

SIDEWALK LIVING

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ABSTRACT

In City of Grants Pass v. Johnson, the Supreme Court held that the Eighth Amendment does not prohibit a city from enforcing a criminal ban on encampments on public property such as parks and sidewalks. But even if municipalities are now permitted to use tactics such as policing, encampment clearing, arrests, and imprisonment, these are not the right ways to address the problems of public homelessness.

Instead, homelessness must be understood as one of many conflicts over limited public space. At its best, vibrant sidewalk life enhances communities and local economies. But at its worst, every use of these finite spaces threatens every other use of them, from transportation to recreation, commerce, community building, art, infrastructure, and much more. Cities, therefore, need to regulate sidewalks with a wide-angle lens that engages holistically with the numerous forces that shape that space. Homelessness—sidewalk living—is best addressed as part and parcel of those broader efforts.

These policies include, but are not limited to, expanding the availability of affordable housing, reducing the pervasiveness of unnecessary parking lots and zoning restrictions, and limiting the prevalence of unduly restrictive public space regulations that interfere with activities that serve communities and also help people

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get out of poverty. But even more important than the specifics, it is in stepping back from homelessness in particular, and in approaching these issues together as facets of responsible stewardship of public space, that municipalities can make more room and a more harmonious sidewalk life for everyone.

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INTRODUCTION

In Yellowstone National Park, there is a massive volcanic field called the Yellowstone Caldera.¹ Fortunately, it has not erupted for tens of thousands of years, and it shows no sign of erupting anytime soon.² But imagine that, as you are reading this, the caldera erupts. People have just enough warning to enable them to flee, so by some miracle nobody dies, but the lava destroys the homes and most of the belongings of the 580,000-plus people in the State of Wyoming.³ Over half a million people without homes would make headline news across the country. It would generate substantial political and public attention. Emergency resources from every level of government would likely pour into the region in an effort to stabilize these people's lives and get them back on their feet.

Meanwhile, the real homelessness problem we have in the United States is much worse than this hypothetical, yet the response is nowhere near adequate or appropriate. The problem: As the U.S. Department of Housing and Urban Development bluntly put it, “[o]n a single night in January 2024, 771,480 people experienced homelessness in the United States, the largest number since data collection began and an overall increase of 19 percent since 2007.”⁴ And while the numbers have never exactly been encouraging—the lowest number in the last eighteen years was still over half a million people⁵—they have been getting alarmingly more tragic. Indeed, since the COVID-19 pandemic began in 2020, the number of people experiencing homelessness in the United States has increased over

1. Alyssa Samson, *When a Sleeping Giant Awakes*, NAT'L GEOGRAPHIC: EDUC. (May 20, 2025), <https://education.nationalgeographic.org/resource/when-sleeping-giant-awakes/> [https://perma.cc/P6CQ-ZVJS].

2. *See id.*

3. The 2024 population of Wyoming was 587,618. *QuickFacts: Wyoming*, U.S. CENSUS BUREAU (July 1, 2024), <https://web.archive.org/web/20250405101345/https://www.census.gov/quickfacts/fact/table/WY/PST045224> [https://perma.cc/TVE4-LK8K].

4. TANYA DE SOUSA & MEGHAN HENRY, U.S. DEP'T OF HOUS. & URB. DEV., *THE 2024 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART I: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (2024)*, <https://www.huduser.gov/portal/sites/default/files/pdf/2024-AHAR-Part-1.pdf> [https://perma.cc/SZC6-NE7P].

5. *Id.* at 2 exhibit 1-1.

30 percent.⁶ What all this means is that, if every person experiencing homelessness in the United States right now gathered in one place, they would outnumber the population of Wyoming, not just by a little, but by almost 50 percent. In fact, they would outnumber the populations of Vermont, Alaska, and the District of Columbia too.⁷ That place—the sum total of every unhoused person in the country—would even get three electoral votes in presidential elections and be represented by two senators and a member of Congress.⁸

And our chosen solution? By and large, to spend decades devoting substantial government power and resources toward punishing people experiencing homelessness, all in a cruel and ineffective effort to make homelessness—or, more accurately, the people themselves—just go away.

To be sure, some defenders of these approaches might be quick to claim that the hypothetical victims of the Yellowstone Caldera are blameless and therefore deserving of our help, while those who are supposedly responsible for their condition without permanent shelter are instead deserving of our shame and reprimand.⁹ Others might refrain from assigning blame but profess to be stumped in the face of a complex, multicausal social problem.¹⁰

6. *Id.* at 3 exhibit 1-3.

7. The 2024 population of Vermont was 648,494. *QuickFacts: Vermont*, U.S. CENSUS BUREAU (July 1, 2024), <https://web.archive.org/web/20250203033643/https://www.census.gov/quickfacts/fact/table/VT/PST045224> [<https://perma.cc/7UTD-7DRH>]. Alaska's was 740,133. *QuickFacts: Alaska*, U.S. CENSUS BUREAU (July 1, 2024), <https://web.archive.org/web/20250203175850/https://www.census.gov/quickfacts/fact/table/AK/PST045224> [<https://perma.cc/6VPT-BPEW>]. The District of Columbia's was 702,250. *QuickFacts: District of Columbia*, U.S. CENSUS BUREAU (July 1, 2024), <https://web.archive.org/web/20250221030839/https://www.census.gov/quickfacts/fact/table/DC/PST045224> [<https://perma.cc/YUY3-G3JC>].

8. *See* U.S. CONST. art. I, § 2, cl. 3 (amended 1868); *id.* art. I, § 3, cl. 1 (amended 1913); *id.* art. II, § 1, cl. 2.

9. *See, e.g.*, Roshan Abraham, *America Has Decided that Homeless People Aren't People*, VICE (May 9, 2023, at 13:08 ET), <https://www.vice.com/en/article/america-has-decided-that-homeless-people-arent-people-jordan-neely/> [<https://perma.cc/QV4V-UZ29>]; Jamelle Bouie, Opinion, *The Demonization of the Homeless Has Vile Consequences*, N.Y. TIMES (May 6, 2023), <https://www.nytimes.com/2023/05/06/opinion/columnists/homeless-jordan-neely.html> [<https://perma.cc/4PBV-HPRY>]; Ethan Ward, *Slashed Tents. Vigilantes. How the Homelessness Crisis Is Making Streets Unsafe for Unhoused People*, LAIST (May 9, 2022, at 08:00 ET), <https://laist.com/news/housing-homelessness/slashed-tents-vigilantes-how-the-homelessness-crisis-is-making-streets-unsafe-for-unhoused-people> [<https://perma.cc/5RQU-XM8L>].

10. *See, e.g.*, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2226 (2024) (“Homelessness is complex. Its causes are many. So may be the public policy responses required to address

But as much as resorting to punishment might seem like an appealing or at least understandable answer, life does not neatly divide us into the blameworthy and the blameless. And even if it did, the numbers do not lie: Decades of punishment have failed.¹¹ Social problems such as homelessness remain problems no matter where the blame falls and no matter how complex they are to solve. Throwing up our hands in the face of the intricacy is both irresponsible and impractical.

At the same time, the opposite extreme is just as imprudent. Many critics of the status quo are often too quick to defend the rights and actions of unhoused people in terms that are too absolute. Precisely because society has failed to adequately respond to the problem, the argument goes, we have forfeited much of the moral authority to remove people from public space. In other words, the interventions that we do offer, from shelters to treatment programs, are all inadequate, and because we have left people with nowhere else to go and nowhere near enough of the right kinds of support, how dare we tell them where they can and cannot sleep?¹²

Homelessness undeniably remains a problem, though—not only for the people experiencing it, but also for the cities, towns, and neighborhoods in which it arises. The problem has many dimensions, but in this Article, I will focus on one important facet: the implications of homelessness for public space. My broader research focuses on sidewalks and the ways that numerous areas of law and policy intersect there to shape and reflect community identities.¹³

it.”); Brief of City of Los Angeles as Amicus Curiae in Support of Neither Party at 13, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 1009148, at *6 (“While the City pursues the goal of providing enough housing and shelter for all unhoused people it must be able to enforce partial solutions as they become available.”).

11. See *infra* Part II.

12. See, e.g., Brief of Chicago Coalition for the Homeless et al. as Amici Curiae in Support of Respondents at 11, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 1469568, at *9; Brief of Amici Curiae Advocates for Survivors of Gender-Based Violence in Support of Respondents at 2-5, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 1484124, at *5-6; Brief Amicus Curiae on Behalf of the Los Angeles Catholic Worker, in Support of Respondents at 3-5, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175), 2024 WL 1484033, at *4-5.

