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## Bathrooms as a Homless Rights Issue

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## BATHROOMS AS A HOMELESS RIGHTS ISSUE\*

RON S. HOCHBAUM\*\*

*Bathrooms are a bellwether of equality. Segregated bathrooms were at the center of the Civil Rights Movement. Accessible bathrooms were at the heart of the Disability Rights Movement. Now, gender-neutral bathrooms or bathrooms assigned by gender, rather than sex, are at the heart of the Transgender Rights Movement.*

*This Article is the first to examine the right to access bathrooms as it relates to the homeless community. The Article explores the current paradox where cities, counties, and states provide few, if any, public bathrooms for the homeless community and the public at large while criminalizing public urination and defecation.*

*To better understand this paradox, the Article contains two original multijurisdictional surveys. The first reviews the prohibitions on public urination and defecation in the ten municipalities with the most homeless individuals. The second explores the Freedom of Information Act and Public Record Act responses of those municipalities to requests for information regarding the public bathrooms they operate and potential barriers to use for homeless individuals (e.g., closing in the evenings or particular seasons, charging a fee for entry, being located in buildings requiring identification for entry, etc.).*

*The Article contextualizes the paradox in relation to human dignity, public health, and the historical use of bathroom access as an exercise of power. It contends that the current scheme denies homeless individuals a basic sense of dignity, while undermining the health and safety justification for prohibitions on public urination and defecation by failing to operate public restrooms. The Article further argues that government actors use bathrooms to marginalize the homeless community in the same way that they have used them to marginalize*

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women, people of color, individuals with disabilities, and transgender individuals. In exploring this use of power, the Article argues that prohibitions on public urination and defecation are part of a larger trend of criminalizing homelessness and the evolution of segregation.

Finally, the Article evaluates potential solutions to the paradox. The solutions reviewed include increasing the availability and accessibility of public restrooms, leveraging private industry, and reforming or challenging the law. The Article concludes that any long-term solution to the problem requires an examination of the paradox through the lens of the homeless community.

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#### INTRODUCTION

In her second novel, *Sula*, Toni Morrison recalls the challenge of using the restroom in the segregated South:

When they changed trains in Birmingham for the last leg of the trip, they discovered what luxury they had been in through Kentucky and Tennessee, where the rest stops had all had colored toilets. After Birmingham there were none. Helene’s face was drawn with the need to relieve herself, and so intense was her distress she finally brought herself to speak about her problem to a black woman with four children who had got on in Tuscaloosa.

“Is there somewhere we can go to use the restroom?”

The woman looked up at her and seemed not to understand. “Ma’am?”

...

“The restroom,” Helene repeated. Then, in a whisper, “The toilet.” . . .

“Yonder,” the woman said. “Meridian. We be pullin’ in direc’lin.” Then she smiled sympathetically and asked, “Kin you make it?”

Helene nodded and went back to her seat trying to think of other things—for the surest way to have an accident would be to remember her full bladder.

At Meridian the women got out with their children . . . Helene looked about the tiny stationhouse for a door that said COLORED WOMEN . . . She looked around for the other woman and, seeing just the top of her head rag in the grass, slowly realized where “yonder” was. All of them, the fat woman and her four children, three boys and a girl, Helene and her daughter, squatted there in the four o’clock Meridian sun. They did it again in Ellisville, again in Hattiesburg, and by the time they reached Slidell, not too far from Lake Pontchartrain, Helene could not only fold leaves as well as the fat woman, she never felt a stir as she passed the muddy eyes of the men who stood like wrecked Dorics under the station roofs of those towns.<sup>1</sup>

For those who have the luxury of forgetting, Morrison’s *Sula* reminds us that bathrooms are a bellwether of equality. Segregated bathrooms were at the center of the Civil Rights Movement.<sup>2</sup> Accessible bathrooms were at the heart

1. TONI MORRISON, *SULA* 23–24 (1974).

2. See *infra* Section III.C.1.

of the Disability Rights Movement.<sup>3</sup> Now gender-neutral bathrooms or bathrooms assigned by gender, rather than sex, are at the heart of the Transgender Rights Movement.<sup>4</sup>

Bathroom accessibility issues also plague the homeless community.<sup>5</sup> Homeless individuals have trouble accessing bathrooms in a world where municipalities fail to maintain public bathrooms and increasingly rely on private industry to provide that public good.<sup>6</sup> Further complicating matters, cities, counties, and states across the country have criminalized urinating and defecating in public.<sup>7</sup> Taken together, these factors create an impossible situation for homeless individuals in which they have no reasonable alternative but to break the law.<sup>8</sup>

The simultaneous absence of public bathrooms and criminalization of public urination and defecation is problematic for a number of reasons. First, in the United States, privacy is central to performing these bodily functions, but the absence of public restrooms denies homeless individuals the dignity associated with this expectation.<sup>9</sup> The failure to provide public bathrooms is dehumanizing on its own and, when combined with prohibitions on bathroom functions, it signals to homeless individuals that society believes they should cease to exist. This says nothing of the resulting health ramifications of failing to provide toilets and a means of hand sanitization.<sup>10</sup>

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3. See *infra* Section III.C.1.

4. See *infra* Section III.C.1.

5. While this Article focuses on access to bathrooms for homeless individuals, many other groups benefit from the presence of accessible public restrooms. These groups include “restroom challenged” individuals who need to use the bathroom more frequently or suddenly such as the elderly, pregnant women, children, and individuals with particular medical conditions. Moreover, access to public restrooms is important to individuals who may spend an extended period of time away from home, such as runners, bicyclists, and tourists.

Additionally, the term “accessible” is used throughout this Article to describe the absence of barriers to bathroom use by homeless individuals. The author acknowledges that the term “accessible” is frequently used to refer to meaningful access for individuals with disabilities. The comparison is appropriate for two reasons. First, the intersection between homelessness and disability is common. See *infra* Section III.C.1. Second, barriers to use by homeless individuals, such as those described in Section III.B., can render the bathroom inaccessible.

6. See *infra* Part II. A more detailed explanation of what is considered a “public bathroom” is explained in Part II. However, in short, for the purpose of this Article a “public bathroom” refers to bathrooms operated and maintained by government agencies as opposed to bathrooms that may be “open” to the public but located on private property.

7. See *infra* Part I.

8. Josh Howard & Vanessa Moore, Seattle Univ. Homeless Rights Advocacy Project, *Nowhere to Go - Homelessness & the Lack of Public Restrooms and Hygiene Facilities*, at ii (draft) (on file with author).

9. See *infra* Section III.A.

10. See *infra* Section III.B.

Moreover, the criminalization of public urination and defecation must be contextualized as part of the larger trend of criminalizing homelessness.<sup>11</sup> The criminalization of homelessness is the outlawing of life-sustaining conduct of homeless individuals, such as sitting or lying on the sidewalk, camping or sleeping in public, eating, and asking for assistance.<sup>12</sup> Criminalizing homelessness is not solely troublesome because it outlaws innocent behavior which, if performed on private premises, would be considered legal. Rather, it is problematic because it is a means by which governments regulate space to exclude those whom the majority deems undesirable. When viewed in this light, it becomes clear that criminalizing homelessness is one facet in the evolution of segregation.<sup>13</sup>

Part I of this Article begins by examining prohibitions on public urination and defecation across the country, surveying the laws criminalizing these necessary bodily functions in the ten cities with the most homeless individuals according to the United States Department of Housing and Urban Development's ("HUD") 2017 Point-in-Time Count.<sup>14</sup> Part II examines the issues of bathroom availability and accessibility for homeless individuals in those same ten cities by reviewing responses to Public Records Act requests, identifying potential barriers to bathroom use for homeless individuals, and determining how many of the bathrooms maintained by the cities are inaccessible due to barriers to use. Part III explores the problems associated with the simultaneous failure to maintain public bathrooms and criminalization of public urination and defecation. Further, this part probes the connection between prohibitions on public urination and defecation and the trend of criminalizing homelessness, as well as its role in the evolution of segregation. Part IV examines potential solutions to the problem, and Part V makes recommendations regarding which solutions should be implemented moving forward.

11. See *infra* Section III.C.2.

12. See *infra* Part II.

13. See *infra* Section III.C.2.

14. "The Point-in-Time (PIT) count is a count census of sheltered and unsheltered people experiencing homelessness on a single night in January." *Point-in-Time Count and Housing Inventory Count*, U.S. DEP'T HOUSING & URB. DEV. EXCHANGE (2019), <https://www.hudexchange.info/programs/hdx/pit-hic/> [<https://perma.cc/A5DZLMY3>]. The local Continuums of Care, "regional or local planning bod[ies] that coordinate[] housing and services funding for homeless families and individuals," conduct the count. *What Is a Continuum of Care?*, NAT'L ALLIANCE TO END HOMELESSNESS, <https://endhomelessness.org/resource/what-is-a-continuum-of-care/> [<https://perma.cc/DKF4-7GNN>]; see also U.S. DEP'T OF HOUS. & URBAN DEV., 2012 INTRODUCTORY GUIDE TO THE CONTINUUM OF CARE (COC) PROGRAM 4 (July 14, 2012), <https://files.hudexchange.info/resources/documents/CoCProgramIntroductoryGuide.pdf> [<https://perma.cc/8U7C-RSNY>]. See generally 42 U.S.C. § 11381 (2012) (discussing the purposes of the Continuum of Care program).

## I. PROHIBITIONS ON PUBLIC URINATION AND DEFECATION

Prohibitions on public urination and defecation are quite common. Cities, counties, and states across the country have bans in effect. To better understand the impact of laws outlawing public urination and defecation on homeless individuals, this Article creates an original survey of the laws prohibiting public urination and defecation in the ten locales with the most homeless individuals according to the HUD 2017 Point-in-Time Count.<sup>15</sup>

HUD's Point-in-Time Count is an annual or biannual census of sheltered and unsheltered homeless individuals in cities, counties, states, and territories across the country.<sup>16</sup> HUD requires that these regions conduct the Point-in-Time Count to receive federal funds to address homelessness.<sup>17</sup> Despite the many valid criticisms of the Point-in-Time Count methodology, this Article focuses on the locales with the most homeless individuals according to the HUD Point-in-Time Count because evidence suggests the findings would be remarkably similar no matter which cities are studied.<sup>18</sup>

15. See MEGHAN HENRY ET AL., U.S. DEP'T OF HOUS. & URBAN DEV., THE 2017 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 17 (2017) [hereinafter HENRY ET AL. 2017], <https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf> [<https://perma.cc/P98Z-D27V>]. One of the most important functions of Continuums of Care is supervision of the Point-in-Time Count of homeless individuals residing in the locale. See *What Is a Continuum of Care?*, *supra* note 14. The results of Point-in-Time Counts are used to determine funding levels and the provisions of services for the homeless community. *Id.*

16. See *What is a Point-in-Time Count?*, NAT'L ALLIANCE TO END HOMELESSNESS (Sept. 7, 2012), <https://endhomelessness.org/resource/what-is-a-point-in-time-count/> [<https://perma.cc/PV6H-VNGV>].

17. See *id.*

18. See generally NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, DON'T COUNT ON IT: HOW THE HUD POINT-IN-TIME COUNT UNDERESTIMATES THE HOMELESSNESS CRISIS IN AMERICA 10-14 (2017) [hereinafter DON'T COUNT ON IT], <https://nlchp.org/wp-content/uploads/2018/10/HUD-PIT-report2017.pdf> [<https://perma.cc/QGC6-RUXN>] (discussing the flaws in the HUD Point-in-Time Count). Laws prohibiting public urination and defecation are widespread. See, e.g., PHX., ARIZ., CHARTER AND CITY CODE ch. 23, art. III, § 23-48 (2019), <https://www.codepublishing.com/AZ/Phoenix/html/pdfs/Phoenix23.pdf> [<https://perma.cc/KBN2-QRRB>]; CHI., ILL., MUN. CODE ch. 8-4, § 8-4-081 (2019), [http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago\\_il/title8offensesaffectingpublicpeaceandwelfare/s/chapter8-4publicpeaceandwelfare?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:chicago\\_il\\$sanc=JD\\_8-4-081](http://library.amlegal.com/nxt/gateway.dll/Illinois/chicago_il/title8offensesaffectingpublicpeaceandwelfare/s/chapter8-4publicpeaceandwelfare?f=templates$fn=default.htm$3.0$vid=amlegal:chicago_il$sanc=JD_8-4-081) [<https://perma.cc/5Z36-NEDH>]; CHARLOTTE, N.C., CODE OF ORDINANCES ch. 15, art. IV, § 15-83 (2019), [https://library.municode.com/nc/charlotte/codes/code\\_of\\_ordinances?nodeId=PTIICOOR\\_CH15OFMIPR\\_ARTIVOFAGPUMODE\\_S15-83URDECEPRPR](https://library.municode.com/nc/charlotte/codes/code_of_ordinances?nodeId=PTIICOOR_CH15OFMIPR_ARTIVOFAGPUMODE_S15-83URDECEPRPR) [<https://perma.cc/E7R4-9GQK>]; COLUMBUS, OHIO, CODE OF ORDINANCES ch. 2317, § 2317.14 (2019), [https://library.municode.com/oh/columbus/codes/code\\_of\\_ordinances?nodeId=TIT23GEOFCO\\_CH2317PUCO\\_2317.14PUURDE](https://library.municode.com/oh/columbus/codes/code_of_ordinances?nodeId=TIT23GEOFCO_CH2317PUCO_2317.14PUURDE) [<https://perma.cc/3UBY-RJ6A>]; HOUS., TEX., CODE OF ORDINANCES ch. 28, art. I, § 28-19 (2019), [https://library.municode.com/tx/houston/codes/code\\_of\\_ordinances?nodeId=COOR\\_CH28MIOFP\\_R\\_ARTIINGE\\_S28-19PUURDE](https://library.municode.com/tx/houston/codes/code_of_ordinances?nodeId=COOR_CH28MIOFP_R_ARTIINGE_S28-19PUURDE) [<https://perma.cc/HBG9-5VXM>]; SAN ANTONIO, TEX., CODE OF ORDINANCES ch. 21, art. I, § 21-27 (2019), [https://library.municode.com/tx/san\\_antonio/codes/code\\_of\\_ordinances?nodeId=PTIICO\\_CH21OFMIPR\\_ARTIINGE\\_S21-27URDEPU](https://library.municode.com/tx/san_antonio/codes/code_of_ordinances?nodeId=PTIICO_CH21OFMIPR_ARTIINGE_S21-27URDEPU) [<https://perma.cc/RJY6-MX5X>].

The Point-in-Time Count found 553,742 individuals were homeless in 2017.<sup>19</sup> Specifically, 262,430 were located in emergency shelters, 98,437 were in

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A shortage of public restrooms is often reported in cities across the country that have these laws. See, e.g., Yoojin Cho, *City Lays out Plans for Permanent Downtown Public Restrooms*, KXAN (July 28, 2018), <https://www.kxan.com/news/local/austin/city-lays-out-plans-for-permanent-downtown-public-restrooms/> [<https://perma.cc/7XHG-P3Y4>] (discussing plan to build permanent restrooms in Austin, Texas); Rocío Guenther, *District 1's Treviño: Drop in Citations Flushes Criticism of \$170K 'Portland Loo'*, RIVARD REP. (June 9, 2017), <https://therivardreport.com/district-1s-trevino-drop-in-citations-flushes-criticism-of-170k-portland-loo/> [<https://perma.cc/R75U-99PM>] (discussing San Antonio's lack of public bathrooms); Stacey McKenna, *No Toilets for the Homeless*, BRIGHT MAG. (Jan. 20, 2016), <https://brightthemag.com/no-toilets-for-the-homeless-55b3b073e919?gi=819da42da331> [<https://perma.cc/XHG6-DNYV>] (discussing the lack of public bathrooms in Denver, Colorado); Ann O'Malley, *Public Restrooms Sparse Downtown*, COLUMBUS DISPATCH (Feb. 26, 2016), <https://www.dispatch.com/article/20160226/OPINION/302269786> [<https://perma.cc/E8HS-GNU8>] (addressing the public bathroom shortage in Columbus, Ohio); John D. Thomas, *Why Is It So Difficult To Find a Public Bathroom?*, CHI. TRIB. (Aug. 21, 2013), <https://www.chicagotribune.com/opinion/ct-xpm-2013-08-21-ct-perspec-0821-bathroom-20130821-story.html> [<https://perma.cc/8PFH-M2NR>] (addressing the lack of public restrooms in Chicago, Illinois); *Downtown Jacksonville Is Missing This Public Health Necessity*, COASTAL (Jan. 4, 2019), <https://thecoastal.com/buzz/buildingupjax/downtown-jacksonville-is-missing-this-public-health-necessity/> [<https://perma.cc/7UFQ-QDVP>] (discussing lack of public restrooms in Jacksonville, Florida).

Nevertheless, before proceeding, it is important to acknowledge that HUD's poor methodology results in significant undercounting of the true homeless population each year. DON'T COUNT ON IT, *supra*, at 6. For starters, the count is held annually in the last ten days of January. *Id.* at 12. By conducting the count during a winter month when homeless individuals may be more likely to pay for a hotel, stay with a friend, or hide from the weather, HUD ensures that the final tally remains low. *Id.* Additionally, the fact that a homeless individual must be visible to be counted overlooks the fact that homeless individuals avoid being seen for a variety of reasons, not the least of which is that remaining visible may lead to a citation or arrest under the antihomeless laws discussed in Section III.C.2 below. *Id.* at 6. Moreover, HUD's definition of homelessness is overly restrictive. It excludes individuals who may be "couchsurfing" or staying in a hotel, even if only for a night. *Id.* at 12. It also excludes individuals in jails and hospitals. *Id.* In 2017, Houston found that the total results of its count increased by fifty-seven percent after accounting for incarcerated individuals who reported being homeless before their arrest. *Id.* Finally, the methodology varies from one Continuum of Care to another and sometimes by year. *Id.* at 10–11. For example, San Francisco conducts the Point-in-Time Count over one night while Los Angeles conducts it over three nights. *Id.* at 10. Even how homelessness is defined, and consequently who is counted, can change from year to year. *Id.*

Lastly, using the Point-in-Time methodology does not account for the "transitory nature" of homelessness and results in undercounting. *Id.* at 6. To understand the true number of individuals experiencing homelessness, it would be better to count how many people are homeless over the course of a year. *Id.* According to a 2001 study using data from homeless individuals accessing the social services, the actual number of homeless individuals experiencing homelessness at some point during that year was likely 2.5 to 10.2 times larger than the number of individuals counted by HUD. *Id.*

19. U.S. DEP'T OF HOUS. & URBAN DEV., HUD 2017 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS 1 (2017) [hereinafter HUD 2017 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS], [https://www.hudexchange.info/resource/reportmanagement/published/CoC\\_PopSub\\_NatlTerrDC\\_2017.pdf](https://www.hudexchange.info/resource/reportmanagement/published/CoC_PopSub_NatlTerrDC_2017.pdf) [<https://perma.cc/F2XR-4AZ6>]. This count represents an increase in the number of homeless individuals from previous years. Christopher Weber & Geoff Mulvihill, *America's Homeless Population Rises for First Time in Years*, U.S. NEWS & WORLD REP. (Dec. 6, 2017), <https://www.usnews.com/news/us/articles/2017-12-06/us-homeless-count-rises-pushed-by-crisis-on-the-west-coast> [<https://perma.cc/8R7L-L6K8>] (attributing the rise in homelessness to the shortage of

transitional housing, and 192,875 were unsheltered.<sup>20</sup> The ten locales with the most homeless individuals were:

- 1) New York City—76,501;
- 2) Los Angeles City and County—55,188;
- 3) Seattle and King County—11,643;
- 4) San Diego City and County—9160;
- 5) District of Columbia—7473;
- 6) San Jose and Santa Clara City and County—7394;
- 7) San Francisco—6858;
- 8) Las Vegas and Clark County—6490;
- 9) Boston—6135; and
- 10) Philadelphia—5693.<sup>21</sup>

These ten locales account for thirty-five percent of all the homeless individuals counted in 2017 but only 9.8 percent of the U.S. population.<sup>22</sup> All ten locales criminalize the acts of public urination and defecation.<sup>23</sup> Some

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affordable housing in West Coast cities). Charles Cowan, William Breakey, and Pamela Fischer explain the difficulty associated with counting homeless individuals:

Counting the homeless population is extremely difficult because of the lack of a clear definition of homelessness, the mobility of the population, and the cyclical nature of homelessness for many individuals. In addition, homeless people are often reluctant to be interviewed, and many of them remain invisible even to the most diligent of researchers. There is no uniform method for counting the homeless, and very few good studies have been done. Three approaches have been used: indirect estimation, single-contact censuses, and capture-recapture studies. Each method, while offering some benefits, suffers from certain technical inadequacies.

Charles D. Cowan, William R. Breakey & Pamela J. Fischer, *The Methodology of Counting the Homeless, in HOMELESSNESS, HEALTH AND HUMAN NEEDS* 170 (1988), [https://www.ncbi.nlm.nih.gov/books/NBK218232/pdf/Bookshelf\\_NBK218232.pdf](https://www.ncbi.nlm.nih.gov/books/NBK218232/pdf/Bookshelf_NBK218232.pdf) [<https://perma.cc/Z3C8-UA3V>].

20. HUD 2017 CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS, *supra* note 19, at 1.

21. HENRY ET AL. 2017, *supra* note 15.

22. *See id.* at 8, 17.

23. *See* D.C. CODE § 22-1321(e) (2019), <https://code.dccouncil.us/dc/council/code/sections/22-1321.html> [<https://perma.cc/427T-TPL5>]; MASS. GEN. LAWS ANN. ch. 272, § 53 (Westlaw through Chapter 134 of 2019 1st Ann. Sess.); L.A., CAL., MUN. CODE § 41.47.2 (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/MZ8Y-3RC8> (staff-uploaded archive)]; L.A. COUNTY, CAL., CODE § 11.16.050 (2019), [https://library.municode.com/ca/los\\_angeles\\_county/codes/code\\_of\\_ordinances](https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances) [<https://perma.cc/3RNB-E5MD>]; SAN DIEGO, CAL., MUN. CODE § 56.55 (2019), <https://docs.sandiego.gov/municode/MuniCodeChapter05/Ch05Art06Division00.pdf> [<https://perma.cc/39U7-UZJ6>]; S.F., CAL., POLICE CODE § 153 (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/GN3U-4G2S> (staff-uploaded archive)]; SAN JOSE, CAL., MUN. CODE § 10.12.110 (2019), [https://library.municode.com/ca/san\\_jose/codes/code\\_of\\_ordinances](https://library.municode.com/ca/san_jose/codes/code_of_ordinances) [<https://perma.cc/P6JQ-M7BV>]; SANTA CLARA, CAL., MUN. CODE § 9.05.010 (2019), <https://www.codepublishing.com/CA/SantaClara/> [<https://perma.cc/6LZY-KFXQ>]; SANTA CLARA COUNTY, CAL., CODE § B14-32.6

prohibit the acts by simply stating that it is unlawful to perform them in “public” or “public view”<sup>24</sup> while others provide exhaustive lists of public places where the acts are prohibited.<sup>25</sup> New York City prohibits the behavior under the guise of “littering”<sup>26</sup> while Boston punishes the behavior under Massachusetts’s prohibition on “indecent exposure.”<sup>27</sup>

Several locales carve out exemptions to their prohibitions. For example, King County, Washington, exempts children under the age of twelve<sup>28</sup> and San

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(2019), [https://library.municode.com/ca/santa\\_clara\\_county/codes/code\\_of\\_ordinances](https://library.municode.com/ca/santa_clara_county/codes/code_of_ordinances) [<https://perma.cc/WD37-E9WK>]; LAS VEGAS, NEV., MUN. CODE § 10.40.040 (2019), [https://library.municode.com/nv/las\\_vegas/codes/code\\_of\\_ordinances](https://library.municode.com/nv/las_vegas/codes/code_of_ordinances) [<https://perma.cc/5Q72-XQTX>]; N.Y.C., N.Y. ADMIN. CODE §§ 16-118(1)(a), (6), (8) (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/8TX5-KCKR> (staff-uploaded archive)]; PHILA., PA., CODE § 10-609(2), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/M6L6-QMH7> (staff-uploaded archive)]; KING COUNTY, WASH., CODE § 12.58 (2019), [https://aqua.kingcounty.gov/council/clerk/code/15\\_Title\\_12.htm#\\_Toc528738629](https://aqua.kingcounty.gov/council/clerk/code/15_Title_12.htm#_Toc528738629) [<https://perma.cc/955A-DNTB>]; SEATTLE, WASH., MUN. CODE § 12A.10.100 (2019), [https://library.municode.com/wa/seattle/codes/municipal\\_code](https://library.municode.com/wa/seattle/codes/municipal_code) [<https://perma.cc/H82Y-26PD>].

24. *See, e.g.*, D.C. CODE § 22-1321(e); SAN JOSE, CAL., MUN. CODE § 10.12.110; SEATTLE, WASH., MUN. CODE § 12A.10.100(A) (2019), [https://library.municode.com/wa/seattle/codes/municipal\\_code](https://library.municode.com/wa/seattle/codes/municipal_code) [<https://perma.cc/H82Y-26PD>] (prohibiting urination or defecation “in a public place . . . where such act could be observed by any member of the public”).

25. *See, e.g.*, L.A., CAL., MUN. CODE § 41.47.2 (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/MZ8Y-3RC8> (staff-uploaded archive)] (prohibiting urination or defecation “in or upon any public street, sidewalk, alley, plaza, beach, park, public building or other publicly maintained facility or place, or in any place open to the public or exposed to public view”); SAN DIEGO, CAL., MUN. CODE § 56.55 (prohibiting urination or defecation “upon any street, sidewalk, alley, plaza, park, beach, public building or publicly maintained facility, or in any place open to the public or exposed to public view”); PHILA., PA. CODE § 10-609(2) (prohibiting urination and defecation “on any public right-of-way, underground platform or concourse, elevated platform serving public transportation facilities, underground or elevated passageways used by the public, railroad or railway passenger stations or platforms, or on the steps leading to any of them”). At least one jurisdiction also criminalizes the failure to “clean or remove” the waste after commission of the underlying offense. LAS VEGAS, NEV., MUN. CODE § 10.40.040(D).

