

PROGRESSIVE PROPERTY THEORY AND THE WICKED PROBLEM OF HOMELESSNESS: THE CASE FOR A NATIONAL RIGHT TO SHELTER

Abstract: The United States is experiencing an unparalleled affordable housing and homelessness crisis, and at least 580,000 people are forced to live unhoused each year. Despite this crisis, no federal law has established a right to shelter and the Supreme Court has not yet recognized a constitutional right to housing. In the absence of a national right, various forms of a right to shelter have emerged in individual jurisdictions across the United States. These right to housing alternatives have ranged from the all-encompassing right to shelter that has existed in New York City since 1979 to the more limited right to shelter regimes existing in Washington, D.C. and Massachusetts. Similarly, the Ninth Circuit’s 2018 decision in *Martin v. City of Boise* provides the potential contours for a right to shelter built on Eighth Amendment jurisprudence. The growing national homelessness and affordable housing crisis demands bold action—the property system in the United States must be reoriented if it is to remain fit for purpose. This Note explores the development of right to shelter regimes through the lens of Resilient Property Theory (RPT) and conceptualizes the homelessness crisis as a wicked property problem: a large-scale and existential threat to the resilience of the state and vulnerable members of society rooted in the property system. This Note argues that the emergence of individual jurisdictional rights to shelter are part of various state responses to the increasingly wicked property problem of homelessness that simultaneously allocate resilience to individuals experiencing homelessness. Finally, this Note calls for a national right to shelter, arguing that individual jurisdictional rights to shelter provide an example of a progressive property approach to rights realization that actualizes a potential framework for a future national right to shelter.

*Reservations at the Days Inn
We was living out a hotel at the time
Breakfast, lunch and dinner, chicken from kentucky fried
Mama babysitting section 8 vouchers the move
When nothing else to lose but a burger flipping job
Close my eyes inside the swap meet and imagine it’s a mansion*

—Kendrick Lamar, *County Building Blues*¹

¹ KENDRICK LAMAR, *County Building Blues*, on GOOD KID, M.A.A.D CITY, TARGET DELUXE EDITION (Aftermath/Interscope Records 2012).

INTRODUCTION

Holly, a thirty-eight-year-old customer service specialist, and Kiel, a forty-year-old roofer, earned a total of \$80,000 in 2021.² They lived in Warwick, Rhode Island and were evicted by their landlord a few months after Holly gave birth to their fourth child.³ The couple had never missed a rent payment and had a stable income, including a federally-issued housing voucher that helped cover part of their rent.⁴ Nevertheless, their landlord wanted their apartment, so when they could not find another affordable rental, they were made homeless—forced to flit between hotels and from campground to campground.⁵

David, a fifty-eight-year-old who grew up in Inglewood, California, started living outside after he was forced to quit his job with a railroad to take care of a sick family member.⁶ A former firefighter for the Oregon forestry department, David studied psychology in college and uses his prior studies to help other members of his community in Venice Beach in Los Angeles.⁷ Larry, forty-one, lives with his wife and dog in their thirty-five-year-old RV by the Columbia River in Portland, Oregon.⁸ Larry used to work as a car salesperson before he started using prescription painkillers following an accident some twenty years ago.⁹ Jeremiah moved to Las Vegas in 2006 after being discharged from the United States Marine Corps.¹⁰ He worked as a stagehand and

² Alexa Gagosz, *How a Hard-working, Middle-class Family Spiraled into Homelessness*, BOS. GLOBE (Dec. 17, 2022), <https://www.bostonglobe.com/2022/12/17/metro/how-hard-working-middle-class-family-spiraled-into-homelessness/> [https://perma.cc/AK2M-R3UU].

³ *Id.* This Note deliberately uses the terms “person experiencing homelessness,” “unhoused” person, and “unsheltered” person rather than “homeless person” or “the homeless.” Terms such as “homeless person” deny an individual’s humanity and reduce an individual to their experience of homelessness while also reinforcing negative stereotypes and harmful assumptions regarding individuals’ personal situations and circumstances. See, e.g., ENDEAVORS, *Homeless vs Experiencing Homelessness: Why Vocabulary Matters* (Jan. 16, 2020), <https://endeavors.org/community-services-news/homeless-vs-experiencing-homelessness-why-vocabulary-matters/> [https://perma.cc/7RJX-3JQT] (describing the importance of using “people-first language” and the harmful effects of terms such as “homeless”).

⁴ Gagosz, *supra* note 2.

⁵ *Id.* Their landlord claimed to need the apartment for a relative. *Id.* Because Holly and Kiel rented on a month-to-month basis, the landlord was only legally required to provide them with thirty days’ notice. *Id.*

⁶ Robert Karron, *Op-Ed: Profiles of People Living in Homeless Encampments. It’s Rarely What You’d Expect*, L.A. TIMES (May 29, 2023), <https://www.latimes.com/opinion/story/2022-05-29/venice-library-homeless-encampment-interviews> [https://perma.cc/34ZB-F9WL].

⁷ *Id.*

⁸ Angela Hart, *Sobering Lessons in Untying the Knot of a Homeless Crisis in Portland*, THE COLUMBIAN (June 27, 2022), <https://www.columbian.com/news/2022/jun/27/sobering-lessons-in-untying-the-knot-of-a-homeless-crisis-in-portland/> [https://perma.cc/RJ6Y-WNLD].

⁹ *Id.*

¹⁰ Las Vegas Downunder, *Homeless Las Vegas 2022 (Stories of homeless) Episode 1*, YOUTUBE (Apr. 11, 2022), https://www.youtube.com/watch?v=7Orl8_bRl1m4.

went on tour with bands such as Metallica.¹¹ In 2017, Jeremiah was made homeless and he now lives in a sewer tunnel beneath the Las Vegas strip.¹²

These stories represent some of the at least 582,462 people that experienced homelessness in the United States in 2022.¹³ They also provide a small snapshot of the many causal factors that leave individuals unhoused each year.¹⁴ At the individual level, the immediate trigger may be a health issue or loss of work, but these factors mask the more critical systemic cause: a fundamental lack of affordable housing.¹⁵ Housing insecurity, homelessness, and housing unaffordability go hand in hand.¹⁶ Nationwide, the United States has a shortfall of seven million ‘affordable and available’ homes for renters with the lowest incomes: leaving only thirty-six units of rental housing for every one hundred households with extremely low incomes.¹⁷ As the supply of affordable

¹¹ *Id.*

¹² *Id.* In 2019, an estimated three hundred people experiencing homelessness in southern Nevada lived in underground tunnels beneath Las Vegas. John L. Smith, *Beneath Las Vegas’ Glittering Strip, Homeless People Live in Storm Tunnels*, HUFFPOST (Dec. 17, 2019), https://www.huffpost.com/entry/las-vegas-homeless-storm-tunnels_n_5df78f79e4b0ac01a1e3cac6 [<https://perma.cc/DDF8-A4KF>]. Individuals experiencing homelessness in urban environments in the United States have frequently lived in underground spaces. *See, e.g.*, John Tierney, *In Tunnel, ‘Mole People’ Fight to Save Home*, N.Y. TIMES (June 13, 1990), <https://www.nytimes.com/1990/06/13/nyregion/in-tunnel-mole-people-fight-to-save-home.html> [<https://perma.cc/HQC5-HS56>] (describing the communities of individuals experiencing homelessness living in the Robert-Moses-constructed railroad tunnels beneath Riverside Park on the Upper West Side of Manhattan, New York).