13. See generally MICHAEL C. POLLACK, *SIDEWALK NATION: THE LIFE AND LAW OF AMERICA’S MOST OVERLOOKED RESOURCE* (forthcoming 2026) (detailing the significance of sidewalks in social and political contexts); Michael C. Pollack, *Sidewalk Government*, 122 MICH. L. REV. 613, 620-29 (2024) [hereinafter Pollack, *Sidewalk Government*] (highlighting the various roles that sidewalks play for neighborhood residents, property owners, commercial

Sidewalks both affect and are affected by First Amendment law,¹⁴ Fourth Amendment law,¹⁵ property law,¹⁶ tax law,¹⁷ local government law,¹⁸ disability law,¹⁹ and much more. Among all of these, homelessness looms large. After all, while unhoused people live and rest in a lot of places—including parks, subways, bus stops, train stations, and shelters—sidewalks are extremely common spots.²⁰ Perhaps even more important, they are extremely *salient* spots because sidewalks are where homelessness collides most frequently and most immediately with numerous other users and uses of limited public space.²¹ Sidewalks are therefore the places where many people tend to experience and confront homelessness most acutely.

While our public space should of course accommodate those who do not have private space of their own, homelessness harms sidewalk use and sidewalk life in numerous ways. What this means is that people experiencing homelessness cannot be permitted to occupy scarce public space unchecked. But—and this is critical—that is not because they are necessarily doing so in ways that are dangerous or unhealthy. At bottom, it is because *nobody* can be permitted to occupy scarce public space unchecked. To be sure, we may have greater sympathy for the person who does it because they have no other choice than we do for the person who does it because they simply feel like it, or than we do for the business that does it just to make extra money. But our sympathy cannot obscure the reality that every use of limited public spaces, such as sidewalks, threatens every other use of those spaces, from transportation to recreation, commerce, community building, art, infrastructure, and much more.²² When those uses are threatened, the vitality of whole neighborhoods—particularly some of the poorest neighborhoods—is

interests, communities, and local governments).

14. *See infra* text accompanying note 33.

15. *See infra* text accompanying notes 94-96.

16. *See infra* text accompanying notes 98-102.

17. *See infra* notes 119-23 and accompanying text.

18. *See infra* Parts III-IV.

19. *See infra* text accompanying notes 88-90.

20. Pollack, *Sidewalk Government*, *supra* note 13, at 633.

21. *See id.* at 633-34.

22. *Id.* at 629-35.

put at risk.²³ When we think about the legal and policy solutions for homelessness, we therefore have to do so in the context of identifying what and who we want our civic life and public space to be for.

This Symposium is centered around the Supreme Court's 2024 decision in *City of Grants Pass v. Johnson*, in which the Court held that the Eighth Amendment does not prohibit a city from enforcing a criminal ban on encampments on public property such as parks and sidewalks.²⁴ I tend to think this is a correct application of the Eighth Amendment—which bans imposing “cruel and unusual punishments” rather than defining cruel and unusual crimes²⁵—and, as I argue below, I also believe that municipalities need the power to protect the usability and accessibility of public space for the public.²⁶ I also do not think the Court's decision spells doom for the rights of people experiencing homelessness because, as even the Court agreed, other provisions of federal and state constitutions continue to play important parts in protecting the rights of people experiencing homelessness.²⁷ *Grants Pass* thus does not give municipalities free reign against unhoused people.

But just because the government is allowed to do a thing does not mean it is a good idea to do it. And even if municipalities are permitted to use tactics such as policing, encampment clearing, arrests, and imprisonment, these are, without more, not the way out. Indeed, punitive approaches at best offer short-term relief and, at worst, exacerbate the problem by making it that much harder for people to transition out of homelessness.²⁸ Instead of looking at homelessness as a problem of its own type, or as a problem of bad people making bad choices, or as a problem that is just too hard to solve, we have to lean in to the complexity. The more that homelessness touches on other issues of law and policy, the more levers we have to address it.

Specifically, this Article argues that we should address homelessness as part of a broader effort to make public space work for everyone, including but not limited to people experiencing

23. *See id.*

24. 144 S. Ct. 2202, 2226 (2024).

25. U.S. CONST. amend. VIII (emphasis added).

26. *See infra* notes 88-95, 117-21 and accompanying text.

27. *Grants Pass*, 144 S. Ct. at 2224.

28. *See infra* Parts II-III.

homelessness. That means making serious efforts and investments that pair the reclamation of public space with the provision of real, safe, sustainable, affordable, and long-term housing alternatives. It means lifting regulations that consign far too much land in dense cities to inefficient uses, such as parking, rather than to productive uses, such as recreation, commerce, or housing. It means approaching the regulation of public space with an eye toward making it easier to engage there in prosocial, beneficial activities, such as vending, which can serve communities while also helping people get out of poverty. And it means doing it all with a wide-angle lens that engages holistically with the numerous forces that shape public space.

This Article proceeds in four parts. Part I responds to the black-and-white ways in which homelessness is too often framed and instead presents the problem of homelessness as a tragedy of the commons: a private exploitation of public space that, while understandable on its own, comes together to threaten the space for everyone's sake. This understanding of the problem is important for two reasons. First, it is how the problem is actually experienced by most people, and, I will argue, it is at the root of the public revulsion that is often directed at people experiencing homelessness. Second, tragedies of the commons have well-understood remedies rooted in property law and government regulation, so understanding homelessness in this way can chart the path toward more effective responses.

Parts II and III are devoted to critiquing the most dominant approaches in cities and towns today: privatization and policing. In addition to relying on policing as a primary tool to address homelessness, many municipalities center the interests and rights of businesses and private property owners. This is part and parcel of a broader misallocation of authority for public space, but both of these tactics have particularly troubling consequences for people experiencing homelessness, who often see some of the most available paths away from living on the sidewalk blocked in the name of the protection of that very space.

Part IV turns to what we ought to do instead. Having situated the problem of homelessness in the context of conflicts over limited public space in Part I, and having criticized the roles of police and

private property owners in Parts II and III, this Part makes the case for regulatory responses. But the argument is not simply one for more requirements and more red tape. Instead, communities need to step back and make government-wide commitments to the public space and civic life they want to see. Oftentimes, achieving those goals might actually mean *less* regulation in spots—or at least *smarter* and more *comprehensive* regulation. Protecting public space for all of the public requires government intervention, but, too often now, local governments regulate only for the interests of some. Changing that can change everything for people experiencing homelessness, and for all of us.

I. HOMELESSNESS AS A TRAGEDY OF THE COMMONS

The concept of the tragedy of the commons was first described by the Greek philosopher, Aristotle, who wrote: “[T]hat which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest.”²⁹ In other words, when it comes to private resources—the spaces and things we each own ourselves—we give them great care to avoid depleting them through overuse. A farmer is careful about giving fields a rest between growing seasons, rotating the crops so the soil does not get worn out and preventing the animals from eating more than the field can handle. Even for those of us who are not farmers, we are thoughtful in our own yards (to water the lawn and the plants, to ensure that the grass gets enough sunlight, to not trample it too much) and our own homes (to clean up the kitchen after we are done cooking, to turn out the lights when we have left a room). But when it comes to many public resources, we do not have the same incentives to be quite so careful. We may let our

29. ARISTOTLE, *The Politics*, in *THE POLITICS AND THE CONSTITUTION OF ATHENS* 9, 33 (Stephen Everson ed., Benjamin Jowett trans., 1996). The phrase itself is often credited to Garrett Hardin. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1243 (1968). Some, including Hardin himself, have deployed Hardin’s work in support of a number of odious and racist causes that warrant condemnation. Gregory M. Stein, *Environmental Justice and the Tragedy of the Commons*, 13 *CAL. L. REV. ONLINE* 10, 11-12 (2022), <https://www.californialawreview.org/online/k0r4wuqfujqjgyw2e6naejr1ymtrak> [<https://perma.cc/8BVE-65W7>] (discussing the fields in which Hardin’s work has been used to support controversial theories). But the basic concept dates back to antiquity and can readily be separated from those causes.

animals graze more than the field can tolerate. We are not as attentive to how our picnicking tramples the grass in a park. We are not as careful about cleaning up after ourselves. We may even litter.

On the one hand, we do it because we can get away with overusing or not maintaining the shared resource. Once we are done, we can just move on to someplace else without anyone detecting or punishing our misuse. Moreover, we do not feel the effects of our activity—that is, we do not internalize the negative externalities—so we are less likely to avoid causing them. And on the other hand, if we *were* to invest our time and money in maintenance and cleanup, we would not be able to capture all the benefits of that investment: We cannot internalize the positive externalities either. That means others could and would free ride on our hard work. And because we can rationally expect that to happen, we are not likely to do that work in the first place, or at least not to do more than the bare minimum we need to keep the resource usable for ourselves only.

The predicted outcome is that finite resources that are open to everyone will ultimately tend to be depleted and even ruined because each rational user considers only their own utility, not the group's.³⁰ Therein lies the tragedy. Everyone's individually rational, albeit rationally selfish, behavior leads to a result that none would rationally desire.

While the paradigm examples were once grazing fields, sidewalks are unfortunately a terrific illustration of the tragedy of the commons in a modern, urban society. That is because we all use them for much more than just traveling from one place to another.³¹ Sidewalks are also where we socialize. They are where we host parties, festivals, parades, or just chats with neighbors and friends.³² Sidewalks are where we speak. They are where we protest, picket, gather signatures for causes and candidates, or even create and display art.³³ Sidewalks are where we engage in commerce. They are where restaurants and cafés set up tables, where popular

30. See ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30 (1990) (calling these “common-pool resources”).

31. See Pollack, *Sidewalk Government*, *supra* note 13, at 620-29.

32. *Id.* at 621, 627.

