

# Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping

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## INTRODUCTION

To be homeless in Arizona is to be a criminal. City ordinances across the state prohibit broad swaths of conduct that make merely existing in public spaces difficult for those who lack housing. As a result, Arizonans experiencing homelessness commit countless crimes every day out of necessity, including loitering in parks,<sup>1</sup> resting at bus stops,<sup>2</sup> obstructing sidewalks,<sup>3</sup> pitching tents,<sup>4</sup> asking for money,<sup>5</sup> asking for work,<sup>6</sup> and sleeping just about anywhere.<sup>7</sup> At the state level, Arizona law prohibits loitering, littering, and public nuisances, the last of which is frequently invoked to justify sweeping and dismantling homeless encampments.<sup>8</sup> As prohibitions on the homeless experience proliferate, so too does Arizona's homeless population. The state has experienced consistent year-over-year increases in

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1. PHX., ARIZ., CITY CODE § 23-8 (2020).

2. *Id.* § 36-401(4).

3. *Id.* § 23-9.

4. *Id.* § 33-2.

5. *Id.* § 23-7(B).

6. *Id.* § 36-131.01(A).

7. *Id.* § 23-30.

8. ARIZ. REV. STAT. ANN. §§ 13-2905, 13-1603, 36-601 (2020); see PIMA CNTY. DEP'T OF ENV'T QUALITY, SHERRIFF'S DEP'T, PIMA COUNTY HOMELESS ENCAMPMENT PROTOCOL (2015), [https://webcms.pima.gov/UserFiles/Servers/Server\\_6/File/Government/Administration/Administrative%20Procedures/50-02%20-%202015%20HOMELESS%20ENCAMPMENT%20PROTOCOL.pdf](https://webcms.pima.gov/UserFiles/Servers/Server_6/File/Government/Administration/Administrative%20Procedures/50-02%20-%202015%20HOMELESS%20ENCAMPMENT%20PROTOCOL.pdf) [<https://perma.cc/Z7WY-SR27>].

the number of individuals experiencing homelessness, many (if not most) of whom are currently living unsheltered, in places not fit for human habitation.<sup>9</sup>

Arizona is not unique in this regard. Homelessness is a national crisis that forces millions of Americans every day to try to survive in public places.<sup>10</sup> Yet the criminalization of homelessness seems only to be increasing. The National Law Center on Homelessness and Poverty surveyed hundreds of cities nationwide and found dramatic spikes in such laws in recent years.<sup>11</sup> In the span of a decade, city-wide bans on camping in public increased by 69%; bans on begging increased by 43%; bans on sitting or lying down increased by 52%; and bans on standing around increased by a remarkable 88%.<sup>12</sup> The sad truth is that laws criminalizing the homeless experience are more popular than ever.<sup>13</sup>

Legal academics have long understood that criminalizing behaviors attendant to homelessness merely compounds the problem. By imposing a carceral response to a societal failure, the criminalization of homelessness violates fundamental principles of criminal law, punishing those who lack

9. See *infra* text accompanying notes 23–28.

10. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 9 (2018), <https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs-Litigation-Manual.pdf> [<https://perma.cc/Y2KY-GJLP>].

11. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 (2018), <https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf> [<https://perma.cc/7WT4-CSZB>] (finding that “laws punishing the life-sustaining conduct of homeless people has [sic] increased in every measured category since 2006, and in some cases dramatically so”).

12. *Id.* at 10–11.

13. Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 110 (2019) (“Statewide studies also suggest the dizzying popularity of criminalization laws.”); see also JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIV. HOMELESS RTS. ADVOC. PROJECT, WASHINGTON’S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (Sara K. Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=hrap> [<https://perma.cc/949Z-7FJE>] (Washington state study); POL’Y ADVOC. CLINIC, UNIV. OF CAL. BERKELEY SCH. OF L., CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE (2016), <https://www.law.berkeley.edu/wp-content/uploads/2015/12/Californias-New-Vagrancy-Laws.pdf> [<https://perma.cc/M483-4LNP>] (California study); RACHEL A. ADCOCK ET AL., HOMELESS ADVOC. POL’Y PROJECT, UNIV. OF DENVER, STURM COLL. OF L., TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO (Rebecca Butler-Dines et al. eds., 2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf> [<https://perma.cc/W442-D4ZP>] (Colorado study); ALLISON FRANKEL ET AL., ALLARD K. LOWENSTEIN INT’L HUM. RTS. CLINIC, YALE L. SCH., “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT (Hope Metcalf et al. eds., 2016), [https://law.yale.edu/sites/default/files/area/center/schell/criminalization\\_of\\_homelessness\\_report\\_for\\_web\\_full\\_report.pdf](https://law.yale.edu/sites/default/files/area/center/schell/criminalization_of_homelessness_report_for_web_full_report.pdf) [<https://perma.cc/8WKS-8NDP>] (Connecticut study).

alternative choices hence moral culpability.<sup>14</sup> As a social policy, it is also ineffectual. It traps individuals in cycles of poverty that are likely to prolong their experiences of homelessness and push them toward further criminality for life-sustaining resources.<sup>15</sup> And it has proven to be more expensive and less effective than non-carceral alternatives, such as housing-first solutions.<sup>16</sup>

To date, however, academic solutions to the criminalization of homelessness have centered on aspirational calls for code reform or on strategies for constitutional litigation to protect individual rights.<sup>17</sup> Although well intentioned,<sup>18</sup> neither road has shown itself to be a viable avenue for substantive reform. As I detail in this Essay, political structures and incentives, as well as the momentum of public perception, are aligned against decriminalization and legalization efforts.<sup>19</sup> Similarly, successful civil rights suits against municipalities are notable precisely because they are rare. Litigation is slow, expensive, and (even when successful) has not always led to on-the-ground changes in the local approach to policing homeless populations.<sup>20</sup> Staking our hopes to a shift in public sentiment or to costly litigation, or both, in order to protect a segment of our society that is fundamentally defined by a denigrating social stigma and lack of access to resources is likely to be as ineffectual as criminalization itself.

In contrast, this Essay proposes that homeless advocates and reform-minded academics turn their attention to police departments as a potential site of attainable change. Specifically, Arizona law grants broad discretion to police departments to issue citations for misdemeanor crimes in lieu of custodial arrests. Implementing a mandatory citation policy for the crimes

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14. See Rankin, *supra* note 13, at 123.

15. See *infra* text accompanying notes 45–46. Despite popular perceptions of homelessness as a chronic and persistent condition, the more common experience is individuals experiencing homelessness in brief, transitional episodes. See Adam M. Lippert & Barrett A. Lee, *Stress, Coping, and Mental Health Differences Among Homeless People*, 85 SOCIO. INQUIRY 343, 345 (2015). A 2017 report from the U.S. Department of Housing and Urban Development found that only about 24% of individuals experiencing homelessness nationally had chronic patterns of homelessness. MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URB. DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 62 (2017), [https://www.abtassociates.com/sites/default/files/migrated\\_files/752fef9b-2a56-466d-926e-7058756738b6.pdf](https://www.abtassociates.com/sites/default/files/migrated_files/752fef9b-2a56-466d-926e-7058756738b6.pdf) [<https://perma.cc/SPB2-DJYW>].

16. Rankin, *supra* note 13, at 104.

17. See, e.g., *id.* at 135 (“Cities throughout America can and should do more to end the criminalization of homelessness and redirect such investments to non-punitive alternatives such as Housing First and permanent supportive housing.”); Seth Lemings, *The De-Criminalization of Homelessness*, 10 U.C. IRVINE L. REV. 287, 304–06 (2019).

18. To be clear, I support both strategies as a matter of principle.

19. See *infra* Part III.A.

20. See *infra* Part III.B.

associated with homelessness, such as urban camping,<sup>21</sup> would spare countless individuals the indignity of arrests, including the associated (and often catastrophic) loss of property, publicity, and separation from community. Officers commonly decline to issue citations to homeless individuals because the default departmental guidelines regarding the exercise of citation discretion disadvantage those who can't demonstrate sufficient community ties or prove their identity to the satisfaction of the arresting officer. Adopting a mandatory citation policy obviates the need for discretion. And it is a reform easily implemented. Indeed, many departments adopted a presumptive citation policy when facing the coronavirus pandemic in early 2020,<sup>22</sup> proving that citations in lieu of arrest is a workable compromise when needed to avoid substantial negative consequences.

Part I of this Essay details Arizona's growing population of unsheltered homeless individuals and the urban camping laws that prevent them from sheltering themselves. Part II examines the indignity associated with arresting homeless individuals, highlighting the particular vulnerabilities associated with the loss of property and community. Part III explores the code reform and constitutional litigation approaches to protecting the rights of homeless individuals. It explains why these well-intentioned movements are structurally disadvantaged in effecting change on behalf of marginalized communities. Part IV articulates and defends the idea of mandatory citations for urban camping as a small, but significant reform that could protect the dignity of homeless individuals. Urban camping is the focus of this article because it criminalizes the most fundamental part of the homeless experience—merely existing in public space with nowhere else to go. But the analysis easily can be extended to many other types of misdemeanor violations that reflect the reality of desperate circumstances rather than true criminal culpability.

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21. See, e.g., PHX., ARIZ., CITY CODE § 23-30 (2020) (“For the purposes of [the urban camping ordinance] the term ‘camp’ means to use real property of the City for living accommodation purposes such as sleeping activities, or . . . using any tents or shelter or other structure or vehicle for sleeping . . .” (emphasis added)).

22. *Police Responses to Covid-19*, BRENNAN CTR. FOR JUST. (July 8, 2020), <https://www.brennancenter.org/our-work/research-reports/police-responses-covid-19> [<https://perma.cc/6TPF-KVVN>].

## I. CRIMINALIZING HOMELESSNESS IN ARIZONA

Arizona has an estimated 10,000 individuals currently experiencing homelessness.<sup>23</sup> The vast majority of those individuals are located within the greater Phoenix metropolitan area.<sup>24</sup> Nearly half exist unsheltered.<sup>25</sup> Since 2015, “unsheltered homelessness—people living on the streets, in desert washes, vehicles or another place not meant for habitation—increased” year over year,<sup>26</sup> seeing cumulative growth of nearly 150%.<sup>27</sup> Part of the growth in unsheltered homelessness is due to cuts in shelter funding; since 2014, shelter capacity in Maricopa County has reduced by roughly 30%.<sup>28</sup>

There are strong reasons to suspect that the number of unsheltered homeless individuals will continue to grow. According to the CEO of the Central Arizona Shelter Services, “Arizona is facing the worst affordable housing crisis of our time.”<sup>29</sup> A report in March 2019 by the National Low-Income Housing Coalition “showed that for people with extremely low incomes, Arizona has the third most-severe shortage of rental housing in the country, with a deficit of more than 153,000 homes.”<sup>30</sup> The Phoenix metro area, in particular, ranks near the bottom nationally in the availability of

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23. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, ARIZONA HOMELESSNESS STATISTICS (2019), <https://www.usich.gov/homelessness-statistics/az/> [<https://perma.cc/5QXD-YS38>]; NAT’L ALL. TO END HOMELESSNESS, HOMELESSNESS IS A PROBLEM IN ARIZONA (2018), <https://endhomelessness.org/wp-content/uploads/2019/08/AZ-fact-sheet-2019.pdf> [<https://perma.cc/B85D-EM5H>].

24. The annual point-in-time count conducted in January 2020 identified 7,419 individuals experiencing homelessness in Maricopa County, which comprises Phoenix, Chandler, Tempe, Mesa, and other surrounding municipalities. MARICOPA ASS’N OF GOV’TS, 2020 POINT-IN-TIME (PIT) COUNT (2020), <https://azmag.gov/Portals/0/Documents/MagContent/2020-PIT-Handout.pdf?ver=2020-05-01-165107-217> [<https://perma.cc/S2QB-UZ8K>].

25. Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, AZCENTRAL (May 7, 2019, 5:24 PM), <https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/> [<https://perma.cc/HPV3-N2FY>].