26. N.Y.C., N.Y., ADMIN. CODE § 16-118 (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/8TX5-KCKR> (staff-uploaded archive)]. The New York City Council recently amended the city’s law to allow police to issue a civil summons instead of a criminal summons. Criminal Justice Reform Act, Local Law No. 73 Int. 1057-2016, § 8 (N.Y.C. 2016), <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2553512&GUID=D93F40DB-CD7D-424C-AC63-AECEACBD4D06&Options=ID%7cText%7c&Search=urination> [<https://perma.cc/6UXW-BM5D> (staff-uploaded archive)] (amending N.Y.C., N.Y., ADMIN. CODE § 14-155). The amendments also reduced the possible length of imprisonment from ten days to one. *Id.*; *see also* Press Release, Office of the Mayor of N.Y.C., Mayor de Blasio Signs the Criminal Justice Reform Act (June 13, 2016), <https://www1.nyc.gov/office-of-the-mayor/news/530-16/mayor-de-blasio-signs-criminal-justice-reform-act> [<https://perma.cc/K378-J42B>].

27. MASS. GEN. LAWS ANN. ch. 272, § 53 (Westlaw).

28. KING COUNTY, WASH., CODE § 12.58.010(A). Strangely, King County also effectively creates an exemption for golfers by explicitly excluding golf courses from the definition of public places. *Id.* § 12.58.010(B).

Francisco exempts individuals with “verified medical conditions.”<sup>29</sup> Similarly, Las Vegas’s code explicitly provides that a “verified medical condition” constitutes an affirmative defense.<sup>30</sup>

In most jurisdictions, public urination and defecation is a citable offense that results in a fine.<sup>31</sup> Fines range from \$50 to \$2000.<sup>32</sup> Two jurisdictions require escalating fines for repeat offenses within twelve months of the first offense.<sup>33</sup> Homeless individuals are at serious risk of repeating the offense numerous times within one day, let alone a calendar year.

In addition to fines, many jurisdictions permit prosecutors to pursue incarceration.<sup>34</sup> Permissible sentences range from one day in New York City to six months in Santa Clara, Las Vegas, and Boston.<sup>35</sup> At present, there is no public data on how prosecutors use their discretion in charging violations of public urination and defecation. However, prosecutors may seek incarceration more frequently for offenses committed by homeless individuals because

29. S.F., CAL., POLICE CODE art. 2, § 153(d) (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/3XXW-SMMZ> (staff-uploaded archive)]. The California state law that prohibits public urination and defecation provides exemptions for individuals who cannot comply due to “disability, age, or a medical condition.” CAL. PENAL CODE § 640(d)(3) (West Supp. 2019).

30. LAS VEGAS, NEV., MUN. CODE § 10.40.040(C) (2009), [https://library.municode.com/nv/las\\_vegas/codes/code\\_of\\_ordinances?nodid=LAVENEMUCO](https://library.municode.com/nv/las_vegas/codes/code_of_ordinances?nodid=LAVENEMUCO) [<https://perma.cc/2MX8-FBFT>].

31. JAVIER ORTIZ & MATTHEW DICK, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, *THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS* 17 (Sara Rankin ed., 2015).

32. *See, e.g.*, N.Y.C., N.Y., ADMIN. CODE § 16-118(9) (indicating a seventy-five dollar fine for the first violation); PHILA., PA., CODE § 1-109(3)(e) (2019), [https://www.amlegal.com/codes/client/philadelphia\\_pa/](https://www.amlegal.com/codes/client/philadelphia_pa/) [<https://perma.cc/2TQZ-S696>] (setting the fine for a Class III offense at two thousand dollars for each violation); SUPERIOR COURT OF CAL., CTY. OF SANTA CLARA, 2019 TRAFFIC BAIL SCHEDULE, [http://www.sccourt.org/documents/traffic\\_bail.pdf](http://www.sccourt.org/documents/traffic_bail.pdf) [<https://perma.cc/F4ZX-4VFM>] (setting bail at fifty dollars).

33. SANTA CLARA, CAL., MUN. CODE § 9.05.010(d)(1)(B)–(D) (2019), <https://www.codepublishing.com/CA/SantaClara/#!/SantaClara09/SantaClara0905.html> [<https://perma.cc/6LZY-KFXQ>] (setting the maximum fines within a one-year period of three hundred dollars for the second violation, six hundred dollars for the third violation, and nine hundred dollars for the fourth violation); N.Y.C., N.Y., ADMIN. CODE § 16-118(9)(b)(2)–(3) (setting a fine between 250 and 350 dollars for the second violation and a fine between 350 and 450 dollars for the third violation).

34. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 53(a) (Westlaw through Chapter 134 of 2019 1st Ann. Sess.) (providing for a sentence not to exceed six months); SANTA CLARA, CAL., MUN. CODE § 1.05.070(e)(2) (2019), <https://www.codepublishing.com/CA/SantaClara/#!/SantaClara01/SantaClara0105.html#1.05> [<https://perma.cc/M3QU-MUBN>] (allowing for a sentence of up to six months); LAS VEGAS, NEV., MUN. CODE § 10.40.110 (2019), [https://library.municode.com/nv/las\\_vegas/codes/code\\_of\\_ordinances?nodid=LAVENEMUCO](https://library.municode.com/nv/las_vegas/codes/code_of_ordinances?nodid=LAVENEMUCO) [<https://perma.cc/2MX8-FBFT>] (allowing for imprisonment up to six months); N.Y.C., N.Y., ADMIN. CODE § 16-118(8) (permitting a sentence of one day).

35. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 272, § 53(a) (Westlaw); SANTA CLARA, CAL., MUN. CODE § 1.05.070(e)(2) (allowing for a sentence of up to six months); LAS VEGAS, NEV., MUN. CODE § 10.40.110 (2009), [https://library.municode.com/nv/las\\_vegas/codes/code\\_of\\_ordinances?nodid=LAVENEMUCO](https://library.municode.com/nv/las_vegas/codes/code_of_ordinances?nodid=LAVENEMUCO) [<https://perma.cc/2MX8-FBFT>] (allowing for imprisonment up to six months); N.Y.C., N.Y. ADMIN. CODE § 16-118(8) (permitting a sentence of one day).

homeless individuals often lack the ability to pay the fine and are more likely to have violated the law multiple times. In most jurisdictions, whether a prosecutor pursues a fine or incarceration, the offense is charged as a criminal offense.<sup>36</sup>

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36. See, e.g., D.C. CODE § 22-1321(h) (2019), <https://code.dccouncil.us/dc/council/code/sections/22-1321.html> [<https://perma.cc/L77N-SYLR>]; LAS VEGAS, NEV., MUN. CODE § 10.40.040(B) (2019), [https://library.municode.com/nv/las\\_vegas/codes/code\\_of\\_ordinances?nodeId=LAVENEMUCO](https://library.municode.com/nv/las_vegas/codes/code_of_ordinances?nodeId=LAVENEMUCO) [<https://perma.cc/2MX8-FBFT>]; PHILA., PA., CODE § 10-609(3)(a) (2019), [https://www.amlegal.com/codes/client/philadelphia\\_pa/](https://www.amlegal.com/codes/client/philadelphia_pa/) [<https://perma.cc/2TQZ-S696>]; SEATTLE, WASH., CRIM. CODE 12A.10.100(D) (2019), [https://library.municode.com/wa/seattle/codes/municipal\\_code?nodeId=Tit12ACRCCO\\_SUBTITLE\\_ICRCCO\\_CH12A.10OFAGPUMO\\_12A.10.100URPU](https://library.municode.com/wa/seattle/codes/municipal_code?nodeId=Tit12ACRCCO_SUBTITLE_ICRCCO_CH12A.10OFAGPUMO_12A.10.100URPU) [<https://perma.cc/5WUY-ZBJ6>].

Ordinances Criminalizing Public Urination and Defecation in Locales with Highest Homeless Populations*				
Continuum of Care	Provision	Offense Type	Fine	Imprisonment
<i>New York City</i>	N.Y.C. Administrative Code § 16-118	Civil or Criminal	\$50– 250*	1 day
<i>Los Angeles City &amp; County</i>	L.A. Municipal Code § 41.47.2	Criminal	\$250	N/A
	L.A. County Code 11.16.050	Criminal	\$50	N/A
<i>Seattle/King County</i>	Seattle Criminal Code 12A.10.100	Criminal	Up to \$500	N/A
	King County Code 12.58	Civil	Up to \$125	N/A
<i>San Diego City &amp; County</i>	San Diego Municipal Code § 56.55	Criminal	\$250	N/A
<i>District of Columbia</i>	D.C. Code § 22-1321	Criminal	Up to \$500	Up to 90 days
<i>San Jose/Santa Clara City &amp; County</i>	San Jose Municipal Code § 10.12.110	Criminal	\$50	N/A
	Santa Clara Municipal Code § 9.05.010	Criminal, Civil, and/or Administrative (Discretionary)	Up to \$150*	Up to 6 months
	Santa Clara County Code of Ordinances Chapter III, Article 2, § B14-32.6	Criminal	Up to \$1000	N/A

<i>San Francisco</i>	San Francisco Police Code Article 2, § 153	Criminal	\$50–500	N/A
<i>Las Vegas &amp; Clark County</i>	Las Vegas Municipal Code Division IV, Chapter 10.40.040	Criminal	\$100–1000	Up to 6 months
<i>Boston</i>	Commonwealth of Massachusetts General Laws, Part IV, Title 1, Chapter 272, § 53	Criminal	\$150	Up to 6 months
<i>Philadelphia</i>	Philadelphia Code § 10-609	Criminal	\$2000	N/A

\*These ordinances require escalating fines for subsequent offenses committed within one year of the original offense.

Even if a judge orders a sentence of a fine, many homeless individuals will end up incarcerated for the offense of public urination and defecation anyway. That is because, in many instances, homeless individuals cannot afford to pay the fine associated with their citation.<sup>37</sup> For example, a recent survey in San Francisco revealed that ninety percent of homeless individuals cited for various offenses do not have the ability to pay the associated fines.<sup>38</sup> When a fine goes

37. See generally TEX. APPLESEED & TEX. FAIR DEF. PROJECT, PAY OR STAY: THE HIGH COST OF JAILING TEXANS FOR FINES & FEES 1 (2017), [https://www.texasappleseed.org/sites/default/files/PayorStay\\_Report\\_final\\_Feb2017.pdf](https://www.texasappleseed.org/sites/default/files/PayorStay_Report_final_Feb2017.pdf) [<https://perma.cc/2B3M-DTBJ>] (explaining that the failure to pay a ticket can lead to an arrest warrant and jail time); JON WOOL, ALISON SHIH & MELODY CHANG, VERA INST. FOR JUSTICE, PAID IN FULL: A PLAN TO END MONEY INJUSTICE IN NEW ORLEANS 31 (2019), [https://storage.googleapis.com/vera-web-assets/downloads/Publications/paid-in-full-a-plan-to-end-money-injustice-in-new-orleans/legacy\\_downloads/paid-in-full-report.pdf](https://storage.googleapis.com/vera-web-assets/downloads/Publications/paid-in-full-a-plan-to-end-money-injustice-in-new-orleans/legacy_downloads/paid-in-full-report.pdf) [<https://perma.cc/2XST-XKGE>] (“On any given day in 2018, approximately 77 people arrested for state misdemeanor crimes were in jail because they were unable to pay bail.”); Kate Giammarise & Christopher Huffaker, *Jailed over Unpaid Fines, Courts Costs: Debtors’ Prisons?*, PITTSBURGH POST-GAZETTE (Feb. 24, 2018), <https://www.apnews.com/c088ef18e04d493aaa987c255f6d2df9> [<https://perma.cc/SBK7-7AJ8>] (stating that in an annual review involving people jailed for failure to post collateral, over ten percent of cases involved a defendant who was homeless and unable to pay the fine).

38. COAL. ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 2 (2015) [hereinafter PUNISHING THE POOREST], <http://www.cohsf.org/Punishing.pdf> [<https://perma.cc/TFT5-V6CP>].

unpaid, courts may issue a bench warrant for the arrest of the individual cited.<sup>39</sup> As a result, imprisonment may be inevitable for homeless individuals caught performing a function they have no choice but to carry out.<sup>40</sup>

## II. AVAILABILITY AND ACCESSIBILITY OF PUBLIC BATHROOMS FOR HOMELESS INDIVIDUALS

Despite enacting prohibitions on public urination and defecation, municipalities maintain a woefully insufficient number of public restrooms to serve individuals who are homeless. Moreover, many of the public bathrooms that they do maintain possess barriers to use by the homeless community.<sup>41</sup> Therefore, two issues are raised in the provision of public bathrooms for the homeless community: (1) whether bathrooms are available (i.e., physically present); and (2) if they are available, whether they are accessible to homeless individuals.

### A. *Why Bathrooms in Homeless Shelters Are Not a Solution*

Before discussing the availability of public bathrooms, it is instructive to address why homeless shelters do not provide adequate access to restrooms. Homeless shelters do not and, in fact, cannot provide a solution to the public bathroom shortage for a variety of reasons.

39. See CAL. PENAL CODE § 853.8 (2008); MASS. GEN. LAWS ANN. ch. 276, § 31 (Westlaw through Chapter 134 of 2019 1st Ann. Sess.); N.Y. CRIM. PROC. LAW § 420.10(3) (McKinney Supp. 2019); 234 PA. CODE § 430(B)(3)(b) (2003), <https://www.pacode.com/secure/data/234/chapter4/s430.html> [<https://perma.cc/C62B-KRLZ>]; see also CAL. R. CT. 4.107(b)(7) (West 2017); BONNEY LAKE, WASH., MUN. CT. LOC. RULE 3.2 (2010), [https://www.courts.wa.gov/court\\_rules/?fa=court\\_rulesPDF](https://www.courts.wa.gov/court_rules/?fa=court_rulesPDF) [<https://perma.cc/AUA9-2DNF> (staff-uploaded archive)]; LAS VEGAS JUSTICE COURT, *Avoid a Warrant for Your Arrest Being Issued! Pay the Fine or . . .*, [http://www.lasvegasjusticecourt.us/divisions/traffic\\_-\\_citation/pay\\_the\\_fine\\_or.php](http://www.lasvegasjusticecourt.us/divisions/traffic_-_citation/pay_the_fine_or.php) [<https://perma.cc/558K-AUXU>].

40. See, e.g., RACHEL A. ADCOCK ET AL., UNIV. OF DENVER STURM COLL. OF LAW HOMELESS ADVOCACY POLICY PROJECT, TOO HIGH A PRICE: WHAT CRIMINALIZING HOMELESSNESS COSTS COLORADO 16 (2016), <https://www.law.du.edu/documents/homeless-advocacy-policy-project/2-16-16-Final-Report.pdf> [<https://perma.cc/4J6A-MNTH>]; BAILEY GRAY, DOUG SMITH & ALLISON FRANKLIN, TEX. CRIM. JUSTICE COAL., RETURN TO NOWHERE: THE REVOLVING DOOR BETWEEN INCARCERATION AND HOMELESSNESS, 6 (2019), <https://www.texasjc.org/system/files/publications/Return%20to%20Nowhere%20The%20Revolving%20Door%20Between%20Incarceration%20and%20Homelessness.pdf> [<https://perma.cc/U9FM-EFG9>]; Stacey McKenna, *Jailed for Being Homeless*, VERA INST. (June 21, 2016), <https://www.vera.org/the-human-toll-of-jail/jailed-for-being-homeless> [<https://perma.cc/8S27-6R46>]; Bidish Sarma & Jessica Brand, *The Criminalization of Homelessness: Explained*, APPEAL (June 29, 2018), <https://theappeal.org/the-criminalization-of-homelessness-an-explainer-aa074d25688d/> [<https://perma.cc/DB7M-JGAK>].

41. McKenna *supra* note 18.

First, homeless shelters are frequently at capacity.<sup>42</sup> A 2007 study from the U.S. Conference of Mayors showed that over half of the twenty-three cities surveyed reported having shelters that turned people away due to lack of capacity.<sup>43</sup> Second, many homeless shelters close during the day, so even if an individual is lucky enough to stay in a shelter at night, the individual still must rely on public restrooms during the day.<sup>44</sup>

Finally, many homeless individuals prefer the streets or a car over shelters. Some avoid shelters because they are frequently overcrowded.<sup>45</sup> Individuals with mental health issues, such as posttraumatic stress disorder, could be triggered by shelter conditions.<sup>46</sup> They may also avoid shelters due to symptoms of their mental health issues, such as paranoia or social avoidance.<sup>47</sup> Shelters also have restrictive rules that lead homeless individuals to avoid them. For example, couples with differing gender expressions may avoid gender-segregated shelters, and individuals with substance-use conditions are rarely permitted to stay.<sup>48</sup> Additionally, shelters have rules regarding when residents can come and go so individuals who work early or late cannot access them.<sup>49</sup> Further, homeless individuals who own dogs for safety or emotional support are not able to bring them into the shelter and have nowhere to board them.<sup>50</sup>

#### B. *Availability of Public Bathrooms*

In common parlance, bathrooms on both public and private property are referred to as “public restrooms.” In this Article, however, “public bathrooms” refer to bathrooms operated and maintained by a government entity. In most instances, the agency responsible for maintaining the bathroom is the agency responsible for the property it is located on. For example, a bathroom located in a public park falls under the purview of the parks department.

“Public bathrooms” located on private property are better described as “bathrooms available to the public.” In other words, they are present and homeless individuals *might* be able to access them. The distinction is an

42. *How Many People Experience Homelessness?*, NAT'L COAL. FOR THE HOMELESS (2009), [https://www.nationalhomeless.org/factsheets/How\\_Many.pdf](https://www.nationalhomeless.org/factsheets/How_Many.pdf) [<https://perma.cc/6GBS-2XEY>].

43. *Id.*

44. *Why Some Homeless Choose the Streets Over Shelters*, NPR: TALK NATION (Dec. 6, 2012), <https://www.npr.org/2012/12/06/166666265/why-some-homeless-choose-the-streets-over-shelters> [<https://perma.cc/TNW6-CN76>].

45. Chris Walker, *Why Do So Many Homeless Refuse To Stay in Overnight Shelters?*, WESTWORD (Nov. 9, 2018), <https://www.westword.com/news/reasons-why-denvers-homeless-sleep-outside-and-not-in-overnight-shelters-10987893> [<https://perma.cc/AX6Y-DT7V>].

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

important one because owners of bathrooms that are “available to the public” frequently exclude homeless individuals and others that are poor. The owner of the underlying property on which these bathrooms are located is able to set terms by which individuals may access the bathroom and is much more likely to do so than the government entities that operate “public bathrooms.”<sup>51</sup> This phenomenon is commonly observed when business owners restrict bathroom access to “Customers Only.” This is not to say that homeless individuals are never able to access “bathrooms available to the public,” but that in doing so they must comport with the expectations of the property owner.<sup>52</sup>

That being said, one of the many barriers to accessibility of public bathrooms for homeless individuals includes the fact that cities do not adequately publicize their availability, often failing to provide a centralized list of bathrooms they maintain.<sup>53</sup> As a result, this Article includes an original and comprehensive multijurisdictional survey of public bathrooms maintained by the ten locales with the most homeless individuals.

To create this multijurisdictional survey, the author sent public record requests to the largest cities within the ten locales with the most homeless individuals: New York City, Los Angeles, Seattle, San Diego, Washington, D.C., San Jose, San Francisco, Las Vegas, Boston, and Philadelphia.<sup>54</sup> The

51. See PEOPLE FOR FAIRNESS COAL. DOWNTOWN D.C. PUB. RESTROOM COMM., ACCESS TO RESTROOMS IN DOWNTOWN WASHINGTON DC THAT ARE CLEAN, SAFE, & AVAILABLE 24/7, at 4–5, 8 (2015) [hereinafter PFFCDC, ACCESS TO RESTROOMS], <https://pffcdc.org/wp-content/uploads/2016/01/Restroom-Inventory-Full-Report.pdf> [<https://perma.cc/CX2J-QDRM>]; PEOPLE FOR FAIRNESS COAL., DOWNTOWN D.C. PUB. RESTROOM COMM., REVISITING, ONE YEAR LATER, PRIVATE FACILITIES IN DC THAT LET US USE THEIR RESTROOMS 2–3 (2017) [hereinafter PFFCDC, REVISITING], <https://pffcdc.org/wp-content/uploads/2017/01/2016-follow-up-to-Restroom-Inventory-carried-out-in-2015-copy.pdf> [<https://perma.cc/QLY4-MR8V>]; see also Natalie Shure, *The Politics of Going to the Bathroom*, NATION (May 23, 2019), <https://www.thenation.com/article/toilet-urination-disability-access/> [<https://perma.cc/WS8X-PZ44>].

52. See LEZLIE LOWE, NO PLACE TO GO: HOW PUBLIC TOILETS FAIL OUR PRIVATE NEEDS 134–35 (2018).

53. It should be noted that Boston began publishing a list of its public restrooms online after the initial drafting of this Article. See *Public Restrooms in the City of Boston*, BOSTON.GOV (Apr. 22, 2019), <https://www.boston.gov/departments/311/public-restrooms-city-boston> [<https://perma.cc/D8LS-8AVA>]. As one might imagine, an online list may not be readily accessible to much of the homeless community, but Boston should be commended for making the information publicly available. Ideally, cities would disseminate the information in several different modes.

54. Public record requests were sent to these ten cities rather than every city in each Continuum of Care because a significant majority of homeless individuals in the Continuums of Care organized by county reside in the largest city within that county. For example:

- 62.4% of Los Angeles County’s homeless residents live in the City of Los Angeles;
- 73% of King County’s homeless residents live in Seattle;
- 61.6% of San Diego County’s homeless residents live in the City of San Diego; and
- 58.8% of Santa Clara County’s homeless residents live in the City of San Jose.

requests asked each city to identify the address or location of every public restroom it maintained or operated. The requests then asked each city to identify potential barriers to access for homeless individuals, which are discussed below.<sup>55</sup>

According to the responses, the number of public bathrooms each city maintains are as follows:

- 1) New York—726;
- 2) Los Angeles—264;
- 3) Seattle—231;
- 4) San Diego—212;
- 5) Washington D.C.—126;
- 6) San Jose—75;
- 7) San Francisco—188;
- 8) Las Vegas—89
- 9) Boston—135; and
- 10) Philadelphia—71.<sup>56</sup>

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APPLIED SURVEY RESEARCH, 2017 SANTA CLARA COUNTY HOMELESS CENSUS & SURVEY: COMPREHENSIVE REPORT 12 (2017), <https://www.sccgov.org/sites/osh/ContinuumofCare/ReportsandPublications/Documents/2017%20Santa%20Clara%20County%20Homeless%20Census%20and%20Survey%20Report.pdf> [<https://perma.cc/B3CB-3SG5>]; APPLIED SURVEY RESEARCH, SEATTLE/KING COUNTY POINT-IN-TIME COUNT OF PERSONS EXPERIENCING HOMELESSNESS 2017, at 9 (2017), <http://allhomekc.org/wp-content/uploads/2016/11/2017-King-PIT-Count-Comprehensive-Report-FINAL-DRAFT-5.31.17.pdf> [<https://perma.cc/FQ79-5GU2>]; L.A. HOMELESS SERVS. AUTH., 2017 GREATER LOS ANGELES HOMELESS COUNT—DATA SUMMARY, TOTAL POINT IN TIME HOMELESS POPULATION BY GEOGRAPHIC AREAS (2018) [hereinafter L.A. HOMELESS SERVS. AUTH.], <https://www.lahsa.org/documents?id=1354-2017-homeless-count-total-point-in-time-homeless-population-by-geographic-areas.pdf> [<https://perma.cc/RKG7-BRUB>]; SAN DIEGO REG'L TASK FORCE ON THE HOMELESS, 2017 WEALLCOUNT: CITY TOTALS, [hereinafter SAN DIEGO REG'L TASK FORCE], <https://www.rtfhsd.org/wp-content/uploads/2017/07/D-2017-city-totals.pdf> [<https://perma.cc/E3FJ-PCDD>]. Clark County, Nevada, was the only Continuum of Care that did not provide data regarding its census by city. See BITFOCUS, 2017 SOUTHERN NEVADA HOMELESS CENSUS & SURVEY REPORT 9, <http://helphome.org/wp-content/uploads/2017/07/2017-S-Nevada-Census-and-Survey-for-posting.pdf> [<https://perma.cc/B9BG-Z62K>]. Therefore, it is not clear whether the majority of Clark County's homeless residents reside in Las Vegas.

55. Unless a municipality dictated the format of the public record request, the letter appended to end of this Article was sent to its Public Records officer. See *infra* Appendix A.

56. Letter from Fernando Campos, Exec. Officer, Bd. of Pub. Works, City of L.A., to Ron Hochbaum, Clinical Teaching Fellow, Loyola Univ. Chi. Sch. of Law (Aug. 8, 2018) (on file with author) (specifying number of public bathrooms in Los Angeles); Email from Rafael L. Kieffer, Assistant City Solicitor, & Santos M. Ramos, III, Legal Intern, City of Phila., to Imani Hollie, Research Assistant, Loyola Univ. Chi. Sch. of Law (Nov. 15, 2018) (on file with author) (specifying the number of bathrooms maintained by the Philadelphia Department of Public Property); Email from Matthew Mrozek to author (June 19, 2019, 10:31 EST) (on file with author) (specifying number of bathrooms maintained by the Brooklyn Public Library); Data provided by City of Las Vegas (on file with author) (specifying the number of public bathrooms in Las Vegas); Data provided by N.Y.C. Dep't of Health and Mental Hygiene (on file with author) (specifying number of public bathrooms

Unfortunately, there are limitations associated with this data. As discussed above, most cities do not maintain centralized lists of the public bathrooms they operate. Moreover, the responsibility for operating and maintaining those bathrooms is frequently divided across multiple municipal agencies. The cities' responses frequently reflected the lack of uniformity across municipal governments in maintaining and storing this data. For example, there was variability between cities regarding the properties in which their bathrooms are located. Municipalities typically identified bathrooms located in public parks, recreational centers, government buildings, libraries, police or fire stations, public piers or beaches, and shopping districts.<sup>57</sup> Several cities also identified "stand-alone" bathrooms, usually constructed on a street corner or transported to their location on a daily basis. Some of the variability can be attributed to

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maintained by the New York City Department of Health and Mental Hygiene); Data provided by City of San Diego (on file with author) (specifying number of public bathrooms in San Diego); Data provided by City of S.F. (on file with author) (specifying number of public bathrooms in San Francisco); Data provided by City of San Jose (on file with author) (specifying number of public bathrooms in San Jose); Data provided by City of Seattle (on file with author) (specifying number of public bathrooms in Seattle); Data provided by Wash., D.C. Dep't of Parks and Recreation (Oct. 2, 2018) (on file with author) (specifying number of public bathrooms in Washington, D.C.); Data provided by Free Library of Phila. (Feb. 2019) (on file with author) (specifying library locations in Philadelphia); *Public Restrooms in the City of Boston*, *supra* note 53 (specifying number and location of public bathrooms in Boston).