33. *Id.* at 627-28.

stores and clubs make customers wait in line, and where shops display advertising.³⁴ They are where individuals may sell things of their own, where food carts may do business, where buskers play music for spare change, and where Girl Scouts sell cookies.³⁵ Increasingly, they are also where companies are deploying robots to deliver food and packages.³⁶ Finally, sidewalks are where governments and property owners alike install the infrastructure that is necessary to keep a city running.³⁷ They are where we put lamp-posts, fire hydrants, telephone and cable poles, bus stops, subway entrances, mailboxes, scaffolding for buildings under construction, and more.³⁸

Each of these uses competes for space on a narrow strip of concrete, and each threatens the viability and vibrancy of the others.³⁹ Utility infrastructure on the sidewalk takes space away from sidewalk dining, and construction scaffolding can throw those café tables into darkness. Sidewalk queuing takes away space from pedestrians. Sidewalk vending competes with sidewalk dining and vice versa. Sidewalk protest and picketing may make the space hostile to other commercial uses—indeed, that is often the point of the protest.⁴⁰ Sidewalk delivery robots can make the space less accessible for travelers who use wheelchairs or who have other mobility limitations. And on and on. None of these uses is “wrong” in some abstract or normative sense. The people engaged in them are using available space to engage in activities that benefit their interests. Perhaps those activities even benefit the public interest as well. The wrongness only arises when people try to do all these

34. *Id.* at 622-23.

35. *Id.* at 625-26.

36. See, e.g., *Sidewalk Robots Are Already Busy Delivering Groceries*, THE ECONOMIST (Feb. 12, 2022), <https://www.economist.com/science-and-technology/sidewalk-robots-are-busy-delivering-groceries-while-autonomous-vehicles-wait-for-the-green-light/21807601> [<https://perma.cc/M3VL-JMER>].

37. Pollack, *Sidewalk Government*, *supra* note 13, at 628.

38. *Id.* at 628-29.

39. See *id.* at 629-35.

40. See, e.g., Chloe Folmar, *Morton's Condemns Abortion Rights Protesters for Disrupting Kavanaugh's Freedom to 'Eat Dinner'*, THE HILL (July 8, 2022, 08:28 ET), <https://thehill.com/regulation/court-battles/3549907-mortons-condemns-abortion-rights-protestors-for-disrupting-kavanaughs-freedom-to-eat-dinner/> [<https://perma.cc/5QHB-SAVT>].

things at once in the same limited space. The collision creates the tragedy.

Moreover, just as with the grazing fields, all of these uses not only compete in real time with others, but they risk damaging the underlying resource in the long term. More use means more wear and tear on the concrete.⁴¹ As sidewalk pavers crumble, the space becomes less usable for everyone and for all these uses, but particularly for people with mobility limitations who struggle to navigate uneven terrain.⁴²

Homelessness is, in one sense, just another use of the sidewalk. Unhoused people may use the sidewalk to sit, eat, sell items, and panhandle. They may use the sidewalk to socialize, sleep, and relieve themselves. And similar to all the other uses of the sidewalk, these are rational, self-regarding activities that can interfere with the sidewalk's utility for everyone else's rational, self-regarding activities and that can, in the long run, harm the sidewalk surface itself.⁴³ That is, people experiencing homelessness create negative externalities on the sidewalk—*not because they are bad people*, but because they are occupying and using limited space that depletes the resource when others also want or need to use it.

People can argue ad nauseam about whether homelessness is malignant or unfortunate, whether it is the fault of individuals or of society, and so on, just as they can argue whether protests, queues, and everything else are good or bad. As I indicated at the outset, my argument here is that those debates miss the point, or at the very least make it needlessly harder to get to resolutions.⁴⁴ People who operate sidewalk cafés are not bad people. People who picket are not bad people. Girl Scouts selling cookies are not bad people. And people experiencing homelessness are not bad people. In fact, all of these people have something in common: They rationally use the public sidewalk for their own private benefits and, in doing so, risk the value of the space for everyone.

One of the reasons the tragedy of the commons is a tragedy is because there is nobody to blame. We do not call it the “crime of the

41. See Pollack, *Sidewalk Government*, *supra* note 13, at 640.

42. *Id.* at 641-42.

43. *Id.* at 662.

44. See *supra* text accompanying notes 5-8.

commons.” The problem is a structural phenomenon, and I do not mean “structural” in the sense that homelessness is a failing of society to protect our most vulnerable (though it is). It is structural in the sense that it inheres in the legal and regulatory structure of public space itself.

This framing is particularly useful when it comes to addressing the problem of homelessness in public space for a few reasons. First, it seems to be how homelessness manifests for many of the people who find it to be a problem.⁴⁵ That is, many people who vilify unhoused people do so because they find their presence in public space to impede their own enjoyment of the space.⁴⁶ To be sure, much of that impression is misplaced. Plenty of unhoused people who sit or sleep on the sidewalk are not limiting anyone’s ability to walk safely, eat safely, or do anything else.⁴⁷ Moreover, while people who are unhoused sometimes harass others in public space, so do plenty of people who are not unhoused. But misplaced or not, that is the reaction. And, ultimately, people sleeping on the sidewalk do take up space, particularly if they are doing so as part of a larger encampment. That occupation of space is objectionable precisely because it makes the sidewalk less usable by others.

Stripping down the problem to how it actually impacts communities and approaching it from that perspective ought to enable us to move past arguments that either disparage unhoused people as inherently bad or that portray them as hapless victims of an intolerant or unsupportive society. At the end of the day, none of that matters.

Second, approaching the question in terms of the tragedy of the commons is also beneficial because it offers clearer paths toward solutions. And we do indeed need solutions, because protecting the usability and accessibility of public space for the public is essential

45. See Risa Goluboff & Richard Schragger, *Grants Pass and the Vagrancy Revolution Revisited*, 2024 SUP. CT. REV. 191, 215 (“Vagrancy regulation is about urban space: The shelter-less are only a problem when they are among us, in spaces we want to be in, physically, socially, and economically.”).

46. See Romeo Vitelli, *Why Is Homelessness So Stigmatized?*, PSYCH. TODAY (June 5, 2021), <https://www.psychologytoday.com/us/blog/media-spotlight/202106/why-is-homelessness-so-stigmatized> [<https://perma.cc/E53M-5Y7Y>].

47. See Nicole Wetsman, *Why Experts Say Unhoused People Are Unfairly Assumed to Be Dangerous*, ABCNEWS (Oct. 17, 2023, at 05:17 ET), <https://abcnews.go.com/Health/unhoused-people-perceived-dangerous/story?id=103751928> [<https://perma.cc/45LX-EXSY>].

for communities, their residents, their economies, and their safety. There are three traditional ways to resolve the tragedy: (1) privatize the resource, (2) regulate the resource by law, or (3) govern the resource by norms.⁴⁸ The first introduces an owner of the space who, by making it private property, has the power to either exclude other users altogether or to manage other users by charging a fee, imposing rules, or in some other way compelling them to maintain the shared resource on pain of losing access to it.⁴⁹ The second keeps the resource public but sees the government step in to impose regulations and rules that govern its use and that prevent its depletion.⁵⁰ This approach requires a government that has the tools and the wherewithal to not only create smart rules but to enforce them effectively. Finally, the third relies on informal social norms and consensus to govern the shared resource without privatization or government regulation.⁵¹

The last option—reliance on norms—has promise, but only in limited circumstances. Nobel Laureate Elinor Ostrom demonstrated that shared resources can sometimes be effectively managed without privatization or government intervention.⁵² Instead, the people who use the resource can create and enforce their own rules and norms.⁵³ This is most likely to be the case, however, under specific conditions. Self-organization works best when all of the users share similar stakes in the resource, when they will find it easy to monitor one another, when they trust each other, and when they make up a small, stable, and relatively uniform group.⁵⁴ Needless to say, even if smaller towns can make this work, these circumstances are rarely

48. OSTROM, *supra* note 30, at 1.

49. See Barton H. Thompson, Jr., *Tragically Difficult: The Obstacles to Governing the Commons*, 30 ENV'T L. 241, 243-44 (2000); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

50. See OSTROM, *supra* note 30, at 8-11; Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 719-20 (1986).

51. See generally OSTROM, *supra* note 30 (arguing that local communities can establish norms which overcome the tragedy of the commons); Rose, *supra* note 50 (providing a historical perspective on "public property").

52. See generally OSTROM, *supra* note 30 (exploring the conditions under which shared resource problems have been satisfactorily solved).

