by many of the same social forces that affect anyone struggling to find and keep housing, the battered women's movement and the homeless movement have followed parallel paths. Federal cuts in subsidized housing have greatly limited access to affordable housing for low-income people, among them millions of DV survivors and their children struggling with housing instability and compromised safety. The intent of this paper is to outline *briefly* the parallel paths of these movements and highlight where they intersect.

homelessness has affected a wide range of people throughout the history of the United States.

Homelessness

Homelessness, the condition of people without a regular dwelling, has long been associated with single men such as the hobos traveling across the country by train during and after the Civil War. But in reality, homelessness has affected a wide range of people throughout the history of the United States. During the Great Depression of the 1930s, millions of homeless people migrated across the country trying to find a way out of poverty, hunger, and homelessness. Decades later, in 1963, the Community Health Act set the stage for a new wave of homelessness as psychiatric patients were released from state hospitals into communities with the expectation that treatment and follow-up would be provided by community mental health centers. This plan was never fully funded, and without any sustainable support system, these former patients soon appeared on city streets and became the visible face of the homeless population.

Battered Women's Shelters

Prior to the women's movement of the 1960s, battered women had few options for seeking safety. They suffered silently for years, often watching the impacts of physical and mental abuse on their growing children. There were no laws to protect them and no reliably safe places for them to get away from abusive husbands. A battered woman was unlikely to bring her children to a community shelter or a soup kitchen and even less likely to camp out or live on the streets. In addition, divorce was difficult to obtain and divorced women were stigmatized in many communities. Employment opportunities and affordable, reliable childcare were often unavailable.

the climate of the times engendered a new response: the creation of "safe homes" and underground networks for escape.

Sisterhood is Powerful

EQUALITY

The women's movement created an opportunity for women to acknowledge and speak out about the abuse that existed in many of their homes. While the extent of abuse was not necessarily new information to those familiar with stories of a spouse's violence and cruelty passed down through generations of women or to those with memories of witnessing violence in their homes as children, the climate of the times engendered a new response: the creation of "safe homes" and underground networks for escape. Battered women and their allies set aside rooms in their homes to harbor women and children fleeing violence. The "safe homes" birthed the shelter movement, in which homes—usually in residential communities—were dedicated to the safety and healing of domestic violence victims. The first shelters were open by 1973. Family shelters operated by faith communities, such as Volunteers of America and the Salvation Army, slowly began to recognize that many if not most of the homeless women and children arriving at their doorsteps were fleeing abusive homes.

By 1979, more than 250 shelters for battered women existed in the United States.

The battered women's shelter movement spread. By 1979, more than 250 shelters for battered women existed in the United States. Domestic violence victims found a refuge where they were able to share their stories of abuse and hear that they were not alone and that the abuse was not their fault. Shelters typically afforded only a short-term stay—just enough to heal a little bit. Many women returned to their homes because there were no other realistic options, though some women were able to put together enough resources to start a new life.

As a testament to the growing recognition of the widespread incidence of abuse in homes across the country, the shelter movement gathered further momentum. By 1983, more than 700 battered women's shelters were operating

across the United States. Funding was scarce and the work to sustain these new supports required herculean grassroots efforts, with strategies that varied from community to community. Some of the logical funding sources were closed off to shelter organizers. Since most battered women technically had homes, these women and children were not perceived as homeless. Consequently, the shelters were not able to qualify for emergency assistance that other homeless shelters had access to through the Federal Emergency Management Act (FEMA) as it was established in 1979 to administer disaster relief and emergency assistance.

Survivors and allies started organizing to advocate for the public and private funding needed to support shelters and their services. These efforts resulted in the passage of legislation in many states to fund domestic violence programs through marriage license fees. In 1984, Congress passed the Family Violence Prevention and Services Act (FVPSA), which has since become a vital funding source for the more than 2,000 DV shelters and safe houses that currently exist. Many states also committed additional funds for battered women's shelters—often from their FEMA or Victims of Crime Act (VOCA) allocation.

In 1978, HUD's budget was over $83 billion. In 1983, draconian cuts reduced the budget to only $18 billion

Federal Housing Cutbacks Lead to Massive Homelessness

In the meantime, during the early 1980s, the U.S. Department of Housing and Urban Development (HUD) budget, which included funding for low-rent public housing and for affordable housing in rural areas, was severely cut. In 1978, HUD's budget was over $83 billion. In 1983, draconian cuts reduced the budget to only $18 billion: a *$65 billion reduction* in support for housing. Affordable housing stock shrank dramatically. For example, from 1976 to 1985 a yearly average of almost 31,000 new rural affordable housing units were built, but from 1986 to 1995 average yearly production fell to less than half that of the previous decade. This trend strongly suggests that the extensive homelessness we have seen in the United States since the 1980s is inextricably tied to these cutbacks and to the near elimination of the federal government's commitment to building, maintaining, and subsidizing affordable housing. Community perception also underwent a dramatic shift over the same time period. Recognition faded of the systemic problems historically viewed as the causes of homelessness, such as inadequate wage standards and inadequate affordable housing, and the blame was increasingly laid on the personal deficiencies of those struggling with poverty.

The McKinney Act increased the stock of emergency shelters and poured new life into transitional housing

Emergency Shelters and the Stewart B. McKinney Act of 1987

During the period of HUD cutbacks to affordable housing development and subsidy in the 1980s, family homelessness continued to rise. Meanwhile, a new funding stream emerged to support many new homeless shelters when Congress created the Emergency Food and Shelter National Board Program in 1983. Then, in 1987, Congress passed the Stewart B. McKinney Homeless Assistance Act (now McKinney-Vento), which provided $880 million in homeless assistance funding, presumably in an attempt to partially fill the $65 billion gap in subsidized housing. The McKinney Act increased the stock of emergency shelters and poured new life into transitional housing, a model developed for those leaving institutions such as mental institutions, drug/alcohol treatment programs (recovery houses), and prisons (halfway houses). The rationale for transitional housing was that these populations needed supportive services in order to learn how to handle financial and tenancy obligations. Some also saw the offer of permanent housing at the end of a transitional housing stay as the "carrot" needed to encourage residents to follow treatment programs, maintain sobriety, and secure employment. Shelters and transitional housing came to be viewed as the most appropriate response to the many people who were forced into homelessness due to poverty.

Domestic Violence Agencies as Homeless/Housing Service Providers

The battered women's shelter movement faced several new challenges in the 1990s. The rise in homelessness and the continuing lack of shelter and housing for an increasing population affected by mental health issues increased the number of women accessing domestic violence emergency shelters, often changing the mix of residents to include more impoverished women and many more with mental illness. Additionally, the impacts of trauma often resulted in drug and alcohol use by survivors. Battered women's shelter advocates were often not equipped to address chemical dependency, and drug/alcohol program counselors were not equipped to address the safety needs of survivors.

Both the increasingly complex needs of survivors and the general lack of community resources for mentally ill homeless women required additional training and a push for "professionalization" among those working in shelters. Many programs established educational requirements for their direct service employees and shifted toward a less grassroots and more clinical approach. While trying to better equip programs to effectively respond to the complex issues that accompanied survivors to shelter, the movement steadily resisted adopting a cause-and-effect analysis that identified domestic violence victimization as a mental health issue and refrained from mandatory mental health services as part of its response to victims. Recognizing that domestic violence services were made necessary because of systemic oppression based on gender, not because of women's mental health issues, leaders in the movement continued to support staff qualifications that valued life experience at the same level as higher education and certification programs.

Advocates started to make the case that battered women were indeed homeless if their residence was not a safe place for them

As the population coming to shelters changed, advocates began to see that homelessness and poverty were issues as significant for many survivors as was domestic violence. Advocates started to make the case that battered women were indeed homeless if their residence was not a safe place for them to be and argued that federal emergency shelter dollars (through FEMA and HUD) should join federal FVPSA and state and local funding as a critical part of domestic violence program budgets. With new public funding came new requirements and regulation, including service standards, administrative codes, reporting, and data collection. Running programs now involved more administrative effort, new responsibilities that competed with service delivery, and further intrusion into the privacy survivors could expect when entering a program for help.

On the social change front, as a result of the advocacy and education efforts of the movement, domestic violence began to be framed less as a private family matter and more as a public safety issue: a crime. Some funding sources required domestic violence programs to collaborate with the criminal legal system. These collaborations provided new tools to help keep some survivors safer, but they also narrowed the analysis of a complex issue and changed the flavor of domestic violence advocacy to fit within the criminal legal system. Additionally, federal and local grants that supported what came to be called a "coordinated community response" to domestic violence further deepened funder expectations and reporting requirements even as they provided more resources for survivors.

Yet advocates were keenly aware that survivors leaving shelters needed more options.

Throughout this time, emergency shelters remained the core service that most programs across the country provided to DV victims. Yet advocates were keenly aware that survivors leaving shelters needed more options. Those already impoverished or teetering on the brink of poverty due to the loss of an abuser's income and those with minimal education or vocational training and little or no employment history became stuck on long waiting lists for the shrinking stock of subsidized housing. Since emergency shelter stays were time-limited, many survivors returned to an abusive home, traveled from shelter to shelter, or relied on unstable housing with friends or relatives. The newly available HUD-McKinney funding for transitional housing programs seemed to be a perfect solution for the next housing step while survivors worked on job skills, financial management, and myriad other issues that were barriers to housing stability. Taking the lead from domestic violence agencies operating McKinney-funded transitional housing programs, Congress included in the 1994 Violence Against Women Act (VAWA) funding authorization to augment the transitional housing dedicated to domestic violence survivors.

Even as domestic violence agencies were embracing transitional housing as the next step after emergency shelter, organizations serving the chronically homeless population and homeless families were experimenting with "housing first" models. This approach supported access to permanent housing as soon as possible upon entry into homelessness, followed by wrap-around services, such as education, job training, mental health counseling, drug and alcohol treatment, and parenting support, to help with housing retention. Countering the prevailing notions of the time, the "housing first" movement asserted that housing is a right and not a reward for program completion.

Overlap of Domestic Violence and Homelessness

Domestic violence is one of the leading causes of homelessness for women and children. Among U.S. city mayors surveyed in 2005, 50% identified intimate partner violence as a primary cause of homelessness in their city. In the HUD 2012 Continuum of Care Homeless Assistance Program Point-in-Time Count, the largest subpopulation of homeless persons in Washington State was victims of domestic violence. (Each jurisdiction's housing and homelessness services that are funded by McKinney-Vento make up a Continuum of Care. Larger counties have their own Continuum of Care; smaller counties are usually included in a "balance of state" (or statewide) Continuum of Care.)

Domestic violence and homelessness are likely to occur together and can increase the need for resources and services, especially housing. The 2010 Federal Strategic Plan to Prevent and End Homelessness includes a citation from the National Center for Children in Poverty that indicates that "among

mothers with children experiencing homelessness, more than 80 percent had previously experienced domestic violence." According to a 1997 study by Browne and Bassuk, 92% of homeless women have experienced severe physical or sexual abuse at some point in their lives. The same study indicated that 63% of homeless women have been victims of domestic violence as adults. Strikingly similar results can be found in the 2004–2009 Washington Families Fund Five-Year Report: In the Moderate-Needs Family Profile for families served, 66% of women had experienced domestic violence. In the High-Needs Family Profile for families served, 93% of women had experienced physical or sexual violence. Data from the SHARE study, conducted by Rollins, Glass, Niolon, Perrin, and Billhardt, indicates that while only 26% of women accessing a wide range of DV services would be defined as homeless according to the federal definition at the time of the study, all were experiencing varying degrees of housing instability. Survivors participating in the study cited help with housing as the most helpful service they had received. (More details about the SHARE study are available in the second paper in this series.)

By the early 1990s, domestic violence shelters were at capacity, and many urban shelters had high turn-away rates. This situation continued into the new century, until the economic recession in 2008 exacerbated the crisis of limited bed space. DV agencies were forced to develop triage systems to ensure that women in the greatest danger were prioritized for shelter space. Women who had not recently fled their abusers and did not appear to have immediate safety needs were often seen as simply homeless—even if the homelessness was a result of domestic violence. For many of these survivors, poverty and trauma combined to create a downward spiral of homelessness, too frequently accompanied by mental health and chemical dependency issues.

For many of these survivors, poverty and trauma combined to create a downward spiral of homelessness, too frequently accompanied by mental health and chemical dependency issues.

Many survivors who fell through the cracks of the DV system's eligibility triage ended up in homeless shelters. Survivors also turned to homeless shelters when DV shelters were full. Homeless shelter providers were often uncomfortable sheltering domestic violence victims due to their complex safety needs and the potential violence of abusive partners. In many communities, a schism formed between DV shelters and homeless shelters as women, often with their children, were sent back and forth between the two systems. Resources tended to be aligned to address only one realm of a survivor's circumstances, with DV shelters focusing on safety planning, legal issues, and advocacy and homeless service providers focusing on improved financial stability and permanent housing.

Women learned to redefine their experiences and needs in order to qualify for program admission. With the advent of more research documenting the high degree of intersection between domestic violence and homelessness and housing instability, both systems have become increasingly aware of the need to work together.

Domestic violence programs and homeless/housing organizations in many communities have forged relationships as a part of local planning efforts to end homelessness.

Where Are We Now?

Domestic violence agencies have successfully secured HUD grants for shelter, transitional housing, and rapid re-housing programs and have utilized VAWA funds for transitional housing. Domestic violence advocates were successful with legislative efforts on the national level to protect survivors' privacy by exempting victim services providers from HUD's requirements to enter personally identifying information of domestic violence survivors in shared Homeless Management Information System (HMIS) databases. Domestic violence programs and homeless/housing organizations in many communities have forged relationships as a part of local planning efforts to end homelessness.

During the last decade, with HUD's strong encouragement and with growing local will to better respond to homelessness, communities across the country have been developing their own 10-Year Plans to End Homelessness. HUD has invested in program evaluations and research to determine the degree to which McKinney-Vento Act programs for transitional and permanent housing have been successful in decreasing homelessness. Domestic violence advocates' involvement in 10-Year Plans and McKinney-Vento Continuum of Care plans varies from community to community, as do housing programs' awareness of and engagement with domestic violence victim services providers.

Evolving "housing first" approaches ... have been very successful in many communities.

During the course of these planning processes, advocates for the homeless brought the consistent message that it was the housing system that needed fixing, not those who were homeless. Many homeless advocates across the country developed and implemented pilot projects testing strategies to

Analysis has also shown that providing transitional housing costs more than providing rental assistance ... along with tailored support service

help homeless individuals access and retain housing. Evolving "housing first" approaches that expedited the move of homeless people into permanent housing and then provided tailored services to support housing retention have been very successful in many communities. Program evaluations have suggested that transitional housing program expectations are onerous and overly rule-based and are implicated in repeat episodes of homelessness rather than fostering the desired outcome of stability in permanent housing. Analysis has also shown that providing transitional housing costs more than providing rental assistance based on individual need along with tailored support services. Increasingly working within a social justice framework that emphasizes voluntary rather than mandatory services, advocates for the homeless have been successfully placing homeless people into permanent housing. Good outcomes—especially with a particularly high-barrier, chronically homeless population (primarily single men with long periods of living on the streets, often with chemical dependency and/or mental health issues)—have lent credibility to the "housing first" approach.

Positive outcomes and participant feedback in both HUD-funded research and pilot program evaluations caught the attention of policymakers. The reauthorization of the McKinney-Vento Act shifted the goal and funding authorization of the act toward supporting long-term housing, homelessness prevention, and brief homeless intervention services rather than facility-based transitional housing. This reauthorization, known as the Homeless Emergency and Rapid Transition to Housing (HEARTH) Act, became law on May 20, 2009. Implementation of the new provisions is gradually rolling out, with domestic violence programs left to determine what the impact will be on their emergency shelter and transitional housing programs. Continuums of Care are reviewing their housing inventory and analyzing housing programs to determine how they might be more cost effective and more responsive to the permanent housing needs of homeless individuals. Many jurisdictions are actively shifting funds from emergency shelters and transitional housing facilities to homelessness prevention, rapid re-housing, and permanent supportive housing programs.

Where Do We Go from Here?

Domestic violence programs that receive public housing money... will also need to participate in their community's 10-Year Plan to End Homelessness and/or their local Continuum of Care planning process.

Where Do We Go from Here?

The once-parallel paths of the homelessness prevention field and the domestic violence advocacy field have come to many points of intersection through the past decades. The recognition of the interrelatedness of these two social problems has introduced new funding streams, new approaches, and new challenges. At this juncture, it will be important for domestic violence programs that have historically provided emergency shelter and transitional housing as core service components to review their agency mission, the needs of survivors, and the resources necessary to meet those needs. Domestic violence programs that receive public housing money, especially funds that originate with HUD, will also need to participate in their community's 10-Year Plan to End Homelessness and/or their local Continuum of Care planning process. Advocacy to ensure agency viability and relevancy in the changing climate—and to ensure meaningful response is available to domestic violence survivors—is extremely important right now within both systems.

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Camillus House

Our History and Mission

Camillus House has provided humanitarian services to the indigent and homeless populations of Miami-Dade County, Florida for more than 50 years.

Established by the Little Brothers of the Good Shepherd in 1960, Camillus House has grown steadily over the years from a small overnight shelter into a full service center offering a "system of care" for persons who are poor and homeless.

Every service offered at Camillus is carried out with the deeply held belief that every human being is precious in the eyes of the Lord and deserves love, respect and a chance to live a dignified life.

What We Do

Camillus House has grown steadily over the years from a small soup kitchen into a full-service center offering what we call a comprehensive "system of care" for the poor and homeless — a seamless, step-by-step process designed to bring persons from a life on the streets all the way to permanent housing.

- Fully integrated services are provided through multiple program areas.
- Compassionate Healing (substance abuse and mental health treatment)
- Continuum of Housing (emergency, transitional, and permanent housing)
- Compassionate Hospitality (food, clothing, showers, outreach, case management, rent assistance)
- Camillus Health Concern (sister organization providing health care services including adult primary care, pediatrics and a number of specialties)

Organization Profile:

- 501(c) 3 Non-Profit Agency serving the Poor and Homeless.
- Founded in 1960 to initially help Cuban exiles.
- Established by the Little Brothers of the Good Shepherd.
- Provides a broad range of social and health services to over 12,000 men, women and children on annual basis.
- Camillus House employs 135 staff members.

Mission, Vision & Values

Mission Statement: Rooted in the compassionate Hospitality of St. John of God, we improve the quality of life of those who are vulnerable and homeless in South Florida through the provision of a continuum of housing and supportive services.

Vision Statement: Camillus House envisions its service to the poor and homeless as a continuum of care which empowers clients towards personal rehabilitation and proactive integration as productive members of the general population.

Our vision for tomorrow is always built on the ideals of our founding mission which aims to provide every client with opportunities to combine personal and community resources in order to affect physical, mental and spiritual well-being.

Camillus House programs include development initiatives that will enhance client efforts to re-shape their ability for self-enrichment.

These initiatives include:

- Emergency assistance with food, clothing and shelter.
- Job training and placement.
- Residential substance abuse treatment and aftercare.
- Behavioral health and maintenance.
- Health care access and disease prevention.
- Transitional and permanent housing.

We commit ourselves eagerly to the adaptation of our mission in order to meet the new challenges facing the homeless in our contemporary society. The spirit of God moves us to action with reverence for the quality of life for all we serve and the elimination of the causes of homelessness in our times.

Our Values: Camillus House integrates the following values in every aspect of service:

- Hospitality
- Respect
- Quality
- Spirituality
- Responsibility

Camillus House, Services

HOSPITALITY SERVICES is the oldest and probably most well known of the services offered at Camillus House. Its primary purpose is to ensure that each client's basic human need for food, clothing and overnight shelter are met.

Since people who are hungry, or cold, or sleeping on the street cannot begin to address the larger issues that prevent them from leading a fulfilling life, Hospitality Services focuses on providing the immediate care they need.

Hospitality encompasses two primary program areas:

DIRECT CARE MINISTRY, which includes overnight shelter, showers, clothing exchange, mail services, telephone usage, public restrooms, and basic referrals and information.

Hospitality serves as an essential entry point into the full continuum of care services offered by Camillus, as many clients who initially visit in search of basic services decide to access the other programs available.

A Client Services Specialist serves as the first primary contact for most homeless persons who come to the Day Center for services. The Services Specialist assists clients in obtaining immediate needs, such as food, showers or clothing; provides information regarding services available; and provides hygiene items, such as soap, toothpaste and combs. Other types of assistance immediately available include bus tokens, water, foot lotion and other small items. Public restrooms and water fountains also are available.

Camillus offers free mail service, whereby persons who are homeless can use Camillus as a mailing address in order to send and receive mail. Incoming mail is sorted on a daily basis, and the names of all persons with mail pending are posted so that individuals know when to pick up their mail. Clients can make free local phone calls, or long distance calls with approval.

Homeless persons may obtain a free, “Camillus House” picture ID, which often serves as their only form of ID. Camillus also recently entered into a partnership with the 11th Judicial Circuit Court Criminal Mental Health Project, and Partners in Crisis, to begin producing special ID cards for clients with mental illness. Participation for clients is strictly voluntary.

The ID cards serve three purposes: 1) they provide clients with some sort of identification; 2) they alert police who may encounter the client on minor incidents that the client should be taken to a mental health facility rather than to jail; and 3) identify clients as registered with Camillus House and eligible for services, such as mail, phone, meals and showers.

In addition, Camillus assists clients who have lost all of their ID in re-establishing their identity by obtaining birth certificates, social security cards and other forms of ID vital to helping them obtain housing and employment.

Camillus offers free, hot showers for men three days per week, and for women three days per week. Clients may obtain a free exchange of clean clothing, in conjunction with the shower program, or via special referral.

The meal program at Camillus House offers free, nutritious meals to the hungry of Miami-Dade County. Five days a week, individuals registered as Camillus Day Center clients are provided with a hot, complete meal. The meal program also provides meals for clients of other Camillus House programs, including three (3) meals per day for the clients of the ISPA treatment program and breakfast for clients who have stayed in the emergency overnight shelter.

The Food Services program puts together bagged lunches and food boxes for distribution to individuals and families on a daily basis. Bagged lunches are provided through the Day Center program, to clients who are unable to attend the afternoon meal or who need immediate food to take with medication. Food boxes are provided to individuals or families on a case-by-case basis, and typically help those whose food stamps have run out by the end of the month.

Camillus provides large amounts of food, as well as other donations, to other nonprofit organizations, including many local faith-based organizations. Since Camillus sometimes cannot use all of the food donations it receives before some of the food spoils or exceeds its expiration date, Camillus distributes the food to other organizations that don't have the same capacity as Camillus to receive and store food. Organizations requesting food must complete a simple application. Camillus then works with that organization to determine their needs and to establish a specific pick-up schedule.

Camillus Health Concern: We offer a full complement of healthcare services to persons who are homeless by a caring team of healthcare practitioners

The Continuum of Housing

Camillus Housing Services addresses the most obvious aspect of homelessness — to provide individuals and families with a place to live.

A range of housing options include Emergency, Transitional and Permanent Housing, depending upon the stage in which each client is during their recovery from homelessness.

All housing programs are linked to Camillus' other programs so that clients receive the comprehensive health care and social services they require during their participation in the program. On an average night, some 1,000 men, women and children of South Florida will spend the night at Camillus House.

EMERGENCY HOUSING is temporary housing provided for a period of up to 90 days, depending upon the program and the needs of the client.

This type of housing provides persons who are homeless with an immediate place to get off the streets, and also serves as an entry point into the countywide "continuum of care." It is here that clients' needs are assessed, including the need for substance abuse treatment, mental health services, employment assistance and other help. Depending upon the individual needs and motivation of the client, he/she may then be placed into transitional housing or treatment program.

TRANSITIONAL HOUSING is generally provided for a period of 6–18 months, during which residents are able to gain some stability in their lives.

Clients receive a great deal of support while they adjust to living off the streets and learn to live independently. Residents are not given a free ride, though, as they must hold a job and pay monthly program fees.

Special emphasis is placed on teaching clients how to manage a personal budget. One third of clients' income is utilized for monthly program fees; one third is theirs to spend on bills and personal items; and one third is saved in a bank account for use when they exit the program.

Once ready for the next step, clients transition into permanent housing.

Camillus House provides transitional housing through multiple facilities located throughout Miami-Dade County.

Camillus House opened **Emmaus Place** in April 2011 for young men be-tween the ages of 18 and 23 who have aged out of the foster care system. Participants of Emmaus must be registered in Florida's Road to Independence program – a state funded initiative which provides a 2-3 year stipend to offset living expenses while attending college or university.

A recent study found that 25 per-cent of youth transitioning out of foster care in Miami become homeless within the first five years. By targeting this particular population, Camillus House is launching a dramatic new initiative

aimed at not just ending homelessness in Miami, but preventing it before it starts.
The seven-unit housing program provides residents the support and services they need to become self-sufficient, independent adults.
Located in the Lummus Park Historic District of Miami, Emmaus Place is a short distance away from employment centers (offices, retail and industrial), houses of worship, parks, stores, hos-pitals, fire station, library and other community services.
Camillus House partnered with Our Kids of Miami-Dade and Monroe, Inc., Casa Valentina and Biscayne Housing Group to create Emmaus Place.
Males, transitioning out of foster care, ages 18–23; attending school or working with Case Manager to develop plan.
Residents pay 30% of adjusted gross income as part of their client contribution.

The Good Shepherd Villas (GSV) provides 14 beds of Safe Haven housing for individuals who are homeless and suffering from persistent and severe mental illness.

The program includes eight one-bedroom apartments in four duplex buildings, along with two stand-alone units used as common areas and staff offices.
Safe Haven is a 24-hour/7 days-a-week community-based early recovery model of supportive housing that serves hard to reach, hard to engage individuals who are homeless with severe mental illness.
GSV offers a low demand setting where persons who are severely mentally ill can initiate the slow process of stabilization and recovery from pro-longed periods on the streets.
The integration of secure, stable housing with comprehensive social services including case management, benefit assistance, and transportation to and from health services appointments is critical in meeting the needs of the individuals who reside at GSV.
Individuals are housed in pairs and share a kitchen and bathroom but have their own enclosed sleeping area for privacy. A picnic and garden area create a serene space for rest, meditation and additional interaction.
Clients must be chronically homeless; have severe mental illness; meet a threshold level on the Instrumental Activities of Daily Living scale; not actively abusing drugs or alcohol; functional ability to participate in development of and work toward their Transition plan.
Residents pay 30% of adjusted gross income as part of their client contribution.

Mother Seton Village was opened in November 2000 as a transitional housing program for families with children who are homeless.
The facility is located on the former Homestead Air Reserve Base, and en-compasses a total of thirty-nine (39) one, two, and four-bedroom apartments with approximately 162 Beds.
The location offers residents easy access to community amenities such as Miami-Dade Transit's Metro Bus system with access to Dadeland South Metro Rail station; local grocery stores; health care facilities; restaurants and local shopping centers.

Camillus House provides a full array of supportive services, including case management, job development, basic life skills training, educational opportunities, child care, and much more.

Clients must be homeless with referral by walk-in or from an emergency shelter; ability to live independently; drug and alcohol free; compliance with program participation, including attaining employment/income.

Residents pay 30% of adjusted gross income as part of their client contribution.

St. Michael's Residences was opened in November 2000 as a transitional housing program for 30 single adults who are homeless, with a special emphasis on serving veterans who are homeless.

The housing facility offers a dignified, secure living environment where veterans facing similar circumstances can interact and support each other as they strive to transition to permanent housing.

The location offers residents easy access to community amenities such as Miami-Dade Transit's Metro Bus system with access to Dadeland South Metro Rail station; local grocery stores; health care facilities; restaurants and local shopping centers.

The primary goal of St. Michael's Residences is to transition veterans who are homeless into permanent housing. This housing program is also designed to guide participants in obtaining employment from the moment they enter the program.

Camillus House provides ongoing case management, life skills training, assistance in accessing benefits, and job skills training to ensure veterans achieve adequate income and skills needed to achieve a higher level of self-sufficiency before moving on to permanent housing.

Client must be a homeless veteran referred by the Veterans Administration, and drug and alcohol free.

Residents pay 30% of adjusted gross income as part of their client contribution.

PERMANENT HOUSING offers a supported living environment to persons who are formerly homeless and have transitioned out of transitional housing, but still require some sort of support in order to maintain their stability.

Although called "permanent housing," most residents eventually move out into unsupported housing after they have increased their income and become more comfortable with their independence, sometimes taking several years.

As with Camillus' transitional housing programs, residents contribute 30% of their income toward program fees and must participate in the programs' supportive services.

Brother Mathias Place provides permanent housing for single parent and intact families with children who are experiencing homelessness and who have a disabling condition in south Miami-Dade.

While it is a non-treatment pro-gram, heads of households must be either disabled or in recovery from substance abuse. The 10 available units are leased from a private owner with families contributing up to 30% of their adjusted gross income.

The program is structured with supportive services offering employment and job training, life skills training, and referrals to primary and out-patient health facilities as needed. The integration of secure, stable housing with comprehensive social services including case management, benefits assistance, and transportation is critical in meeting the needs of program participants.

Homelessness; disability such as mental illness, addiction, or health/physical; referred via walk-in, or from an emergency shelter, transitional housing, or treatment facility; ability to live independently; drug and alcohol free; compliance with program requirements; proof of income. Residents pay 30% of adjusted gross income as part of their client contribution.

Brownsville Christian Housing Center (BCHC) is a 74-unit housing pro-gram located in the renovated former “Christian Hospital” facility in the historic area of Brownsville.

The old Christian Hospital was the first hospital serving the African-American population in the community and is a historically significant building.

Each unit is an efficiency apartment with its own kitchen, bathroom, a twin bed, and individual air conditioning unit.

BCHC serves adult men and women who have come through Miami-Dade County’s Continuum of Care, and who are now ready to live on their own in a permanent housing setting but cannot afford unsubsidized housing.

Camillus House provides residents a range of services in a safe and supportive environment, allowing them to live productive and dignified lives.

Chronic homelessness; disability such as addiction, mental health or physical/health; referral via walk-in, or from an emergency shelter or transitional housing; ability to live independently; drug and alcohol free.

Residents must pay 30% of adjusted gross income as part of their client contribution.

Applicants with no income must show support in the amount of $50 per month and how they plan to eat and take care of basic needs.

Camillus House opened **Labre Place** in early 2012. The nine-story high-rise building is made up of 90 one-bedroom apartments. Fifty of the units are set aside for persons who were formerly homeless and are placed by Camillus House. The remaining 40 tenants will be persons who qualify as low income residents under federal guide-lines.

The new residential building is very close to local public transportation and to Interstate Highway 95. In addition, residents have easy access to Camillus Health, which provides primary health care services to persons who are homeless in Miami-Dade County.

Located in the Lummus Park Historic District of Miami, Labre is a short distance away from employment centers (offices, retail and industrial), houses of worship, parks, stores, hospitals, fire station, library and other community services. To enhance residents' quality of life, special programs and activities are available at no cost to them.

Camillus House provides supportive services to the formerly homeless residents to ensure their stability and quality of life. These services include medical care, behavioral health treatment and employment assistance.

Income eligibility: $8,000–$15,000 per year. 30% of adjusted gross income client contribution; flat rate of $674 per month. Managed by Royal America, an external company.

Camillus opened **Somerville Residence** in April 2001. The campus-style facility includes 48 units of one-, two-, and three-bedroom apartments and efficiencies.

The facility, which has provided permanent, affordable housing to single parent families and single women over age 40, is currently being re-purposed to support the emerging needs of other vulnerable populations within our community.

Updates on this facility and the future programs it will support will be posted on this page later this year.

CAMILLUS HOUSE, WHAT IS THE HOMELESS TRUST, AND HOW DOES CAMILLUS HOUSE RELATE TO IT? (www.camillus.org)

The Miami-Dade County Homeless Trust was created in 1993 by the Board of County Commissioners to:

• To administer the proceeds of a one-percent food and beverage tax.
• To implement the Miami-Dade County Community Homeless Plan, the local continuum of care plan.
• To serve in an advisory capacity to the Board of County Commissioners on issues involving homelessness.

The Trust is not a direct service provider. Instead, it is responsible for the implementation of policy initiatives developed by the 27-member Miami-Dade County Homeless Trust Board, and the monitoring of contract compliance by agencies contracted with the County, through the Trust, for the provision of housing and services for homeless persons. Camillus House is one of these agencies.

Through its policies and procedures, the Trust also oversees the utilization of the food and beverage tax proceeds dedicated for homeless purposes, as well as other funding sources, to ensure the implementation of the goals of the plan. Additionally, the Trust has served as lead applicant on behalf of the County for federal and state funding opportunities, and developing and implementing the annual process to identify gaps and needs of the homeless continuum.

The Trust's annual budget is approximately $37 million, comprised of local food and beverage proceeds, as well as Department of Housing and Urban Develop (HUD) and state funding. Approximately $20 million per year comes through a competitive process via HUD, $11 million via the Food and Beverage tax, and the remainder through State funding and private sector contributions.

The Trust is a proprietary department and receives no general fund dollars from the County. The Miami-Dade County Homeless Trust Board is comprised of a 27-member, broad-based membership representing numerous sectors of our community.

Camillus House is an active participant in Homeless Trust activities, with Camillus staff holding a seat on the Trust’s Board of Directors and participating in the Trust’s planning and advocacy efforts. Camillus currently maintains 14 contracts with the Homeless Trust.

About Us

The Miami-Dade County Homeless Trust serves as the lead agency for Miami-Dade County's homeless Continuum of Care (CoC), responsible for the oversight, planning and operations of the entire CoC including:

- Administering proceeds of a one-percent (1%) Food and Beverage Tax. Miami-Dade had the first dedicated funding source for homelessness in the United States – a unique 1% Food and Beverage Tax which is foundational to the funding of the Homeless Trust today.
- Implementing the Miami-Dade County Community Homeless Plan: Priority Home which provides a framework for preventing and ending homelessness in Miami-Dade County.
- Serving as the collaborative applicant for federal and state funding opportunities.
- Administering grants and overseeing operations and fiscal activities for over 120 housing and services programs operated by more than 20 competitively selected non-profit providers and government entities.
- Managing Miami-Dade County's Homeless Management Information System (HMIS), the local technology system used to collect client-level data on the provision of housing and services to homeless individuals and families and persons at risk of homelessness.
- Developing policy and serving in an advisory capacity to the Board of County Commissioners on issues involving homelessness.

History

In the early 1990s, more than 8,000 people were camping on the streets, sidewalks and underpasses of Miami-Dade County. Independent non-profits were overwhelmed and there was little coordination between agencies serving homeless households. In 1992, then Governor Lawton Chiles appointed leaders to a Governor's Commission on Homelessness. The commission was led by former Knight Ridder chairman, *Miami Herald* publisher, and longtime Miami resident, Alvah Chapman. Mr. Chapman, along with many other influential thought-leaders, businessmen and elected officials, came together and recommended three (3) key activities be pursued to address the community's needs:

- Pursue a dedicated source of funding/private sector funding
- Create a body with diverse representation to implement plan
- Research best practices to address homelessness and develop goals for implementation

Food & Beverage Tax

The Governor's Task Force pursued and secured a one-percent Food & Beverage Tax (F&B Tax). Approved in 1992, the enabling legislation for the Homeless and Domestic Violence F&B Tax became the first dedicated source of funding for homelessness through a tax in the country. Eighty-five (85%) of funds go toward preventing and ending homelessness; 15% is allocated to the construction and operation of domestic violence centers and overseen by the Domestic Violence Oversight Board.

This tax is collected on all food and beverage sales in restaurants which gross more than $400,000 a year and are licensed by the State of Florida to sell alcoholic beverages for consumption on the premises, except for hotels and motels. The tax is collected throughout Miami-Dade County with the exception of facilities in Miami Beach, Surfside and Bal Harbour. The levying of the tax required the creation of a community plan. The Homeless Trust Board created by county ordinance is responsible for the implementation of the Miami-Dade County Community Homeless Plan: Priority Home.
Chapman Partnership serves as the private sector partner to the Miami-Dade County Homeless Trust and is commissioned by the Homeless Trust to operate two Homeless Assistance Centers which have assisted more than 100,000 individuals and families during its 20+ year history.

As a result of the CoC's work, under the leadership of the Homeless Trust, unsheltered homelessness in Miami-Dade has gone from more than 8,000 people fewer than 1,100 persons. In 2019, the Homeless Trust recorded record low homeless totals. Currently, the Homeless Trust has more than 8,000 beds/units in its Housing Inventory Count dedicated to serving persons who are homeless and formerly homeless

Homeless Trust

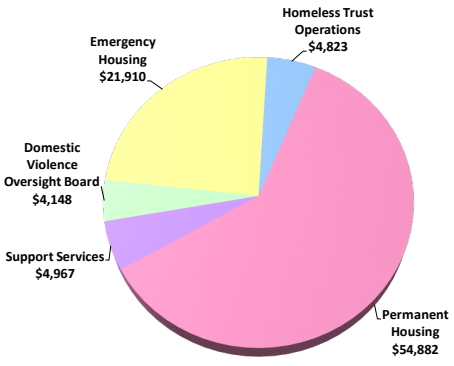
The Miami-Dade County Homeless Trust (Homeless Trust) serves as the coordinating entity for the provision of housing and services to individuals and families experiencing homelessness throughout Miami-Dade County. The Homeless Trust advises the Board of County Commissioners (BCC) on issues related to homelessness and serves as the identified "Collaborative Applicant" for the United States Department of Housing and Urban Development's (U.S. HUD) Continuum of Care Program and the Florida Department of Children and Families Office on Homelessness. The Homeless Trust implements Miami-Dade County's Community Homeless Plan: Priority Home and the one percent Food and Beverage Tax proceeds in furtherance of the plan. Eighty-five percent (85%) of Food and Beverage Tax proceeds are dedicated to homeless housing and services and leveraged with federal, state, local and other resources dedicated to providing housing and services for the homeless, including survivors of domestic violence. The Homeless Trust also provides administrative, contractual and policy formulation assistance related to homeless and domestic violence housing and services. The Homeless Trust also assists in coordinating and monitoring the construction and operations of domestic violence centers in Miami-Dade County, which are funded through the remaining 15 percent of the Food and Beverage Tax.

As part of the Health and Society strategic area, the Homeless Trust funds and monitors homeless prevention services, temporary and permanent housing, and supportive services for the homeless, including homeless outreach. Each area is specifically designed to meet the unique needs of homeless individuals and families when they first enter the system and as their needs develop and evolve over time. This blend of housing and services comprises what is known as the homeless continuum of care. Over 9,000 emergency, transitional and permanent housing beds have been developed by or through the Homeless Trust since its inception in 1993. A Board of Trustees, comprised of 27 members, governs the Homeless Trust. Membership consists of appointed leadership, including County and City commissioners, representatives from the Judiciary, the Superintendent of Schools, the Florida Department of Children and Families Regional Administrator and the City of Miami Manager. The Board also includes representation from Miami Homes for All; business, civic and faith-based community groups; homeless service providers; homeless individuals; and formerly homeless individuals. To fulfill its mission of assisting homeless individuals and families, the Homeless Trust relies on the services offered by provider agencies within the community, including its private sector partner, Chapman Partnership.

FY 2023-24 Adopted Operating Budget

Expenditures by Activity

(dollars in thousands)



Revenues by Source

(dollars in thousands)

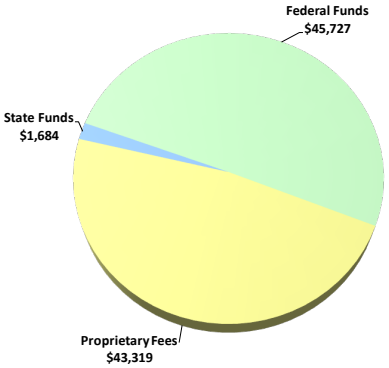
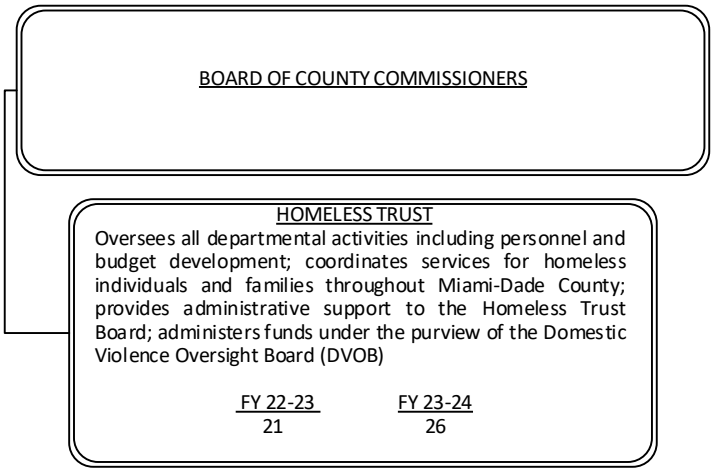


TABLE OF ORGANIZATION



The FY 2023-24 total number of full-time equivalent positions is 26

DIVISION: HOMELESS TRUST OPERATIONS

The Homeless Trust Division oversees all departmental activities, including personnel and budget development, and coordinates housing and services for homeless and formerly homeless individuals and families throughout Miami-Dade County.

- Administers more than 100 individual grant-funded programs with more than 20 organizations to provide essential housing and services for people experiencing homelessness in Miami-Dade County
- Administers 85 percent of the one percent Food and Beverage Tax proceeds
- Conducts two countywide homeless census counts each year to assess the type and number of homeless individuals in Miami-Dade County and surveys and analyzes system data to improve utilization and performance
- Coordinates Homeless Trust activities and recommends, defines and monitors operating goals, objectives and procedures for the Homeless Trust
- Coordinates referrals of homeless individuals and families to permanent supportive housing
- Implements policies developed by the Homeless Trust Board and Committees
- Manages the local Homeless Management Information System to track system utilization, needs, gaps and trends
- Provides a continuum of housing and support services for targeted homeless populations, including services related to sexual assault and domestic violence, mental health and substance abuse
- Provides culturally sensitive prevention, outreach and intervention services for homeless and formerly homeless individuals and families, including veterans, chronically homeless, youth and families
- Serves as staff to the Board of the Homeless Trust and liaison to the Office of the Mayor and the BCC
- Utilizes local, state and federal funds to assist the homeless and formerly homeless
- Administers 15 percent of the one percent Food and Beverage Tax proceeds; these funds are under the purview of the DVOB

Strategic Objectives - Measures

- HS1-1: Reduce homelessness throughout Miami-Dade County

Objectives	Measures			FY 20-21 Actual	FY 21-22 Actual	FY 22-23 Budget	FY 22-23 Projection	FY 23-24 Target
Eliminate homelessness in Miami-Dade County	Total number of homeless persons*	OC	↓	3,245	3,276	3,300	3,350	3,300
	Number of persons entering the system for the first time	OC	↓	4,703	5,101	4,650	4,700	4,600
	Average number of days persons remain homeless	OC	↓	141	145	138	140	137
	Percentage of persons who access permanent housing upon exiting a homeless program	OC	↑	45%	55%	58%	57%	59%
	Percentage of persons who achieve an increase in income upon exiting a homeless program	OC	↑	35%	35%	36%	35%	36%
	Percentage of individuals who return to homelessness within two years	OC	↓	24%	19%	24%	25%	23%

*Measure refers to the total number of sheltered and unsheltered homeless persons at a single point in time. FY 2022-23 Projection increased in part because of first time homelessness, but also, because of increased shelter capacity due to the loosening of COVID restrictions

DIVISION COMMENTS

- **During FY 2022-23 a Business Analyst overage position was added to analyze and measure systemwide and project-level performance for the homeless Continuum of Care, interpret data related to homeless sub-populations, identify provider characteristics and client pathways that contribute to performance and recommend changes to improve performance outcomes ($68,000)**
- **The FY 2023-24 Adopted Budget includes funding for the addition of two Contract Officers to process current and new provider reimbursements ($193,000), one Quality Assurance Coordinator to monitor the special NOFO project providers ($104,000), and one Accountant 2 to assist with the accounting and processing of payments for current and new providers ($100,000)**

The United States Department of Housing and Urban Development (USHUD) released a special Notice of Funding Opportunity (NOFO) to address unsheltered homelessness with an emphasis on serving people with severe service needs. Homeless Trust is receiving additional funds totaling $21,214,204 for three years commencing in FY 2023-24; the Homeless Trust will contract with five providers to provide the services (Camilus House, Educate Tomorrow, New Hope Corps, City of Miami Beach and Miami Recovery Project)

- The Homeless Trust continues to feel the impacts of Miami-Dade County's affordable housing crisis and the lack of housing options, particularly for persons at or below 30% of the Area Median Income, many of whom are disabled; continuing fallout from the COVID-19 pandemic, the closing of unsafe structures following the Surfside collapse and increased migrant inflow have further strained available resources; homeless prevention services also remain in demand as renters and property owners face hardships

The Homeless Trust continues to partner with and leverage the resources of area public housing agencies, including Miami-Dade, Miami Beach, Hialeah and Homestead, to provide housing to homeless households, including 770 Emergency Housing Vouchers made available through the American Rescue Plan Act

The Homeless Trust continues to work with Participating Jurisdictions, including Miami-Dade, Miami, Hialeah, Miami Beach and North Miami to target HOME Investment Partnerships American Rescue Plan Program (HOME-ARP) resources to add new units to the development pipeline targeted to people experiencing homelessness and rehouse persons experiencing homelessness

- Efforts continue to pursue full participation in the Local Option 1% Food and Beverage Tax in Miami-Dade as three municipalities (Miami Beach, Surfside and Bal Harbour) remain exempt from the penny program
- Food and Beverage Tax funded investments in homeless prevention, rapid rehousing and specialized outreach programs have been enhanced in the FY 2022-23 Adopted Budget to offset the phase out of Emergency Solutions Grant-Coronavirus (ESG-CV) resources made available through the Coronavirus Aid, Relief, and Economic Security Act (CARES Act); ESG-CV resources have largely returned to pre-pandemic levels

During the 2023 State Legislative Session, the Homeless Trust secured a special appropriation of $562,000 for low barrier, single-site permanent supportive housing allowing for quick placement of individuals coming directly from the street who would likely not do well in a congregate facility, such as an emergency shelter; this new housing serves as a bridge to other permanent housing

The Homeless Trust continues to pursue strategies to eliminate race as a social determinant of homelessness and is working to ensure black persons and persons with lived experience are part of CoC planning and decision making; the Homeless Trust continues to perform an annual racial disparity quantitative assessment, review its coordinated entry system to ensure people of color have equal access to permanent housing, and facilitate trainings on racial bias and equity

- In FY 2023-24 Adopted Budget, the Homeless Trust Capital and Tax Equalization Reserves for future infrastructure acquisition and renovations are $6.349 million; Tax Equalization Reserves, which are essential to maintaining service levels and adding needed capacity, are $2.002 million

ADDITIONAL INFORMATION

The FY 2023-24 Adopted Budget includes allocations to the Sundari Foundation, Inc., operators of the Lotus House Women's Shelter, for emergency shelter to provide evidence-based, trauma-informed housing and services for homeless women, youth, and children with special needs in the Health and Society Community-Based Organizations allocation for $578,900

CAPITAL BUDGET HIGHLIGHTS AND OPERATIONAL IMPACTS

The Department's FY 2023-24 Adopted Budget and Multi-Year Capital Plan includes funding to address long-term infrastructure needs at Chapman Partnership North; improvements include interior and exterior renovations, replacement of aging equipment, commercial kitchen upgrades and HVAC replacement; these projects are funded with Homeless Trust Capital Reserve funds; as part of the Mayor's resiliency initiative, where applicable, equipment will be energy efficient; these facilities, through a private -public partnership offer homeless assistance to men, women and children as well as provide a variety of support services (total program cost $2.4 million; $465,000 in FY 2023-24; capital program #2000002458)

The Department's FY 2023-24 Adopted Budget and Multi-Year Capital Plan includes funding to address long-term infrastructure needs at Chapman Partnership South; improvements include installation of security cameras, HVAC replacement, kitchen upgrades, and new generators; these projects are funded with Homeless Trust Capital Reserve funds; as part of the Mayor's resiliency initiative, where applicable, equipment will be energy efficient; these facilities, through a private -public partnership offer homeless assistance to men, women and children as well as provide a variety of support services (total program cost $1.785 million; $430,000 in FY 2023-24; capital program #2000002355)

In order to meet the increasing demand to provide shelter and support services to the homeless population in Miami-Dade County, the Department purchased the KROME facility in January 2023 for $4.594 million, funded with Miami-Dade Rescue Plan funds; in FY 2023-24, the Department's Adopted Budget and Multi-Year Capital Plan includes funding for the renovation of the facility in order to provide specialized housing and services for unsheltered single adult men with special needs; the project is funded with the HOMES Plan ($2.1 million), City of Miami Beach contribution ($1 million), and the Miami-Dade Rescue Plan ($6 million); the annual estimated operating cost is $1.5 million (total program cost $9.1 million; $4.506 million in FY 2023-24; capital program #2000002975)

The Department's FY 2023-24 Adopted Budget and Multi-Year Capital Plan includes funding to purchase and renovate the La Quinta Hotel in Cutler Bay; the project is funded with the HOMES Plan ($7.9 million) and the City of Miami's HOMES Plan ($8 million); this facility, through a private-public partnership will offer homeless assistance to chronically homeless individuals as well as provide a variety of support services to include case management and life skills training; the hotel has 107 rooms including 6 to 7 large suites; the annual estimated operating cost is $1.64 million (total program cost $15.9 million; $5.35 million in FY 2023-24; capital program #2000003116)

The Department's FY 2023-24 Adopted Budget and Multi-Year Capital Plan includes funding to address the aging infrastructure at Verde Gardens; improvements include, but not limited to interior and exterior renovations, replacement of aging of equipment, commercial kitchen upgrades, HVAC replacement, and the installation of security cameras; as part of the Mayor's resiliency initiative, where applicable, equipment will be energy efficient; the facility provides supportive housing and services to families experiencing homelessness; the project is funded with Homeless Trust Capital Reserve funds (total program cost $4.459 million; $641,000 in FY 2023-24; capital program #2000002356)

SELECTED ITEM HIGHLIGHTS AND DETAILS

Line-Item Highlights	(dollars in thousands) Actual FY 20-21	Actual FY 21-22	Budget FY 22-23	Projection FY 22-23	Adopted FY 23-24
Advertising	6	6	10	5	7
Fuel	0	0	0	0	0
Overtime	0	0	0	0	0
Rent	101	98	113	100	120
Security Services	0	0	0	0	0
Temporary Services	0	0	0	0	0
Travel and Registration	1	6	7	12	14
Utilities	9	10	8	8	8

OPERATING FINANCIAL SUMMARY

(dollars in thousands)	Actual FY 20-21	Actual FY 21-22	Budget FY 22-23	Adopted FY 23-24
Revenue Summary				
Carryover	24,902	27,770	38,070	37,008
Food and Beverage Tax	31,209	40,488	40,030	42,227
Interest Earnings	60	167	59	150
Miscellaneous Revenues	200	200	0	0
Other Revenues	62	116	301	175
State Grants	3,522	7,175	2,674	1,684
Federal Grants	28,769	30,857	33,850	45,727
Total Revenues	88,724	106,773	114,984	126,971
Operating Expenditures Summary				
Salary	2,341	2,044	2,043	2,545
Fringe Benefits	21	837	837	1,070
Contractual Services	65	98	126	101
Other Operating	697	969	559	653
Charges for County Services	572	562	569	624
Grants to Outside Organizations	51,593	59,386	85,539	85,729
Capital	5,431	382	30	8
Total Operating Expenditures	60,720	64,278	89,703	90,730
Non-Operating Expenditures Summary				
Transfers	0	0	5,074	1,568
Distribution of Funds In Trust	0	0	0	0
Debt Service	0	0	0	0
Depreciation, Amortizations and Depletion	0	0	0	0
Reserve	0	0	20,207	34,673
Total Non-Operating Expenditures	0	0	25,281	36,241

(dollars in thousands) Expenditure By Program	Total Funding Budget FY 22-23	Total Funding Adopted FY 23-24	Total Positions Budget FY 22-23	Total Positions Adopted FY 23-24
Strategic Area: Health and Society				
Homeless Trust Operations	4,002	4,823	21	26
Domestic Violence Oversight Board	4,601	4,148	0	0
Emergency Housing	19,796	21,910	0	0
Permanent Housing	57,855	54,882	0	0
Support Services	3,449	4,967	0	0
Total Operating Expenditures	89,703	90,730	21	26

CAPITAL BUDGET SUMMARY

(dollars in thousands)	PRIOR	FY 23-24	FY 24-25	FY 25-26	FY 26-27	FY 27-28	FY 28-29	FUTURE	TOTAL
Revenue									
City of Miami Beach Contribution	0	1,000	0	0	0	0	0	0	1,000
HOMES Plan	7,900	2,100	0	0	0	0	0	0	10,000
HOMES Plan - City of Miami	8,000	0	0	0	0	0	0	0	8,000
Homeless Trust Capital Reserves	4,826	1,568	730	780	580	160	0	0	8,644
Miami-Dade Rescue Plan	4,594	1,406	0	0	0	0	0	0	6,000
Total:	25,320	6,074	730	780	580	160	0	0	33,644
Expenditures									
Strategic Area: HS									
Homeless Facilities	17,341	11,392	1,877	1,899	975	160	0	0	33,644
Total:	17,341	11,392	1,877	1,899	975	160	0	0	33,644

FUNDED CAPITAL PROGRAMS

(dollars in thousands)

CHAPMAN PARTNERSHIP NORTH - FACILITY IMPROVEMENTS **PROGRAM #: 2000002458**

DESCRIPTION: Provide facility improvements to address long-term facility needs to include interior and exterior renovations, replacement of aging equipment, commercial kitchen upgrades, and HVAC replacement

LOCATION: 1550 North Miami Ave
North Miami

District Located: 3
District(s) Served: Countywide

REVENUE SCHEDULE:	PRIOR	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	FUTURE	TOTAL
Homeless Trust Capital Reserves	440	465	475	545	375	100	0	0	2,400
TOTAL REVENUES:	**440**	**465**	**475**	**545**	**375**	**100**	**0**	**0**	**2,400**
EXPENDITURE SCHEDULE:	**PRIOR**	**2023-24**	**2024-25**	**2025-26**	**2026-27**	**2027-28**	**2028-29**	**FUTURE**	**TOTAL**
Furniture Fixtures and Equipment	55	5	15	455	5	0	0	0	535
Infrastructure Improvements	335	410	410	40	320	100	0	0	1,615
Major Machinery and Equipment	50	50	50	50	50	0	0	0	250
TOTAL EXPENDITURES:	**440**	**465**	**475**	**545**	**375**	**100**	**0**	**0**	**2,400**

CHAPMAN PARTNERSHIP SOUTH - FACILITY RENOVATION **PROGRAM #: 2000002355**

DESCRIPTION: Provide facility improvements to address long-term facility needs include the installation of security cameras, HVAC replacement, kitchen upgrades, and new generators

LOCATION: 28205 SW 124 Ct
Homestead

District Located: 9
District(s) Served: Countywide

REVENUE SCHEDULE:	PRIOR	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	FUTURE	TOTAL
Homeless Trust Capital Reserves	910	430	100	80	205	60	0	0	1,785
TOTAL REVENUES:	**910**	**430**	**100**	**80**	**205**	**60**	**0**	**0**	**1,785**
EXPENDITURE SCHEDULE:	**PRIOR**	**2023-24**	**2024-25**	**2025-26**	**2026-27**	**2027-28**	**2028-29**	**FUTURE**	**TOTAL**
Infrastructure Improvements	485	380	50	30	100	60	0	0	1,105
Major Machinery and Equipment	30	50	50	50	500	0	0	0	680
TOTAL EXPENDITURES:	**515**	**430**	**100**	**80**	**600**	**60**	**0**	**0**	**1,785**

HOMELESS FACILITIES **PROGRAM #: 2000003116**

DESCRIPTION: Purchase, renovate and/or construct facilities to provide housing for chronically homeless individuals and families

LOCATION: Various Sites
Throughout Miami-Dade County

District Located: 8
District(s) Served: Countywide

REVENUE SCHEDULE:	PRIOR	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	FUTURE	TOTAL
HOMES Plan	7,900	0	0	0	0	0	0	0	7,900
HOMES Plan - City of Miami	8,000	0	0	0	0	0	0	0	8,000
TOTAL REVENUES:	**15,900**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**15,900**
EXPENDITURE SCHEDULE:	**PRIOR**	**2023-24**	**2024-25**	**2025-26**	**2026-27**	**2027-28**	**2028-29**	**FUTURE**	**TOTAL**
Building Acquisition/Improvements	10,550	5,350	0	0	0	0	0	0	15,900
TOTAL EXPENDITURES:	**10,550**	**5,350**	**0**	**0**	**0**	**0**	**0**	**0**	**15,900**

KROME FACILITY - PURCHASE/RENOVATE **PROGRAM #: 2000002975**

DESCRIPTION: Purchase and repurpose the existing KROME facility to provide specialized housing and services for unsheltered single adult men with special needs

LOCATION: 18055 SW 12 St
Unincorporated Miami-Dade County

District Located: 11
District(s) Served: Countywide

REVENUE SCHEDULE:	PRIOR	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	FUTURE	TOTAL
City of Miami Beach Contribution	0	1,000	0	0	0	0	0	0	1,000
HOMES Plan	0	2,100	0	0	0	0	0	0	2,100
Miami-Dade Rescue Plan	4,594	1,406	0	0	0	0	0	0	6,000
TOTAL REVENUES:	**4,594**	**4,506**	**0**	**0**	**0**	**0**	**0**	**0**	**9,100**
EXPENDITURE SCHEDULE:	**PRIOR**	**2023-24**	**2024-25**	**2025-26**	**2026-27**	**2027-28**	**2028-29**	**FUTURE**	**TOTAL**
Building Acquisition/Improvements	4,594	4,506	0	0	0	0	0	0	9,100
TOTAL EXPENDITURES:	**4,594**	**4,506**	**0**	**0**	**0**	**0**	**0**	**0**	**9,100**

Estimated Annual Operating Impact will begin in FY 2023-24 in the amount of $1,500,000 and includes 0 FTE(s)

VERDE GARDENS - FACILITY RENOVATIONS **PROGRAM #: 2000002356**

DESCRIPTION: Provide facility improvements to include interior and exterior renovations, replacement of aging equipment, commercial kitchen upgrades, HVAC replacement, and the installation of security equipment

LOCATION: Various Sites
Homestead

District Located: 9
District(s) Served: Countywide

REVENUE SCHEDULE:	PRIOR	2023-24	2024-25	2025-26	2026-27	2027-28	2028-29	FUTURE	TOTAL
Homeless Trust Capital Reserves	3,476	673	155	155	0	0	0	0	4,459
TOTAL REVENUES:	**3,476**	**673**	**155**	**155**	**0**	**0**	**0**	**0**	**4,459**
EXPENDITURE SCHEDULE:	**PRIOR**	**2023-24**	**2024-25**	**2025-26**	**2026-27**	**2027-28**	**2028-29**	**FUTURE**	**TOTAL**
Furniture Fixtures and Equipment	93	50	50	50	0	0	0	0	243
Infrastructure Improvements	1,149	591	1,252	1,224	0	0	0	0	4,216
TOTAL EXPENDITURES:	**1,242**	**641**	**1,302**	**1,274**	**0**	**0**	**0**	**0**	**4,459**

UNFUNDED CAPITAL PROGRAMS

PROGRAM NAME	LOCATION	(dollars in thousands) ESTIMATED PROGRAM COST
THIRD DOMESTIC VIOLENCE SHELTER - NEW	Undisclosed	16,500
	UNFUNDED TOTAL	**16,500**

The shelter movement began in earnest in the 1970s, as a response to the growing homelessness rate spurred by high unemployment, rising housing costs, and deinstitu-tionalization of people with severe mental illness (Arrighi, 1997; Dordick, 1996). At the time, homelessness was seen as a temporary problem on both an individual and societal level. However, as homelessness rates continued to rise through the late 1980s (represented increasingly by women and families), shelters became permanent community fixtures. With this de-velopment came heightened shelter bureaucratization and in-stitutionalization, perceived as a way to facilitate communal living (Gounis, 1992; Morgan, 2002; Stark, 1994).

Such bureaucratization and institutionalization have become so salient within contemporary homeless shelters that some argue they embody many of the tenets of a total insti-tution (Bogard, 1998; Dordick, 1996; Snow & Anderson, 1993; Stark, 1994) as originally conceptualized by Goffman (1961). In its most general definition, a total institution is "a place of resi-dence ... where a large number of like-situated individuals, cut off from the wider society for an appreciable period of time, together lead an enclosed formally administered round of life" (Goffman, 1961, p. xiii). While Goffman did not classify home-less shelters as total institutions at the time of his writing (pre- 1970s shelter movement), research on various types of shelters (e.g., homeless, domestic violence) has examined the ways in which they may be classified as such (Bogard, 1998; Moe, 2009; Snow & Anderson, 1993; Stark, 1994). As Stark (1994) attests, shelters become a type of total institution "when the role that the individual assumes as shelter resident blocks his or her ability to pursue the most basic human roles-those of friend, lover, husband, wife, parent, and so forth" (p. 557).

The goal[s] of this paper are twofold. First, we examine the ways in which an urban Midwestern shelter, referred here as The Refuge (pseudonym), operates as a total institution. Second, we explore the ways in which female residents ne-gotiated the bureaucracy and institutionalization within this shelter, presenting our findings within a typology of survival strategies: submission, adaptation, and resistance. Data come from field observations within the shelter and semi-structured interviews conducted with twenty female residents.

The Refuge as a Total Institution

In an effort to run efficiently and, presumably, fairly, a bureaucratic structure was employed at The Refuge, which encompassed many rules and illustrated a clear demarcation between staff and residents. For discipline, The Refuge uti-lized a point system. A staff member could issue a point to any resident for any rule infraction or disobedience. Once issued, the point could not be reversed, unless formally erased by the issuing staff member. Residents were terminated from the shelter after receiving three points.

Characteristic of total institutions, shelter staff enjoyed a wide degree of discretion in terms of issuing points, as well as enforcing other rules, administering services, and providing access to resources (Marvasti, 2002; Mulder, 2004). Through observation, it was clear that staff at The Refuge were encour-aged to use their discretion in such matters as distributing per-sonal items, as well as permitting entrance and exit of residents from the shelter. Likewise, education and access to community resources were subject to the approval and assistance of each resident's caseworker. The wide margin of staff discretion, and their potential misuse of authority, created a deep power dif-ferential from the residents' perspectives. As Becky comment-ed, "I think some of the staff treat

them [residents] okay, but overall, I think they treat them kind of harsh .... I think they on a power trip." Moreover, this discretion allowed staff to rein-force their own version of hierarchy, favoring some residents over others (see Holden, 1997).

Because total institutions emphasize conformity to rules, there is little respect for autonomy or individuality (Goffman, 1961). Residents are viewed as dependents, reduced to virtual child-like status, in that they are fully reliant on the institution for all of their basic necessities (e.g., food, shelter, clothing, per-sonal items) [Snow & Anderson, 1993]. In this way, residing at the shelter seemed to carry with it the presumption that one is incapable of regulating one's own affairs. Such a supposition is closely related to the original conceptualization of the total institution, in that such facilities have traditionally been asso-ciated with persons who, due to either illness or poor decision making, are seen as incapable of functioning in the larger com-munity (e.g., people with mental illness, criminal offenses or contagious diseases) [Stark, 1994].

Accordingly, The Refuge relied upon an age-graded system (Goffman, 1961) aimed at subjecting previously independent adults to rules and tasks that were infantalizing and demoral-izing. For instance, rules dictated when and where activities, mealtime, recreation, and bedtime took place. Residents re-sented such measures. As Nicole commented, "If they want respect, they should talk to you with respect and not talk to us like we kids, 'cause we are all adults here."

Mothers, in particular, recognized the institutionally imposed role conflict between autonomous adult and dependent. Prior to entering shelter, many women who were mothers were considered the sole heads of their families. Upon entering the shelter, however, their familial leadership roles were usurped by staff authority. Subsequently, both mothers and their children were subjected to the rules and discipline of the shelter.

Surviving the Shelter as a Total Institution

Submission: Embracing the Total Institution

Based on their responses to the interview questions and field observations, we categorized seven of the interviewees as "submitters" to the shelter institution because of their com-plete deference to the organization, its power hierarchy, and its disciplinary system. Such women fit the categories of "good," "deserving" or "appropriate" clientele (Ferraro 1981; Lindsey, 1998; Marvasti 2002), in that they obeyed the rules, did not question the authority of the staff, stayed out of others' busi-ness, and appeared grateful for what they received. The shelter organization thrived with these residents, who due to their compliance, reinforced the structure and created a reciprocal codependence between themselves and the organization. In other words, the shelter, whose stated purpose is to help resi-dents become independent, actually reinforced dependence on the system through its support of submissive residents (Stark 1994).

An example of such dependence and submission to the institution can be found in Mary and her two children, who had resided in The Refuge for six months at the time of her interview. The Refuge policy dictates a maximum shelter stay of thirty days, so substantial exceptions were made on her behalf. Instead of pursuing outside work, Mary applied for and was hired as a staff person in the women's dormitory -the same dormitory in which she was living. She lamented the lack of enforcement of shelter rules during the interview, which she had to both enforce upon others and follow herself. When asked if there were any rules that she would change, Mary replied, "No, definitely not. I would make sure they are enforced." Mary stated that she had no future plans of leaving the shelter, and she was indeed still living and working at The Refuge

when data collection was completed (comprising a nine-month stay).

Adaptation: Reframing the Total Institution

Seven women adjusted to shelter institutionalization through adaptation. The adaptive strategies assumed two primary strategies: (1) emphasizing spirituality; or (2) recre-ation of hierarchy. This group was characterized by their ac-knowledgement of their subjugated role within the shelter hierarchy. However, unlike the unquestioned acceptance il-lustrated by those who submitted to their status, "adapters" reframed their identities in ways that allowed them to define for themselves where they fit within the hierarchy.

Adaptation through emphasizing the spiritual self Adaptation through one's spiritual identity was a powerful element to shelter survival. Unlike the submitters, spiritual adapters were able to articulate the reasons for their homelessness, accept re-sponsibility for their situation, and view their faith as central to their efforts to regain economic independence. Indeed, what was distinct about this group of women was their heightened sense of personal responsibility. They viewed their homeless-ness as a result of their "sins," and believed that only through a genuine focus on their spirituality would they have any hope of escaping their plight. In contrast to submitters, spiritual adapters did not appear to embrace the bureaucratic and insti-tutionalized nature of the shelter. They seemed relatively un-interested in condoning the shelter's practices and the efforts of its staff. Instead they turned inward, embracing their faith as an instructional guide in accepting and resolving their situ-ations.

Iyayeiya expressed similar sentiments with regard to her "sin" of being "promiscuous" and having relationships with abusive men, "I get my strength from God through prayer ev-eryday. You know, He gets me up in the morning. He provides shelter. .. this is like God's hotel to me. I don't see this as, 'Uh, I stay at the shelter.'" As a result of her belief in God's care, Iyayeiya had resolved to keep men and "fornication" out of her life as she worked to move out of homelessness.

Adaptation through recreating hierarchies. In the second adaptive strategy, women reframed the shelter experience in ways that allowed them to see themselves as better positioned than other residents. Distinct from the spiritual adapters who focused on personal responsibility and spiritual growth, hier-archical adapters focused more on the distinct circumstances of shelter residents, differentiating between those considered "homeless" and those considered "houseless." Homelessness referred to those who entered shelter because of an incapaci-tation, perceived lack of judgment or poor decision-making, such as mental illness or alcoholism. Alternatively, house-less referred to those who entered shelter due to "bad luck" (e.g., losing a job, going though a difficult divorce). A home-less person was in a long-term predicament and deserved some amount of personal blame. A houseless person was in a temporary situation that could be rectified given some time and assistance. In this way, a hierarchy between residents was created.

Tasha illustrated the distinction well, "This is my third time being here. I might have been homeless, well houseless three times. Each time, I feel it wasn't my fault." She indicated that she had become houseless due to being laid off, suffering poor credit, and forced evictions.

Resistance: Rejecting the Total Institution

A third group of women actively resisted the bureaucracy and structure of the shelter, which they viewed as contributing to their marginalization. Comprised of six women, this group opposed the subordination of the shelter experience, doing so most often by verbally expressing their opinions and thoughts to staff and other residents. Nee-Nee exemplified the "resist-ers" when she blatantly responded that the shelter's services were "full of shit." This

group was characterized by consci-entious efforts at retaining a sense of themselves within the shelter. Their voices and actions expressed their desire for au-tonomy and respect as individuals. As Kelly described:

> I let them [staff] know they ain't gonna use none of that [rules and use of discretion] against me, 'cause I know that I have street smarts and educational smarts, and I'm not gonna let you judge me off that and break me down like I can't be on the same level as you ... That's how they do. They'll try to demean you, the staff do here ... They wanna just brainwash you ... But that's not gonna help you get an apartment.

This group of women aptly articulated the contradictory nature of the shelter institution, and were unique from the other groups in their ability to place their critiques within a larger social context. For example, Alice compared the shelter system to a correctional system:

> I think shelters should be like a shelter, not like a treatment center. If you come into a shelter, you need it not to feel like a correctional center. Like a prison! You got people right back out there on the streets because they don't want to be closed in all the time.

Conclusion

The results of this analysis point to several recommendations for homeless shelters, beginning with a thorough reevaluation of shelter goals and practices. A contradiction exists between the operation of such agencies, and their reaction to and dismissal of those who reject their structures. Indeed, the women in our study who resisted the shelter's rules and its staff, and subsequently risked being denied the safety and security the shelter could provide, were in a way the very type of individual social service-based agen-cies claim to want to create. Given the appropriate resources, these women exhibited the drive and tenacity to survive in an autonomous state. Indeed, if agencies that served marginalized populations, like homeless women, were truly concerned with and committed to fostering self-sufficiency, it would be these clientele who would be seen as at least somewhat desirable.

This adversarial relationship is inherently counter-produc-tive to the goal of self-sufficiency of shelter residents. Homeless shelter workers should operate as advocates for shelter resi-dents, providing individualized case management to aid in securing employment and stable housing. Staff should be educated about inequality (Abramovitz, 2005), urban neigh-borhood issues (Kissane, 2004), and poverty policies (such as welfare reform) to aid their advocacy for clients (Kissane, 2006). With this knowledge, staff should be able to display greater empathy for residents, holding more positive regard for clients rather than judgment. Appropriate strengths-based assistance may thus become possible (Saleebey, 2005).

Every night people in Santa Clara County, USA board 24-hour public transportation routes for shelter. While this social phenomenon exists in urban centres around the world, research or data about those who use buses or trains as shelter are limited. This is not surprising given that most research about people who are homeless takes place in shelters (Cunningham and Henry, 2008). Not only do we not know much about those who use this type of shelter strategy, the practice raises questions similar to those being asked about the rights of people without homes to access and use public space (such as libraries, public parks or plazas) as an alternative or in addition to separate services designed specifically to serve the unhoused.1 While laws are not being broken, policies and services are often being utilised by those who are unhoused in unintended ways, conflicting with how service providers, businesses and the housed envision or desire the space to be used.

Background

In most communities in the US, there exists a complicated maze of separate public and non-profit services and benefits available for people without permanent housing. While the UK, for example, has a framework of statutory responsibilities towards those who are homeless, the US response is typically piecemeal and differs significantly by locality (Minnery and Greenhalgh, 2007). Some cities and counties devote significant resources to build local shelters and affordable housing, as well as augment the work of independent non-profit shelters and private developers, but there is no federal or state mandate for such an approach (Shin, 2007). Therefore, as long as the US (and countries like it) approach homelessness as an individual problem of welfare, rather than a structural lack of affordable housing, the issue and problem are never adequately addressed (Daly, 1996). Relatedly, in most, if not all, communities in the United States there is not enough shelter space to meet the need.

While providing shelter has been the most common response to homelessness, this approach has been temporary and an inadequate stopgap. Emergency shelters typically follow similar rules about maximum nights of stay allowed. For example, single men are usually given shelter on a day-to-day basis, and families are allowed a longer time frame (30–90 days) (Feltey and Nichols, 2008). Many communities have also begun to open large shelter spaces during the winters only. In addition, because of the need to house large numbers of people, with a variety of needs and situations, rules tend to dominate lives in the shelters (Loseke, 1992; Spencer and McKinney, 1997). People must be in and out of the shelters at specific times. Shelter residents also worry about exposure to sickness and criminal activity (Donley and Wright, 2008).

This combination of uncoordinated structural and individual responses to homelessness in the US has meant that there are vastly larger proportions of people sleeping rough in the US compared to Europe. As a result, people often cannot access emergency shelters and try to find alternatives. Popular substitutes include sleeping in vehicles, on the streets, and in encampments. Riding public transportation for shelter has also been identified by the press as a creative way to stay warm throughout the night (Brown, 2005;Peterson, 2007;Royale, 2007; Samuels, 2006).

While riders legitimately pay to ride the bus, transportation authorities and housed riders make complaints similar to those often raised about the use of libraries by the unhoused, specifically pointing out odour and unruly behaviour as problems. In addition, public agencies and employees in non-homeless service fields are confronted with a range of

mental health, family and public health needs for which they are not prepared. Various cities have attempted to ask people who are homeless to leave libraries under a public nuisance clause. The removals have been challenged in the courts with mixed outcomes, and raise larger questions about who really has access to and control over public space and the functions of such spaces (Hodgetts et al., 2008; Wright, 1997). Homelessness becomes more visible as a public issue, and communities often struggle to figure out how to respond.

Context

These dilemmas were being actively discussed in the community where this study took place. Transportation officials said that the buses should not be used as shelters, and other entities should be responsible for unhoused riders. At the same time, shelter and other service providers said they were fulfilling their mandates and had no responsibility (or resources) for addressing the issue. Cities could not act because the bus route crossed through many different jurisdictions. And no entity was quite sure exactly what, if anything, should be done. We decided to conduct a study with unhoused riders in the hope this would move the conversation forward and better inform any policy decisions that might be considered.

Santa Clara County is in Silicon Valley in Northern California, and has an estimated 1.8 million residents (US Census, 2008) with one of the costliest housing markets in the United States (Center for Housing Policy, 2009). A recent street count puts the number of homeless individuals in the county at 7,086 unduplicated persons, 2,270 of whom are defined as chronically homeless (Fernandez, 2009). The county has approximately 26 emergency shelters that provide space for up to 1,000 persons each night. In the winter months (November through March), additional shelter is provided for 300 more persons (Santa Clara County, 2009).

At the systems level, shelter is not provided based on the numbers of unhoused persons or even known needs, but rather based on limited resources for existing services, funded usually on a year-to-year basis. As a result, non-profit shelters and social service organisations often compete with one another for funding, and while government entities support such organisations in their work, no entity is charged with monitoring needs and resources (Fogel et al., 2008). The lack of funding stability is even more pronounced when localities are struggling economically. In 2009, a large shelter provider in the county had plans to cut the number of emergency shelter beds available until two wealthy couples donated funds to keep the shelter open at full capacity.

This uncertainty and gap between needs and resources results in many persons living on the streets, in encampments, in abandoned buildings, and any other configuration that can be utilised for shelter. The bus is one such repurposing of space. While there are a number of questions and issues that could be understood and explored from the perspectives of people who ride public transportation for shelter, this study provides a preliminary look at how often people say they ride the bus for shelter, who they are, why they say they ride the bus for shelter, and the services they say they would like to utilise.

The 24-hour bus route

The route in question is 42 kilometers long and passes through six cities. At the southern most end, the route travels through some of the most impoverished areas of San Jos´e and ends in one of the most affluent cities in the county, Palo Alto, home to Stanford University. It is the only all-night full-service route and, according to the transportation authority, carries 20,000 riders a day, 20 per cent of the total ridership in the county (VTA, 2009).

Because of its centrality and popularity, the bus runs frequently, every ten minutes or so during the day, reducing to every hour after 12:30 a.m.

In the evening, the route takes approximately one hour and thirty minutes from end to end. At night, the layover times at the end of each line are at least an hour, and operators are required to empty the bus of passengers and lock up the bus until the bus leaves at the next scheduled time.

The bus on this route is often referred to by people who are homeless as 'hotel 22', in reference to the large numbers of people who ride this numbered route for shelter. Although there has never been an official count, an unofficial survey of bus operators puts the number at 50–60 persons a night who ride the route for shelter.

Findings

The bus as shelter

Like many experiences of being homeless, riding the bus for shelter requires timing and waiting. One rider said that she started her ride early, at 7:30 p.m., because that allowed her the longest stint to sleep: two hours before she had to deboard. After that the most she could sleep at a time was an hour and a half. Once boarded, most riders went to the front or back of the bus and quickly fell asleep. Although surveyors saw some people laying across the bench in the back of the bus or taking up two seats, most sat up and slept. Manuel noted how difficult it is to ride the bus:

It's been tough sleeping on the bus. Actually it's really hard to sleep on the bus because it moves a lot and makes a lot of noise. I have bruises on my body and wake up with pain. A human isn't meant to sleep on the bus, or to sleep sitting down. I know that this is only a phase in my life. I'm conscious of whom I am and I don't drink or do drugs like some of the other people on here. I know I'm going to be better and that things will work out.

Most unhoused riders did not leave the bus before the end of the line. At the end of the route, one operator would walk up and down the aisle of the bus hitting the metal rails with a cane to wake people up. During the layovers the data collection teams noted how deserted the bus terminals were, especially during the long layovers when the operators would drive the buses to a garage. Riders waited quietly, some sleeping on benches, a few huddled with other riders, but most stayed awake and alone with their belongings.

Both terminals at each end of the line are in isolated locations. One is essentially in the parking lot of a large shopping mall that is closed all night, and the other is near a train terminal and tucked behind a closed catering business. During short layovers, the operators empty the buses and drive them away from the loading area, but still in view of riders. Sometimes the operators stay on the buses with the lights on, other times they stand outside, smoking, reading and/or talking on their cell phones. The buses generally leave on time, with buses pulling up to the terminal and passengers responding by quietly lining up for the ride back to the end of the line.

Frequency of riding for shelter

To get a sense of how often riders use the bus for shelter and other shelter options that riders used, we asked respondents to name all the places they usually stayed for shelter. Almost two-thirds of those surveyed said that the bus was their only or one of their usual sources of shelter. Of the 29 persons who said they usually stayed in only one place, 14 named the bus as that one place. The next most usual place to stay was outdoors (see Figure 1). Eleven respondents combined both the bus and one to three other places. Hotels/motels, shelters and bus/train stations were the most popular combinations with the bus.

When asked how respondents usually paid for their bus fare, for 19 respondents the most common response was a monthly pass. Just over a third paid for a day pass and nine paid cash for a single ride. No one used an annual pass. However, even though a large proportion of unhoused riders said that they usually paid

with a monthly pass, half of those riders said they had paid cash for the particular trip they were on when surveyed (either for a single ride or a day pass).7 Overall, when asked how they had paid for their current trip, a third of riders said they paid cash for a single ride ($1.75), just under a quarter said they used a day pass ($5.25), and eight persons said they used a monthly flash pass. It should be noted that the day pass expires at midnight so riders who stay on the bus overnight must buy two day passes. One rider said that he paid $10 a night to ride the bus, far cheaper than any motel he could find.

Those surveyed ranged in age from 20 to 71 years, with a mean age of 47 years. More men (n = 35) than women (n = 13) rode the bus for shelter. Almost half were African American, ten were white, and similar proportions identified as Latino, Asian or of more than one race/ethnicity.

In Table 1 we compare the demographics of bus riders surveyed for our project with data from a survey conducted in March of 2007 as part of the homeless street count and census that takes place in the county every two years.8 The most interesting difference between those who usually stay in shelters or outdoors compared to bus riders is the large proportion of bus riders who self-identify as African American. This is even more striking given that less than 3 per cent of the population of the county is African American (American Community Survey, 2005)and 20 per cent of the homeless population in the county has been identified as African American (Fernandez, 2009).

When questioned about why they were unhoused, almost all respondents said they were not able to afford rent or did not have enough money in general.

Why ride the bus?

There were different reasons given by gender for riding the bus overnight. Thirty-two of the 35 men surveyed said that they rode the bus to sleep or because they did not have a permanent home. Over half of the women surveyed said that they rode the bus overnight for safety, while only a quarter of the men surveyed said that they rode the bus for that reason. Only five people in the full sample said that they rode the bus because they had been turned away from a shelter.

In informal conversations with riders, there was one person who said that he was unaware of local shelters, but most had stayed at shelters at some point and chose the bus over the shelters. The main reasons mentioned were concerns for safety and dissatisfaction with shelter rules.

The mixed attitudes of bus operators

Although interviewing bus operators was not part of the study, a number of the operators talked to the surveyors, as well as the instructor and peer educator on the ground. There were a variety of opinions among the operators about the presence of unhoused riders on their routes during the night. For example, although all operators were instructed to empty the bus at the end of the line, even when they were continuing back on the route, one did not, saying that he saw no need to empty the bus as long as he did not need to leave the bus himself and could stay awake.

During a layover, one of the riders told a surveyor that the operators were ‘being nice tonight because you guys [the surveyors] are on’. She commented that often the operators would not turn on the heat, but did this night she presumed because of the presence of the surveyors. Turning on the heat and dimming the lights in the bus during the ride were indicators to unhoused riders of a compassionate bus operator. Unhoused riders who had been riding for a number of years made sure to ride on the buses driven by those operators. As a result, some of the buses were quite crowded throughout the night, while others were virtually empty.

Discussion and Conclusion

Taken together, the perspectives of unhoused riders profiled in this study provide insight into the larger function of the bus and public space as shelter. Riding the bus, and using public space, is one way to attempt to escape the stigma and label that goes with homelessness. While libraries often function as day centres for those without housing, in the absence of other options public transportation serves as an overnight alternative to the shelter system. These options also allow people who are unhoused to potentially escape the label of being homeless and use spaces that are presumed to be accessible to all (Hodgetts et al., 2008;Johnsen et al., 2005). We saw riders distancing themselves from the label of homeless as well as acknowledging how bad it was to be homeless.

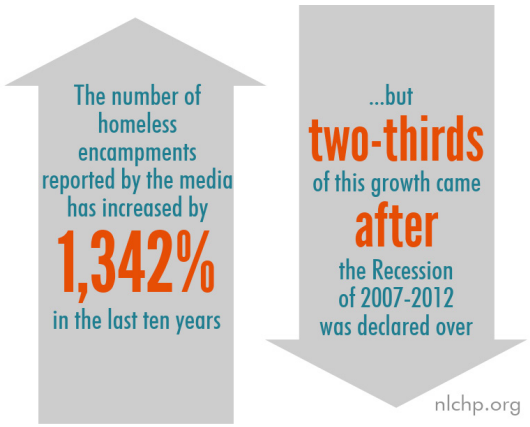
At the same time, the bus also provides a form of freedom that shelters do not. While most riders did not deboard the bus before the end of the line, theoretically they could at any time. This is different from most shelters that require checking in by a certain time and an inability to leave until the shelter opens its doors early the next morning. At the same time that the bus allows for a measure of freedom, it also provides a feeling of safety.

The practice of actively choosing forms of shelter outside the social service system also points to inadequacies in how homelessness is addressed in communities in the US. In the past, shelter has been the primary focus and assumed need.

While the use of public transportation as a form of shelter is viewed by some as a public nuisance, it can also be seen as an innovative way that individuals who are unhoused respond to the inadequate and often piecemeal way that homelessness has been addressed. At the same time, the practice also raises policy questions about how public services for all can be provided within the context of a large homeless population. As long as there is homelessness, people who are unhoused will use public space, sometimes in unintended ways. The magnitude of the use will likely depend on the availability, knowledge and perception of the utility of other possible options.

EXECUTIVE SUMMARY

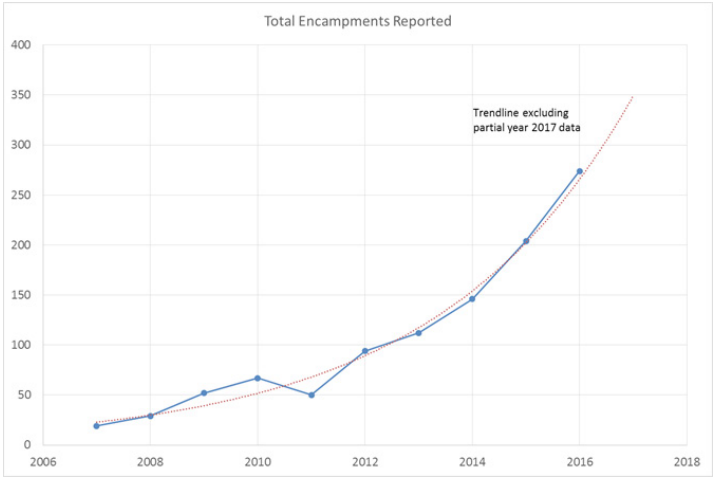
This report by the National Law Center on Homelessness & Poverty ("the Law Center") documents the apparent rapid growth of encampments of people experiencing homelessness or "tent cities" across the United States and the legal and policy responses to that growth. (This report uses the term "encampments" but recognizes that there are multiple ways to refer to the living situation of self-sheltering homeless persons).



The number of documented homeless encampments has increased sharply

This report finds that in the past decade, documented homeless encampments have dramatically increased across the country. Many encampments are designed to be hidden to avoid legal problems or evictions. While some encampments last for years, others are forced to move frequently. These factors make documenting their existence a challenge. As a proxy, this report counts only those encampments reported by the media, and of those, using only media reports that reference the state in which the encampment occurred. Only one report was counted for each encampment. While this is an imperfect proxy, the trends within that limited data set are useful and confirm anecdotal reports from across the country. Between 2007 and 2017:

- **The number of encampments reported grew rapidly**: Our research showed a 1,342 percent increase in the number of unique homeless encampments reported in the media, from 19 reported encampments in 2007 to a high of 274 reported encampments in 2016 (the last full year for data), and with 255 already reported by mid-2017, the trend appears to be continuing upward. Two-thirds of this growth comes *after* the Great Recession of 2007-2012 was declared over, suggesting that many are still feeling the long-term effects.
- **Encampments are everywhere:** Unique homeless encampments were reported in every state and the District of Columbia. California had the highest number of reported encampments by far, but states as diverse as Iowa, Indiana, Louisiana, Michigan, Oregon, and Virginia each tallied significant numbers of reported encampments.
- **Many encampments are medium to large**: Half the reports that recorded the size of the encampments showed a size of 11-50 residents, and 17 percent of encampments had more than 100 residents. Larger encampments are obviously likely to garner more coverage, but these figures suggest that there are high numbers of both medium and large encampments across the country.
- **Encampments are becoming semi-permanent features of cities:** Close to two-thirds of reports which recorded the time in existence of the encampments showed they had been there for more than one year, and more than one-quarter had been there for more than five years.
- **But most are not sanctioned and are under constant threat of eviction:** Three-quarters of reports which recorded the legal status of the encampments showed they were illegal; 4 percent were reported to be legal, 20 percent were reported to be semi-legal (tacitly sanctioned).

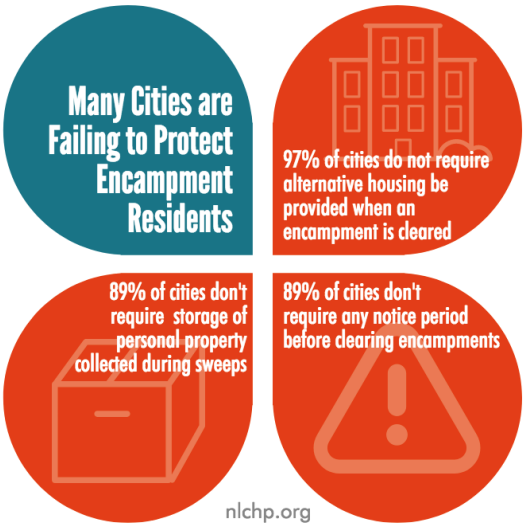


This increase in encampments reflects the growth in homelessness overall, and provides evidence of the inadequacy (and sometimes inaccessibility) of the U.S. shelter system. The growth of homelessness is largely explained by rising housing costs and stagnant wages. A new report by Freddie Mac documents a 60 percent drop in market-rate apartments affordable to very low-income families over just the past six years. Zillow recently documented a strong relationship between rising rents and the growth of homelessness, particularly in high-growth cities like Los Angeles, where a 5 percent rent increase equates to 2,000 additional homeless persons on the streets.

> "There are … reasons to say no when officers offer to bring you to shelter. Agreeing to go to a shelter in that moment means losing many of your possessions. You have to pack what you can into a bag and leave the rest behind, to be stolen or thrown away by City workers. For me, I would have lost my bulky winter clothes, my tent, my nonperishable food, and the bike parts I used to make repairs for money. You give up all this property just for the guarantee—if you trust the police—of a spot on the floor *for one night*. It's not really a "choice" for me to give up all those resources. I needed to make smart survival decisions.
>
> –Eugene Stroman, homeless in Houston, TX

The growth of encampments is a predictable result of policy choices made by elected officials. California, where the most homeless encampments were reported in our study, has acknowledged for a decade that it needs to be building approximately 180,000 units of new housing a year—but has been building less than half of that. Consequently, the *majority* of California renters now pay more than 30 percent of their income on rent, and nearly one third pay more than 50 percent, putting them just one missed paycheck or medical emergency away from eviction and possible homelessness. A recent Florida study found the majority of homeless persons surveyed named medical debt as the primary cause of their homelessness. Because the growth of encampments is primarily due to these other factors than individual character flaws or choices, the most effective responses will be systemic in nature and avoid involving individuals in the criminal justice system unnecessarily.

In the United States, the wealthiest country on earth, encampments of homeless people are unacceptable. But how cities respond to encampments varies widely.



Many communities are responding with punitive law enforcement approaches

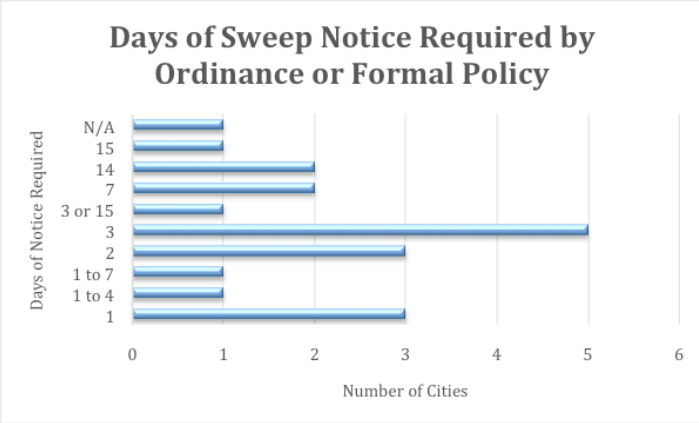
Municipalities often face pressure to "do something" about the problem of visible homelessness. For many cities, the response has been an increase in laws prohibiting encampments and an increase in enforcement. When a city evicts residents of an encampment and clears their belongings, it is often called a "sweep." We surveyed the laws and policies in place in 187 cities across the country (the first attempt at a national survey of formal and informal policies on encampments) and found:

- 33 percent of cities prohibit camping city-wide, and 50 percent prohibit camping in particular public places, increases of 69 percent and 48 percent from 2006-16, respectively.
- 50 percent have either a formal or informal procedure for clearing or allowing encampments. (Many more use trespass or disorderly conduct statutes in order to evict residents of encampments).
- Only five cities (2.7 percent) have some requirement that alternative housing or shelter be offered when a sweep of an encampment is conducted.
- Only 20 (11 percent) had ordinances or formal policies requiring notice prior to clearing encampments. Of those, five can require as little as 24 hours' notice before encampments are evicted, though five require at least a week, and three provide for two weeks or more. An additional 26 cities provided some notice informally, including two providing more than a month.
- Only 20 cities (11 percent) require storage be provided

for possessions of persons residing in encampments if the encampment is evicted. The length of storage required is typically between 30 and 90 days, but ranged from 14 to 120 days.

- Regional analysis found western cities have more formal policies than any other region of the country, and are more likely to provide notice and storage.

While a large and growing number of cities have formal or informal procedures for addressing encampments, relatively few affirmatively provide for the housing and storage needs of the persons living in the encampments.



"I honestly believe that people need to sleep and that people are healthier when they get sleep, they can make better decisions when they get sleep. If at some point in the future, we can have a place where people can go and sleep lawfully, I think that makes great sense. At the same time, [our decision not to enforce the anti-camping ordinance] gives us the opportunity to say, we can't enforce this [ordinance] rigorously when there aren't enough beds or even close to it for people to sleep."

–Andy Mills, Santa Cruz Police Chief

Encampment Evictions are Expensive

Using the criminal justice system and other municipal resources to move people who have nowhere else to go is costly and counter-productive, for both communities and individuals. Honolulu, HI spends $15,000 per week—3/4 of a million dollars a year—sweeping people living in homeless encampments, many of whom simply move around the corner during the sweep and then return a day later. Washington, D.C. spent more than $172,000 in just three months on sweeps. Research shows that housing is the most effective approach to end homelessness with a larger return on investment. Beyond this misuse of resources, sweeping encampments too often harms individuals by destroying their belongings, including their shelter, ID and other important documents, medications, and mementos. More often than not, this leaves the homeless person in a worse position than before, with a more difficult path to exit homelessness. Moreover, sweeps frequently destroy the relationships that outreach workers have built with residents, and that residents have built with each other, again, putting further barriers between residents and permanent housing.

"Did I get arrested? Sure. I had nowhere else to go. They took me to jail, and took away my stuff…I was chased and cited by the city, but I was determined to sleep somewhere...Arrests delayed me getting stabilized for six months."

-Milton Harris, formerly homeless in Sacramento, CA

Other cities spend thousands of dollars on fences, bars, rocks, spikes, and other "hostile" or "aggressive" architecture, deliberately making certain areas of their community inaccessible to homeless persons without shelter. San Diego, CA, recently spent $57,000 to install jagged rocks set in concrete underneath an overpass in advance of the Major League Baseball All-Star game. Other cities, like Chicago, IL, simply fence off areas under bridges to prevent homeless persons from sheltering there. In either case, the money did not reduce the need for people to find shelter but potentially put people at greater vulnerability to exposure and hazards.

To illustrate what criminalization of encampments is like on the ground, we invited some of our local partners to offer examples of punitive, non-constructive approaches.

- **Denver**, **CO**: Law enforcement removed blankets from sleeping people in the middle of the night while the

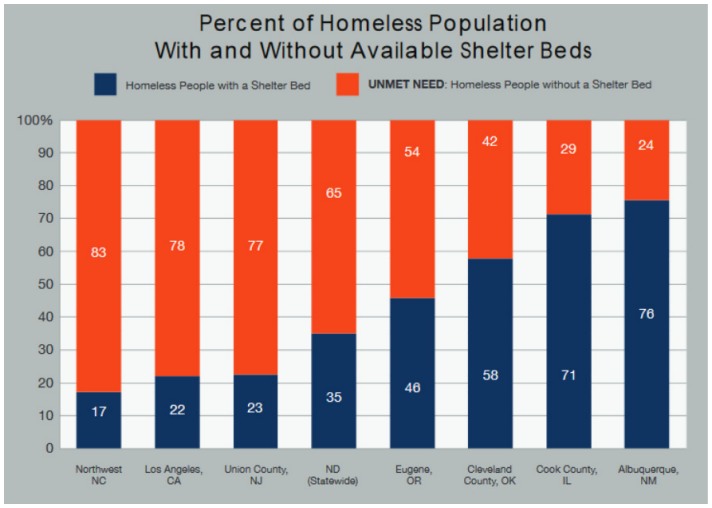
Photo credit: Ben Burgess//Street Sense Media

temperatures were below freezing.

- **San Diego, CA**: The city uses a law intended to keep trash cans off the sidewalk to arrest and jail people who are living outside.
- **Olympia, WA:** The city uses trespass laws to charge people who are sleeping in the woods, despite the fact that there are only 250 shelter beds for at least 800 homeless people.
- **Titusville, FL:** The city dismantled an encampment in 2011 that was home to mostly veterans, destroying irreplaceable items including the ashes of one man's father and the WWII flag that another man's father earned for service in the military.

Law Enforcement Threats Do Not Decrease the Number of People on the Streets

Many communities state they need criminalization ordinances to provide law enforcement with a "tool" to push people to accept services, such as shelter. Conducting outreach backed with resources for real alternatives, however, is the approach that has shown the best, evidence-based results. The 100,000 Homes Campaign found permanent housing for more than 100,000 of the most "service-resistant" chronically homeless individuals across America by listening to their needs and providing appropriate alternatives that actually meet their needs.



Most cities in the United States have insufficient shelter beds for the number of people experiencing homelessness; in some cities, the shortage is stark. So when law enforcement tells residents of encampments to go to a shelter, they risk finding the shelter full. Even where shelter beds are open, they are not always appropriate, or even adequate, for all people. Many shelters are available only to men or only to women; some require children, others do not allow children. Some do not ensure more than one night's stay, requiring daily long waits in line- sometimes far from other alternatives. Other shelters do not allow people to bring in personal belongings, much less store belongings during the day. These restrictions can make it very difficult to hold a job, whether day shift or night shift. Because of nighttime employment or physical disabilities, some people need a place to lie down undisturbed during the day. Congregant settings are not appropriate for all people, providing exposure to germs and noise and lacking privacy. And some shelters require residents to participate in religious activities, while others have time limits, charge money, or have other rules or restrictions that bar groups of people. Very few shelters allow pets. All of these factors may mean that even though a shelter may technically have a bed empty, it may not be actually accessible to an individual living in an encampment.

"I learned from other homeless people that the shelters were usually full, and it wasn't worth the effort to constantly wait in line…Going and seeking out shelter would have meant losing many of my things. I would have to pack a bag and leave everything else behind, trying to hide it in the bushes. I'd be risking a lot of my property just to try to get a shelter space for one night. Plus, with my cancer diagnosis, it felt like it was a health risk for me to go inside. It was cleaner on the street than it was in any of those shelters. In a tent, I could keep my area as clean as I wanted.… Rather than sacrificing my health and my dignity, I focused on moving on and making do with what was stable: a tent.

–Tammy Kohr, formerly homeless in Houston, TX

Encampment Evictions are Not the Best Way to Protect Health & Safety

City officials frequently cite concerns for public health and safety as reasons for sweeps of encampments, but again the cost is high and the impact is either minor or counterproductive. At the extreme are cities like Denver, where law enforcement officers were caught on video pulling blankets off homeless persons in sub-zero temperatures. The Denver Mayor claimed his concern was for the homeless persons: "Urban camping—especially during cold, wet weather—is dangerous and we don't want to see any lives lost on the streets when there are safe, warm places available for people to sleep at night." But Denver has far fewer available shelter beds than homeless people, meaning that the city increased exposure and health risks for vulnerable people instead of decreasing them.

City officials will often highlight the health and safety hazards of open fires, public urination and defecation, and rodent infestation encouraged by litter. While these concerns are valid, sweeps rarely result in improved health or safety. What works is providing access to sanitation facilities and water, regular trash removal, and safe cooking facilities—all things that a city can do that improve the health and safety of all its residents.

Case studies of non-enforcement approaches show promising lessons

This report explores experiments by a number of cities that have adopted approaches other than arbitrary evictions or criminalization, or at least approaches to lessen the number and negative consequences of encampment evictions. These are not all of the possible alternatives, nor do we cover every city that is using a non-enforcement approach. All of the cities highlighted need further improvements in their policies, some even more than others. But each case study seeks to inspire communities by sharing how other cities are addressing concerns about homeless encampments more effectively, more humanely, and at lower cost.

Cities Ending Encampments Through Housing

In 2015, the U.S. Interagency Council on Homelessness published guidance for cities entitled *Ending Homelessness for People Living in Encampments.* As the title implies, it emphasizes that the best approach to ending encampments is to end homelessness for the people living in them. It sets out four basic principles for effectively dealing with encampments:

1. Preparation and Adequate Time for Planning and Implementation
2. Collaboration across Sectors and Systems
3. Performance of Intensive and Persistent Outreach and Engagement
4. Provision of Low-Barrier Pathways to Permanent Housing

"The forced dispersal of people from encampment settings is not an appropriate solution or strategy, accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide such lasting solutions to people who have been sleeping and living in the encampment."

U.S. Interagency Council on Homelessness, *Ending Homelessness for People Living in Encampments* (2015)

This report looks at cities implementing this approach, at least in part:

- **Charleston, SC**, ensured adequate time for planning, outreach, housing and services to close a 100-person encampment through housing most of its residents, without a single arrest.
- **Indianapolis, IN**, adopted an ordinance requiring residents be provided with adequate alternative housing before an encampment can be evicted, and mandates at least 15 days' notice of planned evictions to encampment residents and service providers.
- **Charleston, WV**, settled litigation by adopting an ordinance requiring that encampment evictions cannot proceed unless residents are provided with adequate

alternative housing or shelter, and providing 14 days' notice to encampment residents and service providers of planned evictions, and that storage facilities will be made available for homeless individuals.

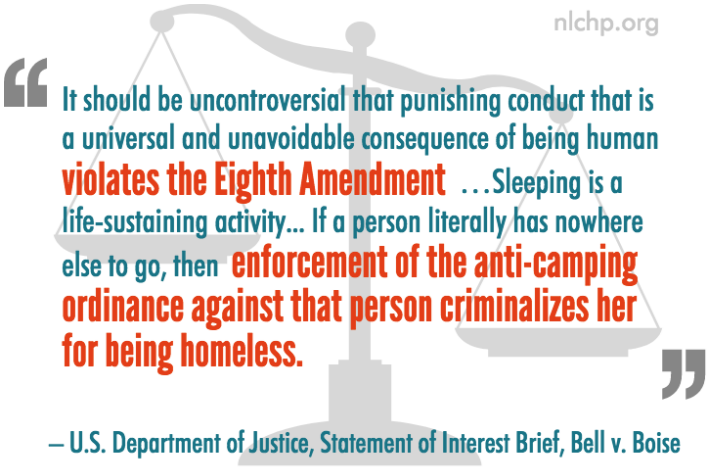
- **Seattle, WA and San Francisco, CA**, both cities proposed, but have not yet passed, ordinances that would improve upon Indianapolis, IN's and Charleston, WV's by ensuring adequate provision for sanitation and hygiene needs in existing encampments, as well as clear notice and provision of adequate housing alternatives and storage in the event of displacement. In 2016, the U.S. Department of Justice analyzed the Seattle proposal and found it to be a constitutional approach that is consistent with federal policy against criminalization.

Putting into law the commitment to closing encampments through housing the individuals living there encourages these communities to take an approach that will permanently end the need for the encampments.

> I know the City is also saying they need to ban tents because our encampment is so dirty. The only reason it's dirty is that people are getting overwhelmed and they don't know what to do with their trash. If the City would give them a solution, they'd use it…. It's not like we can pay for a trash man. The tents themselves are clean. People have their own areas that they generally keep tidy. It's the areas where we leave trash to be picked up that are not clean. It's where we have to go to the bathroom that is not clean. Those problems have nothing to do with the tents, and they can be fixed with solutions other than jail.
>
> –Tammy Kohr, formerly homeless in Houston, TX.

Cities Integrating Encampments as a Step toward Addressing Homelessness

Our survey of 187 cities found only ten of these cities have explicitly permitted some form of legalized camping. Encampments are not an appropriate long term solution to homelessness or the nation's affordable housing crisis. However, in the absence of such solutions—and while we advocate for them—homeless people need a place to sleep, shelter themselves, and store belongings. In order to be successful, legalized encampments require a tremendous amount of planning, consultation, and collaboration with all stakeholders, most especially the homeless residents of the



encampment. In many cases, this time and effort may be better spent developing other interim or permanent housing solutions. However, the following cities, which allow some forms of temporary encampments, may have lessons for others on how to effectively use them to get people closer to adequate housing and avoid subjecting them unnecessarily to the criminal justice system:

- **Las Cruces, NM**, hosts a permanent encampment with a co-located service center.
- **Washington State** permits religious organizations to temporarily host encampments on their property.
- **Vancouver, WA**, permits limited overnight self-sheltering encampments on city property.

In each of the above case studies, we examine, to the extent possible, both the substance of the approach and the means by which each community came to adopt that approach, to assist other communities in implementing similar reforms.

Other Approaches

Although outside the scope of our research for this report, we also mention some approaches that may merit further study. Some cities permit limited safe parking options for those who are living in vehicles, including **Eugene, OR; Los Angeles, CA; San Luis Obispo, CA; Santa Barbara, CA; and San Diego, CA.** Pilot programs in **Seattle, WA and Multnomah County, OR**, have that permit, or even pay for, residents to host tiny homes in back yards to house persons experiencing homelessness.

Courts are increasingly affirming the rights of homeless persons living in encampments

This report reviews relevant case law related to encampments. At the federal level, an increasing number

of courts are applying the First, Fourth, Fifth, Eighth, and Fourteenth Amendments to protect the rights of homeless individuals to perform survival activities in public spaces where adequate alternatives do not exist; the rights of homeless individuals not to be deprived of their liberty or property without due process of law; the due process rights of homeless individuals to travel; and their rights to be free from cruel and unusual punishment. At the state level, the record is more mixed, but lawyers have created some important precedents using principles of estoppel, unclean hands, and necessity. Settlements in cases have generally resulted in minimum notice periods before evictions can take place and requirements for cities to store belongs that are seized, in addition to compensation for the victims of the sweeps and their attorneys. At least one settlement, in Charleston, WV, led to a requirement of providing alternative housing for encampment residents before they can be evicted.

Additionally, we review recent international human rights law developments on the right to adequate housing and prohibitions on criminalization of homelessness, which can provide useful lessons for governments struggling to deal with growing homelessness and encampments.

Successful approaches to encampments all follow certain principles

Based on the case studies and our research to date, as well as relevant domestic and international laws and federal guidance that are reviewed in this report, we found certain key principles and corresponding practices appear to be important for successful interventions to end encampments in our communities—see the chart on the next page.

Beyond these specific recommendations, in order to create the long-term housing solutions communities needed to permanently end encampments, we also encourage individuals and organizations to look at the model policies of the **Housing Not Handcuffs Campaign**. The Campaign, launched in 2016 by the Law Center together with a number of other organizations and now endorsed by over 600 organizations and individuals, provides models for local, state, and federal legislation to shorten homelessness by stopping its criminalization, prevent people from becoming homeless through increased renter protections, and end homelessness through increasing access to deeply affordable housing.

View these policies and endorse the Housing Not Handcuffs Campaign at housingnothandcuffs.org.

Encampment Principles and Practices	
Principle 1: All people need safe, accessible, legal place to be, both at night and during the day, and a place to securely store belongings—until permanent housing is found.	1. Determine the community's full need for housing and services, and then create a binding plan to ensure full access to supportive services and housing affordable for all community members so encampments are not a permanent feature of the community. 2. Repeal or stop enforcing counterproductive municipal ordinances and state laws that criminalize sleeping, camping, and storage of belongings. 3. Provide safe, accessible, and legal places to sleep and shelter, both day and night. Provide clear guidance on how to access these locations. 4. Create storage facilities for persons experiencing homelessness, ensuring they are accessible–close to other services and transportation, do not require ID, and open beyond business hours.
Principle 2: Delivery of services must respect the experience, human dignity, and human rights of those receiving them.	1. Be guided by frequent and meaningful consultation with the people living in encampments. Homeless people are the experts of their own condition. 2. Respect autonomy and self-governance for encampment residents. 3. Offer services in a way that is sensitive and appropriate with regard to race, ethnicity, culture, disability, gender identity, sexual orientation, and other characteristics. Use a trauma-informed approach.
Principle 3: Any move or removal of an encampment must follow clear procedures that protect residents.	Create clear procedures for ending homelessness for people living in pre-existing encampments, including: 1. Make a commitment that encampments will not be removed unless all residents are first consulted and provided access to adequate alternative housing or—in emergency situations—another adequate place to stay. 2. If there are pilot periods or required rotations of sanctioned encampments, ensure that residents have a clear legal place to go and assistance with the transition. Pilot periods or requiring rotation of legal encampments/parking areas on a periodic basis (e.g., annually or semi-annually) can help reduce local "not-in-my-back-yard" opposition, but shorter time periods hinder success. 3. Provide sufficient notice to residents and healthcare/social service workers to be able to determine housing needs and meet them (recommended minimum 30 days, but longer if needed). 4. Assist with moving and storage to enable residents to retain their possessions as they transfer either to housing, shelter, or alternative encampments.
Principle 4: Where new temporary legalized encampments are used as part of a continuum of shelter and housing, ensure it is as close to possible to fully adequate housing.	**1.** Establish clear end dates by which point adequate low-barrier housing or appropriate shelter will be available for all living in the legal encampments. **2.** Protect public health by providing access to water, personal hygiene (including bathrooms with hand washing capability), sanitation, and cooking services or access to SNAPS hot meals benefits. **3.** Provide easy access to convenient 24-hour transportation, particularly if services are not co-located. **4.** Statutes and ordinances facilitating partnerships with local businesses, religious organizations, or non-profits to sponsor, support or host encampments or safe overnight parking lots for persons living in their vehicles can help engage new resources and improve the success of encampments. **5.** Do not require other unsheltered people experiencing homelessness to reside in the encampments if the facilities do not meet their needs.

Principle 5: Adequate alternative housing must be a decent alternative.	1. Ensure that emergency shelters are low-barrier, temporary respites for a few nights while homeless individuals are matched with appropriate permanent housing; they are not long-term alternatives to affordable housing and not appropriate in the short term for everyone. Low-barrier shelter includes the "3 P's"—pets, possessions, and partners, as well as accessible to persons with disabilities or substance abuse problems. 2. Adequate housing must be: a. Safe, stable, and secure: a safe and private place to sleep and store belongings without fear of harassment or unplanned eviction; b. Habitable: with services (electricity, hygiene, sanitation), protection from the elements and environmental hazards, and not overcrowded; c. Affordable: housing costs should not force people to choose between paying rent and paying for other basic needs (food, health, etc.); d. Accessible: physically (appropriate for residents' physical and mental disabilities, close to/transport to services and other opportunities) and practically (no discriminatory barriers, no compelling participation in or subjection to religion).
Principle 6: Law enforcement should serve and protect all members of the community.	1. Law and policies criminalizing homelessness, including those criminalizing public sleeping, camping, sheltering, storing belongings, sitting, lying, vehicle dwelling, and panhandling should be repealed or stop being enforced. 2. Law enforcement should serve and protect encampment residents at their request. 3. Law enforcement officers—including dispatchers, police, sheriffs, park rangers, and private business improvement district security—should receive crisis intervention training and ideally be paired with fully-trained multi-disciplinary social service teams when interacting with homeless populations.

Deborah K. Padgett, Benjamin Henwood, and Sam J. Tsemberis, Housing First: Ending Homelessness,Transforming Systems, and Changing Lives (Oxford, 2015)

Ch. 3 Three Lineages of Homeless Services

Ending homelessness in the 1990s did not happen, but not for lack of trying. The civic response to the crisis was an unprecedented outpouring of public and private funds. The strictures attached to these funds steered efforts in certain directions (and away from others), but they also allowed institutional entrepreneurs and organizations sufficient latitude to address homelessness in differing ways.

In this chapter, we describe three broad forms this service response took, which we call: *extending the mission, advocacy with action,* and *business model* approaches. Each of these approaches is rooted in different but overlapping philosophies of service and each has its own institutional logic. The first is rooted in traditional faith-based charity and philanthropic giving, the second in a manifestation of human rights activism, and the third in representing public–private partnerships infused with business practices. The examples described in this chapter are archetypal, and there are many organizations that draw on elements of more than one approach. Not surprisingly, the presence of multiple logics can introduce volatility and seed change, especially if they are competing or contradictory.

Lineage 1: Extending the Mission

Charitable giving has taken many forms in the United States; religious doctrine has always been a powerful motivator, seeking to reform the destitute and shape their destinies toward becoming productive God-fearing citizens. Among the more visible and impenitent were the men who drank in excess, stumbling on the streets or passed out in doorways. The rescue missions run by religious charities were places to dry out, get a meal, and hear a sermon.

Long-term presence in the skid rows of American cities meant faith-based organizations were among the first to step up in the 1980s, already equipped to operate soup kitchens, food pantries, and small shelters. Many Christian missions and their volunteers were driven by compassion as well as an evangelical impulse. Well-meaning but morality-driven, these religious missions have been small-scale but determined stakeholders in the "homeless industry."

Included in this lineage are the much larger but still charity-driven philanthropic organizations. Generally secular and more broadly defined in purpose, wealthy foundations extend assistance through program development and evaluation, spending private endowments for public welfare. …

Lineage 2: Advocacy with Action

Although missions and foundations did not eschew advocacy, it was not their primary goal. This second lineage represents putting advocacy first. Raising public consciousness and arguing for the human right to housing was no small effort.

Organizations and movements protesting homelessness.

Protest tactics of social activists were well honed by the time of the homelessness crisis, drawing inspiration from a variety of causes from civil rights to feminism to opposition to the Vietnam War. In October 1989, over 250,000 homeless men and women and their supporters marched in Washington, DC at a Housing Now! rally. Newspaper accounts of homeless protests were reported in over 60 U.S. cities during the 1980s with more than 500 protest events in 17 of those cities.

With the prominent exception of the AIDs response, no social movement at the time had as much draw as homeless advocacy.[2]

Movements by or on behalf of the poor are inherently under-resourced—the primary stakeholders have to expend precious energy on top of struggling to survive. Moreover, unlike other social movements such as AIDS advocacy, they rarely attract wealthy benefactors. Thus, it is all the more remarkable that hundreds of thousands turned out to protest homelessness, many of whom were drawn from the ranks of homeless men and women.

Lineage 3: The Advent of the Business Model

As homeless organizations expanded in size and scale, and as private donors and businesses became more influential, business practices were introduced and promoted as important to maintaining solvency. Although profits were not the goal, homeless organizations could presumably benefit from business practices such as monitoring productivity, maintaining quality assurance, and focusing on results. This also made public–private partnerships go more smoothly because both "sides" shared the same language.

The Corporation for Supportive Housing.

The Corporation for Supportive Housing (CSH) began in 1991 as a "middleman" organization extending financial and technical assistance to nonprofits seeking funding to house homeless families and individuals with special needs, including mental illness, HIV/AIDS, and substance abuse. Its founder, Julie Sandorf, was an advocate for the homeless who became inspired by priests at Manhattan's St. Francis Residence who had managed to transform SRO services into full-scale programs including housing for mentally ill parishioners.

Sandorf's admiration for this "extending the mission" approach, combined with her strong ties to foundations, led to the founding of CSH. With grants from the Pew Charitable Trusts, Robert Wood Johnson Foundation and the Ford Foundation, CSH benefited from the surge in availability of funds—and from the need for technical assistance to obtain those funds. CSH filled a niche, acting as a broker to help nonprofits get their share of the pie.

Another entrepreneurial force behind CSH's growth was Carla Javits, daughter of the late U.S. Senator Jacob Javits. Spearheading the West Coast operations of CSH, Javits later became its national President and Chief Executive Officer (CEO), overseeing CSH offices in 10 states. Under Javits, CSH made its mark by targeting the shortage of affordable housing for people with special needs and by developing complex public–private financial packages to build supportive housing for them. Negotiating low-interest loans and managing budgets and project costs were skills CSH offered.

Blurring the Boundaries between Non-profit and For-Profit: The Rise of Social Enterprise in Homeless Services

One variant of the business model approach brought a blending of nonprofit and for-profit within the same organization. The most common version of this involves starting a small business venture within a homeless services program to generate revenue and provide jobs for clients. Common Ground, for example, took advantage of its prime location to invite an ice cream franchise onto its ground floor, stipulating that the owners must hire tenants as workers. Denver's CCH opened pizza parlors where program residents found jobs. Coffee shops and copy centers are also favorite small business start-ups, run and staffed by nonprofits.

Embedding small businesses within a nonprofit organization is a minimalist version of boundary blurring, given that it does not change the essential function or daily operations of the parent organization. At the opposite end of the spectrum are the rare businesses (e.g., Paul Newman's line of salad dressings and food products) whose primary goal is turning over profits to charity. In the middle realm are organizations whose mission is charitable (not-for-profit) but whose operations follow business principles.

The term *social enterprise* is used to refer to this harnessing of business practices for social good as well as profits for shareholders. By drawing wealthy donors deeper into solving fundamental problems like poverty and food insecurity, social enterprises have become a favorite of business leaders seeking social and ethical relevance. Seen as filling gaps left by the heavily bureaucratic public sector and underfunded nonprofit sector, social enterprises are posited as smaller and more responsive to local problems. Initial funds and technical assistance come from wealthy investors; organizational recipients are expected to help the needy and thereby reap "profits" that benefit society. These organizations abide by (and succeed according to) business practices such as accountability and cost–benefit calculations.

Corporate social responsibility has become de rigueur at Harvard's and other business schools where a "double bottom line" is promoted. The rise of social enterprise supplies a more sophisticated and monetized version of the traditional philanthropic giving to charitable causes (recall Lineage #1).

Growing Convergence among the Lineages Over Time

The three lineages set forth in this chapter rested on different logics and philosophies, the oldest of these rooted in traditions of charitable giving, the second arriving on the heels of the protest movements of the 1960s, and the third a response to the surge in public funding as well as the corporatization of the nonprofit world. The lines became blurred, however, as homeless service organizations adapted to changing times and funding streams.

One prime mover of convergence arose from decisions on eligibility for funding. The emphasis on serious mental illness opened the door to state mental health dollars targeted to housing and services. Single adults constituted the most visible group of homeless people. Families—rarely seen living on the streets—were typically placed in temporary hotels or shared apartments. Adolescents were referred to nonprofit organizations that specialized in youth services—specific needs beyond shelter included determining guardianship, ensuring school enrollment, and seeking family reunification.

Single homeless adults were more likely to be male and had a significantly higher incidence of mental illness and addiction than homeless families or youths. In most large U.S. cities, single adult homeless were primarily African American. These demographic characteristics did not inspire a groundswell of sympathy compared with the response to other disabled and impoverished groups (Hopper, 2003). Of three types of disability—developmental, physical, and psychiatric—the first two were given special status in housing and service provision dating back to the early 20th century. Relatively few individuals who were blind, physically handicapped, or had developmental disabilities became homeless given the safety net services available for them. This was far from true for the third group. Persons with a psychiatric disability had (and still have) to prove their eligibility to a psychiatrist–gatekeeper—with varying degrees of accommodation given a lack of diagnostic clarity. Those with addictions are at the bottom of the pecking order of sympathy and disability entitlements.

However, the sight of homeless people visibly suffering from mental illness prompted action at several levels. In New York State, funding for mental health—largely a state responsibility—was supplemented by Federal dollars channeled through SSI, McKinney funds, and rental subsidies from the Department of Housing and Urban Development (HUD). The rationale for seeking funds for housing was simple: a sizeable minority (about one third) of the homeless had a serious mental illness and their mental problems were unlikely to improve while homeless. Rather than "treat and retreat," mental health providers entered the housing business (Houghton, 2001).

And thus a "disability ethos" became one of the bonds reaching across the disparate array of homeless services, along the way cleaving family homelessness from single adult homelessness and adjudicated disability from nonadjudicated disability. By comparison, homeless families were not subject to the same demands for treatment and other demonstrations of housing worthiness, but they faced different obstacles in not having the same access to disability income and housing-plus-services programs.

At the same time, the disability ethos created a labeled class for whom access to services meant accepting a psychiatric diagnosis that held lifelong consequences. The decision to accept disability income and related entitlements along with the potential for stigma and social exclusion was one made with few other options.

National Campaigns to End Homelessness

In 2000, the National Alliance to End Homelessness (NAEH) announced a bold national campaign challenging communities to develop "ten-year plans" to end homelessness. By this point, the so-called epidemic was entering its third decade, and few would disagree that a new approach was needed. NAEH was prepared to lead the way and it had a key ally in Philip Mangano, President Bush's appointee to the U.S. Inter-Agency Council on Homelessness (USICH). A self-described homelessness abolitionist, Mangano arrived in Washington just as the research findings on Pathways Housing First (PHF) were becoming widely known. The Ten Year Plan and its successor (the 100,000 Homes Campaign) were valiant attempts to inject national advocacy and energy into the lumbering bureaucracy surrounding homeless services. In a sign of the times, the 1980s protests and hunger strikes had morphed into sophisticated media-driven campaigns.

The 100,000 (100K) Homes campaign was an ambitious project that galvanized local communities throughout the United States. Ending in July 2014, 100K was featured on national television (the CBS news show "60 Minutes") and garnered international attention. Organized by Community Solutions, Inc. (founded by Rosanne Haggerty), the campaign depended on sophisticated media outreach, coordinated assistance, and buy-in by local homeless providers (many of whom were eager to try something new to jump-start flagging programs and morale).

Growing Convergence: Charity, Advocacy, and Business under One Roof

By the late 1990s, the converging of the three lineages had evolved such that the first two became small players in the larger industry. Rescue missions and soup kitchens continued to exist, but their assistance was stopgap and temporary. Similarly, advocacy groups continued to push for more funding and services, but the heavy lifting at the policy level was taken up by national organizations such as the NAEH and the National Coalition for the Homeless. Advocacy-only groups, dependent on private donations, also faced shortfalls in times of compassion fatigue. Many began to find a place as providers of services, taking advantage of public funds to offer direct services.

Between 1987 and 1993, Congress appropriated 4.2 billion dollars in McKinney-Vento funds for emergency food, shelter, and transitional housing programs as well as demonstration projects in mental health and job training (U.S. Government Accounting Office, 1994). In this climate of expansion, large multipurpose organizations were far more capable of securing grants and contracts for services and remaining self-sustaining via a mix of contracts, grants, donations, tax benefits, and low-interest loans. Enjoying the advantages of scale and diversification, they could produce sophisticated proposals for funding, oversee quality assurance, and assure donors large and small that the money would be responsibly spent.

What did such organizations look like? The bigger ones might have the staircase fully represented: drop-in center, emergency shelter, community residence (an entire building or portion of a building dedicated to congregate living for clients), scattered apartments where clients live two or three per unit, and single occupancy apartments (the ultimate step). Clients might enter at the bottom and work their way up or, if deemed higher functioning at the time of referral, enter at a higher step (only HF gave access to the highest step right away).

A more common approach for the larger-scale organization would be to stay with the middle steps, leaving the lowest to city authorities and private shelters and the highest to the individual's initiative.[3] Larger cities spawned several such organizations. In New York City, Project Renewal, The Bridge, Goddard-Riverside Community Center, Bowery Residents Committee, Common Ground, and Center for Urban Community Services (CUCS) coexisted and competed for city and state contracts. The primary advocacy organization in the city—the Coalition for the Homeless—continued to pursue litigation and produce policy briefs and press releases, but it also added service components such as scatter-site housing for persons with HIV/AIDS, summer camps and after-school programs for homeless children, and emergency rental assistance.

Conclusion: Lineages, Logics, and Paradigm Shifts

Despite diverse beginnings, homeless organizations serving single adults shared an institutional logic invested in the continuum or mainstream model and dependent on funding tied to disability. Homeless families with young children were given more immediate entrée to housing, typically short-term transitional housing that offered few support services.

The three lineages thus evolved. Charities that started out offering free meals or a bed for the night grew into multipurpose operations. Their much larger counterparts—philanthropic foundations—channeled private wealth toward public services. Advocacy groups shifted from protest marches to lawsuits and media campaigns; many also turned to government service contracts to stay solvent. The third lineage, the business model approach, came to subsume but not submerge the other two. Much of this evolution was a response to increases in funding for homeless services and the bureaucratization that accompanied growth and complexity. Close ties to the business community ensured greater access to wealthy donors as well as to expertise in management and accounting.[4]

Program founders and advocates were successful institutional entrepreneurs, garnering support for their organizations and drawing attention to the cause of ending homelessness. All of these individuals and organizations depended upon public funds and private partnerships and all were severely constrained by a level of demand that far exceeded the supply. To the extent that service providers were wedded to the mainstream model, a significant portion of the "demand" was unhappy with the "supply."

Homelessness: Targeted Federal Programs

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Libby Perl, Coordinator
Specialist in Housing Policy
eperl@crs.loc.gov

Eugene Boyd
Analyst in Federalism and Economic Development Policy
eboyd@crs.loc.gov

Johnathan H. Duff
Analyst in Health Policy
jduff@crs.loc.gov

Adrienne L. Fernandes-Alcantara
Specialist in Social Policy
afernandes@crs.loc.gov

Boris Granovskiy
Analyst in Education Policy
bgranovskiy@crs.loc.gov

Elayne J. Heisler
Specialist in Health Services
eheisler@crs.loc.gov

Lisa N. Sacco
Analyst in Illicit Drugs and Crime Policy
lsacco@crs.loc.gov

For a copy of the full report, please call 7-5700 or visit www.crs.gov.

The federal government administers a number of programs, through multiple federal agencies, that are targeted to assisting people who are experiencing homelessness by providing housing, services, and supports. Some programs target specific populations, such as veterans and youth, while others serve all people who are homeless. Available assistance may also depend on how programs define "homelessness."

There is no single federal definition of homelessness. A number of programs, including those overseen by the Departments of Housing and Urban Development (HUD), Veterans Affairs (VA), Homeland Security (DHS), and Labor (DOL), use the definition enacted as part of the McKinney-Vento Homeless Assistance Act (P.L. 100-77), as amended. The McKinney-Vento definition largely considers someone to be homeless if they are living in a shelter, are sleeping in a place not meant to be used as a sleeping accommodation (such as on the street or in an abandoned building), or will imminently lose their housing. Definitions for several other programs, such as the Department of Education (ED), are broader, and may consider someone living in a precarious or temporary housing situation to be homeless.

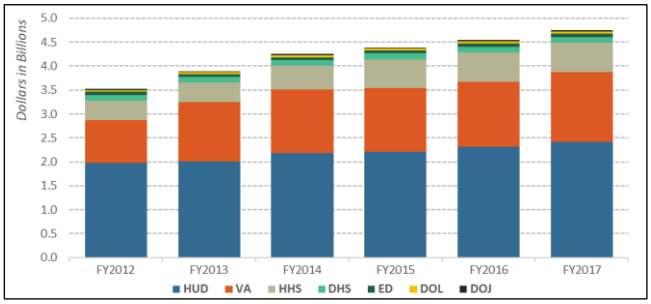
Programs that serve people experiencing homelessness include the Education for Homeless Children and Youths program administered by ED and the Emergency Food and Shelter program, a Federal Emergency Management Agency (FEMA) program run by DHS. The Department of Health and Human Services (HHS) administers several programs that serve homeless individuals, including Health Care for the Homeless, Projects for Assistance in Transition from Homelessness, and the Runaway and Homeless Youth program. The Department of Justice administers a transitional housing program for victims of domestic violence.

HUD administers the Homeless Assistance Grants, made up of grant programs that provide housing and services for homeless individuals ranging from emergency shelter to permanent housing. The VA operates numerous programs that serve homeless veterans. These include Health Care for Homeless Veterans, Supportive Services for Veteran Families, and the Homeless Providers Grant and Per Diem program, as well as a collaborative program with HUD called HUD-VASH, through which homeless veterans receive Section 8 vouchers from HUD and supportive services through the VA. The Department of Labor also operates a program for homeless veterans, the Homeless Veterans Reintegration Program.

The federal government, through the U.S. Interagency Council on Homelessness, has established a goal of ending homelessness among various populations, including families, youth, chronically homeless individuals, and veterans (the VA also has its own goal of ending veteran homelessness). Point-in-time counts of those experiencing homelessness in 2017 show overall reductions among homeless people, as well as reductions among chronically homeless individuals, people in families, and veterans compared to recent years. At the same time, however, homelessness in some parts of the country, particularly areas with high housing costs, has increased.

The chart to the right shows trends in targeted federal homelessness funding, broken down by federal agency, from FY2012-FY2017.

Funding for Select Targeted Federal Homeless Programs



Source: Federal appropriations laws and agency budget justifications.

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Introduction

Federal assistance targeted to homeless individuals and families was largely nonexistent prior to the mid-1980s. Although the Runaway and Homeless Youth program was enacted in 1974 as part of the Juvenile Justice and Delinquency Prevention Act (P.L. 93-415), the first federal program focused on assisting all homeless people, no matter their age, was the Emergency Food and Shelter (EFS) program, established in 1983 through an emergency jobs appropriation bill (P.L. 98-8). The EFS program was and continues to be administered by the Federal Emergency Management Agency (FEMA) in the Department of Homeland Security (DHS) to provide emergency food and shelter to needy individuals.

In 1987, Congress enacted the Stewart B. McKinney Homeless Assistance Act (P.L. 100-77), which created a number of new programs to comprehensively address the needs of homeless people, including food, shelter, health care, and education. The act was later renamed the McKinney-Vento Homeless Assistance Act (P.L. 106-400) after its two prominent proponents—Representatives Stewart B. McKinney and Bruce F. Vento. The programs authorized in McKinney-Vento include the Department of Housing and Urban Development (HUD) Homeless Assistance Grants, the Department of Labor (DOL) Homeless Veterans Reintegration Program, the Department of Health and Human Services (HHS) Grants for the Benefit of Homeless Individuals and Health Care for the Homeless, and the Department of Education (ED) Education for Homeless Children and Youths program.

The way homelessness is defined largely determines who is served by a particular federal program. This report discusses the definitions of homelessness used by targeted federal homeless programs. In addition, the report describes the current federal programs that provide targeted assistance to homeless individuals and families (other federal programs may provide assistance to homeless individuals but are not specifically designed to assist homeless persons). These include those programs listed above, as well as others that Congress has created since the enactment of McKinney-Vento. In addition, this report discusses federal efforts to end homelessness. Finally, **Table 2** at the end of this report shows funding levels for each of the ED, DHS, HHS, HUD, DOL, and Department of Justice (DOJ) programs that assist homeless individuals. **Table 3** shows funding levels for VA programs.

The Federal Response to Homelessness

Homelessness in the United States has always existed, but it did not come to the public's attention as a national issue until the 1970s and 1980s, when the characteristics of the homeless population and their living arrangements began to change. Throughout the early and middle part of the 20th century, homelessness was typified by "skid rows": areas with hotels and single-room occupancy dwellings where transient single men lived.[1] Skid rows were usually removed from the more populated areas of cities, and it was uncommon for individuals to actually live on the streets.[2] Beginning in the 1970s, however, the homeless population began to grow and become more visible to the general public. According to studies from the time, homeless persons were no longer almost exclusively single men, but included women with children; their median age was younger; they were more racially diverse (in previous decades, the observed homeless population

[1] Peter H. Rossi, *Down and Out in America: The Origins of Homelessness* (Chicago: The University of Chicago Press, 1989), pp. 20-21, 27-28.

[2] Ibid., p. 34.

was largely white); they were less likely to be employed (and therefore had lower incomes); they were mentally ill in higher proportions than previously; and individuals who were abusing or had abused drugs began to become more prevalent in the population.[3]

A number of reasons have been offered for the growth in the number of homeless persons and their increasing visibility. Many cities demolished skid rows to make way for urban development, leaving some residents without affordable housing options.[4] Other possible factors contributing to homelessness include the decreased availability of affordable housing generally, the reduced need for seasonal unskilled labor, the reduced likelihood that relatives will accommodate homeless family members, the decreased value of public benefits, and changed admissions standards at mental hospitals.[5] The increased visibility of homeless people was due, in part, to the decriminalization of actions such as public drunkenness, loitering, and vagrancy.[6]

In the 1980s, Congress first responded to the growing prevalence of homelessness with several separate grant programs designed to address the food and shelter needs of homeless individuals. These programs included the Emergency Food and Shelter Program (P.L. 98-8), the Emergency Shelter Grants Program (P.L. 99-591), and the Transitional Housing Demonstration Program (P.L. 99-591).[7] In 1983, a Federal Interagency Task Force on Food and Shelter for the Homeless was created to coordinate the federal response to homelessness. Among its activities was making vacant federal properties available as shelters.[8]

Congress began to consider comprehensive legislation to address homelessness in 1986. On June 26, 1986, H.R. 5140 and S. 2608 were introduced as the Homeless Persons' Survival Act to provide an aid package for homeless persons. No further action was taken on either measure, however. Later that same year, legislation containing Title I of the Homeless Persons' Survival Act—emergency relief provisions for shelter, food, mobile health care, and transitional housing—was introduced as the Urgent Relief for the Homeless Act (H.R. 5710). The legislation passed both houses of Congress in 1987 with large bipartisan majorities. The act was renamed the Stewart B. McKinney Homeless Assistance Act after the death of its chief sponsor, Stewart B. McKinney of Connecticut; it was renamed again on October 30, 2000, as the McKinney-Vento Homeless Assistance Act after the death of another prominent sponsor, Bruce F. Vento of Minnesota. In 1987, President Ronald Reagan signed the act into law (P.L. 100-77).

The original version of the McKinney-Vento Act consisted of 15 programs either created or reauthorized by the act, providing an array of services for homeless persons and administered by various federal agencies. The act also established the United States Interagency Council on Homelessness, which is designed to provide guidance on the federal response to homelessness through the coordination of the efforts of multiple federal agencies covered under the McKinney-Vento Act. Since the enactment of the McKinney-Vento Homeless Assistance Act, there have been some legislative changes to programs and services provided under the act and new programs that target homeless individuals have been created. Specific programs covered under the McKinney-Vento Act, as well as other federal programs responding to homelessness, are discussed in this report.

[3] Ibid., pp. 39-44.

[4] Ibid., p. 33.

[5] Ibid., pp. 181-194, 41. See also Martha Burt, *Over the Edge: The Growth of Homelessness in the 1980s* (New York: Russell Sage Foundation, 1992), pp. 31-126.

[6] Down and Out in America, p. 34; Over the Edge, p. 123.

[7] All three programs were incorporated into the McKinney-Vento Homeless Assistance Act in 1987. (The Transitional Housing Demonstration Program was renamed the Supportive Housing Demonstration Program.)

[8] See U.S. Congress, House Committee on Government Operations, Subcommittee on Intergovernmental Relations and Human Resources, *The Federal Response to the Homeless Crisis*, hearing, 98th Cong., 2nd sess., October 3, 1984, p. 205.

Efforts to End Homelessness

For nearly 10 years, since 2009, agencies within the federal government have focused on ending homelessness among all people experiencing it by focusing on specific populations, including veterans, families with children, youth, and people considered chronically homeless. However, efforts to bring about an end to homelessness began almost 20 years ago, when the concept was

[53] See U.S. Department of Veterans Affairs, *VHA Directive 1162.06, Veterans Justice Programs,* September 27, 2017, https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=5473.

[54] 38 U.S.C. §2062.

[55] 38 U.S.C. §8161 et seq.

introduced in a report from the National Alliance to End Homelessness (NAEH), which outlined a strategy to end homelessness in 10 years.[56] The plan included four recommendations: developing local, data-driven plans to address homelessness; using mainstream programs (such as Temporary Assistance for Needy Families, Section 8, and Supplemental Security Income) to prevent homelessness; employing a housing first strategy to assist most people who find themselves homeless; and developing a national infrastructure of housing, income, and service supports for low-income families and individuals.

While the idea of ending homelessness for all people was embraced by many groups, the George W. Bush Administration and federal government focused on ending homelessness among chronically homeless individuals specifically. Initially, the term "chronically homeless" only included single, unaccompanied individuals. The term was defined as "an unaccompanied homeless individual with a disabling condition who has been continually homeless for a year or more, or has had at least four episodes of homelessness in the past three years."[57] The HEARTH Act updated the definition to include families with a head of household who has a disability.[58]

In the year following the release of the NAEH report, then-HUD Secretary Martinez announced HUD's commitment to ending chronic homelessness at the NAEH annual conference. In 2002, as a part of his FY2003 budget, President Bush made "ending chronic homelessness in the next decade a top objective." The bipartisan, congressionally mandated Millennial Housing Commission, in its Report to Congress in 2002, included ending chronic homelessness in 10 years among its principal recommendations.[59] And, by 2003, the United States Interagency Council on Homelessness (USICH) had been re-engaged after six years of inactivity and was charged with pursuing the President's 10-year plan.[60] For the balance of the decade, multiple federal initiatives focused funding and efforts on this goal.

However, the initiative to end chronic homelessness raised some concerns among advocates for homeless people that allocating resources largely to chronically homeless individuals is done at the expense of families with children who are homeless, homeless youth, and other vulnerable populations.[61] When it was enacted in 2009, the HEARTH Act mandated that the USICH draft a Federal Strategic Plan to End Homelessness among all groups (families with children, unaccompanied youth, veterans, and chronically homeless individuals) within a year of the law's enactment, and to update the plan annually. In addition to the USICH plan, in November 2009 the VA announced a plan to end homelessness among veterans within five years. These plans—to end chronic homelessness, to end homelessness generally, and to end veterans' homelessness—are described below. Further, **Table 1**, following the descriptions of plans to end homelessness, presents numbers of homeless people, including people in families, veterans, and those experiencing chronic homelessness.

[56] National Alliance to End Homelessness, *A Plan: Not a Dream. How to End Homelessness in Ten Years*, June 1, 2000, http://www.endhomelessness.org/files/585_file_TYP_pdf.pdf.

[57] 24 C.F.R. §91.5.

[58] 42 U.S.C. §11360(2).

[59] The report is available at http://govinfo.library.unt.edu/mhc/MHCReport.pdf. See pp. 54-56.

[60] The Interagency Council on Homelessness (ICH) was created in 1987 in the Stewart B. McKinney Homeless Assistance Act, P.L. 100-77. Its mission is to coordinate the national response to homelessness. The ICH is composed of the directors of 19 federal departments and agencies whose policies and programs have some responsibility for homeless services, including HUD, HHS, DOL, and the VA.

[61] See, for example, the House Financial Services Committee, Subcommittee on Housing and Community Opportunity, *Hearing on Reauthorization of the McKinney-Vento Homeless Assistance Act, Part II*, 110th Cong., 2nd sess., October 16, 2007, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:39908.pdf.

The Chronic Homelessness Initiative

In 2002, the George W. Bush Administration established a national goal of ending chronic homelessness within 10 years, by 2012. An impetus behind the initiative to end chronic homelessness is that chronically homeless individuals were estimated to account for about 10% of all users of the homeless shelter system, but are estimated to use nearly 50% of the total days of shelter provided.[62] (For more information about research surrounding chronic homelessness and permanent supportive housing, see CRS Report R44302, *Chronic Homelessness: Background, Research, and Outcomes*.)

Permanent supportive housing is generally seen as a solution to ending chronic homelessness. It consists of housing, paired with social services, available to low-income and/or homeless households. Services can include case management, substance abuse counseling, mental health services, income management and support, and life skills services. A model of permanent supportive housing called "housing first" offers homeless individuals with addictions and mental health issues immediate access to housing even if they have not participated in treatment. Instead, the housing first model offers counseling and treatment services to clients on a voluntary basis rather than requiring sobriety or adherence to psychiatric medication treatment. It also stresses the importance of resident choice about where to live and the type and intensity of services, with services structured to fit individual resident needs. In the late 1990s, research began to show that finding housing for homeless individuals with severe mental illnesses meant that they were less likely to be housed temporarily in public accommodations, such as hospitals, jails, or prisons.[63] Based on the research, service providers and HUD began to devote resources to housing first initiatives.

The Administration undertook several projects to reach its goal of ending chronic homelessness within 10 years, each of which took place during the mid-2000s. These included (1) a collaboration among HUD, HHS, and VA (the *Collaborative Initiative to Help End Chronic Homelessness*) that funded housing and treatment for chronically homeless individuals; (2) a HUD and DOL project called *Ending Chronic Homelessness through Employment and Housing*, through which HUD funded permanent supportive housing and DOL offered employment assistance; and (3) a HUD pilot program called *Housing for People Who Are Homeless and Addicted to Alcohol* that provided supportive housing for chronically homeless persons.

In addition, since FY2005, HUD has encouraged the development of housing for chronically homeless individuals in the way that it distributes the Homeless Assistance Grants to applicants through its annual grant competition. For example, HUD has set aside additional funding for projects that serve those experiencing chronic homelessness. In addition, HUD's Continuum of Care program requires that at least 30% of funds (not including those for permanent housing renewal contracts) are to be used to provide permanent supportive housing to individuals with disabilities or families with an adult head of household (or youth in the absence of an adult) who has a disability. While homeless people with disabilities need not have been homeless for the duration required for chronic homelessness, there is overlap in the populations. The requirement for permanent supportive housing is to be reduced proportionately as communities increase permanent housing units for those individuals and families, and it will end when HUD determines

[62] Randall Kuhn and Dennis Culhane, "Applying Cluster Analysis to Test a Typology of Homelessness by Pattern of Shelter Utilization: Results from the Analysis of Administrative Data," *American Journal of Community Psychology*, vol. 26, no. 2 (April 1998), p. 219.

[63] See Dennis Culhane, Stephen Metraux, and Trevor Hadley, "Public Service Reductions Associated with Placement of Homeless Persons with Severe Mental Illness in Supportive Housing," *Housing Policy Debate*, vol. 13, no. 1 (2002): 107-163.

that a total of 150,000 permanent housing units have been provided for homeless persons with disabilities since 2001.

The U.S. Interagency Council on Homelessness Federal Strategic Plan to Prevent and End Homelessness

The HEARTH Act, enacted on May 20, 2009 as part of the Helping Families Save Their Homes Act (P.L. 111-22), charged the U.S. Interagency Council on Homelessness (USICH) with developing a National Strategic Plan to End Homelessness. The HEARTH Act specified that the plan should be made available for public comment and submitted to Congress and the President within one year of the law's enactment.

The USICH released its report, entitled *Opening Doors*, in 2010. The plan set out goals of ending chronic homelessness as well as homelessness among veterans within the next five years and ending homelessness for families, youth, and children within the next 10 years. USICH updated the plan several times in subsequent years. The 2015 version expanded on what it means to end homelessness. It does not mean that homelessness will never occur, but rather that it should be "rare, brief, and non-recurring."[64] Specifically, communities should

- be able to identify people experiencing and at risk of homelessness;
- prevent and divert people from homelessness;
- provide immediate access to shelter and services while working to obtain permanent housing; and
- quickly connect people to housing and services when homelessness occurs.

The 2018 update to the USICH plan was retitled *Home, Together*.[65] The plan continues the goals of ending homelessness among specific populations, but it does not include time limits. The report includes six areas of increased focus—affordable housing, homelessness prevention and diversion, unsheltered homelessness, rural communities, employment, and learning from people who have experienced homelessness.[66]

The Department of Veterans Affairs Plan to End Homelessness

On November 3, 2009, the VA announced a plan to end homelessness among veterans within five years, by the end of 2015.[67] While the VA did not reach its goal to end homelessness within the time period, it has continued to work toward reducing veteran homelessness, acknowledging in 2017 that ending veteran homelessness may still be a "multi-year process."[68] Similar to the USICH plan, an end to veteran homelessness, according to the VA, means that communities will identify all veterans experiencing homelessness, be able to provide shelter immediately for

[64] U.S. Interagency Council on Homelessness, *Opening Doors: Federal Strategic Plan to Prevent and End Homelessness, As Amended In 2015,* June 2015, https://www.usich.gov/resources/uploads/asset_library/USICH_OpeningDoors_Amendment2015_FINAL.pdf.

[65] U.S. Interagency Council on Homelessness, *Home, Together: The Federal Strategic Plan to Prevent and End Homelessness,* July 19, 2018, https://www.usich.gov/resources/uploads/asset_library/Home-Together-Federal-Strategic-Plan-to-Prevent-and-End-Homelessness.pdf.

[66] Ibid., p. 4.

[67] See U.S. Department of Veterans Affairs, "Secretary Shinseki Details Plan to End Homelessness for Veterans," press release, November 3, 2009, http://www1.va.gov/OPA/pressrel/pressrelease.cfm?id=1807.

[68] Jennifer McDermott, "New VA head: It'll take longer to end veteran homelessness," *Associated Press,* May 11, 2017.

veterans who want it, be able to help veterans move quickly into permanent housing, and have the capacity to help veterans who fall into homelessness in the future.[69]

The VA has not released a formal written plan to end homelessness. Instead, beginning with the FY2011 budget, VA budget documents have outlined ways in which it will pursue the goal of ending homelessness.[70]

Numbers of People Experiencing Homelessness

In the years since USICH and the VA announced efforts to end homelessness, there have been reductions in the overall number of people experiencing homelessness according to HUD's point-in-time counts, as well as in specific populations—people in families with children, veterans, and chronically homeless individuals. However, some communities, particularly in urban areas with growing housing costs, have seen an increase in the number of people experiencing homelessness over the same time period. Among those that have drawn attention for rising numbers of homeless people are Los Angeles City and County, which saw homelessness increase by 66% between 2010 and 2017, Seattle and King County (29%), New York (44%), and Honolulu (69%).[71]

See **Table 1** for point-in-time counts of people experiencing homelessness since 2007. For more information on HUD counts and estimates, see CRS In Focus IF10312, *How Many People Experience Homelessness?*

Table 1. Point-in-Time Counts of People Experiencing Homelessness

(Total and select subpopulations)

				Chronically Homeless	
Year	All Homeless People	People in Families with Children[a]	Veterans	Individuals	People in Families[b]
2007	647,258	234,558	—	119,813	—
2008	639,784	235,259	—	120,115	—
2009	630,227	238,096	73,367	107,212	—
2010	637,077	241,937	74,087	106,062	—
2011	623,788	236,175	65,455	103,522	—
2012	621,553	239,397	60,579	96,268	—
2013	590,364	222,190	55,619	86,289	16,539

[69] U.S. Department of Veterans Affairs, *FY2018 Budget Justifications, Volume II, Medical Programs and Information Technology Programs*, pp. VHA-152 to VHA-153, https://www.va.gov/budget/docs/summary/fy2019VAbudgetVolumeIImedicalProgramsAndInformationTechnology.pdf.

[70] See, for example, *FY2019 VA Budget Justifications, Volume 2 Medical Programs and Information Technology Programs*, p. VHA-158, https://www.va.gov/budget/docs/summary/fy2019VAbudgetVolumeIImedicalProgramsAndInformationTechnology.pdf.

[71] See HUD point-in-time count data by Continuum of Care, available at https://www.hudexchange.info/resource/5639/2017-ahar-part-1-pit-estimates-of-homelessness-in-the-us/. Various news reports have noted the growing numbers of homeless people in these communities. See, for example, Gale Holland, "L.A.'s homelessness surged 75% in six years. Here's why the crisis has been decades in the making," *Los Angeles Times*, February 1, 2018; Vernal Coleman, "Annual homeless count reveals more people sleeping outside than ever before ," *Seattle Times*, May 31, 2018; Mara Gay, "NYC Rise in Homeless is One of the Biggest in the U.S.," *Wall Street Journal*, December 6, 2017; and Dan Nakaso, "Most see homeless problem getting worse," *Honolulu Star Advisor*, March 26, 2018.

Year	All Homeless People	People in Families with Children[a]	Veterans	Chronically Homeless	
				Individuals	People in Families[b]
2014	576,450	216,261	49,689	83,989	15,143
2015	564,708	206,286	47,725	83,170	13,105
2016	549,928	194,716	39,471	77,486	8,646
2017	553,742	184,661	40,056	86,962	8,457

Source: Data from 2007 through 2015 are taken from the HUD Annual Homeless Assessment Report, https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf. Data from 2016 thereafter are taken from subsequent Annual Homeless Assessment Reports, available at https://www.hudexchange.info/programs/hdx/guides/ahar/#reports.

Notes: Point-in-time counts are conducted by local communities and are to take place during one day in January each year. Therefore, the counts are a snapshot of the number of people who are homeless on a given day. They do not represent the total number of people who experience homelessness over the course of a year.

a. Families with children are households with at least one adult and one child.

b. HUD began reporting chronically homeless people in families as part of the 2013 point-in-time count.

RAPID RE-HOUSING
RRH

FACT SHEET: HOUSING FIRST

APRIL 2016

National Alliance to End Homelessness

WHAT IS HOUSING FIRST?

Housing First is a homeless assistance approach that prioritizes providing permanent housing to people experiencing homelessness, thus ending their homelessness and serving as a platform from which they can pursue personal goals and improve their quality of life. This approach is guided by the belief that people need basic necessities like food and a place to live before attending to anything less critical, such as getting a job, budgeting properly, or attending to substance use issues. Additionally, Housing First is based on the theory that client choice is valuable in housing selection and supportive service participation, and that exercising that choice is likely to make a client more successful in remaining housed and improving their life.[i]

HOW IS HOUSING FIRST DIFFERENT FROM OTHER APPROACHES?

Housing First does not require people experiencing homelessness to address the all of their problems including behavioral health problems, or to graduate through a series of services programs before they can access housing. Housing First does not mandate participation in services either before obtaining housing or in order to retain housing. The Housing First approach views housing as the foundation for life improvement and enables access to permanent housing without prerequisites or conditions beyond those of a typical renter. Supportive services are offered to support people with housing stability and individual well-being, but participation is not required as services have been found to be more effective when a person chooses to engage.[ii] Other approaches do make such requirements in order for a person to obtain and retain housing.

WHO CAN BE HELPED BY HOUSING FIRST?

A Housing First approach can benefit both homeless families and individuals with any degree of service needs. The flexible and responsive nature of a Housing First approach allows it to be tailored to help anyone. As such, a Housing First approach can be applied to help end homelessness for a household who became homeless due to a temporary personal or financial crisis and has limited service needs, only needing help accessing and securing permanent housing. At the same time, Housing First has been found to be particularly effective approach to end homelessness for high need populations, such as chronically homeless individuals.[iii]

WHAT ARE THE ELEMENTS OF A HOUSING FIRST PROGRAM?

Housing First programs often provide rental assistance that varies in duration depending on the household's needs. Consumers sign a standard lease and are able to access supports as necessary to help them do so. A variety of voluntary services may be used to promote housing stability and well-being during and following housing placement.

Two common program models follow the Housing First approach but differ in implementation. Permanent supportive housing (PSH) is targeted to individuals and families with chronic illnesses, disabilities, mental health issues, or substance use disorders who have experienced long-term or repeated homelessness. It provides longterm rental assistance and supportive services.

A second program model, rapid re-housing, is employed for a wide variety of individuals and

families. It provides short-term rental assistance and services. The goals are to help people obtain housing quickly, increase self-sufficiency, and remain housed. The Core Components of rapid re-housing—housing identification, rent and move-in assistance, and case management and services—operationalize Housing First principals.

DOES HOUSING FIRST WORK?

There is a large and growing evidence base demonstrating that Housing First is an effective solution to homelessness. Consumers in a Housing First model access housing faster[iv] and are more likely to remain stably housed.[v] This is true for both PSH and rapid re-housing programs. PSH has a long-term housing retention rate of up to 98 percent.[vi] Studies have shown that rapid re-housing helps people exit homelessness quickly—in one study, an average of two months[vii]—and remain housed. A variety of studies have shown that between 75 percent and 91 percent of households remain housed a year after being rapidly re-housed.[viii]

More extensive studies have been completed on PSH finding that clients report an increase in perceived levels of autonomy, choice, and control in Housing First programs. A majority of clients are found to participate in the optional supportive services provided,[ix] often resulting in greater housing stability. Clients using supportive services are more likely to participate in job training programs, attend school, discontinue substance use, have fewer instances of domestic violence,[x] and spend fewer days hospitalized than those not participating.[xi]

Finally, permanent supportive housing has been found to be cost efficient. Providing access to housing generally results in cost savings for communities because housed people are less likely to use emergency services, including hospitals, jails, and emergency shelter, than those who are homeless. One study found an average cost savings on emergency services of $31,545 per person housed in a Housing First program over the course of two years.xii Another study showed that a Housing First program could cost up to $23,000 less per consumer per year than a shelter program.[xiii]

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Nicholas Pleace, Housing First Guide: Europe (2016)

1.1. Introducing Housing First

Housing First is probably the **single most important innovation in homelessness service design** in the last 30 years. Developed by **Dr. Sam Tsemberis** in New York, the Housing First model has proven very **successful in ending homelessness among people with high support needs** in the USA and Canada and in several European countries.

Housing First is designed for people who need *significant* levels of help to enable them to leave homelessness. Among the groups who Housing First services can help are people who are homeless with severe mental illnesses or mental health problems, homeless people with problematic drug and alcohol use, and homeless people with poor physical health, limiting illness and disabilities. Housing First services have also proven effective with people who are experiencing long-term or repeated homelessness who, in addition to other support needs, often lack social supports, i.e. help from friends or family and are not part of a community. In the United States and Canada, Housing First programmes are also used with homeless families and young people.

Housing First uses housing as a *starting point* rather than an *end goal*. Providing housing is what a Housing First service does before it does anything else, which is why it is called *'Housing First'*. A Housing First service is able to focus immediately on enabling someone to successfully live in their own home as part of a community. Housing First is also focused on improving the health, well-being and social support networks of the homeless people it works with. This is very different from homelessness services that try make homeless people with high support needs 'housing ready' *before* they are rehoused. Some existing models of homelessness services require someone to show sobriety and, engagement with treatment and to be trained in living independently before housing is provided for them. In these types of homelessness service, housing happens ***'last'***.

Housing First is designed to ensure homeless people have a high degree of choice and control. Housing First service users are *actively encouraged* to minimise harm from drugs and alcohol and to use treatment; they are *not required* to do so. Other homelessness services, such as staircase services, often *require* homeless people to use treatment and to abstain from drugs and alcohol, before they are allowed access to housing and may also remove someone from housing if they do not comply with treatment or do not show abstinence from drugs and alcohol.

In the USA, Canada and in Europe, **research shows that Housing First generally ends homelessness for at least eight out of every ten people.** Success has also been reported with diverse groups of homeless people. Housing First has worked very well for people who are not well integrated in society after long-term or repeated homelessness, homeless people with severe mental illness and/or problematic drug and alcohol use and homeless people with poor physical health.

Housing First in Europe can be described as following eight core principles. These core principles are very closely based on those developed by Dr. Sam Tsemberis, who created the first Housing First service in New York in the early 1990s. These principles were defined in consultation with Dr. Tsemberis and the advisory board for this Guide.

Eight core principles:

Housing is a human right

Choice and control for service users

Separation of housing and treatment

Recovery orientation

Harm reduction

Active engagement without coercion

Person-centred planning

Flexible Support for as Long as is Required

Operating within these core principles, Housing First pursues a range of service priorities, which include offering help with sustaining a suitable home and with improving health, well-being and social integration. Housing First is designed to provide opportunities to access treatment and help with integration into a community. There is also the option to get help with strengthening social supports and with pursuing rewarding opportunities, such as arts-based activities, education, training and paid work.

1.2. The History of Housing First

Housing First was developed by Dr. Sam Tsemberis, at Pathways to Housing in New York, in the early 1990s. **Housing First was originally developed to help people with mental health problems who were living on the streets;** many of whom experienced frequent stays in psychiatric hospitals. The target populations entering Housing First later grew to include people making long stays in homelessness shelters and those at risk of homelessness who were discharged from psychiatric hospitals, or released from prison. With some modification to the support services, Housing First services are now also used with families and young people who are homeless in North America.

Before Housing First, permanent housing with support was only offered to homeless people in North America after they had graduated from a series of steps that began with treatment and sobriety. Each step on this 'staircase' was designed to prepare someone for living independently in their own home. When all the steps were complete, a formerly homeless person with mental health problems was meant to be 'housing ready' because they had been 'trained' to live independently. These types of services are sometimes called 'staircase', 'linear residential treatment' or 'treatment-led approaches'.

These 'staircase' services and the 'housing readiness' culture had originally arisen from practice in North American psychiatric hospitals, where individuals with a diagnosis of severe mental illness were initially considered incapable of functioning in all areas of life and needed around-the-clock supervision and support. By the 1980s, North American mental health professionals were raising serious questions about

the effectiveness of services based on these assumptions about severe mental illness. However, a staircase approach became firmly established as the model for helping homeless people with high needs in North America.

The staircase approach for homeless people had three goals:

- Training people to live in their own homes after being on the streets or in and out of hospitals.
- Making sure someone was receiving treatment and medication for any ongoing mental health problems.
- Making sure someone was not involved in behaviour that might put their health, well-being and housing stability at risk, particularly that they were not making use of drugs and alcohol (sobriety).

During the 1990s, it started to become clear that staircase services for individuals with psychiatric diagnoses, especially those with co-occurring addiction problems, were not always working very effectively. There were three main problems:

- Service users became 'stuck' in staircase services, because they could not always manage to complete all the tasks necessary to move between one step and the next.
- Service users were often evicted from temporary and permanent housing because of strict rules, such as requirements for total abstinence from drugs and alcohol and being required to participate in psychiatric treatment.
- There were worries about whether staircase services were setting unattainable standards in the requirements they placed on people, i.e. service users were expected to behave more correctly than other people; they were required to be a 'perfect' citizen, rather than an ordinary citizen.

North American 'supported housing' services, developed as an alternative to staircase services, had a different approach. Former psychiatric patients were immediately, or very quickly, given ordinary housing in ordinary communities and received flexible help and treatment from mobile support teams, within a framework where the service user had a lot of choice and control. Support was provided for as long as was needed.

'Supported housing' services in North America did not require abstinence from drugs or alcohol, and they did not expect full engagement with treatment as a condition for being housed. Giving former psychiatric patients far more choice about how they lived their lives, while encouraging positive changes and providing help when it was asked for, was found to be more effective than a staircase approach. **This supported housing model was the basis for Housing First.**

However, as homelessness began to increase, services for homeless people often continued to use the stairway model, because that was still consistent with the predominant mental health services model in the USA. As most of those who were on the streets - the visibly homeless - were thought to have very high rates of severe mental illness, it seemed reasonable to use the traditional mental health services approach that had often been used by psychiatric hospitals. Most homelessness services therefore followed the staircase model. In Europe too, homelessness services had been designed according to a staircase approach, which saw housing as the end goal rather than as the first step in ending homelessness.

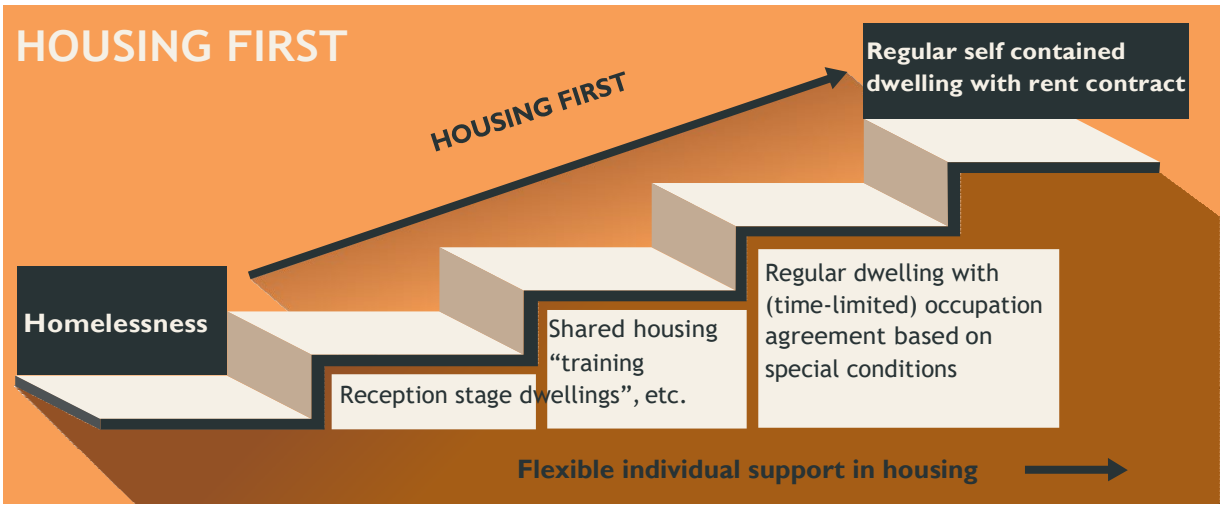
Research on staircase homelessness services reported similar problems to those identified in staircase mental health services. In particular:

- Homeless people became 'stuck', unable to complete the steps that they were expected to follow to be rehoused.
- Staircase services were abandoned by homeless people who did not like or could not follow the strict rules.

- There were concerns about the ethics of some staircase services - particularly a tendency to view homelessness as the result of someone's character flaws - with homeless people being blamed for causing their own homelessness.
- Staircase services could be harsh environments for homeless people.
- Costs were high, but the effectiveness of staircase services was often limited.

Building on the supported housing model, Housing First, as developed by Dr. Sam Tsemberis in New York, was focused on homeless people with a severe mental illness. Housing was provided *'first'* rather than, as in the staircase model, *'last'*. **Housing First offered rapid access to a settled home in the community, combined with mobile support services that visited people in their own homes.** There was **no requirement to stop drinking or using drugs and no requirement to accept treatment in return for housing.** Housing was not removed from someone if their drug or alcohol use did not stop, or if they refused to comply with treatment. If a person's behaviour or support needs resulted in a loss of housing, Housing First would help them find another place to live and then continue to support them for as long as was needed.

Rather than being required to accept treatment or complete a series of 'steps' to access housing, someone in a Housing First service leaps *over* the steps and goes *straight* into housing. Mobile support is then provided to help Housing First service users to sustain their housing and promote their health and well-being and social integration, within a framework that gives service users a high degree of choice and control (Figure 1).



In the late 1990s, pioneering American social research by Dennis P. Culhane and colleagues showed there was **a small group of people with very high needs, who made long-term and repeated use of homelessness services, yet whose homelessness was never resolved.** Staircase services were found not to be performing well in ending this long-term ("chronic" and "episodic") homelessness, which was being found to be very damaging to the health and well-being of the people experiencing it. Housing First, which research showed had been successful in New York, could, in contrast, end long-term homelessness at a much higher rate than staircase services. **The systematic use of comparative research, demonstrating Housing First in comparison with other homelessness services, encouraged wider use of Housing First throughout the USA and attracted attention from the Federal government.**

Importantly, **there was also an economic case for Housing First. This case centred on the relatively high cost of frequent hospitalisation and incarceration associated with long-term homelessness,** i.e. long-term homeless people often made frequent use of emergency medical services, had high rates of contact with mental health services and could often have contact with the criminal justice system. As they did not resolve long-term homelessness in many cases, staircase programmes started to be seen as not cost-efficient, especially because the staircase services themselves were also relatively expensive.

Research was showing that Housing First could potentially deliver significantly better results, for a lower level of spending, than staircase services. Comparatively, Housing First cost significantly less than other services. Figures from Pathways to Housing show programme costs of $57 per night, compared to $77 for a place in a shelter (approximately €52 compared €70, 2012 figures). In London, in 2013, one Housing First service was found to cost approximately £9,600 (€13,500) per person per year (excluding rent). This was compared to between £1,000 per year *more* for a shelter, or nearly £8,000 *more* for a place in a high-intensity staircase service (excluding rent). This represented an annual saving approximately equivalent to between €1,400 and €11,250 (2013 figures).

It was also seen that by ending homelessness among people with very high support needs, Housing First could potentially save money for other services, such as psychiatric services, emergency medical services and the criminal justice system. This was because homeless people with very high support needs, if they were housed with the proper support, would not encounter these services as often as when they were homeless and could stop using them altogether. Homeless people with high support needs could now be offered Housing First, which, as well as being very likely to end their homelessness, could be more cost effective than alternative homelessness services.

1.3. Housing First in Europe

European use of Housing First has been encouraged by the North American research results. Initially, the inspiration came from the original service developed in New York, then from other US Housing First services. More recently, some very successful results from the Canadian At Home/ Chez Soi Housing First programme, a randomised control trial (RCT) involving 2,200 homeless people comparing Housing First with existing homelessness services, have become influential in European debates (see Chapter 5).

Within Europe, the results of the **Housing First Europe research project,** led byVolker Busch-Geertsema, were among the first to confirm that Housing First could be successful in European countries. A large-scale randomised control trial as part of the French Un Chez-Soi d'abord Housing First programme, being conducted by DIHAL, will provide systematic data on Housing First effectiveness across four cities in France, in 2016. A number of observational studies, that look at Housing First but do not compare it with other homelessness services, have also reported very positive results from Denmark, Finland, the Netherlands, Portugal, Spain and the UK. Collectively, these findings show that:

- In Europe, Housing First is generally more effective than staircase services in ending homelessness among people with high support needs, including people experiencing long-term or repeated homelessness.
- Housing First can be more cost-effective than staircase services because it is able to end homelessness more efficiently. Housing First may also generate cost offsets for (reduce the costly use of) other services. For example, Housing First may reduce frequent use of emergency medical and psychiatric services, prevent long and unproductive stays in other forms of homelessness service and lessen rates of contact with the criminal justicesystem.
- Housing First addresses the ethical and humanitarian concerns raised about the operation of some staircase services.

In 2016, Housing First was becoming increasingly important in Europe. In some cases, Housing First was integral to comprehensive homelessness strategies, in others, experiments were still underway. The countries where Housing First was being used include:

Austria	Belgium
Denmark	Finland
France	Ireland
Italy	The Netherlands
Norway	Portugal
Spain	Sweden
The United Kingdom	

Housing First has been successfully piloted in Vienna. Nine Housing First projects were tested in Belgium in 2015, with 150 homeless people with high support needs receiving Housing First. The programme is being evaluated with a view to testing whether Housing First could be more widely used (see Appendix).

The first stage of the Danish Homelessness Strategy from 2009-2013 was one of the first large-scale Housing First programmes in Europe and housed more than 1,000 people. A summary of the Danish programme is included in the Appendix.

Finland has made extensive use of Housing First within its national strategy to reduce and prevent homelessness. Absolute and relative reductions in long-term homelessness have been achieved by using a mix of Housing First service models, including both congregate and scattered housing models (see Chapter 3 and Chapter 4). An example of a Finnish Housing First service is described in the Appendix. Initial results from the French Un Chez Soi d'abord Housing First pilot programme are positive, with the existing work to continue through 2017 before use of Housing First is expanded from 2018 onwards (see Appendix).

In Italy in 2015, homelessness service providers and academics cooperated to form the Housing First Italian Network, a confederation of organisations providing, or with an interest in, Housing First. Housing First Italia had 51 members in 10 Italian regions, of which 35 had operational projects in 2015. Two Italian examples of Housing First services are summarised in the Appendix.

In 2014 17, Housing First services were operating across the Netherlands. In Amsterdam, the Discus Housing First project had been operating successfully since 2006. In Portugal, the Casas Primeiro service in Lisbon has pioneered the use of Housing First. A summary of Casas Primeiro is presented in the Appendix. In Spain, the first Housing First service, HÁBITAT, began operations in May 2014, working in Madrid, Barcelona and Málaga. The HÁBITAT project was evaluated throughout and Housing First has now become part of wider Spanish homelessness strategy (see Appendix).

Norwegian use of Housing First has expanded quite rapidly from 12 Housing First services with 135 service users in December 2014 to 16 Housing First services with a total of 237 service users in July 2015. In Norway, Housing First is one of a range of services used within an integrated homelessness strategy (see Appendix).

In Poland, a practitioner conference on Housing First was held in Warsaw in February 2016. Promotion of Housing First is being pursued by an evidence-based advocacy project.

In Sweden, the University of Lund has been actively promoting the idea of Housing First with homelessness service providers and policy makers. In 2009, the University hosted a national conference on Housing First. Two municipalities, Stockholm and Helsingborg, began to operate Housing First services soon afterwards, as a direct result of this conference. Since that time, another 11 municipalities have started up Housing First services. It seems that Housing First has spread even more widely in Sweden, since 94 municipalities state that they provide Housing First services to their citizens (according to one of the 'Open Comparisons' conducted by the National Board of Health and Welfare). These on-going initiatives have been developed at local level rather than as a result of national policy (see Appendix).

In the UK, the first successful experiment with Housing First was run by Turning Point in Scotland in 2010. An observational evaluation conducted over the course of 2014-2015 also showed that early experiments with Housing First in England were also proving successful, although as in Sweden, development was often at local level. In England, there was not yet a national Housing First policy as of early 2016, but the English federation of homelessness organisations (Homeless Link) had launched a Housing First England initiative to promote the use of Housing First in the country. Additionally, the Welsh Government recommended the use of Housing First models in its guidance for its recently revised homelessness laws in 2015 (see Appendix).

In some countries in Central and Eastern Europe, Housing First was still in the process of being developed in 2015/16. Experiments with Housing First have taken place in the Czech Republic and Hungary.

1.4. The Evidence for Housing First

1.4.1. Ending Homelessness for People with High Support Needs

Housing First services are very successful at ending homelessness for homeless people with high support needs. In most cases, European Housing First services end homelessness for at *least* eight out of every ten people.

- In 2013, the Housing First Europe project reported that **97%** of the high-need homeless people using the Discus Housing First service in Amsterdam were still in their housing after 12 months in the service. In Copenhagen, the rate was **94%** overall, with a similarly impressive level reported by the Turning Point Housing First service in Glasgow (**92%**). The Casas Primeiro Housing First service in Lisbon reported a rate of **79%**.
- The French Un Chez-Soi d'abord Housing First programme reported interim results in late 2013, showing **80%** of the 172 homeless people using Housing First services in the four city pilot sites had retained their housing for 13 months.
- Initial results from the Spanish HÁBITAT Housing First programme indicated extremely high levels of housing sustainment in late 2015.
- Finland has reported a fall in the absolute numbers of long-term homeless people following the adoption of a national strategy centred on using Housing First to end long-term homelessness. In 2008, 2,931 people were long-term homeless in the ten biggest cities. This number had dropped to 2,192 in late 2013, a reduction of **25%**. Numbers of long-term homeless people fell from **45%** to **36%** of the total homeless population during the same period.
- In 2015, an observational evaluation of Housing First in England reported that, across five Housing First services, **74%** of homeless people had retained their housing for at least 12 months.
- In 2015, the Housing First service in Vienna reported that, among all the service users worked with over a two-year period, **98%** were still in their apartments.

Success rates in Europe parallel or exceed the results achieved in North America. US studies have reported rates of housing sustainment between 80% and 88%. The recent evaluation of the Canadian At Home/Chez Soi programme reported that Housing First service users spent 73% of their time stably housed over two years, compared to 32% of those receiving other homelessness services.

An international evidence review conducted in 2008 reported that between 40% and 60% of homeless people with high support needs were leaving or being ejected from staircase services before they were rehoused. This was in sharp contrast to Housing First services that were typically keeping 80% or more of their service users housed for at least one year.

As previously stated, Housing First is very successful at ending homelessness among homeless people with high support needs. However, there are some people, typically between 5-20% of service users, for whom Housing First is not able to provide a sustained exit from homelessness.

1.4.2. Health and Well-Being

Housing First can make a positive difference to the health and well-being of homeless people with high support needs:

- In 2013, the Housing First Europe research project reported that 70% of Housing First service users in Amsterdam had reduced their drug use, with 89% reporting improvements in their quality of life and 70% reporting improvements in their mental health. Positive results were also produced by the Turning Point service in Glasgow, where drug/alcohol use was reported to have stabilised or reduced in most cases. In the Casas Primeiro service in Lisbon, 80% reported a lower level of stress. Danish Housing First services reported a more mixed picture, but 32% reported improvements in alcohol use, 25% an improvement in mental health and 28% in physical health.

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- In 2015, interim results reported from the French Un Chez-Soi d'abord Housing First programme showed that, in the six months prior to inclusion in Housing First, homeless people had spent an average of 18.3 nights in hospital. When they had been using Housing First for 12 months, the time spent in hospital in the last six months had fallen to 8.8 nights on average. Contacts with hospitals and the frequency of stays in hospital had fallen significantly.
- The 2015 evaluation of Housing First in England found that 63% of service users self-reported improvements in physical health and 66% self-reported gains in mental health, with some smaller improvements around drug and alcohol use.

Housing First, both in Europe and North America, has been shown to deliver improvements in health and well-being. Results can be variable - not all Housing First service users benefit from better health and well-being - but Housing First is able to deliver positive changes for many of the people using it.

1.4.3. Social Integration

Social integration has three main elements:

- *Social support*, which centres on someone feeling that they are valued by others, called *esteem support*; help in understanding and coping with life, called *informational support*; *social companionship* (spending time with others) and practical or *instrumental support*.
- *Community integration*, which can be tricky to define precisely, but which generally refers to positive, mutually beneficial relationships between Housing First service users and their neighbours. In a broader sense, community integration also refers to a homeless person not being *stigmatised* by the community. Housing First can help someone to adjust to new community roles, i.e. being a good neighbour.
- *Economic integration*, which can mean paid work, but also socially productive or rewarding activities, ranging from participating in arts-based activities through to informal and formal education, training and job-seeking.

A key goal of Housing First (see Chapter 3 and Chapter 4) is to promote social integration in the community. Housing functions as the basis, or foundation, from which Housing First seeks to help a service user develop the social supports, community integration and economic integration that can improve their quality of life. Good quality social supports, living a life that involves positive engagement with the surrounding community and having a structured, purposeful existence, can all demonstrably enhance health and well-being.

- The Casas Primeiro Housing First service in Lisbon reported that almost half the Housing First service users had started to meet people in cafés to socialise, with 71% reporting they felt 'at home' in their neighbourhood and 56% reporting feeling part of a community.
- A recent evaluation of Housing First in England found that of 60 users of Housing First services, 25% had reported regular contact with their family prior to working with Housing First, rising to 50% once they were receiving Housing First support. Prior to working with Housing First, 78% of people were involved in nuisance behaviour, such as drinking alcohol on the street. This fell to 53% after they began working with Housing First.
- There is qualitative research from both Europe and North America that shows that people using Housing First can have a greater sense of security and belonging in their lives than was the case before homelessness. This has been described as Housing First enhancing someone's sense of security in their day-to-day life, or *ontological security*.

Evidence that Housing First has the capacity to help homeless people with high support needs into paid work is not extensive in Europe or North America, but it must be noted that the people using Housing First often face multiple barriers to employment. Housing First is designed to deliver improvements in health, well-being and social integration. Housing First is not presented, nor expected to be seen, as a 'miracle cure' or panacea that will rapidly end all the negative consequences of homelessness. Housing First successfully ends homelessness and that, in itself, creates a situation in marked contrast to the multiple risks to health, well-being and social integration that are associated with homelessness.

The Core Principles of Housing First

All Housing First services are based on the Pathways model, developed by Dr. Sam Tsemberis, in New York in the early 1990s. **The core principles of Housing First in Europe are drawn directly from the Pathways model.** However, there are significant differences between some European countries and North America and between European countries themselves.. This means that the core principles for Housing First in Europe do not exactly mirror those of the original Pathways model. **The eight core principles of Housing First in Europe, developed in consultation with the advisory board for this Guide,** of which Dr. Tsemberis was a member, are:

Eight core principles:

Housing is a human right

Choice and control for service users

Separation of housing and treatment

Recovery orientation

Harm reduction

Active engagement without coercion

Person-centred planning

Flexible Support for as Long as is Required

Support in Housing First

Support in Housing First centres on delivering **housing sustainment, the promotion and support of good health and well-being, developing social supports and community integration and extending participation in meaningful activity.** Housing First delivers these services using **multidisciplinary teams** and/or various forms of **high intensity case-management** services. **Mobile teams** of workers provide these services to the people using Housing First services by visiting them **at home**, or sometimes at **another mutually agreed location**, such as a café.

Delivering Housing

4.1. Housing and Neighbourhood in Housing First

There is an important distinction between being provided with accommodation and having a real home. To be a home, housing must offer:

- Legally enforceable **security of tenure**, i.e. someone using Housing First should not be in a position where they have no housing rights and can be evicted immediately without any warning and/or with the use of force.
- **Privacy.** Housing must be a private space where someone can choose to be alone without interference and can conduct personal relationships with family, friends and/or their partner.
- A space that the person living within it has **control** over, in terms of who can enter their home and when they can do so and also in terms of being able to live in the way they wish, within the usual constraints of a standard tenancy or lease agreement.
- A place in which someone feels physically **safe and secure.**
- **Affordability,** in that rent payments are not so high as to undermine the person's ability to meet other living costs, such as food and utility bills.
- **All the amenities** that an ordinary home possesses, sufficient furniture, a working kitchen and bathroom and working lighting, heating and plumbing.
- A **fit standard** for occupation, i.e. not overcrowded or in poor repair.
- **Their own place** that they can decorate and furnish as they wish and where they can live their life in the way they choose. Housing must not be subject to the kind of rules and regulations that can exist in an institution, determining how a space is decorated, furnished and lived in.

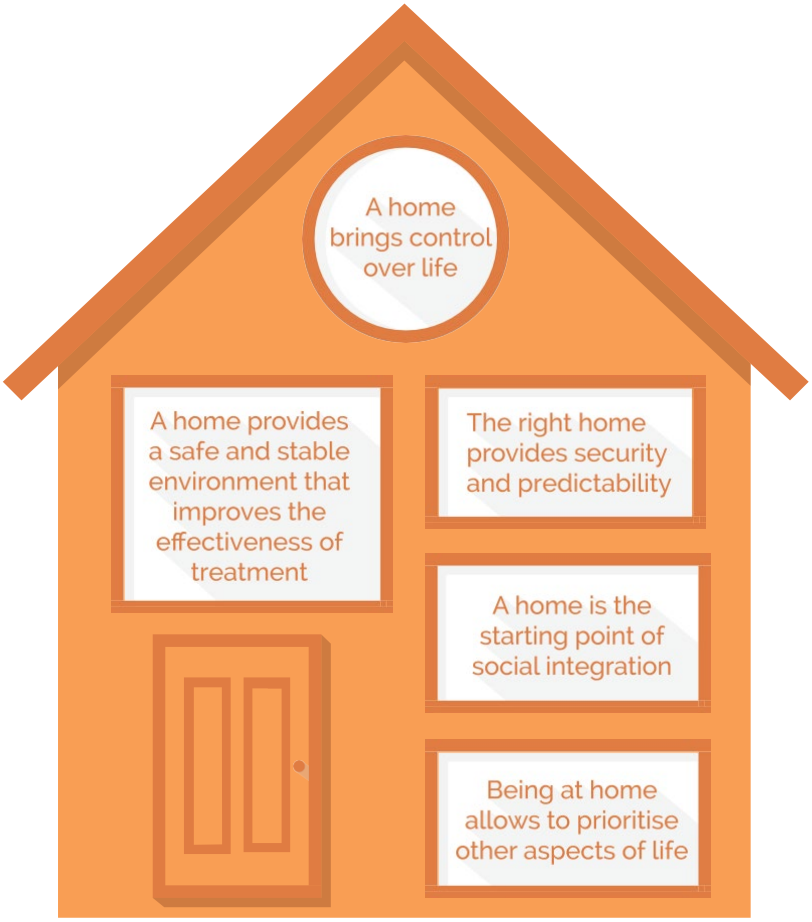
The European typology of homelessness (ETHOS) identifies physical, social and legal domains in defining what is meant by a home. The physical domain centres on having one's own living space, i.e. someone has their own front door to their own home, under their exclusive control. The social domain means having the space and the privacy to be 'at home'. The legal domain echoes the international definition of a right to housing, i.e. security of residence with legal protections (see Chapter 2).

The location of housing is important. However, Housing First services will not have the resources to simply pick anywhere in a city or municipality. In some locations, such as major European cities, there will very often be a need for compromise between what is affordable for Housing First service users and what would be an 'ideal' home.

Where possible, it is important to avoid areas characterised by high crime rates, nuisance behaviour and low social cohesion/weak social capital, where there is little or no 'community' in a positive sense and a Housing First service user might be subject to bullying or persecution or be at continual risk of being a victim of crime. There is clear evidence that the wrong location can inhibit or undermine the recovery that Housing First services seek to promote. More generally, it is desirable to avoid physically unpleasant locations and those without access to necessary and desirable amenities, e.g. an affordable local shop, public transport links and pleasant green space. The right kind of neighbourhood can be a determinant of health, well-being and social integration, positively influencing outcomes for Housing First service users.

Some Housing First service users may wish to move away from the locations in which they experienced homelessness. The reasons for this may include wanting to avoid negative peer pressure from their former life. For some Housing First service users, including women who have experienced gender-based/domestic violence, there may be a need to avoid living in certain areas for reasons of personal safety and to improve their health and well-being. Ideally, housing should not be located in an area that a Housing First service user wishes to avoid.

Adequate homes must be located in an adequate neighbourhood. Avoiding areas characterised by social problems and poor facilities will help increase the chances that housing can be sustained.



4.2. Providing Housing

Housing First service users are able to exercise choice in using treatment (see Chapter 2 and Chapter 3) and should also be able to exercise choice about where and how they will live. Obviously, housing options will be subject to what is available and what can be afforded by Housing First service users, but generally speaking:

Housing First service users should expect:

- To be able to **see housing before they agree to move into it.**
- To be offered **more than once choice of housing**, i.e. they should be able to refuse offered housing if they wish without there being any negative consequence for them. In practice, a Housing First service may face challenges in finding ideal housing. This will need to be made clear to each Housing First service user, but there should be no expectation that being offered only one or two choices is sufficient. Housing First should never withdraw an offer of housing and support on the basis that someone has refused one or more offers of housing.
- To have the **financial consequences of having their own home clearly explained to them** and to have the opportunity to discuss this. Before moving into their home, Housing First service users should understand what their financial obligations will be and how much money they will have. In some European countries, which pay a basic income to anyone who is unemployed, someone may have less *disposable* income when housed than when living in emergency or temporary accommodation for homeless people (because they have additional living costs).
- To have **some choice with respect to the location** of the housing that they are offered.
- To be offered some **flexibility around how they choose to live**, i.e. someone may wish to live with a partner, friends or with other people, rather than on their own in an apartment. Some Italian Housing First services, for example, will support families and some English services will support couples (see Appendix).

There are three main mechanisms by which a Housing First service can deliver housing:

- Use of the private rented sector
- Use of the social rented sector (where social rented housing exists)
- Direct provision of housing, by buying housing, developing new housing or using existing housing stock.

The challenges faced by a Housing First service may include:

- **Finding enough affordable, adequate housing** in acceptable locations in high-pressure housing markets (where housing demand is very high). Any area with high economic growth is likely to be a challenging place to find sufficient housing of the right sort. The type of housing available in some rural areas (a relative absence of smaller apartments) may also present a challenge.
- Where **social housing** is available, it may be **targeted on groups other than people who are homeless**, or it may be subject to high demand.
- There may be problems with the **availability, affordability and quality of housing in the private rented sector.**
- Both social and private sector **landlords may be reluctant to house formerly homeless people** with high support needs. There are concerns that people who have been homeless will present management problems, such as getting into disputes with neighbours, or failing to pay their rent.
- **Housing First service users sometimes cannot access sufficient welfare benefits to pay the rent.** This is more of an issue in European countries that have limited welfare systems than in those with extensive welfare systems, where various forms of housing benefit or minimum income benefit pay all or most of the rent for very low income/vulnerable groups. In countries with more limited welfare systems, Housing First services may need to find income streams to help pay the rent for their service users.
- It is possible to create new housing specifically for Housing First but **the costs of development (building new housing) or renovating/converting** existing housing are considerable. Buying housing is also an option, but while this *may* be cheaper than building or renovating, again, the costs may be too high for this to be a realistic option.
- **NIMBY (not in my back yard) attitudes** linked to the stigmatisation of homeless people which may lead neighbourhoods to try to stop Housing First services from operating in their area. Housing

First services may need to work with neighbouring households, providing information, reassurance and if necessary intervening if a Housing First service user has caused a problem (also intervening if a neighbour is behaving unreasonably towards a Housing First service user).

- Housing First can work flexibly and imaginatively, but it **cannot fix underlying problems with affordable and adequate housing supply** and may encounter operational difficulties in any context where there is just not enough affordable or adequate housing for the entire population.

Housing First is meant for homeless people with high support needs. The need that Housing First services have in terms of numbers of housing units will often be *relatively* small. Although data on European homelessness are incomplete, it appears that, even in a major city, a Housing First service would probably *not* require hundreds of homes.

REPORT | April 2020

HOUSING FIRST AND HOMELESSNESS: THE RHETORIC AND THE REALITY

Stephen Eide
Senior Fellow

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About the Author

Stephen Eide is a senior fellow at the Manhattan Institute and a contributing editor of *City Journal*. He researches state and local finance and social policy questions such as homelessness and mental illness. Eide has written for many publications, including *National Review*, the *New York Daily News*, the *New York Post*, the *New York Times*, Politico, and the *Wall Street Journal*. He was previously a senior research associate at the Worcester Regional Research Bureau. He holds a B.A. from St. John's College in Santa Fe, New Mexico, and a Ph.D. in political philosophy from Boston College.

Contents

Executive Summary

Over the past two decades, a policy known as "Housing First" has come to dominate the government response to homelessness. Housing First has two chief tenets: (1) the most effective solution to homelessness is permanent housing; and (2) all housing for the homeless should be provided immediately, without any preconditions, such as sobriety requirements. The movement to "end homelessness," in which hundreds of communities have participated, is centered on the implementation of Housing First.

More recently, the Trump administration has begun modifying the federal government's commitment to Housing First. These changes have been prompted, in part, by the fact that, in California and elsewhere, community efforts to end homelessness have failed even to arrest its increase. Though the changes thus far have been modest, they have been strenuously criticized by advocates who sense a weakening in the Housing First consensus.

This report contributes to the debate over homelessness policy by assessing Housing First's rhetoric—the claims made by proponents—in light of the available evidence. It argues that proponents overstate the ability of Housing First to end homelessness, the policy's cost-effectiveness, and its ability to improve the lives of the homeless.

Key Findings

- Housing First has not been shown to be effective in ending homelessness at the community level, but rather, only for individuals.
- A Housing First intervention for a small segment of "high utilizer" homeless people may save taxpayers money. But making Housing First the organizing principle of homeless services systems, as urged by many advocates, will not save taxpayers money.
- Housing is not the same as treatment. Housing First's record at addressing behavioral health disorders, such as untreated serious mental illness and drug addiction, is far weaker than its record at promoting residential stability.
- Housing First's record at promoting employment and addressing social isolation for the homeless is also weaker than its record at promoting residential stability.

Recommendations

- The U.S. Department of Housing and Urban Development should allow more flexibility from Housing First requirements for communities pursuing homelessness assistance grants through the "Continuum of Care" (CoC) program.
- State and local Housing First mandates should be reassessed.
- The homelessness debate should be reintegrated into the safety-net debate.

HOUSING FIRST AND HOMELESSNESS: THE RHETORIC AND THE REALITY

I. History of Housing First

In response to the emergence of "modern" homelessness in the early 1980s, cities first focused on developing emergency shelter programs. Shelter was emphasized in those years because the rise in homelessness was assumed to be a temporary crisis created by the 1980–82 recession, and, going back to the 19th century, temporary housing had always been part of the response to housing instability challenges.[1] Throughout the 1980s and 1990s, however, the economy improved but homelessness did not decline; in some cities, it increased. Policymakers thus began to reason that a new response was required to meet this new, and apparently structural, socioeconomic challenge.

The first proper homeless services system—as distinct from the preexisting array of safety-net programs and services—is often described as having had a "linear" character.[2] Housing programs for the homeless would be arranged in a continuum of emergency, transitional, and permanent options. Linear-style systems would guide clients out of homelessness gradually, first from the streets to shelter, then to a service-enhanced transitional housing program, and then to permanent housing, either publicly subsidized or private.[3] It was always understood that at least some of the homeless population would need permanent housing benefits—meaning a rental subsidy not subject to any time limits. But the most troubling cases, such as individuals who were mentally ill or had drug addictions, would need services in addition to housing benefits, both for their sake and to ensure the success of the housing intervention.[4]

The linear system was developed during the lead-up to the 1996 welfare reform, the Personal Responsibility and Work Opportunity Reconciliation Act. The same concerns about changing public assistance programs to promote self-sufficiency and minimize dependency also shaped the debate over the early 1990s homeless services system. A 1994 strategic plan by the United States Interagency Council on Homelessness (USICH) to "break the cycle of homelessness" began with an epigraph by President Bill Clinton about how "work organizes life"[5] and, in detailing the purpose of housing programs for the homeless, placed high emphasis on "mak[ing] housing work again."[6] With so many people cycling between the streets, shelter, and unstable housing arrangements, a welfare reform–style emphasis on work would overcome homelessness recidivism.[7]

Policymakers in the early 1990s were also concerned about the flaws of deinstitutionalization. Transitioning the public mental-health-care system from an inpatient to a mainly outpatient model began in the 1950s, and it proceeded at an especially rapid pace during the 1970s. Deinstitutionalization's promise of "better care in the community"[8] had been undermined by the spectacle of mentally ill individuals living on the streets who were either former patients in mental hospitals or people who would have been committed to long-term psychiatric care in earlier times. The homeless mentally ill needed not only housing but "structured care and residential support" similar to what had existed in the state hospitals.[9] To correct the mistakes of the past, the homeless mentally ill would need a variety of levels of support, depending on what stage they were at in their psychiatric rehabilitation.

The "linear" character also applied to programs designed to help homeless populations that faced substance abuse, unemployment, and other challenges that had contributed to their homelessness. Heavy focus was placed on the transitional housing model. Transitional housing provides temporary housing, like shelter, but for a longer

duration—up to 24 months—and in a more service-enhanced environment.[10] Housing was considered part of an overall effort to repair broken lives and address the problems that caused or strongly contributed to clients' homelessness.[11]

Press reports and advocates of Housing First often use the phrase "housing readiness" to describe the aim of linear programs. But housing readiness, while certainly used by some participants in the 1990s debate,[12] was not, in every case, how linear-style service providers themselves characterized their ultimate aims. Whereas Housing First providers hold themselves, most of all, to the standard of residential stability—keeping the most clients housed for the longest period—linear-style programs often viewed residential stability as secondary to larger goals of independence or health. Much like how residential treatment programs use temporary housing as a means toward the goal of sobriety, transitional housing providers always aimed at goals beyond mere residential stability.[13] This is why some have described the debate between the two approaches as one of different "paradigms"—the dispute concerns not just the best way to achieve a mutually agreed-upon goal but a dispute over which goals to pursue.[14]

The groundwork for Housing First was laid in the late 1970s, when advocates began promoting the term "homelessness," a term that previously had never been widely in use, to pressure governments to develop more subsidized housing.[15] The belief in housing as a human right—meaning that government is obliged to provide it for anyone who cannot find housing on his own—had many adherents in advocacy circles but was antithetical to the notion of preconditions for housing benefits.[16] Housing First advocates were influenced by the "recovery model," an approach to mental health that stresses the importance of letting mentally ill people choose their care and treatment regimens.[17] Criticisms that, decades earlier, had been leveled at the traditional asylums by Erving Goffman and others were revived and directed at the linear homeless services system.[18] Housing First advocates believed that linear programs did more to undermine independence than promote it, by placing the homeless in what they viewed as a quasi-institutional living environment. Theories of "community integration" called for decoupling housing benefits and social services for mentally ill clients.[19] Instead of transitional housing, they called for "supported" or "supportive" housing, which generally meant subsidized housing that made services available to tenants but did not require participation or have any other requirements.[20]

These concepts—housing as a human right, the imperative of personal autonomy, even for those with untreated serious mental illness, and community integration—were developed in academic articles in the 1990s and formed the theoretical basis for Housing First.

The empirical basis was developed by Sam Tsemberis, a New York–based clinician who founded Pathways to Housing in 1992. Pathways placed its mentally ill clients, all formerly homeless or at serious risk of homelessness, in scattered-site supported housing units without any preconditions. Tsemberis then did studies, including a rigorous randomized-controlled trial, on their rates of residential stability. He found that, of a pool of individuals suffering from serious mental-health disorders, clients placed in Pathways units stayed stably housed at higher rates than those placed in linear-style programs.[21]

In 2000, the National Alliance to End Homelessness launched the campaign to end the problem in 10 years. "People should be helped to exit homelessness as quickly as possible through a housing first approach," the organization proclaimed. "For the chronically homeless, this means permanent supportive housing (housing with services)—a solution that will save money as it reduces the use of other public systems. For families and less disabled single adults, it means getting people very quickly into permanent housing and linking them with services. People should not spend years in homeless systems, either in a shelter or in transitional housing."[22]

This campaign quickly found an ally in the George W. Bush administration, whose secretary of the Department of Housing and Urban Development, Mel Martinez, was the keynote speaker at the 2001 annual meeting of the National Alliance to end homelessness.[23] Under the leadership of USICH executive director Philip Mangano, the Bush administration began the "Chronic Homelessness Initiative," which encouraged states and localities to create 10-year plans to end chronic homelessness.[24] (Though the formal requirements for "chronic" homeless status have changed over time, the term generally means someone whose experience of homelessness is long-term and who suffers from a disability.) It has been estimated that more than 350 states and localities endorsed, in some fashion, the goal of ending homelessness through a Housing First approach.[25] California, host to the largest homeless population of any state, made Housing First a requirement for state-funded homelessness programs in 2016.[26]

The Obama administration put out a strategic plan to end homelessness in 2010 (updated in 2015).[27] USICH assumed responsibility for defining what it would mean to "end" homelessness and for validating claims made

FIGURE 1.

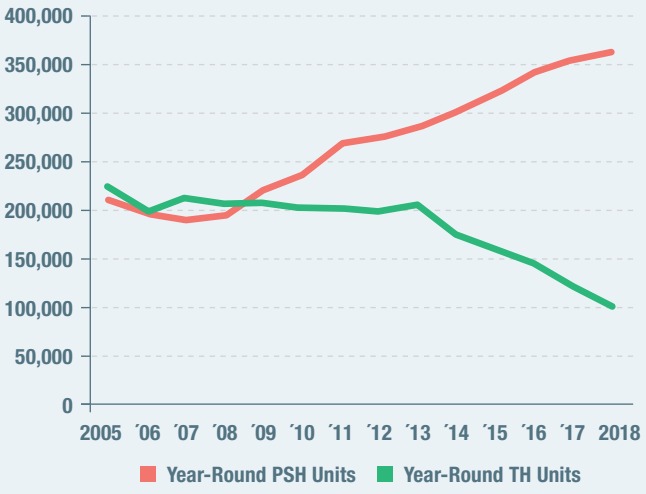
HUD's Homeless Assistance Grant Program, 2005–18

	Permanent Supportive Housing Award	Share of Total Grant	Transitional Housing Award	Share of Total Grant
2005	$595,483,232	50%	$417,439,417	35%
2006	$617,611,791	51%	$415,335,530	34%
2007	$727,119,842	55%	$435,684,534	33%
2008	$782,671,147	55%	$435,501,349	31%
2009	$926,779,901	59%	$428,789,845	28%
2010	$996,554,318	61%	$430,421,319	26%
2011	$1,040,824,807	62%	$430,229,366	26%
2012	$1,027,500,308	61%	$417,457,781	25%
2013	$1,132,624,508	67%	$371,494,431	22%
2014	$1,240,437,375	69%	$325,548,173	18%
2015	$1,407,021,020	72%	$172,252,643	9%
2016	$1,434,271,450	73%	$108,067,486	6%
2017	$1,496,858,863	74%	$80,669,446	4%
2018	$1,542,451,024	71%	$66,342,036	3%

Source: HUD, Continuum of Care Program. Numbers do not add up to 100% because permanent supportive housing and transitional housing are not the exclusive uses of these funds.

FIGURE 2.

Permanent Supportive Housing (PSH) vs. Transitional Housing (TH) Units, 2005–18



Source: HUD, CoC Housing Inventory Count Reports

by communities that they had "ended" homelessness for some cohort, such as the chronic or veterans' population. Targeting resources toward specific homeless cohorts was seen as beneficial in itself and, if successful, a source of proof that ending homelessness, broadly speaking, was achievable.[28]

HUD is the most important agency in federal homelessness policy because of its responsibility to disburse billions in funds for homelessness programs to states and localities. Over time, the federal government has tightened adherence requirements to Housing First for local agencies pursuing homeless assistance funds from HUD. **Figures 1** and **2** show how this has led to a dramatic shift in support from transitional housing programs—closely associated with the linear approach—to the permanent supportive housing programs favored by Housing First–oriented systems.

The Trump administration, despite departing from the Obama administration on several safety-net and poverty-policy questions, remained focused on Housing First for its first two and a half years in office. Six months into the new administration, 23 Republican congressmen sent a letter to HUD secretary Ben Carson, asking him to review his agency's "current procedures" that follow Housing First principles and to "end the recommended scoring guidelines that currently punish programs that prioritize work, education, and sobriety."[29] Much federal funding for homeless services flows through the Continuum of Care (CoC) grant competition, which is structured around a points system and set of criteria laid out by HUD.[30] In its response letter, HUD asserted that Housing First was an "evidence-based" practice and argued that its current approach was not unduly burdensome on local autonomy.[31] Carson and other prominent administration officials have made many public statements in favor of Housing First.[32] Most critically, HUD's Notice of Funding Availability (NOFA), the annual document that lays out requirements for access to billions in CoC program funds, kept in the Obama-era language regarding Housing First.