26. *Id.*

27. Sonu Wasu, *Homelessness in Maricopa County Is Worse Now Than It’s Ever Been, Advocates Say*, ABC15 (July 23, 2019, 10:31 PM) <https://www.abc15.com/news/region-phoenix-metro/central-phoenix/homelessness-in-maricopa-county-is-worse-now-than-its-ever-been-advocates-say> [<https://perma.cc/3P7Z-26A9>] (“Glow said since 2015 there had been a 149% increase in the number of unsheltered homeless individuals living on the streets of Maricopa County.”).

28. Boehm, *supra* note 25 (“Beds have decreased by about 30 percent since 2014 as agencies have shifted funding away from shelters and into housing programs.”).

29. Wasu, *supra* note 27.

30. Elizabeth Whitman, *74-Year-Old Phoenix Woman Became Homeless After \$50 Rent Increase*, PHX. NEW TIMES (Sept. 21, 2019, 5:33 PM), <https://www.phoenixnewtimes.com/news/phoenix-woman-homeless-affordable-housing-cass-shelter-rent-security-11360395> [<https://perma.cc/9C3D-VLCW>].

affordable and available rental housing.<sup>31</sup> To compound the problem, Arizona has the second-highest eviction rate in the country with more than 25,000 eviction orders processed by Phoenix courts in 2018.<sup>32</sup> And a “tsunami” of new evictions is expected to hit Arizona this fall as a consequence of coronavirus-related job losses.<sup>33</sup>

Nevertheless, Arizona has responded to homelessness in the same manner as most states; it criminalizes and punishes the behaviors that define the experience. The most pernicious criminal laws are those that outlaw urban camping, essentially any act of falling asleep in public when you have nowhere else to go. To see the breadth of urban camping prohibitions, consider Phoenix City Code section 23-30, which makes it unlawful to

use real property of the City for living accommodation purposes such as sleeping activities, or making preparations to sleep, including the laying down of bedding for the purpose of sleeping, or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping or doing any digging or earth breaking or carrying on cooking activities.<sup>34</sup>

In 2018, in response to resident concerns, Phoenix also declared it illegal for homeless individuals to reside on a sparsely used median in Roosevelt Row.<sup>35</sup>

Tempe’s urban camping ordinance, originally passed in 1997 and updated in 2018, prohibits any unpermitted use of public property “as a temporary or

31. *Id.* (“Among cities, the Phoenix metro area tied for sixth place for the same dubious distinction.”); *see also* Wasu, *supra* note 27 (“For every 100 low-income renters in need . . . the Phoenix metropolitan area has only 20 affordable and available rental units, which ranks near the bottom nationally.”).

32. Wasu, *supra* note 27.

33. MacKenzie Belley, *Report: Arizona Had Highest ‘Housing Loss’ Rate; More Evictions Coming*, AZMIRROR (Sept. 10, 2020, 10:31 AM), [https://www.azmirror.com/2020/09/10/7824/\[https://perma.cc/SW22-LM62\]](https://www.azmirror.com/2020/09/10/7824/[https://perma.cc/SW22-LM62]); *see also* Courtney Holmes, *Eviction Crisis Looming in Arizona Once Moratorium on Evictions Ends*, ABC15 (July 30, 2020, 8:44 PM), <https://www.abc15.com/news/rebound/coronavirus-money-help/eviction-crisis-looming-in-arizona-once-moratorium-on-evictions-ends> [https://perma.cc/DKL4-HSDB].

34. PHX., ARIZ., CITY CODE § 23-30 (2020); *see also* ACLU OF ARIZ., HOMELESS IN PHOENIX: KNOW YOUR RIGHTS 5, [https://www.acluaz.org/sites/default/files/field\\_documents/homeless\\_rights\\_in\\_phoenix.pdf](https://www.acluaz.org/sites/default/files/field_documents/homeless_rights_in_phoenix.pdf) [https://perma.cc/GN56-C5CE].

35. Jen Fifield, *Can Homeless Sleep on the Streets? Phoenix Area Cities Are Rethinking Bans*, AZCENTRAL (Dec. 10, 2018, 4:19 PM), <https://www.azcentral.com/story/news/local/glendale/2018/12/10/arizona-cities-change-laws-banning-homeless-sleeping-streets-urban-camping/2195323002/> [https://perma.cc/SBX2-T783]; Richard Ruelas, *Phoenix Declares Roosevelt Row Homeless Camp ‘Illegal,’* AZCENTRAL (Jan. 4, 2018, 3:13 PM), <https://www.azcentral.com/story/news/local/phoenix/2018/01/02/phoenix-declares-roosevelt-row-homeless-camp-illegal/998466001/> [https://perma.cc/8YNB-PLBH].

permanent place of dwelling . . . or as a living accommodation at any time.”<sup>36</sup> According to that ordinance, indications of camping include such innocuous behaviors as “storing personal belongings, laying down bedding for sleeping, [and] using tents or temporary structures for shelter.”<sup>37</sup> Similarly, in Scottsdale, a person cannot “camp in any public park, street or place, except when specifically authorized by a permit issued by the city,” which includes “activities such as erecting tents or any other structure providing shelter, digging or breaking earth, laying down bedding for the purposes of sleeping, using camp paraphernalia, storing personal belongings, starting a fire, regularly cooking or preparing meals, or living in a parked vehicle.”<sup>38</sup>

Professor Sara Rankin is a leading expert on the complex web of state and local laws criminalizing individuals’ attempts to engage in basic, life-sustaining activities in public places.<sup>39</sup> Rankin’s work highlights the tragic consequences of criminalization as a response to homelessness.

For starters, criminalization of behaviors attendant to homelessness is inconsistent with the foundational principles of criminal law.<sup>40</sup> With few (and controversial) exceptions, criminal law justifies inflicting punishment as a response to moral culpability, which is a function of individuals’ voluntary choices.<sup>41</sup> But laws criminalizing homelessness sweep so broadly as to capture essential activity, not merely chosen criminality. “Examples include laws that prohibit sitting, standing, sleeping, receiving food, going to the bathroom, asking for help, or protecting one’s self from the elements—all basic behaviors necessary for survival.”<sup>42</sup> Moreover, the primary causes of homelessness also cannot fairly be attributed to culpable individual choice.<sup>43</sup> They include the lack of affordable housing, the failure to provide a living wage, domestic violence perpetrated by others, dizzying medical debt, and

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36. TEMPE, ARIZ., CITY CODE §§ 23-90 to -91 (2020), [https://library.municode.com/az/tempe/codes/city\\_code?nodeId=CH23PARE](https://library.municode.com/az/tempe/codes/city_code?nodeId=CH23PARE) [<https://perma.cc/G2HY-3K6H>].

37. *Id.*

38. SCOTTSDALE, ARIZ., REV. CODE § 19-21(a)–(c) (2020) (violations are also class 1 misdemeanors punishable under state law).

39. Rankin, *supra* note 13, at 106–07.

40. *See id.* at 123.

41. *See generally* Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449 (2012).

42. Rankin, *supra* note 13, at 107 (footnote omitted).

43. *See* KAYA LURIE & BREANNE SCHUSTER, SEATTLE UNIV. HOMELESS RTS. ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS 2 (Sara K. Rankin ed., 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2602532](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602532) [<https://perma.cc/7NBE-586M>] (finding that “marginalized groups disproportionately experience homelessness, including its many burdens—such as laws that criminalize the conduct of necessary, life-sustaining activity in public”).

untreated mental illness.<sup>44</sup> If anything, these causes point to the culpability of the state in both creating—and failing to remedy—the very conditions they punish as criminal.

Second, laws criminalizing homelessness actually entrench individuals in poverty and create barriers to recovery.<sup>45</sup> Criminal convictions (and in some instances, even mere arrests) frequently render individuals ineligible for jobs, housing, food stamps, shelters, or other government services or benefits.<sup>46</sup> In addition, criminal fines and fees (including late payment fees) are often impossibly out of reach for homeless individuals, who may not know where the money for their next meal is coming from.

Lastly, the financial costs of criminalizing homelessness are borne not only by those who are rendered criminals, but also by society overall. Studies have consistently demonstrated that housing-first responses to homelessness have better outcomes at a lower expense than criminalization.<sup>47</sup> The same is

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44. Rankin, *supra* note 13, at 123 (citing NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2015), [https://www.nlchp.org/documents/Homeless\\_Stats\\_Fact\\_Sheet](https://www.nlchp.org/documents/Homeless_Stats_Fact_Sheet) [<https://perma.cc/X5LC-8NF6>]); E.C. HEDBERG & BILL HART, MORRISON INST. FOR PUB. POL'Y, A NEW LOOK: A SURVEY OF ARIZONA'S HOMELESS POPULATION 7–9 (2013), <https://morrisoninstitute.asu.edu/sites/default/files/newlook-homelessurvey.pdf> [<https://perma.cc/GNM7-HJBW>].

45. Rankin, *supra* note 13, at 108.

46. *Id.*; see also SUZANNE SKINNER, SEATTLE UNIV. HOMELESS RTS. ADVOC. PROJECT, SHUT OUT: HOW BARRIERS OFTEN PREVENT MEANINGFUL ACCESS TO EMERGENCY SHELTER 23–26 (2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1004&context=hrap> [<https://perma.cc/DTR6-NF4L>] (explaining that the conditions and rules of many shelters effectively bar many individuals experiencing homelessness from entry to the shelters due to their criminal record, which results from the criminalization of laws that punish individuals for being homeless). See generally Alexandra Natapoff, *Misdemeanors*, 85 S. CALIF. L. REV. 1313, 1313 (2012) (writing that “[t]he consequences of these [misdemeanor] convictions are significant: in addition to the stigma of a criminal record, misdemeanants are often heavily fined or incarcerated, and can lose jobs, housing, or educational opportunities”).

47. Rankin, *supra* note 13, at 109. See also JOSHUA HOWARD & DAVID TRAN, SEATTLE UNIV. HOMELESS RTS. ADVOC. PROJECT, AT WHAT COST: THE MINIMUM COST OF CRIMINALIZING HOMELESSNESS IN SEATTLE AND SPOKANE, at iii (Sara K. Rankin ed., 2015), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1000&context=hrap> [<https://perma.cc/8N65-M44D>] (estimating \$2 million in potential annual savings in Seattle and Spokane); GREGORY A. SHINN, RETHINK HOMELESSNESS, THE COST OF LONG-TERM HOMELESSNESS IN CENTRAL FLORIDA: THE CURRENT CRISIS AND THE ECONOMIC IMPACT OF PROVIDING SUSTAINABLE HOUSING SOLUTIONS 8 (2014), <https://shnny.org/uploads/Florida-Homelessness-Report-2014.pdf> [<https://perma.cc/AG2H-ZNZG>] (estimating over \$21,000 in potential annual savings, per person, in Central Florida); SARAH B. HUNTER ET AL., RAND CORP., EVALUATION OF HOUSING FOR HEALTH PERMANENT SUPPORTIVE HOUSING PROGRAM, at viii (2017), [https://www.rand.org/content/dam/rand/pubs/research\\_reports/RR1600/RR1694/RAND\\_RR1694.pdf](https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1694/RAND_RR1694.pdf) [<https://perma.cc/3UXJ-4ELP>] (estimating a 20% net cost savings in Los Angeles County).



true of government-funded health care and substance abuse treatment.<sup>48</sup> By contrast, a carceral response to homelessness is both needlessly expensive and ineffectual. Extending criminal justice system resources to arrest, convict, and punish individuals experiencing homelessness, including by assessing fines and fees they will never be able to afford, offers no path to escaping the circumstances at the root of the offending behavior.<sup>49</sup>

## II. THE INDIGNITY OF ARRESTING THE HOMELESS

But conviction and formal punishment are not the only aspects of criminalization of consequence to homeless individuals. Custodial arrest, itself, can be a punishing and costly experience that redoubles the indignity of homelessness. Although human dignity has been a contested topic, with no settled meaning,<sup>50</sup> “dignity has its greatest appeal when understood as respecting a person’s humanity and guarding against their humiliation and subordination.”<sup>51</sup>

When we talk about violations of dignity, particularly in law, we are typically concerned with the manner in which one individual behaves toward another.<sup>52</sup> However, several alternative conceptions of human dignity focus instead on the notion of basic needs. When used this way, a claim to human dignity is a claim of entitlement *qua* human being to ensuring that certain needs get met, typically by the state.<sup>53</sup>

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48. Rankin, *supra* note 13, at 109.