53. *Id.*

54. *Id.* at 211. See generally ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991) (describing the effectiveness of norms among cattle ranchers in Shasta County, California).

present when it comes to sidewalks in large, urban communities. The more users there are, the more uses they pursue. And the more diverse their views about the “correct” uses of sidewalk space, the less likely they are to reach consensus about what the rules are and how they ought to be enforced. Another way to make this point is to look at where society finds itself, particularly when it comes to homelessness. There is nothing approaching a sense of shared norms, at least not ones that are shared among unhoused people and their neighbors.⁵⁵ Again, that is not because the former are bad or incorrigible, but simply because their interests are not aligned with those of many of their neighbors. I would say the same—and have—about why norms are a tough sell when it comes to regulating most sidewalk activity.⁵⁶

That leaves us with either privatization or the regulation of public space by the government. We have used both of these approaches when it comes to the sidewalks in general and to homelessness in particular. And we have gotten nowhere. Parts II and III set out the numerous flaws of our most common responses to homelessness, and Part IV sets a course toward a better approach to this particular tragedy of the commons.

II. PRIVATE RESPONSES TO HOMELESSNESS

Take privatization first. It is true that the conflicting uses, the overuse, and the physical damage can be traced to the fact that sidewalks are finite in space, time, and durability, but open to everyone.⁵⁷ It is therefore also true that closing them to troublemakers, however defined, would limit the trouble. But as I have argued in previous work,

[P]roperty rights solve the tragedy of the commons by eliminating the commons, not by eliminating the tragedy. This may be a fair approach when the value of the resource in question exists simply in its ability to be consumed, but it loses much of its allure as soon as there is *also* value in the experience of the

55. See Pollack, *Sidewalk Government*, *supra* note 13, at 633-34.

56. See *id.* at 636.

57. See *id.* at 630.

collective use itself and in the equality of access to that experience.⁵⁸

That is, privatization can address the problem because putting sidewalks into private hands would enable those owners to throw out everyone who was not behaving according to their wishes—whether that is sleeping, sitting, or panhandling, or whether that is socializing for too long, selling the wrong kind of product, or even wearing the wrong kind of clothes.⁵⁹ But in doing so, it would destroy what a sidewalk is: a place for communities to be communities. It would also raise a host of administrability problems—who would be the owners?—and, the more owners there are, the more that one’s rights to engage in sidewalk activities would vary every few feet and the more that governments would find it difficult to place the infrastructure that is necessary for a city to operate.⁶⁰ And, in the context of homelessness in particular, it would only “address the problem” in the superficial sense of eliminating unhoused people from some or all sidewalks.⁶¹ It would do nothing at all to make unhoused people housed or to improve their lives in any way.

We have some experience with versions of privatization, too, and it has usually gone quite badly from the perspective of dealing with homelessness. While actual private ownership and control of sidewalks is rare, one way in which the regulation of sidewalks is sometimes privatized is by business improvement districts (BIDs).⁶² A BID is a quasi-governmental, quasi-private organization with some delegated governmental authority in a particular area of a city

58. *Id.* at 657-58.

59. *See, e.g.*, *Utah Gospel Mission v. Salt Lake City Corp.*, 425 F.3d 1249, 1257-58 (10th Cir. 2005) (finding that after Salt Lake City turned total control of a stretch of sidewalk over to the Church of Jesus Christ of Latter-Day Saints, the sidewalk was no longer a public forum and that the Church’s restrictions on expression and dress could therefore be enforced there); Christopher Serkin, *Public Entrenchment Through Private Law: Binding Local Governments*, 78 U. CHI. L. REV. 879, 902-03 (2011) (discussing *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002), which “involved selling the Church of Jesus Christ of Latter-Day Saints a portion of Salt Lake City’s main street, over which the city retained an easement,” because the church wanted to “regulate the behavior and dress of people on the public square in front of its church in downtown Salt Lake City”).

60. *See* Pollack, *Sidewalk Government*, *supra* note 13, at 657.

61. *See id.* at 657-58.

62. Richard Briffault, *A Government for our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 366 (1999).

to improve the business environment by collecting trash, planting flowers, providing security, installing benches and lights, shoveling snow, and cleaning and maintaining the sidewalks.⁶³ BIDs carry out these tasks pursuant to state and local law with money that they bring in by imposing assessments on commercial properties within their zones.⁶⁴ And because the commercial properties are the ones that owe the money, it is usually just the commercial properties that have the power to vote for the people who run the BID and make the decisions about its operations.⁶⁵ But because they sometimes hire supplemental police or sanitation services, for example, BIDs can exert influence over who gets to use sidewalks and how they get to use them.⁶⁶ Unsurprisingly, they often use that power to exclude unhoused people from the space, whether they are engaged in small-scale vending to try to earn some money or whether they are simply existing.⁶⁷ Moreover, BIDs also exert political pressure when it comes to setting local governmental policy and local law, and they have been major driving forces behind many of the more aggressive steps cities have taken against unhoused people.⁶⁸ But in terms

63. *See id.* at 394-401.

64. *See* LYNN A. BAKER, CLAYTON P. GILLETTE & DAVID SCHLEICHER, LOCAL GOVERNMENT LAW: CASES AND MATERIALS 270-71 (5th ed. 2015).

65. *See, e.g.*, *Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 97 (2d Cir. 1998).

66. *See, e.g.*, Briffault, *supra* note 62, at 394-409 (discussing BID powers and activities, including programs aimed at removing people experiencing homelessness); *Our Services*, GRAND CENT. P'SHIP, <https://www.grandcentralpartnership.nyc/about/our-services> [<https://perma.cc/UMK3-YESA>] (describing the BID's provision of oversight services and infrastructure such as "supplemental public safety," light poles, garbage cans, bike racks, benches, and "homeless outreach").

67. *See, e.g.*, ANASTASIA LOUKAITOU-SIDERIS & RENIA EHRENFUCHT, SIDEWALKS: CONFLICT AND NEGOTIATION OVER PUBLIC SPACE 141 (2009) (noting that when Donald Trump led the Fifth Avenue Merchant Association BID in New York City in 1985, he got then-Mayor Ed Koch to deploy the police to remove vendors from Fifth Avenue's sidewalks because he thought "Africans" were a "blight" on the neighborhood); SETHA LOW, WHY PUBLIC SPACE MATTERS 113 (2023) ("Streets, plazas, and sidewalks were closed [to vending] because of the powerful business lobby BID regulations and the increasing quasi-privatization of streets, plazas, and sidewalks by corporate interests limited street vendors' access to many of the locations where they traditionally worked.").

68. *See* LOUKAITOU-SIDERIS & EHRENFUCHT, *supra* note 67, at 244 ("[M]unicipal policies and ordinances assume a link between sidewalk space and abutting property interests—particularly those properties that are engaged in economic activities."); MITCHELL DUNEIER, SIDEWALK 252 (1999) (quoting a BID president saying that "street people" should not have rights and asserting: "They are not homeless. These people never had homes."); FORREST STUART, DOWN, OUT, AND UNDER ARREST: POLICING AND EVERYDAY LIFE IN SKID ROW 56 (2016) (describing how BIDs "aggressively lobb[ie]d the LAPD to begin clearing homeless

of the underlying problem, all that these approaches have achieved is the clearing of visibly unhoused people from specific spaces. That simply puts greater demands on other spaces without comparable resources or political power. And it leaves the individuals themselves no better off.

Private interests have recently adopted still further troubling techniques to regulate the use of sidewalks by people experiencing homelessness. One, in early stages, is turning to public nuisance law. In these lawsuits, individuals and property owners sue cities for their failure to clear, in the words of an Arizona law, “[a]ny place, condition or building that is controlled or operated by any governmental agency and that is not maintained in a sanitary condition.”⁶⁹ An Arizona appellate court held that this statute encompasses encampments on sidewalks adjacent to government-owned land.⁷⁰ More capaciously, a bill currently in the Pennsylvania legislature would enable individuals to petition their local governments to compel any private property owner to either eject encampments on their land or assume legal responsibility for them within thirty days.⁷¹ Finally, a decidedly less formal way that individuals are taking matters into their own hands is simply by blockading sidewalks in front of their properties.⁷² In my own research, for example, I have seen stretches of sidewalk in Denver, Colorado, strewn with metal basins full of heavy rocks, or even with piles of boulders, designed to “encampment-proof” the sidewalk. To be clear, these obstructions are put in place by owners of adjacent property

people from Skid Row sidewalks”); Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 971 (2020) (“[L]ocal business interests have frequently been at the forefront of movements to criminalize and arrest those experiencing homelessness.”); JEFFREY SELBIN, STEPHANIE CAMPOS-BUI, JOSH EPSTEIN, LAURA LIM, SHELBY NACINO, PAULA WILHELM & HANNAH STOMMEL, U.C. BERKELEY SCH. LAW, POL’Y ADVOC. CLINIC, HOMELESS EXCLUSION DISTRICTS: HOW CALIFORNIA BUSINESS IMPROVEMENT DISTRICTS USE POLICY ADVOCACY AND POLICING PRACTICES TO EXCLUDE HOMELESS PEOPLE FROM PUBLIC SPACE 9-10 (2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/09/SSRN-id3221446.pdf> [<https://perma.cc/JAN8-BDQJ>].

69. ARIZ. REV. STAT. ANN. § 36-601(A)(4) (2025); *see also id.* § 9-240(B)(3)(a) (stating that municipal governments “exercise exclusive control over the streets, alleys, avenues and sidewalks”).