In summer 2019, the Trump administration began to signal a shift. The first notable change came in the 2019 NOFA, which "Provid[ed] Flexibility for Housing First with Service Participation Requirements."[33] In the section "CoC Coordination and Engagement" (VII.B.1 in the FY18 NOFA, VII.B.6 in the FY19 NOFA), the seven points allocated for embracing "Housing First" were, in FY19, dedicated to "Low Barriers to Entry" (**Figure 3**). The intention of the change was for localities to discourage service providers from attaching sobriety requirements or other preconditions to clients' initial entry into a federally funded housing program but allow for their usage in clients' ongoing participa-

FIGURE 3.

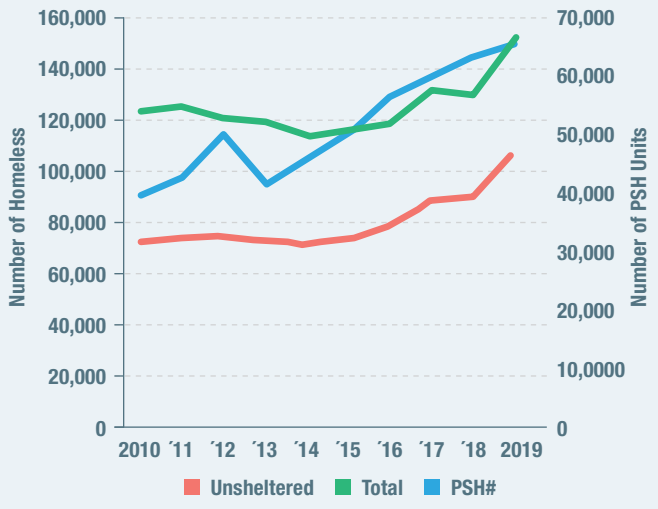
Housing First–Relevant Language in the FY18 and FY19 NOFAs

FY18 (7 Points)	g. Housing First. Uses a Housing First approach. Any housing project application that indicates it will use a Housing First approach, that is awarded FY 2018 CoC Program funds will be required to operate as a Housing First project.	At least 75 percent of all project applications that include housing activities (i.e., permanent housing, transitional housing, and safe haven) submitted under this NOFA are using the Housing First approach by providing low barrier projects that do not have service participation requirements or preconditions to entry and prioritize rapid placement and stabilization in permanent housing. This means the projects allow entry to program participants regardless of their income, current or past substance use, history of victimization (e.g., domestic violence, sexual assault, childhood abuse), and criminal record–except restrictions imposed by federal, state or local law or ordinance (e.g., restrictions on serving people who are listed on sex offender registries).
FY19 (7 Points)	g. Low Barriers to Entry. CoC Program-funded projects in the geographic area have low barriers to entry and prioritize rapid placement and stabilization in housing.	CoCs must demonstrate at least 75 percent of all project applications that include housing activities (i.e., permanent housing, transitional housing, and safe haven) submitted under this NOFA use the following practices: • provide low barriers to entry without preconditions and regardless of their income, current or past substance use, history of victimization (e.g., domestic violence, sexual assault, childhood abuse), and criminal record—except restrictions imposed by federal, state, or local law or ordinance (e.g., restrictions on serving people who are listed on sex offender registries), and • prioritizes rapid placement and stabilization in permanent housing The use of service participation requirements after people have stabilized in permanent housing will not affect the score on this rating factor.

Source: HUD, "Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2018 Continuum of Care Program Competition," June 20, 2018, p. 53; "Notice of Funding Availability (NOFA) for the Fiscal Year (FY) 2019 Continuum of Care Program Competition," July 3, 2019, pp. 63–64

FIGURE 4.

Trends in Investment in PSH Units and Homelessness in California, 2010–19



Source: Source: HUD, Continuum of Care Program

tion in programs.

In late 2019, prompted by advocates,[34] Congress required HUD to return to the FY18 language for the 2020 NOFA.[35] In the meantime, the Trump administration has been active in questioning Housing First on other fronts. In September 2019, the Council of Economic Advisers (CEA) released a comprehensive report on homelessness policy in America that included a critical discussion of Housing First's limitations.[36] In December, a new USICH executive director was appointed, Robert Marbut, an adherent of the older, linear approach ("I believe in Housing Fourth").[37]

The Trump administration has pursued these changes partly because of philosophical objections to the Housing First philosophy but also because so many communities that participated in the campaign to end homelessness, such as Los Angeles and San Francisco, are now dealing with crises of unprecedented magnitudes. The failures of California jurisdictions' 10-year plans to end homelessness in some form have been covered in a number of press outlets.[38]

California is host to approximately one-fourth of the nation's total homeless population and half of the nation's total unsheltered population. Since 2010, California has added more than 25,000 PSH (permanent supportive housing) units, an increase of about two-thirds (**Figure 4**)—yet the state's unsheltered homeless population, over the same span, increased by half. The public has registered support

for investing in homeless services, through successful initiative campaigns, but continues to voice concern over the direction of policy in opinion surveys.[39] This has inevitably raised questions about the Housing First approach that has been in place through this recent rise in homelessness. Therefore, now is a good time to take stock of Housing First. How effective has Housing First been? Does it deserve the wide acclaim it has received from advocates?

II. "We Know How to End Homelessness"

Housing First has evolved somewhat.[40] Originally, it was associated with providing permanent supportive housing for the chronically homeless. That remains a core priority of Housing First–oriented homeless services systems, but, more recently, USICH and advocates have encouraged governments to view Housing First as a "whole system orientation."[41] All homeless services, for all homeless populations, temporary and permanent housing alike, are expected to conform with the Housing First philosophy. In addition to expanding permanent supportive housing, the top priority of any Housing First system, emergency shelter should also be provided without any barriers (see, for example, San Francisco's Navigation Centers, Los Angeles's Bridge program, and New York City's Safe Haven shelters).[42] "Rapid Rehousing"—short-term rental assistance to be used for a private apartment—is also seen as part of a Housing First–oriented homeless services system, though it is a temporary benefit.[43] So, too, is providing standard affordable housing—understood as subsidized housing without any time limits—to non-chronic homeless clients, such as families, as long as it is provided without any barriers.[44] Housing First systems work to "align" or "integrate" existing affordable housing programs with homeless services, meaning, for instance, preferential access for the homeless for Section 8 vouchers or newly developed affordable housing units.[45]

Proponents argue for organizing homeless services systems around the principle of Housing First based on scientific evidence, not only, or even mainly, because it is founded on more just or humane principles. In their view, Housing First has been "proven" or "demonstrated" to be superior to alternatives and to be able to end homelessness.[46] In most instances, when a policymaker is making some claim about how "we know how to end homelessness,"[47] they are referring to the social science evidence base behind Housing First.

At their core, these claims are based on studies that have registered high rates of residential stability when homeless individuals, or people at serious risk of homelessness, have been placed in permanent supportive housing units under a Housing First policy. Residential stability may be measured in terms of how many days someone spends in his unit over a particular period, or whether he still occupies his unit at a certain time benchmark.[48]

The "gold standard" in social science research is the randomized-control trial (RCT). In an RCT, researchers examine the effect of some intervention on two different cohorts who are similar in every important respect. Though the literature on Housing First is significant, the number of truly rigorous RCT studies of the approach is relatively small. One 2015 review credits only four, with several more studies having a "quasi-experimental" design.[49] A 2014 survey identified seven RCTs and five "quasi-experimental" studies.[50] A 2017 survey of the literature credits 14 RCTs, based on 12 trials.[51] The best-known RCTs are the Pathways studies discussed earlier and the more recent At Home / Chez Soi, which encompassed five Canadian cities and more than 1,000 participants. One common criticism of the literature on Housing First is that studies often relate few details about the programs under examination (a significant concern for a policy that advocates are trying to scale up and expand nationwide).[52]

Still, despite certain limitations, the Housing First literature has demonstrated that Housing First interventions tend to yield high rates of residential stability.[53] The rates of residential stability are often in the 70%–80% range, for the length of the trial, which typically lasts a couple of years. "Usual care" or "treatment first" comparison groups, by contrast, often register rates below 50%. And, to reemphasize, these studies typically involved "chronic" homeless cases suffering from serious mental illness or some other behavioral health disorder. Whether looking at how many days housed as the measure of residential stability, or how many participants remained in housing at the end of the study, Housing First–style interventions have demonstrated real strength at addressing homelessness.

While it may have been the case 30 years ago that homeless policymakers doubted whether people with untreated serious mental illness and other social challenges could hold on to their housing if those challenges were not addressed first, there is less doubt about that point now. This is the thinking behind claims about how the Housing First literature "proves" how to "end homelessness."

The ability of Housing First programs to keep the homeless housed at a higher rate than linear-style programs has been acknowledged by, among others, the Trump administration's CEA.[54] The Trump administration also acknowledges that homelessness is, in large measure, a housing problem.[55] Any community that experiences a shortage of rental units affordable to low-income households will, all other factors being equal, experience higher levels of homelessness than communities with a larger store of such units.[56] Nor is there serious dispute that some of the homeless population, such as those with serious mental illness, will need rental subsidies for the rest of their lives.

But claims that Housing First has been shown to end homelessness elide the distinction between evidence at the individual level and the community level. Housing First advocates' rhetoric that investing in permanent supportive housing will end homelessness raises hopes of ending homelessness at the community or national level. For example, Los Angeles County's Measure HHH,[57] which authorized $1.2 billion in bonds to build thousands of permanent supportive housing units, had the working title "Housing and Hope to End Homelessness." However, as noted above (Figure 4), California's experience has been increased investment in permanent supportive housing and increased homelessness. Given that, according to advocates, hundreds of localities have adopted Housing First, one might have expected at least a handful of examples of communities where Housing First has eliminated or drastically reduced homelessness in a manner noticeable to the broader public. That has not been the case.

Scholars who have studied the community-level effects of increased investment in permanent supportive housing have found that: (1) governments may need to create as many as 10 units of permanent supportive housing in order to reduce the local homeless population by one person;[58] and (2) a certain "fade-out" effect is observed whereby the reduction is only temporary. There is no scholarly consensus as to the weakness of Housing First on community-level rates of homelessness. But it does show that scholarship conforms to people's experiences: more investment in PSH does not necessarily lead to less homelessness.

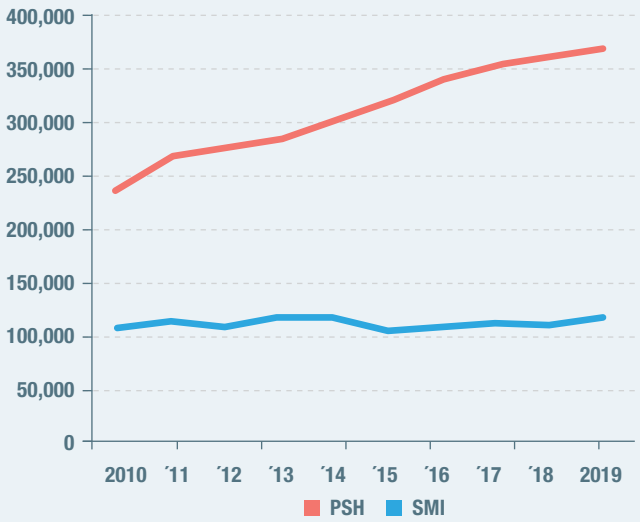
As noted, many participant communities in the campaign to end homelessness have targeted a specific cohort, such as the chronic homeless or veterans. Utah[59] is perhaps the most touted success story from the campaign to end homelessness. But in a 2015 study, economist Kevin Corinth showed how claims about Utah's "ending" homelessness can mostly be ascribed to methodological changes and shifting definitions of "chronic" status.[60] In 2009, Utah adjusted its "point-in-time" homeless numbers to reflect only the homeless who were counted on a certain day in January, instead of an "annualized" estimate to reflect all homeless throughout the year, and abruptly ceased including transitional housing clients in its count of sheltered "chronic" homeless. Nonetheless, media and public officials continue to tout Utah as a case study in how to end homelessness via Housing First.[61] (USICH does not currently list Utah or any of its localities among the communities that have "ended" chronic homelessness.)[62] Even when the definition of "chronic" homelessness is settled, the number of chronic homeless will always face the challenge of counting the unsheltered population. Counting the unsheltered and documenting their challenges, such as what disabilities they suffer from and how long they have been on the streets, are tasks that continue to be plagued by a range of methodological difficulties that quite possibly will never be resolved.

Problems with data and definitions are one reason for giving pause to claims about the success of the campaign to end homelessness. Another is that, even if homelessness has been "ended" or reduced for one specific cohort, that does not necessarily imply progress toward ending homelessness more generally. Just as many factors cause homelessness, many factors may also be at work in reducing it, such as an improving economy or demographic changes. Many sources have claimed that a recent investment in permanent supportive housing for veterans has reduced veterans' homelessness, and even ended it in some communities.[63] But a recent study by economist Brendan O'Flaherty demonstrated that the decline in veterans' homelessness can largely be attributed to the decline in the veteran population of the age at greatest risk of homelessness and the nationwide decline as the nation has emerged from the last recession, not to government policy.[64]

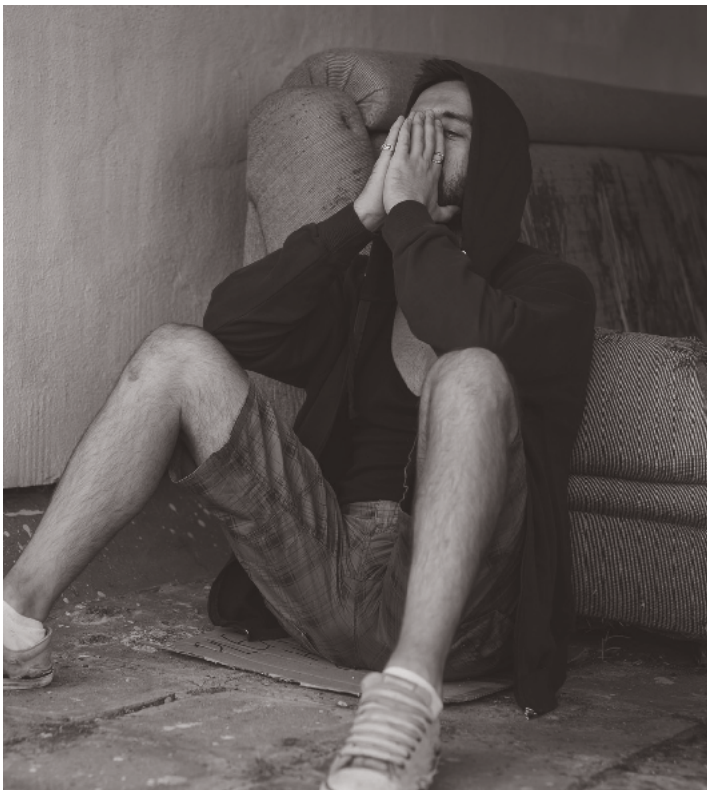
The case of the seriously mentally ill, though less of a priority for USICH (no criteria for "ending" homelessness for this population have been issued),[65] should also be discussed. Housing First supportive housing programs target the seriously mentally ill partly because of a commitment to helping the hardest or chronic cases, but partly because seriously mentally ill individuals qualify for disability benefits. For its influential 2004 study, Pathways to Housing recruited some participants directly from a mental hospital. Indeed, requiring, or strongly urging, supportive housing clients to participate in a money-management program is one of the few infringements on personal liberty that Housing First providers countenance.[66] The number of seriously mentally ill homeless has been virtually

FIGURE 5.

PSH Units, Seriously Mentally Ill Homeless, 2010–19



Source: HUD, Continuum of Care Program



flat since 2010, even as the number of permanent supportive housing units nationwide has increased by more than 50% (**Figure 5**).

USICH defines what it means to "end homelessness" and also evaluates communities' claims for having done so. The council has published criteria and benchmarks for ending homelessness for four cohorts: veterans, chronic, unaccompanied youth, and families with children and, at present, has recognized about 80 communities for having "ended" homelessness for one of these cohorts.[67]

However, the official language and criteria regarding "ending" homelessness are not uncontroversial. Some have criticized it as "Orwellian."[68] To give a community credit for having made homeless "rare, brief and one-time," USICH performs an assessment of that the community's services system. USICH examines system capacity, relative to need (number of homeless) but also whether that system conforms to Housing First. In other words, if the community's capacity to house the homeless—as assessed by the government—matches the number of homeless, the government says that the community has ended homelessness. But that does not mean that there are zero homeless people in the community. Ending homelessness in a community does not need to mean zero homeless people.[69]

Figure 6 lists a cohort of communities that USICH currently credits for having "ended" veterans' homelessness. These communities are, according to the most recent HUD figures, host to more than 2,000 homeless veterans. Communities with modest homelessness challenges more generally are host to as few as one homeless veteran, but others estimate that hundreds of veterans are included in their homeless populations. Most of the communities recognized for having "ended" veterans' homelessness have at least seen a reduction in veterans' homelessness since 2011 (the first year that CoC-level veteran data are available), though not all. In 2019, Portland/Gresham/Multnomah County Continuum of Care, the Northwest Minnesota Continuum of Care, and Norman/Cleveland County, OK all reported higher numbers of homeless veterans than in 2011, before they "ended" veterans' homelessness.

Officials in New York and Los Angeles continue to embrace the goal of ending homelessness, as did some candidates for the 2020 Democratic presidential nomination.[70] But no community has truly ended homelessness using Housing First, and certainly not any community facing crisis-level homelessness. We would not say that a community has ended murder based upon a qualitative analysis of its police department, but rather the absence of murder. If ending homelessness must remain the goal of homelessness policy, governments should define success in a way that can be independently verified by the public. The public

can observe homelessness. It cannot easily observe and analyze service systems' capacity and competence. Thus, ending homelessness should mean the absence of homelessness, as observable to members of the public.

Brendan O'Flaherty is an economist at Columbia University and has been, for decades, one of the leading scholars of homelessness. He is known for his analysis of how housing-market dynamics account for much of modern homelessness[71] and for refuting the "Dinkins Deluge" thesis that, when New York City provided housing to shelter clients around 1990, it led, through moral hazard, to a significant increase in sheltered homelessness.[72] In a recent review of the literature, including on Housing First, O'Flaherty came to the conclusion that "we don't know how to end homelessness. Not in the aggregate, anyway."[73]

FIGURE 6.

Number of Homeless Veterans in Communities Recognized as Having "Ended" Veterans' Homelessness, 2019

Community	# homeless veterans in 2019
Portland/Gresham/Multnomah County Continuum of Care	473
Atlanta, GA	349
Philadelphia, PA	250
Miami-Dade County, FL	169
Long Island, NY	128
Kansas City, KS/Kansas City, MO, and Independence/Lee's Summit/Jackson, Wyandotte Counties Continuum of Care	116
Pittsburgh/McKeesport/Penn Hills/Allegheny County CoC	100
Western Pennsylvania Continuum of Care	88
Lowell, MA	45
Punta Gorda/Charlotte County, FL	43
Massachusetts Balance of State Continuum of Care	42
Cumberland County/Fayetteville, NC	38
Nebraska Balance of State Continuum of Care	31
Scranton/Lackawanna County, PA	30
Lansing, East Lansing, Ingham County, MI, Continuum of Care	26
Lancaster City & County, PA	21
Lincoln, NE	21

Community	# homeless veterans in 2019
Mississippi Balance of State Continuum of Care	20
DeKalb County, GA	17
Norman/Cleveland County, OK	14
Montgomery County, MD	13
Reading/Berks County, PA	13
Bergen County, NJ	13
Saint Joseph/Andrew, Buchanan, DeKalb Counties, MO, Continuum of Care	13
Northwest Minnesota Continuum of Care	9
Moorhead/West Central Minnesota Continuum of Care	9
Rochester/Southeast Minnesota Continuum of Care	9
Mississippi Gulfport/Gulf Coast Regional Continuum of Care	8
Jackson/West Tennessee Continuum of Care	8
Lynn, MA	2
Southwest Minnesota Continuum of Care	2
Northeast Minnesota Continuum of Care	2
Waukegan, North Chicago/Lake County, IL, Continuum of Care	1
Total	2,123

Source: USICH, "Communities That Have Ended Homelessness"; HUD, Continuum of Care Program

Note: This table includes every community that, as of March 2020, USICH has credited with "ending veterans' homelessness" for which HUD has homeless population data. HUD relates homelessness data on a CoC basis, and USICH has recognized, for ending homelessness, localities that are part of a larger CoC.

III. Cost-Effectiveness

One of the most famous statements in defense of Housing First came in Malcolm Gladwell's 2006 *New Yorker* article "Million-Dollar Murray."[74] This article, which the Bush administration had a hand in setting up,[75] detailed the struggles of a "high utilizer": a man in Reno, Nevada, whose homelessness and alcoholism placed a costly burden on the local health-care and criminal-justice systems. The central claim of Gladwell's article was that homelessness was "easier to solve than to manage" because placing people in permanent housing will lead to less usage of other service systems—most notably, hospitals and jails, thus saving money. Similar cost-savings claims have been central to the rhetoric over ending homelessness.[76]

But in the academic literature, the cost-savings argument for Housing First is treated with more skepticism. Here is an area where RCT-level rigor truly matters. Studies that have a "pre-post" design look at the reduction in costs of hospitals, jails, and so on, that result when a cohort is moved from the streets to stable housing. Homeless people who are put into permanent supportive housing programs often have extraordinarily high health costs immediately before their placement. But someone who costs the health-care system $100,000 in a given year is not necessarily going to cost the health-care system $100,000 every year of his adult life.[77] The reduction in costs, following a high utilizer's housing placement, may have as much to do simply with a "regression to the mean" than the virtue of the Housing First /PSH intervention.[78]

Moreover, high utilizers such as Million-Dollar Murray and people with untreated schizophrenia who have lived for years on the street are unrepresentative of the homeless population as a whole. Not only a minority, they are a minority of the chronic homeless.[79] They are certainly unrepresentative of the "working poor" or "down on their luck" homeless often cited in the media. The 2015 Family Options Study, prepared for HUD, examined various housing interventions among a pool of more than 2,000 homeless families with moderate social needs, over a three-year period. The permanent housing intervention was more successful in achieving housing stability than temporary housing interventions, but it was also more expensive.[80]

Governments can't save costs from people who don't make much use of expensive service systems, to begin with. Some homeless may have low service costs because they're "service-resistant," a particularly significant problem for the mentally ill. Another reason that many of the homeless may be low utilizers is that they live in a jurisdiction with limited mental-health and substance-abuse services[81] (states vary dramatically in their investment in behavioral health).[82] "Usual care," the control with which some studies compare Housing First interventions, can vary widely between jurisdictions. "Usual care," in the case of New York City, means a $2 billion shelter system. But, in other communities, to build a Housing First–oriented homeless services system might mean building the first homeless services system that they ever had.[83]

This is not to say that homeless services systems shouldn't focus on "high utilizers," or that, in some cases, they may yield short-term savings on jails and hospitals for certain individuals. But Housing First's success with different homeless populations has been cited as evidence of its merit as a systemwide organizing principle, applicable for the entire homeless population.[84] The evidence is weak that a systemwide application of Housing First—for the benefit of the many different types of homeless people—would generate net savings for taxpayers.

Physical Health-Care Systems. Homeless people are generally in bad health, due to rare diseases and illnesses associated with living in conditions not meant for human habitation, high rates of substance abuse, and inadequate treatment for ordinary illnesses.[85] They also make heavy use of emergency rooms and other expensive crisis services. Once they are stably housed, the homeless will be better positioned to avoid the need for costly triage treatment and instead use ordinary outpatient forms of care to prevent their health problems from becoming crises. Housing First programs will thus supposedly achieve better health at lower costs.

Evidence of the health effects of Housing First and permanent supportive housing is far less robust than many suggest. It is fair to argue that no policymaker who wants better health for the homeless can be indifferent as to whether they stay on the streets. But even assuming that Housing First improves people's physical health, it is not clear that that would mean it saved money. People who live long healthy lives have high health-care costs.[86] Cost-efficiency arguments for smoking-cessation campaigns have been criticized for failing to take into account the fact that nonsmokers live longer than smokers.[87] Perhaps the most reasonable view was expressed in a 2018 survey of the literature by the National Academies of Sciences, Engineering, and Medicine. While still defending the view that "housing in general improves health," this study came to the overall conclusion that "there is no substantial published evidence as yet to demonstrate that PSH improves health outcomes or reduces health care costs."[88]

Mental-Health-Care Systems. Arguments that the mental-health-care system, which has always been expensive, holds great potential for cost savings, go back a very long time.[89] Deinstitutionalization promised better care and at a lower cost. On an annual basis, inpatient psychiatric commitment at a state-run facility can run close to $250,000.[90] But civil commitment doesn't apply to the entire seriously mentally ill homeless population, which is itself a minority of the total homeless population (116,179 out of 567,715).[91] (Million-Dollar Murray was an alcoholic, not a schizophrenic.) Psychiatric hospitals have fixed costs that are difficult to reduce even if a few people avoided being committed as a result of receiving housing benefits.

Criminal-Justice Systems. Jails also have significant fixed costs. Over the last decade, New York City's jail population has declined by 40% while the Department of Correction budget has increased by one-third.[92] The argument that Housing First saves money on jails dovetails with the critique of the so-called criminalization of homelessness.[93]

There is no question that enforcing quality-of-life ordinances, which are often violated by the homeless,[94] places a fiscal burden on public safety agencies. However, it does not follow that investing massively in permanent supportive housing and drastically scaling back on law enforcement would be fiscally prudent.

First, as discussed above, academic studies and the experience of jurisdictions in California have demonstrated the weakness of permanent supportive housing programs to reduce homelessness and thus presumably reduce public complaints about disorder. Second, less law enforcement carries costs, including public spaces increasingly occupied by encampments (and their attendant crime and public-health burdens) and attracting more street homeless from neighboring jurisdictions, thus increasing the demand for public services.

In any event, total law-enforcement cost savings would be very difficult to calculate, since jail is a small part of the "use" that homeless make of the criminal-justice system (very few misdemeanor offenses result in incarceration).[95] If 20 men are removed from Los Angeles's Skid Row by being put in permanent supportive housing, how many cops would the LAPD redeploy? Quite possibly, there would be no savings.

Shelter Systems. San Francisco's "Navigation Center" costs $100 per bed per night.[96] In New York City, shelter beds for families with children average $201.60 (an 89% increase since FY15) and for single adult shelter beds, the average is $124.38 (a 58% increase since FY15).[97] Shelter costs are high to ensure a certain level of quality, particularly security and on-site social services. For decades, and long before Housing First and its attendant social science literature, advocates claimed that affordable housing is cheaper than shelter.[98] A leading topic of housing policy debate in New York state government concerns "Home Stability Support." This program would increase the "shelter allowance," a permanent housing benefit to which public assistance clients are entitled. Proponents of Home Stability Support estimate that a more generous shelter allowance would cost New York City taxpayers about $27,000 less than shelter on an annual basis.[99]

But comparing temporary and permanent housing costs raises "apples to oranges" difficulties. It is complicated to compare a housing benefit that someone may well receive for decades with one that he would receive for only weeks or months. People who receive subsidized housing in tight rental markets are apt to continue using that benefit for a long time.[100] In New York City, the average length of stay for a public housing resident is 23 years.[101] In 2017, the most recent year for which there are data, only about 16% of permanent supportive housing residents moved out, and the share of long-stayers in permanent supportive housing has been steadily increasing over the years.[102] It is extremely expensive to provide a lifetime rental subsidy to someone, which is how permanent housing benefits function in the high-cost jurisdictions that now face the most serious homelessness challenges. It would be extraordinarily expensive to provide such subsidies to everyone, every year, who claims to be homeless in such jurisdictions. It would be much cheaper to provide temporary assistance to the vast majority of the homeless.

Governments that invest heavily in Housing First programs should expect the overall cost of government to rise. For some individuals, or some service systems, there may be cost offsets, but cost offsets are different from savings. A $1 investment in Housing First may be offset by 30 cents in savings on other service systems, but that still means that the government is 70 cents larger. Certainly, cost-effectiveness arguments should not lead anyone to think that Housing First investments will lead to tax reductions or somehow free up money that may be devoted to other purposes. Service systems' costs are split between various governments and agencies and even nonprofit organizations. (This has been referred to as the "wrong pockets" problem.)[103]

Dennis Culhane, a leading homelessness researcher who was featured in "Million-Dollar Murray," has subsequently cautioned against the risk of "overstating" the cost-savings argument. In 2008, he criticized

the design quality of more than 40 cost studies based upon their small size and selectivity in populations examined, noting that "in general, the larger the sample (and presumably the more representative of adults who are homeless), the lower the average annual costs of services use." But such studies are beneficial, he says, for showing the efficiency and accountability of homeless services systems and thus "mobiliz[ing] political will."[104]

It is certainly the case that, in many jurisdictions where homelessness is at crisis levels, the public has shown a marked willingness to raise taxes for homeless services. Some recent, successful ballot initiative campaigns in California, such as Measure HHH (Los Angeles County, 2016), made use of cost-savings rhetoric. Whether those arguments were, ultimately, more important for the voting public than humanitarian considerations is unclear. Some scholars have questioned the benefit of distracting from the humanitarian case for investing in homeless services.[105] Certainly, for those with poor physical or mental health, it is not obvious why reducing health-care expenditures should be a standard of policy effectiveness.

In sum, the truly "evidence-based" view of Housing First, when it comes to cost savings, bears a certain parallel with residential stability. The evidence supports the view that a Housing First intervention may, for certain individuals, reduce costs, at least in the short term. But the evidence does not support any thesis about systemwide cost savings. Housing First has not been demonstrated to be capable of saving costs for entire systems any more than it has been demonstrated to be capable of ending homelessness for entire communities.

IV. The Record on Behavioral Health

HUD estimates that 16% of the homeless population exhibits "Chronic Substance Abuse" and that "Severe Mental Illness" afflicts 20%.[106] Drug addiction and mental illness drive much of the "chronic homelessness" challenge. Permanent housing is seen as a condition of recovery for this cohort.[107] One of the main recommendations that USICH made in its 2017 brief, "Strategies to Address the Intersection of the Opioid Crisis and Homelessness," was to "Remove Barriers to Housing" by implementing Housing First.[108] But the research is ambiguous as to how much permanent housing, on its own, stimulates recovery.

In a 2019 law review article, Sara Rankin, of Seattle University School of Law, argued in favor of Housing First based on "the reality that people need basic necessities like food, sleep, and a stable place to live before attending to any secondary issues, such as getting a job, budgeting properly, or attending to substance use issues." She wrote that the "Housing First approach views housing as the foundation for life improvement and enables access to permanent housing without prerequisites or conditions beyond those of a typical renter."[109]

However, a 2017 survey of the literature by researchers Stefan G. Kertesz and Guy Johnson judged Housing First to have demonstrated, at best, modestly beneficial clinical impacts.[110] The Trump administration's CEA acknowledged the research on Housing First residential stability but argued: "For outcomes such as impacts on substance abuse and mental illness, Housing First in general performs no better than other approaches."[111] The 2018 study published by the National Academies of Sciences, Engineering, and Medicine found no strong evidence of Housing First and improvement of mental disorders, as have other surveys.[112]

Stated otherwise, the evidence for Housing First and behavioral health is far weaker than for residential stability. Some Housing First proponents, committed to the harm-reduction philosophy of recovery as a choice, are forthright about Housing First's modest ability to address behavioral health disorders.[113] Harm-reduction policy calls for prioritizing the remediation of symptoms and the harmful effects of disorders such as opioid addiction over trying to root out or overcome the underlying disorder. More commonly, though, advocates display a rhetorical suggestiveness about the link between permanent housing and behavioral health that seems intended to convince the public of evidence that does not exist.[114]

V. Self-Sufficiency and Social Isolation

Originally, Housing First was mainly associated with the chronic homeless population who had disabilities—most notably, serious mental illness. Hence, employment outcomes were not of leading interest. But as the theory of Housing First has evolved to take on a "systemwide orientation," applicable to the entire homeless population, it has come to be applied for cohorts that might be considered potential members of the working class. Permanent housing benefits are often likened to a "platform" from which, after having secured stable

housing, people can go to pursue various other goals, such as health and employment.[115] "Optimize self-sufficiency" is an official goal of HUD's NOFA.[116]

As noted, the large-scale Family Options Study (2015) showed robust rates of residential stability for the families receiving a permanent housing intervention. Accordingly, the study has been seen as supportive of Housing First, particularly as regards the "whole systems" orientation. But it also found evidence that housing subsidies, instead of granting recipients the freedom to focus more on employment and less on their housing instability challenges (à la the "platform" theory), actually led to diminished work effort.[117] In sum, housing subsidies increased rates of housing stability (and, as noted, at a greater cost than other interventions) but not self-sufficiency.[118] This was a troubling finding, since lack of work was one of the major social challenges faced by homeless families that participated in the study.[119] A 2012 article about Housing First cautioned that "subsidized housing may create disincentives for employment … and for independent housing … much in the way that disability benefits and public income support have been found to be associated with less employment."[120]

Another outcome worth evaluating is social isolation, a significant cause of homelessness. HUD has noted that while, nationwide, about 13% of the U.S. population is a member of a single-person household, 65% of the sheltered homeless population is.[121] "Community integration" was one of the original goals of Housing First, which criticized the quasi-institutional character of the linear homeless services system.[122]

ProPublica's "Right to Fail" report in late 2018, and the accompanying documentary released by Frontline in February 2019,[123] suggested that Housing First may serve more to increase social isolation than address it.[124] The report profiled a few seriously mentally ill clients of a supported housing program in New York, and how an excess of independence led to decompensation and even death. These individuals were, in some cases, stably housed, but living in apartments strewn with waste, swarming with bugs, and living with untreated infections and other health problems, and extremely isolated. "Right to Fail" did not specifically target Housing First—these were former residents of adult homes who had been placed in independent living under court order. Still, the report demonstrates that many mentally ill adults are, on the one hand, not eligible for institutionalization but, on the other, plainly not prepared for independent living.

The ProPublica study cannot be dismissed as simply anecdotal.[125] Several peer-reviewed articles and studies have questioned whether Housing First has lived up to its initial promise of "community integration."[126] Others, to be sure, have defended it.[127] But the least that can be said is that whatever some Housing First program may have managed to achieve with respect to community integration, the evidence is far weaker with respect to that outcome than has been measured with respect to residential stability.

VI. Conclusion

The claim that Housing First is "proven" is an attempt to take homelessness policy out of the realm of ordinary policy debate. "Evidence-based" rhetoric means to suggest that homelessness policy is simply different: alternatives to Housing First are illegitimate because they are not grounded in science in the way that Housing First is. This is not accurate. Homelessness policy questions should not be considered more settled than questions of mental health, public safety, or any other element of poverty or social policy.

It is crucial to parse claims about what is evidence-based about Housing First and what is founded on humanitarian concerns, intuition, ideology, or some other factor. There is no evidence-based proof of Housing First's ability to treat serious mental illness effectively, or drug or alcohol addiction. Housing First is not a reliable solution to social isolation, a very significant cause and effect of homelessness. Claims made on behalf of the campaign to end homelessness—that Housing First has ended veterans' homelessness, chronic homelessness, or homelessness at the community level—are not based in "evidence," as that term is normally understood, and they rely on a highly technical (and dubious) definition of "ending" homelessness.

A common refrain among advocates is that " 'Housing First' does not mean 'Housing Only.' "[128] This is not an evidence-based claim. The claim could be verified only through a broad and thorough analysis of Housing First's implementation across scores of programs across the nation. Surely, some programs are far more inventive in getting service-resistant clients to accept treatment and services than are others. A supportive housing program that systematically fails to engage any of its clients is, practically speaking, a "Housing Only" program. The literature about how Housing First programs function is far too sparse to validate that " 'Housing First' does not mean 'Housing Only.' "

There is, however, reasonable evidence to suggest that Housing First–style interventions will promote

residential stability, and quite likely at a higher rate than programs that provide housing on a time-limited basis and/or rely on "barriers," at least over a one- to two-year horizon. But an intervention is different from a policy or service system. An intervention could be one program among many. The evidence does not support the idea that Housing First should be made an organizing principle of homeless services systems. Arguments for Housing First on a systemwide basis may be defended based on intuition or humanitarian concerns, but they are not evidence-based.

The result of governments adopting Housing First as a "whole-system orientation" has been to discredit, or at least drastically de-emphasize, approaches to homelessness other than permanent housing. Less than one-fifth of the homeless population is "chronic"[129]—the population for whom Housing First was initially developed. The more that the homeless problem is described as people "down on their luck," the less logical is the claim that permanent housing is the solution. Housing First is an entirely inappropriate intervention for the working poor, examples of which include participants in "Safe Parking" programs[130] (which is to say that, in addition to reckoning with the limitations of Housing First for the chronically homeless, permanent housing is not always an appropriate solution to street homelessness).

What kind of homeless services system do we want? That is ultimately what the Housing First debate is about. As noted, the reduction in transitional housing units is a striking example of the influence of Housing First. But it is impractical to try to design a homeless services system without programs that have features similar to transitional housing. The homeless population has many problems other than housing instability. As such, there is a certain logic to trying to address these problems along with housing instability and give them equal emphasis while doing so. That logic, though, runs contrary to the logic of Housing First, which, particularly in its original articulation, insisted on the separation of housing and social services.

In the criminal-justice world, "problem-solving courts" such as drug and mental-health courts are not simply concerned with adjudicating charges. They also deal with the addiction and untreated serious mental illness of people involved in the criminal-justice system.[131] Similarly, the linear approach to homelessness had much more of a problem-solving orientation than the current Housing First system—focused, as it is, on keeping the most people housed for the longest period of time.

But if homeless services systems don't work on problems other than housing instability, other systems will. Indeed, the line between emergency shelter and transitional housing can get blurry. New York City's family shelter system, for instance, in many ways resembles transitional housing more than traditional notions of emergency shelter.

Before Housing First, the homeless population was offered a robust variety of housing and service options that reflected their diverse needs. This so-called linear system viewed permanent supportive housing and other low-barrier housing programs for the homeless as valuable to a continuum of service options.[132] But when too much emphasis is placed on low-barrier options, governments must ask whether they are designing a truly inclusive homeless services system.

Clearly, some clients will be best served by providers that emphasize sobriety and work. In the world of addiction services, many providers use social pressure to encourage sobriety. Is it illegitimate or not "evidence-based" for residential treatment programs to offer temporary housing coupled with sobriety requirements?[133] What's more important—achieving a year of sobriety or a year of housing stability? A program that sets no goals other than "residential stability," and that specifically does not require sobriety, will not be able to use social pressure to encourage sobriety. The same issue arises for programs that try to turn their clients into responsible fathers and economically independent members of their communities. As an example: Joe Biden's presidential campaign has called for reinvesting in transitional housing programs to facilitate prisoner reentry.[134]

Housing First is the dominant policy framework for homeless services. Yet, after years of implementation, communities are not close to ending homelessness. If homeless services systems can't focus as much on substance abuse, unemployment, and other social ills as they do on residential stability, those challenges will simply be left to other social-services systems. In light of these facts, a certain reorientation is justified.

Recommendations

1. HUD should allow more flexibility from Housing First requirements for communities pursuing homelessness assistance grants through the "Continuum of Care" program.

There are about 400 CoC agencies across the nation. HUD directs billions in Homelessness Assistance

Grants through these agencies to on-the-ground service providers. Federal homeless services funding was structured in this manner in deference to localism.[135]

When the CoC program was set up in the 1990s, it was "designed to meet the multi-faceted needs of homeless persons in the nation's communities."[136] In many communities, the local "CoC" is the lead policymaking organization on homelessness. As Housing First requirements have tightened, however, the CoC program has been criticized for departing from its original spirit and adopting a "one-size-fits-all" approach to homeless services.[137] Many criticisms of HUD's application of Housing First principles have come from religious organizations, which have, for more a century, played a significant role in addressing homelessness.[138] The federally directed restructuring of homeless services has had a significant impact at the community level. Examples of highly regarded service providers that have experienced cuts include Community Housing Innovations, the largest provider of homeless services on Long Island,[139] and the New York City–based Doe Fund.[140] Other providers have ceased pursuing HUD funding or been pressured—by the federal government, ultimately—to make programmatic changes contrary to their priorities.

2. State and local Housing First mandates should be reassessed.

Homelessness is highly concentrated in certain urban areas, as are major homeless services systems. California and New York are hosts to about one-third of the total permanent and temporary year-round beds for the homeless.[141] Thus, state and local policies may, in some cases, matter even more than federal funding requirements. State Housing First mandates, such as California's SB 1380,[142] should be reassessed in light of the need to develop homeless services systems reflective of the needs of the entire homeless population.

3. The homelessness debate should be reintegrated into the safety-net debate.

Housing First has separated the debates over homelessness and the safety net more broadly. In its approach to poverty, the Trump administration has tried to promote the expanded use of work requirements for safety-net programs.[143] While there is a serious debate over the appropriateness and effectiveness of work requirements for noncash programs such as Medicaid and the Supplemental Nutrition Assistance Program, there is a broad acceptance of their legitimacy in the case of public assistance. In homeless policy circles, by contrast, there is broad opposition to the use of work requirements, as well as drug testing, program-participation requirements, and adherence to treatment regimens.

As a result of Housing First's influence, the question of upward mobility for the homeless is discussed far less often than it is for the poor. Policymakers speak with modesty about such grandiose goals as ending poverty. But with respect to ending homelessness, they are expected to accept not only the nobility of that goal but its practicality. As a result, Housing First has come to function as a harm-reduction approach not only for behavioral health but also for poverty. Someone placed in permanent supportive housing may have ended his homelessness, but he is only managing his poverty.

Endnotes

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[2] Stefan G. Kertesz et al., "Housing First for Homeless Persons with Active Addiction: Are We Overreaching?" *Milbank Quarterly* 87, no. 2 (June 2009): 495–534.

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[5] HUD, "Priority: Home!" p. iii: "I do not believe we can repair the basic fabric of society until people who are willing to work have work. Work organizes life. It gives structure and discipline to life. It gives a role model to children. We cannot repair the American community and restore the American family until we provide the structure, the value, the discipline and reward that work gives."

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[7] Shannon E. Couzens, "*Priority: Home!* A True Priority? An Analysis of the Federal Plan to Break the Cycle of Homelessness," *Journal of Social Distress and the Homeless* 6, no. 4 (1997): 275–82.

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[9] Jack Tsai, Alvin S. Mares, and Robert A. Rosenheck, "A Multi-Site Comparison of Supported Housing for Chronically Homeless Adults: 'Housing First' Versus 'Residential Treatment First,' " *Psychological Services* 7, no. 4 (November 2010): 220.

[10] HUD, "The 2017 Annual Homeless Assessment Report (AHAR) to Congress, Part 2: Estimates of Homelessness in the United States," October 2018, p. v.

[11] See, e.g., Sam Tsemberis, "From Streets to Homes: An Innovative Approach to Supported Housing for Homeless Adults with Psychiatric Disabilities," *Journal of Community Psychology* 27, no. 2 (1991): 227: "Most [linear residential treatment] housing providers regard themselves as treatment providers rather than as landlords"; Priscilla Ridgway and Anthony M. Zipple, "The Paradigm Shift in Residential Services: From the Linear Continuum to Supported Housing Approaches," *Psychosocial Rehabilitation Journal* 13, no. 4 (April 1990): 17: "The residential program is seen as primarily a clinical modality designed to treat mentally ill individuals rather than a home for those who live there"; Daniel Gubits et al., "Family Options Study: Short-Term Impacts of Housing and Services Interventions for Homeless Families," HUD, Office of Policy Development and Research, July 2015, p. xxi: "Practitioners' goals for project-based transitional housing … extend beyond housing stability to adult well-being and aspects of family self-sufficiency."

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[14] Ridgway and Zipple, "The Paradigm Shift in Residential Services"; Kertesz, "Housing First for Homeless Persons with Active Addiction"; Victoria Stanhope and Kerry Dunn, "The Curious Case of Housing First: The Limits of Evidence-Based Policy," *International Journal of Law and Psychiatry* 34, no. 4 (July/August 2011): 275–82.

[15] The role played by advocates in the popular adoption of the term "homeless" has been discussed in many sources. See, e.g., Robert C. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning," *Yale Law Journal* 105, no. 5 (January 1996): 1192–93, 1214; Richard W. White, Jr., *Rude Awakenings: What the Homeless Crisis Tells Us* (San Francisco: ICS, 1992), chap. 9; Brendan O'Flaherty, *Making Room* (Cambridge, MA: Harvard University Press, 1996), pp. 9–11; Forrest Stuart, *Down, Out, and Under Arrest* (Chicago: University of Chicago Press, 2018), p. 49; Hopper, *Reckoning with Homelessness*, p. 7; HUD, "Priority: Home!" p. 22.

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[20] Housing programs are more difficult to categorize than is typically acknowledged in the literature. Traditionally, "supported housing" meant ordinary rental apartments leased from a private landlord via a service provider. The term meant "tenant-based" or "scatter-sited" housing for the homeless, with services made available 24/7 but based out of a separate location. "Supportive housing," by contrast, was understood to mean congregate- or project-based—custom-built affordable housing for the homeless that offers 24/7 services on-site. However, the terms have become blurred, and "supportive housing," by far the more common term, now refers to both project-based and tenant-based programs. Support for "supportive housing" and "permanent supportive housing" programs has also become generally indistinguishable from support for Housing First, even though some older supportive housing programs were not designed in accord with Housing First principles. It is possible that the blurring of these concepts in advocates' rhetoric has been deliberate (see Richard Cho, "Four Clarifications About Housing First," USICH, June 18, 2014: "I see it as a sign of progress that permanent supportive housing and Housing First are being conflated").

[21] Though Pathways to Housing continues to operate in other jurisdictions, its New York program was forced to close because of bankruptcy proceedings, as Tsemberis's efforts to expand the program nationally jeopardized contracts with the state Office of Mental Health and even risked eviction for more than 100 Pathways clients. See Greg B. Smith, "Homeless Group in $25M Bankruptcy Fight Failed to Pay Rent for Mentally Ill," *New York Daily News,*

Feb. 13, 2018; "Motion to Approve Settlement, Deborah J. Piazza, as Chapter 7 Trustee of Pathways to Housing NY, Inc., Plaintiff, – v – Sam Tsemberis and Pathways to Housing National, Inc. a/k/a Pathways to Housing, Inc.," United States Bankruptcy Court, Southern District of New York, Mar. 2, 2018.

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[110] Kertesz and Johnson, "Housing First: Lessons from the United States."

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[112] National Academies, *Permanent Supportive Housing*: "[E]ven though supportive housing models have been found to decrease the number of days spent homeless … for individuals with serious mental illness and/or substance use, this has not translated to significant improvements in mental health status in most studies," p. 48, and chap. 9 generally; Rog, "Permanent Supporting Housing," p. 292: "[The] majority of studies … found no effect of permanent supportive housing on psychological symptoms or alcohol or drug use"; Tsai, Mares, and Rosenheck, "A Multi-Site Comparison of Supported Housing," p. 20: "[N]o differences were found on psychiatric, substance abuse, or community adjustment outcomes"; Jack Tsai and Robert A. Rosenheck, "Considering Alternatives to the Housing First Model," *European Journal of Homelessness* 6, no. 2 (December 2012): 203: "Housing First, along with less clearly defined permanent supported housing programmes, have primarily shown success in housing outcomes, with minor or no improvements observed in clinical, social, and quality of life outcomes."

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FIVE

The Invention of Chronic Homelessness

In 2007, a coalition of los angeles government offices and nonprofit organizations launched Project 50, a social service and housing program targeting what researchers, politicians, and journalists have recently begun calling the "chronically homeless." As defined by the United States Interagency Council on Homelessness, "A chronically homeless person is . . . an unaccompanied homeless individual with a disabling condition who has either been continuously homeless for a year or more *or* has had at least four episodes of homelessness in the past three years."[1] Unlike individuals or families for whom living without shelter is a temporary episode, the chronically homeless are understood to exhibit long-term patterns of cycling in and out of shelters, hospitals, and jails, interspersed with periods of living unhoused and on the streets.

Following a model tested first in New York City, Project 50's team of outreach workers set out to identify chronically homeless individuals concentrated in downtown Los Angeles in a neighborhood still called Skid Row. Mortality rates are so high in Skid Row—three times that of the surrounding county—that in the 1970s, one group of researchers referred to the neighborhood as a "death zone."[2] In recent years, Skid Row has been undergoing a dramatic revanchist turn as it is reterritorialized by luxury housing developments and consumer amenities.[3] As described by Neil Smith, "revanchism" names a model of gentrification that seeks revenge on poor populations who occupy spaces that capital now wishes to reclaim for investment.[4] An expanding and increasingly hostile police presence has accompanied this real-estate push-out. After a pilot launch in 2005, the so-called Safer City Initiative targeted unsheltered individuals in Skid Row for criminal punishment from 2006 to 2007; it represented one of the greatest concentrations of police force in the United States.[5]

Armed with outreach questionnaires, Project 50 workers initiated face-to-face conversations with Skid Row residents. In these conversations,

they gathered targeted information about the lives of their interview subjects, including how much time they had spent in hospitals, shelters, and living on the street, their medical backgrounds and histories of substance use, as well as any current health conditions. For each Skid Row resident interviewed, the information obtained was measured against what is known as a "vulnerability index." The index used by Project 50 identifies eight conditions linked to increased mortality among street populations:

> more than three hospitalizations or emergency room visits in a year
> more than three emergency room visits in the previous three months
> aged 60 or older
> cirrhosis of the liver
> end-stage renal disease
> history of frostbite, immersion foot, or hypothermia
> HIV+/AIDS
> tri-morbidity: co-occurring psychiatric, substance abuse, and chronic medical condition.[6]

The index is based on medical research demonstrating that possessing any one of these indicators significantly decreases an individual's lifespan. The "50" in Project 50 refers to the goal of the outreach efforts: to use the index to identify the fifty people in Skid Row most likely to die in the coming year. These individuals were offered immediate placement into a housing program, with none of the typical case management requirements regarding social services or sobriety. One radio program described Project 50 residents as those "fortunate enough to be determined the most unfortunate."[7]

Project 50 is just one among hundreds of chronic homelessness programs launched in municipalities across the United States in recent years. Chronic homelessness programs depart from long-held assumptions about people living in poverty and long-established technologies for managing those populations, and thus their emergence and rapid spread defies easy explanation. As chapter 3 argued, popular conceptions of poverty in the United States have maintained that individuals living in poverty produce their impoverished conditions, not social or governmental institutions. Such discourse of personal responsibility has been accompanied by intensive networks of social welfare technologies that

seek to regulate the poor by intervening in individual behavior. As chapter 3 also demonstrated, persons living without shelter have been understood as being especially incapable of self-management and in need of invasive social assistance. Many decades of formal and informal policy have made treatment for substance abuse and psychiatric disabilities a mandatory condition for entering and remaining in housing programs. Such earlier policy argued that drug/alcohol and psychiatric treatment, as well as social services focused on money management, job training, and a wide range of other so-called life skills, make formerly "shelter-resistant" individuals "housing-ready."

Thus, chronic homelessness initiatives are quite surprising, as they facilitate immediate access to housing with no social service or work requirements, bypassing the coercive social control technologies associated with the contemporary workfare state and the war on the poor.[8] This departure in policy is even more surprising considering that those categorized as chronically homeless are disproportionately men of color who actively consume drugs and alcohol and lack close family ties.[9] Far from finding themselves the privileged targets of housing programs, members of this population, typically demonized as the "undeserving poor," are more commonly barred from social service agencies and housed in prisons and jails.[10]

Long before the advent of chronic homelessness initiatives, advocates and activists organized against mandatory health and social services in housing programs. Socially progressive service organizations, convinced that mandatory services actually kept people out of shelters, experimented with making services optional.[11] This model, known as "Housing First," remained marginal within the homeless services industry until its adoption by the federal government for chronic homelessness initiatives. How did this unexpected moment arrive, and through the efforts of the neoconservative administration of George W. Bush?[12] Should this be taken as a compassionate turn in social policy and administration? Does it represent a reversal of social abandonment, as vilified populations deemed most likely to die became targeted for life-saving housing interventions rather than displaced to zones of exclusion?

In my use, "chronically homeless" should always be read as if in scare quotes. As will become clear, I want to foreground the provisional and constructed nature of the term, even as I investigate its deployment.

Due to its very real material consequences, we must take the term seriously while nonetheless understanding it to mean populations *targeted* as "chronically homeless." How those quotes fall away and this subpopulation achieves a taken-for-granted status are investigated in the chapter that follows. The rise of chronic homelessness as a concern results from the convergence of two historical forces. The first is a counterdiscourse in homeless social services that challenges medical models and technologies of homeless management. This is the early Housing First movement and a related discourse of public health. The second is the production of an economic analysis of homelessness that emphasizes the financial cost of leaving populations housing deprived. This economic analysis is produced first by social scientists and then picked up and circulated by government offices and mass media. Uncovering the intersection of these historical forces makes the arrival of chronic homelessness initiatives less surprising, and points toward the limits of these initiatives as well. Despite the promise of chronic homelessness programs—namely, the lifting of barriers to access and the immediate provision of housing—I propose a cautious interrogation of the relationships between the technical calculation of death chances and the securing of health and life resources. This is to take seriously the tension expressed by a social worker with an activist background who told me:

> I mean the good thing is that we're really making an impact. We're really housing people. At times I'm like, oh my god, I'm just so "the Man" right now, selling out big time. But then at other times, you know, I see the folks that we're able to get inside. And they're the people that nobody else has ever been able to really talk to, or have wanted to talk to. You know, the quote-unquote "resistant to services" people. And we spend time with them, and we don't give up on them.

This social worker communicates some dismay at working within the government—"I'm just so 'the Man' right now"—while also asserting the incontrovertible fact that the program is housing exactly the people who have been most blocked from social welfare benefits. Ultimately, the contradictions that statement points to, and the surprise of finding a progressive housing agenda picked up and promoted by the U.S. federal government, arise from the ways in which managing vulnerable populations enables neoliberal economic expansion.

"Housing First" and the Demedicalization of Homelessness

As discussed in the previous two chapters, the primary mode for managing homelessness within the dominant medical model has been through case management technologies. In contemporary social work practice, the medical logics embedded in case management technologies comprise an inherited culture that has made case management seem obvious and necessary. This has been formalized by the Department of Housing and Urban Development (HUD) in the Continuum of Care (CoC) model, which mandates progression through stages of housing, from emergency shelter, to transitional housing, and ultimately in either private marketplace or supportive permanent housing. Thus, the old Progressive-era work test has survived in a new form. Rather than cutting stone or lumber, modern shelter aspirants demonstrate worth through commitment to working on themselves and making it through the Continuum. As a former caseworker and current director of a housing program told me, "I think there's just this really old-fashioned treatment approach to things, where you have to earn your way to housing. I can't really say that I've ever seen any kind of formal funding requirement of sobriety or anything like that. You basically worked your way up the Continuum." As the statement suggests, notions of deserving versus undeserving poor are embedded in practices that withhold housing and other services from those who have not "earned" it. As it also suggests, associations of homelessness with alcohol abuse and drug addiction have especially called forth the presumed necessity of professional intervention in the form of social work technologies. That informant continued, "People thought that they needed to have folks that were clean and sober. It was sort of just a requirement that was handed down but never really written anywhere." A staff therapist of another organization explained that mandatory treatment draws legitimacy from the popular conception that "addicts" require shaming and direct intervention. But it is also produced by the professionalization of social work, and the organizational status of the case manager over the client.

> I think to some degree it's a thing we're conditioned to about substance use generally. But I think it's sort of a natural extension of being in the social services world as well. Because just the logic of social services is

> that we're being paid to make life better for these people. Therefore, our judgment is paramount. And they ought to be following that. And so going into a setting where we don't just impose our judgment on things I think doesn't feel right to some people. And then you complicate it further with our conventional view of addiction stuff, where it's all about, you know, shaming someone until they come around and start making better decisions for themselves. . . . The whole thing just becomes a big mess I think.

Thus, moral, medical, and popular conceptions of selfhood and homelessness naturalize the compulsory deployment of case management technologies. As a result, the provision of housing services has almost always been conjoined to coercive attempts at fixing problem individuals.

In contrast to compulsory case management technologies of social and health services, Housing First represents a potentially radical break from medicalized models by separating shelter provision from social and health services. Housing First programs make available traditional social and health services, but as the designation suggests, housing is the first thing provided, and services are not required for admittance. Housing First represents a social commitment to the principle that all people deserve housing at all times, and an organizational commitment to putting resources into supporting all residents. The Downtown Emergency Services Center (DESC), which is based in Seattle and has become a model for agencies around the country, outlines the following core components of a Housing First approach:

> Move people into housing directly from streets and shelters without preconditions of treatment acceptance or compliance.
> The provider is obligated to bring robust support services to the housing. These services are predicated on assertive engagement, not coercion.
> Continued tenancy is not dependent on participation in services.
> Units targeted to most disabled and vulnerable homeless members of the community.
> Embraces harm reduction approach to addictions rather than mandating abstinence. At the same time, the provider must be prepared to support resident commitments to recovery.
> Residents must have leases and tenant protections under the law.
> Can be implemented as either a project-based or scattered site model.[13]

Before being named as such, Housing First practices were being put in place by a small number of nonprofit agencies targeting unsheltered populations. These organizations, each of which was attempting to reach what one informant called "the hardest to house" and another "the worst of the worst," came to a reverse logic about the relationship of services and housing. Compulsory psychiatric and drug treatment, rather than enabling people to stay housed, came to be seen as barriers that kept people on the streets. Compulsory requirements set up residents to fail (at sobriety, for example), and thus to be evicted and deprived of housing once more. A self-fulfilling prophecy was put in place: residents in fact appeared not to be ready for housing. Speaking of this process that leads to eviction, one caseworker told me, "It deepens people's impressions that these clients are impossible to house. Every time that happens, then they feel more strongly about that."

As suggested in the DESC principles cited above, proto–Housing First programs evolved out of contemporaneous harm reduction movements in AIDS activism. In the realm of HIV/AIDS prevention, harm reduction argues that abstinence models do not keep people safe and that education efforts should rather be aimed toward developing safer practices. Services must meet clients "where they're at" and provide tools for making healthier choices in how to have sex or use drugs.[14] Translated to the realm of housing, harm reduction suggested that rather than coercing residents to accept an organization's concept of housing readiness, organizations should simply provide housing; housing is a safer option than living unhoused, and once housed, clients can be supported in making informed choices about their needs and interests regarding services. Since many housing organizations were already working with populations targeted by harm reduction HIV/AIDS prevention, they were already prepped for Housing First. "It wasn't some huge internal dialogue we had to go through to get comfortable with Housing First as an idea. There was some pushback from some of the staff. But those values were pretty much in all of our seminal documents, part of orientation, part of ongoing supervision, part of service training. It wasn't a huge thing for us; it just felt like a very natural evolution."

The early adoption of Housing First did not occur all at once. Rather, it was a piecemeal effort that required reevaluating long-held

assumptions rooted in the disciplinary case management model. Service providers describe a kind of organic process of trial and error that led their respective agencies to develop "low-demand" environments that would eventually be named and organized as Housing First. The director of one such agency describes the shift at that agency from "housing readiness"—the notion that only some people were prepared to accept and stay in housing, and that others must first go through mandatory treatment.

> We employed a readiness concept. "So-and-so" is not ready for this housing because he's not keeping his appointments with their case manager. Or "so-and-so" is not ready because he's a crack addict and he's not doing anything. And yet, because of who we are . . . we were sort of known in the community as the organization of last resort. If you were so crazy, or so into drug and alcohol use, and the Y[MCA] didn't want to serve you anymore, they would refer you to [us]. Social workers and emergency departments, police officers—if they encountered someone who was very disorganized, very dysfunctional, they would take them here. So we had all that experience. But we were right out of the box with a housing project and we sort of, to a certain degree, followed this readiness thing. But because we had all this experience, we also stretched that a little bit, and took some risks with people.

As the statement indicates, an organizational commitment to finding ways to house those populations who were most neglected by compulsory services drove these early experiments in Housing First.

Of course, the medical model and its technologies of compliance proved quite sticky. Even as agencies experimented with low-demand environments with optional treatment services, pathologizing assumptions about homeless populations were not automatically or easily abandoned.

> When we developed [our first permanent low-demand housing,] we sort of had this naïve assumption that this group was gonna trash the building. And so we built in this humongous line item into the budget for repairing things. Because our thought was, "We're not gonna kick them out, we're just gonna fix the things that they break." And it turned out, that didn't happen. And I think that was part of the change in our thinking to "these people are really not any more difficult to house than anybody else."

> Even though we were close to these people, I think we bought into the same stereotypes. That they're a bunch of animals who are gonna rip the place to shreds. It's embarrassing to think about it now.

Despite some of these reservations, organizations that experimented with low-demand or Housing First approaches quickly saw that freeing clients from mandatory services did not render them incapable of staying housed.

> And over the first few years of operation we discovered that the people that we were taking risks with were just as likely to succeed in housing as those people that we predicted were housing ready. About the time we were coming to that realization, the Safe Haven idea was introduced at the federal level. And the next housing project . . . we decided that we wanted to build this housing project, and we wanted to use it as an engagement tool. So we set our caps to recruit residents that we knew to be crazy and homeless and not connected to anybody's [services] program, including our own. [15]

As the experiments bore results, the idea that some populations possess an untamed desire to live on the street came undone. Along with it, the notions of "service resistant" and "housing ready" seemed increasingly implausible.

> There was all sorts of mythology out there about, this is the one group of homeless people that is just not gonna come inside. They would prefer to be outside and just drink themselves to death. It turned out that was not the case. We had to make seventy-nine offers of housing to get seventy-five people to accept housing.
>
> I think we're experiencing evidence that homeless people want housing, and can maintain it. When I started . . . what they told me was, homeless people won't talk to you, they don't want housing. They would be labeled as "service resistant," which is just meaningless. It's just a meaningless thing to call a person, it doesn't mean anything. It's not rooted in behavioral science, it's just a cop out.

As the director of one program pointed out to me, these early experiments succeeded because agencies were offering permanent housing, as opposed to temporary placement in an emergency shelter while clients got clean and sober. An organizational recognition was emerging that clients respond to the conditions of housing opportunities, as

anyone would. Rejection of heavy service requirements or the lack of privacy and comfort in emergency shelters was being recognized as a reasonable reaction that agencies must take seriously. "Everybody knows that shelter is not a place anybody wants to be. So quote-unquote 'shelter resistant,' I never believed a word about it. If you give somebody housing, they're gonna go in. So why even tag somebody with that description? I'm resistant to shelter, anybody would be."

Slowly a new logic developed: clients who refused compulsory services would accept no-strings-attached housing. This led to new outreach approaches, as Housing First principles got structured into every stage of work.

> So we focused on going out to the folks on the street. They started to ask people, "Will you work with us toward permanent housing?" They didn't talk to them about, like, you need to get clean, you need to go into [emergency] shelter, you need to get mental health services. The first question was, "Will you work with us toward permanent housing? Your own apartment—your own place with a door that locks. And if you're willing to work with us, we will stick with you until it happens." And that's how they were able to reduce [street] homelessness.

As the bind between housing and compliance technologies loosened, pathological conceptions of homeless populations lost their logical force. Housing First technologies edged out disciplinary logics that individuals must be reformed to be housing ready. Rather than a war on the poor mentality that assigns individuals personal responsibility for conditions of poverty, a new view of institutional responsibility emerged. From this view, government and nonprofit organizations, not individuals living without shelter, bore responsibility for housing failures.

> If this person goes back on the streets, then you the housing provider need to realize that you failed the individual. It's not the individual that has failed himself, but we have failed to figure out how to work with him. And you need to be confident that you have exhausted the possibilities. I think too much still we just give up on people and say, "Well, they didn't jump through all the hoops we wanted them to, so they clearly don't want this housing." Well, that's nonsense, nobody wants to go to sleep back on the street.
>
> I think we should be held accountable for outcomes that are really difficult to achieve. . . . For a long time, we as a sector put the onus on

> the individual to figure out how to work with us. And now I think the shift is . . . [that] it's our job to figure out how to work with that individual, and it's not ok just to say, "They don't wanna come inside." We have to figure out how to get that person inside and how to negotiate with them and serve them.

For organizations to accept and understand the ways that technologies of compliance perpetuate housing deprivation requires fundamentally reconceptualizing the role of nonprofit organizations within the nonprofit industrial complex. It requires understanding the provision of housing—rather than the reforming of the individual—as the appropriate goal. This means, as many described it, that "housing is an outcome" rather than a tool for enforcing compliance in self-help regimes.

> A lot of people can't seem to accept the idea that being housed is an outcome for homeless people. They want to know, "So, what's happening to their mental health symptoms? And are they getting jobs, and are they abstinent from substance use?" and all that kind of stuff. Which for some people, certainly it's the route they end up taking and it helps and all that. But the point of housing is housing. It's an outcome for all of us. It isn't to facilitate something else for us. It's to have a home base. Why can't it be for them as well?

Housing First principles demand a rejection of the polarizing pathologization embedded in disciplinary social work regimes. Rather than marking out "the homeless" as a special category of individual, Housing First insists that housing-deprived populations deserve the same access to housing as any of us who are able to pay for that privilege.

Thus, throughout the 1990s, before being named as such, Housing First approaches developed organically through organizational experiments with housing under-served populations. When Pathways to Housing, an early advocate of this approach, published research indicating that mandatory services do not impact ability to find and maintain housing, Housing First was organized as a named concept, and began to formally travel around social service networks.[16] Thus, the leader of an effort to convert service-heavy supportive housing to Housing First describes recognizing the new common sense of Housing First. That manager, charged with dramatically reducing the street population of a tourist urban core, described hearing about Housing First

and recognizing almost immediately that it would be the most "efficient and effective way" of getting that population housed.

In challenging pathological conceptions of homelessness and attempting to address the needs of underserved populations, Housing First advocates enacted a demedicalization of homelessness. In other words, in this approach, the idea of homelessness as an incarnation of a failed selfhood is undermined, and along with it, the compulsory use of case management technologies is undermined as well. Accompanying this demedicalization has been a new discourse that reframes homelessness as a public health issue. This discourse also concerns medical issues, but does not treat housing deprivation as a pathology that must be cured. Rather, this new discourse draws attention to the health consequences of living without shelter, such as those outlined in chapter 1, including greater exposure to tuberculosis and HIV and much higher mortality rates than housed populations. Through this discourse, advocates emphasize that living without shelter dramatically harms health and shortens life—hence Project 50's goal of locating those most likely to die in the coming year. Insisting on the health needs of unsheltered populations has been an attempt to undo the stigmas attached to cultural conceptions of the homeless:

> The health piece is less stigmatized. We're able to use it as a more powerful advocacy tool. If you scratch an alcoholic you're gonna get liver disease. If you scratch, unfortunately, someone with severe and persistent mental illness, you're gonna find diabetes and heart disease from the secondary [effects] of taking the psych meds. So you can find a way to less stigmatized manifestations of all the things we see on the streets and use that.

This counter-discourse of public health also seeks to mobilize political sympathy against demonizing portraits of the undeserving poor. Advocates describe it as a means of redirecting attention and garnering support. Referencing an agency's work doing public presentations on the health consequences of housing deprivation, one staff member told me:

> Almost always . . . it's common for one of [the government officials] to start weeping. And then publicly, because it's framed as a life or death issue, not as a behavioral health issue, they have the clearance to take bold decisive action. They're like, "Oh my god, they're gonna die." And

> they have this little mini freak-out on Thursday, and then on Friday, they step up.

Another worker, describing efforts in the local community, echoed this sentiment:

> The number one most vulnerable guy we found . . . was in the middle of going through chemotherapy on the street when we found him. How can you as a public official not act? I mean, that's just ridiculous, there's no reason that man should be on the street. And so it takes away, I think, a lot of the "people are drug users, or they're crazy, or they're undeserving of our services." And brings it down to a level which everyone can relate to, about being how awful it is to be sick, and especially sick on the street.

While there is no doubt that for advocates, the public health discourse is a powerful mobilizing tool, it is not clear how much credit the discourse deserves for changing the political landscape of homeless social services. As it turns out, economics is playing at least as important a role as empathy.

The Costs of Chronic Homelessness

Looking at how public health concerns get rolled out suggests that we must attend to an economic dimension of those health concerns. This economic dimension follows from what I would call the "invention of chronic homelessness." By "invention," of course, I do not mean to deny that some people endure much of their lives deprived of housing. Nor do I mean to downplay the incredible risks to health and life posed by housing insecurity and deprivation. Rather, I want to draw attention to how a certain conception of a subcategory of homelessness—the chronically homeless—becomes the condition of possibility for the mobilization of public health discourses and Housing First practices. And in turn, I want to attend to how that condition of possibility sets limits on what becomes of those discourses and practices.

The terms "chronic homelessness" and "chronically homeless" start appearing in media discourse as early as the 1980s. The usage at that time, and up until the mid-1990s, was fairly loose.[17] The terms were used to describe a state any person might be in. So, for example,

a newspaper article might describe someone by saying, "Throughout his 20s and 30s, John was chronically homeless"—as in, John was frequently without a home. Beginning in the mid-1990s, however, the meaning of these terms began to congeal, and they came to refer to a specific *subset* of homeless people, rather than a state any person might be in. This solidification of the concept happened as a result of research conducted out of the University of Pennsylvania by Dennis Culhane and Randall Kuhn. In a series of studies published in 1998, Culhane and Kuhn argue that people who stay in emergency homeless shelters can be organized into three categories: the transitionally homeless, the episodically homeless, and the chronically homeless. In the first study, Culhane and Kuhn explain: "The *chronically homeless* population could be characterized as those persons most like the stereotypical profile of the skid-row homeless. These are people who are likely to be entrenched in the shelter system, and for whom shelters are more like long-term housing than an emergency arrangement."[18] Thus, the chronically homeless are one part of all those who use shelters. Culhane and Kuhn described them as "over-utilizers"—their shelter stays last the longest, and they are most likely to return. In the second study, Culhane and Kuhn argue that the chronically homeless tend to share a number of characteristics and that "in general, being older, of black race, having a substance abuse or mental health problem, or having a physical disability, significantly reduces the likelihood of exiting shelter."[19]

Culhane and Kuhn's research not only solidified the concept of chronic homelessness. It also introduced an economic dimension to the category. The extended stays and high rates of recidivism attributed to the chronically homeless are understood to be most significant in terms of their drain on the shelter systems; Culhane and Kuhn argue that chronically homeless individuals use a "disproportionate amount of resources" in the homeless service industry. In other words, with their long and frequent shelter stays, they are the most costly. Subsequent research by Culhane, Kuhn, and others went further, correlating shelter stay statistics with data from hospitals and jails to show that the chronically homeless in fact brought high costs to these other institutional sites as well.[20]

The concept that there exists a distinct subset of chronically homeless people has turned out to be quite compelling, and since the publica-

tion of Culhane and Kuhn's study, it has circulated widely through mass media. In the years just around the publication of their study, newspapers began to consistently use the term "chronically homeless" to refer to a specific set of people. In this circulation, the concept has brought the economic analysis along with it. Media accounts frequently refer back to the idea that chronically homeless populations are expensive. Malcolm Gladwell's widely read 2006 article for the *New Yorker,* "Million Dollar Murray," follows one of the chronically homeless as he moves about draining institutions of money. In the piece, Gladwell summarizes further research that tracks the impact of the chronically homeless on hospital systems:

> Boston Health Care for the Homeless Program, a leading service group for the homeless in Boston, recently tracked the medical expenses of a hundred and nineteen chronically homeless people. In the course of five years, thirty-three people died and seven more were sent to nursing homes, and the group still accounted for 18,834 emergency-room visits—at a minimum cost of a thousand dollars a visit. The University of California, San Diego Medical Center followed fifteen chronically homeless inebriates and found that over eighteen months those fifteen people were treated at the hospital's emergency room four hundred and seventeen times, and ran up bills that averaged a hundred thousand dollars each.[21]

Many social service agencies have produced their own studies, making note of some of the same costs. As a program manager told me, "We had someone run the Medicaid numbers on about one hundred clients, and they were costing $24,000 a year pre-housing. It was costing us $24,000 a year to do nothing."

In 2001, HUD named ending chronic homelessness one of its programming priorities. By 2003, the Bush administration included this goal in the fiscal year budget; it was followed by an endorsement of such efforts by the U.S. Council of Mayors.[22] Chronic homelessness programs have been a central feature of what are known as 10-Year Plans, or municipal initiatives to end street homelessness in a decade. Currently, at least 243 communities in the United States have established 10-Year Plans.[23] As partnerships among municipal governments, nonprofit organizations, and business leaders, the 10-Year Plans are typical arrangements of neoliberal governance. Like the destruction of skid rows that

began in the 1960s, 10-Year Plans today aim to clear space in city centers to improve opportunities for capital investment and growth.

Social service models that require psychiatric and drug/alcohol treatment have been considered an obstacle to 10-Year Plans, insofar as they keep the chronically homeless out of housing programs and on the streets, in the way of business ventures, wealthy residents, and tourists. Thus, the federal Interagency Council on Homelessness and HUD have called for a "paradigm shift" in social services and housing. As stated by *Strategies for Reducing Chronic Street Homelessness,* a report prepared for HUD, "The people on whom this project focuses are, by definition, those for whom these programs and services have not produced long-term solutions to homelessness. Their resistance to standard approaches has been a challenge to communities committed to ending chronic street homelessness."[24] While the statement still emphasizes individual-level resistance, rather than the institutional barriers indicated by my informants, its suggestion that mandatory requirements be lifted gels with what housing program residents and advocates have long argued—namely, that there is a mismatch between organizational requirements and clients' needs. This, rather than an untamed desire to live on the streets, explains resistance to shelter.[25] The paradigm shift called for in *Strategies for Reducing Chronic Street Homelessness* would remove barriers to access by delinking "housing and service use/acceptance, so that to keep housing, a tenant need only adhere to conditions of the lease (pay rent, don't destroy property, no violence), and is not required to participate in treatment or activities."[26] HUD's programs also call for harm-reduction, rather than zero-tolerance, approaches, "where sobriety is 'preferred but not required,' which often translate into a 'no use on the premises' rule for projects that use HUD funds."[27]

The federal government understands that chronic homelessness programs may be a difficult transition for housing providers, who have traditionally relied on more directly coercive measures for controlling resident populations, as well as the funds attached to such approaches. One director of a program, who formerly managed a housing program as it underwent a transition to Housing First, recounted feelings of resistance when first confronted with "hard to house" clients. "I'd say—he's not ready for our housing. You gotta send him to the shelter, you gotta send him to transitional housing, and then he can apply from there. With

us doing this project there was a real tension in our organization, with one part of our organization trying to house people, and the other part saying they're not housing ready." HUD has recognized the organizational challenges, and the organizational resistance they are likely to bring:

> For mental health and social service providers, low-demand environments mean they cannot require tenants to use services, and they have to deal with both mental health and substance abuse issues, and do so simultaneously. In addition, tenants may not use their services consistently, thus reducing reimbursements on which the providers may rely. For housing providers, a low-demand residence means that tenants may not act as predictably as the property managers might wish. For both, the challenges are as much philosophical as financial, in that the new model demands that they conduct business in ways that had formerly been considered not just impractical but wrong.[28]

Despite these obstacles, HUD has made programs that incorporate chronic homelessness initiatives a strong priority of its Homeless Assistance grants. This includes funding allocated through the Samaritan Housing Initiative to develop permanent housing exclusively for populations designated chronically homeless.[29]

Thus, as a result of its attachment to chronic homelessness initiatives and 10-Year Plans, Housing First has become not only prioritized but even a mandated approach. In a sense, the target of "the compulsory" has shifted from individual clients to organizations. And this compulsory has the force of the financial behind it. Many leaders of a loosely conceived Housing First movement argue that the traditional funding structure of the homeless services industry encouraged leaving populations unhoused.

> You know, to get the provider community . . . rethinking the way that they've been doing business for 20 years has been enormously challenging. Because what's the incentive for doing that? If the money you're getting isn't changing, if no one is paying you to do anything different than what you've been doing? If there's no consequence . . . then it's kind of understandable, why would you change what you're doing?

The reorganization of federal funding now provides this financial incentive for taking on Housing First approaches. Organizations that

previously received government contracts based on outreach (or what is described as "contact") are now being required to document placements and placement duration. "In the past, the contracts were really only based on contacts. So you could be constantly contacting people on the street and not housing anybody, and it wouldn't make a difference." The shift has required a willingness to work with and for demonized populations. One municipal program director remarked that many organizations that saw their work as providing health and treatment services rather than housing were unable to make this shift, "So we put them out of business." The change in federal funding priorities has been reproduced at all levels of government, including city contracts. City funding often provides the bulk of money for an organization, along with private foundation grants. Federal funding, though underwriting only a small portion of the work, functions as something like a "seal of approval": agencies must secure federal funding to qualify for other kinds of funding. In that way, federal funding requirements often "trickle down" to lower levels of government.

> And so when we demonstrated that there were results from this program, the city ended up withdrawing all of its outreach contracts and reissuing an RFP [request for proposals]. So they reissued that money. What they've now started paying outreach workers to do is to house people. And since they've done that, they've housed 1,100 people. So there's just been a huge shift . . . in part because of this shift from an approach which is about making contact to one which is about a census reduction in street homeless people, and therefore [about] requiring housing providers, and especially providers who were supposed to be serving this population, to take the hardest to house, and figure out how to keep them in housing.

Thus, the reinterpretation of housing deprivation as an economic burden on city resources has forced an economic overhaul of housing services as well. It is not surprising, then, that in taking up chronic homelessness as an object of knowledge and intervention, the federal government has translated the economic dimensions of the category into business plans for its management. An Interagency Council on Homelessness presentation on 10-Year Plans offers the following reasons to focus on chronic homelessness:

> This group consumes a disproportionate amount of costly resources.
> Addressing the needs of this group will free up resources for other homeless groups, including youth/families.
> Chronic homelessness has a visible impact on your community's safety and attractiveness.
> It is a finite problem that can be solved.
> Effective new technologies exist to engage and house this population.
> This group is in great need of assistance and special services.[30]

The presentation is a textbook example of neoliberal post-social thinking in action. The first two points make explicitly economic arguments. The third point makes an implicit economic argument, evoking the cost to urban economies posed by perceived danger and dirt. The fourth and fifth points make pragmatic arguments—it can be done—and only the last point makes something like a social welfare argument about the needs of the population itself. The presentation elaborates on only the first point, regarding the disproportionate consumption of resources, positing that the chronically homeless represent only 10 percent of the overall homeless population, but consume 50 percent of resources.[31] This data is also not correct. The 50 percent figure is rounded up from the 46.9 percent established by Culhane and Kuhn's research, which applies only to number of shelter days "consumed" by chronically homeless residents in the shelter systems they studied.[32]

That chronic homelessness demands savvy economic responses is made even more explicit in a second presentation entitled *Good . . . to Better . . . to Great: Innovations in 10-Year Plans to End Chronic Homelessness in Your Community.*[33] The presentation draws from *Good to Great,* a study by Jim Collins, which identifies the attributes of corporations that sustain long-term competitive edges over other corporations and perform "above market." The Interagency Council presentation applies the principles of Collins's study to analyze chronic homelessness programs and identify how "great" programs employ the same principles found by Collins as key to corporate success—"disciplined people, disciplined thought, disciplined action." The presentation not only encourages partnerships between government offices, nonprofit agencies, and private sector business leaders, but also suggests that 10-Year-Plan leadership be placed in someone "of high standing in the community who is *not* primarily

associated with homelessness." This is meant to lend credibility to the efforts, providing a sheen of respectability and distancing them from touchy-feely social programs.

According to the presentation, a key element of "disciplined thought" is the implementation of a business plan to combat chronic homelessness. Great plans include the following elements of disciplined thought:

> Business Principles—familiar concepts, such as investment vs. return, that bring a business orientation to the strategy
> Baselines—documented numbers that quantify the extent of homelessness in the local community
> Benchmarks—incremental reductions planned in the number of people experiencing chronic homelessness
> Best Practices—proven methods and approaches that directly support ending chronic homelessness
> Budget—the potential costs and savings associated with plan implementation.[34]

Thus, the invention of chronic homelessness becomes an opportunity for a thorough reimagining of social services as economic ventures. The problem of chronic homelessness becomes a problem of inefficient use of resources. The solution becomes better management of social welfare administration through the application of business principles.

Thus, the federal government's interest in Housing First is not so surprising after all. As one advocate told me, "From a conservative's perspective, it saves money. It saves taxpayers money. Research has even shown it's even cheaper in the long run to fund Housing First programs because it reduces recidivism rates. And it's really expensive to go from shelter to street to psych hospital to jail to community courts, through all these revolving doors." Recognizing the limits of political empathy, advocates have been able to leverage the economizing of health to advance their social agenda. "Asserting the cost savings offers an apparently irrefutable logic. So that's what I use sometimes when I'm talking to a government type. I'll talk about how it's really beneficial for people, but then if I'm really trying to sell somebody on it who hates homeless people, that's what I'll tell them about it. So that's why they're interested."

While advocates argue that the economic costs of housing deprivation become a way to translate across political divides, connecting advocates and politicians, it represents instead a new political constitution of housing needs. In this context, the economizing of life, health, illness, and death may provoke unexpected investments in vilified and long-abandoned populations. As a part of biopolitical governance, these programs serve to shore up and extend neoliberal economic industries that produce housing insecurity in the first place.

Economizing Race and Death

While many agencies and advocates are enthusiastic about this move to Housing First models, some have critiqued the language of chronic homelessness discourse. A report issued by the National Coalition for the Homeless states, "The term 'chronic homeless' treats homelessness with the same language, and in the same fashion, as a medical condition or disease, rather than an experience caused fundamentally by poverty and lack of affordable housing."[35] Of course chronic homelessness programs have a complicated relationship to medicalization. On the one hand, although the concept of "chronic homelessness" does carry a pathologizing taint, in practice the programs actually leave behind many of the disciplinary techniques of pathologization. If "chronically homeless" codes shelter needs as medical problems, as if some people are addicted to being homeless, we must nonetheless note that it is exactly the technologies of medicalization that chronic homelessness programs undo, insofar as they allow for immediate access to housing without service and treatment requirements. Policy reports on chronic homelessness initiatives continue to stress the responsibility of the individual, evoking some of that old moral argument. But rather than the individual's self-work being a necessary first step toward housing provision, the current model provides housing regardless of an individual's willingness to submit to medicalizing, disciplinary regimes.

On the other hand, in its adoption of Housing First through chronic homelessness programs, the federal government does not offer a critique of pathologization. While federal chronic homeless programs suppress the compulsory use of case management technologies, they do so through the argument that requiring services is not cost effective, insofar

as that requirement acts as a barrier keeping people on the street where they cost cities money. Pathological conceptions of homeless populations did not disappear with the rising validity of Housing First approaches. In fact, some argue that the persistence of these pathological conceptions provides a stumbling block for the adoption of Housing First in anything more than name. "If these providers feel like there's some kind of a gravy train for working with high utilizers and they don't know how long it's gonna last, and they want in on it, they're gonna say they're doing Housing First but they're afraid to do it. What I've seen at [our Housing First project] is people come to visit and they have all sorts of fears about what it would really be like to house this group of people in our community or wherever." The persistence of pathological conceptions opens a space for the rearticulation of medicalized notions and the reassertion of disciplinary technologies of compliance. Chronic homelessness programs allow for two ideas to exist side by side: that there is something wrong with these people, but nonetheless we need to house them. In the context of medicalized social problems, sympathy and disdain peacefully coexist.

Not only do federal chronic homelessness programs leave the pathologization of housing deprivation in place. These programs also expand housing opportunities only for people designated chronically homeless. So, as much as chronic homelessness initiatives function to bring people into permanent housing, they also serve a population-sorting function that excludes other people from housing. As Foucault wrote, "Knowledge is not made for understanding; it is made for cutting."[36] Those that chronic homelessness cuts from housing are populations whose costs are not directly carried by city institutions, but whose health and housing are nonetheless quite precarious. Keeping in mind that the federal government defines the chronically homeless as "unaccompanied adults," we can see that if you have a family that can absorb the work of the welfare state, you are considered a bad investment and unworthy of housing; only those with absolutely no familial safety net are brought into housing.

The earlier history of the concept of chronic homelessness indicates something about this cutting function. "Chronically homeless" as a category was introduced prior to Culhane and Kuhn in New York City by

Rudolph Giuliani. During his first mayoral campaign in 1993, Giuliani released a position paper in which he promised as mayor to limit shelter stays to ninety days for all shelter users except what he called the "chronically homeless." So the category has always served a sorting function, cutting out those who deserve investment from those who do not. While the public reacted with confusion to Giuliani's term, and some with hostility to his plan, soon enough Giuliani's suggestion that there was a chronic subset of shelter-stayers would be accepted as commonsense, and Culhane and Kuhn would provide the economic justification for what has in effect been a national policy that instates what Giuliani called for: the privileging of one part of the unsheltered population and the exclusion of the rest. As a population-sorting mechanism, chronic homelessness preserves the idea that some deserve housing and some do not. But if an a previous era, you proved you were among the deserving poor through a willingness to submit to mandatory case management technologies, today, the determination of who deserves housing moves from a moral calculation to an economic one.

Further, even within those targeted for chronic homelessness programs, distinctions continue to be made. Agency managers describe a process of "creaming" for chronic homeless housing—as in picking the cream of the crop among clients they already know. This is especially the case for "scatter-site housing," when programs rent apartments in buildings that also house private tenants with no program affiliation. The push for scatter-site responds to the pressure of white and wealthier residents to keep concentrated housing forms like shelters out of their neighborhoods, a sentiment described as "NIMBYism" (for "not in my backyard"). In cases of scatter-site housing, questions of sobriety, and even stratification of kinds of substance use, arise.

> The big thing now in Philly, and also in New York, in some scatter-site programs . . . is that they won't take people that are active crack users. Heroin is fine, schizophrenia is fine, but crack—no. Because they say that it attracts more criminal activity, more groups of people that are taking over apartments, and more dangerous behavior, sex work, and all of this. And that, you know, one lonely heroin addict is easier to deal with when you have to deal with landlords and an apartment building with other people in it that aren't in a Housing First program.

The stratification of need points to the lack of a structural critique in the rush to Housing First. The National Coalition for the Homeless report cited above goes on to point out that in addition to reproducing homelessness as a pathology or addiction, chronic homelessness programs will do nothing to alter the structural conditions that produce housing insecurity and deprivation. And at the same time, the adoption of Housing First by federal, state, and municipal governments runs the risk of emptying Housing First of its disrupting potential, instrumentalizing it as financial incentive rather than as a social or political commitment that directs agencies to adopt (or claim to adopt) Housing First approaches. "Now, because it is ensconced in policy, and it's everybody's priority—federal as well as state and local government—everybody's doing it. And the reality is, a bunch that are saying they're doing it, aren't."

Finally, while there is an immediate benefit in getting people housed, the successes of chronic homelessness programs are short-term and not sustainable. As one advocate commented, "And so people start throwing up units and developers are like, 'Great, the money's out there, the capital's out there.' But there's no operating [funds] to sustain that." The case of chronic homelessness programs in one city attests to the limits of this strategy. In this city, agency advocates were able to obtain records from public hospitals and calculate the seventy-five "most expensive homeless people" in the area—specifically, those with the most frequent or longest visits to public hospitals. Program managers then conducted targeted outreach to locate these individuals and place them into housing. However, as a staff member of that program noted, as beds open up (as residents move on, or die) and "less expensive" people are brought in, the savings to the city will decrease. In other words, the relative cost of housing versus hospitalization will *increase,* perhaps until the chronic homelessness program actually becomes more expensive than leaving people unhoused and reliant on hospital systems. As business ventures, chronic homelessness programs have no loyalty to an ethic of housing people, despite the commitment of individuals working within those programs to just such an ethic.

Nonetheless, most advocates remain enthusiastic about the rise of Housing First as federal policy. They suggest that the economic argument—"it is more expensive to leave people unhoused"—is ultimately a politically efficacious means to reach a socially desirable end.

While it is hard to argue against the immediate provision of housing for vulnerable populations—or, for that matter, the provision of housing for all people at all times—I would suggest that the economic here is more than simply an argument. Rather than a contradiction in politics that results in a surprising socially desirable end, this can be understood as a reconstitution of the political in the form of a neoliberal biopolitics. The genius of Culhane, Kuhn, and their colleagues' research is that they were able to mobilize neoliberal discourse of cost and efficiency to successfully advocate what humanist or ethical discourses have failed to do—namely, that people in need of shelter should be housed as quickly as possible. In recasting housing insecurity in terms of financial cost, their research provides an economic justification for permanent, long-term housing. The danger of the research is of course the same thing—its synchronicity with a neoliberal reshaping of social justice imaginations. While others have pointed out the rise in neoliberal governance of managerial strategies derived from private business sectors, the strategies are not simply an external logic applied to a stable social field, but rather a transformative force reshaping the very conception of something like housing deprivation. The invention of chronic homelessness retrofits a social problem as an economic problem. Thus, while at a discursive level, chronic homelessness evokes addiction and hence individual behavior and personal attributes, in practice, it functions as a statistical model for assessing the economic costs of a subpopulation; chronic homelessness is at its heart an economic category.

Culhane and Kuhn's stratification of shelter use effected an important shift in how individual-level behaviors can be linked to the organization of shelter services. The focus of Culhane and Kuhn's argument is not on what is wrong with the chronically homeless and how to fix them. The characteristics they attribute to the chronically homeless—"being older, of black race, having a substance abuse or mental health problem, or having a physical disability"—remain at the aggregate level to identify a subpopulation.[37] The research acknowledges that inadequate "'safety net' programs" force individuals to rely on emergency shelter systems.[38] It does not go as far as advocating structural changes that might slow or end the reproduction of housing insecurity—for example, challenging discriminatory renting practices or the racial wealth divide. But neither do the authors argue that service providers need to end

drug and alcohol use among their clients. In fact, as noted above, the application of their research has deemphasized the importance of sobriety and other individual-level interventions. For Culhane and Kuhn and the federal policies that followed their research, the most important changes that must be made are in the allocation of resources at organizational levels. Thus, while the role of nonprofits in governance changes and nonprofit agencies again become renewed targets of governance, the existence of a nonprofit industrial complex that is free of accountability to social movements persists.

Given the shift to biopolitical concerns provoked by the invention of chronic homelessness, the end of mandatory social and psychiatric services is not so surprising after all. The biopoliticization of housing insecurity moves away from targeting individual behaviors as the point of intervention, as the population instead is taken up as the proper object of governance. In putting forth a biopolitical model that abstracts attributes and behaviors of individuals and organizes them as a statistical population, the invention of chronic homelessness undercuts the disciplinary technologies of the case management system. In other words, disciplinary mechanisms of individuated control, considered inadequate or ineffective, are being suppressed by population management techniques. In matching the profile of the chronically homeless, subjects are in effect biopoliticized, or absorbed into a governance that regulates a population's costs by economizing and securing its health and life chances. Concern with the apparently limited resources of municipalities, rather than with individual well-being, motivates this biopoliticization. The invention of chronic homelessness deemphasizes individual compliance with service requirements in favor of economic containment of population costs—in a move that unexpectedly benefits an abandoned and usually despised and degraded population. The shift to population level concerns legitimated the Housing First model not because the federal government accepted that mandatory services are paternalistic or offensive, but because it saw mandatory services as a deterrent it could no longer afford.

Thus, the invention of chronic homelessness points to the reconfiguration of disciplinary sites through biopolitical projects. As the persistence of pathologization attests, this is not an end to discipline. Chronic homelessness programs, like the HMIS database program discussed in

the previous chapter, represent a rerouting of disciplinary technologies in a context of the biopoliticization of homelessness. If HMIS generates a homeless population as a mechanism for regulating service agencies, chronic homelessness initiatives form the population as a target of governance itself. Disciplinary case management puts in place the intersubjective relationships that advocates use in outreach efforts to make contact with people on the street and engage them toward learning their health histories. Nonetheless, while the vulnerability index used by programs such as Project 50 engage at the individual level, its use is not toward developing a full, deep understanding of the individual as an individual. Rather, the index is used to glean specific points of data that connect that individual to a population defined in terms of health patterns and economic costs. That individual then becomes understood not so much as a case, but as a data match with a statistical profile. In this sense, the index translates between the individual and the population across a ground of economized health concerns.[39] As I argued in the case of HMIS, like any technology, the vulnerability index is not simply a tool, but must be recognized for its productive capacities. In translating back from the population, the index reproduces the homeless individual, not as pathological subject in need of mandatory case management, but rather, as a component part of a population that must be collectively managed through forms of housing that contain its economic impact.

Patricia Ticineto Clough helps characterize such "post-disciplinary" social programs, which she understands as indicating

> the increasing abandonment of support for socialization and education of the individual subject through interpellation to and through national and familial ideological apparatuses. The production of normalization is not only, or even primarily, a matter of socializing the subject; increasingly, it is a matter of directly bringing bodies and bodily affective capacities under an expanded grid of control, especially through the marketization of affective capacity.[40]

For sure, the discourse of chronic homelessness continues to perform the disciplinary work of pathologizing residents of housing programs. In so doing, it may hold in place the imperative of reforming the individual, even if such an imperative is not mobilized as strongly in the present moment.[41] But in the meantime, a biopolitical model that addresses

individuals as component parts of a population whose death and life chances are correlated with economics and managed through economic means, or what Clough refers to as "marketization," overrides the imperatives of socializing into responsible selves. Within this model, the immediate provision of housing becomes the most economically efficient means of managing this population. The biopoliticization of homelessness signals and produces the transformation of social programs into economic programs, a transformation that characterizes Jacques Donzelot's description of the transition from the social welfare state to the social investment state.[42] The economics do not end with the analysis that produces the category "chronic homelessness," but extend into and transform the programs to which that category gives rise.

The greatest danger in chronic homelessness programs is that they are part of neoliberal economies, and thus they enable and extend, rather than challenge, the very economic conditions that produce housing insecurity and deprivation in the first place. In our conversations, some advocates suggested to me that the fact that their programs benefit businesses by "cleaning up" city neighborhoods is not an irresolvable conflict. A staff person at one such program told me:

> I think we have the same interests. The business community in downtown, some of the leaders are a little bit . . . hard to swallow. But we have the same interests, right? I mean, I don't think they give a crap about homeless people, but they wanna see no one sleep on the street and we wanna see no one sleep on the street.

But we must ask if the interests of the neoliberal economy and populations living without shelter can ever be the same. As proponents of the programs note, 10-Year Plans come into being through the support of police and local business organizations, both of which eagerly support the effort to remove unsheltered individuals from public view. In this way, 10-Year Plans function as the second phase of a spatial-capital reorganization of the city that began with the destruction of skid rows. 10-Year Plans attempt to clean up the mess made by the evaporation of SROs and other forms of low-cost housing by removing the individuals left behind. 10-Year Plans do nothing to alter the structural conditions that reproduce and distribute housing insecurity and deprivation. In this sense, the plans preserve an earlier assumption of housing insecurity,

as if removing "problem individuals" from "the streets" is an adequate solution. The fact remains that "the streets"—here we can substitute the racisms of labor markets, privatized housing, police/prison systems, and inadequate public assistance programs—will continue to produce unsheltered populations.[43]

Chronic homelessness initiatives are economic programs in that they (attempt to) remove obstructions to the smooth functioning of neoliberal consumer/tourist economies in urban centers, benefiting in the short term a small handful of clients who fit the profile of the chronically homeless. Chronic homelessness programs are furthermore economic in a second sense: the *management* of housing insecurity is itself an economic enterprise. The proliferation of chronic homelessness programs, the circulation of funding, the commissioning of studies and reports—all of this forms part of the nonprofit industrial complex, where the post-social state meets postindustrial service and knowledge industries. Contrary to rhetoric that associates "the homeless" with waste and cost, housing insecurity and deprivation prove to be sites of economic productivity in which individuals organized as "chronically homeless" become the raw material out of which studies and services are produced. While consumer/tourist economies may be served by removing unsightly reminders of poverty from view, the social service and knowledge industries that manage this removal are at odds with an end to housing insecurity. An actual elimination of housing insecurity and deprivation would also mean an end to the service and knowledge industries proliferating around managing and studying populations living without shelter. Hence, the complex of agencies and organizations produce new forms of industry that do not fundamentally challenge the social, political, and economic reproduction of housing insecurity and deprivation, even if they do reduce their immediate effects.

While some advocates argue that chronic homelessness initiatives contain something of an inherent contradiction in that they serve both the economic needs of neoliberal cities and the needs of a vulnerable population, there is no contradiction. Chronic homelessness programs serve the economy twice over: first by removing an economic obstacle and then by investing in a growing nonprofit industry of population management. The invention of chronic homelessness enacts the economizing of the social that characterizes neoliberalism, not simply by

subjecting social programs to economic logics, but by transforming social programs into economic industries. The classic or Keynesian social welfare state organized the national population by stratifying it in terms of labor. Populations organized as potential or former workers, or as vital to the reproduction of labor, would be invested in through social programs; those subject to extraction but organized as outside labor would be socially abandoned. Under neoliberal biopolitics, the targets of social programs need not be addressed as labor. Rather, the clients of such programs are labored on by social service and knowledge industries—industries that sustain rather than challenge the neoliberal economies that produce housing insecurity and deprivation.

Loïc Wacquant, Punishing the Poor: The Neoliberal Government of Social Insecurity (2009)

[C]ontemporary societies have at their disposal at least three main strategies to treat the conditions and conducts that they deem undesirable, offensive, or threatening.[12] The first consists in *socializing* them, that is, acting at the level of the collective structures and mechanisms that produce and reproduce them—for instance, as concerns the continual increase in the number of the visible homeless who "stain" the urban landscape, by building or subsidizing housing, or by guaranteeing them a job or an income that would enable them to acquire shelter on the rental market. This path entails (re)asserting the responsibility and (re)building the capacities of the social state to deal with continuing or emerging urban dislocations. The second strategy is *medicalization*: it is to consider that a person is living out on the street because she suffers from alcohol dependency, drug addiction, or mental deficiencies, and thus to search for a medical remedy to a problem that is defined from the outset as an individual pathology liable to be treated by health professionals.

The third state strategy is *penalization*: under this scenario, it is not a matter of either understanding a situation of individual distress or a question of thwarting social cogs; the urban nomad is labeled a delinquent (through a municipal ordinance outlawing panhandling or lying down on the sidewalk, for instance) and finds himself treated as such; and he ceases to pertain to homelessness as soon as he is put behind bars. The "legal construction of the homeless as bare life" abridges his

or her rights, effectively reduces him to a noncitizen, and facilitates criminal processing.[13] Here penalization serves as a *technique for the invisibilization of the social "problems"* that the state, as the bureaucratic lever of collective will, no longer can or cares to treat at its roots, and the prison operates as a judicial garbage disposal into which the human refuse of the market society are thrown.

Inasmuch as they have developed the necessary organizational and ideological capacity, advanced countries can implement these three strategies in diverse combinations and for diverse conditions. There is, moreover, a dynamic interrelationship between these three modalities of state treatment of deplorable states of affairs, with medicalization often serving as a conduit to criminalization at the bottom of the class structure as it introduces a logic of individual treatment.* What matters here is that the weighing and targeting of these manners of governing indocile populations and territories is *doubly political.* First, they are political in that they result from ongoing power struggles between the agents and institutions which contend, in and around the bureaucratic field, to shape and eventually direct the management of "troubled persons" and troubling collective states. Second, the shifting dosage and aim of socialization, medicalization, and penalization are political in that they result from choices that engage the conception that we have of life in common.

It is crucial that these choices be made with full knowledge of the causes and consequences, in the middle and long run, of the options offered. The most portentous scientific and civic mistake here consists in believing and making people believe, as the hypersecuritarist discourse that saturates the political and journalistic fields today asserts, that police and carceral management is the optimal remedy, the royal road to the restoration of sociomoral order in the city, if not the only means of ensuring public "safety," and that we have no alternative to

*In American history, the adoption of the medical model to deal with a variety of disquieting activities (opiate use and addiction, homosexuality, abortion, child abuse and madness) has repeatedly led to their penalization. Peter Conrad and Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (Philadelphia: Temple University Press, 1992). An instructive case study of how medicalization worked to divert attention from the socioeconomic roots of the rising presence of homeless people on the streets of New York City in the 1980s (namely, the steep decline in stable jobs and severe penury of affordable housing) and to justify a policy of physical removal of social discards from public space is Arline Mathieu, "The Medicalization of Homelessness and the Theater of Repression," *Medical Anthropology Quarterly*, n.s. 7, no. 2. (June 1993): 170–84. For a germane analysis in the French case, see Patrick Gaboriau and Daniel Terrolle, eds., *Ethnologie des sans-logis. Etude d'une forme de domination sociale* (Paris: L'Harmattan, 1998).

contain the social and mental turbulence induced by the fragmentation of wage work and the polarization of urban space. The sociological analysis of the stupendous ascent of the penal state in the United States after the peaking of the Civil Rights movement demonstrates that such is not the case. Entering into the living laboratory of the neoliberal revolution also has the virtue of revealing in quasi-experimental fashion the colossal social cost and the irreversible debasement of the ideals of freedom and equality implied by the criminalization of social insecurity.

2

The Criminalization of Poverty in the Post–Civil Rights Era

In his lecture course on socialism, Émile Durkheim contends that the state is "not an enormous coercive power, but a vast and conscious organization" capable "of an action at once unified and varied, supple and extensive."* Historical experience shows that these two aspects are by no means incompatible, and that a state apparatus can very well be both at the same time. Such is the case at the dawn of the twenty-first century with the United States, where, notwithstanding the virulently antistatist ambient discourse, public force understood *in the strict sense* plays an increasingly decisive role in the patterning and conduct of national life.

Over the past three decades, that is, since the race riots that shook the ghettos of its big cities and marked the closing of the Civil Rights revolution, America has launched into a social and political experiment without precedent or equivalent in the societies of the postwar West: the gradual replacement of a (semi-) welfare state by a police and penal state for which the criminalization of marginality and the punitive containment of dispossessed categories serve as social policy at the lower end of the class and ethnic order. To be sure, this welfare state was, as we shall note shortly, notably underdeveloped compared to its European counterparts. For a number of well-known historical reasons, the sphere of citizenship is particularly constricted in the United States, and the ability of subordinate categories to make themselves heard, severely circumscribed.** Rather than of a welfare state, one should

speak here of a *charitable state* inasmuch as the programs aimed at vulnerable populations have at all times been limited, fragmentary, and isolated from other state activities, informed as they are by a moralistic and moralizing conception of poverty as a product of the individual failings of the poor.[1] The guiding principle of public action in this domain is not solidarity but *compassion*; its goal is not to reinforce social bonds, and still less to reduce inequalities, but at best to relieve the most glaring destitution and to demonstrate society's moral sympathy for its deprived yet deserving members.

Moreover, the hypertrophied penal state that is bit by bit replacing the rump social-welfare state at the bottom of the class structure—or supplementing it according to a gendered division of labor—is itself incomplete, incoherent, and often incompetent, so that it can fulfill neither the unrealistic expectations that have given birth to it nor the social functions that it has as its mission to shore up. And it is hard to see how its development could go unchecked indefinitely, since in the medium run it threatens to bankrupt the large states that lead the pack in the frantic race to hyperincarceration, such as California, New York, Texas, and Florida.[2] Lastly, notwithstanding the thundering proclamations of politicians from all sides about the necessity to "end the era of Big government"—the cheery chorus of Clinton's State of the Union address in 1996—the US government continues to provide many kinds of guarantees and support to corporations as well as to the middle and upper classes, starting, for example, with homeownership assistance: almost half of the $64 billion in fiscal deductions for mortgage interest payments and real estate taxes granted in 1994 by Washington (amounting to nearly three times the budget for public housing) went to the 5 percent of American households earning more than $100,000 that year; and 16 percent of that sum went to the top 1 percent of taxpayers with incomes exceeding $200,000. Over seven in ten families in the top 1 percent received mortgage subsidies (averaging $8,457) as against fewer than 3 percent of the families below the $30,000 mark (for a paltry $486 each).[3] This fiscal subsidy of $64 billion to wealthy home owners dwarfed the national outlay for welfare ($17 billion), food stamps ($25 million), and child nutrition assistance ($7.5 billion).

It is the thesis of this book that the United States is groping its way

toward a new kind of hybrid state, neither a "protector" state, in the Old World sense of the term, nor a "minimalist" and noninterventionist state, conforming to the ideological tale spun by zealots of the market. Its social side and the benefits it dispenses are increasingly secured by the privileged, especially through the "fiscalization" of public support (for education, health insurance, and housing),* while its disciplinary vocation is upheld mainly in its relation to the lower class and subordinate ethnic categories. This *centaur state*, guided by a liberal head mounted upon an authoritarian body, applies the doctrine of "laissez-faire et laissez passer" upstream, when it comes to social inequalities and the mechanisms that generate them (the free play of capital, dereliction of labor law and deregulation of employment, retraction or removal of collective protections), but it turns out to be brutally paternalistic and punitive downstream, when it comes to coping with their consequences on a daily level.

This chapter provides a preliminary sketch of the twofold shift that has *tipped the balance of the US bureaucratic field from its protective to its punitive pole* when it comes to managing poor populations and territories.[4] It argues that the downsizing of the social-welfare sector of the state and the concurrent upsizing of its penal arm are functionally linked, forming, as it were, the two sides of the same coin of state restructuring in the nether regions of social and urban space in the age of ascending neoliberalism. The gradual rolling back of the social safety net commenced in the early 1970s as part of the backlash against the progressive movements of the previous decade and culminated in 1996 with the conversion of the right to "welfare" into the obligation of "workfare," designed to dramatize and enforce the work ethic at the bottom of employment ladder. We shall show in the next chapter that the new punitive organization of welfare programs operates in the manner of a labor parole program designed to push its "beneficiaries" into the subpoverty jobs that have proliferated after the discarding of the Fordist-Keynesian compromise. The diffusing social insecurity and escalating life disorders caused by the desocialization of wage labor and

*In *The Hidden Welfare State: Tax Expenditures and Social Policy in the United States* (Princeton, N.J.: Princeton University Press, 1997), Christopher Howard shows that the social spending of the federal government is increasingly effected in a concealed manner, by way of fiscal arrangements that systematically favor business and wealthier households and effectively bypass the poor. In 1995, tax expenditures with social welfare objectives (such as deductions for home mortgage interest and employer-provided pensions) exceeded $450 billion, more than ten times the budget for AFDC and food stamps put together. Nine-tenths of these expenditures benefited the middle and upper classes (compared with two-thirds for official social spending).

the correlative curtailment of social protection, in turn, were curbed by the stupendous expansion of the penal apparatus that has propelled the United States to the rank of world leader in incarceration. This abrupt rolling out of the penal state will be mapped out in detail in the second part of the book.

Some Distinctive Properties of the American State

To grasp the nature and means of this political mutation, it is indispensable first to identify the distinctive structural and functional properties of what political scientist Alan Wolfe nicely calls America's "franchise state."[5] Here I will briefly emphasize five.

1. *A "society without a state," a society against the state*

The first distinctive trait of the state in America has to do with the representation it is given in the national *doxa*. Just as France has, until recently, thought of itself as a "nation without immigrants," even as its industrial, urban, and cultural history has been decisively stamped by the influx of foreign populations since the end of the nineteenth century, the reigning civic ideology of the United States has it that it is "a society without a state."[6]

From the Pilgrim fathers to the Bush dynasty, Americans have always viewed themselves as an autonomous people fundamentally rebellious to any suprasocial authority—save for that of God. This is attested by the many articles in the Constitution that disperse and curb public powers, regarded *ex hypothesi* as potentially tyrannical, and the venomous antistatism of the national political culture. The 1996 campaign for the presidential nomination offered a translucent illustration of this streak: all the candidates claimed that they wanted to "clean up Washington" and the federal government was characteristically presented as a foreign force, if not as the enemy of the people, by those who were its very servants. During the 2000 campaign, Albert Gore Jr., the sitting vice president for eight years, insisted on locating his campaign headquarters in Tennessee in order to stage his alleged closeness to the "people" and distance from "government elites," even though, as the son of a senator, he had spent his entire life and career in the corridors of power in Washington. Another indicator: Americans were likelier to blame the federal government (79 percent), and then "American workers themselves" (75 percent) and their fast-flagging unions

(62 percent), than they were Wall Street (50 percent) for the massive destruction of jobs that marked the beginning of the 1990s.[7]

2. *Bureaucratic fragmentation and dysfunctions*

The American state is a decentralized network of loosely coordinated agencies whose powers are limited by the very fragmentation of the bureaucratic field and the disproportionate power the latter grants to local authorities. The sharing of budgetary responsibilities and attributions among the various levels of government (federal, state, county, and municipal) is a source of constant dissension and distortion. The result is that there is often an abyss between the policies promulgated "on paper" in Washington and in state legislatures and the services actually delivered on the ground by street-level bureaucracies.[8]

The related absence of a tradition of public service and of stable channels for the recruitment and oversight of civil servants, especially in higher offices, means that the administrative apparatus is directly subjected to the forces of money, on the one hand, and to the brute demands of "electoral patrimonialism," on the other. Thence the bureaucratic incoherence and ineptitude that often preside over the design and implementation of national and local policies.[9] It also helps account for the extreme porosity of the public-private divide: according to a century-old tradition, updated by the "War on poverty" during the 1960s, a large share of social programs aimed at the lower class (such as the "Head Start" preschool plan or support for orphans and child protective services) is subcontracted to private and nonprofit agencies, which distribute and administer them in the name of the national collectivity. The historically entrenched pattern of reliance on the commercial and third sectors for carrying out many welfare duties of the state has created a vast and intricate mesh of organizations and interest groups "dedicated to preserving the private tilt of US social policy,"[10] which further complicates the landscape of large-scale public provision and creates an institutional terrain very propitious to efforts at further privatization of its activities.

3. *A dual state, or the great institutional-cum-ideological bifurcation*

Since the foundational era of the New Deal, the social action of the US state has been split into two hermetically sealed domains that are sharply distinguished by the composition and political weight of their respective "clienteles" as well as by their ideological charge.[11] The first

strand, under the heading of "social insurance," is responsible for the collective management of the life-risks of wage earners—unemployment, sickness, and retirement. In principle, everyone with a stable job is entitled to participate in these programs and enjoys benefits construed as the just counterpart to their contributions (but we shall see shortly that this principle is in practice routinely violated in the lower tiers of the job market). The second plank, designated by the loathsome idiom of "welfare,"[12] concerns only assistance to dependent and distressed individuals and households. Its recipients are submitted to draconian conditions (of income, assets, marital and familial status, residence, etc.) and are placed under a harsh tutelage that clearly demarcates them from the rest of society and effectively makes them second-class citizens, on grounds that the support they receive is granted without an offsetting contribution on their part, and thus threatens to undermine their "work ethic."

Historically, the main beneficiaries of the "social insurance" side of the US social state, such as the Social Security retirement fund, have been men (as full-time workers and heads of households), whites (who have long cornered the lion's share of stable jobs in the industrial and service sectors), and the families of the labor aristocracy and the middle and upper classes. Although public assistance programs such as Aid to Families with Dependent Children (AFDC, income and in-kind grants to destitute single mothers with young children) reach a broad public that is majority white—more than one American household in four was on the "welfare" rolls at some point during the 1980s[13]—in the popular imagination their clientele is essentially made up of urban minorities and dissolute women living off the nation in the manner of social parasites.

4. *A residual welfare state*

The American state is the prototype of the "residual welfare state"[14] to the extent that it offers support only in response to the cumulative failures of the labor market and the family, by intervening on a case-by-case basis through programs strictly reserved for vulnerable categories that are deemed "worthy": ex-workers temporarily pushed out of the wage-labor market, the handicapped and severely disabled, and, subject to varying restrictive conditions, destitute mothers of young children.[15] Its official clientele is thus composed of "dependents" from working-class backgrounds, low-pay workers, the unemployed, and families of color, who have no influence upon the political system and, by the same token, no means of protecting their meager prerogatives.

The United States thus presents the paradox of a nation that venerates children but has no family support or education policy, so that one child in four (one black child in two) lives under the official "poverty line"; a country that spends vastly more than any of its competitors on healthcare as a percentage of its GDP, yet leaves some 45 million people (including 12 million children) without medical coverage at any one time; a society that sacralizes work, yet has no national framework for training or supporting employment worthy of the name. All because "state charity" has for its primary objective bolstering the mechanisms of the market and especially imposing the tough discipline of deskilled wage labor upon marginal populations.[16]

5. *A racial state*

Finally, the United States sports the highly distinctive property of being endowed with a *racial state* in the sense that, much like Nazi Germany and South Africa until the abolition of apartheid, the structure and functioning of the bureaucratic field are thoroughly traversed by the imperious necessity of expressing and preserving the impassable social and symbolic border between "whites" and "blacks," incubated during the age of slavery and subsequently perpetuated by the segregationist system of the agrarian South and the ghetto of the Northern industrial metropolis.* The pervasiveness and potency of this denegated form of ethnicity called "race" as a principle of social vision and division that effaces, ideologically and practically, the insuperable contradiction between the democratic ideal founded on the doctrine of the natural

rights of the individual and the persistence of a caste regime, is essential to understanding the initial atrophy and accelerating decay of the American social state in the recent period on the one hand, and the stupefying ease and speed with which the penal state arose on its ruins on the other.

Indeed, the originary caesura of the national social space into two communities perceived as congenitally disjoint and inherently unequal, between which the other components of the US ethnic mosaic are inserted (Latinos, Asians, and Native Americans, according to the official taxonomy), overdetermines the design and implementation of public policy in all domains. The white-black cleavage infects the national political culture and distorts the electoral and legislative game at the local as well as the federal level, from campaign fund-raising to the drawing of districts, the rhetoric of candidates for office, the formation of legislative factions and alliances, to the manufacturing of legislation.[17] From its origins, this rigid partition has also thwarted the unification and organization of the working class. Together with the strong integration of the capitalist class at the onset of industrialization, it accounts for the absence of union mobilization of an oppositional kind and, by the same token, for the feeble political oversight of the markets for labor, capital, and public goods.[18]

Lastly, through the intercession of regional cleavages, racial division anchors the teratological development of a welfare state split into two blocs, one turned toward whites and the middle and upper classes, the other aimed at blacks and the unskilled working class during the foundational era of the New Deal no less than during the expansionary period of the 1960s; and it underpins the tilting, over the ensuing two decades, from the assistantial to the penal management of poverty, misperceived as a problem affecting blacks first and foremost.[19] The ethnic division of the proletariat and the structural dualism of the semiwelfare state contribute to perpetuating the racialization of politics, which in turn feeds the retreat from civic participation, facilitating the stranglehold of corporations and wealthy funders on the electoral system.

Rolling Back the Charitable State

These distinctive characteristics explain why, although social inequality and economic insecurity increased sharply during the closing three decades of the twentieth century,[20] the American charitable state has steadfastly reduced its perimeter of operation and squeezed its modest budgets so as to allow for the explosive increase in military spending

Table 1. Decrease in welfare payments to poor single mothers (AFDC)*, 1975–95

	1970	1975	1980	1985	1990	1995
Current dollars	221	264	350	399	432	435
Constant dollars	221	190	165	144	128	119
Change	100	86	75	65	58	49.8

*Median payment for a family of four

SOURCE: Committee on Ways and Means, US House of Representatives, *1996 Green Book* (Washington, D.C.: U.S. Government Printing Office, 1997), 443–45, 449.

and the extensive redistribution of income from wage earners toward firms and the affluent fractions of the upper class. So much so that the "War on poverty" has given way to a simile *war against the poor*, made into the scapegoats of all the major ills of the country[21] and now summoned to care for themselves lest they be hit by a volley of punitive and humiliating measures intended, if not to put them back onto the narrow path of precarious employment, then at least to minimize their social demands and thus their fiscal burden.

Impaired by the administrative and ideological split between "welfare" and "social insurance," stigmatized by their close association with the demands of the black political movement, and tarnished by the notorious inefficiency of the agencies responsible for implementing them, programs targeted at the poor were the first victims of the sociopolitical reaction that carried Reagan to power in 1980 and then fostered the success of Clinton's "New Democrats."[22] Although the cost of AFDC never reached 1 percent of the federal budget, every government since Jimmy Carter has promoted its reduction as a top priority. And they have very largely succeeded at the level of recipients (see table 1): in 1970, the median AFDC payment for a family of four without any other source of income was $221 per month; in 1990, this sum reached $432 in current dollars, or $128 adjusting for inflation, corresponding to a net decline in purchasing power of 42 percent. By 1995, on the eve of its elimination, the AFDC package came to a paltry $435, or $110 in 1970 dollars, representing a real drop of more than one-half.

Moreover, these nationwide statistics conceal sharp regional disparities (see table 2). Social assistance was always significantly higher in the urban and industrial Midwest and Northeast, the historic cradle of both the working class and the black ghetto, than in the South, where poverty is more prevalent still and the social safety net virtually nonexistent. Thus, in 1996 the maximum monthly allowance for a family of three came to $577 in New York and $565 in Boston, as against a

Table 2. Maximum AFDC payment for a family of three in selected states, 1970–96*

	1970	1980	1990	1996	% change in real value, 1970–96
New York (City)	279	394	577	577	–48
Michigan (Detroit)	219	425	516	459	–48
Pennsylvania	265	332	421	421	–60
Illinois	232	288	367	377	–59
Texas	148	116	184	188	–68
Mississippi	56	96	120	120	–46

*In dollars per month

SOURCE: Committee on Ways and Means, U.S. House of Representatives, *1996 Green Book* (Washington, D.C.: US Government Printing Office, 1997), 459, 861, 921.

mere $120 in Mississippi, $185 in Albert Gore's Tennessee, and $188 in George W. Bush's Texas. But the decline in real terms was catastrophic everywhere, ranging from one-half in Michigan to two-thirds in Texas. In 1970, the AFDC package covered a national average of 84 percent of the "minimal needs" officially entitling one to public assistance; by 1996, this figure had fallen to 68 percent; in Texas, this ratio had plummeted to 25 percent (compared to 75 percent a quarter-century earlier).

Yet impoverished families must first succeed in receiving the meager assistance to which they are legally entitled. The second technique for shrinking the charitable state is not budgetary but administrative: it consists in multiplying the bureaucratic obstacles and requirements imposed on applicants with the aim of discouraging them or striking them off the recipient rolls (be it only temporarily). Under the cover of ferreting out abuses and turning up the heat on "welfare cheats," public aid offices have multiplied forms to be filled out, the number of documents to be supplied, the frequency of checks, and the criteria for periodically reviewing files. Between 1972 and 1984, the number of "administrative denials" on "procedural grounds" increased by almost one million, two-thirds of them directed against families who were fully within their rights.[23] This practice of bureaucratic harassment has even acquired a name well known among specialists, "churning," and it has given rise to elaborate statistics tracking the number of eligible claimants on assistance whose demands were unduly rejected for each program category. Thus, whereas 81 percent of poor children were covered by AFDC in 1973, over 40 percent did not receive the financial aid to which they were entitled fifteen years later. In 1996, at welfare's burial, it was estimated that every other poor household in America did not receive benefits for which it was eligible.

Finally, there remains the third and most brutal technique, which consists of simply eliminating public aid programs, on grounds that their recipients must be snatched from their culpable torpor by the sting of necessity. To hear the chief ideologues of American sociopolitical reaction, Charles Murray, Lawrence Mead, and Daniel Patrick Moynihan, the pathological "dependency" of the poor stems from their moral dereliction. Absent an urgent and muscular intervention by the state to check it, the growth of "nonworking poverty" threatens to bring about nothing less than "the end of Western civilization."[24] At the start of the 1990s, several formerly industrial states with high unemployment and urban poverty rates, such as Pennsylvania, Ohio, Illinois, and Michigan, unilaterally put an end to General Assistance, a locally funded program of last resort for the indigent—overnight in Michigan, after a brief transition period in Pennsylvania. This resulted in the dumping of one million aid recipients nationwide.

The downsizing of America's charitable state has proceeded across a broad front and has not spared the privileged domain of social protection. In 1975, the unemployment insurance scheme established by the Social Security Act of 1935 covered 76 percent of wage earners who lost their jobs. By 1980 that figure had fallen to one in two due to state-mandated administrative restrictions and the proliferation of "contingent" jobs; and in 1995 it approached one worker in three. While coverage shrank, for twenty years the real average value of unemployment benefits stagnated at $185 per week (in constant dollars of 1995), disbursed for a meager fifteen weeks, giving most jobless people "on the dole" incomes putting them far below the poverty line.[28]

The same trend applies to occupational disability, for which the rate of coverage dropped from 7.1 workers per thousand in 1975 to 4.5 per thousand in 1991. Likewise for housing: in 1991, according to official figures, one in three American families was "housing poor," that is, unable to cover both basic needs and housing costs, while the homeless population numbered between 600,000 and 4 million. Meanwhile, the federal budget for social housing plummeted from $32 billion in 1978 to less than $10 billion a decade later in current dollars, amounting to a cut of 80 percent in real dollars.[29] At the same time, Washington eliminated funding for general revenue sharing, local public works, and urban development grants, as well as drastically pared most programs aimed at reintegrating the unemployed. When the Comprehensive Education and Training Act (CETA) program was terminated in 1984, over 400,000 public jobs for unskilled people disappeared. In 1975, the federal government devoted $3 billion to providing job training to 1.1 million poor Americans; by 1996, this figure had fallen to $800 million

(in constant dollars), barely enough to cover 329,000 trainees. Meantime, budgets allocated to financing "summer jobs" for underprivileged youth were cut by one-third and the number of their beneficiaries by one-half.[30]

But it is at the municipal level that the concerted attack on urban and social policy was most ferocious. Using the pretext of the fiscal crisis triggered by the exodus of white families, middle-class revolts against taxation, and the drying up of federal subsidies, American cities sacrificed public services essential to poor neighborhoods and their inhabitants—housing, sanitation, transportation, and fire protection, as well as social assistance, health, and education. They diverted a growing share of public monies toward the support of private commercial and residential projects that promised to attract the new service-based corporations and the affluent classes.[31] This shift was justified by invocation of the alleged efficiency of market mechanisms in the allocation of city resources and federal funds. And it was greatly facilitated by the rigid racial segregation of the American metropolis, which sapped the collective capacity of poor residents by fracturing them along the color line. A single example suffices to indicate the devastating effects of this turnaround: while the costs and profits of free-market medicine soared, in Chicago the number of community hospitals (i.e., those accessible to people without private medical coverage) slumped from 90 in 1972 to 67 in 1981 to 42 in 1991. By that year, outside of the dilapidated and overcrowded Cook County Hospital, no health center in the entire city provided prenatal support to mothers without private insurance. In 1990, the director of Chicago's hospitals announced that the public health system was a "non-system on the brink of collapse," fundamentally incapable of fulfilling its mandate. That this declaration elicited no response from city and state officials and administrators speaks volumes about the indifference with which the rights and well-being of the urban poor are regarded.[32] The fact that the dispossessed families of Chicago are disproportionately black and Latino (from Mexican and Puerto Rican parentage) is key to explaining their civic invisibility.

The consequences of the withdrawal of the charitable state are not hard to guess. At the end of 1994, despite two years of solid economic growth, the Census Bureau announced that the official number of poor people in the United States had surpassed forty million, or 15 percent of the country's population—the highest rate in a decade. In total, one white family in ten and one African-American household in three lived below the federal "poverty line." This figure conceals the depth and intensity of their dereliction inasmuch as this threshold, calculated according to an arbitrary bureaucratic formula dating from 1963 (based

on family consumption data from 1955), does not take into account the actual cost of living and the changing mix of essential goods, and it has been drawn ever lower over the years: in 1965 the poverty line stood at about one-half of the national median family income; thirty years later it did not reach one-third.* Comparative analysis reveals that, despite a notably lower official unemployment rate, "poverty in the United States is not only more widespread and more persistent, but also more severe than in the countries of continental Europe."[33] In 1991, 14 percent of American households received less than 40 percent of the median national income, as against 6 percent in France and 3 percent in Germany. These gaps were considerably more pronounced among families with children (18 percent in the United States versus 5 percent in France and 3 percent for its neighbor across the Rhine), not to mention single-parent families (45 percent in the United States, 11 percent in France, and 13 percent in Germany). This is hardly surprising when the minimum hourly wage is set so low that an employee working full-time year-round earned $700 per month in 1995, putting him 20 percent below the poverty line for a household of three, and when public aid is calculated to fall well below that wage rate in order to avoid creating "disincentives" to work:[34] the maximum AFDC cash payment in the median state in 1994 came barely to 38 percent of the poverty line and reached only 69 percent when combined with the value of food stamps and other in-kind support.

The degradation of employment conditions, shortening of job tenures, drop in real wages, and shrinking of collective protections for the US working class over the past quarter-century have been brought about and accompanied by a surge in precarious wage work. The numbers of on-call staff and day laborers, "guest" workers (brought in through state-sponsored programs of seasonal importation of agricultural laborers from Mexico or the Caribbean, for instance), office- or service-workers operating as subcontractors, compulsory part-timers, and casual staff hired through specialized "temp" agencies have all increased much more quickly than other occupational categories since the mid-1970s—with temporary help leading the pack at a yearly clip of 11 percent. Today *one in three Americans in the labor force is a non-standard wage earner*: such insecure work must clearly be understood as a perennial form of subemployment solidly rooted in the new socio-economic landscape of the country and destined to grow.[35]

During the 1980s and 1990s, mass layoffs became a privileged instrument for the short-term financial management of US firms,[41] so that the country's middle and managerial classes made the bitter discovery of job insecurity during a period of sturdy growth. The return of economic prosperity to the United States was thus built on a spectacular degradation of the terms and conditions of employment: between 1980 and 1995, 41 percent of "downsized" employees were not covered by unemployment insurance and two-thirds of those who managed to find new work had to accept a position with lower wages. In 1996, 82 percent of Americans said that they were prepared to work longer hours to save their jobs; 71 percent would consent to fewer holidays, 53 percent to reduced benefits, and 44 percent to a cut in pay.[42] The absence of collective action in the face of stock-market-driven layoffs is explained by the congenital weakness of unions, the lock that corporate financiers have placed on the electoral system, and the power of the ethos of meritocratic individualism, according to which each wage earner is responsible for his or her own fate.

Failing a language that could gather the dispersed fragments of personal experiences into a meaningful collective configuration, the diffuse frustration and anxiety generated by the disorganization of the established reproduction strategies of the American middle classes have been redirected *against the state*, on the one side, which was accused of weighing on the social body like a yoke as stifling as it is useless, and, on the other, *against categories held to be "undeserving,"* or suspected of benefiting from programs of affirmative action, henceforth perceived as handouts violating the very principle of equity they claim to advance. The former tendency expressed itself in the pseudo-populist tone of electoral campaigns during the closing decade of the century, in which politicians near-unanimously directed a denunciatory and revanchist discourse against Washington's technocrats and other bureaucratic "elites"—of which they are typically full-fledged members—and public services—whose personnel and budgets they promised to "trim." The second tendency is evident in the fact that 62 percent of Americans are opposed to affirmative action for blacks and 66 percent are against affirmative action for women, even in those cases where it is proven that those helped were targets of discrimination, while two Americans in three wish to curtail immigration, even as 55 percent concede that immigrants take jobs nationals do not want (precisely because they are overexploitative).[43] This is the logic according to which in 1996, confirming its historic role as the nation's bellwether, California abolished the promotion of "minorities" in higher education and excluded so-

called illegal immigrants from all public services, including schools and hospitals.

Whence, finally, the national hysteria around the problem of "welfare" that led to the public aid "reform" of 1996, which we shall analyze in some detail in the next chapter. Hypocritically entitled the "Personal Responsibility and Work Opportunity Act," it amounted to abolishing the right to assistance and instituted forced deskilled wage labor as the sole means of support on the pretext of setting the indigent back onto the road to "independence." Sacrificing the poor—and especially the black urban subproletariat, incarnation and scapegoat of all the country's ills—to exorcise the worries of the middle and working classes over their future is once again to ask those who are the living negation of the "American dream" to suffer for their alleged alterity so that, in spite of everything, the country may uphold its faith in the national myth of prosperity available to all.

Rolling Out the Penal State

How to stem the mounting tide of dispossessed families, street derelicts, alienated jobless youth, and the despair and violence that intensify and accumulate in the neighborhoods of relegation of the big cities? At all three levels of the bureaucratic field, county, state, and federal, the American authorities have responded to the rise of urban dislocations—for which, paradoxically, they are largely responsible—by developing their penal functions to the point of hypertrophy. As the social safety net of the charitable state unraveled, the dragnet of the punitive state was called upon to replace it. Its disciplinary mesh was flung throughout the nether regions of US social space so as to contain the disarray and turmoil spawned by the intensification of social insecurity and marginality. A causal chain and functional interlock was thus set into motion, whereby economic deregulation required and begat social welfare retrenchment, and the gradual makeover of welfare into workfare, in turn, called for and fed the expansion of the penal apparatus.

The deployment of this *state policy of criminalization of the consequences of state-sponsored poverty* operates according to two main modalities. The first and least visible one—except to those directly affected by it—consists in *reorganizing social services into an instrument of surveillance* and control of the categories indocile to the new economic and moral order. Witness the wave of reforms adopted between 1988 and 1995 in the wake of the Family Support Act by some three dozen states that have restricted access to public aid and made it conditional upon upholding certain behavioral norms (economic, sexual, familial, educational, etc.) and upon performing onerous and humiliating bureaucratic obligations. The most common of these requirements stipulate that the recipient must accept any job or assimilated activity offered to her, whatever the pay and working conditions, on pain of forsaking the right to assistance ("workfare"). Others index the amount of assistance received by the families to the school attendance record of their children or teenage recipient ("learnfare"), or peg them on enrollment in pseudo-training programs that offer few if any skills and job prospects.[44] Yet others establish a ceiling on the cash value of aid or set a maximum duration after which no support will be accorded. In New Jersey in the mid-1990s, for instance, AFDC benefits were terminated if an unmarried teen mother did not reside with her parents (even in cases where the latter had thrown her out), and the amount she received was capped if she begat additional children.

The insufficiency and inefficiency of forced-work programs are as glaring as their punitive character. While such programs are periodically vaunted as the miracle cure for the epidemic of "dependency" said to afflict the American poor, none of them has ever allowed more than a handful of participants to escape destitution. The reasons for their failure are several: the jobs proposed or imposed are too precarious and ill paid to offer a platform for economic autonomy; they do not provide medical coverage or child care assistance, making employment both risky and prohibitively costly for mothers with young offspring; the workplaces are physically and emotionally degrading; and a majority of "welfare mothers" already work while receiving aid in the first place.[45] At best, such programs replace "dependency" on means-tested state programs with "dependency" on superexploitative employers at the margins of the labor market, supplemented by fragile family networks, and illegal street commerce where accessible, a combination that nearly guarantees continued poverty. But precisely: it will be shown in the next chapter that workfare policy does not aim to reduce *poverty* but seeks only to diminish the *visibility of the poor in the civic landscape* and to "dramatize" the imperative of wage labor by issuing "a warning to all Americans who were working more and earning less, if they were working at all. There is a fate worse, and a status lower, than hard and unrewarding work."[46]

The long train of welfare reform measures also extols and embodies the new paternalist conception of the role of the state in respect to the poor, according to which the conduct of dispossessed and dependent citizens must be closely supervised and, whenever necessary, corrected through rigorous protocols of surveillance, deterrence, and sanction,

Table 3. Number of inmates in federal and state prisons, 1970–95 (in thousands)

	1970	1980	1990	1995	change 1970–95 (%)
Total	199	320	743	1078	442
Annual growth in preceding decade (%)	*–1.2*	*6.1*	*13.2*	*9*	
Blacks	81	168	366	542	569
Annual growth for blacks (%)	*–0.7*	*10.8*	*17.9*	*9.7*	

SOURCE: Bureau of Justice Statistics, *Historical Corrections Statistics in the United States, 1850–1984* (Washington, D.C.: Government Printing Office, 1986); idem., *Prisoners in 1996* (Washington, D.C.: Government Printing Office, 1997).

very much like those routinely applied to offenders under criminal justice supervision. The shift "from carrots to sticks," from voluntary programs supplying resources to mandatory programs enforcing compliance with behavioral rules by means of fines, reductions of benefits, and termination of recipiency irrespective of need, that is, programs treating the poor as *cultural similes of criminals* who have violated the civic law of wage work, is meant to both dissuade the lower fractions of the working class from making claims on state resources and to forcibly instill conventional morality into their members.* And it is instrumental in embellishing the statistics of public aid offices by "dressing up" recipients as workers while trapping the assisted population in the urban wastelands set aside for them.

The second component of the policy of punitive containment of the poor is *massive and systematic recourse to incarceration* (see table 3). Confinement is the other technique through which the nagging problem of persistent marginality rooted in unemployment, subemployment, and precarious work is made to shrink on—if not disappear from—the public scene. After decreasing by 12 percent during the

*This moral agenda is frankly laid out by the ideologues of state paternalism: "The social problems associated with long-term welfare dependency cannot be addressed without first putting the brakes on the downward spirals of dysfunctional behavior common among so many recipients. . . . Character is built by the constant repetition of diverse good acts. These new behavior-related welfare rules are an attempt, long overdue in the minds of many, to build habits of responsible behavior among long-term recipients; that is, to legislate virtue." Douglas J. Besharov and Karen N. Gardiner, "Paternalism and Welfare Reform," *The Public Interest* 122 (winter 1996): 70–84, citation p. 84.

1960s, the population condemned to serve time in state prisons and federal penitentiaries (excluding detainees held in city and county jails, awaiting judgment or sanctioned with short custodial sentences) exploded after the mid-seventies, jumping from under 200,000 in 1970 to nearly one million in 1995—an increase of 442 percent in a quarter-century never before witnessed in a democratic society. Like the social disengagement of the state, imprisonment has hit urban blacks especially hard: the number of African-American convicts increased sevenfold between 1970 and 1995, after falling 7 percent during the previous decade (even though crime rose rapidly during the 1960s). In each period, the growth rate of the black convict population far exceeded that of their white compatriots. In the 1980s, the United States added an average of 20,000 African Americans to its total prisoner stock *every year* (over one-third the total carceral stock of France). And, for the first time in the twentieth century, the country's penitentiaries held more blacks than whites: African Americans made up 12 percent of the national population but supplied 53 percent of the prison inmates in 1995, as against 38 percent a quarter-century earlier. The rate of incarceration for blacks *tripled in only a dozen years* to reach 1,895 per 100,000 in 1993—amounting to nearly seven times the rate for whites (293 per 100,000) and twenty times the rates recorded in the main European countries at that time.[47]

We will track down the sources and modalities of this astronomical increase in the prison population in detail in chapter 4 and demonstrate in particular that it is utterly disconnected from crime trends. In chapter 6, we will moreover show how the sudden growth of the prison relates to the crumbling of the urban ghetto as physical container for undesirable dark bodies. Here we want simply to note that a major engine behind carceral growth in the United States has been the "War on drugs"—an ill-named policy since it refers in reality to a guerilla campaign of penal harassment of low-level street dealers and poor consumers, aimed primarily at young men in the collapsing inner city for whom the retail trade of narcotics has provided the most accessible and reliable source of gainful employment in the wake of the twofold retrenchment of the labor market and the welfare state.[48] It is a "war" that the authorities had no reason to declare in 1983, considering that marijuana and cocaine use had been declining steadily since 1977–79 and that the supply-reduction approach to drug consumption has a long and distinguished history of failure in America.* And it was fully

predictable that this policy would disproportionately strike lower-class African Americans insofar as it was directly targeted on dispossessed neighborhoods in the decaying urban core.

The rationale for this narrow spatial aiming of a nationwide penal drive is easy to disclose: the dark ghetto is the stigmatized territory where the fearsome "underclass," mired in immorality and welfare dependency, was said to have coalesced under the press of deindustrialization and social isolation to become one of the country's most urgent topics of public worry. But it is also the area where police presence is particularly dense, illegal trafficking is easy to spot, high concentrations of young men saddled with criminal justice records offer easy judicial prey, and the powerlessness of the residents gives broad latitude to repressive action. It is not the War on drugs per se, but the timing and selective deployment of that policy in a restricted quadrant located at the very bottom of social and urban space that has contributed to filling America's cells to bursting and has quickly "darkened" their occupants.

Yet, the doubling of the carceral population in ten years, and its tripling in twenty years after the mid-197os, seriously underestimates the real weight of penal authority in the new apparatus for treating urban poverty and its correlates. For those held behind bars represent only a quarter of the population under criminal justice supervision. If one takes account of individuals placed on probation on parole, more than five million Americans, amounting to 2.5 percent of the country's adult population, fell under penal oversight by 1995. In many cities and regions, the correctional administration and its extensions are the main if not the sole point of contact between the state and young black men from the deskilled lower class: as early as 1990, 40 percent of African American males age 18 to 35 in California were behind bars or on probation and parole; this rate reached 42 percent in Washington, D.C., and topped 56 percent in Baltimore.51 Thus, during the same period when the US state was withdrawing the protective net of welfare programs and fostering th generalization of subpoverty jobs at the bottom of the employment lad der, the authorities were extending a reinforced carceral mesh reaching deep into lower-class communities of color.

The financial transla.tion of this "great confinement" of marginality is not hard to imagine. As will be documented fully in chapter s, to implement its policy of penalization of social insecurity at the bottom of the socioracial structure, the United States massively enlarged the budget and personnel devoted to confinement, in effect ushering in the era of "carceral big government" just as it was decreasing its com mitment to the social support of the poor. While the share of national expenditures allocated to public

assistance declined steeply relati ve to need, federal funds for criminal justice multiplied by 5.4 between 1972 and 1990, jumping from less than $2 billion to more than $10 billion, while monies allotted to corrections proper increased elevenfold. The financial voracity of the penal state was even more unbridled at the state level. Taken together, the fifty states and the District of Colum-bia spent $28 billion on criminal justice in 1990, 8.4 times more than in 1972; during this stretch, their budgets for corrections increased twelvefold, while the cost of criminal defense for the indigent (who make up a rising share of those charged in court) grew by a factor of 24. To enforce the Violent Crime Control and Law Enforcement Act of 1994, which envisaged boosting the national carceral population from 925,000 to some 2.26 million over a decade, the US Congress forecast expenditures of $351 billion, including $100 billion just for building new custodial facilities—nearly twenty times the AFDC budget that year.[52] We shall see in chapter 4 that these predictions turned out to be rather accurate: a decade later the country had doubled its popula-tion under lock, and budgets for corrections were pushing counties and states deep into debt.

Incarceration in America thus expanded to reach an industrial scale heretofore unknown in a democratic society, and, in so doing, it spawned a fast-growing commercial sector for operators helping the state enlarge its capacity to confine, by supplying food and cleaning services, medical goods and care, transportation, or the gamut of activities needed to run a penal facility day-to-day. The policy of hyperincarceration even stimulated the resurgence and exponential expansion of *jails and prisons constructed and/or managed by private operators*, to which public authorities perpetually strapped for cells turned to extract a better yield out of their correctional budgets. Incarceration for profit concerned 1,345 inmates in 1985; ten years later, it covered 49,154 beds, equal to the entire confined population of France. The firms that house these inmates receive public monies against the promise of miser's savings, on the order of a few cents per capita per day, but multiplied by hundreds of thousands of bodies, these savings are put forth as justification for the partial privatization of one of the state's core regalian functions.[53] By the late 1990s, an import-export trade in inmates was flourishing among different members of the Union: every year Texas brings in several thousands convicts from neighboring states but also from jurisdictions as far away as the District of Columbia, Indiana, and Hawaii, in utter disregard of family visiting rights, and later returns them to their county of origin where they will be consigned on parole at the end of their sentence.

Returning Home . . . to Homelessness:

San Diego's Homeless Court Program Models Ways to Help

By Steve Binder and Amy Horton-Newell

Editor's Note: *The ABA Commission on Homelessness and Poverty is dedicated to establishing homeless courts and legal services at Stand Down events for homeless veterans. It offers free technical assistance. For more information, e-mail Commission Director Amy Horton-Newell at amy.hortonnewll@americanbar.org. or call her at (202) 662-1693.*

Image: Getty Images

Steve Binder

Amy Horton-Newell

Steve Binder (steve.binder@sdcounty.ca.gov) *is a deputy public defender with the San Diego Office of the Primary Public Defender. He cofounded San Diego's Homeless Court Program in 1989 and Veterans Treatment Review Calendar (now Veterans Court) in 2011. He is a special advisor and former chair to the ABA Commission on Homelessness and Poverty.*

Amy Horton-Newell (amy.hortonnewell@americanbar.org) *is director of the ABA Commission on Homelessness and Poverty and the Coordinating Committee on Veterans Benefits and Services.*

In 1989, it was not unusual for a homeless person in San Diego to carry a pocketful of 20 or more citations. One could also find a handful of people on the streets with 50 to 100 warrants for "disturbing the peace." The citations issued by police came to be seen as an indirect invitation to get out of town. In practice, the police and the homeless were engaged in a game of cat and mouse. The police would conduct a sweep of the streets in downtown San Diego, issue citations, and force the homeless into Balboa Park. In an effort to clear out the park, police would issue a new round of citations. And another round-robin of citations and movement would ensue.

The Regional Task Force on the Homeless for San Diego County estimates the City of San Diego is residence to more than 9,600 homeless people, fewer than half of whom are sheltered. And the Department of Housing and Urban Development (HUD) and the Department of Veterans Affairs (VA) estimate that nearly 42 percent of our nation's homeless veterans are located in the San Diego area. The cost of housing people in an emergency shelter bed is $5 a night for an average transitional shelter bed, while support services cost $40 a day. The cost of incarceration in the county jail is an estimated $90 a night. If mental health services are required, the cost of incarceration exceeds $400 a day.

By the late eighties, the police complained that the people they arrested were released after serving a few days in custody. Judges were frustrated with the backlog of cases and warrants that accumulated when defendants failed to appear for court. These same judges realized the futility of handing out sentences and issuing orders that would not be obeyed.

Homeless defendants often fail to appear in court, not because of a disregard for the court system, but because of their status and condition. They struggle daily for food, clothing, and shelter. They are not in a position to adhere to short-term guidelines. Not only does the daily struggle to survive inhibit participation in court, but the participants are also scared. The court orders and sentences result in fines they cannot pay and custody that ends with their release back to the streets in the same condition in which they started. Custody leaves them, society, and the court no better off than before they went in.

When homeless people did appear in court, they tried to explain to the judge the sorry set of circumstances that had taken them from families, homes, and jobs to sleeping in the dirty bedrolls that lay beside them in court. Some were articulate and educated and some were even working. Yet they still were unable to afford a rent deposit or a room. They would come before the court and walk away with a sentence that required them to pay a fine, perform public service work, or spend time in custody. They picked up their court orders at the clerk's office and walked back to the streets, adding legal burdens on top of their other troubles.

Not only did this approach affect the people experiencing homelessness, but the prosecutors, judges, and even the police were uncomfortable and frustrated with the futility of this revolving-door approach. A person who cannot afford a room to rent cannot afford a fine for being homeless. At the time, there were no alternatives. The criminal justice system had an established routine that unfortunately did not adequately meet the needs of this population with special issues.

All Rise: The First Homeless Court Session for Veterans

Early one Saturday morning in July 1989, three gray, concrete handball court walls housed justice. They were located on San Diego High School's athletic field. Desert military camouflage netting sheltered the court from the sun. The United States flag was anchored in one corner, the State of California's in the other. The defendants appearing before this outdoor court were veterans living on the streets of San Diego, but for three days they were sheltered in tents (each a community unto itself), and they received employment counseling, housing referrals, medical care, and other social services.

These services were supplied under the auspices of Stand Down, San Diego's annual three-day tent city designed to relieve the isolation of homeless veterans

while assisting their reentry into society. "Stand down" as a military term signifies the process of pulling exhausted soldiers from the field of battle and moving them to a place of relative safety to rest and recover before returning to fight. The yearly event provides comprehensive services for homeless veterans, including those related to employment, housing, medical needs, legal services needs (civil and criminal), physical and mental health treatment, and numerous other matters. But the event is more than a collection of services. Stand Down, founded by Vietnam veterans Jon Nachison and Robert Vankeuren and sponsored by Veterans Village of San Diego, concentrates on building community and developing the strengths of the participants as members of that community. The Stand Down slogan reads, "A Hand Up, Not a Handout."

At the conclusion of the first Stand Down in 1988, 116 of 500 homeless veterans (one in five) said their greatest need was to resolve outstanding criminal cases. The Homeless Court Program (HCP) evolved in response. It is a special session of the San Diego Superior Court held at Stand Down events for homeless veterans and in community rooms at local homeless service agencies to resolve criminal cases of participants already engaged in program rehabilitative activities. Initial referrals of participants to homeless court originate from homeless service agencies. The prosecution and defense review the cases before the court hearing. The court order for sentencing substitutes participation in agency programs for fines and custody. The HCP is designed for efficiency: the majority of cases are heard and resolved, and people are sentenced, in one hearing. The HCP combines a progressive plea bargain system, alternative sentencing structure, assurance of "no custody," and proof of program activities to address a full range of misdemeanor offenses and bring the individuals back into society.

In 1989, at the first HCP session on that warm Saturday in July, a lone man and his attorney stood before the judge. Together, they presented his cases and an advocacy packet of his accomplishments. The judge reviewed the packet. He asked a few questions of the participant. The judge resolved all his cases, reconciling his offenses with his accomplishments, ruling that the defendant had fulfilled all requirements of the court. At that moment, an audible gasp emanated from the assembled crowd filled with fellow participants, service providers, and the founders of Stand Down. Free to go, the veteran returned to the community.

The audible gasp was a collective recognition that the court had, not only the power to bring order to the streets, but also the power to affirm hard-fought accomplishments in treatment services that reclaim lives. After the first group of HCP participants returned to the larger encampment, a deluge of homeless veterans rushed the court to seek resolution of their cases. Before, they had feared the police arresting them and believed the hearing was staged for a sweep. Now, they approached the HCP voluntarily, seeking redemption from their past and their criminal cases.

Following this first homeless court, the San Diego court reported 130 defendants with 451 cases adjudicated through Stand Down. In the next 20 years, the HCP served an average of 196 veterans annually with 832 cases adjudicated each year. Those totals—3,920 veterans and 16,640 cases—speak to the power of the court to affect change, as well as to the deep-rooted desire and commitment of homeless veterans to fully participate in our communities.

Because of participants' increased demand, the HCP expanded beyond Stand Down. In 1990, it began to serve battered and homeless women; in 1994, it included residents at the city-sponsored cold-weather shelter; and by 1995, it encompassed the general homeless population served at local San Diego shelters. It went from a court that convened once a year at Stand Down to meeting quarterly, and since 1999, it has held monthly sessions. In addition to the session held at the annual Stand Down event for homeless veterans, the court alternates between two shelters (St. Vincent de Paul and Veterans Village of San Diego) in order to resolve outstanding misdemeanor criminal cases.

Currently, the HCP has been replicated across the United States at annual Stand

Down events, as well as monthly calendars in communities across the nation, including Ann Arbor and Detroit, Michigan; Albuquerque and Santa Fe, New Mexico; Houston, Texas; New Orleans, Louisiana; Phoenix and Tucson, Arizona; and one-third of the California courts.

Coordinating Homeless Court at Stand Down

Practically speaking, the HCP process at Stand Down is relatively straightforward. In the weeks leading up to the event, homeless service providers encourage homeless veterans to sign up for participation. The court clerks research and pull each participant's misdemeanor cases for review by the prosecution and ready the docket for resolution of these cases on site during the Stand Down event.

On the day before the actual court session at Stand Down, the prosecution and defense attorneys commence the disposition of cases at 8:30 a.m. When the participants arrive on the handball court to address their misdemeanor case or cases, the court clerks check them in, pull their cases, and deliver the court file to the defense. Due to budget constraints, participants are not able to sign up for court on site. However, defense attorneys counsel Stand Down participants to dispose of their case or cases and to sign an alternative sentencing agreement, directing them to the next day's HCP calendar. The court clerks generate court calendars to ensure a smooth court session the following day.

The defense attorneys review cases with participating veterans, formalize plea bargains, suggest or recommend terms and conditions of probation, and set matters for trial as appropriate. Problem cases (e.g., felonies, threat of custody, domestic violence) are counseled for a court date in the downtown courthouse. Those who may participate sign up for on-site programs designated for alternative sentencing, which facilitates compliance with the disposition of cases.

The participants who will have all of their cases dismissed and are not entering a plea to any charge or case move to the on-site "bail office" to receive a court minute order. On the day of the court session, the on-site proceedings are held from 9 a.m. until noon. The disposition of cases continues while court is in session. The court clerks prepare cases (negotiated pleas and further proceedings) for court and walk the participants into the handball court while the homeless court is in session. The court clerks set a future hearing/follow-up calendar in the courthouse for complicated cases and cases not heard during this Saturday session.

Why a Specialized Court for the Homeless?

To effect real change, we must meet people where they are. When you step outside the traditional judicial boundaries, you have more tools, greater access, and stronger responses from treatment providers, clients, and the community at large. When you reach out to the community, the community responds. There is great power in accentuating the positive.

The HCP is a positive antidote to the overall frustration and despair in our justice system and the sense that it is not working. For people who experience homelessness in particular, the sense is amplified that the system most certainly does not work for them and that it is not in place to help them improve their lives; rather, the sense is that it pushes them further outside of society. The HCP recognizes that homelessness is a deplorable condition and that it is the condition that is deplorable, not the person. A person participates voluntarily in reclaiming his or her life via job training, learning computer skills, or attending AA or NA meetings. He or she actively works to rejoin society. We may find it hard to change the world, but we can change one person's world in the course of HCP proceedings. Opening the door of justice and returning people to our communities promotes the individual and public safety.

HCP sessions have been held for 25 years. It is apparent that, when participants work with agency representatives to identify and overcome the causes of their homelessness, they are in a stronger position to successfully comply with court orders. The quality, not the quantity, of the participant's time spent in furtherance of the program is of paramount importance for the participant, the court, and society in general. Reliance on convictions and incarceration to solve social problems overlooks our collective

ability to overcome trauma through treatment, which is an HCP endeavor that ultimately enhances public safety by conducting review hearings and monitoring to ensure people respond to the challenges in their program activities.

The HCP challenges criminal justice practitioners, treatment providers, and participants to view their roles and behaviors in a different light. Stepping outside the adversarial system of the traditional court, these collaborative partners understand the value of working together as equal partners to address the underlying problems homelessness represents. The realities underlying any given criminal offense challenge us to grasp the complexities that led an individual to this act. The court order creates a nexus to an offense. The homeless service agency can reach beyond the offense, conduct assessments of the individual's social history, develop an action plan, and challenge each person to resolve the underlying problems that lead to interaction with the criminal justice system. And so, the initial criminal charge is actually a headline to a greater story.

Conclusion

While the ongoing problems homelessness represents are discouraging and frustrating, it is important to remember that it is the condition of homelessness that is undesirable, not the people who are homeless. Homeless participants who successfully complete the HCP are living examples that people can overcome hardship and challenges, address problems that led to homelessness, and reclaim their lives. The HCP strengthens community and brings law to the streets, the court to providers, and homeless people back into society. ◆

Distinctions between a Traditional Court and Homeless Court

In San Diego, the traditional court sentence for a public nuisance offense is a fine of $300. A defendant receives a $50 "credit" against a fine for every day spent in custody. The defendant who spends two days in custody receives credit for a $100 fine. To satisfy a fine of $300, the court requires that a defendant spend six days in custody. Thirty days in custody is the equivalent of a $1,500 fine. The court might convert this fine to six days of public service work or the equivalent time in custody.

The traditional punishment for a petty theft is one day in custody (for book and release), $400 in fines, victim restitution, and an eight-hour shoplifter course. A defendant convicted of being under the influence of a controlled substance for the first time faces a mandatory 90 days in custody or the option of completing a diversion program. The diversion program includes an enrollment orientation, 20 hours of education (two hours a week for 10 weeks), individual sessions (biweekly for three months, 15 minutes each), drug testing, weekly self-help meetings, and an exit conference.

By the time typical participants stand before an HCP judge, they have already been in a homeless service program for at least 30 days (from the initial point of registration to the hearing date). By this point, their level of activities in the program or a service agency exceeds the requirements of the traditional court order. While the program activities vary from one agency to another, they usually involve a greater time commitment than traditional court orders and greater introspection on the part of their participants. Program staff ensure that the homeless participants are already successful in their efforts to leave the streets before they enter the courtroom. These individuals are on the right track before they meet the judge at the HCP.

Karen Garcia, CARE Court will change how California addresses serious, untreated mental illness. Here's how, LA Times, Sept. 15, 2022

California has a new statewide approach to treatment for people struggling with serious mental illness: the CARE Court.

The program connects people in crisis with a court-ordered treatment plan for up to two years, while diverting them from possible incarceration, homelessness or restrictive court-ordered conservatorship.

Gov. Gavin Newsom signed the measure (Senate Bill 1338) into law Wednesday. Because it does not go into effect immediately, however, most California counties will not see the program's implementation until 2024.

The law takes a phased-in approach, with Glenn, Orange, Riverside, San Diego, Stanislaus, Tuolumne and San Francisco counties implementing the program by October 2023. The remaining counties are required to start the program no later than December of the following year.

How will CARE Court work?

To initiate a treatment plan, a family member, behavioral health provider or first responder petitions a judge to order an evaluation of an adult with an untreated psychotic disorder (such as schizophrenia) who is in severe need of treatment and, in some cases, housing. A court may also start the program by referring a person from assisted outpatient treatment, conservatorship proceedings or misdemeanor proceedings to a CARE treatment plan.

The judge then orders a clinical evaluation and appoints legal counsel and a volunteer CARE supporter. The supporter would help a CARE recipient understand the options available in the program so the recipient can make decisions with as much autonomy as possible.

If the person meets the criteria, the judge then orders a series of hearings and the development of an individualized CARE plan that's appropriate culturally and linguistically.

The plan — developed by county behavioral health professionals, the individual and the volunteer supporter — can include behavioral health treatment, medication, substance abuse treatment, social services and housing specific to the individual's needs.

If needed the court may issue orders necessary to support the CARE recipient in accessing housing and services, including imposing sanctions on providers and local government agencies if they fail to provide court-ordered services or treatment.

Throughout this process, the court will hold status hearings as needed to check in with the recipient and review the progress made, the services provided, any issues the person might be experiencing with the program and recommendations for making the plan more successful.

People who graduate from the program will remain eligible for ongoing treatment, supportive services, and housing in the community to support long-term recovery.

Who is eligible for this program?

The CARE Court program is for individuals diagnosed with schizophrenia spectrum disorder or other psychotic ailments in that class, as defined by the current edition of the Diagnostic and Statistical Manual of Mental Disorders.

A person struggling with these mental health challenges must also be 18 years old or older and not currently stabilized by treatment. In addition, the person must be deteriorating substantially and "unlikely to survive safely in the community without supervision," or at risk of a relapse or deterioration that would result in "grave disability or serious harm to the person or others."

This program may be an appropriate step for someone who has experienced a short-term involuntary hospital hold (either 72 hours or 14 days) or who can be safely diverted from certain criminal proceedings.

Is this program voluntary?

Although participation in CARE plans is voluntary, a court can draw up a plan for a qualified individual without that person's consent, and a judge can order housing and other services for that person. Some critics of the program, including the ACLU and Human Rights Watch, argue that it's coercive to force people into court proceedings as a way to provide treatment.

February 11, 2024 | Miami Herald, The (FL) | Brittany Wallman, Miami Herald

This could be the year Miami-Dade County makes history, opening a center for treating and helping — instead of incarcerating — people with mental illness. It is thought to be the first of its kind in the nation.

But delay upon delay upon delay — so much bureaucracy it's hard to blame any one thing — mean that the planned Miami Center for Mental Health and Recovery is slated to open some 20 years after it first was promised.

Many of those who will be helped are chronically **homeless**. Most have been diagnosed with schizophrenia, or bipolar disorder. Many abuse drugs or alcohol. All of them find themselves in and out of jail, at great cost to taxpayers, after being accused of committing non-violent crimes. They're largely invisible to society, except when they cause problems.

An alternative to jail, the center will be a place judges can send non-violent defendants accused of misdemeanors or low-level felonies instead of locking them up. Police could take potential arrestees there instead of booking them in to the jail.

Offering the gamut of services a person might need to turn their life around, the center represents a starkly more humane approach than the neglectful, abusive treatment federal authorities documented in Miami-Dade jails as recently as 2011.

If it opens this year, the center will be the crowning achievement of Judge Steven Leifman's career. The 65-year-old Miami-Dade associate administrative judge retires from the county bench next January. Leifman has worked since his earliest days as a judge to reverse what he saw as an illogical, inhumane approach to handling arrestees with mental illness.

Screen Shot 2024-02-08 at 4.12.40 PM (1).pngThe Herald's reporting from the early 2000s gave an apocalyptic view of life on the ninth floor of the county jail.

It's a predicament no jurisdiction has solved, and mistakes can be deadly. On any given day in America, jails are filled with suspects with mental illness. Because of their chronic condition, they may not be safely mixed with the general jail population.

And simply cycling them in and out of jail is a waste of public money — and of human lives, Leifman said.

"No one's getting better. They don't get better in jail," Leifman said. "You have a chance to break that horrible cycle. ... You have a chance to help people recover."

Decades of plodding

Some 20 years ago, Miami-Dade voters approved a $2.9 billion "Building Better Communities" bond program for, among many other things, the center that still hasn't opened. It's at 2200 NW Seventh Ave. in Miami, a renovation of the building formerly housing a state lockup for restoring mental competency to accused felons awaiting trial.

A county list of projects said the center would free up jail space and provide a more effective way to "house the mentally ill as they await a trial date."

While progress stalled on the center, the underlying practices championed by Judge Leifman have taken root since then: non-violent suspects with mental illness or substance use disorders can be diverted from jails and connected with support services in the community. A national expert in decriminalizing mental illness, Leifman travels the country sharing "the Miami model."

MIA_109MIAMIMENTAL00NEWPPPConsultant John W. Dow, far left, and Judge Steve Leifman, center, lead a tour of the not-yet-opened Miami Center for Mental Health and Recovery at 2200 NW Seventh Ave..

But the new, 208-bed center will offer everything under one roof. Clients will get help accessing benefits they qualify for, receive optical, dental, medical and psychiatric care, appear in the facility's courtroom when necessary, detox from substances, quit smoking, have unfortunate tattoos removed, work with dogs in an on-site kennel, learn culinary job skills and receive help getting permanently stabilized. All in a seven-story, renovated state building near west Wynwood that will serve an estimated 9,000 clients a year.

A 2020 documentary entitled The Definition of Insanity about Leifman and the mental health project, narrated by director/actor Rob Reiner, premiered at the Miami Film Festival and was aired nationally on PBS.

"It's a humane, science-based concept," said retired Circuit Judge Jeri Beth Cohen, president of the board for the Miami Foundation for Mental Health.

A shameful past

Though Miami-Dade is now seen as progressive in diverting some mentally arrestees with mental illness away from jail cells, the county's past is dark.

A 1984 headline in the Miami Herald blared "Study: Dade fails with insane criminals."

The story, by legendary cops beat writer Edna Buchanan, led with a mentally sick robber and killer who had "18 arrests, 918 days in jail, 112 court appearances, 20 psychiatric evaluations and 1,033 days of treatment in state hospitals."

He was, according to the report, "a perfect example of the failure of Dade County's justice system to deal with incompetent and insane criminals."

Screen Shot 2024-02-08 at 4.07.31 PM.pngA Miami Herald story from 1984 about the county's failure to treat inmates with mental illnesses.

A citizen-led investigation, by activist Renee Turolla, had exposed the failures in a 400-page report that was followed by heavy news coverage.

A Dade grand jury picked up on it, peering into what it described as "the trail of the mentally ill from the street, to the jail, to court, to state hospitals, back to court and then back onto the street, only to retrace these steps again."

The grand jury in 1985 concluded that with proper care, these arrestees "would have a real chance for success," and the costs would be lower than repeatedly jailing or hospitalizing them.

Among the recommendations was a residential treatment facility.

Twenty-three years later, in 2008, conditions in Miami-Dade County jails were still so dismal for people with mental illness, the federal Department of Justice launched a three-year investigation.

Jail guards routinely physically abused inmates, the report said. Suicidal inmates were treated with such disregard that they did indeed die in their cells. Detainees were "routinely subject to discipline" for behavior that was symptomatic of their illness.

"[Miami-Dade Corrections and Rehabilitation's] deliberate indifference to protecting the Jail's prisoners from harm is a systemic failure," the report said.

In 2013, the county agreed to a slew of corrective actions, under a federal DOJ consent decree, including a renewed promise to build the mental health facility.

Judge Leifman, who'd been pressing for the facility for years by then, was quoted: "It's time that we change

the way we've been dealing with this problem. This is an excellent step in the right direction."

Last fall, the DOJ announced that Miami-Dade's jail system is mostly in compliance with the consent decree, and can be removed from federal oversight next year if the reforms are maintained.

MIA_20240124AD2469STATEOFTH'We might not be saving money just yet, but we're saving lives,' Miami-Dade Mayor Daniella Levine Cava said.

Neighboring Broward County, whose jail system also has been subject to consent decree monitoring, is facing similar issues, struggling with how to properly care for inmates with mental illness. On Jan. 29, the president of the national NAACP asked for a federal investigation into a reported 21 deaths in Broward jails since 2021, many of them committing suicide.

'It's going to cost'

Initially, there will be no savings, Leifman and Miami-Dade County Mayor Daniella Levine Cava conceded.

To the contrary, there will be startup costs — amounts Leifman, Levine Cava and others said were still in discussion and can't be revealed.

"We might not be saving money just yet, but we're saving lives," the mayor said.

She said the Miami-Dade County Commission will vote in February or March on a budget to operate the center, and on contracts with Jackson Health System and the Advocate Program, which is now slated to operate the facility.

Plans for Thriving Mind South Florida to operate the center collapsed when Thriving Mind withdrew, citing the lack of plans or a budget, CEO Dr. John W. Newcomer said in a written response to the Miami Herald.

Thriving Mind did agree to complete the building's $51.1 million renovation — paid for by Miami-Dade County and Jackson Health System. A temporary certificate of occupancy was granted Dec. 22, Newcomer said. The building was turned over to the county on Jan. 26.

But when?

Whether the Miami Center for Mental Health and Recovery will open its doors in 2024 is an unsettled question.

A published report in July 2019 quoted Leifman predicting an opening in 18 months. A county report in July 2020 put the project completion at June 2023. In a grant application in 2021, the county said it would be "opening in early 2022." News coverage last year had it opening in six months.

Levine Cava now predicts an opening "within the year." Leifman said it would likely be November. CEO Isabel Perez-Moriña of the Advocate Program said it would likely open by year's end.

One thing is agreed upon, though.

Each client, upon admission to the center, will have his or her feet washed, said Leifman, who borrowed the idea from a program for the **homeless** in Boston.

The gesture, an act of humanity and, for the foot-washer, humility, will set the tone, Leifman said.

"We want people to know they're welcome here," Leifman said. "Many of them have learned helplessness. They've given up because the system is so bad. Half of them don't care if they breathe, anyway. That's why the feet washing is so important."

At the labyrinthine mid-rise a bit north of Jackson Memorial Hospital, Leifman led his umpteenth tour on a recent Monday, asking criminal justice and social work faculty from Florida Atlantic University how they might collaborate.

"You have to be persistent," he said to the group. "Everyone talks about change, but no one wants to do it. It's hard. It takes time. But trust me, this is well worth it."

Staff writer Douglas Hanks contributed to this report.

CalHHS
California Health & Human Services Agency

Community Assistance, Recovery, and Empowerment (CARE) Act

The CARE Act ensures mental health and substance use disorder services are provided to the most severely impaired Californians who too often languish – suffering in homelessness or incarceration – without the treatment they desperately need.

CARE IS A NEW APPROACH AND A PARADIGM SHIFT

CARE is an upstream diversion that prevents more restrictive conservatorships or incarceration for people with schizophrenia spectrum or other psychotic disorders, and is based on evidence which demonstrates that many people can stabilize, begin healing, and exit homelessness in less restrictive, community-based care settings. With advances in treatment models, new longer acting antipsychotic treatments, and the right clinical team and housing supports, CARE works to help individuals who are experiencing a mental health crisis before they get arrested and committed to a State Hospital or placed in a Lanterman-Petris-Short (LPS) Mental Health Conservatorship.

CARE PROCESS

The CARE process begins with a petition to the Court from family members, behavioral health providers, or other parties specified in the CARE Act that have a relationship to the individual with untreated schizophrenia spectrum or other psychotic disorders. The Court reviews this petition and appoints a legal counsel to the individual, as well as a voluntary supporter chosen by the individual, if desired, to help the participant understand, consider, and communicate decisions throughout the CARE process.

If the individual is determined by the Court to meet the CARE criteria (as specified in Section 5972) and refuses to voluntarily engage in services, the Court orders development of a CARE plan. The CARE plan is developed by the county behavioral health agency together with the participant and their legal counsel and voluntary supporter, and focuses on the specific needs of the individual by ensuring access to a coordinated set of clinically appropriate, community-based services and supports that are culturally and linguistically

(rev 10/17)

competent. CARE plans may include provision of short-term stabilization medication, wellness and recovery supports, and connection to social services such as housing that are often not provided to this vulnerable population. The Court reviews and adopts the CARE plan with both the participant and county behavioral health as party to the Court order for up to 12 months.

Once the CARE plan is adopted, the county behavioral health agency and other providers begin treatment to support the recovery and stability of the participant. Progress on these treatments is regularly monitored by the Court, and the CARE plan may be revised or extended by up to 12 months.

Once an individual completes the requirements of the CARE plan, they remain eligible for ongoing treatment, supportive services, and housing in the community to support a successful transition and long-term recovery. The individual may also elect to execute a Psychiatric Advance Directive at this time, allowing them to document their preferences for treatment in advance of potential future mental health crisis.

ACCOUNTABILITY IN CARE GOES BOTH WAYS

If a participant cannot successfully complete a CARE plan, the Court may utilize existing authority under the LPS Act to ensure the participants safety.

However, the CARE Act also holds local governments accountable for using the variety of robust funding streams available to counties today to provide care to the people who need it. These funding sources include nearly $10 billion annually for behavioral health care and over $14 billion in state funding that has been made available over the last two years to address homelessness. Participants must also be prioritized for any appropriate bridge housing funded by the Behavioral Health Bridge Housing program, which provides $1.5 billion in funding for transition housing and housing support services. If local governments do not meet their specified responsibilities under the Court-ordered CARE plans, the Court will have the ability to order sanctions and, in extreme cases, appoint an agent to ensure services are provided.

CARE REQUIRES COMMUNITY ENGAGEMENT AND INPUT

Successful implementation of the CARE Act requires deep engagement with the community to ensure that it is built with Californians and not for them. In the coming months, we will engage a broad set of stakeholders to help shape implementation and ensure that CARE delivers meaningful results for some of our most vulnerable neighbors.

> We call on organizations and individuals alike to engage with us as CARE is implemented. Make sure to sign up for our listserv to receive information and notifications by e-mailing **CAREAct@chhs.ca.gov**.

CalHHS
California Health & Human Services Agency

CARE FAQ

Community Assistance, Recovery, and Empowerment (CARE) Act

Updated based on the enacted law SB 1338

What is CARE?

The CARE Act will ensure mental health services are provided to the most severely impaired Californians who too often languish without the treatment they desperately need.

CARE goes upstream to divert and prevent more restrictive conservatorships or incarceration. It connects a person in crisis with a court-ordered CARE plan or agreement for up to 12 months, with the possibility to extend for an additional 12 months.

A new approach is needed to act earlier and to provide support and accountability for individuals with severe untreated mental illnesses as well as for local governments responsible for providing behavioral health services. Through California's civil courts earlier action, support, and accountability is provided through the CARE process.

CARE provides individuals with clinically appropriate community-based services and supports that are trauma-informed and culturally and linguistically competent, including stabilization medications, wellness and recovery supports, and connection to social services and housing.

Advances in treatment models such as new longer acting antipsychotic treatments, along with the right clinical team and housing plan, can successfully stabilize and support individuals in the community who have historically suffered tremendously on the streets or during avoidable incarceration.

What are the Criteria for Participation in CARE?

CARE is NOT for everyone experiencing homelessness or mental illness; CARE focuses on people with schizophrenia spectrum or other psychotic disorders who meet specific criteria described below. The CARE process is intended to be the least restrictive alternative to help these individuals before they are committed to a State Hospital or become so impaired that they end up in an involuntary Lanterman-Petris Short (LPS) Mental Health Conservatorship.

To be eligible, a person must meet the following criteria:

- Is 18 years of age or older.
- Is currently experiencing a severe mental illness, as defined in paragraph (2) of subdivision (b) of Section 5600.3, and has a diagnosis identified in the disorder class: schizophrenia spectrum and other psychotic disorders, as defined in the most current version of the Diagnostic and Statistical Manual of Mental Disorders. This section does not

establish respondent eligibility based upon a psychotic disorder that is due to a medical condition or is not primarily psychiatric in nature, including, but not limited to, physical health conditions such as traumatic brain injury, autism, dementia, or neurologic conditions. A person who has a current diagnosis of substance use disorder as defined in paragraph (2) of subdivision (a) of Section 1374.72 of the Health and Safety Code, but who does not meet the required criteria in this section shall not qualify for the CARE process.

- Is not clinically stabilized in on-going voluntary treatment.
- At least one of the following is true:

  (1) The person is unlikely to survive safely in the community without supervision and the person's condition is substantially deteriorating.

  (2) The person is in need of services and supports in order to prevent a relapse or deterioration that would be likely to result in grave disability or serious harm to the person or others, as defined in Section 5150.

- Participation in a CARE plan or CARE agreement would be the least restrictive alternative necessary to ensure the person's recovery and stability.
- It is likely that the person will benefit from participation in a CARE plan or CARE agreement.

How do the CARE Proceedings Work?

Referral/ Petition Process

CARE proceedings begin with a petition filed by a family member, roommate, first responder, provider/clinician, public guardian, authorized representative of the county behavioral health services, adult protective services, Indian health services/ tribal courts, or the respondent. The petition is a presentation of facts supporting the petitioner's assertion that the individual meets the criteria described above.

The court may also refer respondents to CARE proceedings from assisted outpatient treatment, conservatorship proceedings, or misdemeanor proceedings pursuant to Section 1370.01 of the Penal Code.

CARE Proceedings

Once a petition is filed, the court promptly reviews the petition to determine if a respondent meets, or may meet, the criteria for CARE. If not, the matter is dismissed.

If the petition is not dismissed, the court orders the county to investigate and submit a written report within 14 days with a determination as to whether the respondent meets, or is likely to meet, CARE criteria. The written report must also include conclusions and recommendations regarding the respondent's ability to voluntarily engage in treatment and services. Counties may be granted an additional 30 days to submit this report if they are making progress to engage the respondent.

If the respondent voluntarily agrees to receive services, or if there is insufficient evidence that the respondent meets the CARE criteria, the case is dismissed. If the respondent is likely to meet the CARE criteria and does not engage in services voluntarily, the court will set an initial appearance on the petition within 14 days.

Before the initial appearance, the court appoints counsel for the respondent and orders the county to provide notice of the hearing to the petitioner, respondent, counsel, and county behavioral health.

The petitioner as well as a representative from the county behavioral health agency must be present at the initial appearance, but the respondent may waive personal appearance and appear through counsel.
A tribal representative may also be present if applicable.

If the petitioner is not the county behavioral health agency, the court will relieve the petitioner and appoint the county behavioral health agency as the substitute petitioner. A petitioner who is relieved can make a statement at the hearing on the merits of the petition. If the petitioner is a family member or roommate and the respondent consents, the court may assign ongoing rights of notice and allow for continued participation and engagement in the respondent's CARE proceedings.

A hearing on the merits of the petition is scheduled within 14 days of the initial appearance, at which time the court will determine if the respondent meets CARE criteria. If the court finds that the respondent meets the CARE criteria, the court will order the county behavioral health agency to work with the respondent, respondent's counsel, and the voluntary supporter to engage in behavioral health treatment and enter into a CARE agreement, which is a voluntary settlement agreement entered into by the parties.

Within 14 days, a case management hearing will determine if the parties have entered, or are likely to enter, into a CARE agreement. If so, the court will approve or modify the terms of the agreement and set a progress hearing for 60 days.

If not, the court will order the county behavioral health agency, through a licensed behavioral health professional, to conduct a clinical evaluation of the respondent, unless there is an existing clinical evaluation of the respondent completed within the last 30 days and the parties stipulate to the use of that evaluation.

During the clinical evaluation hearing, the county will present its findings from the clinical evaluation, and the respondent will have an opportunity to address the court in response to the evaluation. If the court finds that the respondent meets the CARE criteria, the court will order the county behavioral health agency, the respondent, and the respondent's counsel to jointly develop and submit to the court a CARE plan within 14 days.

During the CARE plan review hearing, the court reviews the proposed CARE plan and listens to all parties involved and will adopt the elements of the CARE plan that support the recovery and stability of the respondent. The court may issue any orders necessary to support the respondent in accessing appropriate services and supports, including prioritization for those services and supports, subject to applicable laws and available funding. The evaluation and all reports, documents, and filings submitted to the court shall be confidential.

Once the court approves the CARE plan, the CARE timeline begins for up to one year. The court will have status review hearings not less frequently than 60-day intervals throughout the implementation of the CARE plan. Status review hearings will provide the following information:

- Progress the respondent has made on the CARE plan.
- What services and supports in the CARE plan were provided, and what services and supports were not provided.
- Any issues the respondent expressed or exhibited in adhering to the CARE plan.
- Recommendations for changes to the services and supports to make the CARE plan more successful.

Graduation

The court will hold a one-year status hearing in the 11th month of the CARE

process to determine whether to graduate the respondent from CARE or reappoint the respondent to the program for one more year.

The respondent may elect to continue to in the program or to be graduated from the program. If they respondent elects to be graduated, the court orders the creation of a graduation plan and schedules a graduation hearing in the 12th month. Upon successful completion and graduation by the court, the participant remains eligible for ongoing treatment, supportive services, and housing in the community to support long term recovery.

If a respondent elects to remain in CARE, the respondent may request any amount of time, up to and including one additional year. The court may permit the ongoing voluntary participation of the respondent if the court finds both of the following:

- The respondent did not successfully complete the CARE plan.
- The respondent would benefit from continuation of the CARE plan.

The court will issue an order permitting the respondent to continue in the CARE plan or deny the respondent's request to remain in the CARE plan, and state its reasons on the record.

A respondent may be involuntarily reappointed to CARE only if the court finds that the individual did not successfully complete the CARE process, all services and supports required through CARE process were provided, the respondent will benefit from continuation in CARE, and the respondent currently meets criteria. Reappointment to CARE can only be once and up to one additional year.

How is Self-Determination Supported in CARE?

Supporting a self-determined path to recovery and self-sufficiency is core to CARE. Each respondent is offered legal counsel and may choose a volunteer supporter in addition to their full clinical team. The role of the supporter is to help the respondent understand, consider, and communicate decisions to ensure the respondent is able to make self-directed choices to the greatest extent possible.

The Department of Health Care Services, in consultation with disability rights groups, county behavioral health and aging agencies, individuals with lived expertise, families, racial justice experts, and other appropriate stakeholders shall provide optional training and technical resources for volunteer supporters on the CARE process, community services and supports, supported decision-making, people with behavioral health conditions, trauma-informed care, and psychiatric advance directives.

The CARE plan ensures that supports and services are coordinated and focused on the individual needs of the respondent. A Psychiatric Advance Directive provides further direction on how to address potential future episodes of a mental health crisis that are as consistent as possible with the expressed interest of the respondent.

Why doesn't CARE include all Behavioral Health Conditions?

CARE is meant for people with a focused diagnosis that is both severely impairing and highly responsive to treatment, including stabilizing medications. Broader behavioral health redesign is being led by the Administration, so all Californians have easy access to high quality and culturally responsive behavioral health care. This includes expansion of behavioral health

capacity through treatment and workforce infrastructure improvements and reducing fragmentation in the behavioral health system.

What does a Respondent in CARE Receive?

CARE provides respondents with a clinically appropriate, community-based set of services and supports that are culturally and linguistically competent. This includes short-term stabilization medications, wellness and recovery supports, and connection to social services and housing. Respondents will also be provided with legal representation for court proceedings.

What Housing is Available to a Respondent in CARE?

Housing is an important component to CARE, since finding stability and staying connected to treatment is next to impossible while living outdoors, in a tent or a vehicle. Respondents served by CARE will need a diverse range of housing, including clinically enhanced interim or bridge housing, licensed adult and senior care facilities, supportive housing, or housing with family and friends. The court may issue orders necessary to support the respondent in accessing housing, including prioritization for these services and supports.

In the 2021 Budget Act, the state made a historic $12 billion investment to prevent and end homelessness, included funding for new community based residential settings and long-term stable housing for people with severe behavioral health conditions. Additionally, the 2022- 2023 budget includes $1.5 billion to support Behavioral Health Bridge Housing, which will fund clinically enhanced bridge housing settings that are well suited to serving CARE respondents. CARE respondents will be prioritized for any appropriate bridge housing funded by the Behavioral Health Bridge Housing program.

What is meant by Court-ordered Stabilization Medications?

Stabilization medications may be included in the CARE plan. Court-ordered stabilization medications cannot be forcibly administered. Seeking an involuntary medication order for a respondent would be outside the proceedings and subject to existing law.

Stabilization medications would be prescribed by the treating licensed behavioral health care provider, and medication management supports will be offered by the care team. The treating behavioral health care provider will work with the respondent to address medication concerns and make changes to the treatment plan as necessary.

Stabilizing medications will primarily consist of antipsychotic medications, which are evidence-based treatments to reduce the symptoms of hallucinations, delusions, and disorganization that cause impaired insight and judgment in individuals living with schizophrenia spectrum and other psychotic disorders. Medications may be provided as long-acting injections which reduce the day-to-day adherence challenges many people experience with daily medications.

What if a Respondent does not Participate in the Court-ordered CARE plan?

A respondent who does not participate in the court-ordered CARE plan may be subject to additional court hearing(s). If a respondent cannot successfully complete a CARE plan, the respondent may be

terminated from the CARE proceedings. They will still be entitled to all services and supports for which they are eligible. The Court may utilize existing authority under the LPS Act to ensure the respondents safety. The court will notify the county behavioral health agency and the Office of the Public Conservator and Guardian if the court utilizes that authority.

If the respondent was provided all the services and supports in the CARE plan, the respondents failure to participate in the CARE process will be considered in any subsequent hearings under the LPS Act that occur within 6 months, and shall create a presumption at that hearing that the respondent needs additional intervention beyond the supports and services provided by the CARE plan.

What if a Local Government does not Provide the Court-ordered CARE plan?

If the court finds that the county or other local government entity is not complying with court orders, the court will report that finding to the presiding judge of the superior court. If the presiding judge finds that the local government entity has substantially failed to comply, the presiding judge may issue an order imposing a fine up to one thousand dollars ($1,000) per day, not to exceed $25,000 for each individual violation.

Fines collected will be deposited in the CARE Act Accountability Fund and will be used to support the efforts of the local government entity that paid the fines to serve individuals who have schizophrenia spectrum or other psychotic disorders and who are experiencing, or are at risk of, homelessness, criminal justice involvement, hospitalization, or conservatorship.

If the court finds that the local government entity is persistently noncompliant, the presiding judge may appoint a receiver to secure court-ordered care for the respondent at the local government entity's cost. The court will consider whether there are any mitigating circumstances impairing the ability of the local government entity to fully comply with court orders, and whether they are making a good faith effort to comply.

How is CARE funded?

County behavioral health agencies are responsible for Medi-Cal Specialty Mental Health Services, substance use disorder treatment, and community mental health services.

Most respondents in CARE will be Medi-Cal beneficiaries or eligible for Medi-Cal.

For a respondent who has commercial insurance, CARE requires that a health plan reimburse the county for eligible behavioral health care costs.

Existing funding sources for CARE-related services and supports include nearly $10 billion annually for behavioral health care, including the Mental Health Services Act and behavioral health realignment funds. Additionally, various housing and clinical residential placements are also available to cities and counties, including over $14 billion in state funding that has been made available over the last two years to address homelessness. CARE process participants will be prioritized for any appropriate bridge housing funded by the Behavioral Health Bridge Housing program which provides $1.5 billion in funding for housing and housing support services.

In addition, the state will provide funding for technical assistance, data and evaluation, legal representation for the respondent, and funding to support court and county administration.

How will CARE be Evaluated?

The Department of Health Care Services (DHCS) will produce an annual CARE Act report which will include information on the effectiveness of CARE in improving outcomes and reducing disparities, homelessness, criminal justice involvement, conservatorships, and other outcomes as specified by law. The annual report will include measures to examine the impact and monitor the performance of CARE implementation. Data in the report will be stratified by age, sex, race, ethnicity, languages spoken, disability, sexual orientation, gender identity, health coverage source, and county, to the extent statistically relevant data is available.

DHCS will also contract with an independent, research-based entity to conduct an evaluation of the effectiveness of CARE. The independent evaluation shall highlight racial, ethnic, and other demographic disparities, and include causal inference or descriptive analyses regarding the impact of CARE on disparity reduction efforts.

DHCS will provide a preliminary report to the Legislature three years after the implementation date of the CARE Act and a final report to the Legislature five years after the implementation date of the CARE Act.

How will the State support Implementation?

CalHHS will convene a working group to provide coordination and on-going engagement with, and support collaboration among, relevant state and local partners and other stakeholders during implementation of CARE. The working group shall meet no more than quarterly and end no later than December 2026.

Will CARE be Available Statewide and When?

Yes—all counties will participate in CARE through a phased-in approach. The first cohort of counties to implement the CARE Act include the counties of Glenn, Orange, Riverside, San Diego, Stanislaus, Tuolumne, and San Francisco. This cohort will be required to implement the CARE Act by October 1, 2023, with all remaining counties to begin implementation by October 1, 2024, unless the county is granted additional time by DHCS. Counties will not have an option to opt-out.

Plans will include housing. Individuals who are served by CARE will have diverse housing needs on a continuum ranging from clinically enhanced interim or bridge housing, licensed adult and senior care settings, supportive housing, to housing with family and friends.

Various housing and clinical residential placements are also available to cities and counties, including over $14 billion in state funding that has been made available over the last two years to address homelessness. CARE process participants will also be prioritized for any appropriate bridge housing funded by the Behavioral Health Bridge Housing program, which provides $1.5 billion in funding for housing and housing support services.

CalHHS
California Health & Human Services Agency

CARE Court FAQ

A New Framework for Community Assistance, Recovery, and Empowerment

1. What is CARE Court?

CARE Court is a proposed framework to deliver mental health and substance use disorder services to the most severely impaired Californians who too often languish – suffering in homelessness or incarceration – without the treatment they desperately need.

It connects a person in crisis with a court-ordered CARE Plan for up to 12 months, with the possibility to extend for an additional 12 months. The framework provides individuals with a clinically appropriate, community-based set of services and supports that are culturally and linguistically competent. This includes court-ordered stabilization medications, wellness and recovery supports, and connection to social services and housing.

2. How is self-determination supported in the CARE Court model?

Supporting a self-determined path to recovery and self-sufficiency is core to CARE Court, with a Public Defender and a newly established CARE Supporter for each participant in addition to their full clinical team.

The role of the CARE Supporter is to help the participant understand, consider, and communicate decisions, giving the participant the tools to make self-directed choices to the greatest extent possible. The CARE Plan ensures that supports and services are coordinated and focused on the individual needs of the person it is designed to serve.

The creation of a Psychiatric Advance Directive further provides direction on how to address potential future episodes of impairing illness that are consistent with the expressed interest of the participant and protect against negatives outcomes such as involuntary hospitalization.

3. What are the criteria for participation in CARE Court?

CARE Court is NOT for everyone experiencing homelessness or mental illness; rather it focuses on people with schizophrenia spectrum or other psychotic disorders who meet specific criteria – before they get arrested and committed to a State Hospital or become so impaired that they end up in a Lanterman-Petris-Short (LPS) Mental Health Conservatorship. Although homelessness has many faces in California, among the most tragic is the face of the sickest who suffer from treatable mental health conditions—this proposal aims connect these individuals to effective treatment and support, mapping a path to long-term recovery.

(rev 6/22)

4. What is the purpose of CARE Court?

CARE Court aims to deliver behavioral health services to the most severely ill and vulnerable individuals, while preserving self-determination and community living.

CARE Court is an upstream diversion to prevent more restrictive conservatorships or incarceration; this is based on evidence which demonstrates that many people can stabilize, begin healing, and exit homelessness in less restrictive, community-based care settings. With advances in treatment models, new longer acting antipsychotic treatments, and the right clinical team and housing plan, individuals who have historically suffered tremendously on the streets or during avoidable incarceration can be successfully stabilized and supported in the community.

CARE Court may be an appropriate next step after a short-term involuntary hospital hold (either 72 hours/5150 or 14 days/5250), an arrest, or for those who can be safely diverted from a criminal proceeding. Remote or virtual proceedings may be especially effective for CARE Court participants.

5. Is CARE Court a conservatorship?

No, it seeks to prevent the need for conservatorship by intervening prior to the need for such restrictive services and providing shorter-term court ordered, community-based care with Supportive Decision Making.

Current Lanterman-Petris-Short (LPS) Act Mental Health conservatorship is rarely timely, difficult to have granted, establishes a substitute decision maker for the person, and typically relies on locked placements as a first line intervention.

6. What does a participant in CARE Court receive?

The framework provides individuals with a clinically appropriate, community-based set of services and supports that are culturally and linguistically competent. This includes short-term stabilization medications, wellness and recovery supports, and connection to social services and housing. Housing is an important component—finding stability and staying connected to treatment, even with the proper supports, is next to impossible while living outdoors, in a tent or a vehicle.

Each participant will also be provided a new, designated CARE Supporter to assist with Supported Decision Making for the CARE Plan, the creation of a Psychiatric Advance Directive, and a "graduation" plan for recovery and wellness post-CARE Court. The role of the CARE Supporter is to help the participant understand, consider, and communicate decisions, giving the participant the tools to make self-directed choices to the greatest extent possible. Participants will also have a designated court appointed attorney, for court proceedings.

7. How does CARE Court work?

Referral: The first step is a petition to the Court, by a family member, behavioral health provider, first responder, or other approved party to provide care and prevent institutionalization.

Clinical Evaluation: The civil court orders a clinical evaluation after a reasonable likelihood of meeting the criteria is found. Court appoints a public defender and CARE Supporter. The court reviews the clinical evaluation and, if the individual meets the criteria, the court orders the development of a CARE Plan.

CARE Plan: The CARE Plan is developed by county behavioral health, participant and CARE Supporter including behavioral health treatment, stabilization medication, and a housing plan. The court reviews and adopts the CARE Plan with both the individual and county behavioral health as party to the court order for up to 12 months.

Support: The county behavioral health care team, with the participant and CARE Supporter, begin treatment and regularly review and update the CARE Plan, as needed, as well as a Psychiatric Advance Directive for any future crises. The court provides accountability with status hearings, for up to a second 12 months, as needed.

Success: Upon successful completion and graduation by the Court, the participant remains eligible for ongoing treatment, supportive services, and housing in the community to support long term recovery. The Psychiatric Advance Directive remains in place for any future crises.

8. What is meant by court-ordered stabilization medications?

Stabilization medications may be included in the court ordered CARE Plan.

Court ordered stabilization medications are distinct from an involuntary medication order in that they cannot be forcibly administered. Seeking an involuntary medication order for a participant would be outside the proceedings and subject to existing law. Failure to participate in any component of the CARE Plan may result in additional actions, consistent with existing law, including possible referral for conservatorship with a new presumption that no suitable alternatives exist.

Stabilization medications would be prescribed by the treating licensed behavioral healthcare provider/prescriber and medication management supports will be offered by the care team. As a participant in the development and on-going maintenance of the CARE Plan, the participant will work with their behavioral healthcare provider and their CARE Supporter to address medication concerns and make changes to the treatment plan.

Stabilizing medications will primarily consist of antipsychotic medications, which are evidence-based treatments to reduce the symptoms of hallucinations, delusions, and disorganization—these are the symptoms that cause impaired insight and judgment in individuals living with Schizophrenia spectrum and other psychotic disorders. Medications may be provided as long-acting injections which reduce the day-to-day –adherence challenges many people experience with daily medications.

9. What if an individual does not participate in the Court-ordered CARE Plan?

An individual who does not participate in the court-ordered CARE Plan may be subject to additional court hearing(s). If a participant cannot successfully complete a CARE Plan, the individual may be referred by the Court for a conservatorship, consistent with current law. For individuals whose prior conservatorship proceedings were diverted, those proceedings will resume under a new presumption that no suitable alternatives to conservatorship are available.

10. Will CARE Court be available statewide?

Yes—all counties will participate in Care Court. There is not an option to opt-out.

11. What if a local government does not provide the court-ordered CARE Plan?

If local governments do not meet their specified responsibilities under the court-ordered CARE Plans, the Court will have the ability to order sanctions and, in extreme cases, appoint an agent to ensure services are provided.

12. How is CARE Court different from current approaches in California - namely Mental Health (or LPS) Conservatorship and the more recent Laura's Law (Assisted Outpatient Treatment)?

CARE Court applies only to a small and distinct group of adults with under or untreated Schizophrenia spectrum and other psychotic disorders who meet certain criteria.

CARE Court differs fundamentally from Mental Health/LPS Conservatorship. It does not include custodial settings or long-term involuntary medications. CARE Court provides a new CARE Supporter role, to empower the individual in directing their care as much as possible. Lastly, the court ordered CARE Plan is no longer than 12 or, if extended, 24 months.

CARE Court is different from both Mental Health/LPS Conservatorship and Laura's Law approaches in that it may be initiated on a petition to the Court by family members, service providers, and other authorized parties, in addition to County Behavioral Health. Local government is also part of the court order, along with the participant, to ensure accountability to the provision of treatment and care.

CARE Court is also separate from Probate Conservatorship where a court may appoint a conservator for people determined to be incapacitated to manage their financial or personal care decisions.

13. How is CARE Court funded?

Existing funding sources for the CARE Plan services and supports include nearly $10 billion annually for behavioral healthcare (including Mental Health Services Act, mental health realignment, federal funds) and the proposed $1.5 billion for behavioral health bridge housing, as well as various housing and clinical residential placements available to cities and counties under the Governor's $12 billion homelessness investments which began in 2021. County behavioral health is responsible for Medi-Cal Specialty Mental Health Services and Substance Use Disorder (SUD) treatment and community mental health services.

Costs for the Court, the Public Defender, the new CARE Supporter program, and state oversight will require new funding. The state will provide technical assistance to the Counties and will be responsible for data collection, evaluation, and reporting.

14. What housing is available to an individual in CARE Court?

Housing is an important component of CARE Court—finding stability and staying connected to treatment, even with the proper supports, is next to impossible while living outdoors, in a tent or a vehicle. CARE Plans will include housing. Individuals who are served by CARE Court will have diverse housing needs on a continuum ranging from clinically enhanced interim or bridge housing, licensed adult and senior care settings, supportive housing, to housing with family and friends.

In the 2021 Budget Act, the state made a historic $12 billion investment to prevent and end homelessness which included unprecedented new funding to create new community based residential settings and long-term stable housing for people with severe behavioral health conditions. Additionally, the Governor's proposed 2022-2023 budget includes $1.5 billion to support Behavioral Health Bridge Housing, which will fund clinically enhanced bridge housing settings that are well suited to serving CARE Court participants.

350 Fifth Avenue, 34th Floor
New York, NY 10118-3299
Tel: +1-212-290-4700
Fax: +1-212-736-1300; 917-591-3452

April 12, 2022

Assembly Member Mark Stone
Chair, Judiciary Committee
California State Assembly
1021 O Street, Suite 5740
Sacramento, CA 94249

HUMAN RIGHTS WATCH

HRW.org

Re: Human Rights Watch's Opposition to CARE Court (AB 2830)

Dear Assembly Member Stone:

Human Rights Watch has carefully reviewed AB 2830[1] and the proposed framework for the Community Assistance, Recovery and Empowerment (CARE) Court created by CalHHS,[2] and must respectfully voice our strong opposition. CARE Court promotes a system of involuntary, coerced treatment, enforced by an expanded judicial infrastructure, that will, in practice, simply remove unhoused people with perceived mental health conditions from the public eye without effectively addressing those mental health conditions and without meeting the urgent need for housing. We urge you to reject this bill and instead to take a more holistic, rights-respecting approach to address the lack of resources for autonomy-affirming treatment options and affordable housing.

CARE Court proponents claim it will increase up-stream diversion from the criminal legal and conservatorship systems by allowing a wide range of actors to refer people with schizophrenia and other psychotic disorders to the jurisdiction of the courts without an arrest or hospitalization. In fact, the bill creates a new pathway for government officials and family members to place people under state control and take away their autonomy and liberty.[3] It applies generally to those the bill describes as having a "schizophrenia spectrum or other psychotic disorder" and specifically targets unhoused people.[4] It seems aimed at facilitating removing unhoused people from public view without actually providing housing and services that will help to resolve homelessness. Given the racial

[1] California AB 2830, "Community Assistance, Recovery, and Empowerment (CARE) Court Program (Bloom)," 2022, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2830 (accessed April 12, 2022).
[2] California Health & Human Services Agency, "CARE Court: A New Framework for Community Assistance, Recovery & Empowerment," March 2022, https://www.chhs.ca.gov/wp-content/uploads/2022/03/CARE-Court-Framework_web.pdf (accessed April 12, 2022).
[3] California AB 2830, "Community Assistance, Recovery, and Empowerment (CARE) Court Program (Bloom)," 2022, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2830.
[4] Marisa Lagos, "Gov. Newsom on His Plan to Tackle Mental Health, Homelessness with 'CARE Courts'," *KQED*, March 16, 2022, https://www.kqed.org/forum/2010101888316/gov-newsom-on-his-new-plan-to-tackle-mental-health-homelessness-with-care-courts (accessed April 12, 2022).

demographics of California's homeless population[5], and the historic over-diagnosing of Black and Latino people with schizophrenia,[6] this plan is likely to place many, disproportionately Black and brown, people under state control.

CARE Court is Coerced Treatment

Proponents of the plan describe CARE Court in misleading ways as "preserving self-determination" and "self-sufficiency," and "empower[ing]."[7] But CARE Court creates a state-imposed system of coerced, involuntary treatment. The proposed legislation authorizes judges to order a person to submit to treatment under a CARE plan.[8] That treatment may include an order to take a given medication, including long-acting injections, and a housing plan.[9] That housing plan could include a variety of interim housing or shelter options that may be unacceptable to an individual and unsuited to their unique needs.[10]

A person who fails to obey court orders for treatment, medication, and housing may be referred to conservatorship, which would potentially strip that person of their legal capacity and personal autonomy, subjecting them to forcible medical treatment and medication, loss of personal liberty, and removal of power to make decisions over the conduct of their own lives.[11] Indeed, the court may use failure to comply with their court-ordered treatment, "as a factual presumption that no suitable community alternatives are available to treat the individual," paving the way for detention and conservatorship.[12] In practical effect, the mandatory care plans are simply pathways to the even stricter system of control through conservatorship.

This approach not only robs individuals of dignity and autonomy but is also coercive and likely ineffective.[13] Studies of coercive mental health treatment have generally not shown

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[5] Los Angeles Homeless Services Authority, "Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness," December 2018, https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness (accessed April 12, 2022).

[6] Charles M. Olbert, Arundati Nagendra, and Benjamin Buck, "Meta-analysis of Black vs. White racial disparity in schizophrenia diagnosis in the United States: Do structured assessments attenuate racial disparities?" *Journal of Abnormal Psychology* 127(1) (2018): 104-115, accessed April 12, 2022, doi: 10.1037/abn0000309; Robert C. Schwartz and David M. Blankenship, "Racial disparities in psychotic disorder diagnosis: A review of empirical literature," *World Journal of Psyciatry* 4 (2014): 133-140, accessed April 12, 20220, doi: 10.5498/wjp.v4.i4.133.