49. *See id.* at 108 (citing ALEXES HARRIS, *A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR* (2016)).

50. Ben A. McJunkin, *Rank Among Equals*, 113 MICH. L. REV. 855, 857–58 (2015). Some scholars have even argued that the concept is basically absurd. *See, e.g.*, Ruth Macklin, *Dignity Is a Useless Concept*, 327 BMJ 1419, 1419 (2003) (arguing “that appeals to dignity are either vague restatements of other, more precise, notions or mere slogans that add nothing to an understanding” of dignity and should be eliminated); Stephen Pinker, *The Stupidity of Dignity*, NEW REPUBLIC (May 27, 2008), <https://newrepublic.com/article/64674/the-stupidity-dignity> [<https://perma.cc/S2CT-4RRU>] (arguing that dignity as a concept in bioethics is relative, fungible, and potentially harmful).

51. Shalini Bhargava Ray, *The Law of Rescue*, 108 CALIF. L. REV. 619, 657 (2020) (citing Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694 (2008)).

52. For example, I have long argued that intentionally and materially deceiving another person in order to procure (putative) sexual consent is a violation of human dignity. Ben A. McJunkin, *Deconstructing Rape by Fraud*, 28 COLUM. J. GENDER & L. 1, 45–46 (2014) (“[M]isrepresentations made for the purpose of procuring sex that might otherwise not be forthcoming are an affront to dignity, full stop.”).

53. McJunkin, *supra* note 50, at 873–74, 874 n.91 (“[W]e should expect dignity to entail some guarantee of substantive equality as a predicate to exercising the rights conferred by the status; it is well understood that substantive inequalities genuinely impede the capacity to benefit from legal rights.”).

One of the most well-known human dignity theories of this sort is Martha Nussbaum's capabilities model. Nussbaum argues that a life worthy of human dignity requires the development of certain basic capabilities.<sup>54</sup> She centers these capabilities in her theory of basic social justice, which imposes a duty on governments to ensure that all people have the capacity to develop their capabilities.<sup>55</sup>

Although not explicitly framed as a theory of dignity, Martha Fineman's well-known "vulnerability theory" offers a similar lens for considering the needs of homeless populations and the government's obligations towards them. Fineman posits that vulnerability is an inherent condition of human existence and that governments have an obligation to address vulnerability and promote substantive equality.<sup>56</sup> The way in which governments must go about this task is through societal institutions that distribute essential social goods, such as health care, employment, and security.<sup>57</sup>

When viewed through a basic-needs lens, the dignity of an individual is violated when he or she lacks access to those resources that are necessary to a pursue a good life worthy of meaning. Homelessness becomes a quintessential example of indignity because basic housing provides more than bare shelter.<sup>58</sup> It also provides physical security, privacy, and a sense of belonging:

The person who wanders the streets by day, scrounging for food and spare change, hoping to find a safe post in a doorway or under a bridge in which to spend the night, is far from being the author or creator of his own life. . . . Police tell them where they cannot be; business owners tell them where they are not welcome; pedestrians signal subtle (sometimes not so subtle) orders to go elsewhere. The problem for them is that there *is* no place else to go where they belong. In this sense their lot is worse than that of prisoners, who at least belong somewhere.<sup>59</sup>

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54. MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 32–34 (2011) (identifying ten central capabilities: life; bodily health; bodily integrity; senses, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment).

55. *Id.*

56. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9–15 (2008).

57. See Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 255–56 (2010).

58. In countries like South Africa, the conflict between homelessness and dignity takes on a special dimension because those countries have made housing a matter of an affirmative constitutional right. See S. AFR. CONST., 1996 § 26(2).

59. Gregory S. Alexander, *Property, Dignity, and Human Flourishing*, 104 CORNELL L. REV. 991, 1045 (2019).

Arresting the homeless not only punishes this preexisting indignity but exacerbates it. For one thing, a custodial arrest can mean a significant loss of property. “Many homeless people lose all their possessions, even difficult-to-obtain IDs, when they are arrested.”<sup>60</sup> News articles are replete with stories of individuals who have lost essential possessions as a result of camping arrests.<sup>61</sup> One such individual is Elisheya Riley, who had been cited multiple times for urban camping during a two-year period of homelessness, spanning her late fifties and early sixties.<sup>62</sup> She described police simply “hauling away bags of her things, including her birth certificate, identification card and sentimental jewelry.”<sup>63</sup>

Property left behind following an arrest can be labeled “abandoned trash” by the police department, who then confiscate it and destroy it.<sup>64</sup> Sociologist Chris Herring recounts people he met while researching the issue “who had lost expensive life-saving medications, treasured family keepsakes[,] and the last few belongings they had managed to hold onto. One woman lost her daughter’s Purple Heart.”<sup>65</sup>

Another important loss is that of place and community. Maintaining social networks—being connected to others also experiencing homelessness, as is the case in homeless encampment communities—“can help to fulfill critical basic psychological, emotional, and social needs.”<sup>66</sup> But homeless individuals are less likely to return to the same location following a custodial arrest. According to Professor Dilara Yarbrough, “[E]nforcement of anti-homeless laws . . . does a lot of harm to people who are deprived of housing by disrupting their lives, disrupting their support networks and exposing them to even more harm.”<sup>67</sup>

Research indicates that needlessly removing individuals from their communities has detrimental effects on the stability of families and may

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60. NAT’L COAL. FOR THE HOMELESS, *ILLEGAL TO BE HOMELESS: THE CRIMINALIZATION OF HOMELESSNESS IN THE UNITED STATES* 8 (2004), <https://www.nationalhomeless.org/publications/crimreport2004/report.pdf> [<https://perma.cc/F2CN-MYSW>].

61. Madeline Ackley, *Phoenix Still Criminalizes Homelessness, Despite Court Ruling, Protesters Say*, *AZMIRROR* (Jan. 9, 2020, 9:13 AM), <https://www.azmirror.com/2020/01/09/phoenix-still-criminalizes-homelessness-despite-court-ruling-protesters-say/> [<https://perma.cc/X396-K245>].

62. *Id.*

63. *Id.*

64. Adora Svitak, *Why You Should Think Twice About Calling the Police on Homeless People*, *BOLD ITALIC* (Oct. 22, 2018), <https://thebolditalic.com/why-you-should-think-twice-about-calling-the-police-on-homeless-people-bfec223444f9> [<https://perma.cc/EH2R-HEYF>].

65. *Id.*

66. Rankin, *supra* note 13, at 106.

67. Svitak, *supra* note 64.

contribute to increased crime and disorder.<sup>68</sup> “Even if misdemeanor charges ultimately get dismissed by the courts, just the interaction with police and resulting displacement can have disastrous effects . . . .”<sup>69</sup> Homeless individuals are more vulnerable to violence in new and unfamiliar locations.<sup>70</sup> “More than half of people experiencing homelessness ‘report some kind of victimization while they are homeless, ranging from theft to beatings and sexual assault.’”<sup>71</sup> In many cases, women have reported that they’ve experienced sexual assault immediately following a relocation.<sup>72</sup>

Arrests can also have substantial collateral consequences that intrude on individuals’ liberty and violate their dignity. An unnecessary arrest can result in the loss of work, reputational damage, and financial hardship.<sup>73</sup> “To an individual under arrest, it generally means at least a temporary loss of freedom, a damaged reputation, and an arrest record which may not be expungable even if the arrest was illegal.”<sup>74</sup>

Even the Supreme Court has at times grappled with the “pointless indignity” of custodial arrests.<sup>75</sup> When stopped for the seemingly trivial offense of not wearing her seatbelt, Gail Atwater was subjected to a full custodial arrest rather than being given a citation.<sup>76</sup> She was handcuffed and taken by squad car to the local jail, where her property was taken, as was her mug shot.<sup>77</sup> She sat alone in a cell for a charge ultimately resolved by a \$50 fine.<sup>78</sup>

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68. Cecelia Klingele et al., *Reimagining Criminal Justice*, 2010 WIS. L. REV. 953, 973 (2010) (citing TODD R. CLEAR, *IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE* (2007)).

69. Svitak, *supra* note 64.

70. *Id.*

71. Rankin, *supra* note 13, at 106 (quoting Lippert & Lee, *supra* note 15, at 347). Studies have consistently found particularly high rates of victimization among homeless adolescents—more often physical abuse for males and sexual abuse for females. See Angela J. Stewart et al., *Victimization and Posttraumatic Stress Disorder Among Homeless Adolescents*, 43 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 325, 329 (2004). Homeless youths also report high rates of hypervigilance and avoidance as strategies to reduce the risks of victimization, likely at the expense of long-term psychological and emotional health. See *id.* at 329–30.

72. Svitak, *supra* note 64.

73. INT’L ASS’N OF CHIEFS OF POLICE, *CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT’S USE OF CITATION ACROSS THE UNITED STATES* 14 (2016), <https://www.theiacp.org/sites/default/files/all/c/Citation%20in%20Lieu%20of%20Arrest%20Literature%20Review.pdf> [<https://perma.cc/C3CL-RF7C>].

74. Alan G. Gless, *Arrest and Citation: Definition and Analysis*, 59 NEB. L. REV. 279, 280 (1980) (footnotes omitted).

75. *Atwater v. Lago Vista*, 532 U.S. 318, 347 (2001).

76. *Id.* at 324.

77. *Id.*

78. *Id.*

In *Atwater v. Lago Vista*, a divided Supreme Court debated the constitutional implications of Ms. Atwater's experience.<sup>79</sup> While a narrow majority of the Court found that the choice to arrest Atwater was a permissible option, it nevertheless acknowledged that "*the physical incidents of arrest were merely gratuitous humiliations* imposed by a police officer who was (at best) exercising extremely poor judgment."<sup>80</sup> The majority admitted that Atwater had a stronger interest in living "free of pointless indignity and confinement" than the city had an interest in arresting her.<sup>81</sup>

The dissenters were outraged that their colleagues could find a "pointless indignity" constitutionally acceptable.<sup>82</sup> Justice O'Connor powerfully detailed the intrusiveness of custodial arrests:

A custodial arrest exacts an obvious toll on an individual's liberty and privacy, even when the period of custody is relatively brief. The arrestee is subject to a full search of her person and confiscation of her possessions. If the arrestee is the occupant of a car, the entire passenger compartment of the car, including packages therein, is subject to search as well. The arrestee may be detained for up to 48 hours without having a magistrate determine whether there in fact was probable cause for the arrest. Because people arrested for all types of violent and nonviolent offenses may be housed together awaiting such review, this detention period is potentially dangerous.<sup>83</sup>

Her dissent concluded by explaining that, given the alternative of writing a citation, the intrusiveness of a custodial arrest must require some additional governmental interest to be permissible.<sup>84</sup>

That the *Atwater* Court couched the trauma of custodial arrest in the language of humiliation and indignity was apropos.<sup>85</sup> The material deprivations that attend custodial arrests undermine an individual's capacity to realize fundamental rights, including property rights, the right to political participation, the right to health care, and the right to an education. And arrest and conviction records make it harder for individuals experiencing homelessness to escape poverty or obtain benefits, and thus to realize these essential rights in the future.<sup>86</sup>

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79. *Id.* at 323.

80. *Id.* at 346–47 (emphasis added).

81. *Id.* at 347.

82. *Id.* at 360 (O'Connor, J., dissenting).

83. *Id.* at 364 (citations omitted).

84. *Id.* at 365–66.

85. *Id.* at 354–55 (majority opinion).

86. *See supra* text accompanying notes 45–46.

Homelessness itself is a societal failure that undermines human dignity. Criminalizing the very experience of homelessness is a second indignity. Enforcing the criminalization of homelessness through the mechanism of custodial arrest is a needless third indignity. It can be exceptionally costly to populations that already make do with so little. Whether a lost job, lost property, or separation from the safety of a community, the indignity of arresting homeless individuals is all the greater precisely because it is “pointless.”<sup>87</sup>

### III. STRUCTURAL IMPEDIMENTS TO DIGNITY

Given the foregoing, broad decriminalization or legalization of behaviors attendant to homelessness would be the most beneficial legal reform for homeless communities, and also arguably for society at large. Barring that, constitutional litigation would at least seem to hold promise at establishing clear, universal rules to ensure that the rights of homeless individuals are respected.