70. *Brown v. City of Phoenix*, 557 P.3d 321, 330 (Ariz. Ct. App. 2024).

71. S.B. 780, 2025 Gen. Assemb., Reg. Sess. (Pa. 2025).

72. Joel Grover & Amy Corral, *Fencing Off LA’s Homeless*, NBC LA (Jan. 17, 2020, at 06:56 ET), <https://www.nbclosangeles.com/investigations/fencing-off-las-homeless/2293442/> [<https://perma.cc/4YJ8-W5M8>].

without legal authority,⁷³ which of course differentiates them from the BIDs and the private lawsuits that deploy lawful power against homelessness.⁷⁴ But they are nonetheless part of the range of tools that private interests use to manage the sidewalk and to exclude unhoused people from it.

It is also worth underscoring that, in addition to being ineffective ways to actually address homelessness, these privatized tactics are further worrisome because, as I said above, they threaten the commons.⁷⁵ This sort of freelancing, whether blessed by government or not, represents the private control of public space at the expense of the general public. After all, the same boulders and basins that obstruct encampments also obstruct pedestrians, strollers, and wheelchairs. And they contribute to a more widespread, pernicious belief that adjacent property owners in any respect “own” the sidewalk.⁷⁶ That is bad for everyone.

III. POLICING HOMELESSNESS

With privatization being no way to solve this particular tragedy of the commons, that leaves government regulation. We have plenty of that, too, but while the rest of the panoply of sidewalk uses are managed by a tangled web of municipal agencies,⁷⁷ the primary regulator of homelessness is the police.⁷⁸ And that has largely been a failure, too.

Police-oriented responses to homelessness have dominated on and off throughout our history. City governments in the industrial era often lacked social services agencies, which meant that the police were effectively responsible for the public welfare.⁷⁹ The way they

73. *Cf. id.* (reporting that Los Angeles police ordered individuals to take down fences they put up on sidewalks).

74. *See* Pollack, *Sidewalk Government*, *supra* note 13, at 658-59.

75. *See supra* Part I.

76. Pollack, *Sidewalk Government*, *supra* note 13, at 622-25.

77. *Id.* at 647-53.

78. *See* SEAN E. GOODISON, JEREMY D. BARNUM, MICHAEL J. D. VERMEER, DULANI WOODS, SIARA I. SITAR & BRIAN A. JACKSON, *THE LAW ENFORCEMENT RESPONSE TO HOMELESSNESS 1* (2020) (“Police often are the first (and sometimes the only) point of government contact for persons experiencing homelessness[.]”).

79. STUART, *supra* note 68, at 45-47. It was with this background in mind that a president of the International Association of Chiefs of Police, Joseph M. Quigley, said: “The police chief should be the moral physician of the community.” *See id.* at 46 (quoting SAMUEL WALKER, A

met that responsibility was primarily by arresting people who threatened the public welfare, as they defined it. Studies have shown that “the more responsibility the police held for the management of the dangerous class,” as they called it, “the more arrests they made for begging, public drunkenness, vagrancy, ‘corner lounging,’ and other minor public order offenses.”⁸⁰ But by the mid-1900s, and in the wake of the Great Depression and the ascendancy of President Franklin Roosevelt’s New Deal philosophy, the idea took hold that government should affirmatively provide for the public welfare with a robust social safety net.⁸¹ For half a century, the role of the police shrank to crime-fighting, and homelessness was not viewed primarily as a policing problem.⁸²

But the pendulum swung back starting in the 1980s and 1990s. Beginning with President Ronald Reagan and continuing through President Bill Clinton, more self-sufficient approaches to government took hold across the country and saw welfare slashed.⁸³ Soon, “every major American municipality either abolished or reduced income relief to indigent single adults,” public housing programs were abandoned, and homeless shelters were privatized.⁸⁴ In their place, the police returned to the forefront of the management of public order. These efforts were also bolstered by new legislation that criminalized whole swaths of sidewalk activity. The so-called “broken windows” theory—which holds that crime follows low-level disorder⁸⁵—led cities and states to criminalize offenses including sleeping on the sidewalk, sitting or lying down on the sidewalk, loitering on the sidewalk, begging or panhandling on the sidewalk, keeping personal property on the sidewalk, or even sharing food on the sidewalk.⁸⁶ So, now, “[w]hen government does assume

CRITICAL HISTORY OF POLICE REFORM 81 (1977).

80. *Id.* at 45-46.

81. *Id.* at 47.

82. *Id.* at 54.

83. *Id.* at 58-59.

84. *Id.* at 59-60.

85. James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1982, at 29, 31, <https://cdn.theatlantic.com/media/archives/1982/03/249-3/132638105.pdf> [<https://perma.cc/PK5D-7LZW>].

86. *See, e.g.*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 37-47, 105, app. A at 106-18 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [<https://perma.cc/E7EJ-LBGY>]. *See generally* Tony Robinson, *No Right to*

responsibility in the lives of [unhoused] people, ... it attempts to eradicate them from the streets or to shape their behavior” rather than to help them.⁸⁷

As stated in Part I, it must be acknowledged that these activities do in fact impose real costs for communities.⁸⁸ It is a mistake for advocates and scholars to try to minimize this reality. It is also a serious error to suggest that the needs of unhoused people necessarily outweigh the comfort of unobstructed sidewalks. So many people are negatively impacted by obstructed sidewalks, *especially* people of color, people with fewer resources, and people with more mobility limitations.⁸⁹ In fact, working adults with disabilities make a greater share of their trips by sidewalk than working adults without disabilities, and people of color are significantly more likely than white people to lack access to a car.⁹⁰ Public transportation is distressingly unavailable along many of these same lines: “[N]early a quarter of all adults, and more than half of those living below the poverty line, experienc[e] transportation insecurity,” and “those affected are disproportionately people of color who live in urban areas.”⁹¹ For all these reasons, usable, clear, and safe sidewalks are anything but a luxury.

At the same time, however, there are plenty of sidewalk activities that impede access, generate negative externalities, and create

Rest: Police Enforcement Patterns and Quality of Life Consequences of the Criminalization of Homelessness, 55 URB. AFFS. REV. 41 (2019) (reporting and reviewing surveys and police data regarding quality of life policing for homeless Colorado residents).

87. DUNEIER, *supra* note 68, at 10.

88. *See supra* Part I.

89. *See* Notice of Settlement Exhibit 1 at 3-5, *Tozer v. City of Portland*, No. 22-cv-01336, 2023 WL 8295886 (D. Or. Nov. 30, 2023); *Tozer, et al. v. City of Portland Settlement Agreement*, PORTLAND.GOV, <https://www.portland.gov/homelessness-impact-reduction/tozer-settlement-0> [<https://perma.cc/7J9M-Y3YE>]; Claire Rush, *People with Disabilities Sue over Blocked Portland Sidewalks*, AP NEWS (Sep. 8, 2022, at 21:05 ET), <https://apnews.com/article/oregon-lawsuits-portland-class-action-government-and-politics-e4dac58daf47221f08c8a13e185a7d24> [<https://perma.cc/35V2-G7CY>] (describing the resolution of a lawsuit about mobility limitations arising from sidewalk encampments).

90. ANNA LETITIA ZIVARTS, WHEN DRIVING IS NOT AN OPTION: STEERING AWAY FROM CAR DEPENDENCY 37 (2024); *Car Access*, NAT'L EQUITY ATLAS, https://nationalequityatlas.org/indicators/Car_access [<https://perma.cc/D2ZL-9DT9>].

91. SARA C. BRONIN, KEY TO THE CITY: HOW ZONING SHAPES OUR WORLD 93 (2024); *see also* DEBORAH N. ARCHER, DIVIDING LINES: HOW TRANSPORTATION INFRASTRUCTURE REINFORCES RACIAL INEQUALITY 12-13 (2025) (arguing that transportation policy has been used as a tool to reinforce racial inequality).

conflicts for scarce space. Sidewalk commerce, advertising, dining, food trucks, and all the rest do that too. But none of those are regulated by criminal law. Commercial obstructions are instead governed by civil regulations that are enforced by agencies carrying only the threat of fines.⁹² An owner of a sidewalk café that sells food to patrons without a license may face civil fines of a few hundred dollars; an unhoused person who shares food with a friend may face arrest and imprisonment.⁹³ A restaurant that asks people to wait in a line around the block likely faces no regulation at all;⁹⁴ an unhoused person who sits for too long on that same sidewalk may be convicted of a crime.⁹⁵

To make matters even worse, the policing of homelessness is, in practice, limited by fewer constitutional protections than many of the rest of us enjoy. For one thing, all of those criminal ordinances that unhoused people will invariably end up violating create reasons—both real and pretextual—for police officers to stop, search, and harass them. That is, these laws supply the reasonable suspicion, or even the probable cause, necessary under the Fourth Amendment to justify invasions of their privacy.⁹⁶ As Professor Forrest Stuart puts it, with “ordinances outlawing such ambiguous and commonplace behaviors as loitering, panhandling, and blocking the sidewalk, police officers have gained a new flexibility to conduct

92. See Pollack, *Sidewalk Government*, *supra* note 13, at 648-50 (discussing civil regulatory agencies with sidewalk responsibilities).