[7] "CARE (Community Assistance, Recovery and Empowerment) Court," California Health & Human Services Agency, March 14, 2022, Slides 5, 10 and 20, https://www.chhs.ca.gov/wp-content/uploads/2022/03/CARE-Court-Stakeholder-Slides-20220314.pdf (accessed April 12, 2022); Marisa Lagos, "Gov. Newsom on His Plan to Tackle Mental Health, Homelessness with 'CARE Courts'," *KQED*, March 16, 2022, https://www.kqed.org/forum/2010101888316/gov-newsom-on-his-new-plan-to-tackle-mental-health-homelessness-with-care-courts (accessed April 12, 2022).

[8] AB 2830, Section 59–82 (a)-(b).

[9] AB 2830, Section, 5982.

[10] AB 2830, Section 5982(c); "CARE (Community Assistance, Recovery and Empowerment) Court." The DHHS presentation discusses a range of housing possibilities including "interim or bridge housing," which in common usage means temporary shelter.

[11] AB 2830, Section 5979(a); California Welfare and Institutions Code Section 5350—5372, https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=WIC&sectionNum=5357 (accessed April 12, 2022).

[12] AB 2830, Section 5979(a).

[13] Sashidharan, S. P., Mezzina, R., & Puras, D., "Reducing coercion in mental healthcare," *Epidemiology and psychiatric sciences*, 28(6) (2019): 605–612, accessed April 12, 2022, https://doi.org/10.1017/S2045796019000350 ("Available research does not suggest that coercive intervention in mental health care "are clinically effective, improve patient safety or result in better clinical or social outcomes.").

positive outcomes.[14] Evidence does not support the conclusion that involuntary outpatient treatment is more effective than intensive voluntary outpatient treatment and, indeed, shows that involuntary, coercive treatment is harmful.[15]

Coerced Treatment Violates Human Rights

Under international human rights law, all people have the right to "the highest attainable standard of physical and mental health."[16] Free and informed consent, including the right to refuse treatment, is a core element of that right to health.[17] Having a "substitute" decision-maker, including a judge, or even a "supporter," make orders for health care can deny a person with disabilities their right to legal capacity and infringe on their personal autonomy.[18]

The Convention on the Rights of Persons with Disabilities establishes the obligation to "holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment."[19] The US has signed but not yet ratified this treaty, which means it is obligated to refrain from establishing policies and legislation that will undermine the purpose and object of the treaty, like creating provisions that mandate long-term substitute decision-making schemes like conservatorship or court-ordered treatment plans.

The World Health Organization has developed a new model that harmonizes mental health services and practices with international human rights law and has criticized practices promoting involuntary mental health treatments as leading to violence and abuse, rather than recovery, which should be the core basis of mental health services.[20] Recovery means

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[14] Sashidharan, S. P., Mezzina, R., & Puras, D., "Reducing coercion in mental healthcare," *Epidemiology and psychiatric sciences*, *28*(6) (2019): 605–612, https://doi.org/10.1017/S2045796019000350 (accessed April 12, 2022); Richard M. Ryan, Martin F. Lynch, Maarten Vansteenkiste, Edward L. Deci, "Motivation and Autonomy in Counseling, Psychotherapy, and Behavior Change: A Look at Theory and Practice," *Invited Integrative Review* (2011), https://www.apa.org/education/ce/motivation-autonomy.pdf (accessed April 12, 2022); McLaughlin, P., Giacco, D., & Priebe, S., 2016, "Use of Coercive Measures during Involuntary Psychiatric Admission and Treatment Outcomes: Data from a Prospective Study across 10 European Countries," *PloS one*, *11*(12), https://doi.org/10.1371/journal.pone.0168720 ("All coercive measures are associated with patients staying longer in hospital, and seclusion significantly so, and this association is not fully explained by coerced patients being more unwell at admission.").

[15] Joseph P. Morrissey, Ph.D., *et al.*, "*Outpatient Commitment and Its Alternatives: Questions Yet to Be Answered*," Psychiatric Services (2014): 812 at 814 (2014); S.P. Sashidharan, Ph.D., *et al.*, "Reducing Coercion in Mental Healthcare," *Epidemiology and Psychiatric Sciences* 28 (2019): 605-612.

[16] International Covenant on Economic, Social and Cultural Rights, ("ICESCR"), adopted December 16, 1966, entered into force January 3, 1976, Art. 12(1), https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx.

[17] Human Rights Council; United Nations, General Assembly, "Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health," March 28, 2017, https://undocs.org/en/A/HRC/35/21, para. 63. See also Convention on the Rights of Persons with Disabilities, art. 12 read in conjunction with art. 25; Committee on the Rights of Persons with Disabilities: General comment No. 1 (2014), May 19, 2014, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement, para. 31, 41.

[18] Convention on the Rights of Persons with Disabilities, art. 12; Committee on the Rights of Persons with Disabilities: General comment No. 1 (2014), May 19, 2014, para. 7.

[19] Committee on the Rights of Persons with Disabilities: General comment No. 1 (2014), May 19, 2014, para. 7.

[20] Freedom from coercion, violence, and abuse. WHO Quality Rights core training: mental health and social services, 2019, https://apps.who.int/iris/bitstream/handle/10665/329582/9789241516730-eng.pdf?sequence=5&isAllowed=y, p. 2, 8, 22.

different things for different people but one of its key elements is having control over one´s own mental health treatment, including the possibility of refusing treatment.

To comport with human rights, treatment should be based on the will and preferences of the person concerned, and not defined by some other entity's conception of their best interest. Housing or disability status does not rob a person of their right to legal capacity or their personal autonomy, including the right to refuse treatment. In very narrow, exceptional circumstances, where a person poses a serious and imminent risk to themselves or a third party and a qualified healthcare professional has determined they lack capacity to give informed consent to treatment, a brief, temporary period of mandatory treatment may be permissible if strictly clinically necessary for the purpose of returning the person to a place of autonomy in which they can make decisions about their own welfare—and for no longer than that. The process envisioned by the CARE Court plan is far more expansive; by definition, involuntary; and, as discussed below, runs the risk of being abused by self-interested actors. This coerced process leading to "treatment" undermines any healing aim of the proposal.

CARE Court Denies Due Process

The CARE Court proposal authorizes family members, first responders, including police officers or outreach workers, the public guardian, service providers, and the director of the county behavioral health agency, to initiate the process of imposing involuntary treatment by filing a petition with the court.[21] These expansive categories of people with the power to embroil another person in court processes and potential loss of autonomy, many of whom lack any expertise in recognition and treatment of mental health conditions, reveals the extreme danger of abuse inherent in this proposal. For example, interpersonal conflicts between family members could result in abusive parents, children, spouses, and siblings using the referral process to expose their relatives to court hearings and potential coerced treatment, housing, and medication.

Law enforcement and outreach workers would have a new tool to threaten unhoused people with referral to the court to pressure them to move from a given area. These state actors could place those who disobeyed their commands into the CARE Court process and under the control of courts. Given the long history of law enforcement using its authority to drive unhoused people from public spaces, a practice that re-traumatizes those people and does nothing to solve homelessness, it is dangerous to provide them with additional powers to do so.[22]

The legislation does not set meaningful standards to guide judicial discretion and does not delineate procedures for those decisions.[23] It establishes a contradictory and unworkable procedure by which a petition may be made on an allegation that a person "lacks medical decision making capacity"[24] On a mere showing of "prima facie" evidence that the petition is

[21] AB 2830, Section 5974.
[22] Chris Herring, "Complaint-Oriented Policing: Regulating Homelessness in Public Space," *American Sociological Review* 1-32, (2019), https://static1.squarespace.com/static/5b391e9cda02bc79baffebb9/t/5d73e7609b56e748f432e358/1567876975179/complaint-oriented+policing_ASR.pdf.
[23] AB 2830, Section, 5972-5978
[24] AB 2830, Section 5972.

true, the person is then required to enter into settlement discussions with the county behavioral health agency.[25] If someone lacks decision-making capacity, they would not be able to enter a settlement agreement voluntarily. Unless the parties stipulate otherwise, failure to enter a settlement agreement results in an evaluation by that same behavioral health agency, which is used to impose a mandatory, court-ordered course of treatment.[26] This process is entirely involuntary and coercive. The role of the behavioral health agency poses a great potential for conflicts of interest, as they will presumably be funded to carry out the Care Plans that result from their negotiations and their evaluations.

The CARE Court plan threatens to create a separate legal track for people perceived to have mental health conditions, without adequate process, negatively implicating basic rights.[27] Even with stronger judicial procedures and required clinical diagnoses by mental health professionals, this program would remain objectionable because it expands the ability of the state to coerce people into involuntary treatment beyond the limited and temporary circumstances provided for under human rights law.

CARE Court will harm Black, brown, and Unhoused people

The CARE Court directly targets unhoused people to be placed under court-ordered treatment, thus denying their rights and self-determination. Governor Newsom, in pitching this plan, called it a response to seeing homeless encampments throughout the state of California.[28] CARE Court will empower police and homeless outreach workers to refer people to the courts and allow judges to order them into treatment against their will, including medication plans. Despite allusions to "housing plans," CARE Court does not increase access to permanent supportive housing and indeed, the bill prohibits the court from requiring the county to provide actual housing.[29]

Due to a long history of racial discrimination in housing, employment, access to health care, policing and the criminal legal system, Black and brown people have much higher rates of homelessness than their overall share of the population.[30] The CARE Court plan in no way addresses the conditions that have led to these high rates of homelessness in Black and brown communities. Instead, it proposes a system of state control over individuals that will compound the harms of homelessness.

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[25] AB 2830, Section 5977.
[26] AB 2830, Section 5977.
[27] Committee on the Rights of Persons with Disabilities, "Guidelines on article 14 of the Convention on the Rights of Person with Disabilities: The right to liberty and security of persons with disabilities," (September 2015), para. 14 https://www.google.com/search?q=Guidelines+on+CRPD+article+14%2C+paragraph+21&rlz=1C1PRFI_enUS936US936&oq=Guidelines+on+CRPD+article+14%2C+paragraph+21&aqs=chrome..69i57j33i160.3045j0j7&sourceid=chrome&ie=UTF-8, para. 14.
[28] KQED, "Gov. Newsom on His Plan to Tackle Mental Health, Homelessness with 'CARE Courts.'"

[30] Kate Cimini, "Black people disproportionately homeless in California," *CalMatters*, February 27, 2021, https://calmatters.org/california-divide/2019/10/black-people-disproportionately-homeless-in-california/ ("about 6.5% of Californians identify as black or African American, but they account for nearly 40% of the state's homeless population"); Esmeralda Bermudez and Ruben Vives, "Surge in Latino homeless population 'a whole new phenomenon; for Los Angeles," *LA Times*, June 18, 2017, https://www.latimes.com/local/california/la-me-latino-homeless-20170618-story.html; Los Angeles Homeless Services Authority, "Report and Recommendations of the Ad Hoc Committee on Black People Experiencing Homelessness," December 2018, https://www.lahsa.org/documents?id=2823-report-and-recommendations-of-the-ad-hoc-committee-on-black-people-experiencing-homelessness.

Further, much research shows that mental health professionals diagnose Black and Latino populations at much higher rates than they do white people.[31] One meta-analysis of over 50 separate studies found that Black people are diagnosed with schizophrenia at a rate nearly 2.5 times greater than white people.[32] A 2014 review of empirical literature on the subject found that Black people were diagnosed with psychotic disorders three to four times more frequently than white people.[33] This review found large disparities for Latino people as well. CARE Court may place a disproportionate number of Black and Latino people under involuntary court control.

CARE Court Does Not Increase Access to Mental Health Care

The CARE plan would establish a new judicial infrastructure focused on identifying people with mental health conditions and placing them under state control for up to twenty-four months. While touted as an unprecedented investment in support and treatment for people with mental health conditions, in reality, the program provides no new funding for behavioral health care, instead re-directing money already in the budget for treatment to programs required by CARE Court.[34] According to the DHHS presentation on the proposal, the only new money allocated for the program will go to the courts themselves to administer this system of control.[35]

The court-ordered plans will include a "housing plan," but not a guarantee of, or funding for, permanent supportive housing.[36] The court may not order housing or require the county to provide housing.[37] The proposal seems to anticipate allowing shelter and interim housing to suffice if available, without recognizing the vast shortage of affordable housing, especially supportive housing, throughout most of California.[38] To the extent the proposal relies on state investment in housing already in existence, it will prioritize availability of that housing for people under this program, meaning others in need would have less access to that housing.

California Should Invest in Voluntary Treatment and Supportive Services

CARE Court shifts the blame for homelessness onto individuals and their vulnerabilities, rather than recognizing and addressing the root causes of homelessness such as poverty, affordable housing shortages, barriers to access to voluntary mental health care, and racial discrimination. CARE Courts are designed to force unhoused people with mental health conditions into coerced treatment that will not comprehensively and compassionately address their needs.

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[31] https://pubmed.ncbi.nlm.nih.gov/29094963/; https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4274585/
[32] https://pubmed.ncbi.nlm.nih.gov/29094963/
[33] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4274585/
[34] "CARE (Community Assistance, Recovery and Empowerment) Court," California Health & Human Services Agency.
[35] Ibid.
[36] Ibid.
[37] AB 2830, Section 5982(c).
[38] Ibid.; National Low Income Housing Coalition, "The Gap: A Shortage of Affordable Homes," March 2020, https://reports.nlihc.org/sites/default/files/gap/Gap-Report_2021.pdf, p. 2, 9; California Housing Partnership, "California Affordable Housing Needs Report," March 2020, https://1p08d91kdoc03rlxhmhtydpr-wpengine.netdna-ssl.com/wp-content/uploads/2020/03/CHPC_HousingNeedsReportCA_2020_Final-.pdf.

Californians lack adequate access to supportive mental health care and treatment.[39] However, this program does not increase that access. Instead, it depends on money already earmarked for behavioral health initiatives and layers harmful court involvement onto an already inadequate system. Similarly, the "Care plans" mandated by the CARE Courts do not address the shortage of housing.

Investing in involuntary treatment ties up resources that could otherwise be invested in voluntary treatment and the services necessary to make that treatment effective.[40] California should provide well-resourced holistic community-based voluntary options and remove barriers to evidence-based treatment to support people with mental health conditions who might be facing other forms of social exclusion. Such options should be coupled with investment in other social supports and especially housing, not tied to court-supervision.

Rather than co-opting the language used by movements supporting housing and disability rights and cynically parading the trauma of family members let down by the state mental health system, as proponents of CARE Courts have done, we instead ask that you reject the CARE Court proposal entirely and direct resources towards making voluntary treatment and other necessary services accessible to all who need it.

Sincerely,

Olivia Ensign
Senior Advocate, US Program
Human Rights Watch

John Raphling
Senior Researcher, US Program
Human Rights Watch

[39] Liz Hamel, Lunna Lopes, Bryan Wu, Mollyann Brodie, Lisa Aliferis, Kristof Stremikis and Eric Antebi, "Low-Income Californians and Health Care," *KFF*, June 7, 2019, https://www.kff.org/report-section/low-income-californians-and-health-care-findings/#:~:text=About%20half%20of%20Californians%20with%20low%20incomes%20%2852,not%20able%20to%20get%20needed%20services%20%28Figure%208%29. ("A majority of low-income Californians (56 percent) say their community does not have enough mental health care providers to serve the needs of local residents.")

[40] Physicians for Human Rights, *Neither Justice nor Treatment: Drug Courts in the United States*, June 2017, phr_drugcourts_report_singlepages.pdf, p. 3.

Emma G. Fitzsimmons and Andy Newman, New York's Plan to Address Crisis of Mentally Ill Faces High Hurdles, N.Y. Times, Nov. 30, 2022

Many New Yorkers agree that the city must do more to help people with severe mental illness who can be seen wandering the streets and subways.

But on Wednesday, a day after Mayor Eric Adams announced an aggressive plan to involuntarily hospitalize people deemed too ill to care for themselves, experts in mental illness, homelessness and policing expressed skepticism that the plan could effectively solve a crisis that has confounded city leaders for decades.

Mr. Adams said he was instructing police officers and other city workers to take people to hospitals who were a danger to themselves, even if they posed no risk of harm to others, putting the city at the center of a national debate over how to care for people with severe mental illness.

Mental health experts and elected officials applauded the mayor's attention to the issue, but also raised questions about how his plan would be implemented, how many people might be affected and whether police officers should be involved.

Steven Banks, the former social services commissioner under Mr. Adams's predecessor, Bill de Blasio, suggested that the solutions to the current crisis lay beyond Mr. Adams's plan.

"Homelessness is driven by the gap between rents and income and the lack of affordable housing, and mental health challenges for both housed and unhoused people are driven by the lack of enough community-based mental health services," he said in a statement.

He added that the city, state and federal governments all "need to do more to address these interrelated crises in order for New Yorkers to see a difference on the streets, on public transportation, and in the shelter census."

The mayor's plan comes at the end of a year in which random attacks in the subways and streets, many of them attributed to homeless people with mental illness, have put many New Yorkers on edge. Mr. Adams and Gov. Kathy Hochul have both rolled out numerous programs to address the issue, including adding outreach teams and clearing encampments, to try to convince people to move to shelters.

Mr. Adams has said that people with mental illness were largely responsible for an increase in crime in the subway, though most crimes overall are not committed by people who are unhoused or mentally ill, and most mentally ill or homeless people are not violent.

Jody Rudin, a former deputy city commissioner of homeless services who is now C.E.O. of the Institute for Community Living, which runs housing and mental-health programs under contract with the city, applauded the mayor for "leaning into and talking about this issue."

"There seems to be an appreciation for the need for trauma-informed and community-based services, not just lip service, and to some extent he's putting his money where his mouth is," she said.

But Ms. Rudin said that most of the people in greatest need of help are already well known to clinicians who do street outreach. And she said that she was concerned that those people would be consulted by neither police officers, emergency services workers, nor hospital personnel who the mayor said would staff a new hotline, in deciding whether to bring someone to a hospital against their will.

"If it's done in a coordinated way, it could be really helpful to people's ability to live healthy and fulfilling lives," she said. "If it's done in a messy and uncoordinated way, we have real concerns."

William J. Bratton, the former New York City police commissioner, said that Mr. Adams was trying to do the right thing, but that his plan would be very difficult to carry out.

“There’s no place to put a lot of these poor souls,” he said. “It’s a well-intended measure and long overdue to try to deal in a more humane way with this seemingly intractable problem.”

Mr. Adams has acknowledged that New York did not have enough psychiatric beds to accommodate everyone, and said the city would start training police officers about responding with compassion.

After a decades-long deinstitutionalization push that closed thousands of psychiatric hospital beds, and the loss of more beds during the pandemic, the city finds itself with a chronic bed shortage. Hospitals are under constant pressure to make room for new psychiatric emergency patients.

Even if enough hospital capacity can be created to admit many more people, it is unclear what will happen when the hospital discharges someone.

Some people would be discharged to specialized shelters for people with mental illness. Some of those shelters have difficulty keeping their residents out of trouble.

Experts say the best place to put someone with severe mental illness after they leave a hospital is usually in supportive housing, which comes with on-site social services, and has the best track record for keeping people stable over the long haul. But though the city and state are accelerating plans to create more supportive housing, it is in such short supply that four of five qualified applicants are turned away.

Simply finding providers of outpatient psychiatric care, essential to breaking the cycle of hospitalization and jail that so many people with mental illness wind up in, is difficult.

“Outpatient clinics are booked for months out, if they even are taking referrals,” said Bridgette Callaghan, who runs teams of field clinicians that treat the most severely mentally ill people in streets and shelters for the Institute for Community Living under a city program called Intensive Mobile Treatment.

Mr. Bratton, who served as police commissioner under Mayor Rudolph W. Giuliani and Mr. de Blasio, said the plan was risky for Mr. Adams and that leaders across the nation would be watching New York’s approach. It will take months to properly train police officers about how to conduct psychological evaluations and how to handle people who resist being transported to hospitals, he noted.

“The cops are going to see this as another burden being placed on them,” he said.

New Yorkers should not expect to see dramatic changes overnight. The city started training doctors who work with patients about the new guidance on Tuesday. It will begin training police officers and Emergency Medical Services staff in the coming weeks, city officials said.

Mr. Adams acknowledged on Tuesday that the city would need many more psychiatric beds at hospitals for his plan to be successful, and he said that he would work with state lawmakers in Albany to add beds. Ms. Hochul, who has said she supports the mayor’s efforts, recently announced that the state was setting up two new units at psychiatric centers, including 50 inpatient beds.

Alanna Shea, 38, has dealt with homelessness, addiction and mental illness, and said she is currently a “drop in” at a shelter. She said she was alarmed by the new policy because of her own experiences in hospitals.

“It scares me,” she said, speaking near a subway entrance on 125th Street in Harlem. “I want to be safe here but I also want to be safe if I’m in a facility.”

Mental health advocates have said the plan infringes on people's rights. They argue that police officers should not be responsible for deciding who should be transported to hospitals.

"Instead of using the least restrictive approach, we are defaulting to an extreme that takes away basic human rights," said Matt Kudish, chief executive of the National Alliance on Mental Illness of New York City.

Jumaane Williams, the city's public advocate, and some other Democratic elected officials have raised concerns about police officers evaluating people on the streets and the lack of details on what care people will receive once they are removed.

"That's a major red flag right there," Mr. Williams said.

Mr. Williams said that while he was glad that Mr. Adams was committed to helping people with severe mental illness, he worried that Black men would be disproportionately affected by the new policy and that people would be turned away from overburdened hospitals. He said that the city should focus on funding less intrusive programs like homeless drop-in centers, where people can get a hot meal and a shower, and mental health urgent care centers.

"You have to put the funding into the programs that are needed so you don't have to do this," he said.

Ron Kim, a left-leaning state assemblyman from Queens, said he was supportive of the plan because he believes that Mr. Adams wants to rebuild government to help the public.

"He's saying the buck stops here — he's saying we're going to activate city workers to intervene," Mr. Kim said.

Mr. Kim said he was moved by a recent dinner with the father of Michelle Go, who was killed in January when she was shoved in front of a subway train by a homeless and mentally ill man.

"I was shocked to hear that from the pain he's been going through, he wasn't focused on punishing the attacker," Mr. Kim said. "He was really furious about how we didn't see the signs, and we failed to intervene."

Elizabeth Kim, New NYC policy to address mental illness will force more people to hospitals. Here's what to know, Gothamist, Nov. 30, 2022

Mayor Eric Adams is dramatically ramping up his strategy to address New York City's homelessness and mental health crisis by directing police and emergency medical responders to force individuals deemed unable to meet "basic human needs" into hospitals.

Adams, a moderate Democrat who has prioritized public safety, described the plan as the "next phase" of an approach to homelessness that has included increased policing on the subways and the removal of homeless encampments.

An estimated 3,400 New Yorkers live on the streets and subways according to an annual city survey, but experts say the figure is a severe undercount. Although that number is down slightly from the pre-pandemic era, a string of high-profile deadly crimes committed by homeless people with reported histories of mental illness has rattled many New Yorkers.

But the city's new plan is already facing a legal challenge and likely some logistical hurdles. Homeless and civil liberty advocates as well as some city lawmakers have already voiced their opposition to the policy.

Here's what New Yorkers need to know about the new directive and the obstacles that lie ahead.

How is this policy different from the previous way the city handled mentally ill New Yorkers?

The mayor's new directive essentially expands the definition of who qualifies for involuntary removal from public places for the sake of potential hospitalization. New York state's Mental Hygiene Law outlines that a person can be taken to a hospital or psychiatric facility for an evaluation "if such person appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others."

But City Hall officials are relying on a state health department memorandum issued in February that interprets the law as allowing "for the removal of a person who appears to be mentally ill and also displays an inability to meet basic living needs, even when no recent dangerous act has been observed."

The memorandum also states that these guidelines are "intended to help clinicians and other community providers make thoughtful, clinically appropriate determinations relating to involuntary and emergency assessments."

Speaking to reporters on Tuesday, Adams described behaviors that he said New Yorkers have become accustomed to seeing but warrant greater city intervention.

"You're watching people standing there on the street talking to themselves, don't have shoes on, shadowboxing, unkempt — and we are walking by them," he said. "We are pretending as though we don't see them."

The mayor said he is refusing to "punt" the issue.

Who will be assessing whether an individual meets the criteria for involuntary hospitalization?

According to state law, a police officer, peace officer, physician or mental health professional can each make the assessment of whether to order someone to be involuntarily brought to a hospital.

On Tuesday, the mayor said that police and first responders have been reluctant to use their authority under the law "because there has not been any real clarity."

Deputy Mayor for Health and Human Services Anne Williams-Isom on Tuesday told reporters that

the decisions would be made on a “case-by-case” basis, but she outlined some of the process.

“You ask them questions, you ask them where have they been. You ask them do they have a place to go?” she said.

She added that an evaluation could take into account their physical well-being and whether they are “not based in reality.”

If police or first responders are unsure, she said they would be able to call on specialized teams that include mental health professionals. However, she could not immediately say how many city workers are currently dedicated to this helpline.

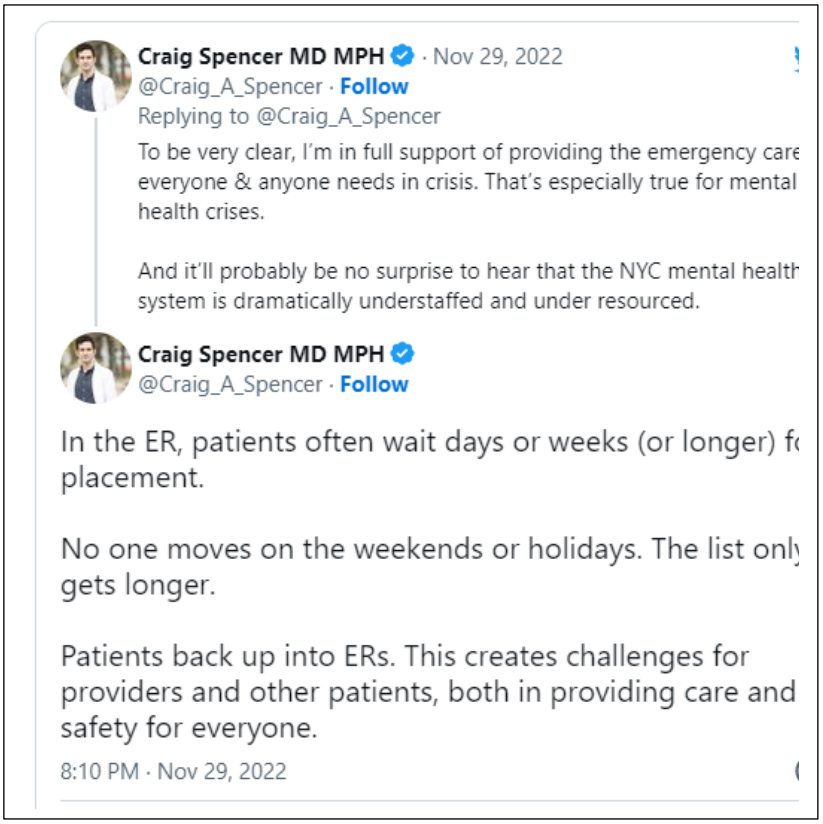
Once an individual is brought to a hospital, a medical doctor will determine whether they meet the criteria allowing them to be involuntarily committed, according to Brendan McGuire, the mayor’s chief legal counsel.

Does the city have enough beds and programs to treat the mentally ill?

No. Emergency room doctors have frequently complained about a shortage of so-called “psych beds.”

Following the mayor’s announcement on Tuesday, Dr. Craig Spencer, the former director of global health in emergency medicine at New York-Presbyterian/Columbia University Medical Center, was among those in the medical community who expressed their concerns. Spencer now works for the Brown University School of Public Health.

In a tweet, he described the city’s mental health system as “dramatically understaffed and under-resourced,” with patients often waiting days or weeks for placement in the emergency room.



Other mental health facilities and programs have also been strained, according to Public Advocate Jumaane Williams, who recently issued an update to a 2019 report on the city's response to the crisis. The public advocate also found that since 2019 the number of respite care centers — mental health facilities that offer an alternative to hospitalization — fell by half. Meanwhile, the number of mobile crisis units — teams made up of social workers, nurses and psychiatrists — dropped from 24 to 19.

How have lawmakers and advocates responded to the plan?

Reception has been mixed. On Wednesday, City Council Speaker Adrienne Adams issued a statement saying that she and her colleagues had "many questions" about the new policy and how it will be carried out.

"The vague and broad definitions surrounding mental illness, and the delegated authority to non-mental health professionals for involuntary removal and admission raise serious concerns," she said. "The way this new policy will be implemented and the agencies and individuals being tasked with this response need to be more carefully considered, and the Council will continue playing a strong oversight role." She cautioned against "unduly relying on involuntary commitment and short-term responses that can be counterproductive."

Tiffany Cabán, a left-leaning Queens councilmember and a former public defender, similarly criticized the use of involuntary hospitalization." Consent is key," she tweeted.

But at least two other Queens councilmembers have publicly expressed support for the mayor's directive.

The mayor has received key support from Gov. Kathy Hochul as well as a handful of state lawmakers. He will need the state Legislature's backing for an 11-point series of reforms in state law that seek to provide clearer guidance on when involuntary hospitalizations can be ordered.

Hazel Crampton-Hays, a spokesperson for Hochul, issued a statement praising the mayor's plan as one that "builds on our ongoing efforts together" around mental illness, including outreach teams in the subways and increasing bed capacity at psychiatric hospitals.

Among homeless advocates, Jacqueline Simone, policy director for Coalition for the Homeless, accused the mayor of having "continually scapegoated homeless people and others with mental illness as violent."

Simone argued that instead of leaning on involuntary hospitalizations the mayor should instead focus his efforts on "expanding access to voluntary inpatient and outpatient psychiatric care."

But the Legal Aid Society, which also represents the homeless, praised the mayor for taking a "step in the right" direction by addressing the city's mental health crisis.

At the same time, Tina Luongo, Legal Aid's chief attorney, told WNYC that "involuntary confinement, whether it's in a hospital or a jail or prison, is not the answer that we need."

The group is urging Adams to to support legislation that would allow New Yorkers who are charged with crimes and also have substance use disorders or mental health conditions to be placed in treatment programs as opposed to jail.

The stiffest criticism has come from civil liberty defenders.

Donna Lieberman, the executive director of the New York Civil Liberties Union, also decried the plan as "playing fast and loose with the legal rights of New Yorkers."

She also cautioned about legal challenges that the new policy will prompt. "The federal and state constitutions impose strict limits on the government's ability to detain people experiencing mental illness – limits that the mayor's proposed expansion is likely to violate," she said.

Similarly, Norman Siegel, a noted civil rights attorney and longtime adviser to the mayor, also said the plan was misguided and that the city was skating on thin legal ground.

Is there a legal challenge yet?

Yes, on Dec. 8, a coalition of civil rights groups and advocates for people experiencing mental illness filed a lawsuit — lumping it into an existing class-action lawsuit against the NYPD — claiming the policy "discriminates against individuals by treating them differently simply because of their actual or perceived mental disability."

Attorneys for the plaintiffs are asking a Manhattan federal judge for a temporary restraining order against the policy. They, along with attorneys representing the city, were in court on Dec. 12. It's unclear when a judge is expected to grant or deny a temporary restraining order.

Is this the first time the city has ever enacted such a policy?

No. In 1987, then-Mayor Ed Koch introduced a program that placed severely mentally ill people found on Manhattan streets into a psychiatric ward at Bellevue Hospital. But the policy was undermined by court battles, overcrowding and bureaucratic problems. It gave way to a landmark lawsuit involving a woman named Joyce Brown who was confined for 12 weeks. A state judge ruled that she should be freed because the city failed to prove she was mentally ill or unable to care for herself. But the decision was reversed by a state appeals court. Ultimately, psychiatrists decided to release her after Brown successfully convinced the court that she should not be forced

to take medication.

Brown later became famous, speaking at Harvard University and being interviewed on “60 Minutes.” She eventually moved into a long-term residence for people with mental illness.

She died at age 58 on Nov. 29, 2005.

Greg B. Smith, Judge Delays Ruling on Adams' Mental Health 'Involuntary Removal' Plan, The City, Dec. 12, 2022

A federal judge Monday reserved judgment on a request to halt Mayor Eric Adams' plan to expand the use of involuntary commitment for people having mental health crises.

Manhattan Federal Judge Paul Crotty postponed deciding on a request by lawyers and advocates for the mentally ill for a temporary restraining order that would have put the brakes on the mayor's "Involuntary Removal Directive," which went into effect Nov. 29.

But the judge had also questioned whether anybody has been directly affected by the new initiative — and thus whether the request to stop enforcement was premature.

City Hall lawyer Alan Scheiner stated flatly that the answer was no, asserting that there is "not a single example of someone taken into custody because of this initiative."

The judge referenced a plaintiff in the case, Steven Greene, a 26-year-old diagnosed with post-traumatic stress disorder (PTSD) and attention deficit disorder (ADD) who says he's been involuntarily detained three times by police responding to mental health calls in the last few years — all before the new expansion.

"What about Mr. Greene's statement that he's afraid to go out on the street?" Crotty asked.

Greene's most recent detention in 2020 happened before Adams even ran for office, but in an affidavit filed in the request to halt the plan, Greene asserted the new initiative has left him in fear.

"As a result of the mayor's announcement, I am afraid to leave my apartment," he stated. "I am now constantly fearful that my mental disability will cause an NYPD officer to forcibly and violently detain me and hospitalize me against my will."

"My PTSD has been exacerbated by this announcement," he added.

New vs. Old

During an hour-long court hearing, plaintiff attorneys from New York Lawyers for the Public Interest insisted that the mayor's announcement was clearly a new initiative, while the city attorney described it as merely an effort to educate police about a tool they already had.

Prior to Adams' announcement last month, city policy had been to involuntarily detain a person experiencing a mental health crisis only if they were deemed to be an immediate risk to themselves or others. Typically that meant evidence or an observation that they had actually threatened to harm others or themselves.

Adams' said that he was expanding that to say anyone who appeared to be mentally ill and unable to take care of their own basic needs would be eligible — "even when no recent dangerous act has been observed."

The new protocol listed three examples that could initiate involuntary removal: "serious untreated physical injuries, unawareness or delusional misapprehension of surroundings, or unawareness or misapprehension of physical condition or health."

Advocates for those with mental disabilities, including Community Access, National Alliance on Mental Illness of New York, and Correct Crisis Intervention Today, argue that this language is so broad it could result in people being forcibly detained against their will merely for mumbling to themselves or appearing to be homeless on a cold night.

"Police officers are now going to be policing mental health," said a lawyer for the groups, Luna Droubi of the firm Beldock Levine and Hoffman. "This is policing someone for being homeless. This is policing someone for being mentally ill."

The city's lawyer, Scheiner, questioned the

motivation of the groups in moving to halt the new effort, arguing that the mayor's intent was to provide more help — not less — to those with mental disabilities who are unable to provide for themselves.

"What the plaintiffs appear to want, and I find this a bit perverse, is for mentally ill people to starve to death, bleed to death in the street, walk into traffic," he said.

'Triggering' Tactics

The request for the temporary stay was filed as part of an ongoing lawsuit filed last year on behalf of Greene and others who've been detained against their will by police in the last few years for psychiatric reasons.

That includes the case of Peggy Herrera, highlighted Monday by THE CITY. Herrera called 911 seeking help when her 21-year-old son, Justin Baerga, was having a mental health crisis, specifically asking them to send EMTs — not police. Several cops showed up anyway and Herrera wound up handcuffed and arrested while Baerga was beaten, handcuffed and brought to a nearby hospital psychiatric ward.

In requesting a temporary stay on Adams' new directive, lawyers suing the city in the ongoing case warned about "police officers with little to no expertise in dealing with individuals with mental disabilities who will be required to determine whether an individual should be forcefully — often violently — detained against their will."

In Greene's case, regular police officers, Emergency Service Unit (ESU) cops and EMTs showed up at his Bronx apartment in May 2020. Unbeknownst to Greene, the cops were responding to a 911 call that came in as "EDP [emotionally disturbed person] with a gun," according to the lawsuit.

When Greene answered the door and stepped into the hallway, an ESU cop asked him if he was suicidal, and another cop told him his social worker had called 911 to ask police to check on him. An EMT at the scene then said he'd need to go to the hospital because of the call from the social worker, whom he did not identify.

Greene denied being suicidal and refused to go to the hospital. When he turned and re-entered his apartment, the cops followed and eventually handcuffed him.

On the street, he was forcibly strapped to a gurney and placed in an ambulance. On the way to North Central Bronx Hospital, he told the EMTs that "they should not barge into the apartment of someone who has PTSD because it is triggering," the lawsuit states.

Greene was released from the hospital a few hours after he arrived, and his lawyers say this was not a new experience for him. He had been detained against his will on two prior occasions, according to the suit.

The judge did not say when he would make a decision in the case.

Memorandum

To: NYS Public Mental Health Providers

From: Ann Marie T. Sullivan, MD, Commissioner, NYSOMH
Thomas Smith, MD, Chief Medical Officer, NYSOMH

Date: February 18, 2022

RE: Interpretative Guidance for the Involuntary and Custodial Transportation of Individuals for Emergency Assessments and for Emergency and Involuntary Inpatient Psychiatric Admissions

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This guidance is intended to help clinicians, and other community providers, make thoughtful, clinically appropriate determinations relating to involuntary and emergency assessments, while respecting an individual's due process and civil rights.

Summary

There is often a misconception amongst both police as well as front-line mental health crisis intervention workers that a person with mental illness must present as "imminently dangerous" in order to be removed from the community to a hospital or CPEP setting for evaluation, admission and treatment, meaning that they need to present an immediate overt risk of violence to others or an immediate overt risk of physical harm to themselves in order for removal to be implemented. This is not the case.

The Mental Hygiene Law provides authority for peace officers and law enforcement officers to take into custody for the purpose of a psychiatric evaluation those individuals who appear to be mentally ill and are conducting themselves in a manner which is likely to result in serious harm to self or others, which includes ***persons who appear to be mentally ill and who display an inability to meet basic living needs, even when there is no recent dangerous act***.

Likewise, Directors of Community Services, as well as physicians or qualified mental health professional who are members of an approved mobile crisis outreach team, have the power to remove or to direct the removal of any person to a hospital for the purpose of evaluation for admission if such person appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others, which includes ***persons with a mental illness who displays an inability to meet basic living needs, even when there is no recent dangerous act***.

Limiting the application of the Mental Hygiene Law's (MHL) removal and admission provisions to only those who present as "imminently dangerous" leaves vulnerable persons at risk in the community without an opportunity for assessment, care and treatment, and can also impact the public safety. The New York State Office of Mental Health (OMH) therefore wishes to clarify both removal and involuntary psychiatric admission criteria for individuals who are suspected of

having a mental illness who may not be considered imminently dangerous. Article 9 of the Mental Hygiene Law provides the statutory framework for these provisions, and relevant statutes are summarized within this guidance. For additional clarification, OMH has provided caselaw summaries to provide examples of the practical application of these statutes. [1]

Background

Homelessness in New York City has reached the highest levels since the Great Depression; in October 2021, there were over 48,000 homeless individuals in NYC homeless shelters.[2] One third of homeless individuals suffer from a serious mental illness; the numbers are even higher for homeless single adults.[3] Chronically homeless individuals with serious mental illness often have symptoms and cognitive difficulties that further contribute to difficulties accessing treatment and housing resources, placing them at higher risk for poor outcomes including harm to themselves or others.

Involuntary and emergency admissions are governed by New York State laws, regulations issued by OMH, and judicial decisions issued by courts in NYS that interpret those laws and regulations.

- The primary body of laws that govern Involuntary and Emergency Admissions is Article 9 of the Mental Hygiene Law.
- OMH's regulations are set forth in Title 14 of New York Codes, Rules and Regulations.
- There have been a number of important judicial decisions that help define criteria for admission; citations to some of these decisions are included below.

I. *Serious Harm to Self or Others*

Under the authority of MHL §§9.37, 9.41 & 9.45, and current case law, police and peace officers have the ability, and with respect to §§9.37 & 9.45 the duty, to take into custody for the purpose of a psychiatric evaluation those individuals who appear to be mentally ill and are conducting themselves in a manner which is likely to result in serious harm to self or others. MHL §9.59 confers statutory immunity from liability to police officers, peace officers, and EMTs, for non-motor vehicle related injuries and death allegedly incurred in the course of such removal, absent gross negligence.

In *Matter of Scopes*, the Appellate Division's Third Department ruled that in order to satisfy substantive due process requirements, "the continued confinement of an individual must be based upon a finding that the person to be committed poses a real and present threat of substantial harm to himself or others," but that such a finding does not require proof of a recent overtly dangerous act.[4]

[1] This guidance is intended to provide a synopsis of relevant caselaw and statutory authority and is not meant to constitute legal advice. This guidance memorandum should therefore not be construed as OMH providing legal advice or be relied on as legal authority. All providers should consult their own legal counsel as appropriate.
[2] Coalition for the Homeless. Basic Facts About Homelessness. January 2022. Accessed January 21, 2022 https://www.coalitionforthehomeless.org/basic-facts-about-homelessness-new-york-city/
[3] Shan LA and Sandler M. (2019). Addressing the Homelessness Crisis in New York City: Increasing Accessibility for Persons with Severe and Persistent Mental Illness. Columbia Social Work Review, 14(1), 50–58. https://doi.org/10.7916/cswr.v14i1.1856
[4] *Matter of Scopes v. Shah,* 59 A.D.2d 203, 398 N.Y.S.2d 911 (N.Y. App. Div. 1977).

The Appellate Division's First Department, in *Boggs v. Health Hospitals Corp.*, held that a person's inability to meet their basic living needs was sufficient to establish dangerousness to self, thereby meeting the involuntary admission standard that the person appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others. In that case, Ms. Brown, aka Billy Boggs, was homeless and was allegedly living on a sidewalk grate in winter, running into traffic, making verbal threats to passersby, tearing up and urinating on money that passersby gave her, and covering herself in her own excrement. On January 15, 1988, a state supreme court justice ruled that Bellevue Hospital could not forcibly medicate Ms. Brown and ordered her released from hospitalization, in part because although she was mentally ill, her behavior was not deemed by the court to be obviously and immediately dangerous to anyone. The case was appealed, and the appellate court ruled that Ms. Boggs' behavior met the standard for involuntary admission as she was unable to meet her needs for food, clothing, and shelter, which was deemed sufficient to establish dangerousness to oneself.[5]

Further cases followed and applied the same standard as found in *Boggs* and it is now well settled law[6] that an inability to meet one's need for food, clothing or shelter is sufficient to establish dangerousness to self for purposes of removal from the community for assessment and involuntary admission.

II. *Mechanisms for Removal from the Community*

MHL §§9.37, 9.41, 9.45 and 9.58, combined with the established *Boggs* standard in case law, provide the authority to remove and hospitalize people who appear to have mental illness and present a danger to themselves due to substantial self-neglect, with evidence of a recent overt dangerous act not being necessary.

MHL Section 9.37

Subsection (d) of MHL §9.37 provides that upon the written request of a director of community service or their designee, it shall be the duty of peace officers, when acting pursuant to their special duties, or police officers who are members of the state police or an authorized police department or sheriff's department, to take into custody and transport any such person (for whom there is an application for involuntary admission pursuant to this section) as requested and directed by such director or designee. Ambulance services are also authorized to transport such individuals.

MHL Section 9.41

Any law enforcement officer may take into custody for an evaluation any person who appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others. Likelihood of serious harm includes: attempts/threats of suicide or self-injury; threats of physical harm to others; or other conduct demonstrating that the person is dangerous to him or herself, including a person's refusal or inability to meet his or her essential need for food, shelter, clothing or health care, provided that such refusal or inability is likely to result in serious harm if there is no immediate hospitalization.

[5] *Boggs v. Health Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (N.Y. App. Div. 1987).
[6] *In re Application of Consilvio v. Diane W.,* 269 A.D.2d 310, 703 N.Y.S.2d 144 (N.Y. App. Div. 2000), *In re Carl C.*, 126 A.D.2d 640, 511 N.Y.S.2d 144 (N.Y. App. Div. 1987).

MHL Section 9.45

A director of community services or their designee has the power to direct the removal of any person for an evaluation if any authorized individual reports that such a person has a mental illness for which immediate care and treatment in a hospital is appropriate and which is likely to result in serious harm to himself or herself or others. Authorized reporters include the following: licensed physician, licensed psychologist, registered nurse, or licensed social worker providing treatment, police/peace officer, spouse, child, parent, adult sibling, legal guardian, and supportive or intensive case manager. Peace officers, when acting pursuant to their special duties, or police officers must assist in taking into custody and transporting any such person.

MHL Section 9.58

A physician or qualified mental health professional who is a member of an approved mobile crisis outreach team shall have the power to remove or to direct the removal of any person to a hospital approved by the Commissioner for the purpose of evaluation for admission if such person appears to be mentally ill and is conducting himself or herself in a manner which is likely to result in serious harm to the person or others.

III. *Involuntary and Emergency Admissions*

Admission Standards:

- ***A person with a mental illness who displays an inability to meet basic living needs meets the involuntary admission standard for dangerousness to self.*** The individual is conducting himself or herself in a manner which is likely to result in serious harm to the individual or others.

- ***A person with a mental illness can meet criteria for involuntary admission even when there is no recent dangerous act.*** Courts have found that evaluating psychiatrists may consider an individual's entire history when determining if an individual needs involuntary admission.

The following provisions of the MHL are applicable to involuntary and emergency admissions and are subject to the *Boggs* and *Scopes* standards previously discussed.

Involuntary Admissions on Medical Certification ("2PC")

MHL §9.27 sets the standard for involuntary admissions by medical certification (also called a "9.27" or a "2PC") which may be utilized in psychiatric hospital settings, psychiatric emergency rooms and comprehensive psychiatric emergency programs at the point of admission. Under this statute, individuals can potentially be held for up to 60 days, although the patient, a friend or relative, or the Mental Hygiene Legal Service may request a court hearing to contest the involuntary retention at any time during such period.

As per statute, to be involuntarily hospitalized, an individual must have:

- "a mental illness[7] for which care and treatment as a patient in a hospital is essential to such

[7] The term "Mental Illness" is defined in MHL§ 1.03 as "an affliction with a mental disease or mental condition which is manifested by a disorder or disturbance in behavior, feeling, thinking, or judgment to such an extent that the person afflicted requires care, treatment and rehabilitation."

person's welfare and whose judgment is so impaired that he is unable to understand the need for such care and treatment." (MHL §9.01 and §9.27)

Court decisions have further clarified these requirements. For instance, the Appellate Division's Second Department held in the *Matter of Harry M* that involuntary admissions must be based on a finding that the individual is dangerous, but also that dangerousness is not solely determined based upon whether an individual is expressing suicidal or homicidal ideation.[8] The Court was clear that involuntary admissions were permissible for individuals "whose mental condition manifests itself in a neglect or refusal to care for themselves which presents a real threat of substantial harm to their well-being." ***Patients can meet criteria for involuntary admission even when there is no recent dangerous act.*** Courts have found that evaluating psychiatrists may consider an individual's whole history when determining if an individual needs involuntary admission.[9,10]

The following are examples of individuals who would meet criteria for involuntary admission on medical certification[11]:

- Patient A, who has a history of bipolar disorder and four prior psychiatric admissions, was brought to a medical emergency department (ED) where she was found to be acutely agitated by the consulting psychiatrist. She removed all her clothes, required several rounds of emergent intramuscular medications, and four-point restraints for agitated behavior. The consulting psychiatrist documented that Patient A had paranoia, poor impulse control, was unable to care for her basic needs, and was therefore a potential danger to herself.[12]

- Patient B is a 43-year-old woman with schizoaffective disorder. When unmedicated, she walks onto busy roads and preaches to the passing cars. She has had numerous prior admissions where the religious preoccupations improve, but she always discontinues treatment upon discharge and resumes this activity, which places her in serious danger of being hit by a car. Patient B consistently denies suicidal ideation. Patient B also refuses to engage in planning on how to obtain food and shelter and is insistent on being discharged to a shelter.[13]

- Patient C is a 40-year-old woman who is street homeless and has lived outside a restaurant in Manhattan for the last year. A homeless outreach team has observed her steadily deteriorate and become increasingly disheveled, malodorous, and malnourished. The outreach social worker observed Patient C urinate and defecate on the street, tear up money given to her by people walking by, and become increasingly verbally aggressive, including shouting racial slurs and other obscenities at pedestrians and delivery workers. The mobile crisis team staff are worried she will be assaulted because of her behavior.[5]

- Patient D is a 23-year-old with a prior diagnosis of anorexia nervosa. She was admitted with a weight of 52 lbs (normal for her height would be 100 lbs). Patient D continued to restrict caloric intake and intermittently became hyponatremic from polydipsia in an effort to show weight increase without eating. Patient D showed extreme difficulty gaining insight into the

[8] *Matter of Harry M*, 96 A.D.2d 201, 468 N.Y.S.2d 359 (N.Y. App. Div. 1983).
[9] *Boggs v. Health Hosps. Corp.*, 132 A.D.2d 340, 523 N.Y.S.2d 71 (N.Y. App. Div. 1987).
[10] *Matter of Seltzer v. Hogue*, 187 A.D.2d 230, 594 N.Y.S.2d 781 (N.Y. App. Div. 1993).
[11] While these examples are derived from the cited published caselaw, some of the facts may have been altered in this guidance for narrative purposes.
[12] *Rueda v. Charmaine D.*, 17 N.Y.3d 522, 958 NE 2d 106, 934 N.Y.S.2d 72 (2011).
[13] *Matter of Yvette S.*, 163 Misc.2d 902, 622 N.Y.S.2d 879 (Sup. Ct, Queens Cnty. 1995).

dangerousness of her behavior and remained resistant to psychotherapeutic or pharmacologic treatment, even though she gained weight and was placed on fluid restriction in the structured unit milieu. Her treating psychiatrist was concerned that without a controlled environment that could impose fluid restrictions and further treatment, Patient D could experience cerebral edema and die.[14]

- Patient E is a 48-year-old man with bipolar disorder and several prior psychiatric admissions who was brought to the ED for treatment of severe hand injuries that required amputation of his left hand and three fingers on his right hand. Five days prior, he had allowed a large firecracker to explode in his hands and did not seek treatment until a family member found him and called 911. The need to amputate resulted from the patient's delay in seeking medical treatment. Two days after the surgery, he eloped from the hospital and was later brought back by police. He was transferred to the hospital's psychiatric unit where he remained irritable, labile, easily agitated, pressured, intrusive, and had disorganized speech. No suicidal ideation or intent was present. [15]

- Patient F is a veteran with a history of traumatic brain injury, schizophrenia, and substance use disorder (cocaine, heroin, PCP, cannabinoids, alcohol, and LSD) who was brought to a CPEP by the police with threatening behavior. Patient F has a 30-year history of extensive prior involuntary admissions and incarcerations for threatening and destructive behavior and shows no insight into having any mental illness or substance use disorders. He previously improved on treatment with lithium and chlorpromazine, but today is not on any medications. He also has a history of immediately discontinuing treatment and relapsing on substances upon discharge from psychiatric hospitals. While currently Patient F denies any suicidal and homicidal ideation, he has a history of masturbating in public, crouching between parked cars and jumping into traffic, siphoning gasoline from cars and using it to light newspapers on fire under other cars, and a history of assaulting and injuring an older woman. He has a prior admission for when Patient F threw a 150lb bench through a neighbor's windshield, bending the frame and breaking the steering system of the car.[16]

Emergency Admission for Immediate Observation, Care, and Treatment

MHL §9.39 sets the standard for emergency psychiatric hospitalization (also called a "9.39" or a "1PC"). Individuals alleged to have a mental illness can be held for up to 14 days under this statute for observation, care and treatment. An emergency admission under MHL §9.39 requires that the individual alleged to have a mental illness has engaged in a recent overt dangerous act or behavior and the individual must present either:

- A "substantial risk of physical harm to himself as manifested by threats of or attempts at suicide or serious bodily harm or other conduct demonstrating that he is dangerous to himself," OR

- A "substantial risk of physical harm to other persons as manifested by homicidal or other violent behavior by which others are placed in reasonable fear of serious physical harm." (MHL §9.39)

[14] *Matter of Paulina D.*, 104 A.D.3d 883, 961 N.Y.S2d 320 (N.Y. App. Div. 2013).
[15] *New York City Health & Hosps. Corp. v. Brian H.*, 51 A.D.3d 412, 857 N.Y.S.2d 530 (N.Y. App. Div. 2008).
[16] *Seltzer v. Hogue*,187 A.D.2d 230, 594 N.Y.S.2d 781 (N.Y. App. Div. 1993)

However, a substantial inability to provide for one's basic needs because of a mental illness can be considered conduct demonstrating that a person is dangerous to themselves.

Examples of individuals who may meet criteria for an emergency psychiatric admission include:

- Patient W is a 19-year-old brought to the ED by police after yelling and shaking their fists at several customers in a supermarket. Patient W also pushed over a shopping cart, damaged products, and tried to break a display case.

- Patient X is an 87-year-old who was brought to the ED by his son after the son found a suicide note. Patient X recently gave away his money to charity and bought a gun.

- Patient Y is a 40-year-old with schizophrenia who has disengaged from care. Patient Y was brought to the ED by EMS with hypothermia because he was grossly disorganized and unable to locate shelter despite the freezing cold weather.

- Patient Z is 38-year-old with schizoaffective disorder. She is convinced N, an acquaintance, is a spy from the devil and Patient Z plans to "exorcise N from the earth." Patient Z has purchased a gun and has been carrying it in the event she runs into N.

Emergency Admission to a Comprehensive Psychiatric Emergency Program

MHL §9.40 provides for emergency admission to a comprehensive psychiatric emergency program (CPEP). Emergency admission to a CPEP uses the same standard as a MHL §9.39 emergency admission but differs in that individuals may only be held for observation, care and treatment for up to a maximum of 72 hours under this statute and upon the expiration of such time the individual must be discharged or else converted to MHL §§9.27 or 9.39.

The following is a hypothetical based upon caselaw of an individual who would meet criteria for an emergency admission:

- An individual was brought to a CPEP by EMS after a series of provoked verbal and physical altercations with another tenant in their housing development. The individual was interviewed by a medical student and subsequently by a doctor with the medical student present. Based upon the second interview, the doctor determined that the individual had demonstrated poor judgment and that this judgment combined with grandiosity could be a sign of ***hypomania***, which the doctor believed was a potentially dangerous condition if untreated that interfered with the ability to engage in the community in a safe way. The attending psychiatrist then interviewed the individual and reviewed the medical chart and collateral sources. The attending psychiatrist concluded that the individual exhibited poor judgment and potentially aggressive and violent verbal and physical behavior and as such, should be held for further observation under MHL § 9.40. Upon further interviews and observations, the individual was converted to a MHL § 9.39 status. The court found that the doctors' diagnoses, actions, and subsequent determinations under ***MHL §§ 9.40*** and ***9.39*** did not fall substantially below accepted medical standards.[17]

[17] *Kraft v. City of NY*, 696 F.Supp.2d 403 (2010).

Resources

Office of Mental Health; Mental Hygiene Law – Admissions Process
OMH Form 471 – Application for Involuntary Admission on Medical Certification
OMH Form 471a – Certificate of Examining Physician
OMH Form 471b – Request by Examining Physician to Transport A Mentally Ill Person
OMH Form 474 – Emergency Admission

This guidance is intended to provide information about NYS statutes related to involuntary inpatient mental health treatment. Clinicians should feel comfortable contacting their local NYS OMH Field Office to discuss specific cases and circumstances in which questions arise regarding involuntary care.

Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996)

II. Chronic Nuisances in Public Spaces

In large cities in the United States, governments own as much as 45% of the developed land area and allocate most of these public lands for use as streets and highways. In a society that not only accepts, but exalts, private property in land, why does one observe so much open-access land? The basic reason is that private firms cannot feasibly collect tolls from entrants who use spaces for no more than a few moments. As a result, market forces alone cannot supply an adequate number of transportation corridors such as streets and sidewalks. Nor can markets readily provide, in downtown areas, squares and parks for pedestrians to use briefly for gathering and relaxation.

Democratic ideals provide another rationale for public spaces. Mass gatherings and mixings occur more frequently where there are numerous sites that all can enter at no charge. To socialize its members, any society, and especially one as diverse as the United States, requires venues where people of all backgrounds can rub elbows. In Carol Rose's memorable phrase, there must be sites for "the comedy of the commons." For a romantic, the ideal is to have some spaces that replicate the Hellenic agora or the Roman forum. A liberal society that aspires to ensure equality of opportunity and universal political participation must presumptively entitle every individual, even the humblest, to enter all transportation corridors and open-access public spaces.

A. The Tragedy of the Agora

A space that all can enter, however, is a space that each is tempted to abuse. Societies therefore impose rules-of-the-road for public spaces. While these rules are increasingly articulated in legal codes, most begin as informal norms of public etiquette.

Rules of proper street behavior are not an impediment to freedom, but a foundation of it. As Chief Justice Hughes put it, the regulation of public spaces "has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend." These rules are comparable to the use of Roberts' Rules of Order in a meeting. . . ..

B. The Concept of a Chronic Street Nuisance

What, if anything, should a society do when an individual perpetrates a chronic street nuisance? This category, as I define it, refers to behavior that (1) violates community norms governing proper conduct in a particular public space (2) over a protracted period of time (3) to the minor annoyance of passersby. Protracted, nonaggressive panhandling and bench squatting are paradigm examples.

At first blush, a chronic street nuisance seems too minor a matter to be worth anyone's attention, much less that of municipal authorities. An individual victimized -- even the word seems too strong -- by this sort of behavior experiences only a minor level of vexation, and usually only for an instant. The encounter will generally not elicit comment, much less official complaint, from a pedestrian. By contrast, an arrest for breach of the peace typically involves behavior anomalous enough to provoke a buzz of conversation among those who witnessed it.

Perhaps it is not surprising, then, that the crackdown ordinances of the 1990s generally have targeted, not chronic street nuisances, but single acts of disorderly conduct, such as an aggressive solicitation, the act of lying down on a busy sidewalk, or an instance of overnight sleeping in a park. Indeed, the criminal justice system generally responds to troubling incidents, not to courses

of conduct over time (with some exceptions, such as racketeering). A number of practical reasons explain this pattern. An incident is far more likely to produce a complaining witness who will agitate for prosecution. Evidence is easier to gather when the facts at issue involve behavior within a short time frame. Furthermore, risks of discriminatory enforcement probably are higher when police and prosecutors target chronic offenders.

Because the criminal justice system now focuses primarily on troubling incidents -- on the spikes on the graph of street disorder -- the ambient levels of street disorder are likely higher than optimal. A few street people disproportionately create an ambience of urban disorder …

1. Harms of Chronic Street Misconduct in General

For four interrelated reasons, the harms stemming from a chronic street nuisance, trivial to any one pedestrian at any instant, can mount to severe aggravation. First, because the annoying act occurs in a public place, it may affect hundreds or thousands of people per hour. (Contrary to what some might assert, views of offensive street conduct cannot be avoided simply by turning one's eyes.) Second, as hours blend into days and weeks, the total annoyance accumulates. Third, a prolonged street nuisance may trigger broken-windows syndrome. As time passes, unchecked street misconduct, like unerased graffiti and unremoved litter, signals a lack of social control. This encourages other users of the same space to misbehave, creates a general apprehension in pedestrians, and prompts defensive measures that may aggravate the appearance of disorder. For example, designers of a downtown office building who anticipate bench squatting may place spikes in building ledges. These spikes then serve as architectural embodiments of a social unravelling, accentuating the broken-windows signal. Fourth, some chronic street offenders violate informal time limits. In open-access public spaces suited to rapid turnover, norms require individual users to refrain from long-term stays that prevent others from exercising their identical rights to the same space. These norms support government time limits on the use of public parking spaces and campsites. They also underlie informal cutoff points on the use of, say, a drinking fountain on a hot day, a public telephone booth in a crowded airport, or a playground basketball court. The longer an individual panhandles or bench squats, the more likely pedestrians will sense that he is disrespecting an informal time limit. Even street performers and solicitors for charities, commonly well received when they first arrive at a public space, may eventually wear out their welcomes.

In the case of a mild-mannered panhandler or bench squatter, the graph of damage caused over time may be U-shaped. On first arrival, a new panhandler or bench squatter in a downtown plaza may make the regular users of the space apprehensive. After some time has passed, familiarity may allay these users' worst apprehensions, and the regular users may adapt to some degree to the newcomer's presence. Eventually, however, the marginal damage per period of time may turn upward. Observers may be increasingly annoyed that the street person is not only overusing scarce public space, but apparently has not sought out employment, family assistance, or public aid.

C. A Recommended Doctrinal Definition of a Chronic Street Nuisance

The varied enforcers of street norms, including nonstate entities, can benefit from having a test for identifying chronic street misconduct. Law, particularly the traditional law of public nuisances, suggests some formulations that any of these enforcers could use.

1. A Proposed Prima Facie Case

Public-nuisance law, a stepchild of the far more analyzed private-nuisance law, deals in part with

pervasive harms, usually minor at any instant, that persist for a long duration to the injury of the general public. Unless a member of the public has suffered special injury, a public nuisance typically is remediable solely by public officials, who may seek abatement orders or imposition of (usually minor) criminal penalties. Public-nuisance doctrine properly pays heed to both the value of the annoying activity to its sponsor and the magnitude of the harm to the public.

a. The Proposal

The following test (for lawyers, prima facie case) can serve to identify the gravamen of the offense: A person perpetrates a chronic street nuisance by persistently acting in a public space in a manner that violates prevailing community standards of behavior, to the significant cumulative annoyance of persons of ordinary sensibility who use the same spaces. This is a strict-liability test, like that for a public nuisance; there is no required element of negligence or wrongful intent. A strict-liability test is readily administrable, a distinct advantage in light of the many actors who engage in social control of street behavior. The proposed standard is also democratic, because virtually everyone is a street user and helps shape street norms through highly diffuse and pluralistic social processes. That there is little variation in the tastes for street order between, for example, rich and poor, and black and white, should help reassure those worried about possible biases in the approach.

c. Only Acts, Not a Status, Can Create a Nuisance

The proposed legal definition of a chronic street nuisance requires a voluntary course of action such as protracted panhandling or day-after-day bench squatting. Both classical-liberal ideals and the Constitution demand that the law of street nuisances regulate a person's choices, not some unalterable status. In particular, it is impermissible to criminalize either the status of poverty or the status of homelessness (lack of regular access to a permanent dwelling). To take advantage of this legal doctrine, some advocates for street people have striven to characterize municipal crackdown ordinances that purportedly target behavior as actually targeting status.

Many advocates sincerely believe that street people are so constrained by economic and social circumstances that they lack real choices. Most (although not all) social-welfare professionals hold the view that poor people always act under duress; according to this view, society should not "blame" poor people or, under an extreme formulation, ask them to bear any responsibilities. While no one's will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition -- or salutary myth -- that an individual is generally responsible for his behavior. This policy, at the margin, helps foster civic rectitude.

To treat the destitute as choiceless underestimates their capacities and, by failing to regard them as ordinary people, risks denying them full humanity. Street people daily face fundamental decisions about where to eat, sleep, and pass time. More than persons living lives structured by families and employers, a street person must individually craft a daily routine.

Begging, for example, is an option, not an inevitability. Only a small percentage of disabled and destitute individuals engage in panhandling. Brandt Goldstein found that most panhandlers at Yale had consciously weighed alternatives, including holding a low-status, minimum-wage job. There is abundant evidence that chronic beggars premeditate how to increase the alms they receive. Bench squatters also have many choices about where to be, and plenty of time to move from place to place. In sum, panhandling and bench squatting are acts, not statuses. . .

E. Why "Homeless" Tends to Be a Misleading Label

The previous paragraph includes several references to the "homeless." This term is commonly applied to all poor people -- including those who reside in permanent dwellings -- who chronically make heavy use of the streets. Because the term often crops up in litigation and policy discussions, I conclude this part with some linguistic housekeeping on the differences between the "homeless" and "street people."

The nouns customarily used to describe down-and-out street people have moved with the spirit of the times. Before the 1980s, street people were usually saddled with a negative label, such as "vagrant," "derelict," "bum," "drifter," or "beggar." In the 1980s, activists encouraged journalists and scholars to relabel street people as the "homeless," a term that had been used with reference to street people only sparingly during prior decades. In the mid-1980s, the universal adoption of the term "homeless" helped engender more empathy for street people. Whenever possible in this Article, however, I refer to "street people" (or "panhandlers" or "bench squatters"), not to the "homeless." "Homeless" is an unduly ambiguous word and implies policy solutions that are inapt.

Ordinary speakers tend to attach the "homeless" label to individuals whose lives meet at least one of three quite different criteria: persons who spend the night in an emergency shelter; persons who spend the night on the "streets" (e.g., in vehicles, railroad stations, parks, and other spaces not designed for residential use); and panhandlers, daytime bench squatters, squeegee men, can collectors, and other active "street people." To be sure, the members of all three groups share a number of attributes. They tend to be destitute, socially isolated, and at most episodically employed. They also tend to be heavy users of public spaces.

Nevertheless, the composition of these three groups overlaps far less than is popularly thought. For example, although pedestrians may assume that a panhandler sleeps in a shelter or on the streets, studies indicate that, in most cities (but seemingly not in New York), a large majority of panhandlers have "regular access to a permanent dwelling" and thus fail to meet the scholarly definition of the homeless. Conversely, only a small fraction of the street and shelter homeless engage in panhandling.

The label "homeless" also has fostered misguided policies. The word implies that the problems of the people so labeled can be solved with bricks-and-mortar -- with "housing, housing, housing," as Robert Hayes and other advocates were still saying in the late 1980s. By the early 1990s, there was broad agreement that this policy response was largely off target, and the new mantra became "therapy, therapy, therapy." Brendan O'Flaherty persuasively argues that the new policy fix is no better than the old. Singling out persons labeled "homeless" for special benefits and burdens tends to entrap them in a marginal status. O'Flaherty would treat them like everyone else, not as members of a special class.

III. The Many Sources of Street Order

If a perpetrator of a chronic street nuisance were deemed an appropriate target for a sanction, who should apply the punishment? Although "legal centralists" think first of the state, another enforcer often would be preferable. An individual's behavior toward another person can be constrained by: first-party controls that the individual imposes on himself; second-party controls that the other person applies; and third-party controls administered by either (a) unofficial onlookers, (b) private organizations, or (c) the state. The suitability of the candidates varies with the information they possess about street behavior, and with their incentives and capacities to act on that information. When making street law, legislators and judges should be aware of the full panoply of enforcers and be sensitive to the relative aptitude of each.

A. Internalized Norms of Street Etiquette

Much orderly behavior is self-generated. Parents, teachers, religious leaders, and others strive to induce young people to internalize norms, including informal rules of proper conduct in public places. A person who has internalized a norm will usually comply with it to avoid guilt feelings. Most people avoid chronic panhandling and bench squatting because they would feel ashamed of themselves for doing it.

In the United States, the socialization of the young is much more haphazard than in, say, Japan. Researchers find that American street people disproportionately have spent their childhoods with severe disadvantages, including a lack of socialization to mainstream norms. …

B. Pedestrians' Self-Help Defenses

A pedestrian bothered by a street nuisance may exercise self-help against the perpetrator. While walking by an unaggressive chronic panhandler, for example, a pedestrian at minimum could decline to give alms -- a response that, if universal, would discourage panhandling by making it fruitless. A pedestrian's affirmative self-help reactions might conceivably include, in order of escalating severity and controversy: avoiding eye contact after being accosted; coldly staring back; frowning; speaking reprovingly; pushing the extended palm away; spraying mace; and throwing a punch. …

A chronic street nuisance is a nearly intractable social problem largely because an affected pedestrian is highly unlikely to do anything in response to it. The amount of damage from a single act of panhandling or bench squatting is typically insignificant; for a given onlooker, the harm can become substantial only after it has accumulated over time. …

C. Third Parties That Police the Streets

1. Individual Champions of the Public

b. Owners and Occupiers of Abutting Land

Many private third parties have stronger incentives to monitor public spaces than ordinary pedestrians do. Landlords and tenants of street-level properties tend to be especially attentive because the external benefits of greater street civility are capitalized into the value of their assets. For example, a restaurateur with a multi-year lease would want to shoo away sidewalk panhandlers who had chronically annoyed his patrons. His landlord would share this interest. Commercial leases commonly entitle the landlord to a percentage of the tenant's gross income, and, in any event, the landlord would be concerned about rent levels in postlease years. Small wonder that streetfront merchants earned Jane Jacobs's glowing admiration as "eyes upon the street."

2. Organizations That Enforce Street Decorum

Various associations other than the police may have an interest in enforcing street norms. …Most pertinently, residents of a neighborhood may form organizations for the specific purpose of governing public spaces. Familiar examples are residential block associations and groups such as "Friends of the Park." In commercial districts, where panhandlers most commonly congregate, merchants' associations are key players. A voluntary merchants' association, such as a Chamber of Commerce chapter, may face a free-rider problem and consequently be ineffective at providing public goods. One solution to the free-riding problem is formation of a Business Improvement District (BID), a government-approved organization empowered to levy assessments on all landowners within district boundaries. Although BIDs also engage in sanitation and business

promotion, the control of disorderly street people has emerged as one of their central functions. Some have hired outreach workers to offer social services to the chronically homeless. Harking back to a late-nineteenth-century tradition, an increasing number of merchants' associations appeal to pedestrians to refrain from giving cash to panhandlers (a strategy that First Amendment scholars would refer to as "more speech").

3. The Police

Members of close-knit social communities commonly are able to dispense with government peacekeepers. Indeed, police departments were unknown in the United States prior to the mid-nineteenth century. Today, because large cities are far from close-knit, even Jane Jacobs would acknowledge that police officers play an essential role in monitoring downtown spaces. In these social environments, other types of enforcers simply are unable to provide enough of the public good of street order.

In the latter half of the nineteenth century, urban police forces concentrated much of their effort on controlling street misconduct, which in that era was associated with "the dangerous class." Beginning around the turn of the century, however, police officers and prosecutors began to regard fighting violent crime as more important than dealing with disorderly behavior. Particularly in the years after 1965-1975, a decade that witnessed both a jump in violent crime and a legal revolution that eviscerated street law, police officers' concern with minor misbehavior in public spaces plunged. The 1990s backlash may signal the end of this period of relative inattention.

A conscientious foot-patrol officer strives to develop relationships with street people, partly to protect them from crime. To control someone creating a temporary disturbance in a public space, an officer is apt first to try informal methods, and to use arrest for public nuisance only as a last resort. Unlike a disturber of the peace, the perpetrator of a chronic street nuisance is highly unlikely to provoke any onlooker into making a report to the police. Because patrol officers are habitual street users, however, they themselves witness continuing violations of street norms and can keep mental records on the protractedness of offenses.

If armed with a traditional public-nuisance statute or a more particularized statute or ordinance aimed at chronic street misconduct, in practice a police officer would be inclined to invoke this statutory authority, not as a ground for making an arrest, but as the basis for a verbal warning or request to move along. Nothing more should be necessary in the overwhelming majority of cases. If a street person were to ignore this warning, the next step might be a citation. Recidivists eventually would risk a few nights in jail. A city attorney might even seek an injunction that ordered an inveterate offender not to resume the chronic pattern of begging, bench squatting, or other offense.

In some contexts, police officers are less suited than others to enforce street decorum. Given central-city pay scales, patrol officers tend to be relatively costly "eyes on the street" compared to eyes in the informal sector. Many police forces also have officers who are corrupt, capricious, and sadistic. As the next parts demonstrate, the risk of police misconduct led to several decades of judicial hostility to the enforcement of vagrancy laws, to the eclipse of informally policed Skid Rows, and, in some cities, to the creation of officially designated safe zones for disorderly people.

. . .

VI. The Federal Constitutional Rights of Individuals Who Chronically Misbehave in Public Spaces

Both informal and formal systems for zoning public spaces pose significant federal constitutional issues, although of somewhat different sorts. . . . For example, in a leading case, *Pottinger v. City of Miami*, a class action brought on behalf of Miami's street people, the plaintiffs' complaint invoked four different amendments to the United States Constitution, as well as the unenumerated federal constitutional rights of privacy and travel.

Ordinary pedestrians are not parties in these cases, and they are also unlikely to appear as witnesses. Typical is *Pottinger*, which pitted street people against city officials. Despite the best efforts of city attorneys, this lineup of parties creates a risk that a judge assigned to a street-law case will have a one-sided impression of the liberty issues at stake. For example, panhandlers who make a downtown space uninviting conceivably may infringe on other pedestrians' privacy, right of travel, "right to be left alone," and ability "peaceably to assemble" in an agora. The characterization of pedestrian interests in the prior sentence is not meant to imply a recommendation that a judge hold that a pedestrian has a federal constitutional right to inviting public spaces. The point, rather, is that the rules of street law affect the liberty interests of all who are mobile, many of whom may not be before the court.

Another important constitutional issue warrants attention at the outset. Government efforts to treat persons by category may run afoul of the Equal Protection Clause. Because neither poverty nor homelessness is a "suspect classification," the principal legal question would be de facto discrimination by race. Between 1970 and 1990, the population of street people in many downtowns went from disproportionately white to disproportionately black. A crackdown ordinance, even if racially neutral on its face, would be vulnerable to an equal protection challenge if city legislators had harbored racial animus when adopting the ordinance or if officials had administered it in a racially discriminatory fashion.

This issue is strikingly absent in street-law litigation. Although racial tensions unquestionably pervade American life, the *Pottinger* advocates and other attorneys for street people, who typically show no hesitation in making a scattershot constitutional attack, rarely plead that a crackdown policy is racially discriminatory. For a variety of reasons, in most cities this charge would be difficult to prove. Partly because the effects of alcoholism, drug addiction, and mental illness are colorblind, even in the 1980s and early 1990s, whites constituted a significant fraction of panhandlers, bench squatters, and other downtown street people. The timing of the crackdowns also does not suggest a racial motive; while black street people had begun to increase in number in the early 1980s, many cities did not start their crackdowns until a decade later. More probative still, many of the cities that implemented street-control programs in the early 1990s could not plausibly be regarded as hotbeds of anti-black animus. In Atlanta and Washington, D.C., for example, blacks dominate local politics. The likes of Berkeley, Evanston, and Seattle are hardly known for racist virulence. In general, white prejudice against blacks has been in decline since 1960; indeed, it was this decline that enabled more street blacks to go downtown in the 1970s and 1980s. Pedestrians' concerns about street disorder span all centuries, social classes, and races. While advocates and judges must be alert to evidence of racial discrimination, they should also recognize that a city can have entirely legitimate reasons for attempting to stem misconduct in public spaces.

B. Bench Squatters' Constitutional Rights

In the early 1990s, advocates initiated lawsuits to establish the rights of the street homeless to camp overnight in certain public spaces in downtown areas of large cities. The trial judge in

Pottinger v. City of Miami and the intermediate appellate court in Tobe v. City of Santa Ana (the two leading cases) ruled that the U.S. Constitution indeed requires a city to allow a bench squatter to sojourn in some public place. First Amendment issues were not central in either *Pottinger* or Tobe because bench squatting typically is too passive to constitute "expressive conduct." Rather, the advocates' early successes in both cases mainly turned on the right of travel and the right to be free from prosecution for a status crime.

1. Freedom of Travel

In the abstract, the federal constitutional right of travel might entitle a destitute person to sojourn in: (1) all city spaces; (2) most city spaces; (3) a few city spaces; or (4) none at all.

While advocates for street people can be expected to press for (1) or (2), most judges wisely have concluded that (3) and (4) are the only conceivable constitutional mandates. A city has a number of legitimate reasons for regulating chronic squatting in a well-trafficked space. A street person in New York City surely should not have the privilege of bedding down in the Children's Zoo in Central Park or on every street or sidewalk. A public space is no longer openly accessible when one individual is using it all the time. An unfettered right to squat almost anywhere, with priority given to those arriving first in time, would create a land rush on a city's choicest spots.

At the very most, the federal constitutional right of travel requires a city to permit a destitute individual to enter all open-access public spaces when alert, and camp and bench squat at a few public locations that the city has plausibly selected for that use. This outcome would permit a city to keep most of its public spaces inviting for ordinary pedestrians, while providing the destitute with ample channels for sojourning. The leading decisions all indicate that no more is required of a city. In Clark v. Community for Creative Non-Violence, for example, the Supreme Court sustained a National Park Service restriction on the establishment of campsites along the Mall and in Lafayette Park. As mentioned, these Washington venues are prime national gathering places. The Court's decision enabled park administrators to ensure that many different groups could rotate rapidly through the spaces without having to deal with entrenched squatters. The Clark majority noted that the National Park Service had provided ample camping sites at other downtown locations.

Pottinger, a high-water mark in the advocates' campaign to plead the right of travel, was a class action brought to prevent the Miami police from arresting and ousting homeless individuals squatting in Lummus and Bicentennial Parks and under I-395 overpasses. Judge Atkins, the federal district judge, held in part that Miami's practice infringed upon the plaintiffs' fundamental rights of travel. "The evidence overwhelmingly shows that plaintiffs have no place where they can be without facing the threat of arrest." Judge Atkins, however, provided only a spatially limited remedy. He ordered the parties to agree on at least two public areas, located near service centers that cater to the homeless, that could function as "safe zones" for them. In effect, *Pottinger* held that the federal right to travel required Miami officially to designate several public-space Skid Rows …

In Tobe, however, the California Supreme Court … declined even to entitle the campers to *Pottinger*-style [zones], which Santa Ana presumably would have sought to locate on sites other than its Civic Center. Instead, the court stated flatly that "[t]here is no . . . constitutional mandate that sites on public property be made available for camping to facilitate a homeless person's right to travel, just as there is no right to use public property for camping or storing personal belongings." In sum, while *Pottinger* provided interpretation (3), Tobe rendered interpretation (4).

The California Supreme Court's decision in Tobe should not, however, be read as a prod to cities to restrict street people's rights to the federal constitutional limit. Even in the absence of federal constitutional compulsion, most counties and large cities, especially, can be expected to provide some public spaces for indigent campers and bench squatters. Rather, the California Supreme Court's implicit and invaluable message in Tobe -- one that the court of the nation's most populous state was magnificently situated to deliver -- was that the time had come to largely defederalize constitutional litigation over the particulars of municipal street law.

The *Pottinger* litigation illustrates the wisdom of this message. Even though *Pottinger* stops far short of establishing an unrestricted right to camp, even its recognition of a right to sleep in a few city-approved places threatens to embroil judges in policy details that are beyond their institutional competence. Because a squatter in a public space makes heavier demands on public land resources than does the ordinary citizen, a right to sojourn at no charge is a species of welfare right. Both the U.S. Supreme Court and the state supreme courts have rightly been chary of constitutionalizing the fiercely controverted field of welfare law. A city's public-campsite policies entail decisions on, among other matters: (1) locations; (2) the quantity and quality of facilities and services; (3) admissions policies; (4) length-of-stay policies; and (5) whether an individual's continued stay is to be conditioned on compliance with work assignments or deportment rules. After *Pottinger*, Miami's decisions on all these fronts had federal constitutional dimensions. While these cases involved overnight camping, a judicial decision recognizing a federal constitutional right to bench squat would be a tar baby of comparable proportions.

2. The Eighth Amendment Ban on Criminalizing Status

Advocates for homeless street people have had some success with a closely related constitutional theory. The Supreme Court has held that the Eighth Amendment's prohibition on cruel and unusual punishment bars prosecution for a mere status, for example, being a drug addict. The normative basis for this doctrine is that having a condition one cannot alter should not by itself make one guilty of a crime. Advocates argue that destitute individuals have no control over their homelessness, extreme poverty, mental illness, or whatever, and therefore must be immune from punishment on account of an unalterable status. They therefore might argue that the Eighth Amendment would bar a city from arresting a bench squatter who had chronically occupied a plaza bench.

Like the freedom-of-travel precedents, however, the status-crime decisions at most confer a federal constitutional entitlement to access to spatially limited safe havens. True, lower court opinions in *Pottinger* and Tobe (both later reversed) did invalidate the Miami and Santa Ana ordinances for criminalizing the status of homelessness; but even those opinions stressed that the defendant cities had provided no public place where a homeless person could bed down without fear of arrest. Similarly, in Powell v. Texas, by a 5-4 margin the Supreme Court declined to reverse the conviction of a chronic alcoholic whom the Austin police had arrested for violating a statute against being found drunk "in any public place." The majority held that this was not a status crime because Mr. Powell had committed "acts" by drinking and then taking himself into a public area. In other words, Austin, Texas, did not have to permit Mr. Powell to wander at will throughout its downtown in an inebriated condition. Justice White's concurring opinion in Powell states that a city is constitutionally obliged to provide a compulsive alcoholic with some site where he would be safe from criminal prosecution. Presumably, a Skid-Row Red Zone in Austin where public drunkenness was permitted would be enough.

VII. The Relative Merits of Informal and Municipal Zoning of Public Spaces

This review demonstrates that federal constitutional law is indirectly encouraging cities to bring back Skid Rows, but in a form far more official than the 1950s version. By designating particular districts where minor street misconduct would be decriminalized, a city would be providing "alternative channels" for First Amendment expression. If the right of travel or the Eighth Amendment requires a large city to provide indigent individuals with safe havens for camping, drinking, and bench squatting, these zones would satisfy that obligation. No doubt partly on the advice of city attorneys, Orlando, Dallas, Jacksonville, and other cities have begun to set up official Red Zones for the destitute.

The constitutional revolution in street law that occurred between 1965-1975 was aimed largely at limiting police discretion. While police misconduct is unquestionably a serious and legitimate concern, it is worth considering whether informal zoning is in some respects superior to the formal zoning approach that the courts currently seem to be forcing on cities.

Questions of comparative institutional competence can be investigated through conventional tools of policy analysis. The Skid Row system was a hybrid that entailed unofficial police enforcement of informal norms that varied from neighborhood to neighborhood. Formal city zoning of public spaces is more thoroughly governmental because it directs the police to adhere to detailed municipal directives. Neither of these two systems is obviously superior to the other.

One yardstick for an institution's performance is its capacity to make optimal rules -- in this context, the various street codes and boundary lines for zones. For example, is "city hall" or "civil society" better at locating a Skid Row and deciding what can go on there? In a city that formally zoned public spaces, politicians would have to draw numerous boundary lines, some at the subblock level. Experience with conventional municipal zoning of private lands indicates that this might prove to be a capricious process, dominated by warring special interests. …

On the other hand, loosely knit social groups such as downtown pedestrians and merchants are often ineffectual norm makers and, when they do overcome their free-rider problems, may treat minorities and outsiders more viciously than a city would. Informal rulemakers also cannot produce a code as detailed as a government's. Normmakers, for example, are likely to be incapable of establishing specific hours and time limits for activities in public spaces.

Another yardstick of institutional competence is administrative efficiency. The Skid Row system granted patrol officers great discretion to divine neighborhood norms and to administer casual sanctions to enforce them. Until recent decades, in doing this, the police took advantage of the plasticity of "public nuisance," "disorderly conduct," and other broad legal definitions of obnoxious street behavior. This was a flexible and cheap system. It was also vague and discretionary, shortcomings that led the Supreme Court to try to shut it down.

The efficient pursuit of street decorum is inherently in tension with protecting unpopular people from arbitrary police actions. Street law presents the familiar dilemma of choosing between standards and rules. Compared to standards, rules promise to limit discretion and provide better notice of what is illegal. But rules commonly involve higher administrative costs than standards, are less flexible, may in fact lead to individually unjust results, and tend to be manipulated or even ignored in application.

In light of the wide diversity of public places and pedestrian behaviors, there is much to be said for standards in street law. Indeed, if it could be achieved, the first-best solution to the problem of

street misconduct would be the maintenance of a trustworthy police department, whose patrol officers would be given significant discretion in enforcing general standards against disorderly conduct and public nuisances. Certain administrative reforms could contribute to this end. Selection, training, and supervision methods can be shaped to help make police officers more trustworthy agents of constitutional values. The continuing racial integration of police forces should tend to cure some of the racist aspects of the Skid Row system of the 1950s. In some contexts, community-based policing, which assigns a particular officer to a particular neighborhood, might make a beat-patrol officer more averse to gaining a reputation for capriciousness and excessive violence.

Many observers understandably regard a street regime premised on trustworthy police officers as unrealistic. In some cities, it unquestionably is. In these locales especially, the official zoning of public spaces -- which elsewhere would be a second-best approach -- may be the best that lawmakers can do.

Having pushed cities in the direction of formal public-space zoning, judges should not strictly scrutinize the policies of municipalities that have accepted this invitation. Courts generally yield to municipal decisions that regulate private land uses. If federal judges would be deferential toward the City of Berkeley's decisions over where private landowners can operate, say, book stores, churches, and copycenters, should they not also be deferential to Berkeley's decisions about where people can chronically beg and squat on the public sidewalk?

VIII. Conclusion

Unchecked street misconduct creates an ambience of unease, and for some, of menace. Pedestrians can sense that even minor disorder in public spaces tends to encourage more severe crime. City dwellers who perceive that their streets are out of control are apt to take defensive measures. They may use sidewalks and parks less, or favor architectural designs that discourage leisurely stays in public spaces. In particular, they may relocate to more inviting locales. As modes of travel and communication improve, individuals have ever greater choices. Shoppers can switch to enclosed malls, employers can move to suburban industrial parks, and universities can shift activities to satellite branches.

… Disorderly people are not the only citizens with liberty interests at stake in these instances. Street law must also attend to the privacy and mobility interests of pedestrians of ordinary sensibility, not to mention the rights of the unusually delicate. Because demands on public spaces are highly diverse, city dwellers have historically tended to differentiate their rules of conduct for specific sidewalks, parks, and plazas. Some neighborhoods, like traditional Skid Rows, have been set aside as safe harbors for disorderly people. Other sites, like tot-lots, have been allocated as refuges for persons of delicate sensibility. A constitutional doctrine that compels a monolithic law of public spaces is as silly as one that would compel a monolithic speed limit for all streets.

The reconciliation of individual rights and community values on the streets is a profoundly difficult problem. For a problem so intractable, a pluralistic legal approach is advisable. Judges should refrain from using the generally worded clauses of the United States Constitution to create a national code that denies cities sufficient room to experiment with how to grapple with street disorder.

Stephen J. Schnably, Rights of Access and the Right to Exclude: The Case of Homelessness, in Property Law on the Threshold of the 21st Century 553-72 (G.E. van Maanen & A.J. van der Walt, eds., Institute for Transnational Research, 1996)]

I. Local Strategies for Dealing with Homeless People: Invisibility and Discipline

Few would disagree that homelessness is a major problem in the United States. To venture beyond that generalization, however, is to plunge immediately into controversy. Even the numbers are contested. The U.S. Bureau of the Census produced a controversial count of 230,000 homeless people in 1991. A more revealing study recently concluded that "about 12 million (6.5%) of the adult residents of the United States have been literally homeless at some time during their lives."

The causes of homelessness are equally a source of contention. No one who has the slightest familiarity with the problem can fail to appreciate the enormous difficulty of the question and the dangers of oversimplification. In part the difficulty stems from the nature of the homeless population itself, which varies from one locality to the next, and changes over time. At one point the population may be largely single men; at another point it may include many families (typically women with children). Though minorities are generally overrepresented among the homeless population, its racial and ethnic composition is not the same everywhere. These differences make generalizations risky, to say the least. But the risk is not merely empirical. To identify a cause (or causes) of homelessness is, of necessity, to issue a prescription for its cure, and that endeavor inevitably implicates controversial questions of social policy generally.[1]

That I cannot here provide the painstaking foundation upon which claims about the causes of homelessness ought ideally to rest is, however, no reason to hide my own position on the matter. Indeed, the argument that follows depends upon it in important ways. I believe, however, that the account of local governments' responses to homelessness, and the ways in which a right of access might either counter those responses or play into them, may give insights into strategies for dealing with homelessness even if one disagrees with the premises.

To my mind, even giving full weight to the complexity and variety of the factors involved in producing homelessness, two stand out in particular. One is the deindustrialization of the economy, with its loss of jobs that, while relatively low paying, could still support a living. The second is a precipitous decline in low-cost housing over the last fifteen years or so. The decline is attributable to a variety of social policies, including urban "renewal" and redevelopment that eliminated single-room occupancy hotels in favor of expensive condominiums, and vast cutbacks in federal low-income housing support. Together these factors have left many people at risk of falling into homelessness at any given moment — whether from loss of a job, rent increases, domestic violence, uninsured medical costs, substance abuse, or mental health problems.

[1] To take but one example, the common claim that "deinstitutionalization" caused homelessness is as much an attack on the model of social and legal advocacy that won the right of people in mental institutions to receive care in less restrictive settings — and to enjoy greater procedural safeguards before being committed — as it is an attempt to explain why there are people living on the streets. For two versions of the attack, see Myron Magnet, The Dream and the Nightmare: The Sixties' Legacy to the Underclass 76-114 (1993); Rael Jean Isaac & Virginia C. Armat, Madness in the Streets: How Psychiatry and the Law Abandoned the Mentally Ill (1990). For a critique of the claim that deinstitutionalization is in large degree responsible for homelessness, see Richard H. Ropers, The Invisible Homeless: A New Urban Ecology 142-168 (1988). *Cf.* David A. Snow et al., *The Myth of Pervasive Mental Illness Among the Homeless*, 33 Social Problems 407, 408 (1986) (arguing that prevalence of mental illness among homeless population has been exaggerated). *See also* James D. Wright, *The Mentally Ill Homeless: What is Myth and What is Fact?*, 35 Social Problems 182, 189-90 (1988); David A. Snow et al., *On the Precariousness of Measuring Insanity in Insane Contexts*, 35 Social Problems 192, 195 (1988).

A necessary (though likely not sufficient) element of any effective plan to deal with homelessness would be vigorous governmental action to address the underlying causes — the erosion of a base of lower income but living wage jobs, and the sharp decrease in the stock of affordable housing. The current political climate makes that unlikely. Consequently, local governments have tended to adopt either of two strategies (or more accurately, combinations of the two). What unites the two is their singular inattention to promoting democratic empowerment of the people they purport to help.

The first I will call the strategy of invisibility. The specific idea is to render homeless people invisible, whether by forcing them into hiding or driving them "the hell out of town," as one mayor put it in his bid for reelection. The strategy has been implemented in a variety of ways. Localities have passed laws prohibiting sleeping in public, placed sprinklers in parks timed to go off randomly at night, and undertaken many other forms of official harassment that target the public presence of homeless people.

An example from Miami may help illustrate the tactic. Camillus House, a private Catholic shelter located downtown, regularly serves meals to homeless people. At one point local businesses complained about seeing "derelicts" lined up outside waiting for the meals. The police began to arrest homeless people for obstructing the sidewalk outside Camillus House — even though they were doing no such thing, and even though the State Attorney's office did not prosecute homeless people for offenses of that sort. An internal police memorandum, however, proclaimed the program a great success. People would miss the meals while they were being booked, so they learned not to line up on the sidewalk; instead, they would hide in alleys around Camillus House while they were waiting. Their public presence had simply been eliminated.[2]

These tactics appear to be part of a larger trend. One could draw a connection, for example, between the strategy of invisibility and the increasing willingness to deal with the problems of the inner cities simply by excising large numbers of young African-American males from the general population, at least temporarily, through the means of imprisoning them. In both strategies, distinct and marginalized populations are targeted for treatment as enduring underclasses to be contained, with the underlying economic, social, and political structures and policies that helped marginalize them in the first place being taken for granted. In this sense, the strategy of invisibility might in Foucauldian terms be deemed one of "governmentality."

The other — at first glance more benign — strategy I will call "disciplinary," once again borrowing Foucauldian terminology. More prosaically it might be called requiring the victims to blame themselves as a condition of offering them the help of experts. Taking the background causes — the eroding of the jobs base and the stock of low-income housing — as a given, this approach promises the delivery of shelter, employment skills, and other services to needy individuals. It emphasizes taking careful case histories of homeless persons, delivering health care services, providing job training, and assisting individuals with finding housing in order to reintegrate each homeless person back into productive society. Often such programs are undertaken as public-private partnerships

[2] As the memorandum put it, the "reason for the [positive] results is that because of the arrest, they are taken from the immediate area where the food is located. They are placed in the east wing of the jail where food is not served. Consequently they do not get fed. What has occurred is that the vagrants now await food in hidden areas around the Camilus [*sic*] House." Pottinger v. City of Miami, 810 F. Supp. 1551, 1567 (S.D. Fla. 1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994), *op. after remand*, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), *appeal pending*.

Interestingly, Miami simply does not count people as homeless if they pick up their belongings every morning and move on rather than stay in one place. Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 25, 38-40 (testimony of Livia Garcia, an official in Miami's homeless program). That enumeration practice itself helps render a significant segment of the city's homeless population invisible.

driven largely by downtown business interests.

Two features make this strategy disciplinary. The first is the background assumption that the causes of homelessness lie for the most part in individual failings, and that individuals must therefore immerse themselves in a programmatic routine designed to return them to normality. If they fail to do so, they face implicit threats of sanctions. One example is a plan floated by New York Mayor Rudolph Giuliani, and backed up by threats of denial of shelter, to have each homeless person sign a contract specifying steps towards "rehabilitation."

The second is the way such programs render each homeless individual a cog in a machine — the way they make the homeless person the object of individualized case management in a system over which homeless people individually and collectively have little if any control. This may show up, for example, in the imposition of rigid rules of behavior on homeless people, rules justified as necessary to teach them how to live like productive people again. Once again, though, while they may have little control over the setting of the rules, homeless people are expected to conform to them willingly and actively. The discipline is not merely external but is expected to be self-imposed: That is part of their "rehabilitation" into productive members of society.

One might attempt to justify these programs if they actually provided a way out of homelessness. But that is almost certainly what they cannot do for most homeless people. It is not just they treat as irrelevant the shortage of jobs and housing for poor people (or indeed of health care or substance abuse programs), although that is indeed a problem. Training in job skills, for example, does homeless people little good if available jobs do not pay enough for housing.[3] More fundamentally, to the extent that disciplinary programs succeed in defining self-assertion and control over one's life in terms of immersion in expert regimes and routines, the more likely they are to succeed in stunting an alternative: the development of a political identity through collective self-assertion and mobilization of homeless people themselves. Yet (as I will argue in Part III) this alternative prospect offers a better hope of forcing the political system to deal with the housing, jobs, and other needs of the very poor.

The two strategies of discipline and invisibility cannot be considered in isolation from each other. One reason is that while localities may employ them separately, the strategies are often integrally related. Consider, for example, the policy of building large shelters. In part the aim of the policy, as local officials sometimes admit, is to sweep homeless people from public view and gather them into one, more manageable — and less visible — mass. In part the aim is to render them more amenable to programs allegedly designed to foster individual reintegration into the mainstream. Once these disciplinary programs are in the place, moreover, they can be used to justify punitive measures against those who fail to rehabilitate themselves. Homeless people can then be arrested for living in public or have their children taken away from them, for example.

A second relationship between the two strategies arises from the fact that homeless people are never completely captive to the strategies of invisibility and discipline. One form of resistance involves openness and community. Individuals may refuse to hide, establishing a spot on a corner where they regularly stay; groups of homeless people may form communities of sorts centered on semi-permanent encampments, and may engage in self-help to lift themselves out of homelessness rather than rely entirely on disciplinary programs for that.[4] Other forms of resistance, however, involve concealment

[3] Here, too, the disciplinary feature comes to the fore. In the face of such clear-cut yet unaddressed obstacles, the persistence of the programs highlights their self-referential character. One cannot help but wonder whether it would be more accurate to say that the very point of the help they promise is not the provision of decent jobs and low-income housing but the acceptance of the bureaucratic routines.

[4] As one expert familiar with the homeless population in Miami testified in *Pottinger*:

and isolation. Rather than being forced into a disciplinary program (by arrests and others forms of harassment), that is, homeless people can go into hiding. Many homeless people do so simply by the way they dress: Though obviously poor, most are indistinguishable by the way they look from people with homes. Homeless people can also avoid harassment by living in more dispersed groups or even alone, moving about through the city nomadically as they carry their possessions from place to another in a shopping cart.[5] The irony is that sometimes the only realistic way homeless people may see to avoid disciplinary programs is to accommodate the strategy of invisibility.

Obviously, the picture I have presented is fairly bleak. There are, to be sure, shelter programs that do attempt to treat homeless people with a sense of dignity, actively involving them in setting policies, and encouraging a sense of community. Still, I suspect these are the exception, and in any event, there remains the task of defending homeless people against the strategies laid out above.

A right of access to public property might seem like a useful tool in that defense. If homeless people had rights of access to public spaces, it might help them resist being swept into invisibility or forced into disciplinary programs. I explore this strategy in the next Part.

B. *Homelessness and the Institutional Limitations of the Courts*

… A right of access to public spaces would need to be judicially enforced. Yet courts today are unlikely to impose sweeping, intrusive structural reforms to protect the rights of homeless people. Nor are they likely to be concerned whether the content of the rights they proclaim empower homeless people in any meaningful way. Mediated through these institutional features, the social image of the

> In the encampments, when the people were able to congregate, … they developed communities ... They had rules that they each understood. They had associates and friends to guard their belongings when they were gone. They shared their food. They found out where there ? [was] employment, they gave people the opportunity to save a little money.
>
> One example is a man that was over on Watson Island [where many homeless people lived] that had open heart surgery, and he and his companion, lady, was with him, and he, because of the situation he was in without income and having problems at S.S.I. [a federal program for poor people with severe disabilities], was staying there. As soon as he was able to get his S.S.I. started, and get a little money, he and his lady friend moved out. Now, I don?t think they could have done that as efficiently if he and his lady companion would have had to move every day. They just could not have tackled the system and be on the move every day.
>
> People — they tend to work and save their money, and part of the reason why the biggest help to the homeless is themselves getting themselves off the street is because they will find a situation where they can get a little work, where they can save a little money, and then as soon as most of them have that, they will move out.

Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 119 (testimony of Dr. Andrew L. Cherry). On the design of welfare and other benefits procedures to make it difficult for poor people to claim all the benefits to which they are entitled, see WOLCH & DEAR, *supra* note 5, at 269 (noting that routines for applying for and receiving benefits "are deliberately designed to frustrate the applicant and recipient. One high-ranking county welfare official admitted that 'the welfare application process … was designed to be rough. It is designed quite frankly to be exclusionary.'") (quoting Robert Chaffee in Gary L. Blasi, *Litigation Strategies for Addressing Bureaucratic Disentitlement*, 16 N.Y.U. REV. L. & SOC. CHANGE 591, 596 (1987-1988)).

[5] *See* Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, June 15, 1992, at 171-72 (testimony of Dr. David F. Fike, an expert in homelessness):

> This surprises a lot of people, but most of the homeless make substantial efforts to keep clean and keep in clean clothing. One of the other myths that is afloat is the myth of dirtiness. … The truth of the matter is that grooming and cleanliness has to do with the hiding and avoiding of harassment phenomenon. So, the other reason that most of the several thousand homeless people in Miami and the other urban areas are invisible is that most of them choose not to show the open signs of homelessness that people begin to recognize — disheveled clothing, dirty hair, not being shaven, and so forth.

See also Pottinger v. City of Miami, No. 88-2604-CIV-ATKINS, Trial Transcript, Jan. 30, 1995, at 97-99, 116-18 (testimony of Dr. Andrew L. Cherry) (noting increase in number of homeless people living nomadically out of shopping carts since Miami began clearing encampments with aim of placing people in programs).

home might transform a right of access to public property into something that supported rather than countered the strategies of invisibility and discipline.

1. *The hesitance to impose sweeping, intrusive structural reforms*. — Courts will inevitably face strong institutional pressures to limit the right of access to fairly small areas. A remedy thus limited might appear closer in one respect to a home, in the sense of providing homeless people with an identified portion of (public) property in which they were protected, rather than giving them an immunity to arrest for performing life-sustaining functions on public property wherever that might be. It is this very resemblance — this tie to a particular location — that might, however, bolster the strategy of invisibility.

The pressures to limit the right of access can perhaps most easily be understood by considering the alternatives, both of which will simply appear unacceptable to most courts. On the one hand, a court could simply declare a right of access to all public property open to the public, and leave the matter there. But the very reason for a lawsuit that might lead to such a ruling would be a policy of systematic police arrests of the homeless for performing innocent, life-sustaining conduct in public; and it would seem unduly optimistic to expect such arrests simply to cease upon a broad declaration of a right of access. Thus this course of action seems unsatisfactory.

On the other hand, a court could enjoin enforcement of the many laws used to harass homeless people — *e.g.*, ordinances that outlaw being in the parks after dark, or sleeping in public — and actively oversee implementation of the injunction. That could require instituting training programs for officers, appointing a special master to monitor performance, and taking a wide range of other actions that would significantly interfere with the autonomy of police departments and other local officials. The era of the federal courts' willingness to order intrusive, institution-wide relief to reconstruct a public entity in line with constitutional norms, however, may well have drawn to a close, at least for now. This development reflects the triumph of conservative conceptions of the judicial role, evident as early as 1976 in *Rizzo v. Goode*.[6]

Faced with these alternatives, limiting the right of access to specified areas can easily appear an attractive compromise. In *Pottinger v. City of Miami*, a federal district court proposed setting up what it called 'safe zones" in response to Miami's efforts to render homeless people invisible by driving them outside the city or keeping them constantly on the move within it.[7] Originally, these safe zones were to be in a park and under a highway underpass, where there had already been fairly large encampments of homeless people. Homeless people would be free from arrest in these safe zones, so that there would be at least someplace where their very existence was no longer criminalized. Because the relief would apply only to limited areas, it would intrude less on local officials' discretion, but would still offer some hope of freedom from harassment.

… The obvious danger is that a city could seize upon the safe zone concept and transform it from an attempt to give at least limited protection to homeless people from official harassment into a tool for pursuing the strategy of invisibility. Safe zones could be used to move homeless people out of areas where they are deemed unsightly, such as downtown business areas, into what amount to state-sponsored detention camps. Homeless people would be allowed to do their living on public property,

[6] 423 U.S. 362 (1976).

[7] 810 F. Supp. 1551 (S.D. Fla. 1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994), *op. after remand*, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), *appeal pending*. *Pottinger* held that Miami had violated, among other things, homeless people's constitutional right to freedom of movement and their Eighth Amendment right not to be punished for their status as homeless people. *See generally* Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-homeless Lawsuit*, 23 STETSON L. REV. 467 (1994) (account by ACLU trial counsel of strategic issues faced in lower court proceedings).

but would be forced to do so in the functional equivalent of a home in the worst sense: out of sight and (given that minorities are typically overrepresented among the homeless population) in segregated areas. And once out of public sight, their daily activities would no longer stand as a constant reproach to the failure of an economic and social policy that takes the erosion of the jobs and housing base for poor people for granted. Indeed, at worst a right of public access could serve as a very cheap form of "housing" for homeless people.

… To be sure, alternatives are conceivable. A court could break the link between a right of access to public spaces and the existence of local government programs for homeless people. It might retain a safe zone or similar remedy so long as there were any homeless people, even if in theory a locality's program for the homeless had the capacity to handle them all. That would put the burden on the locality to devise programs that were capable of operating principally by attracting people rather than by sweeping them into disciplinary programs that require the victims to blame themselves, treat them undemocratically, and fail to address the underlying structural causes of homelessness.[8] Or a court could accept in principle the link between a right of access and programs for the homeless, but closely scrutinize the latter before cutting back or denying the right of access on the theory that homeless people now had alternatives to being on the streets.

It is not, in other words, the inevitable fate of a right of access that the courts withdraw it in such a way as to fit all too neatly into a disciplinary strategy. But neither should we be too quick to discount the risk that that is what will happen. Given the limited experience with rights of access, gauging that risk is difficult. The federal court in Miami is the only one to have ordered safe zones to date (though other cities have established encampments without court order), and Miami is far from being able to assert convincingly that it currently has programs in place sufficient to handle all homeless people. The *Pottinger* court has indicated that it might be willing to rule on "the reasonableness of the alternatives presented to involuntarily homeless persons" by Miami's programs at some point when they could arguably accommodate everyone, though it is unclear how searching its scrutiny would turn out to be.[9] It makes sense to press the courts to engage in such scrutiny, but the fact is that courts will find it very tempting to withdraw or cut back upon rights of access by homeless people without seriously questioning disciplinary programs that localities put in place.

III. PROPERTY THEORY AND THE POWER OF IMAGES

A. *Alternatives to Judicial Enforcement of Rights*

… An alternative strategy to relying mainly on the courts would have to begin with the recognition that homeless people are not, in fact, inert or completely beaten down. On the contrary, homeless people have formed unions in various cities around the country.[10] They have marched to city halls,[11]

[8] Granted, some homeless people with severe mental illnesses might lack the capacity to make an informed decision about accepting help. But unless one believes that mental illness is the primary cause of homelessness, that most homeless people become mentally ill because of their homelessness, or that more than a trivial minority of homeless people choose to be homeless — propositions I reject — the primary burden ought to be on homeless programs to attract homeless people.

[9] Pottinger v. City of Miami, No. 88-2406-CIV-Atkins (S.D. Fla. April 7, 1995), slip op. at 8 n.7, *appeal pending*.

[10] *E.g.*, Faye Fiore, *For at Least a Day, the Homeless Aren't Voiceless*, L.A. TIMES, May 6, 1990, at B1; Jim Yardley, *Union for Homeless Seeks Clout*, ATLANTA J. & CONST., Dec. 27, 1992, at A3; Daryl Strickland, *Homeless Gather Under 1 Roof to Organize Union*, CHI. TRIB., March 9, 1986, at 3; *Free Medical Care for Homeless, Poor Is Aim of New Union in Philadelphia*, DAILY LABOR REPORT (BNA) NO. 70, at A-12 (April 11, 1985) (available in Lexis/News Library). *See also, e.g.*, ROPERS, *supra* note 8, at 198-208 (political organizing by homeless people and supporters in Los Angeles).

[11] *E.g.*, Marlon Millner, *Homeless Tell Mayor of Alleged Police Harassment*, ATLANTA J. & CONST., July 26, 1994, at C5.

invaded city council meetings,[12] occupied local housing offices,[13] and initiated drives to register to vote,[14] all in an effort to give themselves their own voice in politics.

Nor are homeless people without political allies. Granted, much of the political organizing around homelessness has relied heavily on appeals to the charity of the better-off that reinforce the notion of homeless people as passive victims. Still, even those efforts have made some headway in putting affordable housing and related matters on the agenda.[15] Further, the millions of people who at some point in their lives have experienced homelessness, or who are at risk for it, form a natural base of political allies for homeless people. The more homeless people can resist being pathologized as deviant failures rather than viewed as ordinary people with problems that afflict or threaten to afflict many others, the more easily they will be able to build such alliances.

Rights of access to public property, even in the form of safe zones, might play a useful role in organizing by homeless people and their allies. While some homeless people may become relatively isolated and nomadic, many others form semi-permanent communities, with both practical and spiritual benefits. For example, many homeless people work, and they can often count on someone in the encampment to watch their personal possessions during the day. Protecting and recognizing a number of safe zones or similar areas spread throughout the city, to a large extent reflecting pre-existing encampments at sites chosen by homeless people themselves from their admittedly limited options, could facilitate further development of community — especially if the encampments were protected from being arbitrarily closed down by local officials.[16] Further, the greater sense of personal security that freedom from constant police harassment would provide not only would be desirable in itself, but could also facilitate political organizing of homeless people in coalition with other groups.

In turn, even minimally enhanced possibilities of organizing might at least help make it possible for homeless people to put demands for housing, jobs, health care, and other needs on the political agenda with greater force. It could also help them resist the provision of such needs through disciplinary programs of the sort I have described. The key factor would be to make attempts to gain rights of access part of a broader political struggle to address the conditions that give rise to homelessness and near homelessness. In the context of that struggle, the potential for safe zones or other rights of access to be turned against homeless people would be diminished. …

The current political climate is, of course, far less conducive to organizing by any politically marginalized and oppressed group, including homeless people and their allies. There is always a risk that the organizational efforts will fail, and that rights of access will then more easily be deployed against homeless people. But only those who comfortably have nothing at stake — and homeless people are not among them — could take that risk as a call to inaction.

[12] *E.g.*, Fiore, *supra* note 39.

[13] *See Homeless Families Will 'Move In' to Housing Director's Office Today*, PR NEWSWIRE, Aug. 25, 1995 (available in Lexis/News File).

[14] *See* Christine Dempsey, *Assistant Registrar Named for Homeless*, HARTFORD COURANT, Aug. 19, 1994, at D4; Jerry Thornton, *Homeless Rise to Be Counted*, CHI. TRIBUNE, March 31, 1986, at 3.

[15] *See* Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271, 291-301 (1990-91).

[16] Indeed, such protection would be especially crucial, for political organizing would make homeless people at any given encampment even more visible, and therefore more vulnerable.

What is it about the homeless that inspires such overt antipathy from main? stream society? What is so special about their particular variety of deviance that elicits such a vehement and violent response to their presence? After all, "the homeless" as a class lack almost all indicia of societal power, posing no viable political, economic, or military threat to the dominant culture.

Demonization and Disease

In mainstream publications, both academic and journalistic, even depictions intended to be sympathetic to the homeless often contribute to a mindset of demonization. One of the most enduring signs of this is the association of homelessness with images of dirt, filth, decay, and disease. Henry Miller notes that historically the vagrant was seen as a person of "many vices and debilities; was sickly and suffered from the ravages of tuberculosis, typhus, cholera, scrofula, rickets, and other disorders too numerous to mention; was apt to be a member of the despised races; [and whose] life was characterized by all the usual depravities: sexual license, bastardy, prostitution, theft." Miller's analysis suggests two related strands that contribute to homeless stigmatization. The first arises from invocations of disorder, illegality, and immorality and leads to processes of regulation, criminalization, and enforcement. The second is the disease and decay image, which leads to processes of sanitization, sterilization, and quarantine. In a sense, these two spheres are inseparable, leading to the same ends of exclusion, eradication, and erasure. Both strands converge in another sense vis-a-vis the homeless who occupy spaces that, like themselves, are often viewed as dirty and disorderly and thus require regulation and sterilization; as Mike Davis opines, "public spaces," like the homeless, are imbued with "democratic intoxications, risks, and unscented odors."

The analysis in this essay considers the "disease" metaphor to be conceptually distinct from the "disorder" image. This arises out of the "Disneyfication" of urban space that geographers have often noted, since the Disney metaphor (and reality) is one of antiseptic sterility and disinfected experience, of shiny surfaces and squeaky-clean images.

In analyzing "new urban spaces," Wright thus observes: "In effect, street people, camping in parks, who exhibit appearances at odds with middle-class comportment, evoke fears of 'contamination' and disgust, a reminder of the power of abjection. Homeless persons embody the social fear of privileged consumers, fear for their families, for their children, fear that 'those' people will harm them and therefore must be placed as far away as possible from safe neighborhoods."

Disturbingly, many proponents of regulating and criminalizing the homeless readily embrace such disease metaphors and their ethnocidal implications. Robert Ellickson (1996), Yale Law School Professor of Property and Urban Law, for example, implicitly affirms the image through his "revulsion at body odors and the stink of urine and feces" (Waldron, 2000). "Others, including many city officials, celebrate gentrification for reversing urban decay and boosting the tax base. They often refer to it as 'revitalization,' drawing on the metaphors of disease, deterioration, death, and rebirth". As Jeff Ferrell observes, "drawing on evocative images of filth, disease, and decay, economic and political authorities engage in an ideological alchemy through which unwanted individuals become [a] sort of 'street trash' [and which] demonizes economic outsiders, stigmatizes cultural trespassers, and thereby justifies the symbolic cleansing of the cultural spaces they occupy." Countless newspaper editorials, including cartoons, contribute to these trends by depicting the homeless as vile, malodorous,

and dangerous which is starkly evident in an Arizana Republic editorial image of Tempe's major downtown thoroughfare, Mill Avenue.

Disorderly Conduct: The Absurdity of Anti-Homeless Legislation

It is not much of a stretch to move from this sense of "spatial cleansing" and "cultural sanitization" to patterns of criminalization and enforcement. As Smith notes, "increasingly, communities are using the criminal law to cleanse their streets of homeless survivors." Whereas the "disease" metaphor is predicated on a view of the homeless as physical pestilence, the "disorder" image upon which criminalization often is based arises from a view of the homeless as a "moral pestilence" and a "threat to the social order" .

Such tautologies were prominently displayed in an article written soon after passage of a Seattle ordinance that criminalized sitting on sidewalks:

> "This is not aimed at the homeless, it is aimed at the lawless," says Seattle City Attorney Mark Sidran. By "the lawless" Sidran and other city officials mean people who, lacking anywhere else to go, sit down on the sidewalk. Jim Jackson, an Atlanta businessman, confidently declares that his city's new laws will "not punish anyone but the criminal." San Francisco's Mayor Frank Jordan assures us that "homelessness is not a crime. It is not a crime to be out there looking like an unmade bed. But if criminal behavior begins then we will step in and enforce the law" .

The logical flaw in this "official" position is all too apparent: "But if criminal behavior begins .... " "We punish only the criminal." "It is aimed at the lawless." All of these statements are made in reference to conduct such as sitting on the sidewalk that, before passage of this recent spate of laws, had been legal and generally seen as innocent acts. Now, by virtue of a law prohibiting sitting, an entire category of people is made "criminal" for acts committed before the law existed! The lesson? If you want to eliminate a particular social class or subculture or deviant group, locate some behavior that is largely peculiar to that group and make it illegal.

Ferrell notes that the daily lives of the homeless "are all but outlawed through a plethora of new statutes and enforcement strategies regarding sitting, sleeping, begging, loitering, and 'urban camping." As Mitchell emphasizes, "if homeless people can only live in public, and if the things one must do to live are not allowed in public space, then homelessness is not just criminalized; life for homeless people is made impossible." The implications and intentions are all too clear:

> By in effect annihilating the spaces in which the homeless must live, these laws seek simply to annihilate homeless people themselves .... The intent is clear: to control behavior and space such that homeless people simply cannot do what they must do in order to survive without breaking laws. Survival itself is criminalized .... In other words, we are creating a world in which a whole class of people simply cannot be, entirely because they have no place to be .

Apology Rejected

With anti-homeless ordinances rapidly proliferating, their proponents and apologists have redoubled their efforts to construct justifications for laws restrict-ing conduct in public places. Standard justifications have included public health and safety, economics, and aesthetics .

Another theme of such "quality of life" campaigns, one that has become something of a mantra for its proponents, is the notion of "civility." As Ellickson predicted, "cities, merchants, and pedestrians will increasingly reassert traditional norms of street civility." One of the staunchest proponents of the concept has

been Rob Teir , who begins from a premise that public spaces are primarily spaces of commerce, shopping, and recreation. Teir laments that "homeless people have taken over parks, depriving everyone else of once-beautiful places," but believes that through "fair-minded law enforcement and 'tough love' ... urban communities can reclaim their public spaces." Another proponent similarly notes that a "perception grew that [the homeless], and not the community as a whole, 'owned' the areas they occupied," and concludes that efforts ought to be undertaken toward "reclaiming public spaces from 'the homeless"' . Likewise, Chuck Jackson , the director of a downtown Houston "business improvement district" , claims that the homeless have "colonized public areas." As Neil Smith points out, however, a more accurate label for such "civility" arguments is "revanchism," namely, the establishment of a vengeful policy bent on regaining original areas lost in war. "This revanchist urbanism represents a reaction against the supposed 'theft' of the city, a desperate defense of a challenged phalanx of privileges, cloaked in the populist language of civic morality, family values, and neighbor-hood security. It portends a vicious reaction against minorities, the working class, homeless people, the unemployed, women, gays and lesbians, immigrants."

Nonetheless, proponents such as Teir continue to argue that "measures aimed at maintaining street order help mostly the poor and the middle class [since] the well off can leave an area when it gets intolerable. It is the rest of us who depend on the safety and civility of public spaces." The problem is that it is precisely the "well-off' who have "stolen" and "colonized" the public places of the city, literally and legally converting supposedly prized havens of public space into exclusionary domains of private property. As Mitchell observes, the concept of "civility" has often been invoked historically "to assure that the free trade in ideas in no way threatened property rights." The essence of such "civility," then, is to protect and reinforce private property claims advanced by "urban stakeholders," including "central business district property owners, small business owners, real estate developers, and elected officials" . The Web site of the Downtown Tempe Community, Inc. , a pro-business lobbying entity, for example, emphasizes that "we seek ordinances that advance our strategy of order and civility in the public space. Working with our private property owners, we seek cooperation on interdependent security is-sues."8 The DTC further claims that such efforts have "made the downtown a safer place." It must be noted that images of "public safety" and "community standards" specifically exclude the homeless and the poor from participation, since these groups are constructed as not part of the community, the public, or those with a stake in political decisions and city affairs.

Breaking Down "Broken Windows"

Another significant justification for anti-homeless laws, one that has received much attention and critical treatment, is the "broken windows" theory. Originating in a landmark Atlantic Monthly article, the theory's chief proponents, James Wilson and George Kelling, argue that "disorder and crime are usually inextricably linked, in a kind of developmental sequence. Social psychologists and police officers tend to agree that if a window in a building is broken and left unrepaired, all the rest of the windows will soon be broken." The authors go on to hypothesize that "serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window." They conclude that "the police and the rest of us ought to recognize the importance of maintaining, intact, communities without broken windows." In other words, the aim ought to be the maintenance of communities without "broken people," since they represent the source and origin of the crime problem, the first step on the slippery slope from "untended property" to "un-tended behavior" to "serious street crime."

Robert Ellickson attempts to link one step to the next in this suspect syllogism: "A regular beggar is like an unrepaired broken window – a sign of the absence of effective social-control mechanisms in that public space .... Passersby, sensing this diminished control, become prone to committing additional, perhaps more serious, criminal acts."

[M]any scholars and commentators have de-nounced "broken windows" as discriminatory in intent and application, funda-mentally unfair, logically flawed, and unsupported by studies of criminality and behavior. Jeremy Waldron , for example, asks two related and pointed questions: "Relative to what norms of order are bench squatters or panhandlers or smelly street people described as 'signs of disorder' ?" and "What is to count as fixing the window, when the 'broken window' is a human being?" In addressing the first, Waldron's answer is in the form of a question reminiscent of objections raised to the "civility" proponents: "Are these the norms of order for a complacent and self-righteous society, whose more prosperous members are trying desperately to sustain various delusions about the situation of the poor?" In terms of the second, Waldron notes that "giving him money" is not an accepted response under the theory, nor is the provision of "public lavatories and public shower facilities. Instead, fixing the window is taken to mean rousting the smelly individual and making him move out of the public park or city square ... as though the smartest way to fix an actual broken window were to knock down the whole building, or move it to just outside the edge of town." Unless attention is paid to the factors contributing to what caused the window to break in the first place, "fixing" the window is only a band-aid solution, since more broken windows are likely to develop from the same socioeconomic conditions.

A final objection to "broken windows" as social policy is suggested by Waldron in the implicit derogation that comes when human beings are compared "even figuratively to things." Waldron wonders what would have ensued if Wilson and Kelling's article had been titled "Broken People." The central premise of the theory thus rests on a blatant form of dehumanization, figuratively in its principles, but literally in its widespread deployment as the cutting edge of urban social policy. This is another way of expressing the tired and dangerous characterization of the homeless as pathological deviants or structural victims and serves to undermine their agency, autonomy, and dignity. However, the impressive adaptability, social solidarity, and inherent resistance often dem-onstrated by street people and their communities of coping effectively rebut such dominant conceptions.

Policing "Pleasantville": The Private Security Matrix

Business improvement districts play a role in policing entertainment districts in particular and urban space in general, since "the typical BID involves a quasi-law enforcement force whose job includes, in large part, removing people who appear to be homeless from the BID areas" . Besides "arresting beggars" , BIDs "typically focus on 'broken win-dows' in the literal sense, cleaning streets and providing a visible, uniformed presence, all toward the goal of making public spaces more inviting" .12 Kelling and Coles note that many BIDs have a "uniformed presence" that often serves as the "eyes and ears" of the police, and they are in "radio contact with the police, and are trained to report suspicious behavior."

Thus, Jones and Newburn discern that "a 'new feudalism' is emerging, in which private corporations have the legal space and economic incentives to do their own policing. In this view, mass private property has given large corporations a sphere of independence and authority which can rival that of the state."

Leonard C. Feldman, Citizens Without Shelter: Homelessness, Democracy, and Political Exclusion (2004)

CRIMINOLOGICAL JUSTIFICATION OF THE NEW POLICIES: BROKEN WINDOWS, CITIZEN FEAR, AND FUTURE CRIMINALITY

The "broken-windows" theory of disorder and crime, and its order-maintenance prescriptions, have played a significant role in justifying the new public-space ordinances. For instance, in *Young v. New York City,* a case concerning a panhandling prohibition in New York City subways, a New York federal court heard testimony from George Kelling, one of the authors of *Fixing Broken Windows,* and cited that study approvingly in upholding the prohibition. Several other courts have discussed the broken-windows approach to "disorder" in public spaces in order to establish that a significant or compelling government interest is served by the statute under review. The broken-windows theory is, I argue, a modified version of the future-criminality justification for vagrancy law. Accompanying *both* the vagrancy/production and homelessness/consumption regimes is the criminological theory that seemingly innocuous behavior (loafing, begging, sitting, panhandling) breeds crime. There is also an important difference, however. Whereas the criminological theory underlying the vagrancy/production approach articulated a *direct* link between vagrancy and crime (vagrants turn into criminals without the discipline of forced labor), the contemporary anti-homeless approach articulates a *mediated* link: panhandlers present the appearance of disorder that signifies to others (criminals) that the space lacks the social controls needed to stop crime.

The broken-windows argument starts with a metaphor—a metaphor that brings to mind other metaphors, such as domino theories and slippery slopes, concerning the descent into disorder when an initial event is not prevented. The claim is that a single broken window left unrepaired signals to passersby that no one cares and therefore breaking more windows is cost free; likewise, disorderly conduct in public space, left uncorrected, signals that the mechanisms of social control are in abeyance and therefore criminal acts can flourish. Kelling and Coles state that "disorderly behavior unregulated and unchecked signals to citizens that the area is unsafe. Responding prudently, and fearfully, citizens will stay off the streets, avoid certain areas, and curtail their normal activities and associations." These prudent and fearful citizens, in withdrawing from public space, "also withdraw from roles of mutual support, . . . thereby relinquishing the social controls they formerly helped to maintain." The result is "increasing vulnerability to an influx of more disorderly behavior and serious crime."[80]

In the original *Atlantic Monthly* article on the broken-windows theory of crime, Kelling and James Q. Wilson seem to suggest that disorderly behavior such as public drinking, loitering by groups of youths, and

panhandling (which appears to be their preoccupation) sends two distinct signals to two groups. To "citizens," the message is to stay away and be afraid. To "criminals," the message is to come and capitalize on the absence of informal social-control mechanisms: "Disorderly behavior unregulated and unchecked signals to citizens that the area is unsafe [while] muggers and robbers, whether opportunistic or professional, believe they reduce their chances of being caught . . . if they operate on streets where potential victims are already intimidated by prevailing conditions. If the neighborhood cannot keep a bothersome panhandler from annoying passersby, the thief may reason, it is even less likely to call the police to identify a potential mugger." In the broken-windows theory, panhandlers do not become criminals, but they are crimogenic. They frighten upstanding citizens, create a climate of fear and intimidation that is receptive to crime, and send signals to criminals that this climate exists: "Serious street crime flourishes in areas in which disorderly behavior goes unchecked. The unchecked panhandler is, in effect, the first broken window."[81] From vagrancy as a moral pestilence and the vagrant as the "chrysalis" to the panhandler as "the first broken window": both metaphors concern future criminality, but the broken-windows theory places citizen fear and withdrawal as the mediating link between panhandling and more serious crime.

This more complicated version of the future-criminality argument (an argument rejected by Justice Douglas in *Papachristou*) recasts the "moral disease" of vagrancy into a behavioral analysis of public spaces. Just as emphasis on "conduct" avoids overt criminalization of suspect identities, the broken-windows justification of conduct-based ordinances avoids any claims about the vagrant or panhandler's character and immorality; it is a new criminological vision or theory unmoored by the deep chains of pathology and criminal identity. Nevertheless, the broken-windows discourse succeeds in dividing the world into two groups: upstanding but fearful citizens who prudently avoid disordered public spaces, and homeless panhandlers who are the personification of broken windows. Although Kelling and Coles claim to have avoided the criminalization of status via a focus on behavior, their "text of behavior is in need of a subtext of identity," as Schram puts it in the context of welfare reform.[82] They find it in the irresponsible panhandler-as-broken window.

If the key mediator between disorder and crime is citizens' fear of disorder, one might ask whether their fear of panhandlers is justified. Does citizen fear of some kinds of disorder reflect prudence and citizen fear of other forms reflect prejudice? Such questions cannot be asked within the broken-windows theory, because citizen fear of disorder turns out to be its

own justification. Kelling and Coles claim that it is "neither an unreasonable nor extreme reaction, since disorder does indeed precede or accompany serious crime and urban decay."[83] But disorder, they argue, leads to crime *because* citizens fear it and withdraw from public spaces. Thus they create an undifferentiated category of disorder and, in a circular argument, close off questions about the reasonableness of citizen fear.

That citizen fear of homeless persons and panhandlers is central in the creation of public-space restrictions can be seen in the lead-up to the passage of the Baltimore City Council's aggressive-solicitation ordinance: a "Security Task Force" made up of members of the Downtown Partnership (which administers a "special taxing district" and provides "supplementary security" as part of the blurring of private/public boundaries in urban spaces), city officials, police officers, and "community representatives" issued a report on "people causing anxiety" and concluded that "two discrete populations of people . . . cause much of the public anxiety downtown: aggressive beggars or panhandlers who intimidate and harass other individuals, and the hardcore homeless, whose situations are exacerbated by a range of economic, physical, or social problems."[84]

Even if we grant Kelling and Coles's claim that citizen fear of panhandlers and homeless persons leads to crime because fearful citizens withdraw from public spaces and create crimogenic conditions, our effective responses are not limited to the prohibition of panhandling and public sleeping. We might instead break out of the circularity of the argument, questioning whether such fear is justified, and whether a more appropriate response is for domiciled citizens to refuse sanctuary in their fear, and to remain engaged in public spaces with "social disorder."

This is the recommendation of Richard Sennett, who, in *The Uses of Disorder,* urges urban dwellers to overcome a desire for complete control and certainty and to become receptive to disorder, uncertainty, and difference. Urban planning and policy, according to Sennett, should be oriented toward fostering unplanned encounters between strangers to help them overcome their fears of disorder and difference. Such unplanned encounters would permit the experience of difference in a milieu that prevents those differences from being converted into otherness. Sennett claims that "what should emerge in city life is the occurrence of social relations, *and especially relations involving social conflict,* through face to face encounters." He argues that when day-to-day conflictual contact with strangers (who are the bearers of difference) is lacking, reified, purified identities will form. These purified selves, "unused to the daily shocks of confrontation and the expression of ineradicable conflict, react with . . . volatility to the disorders of oppressed

groups in the city, and meet the hostility from below with an oppressive hand." Day-to-day contact with strangers prevents their becoming wholly "other"—not because one "sees past" the difference and "discovers" that these others are "really" no different from ourselves but, rather, because the demand for mutual survival, the reality of interdependence, the impossibility of withdrawal prevent the dynamics of identity/difference from taking an ugly turn: "Confronted with the need to act, to deal with human differences in order to survive, it seems plausible that the desire for a mythic solidarity would be defeated by this very necessity for survival."[85]

Sennett's reasoning suggests that even if broken-windows policing succeeds in excluding social disorder from the consumptive public sphere, domiciled citizens' fear of disorder will only increase as they become unused to face-to-face encounters with difference and, as Susan Bickford points out, they rely more exclusively on media stereotypes for representations of others who are "zoned out" of purified spaces. But Bickford also cautions against "demonizing fear as deeply undemocratic." It is no easy task to determine which citizen fears are justified and which are unjustified: "Sometimes . . . democratic politics requires citizens to act in certain ways in spite of fear and risk, and a political ethic of courage might help to revitalize democratic politics in an inegalitarian society. But surely public life cannot require of us that we never act on our fears. How do I know when to act against or in spite of my fears, and how do I know when my fear is discerning in a way that should guide my actions? These are challenging and disturbing judgments to make, and part of the uncertainty that enclosed spaces help us avoid is the uncertainty of how to act with respect to a disturbing stranger."[86]

It is important not to dismiss the fears of domiciled citizens in disorderly public spaces. But it is also important not to accept fear of disorder as an unquestioned basis of public policy, for the security that broken-windows policing and anti-homeless legislation create for the domiciled in public spaces is simultaneously the creation of insecurity for those who are excluded from the consumptive public sphere: "If the consuming white middle-class public comes to feel at risk in the presence of those who do not look or act like them, then purifying public space of risk for them means increasing danger, discomfort, or outright exclusion for those typed as alien or unknown."[87] The broken-windows argument closes off these lines of thought in a circular argument concerning citizen fear as both the (intermediary) cause of crime and the justification for the policing of disorder. Although Bickford is right to suggest that there is no easy answer to the question of when citizen fear of disorder is justified and reasonable and when it should

be overcome, one way of getting a better handle on this question is to disaggregate the forms of disorder that Kelling and Coles consistently conflate.

Indeed, a recent study of New York City panhandlers and sidewalk vendors suggests that the broken-windows theory may suffer from an unrigorous definition of disorder. Mitchell Duneier, in *Sidewalk,* discovers a complex urban ecology of panhandlers, vendors of printed matter, and the housed citizens who support them. Frequently, according to Duneier, panhandlers and vendors become the eyes and ears on the street that help to sustain social order. Some vendors and panhandlers do act abusively and seek to intimidate passersby, but for the most part, Duneier says, "their presence on the street enhances social order." Furthermore, their presence fosters the sorts of encounters across social and cultural boundaries that Sennett suggests can make citizens less fearful: the vendors' tables became "a site for the interaction that weakens the social barriers between persons otherwise separated by vast social and economic inequalities."[88]

Duneier suggests not that we abandon broken-windows approaches to policing but rather that they be better targeted so as to avoid the blanket harassment of street-dwellers, panhandlers, and sidewalk vendors. This requires us to refuse the easy identification of physical forms of disorder—literal broken windows, graffiti, and other vandalism—with actual existing persons: "How do Wilson and Kelling know when they see instances of *social* broken windows that tell potential criminals that they can break the law? 'Social disorder' is not the same as a public telephone that has been vandalized. The men working on Sixth Avenue may be viewed as broken windows, but this research shows that most of them have actually become public characters who create a set of expectations, for one another and strangers, . . . that 'someone cares.'"[89] Whereas Wilson and Kelling's assertion that "the panhandler is the first broken window" offers a new version of the future-criminality defense of vagrancy law, Duneier's study suggests that such forms of "social disorder" may neither warrant fear and withdrawal on the part of domiciled citizens nor send encouraging messages to opportunistic criminals.

An act relating to unauthorized public camping and public sleeping; creating s. 125.0231, F.S.; providing definitions; prohibiting counties and municipalities from authorizing or otherwise allowing public camping or sleeping on public property without certification of designated public property by the Department of Children and Families; authorizing counties to designate certain public property for such uses for a specified time period; requiring the department to certify such designation; requiring counties to establish specified standards and procedures relating to such property; authorizing the department to inspect such property; authorizing the Secretary of Children and Families to provide certain notice to counties; providing applicability; providing an exception to applicability during specified emergencies; providing a declaration of important state interest; providing applicability; providing effective dates.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 125.0231, Florida Statutes, is created to read:

125.0231 Public camping and public sleeping.—

(1) As used in this section, the term:

(a) "Department" means the Department of Children and Families.

(b)1. "Public camping or sleeping" means:

a. Lodging or residing overnight in a temporary outdoor habitation used as a dwelling or living space and evidenced by the erection of a tent or other temporary shelter, the presence of bedding or pillows, or the storage of personal belongings; or

b. Lodging or residing overnight in an outdoor space without a tent or other temporary shelter.

2. The term does not include:

a. Lodging or residing overnight in a motor vehicle that is registered, insured, and located in a place where it may lawfully be.

b. Camping for recreational purposes on property designated for such purposes.

(2) Except as provided in subsection (3), a county or municipality may not authorize or otherwise allow any person to regularly engage in public camping or sleeping on any public property, including, but not limited to, any public building or its grounds and any public right-of-way under the jurisdiction of the county or municipality, as applicable.

(3) A county may, by majority vote of the county's governing body, designate property owned by the county or a

municipality within the boundaries of the county to be used for a continuous period of no longer than 1 year for the purposes of public camping or sleeping. If the designated property is within the boundaries of a municipality, the designation is contingent upon the concurrence of the municipality by majority vote of the municipality's governing body.

(a) A county designation is not effective until the department certifies the designation. To obtain department certification, the county shall submit a request to the Secretary of Children and Families which shall include certification of, and documentation proving, the following:

1. There are not sufficient open beds in homeless shelters in the county for the homeless population of the county.

2. The designated property is not contiguous to property designated for residential use by the county or municipality in the local government comprehensive plan and future land use map.

3. The designated property would not adversely and materially affect the property value or safety and security of other existing residential or commercial property in the county or municipality and would not negatively affect the safety of children.

4. The county has developed a plan to satisfy the requirements of paragraph (b).

Upon receipt of a county request to certify a designation, the

department shall notify the county of the date of receiving the request, and of any omission or error, within 10 days after receipt by the department. The department shall certify the designation within 45 days after receipt of a complete submission from the county, and the designation shall be deemed certified on the 45th day if the department takes no action.

(b) Except as provided in paragraph (e), if a county designates county or municipal property to be used for public camping or sleeping, it must establish and maintain minimum standards and procedures related to the designated property for the purposes of:

1. Ensuring the safety and security of the designated property and the persons lodging or residing on such property.

2. Maintaining sanitation, which must include, at a minimum, providing access to clean and operable restrooms and running water.

3. Coordinating with the regional managing entity to provide access to behavioral health services, which must include substance abuse and mental health treatment resources.

4. Prohibiting illegal substance use and alcohol use on the designated property and enforcing such prohibition.

(c) Within 30 days after certification of a designation by the department, the county must publish the minimum standards and procedures required under paragraph (b) on the county's and, if applicable, the municipality's publicly accessible websites.

The county and municipality must continue to make such policies and procedures publicly available for as long as any county or municipal property remains designated under paragraph (a).

(d) The department may inspect any designated property at any time, and the secretary may provide notice to the county recommending closure of the designated property if the requirements of this section are no longer satisfied. A county and, if applicable, a municipality must publish any such notice issued by the department on the county's and, if applicable, the municipality's publicly accessible websites within 5 business days after receipt of the notice.

(e) A fiscally constrained county is exempt from the requirement to establish and maintain minimum standards and procedures under subparagraphs (b)1.-3. if the governing board of the county makes a finding that compliance with such requirements would result in a financial hardship.

(4)(a) A resident of the county, an owner of a business located in the county, or the Attorney General may bring a civil action in any court of competent jurisdiction against the county or applicable municipality to enjoin a violation of subsection (2). If the resident or business owner prevails in a civil action, the court may award reasonable expenses incurred in bringing the civil action, including court costs, reasonable attorney fees, investigative costs, witness fees, and deposition costs.

(b) An application for injunction filed pursuant to this subsection must be accompanied by an affidavit attesting that:

1. The applicant has provided written notice of the alleged violation of subsection (2) to the governing board of the county or applicable municipality.

2. The applicant has provided the county or applicable municipality with 5 business days to cure the alleged violation.

3. The county or applicable municipality has failed to take all reasonable actions within the limits of its governmental authority to cure the alleged violation within 5 business days after receiving written notice of the alleged violation.

(5) This section does not apply to a county during any time period in which:

(a) The Governor has declared a state of emergency in the county or another county immediately adjacent to the county and has suspended the provisions of this section pursuant to s. 252.36.

(b) A state of emergency has been declared in the county under chapter 870.

Section 2. The Legislature hereby determines and declares that this act fulfills an important state interest of ensuring the health, safety, welfare, quality of life, and aesthetics of Florida communities while simultaneously making adequate provision for the homeless population of the state.

Section 3. Section 125.0231(4), Florida Statutes, as created by this act, shall take effect January 1, 2025, and applies to causes of action accruing on or after that date.

Section 4. Except as otherwise expressly provided in this act, this act shall take effect October 1, 2024.

Mitch Perry, Advocates hailed a new law to help stabilize FL's housing crisis, but implementation has been rocky, Florida Phoenix, Oct. 13, 2023

Local officials on the ground working to help alleviate Florida's housing crisis are now asking for a favor when the Legislature convenes in 2024: Fix the unintended consequences that came out of a signature policy initiative in the state Senate.

Florida lawmakers have already been hearing from elected local officials in the past few weeks, saying they need to readdress what's called the "Live Local Act," the new law that passed earlier this year to deal with issues that are hampering affordable housing and development in Florida.

"The Live Local Act, which I think your hearts are in the right place on it and we have a real workforce housing problem here in Hillsborough County, but what it does is it bypasses us as a local government when it comes to the land use and zoning," Hillsborough County Commissioner Michael Owen, of Tampa Bay, said at a legislative delegation last month. "I would ask that you all take a look at it next year."

That was a reference to the law that says a proposed development need only be "administratively approved" without having to get approval by a board of county commissioners if the project satisfies certain regulations.

Another twist? The law allows housing to be built in areas previously zoned only for industrial purposes.

At another recent legislative delegation meeting — in Pasco County — County Commissioner Jack Mariano said the Live Local Act was a "great thing for a lot of areas." But he added that the law is also detrimental to long-term efforts by county officials to bring more businesses to the area, now that housing developments are allowed to be built in areas zoned as industrial.

Overall, officials in other communities say they're grateful for the hefty pot of state money — $711 million that was listed as the appropriation for the Live Local Act initiative, according to legislative records. But at the same time, they're unhappy about the law's inability to account for the unique characteristics inherent in each community when it comes to their comprehensive plans, by imposing a "one-size" fits all framework.

Florida's two-month legislative session will begin Jan. 9, 2024, and some local government officials have been calling on state lawmakers to file a "glitch" bill even before the new session begins in January.

The Senate moved quickly

The Live Local Act was Senate President Kathleen Passidomo's signature policy initiative going into the 2023 legislative session, and the bill moved quickly through both legislative chambers last spring.

Some Democrats criticized the measure for banning local governments from implementing rent control laws, but the legislation passed unanimously by the Senate on just the second day of the session. The House passed it a few weeks later and Gov. Ron DeSantis signed it into law in March.

The law gives tax breaks to developers who create multifamily and mixed-use residential properties with at least 70 units in any area zoned for commercial, industrial or mixed-use if at least 40% of those units are dedicated to affordable units for a period of 30 years.

But there's been pushback from local officials.

“I think it’s too early to really know all the potential unintended consequences of this legislation,” says Seminole County Commissioner Lee Constantine, in east Central Florida.

In his role as the [now former] president of the Florida Association of Counties, Constantine says he and his staff worked with Senate President Passidomo and her staff on suggestions as the bill was being drafted. He says the organization supported the proposal mostly because of the additional funding for state housing programs.

“Clearly the funding was needed and important, but we have never made any bones about the fact that we felt that there were some things that we did have concerns about,” he said about the final legislation. “Primarily taking away local governments ability in certain situations to govern when it comes to zoning and comp plans and we did feel that there would be, and we have suggestions for working towards suggestions on a glitch bill this year.”

Killing a crucial goal

Located on the west-central coast of Florida, Pasco County has been known as a bedroom community for people who work in Tampa and St. Petersburg because of its lower housing costs.

Local officials have worked for decades on recruiting more businesses in Pasco communities. But allowing housing to be built in areas zoned as industrial —now in the new law — will kill that crucial goal.

“Right now, 43% of our workforce commute outside the county, and it’s really what we call a talent drain,” says David Engel, the economic growth director for Pasco County.

“Our goal for a number of years is to balance our community so that we have job opportunities for our local labor force to avoid commuting ten to twelve hours a week in a car and causing our roadways to clog. So when we start taking indiscriminately industrial zoned areas that were earmarked for employment and we start inserting affordable housing projects inside of them, it causes quite a setback for us, because the employment is essential.”

Engel is an urban planner who was involved in housing policy for decades in New York.

“We applaud the state of Florida for providing some types of revenue, but to put a predominant amount of burden on counties and localities like Pasco County is not reasonable,” he says. “It undermines the broad approach of dealing with our workforce and affordable housing issues for our unmet needs. And it’s something that we would respectfully request be reconsidered.”

A six-month moratorium

In Doral, about 13 miles west of Miami, Mayor Christi Fraga and the city council approved a six-month moratorium on new development applications earlier this summer to give the city time to consider potential changes to its comprehensive plan and land development regulations in reaction to passage of the Live Local Act.

Fraga says that was needed to contend with a proposal from a South Florida developer that came to her before the Live Local Act passed this spring. The development includes the construction of 623 new apartments in five towers between 10 and 12 stories tall, according to the South Florida Business Journal. The new law says a city or county may not restrict the height of a proposed development below the highest currently allowed for commercial or residential development within one mile of the development or three stories, whichever is higher.

"I felt it was just not consistent with that area – not anything that we would allow with our zoning code – and I rejected his proposal right from the start and just told him that it was definitely not something that anybody would be willing to welcome in that zone or that area, especially with the kind of zoning that he had," she says. "And that's when he told me that he was keeping an eye on the Live Local Act and if it passed, he was going to be utilizing the law." (The developer – the Apollo Companies – did not respond to multiple requests for comment).

Fraga calls the Live Local Act another preemption bill that takes powers away from local governments when it comes to land use decisions. She says the moratorium was needed because the law didn't create any procedures for cities to implement any safeguards.

"There was nowhere where our code could address applications such as the one we saw on a parcel that is 18 acres next to a traditional neighborhood with potential 14-story buildings," she says.

The legislation's criteria for what qualifies as an affordable housing project was expanded to include households who make up to 120% of average median income (AMI). That means that in a place like Miami-Dade County, a single person making up to $81,960 or a family of four making up to $117,000 is now eligible.

20 Local Live Act projects

Take for example the case of a proposed development on a closed golf course in Plant City, located east of Tampa in Hillsborough County. The planning board there has twice rejected a mixed-use proposal as being incompatible with the local community. But unbowed and undeterred, the developer, Walden Lake LLC, recently resubmitted a new proposal which they say will now qualify as a Live Local Project, according to the Plant City Observer.

The proposal has 1,530 multifamily units and 468 townhome-style units made up of studio, one and two-bedroom unit up to three stories high.

The attorney representing Walden Lake LLC, Jacob T. Cremer, a partner with Stearns Weaver Miller in Tampa, said that his firm learned about the Live Local Act after the Plant City planning board rebuked their proposal for a second time earlier this year.

That's when they pivoted towards providing more affordable housing in their package under the law to get it through a third time. And under the Act if it does receive administrative approval from Plant City, they won't need to go through the planning board – meaning that the public won't have the ability to weigh in on it.

Nick Brown is president of Save Walden Lake, a neighborhood association that has been opposing plans for developing that area for years. He says he appreciates the intent of the Live Local Act to "enable schoolteachers, policemen and firemen to be able to live close to where they work." But he says that the developer's new proposal is a complete "perversion" of the intent of the law, and says that his group is prepared to legally challenge it if it moves forward.

For his part Cremer says his firm is now working on upwards of twenty Local Live Act projects. He says developers are still trying to figure out if they can take advantage of the law so it works for them.

"The 40% affordable housing requirement is pretty substantial and so they have to make sure that it works for their investors and their lenders," Cremer said. "So that takes a lot of time on the front end and we're finding that it takes a long time to work with the local governments on these

submittals because this is cutting edge stuff…when you're working on something cutting edge like this, it does take some time to figure it out and see how it works and work through the kinks."

A spokesperson for Senate President Passidomo tells the Phoenix that it's too soon right now to determine whether any changes need to be made to the legislation.

"President Passidomo has been monitoring the implementation of Live Local over the summer, and she is familiar with the concerns raised by local government," said Katie Betta, deputy chief of staff for communications. "She is always open to listening to local concerns – Live Local is the product of listening to such concerns over many years. As we … prepare for the upcoming session in January, she will continue to monitor the implementation closely."

Deborah Acosta, Florida's Live Local Act Sparks New Wave of Housing Legislation, Wall Street Journal, Dec. 12, 2023

Less than six months after Florida enacted legislation to encourage more workforce housing, dozens of developers are rushing ahead with projects that qualify for tax breaks under the new law.

The legislation, known as the Live Local Act, offers developers tax breaks and allows them to bypass local zoning rules if enough workforce housing is built. The act is meant to create more housing for middle-income renters who make 120% of an area's median income or less.

Many teachers, paralegals and other professionals have been squeezed out of Miami, Tampa and other expensive Florida cities as rents soared.

Real-estate lawyers say they are working overtime so that their clients' projects qualify for tax breaks next year.

"I have them in every major city—Tampa, Orlando, Miami—and we're in a mad dash to get them done," said Anthony De Yurre, a lawyer at Bilzin Sumberg who says he's personally handling more than 40 different Live Local projects.

In some instances, developers are switching from pure market-rate projects to ones that include workforce housing to take advantage of the tax incentives.

Cymbal DLT, a developer that specializes in market-rate multifamily housing, was already halfway through construction on its latest project when the Live Local Act was enacted. Now, all 341 units in the Laguna Gardens project will be workforce housing.

Asi Cymbal and Hector Dela Torres, the top two executives at Cymbal DLT, refer to their project as "attainable luxury" because the apartments are open with floor-to-ceiling windows, thick soundproof walls between units and lush walking paths and a large pond.

"There's been a lot of talk about creating attainable luxury in South Florida and there wasn't a vehicle like this to make it available to our community," said Dela Torres, who like his partner grew up in government-subsidized housing in New York City.

Miami developer Matt Martinez has focused on multimillion-dollar homes, shopping centers and other commercial properties. But as soon as the new legislation went into effect, he purchased more than 2 acres of land near the city of Homestead in Miami-Dade County to develop multifamily garden-style apartments for workforce housing.

"Our type of deals wouldn't necessarily pencil without the benefit," said Martinez. "Our plan is to build 1,500 workforce housing units in the state of Florida over the next five years."

South Florida wasn't hurting for new rental housing before the Live Local Act. Developers have swarmed the Miami region to build more apartments as a share of inventory than in any other major metropolitan area. But about 90% of the rental projects under construction are luxury units, according to data firm CoStar Group.

The Miami metro area also has the highest share of so-called cost-burdened renters of any major U.S. metropolitan area: 61% of its rental population are spending 30% or more of household income on housing, according to a report released this year by the Joint Center for Housing Studies at Harvard University.

Many politicians felt the state needed to do something, and the Live Local Act received broad bipartisan support when it passed in March.

Still, not everyone in the state has been pleased with all the results. Some projects, like a residential building that would tower over the rest of Miami Beach's Ocean Drive, are already getting pushback from the city's mayor and other locals. Another municipality, Doral, enacted a six-month moratorium on any Live Local Act developments.

But more transplants to the state are making use of the act to build. James Curnin left New York City to build luxury homes in Miami Beach and then multifamily apartments in Miami's Bay Harbor.

In October, he went into contract on land in Miami's Wynwood neighborhood to develop apartments in an area that is zoned industrial. If it weren't for the new law, Curnin wouldn't have bought the land, he said, because the land was zoned to allow for only 14 units.

"I can put 150 apartments here, so it made the numbers make a lot more sense," he said. While 40% of the units will be workforce housing, he's planning to make them all luxury, with finished closets, high-end amenities, and a rooftop padel court.

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Lawrence Mower & Barbara Behrendt, Lawmakers look to fix affordable housing act after outcry across state, Tampa Bay Times, Feb. 9, 2024

TALLAHASSEE — When Florida lawmakers passed legislation to create thousands of affordable housing units last year, it was considered long-overdue relief for low- and middle-income Floridians.

The Live Local Act, as it was called, was a top priority for the Senate president, and no one blanched at its $711 million price tag.

Less than a year later, communities across the state are in uproar. Local officials complain of proposed developments ruining the character of neighborhoods. Some say they've lost control of local planning.

And the law has allowed developers to avoid millions in local taxes without providing much affordable housing for lower-income residents.

A report on one of the bill's key components shows that fewer than 500 new apartments meriting tax breaks are affordable for Floridians earning 80% or less of the median income.

Senate President Kathleen Passidomo, R-Naples, and other state lawmakers have recognized the outrage. The Senate on Wednesday unanimously passed a "glitch" bill addressing some — but not all — of the complaints. The legislation still has to pass the House.

Passidomo said she wants to keep working with local governments, and the law could change in future years to accommodate complaints. But she said the Live Local Act's success will take years to realize.

"The market is going to dictate what is going to be built," she said. "We have to let this play out."

That's little comfort to local officials who believe the legislation hasn't delivered enough affordable housing.

"It's absolutely absurd," said Pasco County Commissioner Jack Mariano after watching the bill pass on Wednesday. "It doesn't help the regular working people."

"Historic" housing support

After years of inaction, last year's Live Local Act was considered Florida's most meaningful housing legislation in decades.

Instead of continuing the Legislature's trend of reassigning affordable housing money, the act devoted a record amount of funding to encourage building. Another $100 million went to no-interest loans for Florida workers.

And apartment developers were given tax incentives if they designated at least 70 units as affordable housing, available to people earning up to 120% of the area's median income. In comparison, the state's affordable apartment-building program focuses on units serving people earning only up to 60% of the area's median income.

The goal was to create more workforce housing — and to break local governments' grip on new developments.

After seeing communities reject affordable housing projects, Passidomo wanted Live Local to cut through red tape. The act did just that, allowing affordable housing developments to bypass zoning, density and height requirements.

Communities were anxious over losing control, and some advocates noted that the legislation didn't appear to benefit Floridians making 60% or less of area median income, a level that affordable housing buildings have traditionally sought to help.

Still, the legislation sailed through the Legislature with bipartisan support and was praised by most affordable housing advocates for its record funding. Gov. Ron DeSantis called it "historic" while signing the bill.

After taking effect in July, it quickly prompted clashes between developers and local officials and residents.

Concerns over neighborhoods

In Miami Beach, the owners of the iconic Clevelander Hotel and Bar announced in September they wanted to replace the property with a 30-story tower, with 40% of units qualifying under the higher range of what the Live Local Act designated as "affordable." The mayor called it the "worst idea ever" because it would "destroy" the city's Ocean Drive skyline, and the owners shrank the proposal to 18 stories.

In Doral, a 17-acre high-rise development was proposed next to a community of two-story townhomes. City officials blocked it by invoking a six-month building moratorium. Projects in Weston and Hollywood also were met with resistance.

Few communities have been as vocal against the Live Local Act as Pasco County, which has ample housing but lacks enough jobs. In December, commissioners threatened to sue apartment developers that build on industrial or commercial property. County officials want to preserve those areas to attract jobs.

Senate Bill 328, approved Wednesday, addresses one of the concerns raised by local governments. It would prohibit developments from being higher than 150% of the next-tallest building if it's adjacent to a neighborhood of at least 25 single-family homes.

But it also prohibits communities from using other methods to restrict the size of buildings.

Sen. Alexis Calatayud, R-Miami, who sponsored the bill, called it an "enhancement" to the Live Local Act that preserves the "character of communities."

What's 'affordable'?

SB 328 does nothing to address some of the biggest complaints from communities: tax credits for housing that they don't consider affordable.

The Live Local Act gives apartment developers property tax exemptions of 75% or 100% if they offer at least 70 units that are affordable for households making up to 120% of the area's median income. In Tampa Bay, that's $104,280 for a family of four, according to federal data. It's $123,840 in Miami-Dade County.

Local officials say those standards stretch the definition of who would qualify for affordable housing. They say developers don't have to lower their rents to qualify for tax breaks. Meanwhile, those tax breaks could cost local governments millions in tax revenue.

In Gainesville, six of the seven apartment complexes that have applied for tax exemptions are student housing around the University of Florida, City Commissioner Bryan Eastman told a Senate committee last week.

Full-time college students usually don't qualify for affordable housing programs because students are often subsidized by student loans or their parents, Eastman said. The Live Local Act has no such exemption, and he said the tax exemptions could deprive the city of $3 million in revenue per year.

"A bill that was designed to house low-income residents may be used to give tax exemptions for luxury student housing," Eastman said.

Data from the first six months of the Live Local Act shows that 83 apartment complexes around the state met standards for credits. Those complexes listed 40% of their inventory — about 9,500 units — as affordable under the Live Local Act's more generous definition of households earning 120% of the area median income.

Less than 500 units were designated for people who earn 80% or less of the area median income — $82,560 for a family of four in Miami-Dade County and $69,520 in Tampa Bay.

In Pasco County, two existing apartment complexes that tout "luxury" features have applied for tax credits. The website for Tapestry Cypress Creek offers a clubhouse and saltwater pool. The Gallery at Trinity Apartments features pickleball and an "elite" putting green.

Collectively, the two complexes applied for tax credits because 266 of their 629 units qualify for 120% of the area's median income. None were below 80%. The owners of the apartments have not responded to requests for comment.

When asked by a fellow senator about "luxury" apartments qualifying for tax credits, Calatayud said it "meets the spirit of the legislation" as long as the units are 10% below market rate.

"So good on those Pasco guys that get to move into there," Calatayud said.

David Goldstein, Pasco County's chief assistant county attorney, sent demand letters Wednesday to the two complexes asking them not to apply for the exemptions or to rescind them, claiming the tax credits are unconstitutional because the developments are not a charity. Those tax breaks could cost county coffers as much as $86 million through 2059.

The letter states that the rents charged for a two-bedroom apartment in the complexes "are not affordable to the average Pasco County sheriffs deputy, firefighter or school teacher."

According to federal guidelines, the area median income in Pasco County, which is lumped into the Tampa Bay area, is $89,400. At 120%, a one-bedroom apartment is considered affordable up to $1,957 per month. A two-bedroom would be $2,349.

The Tampa Bay area including Pasco already has a surplus of rental units serving people earning between 80% and 120% of the median income, said Mariano, the Pasco commissioner. He pointed to University of Florida data that shows the area lacks about 380,000 cheaper units — one-bedrooms that cost no more than $1,305 per month and two-bedrooms under $1,566.

Pasco argued to state leaders that the existing Live Local income targets for affordable housing don't meet what Pasco needs, and proposed language to allow each community to define its need.

"It just can't be a one-size-fits-all solution," Pasco County Commissioner Kathryn Starkey told the Tampa Bay Times. She called the tax exemption "corporate welfare."

"It's a tax giveaway with no benefit whatsoever."

Miami Herald staff writer Aaron Leibowitz contributed to this report.

Aaron Leibowitz & Ana Ceballos, Bill making it easier to demolish historic Florida buildings heads to DeSantis' desk, Miami Herald, 03/06/2024

Legislation giving developers more power to knock down historic buildings near Florida's coast without interference from local governments is heading to Gov. Ron DeSantis' desk.

The Florida House passed the measure on an 86-29 vote on Wednesday, despite objections from city officials and historic preservationists in Miami Beach who said the bill threatens to wipe out some of the city's iconic Art Deco architecture. Lawmakers from the Tampa Bay area also raised concerns about the impact potential developments would have on vulnerable coastal communities.

An art piece is pictured in front of the Faena Miami Beach on Nov. 12, 2022. The Faena is one of many historic Art Deco buildings in Miami Beach that would be more difficult to preserve under legislation heading to the desk of Gov. Ron DeSantis.

The proposal has been retooled since last year, when similar legislation passed in the Senate before dying in the House amid an uproar from residents in Miami Beach and several other coastal communities.

Language that could soon be signed by the governor now would exempt St. Augustine, Key West, the town of Palm Beach and buildings along Ocean Drive in South Beach, House sponsor Spencer Roach, R-North Fort Myers, said Tuesday during debate on the bill.

But many buildings in the Mid-Beach and North Beach neighborhoods of Miami Beach could still be affected. That includes Art Deco hotels along Collins Avenue like the Faena, Sherry Frontenac, Casablanca and Carillon.

The legislation would also limit the power of local historic preservation boards like the one in Miami Beach, which has the authority to dictate whether historic structures can be demolished and mandate that certain elements be preserved when structures are rebuilt. About 2,600 buildings in Miami Beach are part of locally designated historic districts.

Proponents of the bill say the changes are crucial to ensuring building safety and resiliency against flooding near Florida's coast — and that local governments can sometimes frustrate that goal by preventing old structures from being knocked down.

"The problem we are trying to solve is that we have some local jurisdictions where the governing body — and sometimes this is even outsourced to a local historic board, which in some cases they are acting as a de facto zoning commission — [is] arbitrarily denying someone's permit to demolish a structure and rebuild a new structure," Roach said during Tuesday's debate. "What we are trying to get rid of is the unfairness of a governing commission violating their own zoning standard arbitrarily and capriciously."

Roach emphasized that his legislation doesn't override local zoning requirements and that any new structure built in place of one that is demolished would need to conform to local regulations. (A different piece of legislation known as the Live Local Act, which became law last year and was revised during this year's

legislative session, does allow developers to sidestep local zoning if they agree to build workforce housing.)

Four House Republicans voted against the bill, including Fabian Basabe of Miami Beach and Linda Chaney of St. Pete Beach. Several Miami-Dade and Tampa Democrats were also among the "no" votes: Christopher Benjamin and Felicia Robinson of Miami Gardens, Kevin Chambliss of Homestead, Ashley Gantt of Miami, Dotie Joseph of North Miami, Michele Rayner and Lindsay Cross of St. Petersburg, as well as Susan Valdes, Dianne Hart and Fentrice Driskell of Tampa.

Cross said Wednesday that she worries Roach's bill will have a negative impact on coastal communities and unfairly force local governments to allow the maximum height and density permitted for new structures after an older building is torn down. She said cities should have been given more flexibility and an opportunity to show they are taking "common-sense steps" to protect against storms and flooding.

"Raising building standards for new construction is actually the right thing to do, but not everything needs to be built to the maximum height and building size," Cross said.

Daniel Ciraldo, executive director of the Miami Design Preservation League, which advocates for preserving Art Deco structures in Miami Beach, said the bill is the latest example of Tallahassee lawmakers preempting local governments from making decisions about their own communities.

"We think that local community planning and consensus building is the best way to make your community resilient," Ciraldo said in an interview Wednesday. "These folks in Tallahassee are writing laws that are impacting places around the state where they don't live."

WHAT AREAS WILL BE AFFECTED?

The legislation would apply to buildings that sit at least partially on the seaward side of the state's coastal construction control line, a boundary that hugs the coast and is meant to restrict construction near beaches. Such buildings could be subject to demolition in three cases: if they do not meet FEMA flood codes, are deemed unsafe by a local building official or are ordered to be demolished by a local government.

Exemptions from the new rules include single-family homes; buildings individually listed in the National Register of Historic Places, like the Fontainebleau in Miami Beach; buildings in historic districts listed in the National Register of Historic Places before 2000, like the Miami Beach Architectural District in South Beach; and buildings on barrier islands with fewer than 10,000 residents.

Last week, the Florida Senate approved the bill with just two "no" votes: Shevrin Jones, D-West Park, whose district includes parts of Miami Beach, and Lori Berman, D-Boynton Beach. Sen. Jason Pizzo, D-Miami, and Sen. Tracie Davis, D-Jacksonville, did not vote.

Jones had proposed an amendment sought by the Miami Design Preservation League that would have removed the provision that says coastal buildings could be demolished if they don't meet FEMA standards for flood-resistant materials and elevated structures in vulnerable areas. Preservationists say few historic buildings conform to those rules.

The Senate bill's sponsor, Bryan Avila, R-Miami Springs, called the amendment "unfriendly" before it failed.

MIAMI BEACH LEADERS PUSH BACK

At a committee hearing last month, Miami Beach City Commissioner Alex Fernandez said the system the city has in place doesn't need to be changed. Miami Beach officials have worked cooperatively with owners of historic buildings to revitalize several Art Deco gems, he noted, including a $500 million

renovation of The Raleigh and an $85 million makeover of the Shelborne.

An amendment that would have allowed local governments to consider the impact of new development in a particular coastal area was voted down Tuesday. The sponsor of that proposal, Rep. Cyndi Stevenson, R-St. Johns, said demolition of coastal structures isn't always the best approach.

"Building back bigger and stronger is not the best solution in all locations in our coastal high-hazard areas, but it is certainly a step ahead in some areas," Stevenson said. "Intensive construction on our vulnerable coast is one of the reasons we are experiencing [high] insurance costs."

AUGUST 8, 2023

Florida's New Live Local Act Offers Land Use and Tax Benefits

Holland & Knight Alert

Pedro Gassant | Alessandria San Roman | Lawrence E. Sellers

PDF

Highlights

- Florida Gov. Ron DeSantis signed into law Senate Bill 102, the Live Local Act (the Act), on March 28, 2023, with an effective date of July 1, 2023.
- The Act mandates that a local government authorize the development of multifamily rentals on sites that are zoned as mixed-use residential, commercial or industrial if at least 40 percent of the residential units in a proposed multifamily development will, for a period of at least 30 years, be affordable to individuals making up to 120 percent of the local area median income (AMI).

- In addition, a county or municipality must apply the highest "allowed" density on any land within its jurisdiction to the proposed multifamily development, while the maximum height is determined based on the highest currently allowed height for commercial and residential development located within 1 mile of the proposed development. At a minimum, the Act mandates that a local jurisdiction allow the proposed development to build to a height of three stories.
- The Act provides that certain developments will be eligible for a 75 percent or 100 percent ad valorem tax exemption, depending on the level of rent restriction for the units, which will first apply to the 2024 tax roll and require a certification notice issued by the Florida Housing Finance Corporation (FHFC).

Florida Gov. Ron DeSantis signed into law Senate Bill 102 on March 28, 2023, with an effective date of July 1, 2023. Commonly referred to as the Live Local Act (the Act), it has significant land use, zoning and tax benefits that will now be available to developers and investors. This Holland & Knight alert provides a general outline of the Act's impact on land use and zoning, as well as a general summary of the Act's benefits from a tax perspective.

Land Use and Zoning Benefits

The Act mandates that a local government authorize the development of multifamily rentals on sites that are zoned as mixed-use residential,[1] commercial or industrial if at least 40 percent of the residential units in a proposed multifamily development will, for a period of at least 30 years, be affordable to individuals making up to 120 percent of the local area median income (AMI), referred to as the Threshold Requirement.

The Act provides that a county or municipality cannot require a proposed multifamily development that will comply with the Threshold Requirement to obtain a land use, zoning, special exception, conditional use approval, variance or comprehensive plan amendment with respect to building height, zoning and density.

Once a multifamily project complies with the Threshold Requirement, a county or municipality must apply the highest "allowed" density on any land within its jurisdiction to the proposed multifamily development. Furthermore, once a project complies with the Threshold Requirement, the local jurisdiction cannot restrict the height of the proposed development below the highest currently allowed height for a commercial or residential development located in the local jurisdiction within 1 mile of the proposed development. At a minimum, the Act mandates that a local jurisdiction allow the proposed development to build to a height of three stories.

There are a panoply of issues associated with the ability to utilize the Act. For example, there are various jurisdictions in South Florida that do not provide for a density per acre but provide for a "pool" of units that can apply to properties. Naturally, one of the questions that arises is regarding the "maximum" density in such jurisdictions. Notwithstanding such issues, the Act provides a path that certainly is tailored toward increasing the inventory of affordable and workforce housing in Florida.

Tax Benefits

The Act provides that certain developments will be eligible for a 75 percent or 100 percent ad valorem tax exemption, depending on the level of rent restriction for the units. If at least 71 units are affordable to natural persons earning up to 80 percent of the AMI,[2] then each unit provided to such persons qualifies for a 100 percent ad valorem tax exemption. If at least 71 units are affordable to natural persons earning more than 80 percent of the AMI and up to 120 percent of the AMI, then each unit provided to such persons is eligible for a 75 percent ad valorem tax exemption. These exemptions first apply to the 2024 tax roll and require a certification notice issued by the Florida Housing Finance Corporation (FHFC).

New Tax Exemptions

This exemption applies throughout Florida without further action by local governments.

The Act defines eligible property to include units in a "newly constructed" multifamily project containing more than 70 units dedicated to housing natural persons or families below certain income thresholds. Newly constructed is defined as an improvement substantially completed within five years before the property owner's first application for the exemption. The units must be occupied by such persons or families and rent limited so as to provide affordable housing at either the 80 percent to 120 percent AMI threshold. Rent for such units also may not exceed 90 percent of the fair market value rent as determined by a rental market study. If an occupied unit qualifies for this exemption and the following year it is vacant on Jan. 1, the vacant unit is eligible for the exemption provided it meets the other requirements and a reasonable effort is made to lease the unit to eligible persons or families.

Units subject to a recorded agreement with the FHFC under Ch. 420, F.S., to provide affordable housing and property receiving an exemption under Section 196.1979, F.S., as created by a local affordable housing exemption ordinance, are not eligible to receive this exemption.

Procedure

The exemption first applies to the 2024 tax roll and will be repealed on Dec. 31, 2059.

To receive this exemption, a property owner must 1) file a certification form with the FHFC and 2) submit an application by March 1 to the local property appraiser, accompanied by the certification notice from the FHFC.

As part of the FHFC certification process, a property owner must submit a request on a form that includes:

1. the most recent market study (the study must have been conducted by an independent certified general appraiser in the preceding three years)

2. a list of units for which the exemption is sought

3. the rent amount received for each unit

4. a sworn statement restricting the property for a period of no less than three years to provide affordable housing

The certification process is administered within the FHFC. The agency's responsibilities include publishing the deadline for submission, reviewing each request, sending certification notices to both the successful property owner and appropriate property appraiser, and notifying unsuccessful property owners with reasons for any denial.

Penalty

If the property appraiser determines that an exemption has been improperly granted within the last 10 years, the property appraiser must serve the owner with a notice of intent to record a tax lien. Such property will be subject to the taxes improperly exempted, plus a penalty of 50 percent and 15 percent annual interest. Penalty and interest amounts do not apply to exemptions erroneously granted due to clerical mistake or omission by the property appraiser.

For Further Assistance

If you have any questions or would like assistance regarding the recent Act requirements, please contact one of the authors.

Mischaël Cetoute, a former law clerk in the firm's Miami office, contributed to this alert.

Notes

[1] The zoning districts that comprise mixed-use districts are anticipated to be an issue in certain municipalities. For example, are Planned Area

Developments or Planned Developments mixed-use districts?

[2] In Miami-Dade, the area median income is $68,300. The upper income threshold for all of the programs (120 percent AMI) is $81,960. Miami-Dade County's Workforce Housing Development Program includes families whose incomes are within 60 percent to 140 percent AMI. Therefore, while units restricted from 120 percent to 140 percent AMI qualify in the county, the aforementioned units do not count toward the minimum of 70 units required by the Live Local Act.

Overview of the Live Local Act (SB 102)

May 9, 2023

AFFORDABLE HOUSING CATALYST PROGRAM

Sponsored by the
Florida Housing Finance Corporation

FLORIDA HOUSING COALITION

About the Florida Housing Coalition

- Statewide nonprofit organization that is primarily a training and technical assistance provider to local governments and nonprofits on all things affordable housing
- Our work covers:
  - Compliance with local, state, and federal affordable housing programs
  - Affordable housing program design
  - Capacity building for nonprofit housing providers
  - Land use planning for affordable housing
  - Research & data gathering
- We can provide free training & technical assistance to you under the Catalyst Program

Presenters

Kody Glazer,
Legal & Policy Director
Glazer@flhousing.org

Ali Ankudowich,
Technical Advisor
Ankudowich@flhousing.org

Live Local Act – topics covered today

I. Funding
II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Live Local summary – array of affordable housing policies

- **Funding and tax credits.** Up to **$811 million** for affordable housing programs.
- **Tax incentives.** Three new property tax incentives and sales tax exemption for specified affordable housing developments.
- **Land use tools & role of local government.** Facilitating affordable housing in commercial, industrial, and mixed-use areas & more.
- **Publicly-owned land.** Encouraging local governments to adopt best practices.
- **State housing strategy.** State guidance on affordable housing policy.
- **Technical assistance.**

Live Local Act

Senate Bill 102
(Calatayud – Miami-Dade)

House Bill 627
(Busatta Cabrera – Miami-Dade)

Addresses a variety of housing policies including funding, tax incentives, and substantial amendments to the state's housing strategy.

3/8/23: Passed Senate unanimously

3/23/23: Passed House 103-6

3/29/23: Signed into Law

I. Funding

II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

What are the Sadowski Trust Funds?

Sadowski Housing Coalition
Housing = Jobs

- Established in 1992
- Consists of two trust funds:
  - **State Housing Trust Fund** – primarily funds the State Apartment Incentive Loan (SAIL) program
  - **Local Government Housing Trust Fund** – funds the State Housing Initiatives Partnership (SHIP) program
- Funded by a portion of documentary stamp taxes collected on real estate transactions
- Collections in the trust funds are directly tied to the real estate market – the hotter the real estate market, the more money in the affordable housing trust funds

FLORIDA HOUSING COALITION

Funding in the Live Local Act

- Provides up to **$811 million** for affordable housing programs (including up to $100 million in a new tax credit program)

Program	Live Local Act	FY 22-23	FY 21-22
SHIP	$252m	$209.475m	$146.7m
SAIL	$259m*	$53.25m	$62.5m
Hurricane Housing Recovery		$150m	
Hometown Hero Program	$100m (from GR)	$100m (from SHTF)	
Inflation Response Program	$100m**		
Live Local Tax Donation Program	(up to $100m***)		
Total funding**	**$811,000,000**	**$512,725,000**	**$209,200,000**

*Discussed on subsequent slides
** If not used by 12/1/23, goes to SAIL
***For SAIL – dependent on contributions to the program
****This does not include member projects or homelessness grant programs.

FLORIDA HOUSING COALITION

Sadowski fully funded & more!

- The Live Local Act **fully funds** the Sadowski Trust Fund programs.
- **AND**
  - Provides an extra $150 million/year for 10 years for a SAIL-like program
  - Up to $100 million/year for SAIL through the new Live Local Tax Donation Program
  - Up to $100 million not used on inflation response program in 2023 to SAIL
- This does not include the value of the new local property tax incentives for certain affordable housing developments.

State Housing Initiatives Partnership (SHIP) program

- Administered by the Florida Housing Finance Corporation (FHFC)
- Deploys funds to 67 counties and 55 eligible municipalities
- Each SHIP jurisdiction develops a Local Housing Assistance Plan (LHAP) that governs its uses of the funding
- SHIP statute provides a series of "set-asides" that local governments must adhere to including:
  - At least 75% for construction-related activities
  - At least 65% for ownership; no more than 25% for rental housing
  - At least 30% for VLI households and at least 30% for LI households; remaining funds up to 140% of AMI
  - No more than 10% on admin expenses

Projected SHIP Distribution Estimates for 2023-24

SHIP allocation based on SB 102, includes DR holdback

PROJECTED SHIP DISTRIBUTION ESTIMATES FOR FY 2023-24

($252,000,000)

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
ALACHUA	3,286,537	1,621,249
Gainesville		1,665,288
BAKER	350,000	350,000
BAY	2,111,922	1,697,141
Panama City		414,781
BRADFORD	350,000	350,000
BREVARD	7,189,654	3,945,682
Cocoa		227,912
Melbourne		996,486
Palm Bay		1,452,310
Titusville		567,264
BROWARD	22,534,548	3,988,613
Coconut Creek		662,516
Coral Springs		1,543,617
Davie		1,223,626
Deerfield Beach		1,000,534
Fort Lauderdale		2,163,317
Hollywood		1,773,469
Lauderhill		856,313
Margate		671,530
Miramar		1,581,925
Pembroke Pines		1,960,506
Plantation		1,077,151
Pompano Beach		1,302,497
Sunrise		1,115,460
Tamarac		831,525
Weston		781,949
CALHOUN	350,000	350,000
CHARLOTTE	2,260,559	2,031,564
Punta Gorda		228,995
CITRUS	1,814,501	1,814,501
CLAY	2,587,678	2,587,678
COLLIER	4,476,074	4,255,404
Naples		220,670
COLUMBIA	818,222	818,222
DE SOTO	409,396	409,396
DIXIE	350,000	350,000
DUVAL	11,836,251	11,836,251
ESCAMBIA	3,777,215	3,149,442
Pensacola		627,773
FLAGLER	1,435,374	320,088
Palm Coast		1,115,286
FRANKLIN	350,000	350,000
GADSDEN	513,413	513,413
GILCHRIST	350,000	350,000

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
GLADES	350,000	350,000
GULF	350,000	350,000
HAMILTON	350,000	350,000
HARDEE	350,000	350,000
HENDRY	461,405	461,405
HERNANDO	2,282,869	2,282,869
HIGHLANDS	1,182,573	1,182,573
HILLSBOROUGH	17,412,196	12,813,635
Tampa		4,598,561
HOLMES	350,000	350,000
INDIAN RIVER	1,888,820	1,888,820
JACKSON	572,956	572,956
JEFFERSON	350,000	350,000
LAFAYETTE	350,000	350,000
LAKE	4,624,711	4,624,711
LEE	9,174,678	5,688,301
Cape Coral		2,379,911
Fort Myers		1,106,466
LEON	3,427,786	1,132,540
Tallahassee		2,295,246
LEVY	513,413	513,413
LIBERTY	350,000	350,000
MADISON	350,000	350,000
MANATEE	4,825,503	4,174,060
Bradenton		651,443
MARION	4,498,384	3,753,002
Ocala		745,382
MARTIN	1,859,122	1,859,122
MIAMI-DADE	20,155,423	13,238,082
Hialeah		1,668,869
Miami		3,355,878
Miami Beach		610,709
Miami Gardens		840,481
North Miami		441,404
MONROE	967,006	967,006
NASSAU	1,093,333	1,093,333
OKALOOSA	2,476,127	2,234,952
Fort Walton Beach		241,175
OKEECHOBEE	454,017	454,017
ORANGE	16,943,828	13,261,934
Orlando		3,681,894
OSCEOLA	4,877,511	3,230,375
Kissimmee		943,311
St. Cloud		703,825

LOCAL GOVERNMENT	COUNTY TOTAL	COUNTY SHARE/ CITY SHARE
PALM BEACH	17,389,885	12,463,331
Boca Raton		1,140,776
Boynton Beach		935,576
Delray Beach		768,633
Wellington		707,768
West Palm Beach		1,373,801
PASCO	6,795,605	6,795,605
PINELLAS	11,137,539	5,783,723
Clearwater		1,364,349
Largo		964,511
St. Petersburg		3,024,956
POLK	8,825,249	6,835,155
Lakeland		1,378,504
Winter Haven		611,590
PUTNAM	855,454	855,454
ST. JOHNS	3,398,088	3,398,088
ST. LUCIE	4,015,093	890,548
Fort Pierce		548,060
Port St. Lucie		2,576,485
SANTA ROSA	2,260,559	2,260,559
SARASOTA	5,182,320	4,535,048
Sarasota		647,272
SEMINOLE	5,531,749	5,531,749
SUMTER	1,606,321	1,606,321
SUWANNEE	513,413	513,413
TAYLOR	350,000	350,000
UNION	350,000	350,000
VOLUSIA	6,550,339	4,565,586
Daytona Beach		887,571
Deltona		1,097,182
WAKULLA	409,396	409,396
WALTON	922,385	922,385
WASHINGTON	350,000	350,000
TOTAL	246,436,400	246,436,400
DR Holdback & Catalyst		5,563,600
TOTAL APPROPRIATION		252,000,000

SHIP allocation based on SB 102, includes DR holdback, uses current Catalyst appropriation

03.2023

State Apartment Incentive Loan (SAIL) program

- Administered by the Florida Housing Finance Corporation
- Provides low or no-interest loans on a competitive basis for the development of affordable housing
- Can be used for new construction and acquisition/rehab
- Generally can only serve households at or below 60% of Area Median Income (AMI) – except in the Keys
- SAIL statute and rule contain key terms to follow regarding compliance, monitoring, and structuring

The Live Local Act funds the traditional SAIL program at **$109 million in non-recurring dollars** plus what is collected through the Live Local Tax Donation Program.

The remaining **$150 million in recurring dollars** is deployed through the SAIL infrastructure but for specific projects listed in the next slide.

FLORIDA HOUSING COALITION

How the $150 million/year for 10 years for SAIL-like program will be spent

70% for projects that:	Rehab/new construction
	Addressing urban infill
	Provide for mixed-use housing
	Provide housing near military installations
30% for projects that:	Use or lease public lands
	Address needs of adults aging out of foster care
	Meet needs of elderly persons
	Provide housing in areas of rural opportunity

Notes:

- FHFC will have the discretion to issue RFAs for this $150m
- Local governments, developers, & advocates should follow the FHFC RFA process and start planning for local projects to support

FLORIDA HOUSING COALITION

Florida Hometown Hero Program

- LLA codifies the Hometown Hero Program in state statute at s. 420.5096 and funds it at $100 million for FY 23-24
- Provides down-payment and closing cost assistance to eligible first-time homebuyers
- Eligibility criteria for applicants:
  - Income not to exceed 150% of state median income or local median income, whichever is greater
  - Must be a Florida resident and employed full-time (35 hours or more/week) by a Florida-based employer
  - First-time homebuyer (does not apply to active duty servicemember or veterans)

Florida Hometown Hero Program

- Terms of assistance:
  - Loan due at closing if property is sold, refinanced, rented, or transferred, unless approved by FHFC
  - Minimum of $10,000 and up to 5% of first mortgage loan, not exceeding $35,000
- Other provisions:
  - Can be used to purchase manufactured homes constructed after July 13, 1994 which are permanently affixed to real property
  - Intended to be a revolving loan program
  - Can be paired with SHIP and other sources of down payment

I. Funding

II. Property tax incentives

III. Land use & zoning
IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Property tax incentives in the Live Local Act

1. Local option affordable housing property tax exemption
2. Nonprofit land used for affordable housing with a 99-year ground lease
3. "Missing middle" property tax exemption

1. Local option affordable housing property tax exemption

- Authorizes local governments to provide property tax exemptions for specified affordable housing developments.
- **Eligible developments:**
  - Contain at least 50 or more units
  - At least 20% of the units must be affordable to households at or below 60% AMI
- Tax exemptions only apply to the affordable units
- Applies to new and existing developments
- Property tax exemptions allowed are based on % of affordability
  - <100% of the units are affordable = up to 75% property tax exemption:
  - 100% of the units are affordable = up to 100% property tax exemption

1. Local option affordable housing property tax exemption

- Other provisions:
  - Maximum rents based on HUD's Multifamily Tax Subsidy Projects Income Limits or 90% of Fair Market Value as determined by a local rental market study, whichever is less
  - Exemption only applies to the taxes levied by the unit of government granting the exemption
  - Process for how localities can implement this optional tool
  - City or counties must post list of properties that receive the exemption on its website
  - Exemption authorized by City or County expires "before the fourth January 1 after adoption"; can be renewed after expiration
  - Penalties for noncompliance

2. Nonprofit land used for affordable housing w/99-year ground lease exemption

- New s. 196.1978(1)(b)
- Property tax exemption applies to **land** owned entirely by a nonprofit that:
  - 1) is leased for a minimum of 99 years
  - 2) is predominately used to provide affordable housing to households up to 120% AMI
- Land is considered "predominately used" for affordable housing if the square footage of the improvements on the land for affordable housing is greater than 50% of all the square footage of the improvements
- Tax exemption is for the **land** only – not the improvements

Opportunities with the new nonprofit land exception

- How does this new exemption differ from the existing nonprofit housing property tax exemption at s. 196.1978(1)?
  - 99-year ground leases will now explicitly qualify for the exemption
- May increase partnerships between nonprofit landowners and for-profit developers
- Community Land Trusts – CLT homeowners now get property tax-free land

3. "Missing middle" property tax exemption

- New s. 196.1978(3)
- Provides a property tax exemption to "newly constructed" multifamily developments that have **more than 70 affordable units** for households up to 120% AMI
- Tax exemption only applies to the affordable units
- Tiered property tax exemptions:
  - Units affordable to 80-120% AMI = 75% property tax exemption
  - Units affordable to <80% AMI = 100% property tax exemption

3. "Missing middle" property tax exemption

- Other provisions
  - Maximum rents based on HUD's Multifamily Tax Subsidy Projects Income Limits or 90% of Fair Market Value as determined by a local rental market study, whichever is less
  - Statute provides process for applying for exemption
  - Units subject to an agreement with FHFC to provide affordable housing to ELI, VLI, and LI households are not eligible for this exemption
  - Penalties for noncompliance
- The intent of this provision is to incentivize non-FHFC subsidized affordable developments

Effect of the "Missing middle" property tax exemption

- Effectiveness will depend on relationship between $ for rents a market-rate developer could charge vs. property tax savings if rented to households at or below 120% AMI
- Will work differently in different markets
- May impact local willingness to devote local dollars to affordable housing initiatives

Comparing the "Missing Middle" exemption and the Local Option Property Tax Exemption

	Section 8 "Missing Middle" Property Tax Exemption	Section 9 Local Option Property Tax Exemption
Local discretion?	No	Yes
Type of development	Multifamily rental developments w/**more than 70 affordable units** Must be "newly constructed" as defined by the Act.	Multifamily rental developments w/50 or more units that set aside at least 20% of the units as affordable housing. Does not have to be "newly constructed" – can apply to existing development.
Affordability requirement	More than 70 units must be affordable of not less than three years after exemption granted	At least 20% of the development must be affordable
Income eligibility	Up to 120% AMI	Up to 60% AMI
Rent limit	No more than rent limit chart derived from the Multifamily Tax Subsidy Projects Income Limits published by HUD or 90% of fair market value rent as determined by a local rental market study	No more than rent limit chart derived from the Multifamily Tax Subsidy Projects Income Limits published by HUD or 90% of fair market value rent as determined by a local rental market study
Exemption authorized	Units at 80-120% AMI = 75% exemption Units <80% AMI = 100% exemption	Up to 75% exemption if fewer than 100% of units are affordable Up to 100% exemption if 100% of units are affordable

I. Funding
II. Property tax incentives

III. Land use & zoning

IV. Using publicly-owned land for affordable housing
V. Amendments to state housing strategy & other reforms

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

A local government cannot regulate the **use, density, or height** of an affordable housing development if a proposed **rental** project is:

- Multifamily or mixed-use residential in any area zoned for commercial, industrial, or mixed use;
- At least 40% of units are affordable for households up to 120% AMI for at least 30 years
- If mixed-use, at least 65% is residential

Local government cannot require a development authorized under this preemption to obtain a zoning/land use change, special exception, conditional use approval, variance, or comp plan amendment for **use, density, or height.**

FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

Affordable housing developments allowed under this preemption are entitled to:

Use

- Allowed to build multifamily rental or mixed-use in commercial, industrial, or mixed-use zones without a zoning or land development change

Density

- Highest density allowed on any land in the City or County where residential development is allowed

Height

- Highest currently allowed height for a commercial or residential development within 1 mile of the proposed development or 3 stories, whichever is higher

FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

Additional provisions:

- All other state and local laws apply.
  - Ex) setbacks, parking, concurrency, max lot coverage, environmental all still apply – all of which can indirectly limit density and height
- If a proposed project satisfies the existing LDRs for multifamily developments and is otherwise consistent with the comprehensive plan, project must be administratively approved (will help prevent NIMBY opposition to certain affordable housing developments)
- LGs must consider reducing parking requirements if project within one-half mile of a major transit stop

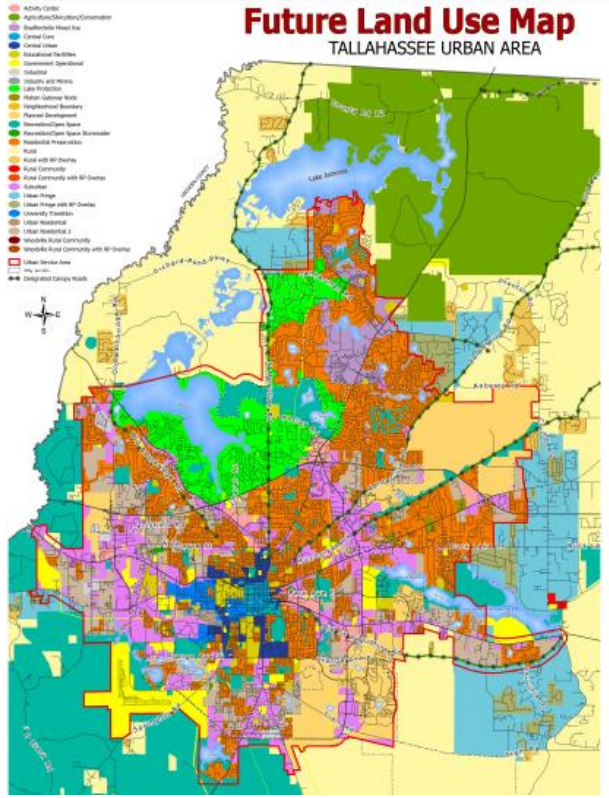
FLORIDA HOUSING COALITION

Land use standards – Affordable housing in commercial, industrial, and mixed-use zones

- **20% Rule – mixed-use only:**
  - **Cities.** If a city has less than 20 percent of total land use designated for commercial or industrial use, only mixed-use residential is allowed with this tool.
  - **Counties.** If proposed project is within boundaries of a multicounty independent special district 1) created to provide municipal services; 2) is not authorized to levy ad valorem taxes, 3) and less than 20 percent of land in that district is designated for commercial or industrial use, then mixed-use only.

What should local governments do now re: these land use standards for AH?

- Start studying your City or County's commercial, industrial, and mixed-use sites that could utilize this new statutory tool
- Examine your:
  - Future land use maps and zoning codes
  - Height and density regulations
  - Other regulations (setbacks, parking, max lot coverage, environmental/resiliency standards, etc.) that influence the use of this tool
- Ask:
  - How much land is eligible for this new tool?
  - What types of projects can be expected on eligible parcels?
  - How can the City/County facilitate affordable housing on eligible parcels?



FLORIDA HOUSING COALITION

How Can LLA Work for You?

- Opportunity to evaluate LLA in coordination with existing local regulations and incentives to increase the supply of affordable housing. May include incentivizing housing production in targeted areas over others.
- This tool can facilitate redevelopment/infill projects to convert underutilized commercial & industrial properties into affordable housing
- Can facilitate increased mixed-use and access – both physical access between residential and non-residential and access via affordability.
- Can save staff time – no need to rezone parcels for housing uses

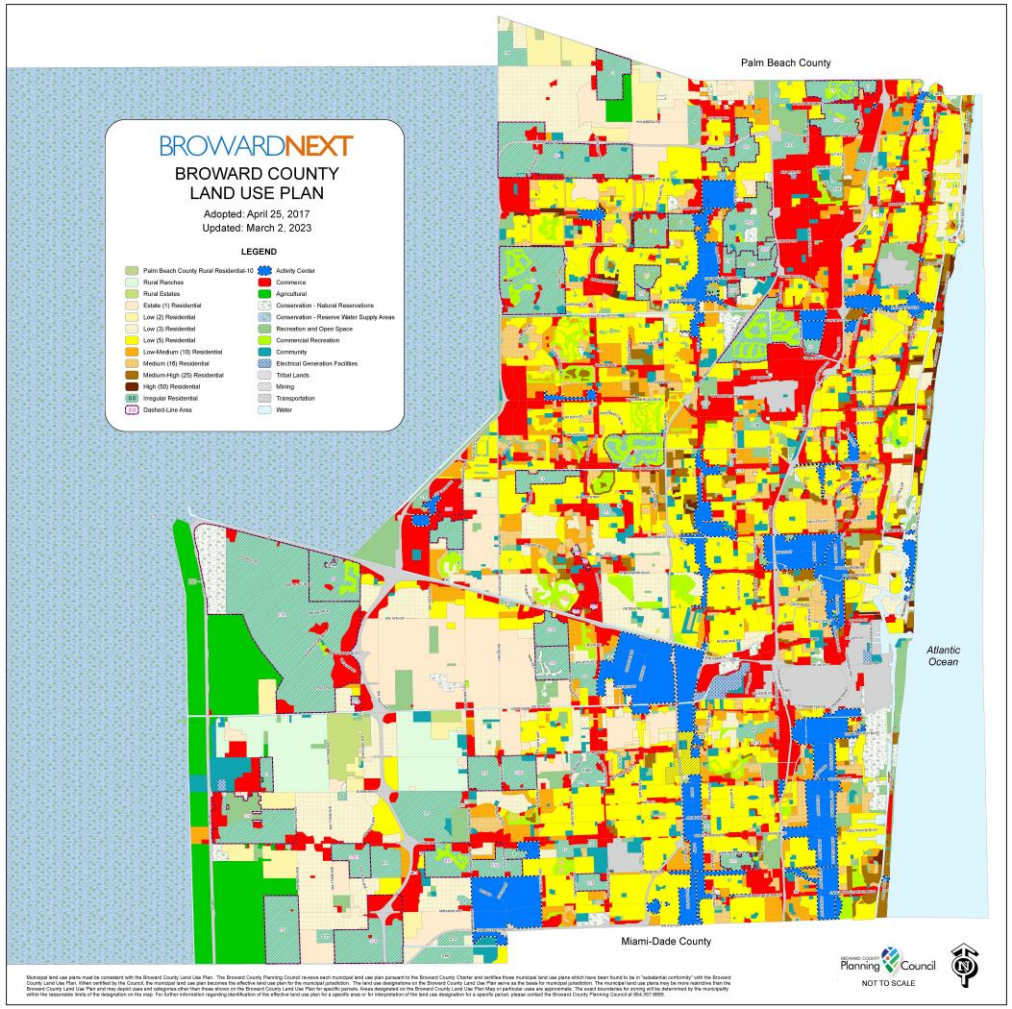
Broward Metropolitan Planning Organization (MPO) Vision 2100

Broward County Land Use Plan

➲ STRATEGY TR-1: Prioritize new development and redevelopment to existing and planned downtowns and major transit corridors and transit hubs.

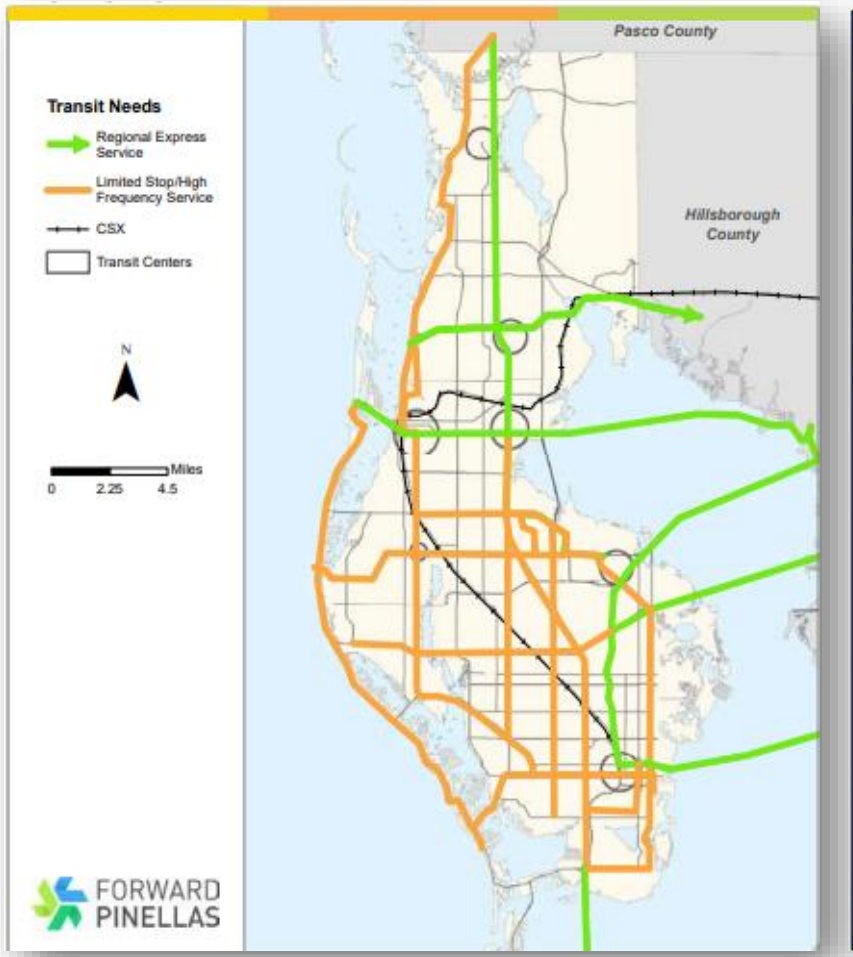
Implementation strategies include:

- Broward County Land Use Plan amendments for appropriately located "activity center," such as downtowns and transit corridors and hubs shall be given preference when considering new or redevelopment proposals.
- Within established and planned "activity centers," Broward County shall utilize multi-modal levels of service standards, and take all committed and funded modes of transportation fully into account when considering development proposals.
- To facilitate the availability of affordable housing in proximity to public facilities, services, amenities, and economic opportunities, the County's "Affordable Housing Density Bonus Program" shall be structured to target established and planned "activity centers," such as downtowns and transit corridors and hubs.



