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## Building a Radical Shift in Policy: Modifying the Relationship Between Cities and Neighbors Experiencing Unsheltered Homelessness

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## Building a Radical Shift in Policy: Modifying the Relationship Between Cities and Neighbors Experiencing Unsheltered Homelessness

Brigid Kelly†

### Introduction

I would hardly wish to deny that in an ideal world, all citizens would have the dignity and privacy made possible by having a private dwelling. In an ideal world, park benches would be spaces for relaxation and not beds; transit facilities and public libraries would not be places where people went to stay warm; and garbage would be undisturbed by those looking for scraps to eat. What I object to is the assumption that we live in the sort of world where we can reasonably expect these things and where we can judge those who use public spaces in this manner as people who lack civic sense. I object to perceptions of the destitute that reduce them to public nuisances who have no entitlements to be in or use public spaces, and who can be made to magically disappear by acts of legislative conjuring. What I object to are policy responses to the homeless that are motivated simply by the desire to remove them from public view . . . .<sup>1</sup>

More than half a million of our neighbors in the United States will experience homelessness tonight.<sup>2</sup> Nearly forty percent of those neighbors will spend the night unsheltered—on the street, in parks, or in other places not meant for human habitation.<sup>3</sup> Systemic

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1. Uma Narayan, *No Shelter Even in the Constitution? Free Speech, Equal Protection, and the Homeless*, in *THE ETHICS OF HOMELESSNESS* 206, 217–18 (G. John M. Abbarno, ed., 2d ed. 2020).

2. *State of Homelessness: 2021 Edition*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2021/> [hereinafter *State of Homelessness*] [<https://perma.cc/35RF-6AYG>].

3. MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URB. DEV., *THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 1 (2019)* [hereinafter 2019 AHAR].

discrimination,<sup>4</sup> a lack of viable shelter availability,<sup>5</sup> inaccessible healthcare,<sup>6</sup> a global pandemic,<sup>7</sup> and an affordable housing crisis<sup>8</sup> paint a grim picture of the fight for survival taking place in many communities throughout the United States. Further, as homelessness increases and housing resources become less accessible, a growing number of cities are adopting criminalization policies to formally and informally punish those experiencing homelessness<sup>9</sup> for doing life-sustaining activities like sitting or lying down,<sup>10</sup> loitering,<sup>11</sup> and storing property.<sup>12</sup> Local ordinances

4. See, e.g., NAT'L L. CTR. ON HOMELESSNESS & POVERTY, RACISM, HOMELESSNESS, AND COVID-19 (2020), [https://nlchp.org/wp-content/uploads/2020/05/Racism-Homelessness-and-COVID-19-Fact-Sheet\\_Final\\_2.pdf](https://nlchp.org/wp-content/uploads/2020/05/Racism-Homelessness-and-COVID-19-Fact-Sheet_Final_2.pdf) [hereinafter RACISM, HOMELESSNESS, AND COVID-19].

5. See SAMANTHA BATKO, BARBARA POPPE, SARAH GILLESPIE, STEPHEN METRAUX, KATRINA BALLARD & MARY CUNNINGHAM, URB. INST., ALTERNATIVES TO ARRESTS AND POLICE RESPONSES TO HOMELESSNESS 5 (2020) (“Overall, the US does not have enough emergency shelter and transitional housing beds to provide housing to every person experiencing homelessness . . .”).

6. See Seiji Hayashi, *How Health and Homelessness are Connected—Medically*, ATLANTIC (Jan. 25, 2016), <https://www.theatlantic.com/politics/archive/2016/01/how-health-and-homelessness-are-connectedmedically/458871/> [<https://perma.cc/JJB8-5CEB>].

7. See, e.g., NAT'L ALL. TO END HOMELESSNESS, POPULATION AT-RISK: HOMELESSNESS AND THE COVID-19 CRISIS 1 (2020) (“\$11.5 billion is necessary for 400,000 new shelter beds needed to accommodate everyone who is unsheltered and to ensure appropriate social distancing, and [the creation of quarantine locations for the sick and exposed.”); Tatiana Parafiniuk-Talesnick, *Winter is Coming, and Homeless People in Lane County Have Few Places to Go*, REG.-GUARD (Nov. 11, 2020), <https://www.registerguard.com/story/news/2020/11/11/winter-coming-homeless-people-lane-county-have-few-places-go/6079879002/> [<https://perma.cc/7R6C-AN7F>] (discussing the shortage of shelter beds in Lane County, Oregon due in part to COVID-19 health guidelines).

8. See ANDREW AURAND, DAN EMMANUEL, DANIEL THREET, IKRA RAFI & DIANE YENTEL, NAT'L LOW INCOME HOUS. COAL., THE GAP: A SHORTAGE OF AFFORDABLE HOMES (2020) [hereinafter THE GAP].

9. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 11 (2019) [hereinafter HOUSING NOT HANDCUFFS] (“The results of our research show that the criminalization of homelessness is prevalent across the country and has increased in every measured category since 2006. . . . We also found a growth in laws criminalizing homelessness since . . . 2016.”).

10. See *id.* at 13 (finding that 55% of cities have policies that prohibit sleeping or lying down in public, even though “every human being must occasionally rest [and] laws restricting sitting and lying down in public punish people experiencing homelessness for doing so”).

11. See *id.* (reporting that a growing number of cities are adopting laws that prohibit loitering, loafing, and vagrancy—laws that are “[s]imilar to historical Jim Crow, Anti-Okie, and Ugly laws . . . [because these] discriminatory ordinances grant police a broad tool for excluding visibly poor and homeless people from public places”).

12. See *id.* at 46 (explaining that Sacramento, California has a policy that makes it unlawful to “store personal property, including camp paraphernalia’ on any public property”).

and law enforcement practices reflect the sentiment expressed by Uma Narayan: a desire to remove humans labeled as nuisances from the public landscape, even though these individuals have nowhere else to go.<sup>13</sup> As municipalities cite public health concerns and safety to justify the enforcement of such legislative mechanisms,<sup>14</sup> the result is a cycle of expensive, inhumane, and short-term responses that cause cities to engage in potentially unconstitutional activities<sup>15</sup> and inefficient resource allocation.<sup>16</sup> The policies ultimately cater to those with conventional property

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13. Narayan, *supra* note 1; *see also* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 102 (2019) (“Key drivers for the criminalization of homelessness are increasingly popular laws and policies that seek to expel visibly poor people from public space.”).

14. *See, e.g.*, Ellen K. Boegel, *Are Health and Safety Laws Violating the Equal Rights of the Homeless?*, AMERICA (Feb. 7, 2019), <https://www.americamagazine.org/politics-society/2019/02/07/are-health-and-safety-laws-violating-equal-rights-homeless> [<https://perma.cc/NZB5-J5CV>] (explaining that municipalities use “[a]nti-camping and public nuisance laws” to protect public spaces, prevent the blockage of sidewalks and doorways, and decrease fire hazards); *see generally* HOUSING NOT HANDCUFFS, *supra* note 9, at 11 (“[Cities] often justify enforcement of criminalization laws based on alleged availability of emergency shelter beds. But emergency shelters are not available in every community with unhoused people, and even where shelters exist, they are generally full and routinely turn people away at the front door. Moreover, emergency shelters offer only temporary shelter—sometimes only for a single night at a time—and frequently require that people separate from their families, beloved pets, and/or their property upon entry, or subject themselves to religious proselytizing. Shelters may also discriminate on the basis of sexual orientation or gender identity, and/or fail to accommodate disability needs.”).

15. *See, e.g.*, *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019) (considering the Eighth Amendment, the court found that “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”); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1030 (9th Cir. 2012) (“[B]y seizing and destroying Appellees’ unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees’ possessory interests in that property.”); *Cash v. Hamilton Cty. Dep’t of Adult Prob.*, 388 F.3d 539 (6th Cir. 2004) (finding that failing to provide notice of property destruction or opportunity to reclaim belongings violated due process rights).

16. *See* TRISTIA BAUMAN ET AL., NAT’L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 9 (2019) [hereinafter NO SAFE PLACE] (“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 housing is the most affordable option. With state and local budgets stretched to their limit, rational, cost-effective policies are needed—not ineffective measures that waste precious taxpayer dollars.”); Eric Tars, *Alternatives to Criminalization: The Role of Law Enforcement*, CMTY. POLICING DISPATCH, Dec. 2015, [https://cops.usdoj.gov/html/dispatch/12-2015/alternatives\\_to\\_criminalization.asp](https://cops.usdoj.gov/html/dispatch/12-2015/alternatives_to_criminalization.asp) [<https://perma.cc/P4DS-9L8J>] (“[A]rresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do . . .”).

ownership and neglect those bearing the brunt of systemic injustices.<sup>17</sup>

While unsheltered homelessness should not be accepted as a permanent component to cityscapes<sup>18</sup>—and the ultimate goal should be to secure a stable and dignified housing option for all—the crisis of unsheltered homelessness is reaching a breaking point in need of new approach: cities must shift policy away from criminalization and towards practices that protect those experiencing unsheltered homelessness with minimum standards of habitability as special tenants in our community.<sup>19</sup>

While calling for such a fundamental shift in policy may seem radical, this Note seeks to show that it is possible by drawing a parallel between the unsheltered homelessness crisis of today, and the similarly dire crisis experienced by rental housing tenants through the 1960s.<sup>20</sup> When tenants' rights reached a breaking point after being pushed by horrendous rental housing conditions, inadequate municipal responses, and a significant power imbalance between tenants and landlords, the courts—and later legislatures—stepped in to force a shift away from the outdated, inefficient underlying policy of caveat emptor and towards the new implied warranty of habitability.<sup>21</sup> While tenants' rights are far from perfect today, the implied warranty of habitability, seen as “too radical to believe” shortly before its nearly universal adoption across the country, fundamentally redefined the landlord-tenant relationship

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17. HOUSING NOT HANDCUFFS, *supra* note 9, at 15 (“Laws criminalizing homelessness are rooted in prejudice, fear, and misunderstanding, and serve businesses and housed neighbors over the needs of unhoused neighbors. It is critical for lawmakers, policy advocates, and other key stakeholders to understand the fundamental roots of laws criminalizing homelessness: ignorance of the causes of homelessness and deep-seated prejudice against and fear of people experiencing it.”).

18. *See id.* at 23.

19. This Note contains intentional, people-first language that will contribute to a conversation that works towards humanizing and resists stereotyping homelessness. Therefore, the phrase “homeless person” is intentionally excluded from this Note. Instead, the phrase “person experiencing homelessness” is used to center a human condition, not an identity. *See* Anna Scott, *Rethinking the Language Around Homelessness*, KCRW (Mar. 27, 2019), <https://www.kcrw.com/news/shows/press-play-with-madeleine-brand/changing-the-language-around-homelessness/rethinking-the-language-around-homelessness> [https://perma.cc/K9EM-DD5Q] (describing people-first language as an approach that “focuses on the person, rather than their circumstance”).

20. *See* Tova Indritz, *The Tenants' Rights Movement*, 1 N.M. L. REV. 1, 5 (1971) (explaining typical rental housing conditions at issue during the tenants' rights movement through the 1960s).