93. Compare, e.g., N.Y.C., N.Y., ADMIN. CODE § 19-160.5 (2025) (civil penalties), and N.Y.C. Dep’t of Transp., *Sidewalk Cafe: How to Operate*, DINING OUT NYC, <https://www.diningoutnyc.info/rules/sidewalk/operate> [<https://perma.cc/98DZ-RA4J>] (setting out fines), *with* NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 86, at 37-47, 105, app. A at 106-18 (criminal penalties).

94. Cf. Matt Yan, *Why Is There Always a Line? And Why Is It at My Front Door?*, N.Y. TIMES (Apr. 23, 2025), <https://www.nytimes.com/2025/04/22/realestate/new-york-city-long-lines.html> [<https://perma.cc/Q57Q-8FTT>] (describing the inconvenience of long lines created by some New York City businesses, but mentioning no action taken by the City in response); Ruth La Ferla, *The Cult of the Line: It’s Not About the Merch*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/fashion/waiting-in-line-supreme-streetwear-merch.html> [<https://perma.cc/Z9SV-3FR7>] (describing the community created by those waiting in long lines to enter businesses).

95. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, *supra* note 86, at 42.

96. See U.S. CONST. amend. IV (defining probable cause); *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (defining reasonable suspicion); *Immigr. & Naturalization Serv. v. Delgado*, 466 U.S. 210, 216-17 (1984) (same); *Terry v. Ohio*, 392 U.S. 1, 20-22 (1968) (same).

stops, interrogations, and searches where they might otherwise have lacked legal authority or probable cause.”⁹⁷

For another, consider the common policing practice called the “sweep”: a blitz in which every piece of personal property on the sidewalks is seized, often never returned, and even destroyed.⁹⁸ The police would not be able to lawfully do that to the personal property of most everyone else, but the fact that those belongings are necessarily obstructing the sidewalk creates the justification for substantial interference with the possessions, lives, and even personhood of the owners of that property. The threat to civil liberties has not gone entirely unnoticed. In a 2011 case, *Lavan v. City of Los Angeles*, a federal district court in California held that these practices are contrary to the Fourth Amendment and the Due Process Clause of the Fourteenth Amendment, which protect people against deprivations of property without notice or the opportunity to be heard.⁹⁹ That court therefore enjoined the City of Los Angeles from seizing property “absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, or is evidence of a crime, or contraband.”¹⁰⁰ And it required Los Angeles to maintain whatever property it does seize “in a secure location” for ninety days and to “leave a notice in a prominent place ... including advising where the property is being kept and when it may be claimed by the rightful owner.”¹⁰¹ But in many other jurisdictions, the sweeps continue.¹⁰²

The consequence of all of this policing is, to use Professor Barry Friedman’s apt turn of phrase, a “revolving door of pain.”¹⁰³ And it is in this context that the Supreme Court issued its decision in *Grants Pass*, holding that the Eighth Amendment’s prohibition against “cruel and unusual punishments” does not prohibit the

97. STUART, *supra* note 68, at 81.

98. See Asia Fields, Nicole Santa Cruz, Ruth Talbot & Maya Miller, *I Have Lost Everything*, PROPUBLICA (Feb. 3, 2025), <https://projects.propublica.org/impact-of-homeless-sweeps-lost-belongings/> [<https://perma.cc/8BRY-JNHV>] (collecting stories of personal items lost).

99. 797 F. Supp. 2d 1005, 1011-19 (C.D. Cal. 2011).

100. *Id.* at 1020.

101. *Id.*

102. See Fields et al., *supra* note 98.

103. See Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1618 (2022).

enforcement of ordinances that criminalize public sleeping, even as applied to unhoused people with nowhere else to sleep.¹⁰⁴

I understand the disappointment that many feel about this decision, particularly given how other rights and protections are more theoretical than real for people experiencing homelessness. As I said at the start, I do believe that the decision is correct as a doctrinal matter and that the Eighth Amendment ought not be understood as a substantive limit on what criminal law may proscribe.¹⁰⁵ But that is certainly not to say that there are no such limits. Rather, as even the Court conceded, “many substantive legal protections and provisions” including guarantees of due process and equal protection “have important roles to play when States and cities seek to enforce their laws against the homeless.”¹⁰⁶ *Lavan* is one encouraging example of a court meeting that promise, and more courts should follow its lead.¹⁰⁷

More importantly, courts are hardly the only place in which to have this fight for the dignity and interests of people experiencing homelessness. They might even be among the worst places to have it. There are plenty of government practices that are constitutional but really bad ideas. Policing homelessness is a prime example. As this Part has made clear, we have been operating a system that punishes homelessness as an individual failing rather than as a structural one, despite decades of experience telling us otherwise.¹⁰⁸ That system has visited upon unhoused people untold suffering, and there is little evidence that it is working to do anything other than continue the cycle. Rates of homelessness are increasing all the time—up 19 percent since 2007 and setting new all-time highs as we speak.¹⁰⁹ And we should not be surprised: Police officers are not

104. U.S. CONST. amend. VIII; *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2216 (2024).

105. See *supra* notes 24-27 and accompanying text.

106. *Grants Pass*, 144 S. Ct. at 2224.

107. *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1010-20 (C.D. Cal. 2011).

108. STUART, *supra* note 68, at 6 (coining the term “*therapeutic policing*—a paternalistic brand of spatial, behavioral, and moral discipline designed to ‘cure’ those at the bottom of the social hierarchy of the individual pathologies deemed responsible for their abject circumstances”); *id.* at 13 (“[O]fficers use the threat of citation and arrest to compel these individuals to take steps to better themselves and their circumstances” (at least in the officers’ eyes and standards)).

109. DE SOUSA & HENRY, *supra* note 4, at 2-3.

equipped with any of the tools to actually address the problem, and punishment never made anybody less homeless.¹¹⁰

Sidewalk homelessness is a serious problem that cannot be allowed to continue unchecked; that reality cannot be ignored. With privatization out of the question, and with norms of limited utility, government action is therefore badly needed to mitigate and manage it. But our police-first solutions are not making a dent. It is high time to try something else.

IV. UNLEASHING PUBLIC SPACE FOR EVERYONE

The sidewalk is fundamentally a site of conflict among numerous competing uses and goals that cries out for government supervision. A fundamental obstacle to effective and equitable management of this sidewalk conflict is that nobody in government really “owns” the sidewalk.¹¹¹ There are too many separate agencies and laws, spread across too many levels of government, and that is on top of all the private regulators and interests in the mix.¹¹² The result is a fragmented jumble that, similar to most jumbles, still leaves a number of gaps. And when governance gaps exist, other forces jump to fill them. In the case of homelessness, those forces include BIDs, individual property owners, and the police.¹¹³ If those entities are doing a bad job, or even a harmful job, it is essential to offer something more productive to fill that gap.

That means local governments have to develop the capacity to manage their sidewalks themselves—effectively and coherently, and without reliance on the police or the private sector. In other work, I have developed the idea of a Department of Sidewalks.¹¹⁴ This

110. STUART, *supra* note 68, at 91 (quoting a Los Angeles police officer saying: “I’m not a therapist. I don’t work for the Department of Housing. I’m not DPSS [Department of Public Social Services]. I’m a cop. I’m just doing what I can.” (alteration in original)); Barry Friedman, Max Markham & Scarlet Neath, Opinion, *A Revolution in Public Safety Is Underway*, N.Y. TIMES (May 30, 2025), <https://www.nytimes.com/2025/05/30/opinion/911-public-safety-george-floyd.html> [<https://perma.cc/NA5C-SJ2X>] (“[I]t has become clear that police officers cannot be expected to resolve every social issue or solve every dispute or problem, whether it’s homelessness, a public health crisis, finding a lost pet or responding to a minor traffic accident.”).

111. Pollack, *Sidewalk Government*, *supra* note 13, at 654.

112. *See id.*

113. *See supra* Parts II-III.

114. Pollack, *Sidewalk Government*, *supra* note 13, at 659-68.

municipal department would organize the jumble by giving sidewalks a dedicated regulatory home and by providing the numerous interests that rely on them with centralized responsibility and accountability.¹¹⁵ It would put private interests out of the sidewalk business, and it would consolidate governmental responsibility for all of the various uses of the sidewalk, including those of people experiencing homelessness.¹¹⁶

Doing this well requires not just making changes to a city's organization chart, but developing an integrated vision for the sidewalks in a given community. The current siloed approaches rarely gel into a complete picture, but a Department of Sidewalks would be charged with using a 360-degree lens to see and to regulate all of the sidewalk's uses as part of a larger whole, rather than as distinct problems to solve.¹¹⁷

For one example of what I mean in the context of homelessness, consider sidewalk commerce. Right now, the sidewalks are often sites of a whole host of commercial activity, but the law generally privileges the commercial activity of adjacent brick-and-mortar businesses.¹¹⁸ As I noted in Part II, BIDs and individual businesses have long played a substantial role in setting the rules for sidewalk activities.¹¹⁹ Perhaps chief among those interventions has been a concerted effort to eliminate sidewalk vending that businesses perceive to either drive away customers, attract competitors, or some combination of both.¹²⁰ So, even when vending is allowed, it is

115. *See id.* at 660-62.