57. Noticeably absent from this list are bathrooms located in public transit facilities. There are a number of reasons cities may not have reported bathrooms in these properties. First, public transit systems, even if they are located wholly within a municipality, have a wide range of governance structures. For example, the New York City subway is governed by the Metropolitan Transit Authority, which is supervised by the state governor. *See* Emma G. Fitzsimmons, *Who Really Runs New York City's Subway*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/2017/07/25/nyregion/who-runs-new-yorks-subway.html> [<https://perma.cc/WN9S-ZQ5J> (dark archive)]. Bay Area Rapid Transit, San Francisco's subway system, travels to the surrounding counties and is governed by a special district comprised of elected officials from nine subdistricts. *Board of Directors*, BAY AREA RAPID TRANSIT, <https://www.bart.gov/about/bod> [<https://perma.cc/F2K2-H2DP>]. Additionally, some public transportation systems, despite public perception, may be privately owned. For example, Greyhound and its stations are owned by FirstGroup PLC, a corporation based out of the United Kingdom, which recently put the company up for sale. *See* Tanishaa Nadkar, *Factbox: British Owner Puts Long-Running Greyhound Buses Up for Sale*, REUTERS (May 31, 2019), <https://www.reuters.com/article/us-firstgroup-results-greyhound-factbox/factbox-british-owner-puts-long-running-greyhound-buses-up-for-sale-idUSKCN1T111O> [<https://perma.cc/8Q4D-BV8L>]. Amtrak, on the other hand, is a quasi-public corporation owned and funded in part by the federal government but operated as a private company. *FY 2018 Company Profile*, AMTRAK, <https://www.amtrak.com/content/dam/projects/dotcom/english/public/documents/corporate/nationalfactsheets/Amtrak-Corporate-Profile-FY2018-0319.pdf> [<https://perma.cc/Q7V5-UWCS>]. Finally, most public transit stations operate very few public bathrooms or closed any that were in operation for security reasons. LOWE, *supra* note 52, at 72; Eric Jaffe, *Why Don't American Subway Stations Have Public Bathrooms?*, CITYLAB (Jan. 3, 2013), <https://www.citylab.com/transportation/2013/01/why-dont-american-subway-stations-have-public-bathrooms/4304/> [<https://perma.cc/N9GC-UCN9>]. Many transit authorities do not provide public bathrooms for the same reasons municipalities do not—concerns over cost, crime, etc. *See* Jaffe, *supra*. Others closed their bathrooms after September 11, 2001, and continue to use security as justification for keeping them closed to this day. *Id.*

the fact that certain cities may not contain these kinds of properties (e.g., Las Vegas lacks beaches). The exclusion of a particular property may also indicate that the municipality does not make bathrooms in government buildings, police and fire stations, etc., available to the public. Most of the variability is likely attributed to the cities' failure to keep records or oversight on behalf of the officials charged with responding to the requests.

Additionally, cities were provided a chart they could use to respond to the request and identify potential factors that impact accessibility for the homeless community.<sup>58</sup> Some cities completed the chart, while others simply provided documents they had on file.<sup>59</sup> Cities that did not complete the chart were less likely to identify accessibility barriers. Further, cities that only provided documents on file may not have shared information on all of their bathrooms because of poor record keeping.

Finally, all of the requests for information, except for Washington, D.C., were directed only to municipal governments. In the case of D.C., an additional request for information was sent to the Federal Park Service to account for the likelihood of additional public bathrooms in federal parks throughout the District. The author acknowledges that many of the cities may contain properties owned and operated by their counties and states that contain bathrooms not accounted for. It is the author's belief that these additional bathrooms located on county or state properties are likely few in number and would not, on their own, address the issues associated with the inadequate provision of restrooms.

While the data may undercount the number of public bathrooms in some cities, the author still believes that the data is a sound picture of the availability of bathrooms in the municipalities surveyed. When cities appeared to exclude large sources of public bathrooms from their initial responses (e.g., public libraries), the author sent a follow-up public record request to the municipalities specifically seeking information or documents regarding bathrooms in locations excluded from their initial responses.<sup>60</sup>

In the end and as discussed below, the data still demonstrates that municipalities provide an insufficient number of public bathrooms for homeless individuals for two reasons. First, the public bathrooms are not intended to serve the homeless community alone. Rather, they are designed to serve the public at large. Second, as articulated in Section III.B. below, the presence or availability of a bathroom does not reflect whether the bathroom is accessible to homeless individuals.

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58. See *infra* Appendix A.

59. See sources cited *supra* note 56.

60. Additionally, for one city, Philadelphia, the author supplemented the response with publicly available information regarding bathrooms in public parks.

From the data, we are able to conclude that municipalities provide a woefully insufficient number of public bathrooms for the homeless community by comparing the number of available bathrooms to the size of the cities' homeless populations.<sup>61</sup> As such, the ratio of bathrooms to homeless individuals is as follows:

- 1) New York–1:105;
- 2) Los Angeles–1:126;
- 3) Seattle–1:37;
- 4) San Diego–1:27;
- 5) Washington, D.C.–1:59;
- 6) San Jose–1:58;
- 7) San Francisco–1:36;
- 8) Boston–1:45; and
- 9) Philadelphia–1:80.<sup>62</sup>

Clark County, Nevada, was the only locale among the top ten to fail to provide a breakdown of its homeless population by city. As a result, a ratio of bathrooms to homeless individuals cannot be provided for Las Vegas.

The insufficiency of the public bathroom numbers in each city comes into focus when compared to several minimum standards for bathroom provisions in refugee camps, workplaces, and schools. Standards for refugee camps, workplaces, and schools are more enlightening than standards for restaurants, bars, stores, and entertainment venues because they account for the fact that occupants of the former spend more time in those facilities than occupants of the latter.

The first standard to refer to is the United Nations High Commissioner for Refugees (“UNHCR”) standards for refugee camps because they were designed for individuals displaced from their homes, living in conditions not meant for human habitation, and these facilities were built to be temporary.<sup>63</sup>

61. These bathrooms serve New York's 76,501; Los Angeles's 33,138; Seattle's 8522; San Diego's 5619; Washington, D.C.'s 7473; San Jose's 4350; San Francisco's 6858; Boston's 6135; and Philadelphia's 5693 homeless individuals. HENRY ET AL., 2017, *supra* note 15, at 17; L.A. HOMELESS SERVS. AUTH., *supra* note 54; SAN DIEGO REG'L TASK FORCE, *supra* note 54.

62. The ratios for cities located in Continuums of Care organized by county are based on the homeless population data for the specific city as opposed to the county. The exception, as explained, is Las Vegas because Clark County does not provide a breakdown of its homeless population by city. See HENRY ET AL., 2017, *supra* note 15, at 17; L.A. HOMELESS SERVS. AUTH., *supra* note 54; SAN DIEGO REG'L TASK FORCE, *supra* note 54; sources cited *supra* note 56.

63. U.N. HIGH COMM'R FOR REFUGEES, EMERGENCY HANDBOOK: WASH IN CAMPS 8–9 (2015), <https://emergency.unhcr.org/entry/111751/wash-in-camps> [<https://perma.cc/RP99-ATWB>] [hereinafter UNHCR, WASH]. While homelessness for many in the United States is far from temporary, the comparison between homeless individuals and refugees is made frequently. See, e.g., Joel John Roberts, *Homelessness: America's Refugee Crisis*, HUFFINGTON POST (Sept. 29, 2016), [https://www.huffpost.com/entry/homelessness-america-ref\\_b\\_8215238?guccounter=1&guce\\_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce\\_refer](https://www.huffpost.com/entry/homelessness-america-ref_b_8215238?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xlLmNvbS8&guce_refer)

One need not look further than homeless encampments to see similarities between the living conditions of homeless individuals and refugees.<sup>64</sup> In fact, after a recent visit to the United States to investigate the human rights conditions of the extremely poor, the United Nation's Special Rapporteur compared Los Angeles's Skid Row to a refugee camp saying that the city is failing to meet UNHCR refugee camp standards for the provision of bathrooms.<sup>65</sup>

UNHCR standards require one latrine for every fifty individuals in emergency situations and twenty individuals in nonemergency situations.<sup>66</sup> Its recommendation in nonemergency situations, however, is one latrine for every five camp residents.<sup>67</sup> The UNHCR suggests that the recommendation should be implemented if the "humanitarian situation" is expected to last more than six months.<sup>68</sup>

In the United States, standards for workplaces and schools maintain similar requirements. The Occupational Safety and Health Administration ("OSHA") sets minimum standards for the number of toilets employers must

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rer\_sig=AQAAAjtQptc6ELcHtbczyJC6NEñJ-G\_3OoJbphdHTg7My-5J9E6RFd5G\_Rzxsxdj0DZEFcqbkiI\_4kNnsTlbggeOBH1BHOjeHrApz\_ZEIBDTHNA81C2SxAs7AGArtHHjzFHjNAXEVDNfxX0Xr6AqLZa8A-22gusFpBFddm\_DLYEqMj9K [https://perma.cc/SN42-D84E].

64. Jill Replogle, *Homeless in San Clemente? The City Has a Campsite for You*, LAIST (May 22, 2019), [https://laist.com/2019/05/22/homeless\\_in\\_san\\_clemente\\_the\\_city\\_now\\_has\\_a\\_campsite\\_for\\_you.php](https://laist.com/2019/05/22/homeless_in_san_clemente_the_city_now_has_a_campsite_for_you.php) [https://perma.cc/G7C4-SFY7]; see Jim Walsh, 'A Blessing,' 'A Family,' and 'A Shame on Minneapolis': *Voices from the Hiawatha Avenue Homeless Encampment*, MINNPOST (Sept. 12, 2018), <https://www.minnpost.com/community-sketchbook/2018/09/a-blessing-a-family-and-a-shame-on-minneapolis-voices-from-the-hiawatha-avenue-homeless-encampment/> [https://perma.cc/L9KM-4Z3G] (describing conditions in the Hiawatha Avenue homeless encampment); see also Danny Westneat, *The Sirens are Sounding on Homelessness. Just Not Here.*, SEATTLE TIMES (Apr. 25, 2018), <https://www.seattletimes.com/seattle-news/politics/the-sirens-are-sounding-on-homelessness-just-not-here/> [https://perma.cc/8CQQ-FBWA].

65. Phillip Alston (Special Rapporteur), *Rep. of the Special Rapporteur on Extreme Poverty and Human Rights on His Mission to the United States of America* 12, U.N. Doc. A/HRC/38/33/Add.1 (May 4, 2018); see also "Contempt for the Poor in US Drives Cruel Policies," *Says UN Expert*, U.N. HUMAN RIGHTS OFF. HIGH COMM'R (June 4, 2018), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23172&LangID=E> [https://perma.cc/B4QW-YLJP (staff-uploaded archive)].

66. UNHCR, WASH, *supra* note 63, at 4. The UNHCR also recommends that bathrooms be located not more than fifty meters and not closer than six meters from the shelter. U.N. HIGH COMM'R FOR REFUGEES, EMERGENCY HANDBOOK: CAMP PLANNING STANDARDS (2015), <https://emergency.unhcr.org/entry/45582/camp-planning-standards-planned-settlements> [https://perma.cc/94RT-XHH6]. This is to encourage their use but prevent issues associated with odor and pests. *Id.* As described below, a frequent barrier to public restroom use by homeless individuals is that they are frequently not located in areas homeless individuals congregate or camp.

67. UNHCR, WASH, *supra* note 63, at 9.

68. *Id.*

provide for their employees. The following chart is included in federal regulations promulgated by OSHA:<sup>69</sup>

Number of Employees	Minimum Number of Water Closets <sup>70</sup>
1 to 15	1
16 to 35	2
36 to 55	3
56 to 80	4
81 to 110	5
111 to 150	6
Over 150	One additional fixture for each additional 40 employees

Thus, for most employers, OSHA requires between one toilet for every fifteen to twenty-five employees.<sup>71</sup>

State regulations of schools maintain similar requirements. In Massachusetts, day schools are required to have one toilet for every fourteen students and boarding or “residential” schools are required to have one toilet for every six students in “sleeping quarters.”<sup>72</sup> In California, on the other hand, bathrooms for boys must contain one toilet for every fifty boys and one urinal for every one hundred boys, while bathrooms for girls must contain one toilet for every thirty girls.<sup>73</sup> In Washington State, minimum requirements are also assigned according to gender.<sup>74</sup> According to the Washington Administrative Code, schools in Washington must provide one toilet for every twenty-five girls

69. 29 C.F.R. § 1910.141(c)(1)(i) (2019). The regulation states that “[w]here toilet facilities will not be used by women, urinals may be provided instead of water closets, except that the number of water closets in such cases shall not be reduced to less than 2/3 of the minimum specified.” *Id.* § 1910.141(c)(1)(i) tbl.J-1 n.1

70. The regulation defines a water closet as “a toilet facility maintained within a toilet room for the purpose of both defecation and urination and which is flushed with water.” *Id.* § 1910.141(a)(2).

71. The bathrooms reflect similar standards. In construction, OSHA requires one toilet for worksites with twenty employees or less, one toilet and one urinal per forty workers on worksites of twenty or more, and one toilet and one urinal per fifty workers on worksites of 200 or more. *Id.* § 1926.51(c)(1). In the agricultural industry, OSHA mandates one toilet for every twenty employees. *Id.* § 1928.110(c)(2)(i). The United Kingdom’s equivalent of OSHA, the Health and Safety Executive, has similar standards. See HEALTH & SAFETY EXEC., WELFARE AT WORK: GUIDANCE FOR EMPLOYERS ON WELFARE PROVISIONS 2, <http://www.hse.gov.uk/PuBns/indg293.pdf> [<https://perma.cc/4YFW-AR3S>].

72. 603 MASS. CODE REGS. 18.04(4)(b), (c) (Westlaw through Nov. 1, 2019).

73. *K-12 Toilet Requirement Summary*, CAL. DEP’T EDUC. (2018), <https://www.cde.ca.gov/ls/fa/sf/toiletrequire.asp> [<https://perma.cc/K6SS-UF6A>].

74. WASH. ADMIN. CODE § 51-50-2900 tbl.2902.1 (2019).

and thirty-five boys.<sup>75</sup> Finally, in Pennsylvania, the standards take grade level into account as well. For kindergarten through third grade, there must be one toilet for every fifteen children.<sup>76</sup> For grades four through twelve, there must be one toilet for every twenty girls and one toilet and two urinals for every forty boys.<sup>77</sup>

Unfortunately, the standards for refugee camps, workplaces, and schools are by no means a perfect measuring tool. They express minimum requirements in terms of toilets per person. The cities' responses referred to bathrooms, not toilets. The cities were not asked how many toilets were in each bathroom, as the author was confident that information is not recorded.

Additionally, the standards for refugee camps, workplaces, and schools envision the occupants to be in close proximity to the facilities. However, as explained in the following section, public bathrooms are frequently not well distributed across a city, not strategically located to serve homeless communities within the city, and are frequently located in areas homeless individuals are excluded from through enforcement of antihomeless laws. Nevertheless, in the end, it is safe to say that, even when some cities meet the minimum standards required by some agencies, these bathrooms do not serve the needs of the cities' homeless communities because they are not intended to serve homeless individuals alone. Rather, as public bathrooms, they must serve the public at large.<sup>78</sup>

### C. *Accessibility of Public Bathrooms*

The mere existence of a public restroom does not necessarily mean that the restroom is appropriately accessible to people experiencing homelessness. Thus, it is also important to consider the potential barriers that publicly maintained bathrooms may present for homeless individuals. These barriers include:

- Not being open twenty-four hours per day and seven days a week;
- Closing during particular seasons;
- Not being clean and sanitary or providing an ability to wash one's hands;

75. *Id.*

76. 22 PA. CODE § 53.12 (2019), <https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/022/chapter53/s53.12.html&searchunitkeywords=22%2CPa%2CCode%2CS%2CS53.12&origQuery=22%20Pa.%20Code%20S%2053.12&operator=OR&title=null> [https://perma.cc/92MD-ZKB5]; *id.* § 55.2, <https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/022/chapter55/s55.2.html&d=reduce> [https://perma.cc/YSZ4-8DRF].

77. *Id.* § 55.2; *id.* § 57.2, <https://www.pacodeandbulletin.gov/Display/pacode?file=/secure/pacode/data/022/chapter57/s57.2.html&d=reduce> [https://perma.cc/KZ8L-YKJ2].

78. Thus, while toilets in refugee camps, workplaces, and schools are for the exclusive use of one specific group of occupants, homeless individuals share public bathrooms with the public at large.

- Not being strategically located;
- Being located in an area where antihomeless laws are enforced;
- Being hard to find due to an absence of signage;
- Having physical security on site;
- Being located in a building that requires identification to enter; and
- Requiring a fee for entry or being located in a facility that requires the same.

Whether a bathroom closes at night, on weekends, or during certain times of the year is a rather obvious barrier. Homeless individuals who live outside need to be able to access public bathrooms at all times.<sup>79</sup> While the demand may decrease at night or during colder months when homeless individuals are more likely to access emergency shelters, bathrooms are still necessary at all times of day and throughout the year.

Another apparent barrier is whether the bathroom is regularly maintained. Poorly maintained bathrooms may render the facilities unusable or even physically inaccessible. Further, the absence of a means of hand sanitization may not render the bathroom unusable but may discourage some from using them. Without regular maintenance and a form of hand sanitization, homeless individuals are unnecessarily exposed to the spread of infectious disease. This risk is particularly acute in the homeless community, where many experience health conditions that weaken their immune system.<sup>80</sup>

The location of bathrooms is another obvious barrier to use for homeless individuals. To be truly accessible, bathrooms must be located in areas where homeless individuals congregate.<sup>81</sup> This may present a demand for bathrooms in and around homeless encampments. Other times, it will mean ensuring bathrooms are placed in and around resources on which homeless individuals rely, such as social services agencies, public transit systems, and parks.

79. It is important to note that many homeless individuals living in emergency shelters require access to bathrooms during the day. Emergency shelters frequently close during the day, asking homeless individuals to leave in the early morning and return in the early evening. See, e.g., *Why Some Homeless Choose the Streets Over Shelters*, *supra* note 44.

80. Lorena Arranz et al., *Impaired Immune Function in a Homeless Population with Stress-Related Disorders*, 16 *NEUROIMMUNOMODULATION* 251, 251 (2009).

81. There is tug and pull to this issue because where homeless individuals congregate can be heavily influenced by the availability and accessibility of a bathroom. Homeless individuals and individuals who are restroom challenged frequently plan their day around the availability of a bathroom. See *Who Are the Restroom Challenged*, AM. RESTROOM ASS'N, <https://americanrestroom.org/who-are-the-restroom-challenged/> [<https://perma.cc/A4RM-D8HP> (staff-uploaded archive)] (discussing how individuals who are restroom challenged hesitate to participate in activities that may put them out of range of a bathroom).

What may be less obvious about location as a barrier is the relationship between the bathroom location and enforcement of antihomeless laws.<sup>82</sup> Antihomeless laws are frequently used to remove homeless individuals from particular public spaces.<sup>83</sup> These spaces are often areas where many other individuals congregate and, as a result, are likely also areas where municipalities maintain public bathrooms. For example, antihomeless laws are frequently used to clear shopping districts of visible poverty.<sup>84</sup> Similarly, the increasing issuance of “Stay Away” orders for violating antihomeless laws acts as a barrier to accessing bathrooms.<sup>85</sup> “Stay Away” orders prohibit the individual from returning to certain areas, often the site of the underlying offense.<sup>86</sup> Judges often issue them to homeless individuals for violating park curfews.<sup>87</sup> The practice of issuing these orders is therefore a barrier to using bathrooms that are located in a prohibited zone, such as a park bathroom.<sup>88</sup>

The availability and location of public bathrooms are poorly advertised, which, in itself, serves as a barrier. As mentioned above, cities rarely publish a centralized list of the bathrooms they maintain for public use.<sup>89</sup> Additionally, cities frequently do not publicize the location of public bathrooms through street signs and maps. Unlike airports or malls, where maps and signs direct the public to the location of a bathroom, municipalities rarely provide similar options.<sup>90</sup> Moreover, when public bathrooms are available inside a particular

82. Antihomeless laws criminalize behavior, often life-sustaining, that is attendant to the condition of homelessness. These laws are described in more detail in Section III.C.

83. Sarah K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 39–42 (2016) [hereinafter Rankin, *Influence of Exile*].

84. *Id.*

85. See NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 22 (2014), [https://nlchp.org/wp-content/uploads/2019/02/No\\_Safe\\_Place.pdf](https://nlchp.org/wp-content/uploads/2019/02/No_Safe_Place.pdf) [<https://perma.cc/QG3H-NEJ4>]; Sarma & Brand, *supra* note 40.

86. See Ellen M. Marks, *Ordinances Targeting the Homeless: Constitutional or Cost-Effective?*, 19 WASH. & LEE J. C.R. & SOC. JUST. 437, 447 (2013).

87. See *id.* at 445–47 (explaining how municipal codes target homeless people by prohibiting sleeping in public places like parks); see also Bianca Bruno, *Illegal-Lodging Trial Highlights San Diego’s Homelessness Problem*, COURTHOUSE NEWS SERV. (Sept. 29, 2017), <https://www.courthousenews.com/illegal-lodging-trial-highlights-san-diegos-homelessness-problem/> [<https://perma.cc/R8RY-W7RQ>] (discussing the arrest of a homeless man who was sleeping in a tent past curfew).

88. Marks, *supra* note 86, at 448–51 (referencing a California case that resulted in a “Stay Away” order preventing the defendant from using a bathroom in a park).

89. If they do maintain a centralized list, that list is usually only available online. See, e.g., *Public Restrooms in the City of Boston*, *supra* note 53 (maintaining a list of bathrooms by neighborhood with an interactive map); *Public Toilets*, S.F. PUB. WORKS, <https://www.sfpublicworks.org/services/public-toilets> [<https://perma.cc/F562-NJ9Q>]. Homeless individuals with limited internet access may still find it difficult to access this information.

90. One notable exception is highway rest stops. These services are well advertised by signage but are not a particularly useful alternative for many homeless individuals. Additionally, while developers have produced smartphone applications to help individuals find “public” bathrooms, many

building, municipalities do not place signs on the exterior of the building to notify the public of the bathrooms' availability.

Conditions of entry, such as identification requirements and fees, can also bar homeless individuals. First, it can be difficult for homeless individuals to obtain identification for a number of reasons, such as proof of residency requirements and application fees.<sup>91</sup> Then, even if a homeless individual manages to acquire photo identification, she may struggle to hold on to it because her belongings are unsecured and exposed to theft or frequently thrown away or destroyed during "sweeps" or the clearing of homeless encampments.<sup>92</sup> Second, pay-to-use bathrooms can also be inaccessible to homeless individuals because even a nominal fee can be prohibitive for individuals living on limited or no income.<sup>93</sup>

The presence of security can make public restrooms inaccessible to homeless individuals. Even in public buildings, security is frequently used to remove individuals who are deemed to not "belong." A rather common example is public libraries; homeless individuals are frequently kicked out, accused of

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of the bathrooms deemed "public" by the applications are in fact maintained by private businesses. See John Corpuz, *Best Clean Restroom Finder Apps*, TOM'S GUIDE (Apr. 14, 2016), <https://www.tomsguide.com/us/pictures-story/751-best-restroom-toilet-bathroom-finder-apps.html#s6> [<https://perma.cc/C5VP-VXUL>].

91. See NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, PHOTO IDENTIFICATION BARRIERS FACED BY HOMELESS PERSONS: THE IMPACT OF SEPTEMBER 11, at 4 (2004), [https://www.nlchp.org/documents/ID\\_Barriers](https://www.nlchp.org/documents/ID_Barriers) [<https://perma.cc/69RY-4NZG>] [hereinafter NLCHP, PHOTO IDENTIFICATION BARRIERS] (addressing the difficulty of accessing critical resources due to the absence of photo identification). Many states require proof of residency through a physical address to obtain state identification. *Id.* at 5.

92. See SAMIR JUNEJO, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 17–18 (Suzanne Skinner & Sara Rankin eds., 2016), <https://ssrn.com/abstract=2776425> [<https://perma.cc/J6L6-MU9W> (staff-uploaded archive)]; NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA'S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 83 (2017), [https://www.nlchp.org/Tent\\_City\\_USA\\_2017](https://www.nlchp.org/Tent_City_USA_2017) [<https://perma.cc/LP8V-MY7N>]. Another common barrier to obtaining photo identification is birth certificate requirements. Some states require birth certificates to obtain identification and identification to obtain birth certificates, creating an impossible situation for homeless individuals who struggle to securely store important paperwork. See NLCHP, PHOTO IDENTIFICATION BARRIERS, *supra* note 91, at 4.

93. Take for example an individual living on Supplemental Security Income for which the federal maximum benefit rate in 2018 was \$750. *SSI Federal Payment Amounts*, SOC. SECURITY ADMIN., <https://www.ssa.gov/oact/cola/SSIamts.html> [<https://perma.cc/M29T-PZU3>]. Say the average individual uses the bathrooms four to seven times a day. If the bathrooms cost 25¢ per use, that individual would be spending \$1.00–1.75 per day. Over the course of a month that would average out to \$30.00–52.50 or four to seven percent of their income. It is important to keep in mind, however, that many homeless individuals live without cash aid of any kind. Even if they receive Supplemental Nutrition Assistance, or "food stamps," that benefit cannot be used outside of grocery stores or restaurants. *Id.*

loitering or violating other library rules.<sup>94</sup> The presence of security may also serve as a deterrent for homeless individuals who have had negative experiences with law enforcement or security in private establishments.

These barriers are not an exhaustive list. For homeless individuals reticent to leave their possessions unattended, another potential barrier might include whether the bathroom, or building where the bathroom is located, allows for a homeless person to bring their belongings inside.<sup>95</sup> Yet another barrier could be the amount of foot traffic nearby because homeless individuals with mental health concerns could be uncomfortable near crowds.<sup>96</sup> It is difficult to anticipate what may serve as a barrier for each individual, but the nine potential barriers listed above can at least be ameliorated by a city through strategic bathroom design and implementation.