21. *See* Donald E. Campbell, *Forty (Plus) Years After the Revolution: Observations on the Implied Warranty of Habitability*, 35 U. ARK. LITTLE ROCK L. REV. 793, 794 (2013).

by creating a landlord obligation to provide safe and adequate housing.<sup>22</sup> Many neighbors currently experiencing unsheltered homelessness face circumstances analogous to those experienced by tenants prior to the adoption of the implied warranty of habitability: the outdated and inefficient underlying policies of criminalization create dire living conditions defined by inadequate municipal responses. The crisis of unsheltered homelessness has reached a breaking point similar to the one experienced by tenants. There must be a new policy approach that improves living conditions and fundamentally redefines the relationship between people experiencing homelessness and the cities in which they live.

Part I of this Note provides background information on homelessness as a humanitarian crisis, homelessness as a “wicked problem,” and the characteristics of unsheltered homelessness. Part II argues that the crisis of unsheltered homelessness is at a breaking point, as city responses are hindered by the underlying weight of expanding criminalization policies that are costly, inefficient, and potentially unconstitutional. After providing background on the tenants’ rights movement through the 1960s and early 1970s, Part III argues that the parallels between the tenants’ rights movement and the crisis of unsheltered homelessness indicate that unsheltered homelessness is at a similar breaking point in need of a “revolutionary” shift in policy. Finally, using the framework provided by the tenants’ rights movement leading to the implied warranty of habitability, Part IV articulates how cities could implement a “revolutionary” change to city obligations by implementing a policy shift away from criminalizing people experiencing unsheltered homelessness, and towards a special city tenancy with minimum standards of habitability. Part IV also acknowledges several of the challenges that would need to be overcome should such a policy shift be implemented.

### **I. Background: Homelessness as a Humanitarian Crisis**

In September 2019, Los Angeles Mayor Eric Garcetti called homelessness the “humanitarian crisis of our lives” during an interview with National Public Radio.<sup>23</sup> The description is striking

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22. Serge Martinez, *Revitalizing the Implied Warranty of Habitability*, 34 NOTRE DAME J.L. ETHICS & PUB. POL’Y 239, 251 (2020); see also Kathryn A. Sabbeth, *(Under)enforcement of Poor Tenants’ Rights*, 27 GEO. J. ON POVERTY L. & POL’Y 97, 98–100 (2019) (discussing how many households throughout the country continue to reside in substandard rental housing that “constitute blatant violations of law” due, in part, to the underenforcement of “established legal rights”).

23. National Public Radio, *LA Mayor Eric Garcetti Calls Homelessness The ‘Humanitarian Crisis Of Our Lives’*, ALL THINGS CONSIDERED (Sept. 21, 2019),

when one considers the meaning of a humanitarian crisis: “[a] sudden event that includes high levels of suffering that puts basic human welfare in danger on a large scale,”<sup>24</sup> and even more striking knowing that such crises typically exist internationally, warranting bipartisan funding and personnel intervention from the federal government.<sup>25</sup>

#### A. *Measuring Homelessness*

To better understand the extent of the crisis, the Department of Housing and Urban Development (HUD) requires Continuums of Care (CoCs)—local planning entities—to conduct local Point-in-Time (PIT) counts, typically annually in January.<sup>26</sup> The PIT counts capture geographically-based layers of data about individuals and families experiencing homelessness.<sup>27</sup> The HUD definitions and data relevant to this Note are outlined in Table 1.

**Table 1**

**HUD Definition of Homeless:**

“(1) Individual or family who lacks a fixed, regular, and adequate nighttime residence, meaning:

(i) Has a primary nighttime residence that is a public or private place not meant for human habitation;

(ii) Is living in a publicly or privately operated shelter designated to provide temporary living arrangements (including congregate shelters, transitional housing, and hotels and motels paid for by charitable organizations or by federal, state and local government programs); or

(iii) Is exiting an institution where (s)he has resided for 90 days or less and who resided in an emergency shelter or place not meant for human habitation immediately before entering that institution.”<sup>28</sup>

<https://www.npr.org/2019/09/21/763073646/1-a-mayor-eric-garcetti-calls-homelessness-the-humanitarian-crisis-of-our-lives> [<https://perma.cc/QQU7-CFSP>].

24. JACOB QUINTANILLA, JESSE HARDMAN, MATT ABUD, ALISON CAMPBELL & DEBORAH ENSOR, INTERNEWS, REPORTING ON HUMANITARIAN CRISES: A MANUAL FOR TRAINERS & JOURNALISTS AND AN INTRODUCTION FOR HUMANITARIAN WORKERS 33 (2014).

25. See RHODA MARGESSON, CONG. RSCH. SERV., INTERNATIONAL CRISES AND DISASTERS: U.S. HUMANITARIAN ASSISTANCE RESPONSE MECHANISMS 2 (2015).

26. See 2019 AHAR, *supra* note 3, at 2.

27. See *id.* at 8–75.

28. U.S. Dep’t. of Hous. & Urb. Dev., *Homeless Definition* (2012), [https://files.hudexchange.info/resources/documents/HomelessDefinition\\_RecordkeepingRequirementsandCriteria.pdf](https://files.hudexchange.info/resources/documents/HomelessDefinition_RecordkeepingRequirementsandCriteria.pdf).

Term	Definition	Relevant 2019 PIT Count Statistics
Chronic Homelessness	“[A]n individual with a disability who has been continuously homeless for one year or more or has experienced at least four episodes of homelessness in the last three years where the combined length of time homeless on those occasions is at least 12 months.” <sup>29</sup>	96,000+ people experienced chronic homelessness. <sup>30</sup>
Sheltered Homelessness	“[P]eople who are staying in emergency shelters, transitional housing programs, or safe havens.” <sup>31</sup>	356,422 people experienced sheltered homelessness on any given night. <sup>32</sup>
Unsheltered Homelessness	“[P]eople whose primary nighttime location is a public or private place not designated for, or ordinarily used as, a regular sleeping accommodation for people . . . .” <sup>33</sup>	211,293 people experienced unsheltered homelessness on any given night. <sup>34</sup> While unsheltered homelessness has decreased since 2007, “unsheltered homelessness has increased over each of the last four years” with a 9% increase from 2018 to 2019. <sup>35</sup>
Emergency Shelter	“[P]rovides temporary or nightly shelter beds to people experiencing homelessness.” <sup>36</sup>	“Of the 389,549 beds dedicated to sheltering people currently

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29. 2019 AHAR, *supra* note 3, at 2.

30. *Id.* at 4.

31. *Id.* at 2.

32. *Id.* at 8.

33. *Id.* at 3.

34. *Id.* at 8.

35. *Id.* at 9.

36. *Id.* at 76.



		experiencing homelessness, 75[%] were emergency shelters . . . .” <sup>37</sup>
Transitional Housing	“[P]rovides homeless people with up to 24 months of shelter and supportive services.” <sup>38</sup>	“Of the 389,549 beds dedicated to sheltering people currently experiencing homelessness . . . 25[%] were in transitional housing programs . . . .” <sup>39</sup>
Safe Haven	“[P]rovides temporary shelter and services to hard-to-serve individuals.” <sup>40</sup>	“Of the 389,549 beds dedicated to sheltering people currently experiencing homelessness . . . [l]ess than one percent (0.6%) of shelter beds were provided through safe havens.” <sup>41</sup>

The PIT count also reveals that this humanitarian crisis significantly impacts people of color,<sup>42</sup> as “Black, Latinx, Native American, and Native Hawaiian and Pacific Islander compose a much larger percentage of the homeless population than they do the general population,” and at a disproportionate rate when compared to white communities.<sup>43</sup>

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37. *Id.* at 77.

38. *Id.* at 76.

39. *Id.* at 77.

40. *Id.* at 76.

41. *Id.* at 77.

42. See BATKO ET AL., *supra* note 5, at 3 (“That homelessness and its impacts disproportionately affect people of color is well-documented. Black and Indigenous people in particular are overrepresented among people experiencing homelessness overall and among people enduring unsheltered homelessness. . . . Asian Americans are underrepresented among people experiencing homelessness overall, but among those who do, nearly 50[%] are unsheltered.”).

43. RACISM, HOMELESSNESS, AND COVID-19, *supra* note 4 (displaying a chart showing “Homeless and General Populations by Race and Ethnicity”); e.g., L.A. HOMELESS SERVS. AUTH., REPORT AND RECOMMENDATIONS OF THE AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS (2018) [hereinafter AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS] (discussing racial inequities in homelessness, for example, “[i]n 2017, Black people represented only 9% of the general population in Los Angeles County yet comprised 40% of the population experiencing homelessness”); U.S. Dep’t of Hous. & Urb. Dev., *Racial Equity, HUD EXCHANGE*, <https://www.hudexchange.info/homelessness-assistance/racial-equity/#covid-19> (“African Americans accounted for 40[%] of all

The PIT count provides essential data and drives policy decisions at the federal, state, and local levels,<sup>44</sup> but the results are seen by many as flawed undercounts.<sup>45</sup> According to a report released by the National Homelessness Law Center, PIT count weaknesses can be caused by the primary methodology: CoCs typically deploy volunteers and homeless services professionals to conduct a visual count of the number of people experiencing homelessness.<sup>46</sup> If someone is unsheltered and is not in a visible location on the night of the PIT count—perhaps because law enforcement forced movement from a sidewalk to a dark alley—it is unlikely that they will be counted.<sup>47</sup> Therefore, individuals and families experiencing unsheltered homelessness, the focus of this Note, are likely undercounted—resulting in a less accurate understanding of the individuals sleeping in places not meant for human habitation on any given night.

### *B. Defining Homelessness as a Wicked Problem*

In the late 1960s, scholars began wielding “wicked problem” as the label for difficult-to-define social problems that are “unstructured,” tangled with other societal issues, and caused by amorphous factors.<sup>48</sup> The label added value to policy and academic conversations by recognizing that “the dynamic complexity of many

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people experiencing homelessness in 2019 and 52[%] of people experiencing homelessness as members of families with children, despite being 13[%] of the U.S. population. In contrast, 48[%] of all people experiencing homelessness were [W]hite compared with 77[%] of the U.S. population. People identifying as Hispanic or Latino (who can be of any race) are about 22[%] of the homeless population but only 18[%] of the population overall.”)

44. *What is a Point-in-Time Count?* NAT'L ALL. TO END HOMELESSNESS (Sept. 7, 2012), <https://endhomelessness.org/resource/what-is-a-point-in-time-count/> [<https://perma.cc/D9PY-M8YJ>]; see L.A. HOMELESS SERVS. AUTH., GREATER LOS ANGELES HOMELESS COUNT PRESENTATION 2 (2020) [hereinafter LAHSA 2020 HOMELESS COUNT PRESENTATION] (providing information on the 2020 Greater Los Angeles Homeless Count and the role the data plays to “locally . . . inform policies and strategies to end homelessness . . .”).

45. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 6 (2017) (outlining the flaws of the PIT count and citing “[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”).

46. *Id.* at 10–12.

47. *Id.* at 11.

48. Edward P. Weber & Anne M. Khademian, *Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings*, 68 PUB. ADMIN. REV. 334, 336 (2008); see John C. Camillus, *Strategy as a Wicked Problem*, HARV. BUS. REV., May 2008, 101 (displaying a table with the ten properties of wicked problems).

public problems defies the confines of established ‘stovepiped’ systems of problem definition, administration, and resolution.”<sup>49</sup> Homelessness can be seen as an unstructured wicked problem due to the multitude of factors that can lead to homelessness<sup>50</sup>—including, but not limited to, systemic racism,<sup>51</sup> an expanding gap between incomes and the cost of housing,<sup>52</sup> disabling health conditions,<sup>53</sup> domestic violence,<sup>54</sup> and interactions with the criminal justice system.<sup>55</sup> Further, the solutions used to address homelessness differ from those associated with simpler problems because they are “strongly stakeholder dependent” and create lasting consequences that “may yield utterly undesirable repercussions which outweigh the intended advantages or the

49. Weber & Khademan, *supra* note 48 at 336.

50. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA 18 (2017) [hereinafter TENT CITY] (“While every homeless individual’s path to homelessness is unique, it is becoming more and more apparent that most paths to homelessness are not about bad choices or personal failures, but rather the result of collective policy choices over time that have created a critical deficit of adequate, affordable housing and other safety net services.”).