116. *Id.* at 665.

117. *Id.* at 665-67.

118. *See infra* note 120 and accompanying text.

119. *See supra* notes 62-68 and accompanying text.

120. *See* DUNEIER, *supra* note 68, at 234 (quoting a BID lawyer saying: "The problem—besides that [vending] looks disordered because of the lack of capital investment and the lack of social control imposed upon it—is that there is an element of unfairness with people who are renting stores and are selling similar merchandise and are paying taxes and minimum wage and rent."); NICOLE STELLE GARNETT, ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA 60-61 (2010) ("The strongest opposition to pushcarts came from established merchants seeking to limit (or eliminate) competition from vendors operating without overhead ... [and] curtail[ing] development opportunities by limiting owners' ability to intensify land uses."); Gregg W. Kettles, *Regulating Vending in the Sidewalk Commons*, 77 TEMP. L. REV. 1, 19-20 (2004) ("Neighbors of sidewalk vendors certainly know how to call the police."); *supra* notes 66-67 and accompanying text.

heavily regulated, complicated, and can even be vetoed by nearby property owners.¹²¹

But enabling unhoused people to earn a living could represent a meaningful path out of homelessness.¹²² Paring back or at least rethinking many of these limitations and creating a simpler, one-stop-shop regulatory path toward lawful sidewalk vending could expand economic opportunities for unhoused people and generate new consumer opportunities that boost neighborhood economies as well.¹²³ At the same time, of course, vending takes up scarce space on the sidewalk.¹²⁴ And ultimately, the kernel of the objection from business groups is not necessarily wrong. Competition or alienation really could interfere with those valuable components of city life.¹²⁵ That is why reforms such as these need a careful hand that is positioned to manage the space holistically.

Similarly, think about some of the well-rehearsed, nonpolicing answers often proposed to address homelessness: more mental health services, social services, drug treatment services, job training, a stronger social safety net, and so on.¹²⁶ I agree with all of

121. See, e.g., N.Y.C., N.Y., ADMIN. CODE §§ 20-465, -465.2 (2025) (setting out numerous restrictions and creating a fifteen-member Street Vendor Advisory Board tasked with making recommendations for changes to policy and permitting); NEW ORLEANS, LA., CODE § 110-191(i)-(j) (2025) (detailing restrictions on mobile food vendors); BOULDER, COLO., MUN. CODE § 9-6-5(d) (2025) (requiring that food sales be located 150 feet away from a brick-and-mortar restaurant and, in some zoning districts, requiring permission of property owners); HOU., TEX., CODE OF ORDINANCES §§ 22-15(1), 40-263(3) (2025) (requiring vendors to get a permit predicated on, among other things, the permission of “the property owner of the specific location where the street vendor will sell the merchandise”).

122. See generally DUNEIER, *supra* note 68 (exploring the sidewalk vending economy and its role in the economics of homelessness).

123. See Kevin Duggan, *Lifting Street Vendor Permit Cap Could Raise \$17M: Watchdog*, STREETS BLOG NYC (Jan. 10, 2024, at 00:03 ET), <https://nyc.streetsblog.org/2024/01/10/lifting-street-vendor-permit-cap-could-raise-17-million-watchdog-says> [<https://perma.cc/74DX-RGA3>] (noting analyses suggesting that New York City could bring in \$17 million in sales tax revenue by allowing every vendor currently seeking a permit to operate legally).

124. See Kettles, *supra* note 120, at 32-35.

125. See GARNETT, *supra* note 120, at 61.

126. E.g., Friedman, Markham & Neath, *supra* note 110; Jennifer Brown, *An Experiment Doled Out Money to Homeless People in Denver, No Strings Attached. Here's What Happened.*, COLO. SUN (June 19, 2024, at 04:12 MT), <https://coloradosun.com/2024/06/19/homeless-payments/> [<https://perma.cc/4RXC-75HQ>]; Roger Hannigan Gilson, *Wellness Hub Would Divert Those in Crisis from Courts, Motels and ER*, TIMES UNION (Apr. 28, 2023, at 09:24 ET), <https://www.timesunion.com/hudsonvalley/news/article/wellness-hub-divert-residents-courts-er-17909275.php> [<https://perma.cc/XCP2-JS2K>]; Carl Smith, *New Orleans Has Achieved a 12 Percent Reduction in Its Unsheltered Population*, GOVERNING (May 13, 2024), <https://www.governing.com/story/news/2024/05/13/new-orleans-unsheltered-population-reduction/>.

them and want to see more resources devoted to them, but they risk being deployed ineffectively if they are not coordinated. And, worse, they risk being less effective than they otherwise could be if they are left to operate at the level of individual interventions when there are more structural and legal forces at work.

To take just one widely accepted example, another way to minimize homelessness is by creating more, and more affordable, housing.¹²⁷ Some ways to do that could include offering targeted incentives or tax abatements for developers, or having government build more public housing.¹²⁸ Those can work, but they have their own risks. Public housing is highly policed in a number of ways and there is little political will to invest in it,¹²⁹ and developer incentives too often fail to yield completed projects that meet all of their promises.¹³⁰

A better approach to housing affordability is to unleash more land for more housing by eliminating the legal barriers to development on which many municipalities rely. Two common barriers are single-family zoning and parking minimums.¹³¹ Single-family zoning laws

governing.com/urban/new-orleans-has-achieved-a-12-percent-reduction-in-its-unhoused-population [<https://perma.cc/7NLZ-87XY>].

127. See, e.g., *Housing First is Still the Best Approach to Ending Homelessness*, HOUSING MATTERS (Feb. 14, 2024), <https://housingmatters.urban.org/feature/housing-first-still-best-approach-ending-homelessness> [<https://perma.cc/25SK-48VG>] (noting that when unhoused people in Seattle were asked what would help them obtain permanent housing, 65 percent said “a greater supply of affordable housing”); *Improving Access to Affordable Housing*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/improve-access-to-affordable-housing/> [<https://perma.cc/U3T4-U4HU>]; Bureau of Just. Assistance, *Responding to Homelessness: Police-Mental Health Collaboration (PMHC) Toolkit*, U.S. DEPT OF JUST., <https://web.archive.org/web/20241128051408/https://bja.ojp.gov/program/pmhc/responding-homelessness> [<https://perma.cc/P4FF-GVM6>] (“Access to permanent housing is central to breaking the cycle of incarceration and homelessness for many people.”); Brief of Amici Curiae Local Progress Impact Lab and 156 Current and Former Local Elected Officials in Support of Respondents Supporting Affirmance at 3-8, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (No. 23-175), 2024 WL 1484123, at *4-5.

128. See Deborah N. Archer, *Exile from Main Street*, 55 HARV. C.R.-C.L. L. REV. 788, 796-809 (2020).

129. See, e.g., *id.* at 796-803; Jeffrey Fagan, Garth Davies & Adam Carlis, *Race and Selective Enforcement in Public Housing*, 9 J. EMPIRICAL LEGAL STUD. 697, 699-701 (2012); Anne Marie Smetak, *Private Funding, Public Housing: The Devil in the Details*, 21 VA. J. SOC. POL’Y & L. 1, 30-33 (2014).

130. See Michael C. Pollack, *Reallocating Redevelopment Risk*, 73 FLA. L. REV. 1081, 1122-23 (2021).

131. See John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 666-67 (2023); HENRY GRABAR, *PAVED PARADISE: HOW PARKING EXPLAINS THE WORLD* 151-53 (2023).

require that parcels of land carry only one single-family home rather than a multifamily home or apartment building.¹³² That is, even if a landowner *wants* to build denser housing, the law prohibits them from doing so.¹³³ As a result, the supply of housing in a town is “artificially constrain[ed],” and its price is in turn artificially inflated.¹³⁴ Indeed, recognizing that these zoning laws are one of the most significant barriers to housing affordability in the country, a number of jurisdictions are beginning to repeal them.¹³⁵ More should follow in their footsteps.

Less commonly discussed in this context, but similarly important, are parking minimums. These are laws that require a certain number of parking spaces to be built for each type of land use: Restaurants need a certain number of spaces per square foot, movie theaters a certain number per seat, bowling alleys a certain number per lane, apartment buildings a certain number per bedroom, and so on.¹³⁶ An influential 1982 commercial parking design guide instructed urban planners to design a mall parking lot for the Saturday before Christmas, which unsurprisingly resulted in a massive surplus of parking spaces for all the other days of the year.¹³⁷ Cities thus end up with land that could have been used for housing being dedicated to car storage, even if that amount of parking is not in fact necessary or desired.¹³⁸ Here, too, some cities

132. See Infranca, *supra* note 131, at 666-67.

133. See *id.*

134. RICHARD D. KAHLENBERG, EXCLUDED: HOW SNOB ZONING, NIMBYISM, AND CLASS BIAS BUILD THE WALLS WE DON'T SEE 57 (2023) (“[U]nless one also deals with the way that zoning artificially constrains the supply of housing, the problem [of homelessness] will fester.”).

