6

Punitive Entrenchment

The State not only has greater power to regulate and to police unhoused persons compared to people with access to housing. This chapter argues that the State also has the power to entrench people in the condition of homelessness.[1] Individuals who are entrenched in homelessness continue to experience the forms of double domination described in Chapter 4. Notably, they depend on others to obey laws that govern public property, and they must make nonegalitarian sacrifices to comply with these laws.[2]

This chapter begins with an overview of punitive entrenchment and the main mechanisms that enmesh individuals in poverty and homelessness: fines, fees, surcharges, and collateral consequences of punishment.[3] The chapter then discusses the traditional objections to the punishments imposed on unhoused persons who violate laws that regulate public property, namely that these sanctions are difficult to justify according to retributivist and consequentialist theories of punishment.[4] This chapter's concluding parts demonstrate that the punishments associated with these laws are objectionable because they cement unhoused persons in the condition of homelessness where they are subject to double domination.

6.1 PUNITIVE ENTRENCHMENT

Unhoused persons who violate laws that govern public property can be subject to fines, fees, surcharges, penalties, and collateral consequences, all of which can

[1] Terry Skolnik, "Rethinking Homeless People's Punishments" (2019) 22:1 *New Crim L Rev* 73 at 81–84.

[2] Terry Skolnik, "How and Why Homeless People Are Regulated Differently" (2018) 43 *Queen's LJ* 297 at 309, 316–19.

[3] *See*, *e.g.*, Neil Sobol, "Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses" (2017) 88:4 *U Colo L Rev* 841 at 850, 874; Tia Lee Kerkhof, "Small Fines and Fees, Large Impacts: Ability-to-Pay Hearings" (2021) 95:2 *S Cal L Rev* 447 at 452–53.

[4] David Dolinko, "Retributivism, Consequentialism, and the Intrinsic Goodness of Punishment" (1997) 16:5 *Law & Phil* 507 at 507–08 (describing retributivism); David Dolinko, "Punishment" in John Deigh and David Dolinko (eds.), *The Oxford Handbook on the Philosophy of the Criminal Law* (Oxford University Press, 2011) at 405–07 (describing consequentialism).

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entrench them in the condition of homelessness.[5] These punishments result in poverty penalties for unhoused persons who face harsher financial sanctions because they cannot afford to pay their initial fine.[6] The cumulative effect of these penalties results in a vicious cycle for impecunious and unhoused persons.[7] The direct and collateral consequences of punishment prevent unhoused persons from obtaining private property rights, enjoying all forms of liberty, and escaping double domination.[8]

6.1.1 *Fines*

Punitive entrenchment begins when an unhoused person receives a fine because they violated a law that governs public property.[9] For some individuals, expensive fines can be very difficult if not impossible to pay.[10] In the Ninth Circuit Court of Appeals decision Jones v. City of Los Angeles, the claimants sought an injunction that would preclude the police from enforcing a law that prohibited sitting, lying down, or sleeping on the city's sidewalks.[11] The offense was punishable by up to six months' imprisonment and/or a $1,000 fine – the same maximum penalty that was imposed for assault or drunk driving.[12] At the time when the claimants brought the injunction, there were roughly 1,000 more homeless people than available shelter spaces in Skid

[5] *See, e.g.*, Skolnik, "Rethinking Homeless People's Punishments" at 80–84; Lisa Foster, "The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States" (2020) 11:1 *U Miami Race & Soc Just L Rev* 1 at 3, 6, 8, 15.

[6] Beth Colgan, "The Excessive Fines Clause: Challenging the Modern Debtors' Prison" (2018) 65:1 *UCLA L Rev* 2 at 7, 9, 48 (describing poverty penalties).

[7] *See, e.g.*, Alicia Bannon, Mitali Nagrecha, and Rebekah Diller, "Criminal Justice Debt: A Barrier to Reentry" (2010) at 13, Brennan Center for Justice, www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [perma.cc/6UWJ-NC9A]; Justin Jouvenal, "Homeless Say Booming Cities Have Outlawed Their Right to Sleep, Beg and Even Sit," Washington Post (June 2, 2016) at 10, www.washingtonpost.com/local/public-safety/homeless-say-booming-cities-have-outlawed-their-right-to-sleep-beg-and-even-sit/2016/06/02/7dde62ea-21e3-11e6-aa84-42391ba52c91_story.html [perma.cc/7RYT-VU4W]; Bill O'Grady, Stephen Gaetz, and Kristy Buccieri "Can I See Your ID? The Policing of Youth Homelessness in Toronto" (2011) at 81, https://homelesshub.ca/sites/default/files/CanISeeYourID_nov9.pdf [perma.cc/3HV8-3RCU]; NLCHP, "Housing Not Handcuffs: Ending the Criminalization of Homelessness in U.S. Cities" (2016) at 7, 23, https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf [perma.cc/QZD6-7K7E]; Marianne Quirouette, Tyler Frederick, Jean Hughes et al., "'Conflict with the Law': Regulation & Homeless Youth Trajectories toward Stability" (2016) 31 CJLS 383 at 386; Coalition on Homelessness, "Punishing the Poorest: How the Criminalization of Homelessness. Perpetuates Poverty in San Francisco" (June 2015) at 38–39, www.cohsf.org/Punishing.pdf [perma.cc/NM26-9F68].

[8] *See, e.g.*, Skolnik, "Rethinking Homeless People's Punishments" at 82; Beth Colgan, "Fines, Fees, and Forfeiture" (2017) 18:3 *Criminology, Crim J L & Soc'y* 22 at 24–25.

[9] Skolnik, "Rethinking Homeless People's Punishments" at 82.

[10] *Ibid.* at 78. *See also* Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen Flood, Vanessa MacDonnell, and Jane Philpott et al. (eds.), *Vulnerable: The Law, Policy, and Ethics of COVID-19* (University of Ottawa Press, 2020) at 291–92; Stephanie Ben-Ishai and Arash Nayerahmadi, "Over-Indebted Criminals in Canada" (2019) 42:4 *Man LJ* 207 at 208.

[11] *Jones* v. *City of Los Angeles*, 444 F (3d) 1118 at 1120 (9th Circ 2006).

[12] *Ibid.*; Skolnik, "Rethinking Homeless People's Punishments" at 85, citing Cal Penal Code, § 241 and Cal Vehicle Code, §§ 23152 and 23636.