Pinellas Corridor Planning

- Key objectives
  - Multijurisdictional corridor plans
    - Alternate US 19
    - Roosevelt/East Bay Drive
    - US 19/34th Street
    - Ulmerton Road
  - Adopting local housing density bonus options
  - Funding programs to promote development of housing near transit corridors



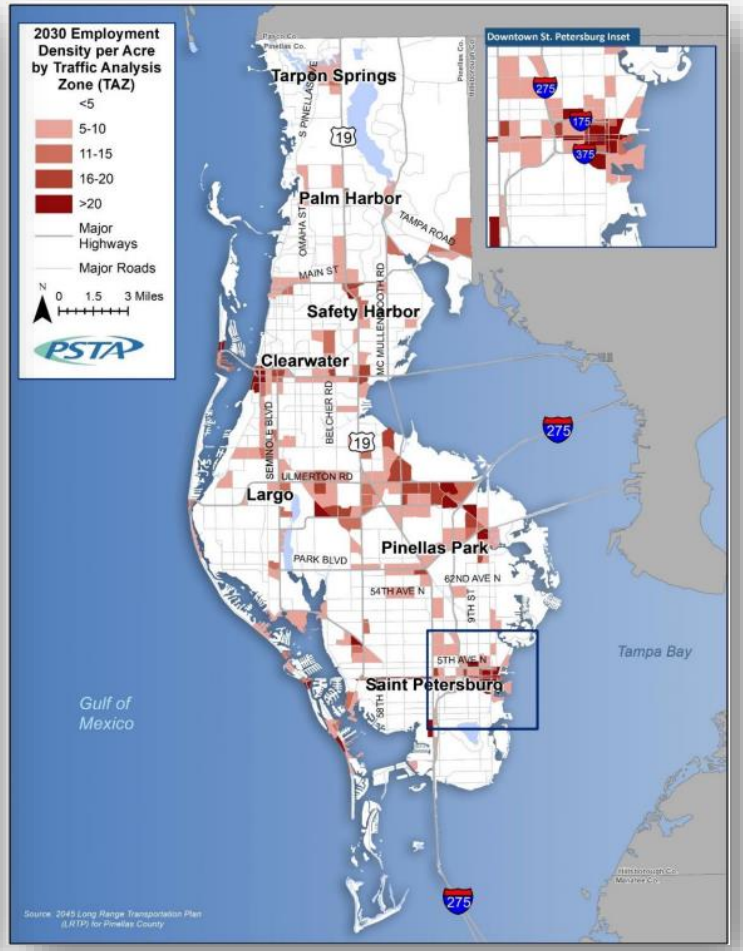


Photo Source: https://psta.net/media/4784/fy2021-2030-tdp.pdf

Model Corridor: Alternate US 19

- Investment Corridor Transition Plan process underway
- SB102 in the context of the transition plan
  - Identifying sites along route that may qualify for land use tool (administrative approval – see Goal 11 of Pinellas Housing Compact Action Plan)
  - Site testing/case studies to
    - Explore site design considerations
    - determine additional incentives needed for developments to pencil
    - How sites support goals in Pinellas Housing Compact Action Plan (specifically Goals 2, 3, 4 and 5)
  - Opportunities for strategic site acquisition
  - Permanent or long-term affordability requirements with funding

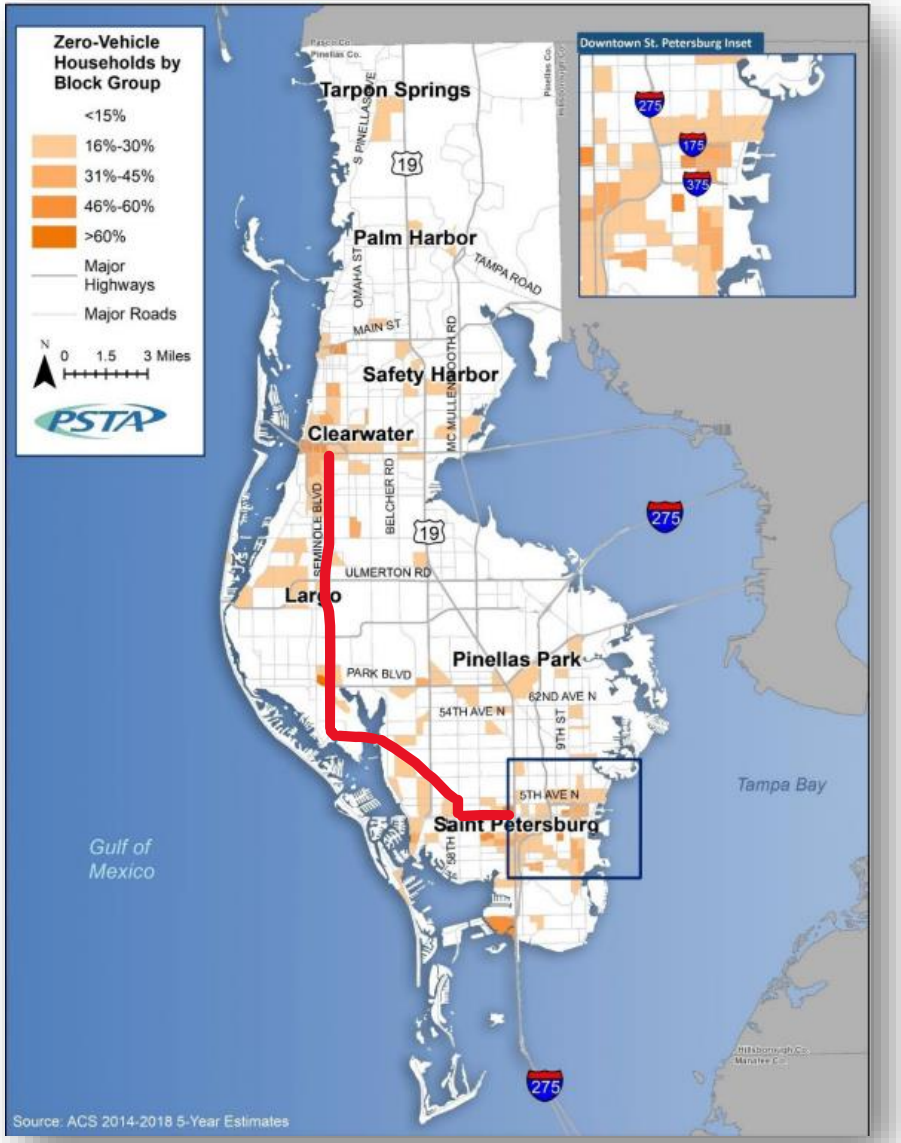
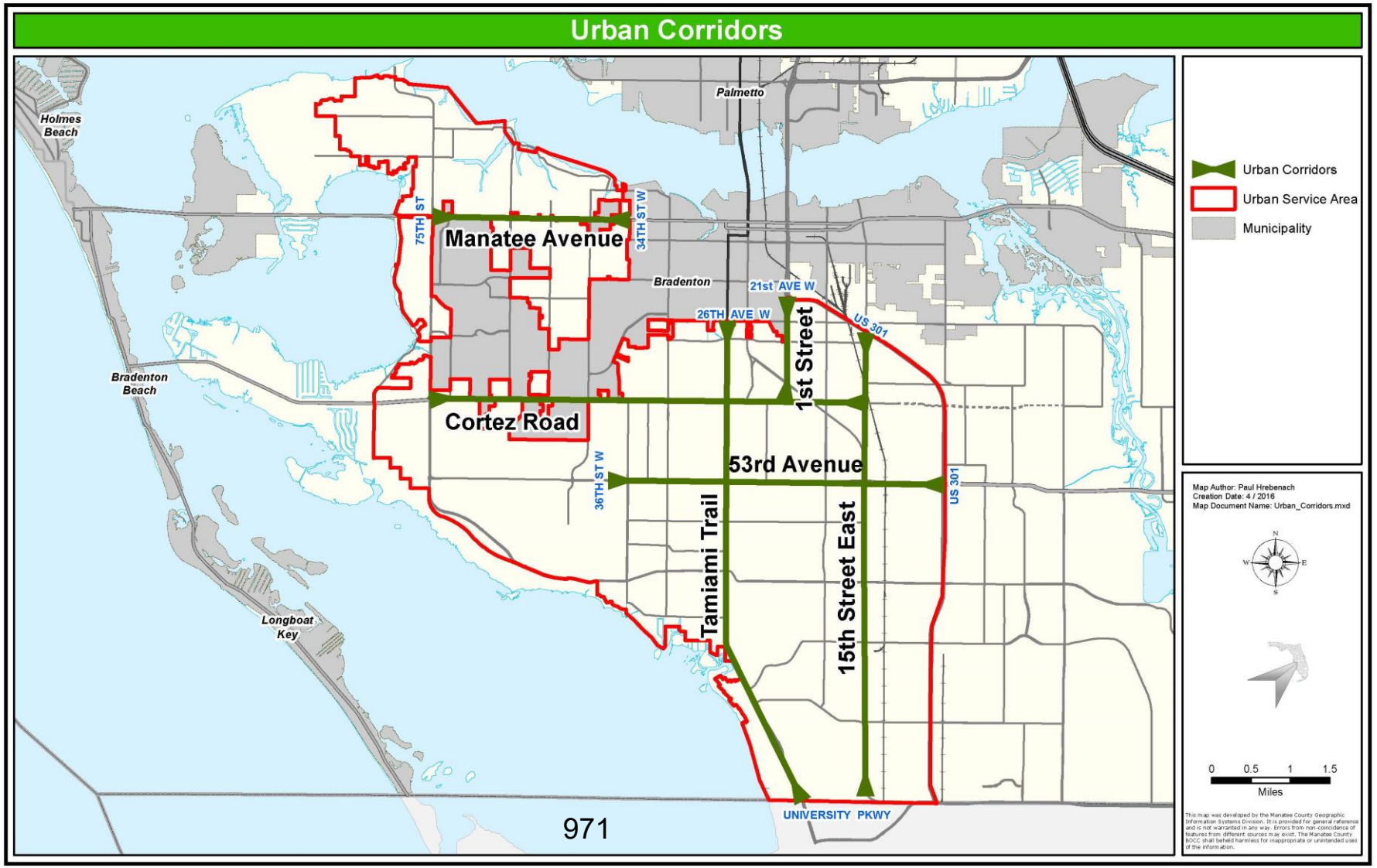


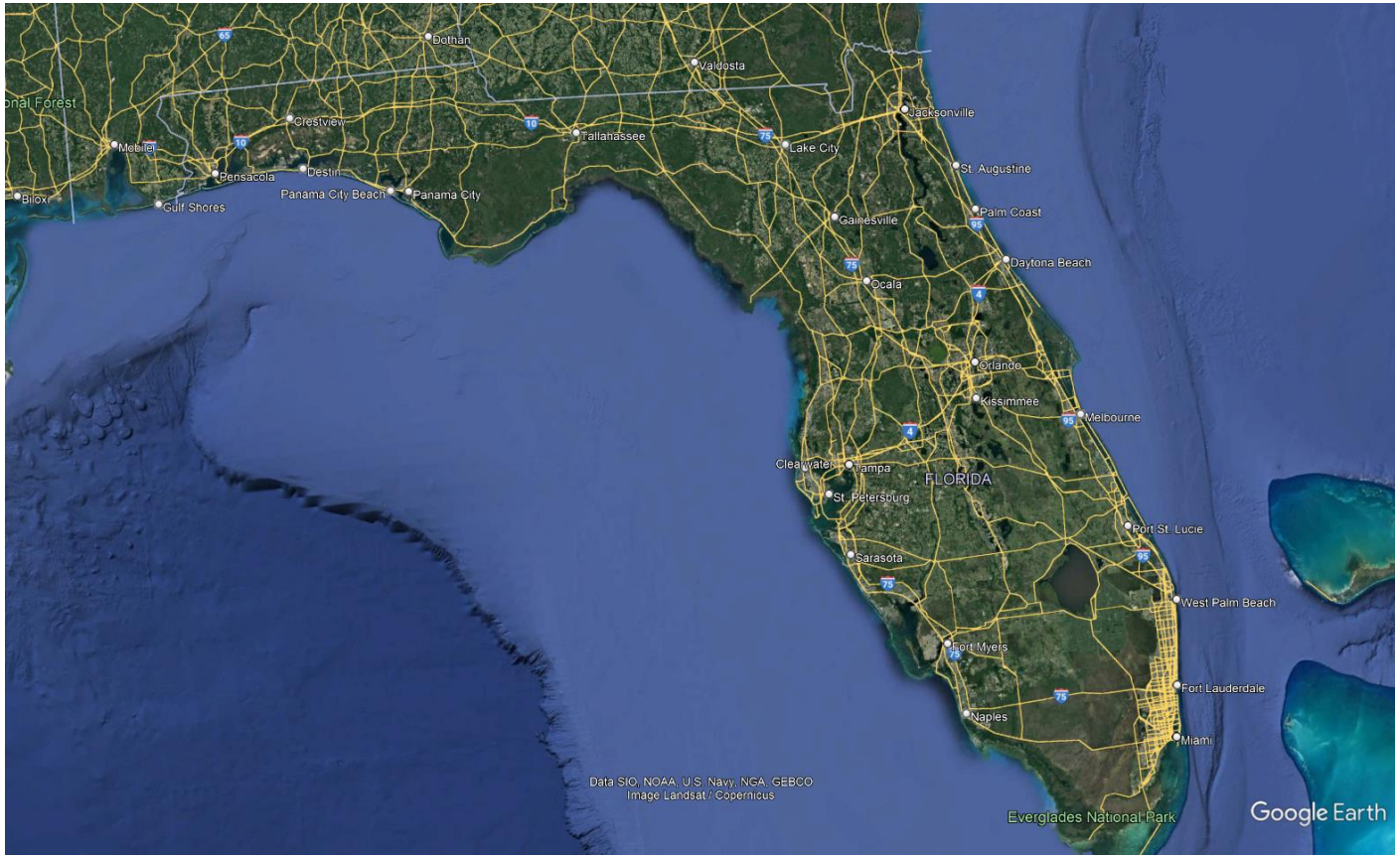
Photo Source: https://psta.net/media/4784/fy2021-2030-tdp.pdf

Manatee County Urban Corridors



Potential for Corridor Redevelopment with LLA & Targeted Incentives

- Countless commercial thoroughfares, main streets, downtown corridors statewide
- Coordination with FDOT on state roadway design - 336.045(6), F.S.



Frequently asked questions (so far) on this land use tool

- Does the tool apply to Planned Unit Developments (PUDs)?
- Who is responsible for compliance monitoring on the affordable units?
- What land development regulations apply to multifamily developments in order to require an administrative approval?
- In which ways can local government still regulate affordable housing developments under this preemption?

When in doubt, consult your City or County Attorney.

We are still in the very early stages of LLA and there are a number of nuanced legal interpretations to sort through.

FLORIDA HOUSING COALITION

"HB 1339" (2020) land use tool amended

F.S. 125.01055(6)/166.04151(6): currently allows local government to approve affordable housing developments on any parcel zoned for a **residential**, **commercial**, or **industrial** use without needing a rezoning or comprehensive plan amendment.

<u>What the Live Local Act does:</u>

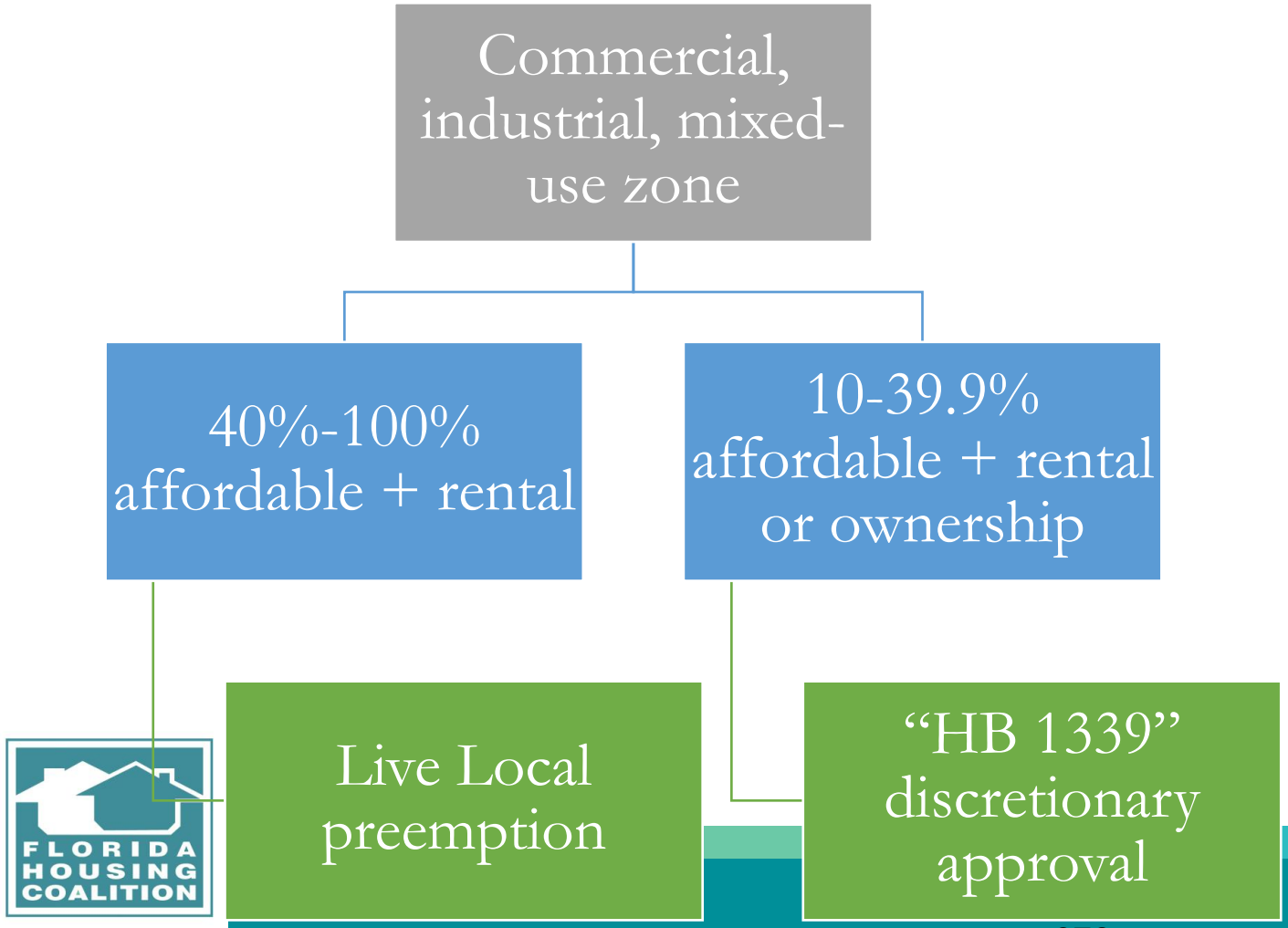
- Strikes out "residential"
- Removes the prohibition on SAIL funded projects

Comparing the new land use tool in SB 102 (2023) and HB 1339 (2020)

	F.S. 125.01055(7)/166.04151(7) – New Live Local tool	125.01055(6)/166.04151(6) – Existing HB 1339 tool as amended by the Live Local Act
Local discretion?	Not for use, density, and height	Yes
Eligible zones	Commercial, industrial, mixed-use	Commercial, industrial
Types of development	Multifamily rental or mixed use residential	Any multifamily or mixed-use residential project (rental or ownership)
Affordability requirement	At least 40% of the units must be affordable for 30 years	At least 10% of the units must be affordable
Local authority	Preempted on certain standards regarding use, height, or density All other state and local laws apply	Discretion to regulate in any manner

FLORIDA HOUSING COALITION

Comparing the new land use tool in SB 102 (2023) and HB 1339 (2020)



- Can use HB 1339 discretionary approval as a "carrot" to build in desired locations
- Possibility - allow developer to build less % of affordable housing in exchange for building away from certain areas intended to be kept for commercial or industrial

I. Funding
II. Property tax incentives
III. Land use & zoning

IV. Using publicly-owned land for affordable housing

V. Amendments to state housing strategy & other reforms

FLORIDA HOUSING COALITION

Using publicly-owned land for AH (Sections 4 & 7)

Background: **F.S. 125.379/166.0451** – Florida's "surplus land" laws

- Requires every city and county, at least every three years, to identify publicly-owned lands that are "appropriate for use as affordable housing"
- Lands identified as "appropriate" for affordable housing are to be placed on an affordable housing inventory list
- Lands placed on the inventory list may be used for affordable housing purposes

Caveats:

- Publicly owned land does not have to be on this inventory list to be used for AH
- Goal of the statute is **transparency/accountability** with the spirit of using more publicly owned land for affordable housing

Using publicly-owned land for AH (Sections 4 & 7)

The Live Local Act amends the state's "surplus land" laws to **newly apply to all dependent special districts**

- "Dependent special district" defined at s. 189.012
- Examples of dependent special districts:
  - Community redevelopment agencies (CRAs)
  - Port authorities
  - Neighborhood improvement districts
  - Housing authorities
  - Water and sewer districts
  - Special taxing districts
  - Development authorities
  - Water and sewer districts
  - Soil and water conservation districts
- See handout for complete list of dependent special districts in Florida (615 in total)

Using publicly-owned land for AH (Sections 4 & 7)

- **Requires** local governments to adopt an affordable housing inventory list by **Oct. 1, 2023** and every 3 years thereafter (restarts the clock)
- **Requires** local governments to make the inventory list of properties appropriate for affordable housing publicly available on its website.
- **Encourages** local governments to adopt best practices for surplus land programs, including:
  - "a) Establishing **eligibility criteria** for the receipt or purchase of surplus land by developers;
  - b) Making the **process** for requesting surplus lands **publicly available**; and
  - c) **Ensuring long-term affordability** through ground leases by retaining the right of first refusal to purchase property . . . and by requiring reversion of property not used for affordable housing within a certain timeframe."

FLORIDA HOUSING COALITION

Section 4 & 7 opportunities

- Makes **more publicly owned land available** for permanently affordable housing development
- **Increases transparency** for affordable housing land inventory lists and processes
- **Improves land disposition procedures** through best practices
- **Better partnerships** with nonprofit housing developers

Hillsborough County website for surplus lands

Surplus County Lands

Surplus County Lands

Real Property that serves no future use for the County may be declared surplus and sold. The methods of disposing of the County's Surplus Property are outlined in the State Statute.

Available Properties

Listed below are all of the available surplus properties for sale. If none are listed, that means we do not have any properties available at this time.

- **Kinnan Street and Oak Preserve Boulevard**

To submit a bid:

1. **Print and complete the required documentation** associated with the parcel, including:
   - **Bid Proposal Form** (Printable) | **Bid Proposal Form** (Fillable)
   - Legal Description Exhibit "A" from the appropriate surplus parcel (see properties on the map for Exhibit A)

FLORIDA HOUSING COALITION

COJ.net > Departments > Neighborhoods > Housing and Community Development Division > Surplus Property Donation Program

Surplus Property Donation Program

According to Section 125.379, *Florida Statutes*, and Chapter 122, *Ordinance Code*, the City of Jacksonville/Duval County is required every three years to adopt an inventory list of all real property within the city to which the City/County holds fee simple title that is appropriate for use as potential affordable housing. City ordinance 2020-207-E approves and adopts an inventory list of all real property within the City of Jacksonville to which the City holds fee simple title that is appropriate for use as potential affordable housing; declares the parcels listed on the Affordable Housing Inventory List to be surplus to the needs of the City; and authorizes the sale of the parcels.

Pursuant to Chapter 122, Ordinance Code, the properties on the affordable housing list may be donated on a first come-first served basis with a restriction that requires the development of the property as permanent affordable housing within 24 months after the donation as evidenced by receipt of a certificate of occupancy.

I. Funding
II. Property tax incentives
III. Land use & zoning
IV. Using publicly-owned land for affordable housing

V. Amendments to state housing strategy & other reforms

Amendments to the State Housing Strategy

- The LLA substantially rewrites the State Housing Strategy at s. 420.0003 of the Florida Statutes
- Includes subsections on state and local policies to increase the supply of affordable housing, implementation goals, research and data gathering, and technical assistance
- Examples:
  - "State and local governments shall provide incentives to encourage the private sector to be the primary delivery vehicle for the development of affordable housing."
  - "State-funded development should emphasize use of developed land, urban infill, and the transformation of existing infrastructure in order to minimize sprawl, separation of housing from employment, and effects of increased housing on ecological preservation areas."

Encouraging local governments to adopt best practices

- **Section 26** of the bill has several provisions encouraging local governments to adopt best practices. These provisions include:
  - "Local government shall provide incentives to encourage the private sector to be the primary delivery vehicle for the development of affordable housing." (lines 1927-1929)
  - "Local governments should consider and implement innovative solutions . . . Innovative solutions include: (lines 1937-1957)
    - "Utilizing publicly held land to develop affordable housing . . ."
    - "Community-led planning that focuses on urban infill, flexible zoning, redevelopment of commercial property into mixed-use property . . ."
    - "Project features that maximize efficiency in land and resource use, such as high density, high rise, and mixed use."
    - "Modern housing concepts such as manufactured homes, tiny homes, 3D-printed homes, and accessory dwelling units."

Other policies in the Live Local Act

- Requires local governments to post expediting permitting procedures online
- Precludes state funding for housing to local governments whose comprehensive plans have been found not in compliance with Chapter 163
- Provides sales tax relief for building materials for certain affordable housing developments
- Addresses using nonconservation state owned land for affordable housing

Other policies in the Live Local Act

- Expands Florida Job Growth Grant Fund to support public infrastructure projects to facilitate the production of affordable housing
- Directs OPPAGA to produce policy reports on affordable housing issues
- Amends FHFC board makeup
- Authorizes FHFC to contract with the Catalyst Program to provide training to local governments specifically on using publicly-owned land for affordable housing

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Live Local's impact on AHAC Strategies

Strategy	Relevant section(s) of the Live Local Act
a. Expedited Permitting	38
b. Fee waivers	8, 9
c. Flexibility in densities	3, 5, 26
d. Reservation of infrastructure capacity	25
e. Affordable accessory residential units	26
f. Reduction of parking and setback requirements	3, 5, 26
g. Flexible lot configurations	3, 5, 26
h. Modification of street requirements	3, 5, 26
i. Housing impact statement	
j. Inventory of publicly owned lands	4, 7, 26, 32
k. Support of development near transit, major employment centers, and mixed-use	3, 4, 5, 7, 26, 32

Training and technical assistance offered by FHC

- Virtual question and answer sessions with local government staff and nonprofits through the Catalyst Program
- Formal trainings to housing organizations including AHACs, MPOs, and housing councils
- Implementation technical assistance
- We will soon be drafting implementation materials to assist local governments implement the tools in the LLA
- For assistance, please contact Kody Glazer at glazer@flhousing.org

Summary of Senate Bill 328 (2024) - Final

Amendments to the Live Local Act

Contact: Kody Glazer, Chief Legal and Policy Officer, glazer@flhousing.org

As of February 28, 2024 the House and Senate have officially passed Senate Bill 328 – the 2024 Legislative Session's Live Local Act amendment bill. This bill amends the Live Local Act's land use preemption, the "Missing Middle" Property Tax Exemption, and funds the Hometown Hero Housing Program at $100 million. The next step is for this bill to be sent to the Governor's desk for final signature. Note that the bill will go into effect right upon it becoming a law – it will not need to wait until July 1 like most other bills.

Amendments to the Live Local Act's Land Use Preemption

SB 328 makes several amendments to s. 125.01055(7) and s. 166.04151(7) of the Florida Statutes which govern the Live Local Act's land use preemption. This land use preemption was designed to facilitate eligible affordable housing developments on parcels zoned for commercial, industrial, and mixed-use by providing favorable use, density, height, and administrative approval standards.

Eligible Zoning & Applicability

- Amends the phrase "if at least 40 percent of the residential units in a proposed multifamily **rental** development are, for a period of at least 30 years, affordable as defined in s. 420.0004" to "if at least 40 percent of the residential units in a proposed multifamily development are **rental units that**, for a period of at least 30 years, affordable as defined in s. 420.0004." This amended phrase opens the possibility for a split multifamily ownership and rental development as long as least 40% of the total units are rental *and* affordable.
- Provides that proposed multifamily developments that are located in a transit-oriented development or area, as defined by the local government, must be mixed-use residential to receive approval with the tool and "otherwise complies with requirements of the county's regulations applicable to the transit-oriented development or area except for use, height, density, and floor area ratio as provided in this section or as otherwise agreed to by the county and the applicant for the development."

Height and Density Allowances

- Newly provides that local governments cannot limit the floor area ratio of a proposed development below 150% of the highest currently allowed floor area ratio on any land where residential development is allowed in the jurisdiction under the jurisdiction's land development regulations.
- Clarifies that the maximum density and height allowances do not include any "bonuses, variances, or other special exceptions" provided in the jurisdiction's land development regulations as incentives for development.
- Allows local governments to limit the maximum height allowance if the proposed development is adjacent to, on two more sides, a parcel zoned for single-family residential use that is within a single-family residential development with at least 25 contiguous single-family homes to 150 percent of the tallest building on property within one-quarter mile of the proposed development or 3 stories, whichever is higher.

Additional Provisions

- Provides that each local government must maintain a policy on its website containing the expectations for administrative approval under the tool.
- Reduces the buffer for local governments to "consider" reducing parking requirements from ½ mile of a "major transit stop" to ¼ mile of a "transit stop." This will establish a lower buffer and encourage reducing parking requirements for projects near any transit stop, not just a "major" transit stop.
- Requires local government to reduce parking requirements by 20% for proposed developments within ½ mile of a "major transportation hub" that have available parking within 600 feet of the proposed development and eliminates parking requirements for a proposed mixed-use residential development within an area recognized as a transit-oriented development or area.
- Provides that proposed developments located within ¼ mile of a military installation may not be administratively approved.
- Provides that the land use preemption does not apply to "airport-impact areas as provided in s. 333.03" and removes the exception for recreational and commercial working waterfront.
- Creates clear criteria for when the preemption does not apply in close proximity to an airport.
- Clarifies that developments authorized with the preemption are treated as a conforming use even after the sunset of the preemption statute (2033) and the development's affordability period unless the development violates the affordability term. If a development violates the affordability term, the development will be treated as a nonconforming use.
- Provides that an applicant who submitted an application, written request, or notice of intent to utilize the mandate before the effective date of the bill may notify the local government by July 1, 2024, of its intent to proceed under the prior provisions of the mandate.

Amendments to the "Missing Middle" Property Tax Exemption

SB 328 makes a few amendments to the Missing Middle Property Tax Exemption enacted at s. 196.1978(3) of the Florida Statutes. This exemption was designed to provide tiered ad valorem property tax exemptions to developments with more than 70 affordable rental units to households at or below 120% AMI.

Provisions

- Extends exemption eligibility to developments with more than 10 affordable units if the development is located in an area of critical state concern.
- Clarifies the exemption only applies to the affordable units within an eligible development.
- Provides how a property appraiser shall determine the value of an affordable unit eligible for the exemption.
- Authorizes the county property appraiser to "request and review additional information necessary" to determine eligibility for the exemption.

Florida Hometown Hero Program

SB 328 funds the Hometown Hero Program at $100 million using federal Coronavirus State Fiscal Recovery Fund dollars.

Shubin Law Group
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THE EUCLID GROUP

Amendments to Live Local Act (SB 328) - a.k.a. the "Glitch Bill"

February 29, 2024

Florida's state legislature has adopted significant changes to the landmark affordable housing legislation passed last year known as the Live Local Act. Senate Bill 328 has been adopted by both the Senate and House and will become law upon receiving the Governor's signature. A summary of the amendments are below:

Zoning/Land Use

- **Height** — (i) maintains the relevant radius for determining max height at 1 mile; (ii) adds a new height limitation to address situations where a property is "adjacent to" a single-family residential neighborhood of 25 or more contiguous homes – in such instance, the local government may restrict the height of a proposed development to 150% of the tallest building on property "adjacent to" the proposed development or 3 stories, whichever is higher; the bill provides that the term "adjacent to" means those properties sharing more than one point of a property line, but does not include properties separated by a public road; (iii) developments cannot look to other projects having received special approvals, or approvals under the Act, to establish a project's height limit.
- **Industrial** — Properties zoned for industrial uses continue to qualify for zoning preemption benefits provided under the Act.
- **FAR** — Confirms that local governments cannot restrict floor area ratio (FAR) below 150% of the highest currently allowed FAR under the local government's regulations. Clarifies that FAR and Floor Lot Ratio are interchangeable.
- **Nonconforming Status** — Requires that developments authorized under the Act be treated as conforming even after the statute's effectiveness and the development's affordability period expires.
- **Parking** — (i) requires local governments to reduce parking requirements by 20% if a qualifying project is within one-half mile of a "major transportation hub" or has available parking within 600ft of the site; and (ii) a local government must eliminate parking requirements for proposed mixed-use projects within a transit-oriented development development or area.
- **Rental v. For Sale Units** — clarifies that only the affordable units in qualifying projects must be rentals; the market units may be for sale.
- **Proximity to Airports & Military Installations** — carve outs added for property near military installations and airport-impacted areas.

- **Bonuses** — Adds that a county or municipality must administratively approve bonuses for density, height, or FAR if the proposed development satisfies the necessary conditions for receiving said bonus. Clarifies that a local government's "highest currently allowed" density, height, and FAR does not include any bonuses, variances, or other special exceptions provided in their regulations.
- **Local Implementation Policy —** requires local governments to publish their policy containing procedures and expectations for the administrative approval of qualifying developments on their website.

Ad Valorem Tax

- **10 units v. 70 units** — decreases the number of units required to be eligible for an ad valorem exemption for qualifying projects, provided the project is within an "area of critical state concern (Florida Keys), as designated by 30.0552 or Chapter 28-36, Florida Administrative Code."
- **Appraisal Methodology** — requires that when calculating the value of a unit for applying the Act's ad valorem exemption, the property appraiser must consider the proportionate share of the residential common areas, including the land, attributable to such unit.

Appropriations

- Appropriates $100 million in non-recurring funds for the Hometown Heroes Program

Applicability

- Provides that applicants who submitted development proposals before this act's effective date can inform the local government by July 1, 2024, to proceed under old regulations or adjust their proposals according to the new act.

We have followed SB328 closely and are continuously fielding calls from clients to help them understand what it means for their projects. Contact us for more information.

Mark Grafton
Cell: 305-401-3565
Office: 305-381-6060
Mgrafton@shubinlawgroup.com

Shubin Law Group, P.A. is a Florida law firm specializing in visioning large-scale real estate projects, getting them entitled, and resolving the disputes that often arise out of those projects www.Shubinlawgroup.com	The Euclid Group is a full-service land-use development and real estate consulting firm based in Florida. www.theeuclidgrp.com

HOUSING NOT HANDCUFFS

A Litigation Manual

NATIONAL LAW CENTER
ON HOMELESSNESS & POVERTY

ABOUT THE NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY

The National Law Center on Homelessness & Poverty is the only national organization dedicated solely to using the power of the law to end and prevent homelessness. We work with federal, state and local policymakers to draft laws that prevent people from losing their homes and to help people out of homelessness. We have been instrumental in enacting numerous federal laws, including the McKinney-Vento Act, the first major federal legislation to address homelessness. The Act includes programs that fund emergency and permanent housing for homeless people; makes vacant government properties available at no cost to non-profits for use as facilities to assist people experiencing homelessness; and protects the education rights of homeless children and youth. We ensure its protections are enforced, including through litigation.

We aggressively fight laws criminalizing homelessness and promote measures protecting the civil rights of people experiencing homelessness. We also advocate for proactive measures to ensure that people experiencing homelessness have access to permanent housing, living wage jobs, and public benefits.

For more information about our organization, access to publications, and to contribute to our work, please visit our website at www.nlchp.org.

This litigation manual is offered as an advocacy tool for use as part of the Housing Not Handcuffs Campaign (HNH Campaign). Housing Not Handcuffs was initiated by the National Law Center on Homelessness & Poverty and more than 100 participating organizations to end the criminalization of homelessness and to promote housing policies. You can learn more about the HNH Campaign at www.housingnothandcuffs.org.

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Maria Foscarinis
President
Executive Director
NLCHP

**Affiliations for identification purposes only*

LAW CENTER STAFF

LaToya Ball
Administrative Manager

Tristia Bauman
Senior Attorney

Janet Hostetler
Deputy Director

Grace Beal
Development & Communications Assistant

Janelle Fernandez
Law & Policy Program Coordinator

LaTissia Mitchell
Executive & Development Specialist

Michael Santos
Attorney

Eric Tars
Senior Attorney

Maria Foscarinis
Executive Director

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Dave Kaylor

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EXECUTIVE SUMMARY

Since the previous edition of this manual was published in 2014, there has been significant litigation challenging the criminalization of homelessness, almost all of it dealing with evictions of homeless encampments and bans on panhandling.

Most recent cases have upheld the legal rights of homeless persons to perform various life-sustaining behaviors in public places. Since 2014, favorable results[1] were obtained in:

- 75% of cases challenging evictions of homeless encampments and/or seizure and destruction of homeless persons' belongings.
- 57% of cases challenging enforcement of camping and/or sleeping restrictions.
- 100% of cases challenging laws restricting begging and solicitation.

Particularly notable recent developments include:

- A ruling from a federal appeals court applied new Supreme Court First Amendment precedent to strike down an anti-panhandling ban and affected courts and cities across the country.
- A statement of interest brief filed by the U.S. Department of Justice stated that making it a crime for people who are homeless to sleep in public places, particularly in the absence of sheltered alternatives, unconstitutionally punishes them for being homeless.

Crisis of Homelessness

Stagnated wages, rising rents, and a grossly insufficient social safety net have left millions of people homeless or at-risk - including at least 1.36 million homeless children enrolled in U.S. public schools. A lack of affordable housing is the leading cause of homelessness, and the crisis is rapidly worsening. Today, there is a shortage of 7.4 million affordable and available rental homes for our nation's poorest renters. This shortage has left millions of households paying more than they can sustainably afford for housing, and it has caused homelessness across the country.

While emergency shelter is not a solution to homelessness, some American cities task homeless shelters with meeting both emergency needs and longer term systemic shortages of permanent housing. As a result, communities with shelter space often lack sufficient beds for all individuals and families that are homeless. This leaves homeless people across the country with no choice but to struggle for survival in public places.

Criminalization of Homelessness: Trends and Consequences

Despite a lack of affordable housing and shelter space, many cities have chosen to threaten, arrest, and ticket homeless persons for performing life-sustaining activities – such as sleeping or sitting down - in outdoor public space. Indeed, the Law Center's November 2016 report on the criminalization of homelessness, "Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities" revealed that laws civilly and criminally punishing homelessness are prevalent and dramatically increasing across the country.[2] For example, half of all cities have one or more laws restricting camping in public, and city-wide bans on camping have increased by 69% since 2006.

In addition to laws that civilly and criminally punish homelessness, the Law Center has noted a rise in governmental practices designed to remove homeless people from public view that may not result in ticketing or arrest. Evictions of homeless encampments, for example, may be justified as a public health and safety measure even in the absence of a camping ban. Not only do these practices displace homeless people from public space without offering them any other place to go, but they may also result in the loss of homeless persons' personal property.

Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, criminalizing homelessness wastes precious public resources on policies that do not work to reduce homelessness. Quite the opposite, arrests, unaffordable tickets, and displacement from public space for doing what any human being must do to survive can make homelessness more difficult to escape.

1 Favorable results in these cases include success in securing injunctions to prevent enforcement of the challenged laws, awards of monetary damages, and settlements that modified laws or altered patterns of enforcement to comport with the civil rights of homeless people.

2 Housing not Handcuffs, Ending the Criminalization of Homelessness in U. S. Cities, Nat'l Lat Center on Homelessness & Poverty (2016) [hereinafter "Housing Not Handcuffs"].

Court Challenges to Laws Restricting Camping and Sleeping

When there are fewer affordable housing units and shelter beds available than people who need them, people are left with no choice but to live outdoors and in public space. Despite a lack of alternative places to live, cities across the country have enacted laws making the life-sustaining activities of homeless people in public space a crime or civil offense.

In many cities, police or other government officials conduct evictions or "sweeps" of public areas where homeless people are living, seizing, destroying, or otherwise causing the loss of homeless people's personal property. This property often includes food, clothing, medicine, identification, and irreplaceable personal items, such as photographs. Evictions also cause homeless people to be displaced from their communities, further harming and marginalizing them, without providing any place for them to go.

Increasingly, however, legal challenges to laws punishing sleeping and camping in public, and challenges to the practice of homeless sweeps, have been successful on constitutional grounds. Key recent decisions include:

Eighth Amendment Challenges to Camping/Sleeping Prohibitions

In Eighth Amendment challenges to anti-camping ordinances and enforcement, plaintiffs argue that enforcement of such laws violates the Eighth Amendment prohibition against cruel and unusual punishment.

- On August 6, 2015, The United States Department of Justice filed a statement of interest in the Law Center's case of *Bell v. Boise*, arguing that making it a crime for people who are homeless to sleep in public places, particularly in the absence of sheltered alternatives, unconstitutionally punishes them for being homeless[3] The Justice Department urged the court to adopt the rationale of *Jones v. City of Los Angeles*, a Ninth Circuit decision which held that criminalizing life-sustaining conduct in public by homeless people, in the absence of any available alternative, is tantamount to criminalizing homeless status in violation of the Eighth Amendment's prohibition against cruel and unusual punishment.[4] As stated by the Justice Department in its filing, "[i]t should be uncontroversial that punishing conduct that is a universal and unavoidable consequence of being human violates the Eighth Amendment. Sleeping is a life-sustaining activity—i.e., it must occur at some time in some place. If a person literally has nowhere else to go, then enforcement of the anti-camping ordinance against that person criminalizes her for being homeless."[5]
- In *Cobine v. City of Eureka*,[6] eleven homeless plaintiffs who (along with approximately 150 other homeless people) had continuously camped in the Palco Marsh area of Eureka, California filed suit in federal court against the city when, under the authority of an anti-camping ordinance, the city began issuing notices of eviction and confiscating personal property. The plaintiffs filed suit noting that homeless individuals outnumber emergency shelter beds by a factor of nearly three to one, and arguing that criminalizing public camping in a city without adequate shelter space violated their Eighth Amendment rights. The U.S. District Court for the Northern District of California enjoined the Eureka from enforcing the anti-camping ordinance until the city provided the plaintiffs with shelter and followed specific procedures for storing confiscated property.[7]

Challenges to the constitutionality of anti-camping ordinances have also been raised as defenses to criminal charges under such laws. For example:

In *The City of North Bend v. Joseph Bradshaw*,[8] a homeless plaintiff was criminally charged with unlawful camping after he was found asleep outside with his belongings. In his defense, Joseph Bradshaw argued that enforcement of the anti-camping ordinance against him violated his right to be free from cruel and unusual punishment under the Eighth Amendment. The Municipal Court for the City of Issaquah in King County concluded that enforcement of the camping ban violated Mr. Bradshaw's constitutional rights to travel and to be free from cruel and unusual punishment.

Fourth and Fourteenth Amendment Challenges to Evictions of Homeless Encampments

Evictions of encampments of homeless people have also been successfully challenged on Fourth and Fourteenth Amendment grounds when residents' possessions are confiscated or destroyed without adequate notice and other due process protections. Key recent decisions include:

- In *Allen v. City of Pomona*,[9] fourteen homeless plaintiffs filed suit on behalf of a class against the City of Pomona arising out of the City's policy and practice of seizing and destroying homeless persons' property, without notice and over the objections of the property owners, in violation of plaintiffs' Fourth and Fourteenth Amendment rights. The plaintiffs' complaint detailed several instances where police officers had permanently deprived plaintiffs of their most essential belongings, including food stamp cards, medication, tents, blankets, state-issued identification cards, birth certificates, and treasured family heirlooms with sentimental value. In

3 *Bell v. Boise* 993 F. Supp. 2d 1237, (D. Idaho 2014). US Statement of Interest available at https://www.justice.gov/crt/file/761211/download.

4 *Jones v. City of Los Angeles*.444 F.3d 1118 (9th Cir.2006). The Jones opinion was vacated pursuant to settlement, but still has persuasive value.

5 *Bell v. Boise* 993 F. Supp. 2d 1237, (D. Idaho 2014). US Statement of Interest available at https://www.justice.gov/crt/file/761211/download.

6 *Cobine v. City of Eureka*, No. C 16-02239 (JSW), 2016 WL 1730084 (N.D. Cal. May 2, 2016).

7 The plaintiffs also argued that the city's seizure of their property violated their Fourth and Fourteenth Amendment rights to be secure from government seizure without due process of the law.

8 *City of North Bend v. Bradshaw*, Case No. Yl 32426A (North Bend Muni. Ct. Jan. 13, 2015).

9 *Allen v. City of Pomona*, No. 16-cv-1859 (C.D. Cal. filed Mar. 18, 2016).

August, 2016, the city and the plaintiffs agreed to a sweeping settlement agreement that, among other relief, provided plaintiffs with priority with regards to permanent housing resources developed by the city to the maximum extent allowed by law.

- In *Mitchell v. City of Los Angeles*, homeless individuals, the Los Angeles Community Action Network, and the Los Angeles Catholic Worker filed suit to challenge the City's practice of seizing and destroying homeless persons' property during arrests and street cleanings. The federal district court ordered the City to stop seizing and destroying homeless persons' property, to improve its property storage procedures, and to make critical belongings like tents and medication available within 24 hours after the seizure.

First Amendment Challenges to Laws Restricting Begging and Solicitation

For many homeless people who do not have income from employment or government benefits, panhandling may be the best option for survival. Unfortunately, too many local governments, instead of finding ways to help homeless persons obtain income, housing, and social services, seek to prohibit panhandling. There have been several successful challenges to panhandling laws since 2015 when the U.S. Supreme Court clarified First Amendment law on content-based restrictions on protected speech in *Reed v. Town of Gilbert*. Indeed, our research finds that panhandling bans have been found unconstitutional on First Amendment grounds in every legal challenge decided since *Reed*. Key recent decisions include:

- The first case to apply *Reed* to panhandling cases was *Norton v. City of Springfield,*[10] the Law Center's successful Seventh Circuit challenge to Springfield, Illinois' panhandling law, which restricted vocal pleas for immediate donations of cash. Explaining that *Reed* describes content based discrimination as a "law [that] applies to particular speech because of the topic discussed *or* the idea or message expressed,"[11] the Seventh Circuit found that Springfield's ordinance regulates speech "because of the topic discussed" and that the law lacked a compelling justification.

- In *Thayer v. City of Worcester*,[12] plaintiffs sought a preliminary injunction against enforcement of two City of Worcester ordinances restricting panhandling. Plaintiffs alleged that the ordinances, which prohibited aggressive panhandling and walking on traffic medians for purposes of soliciting donations, were content based restrictions on speech in violation of the First Amendment right to free speech. On appeal, the First Circuit held that the laws did not violate the First Amendment, but the judgment of the First Circuit was vacated following *Reed* and the matter was remanded to the trial court for further consideration in light of the new precedent. On remand, the trial court found that the ordinances failed to pass muster under the First Amendment because they were not sufficiently tailored to the public interests they were purportedly designed to address.

- In *Homeless Helping Homeless, Inc. v. City of Tampa*,[13] a charity offering emergency shelter to homeless people brought suit in federal court against the City of Tampa, Florida to challenge a city ordinance banning the solicitation of "donations or payment" in parts of downtown Tampa. The court agreed with Homeless Helping Homeless that soliciting "donations or payment" is a form of speech protected by the First Amendment, that Tampa's ordinance constituted a regulation of that speech in a traditional public forum, and that Tampa's ordinance is a content-based regulation of that speech. After the city of Tampa admitted that no compelling government interest supported the ordinance, the court held that the ordinance failed the strict scrutiny test and did not pass constitutional muster, and permanently enjoined Tampa from enforcing it.

This Manual

This litigation manual provides an overview of legal theories that have been used successfully to challenge criminalization policies and practices, and it also sets forth several important considerations for bringing litigation on behalf of homeless people. In addition, it includes numerous summaries of cases that have been brought over the years to protect the civil and human rights of homeless people.

Success in preventing the criminalization of homelessness will not, however, achieve the long-term goal of ending homelessness by ensuring that all Americans have access to safe and affordable housing in neighborhoods of opportunity. It is critical that litigation strategies support organizing and policy advocacy efforts to ensure that legal challenges help secure solutions to the underlying causes of homelessness.

10 *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and *Norton v. City of Springfield* 806 F.3d 411 (7th Cir. 2015).

11 *Id.*

12 *Thayer v. City of Worcester*, 755 F.3d 60 (1st Cir. 2014) and *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015).

13 *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T-23AAS, 2016 WL 4162882 (M.D. Fla. Aug. 5, 2016).

INTRODUCTION

Homelessness is a national crisis, with rising rents, historically low vacancy rates, and a grossly insufficient social safety net leaving millions of people homeless or at-risk - including at least 1.36 million homeless children enrolled in U.S. public schools. Today, there is a shortage of 7.4 million affordable and available rental units for our nation's poorest renters.[14] This housing gap leaves millions of individuals and families across the country spending more than they can sustainably afford to keep roofs over their heads – or leaves them unable to afford housing at all.

Many American cities have fewer emergency shelter beds than people who need shelter. Because homelessness is driven by a large and critical shortage of affordable housing, many individuals and families need help not just for one or two nights, but for long periods of time. Yet many communities continue to treat shelters as the answer to all homelessness, tasking shelters with meeting both emergency needs and longer term systemic shortages of permanent housing. As a result, communities with shelter space often lack sufficient beds for all individuals and families that are homeless. This leaves homeless people across the country with no choice but to struggle for survival in public places.

Although many people experiencing homelessness have literally no choice but to live outside and in public places, laws and enforcement practices punishing the presence of visibly homeless people in public space continue to grow. Homeless people, like all people, must engage in activities such as sleeping or sitting down to survive. Yet, in communities across the nation, these harmless, unavoidable behaviors are punished as crimes or civil infractions.

Our recent report on national trends in criminalization, *Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities* analyzed laws that prohibit the life-sustaining activities of homeless people in 187 cities nationwide since 2006. This analysis revealed that laws civilly or criminally punishing homeless are prevalent and dramatically rising across the country.

We also analyzed local enforcement practices, including increasingly common evictions of homeless encampments upon little or no notice. These evictions, or homeless "sweeps", not only displace homeless people from public space, but they often result in the loss or destruction of homeless persons' few possessions. The loss of these items, which can include critical identification documents, protective tents, or even needed medical equipment, can be devastating to homeless people. Yet, these sweeps are often conducted by governments with no plan to house or adequately shelter the displaced encampment residents. Instead, homeless people are merely dispersed to different public places, leading to the inevitable reappearance of outdoor encampments

Laws criminally or civilly punishing homeless persons' life-sustaining activity are ineffective policies that fail to address the underlying causes of homelessness. Because people experiencing homelessness are not on the street by choice but because they lack choices, criminal and civil punishment serves no constructive purpose. Instead, arrests, unaffordable tickets, and the collateral consequences of criminal convictions make it more difficult for people to exit homelessness and get back on their feet. For example, even misdemeanor convictions can make someone ineligible for subsidized housing under local policy, and criminal records are routinely used to exclude applicants for employment or housing. These barriers to income and housing can prolong a person's homelessness, or even make it permanent.

Criminalization laws also waste precious taxpayer dollars on policies that do not work to reduce homelessness**.** Criminalization is the most expensive and least effective way of addressing homelessness. A growing body of research comparing the cost of homelessness--including the cost of criminalization--with the cost of providing housing to homeless people shows that ending homelessness though housing is the most affordable option over the long run.

Moreover, criminalization policies often violate homeless persons' constitutional and human rights. A number of lawsuits challenging violations of homeless persons' constitutional rights have been filed since the Law Center released its last advocacy manual in 2014. Most recent cases have upheld the legal rights of homeless persons to perform various life-sustaining behaviors in public places. Litigation surrounding evictions of homeless encampments (also known as "sweeps") and restrictions on panhandling have been especially prevalent since 2014, and the following trends have emerged:

- 75% of cases challenging evictions of homeless encampments and/or seizure and destruction of homeless persons' belongings.
- 57% of cases challenging enforcement of camping and/or sleeping bans.
- 100% of cases challenging laws restricting begging and solicitation.

This litigation manual is a companion piece to *Housing Not Handcuffs*. It is meant to be a resource for legal advocates working on the ground to combat criminalization in their communities. This manual evaluates recent trends in criminalization case law, describes successful legal challenges to criminalization policies and practices, and provides case summaries from criminalization litigation broken down by category of prohibited conduct.

14 Nat'l Low Income Hous. Coal., "Study Shows Massive Shortage of Affordable Hous. For Lowest Income Households in Am., (Mar. 2, 2017), available at http://nlihc.org/press/releases/7544.

LEGAL STRATEGIES TO COMBAT CRIMINALIZATION OF HOMELESSNESS

Lawyers have various legal strategies available to combat criminalization measures. Criminal defense lawyers can use constitutional arguments in criminal proceedings to challenge a charge against a homeless person. Constitutional and other legal challenges can also be brought proactively against a municipality to challenge civil rights violations faced by homeless persons. Further, attorneys can mitigate some of the worst collateral consequences of the criminalization of homelessness by providing representation to homeless individuals subject to civil or criminal citations or challenges, even without raising constitutional challenges. This manual focuses on considerations when bringing proactive civil rights litigation.

Overview[15]

Homeless individuals and service providers have brought various legal challenges to municipal ordinances or statutes that criminalize homelessness. Claims may be brought under 42 U.S.C. § 1983 against laws that violate rights guaranteed by the U.S. Constitution. State constitutions may offer differing or broader protections. In addition, human rights protected under international law can provide persuasive theories that have gained traction in some courts.

Challenging Bans on Camping and/or Sleeping in Public

Because many municipalities do not have adequate affordable housing or shelter space to meet the need, homeless people are often left with no alternative but to live and sleep in public spaces. Many municipalities have enacted laws imposing criminal penalties upon homeless individuals for sleeping outside. In 2016, the Law Center found that laws prohibiting camping[16] have increased by 69% since 2006, with as many as a third of cities nationwide banning the activity throughout the entire community.[17] Laws prohibiting sleeping in public are slightly less common, with 27% banning sleeping either city-wide or in particular public places.[18] Enforcement of these laws may result in unaffordable tickets, loss or destruction of personal property, or even jail time for the "crime" of trying to survive outdoors.

Laws punishing people for sleeping outside have been challenged in courts as a violation of homeless persons' civil rights. Some courts have found that laws criminally punishing the life-sustaining activities of homeless people amounts to criminalization of homeless status in violation of the **Eighth Amendment's** prohibition against cruel and unusual punishment. In reaching this conclusion, courts have looked at whether the number of homeless people exceeds the amount of available emergency shelter to determine whether criminalization of activities such as camping in public are voluntary conduct or conduct inextricably linked with homeless persons' status.

On August 6, 2015, the U.S. Department of Justice filed a statement of interest brief in *Bell v. Boise*, a lawsuit filed by the Law Center in federal district court on behalf of six homeless plaintiffs who were convicted under laws that criminalized sleeping or camping in public.[19] The statement of interest advocates for the application of the analysis set forth in *Jones v. City of Los Angeles*, a Ninth Circuit decision that was subsequently vacated pursuant to a settlement.[20] In *Jones*, the court considered whether the city of Los Angeles provided sufficient shelter space to accommodate the homeless population. The court found that, on nights when individuals are unable to secure shelter space, enforcement of anti-camping ordinances violated their constitutional rights.

The position of the Justice Department was underscored in subsequent remarks made by then-Attorney General Loretta Lynch at a White House convening on incarceration and poverty, and

15 This manual does not create an attorney and client relationship with you. The information herein is not offered as legal advice and should not be used as a substitute for seeking professional legal advice. It does not provide an exhaustive list of considerations to be worked out before bringing litigation in any particular case.

16 Camping bans may also be broadly written to prohibit simply sleeping outside, or using any resource to protect oneself from the elements. See Housing Not Handcuffs, supra note 2.

17 The Law Center surveyed 187 cities and assessed the number and type of municipal codes that criminally or civilly punish the life-sustaining behaviors of homeless people. The results of our research show that the criminalization of necessary human activities is prevalent and increasing in cities across the country. See Housing Not Handcuffs, supra note 2.

18 Id.

19 U.S. Dep't of Just. Statement of Interest brief in Bell v. Boise available athttps://www.justice.gov/crt/ file/761211/download.

20 *Jones v. City of Los Angeles,* 444 F.3d 1118, 1126 (9th Cir. 2016).

again in a Department of Justice community policing newsletter dedicated to the criminalization of homelessness.[21] Beyond constitutional concerns, the federal government has repeatedly condemned the criminalization of homelessness as ineffective and expensive public policy. For example, the U.S. Interagency Council on Homelessness stated in its guidance on encampments that, "the forced dispersal of people from encampment settings is not an appropriate solution or strategy, accomplishes nothing toward the goal of linking people to permanent housing opportunities, and can make it more difficult to provide such lasting solutions to people who have been sleeping and living in the encampment."[22]

> *"Many homeless individuals are unable to secure shelter space because city shelters are over capacity or inaccessible to people with disabilities," said Principal Deputy Assistant Attorney General Vanita Gupta, former head of the U.S. Department of Justice Civil Rights Division. "Criminally prosecuting those individuals for something as innocent as sleeping, when they have no safe, legal place to go, violates their constitutional rights. Moreover, enforcing these ordinances is poor public policy. Needlessly pushing homeless individuals into the criminal justice system does nothing to break the cycle of poverty or prevent homelessness in the future. Instead, it imposes further burdens on scarce judicial and correctional resources, and it can have long-lasting and devastating effects on individuals' lives."*

Laws banning sleeping and camping in public have also been challenged as violating the **fundamental right to travel**. Laws illegally penalize travel if they deny a person a "necessity of life."[23] Advocates have contended that arresting people for sleeping outside violates the fundamental right to travel by denying access to a necessity of life, i.e. a place to sleep. At least one court has found that if people are arrested for sleeping in public, those arrests have the effect of preventing homeless people from moving within a city or traveling to a city, thereby infringing upon their right to travel.[24]

Challenging Evictions of Homeless Encampments ("Sweeps")

Some municipalities have engaged in sudden evictions of homeless encampments - often referred to as "sweeps" or "clean ups" - in areas where homeless individuals sleep, rest, and store belongings. During sweeps, police or city workers may confiscate and destroy belongings. Although it is appropriate for city, county, and state governments to clean public areas, courts have found that seizing and destroying homeless persons' personal property may violate their **Fourth Amendment** rights to be free from unreasonable searches and seizures. In addition, courts have found that failing to follow certain procedures when managing confiscated private property may violate due process rights under the **Fourteenth Amendment**.[25]

Challenging Bans on Loitering, Loafing, and Vagrancy

Laws prohibiting loitering, loafing, or vagrancy, are common throughout the country. Similar to historical Jim Crow, Anti-Okie, and Ugly laws, these modern-day ordinances grant police a broad tool for excluding visibly poor and homeless people from public places. In 2016, the Law Center found that 32% of cities prohibit loitering, loafing, or vagrancy throughout entire communities – an 88% increase since 2006.

Municipalities have used broadly-worded loitering ordinances to target homeless individuals in public spaces. The Supreme Court has held that such ordinances are **unconstitutionally vague** when they do not give clear notice of the prohibited conduct or would allow for selective or arbitrary enforcement.[26]

Challenging Bans on Sitting or Lying Down in Public

Bans on sitting or lying down in public are another common form of criminalization ordinance. Although every human being must occasionally rest, laws that restrict resting activities in public are increasingly common. In 2016, the Law Center found that 47% of cities prohibit sitting and lying down in public.[27] This represents a 52% increase since 2006.[28]

Laws restricting sitting or lying down in public have been challenged as violating the **fundamental right to travel**.[29]

Challenging Bans or Restrictions on Panhandling

In the absence of employment opportunities or other sources of income, begging may be a homeless person's best option for obtaining the money that they need to purchase food, public transportation fare, medication, or other necessities. Despite this, many communities have restricted or banned begging or panhandling. In 2016, the Law Center found that 61% of cities studied nationwide restrict or ban panhandling in some or all public places.[30]

Laws prohibiting panhandling, solicitation, or begging may infringe on the **First Amendment** right to free speech. Courts have found begging to be protected speech and laws that target speech based on content must satisfy strict scrutiny to be constitutional.[31] This means that content-based restrictions on speech must be narrowly tailored to achieve a compelling governmental interest.[32] Even

21 U.S. Dept. of Justice, Community Policing Dispatch (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/index.asp.
22 United States Interagency Council on Homelessness, Ending Homelessness for People Living in Encampments: Advancing the Dialogue (August 2015) available at https://www.usich.gov/resources/uploads/asset_library/Ending_Homelessness_for_People_Living_in_ Encampments_Aug2015.pdf.
23 *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 258-59 (1974).
24 *Pottinger v. City of Miami*, 76 F.3d 1154 (11th Cir. 1996).
25 *Mitchell v. City of Los Angeles*, Case No.: 16-cv-01750 SJO (JPR) (C.D. Cal. April 2016).
26 *Chicago v. Morales*, 527 U.S. 41 (1999); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972).
27 Housing Not Handcuffs, supra note 2.
28 Id.
29 *Roulette v. City of Seattle*, 850 F. Supp. 1442 (W.D. Wash. 1994), aff'd, 78 F.3d 1425 (9th Cir. 1996).
30 Housing Not Handcuffs, supra note 2.
31 *Reed v. Town of Gilbert*, 135 S.Ct. 2218 (2015)
32 Id.

where a restriction is content neutral, a panhandling ordinance may still be unlawful if it restricts more speech than is necessary to achieve a legitimate government interest or it fails to leave open ample alternative channels for begging speech.[33]

In addition, some courts have found laws prohibiting begging or panhandling to be unconstitutionally vague where the ordinances do not provide clear notice of the conduct prohibited and could be enforced it in an arbitrary or discriminatory manner.[34]

Challenging Laws Banning Living in Vehicles

Sleeping in one's own vehicle is often a last resort for people who would otherwise be forced to sleep on the streets. A dramatically growing number of cities across the nation, however, have chosen to impose criminal or civil punishments on people who live in their private vehicles, despite their lack of housing options. In 2016, the Law Center found that 39% of cities prohibit living in vehicles.[35] This represents an increase of 143% since 2006.[36]

Laws prohibiting living in vehicles have been challenged as being **unconstitutionally vague** or inviting arbitrary enforcement in violation of due process.[37]

Persuasive Human Rights Theories

Human rights theories provide useful tools when challenging ordinances criminalizing homelessness. Legal arguments supported by human rights treaties ratified by the U.S. can be used to ensure domestic law complies with such treaties, which have the same binding force as federal law.[38] Further, under international law, once the U.S. signs a treaty, it is obligated not to pass laws that would "defeat the object and purpose of [the] treaty."[39]

The Law Center has laid a solid base for using human rights in policy advocacy and litigation against criminalization measures. Federal documents recognize human rights standards as relevant to criminalization, including a 2012 report by the U.S. Interagency Council on Homelessness that acknowledged that "in addition to violating domestic law, criminalization measures may also violate international human rights law, specifically the Convention Against Torture and the International Covenant on Civil and Political Rights"[40] That language was subsequently echoed by the U.S. Department of Justice (DOJ)[41] and U.S. Department of Housing & Urban Development (HUD).[42] At the international level, two of the three treaty bodies which oversee human rights treaties ratified by the U.S., the Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD), have specifically condemned the criminalization of homelessness in the U.S. and called on the U.S. to "[a]bolish laws and policies making homelessness a crime."[43] The third treaty body to which the U.S. is subject, the Committee Against Torture, considered such recommendations at its review of U.S. compliance in November 2014,[44] and has asked the U.S. to address the issue at its upcoming review in 2018.[45]

While human rights treaties may not currently be enforceable on their own in U.S. domestic courts, judges in both state and federal settings have looked to human rights law and jurisprudence in a number of cases.[46] In addition, lawyers can also cite to these sources to support policy advocacy.[47] Numerous resources and networks exist to help litigators use these rich resources in their advocacy.[48]

Cruel and Unusual Punishment

On multiple occasions, the U.S. Supreme Court has looked to international law in interpreting the scope of the Eighth Amendment protection against cruel and unusual punishment.[49] The Law Center has strategically built up commentary from the HRC and numerous other U.N. human rights monitors addressing criminalization of homelessness as cruel, inhuman, and degrading treatment – the international equivalent of our Eighth Amendment

33 *Norton v. City of Springfield*, 768 F.3d 713 (7th Cir. 2014) and *Norton v. City of Springfield* 806 F.3d 411 (7th Cir. 2015).

34 See, e.g., *Atchison v. City of Atlanta*, No 1:96-CV-1430 (N.D. Ga. July 17, 1996) (granting preliminary injunction).

35 Housing Not Handcuffs, supra note 2.

36 Housing Not Handcuffs, supra note 2.

37 *Desertrain v. City of Los Angeles*, 754 F.3d 1147 (9th Cir. 2014)

38 U.S. Const. art. VI, § 2; Id. art. II, § 2, cl. 2.

39 The Vienna Convention on the Law of Treaties, May 23, 1969, art. 18(a), 1155 U.N.T.S. 331.

40 U.S. Interagency Council on Homelessness, Searching out Solutions: Constructive Alternatives to the Criminalization of Homelessness 8 (2012), https://www.usich.gov/resources/uploads/asset_library/Searching_Out_Solutions_2012.pdf.

41 Letter from Lisa Foster, Director, Office for Access to Justice, U.S. Dept. of Justice, to Seattle City Councilors, (Oct.13, 2016), (https://assets.documentcloud.org/documents/3141894/DOJ-ATJ-Letter-to-Seattle-City-Council-10-13-2016.pdf); Matthew Doherty, *Incarceration and Homelessness: Breaking the Cycle,* Community Policing Dispatch, U.S. Dept. of Justice Community Oriented Policing Services, vol. 8, Issue 12 (Dec. 2015), https://cops.usdoj.gov/html/dispatch/12-2015/index.asp.

42 U.S. Dept. of Housing & Urban Development, *Alternatives to Criminalizing Homelessness,* https://www.hudexchange.info/homelessness-assistance/alternatives-to-criminalizing-homelessness/.

43 U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (2014); Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014).

44 Concluding observations on the combined third to fifth periodic reports of the United States of America, adopted by the Committee at its fifty-third session (3-28 Nov. 2014), 19 Dec. 2014, available at http://www.ushrnetwork.org/sites/ushrnetwork.org/files/cat_us_concluding_observations_2014.pdf.

45 Committee Against Torture, *List of issues prior to submission of the sixth periodic report of the United States of America,* CAT/C/USA/QPR/6 ¶ 46 (2016), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/019/66/PDF/G1701966.pdf?OpenElement.

46 *See* Opportunity Agenda, Human Rights in State Courts (2014), http://opportunityagenda.org/human_rights_state_courts_2014.

47 See, e.g., Leo Morales, An open letter to Mayor Bieter & Boise City Council re: proposed Ordinance 38-14, criminalizing houselessness in Boise, ACLU of Idaho (Sept. 23, 2014), https://acluidaho.org/an-open-letter-to-mayor-bieter-boise-city-council-re-proposed-ordinance-38-14-criminalizing-houselessness-in-boise/.

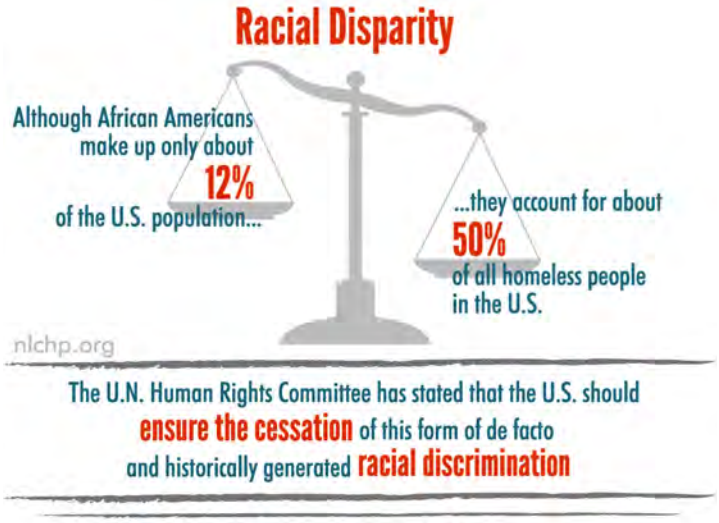
48 *See, e.g.* American University Washington College of Law Center for Human Rights and Humanitarian Law, *Local Human Rights Lawyering Project,* http://www.wcl.american.edu/humright/center/locallawyering.cfm; Columbia Law School Human Rights Institute, Bringing Human Rights Home Lawyers Network, http://web.law.columbia.edu/human-rights-institute/bhrh-lawyers-network.

49 *See, e.g. Roper v. Simmons*, 125 S. Ct. 1183, 1199 (2005); *Graham v. Florida*, 130 S. Ct. 2011; 176 L. Ed. 2d 825 (2010).; *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002).

standard - to provide evidence of an international norm that can guide judges to make similar findings domestically.[50] Rather than simply enjoining such laws only to see communities make minimal changes to the laws but continue criminalizing practices, international law may also provide support for more expansive remedies – such as provision of housing – to address underlying constitutional violations.[51]

Freedom of Movement

In *In Re White*, the California Court of Appeals cited the right to freedom of movement recognized in international law to support its conclusion that both the U.S. and California Constitutions protect the right to intrastate and intra-municipal travel.[52] The petitioner challenged a condition of her probation that barred her from being in certain defined areas of the city. The HRC, which oversees compliance with the International Covenant on Civil and Political Rights (ICCPR), has emphasized that the right to movement and the freedom to choose your own residence are important rights that should only be breached by the least intrusive means necessary to keep public order.[53] Further, in *Koptova v. Slovak Republic*, the CERD, which oversees the International Covenant on the Elimination of Racial Discrimination (ICERD), held that municipal resolutions in villages in the Slovak Republic, which explicitly forbade homeless Roma families from settling in their villages, and the hateful context in which the resolutions were adopted, violated the right to freedom of movement and residence within the border of a country in violation of the ICERD.[54]



Equal Protection/Freedom from Discrimination

Laws criminalizing aspects of homelessness, such as bans on sleeping or sitting in public, or the selective enforcement against homeless people of neutral laws such as those prohibiting loitering or public intoxication may violate human rights law. Both the ICCPR and ICERD, which the U.S. has signed and ratified, prohibit discrimination on the basis of race, and both the ICCPR and the Universal Declaration of Human Rights, a non-binding U.N. declaration, also protect against discrimination on the basis of property and "other status," which can include homelessness.[55] Laws that have a disparate impact on homeless individuals who are members of racial minorities have also been held to violate the ICERD and the ICCPR. In response to reports that "some 50 % of homeless people are African American although they constitute only 12 % of the U.S. population," the HRC stated that the "[U.S.] should take measures, including adequate and adequately implemented policies, to ensure the cessation of this form of de facto and historically generated racial discrimination,"[56] and the CERD expressed concern "at the high number of homeless persons, who are disproportionately from racial and ethnic minorities ... and at the criminalization of homelessness through laws that prohibit activities such as loitering, camping, begging, and lying in public spaces" and called on the government to take corrective action.[57] The U.S. Supreme Court has also looked to international law in interpreting our own equal protection standards under the Fourteenth Amendment.[58]

50 *See* U.N. Human Rights Committee, *Concluding observations on the fourth report of the United States of America*, ¶ 19, U.N. Doc. CCPR/C/USA/CO/4 (2014); U.N. Human Rights Council, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context, Raquel Rolnik, Mission to the United States of America*, ¶ 95, U.N. Doc. A/HRC/13/20/Add.4 (Feb. 12, 2012) [hereinafter UNHRC, *Report of Raquel Rolnik*]; U.N. Human Rights Council, *Final Draft of the Guiding Principles on Extreme Poverty and Human Rights, Submitted by the Special Rapporteur on Extreme Poverty and Human Rights, Magdalena Sepúlveda Carmona*, ¶¶ 65, 66(c), U.N. Doc. A/HRC/21/39 (July 18, 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, ¶¶ 48-50, 78(c), U.N. Doc. A/67/278 (Aug. 9, 2012); Special Rapporteurs on the Rights to Adequate Housing, Water and Sanitation, and Extreme Poverty and Human Rights, *USA: "Moving Away from the Criminalization of Homelessness, A Step in the Right Direction"* (Apr. 23, 2012), http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12079&LangID=E; UNHRC, *Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, Addendum, Mission to the United States of America,* A/HRC/18/33/Add.4, Aug. 2, 2011; Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, *Stigma and the Realization of the Human Rights to Water and Sanitation*, U.N. Doc. A/HRC/21/42 (July 2, 2012); U.N. Human Rights Council, *Report of the Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, Doudou Diéne, Mission to the United States of America*, U.N. Doc. A/HRC/11/36/Add.3 (Apr. 28, 2009) [hereinafter UNHRC, *Report of Diéne*].

51 Eric Tars, Heather Maria Johnson, Tristia Bauman & Maria Foscarinis, *Can I Get Some Remedy? Criminalization of Homelessness and the Obligation to Provide an Effective Remedy,* 45 Col. HRLR 738 (2014), http://nlchp.org/documents/HLRL_Symposium_Edition_Spring2014_Can_I_Get_Some_Remedy.

52 *In Re White*, 158 Cal. Rptr. 562, 567 (Ct. App. 1979).

53 Human Rights Committee, General Comment 27, Freedom of movement (Art. 12), U.N. Doc CCPR/C/21/Rev.1/Add.9 (1999).

54 *Koptova v. Slovak Republic*, (13/1998), CERD, A/55/18 (8 August 2000).

55 See International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976 [hereinafter "ICCPR"]; Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (194; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195, entered into force Jan. 4, 1969).

56 Concluding Observations of the Human Rights Committee on the Second and Third U.S. Reports to the Committee (2006), available at http://hrlibrary.umn.edu/usdocs/hruscomments2.html.

57 Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014), available at https://www.state.gov/documents/organization/235644.pdf.

58 Committee on the Elimination of Racial Discrimination, *Concluding Observations*, CERD/C/USA/CO/7-9, ¶ 12 (2014); Lawrence v. Texas, 539 U.S. 558 (2003); Grutter v. Bollinger, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring).

Freedom from Forced Evictions

Evictions that remove people from public spaces or outdoor encampments (sometimes referred to as "sweeps"), frequently without notice or housing relocation, may violate homeless people's right to freedom from forced evictions under international law. Forced evictions are described as "the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection."[59]According to human rights law, "[e]victions should not result in rendering individuals homeless or vulnerable to the violation of other human rights."[60] In addition, "[n]otwithstanding the type of tenure [including the illegal occupation of land or property]," under human rights law "all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats."[61] For homeless individuals affected by sweeps, human rights law requires that municipalities "take all appropriate measures, to the maximum of [their] available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."[62] This principle has been applied in cases from South Africa establishing that homeless people could not be evicted unless alternative shelter was available.[63]

59 For an excellent summary of forced evictions under international law, see UN HABITAT and UN Office of the High Commissioner for Human Rights, Forced Evictions, Fact Sheet No. 25 Rev. 1I (2014), http://www.ohchr.org/Documents/Publications/FS25.Rev.1.pdf.

60 UN Committee on Economic, Social and Cultural Rights,

61 UN Committee on Economic, Social and Cultural Rights, General Comment 4, *The right to adequate housing* (Sixth session, 1991), U.N. Doc. E/1992/23, annex III at 114 (1991), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 18 (2003).

62 *See* General Comment No. 7.

63 See, e.g., *Occupiers of 51 Olivia Road, Berea Township and Another v. City of Johannesburg and Others*, (24/07) [2008] ZACC 1 (19 Feb. 2008); Michael Clark, Evictions and Alternative Accommodation in South Africa: An Analysis of the Jurisprudence and Implications for Local Government, SERI (2013), http://www.seri-sa.org/images/Evictions_Jurisprudence_Nov13.pdf.

CONSIDERATIONS FOR BRINGING LITIGATION

Before a complaint is ever filed, counsel must consider a wide range of factors to present the strongest case.

Factual Research: Topics to Investigate

Counsel should seek to learn as much as possible about the ordinance or statute that will be challenged. This includes developing a firm understanding of the law's enactment, the jurisdiction's history of and policies regarding enforcement of the ordinance or statute, the municipality's relationship with shelters and other service providers, and difficulties homeless individuals may have complying with the ordinance. This research may be conducted by interviewing homeless individuals and service providers, reviewing municipal documentation found online, and by submitting public records requests.

The jurisdiction's history of, or policies regarding, enforcement can be critical to persuading a court that the problems identified in the eventual complaint are real, concrete, and recurring (and, therefore, not subject to dismissal on mootness or ripeness grounds). The types of questions counsel should ask about the nature of the enforcement should include:

(1) whether there have been changes in frequency or magnitude of enforcement;

(2) whether any notable swings in enforcement efforts are tied to particular events, political trends, enactment of new laws, or local citizen complaints;

(3) whether enforcement spikes during certain seasons or times of day;

(4) whether enforcement is focused on a particular area (and, conversely, whether some locations do not see enforcement); and

(5) whether enforcement is selective, meaning specific groups, such as homeless individuals, or a certain subset of the homeless population, are targeted.

Most importantly, counsel should note how potential defendants are enforcing the statute vis-à-vis specific individuals: is law enforcement issuing verbal warnings or citations, arresting violators, mandating relocation to a local shelter, or enforcing the law through some other means? Identifying municipal or police policies on enforcement is also important. Initial research on policies can be done by reviewing materials (such as press releases and reports) on a municipality's website and reviewing statements made to news media and in municipal or city council meetings. These facts will be critical in determining which legal claims have the greatest chance of success.

Local service providers (such as shelters, food kitchens, clinics, and other social service organizations that serve indigent individuals) can serve as useful resources to understanding the municipality's attitude toward homelessness. Those service providers that are critical of criminalization practices may be important allies in working with plaintiffs and gathering factual information. They may also serve as informal consultants who can help counsel understand the conditions and challenges facing the local homeless population. In contrast, some service providers may not be receptive to assisting in challenges or may be hesitant to publicly support such efforts because of their relationships with the municipality and/or its police department. It may be persuasive to some service providers who participate in their local HUD Continuum of Care to note that HUD assigns two points on their funding application for Continuums that can answer specifically what steps they are taking to end criminalization in their funding application. Participating or assisting in a lawsuit may help with that. [64]

Counsel should examine additional barriers that may hinder homeless individuals' abilities to comply with the ordinance or statute at issue. For example, if making an Eighth Amendment argument where the availability of shelter space may be important, consider barriers to shelter use:

- Age, gender, and family composition restrictions on who may use shelter can leave homeless people with few or no shelter options;
- Mental health issues, such as Post Traumatic Stress Disorder, may make a group shelter setting medically inappropriate or unavailable;

64 *See* U.S. Dept. of Housing & Urban Development, NOTICE OF FUNDING AVAILABILITY FOR THE 2016 CONTINUUM OF CARE PROGRAM COMPETITION, 35 (2016), https://www.hudexchange.info/resources/documents/FY-2016-CoC-Program-NOFA.pdf; National Law Center on Homelessness & Poverty, *The Cost of Criminalizing Homelessness Just Went Up By $1.9 Billion* (2015), http://www.nlchp.org/press_releases/2015.09.18_HUD_NOFA_criminalization.

- Accessibility issues or lack of accommodations for persons with disabilities may render shelter unavailable;
- Religious differences may inhibit an individual from seeking shelter or services from providers that require or include religious services;
- Sobriety requirements can prevent homeless people struggling with alcohol or other addiction from accessing shelter; and
- Location/transportation issues may also limit access to available services, particularly if these are located away from public transportation or if individuals' physical disabilities make transportation difficult.

Public Records Requests

A search of ordinances most likely applied to homeless persons, such as anti-camping, anti-sitting, and other similar laws, can provide information about enforcement against homeless people.

Local law enforcement will have information on arrests and citations for misdemeanor violations by homeless individuals. One way to search for such arrests and citations is by address. Many times a homeless person will list a local shelter or service provider as his or her address when arrested or cited. Police departments may have other ways of listing homeless persons' address in their records, such as "unknown," "no address," "homeless," or "transient."

Public records requests can be made of federal, state, and local governments. The federal Freedom of Information Act (FOIA) gives the public a right to obtain copies of certain documents from federal government agencies and applies to records held by agencies in the executive branch of government. Every U.S. state and some cities have passed laws similar to the federal FOIA that permit the public to request records from state and local agencies.

Public records requests can be helpful in identifying practices within your city that are negatively impacting homeless individuals. Information obtained from public records requests can help identify recurring civil rights violations that will help develop a litigation strategy, should other forms of advocacy with the city fail.

How to Make the Request:

Determine what records you need.

When making a request, it is important to describe the document you are seeking as precisely as possible and include enough information that the record will be reasonably identifiable. This is also important because there may be a copying or processing fee for records requests. See the list below for ideas on what information can be requested.

Identify the agency that has the records.

Public records requests should be directed to the agency that prepared, owned, or retains the records. If it is unclear which agency has the particular records, requests can be sent to multiple agencies.

Make a request to the agency in writing.

The websites of many state agencies provide detailed instructions on how to make public records requests and contain a form that can be used to submit such requests. If the agency in question does not provide such information, a letter should be sent to the agency reasonably describing the records requested and clearly marked as a public records request.

Request a fee waiver if needed.

Agencies can sometimes impose a significant cost for requesting documents; if this will be a barrier for your litigation, make sure to request a fee waiver in your initial application and explain you are making the request on behalf of an impoverished client and for the public good

Follow up on the request.

The federal FOIA requires a response within 20 working days, and state public records laws also impose deadlines by which the agency must respond. The request may be denied in whole or in part, but the agency is required to explain the reasons for denial. Negotiation may be helpful if the agency denies or challenges the scope of the request.

What to Request:

The different types of information advocates may consider seeking through a public records request include the following:

- All available records related to arrest, citation, warning or other actions taken by police officers in relation to violations under anticamping, anti-panhandling, loitering, and/or other ordinances used in your community to target homeless individuals;
- Any and all internal police department statements of policy, practice, guidance, or similar documents relating to the enforcement of any of the ordinances for which you are seeking records;
- All records related to sweeps and policies related to cleaning public spaces;
- All records related to citizen complaints to the police department related to homeless persons;
- All communications between the police department and city officials related to homelessness;
- Any records related to jail capacity, the cost of incarceration, and judicial resources involved in prosecuting homeless individuals; and
- All records related to official figures on the size of the local homeless population and the maximum capacity of local homeless shelters.

Issues to Consider in Working with Plaintiffs

Working effectively with plaintiffs is one of the most important aspects of litigation.[65]

Individual Plaintiffs

When filing a case in federal or state court, counsel should consider whether plaintiffs (1) meet the legal requirements of Article III standing and/or the relevant state law equivalent; (2) have claims not barred by applicable statutes of limitation; (3) have compelling facts; and (4) will be able to participate at depositions and trial. Plaintiffs who have ties within the homeless community and will be able to offer counsel guidance on the issues faced by, and remedies most likely to benefit, the homeless community can be particularly helpful.

To have standing, a plaintiff must demonstrate that he or she has personally suffered or will imminently suffer an injury that is fairly traceable to defendant's conduct and that a favorable decision is likely to redress the injury.[66] Injuries to constitutional rights are generally sufficient to establish standing. Where injunctive relief is sought, a plaintiff must further demonstrate a likelihood of future harm from the unconstitutional enforcement; this additional requirement is unnecessary for claims for monetary damages. While some courts have found that plaintiffs without convictions under anti-camping ordinances lack standing,[67] other courts have found that homeless plaintiffs have standing to challenge anti-camping or anti-sleeping ordinances, even if they have not yet been convicted under the ordinances.[68] Counsel should also anticipate challenges to individual standing where a plaintiff, who seeks only injunctive relief, is no longer homeless, is incarcerated, or has moved from the area.[69]

Beyond standing requirements, however, there are several specific considerations counsel should consider when bringing litigation on behalf of homeless individuals.

First, counsel should consider the number of individual plaintiffs appropriate for an action. A large number of individual plaintiffs can be helpful. Unsheltered homeless individuals may move or become unavailable for other reasons. Further, a large number of plaintiffs will serve to underscore the severity of the issues raised in the litigation. A demographically diverse group of plaintiffs, where possible, may likewise represent the broad harm of a given ordinance.

Second, counsel should think carefully about how to address the potential vulnerabilities of specific plaintiffs, including to prepare those plaintiffs for deposition and trial and identify where supplemental information or expert testimony may need to be procured. Plaintiffs will likely need to explain the circumstances of their past and current living situations and how they became homeless, their employment history, any medical or mental health issues that impact their claims or damages, any criminal record and periods of incarceration, and the circumstances of their citations. Plaintiffs' mental health or criminal histories may also impact the weight given to their testimony. Counsel should consider from the outset whether protective orders may be needed with respect to confidential or sensitive information about the plaintiffs.

Third, counsel should consider how to stay in communication with plaintiffs throughout the duration of any litigation. There are a variety of ways to do so. Some homeless individuals will have email addresses that they check regularly. Others will routinely stay at the same shelter and will be accessible on a regular basis at the same location. To ensure that counsel does not lose touch with plaintiffs (and that counsel is not surprised by any unexpected developments), it is advisable to schedule regular meetings.

Fourth, counsel should discuss possible remedies with individual plaintiffs upfront to determine whether and how to pursue injunctive relief, monetary damages, and/or other relief.

Class Actions – A Special Case

A class action can demonstrate the severity of the issues addressed in litigation. However, counsel must consider whether the requirements embodied in Rule 23 of the Federal Rules of Civil Procedure and/or state law equivalent can be met, as well as the relative strategic merits of a class action. Some legal services organizations are prohibited from participating in class actions as either counsel or party. Filing a lawsuit as a class action has the benefit of being able to seek relief for a large group of individuals.

65 In addition to the issues discussed here, counsel should be aware of any jurisdictional, organizational, or ethical rules or limitations related to establishing the attorney-client relationship.
66 *Dennis Hollingsworth et al. v. Kristin M. Perry*, 133 S. Ct. 2652, 2661 (2013).
67 *Johnson v. Dallas*, 61 F.3d 442, 445 (5th Cir. 1995).
68 *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006).
69 *Cf. Poe v. Snyder*, 834 F.Supp.2d 721, W.D. Michigan (2011).

However, obtaining certification of the class is an additional hurdle to overcome in a lawsuit and may be a better option for certain types of suits than others.

Organizational Plaintiffs

Organizations may be named as plaintiffs if they can demonstrate standing and injury. An organization may be able to establish standing in a representative capacity if: 1) its members would otherwise have standing to sue in their own right, 2) the interests it seeks to protect are germane to the organization's interest, and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. An organization that suffers injury in its own right may have standing to sue. For example, an organization that has or will suffer economic harm or a diminution in membership due to unlawful conduct may be able to establish standing as an organizational plaintiff. Having organizations as plaintiffs can be an advantage, in the event that individual plaintiffs' claims are mooted out. Religious groups, shelters, and other service providers may have a stake in the outcome of litigation challenging an ordinance.

Issues to Consider in Identifying Defendants

While conducting pre-trial research, counsel will need to identify defendants. This may include examining the actions of various government entities, including state and local governments and their agencies and law enforcement departments. Actions may be brought against specific individuals, based upon the level of individual knowledge and conduct. Counsel must give special consideration to issues of sovereign and qualified immunity and the requirement of § 1983 that liability is grounded in an official municipal policy.[70]

70 *Erwin Chemierinsky, Constitutional Law: Principles & Policies* 488-89 (2d ed. 2002).

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Drafting the Complaint

In addition to working with plaintiffs to identify the appropriate claims and defendants, counsel has other strategic considerations when drafting the complaint.

Level of Detail

Counsel should consider the appropriate level of detail in drafting the complaint. At minimum, complaints filed in federal court must meet the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure, *Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Complaints filed in state court may be subject to pleading requirements under state civil procedure laws. In both federal and state courts, the complaint can be an opportunity to educate the court, the media, and the public on the effects of criminalizing homelessness.

Jury Demand

Counsel should consider whether a bench trial or jury trial is preferable given the specific claims and parties. This will likely involve research and considering a local counsel's perspective on the court and the potential jury pool.

Remedies

Challenges to criminalization measures have been most successful where plaintiffs have sought specific declaratory and/or injunctive relief.[71] Monetary damages may also be sought and awarded, though these have been awarded more frequently where a plaintiff's property has been seized or destroyed.[72] Given the needs of the specific plaintiffs, appropriate remedies may also include reimbursement of criminal fines and costs of incarceration, and expungement of violations of the challenged ordinances. Attorneys' fees and litigation costs should also be sought, when available.

In deciding whether to grant a preliminary injunction, courts frequently consider four factors, whether: (1) the moving party is likely to prevail on the merits of his or her claim, (2) the moving party will suffer irreparable injury unless the injunction issues, (3) the threatened injury outweighs the harm the injunction may do to the opposing party, and (4) the injunction would not be contrary to the public interest.[73] Irreparable harm is defined as harm that the plaintiff would suffer absent a preliminary injunction and that cannot later be compensated by damages or a decision on the merits.[74] Some courts do not structure or weigh the factors in any particular order, allowing the judge to exercise more discretion in determining whether a preliminary injunction should be issued; other courts will provide more guidance as to how to weigh or order similar factors.[75]

Filing the Complaint or Sending a Demand Letter?

Sending a demand letter to the defendants, prior to filing the complaint, may provide an opportunity to educate decision-makers and resolve the matter outside of litigation. For instance, the municipality may be willing to amend the objectionable ordinance or put in place a policy clarifying it and limiting enforcement against persons experiencing homelessness. Counsel who is familiar with municipal decision-makers will have the best sense of whether this is an appropriate strategy. Preliminary research will help inform counsel as to the most appropriate tone of any demand letter and other negotiations with municipalities.

71 See e.g. *Jones v. City of Los Angeles*, 444 F.3d at 1120, 1138 (noting that plaintiffs sought a declaratory judgment that enforcement violates homeless persons' rights to be free from cruel and unusual punishment and an injunction against enforcement from 9:00 p.m. to 6:30 a.m. and in cases of medical necessity).

72 See, e.g., *Pottinger v. Miami*, 810 F. Supp. at 1570 ("[A] homeless person's personal property is generally all he owns; therefore . . . its value should not be discounted.").

73 E.g. *Vision Center v. Opticks, Inc.*, 596 F.2d 111 (5th Cir. 1979); *Trak Inc. v. Benner Ski KG*, 475 F. Supp. 1076, 1077 (D. Mass. 1979); *SK&F, Co. v. Premo Pharmaceutical Laboratories, Inc.,* 625 F.2d 1055, (3d Cir. 1980). *CPG Products Corp. v. Mego Corp.,* 502 F. Supp. 42 (S.D. Ohio 1980); *Meridian Mut. Ins. Co. v. Meridian Ins. Group, Inc.*, 128 F.3d 1111 (7th Cir. 1997)

74 *Sampson v. Murray*, 415 U.S. 61 (1974) (citing *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

75 *Lancor v. Lebanon Housing Authority*, 760 F.2d 361, 362 (1st Cir.1985) (heightened importance of probability of success); *Abbott Laboratories v. Mead Johnson & Co.*, 971 F.2d 6 (7th Cir. 1992) (making the first two factors requirements); *Ilapak Research & Development S.A. v. Record SpA.*, 762 F. Supp. 1318 (N.D. Ill. 1991) (acknowledging that Seventh Circuit courts are to employ a sliding scale approach).

Discovery

Plaintiffs' Discovery

Discovery provides important opportunities for factual development of the case – particularly in the context of challenges to criminalization measures for which many of the relevant documents will be exclusively in the defendants' possession. Counsel should strategically consider the use of interrogatories, requests for admission, and requests for production to gain information and documentary support needed to prove each element of plaintiffs' affirmative case.

Key categories of documents that may be available through discovery include: (1) copies of citations, police records or reports, audio-recordings, and emails relating to violations of the challenged ordinances; (2) guidance and instructions on enforcement, whether formal or informal (such as in emails), and training materials on the challenged ordinances; (3) internal communications regarding enforcement policies and practices; (4) annual or periodic reports or data relating to enforcement; (5) defendants' organizational/hierarchy charts; (6) reports or policy documents regarding the ordinances at issue or homelessness; (7) defendants' submissions to federal or state government agencies that pertain to homelessness (e.g. submissions to HUD); and (8) citizen complaints or other materials defendants may use to justify their practices. Materials that can be used to demonstrate an official policy or custom are of particular importance in litigating claims brought under § 1983.

As in other litigation, the meet and confer process is an opportunity to negotiate discovery and protection of confidential or sensitive information in documents. However, where defendants attempt to "hide" information or otherwise obstruct discovery, motions to compel may be necessary to secure materials critical to proving the case.

Depositions provide additional opportunities to develop information necessary to support the affirmative case, particularly with respect to proving an official policy or custom. Documents received earlier in discovery will help identify key witnesses to depose, including officers who have issued citations, persons responsible for the training or supervision of officers, and decision-makers who have created policy or have acquiesced to existing policy.

Defendants' Discovery

Counsel may encounter particular challenges when working with plaintiffs to respond to defendants' discovery requests. Plaintiffs who are homeless and have no reliable place to store their belongings may not have access to the documents sought. To the extent requests seek materials relating to enforcement, responsive documents may already be in the defendants' possession. Counsel can assist plaintiffs in procuring documents from medical providers, employers, and government agencies; however, this process may be time-consuming. Further, such materials may contain confidential or sensitive information that should be produced only subject to a protective order.

Memory issues may also be a hurdle both in responding to requests and in depositions. For instance, plaintiffs who frequently violate the challenged ordinances, out of necessity, may not recall the specific circumstances that led to the violation for which they were cited or arrested. Care should be given to adequately prepare plaintiffs for questioning.

Third-Party Discovery

Shelters and other service providers may also have key materials and information needed in litigation. Service providers who are supportive of the litigation may be willing to provide documents or information without a subpoena or court order. Defendants will likely also seek such discovery from third-party service providers.

Experts

Experts can play an important role in helping fact-finders better understand conditions faced by many homeless individuals and reasons why compliance with ordinances may be impossible. Experts may address the conditions and causes of homelessness, the local conditions and availability of adequate shelter and services, safety concerns at shelters and in sleeping outdoors, and the effects of medical and mental health issues on compliance with the ordinances at issue.

Summary Judgment

Based on the information gleaned in discovery, counsel should evaluate whether there is sufficient evidence to seek summary judgment as to some or all of plaintiffs' claims, or as to liability.

Trial

When litigation leads to trial, counsel should carefully consider trial strategy and themes in light of the locality, its population and potential jury pool (or, if plaintiffs have selected a bench trial, in light of the judge's prior jurisprudence). Counsel should consider the most effective way to convey a compelling message about the impact of the given ordinance on the lives of the plaintiffs. In crafting the affirmative case, counsel should consider which witnesses and evidence can best support that message and the elements of each claim. Counsel should carefully consider the likely strengths and weaknesses of plaintiffs' and other witnesses' trial testimony. As with depositions, counsel must take special care to prepare trial witnesses.

Settlement

Settlement negotiations may offer for the opportunity for a constructive solution that may balance the rights of homeless individuals with a municipality's goals. Settlements can also include remedies that would be unavailable from a trial. Settlements may limit enforcement against homeless individuals under certain circumstances, such as when shelters are full, or in specified locations or during certain hours. Settlements have frequently included funds set aside to assist homeless individuals. Conditions for settlement need to be clear to the parties involved, others similarly situated, and law enforcement, so that all understand what is permitted. To prevent future violations of rights, settlement conditions should also be tailored to allow effective monitoring.

Chapter 5: Causes of Action

5.1.A Express Causes of Action, Section 1983, Elements of the Claim

The two principal statutes creating general causes of action for the enforcement of rights created by federal law are the Reconstruction Civil Rights Acts, particularly Section 1983, and the Administrative Procedure Act. Section 1983 authorizes a wide variety of suits against state and local governments and officials for deprivations of federal rights under color of state law, while other Reconstruction statutes authorize more limited claims against private parties who violate federal rights. The Administrative Procedure Act authorizes a narrower variety of suits against federal officials and agencies. Section 1983 litigation has vindicated constitutional and statutory rights in the context of health, welfare, education, housing, employment, and prison law in litigation against state, county, or municipal officials. The Administrative Procedure Act has vindicated similar rights by correcting federal agency action or by forcing specific federal agency action.

5.1.A. Section 1983

The Reconstruction Civil Rights Acts, enacted during the 1860s and 1870s, provide the right to bring an action in federal court for violations of federal civil rights by state or local officials, by private parties acting in concert with the state, or, in more limited situations, by private parties acting alone. The most important of these statutes is Section 1983. Section 1983 creates no substantive rights. Rather, it creates a vehicle for enforcing existing federal rights. The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The elements of a Section 1983 case are "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" by a "person" acting "under color" of state law. The "laws" referred to include those statutes that confer individual rights on a class of persons that include the plaintiff....

A Section 1983 complaint filed in federal court must name a defendant who is not immune under the Eleventh Amendment and who is acting under color of state law, and must seek relief not barred by the Eleventh Amendment. If the plaintiff establishes a violation of a federal right, defendants may in certain circumstances avoid liability for damages by proving a qualified immunity.

5.1.A.1. Finding a Federal Right

By its terms, Section 1983 can be used to remedy the deprivation of "rights" granted to the plaintiff under the Constitution, federal statutes, and regulations implementing these statutes. Constitutional provisions that are enforceable by a private party under Section 1983 consist of those which create personal rights and either explicitly apply to the states, or have been held to apply to the states by operation of the Fourteenth Amendment.

In contrast to the relatively straightforward expression of individual "rights" protected by the Constitution, whether a statutorily created "right" exists has posed something of a challenge to plaintiffs.

Under the separation of powers doctrine, only the legislative branch has the power to create statutory causes of action. Hence, the ability of a private party to successfully sue to enforce a statute

depends on whether Congress, in enacting the statute, has given the plaintiff a "private right of action." As noted, these rights are sometimes expressly granted by statute. All other rights are "implied," and a court's task is to discern the intent of Congress. The two avenues for enforcing implied rights of action are either to sue directly under the statute or to litigate using the vehicle provided by 42 U.S.C. § 1983.

In *Cort v. Ash*, the Supreme Court enunciated a four-part test to determine whether Congress intended to imply a right to sue directly under a federal statute. In general, a plaintiff asserting the right is required to show that (1) membership in the class for whose benefit the statute was enacted, (2) evidence of Congress' intent to confer a private remedy, (3) that a right to sue would be consistent with the statutory purpose, and (4) that the cause of action is not one traditionally relegated to the states to a degree that implying a right to sue would be inappropriate. In short, under this doctrine, the plaintiff must show that Congress intended to grant both a private right and a private remedy.

In the years following *Cort*, the judiciary became less willing to find rights of action implied directly under a statute, and plaintiffs began turning to Section 1983–the alternative path for enforcing rights created by federal statute. In *Maine v. Thiboutot*, decided five years after *Cort*, the Supreme Court held for the first time that Section 1983 could be used to remedy the deprivation of rights created by a federal statute….

However, not every federal law creates a "right" enforceable by a private plaintiff. As the Supreme Court became increasingly hostile to the use of Section 1983 to enforce federal statutes, it has continued to narrow its conception of the term. For this reason, one should understand the Court's principal objections to the use of Section 1983 to enforce federal statutes.

The … test for finding a right enforceable under Section 1983 was set forth in *Wilder v. Virginia Hospital Association*. It asks whether (1) Congress intended the particular statutory provision to benefit the plaintiff, (2) the provision is so vague or amorphous as to make judicial enforcement difficult or impractical, and (3) the statute imposes a binding obligation on the government. After these inquiries, a fourth arises: (4) did Congress create a comprehensive mechanism for enforcing the statute which implies that it intended to deny a private right of action? …[R]esolution of this first inquiry—the extent to which the plaintiff is "benefited" by the statute—will usually be the key to whether Section 1983 can be invoked to enforce a federal statute.

5.1.A.1.a. Did Congress intend the law to so directly benefit the plaintiff, such that those in his or her place are the "unmistakable focus" of the statute?

With respect to a number of federal programs for low-income people, a strong argument can be made that Congress' mandates are, in *Gonzaga*'s terms, "phrased in terms of the persons protected." However, since many of these statutes were enacted under the Constitution's Spending Clause, specific provisions of the statutes are written in a form which directs a federal agency to spend money so long as the state or other recipient complies with Congress' rules (e.g., "the state's plan shall provide ..."). Not surprisingly, government attorneys have argued with some success that such statutory provisions are "focus[ed] on the person regulated rather than the individuals protected" and hence, "create 'no implication of an intention to confer rights on a particular class of persons.'" This sort of argument underscores the fact that advocates need to find language in the statutory provision sought to be enforced indicating that Congress "intended to confer individual rights upon a class of beneficiaries."

5.1.A.1.b. Is the alleged "right" so vague or amorphous as to make it unenforceable?

[T]he second issue a prospective plaintiff must ask is whether the statute contains a standard by

which to measure the state or local agency's compliance with the law. In *Suter v. Artist M.*, the Court found that the plaintiff could not enforce the requirement, found in the Adoption Assistance and Child Welfare Act, that a state make "reasonable efforts" to avoid the removal of children from their parents' homes. The Court held that the statute failed to set forth standards to judge the "reasonableness" of the state's compliance with the law and was, therefore, too vague and amorphous to allow judicial enforcement. …

5.1.A.1.c. Does the statute create a binding obligation?

In Pennhurst State School and Hospital v. Halderman, the first decision to limit the use of Section 1983 to enforce a federal statute, the Supreme Court considered the ostensibly "rights producing" language found in the Developmentally Disabled Assistance and Bill of Rights Act. The Court ruled that congressional rhetoric about a disabled "bill of rights" found in the statute's declaration of policy could not create enforceable rights since the law did not tie a state's receipt of federal funding to the state's compliance with the purported bill of rights. The statutory language was held to be "hortatory" rather than mandatory. Therefore, the third question a prospective plaintiff must consider is whether the statute sought to be enforced actually requires the state or local agency to do something.

5.1.A.1.d. Does the statute contain a comprehensive enforcement mechanism?

If the statute at issue passes muster under the prongs above, Section 1983 is presumed to provide a remedy unless the defendant shows that the enactment contains a "comprehensive enforcement mechanism" whose breadth or scope suggests that Congress viewed that mechanism as the sole means for statutory enforcement.…

5.1.A.1.e. Does the enactment of a statute by Congress under its Spending Power undermine the enforceability of the statute under Section 1983?

Defendants have argued that legislation enacted under Congress' spending power, Article I, Section 8 of the Constitution, generally creates only voluntary programs which the states are free to reject. Consequently, a state's decision to participate in such a program results only in contractual obligations that cannot rise to the level of being "the supreme law of the land." Although the issue has not come before the Supreme Court, two circuit courts of appeal have rejected this contention: *Antrican v. Odom*and *Westside Mothers v. Haveman*. . . .

5.1.A.1.f. To what degree can a federal regulation create rights enforceable under Section 1983?

[E]very recent appellate decision to address the issue has [held] … that regulations cannot independently create rights, and are enforceable under Section 1983 only to the extent that the regulations merely "flesh out" a statutory provision which itself creates the right.…

5.1.A.2. "Persons" Acting "Under Color of State Law" Under Section 1983

A Section 1983 action can be brought only against a person acting "under color of [state] law." Liability lies against those "who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." Although the term "person" was originally thought to refer only to human beings, the concept was broadened in *Monell v. New York City Department of Social Services* to include cities and local governments whose custom, policy or practice caused the deprivation. [And] when the defendant is a government employee doing his or her job and acting under apparent government authority, she or he is very likely a "state actor. When a private actor is involved, as is increasingly the case with the trend towards "privatization" of government services, the waters are somewhat murkier.

Martin A. Schwartz, Fundamentals of Section 1983 Litigation, 17 Touro L. Rev. 525 (2001)

I. INTRODUCTION

My subject is the fundamentals of Section 1983 litigation. I thought it might help to start with a fact pattern in a typical police misconduct case. It is a fact pattern that I will come back to at different points during my presentation.

Let us assume that we have a plaintiff, Paula Plaintiff, who was arrested. Paula claims that the arresting officer used excessive force during the course of the arrest, and she has asserted a claim for compensatory damages against the police officer. She is also seeking punitive damages. Let us assume that she asserted a claim against the municipality as well. Note that although Paula can bring a claim against the municipality for compensatory damages, municipalities remain immune from punitive damages. Judge Calabresi of the Second Circuit wrote a long opinion indicating that it may be time to reconsider that issue. However, in this case Paula does not seek punitive damages against the municipality.

Let us assume that her claim against the municipality is based upon a failure of the municipality to train and supervise its police officers properly with respect to the use of force in making arrests. It goes without saying that the complaint would also assert a claim for attorney's fees, and there might be supplemental state law claims as well.

II. ELEMENTS OF THE SECTION 1983 CLAIM

The first question to be confronted is: what are the elements of Paula's Section 1983 claim for relief? If you look at the Supreme Court decisional law, it is quite consistent in articulating two, and only two, elements that Paula must allege. She must allege a violation of her federally protected rights, and that the violation occurred under color of state law. This description is incomplete, however, because there are actually four elements of a Section 1983 claim for relief, and in municipal liability cases, there are five elements. Paula must first allege a deprivation of her federally protected rights. Secondly, she has to allege causation by satisfying a type of proximate cause requirement that is read into Section 1983. As the third element she must allege that the deprivation of her federal rights was caused by a "person." Finally, she must allege that this person acted under color of state law. Additionally, since Paula is also seeking to establish municipal liability, she must also establish that the violation of her federally protected rights was attributable to the enforcement of some type of municipal policy or practice.

A) DEPRIVATION OF A FEDERALLY PROTECTED RIGHT

One of the most important principles of Section 1983 litigation is that Section 1983 itself does not give the plaintiff any rights; it does not create any rights; it does not establish any rights. Section 1983 is the procedural vehicle that authorizes the assertion of a claim based upon the deprivation of a federal right created by some source of federal law other than Section 1983. That source of federal law is usually the Federal Constitution. In some cases, it is a federal statute, but it must be a federal statute other than Section 1983.

Paula claims that excessive force was used against her by the police officer during the course of her arrest. Given her claim, it is easy in Paula's case to identify the constitutional right at issue. Paula's claim is based upon the Fourth Amendment. Consequently, she must show that the use of force by the police officer was objectively unreasonable.

It must be noted, however, that although it is easy to identify the constitutional claim in Paula's case, in many cases it is not easy to figure out what the constitutional violation is. In my opinion,

one of the great difficulties with Section 1983 litigation is determining the basis of the constitutional claim. This difficulty arises because Section 1983 incorporates all, or at least virtually all, of the individual rights in the Federal Constitution and makes them all potentially enforceable against defendants who acted under color of state law. Even for constitutional scholars, it is often difficult to figure out whether a constitutional violation exists because there is not always Supreme Court decisional law on point.

B) CAUSATION

The second element, causation, encompasses a type of proximate cause requirement that is built into Section 1983. I refer to a "type" of proximate cause requirement because although courts sometimes refer to the requirement as "proximate cause," courts also use other language, such as "causal connection." In addition, in municipal liability cases, other language like "direct causal connection" or "affirmative link" may appear. One of the unsettled questions is whether the causation requirement in Section 1983 is intended to be the same proximate cause requirement that exists with respect to common law torts, or whether the causation requirement is different under Section 1983. This question has not yet been resolved by the United States Supreme Court. The differences in the way causation is characterized, from decision to decision, might simply be attributed to the use of different language by the Court. Still, it remains somewhat of an unsettled question as to whether the causation requirement in Section 1983 is intended to be precisely the same as the proximate cause requirement that is used for common law tort cases. . . .

C) A "PERSON" WITHIN THE MEANING OF SECTION 1983

The third element is that the defendant must be a "person" within the meaning of Section 1983. State and municipal officials who are sued in their personal capacities are clearly "persons" within the meaning of Section 1983 and they may be sued under Section 1983. Municipalities and other municipal entities are also considered "persons" within the meaning of Section 1983 as a result of the *Monell* decision. If a plaintiff chooses to sue a municipal official in the official's official capacity, that is considered the same thing as suing the municipality. If you think about it then, there is no reason to sue a municipal official in his or her official capacity. The plaintiff can simply name the municipality as a defendant. There are a fairly large number of decisions holding that if the plaintiff names both the municipality and a particular municipal official in that official's official capacity as defendants, the official capacity claim should be dismissed as redundant. The official capacity claim is redundant because it does not add anything to the litigation.

One interesting point to note here, which is not an overwhelming point but worth mentioning in order to avoid needless headaches, is that departments of municipalities, like police departments and sheriffs departments, departments of corrections, and commissions, are usually held to be not suable entities. They are not "persons" within the meaning of Section 1983. Since they are not suable entities, and are commonly dismissed as party defendants, the plaintiff's lawyer should not bother naming them as defendants, but should name the municipality itself.

In attempting to sue a state or state agency under Section 1983, the plaintiff must take into account that states and state agencies sued for monetary relief under Section 1983 are not considered Section 1983 "persons." The interpretation of the word "person" under Section 1983 is thus in harmony with Eleventh Amendment decisional law. The plaintiff can, however, get prospective relief against a state government by naming the appropriate state official in his or her official capacity. The plaintiff cannot sue the state or the state agency for prospective relief, but the plaintiff is able to obtain prospective relief against the responsible state official in his or her official

capacity.

D) ACTION UNDER COLOR OF STATE LAW

Assuming that we have a "person" who is suable under Section 1983, the plaintiff must show that this person acted under color of state law. The easiest case for a finding of action under color of state law is where the state or local official acted while carrying out his or her official responsibilities in accordance and compliance with state law. Difficulty arises when the official acts in violation of state law. If you think about it, Paula Plaintiff's claim presents this type of issue. If she alleges that the officer used excessive force, there is a good probability that the officer was using force in violation of state law standards.

The key question here, and sometimes it is an easier question to ask than to answer, is whether the official was using state authority. Was the official acting pursuant to the power of the state? Was the official using, albeit abusing, state authority? An official who uses, but abuses, state authority by acting in violation of state law nevertheless is said to be acting under color of state law?

As you go down the line, this issue gets tougher and tougher. The next question to ask is: how are officials who use state authority in violation of state law defined? How do we distinguish them from officials who may have been acting in a purely private capacity? In the examples that come to mind, there are two groups of cases where this is a recurrent issue. One example is the school teacher abuse cases where public school teachers abuse students. The question in those cases is whether the teacher was acting as an individual, or alternatively, whether the teacher was exercising, albeit abusing, state authority.

How about private companies or private individuals? They will be found to have acted under color of state law only when they are engaged in state action.

III. THE IMMUINITY DEFENSES

Let us now look at the immunity defenses. My hypothetical police officer here has been sued for damages in his personal capacity. When there is a personal capacity claim against a public official under Section 1983, that official is very likely to raise an immunity defense. Common law immunities have been read into Section 1983 by the United States Supreme Court. Although there is nothing in Section 1983 itself that speaks to the question of immunity, the Supreme Court's position is that when Congress adopted the original version of Section 1983 back in 1871, Congress intended that the common law immunities be considered part of the Section 1983 cause of action.

A) ABSOLUTE IMMUNITY

Some officials are entitled to absolute immunity. This is the cat's pajamas of immunity because absolute means absolute. Even if the official acted in bad faith or with malice, and even if the official violated clear federal law, the official will be protected from personal liability if she has absolute immunity. So the question becomes: who are these lucky souls? They are mainly judges, prosecutors, legislative officials, and witnesses.

Most officials, however, and now we are talking about executive and administrative officials, have a somewhat lesser immunity we call qualified immunity. Qualified immunity will protect them as long as they do not violate clearly established federal law.

B) QUALIFIED IMMUNITY

Other than the question of whether the plaintiff has been able to establish a violation of a federally protected right, this is the most critical issue in Section 1983 litigation. In *Harlow v. Fitzgerald,*

the Supreme Court attempted to simplify qualified immunity. *Attempted*, because qualified immunity continues to be nothing short of a nightmare. The court attempted to simplify qualified immunity by turning the qualified immunity defense into a legal issue that could be determined as a matter of law by federal district court judges early in the litigation. The idea was that qualified immunity would be a test of objective reasonableness, of whether the official acted in an objectively reasonable fashion. The test would determine whether the official acted in such a fashion by asking the question: did this official violate clearly established federal law? Officials who act in violation of clearly established federal law are considered officials who did not act in an objectively reasonable fashion and are, therefore, not protected by qualified immunity. On the other hand, officials who violate federal law, but not clearly established federal law, are viewed as having acted in an objectively reasonable fashion and, therefore, would be protected from personal liability by the qualified immunity defense.

V. MUNICIPAL LIABILITY

Municipal liability is the last issue I want to address. Because there is no respondeat superior liability under Section 1983, in order to establish municipal liability the plaintiff has to show that, in some way, the violation of her federally protected rights was attributable to the enforcement of a municipal policy or practice. Municipal entities, unlike public officials, cannot assert the official's common law immunities, so that, even if the municipal official is protected by an absolute immunity or qualified immunity because the official acted in an objectively reasonable manner, the municipality is still potentially subject to Section 1983 liability. This is one of the main reasons that Section 1983 plaintiffs often couple their personal liability claims with municipal liability claims. The other big reason is to get to the deeper pocket municipal entity.

While Section 1983 complaints commonly assert claims against municipal entities, Section 1983 plaintiffs very often have great difficulties establishing municipal liability. The reason for that is, if one looks at the different potential bases for establishing municipal liability, one finds difficult problems for Section 1983 plaintiffs.

One possibility would be for the plaintiff to rely upon a formally promulgated policy by the municipality, for example, by the city council. The problem is that the formally promulgated policy is often not there. For instance, in police misconduct cases, municipalities typically do not have policies that allow police officers to use unreasonable force, to brutalize individuals, or to make arrests without probable cause. A formally promulgated policy is a potential basis of municipal liability, but it is not found in many cases. It is just not there.

The second possibility is for the plaintiff to be able to show a custom or practice. This custom or practice could be a custom or practice of the higher echelon municipal officials, the policy makers. Alternatively, it could be a practice by lower echelon employees, which, if sufficiently pervasive, gives the higher ups actual, or at least constructive, knowledge as to what is taking place. Although the law recognizes custom or practice as a basis for municipal liability, sufficient evidence to establish the claim is often lacking. These claims are very difficult to prove. It is also very time consuming to find that kind of evidence, requiring a lot of investigation and discovery. The number of plaintiffs who are able to actually prove a municipal custom or practice is quite few in number.

The third possibility is a final decision by a municipal policy maker. This is a possibility, but again, very often, the wrong that the plaintiff is complaining about was not a wrong of a final policy maker of the municipality. Very often, it was the police officer on the beat, or some subordinate employee that engaged in conduct that violated the plaintiff's rights.

Fred Smith, Local Sovereign Immunity, 116 Colum. L. Rev. 409 (2016)

Local governments serve as republican dispensaries of core sovereign functions. Across the country, citizens elect a range of representatives to exact taxes and allocate limited resources in service of the public good. Whether they are called city councilpersons or aldermen, county commissioners or supervisors, local elected representatives often play this crucial role. [L]ocal governments … dispense core sovereign functions. This focus exposes two competing lessons. On the one hand, if it is true that damages suits and intrusive judgments can cripple the ability of states to carry out core sovereign functions, the same is presumably true of local governments as well. On the other hand, the expansive role local governments play in Americans' everyday lives means that a lack of constitutional accountability for constitutional violations is of both pressing and profound concern.

A. *Local Sovereign Interests*

1. *Police Power*.--A guiding principle of federalism, and concomitant state sovereignty, is that states retain a "general police power" that the national government lacks. In *Gonzales v. Oregon*, the Court posited that "the structure and limitations of federalism ... allow the States 'great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."' This general police power permits states to legislate, and sometimes litigate, on behalf of the safety and health of those within its borders. In *United States v. Morrison*, a case often hailed and lamented as a quintessential example of federalism jurisprudence, the majority noted that it could "think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims."

These cases have sometimes acknowledged the role that local governments play in carrying out these powers. Even a cursory observation of local governments confirms this role. Cities and counties across the nation have police forces that respond to disturbances; initiate arrests for major and minor crimes; enforce court orders; and even enforce locally crafted ordinances. When a person dials 911 and reports an emergency, the first responder is likely not an employee of a state government in a distant state capital, but a local policeperson or firefighter. Local governments are critical players in carrying out states' residual police power.

2. *Education*.--In *United States v. Lopez*, the United States Supreme Court famously invalidated the Gun Free School Zones Act on the grounds that it exceeded constitutionally authorized federal power. Concurring, Justice Kennedy opined that "[w]hile the intrusion on state sovereignty may not be as severe in this instance as in some of our recent Tenth Amendment cases, the intrusion is nonetheless significant." The federal act invaded this sovereignty in part because of the traditional role states have played in educating children. "An interference of these [state functions] occurs here, for it is well established that education is a traditional concern of the States." Because schools are "owned and operated by the States or their subdivisions," Justice Kennedy reasoned that the Court had "a particular duty to ensure that the federal-state balance is not destroyed."

Among the state's subdivisions that own and operate schools are local governments. Local governments largely fund public schools and public schools constitute a significant portion of state budgets. And often, it is local city councils and school boards that make decisions about policies and resources in those schools. Local governments, then, play a critical role in carrying out this traditional state function.

*** * ***

Leading scholars have astutely identified the tension inherent in treating local governments as arms of the state for some purposes, and as laboratories of democracy for other purposes. But there are ways in which these conceptions are reconcilable. In ways we have come to accept, states vest local government with historically sovereign powers to protect, educate, and allocate taxes. And like state officials, locally elected representatives often make decisions about how to wield this formidable sovereign power.

B. ***Lawsuits as a Threat to Sovereign Functions***

State sovereignty jurisprudence often also adduces states' collective role as exactors and stewards of tax dollars. In *Alden*, the Court explained this concern as follows: "Private suits against nonconsenting States may threaten their financial integrity, and ... strain States' ability to govern in accordance with their citizens' will, for judgment creditors compete with other important needs and worthwhile ends for access to the public fisc ...."

Accordingly, a state has the important role of tending to its own treasury in ways that comport with the public will and public good. And when that treasury is depleted, the state's survival is imperiled. "Today, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process." For example, as previous commentators have documented, "states faced staggering debts ... in the aftermath of the Revolutionary and Civil Wars." Allowing judicial enforcement of those debts would have presented severe challenges to states' survival.

The Court's observation in *Alden* about "financial integrity" resembles an insight found in cases protecting local government's role in managing the public fisc. In *City of Newport v. Fact Concerts, Inc.*, when the Court rejected punitive damages against cities, it reasoned, "To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the financial integrity of these governmental entities." Local governments, after all, often exact sales and property taxes and allocate them for the public good.

This concern even looms in cases that involve prospective, rather than retrospective, relief. Prevailing plaintiffs in § 1983 cases are entitled to attorneys' fees, including suits for injunctions and declaratory relief. At oral argument in *Los Angeles County v. Humphries*, the case that expanded the heightened causation requirement to suits for prospective relief, several justices identified a potential injustice to taxpayers. The issue of attorneys' fees arose at least twenty-six times during oral argument. As Justice Scalia put it, "I suspect ... the case is mostly about attorneys' fees."

Lawsuits and execution of legal judgments threaten local treasuries and, therefore, their ability to engage their sovereign functions. Just as executing judgments against states could "[endanger] government buildings or property which the State administers on the public's behalf," the same could be said of cities. Courts, after all, sometimes award property to a prevailing party in execution of a judgment. And as Professor Michael McConnell has observed, courts have on rare occasions awarded government property to litigants in execution of judgments against cities. For example, the case of *Estate of DeBow v. City of East St. Louis* involved a decision by a court to award a park and city hall building in execution of a judgment. The Illinois Appellate Court found that awarding city hall to a litigant violated public policy. Still, the court simultaneously upheld the portion of the same execution order that awarded a litigant 220 acres of city-owned vacant

ground.

What is more, as Professor Michelle Anderson has demonstrated, when a city's dollars or property disappear, sometimes cities themselves fall as well. Legal judgments against Mesa, Washington, and Half Moon Bay, California, mark recent examples of legal judgments bringing cities to the brink of collapse.

C. *Accountability*

In government, the power to help citizens is inevitably bundled with the power to harm them. One does not need to travel into the realm of the hypothetical to consider what types of injustices can thrive when powerful local governments are immune from suit.

1. *Municipal Immunity Pre*-Monell.--Prior to 1978, local governments were immune from suit under § 1983. And during that time, a number of local governments abused their sovereign role as custodians of education.

In 1954, the Supreme Court issued its landmark decision in *Brown v. Board of Education*, unanimously using its equitable power to overturn de jure segregation in American schools as a violation of the Fourteenth Amendment's Equal Protection Clause. "Today, education is perhaps the most important function of state and local governments," the Court observed. "Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society .... It is the very foundation of good citizenship."

Nonetheless, neither *Brown* nor its sequel a year later proved sufficient to overcome many local governments' recalcitrant and ominous commitment to "segregation now, segregation tomorrow, and segregation forever." The overwhelming majority of school districts throughout the South did not integrate until the late 1960s and early 1970s. Indeed, when they finally did, local school districts were primarily motivated by something that was not at stake in *Brown* and its progeny: money. That is, a substantial number of school districts desegregated following the passage of a federal law that tied conditional grants to school districts in exchange for "[d]ismantling the dual system of education in the South." To encourage meaningful integration, economists recently demonstrated, a district needed to be paid roughly $1,200 per pupil.

This necessarily means that the threat of private suits for prospective relief, pursuant to the court's equitable authority, was insufficient to convince school districts to desegregate schools. We will never know whether schools would have integrated earlier if monetary damages for psychic and emotional harms had been among the remedies available to school children throughout the South.

2. *Municipal Immunity Post*-Monell.--Today, it is not uncommon for a plaintiff to lack any remedy for a constitutional violation committed by a local agent. The following case typifies this phenomenon.

Jesse Buckley is a resident of Florida whom a police deputy stopped for speeding in March 2004. At the time of the traffic stop, Buckley was homeless and asked the deputy to take him to jail. He allowed himself to be handcuffed, but then, after exiting the car, fell to the ground and sobbed uncontrollably. "My life would be better if I was dead," he told police. The officer threatened to tase Buckley if he refused to stand, but Buckley refused to stand. "I don't care anymore-tase me." The officer then tased the handcuffed, sobbing man three times into different areas of his back and chest. The shocks lasted roughly five seconds per round.

Buckley sued the officer and Washington County, Florida, for excessive force under the Fourth Amendment's prohibition against unreasonable seizures. A federal district court dismissed the claim against the County on a motion for summary judgment. That court, which viewed a video of the incident, noted that "[t]he only apparent purpose for using the taser was to cause the restrained Buckley, who had not been violent or dangerous, to get into [the deputy's] car." The district court also acknowledged that an official investigation conducted by Washington County, Florida exonerated the officer of any wrongdoing and failed to discipline him. Further, the city lacked a written policy on the proper use of a taser when used without darts. Still, the court found that even if the deputy violated the Constitution, the County could not be held liable under the stringent "policy or custom" requirement.

The following year, in a routine unpublished opinion, the Eleventh Circuit dismissed the claim against the deputy as well on qualified immunity grounds. To be sure, a majority on an Eleventh Circuit panel apparently agreed that, at a minimum, the third instance of tasering was unconstitutional. As Judge Beverly Martin wrote, "[T]he Fourth Amendment forbids an officer from discharging repeated bursts of electricity into an already handcuffed misdemeanant--who is sitting still beside a rural road and unwilling to move-- simply to goad him into standing up." But the two-judge majority concluded that the officer was entitled to qualified immunity, reasoning that previous case law could not have given him "fair and clear notice" that his conduct violated the Constitution. This meant that despite the constitutional violation, the plaintiff was left with no constitutional remedy.

Scholars such as Professor Pamela Karlan have shown that federal dockets are replete with cases like Buckley's--where immunities and the municipal causation requirement conspire to immunize local governments and their officials for conduct that violates the Constitution.

Regularly leaving plaintiffs without this remedy undermines representative government. Apposite are the words of Representative Samuel Shellabarger, the author of § 1983, who shepherded the provision through the House of Representatives: "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation." The frequency with which plaintiffs are left without remedy for constitutional violations raises questions about whether this legislative promise is adequately fulfilled today.

The rights-remedies gap also presents substantial challenges to federalism and the reimagined zone of autonomy anticipated by the framers of the Fourteenth Amendment. As the Court recognized in 1880 in *Ex parte Virginia*, "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power." Thus, when Congress enacts legislation pursuant to that amendment, "not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority."

It diminishes these insights when courts refuse to correct constitutional violations on grounds of federalism and autonomy. Indeed, Professor Spaulding has observed that odes to federalism that ignore this monumental history are not just incomplete, but dangerous, because they "turn[] on a chillingly amnesic reproduction of antebellum conceptions of state sovereignty." They relegate the promise of the 42nd Congress to, as Justice Robert Jackson said in another context, "only a

promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."

*** * ***

While there are ways that suits against cities challenge representative government and federalism, cases as epic as *Brown* and as commonplace as *Buckley* dramatize a competing concern: Failure to enforce constitutional guarantees also challenges both representative government and the federal structure as reborn during Reconstruction. Any judicially crafted municipal immunity should aim to calibrate these competing demands on foundational ideals.

Federal Rules of Civil Procedure, Rule 23. Class Actions

(a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:

(A) the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) CERTIFICATION ORDER; NOTICE TO CLASS MEMBERS; JUDGMENT; ISSUES CLASSES; SUBCLASSES.

(1) *Certification Order.*

(A) *Time to Issue.* At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.

(B) *Defining the Class; Appointing Class Counsel.* An order that certifies a class action must define the class and the class claims, issues, or defenses, and must appoint class counsel under Rule 23(g).

(C) *Altering or Amending the Order.* An order that grants or denies class certification may be altered or amended before final judgment.

(2) *Notice.*

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3)—or upon ordering notice under Rule 23(e)(1) to a class proposed to be certified for purposes of settlement under

Rule 23(b)(3)—the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice may be by one or more of the following: United States mail, electronic means, or other appropriate means. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) *Judgment.* Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

(4) *Particular Issues.* When appropriate, an action may be brought or maintained as a class action with respect to particular issues.

(5) *Subclasses.* When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.

(d) CONDUCTING THE ACTION.

(1) *In General.* In conducting an action under this rule, the court may issue orders that:

(A) determine the course of proceedings or prescribe measures to prevent undue repetition or complication in presenting evidence or argument;

(B) require—to protect class members and fairly conduct the action—giving appropriate notice to some or all class members of:

(i) any step in the action;

(ii) the proposed extent of the judgment; or

(iii) the members' opportunity to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or to otherwise come into the action;

(C) impose conditions on the representative parties or on intervenors;

(D) require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly; or

(E) deal with similar procedural matters.

(2) *Combining and Amending Orders.* An order under Rule 23(d)(1) may be altered or amended from time to time and may be combined with an order under Rule 16.

(e) SETTLEMENT, VOLUNTARY DISMISSAL, OR COMPROMISE. The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised only with the court's approval. The following procedures apply to a proposed settlement, voluntary dismissal, or compromise:

(1) *Notice to the Class*.

(A) *Information That Parties Must Provide to the Court*. The parties must provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class.

(B) *Grounds for a Decision to Give Notice*. The court must direct notice in a reasonable manner to all class members who would be bound by the proposal if giving notice is justified by the parties' showing that the court will likely be able to:

(i) approve the proposal under Rule 23(e)(2); and

(ii) certify the class for purposes of judgment on the proposal.

(2) *Approval of the Proposal*. If the proposal would bind class members, the court may approve it only after a hearing and only on finding that it is fair, reasonable, and adequate after considering whether:

(A) the class representatives and class counsel have adequately represented the class;

(B) the proposal was negotiated at arm's length;

(C) the relief provided for the class is adequate, taking into account:

(i) the costs, risks, and delay of trial and appeal;

(ii) the effectiveness of any proposed method of distributing relief to the class, including the method of processing class-member claims;

(iii) the terms of any proposed award of attorney's fees, including timing of payment; and

(iv) any agreement required to be identified under Rule 23(e)(3); and

(D) the proposal treats class members equitably relative to each other.

(3) *Identifying Agreements.* The parties seeking approval must file a statement identifying any agreement made in connection with the proposal.

(4) *New Opportunity to Be Excluded*. If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.

(5) *Class-Member Objections.*

(A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.

(B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:

(i) forgoing or withdrawing an objection, or

(ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

(C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

(f) APPEALS. A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule, but not from an order under Rule 23(e)(1). A party must file a petition for permission to appeal with the circuit clerk within 14 days after the order is entered or within 45 days after the order is entered if any party is the United States, a United States agency, or a United States officer or employee sued for an act or omission occurring in connection with duties performed on the United States' behalf. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

(g) CLASS COUNSEL.

(1) *Appointing Class Counsel.* Unless a statute provides otherwise, a court that certifies a class must appoint class counsel. In appointing class counsel, the court:

(A) must consider:

(i) the work counsel has done in identifying or investigating potential claims in the action;

(ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action;

(iii) counsel's knowledge of the applicable law; and

(iv) the resources that counsel will commit to representing the class;

(B) may consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class;

(C) may order potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney's fees and nontaxable costs;

(D) may include in the appointing order provisions about the award of attorney's fees or nontaxable costs under Rule 23(h); and

(E) may make further orders in connection with the appointment.

(2) *Standard for Appointing Class Counsel.* When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4). If more than one adequate applicant seeks appointment, the court must appoint the applicant best able to represent the interests of the class.

(3) *Interim Counsel.* The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action.

(4) *Duty of Class Counsel.* Class counsel must fairly and adequately represent the interests of the class.

(h) ATTORNEY'S FEES AND NONTAXABLE COSTS. In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement. The following procedures apply:

(1) A claim for an award must be made by motion under Rule 54(d)(2), subject to the provisions of this subdivision (h), at a time the court sets. Notice of the motion must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner.

(2) A class member, or a party from whom payment is sought, may object to the motion.

(3) The court may hold a hearing and must find the facts and state its legal conclusions under Rule 52(a).

(4) The court may refer issues related to the amount of the award to a special master or a magistrate judge, as provided in Rule 54(d)(2)(D).

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 24, 1998, eff. Dec. 1, 1998; Mar. 27, 2003, eff. Dec. 1, 2003; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

Shriver Center, Federal Practice Manual for Legal Aid Attorneys[1]

Chapter 7: Class Actions

7.1 Whether to Bring a Class Action

When engaging in strategic litigation planning, counsel must determine whether the case can and should be brought as a class action. The ramifications of filing a case as a class action must be carefully considered and discussed with the potential class representative(s). Counsel must initially determine whether the case meets the requirements for a class action. If these requirements are likely to be satisfied, several additional considerations are relevant in deciding whether to bring a case as a class action: (1) can the case be won; (2) are there sufficient resources to bring a class action; (3) does having a class facilitate bringing a case to judgment; (4) is a class necessary for relief?

7.1.A. Probability of Success on the Merits

Counsel's assessment of the strength of a case on the merits is always a factor in deciding whether to bring a case, whether framed as a class action or not. However, a judgment in a class action will likely have preclusive effect for the class on class members named or described in the judgment. If plaintiffs win, relief will benefit all affected individuals, including class members with very small claims who might not otherwise sue. However, if plaintiffs lose, the judgment has claim-preclusive effect on all class members and those in privity with them unless absent class members are subsequently able to establish lack of jurisdiction, lack of notice or inadequate representation. The potential for claim preclusion underlies the fundamental due process issues inherent in class action practice. . . .

7.1.B. Resources

Another factor to consider is whether your program has sufficient resources to bring the class action. On the one hand, if the issue is not litigated as a class action, a systemic problem may remain unresolved, and numerous individual cases may have to be brought. This results in duplicative effort. On the other hand, bringing a class action commits program resources to a time-consuming, frequently long-term lawsuit in which zealous representation requires fully litigating the interests of the entire class. …

7.1.C. Effects on the Litigation Process

The third set of considerations relates to how a certified class affects the process of bringing the case to judgment. … Most important is the possibility that the named plaintiff's legal issue will be resolved, thereby requiring a class to avoid mootness. If concern about mootness is the only reason to bring a class action, counsel should assess whether it could be avoided some other way, such as by joining several plaintiffs, having an organizational plaintiff, or by bringing a claim for damages, including nominal damages.

Further, in a class action, a plaintiff class may be allowed much broader discovery than an individual party. However, filing a case as a class action may also result in more vigorous discovery of the named plaintiff(s), particularly on issues relating to plaintiff's adequacy of representation, typicality, and knowledge of the meaning of class representation. …

[1] http://federalpracticemanual.org/

Filing a class action may allow more opportunities for media exposure and public education and awareness about the issues of the case. On occasion, this coverage can be helpful in surfacing witnesses or other useful evidence. In some cases, however, it may create a public backlash that might harm the named plaintiffs' case. Named representatives should be prepared to have the glare of publicity focused on them personally.

Finally, counsel should consider the likelihood that defendants will appeal the case. Defendants may be more likely to appeal an adverse judgment in a class action than in an individual case. Indeed, Rule 23(f) of the Federal Rules of Civil Procedure permits interlocutory appeals of class certification decisions, with a possibility of a stay pending appeal. This issue must be discussed with the named plaintiffs.

7.1.D. Effects on Relief

Several issues relating to relief are critical considerations in deciding whether to bring the case as a class action. These include whether to seek preliminary relief on behalf of named plaintiffs or the class, how tolling of the statute of limitations affects plaintiffs or class claims, and settlement negotiation. …

Litigation strategy and settlement negotiations may create potential conflicts between the named plaintiffs and the class. The general rule is that named plaintiffs have a fiduciary duty to absent class members and are not allowed to abandon their representation or settle in such a way that significantly prejudices the class. At the same time, named plaintiffs may be responsible for regular and lengthy monitoring of the decree or judgment on behalf of the class. These problems are certainly not insurmountable, but they must be carefully discussed with the named plaintiffs before filing. Following this discussion, a retainer should be signed which should detail the agreements made on settlement, negotiation, attorney fees, commitments regarding appellate representation, and provisions for terminating representation.

7.4 Resolution of Class Actions

Class counsel may determine that settlement of the case is appropriate. If a settlement is reached the court will hold a fairness hearing on the settlement and counsel must give notice of the settlement to class members. As in other aspects of class action litigation, the negotiation between the parties will be scrutinized by the court during the fairness hearing. The court will consider any conflicts between named plaintiffs and the class and issues such as attorney fees. Negotiation, notice of settlement and fairness proceedings are discussed below.

7.4.A. Negotiations

Ethical considerations are somewhat different in class action lawsuits. Class action negotiations are at risk of greater collusion between counsel because there is less client control than in individual suits and because the client to whom counsel is accountable may be "amorphous and widespread." Defendants often seek to negotiate plaintiffs' attorney fees as part of the overall settlement. The Supreme Court addressed this issue in *Evans v. Jeff D.*, which held that this behavior on the part of defense counsel was not unethical. However, the *Manual for Complex Litigation* suggests that courts reviewing such settlements should examine them for the "fairness of the allocation between damages and attorney fees, noting that "[t]he ethical problem will be eased if the parties agree to have the court make the allocation."

Persons initiating the class action must be kept apprised of negotiations as they develop. In one disciplinary action, an attorney was suspended and required to pay a fine when he failed to inform his clients about negotiations, entered into a secret agreement in which he was to receive $225,000 in fees, agreed not to represent anyone with related claims and agreed to keep the agreement confidential. The District of Columbia Court of Appeals found this conduct to have violated eight different ethical rules. Courts have cautioned against the inadequacy of lawyer representation and the temptation that lawyers might face, particularly where the individual claims were small, to sell out the class.

Counsel may seek to settle a putative class action prior to class certification. A "settlement class" is one that has been certified at the same time the settlement has been approved. Certification at the time of settlement approval binds all members of the class who have not opted out to the judgment. Settlement classes must satisfy all the requirements of Rule 23(a) and (b). Whether a class action would be manageable is not considered in settlement classes since the matter, by definition, does not proceed to trial. Because of increased possibilities of collusion, settlement classes are subject to more searching scrutiny.

7.4.B. Notice and Settlement

As with many other aspects of class actions, during notice, settlement and fairness proceedings, the court is the protector of the class or putative class. Some courts describe the role of the court at this stage of the proceedings as a fiduciary one. Individual litigants are generally free to compromise their claims and plaintiffs are free to dismiss them voluntarily or, if the complaint has been answered, with the agreement of the defendant under Rule 41(a). Cases filed as class actions generally require more, as detailed in Rule 23(e), and this specific exception is indicated in Rule 41(a).

The 2003 amendments to Rule 23(e) are substantial and are designed to enhance judicial oversight of settlements. Rule 23(e)(1)(A) now provides that court approval is required for “any settlement, voluntary dismissal, or compromise of the claims, issues, or defenses of a *certified* class.” [Emphasis supplied.] This language was added to “resolve any ambiguity” of the previous language and to make clear that 23(e) applies only to a “certified class” and not to settlements with proposed class representatives that resolve only individual claims. This amendment reverses the rule in most circuits requiring approval of the settlement of pre-certification class actions.

The approval by the court is a two-step process: the settlement is presented to the court, which makes a preliminary fairness evaluation. If the preliminary evaluation does not cast doubt on its fairness, the court directs that notice be given for a formal fairness hearing.

Rule 23(e)(1)(B) requires notice where the settlement binds the class through claim or issue preclusion and is not required when the settlement only binds the individual class members. Settlement notice must be prepared in a reasonable manner in all class action settlements, regardless of whether it is a (b)(1), (b)(2) or (b)(3) class. This notice must explain the proposed settlement or dismissal to the class members , specify a means for them to file objections to the proposed terms, set forth any deadline for filing such objections, and inform them of the date of the hearing where their objections will be considered. The form of such a notice should be submitted to the court for approval either as part of the settlement agreement itself or by separate motion. "Reasonable" notice is most commonly notice by mail, but may be supplemented or, when appropriate, replaced by notice by publication. Rule 23 does not necessarily require the party sending the notice to “exhaust every conceivable method of identification.” This notice need not be individualized. Because

both the class and the defendants seek approval of the settlement, courts have shifted the burdens and costs of providing notice to the defendants when appropriate.

Defendants in settled class actions are now required to provide notice of such settlement within ten days of the filing of the agreement on certain federal and state officials. Generally, unless the defendant is a depository institution, the U.S. Attorney General must be served with such notice. The appropriate state official is defined in 28 U.S.C. § 1715(a)(2) and is often the primary regulator of the defendant. The content of the notice is prescribed in 28 U.S.C. § 1715(b). Of potential concern to plaintiffs is that the court may not give final approval of a proposed settlement until at least 90 days from the date the last defendant made notice on the appropriate government officials. With the exception set forth in 28 U.S.C. § 1715(e)(3), a class member is not obligated to comply with the agreement and is not bound by it if this notice is not provided.

7.4.C. Fairness Hearings

The court is required to ensure that the settlement is fair, adequate, reasonable, and not based on collusion. Some courts also consider whether the settlement furthers the public interest. The court has a "heavy, independent duty" in making the approval as the settlement process is more susceptible to abuse than the "adversarial process." As described by the *Manual for Complex Litigation*, the role of the court is to be a "skeptical client" as there is "typically no client with motivation, knowledge, and resources to protect its own interests." The court must balance a variety of factors in reaching this determination of fairness. These standards are expressed in various ways by the courts but fundamentally involve the following inquiries : 1) a comparison of the strength of the plaintiff's case against the recovery proposed in the settlement); 2) the complexity and risks of continued litigation; 3) the presence of collusion in reaching a settlement; 4) the comments of class members; and 5) the stage of the proceedings and the amount of discovery completed. Rule 23(h) sets forth in detail the requirements necessary for a court to award attorney fees in class actions.

The 2003 Amendments added Rule 23(e)(3) requiring the parties to identify any side agreements to the settlement. This rule authorizes the court to require disclosure of "related undertakings that, although seemingly separate, may have influenced the terms of the settlement by trading away possible advantages for the class in return for advantages for others. Doubts should be resolved in favor of identification." Rule (c)(3) does not contemplate discovery of information related to such agreements.

A court approving a class action settlement must make findings of facts and conclusions of law to support its conclusion that the proposed settlement is fair, reasonable, and adequate. Those findings must identify and apply the factors employed to draw that conclusion and must be sufficiently detailed to provide an adequate explanation to the class and to the appellate court for possible review. Class members are, of course, permitted to make objections to the proposed settlement and the court should address those objections in its findings and conclusions. The court may only approve or disapprove the agreement; the court may not rewrite it.

The standard of review for decisions regarding settlements is "abuse of discretion." However, a review of an interpretation of the agreement is *de novo*. Orders disapproving class settlement are generally not subject to interlocutory review. The Supreme Court held in *Devlin v. Scardelletti* that class members who objected to a class settlement were permitted to appeal approval of the settlement without needing to intervene.

I. INTRODUCTION

Named Plaintiffs Christos Sourovelis, Doila Welch, Norys Hernandez, and Nassir Geiger ("Plaintiffs"), on behalf of themselves and all others similarly situated under Federal Rule of Civil Procedure 23(b)(2), bring this putative class action pursuant to 42 U.S.C. § 1983 against the City of Philadelphia, Mayor James F. Kenney, and Police Commissioner Richard Ross, Jr. (collectively, the "City Defendants"); the Philadelphia District Attorney's Office (the "D.A.'s Office") and District Attorney Seth R. Williams (together, the "D.A. Defendants"); and Sheila A. Woods–Skipper, Jacqueline F. Allen, Joseph H. Evers, and Charles A. Mapp (the "First Judicial District Defendants") (all together, "Defendants") to enjoin and declare unconstitutional the City of Philadelphia's civil forfeiture policies and practices. Plaintiffs' Second Amended Complaint asserts seven claims, all of which allege that Defendants' policies and practices violate the Due Process Clause of the Fourteenth Amendment.

Plaintiffs seek to certify a Rule 23(b)(2) class on their fifth claim for relief ("Count Five"). In Count Five, Plaintiffs claim that the City and D.A. Defendants have a policy and practice of retaining forfeited property and its proceeds for use in funding the D.A.'s Office and the Philadelphia Police Department, including paying the salaries of the prosecutors who manage the civil forfeiture program, thereby providing the D.A.'s Office and the Philadelphia Police Department with a direct financial stake in the outcome of civil forfeiture proceedings. Plaintiffs allege that this arrangement creates a conflict of interest, injects impermissible bias into the civil forfeiture process, and violates Plaintiffs' rights to the fair and impartial administration of justice under the Due Process Clause of the Fourteenth Amendment.

For the reasons that follow, the Court will certify a Rule 23(b)(2) class with respect to Plaintiffs' requests for (1) a declaratory judgment declaring unconstitutional the City and D.A. Defendants' policy and practice of retaining forfeited property and its proceeds for use by the D.A.'s Office and the Police Department; and (2) an injunction enjoining that policy and practice. However, the Court will decline to certify a Rule 23(b)(2) class with respect to Plaintiffs' request for an injunction ordering the return of forfeited property on the basis of the alleged constitutional violations.

II. BACKGROUND

Civil forfeiture statutes permit states and the federal government to file actions, under certain circumstances, to obtain ownership of private real and personal property that is related to certain categories of criminal activity. In Pennsylvania, the Controlled Substances Forfeiture Act, 42 Pa. Cons. Stat. Ann. §§ 6801 and 6802 (the "CSFA"), provides that certain real and personal property that is connected to a violation of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa. Cons. Stat. Ann. §§ 780–101 to 780–144, is subject to forfeiture by the Commonwealth of Pennsylvania. 42 Pa. Cons. Stat. Ann. § 6801. The CSFA sets forth the property that is subject to forfeiture by the Commonwealth, see id., and provides a procedure for the forfeiture proceedings, which must be filed in the court of common pleas of the judicial district where the property is located, see id. § 6802.

Plaintiffs' claims in this action relate to property forfeited through civil forfeiture proceedings brought by the D.A.'s Office in the Court of Common Pleas of Philadelphia County. The majority of the property, Plaintiffs allege, was forfeited pursuant to the CSFA. Second Am. Compl. ("SAC") ¶ 41, ECF No. 157. According to Plaintiffs, Philadelphia's civil forfeiture program is one of the largest municipal forfeiture programs in the country, and "unprecedented in scale." Plaintiffs allege that the D.A.'s Office forfeited over $90 million worth of property from 1987 to 2012 through civil forfeiture proceedings, , yielding an average of $5.6 million in forfeiture revenue each year, . Forfeiture data Plaintiffs obtained from the Pennsylvania Office of the Attorney General indicates that the D.A.'s Of-

fice collected over $72.6 million in forfeiture revenue from fiscal years 2002 through 2014. . Plaintiffs allege that this amount constitutes nearly one-fifth of the general budget of the D.A.'s Office as appropriated by the City of Philadelphia.

Plaintiffs allege that the City and D.A. Defendants seize large quantities of personal property for forfeiture, including cash, cell phones, clothing, jewelry, prescription medication, and licensed firearms. . Plaintiffs claim that the majority of the cash seized involves small amounts of money. . For example, in 2010, Philadelphia filed 8,284 currency forfeiture petitions, with an average of $550 at issue in each case. . Plaintiffs also allege that the City and D.A. Defendants file civil forfeiture petitions on 300 to 500 real properties (mostly private residences) each year. . Approximately 100 of these real properties are forfeited and sold at auction annually; and a significant majority of the remaining cases settle under threat of civil forfeiture..

Plaintiffs' Second Amended Complaint alleges that a number of Defendants' civil forfeiture policies and practices are unconstitutional. With respect to Count Five, specifically, Plaintiffs allege that the City and D.A. Defendants retain the proceeds of civil forfeiture proceedings, which provide the Defendants with a direct financial incentive in the outcome of the proceedings. According to Plaintiffs, the D.A.'s Office and Philadelphia Police Department have a written agreement to share proceeds obtained from forfeiture proceedings, , and use a large portion of the forfeiture revenue to pay salaries. Plaintiffs obtained data from the Pennsylvania Office of the Attorney General indicating that the D.A.'s Office spent over $28.5 million of its forfeiture revenue on salaries from fiscal years 2002 through 2014, including the salaries of the prosecutors who administer Philadelphia's civil forfeiture program. Plaintiffs claim that the City and D.A. Defendants' direct financial stake in civil forfeiture proceedings brings irrelevant and impermissible factors into the investigative and prosecutorial decision-making process, which in turn creates a conflict of interest, actual bias, potential for bias, and/or appearance of bias that violates Plaintiffs' rights to the fair and impartial administration of justice guaranteed by the Due Process Clause of the Fourteenth Amendment.

III. PROCEDURAL HISTORY

Plaintiffs' Second Amended Complaint asserts the following seven claims:

(1) the City and D.A. Defendants' policy and practice of failing to provide notice or a hearing before seizing real property violates the Due Process Clause of the Fourteenth Amendment (Count One);

(2) the City and D.A. Defendants' policy and practice of requiring real property owners to waive their constitutional and statutory rights in order to obtain access to their property or have the forfeiture petition withdrawn violates the Due Process Clause of the Fourteenth Amendment (Count Two);

(3) Defendants' policy and practice of failing to provide a prompt, post-deprivation hearing violates the Due Process Clause of the Fourteenth Amendment (Count Three);

(4) Defendants' policy and practice of repeatedly "relisting" forfeiture proceedings violates the Due Process Clause of the Fourteenth Amendment (Count Four);

(5) the City and D.A. Defendants' retention of forfeited property and its proceeds violates the Due Process Clause of the Fourteenth Amendment (Count Five);

(6) Defendants' policy and practice of prosecutors controlling forfeiture hearings violates the Due Process Clause of the Fourteenth Amendment (Count Six);

(7) Defendants' administration of civil forfeiture and related proceedings, including notices to property owners, the timing of filings, and access to court hearings, violates the Due Process Clause of the Fourteenth Amendment (Count Seven).

IV. PROPOSED CLASS

Plaintiffs seek to certify the following class under

Rule 23(b)(2) with respect to their fifth claim for relief:

> All persons who hold legal title to or otherwise have a legal interest in property against which a civil-forfeiture petition was filed by the Philadelphia District Attorney's Office on or after August 11, 2012, or will in the future be filed, in the Court of Common Pleas of Philadelphia County.

V. LEGAL STANDARD

A party seeking class certification must satisfy Rule 23(a) of the Federal Rules of Civil Procedure and the requirements of one of the subsections of Rule 23(b). Wal–Mart Stores, Inc. v. Dukes, 564 U.S. 338, 345, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011). Under Rule 23(a), Plaintiffs must demonstrate that: "(1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). With respect to Rule 23(b), Plaintiffs here seek to certify a class under Rule 23(b)(2), which is appropriate when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. (23)(b)(2).

"Rule 23 does not set forth a mere pleading standard," but instead, "[a] party seeking class certification must affirmatively demonstrate [her] compliance with the Rule—that is, [she] must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc." Dukes, 564 U.S. at 350, 131 S.Ct. 2541. The Supreme Court has repeatedly "recognized ... that 'sometimes it may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.' "

The Supreme Court has also recognized that "[f]requently[,] th [is] 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped.' " Dukes, 564 U.S. at 351, 131 S.Ct. 2541. That is, "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Id..

VI. DISCUSSION

A. Rule 23(a)

The City and D.A. Defendants concede that Plaintiffs' proposed class satisfies numerosity and that the proposed class counsel adequately represents the class. They challenge only commonality, typicality, and Plaintiffs' ability to adequately represent the class. Nonetheless, the Court must satisfy itself, through a "rigorous analysis," that all of the prerequisites of Rule 23(a) are met. See Dukes, 564 U.S. at 350–51, 131 S.Ct. 2541

For the reasons discussed below, the Court finds that Plaintiffs have met their burden to demonstrate that their proposed class satisfies the Rule 23(a) requirements of numerosity, commonality, and adequacy of representation. However, the Court finds that Plaintiffs' claims are not typical of the entire proposed class in one respect: Plaintiffs' property was subject to civil forfeiture pursuant to the CSFA, specifically, and Plaintiffs seek to certify a class of all persons whose property was subject to civil forfeiture, regardless of the legal basis for the forfeiture.

1. Numerosity

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). The Third Circuit has explained that "no minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the [numerosity] prong" has been met.

The putative class consists of thousands of individuals who have a legal interest in property against which a civil forfeiture petition was filed. As this

number is far greater than forty, the Court finds that numerosity is satisfied.

2. Commonality

Rule 23(a)(2) requires a showing of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The commonality element requires that the named plaintiffs "share at least one question of fact or law with the grievances of the prospective class." Rodriguez v. Nat'l City Bank, 726 F.3d 372, 382 (3d Cir. 2013) (quoting Baby Neal v. Casey, 43 F.3d 48, 56 (3d Cir. 1994)). To satisfy the commonality requirement, class claims "must depend upon a common contention ... of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." Dukes, 564 U.S. at 350, 131 S.Ct. 2541. As the Third Circuit has explained, "[m]eeting this requirement is easy enough: '[W]e have acknowledged commonality to be present even when not all members of the plaintiff class suffered an actual injury, when class members did not have identical claims, and, most dramatically, when some members' claims were arguably not even viable.' "

Plaintiffs' action challenges Defendants' civil forfeiture policies and practices. In Count Five, Plaintiffs challenge the City and D.A. Defendants' policy and practice of retaining forfeited property, alleging that the policy and practice creates a conflict of interest that violates the Due Process Clause. See SAC ¶¶ 338–46. The legal and factual questions involved in determining whether or not there is a due process violation and Plaintiffs are entitled to relief include (1) how the proceeds of civil forfeiture actions are distributed; (2) whether the manner in which the proceeds are distributed creates a conflict of interest; (3) whether that conflict of interest, if it exists, deprives litigants in civil forfeiture proceedings of due process of law; and (4) whether an order enjoining the City and D.A. Defendants' retention of forfeiture proceeds and declaring the City and D.A. Defendants' practices unconstitutional would provide relief for the due process violation. .

These common questions are "capable of classwide resolution" because the City and D.A. Defendants allegedly retain all of the property forfeited through civil forfeiture proceedings, and, under Plaintiffs' proposed class definition, every putative class member has a legal interest in property against which a civil forfeiture petition was filed.

3. Typicality

Rule 23(a)(3) requires that the class representatives' claims be "typical" of the claims of the class. Fed. R. Civ. P. 23(a)(3). The typicality inquiry is "intended to assess whether the action can be efficiently maintained as a class and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absentees' interests will be fairly represented." Where claims of the representative plaintiffs arise from the same alleged wrongful conduct on the part of the defendant, the typicality prong is satisfied. " '[E]ven relatively pronounced factual differences will generally not preclude a finding of typicality where there is a strong similarity of legal theories' or where the claim arises from the same practice or course of conduct."

[T]he Court finds that Plaintiffs' claims are materially different from the claims of a portion of the proposed class, which prevents Plaintiffs' claims from being typical of the claims of that subgroup of putative class members.

Plaintiffs, like all other putative class members, have a legal interest in property against which a civil forfeiture petition was filed. However, unlike a portion of the proposed class, Plaintiffs' property was subject to forfeiture under the CSFA—i.e., the forfeiture of their property had a statutory basis. Plaintiffs do not limit their proposed class to persons against whose property civil forfeiture proceedings were filed pursuant to the CSFA or on any other statutory basis. Instead, Plaintiffs seek to certify a class consisting of all persons against whose property civil forfeiture proceedings were filed, regardless of the legal basis for the forfeiture, including forfeiture based on principles of common law.

Given that the legal basis for the forfeitures, including the extent to which the forfeitures were authorized by state statute, may be highly relevant to Plaintiffs' claims, the Court finds that Plaintiffs' claims are not typical of the claims of those persons whose property was subject to forfeiture pursuant to a legal basis other than the CSFA. See Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 183 (3d Cir. 2001) ("The typicality inquiry .... centers on whether 'the named plaintiffs' individual circumstances are markedly different or ... the legal theory upon which the claims are based differs from that upon which the claims of other class members will perforce be based.' ". Here, putative class members whose property was subject to civil forfeiture proceedings based on common law forfeiture may have additional arguments regarding the legality of those forfeiture proceedings that Plaintiffs, and other putative class members whose property was subject to forfeiture under the CSFA, do not have. Accordingly, the Court will remove from the class definition those persons whose property was subject to non-CSFA forfeiture. Plaintiffs' claims are typical of the claims of the remainder of the proposed class—those persons whose property was subject to forfeiture pursuant to the CSFA—and therefore the Court finds that typicality is satisfied with respect to the narrower class definition proposed by the Court.

4. Adequacy of Representation

Rule 23(a)(4) requires representative parties to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). This requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." The Third Circuit applies a two-prong test to assess the adequacy of the proposed class representatives. First, the court must inquire into the "qualifications of the counsel to represent the class," and second, it must assess whether there are "conflicts of interest between named parties and the class they seek to represent." Class counsel must be "qualified, experienced, and generally able to conduct the proposed litigation.".

The Court finds that Plaintiffs' proposed counsel, the Institute for Justice and local counsel David Rudovsky, are qualified to represent the putative class. As the Court found in its order granting final approval of the settlement of Counts One and Two, Plaintiffs' counsel have represented that they have considerable experience litigating complex cases involving constitutional issues, the Institute for Justice has substantial knowledge of the applicable law given its previous experience in civil forfeiture cases, counsel performed extensive work to investigate potential claims and develop legal theories, and counsel will devote sufficient resources to vigorously litigate this case. The City and D.A. Defendants do not challenge the adequacy of class counsel.

Regarding the adequacy of the class representatives, the Court finds that Plaintiffs' interests are aligned with those of absent class members, given the Court's narrower definition of a class consisting of persons against whose property civil forfeiture proceedings were initiated pursuant to the CSFA. See supra at 22–23. Plaintiffs' property was forfeited pursuant to the same statute as absent class members, and based on the same alleged policies and procedures challenged in Plaintiffs' fifth claim for relief. The City and D.A. Defendants' sole argument that Plaintiffs will not adequately represent the class is again that Mr. Geiger does not have a claim because he failed to follow available procedures, which is incorrect. See supra at 22.

B. Rule 23(b)(2)

A party seeking certification under Rule 23(b)(2) must establish that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief.".

Plaintiff seek three forms of relief relating to their claims in Count Five: (1) an entry of judgment declaring the City and D.A. Defendants' policy and practice of retaining all forfeited property and its proceeds unconstitutional under the Due Process

Clause of the Fourteenth Amendment, SAC at 68; (2) the entry of preliminary and permanent injunctions prohibiting the City and D.A. Defendants from engaging in that unconstitutional policy and practice, id. at 69; and (3) an entry of judgment requiring the City and D.A. Defendants to dismiss all civil forfeiture proceedings against Plaintiffs and class members, provide "restitution in the form of return of all property seized from the Named Plaintiffs and class members," and remove all restraints imposed against Plaintiffs' and class members' real property as a consequence of the forfeiture petition.

The City and D.A. Defendants do not object to the certification of a class with respect to the first two forms of relief. Where the parties disagree, however, is whether or not class certification is appropriate with respect to Plaintiffs' request for "restitution." Both sets of parties urge the Court to separately consider Plaintiffs' restitution claim: (1) Plaintiffs request that, should the Court decline to certify Plaintiffs' restitution claim, the Court alternatively certify a class as to Count Five with respect to liability only, deferring the question of restitution until a later date, see Pls.' Mem. at 23; and (2) the City and D.A. Defendants request that, should the Court decide to certify Plaintiffs' claims for declaratory and injunctive relief with respect to Count Five, the Court refuse to certify Plaintiffs' restitution claim.

For the reasons discussed below, the Court agrees that Plaintiffs' requests for (1) a declaration that the City and D.A. Defendants' policies and procedures are unconstitutional and (2) an injunction enjoining those practices and procedures are suitable for class certification under Rule 23(b)(2). However, the Court finds that Plaintiffs' request for a judgment ordering the return of property should not be certified under Rule 23(b)(2).

1. Requests for Declaratory Relief and an Injunction Enjoining the Allegedly Unconstitutional Policy and Practice

The first two forms of relief Plaintiffs request in Count Five are (1) a declaration that the City and D.A. Defendants' policy and practice of retaining forfeited property violates due process; and (2) an injunction enjoining that policy and practice. The City and D.A. Defendants do not challenge the certification of Count Five with respect to these two requests for relief; they do not dispute that the policies and procedures used in civil forfeiture proceedings "apply generally to the class," Fed. R. Civ. P. 23(b)(2), nor do they argue that a claim seeking a declaration that those policies and procedures are unconstitutional is not suitable for class treatment under Rule 23(b)(2).

Plaintiffs' requests for a declaration that certain governmental policies and practices are unconstitutional and an injunction enjoining those policies and practices are classic examples of the types of claims that should be certified under Rule 23(b)(2).

Plaintiffs claim that the D.A. and City Defendants retain proceeds from all civil forfeiture proceedings the D.A. Defendants initiate, which would impact the civil forfeiture proceedings of all of the putative class members. Plaintiffs therefore allege that the City and D.A. Defendants have "act[ed] on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). A declaration that the City and D.A. Defendants' policy and practice is unconstitutional and an injunction enjoining that policy and practice would benefit the entire putative class equally, and thus would be "appropriate respecting the class as a whole." Id. There are also no "disparate factual circumstances" relating to the constitutionality of the City and D.A. Defendants' retention of civil forfeiture profits, and cohesiveness is therefore satisfied.

Accordingly, class certification of Plaintiffs' request for declaratory and injunctive relief in Count Five is appropriate under Rule 23(b)(2), and the Court will grant Plaintiffs' motion for class certification with respect to these two requests for relief.

2. Request for an Entry of Judgment Ordering the Return of Property

The bulk of the parties' arguments regarding class certification of Count Five relate to Plaintiff's third request for relief: an injunction ordering the return of forfeited property. See SAC at 70 (requesting "an entry of judgment requiring Defendants to ...

return ... all property seized from the Named Plaintiffs and class members").

The City and D.A. Defendants argue that this particular request for relief cannot be certified under Rule 23(b)(2) because the rule does not permit certification of claims for "restitution." The City and D.A. Defendants further argue that because the majority of the property forfeited in Philadelphia is cash, and the amount of forfeited cash will differ for each class member, Plaintiffs' request for restitution amounts to an claim for "individualized monetary damages," which is prohibited in a Rule 23(b)(2) class action under the Supreme Court's holding in Dukes. The City and D.A. Defendants also argue that these damages are not "incidental" to Plaintiffs' request for injunctive and declaratory relief. Finally, the City and D.A. Defendants argue that the proposed class cannot be certified under Rule 23(b)(2) because it is not sufficiently cohesive, as required by the Third Circuit in Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998).

In response, Plaintiffs contend that "incidental restitution, even when it consists of returning monies, is appropriate under Rule 23(b)(2)," and that their request for the return of property falls into that category. Plaintiffs further argue that this incidental restitution in no way conflicts with Dukes because the "relief here requires no calculation or case-by-case analysis—simply the mechanistic return of property," and all of the City and D.A. Defendants' asserted "individualized" defenses are either waived or invalid.

For the reasons discussed below, the Court does not agree with the City and D.A. Defendants that restitution claims may never be certified under Rule 23(b)(2). However, the Court finds that the Supreme Court's decision in Dukes, 564 U.S. at 360–61, 131 S.Ct. 2541, prevents the certification of Plaintiffs' request for an injunction ordering the return of property, because (1) the relief to which the putative class members are entitled includes individualized monetary damages, and (2) the restitution sought is not incidental to Plaintiffs' requests for injunctive and declaratory relief. As a result, the Court need not address the City and D.A. Defendants' separate argument that certification of Plaintiffs' restitution claim is not permissible because the class is not sufficiently cohesive.

a. Restitution Claims Under Rule 23(b)(2)

The City and D.A. Defendants argue that restitution claims of any kind cannot be certified under Rule 23(b)(2). The D.A. Defendants further argue that Rule 23(b)(2) does not encompass restitution claims because (1) Rule 23(b)(2) permits only "final injunctive relief or corresponding declaratory relief," and does not specifically list "restitution" as an available remedy, and (2) restitution requires ascertainability so it properly fits under Rule 23(b)(3), which also requires ascertainability. The City and D.A. Defendants are incorrect.

Certification of a class action under Rule 23(b)(2) is warranted only where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Neither the Supreme Court nor the Third Circuit has addressed whether an action seeking restitution is the sort of injunctive relief properly sought under Rule 23(b)(2). However, district courts in other circuits that have addressed the question have classified an order requiring the return of property as the type of injunctive relief that is permissible under Rule 23(b)(2).

Although the Supreme Court has not addressed the question of restitution, it has made clear that where plaintiffs solely seek monetary damages, their claims may be certified only under Rule 23(b)(3), not Rule 23(b)(2). On the basis of the prohibition against certifying class actions under Rule 23(b)(2) for claims solely involving monetary damages, the Third Circuit has previously rejected attempts by putative class action plaintiffs to shoehorn damages claims into Rule 23(b)(2) by asking for an injunction instead of damages. In In re School Asbestos Litigation, the Third Circuit affirmed the district court's denial of a Rule 23(b)(2) class where plaintiffs sought "mandatory injunctive relief in the form of certain remedial action and restitution for expenditures already incurred to ameliorate asbestos hazards." 789 F.2d at 1008. The district court

concluded, and the Third Circuit agreed, that "despite the plaintiffs' ingenuity the claims in this suit were essentially for damages." Id. The class therefore could not be certified under Rule 23(b)(2), because the rule does not permit certification of "an action for money damages." Id.

Following In re School Asbestos Litigation, other courts in this Circuit have denied certification of a Rule 23(b)(2) class where plaintiffs' request for restitution was actually a request for money damages and plaintiffs sought no other declaratory or injunctive relief. These cases do not, as the D.A. Defendants claim, provide support for a blanket prohibition on the certification of restitution claims under Rule 23(b)(2).

The D.A. Defendants' additional arguments that restitution claims can never be certified under Rule 23(b)(2) also fail. The D.A. Defendants argue that restitution is not permissible under Rule 23(b)(2) because restitution cannot be implemented unless class members are ascertainable, and Rule 23(b)(2) does not require ascertainability. This argument does not follow logic. The exclusion of Rule 23(b)(3)'s ascertainability requirement from Rule 23(b)(2) does not mean that actions satisfying the ascertainability requirement cannot be certified under Rule 23(b)(2).

The D.A. Defendants also claim that restitution is prohibited under Rule 23(b)(2) because the rule does not specifically list "restitution" as an available remedy, and instead refers only to "injunctive relief or corresponding declaratory relief." But an injunction ordering restitution is itself a form of injunctive relief, and the sole case the D.A. Defendants cite in support of their argument does not hold otherwise. In Thorn v. Jefferson–Pilot Life Ins. Co., 445 F.3d 311 (4th Cir. 2006), the Fourth Circuit affirmed the district court's refusal to certify a Rule 23(b)(2) class where the plaintiffs sought (1) an injunction prohibiting the defendant insurance company from collecting any future premiums on its allegedly discriminatory policies, (2) restitution in the form of money equivalent to the difference in premium payments made by African–American and white policyholders, and (3) punitive damages and legal fees. Id. at 316, 330–32. The court found that the plaintiffs' sole injunctive relief had already been granted, leaving only the plaintiffs' claims for monetary restitution, punitive damages, and legal fees. Id. at 330–32. Applying the pre-Dukes standard that monetary damages are permitted under Rule 23(b)(2) so long as they do not predominate over a request for injunctive or declaratory relief—a standard that is no longer good law—the court concluded that Rule 23(b)(2) certification was not appropriate because the plaintiffs' only requested relief was monetary damages. Id. Like the other cases the D.A. Defendants cite, Thorn supports only the well-established principle that plaintiffs cannot obtain Rule 23(b)(2) class certification when they are solely seeking monetary damages.

Therefore, as Plaintiffs correctly point out, the City and D.A. Defendants have not identified any blanket prohibition against seeking restitution in a Rule 23(b)(2) action. The cases the City and D.A. Defendants cite establish only that restitution claims may not be certified under Rule 23(b)(2) if the restitution sought is merely another means of seeking monetary damages as the sole relief.

That rule does not bar Plaintiffs' restitution claim here. The "restitution" Plaintiffs seek is the return of property, some of which is personal property, including cash, but some of which is also real property. While the cash Plaintiffs seek could be considered a form of monetary damages, it is clearly not the sole relief Plaintiffs seek, as they also seek the return of other forms of property, as well as other declaratory and injunctive relief. Therefore, the Court will not deny certification of Plaintiffs' restitution claim under Rule 23(b)(2) on that basis.

b. Individualized Monetary Damages

The City and D.A. Defendants also argue that Plaintiffs' restitution claim cannot be certified under Rule 23(b)(2) pursuant to Dukes, 564 U.S. at 360, 131 S.Ct. 2541, because the restitution Plaintiffs seek constitutes "individualized monetary damages."

In Dukes, the Ninth Circuit affirmed the district

court's certification of a Rule 23(b)(2) class of approximately one and a half million current and former female employees of Wal–Mart with respect to the plaintiffs' claim that Wal–Mart engaged in gender discrimination, in violation of Title VII of the Civil Rights Act of 1964, by denying female employees equal pay and/or promotions. Plaintiffs sought injunctive and declaratory relief, punitive damages, and back pay. Id. The Supreme Court reversed the Ninth Circuit order affirming the district court's certification of the class, finding that the plaintiffs' claims for back pay could not be certified under Rule 23(b)(2) because that rule "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages."

The Supreme Court explained that "claims for individualized relief" do not satisfy Rule 23(b)(2) because "[t]he key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.' "Just as Rule 23(b)(2) "does not authorize certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," it similarly does not authorize class certification when each class member would be entitled to an individualized award of monetary damages. Instead, the Court explained, "individualized monetary claims belong in Rule 23(b)(3)."

Relying on Dukes, the City and D.A. Defendants claim that Plaintiffs' restitution claim cannot be certified because it requires the Court to award "individualized monetary damages." First, the City and D.A. Defendants argue that the monetary damages Plaintiffs seek are individualized because each putative class member forfeited a different amount of cash or property, suffered varying amounts of emotional and mental harm, and spent varying amounts on legal services. Second, the City and D.A. Defendants argue that they have defenses to restitution for certain categories of putative class members and individual putative class members that they are entitled to litigate on an individual basis.

In response, Plaintiffs argue that the injunction they seek is not "individualized" because the "relief here requires no calculation or case-by-case analysis—simply the mechanistic return of property." Plaintiffs explain that the Court could issue one single classwide order requiring the City and D.A. Defendants to return all property that was seized from the putative class members, that is, property seized in civil forfeiture proceedings initiated in the Court of Common Pleas of Philadelphia County after August 11, 2012. In this way, Plaintiffs argue, their request for restitution cannot be compared to a case in which "each individual class member would be entitled to a different injunction or declaratory judgment against the defendant," as the Supreme Court characterized an individualized award. See id. at 22. Plaintiffs further argue that the Court's ability to satisfy their restitution claim through one single injunction also distinguishes the instant action from the post-Dukes cases cited by the City and D.A. Defendants in which courts denied Rule 23(b)(2) class certification.

Plaintiffs may be correct that the Court could award the relief that Plaintiffs seek through the issuance of one single injunction, and therefore that their request for relief is not "individualized" in that manner. However, the question is not whether the relief Plaintiffs are seeking is individualized, but whether the relief putative class members are entitled to is individualized. See Dukes, 564 U.S. at 360–61, 131 S.Ct. 2541 (holding that Rule 23(b)(2) "does not authorize class certification when each class member would be entitled to an individualized award of monetary damages" (emphasis added)).

As the City Defendants note, plaintiffs in actions brought pursuant to 42 U.S.C. § 1983 may seek recovery for emotional and mental harm, legal fees, and other compensatory and punitive damages. Plaintiffs do not dispute that the calculation of these types of additional damages would require individualized inquiries. Instead, Plaintiffs argue

that they are not seeking those types of damages here, so the fact that such damages may require individualized inquiries is not relevant to the question of whether or not Plaintiffs' restitution claim itself is individualized. However, Plaintiffs miss the point. The potential that individual class members may have valid claims for damages that Plaintiffs are not pursuing in this action implicates the precise due process concerns identified by the Supreme Court in Dukes, and it is therefore highly relevant to this Court's evaluation of whether or not it should certify Plaintiffs' restitution claim.

The Supreme Court explained in Dukes that where monetary relief is sought in a class action, particular class members may be collaterally estopped from individually seeking compensatory damages that they might otherwise be entitled to receive. A class judgment only binds class members as to matters actually litigated, and some federal courts have therefore concluded that a class action seeking only injunctive relief does not bar later claims for monetary damages. Where, by contrast, plaintiffs in a class action seek a form of monetary damages, later claims for additional or different damages could be precluded.

District courts in this circuit have acknowledged the possibility of preclusion where named plaintiffs seek certification of only certain types of damages claims and absent class members may have additional, different damages claims. For example, in Gaston v. Exelon Corp., 247 F.R.D. 75 (E.D. Pa. 2007), the court noted that it was "likely" that were plaintiffs' equitable claims to be litigated on a class basis, "claim preclusion would bar members of the class from later seeking compensatory and punitive damages." Id. at 88 n.22. In Gates v. Rohm & Haas Co., 265 F.R.D. 208 (E.D. Pa. 2010), aff'd, 655 F.3d 255 (3d Cir. 2011), the court identified a potential conflict where the named plaintiffs brought only medical monitoring and property loss claims and absent class members may have had additional personal injury claims that could have been precluded in later actions. The court ultimately determined that the risk of preclusion was not fatal to certification because plaintiffs sought certification under Rule 23(b)(3), which would provide class members with notice and the opportunity to opt out of the class. The preclusion issue identified in Gaston and Gates is a concern here, as the restitution Plaintiffs seek could be considered a form of compensatory damages for the purposes of preclusion. And, in contrast to Gates, Plaintiffs here seek certification under Rule 23(b)(2), not Rule 23(b)(3). Unlike in a Rule 23(b)(3) class action, absent class members in a Rule 23(b)(2) class action ordinarily receive no notice of their membership in the class and no right to opt out of the litigation. As the Supreme Court explained in Dukes, these protections are not included in a Rule 23(b)(2) class action because they are presumed "unnecessary" where a class "seeks an indivisible injunction benefiting all its members at once." Where a Rule 23(b)(2) class action includes claims for monetary relief, by contrast, it creates the possibility that "individual class members' compensatory-damages claims would be precluded by litigation they had no power to hold themselves apart from." Accordingly, as the D.A. Defendants point out, "[w]ith such claims, class members must be permitted 'to decide for themselves whether to tie their fates to the class representatives' or go it alone—a choice that Rule 23(b)(2) does not ensure that they have.' "

Plaintiffs' dogged insistence that their restitution claim should be certified because they are not seeking "individualized" compensatory and punitive damages on behalf of putative class members highlights a related concern identified by the Supreme Court: permitting monetary damages in a Rule 23(b)(2) action "creates perverse incentives for class representatives to place at risk potentially valid claims for monetary relief" in order to obtain certification. Dukes, 564 U.S. at 364, 131 S.Ct. 2541. Perhaps Plaintiffs are not pursuing other types of damages in this action precisely because it would make obtaining certification under Rule 23(b)(2) more difficult. Class representatives should not be permitted to preference one form of available relief over another that might be more beneficial to certain putative class members—in this case, choosing restitution over other forms of compensatory damages—in an action in which individual class members are not notified about the

action and are not given the ability to opt-out. Indeed, the very reason that notice and opt-out rights are not required in a Rule 23(b)(2) class action—as the Supreme Court explained—is that the relief is beneficial to the class as a whole.

Here, restitution may be adequate relief for some class members, but it may be inadequate for others. For example, the City and D.A. Defendants state that large portions of the forfeited property at issue has been sold or liquidated. For putative class members whose property has been sold, liquidated, or lost, a simple order awarding that property returned may be insufficient to compensate for their losses. Even if the injunction were to order the City and D.A. Defendants to pay the value of the property in the case of lost or sold property, that value may be difficult to determine and, accordingly, whatever metric is used to compute the value may not adequately compensate all class members for their losses. This is especially true in the case of the putative class members who forfeited their real property. Further, for those putative class members—like Plaintiffs Sourovelis, Hernandez, and Geiger—whose property has already been returned, restitution alone would not provide any compensation for the losses they suffered as a result of the deprivation of their property for weeks or months, such as the need to find alternate living arrangements. Thus, restitution would not necessarily benefit "the class as a whole." See Fed. R. Civ. P. 23(b)(2).

As putative class members are entitled to "individualized monetary damages," certification of Plaintiffs' restitution claim under Rule 23(b)(2) is not appropriate under Dukes. In accordance with the reasoning expressed by the Supreme Court in Dukes, in an action where class members will be bound by the outcome and will not be aware of the action or have the ability to opt out, the Court will not force the entire putative class to accept one particular form of damages and be precluded from receiving other forms of damages to which they may be entitled. As a result, the Court will not certify a class under Rule 23(b)(2) with respect to Plaintiffs' request for restitution on their fifth claim for relief.

VII. CONCLUSION

The Court will certify a class on Count Five of Plaintiff's Second Amended Complaint pursuant to Rule 23(b)(2) with respect to Plaintiff's requests for (1) a declaration that the City and D.A. Defendants' policy and practice of retaining forfeited property and its proceeds violates the Due Process Clause; and (2) an injunction enjoining that policy and practice. However, the Court will not certify a Rule 23(b)(2) class with respect to Plaintiff's request for the entry of judgment requiring the return of property. In addition, the Court will modify the class definition to limit the class to those persons against whose property civil forfeiture proceedings were initiated pursuant to the CSFA.

An appropriate order follows.

FIGHTING THE CRIMINALIZATION OF HOMELESSNESS: ANATOMY OF AN INSTITUTIONAL ANTI-HOMELESS LAWSUIT

Benjamin S. Waxman*

I. INTRODUCTION

In November 1988, the Miami Chapter of the American Civil Liberties Union (ACLU) learned that the City of Miami, once again, planned to "sweep" homeless persons from the route of the Orange Bowl Parade and related festivities.[1] Subsequent interviews of homeless persons and advocates revealed that the city, through its police department, was routinely mistreating, arresting, and destroying the property of homeless persons for little more than living in public.[2] A series of strategic meetings of ACLU attorneys and University of Miami law professors culminated in the drafting and filing of a request for a preliminary injunction and a federal class action civil rights lawsuit against Miami.

The request for preliminary injunctive relief was denied.[3] However, four years later, after certifying the lawsuit a class action,[4] and after holding the city in contempt for violating a subsequent preliminary injunction,[5] and conducting a week long bench trial,

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* Attorney with Robbins, Tunkey, Ross, Amsel & Raben, P.A. of Miami, Florida. B.S.B., University of Minnesota; J.D., University of Miami. Mr. Waxman is also a member of the Board of Directors for the Greater Miami Chapter of the American Civil Liberties Union.

1. Christine Evans, *ACLU Sues to Stop Arrest of Homeless*, MIAMI HERALD, Dec. 24, 1988, at 2D.

2. Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (*Pottinger II*).

3. *Id.* at 1555.

4. Pottinger v. City of Miami, 720 F. Supp. 955, 957 (S.D. Fla. 1989) (*Pottinger I*). The class consists of homeless persons living in public places:

> [I]n the geographic area bound on the north by Interstate 95, on the south by Flagler Street, on the east by Biscayne Bay, and on the west by Interstate 95, within the City of Miami, who have been, expect to be, or will be arrested, harassed, or otherwise interfered with by members of the City of Miami Police Department for engaging in the ordinary and essential activities of daily living in public due to the lack of other adequate alternatives.

Id. at 960.

5. *Pottinger II*, 810 F. Supp. at 1555-56. On April 26, 1990, based on two incidents during which Miami police officers burned the personal belongings of homeless persons who were arrested for sleeping in a municipal park, the district court ordered police not to destroy property collected at the time of contact with homeless persons and

United States District Court Judge C. Clyde Atkins ruled in the plaintiffs' favor.[6] The court held in *Pottinger v. City of Miami* that the City of Miami had a policy of harassing and arresting homeless persons, strictly based on their homeless status, for the purpose of driving them from the public domain.[7] The court granted declaratory and injunctive relief[8] and ordered a jury trial to determine monetary damages.[9] The decision is currently pending on appeal in the United States Court of Appeals for the Eleventh Circuit.[10]

Several law review articles have explored the constitutional foundations upon which the *Pottinger* decision relies.[11] However, little has been written about the practical aspects of filing and litigating such an institutional anti-homeless lawsuit. The goal of this Article is to share practical information and knowledge gained through representing the plaintiffs in *Pottinger*.[12] It is the author's

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to follow their own written policy of preserving property obtained during such contacts. *Id.* Approximately one year later the city was held in contempt of this order when it again destroyed the property of homeless persons whom the city was removing from certain public areas. *Id.* at 1556.

6. *Id.* at 1583-84.

7. *Id.* at 1583. The court found that the City of Miami, through a municipal policy, had violated the Eighth Amendment's ban against punishment based on status. *Id.* at 1561-65. The court ruled that police officers' summary seizure and destruction of homeless persons' belongings violated their Fourth and Fifth Amendment rights to be free from unreasonable seizures and takings of personal property. *Id.* at 1570-73, 1570 n.30. Judge Atkins concluded that the city's arrest of the plaintiffs for harmless conduct enjoying other constitutionally protected activities violated their Fourteenth Amendment right to procedural due process. *Id.* at 1575-77. Finally, the court held that Miami's arrests and harassment of homeless persons unjustifiably infringed on their fundamental right to travel in violation of their Fourteenth Amendment right to equal protection under the law. *Id.* at 1578-83.

8. *Id.* at 1584-85.

9. *See id.* at 1570 n.30.

10. Pottinger v. City of Miami (consolidated), Nos. 91-5316 (contempt order) & 92-5145 (final judgment) (11th Cir. April 16, 1991 & Dec. 4, 1992). It is anticipated that the appeal will be argued and decided by the end of 1994. In the face of the city's assurance that it was no longer arresting homeless persons based on their status, the court of appeals stayed enforcement of the district court's injunctive relief, pending its final decision. Order Granting City of Miami's Motion to Suspend and/or Stay Injunction, Pottinger v. City of Miami, Nos. 91-5316 & 92-5145 (11th Cir. June 25, 1993).

11. *See generally* Michael D. Granston, *Rethinking the Fourth Amendment Rights of the Homeless*, 20 Search & Seizure Law Rep. 97 (Feb. 1993); 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 (1992); Paul Ades, Comment, *The Unconstitutionality of "Antihomeless" Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel*, 77 CAL. L. REV. 595 (1989); Donald E. Baker, Comment, *"Anti-Homeless" Legislation: Unconstitutional Efforts to Punish the Homeless*, 45 MIAMI L. REV. 417 (Nov.-Jan. 1990-91).

12. The other ACLU cooperating attorneys were Dade County Public Defender

hope to identify and explore some of the issues involved in this type of litigation and to encourage other attorneys to represent homeless persons against public institutions with anti-homeless policies.

II. THE NEED FOR INSTITUTIONAL LITIGATION

Homelessness in America continues to grow at an alarming rate.[13] If significant strides are to be made in reducing homelessness, large scale challenges to the anti-homeless policies of governments and public sector agencies must be initiated.

The importance of filing actions seeking to redress the unique claims of individual homeless persons cannot be overstated. For many homeless persons, accessing state and federal entitlements may be all that is needed to "get off the streets." For others, redressing a wrongful eviction may prevent a lengthy bout with homelessness.[14] However, such actions will probably not have the impact necessary to change how the public, and ultimately government, perceives and copes with homelessness. These basic perceptions must be changed before government will develop a more humane and effective policy to reduce homelessness.

Public sensitivity about the plight of the homeless has increased substantially in recent years. This is evidenced by regular media attention, the proliferation of homeless advocacy groups, and the daily participation of religious and civic organizations in homeless relief efforts. Unfortunately, this sensitivity has not been ac-

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Valerie Jonas, Miami civil rights lawyer Maurice Rosen (until his death in early 1992), and Dade County Public Defender Rodney Thaxton.

13. *Pottinger II*, 810 F. Supp. at 1554, 1558.

14. For example, in New York City, one study estimates that providing counsel to those facing eviction could prevent 4,873 families and 3,567 individuals from seeking emergency shelter each year. Community Training and Resource Center and City-Wide Task Force on Housing, Inc., *Housing Court, Evictions and Homelessness: The Costs and Benefits of Establishing a Right to Counsel* at iv (1993).

companied by a recognition that homeless persons have certain inalienable, fundamental constitutional rights.[15] Institutional litigation which challenges a municipality's approach to the problem of homelessness on constitutional grounds will force the government entity and its constituents to reevaluate its policies and practices regarding treatment of the homeless.

III. DEFINING GOALS AND OBJECTIVES

As with any lawsuit, the first and most important step is to define the litigation objectives. In the broadest sense, the primary goal of a *Pottinger*-type lawsuit is to expose and reverse an institutional anti-homeless policy. In *Pottinger*, the plaintiffs sought to alter the way Miami viewed and treated the homeless. The plaintiffs believed the city viewed the homeless as criminals worthy of brutal and inhumane treatment. The plaintiffs wanted the city to recognize homelessness as a social and economic condition over which the homeless had little genuine control. The plaintiffs sought to protect their fundamental civil liberties guaranteed by the United States and Florida constitutions.

A more specific objective of this type of litigation is to enjoin the law enforcement strategy a municipality or agency employs to criminalize homelessness. The plaintiffs' attorney should begin by examining the local laws used to arrest homeless persons to uncov-

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15. Violations of these rights have resulted in the recent litigation of several class action lawsuits. On September 23, 1993, United States District Judge U.W. Clemon of the Northern District of Alabama, Southern Division, entered a preliminary injunction enjoining the City of Huntsville from "harassing, intimidating, detaining or arresting [homeless citizens of Huntsville, Alabama], *solely because of their status as homeless persons*, for walking, talking, sleeping, or gathering in parks or other public places in the City of Huntsville." Joe Church v. City of Huntsville, No. 93-C-1239-S (N.D. Ala. Sept. 23, 1993) (emphasis in original). This preliminary injunction was supported by a finding that Huntsville had an unannounced but official policy of isolating and removing its homeless citizens from its city limits. *Id.* The preliminary injunction is pending review in the United States Court of Appeals for the Eleventh Circuit (No. 93-6827). A class action lawsuit has been filed against the City of San Francisco by homeless persons challenging the city's anti-homeless law enforcement practices. Bobby Joe Joyce v. City & County of San Francisco, No. C-93-4149 DLJ (N.D. Cal. Nov. 23, 1993). A similar lawsuit was filed in the Orange County Superior Court of California challenging the City of Santa Ana's enforcement of a local ordinance prohibiting public camping and storage of personal property. The superior court denied relief, but its decision has recently been reversed by the California Court of Appeals for the Fourth Appellate District. Tobe v. City of Santa Ana, No. G014257 (Cal. Ct. App. 4th Dist. Feb. 2, 1994). The appellate court found the ordinance unconstitutional on right to travel, cruel and unusual punishment, vagueness, and overbreadth grounds. *Id.*, slip op. at 13-21.

er any facial constitutional defects. Such laws are often subject to challenge based on vagueness,[16] overbreadth,[17] unequal protection,[18] or First Amendment grounds.[19] Even if the laws are not facially invalid, they may be unconstitutional as applied.

In *Pottinger*, the plaintiffs sought to enjoin Miami from enforcing a variety of broadly-worded ordinances and statutes which proscribed largely harmless conduct against the homeless.[20] None

16. *E.g.*, Kolender v. Lawson, 461 U.S. 352, 358-62 (1983) (invalidating loitering and prowling statute because it failed to give fair warning of illegal conduct and failed to establish minimum guidelines to govern law enforcement); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (striking down vagrancy ordinance found to be vague "both in the sense it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute,' . . . and because it encourages arbitrary and erratic arrests and convictions") (citations omitted). *Contra* Whiting v. Town of Westerly, 942 F.2d 18, 22 (1st Cir. 1991) (rejecting vagueness challenge to ordinance prohibiting nighttime sleeping in public or semipublic places); Hershey v. City of Clearwater, 834 F.2d 937, 940-41 n.5 (11th Cir. 1987) (rejecting, *in dicta*, vagueness challenge to pre-amendment version of ordinance prohibiting sleeping in a vehicle in public).

17. *E.g.*, City of Pompano Beach v. Capalbo, 455 So. 2d 468, 470-71 (Fla. 4th DCA 1984) (declaring ordinance prohibiting sleeping in a motor vehicle facially unconstitutional because it criminalizes inoffensive conduct), *rev. denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985); State v. Penley, 276 So. 2d 180, 181 (Fla. 2d DCA) (same), *cert. denied*, 281 So. 2d 504 (Fla. 1973). *Contra Whiting*, 942 F.2d at 21-22 (rejecting overbreadth argument because sleeping in public is not constitutionally protected); *Hershey*, 834 F.2d at 940 n.5 (upholding similar ordinance against overbreadth challenge).

18. *E.g.*, Parr v. Municipal Court for Monterey-Carmel, 479 P.2d 353, 358 (Cal. 1971) (striking down ordinance prohibiting sitting on sidewalks or steps and lying or sitting on lawns because it discriminated against "hippies" based on their status).

19. *E.g.*, Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking ordinance prohibiting loitering in public to beg on freedom of speech grounds), *aff'g* 802 F. Supp. 1029 (S.D.N.Y. 1992). *Contra* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3d Cir. 1992) (upholding library regulations which effectively bar admission of homeless persons against their First Amendment right to receive information challenge), *rev'g* 705 F. Supp. 181 (D.N.J. 1991); Young v. New York Transit Auth., 903 F.2d 146 (2d Cir.) (upholding ordinance prohibiting begging and panhandling in subway system), *cert. denied*, 498 U.S. 984 (1990); Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (striking on freedom of speech grounds an ordinance prohibiting accosting person in public place for the purpose of begging). The *Blair* case is currently on appeal. Oral arguments were made February 16, 1993. *Blair*, No. 92-15447 (9th Cir. Feb. 16, 1993).

20. *Pottinger II*, 810 F. Supp. at 1559-60 nn.10-14. Miami's police department arrested homeless persons for violating ordinances prohibiting obstructing streets and sidewalks, MIAMI, FLA. CODE § 37-53.5 (1992); sleeping in public, *id.* § 37-63; loitering and prowling, *id.* §§ 37-34, 35, FLA. STAT. § 856.021 (1992) and being in public parks during proscribed hours, MIAMI, FLA. CODE § 38-3. For examples of arrest strategies and anti-homeless ordinances in other cities, see National Law Center on Homelessness & Poverty, *Go Directly to Jail, A Report Analyzing Local Anti-Homeless Ordinances* (Dec. 1991).

of these laws appeared to be facially unconstitutional. Additionally, if a judge declared any of these laws unconstitutional as applied, then city inevitably would have continued its policy of enforcing other facially constitutional laws.[21] Thus, the plaintiffs sought to enjoin the use of *any* law against homeless persons which would ultimately criminalize their public presence.

Another important objective of this type of litigation is to educate the community about homelessness in an attempt to change public opinion. In Miami, the anti-homeless policy was fueled largely by the complaints of local merchants that the unsightly and menacing presence of homeless persons was destroying their businesses.[22] The local merchants claimed homeless persons were sleeping on the sidewalks, bathing in the roadways, and urinating in the alleys adjacent to their businesses. They also attributed large portions of street crime to homeless persons.[23] Such portrayals serve to dehumanize the homeless.

Litigants must strive to give the homeless a human face, showing them as people deserving of rights and dignity as they struggle against circumstances often beyond their control. In *Pottinger*, the plaintiffs proved that the needs of homeless persons far exceeded the resources available to them. For instance, while it was estimated that Miami had approximately 6,000 homeless,[24] the city had fewer than 700 shelter beds.[25] Additionally, it was established that most homeless people are ineligible for all forms of government assistance besides food stamps.[26] By identifying the needs of the homeless and the lack of available resources, this type of litigation

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21. Prior to 1988, the ordinance Miami police most frequently used to arrest homeless persons prohibited sleeping in public. MIAMI, FLA. CODE § 37-63. In Hershey v. City of Clearwater, 834 F.2d 937, 940 (11th Cir. 1987), the court partially invalidated a similar Clearwater ordinance. In response, the City of Miami suspended enforcement of (but did not repeal) § 37-63 and shifted its enforcement emphasis to its previously, little-used park curfew ordinance. *Pottinger II*, 810 F. Supp. at 1566.

22. The city introduced into evidence a number of written complaints of downtown business merchants about the presence and obnoxious activities of homeless persons.

23. The city offered the elimination of crime in its parks as justification for arresting homeless people engaged in harmless, non-criminal conduct such as congregating or lying down in public. The court rejected this justification finding that the arrests were the results of sweeps targeting areas where homeless persons were known to congregate, and not the result of citizen complaints. *Pottinger II*, 810 F. Supp. at 1582. Additionally, the court found that the city had failed to present any evidence that homeless persons committed the crimes reported in the citizens' complaints the city introduced into evidence. *Id.*

24. *Id.* at 1564.

25. *Id.*

26. *Id.*

will go far to change public opinion and anti-homeless policies.

Another goal may be to obtain classwide compensatory damages. Damages awarded to the entire class can be used collectively at the clients' discretion, to provide shelter, support services, and general assistance to the homeless. This litigation goal is exemplified by the case *Simer v. Rios*.[27] There the United States Court of Appeals for the Seventh Circuit acknowledged a theory of "fluid recovery [which] is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case . . . . In a fluid recovery the money is . . . used to fund a project which will likely benefit the members of the class."[28] Although the Seventh Circuit rejected a *per se* fluid recovery approach where class members cannot be identified, it also rejected the argument that a fluid recovery mechanism is unconstitutional. The court held that the appropriateness of fluid recovery must be determined on a case-by-case basis considering the policies of "deterrence, disgorgement, and compensation."[29]

Another important objective is obtaining compensatory damages for the specific injuries individual homeless persons have suffered. Many homeless persons simply need to be compensated for their personal property which has been seized and destroyed, lost employment opportunities resulting from wrongful arrests, and for

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27. 661 F.2d 655 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

28. *Id.* at 675 (citations omitted).

29. *Id.* at 675-76. The case of *Dellums v. Powell* also supports an award of class-wide compensatory damages. 566 F.2d 167 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 916 (1978). The court considered the propriety of granting class-wide damages to demonstrators who had been arrested during a demonstration at the United States Capitol. The damages awarded by the jury were for false arrest, violation of First Amendment rights, cruel and unusual punishment, and malicious prosecution. *Id.* at 174 n.6. Although the court expressed doubt that a uniform class award for First Amendment damages could include an element of emotional harm, it made clear that an award of class-wide damages for certain injuries, based on the likelihood that all members of the class had suffered those injuries, is appropriate. *Id.* at 210. The court stated:

> The class award must focus on the injury sustained by all members of the class — the value that each one of them would necessarily place on the rights of free expression and assembly in the circumstances of this case. The class award for fourth amendment damages included an element for humiliation of arrest and detention, []which may be deemed inescapable for any false detention . . . . In sum, class-wide damages must be those which necessarily arise from events which made this action appropriate for class treatment in the first place: [T]he decision that the group as a whole should be arrested; the uniform booking procedures; and the assumption all the demonstrators were essentially in the same position . . . .

Id. at 210 (footnote omitted).

the fear, embarrassment, and humiliation they suffer on a daily basis. An institutional anti-homeless lawsuit is ineffectual for recovering these damages. In *Pottinger*, nearly five years have passed since the lawsuit was filed. While the lawsuit contemplates a jury trial for damages if the constitutional claims are upheld on appeal,[30] for many homeless persons any financial renumeration will be far too little, far too late. Instead, individual actions for return of property or personal injury would be far more efficient and effective for achieving this objective.

IV. CLIENT RELATIONS

Although sharing the singular characteristic of being without shelter, homeless persons are as diverse as any community straddling racial, ethnic, socio-economic, and educational lines. There are certainly some common denominators, but each homeless person has a unique background, perspective about his or her homelessness, and expectations for the future. The attorney must reach out and develop the trust of these persons who have been discriminated against by the institutions the attorneys appear to represent. An attorney must ensure that the plaintiffs' expectations about winning the lawsuit are realistic. Counsel must advise their clients they are fighting an uphill battle which may take years to resolve. Additionally, counsel must explain that a successful lawsuit will not necessarily translate into monetary awards for individual plaintiffs. The lawsuit may result only in a declaration that the governmental agency is mistreating the homeless and the behavior must stop.

Maintaining client contact is an important and difficult task. Homeless people are highly mobile. Many pass in and out of homelessness on a monthly or weekly basis. For these reasons, it is essential to develop a rapport with a core group of homeless persons who will be active participants in the lawsuit. This can be done by assigning litigation-related tasks and encouraging them to attend, and get others to attend, all court proceedings. These participants can then communicate the status of the lawsuit to other homeless persons and bring the complaints and concerns of these less involved persons to the attorney's attention.

30. *See Pottinger II*, 810 F. Supp. at 1570 n.30.

V. PRE-FILING DISCOVERY/INVESTIGATION

Once the litigation objectives are defined, extensive pre-filing investigation should be initiated. The three most important sources of information concerning anti-homeless policy and practices are the plaintiffs, newspaper articles, and various public records.

A. The Plaintiffs

The most important source of information regarding the factual bases for the lawsuit will be the homeless plaintiffs. Get to know them. Ask them to explain how they have been mistreated or abused by the municipality, police, or other governmental entity. Ask them what can be done to alleviate their plight and compensate them for past wrongs. Fully exploring the circumstances of the plaintiff's homelessness, and the ways in which the institutional defendant compounds it, will provide a wealth of information to support a variety of different theories of liability.

B. News Articles

Local newspaper articles can be invaluable in uncovering institutional policies and practices intended to criminalize homelessness. They will provide numerous leads to other information sources including reporters, community activists, homeless persons, and other homeless advocacy groups. Additionally, these articles will give an essential historical perspective that may establish the existence of long-standing anti-homeless practices.

C. Public Records

Public records are another source of pre-filing discovery. These records typically can be obtained with relative ease and minimum expense. For instance, in *Pottinger*, a large portion of the documentary evidence consisted of arrest records.[31] The attorneys requested these records to determine the extent of the arrest practice and the circumstances under which homeless persons were arrested (e.g., time of day, location, identity of arresting officer or unit, drug charges, and/or weapons related offenses charged). To obtain rele-

31. The plaintiffs introduced into evidence approximately 3,500 arrest records. *Pottinger II*, 810 F. Supp. at 1559 n.9, 1561. These were culled from several times as many computerized arrest reports.

vant arrest records, the attorneys requested a cross-section of two characteristics. First, to identify homeless persons, the attorneys requested arrest records for which the defendant when asked for a home address either gave no home address, gave the address of one of the primary homeless shelters, or gave the streets of Miami.[32] The search was further limited by seeking only records of arrests under ordinances and statutes that proscribed largely harmless conduct but which were being used to target homeless persons.[33]

Attorneys should obtain and review various governmental memoranda. Minutes from city commission, council, department, or agency meetings, including any legislative history, are fruitful sources of policies underlying governmental action. Although they are often long and tedious to review, they may contain incriminating statements expressing an impermissible purpose for the anti-homeless conduct. Additionally, internal documents, such as police memoranda, should be carefully reviewed to determine who is directing any anti-homeless policy and how it is being effectuated.[34] These internal communications may serve as the linch pin of the entire action.

D. Ethical Considerations

Whenever an attorney files a lawsuit raising novel legal arguments, the attorney must be particularly wary of the ethical obligation not to file frivolous lawsuits. Federal Rule of Civil Procedure 11 and local rules provide that when an attorney signs a pleading it is a certificate that

> the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law . . . .[35]

Although the advisory committee notes make clear the rule should

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32. *Id.* at 1559 n.9.

33. See *supra* note 19 for examples of these ordinances.

34. The plaintiffs in *Pottinger* introduced various police department internal memoranda indicating Miami's primary purpose in arresting homeless persons was to keep them moving "in order to 'sanitize' the parks and streets." *Pottinger II*, 810 F. Supp. at 1561, 1567.

35. FED. R. CIV. P. 11.

not chill an attorney's enthusiasm or creativity in pursuing novel factual or legal theories, it obviously requires a minimum amount of pre-filing investigation.[36] Conducting a thorough pre-filing investigation and extensive legal research will serve to satisfy this obligation.

VI. FINANCING THE LAWSUIT

Initiating any type of institutional litigation can be expensive. Pre-filing investigation and discovery entail obtaining, copying, and disseminating volumes of information, deposing and securing deposition transcripts for numerous witnesses, and paying travel expenses and related witness fees. In *Pottinger*, 3,500 arrest records[37] were selected from probably three times as many that counsel reviewed. At fifteen cents a page, this expense alone exceeded five hundred dollars. The attorneys took more than twenty depositions; more than ten were transcribed for use at trial. These expenses neared five thousand dollars. Long distance telephone and copying costs were substantial. Expenses for this type of lawsuit can quickly climb to ten thousand dollars.

A litigation philosophy consistent with the available budget must be adopted early in the process. Compromises and cost cuts will have to be made. Although it is ideal to depose any witness with information relevant to the lawsuit and to have each of these depositions transcribed, foregoing less important depositions may be necessary.

Homeless advocacy groups and other community organizations may provide funding for institutional anti-homeless litigation. Some of these organizations have funds set aside specifically for court cases.[38] Others readily can obtain contributions or conduct fundraising for this purpose.[39]

A motion should be filed to proceed *in forma pauperis*.[40] Although the significant benefits of this status do not take effect until

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36. *Id.*, advisory committee's notes.

