

## Homelessness as a Property Problem

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HERE IS A SIMPLE OBSERVATION that might have consequences for social policy with respect to the homeless. The observation is that homelessness has, to this point in time, largely been treated as a problem of poverty. Having formulated the issue in this way, legal and social analysts have asked a limited, almost formulaic set of questions concerning the depth of the problem (“how many people are actually homeless?”); the scope of the problem (“who are the homeless?”); and the cause of the problem (“is homelessness a product of individual weakness or of structural forces beyond any individual’s control?”). These questions, it turns out, are both extremely difficult to answer and, more disturbingly, not terribly helpful. Even the strongest case that homelessness is “caused” by institutional forces and not personal failure seems unlikely to lead either local or national government to commit the resources necessary to “solve” the underlying problem if that problem is, for example, a failure of the housing market to produce affordable rental units or a failure of the job market to produce entry level jobs that pay decent wages.

I argue in this essay that homelessness can be understood another way: as a problem not of poverty but of property, or more accurately, a problem of what might be called “no property.” “No property” is, I suggest, a distinct and insufficiently understood legal category.<sup>1</sup> Because operative Supreme Court precedent establishes that citizens have no right to have property<sup>2</sup> or to have housing,<sup>3</sup> those who find themselves without any property or housing have no direct legal remedy for their plight. In consequence, they find themselves in the ironic position of advocating affirmatively for rights to more effectively continue in their current position by, for example, being “free” to sleep outdoors or to panhandle aggressively. Victories in such actions—and there have been only a few—are difficult to celebrate.<sup>4</sup>

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1. I explore this category in a slightly different context in Jane B. Baron, *The “No Property” Problem: Understanding Poverty by Understanding Wealth*, 102 MICH. L. REV. No. 6 (forthcoming May 2004).

2. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

3. See, e.g., *Lindsey v. Normet*, 405 U.S. 56 (1972).

4. See, e.g., *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992) (holding that Miami’s practice of “arresting homeless individuals for harmless, invol-

The paradox of homelessness advocacy can only be understood by exploring the full set of legal disabilities to which those in the status of “no property” are subject. But such an exploration involves more than a simple enumeration of the things the homeless have no rights to have. Just as property is not one right or attribute but many—a complex “bundle of sticks,” to use some old terminology—“no property” is also a complicated accretion of legal relations (or the lack thereof). This article makes the case for why we should try harder to understand “no property” as a legal category.

### I. The Individual/Structural Paradigm

In the now-voluminous social science literature on homelessness, certain questions recur. They are, roughly speaking: (1) How many people are really homeless? (2) Who *are* these people, i.e., what are the demographics of those identified as homeless? (3) Are they homeless because of personal failures for which they themselves must take responsibility or because of structural forces (such as changes in the housing or job markets) over which they have no control?<sup>5</sup> Surely it is useful to know as much as we can about those who are homeless and the causes of homelessness. Yet it is also worth considering the presuppositions of these questions, and whether the formulation of the questions limits the kinds of remedies that might be imagined for the problem of homelessness.

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untary conduct which they must perform in public” violated plaintiff’s rights to due process and travel, as well as their rights under the Fourth and Eight Amendments); *Loper v. New York City Police Dep’t*, 999 F.2d 699 (2d Cir. 1993) (holding that a statute barring loitering in a public place for the purpose of begging violated the First Amendment); *Armstrong v. Dist. of Columbia Pub. Library*, 154 F. Supp. 2d 67 (D.D.C. 2001) (holding library rules allowing guards to reject patrons who look like vagrants to be unconstitutionally vague and overbroad). *But see* *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995) (upholding an anti-camping ordinance quite similar to the one struck down in *Pottinger*, 810 F. Supp. at 1551); *Young v. New York City Transit Auth.*, 903 F.2d 146 (2d Cir. 1990), *cert. denied*, 498 U.S. 984 (1990) (upholding rules barring the homeless from panhandling on the New York City subways); *Kreimer v. Bureau of Police*, 958 F.2d 1242 (3d Cir. 1992) (upholding rules promulgated to discourage homeless patrons from staying in the library when not engaged in traditional library functions).

5. Any attempt at a list of all the works taking up one or another of these questions would exceed the length of this article—and might still be incomplete given the volume of academic literature studying the homeless. Some of the more influential works that consider these questions include JOEL BLAU, *THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES* (1992); MARTHA BURT ET AL., *HELPING AMERICA’S HOMELESS: EMERGENCY SHELTER OR AFFORDABLE HOUSING* (2001) [hereinafter BURT ET AL., *HELPING AMERICA’S HOMELESS*]; CHRISTOPHER JENCKS, *THE HOMELESS* (1994); PETER H. ROSSI, *DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS* (1989).