This Part explains why ambitious attempts to help the homeless through legislation or judicial pronouncements are unlikely to be successful in protecting the dignity of individuals experiencing homelessness. Local politics is largely captured by a subset of constituents who have money, property, and business in the community. Such constituents have a long history of viewing individuals experiencing homelessness not as a struggling community member, but as an “other” who must be removed from public view. Recourse to courts, meanwhile, is expensive. And protracted litigation is further hindered by constitutional doctrines that have long privileged privately owned spaces as the locus of individual rights.

#### *A. Criminal Code Reform*

American legislators have long relied on “vagrancy” laws as a means of controlling and regulating the impoverished. Early American vagrancy laws were designed specifically to separate those classes of poor individuals considered “unworthy” of social services from their more deserving counterparts.<sup>88</sup> Vagrancy, in this context, was typically defined as wandering

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87. *Atwater*, 532 U.S. at 347.

88. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 *CRIMINOLOGY* 209, 215–16 (1989). This separation would, in early American lawmakers’ minds, ensure that resources available to help the poor (i.e., shelters, soup kitchens) were utilized by the “worthy” poor, with vagrancy laws ensuring that the “less worthy” poor would not be consuming those same resources. *Id.*

in public without visible means of support.<sup>89</sup> These laws focused on punishing the idle, but able-bodied, for what amounted to criminal laziness.<sup>90</sup>

But even as social resources expanded—and, with them, the capacity to help both the “worthy” and “unworthy” equally—vagrancy laws expanded, too, developing into something of a “catchall” for people engaging in behaviors deemed socially deviant, including drug and alcohol abuse.<sup>91</sup> As visible homelessness in the downtowns of cities began attracting public awareness in the late 1970s,<sup>92</sup> the goal of vagrancy laws was no longer to simply distinguish among the poor but to punish violations of community moral standards and to remove poverty from view.<sup>93</sup>

In 1962, the United States Supreme Court ruled in *Robinson v. California* that laws criminalizing “status,” as opposed to specific conduct, should “be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments” to the Constitution.<sup>94</sup> This set the stage for subsequent challenges to homeless ordinances outlawing vagrancy. In 1972, and again in 1983, the Supreme Court struck down relatively typical ordinances prohibiting vagrancy and loitering, finding this time that the ordinances were vague in violation of the Fourteenth Amendment’s Due Process Clause.<sup>95</sup>

The legislative response, however, was not to reconsider these laws, but to re-draft them with much more specific language targeting the conduct associated with homelessness, such as sleeping and camping in public places, rather than the status of vagrancy.<sup>96</sup> Failing to adequately address the long-term causes of homelessness, along with the increasing lack of available housing, led to the rise of criminalization of conduct linked to

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89. Hannah Kieschnick, Note, *A Cruel and Unusual Way To Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-Homeless Ordinances*, 70 STAN. L. REV. 1569, 1578 (2018) (citing Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts To Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 633–34 (1992)).

90. See, e.g., *Papachristou v. City of Jacksonville*, 405 U.S. 156, 156 n.1 (1972) (striking down an ordinance that criminalized “persons able to work but habitually living upon the earnings of their wives or minor children”).

91. See Adler, *supra* note 88, at 216; Annotation, *What Amounts to Vagrancy*, 14 A.L.R. 1482 (1921).

92. Elizabeth M. M. O’Connor, Note, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. C.L. & C.R. 233, 237 (2006) (citing KENNETH L. KUSMER, *DOWN AND OUT, ON THE ROAD: THE HOMELESS IN AMERICAN HISTORY* 239 (2002)).

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

94. *Robinson v. California*, 370 U.S. 660, 666–67 (1962).

95. *Papachristou*, 405 U.S. at 162, 169; *Kolender v. Lawson*, 461 U.S. 352, 353–54 (1983).

96. Kieschnick, *supra* note 89, at 1578.

homelessness.<sup>97</sup> A survey of 187 cities in America revealed that half now have at least one law restricting camping in public, and those laws continue to proliferate.<sup>98</sup> In the decade between 2006 and 2016, the number of urban camping laws increased by 69% in the cities surveyed.<sup>99</sup> Simultaneously, municipal governments have redoubled efforts to reduce the public visibility of homelessness, such as evictions of homeless encampments, even in cities that lack a formal camping ban.<sup>100</sup>

The shift from historical “vagrancy” laws to contemporary “public disorder” laws, however, reveals the durability of the stereotypical image of homelessness as chronic, self-inflicted poverty.<sup>101</sup> Taken together, these laws outline the contours of an “imagined vagrant,” one who reflects social fears about, and biases against, the chronically poor. And surveys of public sentiment reveal that the same old assumptions about unwillingness to work, and the same moral judgments about substance abuse and mental health, preclude wise policy choices.<sup>102</sup> As Professor Rankin explains,

[S]ome are not prepared to accept evidence that non-punitive alternatives, such as permanent supportive housing, are the most cost-effective ways to solve chronic homelessness. They cannot fathom giving housing or help to someone that does not appear worthy. Such resistance to shifting from criminalization to non-punitive alternatives is fueled by fear, stereotypes, and discrimination.<sup>103</sup>

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97. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1, 3, 13 (1996).

98. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 11, at 22.

99. *Id.*

100. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 10, at 6; *see also* Rankin, *supra* note 13, at 115 (explaining how sweeps of homeless encampments “appease constituents by creating a temporary illusion that homelessness is being solved,” even when in reality they are merely “a costly, rotating door that wastes taxpayer dollars”).

101. Prashan Ranasinghe, *Refashioning Vagrancy: A Tale of Law’s Narrative of Its Imagination*, 11 INT’L J.L. CONTEXT 320, 336 (2015) (“Contemporary vagrancy law has, though largely because of the limits placed on it through constitutional concerns, mimicked its historical predecessor in taking on this aspect of welfare through the allowances it affords particular behaviour; that is, it regulates and manages particular activities rather than seeks to eliminate them. . . . In many ways, *despite* its refashioning, the Law’s imagination about justice ensures that it cannot be anything else other than historical vagrancy. It is in this sense that the present and past meet, and (dis)connect, creating further openings in the closures.”); *see also* KATHERINE BECKETT & STEVE HERBERT, BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA 24 (2010).

102. Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 6–7 (2016).

103. Rankin, *supra* note 13, at 104.



Contemporary laws criminalizing the experience of homelessness are popular in large part because the specter of the imagined vagrant looms large in the social consciousness.

Another reason such laws are popular is political capture. For decades, social scientists have chronicled how the mechanisms of legal change are often controlled by a highly interested minority that benefits from the status quo.<sup>104</sup> In the case of homelessness, local business interests have frequently been at the forefront of movements to criminalize and arrest those experiencing homelessness.<sup>105</sup> When the city of Tempe criminalized sitting or lying on its main commercial thoroughfare in 2016, one city council member admitted that “Tempeans were divided, but the business community convinced the Council to take action.”<sup>106</sup> Likewise, when Denver first considered an urban camping ban in 2012, a city council member defended the ban as a way to “stand up for our businesses downtown.”<sup>107</sup>

The reality is that individuals experiencing homelessness are a visible manifestation of social inequality and disorder that is at odds with the well-polished image needed to maximize tourism, spending, and ultimately municipal profits.<sup>108</sup> Businesses—especially local businesses occupying small storefronts—frequently rely on foot traffic that can be deterred by the presence of homeless individuals.<sup>109</sup> “Potential customers are frightened for their own security by someone who hasn’t had access to a shower in a week.”<sup>110</sup> Coalitions in support of criminal ordinances against homelessness typically consist of merchants, property owners, and city officials, with

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104. See, e.g., Mark A. Edwards, *The Alignment of Laws and Norms: Of Mirrors, Bulwarks, and Pressure Valves*, 10 FIU L. REV. 19, 20 (2014) (first citing Alan Stone, *The Place of Law in the Marxian Structure-Superstructure Archetype*, 19 LAW & SOC’Y REV. 39 (1985); then citing Mark Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986); and then citing DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991)).

105. TONY ROBINSON & ALLISON SICKELS, NO RIGHT TO REST: CRIMINALIZING HOMELESSNESS IN COLORADO 18 (2015), <https://wp-cpr.s3.amazonaws.com/uploads/2019/06/homelessness-study.pdf> [<https://perma.cc/KBK3-GE56>].

106. Melissa Kovacs & Joanna Lucio, *Nuisance and Vagrancy Laws*, ARIZ. ATT’Y, Jan. 2018, at 32, 33.

107. Jeremy Meyer, *Denver May Pursue Law Cracking Down on Homeless on 16th Street Mall*, DENVER POST (Oct. 20, 2011), [www.denverpost.com/breakingnews/ci\\_19160158](http://www.denverpost.com/breakingnews/ci_19160158) [<https://perma.cc/274J-Q7K4>].

108. ROBINSON & SICKELS, *supra* note 105, at 32; Courtney Oxsen, *Embracing “Choice” and Abandoning the Ballot: Lessons from Berkeley’s Popular Defeat of Sit-Lie*, 25 HASTINGS WOMEN’S L.J. 135, 141 (2014).

109. Kovacs & Lucio, *supra* note 106, at 33.

110. *Id.*

unmatched fundraising efforts.<sup>111</sup> Given the speed of rising inequality, political capture by business leaders should be expected to outpace any shifts in public sentiment in favor of decriminalization or legalization of homelessness.

Moreover, Monica C. Bell's pathbreaking work on "legal estrangement" explains well why it would be naïve to expect the tide of public sentiment to suddenly shift.

Legal estrangement is a process by which the law and its enforcers signal to marginalized groups that they are not fully part of American society—that they are not imbued with all the freedoms and entitlements that flow to other Americans, such as dignity, safety, dreams, health, and political voice, to name a few.<sup>112</sup>

Estrangement is a product of three separate but interrelated processes.<sup>113</sup> The first, procedural injustice, describes the ways in which the social and legal policies fail to afford individuals "treatment with dignity and respect, acknowledgment of one's rights and concerns, and a general awareness of the importance of recognizing people's personal status and identity and treating those with respect, even while raising questions about particular conduct."<sup>114</sup> The second, vicarious marginalization, describes how communities' collective memory of mistreatment at the hands of law enforcement underscores their exclusion from the polity.<sup>115</sup> Lastly, and perhaps most importantly to homeless individuals, structural exclusion describes how seemingly neutral laws and policies result in the socially and socioeconomically advantaged hoarding legal resources, including the benefits of law enforcement, to the exclusion of marginalized groups.<sup>116</sup>

Focusing on high-poverty and Black communities, Bell's work highlights how, "at both an interactional and structural level, current regimes can operate to effectively banish whole communities from the body politic."<sup>117</sup>

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111. See Oxsen, *supra* note 108, at 159–60; see also NICHOLAS BLOMLEY, RIGHTS OF PASSAGE: SIDEWALKS AND THE REGULATION OF PUBLIC FLOW 107 (2010) ("The homeless person may view the sidewalk as a temporary home, a space to rest, sleep, or beg. . . . For the association of local businesses, the sidewalk is either a place of potential 'disorder' or a zone of local branding.").

112. Monica C. Bell, *Legal Estrangement: A Concept for These Times*, AM. SOCIO. ASS'N FOOTNOTES, July/Aug. 2020, at 8.

113. Monica C. Bell, *Police Reform and the Dismantling of Legal Estrangement*, 126 YALE L.J. 2054, 2100 (2017).

114. *Id.* (quoting Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 350 (2003)).

115. Bell, *supra* note 113, at 2107–08.

116. *Id.* at 2114–15.

117. *Id.* at 2067.

