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R. George Wright

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# HOMELESSNESS, CRIMINAL RESPONSIBILITY, AND THE PATHOLOGIES OF POLICY: TRIANGULATING ON A CONSTITUTIONAL RIGHT TO HOUSING

R. GEORGE WRIGHT<sup>†</sup>

## INTRODUCTION

The importance of a roof over one's head seems clear to most of us. But private charity, the insurance markets, and the regulatory state offer no guarantees that this most elemental need will be even minimally met. This Article focuses on the continuing denial of any federal constitutional right to even minimal housing,<sup>1</sup> despite the sense that basic values such as meaningful liberty, equality, community, fundamental human flourishing, and basic capacity development seem to suggest a right.<sup>2</sup>

Given that arguments for a constitutional right to even minimal<sup>3</sup> housing from these clearly basic values alone have by themselves not yet moved the needle, this Article takes a different approach. The focus herein supplements the basic values arguments with other important considerations that triangulate, or converge, on a federal constitutional right to housing. These considerations, in their joint convergence, collectively exert additional moral and intellectual pressure in favor of recognizing the constitutional right in question.

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<sup>†</sup> Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. The author's thanks are hereby gratefully extended to Kylee Tomblin.

<sup>1</sup> See, for a cursory treatment at the federal constitution level, *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

<sup>2</sup> See *infra* Part I.

<sup>3</sup> In large measure, this Article leaves open the precise contours and limits of a constitutional right to housing as best resolved through discussion, experience, experiment, and revision, partly at the stage of implementation. For some guidance in this respect, though, see *infra* notes 179–183 and accompanying text.

In particular, the case law addressing homelessness, and homelessness-related conditions and activities, as criminal offenses avoids considering any possible constitutional right to housing. Imposing criminal responsibility implies, without discussion, the absence of any relevant constitutional right to engage in the homelessness-related conduct in question. But criminalization of homelessness-related conditions and activities turns out to be, as argued below, hopelessly burdened with unresolvable basic theoretical problems.<sup>4</sup> These basic problems are inherent not only in homelessness-specific contexts,<sup>5</sup> but less dramatically and less conspicuously in other contexts as well.<sup>6</sup> Recognizing a constitutional right to housing would allow the courts and society to bypass these unresolvable basic problems of purported individual criminal responsibility in the context of homelessness-related crimes.

The converging pressures for recognizing at least some minimal constitutional right to housing build further when we then go on, separately, to consider how the officially adopted policies of governments, at all levels, and across a wide range of contexts, have causally contributed in important ways to the incidence and pathologies of homelessness.<sup>7</sup> Governments cannot at this point legitimately seek to stand apart from the problems of homelessness and then independently assess, with utter detachment, the gravity of such problems as though homelessness-related problems were entirely natural or privately generated phenomena. Governments at all levels are already actively involved in various ways in causing and in at least minimally addressing, however ineffectively, the problems of homelessness.<sup>8</sup> A range of government policies at all levels contributes to the most basic harms of homelessness. However radical someone might think a federal constitutional right to housing is, recognizing such a right would amount to a corrective of causally relevant current government policies, rather than an initial, perhaps gratuitous, entry by government into new territory.<sup>9</sup>

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<sup>4</sup> See *infra* Part I.

<sup>5</sup> See *infra* notes 27–88 and accompanying text.

<sup>6</sup> See *infra* notes 90–101 and accompanying text.

<sup>7</sup> See *infra* Part II.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See *infra* Part II.

When we then finally return to and briefly further consider the classic values case for a constitutional right to housing—as a third, triangulating, converging source of moral and intellectual pressure and motivation<sup>10</sup>—the case for recognizing a federal constitutional right to at least minimal housing becomes far more difficult to dismiss.

I. IS THERE A JUSTIFIED AND WORKABLE DISTINCTION  
BETWEEN PERSONALLY CULPABLE AND NONCULPABLE  
HOMELESSNESS?

A number of the leading homelessness cases take a stand on questions of criminal responsibility for homelessness-related offenses. In the end, though, the cases do not adopt or imply any coherent approach to the inescapable questions of responsibility that are at issue.<sup>11</sup> An approach, such as that herein, that can legitimately bypass these perennially unresolved issues of responsibility is thus attractive.

The starting point for judicial discussions of this sort, including in particular the possible applicability of cruel and unusual punishment doctrine, is the classic narcotic addiction case of *Robinson v. California*.<sup>12</sup> *Robinson* itself did not involve homelessness, but rather the presumed status of being addicted, whatever the lines of causality, to narcotics.<sup>13</sup> The offense in

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<sup>10</sup> See *infra* Part III. Of special interest is that the case for a constitutional right to housing, at the level of basic values, need not itself converge on any single substantive value or set of values. A constitutional right to housing can be defended on either overlapping, cumulating, or some distinct ground. See Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1734 (1995); see also John Rawls, *The Idea of an Overlapping Consensus*, 7 OX. J. LEGAL STUD. 1, 4, 9, 24–25 (1987).

<sup>11</sup> Among the leading and most suggestive cases, chronologically, are *Robinson v. California*, 370 U.S. 660, 667 (1962); *Powell v. Texas*, 392 U.S. 514, 536–37 (1968); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992); *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1109, 892 P.2d 1145, 1169, 40 Cal. Rptr. 2d 402, 426 (1995); *Johnson v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), *vacated as moot following settlement*, 505 F.3d 1006 (9th Cir. 2007); *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1234 (E.D. Cal. 2009); *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 69, 183 Cal. Rptr. 3d 654, 678 (2015); *People v. Diaz*, 24 Cal. App. 5th Supp. 1, 8, 234 Cal. Rptr. 3d 427, 432 (2018); *Manning v. Caldwell*, 900 F.3d 139, 153 (4th Cir. 2018), *rev'd and remanded en banc*, 930 F.3d 264 (4th Cir. 2019); *Martin v. City of Boise*, 902 F.3d 1031, 1049 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019); *O'Callaghan v. City of Portland*, 736 Fed. Appx. 704, 705–06 (9th Cir. 2018); and *First Lutheran Church v. City of St. Paul*, 2018 WL 3762560, at \*8 (D. Minn. 2018).

<sup>12</sup> See *Robinson*, 370 U.S. at 664.

<sup>13</sup> See *id.* at 665.

question did not require a showing of either possession or use of any narcotic while within the State of California.<sup>14</sup> The Court thus sought to distinguish between criminalizing what it referred to as a “status”—in particular, the status of being an addict—and criminalizing some behavior or conduct, even of a passive or negative sort.<sup>15</sup>

There, the presumed status of drug addiction was conceived of as an illness,<sup>16</sup> and thus analogous to having a common cold.<sup>17</sup> As any criminal punishment for merely having a cold would presumably constitute cruel and unusual punishment,<sup>18</sup> so any punishment for the mere status or condition of being addicted to a narcotic would similarly violate the Cruel and Unusual Punishment Clause.<sup>19</sup> The cruelty and unusualness of the punishment in such cases derives not from the length or severity of the criminal punishment, but from the inappropriateness of any punishment in such a case at all.<sup>20</sup>

The United States Supreme Court returned to these themes in their divided opinions in the public drunkenness and alcoholism case of *Powell v. Texas*.<sup>21</sup> In *Powell*, the four Justice plurality rejected the defendant's Cruel and Unusual Punishment Clause challenge and distinguished the prior holding in *Robinson*.<sup>22</sup> Crucially, California had attempted to criminally punish a mere status, that of being addicted, in *Robinson*.<sup>23</sup> But Texas, in the later *Powell* case, had criminalized not the presumed status or condition of being an alcoholic,<sup>24</sup> but the public behavior or conduct of appearing drunk in public on a particular occasion.<sup>25</sup>

The plurality in *Powell* thus again sought to rely on a distinction between a mere status or condition on the one hand, and conduct or behavior on the other.<sup>26</sup> The *Powell* plurality

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<sup>14</sup> See *id.* at 665–66.

<sup>15</sup> See *id.* at 665–68.

<sup>16</sup> See *id.* at 667.

<sup>17</sup> See *id.*

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.*

<sup>21</sup> See generally 392 U.S. 514 (1968) (plurality opinion).

<sup>22</sup> See *id.* at 532–33.

<sup>23</sup> See *id.* at 532.

<sup>24</sup> See *id.*

<sup>25</sup> See *id.*

<sup>26</sup> See *id.* at 533; see also *Lehr v. City of Sacramento*, 624 F. Supp. 2d 1218, 1228–29 (E.D. Cal. 2009); *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1105, 892 P.2d

interprets *Robinson* to rest upon this purported distinction, rather than on a distinction between voluntary acts<sup>27</sup> and involuntary conduct,<sup>28</sup> or conduct that occurs under some relevant sort of compulsion.<sup>29</sup> Importantly, the plurality in *Powell* argues for the difficulty of limiting, in any principled and attractive way, the exclusion from punishment of “involuntary” or somehow “compelled” conduct.<sup>30</sup> In particular, the plurality argues that

[i]f Leroy Powell cannot be convicted of public intoxication, it is difficult to see how a State can convict an individual for murder, if that individual, while exhibiting normal behavior in all other respects, suffers from a “compulsion” to kill, which is an “exceedingly strong influence,” but “not completely overpowering.”<sup>31</sup>

The plurality in *Powell* was thus concerned that attempts to restrict familiar understandings of personal<sup>32</sup> or moral<sup>33</sup> accountability<sup>34</sup> could themselves be limited only on an arbitrary and unprincipled basis.<sup>35</sup>

As it turned out, however, Justice White’s opinion concurring in the *Powell* result<sup>36</sup> might for some purposes be treated as the technical holding in *Powell*.<sup>37</sup> Justice White appears to question the plurality’s use of both the supposed status versus conduct

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1145, 1166 (1995); *Allen v. City of Sacramento*, 183 Cal. Rptr. 3d 654, 669–70 (2015) (“What constitutes ‘might elude perfect definition,’ but factors such as the involuntary acquisition of the characteristic . . . and the degree to which a person has control over that characteristic” are to be included). The obvious problem here is that this account relies, without clarification, on the ideas of voluntariness and involuntariness, and on the equally underdeveloped idea of “control” and degrees thereof. *See Ashbaucher v. City of Arcata*, 2010 WL 11211481, at \*9, \*10 (N.D. Cal. Aug. 19, 2010).

<sup>27</sup> *See Powell*, 392 U.S. at 533.

<sup>28</sup> *See id.*

<sup>29</sup> *See id.*

<sup>30</sup> *See id.* at 534.

<sup>31</sup> *Id.*

<sup>32</sup> *See id.* at 535.

<sup>33</sup> *See id.* at 535–36.

<sup>34</sup> *See id.*

<sup>35</sup> *See id.* at 534–35.

<sup>36</sup> *See id.* at 548 (White, J., concurring).