51. *See, e.g.*, AD HOC COMMITTEE ON BLACK PEOPLE EXPERIENCING HOMELESSNESS, *supra* note 43; Rankin, *supra* note 13, at 101 (discussing how “[r]ace or, more pointedly, racism and homelessness are inseparable”); BATKO ET AL., *supra* note 5, at 4 (discussing how the disproportionately large percentage of people of color experiencing homelessness is “in part a result of the racism and discrimination embedded in the housing market and other systems, including the employment and criminal legal systems” in addition to the policies involved with homeless services, the siting and building of shelters in high-poverty neighborhoods).

52. HOUSING NOT HANDCUFFS, *supra* note 9, at 29 (“The gap between incomes and the cost of housing is a primary cause of homelessness.”); *see* Andrew J. Liese, *We Can Do Better: Anti-Homeless Ordinances As Violations of State Substantive Due Process Law*, 59 VAND. L. REV. 1413, 1418–19 (2006) (“In fact, in forty-six of the fifty-two U.S. jurisdictions (including Puerto Rico and the District of Columbia), the Housing Wage is more than double the federal minimum wage, meaning that an employee earning the federal minimum wage would have to work over eighty hours each week for fifty-two weeks each year in order to afford a two-bedroom apartment at 30[%] of his or her income—the federal definition of affordable housing.”).

53. LAHSA 2020 HOMELESS COUNT PRESENTATION, *supra* note 44, at 23 (citing “[d]isabling [h]ealth [c]ondition” as a primary cause of people experiencing homelessness for the first time).

54. U.S. Dep’t of Hous. & Urb. Dev., *Domestic Violence and Homelessness*, HUD EXCHANGE, <https://www.hudexchange.info/homelessness-assistance/domestic-violence/> [https://perma.cc/TR66-BBS3] (“Persons experiencing domestic violence, particularly women and children with limited economic resources, are at increased vulnerability to homelessness.”).

55. *See* Sarah Gillespie, Samantha Batko, Ben Chartoff, Zach VeShancey & Emily Peiffer, *Five Charts That Explain the Homelessness-Jail Cycle—and How to Break It*, URB. INST. (Sept. 16, 2020), <https://www.urban.org/features/five-charts-explain-homelessness-jail-cycle-and-how-break-it> [https://perma.cc/UPL2-JSR5]; Rankin *supra* note 13, at 101 (describing how “some . . . characterize the United States’ penal system as the nation’s largest homeless shelter” and that “over 15[%] of those in jail were homeless prior to incarceration, a rate of 7.5 to 11.3 times higher than the general adult population”).

advantages accomplished hitherto.”<sup>56</sup> When a community attempts to alleviate the crisis of homelessness, the implemented solutions often reflect the dominant stakeholder interests<sup>57</sup> and, as has been shown with policies that criminalize homelessness, can result in inefficient repercussions that are more costly than beneficial to both a city and those experiencing homelessness.<sup>58</sup>

Labeling homelessness as a wicked problem also supports efforts to consider unique solutions that release communities from the restrictions imposed by “stovepiped” resolutions.<sup>59</sup> While homelessness already has a proven and cost-effective long-term solution—permanent housing<sup>60</sup>—the reality is that affordable and dignified housing solutions are not yet available to all. Therefore, the long-term and proven solution must be supplemented by interim innovations. Similar to the “revolution” in tenants’ rights that called for a fundamental shift in defining the relationship between landlords and tenants in the 1960s, the ballooning humanitarian crisis of unsheltered homelessness faces a similar potential for radical change.<sup>61</sup>

### C. Understanding Unsheltered Homelessness

The number of people experiencing unsheltered homelessness has been growing—by 22% from 2015 to 2019.<sup>62</sup> Experts caution that the 2019 numbers represent a pre-pandemic baseline<sup>63</sup> as the expiration of temporary eviction moratoriums, job loss, health

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56. Richard Tanter, *Ten Criteria for Wicked Problems*, NAUTILUS INST. (May 17, 2008), <https://nautilus.org/gps/solving/ten-criteria-for-wicked-problems/> [https://perma.cc/K8WB-ZEF6].

57. Cf. Benjamin Oreskes & Doug Smith, *Garcetti’s Signature Homeless Program Shelters Thousands, but Most Return to the Streets*, L.A. TIMES (Nov. 20, 2020), <https://www.latimes.com/homeless-housing/story/2020-11-20/garcetti-a-bridge-home-homeless-program-offers-mixed-results> [https://perma.cc/6J2N-7LPA] (discussing a unique city program to address homelessness that includes provisions to accommodate differing stakeholder interests).

58. *E.g.*, BATKO ET AL., *supra* note 5, at v (“[I]nstead of solving the homelessness crisis, these costly, punitive responses are ineffective and can make homelessness worse for those experiencing it and for the communities in which they live.”).

59. Weber & Khademian, *supra* note 48, at 336.

60. *United Way of Greater Los Angeles’ Funders Collaborative Seeks New, Creative, and Scalable Housing Concepts With Latest RFP*, UNITED WAY OF GREATER L.A. (Mar. 22, 2019), <https://www.unitedwayla.org/en/news-resources/blog/united-way-greater-los-angeles-funders-collaborative-seeks-new-creative-and-scalable-housing-concepts-latest-rfp/> [https://perma.cc/CAL6-5GLZ].

61. Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 521 (1984) (discussing why changes to landlord-tenant laws can “fairly be termed ‘revolutionary’”).

62. BATKO ET AL., *supra* note 5, at 2.

63. *State of Homelessness*, *supra* note 2.

expenses, and decreased shelter capacity will likely push a wave of individuals and families out of their homes, out of shelters, and to the streets.<sup>64</sup> The increasing number of people experiencing unsheltered homelessness is particularly concerning as most people living and sleeping outside experience chronic homelessness, need to perform life-sustaining activities in public, and cope with frequent visits and demands from law enforcement often responding to complaints submitted by community members.<sup>65</sup> Further, when compared to individuals in shelters, people experiencing unsheltered homelessness are more likely to have physical health, mental health, and substance use conditions.<sup>66</sup>

### 1. Encampments

Through efforts to develop community and enhance safety, people experiencing unsheltered homelessness may seek out encampments—sometimes referred to as tent cities or homeless camps.<sup>67</sup> Encampments are group-living environments in public spaces where people experiencing homelessness live in temporary

64. See Chris Arnold, ‘Tsunami’ of Evictions Feared as Extra \$600 Unemployment Payments End, NAT’L PUB. RADIO (July 24, 2020), <https://www.npr.org/2020/07/24/894996949/concern-over-evictions-rise-as-covid-19-unemployment-benefits-expire> [https://perma.cc/49LY-6JKY]; GENE FALK, JAMESON A. CARTER, ISAAC A. NICCHITTA, EMMA C. NYHOF & PAUL D. ROMERO, CONG. RSCH. SERV., UNEMPLOYMENT RATES DURING THE COVID-19 PANDEMIC: IN BRIEF (2020) (describing job loss during the COVID-19 pandemic); see, e.g., Jessica Lee, *How Homeless Shelters Across Minnesota Are Scrambling to Prevent the Spread of COVID-19*, MINNPOST (Mar. 31, 2020), <https://www.minnpost.com/health/2020/03/how-homeless-shelters-across-minnesota-are-scrambling-to-prevent-the-spread-of-covid-19/> [https://perma.cc/9KJ9-4LNU] (describing the decreased shelter capacity in Minnesota).

65. 2019 AHAR, *supra* note 3, at 4 (finding that two-thirds of individuals experiencing chronic homelessness were also staying in places not meant for human habitation); see JANEY ROUNTREE, NATHAN HESS & AUSTIN LYKE, CAL. POL’Y LAB, HEALTH CONDITIONS AMONG UNSHELTERED ADULTS IN THE U.S. 6 (2019) (“Unsheltered individuals report ten times as many police contacts on average (21 compared to 2) in the previous six months, and were approximately nine times as likely to report they had spent at least one night in jail in the last six months (81% vs. 9%) [when compared to sheltered individuals.]”); Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOC. REV. 769, 770 (2019) (analyzing the role of “quality-of-life policing” in responding to “visible poverty”).

66. ROUNTREE ET AL., *supra* note 65, at 3–6; see Ann Elizabeth Montgomery, Dorota Szymkowiak, Jessica Marcus, Paul Howard & Dennis P. Culhane, *Homelessness, Unsheltered Status, and Risk Factors for Mortality: Findings From the 100 000 Homes Campaign*, 131 PUB. HEALTH REPS. 765, 765 (“Studies show that people living in unsheltered situations are at increased risk for premature death . . .”).

67. Rankin, *supra* note 13, at 111.

structures or tents.<sup>68</sup> In a 2017 study, the National Homelessness Law Center reported a dramatic increase in the number of encampments over the past decade, impacting every state in the country.<sup>69</sup>

While encampments may provide safety, community, and independence to occupants, they frequently fail to fully address the vulnerability caused by exposure to the elements and lack of access to waste management and restroom facilities.<sup>70</sup> Encampments are also often the subject of community concern due to their visibility,<sup>71</sup> potential to impact safety, and unsanitary conditions.<sup>72</sup> The public concern prompts a variety of responses, depending on the community.<sup>73</sup> Some municipalities formally criminalize the existence of encampments by creating legislative mechanisms to cite encampment occupants for various municipal code violations,<sup>74</sup> while others provide official permits for encampments to exist with support that can include running water, bathroom facilities, and other services.<sup>75</sup> Some cities also allow for informal sweeps—

68. TENT CITY, *supra* note 50, at 28.

69. *Id.* at 7; *see Rankin, supra* note 13, at 111 (“The growing number of unauthorized encampments reflect the reality that many cities lack sufficient emergency shelter and transitional housing. With no safe and legal place to go, many homeless people find community in unauthorized encampments.”).

70. *See, e.g.,* Jessica H. Leibler, Daniel D. Nguyen, Casey León, Jessie M. Gaeta & Debora Perez, *Personal Hygiene Practices Among Urban Homeless Persons in Boston, MA*, 14 INT’L J. ENV’T RSCH. & PUB. HEALTH 928, 928 (2017) (“Persons experiencing homelessness in the United States experience significant barriers to self-care and personal hygiene, including limited access to clean showers, laundry and hand washing facilities.”); Rankin, *supra* note 13, at 111 (“Encampments can offer several benefits to people experiencing homelessness, such as a sense of safety, security, community, autonomy, stability . . .”).

71. *See* SAMIR JUNEJO, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 14 (Suzanne Skinner & Sara K. Rankin eds., 2016) for a discussion about how the visibility of encampments can “bring the issue of homelessness to the attention of the community and policymakers . . . [as] a form of advocacy.”

72. *But see id.* at 7–8, 10 (noting that public safety concerns due to encampments often come from “isolated violent incidents rather than general trends . . . . Violence and criminal activity are not exclusive to homeless encampments . . . . Just because criminal activity can occur at encampments does not make them inherently unsafe”).