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Row.[13] The maximum fine imposed for violating the law amounted to roughly four and half months' worth of welfare payments.[14] The quantum of the fine was the financial equivalent of approximately three months of rent in a single rate occupancy hotel (SRO) – the city's cheapest rental accommodation.[15]

Other cities impose expensive fines for violating laws that regulate public property. In the city of Montreal, sleeping or lying down on a subway bench is punishable by a fine between $75 and $500 prior to applicable administrative fees and penalties.[16] The California Penal Code prohibits individuals from lodging on public property and imposes a minimum fine of $275, a maximum fine of $500, and/or six months' imprisonment.[17] Boulder, Colorado, prohibits camping or lodging on public property without consent, which is punishable by a fine of up to $1,000.[18]

Research demonstrates that most unhoused persons do not pay the fines that they receive for violating laws that govern public property. Marie-Eve Sylvestre and colleagues conducted an empirical study that examined the payment rate of fines issued to people experiencing homelessness in Toronto and Ottawa between the years 2000 and 2006.[19] Their research showed that less than 1 percent of unhoused persons paid the fines that they received when they violated a municipal ordinance.[20] San Francisco's Coalition for the Homeless conducted a similar study between 2007 and 2013.[21] The study concluded that fewer than 10 percent of homeless people paid the fines that they received for violating laws that govern public property.[22]

[13] *Jones* v. *City of Los Angeles*, 444 F (3d) 1118 at 1122 (9th Circ 2006).
[14] *Ibid.* at 1122–23.
[15] *Ibid.*
[16] City of Montréal, revised by-law R-036, By-law on the Standards of Safety and Conduct to be Observed by Persons in the Rolling Stock and Buildings Operated by or for the Société de Transport de Montréal, s. 4(c).
[17] Berkeley Law Policy Advocacy Clinic, "California's New Vagrancy Laws: The Growing Enactment and Enforcement of Anti-Homeless Laws in the Golden State" (2015) at 25–26, https://dx.doi.org/10.2139/ssrn.2558944 [perma.cc/3W7P-8HXB]; Cal Penal Code, § 647(e).
[18] Boulder, Colo, Mun. Code, §§ 5–6–10 and 5–2–4; Rachel Adcock et al., "Too High a Price: What Criminalizing Homelessness Costs Colorado" (2016) at 19–20, www.law.du.edu/documents/homeless-advocacy-policy-project/2–16–16-Final-Report.pdf [perma.cc/9LLH-SJPW].
[19] Marie-Eve Sylvestre, Céline Bellot, Philippe Antoine Couture Ménard et al., "Le Droit est aussi une question de visibilité: l'occupation des éspaces publics et les parcours judiciaires des personnes itinérantes à Montréal et à Ottawa" (2011) 26:3 *CJLS* 531 at 550; Marie-Eve Sylvestre and Céline Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" in Bruce Porter and Martha Jackman (eds.), *Advancing Social Rights in Canada* (Markham: Irwin Law, 2013) at 181.
[20] *Ibid.*
[21] Coalition for the Homeless, "Punishing the Poorest: How the Criminalization of Homelessness Perpetuates Poverty in San Francisco" (June 2015) at 37, Coalition on Homelessness, San Francisco, www.cohsf.org/Punishing.pdf [perma.cc/NM26-9F68].
[22] *Ibid.*

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6.1.2 *Administrative Fees, Surcharges, and Penalties*

Unpaid criminal justice debts can result in additional surcharges, fees, and penalties.[23] The State can attach different types of surcharges to fines.[24] Certain jurisdictions impose administrative surcharges for certain types of offenses, such as traffic offenses or municipal ordinance violations.[25] The revenue from surcharges funds state-related compensation schemes – such as services for victims of crime – or supports certain governmental programs – such as legal aid.[26]

Beth Colgan notes that various forms of surcharges exist. First, the State can impose a fixed surcharge amount irrespective of the quantum of the fine.[27] For instance, in Minnesota, each traffic offense includes a $75 surcharge.[28] Second, the quantum of the surcharge may increase for fines between certain amounts.[29] For example, in the province of Ontario, fines between $101 and $150 incur a $25 surcharge, whereas fines between $301 and $350 incur a $75 surcharge.[30] Third, the surcharge may be proportional to the quantum of the penalty.[31] California imposes a State surcharge that represents 20 percent of the amount of a traffic fine.[32]

The State can also attach administrative fees to fines.[33] Administrative fees recover the cost of investigating, recouping, and adjudicating fines.[34] For instance, fees subsidize court costs, pay for public defenders, and recoup post-conviction costs.[35]

[23] Christopher Hampson, "The New American Debtors' Prisons" (2016) 44:1 *Am J Crim L* 1 at 3–4; Beth Colgan, "Addressing Modern Debtors' Prisons with Graduated Economic Sanctions that Depend on Ability to Pay" (2019) at 6–7, Hamilton Project, www.hamiltonproject.org/assets/files/Colgan_PP_20190314.pdf [perma.cc/BF37-QP96].

[24] Colgan, "The Excessive Fines Clause" at 32–33.

[25] *Ibid.*

[26] *Ibid.* at 32–34; Criminal Justice Policy Program (CJPP), "Confronting Criminal Justice Debt: A Guide for Policy Reform" (2016) at 6, www.nclc.org/wp-content/uploads/2022/10/confronting-criminal-justice-debt-3.pdf [perma.cc/A7Y5-PYFA]; Karen Martin, Bryan Sykes, Sarah Shannon et al., "Monetary Sanctions: Legal Financial Obligations in U.S. Systems of Justice" (2018) 1 *Annual Rev Criminology* 471 at 473.

[27] Colgan, "The Excessive Fines Clause" at 32–33. *See, e.g.*, Karin Martin, Kimberly Spencer-Suarez, and Gabriela Kirk, "Pay or Display: Monetary Sanctions and the Performance of Accountability and Procedural Integrity in New York and Illinois Courts" (2022) 8:1 *Russell Sage Foundation J Soc Sci* 128 at 136.

[28] *See, e.g.*, Martin, Sykes, Shannon et al., "Monetary Sanctions: Legal Financial Obligations in US Systems of Justice" at 474 (citing Minnesota as an example). *See* Minn. Stat. 2022, § 357.021(6)(a) (2022) (surcharges on criminal and traffic offenders).

