

THE NEW NECESSITY

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ABSTRACT

According to the U.S. Supreme Court, cities are free to criminalize homelessness. The 2024 case City of Grants Pass v. Johnson is the most important homelessness case in decades and was a significant blow to advocates for the unhoused. The conservative majority rejected the idea that city ordinances criminalizing sleeping in public amounted to cruel and unusual punishment insofar as they penalized status. There is no sidestepping the loss. But within the faint glow of the embers of the oral argument and of the decision itself, there is the possibility that a new understanding of necessity, supported by the same conservative Justices, could be emerging. This Article takes such a possibility seriously, asking what the reach of this more robust form of necessity would be and how the demands of the unsheltered and hungry might unsettle property owner expectations. Though written largely as a thought experiment, this Article suggests that if the needs of the most vulnerable were prioritized, public and private property rights might have to give way to new necessity-based claims.

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INTRODUCTION

What would it mean for owners and nonowners if property law took necessity seriously? Conceptually, the necessity defense is not complicated: At some point, survival itself can justify nonowners taking or using the property of another without permission.¹ In practice, however, necessity has floated along as little more than an idea, not a source of anxiety for property owners and rarely successfully invoked by nonowners.² Despite the fact that hundreds of thousands of people in the United States—most notably homeless individuals, but also those who are hungry or food insecure—have fairly strong necessity claims,³ necessity itself occupies a particularly isolated and dark corner of the property law edifice.⁴ But that

1. See WAYNE R. LAFAVE, *PRINCIPLES OF CRIMINAL LAW* 414-21 (2d ed. 2010) (providing an overview of the necessity defense). The necessity defense can apply to circumstances besides matters of life and death; the defense allows someone who commits a crime “in order to avert a greater evil” to “avoid criminal liability.” Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1259 (2008).

2. Cf. JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY LAW* 555 (4th ed. 2017) (discussing necessity in the context of easements, and noting that “if the owner has any legal means of reaching the land—regardless of how inconvenient, expensive, or impractical it may be—no strict necessity exists”); *Vorchheimer v. Philadelphian Owners Ass’n*, 903 F.3d 100, 103, 106 (3d Cir. 2018) (“Necessity is a demanding legal standard.... [T]he word ‘necessary,’ without more, is stringent. When it is not followed by an object, ... English speakers and writers typically reserve ‘necessary’ for our physiological needs and perhaps our needs for health and safety.”); *Kloth v. Microsoft Corp.* (*In re Microsoft Corp. Antitrust Litig.*), 355 F.3d 322, 327 (4th Cir. 2004) (“Necessary [is a] word[] of limitation.”).

3. See Jamie Suki Chang, Katherine Saxton, Georgia Bright, Michelle A. Jordan, Andy Gutierrez & Katherine Xia, *Deaths of Profound Despair: A Retrospective Cohort Study of Mortality Among People Experiencing Homelessness*, PLOS ONE, Feb. 16, 2023, at 1, 12, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0281912> [<https://perma.cc/TA6P-2AWE>] (finding that unhoused people are significantly more likely to die “of more injurious, treatable, and traumatic causes than the general population”); Hao Ma, Xuan Wang, Xiang Li, Yoriko Heianza, Peter T. Katzmarzyk, Oscar H. Franco & Lu Qi, *Food Insecurity and Premature Mortality and Life Expectancy in the US*, 184 JAMA INTERNAL MED. 301, 308-09 (2024), <https://jamanetwork.com/journals/jamainternalmedicine/fullarticle/2814488> [<https://perma.cc/XA7J-4GZQ>] (“[L]ower levels of food security were associated with a higher risk of premature mortality and a shorter life expectancy.”).

4. See, e.g., JESSE DUKEMINIER, JAMES E. KRIER, GREGORY S. ALEXANDER, MICHAEL S. SCHILL & LIOR JACOB STRAHILEVITZ, *PROPERTY* (10th ed. 2022) (not covering necessity). *But see* JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISES PEÑALVER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 10-15 (9th ed. 2025) (including a case about necessity and trespass as the second case in the book).

is arguably changing, thanks to conservative Justices on the U.S. Supreme Court.

On April 22, 2024, the Supreme Court heard oral arguments in *City of Grants Pass v. Johnson*,⁵ the most significant case related to homelessness in decades.⁶ Ordinances in the City of Grants Pass, Oregon, criminalized camping—defined as establishing any place with any sort of bedding—on public property or sleeping in a car,⁷ and the local government decided to use these ordinances to push homeless people out of the city.⁸ In *Martin v. City of Boise*, the Ninth Circuit had held that such ordinances, if enforced when the locality did not have enough available shelter beds to provide for the homeless population, amounted to cruel and unusual punishment insofar as they penalized people for existing.⁹ Because everyone, including the homeless population, needs sleep (as well as cooking,

5. 144 S. Ct. 2202, 2202 (2024); Transcript of Oral Argument at 1, *Johnson*, 144 S. Ct. at 2202 (No. 23-175) [hereinafter *Grants Pass Oral Argument*].

6. See Jennifer Ludden, *The Supreme Court Says Cities Can Punish People for Sleeping in Public Places*, NPR (June 28, 2024, at 11:15 ET), <https://www.npr.org/2024/06/28/nx-s1-4992010/supreme-court-homeless-punish-sleeping-encampments> [https://perma.cc/LD2E-QYQR].

7. GRANTS PASS, OR., MUN. CODE §§ 5.61.010, 5.61.030 (2023) (repealed 2025).

8. Brief in Opposition at 1-2, *Grants Pass*, 144 S. Ct. 2202 (No. 23-175). These ordinances are not unique; dozens of major cities across the country criminalize homelessness. See NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12-14 (2019) [hereinafter HOUSING NOT HANDCUFFS], <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [https://perma.cc/YD5U-54UA]. From 2006 to 2019, 171 of the 187 jurisdictions surveyed by the National Homelessness Law Center (then known as the National Law Center on Homelessness & Poverty) passed laws criminalizing homelessness. *Id.* app. A. This included, for example, a 92 percent increase in measures prohibiting camping citywide, which targeted roughly 553,000 homeless Americans—including children—in 2018, a trend surely to continue following the Court's decision. See *id.* at 12, 28; see also Press Release, Los Angeles Airport Peace Officers Association, Supreme Court's Ruling on Homeless Camps Marks Big Win for Public Safety (July 8, 2024), <https://laapoa.com/2024/07/supreme-courts-ruling-on-homeless-camps-marks-big-win-for-public-safety/> [https://perma.cc/HV8F-QFUY] (advocating for efforts "to arrest, cite and fine" homeless Californians in the wake of *Grants Pass*).

9. 920 F.3d 584, 616-17 (9th Cir. 2019). For an overview of the case, see Recent Case, *Eighth Amendment—Criminalization of Homelessness—Ninth Circuit Refuses to Reconsider Invalidation of Ordinances Completing Banning Sleeping and Camping in Public.—Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), 133 HARV. L. REV. 699, 699-703 (2019); Mila Versteeg, Kevin L. Cope & Gaurav Mukherjee, *The New Homelessness*, 113 CALIF. L. REV. 433, 436 (2025); Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 571 (2021).

urination and defecation, and use of space) as a basic part of human existence, cities were not merely criminalizing particular acts—they were criminalizing homeless people for their *status* of being homeless.¹⁰ *Martin* joined a long line of cases recognizing that unhoused people have to live somehow and that means they have to have certain rights to use public property.¹¹ What makes the appeal from *Martin* so important is that, after decades of shying away from such cases, the Supreme Court decided at last to weigh in on local efforts to criminalize homelessness.¹²

Necessity came out of its corner throughout the *Grants Pass* oral argument, which is littered with the idea of necessity.¹³ Conservative Justices, with the help of the attorney for the City, seemed to view necessity as a magical escape valve.¹⁴ Justice Kavanaugh, for example, indicated that necessity would “take care of most of the concerns [with regard to the City’s antihomeless efforts], if not all, and, therefore, avoid the need for having to constitutionalize an area.”¹⁵ Similarly, Justice Gorsuch expressed the hope that necessity would “get rid of this awful status/conduct distinction that we have.”¹⁶ In perhaps the most bizarre exchange of the day, the lawyer representing the United States argued that while sleep was a

10. See Tim Donaldson, *Criminally Homeless? The Eighth Amendment Prohibition Against Penalizing Status*, 4 CONCORDIA L. REV. 1, 14-21 (2019) (discussing this argument in depth).

11. See *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006) (“It is undisputed that, for homeless individuals ... who have no access to private spaces, these acts [of sitting, lying, and sleeping] can only be done in public.”), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1580-81 (S.D. Fla. 1992); see also *Powell v. Texas*, 392 U.S. 514, 551 (1968) (White, J., concurring in the judgment) (“For some of these [homeless] alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible.”); *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024 (9th Cir. 2012) (holding that government seizure and destruction of homeless individuals’ unabandoned, unattended property constituted a Fourth Amendment violation).

12. Indeed, the Court decided to hear “the most significant Supreme Court case about homelessness in four decades. Its outcome will shape whether the U.S. remains a country that punishes people for experiencing homelessness or takes a more compassionate approach.” Jazmyn Clark, *Johnson v. Grants Pass: A Breakdown of the Case Before the Supreme Court and What It Could Mean for People Experiencing Homelessness*, ACLU OF WASH. (May 13, 2024), <https://www.aclu-wa.org/story/johnson-v-grants-pass-breakdown-case-supreme-court-and-what-it-could-mean-people-experiencing> [<https://perma.cc/WEM4-E6J9>].

13. See *Grants Pass* Oral Argument, *supra* note 5, at 23-27, 109-18.

14. See *id.* at 26-28.

15. *Id.* at 114.

16. *Id.* at 148.

necessity, neither eating nor defecating would qualify as necessities.¹⁷ Drawing a line that only he could see, the Deputy Solicitor General threw human experience out the door in an effort to thread the needle between local autonomy and individual rights. Cynically, the attention paid by conservative Justices on the Court appears to be little more than an effort to find an excuse for providing cities with a green light to criminalize homelessness. Pulling necessity out from the recesses of property law, according to this pessimistic take, provides the Justices the sort of doctrinal plausible deniability they are looking for to license what amounts to cruel and unusual punishment against the most vulnerable.

Much will be written about this case in the years to come, inevitably including scholarship highlighting the apparently cynical use of the necessity defense by the Court. This Article differs because it takes the Court at its word. The Justices seem to imagine that necessity is a far more robust doctrine than is generally understood to be the case. The ways in which necessity has been cabined suggest that the Justices' rhetoric and imagination are outrunning the reality of the defense.¹⁸ But the active imagination of conservative Justices contains within itself the power to remake reality.¹⁹ What if necessity was taken seriously? What if necessity provided the homeless, hungry, and most vulnerable, meaningful protection when their actions reflected such necessity?

17. *Id.* at 84, 107-12.

18. Perhaps as a consequence, in contrast with the level of attention paid to necessity during oral argument, aside from Justice Gorsuch's single mention of the necessity doctrine, it is absent from the rest of the opinion. *See City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2220 (2024).

19. Originalism is the preeminent example of this concept, and a major line of criticism against originalism is its tendency to encourage historical cherry picking. For an illustrative critique, see, for example, *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2190 (2022) (Breyer, J., dissenting) ("[T]he Court finds a reason to discount the historical evidence's persuasive force. Some of the laws New York has identified are too old. But others are too recent. Still others did not last long enough. Some applied to too few people. Some were enacted for the wrong reasons."). *But see* William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 *LAW & HIST. REV.* 809, 810 (2019) (noting that originalism respects the continuity of law by treating past legal rules as still binding unless lawfully changed, preserving the authority of lawmakers and allowing for sustainable, incremental legal development); Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 *GEO. L.J.* 97, 156 (2016) ("Adherence to original law, when available, can provide a clearer metric for deciding which interpretations are better than others.").

Drawing on the work of leading property and poverty law theorists, this Article joins the Court's conservative Justices in asserting that necessity should play a larger role in law and society.²⁰ There is general recognition that the current combination of property rights and market forces leaves those living at the bottom of the socioeconomic ladder with many of their most basic human needs being unmet.²¹ For the homeless as well as the hungry, a robust understanding of the necessity defense arguably opens up the door for survival needs to trump the exclusionary expectations of property owners. Importantly, an expansive understanding of necessity would reach both public and private property. Left-leaning politics in the United States are almost instinctively defensive, making it hard to challenge the rising structural inequality in society and the hoarding of property rights by the affluent.²² But conservative rhetoric inflating the importance of necessity arguably creates political space to recognize the ways the needs of the most vulnerable can and should undermine existing property rights.

The idea that a strong form of necessity might destabilize public and private rights is not a new concept invented out of thin air. In response to a particularly hard-hearted attack on the rights of homeless individuals by Professor Robert Ellickson and by others

20. It is worth noting that other works reach similar conclusions as this Article does but through different doctrinal approaches. *See, e.g.*, Ben A. McJunkin, *The Negative Right to Shelter*, 111 CALIF. L. REV. 127, 185-92 (2023); Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383, 428-31 (2015).

21. *See, e.g.*, ANNA BAILEY, PEGGY BAILEY & ERIK GARTLAND, CTR. ON BUDGET & POL'Y PRIORITIES, POLICYMAKERS CAN SOLVE HOMELESSNESS BY SCALING UP PROVEN SOLUTIONS: RENTAL ASSISTANCE AND SUPPORTIVE SERVICES 1-2 (2025), <https://www.cbpp.org/research/housing/policymakers-can-solve-homelessness-by-scaling-up-proven-solutions-rental> [<https://perma.cc/DQ4D-3F6M>]; Michael Diamond, *Affordable Housing: Of Inefficiency, Market Distortion, and Government Failure*, 53 U. RICH. L. REV. 979, 981-82 (2019); *see also* Ilya Somin, *America's Weak Property Rights Are Harming Those Most in Need*, ATLANTIC (Mar. 24, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/weak-property-rights/608476/> [<https://perma.cc/2BM5-994D>] (arguing that the poor and minorities "have the most to gain from stronger protection for property rights, which would enforce tighter constraints on government's power to take property and block development").

22. *See* Jason DeParle, *Silence of the Liberals*, WASH. MONTHLY (Apr. 1, 1999), <https://washingtonmonthly.com/1999/04/01/silence-of-the-liberals/> [<https://perma.cc/RX7S-E4YM>] (arguing that liberals have lost their confident voice in poverty debates, shifting from optimistic advocacy for equal opportunities in the 1960s to a more pessimistic stance during Clinton's welfare reform in the 1990s).

concerned about protecting the pleasantness of urban life, Professor Jeremy Waldron showed the falsely reductive nature of Ellickson's argument.²³ The Ellickson-Waldron debate is representative of academic coverage of homelessness and poverty generally: One side seeks to blame the poor and minimize societal obligations, and the other hopes to awaken the country's moral compass. As Waldron emphasizes, the homeless have no place where they can withdraw and have no options other than to live their lives in public, and therefore, they are differently situated from property owners.²⁴ Whereas respect for the exclusionary rights of ownership is associated with a reciprocity of advantages and disadvantages for property owners, exclusion imposes duties but not benefits on nonowners. When cities criminalize basic requirements of life, it is therefore not simply a matter of requiring the homeless to follow the law like everyone else, but a denial of their very humanity.²⁵ Moreover, as Waldron argues, property owners' discomfort when forced to encounter homeless people should not count as a true cost of homelessness; such proximity is a consequence of society's choice to provide inadequate support for the poorest of the poor, and it is appropriate for the privileged to be reminded of their choices.²⁶ The homeless are entitled to make demands upon public (and private) space precisely because more privileged members of society have chosen to look the other way from the suffering experienced by the most vulnerable.²⁷

A robust version of the necessity defense does not lead toward egalitarianism or communism, because even under an enlarged understanding of necessity, there is an outer bound to what counts

23. See Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 YALE L.J. 1165, 1167-73 (1996); Jeremy Waldron, *Homelessness and Community*, 50 U. TORO. L.J. 371, 380 (2000).

24. See Waldron, *supra* note 23, at 395, 397 n.87.

25. See *id.* at 395 ("Fairness demands that public spaces be regulated in light of the recognition that large numbers of people have no alternative but to be and remain and live *all their lives* in public."); see also *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2228 (2024) (Sotomayor, J., dissenting) ("It is possible to acknowledge and balance the issues facing local governments, the humanity and dignity of homeless people, and our constitutional principles. Instead, the majority focuses almost exclusively on the needs of local governments and leaves the most vulnerable in our society with an impossible choice: Either stay awake or be arrested.").

26. See Waldron, *supra* note 23, at 379-85.

27. See *id.* at 384-85.

as a basic human need.²⁸ That does not mean accounting for these needs is easy. Looking slightly beyond *Grants Pass*, this Article focuses on the needs of the homeless and of the hungry—rejecting the Deputy Solicitor General’s view that hunger does not amount to a need that could qualify for the necessity defense.²⁹ Figuring out which needs count is harder at the margins than at the core; therefore, this Article focuses on core needs. Scholars, advocates, and government institutions have long recognized adequate housing, food, and access to sanitation facilities as basic human needs.³⁰ And these needs, if taken seriously, are enough to cause significant disruptions in existing exclusionary norms of private property. Accordingly, this Article focuses on these core needs, leaving to others the job of unpacking the consequences of taking other arguable needs—including education, health care, and communication—seriously. Rather than getting bogged down in conflicting definitions of need, this Article focuses on the easiest cases: shelter and food.³¹ These needs, taken seriously and associated with a robust understanding of the necessity defense, would be incredibly disruptive of the status quo and property law’s reification of exclusionary rights.

28. See, e.g., *Griffin v. Vaughn*, 112 F.3d 703, 709 (3d Cir. 1997) (finding that administrative custody, as opposed to a denial of “food, clothing, shelter, sanitation, medical care and personal safety, ... clearly do[es] not involve a deprivation of any basic human need”).

29. *Grants Pass* Oral Argument, *supra* note 5, at 84, 127-28. Some of the homeless are hungry and some of those suffering from inadequate access to food are homeless; however, the homeless and the hungry together include more people than just the homeless, but their shared trait is having unmet basic needs.

30. See, e.g., National Standards for the Condition of HUD Housing, 24 C.F.R. § 5.703 (2025); Andrew R. Maroko, Kim Hopper, Caitlin Gruer, Maayan Jaffe, Erica Zhen & Marni Sommer, *Public Restrooms, Periods, and People Experiencing Homelessness: An Assessment of Public Toilets in High Needs Areas of Manhattan, New York*, PLOS ONE, June 23, 2021, at 1, 2-4, 17, <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0252946> [<https://perma.cc/J2FJ-CTQ3>]; Off. of Pol’y Dev. & Rsch., *Housing and Food Insecurity*, DEP’T OF HOUS. & URB. DEV. (Apr. 30, 2018), <https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-043018.html> [<https://perma.cc/EW4Q-8W9E>]; JOINT CTR. FOR HOUS. STUD. OF HARV. UNIV., HOUSING AMERICA’S OLDER ADULTS: MEETING THE NEEDS OF AN AGING POPULATION 1-5 (Marcia Fernald ed., 2014), https://www.jchs.harvard.edu/sites/default/files/media/imp/jchs-housing_americas_older_adults_2014_0.pdf [<https://perma.cc/A9J2-H9YB>]; Regan Lachapelle, *Thousands of Homeless Individuals Could Face Cuts to Food Assistance*, NAT’L ALL. TO END HOMELESSNESS: BLOG (Feb. 9, 2016), <https://endhomelessness.org/blog/thousands-of-homeless-individuals-could-face-cuts-to-food-assistance/> [<https://perma.cc/7C5Q-7C7A>].

31. See *infra* Part III.

Advocacy for the poor and for the unhoused is stuck in a seemingly intractable loop: describing the problem and pushing for additional welfare spending even though there is no political will to support such proposals. The cycle of description coupled with a call for additional funding is repeated because politics remains locked in a pattern of blaming the poor and ignoring the basic humanity of the most vulnerable.³² There is nothing wrong with such scholarship. Much of it contributes greatly to our understanding of poverty, of homelessness, and of the institutions that lock in place disadvantage. Matthew Desmond's *Evicted* is the paradigmatic example.³³ His beautiful writing and ability to capture the lives of poor families and individuals struggling to find and keep decent housing inspired a whole generation of scholars to focus on eviction processes and harms. The book ends with a call for dramatically increasing funding for housing vouchers.³⁴ As much as advocates for the homeless have shown that ramping up Housing First funding is not only the best way to help unsheltered people but is also a cost effective approach, Desmond's call is both appropriate and long overdue. The problem is that such proposals go nowhere. There is no political will to increase welfare spending.³⁵ If anything, representatives are competing with each other to add more strings and punitive requirements to existing welfare programs.³⁶ For anti-poverty advocates, systematic change seems elusive, possible only

32. Some, such as Donald Trump, chastise houseless Americans for their role in urban decline: "The streets of our once-great cities are now controlled by gangs and cartels, and plagued with mentally ill and drug-addicted homeless." *Stop Crime and Restore Safety*, DONALD J. TRUMP: ISSUES, <https://www.donaldjtrump.com/issues> [<https://perma.cc/B7GW-Q49F>].

33. See generally MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2017) (chronicling and providing sociological analysis of the stories of several families facing eviction).

34. See *id.* at 294-98.

35. Nearly four-in-ten Americans, and one-quarter of Democrats, believe government aid to the poor has an overall negative effect. PEW RSCH. CTR., *AMERICANS' VIEWS OF GOVERNMENT'S ROLE: PERSISTENT DIVISIONS AND AREAS OF AGREEMENT 16* (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/06/PP_2024.6.24_role-of-government_REPORT.pdf [<https://perma.cc/5S48-3LWN>].