73. *See id.* at 2–7 for a comprehensive discussion about the various types of encampments in municipalities throughout the United States—including authorized encampments, encampments on private property, and unauthorized encampments.

74. Terrah Glenn, *Solving Unsheltered Homelessness*, NAT’L LEAGUE OF CITIES (Nov. 12, 2019), <https://www.nlc.org/article/2019/11/12/solving-unsheltered-homelessness/> [<https://perma.cc/GY7P-45CG>] (“Local governments, under political pressure from community stakeholders to eliminate these nuisance factors, have responded by passing and enforcing laws that effectively criminalize homelessness.”).

75. *See* REBECCA COHEN, WILL YETVIN & JILL KHADDURI, U.S. DEP’T OF HOUS. & URB. DEV., UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING

encampment evictions—an expensive process during which law enforcement can uproot encampment occupants and force those experiencing unsheltered homelessness to move to a new space, often losing important property and contact with homeless services providers in the process.<sup>76</sup> The nature of sweeps can vary community to community—some municipalities require notice and case management outreach prior to sweeps and will store remaining personal belongings for a certain period of time following sweeps.<sup>77</sup> Other communities will use extreme measures—including violent property destruction—to clear people experiencing homelessness from encampments.<sup>78</sup>

## 2. Shelters

In colder climates where living outside during winter can be life-threatening, there is often a large shelter system. Consequently, those that remain unsheltered in colder climates are often those with “high rates of disability and mental health issues,

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HOMELESSNESS AND COMMUNITY RESPONSES: EMERGING EVIDENCE AS OF LATE 2018, at 1 (2019) [hereinafter UNDERSTANDING ENCAMPMENTS]; JUNEJO, *supra* note 71, at 4 (explaining Seattle’s city-sanctioned encampments to which the city provides “city funds for their operations, access to public property, access to social services, and funding for case management services”).

76. See HOUSING NOT HANDCUFFS, *supra* note 9, at 40 (explaining that sweeps displace people experiencing homelessness from public spaces, cause the loss or destruction of property, disrupt access to case management and health resources, and impose significant costs on cities like Los Angeles, which spends \$31 million on encampment evictions annually); Rankin, *supra* note 13, at 113 (discussing how encampment sweeps often violate the Fourth Amendment and “inflict real and lasting damage on people experiencing homelessness . . . [by] exact[ing] significant emotional and psychological tolls on encampment residents”); Rick Paulas, *Encampment Sweeps Take Away Homeless People’s Most Important Belongings*, VICE (Mar. 4, 2020), <https://www.vice.com/en/article/v74pay/encampment-sweeps-take-away-homeless-peoples-most-important-belongings> [<https://perma.cc/YR3H-549V>] (“Activists have dubbed [encampment sweeps as] the ‘leafblower approach’ to solving homelessness, essentially scattering people without hint or suggestion where they should go.”); BATKO ET AL., *supra* note 5, at 8 (“[B]ecause sweeps are often conducted by or with the participation of police, they increase the likelihood that a person experiencing homelessness will have a negative interaction with police and receive a citation or be arrested.”). Cf. *Interim Guidance on People Experiencing Unsheltered Homelessness*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 23, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html#prevention> [<https://perma.cc/6CVF-SXL3>] (explaining the CDC’s recommendation that communities avoid evicting encampments due to the risk that sweeps could spread the virus throughout the community).

77. See HOUSING NOT HANDCUFFS, *supra* note 9, at 24–25.

78. JUNEJO, *supra* note 71, at 15 (“In 2007, police in St. Petersburg, Florida seized 20 tents in an encampment using scissors, box cutters, and other blades to cut them down. ‘I was in the tent when they started cutting. It was very reckless of them,’ said one of the residents, who was asleep when the police arrived.”).

which may create challenges to entering shelters.”<sup>79</sup> In regions with warmer climates, limited shelter availability creates an unsheltered population with “a greater mix of people, including those who do not have behavioral health disabilities but are unable to access shelter for other reasons.”<sup>80</sup> While many people experiencing unsheltered homelessness seek out shelter and accept emergency housing when it is available, the shelter system may not be for everyone—creating the misconception that people experiencing homelessness are service-resistant or “want to be homeless.”<sup>81</sup> If a shelter bed is available,<sup>82</sup> refusing shelter is often a reflection of deeper variables including, but not limited to, logistical barriers imposed by shelter rules or religious affiliation, mental health conditions, and distrust of those offering assistance.<sup>83</sup> For example, some shelters enforce curfews, forcing those experiencing homelessness with jobs to choose between work and a space to sleep inside if the curfew and working hours conflict.<sup>84</sup>

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79. UNDERSTANDING ENCAMPMENTS, *supra* note 75, at 7; *see supra* Table 1 for the definition of “shelter.”

80. UNDERSTANDING ENCAMPMENTS, *supra* note 75, at 7.

81. *See, e.g.*, Ruth Gourevitch & Mary K. Cunningham, *Dismantling the Harmful, False Narrative That Homelessness Is a Choice*, URB. INST. BLOG (Mar. 27, 2019), <https://www.urban.org/urban-wire/dismantling-harmful-false-narrative-homelessness-choice> [<https://perma.cc/N9LZ-EWJR>] (explaining that the “most common misconception” about people experiencing homelessness is that “they want to be homeless”); Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals’ Lack of Choice*, 95 N.Y.U. L. REV. 1150, 1156 (2020) (“[N]ot all shelters are a viable choice for persons experiencing homelessness . . .”).

82. *See* Joy Moses, *Coming Up Short for Individuals: Why Bed Counts Make a Difference*, NAT’L ALL. TO END HOMELESSNESS BLOG (Feb. 6, 2019), <https://endhomelessness.org/coming-up-short-for-individuals/> [<https://perma.cc/9W3J-GBNQ>] (“Across America, providers only had enough year-round beds to serve 52[%] of [individuals experiencing homelessness] . . . . Bed availability varies greatly from one state to the next. Some states can offer beds to almost everyone who needs one. They include Maine (which has capacity for 95[%] of homeless individuals), West Virginia (94[%]), Kansas (93[%]), Delaware (93[%]), and New York (88[%]). (Of note, New York City has established a legal right to shelter.) Other states are clearly struggling in this area. California, the state with the largest number of homeless people, is only able to offer year-round beds to 21[%] of individuals experiencing homelessness.”).

83. *Cf. Talk of the Nation: Why Some Homeless Choose the Streets Over Shelters*, NAT’L PUB. RADIO (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/95TZ-5H5L>] (“All I can say is that my fear of the unknown, of what might be waiting for me at that shelter, was worse than my fear of the known risk, you know, of staying out on the street. That was where I was comfortable. And I think people, we’re creatures of habit. We get comfortable in the most uncomfortable positions, and that just becomes home.”).

84. *See id.* (“The shelter where I stayed briefly, you had to be in line. They technically opened at 7:00, but you had to be in line at 4:30 in the afternoon to be



Some shelters do not allow pets or partners to stay together, forcing families to separate in order to access a shelter space.<sup>85</sup> For some, mental health conditions such as schizophrenia can make a crowded shelter an unhealthy environment.<sup>86</sup> While street outreach teams work to develop relationships with people experiencing unsheltered homelessness to connect them to the best possible resources—including shelters that can best respond to needs—building rapport can take time due to factors such as past negative experiences with social services or lost communication caused by a change in location following displacement mandated by law enforcement.<sup>87</sup> Ultimately, Housing First—“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”—is proven to be a successful and cost-effective alternative to both unsheltered homelessness and the shelter

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able to get your bed back, and this is obviously not conducive to anyone who is not working bank hours.”); Rick Paulas, *This Is Why Homeless People Don't Go to Shelters*, VICE (Feb. 24, 2020), <https://www.vice.com/en/article/v74y3j/this-is-why-homeless-people-dont-go-to-shelters> [<https://perma.cc/69KX-S3MK>].

85. See *Talk of the Nation*, *supra* note 83 (“[W]hen I was homeless, I had a dog. I used my dog as protection because I was just a single young woman on the streets . . . [T]hey wouldn't let him in shelters . . . I mean, my dog was kind of my family. And so we slept outside because I didn't want to have to give up my dog.”); Gourevitch & Cunningham, *supra* note 81 (“[People] may avoid shelters because of bed bugs, high rates of violence, or policies that prevent them from bringing their personal items or pets with them. Shelters may require sobriety or engagement in services. And couples are often split up when entering shelter, so some avoid it to stay together.”).

86. See *Talk of the Nation*, *supra* note 83 (explaining that the “paranoia and the fear of large groups of people that comes along with schizophrenia,” in part, deterred an individual from accessing shelter while experiencing homelessness).

87. Cf. SAN DIEGO CNTY., SAN DIEGO HOMELESS OUTREACH WORKER BEST PRACTICES 5 (2018) (“[T]he biggest challenge usually identified [for street outreach teams working with people experiencing homelessness] is unmanaged mental illness, which makes client engagement very difficult, particularly when individuals have a lack of insight to their symptoms or cannot provide informed consent. Other major challenges relate to a lack of client readiness, including fear of committing to a program or service requirements and lack of trust. On the systems level, most challenges revolve around limited resources, including difficulty contacting patients without phones or fixed addresses, distance and lack of transportation options, lack of language and interpretation services, and most importantly lack of readily available housing resources to offer clients (e.g., temporary or permanent housing).”); HOMELESS POL'Y RSCH. INST., HOMELESS OUTREACH: THE LOS ANGELES COUNTY CONTEXT 4 (2019) (“One of the primary goals of outreach workers is to gain the trust of the clients they are attempting [to] serve so that a lasting support relationship can develop . . . . However, several qualitative studies have noted that people experiencing homelessness, especially youth and veterans, tend to be distrustful of outreach workers and service provider staff.”).

system.<sup>88</sup> However, the lack of available affordable housing options, such as permanent supportive housing,<sup>89</sup> creates a reality with two alternatives for those experiencing homelessness: temporary shelter that may or may not be healthy<sup>90</sup>—if beds are even available—and living outside.

## II. Unsheltered Homelessness: A Crisis at a Breaking Point

### A. City Responses to Unsheltered Homelessness

While it is widely recognized that access to safe, affordable housing through the Housing First model is the proven, long-term, and most cost-effective solution to homelessness, the reality caused by the current inadequate housing supply cannot be ignored.<sup>91</sup> In response to that reality, some cities have implemented a variety of community-based solutions that bridge the gap between unsheltered homelessness and access to permanent housing.<sup>92</sup> For example, New York City has a year-round “right to shelter” that requires the City to offer shelter to any individual or family experiencing homelessness.<sup>93</sup> In Denver, the City opened two sanctioned—or, city-approved—encampments in December 2020.<sup>94</sup>

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88. *Housing First*, NAT’L ALL. TO END HOMELESSNESS (Apr. 20, 2016), <https://endhomelessness.org/resource/housing-first/> [https://perma.cc/898N-NTR4].

89. See THE GAP, *supra* note 8, at 8 (“No state has an adequate supply of rental housing affordable and available for extremely low-income households.”); EHREN DOHLER, PEGGY BAILEY, DOUGLAS RICE & HANNAH KATCH, CTR. ON BUDGET AND POL’Y PRIORITIES, SUPPORTIVE HOUSING HELPS VULNERABLE PEOPLE LIVE AND THRIVE IN THE COMMUNITY 1, 9 (2016) (“Supportive housing[ is] a highly effective strategy that combines affordable housing with intensive coordinated services . . . . A broad body of research shows that supportive housing effectively helps people with disabilities maintain stable housing . . . . Despite its effectiveness, few of the people who would benefit most from supportive housing actually receive it.”). See William N. Evans, David C. Phillips & Krista Ruffini, *Policies to Reduce and Prevent Homelessness: What We Know and Gaps in the Research*, 40 J. POL’Y ANALYSIS & MGMT. 914, 931–35 (2021), for a comprehensive overview of supportive housing’s history and program design.