¹³ HUD 2022 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, U.S. DEP’T HOUS. & URB. DEV. (Dec. 6, 2022), https://files.hudexchange.info/reports/published/CoC_PopSub_NatTerrDC_2022.pdf [<https://perma.cc/9L6T-LQBY>]. The U.S. Department of Housing and Urban Development (HUD) data is based on a Point-in-Time (PIT) count, where individual Continuums of Care (CoCs) across the United States conduct a count of individuals experiencing homelessness in a particular area over one night, usually in late January. *See* GREGG COLBURN & CLAYTON PAGE ALDERN, HOMELESSNESS IS A HOUSING PROBLEM: HOW STRUCTURAL FACTORS EXPLAIN U.S. PATTERNS 17 (2022) (discussing the interaction between individual and structural causal factors in explaining rates of homelessness). Nonprofit stakeholders and other observers in the housing and homelessness space have identified significant deficiencies in HUD’s PIT count methodology, however, suggesting that the data likely significantly underestimates the number of individuals experiencing homelessness. *See id.* at 45–46, 49 (detailing deficiencies in HUD’s PIT count methodology that result in a “gross mischaracterization” of the scale of homelessness in the United States).

¹⁴ *See* COLBURN & ALDERN, *supra* note 13, at 7–10, 91–92 (discussing how homelessness implicates both individualized and structural causes).

¹⁵ *Id.*

¹⁶ *See id.* at 127–36 (describing market dynamics and the impact of low affordable housing supply on rates of homelessness). Scholars identify the lack of affordable housing as one of the central causes of modern homelessness because the limited supply leaves individuals with low-incomes unable to access housing and forces them to experience homelessness as a result. *See id.* (describing how the low supply of affordable housing precipitates homelessness).

¹⁷ *See The Gap: A Shortage of Affordable Rental Homes*, NAT’L LOW INCOME HOUS. COAL. 1, 5 (Apr. 2022), https://nlihc.org/sites/default/files/gap/Gap-Report_2022.pdf [<https://perma.cc/TL5B-SP2L>] (detailing significant gaps in the supply of affordable housing). “[E]xtremely low-income renter households” are defined as households with incomes either equal to or below the federal poverty

housing continues to fail to keep pace with demand, this dynamic will only worsen.¹⁸

The United States is undergoing an unparalleled affordable housing and homelessness crisis that long precedes recent economic and financial instability.¹⁹ Despite official estimates placing the number of individuals experiencing homelessness at a minimum of 580,000, the episodic nature of homelessness means as many as five million people in the United States may experience homelessness at any point during the year.²⁰ Similarly, more than twenty mil-

line (FPL) or whose income is 30% or less of the area median income (AMI). *Id.* at 2. The 2023 federal poverty guideline for a single-person household is \$14,580. *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Programs*, OFF. ASSISTANT SEC'Y FOR PLAN. & EVALUATION, <https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines> [<https://perma.cc/7CQ4-V99X>].

¹⁸ See *The State of the Nation's Housing*, JOINT CTR. FOR HOUS. STUD. HARV. UNIV., 35–36 (2022), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_State_Nations_Housing_2022.pdf [<https://perma.cc/82GB-E5UU>] (describing low-income households' increased difficulties in making rent following the COVID-19 pandemic and rising housing instability); German Lopez, *Homeless in America: The Homelessness Crisis Is Getting Worse*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html> [<https://perma.cc/CK2D-JZFD>] (describing increasing rates of homelessness and housing insecurity nationwide).

¹⁹ See *The State of the Nation's Housing*, *supra* note 18, at 6 (discussing the ongoing housing affordability crisis). The scale of the affordable housing crisis in the United States is stark and incapable of over-exaggeration. See *The Gap: A Shortage of Affordable Rental Homes*, *supra* note 17, at 4 (describing the significant gaps between the availability of housing for households in different income categories). “Modern homelessness” first emerged in the 1970s and the unavailability of affordable housing has been a decades-long issue. See COLBURN & ALDERN, *supra* note 13, at 46–47 (describing the emergence of the “modern era of homelessness” in the late 1970s, which became the focus of national attention in the 1980s recession); Ian Frazier, *Hidden City: New York Has More Homeless Than It Has in Decades. What Should the Next Mayor Do?*, NEW YORKER (Oct. 28, 2013), <https://www.newyorker.com/magazine/2013/10/28/hidden-city#:~:text=New%20York%20has%20more%20homeless,should%20the%20next%20mayor%20do%3F&text=For%20baseball%20games%2C%20Yankee%20Stadium,then%20would%20have%20to%20stand.> [<https://perma.cc/68A8-JEPU>] (defining the term “modern homelessness” and highlighting the beginning of this trend in the 1970s).

²⁰ See Ben A. McJunkin, *The Negative Right to Shelter*, 111 CAL. L. REV. 127, 134 (2023) (describing the numbers of Americans that may experience homelessness during any given year). The vast difference between official and unofficial estimates of the number of individuals experiencing homelessness each year results from deficiencies in U.S. government homeless count methodology, see *supra* note 13, as well as the “temporary and cyclical” nature of homelessness. See McJunkin, *supra*, at 134 n.36 (detailing studies placing the true number of individuals experiencing homelessness as anywhere from “2.5 to 10.2 times greater than can be obtained using a point-in-time count”). It is also critically important to note that the experience of homelessness in the United States is inherently racialized. See COLBURN & ALDERN, *supra* note 13, at 42 (describing the disproportionate impact of homelessness on Black and Indigenous people). Although Black people make up 13% of the U.S. population, more than 40% of people experiencing homelessness each night are Black. *Id.* Similarly, individuals that identify as Indigenous are more than three times as likely to experience homelessness than their proportion in the general population would suggest. *Id.* at 42–43. Poverty on its own does not adequately account for these disproportions; these disproportions more likely result from the broader social exclusion experienced by many members of racial and ethnic minority groups in the United States. See *id.* at 43 (describing the ways in which social exclusion contributes to increased

lion individuals may be forced to live without a home at some point during their lifetime.²¹ Long-term trends have driven significant demographic changes in the populations most likely to experience homelessness: while in the 1980s families made up only 1% of the population experiencing homelessness in the United States, by 2014 this figure was about 37%.²² The impact that homelessness has on individuals cannot be overstated: homelessness denies individuals' humanity and strips away their most basic human dignities.²³ Homelessness is anathema to freedom and leads to violence, reduced health, and death.²⁴

Despite this overwhelming housing and homelessness crisis, there is no recognized federal or constitutional right to shelter in the United States.²⁵ In 1979, in *Lindsey v. Normet*, the United States Supreme Court appeared to foreclose the development of a constitutional right to housing when it held that the Constitution

rates of homelessness among Black and other marginalized racial minority groups in the United States).

²¹ See McJunkin, *supra* note 20, at 134 (detailing estimates of how many people are expected to experience homelessness at least once during their lifetime).

²² See *Families with Children Experiencing Homelessness: The Causes, Risks and Realities of Homelessness in America*, NAT'L COAL. FOR HOMELESS, <https://nationalhomeless.org/families-youth-education/> [<https://perma.cc/BP6Q-7MFP>] (describing the prevalence of homelessness in children and families); *America's Youngest Outcasts: A Report Card on Child Homelessness*, AM. INSTS. FOR RSCH. & NAT'L CTR. FAM. HOMELESSNESS 1, 9 (Nov. 2014), <https://www.air.org/sites/default/files/2021-06/Americas-Youngest-Outcasts-Child-Homelessness-Nov2014.pdf> [<https://perma.cc/F96Y-BCQA>] (describing child homelessness in the United States).

