2

Homelessness and the Constitution

Following the Broken Windows Theory's emergence, courts and scholars devoted greater attention to how the regulation of public property impacted people experiencing homelessness. Beginning in the 1980s, scholars, public interest groups, and civil libertarians increasingly argued that laws that regulate public property violated unhoused persons' constitutional rights and criminalized the condition of homelessness.[1] Others disagreed. Certain cities and local governments claimed that civil libertarians ignored the need to regulate public property to maintain its communal purpose and foster its aesthetic value.[2] Courts sought to balance unhoused persons' fundamental rights with cities' need to regulate public property.[3]

This chapter provides an overview of how US and Canadian constitutional law approach homelessness and the regulation of public property. It explores the limited success of constitutional rights and doctrines that are invoked to challenge laws that govern public property and to protect unhoused persons' fundamental interests. These constitutional rights and doctrines are: (1) the void for vagueness doctrine, (2) the overbreadth doctrine, (3) the fundamental right to travel, (4) the equal

[1] *See, e.g.*, Gregg Barak and Robert Bohm, "The Crimes of the Homeless or the Crime of Homelessness? On the Dialectics of Criminalization, Decriminalization, and Victimization" (1989) 13:3 *Contemp Crises* 275 at 278–79; Judy Aulette and Albert Aulette, "Police Harassment of the Homeless: The Political Purpose of the Criminalization of Homelessness" (1987) 11 *Human and Soc'y* 244 at 246–47 (cited in Barak and Bohm, "The Crimes of the Homeless or the Crime of Homelessness?"); Maria Foscarinis, "Downward Spiral: Homelessness and Its Criminalization" (1996) 14:1 *Yale L & Pol'y Rev* 1 at 25; Donald Baker, "'Anti-Homeless' Legislation: Unconstitutional Efforts to Punish the Homeless" (1990) 45:2–3 *U Miami L Rev* 417 at 424; Don Mitchell, "Anti-Homeless Laws and Public Space II: Further Constitutional Issues" (1998) 19:2 *Urb Geo* 98 at 103.

[2] Robert Teir, "Restoring Order in Urban Public Spaces" (1998) 2 *Tex Rev L & Pol* 255 at 257; Robert Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning" (1996) 105:5 *Yale LJ* 1165 at 1170–71, 1173–74; James Wilson and George Kelling, "Broken Windows: The Police and Neighborhood Safety," The Atlantic (March 1982), www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465 [perma.cc/MM5T-W4XZ].

[3] *See, e.g.*, *Pottinger* v. *City of Miami*, 810 F Supp 1551 at 1554 (SD Fla 1992), noting: "In essence, this litigation results from an inevitable conflict between the need of homeless individuals to perform essential, life-sustaining acts in public and the responsibility of the government to maintain orderly, aesthetically pleasing public parks and streets."

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protection clause, and (5) the right to be free from cruel and unusual punishments.[4] This chapter highlights how these doctrines fail to protect unhoused persons against various forms of actual and potential interference, such as displacement, fines, arrests, and imprisonment. It also discusses how US and Canadian courts have rejected a positive right to housing, which would better safeguard unhoused persons' basic interests (more on this point in the next chapter).[5] By exploring the limitations of these constitutional rights and doctrines, this chapter lays the groundwork for later parts of the book that show why unhoused persons tend to lack liberty and political equality.

2.1 VOID FOR VAGUENESS

The void for vagueness doctrine prohibits unconstitutionally vague or ambiguously worded penal statutes.[6] There are three justifications for the void for vagueness doctrine.[7] First, the doctrine promotes fair notice and helps prevent unfair surprises.[8] Individuals can obey the law and plan their lives more easily when statutes are clearer and more precise.[9] Second, the void for vagueness doctrine helps deter arbitrary and discriminatory enforcement because it constrains police discretion.[10] Officers enjoy greater police discretion to interpret and enforce vague penal statutes. By limiting police discretion, the void for vagueness doctrine promotes the rule of law and political equality.[11] Third, the doctrine encourages respect for the separation of powers.[12] Ambiguous laws require judges to determine which conduct is illegal, which delegates lawmaking authority from legislators to judges.[13]

[4] Kathryn Hansel, "Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems" (2011) 6:2 *Nw JL & Soc Pol'y* 445 at 448–61; Foscarinis, "Downward Spiral" at 26–49.

[5] Chester Hartman, "The Case for a Right to Housing" (1998) 9:2 *Hous Pol'y Debate* 223 at 229–30; Curtis Berger, "Beyond Homelessness: An Entitlement to Housing" (1991) 45:2–3 *U Miami L Rev* 315 at 324–25; Shelby Green, "Imagining a Right to Housing, Lying in the Interstices" (2012) 19:3 *Geo J Poverty L & Pol'y* 393 at 396–97; Martha Jackman and Bruce Porter, "Rights-Based Strategies to Address Homelessness and Poverty in Canada" in Martha Jackman and Bruce Porter (eds.), *Advancing Social Rights in Canada* (Toronto: Irwin Law, 2014) at 101.

[6] *See, e.g.*, Peter Low and Joel Johnson, "Changing the Vocabulary of the Vagueness Doctrine" (2015) 101:8 *Va L Rev* 2051 at 2052, citing *Kolender* v. *Lawson*, 461 US 352 (1983).

[7] *See, e.g.*, Andrew Goldsmith, "The Void-for-Vagueness Doctrine in the Supreme Court, Revisited" (2003) 30:2 *Am J Crim L* 279 at 283–93.

[8] Marc Ribeiro, *Limiting Arbitrary Power: The Vagueness Doctrine in Canadian Constitutional Law* (Vancouver: UBC Press, 2004) at 1.

[9] *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 SCR 1123 at 1150–52; *Papachristou* v. *Jacksonville*, 405 US 156 at 162 (1972), citing *United States* v. *Harriss*, 347 US 612 at 617 (1954).

[10] *Kolender* v. *Lawson*, 461 US 352 at 357.

[11] John Calvin Jeffries Jr., "Legality, Vagueness, and the Construction of Penal Statutes" (1985) 71:2 *Va L Rev* 189 at 212; *R* v. *Levkovic*, 2013 SCC 25 at para. 32.

[12] Goldsmith, "The Void-for-Vagueness Doctrine in the Supreme Court, Revisited" at 284–86.

[13] *Ibid.* at 284–85.

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Precise statutory language can reduce the risk that judges usurp the legislature's role.[14]

Penal laws must be adequately precise to withstand constitutional scrutiny. The US Supreme Court stated in *Kolender* v. *Lawson* that penal statutes must be defined with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."[15] The Supreme Court of Canada, for its part, stated in *R* v. *Levkovic* that "the essential elements of the crime must be ascertainable in advance."[16] In Canada, a law is unconstitutionally vague where it fails to give "sufficient guidance for legal debate."[17] Furthermore, a Canadian court can conclude that a law fails to meet that requirement only when it has exhausted all of its interpretive function yet still cannot ascertain the statute's scope or meaning.[18]

Following US Supreme Court decisions such as *Papachristou*, *Morales*, and *Kolender* discussed in the previous chapter, civil libertarians argued that some laws that govern public property were unconstitutionally vague.[19] They argued that statutory terms such as "camping," "loitering," and "vagrancy" were unconstitutionally vague and empowered police officers to selectively enforce municipal ordinances against unhoused persons.

In some cases, the arguments succeeded. For example, in the 2007 Supreme Court of Hawaii decision *State* v. *Beltran*, a Honolulu ordinance prohibited "what reasonably appears to constitute camping" in a public area "regardless of the intent of the participants or the nature of any other activities in which they may also be engaging."[20] The court held that the ordinance was void for vagueness. In their view, the ordinance vested the police with virtually unlimited enforcement discretion because officers could disregard both the participants' intent and any activities suggesting that the person was not camping.[21]

The Ninth Circuit Court of Appeals arrived at a similar conclusion in the 2014 decision *Desertrain* v. *City of Los Angeles*.[22] In that case, the court struck down a law that prohibited using a car "as a living quarters either overnight, day-by-day, or

[14] Larry Alexander and Emily Sherwin, *Demystifying Legal Reasoning* (Cambridge University Press, 2008) at 14. Their original quote is: "The interpreter then becomes a rule maker in its own right" (*ibid.*). *See*, *e.g.*, *James* v. *US*, 550 US 192 at 1609 (2007).