### A. *The “How Many?” Question*

Attempts to count the homeless seem to have derived from a variety of concerns in addition to simple documentation. One has been whether there is, at the time of the count, a “crisis” of some kind. A count might show that there “really” are, or “really” are not, many, many people who are without housing. If there really are many, many people without housing, then maybe there is an emergency—perhaps an emergency not previously perceived.<sup>6</sup> And if there is an emergency, then, as with hurricanes and floods, the public can legitimately be asked to contribute resources appropriate to meeting the needs of those in distress. Even if the problem is not emergent in nature, but chronic, a count may reveal that the problem of homelessness is a “big” problem, something to which public attention must be paid.

A second concern behind attempts to count the homeless is to establish whether the problem is one that is growing or shrinking.<sup>7</sup> At times, it has seemed important to establish whether there are more people homeless at a certain point in time than there were at another point. A count that is rising might indicate, among other possibilities, that an earlier-identified emergency is larger in scope than had previously been realized; that a problem initially perceived as an emergency is actually chronic and long-term; that new forces are contributing to or exacerbating the problem of homelessness; or that whatever remedies had been tried in the past are failing. Each of these hypotheses, if supported by data, might suggest distinct paths for intervention.

Whatever the motive, however, counting is difficult.<sup>8</sup> For one thing, it requires consensus on who should be deemed homeless. But there is no single agreed-upon definition of homelessness. Homelessness could mean “sleeping on the streets,” but at least some people sleeping on the street on any given night might sleep indoors most other nights (in a single room occupancy hotel, for example). Is a person who is housed

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6. It was arguably in the spirit of creating a perception of crisis that the late Mitch Snyder, an activist and advocate for the homeless, testified before Congress that 3 million people were homeless in 1983. This estimate proved extremely controversial. For a summary of Snyder’s estimate and the responses to it, especially the reaction of the press, see S. Anna Kondratas, *A Strategy for Helping America’s Homeless*, in HOUSING THE HOMELESS 144 (Jon Erickson & Charles Wilhelm eds. 1986). See also RICHARD W. WHITE, JR., RUDE AWAKENINGS: WHAT THE HOMELESS CRISIS TELLS US (1992) (disputing the notion of a homelessness “crisis”).

7. See, e.g., MARTHA R. BURT, OVER THE EDGE: THE GROWTH OF HOMELESSNESS IN THE 1980s 3 (1992) (examining whether homelessness increased in the 1980s) [hereinafter BURT OVER THE EDGE].

8. Many scholars have examined this problem. For a particularly lucid account of the difficulties, see Martha R. Burt, *Homelessness: Definitions and Counts*, in HOMELESSNESS IN AMERICA 15 (Jim Baumohl ed., 1996).

three weeks out of four a “homeless” person? Homelessness could mean “sleeping in a public shelter,” but at least some people in shelters on any given night might be there only because they recently had an argument with the relative with whom they had been doubled up. Is a person who moves between shelters, relatives, and welfare hotels a “homeless” person? Homelessness could mean “having slept on the street or in a public shelter within the last six months,” but some people who have slept in one or another of those places might now be living in an apartment (or, should this seem too rosy a scenario, in jail). Is someone now housed, but who has recently been without a regular abode, a “homeless” person?

These definitional difficulties make any count of the homeless controversial. And, even if these definitional difficulties could be overcome, there would still be controversy. Counts of homelessness enumerate how many people meet the defined criteria in a given area at a given time, or over a given period. Estimating the extent of the homelessness problem for any different, or larger, area or period requires extrapolation from and interpretation of the data. Nor is there greater consensus on questions such as whether one night, month, or city is typical than there is on the question of how to define homelessness to begin with. It seems axiomatic that in dealing with a problem such as homelessness, we should first assess the extent and the nature of the problem, but it is difficult to get to the “fact of the matter” if there is disagreement over which facts matter. Thus, despite numerous counts, there is still no agreement on how many people are “actually” homeless in the United States.

The methodological problems of counting only mask other potentially more vexing problems. Let us imagine that we had convincing data supporting an estimate that nearly half a million persons experienced episodes of homelessness in the United States in 2003. Is 500,000 “a lot?” If only 50,000 persons experienced homelessness in 2003, would we say that there were not “a lot” of people who were homeless? Under these estimates, is homelessness a “big” problem? The point of counting is to show that homelessness is a problem to which attention should be paid, but here again there is no agreement on the number that will signal that the problem is “really” serious.