²³ See Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L.J. 371, 384 (2000) (describing the indignities of homelessness).

²⁴ See Jeremy Waldron, *Homelessness and the Issue of Freedom*, J. CONST. L. 27, 33 (2019) (describing the ways in which homelessness deprives individuals of freedom); Erin McCormick, 'Homelessness Is Lethal': US Deaths Among Those Without Housing Are Surging, THE GUARDIAN (Feb. 7, 2022), <https://www.theguardian.com/us-news/2022/feb/07/homelessness-is-lethal-deaths-have-risen-dramatically> [<https://perma.cc/YT4K-2FR5>] (describing a 77% increase in the number of individuals dying while experiencing homelessness in the United States over the last five years). According to one estimate, a minimum of twenty people experiencing homelessness die across the United States each day. HOMELESS DEATHS COUNT, <https://homelessdeathscount.org/> [<https://perma.cc/X9JD-BXH5>]. In addition to deaths resulting directly from living outdoors or related medical conditions, individuals experiencing homelessness are also on the receiving end of a horrific and incomprehensible level of violence. See, e.g., Margot Kushel, *Violence Against People Who Are Homeless: The Hidden Epidemic*, UCSF BENIOFF HOMELESSNESS & HOUS. INITIATIVE (July 14, 2022), <https://homelessness.ucsf.edu/blog/violence-against-people-homeless-hidden-epidemic#:~:text=People%20with%20mental%20health%20problems,within%20the%20past%20six%20months> [<https://perma.cc/Y2LV-5P7U>] (describing the high rates of violence against people experiencing homelessness and indicating that eighty-five individuals experiencing homelessness in Los Angeles were murdered during 2021 alone).

²⁵ See Lisa T. Alexander, *Occupying the Constitutional Right to Housing*, 94 NEB. L. REV. 245, 257 (2015) (detailing how there is no formalized legal or constitutional basis for a right to housing in the United States); McJunkin, *supra* note 20, at 131 (stating that only a limited number of jurisdictions have introduced a positive or affirmative right to shelter in the United States). The lack of an affirmative right to housing arguably accords with the broader orientation of the U.S. Constitution and American legal framework, which generally protect negative rights rather than create positive governmental obligations. See generally Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1 (2005).

did not guarantee access to housing.²⁶ *Lindsey* dealt with a class-action case challenging the constitutionality of Oregon's Forcible Entry and Wrongful Detainer (FED) Statute, after the appellants' landlord tried to evict them when they withheld rent based on the uninhabitability of their apartment.²⁷ The Court rejected the appellants' argument that the landlord's move to evict them implicated the fundamental interests of a citizen's right to maintain peaceful possession of their home and obtain adequate shelter for themselves and their family.²⁸ There is no other formalized national legal right to housing currently recognized in the United States.²⁹

²⁶ See *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (holding that the U.S. Constitution does not guarantee housing rights); Alexander, *supra* note 25, at 258 (describing the Supreme Court's foreclosing of a constitutional right to housing in *Lindsey*); David Bryson, *The Role of the Courts and a Right to Housing*, in *A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA* 205 (Rachel Bratt, Michael E. Stone & Chester Hartman eds., 2006) (stating that 1970s Supreme Court decisions foreclosed, at least temporarily, constitutional guarantees of housing). The functional result of the Court's holding has been to foreclose the possibility of a constitutional right to housing in the United States in the immediate term. See *Lindsey*, 405 U.S. at 74 (holding that there is not a constitutionally-guaranteed right to housing); Alexander, *supra* note 25, at 259 (discussing the fallout from the Supreme Court's decision in *Lindsey*); Ann Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 212 (2003) (describing the failure of efforts by litigants to obtain housing via the courts following the Supreme Court's decision in *Lindsey*).

²⁷ See *Lindsey*, 405 U.S. at 59–60, 92 n.1 (describing plaintiffs' seeking of declaratory judgement that the "Oregon Forcible Entry and Wrongful Detainer [(FED)] Statute" was unconstitutional and certification of the suit as a class action). The Lindseys (plaintiffs/appellants) paid \$100 on a month-to-month basis to rent an apartment in Portland. *Id.* at 58–59; Alexander, *supra* note 25, at 258. The Portland Bureau of Buildings declared the apartment unfit for habitation due to housing code violations. See *Lindsey*, 405 U.S. at 92 n.2 (describing the multiple violations issued to appellants' landlord that rendered their apartment unfit for human habitation). The Lindseys had spent two years trying to find an alternative apartment but were unable to do so due to the very low availability of housing and the physical disability of Mr. Lindsey. See Burkhart, *supra* note 26, at 212 (describing the factual circumstances of the named plaintiffs in *Lindsey*). The FED Statute governs evictions in Oregon and allows landlords to seek possession of their property if a tenant is overdue in paying their rent. *Lindsey*, 405 U.S. at 62–63; OR. REV. STAT. § 105.115 (2020).

²⁸ See *Lindsey*, 405 U.S. at 74; Brief for Appellants at 16, *Lindsey*, 405 U.S. 56 (No. 70-5045) (detailing appellants' equal protection arguments). Appellants urged that a citizen's right to "peaceful possession" of their home was a fundamental interest and thus the Court should apply strict scrutiny in reviewing the FED Statute's constitutionality. Brief for Appellants at 16, *Lindsey*, 405 U.S. 56 (No. 70-5045). In their brief, appellants argued that the interests of Oregon tenants burdened by the FED Statute had a significant historical basis and had "long been considered by our courts and legislative bodies to be fundamental interests." See *id.* (detailing appellants' equal protection arguments). In support of their argument that tenants had a right to maintain possession of their home, appellants contended that the Court's deference to the "sanctity of the home" had been demonstrated in a slew of Court decisions. *Id.* at 18. Appellants cited, for instance, the Harlan dissent in *Poe v. Ullman* in which Justice Harlan reasoned that the place of the home, as the center of family life, was so fundamental as to implicate multiple constitutional rights. See *id.* at 16–17 (citing *Poe v. Ullman*, 367 U.S. 497, 551–52 (1961) (Harlan, J., dissenting)); see also *Ullman*, 367 U.S. at 551–52 (Harlan, J., dissenting) (describing the ways that "the home" implicates broader "liberty" and "privacy" rights protected by the Due Process Clause and the Fourth Amendment).