[15] *Kolender* v. *Lawson*, 461 US 352 at 357. *See also Chicago* v. *Morales*, 527 US 41 at 56–57 (1999).

[16] *R* v. *Levkovic*, 2013 SCC 25 at para. 34.

[17] *Ontario* v. *Canadian Pacific Ltd.* [1995] 2 SCR 1031 at para. 2.

[18] *R.* v. *Levkovic* [2013] 2 SCR 204, 2013 SCC 25 at para. 34.

[19] *See*, *e.g.*, John Ammann, "Addressing Quality-of-life Crimes in Our Cities: Criminalization, Community Courts and Community Compassion" (2000) 44 *St Louis U LJ* 811 at 814; Jamie Michael Charles, "'America's Lost Cause': The Unconstitutionality of Criminalizing Our Country's Homeless Population" (2009) 18 *Pub Int LJ* 315 at 321.

[20] *State* v. *Beltran*, 172 P (3d) 458 at 465–67 (Haw Sup Ct 2007).

[21] *Ibid.* at 466.

[22] *Desertrain* v. *City of Los Angeles*, 754 F (3d) 1147 (9th Circ 2014).

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otherwise" because it was unconstitutionally vague.[23] The court decided that although the ordinance was sufficiently vague to apply to any driver who kept food, clothing, or other belongings in their car, it appeared to be enforced exclusively against unhoused persons.[24] In the court's view, the statute conferred too much police discretion and failed to provide fair warning as to the prohibited conduct.[25]

But void for vagueness challenges tend to fail when lawmakers employ precise language in penal statutes.[26] Legislators responded to the void for vagueness doctrine's emergence by enacting a greater number of narrowly tailored ordinances that used precise language.[27] Cities replaced vague loitering laws and urban camping bans with precise legislation that targeted conduct such as staying in a park past its closing hours or sleeping on a subway bench.[28]

Many of these more narrowly tailored laws withstood constitutional scrutiny. For instance, in the Eleventh Circuit Court of Appeals decision *Joel* v. *City of Orlando* decided in 2000, the claimant brought a void for vagueness challenge against an ordinance that prohibited camping on public property.[29] Joel argued that the ordinance was unconstitutionally vague because it did not define the term "camping" with sufficient precision.[30] The court rejected that argument. The appeal justices noted that the statute defined camping as "Sleeping or otherwise being in a temporary shelter out-of-doors" or "Sleeping out-of-doors."[31] The court also observed that the Most Used City Ordinance Book (MUCOB) – a handbook that governs the enforcement of ordinances – provided additional statutory precision.[32] The MUCOB stated that a person did not necessarily camp if they fell asleep on public property.[33] Other indications of camping were required, including whether the individual slept in a tent or sleeping bag, or was covered by materials such as bedrolls.[34] The court concluded that Joel's conduct fell within that description.[35] They also explained that the combination of definitions provided in the ordinance and MUCOB adequately limited police discretion and risks of arbitrary enforcement.[36]

[23] *Ibid.* at 1149, 1157.
[24] *Ibid.* at 1156.
[25] *Ibid.* at 1155–56.
[26] *See, e.g.*, Foscarinis, "Downward Spiral" at 34; Hansel, "Constitutional Othering" at 449.
[27] Baker, "'Anti-Homeless' Legislation" at 429–32.
[28] *Ibid.*
[29] *Joel* v. *City of Orlando*, 232 F (3d) 1353 (11th Circ 2000).
[30] *Ibid.* at 1359–60.
[31] Orlando, Fla, Code of Ordinances, ch. 43, § 43.52 (2000).
[32] *Joel* v. *City of Orlando*, 232 F (3d) 1353 (11th Circ 2000) at 1356.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.* at 1360.
[36] *Ibid.*

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The justices arrived at a similar conclusion in the 2015 California Court of Appeals decision *Allen* v. *Sacramento*.[37] The unhoused plaintiffs challenged the constitutionality of an urban camping ban.[38] They argued that the ordinance was unconstitutionally vague and permitted arbitrary enforcement by the police.[39] The justices remarked that the ordinance defined various terms, such as "camp," "camp facilities," and "public property."[40] Furthermore the court observed that the plaintiffs' conduct clearly violated the ordinance.[41] The justices rejected the plaintiffs' void for vagueness challenge.

Courts have rejected void for vagueness arguments in other cases that involve narrowly tailored laws that employ precise language or define key terms within the statute.[42] Although the void for vagueness doctrine successfully struck down ambiguous statutes, its usefulness has been constrained by narrowly tailored ordinances that target specific acts, and that can result in displacement, fines, arrests, and imprisonment.

2.2 OVERBREADTH

Second, the overbreadth doctrine has also been invoked to strike down some laws that regulate public property. Although overbreadth claims generally fail in the United States, they have been one of the most successful types of constitutional challenges to laws that regulate public property in Canada. In the United States, the overbreadth doctrine is used to attack the facial constitutionality of a law that violates a person's right to free speech.[43] The doctrine applies in contexts where a law regulates "too much speech that is protected."[44] A law in the United States will be unconstitutionally overbroad where its overbreadth is substantial "not only in an absolute sense, but also relative to the statute's plainly legitimate sweep."[45] Overbreadth doctrine protects individuals against broad laws that chill speech and promote self-censorship.[46]

[37] *Allen* v. *City of Sacramento*, 234 Cal App (4th) 41 (App Ct 2015)
[38] *Ibid.* at 48–49.
[39] *Ibid.* at 55.
[40] *Ibid.*
[41] *Ibid.*
[42] *See*, *e.g.*, *People* v. *Diaz* (Cal Sup Ct 2018); *Catron* v. *City of St. Petersburg* (MD Fla 2009); *McArdle* v. *City of Ocala*, FL, 519 F Supp (3d) 1045 at 1052–53 (MD Fla 2021); *Davidovich* v. *City of San Diego* (SD Cal 2011).
[43] *See*, *e.g.*, Richard H. Fallon Jr., "Making Sense of Overbreadth" (1991) 100:4 *Yale LJ* 853 at 863; Brandice Canes-Wrone and Michael C. Dorf, "Measuring the Chilling Effect" (2015) 90:4 *NYU L Rev* 1095 at 1096; Henry Paul Monaghan, "Overbreadth" [1981] Sup Ct Rev 1 at 3; *Osborne* v. *Ohio*, 495 US 103 at 112 (1990).
[44] Kent Greenawalt, "Free Speech in the United States and Canada" (1992) 55:1 *Law & Contemp Probs* 5 at 16; *US* v. *Williams*, 553 US 285 at 1838 (2008).
[45] *US* v. *Williams*, 553 US 285 at 1838 (2008).
[46] *Virginia* v. *Hicks*, 539 US 113 at 119 (2003).

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In the United States, overbreadth challenges to laws that prohibit sleeping, camping, or urinating on public property generally fail.[47] The main problem is that the statute must limit some form of expression for overbreadth doctrine to succeed. Although certain acts or conduct (such as flag burning) are sufficiently expressive to be protected by the First Amendment, the relevant act must intend "to convey a particularized message" and there must be great likelihood "that the message would be understood by those who viewed it."[48] In US contexts, those requirements create a major obstacle for claimants who invoke the overbreadth doctrine to challenge laws that regulate public property. Notably, the claimants must pigeon-hole their interest in sleeping or lying down into a First Amendment claim; they must argue that sleeping, pitching a tent, or sitting on public property are expressive acts.[49] Yet courts tend to reject these claims for two reasons.