37. *Pottinger II*, 810 F. Supp. at 1559 n.9.

38. Subject to approval, organizations such as the American Civil Liberties Union, the National Coalition for the Homeless, and the National Law Center on Poverty and Homelessness all have funds to sponsor various types of anti-homeless litigation.

39. Support often comes with strings attached. Care must be taken to explain the litigation objectives and make clear that litigation decisions will be made by the clients and the attorneys, not the organizations.

40. *See* 28 U.S.C. § 1915 (1988).

any necessary appeal,[41] requesting such certification reflects the reality that homeless persons are indigent and have no more funds to support litigation than they do to secure shelter. Many statutes, including the Federal Civil Rights Act, have fee shifting provisions.[42] Unfortunately, while these statutes provide a basis to recover costs, expenses, and often attorney's fees at the end of the case if the plaintiffs prevail, they do not provide a basis for securing funds at the beginning of the litigation when they are most needed.

An argument can be made that a municipality or other institutional defendant should share the cost of gathering and producing relevant documents. These documents may be essential to prove an unconstitutional pattern and practice. Public records laws often require that such information be stored in a manner accessible to the public and set a cap on the amount that can be charged for its retrieval.[43] To the extent there is substantial expense associated with retrieving and assembling this information, plaintiffs who fall prey to alleged civil rights violations should not have to bear these expenses. Therefore, an argument can be made that the court, through its equitable powers, should shift some of the litigation expenses to the defendant.

Non-lawyer volunteers can perform many tasks essential to a successful lawsuit. The key is to identify delegable tasks. Volunteers can be found among the homeless clients, community organizations, local law schools, and even high schools. Once the lawyers establish criteria for identifying relevant and useful information, volunteers can be used to review computerized records and information, municipal or agency notes and memoranda, and commission or council meeting minutes. Volunteers can be used to search through local media archives for pertinent articles. They can be used to help assemble, organize, and even quantify some of this information.

Many litigation related expenses can be donated or discounted. A large court reporting company, upon being advised of the nature of the lawsuit, may be willing to provide services for free or at discounted rates. Experts from any discipline who have an interest in

41. Section 1915 authorizes the district court to direct the United States to pay copying, printing, and transcription expenses for the appeal. It also authorizes an indigent litigant to proceed in the trial court without prepayment of fees and costs and requires officers of the court to issue and serve all process.

42. *See* 42 U.S.C. § 1988 (Supp. III 1991).

43. Public Records, ch. 119, FLA. STAT. (1993). The general policy of the state is "that all state, county, and municipal records shall at all times be open for a personal inspection by any person." FLA. STAT. § 119.01(1) (1993).

homeless advocacy may agree to assist in exchange for reimbursement of expenses. Professors and other academicians may be willing to consult, conduct research in their field of expertise, or testify without payment for their time.

Successful federal civil rights litigants are entitled to reimbursement for attorney's fees and litigation expenses.[44] Thus, careful contemporaneous records must be kept of all litigation expenses and legal services rendered to support any claim. A log must be kept of all long distance telephone calls, postage fees, and copy expenses.[45] The same level of detail should be given to attorney services. Although the recovery of costs and attorney fees is not a primary goal of the lawsuit, imposition of these expenses on the defendant helps deter future civil rights violations and encourages other potential plaintiffs' attorneys to take on similar risky, but potentially renumerative, cases.[46]

VII. FRAMING THE LAWSUIT

Institutional homeless litigation is of relatively recent origin. There are few reported federal and state cases dealing specifically with the constitutional and statutory rights of homeless persons as a class. The limits of this type of litigation are being explored. Given the novelty of this type of lawsuit and the need to greatly expand state and federal court recognition of homeless rights, attorneys should opt for a shotgun approach in framing the lawsuit. Most modern anti-homeless ordinances and statutes have not been subjected to constitutional scrutiny. It is important to give courts every possible opportunity to invalidate the law or government policy. Thus, the complaint should be crafted in the most creative, expansive way possible. Both federal and state constitutional, statutory, and common law grounds should be explored.

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44. 42 U.S.C. § 1988 (Supp. III 1991).

45. *E.g.*, Cappeletti Bros., Inc. v. Broward County, 754 F. Supp. 197, 198 (S.D. Fla. 1991) (stating nonstatutory costs such as postage, long distance calls, photocopying, travel, paralegals, expert witnesses, and computerized legal research may be included in the definition of attorney's fees in a civil rights case).

46. *See* The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (codified as amended at 42 U.S.C. § 1988 (1988)).

A. Federal Constitutional Grounds

Many provisions of the federal Bill of Rights ostensibly protect homeless persons from governmental anti-homeless policies and practices. Rights have been asserted, successfully and unsuccessfully, under the First Amendment free speech clause.[47] It seems apparent, too, that an anti-homeless policy intended to fracture homeless encampments and to drive homeless persons from the public domain would impinge on First Amendment associational rights.[48]

Under the Fourth Amendment, it has been established that even homeless persons enjoy a reasonable expectation of privacy of personal belongings kept in closed satchels or bags,[49] or otherwise arrange to make obvious that the property belongs to someone.[50] This expectation remains intact even though the personalty is located on public property.[51] The government cannot seize and destroy such personal property.[52] Additionally, although the court in *Pottinger* rejected such a claim, a Fourth Amendment pretext argument can be made for arrests or other seizures of homeless persons for harmless conduct that ostensibly violates misdemeanor ordinances or statutes.[53] Such seizures are unconstitutional if an objectively reasonable police officer would not have made them absent some impermissible purpose.[54]

Under the Fifth Amendment due process clause, arguments can be made on both procedural and substantive grounds. With regard to procedural due process, it should be argued that arresting homeless people under misdemeanor ordinances and statutes, that ap-

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47. Loper v. New York City Police Dep't, 999 F.2d 699 (2d Cir. 1993) (striking down anti-loitering to beg ordinance), *aff'g* 802 F. Supp. 1029 (S.D.N.Y. 1992). *Contra* Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242 (3d Cir. 1992) (upholding public library regulations), *rev'g* 705 F. Supp. 181 (D.N.J. 1991); Young v. New York Transit Auth., 903 F.2d 146 (2d Cir.) (upholding ordinance prohibiting begging in the subway system), *cert. denied*, 498 U.S. 894 (1990); Blair v. Shanahan, 775 F. Supp. 1315 (N.D. Cal. 1991) (striking down ordinance prohibiting accosting person in public place for purpose of begging).

48. *See* Sawyer v. Sandstrom, 615 F.2d 311, 315-17 (5th Cir. 1980).

49. State v. Mooney, 588 A.2d 145, 154-61 (Conn.), *cert. denied*, 112 S. Ct. 330 (1991).

50. *Pottinger II*, 810 F. Supp. at 1571-73.

51. *Id.*; *Mooney*, 588 A.2d at 154-61.

52. *Pottinger II*, 810 F. Supp. at 1570-73; *see* Soldal v. Cook County, Ill., 113 S. Ct. 538, 544 (1992) (holding that the Fourth Amendment protects personal property from illegal seizure regardless of expectation of privacy).

53. *Pottinger II*, 810 F. Supp. at 1569.

54. *E.g.*, United States v. Guzman, 864 F.2d 1512, 1515-18 (10th Cir. 1988); United States v. Smith, 799 F.2d 704, 709-10 (11th Cir. 1986).

pear to outlaw harmless conduct, is overbroad[55] and that these laws, as applied to homeless persons, are vague and fail to give fair notice of the conduct they criminalize.[56] In *Pottinger*, the court found that to be overbroad, a law must "reach [] a substantial amount of constitutionally protected conduct."[57] The court held that the laws police used to arrest the plaintiffs were overbroad as applied because they violated the homeless' Eighth Amendment right to be free from punishment based on status and their fundamental right to freedom of movement.[58] With regard to substantive due process, it should be argued that the core rights protected by the due process clause include the right to live unsheltered in public.[59] The court in *Pottinger* determined that the life-sustaining activities homeless people must conduct in public are not fundamental rights.[60] The court found it unnecessary to address the plaintiffs' substantive due process claim separate from their equal protection claim because they are based on the same standard.[61]

Fifth Amendment equal protection arguments can be formulated by asserting either a suspect class status or a violation of fundamental rights. Although the Supreme Court has repeatedly held that poverty is not a suspect class,[62] the court in *Pottinger* stated that it was not willing to summarily dismiss such a claim on behalf

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55. *E.g.*, Tobe v. City of Santa Ana, No. G014257, slip. op at 18 n.11 (Cal. Ct. App. 4th Dist. Feb. 2, 1994); City of Pompano Beach v. Capalbo, 455 So. 2d 468, 470-71 (Fla. 4th DCA 1984), *rev. denied*, 461 So. 2d 113 (Fla.), *cert. denied*, 474 U.S. 824 (1985); State v. Penley, 276 So. 2d 180, 180-81 (Fla. 2d DCA), *cert. denied*, 281 So. 2d 504 (Fla. 1973).

56. *E.g.*, Kolender v. Lawson, 461 U.S. 352, 361 (1983); Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972); *Tobe*, No. G014257, slip op. at 18.

57. *Pottinger II*, 810 F. Supp. at 1577 (citing Hershey v. City of Clearwater, 834 F.2d 937, 940 n.5 (11th Cir. 1987) (citation omitted)).

58. *Id.*

59. *Cf.* Olmstead v. United States, 277 U.S. 438, 478-79 (1928) (Brandeis, J., dissenting); Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The *Meyer* court defined liberty as:

> [T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

262 U.S. at 399.

60. *Pottinger II*, 810 F. Supp. at 1578.

61. *Id.* at 1575 n.32.

62. *E.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Maher v. Roe, 432 U.S. 464, 470-71 (1977); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 27-28 (1973). *See also Pottinger II*, 810 F. Supp. at 1578.

of homeless persons.[63] The question of whether this unique class of impoverished persons is so disenfranchised and politically powerless so as to be entitled to suspect class status has never been addressed by the United States Supreme Court.[64] The court in *Pottinger* found an equal protection violation based on the city's lack of a compelling justification[65] for violating the plaintiffs' fundamental right[66] to interstate[67] and intrastate travel.[68]

An argument should also be made under the Fifth Amendment takings clause that the summary seizure and destruction of homeless persons' belongings constitutes an unconstitutional taking without compensation. In *Pottinger*, relying on the same facts that supported its finding of a Fourth Amendment violation, the court held that Miami's police practice of seizing and destroying the plaintiffs' personal belongings violated the Fifth Amendment's taking clause.[69]

Perhaps the most significant and potentially far reaching conclusion of the court in *Pottinger* was that the criminalization of essentially inoffensive, harmless conduct in which involuntarily homeless persons must engage in public to survive — sleeping, sitting, standing, and eating — constitutes punishment based on status in violation of the Eighth Amendment's cruel and unusual punishment clause.[70] The decision seems firmly founded upon long standing Supreme Court precedent.[71] Although a conviction general-

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63. *Pottinger II*, 810 F. Supp. at 1578.

64. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938); *Matter of Mota*, 788 P.2d 538, 543 (Wash. 1990); Washington County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310, 334 (Wyo. 1980).

65. The city offered parks and public areas esthetics, tourism and downtown business promotion, and general crime prevention as its reasons for arresting homeless persons. *Pottinger II*, 810 F. Supp. at 1581-83. These justifications were rejected by the court as inadequate. *Id.*

66. The court in *Pottinger* rejected the notion that essential life sustaining activities such as eating, sleeping, sitting, and standing are "fundamental" rights for purposes of equal protection analysis. *Pottinger II*, 810 F. Supp. at 1578. *See* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298-99 (1984); Whiting v. Town of Westerly, 942 F.2d 18, 21-22 (1st Cir. 1991).

67. *Pottinger II*, 810 F. Supp. at 1578-81. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969); Edwards v. California, 314 U.S. 160, 181-82 (1941) (Douglas, Jackson, J.J., concurring).

68. *Pottinger II*, 810 F. Supp. at 1579. *See, e.g.*, Lutz v. City of York, Penn., 899 F.2d 255, 268 (3d Cir. 1990); King v. New Rochelle Mun. Hous. Auth., 442 F.2d 646, 648-49 (2d Cir.), *cert. denied*, 404 U.S. 863 (1971); *Tobe*, No. G014257, slip op. at 14-16.

69. *Id.* at 1570 n.30.

70. *Id.* at 1561-65; *see Tobe*, No. G014257, slip. op. at 16-17.

71. *See* Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660

ly is necessary to invoke Eighth Amendment protection,[72] the cruel and unusual punishment clause also places substantive limits on what types of conduct can be made criminal.[73] In other words, if the ordinance or statute contemplates forbidding homeless persons from performing certain acts that they must perform to survive, the law will be challengeable even without a conviction. Thus, this limitation on the exercise of police powers should be attacked by both *per se* and as applied constitutional challenges.[74]

B. Constitutional Torts

The full range of constitutional torts, including false arrest,[75] malicious prosecution,[76] malicious abuse of process,[77] should be examined in assessing a government entity's mistreatment of homeless persons. If a city has an anti-homeless policy, it is likely that arrests of homeless persons unsupported by probable cause are being made and that lawful or unlawful process (i.e. warrantless arrests and seizures of property) is being initiated for an improper purpose.

In *Pottinger*, a claim for malicious abuse of process was rejected because the court concluded that the action does not lie where the improper motive (driving the homeless from the public domain) arises before the lawful arrest process.[78] The court noted that the tort of malicious abuse of process generally involves some form of extortion.[79] It is submitted that in *Pottinger* the action was well-founded where one police officer testified homeless people were detained longer than others after arrest to keep them off the streets

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(1962). *Accord* Wheeler v. Goodman, 306 F. Supp. 58 (W.D.N.C. 1969), *vacated on other grounds*, 401 U.S. 987 (1971).

72. *E.g.*, City of Revere v. Massachusetts Gen. Hosp., 463 U.S. 239, 243 (1983); Hamm v. DeKalb County, 774 F.2d 1567, 1572 (11th Cir. 1985), *cert. denied*, 475 U.S. 1096 (1986).

73. Ingraham v. Wright, 430 U.S. 651, 666 (1977).

74. The Ninth Amendment's general limitation on the power of the federal government and reservation of rights to the individual also arguably protects an involuntarily homeless person's right to live in public. The Fourteenth Amendment's due process and equal protection clauses generally protect the same rights from state infringement as the Fifth Amendment's due process clause protects from federal infringement.

75. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984).

76. *Id.* § 119.

77. *Id.* § 121. *See* Jennings v. Shuman, 567 F.2d 1213, 1217-19 (3d Cir. 1977).

78. *Pottinger II*, 810 F. Supp. at 1565-69.

79. *Id.*

longer and the officers routinely destroyed the property of homeless persons following their arrests. The city's implicit threat or extortion through its policy was, "if you homeless people do not stay out of our public areas, we are going to continue arresting and detaining you and destroying your property."

C. State Constitutional Grounds

In addition to federal constitutional grounds, state constitutional grounds should also be fully considered for expressing violations of the rights of homeless persons. The courts of many states are actively exploring the limitations of state constitutional rights and are finding that they provide greater rights and more protection than their federal constitutional counterparts.[80] Specifically, some state courts have found that their state constitutions provide greater protection against unreasonable searches and seizures[81] and cruel and unusual punishment,[82] and provide greater rights to due process of law[83] and equal protection.[84] Moreover, many states like Florida have independent, self-standing constitutional provisions protecting a right to privacy and decisional autonomy.[85] This can provide the essential foothold for arguing that even persons who choose to exist without a home have certain fundamental privacy rights that the sovereign cannot violate absent some compelling state interest.[86]

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80. *E.g.*, Traylor v. State, 596 So. 2d 957, 962-63 (Fla. 1992); State v. Ball, 471 A.2d 347, 350-51 (N.H. 1983). *See generally* Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985).

81. *E.g.*, State v. Quino, 840 P.2d 358 (Haw. 1992); State v. Cordova, 784 P.2d 30 (N.M. 1989). Florida courts are limited to interpreting Florida's constitutional provision consistent with the United States Supreme Court's interpretation of the Fourth Amendment. FLA. CONST. art. I, § 12.

82. Florida's constitution prohibits cruel *or* unusual punishment, indicating an intent to provide more protection than the parallel provision in the United States Constitution's Eighth Amendment. FLA. CONST. art. I, § 17 (emphasis added). *See* Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991).

83. *See, e.g.*, State v. Williams, 623 So. 2d 462 (Fla. 1993) (holding that law enforcement's manufacture of crack cocaine violates Florida's due process guarantee); Department of Law Enforcement v. Real Property, 588 So. 2d 957 (Fla. 1991) (holding Florida's Contraband Forfeiture Act constitutional if construed in accordance with Florida's due process protection).

84. *See, e.g., Traylor*, 596 So. 2d at 969.

85. FLA. CONST. art. I, § 23.

86. *Cf. In re* Guardianship of Browning, 568 So. 2d 4 (Fla. 1990) (stating that a person or guardian has a fundamental right to reject medical treatment or terminate life

The court in *Pottinger* rejected the plaintiffs' argument that Miami's arrests of homeless individuals for conducting basic human activities in public violated their fundamental privacy rights.[87] The court observed that, although the plaintiffs had demonstrated a reasonable expectation of privacy in their personal effects, "the law does not yet recognize an individual's legitimate expectation of privacy in such activities as sleeping and eating in public."[88] Efforts should persist to legitimize an individual's expectation of privacy in performing such activities in public where the person has nowhere else to go. The Florida Supreme Court has, for instance, made clear its commitment to the doctrine of primacy[89] and has invited the Bar of Florida to assist it in exploring the limitations of the rights protected by its Declaration of Rights.[90]

D. Federal and State Statutory Grounds

Homeless advocates must survey and explore federal and state statutory rights while preparing their complaint. For instance, the federal Fair Housing Act prohibits discrimination in housing based on race, color, religion, sex, disability, family status, or national origin.[91] Homeless persons often suffer discrimination in housing based on a combination of one or more of these characteristics and their homelessness. For instance, it might be argued that because of a disproportionally high incidence of homelessness among per-

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support systems); Shaktman v. State, 553 So. 2d 148 (Fla. 1989) (stating that a person has a reasonable expectation of privacy in telephone numbers dialed); *In re* T.W., 551 So. 2d 1186 (Fla. 1989) (stating that a pregnant minor has a fundamental right to terminate a pregnancy); Winfield v. Division of Pari-Mutual Wagering, 477 So. 2d 544 (Fla. 1985) (stating that a person has a reasonable expectation of privacy in financial records held by banking institutions); Mozo v. State, 19 Fla. L. Weekly D141, D144-45 (Fla. 4th DCA Jan. 19, 1994) (discussing Florida's privacy provision and finding protection for communications over cordless telephones).

87. *Pottinger II*, 810 F. Supp. at 1573-75.

88. *Id.* at 1575.

89. *Traylor*, 596 So. 2d at 962-63, 982-83. Primacy is the doctrine which requires state courts to give primary and independent consideration to their state constitutions when called upon to decide matters of fundamental rights. *Id.*

90. In the recent case of Kurtz v. City of North Miami, 625 So. 2d 899 (Fla. 3d DCA 1993), the court found that Florida's constitutional right to privacy protected a person's right to engage in the lawful act of cigarette smoking outside the workplace where the person was seeking employment. Although the court emphasized that the city regulation which prohibited employment of smokers effected the applicant's private conduct in her own home, it is unlikely the case would have been decided differently had the applicant done all her smoking in outdoor, public places.

91. 42 U.S.C. §§ 3601-3631 (1988).

sons of a particular protected population, a public housing program could not refuse admittance to an otherwise qualified homeless person. Likewise, the Americans with Disabilities Act (ADA) prohibits discrimination against persons with disabilities or who are perceived to have disabilities.[92] The ADA prohibits such discrimination in the "full and equal enjoyment of any place of . . . public accommodation."[93] Under this law, too, a city could not refuse to provide available housing to a qualified homeless person because of his or her homelessness.[94]

State laws can also be used creatively to protect the rights of homeless persons. Florida, for instance, has a public policy, stated in various statutes, of maintaining the family unit.[95] This policy could be used to prevent any state action, such as harassing and arresting homeless persons for living in public, which might threaten the integrity of the family unit.[96] Additionally, state laws imposing an obligation to educate children[97] arguably carry with them an obligation to provide a reasonable home environment that will facilitate the educational process. Finally, Florida public health laws impose an obligation on local governments to maintain public areas in such a way as to minimize conditions that threaten the health or life of any individual.[98]

VIII. CHOOSING PLAINTIFFS

One fundamental question needing early resolution is the choice of a plaintiff. The lawsuit can be filed on behalf of a single homeless person or small group of homeless persons, or brought as

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92. *Id.* §§ 12101-12213 (Supp. IV 1992).

93. *Id.* § 12181(a).

94. *See id.* § 12181(7)(K) (Supp. IV 1992).

95. *See, e.g.*, FLA. STAT. §§ 39.001(2)(b) & (e) (1993) (intent to provide care, safety, and protection of children in an environment that fosters healthy development and preserve and strengthen a child's family ties); *id.* §§ 39.002(1)(b) & (c) (intent to provide children with a stable home and safe and nurturing environment); *id.* § 39.01(42) (provision of preventative services to children to promote stable living environment and to promote and strengthen family life); *id.* §§ 409.801-803 (Family Policy Act intended to protect, preserve, and enhance stability and quality of family).

96. Legal Services of Greater Miami, Inc. has filed a class action lawsuit on behalf of homeless children against the Florida Department of Health & Rehabilitative Services to force the provision of shelter based on these state policies. Brown v. Towey, Case No. 91-54813 (Fla. 11th Jud. Cir. 1991).

97. *See, e.g.*, FLA. STAT. § 39.002(1)(f) (1993) (children to be provided with equal opportunity and access to quality and effective education).

98. FLA. STAT. § 386.01 (1993) (defining sanitary nuisance).

a class action under Federal Rule of Civil Procedure 23 or similar state rules. The choice of the plaintiff will have a major impact on the course of the litigation.

The primary advantage of bringing an anti-homeless policy lawsuit on behalf of a single homeless person or a small group of homeless persons is the substantially greater degree of manageability. Given the inherently difficult task of maintaining regular contact with homeless persons, the fewer plaintiffs an attorney represents, the easier it will be to maintain contact. Additionally, the fewer clients an attorney represents in one litigation, the easier it is to set litigation goals and priorities. Due to the widely varied backgrounds and circumstances of homeless persons, their interests in pursuing this type of litigation are extremely diverse. Some primarily seek financial renumeration for the injuries they have suffered as a result of wrongful arrests and harassment. Some wish to vindicate their underlying constitutional rights. Some want to preserve the right to live in public and to roam at will from place to place. Limiting the number of plaintiffs will likely lead to greater client consensus about litigation objectives.

Seeking class certification also has several disadvantages. First, it often requires a significant diversion of limited litigation resources. It may involve separate and additional discovery and will probably entail an additional and possibly lengthy evidentiary hearing. The certification of class also may inject error into any judgment. Although the court in *Pottinger* certified the plaintiffs as a class under Federal Rule of Civil Procedure 23(b)(2), Miami is challenging this ruling on appeal arguing it is "fundamentally flawed" because the definition provided by the court for "homeless persons" was vague and overbroad.[99]

Bringing a class action lawsuit also will present certain ethical dilemmas. Can an attorney competently and effectively represent a class of persons whose interests are so diverse and with whom maintaining regular contact is so difficult? How does the attorney proceed when different members of the class desire different courses of litigation? Even if the attorney maintains contact with a core group of the class, is this sufficient representation of the entire class? For all of these difficulties, it would appear that any judgment obtained on behalf of an individual homeless person or a small group of homeless persons in a non-class action lawsuit would

99. See *supra* note 4 for the class definition in *Pottinger*.

be equally applicable to similarly situated homeless persons in future litigation.[100]

Several reasons favor filing a class action suit. First, a class action suit most accurately reflects the reality of a local government's mistreatment of homeless persons. In the language of Rule 23(b)(2), the government agency opposing the class will have acted or refused to act on grounds generally applicable to the entire class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.[101] Although seeking class certification may require an expenditure of additional legal resources and necessitate additional evidentiary hearings, preparation of the pleadings and for any hearing will force the litigants to crystalize their theory of liability and marshal their evidence early in the case. It will provide an opportunity to more fully educate the court early about the facts underlying the lawsuit so the court will have a greater understanding of the case throughout the remaining pretrial proceedings. Most importantly, bringing the case as a class action lawsuit broadens the scope of the testimony that can be introduced at trial. Instead of focusing on the injuries sustained by an individual homeless person or small group of homeless persons, the plaintiffs will be able to bring in evidence of a more general nature concerning the plight of all homeless people.

IX. CHOOSING DEFENDANTS

Choosing the defendants is another litigation-defining task. Any governmental official who may be responsible for any aspect of anti-homeless policy may be sued in his or her official or personal capacity. Potential defendants may include a mayor, city or county commissioners, a city or county manager, and officials within the police department. Naming individuals focuses attention on the misconduct of those officials and may create political pressure for one or more defendants to settle the case. Naming individuals may force these officials to seek individual counsel and create conflicts between the defendants. This may be useful in dividing the interests of the defendants, thereby encouraging settlement or making them more vulnerable to adverse verdicts at trial. However, naming

100. *See generally* United States v. Mendoza, 464 U.S. 154, 158-59 n.4 (1984) (discussing offensive use of collateral estoppel by a nonparty to a prior lawsuit).

101. FED. R. CIV. P. 23(b)(2).

individual defendants will also complicate the litigation by involving more parties and their attorneys. It will also evoke litigation over whether a particular official enjoys qualified immunity.[102] This will require additional legal resources and may ultimately necessitate an interlocutory appeal.[103]

Choosing a municipality as a defendant has its own advantages and disadvantages. One advantage is that by naming one defendant, the plaintiffs will have challenged the misconduct of every municipal official acting in the locale. However, to establish municipal liability, the plaintiffs must prove that the municipality maintained an unconstitutional policy and that the policy caused the injuries suffered by the plaintiffs.[104] Plaintiffs will have to prove the existence of a policy established by an upper-level official with policymaking authority or a well-established and widespread pattern or practice that constitutes a custom or usage with the force of law.[105] A significant disadvantage is that in Florida, and presumably in many other states, a federal civil rights litigant cannot obtain punitive damages against a municipality.[106]

X. CHOOSING THE FORUM

A federal civil rights action filed pursuant to 42 U.S.C. § 1983 alleging a violation of federal or state constitutional rights can be brought both in state and federal court. Several considerations bear on this decision. Perhaps most importantly, a judicial decision impacting a municipality's anti-homeless policy will have significant political implications. An elected state court judge may be wary to condemn a municipality's anti-homeless policy and uphold the rights of this politically unpopular class. On the other hand, a life-appointed federal judge, if provided case law supporting such a decision, should have little difficulty finding municipal liability.

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102. Qualified immunity is a defense to liability for monetary damages of government officials (including police officers) performing discretionary functions where "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

103. *See* Sims v. Metropolitan Dade County, 972 F.2d 1230, 1233 (11th Cir. 1992).

104. *E.g.*, Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95 (1978); Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1st Cir.), *cert. denied*, 493 U.S. 820 (1989).

105. City of St. Louis v. Praprotnik, 485 U.S. 112, 125-27 (1988); *Monell*, 436 U.S. at 691; *Bordanaro*, 871 F.2d at 1155-56; Depew v. City of St. Mary's, Ga., 787 F.2d 1496, 1499 (11th Cir. 1986).

106. FLA. STAT. § 768.28(5) (1993).

Additionally, a federal district judge will likely be far more familiar with the intricacies of federal constitutional litigation than a state court trial-level judge. This situation may be reversed in cases relying upon state constitutional claims. When bringing a case to a speedy conclusion is the overriding concern, filing in state court will probably be the best choice.

XI. BENCH OR JURY TRIAL

Generally, a plaintiff has the right to a jury trial in any action for money damages.[107] Typically, a request for a jury trial must be made at the time of the initial complaint.[108] Once trial by jury is requested, the defendant may be able to insist upon it notwithstanding the plaintiff's later decision to request a trial by the court.[109]

In deciding between judge and jury, the plaintiffs obviously will want to select the fact finder most likely to rule in their favor. A jury trial will be the longer and more complicated option. Given the probable natural prejudice of most people against homeless persons, substantial energies will have to be spent developing voir dire questions to identify venire persons whose prejudices will prevent them from rendering a verdict in the plaintiff's favor. It may be very useful to engage a jury consultant or to conduct a mock trial. If the plaintiffs consider pursuing a bench trial, the judge's political orientation and attitude must be carefully considered.

If the plaintiffs initially request a jury trial and later opt for a bench trial and the defendants oppose the change, a court should favorably consider a motion to bifurcate the liability from the damages portion of the trial. This would allow the court to sit as the finder of fact regarding liability, while preserving the defendants' right to a trial by jury on damages. In *Pottinger*, the plaintiffs sought primarily injunctive and declaratory relief and only, incidentally, monetary damages. The court granted a motion to bifurcate placing the judge in the role of fact finder regarding liability.[110] The court concluded that the equitable issues were "the very heart" of the plaintiffs' class action for which there was no adequate remedy at law. Under these circumstances, the court concluded that it

107. U.S. CONST. amend. VII; FED. R. CIV. P. 38(a).
108. FED. R. CIV. P. 38(b).
109. FED. R. CIV. P. 39(a).
110. *Pottinger II*, 810 F. Supp. at 1557.

was entitled to first resolve the equitable claims even though the results might be dispositive of issues involved in the legal claims.[111]

XII. PUBLICITY

Homelessness is a matter of great public interest. A comprehensive media strategy should be planned in advance. Attorneys should contact local news reporters and advise them of the lawsuit and offer them access to background material. Press releases and conferences announcing the filing of the lawsuit and continuing litigation progress will keep the media actively interested in the case. Introduce the news media to the plaintiffs, show where the homeless live, and have the homeless tell their stories. Any homeless person interviewed in the context of a class action lawsuit will be seen as representing an entire class. Thus, they should be screened and prepared carefully for any media contact.

Before implementing a publicity strategy, the relevant ethical rules must be consulted.[112] Publicity restrictions are greatest in criminal cases or civil matters triable to a jury.[113] Generally, a lawyer is permitted to make extrajudicial statements, without elaboration, regarding the general nature of the claim, information contained in a public record, the general nature of an investigation of the matter, and the scheduling or result of any step in the litigation.[114]

XIII. SELECTION OF WITNESSES

In a lawsuit challenging a municipality's efforts to criminalize homelessness, the plaintiffs will generally call three types of witnesses. First, experts will testify about the plight of the homeless and the nature of the municipal misconduct against homeless persons. Second, homeless persons will testify about their own experiences, including the injuries they have suffered as a result of the

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111. *Pottinger II*, Order on Motion to Bifurcate, filed June 11, 1993, at 3. *See, e.g.*, Katchen v. Landy, 382 U.S. 323, 339 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 477-80 (1962); Beacon Theaters, Inc. v. Westover, 359 U.S. 500, 509-10 (1959).

112. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6 (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107 (1980).

113. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6(b) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(A), (B) (1980).

114. RULES REG. FLA. BAR, Rule of Professional Conduct 4-3.6(c) (1992); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(C) (1980).

municipal anti-homeless policies or practices. Third, other members of the local community will testify about their observations of the municipality's anti-homeless policies and practices.

A. Experts

Experts can testify about the causes and the involuntary nature of homelessness, its local demographics, the circumstances under which homeless people live, and the difficulties they encounter as a group attempting to reenter society. Experts qualified to give this testimony are sociologists, anthropologists, or social workers who have experience dealing with homeless persons. Medical doctors can testify about the health conditions of the homeless. Public health experts can discuss the risks of exposure to unsanitary living conditions not only to the homeless, but to the surrounding community as well. Mental health experts can testify about the psychological and emotional problems that contribute to the plaintiffs' homelessness and burdens their difficult reintegration into society.

Law enforcement experts may be able to testify about the objective unreasonableness of certain police procedures and practices in dealing with homeless persons. The expert may be able to assist in analyzing arrest records or internal police memoranda and identifying a *de facto* policy of harassing homeless persons within the local police department. Since these experts may have many years of experience in police departments, they may have been involved in anti-homeless policies or procedures themselves. This will give them a particularly enlightened vantage point and should make them very credible witnesses.

B. Homeless Witnesses

Selecting homeless witnesses is a difficult task. These witnesses will probably have a spotted, if not lengthy, criminal record.[115] Many are substance abusers. These circumstances are part of the culture of homelessness, which the experts have hopefully explained at trial. Nevertheless, the defendants will undoubtedly highlight these facts and use them to discredit the plaintiffs. While these facts will likely carry little weight with the judge, they will

115. A large part of a homeless person's criminal record may be attributable to arrests for being homeless.

probably prejudice public opinion and the jury.

Any homeless person who testifies will be viewed by the finder of fact as a representative of homeless persons as a class. Witnesses should understand that their participation is a commitment to a potentially lengthy course of proceedings. They will have to agree to appear for meetings, depositions, and hearings. They must understand and be committed to the litigation goals. Many homeless persons are zealots or have hidden agendas for being involved in such a lawsuit. Thus, it is essential to thoroughly prepare any such witnesses for testimony and any out-of-court interviews.

C. Community Members

Many people in the community will have valuable information regarding a municipality's anti-homeless animus. Homeless advocates may be able to testify about the lack of adequate shelter, services, and assistance available to homeless persons in the community. They may also be able to testify about any municipal anti-homeless policy or practice and incidents of official homeless mistreatment and discrimination with which they have been involved.

XIV. TEMPORARY RESTRAINING ORDERS AND PRELIMINARY INJUNCTION LITIGATION

Often it is the imminence of a certain event involving homeless harassment that inspires the filing of an institutional anti-homeless lawsuit. Under these circumstances, the immediate relief of a temporary restraining order (TRO) or preliminary injunction may be necessary. A TRO may be granted without notice to the adverse party if the plaintiffs clearly demonstrate, by affidavit or verified complaint, that immediate and irreparable injury, loss, or damage will result before the adverse party can be heard in opposition and if adequate efforts have been made to provide notice to the opponent.[116] A preliminary injunction may only be issued upon notice and a hearing to the adverse party.[117] To secure such extraordinary relief, plaintiffs must show (1) a substantial likelihood of success on the merits; (2) that plaintiffs will suffer irreparable injury unless the injunction is issued; (3) that the threatened injury outweighs any damage the proposed injunction may cause the opposing

116. FED. R. CIV. P. 65(b).
117. FED. R. CIV. P. 65(a).

party; and, (4) that the injunction, if issued, would not be adverse to the public interests.[118]

Although the main goal of requesting a TRO or preliminary injunction is to secure emergency relief, there are other incidental benefits. The injunction requires the plaintiffs, early in the lawsuit, to clearly articulate their theories of liability and the nature of the relief sought. Conducting the hearing on a preliminary injunction will assist the attorneys in identifying the strengths and weaknesses of the case. The injunction pleadings and the hearing will allow the plaintiffs to begin educating the judge about the nature of the plaintiffs' plight and the mistreatment suffered at the hands of the defendants.

In considering a request for a preliminary injunction, the court will necessarily consider the merits of the plaintiff's claims. However, the complexity of the factual and legal issues of this type of lawsuit make them difficult to fully address in the context of a TRO or preliminary injunction hearing. Thus, if the trial court is disinclined to grant the requested relief, it should be requested not to deny the request based on the failure to demonstrate a substantial likelihood of success on the merits.[119] In *Pottinger*, the district judge denied the plaintiffs' request for a preliminary injunction. The denial was based initially on the court's conclusion that it could not fashion an injunction with the degree of specificity required by Rule 65(d).[120] The court went on to analyze the four factors that must be considered in resolving a motion for a preliminary injunction. After finding that the second, third, and fourth factors weighed against issuing the injunction, the court noted that it need not determine the likelihood of ultimate success on the merits.[121]

XV. TRIAL

The finder of fact must be educated about the nature of homelessness and the anti-homeless policies enforced by the defendant against these vulnerable people. Trial counsel must pay particular attention to detail and not assume the factfinder has any

118. *E.g.*, Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 180-82 (5th Cir. 1975); Canal Auth. of Fla. v. Callaway, 489 F.2d 567, 572-73 (5th Cir. 1974); 11 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2947 (1973).

119. *Pottinger II*, 810 F. Supp. at 1555.

120. FED. R. CIV. P. 65(d). The plaintiffs in *Pottinger II* sought to enjoin the Miami police from, *inter alia*, harassing homeless persons.

121. *Pottinger II*, 810 F. Supp. at 1583-85.

particular knowledge about homelessness. Additionally, the attorney may need to overcome substantial prejudices of the factfinder against homeless persons. It is essential to personalize the homeless to the finder of fact.

Given the complexity and novelty of the issues, it is useful to organize the presentation of the case around themes or analogies to more familiar situations. In *Pottinger*, the plaintiffs urged that the city's harassment of them was like roach control by a professional exterminator.[122] By the plaintiffs' analogy, the city sought to dry up their food supply, destroy their nests, research and develop new poisons, and keep them on the move.[123]

XVI. POST-VERDICT ADMINISTRATION

Regardless of the ultimate outcome, the plaintiffs' lawyers responsibilities may continue well into the future. If a judgment is entered in favor of the defendant, a determination of whether to appeal must be made. The homeless clients must be fully apprised of their appellate rights. If a decision is made to appeal, the attorney must take all necessary steps to preserve that right including filing post-verdict motions and filing any documents necessary to invoke the plaintiffs' appellate rights. If plaintiffs' counsel do not intend to continue with representation on appeal, they should endeavor to secure qualified appellate counsel.

If the court rules in the plaintiffs' favor, counsel must insure that the defendant lives up to the letter and spirit of any injunctive or other relief. This may require further meetings with the defendant, monitoring records that will reflect the defendant's compliance, or attending various collateral proceedings. Any deviations from the court's ruling must be brought immediately to the trial court's attention. This may require filing one or more post-judgment orders to show cause why the defendant should not be held in contempt. Throughout all post-judgment proceedings, counsel must continuously strive to keep the plaintiffs informed as to the status of the lawsuit.

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122. *Id.* at 1555, 1567. *See also* Plaintiff's Post-Trial Memorandum filed July 20, 1992.

123. *Pottinger II*, 810 F. Supp. at 1555, 1567. *See also* Plaintiff's Post-Trial Memorandum filed July 20, 1992.

XVII. CONCLUSION

Municipalities throughout the United States continue to experiment with strained and novel ways to effectuate anti-homeless policy. In far too many communities, being homeless is a crime. If institutional anti-homeless policies are to be eliminated and replaced by thoughtful and effective programs to reduce homelessness consistent with constitutional and statutory rights, more large scale lawsuits like *Pottinger* must be filed and prosecuted.

In many respects, a class action lawsuit to protect constitutional and statutory rights of homeless persons is no different than any other complex, civil rights litigation. The key to successful litigation is to simplify the issues and to present a compelling case that will allow the finder of fact to rule in the plaintiffs' favor. It is hoped that this Article will provide a starting point for devising an effective litigation strategy for any attorney contemplating filing a *Pottinger*-type lawsuit.

James D. Wright & Amy M. Donley, Poor and Homeless in the Sunshine State: Down and Out in Theme Park Nation (2011)

12

A Tale of Two Cities: Homeless Politics and Services in Miami and Orlando

What to do with, for, or about the homeless has bedeviled American cities[1] since the current outbreak of homelessness began in the late 1970s and early 1980s. In this, Florida cities are no exception. In the early 1980s, vast segments of the city of Miami, Florida's largest metro area, approximated Third World homelessness conditions, with immense homeless camps under many of the bridges and overpasses, thousands of street people wandering about the city, and a quasi-official policy of dispersal, indifference, and repression. Street sweeps, demolition of homeless camps, and the confiscation and destruction of homeless peoples' belongings were near-daily occurrences. Much of this went on with the tacit consent of local government and the implicit approval of many downtown business and development interests. And with good reason: the uncontrolled growth of homelessness in downtown Miami was threatening to destroy the quality of urban life.

Homelessness wasn't doing much for the quality of life in Orlando in those years either. Articles in the local paper, the Orlando *Sentinel,* circa late-1980s, routinely referred to the "flood of homeless people" in the city's streets and public places.[2] By 1987, the homeless situation in Orlando was sufficiently alarming to the city's Downtown Development Board that they coughed up $350,000 to help a group of concerned citizens, mostly people of faith, open a shelter to get homeless men off the streets at night. (This shelter eventually became the Coalition's Pavilion, which has been featured in many previous chapters.) An article in the New Orleans *Times-Picayune* compared the homeless situation

to be dismissed, was Hurricane Andrew, the devastating 1992 Category 5 hurricane that leveled the better part of South Florida and rendered thousands of its victims homeless. Andrew was the object lesson, there for anyone to see, that innocent people could become homeless for reasons beyond their control, and that being homeless was not necessarily the homeless person's fault.

The *Pottinger* suit bubbled through the legal system for four years before it was decided in favor of the plaintiffs in the U.S. District Court for the Southern District of Florida in November 1992. Ironically, and perhaps not coincidentally, this was just three months after Hurricane Andrew had destroyed an estimated 25,500 homes and inflicted serious damage on an additional 100,000—no time to be insensitive to the needs of the homeless! The ruling was a slam-dunk. The court found that Miami's practice of arresting people for "harmless life sustaining activities that they are forced to perform in public" was in violation of the Eighth Amendment (these arrests were found to constitute cruel and unusual punishment), the due process clause of the Fourteenth Amendment, and also "burdened the fundamental right to travel in violation of the Equal Protection Clause." Police seizure and destruction of homeless persons' property was found to be in violation of the Fourth Amendment guarantee against unreasonable search and seizure. For relief, the court ordered the City of Miami to comply with the plaintiffs' requests for declaratory and injunctive relief. The City was required to establish safe zones where homeless people could stay without being arrested for "life-sustaining activities." The injunction defined eleven specific "life-sustaining misdemeanors," e.g., being in a park after curfew hours; eating, sleeping, sitting, congregating, or camping in public places; public nudity, urination or defecation; living or sleeping in a vehicle; and the like, for which homeless persons could not be arrested (or even warned about). The police were also ordered to stop arresting homeless people for these activities and to stop confiscating and destroying their property. Numerous other provisions to protect Miami's homeless population from official abuse, harassment, and discrimination were also made.

The City, of course, immediately appealed the court's decision, challenging the basis and scope of the injunction. The appeal was heard two years later, in December 1994, was remanded to the District Court for clarification, and was reheard in April 1995, at which point the original findings and injunction were basically upheld. In February 1996, the entire matter was referred to mediation and a mediation agreement was reached in December 1997, nearly a decade after the original suit was

filed. (In the interim, Pottinger himself had died—where, when, or how, no one seems to know.) The agreement provided for law enforcement training, policy, and protocols to prevent the arrests, harassment, or destruction of the property of homeless people; for an advisory committee to monitor compliance and investigate complaints; for a compensation fund of $600,000 to be disbursed in $1,500 lots via pre-loaded debit cards to homeless persons who had been injured by the unconstitutional conduct of the Miami police; and for "reasonable" attorney's and expert witness fees, a small chunk of which went to the senior author of this book for his testimony on behalf of the plaintiffs.[4]

Despite the decision to appeal the Court's ruling, the City was under no illusions about the likely outcome. In an off-the-record conversation with the plaintiff's expert witness, the city attorney defending the case admitted, "We really don't have a leg to stand on." Even before the appeal was heard, Miami-Dade County took two dramatically positive and significant steps forward. First, a systematic 1992 assessment of the regional homeless problem determined that the problem was far too large to be solved by the private sector alone and that some sort of dedicated, ongoing source of public funding for homeless services would be necessary. The Florida State Legislature, supported by then-Governor Lawton Chiles and acting on the request of the Miami-Dade County Commission, passed legislation enabling a 1 percent "add-on" sales tax on food and beverages sold by establishments with gross annual revenues exceeding $400,000. This tax was implemented in Miami-Dade County in 1993 without significant opposition and now provides about $14 million per year in dedicated funding for homeless services (with 15 percent of the revenue dedicated to domestic violence shelters). Affluent people in Miami who run up a hundred-dollar bar bill get dinged for one extra buck, and the result is eight figures of dedicated annual revenue to fund homeless services. How many site visits does it take to figure out that this must be a significant element in the Miami success story?

In addition to the food and beverage tax, on May 18, 1993, the Miami-Dade County Commission appointed a Task Force on Homelessness to determine what services Miami should be trying to provide to its homeless people with the new revenues. The Task Force was charged with developing a plan to comply with *Pottinger*, but went beyond mere compliance to create a truly comprehensive approach to dealing with the region's homelessness problem. A central part of the plan, the *Dade County Community Homelessness Plan*, was to create the Miami-Dade County Homeless Trust "to oversee that portion of the Food and Bever-

age tax dedicated to homeless programs and to ensure that the proceeds are used in a manner which will provide the greatest benefit to homeless persons and the community as a whole" (Task Force on Homelessness 1994: 21).

Significantly, the co-chairs of the Task Force on Homelessness that created the Community Homeless Plan were then-Commissioner Alex Penelas and Mr. Alvah H. Chapman, Jr. Penelas was at the time the youngest county commissioner in Dade County history. On October 1, 1996, he became the first Executive Mayor of Miami-Dade County, serving in that capacity until 2004—i.e., throughout the formative period of the Homeless Trust and the Community Homeless Plan. From the Trust's inception in 1994 until the end of his tenure as Mayor, Penelas also served as the Trust's chair. Mayor Penelas was an enormously charismatic and influential figure who was voted "America's sexiest politician" by *People* in 1999. That the Community Homeless Plan was *his* plan made a huge difference in getting Miami's influential citizens to take the plan seriously.

Penelas' co-chair was Alvah Chapman, one-time publisher of *The Miami Herald*, chairman of the Knight Ridder newspaper chain, and by all accounts one of South Florida's most influential philanthropic and civic leaders. Chapman's list of accomplishments includes literally scores of philanthropic and charitable activities. In 1995, he became the founding chairman of the Community Partnership for the Homeless, the private partner of the Miami-Dade County Homeless Trust and the entity that operates the Homeless Assistance Centers. The downtown Homeless Assistance Center is adorned by Chapman's bust. It is doubtlessly a fair assessment that pretty much anyone Penelas could not "deliver" to the service of the homeless plan, Chapman could—and this kind of political leadership was also a decisive factor in Miami's long-term success.

Significantly, Penelas was succeeded as Executive Mayor by the current incumbent, Mayor Carlos Alvarez, a former director of the Miami-Dade Police Department. Alvarez has also embraced the cause of homelessness and sits voluntarily as a member of the Board of Directors of the Homeless Trust. Numerous other influential community members also serve on the Trust's Board of Directors, which is chaired by Ronald L. Book, described in *Newsweek* as "one of the state's most powerful lobbyists." Clearly, Miami's Homeless Trust has never suffered for lack of political clout.

Over time, the Miami-Dade County Homeless Trust became the regional lead agency for the U.S. Department of Housing and Urban

Development's "Continuum of Care" (CoC). Each year, HUD awards an array of program funds to local communities to combat homelessness and requires that all applications from a particular area or jurisdiction be coordinated through a single "Continuum of Care" lead agency. Thus, the Homeless Trust has become the organization responsible not only for overseeing the distribution of proceeds from the Food and Beverage Tax, but also for organizing the entire community-wide Continuum of Care effort, an effort that directly or indirectly involves scores of community agencies and programs. Considering both HUD funds and tax revenues, the Trust has annual revenues of more than $40 million.

Most homeless service providers in the Miami CoC also fund-raise independently of the Homeless Trust and operate homeless programs other than those funded by the Trust, so the Trust's $40 million is only a down-payment on the annual cost of providing direct services to Miami's homeless people. According to David Raymond, Executive Director of the Homeless Trust, the total annual expenditure on direct homeless services in Miami-Dade County is at least *twice* the Trust's $40 million, including leveraged funds—i.e., $75 or $80 million each year and quite possibly more than that. In contrast, the Orlando Mayor's Working Committee on Homelessness (about which we will provide more later) estimated in its 2004 report that the equivalent figure for the Orlando metropolitan area was on the order of $10 million; today's figure, according to Orlando's Homeless Services Network, may be closer to $20 million, but surely not much more than that.[5] Miami-Dade County is about twice as populous as the Orlando metro area but spends four or five times more money each year to feed, clothe, treat, shelter, and house its homeless population.

Equally as impressive is the vision expressed in the original Dade County Community Homelessness Plan and the degree to which that plan has been followed in the decade and a half since. In 1994, the homeless population of Miami-Dade was estimated to be about 6,000 persons (at the time, figures of eight or even ten thousand were also being promulgated, but a count of about 6,000 was cited repeatedly in the *Pottinger* proceedings and no one on either side contested this figure). In contrast, the public emergency housing system in early 1990s Miami consisted of some 230 emergency shelter beds and perhaps 50 transitional beds. Non-profit organizations added about 600 emergency beds to the overall capacity, most of them targeted to single men. Finally, there were perhaps 500 "treatment" beds in mental health and substance abuse programs serving a predominantly homeless clientele.

At the outside, the total capacity in 1994 was adequate to provide shelter and some minimal services to not more than one out of four homeless people in Dade County.

The Task Force's plan to address the shortfall was a three-stage system of services: *temporary care* to "provide immediate short term housing and basic support services to persons now residing in public places"; *primary care* to provide transitional housing with treatment and rehabilitation to homeless persons found in need of substance abuse treatment, vocational training, mental health treatment, or basic education; and *advanced care*, defined in the plan as "supported long term housing such as church assisted housing, supported Single Room Occupancy residence, and assisted apartment or other residential arrangements" (p. 5). In contemporary parlance, these are immediately recognizable as emergency assistance, transitional care, and permanent housing—i.e., what we now know as the HUD Continuum of Care. So in its thinking about a comprehensive continuum of services, the original Community Homeless Plan was quite forward-thinking.

To support and promote the three-stage services system, the plan envisioned aggressive outreach whereby professionals and volunteers from the emergency shelters would "visit homeless people to urge them to enter into the centers." This outreach function was expected to be a "formal networking system between provider agencies and law enforcement personnel to ensure a humane and sensitive approach to dealing with homeless persons" (p. 9). These observations led directly to the Miami-Dade County outreach program, a network of more than fifty paid outreach workers, many of them formerly homeless people, who work out of the Miami police department's Neighborhood Enhancement Centers to reach out to street people and bring them into the Continuum of Care. And while this outreach function is not without problems, it would be nearly impossible for a homeless person to be on the streets of Miami or Dade County for more than forty-eight hours without being approached by an outreach worker and referred to a treatment center or emergency shelter, depending on apparent need.

The Task Force was clear that the first priority would be emergency shelter through the Homeless Assistance Centers. The original plan was for 1000-1500 new emergency beds, but as they evolved, the two centers came to serve approximately 750 homeless people and families nightly (with other providers making up the difference). The first center opened in downtown Miami in October 1995; the second began operations in October 1998 at the former Homestead Air Force Base in South

Miami-Dade County (ground zero, incidentally, for Hurricane Andrew in Florida). Construction of the first HAC, then, was well underway before the City's *Pottinger* appeal was even heard. In fact, the appellate court noted favorably that since the 1992 order, the City and its private partners had begun construction of homeless shelters that would address some of the problems that undergirded the district court's ruling. Rather than endless hemming and hawing about where to locate a shelter, the Community Partnership for the Homeless (CPH) found a suitable site, negotiated a "good neighbor" agreement with the surrounding community, and stuck a shovel in the dirt. This is indicative of what can be accomplished with the kind of political leadership and funding CPH and the Homeless Trust have enjoyed over the years.

CPH now provides daily food, shelter, and case management services to about 750 homeless men, women, and children on two separate physical campuses. The annual budget for the overall CPH operation is about $12 million. The Coalition for the Homeless of Central Florida also provides daily food, shelter, and case management services to about 750 homeless men, women, and children on two separate physical campuses. And the annual budget for their operation is about $3.5 million. Is it any surprise that the HACs seem to realize better outcomes?

In addition to 1000-1500 new emergency shelter beds, the plan also envisioned 750 new "primary care" beds within three years. There was no stated goal for stage-three permanent supported housing, only the recognition that such would be the "final stage" in the continuum of care and that "during the next five years, considerable attention must be placed on expanding advanced care facilities for homeless adults and families" (p. 14). As indicated, the plan also anticipated the need for an extensive program of outreach and likewise a need "to coordinate interagency prevention efforts."

The Homeless Trust as it exists today bears a striking resemblance to what the Task Force on Homelessness envisioned fifteen years ago. The outreach system has already been described. As of 2008-09, the Homeless Trust and its Continuum of Care had developed the following capacity:[6]

- 1,402 emergency shelter beds, 786 beds for single individuals and 616 set aside to shelter families, with another 132 emergency beds currently under development. The total shelter capacity in place or in development amounts to 1,534 beds, compared to the original target of 1000-1500. (In 2009, 54 additional emergency shelter beds were added to the capacity, bringing the total to 1,588.)

- 1,895 transitional treatment beds for homeless people with alcohol, drug, psychiatric, physical or other disabilities (versus the original target of 750).
- Some 2,666 units of permanent supported housing already on-line, with a goal to add a hundred new units per year. All told, the Homeless Trust and its partners command approximately 6,000 units of housing for formerly homeless people, almost half of which is supported housing with wrap-around services and the remainder of which is mainstream affordable housing for very low income people.

Today, including clients seen in the homeless prevention program, the Trust and its many collaborators serve 19,000 people annually. The Continuum of Care consists of some twenty-seven agencies and providers working together in a well-coordinated network along with innumerable other collaborations with various city, county, and regional entities. With a few exceptions, the homeless encampments have been largely eliminated, the number of homeless people living in the streets has declined from an estimated 6,000 at the time of *Pottinger* to somewhere around a thousand today (the "official" number from the most recent count is 1,074), and a very extensive and aggressive system of outreach has been established throughout the county to assure that homeless people are aware of the services available to them.

As one Miami stakeholder explained to us in an interview, the key to the Trust's success is that they took a "visionary plan, implemented it, and have stuck with it from the beginning. They have provided consistency and steadiness of vision, have established coordination among the providers, manage their money well, and bring in lots of it." These are not things that would be said of Orlando, whose leaders have a long, sorry history of indifference to a succession of homelessness plans, recommendations, and reports, up to and including the current "Ten 2 End" plan to eliminate chronic homelessness in the Orlando community.

Miami's initial Community Homeless Plan certainly did not envision the end of homelessness, but in the past decade, Miami, along with about 350 other U.S. cities (now including Orlando), have developed and have begun to implement ten-year plans to end homelessness. With program models developed and promulgated by the Interagency Council on Homelessness and the National Alliance to End Homelessness, and with new funding in the pipeline from HUD, many cities have (more or less) realistic aspirations to be rid of homelessness, or at least chronic homelessness, once and for all.[7]

Miami's paradigm for ending homelessness (the same as in many other cities) is to "close the front door and open the back door," i.e.,

to be aggressive about preventing people and families from becoming homeless in the first place and even more aggressive about getting them out of shelters and back into housing once they have become homeless. Yet a third piece is to develop housing infrastructure to provide acceptable housing options to low income people.

Miami's Homeless Trust has relatively successful programs focused on homeless prevention through rent assistance and case management, rapid rehousing of persons and families who have fallen into homelessness, and Housing First (an intervention strategy discussed at length in Chapter Four). Of these, homeless prevention has proven the most vexing. A well-worn cliché promises that "an ounce of prevention is worth a pound of cure." However, the number of people on the verge of becoming homeless is so large (see Chapter Two) that trying to prevent a significant fraction of them from becoming homeless may be like trying to bail out a sinking ocean liner with a teaspoon. Most homeless prevention programs find themselves overwhelmed by demand that quickly depletes the resources available, and in this Miami is no exception. Thus, in terms of sheer economic efficiency, it may be necessary to let people become homeless, intercept them as early in the process as possible, then get them back into housing quickly—i.e., rapid rehousing instead of homeless prevention.

As for infrastructure development, Miami's Homeless Trust has advocated aggressively for the "30:30" campaign, an effort to set aside 30 percent of the affordable housing stock for people at or below 30 percent of the area median income. They have also forged dozens of collaborative arrangements with affordable housing developers and providers, some of whom receive Trust funding and many of whom do not. No big city has enough affordable housing to satisfy the need and probably won't anytime soon, and no city will be able to eliminate homelessness completely so long as this remains true. But Miami and its Homeless Trust are at least making the effort.

In their meta-evaluation of CoC evaluations, Burt et al. (2002) conclude that the question about ending homelessness needs to be divided into two distinct questions: (1) Has the system managed to generate more and better exits from homelessness? (2) Has it prevented fewer entries? In Miami, the answer to the first question is a qualified "yes." With 2,666 units of permanent supportive housing to work with, being "fed" by nearly 2,000 transitional treatment beds, little of which existed when the Trust was formed sixteen years ago, homeless people in Miami have vastly better exit chances today than they did before. And clearly,

there are many fewer homeless people on the streets. On the other hand, both the treatment programs and the permanent housing programs have waiting lists, and vacancies in the permanent housing programs are rare, so "exit" remains problematic for many.

As for limiting new entries into homelessness, a massive investment of resources in homeless prevention would be required and that is probably not in the cards anywhere, the federal Homelessness Prevention and Rapid Rehousing Program (HPRP) notwithstanding. As Burt et al. explain

> With possibly one or two exceptions, none of the communities we visited appears to have reduced the entry of newly homeless people into the system, or the overall volume of homeless people served by the system. To do so will require addressing the two ends of the CoC, prevention and affordable housing, neither of which can be done without significant involvement of mainstream agencies and strong support from the wider community.

Miami has clearly gone further than most CoCs in bringing "mainstream agencies and the wider community" to the table, so while ending homelessness altogether is an audacious and unattainable goal, it is less improbable in Miami than in most American cities.

Conclusions: Miami and Orlando Compared

One question we asked nearly everyone we talked to in the evaluation of Miami's Homeless Trust is why the Trust has been so successful, especially in comparison to other CoCs around the country, many of whom have floundered. Outstanding leadership is the most common answer we got. The principal author of the Dade County Community Homeless Plan, Alex Penelas, who was a County Commissioner at the time, went on two years later to become Miami-Dade's first Executive Mayor, and during his entire term as Mayor also sat as the Chairman of the Board of the Miami-Dade County Homeless Trust. The principal authors of the various Orlando homelessness plans were (1) obscure social work professors from the University of Central Florida; (2) a consultant to a Mayor whose term of office ended within weeks of her plan's publication; (3) the co-chairs of Dyer's working committee, attorney Terry Delahunty and the Executive Director of the Christian Service Center, Robert Stuart; and (4) Tracy Schmidt, Chief Financial Officer of CNL, an Orlando-based financial and insurance group, who chaired the original Regional Commission on the Homeless. All of these are talented and well-meaning people, but none commanded the clout in the Orlando region that Penelas and his co-chair Alvah Chapman did in Miami-Dade. Likewise, the current Chairman of the Board of the Miami-Dade Homeless Trust is often described as one of the most powerful political lobbyists in the State of Florida. The Chairman of the Board of the Homeless Services Network is the Executive Director of the Health Care Clinic for the Homeless—a very talented guy, to be

sure, but not someone whose very presence causes politicians to tremble. In short, Orlando has suffered because no local Leviathan has stepped forward to champion the homeless cause.

A second obvious difference is Miami's food and beverage tax, a dedicated source of funds that provides $14 million each year for homeless services. Among other things, these funds have allowed Miami-Dade to aggressively pursue grant opportunities that require cash matches, whereas Orlando passes annually on numerous grant opportunities because the requisite cash match cannot be found. Needless to add, losing the *Pottinger* suit was an important impetus for the passage of this tax and for the formation of the Task Force on Homelessness that developed the Community Homelessness Plan.

A third point, perhaps less obvious but doubtlessly important, is that the Miami-Dade County metropolitan region has been administered by a county-wide metropolitan government since 1957 (Mohl 1984). This was the nation's first "metro" government and is routinely cited as one of the most successful examples of consolidated urban government anywhere in the country. Beginning in 1957, Miami-Dade metro government slowly and successfully expanded its powers and usurped many of the functions of the county's (then) twenty-seven independently incorporated municipalities, all of which continue to exist, elect mayors and other officials, and otherwise act like real cities, but each of which is very much in the back seat when it comes to driving metro-wide policies like the homelessness plan. (The original twenty-seven municipalities have since expanded to thirty-five.) This, of course, did not happen without a struggle. The metro government in Miami-Dade has endured vociferous opposition ever since the July 1957 referendum. But the many successes of regionalized government in Miami-Dade—in areas such as expressways, mass transit, modernized law enforcement, region-wide development policies and land use codes, strict pollution controls, regional water management, and numerous others where real progress could only be made with a regional approach—simply overwhelmed localist attacks. So, when a regional plan was presented in 1994 to deal with what was obviously a regional homelessness problem, no one looked askance or worried that their pockets were being picked. The contrast with parochial Orlando and the surrounding county and municipal governments could scarcely be sharper. Clearly, the homelessness issue and many others have suffered as a result.

Fourth, the Miami business community seems to have a more enlightened view of homeless issues than the Orlando business community.

Both cities, of course, have Downtown Development Boards (DDB) or Authorities that are concerned about the effects of homelessness on tourism, the business climate, people's willingness to come downtown, and the overall downtown image. And both Boards have expressed concerns about panhandling, public feedings, and homeless people inhabiting public spaces and sleeping in the streets, and have championed ordinances to deal with these issues. But in Orlando, the Downtown Development Board seems to regard homelessness as a nuisance that needs to be eliminated whereas Miami's Downtown Development Authority (DDA) looks on homelessness as a problem that needs to be solved.

The Orlando DDB was represented on the Mayor's Working Committee on Homelessness and provided numerous memos and documents outlining the concerns of the business community. Quoting from one of these, "The Downtown Development Board fields numerous complaints related to panhandling, public urination and a wide variety of loitering from people using our downtown. In particular, panhandling throughout downtown, mass feeding programs and congregations in Heritage Square top the list of complaints." A later passage added, "Many people are uncomfortable and feel threatened by their exposure to this activity," meaning exposure to the alleged activities of the homeless: panhandling, public urination, etc. And finally, "It is common to receive reports that businesses are hesitant to entertain clients because of the concern related to a large downtown homeless population. A good number of potential visitors and customers are also hesitant to venture downtown due to the concentration of homeless individuals in the Central Business District (CBD). In addition, there has been widespread acknowledgement of the devastating impact of concentrated homeless care providers within the Parramore neighborhood."[13] The policy recommendations from the Board to the Committee were a public awareness campaign to discourage people from giving to panhandlers (a recommendation that the Committee accepted), a code amendment to "prohibit public meal distribution/feeding programs throughout downtown" (this was also done, as discussed previously), prohibition of "impromptu worship services for the homeless in Lake Eola Park" and elsewhere in the CBD, greater outreach to street people, and an extension of the Parramore moratorium to the entire downtown core.

Like its Orlando equivalent, the Miami Downtown Development Authority says that it receives three main complaints from residents, visitors, and business owners in the downtown area: "too little parking, too much litter and filth, and too many homeless people." There

is a "persistent homeless problem here in downtown" and over half of all emergency shelter beds are within the DDA district boundaries (i.e., downtown Miami). Also like Orlando, the Miami DDA supported a "no-panhandling zone" ordinance that was eventually enacted. But our contact at the Miami DDA was also quick to distinguish between panhandlers and homeless people and to stress that most of the panhandlers in downtown Miami are *not* homeless. Many, we were assured, are out-and-out criminals that try to appear homeless but have places to live. These people also prey on homeless people in the downtown core (a point later confirmed to us by the Miami Police Department). The Miami DDA was also more than willing to sit down with the Homeless Trust and other advocacy groups to "soften" the ordinance so that the rights and interests of homeless people would be protected to the maximum extent possible.

Miami's DDA staff is even encouraged to volunteer at the Homeless Assistance Center. "We want staff to understand the issue." For a business-oriented group, the DDA is engaged in homeless issues in a relatively progressive way. That is, they seem genuinely concerned about the welfare of homeless people, not just with keeping the streets "clean." "We are not taking proper care of our homeless population—if they are mentally ill and such and we are just leaving them out on the street to be subjected to crime and so forth, it's inhumane" (Donley and Wright 2010).

One of the organized activities that grew out of the Mayor's Working Committee on Homelessness was a "fact-finding" trip to Miami by a group from Orlando—people from the Mayor's Office, from the Working Committee, various service providers, a columnist from the local newspaper, etc. Shortly after their return, the Orlando *Sentinel* ran an editorial "call to arms" urging Orlando's civic and political leaders to follow Miami's lead in providing world-class facilities for Orlando's needy, destitute, and homeless. Alas, neither the fact-finding group nor the *Sentinel* editorial mentioned any of the following salient points of difference between the two cities and their respective situations:

(1) The editorial remarked on the outpouring of concern, civic virtue, and resources that led to the creation of Miami's outstanding Homeless Assistance Centers, but failed to mention that all of this resulted (at least to some extent) from a court decision against the city in the *Pottinger* case. It is certainly possible that the HACs and the larger system of homeless services would have been created regardless of the *Pottinger* decision, but there can be no denying that *Pottinger* put some urgency into the process. At one point, the

appellate judge became so exasperated by the City's foot-dragging that he threatened to put Miami into receivership unless something significant was done. The Community Homelessness Plan, the Miami-Dade County Homeless Trust, and the food and beverage tax were the "significant somethings" the court was looking for.

(2) Miami's downtown HAC is right in the middle of a historically African American, economically depressed, but obviously redeveloping area called Overtown. The shelter is literally within blocks of schools, churches, commercial establishments, and relatively pleasant residential neighborhoods. Here the important lesson—not mentioned in the *Sentinel* editorial—would seem to be that a large, well-designed, and capably managed facility for homeless people is not incompatible with neighborhood revitalization—not in Miami's Overtown and not in Orlando's Parramore either. Yet the struggle to relocate the Coalition and its Men's Pavilion out of Parramore continued for another five years.

(3) As pointed out earlier, the budget for Miami's HAC facilities is more than $12 million per year, about three to four times the operating budget for the Coalition. The Coalition serves about the same number and mix of homeless people with a third of the HAC's budget and well less than half the number of staff. Exhortations to provide better services to homeless people are gratuitous unless there is a plan to provide the necessary staff and other resources and invidious when the vast differences in existing resources are not acknowledged.

(4) As we have seen, much of the money Miami spends on the HACs and other homeless services comes from its dedicated funding source, the 1 percent food and beverage tax. Every observer of the Miami scene agrees that a dedicated funding stream makes all the difference. Yet nothing in the *Sentinel* editorial spoke to the issue of where the money for improved services was going to come from. People in Central Florida are notoriously tax-aversive. A recent referendum to add one cent to the local sales tax to fund transportation improvements was resoundingly defeated despite consistent poll results identifying traffic congestion as the number one threat to the quality of life. More taxes to pay for homeless services? Not a chance!

The *Sentinel* editorial concluded that "Central Florida won't bloom into a world-class community until there is a broad and effective plan to address homelessness." Agreed! Yet, as we have shown in this chapter, Central Florida's leaders have largely ignored a succession of "broad and effective plans" stretching back to at least 1999 and continuing to the present day. Central Florida may well boast world-class theme parks, a beckoning climate, a shiny new Performing Arts Center, a new Events Center, and perhaps one day soon, an NBA championship. But we will not become a world-class *community* until we realize that effectively addressing homelessness in Central Florida entails more than finding creative ways to keep our homeless citizens out of Lake Eola Park.

Ryan J. Dowd, No Other Choice: Litigating and Settling Homeless Education Rights Cases, 23 N. Ill. U. L. Rev. 257 (2003)

INTRODUCTION

It is estimated that in 2001 one million children were forced to experience the traumas of being without a home. Along with the stigma of the title "homeless," these children were sick more often than before and often witnessed domestic violence. They were angry, fearful, depressed; and they were hungry. These children are part of the families that make up nearly forty percent of the homeless people in America; the families that are the fastest growing segment of the homeless population. And homelessness is on the rise.

Homeless children and youth also face barriers to education, an area that is particularly vital to families interested in breaking the cycle of poverty. There are immunization requirements and guardianship requirements to be dealt with, as well as the often insurmountable problem of transportation. Homeless children are highly mobile, changing schools frequently. This mobility is detrimental to homeless children who disproportionately have had to repeat grades and attend special education classes.

Though the problem is large, the situation is not as bleak as it appears. There is progress. Legislatures, both federal and state, have been working on solutions to the problems of educating homeless children and youth for fifteen years now. The legislation has improved exponentially in that time from the original 1987 McKinney Act, with its vague language and meager $5,000,000 appropriation, to the latest federal reauthorization of the McKinney Act which adds greater specificity and comes with a $50,000,000 annual appropriation. States, beginning with Illinois and New York, are responding to the call to assure that education rights cover every homeless child. Though the legislation regarding homeless children and youths' education appears to improve almost annually, enforcement of the granted rights continues to be a significant problem. Many school administrators remain ignorant of the law, or may even hold homeless people in disdain.

Since a private right of action was guaranteed by *Lampkin v. District of Columbia*, advocates for homeless children have had another available avenue of enforcement. Homeless children and parents can sue states or local school districts and officials to force schools to grant homeless children and youth their rights. Though not the preferred method of helping schools into compliance, litigation may be the only method available for districts completely unwilling to help homeless children and youth. Litigating can be particularly effective, especially when a settlement can be reached.

This comment seeks to accomplish four tasks in regard to litigating homeless education rights cases: 1) to map out major issues surrounding enforcement of homeless education rights for those unfamiliar with this area; 2) to spur on dialogue about the appropriate role of, and strategy for, litigation and settlement, particularly in light of the most recent changes in federal law; the literature seems especially void as to the specific role of settling; 3) to more thoroughly document the experiences and wisdom of the attorneys in major cases that have occurred to date while bringing the cases together into a framework in which they can be compared and contrasted; and 4) more ambitiously, seek to provide an initial roadmap for someone contemplating litigation: the hope is that an attorney can develop a long-range plan and have an understanding of what lies ahead at the early stages of conflict with a school.

To these ends, this comment is structured in a linear fashion to trace the litigation and settlement

process from beginning to end. *Section I: Background* introduces the major statutes and case law effecting homeless children and youth. The statutory portion addresses federal law, various state laws and the potential for state regulations. The case law portion introduces the reader to the three main recent cases and touches on earlier, less relevant cases.

Section II: Seeking Alternatives briefly mentions alternatives to litigation that have been superbly detailed in articles by other authors.

Section III: Litigating addresses an assortment of issues related to going to court, from considerations before filing and reasons for litigating, to what specific laws and constitutional provisions to sue under.

Section IV: Settling provides a detailed look into the process of settling and actual settlement documents related to homeless education rights cases. This section is more thorough than the others because of the general inattention given to the role of settlement. Settlements may prove to be especially crucial in some jurisdictions for securing every available right for homeless students.

Section V: Post Settlement/Decision traces the rather lengthy process and battles that ensue after "victory" has already been achieved. Included here is implementation, monitoring, getting to an amicable relationship, and using litigation in one jurisdiction to pressure compliance in another.

Section VI: The Future raises other issues and possible solutions for ensuring compliance with homeless education rights laws in the future.

I. BACKGROUND

This section seeks to give a general overview of the sources of legal rights and precedent in the area of educational rights for homeless children and youth. Part A addresses Subtitle VI-B of the Stewart B. McKinney Homeless Assistance Act, blossoming state laws and potential state regulations. Part B deals primarily with the three most recent critical cases on homeless education rights and also gives a quick summary of earlier, less critical cases.

A. STATUTES AND REGULATIONS

1. The McKinney Act.

In 1987 Congress passed the *Stewart B. McKinney Homeless Assistance Act*. This act was the "first systematic attempt to address the needs of the homeless." Dealing with a wide range of issues related to homeless people in the United States, Subtitle VII-B (later changed to VI) dealt specifically with the educational rights of homeless children. Though a step in the right direction, the McKinney Act required an overhaul in 1990. The 1990 amendments to the Act particularly attacked barriers to enrollment. Again in 1994 the education portion of the McKinney Act was strengthened as part of the "Improving America's Schools Act of 1994."

Most recently, the McKinney Act's Education for Homeless Children and Youth (EHCY) program was reauthorized and enhanced as part of the "No Child Left Behind Act of 2001" on January 8, 2002. The new reauthorization keeps the basic form of the prior legislation, while improving it in many ways.

The education for homeless children and youth section of the McKinney Act, as revised, basically is a grant and subgrant program for state and local educational agencies. The Act also bestows responsibilities on state educational agencies (SEAs), local educational agencies (LEAs), and the Secretary of Education. In the process of giving responsibilities to these entities homeless children

and youth receive additional rights.

Stated in a very abbreviated way, the funded SEA must first establish an Office of the Coordinator for Education of Homeless Children and Youth to gather pertinent information and generally oversee compliance and coordination. The SEA must also develop an extensive state plan and provide technical assistance to local educational agencies. Local educational agencies (LEAs) have similar responsibilities, including designating a liaison for homeless children and youth, coordinating with social service agencies and other LEAs, making homeless students and parents aware of their rights and opportunities and generally assuring compliance. Both state and local educational agencies that are funded must "review and revise any policies that may act as barriers to the enrollment of homeless children and youths," and train appropriate school personnel. The Secretary of Education must, among other things, provide technical assistance, review state plans and report to Congress.

As stated above, in the process of giving state and educational agencies responsibilities, homeless children acquire a new set of rights. The more important rights among these are: to not be segregated into schools or classrooms for homeless students; to have some dispute resolution process for the administration of their rights; to have access to appropriate nutrition programs; to have access to appropriate preschool, before, after, and summer school programs; and to not be isolated, segregated, or stigmatized because of their homelessness. Additionally, a homeless student has a right to go to school in two different places: 1) he or she may stay in his or her school of origin for the duration of homelessness, or 2) he or she may transfer to the school in the district covered by the shelter or other temporary living situation. The decision between the two schools is to be determined by the child's "best interest" (which is essentially the parents' wishes "to the extent feasible," with a presumption towards the school of origin). To further this end of school choice and enrollment, records, proof of residency, and other documentation, as well as guardianship issues and dress code requirements, are not to delay enrollment. Additionally, homeless children and youth have a right to special transportation to the school of origin.

Finally, the Education for Homeless Children and Youth portion of the McKinney Act also provides many needed definitions. Besides defining "local educational agency," "Secretary," "State," "unaccompanied youth," and "enrollment," the recent reauthorization adds an expanded definition of the term "homeless children and youths." This inclusive definition uses the traditional phrase of "individuals who lack a fixed, regular, and adequate nighttime residence" and specifies that it includes a number of specific categories, among them children who are doubled up with other families and "migratory children."

B. CASE LAW

There have been three recent major cases regarding homeless education rights. The first one, *Lampkin v. Washington D.C.*, went before a federal circuit court and was denied certiorari by the United States Supreme Court. The other two cases, *Salazar v. Edwards* and *Collier v. Board Of Education of Prince George's County*, were both eventually settled out of court. In addition, there are a variety of smaller and older cases that warrant mention.

1. Lampkin v. Washington, D.C.

The most important case for homeless education rights is *Lampkin v. Washington D.C.* In this federal case, ten homeless parents, on behalf of their homeless children, and the National Law Center on Homelessness and Poverty sued the District of Columbia, the Mayor of the District of

Columbia, the District of Columbia public schools, and the Superintendent of the District of Columbia public schools. The plaintiffs brought suit under 42 U.S.C. § 1983 (1995) contending that the defendants had failed to comply with requirements of the McKinney Act, and that they had denied them equal protection under the Fifth Amendment of the United States Constitution. Specifically, the homeless families and the National Law Center on Homelessness and Poverty alleged that the defendants had:

> (1) failed to implement a best interest standard in placing homeless children in schools; (2) failed to ensure transportation to and from the school that is in the best interest of homeless children to attend; (3) failed to coordinate social services and public education for homeless children, and to ensure access to comparable educational services and school meal programs; and (4) failed to provide access to free, appropriate public education for homeless children.

Initially, the plaintiffs sought a preliminary injunction, while the defendants sought a dismissal. In this original trial proceeding the preliminary injunction was denied and the motion to dismiss was granted because District Judge Lamberth determined that, pursuant to *Suter v. Artist*, there was no private right of action under the educational portion of the McKinney Act. The Equal Protection claim was also dismissed as having passed rational basis scrutiny.

On appeal, two of the three appellate judges found the McKinney Act to be enforceable by the plaintiff appellants and found that they could therefore invoke section 1983. One circuit judge sided with Judge Lamberth and dissented. The Supreme Court of the United States denied the District of Columbia's writ of certiorari.

When remanded to district court again, Judge Lamberth found for the homeless children, their parents, and the National Law Center on Homelessness and Poverty. The order specifically required that Washington D.C. "identify homeless children at the time they first arrive at the intake center, and refer these children within seventy-two hours for requisite educational services ... while the children are on a waiting list for shelter." Further, the defendants had to provide bus tokens to all homeless children traveling more than 1.5 miles to school, offer bus tokens to parents who escort their young children to school, and eliminate delays in their bus token distribution system. Judge Lamberth offered the District the opportunity of using a reasonable income eligibility standard for token revocation, and the option of using a dedicated bus service instead of tokens.

In the weeks after the injunctive order, the District of Columbia sought to give back McKinney funds so as to evade requirements that it considered cost prohibitive. Stating, "there is now no law to apply," Judge Lamberth dissolved the injunction but denied the District's motion to vacate the order itself. In the conclusion of the opinion, Judge Lamberth stated that "[d]efendants have succeeded in circumventing the requirements of the McKinney Act, thereby denying District citizens the federal assistance that would otherwise have been available."

2. Salazar v. Edwards

In 1992 attorneys for homeless parents and children filed a class action suit in Chicago, Illinois, after an expansive study by the Homeless Advocacy Project of the Legal Assistance Foundation of Chicago and multiple letters threatening to sue. The plaintiff classes were (a) homeless children in Chicago, and (b) parents or guardians of homeless children in Chicago. The defendants were the Illinois State Coordinator of Homeless Children and Youth, the Board of Education of the City

of Chicago, the General Superintendent of the Chicago Public Schools, the State Superintendent of Education, and the individual members of the Illinois State Board of Education. Suit was brought under the following laws: state law which grants every child the right to attend school from age five to twenty, the 1990 version of the McKinney Act through 42 U.S.C. § 1983, the due process clause of the Fourteenth Amendment to the United States Constitution, and the due process clause of the Illinois State Constitution. The complaint alleged that the "local defendants" in Chicago had done the following: failed to adopt the appropriate policies and rules, denied homeless children the opportunity to remain in their home schools, imposed "burdensome transfer requirements" on students who did not remain in their schools of origin, denied transportation, failed to consider parental wishes for school placement, provided no notice of rights, provided no opportunity to challenge school placement, failed to locate and enroll homeless children, and ignored the violations once made aware of them. The "state defendants" were alleged to have: (a) not revised their own policies and not ensured that Chicago revised its own, (b) not coordinated "with other relevant programs and services" and not ensured that Chicago coordinated with the programs, (c) not ensured that Chicago used a "procedure for prompt resolution of placement disputes," (d) not addressed Chicago's enrollment delays for homeless students, (e) not adopted policies "that ensure that homeless children are not isolated or stigmatized" and (f) failed to ensure that Chicago adopted such policies, not generally ensured that Chicago complied with the McKinney Act and not addressed these violations when made aware of them.

Attorneys sought a temporary restraining order for five of the children to which the Chicago Public Schools "immediately agreed to provide the relief requested." After the temporary restraining order, there was a year of fruitless negotiations, followed by the state defendants filing a motion to dismiss. The court granted the motion to dismiss based on the then-current lower court decision in *Lampkin v. District of Columbia*, holding there was no right to private action in the McKinney Act and no right to education in Illinois. The plaintiffs appealed, and while the appeal was pending a number of significant things happened. First, Illinois passed its premier legislation, the Education for Homeless Children Act. The important 1994 amendments to the McKinney Act were also passed, strengthening homeless education rights. Finally, *Lampkin v. District of Columbia* was overturned by a Circuit Court and the Supreme Court denied certiorari. The defendants conceded that the McKinney Act was enforceable and the case went back to trial.

The plaintiffs filed an amended complaint, based on the newly developed state and federal laws, to which the defendants filed a new motion to dismiss, claiming mootness and that the homeless children "must first 'exhaust' the administrative remed[ies]" in the new Illinois law. The motion to dismiss was denied, and intense settlement negotiations began after a second request for a temporary restraining order.

Eventually, the parties reached an extensive settlement agreement. The Chicago Public Schools seemed to have all but ignored the initial settlement, prompting the plaintiffs' attorneys to file a motion to enforce the settlement agreement. On August 3, 1999 Judge Michael Getty determined that there had "been widespread non-compliance with the McKinney Act, the Illinois Homeless Education Act, and the Settlement Agreement ... by the Chicago Board of Education." He further detailed six areas where Chicago was out of compliance and gave a twelve-point order. Parties negotiated another settlement that largely mirrored the first settlement. Since the implementation of the second settlement the lead attorney for the homeless children and families states that the relationship between the schools and homeless children, parents, and their advocates has improved dramatically.

3. Collier v. Board Of Education of Prince George's County

Beginning in 1995 the Baltimore-based Public Justice Center took up the cause of homeless children's education rights, marking their initial efforts with a statewide survey in 1997. Shortly thereafter, Maryland developed regulations which mirrored the McKinney Act, and the Public Justice Center set about measuring compliance with the new regulations and McKinney. Most initial barriers to education were peacefully resolved over the telephone, but multiple violations that the school board would not resolve prompted the Public Justice Center to file suit against Prince George's County.

The Public Justice Center brought a class action lawsuit in federal court with two plaintiff classes similar to the "children" and "parent" classes in *Salazar*. Defendants in this case were the Board of Education of Prince George's County and the Superintendent of Schools for Prince George's County Public Schools. Suit was brought under the McKinney Act, without invoking 42 U.S.C. § 1983 (1995). The complaint specifically alleges that the Board of Education failed to: (a) utilize a "best interest" standard for school placement, (b) observe parental wishes for school placement, (c) "provide comparable services, including transportation services," and (d) review and revise policies "which act as a barrier to the enrollment of homeless children in school."

Attorneys for the children successfully requested a temporary restraining order and a preliminary injunction to get the individual children to school. Following these victories, the school board sought settlement negotiations, which derailed once before resulting in an elaborate and powerful settlement document in September of 2001. As of December 2001, Laurie Norris, lead attorney for the plaintiffs, reported that compliance was going "slow" but was underway.

II. SEEKING ALTERNATIVES

There are many alternatives to litigation that advocates can and should seek before considering taking the situation to court. Two articles on homeless education rights detail these alternative methods for ensuring compliance with the McKinney Act and other homeless education rights legislation. There are five primary methods of advocating compliance without resorting to litigation: factual development, ongoing compliance monitoring, parent and community education, public policy advocacy, and pressing for collaboration between public and private sector community service agencies. It should also be noted that these methods also serve an important function in litigation if that becomes necessary.

Factual development entails documenting noncompliance and making state and local agencies aware of violations. Demands can then be made for voluntary compliance. In both *Salazar* and *Collier* litigation was preceded by extensive reports. In *Lampkin*, "litigation was preceded by factual development, coalition building, reporting, and notification to the D.C. school board that demanded compliance." The information developed initially will be invaluable later if litigation becomes necessary.

Advocates can accomplish compliance monitoring by ensuring that all interested parties scrutinize specific acts of noncompliance against specific homeless children and that these specific acts are reported to the appropriate authorities. Advocates state that "[t]his approach can be effective, efficient, and relatively speedy in remedying violations." Both lead attorneys in *Salazar* and *Collier* claimed that being in touch with families "on the front line" afforded them an extra level of respect from opposition parties who knew the attorneys to be well informed. Additionally, in *Collier*, most violations could be cleared with telephone calls.

Public education involves making "parents, service and shelter providers, school personnel, and other community members" aware of available rights for homeless children and youth. Homeless parents cannot ask for services for their children if neither they, nor anyone else, knows that the services are available and mandated. In Prince George's County, the Public Justice Center combined its statewide monitoring and fact-finding campaign with frequent stops to educate people at homeless shelters. As for Chicago, law students were trained to teach homeless people and their service providers about applicable rights.

Public Policy is another important element in the struggle to assure the access of homeless children and youth to an appropriate education. This process can add additional rights through state laws and regulations as well as educate officials and the public about the plight of homeless children and youth. In Maryland, Illinois, and Washington D.C., the same people who were litigating were also struggling for state laws and regulations and improvements to the federal statutes.

Collaboration between public and private community agencies requires bringing together related agencies to work on the problem of educating homeless students. Janice Johnson Hunter, Michael Willis and Maria Foscarinis mentioned the U.S. Department of Health and Human Services, as well as Head Start programs and shelter providers. In fact, the latest amendments to the McKinney Act mandate that educational agencies coordinate with housing agencies to minimize disruptions to homeless children's education.

III. LITIGATING

At some point the situation may reach a critical mass, where litigation becomes the only available option to address the systemic barriers to homeless children and youth accessing an education. Again, it must be stressed that litigation is only a method of last resort for ensuring that homeless children and youth have access to education; litigation, in the words of Laurie Norris of the Public Justice Center, is for when there is "no other choice."

This section addresses a variety of topics related to litigating homeless education rights cases. First is a list of reasons for litigating, followed by a short discussion of when it is appropriate to litigate. Next is an important segment on cautions that one should consider when deciding whether to litigate. The following topics delve more specifically into litigation issues, such as preparation for filing, whether to bring suit as a class action, whether to sue in state or federal court, and various considerations for the complaint. The litigation section concludes by briefly addressing the all-important temporary restraining order and preliminary injunctions.

There are a number of simple reasons to litigate in order to enforce homeless education rights. The McKinney Act "contains no statutory mechanisms for the administrative enforcement of the beneficiaries' rights," so there is no automatic method of ensuring compliance. Further, the United States Department of Education has been negligent in its enforcement of McKinney provisions. Many of the states are no better in their enforcement. In the absence of other interested parties willing to hold school districts and states accountable, it may sometimes have to be homeless families themselves and their advocates who demand education. In many situations advocates can achieve voluntary compliance, but in other places and times litigation may be necessary.

It may be time to file suit when all alternatives fail, particularly when state and/or local educational agency officials ignore documented violations and demands for compliance. Laurene Heybach, lead attorney in *Salazar v. Edwards*, reports knowing it was time to litigate when school officials refused to implement any suggestions from advocates for fear that such action would be an

admission of responsibility to homeless children.

There are a number of cautionary notes that an attorney should consider before initiating litigation. First, litigating or settling homeless education cases can be expensive, due to both out-of-pocket expenses and attorney time. Second, homeless education cases can span a number of years.

Litigating homeless education rights cases is not a hit-and-run process. It requires a strong commitment to homeless children and a willingness to take responsibility for their education. There is a significant amount of assistance that a lawyer advocate can do for homeless children without litigating, by making the more informal phone calls and writing letters to try to get voluntary compliance. Finally, one should be aware of possible unintended consequences, similar to those in *Lampkin v. District of Columbia*, where the District returned its McKinney funds to evade its responsibilities. Though this problem is hopefully peculiar to Washington, D.C., one should keep this potential problem in mind.

With that said, let us now move into the litigation process. There is a significant amount of preliminary information that one will need to gather for litigation. Most of this information should be available from the prelitigation alternative methods detailed in Section II. What are the specific violations by the state or local educational agency: Transportation? Best interest determinations for placement? Preschool enrollment? Information is critical. For instance, despite the massive amount of fact-finding work done by the Public Justice Center, lead attorney Laurie Norris states that she wishes they would have had even more hard facts at their disposal. It is worth noting that the attorneys in both *Salazar* and *Collier* felt that it was very important that they continued the information gathering process with families and shelter staff throughout the entire suit.

The discovery process will also be pivotal for gathering the necessary information. Deposing school officials will help to highlight the "corporate culture" of the school system, and will reveal its specific weaknesses and faults. Furthermore, attorneys for the homeless children and youth should be seeking expert witnesses to provide testimony. The Public Justice Center in *Collier* sought a transportation expert and a McKinney Act expert, settling instead for just an extremely experienced McKinney expert. *Salazar* utilized education and social work experts to provide information about the effects of high levels of mobility on a child's education. Besides providing the necessary testimony, these experts can provide advice on solutions to the problem in the jurisdiction, and are, therefore, a crucial resource to have.

Armed with the pertinent information, there are a number of options for the lawsuit. Class action suits have proven viable for enforcing homeless education rights. Class actions were utilized in both *Salazar v. Edwards* and *Collier v. Board of Education*, though *Lampkin* was an individual case, as were all prior cases. There is an assumption that class actions have greater reach than individual suits, though the individual nature of *Lampkin* did not stop it from having universal effects. An additional concern to be aware of is that, given the episodic nature of homelessness, individual cases are particularly likely to become moot. This comment is geared towards class action lawsuits, but the principles should be the same for individual cases.

In preparing the complaint an attorney must address a number of issues, including who the plaintiffs and defendants will be, and what law(s) will be used. In the two class action cases to date, two clear classes have emerged: (a) the children class, made up of homeless children denied education, and (b) the parent class, made up of the parents and guardians of homeless children denied education. Though the school district ultimately decides who is denied their rights and can therefore sue, it may be worth the time to carefully consider which individual children should be

representatives of their class. Preferably, one will want children whose experiences are across the spectrum of violations being committed by the educational agency. *Lampkin* was brought by ten parents whose children had experienced varying problems, while *Salazar* was initiated by five sets of parents and children who had experienced a number of areas of noncompliance in Chicago.

Additionally, advocates will want to pay close attention to situations where the schools have made themselves look particularly tyrannous. With homeless education cases, there are inevitably going to be many such horror stories that can be cited to the media and in the complaint in order to show the plight of homeless children.

In the most recent three cases, advocates have chosen a variety of different defendants, for varying reasons. A listing of possible defendants includes: the local educational agency superintendent (*Lampkin, Salazar, Collier*), the local educational agency board of education (*Salazar, Collier*), the city itself (*Lampkin*), the Mayor (*Lampkin*), the public school system (*Lampkin*), the state coordinator of the homeless education program (*Salazar*), the state superintendent of schools (*Salazar*), and the individual members of the state board of education (*Salazar*). Much of the decision of whom to bring suit against will be decided by statutes that determine who has control and responsibility for the schools, as well as who the actual violators are, but there is a bit of strategy involved too. For instance, in *Salazar*, the decision was made to sue state entities because they could stand in the way of enforcement by claiming that settlement items were in conflict with something at the state level. This decision turned out to be very appropriate because the state defendants made changes as a result of the settlement that benefited the entire state. The state is also a possible defendant because of pressure they might then put on the local educational agency to comply. In *Collier*, attorneys chose to keep the lawsuit simpler by suing the superintendent and the school board collectively, rather than each school board member individually.

Just as there are a number of possible defendants, there are also a variety of possible laws under which to file. The obvious and most powerful three are homeless-education-specific state laws and regulations as well as the McKinney Act. There are also a number of other avenues available that have had varying success. In *Lampkin*, attorneys argued a Fifth Amendment equal protection violation, in that Washington D.C. provided the necessary transportation to "mentally and physically handicapped children" but not homeless children. The *Salazar* complaint alleged due process violations under both the Illinois and federal constitutions. There also may be state laws that are not specific to homeless children; for instance, in Illinois all students have the right to finish the school year at their school, even if they move out of the residency area. Besides the variety of laws utilized, 42 U.S.C. § 1983 has been used sporadically. Both *Lampkin* and *Salazar* brought their claims through § 1983, while *Collier* did not.

One last comment about the complaint warrants mentioning. A homeless education case is probably not the appropriate place for notice pleading. Homeless children barred from school are especially sympathetic individuals, and the complaint is an exceptional place to convey the tragic experiences that these children and their parents undergo. The more information provided about the elaborate barriers that homeless families face in trying to enroll in and get to school, the better initial impact one will have upon the judge and the opposing side.

At least three cases have had important experiences with temporary restraining orders and/or preliminary injunctions. Attorneys in *Salazar* initially sought a temporary restraining order on behalf of five children. Attorneys in the case noted that "[b]ecause the restraining order was sought very close to the end of the school year, plaintiffs' demands could be regarded as modest and easily

achievable." Bringing the requests in court prompted the Chicago Public Schools to comply "immediately." The next temporary restraining order that attorneys sought, in the second wave of litigation after the amended complaint, resulted in an initial agreement to comply as well. Unfortunately, the Chicago Public Schools did not act as they said they would and the judge eventually entered an order for the child seeking admission at a neighborhood school.

In the Illinois case *In re: The Educational Interests of J.C., S.G. and M.G.*, the final legal outcome was disappointing, but the successful use of a temporary restraining order provides an important lesson. The trial judge ordered the school of origin to provide transportation for the children to their respective schools, giving the family enough time to get their section 8 housing expedited. In the end, they were able to provide proof of housing within the district and keep the children in their school of origin, uninterrupted.

Ryan J. Dowd, No Other Choice: Litigating and Settling Homeless Education Rights Cases, 23 N. Ill. U. L. Rev. 257 (2003)

IV. SETTLING

Settling, where possible, may almost be a panacea for enforcing and securing homeless education rights in noncompliant states and localities. The two cases that have settled out of court have led to settlement documents which granted rights that were generally superior to, and certainly far more specific than, existing state and federal laws. Surprisingly though, little attention has been given to the role of settling such cases. This section addresses a number of issues related to the process of settling, including reasons to strive for a settlement and tools for leveraging a settlement, and then the section looks at the ideal elements, based on *Salazar* and *Collier*, that an attorney should strive to achieve in a homeless education rights settlement.

A. THE PROCESS

Advocates cite a number of benefits of settling over going to trial. Settlement documents can reach a level of specificity and detail that a judge would be unlikely to order. For example, the *Collier* settlement specifies exactly who needs to sign which documents, as well as where documents are to be filed. By contrast, the *Lampkin* injunction, in a more general fashion, orders the District of Columbia to identify homeless children at intake centers and refer them to "requisite educational services," and to "offer bus tokens to all homeless children who travel more than 1.5 miles ... to school." Furthermore, settlement documents also have the potential to provide substantive rights that a judge would not be likely to mandate. For example, both the *Salazar* settlements and the *Collier* settlement address school fee waivers, something not mentioned in the McKinney Act or Illinois law.

Settling also has the likely advantage of the defendants complying more with rules that they helped to promulgate. Settling instead of going to trial may help to preserve some remnant of goodwill upon which to build. In Chicago, advocates and school personnel have been able to achieve a working relationship after nearly ten years of litigation and negotiations. This working relationship and belated commitment are important for homeless children in the long-term and are more likely to be achieved through settlement than trial.

In most cases, settling will achieve results faster than going to trial. The ten-year track of *Salazar* is probably atypical given its historical place in the middle of the battle over the enforceability of the McKinney Act. Newly revised and created legislation, as well as the precedents of *Lampkin, Salazar* and *Collier,* are more likely to create a situation closer to *Collier*. In this case, the Public Justice Center was able to witness change in the schools a mere four months after filing suit. Even the expedited trial process could not have accomplished the intended goals that quickly.

Settlements do have two potential problems that warrant mentioning. Laurie Norris of the Public Justice Center warns against "settling at all costs," where in the give-and-take of negotiations you are forced to give up important rights and objectives. In the two cases that have settled so far, neither lead attorney reports having had to relinquish any important objectives to which they were entitled. Additionally, Laurene Heybach, from experience, cautions of "a certain kind of defendant that thinks you're the kind of lawyer that, if they sign a piece of paper, the problem will go away." This difficulty appears to have surfaced after the first *Salazar* settlement, but was remedied through tenacity and persistence.

Advocates have reported a few additional tools available in homeless education rights cases for

leveraging a settlement and securing the best settlement document possible. Obviously the media is a strong ally in the process and should be used extensively. As stated above, homeless children who are not allowed to go to school are especially sympathetic characters, and the media has so far been very interested in covering battles over their education rights. Other allies besides the media should be utilized, including community and religious groups. In Chicago, the attorneys for *Salazar* employed a mass letter writing campaign to pressure the Chicago Public Schools to stop fighting homeless children. The Public Justice Center sought to enlist the aid of a grass-roots community organization, in order to have parents "making a clamor". Though they were not able to find such a grass roots organization in the area, they did work the Prince George's County Homeless Services Partnership, an organization of homeless service providers, into the settlement document. The state might also be an additional source of leverage against the local educational agency, particularly if the state has shown a commitment to homeless children in the past.

Both lead attorneys in *Salazar* and *Collier* report that the best tool against complacent schools is extensive, reliable and timely information. Thorough work with homeless families before and during litigation commands the respect of opponents and conveys to them that the "homeless kids problem" is not going to go away without changes, as well as keeps an attorney aware of developments in the treatment of homeless children and youth. Laurie Norris reports that it was "crucial" to the *Collier* case that "they know that we know that they have problems." She also added that the few depositions that the Public Justice Center conducted of school officials proved invaluable in highlighting the nuances of the situation within Prince George's County.

B. THE SETTLEMENT DOCUMENT

The settlements that have been created so far are broad, powerful documents that deserve detailed treatment at this point. First, this article will address settlement documents in homeless education rights cases in a general sense. Then it will analyze the specific components, based upon *Salazar* and *Collier*, that an attorney should strive to get into a homeless education rights settlement.

Generally speaking, a homeless education rights settlement should seek to do three things for homeless children and youth in the jurisdiction: Enforce, Explain and Expand. "Enforce" refers to assuring that schools are actually doing what they are required to do by law. Much of a settlement document in this area will mirror state and federal laws, reiterating rights that should already have been provided. "Explain" means providing specificity to the general language contained in the McKinney Act and state law. The McKinney Act leaves broad discretion to the state and local educational agencies, discretion which can easily be abused through apathy or open hostility to the educational needs of homeless children and youth. An example of a settlement document adding specificity would be where the *Collier* settlement document establishes a bright line rule for "feasibility," which entails transporting children who are thirty-five miles or less from their school of origin. Quite differently, the McKinney Act was completely nonspecific as to when transportation was and was not to be provided. "Expand" refers to areas in which settlement documents can actually provide homeless children and youth additional rights which they did not previously have under existing law. As stated above, *Salazar* and *Collier* have referred to fee waivers, which are not addressed in the McKinney Act. All three E's outlined above have been achieved in *Salazar* and *Collier*, and are presumably achievable in other jurisdictions.

Settlement documents for homeless education rights cases need to be highly specific. The defendant educational agency will have already demonstrated its incompetence in working under the deferential aspirational language of the McKinney Act. Thus, the settlement document should

enter the situation to provide clear guidelines and a specific process for how homeless children and youth in the jurisdiction are to be treated: language that takes into account how educational bureaucracies operate will be incorporated most seamlessly and have the best chance of being complied with. For instance, the *Collier* settlement lays out specific numbers of copies of forms to be distributed to homeless shelters, and requires that all pertinent documents are to be filed in a "single central repository of files" which is to be "organized by student name." Attorneys in both *Salazar* and *Collier* report that the defendants in their cases appreciated the level of specificity and detail in the settlement documents. Laurene Heybach said that the additional specificity benefits schools because it provides clear guidance for what rights are available to homeless children, and everyone then knows that in other situations it is a special request which may be denied. Laurie Norris states that educational bureaucracies are more welcoming of settlement language that fits into processes that they are already familiar with.

There may be a role for aspirational language in some situations. For instance, in the second *Salazar* settlement, it was very important to the Chicago Public Schools to include that "[a]s a result of the joint efforts of [the Chicago Public Schools] and plaintiffs, [the Chicago Public Schools] [are] endeavoring to develop the premier homeless education program in the country." This language fit into the general theme of the second *Salazar* settlement, in which the plaintiffs sought to give Chicago a program that it could be proud of. The strategy and the language of enabling Chicago to have "bragging rights" over its Homeless Education Program worked remarkably well in the second settlement in *Salazar*.

One last general warning is worth mentioning before addressing the individual elements of a settlement document. Attorneys for both *Salazar* and *Collier* stressed the importance of going into the settlement writing process with as much information as possible. Laurene Heybach cautions against writing a settlement document without knowing the nuts and bolts of the problem in the specific jurisdiction, or else there is the danger of creating a settlement that looks good on paper but does not work as applied to a specific school. Laurie Norris highlighted the need to talk to as many people as time allows. In the case of *Collier*, despite collecting ideas from dozens of sources in the months since settling, Norris has received great ideas from other jurisdictions that she wishes she had known about prior to writing the settlement.

Before getting into the specific topics that should be covered, it is appropriate now to give a brief synopsis of the three pertinent settlement documents. While all are powerful in scope and force, they take varied approaches and each have particular points where they are especially effective.

The initial *Salazar* settlement ("*Salazar I*") was a thorough and commanding document that has influenced both settlements since. The major headings are: introduction, definitions, disclaimer, procedures for seeking approval of the settlement agreement, enrollment, transportation, dispute resolution process, training, coordination with other governmental and social service agencies, notification, homeless retention and return program, production of information, enforcement, waiver and release, and attorney fees. Very much oriented towards the rights of homeless children and youth, *Salazar I* is particularly strong in statements of what the Chicago Public Schools shall and shall not do. For instance, under enrollment, *Salazar I* reads definitively "[n]o school shall deny enrollment ... or delay the enrollment or transfer of any homeless child or youth unable to produce school, medical, or residency records." Detailed in its definitions and affirmation of rights, *Salazar I* grants a little more discretion on the finer points of procedure.

The second *Salazar* settlement ("*Salazar II*") is nearly identical to *Salazar I*, making important

changes in a few areas and slightly tweaking several others. *Salazar II* is characterized by the same strong prohibitions and affirmative duties, as well as deference to the finer points, as is *Salazar I*. Using the new leverage of the Chicago Public Schools' continued violations, *Salazar II* gets tougher in some areas, for instance, the situations in which public transportation passes can be revoked from parents accompanying their child to school has been narrowed from *Salazar I*. Salazar *II* also fairly makes some language looser where appropriate. An example is where *Salazar I* admonished the Chicago Public Schools to "take steps to identify and to enroll homeless children" and *Salazar II* changes that statement to "take reasonable steps." *Salazar II* also added that Chicago is endeavoring to create the "premier homeless education program in the country."

The authors of the *Collier* settlement ("*Collier*") relied heavily on *Salazar I* and *II* for ideas to incorporate into their document. Nonetheless, *Collier* approaches the problems of educating homeless children and youth slightly differently than *Salazar I* or *II*. *Collier* is less definitive in its statements of prohibition and affirmative duties than the *Salazar* settlements, preferring instead to heavily outline specific processes and documents that the Prince George's County public schools are to use. The major headings in *Collier* are: revision of policy; forms; outreach and coordination with social services and housing agencies; training of school personnel; identifying, tracking and serving homeless children and youth; transportation; appeals; evaluation; and monitoring compliance.

Taking the varying provisions that attorneys in *Salazar* and *Collier* were able to achieve in their settlements, a vision of the ideal components emerges. It is unlikely in any settlement negotiations that an attorney would be able to get all the specifics outlined below, but they serve as a model and a good beginning position from which to negotiate.

There are twelve topic areas that a homeless education rights settlement should attempt to address: preliminary information, informing, enrollment, identifying, forms, transportation, success, training, special personnel, coordination, disputes/appeals, compliance and court related. They will each individually be discussed in the following sections, with references to the specific provisions in *Salazar I, Salazar II*, and *Collier*.

1. Preliminary Information

Two preliminary/introductory issues need to be addressed by a settlement document: revision of policies and definitions.

The policy of a noncompliant educational agency will probably need to be revised, particularly in light of recent changes to the McKinney Act. *Salazar I* took the approach of laying out specific elements that should be included in the policies of Illinois and Chicago Public Schools. In fact, specific policy documents were attached as exhibits, with the statement in the settlement that each would "formally adopt, implement and comply" with the attached documents. In this area *Collier* took a more deferential approach, ordering the Prince George's County Board of Education to revise its policies so they would comply with the settlement agreement and the Maryland Education Regulations. *Collier* did require the Board of Education to run their proposed policy by the counsel for the plaintiffs. *Salazar II*, because *Salazar I* had already created a written policy, orders the Chicago Public Schools to "comply with the requirements" of the policy, utilizing the affirmative "shall" in places where *Salazar I* had required them to "formally adopt, implement and comply with [a policy that mandates the specific behavior]."

It is probably best to lay out a number of definitions early on as *Salazar I* and *II* did. Perhaps the

most important of the definitions provided is for "Homeless person, child or youth" or "Homeless individual." Both documents use the standard definition laid out in the older versions of the McKinney Act, as well as incorporating the more expansive definition from the U.S. Department of Education's Preliminary Guidance for the Education of Homeless Children and Youth Program. *Salazar II* adds an important paragraph about self-identification as "[o]ne method of determining homelessness," and that school personnel should be trained to recognize "common signs of homelessness," as well as receive sensitivity training in dealing with homeless families.

2. Informing

Homeless families can only take advantage of rights of which they are aware. To this end, a homeless education rights settlement should provide a number of methods for informing and educating individuals of the particular educational rights available to homeless children and youth.

The principal means of informing homeless parents' of their children's options is through flyers, brochures, posters and other written documents. For instance, *Collier* outlines exactly what is to be included in "an easy-to-understand flyer or brochure, at or below reading grade level 5," while *Salazar I* and *II* make provisions for a "written notice" of educational rights. This brochure or flyer in *Collier* is also to be assembled along with all pertinent forms into a "parent pack." Attorneys in *Collier* had also hoped to get a flyer or brochure with a wallet-size punch out card containing a mini-version of available rights and services. Besides the generic form of rights, *Collier* mandates creation of a special brochure of available transportation services. "[A] large informational poster, at or below reading grade level 5" containing the same information as the flyer or brochure is also required by the *Collier* settlement.

It is important that all informational documents and forms be created in multiple languages, depending on the linguistic makeup of the jurisdiction. *Salazar I* and *Collier* provide for Spanish and English. Mindful of the makeup of Chicago, *Salazar II* adds Polish to the list of mandated languages.

Advocate lawyers have developed a variety of creative ways for dispersing these printed informational resources to homeless families. Schools have been required to display posters and notices of rights in prominent places, keep notices and policies on hand, and distribute written notices and brochures to all parents twice per year.

School personnel can be required to inform parents face-to-face of available rights and services. The most powerful method may be frequent visits to shelters to educate families . . .

3. Enrollment

Enrollment encompasses school placement, immunizations and physicals, records, and segregation. Settlement provisions in this area will tend to largely mirror the prevailing state or federal statutes, merely enforcing existing law.

As to school placement, *Salazar II* does a fantastic job in outlining that homeless children and youth have the option of enrolling in:

> (1) the school he or she attended when permanently housed; or
>
> (2) the school in which he or she was last enrolled; or
>
> (3) any school that non-homeless children and youth who live in the attendance area in which the child or youth is actually living are eligible to attend.

One will want to be sure to provide a statement of duration of placement. The best language comes from the recent amendment to the McKinney Act, providing that homeless children and youth may remain in the school of origin for "the duration of [their] homelessness." Strong language is necessary in the area of school placement in order to overcome the ambiguity of the McKinney Act where it states, in regard to the best interest determination, a "local educational agency shall ... *to the extent feasible*, keep a homeless child or youth in the school of origin ...." *Salazar I* and *II* overcome the feasibility standard by essentially removing it and putting the entire choice of which school to attend in the hands of the student and her parents.

A homeless education rights settlement should address the potential barriers and delays created by various records, immunizations, and physicals. *Salazar I* and *II* poignantly require immediate enrollment, mandating that school officials must then verify homelessness, acquire necessary school records, and attempt to get "documentation of immunizations or physicals." Similarly when a child or youth needs a medical examination or immunizations, school personnel must provide a reference "to a physician or clinic, including free clinics ..."

With the extensive treatment in the recent McKinney Amendment it should not be difficult to get a local educational agency to close any remaining segregated schools, assuming they are not in one of the exempted four counties. *Salazar II* specifically says that "[n]o homeless child or youth shall be discriminated against, segregated from the mainstream school population, or isolated on the basis of his or her homelessness."

4. Identifying

The requirement that local educational agencies take steps to identify homeless children and youth is a hard area to work into specifics, though it is especially vital in assuring that homeless children and youth receive an education. Anyone writing a settlement should consult various jurisdictions for ideas on how they go about identifying homeless children and youth.

Collier incorporates a few inventive measures for Prince George's County to use in identification efforts. First, every student withdrawing or enrolling in school is to be asked if their decision is related to homelessness. The School Board also is required to collaborate with shelters and social service agencies to have homeless children identified to their schools "to the extent permitted by law." Finally, schools are to keep records of every self-identified homeless child or youth, specifically utilizing a "Tracking Form for Homeless Students."

5. Forms

Additional forms will probably need to be created in a school system that has been apathetic to the needs of homeless children and youth. *Collier* mandates an omnibus form with the following sections: (a) school choice for homeless students; (b) transportation request; (c) request for services for homeless students; (d) request for waiver of school fees; (e) notice of denial of services; and (f) right to appeal. The most important form to be created is probably the appeal/grievance form. *Collier* requires an appeals form separate from the omnibus form. The Chicago "Homeless Education Dispute Resolution Process Form" is an extensive four-copy document with places for information from the parent/guardian and an area for the "Principal's Action on the Complaint."

A few other provisions about forms should be considered. *Salazar I* and *II* were especially far thinking in requiring school officials to offer to assist parents, guardians and others in filling out forms. Also, it is probably best to provide for mechanisms to have forms distributed. For instance,

Collier requires that 200 omnibus forms and 200 appeal forms be delivered to each homeless shelter in the county. Finally, it may be necessary to specify where and how completed forms are to be maintained. *Collier* creates a "single central repository of files organized by student name in the office of the [Homeless Education Coordinator]." A single location for storage assures convenient access to forms and is likely to make monitoring of the schools' actions easier.

6. Transportation

Transportation is an area of the settlement that will probably have to be individually developed to fit the needs and resources of the jurisdiction. For instance, Laurie Norris reports that while *Salazar I* and *II* could utilize public transportation extensively, that was not possible in Prince George's County, which does not have the elaborate public transportation of Chicago.

Advocates will want to consider existing structures, like bus routes and public transportation, as well as the particular situation of homeless families in the area, such as where the shelters are located. A fair amount of old-fashioned creativity is probably also necessary.

7. Success

The term "success" is used here to reference the variety of programs and rights that can be afforded homeless children and youth once they have been admitted and transported to school. This area is limitless; an attorney should definitely contact other jurisdictions and consult the literature to see what other schools are doing to ensure the success of homeless children and youth.

The most obvious provision to assist homeless children and youth is tutoring. Also, students will need access to special education, free meal programs, school supplies, clothing, medical care, counseling, and before/after/summer school programs. Truancy programs could be especially helpful in the chaotic lives of homeless families. Additionally, advocates should consider provisions necessary to aid with the specific needs of homosexual homeless students and unaccompanied youth.

The most interesting element of the *Salazar* and *Collier* settlements is the attention given to waivers of school fees. Though not specifically mentioned in the McKinney Act, various school fees can be a substantial barrier to the success of homeless children and youth. This link makes them an appropriate provision in a settlement. The same argument might be used for countless other necessities.

8. Training

If progress is going to be made in the long term, certain key people and groups will need to be educated about the problems homeless children and youth encounter in trying to get an education, and the special laws related to them.

Salazar I, *Salazar II* and *Collier* all mandate the training of school personnel. *Salazar II* outlines a system in which principals, liaisons, and "those school clerks who work with the homeless population" receive mandatory annual training. The principals then train the staff at their schools. *Collier* details that most school personnel will be trained extensively initially, and receive annual "refresher sessions" thereafter.

The *Collier* settlement goes on to require the Prince George's County Board of Education to educate other crucial groups. Staff is to make biannual trips to all shelters to train shelter staff, as well as to the Department of Social Services, and its contracted agencies. Other groups may need to be trained depending on the jurisdiction, such as the Prince George's County Homeless Services

Partnership was in *Collier*.

Special attention should be given to whom conducts the training sessions. *Collier* requires that "[p]ersons selected to conduct the in-service programs shall be appropriately qualified, shall be specially trained to present the curriculum, and shall be capable of communicating effectively the material in the curriculum." In this case, attorneys learned after the settlement was complete that Prince George's County has a Staff Development Department that is specially trained in teaching teachers and other school personnel.

9. Special Personnel

The McKinney Act creates two new types of special school personnel: the state coordinator and the local liaison. Additionally, many local educational agencies have a local Homeless Education Coordinator. These positions can be created and given tasks and responsibilities in a settlement.

School personnel who are appointed and trained as liaisons/contacts at individual schools are an important resource for parents and other staff with questions or concerns. Realizing this need for an in-school resource person, *Salazar I* mandated that every school with a homeless shelter in its attendance area have a liaison. Judge Getty, in his order on the motion to enforce, required the Chicago Public Schools to provide a liaison at all schools. This requirement was written into *Salazar II* and Chicago actually discovered that they liked having a liaison at all schools.

The *Collier* settlement details a lot of tasks to be done by the Homeless Education Coordinator for the school system. For example, the Coordinator's office is to house the Single Central Repository where all completed forms are catalogued, maintain records of training and shelter visits and the Coordinator "or her designee shall, within three school days of receipt, review all forms, confirm such review by signing off on the forms, take [appropriate action], keep a written record ..., and file all forms."

A final note on personnel is important. People are everything. It is a difficult prospect to negotiate for staff changes, and a judge is very unlikely to order it, but real change may require getting the right people into the right positions. Even if this cannot officially be bargained for, advocates should consider it if they are attempting to assist reform in any school system.

10. Coordination with other Agencies

Homelessness is such a multifaceted problem that any approach to educating homeless children and youth should incorporate coordination with other agencies. Which agencies are appropriate in a given location may vary from jurisdiction to jurisdiction.

Salazar I and *II* opted for a general statement of commitment to coordinate, whereas *Collier* created a more specific plan. *Collier* requires coordination with the Department of Social Services, local homeless shelters, and the local homeless service providers organization. Housing agencies are also appropriate, which *Collier* made passing reference to, and are added to the latest revision of the McKinney Act. This new McKinney provision could be particularly powerful for future settlements in order to gain specific coordination with housing agencies.

11. Disputes / Appeals

Any homeless education rights settlement will want to provide for a competent dispute resolution or appeals process. The design may vary depending on existing bureaucratic structures and the specific history of violations, but *Salazar* and *Collier* do provide well-planned models.

Salazar I and *II* have a two level process. Initially, the principal is given until the "end of the next school day" to resolve the grievance. If the problem is not resolved in that time, the Regional Education Officer attempts to work out a solution "to the parents' satisfaction," before bringing the parties together and issuing a decision "in an impartial manner within four school days." The Regional Education Officer's decision is the final level within the schools. The *Salazar* settlements are also careful to include assistance with forms and notice of rights.

Collier provides for a more elaborate four level appeals process. Initially, the principal is given five school days to resolve the dispute to the satisfaction of the parent before it is automatically elevated to the Office of Appeals. The Office of Appeals has ten days to reach a satisfactory decision before it is again elevated automatically to the school board. The Board of Education then has thirty days to hold a hearing and reach a disposition, after which the parent may elevate the dispute to the Maryland State Department of Education. Unfortunately, *Collier* had to make an undesirable concession by providing that "[t]hroughout the appeals process, the student may continue to attend the school of origin if the parent arranges and pays for transportation for the student."

12. Compliance

Establishing a procedure for ensuring compliance with the settlement agreement is one of the more important parts of the document. A well-written compliance portion can make a powerful and inexpensive method of acquiring the necessary documents and information to measure progress.

Salazar I, *Salazar II*, and *Collier* took varied approaches to ensuring compliance. *Salazar I* has a "Production of Information" section and an "Enforcement" section. The Production of Information section required the Chicago Public Schools to provide a detailed report to the plaintiffs' counsel for three years and an even more expansive report to the Illinois State Board of Education. The Illinois State Board of Education had to supply the plaintiffs' counsel with information on the winning grant made to raise awareness of the rights of homeless children and youth. The "Enforcement" section provides that "[a]ny class member ... may file a motion seeking enforcement of the term or terms of this Agreement. The filing of such motion shall reinstate the lawsuit. The Court shall retain continuing jurisdiction ..."

Salazar II leaves the "Production of Information" section open for new negotiations, providing that, if no agreement can be reached, similar information to *Salazar I* will be required. The "Enforcement" section provides for specific procedures for individual and systemic violations, and concludes with the statement about the right to file a motion to enforce.

Collier establishes three separate elements for ensuring compliance. The "Evaluation" section creates a system for in-house monitoring by the Department of Research and Evaluation. Here, the Associate Superintendent of Accountability and Assessment completes an annual evaluation that is reviewed by the plaintiffs' counsel. The second part is the "Monitoring Compliance" section which establishes that an assigned individual will "be responsible to monitor [the Board of Education's] compliance with" the settlement and the appropriate laws. Additionally, Prince George's County must provide a monthly report, similar to the annual reports in *Salazar*, which plaintiffs' counsel is paid to review at a reduced hourly rate. As in *Salazar, Collier* concludes with the statement that the settlement is enforceable by members of the classes and that the court retains jurisdiction.

V. POST SETTLEMENT / DECISION

Once the battles of trial or settlement are achieved, the war is not won quite yet. *Salazar*, which required a motion to enforce, is the best example of this principle. This section briefly outlines the process of implementation, monitoring, developing an amicable relationship and using the success in one jurisdiction for another. The purpose for laying out these considerations is so that they can be planned for ahead of time.

Once an order has been made or a settlement reached, the educational agency still has yet to implement the plan. The Public Justice Center has discovered that this process might not be as easy as one would expect. Implementation in *Collier* has been slower than expected, and filled with minor struggles. In *Salazar* it would appear that much of the implementation process never even occurred in Chicago after the first settlement. An attorney should be aware of, and prepared for, these potential difficulties.

An educational agency with a history of denying homeless children and youth their educational rights will need to be monitored after the "final" resolution is reached. A well-written settlement will ensure the production of the information necessary for monitoring, but even that will not necessarily ensure compliance. The Public Justice Center has committed itself to monitoring the Prince George's County Board of Education for at least four years, and attorneys in *Salazar* have already spent five years monitoring Chicago since their initial settlement.

An easily overlooked area of the post settlement or decision process is the need to reform the relationship between homeless advocates and the school system. This need to reach a working relationship is particularly important to consider before and during litigation and settlement. The hostility created from court actions is counterproductive to securing homeless children and youth educational rights in the long term. Attorneys in *Salazar* have reached a model relationship, where advocates from the Chicago Coalition for the Homeless call the Chicago Public Schools three times per week and meet with officials regularly. Attorneys in *Collier* are actively striving to secure this type of relationship. For instance, they have consciously chosen not to take certain issues to court for fear of damaging the rapport any more than necessary. The important thing to note here is that *Salazar* provides a model of, and proves the possibility of, a working relationship with a school system after litigation.

The last line of a Washington Post article quotes Laurie Norris as saying "We're not going to stop with the other counties .... We hope we don't have to file another lawsuit. Hopefully, this will serve as a lesson to the other counties." The process of litigating against one educational agency should help to bring others into compliance "voluntarily." The Public Justice Center, in the months after settling with Prince George's County, specifically held presentations for the other counties outlining homeless education rights and the *Collier* suit. They hope to create a packet, based on the materials created from the *Collier* case, outlining acceptable samples of forms, processes and policies, fully in compliance with the McKinney Act, which can be adopted wholesale. Attorneys in the *Salazar* case have taken their skills, developed in Chicago, into the suburbs, and have used their experiences to help other advocates and jurisdictions nationally.

Board Of Education of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991)

Chief Justice REHNQUIST delivered the opinion of the Court.

Petitioner Board of Education of Oklahoma City sought dissolution of a decree entered by the District Court imposing a school desegregation plan. The District Court granted relief over the objection of respondents Robert L. Dowell et al., black students and their parents. The Court of Appeals for the Tenth Circuit reversed, holding that the Board would be entitled to such relief only upon " '[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions....' ". We hold that the Court of Appeals' test is more stringent than is required either by our cases dealing with injunctions or by the Equal Protection Clause of the Fourteenth Amendment.

I

This school desegregation litigation began almost 30 years ago. In 1961, respondents, black students and their parents, sued petitioners, the Board of Education of Oklahoma City (Board), to end *de jure* segregation in the public schools. In 1963, the District Court found that Oklahoma City had intentionally segregated both schools and housing in the past, and that Oklahoma City was operating a "dual" school system—one that was intentionally segregated by race. In 1965, the District Court found that the School Board's attempt to desegregate by using neighborhood zoning failed to remedy past segregation because residential segregation resulted in one-race schools. Residential segregation had once been state imposed, and it lingered due to discrimination by some realtors and financial institutions. The District Court found that school segregation had caused some housing segregation. In 1972, finding that previous efforts had not been successful at eliminating state imposed segregation, the District Court ordered the Board to adopt the "Finger Plan," under which kindergarteners would be assigned to neighborhood schools unless their parents opted otherwise; children in grades 1–4 would attend formerly all white schools, and thus black children would be bused to those schools; children in grade 5 would attend formerly all black schools, and thus white children would be bused to those schools; students in the upper grades would be bused to various areas in order to maintain integrated schools; and in integrated neighborhoods there would be stand-alone schools for all grades.

In 1977, after complying with the desegregation decree for five years, the Board made a "Motion to Close Case." The District Court held in its "Order Terminating Case":

> "The Court has concluded that [the Finger Plan] worked and that substantial compliance with the constitutional requirements has been achieved. The School Board, under the oversight of the Court, has operated the Plan properly, and the Court does not foresee that the termination of its jurisdiction will result in the dismantlement of the Plan or any affirmative action by the defendant to undermine the unitary system so slowly and painfully accomplished over the 16 years during which the cause has been pending before this court....
>
> "... The School Board, as now constituted, has manifested the desire and intent to follow the law. The court believes that the present members and their successors on the Board will now and in the future continue to follow the constitutional desegregation requirements.
>
> "Now sensitized to the constitutional implications of its conduct and with a new awareness of its responsibility to citizens of all races, the Board is entitled to pursue in good faith its legitimate policies without the continuing constitutional supervision of this Court....
>
> "... Jurisdiction in this case is terminated ipso facto subject only to final disposition of any case now pending on appeal."

This unpublished order was not appealed.

In 1984, the School Board faced demographic changes that led to greater burdens on young black children. As more and more neighborhoods became integrated, more stand-alone schools were established, and young black students had to be bused farther from their inner-city homes to outlying white areas. In an effort to alleviate this burden and to increase parental involvement, the Board adopted the Student Reassignment Plan (SRP), which relied on neighborhood assignments for students in grades K–4 beginning in the 1985–1986 school year. Busing continued for students in grades 5–12. Any student could transfer from a school where he or she was in the majority to a school where he or she would be in the minority. Faculty and staff integration was retained, and an "equity officer" was appointed.

In 1985, respondents filed a "Motion to Reopen the Case," contending that the School District had not achieved "unitary" status and that the SRP was a return to segregation. Under the SRP, 11 of 64 elementary schools would be greater than 90% black, 22 would be greater than 90% white plus other minorities, and 31 would be racially mixed. The District Court refused to reopen the case, holding that its 1977 finding of unitariness was res judicata as to those who were then parties to the action, and that the district remained unitary. The District Court found that the School Board, administration, faculty, support staff, and student body were integrated, and transportation, extracurricular activities and facilities within the district were equal and nondiscriminatory. Because unitariness had been achieved, the District Court concluded that court-ordered desegregation must end.

The Court of Appeals for the Tenth Circuit reversed. It held that, while the 1977 order finding the district unitary was binding on the parties, nothing in that order indicated that the 1972 injunction itself was terminated. The court reasoned that the finding that the system was unitary merely ended the District Court's active supervision of the case, and because the school district was still subject to the desegregation decree, respondents could challenge the SRP. The case was remanded to determine whether the decree should be lifted or modified.

On remand, the District Court found that demographic changes made the Finger Plan unworkable, that the Board had done nothing for 25 years to promote residential segregation, and that the school district had bused students for more than a decade in good-faith compliance with the court's orders. The District Court found that present residential segregation was the result of private decisionmaking and economics, and that it was too attenuated to be a vestige of former school segregation. It also found that the district had maintained its unitary status, and that the neighborhood assignment plan was not designed with discriminatory intent. The court concluded that the previous injunctive decree should be vacated and the school district returned to local control.

The Court of Appeals again reversed, holding that " 'an injunction takes on a life of its own and becomes an edict quite independent of the law it is meant to effectuate.' " That court approached the case "not so much as one dealing with desegregation, but as one dealing with the proper application of the federal law on injunctive remedies." Relying on *United States v. Swift & Co.,* 286 U.S. 106 (1932), it held that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforseen conditions," and "dramatic changes in conditions unforseen at the time of the decree that ... impose extreme and unexpectedly oppressive hardships on the obligor." Given that a number of schools would return to being primarily one-race schools under the SRP, circumstances in Oklahoma City had not

changed enough to justify modification of the decree. The Court of Appeals held that, despite the unitary finding, the Board had the " 'affirmative duty ... not to take any action that would impede the process of disestablishing the dual system and its effects.' "

We granted the Board's petition for certiorari. We now reverse the Court of Appeals.

II

We must first consider whether respondents may contest the District Court's 1987 order dissolving the injunction which had imposed the desegregation decree. Respondents did not appeal from the District Court's 1977 order finding that the school system had achieved unitary status, and petitioner contends that the 1977 order bars respondents from contesting the 1987 order. We disagree, for the 1977 order did not dissolve the desegregation decree, and the District Court's unitariness finding was too ambiguous to bar respondents from challenging later action by the Board. …

… We … decline to overturn the conclusion of the Court of Appeals that while the 1977 order of the District Court did bind the parties as to the unitary character of the district, it did not finally terminate the Oklahoma City school litigation. In *Pasadena City Bd. of Education v. Spangler,* 427 U.S. 424 (1976), we held that a school board is entitled to a rather precise statement of its obligations under a desegregation decree. If such a decree is to be terminated or dissolved, respondents as well as the school board are entitled to a like statement from the court.

III

The Court of Appeals relied upon language from this Court's decision in *United States v. Swift and Co., supra,* for the proposition that a desegregation decree could not be lifted or modified absent a showing of "grievous wrong evoked by new and unforeseen conditions." It also held that "compliance alone cannot become the basis for modifying or dissolving an injunction." We hold that its reliance was mistaken.

In *Swift,* several large meat-packing companies entered into a consent decree whereby they agreed to refrain forever from entering into the grocery business. The decree was by its terms effective in perpetuity. The defendant meatpackers and their allies had over a period of a decade attempted, often with success in the lower courts, to frustrate operation of the decree. It was in this context that the language relied upon by the Court of Appeals in this case was used.

United States v. United Shoe Machinery Corp., 391 U.S. 244 (1968), explained that the language used in *Swift* must be read in the context of the continuing danger of unlawful restraints on trade which the Court had found still existed. "*Swift* teaches ... a decree may be changed upon an appropriate showing, and it holds that it may not be changed ... if the purposes of the litigation as incorporated in the decree ... have not been fully achieved." In the present case, a finding by the District Court that the Oklahoma City School District was being operated in compliance with the commands of the Equal Protection Clause of the Fourteenth Amendment, and that it was unlikely that the school board would return to its former ways, would be a finding that the purposes of the desegregation litigation had been fully achieved. No additional showing of "grievous wrong evoked by new and unforeseen conditions" is required of the school board.

In *Milliken v. Bradley,* 433 U.S. 267 (1977) (*Milliken II*), we said:

> "[F]ederal-court decrees must directly address and relate to the constitutional violation itself. Because of this inherent limitation upon federal judicial authority, federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation...."

From the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination. *Brown* considered the "complexities arising from the *transition* to a system of public education freed of racial discrimination" in holding that the implementation of desegregation was to proceed "with all deliberate speed." *Green* also spoke of the "*transition* to a unitary, nonracial system of public education."

Considerations based on the allocation of powers within our federal system, we think, support our view that quoted language from *Swift* does not provide the proper standard to apply to injunctions entered in school desegregation cases. Such decrees, unlike the one in *Swift,* are not intended to operate in perpetuity. Local control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit local needs. The legal justification for displacement of local authority by an injunctive decree in a school desegregation case is a violation of the Constitution by the local authorities. Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination.

A district court need not accept at face value the profession of a school board which has intentionally discriminated that it will cease to do so in the future. But in deciding whether to modify or dissolve a desegregation decree, a school board's compliance with previous court orders is obviously relevant. In this case the original finding of *de jure* segregation was entered in 1961, the injunctive decree from which the Board seeks relief was entered in 1972, and the Board complied with the decree in good faith until 1985. Not only do the personnel of school boards change over time, but the same passage of time enables the District Court to observe the good faith of the school board in complying with the decree. The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result. . . .

The judgment of the Court of Appeals is reversed, and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER took no part in the consideration or decision of this case.

Justice MARSHALL, with whom Justice BLACKMUN and Justice STEVENS join, dissenting.

Oklahoma gained statehood in 1907. For the next 65 years, the Oklahoma City School Board maintained segregated schools—initially relying on laws requiring dual school systems; thereafter, by exploiting residential segregation that had been created by legally enforced restrictive covenants. In 1972—18 years after this Court first found segregated schools unconstitutional—a federal court finally interrupted this cycle, enjoining the Oklahoma City School Board to implement a specific plan for achieving actual desegregation of its schools.

The practical question now before us is whether, 13 years after that injunction was imposed, the same School Board should have been allowed to return many of its elementary schools to their former one-race status. The majority today suggests that 13 years of desegregation was enough. The Court remands the case for further evaluation of whether the purposes of the injunctive decree were achieved sufficient to justify the decree's dissolution. However, the inquiry it commends to the District Court fails to recognize explicitly the threatened reemergence of one-race schools as a relevant "vestige" of *de jure* segregation.

In my view, the standard for dissolution of a school desegregation decree must reflect the central aim of our school desegregation precedents. In *Brown v. Board of Education,* 347 U.S. 483 (1954) (*Brown I*), a unanimous Court declared that racially "[s]eparate educational facilities are inherently unequal." This holding rested on the Court's recognition that state-sponsored segregation conveys a message of "inferiority as to th[e] status [of Afro–American school children] in the community that may affect their hearts and minds in a way unlikely ever to be undone." Remedying this evil and preventing its recurrence were the motivations animating our requirement that formerly *de jure* segregated school districts take all feasible steps to *eliminate* racially identifiable schools.

I believe a desegregation decree cannot be lifted so long as conditions likely to inflict the stigmatic injury condemned in *Brown I* persist and there remain feasible methods of eliminating such conditions. Because the record here shows, and the Court of Appeals found, that feasible steps could be taken to avoid one-race schools, it is clear that the purposes of the decree have not yet been achieved and the Court of Appeals' reinstatement of the decree should be affirmed. I therefore dissent. …

II

I agree with the majority that the proper standard for determining whether a school desegregation decree should be dissolved is whether the purposes of the desegregation litigation, as incorporated in the decree, have been fully achieved. I strongly disagree with the majority, however, on what must be shown to demonstrate that a decree's purposes have been fully realized. In my view, a standard for dissolution of a desegregation decree must take into account the unique harm associated with a system of racially identifiable schools and must expressly demand the elimination of such schools. …

B

The majority suggests a more vague and, I fear, milder standard. Ignoring the harm identified in *Brown I,* the majority asserts that the District Court should find that the purposes of the decree have been achieved so long as "the Oklahoma City School District [is now] being operated in compliance with the commands of the Equal Protection Clause" and "it [is] unlikely that the Board would return to its former ways." Insofar as the majority instructs the District Court, on remand, to "conside[r] whether the vestiges of *de jure* segregation ha[ve] been eliminated as far as practicable," the majority presumably views elimination of vestiges as part of "operat [ing] in compliance with the commands of the Equal Protection Clause." But as to the scope or meaning of "vestiges," the majority says very little.

By focusing heavily on present and future compliance with the Equal Protection Clause, the majority's standard ignores how the stigmatic harm identified in *Brown I* can persist even after the State ceases actively to enforce segregation. It was not enough in *Green,* for example, for the school district to withdraw its own enforcement of segregation, leaving it up to individual children and their families to "choose" which school to attend. For it was clear under the circumstances that these choices would be shaped by and perpetuate the state-created message of racial inferiority associated with the school district's historical involvement in segregation. In sum, our school-desegregation jurisprudence establishes that the *effects* of past discrimination remain chargeable to the school district regardless of its lack of continued enforcement of segregation, and the remedial decree is required until those effects have been finally eliminated.

III

Applying the standard I have outlined, I would affirm the Court of Appeals' decision ordering the District Court to restore the desegregation decree. For it is clear on this record that removal of the decree will result in a significant number of racially identifiable schools that could be eliminated. . . .

Against the background of former state-sponsorship of one-race schools, the persistence of racially identifiable schools perpetuates the message of racial inferiority associated with segregation. Therefore, such schools must be eliminated whenever feasible. …

In its concern to spare local school boards the "Draconian" fate of "indefinite" "judicial tutelage," the majority risks subordination of the constitutional rights of Afro–American children to the interest of school board autonomy. The courts must consider the value of local control, but that factor primarily relates to the feasibility of a remedial measure, not whether the constitutional violation has been remedied. *Swann* establishes that if further desegregation is "reasonable, feasible, and workable," then it must be undertaken. In assessing whether the task is complete, the dispositive question is whether vestiges capable of inflicting stigmatic harm exist in the system and whether all that can practicably be done to eliminate those vestiges has been done. The Court of Appeals concluded that "on the basis of the record, it is clear that other measures that are feasible remain available to the Board [to avoid racially identifiable schools]." The School Board does not argue that further desegregation of the one-race schools in its system is unworkable and in light of the proven feasibility of the Finger Plan, I see no basis for doubting the Court of Appeals' finding.

We should keep in mind that the court's active supervision of the desegregation process ceased in 1977. Retaining the decree does not require a return to active supervision. It may be that a modification of the decree which will improve its effectiveness and give the school district more flexibility in minimizing busing is appropriate in this case. But retaining the decree seems a slight burden on the school district compared with the risk of not delivering a full remedy to the Afro–American children in the school system.

IV

Consistent with the mandate of *Brown I,* our cases have imposed on school districts an unconditional duty to eliminate *any* condition that perpetuates the message of racial inferiority inherent in the policy of state-sponsored segregation. The racial identifiability of a district's schools is such a condition. Whether this "vestige" of state-sponsored segregation will persist cannot simply be ignored at the point where a district court is contemplating the dissolution of a desegregation decree. In a district with a history of state-sponsored school segregation, racial separation, in my view, *remains* inherently unequal.

I dissent.

Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992)

Justice WHITE delivered the opinion of the Court.

In these cases, the District Court denied a motion of the sheriff of Suffolk County, Massachusetts, to modify a consent decree entered to correct unconstitutional conditions at the Suffolk County Jail. The Court of Appeals affirmed. The issue before us is whether the courts below applied the correct standard in denying the motion. We hold that they did not and remand these cases for further proceedings.

I

This litigation began in 1971 when inmates sued the Suffolk County sheriff, the Commissioner of Correction for the State of Massachusetts, the mayor of Boston, and nine city councilors, claiming that inmates not yet convicted of the crimes charged against them were being held under unconstitutional conditions at what was then the Suffolk County Jail. The facility, known as the Charles Street Jail, had been constructed in 1848 with large tiers of barred cells. The numerous deficiencies of the jail, which had been treated with what a state court described as "malignant neglect," *Attorney General v. Sheriff of Suffolk County,* 394 Mass. 624, 625, 477 N.E.2d 361, 362 (1985), are documented in the decision of the District Court. See *Inmates of Suffolk County Jail v. Eisenstadt,* 360 F.Supp. 676, 679–684 (Mass.1973). The court held that conditions at the jail were constitutionally deficient:

> "As a facility for the pretrial detention of presumptively innocent citizens, Charles Street Jail unnecessarily and unreasonably infringes upon their most basic liberties, among them the rights to reasonable freedom of motion, personal cleanliness, and personal privacy. The court finds and rules that the quality of incarceration at Charles Street is 'punishment' of such a nature and degree that it cannot be justified by the state's interest in holding defendants for trial; and therefore it violates the due process clause of the Fourteenth Amendment." *Id.,* at 686.

The court permanently enjoined the government defendants: "(a) from housing at the Charles Street Jail after November 30, 1973 in a cell with another inmate, any inmate who is awaiting trial and (b) from housing at the Charles Street Jail after June 30, 1976 any inmate who is awaiting trial." *Id.,* at 691. The defendants did not appeal.

In 1977, with the problems of the Charles Street Jail still unresolved, the District Court ordered defendants, including the Boston City Council, to take such steps and expend the funds reasonably necessary to renovate another existing facility as a substitute detention center. *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., June 30, 1977), App. 22. The Court of Appeals agreed that immediate action was required:

> "It is now just short of five years since the district court's opinion was issued. For all of that time the plaintiff class has been confined under the conditions repugnant to the constitution. For all of that time defendants have been aware of that fact.
>
> . . . . .
>
> "Given the present state of the record and the unconscionable delay that plaintiffs have already endured in securing their constitutional rights, we have no alternative but to affirm the district court's order to prohibit the incarceration of pretrial detainees at the Charles St. Jail." *Inmates of Suffolk County Jail v. Kearney,* 573 F.2d 98, 99–100 (CA1 1978).

The Court of Appeals ordered that the Charles Street Jail be closed on October 2, 1978, unless a

plan was presented to create a constitutionally adequate facility for pretrial detainees in Suffolk County.

Four days before the deadline, the plan that formed the basis for the consent decree now before this Court was submitted to the District Court. Although plans for the new jail were not complete, the District Court observed that "the critical features of confinement, such as single cells of 80 sq. ft. for inmates, are fixed and safety, security, medical, recreational, kitchen, laundry, educational, religious and visiting provisions, are included. There are unequivocal commitments to conditions of confinement which will meet constitutional standards." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Oct. 2, 1978), App. 51, 55. The court therefore allowed Suffolk County to continue housing its pretrial detainees at the Charles Street Jail.

Seven months later, the court entered a formal consent decree in which the government defendants expressed their "desire ... to provide, maintain and operate as applicable a suitable and constitutional jail for Suffolk County pretrial detainees." *Inmates of Suffolk County Jail v. Kearney*, Civ. Action No. 71–162–G (Mass., May 7, 1979), App. to Pet. for Cert. in No. 90–954, p. 15a. The decree specifically incorporated the provisions of the Suffolk County Detention Center, Charles Street Facility, Architectural Program, which—in the words of the consent decree—"sets forth a program which is both constitutionally adequate and constitutionally required." *Id.*, at 16a.

Under the terms of the architectural program, the new jail was designed to include a total of 309 "[s]ingle occupancy rooms" of 70 square feet, App. 73, 76, arranged in modular units that included a kitchenette and recreation area, inmate laundry room, education units, and indoor and outdoor exercise areas. See, *e.g., id.*, at 249. The size of the jail was based on a projected decline in inmate population, from 245 male prisoners in 1979 to 226 at present. *Id.*, at 69.

Although the architectural program projected that construction of the new jail would be completed by 1983, *ibid.*, work on the new facility had not been started by 1984. During the intervening years, the inmate population outpaced population projections. Litigation in the state courts ensued, and defendants were ordered to build a larger jail. *Attorney General v. Sheriff of Suffolk County,* 394 Mass. 624, 477 N.E.2d 361 (1985). Thereupon, plaintiff prisoners, with the support of the sheriff, moved the District Court to modify the decree to provide a facility with 435 cells. Citing "the unanticipated increase in jail population and the delay in completing the jail," the District Court modified the decree to permit the capacity of the new jail to be increased in any amount, provided that:

> "(a) single-cell occupancy is maintained under the design for the facility;
>
> "(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program;
>
> "(c) any modifications are incorporated into new architectural plans;
>
> "(d) defendants act without delay and take all steps reasonably necessary to carry out the provisions of the Consent Decree according to the authorized schedule." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110, 111.

The number of cells was later increased to 453. Construction started in 1987.

In July 1989, while the new jail was still under construction, the sheriff moved to modify the consent decree to allow the double bunking of male detainees in 197 cells, thereby raising the

capacity of the new jail to 610 male detainees. The sheriff argued that changes in law and in fact required the modification. The asserted change in law was this Court's 1979 decision in *Bell v. Wolfish,* 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), handed down one week after the consent decree was approved by the District Court. The asserted change in fact was the increase in the population of pretrial detainees.

The District Court refused to grant the requested modification, holding that the sheriff had failed to meet the standard of *United States v. Swift & Co.*, 286 U.S. 106, 119, 52 S.Ct. 460, 464, 76 L.Ed. 999 (1932):

> "Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned."

The court rejected the argument that *Bell* required modification of the decree because the decision "did not directly overrule any legal interpretation on which the 1979 consent decree was based, and in these circumstances it is inappropriate to invoke Rule 60(b)(5) to modify a consent decree." *Inmates of Suffolk County Jail v. Kearney,* 734 F.Supp. 561, 564 (Mass.1990). The court refused to order modification because of the increased pretrial detainee population, finding that the problem was "neither new nor unforeseen." *Ibid.*

The District Court briefly stated that, even under the flexible modification standard adopted by other Courts of Appeals, the sheriff would not be entitled to relief because "[a] separate cell for each detainee has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Id.*, at 565. Finally, the court rejected the argument that the decree should be modified because the proposal complied with constitutional standards, reasoning that such a rule "would undermine and discourage settlement efforts in institutional cases." *Ibid.* The District Court never decided whether the sheriff's proposal for double celling at the new jail would be constitutionally permissible.

The new Suffolk County Jail opened shortly thereafter.

The Court of Appeals affirmed, stating: "[W]e are in agreement with the well-reasoned opinion of the district court and see no reason to elaborate further." *Inmates of Suffolk County Jail v. Kearney,* 915 F.2d 1557 (CA1, 1990), judgt. order reported at 915 F.2d 1557, App. to Pet. for Cert. in No. 90–954, p. 2a. We granted certiorari. 498 U.S. 1081, 111 S.Ct. 950, 112 L.Ed.2d 1039 (1991).

II

In moving for modification of the decree, the sheriff relied on Federal Rule of Civil Procedure 60(b), which in relevant part provides:

> "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: ... (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment...."

There is no suggestion in these cases that a consent decree is not subject to Rule 60(b). A consent decree no doubt embodies an agreement of the parties and thus in some respects is contractual in

nature. But it is an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree that is subject to the rules generally applicable to other judgments and decrees. The District Court recognized as much but held that Rule 60(b)(5) codified the "grievous wrong" standard of *United States v. Swift & Co., supra,* that a case for modification under this standard had not been made, and that resort to Rule 60(b)(6) was also unavailing. This construction of Rule 60(b) was error.

Swift was the product of a prolonged antitrust battle between the Government and the meat-packing industry. In 1920, the defendants agreed to a consent decree that enjoined them from manipulating the meat-packing industry and banned them from engaging in the manufacture, sale, or transportation of other foodstuffs. 286 U.S., at 111, 52 S.Ct., at 461. In 1930, several meat-packers petitioned for modification of the decree, arguing that conditions in the meat-packing and grocery industries had changed. *Id.,* at 113, 52 S.Ct., at 461. The Court rejected their claim, finding that the meat-packers were positioned to manipulate transportation costs and fix grocery prices in 1930, just as they had been in 1920. *Id.,* at 115–116, 52 S.Ct., at 462–463. It was in this context that Justice Cardozo, for the Court, set forth the much-quoted *Swift* standard, requiring "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions" ... as a predicate to modification of the meat-packers' consent decree.

Read out of context, this language suggests a "hardening" of the traditional flexible standard for modification of consent decrees.. But that conclusion does not follow when the standard is read in context.. The *Swift* opinion pointedly distinguished the facts of that case from one in which genuine changes required modification of a consent decree, stating:

> "The distinction is between restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional and tentative.... The consent is to be read as directed toward events as they then were. It was not an abandonment of the right to exact revision in the future, if revision should become necessary in adaptation to events to be." 286 U.S., at 114–115, 52 S.Ct., at 462.

Our decisions since *Swift* reinforce the conclusion that the "grievous wrong" language of *Swift* was not intended to take on a talismanic quality, warding off virtually all efforts to modify consent decrees. *Railway Employes* emphasized the need for flexibility in administering consent decrees, stating: "There is ... no dispute but that a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen."

There is thus little basis for concluding that Rule 60(b) misread the *Swift* opinion and intended that modifications of consent decrees in all cases were to be governed by the standard actually applied in *Swift.* That Rule, in providing that, on such terms as are just, a party may be relieved from a final judgment or decree where it is no longer equitable that the judgment have prospective application, permits a less stringent, more flexible standard.

The upsurge in institutional reform litigation since *Brown v. Board of Education,* 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954), has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased. See, *e.g., Philadelphia Welfare Rights Organization v. Shapp,* 602 F.2d 1114, 1119–1121 (CA3 1979), cert. denied, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980),

in which modification of a consent decree was allowed in light of changes in circumstances that were beyond the defendants' control and were not contemplated by the court or the parties when the decree was entered.

The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often essential to achieving the goals of reform litigation. The Courts of Appeals have also observed that the public interest is a particularly significant reason for applying a flexible modification standard in institutional reform litigation because such decrees "reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions."

Petitioner Rufo urges that these factors are present in the cases before us and support modification of the decree. He asserts that modification would actually improve conditions for some pretrial detainees, who now cannot be housed in the Suffolk County Jail and therefore are transferred to other facilities, farther from family members and legal counsel. In these transfer facilities, petitioners assert that detainees may be double celled under less desirable conditions than those that would exist if double celling were allowed at the new Suffolk County Jail. Petitioner Rufo also contends that the public interest is implicated here because crowding at the new facility has necessitated the release of some pretrial detainees and the transfer of others to halfway houses, from which many escape.

For the District Court, these points were insufficient reason to modify under Rule 60(b)(5) because its "authority [was] limited by the established legal requirements for modification...." 734 F.Supp., at 566. The District Court, as noted above, also held that the suggested modification would not be proper even under the more flexible standard that is followed in some other Circuits. None of the changed circumstances warranted modification because it would violate one of the primary purposes of the decree, which was to provide for "[a] separate cell for each detainee [which] has always been an important element of the relief sought in this litigation—perhaps even the most important element." *Id.*, at 565. For reasons appearing later in this opinion, this was not an adequate basis for denying the requested modification. The District Court also held that Rule 60(b)(6) provided no more basis for relief. The District Court, and the Court of Appeals as well, failed to recognize that such rigidity is neither required by *Swift* nor appropriate in the context of institutional reform litigation.

It is urged that any rule other than the *Swift* "grievous wrong" standard would deter parties to litigation such as this from negotiating settlements and hence destroy the utility of consent decrees. Obviously that would not be the case insofar as the state or local government officials are concerned. As for the plaintiffs in such cases, they know that if they litigate to conclusion and win, the resulting judgment or decree will give them what is constitutionally adequate at that time but perhaps less than they hoped for. They also know that the prospective effect of such a judgment or decree will be open to modification where deemed equitable under Rule 60(b). Whether or not they bargain for more than what they might get after trial, they will be in no worse position if they settle and have the consent decree entered. At least they will avoid further litigation and perhaps will negotiate a decree providing more than what would have been ordered without the local government's consent. And, of course, if they litigate, they may lose.

III

Although we hold that a district court should exercise flexibility in considering requests for modification of an institutional reform consent decree, it does not follow that a modification will be

warranted in all circumstances. Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstance.

A

A party seeking modification of a consent decree may meet its initial burden by showing either a significant change either in factual conditions or in law.

1

Modification of a consent decree may be warranted when changed factual conditions make compliance with the decree substantially more onerous. Such a modification was approved by the District Court in this litigation in 1985 when it became apparent that plans for the new jail did not provide sufficient cell space. *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110. Modification is also appropriate when a decree proves to be unworkable because of unforeseen obstacles, *New York State Assn. for Retarded Children, Inc. v. Carey,* 706 F.2d, at 969 (modification allowed where State could not find appropriate housing facilities for transfer patients); *Philadelphia Welfare Rights Organization v. Shapp,* 602 F.2d, at 1120–1121 (modification allowed where State could not find sufficient clients to meet decree targets); or when enforcement of the decree without modification would be detrimental to the public interest, *Duran v. Elrod,* 760 F.2d 756, 759–761 (CA7 1985) (modification allowed to avoid pretrial release of accused violent felons).

Respondents urge that modification should be allowed only when a change in facts is both "unforeseen and unforeseeable." Brief for Respondents 35. Such a standard would provide even less flexibility than the exacting *Swift* test; we decline to adopt it. Litigants are not required to anticipate every exigency that could conceivably arise during the life of a consent decree.

Ordinarily, however, modification should not be granted where a party relies upon events that actually were anticipated at the time it entered into a decree.. If it is clear that a party anticipated changing conditions that would make performance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court that it agreed to the decree in good faith, made a reasonable effort to comply with the decree, and should be relieved of the undertaking under Rule 60(b).

Accordingly, on remand the District Court should consider whether the upsurge in the Suffolk County inmate population was foreseen by petitioners. The District Court touched on this issue in April 1990, when, in the course of denying the modification requested in this litigation, the court stated that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen. It has been an ongoing problem during the course of this litigation, before and after entry of the consent decree." 734 F.Supp., at 564. However, the architectural program incorporated in the decree in 1979 specifically set forth projections that the jail population would decrease in subsequent years. Significantly, when the District Court modified the consent decree in 1985, the court found that the "modifications are necessary to meet the *unanticipated increase* in jail population and the delay in completing the jail." *Inmates of Suffolk County Jail v. Kearney,* Civ. Action No. 71–162–G

(Mass., Apr. 11, 1985), App. 110 (emphasis added). Petitioners assert that it was only in July, 1988, 10 months after construction began, that the number of pretrial detainees exceeded 400 and began to approach the number of cells in the new jail. Brief for Petitioner in No. 90–954, p. 9.

It strikes us as somewhat strange, if a rapidly increasing jail population had been contemplated, that respondents would have settled for a new jail that would not have been adequate to house pretrial detainees. There is no doubt that the original and modified decree called for a facility with single cells. *Inmates of Suffolk County Jail v. Kearney*, Civ. Action No. 71–162–G (Mass., Apr. 11, 1985), App. 110. It is apparent, however, that the decree itself nowhere expressly orders or reflects an agreement by petitioners to provide jail facilities having single cells sufficient to accommodate all future pretrial detainees, however large the number of such detainees might be. Petitioners' agreement and the decree appear to have bound them only to provide the specified number of single cells. If petitioners were to build a second new facility providing double cells that would meet constitutional standards, it is doubtful that they would have violated the consent decree.

Even if the decree is construed as an undertaking by petitioners to provide single cells for pretrial detainees, to relieve petitioners from that promise based on changed conditions does not necessarily violate the basic purpose of the decree. That purpose was to provide a remedy for what had been found, based on a variety of factors, including double celling, to be unconstitutional conditions obtaining in the Charles Street Jail. If modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule. The District Court was thus in error in holding that even under a more flexible standard than its version of *Swift* required, modification of the single cell requirement was necessarily forbidden.

2

A consent decree must of course be modified if, as it later turns out, one or more of the obligations placed upon the parties has become impermissible under federal law. But modification of a consent decree may be warranted when the statutory or decisional law has changed to make legal what the decree was designed to prevent.

This was the case in *Railway Employes v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961). A railroad and its unions were sued for violating the Railway Labor Act, 45 U.S.C. § 151 *et seq.*, which banned discrimination against nonunion employees, and the parties entered a consent decree that prohibited such discrimination. Later, the Railway Labor Act was amended to allow union shops, and the union sought a modification of the decree. Although the amendment did not require, but purposely permitted, union shops, this Court held that the union was entitled to the modification because the parties had recognized correctly that what the consent decree prohibited was illegal under the Railway Labor Act as it then read and because a "court must be free to continue to further the objectives of th[e] Act when its provisions are amended."

Petitioner Rapone urges that, without more, our 1979 decision in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447, was a change in law requiring modification of the decree governing construction of the Suffolk County Jail. We disagree. *Bell* made clear what the Court had not before announced: that double celling is not in all cases unconstitutional. But it surely did not cast doubt on the legality of single celling, and petitioners were undoubtedly aware that *Bell* was pending when they signed the decree. Thus, the case must be judged on the basis that it was immaterial to petitioners that double celling might be ruled constitutional, *i.e.*, they preferred even in that event to agree to a decree which called for providing only single cells in the jail to be built.

Neither *Bell* nor the Federal Constitution forbade this course of conduct. Federal courts may not order States or local governments, over their objection, to undertake a course of conduct not tailored to curing a constitutional violation that has been adjudicated. But we have no doubt that, to "save themselves the time, expense, and inevitable risk of litigation," petitioners could settle the dispute over the proper remedy for the constitutional violations that had been found by undertaking to do more than the Constitution itself requires (almost any affirmative decree beyond a directive to obey the Constitution necessarily does that), but also more than what a court would have ordered absent the settlement. Accordingly, the District Court did not abuse its discretion in entering the agreed-upon decree, which clearly was related to the conditions found to offend the Constitution.

To hold that a clarification in the law automatically opens the door for relitigation of the merits of every affected consent decree would undermine the finality of such agreements and could serve as a disincentive to negotiation of settlements in institutional reform litigation. The position urged by petitioners

> "would necessarily imply that the only *legally enforceable* obligation assumed by the state under the consent decree was that of ultimately achieving minimal constitutional prison standards.... Substantively, this would do violence to the obvious intention of the parties that the decretal obligations assumed by the state were not confined to meeting minimal constitutional requirements. Procedurally, it would make necessary, as this case illustrates, a constitutional decision every time an effort was made either to enforce or modify the decree by judicial action."

While a decision that clarifies the law will not, in and of itself, provide a basis for modifying a decree, it could constitute a change in circumstances that would support modification if the parties had based their agreement on a misunderstanding of the governing law. For instance, in *Pasadena City Bd. of Ed. v. Spangler*, 427 U.S. 424, 437–438, 96 S.Ct. 2697, 2705–2706, 49 L.Ed.2d 599 (1976), we held that a modification should have been ordered when the parties had interpreted an ambiguous equitable decree in a manner contrary to the District Court's ultimate interpretation and the District Court's interpretation was contrary to intervening decisional law. And in *Nelson v. Collins*, 659 F.2d 420, 428–429 (1981) (en banc), the Fourth Circuit vacated an equitable order that was based on the assumption that double bunking of prisoners was *per se* unconstitutional.

Thus, if the sheriff and commissioner could establish on remand that the parties to the consent decree believed that single celling of pretrial detainees was mandated by the Constitution, this misunderstanding of the law could form a basis for modification. In this connection, we note again, see *supra*, at 755, that the decree itself recited that it "sets forth a program which is both constitutionally adequate and constitutionally *required.*" (Emphasis added.)

B

Once a moving party has met its burden of establishing either a change in fact or in law warranting modification of a consent decree, the district court should determine whether the proposed modification is suitably tailored to the changed circumstance. In evaluating a proposed modification, three matters should be clear.

Of course, a modification must not create or perpetuate a constitutional violation. Petitioners contend that double celling inmates at the Suffolk County Jail would be constitutional under *Bell*. Respondents counter that *Bell* is factually distinguishable and that double celling at the new jail would violate the constitutional rights of pretrial detainees. If this is the case—the District Court

did not decide this issue, 734 F.Supp., at 565–566—modification should not be granted.

A proposed modification should not strive to rewrite a consent decree so that it conforms to the constitutional floor. Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent that equity requires. The court should not "turn aside to inquire whether some of [the provisions of the decree] upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition." *Swift,* 286 U.S., at 116–117, 52 S.Ct., at 463.

Within these constraints, the public interest and "[c]onsiderations based on the allocation of powers within our federal system," *Dowell, supra,* 498 U.S., at 248, 111 S.Ct., at 637, require that the district court defer to local government administrators, who have the "primary responsibility for elucidating, assessing, and solving" the problems of institutional reform, to resolve the intricacies of implementing a decree modification. *Brown v. Board of Education,* 349 U.S. 294, 299, 75 S.Ct. 753, 755–756, 99 L.Ed. 1083 (1955). See also *Missouri v. Jenkins,* 495 U.S. 33, 50–52, 110 S.Ct. 1651, 1662–1663, 109 L.Ed.2d 31 (1990); *Milliken II,* 433 U.S., at 281, 97 S.Ct., at 2757. Although state and local officers in charge of institutional litigation may agree to do more than that which is minimally required by the Constitution to settle a case and avoid further litigation, a court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree. To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter been litigated to its conclusion. The District Court seemed to be of the view that the problems of the fiscal officers of the State were only marginally relevant to the request for modification in this case. 734 F.Supp., at 566. Financial constraints may not be used to justify the creation or perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification.

IV

To conclude, we hold that the *Swift* "grievous wrong" standard does not apply to requests to modify consent decrees stemming from institutional reform litigation. Under the flexible standard we adopt today, a party seeking modification of a consent decree must establish that a significant change in facts or law warrants revision of the decree and that the proposed modification is suitably tailored to the changed circumstance. We vacate the decision below and remand the cases for further proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS took no part in the consideration or decision of these cases.

Justice O'CONNOR, concurring in the judgment. … Portions of the Court's opinion might be read to place new constraints on the District Court's discretion that are, in my view, just as misplaced as the ones with which the District Court fettered itself the first time.

Most significantly, the Court observes that the District Court recognized single celling as " 'the most important element' " of the decree. *Ante,* at 759 (quoting 734 F.Supp., at 565). But the Court decides that "this was not an adequate basis for denying the requested modification." *Ante,* at 759.

This conclusion is unsupported by any authority. Instead, the Court offers its own reasoning: "If modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible. That cannot be the rule." *Ante,* at 762.

This sweeping conclusion strikes me as both logically and legally erroneous. It may be that the modification of one term of a decree does not *always* defeat the purpose of the decree. See *supra,* at 766. But it hardly follows that the modification of a single term can *never* defeat the decree's purpose, especially if that term is "the most important element" of the decree. If, for instance, the District Court finds that the respondents would never have consented to the decree (and a decade of delay in obtaining relief) without a guarantee of single celling, I should think that the court would not abuse its discretion were it to conclude that modification to permit double celling would be inequitable. Similarly, were the court to find that the jail was constructed with small cells on the assumption that each cell would hold but one inmate, I doubt that the District Court would exceed its authority under Rule 60(b)(5) by concluding that it would be inequitable to double cell the respondents. To the extent the Court suggests otherwise, it limits the District Court's discretion in what I think is an unwarranted and ill-advised fashion.

The same is true of the Court's statement that the District Court should "defer to local government administrators ... to resolve the intricacies of implementing a decree modification." *Ante,* at 764. To be sure, the courts should defer to prison administrators in resolving the day-to-day problems in managing a prison; these problems fall within the expertise of prison officials. But I disagree with the notion that courts must defer to prison administrators in resolving whether and how to modify a consent decree. These questions may involve details of prison management, but at bottom they require a determination of what is "equitable" to all concerned. Deference to one of the parties to a lawsuit is usually not the surest path to equity; deference to these particular petitioners, who do not have a model record of compliance with previous court orders in this case, is particularly unlikely to lead to an equitable result. The inmates have as much claim as the prison officials to an understanding of the equities. The District Court should be free to take the views of both sides into account, without being forced to grant more deference to one side than to the other.

Justice STEVENS, with whom Justice BLACKMUN joins, dissenting.

When a district court determines, after a contested trial, that a state institution is guilty of a serious and persistent violation of the Federal Constitution, it typically fashions a remedy that is more intrusive than a simple order directing the defendants to cease and desist from their illegal conduct.

In June 1973, after finding that petitioners' incarceration of pretrial detainees in the Charles Street Jail violated constitutional standards, the District Court appropriately entered an injunction that went "beyond a simple proscription against the precise conduct previously pursued." It required petitioners to discontinue (1) the practice of double celling pretrial detainees after November 30, 1973, and (2) the use of the Charles Street Jail for pretrial detention after June 30, 1976.

Petitioners did not appeal from that injunction. When they found it difficult to comply with the double-celling prohibition, however, they asked the District Court to postpone enforcement of that requirement. The court refused and ordered petitioners to transfer inmates to other institutions. The Court of Appeals affirmed. When petitioners found that they could not comply with the second part of the 1973 injunction, the District Court postponed the closing of the Charles Street Jail, but set another firm date for compliance. While petitioners' appeal from that order was pending, the parties entered into the negotiations that produced the 1979 consent decree. After the Court of Appeals affirmed the District Court's order and set yet another firm date for the closing of the

Charles Street Jail, the parties reached agreement on a plan that was entered by the District Court as a consent decree.

The facility described in the 1979 decree was never constructed. Even before the plan was completed, petitioners recognized that a larger jail was required. In June 1984, the sheriff filed a motion in the District Court for an order permitting double celling in the Charles Street Jail. The motion was denied. The parties then negotiated an agreement providing for a larger new jail and for a modification of the 1979 decree. After they reached agreement, respondents presented a motion to modify, which the District Court granted on April 11, 1985. The court found that modifications were "necessary to meet the unanticipated increase in jail population and the delay in completing the jail as originally contemplated." App. 110. The District Court then ordered that nothing in the 1979 decree should prevent petitioners

> "from increasing the capacity of the new facility if the following conditions are satisfied:
>
> "(a) single-cell occupancy is maintained under the design for the facility;
>
> "(b) under the standards and specifications of the Architectural Program, as modified, the relative proportion of cell space to support services will remain the same as it was in the Architectural Program...."

There was no appeal from that modification order. Indeed, although the Boston City Council objected to the modification, it appears to have been the product of an agreement between respondents and petitioners.

In 1990, 19 years after respondents filed suit, the new jail was completed in substantial compliance with the terms of the consent decree, as modified in 1985.

III

It is the terms of the 1979 consent decree, as modified and reaffirmed in 1985, that petitioners now seek to modify. The 1979 decree was negotiated against a background in which certain important propositions had already been settled. First, the litigation had established the existence of a serious constitutional violation. Second, for a period of almost five years after the entry of the 1973 injunction—which was unquestionably valid and which petitioners had waived any right to challenge—petitioners were still violating the Constitution as well as the injunction. See *Inmates of Suffolk County Jail v. Kearney*, 573 F.2d, at 99. Third, although respondents had already prevailed, they were willing to agree to another postponement of the closing of the Charles Street Jail if petitioners submitted, and the court approved, an adequate plan for a new facility.

Obviously any plan would have to satisfy constitutional standards. It was equally obvious that a number of features of the plan, such as the site of the new facility or its particular architectural design, would not be constitutionally mandated. In order to discharge their duty to provide an adequate facility, and also to avoid the risk of stern sanctions for years of noncompliance with an outstanding court order, it would be entirely appropriate for petitioners to propose a remedy that exceeded the bare minimum mandated by the Constitution. Indeed, terms such as "minimum" or "floor" are not particularly helpful in this context. The remedy is constrained by the requirement that it not perpetuate a constitutional violation, and in this sense the Constitution does provide a "floor." Beyond that constraint, however, the remedy's attempt to give expression to the underlying constitutional value does not lend itself to quantitative evaluation. In view of the complexity of the institutions involved and the necessity of affording effective relief, the remedial decree will often contain many, highly detailed commands. It might well be that the failure to fulfill any one

of these specific requirements would not have constituted an independent constitutional violation, nor would the absence of any one element render the decree necessarily ineffective. The duty of the District Court is not to formulate the decree with the fewest provisions, but to consider the various interests involved and, in the sound exercise of its discretion, to fashion the remedy that it believes to be best. Similarly, a consent decree reflects the parties' understanding of the best remedy, and, subject to judicial approval, the parties to a consent decree enjoy at least as broad discretion as the District Court in formulating the remedial decree.

From respondents' point of view, even though they had won their case, they might reasonably be prepared to surrender some of the relief to which they were unquestionably entitled—such as enforcing the deadline on closing the Charles Street Jail—in exchange for other benefits to be included in an appropriate remedy, even if each such benefit might not be constitutionally required. For example, an agreement on an exercise facility, a library, or an adequate place for worship might be approved by the court in a consent decree, even if each individual feature were not essential to the termination of the constitutional violation. In fact, in this action it is apparent that the two overriding purposes that informed both the District Court's interim remedy and respondents' negotiations were the prohibition against double celling and the closing of the old jail. The plan that was ultimately accepted, as well as the terms of the consent decree entered in 1979, were designed to serve these two purposes.

The consent decree incorporated all the details of the agreed upon architectural program. A recital in the decree refers to the program as "both constitutionally adequate and constitutionally required." That recital, of course, does not indicate that either the court or the parties thought that every detail of the settlement—or, indeed, *any* of its specific provisions—was "constitutionally required." An adequate remedy was constitutionally required, and the parties and the court were satisfied that this program was constitutionally adequate. But that is not a basis for assuming that the parties believed that any provision of the decree, including the prohibition against double celling, was constitutionally required.

IV

The motion to modify that ultimately led to our grant of certiorari was filed on July 17, 1989. As I view these cases, the proponents of that motion had the burden of demonstrating that changed conditions between 1985 and 1989 justified a further modification of the consent decree. The changes that occurred between 1979 and 1985 were already reflected in the 1985 modification. Since petitioners acquiesced in that modification, they cannot now be heard to argue that pre–1985 developments—either in the law or in the facts—provide a basis for modifying the 1985 order. It is that order that defined petitioners' obligation to construct and to operate an adequate facility.

Petitioners' reliance on *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), as constituting a relevant change in the law is plainly misplaced. That case was pending in this Court when the consent decree was entered in 1979. It was the authority on which the sheriff relied when he sought permission to double cell in 1984, and, of course, it was well known to all parties when the decree was modified in 1985. It does not qualify as a changed circumstance.

The increase in the average number of pretrial detainees is, of course, a change of fact. Because the size of that increase had not been anticipated in 1979, it was appropriate to modify the decree in 1985. But in 1985, the steady progression in the detainee population surely made it foreseeable that this growth would continue. The District Court's finding that "the overcrowding problem faced by the Sheriff is neither new nor unforeseen," *Inmates of Suffolk County Jail v. Kearney*,

734 F.Supp. 561, 564 (Mass.1990), is amply supported by the record.

Even if the continuing increase in inmate population had not actually been foreseen, it was reasonably foreseeable. Mere foreseeability in the sense that it was an event that "could conceivably arise" during the life of the consent decree, see *ante,* at 760, should not, of course, disqualify an unanticipated development from justifying a modification. But the parties should be charged with notice of those events that reasonably prudent litigants would contemplate when negotiating a settlement. Given the realities of today's society, it is not surprising that the District Court found a continued growth in inmate population to be within petitioners' contemplation.

Other important concerns counsel against modification of this consent decree. Petitioners' history of noncompliance after the 1973 injunction provides an added reason for insisting that they honor their most recent commitments. Petitioners' current claims of fiscal limitation are hardly new. These pleas reflect a continuation of petitioners' previous reluctance to budget funds adequate to avoid the initial constitutional violation or to avoid prolonged noncompliance with the terms of the original decree. The continued claims of financial constraint should not provide support for petitioners' modification requests.

The strong public interest in protecting the finality of court decrees always counsels against modifications. Cf. *Teague v. Lane,* 489 U.S. 288, 308–310, 109 S.Ct. 1060, 1074–1075, 103 L.Ed.2d 334 (1989) (plurality opinion); *Mackey v. United States,* 401 U.S. 667, 682–683, 91 S.Ct. 1160, 1174–1175, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring in judgments in part and dissenting in part). In the context of a consent decree, this interest is reinforced by the policy favoring the settlement of protracted litigation. To the extent that litigants are allowed to avoid their solemn commitments, the motivation for particular settlements will be compromised, and the reliability of the entire process will suffer.

It is particularly important to apply a strict standard when considering modification requests that undermine the central purpose of a consent decree. In his opinion in *New York State Assn. for Retarded Children, Inc. v. Carey,* 706 F.2d 956 (CA2 1983), Judge Friendly analyzed the requested modifications in the light of the central purpose "of transferring the population of Willowbrook, whose squalid living conditions this court has already recited, to facilities of more human dimension as quickly as possible." *Id.,* at 967. The changes that were approved were found to be consistent with that central purpose. In this action, the entire history of the litigation demonstrates that the prohibition against double celling was a central purpose of the relief ordered by the District Court in 1973, of the bargain negotiated in 1979 and embodied in the original consent decree, and of the order entered in 1985 that petitioners now seek to modify. Moreover, as the District Court found, during the history of the litigation petitioners have been able to resort to various measures such as "transfers to state prisons, bail reviews by the Superior Court, and a pretrial controlled release program" to respond to the overcrowding problem. 734 F.Supp., at 565. The fact that double celling affords petitioners the easiest and least expensive method of responding to a reasonably foreseeable problem is not an adequate justification for compromising a central purpose of the decree. In this regard, the Court misses the point in its observation that "[i]f modification of one term of a consent decree defeats the purpose of the decree, obviously modification would be all but impossible." *Ante,* at 762. It is certainly true that modification of a consent decree would be impossible if the modification of *any* one term were deemed to defeat the purpose of the decree. However, to recognize that *some* terms are so critical that their modification would thwart the central purpose of the decree does not render the decree immutable, but rather assures that a modification will frustrate neither the legitimate expectations of the parties nor the core remedial

goals of the decree.

After a judicial finding of constitutional violation, petitioners were ordered in 1973 to place pretrial detainees in single cells. In return for certain benefits, petitioners committed themselves in 1979 to continued compliance with the single-celling requirement. They reaffirmed this promise in 1985. It was clearly not an abuse of discretion for the District Court to require petitioners to honor this commitment.

I would affirm the judgment of the Court of Appeals.

Horne v. Flores, 557 U.S. 433 (2009)

From the Court's Syllabus:

> A group of English Language–Learner (ELL) students and their parents (plaintiffs) filed a class action, alleging that Arizona, its State Board of Education, and the Superintendent of Public Instruction (defendants) were providing inadequate ELL instruction in the Nogales Unified School District (Nogales), in violation of the Equal Educational Opportunities Act of 1974 (EEOA), which requires States to take "appropriate action to overcome language barriers" in schools, 20 U.S.C. § 1703(f). In 2000, the Federal District Court entered a declaratory judgment, finding an EEOA violation in Nogales because the amount of funding the State allocated for the special needs of ELL students (ELL incremental funding) was arbitrary and not related to the actual costs of ELL instruction in Nogales. The District Court subsequently extended relief statewide and, in the years following, entered a series of additional orders and injunctions. The defendants did not appeal any of the District Court's orders. In 2006, the state legislature passed HB 2064, which, among other things, increased ELL incremental funding. The incremental funding increase required District Court approval, and the Governor asked the state attorney general to move for accelerated consideration of the bill. The State Board of Education, which joined the Governor in opposing HB 2064, the State, and the plaintiffs are respondents here. The Speaker of the State House of Representatives and the President of the State Senate (Legislators) intervened and, with the superintendent (collectively, petitioners), moved to purge the contempt order in light of HB 2064. In the alternative, they sought relief under Federal Rule of Civil Procedure 60(b)(5). The District Court denied their motion to purge the contempt order and declined to address the Rule 60(b)(5) claim. The Court of Appeals vacated and remanded for an evidentiary hearing on whether changed circumstances warranted Rule 60(b)(5). On remand, the District Court denied the Rule 60(b)(5) motion, holding that HB 2064 had not created an adequate funding system. Affirming, the Court of Appeals concluded that Nogales had not made sufficient progress in its ELL programming to warrant relief.

As Justice Alito, writing for the majority, summarized, "the District Court and the Court of Appeals misunderstood both the obligation that the EEOA imposes on States and the nature of the inquiry that is required when parties such as petitioners seek relief under Rule 60(b)(5) on the ground that enforcement of a judgment is "no longer equitable." Both of the lower courts focused excessively on the narrow question of the adequacy of the State's incremental funding for ELL instruction instead of fairly considering the broader question whether, as a result of important changes during the intervening years, the State was fulfilling its obligation under the EEOA by other means. The question at issue in these cases is not whether Arizona must take "appropriate action" to overcome the language barriers that impede ELL students. Of course it must. But petitioners argue that Arizona is now fulfilling its statutory obligation by new means that reflect new policy insights and other changed circumstances. Rule 60(b)(5) provides the vehicle for petitioners to bring such an argument. …"

He wrote at length about the majority's concerns as to consent decrees in "institutional reform cases":

> Rule 60(b)(5) serves a particularly important function in what we have termed "institutional reform litigation." *Rufo, supra,* at 380, 112 S.Ct. 748. For one thing, injunctions issued in such cases often remain in force for many years, and the passage of time frequently brings about changed circumstances—changes in the nature of the underlying problem, changes in governing

law or its interpretation by the courts, and new policy insights—that warrant reexamination of the original judgment.

Second, institutional reform injunctions often raise sensitive federalism concerns. Such litigation commonly involves areas of core state responsibility, such as public education. See *Missouri v. Jenkins,* 515 U.S. 70, 99, 115 S.Ct. 2038, 132 L.Ed.2d 63 (1995) ("[O]ur cases recognize that local autonomy of school districts is a vital national tradition, and that a district court must strive to restore state and local authorities to the control of a school system operating in compliance with the Constitution".

Federalism concerns are heightened when, as in these cases, a federal court decree has the effect of dictating state or local budget priorities. States and local governments have limited funds. When a federal court orders that money be appropriated for one program, the effect is often to take funds away from other important programs. See *Jenkins, supra,* at 131, 115 S.Ct. 2038 (THOMAS, J., concurring) ("A structural reform decree eviscerates a State's discretionary authority over its own program and budgets and forces state officials to reallocate state resources and funds").

Finally, the dynamics of institutional reform litigation differ from those of other cases. Scholars have noted that public officials sometimes consent to, or refrain from vigorously opposing, decrees that go well beyond what is required by federal law. See, *e.g.*, McConnell, Why Hold Elections? Using Consent Decrees to Insulate Policies from Political Change, 1987 U. Chi. Legal Forum 295, 317 (noting that government officials may try to use consent decrees to "block ordinary avenues of political change" or to "sidestep political constraints"); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 Duke L.J. 1265, 1294–1295 ("Nominal defendants [in institutional reform cases] are sometimes happy to be sued and happier still to lose"); R. Sandler & D. Schoenbrod, Democracy by Decree: What Happens When Courts Run Government 170 (2003) ("Government officials, who always operate under fiscal and political constraints, 'frequently win by losing' " in institutional reform litigation).

Injunctions of this sort bind state and local officials to the policy preferences of their predecessors and may thereby "improperly deprive future officials of their designated legislative and executive powers." *Frew v. Hawkins,* 540 U.S. 431, 441, 124 S.Ct. 899, 157 L.Ed.2d 855 (2004). See also *Northwest Environment Advocates v. EPA,* 340 F.3d 853, 855 (C.A.9 2003) (Kleinfeld, J., dissenting) (noting that consent decrees present a risk of collusion between advocacy groups and executive officials who want to bind the hands of future policymakers); *Ragsdale v. Turnock,* 941 F.2d 501, 517 (C.A.7 1991) (Flaum, J., concurring in part and dissenting in part) ("[I]t is not uncommon for consent decrees to be entered into on terms favorable to those challenging governmental action because of rifts within the bureaucracy or between the executive and legislative branches"); Easterbrook, Justice and Contract in Consent Judgments, 1987 U. Chi. Legal Forum 19, 40 ("Tomorrow's officeholder may conclude that today's is wrong, and there is no reason why embedding the regulation in a consent decree should immunize it from reexamination").

States and localities "depen[d] upon successor officials, both appointed and elected, to bring new insights and solutions to problems of allocating revenues and resources." Where "state and local officials ... inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents," they are constrained in their ability to fulfill

their duties as democratically-elected officials. American Legislative Exchange Council, Resolution on the Federal Consent Decree Fairness Act (2006), App. to Brief for American Legislative Exchange Council et al. as *Amici Curiae* 1a–4a.

It goes without saying that federal courts must vigilantly enforce federal law and must not hesitate in awarding necessary relief. But in recognition of the features of institutional reform decrees, we have held that courts must take a "flexible approach" to Rule 60(b)(5) motions addressing such decrees. *Rufo,* 502 U.S., at 381. A flexible approach allows courts to ensure that "responsibility for discharging the State's obligations is returned promptly to the State and its officials" when the circumstances warrant. In applying this flexible approach, courts must remain attentive to the fact that "federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate [federal law] or does not flow from such a violation." *Milliken* v. *Bradley,* 433 U.S. 267, 282, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). "If [a federal consent decree is] not limited to reasonable and necessary implementations of federal law," it may "improperly deprive future officials of their designated legislative and executive powers."

For these reasons, a critical question in this Rule 60(b)(5) inquiry is whether the objective of the District Court's 2000 declaratory judgment order—*i.e.,* satisfaction of the EEOA's "appropriate action" standard—has been achieved. If a durable remedy has been implemented, continued enforcement of the order is not only unnecessary, but improper. We note that the EEOA itself limits court-ordered remedies to those that "are *essential* to correct particular denials of equal educational opportunity or equal protection of the laws." 20 U.S.C. § 1712 (emphasis added).

Dissenting, Justice Breyer observed:

…[T]he Court's discussion of standards raises a far more serious problem. In addition to the standards I have discussed, *supra,* at 2615 – 2616, our precedents recognize *other,* here outcome-determinative, hornbook principles that apply when a court evaluates a Rule 60(b)(5) motion. The Court omits some of them. It mentions but fails to apply others. As a result, I am uncertain, and perhaps others will be uncertain, whether the Court has set forth a correct and workable method for analyzing a Rule 60(b)(5) motion.

First, a basic principle of law that the Court does not mention—a principle applicable in this case as in others—is that, in the absence of special circumstances (*e.g.,* plain error), a judge need not consider issues or factors that the parties themselves do not raise. That principle of law is longstanding, it is reflected in Blackstone, and it perhaps comes from yet an earlier age. 3 Commentaries on the Laws of England 455 (1768) ("[I]t is a practice unknown to our law" when examining the decree of an inferior court, "to examine the justice of the ... decree by evidence that was never produced below"); *Clements v. Macheboeuf,* 92 U.S. 418, 425, 23 L.Ed. 504 (1876) ("Matters not assigned for error will not be examined"); see also *Savage v. United States,* 92 U.S. 382, 388, 23 L.Ed. 660 (1876) (where a party with the "burden ... to establish" a "charge ... fails to introduce any ... evidence to support it, the presumption is that the charge is without any foundation"); *McCoy v. Massachusetts Inst. of Technology,* 950 F.2d 13, 22 (C.A.1 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal" for "[o]verburdened trial judges cannot be expected to be mind readers"). As we have recognized, it would be difficult to operate an adversary system of justice without applying such a principle. See *Duignan v. United States,* 274 U.S. 195, 200, 47 S.Ct. 566, 71 L.Ed. 996

(1927). But the majority repeatedly considers precisely such claims. See, *e.g., ante,* at 2602 – 2604 (considering significant matters not raised below); *ante,* at 2606 – 2607 (same).

Second, a hornbook Rule 60(b)(5) principle, which the Court mentions, *ante,* at 2593, is that the party seeking relief from a judgment or order "*bears the burden* of establishing that a significant change in circumstances warrants" that relief. *Rufo,* 502 U.S., at 383, 112 S.Ct. 748 (emphasis added); cf. *Board of Ed. of Oklahoma City Public Schools v. Dowell,* 498 U.S. 237, 249, 111 S.Ct. 630, 112 L.Ed.2d 715 (1991) (party moving for relief from judgment must make a "sufficient showing" of change in circumstances). But the Court does not apply that principle. See, *e.g., ante,* at 2604 – 2605, and 2606 n. 22 (holding that movants potentially *win* because of *failure* of record to show that English-learning problems do *not* stem from causes other than funding); see also *ante,* at 2601 – 2603 (criticizing lower courts for failing to consider argument not made).

Third, the Court ignores the well-established distinction between a Rule 60(b)(5) request to *modify* an order and a request to set an unsatisfied judgment entirely aside—a distinction that this Court has previously emphasized. Cf. *Rufo, supra,* at 389, n. 12, 112 S.Ct. 748 (emphasizing that "we do not have before us the question whether the entire decree should be vacated"). Courts normally do the latter only if the "party" seeking "to have" the "decree set aside entirely" shows "that the decree has served its purpose, and there is no longer any need for the injunction." 12 J. Moore et al., Moore's Federal Practice § 60.47[2][c] (3d ed.2009) (hereinafter Moore). Instead of applying the distinction, the majority says that the Court of Appeals "strayed" when it referred to situations in which changes justified setting an unsatisfied judgment entirely aside as " 'likely rare.' " *Ante,* at 2595.

Fourth, the Court says nothing about the well-established principle that a party moving under Rule 60(b)(5) for relief that amounts to having a "decree set aside entirely" must show *both* (1) that the decree's objects have been "attained," *Frew,* 540 U.S., at 442, 124 S.Ct. 899, *and* (2) that it is unlikely, in the absence of the decree, that the unlawful acts it prohibited will again occur. This Court so held in *Dowell,* a case in which state defendants sought relief from a school desegregation decree on the ground that the district was presently operating in compliance with the Equal Protection Clause. The Court agreed with the defendants that "a finding by the District Court that the Oklahoma City School District was being operated in compliance with ... the Equal Protection Clause" was indeed relevant to the question whether relief was appropriate. 498 U.S., at 247, 111 S.Ct. 630. But the Court added that, to show entitlement to relief, the defendants must *also* show that "it was unlikely that the [school board] would return to its former ways." *Ibid.* Only then would the "purposes of the desegregation litigation ha[ve] been fully achieved." *Ibid.* The principle, as applicable here, simply underscores petitioners' failure to show that the "changes" to which they pointed were sufficient to warrant entirely setting aside the original court judgment.

Fifth, the majority mentions, but fails to apply, the basic Rule 60(b)(5) principle that a party cannot dispute the legal conclusions of the judgment from which relief is sought. A party cannot use a Rule 60(b)(5) motion as a substitute for an appeal, say, by attacking the legal reasoning underlying the original judgment or by trying to show that the facts, as they were originally, did not then justify the order's issuance. *Browder v. Director, Dept. of Corrections of Ill.,* 434 U.S. 257, 263, n. 7, 98 S.Ct. 556, 54 L.Ed.2d 521 (1978); *United States v. Swift & Co.,* 286 U.S. 106, 119, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (party cannot claim that injunction could not lawfully have been applied "to the conditions that existed at its making"). Nor can a party require a court to retrace old legal ground, say, by re-making or rejustifying its original "constitutional decision every time an effort [is] made to enforce or modify" an order. *Rufo, supra,* at 389–390, 112 S.Ct. 748 (internal

quotation marks omitted); see also *Frew, supra,* at 438, 124 S.Ct. 899 (rejecting argument that federal court lacks power to enforce an order "unless the court first identifies, at the enforcement stage, a violation of federal law").

Sixth, the Court mentions, but fails to apply, the well-settled legal principle that appellate courts, including this Court, review district court denials of Rule 60(b) motions (of the kind before us) for abuse of discretion. A reviewing court must not substitute its judgment for that of the district court. Particularly where, as here, entitlement to relief depends heavily upon fact-related determinations, the power to review the district court's decision "ought seldom to be called into action," namely only in the rare instance where the Rule 60(b) standard "appears to have been misapprehended or grossly misapplied." The Court's bare assertion that a court abuses its discretion when it fails to order warranted relief, fails to account for the deference due to the District Court's decision.

I have just described Rule 60(b)(5) standards that concern (1) the obligation (or lack of obligation) upon a court to take account of considerations the parties do not raise; (2) burdens of proof; (3) the distinction between setting aside and modifying a judgment; (4) the need to show that a decree's basic objectives have been attained; (5) the importance of not requiring relitigation of previously litigated matters; and (6) abuse of discretion review. Does the Court intend to ignore one or more of these standards or to apply them differently in cases involving what it calls "institutional reform litigation"? …

Second, insofar as the Court goes beyond the technical record-based aspects of this case and applies a new review framework, it risks problems in future cases. The framework it applies is incomplete and lacks clear legal support or explanation. And it will be difficult for lower courts to understand and to apply that framework, particularly if it rests on a distinction between "institutional reform litigation" and other forms of litigation. Does the Court mean to say, for example, that courts must, on their own, go beyond a party's own demands and relitigate an underlying legal violation whenever that party asks for modification of an injunction? How could such a rule work in practice? See *supra,* at 2618 – 2619. Does the Court mean to suggest that there are other special, strict pro-defendant rules that govern review of district court decisions in "institutional reform cases"? What precisely are those rules? And when is a case an "institutional reform" case? After all, as I have tried to show, see *supra,* at 2616 – 2617, the case before us cannot easily be fitted onto the Court's Procrustean "institutional reform" bed.

Third, the Court may mean its opinion to express an attitude, cautioning judges to take care when the enforcement of federal statutes will impose significant financial burdens upon States. An attitude, however, is not a rule of law. Nor does any such attitude point towards vacating the Court of Appeals' opinion here. The record makes clear that the District Court did take care. See *supra,* at 2615. And the Court of Appeals too proceeded with care, producing a detailed opinion that is both true to the record and fair to the lower court and to the parties' submissions as well. I do not see how this Court can now require lower court judges to take yet greater care, to proceed with even greater caution, while at the same time expecting those courts to enforce the statute as Congress intended.

42 U.S.C.A. § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C.A. § 2000d et seq.], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

(R.S. § 722; Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641; Pub.L. 96-481, Title II, § 205(c), Oct. 21, 1980, 94 Stat. 2330; Pub.L. 102-166, Title I, §§ 103, 113(a), Nov. 21, 1991, 105 Stat. 1074, 1079; Pub.L. 103-141, § 4(a), Nov. 16, 1993, 107 Stat. 1489; Pub.L. 103-322, Title IV, § 40303, Sept. 13, 1994, 108 Stat. 1942; Pub.L. 104-317, Title III, § 309(b), Oct. 19, 1996, 110 Stat. 3853; Pub.L. 106-274, § 4(d), Sept. 22, 2000, 114 Stat. 804.)

The Attorneys Fees Provision of the Federal FOIA Statute, 5 USC § 552(a)(4)(E)(i)

(E)(i) The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.
(ii) For purposes of this subparagraph, a complainant has substantially prevailed if the complainant has obtained relief through either--
(I) a judicial order, or an enforceable written agreement or consent decree; or
(II) a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial.

9.4 Attorney Fees

Updated 2013 by Richard Rothschild (http://federalpracticemanual.org/acknowledgements#rothschild), 2016 by Jeffrey S. Gutman (http://federalpracticemanual.org/acknowledgements#gutman)

Court-awarded attorney fees are critical in preserving access to the courts for poor people. Some legal aid programs depend on fee awards for their very survival.[1] Without attorney fees, numerous federal laws protecting rights to housing, health care, and other necessities would remain unenforced. The risk of having to pay plaintiffs' attorney fees frequently induces settlement and deters illegal governmental and corporate conduct. Therefore, legal aid advocates need to have a working knowledge of fee issues.

The subject of court-awarded attorney fees has inspired books, even multivolume treatises.[2] This section instead focuses chiefly on the major issues presented in fee litigation: how a plaintiff qualifies as a prevailing party; entitlement to fees; how to calculate a reasonable fee; timing of fee motions and the "*Jeff D.* problem" of defendants forcing plaintiffs' counsel to waive fees as a condition of achieving a settlement on the merits.

9.4.A. Prevailing Party Standard After *Buckhannon*

To qualify for a fee award under most federal fee-shifting statutes, a litigant must be a "prevailing party."[3] Two issues that often arise are (1) how much the litigant has to win and (2) what form the victory must take.[4]

As for the first question, the Supreme Court has held that a plaintiff need not win every single issue or even the "central issue" in order to obtain prevailing party status. A prevailing party is "one who has succeeded on any significant claim affording it some of the relief sought . . . ."[5] Losing on some issues may or may not result in a reduced fee-award amount.[6] It does not affect "the availability of a fee award *vel non*."[7]

In *CRST Van Expedited, Inc. v. EEOC*,[8] the Supreme Court considered the circumstances under which the defendant was deemed to be a prevailing party. In that case, the defendant company prevailed in a Title VII sexual harassment case on grounds that did not reach the merits of the EEOC's claims. The Court held the defendant may nevertheless be a prevailing party "even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason."[9] As noted below, the defendant prevails for merits or nonmerits reasons if the plaintiff's "claim was frivolous, unreasonable, or groundless."[10] It would make little sense if Congress' policy of "sparing defendants from the costs of *frivolous* litigation,"[11] depended on the distinction between merits-based and non-merits-based frivolity. Congress must have intended that a defendant could recover fees expended in frivolous, unreasonable, or groundless litigation when the case is resolved in the defendant's favor, whether on the merits or not. Imposing an on-the-merits requirement for a defendant to obtain prevailing party status would undermine that congressional policy by blocking a whole category of defendants for whom Congress wished to make fee awards available.

The second question—what form the victory must take for the plaintiff—became problematic after *Buckhannon Board v. West Virginia Department of Health and Human Resources*.[12] In *Buckhannon*, the Supreme Court held that voluntary change in behavior by a defendant caused by a pending lawsuit did not qualify the plaintiff as a prevailing party for fee purposes. After *Buckhannon*, whether a plaintiff who is victorious in a practical sense is a prevailing party for fee purposes depends roughly on how much judicial involvement was involved in the victory.

At one end of the spectrum, winning a judgment obviously qualifies a plaintiff as a prevailing party in most cases. The major qualification is that the judgment must require "some action (or cessation of action) by the defendant."[13] The relief awarded must "materially alter the legal relationship between the parties."[14] An injunction or declaratory judgment typically does so.[15] The judicial declaration alone does not suffice. The judgment may be for nominal relief, although in such cases a court may deny fees altogether to the prevailing plaintiff.[16]

At the other end of the spectrum, under *Buckhannon*, simply filing a lawsuit that prompts defendants to change illegal behavior voluntarily (i.e., acting as a "catalyst") does not qualify the plaintiffs as prevailing parties. The *Buckhannon* Court disapproved the catalyst theory of recovery because it permitted an award "where there is no judicially sanctioned change in the legal relationship of the parties."[17] Even in such situations, however, plaintiffs' counsel may still seek a final judgment if the interests and desires of the clients permit. Defendants are likely to claim that their voluntary changes in policy render the case moot. As the *Buckhannon* Court noted, however, mootness is to be found only when "it is clear that the allegedly wrongful behavior could not reasonably be expected to recur."[18]

Somewhere in the middle of the spectrum are victories achieved either by interlocutory orders or by settlement. Even in pre-*Buckhannon* jurisprudence, winning an interlocutory order that merely kept a suit alive did not transform litigants into prevailing parties.[19] Preliminary injunctions, however, are a different matter because, as with final judgments, they order defendants to act or to refrain from acting. Most lower courts have held that a preliminary injunction based on a finding that the plaintiff is likely to prevail on the merits can qualify the plaintiff as a prevailing party.[20] By contrast, where an injunction merely preserves the status quo without reaching the merits, the plaintiff's victory may lack sufficient "judicial *imprimatur*" to qualify the plaintiff as a prevailing party.[21] While expressly declining to decide whether a preliminary injunction victory can qualify a plaintiff as a prevailing party, the Supreme Court has held that plaintiffs who obtain preliminary injunctions but ultimately lose on the merits are not entitled to fees.[22]

Another difficult question is how much "judicial *imprimatur*" for the change of the legal relationship between the parties is needed for a settlement agreement to qualify a plaintiff as a prevailing party.[23] *Buckhannon* states that a plaintiff who secures a court-ordered consent decree is a prevailing party.[24] However, a litigant who achieves success through a "private settlement" is not.[25] Private settlements lack the "judicial approval and oversight involved in consent decrees" and often cannot be enforced in federal court.[26] In a case where the claim to prevailing party status is based entirely on a settlement agreement, the court must determine whether a particular agreement is closer to a consent decree or to a private settlement.[27] The major factors that the courts have looked at are the extent to which the district court was involved in approval of the settlement terms and whether the district court retains jurisdiction to enforce the agreement.[28]

In response to *Buckhannon*, Congress restored the ability to recover fees as a catalyst in Freedom of Information Act (FOIA) cases. An FOIA complainant has "substantially prevailed" and is eligible for fees if the complainant has obtained relief through "a voluntary or unilateral change in position by the agency, if the complainant's claim is not insubstantial."[29]

9.4.B. Entitlement to Fees Under Major Fee-Shifting Statutes

Once a plaintiff demonstrates that she is a prevailing party, showing entitlement to fees usually is not difficult under most federal fee-shifting statutes.

9.4.B.1. Civil Rights Attorney Fees Awards Act and Other Statutes: Double Standard for Plaintiffs and Defendants

Some statutes, such as the Fair Labor Standards Act, provide that a prevailing plaintiff "shall" be entitled to fees.[30] Other statutes, such as the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, specify that a court "may" award fees to the prevailing party.[31] Recognizing, however, that statutes such as Section 1988 are private attorney general measures intended to encourage litigation enforcing important rights, the courts employ a double standard. A prevailing plaintiff "'should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust.'"[32] By contrast, a prevailing defendant may recover an attorney fee only where the suit was "frivolous, unreasonable, or without foundation."[33]

Section 1988, the most widely used fee-shifting statute, authorizes fee awards in actions to enforce civil rights laws, including 42 U.S.C. § 1983 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.C.&vol=42&sec=1983&sec2=undefined&sec3=undefined&sec4=undefined&bUrl=http://federalpracticemanual.org/node/54/edit). A lawsuit that redresses a state or local government violation of rights guaranteed by federal statute is a Section 1983 action within the meaning of Section 1988 and may thus qualify for a fee award.[34] State governments do not enjoy Eleventh Amendment immunity against Section 1988 fee awards.[35]

9.4.B.2. Equal Access to Justice Act—Substantial Justification Standard

The Equal Access to Justice Act (EAJA) presents different entitlement questions. Under the EAJA a party who prevails in litigation against the federal government "shall" be awarded fees "unless the court finds that the position of the United States was substantially justified . . . ."[36] If either the government's prelitigation position or its litigation position lacks substantial justification in both law and fact, the court shall award fees.[37]

While the government is not automatically assessed fees merely because it loses a case, neither does it escape a fee award just because its position is not frivolous. To meet the substantial justification test, the government's position must be "justified to a degree that could satisfy a reasonable person," which requires the government to carry its burden to demonstrate "a reasonable basis both in law and fact."[38]

Although parties often argue that EAJA motions should be controlled by "objective factors" such as the number of times the issue on the merits was litigated previously, the Supreme Court has stated that none of these factors is dispositive in itself.[39] Most district courts decide substantial justification questions on an "I know it when I see it" basis. Once the district court grants or denies a motion, the court of appeals is required to use a deferential abuse-of-discretion standard on appeal.[40]

Another practical hurdle EAJA litigants may have to surmount is the Supreme Court's decision in *Astrue v. Ratliff* that attorney fees belong to the litigant rather than counsel and therefore are subject to offsets when the prevailing plaintiff owes money to the federal government.[41] When there is no preexisting debt, however, courts generally have honored retainer agreements assigning the right to plaintiff's counsel to collect attorney fees.[42]

9.4.C. Calculation of Reasonable Fees: The Lodestar Calculation

Under the leading case of *Hensley v. Eckerhart*, the amount of a statutory fee award is determined by the lodestar method: "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate."[43]

9.4.C.1. Reasonable Number of Hours

What constitutes "hours reasonably expended" is the most frequently debated question in fee litigation.

9.4.C.1.a. Documentation Requirements

Courts and opposing counsel examine whether the hours are well documented. Some courts permit attorneys to reconstruct hours.[44] However, inadequate documentation may result in a reduced fee award.[45] Attorneys, paralegals, and law clerks should begin keeping contemporaneous time records as soon as they realize that a matter may become a case, erring on the side of overinclusiveness. They should record the date, the time spent to complete a task broken down into six-minute increments, and, most important, a sufficiently detailed description of what was done. As one court stated, records should give "enough information as to what hours were devoted to various activities and by whom for the district court to determine if the claimed fees are reasonable."[46] For example, "telephone call" or "research" are inadequate entries, but a court will approve "telephone call with Smith re failure to produce administrative record" or "research re summary judgment motion."[47] Ideally, there should be a separate entry for each telephone call, research project, or other activity. Bundling several activities into one entry, which is known as block billing, can be costly. One circuit court has approved a 20% reduction in compensation for the block-billed hours.[48] Block-billing makes it difficult for courts to assess the number and reasonableness of the hours billed for each task.