²⁹ See Alexander, *supra* note 25, at 259 (discussing how a right to housing has not been formalized in the United States). Scholars have identified other potential bases for a right to housing such as

Notwithstanding the absence of a constitutional or federally-guaranteed right, various jurisdictions have attempted to create a right to shelter or housing.³⁰ This has included New York City, Washington, D.C., Massachusetts, and California.³¹ Perhaps most recently, in 2018, in *Martin v. City of Boise*, the Ninth Circuit Court of Appeals recognized a limited right to shelter by holding

the New Deal policies of Franklin Delano Roosevelt (FDR) or consecutive congressional housing acts but none of these are currently recognized. *See id.* at 257 (exploring scholarship regarding the FDR New Deal policies and their inclusion of a right to housing); Chester Hartman, *The Case for a Right to Housing*, 9 HOUS. POL'Y DEBATE 223, 231–32 (1998) (discussing successive Congressional Housing Acts). The New Deal policies of FDR emphasized the provision of a basic social safety net, which included a proposed “second Bill of Rights” incorporating a right to housing. *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 421–23 (1987) (describing FDR’s New Deal and its accompanying efforts to effect institutional change that redistributed power and rebalanced protections for different society members); Franklin D. Roosevelt, 1944 State of the Union Address (Jan. 11, 1944), <https://www.fdrlibrary.org/address-text> [<https://perma.cc/HFK8-23JF>] (capturing FDR’s 1944 State of the Union Speech during which he called for the “right of every family to a decent home”). The goal of ensuring decent housing for all U.S. families was subsequently included in the preamble to the 1949 Housing Act and re-stated, in some form, in the 1968, 1974, and 1990 Housing Acts. Housing Act of 1949, 42 U.S.C. § 1441 (2018) (containing in its preamble the goal of the “the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family”); *see* Hartman, *supra*, at 231 (discussing successive Housing Acts passed by Congress). It is very important to note that regardless of its stated aims, New Deal policies that sought to increase home ownership rates were centrally implicated in the racist practices of redlining. *See* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 63–65 (2018) (describing the creation of the Home Owners’ Loan Corporation (HOLC) and its role in redlining).

³⁰ *See* S. Lynn Martinez, *An American Vision: The Right to Shelter*, 12 PUB. INT. 1, 6 (1992) (describing how, in the absence of a constitutional or other legal right to shelter, advocates have used litigation to attempt to establish various forms of a right to shelter). One explanation for the emergence of multiple localized rights to shelter, despite the failure of efforts to create a national right to shelter, is the different ways that state power is perceived depending on the scale at which it is exercised. *See* Mariana Valverde, *Seeing Like a City: The Dialectic of Modern and Premodern Ways of Seeing in Urban Governance*, 45 LAW & SOC’Y REV. 277, 287 (2011) (discussing the “naturalization of the local scale of government” such that a localized exercise of the “police power of the state” is seen as legitimate in ways it would not when exercised at the national level); LORNA FOX O’MAHONY & MARC L. ROARK, *SQUATTING AND THE STATE: RESILIENT PROPERTY IN AN AGE OF CRISIS* 359–61 (2022) (describing Valverde’s notion of “[s]eeing like a city,” in opposition to models of centralized governance, and the ways in which local governance frequently avoids many of the challenges stymying efforts at governance at the national level).

³¹ *See* D.C. CODE ANN. § 4-754.11 (West 2022) (establishing a right for clients served by the Washington, D.C. CoC to access shelter in “severe weather conditions”); MASS. GEN. LAWS ANN. ch. 23B, § 30 (West 2023) (promulgating provisions for administration of “emergency housing assistance” to families in Massachusetts, including “pregnant woman [sic] with no other children”); *Ensuring the Right to Shelter: The First Court Decision in Callahan v. Carey Requiring the Provision of Shelter for Homeless Men in New York City*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/wp-content/uploads/2014/08/CallahanFirstDecision.pdf> [<https://perma.cc/8JFM-GMCP>] (detailing the initial judgment of the court finding that New Yorkers experiencing homelessness around the Bowery were entitled to board and lodging); Gary Blasi, *Legal Right to Shelter: The Current Right-to-Housing Debate Often Fails to Note That for Many Years Indigent Californians Had a Right to Housing*, 42 L.A. LAW. 30, 30–32 (2019) (describing proposals for a right to housing in California).

that prosecuting individuals experiencing homelessness for sleeping outdoors, without providing shelter, violated their constitutional rights.³²

In its most general terms, a right to shelter is a legally-mandated obligation for government entities to provide basic shelter for individuals experiencing homelessness with low incomes and without access to other resources.³³ There is a difference in meaning between a right to shelter and a right to housing, even though these terms may be used quasi-interchangeably.³⁴ This Note focuses primarily on the right to shelter, a thinner concept that centers on providing shelter to the most vulnerable populations experiencing homelessness.³⁵ This Note uses the theoretical framework of Resilient Property Theory (RPT) to provide a new way of understanding and responding to the contemporary homelessness crisis.³⁶ Using RPT, this Note conceptualizes the contemporary U.S. homelessness crisis as what RPT terms a wicked property problem: a large-scale, existential threat to the state and vulnerable populations' resilience rooted in the property system.³⁷ Utilizing the framework of Progressive Property Theory (PPT)—which argues for a reorientation of the property system around the goal of facilitating access to resources for all members of society—this Note argues that this crisis necessitates expanding access to property through a national right to shelter.³⁸

Part I of this Note begins by providing an overview of RPT and PPT as theoretical perspectives on the right to shelter and exploring individual U.S. jurisdictions' approaches to implementing a right to shelter.³⁹ Part II of this Note explores arguments for and against the right to shelter, building on the RPT and PPT frameworks and the jurisdictional examination of the previous

³² See *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018) (holding that prosecuting individuals experiencing homelessness under anti-camping ordinances without providing sufficient shelter violates the Eighth Amendment), *amended by* 920 F.3d 584 (9th Cir. 2019).

³³ See, e.g., Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 276 (2009) (describing the role of rights in tackling social and societal problems); Martinez, *supra* note 30, at 2 (discussing the right to shelter); McJunkin, *supra* note 20, at 131 (detailing the components of a right to shelter).

³⁴ See Alexander, *supra* note 25, at 253 (describing the right to shelter and the right to housing as two distinct concepts). A right to housing is generally understood as a transnational concept that emphasizes the role of housing in the promotion and preservation of human rights, building on the Universal Declaration of Human Rights (UDHR) and International Covenant on Economic, Social and Cultural Rights (ICESCR). See, e.g., *id.* at 251–52 (describing the basis of the “human right to housing” as contained within international treaties and human rights declarations).

³⁵ See *id.* at 253 (delineating the difference between the right to housing and the right to shelter).

³⁶ See *infra* notes 53–75 and accompanying text.

³⁷ See *infra* notes 53–75 and accompanying text.

³⁸ See *infra* notes 76–89, 163–208 and accompanying text.

³⁹ See *infra* notes 42–122 and accompanying text.

Part.⁴⁰ In Part III, this Note concludes by arguing for a national right to shelter in response to the U.S. homelessness crisis.⁴¹

I. THEORETICAL PERSPECTIVES ON THE RIGHT TO SHELTER AND SUB-NATIONAL APPROACHES TO IMPLEMENTATION IN THE UNITED STATES

This Part begins by exploring theoretical perspectives on the right to shelter and sub-national approaches to the implementation of such a right within the United States.⁴² Resilient Property Theory (RPT) and Progressive Property Theory (PPT) provide two theoretical lenses for the right to shelter and its place within our current and future property law system.⁴³ Combining these two perspectives allows for an examination of the ways in which a more expansive property system, rooted around the right to shelter, could offer a potential solution to the U.S. homelessness crisis.⁴⁴ Section A of this Part explores RPT and the notion of wicked property problems and PPT.⁴⁵ Section B of this Part discusses sub-national approaches to implementing a right to shelter in the United States.⁴⁶

A. Theoretical Perspectives on the Right to Shelter

Subsection 1 of this Section explores RPT and its conceptualization of wicked property problems: complex social problems that interact with the property system.⁴⁷ Subsection 2 of this Section explores PPT as it relates to the ways that the property system allocates access to rights and resources.⁴⁸ RPT explores the ways in which crises, what it terms “wicked property problems,” drive changes to the property system.⁴⁹ Exploring RPT with reference to homelessness provides background on the ways in which the growing crisis of homelessness demands urgent changes to the property system that allocate resilience to vulnerable members of society.⁵⁰ PPT focuses on the role of property laws in providing individuals with the resources they need to flourish and participate fully in society.⁵¹ PPT provides insight into the ways that property laws can be transformed by instituting a right to shelter as part of a property

⁴⁰ See *infra* notes 123–162 and accompanying text.