36. See, e.g., Harold Pollack & Sheldon Danziger, *House Republicans Want Drug Tests for Food-Stamp Recipients. There's No Good Reason for That.*, WASH. POST (Aug. 21, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/08/21/house-republicans-want-drug-tests-for-food-stamp-recipients-theres-no-good-reason-for-that/> [<https://perma.cc/YF6Y-A4V4>].

in the rarest of moments, and the scholarly loop continues to roll along.

A robust necessity defense offers a way to escape the loop while also working to change the calculus of property owners when it comes to supporting additional welfare funding. Recognizing that the human need for shelter and food should provide a meaningful necessity defense does not itself require any additional spending on welfare programs. Indeed, the relationship between the necessity defense and welfare spending is inverse in most circumstances: As welfare spending increases and the needs of the poor are met by the state, the ability to successfully claim necessity should decrease. The conservative Justices' seeming openness to a more robust understanding of necessity contains muted echoes of a strand of antipoverty scholarship dating back to the Warren Court.³⁷ In a series of articles, most notably his 1969 *Harvard Law Review Foreword*, Professor Frank Michelman argued that advocates should focus on the basic needs of the poor and not push for perfect equality.³⁸ Michelman's insight was that the Court was open to raising the floor by protecting people's basic needs and basic rights but was much less likely to back arguments premised on egalitarian hopes for equal spending or equal outcomes.³⁹ This Article picks up Michelman's needs-focused advocacy stand and applies it to the necessity defense. If the Court were to embrace a robust understanding of necessity, not only would it give those in need the right to use public property free from criminalization, it would also often provide limited rights over private property. Though red-baiting looms over any proposal that threatens private property, the logic of the necessity defense does not apply only to public property. Fortunately, such a threat to private property likely has a direct relationship with public support for additional welfare spending. That is to say, a robust understanding of necessity might make property owners, aware that need itself threatens their right to exclude, more likely to support increased public assistance as a

37. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 22-33 (1969).

38. *Id.* at 8-13.

39. See *id.* at 9.

hedge against necessity-based property invasions.⁴⁰ Though the imagined strong version of necessity pushed by conservative Justices in *Grants Pass* likely was meant as little more than cover for allowing cities to criminalize homelessness, a robust version of necessity could transform both property law and the politics of public assistance.⁴¹

This Article proceeds in five parts. Part I quickly sets the scene, sketching out the litigation leading to *Grants Pass* and providing a brief overview of the necessity defense. Part II explores the conflicting positions property law scholars have taken on the power of municipal governments to criminalize homelessness. It highlights the shallowness of academic justifications for local antihomeless ordinances; in light of the human needs of the most vulnerable, such arguments are mere rationalizations of power. Part III describes the problems that must be solved; namely, how can those without shelter or food have their basic needs met? It focuses on the scale of these problems and on the impact of homelessness and hunger on those suffering from such conditions. Part IV separates questions of fault from matters of necessity, arguing that we can recognize necessity even if the person with the necessity is partly or fully at fault for the existence of the necessity. Part V builds on the strand of antipoverty scholarship that emphasizes need-based arguments over equality-based arguments. It shows how a robust understanding of necessity would destabilize the expectations of property owners and in the process could solve the political will problem that has long undermined efforts to help those with the greatest needs.

I. *GRANTS PASS* AND THE NECESSITY DEFENSE

The Supreme Court's long silence⁴² on public policy related to homelessness ended on June 28, 2024, when it held in *Grants Pass*

40. Indeed, Professor Adam MacLeod sees exclusion and necessity as inherently linked. See Adam J. MacLeod, *The Boundaries of Dominion*, in CHRISTIANITY AND PRIVATE LAW 115-16 (Robert F. Cochran & Michael P. Moreland eds., 2021) ("Natural justice both forbids wrongful invasion of another's possession and requires an exception to exclusive possession in cases of necessity to save a human life.").

41. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2220 (2024).

42. See Ludden, *supra* note 6 (calling *Grants Pass* the "biggest decision on homelessness in decades").

that localities can criminalize homelessness.⁴³ Of course, Justice Gorsuch, writing for the majority, tried to disguise the nature of the holding, burying it in a lengthy opinion about the complications of homelessness and the need to empower localities.⁴⁴ Much of the opinion was filler designed to do little more than show that the Court was aware of the problems associated with homelessness.⁴⁵ Despite the pages dedicated to describing the problem, the question before the Court was actually fairly simple: Can a city criminalize sleeping on all public property within city limits? To which the Court said yes, giving cities a green light to criminalize homelessness through what is likely to be a wave of punitive ordinances designed to push out homeless people.

Narrowly understood, the legal issue in *Grants Pass* was whether an ordinance prohibiting people from camping within the City of Grants Pass amounted to cruel and unusual punishment under the Eighth Amendment.⁴⁶ The City's camping ban was deliberately inclusive, prohibiting use of a pillow or blanket for comfort or warmth, as well as sleeping in one's car.⁴⁷ Those caught violating the ordinance faced "fines starting at \$295 and increasing to \$537.60 if unpaid."⁴⁸ After someone has two such citations within a one-year period, the city can bar them from city parks for 30 days, violation of which is considered criminal trespass and "punishable by a maximum of 30 days in jail and a \$1,250 fine."⁴⁹ For homeless individuals with nowhere to sleep, such escalating

43. See *Grants Pass*, 144 S. Ct. at 2215-16.

44. See *id.* at 2226 ("Nor can a handful of federal judges begin to 'match' the collective wisdom the American people possess in deciding 'how best to handle' a pressing social question like homelessness. The Constitution's Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation's homelessness policy." (citation omitted)).

45. Approximately one-quarter of the majority opinion is dedicated to such analysis. See *id.* at 2208-13 (discussing the challenges of homelessness, citing statistics, causes, and various policy approaches).

46. See *id.* at 2208.

47. See *id.* at 2213 (citing GRANTS PASS, OR., MUN. CODE §§ 5.61.020(A), 5.61.030, 5.61.010(A)-(B)).

48. *Id.* at 2232 (Sotomayor, J., dissenting) (citing GRANTS PASS, OR., MUN. CODE § 6.46.350).

49. *Id.* (first citing GRANTS PASS, OR., MUN. CODE § 6.46.350; and then citing OR. REV. STAT. §§ 164.245, 161.615(3), 161.635(1)(c) (2023)).

sanctions—enforced at the back end by jail time—criminalize their very existence.

In 2019, the Ninth Circuit held that if a city did not have enough available shelter beds, it could not criminally sanction people for sleeping in public; it based this holding on the theory that to do so would amount to cruel and unusual punishment.⁵⁰ The Supreme Court disagreed. According to the *Grants Pass* majority, the Eighth Amendment bar on cruel and unusual punishment is a bar on certain forms of punishment but does not limit what cities can criminalize.⁵¹ After sketching out the homelessness crisis affecting western states, especially California, where half of the country's homeless live, the Court accused the Ninth Circuit of wrongly taking “one of [the] tools off the table” that local governments can use to address the crisis.⁵² In so doing, it rejected the idea—championed by both *Martin v. City of Boise* and the *Grants Pass* dissent—that because all humans require sleep, cities cannot enact camping bans that effectively criminalize people for simply existing as homeless individuals.⁵³ The Court thereby undermined long-standing precedent that distinguished between the criminalization of actions versus the criminalization of one's status.

A. *The Action/Status Distinction*

Prior to the Court's decision in *Grants Pass*, long established precedent supported the view that cities could not criminalize homelessness. In 1962, the Warren Court held in *Robinson v. California* that the State could not criminalize drug addiction, concluding that California could not punish someone for his or her status as an addict.⁵⁴ Actions—such as the purchase, distribution, or use of

50. *Martin v. City of Boise*, 920 F.3d 584, 603 (2019).

51. *See Grants Pass*, 144 S. Ct. at 2216.

52. *Id.* at 2211; *see also* Karen M. Tani, *Foreword: Curation, Narration, Erasure: Power and Possibility at the U.S. Supreme Court*, 138 HARV. L. REV. 2, 84 (2024) (noting that in the *Grants Pass* majority opinion, “people without access to housing appeared not as the deserving beneficiaries of social provision but rather as nuisances—obstacles to local governments' efforts to advance the health and welfare of their communities”).

53. *See Grants Pass*, 144 S. Ct. at 2216-19 (holding that the Eighth Amendment's bar on criminalizing statuses announced in *Robinson v. California* is inapplicable because the statutes do not criminalize status).

54. 370 U.S. 660, 666-67 (1962).

drugs—could be subject to criminal sanctions, but not a person’s very status.⁵⁵ The *Robinson* distinction between action and status⁵⁶ provided advocates for the homeless the legal leverage needed. They successfully argued that, for persons experiencing homelessness, being homeless is a status similar to drug addiction, and therefore, cities could not criminalize homelessness.⁵⁷ A string of cases, supported by an ever-expanding academic literature, ran with this analogy.⁵⁸ If homelessness is a status, then logically state and local governments should not be able to criminalize basic life functions associated with that status, even though such basics—sleeping, eating, and taking up space—by necessity take place in public.⁵⁹

The challenge with reliance on the line between status and action for advocates for the homeless is that their arguments inevitably involved pushing this line as far as possible. Given the physical necessity of sleep for all humans, regardless of whether they own property or not, sleeping in public came to be seen as inseparable from the status of being homeless.⁶⁰ Regardless of why someone is homeless at any given time, at that moment, their status cannot be severed from their lack of housing and the reasons for their homelessness fade relative to the overwhelming condition of being

55. *Id.* at 664, 666.

56. *See id.*

57. While terms such as “homeless” and “addict” are often considered pejorative and have been replaced with more person-centered language, they can serve a specific purpose in discussions of status versus action. Here, these older terms more directly emphasize the distinction between a person’s circumstance or condition (status) and their behaviors or choices (action), which can be valuable for legal analyses or policy discussions.

58. *See, e.g.,* *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136-37 (9th Cir. 2006) (analogizing homelessness to addiction and holding that enforcing anticamping ordinances against homeless individuals when no shelter beds were available violated the Eighth Amendment); *Martin v. City of Boise*, 920 F.3d 584, 615-18 (9th Cir. 2019) (holding that the Eighth Amendment prohibits enforcing anticamping ordinances against homeless people if there are no available shelter beds); 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, 1573 (2018) (arguing for extending the status crimes doctrine from *Robinson* to homelessness); Jamie Michael Charles, Note, “America’s Lost Cause”: *The Unconstitutionality of Criminalizing Our Country’s Homeless Population*, 18 B.U. PUB. INT. L.J. 315, 335 (2009) (same).

59. For a summary of the status crimes doctrine as applied to homeless individuals, see Ben A. McJunkin, *Grants Pass and the Pathology of the Criminal Law*, 102 WASH. U. L. REV. 1583, 1594-98 (2025).

60. *Jones*, 444 F.3d at 1136 (“[S]itting, lying, and *sleeping* ... are universal and unavoidable consequences of being human.” (emphasis added)).

unhoused.⁶¹ But once sleep is characterized as inseparable from status, what about other actions? Eating and defecation are also basic life functions that the homeless often must do in public. Where, in other words, does status end and action begin? The blurring of the status/action line necessary to expand the rights of the homeless arguably created some of the space the Court needed to reject the analogy of homelessness to addiction.⁶²

The Court in *Grants Pass* opted not to explicitly reverse *Robinson*, though it did severely limit its reach.⁶³ According to the majority, “[p]ublic camping ordinances like those before us are nothing like the law at issue in *Robinson*.”⁶⁴ The Court rejected the idea that because someone who is homeless “cannot help but undertake” the action the City criminalized, namely sleeping in public, the City’s camping ban criminalized status.⁶⁵ In other words, the majority sidestepped rather than overturned *Robinson*.⁶⁶ Justice Thomas, in his concurrence, argued that in a future case, “[the Court] should dispose of [*Robinson*] once and for all.”⁶⁷ In her dissent, Sotomayor observed that “[t]hough it casts aspersions on *Robinson* and mistakenly treats it as an outlier, the majority does not overrule or reconsider that decision.”⁶⁸ In the associated footnote, Sotomayor almost goaded the majority: “The most important takeaway from these unnecessary swipes at *Robinson* is just that. They are unnecessary. *Robinson* remains binding precedent, no matter how incorrectly the majority applies it to these facts.”⁶⁹ Sadly for the homeless, *Grants Pass* not only left *Robinson* hanging on life

61. Forty percent of homeless people are unsheltered, which results in “sleeping in ‘places not meant for human habitation,’ such as [public places like] sidewalks, abandoned buildings, bus or train stations, camping grounds, and parked vehicles.” *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2229 (2024) (quoting TANYA DE SOUSA, ALYSSA ANDRICHIK, ED PRESTERA, KATHERINE RUSH, COLETTE TANO & MICAIAH WHEELER, U.S. DEPT’ OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT TO CONGRESS-PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-ahar-part-1.pdf> [<https://perma.cc/S58T-XJXB>]).

62. *See id.* at 2218.

63. *See id.*

64. *Id.*

65. *Id.* at 2219.

66. *See id.* at 2218-19.

67. *Id.* at 2227 (Thomas, J., concurring).

68. *Id.* at 2234 (Sotomayor, J., dissenting).

69. *Id.* at 2234 n.2.

support, it held that homeless people could not use their status to invalidate public camping bans.⁷⁰

B. The Necessity Defense

One way to understand the disagreement between the majority and the dissent in *Grants Pass* is by looking at how they view necessity. The first sentence of Justice Sotomayor's powerful dissent reads: "Sleep is a biological necessity, not a crime."⁷¹ In line with the longstanding position of advocates for the homeless, the dissent's view is that the necessity of certain actions means those actions cannot be crimes.⁷² The majority's position, in contrast, is that state and local governments can criminalize those same actions, but necessity provides a possible backstop, a way to "protect those in our criminal justice system from a conviction."⁷³ Necessity is doing a lot of work for both Gorsuch and Sotomayor, but at very different points in the criminal process. The dissent's view is that necessity means the state cannot sanction such actions,⁷⁴ while the majority believes the state can define such actions as criminal violations even though necessity might provide a strong enough after-the-fact excuse to block a conviction.⁷⁵

Observing that necessity is important for both the majority and dissent is not the same as suggesting that there are not significant differences between these approaches. Sotomayor's approach has necessity play a major ex ante role when it comes to criminalization, working to take certain criminal sanctions off the table.⁷⁶ In contrast, for Justice Gorsuch, necessity does not limit the power of the state to define what amounts to a crime, though necessity may provide an ex post excuse for having violated such laws.⁷⁷ Obviously,

70. *See id.* at 2218 (majority opinion).

71. *Id.* at 2228 (Sotomayor, J., dissenting).

72. *See id.*

73. *Id.* at 2220 (majority opinion).

74. *See id.* at 2228 (Sotomayor, J., dissenting).

75. *See id.* at 2220 (majority opinion).

76. *See id.* at 2236 (Sotomayor, J., dissenting) ("[T]he majority would conclude that the ordinance deemed unconstitutional in *Robinson* criminalizing 'being an addict' would be constitutional if it criminalized 'being an addict and breathing.'").

77. *See id.* at 2220 (majority opinion) ("Insanity, diminished-capacity, and duress defenses also may be available in many jurisdictions." (emphasis added)).

for someone who is homeless, there is real value in knowing that sleeping in public will not be treated as a criminal act. Even if necessity eventually provides ex post relief from such laws, such relief might come only at the tail end of police harassment and the threat of jail time. Moreover, not only does the majority's imagined role for necessity have it operate only at the back end, it is also subject to considerable uncertainty.⁷⁸ According to Gorsuch, "[i]t *may be* that [a necessity] defense extends to charges for illegal camping when it comes to those with nowhere else to go."⁷⁹ *May be* is little comfort for a homeless person facing possible jail time for sleeping in a park.

Necessity's reach traditionally has been quite limited.⁸⁰ The classic example is a boat at sea facing the wrath of a storm⁸¹ and the risk of death.⁸² Though it would ordinarily be trespass to tie onto someone else's dock, necessity can provide adequate justification for invading another's property rights in this way. The necessity of putting out a house fire can provide an excuse for breaking into neighboring homes. But necessity can perhaps be best appreciated by its limited reach even in moments of crisis. Consider two media photos taken in the immediate aftermath of Hurricane Katrina. In one, "a Black male was shown in waist-high water, carrying a carton of soft drinks and a full garbage bag," with a photo caption that read, "A young man walks through chest deep flood water after looting a grocery store."⁸³ The second photo "showed a White couple

78. *See id.*

79. *Id.* (emphasis added).

80. This is particularly the case regarding property law, though it rests in unexpected places. *See* Robert C. Bird & Lynda J. Oswald, *Necessity as a Check on State Eminent Domain Power*, 12 U. PA. J. CONST. L. 99, 101 (2009) (describing necessity as the "long dormant cousin of [the] 'public use'" doctrine, and suggesting it be leveraged to challenge eminent domain actions).

81. The classic scenario emanates from *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221, 222 (Minn. 1910) ("And so public necessity, in times of war or peace, may require the taking of private property for public purposes; but under our system of jurisprudence compensation must be made.").

82. Long recognized, the necessity defense excuses a criminal violation if "the harm which will result from compliance with the law is greater than that which will result from violation of it." 2 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 10.1 (3d ed. 2018).

83. This comparison is drawn from Samuel R. Sommers, Evan P. Apfelbaum, Kristen N. Duker, Negin Toosi & Elsie J. Wang, *Race and Media Coverage of Hurricane Katrina: Analysis, Implications, and Future Research Questions*, 6 ANALYSES SOC. ISSUES & PUB. POL'Y 39, 42 (2006).

carrying food and drinks through similar floodwaters,” with a caption that read, “[t]wo residents wade through chest-deep water after finding bread and soda from a local grocery store.”⁸⁴ As these contrasting captions illustrate, racism can prevent people from successfully calling upon necessity as a defense.⁸⁵ Indeed, white residents and police officers used violence and the threat of violence to prevent Black residents stuck in flooded New Orleans from moving to safer areas.⁸⁶ If necessity has not traditionally been enough to permit Black hurricane victims to take food from a grocery store following devastating flooding, it is hard to see how it could reach the unhoused. Indeed, the Oregon Court of Appeals rejected a claim that “necessity” excused trespass raised by a homeless man in 2021 after he was caught sleeping in a private office space.⁸⁷ Given the many ways society looks the other way when confronted with the challenges of homelessness and often fails to recognize the shared humanity of those struggling with homelessness,⁸⁸ necessity, as traditionally understood, is arguably “unduly

84. *Id.*

85. Racism impacts what is considered a necessity and society’s expectations with regard to how property owners react to perceived threats. See Addie C. Rolnick, *Defending White Space*, 40 CARDOZO L. REV. 1639, 1649, 1678 (2019) (discussing expansions of self-defense laws to cover actions taken to protect property and their racially disparate impacts); U.S. COMM’N ON CIVIL RIGHTS, EXAMINING THE RACE EFFECTS OF STAND YOUR GROUND LAWS AND RELATED ISSUES 17, 18 (2020), <https://www.usccr.gov/files/pubs/2020/04-06-Stand-Your-Ground.pdf> [<https://perma.cc/MF5W-MM63>] (noting that the advent of Stand Your Ground laws exacerbates the existing disparity between white-on-black homicides, which are 281 percent more likely to be found justified, and white-on-white homicides).

86. See, e.g., Andy Grimm, *A Decade After Danziger Bridge Shooting, Killings Still Cast a Shadow*, NOLA.COM (Sep. 5, 2015), https://www.nola.com/news/crime_police/article_00bb8d39-aa35-5959-b613-873905a4e734.html [<https://perma.cc/BZJ4-Q3ZL>] (recounting the police shooting unarmed African Americans six days following Katrina’s landfall, wounding four and fatally shooting two). Notably, a 2005 survey found that 71 percent of African American respondents believed the government’s Katrina response was indicative of racial inequality compared to just 32 percent of whites. Carroll Doherty, *Remembering Katrina: Wide Racial Divide over Government’s Response*, PEW RSCH. CTR. (Aug. 27, 2015), <https://www.pewresearch.org/short-reads/2015/08/27/remembering-katrina-wide-racial-divide-over-governments-response/> [<https://perma.cc/FY4U-35PG>].

87. *City of Eugene v. Adams*, 495 P.3d 187, 188-91 (Or. Ct. App. 2021).

88. See, e.g., Shumita Basu, *What Happens When You Avert Your Eyes from the Homeless*, GOTHAMIST (Sep. 17, 2019), <https://gothamist.com/news/what-happens-when-you-avert-your-gaze-homeless> [<https://perma.cc/A8NH-N6TU>] (“We don’t really have the capability as human beings to look at this onslaught of problems that are depressing, problems that are overwhelming, and deal with it—especially on something like commuting to and from work—on a daily basis.”); Kayla Robbins, *Making Eye Contact with Homeless People Is*

crabbed given its own underlying logic.”⁸⁹ As such, necessity is hardly equal to its role as imagined by the *Grants Pass* majority.

On the other hand, what if *Grants Pass* signals a new understanding of necessity by the conservative members of the Court? What work could the new necessity do and how might it change our understandings of property rights and mutual obligations? Despite the dissent’s protests to the contrary,⁹⁰ necessity was not a powerful enough argument to knock out laws that criminalize homelessness, but according to the Court, necessity could be enough to shield those charged from being convicted. Cynically, it is highly plausible that Gorsuch included the possibility of homeless individuals’ raising the necessity defense as a way to deflect attention and anger from the actual holding in *Grants Pass* that state and local governments can criminalize sleeping in public. On the other hand, it remains the case that the Court, by championing necessity in this way, opened the door to a new, more robust, more far-reaching necessity doctrine.