[29] Colgan, "The Excessive Fines Clause" at 32–33.

[30] O Reg 161/00, s. 1.

[31] Colgan, "The Excessive Fines Clause" at 32–33.

[32] Min Su, "Taxation by Citation? Exploring Local Governments' Revenue Motive for Traffic Fines" (2019) 80:1 *Pub Admin Rev* 36 at 37; Cal Penal Code, § 1465.7.

[33] Colgan, "The Excessive Fines Clause" at 35.

[34] *Ibid.*

[35] Eisha Jain, "Capitalizing on Criminal Justice" (2018) 67:7 *Duke LJ* 1381 at 1404–05.

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Some jurisdictions impose fees even when the prosecution drops the charges against the defendant, or they are acquitted.[36]

Penalties, for their part, are imposed when defendants do not pay the total amount of their fine.[37] There are various types of penalties: late-payment fees, interest charges, collection costs, and charges to enter into installment plans.[38] Penalties result in more expensive fines for impecunious persons because they cannot afford to pay their initial fines.[39] For this reason, some scholars refer to these supplemental charges as "poverty penalties."[40] In certain cases, the total amount of fees and surcharges can exceed the quantum of the initial fine.[41]

Although an unhoused person may be unable to pay a single expensive fine, research shows that many people experiencing homelessness receive multiple citations that lead to additional fees, surcharges, and penalties, and result in significant criminal justice debt.[42] Marie-Eve Sylvestre and Céline Bellot's research highlights how a 52-year-old unhoused man in Montreal received roughly $89,000 worth of fines that he could not afford to pay.[43] Another person experiencing homelessness in Montreal was fined so many times that he owed roughly $44,000 worth of criminal justice debts.[44] In 2015, a social worker at Montreal's "Droit Devant" organization – an alternative justice organization that helps absolve unhoused persons' criminal justice debts – explained that she frequently encounters people experiencing homelessness who owe over $10,000 in unpaid fines.[45]

[36] Policy Advocacy Clinic, "Making Families Pay: The Harmful, Unlawful, and Costly Practice of Charging Juvenile Administrative Fees in California" (March 2017) at 3, 14, www.law.berkeley.edu/wp-content/uploads/2015/12/Making-Families-Pay.pdf [perma.cc/8DXG-Q2B7].

[37] CJPP, "Confronting Criminal Justice Debt" at 15.

[38] *Ibid.*

[39] *Ibid.*; Colgan, "The Excessive Fines Clause" at 32–33.

[40] CJPP, "Confronting Criminal Justice Debt" at 15; Beth Colgan, "Wealth-Based Penal Disenfranchisement" (2019) 72:1 *Vand L Rev* 55 at 62; Ronald Mendoza, "Why Do the Poor Pay More? Exploring the Poverty Penalty Concept" (2008) 23 *J Int'l Dev* 1 at 2.

[41] Beth Colgan, "Reviving the Excessive Fines Clause" (2014) 102:2 *Cal L Rev* 277 at 286.

[42] *See, e.g.,* Céline Bellot and Marie-Eve Sylvestre, "La Judiciarisation de l'itinérance à Montréal: les dérives sécuritaires de la gestion pénale de la pauvreté" (2017) 47 *RGD* 11 at 31–35.

[43] *Ibid.* at 33–35.

[44] *Ibid.*

[45] "Homeless man's $110K in fines sign of 'systemic' issue with police, advocate says," CBC News (March 15, 2016), www.cbc.ca/news/canada/montreal/montreal-homeless-man-100k-fines-1.3473707 [perma.cc/P7LV-DDFT]. *See also* "Montreal Homeless Facing up to $110,000 in Fines," CTV News (March 3, 2016), www.ctvnews.ca/canada/montreal-homeless-facing-up-to-110–000-in-fines-1.2802694 [perma.cc/8E7T-B7LQ]. *See also* Christopher Curtis, "She's Got $25,000 in Fines and Was Homeless: How Will She Clear the Slate?" Montreal Gazette (June 1, 2018), https://montrealgazette.com/news/local-news/fined-for-being-homeless [perma.cc/ZN9K-94GE].

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6.1.3 *Criminal and Civil Collateral Consequences of Punishment*

Unpaid criminal justice debts result in significant consequences. First, courts may issue bench warrants that result in incarceration.[46] In *Bearden* v. *Georgia*, the US Supreme Court decided that the Fourteenth Amendment prohibits the State from imprisoning defendants because they cannot afford to pay their criminal justice debts.[47] The Court decided that judges must hold a *Bearden* hearing to assess a defendant's ability to pay their fines.[48] These hearings assess, for instance, a defendant's employment history and their available assets.[49]

However, the *Bearden* decision held that indigent defendants may still be imprisoned for unpaid criminal justice debts in two circumstances.[50] First, when they did not make *bona fide* efforts to pay their fines, such as seeking employment or borrowing money.[51] Second, even if the defendant made such efforts, they may be incarcerated if alternate forms of punishment are inadequate in the circumstances.[52] The American Civil Liberties Union (ACLU) has demonstrated that many courts do not conduct *Bearden* hearings to evaluate defendants' financial capacities before incarcerating them.[53] Other research confirms the ACLU's findings.[54]

Canadian case law and legislation also prohibit the State from incarcerating individuals because they cannot afford to pay their criminal justice debts. In *R* v. *Wu*, the Supreme Court of Canada stated that "[g]enuine inability to pay a fine is

[46] Matthew Menendez, Michael Crowley, and Lauren-Brooke Eise et al., *The Steep Costs of Criminal Justice Fees and Fines: A Fiscal Analysis of Three States and Ten Counties* (New York: New York University School of Law, 2019) at 20; Sarah Morgan, "Civil Rights/Constitutional Law – Indebted to the State: How the Thirteenth Amendment's Promise of Abolition Holds Protections against the Modern Debtors' Prisons" (2017) 39:2 *W New Eng L Rev* 327 at 332.

[47] *Bearden* v. *Georgia*, 461 US 660 at 664–67 (1983).

[48] *Ibid.*; Torie Atkinson, "A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prison" (2016) 51 *Harv CR-CLL Rev* 189 at 235.

[49] *Bearden* v. *Georgia*, 461 US 660 (1983).