<sup>37</sup> *See generally Marks v. United States*, 430 U.S. 188 (1977) (seeking to establish the Court’s judicial holding in the absence of any single majority rationale). *But see Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 619–21 (7th Cir. 2014) (discussing the logical limitations of the *Marks* rule).

distinction and its understanding of the voluntariness versus involuntariness distinction.<sup>38</sup> Justice White argues at the level of principle that

[i]f it cannot be a crime to have an irresistible compulsion to use<sup>39</sup> narcotics, . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction<sup>40</sup> under a different name. Distinguishing between the two crimes is like forbidding criminal conviction for being sick with flu<sup>41</sup> or epilepsy but permitting punishment for running a fever or having a convulsion.<sup>42</sup>

Set aside, for the moment, all complications associated with possible voluntariness, negligence or recklessness, assumption of the risk, responsibility, or the inevitability or blamelessness of some instances of either addiction or the flu, or the severity of flu symptoms.<sup>43</sup>

Justice White, however, nonetheless voted to uphold Powell's conviction, on the theory that the conviction was not for alcoholism or drinking chronically, or for being drunk, but for appearing in a public place while drunk.<sup>44</sup> The compulsion to drink or to drink to excess was not shown, in this case, to encompass any necessity to appear thus in any public place, as distinct from, say, a private home.<sup>45</sup> Justice White was of the view that "common sense and . . . common knowledge"<sup>46</sup> suggest that a chronic alcoholic need not appear in public while intoxicated.<sup>47</sup>

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<sup>38</sup> See *Powell*, 392 U.S. at 549–50 (White, J., concurring).

<sup>39</sup> Justice White at this point cites *Robinson* not for a status versus conduct distinction, but for the non-criminalizability of the presumably compelled use of the addictive drug. See *id.* at 548 (White, J., concurring).

<sup>40</sup> Addiction is classified by *Robinson* as a status, but on Justice White's view, not meaningfully distinguishable, as to culpability or responsibility, from the closely associated somehow compelled conduct.

<sup>41</sup> It would seem that in some cases, catching or having the flu, and displaying flu symptoms of whatever severity, could reflect the sufferer's earlier choices or conduct. See, e.g., *Flu (Influenza)*, VACCINES (January 2018), <https://www.vaccines.gov/diseases/flu>; *Flu Treatment with Antiviral Drugs*, WEBMD, <https://www.webmd.com/cold-and-flu/flu-medications#1> (last visited Aug. 17, 2019). See generally *infra* note 154 and accompanying text.

<sup>42</sup> *Powell*, 392 U.S. at 548 (White, J., concurring) (internal citations omitted).

<sup>43</sup> For a start on such matters, consider the sources cited *supra* note 41.

<sup>44</sup> See *Powell*, 392 U.S. at 549 (White, J., concurring).

<sup>45</sup> See *id.*

<sup>46</sup> *Id.* at 549.

<sup>47</sup> See *id.* at 549–50.

The four Justice dissenting opinion in *Powell*<sup>48</sup> then formulated the key issue as one of the scope of the relevant compulsion or disease,<sup>49</sup> with status or condition encompassing not just compelled intoxication but also including appearing in public while thus intoxicated.<sup>50</sup> In the language of the *Powell* dissenting opinion, the question was

whether a criminal penalty may be imposed upon a person suffering the disease of “chronic alcoholism” for a condition—being in a state of intoxication in public—which is a characteristic part<sup>51</sup> of the pattern of his disease and . . . not the consequence of appellant’s volition but of “a compulsion symptomatic<sup>52</sup> of the disease of chronic alcoholism.”<sup>53</sup>

Justice Fortas concluded that despite the differences between the statutes in *Robinson* and *Powell*, the basic logic of *Robinson* controlled the result in *Powell*.<sup>54</sup> While the statute in *Powell* required more than a showing of chronic alcoholism or uncontrollable drinking,<sup>55</sup> “in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid.”<sup>56</sup> The condition in *Powell*’s case included the realistic inability to avoid being intoxicated in some public place at some time.<sup>57</sup>

Ultimately, the principle adopted by Justice Fortas’s dissenting opinion is that punishment is inappropriate “if the condition essential to constitute the defined crime is part of the

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<sup>48</sup> See *id.* at 554 (Fortas J., dissenting). Justice Fortas was joined by Justices Douglas, Brennan, and Stewart.

<sup>49</sup> See *id.* at 558.

<sup>50</sup> See *id.*

<sup>51</sup> The idea of a “characteristic” part as used here presumably refers not merely to what typically occurs, but to what must occur in conjunction with the disease itself with some sufficient compulsion or inescapability.

<sup>52</sup> As with the reference to that which is “characteristic” of the disease, see *Powell*, 392 U.S. at 558 (Fortas, J., dissenting), so the reference to a symptom of the disease presumably incorporates some sufficient degree of necessity or compulsion.

<sup>53</sup> See *id.*

<sup>54</sup> See *id.* at 567–68.

<sup>55</sup> See *id.* at 567.

<sup>56</sup> *Id.* at 568.

<sup>57</sup> See *id.*

pattern of [the] disease and is occasioned by a compulsion symptomatic of the disease.”<sup>58</sup> This principle is, interestingly, claimed to be “narrow in scope and applicability.”<sup>59</sup>

The *Powell* dissent’s formulation, however, raises more questions than it answers. Most importantly, the narrowness or breadth of the principle cannot forever be entirely a matter of Justice Fortas’s own expectations. The logic of a declared principle may have a life of its own. In particular, the principle may, by its own logic, break through whatever narrow constraints its adopters had in mind.

One crucial and obvious possibility, as noted below,<sup>60</sup> is that the principles endorsed by both the four Justice dissent and by Justice White in the *Powell* case may not be logically confinable to narcotic addiction, to chronic alcoholism, to any set of recognized diseases, or even to disease in general, whether the condition in question arises through conduct or not. Neither the presence of a medical disease, nor of diseases in general, may be particularly relevant to questions of moral or legal responsibility.

As well, the attempt, running throughout both *Robinson* and *Powell*, to distinguish between statuses on the one hand and conduct on the other may well be doomed to failure. At the very least, the status versus conduct distinction may tell us very little about persuasively distinguishing responsible criminal defendants from those who cannot properly be held responsible.

Even setting aside the typical defenses and excusing conditions, a defendant’s conduct may, on one theory or another, be compelled,<sup>61</sup> or may result from a sort of “compulsion,”<sup>62</sup> beyond the defendant’s “capacity to change or avoid,”<sup>63</sup> entirely apart from any recognized disease or special condition. Responsibility may also be inappropriate even in the absence of any form of compulsion if the status or conduct at issue reflects not choice but mere random processes.<sup>64</sup>

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<sup>58</sup> *Id.* at 569. Thus, both the relevant disease and the ensuing criminalized conduct might both be compelled, with the latter perhaps compelled by the former, or by other causes.

<sup>59</sup> *Id.*

<sup>60</sup> See *infra* notes 90–101 and accompanying text.

<sup>61</sup> See *supra* text accompanying notes 42, 47.

<sup>62</sup> See *supra* text accompanying notes 42, 47.

<sup>63</sup> See *supra* text accompanying note 45.

<sup>64</sup> See *infra* notes 90–99 and accompanying text, as well as the convenient collection of brief references to the implications of merely random processes in *The Standard Argument Against Free Will*, THE INFO. PHILOSOPHER (last visited Aug. 7, 2019), [www.informationphilosopher.com/freedom/standard\\_argument.html](http://www.informationphilosopher.com/freedom/standard_argument.html).

Ultimately, focusing on supposedly distinctive statuses or conditions and related conduct, even with the familiar sorts of legal defenses and excuses, may turn out to be logically underinclusive in mapping the absence of criminal responsibility. Disease, addiction, or homelessness may in the end merely point the way to a much narrower scope for any genuine criminal responsibility. Thus, persuasively imputing criminal responsibility to persons in homelessness-related contexts and beyond may be surprisingly difficult.

This possibility is highlighted by reflecting broadly on the cases addressing<sup>65</sup> whether a conviction for homelessness-related offenses might violate the Cruel and Unusual Punishment Clause.<sup>66</sup> Among the most recent and illuminating cases is the Ninth Circuit's opinion in *Martin v. City of Boise*.<sup>67</sup>

*Martin* holds specifically that “the Eighth Amendment prohibits the imposition of criminal penalties for sitting, sleeping, or lying outside on public property for homeless individuals who cannot obtain shelter.”<sup>68</sup> The theory there is that no criminal punishment is defensible and appropriate for sitting, sleeping, or lying, whether thought of as statuses or as conduct,<sup>69</sup> insofar as such statuses or conduct are realistically unavoidable, as the “universal and unavoidable consequences of being human.”<sup>70</sup> As being homeless in public places cannot itself

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<sup>65</sup> Eighth Amendment issues would not be reached in the absence of a plaintiff's standing, as when a court deems that no relevant punishment has been threatened or applied. *See, e.g.*, *Johnson v. City of Dallas*, 61 F.3d 443, 445 (5th Cir. 1995).

<sup>66</sup> Strictly, typical criminal homelessness cases involving state or municipal law consider the Eighth Amendment prohibition against cruel and unusual punishment as the Eighth Amendment is made binding on the states through its incorporation into the Fourteenth Amendment's Due Process Clause, which itself binds states and cities therein. *See, e.g.*, *Wilson v. Seiter*, 501 U.S. 294, 296 (1991); *Robinson v. California*, 370 U.S. 660, 667 (1962); *see also* *Timbs v. Indiana*, 139 S. Ct. 682, 686–87 (2019) (finding the Eighth Amendment's “excessive fines” prohibition as binding on the states via Fourteenth Amendment Due Process Clause incorporation).

<sup>67</sup> *See generally* 902 F.3d 1031 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 920 F.3d 584 (9th Cir. 2019).

<sup>68</sup> *Id.* at 1048.

<sup>69</sup> *See id.*

<sup>70</sup> *Id.* (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007)) (internal quotation omitted).

be criminalized,<sup>71</sup> what inevitably follows from being homeless in public—sitting, lying, or sleeping in public<sup>72</sup>—cannot under those circumstances be criminalized either.<sup>73</sup>

*Martin* seeks minimally to distinguish culpable homelessness from nonculpable homelessness. The basic assumption is that someone who temporarily abandons a viable residence merely for the purpose of, say, personal amusement, investigative journalism, to win a frivolous bet, or to test the limits of the Cruel and Unusual Punishment Clause may be culpable in a way that should not apply to at least some more typical cases of homelessness. But the court in *Martin* does not begin to explore the ultimate tenability of any such distinction.<sup>74</sup>

At a more immediate practical policy level, *Martin* disclaims any obligation on the part of any government to provide any housing on any terms,<sup>75</sup> let alone any constitutional right to housing.<sup>76</sup> Rather, the *Martin* court's holding is merely that

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<sup>71</sup> See *id.* at 1048.