Ironically, even where this problem has been overcome, and there has been agreement that homelessness has reached levels worthy of being considered a crisis, the resulting interventions have proven problematic. Emergency problems call for emergency solutions: targeted interventions designed to get the victims through in the short term. The

solution to the emergency of homelessness was the creation of more shelter beds and soup kitchens. This approach is perfectly rational as a palliative matter, but it is not without costs. For one thing, shelters are not cheap. For another thing, focusing on shelter and other immediate needs of the homeless absorbs energy that might otherwise be spent on ascertaining how people come to be homeless in the first place. One of the most consistent laments of those who affirmatively advocated for emergency interventions is that, by focusing on individuals' immediate needs for shelter and food, they failed to inquire into or address the long-term problems that led to homelessness from the beginning.<sup>9</sup>

### B. *The "Who Are They?" Question*

Attempts to count the homeless have often been coupled with attempts to describe who the homeless are. Most of the descriptions are demographic in the technical sense: statistical breakdowns showing how many of those counted among the homeless (however that term was defined for purposes of the particular count in question) are, for example, men, women, black, white, married, drug addicted, employed, and so forth.<sup>10</sup> A few of the descriptions have been narrative and ethnographic.<sup>11</sup> The latter try to portray the actual experience of homelessness and thereby try to convey the personal qualities that allow homeless persons to survive. Both the demographic and ethnographic descriptions presume that a more finely grained, nuanced knowledge of the nature of the homeless population will enable more effective, targeted assistance.

As with counting, efforts to provide more precise information on who is homeless (and whether it is a different group than has been homeless in the past) seems perfectly sensible; we must know who is affected by homelessness in order to aid those people. As with counting, however, technical problems cloud the picture. The same sorts of definitional problems that attend the term "homeless" arise with respect to categories such as "addicted," "mentally ill," or "employed," and, of

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9. See, e.g., Gary Blasi, *And We Are Not Seen: Ideological and Political Barriers to Understanding Homelessness*, 37 AM. BEHAVIORAL SCIENTIST 563 (1994) [hereinafter Blasi, *And We Are Not Seen*]; Lucie White, *Representing "The Real Deal,"* 45 U. MIAMI L. REV. 271 (1991); Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327 (2000).

10. For one very detailed analysis along these lines, see BURT ET AL., *HELPING AMERICA'S HOMELESS*, *supra* note 5.

11. See, e.g., ELLIOT LIEBOW, *TELL THEM WHO I AM: THE LIVES OF HOMELESS WOMEN* (1993), and DAVID A. SNOW & LEON ANDERSON, *DOWN ON THEIR LUCK: A STUDY OF HOMELESS STREET PEOPLE* (1993). See also KIM HOPPER, *RECKONING WITH HOMELESSNESS* (2003) (reflecting on the long-term impact of ethnographic efforts).

course, there is also no consensus on which categories count. Groups can be broken down in any number of ways, and while criteria such as age and sex seem obvious, other criteria such as educational attainment or number of prior criminal convictions may or may not also potentially be relevant. To complicate matters further, categories overlap. Some but not all homeless women are drug addicted; likewise, some but not all homeless drug addicts are mentally ill; similarly, some but not all homeless persons who are mentally ill are unemployed. Because of these methodological difficulties, no set of data on the composition of the homeless population is without controversy.

Different problems attend the narrative, ethnographic accounts of the homeless population. Some of these problems are also technical. How does one choose the persons to be interviewed? For how many days does one follow them? Should their stories be taken at face value or checked for accuracy?

However, some of the problems are different. Many of the “thick descriptions” of homeless life reveal that apparently irrational choices are actually, under the circumstances in which they are made, thoroughly functional. A good example is the choice many homeless men make not to utilize shelters and instead to remain on the street. Spending time in homeless shelters, as ethnographers did alongside the subjects whom they studied, revealed that the shelters were crowded, dangerous, and degrading; moreover, staff were rude, patronizing, and sometimes even cruel. Given the mean reality of shelter life, a rational person could sensibly choose the alternative difficulties of surviving in public spaces.<sup>12</sup>

Descriptions such as these, which give texture and substance to experiences that might otherwise be unfathomable, provide an obviously useful and different perspective on the question of who the homeless are. The ethnographies make the homeless understandable in a rather different way than the demographic studies do—not as a statistical group with variegated characteristics, but rather as flesh-and-blood individuals making rational choices under severe constraints. Paradoxically, however, such understandings may make it easier, rather than harder, to ignore the homeless. The narratives of coping are, on some level, reassuring; they tell stories of people whose lives have logic (albeit an unusual one) and order (albeit hidden). Ultimately, knowledge of who the homeless are may be more comforting than unsettling.<sup>13</sup>

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12. This particular example is taken from HOPPER, *supra* note 11.