[50] *Ibid.*

[51] *Ibid.* at 665–73.

[52] *Ibid.*

[53] ACLU Colorado, "Justice Derailed: A Case Study of Abusive and Unconstitutional Practices in Colorado City Courts" (October 5, 2017) at 4, 8–10, www.aclu-co.org/sites/default/files/JUSTICE-DERAILED-web.pdf [perma.cc/MZS6-QGM4]; ACLU Ohio, "The Outskirts of Hope: How Ohio's Debtors' Prisons Are Ruining Lives and Costing Communities" (April 2013) at 9, 12, 14, www.acluohio.org/sites/default/files/TheOutskirtsOfHope2013_04.pdf [perma.cc/LNE2-MQQW]; ACLU Louisiana, "Louisiana's Debtor Prisons: An Appeal to Justice" (2015) at 19–21, www.laaclu.org/en/publications/louisianas-debtors-prisons-appeal-justice [perma.cc/427Z-77GK]; ACLU Washington, "Modern Day Debtors' Prisons: The Ways Court-Imposed Debts Punish People for Being Poor" (2014), www.aclu-wa.org/docs/modern-day-debtors-prisons-washington [perma.cc/7WMW-S88U].

[54] *See, e.g.*, Menendez, Crowley, Eise et al., "The Steep Costs of Criminal Justice Fees and Fines" at 11. See a useful summary of that research in Martin et al., "Monetary Sanctions: Legal Financial Obligations in US Systems of Justice" at 476; Jack Furness, "Willful Blindness: Challenging Inadequate Ability to Pay Hearings through Strategic Litigation and Legislative Reforms" (2021) 52:2 *Colum Hum Rts L Rev* 957 at 984–88.

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not a proper basis for imprisonment."[55] Imprisonment for debt is permissible only where other alternatives are inappropriate and the defendant refuses to pay their fine without reasonable excuse.[56] Like in the United States, Canadian courts must assess the defendant's ability to pay prior to incarcerating them for unpaid criminal justice debts.[57] For instance, the province of Ontario requires judges to gauge a defendant's ability to pay a criminal justice debt before they can be imprisoned.[58] A defendant who cannot afford to pay their fines may also request that the court expunge their fine.[59]

However, in other Canadian jurisdictions, impecunious defendants who cannot afford to pay their fines have been incarcerated. Montreal ended the practice in 2004.[60] In contrast, in 2017, the city of Val d'Or imposed a moratorium on the incarceration of impecunious persons who could not afford to pay their fines.[61] Research demonstrated that 100 percent of individuals who were incarcerated for failing to pay their criminal justice debts were Indigenous.[62] Quebec City ceased incarcerating impecunious persons for unpaid fines in 2018.[63]

Unpaid fines lead to other consequences. They may constitute a breach of one's parole or probation conditions and result in imprisonment.[64] Individuals who are incarcerated for criminal justice debts are unable to work and may lose their jobs, which undermines their ability to support themselves and their families.[65] They are

[55] *R* v. *Wu* 2003 SCC 73 at paras. 3, 60–66.
[56] *Ibid.* at para. 47; Ben-Ishai and Nayerahmadi, "Over-Indebted Criminals in Canada" at 213.
[57] *R* v. *Wu* 2003 SCC 73 at para. 47; *R* v. *Franc*, 2020 ABPC 156 at para. 74; *R* v. *Schultz (No.3)*, 2019 ABPC 97 at para. 76.
[58] Provincial Offences Act, RSO 1990, c. P33, s. 69(9).
[59] *Ibid.* s. 69(15)(c).
[60] Véronique Fortin and Isabelle Raffestin, "Le Programme d'Accompagnement Justice-Itinérance à la Cour Municipale de Montréal (PAJIC): un tribunal spécialisé ancré dans le communautaire" (2017) 47 RGD 177 at 180–81.
[61] *See, e.g.*, Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec, *Listening, Reconciliation, and Progress: Final Report* (Quebec: Government of Quebec, 2019) at 318, www.cerp.gouv.qc.ca/fileadmin/Fichiers_clients/Rapport/Final_report.pdf [perma.cc/ZMA6-LSG5]; Marilyn Coupienne and Édith Perrault, "De la rue à la prison et de la prison à la rue: une analyse du caractère cruel et inusité de l'emprisonnement pour non-paiement d'amendes des personnes en situation d'itinérance" (2020) 50:1 *RGD* 285 at 288.
[62] Coupienne and Perrault, "De la rue à la prison et de la prison à la rue" at 288, citing Public Inquiry Commission on Relations between Indigenous Peoples and Certain Public Services in Québec, *Listening, Reconciliation, and Progress* at 317.
[63] Jean Luc-Lavallée, "Amendes impayées: fini la prison à Québec pour les itinerants," Le Journal de Québec (November 7, 2018), www.journaldequebec.com/2018/11/07/amendes-impayees–fini-la-prison-a-quebec-pour-les-itinerants [perma.cc/FLA2-P4XS]. *But see* Marc Allard, "Encore la prison pour des amendes impayées," Le Soleil (January 16, 2020), www.lesoleil.com/2020/01/16/encore-la-prison-pour-des-amendes-impayees-081314dc2979528276ode780a340269d [perma.cc/WP72-962D] (the article notes that precariously housed individuals could still be imprisoned for unpaid fines, as well as individuals experiencing hidden homelessness who stay with acquaintances).
[64] Katherine Beckett and Alexes Harris, "On Cash and Convictions: Monetary Sanctions as Misguided Policy" (2011) 10 *Criminology & Pub Pol'y* 509 at 524.
[65] Menendez et al., "The Steep Costs of Criminal Justice Fees and Fines" at 6.