<sup>72</sup> See *id.*

<sup>73</sup> See *id.* To the contrary, the recent Fourth Circuit case, *Manning v. Caldwell*, over a dissent, held that “although states may not criminalize status, they may criminalize actual behavior even when the individual alleges that addiction created a strong urge to engage in a particular act.” 900 F.3d 139, 146–47 (4th Cir. 2018), *rev'd and remanded en banc*, 930 F.3d 264 (4th Cir. 2019). Perhaps more strongly, *Manning* also allows for the criminalizing of conduct that is proximately caused by non-volitional or involuntary acts. See *id.* at 147. Neither here nor in other cases do we find a persuasive account of the relationship among addiction, strong or realistically irresistible desires, non-volitional acts, and criminal responsibility, or even of the relationships between policy judgments of proximate cause and, say, deterministic cause in fact. A sharply divided en banc Fourth Circuit reversed the panel decision on grounds partly of vagueness, but as well on Eighth Amendment grounds. The en banc majority construed the plaintiffs' complaint to allege “targeted criminalization . . . of conduct that is an involuntary manifestation of their illness, and that is otherwise legal for the general population,” *Manning*, 930 F.3d at 284, and thus that depends upon no prior criminal conviction and involves no volitional element, where the conduct in question is generally lawful for the drinking age population. See *id.* The theory therein seems to be that punishing entirely involuntary conduct can be permissible where that conduct is deemed sufficiently dangerous as to warrant its general, across the board criminalization for some broader population. See *id.*

<sup>74</sup> See *Martin*, 902 F.3d at 1048. The *Martin* court therein refers to ideas such as inevitability, unavailability, and involuntariness, but with no meaningful clarification.

<sup>75</sup> See *id.*

<sup>76</sup> See *id.* The classic cite to a presumed denial of a federal constitutional right to housing is *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (finding no “constitutional guarantee of access to dwellings of a particular quality”). Access to housing and access to housing of some unspecified quality may, however, pose distinct issues.

otherwise nonculpable<sup>77</sup> homelessness cannot be punished consistent with the prohibition against cruel and unusual punishment.<sup>78</sup> And for the court's purposes, such homelessness includes its presumably inevitable incidents, including resting on public property.<sup>79</sup>

The *Martin* court pursued questions of inevitability, unavailability, and involuntariness only to the limited, and quite dubious, extent of insisting upon an inquiry into the relation between the current number of homeless persons in the relevant jurisdiction and the current number of available beds in that jurisdiction's public and private homeless shelters.<sup>80</sup> Setting aside various associated problems, the *Martin* court concluded that the Eighth Amendment prohibition of criminal convictions in this context could be involved, oddly, only when the number of local homeless persons begins to exceed the number of local simultaneously available shelter beds.<sup>81</sup>

Under this rule, the Eighth Amendment's applicability to homelessness-related offenses is thus a matter of comparing two aggregated totals. Very roughly, the crucial comparison is between the current total objective need for shelter and the current total supply of shelter within the particular jurisdiction.<sup>82</sup> If the former, as an overall total, exceeds the latter, then the possibility of an Eighth Amendment Cruel and Unusual Punishment Clause claim may be available.

This rule raises difficult and important conceptual, measurement, and policy issues.<sup>83</sup> But perhaps the most critical problem is the absence of any explanation as to why an

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<sup>77</sup> See unelaborated terms referred to at *supra* note 74.

<sup>78</sup> See *Martin*, 902 F.3d at 1048.

<sup>79</sup> See *id.*

<sup>80</sup> See *id.* *Martin* relied directly at this point on the vacated opinion of *Jones*, 444 F.3d 1118, 1137–38 (9th Cir. 2006).

<sup>81</sup> See *Martin*, 902 F.3d at 1048, again relying on *Jones*, 444 F.3d at 1138.

<sup>82</sup> See sources cited *supra* note 81.

<sup>83</sup> For example, it is unclear why the nearest and most realistically available shelter facilities cannot be counted, despite their convenience, if they happen to be in a convenient neighboring local jurisdiction, rather than in the jurisdiction making the homelessness arrest. The temptation for any jurisdiction to free ride at the expense of neighboring jurisdictions, perhaps along with some desire to avoid siting a homelessness facility in its own "backyard," may well be widespread. Query also whether a shelter at which the arrestee has previously been assaulted or robbed should count toward the number of total available beds. More broadly, consider issues of personal mobility and public transportation access to one or more of the shelters being counted toward the total, along with how widely known the existence of some facilities may be.

individual person's rights, defenses, moral responsibility, and ultimate culpability should be crucially determined by any sort of relative shifting among the overall aggregate totals.

On this *Martin-Jones* approach, no individual homeless person can invoke the Cruel and Unusual Punishment Clause if there are, however doubtless imperfectly calculated, a thousand local homeless persons at the same time that there are a thousand locally available shelter beds. But if one such shelter bed is then taken out of service, reducing the number of currently available such beds to 999, then, under the *Martin-Jones* rule, the Cruel and Unusual Punishment Clause may apparently be invoked not only by the thousandth arrestee, but, crucially, by the first and only such arrestee.<sup>84</sup>

To explore this odd implication of the *Martin-Jones* test, suppose that on some given day, only one person was arrested and charged with a homelessness-related offense. Suppose further that at the time of that person's arrest, the most accessible local shelter was only half full, or was even entirely unoccupied. Thus, the single arrested person could, in some sense, have realistically claimed any one of numerous available shelter beds for that evening, as could any small number of other potential arrestees have done.

On the logic of the *Martin* and *Jones* cases, though, even that sole arrestee of the day would have been able to invoke the Cruel and Unusual Punishment Clause based on the odd assumption that if, contrary to actual fact, all of the local homeless population had sought local shelter that day, all but one such person could have been accommodated.<sup>85</sup> Any one merely hypothetically unaccommodated person, whether the single actual arrestee or not, would trigger Cruel and Unusual Punishment Clause protection for that single arrestee. So the first and only arrestee is, in effect, allowed under the *Martin-Jones* rule to stand in the shoes of a hypothetical thousandth arrestee of the day, perhaps the only arrestee out of a total of a thousand who could not have found shelter space that day, given the assumed 999 available shelter beds that day.

The *Martin-Jones* rule, otherwise put, evidently assumes that even the first and only homeless arrestee of the day was, constructively, arrested only after the remainder of the homeless

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<sup>84</sup> See *supra* text accompanying notes 81–82.

<sup>85</sup> Again, assume here that there are 1,000 homeless persons and 999 realistically available local shelter beds.

population had somehow reserved all the otherwise available shelter beds. Cruel and Unusual Punishment Clause protection is available based on even a slight excess of the number of homeless persons, *whether they seek shelter space that day or not*, over the total shelter space.<sup>86</sup> The *Martin* and *Jones* cases do not attempt to explain why the Cruel and Unusual Punishment Clause should not, instead, more realistically be available only to homeless arrestees who had no realistic choice, or at best only a limited chance, of finding a local shelter bed.

Suppose, by loose analogy, that we must decide whether to hold some single student responsible for not boarding the daily school bus. Assume that all the buses the student might have caught were only partly full at all relevant times. Would we nonetheless excuse that nonboarding student if, hypothetically, some other student would have been unable to board any bus if, contrary to fact, the students enrolled in the school had fully occupied all the available bus seats?

Thus, the *Martin-Jones* rule differs dramatically from a more intuitive rule that applies the Cruel and Unusual Punishment Clause only if the claimant can show, with whatever degree of probability, that no local shelter bed would have been available for that particular claimant at the time of the arrest.<sup>87</sup> Neither *Martin* nor *Jones* attempts to justify its own approach by comparison with this or with any other more plausible alternative approaches.

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<sup>86</sup> See *supra* text accompanying notes 81–82.

<sup>87</sup> The *Martin* court, 902 F.3d 1031, 1048, cites a Florida federal district court opinion in support of its holding. But the very language quoted by *Martin* explicitly supports a rule that is in conflict with that adopted in *Martin* and *Jones*. The crucial *Pottinger* language is that “[a]s long as the homeless plaintiffs do not have a single place where they can lawfully be, the challenged ordinances . . . punish them for something for which they may not be convicted under the [E]ighth [A]mendment . . .” See *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992). The *Pottinger* language thus refers to the availability of shelter for one or more specific homeless arrestees, rather than to an excess of homeless persons overall compared to the total of currently available shelter places, even where the arrestees could readily have taken shelter. As well, a recent paraphrase of the *Martin-Jones* rule by the Ninth Circuit itself is actually closer to the *Pottinger* formulation above than to the language of the courts in *Martin* and *Jones*. See *O’Callaghan v. City of Portland*, 736 Fed. App’x 704, 705 (9th Cir. 2018) (“We recently held that a city ordinance prohibiting individuals from sleeping outside on public property may violate the Eighth Amendment when enforced against homeless individuals who have no access to alternative shelter.”).

Broadly, then, none of the homelessness-related cases<sup>88</sup> sheds much light on basic individual, collective, and institutional rights and responsibilities in the context of homelessness. The cases seek to distinguish between homelessness-related conditions or acts, whether they are thought of as voluntary or not, that can legitimately be criminalized, and those conditions or acts that cannot be legitimately criminalized.<sup>89</sup> This ongoing project has, however, been plainly unsuccessful.

Crucially, the case law disturbingly recognizes that “[e]very criminal act can be alleged to be the result of some compulsion. If human behavior is viewed as something over which human beings lack control, and for which they are not responsible, the implications are boundless.”<sup>90</sup> The case law on homelessness-related offenses, whether drawing upon other areas of case law or on legal scholarship, or neither, has not even begun to address, let alone resolve this and related basic problems.

The evident failure of the homelessness case law to meaningfully address its own basic logic, implications, and justifiability is of obvious importance. We might imagine, though, that while the criminalized homelessness case law does not adequately justify itself, some justification for this case law might be imported from outside the case law. The natural place to look for meaningful justifications and critique of the criminalized homelessness case law would be in the leading philosophical discussions of responsibility, culpability, blameworthiness, punishment and punishability, compulsion, determinism and randomness, freedom of the will in various senses, and of voluntary and involuntary acts.

Our best contemporary philosophers have indeed produced substantial literature discussing these matters. As it turns out, though, the range and variety of the fundamental and persisting

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<sup>88</sup> The *Manning* case contributes by at least recognizing the problem in this context of slippery slope arguments. See *Manning v. Caldwell*, 900 F.3d 139, 148 (4th Cir. 2018), *rev'd and remanded en banc*, 930 F.3d 264 (4th Cir. 2019). On some intricacies of slippery slope arguments, see generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 361 (1985); Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026, 1030 (2003).

<sup>89</sup> See sources cited *supra* notes 81–82.