First, some courts conclude that sitting or sleeping do not constitute expressive conduct. For instance, in the Ninth Circuit Court of Appeals decision *Roulette* v. *City of Seattle*, the claimants challenged an ordinance that prohibited sitting and lying on the city's sidewalks.[50] They argued that such acts conveyed a message of passivity to pedestrians to whom they were panhandling.[51] In the claimants' view, the statute was unconstitutionally overbroad because it limited that form of expression.[52] The majority of the court rejected that argument and concluded that sitting and lying down are not "integral to, or commonly associated with, expression."[53]

Second, even when courts have recognized that sleeping or camping are expressive – for instance, as a form of protest – courts uphold the law when it is narrowly tailored to achieve a compelling State interest.[54] The US Supreme Court decision *Clark* v. *Community for Creative Non-Violence (CCNV)* illustrates this point.[55] The claimants organized a protest where people camped overnight in Lafayette park in Washington, DC to draw attention to the plight of people experiencing homelessness.[56] They violated a regulation that prohibited camping in certain parks without a permit.[57]

While the Court accepted the premise that the conduct was expressive in the circumstances, it rejected the claimants' overbreadth argument. The majority noted that the State had a substantial interest to maintain the condition of public parks for

47 Hansel, "Constitutional Othering" at 450.
48 *Spence* v. *Washington*, 418 US 405 at 410–11 (1974); *Texas* v. *Johnson*, 491 US 397 at 404 (1989). See a summary of these requirements in Robert Post, "Recuperating First Amendment Doctrine" (1995) 47:7 *Stan L Rev* 1249 at 1251–52.
49 Hansel, "Constitutional Othering" at 451.
50 *Roulette* v. *City of Seattle*, 97 F (3d) 300 at 303–04 (9th Circ 1996).
51 *Ibid.* at 303.
52 *Ibid.* at 303–04.
53 *Ibid.*
54 *Clark* v. *Community for Creative Non-Violence*, 468 US 288 at 293 (1984).
55 *Ibid.*
56 *Ibid.* at 289.
57 *Ibid.* at 290–91.

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the population's use and enjoyment.[58] The Court also concluded that the law was narrowly tailored to achieve the State's objective, and that the State can legitimately restrict the time, place, and manner of certain forms of expression.[59]

The overbreadth doctrine plays a different role in Canada. Canadian case law recognizes the principle of fundamental justice that laws cannot be overbroad in a way that deprives a person of their right to life, liberty, or security of the person.[60] Compared to US overbreadth doctrine, Canadian overbreadth doctrine is more expansive because it applies in contexts other than freedom of speech. An overbroad law regulates conduct that the State did not intend to control.[61] In Canada, laws are unconstitutionally overbroad when they violate individuals' right to life, liberty, or security of the person for no reason.[62] Overbreadth claims have succeeded in certain contexts when unhoused persons challenged the constitutionality of laws that govern public property.[63] The British Columbia (BC) judicial decisions *Victoria (City)* v. *Adams* and *Abbotsford (City)* v. *Shantz* illustrate this point.[64]

First, in the 2009 BC Court of Appeal decision *Victoria (City)* v. *Adams*, municipal ordinances comprehensively prohibited individuals from erecting temporary shelters on public property despite the lack of available shelter spaces in the city.[65] At the time of the litigation, there were over 1,000 people experiencing homelessness in the city of Victoria, and 141 permanent shelter beds in the city which expanded to 326 during extreme weather conditions.[66]

The court observed that homelessness was an involuntary condition for most unhoused persons in Victoria, and stemmed from a confluence of economic, structural, and individual factors.[67] The evidence showed that the temporary shelter ban prevented unhoused persons from protecting themselves against the elements, which subjected them to risks of physical and psychological harm.[68] The medical

[58] *Ibid.* at 299.
[59] *Ibid.* at 295–96, 298–99.
[60] Canadian Charter of Rights and Freedoms, s. 7, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c. 11; *Canada (Attorney General)* v. *Bedford*, 2013 SCC 72 at para. 105; Colton Fehr, "The Individualistic Approach to Arbitrariness, Overbreadth, and Gross Disproportionality" (2018) 51:1 *UBC L Rev* 55 at 59–60.
[61] *Bedford* at para. 101. *See*, *e.g.*, Wayne Renke, "Bedford, Substantive Rationality, and Participatory Democracy" (2015) 20:1 *Rev Const Stud* 30 at 60–61 (noting that an overbroad law is partly arbitrary because it regulates conduct that exceeds its intended scope).
[62] Hamish Stewart, "*Bedford* and the Structure of Section 7" (2015) 60:3 *McGill LJ* 575 at 584, 586; *Bedford* at paras. 108–09.
[63] *See*, *e.g.*, Terry Skolnik, "Homelessness and the Impossibility to Obey the Law" (2016) 43:3 *Fordham Urb LJ* 741 at 756–59.
[64] Terry Skolnik, "Homelessness and Unconstitutional Discrimination" (2019) 15 *JL & Equal* 69 at 81 (providing an overview of these decisions).
[65] *Victoria (City)* v. *Adams*, 2009 BCCA 563 at paras. 21–24, 28.
[66] *Ibid.* at para. 28.
[67] *Ibid.* at paras. 104–11; *Victoria (City)* v. *Adams*, 2008 BCSC 1363 at paras. 59–66.
[68] *Victoria (City)* BCCA at paras. 103–10.

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experts noted that people experiencing homelessness were vulnerable to frostbite and hypothermia during the winter months.[69]

The BC Court of Appeal concluded that the ordinance violated the claimants' constitutional right to life, liberty, and security of the person and that it was unconstitutionally overbroad.[70] In their view, the ordinance was unconstitutional because it prohibited individuals from erecting temporary shelters at all times while there was insufficient shelter space to accommodate the city's unhoused population.[71] In the court's view, the ordinance was overbroad because it was unnecessary for the city to comprehensively forbid individuals from erecting temporary shelters to promote the shared use of public spaces.[72] Although the purpose of the ordinance was to maintain the environmental, recreational, and social benefits of parks, the court concluded that those objectives could be achieved without endangering unhoused persons' physical and psychological integrity.[73] In the court's view, the ordinance would be constitutional if it proscribed temporary shelters at nighttime and required them to be taken down during the day – an approach that sought to balance the interests of unhoused persons' and the city.[74]

The BC Supreme Court reached a similar conclusion in the 2015 decision *Abbotsford (City)* v. *Shantz*.[75] In *Shantz*, city ordinances prohibited individuals from erecting temporary shelters on public property without a permit despite insufficient shelter spaces for the city's unhoused population.[76] Individuals were required to obtain a camping permit using a credit card and pay $15/hour.[77] The city's decision to grant a permit was discretionary – the city could refuse a permit if an individual's proposed use of the park could damage the grounds.[78] Like in Adams, the court struck down the ordinance and permit requirement because they violated the claimants' section 7 Charter interests and were both unconstitutionally overbroad and grossly disproportionate.[79]

2.3 THE FUNDAMENTAL RIGHT TO TRAVEL

The third type of constitutional challenge to laws that govern public property applies only in the United States. Some courts have decided that laws governing public

[69] *Ibid.* at para. 28.
[70] *Ibid.* at paras. 110, 116.
[71] *Ibid.* at para. 116.
[72] *Ibid.*
[73] *Ibid.* at paras. 116, 122.
[74] *Ibid.* at paras. 122, 166.
[75] *Abbotsford (City)* v. *Shantz*, 2015 BCSC 1909.
[76] *Ibid.* at paras. 17–25, 82.
[77] *Ibid.* at para. 22.
[78] *Ibid.*
[79] *Ibid.* at paras. 6, 203, 224.

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property can violate unhoused persons' fundamental right to travel.[80] This right protects people's ability to move between states and within one's own state without being subject to punishment or loss of entitlements.[81]

The fundamental right to travel is justified on various grounds.[82] For one, interstate travel facilitates federalism.[83] More specifically, federalism would be hindered if protectionist policies by one state resulted in retaliatory measures by another.[84] The right to travel thus promotes interstate cooperation.[85] Second, the right protects individual autonomy and promotes self-actualization.[86] The right to travel allows individuals to move between states in search of better employment, to be with their romantic partners who live in other states, to pursue better educational opportunities that exist outside of one's state, or to receive better medical care.[87] Third, the right to travel protects against discrimination because it helps prevent the government from penalizing certain groups from traveling between states.[88] For instance, this right allows individuals to escape state laws that they view to be discriminatory or that limit human flourishing.[89] The right to travel also prevents states from adopting policies that curb the influx of immigration of marginalized groups from other states, and conversely, allows marginalized groups to leave their home state if they construe its laws or policies to be oppressive.[90] Some US Supreme Court justices have connected the right to travel to the notion of political equality

[80] *Pottinger* v. *City of Miami*, 810 F Supp 1551 at 1579–83 (SD Fla, 1992). *See also*, Farida Ali, "Limiting the Poor's Right to Public Space: Criminalizing Homelessness in California" (2014) 21:2 *Geo J Poverty L & Pol'y* 197 at 222; Christine Bella and David Lopez, "Quality-of-life – At What Price? Constitutional Challenges to Laws Adversely Impacting the Homeless" (1994) 10 *J CR & Econ Dev* 89 at 106.