9.4.C.1.b. Overall Billing Judgment Decisions

Hensley states that,"[w]here a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee. Normally this will encompass all hours reasonably expended on the litigation . . . ."[49] However, attorneys seeking court-awarded fees are expected to exercise voluntary "billing judgment," excluding from a fee request "hours that are excessive, redundant, or otherwise unnecessary . . . ."[50] In lengthy, multi-counsel litigation, where justifying every time entry or use of personnel would be difficult, some plaintiffs' attorneys propose a voluntary across-the-board billing judgment reduction, which courts often appreciate.[51] In other instances, where particular recorded activity seems vulnerable, plaintiffs' counsel should consider making discrete reductions.

Where counsel has exercised appropriate billing judgment, district courts do not have unlimited discretion to reduce fees. At least one Court of Appeals has held that while the district court "can impose a small reduction, no greater than 10 percent-a 'haircut'-based on its exercise of discretion and without a more specific explanation," greater reductions require clear explanations.[52]

9.4.C.1.c. Compensable Phases of Litigation

A court may award fees for work on all phases of a lawsuit from prelitigation work,[53] through postjudgment monitoring,[54] including time spent on the fee issue itself.[55] There are some limits, however, on awards for prelitigation services. Time spent "years before the complaint was filed" is unlikely to be compensated.[56] Time spent in administrative proceedings must be "both useful and of a type ordinarily necessary to advance the . . . litigation . . . ."[57] When a plaintiff can make that showing, however, a court may award fees for administrative advocacy even when that advocacy was directed at third parties.[58]

9.4.C.1.d. Compensable Activities

Space does not permit a discussion of which litigation activities are compensable and which are not. When a fee opponent challenges a particular activity, such as attorney travel time, a good place to start researching is one of the fee treatises.[59]

Perhaps the most frequently occurring challenge is to time spent by co-counsel communicating with each other. The Supreme Court has held that district courts have discretion to include conferencing time in a fee award.[60] No court, to our knowledge, has denied compensation altogether for conferences.[61]

A subsidiary issue in some cases is the number of hours spent on counsel communications. Plaintiffs may need to demonstrate to a district court, through copies of agendas or through lead counsel's declarations, why the number of meetings held was necessary and how the meetings actually contributed to the efficiency of the litigation. When counsel do so, some courts award fully compensatory fees even when large numbers of conferencing hours are at issue.[62]

9.4.C.1.e. Compensation for Less than Complete Success

Fee opponents often seek reductions based on the argument that the plaintiffs were only partly successful. Plaintiffs rarely win all conceivable relief while prevailing along the way at every stage on all legal theories advanced. Courts do not, however, require that level of success to award fully compensatory fees.

Less than Complete Relief. Frequently plaintiffs win some, but not all, of the equitable relief prayed for, or relatively small amounts of money in damage cases. In neither event is a reduction in fees necessarily warranted. The *Hensley* Court deemed it insignificant that a prevailing plaintiff did not receive all the relief requested. For example, a plaintiff who failed to recover damages but obtained injunctive relief, or vice versa, may recover a fee award based on all hours reasonably expended if the relief obtained justified that expenditure of attorney time.[63] Lawsuits seeking only damages present different issues. The Supreme Court in *Farrar v. Hobby* held that if a plaintiff wins only nominal damages, a court "usually" denies fees altogether.[64] Even in nominal damage cases, however, as suggested by Justice O'Connor's concurring opinion, a court may award higher fees. Whether it does depends on factors such as the difference between the damage amounts sought and awarded, the significance of the legal issue on which the plaintiff prevailed, and whether the litigation vindicated a public purpose.[65] Several circuit courts have adopted Justice O'Connor's analysis as the rule for nominal-damages cases.[66]

The Court has rejected limiting the amount of fees in a civil rights damages suit to the same percentage that a personal injury lawyer would receive and affirmed a fee award that was nearly eight times the damages recovery.[67] Limiting fees to a percentage of the damages recovery would be inconsistent with the purpose of Section 1988, which "was enacted because existing fee arrangements were thought not to provide an adequate incentive to lawyers particularly to represent plaintiffs in unpopular civil rights cases."[68]

Unsuccessful Proceedings. A prevailing plaintiff need not prevail at every stage in a suit to receive fully compensatory fees. As the Ninth Circuit recognized in refusing to reduce fees for time spent unsuccessfully defending against a writ of certiorari: "Rare, indeed, is the litigant who doesn't lose some skirmishes on the way to winning the war."[69] Relying on *Hensley*, the Ninth Circuit analogized unsuccessful claims to unsuccessful proceedings where the plaintiff ultimately prevailed.[70]

Unsuccessful Issues. Neither does a plaintiff need to win every issue raised in the complaint. Rather, fees for time spent litigating an unsuccessful claim are denied only where that claim "is distinct in all respects from . . . successful claims . . . ."[71] By contrast, where "a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised."[72] Claims are "related" under this analysis when they arise from the same facts or related legal theories.[73]

9.4.C.2. Reasonable Hourly Rates

In *Blum v. Stenson* the Supreme Court held that Section 1988 fees awarded to legal aid programs that do not charge their clients fees should be calculated at rates comparable to those charged by private attorneys in the community with comparable experience.[74] The Court rejected as inconsistent with the legislative history of Section 1988 the argument that fees should be limited to the internal costs of the relatively low salaries paid by legal aid programs.

9.4.C.2.a. Market Rates and How to Prove Them

The *Blum* Court noted Congress' direction that "'the amount of fees awarded under [Section 1988] be governed by the same standards which prevail in other types of equally complex Federal litigation, such as antitrust cases . . . .'"[75] The fee applicant has the burden of proving relevant market rates through evidence "in addition to the attorney's own affidavits . . . ."[76] This evidence often includes:

- declarations from attorneys in a range of private law firms in the relevant community reporting hourly rates charged by those firms for attorneys with the same law school graduation date as the fee applicant;[77]
- excerpts from hourly rate surveys;[78]
- fee award orders specifying past hourly rates awarded for the work of attorneys in the case; and
- other fee award orders in the jurisdiction stating hourly rates for attorneys of comparable experience.

9.4.C.2.b. Frequently Occurring Hourly Rate Issues

Five frequently recurring issues concerning reasonable hourly rates follow:

First, the parties may disagree on which city's prevailing rates apply when plaintiff's counsel practices outside the forum jurisdiction. While this issue can cut both ways, it appears to occur most frequently when an out-of-town big-city lawyer wins in a jurisdiction where prevailing rates are relatively low. Generally the forum community's rates are applicable unless the plaintiff can show that "local counsel was unavailable, either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case.'"[79] A declaration from the director of the legal services program serving the forum community sometimes can help prove this point.

Second, in suits lasting many years, the defendants may argue that compensation must be limited to "historical rates": the market rates prevailing for each of the years the suit was litigated. The Supreme Court has held, however, that "an appropriate adjustment for delay in payment—whether by the application of current rather than historic hourly rates or otherwise—is within the contemplation of [Section 1988]."[80] Thus, in multiyear litigation against a defendant other than the federal government, a court should either award current rates for the entire case—the easiest solution—or award historical rates augmented by a multiplier to compensate for delay in payment.[81]

Third, if the defendants are represented by law firms charging relatively low hourly rates, they may argue that plaintiffs' counsel should be limited to those same rates. Noting that firms representing large institutional defendants such as governments and insurance companies charge low rates to keep repeat business, the courts have rejected these arguments. These firms are "not in the same legal market as private plaintiff's attorneys who litigate civil rights cases."[82]

Fourth, defendants often seek reduction in hourly rates or an overall fee reduction by contending that too much of the work on behalf of the plaintiffs was done by experienced attorneys at the high end of the hourly rate scale. Fee opponents often argue that plaintiffs' counsel should not be awarded "big firm rates" because a large firm would have litigated the case differently, assigning most of the work to associates. Some courts have accepted this argument.[83] Most have rejected it for two reasons. First, small firms and legal aid programs do not have the same luxury as do big firms in choosing to throw armies of associates into the fray.[84] More important, the reason experienced attorneys command higher hourly rates, the courts have realized, is that they are often much more efficient: "Presumably, the skill and experience of the partners places them further along the learning curve and enhances their ability to operate efficiently so that the higher partner rate is likely to be offset, at least in part, by a reduction in the number of hours multiplying that rate."[85]

Fifth, defendants may argue that compensation for the work of paralegals and law clerks should be limited to the amounts that plaintiffs' counsel paid them rather than market rates. The Supreme Court, however, has held that courts should compensate paralegal and law clerk time at market rates if the prevailing practice in the relevant community was to bill that time separately.[86]

9.4.C.2.c. Equal Access to Justice Act Hourly Rate Issues—Statutory Cap and Exceptions

The Equal Access to Justice Act (EAJA) presents an entirely different framework for computing hourly rates. Under the EAJA attorney fees are limited to $125 per hour, subject to certain exceptions.[87]

Inflation Adjustment. Hourly rates may be adjusted to account for increases in the cost of living since March 1996, when Congress set the EAJA hourly rate limit at $125.[88] Although an inflation increase is not automatic, in practice most courts award it, usually unopposed. The adjusted hourly rate equals $125 per hour increased by the percentage increase in the consumer price index for urban consumers (CPI-U).[89] Unlike with other fee statutes, courts must use historical rather than current rates in awarding EAJA fees because of sovereign immunity concerns.[90] Thus, in multiyear litigation the rate for each year is $125 increased by the percentage CPI-U hike from March 1996 through that year.[91]

Market Rates for Special Expertise and in Other Situations. An EAJA fee applicant may be awarded higher market rates if "the court determines that . . . a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee."[92] This requires an extensive showing that (1) the prevailing attorneys possessed specialized expertise; (2) the expertise was needed in the litigation; and (3) the skills needed could not have been obtained at the normal EAJA rates.[93]

As for the first factor, the Supreme Court held that possessing exceptional litigation skills is not good enough. The prevailing attorney must have "distinctive knowledge or specialized skill . . . ."[94] The circuit courts have taken different approaches in construing the *Underwood* requirements. The First, Seventh, Ninth, and Eleventh Circuits have interpreted *Underwood* to allow an enhancement in situations where the attorneys had specialized expertise in a particular area of law.[95] By contrast, the D.C., Fourth, and Fifth Circuits have construed *Underwood* quite narrowly.[96] Most other circuit courts have not squarely addressed this issue.

Even when the prevailing attorney possesses specialized expertise, the attorney must make a strong factual showing that the case could not have been brought by a smart generalist. Lead counsel should demonstrate to the court how the suit could only have been litigated by attorneys with existing contacts in the field or knowledge of hard-to-access rules and authorities. Plaintiffs also need to submit a declaration from a knowledgeable attorney showing the absence of other qualified counsel to litigate such a case.

In addition to authorizing fees generally against the government when no substantial justification can be shown for the government's position, the EAJA subjects the federal government to fees "to the extent that any other party would be liable under the common law or under the terms of any statute which specially provides for such an award."[97] Under this provision, market rates are awarded under equitable fee doctrines such as when the government acts in bad faith, and under statutes other than the EAJA that both apply to the federal government and have fee-shifting provisions.[98]

9.4.C.3. Multipliers

Earlier Supreme Court cases such as *Hensley* contemplated that the lodestar could be augmented by a multiplier in appropriate circumstances.[99] Later cases, however, rendered the multiplier rare in federal court. Most prominently, the Court in *City of Burlington v. Dague* held that courts may not award contingency multipliers to account for either the exceptional riskiness of a particular case or the riskiness of certain kinds of litigation.[100] Previously, the Court had discouraged the use of multipliers based on such factors as the novelty and difficulty of the litigation or the exceptional quality of the representation; the Court reasoned that these factors are generally subsumed within the lodestar.[101] Post-*Dague,* two courts have approved multipliers based on the extreme unpopularity of a case.[102] Another court ordered a multiplier for exceptional results after a 36-year landmark desegregation lawsuit.[103] In addition, where a federal court exercises supplemental jurisdiction over state claims and state law permits multipliers, federal courts are free to augment the lodestar.[104]

In *Perdue v. Kenny A.*,[105] the Court held that there is a "strong presumption" that the lodestar calculation is reasonable, but that there may be a "few" circumstances in which superior attorney performance is not represented in the lodestar calculation. In such cases, the lodestar amount would not have been sufficient to attract competent counsel initially. The Court identified three bases for a possible enhancement: that the hourly rate does not adequately measure the attorney's true market value, such as when the rate is keyed only to the number of years out of law school, 2) the performance involves an "extraordinary" outlay of expenses and litigation is protracted and 3) the performance involves an unanticipated delay in the recovery of fees.[106] Any enhancement must be objective, reasonable and subject to meaningful appellate review.

While *Perdue* left the door slightly ajar for future multipliers, the opinion and its predecessors suggest a more practical approach for fee applicants. The *Perdue* Court recognized that "'brilliant insights and critical maneuvers sometimes matter far more than hours worked or years of experience.'"[107] But "'in those cases, the special skill and experience of counsel should be reflected in the reasonableness of the hourly rates.'"[108] Counsel who have performed exceptionally can use this reasoning to justify seeking higher hourly rates than would normally be warranted by their number of years of experience.

9.4.D. Timing of Fee Petitions

Neither Section 1988 nor most federal fee-shifting statutes specify when the fee motion must be filed.

9.4.D.1. Civil Rights Act and Most Other Cases—Governed by Rule 54 and Local Rules

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure (http://www.jureeka.net/Jureeka/US.aspx?doc=FRCP&rule=undefined&bUrl=http://federalpracticemanual.org/node/54/edit)requires fee motions to be filed no later than 14 days after entry of judgment "[u]nless otherwise provided by statute or order of the court . . . ." For purposes of this rule, a local rule setting a different fee motion deadline is an "order of the court," and the local rule governs.[109]

Some local rules, however, also impose short deadlines for fee motions, which may require counsel to seek an order postponing the deadline or to postpone having a judgment entered until fee papers are prepared. Rule 54 requires only that the fee applicant state the basis for an award and either the amount or "fair estimate" of the amount; thus, the rule appears to permit counsel to file placeholder motions with details to be filled in later.

9.4.D.2. Equal Access to Justice Act Timing Issues

The Equal Access to Justice Act (EAJA) requires fee motions to be filed within 30 days of "final judgment."[110] This in turn is defined as "a judgment that is final and not appealable, and includes an order of settlement."[111]

Fee petitions may also be filed pending appeal; the EAJA merely precludes fee petitions after the 30-day limit.[112] Fee claimants and the government argued for years over what starts the EAJA clock running in Social Security Act cases until the Supreme Court decided the issue in *Shalala v. Schaeffer*.[113] A plaintiff is a prevailing party, the Court held, when she obtains a "sentence four remand" under the Social Security Act: "a judgment modifying or reversing the decision of the Secretary . . . ."[114] By contrast, a "sentence six remand," which merely contemplates that new evidence will be introduced is not a judgment for attorney-fee purposes.[115] Thus, a sentence four remand has the potential to start the clock running for an EAJA fee motion.

The *Schaeffer* Court also held, however, that a sentence four remand order merely triggers the duty to enter judgment and is not a judgment itself. For the 30-day clock to begin running, the district court, pursuant to Rule 58, must enter a judgment "on a separate document."[116]

9.4.E. The "*Jeff D.*" Problem–Forced Fee Waivers and Lump Sum Settlement Offers

Ordinarily a legal aid organization agrees to represent the client without charging a fee, except for recovering court-awarded fees. There are two potential problems with defense settlement offers in most cases handled by legal aid attorneys: (1) the offer is conditioned upon waiver of attorney fees or (2) in cases seeking monetary relief, the defendant offers a lump-sum inclusive of all damages and attorney fees and does not identify the amount of the award allocated to fees. Simultaneously negotiating the best settlement terms for the client and an award of fees for the legal work can create a conflict of interest between attorney and client.

The Supreme Court has acknowledged this problem, but has decided that encouraging settlements is a more important policy objective than helping plaintiff's attorneys avoid an ethical challenge. In *Evans v. Jeff. D.*, the Court held that conditioning a settlement offer on the merits on plaintiffs waiving their claim for Section 1988 fees is permissible.[117] *Jeff D.* has made it very difficult to challenge attorney fee waiver settlement offers, but not impossible. At least two courts, relying upon dictum in *Jeff D.*, have held that suits may proceed challenging an alleged wholesale government policy of demanding fee waivers to deny counsel to disfavored classes of litigants.[118]

Because such suits would not be easy to litigate and win, the goal should be to avoid *Jeff D.* offers in the first place. Some private attorneys have done so by including a provision in the client retainer agreement stating the attorney's hourly rate, and specifying that the client owes that amount if the client, against attorney's advice, accepts a settlement offer that precludes a fee recovery.

This is not a viable option for legal aid programs. For legal aid attorneys, the key to minimizing *Jeff D.* problems is appropriate communication with opposing counsel and with clients. Some opposing counsel, who would never think to make a *Jeff D.* offer to a private attorney, might make such an offer to a legal services attorney, seeking to take advantage of the attorney's perceived idealism. Legal services attorneys need to convey to opposing counsel and the entire legal community, through consistent word and action, that of course, in addition to relief for their clients, they expect their programs to be paid no matter what. Consistently conveying this attitude will discourage *Jeff D.* offers. Client communication is also critical. Clients who are educated on the importance of the case and kept well informed throughout the litigation have been known to reject *Jeff D.* offers.

Even when there is no demand for waiver of fees, incorporating fees in a lump-sum settlement offer presents a serious challenge to the plaintiff's attorney. The attorney must negotiate the maximum monetary and non-monetary relief for the client while also trying to recover fees. Because law firms representing indigent civil rights plaintiffs typically limit their requirement for the client to pay attorney fees to what can be recovered from the defendant, there is also an ethical challenge when the lump-sum does not allocate the portion of the award that represents the amount included for the fees of the plaintiff's attorney. Where damages will be sought, the client retainer agreement needs to address specifically the possibility of a lump-sum settlement offer. The agreement needs to specify that the fees will be calculated in a certain way, and that an accounting of the total fees will be shown to the client at the time a settlement offer is made. Even with full disclosure and agreement from the client, negotiating these lump-sum settlement offers is challenging.

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1. From 1995 to 2009, annual legislation appropriating funds to the Legal Services Corporation (LSC) prohibited LSC grant recipients from claiming attorney fees in most cases. The appropriation measure for 2010 eliminated the prohibition, and LSC then suspended its corresponding regulation, 45 C.F.R. § 1642.3 (http://www.gpo.gov/fdsys/browse/collectionCfr.action?collectionCode=CFR&searchPath=Title+45%2FSubtitle+B%2FChapter+Xvi&oldPath=Title+45%2FSubtitle+B&isCollapsed=true&selectedYearFrom=2010&ycord=2335). The National Legal Aid and Defender Program Enhancement Committee subsequently prepared a useful memorandum setting forth guidance to LSC funded organizations (but useful to any legal aid office) on how to document time, revise retainer and co-counseling agreements and collect attorney fees. *See* the Ohio Legal Services website for more information, www.ohiolegalservices.org (http://www.ohiolegalservices.org/). In addition, programs should seek attorney's fees in cases pending at the time of passage of the appropriations bill. *See* Rochelle Bobroff, *Legal Services Attorney Fees Are Obtainable in Pending Cases* (http://www.povertylaw.org/clearinghouse-review/issues/2010/2010-july-august/bobroff), 44 Clearinghouse Review 157 (July-Aug. 2010).
2. See, e.g., 2 Martin A. Schwartz & John E. Kirklin, Section 1983 Litigation, Statutory Attorney's Fees (4th ed. 2013-2 Supplement).
3. Not all statutes require a recipient of attorney fees to be the prevailing party. Under the National Childhood Vaccine Injury Act of 1986, a court may award attorney fees in connection with an unsuccessful petition for compensation for injuries caused by vaccines if the petition "was brought in good faith and there was a reasonable basis for the claim for which the petition was brought . . ." 42 U.S.C. (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap6A-subchapXIX-part2-subparta-sec300aa-15.pdf)§ 300aa-15 (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap6A-subchapXIX-part2-subparta-sec300aa-15.pdf)(e)(1). In *Sebelius v. Cloer* (http://scholar.google.com/scholar_case?q=133+S.+Ct.+1886&hl=en&as_sdt=400003&case=5490231058864401508&scilh=0), 133 S. Ct. 1886 (2013), the Court held that fees could be awarded under this statute even for an untimely petition brought in good faith. *See Hardt v. Reliance Standard Life Insurance Company* (http://scholar.google.com/scholar_case?q=Hardt+v.+Reliance+Std.+Life+Ins.+Co.&hl=en&as_sdt=400003&case=11497813361210864705&scilh=0), 560 U.S. 242 (2010) (holding that under ERISA provision, 29 U.S.C. § 1132(g)(1) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title29/pdf/USCODE-2009-title29-chap18-subchapI-subtitleB-part5-sec1132.pdf), which allows court to award fees to either party in its discretion, party must demonstrate "some degree of success on the merits" to be awarded fees).
4. For a detailed discussion of these issues, see Gill Deford, *The Imprimatur of (https://sites.google.com/a/povertylaw.org/federal-practice-manual/Home/chapter-9/goog_1668336678)*Buckhannon (https://sites.google.com/a/povertylaw.org/federal-practice-manual/Home/chapter-9/goog_1668336678) *on the Prevailing-Party Inquiry (http://www.povertylaw.org/clearinghouse-review/issues/2008/2008-july-august-issue/deford)*, 42 Clearinghouse Review 122 (July-Aug. 2008).
5. *Texas Teachers Association v. Garland School District* (http://scholar.google.com/scholar?as_q=489+U.S.+782&num=10&as_epq=&as_oq=&as_eq=&as_occt=any&as_sauthors=&as_publication=&as_ylo=&as_yhi=&as_sdt=3&as_sdtf=&as_sdts=14&btnG=Search+Scholar&
489 U.S. 782 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=489&page=782&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 791 (1989).
6. *See* Section 9.4.C.1 (node/54) of this MANUAL.
7. *Texas Teachers Association*, 489 U.S. at 793.
8. 136 S. Ct. 1642 (https://scholar.google.com/scholar_case?q=van+expedited&hl=en&as_sdt=6,43&as_ylo=2016&case=2214445524648138285&scilh=0) (2016).
9. *Id.* at 1651. The Court declined to decide whether the nonmerits grounds of a decision must be preclusive in nature. *Id.* at 1653.
10. *Id.* at 1652 (quoting *Christiansburg Garment Co. v. EEOC* (https://scholar.google.com/scholar_case?case=17214233781367753575&q=van+expedited&hl=en&as_sdt=6,43&as_ylo=2016&scilh=0), 434 U.S. 412, 422 (1978)).
11. *Fox v. Vice* (https://scholar.google.com/scholar_case?q=fox+v+vice&hl=en&as_sdt=6,43&case=4612481658703000905&scilh=0), 563 U.S. 826, 840 (2011).

12. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health & Human Resources* (http://scholar.google.com/scholar_case?case=18016879269718488474&q=532+U.S.+598&hl=en&as_sdt=400003), 532 U.S. 598, 603 (2001).
13. *Hewitt v. Helms (http://scholar.google.com/scholar_case?case=11839869470487121881&q=482+U.S.+755&hl=en&as_sdt=400003)*, 482 U.S. 755 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=482&page=755&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 761 (1987).
14. *Lefemine v. Wideman* (http://scholar.google.com/scholar_case?q=133+S.+Ct.+9&hl=en&as_sdt=400003&case=4742107456975861399&scilh=0), 133 S. Ct. 9, 11 (2012) (per curiam).
15. *Id.*
16. *Farrar v. Hobby (http://scholar.google.com/scholar_case?case=4029288770020466344&q=506+U.S.+103&hl=en&as_sdt=400003)*, 506 U.S. 103 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=506&page=103&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 115 (1992).
17. *Buckhannon*, 532 U.S. at 605.
18. *Id.* at 609 (quoting (http://scholar.google.com/scholar_case?case=5440560917097220943&q=528+U.S.+167&hl=en&as_sdt=400003)*Friends of the Earth, Incorporated v. Laidlaw Environmental Services (TOC), Incorporated (http://scholar.google.com/scholar_case?q=528+U.S.+167&hl=en&as_sdt=400003&case=5440560917097220943&scilh=0)*, 528 U.S. 167 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=528&page=167&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 189 (2000)). Mootness is discussed in detail in Chapter 3 (node/18) of this MANUAL.
19. *Hanrahan v. Hampton (http://scholar.google.com/scholar_case?case=6663162207011683080&q=446+U.S.+754&hl=en&as_sdt=400003)*, 446 U.S. 754 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=446&page=754&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1980).
20. *See, e.g.*, *Higher Taste, Incorporated v. City of Tacoma* (http://scholar.google.com/scholar_case?q=717+F.3d+712&hl=en&as_sdt=400003&case=4310479920149108527&scilh=0), 717 F.3d 712, 716 (9th Cir. 2013); *Common Cause/Georgia v. Billups* (http://scholar.google.com/scholar_case?q=554+F.3d+1340&hl=en&as_sdt=400003&case=12174496308777056971&scilh=0), 554 F.3d 1340, 1355-56 (11th Cir. 2009); *People Against Police Violence v. City of Pittsburgh* (http://scholar.google.com/scholar_case?q=520+F.3d+226&hl=en&as_sdt=400003&case=12675496623981351187&scilh=0), 520 F.3d 226, 232-33 (3d Cir. 2008) ("nearly every Court of Appeals to have addressed the issue has held that relief obtained via a preliminary injunction can, under appropriate circumstances, render a party 'prevailing.'"); *Dearmore v. City of Garland* (http://scholar.google.com/scholar_case?q=519+F.3d+517&hl=en&as_sdt=400003&case=13169766913744860608&scilh=0), 519 F.3d 517, 523-24 (5th Cir. 2008); *Preservation Coalition of Erie County v. Federal Transit Administration (http://scholar.google.com/scholar_case?q=356+F.3d+444&hl=en&as_sdt=400003&case=5764137047917108180&scilh=0)*, 356 F. 3d 444 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=356&page=444&bUrl=http://federalpracticemanual.org/node/54/edit), 451 (2d Cir. 2004). *But see Smyth v. Rivero (http://scholar.google.com/scholar_case?case=16743744066824115818&q=282+F.3d+268&hl=en&as_sdt=400003)*, 282 F.3d 268 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=282&page=268&bUrl=http://federalpracticemanual.org/node/54/edit), 276-77 (4th Cir. 2002) (doubting that winning a preliminary injunction can ever qualify a plaintiff as the prevailing party).
21. *See, e.g.*, *Race v. Toledo-Davila* (http://scholar.google.com/scholar_case?q=291+F.3d+857&hl=en&as_sdt=400003&case=9815521401935248305&scilh=0), 291 F.3d 857 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=291&page=857&bUrl=http://federalpracticemanual.org/node/54/edit), 858-59 (1st. Cir. 2002).
22. *Sole v. Wyner* (http://scholar.google.com/scholar_case?case=4951396588320626640&q=551+U.S.+74&hl=en&as_sdt=400003), 551 U.S. 74 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=551&page=74&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (2007).
23. *Buckhannon*, 532 U.S. at 605.
24. *Id.* at 604.
25. *Id.*
26. *Id.* at 604 n.7.
27. For a discussion on how to structure settlements in light of *Buckhannon*, see Section 9.2 (http://federalpracticemanual.org/node/52) of this MANUAL.
28. *See, e.g., Perez v. Westchester County Department of Corrections (http://scholar.google.com/scholar_case?q=587+F.3d+143&hl=en&as_sdt=400003&case=14111759391179137998&scilh=0)*, 587 F.3d 143 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=587&page=143&bUrl=http://federalpracticemanual.org/node/54/edit), 149-53 (2d Cir. 2009); *Aranov v. Napolitano* (http://scholar.google.com/scholar_case?q=562+F.3d+84&hl=en&as_sdt=400003&case=5864363049908039324&scilh=0), 562 F.3d 84, 88-95 (1st Cir. 2009) (en banc); *Campaign for Responsible Transplantation v. Food and Drug Administration (http://scholar.google.com/scholar_case?q=511+F.3d+187&hl=en&as_sdt=400003&case=16290367056779793368&scilh=0)*, 511 F.3d 187 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=511&page=187&bUrl=http://federalpracticemanual.org/node/54/edit) (D.C. Cir. 2007); *Roberson v. Giuliani* (http://scholar.google.com/scholar_case?case=5018211508198817767&q=346+F.3d+75&hl=en&as_sdt=400003), 346 F.3d 75 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=346&page=75&bUrl=http://federalpracticemanual.org/node/54/edit) (2d Cir. 2003); *Barrios v. California Interscholastic Federation* (http://scholar.google.com/scholar_case?q=277+f3d+1128&hl=en&as_sdt=400003&case=11483109072269469 81&scilh=0), 277 F.3d 1128, 1134-35 n.5 (9th Cir.), *cert. denied*, 537 U.S. 820 (2002); *American Disability Association, Incorporated v. Chmielarz* (http://scholar.google.com/scholar_case?q=289+F.3d+1315&hl=en&as_sdt=400003&case=11135143812204789242&scilh=0), 289 F.3d 1315 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=289&page=1315&bUrl=http://federalpracticemanual.org/node/54/edit), 1320 (11th Cir. 2002); *Smyth v. Rivero* (http://scholar.google.com/scholar_case?case=16743744066824115818&q=282+F.3d+268&hl=en&as_sdt=400003), 282 F.3d 268 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=282&page=268&bUrl=http://federalpracticemanual.org/node/54/edit), 278-81 (4th Cir. 2002) (http://www.povertylaw.org/poverty-law-library/case/51300/51346); *Truesdell v. Philadelphia Housing Authority* (http://scholar.google.com/scholar_case?q=290+F.3d+159&hl=en&as_sdt=400003&case=8308778875884971615&scilh=0), 290 F.3d 159 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=290&page=159&bUrl=http://federalpracticemanual.org/node/54/edit), 165 (3d Cir. 2002).
29. Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(ii) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title5/pdf/USCODE-2009-title5-partI-chap5-subchapII-sec552.pdf).
30. 29 U.S.C. § 216(b) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title29/pdf/USCODE-2009-title29-chap8-sec216.pdf). For a list of other federal attorney-fee provisions, see Gary F. Smith, *Federal Statutory Attorney Fees: Common Issues and Recent Cases* (http://www.povertylaw.org/clearinghouse-review/issues/1994/19941101/500650), 28 Clearinghouse Review 744, 746 (Nov. 1994).
31. 42 U.S.C. § 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1988.pdf). A potentially illuminating recent example outside the traditional legal services context involved an interpretation of the identical fee-shifting language in the Copyright Act. *Kirtsaeng v. John Wiley & Sons, Inc.* (https://scholar.google.com/scholar_case?q=kirtsaeng&hl=en&as_sdt=6,43&as_ylo=2016&case=15816775820778768377&scilh=0), 136 S. Ct. 1979 (2016). There, the Court tried to interpret the fee provision in a manner that would further the purpose of the Copyright Act. It determined that this purpose would be better served by a test that gave "substantial weight to the reasonableness of a losing party's position" and considered other relevant factors than one that gave "special consideration to whether a lawsuit resolved an important and close legal issue and thus 'meaningfully clarifie[d]' copyright law." *Id.* at 1985, 1986-89. In this context, the "substantial weight" test is not equivalent to a presumption against fee shifting."
32. *Hensley v. Eckerhart (http://scholar.google.com/scholar_case?case=5179727217217722884&q=461+U.S.+424&hl=en&as_sdt=400003)*, 461 U.S. 424 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=461&page=424&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 428 (1983) (citations omitted).
33. *Hughes v. Rowe* (https://scholar.google.com/scholar_case?q=449+U.S.+5&hl=en&as_sdt=6,43&case=7507738104613994389&scilh=0), 449 U.S. 5, 14 (1980) (quoting *Christiansburg Garment Co. v. EEOC (http://scholar.google.com/scholar_case?case=17214233781367753575&q=434+U.S.+412&hl=en&as_sdt=400003)*, 434 U.S. 412, 421 (1978) (internal quotation marks omitted)). *See James v. City of Boise (https://scholar.google.com/scholar_case?q=136+S.+Ct.+685&hl=en&as_sdt=6,43&case=9828718838641798 20&scilh=0)*, 136 S. Ct. 685 (2016) (per curiam).
34. *Maine v. Thiboutot (http://scholar.google.com/scholar_case?case=6831866857583820 33&q=448+U.S.+1&hl=en&as_sdt=400003)*, 448 U.S. 1, 9 (1980).
35. *Maher v. Gagne (http://scholar.google.com/scholar_case?case=18723449319439602 86&q=448+U.S.+122&hl=en&as_sdt=400003)*, 448 U.S. 122, 130-33 (1980); *Hutto v. Finney (http://scholar.google.com/scholar_case?case=12687903120774416800&q=437+U.S.+678&hl=en&as_sdt=400003)*, 437 U.S. 678, 693-700 (1978).
36. 28 U.S.C. § 2412(d)(1)(A) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf). The fee petition must, among other things, affirmatively allege that the government's litigation position was not substantially justified. *Scarborough v. Principi (http://scholar.google.com/scholar_case?case=2656699428655665709&q=541+U.S.+401&hl=en&as_sdt=400003)*, 541 U.S. 401 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=541&page=401&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 408 (2004).
37. 28 U.S.C. § 2412(d)(2)(D) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
38. *Pierce v. Underwood (http://scholar.google.com/scholar_case?case=16266758494798074149&q=487+U.S.+552&hl=en&as_sdt=400003)*, 487 U.S. 552 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=487&page=552&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 565 (1988).
39. *Id.* at 568-69. In *Pierce* itself, for example, the Court did not find it dispositive that the government had lost 11 straight times on the same issue. *Id.* at 569. Neither did the Court agree with the government that a Supreme Court grant of certiorari and a stay on the same issue compelled a conclusion that the government's position must have been substantially justified. *Id.*
40. *Id.* at 559-63.
41. *Astrue v. Ratliff* (http://scholar.google.com/scholar_case?q=560+U.S.+586&hl=en&as_sdt=400003&case=12201163316551010265&scilh=0), 560 U.S. 586 (2010).

42. *See Gors v. Colvin (http://scholar.google.com/scholar_case?q=gors+v.+colvin&hl=en&as_sdt=400003&case=4019768891100190655&scilh=0)*, No. Civ. 12-4162 (D.S.D. March 12, 2013) ("Post-*Ratliff* the approach of most courts has been to honor such fee assignments in the absence of the litigant's pre-existing debt to the United States.") (citing *Walker v. Astrue* (http://scholar.google.com/scholar_case?q=walker+v.+astrue&hl=en&as_sdt=400003&case=13062388592856915754&scilh=0), No. 2:09-cv-960 (M.D. Ala. April 5, 2011) (*Ratliff* does not explicitly reject the practice of awarding fees to attorneys where the litigant has assigned them "'in cases where the plaintiff does not owe a debt to the government . . .'"); *Wigginton v. Astrue* (http://scholar.google.com/scholar_case?q=wigginton+v.+astrue&hl=en&as_sdt=400003&case=9953078089422893967&scilh=0), No. 3:09CV00101 (E.D. Ark. April 4, 2011) (same); *Blackwell v. Astrue* (http://scholar.google.com/scholar_case?q=blackwell+v.+astrue&hl=en&as_sdt=400003&case=13139830019926523459&scilh=0), No. CIV 08-1454 (E.D. Cal. March 21, 2011) (same); *Dornbusch v. Astrue* (http://scholar.google.com/scholar_case?q=dornbusch+v.+astrue&hl=en&as_sdt=400003&case=11410441520644296774&scilh=0), No. 09-CV-1734 (D. Minn. March 1, 2011) (same)).
43. *Hensley*, 461 U.S. at 433.
44. *See Kline v. City of Kansas City, Missouri, Fire Department* (http://scholar.google.com/scholar_case?q=245+F.3d+707&hl=en&as_sdt=400003&case=5727062690702400537&scilh=0), 245 F.3d 707 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=245&page=707&bUrl=http://federalpracticemanual.org/node/54/edit) (8th Cir. 2001); *Riordan v. Nationwide Mutual Fire Insurance Comapny* (http://scholar.google.com/scholar_case?case=17236208163369261129&q=Riordan+v.+Nationwide+Mut.+Fire+Ins.+Co.&hl=en&as_sdt=400003), 977 F.2d 47 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=977&page=47&bUrl=http://federalpracticemanual.org/node/54/edit), 53 (2d Cir. 1992); *Davis v. City & County of San Francisco* (http://scholar.google.com/scholar_case?case=3666364257626200153&q=976+F.2d+1536&hl=en&as_sdt=400003), 976 F.2d 1536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=976&page=1536&bUrl=http://federalpracticemanual.org/node/54/edit), 1542 (9th Cir. 1992), *vacated in part on other grounds*, 984 F.2d 345 (http://scholar.google.com/scholar_case?case=3917182333463789463&q=984+F.2d+345&hl=en&as_sdt=400003) (9th Cir. 1993); *Carter v. Sedgwick County* (http://scholar.google.com/scholar_case?case=2528903534524106340&q=929+F.2d+1501&hl=en&as_sdt=400003), 929 F.2d 1501 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=929&page=1501&bUrl=http://federalpracticemanual.org/node/54/edit), 1506 (10th Cir. 1991).
45. *Hensley*, 461 U.S. at 433.
46. *Rode v. Dellarciprete* (http://scholar.google.com/scholar_case?case=7070944502101813099&q=892+F.2d+1177&hl=en&as_sdt=400003), 892 F.2d 1177 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=892&page=1177&bUrl=http://federalpracticemanual.org/node/54/edit), 1191 (3d Cir. 1990).
47. For a comparison of what one court considered to be adequate and inadequate time records, see *Chrapliwy v. Uniroyal Inc. (http://scholar.google.com/scholar_case?case=8084661960747524243&q=583+F.+Supp.+40&hl=en&as_sdt=400003)*, 583 F. Supp. 40, 47 (N.D. Ind. 1983). Interestingly, the time summaries the court approved broke down time by quarter hours rather than tenths, and several of the entries were block billed. Neither practice is likely to pass judicial muster today.
48. *Welch v. Metropolitan Life Insurance Company*, 480 F.3d 942 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=480&page=942&bUrl=http://federalpracticemanual.org/node/54/edit), 948 (9thCir. 2007). At the same time, the Court of Appeals stated that the reduction could not be imposed across-the-board because many of the time entries were not block-billed. *See also Torres-Rivera v. O'Neill-Cancel (http://scholar.google.com/scholar_case?case=3672298485522622324&q=524+F.3d+331&hl=en&as_sdt=400003)*, 524 F.3d 331 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=524&page=331&bUrl=http://federalpracticemanual.org/node/54/edit), 340 (1st Cir. 2008).
49. *Hensley*, 461 U.S. at 435.
50. *Id.* at 434.
51. *See, e.g., Davis*, 976 F.2d at 1543.
52. *Moreno v. City of Sacramento* (http://scholar.google.com/scholar_case?case=7370407832041871360&q=534+F.3d+1106&hl=en&as_sdt=400003), 534 F.3d 1106 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=534&page=1106&bUrl=http://federalpracticemanual.org/node/54/edit), 1112 (9th Cir. 2008).
53. *Webb v. County Board of Education (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D471%26page%3D234&sa=D&sntz=1&usg=AFrqEzf5F7swGSLL-qYrfv9_rscgDOdW3g)*, 471 U.S. 234 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=471&page=234&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 243 (1985).
54. *Pennsylvania v. Delaware Valley Citizens' Council* (http://scholar.google.com/scholar_case?case=14007603328527739 21&q=478+U.S.+546&hl=en&as_sdt=400003), 478 U.S. 546 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=546&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 559 (1986).
55. *See, e.g., Gagne v. Maher (http://scholar.google.com/scholar_case?case=8721328187969217175&q=594+F.2d+336&hl=en&as_sdt=400003)*, 594 F.2d 336 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=594&page=336&bUrl=http://federalpracticemanual.org/node/54/edit), 344 (2d Cir. 1979), *aff'd on other grounds*, 448 U.S. 122 (http://scholar.google.com/scholar_case?case=18723449319439602 86&q=448+U.S.+122&hl=en&as_sdt=400003) (1980), *cited with approval, Immigration & Naturalization Service v. Jean (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D496%26page%3D154&sa=D&sntz=1&usg=AFrqEzeai_K6IdHYnI* 496 U.S. 154 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=496&page=154&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 162 (1990). In *Jean* the Court held that, under the Equal Access to Justice Act (EAJA), fees for time spent on the fee issue should be awarded without a separate inquiry over whether the government's position on the fee issue was substantially justified.
56. *Webb*, 471 U.S. at 242.
57. *Id.* at 243.
58. *Delaware Valley Citizens' Council*, 478 U.S. at 558-59.
59. *See, e.g.*, Schwartz & Kirklin, *supra* note 2, § 4.07[F] at 4-101 (collecting cases dealing with compensability of travel time).
60. *Riverside v. Rivera (http://www.google.com/url?q=http%3A%2F%2Fcaselaw.lp.findlaw.com%2Fscripts%2Fgetcase.pl%3Fnavby%3Dcase%26court%3Dus%26vol%3D477%26page%3D561&sa=D&sntz=1&usg=AFrqEzdVRcSwSpLsysHZbADA)*, 477 U.S. 561 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=477&page=561&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 573 n.6 (1986).
61. *See, e.g., In re Continental Illinois Securities Litigation (http://scholar.google.com/scholar_case?case=8701845183385648132&q=962+F.2d+566&hl=en&as_sdt=400003)*, 962 F.2d 566 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=962&page=566&bUrl=http://federalpracticemanual.org/node/54/edit), 570 (7th Cir. 1992) (holding that unjustified across-the-board cuts in attorney fees for time spent in conference was an abuse of discretion); *Berberena v. Coler* (http://scholar.google.com/scholar_case?case=13024638387835500 09&q=753+F.2d+629&hl=en&as_sdt=400003), 753 F.2d 629 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=753&page=629&bUrl=http://federalpracticemanual.org/node/54/edit), 633 (7th Cir. 1985) (in "a difficult case with significant social effects . . . the participation of [four] attorneys . . . in . . . strategy conferences and negotiations 'may indeed have been crucial . . . .'"); *Scelta v. Delicatessen Support Services, Incorporated* (http://scholar.google.com/scholar_case?q=203+F.+Supp.+2d+1328&hl=en&as_sdt=400003&case=9030366254811063966&scilh=0), 203 F. Supp. 2d 1328, 1333 (M.D. Fla. 2002 (http://www.jureeka.net/Jureeka/US.aspx?doc=FloridaCases&bUrl=http://federalpracticemanual.org/node/54/edit)); *McKenzie v. Kennickell* (http://scholar.google.com/scholar_case?case=14046463809853183420&q=645+F.+Supp.+437&hl=en&as_sdt=400003), 645 F. Supp. 437, 450 (D.D.C. 1986) ("conferences between attorneys to discuss strategy and prepare for oral argument are an essential part of effective litigation . . . there is no reason or authority for allowing only one lawyer to charge for time that more than one lawyer justifiably spent").
62. *See, e.g., United States v. City & County of San Francisco (http://scholar.google.com/scholar_case?case=4129040219444046687&q=748+F.+Supp.+1416&hl=en&as_sdt=400003)*, 748 F. Supp. 1416, 1421 (N.D. Cal. 1990), *aff'd in relevant part sub nom. Davis (http://scholar.google.com/scholar_case?case=3666364257626200153&q=976+F.2d+1536&hl=en&as_sdt=400003)*, 976 F.2d 1536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=976&page=1536&bUrl=http://federalpracticemanual.org/node/54/edit) (counsel compensated for 3,500 hours in conferences with co-counsel and clients); *Riverside*, 477 U.S. at 573 n.6 (affirming compensation for 197 hours of conversation between two attorneys); *Palmigiano v. Garrahy* (http://scholar.google.com/scholar_case?case=10350480004937280947&q=466+F.+Supp.+732&hl=en&as_sdt=400003), 466 F. Supp. 732, 743 (D. R.I. 1979), *aff'd*, 616 F.2d 598 (http://scholar.google.com/scholar_case?case=3810666049454344982&q=616+F.2d+598&hl=en&as_sdt=400003) (1st Cir. 1980) (attorneys fully compensated for 208 hours spent in conference). *See also In re Olson (http://scholar.google.com/scholar_case?case=11442384065085381&q=884+F.2d+1415&hl=en&as_sdt=400003)*, 884 F.2d 1415 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=884&page=1415&bUrl=http://federalpracticemanual.org/node/54/edit), 1429 (D.C. Cir. 1989) (limiting compensation for conferencing hours to 10 percent of total fee request).
63. *Hensley*, 461 U.S. at 436 n.11.
64. *Farrar v. Hobby (http://scholar.google.com/scholar_case?case=4029288770020466344&q=506+U.S.+103&hl=en&as_sdt=400003)*, 506 U.S. 103 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=506&page=103&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 115 (1992).

65. *Id.* at 121-22 (O'Connor, J., concurring). *See, e.g., Barber v. T.D. Williamson, Incorporated (http://scholar.google.com/scholar_case?q=254+F.3d+1223&hl=en&as_sdt=400003&case=3984589032457572447&scilh=0),* 254 F.3d 1223 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=254&page=1223&bUrl=http://federalpracticemanual.org/node/54/edit), 1229-33 (10th Cir. 2001) (evaluating factors); *O'Connor v. Huard* (http://scholar.google.com/scholar_case?case=12534176370722954 99&q=117+F.3d+12&hl=en&as_sdt=400003), 117 F.3d 12 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=117&page=12&bUrl=http://federalpracticemanual.org/node/54/edit), 17-18 (1st Cir. 1997) (affirming a lodestar fee award, where nominal damages award achieved individual plaintiff's goal and served as a deterrent).
66. *See, e.g., Hawa Abdi Jama v. Esmor Correctional Services (http://scholar.google.com/scholar_case?case=7419261553014123846&q=577+F.3d+169&hl=en&as_sdt=400003),* 577 F.3d 169 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=577&page=169&bUrl=http://federalpracticemanual.org/node/54/edit), 174-76 (3rd Cir. 2009); *Mercer v. Duke University* (http://scholar.google.com/scholar_case?q=401+F.3d+199&hl=en&as_sdt=400003&case=4205545425507538379&scilh=0), 401 F.3d 199 (http://scholar.google.com/scholar_case?case=7419261553014123846&q=577+F.3d+169&hl=en&as_sdt=400003), 204 (4th Cir. 2005), and cases cited there.
67. *Riverside*, 477 U.S. at 564-65, 581 (plurality opinion); *id.* at 581-86 (Powell, J., concurring in judgment) (rejecting argument to limit fees to one-third of damages).
68. *Id.* at 586 (Powell, J., concurring).
69. *Cabrales v. County of Los Angeles* (http://scholar.google.com/scholar_case?case=16484297123379678568&q=935+F.2d+1050&hl=en&as_sdt=400003), 935 F.2d 1050 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=935&page=1050&bUrl=http://federalpracticemanual.org/node/54/edit), 1053 (9th Cir. 1991).
70. *Id.* ("Just as time spent on losing claims can contribute to the success of other claims, time spent on a losing stage of litigation contributes to success because it constitutes a step toward victory").
71. *Hensley*, 461 U.S. at 440.
72. *Id.* By contrast, when a portion of a suit is frivolous, entitling the defendant to attorney fees under 42 U.S.C. (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21-subchapI-sec1988.pdf) § 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap21-subchapI-sec1988.pdf) and similar statutes, the defendant is entitled to reimbursement only "for costs that the defendant would not have incurred but for the frivolous claims." *Fox v. Vice* (http://scholar.google.com/scholar_case?q=563+US+2&hl=en&as_sdt=400003&case=4612481658703000905&scilh=0), 131 S. Ct. 2205, 2211 (2011).
73. *Id.* at 435.
74. *Blum v. Stenson (http://scholar.google.com/scholar_case?case=14012192812481338663&q=465+U.S.+886&hl=en&as_sdt=400003),* 465 U.S. 886, 892-(http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=465&page=886&pinpoint=892&bUrl=http://federalpracticemanual.org/node/54/edit)96 (1984).
75. *Id.* at 893 (citing S. Rep. No. 94-1011, at 6 (1976)).
76. *Id.* at 896 n.11.
77. Specific hourly rate information is more persuasive than a declaration of a private attorney that merely says the attorney has looked over the rates sought and thinks they are "reasonable." The latter type of declaration "might properly be characterized by a reviewing court as one given out of courtesy, but it provides little or no evidentiary support for an award." *Norman v. Housing Authority of Montgomery* (http://scholar.google.com/scholar_case?case=12171627398426186975&q=836+F.2d+1292&hl=en&as_sdt=400003), 836 F.2d 1292 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=836&page=1292&bUrl=http://federalpracticemanual.org/node/54/edit), 1304 (11th Cir. 1988).
78. *See, e.g., Salazar v. District of Columbia (http://scholar.google.com/scholar_case?case=9500732964034030420&q=123+F.+Supp.+2d+8&hl=en&as_sdt=400003)*, 123 F. Supp. 2d 8,14 (D.D.C. 2000) (relying upon National Survey Center and National Law Journal surveys to determine reasonable hourly rates in the District of Columbia). *But see Davis*, 976 F.2d at 1547 (rejecting reliance on a different survey because, among other reasons, the survey reported only statewide average rates rather than rates specific to San Francisco, where case was litigated).
79. *Barjon v. Dalton* (http://scholar.google.com/scholar_case?case=8348008322994770761&q=132+F.3d+496&hl=en&as_sdt=400003), 132 F.3d 496 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=132&page=496&bUrl=http://federalpracticemanual.org/node/54/edit), 500 (9th Cir. 1997), *cert. denied*, 525 U.S. 827 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=525&page=827&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1998) (quoting *Gates v. Deukmejian* (http://scholar.google.com/scholar_case?case=916466970969798 4454&q=987+F.2d+1392&hl=en&as_sdt=400003), 987 F.2d 1392 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=987&page=1392&bUrl=http://federalpracticemanual.org/node/54/edit), 1405 (9th Cir. 1992)).
80. *Missouri v. Jenkins (http://scholar.google.com/scholar_case?case=8733218411511751532&q=491+U.S.+274&hl=en&as_sdt=400003),* 491 U.S. 274 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=491&page=274&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 284 (1989).
81. Because waivers of sovereign immunity are strictly construed, fee awards against the federal government after multiyear litigation may not include a multiplier for delay or be based on current hourly rates. *Library of Congress v. Shaw (http://scholar.google.com/scholar_case?case=6160901089183031511&q=478+U.S.+310&hl=en&as_sdt=400003)*, 478 U.S. 310, 317-(http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=310&pinpoint=317&bUrl=http://federalpracticemanual.org/node/54/edit)20 (1986).
82. *Trevino v. Gates (http://scholar.google.com/scholar?hl=en&as_sdt=400003&q=99+F.3d+911&btnG=Search)*, 99 F.3d 911 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=99&page=911&bUrl=http://federalpracticemanual.org/node/54/edit), 925 (9th Cir. 1996), *cert. denied*, 520 U.S. 1117 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=520&page=1117&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1997). *Accord Malloy v. Monahan (http://scholar.google.com/scholar_case?case=7793809105649286862&q=73+F.3d+1012&hl=en&as_sdt=400003)*, 73 F.3d 1012 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=73&page=1012&bUrl=http://federalpracticemanual.org/node/54/edit) (10th Cir. 1996); *Brooks v. Georgia Board of Elections* (http://scholar.google.com/scholar_case?case=6781724410793971064&q=997+F.2d+857&hl=en&as_sdt=400003), 997 F.2d 857 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=997&page=857&bUrl=http://federalpracticemanual.org/node/54/edit), 869-70 (11th Cir. 1993).
83. *See, e.g., Lopez v. San Francisco Unified School District (http://scholar.google.com/scholar_case?case=11877287395304441726&q=385+F.+Supp.+2d+981&hl=en&as_sdt=400003),* 385 F. Supp. 2d 981, 992 (N.D. Cal. 2005) (holding that attorney fees should be reduced when tasks could have been delegated to less experienced attorneys in typical firm environment); *Finkelstein v. Bergna* (http://scholar.google.com/scholar_case?case=6352295019916843572&q=804+F.+Supp.+1235&hl=en&as_sdt=400003), 804 F. Supp. 1235, 1237-38 (N.D. Cal. 1992) (awarding 0 per hour for some of work by plaintiffs' lead counsel and 0 per hour (still a high rate for 1992) for less complex work). *See also McDonald v. Pension Plan of the NYSA-ILA Pension Trust Fund (http://scholar.google.com/scholar_case?case=5637756412846363429&q=450+F.3d+91&hl=en&as_sdt=400003),* 450 F.3d 91 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=450&page=91&bUrl=http://federalpracticemanual.org/node/54/edit), 98 n.6 (2d Cir. 2006) (approving cautiously of district court's reduction in solo practitioner's rate based on fact that larger firms incur greater overhead.
84. *See, e.g., Hutchison v. Amateur Electronic Supply, Incorporated (http://scholar.google.com/scholar_case?q=42+F.3d+1037&hl=en&as_sdt=400003&case=14039217184772654333&scilh=0)*, 42 F.3d 1037 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=42&page=1037&bUrl=http://federalpracticemanual.org/node/54/edit), 1048 (7th Cir. 1994) ("plaintiff asserts that her counsel was essentially a sole practitioner with only part-time associates and law clerks during much of this litigation. If true, the district court's reduction for what it saw as top-heavy staffing cannot be sustained.").
85. *American Petroleum Institute. v. Environmental Protection Agency* (http://scholar.google.com/scholar_case?q=72+F.3d+907&hl=en&as_sdt=400003&case=13315817339089855256&scilh=0), 72 F.3d 907 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=72&page=907&bUrl=http://federalpracticemanual.org/node/54/edit), 916 (D.C. Cir. 1996) ("often, as audits reveal, there is so much senior time billed for reviewing, revising, and discussing the document that it usually would be cheaper to have the senior lawyer simply sit down and draft it"). *Accord Daggett v. Kimmelman (http://scholar.google.com/scholar_case?case=5278859427903744325&q=811+F.2d+793&hl=en&as_sdt=400003)*, 811 F.2d 793 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=811&page=793&bUrl=http://federalpracticemanual.org/node/54/edit) (3d Cir. 1987); *Muehler v. Land O'Lakes, Incorporated* (http://scholar.google.com/scholar_case?q=617+F.+Supp.+1370&hl=en&as_sdt=400003&case=3005874399107804092&scilh=0), 617 F. Supp. 1370, 1379 (D. Minn. 1985); *Laffey v. Northwest Airlines, Incorporated* (http://scholar.google.com/scholar_case?q=572+F.+Supp.+354&hl=en&as_sdt=400003&case=5339183872184679499&scilh=0), 572 F. Supp. 354, 366 (D.D.C. 1983), *rev'd on other grounds*, 746 F.2d 4 (http://scholar.google.com/scholar_case?case=16617800214992945662&q=746+F.2d+4&hl=en&as_sdt=400003) (D.C. Cir. 1985). *See also* Gary Greenfield, *Efficient Litigation: An Ethical Imperative?* 20 American Lawyer 38 (April 1994).
86. *Jenkins*, 491 U.S. at 284-89. *Accord, Richlin Security Service Company v. Chertoff* (http://scholar.google.com/scholar_case?q=128+S.+Ct.+2007&hl=en&as_sdt=400003&case=3258512745862945424&scilh=0), 128 S. Ct. 2007 (2008) (same conclusion for fees awarded under Equal Access to Justice Act).
87. 28 U.S.C. § 2412(d)(2)(A) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
88. *Id.*; *Sorenson v. Mink* (http://scholar.google.com/scholar_case?case=8828475195936420339&q=239+F.3d+1140&hl=en&as_sdt=400003), 239 F.3d 1140 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=239&page=1140&bUrl=http://federalpracticemanual.org/node/54/edit), 1148 (9th Cir. 2001). Before 1996, the limit was per hour, subject to the same statutory exceptions. *Id.*
89. *Sorenson*, 239 F.3d at 1148. See *Zheng Liu v. Chertoff* (http://scholar.google.com/scholar_case?case=15105983029303412827&q=538+F.+Supp.+2d+1116&hl=en&as_sdt=400003), 538 F. Supp. 2d 1116, 1124 (D. Minn. 2008 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCts2001&ct=D.Minn.&year=2008&bUrl=http://federalpracticemanual.org/node/54/edit)) ("Court may use the CPI-U to adjust EAJA rate for inflation"); *Associationn of American Physicians and Surgeons v. Food and Drug Administration* (http://scholar.google.com/scholar_case?case=12239795322170130335&q=391+F.+Supp.2d+171&hl=en&as_sdt=400003), 391 F. Supp.

2d 171, 178 n.5 (D.D.C. 2005 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCtsDDC&year=2005&bUrl=http://federalpracticemanual.org/node/54/edit)) (accepting plaintiff's request for increase over 5 limit for cost-of-living expense based on CPI).

90. *Kerin v. United States Postal Service* (http://scholar.google.com/scholar_case?case=12922304582349319696&q=218+F.3d+185&hl=en&as_sdt=400003), 218 F.3d 185 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=218&page=185&bUrl=http://federalpracticemanual.org/node/54/edit), 194 (2d Cir. 2000); *Masonry Masters, Incorporated v. Nelson* (http://scholar.google.com/scholar_case?q=105+F.3d+708&hl=en&as_sdt=400003&case=11002349028907932020&scilh=0), 105 F.3d 708 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=105&page=708&bUrl=http://federalpracticemanual.org/node/54/edit), 711-13 (D.C. Cir. 1997).
91. *Sorenson*, 239 F.3d at 1148.
92. 28 U.S.C. § 2412(d)(2)(B) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
93. *Rueda-Menicucci v. Immigration & Naturalization Service* (http://scholar.google.com/scholar_case?case=24643289425916643 1&q=132+F.3d+493&hl=en&as_sdt=400003), 132 F.3d 493 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=132&page=493&bUrl=http://federalpracticemanual.org/node/54/edit), 496 (9th Cir. 1997) (denying rate increase where special expertise was unnecessary to successful result); *Raines v. Shalala* (http://scholar.google.com/scholar_case?case=13099480827510446782&q=44+F.3d+1355&hl=en&as_sdt=400003), 44 F.3d 1355 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=44&page=1355&bUrl=http://federalpracticemanual.org/node/54/edit), 1360-61 (7th Cir. 1995); *Pirus v. Bowen* (http://scholar.google.com/scholar_case?case=4752031469487310117&q=869+F.2d+536&hl=en&as_sdt=400003), 869 F.2d 536 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=869&page=536&bUrl=http://federalpracticemanual.org/node/54/edit), 541-42 (9th Cir. 1989).
94. *Underwood*, 487 U.S. at 572.
95. *See Raines*, 44 F.3d at 1361 ("an identifiable practice specialty not easily acquired by a reasonably competent attorney" can be considered a special factor warranting fee enhancement); *Pirus*, 869 F.2d at 541-42 (fee enhancement available for specialized expertise in social security class actions); *Jean v. Nelson* (http://scholar.google.com/scholar_case?case=13244121820722558079&q=863+F.2d+759&hl=en&as_sdt=400003), 863 F.2d 759 (http://www.jureeka.net/Jureeka/US.aspx?doc=F2d&vol=863&page=759&bUrl=http://federalpracticemanual.org/node/54/edit), 774 (11th Cir. 1988), *aff'd*, 496 U.S. 154 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=496&page=154&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1999) (immigration law expertise may qualify). *See Atlantic Fish Spotters Association. v. Daley (http://scholar.google.com/scholar_case?case=5771182819407827559&q=205+F.3d+488&hl=en&as_sdt=400003)*, 205 F.3d 488 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=205&page=488&bUrl=http://federalpracticemanual.org/node/54/edit), 491 (1st Cir. 2000) (holding that practice experience in fisheries can be special factor, but such expertise was not required in this case).
96. *Select Milk Producers, Incorporated. v. Johanns* (http://scholar.google.com/scholar_case?q=400+F.3d+939&hl=en&as_sdt=400003&case=9108954804078046604&scilh=0), 400 F.3d 939 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=400&page=939&bUrl=http://federalpracticemanual.org/node/54/edit), 950-51 (D.C. Cir. 2005) (concluding that "expertise acquired through practice" was not a "special factor" that could warrant an enhanced fee); *F.J. Vollmer Company v. Magaw* (http://scholar.google.com/scholar_case?case=4500915806776590907&q=102+F3d.+591&hl=en&as_sdt=400003), 102 F3d. 591 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=102&page=591&bUrl=http://federalpracticemanual.org/node/54/edit), 598 (D.C. Cir. 1996) (market rate fees "available only for lawyers whose specialty 'requir[es] technical or other education outside the field of American law'"); *Estate of Cervin v. Commissioner* (http://scholar.google.com/scholar_case?case=10863606816158766559&q=200+F.3d+351&hl=en&as_sdt=400003), 200 F.3d 351 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=200&page=351&bUrl=http://federalpracticemanual.org/node/54/edit), 354 (5th Cir. 2000); *Hyatt v. Commissioner (http://scholar.google.com/scholar_case?case=10863606816158766559&q=200+F.3d+351&hl=en&as_sdt=400003)*, 315 F.3d 239 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=315&page=239&bUrl=http://federalpracticemanual.org/node/54/edit), 253 (4th Cir. 2002).
97. 28 U.S.C. § 2412(b) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
98. *See, e.g. Hyatt v. Shalala (http://scholar.google.com/scholar_case?case=3461850712729235149&q=6+F.3d+250&hl=en&as_sdt=400003)*, 6 F.3d 250 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=6&page=250&bUrl=http://federalpracticemanual.org/node/54/edit) (4th Cir. 1993) (refusal of federal government to follow binding circuit precedent in social security cases amounted to bad faith warranting market rate fees); *D & M Watch Corporation v. United States* (http://scholar.google.com/scholar_case?case=7012287446769381974&q=795+F.+Supp.+1172&hl=en&as_sdt=400003), 795 F. Supp. 1172, 1177 (Ct. Int'l Trade 1992) (market rate fees when Customs Service acted in bad faith); *Library of Congress v. Shaw (http://scholar.google.com/scholar_case?case=6160901089183031511&q=478+U.S.+310&hl=en&as_sdt=400003)*, 478 U.S. 310 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=478&page=310&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit), 319 (1986) (noting that Congress waived sovereign immunity to permit Title VII lawsuits and attorney-fee awards against the United States).
99. *Hensley*, 461 U.S. at 434.
100. *City of Burlington v. Dague (http://scholar.google.com/scholar_case?case=2557094556311036785&q=505+U.S.+557&hl=en&as_sdt=400003)*, 505 U.S. 557 (http://www.jureeka.net/Jureeka/US.aspx?doc=U.S.&vol=505&page=557&pinpoint=undefined&bUrl=http://federalpracticemanual.org/node/54/edit) (1992).
101. *See, e.g, Blum*, 465 U.S. at 898-99. Counsel may wish to use this discussion to support relatively high hourly rates.
102. *Oberfielder v. Bertolli* (http://archive.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/060403/$File/01-17302.PDF), 67 Fed. Appx. 408, 411 (9th Cir. 2003) (applying multiplier where "the undesirability of the case is at least partially confirmed by Oberfelder's difficulty in obtaining legal representation and the consequent need for the district court to appoint pro bono counsel"); *Guam Society of Obstetricians & Gynecologists v. Ada* (http://scholar.google.com/scholar_case?q=100+F.3d+691&hl=en&as_sdt=400003&case=17737780869428922444&scilh=0), 100 F.3d 691 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=100&page=691&bUrl=http://federalpracticemanual.org/node/54/edit), 697 (9th Cir. 1996); *Brotherton v. Cleveland* (http://scholar.google.com/scholar_case?case=6548502335887695571&q=141+F.+Supp.+2d+907&hl=en&as_sdt=400003), 141 F. Supp. 2d 907 (S.D. Ohio 2001 (http://www.jureeka.net/Jureeka/US.aspx?doc=FedDistCts1989&ct=S.D.%20Ohio&bUrl=http://federalpracticemanual.org/node/54/edit)).
103. *Geier v. Sundquist* (http://scholar.google.com/scholar_case?case=8761850233406696742&q=372+F.3d+784&hl=en&as_sdt=400003), 372 F.3d 784 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=372&page=784&bUrl=http://federalpracticemanual.org/node/54/edit), 795-96 (6th Cir. 2004).
104. *Mangold v. California Public Utilities Commission* (http://scholar.google.com/scholar_case?case=12139321477714645916&q=67+F.3d+1470&hl=en&as_sdt=400003), 67 F.3d 1470 (http://www.jureeka.net/Jureeka/US.aspx?doc=F3d&vol=67&page=1470&bUrl=http://federalpracticemanual.org/node/54/edit), 1478-79 (9th Cir. 1995) (affirming 2.0 multiplier under California state law in discrimination case).
105. *Perdue v. Kenny A.* (http://scholar.google.com/scholar_case?case=5577757377388451017&q=130+S.+Ct.+1662&hl=en&as_sdt=400003), 559 U.S. 542 (2010).
106. *Id.* at 554-56. The Supreme Court previously approved of an enhancement to account for unanticipated delays in payment. *Jenkins*, 491 U.S. at 284. *But see Shaw*, 478 U.S. at 321-23 (no compensation for delay in suits against federal government).
107. *Id.* at 555 n.5.
108. *Id.* (*citing Blum v. Stenson (http://scholar.google.com/scholar_case?q=465+U.S.+886&hl=en&as_sdt=400003&case=14012192812481338663&scilh=0)*, 465 U.S. 886, 898 (1984)).
109. *Tire Kingdom, Incorporated v. Morgan Tire & Auto, Incorporated (http://scholar.google.com/scholar_case?q=253+F.3d+1332&hl=en&as_sdt=400003&case=2378374591455974 16&scilh=0)*, 253 F.3d 1332, 1335 (11th Cir. 2001).
110. 28 U.S.C. § 2412(d)(1)(B) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf). The Supreme Court has held that a timely fee petition could be amended after 30 days to cure a failure to allege that the government's litigation position was not substantially justified. *Scarborough v. Principi (http://www.google.com/url?q=http%3A%2F%2Fwww.law.cornell.edu%2Fsupct%2Fhtml%2F02-1657.ZO.html&sa=D&sntz=1&usg=AFrqEzeLU4toB-wGyJ-YLNPA68zRX4O98A)*, 541 U.S. 401 (2004).
111. 28 U.S.C. § 2412(d)(2)(G) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title28/pdf/USCODE-2009-title28-partVI-chap161-sec2412.pdf).
112. *Pierce v. Barnhart (http://scholar.google.com/scholar_case?case=16007039865400532999&q=440+F.3d+657&hl=en&as_sdt=400003)*, 440 F.3d 657, 662 (5th Cir. 2006); *Scafar Contracting, Incorporated v. Secretary of Labor (http://scholar.google.com/scholar_case?q=325+F.3d+422&hl=en&as_sdt=400003&case=9568620970664157 8&scilh=0)*, 325 F.3d 422, 431-32 (3rd Cir. 2003); *McDonald v. Schweiker (http://scholar.google.com/scholar_case?case=12983762680330844849&q=726+F.2d+311&hl=en&as_sdt=400003)*, 726 F.2d 311, 314 (7th Cir. 1983); *accord Cervantez v. Sullivan (http://scholar.google.com/scholar_case?case=4060794530324562901&q=739+F.+Supp.+517&hl=en&as_sdt=400003)*, 739 F. Supp. 517, 519 (E.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 229 (http://scholar.google.com/scholar_case?case=10372843251227687529&q=963+F.2d+229&hl=en&as_sdt=400003) (9th Cir. 1992). *See also Adams v. Securities & Exchange Commission (http://scholar.google.com/scholar_case?q=287+F.3d+183&hl=en&as_sdt=400003&case=12162269570492348 44&scilh=0)*, 287 F.3d 183, 187-88 (D.C. Cir. 2002) (noting that Congress, in amending EAJA, adopted *McDonald* approach).
113. *Shalala v. Schaeffer (http://scholar.google.com/scholar_case?case=14438680212630649759&q=509+U.S.+292&hl=en&as_sdt=400003)*, 509 U.S. 292 (1993).
114. *Id.* at 300, *citing* 42 U.S.C. § 405(g) (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap7-subchapII-sec405.pdf), fourth sentence.
115. *Id.* at 298.
116. *Id.* at 302.
117. *Evans v. Jeff D. (http://scholar.google.com/scholar_case?case=17948293160115901520&q=475+U.S.+717&hl=en&as_sdt=400003)*, 475 U.S. 717 (1986).

118. *Bernhardt v. County of Los Angeles (http://scholar.google.com/scholar_case?case=11617238915944960848&q=279+F.3d+862&hl=en&as_sdt=400003)*, 279 F.3d 862 (9th Cir. 2002) (Section 1988 (http://www.gpo.gov/fdsys/pkg/USCODE-2009-title42/pdf/USCODE-2009-title42-chap21-subchapI-sec1988.pdf) suit); *Johnson v. District of Columbia (http://scholar.google.com/scholar_case?case=3150176998005423948&q=190+F.+Supp.+2d+34&hl=en&as_sdt=400003)*, 190 F. Supp. 2d 34, 42-44 (D.D.C. 2002) (provision in Individuals with Disabilities Education Act (IDEA), court relied in part on IDEA's right to counsel provision to distinguish *Jeff D.*).

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Chief Justice REHNQUIST delivered the opinion of the Court.

Numerous federal statutes allow courts to award attorney's fees and costs to the "prevailing party." The question presented here is whether this term includes a party that has failed to secure a judgment on the merits or a court-ordered consent decree, but has nonetheless achieved the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. We hold that it does not.

Buckhannon Board and Care Home, Inc., which operates care homes that provide assisted living to their residents, failed an inspection by the West Virginia Office of the State Fire Marshal because some of the residents were incapable of "self-preservation" as defined under state law. See W. Va.Code §§ 16–5H–1, 16–5H–2 (1998) (requiring that all residents of residential board and care homes be capable of "self-preservation," or capable of moving themselves "from situations involving imminent danger, such as fire"); W. Va.Code of State Rules, tit. 87, ser. 1, § 14.07(1) (1995) (same). On October 28, 1997, after receiving cease and desist orders requiring the closure of its residential care facilities within 30 days, Buckhannon Board and Care Home, Inc., on behalf of itself and other similarly situated homes and residents (hereinafter petitioners), brought suit in the United States District Court for the Northern District of West Virginia against the State of West Virginia, two of its agencies, and 18 individuals (hereinafter respondents), seeking declaratory and injunctive relief that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988 (FHAA), 102 Stat. 1619, 42 U.S.C. § 3601 *et seq.*, and the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U.S.C. § 12101 *et seq.*

Respondents agreed to stay enforcement of the cease-and-desist orders pending resolution of the case and the parties began discovery. In 1998, the West Virginia Legislature enacted two bills eliminating the "self-preservation" requirement, see S. 627, I 1998 W. Va. Acts 983–986 (amending regulations); H.R. 4200, II 1998 W. Va. Acts 1198–1199 (amending statute), and respondents moved to dismiss the case as moot. The District Court granted the motion, finding that the 1998 legislation had eliminated the allegedly offensive provisions and that there was no indication that the West Virginia Legislature would repeal the amendments.

Petitioners requested attorney's fees as the "prevailing party" under the FHAA, 42 U.S.C. § 3613(c)(2) ("[T]he court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee and costs"), and ADA, 42 U.S.C. § 12205 ("[T]he court ..., in its discretion, may allow the prevailing party ... a reasonable attorney's fee, including litigation expenses, and costs"). Petitioners argued that they were entitled to attorney's fees under the "catalyst theory," which posits that a plaintiff is a "prevailing party" if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct. Although most Courts of Appeals recognize the "catalyst theory," the Court of Appeals for the Fourth ***9** Circuit rejected it in *S–1 and S–2 v. State Bd. of Ed. of N. C.*, 21 F.3d 49, 51 (C.A.4 1994) (en banc) ("A person may not be a 'prevailing party' ... except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought"). The District Court accordingly denied the motion and, for the same reason, the Court of Appeals affirmed in an unpublished, *per curiam* opinion. Judgt.

order reported at 203 F.3d 819 (C.A.4 2000).

To resolve the disagreement amongst the Courts of Appeals, we granted certiorari, 530 U.S. 1304, 121 S.Ct. 28, 147 L.Ed.2d 1050 (2000), and now affirm.

In the United States, parties are ordinarily required to bear their own attorney's fees—the prevailing party is not entitled to collect from the loser. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Under this "American Rule," we follow "a general practice of not awarding fees to a prevailing party absent explicit statutory authority." *Key Tronic Corp. v. United States*, 511 U.S. 809, 819, 114 S.Ct. 1960, 128 L.Ed.2d 797 (1994). Congress, however, has authorized the award of attorney's fees to the "prevailing party" in numerous statutes in addition to those at issue here, such as the Civil Rights Act of 1964, 78 Stat. 259, 42 U.S.C. § 2000e–5(k), the Voting Rights Act Amendments of 1975, 89 Stat. 402, 42 U.S.C. § 1973*l* (e), and the Civil Rights Attorney's Fees Awards Act of 1976, 90 Stat. 2641, 42 U.S.C. § 1988. See generally *Marek v. Chesny*, 473 U.S. 1, 43–51, 105 S.Ct. 3012, 87 L.Ed.2d 1 (1985) (Appendix to opinion of Brennan, J., dissenting).

In designating those parties eligible for an award of litigation costs, Congress employed the term "prevailing party," a legal term of art. Black's Law Dictionary 1145 (7th ed.1999) defines "prevailing party" as "[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded <in certain cases, the court will award attorney's fees to the prevailing party>.—Also termed *successful party*." This view that a "prevailing party" is one who has been awarded some relief by the court can be distilled from our prior cases.

In *Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980) *(per curiam)*, we reviewed the legislative history of § 1988 and found that "Congress intended to permit the interim award of counsel fees only when a party has prevailed on the merits of at least some of his claims." Our "[r]espect for ***0** ordinary language requires that a plaintiff receive at least some relief on the merits of his claim before he can be said to prevail." *Hewitt v. Helms*, 482 U.S. 755, 760, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). We have held that even an award of nominal damages suffices under this test. See *Farrar v. Hobby*, 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

In addition to judgments on the merits, we have held that settlement agreements enforced through a consent decree may serve as the basis for an award of attorney's fees. See *Maher v. Gagne*, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980). Although a consent decree does not always include an admission of liability by the defendant, see, *e.g., id.*, at 126, n. 8, 100 S.Ct. 2570, it nonetheless is a court-ordered "chang[e][in] the legal relationship between [the plaintiff] and the defendant." *Texas State Teachers Assn. v. Garland Independent School Dist.*, 489 U.S. 782, 792, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989) (citing *Hewitt*, *supra*, at 760–761, 107 S.Ct. 2672, and *Rhodes v. Stewart*, 488 U.S. 1, 3–4, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988) *(per curiam)*). These decisions, taken together, establish that enforceable judgments on the merits and court-ordered consent decrees create the "material alteration of the legal relationship of the parties" necessary to permit an award of attorney's fees. 489 U.S., at 792–793, 109 S.Ct. 1486; see also *Hanrahan*, *supra*, at 757, 100 S.Ct. 1987 ("[I]t seems clearly to have been the intent of Congress to permit ... an interlocutory award only to a party who has established his entitlement to some relief on the merits of his claims, either in the *trial court* or *on appeal* " (emphasis added)).

We think, however, the "catalyst theory" falls on the other side of the line from these examples. It allows an award where there is no judicially sanctioned change in the legal rela-

tionship of the parties. Even under a limited form of the "catalyst theory," a plaintiff could recover attorney's fees if it established that the "complaint had sufficient merit to withstand a motion to dismiss for lack of jurisdiction or failure to state a claim on which relief may be granted." Brief for United States as *Amicus Curiae* 27. This is not the type of legal merit that our prior decisions, based upon plain language and congressional intent, have found necessary. Indeed, we held in *Hewitt* that an interlocutory ruling that reverses a dismissal for failure to state a claim "is not the stuff of which legal victories are made." 482 U.S., at 760, 107 S.Ct. 2672. See also *Hanrahan, supra,* at 754, 100 S.Ct. 1987 (reversal of a directed verdict for defendant does not make plaintiff a "prevailing party"). A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorney's fees *without* a corresponding alteration in the legal relationship of the parties.

The dissenters chide us for upsetting "long-prevailing *Circuit* precedent." *Post,* at 1850 (opinion of GINSBURG, J.) ***1** (emphasis added). But, as Justice SCALIA points out in his concurrence, several Courts of Appeals have relied upon dicta in our prior cases in approving the "catalyst theory." See *post,* at 1849; see also *supra,* at 1839, n. 5. Now that the issue is squarely presented, it behooves us to reconcile the plain language of the statutes with our prior *holdings.* We have only awarded attorney's fees where the plaintiff has received a judgment on the merits, see, *e.g., Farrar, supra,* at 112, 113 S.Ct. 566, or obtained a court-ordered consent decree, *Maher, supra,* at 129–130, 100 S.Ct. 2570—we have not awarded attorney's fees where the plaintiff has secured the reversal of a directed verdict, see *Hanrahan,* 446 U.S., at 759, 100 S.Ct. 1987, or acquired a judicial pronouncement that the defendant has violated the Constitution unaccompanied by "*judicial* relief," *Hewitt, supra,* at 760, 107 S.Ct. 2672 (emphasis added). Never have we awarded attorney's fees for a nonjudicial "alteration of actual circumstances." *Post,* at 1856 (dissenting opinion). While urging an expansion of our precedents on this front, the dissenters would simultaneously abrogate the "merit" requirement of our prior cases and award attorney's fees where the plaintiff's claim "was at least colorable" and "not ... groundless." *Post,* at 1852 (internal quotation marks and citation omitted). We cannot agree that the term "prevailing party" authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous but nonetheless potentially meritless lawsuit (it will never be determined), has reached the "sought-after destination" without obtaining any judicial relief. *Post,* at 1856 (internal quotation marks and citation omitted).

Petitioners nonetheless argue that the legislative history of the Civil Rights Attorney's Fees Awards Act supports a broad reading of "prevailing party" which includes the "catalyst theory." We doubt that legislative history could overcome what we think is the rather clear meaning of "prevailing party"—the term actually used in the statute. Since we resorted to such history in *Garland,* 489 U.S., at 790, 109 S.Ct. 1486, *Maher,* 448 U.S., at 129, 100 S.Ct. 2570, and *Hanrahan, supra,* at 756–757, 100 S.Ct. 1987, however, we do likewise here.

The House Report to § 1988 states that "[t]he phrase 'prevailing party' is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits," H.R.Rep. No. 94–1558, p. 7 (1976), while the Senate Report ***2** explains that "parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief," S.Rep. No. 94–1011, p. 5 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912. Petitioners argue that these Reports and their reference to

a 1970 decision from the Court of Appeals for the Eighth Circuit, *Parham v. Southwestern Bell Telephone Co.,* 433 F.2d 421 (C.A.8 1970), indicate Congress' intent to adopt the "catalyst theory." We think the legislative history cited by petitioners is at best ambiguous as to the availability of the "catalyst theory" for awarding attorney's fees. Particularly in view of the "American Rule" that attorney's fees will not be awarded absent "explicit statutory authority," such legislative history is clearly insufficient to alter the accepted meaning of the statutory term. *Key Tronic,* 511 U.S., at 819, 114 S.Ct. 1960; see also *Hanrahan, supra,* at 758, 100 S.Ct. 1987 ("[O]nly when a party has prevailed on the merits of at least some of his claims ... has there been a determination of the 'substantial rights of the parties,' which Congress determined was a necessary foundation for departing from the usual rule in this country that each party is to bear the expense of his own attorney" (quoting H.R.Rep. No. 94–1558, at 8)).

Petitioners finally assert that the "catalyst theory" is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees. They also claim that the rejection of the "catalyst theory" will deter plaintiffs with meritorious but expensive cases from bringing suit. We are skeptical of these assertions, which are entirely speculative and unsupported by any empirical evidence (*e.g.,* whether the number of suits brought in the Fourth Circuit has declined, in relation to other Circuits, since the decision in *S–1 and S–2*).

Petitioners discount the disincentive that the "catalyst theory" may have upon a defendant's decision to voluntarily change its conduct, conduct that may not be illegal. "The defendants' potential liability for fees in this kind of litigation can be as significant as, and sometimes even more significant than, their potential liability on the merits," *Evans v. Jeff D.,* 475 U.S. 717, 734, 106 S.Ct. 1531, 89 L.Ed.2d 747 (1986), and the possibility of being assessed attorney's fees may well deter a defendant from altering its conduct.

And petitioners' fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is not clear how often courts will find a case mooted: "It is well settled that a defendant's ***3** voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,* 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal quotation marks and citations omitted). If a case is not found to be moot, and the plaintiff later procures an enforceable judgment, the court may of course award attorney's fees. Given this possibility, a defendant has a strong incentive to enter a settlement agreement, where it can negotiate attorney's fees and costs. Cf. *Marek v. Chesny,* 473 U.S., at 7, 105 S.Ct. 3012 ("[M]any a defendant would be unwilling to make a binding settlement offer on terms that left it exposed to liability for attorney's fees in whatever amount the court might fix on motion of the plaintiff" (internal quotation marks and citation omitted)).

We have also stated that "[a] request for attorney's fees should not result in a second major litigation," *Hensley v. Eckerhart,* 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and have accordingly avoided an interpretation of the fee-shifting statutes that would have "spawn[ed] a second litigation of significant dimension," *Garland, supra,* at 791, 109 S.Ct. 1486. Among other things, a "catalyst theory" hearing would require analysis of the defendant's subjective motivations in changing its conduct, an analysis that "will

likely depend on a highly factbound inquiry and may turn on reasonable inferences from the nature and timing of the defendant's change in conduct." Brief for United States as *Amicus Curiae* 28. Although we do not doubt the ability of district courts to perform the nuanced "three thresholds" test required by the "catalyst theory"—whether the claim was colorable rather than groundless; whether the lawsuit was a substantial rather than an insubstantial cause of the defendant's change in conduct; whether the defendant's change in conduct was motivated by the plaintiff's threat of victory rather than threat of expense, see *post,* at 1852 (dissenting opinion)—it is clearly not a formula for "ready administrability." *Burlington v. Dague,* 505 U.S. 557, 566, 112 S.Ct. 2638, 120 L.Ed.2d 449 (1992).

Given the clear meaning of "prevailing party" in the fee-shifting statutes, we need not determine which way these various policy arguments cut. In *Alyeska,* 421 U.S., at 260, 95 S.Ct. 1612, we said that Congress had not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." To disregard the clear legislative language and the holdings of our prior cases on the basis of such policy arguments would be a similar assumption of a "roving authority." For the reasons stated above, we hold that the "catalyst theory" is not a permissible basis for the award of attorney's fees under the FHAA, 42 U.S.C. § 3613(c)(2), and ADA, 42 U.S.C. § 12205.

The judgment of the Court of Appeals is

Affirmed. …

Justice GINSBURG, with whom Justice STEVENS, Justice SOUTER, and Justice BREYER join, dissenting.

The Court today holds that a plaintiff whose suit prompts the precise relief she seeks does not "prevail," and hence cannot obtain an award of attorney's fees, unless she also secures a court entry memorializing her victory. The entry need not be a judgment on the merits. Nor need there be any finding of wrongdoing. A court-approved settlement will do.

***0** The Court's insistence that there be a document filed in court—a litigated judgment or court-endorsed settlement—upsets long-prevailing Circuit precedent applicable to scores of federal fee-shifting statutes. The decision allows a defendant to escape a statutory obligation to pay a plaintiff's counsel fees, even though the suit's merit led the defendant to abandon the fray, to switch rather than fight on, to accord plaintiff sooner rather than later the principal redress sought in the complaint. Concomitantly, the Court's constricted definition of "prevailing party," and consequent rejection of the "catalyst theory," impede access to court for the less well heeled, and shrink the incentive Congress created for the enforcement of federal law by private attorneys general.

In my view, the "catalyst rule," as applied by the clear majority of Federal Circuits, is a key component of the fee-shifting statutes Congress adopted to advance enforcement of civil rights. Nothing in history, precedent, or plain English warrants the anemic construction of the term "prevailing party" the Court today imposes. …

II

A

The Court today detects a "clear meaning" of the term prevailing party, *ante,* at 1843, that has heretofore eluded the large majority of courts construing those words. "Prevailing party," today's opinion announces, means "one who has been awarded some relief by the court," *ante,* at 1839. The Court derives this "clear meaning" principally from Black's Law Dictionary, which defines a "prevailing party," in critical part, as one "in whose favor a judgment is rendered," *ibid.* (quoting Black's Law Dictionary 1145 (7th ed.1999)).

One can entirely agree with Black's Law Dictionary that a party "in whose favor a judgment is rendered" prevails, and at the same time resist, as most Courts of Appeals have, any implication that *only* such a party may prevail. In prior cases, we have not treated Black's Law Dictionary as preclusively definitive; instead, we have accorded statutory terms, including legal "term [s] of art," *ante,* at 1839 (opinion of the Court); *ante,* at 1846 (SCALIA, J., concurring), a contextual reading. See, *e.g., Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380, 395–396, n. 14, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (defining "excusable neglect," as used in Federal Rule of Bankruptcy Procedure 9006(b)(1), more broadly than Black's defines that term); *United States v. Rodgers,* 466 U.S. 475, 479–480, 104 S.Ct. 1942, 80 L.Ed.2d 492 (1984) (adopting "natural, nontechnical" definition of word "jurisdiction," as that term is used in 18 U.S.C. § 1001, and declining to confine definition to "narrower, more technical meanings," citing Black's). Notably, this Court did not refer to Black's Law Dictionary in *Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), which held that a consent decree could qualify a plaintiff as "prevailing." The Court explained:

> "The fact that [plaintiff] prevailed through a settlement rather than through litigation does not weaken her claim to fees. Nothing in the language of [42 U.S.C.] § 1988 conditions the District Court's power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." *Id.,* at 129, 100 S.Ct. 2570.

The spare "prevailing party" language of the fee-shifting provision applicable in *Maher,* and the similar wording of the fee-shifting provisions now before the Court, contrast with prescriptions that so tightly bind fees to judgments as to exclude the application of a catalyst concept. The Prison Litigation Reform Act of 1995, for example, directs that fee awards to prisoners under § 1988 be "proportionately related to the *court ordered relief* for the violation." 110 Stat. 1321–72, as amended, 42 U.S.C. § 1997e(d)(1)(B)(i) (1994 ed., Supp. V) (emphasis added). That statute, by its express terms, forecloses an award to a prisoner on a catalyst theory. But the FHAA and ADA fee-shifting prescriptions, modeled on 42 U.S.C. § 1988 unmodified, see *supra,* at 1851, n. 1, do not similarly staple fee awards to "court ordered relief." Their very terms do not foreclose a catalyst theory.

B

It is altogether true, as the concurring opinion points out, *ante,* at 1843–1844, that litigation costs other than attorney's fees traditionally have been allowed to the "prevailing party," and that a judgment ***4** winner ordinarily fits that description. It is not true, however, that precedent on costs calls for the judgment requirement the Court ironly adopts today for attorney's fees. Indeed, the first decision cited in the concurring opinion, *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), see *ante,* at 1843, tugs against the restrictive rule today's decision installs.

In *Mansfield,* plaintiffs commenced a contract action in state court. Over plaintiffs' objections, defendants successfully removed the suit to federal court. Plaintiffs prevailed on the merits there, and defendants obtained review here. See 111 U.S., at 380–381, 4 S.Ct. 510. This Court determined, on its own motion, that federal subject-matter jurisdiction was absent from the start. Based on that determination, the Court reversed the lower court's judgment for plaintiffs. Worse than entering and leaving this Courthouse equally "emptyhanded," *ante,* at 1845 (concurring opinion), the plaintiffs in *Mansfield* were stripped of the judgment they had won, including the "judicial finding ... of the merits" in their favor, *ante,* at 1844 (concurring opinion). The *Mans-*

field plaintiffs did, however, achieve this small consolation: The Court awarded them costs here as well as below. Recognizing that defendants had "prevail[ed]" in a "formal and nominal sense," the *Mansfield* Court nonetheless concluded that "[i]n a true and proper sense" defendants were "the losing and not the prevailing party." 111 U.S., at 388, 4 S.Ct. 510.

While *Mansfield* casts doubt on the present majority's "formal and nominal" approach, that decision does not consider whether costs would be in order for the plaintiff who obtains substantial relief, but no final judgment. Nor does "*a single case* " on which the concurring opinion today relies, *ante,* at 1845 (emphasis in original). There are, however, enlightening analogies. In multiple instances, state high courts have regarded plaintiffs as prevailing, for costs taxation purposes, when defendants' voluntary conduct, mooting the suit, provided the relief that plaintiffs sought. The concurring opinion ***5** labors unconvincingly to distinguish these state-law cases. A similar federal practice has been observed in cases governed by Federal Rule of Civil Procedure 54(d), the default rule allowing costs "to the prevailing party unless the court otherwise directs." See 10 Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, Federal Practice and Procedure § 2667, pp. 187–188 (2d ed. 1983) (When "the defendant alters its conduct so that plaintiff's claim [for injunctive relief] becomes moot before judgment is reached, costs may be allowed [under Rule 54(d)] if the court finds that the changes were the result, at least in part, of plaintiff's litigation.") (citing, *inter alia*, *Black Hills Alliance v. Regional Forester,* 526 F.Supp. 257 (D.S.D.1981)).

In short, there is substantial support, both old and new, federal and state, for a costs award, "in [the court's] discretion," *supra,* at 1851, n. 1, to the plaintiff whose suit prompts the defendant to provide the relief plaintiff seeks.

C

Recognizing that no practice set in stone, statute, rule, or precedent, see *infra,* at 1861, dictates the proper construction of modern civil rights fee-shifting prescriptions, I would "assume ... that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' " *Pioneer,* 507 U.S., at 388, 113 S.Ct. 1489 (defining "excusable neglect") (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) (defining "bribery")); see also, *e.g., Sutton v. United Air Lines, Inc.,* 527 U.S. 471, 491, 119 S.Ct. 2139, 144 L.Ed.2d 450 (1999) (defining "substantially" in light of ordinary usage); *Rutledge v. United States,* 517 U.S. 292, 299–300, n. 10, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (similarly defining "in concert"). In everyday use, "prevail" means "gain victory by virtue of strength or superiority: win mastery: triumph." Webster's Third New International Dictionary 1797 (1976). There are undoubtedly situations in which an individual's goal is to obtain approval of a judge, and in those situations, one cannot "prevail" short of a judge's formal declaration. In a piano competition or a figure skating contest, for example, the person who prevails is ***6** the person declared winner by the judges. However, where the ultimate goal is not an arbiter's approval, but a favorable alteration of actual circumstances, a formal declaration is not essential. Western democracies, for instance, "prevailed" in the Cold War even though the Soviet Union never formally surrendered. Among television viewers, John F. Kennedy "prevailed" in the first debate with Richard M. Nixon during the 1960 Presidential contest, even though moderator Howard K. Smith never declared a winner. See T. White, The Making of the President 1960, pp. 293–294 (1961).

A lawsuit's ultimate purpose is to achieve actual relief from an opponent. Favorable judgment may be instrumental in gaining that relief. Generally, however, "the judicial decree

is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant ...." *Hewitt v. Helms*, 482 U.S. 755, 761, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987). On this common understanding, if a party reaches the "sought-after destination," then the party "prevails" regardless of the "route taken." *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (C.A.5 1985).

Under a fair reading of the FHAA and ADA provisions in point, I would hold that a party "prevails" in "a true and proper sense," *Mansfield*, 111 U.S., at 388, 4 S.Ct. 510, when she achieves, by instituting litigation, the practical relief sought in her complaint. The Court misreads Congress, as I see it, by insisting that, invariably, relief must be displayed in a judgment, and correspondingly that a defendant's voluntary action never suffices. In this case, Buckhannon's purpose in suing West Virginia officials was not narrowly to obtain a judge's approbation. The plaintiffs' objective was to stop enforcement of a rule requiring Buckhannon to evict residents like centenarian Dorsey Pierce as the price of remaining in business. If Buckhannon achieved that objective on account of the strength of its case, see *supra*, at 1852–1853—if it succeeded in keeping its doors open while housing and caring for Ms. Pierce and others similarly situated—then Buckhannon is properly judged a party who prevailed.

III

As the Courts of Appeals have long recognized, the catalyst rule suitably advances Congress' endeavor to place private actions, in civil rights and other legislatively defined areas, securely within the federal law enforcement arsenal.

The catalyst rule stemmed from modern legislation extending civil rights protections and enforcement measures. The Civil Rights Act of 1964 included provisions for fee awards to "prevailing parties" in Title II (public accommodations), 42 U.S.C. § 2000a–3(b), and Title VII (employment), § 2000e–5(k), but not in Title VI (federal programs). The provisions' central purpose was "to promote vigorous enforcement" of the laws by private plaintiffs; although using the two-way term "prevailing party," Congress did not make fees available to plaintiffs and defendants on equal terms. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 417, 421, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978) (under Title VII, prevailing plaintiff qualifies for fee award absent "special circumstances," but prevailing defendant may obtain fee award only if plaintiff's suit is "frivolous, unreasonable, or without foundation").

Once the 1964 Act came into force, courts commenced to award fees regularly under the statutory authorizations, and sometimes without such authorization. See *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262, 270–271, n. 46, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Alyeska*, this Court reaffirmed the "American Rule" that a court generally may not award attorney's fees without a legislative instruction to do so. See *id.*, at 269, 95 S.Ct. 1612. To provide the authorization *Alyeska* required for fee awards ***7** under Title VI of the 1964 Civil Rights Act, as well as under Reconstruction Era civil rights legislation, 42 U.S.C. §§ 1981–1983, 1985, 1986 (1994 ed. and Supp. V), and certain other enactments, Congress passed the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1994 ed. and Supp. V).

As explained in the Reports supporting § 1988, civil rights statutes vindicate public policies "of the highest priority," S.Rep. No. 94–1011, p. 3 (1976), U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910 (quoting *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968) *(per curiam)*), yet "depend heavily upon private enforcement," S.Rep. No. 94–1011, at 2, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5910. Persons who

bring meritorious civil rights claims, in this light, serve as "private attorneys general." *Id.,* at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912; H.R.Rep. No. 94–1558, p. 2 (1976). Such suitors, Congress recognized, often "cannot afford legal counsel." *Id.,* at 1. They therefore experience "severe hardshi[p]" under the "American Rule." *Id.,* at 2. Congress enacted § 1988 to ensure that nonaffluent plaintiffs would have "effective access" to the Nation's courts to enforce civil rights laws. *Id.,* at 1. That objective accounts for the fee-shifting provisions before the Court in this case, prescriptions of the FHAA and the ADA modeled on § 1988. See *supra,* at 1851, n. 1.

Under the catalyst rule that held sway until today, plaintiffs who obtained the relief they sought through suit on genuine claims ordinarily qualified as "prevailing parties," so that courts had discretion to award them their costs and fees. Persons with limited resources were not impelled to "wage total law" in order to assure that their counsel fees would be paid. They could accept relief, in money or of another kind, voluntarily proffered by a defendant who sought to avoid a recorded decree. And they could rely on a judge then to determine, in her equitable discretion, whether counsel fees were warranted and, if so, in what amount.

Congress appears to have envisioned that very prospect. The Senate Report on the 1976 Civil Rights Attorney's Fees Awards Act states: "[F]or purposes of the award of counsel fees, parties may be considered ***8** to have prevailed when they vindicate rights through a consent judgment *or without formally obtaining relief.*" S.Rep. No. 94–1011, at 5, U.S.Code Cong. & Admin.News 1976, pp. 5908, 5912 (emphasis added). In support, the Report cites cases in which parties recovered fees in the absence of any court-conferred relief. The House Report corroborates: "[A]fter a complaint is filed, a defendant might voluntarily cease the unlawful practice. *A court should still award fees* even though it might conclude, as a matter of equity, that *no formal relief,* such as an injunction, is needed." H.R.Rep. No. 94–1558, at 7 (emphases added). These Reports, Courts of Appeals have observed, are hardly ambiguous. Compare *ante,* at 1842 ("legislative history ... is at best ambiguous"), with, *e.g., Dunn v. The Florida Bar,* 889 F.2d 1010, 1013 (C.A.11 1989) (legislative history "evinces a clear Congressional intent" to permit award "even when no formal judicial relief is obtained" (internal quotation marks omitted)); *Robinson v. Kimbrough,* 652 F.2d 458, 465 (C.A.5 1981) (same); *American Constitutional Party v. Munro,* 650 F.2d 184, 187 (C.A.9 1981) (Senate Report "directs" fee award under catalyst rule). Congress, I am convinced, understood that " '[v]ictory' in a civil rights suit is typically a practical, rather than a strictly legal matter." *Exeter–West Greenwich Regional School Dist. v. Pontarelli,* 788 F.2d 47, 51 (C.A.1 1986) (citation omitted).

IV

The Court identifies several "policy arguments" that might warrant rejection of the catalyst rule. See *ante,* at 1842–1843. A defendant might refrain from altering its conduct, fearing liability for fees as the price of voluntary action. See *ante,* at 1842. Moreover, rejection of the catalyst rule has limited impact: Desisting from the challenged conduct will not render a case moot where damages are sought, and even when the plaintiff seeks only equitable relief, a defendant's voluntary cessation of a challenged practice does not render the case moot "unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.' " *Ante,* at 1843 (quoting *Friends of Earth, Inc.,* 528 U.S., at 189, 120 S.Ct. 693). Because a mootness dismissal is not easily achieved, the defendant may be impelled to settle, negotiating fees less generous than a court might award. See *ante,* at 1843. Finally, a catalyst rule would "require analysis of the defendant's

subjective motivations," and thus protract the litigation. *Ibid.*

The Court declines to look beneath the surface of these arguments, placing its reliance, instead, on a meaning of "prevailing ***9** party" that other jurists would scarcely recognize as plain. See *ibid.* Had the Court inspected the "policy arguments" listed in its opinion, I doubt it would have found them impressive.

In opposition to the argument that defendants will resist change in order to stave off an award of fees, one could urge that the catalyst rule may lead defendants promptly to comply with the law's requirements: the longer the litigation, the larger the fees. Indeed, one who knows noncompliance will be expensive might be encouraged to conform his conduct to the legal requirements before litigation is threatened. Cf. Hylton, Fee Shifting and Incentives to Comply with the Law, 46 Vand. L.Rev. 1069, 1121 (1993) ("fee shifting in favor of prevailing plaintiffs enhances both incentives to comply with legal rules *and* incentives to settle disputes"). No doubt, a mootness dismissal is unlikely when recurrence of the controversy is under the defendant's control. But, as earlier observed, see *supra,* at 1857, why should this Court's fee-shifting rulings drive a plaintiff prepared to accept adequate relief, though out-of-court and unrecorded, to litigate on and on? And if the catalyst rule leads defendants to negotiate not only settlement terms but also allied counsel fees, is that not a consummation to applaud, not deplore?

As to the burden on the court, is it not the norm for the judge to whom the case has been assigned to resolve fee disputes (deciding whether an award is in order, and if it is, the amount due), thereby clearing the case from the calendar? If factfinding becomes necessary under the catalyst rule, is it not the sort that "the district courts, in their factfinding expertise, deal with on a regular basis"? *Baumgartner v. Harrisburg Housing Auth.*, 21 F.3d 541, 548 (C.A.3 1994). Might not one conclude overall, as Courts of Appeals have suggested, that the catalyst rule "saves judicial resources," *Paris v. Department of Housing and Urban Development,* 988 F.2d 236, 240 (C.A.1 1993), by encouraging "plaintiffs to discontinue litigation after receiving through the defendant's acquiescence the remedy initially sought"? *Morris v. West Palm Beach,* 194 F.3d 1203, 1207 (C.A.11 1999).

The concurring opinion adds another argument against the catalyst rule: That opinion sees the rule as accommodating the "extortionist" who obtains relief because of "greater strength in financial resources, or superiority in media manipulation, rather than *superiority in legal merit.*" *Ante,* at 1847 (emphasis in original). This concern overlooks both the character of the rule and the judicial superintendence Congress ordered for all fee allowances. The catalyst rule was auxiliary to fee-shifting statutes whose primary purpose is "to promote the vigorous enforcement" of the civil rights laws. *Christiansburg Garment Co.*, 434 U.S., at 422, 98 S.Ct. 694. To that end, courts deemed the conduct-altering catalyst that counted to be the substance of the case, not merely the plaintiff's atypically superior financial resources, media ties, or political clout. See *supra,* at 1852–1853. And Congress assigned responsibility for awarding fees not to automatons unable to recognize extortionists, but to judges expected and instructed to exercise "discretion." See *supra,* at 1851, n. 1. So viewed, the catalyst rule provided no berth for nuisance suits, see *Hooper,* 37 F.3d, at 292, or "thinly disguised forms of extortion," *Tyler v. Corner Constr. Corp.*, 167 F.3d 1202, 1206 (C.A.8 1999) (citation omitted).

V

As to our attorney's fee precedents, the Court correctly observes, "[w]e have never had occasion to decide whether the term 'prevailing party' allows an award of fees under the 'catalyst theory,' " and "there is language in our

cases supporting both petitioners and respondents." *Ante,* at 1839, n. 5. It bears emphasis, however, that in determining whether fee shifting is in order, the Court in the past has placed greatest weight not on any "judicial *imprimatur*," *ante,* at 1840, but on the practical impact of the lawsuit. In *Maher v. Gagne,* 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), in which the Court held fees could be awarded on the basis of a consent decree, the opinion nowhere relied on the presence of a formal judgment. See *supra,* at 1853; *infra,* n. 14. Some years later, in *Hewitt v. Helms,* 482 U.S. 755, 107 S.Ct. 2672, 96 L.Ed.2d 654 (1987), the Court suggested that fees might be awarded the plaintiff who "obtain[ed] relief without [the] benefit of a formal judgment." *Id.,* at 760, 107 S.Ct. 2672. The Court explained: "If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced," or "if the defendant, under pressure of [a suit for declaratory judgment], alters his conduct (or threatened conduct) towards the plaintiff," *i.e.,* conduct "that was the basis for the suit, the plaintiff will have prevailed." *Id.,* at 761, 107 S.Ct. 2672. I agree, and would apply that analysis to this case.

The Court posits a " 'merit' requirement of our prior cases." *Ante,* at 1841. *Maher,* however, affirmed an award of attorney's fees based on a consent decree that "did not purport to adjudicate [plaintiff's] statutory or constitutional claims." 448 U.S., at 126, n. 8, 100 S.Ct. 2570. The decree in *Maher* "explicitly stated that 'nothing [therein was] intended to constitute an admission of fault by either party.' " *Ibid.* The catalyst rule, in short, conflicts with none of "our prior *holdings*," *ante,* at 1841.

* * *

The Court states that the term "prevailing party" in fee-shifting statutes has an "accepted meaning." *Ante,* at 1842. If that is so, the "accepted meaning" is not the one the Court today announces. It is, instead, the meaning accepted by every Court of Appeals to address the catalyst issue before our 1987 decision in *Hewitt,* see *supra,* at 1851–1852, n. 4, and disavowed since then only by the Fourth Circuit, see *supra,* at 1852, n. 5. A plaintiff prevails, federal judges have overwhelmingly agreed, when a litigated judgment, consent decree, out-of-court settlement, or the defendant's voluntary, postcomplaint payment or change in conduct in fact affords redress for the plaintiff's substantial grievances.

When this Court rejects the considered judgment prevailing in the Circuits, respect for our colleagues demands a cogent explanation. Today's decision does not provide one. The Court's narrow construction of the words "prevailing party" is unsupported by precedent and unaided by history or logic. Congress prescribed fee-shifting provisions like those included in the FHAA and ADA to encourage private enforcement of laws designed to advance civil rights. Fidelity to that purpose calls for court-awarded fees when a private party's lawsuit, whether or not its settlement is registered in court, vindicates rights Congress sought to secure. I would so hold and therefore dissent from the judgment and opinion of the Court.

Thelton Henderson, *Social Change, Judicial Activism, and the Public Interest Lawyer*, 2 Wash. U. J.L. & Pol'y 33 (2003)[1]

… What does it mean to be a public interest lawyer? … The prevailing view of the public interest lawyer is relatively narrow in scope. Given the persistent nexus between wealth and access to legal representation, our multi-layered society is always in need of lawyers committed to serving poor and under-represented people who would not otherwise have access to crucial legal advice. Our society is equally in need of lawyers who are committed to upholding rights and addressing issues that do not generally attract adequate financial backing, such as civil rights, immigrant rights, child poverty, and today more than ever, those who get caught, perhaps innocently, in the cross-fire of our war on terrorism. I believe that these lawyers deserve special recognition because they devote their careers to the public interest and they do so usually at a substantial personal financial sacrifice.

At the same time, the circle of lawyers who serve the public interest can be viewed as much broader than we sometimes think. In the profession of law, the public interest is always implicated, and we mistake ourselves by assuming otherwise. This premise is as true for a corporate transactional lawyer with Fortune 500 clients as it is for a public defender or an impact litigation attorney. The weighty legal and moral obligations that attorneys face leave ample room to vindicate the public interest if they so choose. Thus, even in the justifiable pride of electing a legal career explicitly dedicated to the public interest, one must never be so jealous of the term 'public interest' as to forget or deny that all lawyers are almost preternaturally so dedicated-- else how can we invite our fellow lawyers to that higher purpose?

Indeed, I firmly believe that a prosecutor who wisely and fairly uses his or her power to forego prosecuting someone when the interest of justice so requires furthers the public interest just as much as a public defender who, from the trenches, defends the criminally-accused indigent. A partner in a major law firm who works to ensure that his or her corporate clients treat their employees in a non-discriminatory manner, or that his or her clients take the high road even as they pursue the bottom line (for example, consider Enron or Worldcom) furthers the public interest just as much as the plaintiffs' lawyer who sues the corporation for discrimination or the government lawyer who charges the corporate executive with fraud and malfeasance.

One of the biggest and most significant civil rights cases I have tried in my 23 years on the bench, a case which challenged widespread unconstitutional conditions at the foremost maximum security prison in California,[1] was litigated by a small prison law group in partnership with one of the country's leading law firms in high-tech litigation and transactional work. The partners and associates at that firm worked in a pro bono capacity and expended tremendous resources, including advancing costs well in excess of a million dollars, on behalf of this very important case. The public interest prison law group could not possibly have handled the case by themselves. The large law firm, in my view, personified the spirit and essence of public interest law.

Whether you can devote your life to being a public interest lawyer as I first defined that term, or whether your career path takes you in other or more varied directions, I hope that you will always consider how your position affects and implicates the public interest, and how you can strive to serve and further the public interest in whatever way your position permits.

…[I]t is no accident that lawyers have shaped our constitutional history as well as the day-to-day events of our society at large. Lawyers are peculiarly equipped, by training and experience, to be partisans for a cause and to take the lead in the vigorous and frank discussions of our society's needs and problems. They have long functioned as architects as well as artisans of social reform, redesigning, reshaping, and creating not only legal institutions, but social, economic, and political institutions as well. To give one obvious example, it was largely lawyers who shaped and managed Franklin Delano Roosevelt's New Deal Administration in l932, a program which brought us out of the most devastating depression in our country's history and positioned us to become the most powerful and prosperous country in the world. And in the early 1960s, lawyers of all colors and backgrounds, young and old, joined the civil rights movement en masse, and made it possible for Dr. Martin Luther King, Jr. to fashion the most successful civil rights movement in our nation's history, one based upon a willingness to go to jail for passive resistance to immoral laws.…

…[T]here are new challenges for those practicing in the public interest, and that these challenges come from different directions. First, as some of our social problems grow more intractable and complex, it becomes much more challenging for lawyers to tackle them through judicial avenues. It is much easier to bring a lawsuit in response to an incident of blatant discrimination than it is to prove forms of discrimination which are no less devastating in their

[1] Judge, United States District Court, Northern District of California.

results, but which occur in more subtle or indirect forms. …At the same time, we have seen federal funding for legal services drastically slashed, and legal aid offices around the country have had to consolidate or close to meet bare-bones funding limits set by the Legal Services Corporation. Studies show that at least eighty percent of the legal needs of the poor still go unmet.[2]

Strict restrictions on the types of cases that legal aid offices can bring have also been imposed. For example, legal aid offices are no longer allowed to bring class action cases,[3] which further impedes their ability to efficiently and effectively enforce important rights. Before this restriction was in place, a legal aid office in northern California brought a class action in federal court, Sneede v. Kizer,[4] contending that the State of California was improperly interpreting the Medicaid statute, and in the process depriving thousands of class members of medical benefits to which they were legally entitled. Legal Aid won that case, and thousands of Californians began to receive critically important medical benefits. Under today's restrictions, this class action could not be brought, and the important rights at stake could never be vindicated, at least not by a legal aid office, except on a one-client-at-a-time basis.

The current restrictions on impact litigation are, for me, particularly ironic. Back in the early days of Lyndon Johnson's war on poverty, when I directed the East Bayshore Neighborhood Legal Center, we would dutifully represent our clients on an individual basis in their grievances against landlords, collection agencies, and the like. I remember clearly when the lightbulb went off for legal aid offices around the country that the best way to fight the systemic problems faced by our clients was to conduct so-called impact litigation, which strikes at the heart of the problem that needs to be addressed. It is a pity this has been stopped.

Not only are resources more scarce, and social issues often more difficult to identify and address, but a more conservative Supreme Court has also significantly impacted the practice of public interest law. In recent years, Supreme Court decisions have dramatically changed the landscape for citizens and lawyers seeking to enforce civil rights or environmental laws.

For example, in three decisions in the 1998-99 Term the Court resoundingly pronounced the inviolability of state sovereignty in the federal system.[5] In the three decisions, all decided by a majority of the same five justices, the Court dramatically curtailed the power of Congress to provide a judicial forum for redress of state infringement of federal rights.

We need not debate the soundness or the wisdom of this jurisprudential trend to expand states' rights in order to understand the concerns of the civil rights community where, historically speaking, the term "states' rights" has been considered synonymous with racial segregation and Jim Crow laws that perpetuated second class citizenship for blacks in our southern states.

Further compounding this effect is the growing trend to label decisions upholding or expanding civil rights as the product of judicial activism, with the pejorative implication that such decisions represent an attempt by judges to improperly disregard legal precedent or to thwart "the will of the legislature" or "the will of the people." Conversely, decisions that are consistent with a more politically conservative outlook are typically portrayed as products of judicial restraint.

It seems to me, however, that the term 'judicial activism' ultimately depends upon whose ox is being gored, and not upon judicial, political, or social persuasion. The truth is that the term 'judicial activism' is not a particularly coherent concept to begin with. All judges are required to act in every case, and every form of judicial action bears some social consequences, if only for the parties involved. Thus, the claim that a judge who maintains the status quo is quiescent whereas a judge whose decisions modify the status quo is active seems to me to be a distinction without a difference. In reality, there are plenty of issues on a conservative agenda that would require active judging to implement, just as there are a host of liberal issues that will only hold firm if judges are restrained in approaching them. …

The true nature of the judicial activism debate can, in my view, be fairly easily and obviously exposed, as was recently done by Professor William P. Marshall of the University of North Carolina.[6] After comprehensively analyzing the decisions of the Supreme Court since 1995, Professor Marshall concluded that the current court is actually the most "activist" in our history.[7] Among other things, he found that it has invalidated over twenty-six federal laws in the last six years.[8] In striking contrast, he tells us that during the entire first 200 years following ratification of the constitution, the Supreme Court only struck down a grand total of 127 federal laws, an average of a little more than one law every two years.[9] …

Of course, no discussion of the challenges facing public interest lawyers would be complete without addressing the very real obstacles to effectuating social change through civil rights litigation, obstacles that have been revealed all

too clearly by the last 25 years of civil rights history in this country.

The singular civil rights case of the last century, in my view, was Brown v. Board of Education.[15] When Brown was decided in 1954, the black community rejoiced in a way it had not since Joe Louis defeated Max Schmeling in an historic heavyweight boxing match. There was great optimism throughout the land that, with the overturning of Plessy v. Ferguson,[16] the days of segregated education in this county were on their way to becoming an unpleasant memory. However, painful experience has shown that this historic judicial ruling cannot, without legislative and executive action, and without grass-roots mobilization, achieve the degree of social change that many, infused with the optimism of the 1950s and 60s, may have hoped for.

Nearly half a century later, we must concede that our public schools are more segregated than ever.[17] The New York Times recently reported on a new study by the Civil Rights Project at Harvard University that shows that white, black and Latino school children are more isolated within their own racial groups than they ***42** were 30 years ago.[18] This is certainly not what Thurgood Marshall and others expected would be the legacy of Brown as they savored their legal victory in 1954. Indeed, the limits on the ability of courts alone to achieve social change cannot be more clearly illustrated than with the case of Brown v. Board of Education.

Interestingly, as the Harvard study found, demographics alone do not account for the rapid re-segregation of schools that has been occurring over the last ten years.[19] Another significant factor has been the recent termination of court-ordered desegregation remedial plans.[20] Since the early 1990s when the Supreme Court began making it easier to terminate such plans, many school districts have lifted desegregation orders.[21] Thus, while Brown can be used to starkly illustrate the limits of the courts, it also serves to underscore their power. When courts utilized the full extent of their remedial power to enforce Brown vigorously through desegregation orders, it had a substantial impact. However, as soon as the courts were required to step back, the force of Brown quickly dissipated, and schools re-segregated. As an aside, I might mention that I've seen this same pattern in prison reform cases, once the court ceases to supervise the constitutional remedies it has ordered. …

That these formidable challenges exist, however, is no reason to stand back or give up on the courts as a component for social change. On the contrary, the courts remain at center stage, and rightly so, as our nation continues to grapple with the social issues of the day. After all is said and done, we are a nation of laws. As a result, our laws are not only symbols, but necessary avenues for our own development and evolution as a free society. It is simply the nature of a society based on the rule of law that change will evolve, at least in part, through our courts. As such, the lawyers and the public, will always press for social changes through the courts. Neither side of the political spectrum will be immune from this pressure.

Moreover, the significance of public interest litigation cannot always be measured by just one scale. For instance, the fact that Brown did not successfully prod our nation to a fully integrated public school system does not undermine the historical enormity of that decision. For the black school child, living with the knowledge and conviction that some measure of his or her plight is the result of unjust and legally disapproved conduct is a fundamentally different reality than having to live with the pain that such conduct is perfectly condoned and legal. Even if very little in day-to-day life changes and there is just the expectation of some material betterment, the knowledge that one's experience finds vindication in the eyes of the law is a good bit of what empowerment means. I think that this is especially true in democratic societies. I have been told by civil rights leaders from Martin Luther King to the remarkable Robert Moses of the Student Non-Violent Coordinating Committee that the new-found expectation that, unlike past administrations, John F. Kennedy would respond to Bull Connors's police dogs and fire hoses in Birmingham, was critically important fuel for the civil rights movement. While our experience with Brown and other civil rights cases may provide a ***44** sobering dose of realism for the public interest litigator, it should not be cause for discouragement. One need not look far to see that courts remain vitally involved in the critical social issues of the day….

Gerald N. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2d ed. 2008)

The Prisoners' Rights "Revolution"

Over the past several decades there has been a great deal of litigation involving the rights of prison inmates. Prior to the 1960s, the courts had adopted a hands-off policy to prisoner suits, refusing to consider the merits of suits challenging prison conditions, rules, and regulations (Comment 1963). This position changed in the early 1960s when the Court held that section 1983 of the Civil Rights Act of 1871 gave prisoners standing in federal courts to make such challenges (*Cooper* v. *Pate* 1964). By the late 1960s and early 1970s, the Court loosened tight restrictions on prisoners providing legal assistance to each other (*Johnson* v. *Avery*), on mail censorship (*Procunier* v. *Martinez* 1974), on freedom of religion (*Cruz* v. *Beto* 1972), and held that denial of medical care to an inmate can constitute cruel and unusual punishment in violation of the Eighth Amendment (*Estelle* v. *Gamble* 1976). A 1972 case (*Haines* v. *Kerner* 1972), allowed a prisoner to proceed with a suit seeking damages resulting from prison disciplinary regulations, while in 1974 the Court invalidated prison disciplinary proceedings that did not provide any due process protections (*Wolff* v. *McDonnell* 1974). In this latter case, Justice White, writing for the majority, noted that "there is no iron curtain drawn between the Constitution and the prisons of this country" (1974, 555–56). While the Burger Court became increasingly hostile to prisoners' suits, it did not repudiate earlier decisions.[3]

At the same time as the Court was liberalizing prisoners' access to federal courts, the number of prisoners skyrocketed.[4] These increases "created a severe crowding problem"[5] that exacerbated tensions and worsened the already often inadequate delivery of services. Indeed, even before the dramatic rise in prison populations, most of the nations' maximum-security prisons were old, deteriorating, and woefully underfunded, barely able, if at all, to provide even minimal levels of services (Cobb 1985).

In the wake of these occurrences there was a flood of prisoner suits,

3. See, for example, *Meachum* v. *Fano* (1976), rejecting a Fourteenth Amendment due process argument that prison transfers require a fact-finding hearing; *Bell* v. *Wolfish* (1979), upholding the "double-bunking" of pre-trial detainees against a Fifth Amendment due process challenge; and *Rhodes* v. *Chapman* (1981), upholding double-celling in an Ohio prison against Eighth and Fourteenth Amendment challenge.

4. See, for example, Finn (1984); Jacobs (1984); Malcolm (1989, 1990, 1991); Selke (1985).

5. Finn (1984, 319). For example, by 1989 the California prison system was "routinely operating" at 175 percent of capacity (Malcolm 1989, 1).

nearly all of which started and ended in the federal district courts. While the first decision invalidating the prison system of an entire state came in 1970 (*Holt* v. *Sarver*), by 1983 prison systems in eight states had been declared unconstitutional (Taggart 1989, 246). By 1986, forty-five states had at least one prison facility involved in litigation and in thirty-seven states correctional administrations or individual prisons were operating under federal court orders (Brakel 1986). What were the results?

Changes in Prisons

The results of prison litigation are not entirely clear. While one school of thought believes that the "collective result of this litigation has been nothing less than the achievement of a legal revolution within a decade" (Orland 1975, 11), the key question is whether this "legal revolution" translated into a revolution in prison conditions. The careful scholar will want to know what changes occurred and whether they can be credited to the courts. In the material that follows I suggest that change varied and that the presence of the constraints and the conditions best explains why litigation worked in some places and not in others.

Overall, the consensus view is that, while some changes have been made, serious problems remain. Although litigation has sometimes succeeded in eliminating the "most severe overcrowding and the most painful and onerous conditions," the contribution of the courts has been "strictly limited" to "only" those achievements (Angelos and Jacobs 1985, 112). Improvements in prisoner health have been reported (Brakel 1986, 64), as has the lessening of the likelihood of "arbitrary abuse" (Turner 1979, 640), but prison overcrowding continues to be a serious problem.[6] One study of four prison reform cases concluded that while "the court orders eliminated the worst abuses and ameliorated the harshest conditions," they failed to deal with "underlying issues and problems" and "were directed more toward symptoms than causes" (Harris and Spiller 1976, 25, 26).[7] As James Jacobs puts it, "there seems to be no agreement on which side is winning" (Jacobs 1980, 430).[8]

There are also the issues of prison construction and the expenditure of funds for the corrections system. Here, the essential argument is that courts have put prison reform on the political agenda and forced states to expend resources to correct constitutionally deficient conditions. The executive director of the American Civil Liberties Union's (ACLU) National Prison Project

6. An example is the Pennsylvania prison riot of October 1989, which occurred in a prison designed for 1,826 inmates but holding 2,607. As of September 30, 1989, the entire Pennsylvania prison system was "about 48 percent over capacity," a situation described as "typical . . . throughout the country" (Hinds 1989, 9).

7. See also Mays and Taggart (1985).

8. When asked if court orders and injunctions were effective in accomplishing the changes intended by the judge, the respondents to a California corrections administrators' survey split fairly evenly (Project 1973, 529).

has argued that prison litigation "exposes the sordid conditions in our prisons to public scrutiny" (Bronstein 1984b, 324).[9] And Justice Brennan, writing in 1981, stated that "the courts have emerged as a critical force behind efforts to ameliorate inhumane conditions." He found it "clear that judicial intervention has been responsible, not only for remedying some of the worst abuses by direct order, but also for 'forcing' the legislative branch of government to reevaluate correction policies and to appropriate funds for upgrading penal systems" (*Rhodes* v. *Chapman* 1981, 359).

Scholars who have closely examined the link between judicial action and prison construction are less sanguine (Finn 1984; Hopper 1985; Peirce 1987). Even ACLU prison litigator Bronstein has noted that "most prison construction is not in response to law suits" but rather "in response to a real need, or at least a perceived need" (Bronstein 1984a, 346). Similarly, studies of the effect of judicial action on expenditures have also found mixed results (Harriman and Straussman 1983; Taggart 1989). A recent study found that "judicial intervention does not ensure a budgetary response" and concluded that "spending is shaped in large measure by forces much more compelling and forceful than a single discrete event such as a court order" (Taggart 1989, 267, 268; cf. Feeley 1989).

Finally, there is the issue of prison violence. Although court-ordered reform is aimed in general at improving the treatment of prisoners, and specifically at reducing arbitrary use of force, there is some evidence suggesting that such reform leads to an increase in prison violence, at least in the short run.[10] Additional factors such as "changes in society" (Project 1973, 494), growing prison populations, and younger, less tractable inmates, have had an effect (Brakel 1986, 6). But overall, as a former Texas prison guard put it, "while prisoners in many institutions now have enhanced civil rights . . . they live in a lawless society at the mercy of aggressive inmates and cliques" (Marquart and Crouch 1985, 584). And by 1986, Brakel concluded that the "contemporary wisdom in corrections is that despite more than a decade of close scrutiny and mandated reforms, many prisons are less safe than they were in the pre-reform days" (Brakel 1986, 6).

In sum, then, it appears that change has been uneven. Many of the worst conditions have been improved to at least minimal standards, but problems still abound. The task that remains is to explain why the change has been so uneven—why there was some change, but only some.

Explaining Judicial Outcomes: Constraints and Conditions

For change to occur as a result of litigation, reformers must overcome the three constraints and then have present at least one of the four conditions.

9. See also Yarbrough (1984, 277).

10. Alpert, Crouch, and Huff (1984, 299); Chilton (1989, 16); Marquart and Crouch (1985, 575, 580); Mays and Taggart (1985, 41–42).

With prison reform, courts overcame only one of the constraints entirely. In individual cases, other constraints were overcome. When this occurred, and when one of the conditions was present, meaningful change occurred. Failure to successfully overcome the constraints, or the lack of at least one of the conditions, meant that court-ordered change was frustrated.

Reformers were able to overcome the problem of lack of precedent. As the brief case discussion indicated, by the early 1970s the Court had essentially opened the court-house doors to prisoner suits. Much of the success here was based on the civil rights litigation of the 1950s and 1960s as well as the reform of criminal procedure initiated by the Warren Court. Once attention was drawn to prison conditions, court action followed.

Political and Social Support. The second constraint on courts' ability to produce significant social reform is the need for political support. Prison reform issues are "essentially political" (Bronstein 1977, 27, 44), and prison reform is "highly dependent upon the political processes" (Resnick 1984, 348). When political leaders are willing to act, this constraint can be overcome. When they do nothing, or oppose court decisions, little change occurs. The reasons for this are relatively straightforward. First, unless prison officials are pushed by political leaders there is "little incentive" for them to "take the risks inherent in changing the current structure" (Note 1979, 1067). Without the support of political leaders, prison officials lack the resources to make many changes and risk their jobs in trying. Ameliorating conditions, improving services, hiring more guards, and building more prisons all cost money, and that money can come only from the legislature and the executive branch. Thus, overcoming the lack of political support was a trickier problem, and one that reformers have not been able to solve uniformly.

Political support for prison reform was based on several factors. In general, a prisoners' rights movement developed that was part of a larger rights movement that swept the U.S. in the 1960s. As one commentator put it, activists "linked the prisoners' cause to the plight of other powerless groups" in the "context of a 'fundamental democratization' which has transformed American society since World War II, and particularly since 1960" (Jacobs 1980, 432).[11] This "social acceptance of civil rights for a variety of 'unconventional' social groups" (Thomas, Keeler, and Harris 1986, 793) made prison reform an issue that politicians could deal with. There was a proliferation of prison support groups ranging from CURE, Citizens United for the Rehabilitation of Errants in Texas (Ekland-Olson and Martin 1988, 368–69), to nationwide, established organizations. In 1970 the American Bar Association created a Commission on Correctional Facilities and Services to advance reform which, with Ford Foundation funding, opened a full-time office in

11. As Jacobs (1980, 436) notes, by the late 1950s and early 1960s, blacks were a majority of prisoners in many Northern prisons and in some state prison systems.

Washington, D.C. (Jacobs 1980, 437–39). The National Institute of Corrections, a federal agency, "played an increasingly important role in the prisoners' rights movement" as did the American Correctional Association, the leading professional association of prison officials (Jacobs 1980, 448). Thus, prison reform moved more toward the political mainstream.

Another important factor in creating political and social support was prison violence. It is an unfortunate fact of American life that it often takes violence to bring an issue to political consciousness. The prison reform movement was unquestionably aided by a series of bloody prison riots and the coming to light of acts of prison violence (Toch 1985, 69). Those acts provided the "critical impetus" (Benton and Silberstein 1983, 122) for reform efforts. In particular, numerous writers point to the riot at New York's Attica prison in September 1971 as having a catalytic effect on the entire prisoners' rights movement.[12] In that riot, described by a state investigating commission as the "bloodiest encounter between Americans since the Civil War" (quoted in Kolbert 1989, 1), forty-three people were killed. And the crucial role of riots and violence in promoting reform has been noted in Mississippi (Hopper 1985, 56), New Mexico (Mays and Taggart 1985, 38, 47), Oklahoma (Giari 1979), and Georgia (Chilton 1989, 10), to cite just a few cases.

Political support for court-ordered prison reform varies enormously. In states like New York and New Mexico, perhaps because of riots and severe overcrowding, Governors Carey, Cuomo, and Anaya have been committed to prison reform and expansion (Jacobs 1984, 216–17 n.19; Mays and Taggart 1985, 48–49). While such political support by no means ensures that reform will occur, it removes the political obstacles found in states such as Oklahoma and Alabama (Giari 1979, 451; Yarbrough 1984). In Alabama, while Lieutenant Governor George McMillen and others supported compliance with court decisions, Attorney General Charles Graddick used opposition to court-ordered reform to bolster his political image (Yarbrough 1984, 287–88, 283). And George Wallace, seldom without a colorful slogan, accused Judge Johnson of creating a "hotel atmosphere" in the state prisons. Wallace's remedy for the problem was simple: "Vote for George Wallace and give a barbed wire enema to a federal judge" (quoted in Yarbrough 1984, 287). It takes no great insight to see that successful prison reform faced major obstacles in many states.

Lack of Implementation Power. The third constraint that must be overcome is the courts' lack of implementation powers. As Bronstein points out, implementation and enforcement of prison reform decrees rests "primarily in the hands of prison officials" (Bronstein 1977, 44) who, like other professionals, do not like having their professional competence challenged. When

12. See, for example, Bronstein (1977, 32); Finn (1984, 320–21); Mullen (1985, 32); Resnick (1984, 348).

courts issue orders requiring prison reform, many administrators see them as doing just that. The problem, of course, is not only that prison officials "often continue to fight for the status quo" (Bronstein 1977, 44), but also that courts lack the tools to insure implementation. Although this is not unusual, the less visible nature of prisons as compared to other governmental agencies which have been the targets of litigation makes implementation even more problematic. Since prison access is regulated for safety reasons, information on conditions and the progress of implementation is difficult to obtain. As Jacobs points out, "even under the best of circumstances," the court "must depend upon the institution's staff for information as to whether a decree is being followed" (Jacobs 1980, 452). The staff, of course, may be uncooperative. Indeed, when California corrections administrators were asked, in a survey, if they could "comply with court orders through changes which meet the letter of the court order, but not its spirit, and thereby frustrate the intent of the court," a whopping 87 percent said yes (Project 1973, 530). As one administrator put it in a follow-up interview, "we can usually get around anything" (Project 1973, 531). Administrators simply play an indispensable role in the success of prison reform. As the assistant attorney general in charge of corrections in Washington state put it, "the key to relief will be commitment by defendants to comply with the letter and the spirit of the order" (Collins 1984, 342). The necessity of support from prison administrators, and their ability to withhold that support, makes overcoming the implementation constraint particularly problematic.[13]

There is also a related issue of staff support below the top administrative level. Since it is the staff who will actually carry out any reform decree, their attitude is vitally important. Yet the staff, operating in a potentially dangerous environment, may have little interest or incentive in reforming their procedures, especially if the reforms are perceived as lessening their authority. A New York study found that the typical corrections officer "opposes prison reform as a threat to his physical security" (New York State 1974, 17). The California correctional administrators' survey just referred to, found "many administrators" stating that the "greatest administrative challenge regarding the effect of change on the staff was having to 'sell' the staff on every new policy" (Project 1973, 502). Indeed, the survey found that "*staff morale* is the operational factor which consistently shows the greatest negative effect" of court-ordered reform (Project 1973, 575).

It makes good sense that staff may feel uneasy about change. Aside from the potential dangers under which they constantly operate, they may also fear for their jobs. Active attempts at implementation may get them into trouble with recalcitrant administrators while active refusal to implement may create similar problems with the court. This attitude can make it doubly hard for

13. For a colorful illustration of this point involving the Texas prison system, see Ekland-Olson and Martin (1988).

courts to find out what prison problems exist, how they are improving and the reasons why. This difficulty in turn limits the courts' ability to mold effective decrees (Note 1979, 1079–80). And when administrators are fighting court-ordered reform, repeated violations of court orders may enhance rather than harm an employee's career.[14] On the other hand, when there is support for the decree on top, staff may be more willing to make a good faith effort.[15]

In sum, the "transformation of the patterns of interaction necessary for prison reform cannot be achieved by decree" (Note 1979, 1073). The active support of administrators and staff is required. And without the presence of factors external to the courts, that support will not be available.

Conditions Necessary for Change

Given the difficulties of implementation that I have laid out, one may wonder why or how reform ever occurs. Clearly, without political support, neither of the first two conditions will be present. It is also clear that there is no market solution. However, there is still room for the fourth condition: administrators willing to make changes who see court decisions as providing cover or a tool for leverage with the legislature and the executive branch. When this condition is present, and the constraints have been overcome, change can occur.

Administrators and staff sometimes believe that changes can be made that will improve life for *everyone* involved in prisons. While, in general, adjudication is "unlikely to be effective because the process remains separate from and foreign to those directly affected" (Note 1979, 1073–74), when administrators and staff are willingly involved in negotiation, change can occur. In the fourteen-year-old Georgia case, for example, as time went on, "key decision makers . . . were comparatively more accepting of the remedial decrees they had to live with, because these orders were the results of their efforts" (Chilton 1989, 14). A similar story can be told of New Mexico and Alabama (Mays and Taggart, 1985; Yarbrough 1984, 282). In Texas, on the other hand, where there was little negotiation, a study concluded that "to the extent that administrators and staff perceive that changes have been imposed, such changes will be resisted and morale among staff will be lowered" (Ekland-Olson and Martin 1988, 378). When prison officials are willing to reform, and take part in the remedial process, reform is more likely.

Much of the argument is highlighted by litigation involving the infamous Parchman Prison in Mississippi. Examining that litigation, one study suggested that "perhaps in no other state has litigation been as fundamentally involved in changing prison conditions." However, the study also identified factors essential to overcoming the constraints and pointed to the conditions

14. For an example from Texas, see Ekland-Olson and Martin (1988, 374).

15. For an argument that this is what happened in New Mexico, see Mays and Taggart (1985, 50).

necessary for change. Prison violence, the result of two inmate guards murdering another prisoner, led to a legislative investigation of prison conditions and the issuance of a report. A "floodtide of prisoners," identified as the "biggest factor operating in corrections in the state," kept the issue in the political spotlight. Within the prison system, much change had been made prior to the filing of the suit. The decline in the profitability of farming made it unattractive for the prison to continue it, and the cruel and exploitative regime that it had fostered was replaced. In the early and mid-1960s, whipping had been stopped and vocational education programs started. By the late 1960s additional education programs were added, including an alcohol and drug rehabilitation center, and a pre-release center staffed with counselors. "In short, Parchman had taken long strides in the changing treatment of inmates by the time the court interceded." Court intervention, then, did not institute change but rather "broadened the scope of the trend" (Hopper 1985, 54, 56–57, 61, 62).

Reform is also more likely where it is seen as involving either a minor issue or as entailing "good correctional policy."[16] This argument is nicely summed up by the Indiana attorney general's comparison of the state's reaction to two cases. In the first, "the federal judge issued a fairly narrow decree dealing with medical care and overcrowding. The state felt that he was right—they were going to comply with it as best they could." However, in the second case, dealing with a reformatory, the judge "issued a very detailed decree telling them how many medical technicians they had to hire, and so on and so forth. They were going to fight this one to the end because they didn't want to be told in detail how to do every single thing in their prison" (as recollected by Bronstein 1984b, 326).

In terms of using court orders as leverage, Herman found that "court orders reducing overcrowding are welcomed by many prison administrators" because such orders give them leverage in the budgetary process (Herman 1984, 308). In other words, the courtroom defendants may actually be secret plaintiffs. The assistant attorney general in charge of corrections for Washington state has noted this too: "sometimes the client wants to lose, since sometimes losing is the only way a correctional administrator can get the money he needs to run a proper program" (Collins 1984, 342). For administrators who wish to make changes but see little hope of obtaining the necessary resources from the legislature, judges may appear as "budgetary saviors" providing the "one possibility for budgetary growth" (Harriman and Straussman 1983, 348, 349).[17] In terms of using courts as cover, administrators can

16. See, for example, Ekland-Olson and Martin (1988, 378); Mays and Taggart (1985, 44, 51); Project (1973, 520, 551).

17. See also *Rhodes* v. *Chapman* (1981, 360) where Justice Brennan noted that "even prison officials have acknowledged that judicial intervention has helped them to obtain support for needed reform."

change rules and then claim that the changes were forced on them by the court. As Jacobs puts it, "rules and practices can be liberalized and then blamed on the courts, thereby blunting criticism from rank and file guards" (Jacobs 1980, 446). For the administrator who is not opposed to at least some changes, court orders can be used as a tool.

Conclusion

Justice Brennan, concurring in a 1981 case (*Rhodes* v. *Chapman*, 359), argued that courts can play a vital role in prison reform. The evidence, however, suggests that despite the good intentions of many prison litigators and judges, courts lack important tools necessary for the successful reform of the American prison system. Justice Powell, for example, has noted that the "problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree" (*Procunier* v. *Martinez* 1974, 404–5). Former Chief Justice Warren Burger agreed, writing in 1985 that "courts are not the primary forum for effective resolution of disputes over prison conditions" (Burger 1985, 9). Clearly, Justice Brennan and proponents of the Dynamic Court view have overstated their case.

On the other hand, courts have made a difference on some issues in some places. If the constraints can be overcome, and one of the conditions is present, litigation can make a difference. The Constrained Court view, then, is also not very helpful. This leaves the conditions. And, as the analysis has shown, they do explain both why change has been uneven and when it has occurred.

Defenders of the use of litigation to improve prison conditions, even if they admit that success is uneven, often argue that there is no other choice. As litigator Turner puts it, "litigation is the clumsiest, most frustrating, costliest way of doing anything, but it's the only game in town because of the default of the other branches of government" (Turner 1984a, 347).[18] Yet there is little evidence that prison reform litigators have put as much time, energy, and resources into political and social change as into litigation. Without that change, litigation will not be effective. Reliance on courts will not bring much change.[19] The political challenge must be faced directly.[20] Litigation, as the executive director of the ACLU's National Prison Project has come to understand, "is not, of course, the real answer" (Bronstein 1984b, 324).

18. See also Comment (1977, 369).

19. Turner's litigation strategy actually recognizes that the ultimate decision must be political. Believing, along with many prison reformers, that a major problem is the excessive use of prison terms in the legal system, he "explicitly" uses litigation to lessen the use of prison terms. Through prison litigation he aims to "improve the conditions of imprisonment and thereby to make it ruinously expensive for the state to continue to incarcerate as many people as they do" (Turner 1984b, 331, 331–32). Yet, as the number of citizens incarcerated has grown enormously, and at an increasing pace, this hardly seems like a sensible strategy.

20. There may be a greater chance of successful implementation when legislatures rather than courts are involved: "Correctional employees understand the legislative process; the Department of Corrections and employee groups are both represented by spokesmen before the legislature" (Project 1973, 554 n.429).

Conclusion: The Revolution That Wasn't

In the decisions that I have examined in this chapter, reformers attempted to dramatically change police and courtroom practices and prison conditions. They did so by litigating, focusing on rights and arguing that prison officials, the police, and the courts must inform criminal defendants of a wide array of rights and refrain from certain practices. And they won many cases.

The Court, however, was unable to achieve its stated goals because political support was often lacking and seldom were the conditions necessary for change present. What was overlooked was that organizations, be they prison systems, police departments, or lower courts, are often unwilling to change. Watching over 1,600 criminal court cases a decade and a half after the "revolution," Feeley found that "constitutional changes notwithstanding, the lower courts are reluctant to treat formally that which has traditionally been treated informally, and they refuse to consider solemnly that which has usually been taken lightly" (Feeley 1979, 8). For many officials, what the Supreme Court did simply "did not matter much" (Wasby 1976, 221). Of the more than 1,600 cases that Feeley saw, the "overwhelming majority ... took just a few seconds" and "the courtroom encounter was a ritual in which the judge ratified a decision made earlier" (Feeley 1979, 11). While some change has occurred, it depended more on the interests of non-Court actors, espe-cially politicians and administrators, than on the courts. The revolution failed.

Mary Ziegler, *Framing Change: Cause Lawyering, Constitutional Decisions, and Social Change*, 94 MARQ. L. REV. 263 (2010)

I. Introduction

[There is a] … crisis of confidence in constitutional litigation as a tool for social change. … Some have questioned the courts' institutional capacity to generate change, either because they cannot ensure that their rulings will be enforced or because they cannot change the beliefs of those whose views determine the course of policy. Others emphasize the ways in which litigation has de-radicalized social movements, since courts favor moderate, legally grounded arguments that may enforce the social status quo. Although they focus on the value of litigation as a tool for change, critics of change-oriented litigation also offer a powerful account of the relationship between social change and judicial decision-making. In this account, as we will see, law is argued to affect neither the concrete enforcement of rights nor popular opinion about the justice of a movement's arguments.

…[T]he basic premises of … [the] model shared by litigation's critics of how social change occurs [has three premises]. The first premise … addresses the relationship between law and social change. Litigation's critics reason that legal reforms almost inevitably mirror shifts in social mores and popular opinion. This is the reflectionist hypothesis: law reflects but does not reshape public attitudes and views. The second premise addresses how social change happens. This is the cause-acceptance hypothesis: social change occurs when a majority of the public accepts the legitimacy of the movement's complaint. A final premise concerns law's relevance to social movement campaigns. This is the clean-up hypothesis: court decisions matter only when they strike down already unusual and unpopular laws or implement remedial measures the public already supports.

… Contrary to what is suggested by the reflectionist hypothesis, decisions and change-oriented litigation may sometimes produce social change indirectly, by redefining a social practice … and thereby influencing citizens' attitudes. This model is one of "constitutional framing," whereby movements, countermovements, and officials in constitutional debates compete and collaborate in changing or reinforcing the meaning of social practices.

The changing definition of a movement's cause may have effects more complex than the outcomes and shifts in public attitudes …. When the prevailing meaning of a practice changes, a decision can alter the argumentative strategies adopted by opposing movements, the alliances each side can pursue, the policy opportunities available to competing groups, and the ways in which a movement can influence popular opinion. The framing effects of a decision may favor progressive social movements or conservative countermovements. In either case, constitutional framing demonstrates that social change occurs not only when members of the public accept the justness of a progressive or conservative movement's cause, but also when the public redefines that cause in a way that favors change.

Finally, contrary to what is suggested by the clean-up hypothesis, … movements may sometimes benefit from using litigation rather than ordinary protest tactics …. Because litigation can foster the expression of alternative arguments, the courts offer movements an opportunity to present a variety of possibly effective frames. When it does not yet have political influence, a movement may often have to rely on the media to publicize a frame. In such a case, movements have reason to silence dissent, for the media are likely to focus on internal divisions once they are discovered rather than on the movement's message. Consequently, social movement organizations may press members to speak with a single voice and to suppress alternative frames. By contrast, in applying rules governing pleading and the submission of amicus briefs, the courts may foster forms of dissent that would prove too costly for movements in the political arena. …

II. Litigation and Its Critics

In recent years, criticisms of change-oriented litigation have been varied and profound. …Part IA opens with an examination of leading criticisms of change-oriented litigation. While offering significantly different proposals, I argue that these scholars work from a shared model of the relationship between legal and social change. Part IB sketches this model and explores its major premises. If we examine and challenge the premises on which this model is built, we will be better able to understand alternative, indirect routes to social change.

A. The Problems With Litigation

Gerald Rosenberg's landmark studies were among the first to propose that "court decisions are neither necessary nor sufficient for producing significant social reform." Rosenberg's main contribution has been to cast doubt not only on the courts' willingness to create social change but also on their ability to implement their decisions. Because they possess few tools to ensure compliance with their decisions, it is argued that courts are not able to create social change unless "their decisions are supported by elected and administrative officials." Rosenberg further argues that support from the public or political elites is necessary to gain sufficient popular support to implement broad social change.

Rosenberg also examines an alternative, "extrajudicial" path of influence, by which court decisions "inspir[e] individuals to act or persuad[e] them to examine and change their opinions." In his analysis of Roe, for example, Rosenberg states a number of claims that could be made in favor of extrajudicial influence: an argument that the Roe Court "greatly influenced popular opinion in favor of abortion" or a claim that the courts "spurred women to form and join women's rights organizations and to raise large sums of money." Based on his analysis, Rosenberg finds no evidence in support of these claims.

Like Rosenberg, Michael Klarman challenges the courts' institutional capacity to generate social change. Klarman highlights the backlash the courts may produce in the rare instances in which their opinions do not track popular opinion. He explains that, "[b]y outpacing public opinion on issues of social reform, such rulings mobilize opponents, undercut moderates, and retard the cause they purport to advance." Moreover, Klarman reasons, there are few positive indirect effects of change-oriented litigation to offset costly backlashes. He acknowledges that judicial victories can have important symbolic value to a movement but questions whether decisions have any broader social impact. By raising the salience of an issue, the courts are argued to be able to "forc[e] many people to take a position [for the first time]." However, he contends, salience-raising fuels backlash and may thus harm rather than help the cause the courts endorsed. Moreover, he offers evidence that judicial decisions do not "influence the position" people take nor make them more "strongly committed to implementing the ruling."

Unlike Klarman, Tomiko Brown-Nagin focuses not on the courts' institutional incapacity, but instead on the adverse effects of change-oriented litigation on social movement efficacy and strategy. Brown-Nagin claims that social movements risk much by using constitutional law to define their campaigns. The courts will fail to deliver the change a movement demands because their decisions are often "moderate, elitist, and utilitarian," the product of negotiations among members of the elite and their effort "to find consensus amidst cultural conflict."

In her view, these outcomes illustrate how social movements are fundamentally in tension with constitutional law and litigation. Law demands that movements de-radicalize, play by institutional rules, and make only those demands that law would recognize. If movements define themselves

by litigation, she argues, they lose their ability to challenge existing policy compromises Only when public attitudes change noticeably can movements effectively pressure the government to recognize the legitimacy of their claims.

By comparison to Brown-Nagin, William Eskridge suggests that even definitional litigation campaigns can have both benefits and costs to social movements. He shows that movements and law have a dialectical relationship: movements propose doctrines and constitutional revolutions that the courts adopt, albeit often in modified form. In turn, constitutional law "influence[s] the rhetoric, strategies and norms of social movements." In Eskridge's view, law helps to define and even create identity-based social movements, first by enforcing discrimination against them and then by giving "concrete meaning to the 'minority group' itself." Later, law gives identity-based social movements a chance to demand social change and permits them to reemerge as mass political mobilizations.

In Eskridge's account, however, some litigation campaigns and judicial decisions have a negative impact both on social movements and on the larger society. As one key example of such a campaign, Eskridge points to Roe v. Wade. Eskridge asserts that Roe announced abortion rights in a "politically insensitive way" by acting before political consensus about abortion rights had been reached. For this reason, Roe "undermine [d]" abortion rights "by stimulating extra opposition to" them.

While often carefully exploring the benefits of some change-oriented campaigns, Eskridge's work suggests that those campaigns should be limited. He implies that "constitutional law can change if a longstanding political equilibrium is destabilized, and it must change if the public culture settles into a new political equilibrium." If these conditions are not in place, a favorable judicial decision may damage the movement whose cause has been embraced and generate "immediate and longstanding political turmoil."

In different ways, and for different reasons, litigation's critics argue that social movements should not invest limited resources in change-oriented litigation. For example, Rosenberg argues that change-oriented litigation "may not be the best use of scarce resources in important battles for significant social reform." If the courts follow popular opinion and are institutionally incapable of changing it, as Klarman's account suggests, social movements should focus on changing popular opinion by direct-action protest. He speaks for others in stating that litigation alone "cannot fundamentally transform a nation."

B. Modeling Change

Critics of litigation offer deeply different arguments about the effects of constitutional litigation on movement strategy and the shortcomings of litigation as a tool for change. However, Their arguments proceed from a shared account of the relationship between legal and social change. This model of change rests on a set of hypotheses about how law relates to social change, how social change occurs, and how law can serve change campaigns. If we understand these hypotheses, we can begin to develop an alternative model of social change.

1. The Reflectionist Hypothesis

As we have seen, litigation's critics question whether constitutional decisions can deliver the social changes a movement seeks. These claims all follow in part from the hypothesis that law reflects public mores, attitudes, and values. For example, Brown-Nagin writes: "It is only after such [public] attitudinal c[h]anges occur or are under way that lawyers might successfully seek changes in

law." Eskridge also reasons "constitutional law can change [only] if a longstanding political equilibrium is destabilized." This is the reflectionist hypothesis: a claim that law reflects popular values, opinions, and mores.

Constitutional framing challenges the hypothesis that law only reflects popular mores and opinions about a movement's cause. It proposes that, under some circumstances, constitutional decisions and litigation can also redefine a movement's cause and reshape debate about it. Much will depend, for example, on whether the public views abortion as an issue of women's rights or as a gender-neutral public health crisis. When a decision helps focus debate on a different set of policy questions in this way, it may change which questions are discussed, alter which arguments are used, reshape the coalitions addressing a movement's grievance, and determine which goals these coalitions are likely to achieve. In this way, constitutional framing can make change more possible.

2. The Cause-Acceptance Hypothesis

If law cannot create social change, how do litigation's critics believe social change occurs? The model underlying otherwise different criticisms of litigation suggests an answer. First, a group of people must recognize and articulate a shared grievance. That movement then develops a repertoire of effective protest tactics, such as marches, media events, advertisements, lobbying, or sit-ins. This effort is a political one that unfolds outside of court.

Social change ultimately happens when popular opinion recognizes the legitimacy of a movement's complaint. For example, Brown-Nagin explains that social change is possible only when "public attitudes . . . changed substantially and noticeably, so much so that the media recognize and confirm the shift in opinion" and public officials are pressured to act. Rosenberg suggests that legislative and judicial action on abortion became possible when "opinions on abortion . . . changed rapidly."…

However, we can better understand how popular opinion changes by looking at more than mere disapproval or approval of a practice. Instead, constitutional framing proposes that attitudes toward a practice will depend on which questions are central to a debate. An issue like … abortion will involve several, sometimes conflicting, policy considerations. A citizen's opinion will depend in part on which of those considerations is given the most weight. …When shifting the meaning of a movement's cause and the public debate about it in this way, constitutional litigation and decisions can help to create a political environment that favors change.

3. The Clean-Up Hypothesis

The final and arguably most important question addressed by litigation's critics involves the role that litigation and law can play in creating social change. Leading criticisms suggest that while litigation alone cannot deliver the social changes movements demand, the courts can strike down outliers, and produce and elaborate on remedies already supported by popular consensus. Rosenberg acknowledges that "litigation can remove minor but lingering obstacles," and he suggests that court-delivered remedies can be part of a "mopping-up operation." …

Constitutional framing demonstrates that constitutional law and litigation can sometimes play a broader and more complex role than the clean-up hypothesis suggests. Framing shows that judicial decisions not only strike down unpopular laws but also produce environments that favor political change. After a high profile decision, debate will turn in part on whether the Court reached the right conclusions on the issues it addressed. When the Court brings attention to new issues, its decision may refocus and reshape popular debate. When addressing a different question about

abortion …, movements and countermovements may be able to make different claims, win different kinds of members, build new alliances, and pursue different kinds of legislative reform. …

III. A New Model of Change

… Why are litigation's critics so adamant that law only reflects popular attitudes? The answer may lie in part in how these scholars measure social change. Litigation's critics first focus on measurable shifts in popular attitudes. … First, critics like Rosenberg have contended that the public is unaware of controversial decisions and their content. If people do not know what the court has said, a judicial decision is unlikely to produce change. Other critics argue that, although the public is aware of controversial opinions, judicial decisions still have no effect on public attitudes. ….

The second primary measurement used by litigation's critics involves the courts' ability to enforce the rights they announce. That the "[c]ourts . . . have neither the purse nor the sword," as Martin Shapiro writes, is well understood. Because courts are also argued to be incapable of altering popular acceptance of a practice, judicial decisions are thought not to encourage public compliance with or official enforcement of a decision.

These measurements offer useful insight into some aspects of our legal system. Recent empirical studies have shown that judicial decisions sometimes have no measurable impact on popular opinion, as was the case when the Court struck down a flag-burning ban in Texas v. Johnson. …

This account is inadequate partly because it considers only whether public approval or disapproval of a cause shifts, not how or why such shifts occur. In recent years, "sociolegal" scholars have suggested one way that law influences popular attitudes: by structuring the way citizens understand the world around them. This explanation draws on cross-disciplinary work about what Erving Goffman first labeled framing: "frameworks of understanding available in our society for making sense out of events." Framing an issue is a way of defining, labeling, and understanding it. …

A growing body of scholarship confirms that the framing of a group's cause is central to its ability to win recruits, to sustain protest, and to influence how other groups and bystanders view that event or cause. … Because so much is at stake in the framing of an issue, social movements often compete in dialogue with one another to frame an issue. …[F]raming campaigns may play a key role in determining what kinds of social change are possible. By convincing members of the public that one's definition of a cause is the right one, movements take an important step in creating support for that cause. … By publicizing a different definition of a group's cause, in turn, a judicial decision may create an environment that favors change.

Litigation's critics neglect this dimension of social change. If we follow some of litigation's critics in looking only at approval or disapproval of a practice, we will miss the beginnings of changes in public attitudes. As social movement scholar Joseph Gusfield explains, the framing of a cause can create "the recognition that some accepted pattern of social life is now in contention."

…[T]here is also reason to think that, in some cases, movements will benefit from using litigation rather than ordinary protest tactics in advancing a frame. The first and less controversial advantage of litigation involves the relative costs of dissent in court. If they lack the ability to influence a legislature, movements using direct action protest tactics to generate official support must often rely heavily on the media to publicize a frame or "mobiliz [e] popular support." … A movement may try to promote a frame directly, through working to attract media coverage of a group's protest activities, or indirectly, through obtaining a high-salience judicial decision that publicizes a frame.

Social movement scholarship points to strategic risks associated with using direct media coverage.

When there are intense struggles within movements regarding cause or identity, a movement may lose control of its message, as "this internal movement conflict can easily become the media's story" and focus. … Consequently, formally structured "social movement organizations" often suppress a rich variety of competing frames in order to present an image of unity and to exercise control over the frame that the media will cover. In mounting an effective political or media campaign, movements are pressured to speak with one voice. In the process, other important views within a movement may not be heard by the public.

By comparison, litigation may sometimes offer movements a better chance to promote diverse frames. As we have seen, an effective political or media strategy may require a movement to silence dissenting members, at least in public debate. By contrast, the Federal Rules of Civil and Appellate Procedure, like those in many states, foster a form of dissent. … Federal Rule of Civil Procedure 8(d) invites "hypothetical" and "inconsistent" claims. Liberal pleading rules of this kind may encourage litigants to present a richer variety of frames. Most state and federal courts also accept or invite the submission of amicus briefs. Thus, amici without the resources or organization to mount a test case will still often be able to present a frame to the court.

Second, the courts may lower the costs of broadcasting a frame to the public. … Although the [Supreme] Court receives substantially less coverage than do the other branches of government, the media pay significant attention to dramatic decisions on divisive issues. In particular, studies of press coverage of the Supreme Court show that the media publicize judicial work product, including the frame of an issue that the Court adopts.

Brown v. Board of Education… reshaped political debate about segregation. As Michael Klarman has documented, it was possible before *Brown* for racial moderates to support segregation without endorsing white supremacy. Politicians like Big Jim Folsom and Lyndon Johnson were able to combine race-equality rhetoric and gradual racial reform with clear support for school segregation. By equating support for segregation with rejection of racial equality, *Brown* helped to radicalize debate and to redefine segregation as a practice inextricably linked to white supremacy . . . .

By redefining an issue, a judicial decision may set back or advance a campaign for change. However, the normative point to be taken from constitutional framing is that litigation can still matter to a change campaign. In spite of the concerns raised by critics like Rosenberg and Klarman, it may still be worthwhile for movements to use their resources on litigation, even early in a struggle. In some cases, litigation may be able to reshape the meaning of a movement's cause in a way that ordinary politics cannot. …

IV. Redefining the Culture Wars

Critics of change-oriented litigation suggest that social movements go to court seeking to win acceptance for their cause. However, as we will see, there is more than one reason to go to court. Part A examines how the definition of the abortion-legalization cause evolved after Roe. We have come to associate pro-choice politics with debate about a woman's right to choose abortion. Before Roe, this frame was often less prominent than those involving physicians' rights and population control. Roe helped to marginalize claims about population growth, and the decision helped to focus new attention on claims about women's reproductive autonomy and equal citizenship. …

This history shows that judicial decisions like Roe … did not simply fail to educate the public or trigger backlashes. Instead, these decisions also drew public attention to a different set of questions. As public debate focused on a new subject, the meanings of each struggle changed as well.

A. The Meaning of Abortion

Today, Roe is arguably best known [among scholars of litigation and social change] for creating backlash. As we will see, however, the decision played an equally important role in redefining the abortion-legalization cause.

1. Lowering the Costs of Dissent

In important ways, the terms of the abortion debate before Roe did not resemble those likely to be familiar to most of us today, as pro-choice activists often avoided the rights- or choice-based frames that now are taken for granted. Instead, groups like the National Abortion Rights Action League (NARAL) were equally likely to adopt population-control frames of the abortion issue. . . .After NBC aired an episode of the popular television program Maude involving abortion, Wilma Scott Heide, then-President of NOW, commented at a NOW press conference: "The pressure of populations on world food supplies is coming home to America."

For the purpose of political organization and media strategy, leaders of groups like NOW and NARAL pressed members to suppress or downplay some claims about women's rights. For example, in 1969, when NARAL formed to coordinate national efforts to repeal abortion bans, there were already deep divisions between feminists and other pro-choice leaders about how the abortion-legalization cause should be described to the public. At the first meeting of the organization's national Board of Directors, Betty Friedan, a founding member of NARAL and a prominent women's rights advocate, moved that NARAL "should support political groups working toward the basic purpose of the right of a woman to decide when to have or not have children." The motion died for lack of a second. At the same meeting, Larry Lader moved that NARAL resolve that, "to prevent increasing overpopulation, American parents in general . . . should adopt the . . . principle of the 2-child family." The motion passed 26-18, as did another resolution intended to make clear that "men as well as women have the right to birth control.". . .

The courts offered the pro-choice movement a place to test frames that movement leaders had sometimes downplayed in the political arena. Of course, several pro-choice briefs in Roe, including the one submitted on behalf of the American College of Obstetricians and Gynecologists and the American Psychiatric Association, still defined the abortion-legalization cause in line with current debate: as gender-neutral, involving "[t]he rights of physicians to administer health care, and of patients to seek medical treatment." However, litigation allowed the feminist wing of the movement to promote a frame that the movement had not stressed in the political domain. Representing a number of women's liberation organizations, including NOW, attorney Norma Zarky entered into the Roe litigation in the hope that the Court would publicize and "reach the fundamental issue of a woman's rights." In another amicus brief on behalf of feminist organizations, Nancy Stearns of the Center for Constitutional Rights explained that Roe offered women the chance to "raise aspects of the constitutional issues before the Court not raised by the parties," especially the equality interests of women involved in abortion legalization. . . .

In drawing on these diverse frames, Roe forged a different definition of the abortion legalization cause. The decision did address the dominant definitions of the cause offered by physicians' groups and public health organizations. In early drafts and in its final version, Roe and its companion case, Doe v. Bolton, treated abortion legalization as an issue involving the mixed right of the woman and the physician, the right of "the physician, in consultation with his patient, . . . to determine, without regulation by the State, that, in his best medical judgment, the patient's pregnancy should be terminated." ."

However, the frame to emerge from Roe also incorporated the claims of feminist attorneys like Zarky and Stearns. As Zarky called for recognition of "a woman's fundamental right to decide for herself whether or not to have a child," the Roe Court emphasized that the constitutional "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." In explaining why the abortion decision deserved constitutional protection, the Court also drew on Stearns' account of the unique burdens and anxieties facing women before and after childbirth. Significantly, population control was not made an issue in the Roe decision.

2. Changing Argumentative Strategies

Although a number of race-based and international scandals hurt the population control movement in the late 1970s, Roe played an important role in deemphasizing population control arguments. After the decision, NARAL operatives were given the following instruction for participating in debates about abortion:

> Allegation: That abortion should not be used as a means of population control. [Response]: Agreed. . . . In a democratic, nonsectarian society, women should be free to make their own decisions regarding childbearing and contraceptive use. The term 'population control' implies the use of coercive policies and programs to limit population growth. The United States has no such policy.

In the aftermath of Roe, pro-choice organizations began stressing rights-based instead of population control arguments. By 1974, NOW operatives were advised to compare "the Supreme Court['s] . . . recogni[tion] of the federal constitutional basis for a woman's right to limit childbearing" to the "freedom of religion or freedom of speech." Similarly, following a strategy meeting in 1973, Planned Parenthood activists were told, "an important thematic idea to be stressed is that abortion in a pluralistic society is to be considered as a matter for determination according to personal choice."

3. Changing Alliances

As Roe helped to change the arguments made in the abortion debate, the decision also changed the alliances available to the pro-choice movement. That African-Americans as a group at one point were more likely to oppose abortion than other groups is relatively well-known. It is less well-documented that, before Roe, prominent African-Americans suggested that the abortion cause was unjust primarily because abortion was defined as an issue of population control. For example, Marvin Davies, the Florida field secretary for the NAACP, stated that population control measures were not "in the best interests of the black people."

When Roe helped to redefine abortion as a choice- or rights-based issue, the pro-choice movement was more easily able to pursue alliances with African-Americans and civil rights leaders. Jesse Jackson, who had led a war against abortion, had described it as a threat to African-Americans. But in 1983, when Jackson declared his intention to run for the Democratic presidential nomination, he promised feminist leaders to defend a woman's right to choose abortion.

4. Changing Policy Possibilities

As Roe helped to reshape the alliances on either side of the abortion debate, it also helped to redefine the political opportunities available to each side. Between 1974 and 1980, as the fight over the scope of abortion funding bans became increasingly bitter, the pro-choice movement was able for the first time to rely on civil rights advocates in the Senate, like Ted Kennedy and Birch Bayh, to vote down the strict House proposals and to call for funding at the very least in cases of

rape, incest, or medical necessity. In 1975, for example, pro-choice leaders expected Kennedy to continue his long-standing, pre-Roe opposition to legalized abortion as a form of population control when the Senate voted on a Medicaid abortion restriction. Because the definitions of abortion had begun to change, Kennedy led the opposition to the restriction and ultimately helped to defeat it that year. After Roe, when debate focused on whether abortion was a constitutional or civil rights issue, leaders like Kennedy helped lead Senate opposition to strict Medicaid bans.

Over time, as the new definition of the pro-choice cause became entrenched, Roe may also have helped to reshape popular opinion. There is reason to think that before Roe a significant number of African-Americans viewed the abortion-legalization cause as a population control measure. A February 1971 poll taken by the Chicago Defender found that while only 26.4% of African-Americans generally opposed abortion reform, 63.7% of those polled professed a belief that government-funded abortions could lead to "mass genocide in the black community."

When Roe helped to redefine abortion as a choice- or rights-based issue, the pro-choice movement was more easily able to convince African-Americans and civil rights leaders to support legalized abortion. A published study on race and views on abortion confirms this view. Controlling for a variety of factors likely to determine a person's views on abortion, including family income, years of education, region of residence, frequency of church attendance, and religious denomination, the study found that, in the two years before Roe, being African-American was, in its own right, a statistically significant predictor that a person would be opposed to abortion reform. In the period three years after Roe, being African-American was no longer a statistically significant predictor of opposition to legalized abortion.

Roe helped fundamentally to reshape the abortion debate. By helping to redefine the abortion-legalization cause, Roe shifted the argumentative strategies used by either side, the coalitions competing movements could form, and the policy opportunities that each side could pursue. Partly because of Roe, what had been a debate about population growth and physicians' rights was becoming a discussion about women's rights. …

V. Reexamining the Value of Litigation

In studying the history of the … abortion struggles, we might be tempted to assume that the terms of discussion have remained relatively stable over time. Nonetheless, the case studies considered here suggest that this would be a mistake. Because litigation's critics ignore the ways in which judicial decisions redefine movement causes, their theories discount important advantages of going to court. As the history studied here suggests, litigation sometimes offers movements framing opportunities that might not be available through ordinary politics.

First, unlike public protest or political lobbying, litigation may sometimes allow movement members to offer a rich range of competing or complementary frames. Before Roe, as we have seen, pro-choice leaders like Lader and Nellis cited strategic reasons for deemphasizing women's-rights claims in the political arena. Through the use of amicus briefs, advocates like Stearns and Zarky effectively used the litigation of Roe to advance alternative women's-right frames that were not sometimes thought to be strategically wise in the political domain. Moreover, Sarah Weddington, counsel for Jane Roe, took advantage of liberal pleading rules to offer both physicians'-rights and feminist frames of the abortion issue. …

Second, by comparison to direct action protest, litigation may sometimes be a less strategically

risky way to publicize a movement's frame. A movement may pay a high price if it adopts alternative strategies for winning media attention, such as recruiting a charismatic leader or staging dramatic protests. Because the media cover controversial judicial opinions, especially those on social issues and civil rights, the courts may offer a less risky way of publicizing a movement's frame. By attracting controversy, a judicial decision will focus media attention on a court's work product. When the public turns its attention to a different set of issues, the court's decision may effectively change the definition of a movement's cause.

The history considered here also suggests that there is a good deal at stake when the definition of a grievance shifts. First, this history suggests that a judicial decision may help to shift the balance of arguments that defines a debate. We have seen that Roe deemphasized population control claims and helped to privilege contentions about women's abortion rights. The decision encouraged advocates to argue, as NARAL operatives were instructed, that "women should be free to make their own decisions regarding childbearing and contraceptive use." …

Moreover, as the terms of a debate change, different coalition-building opportunities may become available to each side as well. After Roe, as we have seen, the pro-choice movement was able for the first time to build an effective partnership with civil rights leaders like Jesse Jackson and Ted Kennedy. …

Thus, the history of the abortion … struggles suggests that there is much more at stake in the definition of a movement's cause than might be supposed by litigation's critics. First, as the social meaning of a movement's grievance changes, the policy opportunities available to that group may narrow or expand. For example, we have seen how the changing definition of abortion helped the pro-choice movement win allies in Congress who helped to fight against strict Medicaid abortion bans. Second, the history considered thus far implies that the evolving definition of a cause may reshape popular opinion…. [T]here is evidence that, as Roe deemphasized population control arguments, African-Americans became more likely to support legalized abortion.

Litigation's critics assume a model of the relationship between law and social change fundamentally different from the one described here. This model hypothesizes that law primarily reflects popular mores. Building on this premise, the model next assumes that social change occurs only when popular approval of a practice increases. Consequently, litigation's critics reason that litigation is valuable only when it suppresses outliers or cleans up after any major social change has already taken place.

However, the history considered here suggests that this model is oversimplified. And if the model of social change assumed by these scholars is incomplete, there may be reason to question their normative conclusions. Of course, the history studied here does not suggest that litigation will always be a wise strategic choice for a movement or countermovement with limited resources. But constitutional framing does suggest that it may still be worthwhile to seek change through litigation. Although we may be aware of reasons not to rely on judicial decisions, we should be equally careful not to blind ourselves to the opportunities still available in the courts. . . .

Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2011)

We live in a culture that prioritizes winning. We declare winners and losers, and we deem it fair and reasonable to distribute benefits based on that distinction: To the victor go the spoils. Perhaps nowhere is the continued articulation of the winner-loser distinction more apparent than in law. Litigation, every day, produces winners and losers--often in very public ways. Some parties prevail, and some do not. To the prevailing parties go a host of remedies, including money, injunctions, and declarations of rights. The losers, of course, submit to the winners, paying damages or ceasing some action. …

Rosenberg's pessimistic account of courts would seem to have much to say to an attempt to theorize litigation loss: Judicial defeats--instances in which courts reject a social movement's claim--may highlight some of courts' key constraints. Moreover, analysis of social movement activity in the wake of litigation loss might offer a comparative account to supplement Rosenberg's empirical analysis and bolster his (somewhat veiled) normative commitments. Although framed most often as an empirical and descriptive account, the constrained-courts view derives from a normative position that prefers social change that emanates from nonjudicial institutions. When courts fail to grant the asked-for reform, advocates may turn to other lawmaking channels, such as legislative and administrative arenas, and Rosenberg's approach would value this tactical and institutional shift. …

…[L]egal mobilization and cause lawyering scholars often assume that a litigation loss has a demobilizing effect. That is, they concede the negative effects of failed litigation. This concession is generally implicit in work that focuses on whether litigation itself can produce positive social change. Other times, the concession is explicit, as scholars contrast the subject of their analysis--positive judicial decisions--with demobilizing events--negative judicial decisions. For instance, McCann notes that "eventual defeat in court can sap movement morale, undercut movement bargaining power, and exhaust movement resources." In this sense, litigation loss, rather than litigation victory, is the point at which sociolegal scholars find common ground with those more generally convinced of litigation's harmful effects. …

By failing to address litigation loss on its own terms, legal mobilization and cause lawyering scholarship furnishes a premature concession to those convinced of litigation's ineffectiveness. Crucially, this concession produces an incomplete picture of law and social change, missing the way in which litigation loss, in addition to litigation victory and process, contributes productively to the process of reform.

IV. The Productive Potential of Litigation Loss

In this Part, I specify the productive effects that judicial defeat may yield for social movements. I show that losing is a relatively routine feature of social movements that advocates have learned to manage and to cultivate for change. Moreover, I relate advocates' framing of litigation loss to the specific limitations of court-centered change.

First, I explore two internal movement effects of litigation loss: (1) Loss may help a specific organization stake out an identity in a competitive social movement by committing itself to a meaningful issue susceptible to judicial rejection; and (2) loss may contribute to mobilization and fundraising by inspiring outrage and signaling the need for continued activism in light of courts' failure to act. Next, I illustrate two external effects of litigation loss: (1) Loss may prompt advocates to shift more attention and resources to other law-making institutions, but it may do so in a way that allows advocates to carve out a specific need for action by other state actors; and (2) advocates

may use loss to appeal to the public by encouraging citizens to rein in an "activist," countermajoritarian judiciary. While many of these indirect effects resonate with those identified by legal mobilization and cause lawyering scholars, I show how these effects derive meaning from the unique attributes of litigation loss, rather than merely the act of litigation.

I use examples primarily from the LGBT-rights movement and the Christian Right movement. Taking cues from legal mobilization scholars' interpretive approach, which relies heavily on content analysis and case studies, I pay significant attention to the actions and statements of social movement lawyers themselves. Furthermore, instead of merely viewing social movements in relation to the state, I devote special attention to the importance of movement-countermovement relationships. My analysis of opposing-movement interactions shows that social movement advocates, who operate within a framework of multidimensional advocacy, do not view defeat in one venue as the end of the story; rather, they engage other venues and alter their messaging based on their loss. …

A. Internal Effects

1. Constructing Organizational Identity

The first aspect of litigation loss that I highlight has an organization-specific component and depends on the social movement organization's relationship to other organizations and constituents within the larger movement. Here I contend that litigation loss may be constitutive of organizational identity and may, counterintuitively, contribute to an organization's stature and longevity within a movement. … I take as my primary example the Thomas More Law Center ("TMLC"), a Christian public-interest law firm headquartered in Ann Arbor, Michigan. I focus on TMLC because it is a relatively new organization intervening in a competitive social movement environment populated by many established, better-resourced, and more connected firms.

a. Contextualizing Organizational Identity

First, focusing on important characteristics of the Christian Right movement facilitates an understanding of how TMLC in particular is well-suited to capitalize on losing. Many public-interest law firms in contemporary social movements pride themselves on their winning records, and together these firms provide a comprehensive, unified picture of their respective movement. …

Not all social movements are so carefully orchestrated or harmonious. Indeed, the main countermovement to the LGBT-rights movement--the Christian Right--is more diffuse and competitive. A concerted Christian Right litigation campaign emerged from the larger political and cultural movement in the 1990s. At least nine Christian Right legal organizations formed in that decade, including current movement leaders the American Center for Law & Justice ("ACLJ") in 1990 and the Alliance Defense Fund ("ADF") in 1994. As Christian Right legal organizations continue to proliferate and compete for constituents, a handful of organizations, including ACLJ and ADF, command the bulk of the financial resources, lead the most high-profile litigation, and pride themselves on their courtroom victories. ACLJ boasts that its chief counsel has successfully argued "[s]everal landmark cases . . . before the U.S. Supreme Court," and ADF points to thirty-three separate Supreme Court decisions in its "History of Success."

Many smaller legal organizations are still staking out their identities in this broader movement. TMLC, founded in 1999, is a prime example. TMLC finds itself somewhat of a theological and geographical outsider in the Christian Right movement. The organization was founded by a Catholic donor, Tom Monaghan, whereas most other prominent Christian Right legal organizations have been directed by evangelical Protestant groups. And with its base in Ann Arbor, Michigan,

TMLC finds itself removed geographically from traditional (coastal) centers of power and without the Washington, D.C., location that more prominent Christian Right legal organizations boast. But, rather than shy away from its non-mainstream markers, TMLC has attempted to stake out a unique identity geared to particular issue areas and strategies. TMLC's willingness to take on hot-button issues that go to the core of constituents' worldviews, and to do so despite relatively slim odds of success, has been key to forming its identity.

b. Loss in Court

TMLC loses at a higher rate than other significant Christian Right legal organizations and demonstrates a willingness to address and embrace litigation loss, rather than to sweep it under the rug and move on. …TMLC's overall success rate was 36%. After removing the cases in which TMLC acted only in an amicus capacity, TMLC had a success rate of 35%. Of the forty-three decisions in which there was a clear prevailing party, TMLC prevailed in fifteen of the decisions and lost in twenty-eight. These success rates contrast, in some cases rather dramatically, with the results of the three comparison organizations. TMLC's overall success rate was the lowest of the four firms; Becket Fund's overall success rate was 59%, compared to 44% for Liberty Counsel and 47% for ACLJ. TMLC's success rate in litigation in which it acted as counsel, rather than merely in an amicus capacity, was also the lowest; Becket Fund prevailed in 52% of decisions for its non-amicus cases, compared to 43% for both Liberty Counsel and ACLJ.

While TMLC certainly hopes and attempts to win, it has a tendency to take on relatively weak cases that other firms might decline. This has implications for both the substantive areas the firm engages and the constituents it represents. For instance, TMLC has staked out a specialization in school-programming litigation, in which the landscape can be summed up rather simply: Courts routinely reject parental-rights and free-exercise challenges to curriculum (usually secular and/or progressive programming), but they often accept Establishment Clause challenges to curriculum (usually science programming). In representing conservative Christian parents in the school-programming domain, TMLC most often challenges school districts that implement progressive programming relating to sex, sexuality, sexual orientation, gender identity, and non-Western religions. In representing school districts, TMLC often defends implementation of science programming that challenges the primacy of evolution. Given the relatively settled legal principles governing both sets of cases, it becomes clear that TMLC represents parties (whether parents or school districts) in disputes where those parties have a relatively minor chance of success. But with these cases, TMLC has staked out a specialty among Christian Right legal organizations, and it has done so on a hot-button issue--school programming--that strikes at the core of movement constituents' beliefs and concerns.

c. Litigation Loss and Organizational Identity

TMLC's dedication to litigation challenging the primacy of evolution and insisting instead on alternative, religiously informed science curriculum facilitates a close examination of TMLC's management of litigation loss in its preferred issue area of school programming. TMLC represented Pennsylvania's Dover County School District in a challenge to the district's instruction of intelligent design. TMLC deliberately decided to construct and litigate an intelligent-design test case. To that end, the firm searched for a school district willing to adopt an alternative curriculum, knowing it would lead to litigation. After the ACLU and Americans United for Separation of Church and State sued the school district on behalf of parents, TMLC defended the district.

Rather than work within the broader movement strategy, TMLC's intelligent-design litigation departed from the mainstream Christian Right's tactical calculations. Other Christian Right organizations neither joined nor endorsed TMLC's campaign. In fact, the actions of TMLC and the Dover School Board upset other groups within the larger movement. ….

Predictably, TMLC lost the case on Establishment Clause grounds. But the litigation gave TMLC a national platform and established the organization's identity as a group willing to put religious principles above legal rules. TMLC's head, Richard Thompson, touted the intelligent-design case because of its "national impact," and the case landed the firm in high-profile press outlets like the New York Times. Commentators described TMLC being "thrust into the limelight with the nationally watched [Dover] case." Consistent with other legal mobilization accounts, the litigation process produced important indirect effects for TMLC. The mere act of litigating brought public attention to the organization and allowed TMLC to claim the issue area as part of its primary work.

But the loss itself also produced important effects for TMLC. Its court defeat became part of a broader historical narrative, as TMLC leaders tapped into a tradition akin to what constitutional law scholar Jules Lobel has labeled "prophetic litigation." By expressing the community's call for change and by documenting the judiciary's rejection of that call, TMLC lawyers articulated "a vision of justice unachievable in the present" at the same time that they "record[ed] history by creating a narrative of oppression and resistance." But whereas Lobel's model of "prophetic litigation" situates losing litigation along a (progressive) historical trajectory, TMLC constructed a historical narrative to serve its immediate organizational needs. That is, TMLC's Thompson positioned his organization's litigation loss within a grand narrative of "oppression and resistance" to appeal directly to constituents for immediate organizational purposes.

Thompson's account relates TMLC's litigation failure to a key constraint of courts--their inability or unwillingness to bring about sweeping cultural reform. In seeking a return to what they see as the original values of the country, America as a "Christian nation," Thompson and his organization asked the court to do too much. TMLC's cultural vision is not cognizable within the contemporary language of rights or existing precedent and, moreover, is inconsistent with the liberal, secular ideology of the American judiciary. But TMLC advocates created a historical record of the courts' dismissive treatment of their competing vision, and they did so for the purpose of establishing, legitimizing, and funding their social movement organization.

In soliciting donations for his organization, Thompson situated TMLC's litigation efforts within broader cultural struggles. His fundraising pitch at the end of 2008 depicted Christians at war with "non-believers" (both secularists and Muslims). …

…[H]e paints continued litigation as necessary, even if it does not produce social change in the near future. Litigation responds to the enemies in the "culture war," meeting their suspect, secular tactics head-on. In the wake of defeat, the "Culture War" symbolism allows TMLC advocates to proclaim, heroically, "We are up against a powerful enemy!" In this sense, TMLC lawyers are central and necessary players. They give voice to their constituents' competing vision of the good even in the face of judicial resistance and rejection. In taking on school-curriculum challenges, and often losing, TMLC lawyers portray themselves as the lone defenders of religious parents--warriors committed to a long-term battle.

And battling a powerful enemy requires resources. While public-interest law firms often depend on recovering attorneys' fees in successful litigation to fund their work, such firms also rely heavily on private donors. In fact, while TMLC founder Monaghan initially funded the group with

$500,000, the firm claims that it is now funded exclusively by private individuals, including 50,000 individuals who make annual membership donations.

2. Mobilizing Constituents, Building Resolve, and Fundraising

… When a court validates a claim, the group's claim enjoys the legitimacy that comes with the state's approval. When a court rejects the group's claim, however, the demand that the legal claim embodies might be made more pressing and the deprivation more acute. That is, denial of the claim might serve to highlight more intensely the injustice suffered by the group. While victory might signal that continued or increased activism is no longer necessary, loss might incentivize more aggressive organization and advocacy.

In this way, loss creates a distinct threat and provides a sense of urgency for a movement.

This is the flip side of Rosenberg's critique of court-centered strategies as demobilizing. Whereas legal victory might lull movement members into a false sense of security, legal defeat might encourage new, more vibrant mobilization and direct action by bringing awareness to courts' ineffectiveness and explicitly demonstrating the failed promise of litigation. Scholars have shown how in the wake of Roe v. Wade, the abortion-rights movement's activism declined, while the activity of opponents increased dramatically. Losing movements might experience a new (or renewed) motivation, while winning movements might relax, believing judicial victory has secured the desired change. Movement advocates, therefore, have an interest in highlighting legal defeat. Indeed, they may even frame ambiguous outcomes as defeats in order to create a new threat against which to rally.

Thus, litigation loss may raise consciousness and mobilize constituents, but it may do so most effectively by inspiring outrage, strengthening resolve, and building a more fervent feeling of entitlement in ways that mere litigation process (and certainly litigation victory) cannot. …

In sum, movement leaders may use an official, published, and publicized instantiation of unfair treatment to raise consciousness and mobilize constituents. The loss (even if partial) sends a message that cannot be sent by litigation itself, and certainly not by litigation victory. Defeat announces that the fight must go on, that more resources are necessary, more citizens are required, and more time is needed. Advocates tap into a historical narrative of "prophetic litigation," but they do so for immediate social movement purposes.

B. External Effects

1. Appealing to Other State Actors

a. Shifts Across Levels of Government

… Loss in the U.S. Supreme Court, or more generally in the federal courts, might prompt a reworked strategy that focuses on state-based venues. In this sense, litigation loss might lead to a critical rethinking of tactics that may ultimately yield a more robust and effective movement. More significantly, though, advocates may use the federal litigation loss to encourage players at the state level to act. The loss itself may specifically aid the appeal to the targets of the new tactics. Furthermore, consistent with theories of state constitutionalism and interactive federalism, state constitutional interpretations that contravene analogous federal interpretations may contribute to eventual shifts in federal jurisprudence. In this sense, a two-way street exists between the federal and state levels of government. The LGBT-rights movement again provides relevant examples. …

The decades-long fight against Florida's blanket ban on adoption by lesbians and gay men provides

a more recent illustration of the shift from federal to state venues and the use of federal litigation loss to advocate in these new venues. In the early 1990s, LGBT-rights advocates pursued state litigation aimed at invalidating the Florida law. While they experienced mixed results at the trial-court level, the Florida Supreme Court ultimately refused to overturn the ban. But after the larger movement's success in Lawrence, Florida advocates had new and compelling federal case law on which to build a federal challenge to the ban. To these advocates' dismay, the Eleventh Circuit Court of Appeals, in Lofton v. Secretary of the Department of Children & Family Services, rejected the challenge and held that the ban was rationally related to legitimate governmental interests. The U.S. Supreme Court denied certiorari. Advocates then faced the prospect of returning to state venues in an attempt to overturn the law. …

The loss in Lofton provided a particularly compelling case in the state legislative arena and in the domain of public opinion. The case portrayed loving, close-knit families and unselfish parents who provided a stable home life for children with pressing medical and emotional needs. While the litigation process facilitated this depiction, the litigation loss itself provided a powerful new dimension by threatening the destruction of these loving, stable families. By upholding the general ban, denying permanency to these families, and leaving them vulnerable to dissolution, the court helped to create an image of an unforgiving, unfair, and illogical law that, while seeking to help the state's most vulnerable children, actually undermined those children's well-being. The loss, rather than the mere act of litigation, highlighted the gravity of this injustice. The judicial decision threatened the physical break-up of the plaintiff families and put the state's coercive power behind the statute.

Post-Lofton, advocates were able to frame legislative demands based on emotional pleas for particular children's best interests. The Lofton court made the law concrete by enforcing it against specific children--special-needs children with loving, committed caretakers seeking to adopt them. …

While legislative work failed to achieve repeal of the adoption ban, activism in the state courts continued to work in conjunction with state legislative efforts. …LGBT-rights lawyers in Florida turned to state-court judges, urging them to use state-law grounds, some of which the Florida Supreme Court had not considered, to remedy the injustice perpetrated by Lofton.

In 2008, two trial-court judges invalidated the ban, and the Florida Court of Appeal recently affirmed one of those decisions. At the trial-court level, Judge Cindy Lederman relied on novel state-law grounds, finding that the law violated children's right to permanency as expressed in Florida's statutory regulations on adoption. Then, in accepting the equal-protection claim, Judge Lederman situated Lofton as out of date, given the volume of intervening studies on the effects of sexual orientation on parenting. …

In affirming Judge Lederman's ruling, the Florida District Court of Appeal relied exclusively on state equal-protection grounds. After explaining that the Florida Supreme Court left open the equal-protection issue in its 1995 decision, the court found no rational basis for the discriminatory treatment of lesbians and gay men in the adoption context. Florida Governor Charlie Crist responded to the appellate court ruling by announcing that the state would stop enforcing the discriminatory law, and the Florida Department of Children and Families made clear that it would not appeal the ruling. In response, Attorney General Bill McCollum, a supporter of the ban, announced that he would not ask the state supreme court to consider the case. While McCollum left open the possibility of future litigation by insisting that "a more suitable case will give the [Florida] Supreme Court the opportunity to uphold the constitutionality of this law," LGBT-rights advocates

hailed the end of the adoption ban.

b. Shifts Across Branches of Government

… By demonstrating the unwillingness of courts to bring about change, litigation loss highlights the importance of action by elected officials and thereby brings a new sense of urgency to what Rosenberg sees as more "political" efforts. But unlike Rosenberg, I do not suggest that strategies aimed at nonjudicial actors are preferable to litigation tactics. Instead, I argue that such strategies work in conjunction with litigation and often derive meaning from failed litigation….

The women's-rights movement, in which legal defeats have spurred legislative reform, provides a useful starting point. Elizabeth Schneider shows how after women's-rights advocates failed to convince the Supreme Court to treat pregnancy discrimination as a sex-equality issue, Congress passed the Pregnancy Discrimination Act, which adopted the exact legal arguments advocates had made in court. In her work on demosprudence, Guinier documents the pay-equity issue as a more recent example from the women's-rights movement. After Ledbetter v. Goodyear Tire & Rubber Co., in which the Supreme Court rejected an equal-pay claim under Title VII based on a constrained reading of filing deadlines, Congress and the President acted quickly to remedy the issue. Movement advocates successfully demonstrated that the Court's failure to recognize the employment-based injustice necessitated legislative and executive action. Justice Ginsburg's dissent, upon which advocates seized, articulated the discrimination experienced by women (and legitimized by the majority) and emphasized the need for a legislative response. While in both of these instances advocates would have preferred to prevail in court, they were able to positively use the litigation losses to achieve the movement's goals by other means. …

2. Appealing to the Public

Just as litigation victory may help a movement sell its cause to the public, litigation loss may ironically have a similar effect. This may depend on whether movement advocates are able to frame the judicial defeat as a contravention of majoritarian beliefs. If so, activists might mobilize popular support by constructing courts as countermajoritarian, elitist, and out of touch with mainstream society. Indeed, when courts fill an important role-- protecting minorities from unfavorable treatment by the majority-- they might also produce opportunities for mobilization by opposing movement forces. This effect is consistent with Rosenberg's analysis of backlash to court decisions. Rosenberg notes that "those judicial opinions that seem most effective in mobilizing citizens are those that anger and outrage segments of the population who mobilize to prevent their implementation and overturn them."

Yet rather than situate backlash to court decisions as unique--i.e., as an institutionally specific response that demonstrates the ineffectiveness of litigation in comparison to legislative advocacy and direct action--I situate backlash to judicial decisions as just one form of countermobilization that occurs in the wake of movement advances. Christian Right advocates have used the ballot-initiative process to turn back LGBT gains deriving from all branches of government. Indeed, LGBT-rights lawyers themselves understand backlash to judicial decisions as part of this broader movement-countermovement phenomenon. … A prime example emerges from Christian Right advocates' successful campaign to amend the California Constitution to prohibit marriage for same-sex couples. …

In May 2008, the California Supreme Court ruled the statutory prohibition on marriage for same-sex

couples unconstitutional. Proposition 8, which proposed to amend the California Constitution to prohibit marriage for same-sex couples, appeared on the November 2008 ballot. Yet the campaign to amend the state constitution actually started in 2003, long before the California Supreme Court decided the issue. Nonetheless, Christian Right advocates, fueled by the court loss, were able to frame Proposition 8 as a necessary and immediate response to a countermajoritarian judiciary. The litigation defeat raised the salience of the issue and lent the campaign a new sense of urgency and legitimacy, helping advocates raise more than $40 million to fund the Proposition 8 effort. …

First, advocates wasted no time in framing the court's decision as "judicial activism," with all of the negative connotations that term has come to carry. Jay Sekulow, the head of ACLJ, which participated in the litigation, announced that "the California marriage decision underscores the growing problem of an activist judiciary."… By striking down Proposition 22--an initiative approved by voters in 2000 that had provided an additional statutory basis for the state's marriage restriction--the justices in the majority became symbols of an elite, secular class ruling without regard for popular will.

…Furthermore, advocates painted the court and the LGBT-rights movement as undemocratic and therefore un-American--a move that relies on the idea, articulated by Rosenberg and Klarman, that countermajoritarian court decisions disrupt the natural and appropriate process of social change. For example, Bauer proclaimed that same-sex marriage advocates use "the most undemocratic methods possible"--relying "on political activists cloaked in black who answer to no one"--because they "cannot achieve [their] goals through the democratic process via the elected legislatures." …The litigation loss allowed proponents to make the measure as much about reining in the courts as about substantive objections to marriage for same-sex couples.

While the Proposition 8 campaign appealed to the "activist judiciary" trope, it focused more heavily on the claim that legalization of same-sex marriage would lead to public schools teaching about same-sex relationships. To make this claim, Christian Right advocates tied largely unrelated, out-of-state litigation defeats to California's fight over marriage. The litigation over free-exercise and parental-rights issues in Massachusetts became a centerpiece of the Proposition 8 campaign in a way that highlights the function of multiple (even low-level) litigation losses. …

Certainly, Christian Right advocates focused on the litigation loss at the California Supreme Court to shape public opinion in a way that supports Rosenberg's account of the courts' countermajoritarian limitation. Yet at the same time, the fact that advocates spent so much time and money on a school-programming message, which had a much more attenuated connection to the "activist court" trope, complicates Rosenberg's empirical claim linking backlash specifically to court decisions. Furthermore, Christian Right advocates have mobilized opposition to LGBT legislative gains by criticizing legislators as antimajoritarian and elitist. …

Ultimately, the Proposition 8 campaign demonstrates the way in which savvy advocates deploy and reconfigure litigation loss to speak to the public. A judicial defeat may allow advocates to paint the judiciary as dangerously countermajoritarian and may inspire voters to restore majoritarian policy. Christian Right lawyers hoped to prevail in court, but when they lost, they did not simply ignore the litigation. Rather, they reconfigured the judicial decision to aid their political campaign. In this sense, they extracted positive effects from what they viewed as an otherwise disappointing result. …

Melanie Garcia, *The Lawyer as Gatekeeper: Ethical Guidelines for Representing a Client with a Social Change Agenda*, 24 GEO J. LEGAL ETHICS 551 (2011)

INTRODUCTION: THE NEED FOR SOCIAL CHANGE LAWYERING

Jane, a transgender woman, wants to sue East Carolina for discriminatory identification policies. Jane has little knowledge of the legal system and turns to a lawyer, Pat, for advice and representation. In their initial meeting, Jane states that her goal is to require the state to reform the process by which gender designations are changed on state identification and recorded in publicly accessible databases. East Carolina's state identification process currently requires its citizens to provide a birth certificate to confirm gender. To change the gender notation on the identification, East Carolina requires a detailed medical history of the person's gender transition and a letter from a doctor from within five years of the identification application verifying the applicant's current gender. These documents then become available on the Department of Motor Vehicles ("DMV") website as part of public record, with the exception of the medical records, although the website notes that the DMV has such records on file. Jane informs Pat that her ultimate goal would be to see transgender people afforded the same rights as other citizens and treated as equals by the rest of society.

While Pat is the only attorney in conservative East Carolina sympathetic to Jane's goals, she is not an advocate for transgender rights. However, she knows there is an active national transgender movement. Because East Carolina is a small state with a small transgender population that prefers anonymity, the national transgender movement has not been active within East Carolina. Pat takes on Jane's case, but must now decide how to proceed.

> [D]isputes are not things: they are social constructs. Their shapes reflect whatever definition the observer gives to the concept .... Of all the agents of dispute transformation lawyers are probably the most important. This is, in part, the result of the lawyer's central role as gatekeeper to legal institutions .... There is evidence that lawyers often shape disputes to fit their own interests rather than those of their clients.

This Note analyzes the role of the lawyer as a gatekeeper of socially transformative courses of action and the duties imposed on lawyers by the American Bar Association's *Model Rules of Professional Conduct*. Disputes are moldable, influenced both by the claimant and her representative. There are multiple ways in which a lawyer, as an expert who exerts substantial power on the client, can and should exercise that authority.

Disputants who seek social change are arguably well represented by lawyers. Lawyers are especially well positioned to play a necessary role in working for the rights of all people because of their access to and knowledge of established forms of social change, namely the judicial system. "[T]hose 'lawyers whose work is directed at altering some aspect of the social, economic and/or political status quo,"' are referred to as social change or cause lawyers. There is a need for the work that social change lawyers do. Social change lawyers "furnish information about choices and consequences unknown to clients; offer a forum for testing the reality of the client's perspective; help clients identify, explore, organize, and negotiate their problems; and give emotional and social support to clients who are unsure of themselves or their objectives;" they also provide an invaluable service to clients and the population at large.

However, there is very little guidance in the *Model Rules* for this kind of lawyering because social

change litigation often focuses on the broader stakes of a social movement rather than on the individual client's needs. In fact, the *Model Rules* may even constrain social change lawyers by requiring them to focus on the client rather than the movement, and the traditional conception of lawyering may be problematic for some social change lawyers. However, the *Model Rules* should not and do not prevent social change lawyers from seeking their and their clients' goals.

The *Model Rules* exhort lawyers to "exercise independent professional judgment and render candid advice," relying not only on "law but [on] other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." But it is unclear what considerations a lawyer must make in advising a client whose situation is directly related to and likely inextricable from a current social movement. Specifically, it is unclear what role a "traditional" lawyer must play when representing a client with social change goals. While much has been written about the role of the cause lawyer and the ethical implications of cause lawyering, this Note will explore what the correct course of action should be for a traditional lawyer representing a client whose ultimate aim is social change and who may want to do so through the litigation of an individual claim. One possible solution would be a collaborative client-lawyer relationship, which could solve the problem social change lawyers face in dividing attention between individual client needs and broader social change goals. Additionally, while this Note will not specifically address these options, consensus-building and mediation may be an alternative to adversarial litigation and would emphasize a collaborative and cooperative approach to effectuating social change.

Moreover, while social change litigation has been recognized as a viable and often successful means of creating social change, this method is not without its critics. Social change litigation has been accused of being contrary to democratic ideals because it rests the decision of how to achieve social change in the hands of one client, rather than in the hands of the affected class. Social change lawyers face a tension in balancing an individual client's goals with a movement's; one possible solution is a move away from litigation toward building community alliances in furtherance of both the client's and the movement's goals.

Lawyers who are not dedicated social change lawyers may represent clients with social change goals and are therefore faced with similar concerns over the *Model Rules*, the lawyer-client relationship, and the implication of social change litigation on the community at large. This Note will address some of the ways the social change literature can inform the decisions of traditional attorneys representing social change clients.

Because lawyers are the gatekeepers to legal knowledge, those not in the practice of creating social change, traditional lawyers, should be informed and armed with possible strategies to effectively represent clients with social change goals. A traditional lawyer taking on a social change client should be ready and open to molding her style and approach to representation in order to best serve the client. ….

I. TRADITIONAL LAWYER: THE ZEALOUS ADVOCATE

> *A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.* [ABA Model Rule 1.3 cmt.1]

As the comment to Model Rule 1.3 regarding "diligence" asserts, a lawyer is expected to act as a

zealous advocate on behalf of her client. This section defines the role of a traditional lawyer and then analyzes the implications of a traditional lawyer zealously advocating for a client's individual legal claim without regard to the client's social change agenda or the larger social movement's goals, concluding that this is detrimental to the client's ultimate goals and therefore in conflict with the *Model Rules*.

A. DEFINING ZEALOUS ADVOCACY

Henry Lord Brougham offered an extreme explanation of the role of a lawyer as an advocate who "knows but one person in all the world, and that person is his client." Brougham insisted that "[t]o save that client by all means and expedients, and at all hazards and costs to other persons, and, among them, to himself, is his first and only duty." While this definition has long been criticized, it illustrates what lawyers are traditionally taught, and what they continue to believe: that their primary function is that of an advocate, "zealously represent[ing] their clients within the bounds of the law."

For a traditional lawyer pursuing the zealous advocacy model of lawyering, there is little chance of conflict between the lawyer's and the client's goals because a lawyer's goal is to advocate zealously for the client. In the social change context, a traditional lawyer will likely have no independent or personal connection to the change that a client wishes to achieve, and would thus not be troubled by the *Model Rules*' directive to advocate zealously for the client in the way that the client wishes. However, a client whose goal is social change may not desire that her lawyer advocate for her zealously in traditional ways, and may not be able to communicate this need or know that any possibilities exist outside of traditional methods of advocacy. Clients seeking social change are often the most disenfranchised members of society and may therefore be unaware of all the possibilities that exist in the pursuit of social change. While a social change client might prefer a course of action that prioritizes her social change agenda over her individual claim, unless a lawyer informs her of this possibility, the client may not be aware that this course of action exists. In that case, a traditional zealous advocate would need to adapt to these different needs or risk being inefficient and ineffectual in representing or achieving the client's social change needs.

Another part of the traditional conception of the lawyer as zealous advocate is that lawyers must retain "a rational distance from the client, whereby the lawyer is careful not to step outside the sphere of neutrality that embodies her role as a professional advocate." According to this principle, a lawyer must remain detached from the potential consequences of her advocacy on society, instead focusing on the client's needs. Because this norm of detachment is part of the traditional conception of a lawyer and zealous advocate, a traditional lawyer advocating for a client with social change needs would likely be neutral and detached toward the effects of such a representation on society at large. This neutrality can be positive in that it does not affect a lawyer's ability to represent a client whose agenda is not consistent with her own. However, in the social change context, it can prevent a lawyer from the zealous advocacy that effective social change work often requires.

B. LITIGATION: NOT THE PROBLEM

A potential pitfall of this zealous advocacy is that lawyers must often represent Justice Oliver Wendell Holmes' "'bad man,' one who cares only for his own good and the consequences that may be taken by public agencies" against him. Combining Holmes' characterization of a typical client with the role of a lawyer as a zealous advocate requires that attorneys not consider the consequences of their actions for the public interest and instead focus on the immediate goals of their individual clients. While in some sense this kind of partisan lawyering is good, necessary, and

particularly American, it may pose problems for clients whose ultimate goal is social change. Too much focus on an individual client's claim in litigation may lead to adverse consequences for the social movement as a whole and may impede the social change the client desires.

However, a focus on litigation is not at the root of the problem a zealous advocate may present for a client seeking social change. Many social change lawyers advocate for their clients through litigation, particularly constitutional litigation, because it is the method with which they are most comfortable and competent. While litigation does incur large costs, can take a long time, and might not be successful, it is a "valid form of political advocacy," and provides both legitimacy to the cause and "bargaining leverage." Therefore, because litigation as a method is widely accepted, it is often an excellent method to pursue, both for social change and traditional lawyers, when a movement is seeking to be recognized by the legal system. In addition to bringing legitimacy to a movement, a successful lawsuit can create a precedent to help further the social movement.