The theory is particularly applicable to individuals experiencing homelessness, as they not only comprise a socially disfavored group—the visibly poor—and thus labor under the associated stigma,<sup>118</sup> but they frequently exist at the intersection of multiple disadvantaged identities.<sup>119</sup> Over 68% of the nation’s homeless population are people of color—about 40% identify as Black.<sup>120</sup> At least half (and that is a very rough estimate) have substance abuse issues, more than double the rate of housed individuals.<sup>121</sup> And 30% to 40% of homeless individuals are affected with psychiatric disorders, such as depression, bipolar disorder, and schizophrenia, which are exacerbated by the experience of homelessness and the lack of access to medical care.<sup>122</sup>

Legal estrangement theory helps explain the resistance to decriminalization and legalization by drawing attention to the law’s role in the collective symbolic and structural exclusion of homeless individuals from society.<sup>123</sup> Although framed to explain disadvantaged communities’ persistent distrust of law, the theory also reveals why some citizens feel empowered to use the criminal law to protect their personal interests at the expense of those who are actually subjected to the law.<sup>124</sup> The homeless are constructed through law as a distinct community defined by marginalization, disaffection, and dehumanization. And the social narratives that ground that process echo the historic, racialized justifications for punishing visible poverty.

### B. Constitutional Litigation

Unfortunately, there is little reason to believe that recourse to courts will fare much better. As this Part will detail, successful constitutional suits against municipalities are rare. Moreover, protracted litigation requires institutional support and funding that is simply not frequently available to homeless communities. And the judicial pronouncement of constitutional rights has not always translated into meaningful improvements in the way

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118. Rankin, *supra* note 13, at 103 (“These laws, fueled by the stigma of visible poverty, function to purge chronically homeless people from public space.”).

119. *Id.* at 100–01.

120. *Id.*

121. NAT’L COAL. FOR THE HOMELESS, SUBSTANCE ABUSE AND HOMELESSNESS 1 (2017), <https://nationalhomeless.org/wp-content/uploads/2017/06/Substance-Abuse-and-Homelessness.pdf> [<https://perma.cc/7XPG-6NPZ>]; *see also* Rankin, *supra* note 13, at 102, 129.

122. Rankin, *supra* note 13, at 105.

123. Bell, *supra* note 113, at 2100.

124. Bell, *supra* note 112, at 8.

homeless populations are policed on the ground, as an analysis of Arizona's responses to a recent Ninth Circuit ruling will demonstrate.

The Fourth Amendment would initially seem to be the most obvious source of rights protecting homeless individuals, ostensibly regulating police practices by prohibiting certain searches and seizures.<sup>125</sup> But a closer examination makes clear that it cannot be relied upon to protect homeless individuals, particularly unsheltered homeless individuals. Although contemporary doctrine is couched in the language of "privacy," Fourth Amendment protections have long privileged private property rights and frequently operate by direct analogy to home ownership.<sup>126</sup> For example, courts not uncommonly note rhetorically that the essence of the Fourth Amendment is "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."<sup>127</sup>

As I have written elsewhere, conceptualizing privacy as an individual value rooted in excluding others reinforces social hierarchies that diminish the already marginalized:

To take but one example, consider LGBTQ youth, who make up an outsized portion of the homeless population in the United States. For these individuals, homelessness is frequently tied to patterns of interfamily conflicts and violence that occur within the privacy of their parents' homes. Once on the street, the lack of Fourth Amendment privacy exposes them to extensive criminal regulation covering most "survival-focused activity associated with homelessness, such as theft, drug use, drug possession and dealing, and sex work." Not only are their lives discursively devalued because they lack access to normatively[ ] prized privacy, but their very publicness (i.e., their lack of privacy) becomes a ground for their subjection to the government.<sup>128</sup>

The absence of privacy is precisely what authorizes on-the-ground policing practices that can denigrate and diminish those who are subjected to them.

And even analogies to private homes falter when extended to homeless individuals. In 2015, the Oregon Court of Appeals held that police officers

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125. See U.S. CONST. amend. IV.

126. Evanie Parr, Note, *When a Tent Is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993, 1004–05 (2019); Carrie Leonetti, *The Wild, Wild West: The Right of the Unhoused to Privacy in Their Encampments*, 56 AM. CRIM. L. REV. 399, 401 (2019).

127. *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (quoting *Silverman v. United States*, 365 U.S. 505, 511 (1961)).

128. Ben A. McJunkin, *The Private-Search Doctrine Does Not Exist*, 2018 WIS. L. REV. 971, 996 (2018) (footnotes omitted) (quoting Orly Rachmilovitz, *Family Assimilation Demands and Sexual Minority Youth*, 98 MINN. L. REV. 1374, 1395 (2014)).

did not invade a person's constitutionally protected privacy interest when they lifted his tarp to investigate inside his makeshift shelter.<sup>129</sup> Although the court acknowledged that the shelter was the plaintiff's residence, it held that this residence was not entitled to constitutional protection because it occupied public property in violation of city ordinances.<sup>130</sup> This is just one of many examples in which people who have self-sheltered without a legal right to camp have been denied Fourth Amendment protections.<sup>131</sup> The reality is that homeless people's actual or subjective expectations of privacy are frequently rendered "unreasonable," hence unenforceable, by the very laws that seek to exclude them from public spaces.<sup>132</sup>

Fourth Amendment protections against unreasonable seizures, rather than searches, have a somewhat better history of being recognized by courts. Dating as far back as the early 1990s, courts have held that seizure and destruction of homeless individuals' property constitutes meaningful interference with their rights.<sup>133</sup> And unlike with Fourth Amendment privacy claims, courts have largely rejected the argument that violating municipal ordinances can justify otherwise unreasonable Fourth Amendment seizures. In 2012, for example, the Ninth Circuit held that "[v]iolation of a City ordinance does not vitiate the Fourth Amendment's protection of one's property," and therefore the seizure and destruction of homeless individuals' unabandoned property during encampment "sweeps" by the City of Los Angeles were unconstitutional.<sup>134</sup> In the years since, courts have increasingly scrutinized the reasonableness of police sweeps.<sup>135</sup>

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129. *State v. Tegland*, 344 P.3d 63, 64 (Or. Ct. App. 2015).

130. *Id.* at 66–67.

131. *Id.* at 69; *see, e.g.*, *United States v. Ruckman*, 806 F.2d 1471, 1472 (10th Cir. 1986); *People v. Nishi*, 143 Cal. Rptr. 3d 882, 889, 891 (Ct. App. 2012); *People v. Thomas*, 45 Cal. Rptr. 2d 610, 612–13 (Ct. App. 1995); *State v. Cleator*, 857 P.2d 306, 309 (Wash. Ct. App. 1993); *State v. Pentecost*, 825 P.2d 365, 367 (Wash. Ct. App. 1992).

132. *Parr*, *supra* note 126, at 1007; *Katz v. United States*, 389 U.S. 347, 359 (1967). On the other hand, some courts have found a constitutional right to privacy even when the temporary dwelling is trespassory, provided that the resident lacked notice of the trespass. *See United States v. Sandoval*, 200 F.3d 659, 660–61 (9th Cir. 2000); *People v. Schafer*, 946 P.2d 938, 940 (Colo. 1997); *Love v. City of Chicago*, No. 96 C 0396, 1998 WL 60804, at \*10 (N.D. Ill. Feb. 6, 1998); *State v. Pippin*, 403 P.3d 907, 909 (Wash. Ct. App. 2017).

133. *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1571 (S.D. Fla. 1992); *see also Kincaid v. City of Fresno*, No. 1:06-cv-1445 OWW SMS, 2006 WL 3542732, at \*35–37 (E.D. Cal. Dec. 8, 2006); *Justin v. City of Los Angeles*, No. CV0012352LGBAIX, 2000 WL 1808426, at \*10 (C.D. Cal. Dec. 5, 2000).

134. *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1027, 1029–30 (9th Cir. 2012).

135. Tim Donaldson, *Abandoned or Unattended? The Outer Limit of Fourth Amendment Protection for Homeless Persons' Property*, 46 HASTINGS CONST. L.Q. 793, 799–801 (2019); *see, e.g.*, *Watters v. Otter*, 955 F. Supp. 2d 1178, 1189–90 (D. Idaho 2013) (holding that the removal

But, as is too often the case, the law on the books does not always match the lived experiences of homeless individuals. Newspapers are replete with stories of individuals who have been evicted from their encampments or who have had their belongings confiscated or destroyed without prior notice during sweeps of public areas conducted by police or government officials.<sup>136</sup> Critics complain that necessary medical supplies are often discarded during these cleanups, exacerbating the health problems that many homeless individuals face.<sup>137</sup> Others allege that “sweeps” are just a codeword for forced relocations, clearing city streets,<sup>138</sup> or influencing homeless communities to move to shelters.<sup>139</sup> In Boston, for example, a recent street cleaning effort by the police department resulted in the unnecessary destruction of wheelchairs left in homeless encampments, and other cleaning efforts in Boston have led to scores of arrests.<sup>140</sup>

Other amendments have occasionally, if infrequently, been used to successfully challenge laws targeting homeless conduct. For instance, a

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and storage of property under the Idaho statute was justified under the community caretaking exception to the Fourth Amendment because the seizures were made to protect the property); *Mitchell v. City of Los Angeles*, No. CV 16-01750 SJO (GJSx), 2016 WL 11519288, at \*3–6 (C.D. Cal. Apr. 13, 2016).

136. See, e.g., Conrad Swanson & Shelly Bradbury, *Police Launch Early Morning Sweep of Homeless Camp near Capitol*, DENVER POST (July 29, 2020, 8:26 PM), <https://www.denverpost.com/2020/07/29/homeless-sweep-denver-capitol-colorado/> [<https://perma.cc/E4JH-37JF>].

137. Anna Maria Barry-Jester, *Sweeps of Homeless Camps in California Aggravate Key Health Issues*, NPR (Jan. 10, 2020, 5:00 AM), <https://www.npr.org/sections/health-shots/2020/01/10/794616155/sweeps-of-homeless-camps-in-california-aggravate-key-health-issues> [<https://perma.cc/MZ94-G4FA>].

138. Martin Auster Muhle, *D.C. Says Homeless Encampments Will Be Permanently Cleared from Under One NoMa Bridge*, WAMU (Jan. 7, 2020), <https://wamu.org/story/20/01/07/d-c-says-homeless-encampments-will-be-permanently-cleared-from-under-one-noma-bridge/> [<https://perma.cc/AX5J-ZFV7>].

139. Jonathan Bach, *Salem Police Clear Homeless Camp Under Marion Street Bridge; Barriers Go Up Wednesday*, STATESMEN J. (Jan. 15, 2019, 5:45 PM), <https://www.statesmanjournal.com/story/news/2019/01/15/salem-police-clear-homeless-camp-marion-street-bridge-install-barriers/2575767002/> [<https://perma.cc/XY5M-YPSW>]; Shawna M. Reding & Molly Oak, *‘We’re Not Leaving.’ City Crews Begin Cleaning Up Homeless Camps near the ARCH in Downtown Austin*, KVUE (Nov. 5, 2019, 3:00 PM), <https://www.kvue.com/article/news/local/homeless/austin-homeless-camps-clean-up-near-arch-ordinance/269-0e9df6e4-cd97-45f0-89db-c65193a6cdd2> [<https://perma.cc/ZKR4-25MP>]; Derica Williams, *“Clean Up and Get Out:” Officials To Clear Homeless Encampment Sites as They Work Toward Permanent Solution*, FOX6 MILWAUKEE (Apr. 24, 2017), <https://fox6now.com/2017/04/24/clean-up-and-get-out-officials-to-clear-homeless-encampment-sites-as-they-work-toward-permanent-solution/> [<https://perma.cc/9LX5-NUFC>].