[81] *See*, *e.g.*, Andrew Porter, "Toward a Constitutional Analysis of the Right to Intrastate Travel" (1991–1992) 86:3 *Nw U L Rev* 820 at 824–25; Paul Ades, "The Unconstitutionality of Antihomeless Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel" (1989) 77:3 *Cal L Rev* 595 at 605–13 (providing an overview of the fundamental right to travel); Karthryn Wilhelm, "Freedom of Movement at a Standstill – Toward the Establishment of a Fundamental Right to Intrastate Travel" (2010) 90:6 *BU L Rev* 2461 at 2466.

[82] Patrick Garry, *An Entrenched Legacy: How the New Deal Constitutional Revolution Continues to Shape the Role of the Supreme Court* (University Park: Penn State University Press, 2010) at 125–26.

[83] Mark Strasser, "The Privileges of National Citizenship: On *Saenz*, Same-Sex Couples, and the Right to Travel" (2000) 52:2 *Rutgers L Rev* 553 at 568.

[84] *Ibid.* at 568–70.

[85] *Ibid.*; Seth Kreimer, "The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism" (1992) 67:3 *NYU L Rev* 451 at 500; Seth Kreimer, "But Whoever Treasures Freedom: The Right to Travel and Extraterritorial Abortions" (1993) 91:5 *Mich L Rev* 907 at 918–19.

[86] R. Linus Chan, "The Right to Travel: Breaking Down the Thousand Petty Fortresses of State Self-Deportation Laws" (2014) 34:2 *Pace L Rev* 814 at 852.

[87] *Saenz* v. *Roe*, 526 US 489 at 502 (1999); Leonard Boudin, "The Constitutional Right to Travel" (1956) 56:1 *Colum L Rev* 47 at 49.

[88] *See*, *e.g.*, Stewart Baker, "A Strict Scrutiny of the Right to Travel" (1975) 22:5 *UCLA L Rev* 1129 at 1135–36.

[89] Garry, *An Entrenched Legacy* at 125–26.

[90] *Ibid.*

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because economically disadvantaged persons can seek better economic opportunities in other states, which reduces the likelihood of social hierarchies.[91]

In rare cases, courts have accepted that laws that regulate public property undermined the right to travel. In the 1992 decision *Pottinger* v. *Miami* discussed more below, municipal ordinances prohibited sleeping on public property even though there was only enough shelter spaces for 700 of the city's 6,000 unhoused persons.[92] Shortly after the trial and before the court rendered its decision, Hurricane Andrew struck southern Florida.[93] The consequences were devastating: the storm's aftermath left roughly 200,000 additional people without housing.[94] The court concluded that the ordinances violated the right to travel for various reasons. The laws expelled people experiencing homelessness from the city and forced them to travel somewhere else to comply with the laws.[95] Additionally, the law deterred unhoused people from other cities from moving to Miami.[96]

Since *Pottinger*, courts overwhelmingly reject the claim that laws that regulate public property violate the right to travel.[97] Some courts have concluded that the *Pottinger* decision was wrong because it misapplied a heightened standard of strict scrutiny to a law that was facially neutral.[98] Such decisions viewed *Pottinger* as bad precedent and reasoned that the decision departed significantly from prior Supreme Court case law.[99] Other courts decided that laws that prohibit camping on public property do not violate the right to travel directly, but instead, impact it incidentally.[100] According to this view, the right is violated only when a law directly penalizes travel and impacts mobility, or, denies entitlements or necessities because one travels.[101] Some justices have ruled that camping ordinances do not violate the right to travel because those who camp on public property do not seek to travel but to remain in one place.[102] For these reasons, laws that govern public property are rarely struck down on the basis that they violate the fundamental right to travel.

[91] *Saenz*, 526 US 489 at 506–07.
[92] *Pottinger* v. *City of Miami*, 810 F Supp 1551 at 1564 (SD Fla 1992).
[93] *Ibid.* at 1558–59.
[94] *Ibid.*
[95] *Ibid.* at 1581.
[96] *Ibid.*
[97] Hansel, "Constitutional Othering" at 452–53; *Sanchez* v. *City of Fresno*, 914 F Supp (2d) 1079 at 1111 (ED Cal 2012); *Davison* v. *City of Tucson*, 924 F Supp 989 at 993–94 (D Ariz 1996); *Allen* v. *City of Sacramento*, 234 Cal App (4th) 41 at 62 (App Ct 2015); *Tobe* v. *City of Santa Ana*, 892 P (2d) 1145 at 1100–04 (Cal Sup Ct 1995); *Joyce* v. *City and County of San Francisco*, 846 F Supp 843 at 861 (ND Cal 1994).
[98] *Joyce*, 846 F Supp 843 at 860–61 (ND Cal 1994).
[99] *Ibid.*
[100] *Tobe* v. *City of Santa Ana*, 892 P (2d) 1145 at 1100–04 (Cal Sup Ct 1995).
[101] *Ibid.* at 1101–04; *Sanchez*, 914 F Supp (2d) 1079 at 1109 (ED Cal 2012).
[102] *Davison*, 924 F Supp 989 at 993–94 (D Ariz 1996).

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2.4 DISCRIMINATION AND EQUAL PROTECTION

Fourth, some argue that laws that govern public property are unconstitutional because they discriminate against unhoused persons.[103] Generally speaking, unconstitutional discrimination implies that the State imposes disadvantages or denies benefits to groups based on their immutable or constructively immutable personal characteristics.[104] Immutable characteristics imply traits that individuals did not choose and generally cannot change, such as race or age.[105] In contrast, constructively immutable traits are associated with an individual's personhood and can be changed only at great personal cost, such as religion, marital status, or citizenship.[106] Courts and scholars generally distinguish between two forms of discrimination: direct and indirect.[107] Direct discrimination (or disparate treatment) implies that the State singles out certain groups for adverse treatment.[108] Indirect discrimination (or disparate impact) implies that the State's neutrally worded laws adversely impact certain groups.[109] Equal protection claims have been the least successful type of constitutional challenge to laws that govern public property in the United States and in Canada.

In the United States, the Fourteenth Amendment's Equal Protection Clause safeguards individuals against unconstitutional discrimination.[110] The judiciary accords the highest level of judicial scrutiny – strict scrutiny – to legislation that discriminates against a constitutionally protected class (or suspect class).[111] Notably, the law must pursue a sufficiently important State objective and employ means that are sufficiently narrowly tailored to achieve that end.[112] To date, the US Supreme Court has recognized five suspect classifications that are subject to some form of heightened scrutiny: race, national origin, alienage, sex, and nonmarital parentage.[113] Suspect classification extends to historically marginalized

[103] *See, e.g.*, Jennifer Watson, "When No Place Is Home: Why the Homeless Deserve Suspect Classification" (2002) 88:2 *Iowa L Rev* 501 at 512–13; Sarah Finnane Hanafin, "Legal Shelter: A Case for Homelessness as a Protected Status under Hate Crime Law and Enhanced Equal Protection Scrutiny" (2011) 40:2 *Stetson L Rev* 435 at 456; Jason Leckerman, "City of Brotherly Love? Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia" (2001) 3:1 *U Pa J Const L* 540 at 561–62; Greg Vamos, "*Kreimer* v. *Bureau of Police*: Are the Homeless Ready for Suspect Classification" (1993) 14 *Whittier L Rev* 731.

[104] *See, e.g.*, *Andrews* v. *Law Society of British Columbia* [1989] 1 SCR 143 at 174–75.

[105] Jessica Clarke, "Against Immutability" (2015) 125:2 *Yale LJ* 2 at 14–15.