The public record requests sought information on most of the potential barriers listed.<sup>97</sup> While the cities provided documentation regarding the amount

94. See Natalie Graham, *Seattle Public Library Rules a Bane to the Homeless*, S. SEATTLE EMERALD (Feb. 16, 2017), <https://southseattleemerald.com/2017/02/16/seattle-public-library-rules-a-bane-to-the-homeless/> [<https://perma.cc/ME2V-RD3A>] (discussing Seattle Public Library's rules that lead to the removal of five individuals per day from its locations); Robert Hanley, *Library Wins in Homeless-Man Case*, N.Y. TIMES (March 25, 1992), <https://www.nytimes.com/1992/03/25/nyregion/library-wins-in-homeless-man-case.html> [<https://perma.cc/7LXA-4D67> (dark archive)]; Martin Weil & Elissa Silverman, *Proposed Rules Would Ban Sleeping in Library*, WASH. POST (Dec. 29, 2008), <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/28/AR2008122802176.html> [<https://perma.cc/4WWM-LPUA> (dark archive)] (discussing Washington, D.C., rules limiting the amount of bags allowed in the library and prohibiting sleeping). On the other hand, many libraries have embraced their roles as de facto daytime drop-in centers for the homeless community. See Justine Janis, *Public Library Social Work: An Emerging Field*, NAT'L ASS'N SOC. WORKERS, ILL. CHAPTER (2018), reprinted in Jill Schacter, REACHING ACROSS ILL. LIBR. SYS. (June 14, 2018), <https://www.railslibraries.info/news/150795> [<https://perma.cc/3WQP-FUGM>]; Ryan Krull, *What's a Library To Do? On Homelessness and Public Spaces*, MILLIONS (Oct. 26, 2017), <https://themillions.com/2017/10/whats-a-library-to-do-on-homelessness-and-public-spaces.html> [<https://perma.cc/2L8B-36SX> (staff-uploaded archive)] (discussing libraries adding social workers to their staff).

95. See *Public Restrooms*, PEOPLE FOR FAIRNESS COAL., <https://pffcdc.org/what-we-do/public-restrooms/> [<https://perma.cc/QC4H-4CNH>] (Oct. 20, 2019) (discussing distribution of informational cards containing details regarding public bathrooms in Washington, D.C.).

96. *Why Some Homeless Choose the Streets Over Shelters*, *supra* note 44.

97. The public records requests sought information regarding seven of the nine barriers mentioned above. The public records requests did not seek information related to whether the bathrooms were strategically located or whether they were located in an area where the responding city issues "Stay Away" orders for violation of other antihomeless laws. The requests did not seek information related to the strategic location of the bathrooms because the answer to that question could change depending on whether the city conducts "sweeps" uprooting encampments with high concentrations of homeless individuals. Additionally, the answer to whether bathrooms are strategically located is best answered by the stakeholders, including the homeless community, as opposed to the city on its own. The requests did not seek information related to whether the bathrooms were located in areas where the city issues "Stay Away" orders out of fear that requesting documentation related to law enforcement could delay responses.

and location of the bathrooms they maintained, not all cities responded to requests regarding the potential barriers.<sup>98</sup>

In Boston for example, most bathrooms are located in buildings that are not open twenty-four hours per day (e.g., libraries and youth and family centers).<sup>99</sup> The bathrooms that are open twenty-four hours per day are either located in buildings that homeless individuals may be reticent to enter (e.g., police and fire stations) or require a fee for entry (25¢ per use).<sup>100</sup> In Los Angeles, on the other hand, very few bathrooms open to the public require a fee for entry or have security present.<sup>101</sup> However, ninety-eight percent of Los Angeles's 264 bathrooms have restricted hours.<sup>102</sup> Similarly, in Las Vegas and Washington, D.C., one hundred percent of the bathrooms close in the evening.<sup>103</sup> Furthermore, Washington, D.C., closes seventeen percent and Seattle twenty-nine percent of its bathrooms during the winter months.<sup>104</sup> Meanwhile, in Seattle seventeen percent, Las Vegas twenty-one percent, and San Jose forty-three percent of bathrooms are located in buildings or facilities that required a fee or membership for entry.<sup>105</sup>

San Francisco and San Diego provided limited information regarding the accessibility of their bathrooms for homeless individuals. The only barrier San Francisco addressed in its response to the public record request was hours of

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98. For example, Boston provided information regarding the hours of operation, cost of entry, and, indirectly, the presence of "security," but did not provide information related to frequency of servicing, presence of hand sanitization mechanisms, signage, or other conditions of entry. See *Public Restrooms in the City of Boston*, *supra* note 53 (link in response to author's public records request to the City of Boston). Many cities claimed they do not keep records of the information requested and therefore, had no duty to supply it under their public records laws.

99. *Id.*

100. *Id.*

101. Letter from Fernando Campos, Exec. Officer, Bd. of Pub. Works, City of L.A. to author (Aug. 8, 2018) (on file with author) (providing information in response to author's public records request).

102. *Id.*

103. Data provided by City of Las Vegas (on file with author) (specifying number of public bathrooms in Las Vegas); Letter from Jamarj Johnson, FOIA Officer, Dep't of Parks and Rec., Gov't of the Dist. of Columbia, to author (Oct. 2, 2018) (on file with author).

104. Email from Jamarj Johnson, FOIA Officer, Dep't of Parks and Recreation, Gov't of D.C., to author (Oct. 2, 2018) (on file with author); Data provided by City of Seattle (on file with author) (specifying number of public bathrooms in Seattle).

105. Email from Jamarj Johnson to author (Oct. 2, 2018) (on file with author); Data provided by City of San Jose (on file with author) (specifying number of public bathrooms in San Jose); Data provided by City of Seattle (on file with author) (specifying number of public bathrooms in Seattle). Only two of Las Vegas's eighty-four bathrooms have security present. Data provided by City of Las Vegas (on file with author).

operation.<sup>106</sup> The response revealed that eighty-seven percent of San Francisco's bathrooms have restricted hours, leaving only twenty-eight open overnight.<sup>107</sup>

Nevertheless, looking at public information beyond San Diego's record response reveals that, until recently, almost all of the city's public bathrooms closed at night. Before the city's recent hepatitis A outbreak, the city maintained only two twenty-four-hour public bathrooms.<sup>108</sup> After the outbreak, it began leaving many of its public bathrooms open all day and started installing new ones.<sup>109</sup> As of September 15, 2017, the city was keeping sixty-eight bathrooms open twenty-four hours per day.<sup>110</sup>

The cities' responses to public record requests provide us with a better understanding of the accessibility of their public bathrooms than we had previously. However, the cities' inability to provide information or records on basic questions of accessibility demonstrates two things. First, it suggests that cities actually know very little and keep poor records about the public bathrooms they maintain. Second, it becomes clear that the maintenance and operations of public bathrooms do not properly account for the needs of homeless individuals.

Accounting for accessibility in addition to availability is critical when assessing cities' provision of public bathrooms for their homeless community. When a city like Los Angeles maintains four overnight bathrooms for its 33,138 homeless residents, it is difficult to view the situation as anything other than governmental malfeasance.<sup>111</sup> With the data revealing the stark deficiency of

106. Data provided by City of S.F. (on file with author) (specifying number of public bathrooms in San Francisco).

107. *Id.* Documents provided by the City of San Diego did not provide sufficient information to understand the issue of accessibility in its bathrooms. The limited information the city provided showed that fifty-two of its 212 bathrooms have limited hours and twenty-three have security on site. See CITY OF SAN DIEGO, CITY OF SAN DIEGO PUBLIC RESTROOM IN DOWNTOWN, REGIONAL PARKS, SHORELINE BEACHES AND BAYS (2017) [hereinafter CITY OF SAN DIEGO PUBLIC RESTROOM] (on file with author); CITY OF SAN DIEGO, FY 2018-LIBRARY SYSTEM SECURITY GUARD SCHEDULE (2018) (on file with author) (showing that twenty-four public libraries, where there would be public restrooms, have security guards).

108. See SANDIEGO.GOV, DOWNTOWN PUBLIC RESTROOMS, <https://www.sandiego.gov/sites/default/files/legacy/directories/pdf/downtownpublicrestrooms.pdf> [https://perma.cc/K3NV-FCYG] (highlighting that the city only operates two twenty-four-hour public bathrooms while the Port of San Diego operates five).

109. See Press Release, City of San Diego, San Diego Expands Public Restrooms in Downtown To Help Curb Hepatitis A Outbreak (Sept. 16, 2017), [https://www.sandiego.gov/sites/default/files/news\\_city\\_adds\\_restrooms\\_downtown\\_091517\\_0.pdf](https://www.sandiego.gov/sites/default/files/news_city_adds_restrooms_downtown_091517_0.pdf) [https://perma.cc/Z9V3-VSNS].

110. See CITY OF SAN DIEGO PUBLIC RESTROOM, *supra* note 107.

111. The potential for tort claims related to the failure to maintain public bathrooms is outside the scope of this Article. However, the author acknowledges that governmental immunity could impede any such claims. See, e.g., *Warren v. District of Columbia*, 444 A.2d 1, 3 (D.C. 1981) (“[A] government and its agents are under no general duty to provide public services, such as police protection, to any particular individual citizen.”); *Florence v. Goldberg*, 375 N.E.2d 763, 766 (N.Y. 1978) (“Moreover, to sustain liability against a municipality, the duty breached must be more than a duty owing to the

bathrooms available to homeless people, the next section explores the implications of failing to provide public restrooms while criminalizing public urination and defecation.

### III. THE IMPLICATIONS IN TERMS OF DIGNITY, HEALTH, AND POWER

#### A. *Human Dignity*

The simultaneous criminalization of public urination and defecation as well as the failure to provide adequate access to public restrooms is problematic for a number of reasons. A central concern is that the situation denies homeless individuals the dignity they deserve.<sup>112</sup> In the United States, and much of the Western world, the ability to use the bathroom in private is synonymous with dignity.<sup>113</sup> And yet, the failure to provide adequate access to public bathrooms for homeless individuals signals that government is not particularly concerned with their feelings of self-worth and dignity. To criminalize public urination and defecation, while failing to provide access to bathrooms, suggests that homeless individuals' very existence is criminal.

To make matters worse, cities' misplaced funding priorities suggest they value dogs over people. In cities across the country, dog parks and bags for the disposal of dog waste are commonplace, but public bathrooms are rare, if they even exist at all.<sup>114</sup> The failure to provide bathrooms while prohibiting public urination and defecation is dehumanizing enough, but the prioritization of dogs over homeless individuals adds insult to injury.

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general public."); *Chapman v. City of Philadelphia*, 434 A.2d 753, 754 (Pa. Super. Ct. 1981) (stating that the government generally only has a duty when someone is exposed to a special danger and authorities have assumed responsibility to protect him or her).

112. See Bryce Covert, *This Really Simple Idea Could Change Homeless People's Lives*, THINKPROGRESS (Feb. 3, 2015), <https://thinkprogress.org/this-really-simple-idea-could-change-homeless-peoples-lives-6bffb0280e07/> [<https://perma.cc/BAV6-FM9Y>] (discussing the dignity that comes with access to a toilet, shower, and laundry machine); Renee Lewis, *Homeless America: 'Everyone Should be Able To Pee for Free With Dignity'*, AL JAZEERA AM. (Aug. 29, 2014), <http://america.aljazeera.com/articles/2014/8/29/homeless-un-toilets.html> [<https://perma.cc/6V7M-6SGU>].

113. Statement, Léo Heller, Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation, *For World Toilet Day, "Sanitation is a Human Right" on 19 November* (Nov. 19, 2017), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22400&LangID=E> [<https://perma.cc/WY5K-8BMR>] ("The human right to sanitation entitles everyone, without discrimination, to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, socially and culturally acceptable and that provides privacy and ensures dignity.").

114. Claire Trageser, *San Diego Installed Public Loos, but Now They're Flush with Problems*, NPR: ALL THINGS CONSIDERED (Aug. 10, 2015), <https://www.npr.org/sections/health-shots/2015/08/10/431240543/san-diego-installed-public-loos-but-now-theyre-flush-with-problems> [<https://perma.cc/4KHB-DFQS>].

Issues of human dignity also highlight the problem with shifting the burden of providing bathrooms to the private sector.<sup>115</sup> In the private sector, it is the norm to reserve bathroom access for patrons.<sup>116</sup> “Bathrooms for Customers Only” signs are now ubiquitous, and employees have become the gatekeepers.<sup>117</sup> This norm asserts that one’s dignity and humanity are tied to their monetary worth—only those able to pay can use the bathrooms. While our governments may sanction this scenario, giving private enterprise control over private property, they should not turn a blind eye to the fact that shifting the burden to businesses means that available bathrooms are inaccessible to low-income individuals.

The association between bathrooms and dignity readily explains why bathroom access has been central to civil rights movements.<sup>118</sup> To have equal and equitable access to bathrooms is critical to one’s perception of herself as human.<sup>119</sup> To have equal access, as in the case of race-based civil rights movements, or equitable access, as in the case of sex-, disability-, and transgender-based civil rights movements, requires recognition from both

115. Policymakers justify shifting the burden to private industry by claiming that public bathrooms are too expensive to install and maintain. Joe Anuta, *Flushing in Brooklyn Costs \$2 Million*, CRAIN’S N.Y. BUS. (June 14, 2017), [https://www.crainsnewyork.com/article/20170614/REAL\\_ESTATE/170619951/a-brooklyn-toilet-cost-2-million-to-renovate-city-councilman-david-greenfield-says](https://www.crainsnewyork.com/article/20170614/REAL_ESTATE/170619951/a-brooklyn-toilet-cost-2-million-to-renovate-city-councilman-david-greenfield-says) [https://perma.cc/999R-MB4L]; Dan Nosowitz, *Why New York City Has a Public Bathroom Problem*, ATLAS OBSCURA (Jan. 28, 2016), <https://www.atlasobscura.com/articles/why-new-york-city-has-a-public-bathroom-problem> [https://perma.cc/XY7M-6TSU (staff-uploaded archive)] (explaining that the perception of public bathrooms as money pits has been used as an excuse not to invest in decent bathroom infrastructure). However, this shift is facilitated by federal and state policies that require businesses to maintain restrooms for their employees and customers. See, e.g., CAL. HEALTH & SAFETY CODE § 114250 (West 2012); N.Y. PUB. HEALTH LAW § 1352-a(1) (McKinney 2012); N.Y. LAB. LAW § 381(1) (McKinney 2015); 29 C.F.R. § 1910.141(c)(1)(i) (2019); CAL. CODE REGS. tit. 8, § 3364(a) (Westlaw through 8/16/19 Register 2019, No. 33); WASH. ADMIN. CODE § 296-800-23020 (Westlaw through 19-13 Washington State Register). The cost justification should not be considered persuasive as many public goods are expensive to build and maintain (e.g., schools, libraries, roads, public transit, communications infrastructure, etc.). Nevertheless, they are important, if not necessary, services to provide to the public.

116. See, e.g., PFFCDC, ACCESS TO RESTROOMS, *supra* note 51; PFFCDC, REVISITING, *supra* note 51.

117. See, e.g., Rachel Siegel, *Two Black Men Arrested at Starbucks Settle with Philadelphia for \$1 Each*, WASH. POST (May 3, 2018), [https://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/?noredirect=on&utm\\_term=.b91190e9aae6](https://www.washingtonpost.com/news/business/wp/2018/05/02/african-american-men-arrested-at-starbucks-reach-1-settlement-with-the-city-secure-promise-for-200000-grant-program-for-young-entrepreneurs/?noredirect=on&utm_term=.b91190e9aae6) [https://perma.cc/2T96-C4BQ (dark archive)].

118. Marie-Amélie George, *The LGBT Disconnect: Politics and Perils of Legal Movement Formation*, 2018 WIS. L. REV. 503, 516–17.

119. Amanda Harmon Cooley, *Against Shaming: Preserving Dignity, Decency, and a Moral-Educative Mission in American Schools*, 91 ST. JOHN’S L. REV. 793, 820 (2017).

public and private providers of restrooms.<sup>120</sup> This recognition ensures dignity in bathroom use.<sup>121</sup> Homeless individuals also deserve this recognition.

B. *The Health of Homeless Individuals*

Municipalities' primary justification for outlawing public urination and defecation is the health and safety of the community.<sup>122</sup> This is, of course, a legitimate public interest. Exposure to urine and feces can result in the transmission of a number of infectious diseases, including salmonella, shigella, hepatitis, tapeworm, and hookworm.<sup>123</sup> These diseases can be spread directly between humans who come into contact with waste or indirectly by coming into contact with insects, animals, or water that are carrying the germs or parasites.<sup>124</sup> As a result, proper and immediate disposal of human waste and basic standards of hygiene are essential for protecting public health.<sup>125</sup> It is for these reasons that homeless advocates are hesitant to challenge prohibitions on public urination and defecation.

However, prohibitions on public urination and defecation combined with a failure to provide adequate access to public restrooms do not account for the health of homeless individuals or others who need ready access to these facilities. There are a number of adverse health effects associated with not using the bathroom in a timely manner.<sup>126</sup> For example, urine retention can lead to urinary tract infections and renal damage.<sup>127</sup> Delays in defecating can lead to

120. See, e.g., Tobias Barrington Wolff, *Civil Rights Reform and the Body*, 6 HARV. L. & POL'Y REV. 201, 202 (2012).

121. See G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 853 F.3d 729, 730–31 (4th Cir. 2017) (Davis, J., concurring); Gregory Korte, *Transgender Bathroom Rule a Matter of Dignity, Obama Says*, USA TODAY (May 16, 2016), <https://www.usatoday.com/story/news/politics/2016/05/16/transgender-bathroom-rule-matter-dignity-obama-says/84460430/> [<https://perma.cc/QPV4-KZDV>].

122. See *People v. McDonald*, 137 Cal. App. 4th 521, 535–36 (2006) (discussing justifications such as health and safety, decency, and anything “offensive to the senses”).

123. Richard Carr, *Excreta-Related Infection and the Role of Sanitation in the Control of Transmission*, in WATER QUALITY: GUIDELINES, STANDARDS AND HEALTH: ASSESSMENT OF RISK AND RISK MANAGEMENT FOR WATER RELATED INFECTIOUS DISEASE 89, 90 (Lonna Fewtrell & Jamie Bartram eds., 2001); see also *Disease from Sewage*, AUSTRALIAN GOV'T DEP'T HEALTH (Nov. 2010), <http://www.health.gov.au/internet/publications/publishing.nsf/Content/ohp-enhealth-manual-atsi-cnt-l-ohp-enhealth-manual-atsi-cnt-l-ch2-ohp-enhealth-manual-atsi-cnt-l-ch2.3> [<https://perma.cc/5HVV-L7ME>].

124. *Disease from Sewage*, *supra* note 123.

125. See Carr, *supra* note 123, at 90 (“[F]or maximum health protection, it is important to treat and contain human excreta as close to the source as possible before it gets introduced into the environment.”).

126. Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Toilet Design*, in LADIES AND GENTS: PUBLIC TOILETS AND GENDER 49 (Olga Gershenson & Barbara Penner eds., 2009); Kathryn H. Anthony & Meghan Dufresne, *Potty Privileging in Perspective: Gender and Family Issues in Planning and Designing Public Restrooms*, 21 J. PLAN. LITERATURE 267, 274 (2007).

127. Memorandum from John B. Miles, Jr., OSHA Directorate of Compliance Programs, on Interpretation of 29 CFR § 1910.141(c)(1)(i): Toilet Facilities (Apr. 6, 1988),

“constipation, abdominal pain, diverticuli, and hemorrhoids . . . .”<sup>128</sup> For homeless women, the inability to access a bathroom and remove used menstrual products can lead to infections and toxic shock syndrome.<sup>129</sup>

Prohibitions on public urination and defecation alone cannot protect homeless individuals and others from the health risks associated with exposure to human waste. Homeless individuals will have to urinate and defecate regardless of whether doing so publicly violates the law. By failing to provide adequate access to public bathrooms, governments ensure that homeless individuals do so in a manner that threatens their health and the health of others.<sup>130</sup> Criminalizing the acts may lead homeless individuals to perform them

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<https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0> [https://perma.cc/FCZ5-3VSU] (“Adverse health effects that may result from voluntary urinary retention include increased frequency of urinary tract infections (UTIs) . . . and, in rare situations, renal damage.”). Urine retention can also result in pain, bladder stretching, pelvic floor damage, and kidney stones. Jon Johnson, *Is It Safe To Hold Your Pee? Five Possible Complications*, MED. NEWS TODAY (Apr. 5, 2018), <https://www.medicalnewstoday.com/articles/321408.php> [https://perma.cc/BJ3J-SUGG]. Finally, consistently holding urine can lead to future incontinence or, adversely, urine retention. Kristin Wong, *What Happens to Your Body When You Hold Your Urine*, LIFE HACKER (Jan. 15, 2016), <https://lifehacker.com/what-happens-to-your-body-when-you-hold-your-urine-1753057396> [https://perma.cc/2293-6JNS].

128. Memorandum from John B. Miles, Jr., *supra* note 127. Further, from a public policy standpoint, restrooms benefit a range of groups who need to access bathrooms more frequently. These groups, frequently referred to as “restroom challenged,” include the elderly, pregnant women, children, and individuals with particular medical conditions. Examples of individuals who need to urinate more frequently include “pregnant women, women with stress incontinence, and men with prostatic hypertrophy.” *Id.* Medical conditions that can cause individuals to urinate more frequently include diabetes, interstitial cystitis, enlarged prostate, and kidney stones. *Frequent Urination: Causes and Treatments*, WEBMD, <https://www.webmd.com/urinary-incontinence-oab/frequent-urination-causes-and-treatments#1> [https://perma.cc/9ZL2-8ST9]; Catharine Paddock, *Frequent Urination: Causes, Symptoms and Treatment*, MED. NEWS TODAY (Nov. 16, 2018), <https://www.medicalnewstoday.com/articles/70782.php> [https://perma.cc/UH3B-2CNE]. Other causes include anxiety, hypertension medication, history of stroke, colon diverticulitis, and some sexually transmitted diseases. *Id.* Medical conditions that cause frequent bowel movements include diverticulitis, inflammatory bowel disease, pancreatitis, celiac disease, irritable bowel syndrome, and bacterial, viral, and parasitic infections that are a result of poor bathroom access. *Frequent Bowel Movements*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/diseases/17791-frequent-bowel-movements> [https://perma.cc/36P8-5VGL].

129. Liz Farmer, *Menstruating While Homeless: An Ignored, Inescapable Issue*, GOVERNING (Apr. 2, 2015), <https://www.governing.com/topics/health-human-services/gov-homeless-women-georgia-fells-femme.html> [https://perma.cc/8B34-XKFY]; Rochaun Meadows-Fernandez, *Getting Your Period Can Be a Pain. Getting It While Homeless Is Even Worse.*, YES! (July 27, 2017), <https://www.yesmagazine.org/people-power/getting-your-period-can-be-a-pain-getting-it-while-homeless-is-even-worse-20170727> [https://perma.cc/6JF8-CPBZ].

130. Kayla Robbins, *Homelessness Is a Public Health Issue*, INVISIBLE PEOPLE, <https://invisiblepeople.tv/homelessness-is-a-public-health-issue/> [https://perma.cc/7HC3-PPNR]. When homeless individuals contract disease, the public at large is still at risk of contracting those diseases. *Id.* This reality undermines the governmental contention that they are protecting the public at large with prohibitions on public urination and defecation. *Id.*

discreetly or in a less trafficked location, but this does not ameliorate the associated health risks.

A recent hepatitis A outbreak underscores the health risks associated with poor access to public bathrooms and proper hygiene. According to the Centers for Disease Control and Prevention (“CDC”), individuals who were most significantly impacted by the outbreak included drug users and homeless people.<sup>131</sup> In addition to experiencing higher rates of drug use, homeless individuals are at a greater risk of contracting hepatitis A because of poor personal hygiene and a lack of sanitation.<sup>132</sup>

San Diego was heavily impacted by the hepatitis A outbreak. The city observed 592 cases of the infection resulting in twenty deaths.<sup>133</sup> The outbreak in San Diego and other parts of California was the “largest person-to-person hepatitis A outbreak in the United States since the hepatitis A vaccine became available in 1996.”<sup>134</sup> To quell the outbreak, the state administered 203,850 vaccinations.<sup>135</sup>

Yet the outbreak was avoidable. Government officials knew that in addition to increased health care access and proper vaccination, the spread of hepatitis A could be prevented through access to bathrooms and sensible harm reduction policies, such as the provision of clean needles.<sup>136</sup> San Diego was acutely aware of the need to provide bathrooms to their homeless communities for some time. In 2000, a grand jury issued the first of four reports alerting the city to its shortage of bathrooms for the homeless population.<sup>137</sup> The grand jury report in 2010 explicitly stated that San Diego was at risk of an illness outbreak

131. *Frequently Asked Questions: Hepatitis A Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/hepatitis/outbreaks/FAQs-HepAOutbreaks.htm> [https://perma.cc/6FWP-3FBX].

132. Lori Fantry, *Hepatitis A*, in *THE HEALTH CARE OF HOMELESS PERSONS* 29, 32 (James J. O’Connell ed., 2007), <https://www.nhchc.org/wp-content/uploads/2012/01/HepatitisA.pdf> [https://perma.cc/2L6S-9FC2].

133. *Hepatitis A Outbreak in San Diego County Is Officially Over*, HEALTH & HUM. SERVS. AGENCY, [https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community\\_epidemiology/dc/Hepatitis\\_A.html](https://www.sandiegocounty.gov/content/sdc/hhsa/programs/phs/community_epidemiology/dc/Hepatitis_A.html) [https://perma.cc/CY4X-8KRA].

134. NOELE NELSON, NAT’L CTR. FOR HIV/AIDS, VIRAL HEPATITIS, STD AND TB PREVENTION, HEPATITIS A OUTBREAKS: CURRENT ISSUES IN IMMUNIZATION WEBINAR 4 (Nov. 7, 2017), [https://www2.cdc.gov/vaccines/ed/ciinc/archives/17/downloads/11\\_8\\_17/HAV%20Outbreaks%2011.8.2017.pdf](https://www2.cdc.gov/vaccines/ed/ciinc/archives/17/downloads/11_8_17/HAV%20Outbreaks%2011.8.2017.pdf) [https://perma.cc/D2FK-GT2U].

135. *Hepatitis A Outbreak in San Diego County Is Officially Over*, *supra* note 133.

136. See SAN DIEGO COUNTY GRAND JURY, *THE SAN DIEGO HEPATITIS A EPIDEMIC: (MIS)HANDLING A PUBLIC HEALTH CRISIS* 11 (May 17, 2018), <https://www.sandiegocounty.gov/content/dam/sdc/grandjury/reports/2017-2018/HepAReport.pdf> [https://perma.cc/WR7E-MBQD] (“Prior to the declaration of a local public health emergency, handwashing stations, an effective tool in combatting disease transmission, had not been allowed on City property because permits had not been granted.”).

137. James Dehaven, *Long Before Deadly Hepatitis A Outbreak, San Diego Was Warned About Lack of Bathrooms*, L.A. TIMES (Sept. 21, 2017), <http://www.latimes.com/sd-me-grand-jury-20170920-story.html#> [https://perma.cc/MC6Z-4VAQ].

due to unsanitary conditions among its homeless population.<sup>138</sup> The history of San Diego's failure to install public bathrooms is long.<sup>139</sup> The city responded to the outbreak by providing more access to bathrooms, but there are still too few and, for those impacted by the hepatitis A outbreak, it was too late.