140. Spencer Buell, *A Scene from “Operation Clean Sweep” in the South End: Crushed Wheelchairs*, BOS. MAG. (Aug. 7, 2019, 12:50 PM), <https://www.bostonmagazine.com/news/2019/08/07/operation-clean-sweep-wheelchairs/> [<https://perma.cc/95VY-CPUN>].

federal district court in Arizona recently concluded that a law restricting begging in public infringed on the First Amendment's guarantee of free speech.<sup>141</sup> (Though the case ultimately settled.) And in the half-decade since the Supreme Court decided *Reed v. Town of Gilbert*, holding that content-based regulations on speech violate the First Amendment, two similar panhandling laws have been deemed impermissible content-based restrictions.<sup>142</sup>

More recently, litigation strategies have emphasized the unconscionability of criminalizing life-sustaining behavior in public. The most famous example of this strategy is *Pottinger v. City of Miami*, an influential class action arising out of Florida.<sup>143</sup> The *Pottinger* plaintiffs alleged that the Miami police had a policy of harassing unsheltered individuals for sleeping and eating in public places with the specific purpose of driving homeless populations out of the city.<sup>144</sup> The class additionally asserted that the city routinely seized and destroyed personal property and/or failed to follow department inventory procedures when confiscating property from individuals experiencing homelessness.<sup>145</sup> Although the trial court initially sided with the plaintiffs and concluded that the city's treatment was unconstitutional, the case ultimately settled, after multiple appeals and nearly ten years of litigation.<sup>146</sup>

Even if such settlements end up changing police behavior, they are binding only on the municipalities that are party to the suit. Moreover, this kind of protracted litigation is quite obviously out of reach financially for most individuals experiencing homelessness. A case like *Pottinger* exists only because of the commitment and funding of the American Civil Liberties Union and the work of homelessness activists.<sup>147</sup>

A similar "settlement story" played out in 2006, in *Jones v. City of Los Angeles*.<sup>148</sup> There, the Ninth Circuit concluded that the Constitution forbids

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141. *Baldwin v. D'Andrea*, No. CV-13-08161-PCT-NVW, 2013 WL 5823094 (D. Ariz. Oct. 4, 2013).

142. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 10, at 8; *see also* *Reed v. Town of Gilbert*, 576 U.S. 155, 155 (2015); *Thayer v. City of Worcester*, 755 F.3d 60, 63 (1st Cir. 2014); *Thayer v. City of Worcester*, 144 F. Supp. 3d 218, 222 (D. Mass. 2015); *Homeless Helping Homeless, Inc. v. City of Tampa*, No. 8:15-CV-1219-T23AAS, 2016 WL 4162882, at \*6 (M.D. Fla. Aug. 5, 2016).

143. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (S.D. Fla. 1992).

144. *Id.* at 1554.

145. *Id.*

146. *See Pottinger v. City of Miami*, 359 F. Supp. 3d 1177, 1179 (S.D. Fla. 2019) (detailing the settlement and subsequent amendments).

147. *See, e.g., ACLU Responds to City of Miami's Motion To Alter Historic Pottinger Agreement Protecting Rights of Homeless*, ACLU FLA. (Oct. 7, 2013), <https://www.aclufla.org/en/press-releases/aclu-responds-city-miamis-motion-alter-historic-pottinger-agreement-protecting-rights> [<https://perma.cc/P6BF-2ZTW>].

148. 444 F. 3d 1118, 1137 (9th Cir. 2006), *vacated*, 505 F.3d 1006 (9th Cir. 2007).

punishing individuals for sleeping in public when they have no available alternative, reversing the trial court's grant of summary judgment in favor of the defendant city.<sup>149</sup> The court's reasoning that homelessness is "a chronic state that may have been acquired 'innocently or involuntarily'" was apparently sufficiently controversial to warrant a scathing Harvard Law Review comment.<sup>150</sup> But the judgment was ultimately vacated by settlement the following year.<sup>151</sup>

It took another thirteen years before the Ninth Circuit had a case that allowed it to reassert its holding.<sup>152</sup> Last year, in *Martin v. City of Boise*, a panel of that court again ruled that the Constitution prohibits criminal penalties for sitting, sleeping, or lying outside *if no space in a city shelter is available*.<sup>153</sup> Many commentators have hailed the *Martin* decision as a substantial victory in the fight against the criminalization of the homeless.<sup>154</sup> But the limitations of this victory again underscore the challenges of relying on litigation-driven approaches to helping the homeless.

By tying criminalization to shelter avoidance, the *Martin* decision simply allows governments to replace one form of unwanted regulatory control with another.<sup>155</sup> Even if a bed is available, using a shelter often means putting one's self and property at risk.<sup>156</sup> Many shelters limit how many possessions a person can bring in, forcing homeless individuals to choose between a bed and their possessions.<sup>157</sup> Sleeping in a shelter also often means being vulnerable to theft or violence from strangers who may be untraceable or

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149. *Id.*

150. *Id.* at 1136; Recent Case, *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006), 120 HARV. L. REV. 829 (2007).

151. *See Jones*, 505 F.3d 1006.

152. *Martin v. City of Boise*, 920 F.3d 584, 616–18 (9th Cir.), *cert. denied sub nom.* 140 S. Ct. 674 (2019).

153. *Id.* at 618.

154. *See, e.g., Rankin, supra note 13*, at 116–18; Morgan Chandegra, Note, *And It's Beginning To Snow*, 56 CAL. W. L. REV. 425, 446–52 (2020).

155. Phoenix Community Action Response Engagement Services (CARES) statistics indicate that nearly 75% of people refused services when contacted. *See Boehm, supra note 25*.

156. Eleanor Goldberg, *It Doesn't Make Any Sense To Arrest People Who Are Homeless*, HUFFPOST (Dec. 22, 2017, 11:41 AM), [https://www.huffingtonpost.ca/entry/arresting-homeless-people\\_n\\_5a39843de4b0b0e5a79dfbc8](https://www.huffingtonpost.ca/entry/arresting-homeless-people_n_5a39843de4b0b0e5a79dfbc8) [<https://perma.cc/KLD9-RHCJ>].

157. *Id.* Individuals experiencing homelessness frequently must carry all their belongings with them, a burden that can impede their sense of autonomy and even hinder their ability to find work. *See, e.g., Zarina Khairzada, This Backpack Isn't for Sale, but It's Helping the Homeless*, SPECTRUM NEWS 1 (Aug. 16, 2019, 8:30 AM), <https://spectrumnews1.com/ca/la-west/news/2019/08/15/this-backpack-isn-t-for-sale-but-it-s-helping-the-homeless> [<https://perma.cc/9XSQ-SVW9>]. Even something as simple as a high-quality backpack "makes a difference and this creates a sense of dignity, a sense of safety." *Id.*



unaccountable if they are not consistent residents.<sup>158</sup> It is no surprise, then, why communities that have experimented with extended-stay shelter programs discovered many homeless individuals abandon the shelters at the first opportunity.<sup>159</sup>

Following the *Martin* decision, some Arizona cities elected to stop enforcing their urban camping laws.<sup>160</sup> But other major cities, including Phoenix, have reportedly made no changes to their policing strategies.<sup>161</sup> Instead, the city is currently implementing a controversial online tool to provide Phoenix police with a live-updating inventory of available shelter beds, ensuring their authority to arrest and punish anyone who elects not to use a shelter when a bed is available.<sup>162</sup> Homeless advocates in Phoenix fear the new tool “would be used by police to ticket people living outdoors by showing that there is shelter available—regardless of whether that shelter is nearby, can accommodate that person’s possessions, or is safe.”<sup>163</sup>

When even a victory is not truly a victory, it may be time to reconsider the strategy.

#### IV. CITATION RELEASE: AN ATTAINABLE SOLUTION

Sometimes the best solution is also the simplest. While we wait for broad public support of decriminalization, which may never come, or for the next transformative constitutional ruling, perhaps we can also just *stop arresting* individuals experiencing homelessness. Arizona law already permits this. Section 3903 of Arizona’s Criminal Code grants police officers discretion to

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158. Goldberg, *supra* note 156; Yoav Gonen, *Homeless Shelter Violence Rates Nearly Double After Data Tweak*, N.Y. POST (Sept. 22, 2016, 2:04 AM), <https://nypost.com/2016/09/22/homeless-shelter-violence-rates-nearly-double-after-data-tweak/> [<https://perma.cc/ZFY3-KU5D>].

159. *See, e.g.*, Gary Warth, *Police Program Offers To Clear Infractions for Homeless in Exchange for Month-Long Shelter Stays*, SAN DIEGO UNION-TRIB. (Jan. 5, 2020, 4:35 AM), <https://www.sandiegouniontribune.com/news/homelessness/story/2020-01-05/police-program-offers-to-clear-infractions-for-homeless-in-exchange-for-month-long-shelter-stays> [<https://perma.cc/DAY5-F97Y>].

160. Ackley, *supra* note 61. Note that the laws criminalizing the conduct remain on the books in most cities; the largest change instead came from the police departments tasked with enforcing the law. Fifield, *supra* note 35.

161. Ackley, *supra* note 61. The Phoenix Police Department rejects this characterization and points to the city’s attempts to connect homeless populations with social services, particularly through the Phoenix C.A.R.E.S program. *Id.*

162. Erasmus Baxter, *Phoenix’s Draft Homelessness Plan Raises Hopes and Concerns*, PHX. NEW TIMES (July 7, 2020, 9:30 AM), <https://www.phoenixnewtimes.com/news/phoenix-draft-homeless-plan-hopes-portal-advocates-community-gallego-11478370> [<https://perma.cc/XS5Q-QCFN>].

163. *Id.*

issue a written citation and notice to appear in court in place of the traditional custodial arrest, booking, and bail process.<sup>164</sup> With a few exceptions not relevant here,<sup>165</sup> this process—alternately called “citation release,” “cite-and-release,” or “citation in lieu of arrest”—is available for any misdemeanor or petty offense, including offenses central to homelessness, such as urban camping.<sup>166</sup>

Every state, in fact, permits a version of citation release.<sup>167</sup> Many have policies broader than Arizona’s. Fourteen states have extended discretionary citation release to felonies.<sup>168</sup> And at least twelve states have established an affirmative presumption in favor of citation release for minor offenses.<sup>169</sup> California Penal Code Section 853.6, for example, instructs that a person suspected of a misdemeanor offense “*shall*, instead of being taken before a magistrate, be released according to the procedures set forth by this chapter.”<sup>170</sup>

Police departments outside of Arizona that have committed to citation release have demonstrated positive results, especially when the approach has been paired with diversionary courts or other rehabilitative resources. Police in San Antonio, Texas, for example, instituted a citation release policy in 2019 for a subset of misdemeanor offenses that might be successfully resolved with pretrial diversion:

Before the program, people accused of a Class A or B misdemeanor were arrested, handcuffed, taken to jail and booked. Some would stay in jail a whole day, miss work and possibly end up with a conviction on their record.

Under the new policy, people receive a citation and are required to report within 30 days to prosecutors at Bexar County Reentry

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164. ARIZ. REV. STAT. ANN. § 13-3903 (2020).

165. *E.g., id.* § 13-3903(C) (limiting the availability of citation release for certain domestic violence offenses); *see also* §§ 13-3602, 25-315 to 25-808.

166. § 13-3903(A).

167. *Citation in Lieu of Arrest*, NAT’L CONF. OF ST. LEGISLATURES (Mar. 18, 2019), <https://www.ncsl.org/research/civil-and-criminal-justice/citation-in-lieu-of-arrest.aspx> [<https://perma.cc/A5TF-D2J3>].

168. *Id.*

169. *E.g.,* CAL. PENAL CODE § 853.6 (West 2020); KY. REV. STAT. ANN. § 431.015(1)(a)(3) (West 2020); MD. CODE ANN., CRIM. PROC. § 4-101(c)(1)(i) (West 2020); MINN. R. CRIM. P. 6.01(1); N.Y. CRIM. PROC. LAW § 150.75 (McKinney 2020); OHIO REV. CODE ANN. § 2935.26 (West 2020); 234 PA. CODE §§ 402, 441, 519 (2020); 31 R.I. GEN. LAWS § 31-27-12 (2020); S.C. CODE ANN. § 56-7-10(A) (2020); TENN. CODE ANN. § 40-7-118(b)(1) (2020); VT. R. CRIM. P. 3(b), (f); VA. CODE ANN. § 19.2-74 (2020).

170. *E.g.,* CAL. PENAL CODE § 853.6 (West 2020) (emphasis added).

Services. They don't have their mugshot taken or are not fingerprinted.