⁴¹ See *infra* notes 163–209 and accompanying text.

⁴² See *infra* notes 47–122 and accompanying text.

⁴³ See *infra* notes 53–89 and accompanying text.

⁴⁴ See *infra* notes 53–89 and accompanying text.

⁴⁵ See *infra* notes 53–89 and accompanying text.

⁴⁶ See *infra* notes 90–122 and accompanying text.

⁴⁷ See *infra* notes 53–75 and accompanying text.

⁴⁸ See *infra* notes 76–89 and accompanying text.

⁴⁹ See *infra* notes 53–75 and accompanying text.

⁵⁰ See *infra* notes 53–75 and accompanying text.

⁵¹ See *infra* notes 76–89 and accompanying text.

system and thereby promoting human flourishing rather than just wealth-maximization.⁵²

1. Resilient Property Theory (RPT) and Wicked Property Problems

RPT provides a framework for understanding the ways that governments intervene in the property system in response to complex property problems and emerging crises.⁵³ RPT theorists argue that government actors shape and constitute the property system through interventions aimed at providing resilience to both the state and certain groups in society.⁵⁴ RPT focuses on the ways that states respond to wicked property problems: inherently complex property-related issues that are the result of multiple and intersecting causal factors.⁵⁵ Design and urban theorists Horst Rittel and Melvin Webber coined the term wicked problems to describe public policy issues that are so intractable and complex that they appear almost impossible to solve.⁵⁶ The wickedness of such problems results both from their intractability and the fact that they implicate

⁵² See *infra* notes 76–89 and accompanying text.

⁵³ See Marc L. Roark & Lorna Fox O'Mahony, *Comparative Property Law and the Pandemic: Vulnerability Theory and Resilient Property in an Age of Crises*, 82 LA. L. REV. 789, 794–95 (2022) (describing the focus of RPT on the “messiness” of property problems together with government responses in “an ‘age of crises’”). Resilient Property Theory (RPT) is the brainchild of Property Professors Lorna Fox O'Mahony and Marc L. Roark of the University of Essex (U.K.) and University of Tulsa College of Law respectively. *Id.* at 790. RPT theorists argue that RPT is not a normative theory for what form state action *should* take, but rather a methodological approach for understanding state action as it currently occurs. See *id.* at 798 (describing the disjuncture between conventional property theories, which seek to provide normative aims for state intervention and action relating to private property, and RPT, which analyzes and attempts to understand the ways that states act in response to exogenous pressures). As opposed to advancing a normative agenda for state intervention rooted in an ideological perspective, RPT seeks to understand state action in the context of the complex and changing demands on a state and its resources. See *id.* at 798–99 (discussing RPT's focus on understanding state action in comparison to advancing an ideological agenda grounded in a conservative or progressive approach); see also Sue-Mari Viljoen, *Resistance to Reform Property: A ‘Resilient Property’ Perspective*, 38 S. AFR. J. ON HUM. RTS. 24, 33–34 (2022) (describing RPT as diverging from structuralist or normative perspectives on property to focus instead on the state).

⁵⁴ See Roark & Fox O'Mahony, *supra* note 53, at 799 (describing the role of states in “shaping and re-shaping of property law”). RPT argues that responses of government actors to property crises provide new understandings of property and how a state's relationship to property and the rights of property owners are changing in response to external pressure. See *id.* at 798–99 (detailing RPT's focus on the ways in which state interventions into the property system change and shape property rights).

⁵⁵ See FOX O'MAHONY & ROARK, *supra* note 30, at 209–12 (describing wicked property problems as inherently complex problems implicating the property system and involving multiple stakeholders with divergent interests).

⁵⁶ See Horst W.J. Rittel & Melvin M. Webber, *Dilemmas in a General Theory of Planning*, 4 POL'Y SCIS. 155, 160 (1973) (setting out the concept of wicked problems); Roark & Fox O'Mahony, *supra* note 53, at 801 (explaining wicked problems). Rittel and Webber identified ten characteristics of these complex societal problems, including the fact that they lack a precise definitional formulation and there is not an enumerable list of possible solutions to wicked problems. See Rittel & Webber, *supra*, at 160–61 (detailing the characteristics of wicked problems).

multiple stakeholders that have divergent goals and interests.⁵⁷ As a result, there is no collective understanding of wicked problems or the best way to solve them.⁵⁸ Examples of wicked problems identified by scholars in this space include climate change and poverty.⁵⁹

Private property is often implicated in wicked problems because of its central role in allocating power and access to resources in society.⁶⁰ The wickedness of property problems is also heightened by the rivalry inherent in the zero-sum way in which claims are conceived under the current property system.⁶¹ Against this background, rival visions for the way the property system should function are further apparent during periods of increased inequality, societal conflict, or crisis.⁶²

⁵⁷ See FOX O'MAHONY & ROARK, *supra* note 30, at 209 (describing wicked problems and their lack of a collective understanding). Wicked property problems implicate multiple stakeholders with differing values, interests, and goals. See *id.* (discussing the ways that wicked property problems implicate multiple stakeholders). As a result, formulating one singular collective understanding of a wicked property problem—and its potential solutions—is difficult because each stakeholder has a different understanding of the problem, its causes, and its potential remedies. See *id.* at 209–12 (exploring how stakeholders' differing interests and understanding of wicked problems prevent their resolution).

⁵⁸ See *id.* (suggesting that wicked problems “are not readily subject to delimitation, attribution of responsibility, or the identification of definitive solutions” because “they lack a shared interpretation or collective understanding”).

⁵⁹ See Roark & Fox O'Mahony, *supra* note 53, at 803–04 (identifying poverty as an example of a wicked problem); FRANK P. INCROPERA, CLIMATE CHANGE: A WICKED PROBLEM: COMPLEXITY AND UNCERTAINTY AT THE INTERSECTION OF SCIENCE, ECONOMICS, POLITICS, AND HUMAN BEHAVIOR 13 (2016) (arguing that climate change is a wicked problem). To take the example of climate change, it involves multiple stakeholders, ranging from individual consumers to multinational corporations, with different and divergent interests. See INCROPERA, *supra*, at 14 (discussing the ways that climate change involves multiple stakeholders). As a societal rather than a “purely scientific or technical” problem, climate change can only be resolved via public policy and the political process. *Id.* The complexity of the issue, together with the differing interests of the stakeholders, make reaching such a resolution extremely difficult. *Id.*

⁶⁰ See FOX O'MAHONY & ROARK, *supra* note 30, at 212 (stating that private property is frequently at the heart of wicked problems); Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 744 (2009) (arguing that property plays a central role in allocating power in contemporary society).

⁶¹ See Roark & Fox O'Mahony, *supra* note 53, at 796 (describing the adversarial environment forming the backdrop to competing property claims). In addition to conflicts stemming from stakeholders' divergent goals and interests, the “putative rivalrous nature” of property and its scarce resources further heightens the often-adversarial nature of discourse around these problems. See *id.* (describing the rivalrous nature of property and competing property claims). Under the conventional law and economics approach to property law, property is inherently zero sum: simply, you either have it or you don't. See *id.* (discussing how individual property claims are in opposition to each other).