The remainder of this Article takes new necessity seriously. Part II, exploring what leading property scholars have written about homelessness; Part III, detailing the extent to which basic human needs are not being met for the unhoused and the hungry; and Part IV, rejecting fault as a bar to necessity-based claims, help set the scene. Part V argues that the new necessity doctrine not only allows advocates to escape their tired, and generally unsuccessful, calls for

Important, INVISIBLE PEOPLE (May 22, 2019), <https://invisiblepeople.tv/making-eye-contact-with-homeless-people-is-important/> [<https://perma.cc/G5AS-VVTA>] (“When you engage with someone, even in the most basic way like making eye contact, you acknowledge your shared humanity. This is what makes the lack of eye contact so dehumanizing.”). Institutions also fail to see the homeless, often failing to adapt to their complex background. See generally Hanna T. Klop, Kirsten Evenblij, Jaap R. G. Gootjes, Anke J. E. de Veer & Bregje D. Onwuteaka-Philipsen, *Care Avoidance Among Homeless People and Access to Care: An Interview Study Among Spiritual Caregivers, Street Pastors, Homeless Outreach Workers and Formerly Homeless People*, BMC PUB. HEALTH, Dec. 29, 2018, at 1, 6-7, <https://bmcpublikealth.biomedcentral.com/articles/10.1186/s12889-018-5989-1> [<https://perma.cc/2YR7-QFPQ>] (examining the healthcare industry’s failure to adequately account for the complex needs of homeless individuals and address its high barriers such as complex bureaucracy and lack of tailored care).

89. R. GEORGE WRIGHT, DOES THE LAW MORALLY BIND THE POOR? OR WHAT GOOD’S THE CONSTITUTION WHEN YOU CAN’T AFFORD A LOAF OF BREAD? 110 (1996).

90. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2228, 2241 (2024) (Sotomayor, J., dissenting).

more money but also helps create the political pressure required for society to meaningfully tackle the problem of homelessness.

II. PROPERTY SCHOLARS ON HOMELESSNESS

Homelessness fundamentally challenges the structure of, and justifications given for, property law (or at least property law as currently found in advanced capitalist countries). Homelessness is a complicated problem with many causes and many possible solutions.⁹¹ Homelessness also inspires wildly divergent responses from property owners and from property scholars. Just as workers in downtown office buildings often hustle past homeless individuals on the street, avoiding eye contact and ignoring pleas for charity, so too many property law scholars gloss over the problem of homelessness, preferring to imagine that ownership is available to all.⁹² Homelessness—capitalism’s functional exclusion of members of society from even the most basic of property rights, shelter—threatens to destroy not only market rationalizations but also most property scholarship. In recent decades, conservative scholars have argued that the “core” of property is exclusion,⁹³ but if homelessness

91. Professors Marc Roark and Lorna Fox O’Mahony call homelessness a “wicked” problem, which they explore through the lens of squatting—the unauthorized occupation of empty land or properties by people lacking legal housing—framing it as a complex property rights issue involving tensions between homeless individuals’ needs and state responses to protect property ownership. See LORNA FOX O’MAHONY & MARC L. ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* at ix (2022).

92. See Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 284 (2004) (“Simply as a descriptive matter, the homeless live in a legal status that might be called ‘no property.’”); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 134 (Thomas I. Cook ed., Hafner Press 1947) (1690) (“Whatsoever then [man] removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property.”); see also MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 20-21 (1991) (“The American property saga starts with John Locke—not with Locke the philosopher or Locke the political theorist, but with Locke the story-teller. Property acquired its near-mythic status in our legal tradition, in part, because the language and images of John Locke played such a key role in American thinking about government.”).

93. See, e.g., David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL’Y 39, 40 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730-31 (1998); cf. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (“[W]e hold that the ‘right to exclude,’ so universally held to be a fundamental element of the property right, falls within [the] category of interests that the Government cannot take without compensation.” (footnote

occupies a central space in our understanding of property, then the core is rotten. For those who are homeless, property rights in general work to destroy, not enhance, liberty.⁹⁴ Property's "core," from this vantage point, is exploitative, constraining, and inhumane.

Before reaching such a negative conclusion, it is worth taking a broad view of the field. As has been generally accepted for at least a century, property rights involve less the relationship between people and objects and more the relationship between people.⁹⁵ Property rights, according to this dominant view, are best understood as paired couplings of rights and responsibilities, of privileges and claims, that define the relationship between property owners and nonowners.⁹⁶ At the margins, there is still plenty of space for academics to argue about whether breaking down property in such a way fails to capture the in rem nature of property rights or not.⁹⁷ Indeed, contemporary property scholarly debate tends to center on questions of whether property is best understood in a reductive

omitted)).

94. See Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296, 299-300 (1991) ("Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.").

95. See, e.g., RESTATEMENT (FIRST) OF PROPERTY Introductory Note (A.L.I. 1936) ("The word 'property' is used in this Restatement to denote legal relations between persons with respect to a thing."); Xiaoqian Hu, *Public Private Property*, 109 MARQ. L. REV. 385, 411 (2025) ("This observation, that property law regulates *relations between people*, is so widely accepted that it is almost cliché."). But see Eric R. Claeys, *Natural Property Rights: An Introduction*, 9 TEX. A&M J. PROP. L. 415, 435 (2023) (defining property rights as relating to "separable" resources that are not essentially connected to any specific person).

96. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28-59 (1913) (discussing the right to property is divisible into four categories to create a bundle: rights, privileges, powers, and immunities); JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 131-34 (2000) (giving a summary of Hohfeld's argument); see also Denise R. Johnson, *Reflections on the Bundle of Rights*, 32 VT. L. REV. 247, 247 (2007) (arguing that whatever its "faults or inadequacies," Hohfeld's bundle theory has, and will continue to be, a cornerstone of the American property tradition).

97. See, e.g., Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 704-07 (2014) (arguing that Hohfeld's bundle of rights undermined the coherence of property law by denying that it had any inherent structure, limiting the Restatement of Property's influence in the field); Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1719 (2012) ("By making the pieces of the bundle fully congruent with their purposes and obscuring the means-ends relation between property law and the purposes it serves, the bundle theory leads to a fallacy of division—like expecting a water molecule to be wet.").

manner based on the exclusionary rights of owners or if generic accounts of property rights cannot be severed from the many exceptions tied to the social nature of property that recognize the rights of nonowners.⁹⁸ Homelessness, because it involves people with little ability to draw upon property rights at all,⁹⁹ arguably sidesteps many of these debates. Homelessness is a large enough problem that it forces the focus away from the nuances of ownership and from small tweaks meant to improve efficiency.¹⁰⁰ When homelessness occupies a central space in our thinking about property, problems of nonownership arguably undermine even the most socially oriented justifications for recognizing private rights over property.

Property scholars have not been blind to the problem of nonownership. As Professor Hanoch Dagan explains, “[b]ecause non-owners are continuously vulnerable, the challenge to property’s legitimacy is, in turn, continuous as well.”¹⁰¹ Similarly, Professor Christopher Essert writes that homelessness “is a problem about property, its justification, and the moral constraints on its realization.”¹⁰² Essert goes on to make an even stronger claim, namely that “[t]he moral problem of homelessness calls for the creation of an institution of property, and any such institution can be justified only insofar as and to the extent that it solves this problem.”¹⁰³ Even if one does not fully agree with Essert that solving homelessness is the

98. Compare Gregory S. Alexander, Reply, *The Complex Core of Property*, 94 CORN. L. REV. 1063, 1064 (2009) (positing a normative, nonownership approach to property law and arguing that property fundamentals are “certainly more complex than the simple image of the virtually absolute right to exclude” and economic efficiency), with Henry E. Smith, Response, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORN. L. REV. 959, 968-70 (2009) (suggesting that while property law certainly extends beyond economic efficiency, its bedrock remains the right to exclude), and Eric R. Claeys, Response, *Virtue and Rights in American Property Law*, 94 CORN. L. REV. 889, 934-46 (2009) (disputing Alexander’s idea that virtue ethics should displace traditional core property rights). See generally Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 407-28 (2015) (providing a critical summary of information theorists’ views of property); Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 115-26 (2013) (giving a summary of progressive property scholarship).

99. See *Grants Pass v. Johnson*, 144 S. Ct. 2202, 2229 (2024) (Sotomayor, J., dissenting).

100. See O’MAHONY & ROARK, *supra* note 91, at 203-59 (presenting a theory for tackling challenging and polarizing property problems, with a focus on homeless squatters).

101. HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 211 (2021).

102. Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFFS. 266, 266 (2016).

103. *Id.* at 281.

only way to justify a property law regime, Professor Jane Baron's observation that homeless individuals are "seriously vulnerable to the effects of owners' actions and inactions"¹⁰⁴ is beyond reasonable debate.

Recognizing nonownership as a structural problem rather than as simply an unfortunate outlier within our ownership society requires us to treat "no property" as a category separate and distinct from "property." Those who see homelessness as a problem but not a threat to the existing property law structure tend to blame the homeless for their predicament and to be concerned about how the presence of homeless people harms ordinary people—meaning people with property.¹⁰⁵ Those who see the existence of a "no property" category as itself undermining the moral and legal foundations of property law focus less on individual fault and more on structural impediments to the acquisition of sufficient property and to the allowance of public space so that homeless individuals can have their basic needs met.¹⁰⁶ Perhaps nowhere is the contrast between a vision of property that seeks to diminish the significance of homelessness to our understanding of property and an approach that emphasizes the distinct problem of "no property" brought into sharper relief within property law scholarship than in the contrasting positions of Ellickson and Waldron on the powers cities should have over homeless individuals.¹⁰⁷

In what follows, Part II first lays out Ellickson's argument and then discusses Waldron's response. Even though Waldron's argument better describes homelessness and is morally superior, Ellickson's position is worth taking seriously because it projects a market-utopian view of property that captures mainstream, as well as conservative intellectual, views on property and homelessness.

104. Baron, *supra* note 92, at 287.

105. See Nikita Stewart, *How Homeless Shelters Affect Property Values*, N.Y. TIMES (Sep. 25, 2019), <https://www.nytimes.com/2019/09/25/nyregion/nyc-homeless-shelters-property-values.html> [<https://perma.cc/V3KN-CD39>] (noting nearby homeless shelters decrease home values in Manhattan by 25 percent).

106. See Essert, *supra* note 102, at 266-67 ("Property's justification lies in its capacity to serve as a unique moral tool to eliminate this problematic way that one can have power over another. But the form of property's justification requires that this elimination be universal. This means that our current institution of property, in leaving some homeless, is inadequate to its own best justification.")

107. See *infra* Parts II.A-B.

A. Ellickson

Professor Ellickson's argument against allowing homeless individuals a right to occupy public space is so openly antihomeless that it risks being taken as a strawman argument. That said, this Section hopes to sketch out Ellickson's argument in an even-handed manner. Ellickson made his mark writing about informal ordering and bargaining in the shadow of the law, drawing on observations of how ranchers and nonranchers settle disputes in rural Shasta County, California.¹⁰⁸ The book has an almost libertarian bent to it, suggesting that Ellickson might cringe at the government pushing the homeless off the street.¹⁰⁹ But just as the Pacific Legal Foundation's libertarian tendencies did not extend to the homeless in its proregulation amicus brief in *Grants Pass*,¹¹⁰ so too Ellickson's scholarship is notably hard-hearted when it comes to the most vulnerable. At different points in time, Ellickson has applied a law and economics form of analysis to attack mixed-income housing projects, rent control, and inclusionary zoning, arguing that such programs, designed to help the poor, actually hurt them by (among other reasons) lowering total housing supply.¹¹¹ In fairness, he has also argued, as have I, that exclusionary zoning has blocked new construction and contributes to the affordability crisis affecting many parts of the country.¹¹² Nevertheless, in part because the same supply-side effects are not present, Ellickson's views on homelessness policy can come across as relatively indifferent to the challenges facing homeless individuals.

108. See ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 15-122 (1991).

109. Ellickson's book centers around how neighbors in rural communities settle disputes, mainly through informal norms and social interactions rather than formal legal processes or government intervention. See *id.* at 52-120.

110. See generally Brief for Pacific Legal Foundation et al. as Amici Curiae Supporting Petitioner, *City of Grants Pass v. Johnson*, 144 S. Ct. 2202 (2024) (No. 23-175) (arguing for greater governmental authority to regulate the activities of homeless individuals).

111. See generally Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 *UCLA L. REV.* 983 (2010) (critiquing mixed-income housing projects); Robert C. Ellickson, *Rent Control: A Comment on Olsen*, 67 *CHI.-KENT L. REV.* 947 (1991) (critiquing rent control); Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 *S. CAL. L. REV.* 1167 (1981) (critiquing inclusionary zoning).

112. See ROBERT C. ELICKSON, *AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING* 113-14 (2022); Ezra Rosser, *The Euclid Proviso*, 96 *WASH. L. REV.* 811, 828-35 (2021).

Similar to the City of Grants Pass decades later, Ellickson's 1996 article on homelessness policy, published by *Yale Law Journal*, focuses not on the rights of homeless individuals but on the rights of urbanites to be free from the harms associated with the homeless.¹¹³ Ellickson asks, "What, if anything, should a society do when an individual perpetrates a *chronic street nuisance*?"¹¹⁴ For Ellickson, "[c]hronic street nuisances occur when a person regularly behaves in a public space in a way that annoys—but no more than annoys—most other users, and persists in doing so over a protracted period."¹¹⁵ (Defined in this way, one might think the article was about delivery drivers who park on sidewalks, college kids who get around on rented scooters, or volunteers seeking signatures on this or that petition.) Ellickson clarifies things when he explains, "[p]rotracted, nonaggressive panhandling and bench squatting are paradigm examples" of chronic street nuisances.¹¹⁶ For Ellickson, chronic street nuisances matter because, "if city dwellers cannot enjoy a basic minimum of decorum in downtown public spaces, they will increasingly flee from those locations to cyberspace, suburban malls, and private walled communities."¹¹⁷

In line with other property scholars who have looked at homelessness, Ellickson believes property law can be part of the solution. But Ellickson identifies a different problem of homelessness than do advocates for the homeless. "Disorderly people are not the only citizens with liberty interests at stake in these instances," Ellickson continues, "[s]treet law must also attend to the privacy and mobility interests of pedestrians of ordinary sensibility, not to mention the rights of the unusually delicate."¹¹⁸ Ellickson's solution: zoning. Zones where homeless people are not allowed, zones where they are, as well as semirestrictive zones.¹¹⁹ According to Ellickson, one of the coauthors of a leading land use textbook,¹²⁰ "[a] specialist in

113. See Ellickson, *supra* note 23, at 1167-68.

114. *Id.* at 1175.

115. *Id.* at 1169.

116. *Id.* at 1175.

117. *Id.* at 1172 (footnote omitted).

118. *Id.* at 1247.

119. *Id.* at 1220-22, 1239-42.

120. ROBERT C. ELICKSON, VICKI BEAN, RODERICK M. HILLS, JR. & CHRISTOPHER SERKIN, *LAND USE CONTROLS: CASES AND MATERIALS* (5th ed. 2020).

property law approaches the issue of street order as a problem not of speech or of crime, but of land management.”¹²¹ As discussed in the introduction to this Part, some property scholars approach the problem of homelessness differently, but for Ellickson, the problem is the discomfort urban dwellers and visitors experience when they encounter panhandlers or homeless individuals sitting on benches. Ellickson’s solution is to selectively remove the homeless from favored areas of the city: out of sight, out of mind.

Ellickson’s imagined zoning solution, which presumptively would be coupled with an array of sanctions to enforce such zoning, relies in part on his understanding of the nature of homelessness and its causes. For Ellickson, people are homeless largely as a result of their own shortcomings. In his own words, “[h]omeless people suffer from an exceptionally high incidence of mental illness and substance abuse, and tend to have far less social capital, not to mention economic capital, to fall back on when misfortune strikes.”¹²² In an earlier article, Ellickson argued that “[m]ost homeless families are not random victims of a recent run of bad luck, and it is highly misleading to suggest otherwise.”¹²³ Instead, Ellickson claimed in the same 1990 article that “the relative inability of heads of homeless families to function independently” was a major cause of family homelessness.¹²⁴ For Ellickson, people who are homeless are at fault and largely responsible for their predicament; therefore, “policymakers should reject the policy proposals that stem from the assumption that the homeless are ordinary people down on their luck.”¹²⁵ Though other scholars argue that once someone is homeless, the causes of such homelessness fade in importance, according to Ellickson, “[t]he great majority of homeless people are not random victims of a housing-market squeeze, but rather deeply troubled individuals and families.”¹²⁶

121. Ellickson, *supra* note 23, at 1171.

122. *Id.* at 1217 (footnote omitted).

123. Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INT. 45, 57 (1990).

124. *Id.*

125. *Id.* at 59.

126. *Id.*; *see also id.* at 58 (“The claim made by some advocates of the homeless—that the stress of being on the streets *causes* the high incidence of mental illness and substance abuse—is unsupported.”).

Once homeless individuals are understood as at fault for their condition, it is easier to recharacterize the homelessness problem as one of bad choices and bad actions rather than as a function of inadequate shelter options.¹²⁷ Homeless individuals are undeserving of “unconditional shelter” because “policymakers should devise aid programs that ... do more to discourage dependency.”¹²⁸ Though left-leaning academics have since written legions of articles critiquing the broken windows theory of urban decline,¹²⁹ in 1996, Ellickson went so far as to write, “a regular beggar is like an unrepaired broken window—a sign of the absence of effective social-control mechanisms in that public space.”¹³⁰ Ellickson’s reliance on the tired distinction between the deserving and undeserving poor,¹³¹ as well as his use of dehumanizing language when referring to the poor, helps explain why he focuses almost entirely on the supposed harms

127. For more on the availability of shelters and the agency of unhoused individuals, see McJunkin, *The Negative Right to Shelter*, *supra* note 20, at 163-74; and see generally Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals’ Lack of Choice*, 95 N.Y.U. L. REV. 1150 (2020).

128. Ellickson, *supra* note 123, at 45.

129. For the pathbreaking exposition of this theory, see George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/> [<https://perma.cc/9J6Y-64GB>]. For critiques of the theory, see generally, for example, Daniel T. O’Brien, Chelsea Farrell & Brandon C. Welsh, *Looking Through Broken Windows: The Impact of Neighborhood Disorder on Aggression and Fear of Crime Is an Artifact of Research Design*, 2 ANN. REV. CRIMINOLOGY 53 (2019) (arguing that there is no consistent evidence to support broken window theory); Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271 (2006) (arguing that studies from New York City and from the Moving to Opportunity program in five cities do not support broken windows theory); BERNARD E. HARCOURT, ILLUSION OF ORDER: THE FALSE PROMISE OF BROKEN WINDOWS POLICING (2001) (critiquing the broken windows theory of policing); Gary Stewart, *Black Codes and Broken Windows: The Legacy of Racial Hegemony in Anti-Gang Civil Injunctions*, 107 YALE L.J. 2249, 2252-57 (1998) (arguing that the broken windows theory can lead to over policing in inner cities).

130. Ellickson, *supra* note 23, at 1182. *But see* McJunkin, *supra* note 20, at 140 (arguing that criminalization is “largely motivated by ignorance of homelessness’s causes and long-standing prejudice against the individuals experiencing it”); Waldron, *supra* note 23, at 388 (“It does seem a bit much to characterize the poorest of the poor as ‘broken windows’ relative to a self-image of righteous prosperity and order, when it is not entirely clear—indeed, when it is exactly the point of our experiment to see—whether we are entitled to project that image.”).

131. *See, e.g.*, Rankin, *supra* note 9, at 584-87 (discussing the prejudices behind criminalization of the chronically unsheltered).

of homelessness to ordinary people (implicitly property owners).¹³² He describes as “wishful thinking” the idea that panhandling could cause “passersby to reflect on (1) the inadequacies of welfare benefits; or (2) the evils of capitalism.”¹³³

For Ellickson, the chronic street nuisances of panhandling and bench squatting by homeless individuals—this last nuisance might best be described simply as the unhoused existing in public space—justify local regulations that push the homeless out of the public square.¹³⁴ Ellickson provides a history of how legal protections and popular perceptions have changed over time and suggests that, “[l]ike the dangers of cocaine, the importance of preventing street disorder had been learned the hard way—through experience.”¹³⁵ Even though his three-part zoning scheme left homeless individuals and families some space where they had greater freedoms,¹³⁶ in general Ellickson was not pulling any punches. As much as parts of his argument might seem cringeworthy to a typical property scholar today—most of whom are fairly progressive¹³⁷—they also epitomize a hardline approach to homelessness that sees homeless individuals as deviant outsiders, undeserving of assistance or legal protection.

B. Waldron

Looking at homelessness from a radically different angle, one that prioritizes the homeless rather than property owners, Professor Waldron defends the right of homeless individuals to take up public space and to act in ways that might otherwise be subject to sanction. Waldron bases his argument on three main claims: (1) the homeless are humans with basic needs; (2) having no other option, the

132. See Ellickson, *supra* note 23, at 1178 (“Observers may be increasingly annoyed that the street person is not only overusing scarce public space, but apparently has not sought out employment, family assistance, or public aid.”).

133. *Id.* at 1230.

134. See *id.* at 1175-84.

135. *Id.* at 1217. For Ellickson’s history of changing legal protections and public reactions to the homeless, see *id.* at 1208-19.

136. *Id.* at 1219-22.