<sup>90</sup> *Manning*, 900 F.3d at 148; see also, e.g., Michael J. Zimmerman, *Varieties of Moral Responsibility*, in THE NATURE OF MORAL RESP.: NEW ESSAYS 45 (Randolph Clarke, Michael McKenna & Angela M. Smith eds., 2018) (2015) (“There is a burgeoning literature on the nature of moral responsibility.”).

disagreements among leading scholars undermine any realistic possibility of clearly justifying one legal approach to homelessness-related criminality over another. The most sophisticated approaches to moral and legal responsibility, in general and as applied to homelessness-related offenses, are fundamentally conflicting and mutually irreconcilable.<sup>91</sup>

The basic disputes over responsibility, freedom, culpability, and the like are expressed through a variety of technical and semi-technical concepts. The fundamental and apparently irreconcilable contradictions are, however, evident to all.<sup>92</sup> Most basically, the leading contemporary philosophers are deadlocked over the actual descriptive role in the world, if any, of various kinds of determinism; of luck, chance, and randomness; and of various forms and strengths of freedom of the will.<sup>93</sup> The leading philosophers are then, independently, also hopelessly deadlocked on the normative or prescriptive implications of any possible roles of determinism, luck, or randomness for questions of

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<sup>91</sup> See Zimmerman, *supra* note 90, at 45 (“Many of these claims appear to conflict with one another.”) (citing several important general instances). For an introduction to the much more complex problem of the long term effects of belief in free will on the presumed morality of one’s character, see generally Damien L. Crone & Neil L. Levy, *Are Free Will Believers Nicer People (Four Studies Suggest Not)*, 1 SOC. PSYCH. & PERSONALITY SCI. 1 (2018); Stephen Cave, *There’s No Such Thing as Free Will But We’re Better Off Believing in It Anyway*, THE ATLANTIC (June 2016), [www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing](http://www.theatlantic.com/magazine/archive/2016/06/theres-no-such-thing).

<sup>92</sup> See, for a mere hint of the unresolved contradictions, ROBERT LOCKIE, FREE WILL AND EPISTEMOLOGY: A DEFENCE OF THE TRANSCENDENTAL ARGUMENT FOR FREEDOM 4 (2018) (“[W]ere determinism true, the determinist would lack epistemic justification for holding this view or maintaining this claim.”); *id.* at 180–81; DERK PEREBOOM, FREE WILL, AGENCY, AND MEANING IN LIFE 199 (2014) (“If we did give up the assumption of the sort of free will at issue [sufficient for moral responsibility], then, perhaps surprisingly, we might be better off as a result.”); Susan Blackmore, *Living Without Free Will*, in EXPLORING THE ILLUSION OF FREE WILL AND MORAL RESP. 161, 162 (Gregg D. Caruso ed., 2013) (“[W]e humans are clever decision-making machines that are prone to a number of powerful illusions, in particular the illusion of a persisting inner self with consciousness and free will . . .”) (internal citation omitted); Neil Levy, *Be a Skeptic, Not a Metaskeptic*, in EXPLORING THE ILLUSION OF FREE WILL AND MORAL RESP. 87, 87 (Gregg D. Caruso ed., 2013) (arguing that due to either “present luck” or “constitutive luck,” “agents are never morally responsible for their actions”); Galen Strawson, *The Impossibility of Ultimate Responsibility?*, in EXPLORING THE ILLUSION OF FREE WILL AND MORAL RESP. 41, 51 (Gregg D. Caruso ed., 2013) (“[H]owever self-consciously aware we are as we deliberate and reason, every act and operation of our mind happens as it does as a result of features for which we are ultimately in no way responsible.”).

<sup>93</sup> See the authorities cited *supra* note 92. Query in particular whether genuine rationality-driven choice-making can actually take place under determinism or in the absence of libertarian free will.

criminal responsibility, culpability, and punishment.<sup>94</sup> And then finally, it should hardly surprise us that the philosophers are also hopelessly deadlocked over even the basic implications of their views for our general legal institutions of criminal adjudication and the disposition of offenders.<sup>95</sup>

At the level of practice, a limited number of the philosophers have indeed converged on at least some broad outlines of what we might call a disease quarantine analogy;<sup>96</sup> perhaps supplemented by some forms of prevention, rehabilitation, cure, counseling, redistribution of resources, training, education, and broader social justice reform.<sup>97</sup> These latter quarantine-plus-social-justice theorists often assume some sort of collective right to self-protection, and protection of the basic health and safety interests of other persons, in justifying their analogy to compulsory quarantines of contagious disease carriers in the public health context.<sup>98</sup>

The intended progressivism, humaneness, and benevolence of these quarantine models of criminal justice institutions is clear. But unfortunately, equally capable philosophers have expressed serious doubts as to the coherence, as well as to the likely long-term benevolence in practice, of any version of a quarantine-based theory.<sup>99</sup> One obvious problem is that if crime

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<sup>94</sup> See authorities cited *supra* note 92.

<sup>95</sup> See authorities cited *supra* note 92.

<sup>96</sup> See, e.g., DERK PEREBOOM, *LIVING WITHOUT FREE WILL* 186 (2001) (referring to an “analogy with our rationale for quarantining carriers of dangerous diseases”); Gregg D. Caruso, *The Public Health-Quarantine Model*, OXFORD HANDBOOK OF MORAL RESP. (forthcoming), <https://ssrn.com/abstract=3068021> (November 14, 2017); Luis E. Chiesa, *Punishing Without Free Will*, 2011 UTAH L. REV. 1403, 1409. Perhaps the most extensive development of a quarantine analogy and related social reforms is by Professor Bruce Waller. See, e.g., BRUCE N. WALLER, *AGAINST MORAL RESP.* 293–95 (2011); BRUCE N. WALLER, *THE INJUSTICE OF PUNISHMENT* (2018).

<sup>97</sup> See the sources cited *supra* note 96.

<sup>98</sup> See, e.g., Gregg D. Caruso, *Free Will Skepticism and Its Implications: An Argument for Optimism*, FREE WILL SKEPTICISM IN L. AND SOC'Y 10 (forthcoming), <https://ssrn.com/abstract=2758311> (April 3, 2016) (“[T]he right to harm in self-defense and defense of others justifies incapacitating the criminally dangerous with the minimum harm required for adequate protection.”); see also Gregg D. Caruso, *Skepticism About Moral Responsibility*, STAN. ENCYCLOPEDIA OF PHIL. (Jan. 18, 2018), <https://plato.stanford.edu/entries/skepticism-moral-responsibility>.

<sup>99</sup> See, most fundamentally, the works of Professor Saul Smilansky, and in particular Saul Smilansky, Review of Bruce N. Waller, *The Injustice of Punishment*, Notre Dame Philosophical Reviews (Oct. 21, 2018), <https://ndpr.nd.edu/news/the-injustice-of-punishment> (“[C]an [moral responsibility] denialists resist the constant temptations for the efficient management of people . . .?”); Saul Smilansky, *Free Will and Respect for Persons*, 29 MIDWEST STUD. IN PHIL. 248, 259 (2005) (“Value and meaning are inherently connected to the idea of free and responsible agency.”);

at the level of the individual or group is sufficiently predictable, preventing future criminality in a cost-effective way may seem more sensible than unnecessarily allowing the crime and its harms to occur, even if this requires sustained pre-crime confinement, or even involuntary medical treatment of one sort or another.<sup>100</sup>

It thus seems reasonable to conclude that neither the homelessness-related case law, nor the most relevant and most sophisticated philosophical discussions, can provide a minimally convincing account of criminal responsibility in the context of homelessness and homelessness-related offenses. The typical current criminal penalty of confining the convicted homeless defendant to some sort of housing for a substantial period is, in our homelessness-related cases, ironic, if not paradoxical. Commonly, the homelessness-related offense stems precisely from the homeless person's unfulfilled wish for housing on a sustained basis. Incarceration can be a sort of degradingly odd parody-response to that understandable wish.

Thus, in a sense, the state responds to what it stigmatizes as criminally culpable conduct by itself providing the convicted defendant with a curious version of what the defendant presumably sought or felt deprived of. It is thus left unclear why officially providing some parody-like form of what the defendant culpably sought is actually an appropriate governmental response. Nor, certainly, is it clear why penologically housing a homeless person should depend upon whether we think of the homeless person's offense as a matter of their status or of their conduct.<sup>101</sup>

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Saul Smilansky, *Hard Determinism and Punishment: A Practical Reductio*, 30 L. & PHIL. 353, 354 (2011) (arguing that in abandoning traditional punishment, hard determinists are instead logically committed to counterintuitive practices that Smilansky refers to as "funishment"); Saul Smilansky, *Pereboom On Punishment: Funishment, Innocence, Motivation, and Other Difficulties*, 11 CRIM. L. & PHIL. 591, 602 (2016); Saul Smilansky, *The Time to Punish*, 54 ANALYSIS 50, 50 (1994) (arguing against the logic of pre-punishment, or the disinclination to wait until an offense has actually been committed before isolating the eventual offender, as in some cases of a reformed system of preventive detention). For further discussion of the logic of pre-punishment in appropriate cases, see the articles collected in 68 ANALYSIS 250–63 (2008).

<sup>100</sup> See the authorities cited *supra* note 99; Michael Louis Corrado, *Punishment and the Burden of Proof*, [www.ssrn.com/abstract=2997654](http://www.ssrn.com/abstract=2997654) (2017); John Lemos, *Moral Concern About Responsibility Denial and the Quarantine of Violent Criminals*, 35 L. & PHIL. 461 (2016).

<sup>101</sup> See *supra* notes 12–65 and accompanying text.

In the end, the efforts of judges and scholars of all sorts to provide any persuasive approach to the criminalization of homelessness-related conditions and activities have been perennially unsuccessful. It is thus difficult, if not impossible, to justify any stance toward this set of criminal cases, where the ironies, paradoxes, basic conflicts, and dead ends regularly appear more directly, more clearly, more starkly, and more inescapably than in typical non-homelessness-related cases.

If the deep and apparently intractable basic problems of criminal culpability in homelessness-related cases cannot be persuasively resolved, they can, on our approach, at least be practically bypassed. Recognizing an enforceable federal constitutional right to housing, however formulated, would allow for such a practical bypass. After all, there can generally be no criminalization of that to which we have an enforceable constitutional right.

The case for a federal constitutional right to at least some minimal sort of housing requires, however, our recognizing that officially adopted government policies of various sorts, are among the substantial and important continuing causes of homelessness. Governments ironically continue to criminalize conditions and activities to which governments themselves systematically and pervasively causally contribute.

## II. PUBLIC POLICY AS ITSELF A CRUCIAL CAUSE OF HOMELESSNESS AND INEVITABLE HOMELESSNESS-RELATED OFFENSES

Even when treated as an administrative matter rather than a more serious criminal matter, the homelessness cases typically distort public discussion by distracting attention from the crucial roles of government, at all levels, in causally generating the status or conduct at issue in such cases. But even if the focus of attention remains initially on the homeless parties, rather than on official policy as causal, some minimal progress can be made by expanding the standard criminal case analysis. Whether successfully or unsuccessfully, a homeless defendant might reasonably seek to raise a defense of necessity,<sup>102</sup> thereby at least

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<sup>102</sup> See R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR? 105, 106 (1996). See also generally Michele Cotton, *The Necessity Defense and the Moral Limits of Law*, 18 NEW CRIM. L. REV. 35 (2015); Dionne Cordell-Whitney, *Jury Will Hear Pipeline Protester's Necessity Defense*, COURTHOUSE NEWS SERV. (July 18, 2018), [www.courthousenews.com/jury-will-hear-pipeline](http://www.courthousenews.com/jury-will-hear-pipeline) (discussing a Minnesota

beginning to point to the homeless defendant's broader circumstances. Raising, however unsuccessfully, a defense of entrapment<sup>103</sup> might also provoke reflection on governmental roles in causally generating homelessness and the inevitably resulting homelessness-related offenses. And there is even a sense in which we might think of governments as complicitous, if not also a technical accomplice or an accessory,<sup>104</sup> to a homelessness-related crime.