13. Thus Hopper, reflecting on his own and others' work detailing the lives of homeless people, concludes that the ethnographies provided “vivid documentation and

### C. *The "Why Are They Homeless?" Question*

While counts and descriptions may be independently valuable, most are enlisted in an effort to elucidate what is widely considered to be the more important question: "Why do people become homeless?" Again, as a policy matter, this question is obviously fundamental; if the causes of homelessness could be ascertained, then they could be addressed. Ideally, intervention directed at these causes could prevent people from becoming homeless in the future.

The literature on homelessness is structured roughly around two competing hypotheses. The first is that homelessness is mostly the result of personal failures such as substance addiction, mental illness, or inability to hold a job.<sup>14</sup> The second competing hypothesis is that homelessness is mostly the result of institutional forces beyond any individual's control such as a mismatch between the supply and demand for low-cost housing or global changes in the job market that have all but eliminated well-paying entry level jobs.<sup>15</sup>

The very substantial energy that has been devoted to supporting one or the other of these hypotheses logically presumes that policy toward the homeless will, and should, turn on the issue of responsibility. Let us assume for a moment that, as the personal responsibility hypothesis asserts, homelessness is caused by individuals' failures to stay clean and sober, to take their medications, or to get to work on time. Under these circumstances, it would be far from clear that public resources should be devoted to the problem in the first place: why should the public save people from the consequences, however severe, of their own misguided choices? Even if some kind of intervention were deemed appropriate, perhaps on humanitarian grounds, it could quite appropriately be limited to the minimum necessary to keep people alive another day. Alternatively, it could be conditioned on the individual taking affirmative steps to deal with his or her problem, for example, by entering a drug treatment program.<sup>16</sup>

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lively analyses, but at the cost of ensuring that the product could safely be ignored." *Id.* at 208.

14. For an overview of the debate, see Paul Koegel, M. Audrey Burnam & Jim Baumohl, *The Causes of Homelessness*, in HOMELESSNESS IN AMERICA 24 (Jim Baumohl ed. 1996). I use the term "mostly" because almost no one is "purely" in one camp or the other. That is, most commentators attributing homelessness primarily to individual factors take at least some account of structural factors, and vice versa.

15. *Id.* Frequently cited structural factors, in addition to employment and housing market changes, include reductions in government benefits, changes in policies governing the admission and discharge of persons with mental illness, and losses of single room occupancy hotels.

16. See, e.g., Robert C. Ellickson, *The Homelessness Muddle*, 99 PUB. INT., Spring 1990, at 59. ("The great majority of homeless people are . . . deeply troubled individuals

Now let us imagine, as the institutional forces hypothesis asserts, that homelessness results from large-scale changes in, for example, the markets for labor and housing. Under these circumstances, even the most responsible individual might become homeless. The case for public response here seems far stronger. If the problem is institutional, the solution cannot be individual. Moreover, a larger intervention would be appropriate. Opening a few more shelters will hardly begin to fix a long-term shortage of affordable housing.<sup>17</sup>

Of course, the world is more complex than either of these alternatives seems to contemplate. A third hypothesis about the cause of homelessness combines elements of both the individual failure and structural forces explanations into what might be called a vulnerability synthesis.<sup>18</sup> In this synthesis, the homeless live, metaphorically speaking, at the confluence of two rivers of disaster, one personal and the other structural. Personal factors such as mental illness render them more vulnerable to tight housing or employment markets, and extreme poverty renders them more vulnerable to the effects of their own personal disabilities. The homeless, in this view, are people whose lives were previously only precariously stable, so just one change—a layoff that results in a period of unemployment, or an episode of mental illness that constitutes the last straw for a roommate or relative—can push them “over the edge”<sup>19</sup> into homelessness.

The vulnerability synthesis appears more balanced and nuanced than the personal failure and institutional forces hypotheses, but it is not without its own problems. It is unclear whether the argument is that personal failures render individuals more vulnerable to institutional forces or, vice versa, that institutional forces render individuals more vulnerable to their own personal failures. As a result, it is not exactly clear what policy response is appropriate under the vulnerability synthesis. It would seem that both rivers of misfortune must be tamed, with individuals getting more help coping with their disabilities and work

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and families who, when deserving of government aid, should be given tailored financial assistance and help in managing their lives more successfully”).

17. See, e.g., GREGG BARAK, *GIMME SHELTER: A SOCIAL HISTORY OF HOMELESSNESS IN CONTEMPORARY AMERICA* 105 (1991) (arguing that establishing more shelters “address[es] only the symptoms of the problem while ignoring the root causes”).