90. *But see* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, KEY CONSIDERATIONS FOR IMPLEMENTING EMERGENCY SHELTER WITHIN AN EFFECTIVE CRISIS RESPONSE SYSTEM 5–6 (2017) (discussing the success of some shelters that operate with best practices including the provision of “[l]ow-[b]arrier [a]ccess” by “removing as many preconditions to entry as possible and responding to the needs and concerns of people seeking shelter” as well as “[a]ccommodating [p]artners, [p]ets, and [p]ossessions” by “inviting self-defined groups of friends and family to access and stay in shelter together,” and “extending hours [for shelter access]”).

91. BATKO ET AL., *supra* note 5, at 2.

92. See Evans et al., *supra* note 89, for a discussion evaluating how different levels of government and private philanthropy have responded to homelessness.

93. Kevin Corinth & Grace Finley, *The Geography of Unsheltered Homelessness in the City: Evidence from “311” Calls in New York*, 60 J. REG’L SCI. 628, 629 (2020).

94. David Mullen, *Denver’s Second Sanctioned Homeless Camp is Now Open and*

In 2018, Los Angeles Mayor Eric Garcetti and the City Council declared an emergency shelter crisis and established A Bridge Home—an initiative to increase the supply of shelter beds and establish bridge housing in every City Council District.<sup>95</sup> While each approach is accompanied by well-documented strengths and weaknesses, the purpose of this Note is not to analyze, minimize, or advocate for the relative merits of innovative efforts.<sup>96</sup> Rather, this Note seeks to frame the conversation about municipal approaches to unsheltered homelessness from a different perspective: regardless of the relative effectiveness of innovative approaches to unsheltered homelessness, the crisis is at a breaking point because of the underlying prevalence of criminalization. As more cities lean on law enforcement and tools of criminalization to push people experiencing homelessness from one unsheltered location to another, cities not only undermine innovative efforts, but also exacerbate the crisis with costly, inefficient, and potentially unconstitutional efforts.<sup>97</sup>

### B. *The Criminalization of Homelessness*

The National Law Center on Homelessness & Poverty (Law Center) tracks municipal laws to create the only national-level report available regarding the criminalization of homelessness.<sup>98</sup> According to the Law Center, “people without housing are ticketed, arrested, and jailed under laws that treat their life-sustaining conduct—such as sleeping or sitting down—as civil or criminal offenses [while] cities routinely displace [people experiencing

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*at Full Capacity*, COLO. POL. (Jan. 11, 2021), [https://www.coloradopolitics.com/denver/denvers-second-sanctioned-homeless-camp-is-now-open-and-at-full-capacity/article\\_d63e68bd-8189-5384-a8cf-ac96ad846d7d.html](https://www.coloradopolitics.com/denver/denvers-second-sanctioned-homeless-camp-is-now-open-and-at-full-capacity/article_d63e68bd-8189-5384-a8cf-ac96ad846d7d.html) [https://perma.cc/587N-NHVM] (explaining that one of the encampments features thirty heated tents in an enclosed area, one hot meal per day, access to services from the Mental Health Center of Denver and other organizations, and 24/7 staffing—among other accommodations).

95. *A Bridge Home*, L.A. MAYOR ERIC GARCETTI, <https://www.lamayor.org/ABridgeHome> [https://perma.cc/R73Z-ZKMM] (“[W]hile we ramp up the work of building those permanent units, we must be equally impatient about finding safe places to sleep for people who are on the streets now. That’s why Mayor Garcetti has launched a new plan called A Bridge Home—to give homeless Angelenos in every neighborhood a refuge in the community they already know and love, until they can be connected with a permanent home.”).

96. See, e.g., Oreskes & Smith, *supra* note 57 (explaining the progress made by Los Angeles Mayor Eric Garcetti’s A Bridge Home initiative).

97. See Trevor Bach, *Will Fines and Jail Time Fix the Homelessness Crisis?*, U.S. NEWS (Oct. 7, 2019), <https://www.usnews.com/news/cities/articles/2019-10-07/us-cities-are-increasingly-cracking-down-on-homelessness> [https://perma.cc/74GR-SFYA].

98. HOUSING NOT HANDCUFFS, *supra* note 9, at 9.

homelessness] from public spaces without providing any permanent housing alternatives.”<sup>99</sup> In the 2019 report reviewing 187 cities, the Law Center found an increase in the prevalence of criminalization policies across the United States—both since 2006 and over the previous three years.<sup>100</sup>

The proliferation of anti-homelessness laws include city regulations prohibiting camping in public,<sup>101</sup> sleeping in public,<sup>102</sup> sitting and lying down in public,<sup>103</sup> loitering,<sup>104</sup> soliciting donations,<sup>105</sup> food sharing,<sup>106</sup> storing property,<sup>107</sup> urinating and defecating in public,<sup>108</sup> and scavenging.<sup>109</sup> The laws may be facially neutral—not naming homelessness as criminal in itself—but the laws undoubtedly disproportionately impact people experiencing homelessness as they “discriminatorily target” and may be “selectively enforced against” those without permanent housing.<sup>110</sup>

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99. *Id.*; see also Rankin, *supra* note 13, at 107 (“Living in public often triggers criminal charges, such as loitering or trespassing. But living in public also commonly triggers civil infractions: a ticket imposing conditions and requirements, such as an order to show up to court, avoid an area for significant period of time, or pay a fee.”); JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. SCH. OF L. HOMELESS RTS. ADVOC. PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE (Sara Rankin ed., 2015) iii n.1 (“Civil violations often evolve into criminal violations because a homeless defendant fails to pay for the fine or cannot appear to contest it.”).

100. HOUSING NOT HANDCUFFS, *supra* note 9, at 11.

101. *Id.* at 12 (“‘Camping’ bans are often written to cover a broad range of activities, including merely sleeping outside. They also often prohibit the use of any ‘camping paraphernalia’ which can make it illegal for unhoused people to use even a blanket.”).

102. *Id.* (describing that sleep is a life-sustaining human behavior and yet “city laws prohibiting sleeping in public have increased 50% since 2006”).

103. *Id.* at 13.

104. *Id.* (describing laws related to “loitering, loafing, and/or vagrancy” as being “[s]imilar to historical Jim Crow, Anti-Okie, and Ugly laws . . . [that] grant police a broad tool for excluding visibly poor and homeless people from public places”).

105. *Id.* (finding that 83% of the cities considered by the Law Center have at least one law restricting “begging in public”).

106. *Id.* at 14.

107. *Id.* (“People experiencing homelessness often have no private place to secure their personal possessions. Laws that prohibit storing property in public space leave homeless people at constant risk of losing their property, including property needed for shelter, treatment of medical conditions, and proof of identity.”).

108. *Id.* (“While cities have a legitimate interest in preventing the accumulation of urine and feces in public space, such interests cannot be met by criminalizing unavoidable bodily functions. If people do not have regular access to toilets, they will expel their human waste in areas other than toilets—they have no choice.”).

109. *Id.* (“76% of cities prohibit rummaging, scavenging, or ‘dumpster diving.’”).

110. Kim, *supra* note 81, at 1152 (citing Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 107 (2019)); HOWARD & TRAN, *supra* note 99, at 2 (citing Bob Egelko, *U.N. Panel Denounces Laws Targeting Homeless*, SF GATE (May 2, 2014), <http://www.sfgate.com/opinion/article/U-N-panel-denounces-laws-targeting->

For the purposes of this Note, the term “criminalization” also includes informal policies or procedures that may not result in criminal or civil penalties—such as “move-along warnings” and encampment evictions—practiced by cities and law enforcement.<sup>111</sup>

Efforts to criminalize life-sustaining conduct—both formally and informally—are seen by some as the prioritization of those in positions of traditional property ownership<sup>112</sup> and the general interest of “expel[ling] visibly poor people from public space.”<sup>113</sup>

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homeless-5449307.php [https://perma.cc/9ZU8-AAG6]; Heidi Groover, *After SPD Sit-Lie Comments, Stuckart Proposes ‘Bias-Free-Policing’ Ordinance*, INLANDER (Sept. 22, 2014), <http://www.inlander.com/Bloglander/archives/2014/09/22/after-spd-sit-lie-comments-stuckart-proposes-bias-free-policing-ordinance> [https://perma.cc/3WHS-U4GX].

111. See U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 5–6 (2012) [hereinafter USICH: SEARCHING OUT SOLUTIONS] (“[F]ormal and informal law enforcement policies are adopted to limit where individuals who experience homelessness can congregate, and punish those who engage in life-sustaining or natural human activities in public spaces.”); Kim, *supra* note 81, at 1154 (“Some cities criminalize homelessness through more informal mechanisms, such as clearing homeless encampments or using police to reduce the visibility of homelessness on subways. These strategies are not necessarily documented in written policies or ordinances, and are thus more difficult to legally challenge . . . [Cities] may use other laws—such as for illegal dumping or shopping cart possession—to cite homeless individuals.”) (citing Letter from Andrew Cuomo, N.Y. Governor, to MTA Board of Directors (July 12, 2019), <https://www.governor.ny.gov/news/gover-cuomo-issues-letter-mta-board-directors-urging-them-address-part-reorganization-plan>; Lauren Aratani, *I’m Just Sleeping: Police Crack Down on Homeless in New York’s Subways*, GUARDIAN (Oct. 12, 2019), <https://www.theguardian.com/us-news-2019-oct-12-new-york-homeless-subways-police-crackdown> [https://perma.cc/HMX8-9Y2X]; Cynthia Hubert, *Sacramento County Cleared Homeless Camps All Year, Now It Has Stopped Citing Campers*, SACRAMENTO BEE (Sept. 18, 2018), <https://www.sacbee.com/news/local/homeless/article218605025.html>); Rankin, *supra* note 13, at 118 (explaining how “move-along warnings” may not result in formal citations, but are still a “form of criminalization that has ‘detrimental consequences for wide swaths of the homeless population’” as “[s]uch warnings are a form of punishment, conducted under the explicit or implicit threat of criminal prosecution . . .”) (quoting Christopher Herring, Dilara Yarbrough & Lisa Marie Alatorre, *Pervasive Penalty: How the Criminalization of Homelessness Perpetuates Poverty*, 67 SOC. PROBS. 131 (2020)) (citing *Martin v. City of Boise*, No. 145-35845, at 18–19 (9th Cir. Sept. 4, 2018)).

112. See generally Rankin, *supra* note 13, at 112 (“Advocates argue that privacy rights should not apply only to conventional homes with four walls and a lockable door[.]”) (citing Evanie Parr, Note, *When a Tent is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993 (2019)).

113. *Id.* at 102; see also USICH: SEARCHING OUT SOLUTIONS, *supra* note 111, at 5 (“Reflecting the frustration of business owners, community residents, and civic leaders who feel that street homelessness infringes on the safety, attractiveness and livability of their cities, some communities around the country are using, or considering using, the criminal justice system to minimize the visibility of people experiencing homelessness.”).