[106] *Ibid.* at 24–25; *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84 at para. 105.

[107] Oran Doyle, "Direct Discrimination, Indirect Discrimination and Autonomy" (2007) 27:3 *Oxford J Leg Stud* 537 at 537–38.

[108] Sophia Moreau, "What Is Discrimination?" (2010) 38 *Phil & Pub Aff* 143 at 154.

[109] *Ibid.*

[110] US Const amend XIV, § 1.

[111] Roy Spece Jr. and David Yokum, "Scrutinizing Strict Scrutiny" (2015) 40:2 *Vt L Rev* 285 at 292.

[112] *Wygant* v. *Jackson Bd. of Ed.*, 476 US 267 at 274 (1986); Spece Jr. and Yokum, "Scrutinizing Strict Scrutiny" at 295.

[113] Kenji Yoshino, "The New Equal Protection" (2011) 124:3 *Harv L Rev* 747 at 756. Yoshino's exact quote is: "The Supreme Court has formally accorded heightened scrutiny to classifications based on five characteristics: race, national origin, alienage, sex, and nonmarital parentage." Internal citations omitted.

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groups that have lacked political power, such that they require additional protection against the majoritarian political process.[114] US courts apply a rational basis standard when individuals who do not fall within a suspect classification claim that they suffered unconstitutional discrimination.[115] Rational basis review is satisfied where the disputed law is "rationally related to a legitimate governmental interest."[116] Statutes that are subject to rational basis review tend to withstand constitutional scrutiny.[117]

US courts have rejected poverty and homelessness as suspect classes.[118] In the 1973 US Supreme Court decision *San Antonio Independent School District* v. *Rodriguez*, the Court decided that wealth was not a suspect classification because it lacked the classic indicia of protected classes – such as political powerlessness and a history of unequal treatment – and because its definition was too amorphous.[119] Some US courts have rejected homelessness as a suspect classification on similar grounds,[120] while others have rejected homelessness as a suspect classification without providing reasons for that conclusion.[121] Absent evidence of discriminatory legislative intent – which is rarely established – facially neutral laws tend to withstand equal protection challenges even when they disparately impact unhoused persons.

The 1971 Supreme Court of California decision *Parr* v. *Municipal Court* remains one of the few instances where such a claim succeeded.[122] In *Parr*, the city of Carmel-by-the-Sea enacted an ordinance that prohibited a range of conduct on public property, including loitering, sitting or lying on steps or lawns, and erecting temporary structures.[123] The city also issued a Declaration of Urgency that was discriminatory on its face against hippies.[124] The court struck down the ordinance.[125] The

[114] Watson, "When No Place Is Home" at 509, citing *San Antonio Independent School Dist.* v. *Rodriguez*, 411 US 1 at 28 (1973).

[115] Yoshino, "The New Equal Protection" at 756.

[116] Thomas Nachbar, "The Rationality of Rational Basis Review" (2016) 102:7 *Va L Rev* 1627 at 1629.

[117] Yoshino, "The New Equal Protection" at 755–56; Katie Eyer, "The Canon of Rational Basis Review" (2018) 93:3 *Notre Dame L Rev* 1317 at 1318–19.

[118] *San Antonio Independent School Dist.* v. *Rodriguez*, 411 US 1 at 32–33; *Lindsey* v. *Normet*, 405 US 56 at 74 (1972); Danieli Evans Peterman, "Socioeconomic Status Discrimination" (2018) 104:7 *Va L Rev* 1283 at 1290–91.

[119] *San Antonio Independent School Dist.* v. *Rodriguez*, 411 US 1 at 19–20, 28–29 (1973); Bertrall Ross II and Su Li, "Measuring Political Power: Suspect Class Determinations and the Poor" (2016) 104:2 *Cal L Rev* 323 at 343.

[120] *See, e.g.*, *Joyce* v. *City and County of San Francisco*, 846 F Supp 843 at 859–61 (ND Cal 1994).

[121] *D'Aguanno* v. *Gallagher*, 50 F (3d) 877 (11th Circ 1995), fn. 2 in that decision; *Kreimer* v. *Bureau of Police for Town of Morristown*, 958 F (2d) 1242 (3rd Circ 1992), fn. 32 in the decision.

[122] *Parr* v. *Municipal Court*, 3 Cal App (3d) 861 (App Ct 1971).

[123] *Ibid.* at 862–63; Carmel-by-the-Sea, Cal, Ordinance 697.02 (1968).

[124] *Parr* v. *Municipal Court*, 3 Cal App (3d) 861 (App Ct 1971) at 863. The Declaration of Emergency stated: "The City Council of Carmel-by-the-Sea has observed an extraordinary influx of undesirable and unsanitary visitors to the City, sometimes known as 'hippies,' and finds that unless proper regulations are adopted immediately the use and enjoyment of public property will be jeopardized if not entirely eliminated; the public parks and beaches are, in many cases, rendered unfit for normal public use by the unregulated and uncontrolled conduct of the new transients."

[125] *Ibid.* at 865–66.

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court observed that the provision and its accompanying declaration were directly discriminatory because they singled out people experiencing homelessness and used pejorative terms such as "undesirable" and "unsanitary."[126] Although the targets of the law were not a suspect class, the court nonetheless struck down the law because its purpose was impermissible and expressed hostility and animus, which violated the right to equal protection.[127]

Canadian courts have also rejected poverty and homelessness as constitutionally protected classes.[128] In Canada, section 15 of the Charter prohibits direct and indirect discrimination on the basis of enumerated and analogous grounds.[129] Enumerated grounds of discrimination are expressly mentioned in section 15's wording and include personal characteristics such as race, age, color, gender, religion, national or ethnic origin, and disability.[130] Analogous grounds of discrimination are not expressly mentioned in section 15 of the Charter's wording yet have been identified by courts as prohibited grounds of discrimination, such as citizenship, marital status, and sexual orientation.[131] Courts recognize new analogous grounds of discrimination based on a group's immutable or constructively immutable personal traits, and factors such as a group's historical disadvantage and lack of political power.[132]

The 2007 Ontario Court of Appeal decision *R* v. *Banks* rejected poverty as a constitutionally protected class.[133] In that decision, a group of impecunious and unhoused persons challenged the constitutionality of a provincial law that prohibited individuals from soliciting money from drivers.[134] They argued that the provisions discriminated against panhandlers.[135] The court rejected that argument. The justices observed that panhandling is an activity rather than a constitutionally protected characteristic, and that impecunious persons are an amorphous group that are not akin to other grounds of discrimination.[136]

Later, in the 2013 Superior Court of Ontario decision *Tanudjaja* v. *Canada (Attorney General) (Application)*, the Superior Court of Ontario rejected homelessness as an analogous ground of discrimination.[137] In *Tanudjaja*, the applicants alleged that the federal and provincial governments made certain decisions in the

[126] *Ibid.* at 867–68.
[127] *Ibid.* at 864–67.
[128] Skolnik, "Homelessness and Unconstitutional Discrimination" at 70; Jessica Eisen, "On Shaky Grounds: Poverty and Analogous Grounds under the *Charter*" (2013) 2 *Can J Poverty L* 1 at 19–20.
[129] *Quebec (Attorney General)* v. A [2013] 1 SCR 61, [2013] SCC 5.
[130] Canadian Charter, s. 15.
[131] *Andrews* v. *Law Society of British Columbia* [1989] 1 SCR 143 [citizenship]; *Miron* v. *Trudel* [1995] 2 SCR 418 [marital status]; *Vriend* v. *Alberta* [1998] 1 SCR 493 [sexual orientation].
[132] *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203 at paras. 13, 60.
[133] *R* v. *Banks* [2007] ONCA 19.
[134] *Ibid.* at paras. 1–10; Safe Streets Act, 1999, SO 1999, c. 8.
[135] *R* v. *Banks* 2007 ONCA 19 at para. 7.
[136] *Ibid.* at paras. 98–99, 104.
[137] *Tanudjaja* v. *Attorney General (Canada) (Application)*, 2013 ONSC 5410.