137. See Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORN. L. REV. 743, 743-44 (2009); see also Adam Bonica, Adam Chilton, Kyle Rozema & Maya Sen, *The Legal Academy’s Ideological Uniformity*, 47 J. LEGAL STUD. 1, 10, 27, 32 (2018).

homeless must act upon those needs—primarily sleeping, eating, and excretion—in public;¹³⁸ and (3) encounters with homeless individuals should not count as a harm to the rest of the public.¹³⁹ It is with this third claim that Waldron directly responds to Ellickson’s concerns about “chronic public nuisance” by rejecting the idea that ordinary actions by homeless individuals should be considered nuisances at all, even if some members of the public are troubled by such encounters.¹⁴⁰

According to Waldron, property law serves as an oppressive force in the lives of homeless individuals and families. The homeless are human, and, therefore, as “embodied beings ... [must] always have a location.”¹⁴¹ But because their status is defined negatively, as *not* having property, as not having private space into which they can retreat, the homeless experience property law differently than do owners.¹⁴² When it comes to being on private property, “the homeless person is utterly and at all times at the mercy of others.”¹⁴³ Though Waldron does not phrase it in the same way as Ellickson, who described “the issue of street order” as a matter of “land management,”¹⁴⁴ Waldron observes, “[o]ne of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where.”¹⁴⁵ He later faults

138. See Waldron, *supra* note 94, at 301-02, 315, 321.

139. See Waldron, *supra* note 23, at 379, 384-85.

140. Compare Waldron, *supra* note 94, at 313 (“[N]ew rules in the subway will prohibit anyone from sleeping or lying down in the cars and stations, whether they are rich or poor, homeless or housed.... Still everyone is perfectly well aware of the point of passing these ordinances, and any attempt to defend them on the basis of their generality is quite disingenuous.”), with Ellickson, *supra* note 23, at 1175 (defining chronic street nuisance as “behavior that (1) violates community norms governing proper conduct in a particular public space (2) over a protracted period of time (3) to the minor annoyance of passersby.”).

141. Waldron, *supra* note 94, at 296. Professor Martha Fineman’s Vulnerability and Human Condition Initiative similarly focuses on the vulnerability shared by all people—tied in part to their physicality—and uses vulnerability as a lens through which to propose different approaches to social relationships and state responsibility. For an examination of the various models that move beyond the traditional liberal paradigm, defining vulnerability as the susceptibility to change in social and physical well-being, rooted in human embodiment and the resulting dependence on social institutions, see *Mission for The Vulnerability and the Human Condition Initiative*, EMORY UNIV.: VULNERABILITY & THE HUM. CONDITION, <https://web.gs.emory.edu/vulnerability/about/index.html> [https://perma.cc/9LGZ-W2R8].

142. See Waldron, *supra* note 94, at 306 (“Their homelessness consists in unfreedom.”).

143. *Id.* at 299.

144. Ellickson, *supra* note 23, at 1171.

145. Waldron, *supra* note 94, at 296.

property theorists who fail to see that for those without property, “enforcement of property rules” can “count as a restriction on freedom.”¹⁴⁶ As Waldron notes, “[h]omelessness is partly about property and law, and freedom provides the connecting term that makes those categories relevant.”¹⁴⁷ Because those who are homeless are not allowed to be many places, for the homeless, “the rules of private property are a series of fences that stand between them and somewhere to be, somewhere to act.”¹⁴⁸

Crucial to Waldron’s argument in favor of recognizing the right of homeless people to occupy public space is his observation that homelessness is a societal choice. According to Waldron, “we are willing to tolerate an economic system in which large numbers of people are homeless,” but we are not “willing to allow those who are in this predicament to act as free agents, looking after their own needs, in public places—the only space available to them.”¹⁴⁹ Waldron describes this as “a deeply frightening fact about the modern United States,” and places the blame squarely on “those who *have* homes and jobs.”¹⁵⁰ With private options off the table, unhoused people have no choice but to occupy and use public space. The homeless have to go to the bathroom in public, for example, because “a conscious political decision has been made *not* to provide such facilities.”¹⁵¹ By focusing on politics, Waldron essentially flips the blame game from the homeless to those with political power. Out of the increased restrictions on what homeless people can do in public, Waldron claims, is emerging “a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and

146. *Id.* at 308.

147. *Id.* at 323.

148. *Id.* at 302; *see also id.* at 315 (“And since freedom to perform a concrete action requires freedom to perform it at some place, it follows that the homeless person does not have the freedom to perform them. If sleeping is prohibited in public places, then sleeping is comprehensively prohibited to the homeless. If urinating is prohibited in public places (and if there are no public lavatories) then the homeless are simply unfree to urinate. These are not altogether comfortable conclusions, and they are certainly not comfortable for those who have to live with them.”).

149. *Id.* at 304.

150. *Id.*

151. Waldron, *supra* note 23, at 384.

standing around.”¹⁵² Not mincing words, Waldron calls this emerging reality, “one of the most callous and tyrannical exercises of power in modern times by a (comparatively) rich and complacent majority against a minority of their less fortunate fellow human beings.”¹⁵³

In an article written as a direct response to Ellickson, Waldron strongly rejects the assertion that cities should be able to push the homeless out of particular areas because of the disutility associated with encountering homeless people.¹⁵⁴ Building off his earlier efforts to define the relevant actions as societal tolerance for gross inequality and failure to adequately respond to homelessness,¹⁵⁵ Waldron shifts the focus away from homeless people and onto the more privileged members of society involved in the same encounter.¹⁵⁶ Waldron admits that “ordinary pedestrians” experience discomfort when they encounter homeless people, but questions whether such discomfort “should even be considered a harm at all.”¹⁵⁷ Continuing in this vein, Waldron notes that “[i]f the situation of some in society is distressing, then it is important that others be distressed by it.”¹⁵⁸

Ellickson published his article defending local government criminalization of “chronic street nuisance” a little more than a quarter of a century ago and Waldron’s response came out just around that same milestone. Looking back, even with the natural advantages of getting to speak second, Waldron successfully claimed the moral high ground. Whereas Ellickson hoped to address the problem of homelessness by pushing the unhoused into areas where they would be less of a nuisance,¹⁵⁹ Waldron argued that “[w]e are not entitled to insist that the homeless person abide by community norms, or that those norms be enforced against her, if the norms are constructed in an image of community whose logic denies in effect

152. Waldron, *supra* note 94, at 301.

153. *Id.* at 301-02.

154. Waldron, *supra* note 23, at 379.

155. *Id.* at 384-88.

156. *Id.* at 379, 384-85.

157. *Id.* at 379.

158. *Id.* at 382.

159. Ellickson, *supra* note 23, at 1175-77.

that homelessness exists.”¹⁶⁰ But if the academic debate was won by Waldron, when it comes to homelessness policy, cities and local governments largely agree with Ellickson.¹⁶¹ The *Robinson* action/status distinction¹⁶² that carried the day in *Martin*¹⁶³ complicated things for a while, but in the wake of *Grants Pass*, cities once again have a green light to push out the homeless.¹⁶⁴ As Waldron noted:

People do not want to be confronted with the sight of the homeless—it is uncomfortable for the well-off to be reminded of the human price that is paid for a social structure like theirs—and they are willing to deprive those people of their last opportunity to sleep in order to protect themselves from this discomfort.¹⁶⁵

Though the Ellickson-Waldron debate took place a quarter of a century ago, the basic terms of the debate and the motivations between the contest remain unchanged. If anything, the stakes have gotten higher as the housing affordability crisis, caused by both severe restrictions on supply and limited public funding for housing, only deepened in the first two decades of the twenty-first century.¹⁶⁶

160. Waldron, *supra* note 23, at 406.

161. *See, e.g.*, GRANTS PASS, OR., MUN. CODE § 5.61.020(A) (2023) (repealed 2025) (prohibiting sleeping on public sidewalks and alleys); §§ 5.61.010, 5.61.030 (2023) (repealed 2025) (prohibiting camping—defined as remaining in a place where any material is used as bedding—upon publicly owned property, under bridges, in parks, and on sidewalks). *See generally* HOUSING NOT HANDCUFFS, *supra* note 8, at 12 (noting that 72 percent of surveyed cities have at least one law restricting public camping while 51 percent have a law banning sleeping in public).

162. *See* *Robinson v. California*, 370 U.S. 660, 666-68 (1962).

163. *See* *Martin v. City of Boise*, 920 F.3d 584, 617 (9th Cir. 2019).

164. *See* *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2226 (2024) (“The Constitution’s Eighth Amendment serves many important functions, but it does not authorize federal judges to wrest those rights and responsibilities from the American people and in their place dictate this Nation’s homelessness policy.”); *see also* Lillian Mongeau Hughes, *After U.S. Supreme Court Allows Cities to Outlaw Homeless Camping, Grants Pass Resumes Fining Disabled Homeless Residents, Advocates Say*, THE OREGONIAN (Oct. 29, 2024, at 12:33 ET), <https://www.oregonlive.com/news/2024/10/after-us-supreme-court-allows-cities-to-outlaw-homeless-camping-grants-pass-resumes-fining-disabled-homeless-residents-advocates-say.html> [<https://perma.cc/8HKL-D22R>].

165. Waldron, *supra* note 94, at 314.

166. *See, e.g.*, ERIK GARTLAND, CTR. ON BUDGET & POL’Y PRIORITIES, FUNDING LIMITATIONS CREATE WIDESPREAD UNMET NEED FOR RENTAL ASSISTANCE 3 (2022) (noting over 76 percent of low-income households lack rental assistance as need for rental assistance has outgrown available funding); Mary Louise Kelly, Mia Venkat, Kathryn Fink & William Troop, *Housing*

Cities and localities are still trying to figure out how to make urban spaces, often occupied by homeless individuals and encampments, more attractive to the general public.¹⁶⁷ And scholars continue to wrestle with the ways the “no property” category challenges property law’s basic structure.¹⁶⁸

III. BASIC HUMAN NEEDS

Sadly, the conversation around basic needs in the United States is at such a gestational stage that space must be dedicated to defending the idea that such needs are a shared condition of the human experience. Part III is dedicated to the rather simple proposition that shelter and food are basic human needs. Of course, one could add other things as well—health care, education, even access to information—but the inability of the most vulnerable to

Experts Say There Just Aren't Enough Homes in the U.S., NPR (Apr. 23, 2024, at 16:04 ET), <https://www.npr.org/2024/04/23/1246623204/housing-experts-say-there-just-arent-enough-homes-in-the-u-s> [<https://perma.cc/9DQZ-V4WW>] (discussing the shortage of four to seven million homes in America); Laura Feiveson, Arik Levinson & Sydney Schreiner Wertz, *Rent, House Prices, and Demographics*, U.S. DEPT OF THE TREASURY (June 24, 2024), <https://home.treasury.gov/news/featured-stories/rent-house-prices-and-demographics> [<https://perma.cc/Y96K-FGR8>] (“Over the last two decades, housing costs have been rising faster than incomes. More than 90 percent of Americans live in counties where median rents and house prices grew faster than median incomes from 2000 to 2020.”).

167. See, e.g., Eric Falquero & Gordon Chaffin, *Exclusion of Homeless People from Public Spaces*, STREET SENSE MEDIA (Dec. 22, 2021), <https://streetsensemedia.org/article/exclusion-of-homeless-people-from-public-spaces/> [<https://perma.cc/9V5L-7H9J>] (detailing the D.C. government’s efforts to clear and prohibit homeless encampments throughout the city, including in newly renovated parks); cf. Doug Smith, *Homeless Encampment Cleanups do Little to Change Numbers of People on the Street, Study Finds*, L.A. TIMES (July 24, 2024, at 03:00 PT), <https://www.latimes.com/california/story/2024-07-24/as-academia-digs-deep-into-homelessness-the-findings-are-grim-but-with-signs-of-hope> [<https://perma.cc/9Y5D-2QB4>] (documenting efforts in Los Angeles to move homeless individuals off the street and into hotels); Jason Ward, Opinion, *Why Is L.A. Still Letting Single-Family Homeowners Block Solutions to the Housing Crisis?*, L.A. TIMES (Feb. 1, 2024, at 03:01 PT), <https://www.latimes.com/opinion/story/2024-02-01/los-angeles-housing-crisis-affordable-executive-directive-1> [<https://perma.cc/8HXW-ZBY6>] (arguing that Los Angeles political leaders are affording disproportionate influence to single-family homeowners at the expense of the city’s homelessness and affordable housing goals).

168. See, e.g., DAGAN, *supra* note 101, at 21; see also Hanoch Dagan, *Liberal Property Theory*, in RESEARCH HANDBOOK ON PROPERTY, LAW AND THEORY 197, 209 (Chris Bevan ed., 2024) (“The human right to housing can be secured if, *but only if*, everyone is ensured a decent minimum tenancy over a minimum length of term and robust protections against eviction.” (emphasis added)).

secure reliable access to shelter and food makes these two needs more than adequate examples through which to consider the nature of necessity. Shelter and food are so elemental to human life that questions—such as those that dogged passage of the Affordable Care Act, such as whether it is fair to require a healthy person to purchase health care insurance or infringes on their liberty—can be sidestepped. Everyone needs shelter and food, period.

Indeed, the idea that basic needs provide a foundation for structuring and thinking through the law is hardly novel. The Bible is full of references to how one ought to treat the needy (Isaiah 58:7, for example, encourages people to give bread to the needy and welcome in the homeless).¹⁶⁹ So is the Quran,¹⁷⁰ the Torah,¹⁷¹ the Book of Mormon,¹⁷² and on and on. Moving from religious to secular, the poem at the base of the Statue of Liberty, “The New Colossus” by Emma Lazarus, famously declared to legions of immigrants:

Give me your tired, your poor,
Your huddled masses yearning to breathe free,
The wretched refuse of your teeming shore.
Send these, the homeless, tempest-tost to me,
I lift my lamp beside the golden door!¹⁷³

As will be shown in what follows in this Part, all levels of government in the United States (local, state, and federal) acknowledge shelter and food as basic needs. Moreover, the state’s moral obligation to assist those in need is infused, both implicitly and explicitly, into laws and policy dealing with everything from the provision of public benefits to allocation of urban space. Put differently, while a substantial gap exists between the level of support being given to the most vulnerable and the resources required to meet their needs, rhetorically, at least, governments in the United States generally admit the obvious, that shelter and food are basic needs.

169. *E.g.*, Isaiah 58:7.

170. *See, e.g.*, THE QURAN 90:14-18.

171. *See, e.g.*, Exodus 22:25; Deuteronomy 15:7-8.

172. *See, e.g.*, 3 Nephi 18:4.

173. EMMA LAZARUS, THE NEW COLOSSUS, *reprinted in* 1 THE POEMS OF EMMA LAZARUS 202-03 (Mary Lazarus & Annie Lazarus eds., 1889).

Among legal scholars, Professor Martha Fineman has probably done more than anyone else to elevate the idea that human needs—or what she calls “vulnerabilities”—should be at the foundation of how the law is structured.¹⁷⁴ According to Fineman, we are all united by our shared vulnerability.¹⁷⁵ Some people have unique challenges or vulnerabilities that the law should respond to, but what matters most is that vulnerability is a shared characteristic of the human condition.¹⁷⁶ In a similar vein, Professor Martha Nussbaum, along with Amartya Sen, a Nobel-prize winning economist, have made similar observations, albeit under a slightly different framework, the capabilities approach.¹⁷⁷ Indeed, the idea that shelter and food are basic human needs is so obviously true that many scholars working in the areas of homelessness or food security simply assert the self-evident truth that people need shelter and food and, perhaps rightly, do not bother to justify such a claim.¹⁷⁸

Citations are hardly needed for the idea that gravity exists; the same should arguably be true for the observation that humans need shelter and food. Yet, this Part, both as a concession to the cold-hearted nature of the politics surrounding public assistance to the poor and as an excuse to collect supporting material, attempts to prove—for lack of a better word—the obvious: that shelter and food are basic human needs. Given that these needs are so fundamental, the collected sources offer but a glimpse of the material—from literature to government programs—supporting the self-evident nature of the claim. But collectively, perhaps, such proofs will underscore the significance of the needs being claimed when someone is forced to rely upon the necessity defense.

174. See *Mission for the Vulnerability and the Human Condition Initiative*, *supra* note 141; Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VALPARAISO U. L. REV. 341, 342 (2019). For a summary of vulnerability theory and an application of the theory to the human need for shelter, see Hu, *supra* note 95, at 442-47.

175. See *Mission for the Vulnerability and the Human Condition Initiative*, *supra* note 141.

176. Fineman, *supra* note 174, at 357-60.

177. See MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 17-19 (2011); AMARTYA SEN, COMMODITIES AND CAPABILITIES 18, 39 (1999). See generally Boram Kimhur, *How to Apply the Capability Approach to Housing Policy? Concepts, Theories and Challenges*, 37 HOUS., THEORY & SOC'Y 257, 258 (2020) (assessing a capability-oriented housing policy framework).

178. See, e.g., McJunkin, *supra* note 20, at 149-53.

A. Homelessness

The United States does not recognize a constitutional right to housing. In contrast, international law provides two major bases for such a right: namely, the Universal Declaration of Human Rights (UDHR)¹⁷⁹ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹⁸⁰ The UDHR states: “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services.”¹⁸¹ Echoing the UDHR, the ICESCR provides: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”¹⁸² Within the right to housing, the Committee on Economic, Social and Cultural Rights (CESCR) identified seven necessary elements: “legal security of tenure; availability of services; affordability; habitability; accessibility; location; and cultural adequacy.”¹⁸³ Despite demonstrating an “international recognition of a human right to housing,” these instruments have little effect on American law.¹⁸⁴

179. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

180. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3; see Sahar Segal, Comment, *The International Human Right to Adequate Housing: An Economic Approach*, 20 CHI. J. INT'L L. 486, 488 (2020). The right to housing is also recognized in numerous other international instruments, including The Convention Relating to the Status of Refugees, the Elimination of all Forms of Racial Discrimination, and the Convention on the Elimination of All Forms of Discrimination Against Women. See *id.* at 491-92 (collecting sources).

181. G.A. Res. 217 (III) A, *supra* note 179, art. 25, ¶ 1; see also *Lindsey v. Normet*, 405 U.S. 56, 84 (1972) (Douglas, J., dissenting in part) (“When American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well known package of goods and services—a package which includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.” (quoting *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970))).

182. International Covenant on Economic, Social and Cultural Rights, *supra* note 180, art. 11.

183. Segal, *supra* note 180, at 493 (noting that CESCR is an independent monitoring body of the ICESCR).

184. See Terri Y. Montague, *The Elusive Quest for a Legal Right to Housing in the U.S.*, CANOPY F. (May 9, 2024), <https://canopyforum.org/2024/05/09/the-elusive-quest-for-a-legal-right-to-housing-in-the-u-s/> [<https://perma.cc/4YYH-8A6Y>]; Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U.

The UDHR is not binding and has no enforcement mechanism,¹⁸⁵ and the United States is not party to the ICESCR and therefore not bound by its terms.¹⁸⁶ Indeed, there is no nationwide recognition of a right to housing in the United States.

In *Lindsey*, the United States Supreme Court held that the Constitution provides no “guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement.”¹⁸⁷ Yet it is worth highlighting that in the U.S. Housing Act of 1949, Congress promised “the realization as soon as feasible the goal of a decent home and suitable living environment for every American family.”¹⁸⁸ Although never realized,¹⁸⁹ Congress’s pledge did not come out of thin air and arguably found partial expression in the Great Society and War on Poverty-era investment in public housing.¹⁹⁰

In contrast to the federal system, state and local governments have been much more proactive in recognizing housing as a right. Approximately half of state constitutions contain some reference to “poverty, public health, and public welfare.”¹⁹¹ Several states have constitutional provisions explicitly empowering their governments to house the homeless.¹⁹² For example, Mississippi’s “constitution provides that the legislature is authorized to provide homes for those who have claims upon the aid of society.”¹⁹³ Similarly, Indiana’s constitution authorizes its county boards to “establish farms

PENN. J.L. & SOC. CHANGE 379, 386 (2011).

185. Byrne & Culhane, *supra* note 184, at 380.

186. *Id.* at 386.

187. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

188. Montague, *supra* note 184.

189. Although Roosevelt’s Economic Bill of Rights never came to be, his ideals did inform the Housing Act of 1949 which created “an explicit social contract to provide adequate housing for [America’s] entire population.” See Byrne & Culhane, *supra* note 184, at 387.

190. See Alexander von Hoffman, *Calling upon the Genius of Private Enterprise: The Housing and Urban Development Act of 1968 and the Liberal Turn to Public-Private Partnerships*, 27 STUD. AM. POL. DEV. 165, 167-68, 172 (2013).

191. See E. MICHELLE ANDREWS, CRISTINE DELANEY GOLDMAN, KATHERINE HUGHES, JOCELYN GETGEN KESTENBAUM, JEAN MCCARROLL, MATTHEW PUTORTI & LAURA STEVEN, *ADVANCING THE RIGHT TO HOUSING IN THE UNITED STATES: USING INTERNATIONAL LAW AS A FOUNDATION* 13 (2016).

192. See *id.* at 13-14.

193. *Id.* at 14 (citing MISS. CONST. art. XIV, § 262).

to house those who ‘have claims upon the ... aid of society.’”¹⁹⁴ Local governments as well have recognized housing as a right.¹⁹⁵ For example, in 2011, Madison County, Wisconsin, passed a resolution that codified housing as a human right and affirmed its county’s responsibility to promote access to adequate housing.¹⁹⁶ Perhaps most famously, in 1981, New York City established a right to shelter.¹⁹⁷ Although this recognition marked a huge win for proponents, it has not solved the City’s housing problem. Rather, critics claim that it fuels New York’s behemoth emergency shelter system—the largest and most expensive of its kind in the United States.¹⁹⁸

Despite these, and other,¹⁹⁹ albeit limited recognitions of a right to housing, American policy largely fails to address this issue.²⁰⁰ As one article recounts, “[o]n a single night in January 2019, 567,715 people were experiencing homelessness.”²⁰¹ An updated 2023 report sets that number at 653,104 Americans—the highest level since the U.S. Department of Housing and Urban Development began keeping track.²⁰² Today, many have become accustomed to seeing people

194. *Id.* at 13 (alteration in original) (quoting IND. CONST. art. IX, § 3).