In sum, prohibitions on public urination and defecation are grounded in good policy justification.<sup>140</sup> Yet the prohibitions when combined with poor bathroom access do not properly account for the health of homeless individuals and others. Moreover, the failure to provide adequate bathroom access means that the health risks from exposure to human waste still remain.

### C. *Bathrooms and the Exercise of Power*

#### 1. Availability and Accessibility As an Exercise of Power

Bathrooms are a regular feature of civil rights movements because they are used as a tool of oppression and marginalization by those in power.<sup>141</sup> The availability and accessibility of bathrooms demonstrates that exercise of power. That power is also on display in the regulation of bathrooms.

Bathrooms and their provision demonstrate the issues raised along sex identification. For example, the early provision of bathrooms raised issues of inviting women into the public arena and challenges to the convention of women's "place" as being in the home.<sup>142</sup> These questions continued as women entered the work force and positions of power—a prominent example being the United States Senate and House of Representative's failure to provide a bathroom for women near their chambers until 1993 and 2011, respectively.<sup>143</sup> Moreover, the design of bathrooms raises many questions of equality and

138. *Id.*

139. See Lisa Halverstadt, *San Diego Scrambles To Address Long-Festering Lack of Restrooms*, VOICE SAN DIEGO (Sept. 18, 2017), <https://www.voiceofsandiego.org/topics/government/san-diego-scrambles-to-address-long-festering-lack-of-restrooms/> [<https://perma.cc/C8MK-Y5U9>].

140. Whatever the resulting punishment, incarceration or fines that do not consider ability to pay act as deterrents is a separate debate.

141. See Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 146 (2017); Jennifer Levi & Daniel Redman, *The Cross-Dressing Case for Bathroom Equality*, 34 SEATTLE U. L. REV. 133, 138–39 (2010); see also Michael A. Olivas, *Immigrants in the Administrative State and the Policy Following Hurricane Katrina*, 45 HOUS. L. REV. 1, 9 (2008); Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 42 (2017).

142. See, e.g., Olga Gershenson & Barbara Penner, *Introduction to LADIES AND GENTS: PUBLIC TOILETS AND GENDER* 23 (2009) (discussing Andrew Brown-May and Peg Fraser's essay on the first Australian public toilet for men predating the first toilet for women by fifty years).

143. Nancy McKeon, *Women in the House Get a Restroom*, WASH. POST (July 29, 2011), [https://www.washingtonpost.com/lifestyle/style/women-in-the-house-get-a-restroom/2011/07/28/gIQAfGdwfL\\_story.html?noredirect=on&utm\\_term=.9536ec623df1](https://www.washingtonpost.com/lifestyle/style/women-in-the-house-get-a-restroom/2011/07/28/gIQAfGdwfL_story.html?noredirect=on&utm_term=.9536ec623df1) [<https://perma.cc/WRJ2-634A> (dark archive)].

equity.<sup>144</sup> For example, allocating equal space to men's and women's restrooms does not lead to equitable results because on average, women take twice as much time in bathrooms as men.<sup>145</sup>

The exercise of power along racial lines was on full display during the era of de jure segregation.<sup>146</sup> Unsupported stereotyping regarding disease and the risk of contraction was used as pretextual justification for segregation.<sup>147</sup> Sometimes this led to separate bathroom facilities for whites and people of color. Other times, it led to the complete absence of bathrooms for people of color as detailed in the excerpt from *Sula* at the start of this Article.<sup>148</sup>

The historic absence of bathrooms that accommodated individuals with physical disabilities demonstrates both the failure to account for the community's needs and their exclusion from the public sphere.<sup>149</sup> Disability rights activists challenged the presumption that it was their condition that forced their exclusion, leading to an understanding that instead, societally erected barriers and prejudice remained in the way.<sup>150</sup> Organizing by disability rights activists eventually led to the passage of the American with Disabilities Act in 1990, which calls for the installation and modification of a number of

144. Colker, *supra* note 141, at 149; Gershenson & Penner, *supra* note 142, at 12–13; Jennifer S. Hendricks, *Arguing with the Building Inspector About Gender-Neutral Bathrooms*, 113 NW. U. L. REV. ONLINE 77, 87 (2018); Kelly Levy, *Equal, but Still Separate?: The Constitutional Debate of Sex-Segregated Public Restrooms in the Twenty-First Century*, 32 WOMEN'S RTS. L. REP. 248, 249 (2011); Sarah A. Moore, *Facility Hostility? Sex Discrimination and Women's Restrooms in the Workplace*, 36 GA. L. REV. 599, 600–03 (2002).

145. Gershenson & Penner, *supra* note 142, at 12–13 (discussing “Potty Parity”). The inequitable results are product of women's need to spend additional time in the restroom. *Id.* One need not look farther than the long lines outside women's restrooms in the theater, airport, etc. to be convinced of the inequitable results. *Id.* Potty Parity led Canada to enshrine a two-to-one ratio bathroom provision standard in its national building code. LOWE, *supra* note 52, at 25.

146. C.J. Griffin, *Workplace Restroom Policies in Light of New Jersey's Gender Identity Protection*, 61 RUTGERS L. REV. 409, 423–25 (2009).

147. ACLU Brief of Amicus Curiae for Appellant at 13–15, *G.G. ex rel. Grimm v. Gloucester County Sch. Bd.*, 853 F.3d 729 (4th Cir. 2017) (No. 15-2056); see also Louise M. Antony, *Back to Androgeny: What Bathrooms Can Teach Us About Equality*, 9 J. CONTEMP. LEGAL ISSUES 1, 4 (1998); Gershenson & Penner, *supra* note 142, at 13; Griffin, *supra* note 146, at 424; Marisa Pogofsky, *Transgender Persons Have a Fundamental Right To Use Public Bathrooms Matching Their Gender Identity*, 67 DEPAUL L. REV. 733, 753–54 (2018).

148. MORRISON, *supra* note 1; Elizabeth Abel, *Bathrooms Doors and Drinking Fountains: Jim Crow's Racial Symbolic*, 25 CRITICAL INQUIRY 435, 440–41 n.5 (1999); Elizabeth Ann Thompson, *The Long, Ugly History of Bathroom Segregation*, PROGRESSIVE (May 31, 2016), <https://progressive.org/oped/long-ugly-history-bathroom-segregation/> [<https://perma.cc/4QUG-A26J>].

149. Catherine Albiston, *Institutional Inequality*, 2009 WIS. L. REV. 1093, 1097 n.18.

150. Arlene Mayerson, *The History of the Americans with Disabilities Act: A Movement Perspective*, DISABILITY RTS. EDUC. & DEF. FUND (1992), <https://dredf.org/about-us/publications/the-history-of-the-ada/> [<https://perma.cc/VW2T-VRSD>]. The “Ugly Laws,” barring individuals with disabilities from being in public, discussed below, further challenge the presumption of the disability as the source of exclusion. See *infra* notes 173, 176 and accompanying text.

bathroom features, including the toilet seat height, grab bars, wall-mounted sinks, and stall dimensions.<sup>151</sup>

Finally, the provision and design of bathrooms raises issues for transgender and gender non-conforming individuals. The lack of gender-neutral bathrooms leads to harassment of transgender individuals and frequently puts them in harm's way.<sup>152</sup> Additionally, the maintenance of restroom organization by sex reinforces heteronormative and patriarchal notions of gender.<sup>153</sup> Bathrooms are one of few remaining places where we tolerate and expect sex segregation.<sup>154</sup> If the advocacy around gender-neutral bathrooms succeeds, it has the potential to dramatically reform mainstream conceptions of gender.<sup>155</sup>

When looking at the provision of bathrooms through the lens of homeless individuals, we see that many of the issues the homeless community faces mirror the experiences of women, people of color, individuals with disabilities, and transgender individuals. For example, the conditions that give rise to the bathroom availability issues homeless individuals confront are similar to nineteenth-century attitudes that prevented the construction of women's bathrooms.<sup>156</sup> In the nineteenth century, women's restrooms were not constructed out of fear that they would encourage women to "leave the home."<sup>157</sup> Today, delays associated with the installation and maintenance of public bathrooms result from "majority" pushback to the idea that providing a bathroom will attract homeless individuals to the area.<sup>158</sup> The stereotyping

151. See, e.g., U.S. DEP'T OF JUSTICE, 2010 ADA STANDARDS FOR ACCESSIBLE DESIGN 165, 168, 171 (2010), <https://www.ada.gov/regs2010/2010ADASTandards/2010ADASTandards.pdf> [<https://perma.cc/ZM2E-D28Y>]; AM. STANDARD, THE ACCESSIBLE BEAUTY OF ADA-COMPLIANT RESTROOMS 4 (2018), <https://www.americanstandard-us.com/press-room/spotlights/the-accessible-beauty-of-ada-compliant-restrooms> [<https://perma.cc/FS3N-E3CG> (staff uploaded archive)]; see also Robert L. Burgdorf Jr., *Why I Wrote the Americans with Disabilities Act*, WASH. POST (July 24, 2015), [https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm\\_term=.ecf9f898c91c](https://www.washingtonpost.com/posteverything/wp/2015/07/24/why-the-americans-with-disabilities-act-mattered/?utm_term=.ecf9f898c91c) [<https://perma.cc/Z3JE-U6JJ>] (dark archive)].

152. NAT'L CTR. FOR TRANSGENDER EQUAL., TRANSGENDER PEOPLE AND BATHROOM ACCESS 1 (2016), <https://transequality.org/sites/default/files/docs/resources/Trans-People-Bathroom-Access-July-2016.pdf> [[perma.cc/AS8S-HA62](https://perma.cc/AS8S-HA62)].

153. See Gershenson & Penner, *supra* note 142, at 12.

154. *Id.* at 9. This expectation conflates the desire for privacy with the mandate of modesty. See *id.* at 10; see also LOWE, *supra* note 52, at 39. The prospect of gender-neutral bathrooms contributed, in part, to the defeat of the Equal Rights Amendment. Gershenson & Penner, *supra* note 142, at 7.

155. See Jacob Tobia, *Why All Bathrooms Should Be Gender-Neutral*, TIME (Mar. 23, 2017), <http://time.com/4702962/gender-neutral-bathrooms/> [<https://perma.cc/32W8-6MSR>].

156. See Gershenson & Penner, *supra* note 142, at 23.

157. *Id.*

158. L.A. CENT. PROVIDERS COLLABORATIVE, NO PLACE TO GO: AN AUDIT OF THE PUBLIC TOILET CRISIS IN SKID ROW 47 (June 2017), <https://www.innerecitylaw.org/wp-content/uploads/2017/07/No-Place-To-Go-final.pdf> [<https://perma.cc/H4GE-7LDP>]; *Homelessness and World Toilet Day*, HUNGER & HOMELESSNESS AWARENESS WEEK (Nov. 20, 2017), <https://hhweek.org/homelessness-and-world-toilet-day/> [<https://perma.cc/2VDU-J5L4>]; Claire

confronted by communities of color is also implicated. The labeling of homeless individuals as diseased and dirty mirrors the stereotyping that was used to justify segregation of communities of color in places where disease could be transmitted such as bathrooms, locker rooms, pools, and water fountains.<sup>159</sup> However, it is the very failure to provide bathrooms that construct and reinforce these stereotypes. When homeless individuals cannot access bathrooms and are forced to leave urine and feces in the street, the stereotypes are reinforced. Further, when people are provided no means of practicing good hygiene, the stereotypes are solidified.

Additionally, there are similarities regarding bathroom accessibility for the homeless community and individuals with disabilities.<sup>160</sup> While the disability movement's focus was largely on physical modifications to bathroom design, accessibility for homeless individuals requires accommodation of overlapping barriers presented by mental and physical disabilities (e.g., presence of security and proximity to areas homeless individuals congregate) and limited financial resources (e.g., identification and entry fees). Finally, homeless individuals share the same concerns with bathroom provision as transgender individuals. Safety concerns are raised by the frequency of maintenance, especially for homeless individuals with compromised immune systems.<sup>161</sup> Furthermore, the need to use a bathroom in an environment free from potential harassment and denigration is implicated by the shifting of bathroom provision to private businesses where homeless individuals are frequently unwelcome.<sup>162</sup> Finally,

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Trageser, *Should Public Toilet in Downtown San Diego Stay or Go?*, KPBS (July 28, 2015) [hereinafter Trageser, *Public Toilet*], <https://www.kpbs.org/news/2015/jul/28/should-public-toilet-downtown-san-diego-stay-or-go/> [<https://perma.cc/FR8P-MBWZ>]; Elyse Wanshel, *Sacramento Opens Public Bathrooms for Homeless People*, HUFFINGTON POST (June 30, 2016), [https://www.huffingtonpost.com/entry/sacramento-pit-stop-public-mobile-attended-bathrooms-homeless\\_us\\_5773ea79e4b0d1f85d47f59a](https://www.huffingtonpost.com/entry/sacramento-pit-stop-public-mobile-attended-bathrooms-homeless_us_5773ea79e4b0d1f85d47f59a) [<https://perma.cc/MG64-H4PA>].

159. See Leilani Farha, *Homeless People Are Not Cockroaches or Vermin – They Are Human and Have Rights*, GUARDIAN (Dec. 21, 2015), <https://www.theguardian.com/housing-network/2015/dec/21/homeless-people-not-vermin-cockroaches-human-rights> [<https://perma.cc/CMD4-LNHP>]; Ji Kim, *Nowhere To “Go”: DC’s Growing Need for 24/7 Public Restrooms*, GREATER GREATER WASH. (Oct. 18, 2018), <https://ggwash.org/view/69495/nowhere-to-go-dcs-growing-need-for-24-7-public-restrooms> [<https://perma.cc/DHW7-8ZKV>].

160. See *supra* Section II.B.

161. See Arranz et al., *supra* note 80, at 251–52.

162. While examining “safety” as it relates to the homeless community necessitates dispelling the myth of homeless individuals as threatening and dangerous individuals, it is also important to bring consideration of the safety of the homeless community to bear. Inviting homeless individuals into spaces where they are historically excluded poses risks. In those spaces they are at risk of physical assault. See, e.g., Wale Aliyu, *Police Identify Homeless Man Who Died After ‘Struggle’ with Stop and Shop Staff*, NBC N.Y. (Apr. 14, 2018), <https://www.nbcnewyork.com/news/local/Man-Caught-Shoplifting-Dies-After-Struggle-With-Stop-and-shop-employees-479778493.html> [<https://perma.cc/W95H-HGET>]; *Black Panthers Protest, Call for Business Boycott After Homeless Man Assaulted*, WISN (May 22, 2017), <https://www.wisn.com/article/protest-outside-milwaukee-convenience-store-after-homeless-man-assaulted/9910410> [<https://perma.cc/UP9S-UMTD>].

both the homeless and transgender communities face criminalization efforts related to their need to use the bathroom.<sup>163</sup>

Comparing the bathroom availability and accessibility issues of homeless individuals with the issues, past and present, faced by women, people of color, individuals with disabilities, and the transgender community brings the dilemma into focus.<sup>164</sup> It is clear that homeless individuals suffer from their lack of representation in the provision of bathrooms.<sup>165</sup> Like marginalized groups before them, they are considered unwanted or treated as invisible. As such, their concerns are not taken into consideration in assessing the issue of availability or accessibility. This invisibility compounds when the lack of bathrooms only serves to further obscure their participation in the public sphere.<sup>166</sup> Moreover, the absence of bathrooms and the discourse around their use stigmatizes the homeless community. Thus, homeless individuals are also marginalized by the powerful who freely use bathrooms as their mechanism of control.

## 2. Prohibitions on Public Urination and Defecation As an Exercise of Power

The prohibitions on public urination and defecation also marginalize homeless individuals. As explored above, these prohibitions are grounded in important health and safety justifications; however, they have a disproportionate impact on the homeless community that lacks access to bathrooms.<sup>167</sup> To better understand the power dynamics involved, it is helpful to contextualize prohibitions on public urination and defecation in the criminalization of homelessness more broadly and explore the roots of criminalization policy.

Antihomeless laws criminalize activities attendant to human survival, and sometimes charitable acts intended to assist homeless individuals in that pursuit.<sup>168</sup> The laws usually fall within four broad categories:

- 1) Sitting, lying, and resting in public spaces;
- 2) Sleeping, camping, and living in vehicles;
- 3) Begging and panhandling; and
- 4) Sharing food.<sup>169</sup>

163. *See supra* Part I.

164. *See* Gershenson & Penner, *supra* note 142, at 9 (“[R]efusing people toilet access remains a remarkably effective form of social exclusion, and in defiance of basic human rights, toilets have become a potent means of further marginalizing social untouchables.”).

165. *See id.* at 10.

166. *See id.* at 9.

167. *See supra* Section III.B.

168. PUNISHING THE POOREST, *supra* note 38, at 5.

169. *Id.* (citing BERKELEY LAW SCH. POLICY ADVOCACY CLINIC, CALIFORNIA’S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS

These categories, however, are not exhaustive. Other examples of antihomeless laws include bans on maintaining or storing a certain amount of belongings, bathing in public, or having unreasonably offensive hygiene or scent.<sup>170</sup>

What is uniform about these laws is that they prohibit behavior that, if performed in private, would not be considered criminal.<sup>171</sup> Yet, homeless individuals “do not have the luxury of privacy, and must carry out their private lives in public places.”<sup>172</sup> Additionally, homeless individuals have no choice but to carry out the prohibited act, such as sitting, lying, sleeping, or camping. Even those acts that may be considered “elective” do not offer much choice because the acts are critical to survival. For example, panhandling may be the only source of income, living in a vehicle may offer safety and security, and storing possessions may be the only means of maintaining life-saving medication or clothing and bedding for warmth.

The criminalization of homelessness is problematic for a variety of reasons. First, it criminalizes behavior that is benign in nature. Moreover, it does nothing to address the true problem—an unaffordable housing market and the lack of sufficient social safety net supports that create a scenario where individuals are forced to live without shelter.<sup>173</sup> In fact, antihomeless laws actively interfere with homeless individuals’ ability to escape their situation.<sup>174</sup> An inability to pay citations issued for violations of antihomeless laws frequently results in the issuance of warrants.<sup>175</sup> Outstanding warrants, in turn, may make homeless individuals ineligible for public benefits such as Social

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IN THE GOLDEN STATE (2016)). The criminalization of homelessness began in the 1980s when visible homelessness became more prevalent due to shortages in subsidized housing stock. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10 (2018) [hereinafter HOUSING NOT HANDCUFFS], <https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs.pdf> [https://perma.cc/TN6W-6FYH]. A study from the National Law Center on Homelessness and Poverty shows that antihomeless laws have increased in every category since 2006. *Id.* at 10.

170. BERKELEY, CAL., MUN. CODE § 13.36.040 (current through 2019), <https://www.codepublishing.com/CA/Berkeley/html/pdfs/Berkeley13.pdf> [https://perma.cc/6H7H-DPX8] (prohibiting the placement of objects in city-owned planters or tree wells); SANTA MONICA, CAL., MUN. CODE § 3.12.360(b), [http://www.qcode.us/codes/santamonica/view.php?topic=3-3\\_12-3\\_12\\_360&frames=on](http://www.qcode.us/codes/santamonica/view.php?topic=3-3_12-3_12_360&frames=on) [https://perma.cc/AJ8A-WWBN] (criminalizing leaving property unattended for ten minutes and maintaining property that cannot be removed and transported within three minutes); ORTIZ & DICK, *supra* note 31, at 14–15 (discussing the town of Burien, Washington’s trespass ordinance); Frances Dinkelspiel, *Berkeley Imposes New Laws on Homeless Behavior*, BERKELEYSIDE (Nov. 18, 2015), <https://www.berkeleyside.com/2015/11/18/berkeley-imposes-new-laws-on-homeless-behavior> [https://perma.cc/DZC6-EC5W].

171. PUNISHING THE POOREST, *supra* note 38, at 7.

172. *See* HOUSING NOT HANDCUFFS, *supra* note 169, at 21.

173. *Id.* at 14.

174. *Id.* at 13.

175. PUNISHING THE POOREST, *supra* note 38, at 2.

Security disability, food stamps, and subsidized housing.<sup>176</sup> Moreover, because many violations of antihomeless laws are considered criminal offenses, they may be added to one's criminal record, which can interfere with their ability to secure housing and employment.<sup>177</sup> These citations can also interfere with one's ability to sustain employment. An inability to pay the citation frequently leads to license suspension or arrest, which impede people's ability to get to work, frequently resulting in dismissal.<sup>178</sup> Finally, criminalizing homelessness is widely considered the most expensive method of "addressing" homelessness.<sup>179</sup>

Criminalizing homelessness also results in a scenario where homeless individuals are too frequently in contact with law enforcement and the criminal justice system. A recent survey conducted by the San Francisco Coalition on Homelessness revealed that among respondents seventy-four percent reported being approached by police in the last year, twenty percent reported being approached four or more times in the past month, and twelve percent reported being approached at least twice a week throughout the last year.<sup>180</sup> Additionally, sixty-nine percent reported being cited in the past year and twenty-two percent reported receiving more than five citations in the last year.<sup>181</sup> According to the National Law Center on Homelessness and Poverty, homeless individuals are eleven times more likely to experience incarceration than the general population.<sup>182</sup>

The impetus behind antihomeless laws is explained in Sara Rankin's formative piece, *The Influence of Exile*.<sup>183</sup> Professor Rankin argues that antihomeless laws are an exercise of power by the in-group seeking to exclude "others" and that they have roots in historical exclusion laws that were founded in bias and bigotry.<sup>184</sup> She points out that antihomeless laws are remarkably

176. See 7 U.S.C. § 2015(k) (2018); 42 U.S.C. § 1382(e)(4)(A)(i) (2012 & Supp. IV 2016); 24 C.F.R. § 982.310(c)(2)(ii)(A) (2019).

177. Michael Pinard, *Criminal Records, Race and Redemption*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 963, 972, 976 (2013); Valerie Schneider, *The Prison to Homelessness Pipeline: Criminal Record Checks, Race, and Disparate Impact*, 93 IND. L.J. 421, 421 (2018).

178. See PUNISHING THE POOREST, *supra* note 38, at 33. In addition to license suspension and arrest, antihomeless laws interfere with a homeless individual's ability to remain employed because they must take off work to appear in court. HOUSING NOT HANDCUFFS, *supra* note 169, at 36. For many homeless individuals who are hourly employees, that flexibility is not possible or the risk of a day's worth of lost income is too great. *Id.*

179. HOUSING NOT HANDCUFFS, *supra* note 169, at 14.

180. PUNISHING THE POOREST, *supra* note 38, at 1.

181. *Id.* at 2.

182. HOUSING NOT HANDCUFFS, *supra* note 169, at 38.

183. Rankin, *Influence of Exile*, *supra* note 83, at 4.

184. *Id.* at 4. Historical exclusion laws in turn found their roots in English labor laws. ORTIZ & DICK, *supra* note 31, at 3. The labor laws required laborers to remain in designated places and work for set wages. *Id.* Individuals who departed from their assigned region and set out in search of higher wages were labeled vagabonds and vagrants. *Id.* The English labor laws would eventually be adopted in the colonies as vagrancy or "warn out" laws. *Id.* Towns used the warn out laws to exile outsiders who they

similar to historical exclusion laws, such as Jim Crow, Anti-Okie, Ugly, and Sundown Town laws, which sought to exile “‘undesirable’ people from public space.”<sup>185</sup> Antihomeless laws, like their predecessors, are grounded in “discrimination, stereotypes, and bias.”<sup>186</sup> In fact, “[s]tudies show visible poverty elicits higher rates of disgust than nearly any other commonly marginalized trait, including racial or ethnic indicia.”<sup>187</sup> It is no surprise that there are significant intersections between the homeless community and the groups previously targeted by historical exclusion laws, such as communities of color and people with disabilities.<sup>188</sup>

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believed would bring economic instability. *Id.* The laws also empowered the towns control their public space and determine who they believed “belonged.” *Id.* at 3–4.

185. Rankin, *Influence of Exile*, *supra* note 83, at 6. States began to pass laws against Okies, or farmers from plains states who were forced off their land, to “protect” their residents from economic harm. ORTIZ & DICK, *supra* note 31, at 4–5. The laws punished both the Okies’ presence and individuals who attempted to assist them. *Id.* For example, “one ordinance from Yuba County[, California,] provided that ‘[e]very person, firm or corporation, or officer or agent thereof that brings or assists in bringing into the State any indigent person who is not a resident of the State, knowing him to be an indigent person, is guilty of a misdemeanor.’” *Id.* (quoting *Edwards v. California*, 314 U.S. 160, 171 (1941)). Similarly, Jim Crow laws were passed in Southern states after the end of the Civil War. *Id.* at 6. These states sought to exclude freed slaves from public spaces and allowed law enforcement to criminalize blacks on the basis of their race. *Id.* The laws enforced the segregation of white and black southerners in restaurants, residential housing, transportation, schools, etc. *Id.* at 6–7. Moreover, Ugly Laws were similarly enacted to exclude undesirable, predominantly disabled individuals from public spaces. *Id.* at 9–10. For example, Chicago’s Ugly Law read: “No person who is diseased, maimed, mutilated or in any way deformed so as to be an unsightly, disgusting or improper is to be allowed in or on the public ways or other public places in this city, or shall therein or thereon expose himself to public view, under penalty of not less than one dollar nor more than fifty dollars for each offense.” *Id.* at 10. Such laws were viewed as necessary to preserve “quality of life.” *Id.* Finally, Sundown Town laws also sought to exclude communities of color from public spaces, frequently barring individuals of color from residing within the town limits. *Id.* at 11. The laws derived their name from provisions that expressly instructed individuals of color to leave the city limits before sundown. *Id.* While some jurisdictions passed laws, others would simply display a warning sign on the road into town making its intentions known. *Id.* “For example, in Rogers, Arkansas, the city had a sign that said ‘N—, You Better Not Let the Sun Set on You in Rogers.’” *Id.*

186. Rankin, *Influence of Exile*, *supra* note 83, at 7.

187. *Id.* at 17; *see also* KAYA LURIE & BREANNE SHUSTER, SEATTLE UNIV. SCH. OF LAW HOMELESS RIGHTS ADVOCACY PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS AND OTHER MARGINALIZED GROUPS, at iv–vii (Sara Rankin ed., 2015), <http://digitalcommons.law.seattleu.edu/hrap/8> [<https://perma.cc/TZ5A-Z4KB>].