18. See BURT, *OVER THE EDGE*, *supra* note 7, at 198; see also BURT ET AL., *HELPING AMERICA’S HOMELESS*, *supra* note 5, at 322; ROSSI, *supra* note 5, at 179.

19. See BURT, *OVER THE EDGE*, *supra* note 7; see also BURT ET AL., *HELPING AMERICA’S HOMELESS*, *supra* note 5, at 322; ROSSI, *supra* note 5, at 179 (explaining the problem of vulnerability).



also being done to address the forces that make things like jobs and housing so hard to find.

Obvious resource issues arise if both aspects of the problem must be dealt with. The case for such resources under the vulnerability synthesis rests on the same basic premise that underlies the individual responsibility and individual forces hypotheses. The argument is that *because* individuals are not alone responsible for homelessness, at least some public involvement seems warranted. For all its apparent sophistication, then, the vulnerability synthesis shares at least one important assumption of the other hypotheses, i.e., that public intervention is more justified if the homelessness problem is structural than it might be if the problem were individual.

On reflection, however, this assumption is highly questionable. First, the line between the personal or individual, on the one hand, and the institutional or structural, on the other, is not as clear as the competing hypotheses seem to imagine. Mental illness is a good example. Mental illness afflicts individual people and, therefore, would appear to be appropriately categorized as an individual problem, rather than a structural or institutional problem. Yet people do not choose to be mentally ill in the way that they choose to drink excessively, even putting the problem of choice and addiction to one side. Not all individual problems, in other words, implicate questions of personal responsibility.

Moreover, as the vulnerability synthesis asserts, “personal” and “institutional” forces interact. Imagine a teenage girl with learning differences, whose difficulties at school cause her to drop out before graduation. She confronts a tight job market without even a high school degree and finds only marginal employment. A short illness causes her to lose her job, which leads to an episode of homelessness. During this episode she becomes depressed and begins to abuse drugs, a problem that multiplies her difficulties finding and keeping both work and housing. What in this causal chain is “structural” and what is “personal”?

Even if the line between the individual and the institutional were totally clear, a more fundamental problem infects all three hypotheses about the causes of homelessness. The theories all seem to concede that when individuals have only themselves to blame for their homelessness, it is difficult to make a claim on public resources to solve the problem. Correlatively, when individuals are not wholly responsible for their plight, they deserve help. Thus, the personal responsibility hypothesis is offered to justify a policy of limited intervention on behalf of the homeless, while the institutional forces hypothesis and the vulnerability synthesis are offered to justify policies of serious intervention.

But if the structural factors identified as causing or contributing to homelessness are factors such as the globalization of the job market or wide scale cutbacks in benefit programs such as Aid to Families with Dependent Children, is it realistic to expect any public intervention at all? Some problems can seem just too big for government, especially local government, to solve. Moreover, at least one powerful strand of thinking about the role of government in American society more generally holds that government operates best when it operates least; rather than intervening in markets, this theory asserts, government should facilitate their free and unfettered operation. Finally, the government responsible for eliminating the AFDC program just a few years ago is hardly likely to institute a whole new system of relief payments. The premise of so much of the thinking about the causes of homelessness—the notion that public resources can and will be mobilized if only it can be shown that the homeless are not themselves responsible for their own plight—will not withstand scrutiny.<sup>20</sup>

The rhetoric of individual responsibility may not only be ineffective, but affirmatively harmful. As historians of welfare have repeatedly shown, poverty has long been associated with desert and merit—or, more accurately, the lack thereof. The poor have often been blamed for their poverty.<sup>21</sup> The hypotheses about causation reflect this culture of blame. What else explains the apparent presupposition that homeless persons who are individually responsible for their homelessness have a weaker claim to public aid? Not only do the current ways of talking about homelessness reflect this tendency to blame, they may entrench it, and thereby help perpetuate a culture in which the extreme poverty instantiated by homelessness is understood in terms of personal irresponsibility.<sup>22</sup> All of this suggests we may need a different paradigm for talking and thinking about homelessness.

## II. A Poverty or a Property Paradigm?

The homeless are very poor.<sup>23</sup> Notwithstanding the deep divisions among academics and others about the causes of homelessness, every-

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20. As noted below (*see infra* note 21 and accompanying text), the notion that if the homeless actually *are* responsible for their own plight, then they do not deserve help may also not withstand scrutiny.