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1990s that decreased access to housing which adversely impacted unhoused persons' fundamental interests.[138] One of the applicants was living on public property and in the shelter system.[139] The other three applicants were living in unaffordable and inadequate housing.[140] The claimants sought remedies that would require the provincial and federal governments to implement strategies and programs that reduce homelessness and improve access to housing.[141] They claimed that courts should exercise their supervisory jurisdiction to ensure that the governments fulfil such positive obligations.[142]

The court rejected their section 15 Charter argument and concluded that homelessness was not an analogous ground of discrimination for several reasons.[143] First, the court concluded that it was not possible to determine objectively who fell within the definition of "homelessness" for the purposes of the application.[144] The court noted that some of the applicants were unsheltered while others were living in inadequate or unaffordable housing.[145] Second, the court concluded that homelessness was not an immutable or constructively immutable personal characteristic akin to age, ethnicity, or gender, that could be determined by objective criteria.[146]

2.5 CRUEL AND UNUSUAL PUNISHMENTS

Fifth, some contend that laws that regulate public property violate the Eighth Amendment because they impose cruel and unusual punishment on people experiencing homelessness.[147] In the United States, Eighth Amendment claims have been the most successful constitutional challenge to laws that govern public property. The Eighth Amendment limits the State's criminal law power in three ways.[148] Notably, the cruel and unusual punishments clause limits the kinds of punishments that the State can impose, prohibits grossly disproportionate punishments, and imposes substantive limits on criminalization and punishment.[149] Most Eighth Amendment challenges to laws that govern public property fall into this third category. Some

[138] *Ibid.* at para. 2.
[139] *Ibid.* at para. 13.
[140] *Ibid.* at paras. 12–14.
[141] *Ibid.* at paras. 2, 110.
[142] *Ibid.*
[143] *See* Skolnik, "Homelessness and Unconstitutional Discrimination" at 70.
[144] *Tanudjaja* v. *Attorney General (Canada) (Application)*, 2013 ONSC 5410 at para. 129.
[145] *Ibid.*
[146] *Ibid.* at para. 130; Eisen, "On Shaky Grounds" at 20.
[147] Harry Simon, "Towns without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities" (1992) 66:4 *Tul L Rev* 631 at 634; Juliette Smith, "Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine" (1996) 29:2 *Colum JL & Soc Probs* 293 at 293–94; 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 1641–42.
[148] *Ingraham* v. *Wright*, 430 US 651 at 667 (1977).
[149] *Ibid.*; Hannah Kieschnick, "A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-homeless Ordinances" (2018) 70:5 *Stan L Rev* 1569 at 1578–79.

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courts have decided that the State violates the Eighth Amendment when it punishes unhoused persons' involuntary need-alleviating acts that stem from their involuntary condition of homelessness.[150]

In the 1992 District Court decision *Pottinger* v. *Miami* discussed above, the court concluded that the State imposed a cruel and unusual punishment when it prohibited sleeping in public despite the lack of sufficient shelter spaces for the city's unhoused population.[151] The court first concluded that homelessness was an involuntarily acquired condition due to factors such as lack of access to housing, financial hardship, and illness.[152] The court noted that unhoused persons had to sleep somewhere but did so on public property involuntarily because they lacked alternatives – involuntary conduct that was inseparable from their involuntary condition.[153] In the court's view, the punishment was cruel and unusual because unhoused persons had no choice but to sleep on public property, violate the law, and face punishment.[154]

The Court of Appeals for the Ninth Circuit arrived at a similar conclusion in *Jones* v. *City of Los Angeles*, where a municipal ordinance prohibited sleeping on the city's streets, sidewalks, and public ways.[155] The offense was punishable by a $1,000 fine and/or six months' imprisonment.[156] At the time, there were roughly 11,000–12,000 unhoused persons in Skid Row, Los Angeles, yet only 9,000–10,000 available spaces to accommodate the city's unhoused population.[157] The court concluded that the ordinance violated the Eighth Amendment.[158] The majority observed that the defendants did not choose to live on the streets.[159] The evidentiary record showed that individuals experience homelessness due to a range of individual and structural factors as well as the lack of affordable housing in Los Angeles.[160] In the court's view, the ordinance violated the Eighth Amendment because homelessness and the act of sleeping in public were both involuntary and inseparable from one another.[161] The holding in *Jones* was, however, vacated when the city reached a settlement with the defendants in 2007.[162]

Lastly, in the 2018 Ninth Circuit Court of Appeals decision *Martin* v. *City of Boise*, the majority of the court applied the principles set out in *Pottinger* and *Jones* to enjoin the city from enforcing an ordinance that prohibited camping on public

[150] *See, e.g.*, Kieschnick, "A Cruel and Unusual Way to Regulate the Homeless" at 1618.
[151] *Pottinger* v. *City of Miami*, 810 F Supp 1551 at 1564 (SD Fla 1992).
[152] *Ibid.* at 1559, 1563–64.
[153] *Ibid.* at 1564–65.
[154] *Ibid.*
[155] *Jones* v. *City of Los Angeles*, 444 F (3d) 1118 (9th Circ 2006).
[156] *Ibid.* at 1123.
[157] *Ibid.* at 1122.
[158] *Ibid.* at 1136.
[159] *Ibid.* at 1137–38.
[160] *Ibid.* at 1123.
[161] *Ibid.* at 1136.
[162] *Jones* v. *City of Los Angeles*, 505 F (3d) 1006 (9th Circ 2007).

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property.[163] The court concluded that the ordinance violated the Eighth Amendment. Point-in-time counts showed that there were over 850 homeless people in Boise, yet roughly 350 homeless shelter spaces and an additional 92 overflow mats.[164] The majority of the court decided that the State cannot criminalize and punish unhoused persons who sleep, sit, or shelter themselves on public property when there are insufficient shelter spaces to accommodate them.[165] Other courts have arrived at similar conclusions in similar circumstances.[166]

Despite these successes, courts may reject unhoused persons' Eighth Amendment claims in other contexts. Eighth Amendment claims may not succeed when defendants challenge a law that comprehensively bans urban camping or sleeping on public property, yet they fail to establish a lack of available shelter space for the unhoused population.[167] In other cases, courts have rejected similar claims when the defendants did not prove that they applied for social or public assistance that could have secured access to housing.[168] Eighth Amendment claims may also fail when a municipal ordinance prohibits need-alleviating conduct through a time, place, or manner restriction rather than a comprehensive prohibition.[169]

More recently, defendants have invoked the Eighth Amendment's Excessive Fines Clause to challenge the severity of fines associated with laws that govern public property.[170] The clause "limits the government's power to extract payments, whether in cash or in kind, as punishment for some offense."[171] The Excessive Fines Clause was incorporated into the states via the Fourteenth Amendment in the 2019 US Supreme Court decision *Timbs* v. *Indiana*.[172]

Some of these challenges have succeeded. In the 2021 decision *City of Seattle* v. *Long*, the defendant was living in his truck, which he parked illegally.[173] The city impounded the vehicle, issued a $44 ticket, and charged him roughly $950 in impoundment fees.[174] The Washington Supreme Court decided that the seizure of the truck and the impoundment fee constituted an excessive fine that violated the Eighth Amendment.[175] Similarly, in the 2020 District Court decision *Blake* v. *City of*

[163] *Martin* v. *City of Boise*, 902 F (3d) 1031 at 1046–50 (9th Circ 2018). Motion for rehearing denied in *Martin* v. *City of Boise*, 920 F (3d) 584 (9th Circ 2019).
[164] *Ibid.* at 1035–38.
[165] *Ibid.* at 1048–49.
[166] *Johnson* v. *City of Grants Pass*, 50 F (4th) 787 (9th Circ 2022).
[167] *See, e.g.*, *Joel* v. *City of Orlando*, 232 F (3d) 1353 at 1362 (11th Circ 2000).
[168] *Tobe* v. *City of Santa Ana*, 892 P (2d) 1145 at 1088–89 (Cal Sup Ct 1995)
[169] *See, e.g.*, *Gomes* v. *County of Kauai*, 481 F Supp 3d 1104 at 1108–09 (Dist Court D Hawaii 2020).
[170] *See, e.g.*, *Blake* v. *City of Grants Pass* (D Or 2020); *McArdle* v. *City of Ocala*, 519 F Supp (3d) 1045 (MD Fla 2021).
[171] *Timbs* v. *Indiana*, 139 US 682 (2019) at 687, citing *United States* v. *Bajakajian*, 524 US 321 (1998) at 327–28.
[172] *Timbs* v. *Indiana*, 139 US 682 (2019); "Fourteenth Amendment – Due Process Clause – Incorporation Doctrine – *Timbs* v. *Indiana*" (2019) 133:1 *Harv L Rev* 342 at 344.
[173] *City of Seattle* v. *Long*, 493 P (3d) at 97 (Wash Sup Ct 2021).
[174] *Ibid.*
[175] *Ibid.*