188. Rankin, *Influence of Exile*, *supra* note 83, at 19–20; *see also* LURIE & SCHUSTER, *supra* note 187. A review of the demographics of homeless individuals reveals that most homeless individuals come from one or more historically marginalized groups. *Id.* While estimates vary, approximately forty to forty-nine percent of homeless individuals are African American, and in total more than half are individuals of color. MEGHAN HENRY ET AL., U.S. DEP’T OF HOUSING & URB. DEV. OFF. OF CMTY. PLANNING & DEV., THE 2016 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS 9 (2016) [hereinafter HENRY ET AL., 2016], <https://www.hudexchange.info/resources/documents/2016-AHAR-Part-1.pdf> [<https://perma.cc/W3FW-TTXN>]; *Who Is Homeless*, NCH Fact Sheet #3, NAT’L COAL. FOR HOMELESS (Aug. 2007), <http://www.nationalhomeless.org/publications/facts/Whois.pdf> [<https://perma.cc/6GBS-2XEY>]. Moreover, it is estimated that approximately forty percent of homeless individuals have mental disabilities, and half of all mothers and children experiencing homelessness are fleeing domestic

Antihomeless laws operate identically to historical exclusion laws in that they: “(1) disproportionately affect one marginalized group of people; (2) result in unavoidable violations by the targeted group; (3) remove all practicable options from the targeted group; and (4) seek to remove the targeted group from sight.”<sup>189</sup> They also evolved from exclusion and vagrancy laws under Supreme Court pressure. Many of the initial laws were struck down as equal protection violations,<sup>190</sup> status crimes,<sup>191</sup> or unconstitutionally vague.<sup>192</sup> In response, municipalities began passing numerous facially neutral laws that prohibited a wide array of conduct.<sup>193</sup> Examples of these conduct-specific laws include prohibitions on sitting, lying, sleeping, camping, deploying bedding, living in vehicles, panhandling, standing in a median, storing belongings, and

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violence. *Who Is Homeless?*, *supra*. Finally, providers of services for homeless use estimate that “a median of 20% identify as gay or lesbian, 7% identify as bisexual, and 2% identify as questioning their sexuality.” SOON KYU CHOI ET AL., *SERVING OUR YOUTH 2015: THE NEEDS AND EXPERIENCES OF LESBIAN, GAY, BISEXUAL, TRANSGENDER, AND QUESTIONING YOUTH EXPERIENCING HOMELESSNESS* 4 (2015), <https://truecolorsfund.org/wp-content/uploads/2015/05/Serving-Our-Youth-June-2015.pdf> [<https://perma.cc/HM86-AH8Z>].

189. ORTIZ & DICK, *supra* note 31, at 22–23 (explaining that homeless individuals are disproportionately impacted because individuals with financial resources have other options and police selectively enforce the law). Moreover, homeless individuals have no choice but to break the law because the conduct criminalized is frequently unavoidable. *Id.* at 23. Homeless individuals are provided no options because, at times, resources are limited but more frequently because the laws, in conjunction with one another, broadly target much of homeless individuals’ conduct. *Id.* at 24. Finally, these antihomeless laws are passed with the objective of removing homeless individuals from public spaces and often cities themselves. *Id.* While proponents of antihomeless laws would argue that the laws target poverty and not race, ethnicity, disability, gender, or sexual orientation, the same narratives that were used to prop up previous exclusionary laws such as Jim Crow, Anti-Okie, Sundown Town, and Ugly Laws are used to support the criminalization of homelessness. See Rankin, *Influence of Exile*, *supra* note 83, at 45. Antihomeless laws rely on a narrative that homeless individuals are dangerous and unclean, which municipal governments in turn use to legitimize public safety and public health justifications. *Id.* This is why campaigns in favor of antihomeless laws frequently call for things like “clean streets” or “civil sidewalks.” See Margie Shafer, *KCBS Cover Story: Berkeley’s Civil Sidewalk Measure Faces Criticism*, CBS S.F. BAY AREA (Oct. 24, 2012), <https://sanfrancisco.cbslocal.com/2012/10/24/kcbs-cover-story-berkeleys-civil-sidewalk-measure-faces-criticism/> [<https://perma.cc/S3XZ-VMXH>]. Exclusionary laws in the United States have always sought to designate who is part of the “in” and “out” groups, and antihomeless laws are merely an extension of this exercise of power from those in the “majority.” See Rankin, *The Influence of Exile*, *supra* note 83, at 4.

190. See *Bailey v. Patterson*, 369 U.S. 31, 33–34 (1962) (striking down a Mississippi law segregating individuals seeking inter- and intrastate transportation by race); *Shelley v. Kraemer*, 334 U.S. 1, 4, 6–7, 18, 20–21 (1948) (striking down a Michigan law allowing restrictive covenants based on race in contracts for real property).

191. *Robinson v. California*, 370 U.S. 660, 660–61, 667 (1962) (striking down a California law criminalizing an individual’s status as an addict).

192. *Kolender v. Lawson*, 461 U.S. 352, 353 (1983) (striking down a California criminal statute as unconstitutionally vague); *Papachristou v. Jacksonville*, 405 U.S. 156, 171 (1972) (striking down a Florida vagrancy law as void for vagueness); see also Fred Barbash, *Supreme Court Strikes Down Vagrancy Law*, WASH. POST, May 3, 1983, [https://www.washingtonpost.com/archive/politics/1983/05/03/supreme-court-strikes-down-vagrancy-law/a3fc2b52-f0f2-4f42-82a0-0b64836fe685/?utm\\_term=.7d3340c12dd5](https://www.washingtonpost.com/archive/politics/1983/05/03/supreme-court-strikes-down-vagrancy-law/a3fc2b52-f0f2-4f42-82a0-0b64836fe685/?utm_term=.7d3340c12dd5) [<https://perma.cc/VYG4-W35D> (dark archive)].

193. ORTIZ & DICK, *supra* note 31, at 22–23.

distributing food, among others. The abundance and breadth of these conduct-specific laws restore to law enforcement much of the broad policing powers they had under exclusion and vagrancy laws.<sup>194</sup>

With this framing in mind, we may view prohibitions on public urination and defecation as part of this broad array of facially neutral, conduct-specific laws. Like its problematic predecessors (exclusion and vagrancy laws) and contemporaries (antihomeless laws), the ban on public urination and defecation disproportionately impacts the homeless community, leaves individuals with no options, and works in conjunction with the absence of bathrooms to push people into the margins. Bans on public urination and defecation fit squarely into the definition of antihomeless laws—one that prohibits life-sustaining conduct.<sup>195</sup>

The contextualization of prohibitions on public urination and defecation in the scheme of criminalizing homelessness and the evolution of laws targeting marginalized groups further reinforces our understanding of the current scheme as an exercise of power. The failure to provide public bathrooms, especially accessible ones, allows the community to perpetuate the invisibility of homeless individuals. In the absence of an accessible bathroom, homeless individuals must relieve themselves in public and the law is used to further shame them, jeopardize their tenuous finances, and at times, incarcerate them. The bans on public urination and defecation also reinforce the public's preexisting biases that homeless individuals are unclean and label them criminals. Therefore, the prohibitions on public urination and defecation can be seen as part of a larger exercise of power that denies the homeless community critical resources and marginalizes them by condemning their existence. Like other antihomeless laws, prohibitions on public urination and defecation should be viewed as part and parcel of the "in" group's concerted effort to designate homeless individuals as "other."

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194. *Id.*

195. While it is impossible to ignore the legitimate public health justification for criminalizing public urination and defecation, it is also impossible to ignore that these prohibitions, combined with the lack of access to bathrooms for homeless individuals, fail to account for the public health interest of the homeless community. *See supra* Section III.B. Moreover, the response from the public when confronted with urine and feces in its streets is rarely an empathetic call for additional public bathrooms or concern for the dignity of homeless individuals. *See Rankin, Influence of Exile, supra* note 83, at 45–46. Rather, the popular response involves increased demand for criminalization to force homeless individuals from public space. *Id.* Municipal governments acquiesce by passing more antihomeless laws, while failing to develop the infrastructure that would enable homeless individuals to urinate and defecate without breaking the law. *Id.*

IV. POTENTIAL SOLUTIONS TO THE DILEMMA OF SIMULTANEOUSLY PROVIDING INSUFFICIENT ACCESS TO BATHROOMS FOR HOMELESS INDIVIDUALS AND CRIMINALIZING PUBLIC URINATION AND DEFECATION

A. *Increase Availability and Accessibility of Public Bathrooms*

The most obvious and direct solution to the shortage of accessible public bathrooms would be to increase the supply by building additional bathrooms and eliminating barriers to existing public bathrooms. Public bathrooms are an important part of ensuring that a city is accessible, healthy, and inclusive.<sup>196</sup> The installation of additional public bathrooms would also serve the community at large and not just homeless individuals.<sup>197</sup> Many groups will benefit from increased toilet access, including the elderly, children, individuals with disabilities, pregnant women, people with particular medical conditions, joggers and bikers, and tourists.<sup>198</sup>

Unfortunately, many cities have come to ignore the benefits, as well as the necessity, of public bathrooms and treat them as expensive nuisances.<sup>199</sup> Government actors and the public at large complain that public bathrooms cannot be maintained properly and are used for criminal activity.<sup>200</sup> The typical response to these challenges is to shutter the bathroom.<sup>201</sup> To homeless advocates, as well as others organizing around bathroom accessibility, this response is confounding. The proper response to these challenges is to target the problem, not the service. If a bathroom becomes dirty, it must be cleaned,

196. See Clara Greed, *The Role of the Public Toilet in Civic Life*, in *LADIES AND GENTS: PUBLIC TOILETS AND GENDER*, *supra* note 125, at 35.

197. See Sarah Breitenbach, *Cities Look to Public Restrooms To Clean Up Downtown, Attract Tourists*, PEW (Sept. 5, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/09/05/cities-look-to-public-restrooms-to-clean-up-downtowns-attract-tourists> [<https://perma.cc/WU3Z-MXR6>].

198. JOSH AHMANN ET AL., RELIEF WORKS, *GOING PUBLIC!: STRATEGIES FOR MEETING PUBLIC RESTROOM NEED IN PORTLAND'S CENTRAL CITY* 6, 20–21 (2006).

199. Christopher Maag, *Seattle To Remove Automated Toilets*, N.Y. TIMES (July 17, 2008), <https://www.nytimes.com/2008/07/17/us/17toilets.html> [<https://perma.cc/3STB-7G54>]; Phillip Reese & Anita Chabria, *'Pit Stop' Toilets for Homeless Cost \$11 a Flush. Is It Worth It?*, SACRAMENTO BEE (Nov. 1, 2016), <https://www.sacbee.com/news/local/health-and-medicine/article111724997.html> [<https://perma.cc/Y37E-7ANJ>]; Trageser, *Public Toilet*, *supra* note 157.

200. Stephanie K. Baer, *Why Covina Is Closing Its Park Bathrooms at Night*, SAN GABRIEL VALLEY TRIB. (Oct. 1, 2015), <https://www.sgvtribune.com/2015/10/01/why-covina-is-closing-its-park-bathrooms-at-night/> [<https://perma.cc/Q9PW-R394>]; Jenny Espino, *As Problems Escalate, Redding Locks Public Restrooms*, REC. SEARCHLIGHT (Sept. 7 2017), <https://www.redding.com/story/news/local/2017/09/07/problems-escalate-redding-locks-public-restrooms/590646001/> [<https://perma.cc/JEJ4-LNVK>].

201. LOWE, *supra* note 52, at 49; Gale Holland, *It Took More than a Decade To Open Public Bathrooms on Skid Row. After Three Months They're Already Gone*, L.A. TIMES, (May 29, 2018), <http://www.latimes.com/local/lanow/la-me-ln-homeless-bathroom-shutdown-20180529-story.html> [<https://perma.cc/7F3J-5RNZ>]; Maag, *supra* note 199; see also Greed, *supra* note 196, at 36–37.

not closed. If it is misused, then alter the design or provision of the service to protect against the misuse.<sup>202</sup> Many public goods, such as parks or buses, pose maintenance problems and are misused, but the government does not stop providing the critical service—it simply responds to the problem.

One city that has had success with responding to the challenges of public bathroom provision and improving availability and accessibility of bathrooms is Portland, Oregon.<sup>203</sup> Through environmental design, Portland created a bathroom that addresses many of the problems other cities cite when refusing to provide bathrooms.<sup>204</sup> The bathroom, called the “Portland Loo,” is designed to be inexpensive, safe, sanitary, and accessible.<sup>205</sup> The Portland Loos are made of graffiti-resistant steel and have sinks outside so individuals are less likely to shower in them.<sup>206</sup> The outside walls feature slats at the top and bottom that allow security or law enforcement to determine if there is more than one person inside.<sup>207</sup> Finally, the bathrooms discourage intravenous drug use by utilizing light blue lighting that makes finding a vein difficult.<sup>208</sup> Portland Loos have been so successful in addressing the concerns cities have about maintaining public restrooms that cities around the country and in Canada have purchased

202. CAROL MCCREARY, BUILDING SAFE TOILET DESIGN INTO SHARED URBAN SPACE, PUBLIC HYGIENE LETS US STAY HUMAN (PHLUSH) 2–4 (2011), <https://www.phlush.org/wp-content/uploads/2011/12/McCreary-Final.pdf> [<https://perma.cc/8KJ9-WBQB>]; MAYOR’S OFFICE OF PUB. POLICY & FIN., CITY & COUNTY OF S.F., CAL., MAYOR’S 2018-2019 & 2019-2020 PROPOSED BUDGET 18–19 (June 1, 2018), [https://sfmayor.org/sites/default/files/CSF\\_Budget\\_Book\\_June\\_2019\\_Final\\_Web\\_REV2.pdf](https://sfmayor.org/sites/default/files/CSF_Budget_Book_June_2019_Final_Web_REV2.pdf) [<https://perma.cc/GT4T-4NXD>].

203. See John Metcalfe, *Why Portland’s Public Toilets Succeeded Where Others Failed*, CITYLAB (Jan. 23, 2012), <https://www.citylab.com/design/2012/01/why-portlands-public-toilets-succeeded-where-others-failed/1020/> [<https://perma.cc/F84K-CJ29>]; Melia Robinson, *Portland, Oregon Spent \$250,000 To Reinvent the Public Toilet and It Worked*, BUS. INSIDER (Oct. 3, 2016), <https://www.businessinsider.com/portland-loo-perfect-public-toilet-2016-10> [<https://perma.cc/PYU4-NGT3> (dark archive)].

204. PEOPLE FOR FAIRNESS COAL., THE PORTLAND LOO: WORLD CLASS SOLUTION TO YOUR CITY’S PUBLIC RESTROOM NEEDS 1, 3, 5 (2017), <https://pffcdc.org/wp-content/uploads/2017/03/Portland-Loo-Presentation-DC-march-2017-1.pdf> [<https://perma.cc/EX36-HKYF>]. The project was started by a Portland City Commission in response to a Portland State University report that called for additional public restrooms in the city. *Id.* at 4. The project brought many city constituencies to the table, including city government, the police and fire departments, public works official, parks and recreation officials, building officials, outside advocacy groups, and key business districts and business owners. *Id.* at 5.

205. See Metcalfe, *supra* note 203; Robinson, *supra* note 203. The Portland Loo itself costs \$90,000. PEOPLE FOR FAIRNESS COAL., *supra* note 204, at 8. Installation is estimated to be \$32,000–38,000, while annual maintenance is estimated to be between \$11,000 and \$12,000. *Id.*

206. *Id.* at 6, 9. The Loos are also designed to accommodate individuals with additional belongings such as tourists with luggage, parents with strollers, and homeless individuals with personal property. *Id.*

207. Robinson, *supra* note 203.

208. *Id.*

and installed them.<sup>209</sup> On the other hand, it should be noted that some of these design features contribute to the stigmatization of the homeless community. While they may be important to ensure the success of public bathrooms, they also highlight the lack of additional critical resources, such as showers or safe injection facilities.

Some cities have tackled the issues of availability and accessibility at the same time by bringing portable toilets in and out of areas where homeless communities congregate.<sup>210</sup> A number of cities including San Francisco, Los Angeles, Sacramento, Denver, and Miami have implemented the initiatives, typically called “Pit Stop.”<sup>211</sup> The bathrooms, which are hauled in daily or every weekday, are usually maintained by an attendant.<sup>212</sup> Some sites also have receptacles for dog waste and used needles.<sup>213</sup> Additionally, the sites have, at times, been used to conduct outreach and connect homeless individuals with services.<sup>214</sup>

Cities can increase the accessibility of their existing bathrooms by removing barriers to use for homeless individuals. Following its hepatitis A outbreak, San Diego reluctantly pursued this route.<sup>215</sup> For a long time, the city

209. *Find a Loo*, PORTLAND LOO, <http://theloo.biz/> [https://perma.cc/6TFF-63LE] (displaying an interactive map showing Portland Loos in cities like Boston, Cincinnati, Miami, San Antonio, Salt Lake City, Vancouver, Seattle, and San Diego among others).

210. Cities also use data regarding where street cleaners have located human waste to determine optimal placement of the portable toilets. Trevor Bach, *Way Fewer People Are Pooping on Miami Streets Since Public Toilet Program Began*, MIAMI NEW TIMES (Dec. 11, 2015), <https://www.miaminewtimes.com/news/way-fewer-people-are-pooing-on-miami-streets-since-public-toilet-program-began-8107633> [https://perma.cc/H8BL-NTP4].

211. PROGRESSIVE URBAN MGMT. ASSOCS., CITY OF DENVER PUBLIC RESTROOMS PILOT PROJECT 4–5 (2018), <https://www.denvergov.org/content/dam/denvergov/Portals/705/documents/projects/Denver-Public-Restrooms-Pilot-Final-Report-2018.pdf> [https://perma.cc/7XMX-N9Y7]; Elizabeth Chou, *LA Approves Funding for Mobile Bathroom Program Amid Concerns About Hepatitis A*, L.A. DAILY NEWS (Dec. 12, 2017), <https://www.dailynews.com/2017/12/12/la-approves-funding-for-mobile-bathroom-program-amid-concerns-about-hepatitis-a/> [https://perma.cc/459M-HA2C]; Mimi Kirk, *How Sacramento Rolled Out a Mobile Restroom for the Homeless*, CITYLAB (Dec. 2, 2016), <https://www.citylab.com/solutions/2016/12/why-sacramentos-toilets-for-the-homeless-succeeded/509375/> [https://perma.cc/Y37E-7ANJ]; David Smiley, *Miami Mayor: \$500K Porta Potty Program a Success*, MIAMI HERALD (Dec. 11, 2015), <https://www.miamiherald.com/news/local/community/miami-dade/downtown-miami/article49301855.html> [https://perma.cc/7WU5-UWX2].

212. Kirk, *supra* note 211. The attendants are credited, in part, with the success of the program. They greet bathroom users, clean and restock the facilities, and ensure that the bathrooms are secure. CITY OF SACRAMENTO, STATUS REPORT ON THE PIT STOP ATTENDED RESTROOM PILOT PROGRAM 5 (2016), [http://sacramento.granicus.com/MetaViewer.php?view\\_id=21&event\\_id=2887&meta\\_id=483112](http://sacramento.granicus.com/MetaViewer.php?view_id=21&event_id=2887&meta_id=483112) [https://perma.cc/4QQ6-AQW2]; Bianca Barragan, *LA Officials ‘Impressed’ by Number of Homeless Residents Using New Public Bathrooms*, CURBED L.A. (July 23, 2018), <https://la.curbed.com/2018/7/23/17595360/homeless-public-bathrooms-mobile-pit-stop-program> [https://perma.cc/ETE2-U2U4].

213. Kirk, *supra* note 211.

214. CITY OF SACRAMENTO, *supra* note 212, at 5.

215. *See supra* Section III.B.

maintained only two twenty-four-hour bathrooms.<sup>216</sup> Despite multiple internal reports alerting city officials to the problem, including one report that warned the city that it was risking illness outbreak, the city took no action.<sup>217</sup> Once it became clear that the outbreak was a public health emergency, the city was still slow to respond.<sup>218</sup> Ultimately, it began keeping open public restrooms that traditionally had closed at night.<sup>219</sup>

Keeping bathrooms open overnight, however, is not the only barrier that is easy to remove. For example, cities like Boston that charge a fee to use bathrooms could simply make the bathrooms free. If charging a fee was an important part of the cities' financing schemes, they could devise a system to waive the fee for individuals who are low-income or have disabilities.<sup>220</sup> The cities could design without difficulty electronic benefit cards or disabled public transit cards to permit homeless individuals to enter bathrooms free of charge.<sup>221</sup> Another easily removable barrier is the presence of security. For cities that feel the need to secure their bathrooms with a physical presence, security personnel can be replaced with bathroom attendants like those used in the Pit Stop programs.<sup>222</sup> Bathroom attendants would still serve to deter unwanted behavior

216. See *supra* Section III.B.

217. See *supra* Section III.B.

218. CITY OF SAN DIEGO, HEPATITIS A OUTBREAK AFTER ACTION REPORT 5–6 (2018), <https://www.sandiegocounty.gov/content/dam/sdc/cosd/SanDiegoHepatitisAOutbreak-2017-18-AfterActionReport.pdf> [<https://perma.cc/66W7-CKL7>].

219. *Bathrooms Open 24/7 Across City of San Diego Amid Hep A Outbreak*, NBC 7 SAN DIEGO (Sept. 15, 2017), <https://www.nbcsandiego.com/news/local/Bathrooms-Open-247-Across-City-of-San-Diego-Amid-Hep-A-Outbreak-444774823.html> [<https://perma.cc/Q3ZD-SH8J>]; see also CITY OF SAN DIEGO PUBLIC RESTROOM, *supra* note 107.

220. It is estimated that at one point there were fifty thousand pay toilets in the United States. LOWE, *supra* note 52, at 21.

221. This program could be modeled on the United Kingdom's Royal Association for Disability Rights program which provides keys to individuals with disabilities to allow them to access 9000 bathrooms across the country. See *Disabled Toilets: What Is a Radar Key?*, BBC: OUCH BLOG (May 21, 2013), <https://www.bbc.com/news/blogs-ouch-22602836> [<https://perma.cc/5DHM-Q542>]; *The Key That Opens 9,000 Bathrooms in the United Kingdom*, NOW I KNOW (May 26, 2015), <http://nowiknow.com/the-key-that-opens-9000-bathrooms-in-the-united-kingdom/> [<https://perma.cc/XCE8-UQPF>]. In the United Kingdom, it costs £3 to obtain the key. *Disabled Toilets: What Is a Radar Key?*, *supra*; see also *How Would You Prefer To Order?*, R.A.D.A.R. KEY CO., <https://www.radarkey.org/order.php> [<https://perma.cc/H9CJ-C7JB>]. This could pose its own barriers for individuals who are low-income. Linking bathroom access to cards that already provide low-income and disabled individuals critical benefits, such as public benefits or transit passes, would be ideal. As noted above, maintaining identification cards and other important documentation can be challenging for the homeless community because of theft and homeless "sweeps." While this proposal would not solve the problem for everyone, it could eliminate barriers for many, including homeless and low-income individuals who reside in temporary supportive housing. The author acknowledges that keeping public bathrooms free is the best means of ensuring they are inclusive and barrier-free.

222. CITY OF SACRAMENTO, *supra* note 211, at 5; Barragan, *supra* note 212.

but would also be able to provide regular maintenance of the bathrooms and if trained properly, referral to other critical services.<sup>223</sup>

Lastly, cities can make their restrooms easier to find. Publicizing the location of bathrooms could be achieved simply through technological solutions such as maintaining a centralized list on the city's website or by designing a cellular application with an interactive map that would direct the public to the nearest restroom. For those without internet access or a smartphone, the city could simply install signs and maps throughout the city to alert pedestrians to the location of a bathroom. Another alternative would be to distribute cards or leaflets with this information to homeless individuals as part of outreach campaigns.<sup>224</sup>

In sum, it is critical that cities stop finding excuses for their failure to provide public bathrooms. Instead, they must learn from the cities that have had some measure of success and implement policies to ensure the availability and accessibility of public bathrooms for all residents, homeless and not. Cities' willingness to do so is critical to creating an accessible, healthy, and inclusive urban environment.

#### B. *Leverage Private Industry*

An even quicker way to increase the supply of restrooms available to homeless individuals would be to leverage the preexisting infrastructure of private industry. States and the federal government already require businesses to maintain public restrooms for their employees and, in some instances, their patrons. These bathrooms could be opened to the public to increase the accessibility of restrooms for homeless individuals.

Leveraging the infrastructure of private industry could take three forms. First, cities could incentivize private business to open their bathrooms to the public regardless of patronage. Second, they could require businesses to let individuals with medical emergencies or particular medical conditions use their bathrooms. Third, cities could require business to open their bathrooms to the public regardless of patronage but without government incentives.

##### 1. Incentives for Business

The United Kingdom and Germany implemented the first incentivization programs, the Community Toilet Scheme ("CTS") and *Nette Toilette* ("Nice

223. Press Release, S.F. Pub. Works, Pit Stop Public Toilet Program Expands to Ninth Neighborhood (Mar. 5, 2018), <https://www.sfpublishworks.org/project/press-release-pit-stop-public-toilet-program-expands-ninth-neighborhood-352018> [<https://perma.cc/Y7VD-5WGW>].

224. See *Public Restrooms*, *supra* note 95.

Toilet”) respectively, with great success.<sup>225</sup> Through the CTS and *Nette Toilette*, municipalities in the United Kingdom and Germany provide financial incentives to private businesses.<sup>226</sup> In exchange, businesses permit the general public to use their bathrooms. Public awareness is also key to both programs, so municipalities maintain lists of participating businesses on their webpages.<sup>227</sup> Many municipalities also provide a map with the location of participating businesses.<sup>228</sup> The businesses also hang signs prominently in their windows and entrances notifying passersby of their participation in the program.<sup>229</sup>

Municipalities advertise the CTS and *Nette Toilette* to businesses in a variety of ways. In addition to the financial incentive, businesses are encouraged to participate because it:

- Allows them to partner with the government to provide a community service;
- Results in free advertising on municipal websites and maps; and
- Results in increased revenue as a result of purchases made by people entering the premises to use the bathrooms.<sup>230</sup>

225. HOUSE OF COMMONS, CMTYS. & LOCAL GOV'T, THE PROVISION OF PUBLIC TOILETS 23 (2008), <https://publications.parliament.uk/pa/cm200708/cmselect/cmcomloc/636/636.pdf> [<https://perma.cc/C4VB-VACS>]; DIE NETTE TOILETTE, <http://www.die-nette-toilette.de/> [<https://perma.cc/7RQK-V8ZC>] (containing a list of over 270 participating municipalities); see also DEP'T FOR CMTYS. & LOCAL GOV'T, IMPROVING PUBLIC ACCESS TO TOILETS GUIDANCE ON COMMUNITY TOILET SCHEMES AND SATLAV 5 (2008), [https://d3n8a8pro7v7hmx.cloudfront.net/grra/pages/39/attachments/original/1446913107/Community\\_Toilet\\_Scheme-1.pdf?1446913107](https://d3n8a8pro7v7hmx.cloudfront.net/grra/pages/39/attachments/original/1446913107/Community_Toilet_Scheme-1.pdf?1446913107) [<https://perma.cc/X2ZZ-6KGQ>].