A prosecutor will decide on a case-by-case basis who is eligible for a type of pretrial diversion program that could require an offender to take a class, complete community service or pay a fine, depending on their financial situation.<sup>171</sup>

Some Arizona police departments already utilize citation release quite extensively for minor crimes. The Surprise Police Department, for example, responded to 88,685 incidents in 2018.<sup>172</sup> The result was 1,325 custodial arrests and 1,047 citations.<sup>173</sup> Surprise Police Department Chief David McGill has also explicitly endorsed the use of citation release as a compassionate alternative when dealing with homeless encampment sweeps. In 2017, he explained, "We are hoping to cite and release but at the same time we'll also be checking for outstanding warrants. We don't plan to confiscate their property, that will be up to them. But if it's not removed within 72 hours, they face additional charges."<sup>174</sup> He added, "We don't want it to look as though we're heartless or harassing the homeless—we're just enforcing the law."<sup>175</sup>

Despite the statutory availability of citation release, however, Arizona police officers often default to custodial arrests when faced with crimes committed by individuals experiencing homelessness. In large part, this is due to a common set of seemingly neutral considerations in police department handbooks and field guides that cabin citation release discretion in ways that disadvantage homeless populations.<sup>176</sup> The Peoria Police Department guidelines provide a helpful example: Peoria Policy 420.3.3 precludes

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171. Sara Cline, *More than 500 People Avoided Jail for Misdemeanors Under San Antonio's New Cite-and-Release Program*, SAN ANTONIO EXPRESS-NEWS (Oct. 15, 2019, 8:29 PM), <https://www.expressnews.com/news/local/article/More-than-500-people-avoided-jail-for-14537203.php> [<https://perma.cc/Y37W-MFKF>].

172. CITY OF SURPRISE POLICE DEP'T, ANNUAL REPORT 20 (2018), <https://www.surpriseaz.gov/DocumentCenter/View/42802/2018-Surprise-Police-Department-Annual-Report> [<https://perma.cc/R6ET-DU43>].

173. *Id.*

174. Larson Newspapers, *Police Sweep Illegal Camp Sites*, SEDONA RED ROCK NEWS (June 7, 2017), <http://www.redrocknews.com/2017/06/07/police-sweep-illegal-camp-sites> [<https://perma.cc/C9LN-KMA8>].

175. *Id.*

176. *See, e.g.*, DEBRA WHITCOMB ET AL., NAT'L INST. OF JUST., CITATION RELEASE 10 (1984), <https://www.ncjrs.gov/pdffiles1/Digitization/94200NCJRS.pdf> [<https://perma.cc/58P9-SKEH>] (explaining that the most explicit guidance that officers are provided about how to exercise citation release discretion comes in general orders setting out reasons to deny citation release).

officers from issuing a citation in lieu of arrest when the suspect “lacks ties to the area, such as a residence, job[,] or family.”<sup>177</sup>

Studies have consistently shown that the existence of such departmental policies, far more than officers’ own judgment or discretion, influence the decision whether to perform a full custodial arrest in any given instance.<sup>178</sup> And Peoria is certainly not an outlier. According to the National Conference of State Legislatures, state and departmental policies commonly discourage police from issuing citations in a variety of circumstances relevant to the experiences of homeless individuals.<sup>179</sup> For example, citations are discouraged if the arrestee requires physical or mental health care; if the arrestee is under the influence of drugs or alcohol; when there is a reasonable likelihood that the offense will resume or continue (particularly relevant to loitering and camping violations); or when the person is unable to provide valid identification at the time of arrest.<sup>180</sup>

For this reason, I recommend that Arizona police departments reform their general orders to make citation release mandatory for urban camping and similar crimes that are simply constitutive of the homeless experience. Eliminating officer discretion for a specific subset of homelessness-related offenses would allow departments to preserve the existing citation release criteria, which may have instrumental value when dealing with other types of offenders or offenses. In addition, it would reduce the possibility of unequal enforcement. When Illinois adopted discretionary citation release for marijuana possession, “[A]rrest rates went down in white neighborhoods but increased in black neighborhoods.”<sup>181</sup> Mandatory citation policies insulate departments from the public scrutiny invited by officer discretion over when and whether to use citation release.<sup>182</sup>

177. PEORIA POLICE DEP’T, PEORIA PD POLICY MANUAL 312 (2017), <https://www.peoriaaz.gov/Home/ShowDocument?id=4656> [<https://perma.cc/63KD-57W2>].

178. William Terrill & Eugene A. Paoline III, *Nonarrest Decision Making in Police-Citizen Encounters*, 10 POLICE Q. 308, 312 (2007), <https://journals.sagepub.com/doi/10.1177/1098611107299998> [<https://perma.cc/LN6V-M3XD>].

179. See NAT’L CONF. OF ST. LEGISLATURES, *supra* note 167.

180. *Id.*; see also WHITCOMB ET AL., *supra* note 176; Floyd F. Feeney, *Citation in Lieu of Arrest: The New California Law*, 25 VAND. L. REV. 367, 372 (1972).

181. Alexandra Natapoff, *Misdemeanors*, in 1 ACAD. FOR JUST., REFORMING CRIMINAL JUSTICE: PUNISHMENT, INCARCERATION, AND RELEASE 71, 90 (Erik Luna ed., 2017) (citing KATHLEEN KANE-WILLIS ET AL., ILL. CONSORTIUM ON DRUG POL’Y, PATCHWORK POLICY: AN EVALUATION OF ARRESTS AND TICKETS FOR MARIJUANA MISDEMEANORS IN ILLINOIS (2014)), [https://law.asu.edu/sites/default/files/pdf/academy\\_for\\_justice/Reforming-Criminal-Justice\\_Vol\\_1.pdf](https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_1.pdf) [<https://perma.cc/FJ7V-L75S>].

182. In addition, officers have reported that they are sometimes reluctant to use citations when victims are present, so as to avoid the perception of leniency. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 73, at 22. A mandatory citation release policy that removes officer discretion

Citation release policies have broad support within the criminal justice community. For example, the American Bar Association's Criminal Justice Section Standard 10-1.3 "favors use of citations by police or summons by judicial officers in lieu of arrest at stages prior to first judicial appearance in cases involving minor offenses."<sup>183</sup> In 2011, the U.S. Department of Justice convened a National Symposium on Pretrial Justice.<sup>184</sup> The first reform recommended by the symposium participants was increased "[u]se of citation releases by law enforcement in lieu of custodial arrests for non-violent offenses when the individual's identity is confirmed and no reasonable cause exists to suggest the individual may be a risk to the community or any other individual," or to miss court appointments.<sup>185</sup> And in 2016, the International Association of Chiefs of Police (IACP) conducted a first-of-its kind study about the use of citation release in the United States, concluding that the practice is not only widely used—in about one-third of all eligible incidents—but also viewed overwhelmingly positively by departments and officers.<sup>186</sup>

One reason for the broad support of citation release is that it provides substantial efficiency gains over custodial arrests. A custodial arrest, which necessarily includes transportation time in addition to the booking, can take up to two hours for an officer to complete.<sup>187</sup> By contrast, the IACP study found that, on average, it takes just twenty-four minutes for an officer to write a citation and send an individual on their way.<sup>188</sup> Citation release thus allows officers to return to the field sooner. Indeed, the Arizona Criminal Justice Commission recently cited these time-saving efficiencies to explain the use of citation release in some more rural counties:

Many Arizona law enforcement agencies are faced with the task of patrolling a vast rural landscape. As a result, some agencies are

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would provide justification to those, such as victims and business organizations, who might be expected to oppose the use of citation release for offenses that are perceived as impacting their interests. *See id.*

183. AM. BAR ASS'N, ABA STANDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 2 (3d ed. 2007), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pretrial\\_release.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.pdf) [<https://perma.cc/YXH5-9APS>].

184. PRETRIAL JUST. INST., NATIONAL SYMPOSIUM ON PRETRIAL JUSTICE (2011), <https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=a67b7c24-c6ab-f9db-9f94-ddfa189a9596&forceDialog=0> [<https://perma.cc/8TFM-LENZ>].

185. *Id.* at 39.

186. INT'L ASS'N OF CHIEFS OF POLICE, CITATION IN LIEU OF ARREST: EXAMINING LAW ENFORCEMENT'S USE OF CITATION ACROSS THE UNITED STATES 9, 10, 13 (Apr. 2016), <https://www.theiacp.org/sites/default/files/all/i-j/IACP%20Citation%20Final%20Report%202016.pdf> [<https://perma.cc/TUG7-4VFU>].

187. *Id.* at 12.

188. *Id.* at 13.

employing the process of citing and releasing alleged offenders in lieu of transporting them to a booking location. The cite and release process eliminates the time-intensive formal booking process at the time of arrest, thus maximizing officers' time on patrol.<sup>189</sup>

Using citation release in place of custodial arrest may also be efficient by reducing the pretrial jail population. Many of Arizona's county sheriffs have been vocal about the fact that their jails are currently at maximum capacity, declining transfers requested by the governor.<sup>190</sup> Jail overcrowding is largely driven by the pretrial detention of nonviolent, misdemeanor offenders.<sup>191</sup> While statewide statistics are hard to come by, the majority of people held in jail nationally are defendants awaiting trial.<sup>192</sup> By keeping homeless individuals out of jail, citation release has the potential to ease the crowding, infrastructure, and staffing burdens that Arizona's jails currently face.<sup>193</sup> Likewise, if citation release can keep offenders out of jail in the first place, research suggests it will also reduce the risk of reoffending, particularly in the case of young and first-time offenders.<sup>194</sup>

The biggest impediment to a mandatory citation release policy for a crime like urban camping is the perception that it will increase failure-to-appear (FTA) rates. FTA risk is one of the most cited reasons officers give for not

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189. PHILIP STEVENSON & MATTHEW BILESKI, ARIZ. CRIM. JUST. COMM'N, DOMESTIC VIOLENCE ARREST AND CASE PROCESSING DATA 3 (2013), <https://repository.asu.edu/attachments/143862/content/Domestic%20Violence%20Arrest%20.pdf> [<https://perma.cc/W7WY-D8AJ>].

190. Associated Press, *Counties Say They Have No Room for Inmates in Ducey Transfer Plan*, MOHAVE VALLEY DAILY NEWS (Feb. 9, 2020, 5:39 PM), <https://mohavedailynews.com/news/15572/counties-say-they-have-no-room-for-inmates-in-ducey-transfer-plan/> [<https://perma.cc/7J4Y-NVKQ>].

191. See Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 74–76 (2020), [https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr\\_online](https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1291&context=nulr_online) [<https://perma.cc/4MRH-F64V>].

192. See Natapoff, *supra* note 46, at 1314 n.7 (noting that approximately 62% of jail inmates were awaiting court action).

193. Use of citations in lieu of arrest avoids pretrial release based solely on financial ability, which is often considered discriminatory. See generally Comment, *An Analysis of the Citation System in Evanston, Illinois: Its Value, Constitutionality and Viability*, 65 J. CRIM. L. & CRIMINOLOGY 75, 79 (1974); Jeffrey M. Allen, Comment, *Pretrial Release Under California Penal Code Section 853.6: An Examination of Citation Release*, 60 CALIF. L. REV. 1339, 1344–49 (1972); INT'L ASS'N OF CHIEFS OF POLICE, LAW ENFORCEMENT'S LEADERSHIP ROLE IN THE PRETRIAL RELEASE AND DETENTION PROCESS 6 (2011), <https://www.nationalpublicsafetypartnership.org/clearinghouse/Content/ResourceDocuments/IA-CP-LE-Leadership-Role-in-Pretrial-20111.pdf> [<https://perma.cc/SGD2-XTJA>].