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also exposed to various harms and risks during imprisonment, such as violence and psychological abuse.[66]

Criminal justice debt can also result in civil consequences that more deeply entrench individuals in homelessness. Various US states suspend an individual's driver's license if they do not pay their fines.[67] Some forms of employment – such as being a taxi driver, bus driver, long-haul trucker, or delivery person – require a driver's license.[68] An individual may lose their job because their profession required a driver's license.[69] Or, they may lose their job because their city lacks adequate public transportation infrastructure and they cannot commute to work.[70] Many individuals who lose their job due to a driver's license suspension receive a lower salary in their subsequent employment.[71] Driver license suspensions also tend to disproportionately impact racialized and socioeconomically disadvantaged persons.[72] Despite these drawbacks, many US states continue to suspend driver's licenses for unpaid criminal justice debt.[73]

Some jurisdictions convert unpaid criminal justice debts into default civil judgments.[74] Cities may contract out unpaid fines to debt-collection agencies.[75] Criminal justice debt can also be disclosed to consumer reporting companies.[76] Unpaid fines can negatively impact a person's credit rating, which can make it more

[66] *See, e.g.*, Benjamin Hattem, "Carceral Trauma and Disability Law" (2020) 72 *Stan L Rev* 995 at 997–98; The Correctional Investigator of Canada, "Annual Report: Office of the Correctional Investigator, 2019–2020" (Ottawa, 2020) at 23–25 (describing sexual coercion in prisons); Terry Skolnik, "Use of Force and Criminalization" (2021) 85:3 *Alb L Rev* 663 at 675.

[67] Atkinson, "A Fine Scheme" at 218–19; ACLU, "Reckless Lawmaking: How Debt-Based Driver's License Suspension Laws Impose Harm and Waste Resources" (2021) at 5, www.aclu.org/wp-content/uploads/legal-documents/reckless_lawmaking_aclu_final_4.19.21.pdf [perma.cc/X3PE-5827]; Joni Hirsch and Priya Sarathy Jones, "Driver's License Suspension for Unpaid Fines and Fees: The Movement for Reform" (2021) 54:4 *U Mich JL Reform* 875 at 876. *Ibid.* at fn. 1, citing Free to Drive, "Existing Laws for Failure to Pay," www.freetodrive.org/maps/#page-content [perma.cc/8ZDA-FAVZ]. The website provides a map of states that continue to suspend driver's licenses for criminal justice debt.

[68] William Crozier and Brandon Garrett, "Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina" (2020) 69:7 *Duke LJ* 1585 at 1599.

[69] *Ibid. See, e.g.*, Elizabeth Forester, "Impact of Criminal Justice Debt on Indigent Defendants in Tennessee" (2020) 61 *Wash U JL & Pol'y* 253 at 263.

[70] Crozier and Garrett, "Driven to Failure" at 1599–600.

[71] *See, e.g.*, Alan Voorhees and Edward Bloustein, "Motor Vehicle Affordability and Fairness Taskforce" (2006) at XII, www.state.nj.us/mvc/pdf/about/AFTF_final_02.pdf [perma.cc/9LRY-74ZL].

[72] *See, e.g.*, Mario Salas and Angela Ciolfi, "Driven by Dollars: A State-By-State Analysis of Driver's License Suspensions for Failure to Pay Court Debt" (2017) at 4, www.justice4all.org/wp-content/uploads/2017/09/Driven-by-Dollars.pdf [perma.cc/W4YP-GAXG]; Melissa Toback Levin, "Driver's License Suspensions for Nonpayments: A Discriminatory and Counterproductive Policy" (2020) 48:1 *Hastings Const LQ* 73 at 76–78.

[73] Free to Drive, "Existing Laws for Failure to Pay."

[74] *See, e.g.*, Ilya Slavinski and Kimberly Spencer-Suarez, "The Price of Poverty: Policy Implications of the Unequal Effects of Monetary Sanctions on the Poor" (2021) 37:1 *J Contemp Crim Just* 45 at 49; Bannon, Nagrecha, and Diller, "Criminal Justice Debt: A Barrier to Reentry."

[75] Justin Olson and Scott Macdonald, "Washington's War on the Visibly Poor: A Survey of Criminalizing Ordinances and Their Enforcement" (2015) at 16, fn. 64, https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1001&context=hrap [perma.cc/Z6MJ-NZY4].

[76] Bannon, Nagrecha, and Diller, "Criminal Justice Debt: A Barrier to Reentry" at 27.

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difficult to rent an apartment and register for utilities.[77] A bad credit rating also decreases one's ability to obtain loans, receive credit cards, or open bank accounts.[78] Empirical research also indicates that unhoused persons who accumulate greater criminal justice debts tend to experience homelessness for longer periods.[79] Together, the cumulative effects of fines, fees, surcharges, penalties, and the collateral consequences of criminal justice debt entrench individuals in the condition of homelessness.

6.2 DISPROPORTIONALITY AND PUNITIVE ENTRENCHMENT

Laws that govern public property may impose disproportionate punishments on unhoused persons.[80] Proportionality implies that a punishment is commensurate with the offense's severity and the defendant's blameworthiness.[81] In terms of offense severity, conduct that harms others or violates their physical integrity are punished more serious than those that do not.[82] Crimes that are committed intentionally are punished more harshly than those that are committed as a result of recklessness or negligence.[83]

Proportionality comprises two elements: cardinal proportionality and ordinal proportionality.[84] Cardinal (or absolute) proportionality refers to the proportionate punishment for a certain crime without having to compare it to other offenses in the criminal justice system.[85] The notion of cardinal proportionality suggests that certain punishments are inherently appropriate for certain crimes.[86] Ordinal proportionality, on the other hand, determines the punishments for different offenses

77 Catherine Chesnay, Céline Bellot, and Marie-Eve Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55:2 *Can J Corr* 161 at 178; Sylvestre and Bellot, "Challenging Discriminatory and Punitive Responses to Homelessness in Canada" at 183.

78 Atkinson, "A Fine Scheme" at 220.

79 Jessica Mogk, Valerie Shmigol, Marvin Futrell et al., "Court-Imposed Fines as a Feature of the Homelessness- Incarceration Nexus: A Cross-Sectional Study of the Relationship between Legal Debt and Duration of Homelessness in Seattle, Washington, USA" (2019) 42:2 *J Pub Health* at 5.

80 This Section's arguments were first advanced in Skolnik, "Rethinking Homeless People's Punishments" at 84–88.

81 *See, e.g.*, *R* v. *M(CA)* [1996] 1SRC 500 at paras. 39–40; Adam Kolber, "The Subjective Experience of Punishment" (2009) 109 *Colum L Rev* 182 at 199.

82 Andrew von Hirsch, *Deserved Criminal Sentences: An Overview* (Oxford: Hart, 2017) at 65–69.

83 *Ibid.* at 64.