But we can hardly understand homelessness, and any resulting related offenses, until we understand the typically unintended causal contributions, direct and indirect, of a number of official policies adopted at one governmental level or another. We need not here attempt to answer the broad and complex<sup>105</sup> question of precisely what conditions cause homelessness.<sup>106</sup> Our

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court ruling allowing a climate-related necessity defense regarding oil pipeline activism); Antonia K. Fassinelli, Note, In re Eichorn: *The Long-Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U.L. REV. 323, 324 (2000).

<sup>103</sup> For a brief mainstream account of the entrapment defense and its limitations, see *Entrapment-Elements*, U.S. DEP'T JUSTICE (last visited Aug. 7, 2019), [www.justice.gov/jm/criminal-resource-manual-645-entrapment-elements](http://www.justice.gov/jm/criminal-resource-manual-645-entrapment-elements).

<sup>104</sup> For a thoughtful recent discussion, see generally Sherif Girgis, Note, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 126 YALE L.J. 460 (2013).

<sup>105</sup> For a brief but useful treatment of the crucial problems posed by "causal density," see Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY J. (Summer 2010), <https://www.city-journal.org/html/what-social-science-does—and-doesn't-know-13297.html>.

<sup>106</sup> Accounts of the most important causes of homelessness, with or without implicating government policies, tend toward consensus, along with a sense that these causes may have interactive and compounding effects. The National Law Center on Homelessness and Poverty cites "insufficient income and lack of affordable housing," domestic violence, unemployment, mental illness, and substance abuse. See *Homelessness in America: Overview of Data and Causes*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY (January 2015), [https://nlchp.org/wp-content/uploads/2018/10/Homeless\\_Stats\\_Fact\\_Sheet.pdf](https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf); see also *Exploring the Crisis of Unsheltered Homelessness*, NAT'L ALLIANCE TO END HOMELESSNESS (June 20, 2018), <https://endhomelessness.org/exploring-crisis-unsheltered-homelessness>; Barrett A. Lee et al., *The New Homelessness Revisited*, 36 ANN. REV. SOC. 501, 509–10 (2010) (referring to, for example, limited supplies of affordable housing, abuse and neglect as a child, poverty, family conflict, alcohol and drug abuse, mental illness, domestic violence, and discharge from some form of institutionalized residence setting); *Homelessness Response: The Roots of the Crisis*, CITY OF SEATTLE (last visited Aug. 7, 2019), [www.seattle.gov/homelessness/the-roots-of-the-crisis](http://www.seattle.gov/homelessness/the-roots-of-the-crisis) (specifying, inter alia, health issues, unemployment, domestic violence, mental illness, addiction, poverty, lack of affordable housing, and racial inequities). For a demographic breakdown of homelessness, see *The 2017 Annual Homeless Assessment Report (AHAR) to Congress*, U.S. DEP'T HOUSING & URB. DEV. (December 2017), <https://files.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf>, at 8–9.

focus is instead on governmental and legal causal contributions to the phenomena of homelessness and resulting crimes.

Ironically, government policy can increase homelessness and homelessness-related crime not only unintentionally, or indifferently, but precisely in attempting to address problems of homelessness. The fancy term for this unfortunate causal phenomenon would be “iatrogenic etiology.”<sup>107</sup> This term generally refers to causing some undesirable phenomenon, which is not a goal of the affected person, in attempting to treat some other related or unrelated malady. While iatrogenic causation is most commonly discussed in medical contexts,<sup>108</sup> the basic idea has been extended broadly<sup>109</sup> to non-medical contexts.<sup>110</sup> Policy-based iatrogenic causation can overlap with the broader

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<sup>107</sup> With ‘etiology’ referring, for our purposes, to the causation of a condition. See the discussion in *Iatrogenesis*, WIKIPEDIA (last visited Aug. 7, 2019), <https://en.wikipedia.org/wiki/Iatrogenesis>.

<sup>108</sup> See, e.g., N.R. Krishnan & A.S. Kasthuri, *Iatrogenic Disorders*, 61 MED. J. ARMED FORCES INDIA 2, 2 (2005) (“Iatrogenic disease is the result of diagnostic and therapeutic procedures undertaken on a patient.”); Trisha Torrey, *Iatrogenic Events During Medical Treatments*, VERYWELL HEALTH (Jan. 21, 2019), <https://www.verywellhealth.com/what-is-iatrogenic-2615180>. One might think of transmitting an infection to a hospital patient by means of an unsanitary item of medical equipment used in his or her treatment.

<sup>109</sup> For a broadening of the scope of discussion, though still with medical reference, see *Iatrogenesis*, ENCYCLOPEDIA (last visited Aug. 7, 2019), <https://www.encyclopedia.com/social-sciences/dictionaries-thesauruses-pictures-and-press-releases/iatrogenesis> (discussing the relatively narrow scope of clinical iatrogenesis, as well as the progressively broader concepts of “social iatrogenesis” and “cultural iatrogenesis”).

<sup>110</sup> See the especially interesting discussion by John Horgan, *The Curse of Iatrogenesis: When “Cures” Make Us Sicker*, SCI. AM. (July 18, 2011), <https://blogs.scientificamerican.com/cross-check/the-curse-of-iatrogenesis-when-cures-make-us-sicker/>, referring in particular to the injuries caused, rather than avoided or minimized, by the use of hard plastic football helmets.

phenomenon of perverse unintended consequences<sup>111</sup> of government policies.<sup>112</sup>

Perhaps the most popular example of a housing policy with unintended, if not also unforeseen, unattractive consequences for homelessness is that of legal controls on rental prices of moderate to lower income residential apartment units.<sup>113</sup> While typical rent control regulations may be intended to help renters in general, the main positive effects actually may be concentrated on those lucky enough to be the currently existing tenants,<sup>114</sup> and

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<sup>111</sup> For classic discussions, see Frederic Bastiat, *That Which is Seen, and That Which is Not Seen*, BASTIAT (originally published July 1850), <http://bastiat.org/en/twisatwins.html>; Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 AM. SOC. REV. 894, 894 (1936). For a brief recent overview, see Rob Norton, *Unintended Consequences*, LIBR. ECON. & LIBERTY (last visited Aug. 7, 2019), [www.econlib.org/library/Enc/UnintendedConsequences.html](http://www.econlib.org/library/Enc/UnintendedConsequences.html). For a number of possible contemporary instances, see Mark J. Perry, *Ten Examples of the Law of Unintended Consequences*, AEI: CARPE DIEM (Nov. 19, 2013), <http://www.aei.org/publication/ten-examples-of-the-law-of-unintended-consequences/>. For a contribution directly addressing housing policy, prices, and homelessness, see Adam B. Summers, *Rent Control, Prop. 10, and the Law of Unintended Consequences*, INDEP. INST. (Oct. 29, 2018), [www.independent.org/news/article.asp?id=10582](http://www.independent.org/news/article.asp?id=10582).

<sup>112</sup> A policy may not be strictly intended to increase homelessness, where the increased homelessness is nevertheless clearly foreseen, and perhaps regretted, by some proponents of the policy in question. A policy might have consequences that strongly appeal to its proponents, such as to outweigh, in their minds, predictable indirect or long-term effects on the homeless population. Consider the policies addressed *infra* notes 113–159 and accompanying text.

<sup>113</sup> For discussion, see HENRY HAZLITT, ECON. IN ONE LESSON ch. 18 (1988), available at <http://steshaw.org/economics-in-one-lesson/chap18p1.html>; Walter Block, *Rent Control*, LIBR. ECON. & LIBERTY (last visited Aug. 7, 2019), <http://www.econlib.org/library/Enc/RentControl.html>; Rebecca Diamond, *What Does Economic Evidence Tell Us About the Effects of Rent Control?*, BROOKINGS (Oct. 18, 2018), <https://www.brookings.edu/research/what-does-economic-evidence-tell-us-about-the-effects-of-rent-control/>; Rebecca Diamond et al., *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence From San Francisco*, CATO INST. (Apr. 18, 2018), <https://www.cato.org/publications/research-briefs-economic-policy/effects-rent-control-expansion-tenants-landlords>; Mark J. Perry, *Due to Rent Control, S.F. Has 31,000 Vacant Housing Units As Frustrated Landlords Give Up*, CARPE DIEM (May 7, 2011), <http://mjerry.blogspot.com/2011/05/because-of-rent-control-sf-has-31000.html>. Some of the basic economic effects of such rent control programs were recently discussed in the context of the campaigns for and against California's statewide ballot Proposition 10. See Summers, *supra* note 111; Melody Gutierrez, *Prop. 10: California Rent Control Expansion Defeated*, S.F. CHRON. (Nov. 6, 2018), <https://www.sfchronicle.com/politics/article/Prop-10-California-rent-control-expansion-13369284.php?psid=cqPwe>; see also Christian Britschgi, *Oregon Likely to Become the First in the Nation to Adopt Statewide Rent Control*, REASON (Jan. 18, 2019), <https://reason.com/2019/01/18/oregon-likely-to-become-the-first-in-the>.

<sup>114</sup> See Diamond, *supra* note 113, at 1.

even then only in the short run.<sup>115</sup> Thus it has been argued that “[w]hile rent control appears to help current tenants in the short run, in the long run it decreases affordability, fuels gentrification, and creates negative spillovers on the surrounding neighborhood.”<sup>116</sup>

Once we see rent control in a dynamic, rather than a merely static or fixed, context, we can see how persons might rationally respond to the incentives established by typical rent control regimes. Landlords might commonly disinvest over time in rent controlled properties, in favor of other sorts of real property not subject to price control.<sup>117</sup> Landlords may recognize little incentive to invest in moderate income apartment unit repairs, maintenance, and the general livability of rent controlled housing units.<sup>118</sup> And certainly, landlords may have little incentive to build new, additional moderate or low-cost housing if it will, or even later may, be subject to below-market rent controls.<sup>119</sup>

Interestingly, though, it is difficult to empirically prove any clear and direct relationship<sup>120</sup> between typical rent control regimes and the severity of the local homelessness problem.<sup>121</sup> Of course, rigorous and decisive demonstrations in the social sciences tend in general to be difficult to arrive at.<sup>122</sup> Other factors may obscure or confound any relationship between residential rent control and homelessness.<sup>123</sup> Still, the absence of a clear correlation in this respect may surprise those who think

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<sup>115</sup> *See id.*

<sup>116</sup> *Id.*

<sup>117</sup> *See* Diamond et al., *supra* note 113.