194. See GEOFFREY MONAGHAN & DAVE BEWLEY-TAYLOR, INT'L DRUG POL'Y CONSORTIUM, PRACTICAL IMPLICATIONS OF POLICING ALTERNATIVES TO ARREST AND PROSECUTION FOR MINOR CANNABIS OFFENCES 3 (2013), [http://filesserver.idpc.net/library/MDLE-report-4\\_Practical-implications-of-policing-alternatives-to-arrest.pdf](http://filesserver.idpc.net/library/MDLE-report-4_Practical-implications-of-policing-alternatives-to-arrest.pdf) [<https://perma.cc/4W4J-LGUT>].

using their citation discretion more frequently.<sup>195</sup> But the single-minded focus on FTA risk has increasingly been called into question by research demonstrating that “most people who miss court aren’t on the run.”<sup>196</sup> Studies show that criminal court FTA rates are about as frequent as no-show rates for medical and dental appointments.<sup>197</sup> Moreover, defendants who miss an appearance tend to return to court for subsequent appearances.<sup>198</sup> Estimated rates of actual flight or long-term absconding are in the low single digits.<sup>199</sup>

Further, the concern over FTA risk should be evaluated against the backdrop of a misdemeanor system that dismisses a large number of cases without prosecution. Case-level data on Arizona prosecutions is scarce, but the best estimates are that roughly a quarter of all arrests lead to charges that are dismissed without conviction.<sup>200</sup> (No data is available to distinguish low-level misdemeanors from more serious crimes.) In New York State, the figure for misdemeanor dismissals is roughly 45%.<sup>201</sup> The number of new citations that result in nonappearance is thus likely to be substantially lower than the current number of custodial arrests that ultimately lead to dismissed charges. This strikes me as an easy trade off.

The recent coronavirus pandemic has demonstrated the feasibility of expanding citation release, as many Arizona counties worked to keep misdemeanants out of jail for their own safety. On March 26, 2020, the Maricopa County Attorney announced that she directed her staff to find ways to “reduce the number of individuals having to interact with the criminal justice system.”<sup>202</sup> That same day, Phoenix Police Chief Jeri Williams said her department would be arresting fewer nonviolent offenders.<sup>203</sup> Goodyear Interim Police Chief Santiago Rodriguez made a similar proclamation, specifically noting the department’s citation release discretion while “encouraging officers to utilize alternate arrest methods in order to reduce

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195. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 73, at 15.

196. Ethan Corey & Puck Lo, *The ‘Failure to Appear’ Fallacy*, APPEAL (Jan. 09, 2019), <https://theappeal.org/the-failure-to-appear-fallacy/> [<https://perma.cc/W5MA-DNF4>].

197. *See id.*

198. *Id.*; Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 689 (2018).

199. Gouldin, *supra* note 198, at 689.

200. *Cases Dismissed: Arizona*, MEASURES FOR JUST., <https://measuresforjustice.org/portal/exploration?!=AZ&m=23> [<https://perma.cc/ET64-2V3Z>].

201. N.Y. STATE DIV. OF CRIM. JUST. SERVS., DISPOSITIONS OF ADULT ARRESTS 3 (2020), <https://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/nys.pdf> [<https://perma.cc/676W-6UXA>].

202. *How Criminal Justice Systems Are Responding to the Coronavirus Outbreak*, CRIME & JUST. INST., <https://www.cjinstitute.org/corona/> [<https://perma.cc/MXH5-LHGJ>].

203. Tom Scanlon, *New Guidelines: Fewer Arrests, More Citations*, W. VALLEY VIEW (Apr. 2, 2020), [https://www.westvalleyview.com/news/new-guidelines-fewer-arrests-more-citations/article\\_5d230248-7394-11ea-840f-37bbbd72a9ec.html](https://www.westvalleyview.com/news/new-guidelines-fewer-arrests-more-citations/article_5d230248-7394-11ea-840f-37bbbd72a9ec.html) [<https://perma.cc/ETC4-FWBW>].

person to person contact.”<sup>204</sup> The Buckeye Police Department and Avondale Police Department followed suit.<sup>205</sup> In Tucson, police officers were ordered to cite and release as frequently as possible, use the long-form process for nonviolent felonies, and not serve misdemeanor warrants unless to protect the public safety.<sup>206</sup>

Departments in other states have adopted similar policies throughout the pandemic.<sup>207</sup> For example, the police department in Chicago directed officers that certain low-level and nonviolent crimes could be handled via citation and misdemeanor summons as opposed to physical arrest.<sup>208</sup> The Washington, D.C. police department extended the use of citation-and-release to a number of new crimes.<sup>209</sup> And the San Francisco Bay Area Police Department has even taken an “education over enforcement” approach, preferring to warn people rather than to arrest them.<sup>210</sup> In all, forty-eight states have adopted policies to decrease the prison population, such as issuing citations in lieu of arrest for lower-level offenses.<sup>211</sup> These efforts make clear that a more widespread citation release policy is possible, despite FTA risk, and indeed relatively easy to implement if departments are sufficiently motivated to protect arrestees from harm.

But why trust police departments to take homelessness seriously? If structural impediments render ambitious legislative and judicial reforms unlikely, are police departments not similarly situated? I think there are two reasons for optimism.

One reason is admittedly somewhat cynical. As a practical solution to the indignity of arresting unsheltered individuals, making citation release mandatory for urban camping violations arguably also benefits the departments who implement it. Citation release has the potential to save police departments both time and money, while also reducing pretrial jail populations. The switch to mandatory citation release would also demonstrate police departments’ commitment to individual autonomy and respect for human dignity, even for disadvantaged members of the community. With police departments under increasing scrutiny, and amidst calls for reform from various community groups, this minor change in favor of respecting dignity may also be a step toward renewing goodwill. On this view, it may be that police departments are simply the best hope among bad options.

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204. *Id.*

205. *Id.*

206. BRENNAN CTR. FOR JUST., *supra* note 22.

207. *See, e.g., id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. CRIME & JUST. INST., *supra* note 202.



The other reason, however, is more charitable, and it is the one I would prefer to end on. Police historically have operated as social service providers as much as law enforcers. Frequently, this involved assisting homeless communities. Around the turn of the twentieth century, police provided a wide range of social programs, from offering basic health services to assigning welfare officers “to look after wayward youths.”<sup>212</sup> At the time, police represented the primary social service agency, largely because of the lack of alternative agencies and the recognition by politicians that providing social services was widely supported by voting blocs, as opposed to the issuance of arrests or citations.<sup>213</sup>

Even as that role shifted to distinct social service agencies, police departments continued to support local homeless communities, frequently with department-led initiatives. For example, many departments have begun to implement specialized training programs to equip officers with the information they need to effectively respond to these communities.<sup>214</sup> Some of these programs are as simple as “make contact with at least one homeless person per shift during field training,” on the theory that exposing officers to homeless issues will better prepare officers for the nuanced situations they will encounter while on duty.<sup>215</sup> Others have established a formal “homelessness school” that combines “classroom instruction, scenario-based exercises, and site visits to shelters and encampments.”<sup>216</sup>

In Los Angeles, the Sheriff’s Department receives training in a program called “Homeless Training for First Responders.”<sup>217</sup> The focus is to equip officers to provide resources and assistance, as opposed to pure enforcement.<sup>218</sup> The program is separated into distinct modules, which cover: “Understanding the Homeless Population, Stages of Homelessness, Approach and Contact, Enforcement and Collaboration, Leveraging Available Resources, and Legal Considerations and Potential Liabilities.”<sup>219</sup> By teaching officers that communication and understanding achieve better results, the department seeks to avoid creating additional problems for the homeless community or making it difficult for future officer interactions with

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212. LARRY K. GAINES & VICTORIA E. KAPPELER, *POLICING IN AMERICA* 77 (Janice Eccleston ed., 6th ed. 2008).

213. *Id.* at 76.

214. POLICE EXEC. RSCH. F., *THE POLICE RESPONSE TO HOMELESSNESS* 73 (2018), <https://www.policeforum.org/assets/PoliceResponseToHomelessness.pdf> [<https://perma.cc/BND2-J7UE>].

215. *Id.* at 6 (describing the Las Vegas Police Department).

216. *Id.* (describing the Broward County, Florida, Sheriff’s Department).

217. *Id.* at 56.

218. *Id.*

219. *Id.*

the same individual. Finally, the program encourages working with other organizations in a joint effort “and to view joint efforts as *including* law enforcement, but not necessarily being *led by* law enforcement.”<sup>220</sup>

Many police departments have even begun dedicating specialized teams within their agencies to homelessness.<sup>221</sup> According to a recent Police Executive Research Forum survey, over half the agencies currently have specific “officers or units dedicated to working with homeless persons.”<sup>222</sup> In Las Vegas, the police department dedicates officers to its Multi-Agency Outreach Resource Engagement Team (“MORE”), whose goal is to conduct outreach and connect homeless individuals with services in the field.<sup>223</sup> Meanwhile, a California homelessness unit discovered through its work that, on average, it takes *seventeen* contacts with a homeless individual before they consent to receiving services.<sup>224</sup> By setting up specialized units, police departments have been actively working to build rapport with affected communities. These outreach teams even frequently take active roles in guiding homeless individuals through the process of recovering property if it was seized or lost.<sup>225</sup>

These touches humanize the issue of homelessness for police in a way that is not true of legislative bodies or even judges. Since police are often the first line of contact with homeless populations, the strategies they have developed are rooted in recognizing the vulnerability and humanity—arguably dignity—of homeless populations. The overarching goal of the programs just detailed is to establish a strong rapport between police and homeless communities over time, building a foundation of trust that can be more effective in providing resources to these communities.

The earlier sections of this Essay thoroughly detailed the harms that custodial arrests inflict upon the homeless, particularly unsheltered individuals. This section explained why I have optimism in a police-department-led reform, even as I doubt the efficacy of legislative- or judiciary-directed proposals. Police departments have a long history of providing direct services to individuals experiencing homelessness. Their on-

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220. *Id.*

221. Departments in Santa Monica, San Diego, Pinellas Park, New York City, and Albuquerque have all established individuated police units with dedicated officers who are tasked solely with interacting with homeless populations. *Responses to the Problem of Homeless Encampments*, ARIZ. ST. UNIV. CTR. FOR PROBLEM-ORIENTED POLICING, <https://popcenter.asu.edu/content/homeless-encampments-page-3#endref61> [<https://perma.cc/V8X9-QU2E>].

222. POLICE EXEC. RSCH. F., *supra* note 214, at 41.

223. *Id.* at 42.

224. *Id.*

225. *Id.* at 49, 52.

the-ground experiences have, in many instances, inspired a continuing culture of support and service, rather than simply enforcement. A mandatory citation policy for urban camping, and similar crimes associated with the experiences of homelessness, taps into that culture. It is a small change at the most amenable level of the criminal justice system. But it is one that has the potential to meaningfully better the lives of those it affects.

#### CONCLUSION

Academic responses to the criminalization of homelessness have directly and ambitiously attacked criminalization itself, calling for repeals of state statutes and city ordinances, or proposing constitutional litigation strategies to protect individuals' rights. But structural barriers to reform resist decriminalization and legalization efforts. And those rare, noteworthy litigation victories are typically the result of protracted suits requiring substantial institutional support and funding. Meanwhile, the judicial articulation of constitutional rights has had little effect on the way we police homeless populations every day.

This Essay offers a more measured proposal: Arizona police departments should adopt a mandatory citation release policy for urban camping violations. These types of misdemeanor violations reflect the reality of desperate circumstances rather than true criminal culpability. Implementing a mandatory citation release policy for the crime most intrinsically tied to homelessness would spare countless individuals the indignity of a full custodial arrest and the attendant risks of property loss and separation from their community. In the absence of full decriminalization, a move to mandatory citation release represents an attainable, yet significant reform that could protect the dignity of countless homeless Arizonans.

Arizona law already grants broad authority to police departments to issue citations. Indeed, many Arizona departments adopted a presumptive citation policy when facing the coronavirus pandemic in early 2020, proving that citations in lieu of arrest can be a workable compromise when used to avoid putting individuals at risk. But seemingly neutral internal department guidelines too often prevent officers from issuing citations when individuals can't demonstrate specific kinds of community ties (usually defined as jobs and home ownership) or can't prove their identity to the satisfaction of the arresting officer. Thankfully, a policy change is easily implemented at the departmental level and redounds to the benefit of departments as well—reducing jail populations, saving departments money, and freeing officers to return to their beat much sooner.

Treating homelessness as a crime doesn't work. But until Arizona embraces non-carceral alternatives, we can at least approach the crime of homelessness humanely and with respect for the individuals who have no other choice.

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