⁶² See *id.* (describing the ways in which conflicts over access to property are foregrounded during periods of societal upheaval). The rivalries between stakeholders and their property claims are compounded by the fact that the property system is both the protector of existing property rights and part of potential solutions to property issues. See *id.* (detailing how property law is both central to protecting existing property rights and to any potential solutions to issues relating to property access). The contested conceptual nature of property also adds to the wickedness of property problems and the difficulties in attempting to find consensus behind certain solutions. See *id.* at 795–96 (describing the

RPT argues for a renewed focus on the role of the state in creating and changing property systems in response to crises that threaten the resilience of the state and members of society.⁶³ RPT argues that wicked property problems or crises such as homelessness reveal states' vulnerability and that, in response, states act to increase their resilience and ensure their continued existence.⁶⁴ When states intervene in the property system, they change the property system in a way that can allocate resilience to vulnerable populations, including individuals experiencing homelessness.⁶⁵ RPT builds on vulnerability theory (VT), a perspective which explores the actions of states and their institutions through the lens of individual bodily vulnerability.⁶⁶ VT argues that vulnerability is a universal human experience, that is, that all humans are inherently vulnerable to external threats to their bodily safety and autonomy.⁶⁷ As a result, state institutions should focus on providing "resilience" to individuals in efforts to help mitigate this vulnerability.⁶⁸

contested ways in which property as a societal institution is uniquely subject to conflicts regarding its origins).

⁶³ See *id.* at 799–800 (describing the central role played by the state in formulating responses to political crises). RPT contends that the primacy of the state and its role in creating property laws is overlooked by conventional property theories, which often view the state's role solely as a disinterested mediator between different property claims. See *id.* at 799 (arguing that paradigms about Anglo-American property law fail to comprehend the central place of states in forming the property system). RPT argues, instead, that states play a central role in constituting the property system. See *id.* (arguing that the state and its institutions have significant power in shaping the property system).

⁶⁴ See FOX O'MAHONY & ROARK, *supra* note 30, at 216 (detailing the ways in which states, as self-interested actors, act in response to their own vulnerability in ways that reinforce and buttress their resilience and legitimacy). RPT theorists posit that the emergence of certain property-related crises that pose threats to states motivate states to then respond to increase their own resilience. *Id.*

⁶⁵ See Roark & Fox O'Mahony, *supra* note 53, at 812, 821, 840 (describing how states assign resilience to themselves and societal groups in ways that change the property system). RPT argues that states' interventions into the property system in response to wicked property problems can provide increased resilience to certain societal groups as well as to the state itself. *Id.*

⁶⁶ See *id.* at 805–07 (describing vulnerability theory and its interaction with RPT). Martha Fineman first developed vulnerability theory in response to perceived shortcomings in the dominant formal equality model in the United States. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 2 (2008) (describing the shortcomings of the formalistic approach to equality dominant in the United States and typically advanced by courts as part of equal protection analyses). Fineman argues that despite popular narratives regarding the diminishing role of the state, the state remains a powerful actor with significant capacity and capability to vindicate public interests. See *id.* at 6, 8 (describing the continued power of the state and its unique ability to pursue "public values"). Vulnerability, Fineman argues, is inherent in the human condition and this engenders a corresponding obligation of social responsibility for states. See *id.* at 8 (arguing that vulnerability is a universal and inevitable human experience that should be at the center of the ways states conceive of their responsibilities to their citizens).

⁶⁷ See Fineman, *supra* note 66, at 9 ("Vulnerability initially should be understood as arising from our embodiment, which carries with it the ever-present possibility of harm, injury, and misfortune from mildly adverse to catastrophically devastating events, whether accidental, intentional, or otherwise.").

⁶⁸ See *id.* at 13 (detailing the focus of vulnerability theory (VT) on the place of societal institutions and their role in providing "'resilience' in the face of vulnerability"). VT argues for an activist

RPT builds on this vulnerability framework to argue that states themselves experience vulnerability in the form of crises and wicked property problems.⁶⁹ These wicked property problems motivate states to legitimate and bolster their authority by providing resilience to certain societal groups.⁷⁰ When a state intervenes in the property system to provide resilience to a certain group, such as individuals experiencing homelessness, it transforms the property system in a way that substantially benefits that particular group.⁷¹ For example, state actions during the COVID-19 pandemic, such as eviction moratoria, are an example of how states allocate resilience in response to wicked property problems.⁷² By allocating resilience to themselves and particular groups in society, states simultaneously re-shape and transform the property system.⁷³ RPT also argues that the state is the primary actor in constituting and forming the property system.⁷⁴ By investigating how state responses change the property system, RPT allows for an exploration of how a right to shelter can be utilized

role for the state to ensure that individuals can access resilience against vulnerability and “[a] [m]ore [p]ositive [e]quality.” See *id.* at 19–22 (describing the increased role of a “[r]esponsive [s]tate” in supervising and monitoring institutions in providing resilience and guarding against vulnerability).

⁶⁹ See FOX O’MAHONY & ROARK, *supra* note 30, at 221–22 (detailing the differences between vulnerability theory and RPT and the focus of RPT on the ways in which states allocate resilience in response to their own vulnerability).

⁷⁰ See *id.* at 216 (detailing the ways in which states, as self-interested actors, act in response to their own vulnerability in ways that reinforce and buttress their resilience and legitimacy).

⁷¹ See Roark & Fox O’Mahony, *supra* note 53, at 812, 821, 840 (describing the ways that states allocate resilience to themselves and how such allocation creates new possibilities within the property system). RPT focuses on the ways in which interactions between a state’s “self-regarding” role in buttressing its own resilience and its “other-regarding role” in allocating resilience within society drive transformations within the property system. See *id.* at 812 (“State responses reveal how the state’s other-regarding responsibilities align with self-regarding actions meant/intended to shore up the authority and legitimacy of state actors and institutions.”); see also Viljoen, *supra* note 53, at 33–34 (discussing RPT’s focus on a “[s]tate’s vulnerability and ability to foster resilience”).

⁷² See Roark & Fox O’Mahony, *supra* note 53, at 840–41 (describing the ways in which the wicked property problems resulting from the COVID-19 pandemic drove states to act to guard against their vulnerability by providing resilience to individuals experiencing homelessness and housing instability).

⁷³ See *id.* (arguing that states’ measures to buttress their legitimacy and provide resilience to individuals experiencing homelessness during the COVID-19 pandemic fundamentally re-shaped and changed the property system). RPT theorists argue that property norms and paradigms define the outer limits of the potential policy solutions open to states. See FOX O’MAHONY & ROARK, *supra* note 30, at 225–26 (describing the role of property norms and the ways in which such norms determine the outer limits of possible state responses to crises). RPT theorists also posit that dominant paradigms and intersubjective understandings regarding the property system, what they describe as the “property *nomos*,” typically govern the ways in which states respond to a particular crisis. See *id.* (describing the ways that property norms provide a “hinterland” that constrains the possible actions of a state). RPT theorists posit that rather than being homogenous, the property *nomos* of a jurisdiction is actually hybrid and represents a fusion of different, overlapping, and competing norms and obligations. See *id.* at 221 (describing the heterogenous nature of the norms making up a jurisdiction’s property paradigms).