21. *See, e.g.*, JOEL F. HANDLER & YEHESEKEL HASENFELD, *WE THE POOR PEOPLE: WORK, POVERTY, AND WELFARE* (1997); MICHAEL B. KATZ, *THE UNDESERVING POOR: FROM THE WAR ON POVERTY TO THE WAR ON WELFARE* (1989).

22. The notion that ways of talking about an issue affect understandings of that issue is explored in Jane B. Baron, *The Expressive Transparency of Property*, 102 COLUM. L. REV. 208 (2002).

23. *See, e.g.*, BURT, *HELPING AMERICA'S HOMELESS*, *supra* note 5, at 93 (describing “extreme poverty” as the “common denominator of homelessness”).

one accepts this simple fact. One way to think about homelessness is as a problem of extreme poverty.

Unfortunately, talking about homelessness in terms of poverty does not get one very far if it is indeed the case that poverty alone will not generate momentum for public action and, even paradoxically, may be deemed a justification for non-action. Legal advocates reflecting on the strategies they used on behalf of the homeless note how, consciously or unconsciously, they worked to separate and differentiate the homeless as a group from the poor as a whole in order to avoid the negative reactions they had seen directed at the poor in the past.<sup>24</sup>

Some within the advocacy community regret that decision and would now pursue the poverty paradigm more aggressively. At least for a time, these advocates note, the homeless seemed sympathetic and worthy of public attention in a way that, for example, housed people on welfare did not. A better understanding of precisely what it was about homelessness that grabbed public attention, some argue, might lead to a better understanding of what allows the public to ignore other forms of extreme poverty. That understanding, in turn, might lead to more effective strategies on behalf of the poor.<sup>25</sup>

The call here is for deeper exploration of attitudes and the cognitive mechanisms through which people “see” (or ignore) the poor generally and the homeless specifically. This exploration, it has been argued, might include the psychological mechanisms which allow the fortunate to pass the homeless by on the street, as well as the attitudes of the relatively well off toward their own wealth. It is these elites, after all, who make policy decisions that affect the homeless, and it is their thinking that advocates will have to change if they want different decisions to be made. But, advocates assert, one cannot change attitudes that one does not understand; thus, to understand poverty policy we must better understand the mindset of those who are not poor.<sup>26</sup>

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24. See, e.g., Gary Blasi, *Advocacy and Attribution: Shaping and Responding to Perceptions of the Causes of Homelessness*, 19 ST. LOUIS U. PUB. L. REV. 207, 219–20 (2000); White, *supra* note 9, at 305–06; Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1247 (2003).

25. See, e.g., Gary L. Blasi, *Social Policy and Social Science Research on Homelessness*, 46 J. SOC. ISSUES 207, 209 (1990) (“whereas it is difficult for most people to imagine the myriad detailed consequences of simply being very poor, it is easier for everyone to imagine being cold, being lost, being very far from—or without—a home”).

26. See *id.* at 216; see also Blasi, *supra* note 24, at 233. As Kim Hopper puts it:

It no longer suffices (if it ever did) to ask what it is about the homeless poor that accounts for their dispossession. One must also ask what it is about ‘the rest’ of us

It is hard to argue against seeking to better understand public attitudes about poverty and wealth. Just as it would be helpful to know the causes of homelessness if we really could, it would be helpful to know how people respond cognitively to various manifestations of poverty. Better information presumably leads to better public policy.

However, better information might just show that negative attitudes toward the poor are deeply entrenched. Even if they are not, altering attitudes takes time. As a strategy for producing help for the homeless, the poverty paradigm cannot promise much, and the limited potential it holds for changing mind sets seems to apply more to the long-term than to the short-term.

Rather than thinking of the homeless population's extreme poverty in terms of identity ("what kind of person becomes so poor?") or cognition ("what kind of person can ignore other people's poverty?"), it might be more helpful to think of the homeless population's poverty in terms of property. Simply as a descriptive matter, the homeless live in a legal status that might be called "no property." This is not to say that the homeless completely lack possessions—we have all seen them lug their "things" around in bags or push them in carts. But those few items somehow do not protect them from hunger, cold, and uncertainty about where they will sleep. This is because all the things they *do not* own subject them to a complex set of legal disabilities.

A set of photographs from an early exposé of the conditions of the homeless, *Private Lives/Public Spaces*,<sup>27</sup> paints a particularly affecting portrait of the situation into which "no property" puts homeless people. One photo shows a foyer to a public restroom where, the caption states, "more than a dozen women may spend the night."<sup>28</sup> The next photo depicts three women in various states of undress washing themselves and their clothing in the sinks of the restroom, after the attendants have gone off duty.<sup>29</sup> The last in the series shows only the lower legs of one of the women, who is washing sores on the bottom of her feet.<sup>30</sup> As is noted in the text, "for the penniless, public bathrooms, bathing and laundry facilities are so scarce, and access to them so limited, that

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that has learned to ignore, then tolerate, only to grow weary of, and now seeks to banish from sight the ugly evidence of a social order gone badly awry?