<sup>118</sup> *See* HAZLITT, *supra* note 113. There may thus be, over time, “no incentive . . . to keep existing low-income housing in good repair.” *Id.* The effects of chronic housing disrepair on homelessness, as incentivized by the rent control regulations at issue in a given case, would accrue only over time.

<sup>119</sup> *See id.*

<sup>120</sup> Note the inherent complications addressed in Manzi, *supra* note 105.

<sup>121</sup> *See* Lisa Sturtevant, *The Impacts of Rent Control: A Research Review and Synthesis*, NMHC RES. FOUND. (May 2018), <https://www.nmhc.org/globalassets/knowledge-library/rent-control-literature-review-final2.pdf> 18 (“There is no consistent relationship observed between rent control and the prevalence of homelessness.”); *see also* Dirk W. Early & Edgar O. Olsen, *Rent Control and Homelessness*, 28 REGIONAL SCI. & URB. ECON. 797 (1998) (“We cannot reject the hypothesis that rent control has no net effect on homelessness.”); Paul W. Grimes & George A. Chressanthi, *Assessing the Effect of Rent Control on Homelessness*, 41 J. URB. ECON. 23 (1997) (“[R]ent control is a positive, although relatively small, determinant of a city’s shelter and street populations.”).

<sup>122</sup> *See* Manzi, *supra* note 105.

<sup>123</sup> *See id.*

of, say, San Francisco and Los Angeles for their residential rent control programs as well as for the scope of their homelessness problems.<sup>124</sup>

On the other hand, we know that rent control may well create a class of “winners,” at least in the short run, in the form of existing tenants who cannot now be subjected to substantial rate increases.<sup>125</sup> Some of those protected tenants might otherwise have become homeless. Their housing units may have deteriorated in quality over time,<sup>126</sup> but still remained habitable. This group of otherwise homeless tenants may at least partially offset the persons more adversely affected, over the long term, by typical rent control regimes.

Two other considerations may help to account for the lack of a clear and strong relationship between rent control policies and homelessness. First is a recognition that government policies affecting homelessness rates create incentives to which all parties may strategically respond over time. Persons who are or may become homeless can often respond to changes in incentives, costs, and available alternatives.<sup>127</sup> Any adverse effects of rent control on homelessness rates will thus be mitigated, if not entirely negated, by any number of adaptive responses. These adaptive responses could include moving into otherwise unattractive family living arrangements, or leaving the geographical jurisdiction entirely.<sup>128</sup> Both of these responses may reduce local homelessness rates.

Second, it would hardly be surprising if a rent controlling jurisdiction also adopted other regulations having the counteracting effect of reducing homelessness rates below where they would otherwise be.<sup>129</sup> And there is certainly no requirement that the relevant government recognize that the offsetting program was made more necessary because of that government’s own rent control program. The response to any adverse effect of any governmental regulation, after all, may be

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<sup>124</sup> Consider the predominance of rent controlled cities in the discussion at *supra* notes 113 and 159 and accompanying text.

<sup>125</sup> For discussion, see the authorities cited *supra* note 113.

<sup>126</sup> See authorities cited *supra* note 113.

<sup>127</sup> See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* 51 (1970).

<sup>128</sup> Leaving the rent controlling jurisdiction may require moving only a minimal distance geographically.

<sup>129</sup> Among the latter responses will be homeless persons who move to a jurisdiction without rent control, but who remain homeless.

the adoption of a separate, compensatory regulation, or any number thereof.<sup>130</sup> The offsetting regulation may or may not be specifically targeted toward reducing local homelessness rates.<sup>131</sup>

More broadly, though, homelessness rates are affected, often adversely, by a number of official government policies ranging far beyond direct residential rent control. Some policies may be intended to reduce homelessness and have either positive or unexpectedly negative actual effects in that regard.<sup>132</sup> Other policies adversely affect local homelessness rates, perhaps foreseeably so, but without the government's explicitly seeking or desiring such effects.<sup>133</sup>

Construction, land use, growth and developmental, zoning, public health, and housing regulations in general may have adverse effects on the availability of low cost housing that might reduce local homelessness rates.<sup>134</sup> In large measure, opposition to the most affordable housing policy options reflects ordinary democratic processes, administrative agency processes, and judicial trials and appeals, all as reflected in governmental policies reducing the otherwise available supply of the least expensive housing units.<sup>135</sup> Governments thus again cause, and bear responsibility for, homelessness and its incidence.

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<sup>130</sup> See, e.g., Barak Orbach, *What Is Government Failure?*, 30 YALE J. REG. ONLINE 44 (2013), <http://yalejreg.com/what-is-government-failure>.

<sup>131</sup> See Sturtevant, *supra* note 121, at 18 (noting that rent control programs have broad direct effects far beyond homeless persons, whereas programs intended to reduce homelessness can be more narrowly targeted).

<sup>132</sup> See Alison McIntyre, *Doctrine of Double Effect*, STAN. ENCYCLOPEDIA PHIL. (Spring 2019), <https://plato.stanford.edu/entries/double-effect>.

<sup>133</sup> As pervades the distinction between specifically intended or hoped for consequences and consequences that were merely foreseen or reasonably foreseeable, and in some sense even considered mildly regrettable. *Id.*

<sup>134</sup> See, e.g., Michael Hendrix, *California Housing Revolution?*, CITY J., (Feb. 21, 2018), <https://www.city-journal.org/html/california-housing-revolution-15731.html> (“[T]he poor . . . are demanding shelter only to find its supply limited by stringent regulations.”); Aaron M. Renn, *Heating Up a Housing Crisis*, CITY J., (May 15, 2018), <http://www.city-journal.org/html/heating-housing-crisis-15905.html> (“Regulations that stifle building are a big part of the problem.”).

<sup>135</sup> For a very concise but broad ranging summary, see Matt Levin, *5 Reasons California's Housing Costs Are So High*, KQED, (May 4, 2018), <http://www.kqed.org/news/11666284/5-reasons-californias> (citing, among other considerations, multiple layers of review for housing projects, not-in-my-backyard (“NIMBY”) based objections at a local city council level, local growth controls, and multi-year delays even for environmentally friendly projects resulting from required environmental impact assessments).

In particular, local residents, homeowners, and landowners may have a substantial interest in preventing increased housing, and especially the lowest income-oriented housing, from reaching the market. Local residents may have a compelling incentive to utilize, or exploit, multiple avenues in delaying or discouraging such construction.<sup>136</sup> It is often assumed that a chronic scarcity of housing, particularly of housing accessible to low-level income persons, helps to maintain a major source of wealth for middle class residents in the form of the sustained or enhanced market value of their residences and neighborhoods.<sup>137</sup>

In contrast, homeless persons within or outside the jurisdiction may typically be far less capable than other local residents of voting in accordance with their interests, of lobbying or donating to campaigns, and even of testifying in multiple forums.<sup>138</sup> Low-income housing construction that might affect local homelessness rates can be opposed at the initial proposal and planning stages, and through administrative and judicial filings and appeals.<sup>139</sup> By one estimate, in some jurisdictions there may be as many as twenty distinct official avenues for such opposition and delay.<sup>140</sup> And the cost of pursuing an administrative or legal objection to a proposed project, and the costs to the potential developers, over a period of years,<sup>141</sup> may be

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<sup>136</sup> See, e.g., Kriston Capps, *Blame Zoning, Not Tech, for San Francisco's Housing Crisis*, CITYLAB, (Mar. 11, 2016), <https://www.citylab.com/equity/2016/03/are-wealthy-neighborhoods-to-blame-for-gentrification-of-poorer-ones/473349/> (“[R]esidents work tirelessly to prevent more housing from being built.”).

<sup>137</sup> See Paavo Monkkonen & Will Livesley-O’Neill, *Overcoming Opposition to New Housing*, UCLA LEWIS CTR. FOR REGIONAL POLY STUD., (2017), <http://www.lewis.ucla.edu/opposition-to-new-housing>; James Pethokoukis, *California Has a Housing Crisis and Can’t Figure Out How to Solve It*, RICOCHET, (Oct. 23, 2018), <https://ricochet.com/565600/california-has-a-housing-crisis> (“[E]xisting homeowners do not want more affordable homes: they want the value of their asset to cost more, not less.” quoting Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. (2018)).

<sup>138</sup> See Edward Glaeser & Joseph Gyourko, *The Economic Implications of Housing Supply*, 32 J. ECON. PERSPS. 3, 5 (2018).

<sup>139</sup> See Monkkonen & Livesley-O’Neill, *supra* note 137; Adam Brinklow, *San Francisco Delays Mission Housing Over Potentially Historic Laundromat*, CURBED, (Feb. 14, 2018), <https://sf.curbed.com/2018/2/14/17012606/laundromat>.

<sup>140</sup> See Monkkonen, *supra* note 137.

<sup>141</sup> See Glaeser & Gyourko, *supra* note 138, at 7; see also Chang-Tai Hsieh & Enrico Moretti, *How Local Housing Regulations Smother the U.S. Economy*, N.Y. TIMES (Sept. 6, 2017), <http://www.nytimes.com/2017/09/06/opinion/housing-regulations-us-economy.html> (arguing that the administrative and judicial processes can operate so as to give any interested party what amounts to a protracted veto over any proposed housing project, regardless of the project’s potential effect on homelessness rates).

systematically lower than the costs of seeking to complete a project that may well not turn out to be profitable even if completed in a timely fashion.<sup>142</sup> This again amounts to a set of government practices that are predictably skewed toward increasing homelessness.

This is not to suggest that opponents of projects that might reduce homelessness rely on mere economic self-interest arguments when seeking to influence the political, administrative, legal, and judicial response to such projects.<sup>143</sup> Opposition can instead focus on concerns as to infrastructure, strain on utilities, traffic in general, environmental effects, historic cultural preservation, building safety,<sup>144</sup> increased pedestrian crowding and congestion perhaps even along with anticipated increases in petty crimes,<sup>145</sup> and even to the fair, free, relaxed use by all persons of public streets and other common spaces.<sup>146</sup>

Whatever the appeal of any of these arguments and concerns, it is clear that rates of homelessness depend in meaningful part on the often predictably skewed processes and outcomes of official government law and policymaking. The branch, level, and geographic scope of such governmental activities may vary from neighborhood planning boards all the way up to broadly applicable federal policies.<sup>147</sup> Inescapably, though, government action, in all jurisdictions and at all levels, often causes homelessness, whether intentionally or not. And with causally important government policymaking comes,

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<sup>142</sup> See generally authorities cited *supra* notes 137–141.

<sup>143</sup> See, e.g., *First Lutheran Church v. City of St. Paul*, 2018 WL 3762560 at \*2 (D. Minn. Aug. 8, 2018); Ginia Bellaphante, *Fighting Back Against the War on Homeless Shelters*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/nyregion/fighting-back-against-the-war-on-homeless-shelters.html>; Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 373 (2000).