⁷⁴ See Roark & Fox O’Mahony, *supra* note 53, at 799 (describing RPT’s focus on understanding the ways that states shape and influence the property system).

by states as part of a response to homelessness that creates a more expansive conception of access to property.⁷⁵

2. Progressive Property Theory (PPT)

PPT challenges the dominant property law framework that analyzes property solely through the prism of the rights accrued by property owners.⁷⁶ At the same time, PPT advances a normative argument that the property law system should promote values that enable individuals to flourish and participate as full citizens in a liberal democracy.⁷⁷

PPT advocates for a new theoretical understanding of property law that emphasizes collective values centered on human dignity and broader societal participation.⁷⁸ Progressive property theorists argue that property touches upon a range of values and that the obligations created by these values reflect judgments regarding what property laws should protect.⁷⁹ Potential values include

⁷⁵ See *id.* at 799–80 (detailing the primacy of the role of the state in forming the property system).

⁷⁶ Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 257 (2019). Instead of focusing solely on the bundle of rights held by property owners, progressive property theorists argue for a greater understanding of the obligations that property owners simultaneously hold. See *id.* at 253 (“At the heart of the *Statement* is the notion that our common conception of property—at core being about the *rights* of owners to exclude and dictate the use of valued resources—pays insufficient attention to the *obligations* of ownership.”). Progressive property theorists also argue that the dominant law and economics framework of the property system does not fully comprehend the ways in which property rights are constrained by interweaving webs of obligations. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 746 (2009) (detailing the ways that conventional property theory overlooks the constraints on property ownership existing in property law).

⁷⁷ See Alexander et al., *supra* note 60, at 744 (suggesting that “property laws should promote the ability of each person to obtain the material resources necessary for full social and political participation”); Weiss, *supra* note 76, at 259 (describing the focus on progressive values undergirding the progressive property system’s approach).

⁷⁸ See Alexander et al., *supra* note 60, at 743 (“[W]e must look to the underlying human values that property serves and the social relationships it shapes and reflects.”). PPT originated in a two-page statement written by four prominent U.S. property law professors—Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer, and Laura S. Underkuffler—published in the *Cornell Law Review* in 2009. See Alexander et al., *supra* note 60, at 743–44 (discussing the need for a new conception of property that supports values inherent to a “free and democratic society”); Weiss, *supra* note 76, at 257 (discussing the origins of PPT). The publishing of the statement of progressive property has been compared, presumably tongue firmly in cheek, with Martin Luther’s nailing of his ninety-five theses to the door of All Saints’ Church, Wittenberg that precipitated the Protestant Reformation. See Weiss, *supra* note 76, at 257 (describing the impact of the publication of the *Statement of Progressive Property*).

⁷⁹ See Alexander et al., *supra* note 60, at 743 (describing the interaction between property law systems and the broader system of values that they promote and protect). The statement’s authors argued that property laws carry internalized judgments regarding what the property system should protect. See *id.* (“Values can generate moral demands and obligations that underlie judgments about the interests that the law should recognize as property entitlements.”). Rather than being naturally predetermined, the property law system is the result of deliberate decisions that allocate power in particular ways. See *id.* at 744 (describing the way that property laws allocate power and determine

human flourishing, individual autonomy, and self-determination.⁸⁰ Conventional property theory, with its utilitarian focus, however, fails to foreground these values adequately, making it morally and normatively deficient as a basis for ordering property relations in contemporary society.⁸¹ PPT argues, instead, that these values should be the focus of the property law system and that property laws should be used to enforce moral obligations that promote collective human flourishing—building upon the capabilities approach.⁸² Accordingly, to enable human flourishing, the property system should be reoriented to provide individuals with the capabilities required for broader human and social development.⁸³ Taking all of this together, proponents of PPT ultimately argue that

access to limited resources). Taking the equal worth of every human being as their foundation, the authors argue that property laws should promote values that enable human flourishing. *See id.* (advancing the normative argument that property laws should provide the framework to support a form of social life that enables human flourishing and broader sociopolitical participation).

⁸⁰ *Id.* at 743–44 (describing the values promoted by the property law system).

⁸¹ *See* Alexander, *supra* note 76, at 748 (describing the article’s normative claims that its theoretical approach toward property law analyses is morally superior because it focuses on enabling human flourishing).

⁸² *See* GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 89 (2012) (describing the capabilities approach advanced by Sen and Nussbaum); Alexander et al., *supra* note 60, at 743–44 (arguing that property law should focus on enabling human development and “full social and political participation”); Weiss, *supra* note 76, at 258 (describing the influence of the capabilities approach on PPT and how it would obligate the property system to support the capabilities that enable human flourishing). Professor Gregory Alexander has expanded upon these notions in subsequent scholarship, where he has detailed his social obligation and human flourishing theories of property. *See, e.g.,* Alexander, *supra* note 76, at 753 (detailing the social obligation theory of property); Gregory S. Alexander, *The Human Flourishing Theory*, CORNELL LEGAL STUD. RSCH. PAPER SERIES NO. 20-02 (Feb. 11, 2020), <https://ssrn.com/abstract=3536381> [<https://perma.cc/XBM3-KEWL>] (describing the development of the human flourishing theory). In contrast to the utilitarian traditions of conventional law and economics property analyses, Gregory Alexander roots PPT in Aristotle’s notion of human flourishing. *See* Alexander, *supra* note 76, at 761, 767 (detailing the ways in which Aristotelian notions regarding human flourishing lay the foundation for a “concrete theory of the social obligation of ownership”); Weiss, *supra* note 76, at 257–58 (describing Gregory Alexander’s focus on Aristotelian ethics when formulating his conception of PPT). The capabilities approach builds from Aristotle’s view that enabling human flourishing should be the ultimate focus of society. *See* Enrica Chiappero-Martinetti, Siddiqur Osmani & Mozaffar Qizilbash, *General Introduction*, in THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH 1, 1 (Enrica Chiappero-Martinetti, Siddiqur Osmani & Mozaffar Qizilbash eds., 2020) (describing the historical antecedents of the capability approach); Weiss, *supra* note 76, at 258 (describing PPT’s central focus on Aristotelian notions of human flourishing). The capabilities approach focuses on the extent to which individuals can function in a society—their capability to do and be certain things. *See* Chiappero-Martinetti et al., *supra*, at 2 (discussing the foundations of the capabilities approach); Martha C. Nussbaum, *The Capabilities Approach and the History of Philosophy*, in THE CAMBRIDGE HANDBOOK OF THE CAPABILITY APPROACH, *supra*, at 13 (describing the focus of the capability approach and its intellectual origins).

⁸³ *See* Weiss, *supra* note 76, at 258–59 (describing the distributional focus of PPT and its interaction with capabilities theory). PPT argues that human flourishing is ultimately dependent on the capabilities of individuals, that is, the extent to which they can access the resources needed to attain human flourishing. *See id.* at 258 (describing the capabilities approach and its interaction with PPT). Progressive property theorists argue that the property law system should promote the social values and other societal prerequisites needed to enable all members of society to attain human flourishing. *See id.* at

its greater understanding of the role of obligations in property law and foregrounding of values promoting human flourishing make it a morally superior basis for property laws compared to conventional property theories.⁸⁴

PPT thus calls for a more expansive property system than typically recognized under conventional property law paradigms, which generally focus on property as an *individual* right.⁸⁵ Instead of focusing on the property rights of individuals, PPT argues that the property system has broader obligations to ensure that all members of society have access to the resources they need to achieve human flourishing and participate fully in society.⁸⁶ Rather than merely mediating private disagreements or safeguarding individual property claims, PPT envisions an activist role for property systems in affirmatively ensuring access to resources.⁸⁷ Progressive property theorists therefore argue that the property system should be reoriented to make it an active vehicle for improving the lives of marginalized members of society.⁸⁸ Applying this framework to property-related issues such as homelessness, PPT theorists argue that policy solutions must involve the reorientation of the property system to enable human flourishing.⁸⁹

258–59 (describing the capabilities approach and its interaction with PPT). Martha Nussbaum, for instance, identifies ten core capabilities that societies should support to enable human flourishing. See MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* 33–34 (2011) (discussing the core capabilities central to a democratic society that enables human flourishing). This includes the capability of bodily health, which incorporates the capability of adequate shelter. See *id.* at 33 (arguing that supporting bodily health, including adequate shelter, should be a central concern in societies).