84 Andrew von Hirsch, *Censure and Sanctions* (Oxford University Press, 1991) at 17–18; Andrew von Hirsch, "Proportionality in the Philosophy of Punishment" (1992) 16 *Crime & Just* 55 at 75–79. Note that other scholars refer to cardinal proportionality as "absolute" proportionality" and ordinal proportionality as "comparative proportionality." *See, e.g.*, Göran Duus-Otterström, "Weighing Relative and Absolute Proportionality in Punishment" in Michael Tonry (ed.) *Of One-Eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press, 2019) at 33–34.

85 *See, e.g.*, Vincent Chiao, "Proportionality and its Discontents" (2022) 41 *L & Phil* 193 at 195.

86 *Ibid.*; Nicola Lacey and Hannah Packard, "The Chimera of Proportionality: Institutionalising Limits on Punishment in Contemporary Social and Political Systems" (2015) 78:2 *Mod L Rev* 216 at 227.

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based on their comparative gravity.[87] The concept of ordinal proportionality contains three principles. *Parity* entails that comparably serious offenses should result in similar punishments.[88] *Rank ordering* implies that more serious crimes should receive harsher punishments than less serious crimes.[89] *Spacing* implies that that punishments for more and less serious crimes should vary sufficiently to reflect their relative gravity.[90]

Unhoused persons' punishments for violating laws that govern public property can raise three types of proportionality concerns.[91] First, the quantum of a fine may be disproportional to the offense's gravity, such that it violates both cardinal and ordinal proportionality constraints.[92] Recall that in *Jones* v. *City of Los Angeles*, discussed in Section 6.1.1, unhoused persons who slept on a sidewalk could be fined up to $1,000 fine and/or receive a six-month prison sentence.[93] This same punishment is imposed for assault or drinking and driving, even though sleeping on a sidewalk neither harms others nor endangers others' well-being.[94] By treating sleeping on a sidewalk as if it were as harmful as assaulting others or driving while intoxicated, the punishment contravenes rank ordering, spacing, and absolute proportionality requirements.[95]

Second, unhoused persons' punishments can be excessive because the law ignores their personal circumstances, which results in harsher sanctions for certain individuals.[96] This second form of disproportionate punishment violates the parity principle because it results in additional poverty penalties for unhoused persons.[97] All other things equal, even though unhoused persons committed the same offense, they are punished more harshly than people with access to housing because they cannot afford to pay their fines.[98] For instance, people experiencing homelessness accumulate additional fees, surcharges, and penalties that people with access to housing will not incur.[99] In some cases, the quantum of the fine becomes so high that it is virtually impossible for an unhoused person to pay it. For this reason, the Supreme Court of Canada decided that mandatory minimum financial penalties

87 Von Hirsch, *Censure and Sanctions* at 18–19.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.*
91 Skolnik, "Rethinking Homeless People's Punishments" at 84–88.
92 *Ibid.* at 84.
93 *Ibid.*; Cal Penal Code, §§240 and 241 (assault) and Cal Vehicle Code §§ 23152 and 23536 (driving while intoxicated). Cited in Skolnik, "Rethinking Homeless People's Punishments."
94 Skolnik, "Rethinking Homeless People's Punishments" at 84.
95 *Ibid.*
96 *Ibid.* at 88; Colgan, "The Excessive Fines Clause" at 48–51.
97 Colgan, "The Excessive Fines Clause" at 48–51 (describing how such fines violate equality in sentencing).
98 *See, e.g.*, April Fernandes, "Monetary Sanctions: A Review of Revenue Generation, Legal Challenges, and Reform" (2019) 15 *Ann Rev L & Soc Sci* 397 at 404.
99 Colgan, "The Excessive Fines Clause" at 48–51.

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can constitute a cruel and unusual punishment because they result in de facto indeterminate sentences for unhoused persons.[100] Unhoused persons' punishments can violate the parity principle in other ways. Due to extreme poverty, people experiencing homelessness may also be incarcerated for unpaid criminal justice debts, while those who can afford to pay their fines will not.

Third, unhoused persons punishments are excessive when they ignore the extent of the defendant's culpability given the circumstances.[101] Many laws that govern public property are strict liability offenses that impose a fixed fine on offenders irrespective of their moral blameworthiness.[102] Because these laws do not generally impose a *mens rea* requirement, the punishments do not generally distinguish between intentional legal transgressions versus negligent or unintentional ones. If an unhoused person takes reasonable precautions to obey a law that governs public property yet violates it, they risk being punished as harshly as someone who intentionally transgresses the law.[103] Such penalties ignore the defendant's degree of culpability, which in addition to the severity of the offense, is the other crucial factor when determining the proportionality of an individual's punishment.[104] Such punishments are objectionable because they communicate that the defendant is more blameworthy than they are.[105]

6.3 RETRIBUTIVISM, CONSEQUENTIALISM, AND LAWS THAT GOVERN PUBLIC PROPERTY

The sanctions associated with laws that govern public property can be difficult to justify according to retributivist and consequentialist theories of punishment. Retribution is a backwards-looking punishment theory.[106] It holds that offenders deserve punishment because of their culpable wrongdoing.[107] As a backward-looking theory, retributivists value punishment irrespective of whether it produces

[100] *R* v. *Boudreault*, 2018 SCC 58 at paras. 3, 64 (striking down the mandatory victim surcharge for that reason); Terry Skolnik, "Beyond *Boudreault*: Challenging Choice, Culpability, and Punishment" (2019) 50 *CR* (7th) 283 at 283.

[101] Skolnik, "Rethinking Homeless People's Punishments" at 85–87.

[102] David Smith, "A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy" (1994) 12:2 *Yale L & Pol'y Rev* 487 at 494; Donald Baker, "Anti-Homeless' Legislation: Unconstitutional Efforts to Punish the Homeless" (1991) 45 *U Miami L Rev* 417 at 450–51.

[103] Skolnik, "Rethinking Homeless People's Punishments" at 85–87.

[104] *See, e.g.*, Richard Frase, "Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: Proportionality Relative to What" (2005) 89:3 *Minn L Rev* 571 at 590.

[105] Antony Duff, *Trials and Punishments* (Cambridge University Press, 1991) at 155, cited in Skolnik, "Rethinking Homeless People's Punishments" at 86; *R* v. *M (CA)* [1996] 1 SCR 500.