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Grants Pass, a group of unhoused persons argued that an urban camping ban violated the Excessive Fines Clause.[176] The ordinances were punishable by a mandatory fine of $295 for urban camping, which increased to $537.60 if the fine was unpaid.[177] The court decided that the ordinances violated the Excessive Fines Clause because the financial penalty was grossly disproportionate to the gravity of the offense.[178] Although the Excessive Fines Clause is still in its early stages, it may play a greater role in invalidating unhoused persons' excessive fines in the future.[179]

In Canada, the constitutional right to be free from cruel and unusual punishments has played virtually no role in striking down the financial penalties associated with laws that govern public property. Section 12 of the Canadian Charter prohibits cruel and unusual punishments.[180] In Canadian law, a punishment is cruel and unusual "if it is grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender . . . or if the law's reasonably foreseeable applications will impose grossly disproportionate sentences on others."[181] This latter portion of the test permits a law to be struck down if, according to a reasonable hypothetical, it would impose a cruel and unusual punishment on a hypothetical offender.[182] As the court explained in *R* v. *Lloyd*, gross disproportionality implies that "the punishment prescribed is so excessive as to outrage standards of decency" and is "abhorrent and intolerable."[183]

The Supreme Court of Canada has concluded that mandatory victim surcharges impose a cruel and unusual punishment that violates section 12 of the Charter.[184] Prior to the 2018 *R* v. *Boudreault* decision, individuals convicted of crimes were required to pay these surcharges, which funded services for victims of crime.[185] The victim surcharge was $100 for summary conviction offenses (the equivalent of misdemeanor offenses), and $200 for indictable offenses (the equivalent of felony offenses).[186] Due to the statutory scheme, judges could not modify or waive the quantum of the surcharge.[187]

[176] *Blake* v. *City of Grants Pass* (D Or 2020).
[177] *Ibid.*
[178] *Ibid.*
[179] *See, e.g.*, Raul Aguilar, "Unconstitutionally Fining: Fining People Experiencing Homelessness in the Era of *Timbs*" (2021) 53:3 UIC L Rev 587 at 603–05; Siobhan Allen, "The Role of the Excessive Fines Clause in Ending the Criminalization of Homelessness" (2022) 55: 4 Colum JL & Soc Probs 499 at 502–03, 533–38.
[180] Canadian Charter, s. 12.
[181] *R* v. *Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para. 22; *R* v. *Nur*, 2015 SCC 15, [2015] 1 SCR 773 at para. 39.
[182] *R* v. *Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para. 25.
[183] *Ibid.* at para. 24; *R* v. *Smith* [1987] 1 SCR 1045 at para. 54.
[184] *R* v. *Boudreault*, 2018 SCC 58; Terry Skolnik, "Beyond Boudreault: Challenging Choice, Culpability, Punishment" (2019) 50 *CR* (7th) 283 at 283, 287–88.
[185] *R* v. *Boudreault*, 2018 SCC 58 at para. 62.
[186] *Ibid.*; Criminal Code, RSC 1985, c. C-46, s. 737.
[187] *R* v. *Boudreault*, 2018 SCC 58 at para. 2.

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The Court struck down the mandatory surcharge for several reasons. The financial penalties ignored the defendant's ability to pay, their level of culpability, and the potentially harmless nature of the offense that gave rise to a surcharge, such as breaching a probation order.[188] In the majority's view, the surcharge imposed the equivalent of indeterminate sentences on impecunious individuals who could not afford to pay the fines.[189] Defendants who failed to pay the fine were also subject to civil collection efforts.[190] The justices also determined that the threat of detention and imprisonment loomed over those who could not afford to pay the surcharge.[191] Notably, police officers could detain individuals prior to committal hearings, which assessed their capacity to pay their fines.[192] For these reasons, the mandatory surcharge constituted a cruel and unusual punishment.

The Supreme Court of Canada recognizes that punishments tend to respect the right to be free from cruel and unusual punishments when judges have the discretion to mitigate their severity.[193] Whereas mandatory minimum penalties result in excessive punishments, judicial discretion permits a judge to impose a proportionate penalty that respects section 12 of the Charter.[194] In *Boudreault*, the mandatory nature of the victim surcharge – and the lack of judicial discretion to mitigate or waive it – underpinned its cruel and unusual character.[195] In contrast, some provinces permit judges to waive or decrease the quantum of a fine – a safety valve that largely insulates financial penalties against successful section 12 Charter challenges.[196] For these reasons, section 12 Charter claims may also fail to protect unhoused persons against financial penalties that can be waived or reduced by judges.

The financial penalty scheme in other provinces may be vulnerable to section 12 Charter claims. Some provinces authorize judges to reduce the quantum of a fine to the minimum amount prescribed by law.[197] However, the minimum fine may still be excessive given a defendant's financial capacities. Furthermore, even when judges have discretion to waive or decrease the quantum of a fine, unhoused persons

[188] *Ibid.* at para. 68.
[189] *Ibid.* at paras. 76–79.
[190] *Ibid.* at para. 74; 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 176. *See* Offence Act, RSBC 1996, c. 338, s. 82(6)–(8).
[191] *R* v. *Boudreault*, 2018 SCC 58 at paras. 69–73.
[192] *Ibid.*
[193] *R* v. *Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para. 36; Debra Parkes, "Punishment and Its Limits" (2019) 88 *Sup Ct L Rev* 351 at 361; Sarah Chaster, "Cruel, Unusual, and Constitutionally Infirm: Mandatory Minimum Sentences in Canada" (2018) 23 *Appeal: Rev Current L & L Reform* 89 at 105, 107–08; Lauren Witten, "Proportionality as a Moral Process: Reconceiving Judicial Discretion and Mandatory Minimum Penalties" (2016) 48:1 *Ottawa L Rev* 81 at 130.
[194] David Paciocco, "The Law of Minimum Sentences: Judicial Responses and Responsibility" (2015) 19:2 *CCLR* 173 at 173–74.
[195] *R* v. *Boudreault*, 2018 SCC 58 at paras. 2, 56, 66.
[196] Provincial Offences Act, RSO 1990, c. P33, s. 69(15) (permitting waiver or reduction of a fine).
[197] Offence Act, RSBC 1996, c. 338, s. 88; Arts. 180.1, 218.6 CPP.

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may not contest them due to personal factors such as mental illness, substance use disorder, or unfamiliarity with the justice system.[198] They may still accumulate significant criminal justice debt from unpaid fines.[199]

2.6 THE POSITIVE RIGHT TO HOUSING

Lastly, some have argued that the Constitution provides a positive right to housing.[200] US and Canadian courts have rejected this claim.[201] The US Supreme Court expressly rejected a positive right to housing in the 1972 decision *Lindsey* v. *Normet*.[202] In *Lindsey*, the claimants were renting a single family residence in Portland, Oregon, on a month-to-month basis.[203] The city declared their property unfit for habitation as a result of substandard living conditions.[204] The claimants then requested that the landlord make certain repairs to the property.[205] The landlord responded by making some of the requested repairs but not others.[206] The claimants subsequently refused to pay the next month's rent until the landlord made the remaining repairs.[207]

The landlord sought a court order to evict the tenant in accordance with Oregon's Forcible Entry and Wrongful Detainer Act.[208] Before the order was executed, the claimants challenged the statute's constitutionality. They argued that it violated the Due Process Clause and the Equal Protection Clause and sought to enjoin the eviction order from being executed.[209] The claimants contended that the "need for decent shelter" and "the right to retain peaceful possession of one's home" were fundamental rights.[210] They argued that the State could only limit those rights if

[198] Terry Skolnik, "The Punitive Impact of Physical Distancing Laws on Homeless People" in Colleen Flood, Vanessa MacDonnell, Jane Philipott et al. (eds.), *The Law, Policy, and Ethics of COVID-19* (University of Ottawa Press, 2020) at 293.