Moreover, constitutional litigation can also bring a movement or the problems faced by members of an oppressed class to the attention of legislators, thereby leading to legislative developments on behalf of the social movement or oppressed class. However, it is not always the case that this kind of litigation will lead to widespread and immediate change within society. Although constitutional protections may change the legal landscape, to diminish the inequities suffered by many on a daily basis, it is often necessary to change people's minds, attitudes, and prejudices through other methods.

Traditional lawyers would likewise be comfortable turning to litigation when representing a client seeking social change. Litigation is therefore a strong choice when a lawyer believes that there is a good chance of a positive outcome, although as a method for social change, it can potentially be problematic.

C. AN INCOMPATIBLE METHOD: ZEALOUS ADVOCACY AND SOCIAL CHANGE

While litigation is not problematic in and of itself, it can create obstacles for a client's efforts toward social change. A win in court may be good for an individual client's claim, but may not create the desired change within society or the resulting precedent might harm the cause of social change as a whole. Even if the result of the litigation is not detrimental to the cause per se, because the litigation affects a distinct community or social class, the community should have a more democratic say in the choice to litigate and the choices that are made within the course of litigation. Regardless of the kind of precedent established, litigation may "infringe upon the freedom of other community members to litigate their own individual cases (or to choose not to litigate)." Rather than creating more opportunities for members of an oppressed social class to exert their power and autonomy, litigation can usurp this power and place it in the hands of a lawyer or an individual client. The possibility that litigation impedes the rights of other members of the afflicted class is a concern that rings particularly true for a client whose goal is in part to better the situation of others.

In reality, traditional and cause lawyers do more than just litigate for their client; they rely on an arsenal of different tactics whether it be to save money, time, resources, or to be more effective. The zealous advocate does not have to be a cutthroat litigator. Rather, a lawyer can be a "creative, cooperative lawyer" and pursue negotiation and other tactics to advance all of the parties' interests. However, when "the interests of the client part from another's interests, the lawyer invariably" bargains for her client's interests above the rest. Zealous advocates, regardless of the course of action they pursue, strive to further the "interests of their clients, not the interests of justice nor the public interests." A client seeking social change will require her lawyer to be aware of public interests and do more than zealously advocate for her individual claim, regardless of what tools her lawyer uses.

While a lawyer acting as a zealous advocate can be effective on behalf of a client with social change goals, her narrowly tailored pursuit of a client's stated dispute and her personal detachment from the client's cause may impede her from effectuating the true change that the client desires. A client with a social change agenda would likely be better served by an attorney operating on a different paradigm.

D. PAT AS A TRADITIONAL LAWYER

Pat, as a zealous advocate representing Jane, would fervently pursue Jane's claim against East Carolina. This would entail filing a complaint in court, attempting negotiations with the state's counsel, pursuing the removal of Jane's personal information from the DMV website, and either negotiating a large monetary settlement for Jane or trying the case in court in the hopes of winning a large compensatory damages award for pain and suffering. Conservative East Carolina would not likely offer a large settlement or concede to Jane's wishes. Pat would likely have to take Jane's claim to court, thereby bringing her into the public sphere. This dispute would also call attention to other members of the transgender community in East Carolina who might wish to avoid the exposure litigation would incur. Additionally, East Carolina juries tend to be highly conservative, so Jane's chances of recovery are slim, even within the federal court system.

Even if Pat and Jane were to prevail at trial, a jury might only award an injunction, or only award nominal damages. The possibility that a trial might hot result in an injunction to the practices that Jane wants to change is high, and in fact might create bad precedent and thereby prevent or make more difficult a change in the future. A more problematic result from Jane's perspective, even though she might not have been able to voice this exactly to Pat, would be a lack of change or worsening of the public's view and treatment of transgender people regardless or even because of success in litigation. While Pat might effectively succeed as a zealous advocate in accomplishing one of Jane's goals, the chances of accomplishing her ultimate goal of social change would likely not be addressed.

II. CAUSE LAWYERS

A lawyer always has a duty to zealously advocate for her client; however, cause lawyers dedicate this energy and zeal not only to their individual clients, but also to the causes their clients represent. This is "[a] more robust vision of client loyalty [that] in this circumstance would ask the litigator to acknowledge the larger client--the community--and thus to consider the consequences of her tactics on the community's interests." Cause lawyers are not detached from their representation, but are passionate supporters of the cause they represent. A cause lawyer advocates the social movement through the individual client and makes choices that take into account the cause's needs.

Pursuing the goals of a social movement in addition to a client's individual goals is a logical choice for lawyers who strongly believe in and are members of the cause that they represent. The *Model Rules* offer very little guidance to cause lawyers whose focus is on doctrinal development on behalf of the cause. This Section divides social change or cause lawyers into two categories: the litigator and the advocate, and addresses each separately. The cause litigator's focus is on constitutional litigation in order to effect social change, while the social change advocate is a member and participant within a social movement and works toward social change using the methods traditionally ascribed to social movements.

A. CAUSE LAWYERING AND LITIGATION

There is no set definition for cause lawyers and what they should do. The definitions and criticisms of cause lawyers below illustrate the lack of consensus in what a cause lawyer is and should be,

and highlight the complexities involved in lawyering for social change. However, in a general sense, cause lawyers may be defined as those whose aim is to bring public advocacy to the forefront through a renewed commitment to morality and bettering society, thereby further legitimizing the legal profession.

Cause lawyers are those who pursue the betterment of society through the promotion of their own political and moral beliefs, and do so by advocating for a particular social movement, focusing on the effects of litigation on society rather than on the individual client. Cause lawyers can do so through a variety of strategies, but because litigation is highly effective, it is one of the main strategies pursued.

Because the *Model Rules* make no mention of representing causes, only individuals and organizations, the *Model Rules* may indicate to lawyers that the furtherance of the public good is a personal endeavor not to be intermingled with their clients' cases. This argument has merit in light of the *Model Rules*' call to lawyers to advocate zealously on behalf of their clients, and therefore not for their own benefits. However, support for cause lawyering lies within the *Model Rules*' exhortation to "protect the system that safeguards individual rights in order to preserve societal values." Additionally, cause lawyers are not solely dedicated to advocating on behalf of the cause without regard to the client. Cause lawyers generally strive for either "doctrinal development or ... direct client advocacy." The lawyer focused on doctrinal development would use an individual client's case in furtherance of "the evolution of a particular novel legal principle" in order to benefit the larger social movement. The direct client advocate would zealously litigate on behalf of an individual client's social change goals.

More than just being a zealous advocate and litigator, a cause lawyer pursuing litigation imbues the claim with personal passion toward the cause. This informs the way in which a cause lawyer advises her client. Model Rule 2.1 offers some guidance on how a cause lawyer should interact with her client: "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Lawyers can and should rely on personal knowledge in order to advise their clients. Additionally, "it is entirely legitimate for a lawyer to engage in work for social change in order to ensure that the rights of all people are protected." The *Model Rules* therefore permit lawyers to advise their clients of the effects any action might have on the broader social movement.

Lawyers whose goal in litigation is doctrinal development are often referred to as impact lawyers. Impact lawyers only accept cases they believe would have the desired precedential effect, but once selected, they zealously advocate on their clients' behalf. This is in part because the impact lawyer selects clients with the same goals as herself, so that advocating for the client is tantamount to advocating for the desired impact. However, this alignment of goals does not always occur and can possibly be detrimental to the client if the impact lawyer remains fixated on the outcome she desires over the welfare of the client. For a cause lawyer with her own agenda, the ethical requirement to zealously represent a client's interests may constrain the way in which she brings about that change. A social change lawyer, according to the *Model Rules*, may not take action to further her own agenda without the client's express authorization. However, while a social change lawyer must "pursue the case in a way that furthers the client's best interests ... she does have control over how to conduct that representation and may be able to shape the client's case in important ways." The choice between an approach that would most benefit the individual client and one that would benefit the cause technically rests in the hands of the client because decisions about "the objectives of representation" are in the client's domain. However, because a client often defers to the lawyer to

make tactical decisions, it is possible that an impact lawyer can pursue a client's objective--the furtherance of the individual client's claim--while still pursuing her own broader social change agenda.

B. CRITIQUES OF LITIGATING FOR SOCIAL CHANGE

There are two major veins of criticisms of cause lawyering: first, the argument against the "anti-majoritarian nature of using the courts to reach goals that could not be attained through ordinary domestic means," and second, the idea of the negative impact on the lawyer-client relationship.

The anti-majoritarian critique sees courts as making law that the democratically elected legislature has declined to enact or consider. Critics have argued that this process is anti-democratic in that it allows one lawyer and a client, or in a class action, a representative plaintiff, to make the decisions for an entire community. Allowing one individual lawyer and client to make the choices within a lawsuit precludes others within the community from doing so as well, either through precedent or, in the case of class actions, preclusion. Moreover, an individual litigation or class action ignores or discards the possibility that members within the community do not in fact want to litigate the issue, would prefer to spend resources on another issue that affects their community, or would prefer a tactic other than litigation to address this issue.

The second vein of criticism, the negative impact of cause lawyering on the lawyer-client relationship, is closely related to a critique of cause lawyering as unrepresentative of the needs of community members. Cause lawyering is criticized as manipulative and likely to allow the lawyer to focus on her own goals rather than those of the individuals. Additionally, one of the most problematic aspects of cause and impact lawyering is that rather than empowering the client, it uses clients as "tools" to further the lawyer's own agenda. However, cause lawyers can attempt to avoid this problem of manipulation through close adherence to the client's stated goals; the method by which a cause lawyer would do so, client-centered practice, is discussed further below.

The problems that these critiques identify may be abated if cause lawyers take affirmative steps to ensure that the lawyer-client relationship meets the requirements of the *Model Rules*. American clients often conceive of themselves as "entitled to be the masters of their lawyers." While this is the case for some privileged clients, many clients in fact experience the inverse: lawyers exerting their power over their clients to the extent that they are making decisions for them. The clients of cause lawyers are particularly susceptible to this power dynamic, as they are often disempowered people. The "client-centered practice" is one method that may diminish the power lawyers exert over their clients. In an endeavor to empower her clients by enabling their right to make choices, a lawyer in a client-centered practice tailors conversations with clients to learn the "relevant facts [that will] help the client articulate his values" and make the choices throughout litigation. Here the lawyer acts less as an expert or guide and more as a careful listener in order to divine the client's will and ensure a less coercive or manipulative relationship. A cause lawyer could apply these methods in order to understand more fully her client's advocacy needs and to be able to construe and help develop, with the client's input, the best course of action in furtherance of both the personal and social change goals of her client.

However, the client-centered practice may be equally flawed because while it is not clearly coercive, this method is still "both psychologically potent and manipulative" of the client. No method is likely to dissipate entirely the power lawyers exert over their clients. This power relationship is inherent: the lawyer has expertise that the client does not, regardless of the tactics the lawyer uses to interact with the client. This difference in expertise, and sometimes level of education, can pressure clients to adopt the lawyer's recommendations, even when the lawyer's recommendations

conflict with the client's desires. Even when the client feels most at ease with the lawyer, the client will likely defer to the lawyer's expertise to make the major legal decisions. Despite the potential coercive effects, the client-centered approach is appealing because it offers a method by which lawyers may learn more about what the client desires, particularly with regard to the client's ultimate goal. With that knowledge, a lawyer will be able to better advise the client, despite of the possibly coercive nature of this advice, as to the best course of action.

Regardless of the criticisms of cause lawyering, cause lawyers advocate for the betterment of society, whether through the promotion of their own ideals, through their client's individual litigation, or through litigation that focuses on the needs of the cause more than the client.

C. CAUSE LAWYERING AND SOCIAL MOVEMENT ADVOCACY

Cause lawyers who are not focused on litigation but are social movement advocates are "integrated members" of the community that they represent, "practicing behavior that moves their cause forward ... using their legal skills on behalf of the cause." Cause lawyers who work along with social movements "make problematic the assumption that there are strict dichotomies between professional and grassroots tactics, or between institutional, nondisruptive practices (litigation) and extrainstitutional disruptive practices (protests, sitins)." A lawyer's duty to zealously advocate for her client extends to both the client's actual claim and to the client's overarching social change goals. As noted above, a cause lawyer focused on litigation can be effective at pursuing both a client's claim and the overarching social change goal, but this often comes at the cost of the client's empowerment. Social movement advocates, unlike cause lawyers whose efforts are directed at litigation, work from within social movements, participating in the traditional methods of social movement advocacy, in an effort to promote social change.

Creating lasting social change within disenfranchised communities requires individuals who seek to change their own and others' social conditions; unfortunately, as subordinated members of the community, they often do not have the knowledge or the resources to go about creating change. In order to fulfill the need for client empowerment, there is a growing shift from impact litigation and direct client advocacy to community building characterized by fostering "an ethic of connections--one of building alliances and creating alternative institutions" directed at social change. This kind of social movement advocacy empowers the client to begin more immediately working toward social change with the other members of her community or with members of the relevant social movement. A social movement advocate can serve this function by translating the client's grievance into the appropriate legal language in order to help give voice to the claim and so that the client may be able to communicate the grievance to other community members. Lawyers are often the most obvious and appropriate choice for these clients because as lawyers they possess extensive knowledge about the legal system necessary to bring about the social change the clients desire.

D. PAT AS A CAUSE LAWYER

Pat, as a cause lawyer representing Jane, would pay particular attention to Jane's overarching goal of social change. If Pat were acting as a direct-client advocate, she would identify Jane's goal to better the treatment of transgender people in East Carolina and pursue it zealously in addition to Jane's individual claim against East Carolina. In doing so, Pat would work toward both of Jane's goals.

However, if Pat were acting as a doctrinal or impact lawyer, she would either have first decided that her own goal was to better the treatment of transgender people and end East Carolina's dis-

criminatory identification process, or have decided that of the potential social change clients available, Jane's claim would be the most likely to create the desired precedent. Once Pat made this decision, she would then zealously pursue her goal to end East Carolina's discriminatory practice. This goal would supersede Jane's individual claim. For example, even if East Carolina offered to settle Jane's claim and remove her information from the DMV website, Pat would likely recommend that Jane continue to pursue litigation in an effort to receive an injunction and establish favorable precedent for future litigants.

If Pat were a social change advocate, she would likely work along with an existing social movement. Pat would introduce Jane to a transgender rights organization and facilitate her work with the transgender rights organization by informing and instructing Jane of the extralegal ways in which a social movement could further her goal of improving treatment of transgender people. Pat would also help Jane put into legal terms the problem with the identifications and the status of transgender rights in East Carolina so that she and the transgender community could assert their rights.

III. RECOMMENDATIONS FOR TRADITIONAL LAWYERS REPRESENTING SOCIAL CHANGE CLIENTS

Because clients will likely seek the services of both cause and traditional lawyers in order to pursue their goals, it is necessary to understand what traditional lawyers, unaccustomed to social change advocacy, should do in such circumstances. In representing a client with social change needs, a traditional lawyer should rely on lessons learned from cause lawyers as well as on the *Model Rules*. There are some critiques of cause and traditional lawyering that cannot be avoided by this course of action because they are inherent to litigation. However, the goal for lawyers representing clients with social change goals should not be to eliminate all problems related to social change lawyering, but rather to strike a balance between the traditional lawyer's focus on an individual client's claim to the detriment of the greater social change goal and the effects on third parties, and the cause lawyer's possible focus on the social change goal over the needs of the individual client.

A. LAWYERING ON BEHALF OF SOCIAL CHANGE CLIENTS

While cause lawyers are often fueled by an intense passion for the cause they represent, lawyers representing social change clients do not have to adopt a similar passion for their clients' goals. Traditional lawyers can instead achieve a similar level of dedication to the client's goals by a true commitment to the *Model Rules*' exhortation to zealous advocacy and by deferring to the client in regards to third-person effects.

The *Model Rules* exhort lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Because lawyers are the gatekeepers to knowledge about the judicial system and the courses of action available to social change clients, a lawyer should not only inform the client of what her legal remedies might be, but also of the extralegal opportunities available to accomplish her goal. The *Model Rules* conceive of lawyers in part as advisors, which allows lawyers to rely on more than just legal considerations in advising their clients. Therefore, a lawyer may advise her clients as to all the possibilities within the lawyer's range of knowledge. Additionally, a lawyer is not required to give unsolicited advice; however, the Rules also require communicating thoroughly with the client about possible means by which to accomplish the client's objectives. Because there are multiple methods by which a client can achieve social change, lawyers are permitted by the *Model Rules* to advise the client of the possibility of pursuing a resolution to her claim through community organizing or work with a social movement, as well as the potential benefits and disadvantages of litigation.

Advising a client about the potential extralegal solutions available does not constitute denying the client representation. A client could choose to pursue both legal and extralegal methods of furthering her claim. Should a client decide not to go forward with a traditional method of legal advocacy, a traditional lawyer can still act as an advisor, in part by informing the client about current social change movements relevant to the client's position and by encouraging and facilitating the client's participation in that movement as well as within the community the client represents. Traditional lawyers need not become involved with social movements themselves or participate in extralegal actions in furtherance of movements, but should consult with their clients to determine whether the clients' goals would best be served by extralegal actions in participation with a social movement. The choice not to pursue social change litigation and to focus solely on community organizing and other extralegal remedies is a gamble for both attorneys and clients, and should be made only when a client is fully informed of the available possibilities.

B. PAT AS A TRADITIONAL LAWYER REPRESENTING A SOCIAL CHANGE CLIENT

Pat, acting as a traditional lawyer representing a social change client, would work to meet Jane's goals by informing her of the various methods available to her and by advising her as to the most likely successful course of action. Pat would likely present Jane with three major options, barring Jane deciding not to go forward with her claim or deciding not to work with Pat at all. Pat would advise Jane that her options are to pursue litigation, pursue litigation and extralegal methods to achieve social change, or only pursue the extralegal methods. To the best of her abilities, Pat would fully inform Jane about the possibilities of success and costs of each course of action, and Jane would then be able to choose which to pursue as a thoroughly informed client. After advising Jane of the possibilities presented by litigation, Pat would advise her about the extralegal possibilities available, but would make sure to inform Jane that these options would require much more time, passion, and involvement on Jane's part than pursuing litigation would. Some of the extralegal options Pat would present to Jane include working with an existing transgender rights group and organizing her own meetings with the transgender community in East Carolina in which to discuss what action should be taken in regards to the discriminatory identification processes, in order to make a more democratic decision about the correct choice of action to pursue. Should Jane choose to continue to focus on her larger social change goal, Pat would continue to inform Jane of the effects her actions might have on the transgender community throughout her representation.

CONCLUSION

While traditional lawyers and cause lawyers take different approaches to litigating and representing social change clients, both approaches are fueled by an underlying dedication to the *Model Rules*' call to zealous advocacy. The choice these two approaches present is whether to advocate on behalf of the individual client's claim or for the broader social change goal, but these two options are not mutually exclusive. Because lawyers are the gatekeepers to knowledge about the judicial system, lawyers representing social change clients should act as advisors and inform clients of the myriad ways in which a social change goal can be met. By doing so, a lawyer would allow the client to make the choice whether to focus on the broader social change goal, the individual claim, or both.

Veryl Pow, *Rebellious Social Movement Lawyering Against Traffic Court Debt*, 64 UCLA L. Rev. 1770 (2017)

The prominence of Black Lives Matter (BLM) in American society today signals the revitalization of alternative forms of participatory democracy-- from localized community organizing to widespread social movements--as political expression among racial minorities. … In proposing a new theory, one I term *rebellious social movement lawyering*, I argue that social movement lawyers should play an active role in social movements, so long as they are guided by two overarching principles at all times: first, that social movements are necessary to achieve structural social change; and second, that the participation and leadership of grassroots community members, more than professionals and formal social justice organizations, is necessary to sustain such movements. …

My theoretical insights on the role and strategies of rebellious social movement lawyers stem from my yearlong localized advocacy against traffic court debt in South Los Angeles. During my second year of law school, I externed with Theresa Zhen, then in her second year of a Skadden fellowship at A New Way of Life Reentry Project (ANWOL), to attack the excessive fines and fees generated from traffic tickets. In response to the structural dimension of traffic court debt, which entraps low-income minorities in cycles of indebtedness and involvement in the criminal justice system, our advocacy gradually evolved from purely direct representation to legislative advocacy, strategic litigation, and community organizing. Though our work was guided neither by principles of building social movements nor by enhancing grassroots democracy, our multifaceted approach to advocacy informs the dynamic role of lawyers under my theory ….

I. TRAFFIC COURT DEBT IN CALIFORNIA

Since the 2015 publication of the U.S. Department of Justice report on Ferguson, Missouri, national attention has increasingly turned to the explosion of traffic court debt in low-income communities of color as a mechanism of revenue generation for municipalities. Los Angeles County is not immune to this scheme, with an average of $26.8 million collected each year from 2010 to 2015 from civil assessment fees--$300 fines that are automatically added to the overall amount owed by individuals who fail to appear for their traffic court hearing or who miss a payment for a traffic citation--alone. …

The fines and fees tacked onto traffic citations have steadily increased over the last few decades. Today, an individual is automatically charged a total of $490 for a $100 ticket. … In addition to an increased financial hardship, individuals with an FTA have their licenses suspended by the Department of Motor Vehicles (DMV) and a misdemeanor conviction on their criminal record. …In summary, the true immediate costs of a traffic infraction include hidden fines and fees that are added on top of the base fine, license suspensions and misdemeanor convictions for FTA and FTP, and the choice between unemployment and incarceration for driving with a suspended license. Quantitative data reveals that this form of revenue generation is predicated on the backs of low-income communities of color. …

Traffic court debt expedites formal contact with the criminal justice system by criminalizing one's inability to pay or appear and one's need to drive with a suspended license. The criminalization of traffic violations by traffic courts must be understood in terms of two complementary dynamics. First, to generate revenue, traffic courts can seamlessly threaten and impose criminal punishment when one ignores financial punishment. Second, the power for traffic courts to do so mirrors a larger structural shift resulting in "the fading line between civil and criminal law," whereby civil

adjudicatory systems are increasingly relied upon to punish low-level, nonviolent violations. Traffic court judges preside over both traffic infractions and misdemeanor traffic tickets, thereby liberating criminal courts to adjudicate nontraffic offenses. Nonetheless, because misdemeanor traffic violations are formally classified as criminal, the collateral consequences of a criminal conviction … carry over to the traffic court context.

One effect of criminalizing traffic violations is that it empowers traffic courts to arrest and jail individuals to collect on unpaid debt. Unsurprisingly, communities of color are disproportionately targeted for arrest and jailing. … Spending time in jail has profound material, psychological, and emotional impacts on individuals and their families both in the short and long term. Short term incarceration can lead to job and housing loss. …In the long term, because a misdemeanor conviction creates a criminal record, one's eligibility for certain jobs, occupational licenses, and benefits may be permanently foreclosed. Entire families are affected materially and emotionally. A greater burden may be placed on a family member without a criminal record to provide for the family. Alternatively, the social stigma of being unemployed or having a criminal record may impel the individual to pursue illicit activities to provide for their family. …

…[A] police stop for an ordinary traffic violation initiates the cycle of traffic court debt. Interrogating the initial encounter with law enforcement reveals a pattern of policing in low-income communities of color based on racial profiling. In South Los Angeles, the effects of driver's license suspensions intersect with a "broken windows" policy of policing that has long aggressively targeted low-income communities of color. [In many cases] … "routine traffic stops" by the LAPD … are merely a pretext for vehicle searches to further race-based nontraffic criminal investigations, and citations are issued ex post facto to justify illegal searches when they yield neither contraband nor weapons….

II. A MULTIFACETED APPROACH TO CHALLENGING TRAFFIC COURT DEBT

A. Direct Representation

I began my externship at A New Way of Life in October 2015 assisting Zhen with the direct representation of indigent clients. We pursued this mode of advocacy both because of the sheer magnitude of need for pro bono representation and because our professional training as public defenders shaped our pragmatic goal of making a meaningful difference in a handful of lives of those who faced insurmountable traffic court debt and license suspensions. …

Without assistance of counsel, the vast majority of indigent defendants cycle in and out of traffic court ignorant of their rights, alone to face a byzantine system that deliberately reduces their humanity to inputs of revenue generation. …In contrast, Zhen and I discovered early on that representation by counsel can be determinative in dropping the charge against a defendant or in waiving the fines and fees at sentencing. Officers were likely to work out a deal with us prior to trial. …

Despite our success with individual cases, Zhen and I became increasingly frustrated by how much work each case demanded for only an individualized effect. Moreover, we were concerned that our individualized courtroom victories reified the predatory procedures of the court, decreasing the likelihood that *pro se* defendants would receive favorable outcomes. These concerns catalyzed a pragmatic shift from primarily engaging in direct representation to adopting a more ambitious vision of systemic reform.

At the same time, we recognized that direct representation opened the door to broader advocacy in two ways. First, the more time we invested in court, the greater the degree of precise knowledge

we possessed of the court's predatory procedures. We appreciated this dialectic, as it informed other strategies, such as impact litigation, to challenge the rampant due process violations we witnessed. Second, because of my community organizing background, we relished the opportunity of organizing with individuals who were directly impacted by traffic court debt. Without providing successful representation in traffic court, it is doubtful that we could have met and recruited community members who would assist us in launching the grassroots organizing off the ground.

This foregoing paragraph anticipates the fluidity in tactics that is the cornerstone in my theory of rebellious social movement lawyering. Rather than being guided by rebellious social movement lawyering principles, however, our decision to shift strategies was a response to the practical limitations of direct representation and our desire to effect systemic change along the lines of our preexisting training and skillsets as traditional legal professionals and, for me, a community organizer.

B. Policy Advocacy

…[D]irect representation was largely ineffective for clients whose licenses had already been suspended, regardless of jurisdiction. From county to county, judges resisted granting indigency hearings to clients whose suspensions resulted from an FTA or FTP absent the payment of "total bail." Thus, a consensus [within a group of concerned practitioners with traffic court experience] congealed around a legislative strategy to end license suspensions as a debt collection mechanism.

To generate political traction, the participants formally announced a coalition, known as Back on the Road California (the BOTR coalition). In April 2015, the BOTR coalition published a report entitled *Not Just a Ferguson Problem--How Traffic Courts Drive Inequality in California*. Through a meticulous breakdown of court fines and fees, interwoven with client narratives illustrating the devastating effect of traffic court debt, the report built a compelling case to end license suspensions altogether.

The report received wide coverage locally and nationally, prompting Governor Jerry Brown to sign a "one-time amnesty program for unpaid traffic ... tickets" on June 24, 2015. Becoming effective on October 1, 2015, with an end date of March 31, 2017, this temporary program provided material relief for some indigent applicants whose licenses were suspended. Theoretically, anyone "in good standing" with a license suspension from an unpaid traffic ticket qualified for license reinstatement, while a narrower subset of these individuals were eligible for an additional debt reduction of up to 80 percent.

On its face, however, the amnesty program was limited in scope and efficacy. First, because the program applied only retroactively to already-issued tickets, indigent individuals ticketed during the program and after its termination were provided no relief from the familiar cycles of license suspensions and criminal justice system involvement without recourse. Second, under the program, applicants who were ticketed after January 1, 2013, were categorically ineligible for debt reduction. Although these applicants would have benefited from license reinstatement, their financial obligations to the state remained excessive and, for most, impossible to meet. For these individuals, there is a high likelihood of wage garnishment, tax levies, and other debt collection methods due to a missed payment. …

The enactment of the amnesty program spurred a new round of direct representation. …Far from abandoning legislative advocacy, we appreciated the significant political ground gained by the initial report through the Governor's initiation of the amnesty program. On April 11, 2016, the BOTR coalition published a second report, titled *Stopped, Fined, Arrested: Racial Bias in Policing*

and Traffic Courts in California. … By assuming a race-conscious framework, we combined our grounded observations of the racial dynamics of traffic court with the broader social momentum against police violence and mass incarceration, by which we hoped to compel urgent legislative action to end the use of license suspensions.

C. Impact Litigation

Given the underwhelming relief that the amnesty program actually provided and the glacial pace at which legislative reform typically occurs, the BOTR coalition decided that litigation was also necessary to disrupt the judicial pathway to driver's license suspensions through notification to the DMV to suspend licenses upon an individual's FTA or FTP. …

On June 15, 2016, a team of coalition members and local advocates in Northern California filed a lawsuit against the Solano County Superior Court for declaratory and injunctive relief from the court's systematic "failure to provide a meaningful opportunity to be heard on the issue of ability to pay prior to referring a traffic defendant to the DMV for driver's license suspension" for an FTA or FTP. This, the complaint stated, violated statutory authority and the state and federal constitutional Due Process and Equal Protection clauses. On the heels of the Northern California litigation, we convened with a team of advocates in Southern California and filed an analogous lawsuit against the Los Angeles County Superior Court….

Two components of the Los Angeles County lawsuit are worth mentioning. First, we identified our plaintiffs from our continual engagement in direct representation. Had we fully transitioned from legal services to legislative advocacy, we would have been severely limited in our capacity to locate ideal complainants. Moreover, those of us who represented clients directly influenced the team's conception of the ideal plaintiff from a fictionalized caricature of a law-abiding, indigent, one-time minor traffic offender to an individual more truly representative of the residents of color at large in Los Angeles County--one with multiple traffic stops, tickets, and arrests pursuant to traffic warrants. Ultimately, our two plaintiffs, one Latina and one Black woman, honestly reflected the everyday experiences of low-income drivers of color with the law and the traffic court system ….

Second, our complaint differed from the Solano County lawsuit in one significant sense. Along with alleging statutory and constitutional violations, we alleged that the practice of license suspensions absent an indigency hearing was a violation of antidiscrimination law. A few of us were adamant about including a race-conscious remedy in the complaint. … Although the outcome of our litigation may not ultimately turn on the anti-discrimination claim, our race-conscious framing constituted a logical progression of the analysis we forged in the second report, and plays an important function in symbolically channeling the racial discontent on the streets to the formally colorblind culture of the judicial system. Moreover, as a matter of trial strategy, by including a race-based claim, we opened the door to the possibility of convincing a sympathetic judge concerned about the racial impact of license suspensions to rule in our favor.

D. Community Organizing

… When I pitched the idea of community organizing, Zhen was enthusiastically supportive. She connected me with one of her clients, E.C., whom she described as particularly vocal about his inability to escape cycles of traffic tickets and debt. What E.C. lacked in formal organizing experience, he made up for with unbridled excitement and eagerness to jump right in. Together, the three of us began hosting meetings twice a month, open to the public, in a conference room at Ascot Library in Watts, South Los Angeles.

Zhen and I shared an organizing philosophy premised on participatory democracy and collective decisionmaking. The overall purpose of these meetings was to empower community members affected by traffic court debt into grassroots organizers capable of leading a local campaign for traffic court reform. Our initial goal was to raise the community's baseline level of knowledge of the traffic court system. Instead of us formulating the problem to attendees, we deliberately assumed the role of facilitators, allowing attendees to create knowledge by sharing stories and listening to each other's experiences. Our assumption was that through repeated encounters with police and traffic court debt, attendees already possessed an acute awareness of the problem.

Far from merely ensuring participation among all attendees, though, we actively facilitated in two ways. First, we synthesized the commonalities among individual experiences to emphasize the collective effects of the system preying on low-income Black and Brown communities, and in turn, foster solidarity. Second, we broke down common experiences into the concrete steps of the larger traffic court system, much in the same way I characterize the system in Part I. We obtained a clearer picture of the concrete steps over time; as our semimonthly meetings progressed, the content of the community conversations blossomed from fines and fees to traffic stops, vehicle searches, and arrests and jail time subsequent to traffic violations. In turn, everyone in the meetings, Zhen and myself included, developed a deeper understanding of the multilayered systemic nature of traffic court debt. …

Aside from developing the collective consciousness of traffic court debt, our goal was to raise the capacity of attendees to lead a grassroots organizing campaign. We believed that transformation into organizers occurred through actual practice. After a few initial meetings, I invited the most dedicated attendees--E.C. and two Black women--to separate planning meetings, where I trained these emerging leaders to independently lead subsequent public meetings at Ascot Library. . . .

Notwithstanding Zhen's and my zealous and multifaceted approach to advocacy, at times in collaboration with dozens of professional advocates statewide, traffic court debt remains a systemic barrier entrapping tens of thousands of low-income Californians of color in cycles of debt and criminal justice system involvement. Absent creative new democratic, grassroots strategies, the structural behemoth of traffic court debt will likely remain a fixture. Indeed, our narrow gaze on license suspensions ignored the systemic problem of traffic court debt, which generates revenue for the state through a complex web of mechanisms.

At best, our professionally-driven campaign and strategies have accomplished limited, temporary gains. Even then, the gains are precarious. At the time of writing, both lawsuits remain pending. Although a promising legislative bill, SB-881, was proposed by Senator Robert Hertzberg in January 2016 to end the use of license suspensions as a debt collection mechanism, that component was completely excised from the final version passed in September. The provisional band-aid of the amnesty program finally peeled off on March 31, 2017. …[O]ur pursuit of legal and legislative modes of advocacy, conducted in a professional vacuum, have left us in a strikingly similar position to where we began--perhaps worse, given the new political landscape in Washington, D.C.. . .

III. REBELLIOUS LAWYERING: AN ACTIVIST THEORY OF LAWYERING

…Since the 1970s, two main progressive legal traditions have emerged to replace legal liberalism, the reigning philosophy from the Warren Court era that favored litigation as the primary mechanism for structural social change. Even the most optimistic account of Warren Court activism failed to withstand a longterm, contemporary analysis against the realities of resegregation, retrenchment of race conscious remedial plans, and the ascent of individual over collective rights

under a neoliberal regime of law and politics. Thus, the new traditions sought to subordinate law and the role of lawyers by instead emphasizing grassroots power as the primary mechanism for social change.

The first of these traditions, movement lawyering, … attempted a reinterpretation of Warren Court decisions through contextualizing landmark court victories against a backdrop of the massively disruptive pressures exerted by the Civil Rights Movement. In its contemporary iteration, movement lawyering describes a "model of practice in which *lawyers accountable to marginalized constituencies mobilize law to build power to produce enduring social change through deliberate strategies of linked legal and political advocacy*." Thus, unlike legal liberalism, lawyers are accountable to "mobilized clients" and deploy legal strategies as part of a broader "integrated advocacy" that recognizes the importance of mass mobilization in structural social change. Like legal liberalism, though, movement lawyering both contemplates the need for legal advocacy and mostly relegates the role of lawyers along their formal, professional identities in which lawyers litigate, while organizers organize. …

[The second tradition,] [r]ebellious lawyering, generated its theoretical currency from practitioners reflecting on their own attempts at creative community lawyering. Rebellious lawyers seek to achieve social change through direct collaboration with community members at the grassroots level. In other words, whereas movement lawyering characterizes lawyers as representing preexisting activist organizations, rebellious lawyers build such organizations from among their legal services clients. …

A. The Rebellious Approach to Advocacy

Rebellious lawyering conceptualizes social change as a dynamic process of collaborative problem solving between community members and lawyers. According to Gerald López, instead of distancing themselves from actively organizing in the manner of movement lawyers, rebellious lawyering involves "teaching self-help and lay lawyering"--that is, "helping people to see that they can identify, understand, and contribute to solving their own and others' problems." López's articulation of teaching, then, is not so much a process of the teacher depositing foreign knowledge into student, but rather a process where lawyers inspire confidence in community members by validating their existing lay methods of problem solving. López deliberately elevates these lay methods of problem solving--methods he calls *lay lawyering*--as possessing equal if not greater importance than professionalized lawyering because community intuitions and traditions have ensured survival, resistance, and progress for generations despite systematic subordination.

Insofar as lawyers specialize in legal knowledge, they should also promote legal literacy among community members. In this way, community members are equipped with a complete arsenal of both legal and nonlegal tactics they are empowered to strategically deploy in their advocacy. As much as rebellious lawyers teach the law, they learn from community members about lay lawyering. Thus, rebellious lawyering is a collaborative, rather than professionalized, approach to problem solving, whereby each member of the community is valuable precisely because they contribute their own sets of skills and knowledge to the grassroots organization. …

While collaboration has been its centerpiece, rebellious lawyering insists that such an approach be deployed to challenge "institutional and structural power" in order to "alter[] the material conditions in which clients live." In other words, rebellious lawyering is concerned with more than resisting the inherent domination within an attorney-client relationship or even immediate symptoms of structural problems. Instead, López calls for rebellious lawyers to "work with others in ... executing strategies

aimed at responding immediately to particular problems *and*, [underlying systemic causes of] social and political subordination." …

[However,] … while the theory contemplates broad structural change, case studies in rebellious lawyering fail to illustrate how rebellious lawyers wage collaborative battles for structural social change where the underlying structures lie at the state, federal, or international level. [C]ase studies reveal that rebellious lawyering is most effective in achieving structural change at a neighborhood or citywide level. In particular, case studies have failed to demonstrate how rebellious lawyering compels institutional actors at the statewide level or higher to concede to demands. …

IV. REBELLIOUS SOCIAL MOVEMENT LAWYERING

A. Principles of Rebellious Social Movement Lawyering

Two overarching principles guide rebellious social movement lawyers. First, drawing from the movement lawyering tradition, rebellious social movement lawyering conceives of broad-based social movements as the primary mechanism for sustainable structural change beyond the localized level. Absent a critical mass of individuals directly participating in a broad-based social movement transcending a finite geography--as opposed to a localized grassroots campaign--social change will be limited in scale, application, and duration. Embedded in this principle is the fundamental notion that legal mechanisms alone cannot achieve structural change because the law constitutes unequal power relations. Instead, structural change occurs when policymakers, as representatives of class interests hostile to low-income communities of color, are compelled to concede power by the disruptive pressures from the mass mobilization of a social movement.

While a social movement orientation provides an overarching framework of structural social change, standing alone, this principle fails to conceive of how to first build, and then sustain, a social movement, or how to interact with an existing social movement in a meaningful way that will endure beyond formal victories. Here, rebellious lawyering's emphasis on community empowerment provides a useful point of departure for building and maintaining a vibrant social movement.

Thus, the second principle underlying rebellious social movement lawyering is grassroots democracy. When community members directly affected by injustice are empowered to take ownership of their own struggle, they will initiate a campaign that is directly responsive to community needs. In other words, rebellious social movement lawyers will constantly engage in what Mari Matsuda terms "looking to the bottom," for both a material understanding of systemic injustices and a solution through organizing by affected individuals.

In order to take ownership, clients must independently arrive at a conviction in the necessity of community organizing. Thus, rebellious social movement lawyers consciously assume a dialogical approach to consciousness raising. Instead of defining a problem and dictating the necessity of organizing to clients, lawyers facilitate a space where clients come together and collectively discuss their problems. Through the practice of listening to others articulate similar problems to oneself, the individualized nature of legal problems--specifically, the self-blame, shame, and internalized victimization--withers away and in its place, a new baseline understanding of the systemic nature of their problems begins to develop. By visualizing others in the community who are similarly harmed by the problem, clients begin to imagine the possibilities of attacking the problem through collaboration and organizing.

Because organizing campaigns are created by clients responsive to their particularized lived reality,

campaigns will undoubtedly entail a symptomatic character at the local level. So long as they are not substituted for the end goal of structural reform, localized, symptomatic struggles are not in themselves problematic. Localized, symptomatic campaigns increase confidence among new organizers through smaller-scale individualized victories, sharpen participatory democracy and collaboration as ways of life, train strategic thinking and organizing skills, and develop leaders from the grassroots. Rebellious social movement lawyers, however, have an additional responsibility to educate and encourage clients-turned-organizers to develop social movement consciousness.

Where rebellious social movement lawyering departs from rebellious lawyering, then, is in the expanded role of lawyers to train grassroots organizers in acquiring (1) a critical analysis of the distinction between formal and substantive change, and (2) the necessity of a broad-based social movement to challenge the systemic nature of immediate problems. Concretely, to facilitate this analytical mindset, lawyers might develop an accessible curriculum of readings on the history of social movements and movement organizations that highlight the tension between symptomatic change and structural reform, the importance of intersectionality and class solidarity across identity-based lines, and the need to forge broader coalitions in building an inclusive social movement. As lawyers and organizers collectively discuss such readings, lessons of the past are digested, thereby sharpening the group's analysis, resiliency, and ability to manage seemingly new but historically similar situations.

Once such an analytical mindset is developed, lawyers and organizers, collaborating as equal members of the grassroots organizing group, will make strategic determinations based on how a proposed tactic or campaign enhances grassroots democracy, social movement building, or both. There is no specific formula for how these strategic determinations will be made. Instead, members must weigh the merits of either continuing a localized, symptomatic campaign or pursuing a broader movement for systemic change. Relevant factors might include the current size of the grassroots organizing group, the readiness and confidence level of existing members to jump into a more ambitious campaign, the material well-being of members, the vulnerability of a target, and the existence of an independent vibrant social movement. …

… [I]nstead of collaborating with "mobilized clients," rebellious social movement lawyers should directly build power among legal services clients and community members in a grassroots organizing group, and thus contribute as equal participants in that context, the question of deference, strategies, and evaluation is directly resolved through democratic decisionmaking at the level of the grassroots organizing group. In other words, rebellious social movement lawyering contemplates that just as clients are transformed into organizers, lawyers are similarly transformed into organizers who jointly participate in the organizing group. Where the organizing group participates as a member organization of a larger coalition or social movement, a strategy will first be democratically decided within the group, and then proposed for adoption at the coalition level. Similarly, where no movement exists, lawyers should build a grassroots organizing group, which, over the course of waging a localized, symptomatic campaign, transitions into conscious movement building activity.

For rebellious social movement lawyers, then, grassroots democracy is the nonnegotiable linchpin of a social movement's viability. Lawyers must play an active role in creating a culture of participatory democracy at the grassroots level before organizing within an existing social movement. Throughout history, many social movements eventually waned or splintered because of the lack of democratic mechanisms to disseminate leadership and decisionmaking among movement participants. Movement organizations--"mobilized clients"--of the past generally assumed a top-heavy hierarchical structure, which not only disempowered, but in many cases led to, the departure

of their members. Because my theory of rebellious social movement lawyering begins with localized, symptomatic campaigns that instill the value of grassroots democracy, seasoned grassroots organizers of these struggles who later join an existing movement or initiate a new movement will inject and insist on a participatory-democratic culture at the movement level. With greater democratic participation and decisionmaking among movement participants, broad-based social movements will be able to adapt to shifting adversities, attract new leaders from the grassroots, and survive beyond formal change.

B. Processes of Rebellious Social Movement Lawyering

… First, lawyers must *act with deliberation* toward enhancing grassroots democracy and building a social movement. Deliberation entails constant reflection on how their actions advance these goals. Lawyers must take heed of the overall campaign direction. Because localized, symptomatic campaigns can be in tension with larger movement building, in that symptomatic demands might reflect individualized grievances rather than structural change, lawyers must reflect like dialecticians. It is not enough to assess the merits of a chosen strategy based on immediate outcomes; one must also consider how a strategy might reinforce complacency among organizers or invite reactionary backlash by the state. Thus, in reflecting dialectically, lawyers might identify opportunities to demystify the structural nature causing the immediate harm sought to be remedied by the localized, symptomatic campaign. This might simply entail reframing symptomatic demands along structural lines, incorporating additional demands that relate to the underlying structure, or partnering with similarly-situated localized organizing campaigns to forge a broader movement against the system producing the harm. In order to avoid reproducing a hierarchy where lawyers become the sole tactical dialectician, however, lawyers must disseminate dialectical thinking skills among the grassroots organizers. In so doing, the symptomatic-structural and localized-movement assessments over demands and scale will occur collaboratively, rather than unilaterally.

Thus, the second approach lawyers assume is the *democratization of skills and knowledge* within the group. The goal is to create a horizontal group where each member contributes their talents, ideas, and leadership equally. At the outset, because skills and knowledge are unequally distributed, education should be prioritized. This education must go both ways. That is, lawyers must simultaneously "[l]earn and [t]each." Lawyers must learn preexisting strategies of "lay lawyering" and understand the intricacies of an unjust system through the eyes of grassroots organizers. In turn, lawyers teach their skills and knowledge, including raising movement consciousness. Moreover, lawyers should disseminate legal knowledge insofar as it explicates existing rights under the law and enables the group to make strategic decisions involving legal advocacy. By knowing the law, the group might decide to structure a campaign expressly drawing from the notion of legal rights. Because rights discourse inherently cabins the vision of freedom and tends to reify unequal power relations, however, the group must think dialectically in making a cost-benefit determination of pursuing such a narrowly defined campaign, such that legal recourse does not in itself become the end. Ultimately, legal knowledge will allow the group to fully weigh a legal strategy alongside other tactical options. While the familiar concerns exist with pursuing litigation as the sole means for change, when understood as just one instrument in the toolkit, litigation can enhance the goal of movement building.

Naturally then, the third approach is reframing *lawyering as one tool in a multipronged strategy* to structural change. If the group decides to litigate, the role litigation is to play in relation to the symptomatic campaign and the overall strategy of movement building must be deliberated and

clearly established. Litigation solely to address a symptom should be used sparingly as it is extremely costly, produces dependency on lawyers, and discourages grassroots collective action that might otherwise achieve similar individualized victories. In contrast to smaller claims, major impact litigation might serve as a bridge between the localized campaign and a broader social movement. Viewed this way, because major litigation tends to receive increased publicity relative to localized grassroots organizing, it might connect the group with other similarly situated communities beyond their immediate network, thus becoming a rallying cry that leads to greater participation across geographical space. Lawyers, however, should not approach major litigation as the exclusive movement strategy, and instead encourage complementary pressure tactics and structural demands that operate outside the law. Far from rejecting the greater access and privilege afforded to them by their profession, rebellious social movement lawyers should seek to contribute their legal training synergistically with the tactics and skills of the organizing group.

Fourth, lawyers must be *flexible* with their strategies by adapting to constantly changing conditions. Every move invites a countermove. Often, the stagnant and predictable strategy proves to be fatal. If it makes no sense to continue a chosen tactic, the group should abandon it. Changing strategies deepens the creative and analytical capacity of grassroots organizers, while exerting new pressures against the system. Constant group reflection is key for assessing the current efficacy and continued potential of chosen strategies.

Finally, lawyers must *defer to group democracy*. A lawyer is merely one member of a collaborative organizing group. Though lawyers should actively contribute their insights, they must ultimately respect democratic decisions, even if it goes against their wisdom. The value of democracy is paramount both in breaking the lawyer's propensity for authority and in developing the leadership of others. Localized, symptomatic campaigns are training grounds for organizers. To the extent that strategies result in missteps, lawyers must understand the greater value in organizers developing ownership, mutual trust, and ability to learn through collectively reflecting on their ineffective strategies and subsequently developing alternatives. …[O]rganizers who experience and believe in grassroots democracy at a localized level will inject that principle at the movement level, thereby enhancing the longevity and vibrancy of the social movement on the whole.

V. RECONCEIVING ADVOCACY AGAINST TRAFFIC COURT DEBT IN CALIFORNIA: A REBELLIOUS SOCIAL MOVEMENT LAWYERING APPROACH

A. Building a Grassroots Organizing Group

Understanding a social movement infused with grassroots democracy to be a necessary predicate for reforming the system of traffic court debt, rebellious social movement lawyers will prioritize the development of the grassroots organizing group above all other tasks. Rebellious social movement lawyers will engage in direct legal services insofar as doing so introduces them to a wide base of potential organizers among their clients. Every courtroom outing should double as an opportunity to converse with the hundreds of unrepresented defendants awaiting arraignment or trial about their situation and to invite them to share their stories at community meetings open to the public.

In building a grassroots organizing group, two types of meetings will be necessary. First, regular public meetings serve as a mechanism to establish community roots and to raise systemic consciousness within the community at large. Lawyers will facilitate community meetings dialogically. Knowledge will be gained from individual participants sharing their stories, listening to others, and reflecting on the shared harms caused by the common underlying system of traffic court debt. In developing a systemic analysis, lawyers might carefully tie together the common threads

of individual stories with an explanation of structural causation. … In the end, though, in order to promote the voices of community members, active moderation of discussion at these public meetings must be approached sparingly.

Second, regular internal organizing meetings allow the most interested and committed clients and public meeting participants to train as grassroots organizers and leaders. A combination of practical organizing and critical thinking skills will be developed through skills-based trainings, group discussions of social movement tailored readings, and participation in localized collective action. As members of these internal meetings grow in skills, confidence, and numbers, the authority of lawyers will diminish as power becomes equalized. Thereafter, meetings will constitute the basis of the grassroots organizing group, in which goals and strategies will be decided based on a collective symptomatic-structural, localized-movement assessment.

In building a localized campaign, the goals will shift along a spectrum of smaller-scale, immediately achievable demands that develop confidence and longer-term, structural demands that are aspirational. On the one hand, specific campaign demands should be reflexive reactions to the material realities of community members. Reflexive demands should neither be limited to procedural defects nor bound by the narrow confines of a cognizable legal claim.

Responsiveness to immediate needs is merely one consideration in demand formulation. On the other hand, lawyers should encourage demands that are not limited to immediate needs or harms, but also express positive visions of transformative and structural change. …Moreover, structural demands increase the possibility of coalescing a social movement with other organizing groups identifying with some aspect of the campaign.

Because decisions over strategy will be made and executed collaboratively, professional strategies might be creatively reconceived such that grassroots organizers can implement these professional strategies themselves. Consider a localized campaign that reimagines direct representation. The traffic court system's smooth functioning is predicated on the rapid mechanization of arraignments among defendants ignorant of their right to trial. In my observation, unrepresented traffic court defendants' arraignments lasted an average of less than a minute. If each defendant were represented, first at arraignment and then at trial, the resulting slowdown would quite literally "crash the system." Should a systemic crash occur, the disruption in itself might compel policymakers to act, or, at the minimum, incite public scrutiny and call for structural change. While a legion of defense attorneys could accomplish this task, an alternative strategy undertaken by a grassroots organizing group is to empower unrepresented defendants to assert their own rights *pro se*. Organizers and lawyers together would mobilize in and around traffic courts in the county to raise awareness of the right to trial among the thousands of defendants lining up for arraignment. If a substantial number of *pro se* defendants collectively asserted their right to a trial, courtroom efficiency would be disrupted, causing the system to crash.

Moreover, grassroots organizers might directly participate in authoring policy reports. Lawyers should welcome this idea, as it upsets the hierarchy reinforced by a separation between professional and unprofessional tasks. Doing so might change the tenor of the reports. For example, instead of professionals framing traffic court debt as an issue of poverty, a grassroots-driven policy report might, from the outset, frame it as an issue of race and poverty. …

Driven by the principles of democracy and movement building, lawyers should rarely use professional strategies that take the center stage in a campaign. One such rarity might occur if the group decides that the benefits of filing a complaint to remedy an immediate harm outweigh the costs of

material resources and minimal grassroots participation. Given that section 40508 of the California Vehicle Code already provides a statutory hook to require courts to conduct a willfulness determination hearing before notifying the DMV for a license suspension, the benefits of injunctive relief might outweigh the costs of minimal legal research and filing. Beyond providing a tangible material benefit to a narrow class of defendants, such a victory might also allow organizers to move beyond the symptom of license suspensions and build a movement that directly focuses on the statewide system of traffic court debt.

Regardless of other strategies deployed in a localized campaign, the central strategy undertaken by the grassroots organizing group will be collective action. Through collective action, community members develop a real understanding of camaraderie, confidence in their own power, and conviction in organizing for change. Moreover, during moments of spontaneity or excitement, many often discover previously suppressed skills and capabilities, such as public speaking, leading chants, and acts of civil disobedience. The form of action will constantly shift, responding to contextual developments that occur in real-time. Tactics should escalate in disruptiveness when the target continues its noncompliance.

Where tactics are minimally disruptive, lawyers should actively participate as organizers. This includes the day-to-day collective outreach activities of canvassing neighborhoods and conversing with defendants around the courthouse pursuant to a "crash the system" strategy. Where tactics are deliberately disruptive, lawyers might best function as legal observers. In the capacity of a professional, lawyers should further provide direct representation as necessary when organizers are arrested.

The foregoing discussion on goals and strategies is focused on the role of lawyers in developing grassroots democracy through localized campaigns. Given the statewide nature of traffic court debt, a localized campaign will be insufficient to compel legislative reform of the system. Yet, as emphasized in Part IV, lawyers must not substitute the top-down construction of structural demands for the process of building successful localized, symptomatic campaigns, which impart the values of democracy and collective action. The key is to supplement the campaign with concrete education, through a movement-oriented curriculum, which raises the group's consciousness both (1) from localized advocacy to social movement building, and (2) from limited, small-scale reforms to durable, structural change.

B. Advancing the Struggle from Local to Movement

Just as strategies and campaign demands are fluid, the leap from localized to movement-level advocacy need not occur in one formalized moment. … Because traffic court debt is a statewide system of harm, simply refocusing the demands of a localized campaign to address structural dimensions will be insufficient to produce change. Mass mobilization beyond the level of Los Angeles County is necessary.

Where no independent social movement exists, coalition building with organizations of similar politics, methodologies, and demographic makeup is crucial to increase the scale of advocacy necessary to compel the state to take notice. As such, organizers might reconceive their day-to-day outreach expansively, viewing community members not just as isolated individuals, but as connected to broader networks including other organizing groups. Where a community member has existing ties to another organizing group, organizers might contemplate outreach in terms of recruiting that other group to a movement against traffic court debt. Even if other organizations are structured hierarchically, veteran organizers from the localized, symptomatic campaign will insist that the coalition be grounded in democracy and meaningful participation among the community

constituents who comprise the other organizations. Unlike a coalition of professionals convening together for litigation, a movement-oriented coalition is formed with the express purpose of generating structural change through mass mobilization.

While the grassroots organizing group possesses greater control in timing their transition to movement-level advocacy where no independent movement exists, the prominence of BLM as a vibrant social movement complicates the movement building role of lawyers in new ways. As a movement, BLM is both a symbolic rallying cry and a physical entity comprised of a coalition of movement organizations. This duality poses a unique opportunity for a localized campaign to, from the outset, embody structural dimensions and thereby increase the potential of mass mobilization against traffic court debt beyond immediate geographic locality.

Against a colorblind ideology that has driven American jurisprudence since the 1970s, BLM has opened a space in mainstream discourse where race has once again become salient. Because of BLM's symbolic power as an overarching beacon against racial injustice, a localized campaign framed in race-conscious terms might be inseparable in the public eye from the larger movement. Instead of distancing themselves from BLM, organizers should be prepared to articulate these connections on both a personal and conceptual level. On a personal level, Black and Brown organizers should freely express their feelings of being simultaneously subjected to multiple forms of racialized violence. Conceptually, symptomatic issues might need to be framed as structural to show how multiple systems interact to produce racial inequality. …[T]raffic court debt, … like other systems identified by BLM, disproportionately enacts its violence on Black and Brown communities. Simply put, challenging traffic court debt simultaneously with police violence is imperative because in spite of both systems, "Black lives matter." By expressly drawing connections to BLM, the demand to end traffic court debt might very well ignite support and mobilization among movement participants.

…BLM is constituted by the Movement for Black Lives (M4BL), a coalition comprised of over fifty Black-led organizations. Because collective action has largely been decentralized, the coalition's primary work instead has been the construction of a platform of movement demands, known as the "Vision 4 Black Lives." The grassroots organizing group might propose the incorporation of a demand to end traffic court debt, which would enhance the current platform demand to end money bail. The group, however, should approach incorporation into M4BL's platform as yet another means for outreach, and not in itself a strategy to effect change. That is, due to the decentralized nature of BLM actions, neither incorporation of a demand nor participation as a member organization within the M4BL alone will generate the mass mobilization needed to compel an end to traffic court debt. …

Unlike the spontaneous BLM actions, which, thus far, have erupted nationwide in reaction to police violence, a successful challenge against traffic court debt will require a much more coordinated, mass mobilization effort in California. While invoking BLM's symbolic power might expedite the transition to structural demands and increase the possibilities of movement building with other BLM supporters or M4BL organizations, the task of movement building will still largely remain in the hands of the grassroots organizing group. Ultimately, the role of rebellious social movement lawyers remains vital, first in building a capable grassroots democratic organization, and second, in advancing the struggle from the local to a movement.

1.3 Factors for Strategic Consideration

Updated 2013 by Jeffrey S. Gutman (http://federalpracticemanual.org/acknowledgements#gutman)

As your office considers the possibility of litigation, it will need to consider who the client is, the client's goals, the capacities of the organization, available resources and time considerations, as well as who can provide the relief that the client seeks.

1.3.A. Who Is Your Client?

Part of the lawyer's job is deciding who will be the client. A person who walks into your office with a grievance will not necessarily become your client in a lawsuit. In individual matters, questions may arise as to who the client is: The parent or the child? The leaseholder or the family member barred from the property? The guardian or the ward? These issues and potential conflicts must be addressed at the outset through careful legal, factual, and, occasionally, ethics research.

Lawyers generally, and legal aid lawyers in particular, need to think carefully about not only which issues are suitable for litigation, but also which clients will best present those issues as parties to litigation. The lawyer has some flexibility in deciding who the client will be. The lawyer may seek clients and not simply wait for individuals to ask for help. For example, when the lawyer knows that a wrong is about to occur or has been occurring, the lawyer may seek out people who want to challenge it.[1] This may take the form of public education about the issue or may involve more actively contacting potential clients through networking with organizations and client groups.[2]

Before accepting someone as a client in potential litigation, issues of standing, ripeness and mootness, discussed in Chapter 3 (http://federalpracticemanual.org/node/18) of this MANUAL, must be considered. Minimizing standing and mootness problems may justify retaining multiple plaintiffs. Yet, representing more than one person may create conflicts, both ethical and practical. Depending on the nature of these issues, such hurdles may counsel in favor of a non-litigation approach.

In many situations, the client may be a community organization. Working with a community organization, especially in the context of tackling systemic issues, has many advantages. The community group may have its own resources to contribute to the advocacy strategy. The group may lend financial and volunteer support, credibility, networking, and potential plaintiffs in any litigation. Most importantly, the group may understand the importance of the issues at hand and the social forces that have created the problem and can lead to its solution. The involvement of a community group can also ensure that attorneys advance the litigation in accordance with community needs.

Working with organizational clients involves special considerations.[3] Most important, the attorney and the group must agree on who speaks for the group. Counsel should also understand whether the group speaks for the community or constituency at large or only for its particular members or leadership. The attorney must have open communications with the group and its leadership so that there is an understanding and agreement on the respective roles of attorney and client. The institutional interests of the organization may diverge from the desires of individual members of the group. The retainer agreement must incorporate all elements of the attorney-client relationship, and should spell out the mechanism by which the decisions of the group will be made and conveyed. While the retainer may specify the name of an individual member of the group, the retainer should state who speaks for the group in case the named individual leaves the group. The attorney and group must agree on the advocacy approach and on determining whether the objectives have been achieved, whether through litigation, settlement, or other means.

The retainer agreement is the blueprint for the relationship with the client. In addition to including any language mandated by the state bar or legal services program, the retainer should anticipate the potential attorney-client relationship problems that can arise during litigation. The respective responsibilities of the attorney and client should be discussed. The grounds for termination of the attorney-client relationship and how such termination will be handled, costs and fees, including attorney's fees, and settlement offers should be addressed. A retainer should also warn a client that he or she will need to report any monetary awards received as a result of litigation and any attorneys' fees awards as income for federal tax purposes. Some attorneys include language explaining the typical time frame for litigation.

In bringing a class action, retainer agreements and conversations with the class spokespersons must make clear that the lawyers' responsibilities are to all class members, not just the named plaintiffs. For example, in challenging mass evictions and proposed demolition of housing, be clear about the extent to which counsel is representing people who want to stay, people who left but will not return, and people who are in need of the housing and do not want the property demolished. If potential conflicts are foreseen, or if those conflicts already exist, the attorney may choose to represent one of the subgroups and recruit private or other nonprofit counsel to represent other subgroups. A conflict of interest with the local legal services office is often one of the criteria that the local office uses for placing a case with *pro bono* counsel.

The lawyer should not simply use the office's standard retainer agreement without ensuring it meets the needs in the contemplated case. While such agreements can serve as a model, they may need modification. These agreements must be explained carefully to the client(s) and a memorandum of that conversation should be drafted and kept in the case file.

1.3.B. What Are Your Client's Goals?

The answer to this question will shape the course of your advocacy strategy as certain approaches will be better than others in achieving clearly identified objectives. In many cases, a client will need to define these objectives in terms of solving the immediate or individual problem, or in terms of solving deeper systemic problems that have manifested themselves in what has happened to the particular client. Effective interviewing and counseling is necessary in order to define problems and objectives. The lawyer must neither defer reflexively to the client's definition nor unilaterally impose her own. Failure to accurately and collaboratively define client needs and objectives can result in misdirected advocacy strategies, ethical headaches and client dissatisfaction. For these reasons, initial client meetings must be carefully planned and considered.

The advocate and the client need to think initially not in legal terms but, instead, consider in a broader way the range of possible solutions and strategies for the problem the client has presented and the implications of each approach. This avoids prematurely selecting litigation as the strategy and inappropriately allowing formulaic ways of requesting relief to limit unnecessarily the goals of the advocacy. Focus first on the desirable outcome and not merely what is believed is attainable. Litigation may not achieve all that is desirable. Other approaches may achieve much of what is sought more quickly and less expensively, potentially with less risk to the client or others in similar situations, or with less risk of creating a negative precedent or provoking negative legislative or administrative responses that could undermine the client's goals. If such alternatives are not feasible or successful, then more narrowly focus on what is legally attainable after completing the legal research and fact investigation.

In some cases a client will have a clear view of what strategy to employ, and in those situations the lawyer's job is to do the technical, professional analysis and work necessary to competently pursue the matter in accordance with the client's wishes. In other situations, the client has limited expectations or understanding of the possibilities and the lawyer's job is to counsel the client regarding options, implications and risks. Part of the advocate's job is to make sure that the client has a full picture of the kinds and extent of relief available as well as the potential approaches and obstacles in achieving them. Do not begin any legal work on behalf of a client until you have a clearly defined understanding of the client's concerns and objectives, a full discussion of the range of potential solutions and their pros and cons, and a written agreement on how to proceed.

What a client wants must be assessed with a measure of sympathetic skepticism. The advocacy strategy and its potential for achieving the client's goals will turn on the client's situation and whether the client's desires are, or may reasonably be, supported in existing law or policy or rational and logical extensions of such law and policy. Thus, as the advocate begins work with a client, it is wise to develop a provisional legal or policy theory (discussed below), which will help define the bounds of the possible and influence your advocacy strategy. It is also important to consider whether particular approaches may have unintended consequences for the client. For example, depending on the circumstances, a client who must rely, or anticipates needing to rely, on needs-based public benefits for subsistence, may ultimately be harmed by a financial recovery. In some cases, program beneficiaries may get along fine if they are ineligible for benefits for a short time, but the loss of some types of benefits may mean a long-term loss that could jeopardize the client's well-being or stability. Individuals receiving needs-based public benefits generally have an obligation to timely report pending litigation and any recovery to the administrator of the benefit program, and, in some cases, may need to assign some or all of their interests in a financial recovery. In addition, advise your client on the impact of a potential financial or attorneys' fees award. Because the Supreme Court has ruled that settlement awards constitute income to the client, attorneys' fees are also considered income and may be taxable to the client.[4] In these cases, the client must be notified that income and any fees generated are taxable income for federal income tax purposes and must be reported. Every situation has to be individually evaluated and the client made aware of potential consequences and strategies to mitigate loss of needed assistance so that the client can make a fully informed decision on how to proceed. This may counsel against litigation, or it may inform the remedies sought in the case.

CHAPTER 4. RULES OF PROFESSIONAL CONDUCT
PREAMBLE: A LAWYER'S RESPONSIBILITIES

A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.

As a representative of clients, a lawyer performs various functions. As an adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.

In addition to these representational functions, a lawyer may serve as a third-party neutral, a nonrepresentational role helping the parties to resolve a dispute or other matter. Some of these rules apply directly to lawyers who are or have served as third-party neutrals. See, e.g., rules 4-1.12 and 4-2.4. In addition, there are rules that apply to lawyers who are not active in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity. For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation. See rule 4-8.4.

In all professional functions a lawyer should be competent, prompt, and diligent. A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or by law.

A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers, and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public's understanding of and confidence in the rule of law and the justice system, because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

Many of the lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct and in substantive and procedural law. A lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.

A lawyer's responsibilities as a representative of clients, an officer of the legal system, and a public citizen are usually harmonious. Zealous advocacy is not inconsistent with justice. Moreover, unless violations of law or injury to another or another's property is involved, preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and heed their legal obligations, when they know their communications will be private.

In the practice of law, conflicting responsibilities are often encountered. Difficult ethical problems may arise from a conflict between a lawyer's responsibility to a client and the lawyer's own sense of personal honor, including obligations to society and the legal profession. The Rules of Professional Conduct often prescribe terms for resolving these conflicts. Within the framework of these rules, however, many difficult issues of professional discretion can arise. These issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the rules. These principles include the lawyer's obligation to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous, and civil attitude toward all persons involved in the legal system.

Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. Within that context, the legal profession has been granted powers of self-government. Self-regulation helps maintain the legal profession's independence from undue government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice. Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility.

Thus, every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest that it serves.

Scope:

The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the rules are imperatives, cast in the terms of "must," "must not," or "may not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts

within the bounds of that discretion. Other rules define the nature of relationships between the lawyer and others. The rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role.

The comment accompanying each rule explains and illustrates the meaning and purpose of the rule. The comments are intended only as guides to interpretation, whereas the text of each rule is authoritative. Thus, comments, even when they use the term "'should," do not add obligations to the rules but merely provide guidance for practicing in compliance with the rules.

The rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers, and substantive and procedural law in general. Compliance with the rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion, and finally, when necessary, upon enforcement through disciplinary proceedings. The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law. The comments are sometimes used to alert lawyers to their responsibilities under other law.

Furthermore, for purposes of determining the lawyer's authority and responsibility, principles of substantive law external to these rules determine whether a client-lawyer relationship exists. Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, for example confidentiality under rule 4-1.6, which attach when the lawyer agrees to consider whether a client-lawyer relationship will be established. See rule 4-1.18. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. The rules presuppose that disciplinary assessment of a lawyer's conduct will be made on the basis of the facts and circumstances as they existed at the time of the conduct in question in recognition of the fact that a lawyer often has to act upon uncertain or incomplete evidence of the situation. Moreover, the rules presuppose that whether discipline should be imposed for a violation, and the severity of a sanction, depend on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption that a legal duty has been breached. In addition, violation of a rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing

to seek enforcement of the rule. Accordingly, nothing in the rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating a substantive legal duty. Nevertheless, since the rules do establish standards of conduct by lawyers, a lawyer's violation of a rule may be evidence of a breach of the applicable standard of conduct.

Terminology:

"Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.

"Consult" or "consultation" denotes communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See "informed consent" below. If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in the legal department of a corporation or other organization.

"Fraud" or "fraudulent" denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information.

"Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

"Lawyer" denotes a person who is a member of The Florida Bar or otherwise authorized to practice in the state of Florida.

"Partner" denotes a member of a partnership and a shareholder in a law firm organized as a professional corporation, or a member of an association authorized to practice law.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

"Reasonably should know" when used in reference to a lawyer denotes that a lawyer of reasonable prudence and competence would ascertain the matter in question.

"Screened" denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these rules or other law.

"Substantial" when used in reference to degree or extent denotes a material matter of clear and weighty importance.

"Tribunal" denotes a court, an arbitrator in a binding arbitration proceeding, or a legislative body, administrative agency, or other body acting in an adjudicative capacity. A legislative body, administrative agency, or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

"Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

RULE 4-1.2 OBJECTIVES AND SCOPE OF REPRESENTATION

(a) Lawyer to Abide by Client's Decisions. Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.

(b) No Endorsement of Client's Views or Activities. A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

(c) Limitation of Objectives and Scope of Representation. If not prohibited by law or rule, a lawyer and client may agree to limit the objectives or scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent in writing. If the attorney and client agree to limit the scope of the representation, the lawyer shall advise the client regarding applicability of the rule prohibiting communication with a represented person.

(d) Criminal or Fraudulent Conduct. A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

Comment

Allocation of authority between client and lawyer

Subdivision (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Law defining the lawyer's scope of authority in litigation varies among jurisdictions. The decisions specified in subdivision (a), such as whether to settle a civil matter, must also be made by the client. See rule 4-1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by rule 4-1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. The lawyer should consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See rule 4-1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See rule 4-1.16(a)(3).

At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to rule 4-1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

In a case in which the client appears to be suffering mental disability, the lawyer's duty to abide by the client's decisions is to be guided by reference to rule 4-1.14.

Independence from client's views or activities

Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token representing a client does not constitute approval of the client's views or activities. ...

father and older brother. As the Supreme Court has acknowledged, there is "abundant evidence that [people with intellectual disabilities] often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders." Atkins, 536 U.S. at 318, 122 S.Ct. 2242. In context, such a diagnosis would have been particularly powerful mitigation evidence.

By failing to identify and present a well-documented scientific phenomenon that had well made its way into the legal landscape of capital defense, and by neglecting to locate and present that vital evidence, Postelle's trial counsel presented a mitigation case that erroneously depicted him as more capable, more cunning, and more culpable than he was. Ignorant of the Flynn Effect and presented with artificially high IQ scores, the jury sentenced Postelle to death. This profound failure by Postelle's counsel erroneously deprived Postelle of his constitutional right to counsel in violation of Strickland.

FORT LAUDERDALE FOOD NOT BOMBS, Nathan Pim, Jillian Pim, Haylee Becker, William Toole, Plaintiffs-Appellants,

v.

CITY OF FORT LAUDERDALE, Defendant-Appellee.

No. 16-16808

United States Court of Appeals, Eleventh Circuit.

(August 22, 2018)

Background: Nonprofit organization filed § 1983 action against city, claiming ordinance and related park rule violated organization's First Amendment rights of free speech and free association and were unconstitutionally vague in restricting organization's weekly events sharing vegetarian or vegan food at no cost with passersby, including homeless persons, who gathered to join in meal at public park, as act not of charity but of political solidarity meant to convey organization's message that society could end hunger and poverty if collective resources were redirected from military and war and that food was human right, not privilege, which society had responsibility to provide for all. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ, William J. Zloch, J., 2016 WL 5942528, granted city summary judgment. Organization appealed.

Holding: The Court of Appeals, Jordan, Circuit Judge, held that organization's outdoor food sharing was expressive conduct protected by First Amendment.

Reversed and remanded.

1. Federal Courts ⚿3604(4)

Court of Appeals reviews the district court's grant of summary judgment de novo.

2. Federal Courts ⚿3573

Court of Appeals applies the plenary standard of de novo review to questions of constitutional law.

3. Federal Courts ⚿3675

In reviewing the parties' cross-motions for summary judgment, Court of Appeals draws all inferences and reviews all evidence in the light most favorable to the non-moving party.

4. Federal Courts ⚿3621

There is an additional twist to the de novo standards of review in the First Amendment context; because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace, Court of Appeals must thus decide for

itself whether a given course of conduct falls on the near or far side of the line of constitutional protection. U.S. Const. Amend. 1.

5. Constitutional Law ⚿1490

Constitutional protection for freedom of speech does not end at the spoken or written word. U.S. Const. Amend. 1.

6. Constitutional Law ⚿1490, 1497

The First Amendment guarantees all people the right to engage not only in pure speech, but expressive conduct as well. U.S. Const. Amend. 1.

7. Constitutional Law ⚿1497, 1655

Under the First Amendment, a sharp line between words and expressive acts cannot be justified; constitutional protection is afforded to speech, and acts that qualify as signs with expressive meaning qualify as "speech" within the meaning of the Constitution. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law ⚿1497

In determining whether conduct is expressive, such that First Amendment protections apply, Court of Appeals asks whether the reasonable person would interpret the conduct as some sort of message, not whether an observer would necessarily infer a specific message. U.S. Const. Amend. 1.

9. Constitutional Law ⚿1497

In answering the question whether a reasonable person would interpret conduct as some sort of message, as required to qualify as expressive conduct protected by the First Amendment, the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol. U.S. Const. Amend. 1.

10. Constitutional Law ⚿1497

The circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive to warrant First Amendment protection, and similar activity that is not. U.S. Const. Amend. 1.

11. Constitutional Law ⚿1762, 1850

Context separates the physical activity of walking from the First Amendment protected expressive conduct associated with a picket line or a parade. U.S. Const. Amend. 1.

12. Constitutional Law ⚿2183, 2201

Context divides simply being in a state of nudity, which is not an inherently expressive condition, from the type of nude dancing that is to some degree constitutionally protected expressive conduct under the First Amendment. U.S. Const. Amend. 1.

13. Constitutional Law ⚿1761

Municipal Corporations ⚿721(1)

Nonprofit organization's outdoor food sharing was "expressive conduct" protected by First Amendment, as surrounding circumstances would lead reasonable observer to view organization's weekly food-sharing in traditional forum of public park at no cost with passersby, including homeless persons, not as mere picnic in park, but as conveying some sort of message, where organization set up tables and banners and distributed literature at events open to all to share meal at same time, treatment of city's homeless population was issue of community concern, and organization used events to convey message that society could end hunger and poverty if collective resources were redirected from military and war and that food was human right, not privilege, which society

had obligation to provide for all. U.S. Const. Amend. 1.

See publication Words and Phrases for other judicial constructions and definitions.

14. Constitutional Law ⚿1497

Although the choice of location alone is not dispositive of whether conduct is sufficiently expressive to qualify for First Amendment protection, location is nevertheless an important factor in the factual context and environment that must be considered. U.S. Const. Amend. 1.

15. Constitutional Law ⚿1497

The history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it, as required to constitute expressive conduct protected by the First Amendment. U.S. Const. Amend. 1.

16. Constitutional Law ⚿1497

Although the fact that explanatory speech is necessary is strong evidence that the challenged conduct is not so inherently expressive that it warrants protection under the First Amendment, the critical question is whether the explanatory speech is necessary for the reasonable observer to perceive a message from the conduct. U.S. Const. Amend. 1.

Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ

Kirsten Noelle Anderson, Jodi Siegel, Southern Legal Counsel, Inc., 1229 NW 12th Ave., Gainesville, FL 32601-4113, Andrea Hope Costello, Florida Legal Services, 14260 W Newberry Rd. #412, Newberry, FL 32669, Mara Shlackman, Law Offices of Mara Shlackman, PL, 757 SE 17th St. PMB 309, Ft. Lauderdale, FL 33316-2960 for Plaintiffs-Appellants.

Alain E. Boileau, Alain E. Boileau, PA 100 N Andrews Ave., Fort Lauderdale, FL 33301, for Defendant-Appellee.

Tracy Tatnall Segal, Akerman, LLP, 777 S Flagler Dr. Ste. 1100W, West Palm Beach, FL 33401-6147, for Amicus Curiae West Palm Beach Food Not Bombs.

Victoria Mesa-Estrada, Florida Legal Services, 14260 W Newberry Rd. #412, Newberry, FL 32669, for Amicus Curiae Marc-Tizoc Gonzalea, Florida Legal Services, Inc., Latina and Latino Critical Legal Theory, Inc., Society Of American Law Teachers, Inc.

Before TJOFLAT and JORDAN, Circuit Judges, and STEELE,* District Judge.

JORDAN, Circuit Judge:

In understanding what is going on around us, context matters. Food shared with company differs greatly from a meal eaten alone. Unlike a solitary supper, a feast requires the host to entertain and the guests to interact. Lady Macbeth knew this, and chided her husband for "not giv[ing] the cheer" at the banquet depicted in Shakespeare's play. As she explained: "To feed were best at home; From thence, the sauce to meat is ceremony. Meeting bare without it." William Shakespeare, The Tragedy of Macbeth, Act III, scene 4 (1606).

Fort Lauderdale Food Not Bombs, a non-profit organization, hosts weekly events at a public park in Fort Lauderdale, sharing food at no cost with those who gather to join in the meal. FLFNB's members set up a table and banner with

* Honorable John E. Steele, United States District Judge for the Middle District of Florida, sitting by designation.

the organization's name and emblem in the park and invite passersby to join them in sitting down and enjoying vegetarian or vegan food. When the City of Fort Lauderdale enacted an ordinance in 2014 that restricted this food sharing, FLFNB and some of its members (whom we refer to collectively as FLFNB) filed suit under 42 U.S.C. § 1983. They alleged that the ordinance and a related park rule violated their First Amendment rights of free speech and free association and were unconstitutionally vague.

The district court granted summary judgment in favor of the City. It held that FLFNB's outdoor food sharing was not expressive conduct protected by the First Amendment and that the ordinance and park rule were not vague. *See Ft. Lauderdale Food Not Bombs v. City of Ft. Lauderdale*, 2016 WL 5942528 (S.D. Fla. Oct. 3, 2016) (final judgment). FLFNB appeals those rulings.

Resolving the issue left undecided in *First Vagabonds Church of God v. City of Orlando, Florida*, 638 F.3d 756, 760 (11th Cir. 2011) (en banc), we hold that on this record FLFNB's outdoor food sharing is expressive conduct protected by the First Amendment. We therefore reverse the district court's grant of summary judgment in favor of the City. On remand, the district court will need to determine whether the ordinance and park rule violate the First Amendment and whether they are unconstitutionally vague.

I

FLFNB, which is affiliated with the international organization Food Not Bombs, engages in peaceful political direct action. It conducts weekly food sharing events at Stranahan Park, located in downtown Fort Lauderdale. Stranahan Park, an undisputed public forum, is known in the community as a location where the homeless tend to congregate and, according to FLFNB, "has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness." D.E. 41 at 8.

At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message.

FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members (or, as the City describes them, volunteers) eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. *See* D.E. 40-23. FLFNB's set-up includes a banner with the name "Food Not Bombs" and the organization's logo—a fist holding a carrot—and individuals associated with the organization pass out literature during the event. *See id.*

On October 22, 2014, the City enacted Ordinance C-14-42, which amended the City's existing Uniform Land Development Regulations. Under the Ordinance, "social services" are

> [a]ny service[s] provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment of assistance; and day shelter or any combination of same.

D.E. 38-1, § 1.B.6. The Ordinance regulates "social service facilities," which include an "outdoor food distribution center." D.E. 38-1, § 1.B.8. An "outdoor food distribution center" is defined as

> [a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein. A food distribution center shall not be considered a restaurant.

D.E. 38-1, § 1.B.4.

The Ordinance imposes restrictions on hours of operation and contains requirements regarding food handling and safety. Depending on the specific zoning district, a social service facility may be permitted, not permitted, or require a conditional use permit. *See* D.E. 38-1 at 9. Social service facilities operating in a permitted use zone are still subject to review by the City's development review committee. *See id.*

Stranahan Park is zoned as a "Regional Activity Center—City Center," D.E. 38-34, and requires a conditional use permit. *See* D.E. 38-1 at 9. To receive a conditional use permit, applicants must demonstrate that their social service facilities will meet a list of requirements set out in § 1.E of the Ordinance.

The City's "Parks and Recreation Rules and Regulations" also regulate social services. Under Park Rule 2.2,

> [p]arks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

D.E. 38-35.

The City has voluntarily not enforced Ordinance C-14-42 and Park Rule 2.2 since February of 2015.

II

FLFNB contends that the Ordinance and Park Rule 2.2 violate its rights to free speech and free association guaranteed by the First Amendment, which is made applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment. *See* D.E. 1 at 21; *Gitlow v. New York*, 268 U.S. 652, 666, 45 S.Ct. 625, 69 L.Ed. 1138 (1925). It also argues that the ordinance and regulation are unconstitutionally vague, both facially and as applied. *See* D.E. 1 at 27.

The City defends the district court's summary judgment ruling. It asserts that the food sharing events at Stranahan Park are not expressive conduct because the act of feeding is not inherently communicative of FLFNB's "intended, unique, and particularized message." *See* City's Br. at 35. Understanding the events, according to the City, depends on explanatory speech, such as the signs and banners, indicating that FLFNB's conduct is not inherently expressive.

[1–3] We review the district court's grant of summary judgment *de novo*. *See Rodriguez v. City of Doral*, 863 F.3d 1343, 1349 (11th Cir. 2017). The same plenary standard applies to questions of constitutional law. *See Graham v. R.J. Reynolds Tobacco Co.*, 857 F.3d 1169, 1181 (11th Cir. 2017) (en banc). In reviewing the parties' cross-motions for summary judgment, we "draw all inferences and review all evidence in the light most favorable to the non-moving party." *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316,

1318 (11th Cir. 2012) (quotation marks omitted and alteration adopted).

[4] There is an additional twist to these standards of review in the First Amendment context. Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace ... we must thus decide for ourselves whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557, 567, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995). *See also Flanigan's Enters., Inc. v. Fulton Cnty., Ga.*, 596 F.3d 1265, 1276 (11th Cir. 2010) (applying First Amendment independent review standard in a summary judgment posture).

III

[5–7] Constitutional protection for freedom of speech "does not end at the spoken or written word." *Texas v. Johnson*, 491 U.S. 397, 404, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989). The First Amendment guarantees "all people [ ] the right to engage not only in 'pure speech,' but 'expressive conduct' as well." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1270 (11th Cir. 2004) (citing *United States v. O'Brien*, 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)). As one First Amendment scholar has explained, "[a] sharp line between 'words' and 'expressive acts' cannot ... be justified in Madisonian terms. The constitutional protection is afforded to 'speech,' and acts that qualify as signs with expressive meaning qualify as speech within the meaning of the Constitution." Cass R. Sunstein, Democracy and the Problem of Free Speech 181 (1993).

[8] Several decades ago, the Supreme Court formulated a two-part inquiry to determine whether conduct is sufficiently expressive under the First Amendment: (1) whether "[a]n intent to convey a particularized message was present;" and (2) whether "in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." *Spence v. Washington*, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974). Since then, however, the Court has clarified that a "narrow, succinctly articulable message is not a condition of constitutional protection" because "if confined to expressions conveying a 'particularized message' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (citing *Spence*, 418 U.S. at 411, 94 S.Ct. 2727). So, "in determining whether conduct is expressive, we ask whether the reasonable person would interpret it as *some* sort of message, not whether an observer would necessarily infer a *specific* message." *Holloman*, 370 F.3d at 1270 (emphasis in original) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338). *See also Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 66, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) ("*FAIR*") (explaining that, to merit First Amendment protection, conduct must be "inherently expressive").

A

On this record, we have no doubt that FLFNB intended to convey a certain message. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. Neither the district court nor the City suggest otherwise. *See* D.E. 49 at 1, 2; D.E. 78 at 24. As noted, the message is "that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide for all." D.E. 39 at 1. Food sharing in a visible public space, according to FLFNB, is "meant to convey that all persons are equal, regardless of socio-economic status,

and that everyone should have access to food as a human right." *Id.* at 2.

[9] "Whether food distribution [or sharing] can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge[.]" *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1032 (9th Cir. 2006). The critical question, then, is "whether the reasonable person would interpret [FLFNB's conduct] as *some* sort of message." *Holloman*, 370 F.3d at 1270. In answering this question, "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969)). History may have been quite different had the Boston Tea Party been viewed as mere dislike for a certain brew and not a political protest against the taxation of the American colonies without representation. *See* James E. Leahy, *Flamboyant Protest, the First Amendment, and the Boston Tea Party*, 36 Brook. L. Rev. 185, 210 (1970). *Cf.* Rodney A. Smolla, Free Speech in an Open Society 26 (1992) (maintaining that mass demonstrations "are perhaps the single *most* vital forms of expression in human experience"); Thomas I. Emerson, The System of Freedom of Expression 293 (1970) ("The presence of people in the street or other open public place for the purpose of expression, even in large numbers, would also be deemed part of the 'expression.' ").

[10–12] It should be no surprise, then, that the circumstances surrounding an event often help set the dividing line between activity that is sufficiently expressive and similar activity that is not. Context separates the physical activity of walking from the expressive conduct associated with a picket line or a parade. *See United States v. Grace*, 461 U.S. 171, 176, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) ("There is no doubt that as a general matter peaceful picketing and leafletting are expressive activities involving 'speech' protected by the First Amendment."); *Hurley*, 515 U.S. at 568, 115 S.Ct. 2338 ("[W]e use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way."). Context also differentiates the act of sitting down—ordinarily not expressive—from the sit-in by African Americans at a Louisiana library which was understood as a protest against segregation. *See Brown v. Louisiana*, 383 U.S. 131, 141–42, 86 S.Ct. 719, 15 L.Ed.2d 637 (1966). And context divides simply "[b]eing in a state of nudity," which is "not an inherently expressive condition," from the type of nude dancing that is to some degree constitutionally protected. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (quotation omitted). *Compare also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–566, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991) (nude dancing is expressive conduct, although "only marginally so"), *with City of Dallas v. Stanglin*, 490 U.S. 19, 25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989) (noting that "recreational dancing" by clothed dance hall patrons is not sufficiently expressive).[1]

The district court concluded that "outdoor food sharing does not convey [FLFNB's] particularized message unless it is combined with other speech, such as that involved in [FLFNB's] demonstrations." D.E. 78 at 24. This focus on

1. *See also Stewart v. Baldwin Cnty. Bd. of Educ.*, 908 F.2d 1499, 1501, 1505 (11th Cir. 1990) (holding that a school employee's "quiet and non-disruptive" early departure from a mandatory meeting communicated an objection to the superintendent's position).

FLFNB's particularized message was mistaken. As *Holloman* teaches, the inquiry is whether the reasonable person would interpret FLFNB's food sharing events as "*some* sort of message." 370 F.3d at 1270.

B

[13] The district court also failed to consider the context of FLFNB's food sharing events and instead relied on the notion that the conduct must be "combined with other speech" to provide meaning. *See* D.E. 78 at 24. As we explain, the surrounding circumstances would lead the reasonable observer to view the conduct as conveying some sort of message. That puts FLFNB's food sharing events on the expressive side of the ledger.

First, FLFNB sets up tables and banners (including one with its logo) and distributes literature at its events. This distinguishes its sharing of food with the public from relatives or friends simply eating together in the park. *Cf. Hurley*, 515 U.S. at 570, 115 S.Ct. 2338 (holding that participation in a parade was expressive in part because group members "distributed a fact sheet describing the members' intentions" and held banners while they marched).

Second, the food sharing events are open to everyone, and the organization's members or volunteers invite all who are present to participate and to share in their meal at the same time. That, in and of itself, has social implications. *See* Mary Douglas, "Deciphering a Meal," in Implicit Meanings: Selected Essays in Anthropology 231 (1975) ("Like sex, the taking of food has a social component, as well as a biological one.").

[14] Third, FLFNB holds its food sharing in Stranahan Park, a public park near city government buildings. *See Spence*, 418 U.S. at 410, 94 S.Ct. 2727. The parties agree that Stranahan Park is a traditional public forum. *See* D.E. 39 at ¶ 9; D.E. 49 at ¶ 9. That agreement is not surprising, for, public parks have, "time out of mind, [ ] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)). They are places "historically associated with the exercise of First Amendment rights." *Carey v. Brown*, 447 U.S. 455, 460, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). And they are places that "commonly play an important role in defining the identity that a city projects to its own residents and to the outside world." *Pleasant Grove City v. Summum*, 555 U.S. 460, 472, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009). Although the choice of location alone is not dispositive, it is nevertheless an important factor in the "factual context and environment" that we must consider. *See Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. *Cf. Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (concluding that a flag burning demonstration at Dallas City Hall conveyed an anti-government/lack of patriotism message).

Fourth, the record demonstrates without dispute that the treatment of the City's homeless population is an issue of concern in the community. The City itself admits that its elected officials held a public workshop "on the Homeless Issue" in January of 2014, and placed the agenda and minutes of that meeting in the summary judgment record. *See* City's Br. at 12; D.E. 38 at ¶ 16; D.E. 38-19. That workshop included several "homeless issues, including public feedings in the C[ity's] parks and public areas." D.E. 38 at ¶ 16. It is also undisputed that the status of the City's homeless population attracted local news coverage beginning years before that 2014 workshop. We think that the local discussion regarding the City's treatment of the

homeless is significant because it provides background for FLFNB's events, particularly in light of the undisputed fact that many of the participants are homeless. This background adds to the likelihood that the reasonable observer would understand that FLFNB's food sharing sought to convey some message. *See Johnson*, 491 U.S. at 406, 109 S.Ct. 2533 (noting that flag burning "coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President"); *Spence*, 418 U.S. at 410, 94 S.Ct. 2727 (noting that the exhibition of a peace symbol taped on a flag "was roughly simultaneous with and concededly triggered by the Cambodian incursion and the Kent State tragedy"); *Tinker*, 393 U.S. at 505, 89 S.Ct. 733 (noting that a black armband was worn during the Vietnam War).

[15] Fifth, it matters that FLFNB uses the sharing of food as the means for conveying its message, for the history of a particular symbol or type of conduct is instructive in determining whether the reasonable observer may infer some message when viewing it. *See Monroe v. State Court of Fulton Cnty.*, 739 F.2d 568, 571 n.3 (11th Cir. 1984) (explaining that, to be sufficiently expressive, "the actor must have reason to expect that his audience will recognize his conduct as communication") (citation omitted). In *Johnson*, for example, the Supreme Court explained the historical importance of our national flag, noting that it is "the one visible manifestation of two hundred years of nationhood" and that "[c]auses and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner." 491 U.S. at 405, 109 S.Ct. 2533 (quotations and citations omitted). Given this history, the American flag was recognized as a symbol for the United States, and its burning constituted expressive conduct. *See id.* at 405–06, 109 S.Ct. 2533. *See also Buehrle v. City of Key West*, 813 F.3d 973, 978 (11th Cir. 2015) (affirming the district court's determination on summary judgment that tattooing is protected activity, and relying in part on a historical analysis).

Like the flag, the significance of sharing meals with others dates back millennia. The Bible recounts that Jesus shared meals with tax collectors and sinners to demonstrate that they were not outcasts in his eyes. *See Mark* 2:13–17; *Luke* 5:29–32. In 1621, Pilgrims and Native Americans celebrated the harvest by sharing the First Thanksgiving in Plymouth. President Abraham Lincoln established Thanksgiving as a national holiday in 1863, proclaiming it as a day of "Thanksgiving and Praise to our beneficent Father" in recognition of blessings such as "fruitful fields and healthful skies." John G. Nicolay & John Hay, 2 Abraham Lincoln: Complete Works 417–418 (1894). Americans have celebrated this holiday ever since, commonly joining with family and friends for traditional fare like turkey and pumpkin pie.

On this record, FLFNB's food sharing events are more than a picnic in the park. FLFNB has established an intent to "express[ ] an idea through activity," *Spence*, 418 U.S. at 411, 94 S.Ct. 2727, and the reasonable observer would interpret its food sharing events as conveying *some* sort of message. *See Holloman*, 370 F.3d at 1270.

C

[16] The City, echoing the district court's analysis, relies on *FAIR*, in which the Supreme Court explained that "[t]he fact that [ ] explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under *O'Brien*." 547 U.S. at 66, 126 S.Ct. 1297. This language from *FAIR*, however, does not mean that conduct loses its expressive nature just because it is also accompanied by

other speech. If it did, the fact that the paraders in *Hurley* were "carrying flags and banners with all sorts of messages" would have placed their conduct outside the realm of First Amendment protection. *See Hurley*, 515 U.S. at 569, 115 S.Ct. 2338. *See also Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43, 43–44, 97 S.Ct. 2205, 53 L.Ed.2d 96 (1977) (per curiam) (considering the denial of a stay of an injunction in a case where members of the National Socialist Party of America sought to parade in uniforms displaying a swastika). The critical question is whether the explanatory speech is *necessary* for the reasonable observer to perceive a message from the conduct.

In *FAIR*, a number of law schools claimed that the Solomon Amendment—which denies federal funding to an institution that prohibits the military from gaining access to its campus and students " 'for purposes of military recruiting in a manner that is at least equal in quality and scope to access to campuses and to students that is provided to any other employer' "—violated their rights under the First Amendment. *See* 547 U.S. at 55, 126 S.Ct. 1297 (quoting 10 U.S.C. § 938(b)). Among other things, the schools asserted that their restriction of military recruiters' access to law students due to a disagreement with the government's then-existing policy excluding homosexuals from the military (such as, for example, requiring them to interview students on the undergraduate campus) was protected expressive conduct. *See id.* at 51, 126 S.Ct. 1297.

The Supreme Court held that it was not. *See id.* at 66, 126 S.Ct. 1297. It noted that "law schools 'expressed' their disagreement with the military by treating military recruiters differently from other recruiters. But these actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 66, 126 S.Ct. 1297. Such speech was necessary to provide explanation because "the point of requiring military interviews to be conducted on the undergraduate campus is not 'overwhelmingly apparent.' An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else." *Id.* (citation omitted). Thus, the "explanatory speech" in *FAIR* was speech that was necessary to explain the law school's conduct. Without it, the conduct alone (requiring military recruiters to see students off-site) was not sufficiently expressive and the reasonable observer would not be likely to infer some message.

Explanatory speech is not necessary in this case. Although such speech cannot create expressive conduct, *see id.* at 66, 126 S.Ct. 1297, context still matters. Here, the presence of banners, a table, and a gathering of people sharing food with all those present in a public park is sufficiently expressive. The reasonable observer at FLFNB's events would infer some sort of message, e.g., one of community and care for all citizens. Any "explanatory speech"—the text and logo contained on the banners—is not needed to convey that message. Whether those banners said "Food Not Bombs" or "We Eat With the Homeless" adds nothing of legal significance to the First Amendment analysis. The words "Food Not Bombs" on those banners might be required for onlookers to infer FLFNB's *specific* message that public money should be spent on providing food for the poor rather than funding the military, but it is enough if the reasonable observer would interpret the food sharing events as conveying "some sort of message." *See Holloman*, 370 F.3d at 1270 (holding that a "generalized message of

disagreement or protest directed toward [a teacher], the school, or the country in general" is sufficient under the *Spence* test, as modified by *Hurley*) (citing *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338).

We decline the City's invitation, *see* City's Br. at 21, to resurrect the *Spence* requirement that it be likely that the reasonable observer would infer a particularized message. The Supreme Court rejected this requirement in *Hurley*, 515 U.S. at 569, 115 S.Ct. 2338 (a "narrow, succinctly articulable message is not a condition of constitutional protection"), and it is not appropriate for us to bring it back to life.

The district court expressed some concern that *FAIR* does not align with the understanding in "*Holloman*[ ] and perhaps also *Hurley*[ ] . . . of a particularized message." D.E. 78 at 21. We do not believe that *FAIR* undermines *Hurley* or that it abrogates *Holloman*. *FAIR* does not discuss the need for a particularized message at all. Nor does it cite to how *Spence* phrased that requirement. *FAIR* did, however, discuss *Hurley*. The Supreme Court explained that "the law schools' effort to cast themselves as just like . . . the parade organizers in *Hurley* . . . plainly overstates the expressive nature of their activity," and was therefore unavailing. *FAIR*, 547 U.S. at 70, 126 S.Ct. 1297. In our view, FLFNB's conduct here is more like that of the paraders in *Hurley* than that of the law schools in *FAIR*. The reasonable observer of the law schools' conduct in *FAIR* was not likely to infer *any* message beyond that the interview rooms were full or that the military preferred to interview elsewhere. *See id.* at 66, 126 S.Ct. 1297. FLFNB's food sharing events are markedly different. Due to the context surrounding them, the reasonable observer would infer some sort of message.

IV

"[T]he nature of [FLFNB's] activity, combined with the factual context and environment in which it was undertaken, lead to the conclusion that [FLFNB] engaged in a form of protected expression." *Spence*, 418 U.S. at 409–10, 94 S.Ct. 2727. We therefore reverse the district court's grant of summary judgment in favor of the City.

We decline to address whether Ordinance C-14-42 and Park Rule 2.2 violate the First Amendment and whether they are unconstitutionally vague. These issues are best left for the district court to take up on remand.[2]

REVERSED AND REMANDED.

Maurice WALKER, on behalf of himself and others similarly situated, Plaintiff-Appellee,

v.

CITY OF CALHOUN, GA, Defendant-Appellant.

No. 17-13139

United States Court of Appeals, Eleventh Circuit.

(August 22, 2018)

Background: Indigent arrestee brought putative class action against city, alleging

2. The district court stated that its rejection of FLFNB's vagueness challenges was affected, although "to a lesser extent," by its ruling that FLFNB's conduct was not protected by the First Amendment. *See* D.E. 78 at 27. Given our ruling that FLFNB's food sharing events constitute expressive conduct, we think that the district court is in the best position to reassess its ruling on the vagueness issues in the first instance.

11 F.4th 1266
United States Court of Appeals, Eleventh Circuit.

FORT LAUDERDALE FOOD NOT BOMBS, Nathan Pim, Jillian Pim, Haylee Becker, William Toole, Plaintiffs - Appellants,
v.
CITY OF FORT LAUDERDALE, Defendant - Appellee.

No. 19-13604
|
(August 31, 2021)

Synopsis

Background: Nonprofit organization and organization members filed § 1983 action against city, seeking declaratory and injunctive relief and damages, claiming ordinance and related park rule, restricting organization's weekly events sharing vegetarian or vegan food at no cost with passersby, was an unconstitutional restriction of expressive conduct. The United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ, William J. Zloch, Sr., J., 2016 WL 5942528, granted summary judgment to city. Organization appealed. The Court of Appeals, 901 F.3d 1235, reversed and remanded. On remand, the District Court, 2019 WL 10060265, granted summary judgment to city. Organization appealed.

Holdings: The Court of Appeals, Marcus, Circuit Judge, held that:

individual members sustained injury in fact sufficient to confer Article III standing;

organization sustained injury in fact sufficient to confer Article III standing;

intermediate, rather than strict, scrutiny applied to park rule; and

park rule was not narrowly tailored and thus was unconstitutional restriction on expressive conduct as applied.

Reversed and remanded.

Hull, Circuit Judge, filed concurring opinion in which Lagoa, Circuit Judge, joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***1271** Appeal from the United States District Court for the Southern District of Florida, D.C. Docket No. 0:15-cv-60185-WJZ

Attorneys and Law Firms

Jodi Siegel, Southern Legal Counsel, Inc., Gainesville, FL, Andrea Hope Costello, Florida Legal Services, Newberry, FL, Mara Shlackman, Law Offices of Mara Shlackman, PL, Fort Lauderdale, FL, for Plaintiffs-Appellants.

Michael Thomas Burke, Johnson Anselmo Murdoch Burke Piper & Hochman, PA, Alain E. Boileau, Alain E. Boileau, PA, Fort Lauderdale, FL, for Defendant-Appellee.

Before LAGOA, HULL, and MARCUS, Circuit Judges.

Opinion

MARCUS, Circuit Judge:

This case presents the second appellate skirmish in Fort Lauderdale Food Not Bombs's ("FLFNB") challenge to Fort Lauderdale's efforts to shut down the practice of sharing food with the homeless in downtown Stranahan Park. FLFNB hosts food-sharing events in order to communicate the group's message that scarce social resources are unjustly skewed towards military projects and away from feeding the hungry. In Round One, a panel of this Court held FLFNB's food sharing to be expressive conduct protected by the First Amendment and remanded the case to the district court to address whether the City's regulations actually violated the First Amendment. Now, in Round Two, we must decide whether Fort Lauderdale Park Rule 2.2, which requires City permission for social service food-sharing events ***1272** in all Fort Lauderdale parks, can withstand First Amendment scrutiny as applied to FLFNB's demonstrations.

It cannot. The Park Rule commits the regulation of FLFNB's protected expression to the standardless discretion of the City's permitting officials. The Park Rule bans social service food sharing in Stranahan Park unless authorized pursuant to a written agreement with Fort Lauderdale (the "City"). That's all the rule says. It provides no guidance and in no way explains when, how, or why the City will agree in writing. As applied to FLFNB's protected expression, it violates the First Amendment. It is neither narrowly drawn to further a substantial government interest that is unrelated to the suppression of free expression, nor, as applied, does it amount to a reasonable time, place, and manner regulation on expression in a public forum. Accordingly, we reverse the district court's order granting summary judgment in favor of the City and remand for further proceedings consistent with this opinion.

I.

A.

Fort Lauderdale Food Not Bombs is a nonprofit unincorporated association affiliated with the international advocacy organization Food Not Bombs. FLFNB advocates the message "that food is a human right, not a privilege, which society has a responsibility to provide for all." Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235, 1238 (11th Cir. 2018) ("FLFNB I").

At the center of FLFNB's efforts are its weekly food sharing events in Fort Lauderdale's downtown Stranahan Park. Stranahan Park "is known in the community as a location where the homeless tend to congregate and, according to FLFNB, 'has traditionally been a battleground over the City's attempts to reduce the visibility of homelessness.' " Id. "At these events, FLFNB distributes vegetarian or vegan food, free of charge, to anyone who chooses to participate. FLFNB does not serve food as a charity, but rather to communicate its message 'that [ ] society can end hunger and poverty if we redirect our collective resources from the military and war ....' Providing food in a visible public space, and partaking in meals that are shared with others, is an act of political solidarity meant to convey the organization's message." Id.

"FLFNB sets up a table underneath a gazebo in the park, distributes food, and its members ... eat together with all of the participants, many of whom are homeless individuals residing in the downtown Fort Lauderdale area. FLFNB's set-up includes a banner with the name 'Food Not Bombs' and the organization's logo -- a fist holding a carrot -- and individuals associated with the organization pass out literature during the event." Id. This includes flyers to convey FLFNB's social-justice message that all who are hungry deserve food.

B.

Sometime before 2000, the City of Fort Lauderdale promulgated Park Rule 2.2:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

Some years ago, Arnold Abbott, who led a program to feed the homeless on a public Fort Lauderdale beach, obtained a state-court injunction against the Park Rule on ***1273** the ground that it violated Florida's Religious Freedom Restoration Act, Fla. Stat. § 761.03. (Abbott is not affiliated with FLFNB.) The injunction required the City to either stop enforcing the Park Rule, designate an area in which Abbott could lawfully distribute food, or specify objective criteria for permitted food-sharing locations. See Abbott v. City of Fort Lauderdale, 783 So. 2d 1213, 1215 (Fla. 4th DCA 2001).

The City stopped enforcing the Park Rule until October 22, 2014, when it enacted Ordinance C-14-42 to amend

the Fort Lauderdale Uniform Land Development Regulations ("ULDR"). The City enacted this ordinance at least in part as an effort to bring itself into compliance with the state-court injunction so that it could resume enforcement of the Park Rule. In the years leading up to the enactment of Ordinance C-14-42, some citizens had complained about a series of problems they believed to be associated with feeding the homeless in public spaces, including safety risks, a lack of proper water and restroom facilities, and the negative impact this conduct may have on surrounding communities. In January 2014, the City Commission held a workshop on the "the homeless population in the City of Fort Lauderdale," where stakeholders debated public food distribution and related issues.

Ordinance C-14-42, as relevant here, (1) defines an Outdoor Food Distribution Center as "[a]ny location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service"; (2) defines "social service[ ]" as "[a]ny service provided to the public to address public welfare and health such as, but not limited to, the provision of food; hygiene care; group rehabilitative or recovery assistance, or any combination thereof; rehabilitative or recovery programs utilizing counseling, self-help or other treatment or assistance; and day shelter or any combination of same"; and (3) requires a conditional use zoning permit for the operation of an Outdoor Food Distribution Center in Stranahan Park.[1] The other city parks in Fort Lauderdale (of which there are more than 90, City of Fort Lauderdale, City Parks, https://www.fortlauderdale.gov/departments/parks-recreation/city-parks (last visited June 29, 2021)) are zoned so that public food-sharing events are not allowed at all, even by permit. Thus, the Ordinance prohibits social service food distribution in most parks and does not provide for food sharing as of right in any park.

[1] Ordinance C-14-42 implemented these regulations of outdoor food distribution by adding new provisions -- ULDR §§ 47-1B.31(B)(4), (C)(2)(c) -- and by making additions to ULDR §§ 47-6.12; 47-6.13; 47-7.10; 47-8.10; 47-8.11; 47-8.12; 47-8.13; and 47-13.10. We refer to these specific components of Ordinance C-14-42 -- those that regulate outdoor food distribution -- as the "Ordinance." Other provisions of Ordinance C-14-42 regulate other social services not relevant to this case, such as providing addiction treatment centers. The constitutionality of the other provisions of Ordinance C-14-42 is not before this Court.

To obtain a conditional use permit, an individual or group must wind through a lengthy process for receiving a zoning variance. This involves an initial application to the Development Review Committee (which meets twice a month); upon approval, a subsequent submission and presentation to the Planning and Zoning Board (which meets once a month); and then a subsequent review by the City Commission. The City Commission has 30 days to decide whether to conduct its own review of the application; if the City Commission does not, the application is considered approved and returns to the Development Review Committee for a check to make sure the final permit is the same as the plan the Zoning Board approved. There is no deadline for a permit to issue, and the ***1274** City's zoning administrator could not provide an average time for resolving applications. Applicants must pay a fee for City staff time spent reviewing an application; the fee can rise as high as $6,000, which the City may reduce in its unguided discretion.

Permitting requirements for outdoor food distribution include that the proposed activities must not impose a nuisance or cause a change to the character of the area, that the use be 500 feet away from similar uses and residential property, that food be timely served and stored at safe temperatures, that a certified food service manager attend the event, and that the site provide handwashing, wastewater disposal, and restroom facilities.

Soon after the Ordinance passed, the City began enforcing it along with the Park Rule. Police officers interrupted and stopped an FLFNB demonstration in Stranahan Park on November 7, 2014. On that day, the city arrested and cited FLFNB members and other demonstrators for violating both the Ordinance and the Park Rule. The City also issued citations to participants in FLFNB demonstrations on November 14 and November 21. FLFNB members Nathan Pim, Jillian Pim, Haylee Becker, and William Toole were not personally arrested or cited, but were present at each of these events and witnessed their co-demonstrators being arrested and cited on November 7 and November 14. They did not directly witness any arrests or citations at the November 21 event; police later delivered a citation to the home of a participant in that demonstration.

The City also enforced the Ordinance and the Park Rule against Abbott, who moved the state court for an order to enforce its 2000 injunction and halt enforcement. See Mot. to Enforce Inj., Abbott v. City of Fort Lauderdale, No. 99-03583 (05), Dkt. No. 37 (Fla. Cir. Ct. Nov. 12, 2014). The Seventeenth Judicial Circuit Court in Broward County issued a temporary stay on December 2, 2014, and the City stopped enforcing the Ordinance along with the Park Rule. Even though the state-court stay expired on January 1, 2015, the City voluntarily continued its non-enforcement, and has not enforced the Ordinance or the Park Rule since. FLFNB continues to hold weekly food-sharing demonstrations in Stranahan Park.

C.

Soon after the state-court stay expired, on January 29, 2015, FLFNB and members Nathan Pim, Jillian Pim, Haylee Becker, and William Toole (the "Individual Plaintiffs," and, together with FLFNB, the "Plaintiffs") sued the City in the United States District Court for the Southern District of Florida pursuant to 42 U.S.C. § 1983. They alleged that the Ordinance and the Park Rule violated their First Amendment rights to free expression and expressive association, and that these regulations were unconstitutionally vague, both facially and as applied. The Plaintiffs sought declaratory and injunctive relief as well as compensatory damages.

After discovery, the parties cross-moved for summary judgment. The district court granted the City's motion on all claims, holding that FLFNB's food-sharing was not expressive conduct entitled to First Amendment protection. Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, No. 15-60185-CIV, 2016 WL 11700270, at *9 (S.D. Fla. Sept. 30, 2016). In an analysis heavily influenced by its initial holding that FLFNB was not engaged in expressive conduct, the district court concluded that the Ordinance and the Park Rule did not infringe on the Plaintiffs' rights to expressive association. Id. Finally, the district court held that the Ordinance and the Park Rule were not ***1275** unconstitutionally vague. The court acknowledged that this holding was also influenced by its conclusion that FLFNB was not engaged in expressive conduct. Id. at *10.

The Plaintiffs appealed the trial court's judgment to this Court. On November 7, 2017, while the appeal was pending, the City repealed the Ordinance insofar as it regulated outdoor food distribution. However, Fort Lauderdale did not repeal the Park Rule, which remains on the books.

In Round One, a panel of this Court reversed the district court's summary judgment order. FLFNB I, 901 F.3d at 1245. We applied the two-part inquiry drawn from Spence v. Washington, 418 U.S. 405, 410–411, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974), and held that FLFNB's demonstrations were expressive conduct protected by the First Amendment. FLFNB I, 901 F.3d at 1240–43. First, the panel had little difficulty concluding that FLFNB "inten[ded] to convey a particularized message" with its food sharing events. Id. at 1240 (quoting Spence, 418 U.S. at 410–411, 94 S.Ct. 2727). FLFNB shared food in order "to convey that all persons are equal, regardless of socio-economic status, and that everyone should have access to food as a human right." Id. at 1240–41.

Next, the panel closely examined the circumstances surrounding FLFNB's food sharing in order to apply the second part of the Spence inquiry -- whether a "reasonable person would interpret FLFNB's food sharing events 'as some sort of message.' " Id. at 1242 (quoting Holloman ex rel. Holloman v. Harland, 370 F.3d 1252, 1270 (11th Cir. 2004)). We held that five circumstances surrounding FLFNB's events would lead a reasonable observer to discern a message. First, FLFNB wasn't just a group of acquaintances eating together in a park -- it adorned its events with tables and banners and distributed literature explaining its political message. Second, the events had "social implications" because they were open to all comers. Id. Third, FLFNB held its food sharings "in Stranahan Park, a public park near city government buildings." Id. Public parks, the panel noted, are "historically associated with the exercise of First Amendment rights." Id. (citation omitted). Fourth, treatment of the homeless was an issue of substantial public concern and discussion in the Fort Lauderdale community. Indeed, the City had held a public workshop on the issue, and local media had covered "the status of the City's homeless population" for years. Id. Fifth, the sharing of food with others in order to communicate a message was a tradition that "date[d] back millennia." Id. at 1243. All of these circumstances combined to "put[ ] FLFNB's food sharing events on the expressive side of the ledger." Id. at 1242.

Since each of the district court's merits holdings had

turned in substantial part on its erroneous conclusion about expressive conduct, the panel remanded the case for the district court to reconsider these issues as well as to address in the first instance whether the Ordinance and the Park Rule violated the First Amendment. Id. at 1245 & n.2.

On remand, the district court took supplemental briefing, including on the effect of the repeal of the Ordinance. For a second time, the district court entered summary judgment in favor of the City. The court held that the Plaintiffs had standing based on the City's disruption of their events, and that FLFNB was a "person" with a cause of action under 42 U.S.C. § 1983. The court noted that while the repeal of the Ordinance mooted the Plaintiffs' claims for declaratory and injunctive relief against the Ordinance, the court still had to rule on its constitutionality because the Plaintiffs also sought compensatory ***1276** damages. Next, the district court held that even accepting FLFNB I's binding holding that the Ordinance and the Park Rule interfered with the Plaintiffs' expressive conduct, both regulations passed First Amendment muster as lawful, content-neutral time, place, and manner regulations.

As for the Plaintiffs' claims that the Ordinance and the Park Rule's permitting requirements acted as a prior restraint by giving City officials unguided discretion to block their expression, the district court observed that the regime was "somewhat suspect." After all, Fort Lauderdale's officials could charge as much as $6,000 for the permitting process but could reduce that amount in any way if they "fe[lt]" it appropriate. Meanwhile, the Park Rule did not provide any standards to guide the exercise of discretion in determining whether to provide City permission to share food in the park. Even so, the district court concluded that the permitting schemes were not subject to either as-applied or facial challenges, because the Plaintiffs never applied for a permit and because the regulations were "laws ... of general application" that did not directly regulate protected expression. The district court also rejected the Plaintiffs' expressive association arguments, reasoning that the regulations "impose a content-neutral restriction on a kind of expressive conduct that is only incidentally associative." Finally, the trial court held that the terms found in the Ordinance and in the Park Rule, such as "social service," were not unconstitutionally vague.

Again, the Plaintiffs timely appealed to this Court.

II.

Before we can consider the merits of the Plaintiffs' claims, we are required to address three threshold matters. As for the first one, we conclude that FLFNB is a "person" and therefore a proper plaintiff under § 1983 of Title 42. Second, as for the City's Ordinance, the Plaintiffs' claims for injunctive and declaratory relief are moot; however, their monetary damages claims arising out of the enforcement of the Ordinance are not. Finally, all of the Plaintiffs have standing to bring their remaining claims. Our review on each of these issues is de novo. See Hoever v. Marks, 993 F.3d 1353, 1357 (11th Cir. 2021); Taylor v. Polhill, 964 F.3d 975, 980 (11th Cir. 2020); Coral Springs St. Sys., Inc. v. City of Sunrise, 371 F.3d 1320, 1328 (11th Cir. 2004).

A.

First, the City argues that FLFNB, as an unincorporated association, is not a "person" that may bring suit under § 1983, which provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (emphasis added). There is some historical support for the City's reading, but this view stands in tension with the text's ordinary meaning, Supreme Court precedent, successive amendments to § 1983, and longstanding, settled practice. Absent clear direction from the Supreme Court, we decline the City's invitation ***1277** to bar all unincorporated associations (other than unions) from being able to sue under § 1983.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.' " United States v. Stevens, 997 F.3d 1307, 1314 (11th Cir. 2021) (citation omitted). When examining the phrase "any citizen of the United States or other person," "person" must refer to something beyond individuals who are United States citizens; otherwise, the term would be redundant. See, e.g., Corley v. United States, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (noting that "one of the most basic interpretive canons" is "that '[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant' ") (citation omitted and alteration accepted). At the very least, the phrase extends a § 1983 cause of action to non-citizen individuals. Congress enacted Section 1 of the Civil Rights Act of 1871 (also known as the Ku Klux Klan Act), the original version of what is now § 1983, in order to enforce the Fourteenth Amendment. See, e.g., Ngiraingas v. Sanchez, 495 U.S. 182, 187, 110 S.Ct. 1737, 109 L.Ed.2d 163 (1990). The word "person" in the Fourteenth Amendment includes not only citizens but also non-citizens within the United States. E.g., Graham v. Richardson, 403 U.S. 365, 371, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971); see also Hague v. Comm. for Indus. Org., 307 U.S. 496, 526, 59 S.Ct. 954, 83 L.Ed. 1423 (1939) (opinion of Stone, J.) ("It will be observed that the cause of action, given by [Section 1 of the 1871 Civil Rights Act], extends broadly to ... those rights secured to persons, whether citizens of the United States or not, to whom the [Fourteenth] Amendment in terms extends the benefit of the due process and equal protection clauses."). We also know that the word "person" in § 1983 extends to corporations, both municipal and otherwise. See Monell v. Dep't of Soc. Servs., 436 U.S. 658, 687, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Indeed, in Monell, the Supreme Court observed that "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis." Id. at 687, 98 S.Ct. 2018.

However, the Supreme Court has also ruled that Native American Tribes seeking to vindicate sovereign rights, States, State officers acting in their official capacities, Territories, and Territory officers acting in their official capacities are not "persons." Inyo Cnty. v. Paiute-Shoshone Indians of the Bishop Cmty. of the Bishop Colony, 538 U.S. 701, 712, 123 S.Ct. 1887, 155 L.Ed.2d 933 (2003) (reasoning that § 1983 "was designed to secure private rights against government encroachment" to reach this conclusion in the case of a Tribe suing to vindicate its right to sovereign immunity from state process); Ngiraingas, 495 U.S. at 187–92, 110 S.Ct. 1737 (examining historical sources and the context surrounding amendments to § 1983 to reach this conclusion with respect to Territories and their officers); Will v. Mich. Dep't of State Police, 491 U.S. 58, 64–67, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) (relying on federalism concerns, the Eleventh Amendment, and the "often-expressed understanding that 'in common usage, the term "person" does not include the sovereign, and statutes employing the word are ordinarily construed to exclude it' " to reach this conclusion regarding States and their officials) (alterations accepted and citation omitted). Monell, Ngiraingas, and Will each interpreted the first use of the word "person" in § 1983, which relates to which entities may be proper § 1983 defendants -- "[e]very person" who under color of law causes a deprivation of federal rights shall be liable to the party ***1278** injured. By contrast, today we interpret § 1983's second use of the word "person" -- "any citizen or other person" -- a phrase that delineates which entities may be proper § 1983 plaintiffs. But these cases are nonetheless instructive, because we "generally presume that 'identical words used in different parts of the same act are intended to have the same meaning.' " United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 213, 121 S.Ct. 1433, 149 L.Ed.2d 401 (2001) (citation omitted).

In order to decide whether FLFNB has a cause of action in this case, we must determine whether "other persons," in addition to including non-citizen individuals and corporate entities, extends to unincorporated associations. The words "other person," by themselves, do not definitively answer the question. Cf. Ngiraingas, 495 U.S. at 187, 110 S.Ct. 1737 ("[Section 1983] itself obviously affords no clue as to whether its word 'person' includes a Territory."). Unlike sovereign entities, there is no presumption that unincorporated associations are not persons. To the contrary, the ordinary meaning of "person" in legal contexts includes unincorporated associations. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 273

(2012) ("Traditionally the word person ... denotes not only natural persons (human beings) but also artificial persons such as corporations, partnerships, associations, and both public and private organizations.") (second emphasis added). Thus, the most natural reading of § 1983 extends a cause of action to unincorporated associations.

On the other hand, we "normally interpret[ ] a statute in accord with the ordinary public meaning of its terms at the time of its enactment." Bostock v. Clayton Cnty., —— U.S. ——, 140 S. Ct. 1731, 1738, 207 L.Ed.2d 218 (2020). And in 1871, unincorporated associations were not legal persons with the capacity to sue or be sued absent some express authorization. United Mine Workers of Am. v. Coronado Coal Co., 259 U.S. 344, 385, 42 S.Ct. 570, 66 L.Ed. 975 (1922) ("Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member."); Wesley A. Sturges, Unincorporated Associations as Parties to Actions, 33 Yale L.J. 383, 383 (1924) (citing authorities dating as far back as 1884 to observe that "[t]he cases are remarkably in accord that, in the absence of enabling statute, an unincorporated association cannot sue or be sued in the common or association name").

Moreover, reading the word "person" to exclude unincorporated associations is fully consonant with the 1871 version of the Dictionary Act, which expressly limited "person" to "bodies politic and corporate." See, e.g., Will, 491 U.S. at 69 n.8, 109 S.Ct. 2304. The Dictionary Act -- a statute that provides general definitions for common terms used across the United States Code, see 1 U.S.C. § 1 -- did not expand to include "associations" until 1948. See Act of June 25, 1948, Pub. L. No. 80-772, § 6, 62 Stat. 683, 859 (1948); Lippoldt v. Cole, 468 F.3d 1204, 1214 (10th Cir. 2006). The 1871 Dictionary Act definition matches the definition of "person" found in the first edition of Black's Law Dictionary, published in 1891, which confirms that an entity needed some express authorization in positive law to achieve legal personhood. Person, Black's Law Dictionary (1891) ("Persons are divided by law into natural and artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws, for the purposes of society and government, which are called 'corporations' or 'bodies politic.' ").

***1279** What's more, the legislative history surrounding the adoption of the 1871 Civil Rights Act does not suggest any departure from the established legal meaning of "person" as it related to the capacity to sue in 1871. See Monell, 436 U.S. at 690, 98 S.Ct. 2018 (analyzing the legislative history of Section 1 to interpret § 1983). The drafters of Section 1 of the 1871 Civil Rights Act likely did not contemplate that unincorporated associations were "persons" under the Act. The Republican sponsors of the Civil Rights Act were aghast at reports of widespread vigilante violence against federal officials, northern transplants, Blacks, and Republicans in the post-war South. These attacks, they believed, were the work of recalcitrant Confederates, including individuals organized as the Ku Klux Klan, who faced only weak opposition from ineffectual state officials. See, e.g., Cong. Globe, 42d Cong., 1st Sess., 320 (1871) (hereinafter "Globe") (Rep. Stoughton) ("There exists at this time in the southern States a treasonable conspiracy against the lives, persons, and property of Union citizens, less formidable it may be, but not less dangerous, to American liberty than that which inaugurated the horrors of the rebellion."); id. at 820 (Sen. Sherman) (observing that the bill was based on the fact that "an organized conspiracy, spreading terror and violence, murdering and scourging both white and black, both women and men, and pervading large communities of this country, now exists unchecked by punishment, independent of law, uncontrolled by magistrates" and that "of all the multitude of injuries not in a single case has redress ever been meted out to one of the multitude who has been injured").

Section 1 itself "was the subject of only limited debate and was passed without amendment." Monell, 436 U.S. at 665, 98 S.Ct. 2018. At most, read together with statements about the 1871 Act generally, floor discussions of Section 1 suggest that both proponents and opponents of the 1871 Act believed that the typical plaintiff would be an individual who suffered a violation of constitutional rights, especially the denial of the equal protection of the laws at the hands of state officials. Thus, for example, proponent Senator Dawes spoke of "citizen[s]" who suffered violations of their rights -- phrasing that implies a concern for the individual plaintiff. Globe at 477 ("I conclude ... [that] Congress has power to legislate for the protection of every American citizen in the full, free, and undisturbed enjoyment of every right, privilege, or immunity secured to him by the Constitution; and that this may be done ... [b]y giving him a civil remedy in the United States courts for any damage sustained in that

regard."). For their part, Democrats who opposed the passage of Section 1 generally claimed that it was too broad, but notably did not argue that the word "person" did anything to expand the range of entities that could traditionally sue. They, too, seemed to envision individual plaintiffs. E.g., id. at 337 (Rep. Whithorne) (complaining that "any person within the limits of the United States who conceives that he has been deprived of any right, privilege, or immunity secured him by the Constitution" would be able to sue and conjuring the hypothetical example of a drunk suing a police officer who had confiscated his pistol).

All told, historical context suggests that the word "person" as used in Section 1 of the 1871 Civil Rights Act did not extend to unincorporated associations. But this does not end the analysis, because we are not interpreting Section 1 of the 1871 Civil Rights Act. Instead, we must apply § 1983 of Title 42 of the United States Code as it exists today, that is, as thrice amended since its initial enactment in 1871. We must therefore account for any changes in the legal meaning of "person" that may have informed Congress's decision to perpetuate ***1280** that term across amended versions of § 1983. Indeed, the Supreme Court in Ngiraingas looked not only to the history of the 1871 Civil Rights Act but also to "the successive enactments of [§ 1983], in context" -- and to changes to the definition of "person" in the Dictionary Act -- in order to interpret the word "person." 495 U.S. at 189, 191 n.10, 110 S.Ct. 1737.

Congress amended the text of § 1983 twice after the 1948 amendment to the Dictionary Act -- which made clear that "person" in "any Act of Congress" includes "associations" and "societies" in addition to "corporations," "companies," "firms," "partnerships," "joint stock companies," and "individuals." See 62 Stat. at 859; 1 U.S.C. § 1. A congressional amendment in 1979 extended § 1983's coverage to injuries inflicted by those acting under the color of District of Columbia law; a 1996 amendment limited the availability of injunctive relief against judicial defendants. See Act of December 29, 1979, Pub. L. No. 96-170, 93 Stat. 1284 (1979); Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, 110 Stat. 3847 (1996). In neither re-enacted version of § 1983 did Congress narrow the definition of "person" in light of the intervening clarification in the Dictionary Act that associations are "persons" as that term is used in federal statutes. Cf. United States v. Bryant, 996 F.3d 1243, 1258 (11th Cir. 2021) ("[W]hen interpreting statutes, what Congress chose not to change can be as important as what it chose to change.").

Similarly, Congress enacted both of these amendments after the 1937 promulgation of Federal Rule of Civil Procedure 17(b), which provided "that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or law of the United States." Parties, 1937 Rep. Advisory Comm. on Civ. Rules 47 (1937); see also Fed. R. Civ. P. 17(b)(3) (the Rule's current text remains nearly identical to that of the original version); Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay, 954 F. Supp. 2d 127, 137 (E.D.N.Y. 2013) (relying on Rule 17(b)(3) to conclude that "an unincorporated association[ ] ha[d] legal capacity to bring [a § 1983] suit because all of its claims allege[d] violations of the United States Constitution"), aff'd, 868 F.3d 104 (2d Cir. 2017), and aff'd, 705 F. App'x 10 (2d Cir. 2017); Playboy Enters., Inc. v. Pub. Serv. Comm'n of P.R., 698 F. Supp. 401, 413–14 (D.P.R. 1988) (similar analysis regarding the unincorporated Puerto Rico Cable Television association), aff'd as modified on other grounds, 906 F.2d 25 (1st Cir. 1990).

And perhaps most significantly, the Supreme Court held in 1974 that an unincorporated union could "sue under 42 U.S.C. § 1983 as [a] person[ ] deprived of [its] rights secured by the Constitution and laws." Allee v. Medrano, 416 U.S. 802, 819 n.13, 94 S.Ct. 2191, 40 L.Ed.2d 566 (1974). Thus, by the time of the 1979 and 1996 amendments to § 1983, federal law made it quite clear that unincorporated associations were "persons" that could sue to enforce constitutional rights under § 1983. It is telling that against this backdrop, Congress did not choose to restrict the scope of the term "person" when it re-enacted amended versions of § 1983. See Pollitzer v. Gebhardt, 860 F.3d 1334, 1340 (11th Cir. 2017) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (emphasis added) (quoting Lorillard v. Pons, 434 U.S. 575, 580, 98 S.Ct. 866, 55 L.Ed.2d 40 (1978)); Fajardo v. U.S. Att'y Gen., 659 F.3d 1303, 1310 (11th Cir. 2011) ("Where words are employed in a statute which had at the ***1281** time a well-known meaning at common law or in the law of this country they are presumed to have been used in that sense unless the context compels to the contrary.") (emphasis added) (quoting Lorillard, 434 U.S. at 583, 98 S.Ct. 866); Scalia

& Garner, supra, at 322 ("The clearest application of the prior-construction canon occurs with reenactments: If a word or phrase has been authoritatively interpreted by the highest court in a jurisdiction ... a later version of that act perpetuating the wording is presumed to carry forward that interpretation."). Whatever "person" meant in 1871, its meaning included unincorporated associations by the time Congress "perpetuated" the word "person" in new versions of § 1983 in 1979 and 1996. See Scalia & Garner, supra, at 322.

Even setting these textual and historical considerations aside, Allee suggests that an unincorporated entity like FLFNB, just like the unincorporated union in that case, is a "person" for § 1983 purposes. In Allee, individual organizers and a union brought a § 1983 action against Texas officials on behalf of a class of union members, alleging that law enforcement had threatened and harassed them for engaging in union organizing activities, including by bringing criminal charges in bad faith. 416 U.S. at 804–09, 94 S.Ct. 2191. A question arose as to whether there were pending state prosecutions against any of the plaintiffs -- if not, the plaintiffs' request for injunctive relief would be partially moot. Id. at 818, 94 S.Ct. 2191. The Supreme Court instructed that on remand, if there were indeed pending prosecutions against the unnamed class members, the district court "must find that the class was properly represented" by the named plaintiffs in part because the named-plaintiff union was a "person[ ]" that could sue under § 1983 and that had standing to complain of the unlawful intimidation of its members. Id. at 819, 94 S.Ct. 2191 n.13; see also id. at 831, 94 S.Ct. 2191 (Burger, C.J., concurring in the result in part and dissenting in part) (acknowledging that the union plaintiff was unincorporated).

In holding that "[u]nions may sue under 42 U.S.C. § 1983 as persons," the Court in Allee did not rest on any distinctive features of unions or suggest that unions should be treated differently than any other kinds of unincorporated associations. Id. at 819, 94 S.Ct. 2191 n.13. The Court might have relied on, but did not so much as mention, characteristics surrounding unions that other types of unincorporated associations may not share, such as their affirmative recognition and privileges in federal and state law. See Coronado Coal Co., 259 U.S. at 385–90, 42 S.Ct. 570. Instead, the Court concluded, without limiting its reasoning, that unincorporated unions were § 1983 "persons." The understanding of the meaning of the term "person" at the time the Civil Rights Act was passed in 1871 presented no obstacle to the result the Supreme Court reached in Allee. A union was neither an individual nor a corporation, yet the Supreme Court held that it still fell within the ambit of the term "other person."

In keeping with a broad reading of Allee, most federal courts to have confronted the question of whether a non-union unincorporated association is a "person" under § 1983 have answered in the affirmative. In Barrett v. United States, the Second Circuit reasoned that an estate administratrix could bring a § 1983 suit on behalf of the estate beneficiaries because they were a group of individuals "associated for a special purpose." 689 F.2d 324, 333 (2d Cir. 1982) ("Unions and unincorporated associations have also been found to possess standing to assert a § 1983 claim."). The Second Circuit weighed in again in Jund v. Town of Hempstead, this time to hold that unincorporated local Republican committees were proper § 1983 defendants. ***1282** 941 F.2d 1271, 1279–80 (2d Cir. 1991). And at least two district courts have adopted this reading. In Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., a court in the Southern District of Florida held that an "unincorporated, voluntary association of students" at a Florida high school was a § 1983 "person." 477 F. Supp. 2d 1246, 1248, 1249–51 (S.D. Fla. 2007). A court in the Northern District of Illinois similarly held that an unincorporated organization representing the interests of a public housing development could bring a § 1983 suit and noted that "[u]nincorporated organizations have been found to be 'persons' entitled to bring suit under § 1983." Cabrini-Green Loc. Advisory Council v. Chi. Hous. Auth., No. 04 C 3792, 2005 WL 61467, at *3 (N.D. Ill. Jan. 10, 2005).

Moreover, there is a longstanding and robust practice of treating unincorporated associations as proper § 1983 plaintiffs as a matter of course. The Eleventh Circuit and an array of other courts have evaluated § 1983 claims brought by all manner of unincorporated associations seeking to vindicate a diverse array of constitutional interests -- including the Orlando and Santa Monica local Food Not Bombs chapters -- without even hinting that they lacked a § 1983 cause of action. See, e.g., First Vagabonds Church of God v. City of Orlando, 638 F.3d 756, 758 (11th Cir. 2011) (en banc) (Orlando Food Not Bombs); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1031 (9th Cir. 2006) (Santa Monica Food Not Bombs); Rounds v. Or. State Bd. of Higher Educ., 166 F.3d 1032, 1034 (9th Cir. 1999) (Students for Legal government, an unincorporated

association of University of Oregon students); Citizens Against Tax Waste v. Westerville City Sch., 985 F.2d 255, 256–57 (6th Cir. 1993) (Citizens Against Tax Waste, an "unincorporated association of property owners in the Westerville City School District"); Marcavage v. City of New York, 918 F. Supp. 2d 266, 267 (S.D.N.Y. 2013) (Repent America, an unincorporated association dedicated to Christian evangelism); Occupy Fresno v. Cnty. of Fresno, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011) (Occupy Fresno, an unincorporated association of individuals who wished to assemble in a park); Good News Emp. Ass'n v. Hicks, No. C-03-3542 VRW, 2005 WL 351743, at *1 (N.D. Cal. Feb. 14, 2005), aff'd, 223 F. App'x 734 (9th Cir. 2007) (unincorporated association organized to promote a faith-based concept of "Natural Family and Marriage"); Nat'l Ass'n of Alzheimer's Victims & Friends v. Pa. Dep't of Pub. Welfare, No. CIV.A. 88-2426, 1988 WL 29338, at *1 (E.D. Pa. Mar. 23, 1988) (National Association of Alzheimer's Victims & Friends, an "unincorporated association founded for the purpose of providing a mutual care and support group for persons suffering from Alzheimer's disease and their families and concerned friends"); Republican Coll. Council of Pa. v. Winner, 357 F. Supp. 739, 740 (E.D. Pa. 1973) (Republican College Council of Pennsylvania). The same is true of a historically significant set of § 1983 plaintiffs, the unincorporated local chapters of the NAACP. See N.A.A.C.P. v. Brackett, 130 F. App'x 648 (4th Cir. 2005).

This body of practice is not a body of holdings and, of course, cannot alter the meaning of the word "person" as used in the statute. But when combined with the ordinary meaning of the text, Allee, persuasive interpretations from other courts, and the body of law informing Congress's amendments to § 1983 -- all of which indicate that unincorporated associations are "persons" -- it at least underscores the need for compelling evidence before we adopt the City's contrary interpretation. See Nasrallah v. Barr, —— U.S. ——, 140 S. Ct. 1683, 1697–98, 207 L.Ed.2d 111, (2020) (Thomas, J., dissenting) (protesting ***1283** that when "presented with two competing statutory interpretations[,] one of which ma[de] sense of" the statute "without upending settled practice, and one of which significantly undermine[d the statute] by removing a vast swath of claims from its reach," the Supreme Court majority should have "justif[ied]" its choice of the latter interpretation and "candidly confront[ed] its implications"); Fowler v. U.S. Parole Comm'n, 94 F.3d 835, 840 (3d Cir. 1996) (While "a practice bottomed upon an erroneous interpretation of the law is not legitimized merely by repetition," "general acceptance of a practice must be considered in any reasoned [statutory interpretation] analysis.").

The Tenth Circuit, which holds that unincorporated associations cannot sue under § 1983, stands alone against the trend of treating unincorporated associations as "persons." See Lippoldt, 468 F.3d at 1216 (holding that Operation Save America, an unincorporated association devoted to anti-abortion advocacy, was not a "person" within the meaning of § 1983); see also Tate v. Univ. Med. Ctr. of So. Nev., No. 2:09-CV-01748-LDG (NJK), 2013 WL 1249590, at *11 (D. Nev. Mar. 26, 2013) (stating, in a single sentence devoid of analysis, that an unincorporated association was not a "person" subject to suit under § 1983), rev'd on other grounds, 617 F. App'x 724 (9th Cir. 2015). The Tenth Circuit's otherwise thorough discussion of the legislative history of the 1871 Civil Rights Act, the background law in 1871, and the 1871 Dictionary Act did not account for the fact that Congress re-enacted the word "person" in § 1983 twice after intervening developments in federal law clarified that unincorporated associations were "persons."

At bottom, in enacting § 1983, Congress "intended to give a broad remedy for violations of federally protected civil rights." Monell, 436 U.S. at 685, 98 S.Ct. 2018. And the Supreme Court has instructed us that "Congress intended § [1983] to be broadly construed." Id. at 686, 98 S.Ct. 2018. "[A]ny plan to restrict the scope of § 1983 comes with a heavy burden of justification -- a burden that is both constitutional and historical." Harry A. Blackmun, Section 1983 and Federal Protection of Individual Rights — Will the Statute Remain Alive or Fade Away?, 60 N.Y.U. L. Rev. 1, 28 (1985). Absent some indication from the Supreme Court that unincorporated associations are not "persons," we decline the City's invitation to upset longstanding practice recognizing that unincorporated associations are "persons" that may sue under § 1983. See id. at 3 (warning "that any restriction of what has become a major symbol of federal protection of basic rights [should] not be made in irresponsible haste" and that absent strong historical evidence, the scope and "underlying principles of § 1983 liability should be secure"). We hold that FLFNB is a person that may bring suit under § 1983.

B.

The second threshold question, also prefatory to an analysis of the merits, concerns the principle of mootness. The Plaintiffs seek declaratory, injunctive, and damages relief as to both the Ordinance and the Park Rule. But well after the commencement of this litigation, the City repealed the challenged Ordinance. The Park Rule remains in effect, so the Ordinance's repeal does not affect the Plaintiffs' claims for declaratory, injunctive, and damages relief concerning the Park Rule. Likewise, the Plaintiffs' claims for monetary damages arising out of the application of the Ordinance while it was still on the books remain viable notwithstanding its subsequent repeal. See, e.g., Checker Cab Operators, Inc. v. Miami-Dade Cnty., 899 F.3d 908, 916 (11th Cir. 2018) ("Although a ***1284** case will normally become moot when a subsequent [law] brings the existing controversy to an end, when the plaintiff has requested damages, those claims are not moot.") (alteration in original) (citation omitted). However, the repeal mooted the Plaintiffs' claims for declaratory and injunctive relief against the Ordinance.

"Plainly, if a suit is moot, it cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it." Coral Springs, 371 F.3d at 1328. "Generally, a challenge to the constitutionality of a statute is mooted by repeal of the statute," but an exception "applies if there is a substantial likelihood that the challenged statutory language will be reenacted." Id. at 1329. The Plaintiffs have failed to meet their burden of proving that this exception applies. See Flanigan's Enters., Inc. of Ga. v. City of Sandy Springs, 868 F.3d 1248, 1256 (11th Cir. 2017) (en banc) ("[O]nce the repeal of an ordinance has caused our jurisdiction to be questioned, [the plaintiff] bears the burden of presenting affirmative evidence that its challenge is no longer moot.") (alteration in original) (citation omitted).

"The key inquiry... is whether the evidence leads us to a reasonable expectation that the City will reverse course and reenact the allegedly offensive portion of its Code should this Court" conclude the case is moot. Id.; Coral Springs, 371 F.3d at 1331 ("Whether the repeal of a law will lead to a finding that the challenge to the law is moot depends most significantly on whether the court is sufficiently convinced that the repealed law will not be brought back."). The Plaintiffs must present "concrete evidence," rather than "mere speculation," that the City will return to its old ways. Nat'l Advert. Co. v. City of Miami, 402 F.3d 1329, 1334 (11th Cir. 2005).

"[T]hree broad factors" guide our inquiry: (1) "whether the change in conduct resulted from substantial deliberation or is merely an attempt to manipulate our jurisdiction"; (2) "whether the government's decision to terminate the challenged conduct was unambiguous," including "whether the actions that have been taken to allegedly moot the case reflect a rejection of the challenged conduct that is both permanent and complete"; and (3) "whether the government has consistently maintained its commitment to the new policy or legislative scheme." Flanigan's Enters., 868 F.3d at 1257. These factors are neither exclusive nor dispositive; rather, the question is whether "the totality of [the] circumstances persuades the court that there is no reasonable expectation that the government entity will reenact the challenged legislation." Id.

The first factor does not help the Plaintiffs. The City repealed the ordinance through its normal legislative process, rather than in "secrecy" or "behind closed doors." Id. at 1260. The Commission considered the repeal at a public meeting, and the Plaintiffs do not provide any reason to believe that "the procedures used by the City to repeal the Ordinance [do not] reflect the same level of deliberation we would expect for any other change in policy." Id. Moreover, the timing of the repeal does not provide reason to "doubt the City's sincerity." Coral Springs, 371 F.3d at 1320. Notably, the City repealed the Ordinance after the district court had granted final judgment in its favor in this case and before this Court had reversed that judgment in FLFNB I. This factor weighs heavily against a conclusion that the City will re-enact the Ordinance.

So does the second factor. The City enforced the Ordinance only for a brief period (about one month) after its October 22, 2014 enactment; the City did not enforce the Ordinance between December 2, 2014 and its repeal on November 7, 2017. ***1285** To be sure, this cessation of enforcement was not the result of an independent change of heart; rather, on December 2, a state court stayed enforcement in connection with a separate lawsuit challenging the Ordinance under Florida's Religious Freedom Restoration Act. And the City has not unequivocally assured that it will not re-enact the Ordinance. See Flanigan's, 868 F.3d at 1262 (city council had passed a resolution disavowing any intent to re-enact the challenged ordinance or anything similar). Still, all the Plaintiffs can offer on the second factor are inferences drawn from the timing of the City's enforcement decisions in relation to litigation developments. And these

inferences are hardly ironclad: the City voluntarily continued its policy of non-enforcement even after the expiration of the state-court stay on January 1, 2015.

At first blush, the Plaintiffs do better on the third factor, for the Park Rule still remains in effect and implicates the gravamen of Plaintiffs' complaint by preventing them from carrying out their expressive food sharing in a public park. When "a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot." Naturist Soc'y, Inc. v. Fillyaw, 958 F.2d 1515, 1520 (11th Cir. 1992); cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, 508 U.S. 656, 662, 113 S.Ct. 2297, 124 L.Ed.2d 586 (1993) (The enactment of a new statute similar to the one repealed saves a case from mootness so long as the new statute implicates "the gravamen of [the original] complaint," even if the new statute "differs in certain respects from the old one" or "disadvantage[s] [the plaintiffs] to a lesser degree than the old one."). Even so, the City stopped enforcing the Park Rule against FLFNB's demonstrations at the same time it stopped enforcing the Ordinance (on December 2, 2014). In practice, the City's commitment to its repeal of the Ordinance and retreat from the policies behind it has not wavered.

To sum it all up, notwithstanding the City's failure to repeal the Park Rule or to unequivocally "disavow[ ] any intent to reenact" the Ordinance, Flanigan's, 868 F.3d at 1263, the Ordinance's regulation of outdoor food distribution is a thing of the past. The Plaintiffs have not offered "concrete evidence" that the City might re-enact the Ordinance. Nat'l Advert. Co., 402 F.3d at 1334. Their case depends almost entirely on conjecture based on the timing of the City's actions and its commitment to a related rule. But the timing at best provides a weak reed to establish an intent to re-enact and at worst undermines the Plaintiffs' case: the City repealed the Ordinance after the district court initially upheld it. This sequence does not betray a strategic repeal to avoid adverse litigation developments. We lack jurisdiction to address the difficult constitutional questions that attend the Plaintiffs' requests for declaratory and injunctive relief against the Ordinance. These claims are moot.

C.

The third, and last, of the threshold issues concerns Article III standing. The City argues that all of the Plaintiffs lack standing to assert damages claims based on the Ordinance and the Park Rule because these regulations, by the City's account, were not enforced against any of the Plaintiffs. According to the City, the Plaintiffs cannot prove a concrete injury connected to the Ordinance or the Park Rule. Like the district court before us, we remain unpersuaded. Both the Individual Plaintiffs and FLFNB have standing to bring damages claims against the City based on its enforcement of the Ordinance and the Park Rule. They also have standing to bring claims for declaratory and injunctive relief against the Park Rule.

***1286** It is by now almost axiomatic that in order to establish constitutional standing, a party plaintiff must show three things:

> First, the plaintiff must have suffered an injury in fact -- an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of -- the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations and quotation marks omitted and alterations accepted); see also Bischoff v. Osceola Cnty., 222 F.3d 874, 883 (11th Cir. 2000). Standing for injunctive relief requires proof of a threat of future injury. Houston v. Marod Supermarkets, Inc., 733 F.3d 1323, 1329 (11th Cir. 2013). If there is a genuine issue of material fact as to whether the Plaintiffs have standing, summary judgment against them on

standing grounds is inappropriate. See Bischoff, 222 F.3d at 884.

1. Individual Plaintiffs. The City applied the Ordinance and the Park Rule to the Individual Plaintiffs insofar as they each participated in a November 7, 2014 FLFNB food-sharing event in Stranahan Park that the police broke up under their authority drawn from the Ordinance and the Park Rule. Plaintiff Nathan Pim, testifying on behalf of FLFNB, explained that the police "stopped" the event "short." **[DE 49-1 at 41]** We have already concluded that the Individual Plaintiffs were engaging in constitutionally protected expression, and the City forced them to stop and disperse. Undeniably, the Ordinance and the Park Rule injured them by directly interfering with and barring their protected expression. "[E]very violation [of a right] imports damage." Uzuegbunam v. Preczewski, —— U.S. ——, 141 S. Ct. 792, 796–97, 799, 209 L.Ed.2d 94 (2021) (citation omitted) (considering it beyond dispute that a college student suffered an injury in fact when he complied with a college official's order to stop speaking and handing out religious literature on campus); cf. Roman Cath. Diocese of Brooklyn v. Cuomo, 592 U.S. ——, 141 S. Ct. 63, 67–68, 208 L.Ed.2d 206 (2020) (per curiam order granting application for injunctive relief) (those who wished to attend religious services, an exercise of their First Amendment freedoms, would suffer irreparable injury if barred from attending by state executive order); Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

In this way, the Individual Plaintiffs sustained an injury in fact sufficient to confer standing that does not depend on the arrests of their FLFNB colleagues at the same demonstrations. What's more, those arrests provide an additional basis for standing, even though the Individual Plaintiffs were not personally arrested or cited. "[S]tanding exists at the summary judgment stage when the plaintiff has submitted evidence indicating 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution.' " Bischoff, 222 F.3d at 884 (quoting Wilson v. State Bar of Ga., 132 F.3d 1422, 1428 (11th Cir. 1998)); see also Susan B. Anthony List v. Driehaus, 573 U.S. 149, 158–59, 134 S.Ct. 2334, 189 L.Ed.2d 246 (2014).

***1287** Each Individual Plaintiff has declared under penalty of perjury that he or she will continue to participate in FLFNB's protected food-sharing demonstrations in Stranahan Park, and there is no dispute that this conduct is arguably proscribed by the Park Rule (and was proscribed by the Ordinance when it was in effect). Of course, the threat of prosecution must be "genuine," not "imaginary" or "speculative," Leverett v. City of Pinellas Park, 775 F.2d 1536, 1538 (11th Cir. 1985), but the Individual Plaintiffs easily meet this requirement. Each directly witnessed the police arrest and/or cite their co-demonstrators or others under the Ordinance and the Park Rule. Citations issued to the Individual Plaintiffs' fellow demonstrators referenced both the Ordinance and the Park Rule. These arrests and citations of the Individual Plaintiffs' "companion[s]" render the threat of enforcement "non-chimerical." Susan B. Anthony List, 573 U.S. at 159, 134 S.Ct. 2334 (describing Steffel v. Thompson, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974)); cf. Bischoff, 222 F.3d at 884–85 (plaintiffs who were threatened with arrest and whose co-demonstrators were actually arrested suffered injury in fact).

2. FLFNB. FLFNB does not claim that it has associational standing to sue on behalf of its members; rather it claims "standing in its own right." Havens Realty Corp. v. Coleman, 455 U.S. 363, 378, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). An advocacy organization like FLFNB suffers injury in fact when the defendant's conduct "perceptibly impair[s] [the organization's] ability" to carry out its mission, including by causing "drain on the organization's resources." Id. at 379, 102 S.Ct. 1114; see also Fla. State Conf. of N.A.A.C.P. v. Browning, 522 F.3d 1153, 1165 (11th Cir. 2008) ("[A] n organization has standing to sue on its own behalf if the defendant's illegal acts impair its ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.").

It is undeniable, as the district court found, that the City's enforcement of the Ordinance and the Park Rule "impair[ed]" FLFNB's "ability to engage in its projects" -- food-sharing demonstrations to criticize society's allocation of resources between food and war -- in a number of ways. Most directly, the police shut down an FLFNB food-sharing demonstration on November 7, 2014. This blocked FLFNB from holding its traditional post-meal organizational meeting in Stranahan Park and cut short an exercise of its chief means of advocacy. See Havens, 455 U.S. at 379, 102 S.Ct. 1114 (plaintiff organization suffered injury where challenged practices impaired its ability "to provide counseling and referral

services for low-and-moderate-income homeseekers"). Moreover, the challenged regulations caused FLFNB to expend resources in the form of volunteer time, including efforts to collect bail money and organize legal representation for its members who were arrested under the Ordinance and the Park Rule. The threat of arrest also has practically hindered would-be volunteers from participating in FLFNB demonstrations. Thus, for example, FLFNB had to stop accepting high school volunteers because it did not want to risk subjecting them to criminal liability. These injuries will continue, because FLFNB continues to hold demonstrations under the threat of Park Rule enforcement.

FLFNB volunteers who would have normally worked on preparing for food-sharing demonstrations had to divert their energies to advocacy activities such as attending City meetings and organizing protests against the Ordinance, as well as arranging for transportation and supplies for these events. FLFNB's Rule 30(b)(6) representative unambiguously testified ***1288** that this "drew away time and resources from free time we would be spending on preparing for ... feedings." See Fla. State Conf. of N.A.A.C.P., 522 F.3d at 1165–66 (organization suffered injury in fact from anticipated diversion of "personnel and time to educating volunteers and voters on compliance with" a challenged law). In the face of these injuries, the fact that FLFNB has continued to hold food sharings in Stranahan Park since the enactment of the Ordinance does not deprive it of standing.

Nor, as the City suggests, does the fact that FLFNB is an informal organization with no formative documents, formal leadership offices, or written proof of membership. The City has not offered any authority to suggest that an unincorporated association's informal structure somehow renders it incapable of sustaining actual and concrete injury. To the contrary, unincorporated associations by their nature lack a charter and often lack formal organizational structures. See S. Cal. Darts Ass'n v. Zaffina, 762 F.3d 921, 931 (9th Cir. 2014) ("[A]n 'unincorporated association' is a 'voluntary group of persons, without a charter, formed by mutual consent for the purpose of promoting a common objective.' ") (citation omitted). This does not block them from seeking redress for injuries they may sustain. See Thompson v. Metro. Multi-List, Inc., 934 F.2d 1566, 1571 (11th Cir. 1991) ("Empire is an unincorporated association. As such, it has standing to allege ... injuries suffered directly by the organization."). On this record as a whole, FLFNB's relaxed organizational style does not denude it of standing.

III.

A.

To take stock so far, the Plaintiffs have standing to bring the following justiciable claims: for declaratory and injunctive relief against the Park Rule, and for compensatory damages with respect to both the Ordinance and the Park Rule. Our next step would normally be to examine the merits of the Plaintiffs' arguments that the Ordinance and the Park Rule are unconstitutional. But there is a twist here. As we see it, we need not, and therefore do not, pass upon the validity of the Ordinance. The Ordinance was repealed on November 7, 2017. And the validity, vel non, of the Ordinance has no bearing on the Plaintiffs' claims for past damages. This is because the Plaintiffs' damages claims with respect to the Ordinance -- the only Ordinance claims left -- are coextensive with their damages claims arising out of the enforcement of the Park Rule. The City enforced the Ordinance and the Park Rule as one, so reviewing the constitutionality of the Park Rule is all we must do in order to determine whether the Plaintiffs may be entitled to damages based on the City's enforcement actions. Because, as we will explain, the Park Rule violates the First Amendment as applied to the Plaintiffs, a ruling on the Ordinance provides no further benefit to the Plaintiffs. Deciding the constitutionality of the repealed Ordinance would therefore be an unnecessary exercise of our authority to interpret the Constitution. "Generally, we don't answer constitutional questions that don't need to be answered." Burns v. Town of Palm Beach, 999 F.3d 1317, 1348 (11th Cir. 2021); see Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.").

To explain, the core of the Plaintiffs' theory of damages is that they were forced to exercise their First Amendment rights under the fear of City sanction. The Ordinance and the Park Rule operated together ***1289** to inflict this fear, so reserving judgment on the Ordinance will not affect the

Plaintiffs' pursuit of compensatory damages. The Plaintiffs explain that they "fear future harassment, arrest and prosecution for continuing to engage in their weekly demonstrations at Stranahan Park." They also complain of associated "impairment of reputation, emotional distress, and loss of protected constitutional freedoms." Thus, for example, plaintiff William Toole declared that "[i]f the City resumes enforcement of the Ordinance and Park Rule, as I anticipate it will, I and other members of [FLFNB] will continue to face the possibility of receiving criminal citations for engaging in political expression, citations carrying a potential penalty of a $500.00 fine, 60 days in jail, or a combination of the two." As an organization, plaintiff FLFNB suffered similar damages because "people who want to associate with [FLFNB] for purposes of engaging in [its] weekly political demonstrations do so by assuming a risk of citation or arrest."

A violation of the Ordinance and a violation of the Park Rule each carry the same penalty. The City could impose the specific penalties Toole and the other plaintiffs fear -- a $500.00 fine and 60 days in jail -- either for a violation of the Ordinance (when it was in effect) or for a violation of the Park Rule. Those convicted of violating the Ordinance "shall ... be punished as provided in Section 1-6 ... of the Code." § 47-34.2(C). Section 1-6 of the Code provides for a $500 fine or 60-day imprisonment punishment. City Code § 1-6(c).

Meanwhile, Park Rule 2.2 prohibits social services in City parks without the City's permission. Section 11.0 of the Park Rules deals with enforcement. Specifically, § 11.3, entitled "Trespass," says that "[a]ny person or group found in violation of [any Park Rule] shall be ordered to leave all [City parks] for a minimum 24-hour period. Any person who fails to leave all City [parks] at the time requested may be arrested and prosecuted for trespassing or prosecuted under other existing ordinances." This directs us to the "Trespassing" section of the City Code, which incorporates the punishment found in City Code § 1-6, the same penalty section incorporated into the Ordinance: "[v]iolators of this section shall be deemed trespassers and subject to punishment as provided in section 1-6 of this Code." City Code § 16-26 (Trespassing). Just as it does for violations of the outdoor food distribution Ordinance, Section 1-6 provides for a fine up to $500 or up to 60 days in jail for Park Rule violations. City Code § 1-6(c). This identity in the available sanction makes sense, because the City enacted the Ordinance at least in part in an effort to bring itself into compliance with the 2000 state-court injunction against the Park Rule, "thereby permitting the resumption of enforcement of the Park Rule."

To support their fears of enforcement, the Plaintiffs identify five instances when the City arrested or cited fellow demonstrators in the Plaintiffs' presence. The arrest documents for four of these demonstrators cite both the Ordinance and the Park Rule. Thus, the Park Rule was an important element in most of the arrests that give rise to the Plaintiffs' claimed damages, namely their fear of arrest and prosecution for engaging in protected expression. Indeed, on November 7, 2014, the same day as the initial arrests, the City's Public Information Officer announced that the City would not allow food sharing in Stranahan Park even pursuant to the conditions of the Ordinance "because social services activities are not allowed to be conducted in our parks per Rule 2.2 of the Parks and Recreation Rules and Regulations." The City's policy of policing food sharing in Stranahan Park -- the source of the Plaintiffs' fear-based damages -- did not depend on the Ordinance. ***1290** In the City's own words, it arose alternatively, and independently, from the Park Rule.

It is true that the record does not indicate that the City ever brought any formal prosecutions under the Park Rule. But the City ultimately dropped all but one of the prosecutions it brought under the Ordinance (one individual pleaded no contest and served ten hours of community service), so the absence of filed Park Rule prosecutions does not drive a meaningful wedge between any damages the Plaintiffs sustained from the enforcement of the Park Rule and any monetary damages arising from the enforcement of the Ordinance.

The Ordinance and the Park Rule operated in tandem and were enforced together against FLFNB's demonstrations. The Plaintiffs acknowledge as much in their complaint: "[v]iolation of the Park Rule is a violation of the [O]rdinance because both require written permission from the City to share food in a City park." The Plaintiffs' alleged damages all stem from a single root: the City's enforcement of the Park Rule.[2] Succeeding in their constitutional claim against the Park Rule would allow the Plaintiffs to proceed in their quest for damages based on this enforcement. Succeeding in their constitutional claim against the Ordinance would not entitle them to anything more because their Ordinance-based damages theories invoke the same set of harms. Cf. Patterson v. Balsamico, 440 F.3d 104, 113–14 (2d Cir. 2006) (nominal damages

award was "contingent on the injuries suffered by [the plaintiff] rather than the number of statutes under which [the defendant was] liable").

[2] Some of the Plaintiffs' filings also might be read to claim damages that do not relate to fears of arrest, but rather to costs incurred in protesting the enactment of the Ordinance. Even these alleged damages stem from the enforcement of the Park Rule. The materials for one of the City meetings FLFNB attended in protest explained that the City wished to pass the Ordinance so that it could resume enforcement of the Park Rule. So FLFNB allegedly expended resources to fight the Park Rule just as much as it did to fight the Ordinance. Of course, nothing in this opinion should be taken to suggest that the Plaintiffs will ultimately be able to prove compensatory damages or even the required causation. We observe only that the damages, as alleged, stem as much from the Park Rule as they do from the Ordinance.

And as we shall see, it is not especially difficult to conclude that the Park Rule cannot pass First Amendment muster as applied to these Plaintiffs.[3] The Ordinance, however, presents a closer and more difficult question. On the one hand, it presents serious constitutional issues arising out of its arduous permitting process and a fee that can rise as high as $6,000 subject to City officials' unfettered discretion. And, at least arguably, the Ordinance effectively bans the Plaintiffs' expression in all City parks; the City did not take advantage of narrower potential alternatives such as allowing demonstrations in particular parks or permitting organizations to hold a limited number of annual food-sharing events as of right. See First Vagabonds Church of God, 638 F.3d at 758 (upholding similar ***1291** Orlando ordinance with these features). On the other hand, the City has a substantial interest in managing its park property, see id. at 761, and the Ordinance (unlike the Park Rule) provides clear and objective standards to guide the City's permitting decisions, such as the requirement that each food sharing use must be at least 500 feet away from any other.

[3] The Plaintiffs also purport to bring a facial challenge to the Park Rule. But they have not shown that the Park Rule prohibits a substantial amount of protected conduct, especially since most of the social service park uses the Park Rule regulates will have no expressive component at all. See Doe v. Valencia Coll., 903 F.3d 1220, 1232 (11th Cir. 2018). Therefore, we follow FLFNB I and treat the Plaintiffs' challenge only as an as-applied one. See 901 F.3d at 1241 ("Whether food distribution or sharing can be expressive activity protected by the First Amendment under particular circumstances is a question to be decided in an as-applied challenge.") (citation omitted and alterations accepted).

The resolution of these issues does not matter here. The Ordinance has been repealed, and its validity does not bear on the Plaintiffs' quest for damages. Since the repeal of the Ordinance renders its validity a wholly academic question, in keeping with the judicial restraint principals of constitutional avoidance, we do not answer it.[4] See Lyng, 485 U.S. at 446, 108 S.Ct. 1319 (lower courts should have answered a constitutional question only if "a decision on that question could have entitled [the plaintiffs] to relief beyond that to which they were entitled on their statutory claims"); Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (courts "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"); Boss Cap., Inc. v. City of Casselberry, 187 F.3d 1251, 1254 (11th Cir. 1999) ("[I]t is our custom not to decide difficult constitutional questions unless we must."), abrogated on other grounds by City of Littleton v. Z.J. Gifts D-4, L.L.C., 541 U.S. 774, 124 S.Ct. 2219, 159 L.Ed.2d 84 (2004).

[4] For similar reasons, we do not reach the Plaintiffs' alternative theories for why the Park Rule is unconstitutional, namely their expressive association, vagueness, and prior restraint theories.

B.

Finally, we come to the merits of the Plaintiffs' as-applied challenge to the Park Rule. Our review of the district court's summary judgment holding that the Park Rule was constitutional is de novo. FLFNB I, 901 F.3d at 1239. We

draw all reasonable inferences in the light most favorable to the Plaintiffs, the non-moving parties. Id.

But first, we pause to clarify what is not up for debate in this appeal. In FLFNB I, a panel of this Court held that FLFNB's food-sharing demonstrations in Stranahan Park are expressive conduct protected by the First Amendment. Id. at 1245. This holding binds us under both the law of the case doctrine, see Rath v. Marcoski, 898 F.3d 1306, 1312 (11th Cir. 2018), and our Court's prior precedent rule, Andrews v. Biggers, 996 F.3d 1235, 1236 (11th Cir. 2021). The sole remaining question for us, then, is whether the Park Rule's regulation of this protected conduct passes First Amendment scrutiny.

To answer this question, we must first decide whether the Park Rule is content neutral or content based, for a content-neutral regulation of expressive conduct is subject to intermediate scrutiny, while a regulation based on the content of the expression must withstand the additional rigors of strict scrutiny. See Texas v. Johnson, 491 U.S. 397, 403–04, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); Burk v. Augusta-Richmond Cnty., 365 F.3d 1247, 1255 (11th Cir. 2004). As we explain, the Park Rule is content neutral. So, we only apply intermediate scrutiny. Specifically, we apply the United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), test for content-neutral regulations of expressive conduct and ask whether the Park Rule "is narrowly drawn to further a substantial governmental interest ... unrelated to the suppression of free speech." ***1292** Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) (citing O'Brien, 391 U.S. at 377, 88 S.Ct. 1673).

Alternatively, we evaluate the Park Rule as a time, place, and manner restriction on expressive conduct. This sort of law also must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. These standards substantially overlap and yield the same result in this case. Either way, the Park Rule violates the First Amendment as applied to the Plaintiffs' food-sharing events.

1. Content Neutrality. Johnson instructs us that a regulation of expressive conduct is content neutral if the justification for the regulation is unrelated to the suppression of free expression. 491 U.S. at 403, 109 S.Ct. 2533. Even a content-neutral purpose, however, cannot save a regulation that " 'on its face' draws distinctions based on the message a speaker conveys." Reed v. Town of Gilbert, 576 U.S. 155, 163–64, 135 S.Ct. 2218, 192 L.Ed.2d 236 (2015).

The Park Rule does not draw content-based distinctions on its face:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City. As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.

The Rule applies not just to food sharing events but also to a host of other social services, including the provision of clothing, shelter, and medical care. These services usually do not involve expressive conduct. Even most social-service food sharing events will not be expressive. See FLFNB I, 901 F.3d at 1242 (holding that FLFNB's food sharing was protected expressive conduct only after a close examination of the specific context surrounding the events). That the Park Rule regulates a range of activity, most of which has no expressive content at all, suggests its application does not vary based on any message conveyed. The Rule does not single out messages which relate to food or the importance of sharing food with the homeless.

Instead, the Park Rule's application to food sharing (and other services) turns on whether the services are provided "in order to meet [the recipients'] physical needs." This distinction does not depend on the content of the message associated with any food sharing that happens to be expressive. The Park Rule (at least in the City's view) applies to FLFNB's sharing of low-cost food with the homeless in order to communicate a message about the societal allocation of resources between food and the military, but it would also apply to an organization that shared low-cost food with the homeless in order to

communicate that the City's homeless shelters serve food that lacks vital nutrients. It would likewise apply to an organization that shared low-cost food with struggling veterans in order to emphasize the debt our society owes for their sacrifice, and so on. Indeed, it would apply to organizations that share food with those in need to communicate any number of messages. Simply put, the Rule does not "draw[ ] distinctions based on [any] message" food-sharers convey. Reed, 576 U.S. at 163, 135 S.Ct. 2218.

The Plaintiffs rely on Reed's allusion to the possibility that some facial distinctions might be content based because they define "regulated speech by its function or purpose" to argue that the Park Rule's social-service-purpose distinction is content based. Id. at 163–64, 135 S.Ct. 2218. But we have characterized this language in Reed as "dicta." ***1293** Harbourside Place, LLC v. Town of Jupiter, 958 F.3d 1308, 1319 (11th Cir. 2020). In any event, as just described, the purpose on which the regulatory definition turns -- sharing food to provide for physical welfare -- is not one that draws a distinction based on the content of any expression. See Recycle for Change v. City of Oakland, 856 F.3d 666, 671 (9th Cir. 2017) (holding, after Reed, that a regulation that applied to unattended donation boxes that collected personal items "for the purpose of distributing, reusing, or recycling those items" did not turn on "communicative content"); Josephine Havlak Photographer, Inc. v. Vill. of Twin Oaks, 864 F.3d 905, 915 (8th Cir. 2017) (regulation that applied to photography for commercial purposes, but not non-commercial purposes, was not content based under Reed). To be sure, it seems likely that most expressive food sharings subject to the Park Rule's regulation will involve some sort of message related to the importance of sharing food with those in need. "But a facially neutral law does not become content based simply because it may disproportionately affect speech on certain topics." McCullen v. Coakley, 573 U.S. 464, 480, 134 S.Ct. 2518, 189 L.Ed.2d 502 (2014).

Likewise, the City's justifications for the Park Rule do not relate to content. "A regulation that serves purposes unrelated to the content of expression is deemed [content] neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The City enacted the Park Rule, and the Ordinance designed to facilitate its enforcement, in order to address a series of problems associated with large group food events in public parks, including loitering and crowds, trash build-up, noise, and food safety issues, as well as to ensure that similar uses of public property did not concentrate in one area. Citizens had complained about some of these problems in connection with food-sharing events. In January 2014, the City Commission held a workshop on homelessness in the community where stakeholders debated public food distribution and related topics. More generally, the Ordinance states that its purpose is "to regulate social service facilities in order to promote the health, safety, morals and general welfare of the residents of the City of Fort Lauderdale." (This statement illuminates the Park Rule's purpose as well, since the City enacted the Ordinance so that it could resume enforcement of the Park Rule.)

These concerns, which boil down to an interest in maintaining public parks and other property in a pleasant, accessible condition, are not related to the suppression of the Plaintiffs' (or any other party's) expression, so they are content neutral. See First Vagabonds Church of God, 638 F.3d at 762 ("[T]he interest of the City in managing parks and spreading large group feedings to a larger number of [locations] is unrelated to the suppression of speech."); see also McCullen, 573 U.S. at 480–81, 134 S.Ct. 2518 (public safety, the need to protect security, and regulation of congestion are content-neutral concerns); Ward, 491 U.S. at 797, 109 S.Ct. 2746 ("The city enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks have to offer, from amplified music to silent meditation.").

One could phrase the City's motives in terms that are perhaps less flattering. The district court said the City was concerned "that food sharing as a social service attracts people who act in ways inimical to" keeping parks safe, clean and enjoyable; the Plaintiffs put a finer point on it and accuse the city of "deter[ring] homeless and hungry people from parks because of how they might act." Fort Lauderdale's ***1294** elected officials seem to have decided that sharing food with large groups of homeless people in public parks causes problems that make those parks less useful to the broader public. But even accepting these descriptions does not alter the First Amendment analysis, which at this stage asks only whether the City's desire to prevent groups of homeless people from gathering in public parks is a goal related to the content of the Plaintiffs' or any other party's expression. The First Amendment does not permit us to go further and comment upon whether this objective is virtuous public policy. We hold simply that the Park Rule is not related to

expressive conduct; it has nothing to do with the Plaintiffs' critique of society's allocation of scarce resources between welfare and defense spending.

The Plaintiffs are wrong to say that the City's concern with the behavior of the crowds that gather at FLFNB expressive food-sharing events is a justification related to "[l]isteners' reaction to speech," which they correctly point out would not be "a content-neutral basis for regulation." Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). Forsyth and related cases stand for the principle that a city may not regulate speech because it "cause[s] offense or ma[kes] listeners uncomfortable," McCullen, 573 U.S. at 481, 134 S.Ct. 2518, or because it might elicit a violent reaction or difficult-to-manage counterprotests, Forsyth Cnty., 505 U.S. at 134, 112 S.Ct. 2395. The City is concerned not that FLFNB's expression will offend or cause violence, but that it will cause the gathering of crowds -- participants in the meals, rather than a bystander audience -- and associated logistical problems such as the accumulation of trash. Addressing the practical problems crowds pose is a content-neutral concern. See McCullen, 573 U.S. at 481, 134 S.Ct. 2518 ("Whether or not a single person reacts to abortion protestors' chants or petitioners' counseling, large crowds outside abortion clinics can still compromise public safety, impede access, and obstruct sidewalks."); cf. Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1317–18 (11th Cir. 2000) (a regulation that distinguished between events based on whether they would require municipal services to "accommodate ... large public gatherings" was "justified without reference to the content of the regulated speech") (emphasis omitted).

2. Intermediate Scrutiny. Since the Park Rule is a content-neutral regulation of expressive conduct, it is subject only to intermediate scrutiny, not the more demanding requirements of strict scrutiny. Specifically, under United States v. O'Brien, the Park Rule may regulate the Plaintiffs' expressive food sharing only so long as food sharing "itself may constitutionally be regulated" (no one has suggested it may not) and the Park Rule "is narrowly drawn to further a substantial governmental interest" that is "is unrelated to the suppression of free speech." Clark, 468 U.S. at 294, 104 S.Ct. 3065 (1984) (citing O'Brien, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968)).

The City does have a "substantial interest in ensuring the ability of [its] citizens to enjoy whatever benefits the city parks have to offer." Ward, 491 U.S. at 797, 109 S.Ct. 2746. More specifically, the Park Rule seeks to further the City's "substantial interest in managing park property and spreading the burden of large group feedings throughout a greater area." First Vagabonds Church of God, 638 F.3d at 762. As we have explained, the regulations are concerned with avoiding concentration of similar park uses and with sanitation and other logistical problems that crowded food distribution events cause -- substantial ***1295** government interests that are unrelated to the suppression of free speech.

However, the Park Rule is not narrowly tailored to the City's interest in park maintenance. Under intermediate scrutiny, the regulation " 'need not be the least restrictive or least inclusive means' of serving the government's interests." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citation omitted). Rather, "the requirement of narrow tailoring is satisfied 'so long as the regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation,' " and "the means chosen are not substantially broader than necessary to achieve the government's interest." Ward, 491 U.S. at 799–800, 109 S.Ct. 2746 (citation omitted and alterations accepted).

Fatally, the Park Rule imposes a permitting requirement without implementing any standards to guide City officials' discretion over whether to grant a permit. The Rule bans social-service food sharings in City Parks "unless authorized pursuant to a written agreement with City." That's it. Under the terms of the Rule, a City official may deny a request for permission to hold an expressive food sharing event in the Park because he disagrees with the demonstration's message, because he doesn't feel like completing the necessary paperwork, because he has a practice of rejecting all applications submitted on Tuesdays, or for no reason at all. In a word, the complete lack of any standards allows for arbitrary enforcement and even for discrimination based on viewpoint.

Generally, subjecting protected expression to an official's "unbridled discretion" presents "too great" a "danger of censorship and of abridgment of our precious First Amendment freedoms." Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). "[D]istaste for [such] censorship -- reflecting the natural distaste of a free people -- is deep-written in our law." Id. It comes as no surprise, then, that "a long line" of

Supreme Court decisions makes it abundantly clear that a regulation which "makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." Shuttlesworth v. City of Birmingham, 394 U.S. 147, 151, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (quoting Staub v. City of Baxley, 355 U.S. 313, 322, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958)).

The facts of Shuttlesworth illustrate the point. A Birmingham, Alabama ordinance empowered the city commission to deny parade permits whenever they thought it necessary for "public welfare," "decency," "morals," or "convenience." Id. at 148–50, 89 S.Ct. 935. In 1963, city officials used this ordinance to arrest and prosecute participants in a peaceful civil rights march held without a license, including Rev. Fred Shuttlesworth. Id. But the Supreme Court invalidated Shuttlesworth's conviction. Id. at 159, 89 S.Ct. 935. The risk that the ambiguity in the licensing regime would permit officials to target individuals, like Shuttlesworth, on the basis of their disfavored expression was too great for the First Amendment to bear.

The reasoning of these prior restraint cases controls the as-applied narrow tailoring inquiry we conduct in this case: "[e]xcessive discretion over permitting decisions is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." Burk, 365 F.3d at 1256. The Park rule does not even supply malleable standards like those found in Shuttlesworth; it doesn't provide any standards at all. As applied to the Plaintiffs' protected ***1296** expression, the Park Rule fails First Amendment scrutiny.

Moreover, the Park Rule's sweeping grant of discretion to City permitting officials is not necessary to further the City's interests in crowd control and park conservation. The government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." McCullen, 573 U.S. at 486, 134 S.Ct. 2518 (citations omitted). Of course, the mere availability of less restrictive alternatives will not cause a regulation to fail narrow tailoring scrutiny, and we may not "replace the City as the manager of its parks." First Vagabonds Church of God, 638 F.3d at 762 (citation omitted and alterations accepted). But an abundance of targeted alternatives may indicate that a regulation is broader than necessary. See McCullen, 573 U.S. at 490–94, 134 S.Ct. 2518 (relying in part on available alternatives to conclude that a regulation of speech near abortion clinics burdened more speech than necessary).

The Park Rule amounts to an outright ban on public food sharing in all of Fort Lauderdale's parks; any exception is subject only to the standardless whims of City permitting officials. For a model of a narrower regulation targeting more or less the same interests, the City need only have looked 218 miles to the northwest. In First Vagabonds Church of God, we upheld an Orlando regulation that permitted public food distribution without a license in sixty-six parks. 638 F.3d at 761. For the group of forty-two parks in the central downtown district near City Hall, each organization was entitled to two licenses per year. Id. And the Orlando ordinance applied only to events likely to attract twenty-five or more people. Id. at 759.

Fort Lauderdale offers no reason it could not have similarly narrowed the Park Rule's permission requirement or tailored it in some other way. Thus, for example, in addition to adding "narrowly drawn, reasonable and definite standards" to guide officials' permitting discretion, Forsyth Cnty., 505 U.S. at 133, 112 S.Ct. 2395 (citation omitted), the City could have required permission only for events likely to attract groups exceeding a certain size. Or it could have required City permission only for certain parks. Central to the City's conclusion that public food distribution causes problems in parks is a collection of seven citizen and organizational complaints about food-sharing events. Six of these are specific to the downtown Fort Lauderdale area. The City could have required permission only in downtown parks or designated limited areas within parks for sharing food. See McCullen, 573 U.S. at 493, 134 S.Ct. 2518 (evidence of disruptive demonstrations at a single Boston clinic did not justify a statewide regulation of demonstrations at abortion clinics); see Clark, 468 U.S. at 295, 104 S.Ct. 3065 (rejecting challenge to a limited ban on camping in Washington, D.C.'s Lafayette Park as applied to an anti-homelessness demonstration; the Park Service allowed camping in designated areas in other parks); Smith v. City of Fort Lauderdale, 177 F.3d 954, 956–57 (11th Cir. 1999) (upholding ban on begging that applied only to a five-mile "designated, limited beach area" and did not ban begging in "many other public fora"). The City also might have allowed groups like FLFNB a limited annual number of food distribution events in Stranahan Park as of right. Again, we do not presume to

tell the City exactly how it should manage its parks; all this is only to say that the Park Rule's utterly standardless permission requirement is "substantially broader than necessary to achieve" the City's interest in maintaining its parks. Ward, 491 U.S. at 782–83, 109 S.Ct. 2746. The Park Rule therefore cannot qualify as a valid regulation of the Plaintiffs' expressive conduct.

***1297** Alternatively, we evaluate the Park Rule under Clark's standard for time place, and manner restrictions. A content-neutral law regulating the time, place, and manner of expression in a public forum must be "narrowly tailored to serve a significant governmental interest" and "leave open ample alternative channels for communication of the information." Clark, 468 U.S. at 293, 104 S.Ct. 3065. Stranahan Park is "an undisputed public forum." FLFNB I, 901 F.3d at 1238. We underscore that parks "occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate." McCullen, 573 U.S. at 476, 134 S.Ct. 2518 (quotation omitted); United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983) (Public parks are "historically associated with the free exercise of expressive activities."); Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."). "[T]he government's ability to permissibly restrict expressive conduct" in Stranahan Park is therefore "very limited." Grace, 461 U.S. at 177, 103 S.Ct. 1702. But the government nevertheless "may enforce reasonable time, place, and manner regulations" on expression in the park. See id.

As a practical matter, there is little difference between this standard and the O'Brien test we have just discussed, and, in any event, they yield the same result in this case. Clark, 468 U.S. at 298, 104 S.Ct. 3065 (observing that the O'Brien standard "is little, if any, different from the standard applied to time, place, or manner restrictions"); see First Vagabonds Church of God, 638 F.3d at 761–62 (analyzing a similar ordinance under both standards). Both require that the regulation be narrowly tailored to serve a significant government interest. Clark, 468 U.S. at 293, 298, 104 S.Ct. 3065. Just as it does under O'Brien, the Park Rule's grant of standardless discretion to the City's permitting officials causes it to fail time, place, and manner scrutiny: "[a] government regulation that allows arbitrary application is 'inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view.' " Forsyth Cnty., 505 U.S. at 130–31, 112 S.Ct. 2395 (quoting Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981)); Burk, 365 F.3d at 1256 ("[T]ime, place, and manner regulations must contain narrowly drawn, reasonable and definite standards, to guide the official's decision and render it subject to effective judicial review.") (internal quotation marks and citations omitted). Since the Park Rule fails because it is not narrowly tailored, we need not address whether it leaves open ample alternative channels for the communication of the Plaintiffs' message.

The long and short of it is that the Park Rule as applied to the Plaintiffs' expressive food sharing activities violates the First Amendment. Accordingly, we **REVERSE** the district court's summary judgment order and **REMAND** for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HULL, Circuit Judge, with whom LAGOA, Circuit Judge, joins, concurring:

I concur in full in the panel opinion. I write separately to emphasize that this is ***1298** the second appeal in this case and that our panel is bound by this Court's holding as to whether the plaintiff FLFNB's food-sharing conduct is sufficiently expressive to warrant First Amendment protection. See Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale, 901 F.3d 1235 (11th Cir. 2018).

In that prior appeal, this Court held that, "on this record," the nature of the plaintiff FLFNB's weekly food-sharing activity in a public park, "combined with the factual context and environment in which it was undertaken," led to the conclusion that FLFNB's food sharing conduct "express[es] an idea through [that] activity," conveys "some sort of message" to a reasonable observer, and constitutes "a form of protected expression" under the First Amendment. Id. at 1240–45 (quotation marks omitted). This holding relied on a well-developed factual record about the plaintiff FLFNB's many years of

food-sharing events (1) that are held in the City's Stranahan Park, a public forum where the homeless congregate, and (2) that are accompanied by FLFNB's banners and distribution of literature. Id. As the panel opinion points out, "most social-service food sharing events will not be expressive." Maj. Op. at 1292. Here, however, we are bound by the holding in the prior appeal that was based on a particular and extensive list of factual circumstances.

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NOTES

Food-Sharing Restrictions: A New Method of Criminalizing Homelessness in American Cities

Jordan Bailey*

INTRODUCTION

Chico and Debbie Jimenez, founders of Spreading the Word Without Saying a Word Ministry, have fed homeless residents of Daytona Beach once a week for more than year.[1] Joan Cheever, operator of a non-profit food truck, has been serving homeless residents of San Antonio for ten years.[2] Arnold Abbot, a ninety-year-old veteran, has been feeding the homeless people of Ft. Lauderdale for decades.[3] In addition to feeding the homeless population, these individuals have something else in common: each has faced penalties, including jail time, in the past year for their charitable work.[4] These penalties are a result of ordinances prohibiting food-sharing which cities have adopted at an increasing rate in recent years. Part of a larger trend towards criminalizing activities of individuals experiencing homelessness, at least sixteen cities have adopted these ordinances since 2013 alone.

The adoption of these ordinances has been widely controversial. Cities often claim that these restrictions are implemented to ensure that the food that the homeless population receives is healthy and properly distributed.[5] Others believe the food-sharing restrictions will encourage homeless people to seek food in

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* J.D. Candidate, Georgetown University Law Center, 2016; B.A. University of Alabama at Birmingham, 2012; Executive Editor, Vol. 23, Georgetown Journal on Poverty Law & Policy. The author thanks his parents, David and Carolyn, his family, and his friends for their constant love and support. The author also thanks Professor Peter Edelman, Kristina Scott, and Dr. Robert Corley for their inspiration and mentorship.

1. Bill Briggs, *Florida Couple Fined, Threatened with Jail for Feeding Homeless*, NBC NEWS (May 12, 2014, 4:35 PM), http://www.nbcnews.com/news/us-news/florida-couple-fined-threatened-jail-feeding-homeless-n103786.

2. Gilbert Garcia, *Chef ticketed, facing $2,000 fine for feeding homeless in San Antonio*, SAN ANTONIO EXPRESS-NEWS (Apr. 14, 2015, 4:35 PM), http://www.mysanantonio.com/news/local/article/Chef-ticketed-facing-2-000-fine-for-feeding-6198766.php.

3. Eliza Barclay, *Florida Activist Arrested for Serving Food to Homeless*, NPR (Nov. 6, 2014, 4:35 PM), http://www.npr.org/blogs/thesalt/2014/11/06/362019133/florida-activists-arrested-for-serving-food-to-homeless.

4. *See supra* notes 1–3.

5. *See infra* Part IV.A.

locations where they can be provided with comprehensive services.[6] Homeless advocates and charities, however, argue that these ordinances are an attempt to hide or remove the homeless population from downtown and tourist areas that cities are wishing to revitalize.[7]

Part I of this Note will provide a brief overview of homelessness and hunger in the United States. Part II will discuss the history of ordinances criminalizing homeless activity, including their origin in vague vagrancy and loitering laws, the adoption of contemporary homeless ordinances, and the recent explosion of their use in cities across the country. Part III will introduce the various forms of food-sharing prohibitions that cities have adopted. Part IV will consider the stated public policy goals behind these prohibitions, consider their effectiveness at attaining these goals, and propose possible alternatives to criminalization. Finally, having concluded that these ordinances should be repealed, this Note will propose in Part V a possible campaign to void current prohibitions and prevent future implementation through the adoption of city or state homeless bills of rights.

I. AN OVERVIEW OF HOMELESSNESS AND HUNGER

In 2014, it was estimated that almost 580,000 people experienced homelessness in the United States on a given night.[8] Sixty-nine percent of these individuals suffering homelessness were living in emergency shelters or transitional housing, while 31% were living in various unsheltered locations.[9] 99,434 people were considered chronically homeless,[10] defined as being homeless for a year or more or experiencing at least four episodes of homelessness in the last three years.[11] Nearly 85% of those considered chronically homeless were experiencing homelessness as individuals rather than families.[12] There were almost 50,000 veterans experiencing homelessness in 2014, and an estimated 45,205 children and youth experiencing homelessness, 50% of whom were unsheltered.[13] Half of the U.S. homeless population is located in just five states—California, New York, Florida, Texas, and Massachusetts—with 20% located in California alone.[14]

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6. *See infra* notes 101–04.

7. *See* Arthur Delaney, *How A Traveling Consultant Helps America Hide The Homeless*, HUFFINGTON POST (Mar. 9, 2015, 9:12 PM), http://www.huffingtonpost.com/2015/03/09/robert-marbut_n_6738948.html.

8. U.S. DEP'T OF HOUS. & URBAN DEV., THE 2015 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2014), https://www.hudexchange.info/resources/documents/2014-AHAR-Part1.pdf.

9. *Id.*

10. *Id.*

11. *Id.* at 2.

12. *Id.* at 1.

13. *Id.*

14. *Id.* at 8.

Homeless families and individuals experience high levels of food insecurity due to their low income and housing instability,[15] requiring them to rely heavily on emergency food assistance.[16] In a 2014 survey of hunger and homelessness in twenty-five U.S. cities, 75% of cities had an increased need of emergency food assistance.[17] Across these twenty-five cities, it is estimated that 27% of the emergency food assistance need went unmet.[18] At the same time that need increased, 82% of cities had to reduce the quantity of food persons could receive during each pantry visit, or food offered per meal at emergency kitchens.[19] Others were forced to reduce the number of times that a person or family could visit a food pantry each month.[20]

II. A HISTORY OF CRIMINALIZATION

American cities have a long and troubling history of using the criminal justice system as a policy tool to punish and remove individuals experiencing homelessness. Such practices have become widely referred to in the housing advocacy community as "criminalizing homelessness."[21] While criminalization has been used for decades, the marked growth in its contemporary use and the range of activity to which criminal violations now apply makes this issue more concerning than ever.[22] This Part will present various methods used to criminalize the behavior of individuals experiencing homelessness, including both vague vagrancy and loitering laws and new contemporary ordinances. It will then discuss the recent explosion of criminalization efforts around the country.

A. Vagrancy and Loitering Laws

The history of criminalizing homelessness likely began with now-defunct vague vagrancy and loitering laws.[23] These laws punished status rather than conduct.[24] Being homeless and unemployed was all that was needed to constitute

15. INST. FOR CHILDREN, POVERTY, AND HOMELESSNESS, THE AMERICAN ALMANAC OF FAMILY HOMELESSNESS 44 (2013), http://www.icphusa.org/pdf/americanalmanac/almanac_issue_foodinsecurity.pdf.

16. *Id.*

17. U.S. CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES 1–2 (2014), http://www.usmayors.org/pressreleases/uploads/2014/1211-report-hh.pdf.

18. *Id.*

19. *Id.*

20. *Id.*

21. Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step From State to State*, 19 PUB. INT. L. REP. 8, 9 (2013); *see also* NAT'L LAW CTR. FOR HOMELESSNESS AND POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 14–16 (2011), http://www.nlchp.org/Criminalizing_Crisis (describing the recent rise in penalizing homeless activities).

22. *See infra* text accompanying notes 58–64.

23. *See* 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, 635–645 (1992).

24. *See* Handler v. Denver, 77 P.2d 132, 135 (Colo. 1938).

arrest; illegal activity was not required.[25] While the use of vagrancy and loitering laws—a practice started in Great Britain in the fourteenth century—has been an American tradition since colonial times, a wave of vagrancy legislation began in 1881 in response to the increasingly static population of individuals experiencing homelessness.[26] These laws also played a critical role in the Jim Crow South. As part of the "Black Codes"—laws passed by Southern state legislatures to limit the freedom of former slaves—vagrancy and loitering statutes allowed white Southerners to intimidate African Americans, arrest them, and often force them back into labor.[27]

State and Federal courts largely upheld vagrancy laws until the 1960s and 1970s.[28] During that time, courts invalidated these statutes on various grounds, including: that they invidiously discriminated against the poor, that they amounted to cruel and unusual punishment, that they restricted the right to travel, and that they were too vague and indefinite to provide adequate notice of prohibited conduct.[29]

As vagrancy laws were invalidated, police began relying heavily on loitering laws to achieve comparable results.[30] This practice was largely upheld until the United States Supreme Court's 1983 decision in *Kolender v. Lawson*,[31] which invalidated a California loitering statute requiring street wanderers to present valid identification when stopped by the police, on the grounds that the statute was too vague to satisfy due process.[32] This decision was followed by *Chicago v. Morales*,[33] which invalidated a Chicago ordinance preventing loitering by gang members on due process grounds.[34]

B. The Introduction of Contemporary Criminalization Ordinances

With many vague vagrancy and loitering laws no longer enforceable, municipalities in the last three decades instituted new ordinances aimed at punishing individuals experiencing homelessness. These ordinances targeted a broad range of homeless activity in public, including panhandling, camping, sleeping in vehicles, sanitation practices, and the storage and transportation of belongings.

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25. *See* Simon, *supra* note 23, at 640.

26. JAMES ADAM WASSERMAN & JEFFREY MICHAEL CHAIR, AT HOME ON THE STREET 9 (2010).

27. *See generally* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME (2008).

28. Simon, *supra* note 23, at 642.

29. *Id.*

30. *Id.* at 644 (stating that after the decision of *Papachristou v. Jacksonville*, 405 U.S. 156 (1972), police officers continued to arrest "suspicious" individuals under the guise of loitering laws).

31. Kolender v. Lawson, 461 U.S. 352 (1983).

32. *Id.*

33. Chicago v. Morales, 527 U.S. 41 (1999).

34. *Id.*

1. Panhandling

Many cities have enacted ordinances against begging and panhandling. The District of Columbia's ordinance, enacted in 1993, prohibits a person from asking, begging, or soliciting alms, including money and other things of value, in a public transportation vehicle; at a bus, train, or subway stop; and within ten feet of an ATM.[35] It also prohibits "aggressive" begging or solicitation in any place open to the general public.[36] This and similar ordinances substantially limiting the time, method, and location of panhandling have been widely upheld by courts.[37] Only outright prohibitions on all panhandling in public have been invalidated as unconstitutional.[38]

2. Sleeping In Vehicles

For many people who can no longer afford traditional housing, living in a motor vehicle is often their last resort short of sleeping in the streets.[39] In the absence of adequate services and alternatives, "[c]ars are the new homeless shelters," according to People Assisting the Homeless CEO Joel John Roberts.[40]

While one would think that cities would prefer this housing arrangement over living in the street, many cities and states have passed laws prohibiting the human habitation of vehicles parked on public streets or in public parking facilities.[41] In Minneapolis, one of the most progressive cities in the country,[42] an ordinance was adopted stating that

> No camp car, house trailer, automobile, tent or other temporary structure may be parked or placed upon any public street or on any public or private premises or street in the city and used as a

35. D.C. CODE § 22-2302 (2015).

36. *Id.*

37. *See* Gresham v. Peterson, 225 F.3d 899, 901 (7th Cir. 2000) (upholding a panhandling ordinance that prohibited solicitation of cash at night near a public transportation vehicle or facility, parked or stopped vehicle, sidewalk café, or bank); Smith v. City of Ft. Lauderdale, 177 F.3d 954, 955 (11th Cir. 1999) (upholding an ordinance that prohibits panhandling on a five-mile stretch of beach); McFarlin v. District of Columbia, 681 A.2d 440, 447–50 (D.C. 1996) (upholding an ordinance that prohibited begging at subway stations and stops). *See generally* Tracy A. Bateman, Annotation, *Laws regulating begging, panhandling, or similar activity by poor homeless persons*, 7 A.L.R. 5th 455 (1992).

38. *See* Speet v. Schuette, 889, F. Supp. 2d 969, 972 (W.D. Mich. 2012) (invalidating a statue that criminalized begging in a public place); C.C.B v. State, 458 So.2d 47, 48 (Fla. Dist. Ct. App. 1984) (invalidating an ordinance that prohibited all forms of begging or soliciting of alms).

39. Kevin O'Leary, *Last Refuge of the Homeless: Living in the Car*, TIME (Feb. 12, 2010), http://content.time.com/time/nation/article/0,8599,1963454,00.html.

40. *Id.*

41. *See, e.g.*, AUSTIN, TEX., CODE OF ORDINANCES, § 9-4-11 (2016); MINNEAPOLIS, MINN., CODE OF ORDINANCES, ch. 244.60 (2015).

42. *See* K.N.C & L.P., *Urban Ideologies*, ECONOMIST (Aug. 4, 2014, 2:53 PM), http://www.economist.com/blogs/graphicdetail/2014/08/daily-chart-0.

> shelter or enclosure of persons and their effects for the purpose of living therein.[43]

These ordinances severely impact the 10,000 people estimated to live in their automobiles throughout the country.[44]

3. Camping in Public

Unfortunately for those individuals experiencing homelessness who do not have a vehicle, camping or sleeping in public is often a basic tool of survival.[45] Yet many localities have passed ordinances making it a crime to engage in these or similar acts.[46] Tucson, for example, passed an ordinance in 1996 prohibiting camping and sleeping on city property at night.[47] It is also illegal to lie or sit on public sidewalks in the downtown commercial area during the day.[48] These ordinances—similar to those found in cities across the country[49]—substantially limit the space in which individuals experiencing homelessness may legally live and sleep. As a result, a nationwide survey of individuals experiencing homelessness revealed that more than 70% are unaware of a single place that is safe and legal for them to sleep outside.[50]

4. Sanitation Practices

Many U.S. cities have also prohibited basic sanitation practices that result from not having access to housing. Cities like Manteca, California, have passed ordinances criminalizing urination and defecation in public.[51] At the same time, many cities have restricted the ability of homeless individuals to access the already-limited supply of public restrooms by closing them at night or removing them all together.[52] This makes legally performing life-sustaining functions

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43. MINNEAPOLIS, MINN., CODE OF ORDINANCES, ch. 244.60 (2015).

44. Dina Demetrius, *Mobile homes: Many 'hidden homeless' Americans living in vehicles*, AL JAZEERA (Oct. 10, 2014), http://america.aljazeera.com/watch/shows/america-tonight/articles/2014/10/10/mobile-homes-manyhiddenhomelessamericanslivinginvehicles.html.

45. *See* Scott Keyes, *City Makes It Illegal To Sleep In Public In Effort To Crack Down On the Homeless*, THINK PROGRESS (Sept. 22, 2014, 8:40 AM), http://thinkprogress.org/economy/2014/09/22/3570021/florida-city-criminalizes-homelessness/.

46. *See* NAT'L LAW CTR. FOR HOMELESSNESS AND POVERTY, NO SAFE PLACE 18–20 (2014) [hereinafter NO SAFE PLACE].

47. TUCSON, ARIZ. CODE, ch. 21 § 3(4) (2015).

48. TUCSON, ARIZ. CODE, ch. 11 § 36 (2015).

49. *See* NO SAFE PLACE, *supra* note 46.

50. WESTERN REG'L ADVOCACY PROJECT, NATIONAL CIVIL RIGHTS OUTREACH FACT SHEET 2 (2014), http://wraphome.org/images/stories/hbr/NationalCivilRightsFactSheetDecember2014.pdf.

51. MANTECA, CAL. MUNICIPAL CODE, tit. 9, ch. 13.020 (2015).

52. *See* Bryce Covert, *California City Bans Homeless From Sleeping Outside: If They Leave, 'Then That's Their Choice'*, THINK PROGRESS (Nov. 10, 2014, 8:47 AM), http://thinkprogress.org/economy/2014/11/10/3590672/manteca-homeless/; Mike Brassfield, *Clearwater neighborhood longs for park toilets, closed to discourage homeless*, TAMPA BAY TIMES (Nov. 28, 2012), http://www.tampabay.com/news/localgovernment/clearwater-neighborhood-longs-for-park-toilets-closed-to-discourage/1263706.

difficult. A number of cities also ban bathing in public fountains, presenting yet another sanitation hurdle for people experiencing homelessness, as their access to showers is usually inadequate.[53]

5. Storage and Transportation of Belongings

Other cities have taken aim at the ability of individuals experiencing homelessness to transport and store their belongings. For example, Honolulu enacted an ordinance in 2010 that bans the use or storage of shopping carts—often used by individuals experiencing homelessness to store their property—in the city's public parks.[54] Similarly, Ft. Lauderdale has prohibited storage of any item of personal property on public property.[55] With few cities providing individuals experiencing homelessness with access to storage,[56] these ordinances place a serious burden on homeless people's ability to secure their valuable possessions, medications, and important documents like birth certificates and Social Security cards.[57]

C. The Recent Explosion of Criminalization Efforts

The number of cities passing ordinances that criminalize homelessness has increased rapidly since 2009.[58] A report by the National Law Center for Homelessness and Poverty (NLCHP) entitled "No Safe Place" demonstrates this increase in its survey of laws from 187 U.S. cities.[59] According to the NLCHP report, while city-wide bans on sleeping in public have not changed between 2011 and 2014, city-wide bans on camping in public have increased by 63%.[60] Similarly, city-wide bans on sitting or lying down in particular public places have increased by 43%.[61] Ordinances prohibiting sleeping in automobiles saw the most dramatic increase—119%—between 2011 and 2014.[62] In fact, more than 40% of cities now institute some form of ban on living or sleeping in automobiles.[63] Ordinances prohibiting panhandling have also increased. More than 140 cities

53. *See, e.g.*, SANTA MONICA, CAL. MUNICIPAL CODE, art. 5, ch. 08.600; *see also* Allison Arieff, *Showers on Wheels*, N.Y. TIMES (Jan. 15, 2015), http://www.nytimes.com/2015/01/17/opinion/showers-on-wheels.html?_r=0.

54. HONOLULU, HAW. REVISED ORDINANCES, § 10-1.2(a)(15) (2015).

55. FT. LAUDERDALE, FLA. CODE OF ORDINANCES, § 16-83(b) (2014).

56. *See* Eleanor Goldberg, *Providing Free Storage Could Be Key To Ending Homelessness*, HUFFINGTON POST (Aug. 29, 2014, 6:14 PM), http://www.huffingtonpost.com/2014/08/27/storage-ending-homelessness_n_5724610.html.

57. *See* Renee Lewis, *Homeless dragged down by belongings, as cities view keepsakes 'trash'*, AL JAZEERA (Nov. 7, 2014, 6:44 PM), http://america.aljazeera.com/articles/2014/11/7/homelessamericansdraggeddownbyneedtocarrybelongings.html.

58. Lauren Spurr, *Criminalization of homelessness on the rise in U.S. cities*, MSNBC (Jul. 18, 2014, 1:39 PM), http://www.msnbc.com/hardball/criminalization-homelessness-the-rise-us-cities.

59. NO SAFE PLACE, *supra* note 46, at 7–11.

60. *Id.* at 18.

61. *Id.* at 22.

62. *Id.* at 9.

63. *Id.*

have instituted an ordinance preventing the practice in particular places, a 20% increase since 2011.[64]

Unfortunately, this increase in the prevalence of ordinances that criminalize homeless activity is occurring at the same time as a dramatic decrease in affordable housing stock in cities across the country. In fact, the share of apartment stock in New York City labeled affordable declined from 58% to 44% between 2008 and 2011.[65] Similarly, only thirty-seven affordable units per 100 needed are available in the Los Angeles rental market.[66] Low-income housing programs—providing funds for struggling Americans to secure homes—are also drying up.[67]

III. FOOD-SHARING ORDINANCES

Over the past year, much attention has been given to a new, rapidly-expanding trend of criminalization: the adoption of strict regulations that essentially prohibit groups and individuals from feeding people experiencing homelessness. These ordinances are unique because, unlike the camping, sanitation, and panhandling ordinances directed at individuals experiencing homelessness, these ordinances are directed at service providers, groups, and individuals attempting to help those in need.