Cities often cite public health,<sup>114</sup> safety, or concern over the impact on the local economy as the impetus behind the creation and enforcement of the previously stated criminalization policies.<sup>115</sup> However, criminalization fails to “solve” any of the previously stated concerns. Instead, criminalization might provide a temporary reprieve in the visibility of homelessness by shifting the concern to a new neighborhood. The collision of growing criminalization policies, more people experiencing unsheltered homelessness, and the decrease in both shelter and affordable housing capacity pushes the crisis towards a breaking point in need of an alternative approach.

### 1. Criminalizing Homelessness is Costly and Inefficient

Criminalizing homelessness is expensive for cities and, therefore, taxpayers.<sup>116</sup> In a study from the state of Washington considering the direct costs of enforcing municipal ordinances targeted at people experiencing homelessness, the research revealed that Seattle spent “[a]n estimated 5-year minimum of \$2,300,000 . . . [on] enforcing just 16% of the city’s criminalization ordinances.”<sup>117</sup> In 2014, Denver disclosed spending approximately \$750,000 to enforce “bans on panhandling and camping or sleeping

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114. *But see* HOUSING NOT HANDCUFFS, *supra* note 9, at 15 (“[Criminalization policies] threaten public health by dispersing people who have nowhere to discard food waste and trash, to expel bodily waste, or to clean themselves and their belongings to more areas of the city, but with no new services to meet their basic sanitation and waste disposal needs.”).

115. *See* HOWARD & TRAN, *supra* note 99, at 2 (“Although proponents tie [criminalization] to improved public safety and improved business, there is no evidence that criminalization ordinances accomplish either of these purported goals.”) (citing Cathy Bussewitz, *New Laws Move the Homeless Out of Waikiki*, SEATTLE TIMES (Sept. 11, 2014), <https://www.seattletimes.com/life/travel/new-laws-move-the-homeless-out-of-waikiki/> [<https://perma.cc/83U5-FZCZ>]); BERKELEY L. POL’Y ADVOC. CLINIC, DOES SIT-LIE WORK: WILL BERKELEY’S “MEASURE S” INCREASE ECONOMIC ACTIVITY AND IMPROVE SERVICES TO HOMELESS PEOPLE, *available at* <http://www.law.berkeley.edu/files/1023sit-lie2.pdf>); *see generally* Katherine Beckett & Steve Herbert, *Penal Boundaries: Banishment and the Expansion of Punishment*, 35 L. & SOC. INQUIRY 1, 1–2 (2010) (discussing the outcomes of legal banishment as a form of “spatial exclusion” meant to “maintain order and exercise social control” over populations including those experiencing homelessness) (citing Benjamin Z. Kedar, *Expulsion as an Issue of World History*, 7 J. WORLD HIST. 165 (1996); STEVE HERBERT, *POLICING SPACE: TERRITORIALITY AND THE LOS ANGELES POLICE DEPARTMENT* (1997); Zygmunt Bauman, *Social Issues of Law and Order*, 40 BRIT. J. CRIMINOLOGY 205 (2000); MICHEL FOUCAULT, *ABNORMAL: LECTURES AT THE COLLÈGE DE FRANCE 1974–1975* (Graham Burchell trans.) (2003)).

116. *See* Rankin, *supra* note 13, at 109 n.52, for an overview of studies reviewing the costs of criminalizing homelessness in Seattle, Spokane, Central Florida, Los Angeles, and San Francisco.

117. HOWARD & TRAN, *supra* note 99, at iii (noting that the figure underestimates the total costs of criminalization).

in public spaces . . .”<sup>118</sup> In Salt Lake City, 85% of the budget dedicated to homeless services is spent on policing.<sup>119</sup> In 2019, Los Angeles invested more than \$30 million in the departments responsible for the city’s encampment sweeps.<sup>120</sup> Further, while criminalizing people experiencing homelessness becomes an increasingly popular municipal tool, the risk of costly litigation also increases as various jurisdictions grapple with the civil and human rights of people experiencing homelessness.<sup>121</sup>

Criminalizing homelessness also drains resources from the criminal legal system.<sup>122</sup> In 2015, the Department of Justice published an article that acknowledged the wasted law enforcement resources involved with citing and informally criminalizing people experiencing homelessness for doing life-sustaining activities.<sup>123</sup> As people experiencing homelessness are eleven times more likely to be arrested than the those not experiencing homelessness, some jurisdictions evidently invest a significant portion of city law enforcement resources towards short-term responses related to homelessness.<sup>124</sup>

Criminalizing homelessness also perpetuates poverty. While cities exercise criminalization measures as fast-acting tools to

118. BATKO ET AL., *supra* note 5, at 8–9.

119. HOUSING NOT HANDCUFFS, *supra* note 9, at 71.

120. Matt Tinoco, *LA Will Spend \$30M This Year on Homeless Sweeps. Do They Even Work?*, LAIST (Apr. 10, 2019), [https://laist.com/2019/04/10/homeless\\_sweeps\\_los\\_angeles\\_public\\_health.php](https://laist.com/2019/04/10/homeless_sweeps_los_angeles_public_health.php) [<https://perma.cc/7H67-Y7WX>].

121. NO SAFE PLACE, *supra* note 16, at 31 (“Criminalization laws expose local governments to protracted and expensive litigation for violating homeless persons’ civil and human rights.”).

122. *See* BATKO ET AL., *supra* note 5, at 7 (“Complaints from residents and businesses to police or public officials are often precursors to interactions between law enforcement officers and people enduring unsheltered homelessness . . . [L]aw enforcement officers are often called to situations that involve homelessness (e.g., conflicts over use of and behavior in public spaces), which can result in arrests, citations, or other coercive measures, or ‘complaint-oriented policing.’”) (citing NO SAFE PLACE, *supra* note 16; Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769 (2019)).

123. Tars, *supra* note 16 (“[A]rresting people for performing basic life-sustaining activities like sleeping in public takes law enforcement professionals away from what they are trained to do . . .”).

124. BATKO ET AL., *supra* note 5, at 8 (“[A] 2016 report by Los Angeles County found that \$100 million was spent on homelessness-related activities, with \$54 to \$87 million going to law enforcement activities . . .”) (citing FEI WU & MAX STEVENS, *THE SERVICES HOMELESS SINGLE ADULTS USE AND THEIR ASSOCIATED COSTS: AN EXAMINATION OF UTILIZATION PATTERNS AND EXPENDITURES IN LOS ANGELES COUNTY OVER ONE FISCAL YEAR (2016)*); *see also* HOUSING NOT HANDCUFFS, *supra* note 9, at 71 (“One in five people booked into jail in Seattle, Washington are homeless.”) (citing David Kroman, *In Seattle, 1 in 5 People Booked Into Jail are Homeless*, CROSSCUT (Feb. 19, 2019), <https://crosscut.com/2019/02/seattle-1-5-people-booked-jail-are-homeless> [<https://perma.cc/9NXP-XCJP>]).

respond to community complaints or to move the visibility of homelessness from one space to another, they ultimately keep individuals and families on the streets longer because “[o]nce individuals are saddled with a misdemeanor or a warrant, they are often rendered ineligible to access shelter, food, services, and other benefits that might support their ability to emerge from homelessness.”<sup>125</sup> Therefore, laws that disproportionately impact people experiencing unsheltered homelessness do not address the roots of homelessness or contribute to the long-term solution of housing.

## 2. Criminalizing Homelessness Can Violate Rights and Expose Cities to Liability

The legal landscape interpreting the constitutional protections of individuals experiencing unsheltered homelessness is complex and varies from jurisdiction to jurisdiction. Part II, Section B.2 will provide a simplified overview of the web of litigation and scholarship exploring the legal protections available to neighbors experiencing unsheltered homelessness. Cities should be aware that criminalization policies—both formal and informal—can result in costly liability under nuanced constitutional interpretations as legal advocates bring successful claims under the First, Fourth, Eighth, and Fourteenth Amendments.<sup>126</sup>

The First Amendment likely protects people experiencing homelessness from a city’s enforcement of ordinances that prohibit panhandling.<sup>127</sup> In 2015, *Reed v. Town of Gilbert* allowed the

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125. Rankin, *supra* note 13, at 108 (citing SUZANNE SKINNER, SEATTLE UNIV. HOMELESS RIGHTS ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER (Sara Rankin ed., 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2776421](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776421) [<https://perma.cc/U9VY-MF3G>]); Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012); *see also* HOUSING NOT HANDCUFFS, *supra* note 9, at 64 (discussing how interactions with the legal system can cause people experiencing homelessness to miss and lose existing work due to the time spent incarcerated or fighting charges—in addition to potentially disqualifying individuals from future work due to disclosure requirements on job applications).

126. *See* NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 8, 11 (2018) [hereinafter LITIGATION MANUAL] (explaining that since 2014, “most recent cases have upheld the legal rights” of people experiencing homelessness as “favorable results 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 [and] 100% of cases challenging laws restricting begging and solicitation”).

127. *See* Judith Welch Wegner & Matthew Norchi, *Regulating Panhandling: Reed and Beyond*, 63 S.D. L. REV. 579 (2019).



Supreme Court to review local regulations on outdoor signage.<sup>128</sup> The Court found that local laws imposing “more stringent restrictions on [certain] signs than it does on signs conveying other messages . . . [constitute] content-based regulations of speech that cannot survive strict scrutiny.”<sup>129</sup> Since the 2015 ruling, all challenges related to panhandling ordinances have found local measures to be unconstitutional, citing *Reed* as authority.<sup>130</sup>

People experiencing homelessness “have a protected possessory interest in their property, and unreasonable interference with this protected property interest, such as through seizure and destruction of property during encampment sweeps, may violate the Fourth Amendment.”<sup>131</sup> In *Lavan v. City of Los Angeles*,<sup>132</sup> Los Angeles city officials seized the belongings of several people experiencing homelessness while they temporarily left the items unattended on a public sidewalk.<sup>133</sup> The Ninth Circuit found that “by seizing and destroying Appellees’ unabandoned legal papers, shelters, and personal effects, the City meaningfully interfered with Appellees’ possessory interests in that property.”<sup>134</sup> Some argue that *Lavan* provides an expansion in the Fourth Amendment protections guaranteed to people experiencing unsheltered homelessness in the Ninth Circuit because it provides “an alternative method through which [people experiencing homelessness can] vindicate their constitutional rights, and need not stake their Fourth Amendment claims . . . on a reasonable expectation of privacy.”<sup>135</sup> Courts have also recognized due process claims under the Fourteenth Amendment when cities mishandle the property of people experiencing homelessness.<sup>136</sup>

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128. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015).

129. *Id.* at 159.

130. LITIGATION MANUAL, *supra* note 126, at 8, 11 (describing how the Seventh Circuit, in *Norton v. City of Springfield*, 806 F.3d 411 (7th Cir. 2015), found a city ordinance that prohibited the verbal solicitations of donations to be unconstitutional for lack of “compelling justification”); *see also* *Thayer v. City of Worcester*, 144 F. Supp. 3d 218 (D. Mass. 2015).

131. HOUSING NOT HANDCUFFS, *supra* note 9, at 77.

132. *Lavan v. City of Los Angeles*, 693 F.3d 1022 (9th Cir. 2012).

133. *Id.* at 1027.

134. *Id.* at 1030.

135. Benjamin G. Kassis, *Owning Property Without Privacy: How Lavan v. City of Los Angeles Offers Increased Fourth Amendment Protection to Skid Row’s Homeless*, 46 LOY. L.A. L. REV. 1159, 1169 (2013) (citing *Lavan*, 693 F.3d at 1030).