HOPPER, RECKONING WITH HOMELESSNESS, *supra* note 11, at 214.

27. ELLEN BAXTER & KIM HOPPER, *PRIVATE LIVES/PUBLIC SPACES: HOMELESS ADULTS ON THE STREETS OF NEW YORK CITY* (1981).

28. The pages with photographs are not numbered. *See id.* at second page past p. 100.

29. *Id.* at third page past p. 100.

30. *Id.* at fourth page past p. 100.

cleanliness is virtually impossible.”<sup>31</sup> In other words, in the legal state of “no property,” there is no right to cleanliness, nor to any place to acquire it.

Such examples can easily be multiplied. It was this observation of the many spaces into which the homeless are not allowed that led Jeremy Waldron to his now famous thesis about the connection between homelessness and freedom: “Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere he is free to perform it.”<sup>32</sup> If, as Waldron observes, there is no place the homeless are entitled to be, then there is also no place they are entitled to, say, leave things that most of us take for granted, such as the clothes we are not wearing or papers we do not wish to carry with us. Public lockers and other storage facilities being relatively scarce and expensive, those things must either be carried around (hence “bag ladies”) or lost, or both. It is difficult to keep objects that, as a practical matter, one has no right to put anywhere.

But the disabilities go far deeper. The homeless are not entitled to have property. The U.S. Supreme Court has held that wealth is not a suspect category for purposes of the Fourteenth Amendment.<sup>33</sup> Nor are the homeless entitled, as a constitutional matter, to housing: the Supreme Court has held that housing is not a fundamental right.<sup>34</sup> The “no-rights” thus add up: no right to be anywhere; no right to have anything; no right to keep what you do have, etc. The whole of “no property” is, in this sense, greater than the sum of its parts, a complex legal state in which one is literally a shadow, a photographic negative of the complex constellation of qualities and attributes that constitute wealth.

The iterative disabilities and “no-rights” that compose “no property” may help account for that part of homeless advocacy that has sought to establish privileges to do such things as panhandle, sleep outdoors, and sit around in public spaces. If won, these freedoms only make it easier for the homeless to deal with their homelessness; they do nothing to make it easier to move out of homelessness or to address the factors—individual or structural—that contribute to homelessness.<sup>35</sup> But

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31. *Id.* at 80.

32. Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295 (1991).

33. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

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

35. See, e.g., Wes Daniels, “*Derelicts*,” *Recurring Misfortune, Economic Hard Times and Lifestyle Choices: Judicial Images of Homeless Litigants and Implications for Legal Advocates*, 45 BUFF. L. REV. 687, 729 (1997) (“[e]ven when criminalization lawsuits are successful, the rights established are negative rights, in that at most they

it is no mystery why advocacy has moved in the rather limited direction of making homelessness more tolerable. Begging, sleeping out of doors, taking up space in libraries—these are the few freedoms that still conceivably can be sought once the larger question of entitlements to housing and wealth are foreclosed.

Interestingly, courts have had a hard time finding ways to recognize even these cramped rights to be homeless more effectively. Given the case law declining to recognize rights to wealth or housing, advocates for, and courts sympathetic to, the homeless have had to turn to precedents holding it unconstitutional to criminalize status rather than specific enumerated acts.<sup>36</sup> Thus, the arguments go, if statutes make it unlawful to, say, sleep or bathe in public parks, but the conditions under which the homeless find themselves leave them no alternative but to sleep and wash in the open, then they will be punished for simply being homeless, i.e., for their status.<sup>37</sup>

This path of argumentation almost always leads to an inquiry into the “involuntariness” of various aspects of homelessness.<sup>38</sup> If persons who are homeless do not have to sleep in the park, but are free to sleep elsewhere, then anti-camping statutes do not in fact penalize homelessness. In a curious loop, then, this litigation strategy moves advocates and courts right back into the individual/structural causal debate: only if the homeless have “no choice” but to be homeless are they entitled to relief. Not only does this avenue move back in the direction of blame, but also the strategy is easy to circumvent. If a municipality can show, for example, that it provides shelter beds, regardless how few or how desirable they might be, then those sleeping in parks must be doing so voluntarily, and anti-camping ordinances do not function to penalize persons simply for being homeless.<sup>39</sup>

Surely these strategies, however sensible from a legal perspective, are an indirect and unreliable way of providing relief. The “no property” paradigm offers potential as a structure in which to understand

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restrict ways in which government can punish homeless people for engaging in certain types of behavior, such as begging or living in public.”)

36. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962); *Powell v. Texas*, 392 U.S. 514 (1968).

37. The case most strongly typifying this approach is *Pottinger v. City of Miami*, 810 F. Supp. 1551 (1992), *remanded*, 40 F.3d 1155 (11th Cir. 1994). But other courts have disagreed with the notion that statutes regulating such activities as outdoor sleeping and washing punish status. See, e.g., *Davison v. City of Tucson*, 924 F. Supp. 989 (D. Ariz. 1996); *Tobe v. City of Santa Ana*, 892 P.2d 1145 (Cal. 1995).

38. See, e.g., *Pottinger*, 810 F. Supp. at 1563–64.

39. See, e.g., *Joel v. City of Orlando*, 232 F.3d 1353 (11th Cir. 2000), *cert. denied*, 532 U.S. 978 (2001).

the legal and social (non)position in which the homeless are situated. While it is important to continue to engage with questions of long-term causes of, and solutions to, homelessness, it is equally important to understand the attributes of homelessness in the present. “No property” at least begins to describe these attributes.

Think of all the “twigs” in the “bundle of sticks” that metaphorically constitutes property. A property owner typically has the right to sell his or her property, to give it away, to exclude others from using it without permission, to devise it at death, and so on. Now try to consider having no rights to do any of these things—what one does not own, one cannot sell, give away, or exclude others from. At a minimum, “no property” is a set of no rights in this sense.

But “no property” is more complicated than this simple description implies. As Wesley Hohfeld noted long ago, property rights are in an important sense relational.<sup>40</sup> If I have a right of ownership, others have related duties to respect those rights. Thus, a landowner’s property right in his land gives rise to a duty on the part of others to stay off that land unless given permission to enter; the owner’s power to exclude gives rise to a liability on the part of anyone who enters without consent. As non-owners in a world of owners, the homeless have many duties to respect the rights of others, and liabilities to the powers of others, without themselves having property that would give rise to duties and liabilities on the part of others toward them. The homeless are thus seriously vulnerable to the effects of owners’ actions and inactions.

This brief enumeration only begins to depict the legal state in which the homeless find themselves. It would be well to develop a fully comprehensive description of the legal status “no property” creates because it is with the sorts of no rights, disabilities, and vulnerabilities outlined above that effective public policy must deal. In a world of “no property,” to take just one example, an anti-camping ordinance, however well it passes muster under existing law, will be flat out ineffective to stop public sleeping if homeless people have no rights to be in private spaces. The same can be said for statutes designed to regulate begging or loitering; the effectiveness of such statutes will depend directly on whether alternatives to the proscribed acts are realistically available. Ordinances designed to eliminate or curtail behaviors found offensive to those who are not homeless must deal with the options that are, or more accurately, *are not* available to the homeless.

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40. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913).

### III. Conclusion

Much current work on homelessness has been devoted to developing information that would enable us to better understand the causes of homelessness and the formation of attitudes towards homeless people. Yet it is difficult to be optimistic that even perfect data will in fact lead to the kind of wide scale public action for which advocates seem to hope. Let us make the wildly improbable assumption that it could be shown beyond reasonable question that homelessness and other forms of extreme poverty are not the products of individual failure. Let us also assume that it could also be shown that deeply embedded patterns of cognition produce erroneous negative reactions to the poor. Will deep commitments of public resources result from a demonstration of these “facts” about the poor and reactions to them?

Perhaps there has been less public reaction to poverty and homelessness than is optimal because of lack of information. But perhaps information has nothing to do with it. National and state governments in these tough economic times are shedding rather than assuming service obligations. Municipalities, in contrast, have had to assume ever greater and more expensive tasks, not least of which relate to protecting local citizens and public property from national security related threats. Under these circumstances, it is difficult to imagine that many new resources will be devoted to homelessness specifically or poverty more generally. In other words, even the best, most well-supported case demonstrating that it would be just for the government to intervene to help the homeless may not, in fact, provoke intervention—and that is true simply because government cannot afford to do what is necessary.

In the short term, it may be that the best approach to the problem of homelessness would be based on understanding the condition of “no property” in which homeless persons live. “No property” constitutes a distinct legal status under which the homeless confront a series of “no-rights” and liabilities that render them distinctly vulnerable. Effective interventions, either to regulate unwanted behaviors or to improve the conditions under which the homeless live, must take account of the legal disabilities affecting the options open to those who are homeless.