<sup>144</sup> See Bellaphante, *supra* note 143.

<sup>145</sup> See *First Lutheran Church*, 2018 WL 3762560 at \*2.

<sup>146</sup> Professor Waldron reports this argument in the context of homeless persons without meaningful shelter. See Waldron, *supra* note 143, at 373. Ironically, though, similar “livability” concerns could be raised with respect to any government policy that geographically concentrates previously homeless persons in any type of meaningful housing.

<sup>147</sup> Such governmental policies thus can involve any level of any government, from local planning commissions and zoning boards to federal housing subsidy policy choices. See, e.g., Vanessa Brown Calder, *The Human Cost of Zoning Regulation*, CATO INST., (Nov. 2, 2017), [www.cato.org/blog/human-cost-zoning-regulation](http://www.cato.org/blog/human-cost-zoning-regulation).

inescapably, government responsibility.<sup>148</sup> This government causal responsibility encompasses what is referred to as the “iatrogenic etiology”<sup>149</sup> of homelessness, through government action, or a set of government policies, at all levels.

Governments also attempt, certainly, to compensate for their own homelessness-inducing policies with occasional efforts to mitigate the policies’ effects and to address non-governmental causes of homelessness. Some of these attempts may be only partially effective, largely ineffective, or even counterproductive.

In particular, governments have attempted to reduce homelessness, or the adverse effects thereof, by means such as providing housing subsidy vouchers,<sup>150</sup> public housing and tax credits,<sup>151</sup> specially targeted taxes,<sup>152</sup> and by emphasizing the provision of housing itself prior to addressing related issues of health, disability, mental illness, or addiction.<sup>153</sup> Recently, for example, the City of San Jose has experimented with paying twenty-five homeless persons \$15 dollars per hour for four to five hours a day to pick up street litter.<sup>154</sup> Technology-intensive

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<sup>148</sup> For a general argument from sufficient state responsibility to the presence of sufficient state action for various purposes, see R. George Wright, *State Action and State Responsibility*, 23 SUFFOLK U.L. REV. 685 (1989). Herein, we make a loosely similar argument, while at the same time emphasizing that the state’s activities affecting homelessness clearly establish the state’s moral, and ultimately constitutional, responsibility to meaningfully address homelessness as a societal condition.

<sup>149</sup> See *supra* note 107 and accompanying text.

<sup>150</sup> See, e.g., Conor Dougherty, *Why Rent Control Is a Lightning Rod*, N.Y. TIMES (Oct. 12, 2018), <https://www.nytimes.com/2018/10/12/business/economy/rent-control-explained.html>.

<sup>151</sup> See *id.*

<sup>152</sup> See, e.g., *San Francisco, California, Proposition C, Gross Receipts Tax for Homelessness Services*, BALLOTPEDIA, (Nov. 2018), [https://ballotpedia.org/San\\_Francisco,\\_California,\\_Proposition\\_C,\\_Gross\\_Receipts\\_Tax\\_for\\_Homelessness\\_Services\\_\(November\\_2018\)](https://ballotpedia.org/San_Francisco,_California,_Proposition_C,_Gross_Receipts_Tax_for_Homelessness_Services_(November_2018)); Kate Conger, *In Liberal San Francisco, Tech Leaders Brawl Over Tax Proposal to Aid Homeless*, N.Y. TIMES (Oct. 19, 2018), <https://www.nytimes.com/2018/10/19/technology/san-francisco-taxes-homeless.html>; Jonathan O’Connell & Gregory Scruggs, *After Amazon Opposition, Seattle Passes Compromise Tax to Fund Homeless Services*, WASH. POST (May 14, 2018), [https://www.washingtonpost.com/business/economy/after-amazon-opposition-seattle-passes-compromise-tax-to-fund-homeless-services/2018/05/14/2a7732a2-57b6-11e8-8836-a4a123c359ab\\_story.html?utm\\_term=.413d48425111](https://www.washingtonpost.com/business/economy/after-amazon-opposition-seattle-passes-compromise-tax-to-fund-homeless-services/2018/05/14/2a7732a2-57b6-11e8-8836-a4a123c359ab_story.html?utm_term=.413d48425111).

<sup>153</sup> See John M. Glionna, *Utah Is Winning the War on Chronic Homelessness With ‘Housing First’ Program*, L.A. TIMES (May 24, 2015), [www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html](http://www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html).

<sup>154</sup> See Alix Martichoux, *San Jose Will Pay Homeless People \$15 an Hour to Pick Up Trash*, S.F. GATE, (Oct. 25, 2018), <https://www.sfgate.com/local/article/San-Jose-trash-pick-up-litter-homeless-job-program-13336666.php>. For a sense of possible unintended effects, see, for example, Shaila Dewan, *Moral Hazard: A Tempest-*

approaches as well have been introduced, linking homeless persons with multiple social service agencies in real time.<sup>155</sup> Practical barriers to the use of shelter space have been identified, if not always remedied.<sup>156</sup> These practical barriers include prior adverse experiences at a shelter, time limits on occupancy per day or on initial eligibility for residency itself, single gender limits, and required sobriety or participation in faith-oriented activities.<sup>157</sup> Adjusting these policies at government-sponsored or subsidized shelters could mitigate some homelessness related problems, even while adding to shelter overcrowding in the short term.<sup>158</sup>

In sum, government policy at all levels has been deeply involved in causally creating, mitigating, and exacerbating homelessness and its associated pathologies. Commonly, though, official policy efforts to address homelessness are then limited in their effects, both favorable and adverse, by the operations of the democratic political process.<sup>159</sup> Overall, the combination of governments' causal contributions to the continuing problem of homelessness and the systematic inadequacies of governmental policy responses<sup>160</sup> to homelessness justify significant attention to the idea of a federal constitutional right to housing. A focus on

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*Tossed Idea*, N.Y. TIMES (February 25 2012), [www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html](http://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html).

<sup>155</sup> See Aria Bendix, *San Francisco's Out-of-Control Homelessness Crisis Could Be Combated by a New Tracking Tool*, BUS. INSIDER, (Sept. 4, 2018), [www.businessinsider.com/san-francisco-system-to-track-homeless-persons](http://www.businessinsider.com/san-francisco-system-to-track-homeless-persons).

<sup>156</sup> See *Unsheltered Homelessness: Trends, Causes, and Strategies to Address*, NAT'L ALLIANCE TO END HOMELESSNESS, (July 26, 2017), <https://endhomelessness.org/resource/unsheltered-homelessness-trends-causes-strategies-address/>. For a useful broader discussion, though locally focused, see Christopher F. Rufo, *Seattle Under Siege*, CITY J., (Autumn 2018), [www.city-journal.org/seattle-homelessness](http://www.city-journal.org/seattle-homelessness).

<sup>157</sup> See *Unsheltered Homelessness: Trends, Causes, and Strategies to Address*, *supra* note 156.

<sup>158</sup> Presumably, making shelter life more viable, if not also more attractive, could result in overcrowding, or lack of space for some persons otherwise interested in shelter access. These outcomes could, in turn, lead to increased pressure for non-shelter-based responses to low income housing concerns.

<sup>159</sup> See, e.g., Carol Galante & Carolina Reid, *Expanding Housing Supply in California: A New Framework For State Land Use Regulation*, TERNER CTR. FOR HOUSING INNOVATION (last visited Aug. 5, 2019), at 5, [http://ternercenter.berkeley.edu/uploads/CCRE\\_Journal\\_-\\_Expanding\\_Housing\\_Supply\\_in\\_California\\_-\\_A\\_New\\_Framework\\_for\\_State\\_Land\\_Use\\_Regulation.pdf](http://ternercenter.berkeley.edu/uploads/CCRE_Journal_-_Expanding_Housing_Supply_in_California_-_A_New_Framework_for_State_Land_Use_Regulation.pdf) (“[B]y the time these revisions pass, they often lack teeth or have so many restrictions that they apply only to a ‘mythical’ project.”). More generally, consider the broad range of regulatory pathologies identified in PETER H. SCHUCK, *WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER* (2014).

<sup>160</sup> See *supra* Part I.

an enforceable federal constitutional right to housing, in any meaningful form, would, again, allow the courts, along with the rest of us, to bypass the unresolvable basic issues of homelessness offenses and criminal responsibility already examined above.<sup>161</sup>

CONCLUSION: BYPASSING THE UNRESOLVABLE PROBLEMS OF  
HOMELESSNESS-RELATED CRIMINALIZATION AND THE  
INADEQUACY OF POLITICS AS USUAL ON THE WAY TO A  
CONSTITUTIONAL RIGHT TO HOUSING

Any complete argument for a federal constitutional right to some form of housing must first appeal to basic values, basic interests, basic human capacities, and basic needs,<sup>162</sup> however unaccommodating American constitutional law has historically been in this regard.<sup>163</sup> There seems to be no reason why arguments grounded in part on some combination of important values, interests, and needs cannot ultimately be successful.

Of course, arguing for a constitutional right to some minimal housing only at this most fundamental level can be a bit tricky. It is, for example, tempting to think of some sort of housing right as a matter of basic values such as genuine freedom,<sup>164</sup> material equality,<sup>165</sup> or basic human flourishing.<sup>166</sup> But many homeless

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<sup>161</sup> See *supra* Part I.

<sup>162</sup> For a useful and concise summary of the international human rights law bearing upon housing, see *The Right to Adequate Housing*, Fact Sheet No. 21/Rev. 1, OFF. U.N. HIGH COMMISSIONER FOR HUMAN RTS., at 10–15, [https://www.ohchr.org/Documents/Publications/FS21\\_rev\\_1\\_Housing\\_en.pdf](https://www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf). See also Maria Foscarinas, et al., *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. 97, 98–100 (2004); Katy Wells, *The Right to Housing*, 67(2) POL. STUD. ASS'N 406, 409–10 (2019), <https://journals.sagepub.com/doi/abs/10.1177/0032321718769009>; Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFF. 266, 275 (2016).

<sup>163</sup> See *Lindsey v. Normet*, 406 U.S. 56, 74 (1972); Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 248 (2015). For a broader consideration, see R. George Wright, *Homelessness and the Missing Constitutional Dimension of Fraternity*, 46 U. LOUISVILLE L. REV. 427, 437–38 (2008).

<sup>164</sup> See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 295–96 (1991).

<sup>165</sup> See generally Akhil Reed Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 37, 40, 43 (1990) (relying less on equality of distribution than on some less demanding standard of baseline minimalism or sufficientarianism); see also generally HARRY FRANKFURT, *ON INEQUALITY* (2015); GEORGE SHER, *EQUALITY FOR INEGALITARIANS* (2014).