226. *Camden's Community Toilet Scheme Is Live*, CAMDEN NEWSROOM (Dec. 12, 2016), <http://news.camden.gov.uk/camdens-community-toilet-scheme-is-live/> [<https://perma.cc/43PP-BH63>]; *Community Toilet Scheme*, EDINBURGH, [http://www.edinburgh.gov.uk/info/20003/business/1306/community\\_toilet\\_scheme/1](http://www.edinburgh.gov.uk/info/20003/business/1306/community_toilet_scheme/1) [<https://perma.cc/TS8M-N2DW>]; *Gute Gründe für die nette Toilette [Good Reasons for the Nette Toilette]*, DIE NETTE TOILETTE, <http://www.die-nette-toilette.de/gute-gruende-fuer-die-nette-toilette.html> [<https://perma.cc/LHS3-T5EW>]; *Newham Launches New Community Toilet Scheme To Improve Access*, NEWHAM LONDON (May 5, 2017), <https://www.newham.gov.uk/Pages/News/Newham-launches-new-community-toilet-scheme-to-improve-access.aspx> [<https://perma.cc/7LWJ-ZCDL>]; *Public Toilets*, BEDFORD BOROUGH COUNCIL, [https://www.bedford.gov.uk/transport\\_and\\_streets/street\\_care\\_cleaning/public\\_toilets/community\\_toilet\\_scheme.aspx](https://www.bedford.gov.uk/transport_and_streets/street_care_cleaning/public_toilets/community_toilet_scheme.aspx) [<https://perma.cc/5B57-VBN9>].

227. See, e.g., BEDFORD BOROUGH COUNCIL, *supra* note 226; *Nette Toilette*, KITZINGEN, [http://www.kitzingen.info/nette\\_toilette.0.html](http://www.kitzingen.info/nette_toilette.0.html) [<https://perma.cc/R3YS-33ZQ>].

228. See, e.g., *Community Toilet Scheme*, *supra* note 226; *Nette Toiletten*, SCHORNDORF, <https://www.schorndorf.de/de/freizeit-tourismus/gaesteservice/nette-toilette> [<https://perma.cc/P82E-VM8S>].

229. See *Die Idee emit Vorbildfunktion [The Idea As a Role Model]*, DIE NETTE TOILETTE, <http://www.die-nette-toilette.de/die-idee-mit-vorbildfunktion.html> [<https://perma.cc/94ZV-PRLV>]; *Newham Launches New Community Toilet Scheme To Improve Access*, *supra* note 226.

230. *Community Toilet Scheme*, CITY LONDON, [https://www.cityoflondon.gov.uk/services/transport-and-streets/clean-streets/Pages/Community-Toilet-Scheme-\(CTS\).aspx](https://www.cityoflondon.gov.uk/services/transport-and-streets/clean-streets/Pages/Community-Toilet-Scheme-(CTS).aspx) [<https://perma.cc/DX38-GV9V>]; DIE NETTE TOILETTE, *supra* note 225.

The programs are widely seen as a cost-effective and sensible way to increase the provision of bathrooms throughout both the U.K. and Germany.<sup>231</sup>

On January 31, 2019, the Washington, D.C. City Council, in response to the activism of the People for Fairness Coalition, passed its own version of the CTS and *Nette Toilette*, the Community Restroom Incentive (“CRI”).<sup>232</sup> Under the program, the city can provide a financial incentive to allay the cost of additional maintenance and cleaning supplies for participating businesses.<sup>233</sup> Like with the CTS and *Nette Toilette*, a participating business would display a sign in a prominent location, and the city will maintain a centralized list of those businesses.<sup>234</sup>

## 2. Restroom Access Acts for Individuals with Particular Medical Conditions

The second proposal, which calls for private businesses to open their bathrooms to individuals with medical emergencies or particular medical conditions, is already widespread. Part of the problem is that the laws are not well known, are rarely enforced, and would not necessarily help homeless individuals.

The state laws, commonly referred to “Restroom Access Acts” or “Ally’s Laws,” require businesses to open employee bathrooms to members of the public with eligible medical conditions.<sup>235</sup> Most Ally’s Laws include eligible

231. *Camden’s Community Toilet Scheme Is Live*, *supra* note 226; DIE NETTE TOILETTE, *supra* note 225; Feargus O’Sullivan, *Germany Found a Cheap Way to Fix Its Lack of Public Restrooms*, CITY LAB (Nov. 1, 2016), <https://www.citylab.com/solutions/2016/11/not-enough-public-restrooms-nice-toilet-program-germany/506075/> [<https://perma.cc/QE6K-CJ87>] (noting that the German city of Bremen saves an estimated \$1 million annually by promoting a network of publicly accessible restrooms in private businesses); *Public Toilets*, *supra* note 226.

232. Public Restroom Facilities Installation and Promotion Act of 2018 § 4(a), 001595. The People for Fairness Coalition began its bathroom activism in 2014. PFFCDC, ACCESS TO RESTROOMS, *supra* note 51, at 3. It began by surveying the models of success in other cities across the country. It then surveyed the issue of bathroom availability and accessibility within the city. Its survey concluded that there are only three twenty-four-hour restrooms in the entire district. *Id.* Afterwards, it surveyed the availability of private restrooms and whether the businesses operating those restrooms would permit homeless or visibly poor people to use their facilities. *Id.* It then lobbied the council to introduce a bill to address the critical shortage of public bathrooms in Washington, D.C. *Public Restrooms*, *supra* note 95.

233. Public Restroom Facilities Installation and Promotion Act of 2018, 66-6 D.C. Reg. 22-608, § 4(a), 001595 (Jan. 31, 2018). The original bill proposed a financial incentive of 110% of the additional expenses incurred by businesses. D.C. Council 22-223 § 4(a), 2017 (D.C. 2018) (“Financial incentives provided under this section shall not exceed 110% of the cost of additional maintenance and cleaning supplies resulting from increased restroom usage due to participation in the program.”). The DC City Council appears to have left the financial incentive to the discretion of the Mayor in the enacted legislation. *See id.* (providing no language to suggest that the mayor has discretion to provide financial incentives up to 110% of the cost of maintenance and cleaning).

234. *Id.* § 4(b)(2), (3).

235. *Ally Bain: 10 Years of Fighting for Restroom Access*, CROHN’S & COLITIS FOUND., <http://www.crohnscolitisfoundation.org/living-with-crohns-colitis/personal-stories/allybain.html> [<https://perma.cc/NR9G-UQ43>]. Ally’s Laws are named after the young woman who inspired them,

medical conditions such as, “Crohn’s disease, ulcerative colitis, any other inflammatory bowel disease, irritable bowel syndrome, or any other medical condition that requires immediate access to a toilet facility.”<sup>236</sup> The laws generally require the individual seeking access to the bathroom to provide proof of an eligible medical condition, such as a doctor’s note.<sup>237</sup> Most Ally’s Laws provide an enforcement mechanism that allows the state to fine a business for refusing an eligible individual access to its restroom.<sup>238</sup> Presently, seventeen states have enacted Ally’s Laws.<sup>239</sup> At minimum, the existence of these laws show a willingness on the part of states to make bathrooms accessible to those most in need.

### 3. Eliminating “For Customers Only”

The third proposal is a hybrid of the first two. It requires businesses that maintain bathrooms for customers to open their bathrooms to the public but does not provide an incentive and does not limit eligibility to individuals with medical conditions.

The Chicago City Council recently introduced a version of this proposal.<sup>240</sup> It reads, “Any licensee that provides public toilet facilities to its

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Ally Bain. *Id.* Ms. Bain was diagnosed with Crohn’s disease as a child. *Id.* When she was fourteen, she was shopping in a store and found that she needed to use the bathroom urgently. *Id.* Store personnel denied her access to their bathroom, leading her to have an accident in the store. *Id.* Partnering with an advocacy organization and an Illinois state representative, Ms. Bain helped pass the Illinois Restroom Act, the first of many similar bills. *Id.*

236. See, e.g., CONN. GEN. STAT. ANN. § 19a-106a(a)(2) (2019); TENN. CODE ANN. 68-15-303(b)(2) (LEXIS through the 2019 Reg. Sess.); TEX. HEALTH SAFETY CODE ANN. § 341.069(a)(2) (Westlaw through the end of the 2019 Reg. Sess. of the 86th Legis.).

237. See, e.g., MASS. GEN. LAWS ch. 270, § 26(b)(1) (Westlaw through Chapter 64, except Chapter 47 of the 2019 1st Ann. Sess.); MICH. COMP. LAWS ANN. § 446.71(c) (Westlaw through P.A. 2019, No. 47, of the 2019 Reg. Sess., 100th Legis.); OR. REV. STAT. ANN. § 659A.413(1)(c) (Westlaw through laws enacted in the 2018 Reg. Sess. and 2018 Spec. Sess. of the 79th Legis. Assemb.).

238. See, e.g., 410 ILL. COMP. STAT. ANN. 39/20 (Westlaw through P.A. 101-600) (providing for a \$100 fine); WIS. STAT. ANN. § 146.29(5)(a) (Westlaw current through 2019 Act 21) (establishing a cap on fines of \$200).

239. COLO. REV. STAT. § 25-41-101 (LEXIS through 2019 Legis. Sess.); CONN. GEN. STAT. ANN. § 19A-106A (Westlaw); DEL. CODE ANN. tit. 16, § 3001H-3006H (2017); 410 ILL. COMP. STAT. ANN. 39/1 TO 39/99 (Westlaw through P.A. 101-600); KY. REV. STAT. ANN. § 211.394 (Westlaw 2019); ME. STAT. tit. 22, § 1672-B (Westlaw through Chapter 505 of the 2019 First Reg. Sess. of the 129th Legis.); MD. CODE ANN., HEALTH-GEN. § 24-209 (Westlaw through 2019 Legislation); MASS. GEN. LAWS CH. 270, § 26 (Westlaw); MICH. COMP. LAWS §§ 446.71-.76 (Westlaw); MINN. STAT. § 325E.60 (2018); OHIO REV. CODE §§ 4173.01-.03 (Westlaw through 2019 portion of 2019-2020 Legis. Sess.); OR. REV. STAT. § 659A.413 (Westlaw); TENN. CODE ANN. § 68-15-303 (Westlaw); TEX. HEALTH & SAFETY CODE ANN. § 341.069 (Westlaw); WASH. REV. CODE ANN. § 70.54.400 (Westlaw through 2019 legislation); WIS. STAT. § 146.29.

240. Elif Geris, *Alderman David Moore: It’s Common Courtesy To Allow Public Use of Your Business’s Bathrooms*, WGN RADIO (Apr. 27, 2017), <https://wgnradio.com/2017/04/27/alderman-david-moore-its-common-courtesy-to-allow-public-use-of-your-business-bathrooms/> [https://perma.cc/7GMR-9HSZ].

customers must allow individuals who have an emergency and need to use the toilet facilities to do so without having to make a purchase. Furthermore, a fee cannot be charged for the use of the toilet facilities under these circumstances.<sup>241</sup> The ordinance had significant support in the City Council but was ultimately abandoned after the mayor's office applied pressure claiming that Illinois' Ally's Law already required what the proponents sought.<sup>242</sup> A plain reading of the ordinance reveals significant differences, most notably that eligibility is not predicated on particular diagnosable medical conditions.

For example, Starbucks voluntarily adopted this policy after an incident of racial discrimination in one its stores.<sup>243</sup> In a Philadelphia Starbucks, two black men, Rashon Nelson and Donte Robinson, were arrested after an employee called the police while they were waiting for a business associate.<sup>244</sup> Much of the incident was caught on camera. What was not filmed was Mr. Nelson's request to use the bathroom, which was denied because he had not yet purchased anything.<sup>245</sup> In response, Starbucks closed all of its cafes for a day of racial bias training and adopted a policy that anyone may come in to their cafes to use the restroom or simply sit without making a purchase.<sup>246</sup> This is significant considering there are nearly 14,000 Starbucks cafes throughout the

241. *Amendment of Municipal Code Chapter 4-4 Adding New Section 4-4-340 To Allow Non-Customers Use of Public Toilet Facilities for Emergency Purposes*, OFF. CITY CLERK, file://fslaw01/E/Staff/Facdirs/rhocbaum/Downloads/O2017-3200.pdf [https://perma.cc/NBF9-CDY4]. Alderman David Moore proposed this ordinance after witnessing a homeless woman have an accident in a Subway restaurant when employees refused to permit her to use their bathroom. See Steve Chapman, *Should Private Businesses Have To Open Their Bathrooms to the Public?*, CHI. TRIB. (Apr. 28, 2017), <http://www.chicagotribune.com/news/opinion/chapman/ct-public-toilets-access-chicago-perspec-0430-20170428-column.html> [https://perma.cc/YX7K-5LZS].

242. John Byrne, *Alderman's Plan To Make Restaurants Open Their Restrooms to Non-Customers Stalls*, CHI. TRIB. (July 19, 2017), <http://www.chicagotribune.com/news/local/politics/ct-chicago-business-bathroom-public-access-met-20170719-story.html> [https://perma.cc/M5R5-EA4S].

243. Monique Judge, *Starbucks Witness: Implicit Bias Exists and White People Need To Speak Up When They See It*, ROOT (Apr. 15, 2018), <https://www.theroot.com/starbucks-witness-implicit-bias-exists-and-white-peopl-1825274101> [https://perma.cc/TA8V-QTJS].

244. Rob Torno, *What Happened at Starbucks in Philadelphia*, PHILA. ENQUIRER (Apr. 16, 2018), <http://www2.philly.com/philly/news/starbucks-philadelphia-arrests-black-men-video-viral-protests-background-20180416.html> [https://perma.cc/R3CE-5S8V].

245. Scott Calvert, *Starbucks, Philadelphia Settle with Two Men Arrested at Café*, WALL ST. J. (May 2, 2018), <https://www.wsj.com/articles/starbucks-philadelphia-settle-with-two-men-arrested-at-cafe-1525289146> [https://perma.cc/BGK9-HURS (dark archive)].

246. Jacey Fortin, *A New Policy at Starbucks: People Can Sit Without Buying Anything*, N.Y. TIMES (May 20, 2018), <https://www.nytimes.com/2018/05/20/business/starbucks-customers-policy-restrooms.html> [https://perma.cc/D9R3-UQ8K (dark archive)]; Daniel Shane & Julia Horowitz, *Starbucks: You Don't Need To Buy Anything To Hang Out in Our Stores*, CNN MONEY (May 21, 2018), <https://money.cnn.com/2018/05/20/news/companies/starbucks-bathroom-policy/index.html> [https://perma.cc/9FY6-87SF].

United States in which homeless individuals can now access bathrooms.<sup>247</sup> A major company adopting such a policy will hopefully set a precedent for other businesses.

#### 4. Synthesizing the Three Proposals

All three proposals have their strengths and weaknesses. The strength of the CTS or CRI programs is that they allow for immediate and somewhat substantial increases in the availability of bathrooms for homeless individuals and members of the public. Additionally, through the programs, governments invite private industry to be part of the solution. On the other hand, the CTS and CRI reinforce the norms around “For Customers Only” policies at businesses that are not part of the program. These norms are subjectively and selectively enforced and lead to discrimination as demonstrated by the incident at the Philadelphia Starbucks.<sup>248</sup> They also lead to the stigmatization of homeless individuals to whom they send the message that one’s financial worth is tied to their humanity.<sup>249</sup>

Ally’s Laws similarly lead to relative increases in access to bathrooms for the public and, unlike the CTS programs, do not require public expenditures. Additionally, the laws are relatively popular because they are for the benefit of a discrete and vulnerable group who require frequent and immediate access to bathrooms. As a result of the small number of people for whom the laws apply, the laws place little burden on the businesses that are subject to them. Ally’s Laws, however, do very little to address the larger issue of bathroom access for homeless individuals and other segments of the public. In addition to limiting eligibility to individuals with particular medical conditions, the laws define eligible individuals as “customers” or invitees, which still gives businesses discretion.<sup>250</sup> Furthermore, the requirement to provide documentation of a qualifying condition is unnecessarily burdensome, especially for the homeless community, which as mentioned above, may have difficulty maintaining important paperwork because of the prevalence of homeless “sweeps.” Finally, as mentioned above, Ally’s Laws are poorly advertised and not properly enforced.

There are many positive aspects of the final proposal, but it will also likely lead to the strongest pushback from the business community. This proposal,

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247. S. Lock, *Number of International and United States Starbucks Stores from 2005 to 2017*, STATISTA (Aug. 9, 2019), <https://www.statista.com/statistics/218366/number-of-international-and-us-starbucks-stores/> [<https://perma.cc/F4XT-D6NS> (dark archive)].

248. Errin Haynes Whack, *Black Men Arrested at Starbucks Settle with Philadelphia for \$1 Each, Plus \$200K for Youth*, USA TODAY (May 2, 2018), <https://www.usatoday.com/story/news/nation/2018/05/02/black-men-arrested-starbucks-settle-philadelphia-entrepreneurs/573470002/> [<https://perma.cc/93CX-TUDJ>].

249. See *supra* Section III.A.

250. See sources cited *supra* note 239.

which essentially bans “For Customers Only” policies, would be the most comprehensive of the three proposals and would likely immediately solve most of the issues of bathroom availability in metropolitan areas. Additionally, the proposal would not require government expenditures. Although businesses will raise concerns regarding the cost of accommodating noncustomers, the proposal would likely not have a significant impact on any individual business because the burden would be spread out among all businesses. That being said, inviting homeless individuals into spaces they have traditionally been excluded from opens these individuals up to risks. While entering such a space would be the individual’s decision to make, the third proposal could expose them to harassment and physical harm.<sup>251</sup> This, once again, raises the issue of availability versus accessibility.

### C. Challenge or Reform the Law

#### 1. Reforming Prohibitions on Public Urination and Defecation

In the absence of cities providing barrier-free public restrooms to homeless individuals, advocates could seek to challenge or reform the law. Reforms to prohibitions on public urination or defecation could take several forms, including amending the law, prosecutorial discretion, and implementation of “ability-to-pay” determinations.

Part of the bathroom dilemma for homeless individuals could be resolved by amending city, county, and state codes to carve out an exception for homeless individuals in bans on public urination and defecation. As described above,

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251. There is an alarming number of examples of physical harassment and assaults on homeless individuals, including forceful ejection from private spaces. *See, e.g.*, Anthonio Castelan, *Homeless Man Allegedly Shot by Security Guard Leaves Behind Daughters*, WJLA (July 1, 2019), <https://wjla.com/news/nation-world/homeless-man-allegedly-shot-by-security-guard-leaves-behind-daughter> [<https://perma.cc/YF99-B2GX>] (detailing Washington, D.C., homeless man shot multiple times by security guard after argument); Michael Gold, *Dunkin’ Donuts Worker Dumps Water on Homeless Man in Viral Video. He’s Fired.*, N.Y. TIMES, (Oct. 2, 2018), <https://www.nytimes.com/2018/10/02/nyregion/dunkin-donuts-homeless-man-video.html> [<https://perma.cc/2QZ8-W7K4> (dark archive)] (explaining a situation where a coffee shop employee dumped water on a homeless man for sleeping inside the store); Matt Helms, *McDonald’s Fires Worker Who Threw Water on Homeless Man*, DETROIT FREE PRESS (Nov. 10, 2015), <https://www.freep.com/story/news/local/michigan/detroit/2015/11/10/mcdonalds-detroit-homeless-water/75519112/> [<https://perma.cc/6H4S-54EF> (staff-uploaded archive)] (describing how a fast-food employee lured a homeless man to the drive-thru window by promising free food and then doused the man with water); *Pacific Beach Homeless Attack Caught on Video*, CBS8 (Aug. 22, 2019), <https://www.cbs8.com/video/news/local/pacific-beach-homeless-attack-caught-on-video/509-d9200d7e-6f30-492a-baed-8d213c7c2169> [<https://perma.cc/X5JG-LVWJ>] (describing a confrontation between a homeless man in San Diego and a sandwich shop employee); John Rawlins, *Video Shows Man Being Dragged from McDonald’s in Center City Philadelphia*, 6ABC (Aug. 25, 2019), <https://6abc.com/video-shows-man-being-dragged-from-center-city-mcdonalds/5488392/> [<https://perma.cc/MQ5A-TEAZ>] (explaining that a homeless man was forcibly dragged from a fast food restaurant after arguing with employees about alleged theft).

some of the laws already identify exempt groups such as children, the elderly, individuals with disabilities and particular medical conditions, and even golfers.<sup>252</sup> As a result, the laws can be amended to add homeless individuals as an exempt group.<sup>253</sup> Alternatively, legislators could amend the law to expressly provide for a necessity or duress defense in cases of public urination and defecation.<sup>254</sup> These amendments would allow the law to acknowledge the unique challenges homeless individuals face in finding accessible bathrooms.

While the exemptions are preferable because they are explicit and would not be subject to the biases of law enforcement, prosecutors and judges, an explicit necessity defense could alleviate elected officials' concerns that carving out exemptions for homeless individuals would lead to increases in public urination and defecation. However, it bears mentioning that an exemption should not lead to an increase in public urination and defecation. As explained above, using the bathroom in private is central to our understanding of human dignity. As such, societal norms still protect against willful public urination and defecation. It is the absence of bathrooms, not the lack of criminal sanction, which causes people to urinate and defecate in the street.

Another potential reform would be the exercise of prosecutorial discretion in the pursuit of public urination and defecation offenses.<sup>255</sup> If better educated regarding the lack of public bathrooms and the barriers they pose to the homeless community, it is possible that prosecutors would decline to pursue citations or arrests pursuant to public urination and defecation laws. This avenue would likely require homeless advocates to wage significant advocacy campaigns. Considering the potential for alternative areas of advocacy, namely the installation of additional bathrooms and removal of barriers to existing bathrooms, it is unlikely advocates would pursue this avenue.

Lastly, reform could include implementation of "ability-to-pay" procedures when fines are levied.<sup>256</sup> According to a recent report from the San Francisco Coalition on Homelessness, sixty-nine percent of homeless survey respondents were cited in the past year and twenty-two percent received more

252. S.F., CAL., POLICE CODE ART. 2, § 153(d) (2019), <http://library.amlegal.com/alpscripts/get-content.aspx> [<https://perma.cc/3XXW-SMMZ>]; KING COUNTY, WASH., MUN. CODE ch. 12.58.010(A)-(B) (2019), [https://www.kingcounty.gov/council/legislation/kc\\_code/15\\_Title\\_12.aspx](https://www.kingcounty.gov/council/legislation/kc_code/15_Title_12.aspx) [<https://perma.cc/N22F-5HA5>].

253. Howard & Moore, *supra* note 8, at 2 (recommending a "reasonable alternatives" exemption).

254. See, e.g., Antonia K. Fasanelli, Note, In re Eichhorn: *The Long Awaited Implementation of the Necessity Defense in a Case of the Criminalization of Homelessness*, 50 AM. U. L. REV. 323, 347-54 (2000); David M. Smith, Note, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487, 498-501 (1994); Howard & Moore, *supra* note 8, at iii.

255. Josh Bowers, *Legal Guilt, Normative Innocence, and the Equitable Decision Not To Prosecute*, 110 COLUM. L. REV. 1655, 1675-76 (2010).

256. Howard & Moore, *supra* note 8, at 29.

than five citations in the past year.<sup>257</sup> Of those cited, ninety percent reported being “unable to pay the fine for their last citation.”<sup>258</sup>

This data suggests that homeless individuals will benefit from the national movement to implement fair and consistent ability-to-pay procedures for both civil and criminal fines and fees. Across the country, different coalitions and advocacy groups have begun to raise awareness of the disparate impact and collateral consequences of using monetary penalties to exact punishment or regulate compliance for offenses ranging from parking violations to criminal convictions.<sup>259</sup> As a result of their advocacy, a number of cities and states have instituted new procedures that allow a person to provide information about their ability to pay fines and fees before punitive collection measures can be taken.<sup>260</sup>

Generally, there are two parts to most ability-to-pay determination process proposals. The first requires adjudicators to evaluate the existence of financial hardship. This typically requires the fined individual to provide financial information in the form of declarations, applications, or written proof of income and expenses.<sup>261</sup> The second part calls for adjudicating bodies to determine a fair repayment process. These processes may include a reduction

257. PUNISHING THE POOREST, *supra* note 38, at 2.

258. *Id.*

259. See Megan Cassidy, *Alameda County Looks To Eliminate Fines, Fees for Defendants*, S.F. CHRON. (Sept. 15, 2018), <https://www.sfchronicle.com/crime/article/Alameda-County-looks-to-eliminate-fines-fees-for-13233067.php> [<https://perma.cc/Q6XV-QM2L> (staff uploaded archive)]; Avni Desai, *Affordable Justice: Debt Free SF*, STREET SHEET (Apr. 1, 2016), <http://www.streetsheet.org/?p=2064> [<https://perma.cc/B5MG-ZGNZ>]; Gina Ender, *Bill Would Give Parking Ticket Payment Plan Option for Low-Income Drivers*, SIGNAL (June 2, 2017), <https://signalsv.com/2017/06/bill-give-parking-ticket-payment-plan-option-low-income-drivers/> [<https://perma.cc/H597-V47Y>]; Matthew McLoughlin, *One Chicago Judge’s Bond Decision Could Be a Model for a More Just Pretrial System*, TRUTHOUT (July 22, 2018), <https://truthout.org/articles/chicago-judges-bond-decision-is-model-for-a-more-just-pretrial-system/> [<https://perma.cc/H9LR-DG5S>]; *New Law Designed To Protect Texans from Being Jailed for Minor Traffic Tickets Has Resulted in 300,000 Fewer Arrest Warrants, Announces Rep. Canales*, TITANS TEX. LEG. (Sept. 7, 2018), <https://edinburgpolitics.com/2018/09/07/law-protect-texans-minor-traffic-tickets-fewer-arrest-warrants/> [<https://perma.cc/S277-MBJC>]; *Vision*, BACK ON ROAD CAL., <https://ebclc.org/backontheroad/about/> [<https://perma.cc/5U4N-S9X8>]; *Our Vision and Our Work*, FINES & FEES JUST. CTR., <https://finesandfeesjusticecenter.org/> [<https://perma.cc/969X-FJ89>].