[199] Emily Knox, "Poverty Is Not a Crime – So Why Is Montreal Still Ticketing the Unhoused?" CBC News (October 28, 2021), www.cbc.ca/news/canada/montreal/first-person-bylaw-infraction-unhoused-poverty-tickets-1.6221531 [perma.cc/2RVP-G5Y].

[200] *See, e.g.*, Shelby Green, "Imagining a Right to Housing, Lying in the Interstices" (2012) 19:3 Geo J Poverty L & Pol'y 393 at 396; Tracy Heffernan, Fay Faraday, and Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 JL & Soc Pol'y 10 at 11.

[201] *See, e.g.*, *Lindsey* v. *Normet*, 405 US 56 (1972); Maria Massimo, "Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach" (2021) 62:1 *BC L Rev* 273 at 287; *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at para. 30; Sarah Hamill, "Caught between Deference and Indifference: The Right to Housing in Canada" (2018) 7 *Can J Hum Rts* 67 at 70; Casey Dawkins. "The Right to Housing in an Ownership Society" (2020) 47:2 *Hous & Soc'y* 81 at 82–83.

[202] *Lindsey* v. *Normet*, 405 US 56 (1972) at 74; Maria Foscarinis, "The Growth of a Movement for a Human Right to Housing in the United States" (2007) 20 *Harv Hum Rts J* 35 at 37.

[203] *Lindsey* v. *Normet*, 405 US 56 (1972) at 74.

[204] *Ibid.* at 58–59.

[205] *Ibid.*

[206] *Ibid.*

[207] *Ibid.*

[208] *Ibid.*

[209] *Ibid.* at 59–64.

[210] *Ibid.* at 74. Quotation marks in original decision.

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justified by a compelling interest and narrowly tailored means to achieve the State's objective.[211] The majority of the Court disagreed.[212] Although the Court recognized the importance of housing, they concluded that the Constitution's wording provided no affirmative right to housing.[213]

The 2014 Ontario Court of Appeal decision *Tanudjaja* v. *Canada (Attorney General)* declined to recognize a positive right to housing.[214] The majority of the justices cited Supreme Court of Canada precedent that rejected a freestanding right to healthcare.[215] They noted that existing Supreme Court of Canada decisions have not affirmed a positive State duty to ensure that individuals enjoy the section 7 Canadian Charter right to life, liberty, and security of the person.[216] They also observed that the court would usurp the legislator's function if it judicially reviewed the government's public policy approach to homelessness without a constitutional challenge to a particular law or policy.[217]

To be clear, positive economic and social rights have not been foreclosed entirely in Canada.[218] The Supreme Court of Canada noted that the State may have some positive duties to allocate resources or entitlements in certain contexts, even though such contexts have not yet been recognized.[219] Similarly, in the Ontario Court of Appeal's decision in *Tanudjaja*, the majority of the court noted that the Supreme Court of Canada left open the possibility that the State may have positive duties to remedy Charter rights violations in certain contexts.[220]

There are different reasons why courts are reticent to constitutionalize a right to housing that is not provided expressly in the Constitution. First, some courts worry that the recognition of justiciable positive rights erodes the separation of powers.[221] According to this argument, courts would usurp the functions of other branches of government by second-guessing their priorities and public policy

[211] *Ibid.*
[212] *Ibid.*
[213] *Ibid.*
[214] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at paras. 30–32.
[215] *Ibid.*, citing *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35 at para. 104.
[216] *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84 at para. 81. *See also*, *Auton (Guardian ad litem of)* v. *British Columbia (Attorney General)*, 2004 SCC 78 at para. 41.
[217] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at paras. 33–34.
[218] *See*, *e.g.*, Miriam Cohen and Martin-Olivier Dagenais, "The Implementation of Economic, Social and Cultural Rights in Canada: Between Utopia and Reality" (2021) 7:1 *Const Rev* 26 at 40; Martha Jackman, "One Step Forward and Two Steps Back: Poverty, the Charter and the Legacy of *Gosselin*" (2019) 39:1 *NJCL* 85 at 100–01.
[219] *Gosselin* v. *Quebec (Attorney General)*, 2002 SCC 84 at para. 82, noting: "One day s. 7 [of the Canadian Charter] may be interpreted to include positive obligations." Words in brackets mine.
[220] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at para. 37.
[221] *Tanudjaja* v. *Attorney General (Canada) (Application)*, 2013 ONSC 5410 at paras. 140–43; Katharine Young, "The Minimum Core of Economic and Social Rights: A Concept in Search of Content" (2008) 33 *Yale J Int'l L* 113 at 159 (describing this argument); Herman Schwartz, "Do Economic and Social Rights Belong in a Constitution" (1995) 10:3 *Am U J Intl L & Pol'y* 1233 at 1237–38.

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decisions.[222] Furthermore, some scholars note that the recognition of positive rights raises democratic legitimacy concerns.[223] Namely, few unelected justices can override the complex public policy decisions made by many democratically elected lawmakers.[224] Some note that this is problematic because lawmakers are more representative of the population's diversity compared to judges.[225] Second, some courts observe that the judiciary lacks the institutional competence to implement or supervise redistributive schemes that involve complex public policy concerns.[226] Courts lack the information-gathering capacities that other branches of government have.[227] They also lack the expertise to devise or enforce complicated schemes whose implementation affects other public policy areas.[228] Finally, courts are concerned that they cannot devise a concrete threshold for what constitutes "adequate" housing and ensure that the government respects that standard.[229] For these types of reasons, courts have rejected a positive right to housing in the United States and Canada.

2.7 CONCLUSION

This chapter provided an overview of how US and Canadian constitutional law approach homelessness and the regulation of public property. It analyzed the principal constitutional challenges to municipal ordinances that govern need-alleviating conduct and highlighted their limitations. It demonstrated how constitutional claims fail to protect unhoused persons against various forms of actual and threatened interference associated with these laws, such as displacement, fines, arrests, and imprisonment. This chapter also explained how US and Canadian courts have thus far rejected a positive right to housing that would safeguard individuals against such forms of actual and threatened interference.

[222] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at para. 33; Malcolm Langford "The Justiciability of Social Rights: From Practice to Theory" in Malcolm Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press, 2008) at 31 (describing this argument).

[223] Frank Cross, "The Error of Positive Rights" (2000) 48 *UCLA L Rev* 857 at 890, 914.

[224] *Ibid.*

[225] *Ibid.*

[226] *Tanudjaja* v. *Attorney General (Canada) (Application)*, 2013 ONSC 5410 at paras. 33–34; *Chaoulli* v. *Quebec (Attorney General)*, 2005 SCC 35 at para. 164; Mitra Ebadolahi, "Using Structural Interdicts and the South African Human Rights Commission to Achieve Judicial Enforcement of Economic and Social Rights in South Africa" (2008) 83:5 *NYU L Rev* 1565 at 1567 (providing an overview of this argument); Helen Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review" (1999) 112:6 *Harv L Rev* 1131 at 1175 (summarizing this argument).

[227] Cass Sunstein, "The Most Knowledgeable Branch" (2016) 164 *U Pa L Rev* 1607 at 1613–15.

[228] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at para. 34. *See, e.g.*, Wayne McCormack, "Property and Liberty – Institutional Competence and the Functions of Rights" (1994) 51:1 *Wash & Lee L Rev* 1 at 55–57.

[229] *Tanudjaja* v. *Canada (Attorney General)*, 2014 ONCA 852 at paras. 34–35; Hershkoff, "Positive Rights and State Constitutions" at 1179 (summarizing this argument).

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The next chapter explores how legal theorists have analyzed the relationship between homelessness, liberty, and property from the standpoint of two theories of freedom: positive and negative. Subsequent parts of this book highlight how these theories provide an important – but limited – understanding of this relationship, and overlook how unhoused persons face different forms of domination that undermine their freedom and equality.

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