[106] Leo Zaibert, *Punishment and Retribution* (New York: Routledge, 2006) at 35, 135; Ted Honderich, *Punishment: The Supposed Justifications Revisited*, 5th ed. (Ann Arbor: Pluto, 2006) at 17–19.

[107] John Kleinig, "What Does Wrongdoing Deserve?" in Michael Tonry (ed.), *Retributivism Has A Past: Has It A Future?* (Oxford University Press, 2011) at 54–55.

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prospective benefits.[108] Proportionality is central to retributivism.[109] The defendant's desert is calculated according to the crime's severity and the offender's level of moral blameworthiness.[110] Excessive punishments are objectionable because defendants are punished more harshly than they deserve.

Retributive theories of punishment recognize that individuals deserve punishment only when they had the free choice to obey the law.[111] For instance, H. L. A. Hart famously argued that individuals can be punished only when they had the capacity and fair opportunity to comply with the law.[112] These requirements aim to recognize the importance of human agency and rationality.[113] The law instrumentalizes individuals, treats them as scapegoats, and disregards their human agency when they are punished for violating laws that they could not obey even if they tried.[114]

The importance of free choice to obey the law underpins excusatory defenses such as duress and necessity.[115] Individuals are acquitted when threats, violence, or perilous circumstances undermined their freedom to comply with the law.[116] In such contexts, law-abidingness is not a reasonable alternative to breaking the law.[117] For this reason, individuals do not deserve punishment when they lacked a free choice – and thus a fair opportunity – to obey the law.[118]

[108] Michael Moore, *Placing Blame: A Theory of the Criminal Law* (Oxford University Press, 2010) at 153–54; Russell Christopher, "Deterring Retributivism: The Injustice of 'Just' Punishment" (2002) 96:3 *Nw U L Rev* 843 at 847–48.

[109] *See, e.g.*, William W. Berry II, "Promulgating Proportionality" (2011) 46:1 *Ga L Rev* 69 at 92–93; Thom Brooks, "Retribution" in Thom Brooks (ed.), *Retribution* (London: Routledge, 2019) at 83.

[110] Andrew von Hirsch, "Proportionality in the Philosophy of Punishment: From 'Why Punish' to 'How Much'" (1990) 1 *Crim LF* 259 at 262; Douglas Husak, "Why Punish the Deserving?" (1992) 26 *Nous* 447 at 462.

[111] *See, e.g.*, Michael Moore, "Choice, Character, and Excuse" (1990) 7 *Soc Phil & Pol'y* 29 at 31–35; Herbert Morris, "Persons and Punishment" (1968) 52:4 *Monist* 475 at 485; Samuel Pillsbury, "The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility" (1992) 67:3 *Ind LJ* 719 at 722; Antony Duff, "Choice, Character, and Criminal Liability" (1993) 12:4 *L & Phil* 345 at 346–55.

[112] H. L. A. Hart and John Gardner, *Punishment and Responsibility* (Oxford University Press, 2008) at 22–23, 153. It is important to note that Hart advanced a mixed theory of punishment.

[113] Peter Aranella, "Convicting the Morally Blameless: Reassessing the Relationship between Legal and Moral Accountability" (1992) 39:6 *UCLA L Rev* 1511 at 1532–33, 1534–35.

[114] Antony Duff, "Penal Communications: Recent Work in the Philosophy of Punishment" (1996) 20 *Crime & Just* 1 at 10; Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 *Fordham Urb LJ* 741 at 745.

[115] Moore, "Choice, Character, and Excuse" at 29.

[116] *See, e.g.*, Terry Skolnik, "Three Problems with Duress and Moral Involuntariness" (2016) 63:1 *Crim LQ* 124 at 127–28.

[117] *See, e.g.*, Benjamin Berger, "Emotions and the Veil of Voluntarism: The Loss of Judgment in Canadian Criminal Defences" (2005) 51:1 *McGill LJ* 99 at 107–08.

[118] Moore, "Choice, Character, and Excuse" at 29; Joshua Dressler, "Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code" (1988) 19:3 *Rutgers LJ* 671 at 674–75, 701–02.

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Scholars contend that retribution cannot justify the punishment of unhoused persons who violate laws that govern public property in two contexts. First, some argue that unhoused persons do not deserve punishment when they lacked a fair opportunity to obey laws that govern public property, especially when laws prohibit urban camping or sleeping in public despite insufficient shelter space to accommodate the city's unhoused population.[119] Notably, the lack of shelter space undermines unhoused persons' fair opportunity to obey these laws.[120] Second, some argue that unhoused persons' punishments violate retributivism's proportionality constraint.[121] Unhoused persons' sanctions can be excessive for various reasons.[122] As discussed in Section 6.2, punishments can be disproportionate with respect to the nature of the offense, individuals' personal circumstances, and their level of moral blameworthiness.[123] Retributivism's core tenets are violated in these contexts because unhoused persons do not deserve punishment or are punished more harshly than they deserve.

Others argue that unhoused persons' punishments cannot be justified by consequentialist theories of punishment in certain contexts.[124] Consequentialism is a forward-looking punishment theory.[125] It posits that punishment is justified because of its future benefits – namely, that it prevents the offender and others from committing crimes.[126] Like retributivism, consequentialism also appeals to the offender's rationality, agency, and freedom of choice.[127] The threat of punishment incentivizes individuals to comply with the law.[128] The prospect of punishment appeals to individuals' self-interest to maximize their freedom and avoid coercion.[129]

[119] Skolnik, "Homelessness and the Impossibility to Obey the Law" at 749.

[120] *See, e.g., ibid.*; Smith, "A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy" at 488, 498–99; Sara Rankin, "Punishing Homelessness" (2019) 22:1 *New Crim L Rev* 99 at 116–17; Sara Rankin, "Hiding Homelessness: The Transcarceration of Homelessness" (2021) 109:2 *Cal L Rev* 559 at 571; Edward Walters, "No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless" (1995) 62:4 *U Chi L Rev* 1619 at 1641.

[121] Skolnik, "Rethinking Homeless People's Punishments" at 84–88. *See also* Siobhan Allen, "The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness" (2022) 55:4 *Colum JL & Soc Probs* 499 at 526–30; Sara Rankin, "Civilly Criminalizing Homelessness" (2021) 56:2 *Harv CR-CL L Rev* 367 at 385–87.

[122] *Ibid.*

[123] Section 6.2.