260. See Cassidy, *supra* note 259.

261. See, e.g., *Payment Plan*, S.F. MUN. TRANSIT AUTHORITY, [https://www.sfmta.com/sites/default/files/reports-and-documents/2018/07/payment\\_plan\\_7.12.18.pdf](https://www.sfmta.com/sites/default/files/reports-and-documents/2018/07/payment_plan_7.12.18.pdf) [<https://perma.cc/Q27W-GJ3M>]; *Request for Ability To Pay Determination*, CITY OAKLAND, <https://www.oaklandca.gov/documents/ability-to-pay-application-parking-ticket> [<https://perma.cc/ZA47-LJ8Q>].

in the overall fine amounts,<sup>262</sup> affordable monthly installment payments,<sup>263</sup> community service in lieu of repayment,<sup>264</sup> or some combination of the three.<sup>265</sup>

Ability-to-pay determinations have significant potential for alleviating the burden of fines levied pursuant to antihomeless laws. As a result, homeless individuals cited under public urination and defecation laws would benefit. Ability-to-pay determinations ensure that fines do not serve as a barrier out of homelessness by exacting homeless individuals' limited income for necessities. Additionally, they decrease the use of collection measures such as license suspensions and the issuance of warrants, which prevent homeless individuals from securing employment, public benefits, and subsidized housing.

## 2. Constitutional Challenge Under *Robinson*

If advocates were unsuccessful in convincing cities to provide additional bathrooms or reform prohibitions on public urination and defecation, a constitutional challenge under *Robinson v. California*<sup>266</sup> could be considered. Scholars have considered the prospect of a *Robinson* challenge to laws criminalizing transgender individuals' use of bathrooms corresponding with their gender identity.<sup>267</sup> However, the inconsistent results in lawsuits challenging antihomeless laws prohibiting sleeping and camping should give advocates pause.

In *Robinson*, the Supreme Court struck down a California law making it a criminal offense to be addicted to narcotics, holding that criminalizing someone's status violated the Eighth Amendment prohibition on cruel and unusual punishment.<sup>268</sup> The Court reasoned that medical conditions could be contracted innocently and to punish someone for having one would constitute cruel and unusual punishment.<sup>269</sup> The Court revisited *Robinson* in *Powell v. Texas*,<sup>270</sup> clarifying that the Eighth Amendment barred the criminalization of status and distinguished status from conduct.<sup>271</sup> In *Powell*, the Justices could not

262. Maura Ewing, *Should States Charge Low-Income Residents Less for Traffic Tickets?*, ATLANTIC (May 13, 2017), <https://www.theatlantic.com/politics/archive/2017/05/traffic-debt-california-brown/526491/> [<https://perma.cc/7WMW-MCEZ>].

263. *Payment Plan*, *supra* note 261.

264. Rebecca Beitsch, *An Alternative to Paying Court Debt: Working It Off*, PEW (Apr. 4, 2017), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2017/04/04/an-alternative-to-paying-court-debt-working-it-off> [<https://perma.cc/8NNA-7GYD>]; *Payment Plan*, *supra* note 261.

265. Elise Herron, *TriMet Has Voted To End Massive Fees for Fare Evasion*, WILLAMETTE WEEK (March 7, 2018), <https://www.wweek.com/news/2018/03/07/trimet-has-voted-to-end-massive-fees-for-fare-evasion/> [<https://perma.cc/GT28-72WC>].

266. 370 U.S. 660 (1962).

267. Rushin & Carroll, *supra* note 141, at 9.

268. *Robinson*, 370 U.S. at 666–67.

269. *Id.* at 667.

270. 392 U.S. 514 (1968) (plurality opinion).

271. *Id.* at 533.

reach a majority, but five of the nine Justices supported the principle that the states cannot punish involuntary behavior that is an unavoidable consequence of one's status.<sup>272</sup> However, in a concurring opinion, Justice White explained that Powell did not demonstrate his conduct was involuntary and therefore declined to join the dissenting opinion.<sup>273</sup>

Homeless advocates have used *Robinson* and *Powell* to challenge antihomeless laws as status crimes with mixed results. Some have had success. For example, in *Pottinger v. City of Miami*,<sup>274</sup> the Southern District of Florida concluded that the city's prohibitions on sitting, sleeping and eating in public were status crimes barred by the Eighth Amendment.<sup>275</sup> Similarly in *Jones v. City of Los Angeles*,<sup>276</sup> the court found that the prohibited conduct was an "unavoidable consequence[] of being human" and "involuntary and inseparable from status."<sup>277</sup> In other cases, courts have rejected these arguments.<sup>278</sup> These courts typically find that that homelessness is not a status, the prohibited conduct is not a result of homelessness, or that homeless individuals chose to engage in the prohibited conduct.<sup>279</sup> Courts are quick to accept a city's justifications for its laws criminalizing conduct associated with homelessness.<sup>280</sup>

Despite the mixed results, homeless advocates were encouraged when the Department of Justice ("DOJ") filed an amicus brief in *Martin v. Boise*,<sup>281</sup> adopting the argument that antihomeless laws should be considered

272. *Id.* at 548–49 (White, J., concurring); *id.* at 267–70 (Fortas, J., dissenting).

273. *Id.* at 552–54.

274. 810 F. Supp. 1551 (S.D. Fla. 1992).

275. *Id.* at 1562 (citing *Robinson v. California*, 370 U.S. 660 (1968)).

276. 444 F.3d 1118 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (citing *Powell*, 392 U.S. at 554).

277. *Id.* at 1136.

278. *See, e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000).

279. *See, e.g., id.* at 1362 ("The ordinance in question here does not criminalize involuntary behavior. The City [of Orlando] is constitutionally allowed to regulate where 'camping' occurs, and the availability of shelter space means that [Plaintiff] had an opportunity to comply with the ordinance."); *Joyce v. City & Cty. of S.F.*, 846 F. Supp. 843, 857 (N.D. Cal. 1994) ("As an analytical matter . . . homelessness is not readily classified as a 'status.'"); *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1105 (1995) ("Assuming arguendo the accuracy of the [plaintiffs'] descriptions of the circumstances in which they were cited under the [anti-camping] ordinance, it is far from clear that none had alternatives to either the condition of being homeless or the conduct that led to homelessness and to the citations.").

280. *See* *Roulette v. City of Seattle*, 97 F.3d 300, 306 (9th Cir. 1996); *Davison v. City of Tucson*, 924 F. Supp. 989, 991–92 (D. Ariz. 1996).

281. *Bell v. City of Boise*, 834 F. Supp. 2d 1103 (D. Idaho 2011), *rev'd*, 709 F.3d 890 (9th Cir. 2013). Following an appeal to the Ninth Circuit, this case was remanded to the district court for further proceedings. On the second appeal, certain plaintiffs withdrew from the case, resulting in the name being changed to reflect the participants and leaving it titled *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019), *petition for cert. filed*, No. 19-247 (U.S. Aug. 22, 2019).

unconstitutional pursuant to *Jones*.<sup>282</sup> At the time, Vanita Gupta, the head of the DOJ's Civil Rights Division, said:

Criminally prosecuting those individuals for something as innocent as sleeping when they have no safe, legal place to go, violates their constitutional rights. Moreover, enforcing these ordinances is poor public policy. Needlessly pushing homeless individuals into the criminal justice system does nothing to break the cycle of poverty or prevent homelessness in the future. Instead, it imposes further burdens on scarce judicial and correctional resources, and it can have long-lasting and devastating effects on individuals' lives.<sup>283</sup>

While the district court disagreed with the DOJ, the Ninth Circuit reversed, issuing the first decision of significant precedential value finding that antihomesless laws violate the Eighth Amendment's prohibition on cruel and unusual punishment.<sup>284</sup> Ruling Boise's camping and sleeping bans unconstitutional, the court held that the "conduct at issues here is involuntary and inseparable from status—they are one and the same given that human beings are biologically compelled to rest, whether by sitting, lying, or sleeping."<sup>285</sup> The court went on to find that "just as the state may not criminalize the state of being 'homeless in public places,' the state may not 'criminalize conduct that is an unavoidable consequence of being homeless — namely sitting, lying, or sleeping on the streets.'"<sup>286</sup> Boise has appealed the matter and the Supreme Court is expected to decide whether to grant a writ of certiorari by the end of the year.<sup>287</sup>

Even with these encouraging signs, advocates should proceed with caution. Homeless individuals might face an uphill battle using *Robinson* to challenge prohibitions on urination and defecation. The disparate impact of prohibitions on public urination and defecation on the homeless community may not be sufficient for a court to conclude that the laws are tied to an individual's homeless status. The Ninth Circuit's ruling in *Martin* aside, cases challenging bans on sleeping and camping are received with mixed results. If attorneys are able to clear the status hurdle, they may still struggle to convince a court that public urination and defecation is an involuntary consequence of homelessness. In *Martin* and other cases challenging prohibitions on sleeping in

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282. See Statement of Interest of the United States at 10–11, *Bell*, 834 F. Supp. 2d 1103 (No 1:09-cv-540-REB).

283. Press Release, U.S. Dep't of Justice Office of Pub. Affairs, Justice Department Files Brief To Address the Criminalization of Homelessness (August 6, 2015), <https://www.justice.gov/opa/pr/justice-department-files-brief-address-criminalization-homelessness> [<https://perma.cc/7C9P-3M6T>].

284. *Martin*, 920 F.3d at 584.

285. *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006)).

286. *Id.* (quoting *Jones*, 444 F.3d at 1136).

287. *Id.*, petition for cert. filed, No. 19-247 (U.S. Aug. 22, 2019).

public, the presence of available shelter beds renders the decision to sleep in public voluntary.<sup>288</sup> It is easy to foresee those precedents being applied to bans against public urination and defecation in the presence of public or even private bathrooms, no matter how inaccessible those bathrooms may be. On the other hand, in cities that do not maintain any overnight bathrooms a *Robinson* challenge might have better chances of success. Moreover, in cities like San Diego, where there is a long and documented history of the harms caused by the failure to provide bathrooms, lawsuits may prove more successful.<sup>289</sup>

### 3. Relief Under the Homeless Bill of Rights

Homeless advocates struggling to find relief under *Robinson* will likely not see more promising prospects using a legal challenge pursuant to Homeless Bills of Rights (“HBR”). While HBRs are intended to protect homeless individuals from antihomeless laws, it is unlikely that courts would extend the reach of the current state laws to prohibitions on public urination and defecation.<sup>290</sup> Further, the one territory with an HBR does not provide for affirmative litigation as a method of enforcement.<sup>291</sup>

Connecticut, Rhode Island, Illinois, and Puerto Rico have enacted HBRs.<sup>292</sup> The HBRs for the states do not address the issue of accessible bathrooms. Connecticut, Rhode Island, and Illinois’s HBRs share similar language.<sup>293</sup> In fact, Illinois and Rhode Island’s HBRs are nearly identical. All three states guarantee the right to emergency medical care, to vote, a reasonable

288. See, e.g., *Jones*, 444 F.3d at 1118, *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007).

289. See *supra* Section III.B.

290. See *Right To Rest Model Legislation, Homeless Bill of Rights Campaign*, WESTERN REGIONAL ADVOC. PROJ., <https://wraphome.org/wp-content/uploads/2017/11/Right-To-Rest-Act-Boiler-Plate.pdf> [<https://perma.cc/NW2Y-4C4M>].

291. P.R. LAWS ANN. tit. 8, § 1006c (LEXIS through 2011 Legis. Sess. And various acts from 2012 to the present); see also Act of Sept. 27, 2007, ch. 130, 2007 P.R. LAWS 527 (codified as amended at P.R. LAWS ANN. tit. 8, §§ 1006–1006h (LEXIS)).

292. See CONN. GEN. STAT. ANN. § 1-500 (Westlaw through Jan. 2019 Regular Sess. and the 2019 July Sess.); 775 ILL. COMP. STAT. ANN. 45/10 (Westlaw through P.A. 101-600); P.R. LAWS ANN. tit. 8, § 1006c (LEXIS through 2011 Legis. Sess. and various acts from 2012 to the present); 34 R.I. GEN. LAWS ANN. § 34-37.1-3 (Westlaw current through Ch. 310 of the 2019 Regular Sess.). The impact of the Great Recession allowed homeless advocates in Rhode Island to generate support for the mainland’s first HBR. Sara Rankin, *Homeless Bill of Rights (Revolution)*, 5 SETON HALL L. REV. 383, 405 (2015) [hereinafter Rankin, *Homeless Bill of Rights*] (discussing the factors behind the passage of Rhode Island’s HBR).

293. See CONN. GEN. STAT. ANN. § 1-500 (Westlaw); 775 ILL. COMP. STAT. ANN. 45/10 (Westlaw); P.R. LAWS ANN. tit. 8, § 1006c (LEXIS); 34 R.I. GEN. LAWS ANN. § 34-37.1-3 (Westlaw).

expectation of privacy with respect to personal property, and equal treatment by state and municipal agencies.<sup>294</sup>

Connecticut, Rhode Island, and Illinois all confer upon homeless individuals the right to move freely in public spaces.<sup>295</sup> Rhode Island's HBR states:

A person experiencing homelessness has . . . the right to use and move freely in public spaces, including but not limited to public sidewalks, public parks, public transportation, and public buildings, in the same manner as any other person and without discrimination on the basis of his or her housing status.<sup>296</sup>

Illinois's HBR is nearly identical, save grammatical differences.<sup>297</sup> Connecticut's HBR similarly provides homeless individuals the right to "[m]ove freely in public spaces, including on public sidewalks, in public parks, on public transportation and in public buildings without harassment or intimidation from law enforcement officers in the same manner as other persons."<sup>298</sup> These provisions are generally interpreted to protect homeless individuals from antihomeless laws. A plain reading of the language, however, suggests that protection may be limited to antihomeless laws related to sitting, lying, sleeping, and camping, as opposed to panhandling, sharing food, and public urination and defecation.<sup>299</sup>

294. See CONN. GEN. STAT. ANN. § 1-500 (Westlaw); 775 ILL. COMP. STAT. ANN. 45/10 (Westlaw); P.R. LAWS ANN. tit. 8, § 1006c (LEXIS); 34 R.I. GEN. LAWS ANN. § 34-37.1-3 (Westlaw).

295. See CONN. GEN. STAT. ANN. § 1-500 (Westlaw); 775 ILL. COMP. STAT. ANN. 45/10 (Westlaw); P.R. LAWS ANN. tit. 8, § 1006c (LEXIS through 2011 Legis. Sess. and various acts from 2012 to the present); 34 R.I. GEN. LAWS ANN. § 34-37.1-3 (Westlaw).

296. 34 R.I. GEN. LAWS ANN. § 34-37.1-3(1) (Westlaw).

297. 775 ILL. COMP. STAT. ANN. 45/10 (a)(1) (Westlaw).

298. CONN. GEN. STAT. ANN. § 1-500(b)(1) (Westlaw).

299. *Id.*; 775 ILL. COMP. STAT. ANN. 45/10(a)(1) (Westlaw); 34 R.I. GEN. LAWS ANN. § 34-37.1-3(1) (Westlaw); see also Darby Penney, *Rhode Island First State To Pass Homeless Bill of Rights*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (2014), <https://www.samhsa.gov/homelessness-programs-resources/hpr-resources/rhode-island-homeless-bill-rights> [<https://perma.cc/4XNU-PRJW>] (addressing how HBR has not led to a flood of litigation); Colin Rugg, *Landmark Case To Set Precedent on Illinois' Homeless Bill of Rights*, SPARE CHANGE NEWS (Sept. 3, 2016), <http://sparechangenews.net/2016/09/landmark-case-to-set-precedent-on-illinois-homeless-bill-of-rights/> [<https://perma.cc/K8PC-A662>]. California's proposed HBR is more explicit about the protections it provides. TRISTIA BAUMAN ET. AL., NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, FROM WRONG TO RIGHTS: THE CASE FOR HOMELESS BILL OF RIGHTS LEGISLATION 12, [https://www.nlchp.org/documents/Wrongs\\_to\\_Rights\\_HBOR](https://www.nlchp.org/documents/Wrongs_to_Rights_HBOR) [<https://perma.cc/3Q92-ZULZ>]; Rankin, *Homeless Bill of Rights*, *supra* note 292, at 413. An initial draft of the California HBR actually conferred a right to public urination and defecation. Rankin, *Homeless Bill of Rights*, *supra* note 292, at 413. When that provision resulted in alarm, legislators made revisions mandating municipalities provide sufficient public bathrooms. *Id.*

Puerto Rico's HBR explicitly addresses homeless individuals' right to bathrooms. In its "Statement of Motives," Puerto Rico draws the connection between access to bathrooms and dignity.<sup>300</sup> Section 5 of the Act, its substantive Bill of Rights, addresses bathroom access as part of the first right conferred: "(a) Rights of the Homeless—The rights and benefits hereby guaranteed are: 1. The right to receive shelter which is adequate and suitable for human habitation, with the appropriate toileting and restroom facilities, within a safe environment of dignity and respect."<sup>301</sup> Later on, the Act also establishes a "Multi-Sector Homeless Population Support Council" tasked with, among other responsibilities, establishing a plan of action that ensures "[a]ccess to public restrooms and toileting facilities in which the basic services for personal hygiene are provided."<sup>302</sup> However, the establishment of the Council is used in place of an affirmative litigation enforcement mechanism as the means of resolving issues facing Puerto Rico's homeless.<sup>303</sup> As a result, advocates and attorneys cannot use the courts to challenge prohibitions on public urination and defecation and other antihomeless laws.<sup>304</sup>

The HBRs, as presently enacted, are not the appropriate mechanism for challenging laws criminalizing public urination and defecation. Using the HBRs either through litigation or drafting to confer a right to public urination and defecation could have the unintended effect of slowing passage of bills in other states. If advocates would like to use HBRs to protect the homeless community from the bathroom dilemma, it would be better to incorporate provisions such as the one proposed in California's bill, which requires municipalities provide "[a]ccess to safe, clean restrooms, water, and hygienic supplies necessary to maintain health, safety, and dignity."<sup>305</sup>

300. Act of Sept. 27, 2007, ch. 130, 2007 P.R. Laws 527 (codified as amended at P.R. LAWS ANN. tit. 8, §§ 1006–1006h (LEXIS)) ("Each of these persons lacks the essentials for leading a life of dignity: a fixed and adequate residence, adequate nutrition, toileting facilities, access to adequate health services, participation in community activities, and opportunities for training, employment and entrepreneurial development.").

301. Act of Sept. 27, 2007, ch. 130, 2007 P.R. Laws 527 (codified as amended at P.R. LAWS ANN. tit. 8, 5(a)(1)).

302. Act of Sept. 27, 2007, ch. 130, 2007 P.R. Laws 527 (codified as amended at P.R. LAWS ANN. tit. 8, § 9(d)(1)(A)).

303. Rankin, *Homeless Bill of Rights*, *supra* note 292, at 402 ("Like its predecessor, Act 130 is not judicially enforceable; instead, it tasks the Council with responsibility for designing protocols to ensure agency implementation of the enumerated rights and with responsibility for enforcing compliance.").

304. See P.R. LAWS ANN. tit. 33, § 1401(a) (LEXIS through all acts translated by the Translation Office of the Puerto Rico Government through the 2011 Legislative Session and various acts from 2012 to the present); THE NAT'L COAL. FOR THE HOMELESS & THE NAT'L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES, 33–34 (2006), <https://www.nationalhomeless.org/publications/crimreport/meanestcities.html> [<https://perma.cc/848S-36ZH>].

305. A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 2(c)(6) (Cal. 2012).

## V. THE PATH FORWARD

Fixing the dilemma of bathroom provision for the homeless community is no easy task. It will not be as simple as building more bathrooms or removing barriers to existing ones. A commitment to dignity, health, and voice for homeless individuals and their bathroom needs is critical to the process. Without it, newly available bathrooms will be closed the moment the burden is believed to outweigh the necessity.<sup>306</sup>

A commitment to dignity and respect for the homeless community will require government actors, private industry, and the public to acknowledge its prejudice for the homeless and visibly poor. With this acknowledgement, a better understanding of how power is wielded to result in limited availability and accessibility of bathrooms and how it is used regulate homeless individuals' acts of urinating and defecating. Only after the challenge of going to the bathroom is viewed through the lens of the homeless community can sustainable and inclusive solutions be accomplished. In developing solutions, it will be critical to consult with homeless individuals to fully understand their perspectives and needs.

This problem demands swift action. Too many cities are exposing homeless individuals and others to health risks by maintaining an inadequate supply of bathrooms. A quick and comprehensive solution should include increasing the availability of public and private restrooms.

Public restrooms should be designed taking the needs of the homeless community into account. This will mean installing restrooms near encampments, not charging a fee, designing them in a manner that will allow homeless individuals to secure their possessions, and ensuring that they are maintained regularly and available at all times of day. It will also require effective advertisement of all publicly available options. Publishing a list online is inadequate; it will require comprehensive signage and consistent outreach.

Leveraging private industry is an important part of any solution. In the short-term, cities should implement CTS or CRI programs to ensure the quickest results. CTS programs invite private businesses to be part of the solution, which would help protect against harassment and physical harm homeless individuals might face for entering environments from which they have traditionally been excluded. The speed with which a CTS program could be implemented would help mitigate the risks associated with the current level of bathroom provision.

In the long term, however, cities should consider bans on "For Customers Only" policies. This approach is the only way that the power dynamics behind bathroom provision can be addressed. The Starbucks example demonstrates the

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306. See *supra* Section IV.A.

logic behind eliminating “For Customers Only” policies.<sup>307</sup> Starbucks’s policy change came about through the realization that “For Customers Only” policies can only be enforced indiscriminately and the subjectivity required reinforces our worst prejudices and fears. To maintain the policy would only ensure that additional discriminatory events would continue to occur.<sup>308</sup> One hopes that Starbucks was also motivated by decency and a realization that the ability to use the bathroom should not be predicated on having money to spare. However, Starbucks did not provide any indication that those latter motivations were involved. Moreover, previous studies show that inviting the public to use a business’ bathroom results in increased revenue,<sup>309</sup> so it is more likely that Starbucks was motivated by an evaluation of its legal risk and profit potential than benevolence.

In sum, any response involves short-term and long-term components. In the short-term, the critical bathroom shortage and attendant health risks must be resolved. In the long-term, we must acknowledge how we continue to use bathrooms and the act of going to the bathroom as a means of marginalization. This realization should also be part of a larger acknowledgment of the myriad of ways that the homeless community is oppressed and marginalized.

#### CONCLUSION

The issue of availability and accessibility of bathrooms for homeless individuals is a crisis. In the best light, the crisis can be explained by governmental negligence. However, when examined alongside the history of marginalized groups’ fights for bathroom access and the criminalization of homelessness as segregation evolved, a different conclusion is reached. That examination helps us understand that bias and an exercise of power is responsible for the current dilemma.

Homeless advocates’ reticence to focus on the dilemma of the simultaneous lack of access to bathrooms and criminalization of public urination and defecation is understandable. It is already hard enough to stem the tide of antihomeless legislation, and prohibitions on public urination and defecation have a strong public interest justification. Additionally, advocacy around affordable housing has the potential to resolve many of the underlying issues related to bathroom access while also addressing the central problem of chronic homelessness.

That being said, prohibitions on public urination and defecation combined with insufficient access to public bathrooms put homeless individuals in as much legal jeopardy as any other antihomeless law. Additionally, access to public

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307. See *supra* Section IV.B.

308. See *LOWE, supra* note 52, at 43–44.

309. See *supra* note 230 and accompanying text.

restrooms have important health implications for homeless individuals and are “essential to human dignity in our culture.”<sup>310</sup>

Advocacy around bathroom availability and accessibility will be a struggle. It will surface the worst of the public’s bias and prejudice, reinforcing stereotypes of homeless individuals as unclean and diseased. However, similar factors are implicated in every struggle for bathroom access. As Olga Gershenson and Barbara Penner explain, “Changes to existing toilet arrangements are explosive because they recognize, accommodate, and, hence, legitimate the presence of a social group who customarily ‘make do’ and remain invisible at the level of representation.”<sup>311</sup> As such, advocates would be well advised to tackle the issue of bathroom access and criminalizing public urination and defecation while addressing the injustice of criminalizing homelessness at large, even if that conversation requires more nuance and compassion than most debates regarding homelessness permit.

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310. Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263, 284 (1990).

311. Gershenson & Penner, *supra* note 142, at 9.

**Appendix A: Public Record Request**

To Whom It May Concern:

Under the [Insert Name and Citation of Public Record or Freedom of Information Act], we are requesting an opportunity to inspect or obtain copies of public records that provide information about all of the public restrooms operated by [Insert Name of City]. We ask that you provide the address or location of each facility. Furthermore, we ask that you answer the following questions for each restroom operated by [Insert Name of City]:

1. What are the days and hours of operation?
2. How frequently is the bathroom serviced (i.e. cleaned and stocked with toilet paper)?
3. Whether the bathroom has a sink or other mechanism that allows users to wash their hands. Alternatively, whether hand sanitizer is provided.
4. Whether there are street signs or signs off premises directing the public to the location of the public restroom.
5. Whether government-issued photo identification is required to enter the premises containing the restroom (e.g. courthouse, government building, etc.).
6. Whether an individual must be a patron of the facility containing the restroom (e.g. museum, parking garage, etc.).
7. Whether there is security on the premises. If so, how many of the hours during which the restroom is open to the public (*see* Question 1) is security present?

Finally, please let us know if a centralized list of public restrooms maintained by [Insert Name of City] is made available to the public and where that list may be found.

We have attached, for your convenience, a chart that may be filled out as a way of responding to our request.

If answering our questions is too burdensome, we ask for documentation containing the information requested. For example:

1. Documents containing the locations of the public restrooms operated by [Insert City]

2. Documents indicating the days and hours of operation of the public restrooms.
3. Documents relating to the maintenance and service schedule of each bathroom.
4. Documents relating to the presence of hand hygiene or sanitization mechanism in the public bathrooms.
5. Documents relating to the erection of signage directing the public to the bathroom.
6. Documents relating to the conditions of entry (e.g. photo identification, entrance fee, etc.)
7. Documents relating to the presence of security and their hours on the premises.

Please send your response to the following address:

Ron S. Hochbaum  
Beazley Institute for Health Law and Policy  
Loyola University Chicago School of Law  
25 E. Pearson Street  
Chicago, IL 60611

Alternatively, you may e-mail the response to [rhochbaum@luc.edu](mailto:rhochbaum@luc.edu).

If you have any questions or concerns, please do not hesitate to contact us at (312) 915-6438. We look forward to hearing from you in writing within [Insert Statutorily Prescribed Time for a Response] from the receipt of the request. Thank you for your time and consideration.