195. *See id.*

196. *Id.* at 14.

197. *See* Byrne & Culhane, *supra* note 184, at 386.

198. *Id.* For reporting and discussion on how New York City’s “Right to Shelter” applies to migrant communities, see, for example, Luis Ferré-Sadurní, *New York City to Impose Stricter Limits on Migrant Adults in Shelters*, N.Y. TIMES (Mar. 15, 2024), <https://www.nytimes.com/2024/03/15/nyregion/nyc-right-to-shelter-homeless-migrants.html> [<https://perma.cc/MRW6-V9TL>]; Andy Newman & Dana Rubinstein, *Chaos, Fury, Mistakes: 600 Days Inside New York’s Migrant Crisis*, N.Y. TIMES (Dec. 26, 2023), <https://www.nytimes.com/2023/12/26/nyregion/migrant-crisis-mayor-eric-adams.html> [<https://perma.cc/SOE3-TN8R>].

199. *See, e.g.*, Philip Tegeler & Sam Reece, *Section 8 in the Courts: How Civil Rights Litigation Helped to Shape the Housing Choice Voucher Program*, 26 CITYSCAPE 89, 89 (2024) (analyzing the history and impact of the Section 8 Housing Voucher Program). *But see* Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don’t Use Housing Vouchers*, 121 MICH. L. REV. 221, 255-59 (2022) (discussing the challenges of implementing state-level voucher programs).

200. *See, e.g.*, Jennifer Ludden, *Homelessness in the U.S. Hit a Record High Last Year as Pandemic Aid Ran Out*, NPR (Dec. 15, 2023, at 16:25 ET), <https://www.npr.org/homelessness-affordable-housing-crisis-rent-assistance> [<https://perma.cc/9U4F-X9MN>]; Hanna Love & Tracy Hadden Loh, *Homelessness in US Cities and Downtowns*, BROOKINGS INST. (Dec. 7, 2023), <https://www.brookings.edu/articles/homelessness-in-us-cities-and-downtowns/> [<https://perma.cc/ZE65-DRL5>].

201. Kim, *supra* note 127, at 1151.

202. TANYA DE SOUSA, ALYSSA ANDRICHIK, ED PRESTERA, KATHERINE RUSH, COLETTE TANO & MICAIAH WHEELER, U.S. DEP’T OF HOUS. & URB. DEV., *THE 2023 ANNUAL HOMELESSNESS*

living in public spaces.²⁰³ Often, even relatively progressive advocates turn a blind eye toward the homeless. For instance, the then-Mayor of Sacramento, California, wrote in an op-ed, “[l]iving on the streets should not be considered a civil right.”²⁰⁴ Meanwhile, other public figures expressly ostracize the homeless.²⁰⁵

Aside from being an “eyesore,”²⁰⁶ homelessness imposes serious consequences on individuals and communities. For instance, unsheltered people often lack access to healthcare and face “high rates of chronic disease, serious mental illness, and substance abuse.”²⁰⁷ Relatedly, homelessness is frequently associated with greater exposure to external risks, including assault, injury, and communicable and sexually transmitted diseases.²⁰⁸ One woman recounted how she had been “regularly stalked and beaten by a man who worked the front counter of the homeless outreach center where [she] had picked up [her] daily hygiene kits” while unsheltered.²⁰⁹ Despite these known dangers, the United States has not embraced

ASSESSMENT REPORT (AHAR) TO CONGRESS 12 (2023), <https://www.huduser.gov/portal/sites/default/files/pdf/2023-AHAR-Part-1.pdf> [<https://perma.cc/S58T-XJXB>].

203. See Alvin Powell, *Why It's so Hard to End Homelessness in America*, HARVARD GAZETTE (Jan. 24, 2024), <https://news.harvard.edu/gazette/story/2024/01/why-its-so-hard-to-end-homelessness-in-america/> [<https://perma.cc/8YQF-3NMK>].

204. See Kim, *supra* note 127, at 1158-59 (quoting Darrell Steinberg, *Building More Permanent Housing Alone Won't Solve Homelessness in California*, L.A. TIMES (July 17, 2019, at 03:15 PT), <https://www.latimes.com/opinion/story/2019-07-16/op-ed-building-more-permanent-housing-alone-wont-solve-homelessness-in-california> [<https://perma.cc/TNF4-RVGU>]).

205. See *id.* at 1160 (quoting President Donald Trump describing cities that allow homelessness as “hell”).

206. See Tylisa Hampton, *‘It's Not Just an Eyesore, It's a Danger,’ Frustrations Mounting Around Little Rock Homeless Encampment Behind Summer Camp*, KARK (July 7, 2024, at 06:55 CT), <https://www.kark.com/news/local-news/its-not-just-an-eyesore-its-a-danger-frustrations-mounting-around-little-rock-homeless-encampment-behind-summer-camp/> [<https://perma.cc/CN2Q-KDKH>].

207. Jessica Richards & Randall Kuhn, *Unsheltered Homelessness and Health: A Literature Review*, 2 AM. J. PREVENTIVE MED. FOCUS 1, 8 (2023); see, e.g., Jeremy Cygler, *“Health Care for the Homeless” Is Just a Start. People Need Housing.*, HARV. PUB. HEALTH (June 20, 2024), <https://harvardpublichealth.org/policy-practice/affordable-housing-is-key-to-end-cycles-of-homeless-hospitalization/> [<https://perma.cc/TF5Q-E4C8>].

208. See Richards & Kuhn, *supra* note 207, at 6-7.

209. Lori Teresa Yearwood, *For Years, I've Tried to Work My Way Back into the Middle Class*, MIT TECH. REV. (Feb. 23, 2021), <https://www.technologyreview.com/2021/02/23/1019477/homelessness-work-economy-inequality-middle-class/> [<https://perma.cc/3P8C-NU3M>].

the sort of robust national housing-first policy needed to put a major dent in homelessness.²¹⁰

B. Hunger

Despite, or perhaps because of, its obvious necessity, the United States has a complicated relationship with recognizing food as a basic right. For instance, in 2014, the United States, continuing its longstanding pattern,²¹¹ voted against a United Nations' Resolution declaring food a human right.²¹² U.S. representatives to the United Nations explained:

The United States supports the right of everyone to an adequate standard of living, including food, as recognized in the Universal Declaration of Human Rights. Domestically, the United States pursues policies that promote access to food, and it is our objective to achieve a world where everyone has adequate access to food, but we do not treat the right to food as an enforceable obligation.²¹³

210. See Jason DeParle, *Federal Policy on Homelessness Becomes New Target of the Right*, N.Y. TIMES (June 20, 2023), <https://www.nytimes.com/2023/06/20/us/politics/federal-policy-on-homelessness-becomes-new-target-of-the-right.html> [<https://perma.cc/9S5A-6TG4>] (noting growing opposition to the already-limited housing first policies, including policy bans in states such as Georgia, Missouri, and Texas).

211. See Ann M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social and Cultural Rights: Must the Poor Be Always with Us?*, 13 SCHOLAR: SAINT MARY'S L. REV. ON MINORITY ISSUES 231, 238-39 (2010); Tess Brennan, *Maine Becomes the First US State to Recognize the Right to Food in a Constitutional Amendment*, UNIVERSAL RTS. GRP. (Jan. 19, 2022), <https://www.universal-rights.org/maine-becomes-the-first-us-state-to-recognise-the-right-to-food-in-a-constitutional-amendment/> [<https://perma.cc/6X6P-6HDG>].

212. See U.S. *Explanation of Vote on the Right to Food*, U.S. MISSION TO INT'L ORGS. IN GENEVA (Mar. 23, 2017) [hereinafter *U.S. Vote Explanation*], <https://geneva.usmission.gov/2017/03/24/u-s-explanation-of-vote-on-the-right-to-food/> [<https://perma.cc/UB6C-YQ4D>]. International law recognizes a right to food in numerous binding and nonbinding agreements. See generally Kerstin Mechlem, *Food Security and the Right to Food in the Discourse of the United Nations*, 10 EUR. L.J. 631, 637-40 (2004) (contextualizing the right to food within the broader rights-based approach to development). Additionally, almost thirty countries have codified their own version of a constitutional right to food. See Nadia Lambek & Priscilla Claeys, *Institutionalizing a Fully Realized Right to Food: Progress, Limitations, and Lessons Learned from Emerging Alternative Policy Models*, 40 VT. L. REV. 743, 753 (2016).

213. U.S. *Vote Explanation*, *supra* note 212.

Despite such reluctance, the United States is party to other international instruments codifying a right to food, including the United Nations' UDHR, which recognizes that "[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including *food*, clothing, housing and medical care and necessary social services."²¹⁴

Within the realm of domestic law, neither the U.S. Constitution nor any federal statute explicitly recognizes food as an inherent right.²¹⁵ Despite such an absence, there is a burgeoning movement at the state level to formalize access to food as a right.²¹⁶ In 2021, Maine became the first state to enshrine access to food as a constitutional right.²¹⁷ Maine's new constitutional provision states:

All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance,

214. G.A. Res. 217 (III) A, *supra* note 179, art. 25, ¶ 1 (emphasis added). The United States has signed, but is not party to, the ICESCR, which recognizes a similar right to "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." International Covenant on Economic, Social and Cultural Rights, *supra* note 180, art. 11; see SCOTT BUSBY, WHITHER THE UNITED STATES ON ECONOMIC, SOCIAL, AND CULTURAL RIGHTS? 2 (2024), <https://www.csis.org/analysis/whither-united-states-economic-social-and-cultural-rights> [https://perma.cc/4WZ9-TVC3]. Article 11, ¶ 2 of the ICESCR plainly recognizes that all people have a fundamental right to be free from hunger. See International Covenant on Economic, Social and Cultural Rights, *supra* note 180, art. 11, ¶ 2. It is worth noting that the UDHR, notwithstanding its character as an "international bill of rights," is not binding. See Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT'L HUMAN RTS. 2, 4-5, 10 (2004) (describing the UDHR as "a common standard" toward which nations should strive). *But see* DAVID A. SHIMAN, ECONOMIC AND SOCIAL JUSTICE: A HUMAN RIGHTS PERSPECTIVE 7-8 (1999) ("[S]ince the Universal Declaration is so widely used as the primary statement of what are considered human rights today, it is often regarded as having legal significance and considered customary international law and as the authentic interpretation of the references in the UN Charter" (internal quotation marks and emphasis omitted)). For a discussion on the symbolic importance of the UDHR, see Jane McPherson, *Article 25 Changed My Life: How the Universal Declaration of Human Rights Reframed My Social Work Practice*, 22 REFLECTIONS: NARRATIVES OF PRO. HELPING 23, 26 (2016).

215. See generally Robert H. Bork, Commentary, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 697-98, 701 (1979) (asserting that the Framers of the Constitution did not recognize welfare rights).

216. See Smita Narula, *Realizing the Right to Food in Maine: Insights from International Law*, 76 ME. L. REV. 165, 177 (2024).

217. *Id.* at 202.

bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.²¹⁸

Maine is not alone; legislators from other states, including Hawaii, Massachusetts, Tennessee, and Washington, have engaged in the process of drafting their own right-to-food proposals.²¹⁹

Although the United States largely lacks formal law securing a right to food, the federal government spends billions of dollars feeding hungry Americans every year.²²⁰ Federal food assistance programs fall into three general categories: general nutritional assistance, child and infant, and specialized food distribution programs.²²¹ These programs include the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants and Children (WIC), the National School Lunch Program (SLP), and the Emergency Food Assistance Program (TEFAP).²²² As of December 2023, one in four Americans benefit from a federal food assistance program.²²³ Federal programs

218. *Id.* at 166 (quoting ME. CONST. art. I, § 25).

219. R. Denisse Córdova Montes, *Using International Human Rights Law to Address Hunger in the U.S.*, 6 BUS. ENTREPRENEURSHIP & TAX L. REV. 1, 3 (2022). Notably, there is a burgeoning group of so-called “cottage food laws,” which permit small-scale farmers to sell directly to consumers. See Jeffery K. O’Hara, Marcello Castillo & Dawn Thilmany McFadden, *Do Cottage Food Laws Reduce Barriers to Entry for Food Manufacturers?*, 43 APPLIED ECON. PERSPS. & POL’Y 935, 935 (2021). Although such laws “generally lack this explicit idea of food as a human right ... that may be the next step.” Randa Larsen, *Food for Thought: The Emergence of Right-to-Food Legislation in the United States*, MINN. L. REV. DE NOVO (Feb. 13, 2023), <https://minnesotalawreview.org/2023/02/13/food-for-thought-the-emergence-of-right-to-food-legislation-in-the-united-states/> [https://perma.cc/U5WR-N9WV].

220. See Drew DeSilver, *What the Data Says About Food Stamps in the U.S.*, PEW RSCH. CTR. (July 19, 2023), <https://www.pewresearch.org/short-reads/2023/07/19/what-the-data-says-about-food-stamps-in-the-u-s/> [https://perma.cc/NG5Y-7JC6] (reporting federal spending on SNAP alone was \$119.4 billion during fiscal year 2022); *2018 Farm Bill*, U.S. DEPT OF AGRIC.: ECON. RSCH. SERV. (July 31, 2025), <https://www.ers.usda.gov/topics/farm-bill/2018-farm-bill> [https://perma.cc/7QEG-T2P8] (projecting the government to spend \$428 billion over a five-year period on nutrition programs, crop insurance, producer subsidies, and farm conservation efforts).

221. See Anna Speck, *A Brief Overview of the Right to Food in the United States*, HUNTER COLL. N.Y.C. FOOD POL’Y CTR. (May 1, 2024), <https://www.nycfoodpolicy.org/a-brief-overview-of-the-right-to-food-in-the-united-states/> [https://perma.cc/PS48-7E48].

222. *Id.*

223. See Wendi Gosliner & Lorrene D. Ritchie, Editorial, *Bold Action Needed for Equitable Access to Nutrition Assistance by All*, 113 AM. J. PUB. HEALTH S202, S203 (2023).

affect an even greater percentage of children.²²⁴ From 2021 to 2022, more than 50 percent of school-aged children participated in a federal school lunch program.²²⁵ In 2023, the Biden administration announced its new “National Strategy on Hunger, Nutrition, and Health,” which aims to further expand food access programs.²²⁶

The largest, and arguably most well-known, food access program is SNAP. The program, formerly known as food stamps, provides low-income households a certain amount of money to spend on food every month.²²⁷ Generally, households with a gross monthly income at or below 130 percent of the federal poverty level and a net monthly income at or below 100 percent of the federal poverty level are eligible for SNAP.²²⁸ In 2023, a household of four would have had to make \$3,007 or less in gross monthly income and \$2,313 or less in net monthly income to qualify.²²⁹ In addition, most non-disabled Americans without dependents must meet additional work requirements to receive SNAP benefits.²³⁰ In 2023, the average monthly SNAP benefit was \$181.72 per person and \$343.00 per household.²³¹

224. *See id.*

225. *See id.*

226. *See* Press Release, The White House, Fact Sheet: Biden-Harris Administration Launches the White House Challenge to End Hunger and Build Healthy Communities, Announces New Public & Private Sector Actions to Continue Momentum from Historic Hunger, Nutrition, and Health Conference (Mar. 24, 2023), <https://bidenwhitehouse.archives.gov/briefing-room/statements-releases/2023/03/24/fact-sheet-biden-harris-administration-launches-the-white-house-challenge-to-end-hunger-and-build-healthy-communities-announces-new-public-private-sector-actions-to-continue-momentum-from-hist/> [<https://perma.cc/3Z6U-PBYW>].

227. *See* LAUREN BAUER & CHLOE N. EAST, A PRIMER ON SNAP WORK REQUIREMENTS 1-2 (2025), <https://www.hamiltonproject.org/publication/paper/a-primer-on-snap-work-requirements/> [<https://perma.cc/F9VX-JB7X>].

228. *See id.* at 2.

229. *See* DeSilver, *supra* note 220.

230. *See id.*; Colin Gray, Adam Leive, Elena Prager, Kelsey Pukelis & Mark Zaki, *Employed in a SNAP? The Impact of Work Requirements on Program Participation and Labor Supply*, 15 AM. ECON. J.: ECON. POL’Y 306, 310, 338-39 (2023) (finding that decreases in SNAP participation do not correlate with increases in employment); Stephanie Ettinger de Cuba, Mariana Chilton, Allison Bovell-Ammon, Molly Knowles, Sharon M. Coleman, Maureen M. Black, John T. Cook, Diana Becker Cutts, Patrick H. Casey, Timothy C. Heeren & Deborah A. Frank, *Loss of SNAP Is Associated with Food Insecurity and Poor Health in Working Families with Young Children*, 38 HEALTH AFFS. 765, 769 (2019) (“This study showed that, paradoxically, families with children that participated in [SNAP], increased their earned income, and therefore had their SNAP benefits reduced or cut off in response.”).

231. *See* DeSilver, *supra* note 220.

Federal food assistance began during the Great Depression as part of President Roosevelt's sweeping New Deal programs.²³² Under his "Economic Bill of Rights" proposal, Roosevelt argued that every American had a "right to housing, food, employment, education and other tangible items."²³³ Roosevelt justified his policies on two major grounds: national security and morality.²³⁴ He worried that, as the United States changed socially, economically, and politically, the scope of the original Bill of Rights would be "inadequate to assure us equality in the pursuit of happiness."²³⁵ Roosevelt observed that, perhaps in reaction to the rise of fascism in Nazi Germany, "people who are hungry and out of a job are the stuff of which dictatorships are made."²³⁶ During his 1944 State of the Union address, Roosevelt reiterated that codifying an Economic Bill of Rights would ensure security and "begin to lay the plans and determine the strategy for the winning of a lasting peace."²³⁷ Further, he proclaimed that if any number of Americans, "whether it be one-third or one-fifth or one-tenth [of the population,] is ill-fed, ill-clothed, ill-housed, and insecure," then the United States had a moral duty to act.²³⁸ He underlined that "[e]ach and every one of [us] has a solemn obligation under God to serve this Nation in its most critical hour—to keep this Nation great—to make this Nation greater in a better world."²³⁹

Both common sense and common decency strongly support the recognition of a right to food. The right to food is so obvious that American courts have long taken it for granted.²⁴⁰ It is not difficult

232. See Andrew Hammond, *Litigating Welfare Rights: Medicaid, SNAP, and the Legacy of the New Property*, 115 NW. UNIV. L. REV. 361, 371 (2020).

233. Patrick J. Austin, *Expansive Rights: FDR's Proposed "Economic" Bill of Rights Memorialized in the International Covenant on Economic, Social, and Cultural Rights, but with Little Impact in the United States*, 15 CHI.-KENT J. INT'L & COMPAR. L. 1, 12, 13 (2015).

234. See *id.* at 5.

235. *Id.* at 15 (quoting FRANKLIN D. ROOSEVELT, *THE PUBLIC PAPERS & ADDRESSES OF FRANKLIN D. ROOSEVELT* 40-42 (Samuel Rosenman ed., 1950)).

236. *Id.*

237. *Id.* at 16.

238. *Id.*

239. Franklin D. Roosevelt, State of the Union Radio Address to the Nation (Jan. 11, 1944), <https://www.presidency.ucsb.edu/documents/state-the-union-radio-address-the-nation> [<https://perma.cc/5RJ3-PBXK>].

240. See, e.g., *Carpenters' Dist. Council, United Bhd. of Carpenters v. Miami Chapter of Associated Gen. Contractors*, 55 So. 2d 794, 796 (Fla. 1951) ("In so holding the court gave substance to the most fundamental of man's inalienable rights. The right to work is equivalent to the right to eat and the right to eat and provide raim[e]nt for his dependents is

to understand why. Humans cannot survive without food.²⁴¹ History suggests that humans can last several days without eating.²⁴² Famously, Mahatma Gandhi survived a twenty-one-day-long hunger strike, subsiding only on small sips of water.²⁴³ Despite this, and other accounts of survival, it need not be reiterated that temporary or chronic starvation carries serious health risks.²⁴⁴ After all, as basic biology, several best-selling books,²⁴⁵ and a BBC article confirm, “[e]ven Supreme Court justices ... have to eat.”²⁴⁶

man’s most dominant urge.”); *Bell v. Maryland*, 378 U.S. 226, 255 (1964) (Douglas, J., concurring) (“Is the right of a person to eat less basic than his right to travel, which we protected in *Edwards v. California*? Does not a right to travel in modern times shrink in value materially when there is no accompanying right to eat in public places?” (internal citation omitted)); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 n.1 (1992) (Scalia, J., concurring in part and dissenting in part) (“It drives one to say that the only way to protect the right to eat is to acknowledge the constitutional right to starve oneself to death.”).

241. See *Wilson v. Seiter*, 501 U.S. 294, 304 (1991) (describing food as an “identifiable human need”); see also *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2230 (2024) (Sotomayor, J., dissenting) (describing eating as an “act of living”); Frank Yiannas, Deputy Comm’r, Food & Drug Admin., Remarks on World Food Safety Day 2022 at the World Health Organization’s Health Talks (June 7, 2022), <https://www.fda.gov/news-events/speeches-fda-officials/remarks-fda-deputy-commissioner-frank-yiannas-world-food-safety-day-2022-world-health-organizations> [<https://perma.cc/83MH-MNE8>] (“[F]ood is essential for life.”); 170 CONG. REC. H3468 (2024) (statement of Rep. Schakowsky) (“[C]hildren and families need to eat.”).