<sup>166</sup> For broad background, see Gregory S. Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, 1–3 (2013),

persons most want not a classic free and open choice between homelessness and nonhomelessness, but simply a viable home, whether freely chosen or not.<sup>167</sup> Freedom in the sense of choice among viable options is really not crucial in this context. As well, thinking of a constitutional right to some sort of housing instead in terms of equality is certainly useful. But any such constitutional right would obviously be thought of in terms such as minimal adequacy, decency, or sufficiency of the housing, rather than in terms of the size or quality of any guaranteed shelter being equal to that of some selected comparison group.<sup>168</sup> Adequacy, decency, and sufficiency do not imply substantive equality. There would be an equal right to some sort of housing, but hardly a right that everyone's housing be equal in quality to everyone else's. And while it is also certainly sensible to think of a constitutional right to housing in terms of human flourishing, important work would remain to be done in translating the general idea of human flourishing into a more determinate conception that would imply a federal constitutional right.<sup>169</sup>

These complications, however, hardly undermine the possibility of a persuasive cumulative and converging multi-element case, incorporating arguments at the most basic normative level, for a federal constitutional right to housing. Our focus herein has been on promoting the idea of a federal constitutional right to minimal housing by triangulation, through separate perspectives and motivations, exerting cumulating pressure from different directions. Separate components of an argument for a constitutional right to housing are, on this approach, coordinated and brought to bear jointly.

This Article highlights that criminalizing homelessness and homelessness-related statuses and conduct leads to unresolvable problems at the level of basic criminal theory.<sup>170</sup> These

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<https://scholarship.law.cornell.edu/facpub/653/>; GREGORY S. ALEXANDER, PROPERTY AND HUMAN FLOURISHING ch. 10 (2018).

<sup>167</sup> See Wright, *supra* note 163, at 454. *But cf.* Waldron, *supra* note 164, at 303 (“The freedom that means most to a person who is cold and wet is the freedom that consists in staying under whatever shelter he has found.”).

<sup>168</sup> See sources cited *supra* note 165.

<sup>169</sup> The idea of human flourishing, as classically elaborated by Aristotle and in Professor Alexander's general property theory, is more general than the concept of community and community responsibility developed by Alexander. See Alexander, *Ownership and Obligations: The Human Flourishing Theory of Property*, *supra* note 166; see also Wright, *supra* note 163, at 438–39 (discussing the relevant application of the ideas of community, fraternity, and solidarity).

<sup>170</sup> See *supra* Part I.

unresolvable problems are of varying degrees of breadth and context-specificity,<sup>171</sup> and these problems are plainly sufficiently important to impeach the logic and fairness of typical criminalization of homelessness. A constitutional right to some sort of housing effectively bypasses these evidently unsolvable problems of personal criminal responsibility.

This Article then focused on the role of governments, at all levels, in causally contributing to homelessness in general through various consciously chosen government policies.<sup>172</sup> For the sake of simplicity, this Article focused on government policies as among the important causes of homelessness in general, as opposed to focusing on particular categories of homelessness. But it should be clear that consciously adopted government policies have affected, positively and negatively, the incidence of homelessness among, say, deinstitutionalized but seriously mentally ill persons,<sup>173</sup> traumatized or otherwise vulnerable discharged military veterans,<sup>174</sup> and newly released ex-offenders who are ill-prepared for transitioning to self-sufficient life in the community.<sup>175</sup>

Thus, whatever the level of government, and however we think of the problem of homelessness, it is clear that consciously adopted government policies, of various sorts, have substantially

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<sup>171</sup> Some problems of voluntariness, freedom, and responsibility are thus specific to homelessness, while others are of much broader scope and applicability.

<sup>172</sup> See *supra* Part I.

<sup>173</sup> See, e.g., H.R. Lamb, *Deinstitutionalization and the Homeless Mentally Ill*, 35 HOSP. & CMTY. PSYCHIATRY 899, 899 (1984), [www.ncbi.nlm.nih.gov/pubmed/6479924](http://www.ncbi.nlm.nih.gov/pubmed/6479924); Daniel Yohanna, *Deinstitutionalization of People with Mental Illness: Causes and Consequences*, 15 AM. MED. ASSOC. J. ETHICS 886, 886 (October 2013), <https://journalofethics.ama-assn.org/article/deinstitutionalization-people-mental-illness>.

<sup>174</sup> For background, see generally *Veteran Homelessness*, NAT'L ALLIANCE TO END HOMELESSNESS (Apr. 22, 2015), <https://endhomelessness.org/resource/veteran-homelessness/>; *Background & Statistics*, NAT'L COALITION FOR HOMELESS VETERANS (last visited Aug. 7, 2019), [http://nchv.org/index.php/news/media/background\\_and\\_statistics/](http://nchv.org/index.php/news/media/background_and_statistics/). Specific categories of homelessness may co-present, and interact, in the cases of individual homeless persons. For context, see § 5 of The 2017 Annual Homeless Assessment Report to Congress, U.S. DEP'T HOUSING & URB. DEV. (Dec. 2017), <https://files.hudexchange.info/resources/documents/2017-AHAR-Part-2.pdf>.

<sup>175</sup> For relevant data, see Claire W. Herbert et al., *Homelessness and Housing Insecurity Among Former Prisoners*, 1 RUSSELL SAGE FOUND. J. SOC. SCI. 44 (2016), [www.ncbi.nlm.nih.gov/pmc/articles/PMC4762459/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4762459/); Mindy Mitchell, *Homelessness and Incarceration Are Intimately Linked*, NAT'L ALLIANCE TO END HOMELESSNESS (Mar. 29, 2018), <https://endhomelessness.org/homelessness-incarceration-intimately-linked-new-federal-funding-available-reduce-harm/> ("Almost 50,000 people a year enter homeless shelters immediately after exiting incarceration.").

contributed, directly or indirectly, to homelessness of all sorts.<sup>176</sup> These crucial government-policy contributions to the underlying pathologies exert a further intellectual and moral pressure on government to rectify the lamentable phenomena of homelessness to which it has substantially contributed. Governments in general are thus clearly implicated, causally and morally, in what is normally recognized as among the most serious and fundamental sorts of deprivations.

At this point, it is no longer plausible or morally satisfactory for governments to adopt only modest programs, or merely to spend incrementally more, on homelessness-related programs. Typical programs, at whatever level of government, have plainly had only modest positive effects, and often amount merely to attempts to counteract with one set of policies the homelessness often predictably generated by other sets of government policies.<sup>177</sup>

Consider, by way of analogy, how one would respond to a government that recognized a constitutional right to legal counsel in criminal cases,<sup>178</sup> but that was content with only partial compliance with that constitutional right, with the level of actual compliance varying more or less randomly, and with the government taking credit for years of slightly greater compliance, and promising to try to do better after the years of slightly lower compliance. Or consider, also outside the homelessness context, the federal constitutional right to not be subjected to cruel and unusual punishment.<sup>179</sup> What would the proper public response be to a government that in fact tended to causally contribute to

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<sup>176</sup> See generally *supra* Part II.

<sup>177</sup> Consider, for example, local homeless service programs that only partially offset the homelessness causing effects of a range of other governmental policies. In general, modest increases in funding, against a continuing background of government policy causal contributions to homelessness, is unlikely to be effective. See David S. Lucas, *The Impact of Federal Homelessness Funding on Homelessness*, 84 S. ECON. J. 548, 548–49 (2017).

<sup>178</sup> See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). This constitutional right to counsel as explicitly wealth redistributive and publicly costly, would also count as a “positive” constitutional right. *But see* Robert C. Ellickson, *The Untenable Case for an Unconditional Right to Shelter*, 15 HARV. J.L. & PUB. POL’Y 17, 17 (1992) (foregrounding negative constitutional rights).

<sup>179</sup> See U.S. CONST. amend. VIII; *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958) (discussing the “evolving standards of decency that mark the progress of a maturing society”).

inhumane prison conditions, but that was content with both modest reform efforts, and correspondingly limited success, in reducing the number of such constitutional violations?

Importantly, a federal constitutional right to minimal housing need not involve any level of government as a typical provider of housing as a matter of first resort.<sup>180</sup> The crucial first step would instead involve imposing a heavier burden of constitutional justification on all government policies, at whatever level, that have the effect, separately or jointly, of significantly contributing over time to homelessness.<sup>181</sup> And we should not expect a constitutional right to housing to be, in its contours, any more textually precise than, say, the scope in actual practice of the Commerce Clause.<sup>182</sup> The scope of any right to housing should, however, reflect substantive interests, including the need to maintain reasonable incentives for socially productive behavior.<sup>183</sup>

Finally, the logic of a distinctly federal-level constitutional right to housing is in part a matter of recognizing that the basic indignities of homelessness, and the basic moral and constitutional values at stake,<sup>184</sup> do not substantially vary in their nature across state lines.<sup>185</sup> As well, the federal government controls far greater resources than do individual states in meaningfully addressing homelessness and has important advantages of scale in affirmatively responding to homelessness. And while local knowledge will certainly be

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<sup>180</sup> For a discussion of implementation issues, see, for example, Shelby D. Green, *Imagining a Right to Housing: Lying in the Interstices*, 19 GEO. J. POVERTY L. & POL'Y 392, 442 (2012) (discussing, among other considerations, imposing a heavier burden of legal justification on all policy measures that operate, even inadvertently, to exacerbate homelessness).

<sup>181</sup> See *id.* As with any other constitutional right, whether negative or positive, issues of eligibility and of line drawing would of course require determination and revision. See *id.*

<sup>182</sup> See *id.*; see also *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (“[W]e must never forget that it is a [broadly phrased] *constitution* we are expounding.”) (emphasis in the original). Historically, the Court seemed concerned about problems of line drawing in *Lindsey v. Normet*, 406 U.S. 56 (1972). Line drawing problems are probably more severe, however, in equal protection, substantive due process, free speech, and religion cases.

<sup>183</sup> See Ellickson, *supra* note 178, at 17. Professor Ellickson appears to focus on a constitutional right to housing only in conjunction with a number of other costly positive constitutional rights. See *id.*

<sup>184</sup> See *supra* notes 163–169 and accompanying text.

<sup>185</sup> The constitutionally appropriate responses to homelessness may well, however, reflect local living cost differences, once the legal and politically imposed causes of homelessness have been negated or removed.

valuable in responding in qualitatively different ways to homelessness,<sup>186</sup> federal authority would likely be necessary to overcome any local inclination to shift problems of homelessness onto neighboring jurisdictions, rather than to more meaningfully address the pathologies of homelessness.<sup>187</sup> These considerations, taken collectively, thus triangulate upon a federal constitutional right to housing, and tend jointly to apply more rational and moral pressure, from various directions, toward the recognition of such a right.

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<sup>186</sup> Investigation of the impact on homelessness of various local policies should presumably begin at the local level. As well, the motivating sentiments of community, solidarity, and fraternity in particular may, in many cases, be stronger at local levels. For background, see Wright, *supra* note 163.

<sup>187</sup> For a sense of the common local impulse to strategically, if also selfishly, “free ride” on the presumed efforts of other, perhaps similarly motivated, neighboring jurisdictions, see Wright, *supra* note 163, at 468–70.