136. *See Rankin*, *supra* note 13, at 113 (2019) (citing *Mitchell v. City of Los Angeles*, No. CV1601750SJOGJSX, 2016 WL 11519288 (C.D. Cal. Apr. 13, 2016)); *see also* LITIGATION MANUAL, *supra* note 126, at 7–8, 11 (providing an overview of how the Fourth and Fourteenth Amendments interact to protect people experiencing homelessness from encampment sweeps and other municipally-driven

In 2018, *Martin v. City of Boise*<sup>137</sup> “created shock waves throughout cities in the Ninth Circuit”<sup>138</sup> as it ruled that “the City of Boise violated the Eighth Amendment by prosecuting individuals for ‘involuntarily sitting, lying and sleeping in public’ when no sleeping space was ‘practically available in any shelter’ at the time of the plaintiffs’ arrests.”<sup>139</sup> The Ninth Circuit determined that the criminalization of unsheltered homelessness amounted to cruel and unusual punishment even when shelter beds were technically available, but conditioned on willingness to participate in religious activities.<sup>140</sup> While *Martin* provides new Eighth Amendment protections for people experiencing unsheltered homelessness facing municipal ordinances criminalizing their existence, the case is geographically narrow, and advocates are already calling for an expanded definition of “practically available” shelter.<sup>141</sup>

Ultimately, as discussed by numerous reports from a variety of sources—ranging from the Department of Justice<sup>142</sup> and HUD<sup>143</sup> to various nonprofits,<sup>144</sup> health institutions,<sup>145</sup> and city government

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criminalization efforts).

137. *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

138. Morgan Chandegra, *And It’s Beginning to Snow*, 56 CAL. W. L. REV. 425, 425 (2020).

139. Kim, *supra* note 81, at 1155 (quoting *Martin v. City of Boise*, 902 F.3d 1031, 1048–49 (9th Cir. 2018), amended by 920 F.3d 584 (9th Cir. 2019) (en banc)).

140. *Martin*, 902 F.3d at 1041.

141. See Kim, *supra* note 81, at 1150, for an explanation of the Supreme Court’s decision to deny review of *Martin v. City of Boise*, a robust discussion about viable shelter choices for people experiencing homelessness, and an overview of the argument in favor of treating homelessness as a status under the Cruel and Unusual Punishments Clause.

142. See, e.g., LITIGATION MANUAL, *supra* note 126, at 7 (explaining that in 2015, the Department of Justice “filed a statement of interest in . . . *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. . . . 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”); Tars, *supra* note 16.

143. See, e.g., HOUSING NOT HANDCUFFS, *supra* note 9, at 74 (“To encourage communities to invest in proven solutions for ending homelessness, the Department of Housing and Urban Development (HUD) created incentives for communities to stop criminalizing homelessness through its annual Continuum of Care (CoC) Program Competition, which awards more than \$2 billion in federal funds for homeless housing and services each year.”).

144. See, e.g., *id.* at 73–74.

145. See, e.g., *id.* at 15 (“[T]he American Medical Association and American Public Health Association have both condemned criminalization and sweeps in policy resolutions.”).

coalitions<sup>146</sup>—the cost-benefit analysis reveals that formal and informal criminalization of people experiencing homelessness is an inefficient response to the crisis and opens municipalities to constitutional litigation. Therefore, cities should work towards eradicating criminalization policies and investing in proven best practices that end homelessness—housing and supportive services. However, given the long-term nature of such a shift in investment, an interim shift in perspective is needed to treat people experiencing unsheltered homelessness as special tenants, as informed by the tenants’ rights movement.

### III. Finding an Alternative to Criminalization: Informed by the Tenants’ Rights Movement

#### A. A Brief History of the Tenants’ Rights Movement

Between the 1800s and the 1960s, tenants, legislatures, and courts grappled with the appropriate way to link human dignity and housing habitability<sup>147</sup> with government enforcement and court authority. By the late 1960s, tenant conditions reached a breaking point—forcing courts and legislatures to call for a radical shift in perspective and establish minimum habitability standards with the implied warranty of habitability in rental housing.<sup>148</sup> While recognition of tenants’ rights is far from perfect today, the adoption of the implied warranty of habitability—what some have labeled “too radical to believe”—provides a blueprint for shifting judicial, legislative, and municipal perspective to create protections for a historically neglected subset of the population.<sup>149</sup>

Prior to the late 1960s, tenants’ rights in rental housing were defined by caveat emptor—a property law doctrine from the 1500s

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146. See, e.g., Glenn, *supra* note 74 (“While [criminalization] strategies may temporarily assuage public outcry against homeless encampments, they do not appear to work as therapeutic and cost-effective long term solutions for the unsheltered homeless. In fact, in the absence of a complimentary policies that emphasize the provision of a sufficient quantity of shelter and crisis services, enforcement activity alone may make conditions worse.”).

147. See Martinez, *supra* note 22, at 244 (“The American housing movement is usually traced to New York City in the late 1800s, when Jacob Riis shocked the public with his revelatory series of photos of New York City tenements and their appalling conditions.”).

148. See Matthew Desmond, *The Tenants Who Evicted Their Landlord*, N.Y. TIMES (Dec. 17, 2020), <https://www.nytimes.com/2020/10/13/magazine/rental-housing-crisis-minneapolis.html> [<https://perma.cc/YY23-RZRW>]; Indritz, *supra* note 20, at 1, 21, 43–44 (discussing how middle and upper-income renter experience with poor housing conditions strengthened the tenants’ rights movement in the 1960s).

149. Martinez, *supra* note 22, at 251.

that linked a tenant's responsibility to pay rent with the right to continued possession of the land.<sup>150</sup> The doctrine existed to reflect the interests of the parties at the time of its adoption: "[t]he landlord wanted rent and the agrarian tenant wanted to ensure undisturbed possession of the property for the length of the term."<sup>151</sup> However, by the late 1800s, the doctrine became increasingly outdated as urban tenancy grew and interests shifted because "[t]enants no longer wanted the land and to be left alone, but instead sought safe and secure housing."<sup>152</sup> While tenant organizing worked throughout the first half of the 20th century to improve unsafe housing conditions and associated policies, it was not enough to overcome caveat emptor and significantly reduce slum-like conditions in rental housing.<sup>153</sup> In 1960, an estimated 10.6 million out of a total of 58.3 million units of housing were considered substandard.<sup>154</sup>

By the late 1960s, the tenants' rights movement had grown to be a "multi-class national movement" in the context of advocacy related to civil rights and welfare accessibility, though it was seen at the time as a "radical activity."<sup>155</sup> As the housing shortage worsened and the existing housing stock grew older, the tenants' rights movement grew from low, middle, and upper-income renter frustration due to the lack of mechanisms through which to improve poor housing conditions such as "exposed wiring or pipes, holes in the walls or floors . . . the stench and filth of uncollected garbage . . . [and] rats and cockroaches."<sup>156</sup> Even though most local governments implemented housing codes to establish health and safety standards by the late 1960s, municipal ability to enforce the standards was weak and inefficient.<sup>157</sup> Further, a significant power

150. See Campbell, *supra* note 21, at 795–96.

151. *Id.* at 796.

152. *Id.* at 797, 799 ("The historical foundations on which the *caveat emptor* and dependent covenants doctrines were based came under attack in the mid-1800s. The presumptions no longer held. The emphasis on land and the independence of covenants began to appear one-sided and subject to abuse.")

153. See *id.*

154. See *id.* at 804.

155. Indritz, *supra* note 20, at 1, 39 ("For these present times, though, tenant organizing remains a radical activity, threatening to the large and powerful real estate industry.")

156. *Id.* at 5; cf. Peter Dreier, *The Tenants' Movement in the United States*, 8 INT'L J. URB. & REG'L RSCH. 255, 257 (1984) (explaining that the tenants' right movement in the 1960s "developed in a context of rising expectations . . . . As the standard of living improved for most Americans, the poor became more aware of the gap between themselves and the affluent society").

157. Campbell, *supra* note 21, at 800–01; see also Dreier, *supra* note 156, at 255, 257 (explaining that tenants are not often seen as a "serious contender on the political scene" making advocacy and change difficult).

imbalance between renter and landlord flourished within the structure of caveat emptor as landlords successfully dodged attempts to meaningfully implement housing codes and maintain rental habitability.<sup>158</sup> Therefore, between the failure of caveat emptor to meet the needs of tenants and the municipal inability to adequately enforce housing codes, housing conditions and the treatment of tenants reached a breaking point.<sup>159</sup> Tenant advocacy and the resulting social pressure led the courts to step in and create the implied warranty of habitability<sup>160</sup> “in response to the ongoing failure of law and municipalities to adequately address substandard conditions in rental housing.”<sup>161</sup> While premised on an imperfect comparison to the contractual sale of goods, the implied warranty of habitability shifted the landlord-tenant relationship from one rooted in the doctrine of caveat emptor to one rooted in private contracts.<sup>162</sup> Seen by academics and practitioners as a “revolutionary” change “striking at the core of the landlord-tenant relationship, both in legal and practical terms,” the implied warranty of habitability addressed the inherent power imbalance between tenant and landlord by guaranteeing tenants the right to a habitable dwelling.<sup>163</sup> With support from housing codes, the implied warranty of habitability set a minimum expectation for housing conditions and placed “an obligation” to maintain minimum standards on landlords “as a matter of public policy.”<sup>164</sup> After *Javins*

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158. See Martinez, *supra* note 22, at 240–44 (“Bad housing conditions for low-income tenants are a very stark physical manifestation of an enduring truth for low-income tenants: landlords have power and tenants have almost none. . . . The implied warranty of habitability arose in the wake of the failure of property law and municipal housing code legislation to meaningfully incentivize landlords to maintain their rental properties with low-income tenants.”).

159. See Campbell, *supra* note 21, at 804 (commenting that “[s]omething had to give” in the late 1960s in response to poor rental housing conditions).

160. See Martinez, *supra* note 22, at 248 (citing *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071 (1970) as the seminal case to find a “non-waivable implied warranty of habitability in every residential lease”). See Richard H. Chused, *Saunders (a.k.a. Javins) v. First National Realty Corporation*, 11 GEO. J. ON POVERTY L. & POL’Y 191 (2004) for a discussion about the context leading to the decision in *Javins*.

161. Martinez, *supra* note 22, at 239; see also Paula A. Franzese, Abbott Gorin & David J. Guzik, *The Implied Warranty of Habitability Lives: Making Real the Promise of Landlord-Tenant Reform*, 69 RUTGERS L. REV. 1, 1 (2016) (“The implied warranty of habitability is an implicit promise that every residential landlord makes to provide tenants with premises suitable for basic human dwelling.”).

162. Campbell, *supra* note 21, at 829–30.

163. Rabin, *supra* note 61, at 521; see Martinez, *supra* note 22, at 246 (“Reforms to housing law took on new urgency in the mid-1960s after urban riots were linked to bad housing conditions. It was in this context that the implied warranty of habitability was developed as a tool to protect tenants living in substandard conditions and promote important public policy goal of improving housing.”).

164. See Campbell, *supra* note 21, at 800, 803.

*v. First National Realty Corp.*, the seminal court decision recognizing the non-waivable implied warranty of habitability, adoption by other courts and legislatures became nearly universal across the country<sup>165</sup> and by 1972, the implied warranty of habitability became part of the Uniform Residential Landlord Tenant Act.<sup>166</sup>

While the merits and impact of the implied warranty of habitability remain outside the scope of this Note, the “revolutionary” shift in legal and societal perspective directed by courts and legislatures provides a powerful framework from which to base a shift in perspective in municipal approaches to unsheltered homelessness.