242. Alan D. Lieberman, *How Long Can a Person Survive without Food?*, SCI. AM. (Nov. 8, 2004), <https://www.scientificamerican.com/article/how-long-can-a-person-survive-without-food/> [<https://perma.cc/629U-4YC8>] (noting the lack of research into long-term total starvation); see also *Rowland v. California Men’s Colony, Unit II Men’s Advisory Council*, 506 U.S. 194, 206 (1993) (describing food as a “necessit[y] of life”); *Bradford v. Michigan*, 394 U.S. 1022, 1022 (1969) (Warren, C.J., dissenting from denial of certiorari) (same); *Jefferson v. Hackney*, 406 U.S. 535, 581 (1972) (Marshall, J., dissenting) (“Many of these children [receiving welfare] will be seriously handicapped as adults because in childhood they are not receiving proper and sufficient food, clothing, medical attention, and the other bare necessities of life.” (quoting S. DOC. NO. 80-208, at 105 (2d Sess. 1948))).

243. Lieberman, *supra* note 242.

244. See, e.g., Sandra C. Wisner, *Starved for Justice: International Complicity in Systematic Violations of the Right to Food in Haiti*, 6 COLUM. HUM. RTS. L. REV. ONLINE 409, 427 (2022), <https://hrlr.law.columbia.edu/hrlr-online/starved-for-justice-international-complicity-in-systematic-violations-of-the-right-to-food-in-haiti> [<https://perma.cc/P5WV-DP52>] (describing the physiological effects on malnutrition); see also UPTON SINCLAIR, *THE JUNGLE* 336 (1906) (“[F]acing the grisly phantom of starvation. Raw, naked terror possessed him, a maddening passion that would never leave him, and that wore him down more quickly than the actual want of food. He was going to die of hunger!”).

245. See, e.g., CLARE CUSHMAN, *TABLE FOR 9: SUPREME COURT FOOD TRADITIONS & RECIPES* 3 (2017); NINA TOTENBERG, *DINNERS WITH RUTH* at xi (2022); MARTHA-ANN ALITO, *CHEF SUPREME: MARTIN GINSBURG* (2011).

246. Ashley Gold, *The Secrets of a Supreme Court Diet*, BRIT. BROAD. CORP. (June 4, 2016), <https://www.bbc.com/news/world-us-canada-36439148> [<https://perma.cc/QX3V-J3YH>].

IV. FAULT AND NECESSITY

Before turning to the legal significance of unmet shelter and food needs vis-à-vis the reach of the necessity defense, I address the possibility that individual fault contributed to the needs of the most vulnerable and that such fault should count against any claims for support tied to the fulfillment of basic needs. In other words, if someone is in need because of his or her life choices, perhaps the demand such needs place on other people merits little attention. Political rhetoric routinely distinguishes between the deserving and the undeserving poor,²⁴⁷ with the distinction between these two types of poor people finding its way into nearly every corner of the welfare state.²⁴⁸ Programs tied to the right sort of poor people—those who work, those who marry, and those who have children after marriage rather than before—tend to enjoy broader bipartisan

247. Take, for example, President Lyndon B. Johnson's remarks when signing Medicare into law and congressional statements during President William J. Clinton's push to "reform welfare as we know it." Mike McCurry, Press Secretary, White House, Press Briefing at Trans World Dome in St. Louis, Missouri (May 18, 1996), <https://www.presidency.ucsb.edu/documents/press-briefing-mike-mccurry-326> [<https://perma.cc/87YA-DD9Y>]. Compare President Lyndon B. Johnson, Remarks at the Signing of the Medicare Bill (July 30, 1965), <https://www.presidency.ucsb.edu/documents/remarks-with-president-truman-the-signing-independence-the-medicare-bill> [<https://perma.cc/R64Z-4TJ7>] ("No longer will older Americans be denied the healing miracle of modern medicine. No longer will illness crush and destroy the savings that they have so carefully put away over a lifetime so that they might enjoy dignity in their later years."), with 142 CONG. REC. 17679 (1996) (statement of Rep. David R. Obey) ("[T]he existing welfare system is broken, it needs radical overhaul. There is no doubt about that.... Taxpayers are tired of people who will not work taking a bite out of their tax dollars."). See generally MICHAEL B. KATZ, THE UNDESERVING POOR (2d ed. 2013) (examining how the historical shift in perspective has influenced America's treatment of the poor); JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION (1971) (arguing for reform in welfare programs such as the Aid to Families with Dependent Children Program (AFDCP) that fosters a more positive societal view of those who benefit from such services).

248. States often tied welfare support through programs such as Aid to Families with Dependent Children to supposed moral worth by, for example, denying benefits to mothers who cohabitated with men. See *King v. Smith*, 392 U.S. 309, 311, 333 (1968) (striking down Alabama's man in the house rule); see also Noah D. Zatz, *Poverty Unmodified?: Critical Reflections on the Deserving/Undeserving Distinction*, 59 UCLA L. REV. 550, 563-70 (2012). Conversely, programs such as Social Security are "basically value-neutral," making "relatively few judgments about the decisionmaking of claimants." *Id.* at 584 (quoting David A. Super, Essay, *The New Moralizers: Transforming the Conservative Legal Agenda*, 104 COLUM. L. REV. 2032, 2037 n.9, 2061 (2004)).

support.²⁴⁹ On the other hand, proposals to increase welfare without employment or citizenship as preconditions have little to no legislative momentum.²⁵⁰ The poverty law literature attacking the distinction between the deserving and the undeserving poor could fill a small library,²⁵¹ yet fault has not lost its political and legal salience.

To its credit, the Court in *Grants Pass* largely, though not entirely, stays away from questions of fault. According to the Court:

Those experiencing homelessness may be as diverse as the Nation itself—they are young and old and belong to all races and creeds. People become homeless for a variety of reasons, too, many beyond their control. Some have been affected by economic conditions, rising housing costs, or natural disasters. Some have been forced from their homes to escape domestic violence and other forms of exploitation. And still others struggle with drug addiction and mental illness. By one estimate, perhaps 78 percent of the unsheltered suffer from mental-health issues, while 75 percent struggle with substance abuse.²⁵²

The Court ultimately uses the complicated nature of homelessness and its causes as an excuse for engaging in rational basis review of legislation criminalizing homelessness. In the concluding section of the opinion, the Court notes, “Homelessness is complex.

249. Khiara M. Bridges, *The Deserving Poor, the Undeserving Poor, and Class-Based Affirmative Action*, 66 EMORY L.J. 1049, 1092 (2017); see also BRENDEN McDERMOTT, MARGOT L. CRANDALL-HOLLIK & CONOR F. BOYLE, CONG. RSCH. SERV., R43805, THE EARNED INCOME TAX CREDIT (EITC): HOW IT WORKS AND WHO RECEIVES IT 15 (2023) (noting Congress’s five successful efforts to increase the Earned Income Tax Credit amount in 1986, 1990, 1993, 2001, and 2009).

250. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 264 n.324 (2008) (discussing the shift in welfare policy away from unconditional benefits and toward work requirements); 8 U.S.C. §§ 1611(a), 1613(a) (barring most immigrants from access to welfare); see also Hannah Gilberstadt, *More Americans Oppose than Favor the Government Providing a Universal Basic Income for All Adult Citizens*, PEW RSCH. CTR. (Aug. 19, 2020), <https://www.pewresearch.org/short-reads/2020/08/19/more-americans-oppose-than-favor-the-government-providing-a-universal-basic-income-for-all-adult-citizens/> [<https://perma.cc/BV58-NJL9>].

251. See, e.g., Zatz, *supra* note 248, at 552.

252. *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2208 (2024) (citations omitted).

Its causes are many.”²⁵³ It then goes on to restrict judicial review of antihomeless ordinances.²⁵⁴

Despite the Court’s choice to sidestep the issue in *Grants Pass*, fault is never far from the surface when it comes to explaining why people need shelter or food. In *Department of Housing and Urban Development v. Rucker*, the Supreme Court held that public housing authorities could evict residents for any drug-related activity, on or off the premises.²⁵⁵ It upheld this “one-strike” policy even in fairly remote cases, such as a grandchild using drugs off-premises or a caretaker over whom the resident had little meaningful control getting caught doing drugs.²⁵⁶ The Court, as well as the Department of Housing and Urban Development, radically undermined the property interest that poor residents have in their apartments based on the slightest whiff of wrongdoing in a way that would be almost unimaginable if applied to privately owned homes.²⁵⁷ In the food context, several states, as well as House Republicans, have pushed to have SNAP benefits (what used to be called “food stamps”) made conditional on passing a drug test.²⁵⁸ Though such warrantless

253. *Id.* at 2226.

254. *See id.* (“Nor can a handful of federal judges begin to ‘match’ the collective wisdom the American people possess in deciding ‘how best to handle’ a pressing social question like homelessness.” (quoting *Robinson v. California*, 370 U.S. 660, 689 (1962) (White, J., dissenting))).

255. 535 U.S. 125, 136 (2002).

256. *See id.* at 128, 136. A number of scholars and members of the public have criticized the Court’s overreach in *Rucker*. *See, e.g.*, Evi Schueller, Note, *HUD v. Rucker, Unconscionable Due Process for Public Housing Tenants*, 37 U.C. DAVIS L. REV. 1175, 1176 (2004); Tamara R. Piety, *The War on the Poor—News from the Front: Department of Housing and Urban Development v. Rucker*, 38 TULSA L. REV. 385, 386 (2002); Charles Lane, *Supreme Court Upholds Public Housing Drug Law*, WASH. POST (Mar. 27, 2002), <https://www.washingtonpost.com/archive/politics/2002/03/27/supreme-court-upholds-public-housing-drug-law/11353004-2b33-4ab7-9f12-89dd349a6842/> [<https://perma.cc/HFC5-W27G>] (labeling the policy a harsh, “one strike and you’re out” law on unwitting poor tenants).

257. *See* Rachel Hannaford, Comment, *Trading Due Process Rights for Shelter: Rucker and Unconstitutional Conditions in Public Housing Leases*, 6 U. PA. J. CONST. L. 139, 154 (2003). Indeed, the Housing and Urban Development (HUD) website at the time of the Court’s ruling billed the policy as “the toughest admissions and eviction policy that HUD has implemented.” Lane, *supra* note 256.

258. Pollack & Danziger, *supra* note 36; A.G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. TIMES (Oct. 10, 2011), <https://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html> [<https://perma.cc/L86G-5ZV9>]; H. Claire Brown, *Buried in Wisconsin Republicans’ Lame-Duck Legislation: Drug Testing Requirements for Food Stamp Applicants*, THE INTERCEPT (Dec. 6, 2018, at 17:25 ET), <https://theintercept.com/2018/12/06/wisconsin-food-stamps-drug-testing/> [<https://perma.cc/4J75-AUNJ>].

searches have not fared well before the courts,²⁵⁹ such legislative efforts arguably serve their primary political purpose, signaling that the poor are worthy of blame and not worthy of getting support for their basic needs.

Advocates for the poor, faced with such vitriol against those they are trying to help, naturally push back. Indeed, the terms of the main debate about poverty have not changed for decades. On the conservative side are those who believe that people are poor because they made bad choices.²⁶⁰ What those choices are vary according to which account is used but are often boiled down to not finishing high school or not going to college, not getting married, and having a baby while still young.²⁶¹ From this perspective, anyone can succeed in America as long as they make good decisions and work hard.²⁶² Horatio Alger is alive and well.²⁶³ For many progressives,

259. See *Lebron v. Wilkins*, 820 F. Supp. 2d 1273, 1293 (M.D. Fla. 2011) (rejecting the Florida testing program and affording welfare applicants Fourth Amendment protection from unwarranted drug testing), *aff'd sub nom.*, *Lebron v. Sec'y, Fla. Dep't of Child. & Fams.*, 710 F.3d 1202 (11th Cir. 2013); see also Andrew Cohen, *Poverty in a Cup: Why a Federal Judge Rejected a Florida Drug-Test Requirement*, ATLANTIC (Jan. 6, 2014), <https://www.theatlantic.com/national/archive/2014/01/poverty-in-a-cup-why-a-federal-judge-rejected-a-florida-drug-test-requirement/282825/> [<https://perma.cc/N3CB-HP8T>]. Notably, according to the Center for Law and Social Policy, thirteen states spent more than \$490,000 to drug test 2,541 applicants for funding under the Temporary Assistance for Needy Families (TANF) program, and only 301 tests came up positive. Amanda Michelle Gomez, *States Waste Hundreds of Thousands on Drug Testing for Welfare, But Have Little to Show for It*, CTR. FOR L. & SOC. POL'Y (May 7, 2018), <https://www.clasp.org/press-room/news-clips/states-waste-hundreds-thousands-drug-testing-welfare-have-little-show-it/> [<https://perma.cc/AB6Y-CN9B>].

260. See, e.g., Ellickson, *supra* note 23, at 1187 (“While no one’s will is fully free, virtually all of us have some capacity for self-control. Legal and ethical systems therefore properly subscribe to the proposition—or salutary myth—that an individual is generally responsible for his behavior.”).

261. See *id.* at 1204 (scrutinizing single-parent households); Christopher Jencks, *Do Poor Women Have a Right to Bear Children?*, AM. PROSPECT (Jan. 1, 1995), <https://prospect.org/economy/poor-women-right-bear-children/> [<https://perma.cc/5W3D-3BH7>] (arguing that the public recognizes “three forms of responsible behavior: delaying parenthood until you are in your twenties, getting married before you have children, and staying in school”); PHIL GRAMM, ROBERT EKELUND & JOHN EARLY, *THE MYTH OF AMERICAN INEQUALITY* 70-72 (2022) (noting that the percentage of Americans with no postsecondary education decreased in each higher income quintile); see also Brad Swanson, *Republicans Are Gaslighting Us on Poverty*, NATION (Aug. 21, 2023), <https://www.thenation.com/article/economy/republicans-gaslighting-poverty-gramm/> [<https://perma.cc/Z7Q6-WHLD>]. See generally KRISTIN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEEN PREGNANCY* 43 (1996) (arguing that teen pregnancy, rather than a causation of poverty, is an inevitable result from a decrease in government assistance).

262. GRAMMETAL., *supra* note 261, at 71 (“But while there are exceptions and occupational choice, experience, general intelligence, ambition, and even luck have an impact on earned

people are poor not because of any fault of their own but because of larger structural forces.²⁶⁴ Those forces differ depending on which group is being discussed and what theory is in vogue, but structural forces include: race and gender discrimination, deindustrialization, weak labor organization, and the winner-takes-all economy.²⁶⁵ Works that delve deeply into the lives of poor people tend to provide a more nuanced perspective, one that attributes poverty to a combination of structural barriers and individual fault, before ending with suggestions of structural reforms that could make a difference.²⁶⁶

To escape the fault battles, antipoverty advocates often focus on the needy who are blameless by definition: poor children.²⁶⁷ As they point out, punitive policies that target poor parents also harm poor children who have done nothing wrong.²⁶⁸ Members of the Court have, at times, engaged in the same strategy. The Court, in *Dandridge v. Williams*, upheld Maryland's decision to institute a family cap, a maximum welfare amount that would not increase

income, education is the prime path by which most Americans achieve economic advancement.”).

263. See generally Michael Moon, “The Gentle Boy from the Dangerous Classes”: Pederasty, Domesticity, and Capitalism in Horatio Alger, 19 REPRESENTATIONS 87, 89 (1987) (describing the standard storyline of Alger’s works).

264. See, e.g., Matthew Desmond, *Why Poverty Persists in America*, N.Y. TIMES MAG. (Mar. 9, 2023), <https://www.nytimes.com/2023/03/09/magazine/poverty-by-america-matthew-desmond.html> [<https://perma.cc/3HPL-TNHN>] (discussing various recent structural forces contributing to poverty, including erosion of organized labor, persistence of payday loans, and housing crises).

265. See, e.g., JASON DEPARLE, AMERICAN DREAM 16 (2004); Thalia González & Paige Joki, *Reproducing Inequality: Racial Capitalism and the Cost of Public Education*, 65 B.C. L. REV. 317, 326, 352 (2024); *Unions Help Reduce Disparities and Strengthen Our Democracy*, ECON. POL’Y INST. (Apr. 23, 2021), <https://www.epi.org/publication/unions-help-reduce-disparities-and-strengthen-our-democracy/> [<https://perma.cc/634U-N347>]; MICHELLE WILDE ANDERSON, THE FIGHT TO SAVE THE TOWN 78 (2022).

266. See, e.g., DESMOND, *supra* note 33, at 294-98; DEPARLE, *supra* note 265, at 16; KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP 2, 25-26, 219 (2005).

267. See, e.g., Jacob Goldin & Ariel Jurow Kleiman, *Whose Child Is This? Improving Child-Claiming Rules in Safety-Net Programs*, 131 YALE L.J. 1719, 1728-32, 1754-55 (2022) (discussing public support for welfare provisions for children); SAMUEL HAMMOND & ROBERT ORR, NISKANEN CTR., THE CONSERVATIVE CASE FOR A CHILD ALLOWANCE 6-7 (2021).

268. See, e.g., *If I Wasn’t Poor, I Wouldn’t Be Unfit: The Family Separation Crisis in the US Child Welfare System*, HUMAN RIGHTS WATCH & AM. C.L. UNION (Nov. 17, 2022), <https://www.hrw.org/report/2022/11/17/if-i-wasnt-poor-i-wouldnt-be-unfit/family-separation-crisis-us-child-welfare> [<https://perma.cc/274F-LZC3>].

after the fourth or fifth child.²⁶⁹ Justice Marshall, writing in dissent, drew upon the innocence of poor children in his response: “[T]he only distinction between those children with respect to whom assistance is granted and those children who are denied such assistance is the size of the family into which the child permits himself to be born.”²⁷⁰ The Court’s deferential review of the family cap was wrong, Marshall argued, because “the State may not wield its economic whip in this fashion when the effect is to cause a deprivation to needy dependent children in order to correct an arguable fault of their parents.”²⁷¹ Children are the perfect example of how—when it comes to basic needs such as shelter and food—people who experience need are not necessarily at fault for their circumstances.

But the claim in this Part goes further, that necessity can, and often should, be separated entirely from fault. Consider a convicted murderer confined to a high security prison. Even if he or she is entirely at fault for being behind bars, that same person needs food daily. The fault does not change the need; his or her past wrong does not lessen his or her need for food nor does it absolve the state from its obligation as jailor to provide food.²⁷² Need is sometimes paramount, even in the presence of fault. This is, perhaps, best illustrated by the traditional necessity defense cases, which for some reason frequently involve boats.²⁷³ Suppose a fishing boat gets

269. 397 U.S. 471, 487 (1970).

270. *Id.* at 519 (Marshall, J., dissenting).

271. *Id.* at 525.

272. See *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (“[P]rison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care.”); *DeShaney v. Winnebago Cnty. Dep’t of Soc. Servs.*, 489 U.S. 189, 200 (1989) (“[W]hen the State by the affirmative exercise of its power so restrains an individual’s liberty that it renders him unable to care for himself, and at the same time fails to provide for his *basic human needs*—e.g., food—it transgresses the substantive limits on state action set by the Eighth Amendment.” (emphasis added)).

273. See *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) (finding boat owner was justified by necessity in mooring his boat to another’s dock during a storm, and the dock owner was not justified in unmooring it); *Mouse’s Case* (1609) 77 Eng. Rep. 1341, 1342; 12 Co. Rep. 63, 64 (permitting a passenger to throw plaintiff’s property out of the barge to prevent others from drowning); RESTATEMENT OF TORTS (SECOND) §§ 196-197, 262-263 (A.L.I. 1965); see also *United States v. Holmes*, 26 F. Cas. 360, 363-64 (C.C.E.D. Pa. 1842) (No. 15,282) (rejecting necessity after a sailor threw passengers overboard from an overcrowded lifeboat); *R. v. Dudley* (1884) 14 QBD 273 at 287-88 (Eng.) (rejecting necessity defense after shipwrecked sailors killed and ate a crew member for survival); cf. *Vincent v. Lake Erie Transp. Co.*, 124

caught in a storm, but the only way to reach safety requires that they tie up at a private dock. Can the boat captain use such a dock? The answer, not surprisingly, is yes.²⁷⁴ Even though such use violates the dock owner's right to exclude, necessity provides a valid defense for trespassing on the dock.²⁷⁵ Life and limb, in these classic cases, trump the interests of private property owners.²⁷⁶ And it does so even if the boat captain was at fault—if the storm was approaching and he or she should not have been fishing at the time.²⁷⁷ The immediacy of the moment means questions of fault are put to one side because of the weight of the need.

Necessity sits awkwardly next to the attacks on welfare recipients because the necessity defense is about what someone in need can do to address their needs rather than what society must provide. This can feel like splitting hairs, but the distinction matters because necessity, rather than demanding societal assistance, provides an excuse for an action that otherwise would be wrong.²⁷⁸ For someone without shelter or adequate food, government assistance would be great and could fully take care of the need. But what is a person—whose basic needs when it comes to shelter and food are not met—allowed to do? Arguing that such a person is in that position because they made bad choices at earlier points in time fails to respond to the pressing nature of their current needs. Regardless of whether they are homeless and hungry because of past fault or because of structural forces, they have immediate needs that may require intruding on the property rights of others in order to address those needs.²⁷⁹

N.W. 221, 222 (Minn. 1910) (holding ship owner liable for damage done to a dock by his ship during a storm, even though keeping the ship moored was necessary to save it).