135. See Infranca, *supra* note 131, at 661-63, 666-69 (discussing reform efforts); Alexander von Hoffman, *Single-Family Zoning: Can History Be Reversed?*, HARV. UNIV. JOINT CTR. FOR HOUS. STUD.: BLOG (Oct. 5, 2021), <https://www.jchs.harvard.edu/blog/single-family-zoning-can-history-be-reversed> [<https://perma.cc/J7GE-T252>] (discussing reforms in Minneapolis, Oregon, and California); Emily Badger & Quoctrung Bui, *Cities Start to Question an American Ideal: A House with a Yard on Every Lot*, N.Y. TIMES (June 18, 2019), <https://www.nytimes.com/interactive/2019/06/18/upshot/cities-across-america-question-single-family-zoning.html> [<https://perma.cc/BAC5-W7YW>].

136. See GRABAR, *supra* note 131, at 151-53; DONALD C. SHOUP, THE HIGH COST OF FREE PARKING 21-23 (2005); see, e.g., HOU., TEX., CODE OF ORDINANCES § 26-492 (2025).

137. GRABAR, *supra* note 131, at 157.

138. See, e.g., Joshua Fechter, *Why Some Texas Cities are Getting Rid of Their Minimum Parking Rules*, TEX. TRIB. (Mar. 18, 2024, at 05:00 CT), <https://www.texastribune.org/2024/03/18/texas-cities-parking-rules-housing-climate/> [<https://perma.cc/B8X5-PJTZ>].

and states are setting a great example for the rest of the country by repealing these laws.¹³⁹

This is not just theoretical. The U.S. Department of Justice explained that “[a]ccess to permanent housing is central to breaking the cycle of incarceration and homelessness for many people.”¹⁴⁰ The Government Accountability Office found that “a \$100 increase in rent is associated with an approximately 9 percent average increase in the homelessness rate.”¹⁴¹ Therefore bringing down housing costs ought to therefore be a high priority, and we know that parking minimums and zoning laws raise those costs. Specifically, one study found that parking minimums raise rents by about 17 percent.¹⁴² With that in mind, consider that Los Angeles County has 18.6 million parking spaces, “more than two for every adult.”¹⁴³ That is 14 percent of all the land in the entire county.¹⁴⁴ Imagine how much more housing could be built, how affordable that housing could become, and how many fewer people would be unhoused if even some of that land held apartment buildings. Frankly, we do not even have to imagine: Denver, Colorado, has been lifting many of its parking minimums and, in January 2025, a “massive wave of new supply” of apartments—about twenty thousand units in just the previous year, and a predicted fifteen thousand more in the year ahead—caused the “biggest quarterly rent decline on record” and made housing much more affordable for many more people.¹⁴⁵ Likewise, Houston, Texas, which does not have these sorts of zoning

139. See BRONIN, *supra* note 91, at 102-03; Fetcher, *supra* note 138; Jane Margolies, *Awash in Asphalt, Cities Rethink Their Parking Needs*, N.Y. TIMES (Mar. 9, 2023), <https://www.nytimes.com/2023/03/07/business/fewer-parking-spots.html> [<https://perma.cc/G75T-JGCL>].

140. U.S. DEP’T OF JUST., *supra* note 127 (“Access to permanent housing is central to breaking the cycle of incarceration and homelessness for many people.”).

141. U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-433, HOMELESSNESS: BETTER HUD OVERSIGHT OF DATA COLLECTION COULD IMPROVE ESTIMATES OF HOMELESS POPULATION app. II at 54-55 (2020), <https://www.gao.gov/assets/d20433.pdf> [<https://perma.cc/EG36-B22Z>].

142. See C.J. Gabbe & Gregory Pierce, *Hidden Costs and Deadweight Losses: Bundled Parking and Residential Rents in the Metropolitan United States*, 27 HOUS. POL’Y DEBATE 217, 224-25 (2017).

143. GRABAR, *supra* note 131, at 182.

144. *Id.*

145. Aldo Svaldi, *Metro Denver Apartment Rents Plunge in Fourth Quarter as a Blizzard of New Units Descend on Market*, DENV. POST (Jan. 24, 2025, at 06:00 MT), <https://www.denverpost.com/2025/01/24/metro-denver-apartment-rents-falling-vacancies-rising/> [<https://perma.cc/W26F-YT54>].

restrictions and has therefore also seen more housing development, has slashed its homeless population by 60 percent since 2011.¹⁴⁶

But we cannot pull on just one lever at a time. Removing these barriers to development and affordability *also* promotes a more vibrant, walkable community in which sidewalks are more heavily used and contribute more to society. That is something that would pay significant dividends: Sidewalk life generates more property- and sales-tax revenue, it creates neighborhoods that people want to live and shop in, it makes people healthier and happier, and it even helps to mitigate some of the effects of climate change.¹⁴⁷ But it also means more demand for those sidewalks and, in turn, more conflict and more potential tragedies of the commons.¹⁴⁸ Without attending to those consequences—expanding or modernizing existing sidewalk networks, developing smarter regulations for them, and so on—the benefits from all of that new and more affordable development could create a whole new set of problems.

That is why all of these policy choices must be made as part of one cohesive vision for public space. The things that detract from sidewalk life also detract from everything else in a neighborhood. But while the things that can improve sidewalk life can enhance a neighborhood, they can also overwhelm the space. Similarly, while simply moving unhoused people along to a different place can “fix” the problem in one neighborhood, it does so by making another neighborhood’s sidewalk life even worse, overwhelming *their* space. And while individualized interventions can help people transition out of homelessness one at a time, they would be much more effective as part of a larger mission, for example, to make public

146. Nicholas Kristof, Opinion, *Here’s How Houston Is Fighting Homelessness—and Winning*, N.Y. TIMES (Nov. 22, 2023), <https://www.nytimes.com/2023/11/22/opinion/homeless-houston-dallas.html> [<https://perma.cc/RLK7-XHV8>]; Michael Kimmelman, *How Houston Moved 25,000 People from the Streets into Homes of Their Own*, N.Y. TIMES (June 15, 2023), <https://www.nytimes.com/2022/06/14/headway/houston-homeless-people.html> [<https://perma.cc/PAJ8-B9PK>].

147. See Pollack, *Sidewalk Government*, *supra* note 13, at 617-18 (noting environmental implications of sidewalks); JEFF SPECK, WALKABLE CITY: HOW DOWNTOWN CAN SAVE AMERICA, ONE STEP AT A TIME 37-50 (2012) (discussing health benefits of walkable communities); COLIN ELLARD, PLACES OF THE HEART: THE PSYCHOGEOGRAPHY OF EVERYDAY LIFE 117-19 (2015) (same); Rachel Quednau, *Why Walkable Streets Are More Economically Productive*, STRONG TOWNS (Jan. 18, 2018), <https://www.strongtowns.org/journal/2018/1/16/why-walkable-streets-are-more-economically-productive> [<https://perma.cc/E95E-8NA6>].

148. See Pollack, *Sidewalk Government*, *supra* note 13, at 629-35.

space available for more harmonious and productive uses for everyone's sake. Without that, it is all a game of whack-a-mole, and nobody wins those.

Doing this right requires a significant investment in the preservation and expansion of sidewalks as a community resource. Spending less on the policing of homelessness and more on helping people experiencing homelessness is exactly right, but has to be implemented as part of a larger mission that is tied to the protection of the commons as an accessible and high-quality public space. If framed and executed in that way, the investment ought to both garner more political support and generate more substantial, effective, and lasting returns.

CONCLUSION

Too often, the problem of homelessness is approached in one of three ways: First, from the position that people experiencing homelessness are malignant forces deserving of punishment and banishment; second, from the position that unhoused people are victims who should be allowed to occupy public space; or third, from the position that assistance for people who want to transition out of homelessness should be delivered in the form of individual services. The first is just plain wrong and cruel, as well as ineffective.¹⁴⁹ The second is well intentioned, but it misses the very real negative externalities that homelessness generates, particularly for vulnerable populations.¹⁵⁰ And the third misses the larger legal picture and policy setting in which homelessness arises.¹⁵¹

Understanding homelessness instead as a public space conflict—a tragedy of the commons—both more accurately captures the problem and points the way towards more effective solutions. We need more systematic, coherent government management of sidewalks writ large, and homelessness is a significant piece of the sidewalk puzzle. Housing affordability and development, land use regulation, commercial regulation, the role of private entities in public space—all of these are also pieces of the sidewalk puzzle, and of the

149. *See supra* notes 102, 107-09 and accompanying text.

150. *See supra* notes 88-90 and accompanying text.

151. *See supra* notes 127-33, 140-41 and accompanying text.

homelessness puzzle. Only by tackling them together, as parts of the same bigger question, can municipalities generate lasting changes that lift whole communities up, make room in public space for everyone in harmony, and leave no one behind.