*B. Comparing the Tenants’ Rights Movement with the Crisis of Unsheltered Homelessness*

While the relationship between tenants and landlords and the relationship between people experiencing homelessness and the municipalities in which they reside share limited crossover due to fundamental differences—including, but not limited to, the role of a contractual lease with dependent terms<sup>167</sup>—there are also inherent similarities between the tenants’ rights movement and the unsheltered homelessness crisis of today.

Similar to how the outdated and unbalanced doctrine of caveat emptor provided the backdrop that hindered tenant progress through the 1960s, policies of criminalization—a response shown to be inefficient, costly, and potentially unconstitutional<sup>168</sup>—has hindered efforts to address unsheltered homelessness by making it more difficult for people experiencing homelessness to access housing.<sup>169</sup> In addition, similar to the renters who carried the tenants’ rights movement in the 1960s, many people experiencing unsheltered homelessness are living in uninhabitable conditions without real recourse to improve their conditions due to the inaccessibility of shelters and the severe lack of affordable and

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165. Martinez, *supra* note 22, at 251 (explaining that an idea that was once seen as “radical” became nearly universal as forty-nine states and the District of Columbia all adopted some version of the implied warranty of habitability).

166. *See id.* (citing UNIF. RESIDENTIAL LANDLORD & TENANT ACT §2.104 (UNIF. L. COMM’N 2015)).

167. *See id.* at 239, 242–43.

168. *See* discussion *supra* Part II, Sections A–B and accompanying notes.

169. Compare Campbell, *supra* note 21, at 796 (discussing the weaknesses of the doctrine of caveat emptor), with Rankin, *supra* note 13, at 108 (explaining how the repercussions from criminalization can negatively impact people experiencing homeless and future abilities to gain access to permanent housing).

supportive permanent housing throughout the United States.<sup>170</sup> When the courts began to rapidly adopt the implied warranty of habitability in the 1960s and 1970s, the judicial system had reached a watershed moment in response to the cries of relatively powerless tenants facing unfair treatment from landlords and the indifferent municipalities failing to address issues of housing habitability.<sup>171</sup> People experiencing unsheltered homelessness are similarly powerless against the unfair treatment from municipalities criminalizing them because of the public spaces they have been relegated to for life-sustaining activities. Therefore, just as the courts confronted the need to protect tenants in the wake of failing systems provided by private landlords and municipalities, the crisis of unsheltered homelessness has reached a similar watershed moment: so long as appropriate housing options for all remain inaccessible, municipalities must absorb a new obligation to pivot from criminalization and view neighbors experiencing homelessness as the city's special tenants, entitled to basic habitability rights.

#### **IV. Treating Neighbors as Neighbors: the Creation of a Special Tenancy**

The goal of this Note is not to advocate for the “right” to experience unsheltered homelessness, nor should unsheltered homelessness be accepted as an inherent part of the city environment. However, until cities can increase the supply of affordable housing and fully embrace the Housing First model, unsheltered homelessness will remain a reality in many municipalities.<sup>172</sup> Therefore, it is time for cities to shift away from expensive, inefficient, and potentially illegal criminalization policies and towards recognition that unsheltered homelessness is a wicked problem in need of a “revolutionary” approach.<sup>173</sup> Part IV

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170. See *supra* Part I, Section C and accompanying notes (discussing the conditions faced by people experiencing unsheltered homelessness including limited shelter availability and inadequate housing supply).

171. See Martinez, *supra* note 22, at 246 (discussing the context in which judges and legislators stepped in to improve the status quo for tenants).

172. See generally JUNEJO, *supra* note 71, at 22 (“Encampments are not a solution to homelessness; they are a temporary and inadequate response. But the depth of the homelessness crisis in some areas of the country requires cities to embrace encampments as an interim measure to provide some degree of stability to people experiencing homelessness, but those cities should simultaneously redouble efforts to provide permanent housing.”).

173. See *supra* Part II and accompanying notes (discussing the criminalization of people experiencing homelessness); *supra* Part 0 and accompanying notes (discussing how the unsheltered homelessness crisis parallels the tenants’ rights

seeks to use the framework of the tenants' rights movement to briefly explore what a "revolutionary" approach could look like for cities. The goal of the new approach is not to supplant current innovative efforts pursued by cities, such as the programs outlined in Part II, but rather to replace the backdrop of criminalization practices. Using the blueprint from the tenants' rights movement, the stage for a "radical" change to the legal and practical relationship between cities and people experiencing homelessness seems to be set. It is now incumbent upon cities to treat neighbors experiencing homelessness as special tenants of the municipality who are entitled to live in a habitable environment, rather than nuisances subject to criminalization for existing.

*A. Creating Habitability Standards and Defining a New Relationship*

Similar to the tenants' rights movement, municipalities could start by adopting the equivalent of a housing code for instances of unsheltered homelessness.<sup>174</sup> With support from a modified housing code addressing conditions for those living outside, a new obligation to maintain minimum standards of habitability would be placed on cities "as a matter of public policy."<sup>175</sup> A minimum standard of habitability for people experiencing unsheltered homelessness could take many forms, depending on the geographic location and weather conditions. Standards could be informed by some of the most basic guarantees provided for in local housing codes, such as access to resources like restrooms, showers, and heat when temperatures reach a certain level.<sup>176</sup> With a habitability baseline informing city interactions with people experiencing homelessness—rather than interactions characterized by formal and informal criminalization—there could be more opportunity to break the cycle of poverty, build trust, and connect people experiencing homelessness with long-term housing and supportive services.

Similar to the tenants' rights movement, establishing a modified housing code may be ineffective if cities are not

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movement that resulted in a "revolutionary" shift in policy).

174. See Martinez, *supra* note 22, at 246 ("For all of its failings, however, the housing code movement did have one important consequence: it fostered the idea that landlords had the responsibility to maintain their rental dwellings as a matter of public policy.").

175. *Id.*

176. See, e.g., MINNEAPOLIS, MINN. CODE OF ORDINANCES, art. IV, §§ 244.290, 244.430 (2021).



incentivized to enforce or adhere to the new obligations.<sup>177</sup> Just as the courts stepped in on behalf of tenants to correct the power imbalance between tenants and landlords, courts could similarly intervene to adjust the power distribution between people experiencing homelessness and municipalities.<sup>178</sup> While the specific mechanics of the implied warranty of habitability are unlikely to be informative—as they involve enforcing the dependent covenants of a contractual lease—the courts could engage in an evaluation similar to the one that provided for the rise of the implied warranty of habitability. The relationship between people experiencing homelessness and cities must be reevaluated to address evolving expectations of health and habitability, and a new, viable legal doctrine must be established to enforce the new relationship.<sup>179</sup>

### B. *Exploring Potential Challenges to a Special Tenancy*

Yes, the stage is set for a “revolutionary” change to the relationship between cities and people experiencing homelessness, and yes, it may be seen as radical, unrealistic, or impossible. However, the same critiques were thrown at the tenants’ rights movement just a few years prior to the nearly universal adoption of the implied warranty of habitability in rental housing.<sup>180</sup>

As explored in Part I, wicked problems call for “non-stovepiped” solutions that typically reflect the dominant stakeholder interests.<sup>181</sup> When it comes to unsheltered homelessness, the dominant stakeholders are people with traditional property ownership—businesses and homeowners—subsets of communities that value quick responses to the visibility of homelessness, regardless of the long-term impact.<sup>182</sup> Therefore, shifting away from criminalization and towards minimum habitability for people experiencing homelessness would likely run contrary to those dominant stakeholder interests. The shift in policy should be accommodated by community education about why

177. Campbell, *supra* note 21, at 801 (discussing the weaknesses of housing code enforcement prior to the implied warranty of habitability).

178. See Martinez, *supra* note 22, at 249 (explaining that the court in *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1080 (1970) noted “the power imbalance between landlords and tenants, as well as housing shortages and discrimination in the rental market and the society-wide negative impact of poor housing”).

179. See Campbell, *supra* note 21, at 804.

180. See Martinez, *supra* note 22, at 251.

181. See Weber & Khademian, *supra* note 48 (explaining that these “wicked” problems require the participation of all different people and stakeholders to “serve as premise for cooperation”).

182. HOUSING NOT HANDCUFFS, *supra* note 9, at 15 (describing the dominant stakeholders pushing for criminalization policies to address homelessness).

criminalization is ineffective in the long term and can no longer characterize municipal policy. Further, it is possible that maintaining minimum habitability standards for those living outside will improve the overall habitability of communities that are home to those experiencing unsheltered homelessness.<sup>183</sup>

While a city-based approach to exploring an alternative to criminalization is necessary because municipal codes and localized informal policies define criminalization in each city, it is also limiting. City boundaries could be abused by municipalities uninterested in investing in “revolutionary” modifications to the relationship between cities and people experiencing unsheltered homelessness.<sup>184</sup> To best implement a “revolutionary” approach to seeing people experiencing homelessness as special tenants within a community, it should be a regional approach to prevent cities from pushing individuals towards boundaries with certain resources.

Finally, defining what is “habitable” will be another challenge for cities and potentially the courts charged with evaluating a new legal doctrine defining the new relationship between cities and people experiencing homelessness. Just as the courts continue to struggle with defining habitability in terms of landlord-tenant law, habitability can be seen as an “evolutionary concept” that is susceptible to changes over time and based on the lived experiences of those charged with constructing the standards.<sup>185</sup>

## Conclusion

As municipalities face a growing crisis of unsheltered homelessness, there must first be a call to invest in the proven and long-term solution: affordable and safe housing options. However, there is an interim reality currently characterizing cities throughout the United States because the inaccessibility of shelter beds and inadequate supply of housing leave many—more than 211,200 people in 2019<sup>186</sup>—to live in places not meant for human

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183. See generally Emily Alpert Reyes, *\$339,000 for a Restroom? L.A. Politicians Balk at the Cost of Toilets for Homeless People*, L.A. TIMES (June 10, 2019), <https://www.latimes.com/local/lanow/la-me-ln-homeless-bathroom-restroom-feces-skid-row-pit-stop-20190610-story.html> [https://perma.cc/2EDC-BWGE] (highlighting how investing in basic sanitation resources can improve the overall habitability of a community occupied by people experiencing homelessness).

184. See generally Jared Osborne, *Prosecution or Forced Transport: Manhattan Beach’s Unconstitutional Banishment of the Homeless*, 93 S. CAL. L. REV. POSTSCRIPT 70 (discussing Manhattan Beach and the city’s “potential transportation of the homeless out of its jurisdiction”).

185. Campbell, *supra* note 21, at 810–20.

186. 2019 AHAR, *supra* note 3, at 8.

habitation. In response, cities are increasingly criminalizing those experiencing homelessness—both formally and informally—with inefficient and costly investment from law enforcement that tends to perpetuate the cycle of poverty. Further, criminalization policies make cities increasingly susceptible to constitutional claims related to the First, Fourth, Eighth, and Fourteenth Amendment rights of people experiencing unsheltered homelessness. The crisis of unsheltered homelessness is at a breaking point: even in places implementing innovative solutions to bridge the gap between unsheltered homelessness and permanent housing, the backdrop of criminalization hinders significant progress and takes away integral resources. Therefore, similar to the fundamental shift in legal and practical components defining the relationship between landlords and tenants in the 1960s, the time has come for cities to take on additional responsibility and seek out an alternative, “revolutionary” approach to unsheltered homelessness. So long as living outside is a reality faced by community members, cities must turn away from criminalization and towards seeing people experiencing unsheltered homelessness as the city’s tenants in need of minimum standards of habitability.