274. *See Ploof*, 71 A. at 189.

275. *See id.*

276. *See id.* (“This doctrine of necessity applies with special force to the preservation of human life.... One may sacrifice the personal property of another to save his life or the lives of his fellows.”).

277. *See id.*

278. *See id.*

279. *See In re Eichorn*, 81 Cal. Rptr. 2d 535, 540 (Ct. App. 1998) (holding that a homeless man convicted of violating an anticamping law should have been allowed a jury instruction on the necessity defense at trial); *Commonwealth v. Magadini*, 52 N.E.3d 1041, 1051 (Mass. 2016) (defendant convicted of criminal trespass for sleeping in an office building entitled to present a necessity defense at trial).

V. THE NEW NECESSITY

Taking the needs of the most vulnerable seriously means recognizing the legal weight of those needs. A robust version of the necessity defense—what this Article is calling “the new necessity”—provides an opportunity for antipoverty advocates to move beyond utopian calls for more funding. Moreover, the conservative majority’s suggestion in *Grants Pass* that the necessity defense could protect homeless individuals from otherwise applicable criminal law invites a reconceptualization of the demands that unmet basic human needs impose upon the rest of society, including property owners.²⁸⁰

The possibility of increased public spending directed at helping the poor has enabled advocates and scholars to blind themselves to the present, immediate demands that need places on society. Conservatives have used the relative efficiency of tax-and-transfer forms of assistance to attack other forms of assistance, but have punted on what to do if tax-and-transfer mechanisms never get funded.²⁸¹ Progressives are just as guilty, ending often heartbreaking studies of poverty with pleas to increase funding without wrestling with what to do when such utopian calls predictably go unanswered.²⁸² Just as need exists and must be taken into account independently of individual fault, so too need matters even when, or perhaps especially when, direct support is inadequate. If someone is in a burning building and can escape by breaking a window, we do not tell them to sit tight because in theory firefighters can more

280. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2220 (2024) (“Like some other jurisdictions, Oregon recognizes a ‘necessity’ defense to certain criminal charges. It may be that defense extends to charges for illegal camping when it comes to those with nowhere else to go.”).

281. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 994, 1069 n.234 (2001) (emphasizing the efficiency of tax-and-transfer programs over other forms of assistance). But see Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1052-53 (2016) (arguing that the political costs of enacting some tax-and-transfer programs can make them less efficient than other equity-driven programs or rule changes); Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478, 2502 (2014) (suggesting tax system may be “poorly equipped” or unable to redistribute based on certain “non-income characteristics”).

282. DESMOND, *supra* note 33, at 280-98.

efficiently deal with the problem or let them languish until the fire department becomes fully funded. We recognize the immediacy of their need and pardon them for breaking laws or property to reach safety.²⁸³

Besides offering a way to move beyond the sort of magical thinking that requires manna from heaven, focusing on necessity has the additional benefit of not framing poverty in terms of the demands of socioeconomic equality. The capitalist system is based on socioeconomic differences, on winners and losers.²⁸⁴ Perhaps as a result, equality arguments related to the rights of the poor often fall flat, as Professor Frank Michelman observed more than a half-century ago, while arguments grounded on people's basic needs fare better before the courts and in the court of public opinion.²⁸⁵ Michelman argued that, as a strategic matter, antipoverty advocates should focus more on needs and less on equality.²⁸⁶ The politics surrounding welfare programs have not improved since Michelman made his observations,²⁸⁷ which means it is perhaps even more important to heed his call to emphasize basic needs rather than push for true class equality. Indeed, in light of the country's unwillingness to tackle the harms of poverty through tax-and-transfer policies,²⁸⁸ a needs-based approach to deprivation invites a new, thicker understanding of necessity that extends beyond claims

283. See *Bowditch v. Boston*, 101 U.S. 16, 18 (1879) (“[I]n cases of actual necessity, to prevent the spreading of a fire, ... there was no responsibility on the part of such destroyer, and no remedy for the owner.”).

284. See generally BRANKO MALANOVIĆ, *CAPITALISM, ALONE* (2019) (describing liberal meritocratic capitalism).

285. See, e.g., Michelman, *supra* note 37, at 9-13 (arguing that the Constitution guarantees a right to welfare and certain Supreme Court opinions ostensibly based on equality underscored the state's responsibility to guarantee access to necessities); see also Liu, *supra* note 250, at 207-09 (providing an overview of Michelman's *Foreword*).

286. See Frank I. Michelman, *Legitimacy, The Social Turn, and Constitutional Review: What Political Liberalism Suggests*, 98 *CRITICAL Q. FOR LEG. & L.* 183, 188-90, 197 (2015) (suggesting that the emergence of “weak-form” judicial review models may be a response to the tension between including socioeconomic rights as constitutional essentials and concerns about judicial overreach in economic policy).

287. See CAROL A. HORTON, *RACE AND THE MAKING OF AMERICAN LIBERALISM* 191-222 (2005) (profiling America's rightward turn that ran parallel to the Great Society); see also PEW RSCH. CTR., *AMERICANS' VIEWS OF GOVERNMENT'S ROLE: PERSISTENT DIVISIONS AND AREAS OF AGREEMENT* 16-17 (2024), https://www.pewresearch.org/wp-content/uploads/sites/20/2024/06/PP_2024.6.24_role-of-government_REPORT.pdf [<https://perma.cc/5S48-3LWN>] (noting contemporary America's endorsement of increased government involvement is tepid at best).

288. See Fennell & McAdams, *supra* note 281, at 1052-53.

upon the public purse and includes rights to invade the property rights of others in order to meet those needs.

Part V explores the new necessity, starting with a justification for moving away from utopian pleas for additional funding and moving toward greater appreciation of the ways that focusing on immediate needs allows advocates to challenge the larger structural forces that deny the humanity of the most vulnerable. The argument will not be fully convincing for everyone, but it will be successful if it challenges the view that necessity should be limited to a small number of chance events. Though expanded welfare programs—in particular, the adoption of housing first policies and a more generous food stamp program—could have dealt with many of the basic needs of the poor, when the level of assistance is such that basic needs remain unmet,²⁸⁹ the new necessity defense should be readily and presumptively available.

A. Antipoverty Work and the Abracadabra Moment

A belief that more should be done to help the needy is a foundational element of most antipoverty work. The primary policy suggestion is a call for increased spending on whatever social welfare program is being considered.²⁹⁰ Accordingly, the form that most antipoverty work takes is pretty well established and ubiquitous in the literature: (1) a description of the hardships particular groups of poor people face, (2) presentation of the heart-rending experiences of particular families (often in the form of anecdotes, case studies, or ethnographies), and (3) a call for increased government spending in that particular area.²⁹¹ Sometimes authors launch immediately into stories of particular families and sometimes

289. See generally MATTHEW P. RABBITT, LAURA J. HALES, MICHAEL P. BURKE & ALISHA COLEMAN-JENSEN, U.S. DEP'T OF AGRIC., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2022, at 8 (2023), https://ers.usda.gov/sites/default/files/_laserfiche/publications/107703/ERR-325.pdf [<https://perma.cc/S8LB-T3NH>] (noting that 12.8 percent of Americans “were food insecure at some time during 2022”); Healthy People 2030, *Housing Instability*, OFF. OF DISEASE PREVENTION & HEALTH PROMOTION, <https://odphp.health.gov/healthypeople/priority-areas/social-determinants-health/literature-summaries/housing-instability> [<https://perma.cc/4Y6J-7C8C>] (summarizing the literature on the public health impacts of housing instability).

290. See *supra* notes 32-36 and accompanying text.

291. For a recent and particularly compelling example that follows this pattern, see BRIAN GOLDSTONE, *THERE IS NO PLACE FOR US: WORKING AND HOMELESS IN AMERICA* (2025).

scholars will wrap their arguments in a layer of empirical analysis, but the call at the end is almost inevitably for increased government spending.²⁹²

To be clear, such work can be incredibly important. Professor Matthew Desmond, for example, won the Pulitzer Prize for his beautifully written and incredibly insightful book, *Evicted*.²⁹³ Desmond's storytelling gifts propelled the book onto bestseller lists and fueled an ongoing scholarly and, often, national conversation about eviction-related harms.²⁹⁴ After giving vivid, often heartbreaking, accounts of the experiences of poor people struggling to find and keep decent housing,²⁹⁵ Desmond ends *Evicted* by calling for a massive expansion of Housing and Urban Development's housing voucher program.²⁹⁶ The book is a tour de force—arguably the best book about poverty since Jason DeParle's *American Dream*,²⁹⁷ and perhaps even since Michael Harrington's *The Other America*²⁹⁸—but the solution is almost laughably or tragically divorced from political reality.²⁹⁹

292. See *id.*

293. DESMOND, *supra* note 33; see also Ezra Rosser, *Exploiting the Poor: Housing, Markets, and Vulnerability*, 126 YALE L.J.F. 458, 458 (2017) (discussing and celebrating *Evicted*).

294. See, e.g., Eyal Press, *Will This New Book Change the National Debate on Poverty?*, NATION (Mar. 29, 2016), <https://www.thenation.com/article/archive/this-new-book-could-change-the-national-debate-on-poverty/> [<https://perma.cc/BFG9-5SMV>]; *On the Brink of Homelessness: How the Affordable Housing Crisis and the Gentrification of America Is Leaving Families Vulnerable: Hearing Before the H. Comm. on Fin. Servs.*, 116th Cong. 6-7 (2020) (testimony of Matthew Desmond, Director, Eviction Lab).

295. See Ezra Rosser, *Laying the Foundation: The Private Rental Market and Affordable Housing*, 44 FORDHAM URB. L.J. 499, 504-20 (2017) (providing an in-depth discussion of Desmond's portrayal of tenants and landlords).

296. DESMOND, *supra* note 33, at 294-96.

297. DEPARLE, *supra* note 265.

298. MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* (1962).

299. See, e.g., Corianne Payton Scally, *Who, Why, and How Communities Oppose Affordable Housing*, SHELTERFORCE (Apr. 23, 2014), https://shelterforce.org/2014/04/23/who_why_and_how_communities_oppose_affordable_housing/ [<https://perma.cc/3884-QG5J>] (noting widespread opposition to public housing projects for fear of crime, increased taxes, school degradation, and traffic congestion); SHARON PARROTT, SAMANTHA JACOBY, ALLISON ORRIS, LADONNA PAVETTI, DAVID REICH & DOTTIE ROSENBAUM, CTR. ON BUDGET & POL'Y PRIORITIES, MCCARTHY BILL USES DEBT CEILING TO FORCE HARMFUL POLICIES, DEEP CUTS 1-2 (2023), <https://www.cbpp.org/research/federal-budget/mccarthy-bill-uses-debt-ceiling-to-force-harmful-policies-deep-cuts> [<https://perma.cc/79BF-GCJS>] (noting that a 2023 Republican proposal would “cause 926,000 households to lose Housing Choice Vouchers or project-based rental assistance”).

One might hope that national stinginess, when it comes to social spending, is simply a matter of the American public being unaware of the problems faced by the poor. In such circumstances, scholarship that brings such suffering to the surface can help create the political will necessary to increase spending directed at improving the lives of the poor. It is almost a truism today that Harrington's *The Other America* contributed to the antipoverty efforts of the Kennedy and Johnson administrations.³⁰⁰ Similarly, *Evicted* no doubt deserves some of the credit for the move by some localities to provide those being evicted with a right to an attorney, not to mention for the wave of eviction-focused scholarship that followed the book's publication.³⁰¹ But, however many books are published that humanize the poor and highlight their suffering, most calls for increased spending fall flat.³⁰² Given the nation's indifference to the experiences of poor people and the country's fickle attention, the policy solution offered by such books and articles—a call for more spending—can seem both apolitical and naively utopian.

The observation that antipoverty scholarship tends to end with a utopian call for more money is not to denigrate either the power of such scholarship or the continual need to call for additional funding to support those in poverty. The United States is an outlier when it comes to social support for those in need compared to other developed countries. The norm among Organisation for Economic Co-operation and Development (OECD) countries is to use tax-and-transfer policies to a greater extent than the United States to reduce

300. See Maurice Isserman, *Michael Harrington: Warrior on Poverty*, N.Y. TIMES (June 19, 2009), <https://www.nytimes.com/2009/06/21/books/review/Isserman-t.html> [<https://perma.cc/D8ZE-HJE3>].

301. See Marissa J. Lang, *When Facing Eviction, Some D.C. Renters Will Now Get Free Lawyers*, WASH. POST (Nov. 2, 2023), <https://www.washingtonpost.com/dc-md-va/2023/11/02/dc-legal-aid-right-to-counsel-relaunch/> [<https://perma.cc/8KS9-M3GL>] (discussing coalition's implementation of a right to counsel program for tenants facing eviction proceedings); see also Laurie Ball Cooper, *Legal Responses to the Crisis of Forced Moves Illustrated in Evicted*, 126 YALE L.J.F. 448, 449-54 (2017) (reviewing MATTHEW DESMOND, *EVICTED PROPERTY AND PROFIT IN THE AMERICAN CITY* (2016)) (discussing Desmond's book and how the law can reduce evictions).

302. See, e.g., DOUGLAS RICE, CTR. ON BUDGET & POL'Y PRIORITIES, CHART BOOK: CUTS IN FEDERAL ASSISTANCE HAVE EXACERBATED FAMILIES' STRUGGLES TO AFFORD HOUSING 2 (2016), <https://www.cbpp.org/research/chart-book-cuts-in-federal-assistance-have-exacerbated-families-struggles-to-afford-housing> [<https://perma.cc/AMZ7-8PDC>] (examining the "six years of budget austerity" from 2010 to 2016 that "weakened housing assistance programs").

the percentage of the population in poverty.³⁰³ In contrast, U.S. politics tend to divide the poor into deserving and undeserving categories, penalizing people for their poverty and maintaining an overall low level of welfare assistance.³⁰⁴ While Social Security helps ensure that less than 10 percent of the elderly fall below the poverty line,³⁰⁵ 28 percent of households headed by a single mother are impoverished.³⁰⁶ Indeed, even though children are categorically not at fault for their situation, more than 16 percent of children live in poverty.³⁰⁷ These figures reflect not a lack of resources—the United States spends more than \$2 billion on each B-2 Spirit bomber³⁰⁸—but a lack of will. Scholarship that tries to break through the country’s hard-headed (and hard-hearted) approach to helping those in need is surely valuable, even if the final plea involves a bit of magical thinking.

303. JANET C. GORNICK, DAVID BRADY, IVE MARX & ZACHARY PAROLIN, *POVERTY AND POVERTY REDUCTION AMONG NON-ELDERLY, NONDISABLED, CHILDLESS ADULTS IN AFFLUENT COUNTRIES: THE UNITED STATES IN CROSS-NATIONAL PERSPECTIVE* 1, 8 (2024), <https://www.brookings.edu/articles/poverty-and-poverty-reduction-among-non-elderly-nondisabled-childless-adults-in-affluent-countries-the-united-states-in-cross-national-perspective/> [<https://perma.cc/CK8Y-HKJB>] (stating that the United States reduced poverty among childless adults by only 19 percent through taxes and transfers, while other OECD countries, such as Canada and the Netherlands, reduced poverty by 35 percent and 66 percent, respectively).

304. *See generally* KATZ, *supra* note 247 at 1-49 (explaining the origins of the concept of the undeserving poor); GORNICK ET AL., *supra* note 303, at 16 (describing the United States as “somewhat of an exception in the affluent world” for lacking a national cash-based safety net for childless adults).

305. Zachary Scherer & Brittany Kang, *Older Adults in Poverty Less Likely Than Those Not in Poverty to Live in Households That Receive Social Security*, U.S. CENSUS BUREAU (June 25, 2024), <https://www.census.gov/library/stories/2024/06/elder-poverty.html> [<https://perma.cc/V4AS-KZBV>].

306. Isabela Salas-Betsch, *The Economic Status of Single Mothers*, CTR. FOR AM. PROGRESS (Aug. 7, 2024), <https://www.americanprogress.org/article/the-economic-status-of-single-mothers/> [<https://perma.cc/PS9N-5YU2>].

307. Craig Benson, *Child Poverty Rate Still Higher than for Older Populations but Declining*, U.S. CENSUS BUREAU (Dec. 4, 2023), <https://www.census.gov/library/stories/2023/12/poverty-rate-varies-by-age-groups.html> [<https://perma.cc/8NRL-ZJC2>].

308. With the funds for one B-2 bomber, the U.S. Navy could construct 40 percent of a Nimitz-class nuclear aircraft carrier. Harrison Kass, *Why the Air Force’s B-2 Bomber Costs \$2 Billion*, NAT’L INT.: THE BUZZ (Aug. 30, 2024), <https://nationalinterest.org/blog/buzz/why-air-forces-b-2-bomber-costs-2-billion> [<https://perma.cc/4YF5-VKB5>]; *see also id.* (\$350 million per F-22 Raptor fighter jet); *id.* (\$340 million per C-17 Globemaster cargo craft); *id.* (\$290 million per P-8 Poseidon reconnaissance aircraft); *id.* (\$115 million per F-35 fighter jet).

Conservative scholarship on inequality and social welfare spending often relies on a similar form of intellectual abracadabra. Among law and economics-influenced conservatives, the argument—usually credited to Professors Louis Kaplow and Steven Shavell—that tax-and-transfer programs are the most efficient way to address inequality is accepted almost as a matter of faith.³⁰⁹ Any efforts to address inequality through other mechanisms, such as rule changes that take equity into account, are dismissed as sub-optimal relative to the hypothetical tax-and-transfer solution.³¹⁰ A number of scholars, most notably Professors Lee Fennell, Richard McAdams, and Zachary Liscow, have poked rather large holes in the idea that tax-and-transfer solutions are necessarily the most efficient.³¹¹ Nevertheless, the argument that tax-and-transfer solutions are always the preferable way of addressing inequality rides on, in part because of the obvious appeal of the ability to dismiss most progressive policy interventions as inefficient.³¹²

The true power of this conservative *deus ex machina* argument is that the theoretical possibility of a more efficient approach is used to undermine antipoverty efforts regardless of the political impossibility of increasing taxes to expand aid to the poor.³¹³ Whereas

309. See Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 821 (2000). *But see* Ronen Avraham, David Fortus & Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1127-29 (2004) (arguing Kaplow and Shavell's conclusion relies on unrealistic assumptions about homogeneity across individuals and complete information).

310. See Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 669 (1994).

311. See Fennell & McAdams, *supra* note 281, at 1111 (highlighting “political action costs” that can make it more difficult to achieve certain distributive outcomes through the tax system compared to other legal rules); Zachary Liscow, *Redistribution for Realists*, 107 IOWA L. REV. 495, 516-17 (2022) (arguing that tax-and-transfer policies fail because of insistent redistribution in areas where the public is hesitant to accept redistribution).

312. See Liscow, *supra* note 311, at 529 (“Economics tries to find the most efficient way to help the poor given limited resources, and it says that giving cash through taxes and transfers is typically the best way to do that.... However, with policy siloing, the one-pieist method that underlies law and economics textbooks and much lawmaking simply ceases to be a useful heuristic in deciding any individual policy question.... [O]nce there are multiple real-world actors implementing policy in a democracy and the attitudes of voters matter in practice, the fallibility of standard economics approach comes into view.”).

313. See, e.g., *id.* at 556 (“[The tax-and-transfer] approach depends upon empirical assumptions that are deeply at odds with social reality. The result has been skyrocketing inequality.”).

progressives end their arguments with a call for increased spending, conservatives use the possibility—however remote—of increased spending to cut off conversations about legal changes that could help poor people.³¹⁴ In both cases, the possibility of increased spending is so remote that such arguments—regardless of initial political posture—might be characterized as little more than thought experiments.³¹⁵ Unfortunately, policy arguments in favor of increased spending and academic arguments about the relative efficiency of tax-and-transfer programs provide little comfort to those in poverty whose needs are real and who, given the immediacy of their needs for shelter or food, cannot be asked to simply wait for a better day.³¹⁶ Arguably, necessity provides the outlet those suffering from extreme poverty need when increased spending or tax-and-transfer options do not actually materialize.

B. Equality Versus Just Needs

In a now canonical work within the poverty law field, Professor Frank Michelman argued that advocates should focus more on the just needs of their poor clients and less on equality-based claims.³¹⁷ Michelman used his invitation to write the 1968 *Harvard Law Review Foreword* to criticize the emphasis that poverty law lawyers and the Court were placing on equality.³¹⁸ Michelman claimed that while there was language in some of the Court's recent decisions to support an equality-based analysis of what the Court was doing, a better way of understanding the jurisprudence was to recognize the

314. Or as Professor Jeremy Waldron explains in a response to *Fairness Versus Welfare*, there is space and often a need for mid-level rule changes based on distributional fairness despite Kaplow and Shavell's claim that only ultimate welfare (best achieved through tax-and-transfer programs) should matter. Jeremy Waldron, *Locating Distribution*, 32 J. LEGAL STUD. 277-278 (2003).

315. See Liscow, *supra* note 311, at 531-48 (arguing for more immediate action across various policy domains, such as transportation and social insurance programs, to aid the poor rather than waiting for major tax reform).

316. Making a similar point, Professor Julie Gilgoff argues that given soaring homelessness rates, "self-help measures should be tolerated in the absence of adequate policy that preserves and redistributes affordable housing to meet the need of non-congregate housing." Julie Gilgoff, *Land Redistribution in the Aftermath of the COVID-19 Pandemic*, 67 WAYNE L. REV. 211, 250 (2022).