[124] Skolnik, "Homelessness and the Impossibility to Obey the Law" at 749.

[125] Dolinko, "Punishment" at 405.

[126] *Ibid.*

[127] Ronald Akers, "Rational Choice, Deterrence, and Social Learning Theory in Criminology: The Path Not Taken" (1990) 81:3 *J Crim L & Criminology* 653 at 654; Terry Skolnik, "Socially Deprived Offenders" in Jesper Ryberg (ed.), *The Oxford Handbook of Punishment Theory and Philosophy* (Oxford University Press, 2024) (forthcoming). Draft on file with author.

[128] Von Hirsch, *Censure and Sanctions* at 13.

[129] *See, e.g.*, Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford University Press, 2009) at 47–48.

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Some note that punishments cannot prevent unhoused persons from alleviating their needs on public property when they lack reasonable alternatives.[130] According to this argument, since individuals without access to property must alleviate their needs, access to private property – rather than punishment – is necessary to ensure compliance.[131] The brunt of this argument is that punishment is not an instrumentally rational means to deter unhoused persons from alleviating their needs on public property when they lack other reasonable options.[132]

6.4 COUNTERPRODUCTIVITY, PUNITIVE ENTRENCHMENT, AND DOMINATION

The punishments imposed on unhoused persons for violating laws that govern public property are objectionable for another reason: these punishments are counterproductive. Harsh punishments increase the risk that individuals will become entrenched in homelessness, continue to alleviate their needs on public property, and repeatedly violate laws that govern public property.[133] Punitive entrenchment prolongs and aggravates the double domination that unhoused persons experience.

The relationship between need-alleviating conduct, negative externalities, and punishment highlights the self-defeating nature of unhoused persons' harsh penalties for violating laws that regulate public property. Need-alleviating conduct that occurs on public property generates negative externalities.[134] The term "negative externalities" implies "acts that impose unaccounted-for costs on others."[135] The previous chapter demonstrated how individuals who alleviate their needs on public property may create public health concerns, decrease the aesthetic value of public space, reduce the efficiency of public ways, deprive others from using certain spaces, and more.[136] These acts can diffuse negative externalities (or unaccounted-for costs) amongst many individuals who use public property simultaneously.[137]

[130] Maria Foscarinis, "Downward Spiral: Homelessness and its Criminalization" (1996) 14 *Yale L & Pol'y Rev* 1 at 58.

[131] *Ibid.*; Jane Baron, "Homelessness as a Property Problem" (2004) 36:2 *Urb Law* 273 at 287.

[132] Colton Fehr, "Instrumental Rationality and General Deterrence" (2019) 57:1 *Alta L Rev* 53 at 61 (describing the relationship between deterrence and instrumental rationality; although Fehr focuses primarily on the relationship between punishment and general deterrence, similar arguments apply to the relationship between punishment and specific deterrence).

[133] Terry Skolnik, "Freedom and Access to Housing: Three Conceptions" (2018) 35 *Windsor YB Access Just* 226 at 240; Skolnik, "Rethinking Homeless People's Punishments" at 82.

[134] *See*, *e.g.*, Robert Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" (1996) 105:5 *Yale LJ* 1165 at 1172.

[135] Gideon Parchomovsky and Peter Siegelman, "Cities, Property, and Positive Externalities" (2012) 54:1 *Wm & Mary L Rev* 211 at 214.

[136] *See* Chapter 5 of this book; Skolnik, "Freedom and Access to Housing" at 240.

[137] Ellickson, "Controlling Chronic Misconduct in City Spaces" at 1177.

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Private property is valuable because it internalizes unaccounted-for costs that would otherwise occur on public property.[138] Individuals who can freely access private property can alleviate their needs without creating negative externalities that undermine others' use and enjoyment of public space. In contrast, individuals who lack access to private property may generate such unaccounted-for costs because they have no alternative but to alleviate their needs on public property.[139] Since individuals cannot abstain from alleviating their needs, they must access a private place that absorbs these unaccounted-for costs.[140]

Access to housing endows individuals with the greatest liberty to access private property, alleviate their needs in private, and generate fewer negative externalities on public property. Conversely, individuals without access to housing will continue to alleviate their needs in public and generate these unaccounted-for costs.[141]

This explains why punitive entrenchment is morally objectionable for various reasons. First, harsh punishments and their collateral consequences may not only decrease access to housing for unhoused persons, but may also increase the likelihood that they will consistently alleviate their needs on public property.[142] These punishments can be more than ineffective from the standpoint of deterrence; they can be counterproductive.[143] Second, punitive entrenchment can cement individuals in the condition of homelessness where they will continue to experience nonegalitarian coercion.[144] So long as individuals remain entrenched in homelessness, the State will have greater power to regulate and police their basic needs compared to people with access to housing.[145] Third, individuals who are entrenched in homelessness will persistently suffer double domination, as described in earlier chapters. Notably, others will control their opportunities to obey laws that govern public property, and they will be forced to make nonegalitarian sacrifices to comply with these laws.[146] Ultimately, punitive entrenchment leads to nonegalitarian coercion and double domination.

6.5 CONCLUSION

This chapter demonstrated why the punishments associated with laws that govern public property entrench individuals in homelessness. It highlighted why unhoused persons' punishments can be excessive and violate basic proportionality constraints.

[138] *See generally* Harold Damsetz, "A Theory of Property Rights" (1967) 57:2 *Am Econ Rev* 347 at 348 (noting that private property internalizes externalities).
[139] *See, e.g.*, Skolnik, "Freedom and Access to Housing: Three Conceptions" at 240.
[140] Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39:1 *UCLA L Rev* 295 at 321 (describing how unhoused persons must alleviate their needs).
[141] *Ibid.*
[142] Skolnik, "Rethinking Homeless People's Punishments" at 82.
[143] *Ibid.* at 83.
[144] Skolnik, "Freedom and Access to Housing" at 240–41.
[145] Skolnik, "How and Why" at 323.
[146] Skolnik, "Freedom and Access to Housing: Three Conceptions" at 240–41.

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It demonstrated why some of these punishments and their collateral consequences cannot be justified by retributive and consequentialist theories of punishment. Its concluding parts explained why these punishments can be counterproductive. The next chapter explains how the State has an overarching fiduciary duty to counteract domination, and three specific fiduciary duties related to homelessness and public property.

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