Much of the attention surrounding these ordinances resulted from the November 2014 arrest of Arnold Abbot by Ft. Lauderdale police after he fed individuals on a public beach.[68] Abbot, a ninety-year-old homeless advocate and founder of Love Thy Neighbor,[69] has been providing meals to over 1,400 individuals in Ft. Lauderdale who are experiencing homelessness every week since 1991.[70] His arrest was the result of the city's new ordinance strictly regulating the provision of food services in outdoor areas.[71] Although its

64. *Id.* at 21.

65. N.Y. OFFICE OF THE STATE COMPTROLLER, THE CONTINUED DECLINE IN AFFORDABLE HOUSING IN NEW YORK CITY 2 (2013), https://www.osc.state.ny.us/osdc/affordable_housing_3-2014.pdf.

66. Raphael Bostic & Tony Salazar, *L.A.'s real housing problem*, L.A. TIMES (Feb. 4, 2013), http://articles.latimes.com/2013/feb/04/opinion/la-oe-bostic-rental-housing-crisis-20130204.

67. *See* DOUGLAS RICE, CTR. FOR BUDGET AND POLICY PRIORITIES, SEQUESTRATION COULD DENY RENTAL ASSISTANCE TO 140,000 LOW-INCOME FAMILIES (2013), http://www.cbpp.org/sites/default/files/atoms/files/4-2-13hous.pdf.

68. Geetika Rudra, *Crackdown on Feeding Homeless Gets More People Arrested*, ABC NEWS (Nov. 9, 2014 6:03 PM), http://abcnews.go.com/US/crackdown-feeding-homeless-people-arrested/story?id=26793092. Although Abbot was not actually taken into custody, he was served with notices to appear in court and charged with a criminal offense. *See* Amy Sherman, *Jack Seiler says Arnold Abbott, 90-year-old, wasn't taken into custody for feeding homeless*, POLITIFACT FLA. (Nov. 17, 2014, 2:58 PM), http://www.politifact.com/florida/statements/2014/nov/17/jack-seiler/jack-seiler-says-arnold-abbott-90-year-old-wasnt-t/.

69. Love Thy Neighbor is an all-volunteer, interfaith organization committed to helping the homeless. *See About Us*, LOVE THY NEIGHBOR, http://lovethyneighbor.org/about-us/ (last visited Feb. 7, 2016).

70. *Id.*

71. FT. LAUDERDALE, FLA. ORDINANCE NO. C-14-42 (2014), https://fortlauderdale.legistar.com/LegislationDetail.aspx?ID=1944463&GUID=27834143-2A86-4467-9261-225B846FF1BB&Options=&Search (amending FT. LAUDERDALE, FLA. CODE OF ORDINANCES, § 47-18.31 (2014)).

ordinance has become well recognized due to strict enforcement, Ft. Lauderdale is just one of many cities that have instituted or proposed food-sharing prohibitions since 2007.[72]

According to a report from the National Coalition for the Homeless, at least twenty-one cities adopted food-sharing restrictions in 2013-2014.[73] Ten other cities introduced similar legislation during that same time period,[74] a 47% increase in such activity from 2010.[75] While there are various methods that cities employ to restrict or prohibit food-sharing, they can generally be divided into three categories: (a) restricting the use of public property, (b) instituting strict food-safety regulations, and (c) relocating food-sharing events.[76]

A. Restricting the Use of Public Property

The most popular form of restrictions on food-sharing are those instituted through limitations on use of public property.[77] One such restriction is requiring that groups or individuals receive a permit before distributing food in parks and other public areas. For example, Myrtle Beach, South Carolina, requires that an individual or group performing a "large group feeding" in a park or public facility apply for a permit.[78] Although the permit process likely does not present an insurmountable hurdle, the ordinance places an annual permit limit of one per individual or four per legally-recognized entity.[79] This greatly limits the opportunities of individuals or organizations looking to develop regularly-scheduled or widespread food-sharing programs.

Some cities impose substantial fees on those seeking food-sharing permits. Only 150 miles from Myrtle Beach, the city of Columbia, South Carolina, requires individuals and organizations to pay a weekly fee of up to $120 per hour when feeding twenty-five or more people in a public park.[80] Sacramento has proposed a similar ordinance that would require individuals or groups to pay

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72. *See generally* THE NAT'L COAL. FOR THE HOMELESS, FOOD-SHARING REPORT: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED (2014) [hereinafter FOOD-SHARING REPORT], http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf; THE NAT'L COAL. FOR THE HOMELESS & THE NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS (2010) [hereinafter A PLACE AT THE TABLE], http://nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf.

73. FOOD-SHARING REPORT, *supra* note 72, at 4.

74. *Id.*

75. Eliza Barclay, *More Cities Make It Illegal To Hand Out Food To the Homeless*, NPR (Oct. 22, 2014, 2:05 PM), http://www.npr.org/blogs/thesalt/2014/10/22/357846415/more-cities-are-making-it-illegal-to-hand-out-food-to-the-homeless?utm_medium=RSS&utm_campaign=news.

76. FOOD-SHARING REPORT, *supra* note 72, at 8–19.

77. *Id.* at 4 (stating that twelve out of twenty-one cities had employed this method).

78. MYRTLE BEACH, S.C. CODE OF ORDINANCES, § 14-316(f) (2015).

79. § 14-316(f)(3).

80. COLUMBIA, S.C. CODE OF ORDINANCES, § 15-2-5 (2015); *see also* Scott Keyes, *'Exile The Homeless' City Now Require Permits and Large Fees To Feed The Homeless*, THINK PROGRESS (Feb. 13, 2014, 11:21 AM), http://thinkprogress.org/economy/2014/02/13/3288211/columbia-feeding-homeless-ban/.

between $100 and $1,250 depending on the number of people served.[81] These fees can be cost-prohibitive to many individuals or organizations that have limited budgets and simply distribute donated food.[82]

B. Strict Food Safety Regulations

Another common way of targeting those that feed individuals experiencing homelessness is to subject them to strict food safety regulations that typically apply to restaurants, food trucks, and other vendors selling food. This can be accomplished—as San Antonio has done—by simply not offering charities that feed individuals experiencing homelessness an exclusion from the health code.[83] By limiting health code and food permit requirements to those *selling* food rather than distributing it for free, cities can ensure food safety without creating hardships for those feeding individuals experiencing homelessness.[84]

For those attempting to share food, being subjected to food safety regulations is often an impossible obstacle. First, annual health permits can cost hundreds, if not thousands, of dollars.[85] Additionally, unlike restaurants, charity or home kitchens used to prepare meals often do not meet the necessary regulations in order to prepare hot food.[86] These regulations can often include physical requirements, like powered exhaust vents and mop sinks,[87] and personnel requirements, like having at least one person who is a certified food safety manager.[88] Once food is prepared, regulations greatly burden its transportation and distribution to homeless populations. Some regulations require that food distribution areas have access to hot and cold water, hand-washing stations, and portable bathrooms.[89]

Another method cities can use to subject charities to strict food regulations, is to institute outright bans on donated food on the grounds that the nutrition of the contents cannot be accurately verified. For example, the Bloomberg administration in New York City partially banned food donations from charities to shelters in 2012 because the city claimed that it was unable to monitor the salt, fat, and fiber in meals served to individuals experiencing homelessness.[90]

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81. *See* FOOD-SHARING REPORT, *supra* note 72, at 8.

82. *See Frequently Asked Questions*, FOOD NOT BOMBS, http://www.foodnotbombs.net/faq.html (last visited Feb. 7, 2016) (describing Food Not Bombs' method for collecting and distributing food).

83. *Compare* SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13.3 (2015) (defining food establishment); *with* NEV. REV. STAT. § 446.020 (2015) (defining food establishment).

84. *See* NEV. REV. STAT. § 446.020 (2015) (emphasis added).

85. *See* SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13-27(a) (2015).

86. FOOD-SHARING REPORT, *supra* note 72, at 14.

87. SAN ANTONIO, TEX. CODE OF ORDINANCES, § 13-41 (2015).

88. DALLAS, TEX. CODE OF ORDINANCES, § 17-2.2(c)(1) (2015).

89. *See, e.g.*, FT. LAUDERDALE, FLA. ORDINANCE, C-14-42 (2014).

90. *Bloomberg Strikes Again: NYC Bans Food Donations To The Homeless*, CBS NEW YORK (Mar. 19, 2012, 8:33 PM), http://newyork.cbslocal.com/2012/03/19/bloomberg-strikes-again-nyc-bans-food-donations-to-the-homeless/.

C. Relocate Food-sharing Events

Finally, cities are attempting to limit food-sharing by relocating food-sharing events and sites.[91] Unfortunately, other cities outright prohibit, or have attempted to prohibit, food-sharing in some public locations, often those most convenient for engaging with the city's homeless population. In 2012, the City of Philadelphia issued regulations prohibiting all outdoor feeding in the city's parks and requiring that all programs move to indoor locations.[92] Advocates argued that the indoor feeding resources were insufficient to meet the needs of the city's homeless population and that individuals experiencing homelessness were reluctant to leave their belongings and spots in the park to travel to an indoor facility.[93] Similarly, Wilmington, North Carolina prohibits the distribution of food on city streets and sidewalks;[94] the Parks Department in Manchester, New Hampshire has attempted to prohibit food-sharing in a downtown park;[95] and Cincinnati park officials have attempted to prohibit food-sharing in a park across from the city's largest homeless shelter.[96]

IV. PUBLIC POLICY

Despite the arrests, fines, and effects of restricting food sharing, punishing individuals experiencing homelessness or those that attempt to help them is not the stated reason for instituting and enforcing these laws. This Part will attempt to (a) identify the stated public policy rationale behind the enactment of these restrictions, (b) analyze whether the goals of this policy can be accomplished through these various restrictions, and (c) propose alternatives to food-sharing criminalization.

A. Stated Rationale Behind Food-Sharing Restrictions

Advocacy groups have argued that these food-sharing prohibitions are merely efforts to hide a city's homeless population from residents and tourists.[97] These groups believe that business interests and sentiments of "NIMBYism" (Not in My Back Yard) are the real forces driving officials to adopt these

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91. *See, e.g.*, *infra* notes 92–96 and accompanying text.

92. Chosen 300 Ministries v. Philadelphia, No. 12-3159, 2012 WL 3235317, at *2 (E.D. Pa. Aug. 9, 2012) (in findings of fact).

93. *Id.*

94. WILMINGTON, N.C. CODE OF ORDINANCES ch. 11, art. III, § 11-47 (2005).

95. FOOD-SHARING REPORT, *supra* note 72, at 10; *see also Homeless advocates, city dispute weekend meals*, WMUR (May 17, 2013, 11:46 PM), http://www.wmur.com/news/nh-news/homeless-advocates-city-dispute-weekend-meals/20200016.

96. A PLACE AT THE TABLE, *supra* note 72, at 10.

97. Arthur Delaney, *How A Traveling Consultant Helps America Hide The Homeless*, HUFFINGTON POST (Mar. 9, 2015, 9:12 PM), http://www.huffingtonpost.com/2015/03/09/robert-marbut_n_6738948.html.

measures.[98] Mayors and city officials have repeatedly cited public safety, health, and dignity as the rationales behind food-sharing restrictions, despite the oppressive appearance of the ordinances. During the adoption of Philadelphia's prohibition on food-sharing in 2012, Mayor Michael Nutter stated that "[p]roviding to those who are hungry must not be about opening the car trunk, handing out a bunch of sandwiches, and then driving off into the dark and rainy night."[99] Similarly, Ft. Lauderdale Mayor Jack Seiler stated that food-sharing restriction "allow[] the homeless to be fed in a more safer [sic], secure, sanitary setting."[100]

In addition to claims that these ordinances promote health, safety, and dignity, many cities argue that prohibiting food-sharing is part of a larger comprehensive strategy to tackle homelessness. This is premised on the belief that giving food to homeless people is actually counterproductive. According to Dr. Robert Marbut,[101] a homelessness consultant who has assisted cities like Fresno and Sarasota:[102]

> External activities such as "street feeding" must be redirected to support the transformation process. In most cases, these activities are well-intended efforts by good folks, however these activities are very enabling and often do little to engage homeless individuals. Street feeding programs without comprehensive services actually increase and promote homelessness. Street feeding groups should be encouraged to co-locate with existing comprehensive service programs.[103]

These efforts to restrict food-sharing are merely an outgrowth of Marbut's principles. If individuals cannot get food on the street, the argument goes, they will be incentivized to seek out food from locations established by the city, such as shelters, where they can get both a warm meal and wrap-around services.[104]

B. Efficacy of Restrictions

Improving public safety and furthering the health and dignity of individuals experiencing homelessness—as well as getting people out of homelessness

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98. *See* FOOD-SHARING REPORT, *supra* note 72, at 15.

99. *City To Ban Street-Corner Feedings of Homeless*, CBS PHILLY (Mar. 14, 2012, 11:30 PM), http://philadelphia.cbslocal.com/2012/03/14/nutter-announces-ban-on-outdoor-feeding-of-homeless/.

100. *Interview with John Seiler, Mayor of Fort Lauderdale, FL*, CNN NEW DAY (Nov. 11, 2014), https://vimeo.com/111549126.

101. *See Dr. Robert Marbut Jr.*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Dr.html.

102. *See Projects*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Projects.html.

103. *Seven Guiding Principles*, MARBUT CONSULTING (2015), http://www.marbutconsulting.com/Seven_Guiding_Principles_FQ.html (quoting from "External Activities Must be Redirected or Stopped").

104. *See Projects, supra* note 102.

altogether—are admirable goals for any city. But are the varied policies of criminalizing food-sharing an effective means for securing these goals? Probably not.[105]

Concerning a city's desire to increase safety, there appears to be little evidence that individuals experiencing homelessness are a threat to the public.[106] According to a study of Baltimore's homeless population, although homeless individuals are more likely to engage in non-violent and non-destructive crimes than non-homeless individuals, non-homeless persons are more likely than homeless persons to engage in crimes against persons or property.[107]

In fact, there is a growing trend of violence by non-homeless individuals *against* the homeless population.[108] In 2013 alone, it was reported that there were 109 violent attacks against individuals experiencing homelessness, eighteen of which resulted in death.[109] That number of violent attacks represents an astounding 24% increase in attacks from 2012.[110]

Similar to public safety, health and food safety are legitimate concerns for a city, and the regulation of the storage, preparation, and delivery of food is a critical consumer protection function. Again, however, the application of health permits and food safety regulations to charitable organizations and others attempting to feed the homeless appears to be a solution in search of a problem. Some cities enforcing these food safety regulations have never actually received any reports of homeless individuals getting sick from shared food.[111] Additionally, these regulations do not extend to personal, family, or potluck meals prepared in a private home or church,[112] likely because these groups lack any incentive to cut corners regarding the safety of their friends or family. Food prepared for a community or family event is analogous to individuals feeding the homeless, since they are only doing so to benefit those receiving the food; no incentive exists for them to cut corners on food safety. While isolated incidents of cruelty through unsanitary feeding have occurred,[113] food safety regulations—although likely to diminish charitable activity[114]—are unlikely to stop these bad actors from targeting individuals experiencing homelessness for mistreatment.

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105. *See infra* Part IV.B.

106. *See* Meredith Bolster, *Myths about the homeless, Part Two,* BANGOR DAILY NEWS (Apr. 9, 2011, 5:04 PM), http://bangordailynews.com/2011/04/08/health/myths-about-the-homeless-part-2/.

107. *Id.*

108. NAT'L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF HATE CRIMES AND VIOLENCE COMMITTED AGAINST THE HOMELESS IN 2013 at 6 (2014), http://nationalhomeless.org/wp-content/uploads/2014/06/Hate-Crimes-2013-1.pdf.

109. *Id.* at 6.

110. *Id.*

111. FOOD-SHARING REPORT, *supra* note 72, at 15.

112. *See, e.g.*, NEV. REV. STAT. § 446.020 (2015) (stating that the definition of a "food establishment" excludes private home and religious organizations).

113. Mark Horvath, *Why You Should Support Regulating the Public Feeding of Homeless People*, HUFFINGTON POST (Aug. 8, 2012, 9:08 AM), http://www.huffingtonpost.com/mark-horvath/public-feeding-homeless-regulating_b_1804687.html (describing college students putting feces on sandwiches and giving them to the homeless).

114. *See supra* Part III.B.

A number of cities have also cited dignity as a reason for food-sharing ordinances. According to these cities, getting fed indoors with access to shelter and other services is more dignified than getting fed in a park or other public place.[115] While this might be true in theory, the practice can be quite different. For example, after St. Petersburg criminalized some homeless activities, the city opened a wrap-around service shelter as part of Robert Marbut's consulting model.[116] Unfortunately, that shelter, located twenty miles from downtown, is an old prison facility next to the current county jail.[117] The shelter is operated by the county sheriff's department with the help of private security guards, and rule breakers are required to sleep outside in an exposed courtyard, even when it rains.[118] According to a former resident, those running the shelter see the residents as inmates rather than homeless.[119] This hardly sounds more dignified than any alternative arrangement.

It is also questionable whether using these food-sharing prohibitions will incentivize individuals to participate in programs with comprehensive services that can get them on a pathway out of homelessness. Outdoor food-sharing programs in public places may be the only way some individuals experiencing homelessness are able to access food.[120] There are a number of reasons that individuals experiencing homelessness might not be able to make it to an indoor food-sharing program with services, including work conflicts, illness, disability, and a lack of transportation.[121] Additionally, some cities pass ordinances to incentivize individuals experiencing homelessness to use resources that have not yet been established because they lack the indoor feeding capacity to adequately meet the hunger needs of the homeless population.[122] When cities deprive individuals experiencing homelessness of food, they are forced to expend all of their energy on obtaining food rather than improving other aspects of their lives.[123]

Although it is questionable whether food-sharing prohibitions will accomplish the cities' stated goals, it is likely that these ordinances—combined with criminalization measures that target camping, panhandling, and other activity—*will* accomplish the cynical goal suspected by the homeless advocacy community: making the homeless population less visible in downtown and tourist

115. *See, e.g.*, Matt Pearce, *Homeless feeding bans: Well-meaning policy or war on the poor?*, L.A. TIMES (Jun. 11, 2012), http://articles.latimes.com/2012/jun/11/nation/la-na-nn-homeless-feeding-bans-20120611 (highlighting the statement of Mark McDonald, spokesman for Philadelphia Mayor Michael Nutter).

116. Delaney, *supra* note 97; *See generally* Robert G. Marbut, Presentation of Findings and Action Plan Recommendations to the City of St. Petersburg (2014), http://www.stpete.org/socialservices/docs/FollowupReviewOfHomelessnessReportInStPeteFINAL_June_8__2014.pdf.

117. Delaney, *supra* note 97.

118. *Id.*

119. *Id.*

120. A PLACE AT THE TABLE, *supra* note 72, at 9.

121. *Id.*

122. FOOD-SHARING REPORT, *supra* note 72, at 6–7.

123. FOOD-SHARING REPORT, *supra* note 72, at 7.

areas.[124] When individuals experiencing homelessness cannot engage in any life-sustaining activities across entire sections of a city, they are naturally pressured to go elsewhere. Unfortunately, hiding individuals experiencing homelessness, however convenient for businesses, tourists and other city residents, neither helps those in need nor tackles the root causes of homelessness.

C. Alternative Policies

If the food-sharing policies being implemented by cities are not going to be successful at achieving their stated goals, what alternative policies should be introduced? First, cities should collaborate with food-sharing programs on issues of hunger and homelessness[125] rather than forcing them to adapt or abandon their work under the weight of these food-sharing prohibitions.[126] One example of successful collaboration is Dining with Dignity,[127] a St. Augustine food-sharing program led by various churches, restaurants, and charities that provides meals to the city's homeless population every day of the year.[128] While the program initially provided food in an area that caused concern among businesses and city leaders, the city manager and program leaders collaborated to find a new downtown food-sharing site that was convenient and helpful to all parties: individuals experiencing homelessness, the program, and downtown businesses.[129] Although this recommendation is seemingly simple and somewhat obvious, soliciting the input of those who work with individuals experiencing homelessness every day would secure much-needed expertise and save cities money, time, and public scorn.[130]

Another alternative to criminalizing food-sharing would be to improve the access of individuals experiencing homelessness to the Supplemental Nutrition Assistance Program (SNAP), the national food help program for low-income

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124. Teresa Wiltz, *Do New Laws Help or Hurt the Homeless?*, PEW CHARITABLE TRUSTS (Nov. 17, 2014), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2014/11/17/do-new-laws-help-or-hurt-the-homeless.

125. A PLACE AT THE TABLE, *supra* note 72, at 4.

126. *See supra* Part III.

127. *See Dining with Dignity*, ST. FRANCIS EPISCOPAL CHURCH, http://www.saintfrancisepiscopalchurch.org/ministries-outreach/local-and-domestic-outreach/dining-with-dignity/ (last visited Feb 7, 2016).

128. *Dining with Dignity serves homeless*, ST. AUGUSTINE RECORD (Sept. 16, 2011, 12:06 AM), http://staugustine.com/living/religion/2011-09-16/dining-dignity-serves-homeless#.VUjo0CFVikp.

129. FOOD-SHARING REPORT, *supra* note 72, at 21.

130. Many of these cities have faced lawsuits regarding these food-sharing ordinances. *See, e.g.*, Bod Norman, *Lawsuit filed against city of Fort Lauderdale over homeless feeding ordinance*, WPLG MIAMI (Nov. 20, 2014), http://www.local10.com/news/lawsuit-filed-against-city-of-fort-lauderdale-over-homeless-feeding-ordinance/29842890; Kate Shellnut, *Homeless ministry says Dallas food ordinance restricts their religious freedom*, HOUSTON CHRONICLE (Nov. 10, 2011), http://blog.chron.com/believeitornot/2011/11/homeless-ministry-says-dallas-food-ordinance-restricts-their-religious-freedom/. Additionally, many cities, like Ft. Lauderdale, have faced heavy criticism from the media, faith communities, and poverty advocates. *See, e.g.*, *Interview with John Seiler, Mayor of Fort Lauderdale, FL*, CNN NEW DAY (Nov. 11, 2014), https://vimeo.com/111549126.

individuals and families.[131] Although most individuals experiencing homelessness are likely eligible for SNAP, an estimated 63% are not receiving benefits.[132] This low enrollment rate is likely due to the numerous information and eligibility barriers that individuals experiencing homelessness face. These individuals have often been misinformed about SNAP benefit requirements, believing, for example, that they must have a permanent address to qualify.[133] Similarly, they often face traditional barriers—such as lack of access to transportation—that can impact their ability to apply and use SNAP benefits.

If their states participate in the program, cities should also implement the SNAP Restaurant Meals Program (SNAP RMP).[134] Even if an individual experiencing homelessness secures SNAP benefits, the program's restrictions can greatly limit their effectiveness. For example, benefits cannot be used to buy hot food at a grocery store or market.[135] Since individuals experiencing homelessness often do not have access to means of food preparation, storage, or refrigeration, purchasing many perishable foods is often not an option.[136] SNAP RMP allows individuals experiencing homelessness to pay for fresh, hot meals at participating USDA-approved restaurants with their SNAP benefits.[137] SNAP RMP could be very helpful in reducing both food insecurity among the homeless population and the need for food-sharing programs, since a new alternative for hot meals will be available. California, one of three states currently participating in the program, already has more than 477 restaurants participating in Los Angeles County alone.[138]

If, as argued by many cities, the goal of food-sharing restrictions is about solving the condition of being homeless altogether, then those cities should consider implementing a "housing first" approach rather than criminalizing efforts to feed people. Housing first is among the best ways to help those who are chronically homeless get off the streets and onto a sustainable path to permanent housing.[139] As the name suggests, this approach provides permanent, affordable housing to individuals experiencing homelessness as quickly as possible,[140] without regard to income, sobriety, or participation in treatment programs.[141]

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131. *Supplemental Nutrition Assistance Program (SNAP)*, FOOD AND NUTRITION SERVICE, USDA (Nov. 20, 2014), http://www.fns.usda.gov/snap/supplemental-nutrition-assistance-program-snap.

132. UNITED STATES GEN. ACCOUNTING OFFICE, HOMELESSNESS: BARRIERS TO USING MAINSTREAM PROGRAMS 20 (2000) [hereinafter BARRIERS], http://www.gao.gov/new.items/rc00184.pdf.

133. *Id.*

134. A PLACE AT THE TABLE, *supra* note 72, at 4.

135. *Supplemental Nutrition Assistance Program (SNAP): Eligible Food Items*, FOOD AND NUTRITION SERVICE, USDA (Jul. 18, 2014), http://www.fns.usda.gov/snap/eligible-food-items.

136. BARRIERS, *supra* note 132, at 20.

137. *See CHC's Position on the SNAP Restaurant Meals Program*, CONGRESSIONAL HUNGER CTR. (Sept. 16, 2011), http://www.hungercenter.org/news/chc%E2%80%99s-position-on-the-snap-restaurant-meals-program/; *see also* 7 C.F.R. § 271.2 (2015) (defining eligible foods).

138. A PLACE AT THE TABLE, *supra* note 72, at 4.

139. Gary A. Benjamin, *Homelessness: A Moral Dilemma and an Economic Drain*, 13 J. L. SOC'Y 391, 402 (2012).

140. *Housing First*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (2013), https://www.usich.gov/solutions/housing/housing-first.

141. *Id.* (discussing past requirements for getting housing assistance).

Once housed, individuals are provided with the social services and support needed to achieve stability and pursue personal goals.[142] Salt Lake City has seen extraordinary success from providing housing first.[143] Since Utah adopted the program in 2005 as part of its ten-year plan to end chronic homelessness, the state has seen a 72% decrease in the number of chronically homeless individuals.[144]

Although this list is not exhaustive, implementing one or more of these alternatives to food-sharing criminalization could have a positive impact on how homelessness and hunger are being addressed.

V. REPEALING CURRENT FOOD-SHARING RESTRICTIONS AND PREVENTING FUTURE IMPLEMENTATION

This Note has identified the various forms of food-sharing restrictions, questioned the public policy behind those restrictions, and proposed a number of alternatives to accomplishing cities' stated goals. With the understanding that these restrictions place a burden on charitable organizations and individuals, and that they do not result in better outcomes for those experiencing homelessness, only one question remains: how do individuals challenge current restrictions and prevent future ones from being implemented by cities under pressure from businesses, tourists, and the like? This Part will (a) describe the varied results of litigation and (b) argue that implementing a "homeless bill of rights" in states and cities would be an effective way to counter and prevent these restrictions.

A. Varied Results of Litigation

Challenging city ordinances that require food-sharing restrictions in state and federal court has proved successful in some cases. In 2007, the U.S. District Court for Nevada invalidated a Las Vegas ordinance that prohibited the feeding of the indigent in city parks as unconstitutionally void for vagueness.[145] Similarly, in 2012, the U.S. District Court for Eastern Pennsylvania held that a Philadelphia ordinance prohibiting the feeding of individuals experiencing homelessness in Fairmount Park—a collection of sixty-three parks that is the

142. *Id.*

143. Kara Dansky, *This City Came Up With a Simple Solution to Homelessness: Housing*, NATION (Oct. 23, 2014), http://www.thenation.com/article/184017/city-came-simple-solution-homelessness-housing.

144. Scott Carrier, *Room for Improvement*, MOTHER JONES (Mar. 2015), http://www.motherjones.com/politics/2015/02/housing-first-solution-to-homelessness-utah. Utah's housing first approach includes access to food and other services. *See* Candi Helseth, *Compassionate Collaboration Reduces Homelessness in Utah,* RURAL MONITOR (Nov. 18, 2014), https://www.ruralhealthinfo.org/rural-monitor/housing-first-utah/ ("In addition to case management, housing and outreach services partners offer transportation, child care, employment training and support, substance abuse treatment, counseling, and medical, legal, food and essential services.").

145. Sacco v. Las Vegas, Nos. 2:06-CV-0714-RCJ-LRL, 2:06-CV-0941-RCJ-LRL, 2007 WL 2429151, at 3 (D. Nev. 2007).

largest municipally-operated park system in the United States[146]—was an unconstitutional violation of religious charities' right of free exercise.[147]

The results of litigation challenging regulatory restrictions—rather than across-the-board prohibitions—have been less promising. In 2011, Orlando's food-sharing permit ordinance, which required organizations engaged in group feedings in public parks to obtain a permit, and limited an organization to two park-specific permits per year, was upheld by the Eleventh Circuit.[148] Petitioners challenged the ordinance on the grounds that it violated the First Amendment guarantees of free speech and free exercise.[149] The Court found that the ordinance violated neither the Free Exercise Clause, since the ordinance was rational and of neutral applicability,[150] nor the Free Speech Clause, since the ordinance was a reasonable time, place, and manner restriction.[151] In 2006, the Ninth Circuit rejected a facial challenge to a Santa Monica ordinance requiring food distribution in the city's parks or city hall lawn to comply with state health and safety standards, holding that the conduct was not integral to, or commonly associated with, expression.[152]

These cases demonstrate the limited success of litigation to defeat food-sharing ordinances. The litigation approach is further complicated by the variety of methods cities employ to restrict food sharing. A city determined to keep charities from feeding individuals experiencing homelessness will always be able to find permitted alternatives if a preferred method is defeated in litigation.

B. Homeless Bills of Rights

One alternative to costly, unpredictable litigation as a strategy to defeat these restrictions and prevent their future implementation is for cities and states to adopt "homeless bill of rights" legislation. In 2012, Rhode Island became the first state to pass such legislation.[153] The bill protected individuals experiencing homelessness from being discriminated against with respect to freedom of movement, access to municipal services, employment, emergency medical care, voting, confidentiality of personal records, and privacy rights in personal property.[154] In 2013, similar laws were adopted in Connecticut and Illinois in an effort to protect those states' homeless populations.[155]

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146. Chosen 300 Ministries v. Philadelphia, No. 12-3159, 2012 WL 3235317, at *1 (E.D. Penn. Aug. 9, 2012).

147. *Id.* at 27.

148. *See* First Vagabonds Church of God v. Orlando, 638 F.3d 756 (11th Cir. 2011).

149. *Id.* at 759.

150. *Id.* at 763, *aff'g in part* First Vagabonds Church of God v. Orlando, 610 F.3d 1274 (11th Cir. 2010).

151. *Id.* at 762.

152. Santa Monica Food Not Bombs v. Santa Monica, 450 F.3d 1022, 1032 (11th Cir. 2006).

153. Michael F. Drywa, Jr., *Rhode Island's Homeless Bill of Rights: How Can the New Law Provide Shelter from Employment Discrimination?*, 19 ROGER WILLIAMS U. L. REV. 716, 717 (2014).

154. *Id.*

155. Jonathan Sheffield, *A Homeless Bill of Rights: Step by Step From State to State*, 19 PUB. INT. L. REP. 8, 10 (2013).

If correctly written, these homeless bills of rights could be very effective at rendering void current food-sharing laws and preventing their future implementation in cities around the country. Although charities and advocates have not yet challenged food-sharing restrictions in the states where these homeless bills of rights exist, advocates have expressed concern that, absent specific language protecting the right to receive food, these laws may not be adequate to defeat ordinances targeting those that feed individuals experiencing homelessness.[156]

Homeless bill of rights legislation introduced in California in 2015 attempts to remedy this issue by providing additional language to protect food-sharing.[157] This draft legislation states that every person in the state has the basic human and civil right to "eat, share, accept, or give food in any public space in which having food is not otherwise generally prohibited."[158] Advocates should use this language as a model when campaigning for states and cities to implement similar legislation so that food-sharing restrictions can be defeated and prevented.

The passage of homeless bill of rights legislation, however, is unlikely to be a panacea for the issues facing those without shelter. While the legislation would be effective at voiding municipal ordinances criminalizing homeless activity or activity meant to assist the homeless population, accomplishing the actual goals of a homeless bill of rights might be more challenging because of the practical constraints of judicial enforcement and administrative implementation.[159] For example, an individual experiencing homelessness denied a right guaranteed under this proposed legislation would have to seek recourse in the court.[160] This would require people who are homeless to not only be aware of their rights, but also to have the resources to seek appropriate relief for an alleged violation. Fortunately, this scenario is less applicable to food-sharing restrictions since ordinances often prohibit activity by institutional bodies, such as non-profit and religious organizations, which are likely better-versed in the law. Additionally, the primary barriers to sharing food—criminal penalties, land-use restrictions, and permitting processes[161]—will be easily addressed by the passage of a homeless bill of rights.

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156. Jake Grovum, *Activist Aim to Bolster Rhode Island's Homeless Bill of Rights*, PEW CHARITABLE TRUSTS (Nov. 12, 2012), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2012/11/12/activists-aim-to-bolster-rhode-islands-homeless-bill-of-rights.

157. S.B. 608, 2015 Leg., 2015–2016 Reg. Sess. (Cal. 2015), http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0601-0650/sb_608_bill_20150227_introduced.html.

158. *Id.* at 53.81.b(3).

159. Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 421–23 (2015) (discussing the practical challenges associated with the implementation of a homeless bill of rights).

160. Rhode Island's Homeless Bill of Rights provides that a civil action may be brought alleging violation of the Homeless Bill of Rights. 34 R.I. GEN. LAWS § 34-37.1–4 (2015). The court may award appropriate injunctive or declaratory relief, actual damages, and reasonable attorneys' fees and costs to a prevailing plaintiff. *Id.*

161. *See supra* Parts II and III.

CONCLUSION

Cities across the country will likely continue to consider ordinances that criminalize laudable charitable efforts to feed individuals experiencing homelessness. This particularly virulent form of homelessness criminalization, which fails to achieve its oft-stated goal of improving the health and dignity of the homeless population, is only beneficial to those wishing to hide or remove that population from business districts or tourism sites.

These ordinances—which may be doing real harm to the nutritional needs of those without a home—should be repealed and prevented, and the numerous alternatives to accomplishing cities' stated goals should be implemented. One option is for cities and states to adopt of homeless bills of rights that are food-sharing-inclusive. Though a homeless bill of rights will likely not get people off the street and into affordable housing, it will at a minimum ensure that individuals experiencing homelessness can receive a hot meal from a person willing to provide it.

Criminalizing Charity: Can First Amendment Free Exercise of Religion, RFRA, and RLUIPA Protect People Who Share Food in Public?

Marc-Tizoc González*

* Professor of Law, St. Thomas University School of Law, mtgonzalez@stu.edu, @marctizoc, http://www.foodsharinglaw.net [https://perma.cc/MT34-9LWF]. This Article is the second in a series that critically analyzes the criminalization of people who publicly share food with those who hunger. I again thank all the scholars, lawyers, and activists who supported my first Article in the series, Marc-Tizoc González, *Hunger, Poverty, and the Criminalization of Food Sharing in the New Gilded Age*, 23 AM. U. J. GENDER, SOC. POL'Y & L. 231 (2015) (lead article). For helpful comments on this Article, I also thank Gordon Butler, Amy J. Cohen, Brendan Conley, Richard Delgado, Teague González, Angela P. Harris, Ernesto Hernández-López, John Kang, Christine Klein, Thomas Kleven, Beth Kregor, Tamara Lawson, Stephen Lee, Beth Lyon, Audrey McFarlane, Osha Neumann, Adam P. Romero, Amy Ronner, Sarah Schindler, Francisco Valdes, Patricia E. Wall, Jeff Weinberger, and Brenda Williams. Finally, I thank the outstanding research assistants who have supported this multiyear project: Jessica Biedron, Gracy Crumpton, Marina G. González, Cynthia Lane, Patricia J. Peña, Jesse S. Peterson, and Gwendolyn Richards.

I dedicate this Article to D, an African American elder whom I met in December 2006 while helping to establish the Oakland, California, office of the Alameda County Homeless Action Center. As a staff attorney therein, I represented D in his successful claim for federal disability benefits, defended his liberty against several charges of "quality of life" criminal infractions, and generally counseled him as he contended with the socio-legal conditions of extreme poverty and racism. When we last saw each other, in June 2011, I tried to thank him for all that he had taught me. He replied with a grin, "We're just getting started!"

The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.

– Anatole France (April 16, 1844, to October 12, 1924)[1]

> On the morning of Saturday, August, 24 [2013], Love Wins [Ministries] showed up at Moore Square [in Raleigh, North Carolina] at 9:00 a.m., just like we have done virtually every Saturday and Sunday for the last six years. We provide, without cost or obligation, hot coffee and a breakfast sandwich to anyone who wants one. We keep this promise to our community in cooperation with five different, large suburban churches that help us with manpower and funding.
>
> On that morning three officers from Raleigh Police Department prevented us from doing our work, for the first time ever. An officer said, quite bluntly, that if we attempted to distribute food, we would be arrested. . . .
>
> When I asked the officer why, he said that he was not going to debate me. "I am just telling you what is. Now you pass out that food, you will go to jail."[2]

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1. Justice Frankfurter preferred this English translation. *See* Griffin v. Ill., 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (citation omitted); *see also* ANATOLE FRANCE, LE LYS ROUGE 117 (4th ed. 1894) [hereinafter FRANCE, LE LYS ROUGE], https://fr.wikisource.org/wiki/Le_Lys_rouge/VII [https://perma.cc/29ST-ZTAW] (In the original French: "Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain."); ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., 6th ed. 1921) [hereinafter FRANCE, THE RED LILY], https://books.google.com/books?id=2-YLAAAAIAAJ [https://perma.cc/R2CT-3NZK] ("At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."); FRANCE, THE RED LILY, *supra*, at ch. VII (Project Gutenberg trans.), http://www.gutenberg.org/files/3922/3922-h/3922-h.htm#link2HCH0007 [https://perma.cc/WL8L-RY77] ("The poor must work for this, in presence of the majestic equality of the law which prohibits the wealthy as well as the poor from sleeping under the bridges, from begging in the streets, and from stealing bread."). I thank activist, artist, and attorney Osha Neumann for introducing me to this quote in 2007 while mentoring me in the legal defense of an elderly Black man whom police arrested for begging in Oakland, California, under former CAL. PENAL CODE section 647(b)(6), which prohibited "[w]illfully disturbing others on or in any system facility or vehicle by engaging in boisterous or unruly behavior."

2. Hugh Hollowell, *Feeding Homeless Apparently Illegal in Raleigh, NC*, LOVE WINS MINISTRIES (Aug. 24, 2013), http://lovewins.info/2013/08/feeding-homeless-apparently-illegal-in-raleigh-nc/ [https://perma.cc/LSP3-GA4L].

INTRODUCTION

Food is necessary for human survival and fundamental to human flourishing.[3] In the United States, however, over forty-eight million people (more than fifteen percent of the populace) suffered "food insecurity" in 2014.[4] Despite these human realities and socio-legal conditions, over the past decade the National Coalition for the Homeless and the National Law Center on Homelessness and Poverty have documented fifty-seven U.S. cities across twenty-five states that have proscribed or otherwise regulated the unauthorized provision of food to hungry people in public.[5]

To criminalize people for publicly sharing food with those who hunger may seem absurd, cruel, or unusual,[6] and indeed, numerous people have challenged these

3. *Accord* Dylan Clark, *The Raw and the Rotten: Punk Cuisine*, 43 ETHNOLOGY 19, 19 (2004) ("Levi-Strauss (1964) saw the process of cooking food as the quintessential means through which humans differentiate themselves from animals, through which we manufacture culture and 'civilization.'"); Michael Gurven & Adrian V. Jaeggi, *Food Sharing*, *in* EMERGING TRENDS IN THE SOC. AND BEHAV. SCI. 1, 4 (Robert Scott & Stephen Kosslyn eds., 2015) ("Among humans, the necessity for sharing [food] in order to provision infants, juveniles, and adolescents—and abundant inter-household sharing among adults—has led to a relatively high intrinsic propensity to share with others, and a high degree of sensitivity to cues of recipient need.") (citation omitted).

4. ALISHA COLEMAN-JENSEN, MATTHEW P. RABBITT, CHRISTIAN A. GREGORY & ANITA SINGH, ECON. RES. SERV., U.S. DEP'T OF AGRIC., ERR-194, HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2014, at 6, 10 (2015) [hereinafter HOUSEHOLD FOOD SECURITY IN THE UNITED STATES].

5. NAT'L COAL. FOR THE HOMELESS, SHARE NO MORE: THE CRIMINALIZATION OF EFFORTS TO FEED PEOPLE IN NEED 4–5, 25 (2014) [hereinafter SHARE NO MORE], http://nationalhomeless.org/wp-content/uploads/2014/10/Food-Sharing2014.pdf [https://perma.cc/WCJ7-V496] (reporting that twenty-one cities established restrictions on sharing food publicly from January 2013 to October 2014 and that ten other cities were considering such legislation, and also depicting a map of fifty-seven cities, across twenty-five states, that have attempted to ban, relocate, or otherwise restrict such activity); *see also* NAT'L COAL. FOR THE HOMELESS & NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A PLACE AT THE TABLE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS 10–14 (2010) [hereinafter A PLACE AT THE TABLE], http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf [https://perma.cc/QPH5-VAZ3] (discussing municipal laws in twelve U.S. cities that "at some point limited the use of public parks for sharing food with homeless people"); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 8, 24–25 (2014) [hereinafter NO SAFE PLACE], http://nlchp.org/documents/No_Safe_Place [https://perma.cc/P5VJ-Z2MQ] (discussing restrictions on food sharing in seventeen cities); NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, FEEDING INTOLERANCE: PROHIBITIONS ON SHARING FOOD WITH PEOPLE EXPERIENCING HOMELESSNESS vi, 2–3, 7–8, 10–18, 20 (2007) [hereinafter FEEDING INTOLERANCE], http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf [https://perma.cc/B47S-XQ8A] (listing and summarizing food-sharing restrictions in twenty-two U.S. cities). *See generally infra* App. 2 U.S. Cities with Anti-Food-Sharing Laws (grouping the cities by state).

6. *Cf.* Statement of Interest of the United States at 3–4, Bell v. City of Boise, No. 1:09-cv-540-REB (D. Idaho Aug. 6, 2015), https://www.justice.gov/crt/file/761211/download [https://perma.cc/GWS5-28KF] (arguing that if insufficient shelter space makes it impossible for some homeless individuals to comply with city ordinances that prohibit camping, lodging, or sleeping in public, then enforcement of such ordinances would amount to the criminalization of homelessness in violation of the Eighth Amendment).

laws.[7] Adapting the usage preferred by some of the people who publicly share food with those who hunger, I use the phrase, "the food-sharing cases" to describe when people challenge their criminalization under "anti-food-sharing laws,"[8] and I use the phrase "those who hunger" to evoke the Biblical Beatitudes of the Sermon on the Mount: (viz., "Blessed are they who hunger and thirst for righteousness, for they will be satisfied").[9] Since 1993, legal challenges to these laws have predominantly sounded in federal courts, which have produced over a dozen published and unpublished judicial opinions, including several from the U.S. Courts of Appeals for the Ninth and Eleventh Circuits.[10] Only a few challenges have sounded in state courts,[11] and several recent food-sharing cases have resolved entirely in the court of public opinion.[12]

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7. *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: ADVOCACY MANUAL 132–41 (2011), [hereinafter CRIMINALIZING CRISIS], https://www.nlchp.org/documents/Criminalizing_Crisis_Advocacy_Manual [https://perma.cc/P37C-PSW4] (summarizing twelve published federal judicial opinions regarding such laws); *see also infra* App. 1. The Litigated Food-Sharing Cases (listing the cases chronologically).

8. *Accord* KEITH MCHENRY, HUNGRY FOR PEACE: HOW YOU CAN HELP END POVERTY AND WAR WITH FOOD NOT BOMBS 11, 14, 19–20, 153 (2015), https://www.foodnotbombs.net/hungry_for_peace_book.pdf [https://perma.cc/AF6C-ENKY] (discussing how one of the eight co-founders of the international Food Not Bombs movement understands the ethics of sharing food); SHARE NO MORE, *supra* note 5, at 2, 4 (discussing restrictions on food sharing); Nathan Pim, *Food Sharings Shut Down 11.2.2014, Hunger Strike Declared*, RESIST FT. LAUDERDALE HOMELESS HATE LAWS (Nov. 2, 2014), http://homelesshatelaws.blogspot.com/2014/11/food-sharings-shut-down-1122014-hunger.html [https://perma.cc/QN8K-5YWH] (discussing the initial enforcement of a 2014 City of Fort Lauderdale law against people who publicly share food on the sidewalk by a city park); *see* González, *supra* note *, at 233.

9. *Matthew* 5:6.

10. *See* CRIMINALIZING CRISIS, *supra* note 7, at 132–42 (summarizing twelve published federal judicial opinions regarding food-sharing laws from 1993 until 2011); *see also infra* App. 1. The Litigated Food-Sharing Cases (listing the cases chronologically).

11. *See, e.g.*, Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs., 712 P.2d 914, 921 (Ariz. 1985) (affirming the trial court's preliminary injunction against a church program that provided one free meal a day to indigent persons and holding that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort, or convenience constitutes a public nuisance, notwithstanding no violation of criminal or zoning laws); Abbott v. City of Fort Lauderdale (*Abbott II*), 783 So. 2d 1213, 1214 (Fla. Dist. Ct. App. 2001) (affirming the trial court's final judgment that Fort Lauderdale's anti-food-sharing law violated the plaintiffs' rights under the Florida Religious Freedom Restoration Act of 1998, FLA. STAT. ANN. § 761.03 *et seq.* (West 2016)); Wilkinson v. Lafranz, 574 So. 2d 400 (La. Ct. App. 1991) (dismissing plaintiffs' appeal of the denial of its motion for a preliminary injunction against a church's soup kitchen as untimely filed, but finding that plaintiffs' claim for a permanent injunction remained pending).

12. *See, e.g.*, Colin Campbell, *Emails: Legal Advice Sought to "Clean Up" Moore Square*, NEWS & OBSERVER (Sept. 13, 2013), http://www.newsobserver.com/news/local/community/midtown-raleigh-news/article10279163.html [https://perma.cc/MQB6-VBUX] (reporting that the City Council of Raleigh, North Carolina, ordered police to temporarily stop enforcing rules prohibiting food sharing after social media and traditional media uncovered city employees' emails regarding "how to push out charities and suspected criminals to 'clean up' Moore Square").

While the human practice of sharing food is literally prehistoric,[13] and myriad relevant historical antecedents exist,[14] the first wave of modern anti-food-sharing laws in the United States emerged in the 1980s and spread throughout the 1990s. In this period, some cities used their police power to proscribe food sharing on publicly and *privately* owned properties as a regulation of health, parks, nuisance, or zoning.[15] Since the 2000s, however, the second wave of modern anti-food-sharing laws has featured a surge of laws that typically threaten a misdemeanor crime against people who share food with those who hunger while on public (city-owned) properties—such as parks, sidewalks, and streets—without first obtaining the

13. Gurven & Jaeggi, *supra* note 3, at 1 ("Among hunter-gatherers, whose lifeways most closely resemble those of ancestral humans, the direct transfer of food items among individuals (hereafter 'food sharing') is an important and ubiquitous form of cooperative behavior.").

14. *See, e.g.*, Shamhart v. Morrison Cafeteria Co., 32 So. 2d 727, 728 (Fla. 1947) (enjoining the appellee cafeteria owner from creating a public nuisance when his customers' queue on the sidewalk routinely blocked the entrance to appellant's drug store, where the appellee used the entire space of his premises for cooking food and seating customers); HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 123–72 (1965) (discussing First Amendment jurisprudence that the Court created as the National Association for the Advancement of Colored People Legal Defense and Educational Fund (NAACP LDF) defended students and others who protested racial segregation through protest marches and lunch counter sit-ins); EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 1–3, 64–70 (2010) (interpreting the civil rights lunch counter sit-in protests of the 1960s under the theory of property outlaws and altlaws); THE DR. HUEY P. NEWTON FOUND., THE BLACK PANTHER PARTY: SERVICE TO THE PEOPLE PROGRAMS 30–39 (David Hilliard ed., 2008) (discussing the Free Breakfast for Schoolchildren Program and Free Food Program); William N. Eskridge, *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2334–40 (2002) (discussing how civil rights litigation spurred the Court to evolve First Amendment jurisprudence to protect expressive association and expressive conduct); González, *supra* note *, at 235 n.4 (referencing gendered and racialized socio-legal conflicts concerning the preparing and providing of food to striking California cotton pickers in 1933) (I thank John Kang for encouraging me to read Kalven's classic book and Thomas Kleven for encouraging me to consider relevant public nuisance cases, which led me to *Shamhart*.).

15. *See, e.g.*, McHenry v. Agnos (*McHenry I*), 983 F.2d 1076 (9th Cir. 1993) (unpublished table decision) (affirming the district court's summary judgment in favor of municipal defendants, where the plaintiff sued under 42 U.S.C. § 1983 (2012), alleging that a San Francisco superior court injunction against his distribution of food violated his civil rights); W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church II*), 862 F. Supp. 538, 547 (D.D.C. 1994) (granting summary judgment for plaintiff church, which argued that its "program to feed the homeless . . . constitutes religious activity protected by the First Amendment of the constitution and the Religious Freedom Restoration Act of 1993 and that application of the District of Columbia's zoning regulations to the feeding program impermissibly infringes upon plaintiffs' right to free exercise of their religion" and enjoining the District of Columbia from interfering with the plaintiffs' program, "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance."); *Armory Park Neighborhood Ass'n*, 712 P.2d at 921 (affirming the trial court's preliminary injunction against a church program that provided one free meal a day to indigent persons and holding that conduct which unreasonably and significantly interferes with the public health, safety, peace, comfort, or convenience constitutes a public nuisance, notwithstanding no violation of criminal or zoning laws); *Wilkinson*, 574 So. 2d 403 (dismissing plaintiffs' appeal of the denial of its motion for a preliminary injunction against a church's soup kitchen as untimely filed but finding that plaintiffs' claim for a permanent injunction remained pending).

proper permit.[16] Some municipal legislatures promulgated these criminalization efforts in the years preceding the Great Recession of December 2007 to June 2009;[17] others enacted such laws during the Great Recession,[18] and despite the uneven economic recovery,[19] this trend has yet to stop.[20]

The food-sharing cases implicate a number of constitutional doctrines and statutory rights and thus merit scholarly attention on the basis of their legal complexity alone. For example, in 2011, the Eleventh Circuit of the U.S. Court of Appeals created an inter-circuit split in authority when it upheld the City of Orlando's anti-food-sharing law.[21] Where the Eleventh Circuit affirmed Orlando's law "as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct,"[22] in 2006 the Ninth Circuit found that a community events ordinance that regulated diverse uses of public property, including food sharing,

16. *Accord* SHARE NO MORE, *supra* note 5, at 20–21; A PLACE AT THE TABLE, *supra* note 5; CRIMINALIZING CRISIS, *supra* note 7, at 132–41; NO SAFE PLACE, *supra* note 5, at 26; FEEDING INTOLERANCE, *supra* note 5, at 7; *see, e.g.*, First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God IV*), 610 F.3d 1274, 1280 n.4 (11th Cir. 2010), *vacated & rev'd en banc*, 616 F.3d 1229, 1230 (11th Cir. 2010) ("Violations of the Ordinance are punishable by a fine of up to $500 or 60 days of imprisonment."); Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1029 (9th Cir. 2006) (quoting SANTA MONICA, CA., MUNICIPAL CODE § 5.06.020 (2017), adopted October 22, 2002, which provides, "Any person violating this Section shall be guilty of a misdemeanor which shall be punishable by a fine not exceeding One Thousand Dollars per violation, or by imprisonment in the County Jail for a period not exceeding six months, or by both such fine and imprisonment.").

17. *See* CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2014, CURRENT POPULATION REPORTS P60-252, at 21 (2015) (discussing the recession concept and showing that the eighteen-month Great Recession was the longest of the eleven recessions on record since 1948); FEEDING INTOLERANCE, *supra* note 5, at 2 ("In the past few years, many cities have adopted a new tactic—one that targets not only homeless persons but also individual citizens and groups who attempt to share food with them.").

18. *See* A PLACE AT THE TABLE, *supra* note 5, at 2–3, 10–17 (discussing anti-food sharing laws in twenty-one cities).

19. *See* Emmanuel Saez, *U.S. Top One Percent of Income Earners Hit New High in 2015 Amid Strong Economic Growth*, WASH. CTR. FOR EQUITABLE GROWTH (July 1, 2016), http://equitablegrowth.org/research-analysis/u-s-top-one-percent-of-income-earners-hit-new-high-in-2015-amid-strong-economic-growth/ [https://perma.cc/N39E-DRFS] (reporting that U.S. families in the bottom ninety-nine percent of income earners have recovered only about sixty percent of their income losses due to the Great Recession).

20. *See* SHARE NO MORE, *supra* note 5, at 4–5 (stating that seven cities were still in the process of trying to pass anti-food-sharing laws at the time of the report).

21. González, *supra* note *, at 233–34, 260–77 (discussing the split in authority between the Ninth and Eleventh Circuits of the U.S. Courts of Appeals regarding the food-sharing cases).

22. First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God V*), 638 F.3d 756, 758–59 (11th Cir. 2011) (en banc), *rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008) (upholding an anti-food-sharing law "as a reasonable time, place, or manner restriction and as a reasonable regulation of expressive conduct," which required a permit to conduct a "large group feeding," within public parks located in a two-mile radius of city hall, with no more than two permits available per year to a permittee for any particular park, and where "large group feeding" was defined as, "an event intended to attract, attracting, or likely to attract twenty-five (25) or more people . . . for the delivery or service of food.") (citation omitted).

was unconstitutional for not being narrowly tailored under the First Amendment.[23] In district courts, other food-sharing cases have featured diverse arguments over the free exercise of religion, peaceable assembly, expressive association, and equal protection.[24] Also, some food-sharing cases have implicated federal or state Religious Freedom Restoration Acts,[25] and one has featured the Religious Land Use and Institutionalized Persons Act of 2000.[26] Finally, several of the earliest food-sharing cases featured nuisance law.[27]

Beyond legal doctrines, the food-sharing cases merit scholarly attention because socio-legal conflicts over sharing food in public implicate numerous important jurisprudential principles and socio-legal theories. For example, anti-food-sharing laws might be cognized as one of the new set of laws, regulations, policies, and practices that cities have recently deployed to effect the banishment, exclusion, or exile of socially marginal classes of people (e.g., people who "aggressively beg" or "the homeless").[28] Alternatively, the food-sharing cases might

23. *Santa Monica Food Not Bombs*, 450 F.3d at 1040, 1043 ("[A] narrowly tailored permit requirement must maintain a close relationship between the size of the event and its likelihood of implicating government interests," and finding that a city department's instruction undermined an ordinance's narrow tailoring where it mandated, "that 'any activity or event which the applicant intends to advertise in advance via radio, television, and/or widely-distributed print media shall be deemed to be an activity or event of 150 or more persons.'") (citation omitted).

24. *See* González, *supra* note *, at 233–34, 260–77.

25. *See, e.g.*, Chosen 300 Ministries, Inc. v. City of Phila., No. 12-3159, 2012 WL 3235317, at *26–27 (E.D. Penn. Aug. 9, 2012) (applying the Pennsylvania Religious Freedom Protection Act (PRFPA), 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401 *et seq.* (West 2012), and issuing a preliminary injunction against the defendant city); Big Hart Ministries Ass'n, Inc. v. City of Dall., No. 3:07-CV-0216-P, 2011 WL 5346109, at *5 (N.D. Tex. Nov. 4, 2011) (deciding that the plaintiffs had presented enough evidence to withstand summary judgment on their claim under the Texas Religious Freedom Restoration Act (TRFRA), TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017)); First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God II*), 2008 WL 2646603 (M.D. Fla. June 26, 2008) (finding no violation of the Florida Religious Freedom Restoration Act (FRFRA), FLA. STAT. ANN. § 761.01 *et seq.* (West 2016)), *rev'd on other grounds* 638 F.3d 756, 758–59 (11th Cir. 2011) (en banc); Stuart Circle Par. v. Bd. of Zoning Appeals of Richmond, 946 F. Supp. 1225 (E.D. Va. 1996) (applying the least restrictive means test of the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.* (2012), and issuing a temporary restraining order against the defendant); Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554 (M.D. Fla. 1995) (finding no violation of RFRA); *W. Presbyterian Church II*, 862 F. Supp. at 547 (granting summary judgment for plaintiff church, which claimed that defendants' enforcement of zoning laws violated the RFRA); *Abbott II*, 783 So. 2d 1213 (enjoining the defendant from enforcing its park rule because it violated FRFRA).

26. Pac. Beach United Methodist Church v. City of San Diego, No. 07-CV-2305-LAB-PCL, 2008 WL 7257244 (S.D. Cal. Apr. 18, 2008) (Order of Dismissal).

27. *See, e.g.*, *W. Presbyterian Church II*, 862 F. Supp. at 547; *Armory Park Neighborhood Ass'n*, 712 P.2d at 921; *Wilkinson*, 574 So. 2d 403; Greentree at Murray Hill Condo. v. Good Shepherd Episcopal Church, 550 N.Y.S.2d 981 (N.Y. 1989).

28. *See, e.g.*, KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 10 (2010) ("[T]he new legal tools we analyze here entail banishment: the legal compulsion to leave specified geographic areas for extended periods of time."); Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST. 195, 195 (2003) ("[P]atterns of spatial exclusion and marginalization of the impoverished that have existed throughout modern history have reemerged."); Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165 (1996);

be understood to resurface old yet ongoing debates, and socio-legal struggles, over homelessness and liberty.[29] Similarly, evaluating the food-sharing cases might help to nuance new theories of "pedestrianism," "property outlaws," the "right to the city," and the "urban commons."[30] Alternatively, they might recapitulate past and present contests over the definitions and limits of police power, private and public property, and public space.[31] Further, some anti-food-sharing laws seem to have responded to recent mass urban protests and social movements like Occupy Wall

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Stephen R. Munzer, *Ellickson on "Chronic Misconduct" in Urban Spaces: Of Panhandlers, Bench Squatters, and Day Laborers*, 32 HARV. C.R.–C.L. L. REV. 1 (1997); Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016); Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TULANE L. REV. 631 (1994).

29. *See, e.g.*, Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 5–6 (1996); 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 (1999); Nate Vogel, *The Fundraisers, the Beggars, and the Hungry: The First Amendment Rights to Solicit Donations, to Beg for Money, and to Share Food*, 15 U. PA. J.L. & SOC. CHANGE 537 (2012); Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991); David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487 (1994).

30. *See, e.g.*, NICHOLAS BLOMLEY, RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW (2011); DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION (2012); ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFEUCHT, SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE (2009); DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE (2003); PEÑALVER & KATYAL, *supra* note 14, at 12–18 (theorizing acquisitive and expressive disobedience to property laws under a theory of "property outlaws and altlaws," social actors who play an important role in the evolution and transfer of property entitlements between owners and nonowners); Sheila R. Foster, *Collective Action and the Urban Commons*, 87 NOTRE DAME L. REV. 57 (2011); David Harvey, *The Right to the City*, 53 NEW LEFT REV. 23 (2008); Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT'L L. 435 (2006).

31. *See, e.g.*, STEPHEN CARR, MARK FRANCIS, LEANNE G. RIVLIN & ANDREW M. STONE, PUBLIC SPACE (1992); MIKE DAVIS, CITY OF QUARTZ: EXCAVATING THE FUTURE OF LOS ANGELES (1990); MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC SPACE 3 (2004) ("[T]he privatization of public space undermines the opportunities for free speech . . . the dependence of free speech upon spatial practices is not always clear."); MITCHELL, *supra* note 30; THE POLITICS OF PUBLIC SPACE (Setha Low & Neil Smith eds., 2006); Ellickson, *supra* note 28; Ernesto Hernández-López, *LA's Taco Truck War: How Law Cooks Food Culture Contests*, 43 U. MIAMI INTER-AM. L. REV. 233, 237–39 (2011) (arguing that debates over the legality and illegality of food truck vendors in Los Angeles "reflect larger cultural contests about local and neighborhood identity, local economics, and public space . . . . These arguments focus on how neighborhoods view themselves and the image they project, whether it's in perceived property values, excluding businesses or outside customers, or prejudices concerning the working class and immigrants.") (citations omitted); *see also* Hernández-López, *supra*, at pt. III.c, 262–66 ("Food Trucks Raise Old Questions about Public Space"); Audrey G. McFarlane, *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 1 (2003); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986); Lawrence J. Vale, *Securing Public Space*, 17 PLACES 38, 38 (2005), http://escholarship.org/uc/item/7203x7dk [https://perma.cc/DR99-7WCK] (theorizing "the securescape—the uneasy confluence of security, landscape, and escape from public contact").

Street,[32] and they bear resemblance to the "ugly laws" of an earlier era.[33] Finally, the food-sharing cases implicate the international human right to food and related notions of food justice, food oppression, and food sovereignty.[34] Engaging with such theories promises great enjoyment and illumination.[35] This Article, however, focuses on existing First Amendment jurisprudence, in particular the Free Exercise Clause and related statutes, to explore what limits might (and should) exist on the power of local government to prohibit, permit, or otherwise regulate people's diverse uses of publicly and privately owned properties that are generally accessible to the public.

The Article proceeds in two major Parts. Guided by anthropological concepts of the "emic" and the "etic,"[36] Part I describes how two different classes of people describe their practices of sharing food in public as well as how cities cognize such activities when they set out to criminalize, or otherwise regulate, them. I distinguish between people who publicly share food for religious, versus political (in the social,

32. *See, e.g.*, Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 VILL. L. REV. 339 (2012); Sarah Kunstler, *The Right to Occupy: Occupy Wall Street and the First Amendment*, 39 FORDHAM URB. L.J. 989 (2012); Udi Ofer, *Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks*, 39 FORDHAM URB. L.J. 1155 (2012); *see also About the Black Lives Matter Network*, BLACK LIVES MATTER, http://blacklivesmatter.com/about/ [https://perma.cc/573C-CJJ4] (last updated 2017).

33. *See* SUSAN SCHWEIK, THE UGLY LAWS: DISABILITY IN PUBLIC (2009); Susan Schweik, *Kicked to the Curb: Ugly Law Then and Now*, 46 HARV. C.R.–C.–L. L. REV. AMICUS *1 (2011).

34. *See, e.g.*, CULTIVATING FOOD JUSTICE (Alison Hope Alkon & Julian Agyeman eds., 2011); ROBERT GOTTLIEB & ANUPAMA JOSHI, FOOD JUSTICE (2010); ERIC HOLT-GIMÉNEZ & RAJ PATEL, FOOD REBELLIONS!: CRISIS AND THE HUNGER FOR JUSTICE (2009); KIM KESSLER & EMILY CHEN, FOOD EQUITY, SOCIAL JUSTICE, AND THE ROLE OF LAW SCHOOLS: A CALL TO ACTION (2015), https://law.ucla.edu/centers/social-policy/resnick-program-for-food-law-and-policy/publications/food-equity-social-justice-and-the-role-of-law-schools/ [https://perma.cc/4EXL-PTLT]; Ahmed Aoued, *The Right to Food: The Significance of the United Nations Special Rapporteur*, *in* INTERNATIONAL POVERTY LAW: AN EMERGING DISCOURSE, at 87 (Lucy A. Williams ed., 2006); Christopher J. Curran & Marc-Tizoc González, *Food Justice as Interracial Justice: Urban Farmers, Community Organizations and the Role of Government in Oakland, California*, 43 U. MIAMI INTER–AM. L. REV. 207 (2011); Andrea Freeman, *Fast Food: Oppression through Poor Nutrition*, 95 CAL. L. REV. 2221 (2007); Carmen G. Gonzalez, *The Global Politics of Food: Introduction to the Theoretical Perspectives Cluster*, 43 U. MIAMI INTER–AM. L. REV. 75 (2011).

35. Constrained in numerous ways (e.g., time, ongoing analysis, the law review format), this Article does not delve deeply into how socio-legal theories illuminate the food-sharing cases. Rather, this Article focuses on applying First Amendment Free Exercise of Religion jurisprudence to the food-sharing cases. I plan to elaborate the historical, jurisprudential, and theoretical importance of the food-sharing cases in a book on the subject, tentatively titled: *The Food Sharing Cases: Criminalizing Charity and Deterring Organic Solidarity in the United States.*

36. My understanding of these terms derives from graduate study under visual anthropologist Peter Biella, in particular his lecture of May 10, 2000 at San Francisco State University. In the discipline of anthropology, the "emic" concept may be understood to regard people's "native" usage of language and other cultural practices. In contrast, the "etic" concept regards the outsider specialist's interpretation of such practices. The concepts derive from the linguistic conceptualization of the phonemic and phonetic aspects of language. *See, e.g.*, Alan Dundes, *From Etic to Emic Units in the Structural Study of Folktales*, 75 J. AMER. FOLKLORE 95, 96, 101–03 (1962) (adapting the emic and etic concepts, innovated by KENNETH L. PIKE, LANGUAGE IN RELATION TO A UNIFIED THEORY OF THE STRUCTURE OF HUMAN BEHAVIOR (1954), to the study of folklore).

not electoral, sense) reasons, and elucidate the distinctive meanings that they impute to the public sharing of food. Drawing on published judicial opinions, as well as popular media reportage of select food-sharing cases, Part I also presents a partial history of food sharing in the United States from the late 1980s, after which the Ninth Circuit issued an unpublished opinion regarding a food-sharing case in San Francisco, California, through the most recent food-sharing controversy to be litigated in federal court, which emerged at the end of 2014 in Fort Lauderdale, Florida.[37] I detail salient features of food-sharing practices and anti-food-sharing laws to provide readers with a strong foundation to understand the contemporary practice of sharing food with hungry people in public and how different U.S. cities have proscribed this activity over the past several decades. In turn, this basis should enable readers to better evaluate how courts should apply First Amendment jurisprudence to the food-sharing cases.

Part II then explores how various courts have adjudicated the food-sharing cases under the Free Exercise Clause and related statutes. In other work,[38] I have discussed the split in authority between the Ninth Circuit and Eleventh Circuit of the U.S. Courts of Appeals regarding how to apply several free speech doctrines, including the regulation of expressive conduct and putatively content neutral time, place, and manner restrictions, to the food-sharing cases.[39] Differences regarding how courts have applied free speech doctrines are critically important for pending and future food-sharing cases, but many courts have resolved food-sharing cases under the Free Exercise Clause and related statutes like the federal Religious Freedom Restoration Act of 1993 (RFRA) and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[40] Also, state Religious Freedom Restoration Acts (state RFRAs) have provided the most consistent way by which courts have disposed of anti-food-sharing laws.[41] Therefore, Part II discusses how courts have adjudicated various food-sharing cases under the Free Exercise Clause, RFRA, state RFRAs, and RLUIPA. I then conclude the Article by arguing for U.S. cities to stop criminalizing the charitable sharing of food in public.

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37. *See McHenry I*, 983 F.2d 1076 (unpublished table decision); Complaint for Declaratory and Injunctive Relief and Damages: Preliminary Statement, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs I*), No. 0:15-CV-60185 (S.D. Fla. Jan. 29, 2015) [hereinafter Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*]. On the concept of "partial history," see ROBERT F. BERKHOFER, BEYOND THE GREAT STORY: HISTORY AS TEXT AND DISCOURSE 38–39 (1995) (theorizing how the paradigm of normal history understands partial histories as contextualized within a "Great Story" about the past).

38. *See* González, *supra* note *, at 233–34, 260–77 (discussing the inter-circuit split).

39. *Compare First Vagabonds Church of God V*, 638 F.3d at 758–59 (en banc), *rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008), *with Santa Monica Food Not Bombs*, 450 F.3d 1022.

40. Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq.*; Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), *codified at* 42 U.S.C. § 2000bb *et seq.*

41. *See, e.g.*, *W. Presbyterian Church II*, 862 F. Supp. 538; *Stuart Circle Par.*, 946 F. Supp. 1225. *But see Daytona Rescue Mission*, 885 F. Supp. 1554 (applying RFRA but finding that the city code did not substantially burden the petitioners' free exercise of religion).

I. CONTESTED (EMIC AND ETIC) MEANINGS OF SHARING FOOD IN PUBLIC

Before discussing how courts have applied First Amendment jurisprudence to food-sharing cases, it is important to establish a baseline understanding of the practice of publicly sharing food with hungry people. Therefore, here I discuss how people who share food publicly explain what they do. For example, religious food-sharing activists (i.e., people who publicly share food with those who hunger because of their religious beliefs) often discuss their conduct in terms of "charity" and "ministry."[42] In contrast, political food-sharing activists (i.e., people who share food because of their political beliefs) often expressly disavow the label of charity and instead describe their conduct in terms of "solidarity" and "mutual aid."[43] Theories and practices of charity, mutual aid, and solidarity have long and distinctive histories that are beyond the scope of this Article. Nevertheless, the emic meanings ascribed by people who publicly share food with those who hunger merit serious consideration, especially by municipal legislators who consider promulgating an anti-food-sharing law and judges who consider the validity of such a law. Indeed, as discussed below in Part II, the food-sharing cases almost always feature a conflict not only about the conduct of publicly sharing food with those who hunger, but also about the meaning of that conduct. Therefore, in addition to discussing how religious and political food-sharing activists explain themselves, this Part also details how various cities cognize food sharing in terms of "food distribution," "homeless feeding," "large group feeding," "outdoor public serving of food," and/or as a "social service, social service facility, or outdoor food distribution center."[44]

Understanding the emic meanings of food sharing is important in at least three ways. First, from a legal perspective, the self-understandings of people who publicly share food may clarify how courts that consider food-sharing cases should apply First Amendment jurisprudence. Understanding the reasons proffered by religious and political food-sharing activists for what they do is essential to a meaningful adjudication of the constitutionality of any particular anti-food-sharing law, especially under First Amendment free speech doctrines like content discrimination, expressive conduct, and viewpoint discrimination, but also including the free exercise of religion and whether a law constitutes a "substantial burden" on the exercise of religion. Second, from a practical perspective, not understanding the emic meanings ascribed by people who practice religious charity or political solidarity around the public sharing of food makes it more likely than not that anti-food-sharing laws will fail to deter public food sharing because food-sharing

42. *See infra* Section I.A.

43. *See infra* Section I.B.

44. *See, e.g.*, *First Vagabonds Church of God V*, 638 F.3d at 759 (large group feeding); *Santa Monica Food Not Bombs*, 450 F.3d at 1030 (food distribution); *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *1 (outdoor public serving of food); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37 (social service, social service facility, and outdoor food distribution center); Findings of Fact and Conclusions of Law at 32, *Big Hart Ministries Ass'n*, No. 3:07-CV-0216-P (N.D. Tex. Mar. 25, 2013) [hereinafter Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*] (homeless feeding).

activists' underlying motivations will remain. Thus, understanding the terms under which different food-sharing activists understand their actions would benefit legislators considering the amendment, enactment, or repeal of an anti-food-sharing law. Finally, from a theoretical perspective, critically apprehending food-sharing activists' emic understandings provides insights into their "legal consciousness" and practices of "popular constitutionalism."[45]

A. Religious Charity or Ministry

Selecting from several of the food-sharing cases that featured religiously motivated activists, this Section represents how they typically discussed their activity under terms of charity and ministry.[46] In one of the first food-sharing cases litigated in federal court, *Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia*, the plaintiffs argued that their program of providing food on church premises for people who were homeless was "an integral part of their religious beliefs."[47] Collaborating with the then-new nonprofit corporation, Miriam's Kitchen, Inc., the church began its program to feed homeless people in 1984, "in response to the dramatic upsurge in homelessness experienced by [the people of Washington, D.C.] in the early 1980s."[48] Originally, the program provided bag lunches; later it served breakfast in the church basement.[49] Five years later, the church decided to relocate from 1906 H Street, N.W. to 2401 Virginia Avenue, N.W. in the Foggy Bottom neighborhood, and in December 1990 the church applied for city permission to build its new building.[50]

The District of Columbia Zoning Administrator issued the building permit, but the permit application "made no specific reference to the operation of a feeding program at the site."[51] Construction on the new church began in June 1992, but in

45. *See, e.g.*, Austin Sarat, *"... The Law Is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 343–44 (1990) ("I suggest that the legal consciousness of the welfare poor is a consciousness of power and domination, in which the keynote is enclosure and dependency, and a consciousness of resistance, in which welfare recipients assert themselves and demand recognition of their personal identities and their human needs."); Kendall Thomas, Rouge et Noir *Reread: A Popular Constitutional History of the Angelo Herndon Case*, 65 S. CAL. L. REV. 2599, 2609 (1992) ("The perspective of popular historical method permits us to see the extent to which the history of constitutionalism in America, viewed from its underside, can be plotted as a story of a body of law born of sustained struggle, the outcome of painful, passionate political and ideological contests between subordinate groups and dominant institutions.") (citation omitted).

46. *E.g.*, *Big Hart Ministries Ass'n*, 2011 WL 5346109, at *3-4; *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *19; *First Vagabonds Church of God V*, 638 F.3d at 758, *rev'd en banc, rev'g* 578 F. Supp. 2d 1353 (M.D. Fla. 2008); *Daytona Rescue Mission*, 885 F. Supp. at 1556; *W. Presbyterian Church II*, 862 F. Supp. at 540; *Stuart Circle Par.*, 946 F. Supp. at 1228.

47. W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church I*), 849 F. Supp. 77, 79 (D.D.C. 1994) (granting the plaintiffs' motion for preliminary injunction).

48. *W. Presbyterian Church II*, 862 F. Supp. at 540 (granting the plaintiffs' motion for summary judgment).

49. *Id.*

50. *Id.*

51. *Id.*

August 1993 the zoning administrator received complaints from a local neighborhood commission and association regarding the church's "plans to provide food for the needy,"[52] and in September 1993, the zoning administrator notified the church in writing "that its feeding program was not a use permitted as a matter of right in a residential zone and was a prohibited use in the special purpose zone."[53] The following month, the plaintiffs appealed to the Board of Zoning Adjustment, but after holding two public hearings, the board voted in March 1994 to uphold the zoning administrator's decision.[54] The plaintiffs thus litigated the matter, filing suit in April 1994 and obtaining a preliminary injunction later that month.[55]

Five months later, in analyzing the plaintiffs' motion for summary judgment, District Judge Stanley Sporkin noted, "The plaintiffs maintain that ministering to the needy is a religious function rooted in the Bible, the constitution of the Presbyterian Church (USA) and the Church's bylaws."[56] Judge Sporkin's opinion also quoted several Biblical passages, which supported "the view that the Church's ministry is not merely a matter of personal choice but is a requirement for spiritual redemption."[57] For example, "For I was an hungred [sic], and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in."[58] Similarly, "If a person is righteous and does what is lawful and right . . . and gives his bread to the hungry and covers the naked with a garment . . . he is righteous, he shall surely live, says the Lord God."[59] Finally:

> What does it profit, my brethren, if a man says he has faith, but has not works? Can his faith save him? If a brother or sister is ill-clad and in lack of daily food, and one of you says to them, "Go in peace, be warmed and filled," without giving them the things needed for the body, what does it profit? So faith by itself, if it has no works, is dead.[60]

Judge Sporkin's opinion also referenced Islam, Hinduism, and Judaism as similarly promoting "the concept of acts of charity as an essential part of religious worship."[61] Reserving discussion of the legal issues at play in the case for Part II.B.1, *infra*, here it should suffice to say that Judge Sporkin concluded that:

> The plaintiffs here seek protection for a form of worship their religion mandates. It is a form of worship akin to prayer. . . . The Church may use its building for prayer and other religious services as a matter of right and

52. *Id.*
53. *Id.* (citation omitted).
54. *Id.* at 541–42.
55. *Id.* at 540; *see also W. Presbyterian Church I*, 849 F. Supp. at 79 (granting the plaintiffs' motion for preliminary injunction).
56. *W. Presbyterian Church II*, 862 F. Supp. at 544.
57. *Id.* at 544 n.3.
58. *Id.* at 544 n.3 (quoting *Matthew* 25:35).
59. *Id.* (quoting *Ezekiel* 18:5–9).
60. *Id.* (quoting *James* 2:14–17).
61. *Id.* at 544.

> should be able, as a matter of right, to use the building to minister to the needy.[62]

Using terms of religious charity, ministry, spiritual redemption, works of faith, and worship, one of the first modern food-sharing cases, *Western Presbyterian Church*, thus represented the emic meanings ascribed by the plaintiffs to their provision of food to hungry people. As we shall see, religious food-sharing activists have often used such terms to describe what they believe they are doing when they publicly share food.

A hundred miles away, another of the early food-sharing cases featuring religious activists raised similar socio-legal issues and surfaced similar emic meanings. In *Stuart Circle Parish v. Board of Zoning Appeals of the City of Richmond, Virginia*, the plaintiffs were "a partnership comprised of six churches of different denominations located within about five blocks of each other in the Stuart Circle area of the City of Richmond."[63] Some fifteen years prior to the litigation, the Stuart Circle Parish started "a Meal Ministry, which offers worship, hospitality, pastoral care, and a healthful meal to the urban poor of Richmond on Sunday afternoons."[64] First located in the Pace Memorial Methodist Church, the Meal Ministry eventually outgrew that location and came to attract about "one hundred people, some homeless, some not, but nonetheless needy."[65] Therefore, the plaintiffs shifted the Meal Ministry about half a mile west to the First English Evangelical Lutheran Church.[66] Shortly thereafter, the City of Richmond Zoning Administrator received complaints "about unruly behavior, public urination and noise in the area" and, in a pattern that is typical of the first wave of modern food-sharing cases, the administrator quickly determined that the Meal Ministry violated the city zoning ordinance.[67] In early November 1996, the Board of Zoning Appeals upheld the administrator's determination, and the plaintiffs quickly sued for injunctive relief.[68]

Later that month, when analyzing the plaintiffs' motion for a temporary restraining order, District Judge Robert E. Payne noted, "Plaintiffs view the Meal Ministry as the physical embodiment of a central tenet of the Christian faith, ministering to the poor, the hungry and the homeless in the community."[69] Referencing witness testimony, Judge Payne noted "that the feeding of the urban poor in Richmond is an extension of their morning worship . . . . Indeed, caring for the poor has been central to the Methodist faith, and was a formal teaching of John

62. *Id.* at 547.

63. *Stuart Circle Par.*, 946 F. Supp. at 1228.

64. *Id.*

65. *Id.*

66. *Id.* According to Google Maps, the Pace Memorial Methodist Church is located at 700 West Franklin Street, Richmond, Virginia 23320, and the First English Evangelical Lutheran Church is at 1603 Monument Avenue, Richmond, Virginia 23220. The distance between them is 0.6 miles.

67. *Id.*

68. *Id.*

69. *Id.* at 1228–29.

Wesley, the founder of Methodism."[70] He referenced another witness who "testified that one of the most important facets of her [Catholic] religion is sharing in the Eucharist, which is the equivalent of sharing in a meal with God and the congregation."[71] He continued, "Sharing a meal with the homeless is a natural extension of this practice."[72] Finally, Judge Payne referenced an expert witness in Christian theology, who "pointed to passages in the Bible in both the Old and New Testament, including the Sermon on the Mount and the sharing of the loaves and fishes."[73] Judge Payne thus concluded "that, for the plaintiffs, the feeding of those less fortunate constitutes methods of obtaining a blessing and the means to redemption."[74] He explicated:

> [T]he plaintiffs showed that it was central to their faith to invite the homeless into the church in order to establish a climate of worship. . . . Moreover . . . it is the gathering together as a community to share in the meal that constitutes the essence of their faith.[75]

In the context of the food-sharing cases, therefore, *Stuart Circle Parish* adds to and extends the emic meanings expressed by the plaintiffs in *Western Presbyterian Church*. For the *Stuart Circle Parish* plaintiffs, ministry to "the poor, the hungry, and the homeless in the community" within the largest of the Stuart Circle Parish churches was not merely about fulfilling the alimentary needs of people who were hungry but was also a religious way to "obtaining a blessing and the means to redemption."[76] Indeed, it was "the gathering together as a community to share in the meal that constitute[d] the essence of their faith."[77] *Stuart Circle Parish* thus surfaces an important, yet often underappreciated, insight that I herein elaborate: too often commentators reduce the people who benefit from public food sharing to "the homeless."[78] As noted in *Stuart Circle Parish* and *Western Presbyterian Church*, however, the religious food-sharing activists believed that they benefited greatly from sharing food with hungry people. Obtaining a blessing or redemption may not amount to pecuniary consideration, but it is a profound benefit to those who profess their religion as they share food in communion.

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70. *Id.* at 1236.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* Judge Payne then quoted *Matthew* 25:35, 40–43, 46, which begins, "I was hungered and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger and ye took me in."

75. *Id.* at 1239.

76. *Cf. id.* at 1228–29; *id.* at 1236.

77. *Id.* at 1239.

78. *See, e.g.*, Adam Nagourney, *As Homeless Line Up for Food, Los Angeles Weighs Restrictions*, N.Y. TIMES (Nov. 25, 2013), http://www.nytimes.com/2013/11/26/us/as-homeless-line-up-for-food-los-angeles-weighs-restrictions.html [https://web.archive.org/web/20170323135126/http://www.nytimes.com/2013/11/26/us/as-homeless-line-up-for-food-los-angeles-weighs-restrictions.html] (focusing on homeless people while reporting on an emerging controversy around food sharing in Los Angeles, California).

Additionally, as Judge Payne noted, the *Stuart Circle Parish* plaintiffs shared food with approximately "one hundred people, some homeless, some not, but nonetheless needy."[79] Naming the multiple classes of people who benefited from the Meals Ministry is important because the people who ate a weekly Sunday afternoon meal in the First English Evangelical Lutheran Church were not exclusively homeless. As I have elsewhere argued, the number of people who are homeless in the United States is a very small proportion of the massive numbers of people who are poor and/or hungry.[80] Depending on the estimate, homeless people number from "3.5% to 7.5% of the population of poor people in the United States."[81] I highlight this fact not to argue that homeless people are less important because of smaller numbers but rather to underscore that food sharing implicates a substantially larger number of people—namely the approximately fifteen percent of the U.S. population that is food insecure.[82]

Religious food-sharing activists feature in several other food-sharing cases,[83] but brevity militates against representing here all of the religious food-sharing cases. Instead, I discuss other religious food-sharing cases *infra* at Part II, detailing how courts have applied First Amendment free exercise of religion, and related statutory, jurisprudence. In the next section, I discuss the food-sharing cases that feature politically motivated activists. The case law often features a particular group, Food Not Bombs, but other politically motivated food-sharing activist groups exist.[84]

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79. *Stuart Circle Par.*, 946 F. Supp. at 1228.

80. González, *supra* note *, at 239 (arguing that poverty should not be conflated with homelessness and noting that the U.S. Census counted almost 46.5 million poor people in 2012 in comparison to the 649,917 people whom the U.S. Interagency Council on Homelessness estimated in 2012 as "without a place to call home on any given night and more than 1.59 million [people who] spent at least one night in emergency shelter or transitional housing over the past year") (citation omitted). As noted earlier, in 2014 over forty-eight million people in the United States were food insecure. *See* COLEMAN-JENSEN ET AL., *supra* note 4, at 6, 10, and accompanying text.

81. González, *supra* note *, at 239–40 (citations omitted). In 2014, the population of poor people was 14.8%. DENAVAS-WALT & PROCTOR, *supra* note 17, at 12. Multiplying that percentage by the 3.5% and 7.5% estimates shows that homeless people constitute from one-half a percent to a little over one percent of the U.S. population, which was 319,849,022 on Dec. 31, 2014. *U.S. and World Population Clock*, U.S. CENSUS, http://www.census.gov/popclock/ [https://perma.cc/JU98-6JYS] (last updated Oct. 28, 2017).

82. *See* COLEMAN-JENSEN ET AL., *supra* note 4, at 6, 10 (regarding food insecurity in the United States); *see also* MCHENRY, *supra* note 8, at 15 ("People that had been living average middle class suburban lives were showing up to eat, having moved in with their families or friends after foreclosing on their homes. Some people reported that they were camping at the state park or told us they ate at Food Not Bombs so they would have enough money to pay their mortgage.").

83. *E.g.*, *Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at 1–2; *First Vagabonds Church of God V*, 638 F.3d at 758; Layman Lessons, Inc. v. City of Millersville, 636 F. Supp. 2d 620, 626 (M.D. Tenn. 2008); *Abbott II*, 783 So. 2d 1213; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 2.

84. *See, e.g.*, Nagourney, *supra* note 78 (reporting on the introduction of a Los Angeles city council resolution to move "food lines" indoors, in response to complaints organized by the Melrose Action Neighborhood Watch, against the West Hollywood Food Coalition, which was established twenty-seven years earlier and provides free nightly meals to up to 200 people from a large truck). For commentary on the legal and cultural contests over earlier restrictions on commercial food trucks (i.e., trucks which people use to sell meals) in Los Angeles, see Hernández-López, *supra* note 31, *passim*,

It bears highlighting that the categories of "religious" and "political" food-sharing activists are themselves etic (i.e., those of an outsider specialist): they find purchase in the configuration of the First Amendment, which U.S. courts have interpreted to provide substantially different protection for claims cognized under the free exercise of religion versus the freedom of speech or the right of the people peaceably to assemble. While I believe the distinction between religious and political food-sharing activists is useful, I understand people who publicly share food as momentarily occupying changing positions in society (e.g., shaped by, *inter alia*, ability, age, education, gender, health, income, poverty, profession, race, wealth, etc.), and I believe that they likely have mixed motives that change during the time in which they share food in public.

B. Political Solidarity or Mutual Aid

The 1993 unpublished Ninth Circuit memorandum opinion, *McHenry v. Agnos*, is an example of how politically motivated activists challenged the first modern wave of anti-food-sharing laws.[85] The plaintiff-appellant, Keith McHenry, was a "co-founder and member of Food Not Bombs (FNB), an organization which distributes free food to San Francisco citizens and advocates increased public assistance for the homeless and hungry of that city."[86] In the 1996 unpublished Ninth Circuit memorandum opinion, *McHenry v. Jordan*, the court noted, in understated tones, "Since he organized FNB in San Francisco in 1987, McHenry has had a rather acrimonious relationship with San Francisco City authorities."[87] For people familiar with the international Food Not Bombs movement, or with the history of San Francisco, California, in the 1980s and 1990s, these case citations speak volumes. Since its 1980 origin, the Food Not Bombs movement has grown rhizomatically, across and beyond the United States, so that its banner, showing a fist holding a carrot, has become a familiar sight near the foldout tables where Food Not Bombs volunteers serve vegan or vegetarian meals at public protests and public food sharings, which take place in over a thousand cities worldwide.[88] In the same

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and Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 U.C. IRVINE L. REV. 91 *passim* (2012).

85. *McHenry I*, 983 F.2d 1076 (unpublished table decision). The panel consisted of Circuit Judges Proctor Hug, Jr., Harry Pregerson, and Charles E. Wiggins. *Id.*

86. *Id.* at *1; *see also* MCHENRY, *supra* note 8, at 14, 17, 20–21, 28, 33, 99–114, 150–51, 153, 155–60 (describing the history of the Food Not Bombs organization from its 1980 origin in organizing legal defense for an activist arrested following a direct action protest against the construction of the Seabrook Nuclear Power Generating Station, to its 1981 first meals in and around Boston, Massachusetts, to the 1988 founding of the San Francisco chapter, and through the ensuing decades as the Food Not Bombs movement grew across and beyond the United States).

87. McHenry v. Jordan (*McHenry II*), 81 F.3d 169 (9th Cir. 1996) (unpublished table decision). The panel consisted of Circuit Judges Herber Y. C. Choy (senior), Robert R. Beezer, and Michael Daly Hawkins. *Id.*

88. *See* MCHENRY, *supra* note 8, at 116 ("Food Not Bombs is active in over 1,000 cities around the world and often the most visible project accessible to the mainstream."); *see also id.* at 99–114, 155–60 (describing the history and growth of Food Not Bombs). On the notion of rhizomatic growth, see Kristin Lindgren, Amanda Cachia, & Kelly C. George, *Growing Rhizomatically: Disabilities, the Art*

period, San Francisco featured events ranging from the development of its high-rise financial district and the growth of homelessness under the mayoralty of Dianne Feinstein (1978 to 1988), to the catastrophic Loma Prieto earthquake of 1989 during the mayoralty of Art Agnos (1988 to 1992), to the expressly antihomeless "Matrix Quality of Life Program" of the mayoralty of Frank Jordan (1992 to 1996), to the dot-com boom during the mayoralty of former Speaker of the California Assembly, Willie Brown, the first African American mayor of San Francisco (1996 to 2004).[89] The Food Not Bombs movement grew in the same decades when the "City by the Bay" concentrated the wealth generated by myriad technology companies.

For readers who are unfamiliar with Food Not Bombs, *Hungry for Peace*, written by Keith McHenry, is one of the best textual sources to express the emic meanings that some politically motivated people ascribe to food sharing.[90] Other useful textual sources for these meanings are the pleadings and judicial opinions regarding the food-sharing cases in which Food Not Bombs volunteers were plaintiffs.[91] As shown below, the terms under which Food Not Bombs volunteers typically express their emic understandings of publicly sharing food include solidarity and mutual aid. To elaborate the social history of Food Not Bombs and the intellectual history of solidarity and mutual aid is beyond the scope of this Article, but quoting McHenry at length is merited to represent the emic terms under which Food Not Bombs groups publicly share food.

Under a section titled, "Solidarity, Not Charity," McHenry names the three principles of Food Not Bombs:

> 1. The food is always vegan or vegetarian and free to everyone, without restriction, rich or poor, stoned or sober.

Gallery, and the Consortium, 34 DISABILITY STUD. Q. (2014), http://dsq-sds.org/article/view/4250/3590 [https://perma.cc/CCR7-3KHU] ("What does it mean to develop rhizomatically? Botanically speaking, a rhizome is an underground plant stem that grows horizontally, producing roots and shoots from its nodes. Ginger, bamboo, and irises are rhizomes. Deleuze and Guattari contrast rhizomatic growth with arborescent growth: a model based on roots, trees, branches, linear and vertical development. Their philosophical concept of the rhizome, both distinct from and linked to the biological one, has itself traveled in non-linear ways, finding alliance with varied disciplines, modes of thought, and artistic practices."). *See generally* GILLES DELEUZE & FÉLIX GUATTARI, A THOUSAND PLATEAUS: CAPITALISM AND SCHIZOPHRENIA *passim* (Brian Massumi trans., 1987) (theorizing the rhizome).

89. *See* MCHENRY, *supra* note 8, at 14, 19–22, 33, 41, 53–54, 58–59, 63, 65, 88, 91–95, 103–09, 115, 153, 155–60 (discussing the history of Food Not Bombs in San Francisco, including the Matrix program); Foscarinis, *supra* note 29, at 37–38, 55–56, 60 (discussing the Matrix program and its litigation, Joyce v. City of San Francisco, 846 F. Supp. 843 (N.D. Cal. 1994)).

90. *See* MCHENRY, *supra* note 8, at 153 ("The eight founders of Food Not Bombs are Mira Brown, C. T. Lawrence Butler, Jessie Constable, Susan Eaton, Brian Feigenbaum, Keith McHenry, Amy Rothstien, and Jo Swanson.").

91. *E.g.*, *First Vagabonds Church of God V*, 638 F.3d at 758–59; *Santa Monica Food Not Bombs*, 450 F.3d at 1030; *Jordan*, 81 F.3d 169 (unpublished table decision); *Agnos*, 983 F.2d 1076 (unpublished table decision); Sacco v. City of Las Vegas, Nos. 2:06-CV-0714-RCJ-LRL, 2:06-CV-0941-RCJ-LRL, 2007 WL 2429151, at 3 (D. Nev. Aug. 20, 2007) (enjoining permanently the defendants from enforcing a law that barred the feeding of the indigent in city parks); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

2. Food Not Bombs has no formal leaders or headquarters, and every group is autonomous and makes decisions using the consensus process.

3. Food Not Bombs is dedicated to nonviolent direct action and works for nonviolent social change.[92]

According to McHenry, these principles "were first formally suggested and adopted at the 1992 Food Not Bombs International Gathering in San Francisco."[93] For McHenry, "It cannot be stressed enough that Food Not Bombs is not a charity and is working to inspire a dramatic change in society. Sharing food for free without restriction is a revolutionary act in a culture devoted to profit."[94] As he explains:

> [W]e invite people who receive the food to become involved in participating in the collection, cooking or sharing of the food. Food Not Bombs volunteers work in solidarity with many members of their community and encourage everyone's participation in all aspects of our local chapters, including help with decision making. People eating with Food Not Bombs should never feel that they are in any way inferior to those who are sharing the food. We are all equal. This isn't charity. This provides an opportunity for people to regain their power and recognize their ability to contribute and make a change. This could be one of the most important ways Food Not Bombs contributes to social change.[95]

He continues:

> We build solidarity by sharing food and literature at events and actions organized by other groups. We also distribute literature at our meals that is provided by the organizations we support, promoting solidarity and the building of coalitions. Offering food and logistical support is a great way to create lasting relationships with activists working on issues related to the goals of Food Not Bombs. We are working against the perception of scarcity, which causes many people to fear cooperation among groups.[96]

McHenry also discusses Food Not Bombs in terms of mutual aid. For example, he notes:

> The founders of Food Not Bombs thought that there might be a way to encourage the public to seek an end to war and poverty, with a living theater and mutual aid on the streets. No lengthy theories and long winded speeches to bore the public. We also made sure there would never be any charismatic leaders for the authorities to discredit or leadership for them to replace. Food Not Bombs is about action, reliability, respect, trust and relationships in the community. We are about making sure everyone is free to express their best self and has the food, clothing, healthcare and housing they deserve. In short, we were searching for a way to reach a public

92. MCHENRY, *supra* note 8, at 19.
93. *Id.* at 21.
94. *Id.* at 20.
95. *Id.*
96. *Id.* at 32.

> unfamiliar with alternative ways of organizing society and of relating to our fellow animal and human beings.[97]

McHenry's representations of solidarity and mutual aid resonate throughout four twenty-first century food-sharing cases in which Food Not Bombs volunteers were plaintiffs.[98] Courts, however, do not often adopt these emic meanings but instead impose their etic understandings. Consider, for example, *Santa Monica Food Not Bombs v. City of Santa Monica*, in which the plaintiffs' opening brief to the Ninth Circuit, appealing the lower court's grant of the defendants' motion for summary judgment, explained:

> Plaintiff Santa Monica Food Not Bombs . . . is an unincorporated association devoted to drawing attention to the connection between the lack of food for the poor and the war preparation activities of the federal government . . . . Some of its members are homeless residents of the City [of Santa Monica], who not only help provide meals but also join their fellow homeless in eating the meals.[99]

In the panel's opinion, Ninth Circuit Judge Marsha S. Berzon recognized this plaintiff's self-identification (viz., "Plaintiff Santa Monica Food Not Bombs is an unincorporated association that seeks to highlight a 'connection between the lack of food for the poor and war-preparation activities of the United States government'").[100]

In contrast, consider the difference between the plaintiffs' amended complaint in *First Vagabonds Church of God v. City of Orlando*, and how various courts represented these plaintiffs. The complaint explained that:

> Plaintiff Orlando Food Not Bombs is an unincorporated association affiliated with the grassroots international Food Not Bombs movement, which is organized according to principles of egalitarianism, consensus, cooperation, autonomy, and decentralization. The group shares food with homeless and hungry people in Orlando to call attention to society's failure to provide food and housing to each of its members and to reclaim public space. The name Food Not Bombs states the group's most fundamental principle: society needs to promote life, not death.[101]

Reviewing the various judicial opinions in *First Vagabonds Church of God* suggests the existence of a struggle over emic versus etic meanings. For example,

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97. *Id.* at 15.

98. *First Vagabonds Church of God V*, 638 F.3d at 758–59 (en banc); *Santa Monica Food Not Bombs*, 450 F.3d at 1030; *Sacco*, 2007 WL 2429151 (permanently enjoining the defendants from enforcing a law that barred the feeding of the indigent in Las Vegas parks); Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

99. Plaintiff's Opening Brief on Appeal from the Order Granting Defendants' Motion for Summary Judgment at 15, *Santa Monica Food Not Bombs*, 450 F.3d 1022 (9th Cir. 2006) (No. 03-56623), 2004 WL 443395, at *15.

100. *Santa Monica Food Not Bombs*, 450 F.3d at 1030.

101. Amended Complaint for Declaratory and Injunctive Relief and Damages at 4, First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God III*), 578 F. Supp. 2d 1353 (M.D. Fla. 2008), 2006 WL 3916070 (M.D. Fla. Dec. 29, 2006).

District Court Judge Gregory A. Presnell initially accepted Orlando Food Not Bombs' self-description.[102] After a bench trial and post-trial submissions, however, Judge Presnell characterized Orlando Food Not Bombs (OFNB) as:

> [A] loosely structured organization of political activists, including anarchists, communists, vegans, and those generally opposed to war and violence. Notwithstanding their diffuse views, all OFNB members share in OFNB's core belief: that food is a right which society has a responsibility to provide to all of its members.[103]

By the time the case reached the Eleventh Circuit Court of Appeals, however, Circuit Judge James Larry Edmondson significantly truncated the plaintiff's self-description (viz., "Plaintiff Orlando Food Not Bombs is a loosely structured organization of political activists who share the view that society has a responsibility to provide food to all of its members").[104] In contrast, dissenting Circuit Judge Rosemary Barkett cognized OFNB in the terms preferred by its members.[105] Finally, in the en banc opinion, Circuit Judge William H. Pryor, reduced the plaintiff's self-identification into, "a group of political activists dedicated to the idea that food is a fundamental human right."[106]

While some readers may find the different descriptions of the various Food Not Bombs plaintiffs unimportant, I find the changing descriptors of the OFNB plaintiffs in *First Vagabonds Church of God* significant and perhaps even predictive: they suggest a critical contest over the terms by which a court comes to understand public food sharing. The results of such contests seem to be that when a court adopts the emic terms of a plaintiff, as in the first two religious food-sharing cases discussed above in Part I.A., then the plaintiff prevails. In contrast, when courts disregard the emic terms of a plaintiff, as the majority opinions of the Eleventh Circuit Court of Appeals arguably did in *First Vagabonds Church of God*, then the court rules against the plaintiff. This hypothesis is certainly not novel. Socio-legal scholars have critiqued deconstruction, binary metaphors, and framing for

102. First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God I*), No. 6:06-CV-1583-Orl-31KRS, 2008 WL 899029, at *1 (M.D. Fla. Mar. 31, 2008) (granting in part and denying in part the defendants' motion for summary judgment) ("Plaintiff Orlando Food Not Bombs ('OFNB') is an unincorporated association with the international Food Not Bombs movement. This group shares food with homeless and hungry people at Lake Eola Park to draw attention to 'society's failure to provide food and housing to each of its members and to reclaim public space.'") (citation omitted).

103. *First Vagabonds Church of God III*, 578 F. Supp. 2d at 1356 (permanently enjoining defendants from enforcing their Large Group Feeding Ordinance), *rev'd*, 638 F.3d at 758–59 (en banc).

104. *First Vagabonds Church of God IV*, 610 F.3d at 1280 (affirming in part, reversing in part, and vacating the district court's permanent injunction), *rev'g*, 578 F. Supp. 2d 1353 (M.D. Fla. 2008), *vacated by* 616 F.3d 1230 (11th Cir. 2010), *reinstated in part en banc*, 638 F.3d 756 (11th Cir. 2011).

105. *Id.* at 1293 n.1 ("Orlando Food Not Bombs is an association of political activists affiliated with the international Food Not Bombs movement. It is undisputed that its members are opposed to war and violence and share the core belief that food is a right which society has a responsibility to provide to all.").

106. *First Vagabonds Church of God V*, 638 F.3d at 758.

decades.[107] Because the food-sharing cases often sound in the First Amendment, however, how courts cognize public food sharing and whether they extend constitutional protection to its practitioners seem to depend on whether judges accept, or at least not reject as incomprehensible, the plaintiffs' emic explanations for sharing food in public. Perhaps the judges even come to identify with the plaintiffs' reasons for seeking protection under the First Amendment?

Possibly accounting for this phenomenon, in the latest food-sharing case to be litigated in federal court, *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*,[108] it appears that the plaintiffs seek to make themselves cognizable to the court by mixing emic terms of solidarity with etic terms of First Amendment jurisprudence:

> Plaintiffs share food during their Friday demonstrations at Stranahan Park as symbolic expression of the group's political beliefs that food is a human right and to communicate a message of social unity and solidarity with people who are hungry, which is a human condition shared by all.[109]

Time will tell how Southern District of Florida District Judge William J. Zloch comes to understand the plaintiffs, as well as the municipal defendant, which has its own distinctive view on sharing food in public.[110]

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107. *See, e.g.*, J. M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 753 (1987) ("But we can read Derrida's work as challenging this commonsense conception. When we hold an idea in our minds, we hold both the idea and its opposite; we think not of speech but of 'speech as opposed to writing,' or speech with the traces of the idea of writing, from which speech differs and upon which it depends. The history of ideas, then, is not the history of individual conceptions, but of favored conceptions held in opposition to disfavored conceptions . . . . Our understanding of legal ideas may indeed involve, as Derrida says of speech and writing, the simultaneous privileging of ideas over their opposites.") (citations omitted); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 607 n.123 (1990) (comparing Balkin's interpretation of Derrida, with George Lakoff and Mark Johnson's theorization of the concepts that underlie binary spatial metaphors, and Audre Lorde's critique of simplistic binary oppositions as applied to human differences); Mark L. Johnson, *Mind, Metaphor, Law*, 58 MERCER L. REV. 845, 867 (2007) ("As humans we understand things by framing them via what George Lakoff calls 'idealized cognitive models.' Much of ethical and legal reasoning is a matter of framing situations and problems relative to various cognitive models, and image schemas, radial categories, and metaphors play a central role in defining our models.") (citation omitted); *see also* Martha F. Davis, *Law, Issue Frames and Social Movements: Three Case Studies*, 14 U. PA. J.L. & SOC. CHANGE 363, 364–65 (2011) ("While there are many definitions of framing and specific types of frames, there is general agreement that frames are 'schema of interpretation' that 'give meaning to key features of some topic or problem.'") (citation omitted).

108. Complaint: Preliminary Statement, *Fort Lauderdale Food Not Bombs I*, *supra* note 37.

109. *Id.* at 10; *see also id.* at 4 ("Plaintiff Fort Lauderdale Food Not Bombs is an unincorporated association affiliated with the grassroots international Food Not Bombs movement that engages in peaceful political direct action to communicate its message that our society can end hunger and poverty if we redirect our collective resources from the military and war and that food is a human right, not a privilege, which society has a responsibility to provide to all. Food Not Bombs shares food with anyone, without restriction, to communicate this message and organize for positive social change. The group does not serve food as a charity, but instead as an expression of and to further their political message. Food Not Bombs serves vegan or vegetarian food to reflect its political dedication to nonviolence against all, including animals.").

110. During the editing of this Article, Judge Zloch issued an order granting the City of Fort Lauderdale motion for summary judgment and denying the Plaintiffs' similar motion. Order, *Fort*

C. Municipal Terms

Cities that promulgate anti-food-sharing laws claim markedly different concerns than those expressed by religious and political food-sharing activists. In Part II *infra*, I discuss a few of the governmental interests that cities claim as compelling, important, or substantial justifications for their anti-food-sharing laws (e.g., competing uses, park aesthetics, public health, public safety, or zoning). Here, I overview four cities' labeling of public food sharing in terms of "food distribution" (Santa Monica, California) "homeless feeding" (Dallas, Texas), "large group feeding" (Orlando, Florida), and "social service facility" (Fort Lauderdale, Florida).[111] To provide readers with a sense of how these laws have recently evolved, I discuss these cities' different anti-food-sharing laws in the chronological order in which the cities promulgated them. I end the Part by briefly contrasting these labels with the emic meanings expressed by religious and political food-sharing activists.

1. Food Distribution

On October 22, 2002, the city council of Santa Monica, California, enacted an ordinance with two provisions to regulate the distribution of food in public parks, streets, and sidewalks.[112] In a new chapter of the Santa Monica Municipal Code (SMMC), entitled "Food Distribution on Public Property," Section 5.06.010 regulated food distribution in city parks and on the city hall lawn, and SMMC Section 5.06.020 regulated food distribution on public streets and sidewalks.[113] Section 5.06.010 required any person who would serve or distribute "food to the public" to comply with state health and safety standards, display a valid permit from the county Department of Health, obtain city approval as to location, and otherwise comply with Santa Monica's community events law, which the city had enacted the prior year.[114] Section 5.06.020 banned food distribution without city authorization

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Lauderdale Food Not Bombs I, No. 15-60185-CIV (S.D. Fla. Sept. 30, 2016), 2016 WL 5942528. Critiquing Judge Zloch's reasoning is not feasible here, but the Plaintiffs have appealed to the Eleventh Circuit. *See* Appellants' Initial Brief, Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs II*), No. 16-16808, (11th Cir. Jan. 18, 2017), 2017 WL 1076817; *see also* Oral Argument, *Fort Lauderdale Food Not Bombs II*, No. 16-16806 (11th Cir. Aug. 24, 2017), http://www.ca11.uscourts.gov/system/files_force/oral_argument_recordings/16-16808.mp3?download=1 [https://perma.cc/BKR7-2ULT] (linking to the digital recording of the oral arguments).

111. *See, e.g.*, *First Vagabonds Church of God V*, 638 F.3d at 759 (en banc) (large group feeding); *Santa Monica Food Not Bombs*, 450 F.3d at 1030 (food distribution); *Chosen 300 Ministries, Inc.*, 2012 WL 3235317 (outdoor public serving of food; Complaint for Declaratory and Injunctive Relief and Damages, Ordinance C-14-42 at 1–7, *Fort Lauderdale Food Not Bombs I*, *supra* note 37 (social service, social service facility, and outdoor food distribution center); Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44 (homeless feeding).

112. *Santa Monica Food Not Bombs*, 450 F.3d at 1029 (discussing SANTA MONICA, CAL. MUNICIPAL ORDINANCE No. 2055 (adopted Oct. 22, 2002), codified at SANTA MONICA, CAL. MUN. CODE § 5.06 (amended Feb. 24, 2004)).

113. *Id.* at 1029.

114. *Compare id.* at 1026 (dating the enactment of the community events ordinance as May 8, 2001, and noting its subsequent amendments), *with id.* at 1029 (discussing the food distribution ordinance).

under threat of a misdemeanor punishable by a fine not to exceed $1000, imprisonment in the county jail not to exceed six months, or both.[115]

On January 3, 2003, the plaintiffs filed their complaint in federal court seeking declaratory and injunctive relief from several Santa Monica ordinances, which regulated community events, food distribution, and street banners. On August 11, 2003, District Court Judge Manuel L. Real granted the city defendants' motion for summary judgment.[116] The plaintiffs appealed, and during its pendency, on February 24, 2004, the city amended its food distribution ordinance.[117] As to Section 5.06.010, Santa Monica clarified that city approval as to location would be controlled by state guidelines as administered by the County of Los Angeles, that the city would adopt new guidelines to administer the ordinance, and that compliance with the city's park maintenance code would be necessary.[118] As to Section 5.06.020, the amendment clarified four kinds of city authorization (vending permit, use permit, outdoor dining license, or community event permit) and, in an important concession to the plaintiffs, provided that "no permit or license shall be required for a noncommercial food distribution that does not interfere with the free use of the sidewalk or street by pedestrian or vehicular traffic."[119]

Santa Monica Food Not Bombs thus established the first terms under which some cities in the second modern wave of anti-food-sharing laws have cognized people who share food in public. The City of Santa Monica paired its "food distribution on public property" ordinance with a community events ordinance that further regulated the use of city properties. When challenged in court, Santa Monica prevailed at the district court, and predominantly prevailed at the Ninth Circuit, but the city nevertheless amended the part of its food distribution ordinance that regulated the use of streets and sidewalks so not to require a permit or license for "noncommercial food distribution that does not interfere with the free use of the sidewalk or street."[120] This clear exception for noncommercial food distribution is in marked contrast to other cities' approaches to regulating public food sharing. Moreover, after its amendment and litigation, Section 5.06.010 only required a permit for public food sharing in groups of 150 or more persons.[121]

115. *See id.* at 1029 (quoting SANTA MONICA, CAL. MUN. CODE § 5.06.020 (adopted Oct. 22, 2002)).

116. *Id.* at 1031.

117. *See id.* at 1029 (dating the amendment as Feb. 24, 2004); *see also* Plaintiff's Opening Brief, *Santa Monica Food Not Bombs*, 450 F.3d 1022 (No. CV-03-0032), 2004 WL 443395.

118. *Santa Monica Food Not Bombs*, 450 F.3d at 1029 (citing SANTA MONICA, CAL. MUN. CODE § 5.06.010 (adopted Oct. 22, 2002)).

119. *Id.* at 1030 (citing SANTA MONICA, CAL. MUN. CODE § 5.06.020 (adopted Oct. 22, 2004)) (emphasis removed).

120. SANTA MONICA, CAL. MUN. CODE § 5.06.020 (amended Feb. 24, 2004).

121. *See* González, *supra* note *, at 270–74 (discussing *Santa Monica Food Not Bombs*, 450 F.3d at 1025, 1035–45, which determined that a mandatory administrative instruction, requiring a community events permit for groups below 150 persons, failed the narrow tailoring requirement of First Amendment free speech strict scrutiny because it detached the ordinance from the city's asserted governmental interest in allocating the use of public open space by large groups).

2. Homeless or Large Group Feeding

On June 8, 2005, Dallas enacted its "Food Establishment Ordinance," which amended the city code to regulate "food establishments, including organizations that feed the homeless."[122] As noted by the court, District Judge Jorge A. Solis, "The stated purpose of the Ordinance [was] 'to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented.'"[123] At first glance, the ordinance might seem to apply only to commercial food establishments, but it expressly applied to organizations that feed the homeless when it articulated a nine-element "Homeless Feeder Defense."[124] While including the Homeless Feeder Defense in the ordinance might suggest that Dallas intended to provide a reasonable exception to its food establishment ordinance, after six years of litigation, on March 28, 2013, Judge Solis permanently enjoined the City of Dallas from enforcing the ordinance against the two organizational plaintiffs and one individual plaintiff.[125]

Orlando, Florida, evidenced a third approach to regulating food sharing in public. On July 24, 2006, its city council enacted an ordinance to amend Chapter 18A (Parks and Outdoor Public Assemblies) of its city code by adding and defining the terms "large group feeding" and "Greater Orlando Park District (GDPD)" and by creating a new section to regulate large group feeding in parks and park facilities owned or controlled by the city and within the GDPD.[126] As I have discussed the

122. Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 11 (citing and quoting DALL. CITY CODE § 17-1.1; TEX. ADMIN. CODE § 229.161 *et seq.*; *Minutes of the Dallas City Council Wed., Jun. 8, 2005*, DALL. CITY HALL (approved June 22, 2005), http://citysecretary.dallascityhall.com/pdf/CC2005/cc060805.pdf [https://perma.cc/ZM47-YCF2]).

123. Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 11.

124. *Id.* at 11–12 (citing DALL. CITY CODE § 17-1.6 (5), "known as the 'Homeless Feeder Defense,' [which] provides that an organization serving food to the homeless need not comply with the Ordinance if it meets other criteria, such as: (1) obtaining location approval from the City; (2) providing restroom facilities; (3) having equipment and procedures for disposing of waste and wastewater; (4) making available handwashing equipment and facilities, including a five-gallon container with a spigot and a catch[,] bucket, soap, and individual paper towels; (5) registering with the City; (6) obtaining written approval from the property owner; (7) having a person present at all times who has completed the City's food safety training course; (8) complying with food storage and transport[ation] requirements; and (9) ensuring the feeding site is left in a clean, waste-free condition").

125. Final Judgment at 1, *Big Hart Ministries Ass'n*, No. 3:07-CV-0216-P (N.D. Tex. Mar. 28, 2013). Judge Solis ultimately found that the Homeless Feeder Defense substantially burdened the plaintiffs' rights to freely exercise their religion without the compelling justification required by the Texas Religious Freedom Restoration Act of 1999 (TRFRA). Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44, at 39 (citation omitted). TRFRA provides that, "a government agency may not substantially burden a person's free exercise of religion" unless the agency, "demonstrates that the application of the burden to the person: (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that interest." TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017).

126. ORLANDO CITY COUNCIL, CITY OF ORLANDO COUNCIL MINUTES, at 18–19 (Fla. July 24, 2006); *see also First Vagabonds Church of God IV*, 610 F.3d at 1292–93 (reproducing relevant parts of the ordinance); González, *supra* note *, at 267–68 (discussing the ordinance).

political history of the ordinance's enactment at length elsewhere,[127] here I make five brief points. First, Orlando defined a "large group feeding" as:

> [A]n event intended to attract, attracting, or likely to attract twenty-five (25) or more people, including distributors and servers, in a park or park facility owned or controlled by the City, including adjacent sidewalks and rights-of-way in the GDPD, for the delivery or service of food. Excluded from this definition are activities of City licensed or contracted concessionaires, lessees, or licensees.[128]

Second, Orlando defined its new GDPD "as an area within the limits of the City of Orlando, Florida, extending out a two (2) mile radius in all directions from City Hall and including all of the parks and park facilities owned or controlled by the City touched by that radius, in their entirety."[129] Third, within the GDPD, which included "approximately forty-two public parks,"[130] the ordinance made it "unlawful to knowingly sponsor, conduct, or participate in the distribution or service of food at a large group feeding at a park or park facility . . . without a Large Group Feeding Permit."[131] Fourth, the ordinance provided that "[n]ot more than two (2) Large Group Feeding Permits shall be issued to the same person, group, or organization . . . for the same park in the GDPD in a twelve (12) consecutive month period."[132] Finally, violation of the ordinance was punishable by "a fine not to exceed $500.00" or "a definite term of imprisonment not to exceed sixty (60) days, or by both such fine and imprisonment."[133]

Thus, in 2006 the city of Orlando defined a large group feeding as amounting to twenty-five people, including "distributors and servers," and it created a two-mile radius downtown park district, centered on city hall, within which any person or organization seeking to share food in public must obtain a permit, with such person or organization unable to obtain more than two such permits in any twelve consecutive months for any particular park.[134] From Santa Monica, California, in 2002, to Dallas, Texas, in 2005, to Orlando, Florida, in 2006, we thus see how cities cognized public food sharing in terms of food distribution, food establishment and homeless feeding, and large group feeding, respectively. Such terms are far from the emic meanings expressed by food-sharing activists motivated by religious belief (charity, ministry, and works of faith) or political principle (solidarity and mutual aid), and the municipal terms are striking for their facial neutrality. (Only Dallas's ordinance expressly regulated homeless people in an affirmative defense to its food

127. González, *supra* note *, at 263–70.

128. ORLANDO, FLA. CODE OF ORDINANCES tit. II, § 18A.01(24) (2016), https://www.municode.com/library/fl/orlando/codes/code_of_ordinances?nodeId=TITIICICO_CH18APAOUPUAS_S18A.01DE [https://perma.cc/6TH4-6RMX].

129. *Id.* § 18A.01(25).

130. *First Vagabonds Church of God I*, 2008 WL 899029, at *1.

131. ORLANDO, FLA., CODE OF ORDINANCES tit. II § 18A.09-2(a) (1999).

132. *Id.* § 18A.09-2(c).

133. *Id.* §§ 1.08(3), 18A.24(4) ("Any person violating the provisions of any section of this chapter shall be subject to arrest and punishment as provided in Section 1.08 of this Code.").

134. *Id.* §§ 18A.01(24)–(25), 18A.09-2(c).

establishment ordinance.)[135] Beyond the advice of counsel, however, the municipal terms also evidence how particular city councils understood the socio-legal activity that they sought to regulate. Indeed, reflecting on the municipal terms raises questions regarding the implicit meanings of "distributing" (or serving) food,[136] versus "feeding" people who are homeless or otherwise hungry.

As above explained, I have adopted the phrase food sharing and believe that it accurately labels the various emic meanings that food-sharing activists ascribe to themselves. Cities that enacted anti-food-sharing laws, however, seem relatively unconcerned with activists' emic meanings and instead focus on governmental interests that are facially neutral and perhaps putatively objective. Distributing, feeding, sharing, and serving are different, yet related, ways to describe the patterned phenomena that I call public food sharing. These labels matter because they tend to play out differently under different First Amendment doctrines (e.g., protected expression versus unprotected conduct, content based discrimination versus content neutral regulation, exercise of religion or not, and substantial burden versus mere inconvenience).[137] Before turning to Part II, however, I briefly discuss the municipal term "social services facility," which is at issue in the latest anti-food-sharing law to be litigated in federal court.

3. Social Service Facilities and Outdoor Food Distribution Centers

On October 22, 2014, the City of Fort Lauderdale enacted an ordinance to regulate "social service facilities."[138] Ordinance No. C-14-42 substantially amended "Section 47-18.31, Social service facility (SSF), of the Unified Land Development Regulations (hereinafter referred to as 'ULDR')."[139] From being a single brief paragraph, the ordinance expanded section 47-18.31 to fifteen pages of new purpose, definitions, development standards, table of allowable uses by zoning district, level of review, and lists of permitted and conditional uses.[140] The ordinance redefined "social services" to mean "[a]ny service provided to the public to address

135. DALL., TEX. CODE OF ORDINANCES vol. 1, § 17-1.6 (2015).

136. *Cf. Chosen 300 Ministries, Inc.*, 2012 WL 3235317, at *27 n.11 (discussing Philadelphia's anti-food-sharing law, which provided, "No person, group, or organization shall engage in Outdoor Public Serving of Food . . . [which] means the distribution of food free of charge to members of the public, in groups of three or more people, on any public highway, on any public sidewalk, or in any outdoor public place.").

137. *See infra* Part II.B.2 (discussing exercise of religion and substantial burden versus mere inconvenience).

138. FORT LAUDERDALE, FLA., ORDINANCE AMENDING THE UNIFIED LAND DEVELOPMENT REGULATIONS, No. C-14-42, at 1, 15 (adopted Oct. 22, 2014), http://www.fortlauderdale.gov/home/showdocument?id=6404 [https://perma.cc/P2LC-CRHN]; *see also* Larry Barszewski, *Fort Lauderdale Commissioners Pull All-Nighter and Approve Homeless Feeding Restrictions*, SUNSENTINEL (Oct. 22, 2014), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-lauderdale-homeless-feeding-sites-20141021-story.html [https://perma.cc/FXX4-5D6H].

139. FORT LAUDERDALE, FLA, ORDINANCE No. C-14-42, at 2.

140. *Id.* at *passim.*

public welfare and health such as, but not limited to, the provision of food."[141] The ordinance defined what it termed "Outdoor Food Distribution Centers" as:

> Any location or site temporarily used to furnish meals to members of the public without cost or at a very low cost as a social service as defined herein . . . and is generally providing food distribution services exterior to a building or structure without permanent facilities on a property.[142]

The ordinance mandated thirteen specific development standards for Outdoor Food Distribution Centers, which included, *inter alia*, meeting all state, county, and city requirements for food service establishments; not being closer than 500 feet from another food distribution center or any residential property; providing restroom facilities and equipment for hand washing and the lawful disposal of waste and wastewater; having written consent from the owner of the property on which the outdoor food distribution occurs; ensuring that one onsite person has received state food manager certification; requiring adequate food storage at prescribed temperatures and clean food transportation; mandating food service within four hours of its preparation; etc.[143] Further, the ordinance categorized Outdoor Food Distribution Centers as a "permitted use" in only one kind of zoning district, Heavy Commercial/Light Industrial.[144] In Community Facility (including House of Worship) and Regional Activity Center zoning districts, Outdoor Food Distribution Centers became a "conditional use," which therefore required "site plan level III approval" with newly created review criteria that included "compatibility with the character of the area."[145] In Park, Residential, and myriad other zoning districts, Outdoor Food Distribution Centers became a "prohibited use."[146] Additionally, the Fort Lauderdale Parks and Recreation rules and regulations expressly prohibited using parks for "business or social service purposes unless authorized pursuant to a written agreement with [the] City."[147]

In other words, Fort Lauderdale's 2014 ordinance deployed the police power delegated to it by the State of Florida to define the practice of publicly sharing food as a "social service," and to require this ostensible social service to comport with

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141. *Id.* at 3 (amending Fort Lauderdale, Fla., Unified Land Dev. Code § 47-18.31(B)(6)).

142. *Id.* (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(B)(4)).

143. *Id.* at 6–7 (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(C)(2)(c)).

144. *Id.* at 7–9, 11 (amending Fort Lauderdale, Fla. Unified Land Dev. Code §§ 47-6.13, 47-18.31(D)).

145. *Id.* at 8–14 (amending Fort Lauderdale, Fla. Unified Land Dev. Code §§ 47-8.10–47-8.13, 47-13.10, 47-18.31(D)). Site plan level III approval requires approval from the Planning and Zoning Board after an opportunity for public participation, City of Fort Lauderdale, Fla., *Development Review Committee*, FORTLAUDERDALE.GOV, http://www.fortlauderdale.gov/departments/sustainable-development/urban-design-and-planning/development-applications-boards-and-committees/development-review-committee [https://perma.cc/B3FN-YEXQ] (last visited July 15, 2016).

146. FORT LAUDERDALE, FLA, ORDINANCE No. C-14-42, at 8–9 (amending Fort Lauderdale, Fla. Unified Land Dev. Code § 47-18.31(D)).

147. City of Fort Lauderdale, Fla., *Parks and Recreation—Rules and Regulations* (Rule 2.2. Social Services), FORTLAUDERDALE.GOV [hereinafter *Fort Lauderdale Parks and Recreation—Rules and Regulations*], http://www.fortlauderdale.gov/home/showdocument?id=2908 [https://perma.cc/QJV5-47PF] (last visited Sept. 12, 2016).

the city's zoning laws and park rules. Under the former, an "Outdoor Food Distribution Center" was a permitted use only in Heavy Commercial/Light Industrial districts located no closer than 500 feet from any other food distribution center or residential property; a conditional use (requiring approval from the planning and zoning board) in community facility, house of worship, and regional activity center districts; and a prohibited use in city parks. Consequently, under the terms of its new ordinance, public food sharing or an "Outdoor Food Distribution Center" would henceforth be relegated to a small number of locations within the city of Fort Lauderdale, not including any city parks and only possibly including a house of worship if it obtained permission for such a conditional use.

Instantiating Mark Twain's aphorism that "[t]ruth is stranger than fiction,"[148] one of the first four people whom Fort Lauderdale police arrested under the ordinance was a ninety-year-old World War II veteran.[149] Arnold Abbot had just served the fourth plate of food when police ordered him to "Drop that plate right now," and then cited and released him and three other food-sharing volunteers.[150] Abbott had been publicly sharing food in Fort Lauderdale, often at its beachside parks, since 1991 through the nonprofit Love Thy Neighbor Fund, Inc., which he established to commemorate his deceased wife.[151] A few days later, police again arrested, cited, and released Abbott, along with several other food-sharing volunteers.[152] Adding to the strangeness, Abbott was arrested thirteen years after he successfully sued the City of Fort Lauderdale for violating his rights under the

148. MARK TWAIN, FOLLOWING THE EQUATOR: A JOURNEY AROUND THE WORLD 155 (Olivia L. Clemens ed., Harper & Bros. Publishers 1899) ("Truth is stranger than fiction, but it is because Fiction is obliged to stick to possibilities; Truth isn't.").

149. Mike Clary, *Police Shut Down Stranahan Park Homeless Feeding Site, Cite Activists for Breaking New Law*, SUNSENTINEL (Nov. 2, 2014, 4:50 PM), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-homeless-feeding-citations-20141102-story.html [https://web.archive.org/web/20171026185759/http://www.sun-sentinel.com/g00/local/broward/fort-lauderdale/fl-homeless-feeding-citations-20141102-story.html]; Jeff Weinberger, *Video: A 90-Year-Old and Two Clergymen Cited, Face Possible Jail Time, for Feeding the Homeless in Fort Lauderdale*, NEW TIMES BROWARD-PALM BEACH (Nov. 3, 2014, 9:30 AM), http://www.browardpalmbeach.com/news/video-a-90-year-old-and-two-clergymen-cited-face-possible-jail-time-for-feeding-the-homeless-in-fort-lauderdale-updated-6471412 [https://perma.cc/QUJ9-Z4B5].

150. Weinberger, *supra* note 149.

151. Stefan Kamph, *At the Beach with Arnold Abbott, Fort Lauderdale's Homeless-Feeding Advocate*, NEW TIMES BROWARD-PALM BEACH (Sept. 22, 2011, 9:05 AM), http://www.browardpalmbeach.com/news/at-the-beach-with-arnold-abbott-fort-lauderdales-homeless-feeding-advocate-6472058 [https://perma.cc/HB3Q-GUFA]; *see also* LOVE THY NEIGHBOR, http://lovethyneighbor.org [https://perma.cc/WSF7-58PP] (last visited July 15, 2016) ("Love Thy Neighbor is an all volunteer organization embracing the vision and passion of one woman, Maureen Abbott, who devoted her life to caring for as many poor, hungry, and homeless as she could reach.").

152. Mike Clary, *Activist, 90, Cited Again for Feeding Fort Lauderdale Homeless*, SUNSENTINEL (Nov. 6, 2014, 5:12 AM), http://www.sun-sentinel.com/local/broward/fort-lauderdale/fl-homeless-feeding-citations-folo-20141105-story.html [https://web.archive.org/save/http://www.sun-sentinel.com/g00/local/broward/fort-lauderdale/fl-homeless-feeding-citations-folo-20141105-story.html].

Florida Religious Freedom Restoration Act.[153] His state court lawsuit, upheld on appeal, won an injunction against enforcement of the city park rules unless the city provided a suitable alternative site, which it repeatedly failed to do.[154] In a final absurdity, which Kafka might have appreciated, when asked about the new ordinance, Fort Lauderdale City Manager Lee Feldman was quoted as saying, "the new rules will 'bring the city into full compliance' with a 2000 court order in a case brought by Abbott."[155]

II. PUBLICLY SHARING FOOD AS A FREE EXERCISE OF RELIGION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[156]

Courts have adjudicated most of the food-sharing cases under the First Amendment. Therefore, this Part discusses how different courts have applied the Free Exercise Clause and related statutes, including the federal Religious Freedom Restoration Act of 1993 (RFRA),[157] various state religious freedom restoration acts ("state RFRAs"),[158] and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[159] While a detailed history of the Supreme Court jurisprudence that led Congress to enact RFRA and RLUIPA is beyond the scope of this Article, such history is relevant to the food-sharing cases because several of the earliest food-sharing cases were litigated after Congress enacted RFRA but

153. *Abbott II*, 783 So. 2d at 1214–15 (affirming the trial court's injunction and remanding for its determination of whether the city's proposed alternate location complied with the trial court's order and the plaintiff's rights under the Florida Religious Freedom Restoration Act, FLA. STAT. ANN. § 761.03 (West 2016)).

154. *Abbott II*, 783 So. 2d at 1215; Order on Plaintiff's Renewed Motion for Contempt and/or to Enforce Injunction, Abbott v. City of Fort Lauderdale (*Abbott I*), No. CACE 99-003583(05) (Fla. Cir. Ct. June 14, 2000), *rev'd & remanded*, *Abbott II*, 783 So. 2d 1213 (finding the city's proposed alternate location not minimally suitable and including the trial court's June 14, 2000 Final Judgment and Order).

155. Larry Barszewski, *Feed the Poor—Only Where Permitted, Fort Lauderdale Says*, SUNSENTINEL (Oct. 6, 2014, 3:55 PM), http://www.sun-sentinel.com/local/broward/fl-lauderdale-homeless-feeding-rules-20141006-story.html [https://web.archive.org/save/http://www.sun-sentinel.com/g00/local/broward/fl-lauderdale-homeless-feeding-rules-20141006-story.html]; *accord* CITY OF FORT LAUDERDALE, FLA., CITY COMM'N, REGULAR MEETING AGENDA MEMO, #14-0889, at 1 (2014) ("The revisions also bring the City into full compliance with the Court's Final Judgment of June 14th, 2000 in the case of Abbott v. City of Fort Lauderdale, 783 So. 2d 1213 (Fla. Dist. Ct. App. 2001), and thereby permitting the resumption of the enforcement of Park Rule 2.2.") (footnote omitted).

156. U.S. CONST. amend. I.

157. Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (Nov. 16, 1993), *codified at* 42 U.S.C. § 2000bb *et seq.*

158. *E.g.*, Pennsylvania Religious Freedom Protection Act, 71 PA. STAT. AND CONS. STAT. ANN. §§ 2401 *et seq.* (West 2012); Texas Religious Freedom Restoration Act, TEX. CIV. PRAC. & REM. CODE ANN. § 110.003 (West 2017); Florida Religious Freedom Restoration Act, FLA. STAT. ANN. § 761.01 *et seq.* (West 2016).

159. Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq.*

before the Court held that it could not constitutionally apply to state and local governments.[160] Also, in the wake of *City of Boerne*, numerous states adopted their own religious freedom restoration acts, and these state RFRAs have featured in several recent religious food-sharing cases.[161] Finally, RLUIPA, which by its terms applies to the states,[162] and which the Court has upheld against an establishment clause challenge,[163] has featured in at least one food-sharing case.[164] The religious food-sharing cases thus provide a window into the Court's changing constitutional and statutory jurisprudence on the free exercise of religion. Below I briefly trace that doctrinal history and discuss its application in several of the food sharing cases.

A. The Free Exercise Clause

In 1940, the Supreme Court first applied the Free Exercise Clause of the First Amendment to state and local governments through the Due Process Clause of the Fourteenth Amendment.[165] From 1963 to 1990, the Court's protection of the free exercise of religion nominally followed the strict scrutiny test that was established in *Sherbert v. Verner*.[166] Under that view, government laws that substantially burdened a person's free exercise of religion required a compelling state interest and narrow tailoring to advance that interest.[167] In 1990, however, in *Employment Division v. Smith*, the Court held "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability.'"[168] Thereafter, neutral laws of general applicability that only incidentally infringed on a person's religion were merely subject to rational basis review.[169] In contrast, strict scrutiny would apply if the objective of a law was to infringe upon or restrict a religious practice (i.e., if it was not a neutral law of general applicability).[170]

160. City of Boerne v. Flores, 521 U.S. 507 (1997).

161. *See infra* Part II.B.

162. *See* 42 U.S.C. § 2000cc–5(4)(A) (defining "government" broadly).

163. *See* Cutter v. Wilkinson, 544 U.S. 709 (2005).

164. *See infra* Part II.C.

165. Cantwell v. Conn., 310 U.S. 296 (1940), *discussed in* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1248, 1319–20 (5th ed. 2015).

166. Sherbert v. Verner, 374 U.S. 398, 399, 403 (1963) (applying strict scrutiny to reverse the denial of unemployment benefits to a Seventh-day Adventist who quit her job rather than work on her Saturday Sabbath); *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (applying free exercise strict scrutiny to exempt fourteen- and fifteen-year-old students of Amish parents from a state compulsory education law). Erwin Chemerinsky notes that although *Sherbert* established strict scrutiny, in this period the Court only applied strict scrutiny to cases involving denials of unemployment benefits and compulsory education laws. CHEMERINSKY, *supra* note 165, at 1321–26.

167. *Sherbert*, 374 U.S. at 406.

168. Emp't Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 879 (1990) (citations omitted).

169. CHEMERINSKY, *supra* note 165, at 1328.

170. *See* Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest.") (citation omitted).

Daytona Rescue Mission, Inc. v. City of Daytona Beach is an early food-sharing case that featured analysis of the Free Exercise Clause.[171] The defendant city denied the plaintiffs' application for a permit to operate a food bank and homeless shelter, and the plaintiffs sought declaratory and injunctive relief from the city's zoning code, alleging that it violated their constitutional free exercise and statutory RFRA rights.[172] In April 1992, the plaintiff pastor contacted city officials to discuss his intent to establish a rescue mission, and over the course of a year he pursued numerous possible sites and made offers on two of them.[173] In May 1993, however, the city adopted a Land Development Code, which permitted churches in the relevant zoning district but "provided that homeless shelters and food bank programs are not accessory uses."[174] In June 1993, the plaintiff pastor obtained a contract for sale for one site and immediately applied for a "semi-public use" permit for his intended "Church-Mission."[175] His application specified his intent to use the "site as a facility for worship services, daily housing of a limited number of homeless men, and daily feeding of homeless men, including those who would not be sheltered at the facility."[176] The City Planning Board heard the request the following month and denied it in August 1993, and in October 1993, the City Commission voted unanimously to deny the permit.[177] In such a posture, the plaintiffs sued in federal court, and the court, District Judge G. Kendall Sharp, granted the municipal defendants' motion for summary judgment in May 1995.[178]

Curiously, although the court noted that RFRA had been held to be retroactive, its analysis did not stop with the statutory interpretation and application but also reached the constitutional question.[179] It then applied two analyses of the Free Exercise Clause—"both the Supreme Court analysis and the *Grosz* three-part tests in [the Eleventh Circuit's] opinion in *First Assembly*."[180] Focusing on the Supreme Court analysis, Judge Sharp found "that the City code is neutral and of general applicability."[181] Although he acknowledged that the city's land development code changed the definition of a church or religious institution after the plaintiff had applied for the permit, Judge Sharp concluded that the law was neutral and of general applicability because competent evidence showed that the definitional change reduced an established policy into writing, and because the

171. 885 F. Supp. 1554 (M.D. Fla. 1994).
172. *Id.* at 1554–55.
173. *Id.* at 1556.
174. *Id.*
175. *Id.*
176. *Id.*
177. *See id.*
178. *Id.* at 1555.
179. *Id.* at 1558 (citing Lawson v. Dugger, 844 F. Supp. 1538 (S.D. Fla. 1994)).
180. *Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1557–58 (citing First Assembly of God of Naples, Fla., Inc. v. Collier Cty., Fla. (*First Assembly of God of Naples I*), 20 F.3d 419 (11th Cir. 1994), *opinion modified on denial of reh'g*, 27 F.3d 526 (11th Cir. 1994); Grosz v. City of Miami Beach, Fla., 721 F.2d 729 (11th Cir. 1983)).
181. *Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1558.

initial city official with whom the plaintiff met in 1992 said that the homeless shelter and food bank would be treated as a special use.[182] Therefore, the court found no violation of the Free Exercise Clause.[183] (I discuss the court's application of RFRA in Part II.B, *infra*.)

Daytona Rescue Mission thus shows one approach to claims brought under the Free Exercise Clause and is relevant for states without a state RFRA in situations where RLUIPA does not apply. Unless a plaintiff in such a situation can persuade the court that the law is not neutral and of general applicability but instead has the objective to infringe upon or restrict a religious practice, the court will apply rational basis review, and given the government's significant interest in regulating zoning, it is likely that no constitutional violation will be found.[184]

B. The Religious Freedom Restoration Act (RFRA)

In contrast, under the Religious Freedom Restoration Action of 1993, even neutral laws of general applicability are subject to strict scrutiny so long as they substantially burden the free exercise of religion.[185] Before the Court held in 1997 that RFRA was not a proper exercise of Congress's Fourteenth Amendment, Section Five enforcement power over the states,[186] several courts applied RFRA to state laws. Thereafter, RFRA was applicable only to the federal government, but several states quickly adopted their own RFRAs, and they have featured in several recent food-sharing cases. Below, I discuss both sorts of cases.

1. Federal RFRA

Reviewing how courts have applied RFRA to religious food-sharing cases is warranted for at least two reasons. First, courts adjudicated several of the early religious food-sharing cases before the Court held that RFRA could not constitutionally apply to state and local law.[187] Second, one of those cases arose in the Federal District of Columbia,[188] and RFRA remains applicable to federal law.[189] Thus, elucidating courts' past applications of RFRA in several past food-sharing cases can still inform strategies for future litigation.

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182. *Id.*

183. *Id.* at 1561.

184. *See, e.g., id.* at 1558 (citing First Assembly of God of Naples, Fla. v. Collier Cty., Fla. (*First Assembly of God of Naples II*), 775 F. Supp. at 386 (M.D. Fla. 1991)).

185. Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified at 42 U.S.C. § 2000bb *et seq.* (2012)).

186. *Boerne*, 521 U.S. 507.

187. *Compare Boerne*, 521 U.S. 507, *with Stuart Circle Par.*, 946 F. Supp. 1225; *Daytona Rescue Mission, Inc.*, 885 F. Supp. 1554 (applying RFRA but finding that the city zoning laws did not substantially burden the petitioners' free exercise of religion); *W. Presbyterian Church II*, 862 F. Supp. 538 (D.D.C. 1994).

188. *W. Presbyterian Church II*, 862 F. Supp. 538.

189. Burwell v. Hobby Lobby, 134 S. Ct. 2751 (2014); Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

In Part I.A., *supra*, I discussed the first religious food-sharing case, *Western Presbyterian Church v. Board of Zoning Adjustment of the District of Columbia.* In that case, District Judge Sporkin granted the plaintiffs' motion for summary judgment and permanently enjoined the District of Columbia from preventing the plaintiffs from ministering to the needy by charitably providing food to homeless people at the site of their new church, "so long as the feeding program is conducted in an orderly manner and does not constitute a nuisance."[190] As he concluded, "The Church may use its building for prayer and other religious services as a matter of right and should be able, as a matter of right, to use the building to minister to the needy."[191] He explained, "To regulate religious conduct through zoning laws, as done in this case, is a substantial burden on the free exercise of religion . . . in violation of the First Amendment and the Religious Freedom Restoration Act of 1993."[192]

According to RFRA, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except" if the government "demonstrates that application of the burden to the person" furthers "a compelling government interest; and is the least restrictive means of furthering that compelling governmental interest."[193] In *Western Presbyterian Church*, the defendants conceded that they had no compelling governmental interest in prohibiting the plaintiffs from conducting their "feeding program . . . 'so long as appropriate controls are in place'"[194] Therefore, the defendants disputed whether the District of Columbia zoning regulations, as applied, substantially burdened the plaintiffs' free exercise of religion.[195] As discussed in Part I.A., *supra*, the court took seriously the emic views ascribed by the plaintiffs to their practice of providing food to hungry people.[196] The plaintiffs justified their practice in terms of religious charity, ministry, spiritual redemption, and works of faith, and Judge Sporkin found ample textual support in the Bible, the constitution of the Presbyterian Church (USA), and the church's bylaws.[197] He therefore found that "the Church's feeding program in every respect is a religious activity and a form of worship."[198] He noted, "It also happens to provide, at no cost to the city, a sorely needed social service."[199] As Judge Sporkin explained, "The secular benefits inure to the needy persons who partake of the free breakfasts; the members of the Church benefit spiritually by providing the service."[200] Consequently, he found that the defendants' application of the District of Columbia

190. *W. Presbyterian Church II*, 862 F. Supp. at 547.
191. *Id.*
192. *Id.*
193. 42 U.S.C. § 2000bb-1, *discussed in W. Presbyterian Church II*, 862 F. Supp. at 545–46.
194. *W. Presbyterian Church II*, 862 F. Supp. at 545 (citation omitted).
195. *Id.*
196. *See supra* notes 47–62 and accompanying text.
197. *W. Presbyterian Church II*, 862 F. Supp. at 544.
198. *Id.* at 546.
199. *Id.*
200. *Id.*

zoning laws substantially burdened the plaintiffs' free exercise of religion in violation of RFRA.[201]

The court in *Daytona Rescue Mission, Inc. v. City of Daytona Beach*, District Judge G. Kendall Sharp, took the opposite view.[202] As discussed in Part II.A., *supra*, Judge Sharp analyzed the case under the Free Exercise Clause and RFRA. As to the former, he found that the city zoning law was neutral and of general applicability.[203] As to the latter, he found that it did not substantially burden the plaintiffs' free exercise of religion.[204] Judge Sharp acknowledged the contrary finding in *Western Presbyterian Church*, but he found that the *Daytona Rescue Mission* plaintiffs had failed to show that the City code prevented them from running a homeless shelter and food program "anywhere in Daytona Beach."[205] Although he acknowledged that the defendants' denial of the plaintiffs' application for "semi-public use" prevented them "from engaging in such conduct," Judge Sharp credited the defendants for presenting evidence that other homeless shelters existed in the city and faulted the plaintiffs for "pursu[ing] only two sites and applying for semi-public use at only one site."[206] Moreover, perhaps to reduce the risk of an appellate court reversal, he found that if the defendants had substantially burdened the plaintiffs' free exercise of religion, then the defendants' "interest in regulating homeless shelters and food banks is a compelling interest and that the code furthers that interest in the least restrictive means."[207]

On one view, *Daytona Rescue Mission* simply stands in contrast to *Western Presbyterian Church*. Different district courts found different facts and concluded differently on the law. In my view, however, Judge Sharp was wrong to rule at summary judgment that Daytona Beach's zoning laws did not substantially burden the plaintiffs' free exercise of religion. Because in that pre-1997 era courts understood that RFRA applied to state and local law, strict scrutiny applied.[208] That the zoning laws were "generally applicable" was irrelevant. While the plaintiffs bore the evidentiary burden to show that the zoning laws substantially burdened their free exercise of religion,[209] I believe that they clearly met their burden.

Judge Sharp obtained the standard for "substantial burden" from a recent Ninth Circuit case.[210] Under that standard, plaintiffs had to show that the governmental action pressured them either "to commit an act forbidden by the

201. *Id.* at 547.

202. *See Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1560.

203. *Id.* at 1558.

204. *Id.* at 1560.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 1559 ("As stated in the statute, the purpose of RFRA is to restore the compelling interest test, as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . in cases where the free exercise of religion is substantially burdened.") (citations omitted).

209. *See Daytona Rescue Mission, Inc.*, 885 F. Supp. at 1559.

210. *Id.* at 1560 (citing Vernon v. City of Los Angeles, 27 F.3d 1385, 1393 (9th Cir. 1994) (citations omitted)).

religion or" prevented them "from engaging in conduct or having a religious experience which the faith mandates."[211] Further, "[t]his interference must be more than an inconvenience; the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine."[212] Under the facts of the case, Daytona Beach's zoning laws prevented the plaintiffs from "engaging in conduct or having a religious experience which the faith mandates," and this interference was more than an inconvenience but rather went to tenets or beliefs that were central to their religious doctrine. Consider first that Judge Sharp noted that the pastor plaintiff diligently "looked at numerous sites" before making offers to purchase on two of them.[213] One of the offers was refused but the pastor timely applied for the "semi-public use" of "Church-Mission" for the property that he ultimately purchased, which was "zoned M-1 (Local Industry)," a zoning district in which churches were permitted uses.[214] Also, consider that the plaintiff who pursued this endeavor had been "the pastor of the Milwaukee Rescue Mission from 1978 to 1992."[215] Upon moving to the city of Daytona Beach, he immediately consulted with the City Director of Planning and Redevelopment (in April 1992) and then spent over a year looking at numerous potential sites for the rescue mission before ultimately obtaining a purchase agreement in June 1993.[216] He then timely applied for a permit for "semi-public use," but during the process encountered city officials who "were concerned about the issue of safety and security."[217]

Comparing Judge Sharp's opinion in *Daytona Rescue Mission* with Judge Sporkin's opinion in *Western Presbyterian Church*, the judges' different treatment of the emic meanings ascribed to the ministry of providing food (and shelter) looms large. Where Judge Sporkin accepted the plaintiffs' explanations of providing food to hungry people in terms of religious charity, ministry, spiritual redemption, and works of faith, which their foundational religious texts amply supported, Judge Sharp glossed over the *Daytona Rescue Mission* plaintiffs' substantial efforts to purchase and permit a place for their rescue mission. Had the plaintiffs purchased without attempting to comply with the zoning laws, and then challenged those laws as violating their free exercise of religion rights, then it would have been proper to disregard their claim for want of a substantial burden because a mere inconvenience (i.e., not wanting to apply for a zoning permit). Here, however, the plaintiffs conducted their due diligence and complied with the zoning laws.[218] Their attempt to create a rescue mission was frustrated when local officials denied their application, citing "safety and security" concerns, but such concerns are only relevant to whether the law furthered a compelling governmental interest, not to

211. *Id.* at 1559–60 (citing *Vernon*, 27 F.3d at 1393 (citations omitted)).
212. *Id.*
213. *Id.* at 1556.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.* at 1556, 1559.
218. *Id.* at 1556.

whether the law substantially burdened the plaintiffs' free exercise of religion. Similarly, to require the plaintiffs to apply for a permit for "semi-public use" prior to owning an interest in the subject property seems unreasonable and itself a substantial burden on the free exercise of religion. While a sophisticated purchaser could make the purchase agreement contingent on obtaining city approval of the "semi-public use," such a contingency would likely make the buyer less attractive because of the additional time and uncertainty that the contingency would insert into the transaction. Moreover, the religious use sought for the particular location was permissible under the zoning laws of the zoning districts at issue. City officials, however, had recently amended those laws to redefine churches and religious institutions as "buildings used for the sole purpose of worship and customarily related activities" and expressly excluded homeless shelters and food banks from being "customarily related activities."[219]

Notwithstanding those facts, Judge Sharp found the application of the zoning laws not to impose a substantial burden and thus neatly disposed of the plaintiffs' claim, leaving them the owners of real property that they were entitled to use as a church "for the sole purpose of worship and customarily related activities" so long as those activities did not include the food and shelter ministries that were essential to the rescue mission. Perhaps the problem was evidentiary? If the plaintiffs had made a stronger showing of the centrality of food and shelter ministries to their religion, perhaps the court would have denied the defendants' motion for summary judgment and allowed the case to proceed to a trial? Other courts in this era, when RFRA applied to state and local law, had found that, "Plaintiffs have made a strong showing that feeding the poor constitutes a central tenet of [their] religion."[220] In the alternative, perhaps the Ninth Circuit standard that Judge Sharp adopted was too narrow? The standard for "substantial burden" in this era was in dispute: some circuits of the U.S. Courts of Appeals defined it narrowly, as requiring state compulsion to do religiously forbidden activity or state coercion to refrain from religiously mandated activity, and other circuits defined it more broadly to include state laws that compel, constrain, or inhibit religious conduct or expression.[221] Ultimately, however, even under a narrow interpretation of "substantial burden," I believe that Judge Sharp misunderstood, or rejected, the emic meanings that the plaintiffs ascribed to their particular exercise of religion. Under his ruling, the City of Daytona Beach's decision to redefine the food and shelter ministries that

219. *Id.*

220. *Stuart Circle Par.*, 946 F. Supp. at 1236.

221. *Id.* at 1237–38 (discussing, *inter alia*, Mack v. O'Leary, 80 F.3d 1175, 1178–79 (7th Cir. 1996) (discussing the inter-circuit split and interpreting the term broadly); Goodall by Goodall v. Stafford Cty. Sch. Bd., 60 F.3d 168, 171 (4th Cir. 1995), *cert. denied*, 516 U.S. 1046 (1996) (defining the term more narrowly)); *see also* Jonathan Knapp, *Making Snow in the Desert: Defining Substantial Burden under RFRA*, 36 ECOLOGY L.Q. 259, 281–82, 285–87 (2009) (distinguishing between two tests of substantial burden, "coercion" and "substantial impact," and discussing the inter-circuit split over the meaning of substantial burden).

constituted the essential purpose of the plaintiffs' rescue mission was constitutional and survived strict scrutiny.

In my view, *Daytona Rescue Mission* was wrongly decided, and it contrasts markedly with its contemporaries, *Western Presbyterian Church* and *Stuart Circle Parish*. Nevertheless, it remains instructive for how a court could find no violation of RFRA, or a state RFRA, in a claim brought by people who publicly share food as an exercise of their religion.

2. State RFRAs

In the second modern wave of the food-sharing cases, state RFRAs have provided the most consistent way by which courts have disposed of anti-food-sharing laws.[222] Despite the differences between particular state RFRAs, where a food-sharing case features such a law, only one court has not found a violation of state statutory rights to the free exercise of religion.[223] This Section thus reviews two food-sharing cases that featured state RFRA claims, drawing out the differences in treatment between cases arising from Fort Lauderdale and Orlando, Florida.[224]

a. Florida RFRA

Florida enacted its Religious Freedom Restoration Act in 1998 (Florida RFRA).[225] It mandates that:

> The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person: (a) Is in furtherance of a compelling governmental interest; and (b) Is the least restrictive means of furthering that compelling governmental interest.[226]

Also, the Florida RFRA defines "exercise of religion" as "an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief."[227]

As earlier discussed,[228] in 2001, Arnold Abbott, and his nonprofit Love Thy Neighbor Fund, successfully sued the City of Fort Lauderdale for violating their

222. *See, e.g.*, *Abbott II*, 783 So. 2d 1213; *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

223. *See First Vagabonds Church of God I*, 2008 WL 899029.

224. For the sake of brevity, I forego discussing two recent food-sharing cases that featured state RFRAs in Pennsylvania and Texas. *See Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

225. FLA. STAT. ANN. § 761.03 *et seq.* (West 2016).

226. *Id.* § 761.03(1).

227. *Id.* § 761.02(3).

228. *See supra* notes 151–55 and accompanying text.

rights under Florida RFRA.[229] His state court lawsuit, upheld on appeal by Florida District Court of Appeal Judge W. Matthew Stevenson, won an injunction against enforcement of city park rules unless the city provided a suitable alternative site, which it repeatedly failed to do.[230] According to the trial court, Circuit Judge Estella May Moriarty noted that Abbott founded Love Thy Neighbor in 1991 as "a memorial to his late wife and to provide a vehicle to follow his religious conviction that God is served by feeding the poor and homeless."[231] From then until November 1997, Abbott and the other Love Thy Neighbor volunteers conducted their public food sharing without censure at several locations within the city, including public parks and beaches during a period in which Fort Lauderdale experimented with several "safe zones" for homeless people in the wake of *Pottinger v. City of Miami*.[232] In 1996, however, Fort Lauderdale enacted Park Rule 2.2, which declared that:

> Parks shall be used for recreation and relaxation, ornament, light and air for the general public. Parks shall not be used for business or social service purposes unless authorized pursuant to a written agreement with City.
>
> As used herein, social services shall include, but not be limited to, the provision of food, clothing, shelter or medical care to persons in order to meet their physical needs.[233]

The following year, in November 1997, the city manager, police commander, and head of the local "Hotel-Motel Association" met with Abbott to discuss their concerns regarding the food sharing that he conducted at the beach and their perceptions of its effect on tourism.[234] Shortly thereafter, in January 1998, "a notice was posted that social services were prohibited at the beach but were approved at the downtown 'safe zone.'"[235] Although the city had no procedure for requesting a permit, the city told Abbott that he had to apply for a permit to continue sharing food at the beach.[236] He filed an "Outdoor Event Application" in March 1998, but the city did not respond until February 1999. In its response, the city manager

229. *See Abbott II*, 783 So. 2d at 1214–15 (affirming the trial court's injunction and remanding for its determination of whether the city's proposed alternate location complied with the trial court's order and the plaintiff's rights under FLA. STAT. ANN. § 761.03 (West 2016)).

230. *See id.* at 1215; *see also* Order on Plaintiff's Renewed Motion for Contempt and/or to Enforce Injunction at 15, *Abbott I*, No. 99-003583(05) (Fla. Cir. Ct. June 14, 2000) (finding the city's proposed alternate location not minimally suitable and including the trial court's June 14, 2000 Final Judgment and Order) (on file with author).

231. Final Judgment at 8, *Abbott I*, No. 99-003583(05) (June 14, 2000) [hereinafter Final Judgment, *Abbott I*]; *accord* Kamph, *supra* note 151; LOVE THY NEIGHBOR, *supra* note 151.

232. *See id.*; *see also* Pottinger v. City of Miami, 720 F. Supp. 955 (S.D. Fla. 1992), *aff'd*, 40 F.3d 1155 (11th Cir. 1994) (establishing "safe zones" where the city's police could not arrest homeless people performing harmless life sustaining acts).

233. Final Judgment, *Abbott I*, *supra* note 231, at 8; *accord* Complaint For Declaratory and Injunctive Relief and Damages at 9–10, *Fort Lauderdale Food Not Bombs I*, 2016 WL 5942528 (citing *Fort Lauderdale Parks and Recreation—Rules and Regulations*, *supra* note 147, at Rule 2.2. Social Services.

234. Final Judgment, *Abbott I*, *supra* note 231, at 8.

235. *Id.*

236. *Id.* at 2–3.

denied the request, writing that the application had been deferred because of an emergency lack of shelter beds, which the city had just remedied by opening a new shelter, and that "the Zoning code permitted the regular provision of feeding only in a building and only as a conditional use in designated zoning districts."[237] The city manager's notice concluded that city staff would start enforcing violations the following month. Abbott and the other plaintiffs subsequently filed suit.[238]

While the *Abbott* plaintiffs argued that Park Rule 2.2 violated Florida RFRA, the Civil Rights Act of 1964, and the First and Fifth Amendments of the U.S. Constitution, the trial court only found a violation of Florida RFRA.[239] Judge Moriarty found, and the appellate court affirmed, that the plaintiffs were "substantially motivated by a religious belief" and that "the zoning code prevents the plaintiffs from engaging in feeding operations anywhere in the city except as a conditional use granted after as many as five public hearings."[240] In other words, the court found the park rule was a substantial burden on the exercise of religion. The court concluded, however, that "the Rule serves a significant government interest in providing recreation and promoting tourism."[241] It then considered whether the city had complied with the "least restrictive means" requirement of Florida RFRA.[242]

Judge Moriarty noted that the city had closed the "safe zone" that it once provided for such services, that many code sections permitted restaurants but disapproved "feeding of the homeless except as a conditional use," and that churches "also must apply for a conditional use permit to operate a feeding program."[243] Thus, the plaintiffs had no place where "they could practice their faith as a matter of right."[244] Citing *Western Presbyterian Church* and *Stuart Circle Parish* (but not *Daytona Rescue Mission*), Judge Moriarty concluded that the defendant city had failed to use the least restrictive means to further its governmental interest in "providing recreation and promoting tourism," and she enjoined the city from enforcing its park rule.[245] In her order, she enjoined the city of Fort Lauderdale from prohibiting:

> Plaintiffs' feeding of the homeless at the picnic area of the public beach until such time as the city either designates an alternative site on public property or amends its zoning code to provide locations where Plaintiffs [sic] activities are permitted as of right rather than as a conditional use, or

237. *Id.* at 3.
238. *Id.*
239. *Id.* at 1, 4–5.
240. *Id.* at 5.
241. *Id.* at 4 (citations omitted).
242. *Id.* (citation omitted).
243. *Id.*
244. *Id.*
245. *Id.* at 4–5.

specifies with particularity the objective criteria that must be met to allow a conditional use.[246]

Abbott v. City of Fort Lauderdale is thus the first of the food-sharing cases in which a court adjudicated the plaintiffs' claim under a state RFRA, and in this first case, the plaintiffs prevailed. A decade later, different plaintiffs would achieve similar success in Pennsylvania and Texas,[247] but curiously a subsequent case in Florida would dispose of the Florida RFRA claim and resolve the constitutional matters in the municipal defendant's favor.[248] Before turning to the second Florida RFRA case, however, I highlight that *Abbott* cuts against my argument regarding the importance of emic and etic meanings: where cases like *Western Presbyterian Church* and *Stuart Circle Parish* seem to show a positive correlation between courts that adopt plaintiffs' emic terms and favorable plaintiff results, and cases like the *McHenry* cases, *Daytona Rescue Mission*, and *First Vagabonds Church of God* seem to show a positive correlation between courts that disregard or reject plaintiffs' emic terms and results that favor the defendants, *Abbott* provides a counterpoint.

In *Abbott*, neither trial judge Moriarty nor appellate judge Stevenson adopted the plaintiffs' emic religious terms. Instead, they uniformly utilized etic phrases like "feeding the poor and homeless," "feeding of the homeless," "feeding operations," and "feeding program." To me, these terms seem far from those evoked by the name of Abbott's nonprofit, Love Thy Neighbor, which derives from the New Testament of the Bible.[249] Nevertheless, the *Abbott* courts resolved the case in the plaintiffs' favor. Whether commentators should regard this as an exception that proves the rule, evidence that disproves the emic/etic null hypothesis, evidence that suggests multivariate causality, or something else, I leave to future discourse on the matter, in particular after I study the attitudinal model of judging and its critiques.[250]

Returning to the Florida RFRA narrative, seven years after Florida courts decided *Abbott*, the Middle District of Florida, District Judge Gregory A. Presnell, found that religious food-sharing plaintiffs in Orlando failed to prove that the defendant city's Large Group Feeding Ordinance violated Florida RFRA.[251] After the bench trial in *First Vagabonds Church of God v. City of Orlando*, during which the defendant orally moved for a judgment on partial findings, Judge Presnell concluded that, "Clearly the ordinance places a *significant* burden on FVCG's

246. *Id.* at 5–6.

247. *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

248. *First Vagabonds Church of God II*, 2008 WL 2646603.

249. *See, e.g.*, *Mark* 12:31 (New Am.) ("The second [greatest commandment] is this: 'You shall love your neighbor as yourself.' There is no other commandment greater than these.").

250. *See, e.g.*, Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 963–68 (2011) (discussing the literature regarding strategic decision making, the attitudinal model, and agency costs as to state courts). *See generally* JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL (1993). I thank Francisco Valdes for encouraging me to consider the attitudinal model.

251. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2.

services. However, it does not rise to the level of a *substantial* burden as defined by FRFRA."[252] What explains this odd distinction between a "significant" and "substantial" burden? Between *Abbott* and Judge Presnell's ruling and order in *First Vagabonds Church of God*, the Supreme Court of Florida, Justice Peggy A. Quince, determined *Warner v. City of Boca Raton*, a case that considered squarely the requirements of Florida RFRA, including its definition of "substantial burden."[253]

In *Warner*, the Eleventh Circuit certified two questions to the Florida Supreme Court. Answering the first one, Justice Quince explained the following about the Florida RFRA:

> [T]he RFRA expands the scope of religious protection beyond the conduct considered protected by cases from the United States Supreme Court. We also hold under the Act, any law, even a neutral law of general applicability, is subject to the strict scrutiny standard where the law substantially burdens the free exercise of religion.[254]

As to the meaning of Florida RFRA's "substantial burden" phrase, Justice Quince specifically considered and rejected "the middle and broad definitions of 'substantial burden'" adopted by the Sixth (middle), and Eighth and Tenth (broad), Circuits of the U.S. Courts of Appeals.[255] Instead, she explained:

> Accordingly, we conclude that the narrow definition of substantial burden adopted by the Fourth, Ninth, and Eleventh Circuits is most consistent with the language and intent of the FRFRA. Thus, we hold that a substantial burden on the free exercise of religion is one that either compels the religious adherent to engage in conduct that his religion forbids or forbids him to engage in conduct that his religion requires.[256]

Addressing the second question certified to it, the court rephrased it into, "Whether the City of Boca Raton Ordinance at issue in this case violates the Florida [RFRA]?"[257] The court answered in the negative and agreed with the underlying federal district court's finding that the city's "regulation did not substantially burden appellants' free exercise of religion."[258] The municipal law in question was a 1982 "regulation prohibiting vertical grave markers, memorials, monuments, and structures on cemetery plots" in the city-owned cemetery.[259] The regulation instead allowed for stone or bronze markers that were level with the ground.[260] Despite the regulation, however, people, including the appellants, continued to decorate their familial graves with vertical decorations, and the city did not attempt enforce the regulation until 1991, when it sent notices to plot owners that noncomplying

252. *Id.* (emphasis added).
253. Warner v. City of Boca Raton, 887 So. 2d 1023, 1031–33 (Fla. 2004).
254. *Id.* at 1035–36.
255. *Id.* at 1033.
256. *Id.* (citation omitted).
257. *Id.* at 1034.
258. *Id.* at 1035 (citation omitted).
259. *Id.* at 1025.
260. *Id.*

structures would be removed, followed by a second notice in 1992.[261] When some plot owners continued to defy the regulation, the city agreed to postpone removal pending further study.[262] It then amended the regulations in 1996 to permit vertical grave decorations for up to sixty days from the date of burial and on certain holidays.[263] The following year, after its survey determined that most plot owners approved of the amended regulations, the city council announced that it would begin enforcing them in January 1998, and litigation ensued.[264]

This was the context in which the Florida Supreme Court agreed with the district court finding that the regulation did not substantially burden the plaintiffs' exercise of religion. As the district court explained, the regulations did "not prohibit the plaintiffs from marking graves and decorating them with religious symbols. Rather, the regulations permit only horizontal grave markers."[265] Further, the amended regulations permitted vertical grave decorations for limited times.[266] Thus, the district court found that the amended regulations "merely inconvenience the plaintiffs' practice of marking graves and decorating them with religious symbols."[267] As a mere inconvenience, the regulations were not a substantial burden on the plaintiffs' exercise of religion.

Warner narrowly defined the Florida RFRA's definition of substantial burden. In my view, however, *Warner* does not warrant Judge Presnell's conclusion in *First Vagabonds Church of God.* Rather, I believe that he wrongly concluded that the "significant burden," which he found Orlando's "Large Group Feeding" ordinance had imposed on the plaintiffs' exercise of religion, did "not rise to the level of a substantial burden as defined by FRFRA."[268] Judge Presnell's conclusion was wrong for at least three reasons. First, he impermissibly created the notion of a "significant burden," which has no place in Florida RFRA's statutory scheme.[269] Under Florida RFRA, Judge Presnell could either find a substantial burden (using *Warner*'s narrow definition), or he could find no substantial burden (and possibly characterize it as a mere inconvenience). Instead, he found a significant burden, which by its terms is

261. *Id.*
262. *Id.*
263. *Id.* at 1035.
264. *Id.*
265. *Id.* (citation and internal quotation marks omitted).
266. *See id.*
267. *Id.* (citation omitted and internal quotation marks omitted).
268. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2 (emphasis added). Judge Presnell's conclusion is particularly perplexing because earlier in the litigation, he had denied the defendant's motion for summary judgment and specifically noted that the religious plaintiffs had argued that the ordinance would preclude them from conducting their religious services and that their evidence had shown, "that, given the limited means of communication and transportation available to them, there is at least a possibility that these limitations would prevent a substantial portion of the FVCG congregation from learning of and traveling to these services, making the ordinance more than a mere inconvenience." *First Vagabonds Church of God I*, 2008 WL 899029 at *3 (granting in part and denying in part defendant's motion for summary judgment). Nevertheless, Judge Presnell ultimately concluded that these were not substantial burdens. *First Vagabonds Church of God II*, 2008 WL 2646603, at *2.
269. FLA. STAT. ANN. § 761.01 *et seq.* (West 2016).

more burdensome than a mere inconvenience or other *de minimis* infringement, but declared, without a persuasive explanation, that it did not amount to a substantial burden.[270] Second, beyond Judge Presnell's self-contradictory terms, I believe that he misapplied *Warner* because Justice Quince's opinion specifically approved the Florida District Court of Appeal's opinion in *Abbott v. City of Fort Lauderdale* and specifically disapproved the approach of a different Florida appellate court.[271]

Third, and perhaps most importantly, I believe that the facts of *Warner* are distinguishable from the facts of *First Vagabonds Church of God.* As earlier discussed,[272] Orlando's Large Group Feeding ordinance created a two mile radius around city hall in which any person who sought to share food in a public park, including those who did so to exercise religion, was required to obtain a permit and was limited to obtaining only two such permits in any consecutive twelve months for any particular park. In *Warner*, the regulation, as amended, allowed cemetery plot owners to memorialize the interred with horizontal grave markers and to use vertical grave decorations for two months after burial and during specified holidays. No evidence reached the Supreme Court of Florida that any plot owner had installed a permanent vertical grave marker prior to the city cemetery regulations; thus, both the district court's and the Florida Supreme Court's conclusions that the regulations' burden on the plaintiffs' exercise of religion amounted to a mere inconvenience seem warranted. In contrast, for reasons explained at length in Part I.A, *supra*, the public sharing of food for religious reasons is an active practice of charity, ministry, and worship. This was true for the plaintiffs in *Abbott* and no less so for the religious plaintiffs in *First Vagabonds Church of God.*[273]

Circuit Judge Moriarty found that Fort Lauderdale's park rule imposed a substantial burden on the *Abbott* plaintiffs, in part because it prevented them "from engaging in feeding operations anywhere in the city except as a conditional use

270. After finding no substantial burden on the religious plaintiffs' exercise of religion, which was necessary for their claim under Florida RFRA, in a subsequent opinion, Judge Presnell reached the First Amendment Free Exercise Clause claim and found the ordinance violated the plaintiffs' constitutional rights because it lacked a rational basis. *See First Vagabonds Church of God III*, 578 F. Supp. 2d at 1361–62. This too seems a clearly reversible error, for how could a law pass the strict scrutiny required by Florida RFRA yet fail the rational basis review required of a neutral law of general applicability under the Free Exercise Clause after *Smith*?

271. *Warner*, 887 So. 2d at 1036 n.11 (approving *Abbott II*, 783 So. 3d 1213, and disapproving First Baptist Church of Perrine v. Miami-Dade Cty., 768 So. 2d 1114 (Fla. Dist. Ct. App. 2000)).

272. *Cf. supra* notes 126–34 (discussing *First Vagabonds Church of God IV*, 610 F.3d 756, and the Greater Orlando Park District (GDPD)).

273. *Compare supra* notes 228–49 and accompanying text (discussing the Final Judgment and Order in *Abbott I*, No. 99-003583(05)), *with First Vagabonds Church of God II*, 2008 WL 2646603, at *1 ("Pastor Brian Nichols . . . was ordained as a Christian minister in 2004 . . . . In 2005 he formed his congregation, the First Vagabonds Church of God . . . in Orlando. Nichols, having been homeless himself for a time, sought to minister to homeless Christians in downtown Orlando . . . . Currently, his congregation has approximately forty members and holds services every Sunday . . . in Langford Park, which is located within the GDPD. The services consist of songs, prayer, Bible readings and food sharing. The breaking of bread amongst the members of his congregation is a Christian tradition and an integral part of Nichols' ministry.")

granted after as many as five public hearings."[274] Similarly, Orlando's Large Group Feeding ordinance required the religious plaintiffs in *First Vagabonds Church of God* to limit their religious food sharing to no more than twice within a consecutive twelve month period at the park where they had practiced their ministry prior to the city's enactment of its anti-food-sharing law. To exercise their religion under the anti-food-sharing law, the religious plaintiffs would have to shift from park to park within the GDPD, using any particular park, after obtaining a permit, no more than twice within twelve consecutive months, or they would have to relocate outside of the GDPD. In other words, Orlando's Large Group Feeding ordinance promised to make the First Vagabonds Church of God, and the other religious plaintiffs, vagabond from park to park within the GDPD, or to exercise their religion away from the city center, wherein their impoverished and homeless congregants tended to be.[275] Even under the narrow interpretation of Florida RFRA's definition of substantial burden, Judge Presnell should have found a substantial burden on the plaintiffs' exercise of religion because the ordinance forbid them from engaging in conduct that their religion required. Under Florida RFRA, he should have determined whether the city defendant had a compelling governmental interest and whether the Large Group Feeding ordinance was the least restrictive means of furthering it.

Reflecting on these applications of Florida RFRA to two different food-sharing cases provides insights into the threshold question of when a state or local law may constitute a substantial burden on the exercise of religion. I believe that the courts correctly decided *Abbott* but incorrectly found no substantial, but only a significant, burden on religion in *First Vagabonds Church of God.* Since *First Vagabonds Church of God*, two other courts have found violations of two different state RFRAs.[276] In the interests of brevity, however, I now turn to discuss another statute that has proven important in protecting people who publicly share food in the exercise of their religion.

C. The Religious Land Use and Institutionalized Persons Act (RLUIPA)

In 1997, the Court held that RFRA could not constitutionally apply to state and local governments.[277] In 2000, Congress responded by enacting the Religious Land Use and Institutionalized Persons Act (RLUIPA).[278] Grounded in

274. Final Judgment and Order at 5, *Abbott I*, No. 99-003583(05) (June 14, 2000).

275. *See First Vagabonds Church of God III*, 578 F. Supp. 2d at 1358; *First Vagabonds Church of God II*, 2008 WL 2646603, at *1–2.

276. *Chosen 300 Ministries, Inc.*, 2012 WL 3235317; Findings of Fact and Conclusions of Law, *Big Hart Ministries Ass'n*, *supra* note 44.

277. *Boerne*, 521 U.S. 507.

278. Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), *codified at* 42 U.S.C. § 2000cc *et seq*; *see also* Holt v. Hobbs, 135 S. Ct. 853, 860 (2015) (discussing the origins of RLUIPA). I thank Audrey McFarlane and Sarah Schindler for encouraging me to discuss the impact of RLUIPA on the food sharing cases.

Congressional authority derived from the Spending and Commerce clauses,[279] the Court upheld RLUIPA as constitutional against an Establishment Clause challenge in 2005.[280] As its title indicates, RLUIPA provides rights in "two areas of government activity. Section 2 governs land-use regulation,"[281] and is the relevant section for the food-sharing cases. In language that substantially follows RFRA, Section 2 provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.[282]

In other words, RLUIPA requires strict scrutiny of any land use regulation, such as a zoning law, and it expansively defines "land use regulation" to include "formal or informal procedures or practices that permit the government to make individualized assessments of the proposed uses for the property involved."[283] Also, RLUIPA changed RFRA's definition of "exercise of religion."[284] Where RFRA's original definition of the exercise of religion expressly referred to "the exercise of religion under the First Amendment," RLUIPA redefined it to mean "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[285]

At a glance, it would seem that RLUIPA offers a powerful protection to people who would publicly share food as an exercise of their religion, provided that they sought to do so at a real property in which they owned an interest. To date, however, the food-sharing cases have not seen much action under RLUIPA. While the National Law Center on Homelessness and Poverty counts three food-sharing cases that feature RLUIPA,[286] a close reading of them shows that only one pertains to food sharing.[287] The other two cases instead feature socio-legal conflict over churches that sought to provide "a homeless ministry (including a shelter) in its

279. *Holt*, 135 S. Ct. at 860 (citing 42 U.S.C. § 2000cc–1(b)).

280. *Cutter*, 544 U.S. at 719–20 ("In accord with the majority of Courts of Appeals that have ruled on the question . . . we hold that § 3 of RLUIPA fits within the corridor between the Religion Clauses: On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

281. *Holt*, 135 S. Ct. at 860 (citing 42 U.S.C. § 2000cc).

282. 42 U.S.C. § 2000cc(a)(1).

283. *Id.* § 2000cc(a)(2)(C).

284. *Burwell*, 134 S. Ct. at 2761–62 (citing 42 U.S.C. §§ 2000bb–2(4), 2000cc–5(7)(A)).

285. *Id.* (citing 42 U.S.C. § 2000cc–5(7)(A)) (internal quotations omitted); *accord Holt*, 135 S. Ct. at 860.

286. *See* CRIMINALIZING CRISIS, *supra* note 5, at 134, 136–38 (discussing Family Life Church v. City of Elgin, 561 F. Supp. 2d 978 (N.D. Ill. 2008); *Layman Lessons*, 636 F. Supp. 2d; Order of Dismissal, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (on file with author)).

287. Order of Dismissal, *Pac. Beach United Methodist Church*, 2008 WL 7257244.

church building,"[288] or "a storage and distribution center for donated clothing and personal items pending distribution to the needy as well as a retail store selling donated items."[289]

As to the one case that did feature RLUIPA and food sharing, *Pacific Beach United Methodist Church v. City of San Diego*, the parties jointly filed a motion to dismiss, "captioned Stipulation of Settlement and Dismissal."[290] Because the order contains no substantive discussion of RLUIPA, we only have the parties' arguments, which offer one important insight: in the Defendants' Joint Opposition to Plaintiffs' Motion for Preliminary Injunction, they argue that the plaintiffs failed to show that the City of San Diego had imposed a substantial burden when the city inspected the plaintiffs' church without prior notice, and a city official later repeatedly stated that a written notice of violation regarding several municipal zoning codes was being prepared.[291] As with the RFRA cases discussed above, if plaintiffs fail to show a substantial burden on their exercise of religion, RLUIPA provides no protection.[292] In the food-sharing cases, this is a familiar point from *First Vagabonds Church of God* and *Daytona Rescue Mission*; in that context, *Pacific Beach United Methodist Church* makes clear that in litigation featuring RFRA or RLUIPA, cities will almost certainly attack the sufficiency of the plaintiffs' showing of a substantial burden on their exercise of religion. The *Pacific Beach United Methodist Church* parties settled and thereby enabled the plaintiffs to maintain their religious practice of "sharing a meal and [other] religious services with the poor, the hungry and the homeless, and others, on Wednesday nights."[293] To learn how RLUIPA will feature in a more fully litigated food-sharing case, we shall have to wait.

CONCLUSION

I conclude by recapitulating the Article and arguing for U.S. cities to stop criminalizing people who share food in public. In Part I, I urged readers to attend carefully to the emic and etic meanings ascribed to the practices that constitute

288. *Family Life Church*, 561 F. Supp. 2d at 982.

289. *Layman Lessons*, 636 F. Supp. 2d at 626. The *Layman Lessons* plaintiff was a nonprofit religious institution that sought "to provide food, clothing, shelter, transportation and Christian training to those in need." *Id.* The property subject to the litigated dispute however, was not intended to house and feed the homeless although the city codes administrator "had initially been confused about the type of business activity that Layman Lessons planned to conduct . . . specifically, she thought Layman Lessons intended to house and feed the homeless there." *Id.* at 627. The plaintiff clarified this point, however, so neither food, nor shelter further featured in the litigation. *See id.* at 627–28.

290. Order of Dismissal at 1, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (S.D. Cal. Feb. 11, 2008).

291. Trial Motion, Memorandum and Affidavit at 11–13, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (S.D. Cal. Feb. 11, 2008).

292. *Accord Holt*, 135 S. Ct. at 862–63.

293. Complaint for Declaratory and Injunctive Relief and Damages at 1, *Pac. Beach United Methodist Church*, 2008 WL 7257244 (on file with author); *see also* Ronald W. Powell, *City to Allow Food-for-Needy Program*, SAN DIEGO UNION TRIB. (Apr. 22, 2008), http://legacy.sandiegouniontribune.com/news/metro/20080422-9999-1m22nohome.html [https://perma.cc/K7QC-WJAB] (reporting on the settlement).

public food sharing. Drawing on these concepts from the discipline of anthropology, I elucidated how religiously and politically motivated people who share food in public describe their practice and explained how the former prefer terms of charity, ministry, works of faith, or worship, while the latter tend to prefer solidarity and mutual aid. In highlighting these emic terms, I presented a partial history of public food sharing in the United States during the first and second modern waves of anti-food-sharing laws. I then turned to the terms preferred by the cities that criminalize, or otherwise regulate, people who share food in public. Discussing ordinances that use terms like food distribution, homeless feeding, large group feeding, social services, social service facilities, and outdoor food distribution centers, I argued that the relative distance between emic and etic terms correlates with how courts adjudicate food-sharing cases, showing that in most cases, where a court adopts the plaintiffs' emic terms, the resolution is in their favor. In contrast, where a court disregards or rejects the plaintiffs' emic terms and instead prefers the etic terms of a municipality or of First Amendment jurisprudence, the adjudication often favors the defendants. Finally, I argued that attending carefully to the emic and etic meanings is important not only for legal adjudication but also to legislate public food sharing in pragmatic ways that obtain cities' legitimate governmental interests while accounting for the powerful motivations of people who share food in public.

In Part II, I discussed critically how courts have applied First Amendment jurisprudence, in particular the Free Exercise Clause, and related statutes, and argued when I believe that judges applied that jurisprudence incorrectly. Elaborating my partial history of the food-sharing cases, I showed how federal courts applied RFRA in the early years before the Supreme Court repudiated its application to state and local governments and apparently disproved my "null hypothesis" (i.e., that the emic meanings ascribed to public food sharing by the religious activists who do it as an expression of charity, ministry, works of faith, and/or worship do not matter to the resolution of such cases) and proved my alternate hypothesis (i.e., that the emic meanings do matter to the judicial resolution of food-sharing cases). The food-sharing cases that implicated RFRA also showed the importance of the jurisprudential notion of a substantial burden on the free exercise of religion. Courts that adopt the emic meanings ascribed to public food sharing always ruled in the plaintiffs' favor, and courts that disregarded or rejected those terms almost always ruled in the defendants' favor. I further supported this argument by attending to different approaches that courts took to the state RFRA of Florida, arguing why the latter case's finding of a significant, but not substantial, burden on the plaintiffs' exercise of religion was wrong for being internally self-contradictory, a misapplication of the narrow definition of Florida RFRA, and distinguishable from the case in which the Florida Supreme Court interpreted Florida RFRA's narrow definition of substantial burden. I then discussed RLUIPA and the food-sharing cases briefly and concluded that food-sharing litigation involving RLUIPA will

similarly predictably feature contests over the threshold issue of what constitutes a substantial burden on the exercise of religion.

I now argue for U.S. cities to stop criminalizing people who share food in public and to instead cultivate charitable practices like public food sharing and similar efforts at "collective action in the urban commons."[294] Cultivating public food sharing with city laws will not only respect, rather than substantially burden, people who publicly share food as an exercise of religion, but it will also promote class relations of "organic solidarity." The eminent sociologist Émile Durkheim theorized organic solidarity by analogy with the human body, with each organ highly specialized to provide a specific function while working as part of a whole that was intertwined for common yet distinct goals.[295] Durkheim's theorization of organic solidarity is particularly resonant for public food sharing because early commentators noted that, "Durkheim conceives of the growth of organic solidarity as a process of liberation of the individual from the social repression of mechanical solidarity."[296] In addition to facilitating people's liberation from social repression, cities that cultivate public food sharing will more likely than not reduce the material deprivation amongst the homeless, hungry, and otherwise impoverished people who often congregate downtown. In contrast, to criminalize public food sharing exacerbates these people's material deprivation while failing to address the underlying conditions that make homelessness, and other forms of being visibly poor, objectionable to some city legislators.[297]

294. *Cf.* Foster, *supra* note 30, at 58 (defining the urban commons as "local tangible and intangible resources in which [urban residents] have a common stake," ranging from "local streets and parks to public spaces to a variety of shared neighborhood amenities").

295. *See* ÉMILE DURKHEIM, THE DIVISION OF LABOUR IN SOCIETY 181 (1893, George Simpson trans., 1933); *see also* Martha R. Mahoney, *Class and Status in American Law: Race, Interest, and the Anti-Transformation Cases*, 76 S. CAL. L. REV. 799, 803, 817 (2003) ("Class-based solidarity, in contrast, creates a basis for identity that may diminish white working class attachment to race privilege or at least create openings for change . . . . In concepts of class interest that are based on group relations of economic power, antiracist solidarity is an actual or potential interest of white workers, and class awareness and activism are vital to the transformation of white attachment to privilege."); Martha R. Mahoney, *What's Left of Solidarity: Reflections on Law, Race, and Labor History*, 57 BUFF. L. REV. 1515, 1516–17 (2009) ("The term 'class' includes more than identification of the position in society of an individual or group. Class involves the work people do; the understandings they form about themselves, their lives, and the people with whom they live and work; economic and social relations between groups; and the actions they take to pursue their interests.") (citation omitted).

296. Julius Stone, Book Review, *On the Division of Labour in Society*, 47 HARV. L. REV. 1448, 1450 (1934) ("Durkheim conceives of the growth of organic solidarity as a process of liberation of the individual from the social repression of mechanical solidarity.") (citation omitted).

297. On being "visibly poor," see Rankin, *supra* note 28, at 6 ("[T]he term 'visibly poor' and related iterations encompass individuals currently experiencing homelessness, but also include individuals experiencing poverty in combination with housing instability, mental illness, or other psychological or socioeconomic challenges that deprive them of reasonable alternatives to spending all or the majority of their time in public.") (citation omitted).

In the wake of the longest recession on record since 1948,[298] almost forty-seven million people in the United States live below the poverty threshold,[299] and over forty-eight million people suffer "food insecurity" (i.e., hunger).[300] Faced with this situation, city leaders should eschew the revanchist criminalization of people who are homeless, hungry, or otherwise impoverished, as well as the criminalization of the religiously or politically motivated social activists who seek to publicly share food with them.[301] City leaders should instead incentivize urban residents to act collectively across their social classes in order to improve all residents' health and nutrition. Indeed, in the current era of austerity,[302] and in light of the national endemic of obesity and overweight,[303] U.S. cities have much to gain by cultivating cross-class relations of organic solidarity: persevering through a historical period

298. DENAVAS-WALT & PROCTOR, *supra* note 17, at 21.

299. *Id.* at 12 ("In 2014, the official poverty rate was 14.8 percent. There were 46.7 million people in poverty.").

300. COLEMAN-JENSEN ET AL., *supra* note 4, at i, v, 6, 10.

301. On revanchism, or the politics of revenge, see NEIL SMITH, THE NEW URBAN FRONTIER: GENTRIFICATION AND THE REVANCHIST CITY, at 44–47, 211–18 (1996) (theorizing the revanchist city from the historic revanchists of late nineteenth century France and applying the concept to explain the gentrification process in New York City at the end of the twentieth century); González, *supra* note *, at 234–36, 257–59, 279–81 (evaluating Smith's discussion of historical French revanchism and his theorization of the emergence of the revanchist city in the late twentieth century United States and explaining the emergence of anti-food-sharing laws under Smith's theory of the revanchist city).

302. *See* THOMAS BYRNE EDSALL, THE AGE OF AUSTERITY: HOW SCARCITY WILL REMAKE AMERICAN POLITICS (2012); Zachary A. Goldfarb, *Have We Been Living in an Age of Austerity?*, WASH. POST (Feb. 21, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/02/21/have-we-been-living-in-an-age-of-austerity/ [https://perma.cc/56ZR-VFPJ].

303. *See* Ashleigh L. May et al., *Obesity—United States, 1999–2010*, *in* CENTERS FOR DISEASE CONTROL AND PREVENTION [CDC], CDC HEALTH DISPARITIES AND INEQUALITIES REPORT—UNITED STATES, 2013, MMWR 120, 120 (Nov. 22, 2013) [hereinafter May et al., CDC], http://www.cdc.gov/mmwr/pdf/other/su6203.pdf [https://perma.cc/5FQ4-YCJW] ("Since 1960, the prevalence of adult obesity in the United States has nearly tripled, from 13% in 1960–1962 to 36% during 2009–2010 . . . . Although the prevalence of obesity is high among all U.S. population groups, substantial disparities exist among racial/ethnic minorities and vary on the basis of age, sex, and socioeconomic status.") (citations omitted); Manel Kappagoda, Samantha Graff & Shale Wong, *Public Health Crisis: Medical-Legal Approaches to Obesity Prevention*, *in* POVERTY, HEALTH AND LAW: READINGS AND CASES FOR MEDICAL-LEGAL PARTNERSHIP 601 (Elizabeth Tobin Tyler, Ellen Lawton, Kathleen Conroy, Megan Sandel & Barry Zuckerman, eds., 2012) ("Skyrocketing obesity rates in the United States over the past three decades have prompted call to action . . . . Currently two-thirds of adults and one third of children are overweight or obese . . . . As of 2008, 33.8 percent of adults and 16.9 percent of children ages 2–19 in the United States were considered obese."); *see also* Lauren Berlant, *Slow Death (Sovereignty, Obesity, Lateral Agency)*, 33 CRITICAL INQUIRY 754, 756 (2007) (arguing that poverty, hunger, and obesity are better understood as "endemic," facts of ordinary life for various vulnerable populations in the United States and other societies, rather than as exceptional or "epidemic"). For Berlant, "slow death" refers to "the physical wearing out of a targeted population" in a scene, episode, or other temporal environment that is "nearly a defining condition of their everyday experience and historical existence." *Id.* at 754. Under this approach, while the disproportionate poverty, hunger, and obesity of children, the elderly, immigrants, racialized ethnic minorities, and women may provoke feelings of outrage (that might be channeled into activism), these upsetting scenes serve vested interests with a long genealogy, namely, capitalism, or the historically particular class relations of the United States' political economy. *See id.* at 766.

marked by substantial assaults on governance and the public fisc may well require the kind of compassionate cooperation that food sharing exemplifies.

Finally, cities should stop promulgating, or repeal, anti-food-sharing ordinances and other municipal laws that criminalize people who are homeless, hungry, or otherwise impoverished, marginalized, and vulnerable because such laws are socially corrosive. Anti-food-sharing laws extend criminalization beyond their ostensible targets—impoverished, homeless, or otherwise hungry people. While homeless, hungry, or otherwise impoverished people may be subject to arrest and prosecution under an anti-food-sharing law, the typical activity criminalized by such laws is providing food to, or sharing food with, hungry people while on city-owned, ostensibly public, property. In other words, anti-food-sharing laws criminalize the religious and social activists who publicly assemble in order to provide food to hungry people. Not surprisingly, such laws sometimes deter the charity and ministry, or solidarity and mutual aid, that people practice and experience when they act together to satisfy the human need to eat. That these laws threaten organic solidarity in an historical moment when rates of impoverishment and hunger have increased significantly (i.e., before, during, and after the Great Recession) is particularly striking.[304] In my view, anti-food-sharing laws ultimately evidence the spread of a socially corrosive politics, which the late critical geographer Neil Smith, termed "the revanchist city," an ideology that competes with the ebullience of gentrification and which scapegoats disfavored and marginalized social groups in order to consolidate politically reactionary power.[305]

Criminalizing this sort of charity feels particularly disturbing because it appears unprecedented in U.S. history to generally make a crime out of providing food to hungry people.[306] While the color of law sometimes justified police action against sharing food, in U.S. history this typically only occurred during intense moments of social conflict, such as a labor strike, or in an historical moment where entire classes of people were denied fundamental constitutional rights and the equal protection of the law, such as under Jim Crow regimes, the Black Codes, or the peculiar institution of slavery.[307] In contrast, today, in an era that some commentators have dubbed the New Gilded Age,[308] increasing numbers of U.S. cities are promulgating anti-food-sharing laws in apparent disregard of superior statutory rights, constitutional rights, and international human rights.

Indeed, contextualizing the food-sharing cases in Anglo-American legal history raises other provocative comparisons, reaching beyond the poor house of the nineteenth century to the colonial outdoor relief of the eighteenth century, and

304. *Accord* González, *supra* note *, at 232–33 (noting the increase in poverty and food insecurity from 2006 to 2012).

305. *Id.* at 234–36, 257–59, 279–81 (evaluating Smith's discussion of historical French revanchism and his theorization of the emergence of the revanchist city in the late twentieth century United States).

306. *Id.* at 235–36.

307. *See id.* at 235.

308. *See id.* at 236–57 (discussing the notion of a New Gilded Age in the United States).

even further, to the English Poor Laws of the fourteenth century, which expressly forbade charity to the able-bodied poor so that they be compelled to labor in order to live.[309] In this light, the revanchist city of the twenty-first century seems particularly dystopian because the city governments that promulgate anti-food-sharing laws typically act at the behest of a handful of individuals, sometimes affiliated with a local chamber of commerce, often downtown area merchants or new residents to a city center.[310] In other words, U.S. cities are criminalizing charity and deterring organic solidarity at the behest of a relatively small number of citizens who are effectively claiming the right to exclude visibly homeless, impoverished, or otherwise hungry people from their midst, as well as those individuals of ostensibly nonpoor (middle) classes who organize themselves to help hungry people not starve. This brave new reality is redolent of medieval banishment or exile and should have no place in twenty-first century law and society.[311]

309. *See id.* at 236 (discussing the English Statute of Laborers (1349)) (citing to JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 10 (1995); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millennium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 102–03 (1998)); *see also* Stefan A. Riesenfeld, *The Formative Era of American Public Assistance Law*, 43 CAL. L. REV. 175, 188–89 (1955).

310. *See, e.g.*, González, *supra* note *, at 269 (discussing Orlando Mayor Buddy Dyer's reference to the Orlando Chamber of Commerce in the process that enacted the city's Large Group Feeding Ordinance); *see also supra* note 234 and accompanying text (discussing how the city manager, police commander, and head of the local Hotel-Motel Association met with Arnold Abbott to discuss their concerns regarding the food sharing that he conducted at the beach and their perceptions of its effect on tourism).

311. *See generally* BECKETT & HERBERT, *supra* note 28; Amster, *supra* note 28; Rankin, *supra* note 28; Riesenfeld, *supra* note 309, at 189; Simon, *supra* note 28.

Appendix 1: The Litigated Food-Sharing Cases (listed chronologically).[312]

	Case Name	Date of Opinion	Jurisdiction	Citation
1.	Armory Park Neighborhood Ass'n v. Episcopal Cmty. Servs.	Aug. 29, 1985	Ariz.	712 P.2d 914 (Ariz. 1985)
2.	Wilkinson v. Lafranz	Jan. 11, 1991	La.	574 So. 2d 403 (La. Ct. App. 4 Cir. 1991)
3.	McHenry v. Agnos (*McHenry I*)	Jan. 19, 1993	9th Cir.	983 F.2d 1076 (unpublished table decision)
	McHenry v. Jordan (*McHenry II*)	May 30, 1996	9th Cir.	81 F.3d 169 (unpublished table decision)
4.	W. Presbyterian Church v. Bd. of Zoning Adjustment of D.C. (*W. Presbyterian Church I*)	Apr. 15, 1994	D.D.C.	849 F. Supp. 77
	W. Presbyterian Church II	Sept. 8, 1994	D.D.C.	862 F. Supp. 538
5.	Daytona Rescue Mission, Inc. v. City of Daytona Beach	May 12, 1995	M.D. Fla.	885 F. Supp. 1554
6.	Stuart Circle Par. v. Bd. of Zoning Appeals of Richmond	Nov. 26, 1996	E.D. Va.	946 F. Supp. 1225
7.	Abbott v. City of Fort Lauderdale (*Abbott I*)	June 14, 2000	Fla.	No. CACE99-003583(05) (Fla. Cir. Ct. June 14, 2000)
	Abbott II	May 2, 2001	Fla.	783 So. 2d 1213 (Fla. Dist. Ct. App. 2001)

312. App. 1. The Litigated Food-Sharing Cases (listed chronologically) derives from CRIMINALIZING CRISIS, *supra* note 5, at 62–63, 132–42 (listing twelve federal court cases, including four appellate opinions, and one state (Florida) court case), plus additional research conducted by the author and his research team that identified further proceedings in those cases, additional published and unpublished cases, and emerging controversies that had yet to be litigated. The author plans to update this table online at http://foodsharinglaw.net [https://perma.cc/E6BC-YAA5].

8.	Santa Monica Food Not Bombs v. City of Santa Monica	June 16, 2006	9th Cir.	450 F.3d 1022
9.	Sacco v. City of Las Vegas	Aug. 20, 2007	D. Nev.	2007 WL 2429151
10.	Pac. Beach United Methodist Church v. City of San Diego	Apr. 18, 2008	S.D. Cal.	07-CV-2305-LAB-PCL Order of Dismissal
11.	First Vagabonds Church of God v. City of Orlando (*First Vagabonds Church of God I*)	Mar. 31, 2008	M.D. Fla.	2008 WL 899029
	First Vagabonds Church of God II	June 26, 2008	M.D. Fla.	2008 WL 2646603
	First Vagabonds Church of God III	Sept. 26, 2008	M.D. Fla.	578 F. Supp. 2d 1353
	First Vagabonds Church of God IV	July 6, 2010	11th Cir.	610 F.3d 1274
	First Vagabonds Church of God V	Apr. 12, 2011	11th Cir.	638 F.3d 756
12.	Big Hart Ministries Ass'n, Inc. v. City of Dall. (*Big Hart Ministries Ass'n*)	Nov. 4, 2011	N.D. Tex.	2011 WL 5346109
	Big Hart Ministries Ass'n	Mar. 25, 2013	N.D. Tex.	3:07-CV-0216-P Findings of Fact and Conclusions of Law
	Big Hart Ministries Ass'n	Mar. 28, 2013	N.D. Tex.	3:07-CV-0216-P Final Judgment
13.	Chosen 300 Ministries, Inc. v. City of Phila.	Aug. 9, 2012	E.D. Pa.	2012 WL 3235317 Findings of Fact and Conclusions of Law
14.	Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale (*Fort Lauderdale Food Not Bombs I*)	Sept. 30, 2016	S.D. Fla.	15-60185-CIV-ZLOCH Order on Motions for Summary Judgment
	(*Fort Lauderdale Food Not Bombs II*)	Jan. 18, 2017	11th Cir.	2017 WL 1076817

Appendix 2: U.S. Cities with Anti-Food-Sharing Laws (by state).[313]

Alabama	**Arizona**	**California (10)**	**Colorado**	**Connecticut**
Birmingham	Phoenix	Chico Costa Mesa Hayward Los Angeles Malibu Ocean Beach Pasadena Santa Monica Sacramento Ventura	Denver	Middletown
Florida (11)	**Georgia**	**Indiana**	**Iowa**	**Kentucky**
Daytona Beach Fort Lauderdale Gainesville Jacksonville Lake Worth Melbourne Miami Orlando Palm Bay St. Petersburg Tampa	Atlanta	Indianapolis Lafayette	Cedar Rapids Davenport	Covington
Maryland	**Missouri**	**North Carolina**	**New Hampshire**	**New Mexico**
Baltimore	Kansas City St. Louis Springfield	Charlotte Raleigh Springfield	Manchester	Albuquerque
Nevada	**Ohio**	**Oklahoma**	**Oregon**	**Pennsylvania**
Las Vegas	Dayton	Oklahoma City Shawnee	Medford	Harrisburg Philadelphia
South Carolina	**Tennessee**	**Texas**	**Utah**	**Washington**
Columbia Myrtle Beach	Nashville	Corpus Christi Dallas Houston	Salt Lake City	Olympia Seattle Sultan

313. App. 2. U.S. Cities with Anti-Food-Sharing Laws derives from SHARE MO MORE, *supra* note 5, at 5, which maps the fifty-seven cities across twenty-five states that the National Coalition for the Homeless reports as "U.S. cities that have attempted to restrict, ban, or relocate food-sharing." The author plans to update this table online at http://foodsharinglaw.net [https://perma.cc/E6BC-YAA5].

The 2021 Florida Statutes

CHAPTER 761
RELIGIOUS FREEDOM

761.01 Short title.—This act may be cited as the "Religious Freedom Restoration Act of 1998."
History.—s. 1, ch. 98-412.

761.02 Definitions.—As used in this act:

(1) "Government" or "state" includes any branch, department, agency, instrumentality, or official or other person acting under color of law of the state, a county, special district, municipality, or any other subdivision of the state.

(2) "Demonstrates" means to meet the burden of going forward with the evidence and of persuasion.

(3) "Exercise of religion" means an act or refusal to act that is substantially motivated by a religious belief, whether or not the religious exercise is compulsory or central to a larger system of religious belief.
History.—s. 2, ch. 98-412.

761.03 Free exercise of religion protected.—

(1) The government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, except that government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person:

(a) Is in furtherance of a compelling governmental interest; and

(b) Is the least restrictive means of furthering that compelling governmental interest.

(2) A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief.
History.—s. 3, ch. 98-412.

761.04 Attorney's fees and costs.—The prevailing plaintiff in any action or proceeding to enforce a provision of this act is entitled to reasonable attorney's fees and costs to be paid by the government.
History.—s. 4, ch. 98-412.

761.05 Applicability; construction.—

(1) This act applies to all state law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this act.

(2) State law adopted after the date of the enactment of this act is subject to this act unless such law explicitly excludes such application by reference to this act.

(3) Nothing in this act shall be construed to authorize the government to burden any religious belief.

(4) Nothing in this act shall be construed to circumvent the provisions of chapter 893.

(5) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution prohibiting laws respecting the establishment of religion.

(6) Nothing in this act shall create any rights by an employee against an employer if the employer is not a governmental agency.

(7) Nothing in this act shall be construed to affect, interpret, or in any way address that portion of s. 3, Art. I of the State Constitution and the First Amendment to the Constitution of the United States respecting the establishment of religion. This act shall not be construed to permit any practice prohibited by those provisions.

History.—s. 5, ch. 98-412.

761.061 Rights of certain churches or religious organizations or individuals.—

(1) The following individuals or entities may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if such an action would cause the individual or entity to violate a sincerely held religious belief of the individual or entity:

(a) A church;

(b) A religious organization;

(c) A religious corporation or association;

(d) A religious fraternal benefit society;

(e) A religious school or educational institution;

(f) An integrated auxiliary of a church;

(g) An individual employed by a church or religious organization while acting in the scope of that employment;

(h) A clergy member; or

(i) A minister.

(2) A refusal to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges under subsection (1) may not serve as the basis for:

(a) A civil cause of action against any entity or individual protected under subsection (1); or

(b) A civil cause of action, criminal cause of action, or any other action by this state or a political subdivision to penalize or withhold benefits or privileges, including tax exemptions or governmental contracts, grants, or licenses, from any entity or individual protected under subsection (1).

History.—s. 1, ch. 2016-50.