317. Michelman, *supra* note 37, at 13-16, 33-39.

318. See *id.* at 32-33.

Court's willingness to protect the just needs of the poor.³¹⁹ Rather than pushing for the poor to be treated equally (something that at a certain point is arguably antithetical to market economies), Michelman felt that advocates should focus on establishing a minimum floor below which the poor were protected.³²⁰ According to Michelman, though the Court was not using the language of just needs, that is what the Court was protecting, and advocacy tied to the recognition of rights related to such needs would be more successful than the arguably larger claim that poor people deserved equal treatment.³²¹

Though Michelman's *Foreword* was published five years after the publication of Professor Charles Reich's *The New Property*, both articles were attempting to explain the place of poor people within capitalism and the expanding welfare state.³²² Reich sought to expand what counts as property by connecting state-provided support, such as welfare, to other forms of state-tied privileges, such as radio licenses or bar memberships.³²³ As he showed, in a modern economy, people across economic tiers depend on state-provided privileges and support for their livelihoods in much the same way as people in earlier periods relied upon real property.³²⁴ But if state-provided goods, including both welfare and professional licenses, were thought of as mere gratuities, the state could coerce people to give up many of their other rights in order to secure their economic wellbeing.³²⁵ The solution, according to Reich, was to recognize that people had a property interest in state-provided goods, which, in the case of poor people, meant recognizing their property rights to welfare.³²⁶ These were strong claims, but ones that found some support in the 1968 case of *Goldberg v. Kelly*, which recognized the right of welfare recipients to a pretermination hearing before the state cut off their benefits.³²⁷

319. *See id.* at 24.

320. *See id.* at 32-33.

321. *See id.* at 22.

322. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 738, 761-62, 787 (1964); Michelman, *supra* note 37, at 9-19.

323. *See* Reich, *supra* note 322, at 733-34.

324. *See id.* at 737.

325. *See id.* at 733, 756, 760-61.

326. *See id.* at 785-86.

327. 397 U.S. 254, 262 n.8 (1970) (citing Reich, *supra* note 322).

At the time Michelman was working on his *Foreword*, the future direction of the Court was unknown. Advocates for the poor could look with optimism at *Goldberg v. Kelly*³²⁸ and at *King v. Smith*, which struck down Alabama's substitute father rules that policed the sexuality of welfare mothers,³²⁹ but one could just as reasonably predict that the Court would reverse course. And that is what happened. *Goldberg* was not overturned but was poverty law's high water mark.³³⁰ It would take several decades for Reich's argument that welfare should be treated as a property right to be authoritatively rejected, but it finally was when President William J. Clinton signed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (otherwise known as welfare reform).³³¹ In the meantime, however, the Court did its part to distance itself from the promise of *Goldberg*. In the same term as *Goldberg*, the Court upheld Maryland's family cap over a powerful dissent by Justice Thurgood Marshall in *Dandridge v. Williams*.³³² Three years later, the Court in *San Antonio Independent School District v. Rodriguez* held that poor children did not have a right to receive an education equal to that of wealthy children because education was not a fundamental right and class was not a suspect classification.³³³ And with that decision the courtroom doors, at least those of the federal courts, were essentially closed on the recognition of greater rights for poor people.³³⁴ With the Court providing such a hostile environment for even the most sympathetic of poor clients—children untainted by the deserving versus undeserving structural paradigm—Reich's hope that welfare could be treated as a right had little hope.³³⁵ Indeed, a half-century after the *Harvard Law Review* published the *Foreword*, even Michelman's more pragmatic call to

328. *See id.* at 269-71.

329. 392 U.S. 309, 311-13 (1968).

330. *See Mathews v. Eldridge*, 424 U.S. 319, 340-41 (1976) (holding that the removal of disability benefits was not protected by *Goldberg* and distinguishing disability benefits from welfare assistance).

331. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of titles 8 and 42 of the United States Code).

332. 397 U.S. 471, 476-83 (1970); *see also id.* at 508-530 (Marshall, J., dissenting).

333. 411 U.S. 1, 28-29, 35, 54-55 (1973).

334. *See id.* at 54-55.

335. *See Reich, supra* note 322, at 739.

focus on just needs as the best way to advance the antipoverty cause arguably reads as both naïve and unrealistic.

But the Court's reliance on necessity as a way to lessen the criminalization blow in *Grants Pass* arguably breathes new life into Michelman's just needs approach. One of the principal contributions of Michelman's *Foreword* can be found in its rejection of stated doctrinal reasons in favor of realist understandings in legal decisions.³³⁶ Lurking beneath the surface of doctrinal justifications, according to Michelman, was concern about protecting the just needs of the poor.³³⁷ Doctrine thus was an instrument, not an end. Optimistically, the elevation of the necessity defense arguably is playing a similar role in *Grants Pass*: The Court is able to move forward with its doctrinal rejection of the cruel and unusual punishment limitation on the criminalization of homelessness because the necessity defense provides the homeless with a minimum level of protection required by their just needs.³³⁸ In other words, rather than just being a veneer of humanity upon an otherwise inhumane and unjust decision, discussion of necessity by conservative Justices—in their majority opinion as well as during oral argument—amounts to their acknowledgment that the demands of the homeless can sometimes be just.³³⁹

What makes Michelman's just needs approach attractive when considering the necessity defense is that both are rooted in the basic demands of poverty. While a just needs approach need not be limited to immediate needs—that is, the approach would also support policies designed to protect the poor from experiencing such needs—the approach certainly reaches individuals whose needs are unmet. This might be thought of as a distinction without a difference; after all, policies that *ex ante* help the poor ensure their just needs are met likely are motivated by the same instinctual concern for human life as an allowance, *ex post*, for the poor to take matters into their own hands when their basic needs are unmet. Moreover,

336. See Michelman, *supra* note 37, at 10.

337. See *id.* at 9, 16, 33.

338. See *City of Grants Pass v. Johnson*, 144 S. Ct. 2202, 2224-26 (2024) (discussing the “difficult questions” lower courts will have to answer to determine whether necessity is a warranted defense); *Grants Pass* Oral Argument, *supra* note 5, at 112, 143-48 (discussing the necessity defense).

339. See *Grants Pass*, 144 S. Ct. at 2224-26.

the ex ante approach is often preferable to the ex post option. Indeed, in the context of *Grants Pass*, that is undoubtedly true, at least with respect to the right of the homeless to occupy public land.³⁴⁰ As future scholarship will undoubtedly highlight, the judicially-created ex ante prohibition on criminalizing homelessness that the Court struck down placed homeless people in a better position vis-à-vis the state than an ex post option of claiming necessity. The ex post claim of right not only is subject to greater uncertainty but even if upheld comes only on the heels of police harassment. But it is still important to recognize that the invalidation of ex ante protection in *Grants Pass* does not by itself speak to the ex post necessity-based option held by homeless individuals to assert claims to space.³⁴¹ The same can be said of the political unwillingness, ex ante, to assure everyone has enough food for each upcoming month and the ex post necessity claims that the hungry might assert in order to satisfy their basic food needs.

C. Necessity and Property

One of the touchstones of necessity is its immediacy.³⁴² If a city has to destroy a house in order to create a firebreak to save the rest of the city, the immediacy of the necessity can justify an otherwise impermissible intrusion on private property rights.³⁴³ When there is no immediacy to the unmet needs of those trespassing but only convenience or efficiency-tied reasons for intruding on the rights of owners, courts are likely to protect the exclusionary rights of owners and may do so through punitive damage awards.³⁴⁴ Traditionally, as previously acknowledged in Part I.B, the necessity defense—which can arise in criminal law, torts, and property law—has been narrowly construed, rarely providing those intruding on the rights of others with meaningful protection.³⁴⁵ But the reach of the *Grants*

340. See *id.* at 2220.

341. See *id.* at 2226.

342. See, e.g., *Ploof v. Putnam*, 71 A. 188, 188 (Vt. 1908) (finding defendant successfully invoked necessity defense following the “aro[usal of] a sudden and violent tempest”); *United States v. Bailey*, 444 U.S. 394, 410-11 (1980) (demanding imminence to invoke the necessity criminal defense).

343. See *Surocco v. Geary*, 3 Cal. 69, 73 (1853).

344. See *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997).

345. See *supra* Part I. B.

Pass version of necessity as suggested by both the oral argument and the majority opinion arguably is not limited to a narrow doctrinal understanding.³⁴⁶ If the Justices are serious that necessity could provide an excuse for violating a statute criminalizing homelessness, necessity would include within its protection a whole host of activities that infringe on public and private property rights.³⁴⁷

Indeed, one of the most striking features of advocacy in support of the homeless is its tendency to be deliberately self-limiting. The goal seems to be to find a limiting principle that can distinguish legitimate demands to use public space from excessive demands. Advocates seem acutely aware that the public will likely not tolerate wholesale claims to public space; accordingly, advocates are careful to distinguish claims to public space from the possibility that necessity might impose obligations on private landowners as well.³⁴⁸ Waldron's analysis quite deliberately focuses on public space and takes off the table discussion of homeless people making demands upon the owners of private property.³⁴⁹ Similarly, during the *Grants Pass* oral argument, the lawyer for the Department of Justice was careful to distinguish between the right of homeless people to sleep

346. See *Grants Pass*, 144 S. Ct. at 2220 (“It may be that [the necessity] defense extends to charges for illegal camping when it comes to those with nowhere else to go.... States and cities are free as well to add additional substantive protections.... For that matter, nothing in today’s decision prevents States, cities, and counties from going a step further and declining to criminalize public camping altogether. For its part, the Constitution provides many additional limits on state prosecutorial power, promising fair notice of the laws and equal treatment under them, forbidding selective prosecutions, and much more besides.”); see also *Grants Pass* Oral Argument, *supra* note 5, at 113-14 (Justice Kavanaugh suggesting the necessity defense as a potential alternative to using the Eighth Amendment). For a problematic embrace of prosecutorial discretion as a partial solution, see Andrew I. Lief, Comment, *A Prosecutorial Solution to the Criminalization of Homelessness*, 169 U. PA. L. REV. 1971, 1990-92 (2021) (arguing that prosecutors should decline to charge homeless people who are employed and claiming in contrast that unemployed homeless people should face the possibility of prosecution).

347. See *Grants Pass* Oral Argument, *supra* note 5, at 27, 46-47, 70, 84, 142-43 (addressing the potential necessity of eating, sleeping, stealing food, using addictive drugs, defecating, and urinating).

348. See, e.g., Gregory S. Alexander, Essay, *Property, Dignity, and Human Flourishing*, 104 CORN. L. REV. 991, 1040 (2019) (answering in the negative the question, “should the law of property place on the owners an obligation to contribute in some way, as property owners, to provide adequate housing to the many people who currently lack access to it?”).

349. See Waldron, *supra* note 23, at 372-74; Waldron, *supra* note 94, at 300.

in public and the right of cities to regulate public defecation.³⁵⁰ With advocates so intent on addressing the slippery slope argument, it is easy to lose sight of the legal and moral rights that should attach to immediate just needs.

If someone has no place to sleep or has no food to eat, a robust form of necessity in theory would grant that person *ex post* relief for having intruded on the rights of the public or of private property owners in order to secure access to basic shelter or food. The immediacy of the need is such that if relief is only available by trespassing on the rights of private owners, a person facing such difficulties should not be told that the availability of relief is conditioned on her limiting her demand to the use of public space. If public space is unavailable or cannot by itself address the just need that is unmet (for example, hunger), actions to secure basic needs should be covered by necessity even if they intrude on the rights of private owners. Though advocates have traditionally limited their discussion to rights to occupy public space and resisted assertions of rights over private property, there is no *a priori* reason why private rights should be immune from the demands of the most vulnerable seeking to meet their basic needs.³⁵¹ Progressive property theorists lean on the idea, expressed by the New Jersey Supreme Court, that “[p]roperty rights serve human values[,]” and therefore “are recognized to that end, and are limited by it.”³⁵² But by invoking necessity as a possible limit on the reach of ordinances that criminalize homelessness, the conservative majority of the U.S. Supreme Court seems to be recognizing a similar limit upon the rights of property owners.

The fundamental value underlining the necessity defense is relatively simple: Human life matters more than property.³⁵³ A lot flows from recognition of such a value. Some laws and theories of law cannot withstand the force of a robust understanding of necessity’s reach. Stand Your Ground laws that grant property owners a right to resort to violence to protect their property rights

350. See Grants Pass Oral Argument, *supra* note 5, at 108-09.

351. See Waldron, *supra* note 94, at 295, 298.

352. State v. Shack, 277 A.2d 369, 372 (N.J. 1971).

353. See, e.g., Ploof v. Putnam, 71 A. 188, 189 (Vt. 1908) (“This doctrine of necessity applies with special force to the preservation of human life.”).

might have to give way to a more contextualized approach.³⁵⁴ Exclusion-based theories of property, similarly, would have to give more space to necessity as an exception to the general exclusionary rule.³⁵⁵ How much space depends on the degree of societal inequality and the number of people with unmet just needs, but, at least in contemporary U.S. society, the number of highly vulnerable people is far from negligible.³⁵⁶

Many of the justifications given for strong exclusionary property rights are utilitarian and structural—deriving their power from the idea that strong property rights protections create the appropriate incentives for producing wealth.³⁵⁷ Compared to historical models of communism in practice, such justifications are undoubtedly true.³⁵⁸ But the demands of necessity are not tied to structural justifications but to the immediacy of the basic needs for human life. Simply observing the advantages of capitalist market economies should not silence the conversation regarding the appropriate division between private rights and public obligations. Even within the existing property and market regime, some property rights, public and private, should give way when confronted with the immediate necessity-based demands of the most vulnerable.

CONCLUSION

This Article takes seriously the robust conception of necessity advanced by conservative Justices in the *Grants Pass* litigation. It could well be that the Justices did not actually intend to be taken seriously; that instead they drew upon necessity simply as a smokescreen to hide the cruelty of their decision to allow localities to criminalize homelessness.³⁵⁹ Necessity under this pessimistic take

354. For more on Stand Your Ground Laws, see Cynthia V. Ward, *Three Questions About “Stand Your Ground” Laws*, 95 NOTRE DAME L. REV. REFLECTION 119, 119-38 (2020).

355. Cf. *Ploof*, 71 A. at 189 (noting that entering land out of necessity “is not a trespass”).

356. See generally KATHRYN J. EDIN & H. LUKE SHAEFER, \$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA (2015) (focusing on the population of extremely poor people within the United States); PETER EDELMAN, SO RICH, SO POOR (2012) (examining poverty, including extreme poverty, in America).

357. See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 356-57 (1967).

358. For an excellent critical history of communism, see generally ARCHIE BROWN, THE RISE AND FALL OF COMMUNISM (2009) (analyzing communist systems across the globe).

359. See Jamelia N. Morgan, Essay, *Policing Marginality in Public Space*, 81 OHIO ST. L.J.

could be merely a rhetorical tool or a device touted by the conservative Justices out of ignorance of necessity's traditionally limited reach.³⁶⁰

Yet, there is value in engaging in this Article's thought experiment: What if we took seriously the Court's newfound embrace of necessity? The new necessity envisioned by the Court would seem to cover the acquisition of the basic requirements—starting with but not limited to shelter and food—for life. Unlike traditional academic discussions that center upon what should be done and what is the best, most efficient, way to help the poor, necessity is ultimately about the immediate needs of the most vulnerable.³⁶¹ The possibility, however remote, of a better solution to a given social problem does little to address the immediate needs of the poor. A robust necessity defense would allow those with just needs to act unilaterally in the here-and-now, bypassing the progressive hope for additional funding and the conservative argument that tax-and-transfer schemes are the most efficient solution.³⁶²

One could object that the Court was wrong in its understanding of the reach of necessity, and therefore, the hungry and the unsheltered are unlikely to successfully assert claims to public or private property in order to address their basic needs. That is a fair critique and likely true.³⁶³ To return, briefly, to the debate between

1045, 1060-62 (2020) (emphasizing the “public ordering function” of criminal law targeting the homeless, especially as applied against marginalized communities).

360. See *Grants Pass* Oral Argument, *supra* note 5, at 46-47, 144 (acknowledging the necessity defense is a “very narrow” one, and noting Oregon courts’ failure to employ it in these circumstances); see also Bird & Oswald, *supra* note 80, at 101 (describing necessity as the public use doctrine’s “long dormant cousin”); Nicholas G. Glover, *Letting Government Breathe: How Zoning Deregulation Provides a Workable Solution to Homelessness*, 53 *FORDHAM URB. L.J. ONLINE* 1, 33 (2025) (likening Justice Gorsuch necessity suggestion as “putting a band-aid on a seismic gash”).

361. Compare *supra* Part II (discussing efficient ways to deal with homelessness), with *Ploof v. Putnam*, 71 A. 188, 189 (Vt. 1908) (recognizing that unauthorized land incursion due to necessity is not trespass), and *Surocco v. Geary*, 3 Cal. 69, 74 (1853) (denying recovery for the destruction of a home to serve as a firebreak based on the doctrine of necessity).

362. See *supra* notes 288-89 and accompanying text.

363. See Michael Santos, Laura Riley, Kirsten Anderson & Erica McWhorter, *Criminalization of Homelessness and Poverty Post-Grants Pass Is Still Unlawful and Ineffective at Reducing Homelessness*, 50 *HUMAN RTS.* 6, 6 (2025) (presenting the reasons necessity is likely an “elusive option” for homeless individuals facing prosecution); Meghan J. Ryan, *The Miserly Message of Grants Pass*, 22 *OHIO ST. J. CRIM. L.* 173, 185 (2025) (observing that “it remains quite questionable, though, how effective such [necessity-based] claims would be”).

Ellickson and Waldron, even Ellickson's hard-hearted approach leaves zones for homeless individuals to exist.³⁶⁴ Necessity-based claims to space might be unavailable in cities with the sort of zoning-based solutions promoted by Ellickson and an option only in those localities that prohibited homelessness in all areas.³⁶⁵

There are severe limits on necessity's reach. Nevertheless, the possibility, however remote, of a new necessity taking hold and providing the most vulnerable with a recognized excuse for trespassing on public and private property rights, has the power to change the political calculus surrounding welfare.³⁶⁶ There is a long strain within American politics objecting to state-provided support for the most needy.³⁶⁷ The poor are blamed for their condition³⁶⁸ while assistance, financial and in kind, is hard to access and generally inadequate to address the level of need experienced by poor families and individuals.³⁶⁹ Those better off can look the other way, secure in their expectation that their wealth, privilege, and property are protected and considered inviolate even against those whose basic needs are unmet.

The new necessity upends these expectations by focusing on how those with just needs might be excused under a robust version of the law of necessity when they act to satisfy such needs at the expense of public or private property owners. By forcing property owners to recognize the degree to which extreme poverty undermines their exclusionary rights, the possibility that the poor will be able to

364. See *supra* Part II.

365. See *supra* Part II.A.

366. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 163 (2000) ("Protecting property does not require us to declare property rights to be absolute."); *id.* at 210 ("Property confers power over others, but also obligation toward them. The two go hand in hand. Obligation limits power by directing it toward the fulfillment of others' needs.").

367. See, e.g., JOEL F. HANDLER & YEHEKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 156-59, 182-84 (2007) (reviewing the history of welfare in the United States).

368. See *id.* at 158-59 ("The overriding myth continues to be that welfare persists because of the characteristics of the families, not because of larger, structural conditions of society.").

369. KATIE BUITRAGO, JAMELA CLARK, EMILY DOBSON, KIMBERLY DREW, SUNIYA FAROOQUI, EDRIKA FULFORD, RITA JEFFERSON, KATHRYN (CALLIE) KAPLAN, ACES LIRA, NIYA KELLY, LEEANNA MAJORS, TAISHI NEUMAN & MAXICA WILLIAMS, RESIGNED TO THE PROCESS: BARRIERS TO ACCESSING AND MAINTAINING TANF AMONG LOW-INCOME FAMILIES WITH YOUNG CHILDREN IN ILLINOIS 4-5, 7 (2022).

assert claims over public space and private property could help change the politics surrounding public assistance.³⁷⁰

Isolated calls for additional funding have largely failed to change the politics surrounding antipoverty programs.³⁷¹ The new necessity could help crack open the funding door by making property owners personally feel (in terms of diminishment of their exclusionary rights) some of the costs of leaving a portion of the population hungry and unhoused. That in turn could help create more space for the sort of policies that would protect the most vulnerable. The middle- and upper-class can easily disregard calls for greater worker protections, increased welfare spending, subsidized child and elder care, housing first approaches, and the like when their property is not under threat. The new necessity makes even the privileged feel the costs of continually undermining the social safety net.

Crucially, even if the new necessity has little to no political impact, it promises to give the most vulnerable greater freedom to claim the resources and space needed to address their basic needs. That the conservative Justices gave a green light to localities to criminalize homelessness struck a significant blow against recognition of the shared humanity of the most poor. But within the ashes of *Grants Pass* are progressive possibilities contained in the conservative Justices' seeming readiness to embrace a new, more robust understanding of necessity that would radically change the rights of the most needy.

370. See WRIGHT, *supra* note 89, at 118 (“Some acts threaten basic social arrangements, institutions, and class structures.... [E]conomically based necessity claims, typically involving possible starvation, homelessness, and poverty, normally pose this sort of explicit or implicit threat to a society’s class [structure].”).

371. Contrast DESMOND, *supra* note 33, at 280-98 (calling for increased funding to address poverty), with BUITRAGO ET AL., *supra* note 369, at 4-5, 7 (finding that aid continues to be inadequate at addressing extreme poverty).