⁸⁴ See Weiss, *supra* note 76, at 259 (describing the focus of PPT).

⁸⁵ See Alexander et al., *supra* note 60, at 743 (describing how the conception of property as bound up with individual control is insufficient for both mediating property conflicts and helping create institutions related to property). A central component of the work of progressive property theorists such as Gregory Alexander has been to examine the ways that even individual property rights are in fact constrained by norms of social obligations. See, e.g., GREGORY S. ALEXANDER, *PROPERTY AND HUMAN FLOURISHING* 40, 56–62 (2018) (describing the ways that property owners owe obligations to each other). This Note is primarily focused on PPT's analysis of general obligations: a collective obligation owed by and to society more broadly. See *id.* at 55–57 (categorizing different property-related obligations as general or specific obligations).

⁸⁶ See, e.g., ALEXANDER, *supra* note 85, at 6–9 (arguing that communities should ensure individual access to the capabilities and resources needed to allow all members to attain human flourishing); Alexander et al., *supra* note 60, at 743–44 (arguing that the property system should promote society members' ability to access the resources they need to attain human flourishing and be able to take part fully in society).

⁸⁷ See, e.g., Alexander et al., *supra* note 60, at 743–44 (arguing that the property system should enable society members to access the resources they need to attain human flourishing and be able to take part fully in society).

⁸⁸ See ALEXANDER, *supra* note 85, at 320 (arguing that the property system should be used to support efforts that improve the lives of marginalized members of society).

⁸⁹ See *id.* at 319–20 (arguing that progressive property solutions to property-related problems should be centered around human flourishing).

B. Sub-National Approaches to the Right to Shelter in the United States

This Section explores sub-national approaches to a right to shelter in the absence of a nationally-recognized right.⁹⁰ Subsection 1 of this Section discusses broad right to shelter regimes in the United States, focusing on the right to shelter existing in New York City and attempts to introduce a human right to housing in California.⁹¹ Subsection 2 of this Section explores examples of more limited rights to shelter in the United States in Washington, D.C., Massachusetts, and potentially the Ninth Circuit following its decision in *Martin v. City of Boise*.⁹²

1. A Broad Right to Shelter: Right to Shelter by Consent Decree in New York City and a Potential Human Right to Housing in California

Broad right to shelter regimes intend to provide a right to shelter to all individuals experiencing homelessness rather than limiting the right to certain eligible groups or populations.⁹³ New York City's right to shelter, established via litigation in 1979, and recent efforts in California to establish a right to housing, provide two such examples of broad right to shelter regimes in the United States.⁹⁴

Callahan v. Carey was a class-action suit that challenged the New York City government's failure to provide shelter to individuals experiencing homelessness.⁹⁵ The lead plaintiff in *Callahan* was Robert Callahan, a fifty-four-year-old former short-order cook who slept outdoors or in the sometimes vio-

⁹⁰ See *infra* notes 93–122 and accompanying text.

⁹¹ See *infra* notes 93–108 and accompanying text.

⁹² See *infra* notes 109–122 and accompanying text.

⁹³ See Blasi, *supra* note 31, at 32, 34 (describing the expansive right to shelter in place in New York City and proposed in California and contrasting it with more limited potential rights to shelter such as in the Ninth Circuit following *Martin*).

⁹⁴ See ACA-10, 2019-2020 Cal. State Assemb. (Cal. 2020) (containing proposed assembly constitutional amendment creating a “human right to housing” in California); SCA 9, 2021-2022 Cal. State S. (Cal. 2022) (containing provisions of proposed senate constitutional amendment establishing a “fundamental human right to housing” in California); *Ensuring the Right to Shelter: The First Court Decision in Callahan v. Carey Requiring the Provision of Shelter for Homeless Men in New York City*, *supra* note 31 (detailing the trial court's initial judgment in *Callahan v. Carey*).

⁹⁵ See Amended Complaint at 1, *Callahan v. Carey*, No. 72581/79 (N.Y. Sup. Ct. filed Apr. 30, 1980) (describing the class members as “homeless men without income or property” and detailing the legal bases for the causes of action). *Callahan* was brought by pro bono attorney Robert Hayes and The Legal Aid Society. *Id.*; Frazier, *supra* note 19 (describing how Robert Hayes brought *Callahan* pro bono). Robert Hayes eventually went on to co-found the Coalition for the Homeless in New York City with two other homelessness advocates after leaving private practice. See Bridget Read, ‘It Was Imperfect by Definition,’ CURBED (Sept. 27, 2022), <https://www.curbed.com/2022/09/right-to-shelter-interview-robert-hayes.html> [<https://perma.cc/4UC8-NK8T>] (describing Hayes as a recent law graduate working at a white shoe Wall Street firm and detailing his subsequent involvement in founding Coalition for the Homeless).

lent and dangerous lodging houses around the Bowery in Lower Manhattan.⁹⁶ The suit argued that New York City violated Article XVII, Section One of the state's constitution, which obligated the City to provide shelter to New Yorkers experiencing homelessness.⁹⁷ *Callahan* was eventually settled via a consent decree, which established the City's obligation to provide shelter to every "homeless man" within its jurisdiction.⁹⁸ In addition to creating an obligation to provide shelter to all individuals that seek it, the decree also included a range of standards to govern the services and facilities of the shelters themselves.⁹⁹

⁹⁶ See Amended Complaint, *supra* note 95, at 4–5 (describing the lead plaintiff's background and history of sleeping outside around the Lower East Side of Manhattan); Read, *supra* note 95 (detailing plaintiff Callahan's former employment). By the time the complaint was filed, Callahan had already spent approximately four years living unhoused around the Bowery. See Amended Complaint, *supra* note 95, at 11–12 (describing how Plaintiff Callahan had lived "on or around the Bowery" since 1975).

⁹⁷ N.Y. CONST. art. XVII, § 1 (West, Westlaw through L.2022, chapters 1 to 738); see Amended Complaint *supra* note 95, at 9 (detailing the constitutional bases for the plaintiffs' causes of action). This provision states that: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." N.Y. CONST. art. XVII, § 1. There are parallels between the circumstances that formed the backdrop of the adoption of Article XVII of the New York Constitution and the New Deal policies of FDR referenced earlier in this Note. *Id.*; see Frazier, *supra* note 19 (describing the historical context behind the adoption of New York's constitutional amendment, Article XVII); Sunstein, *supra* note 29, at 421–23 (describing FDR's New Deal policies). The historical context behind the adoption of this constitutional amendment was a central component of the case theory in *Callahan*; the plaintiffs argued that the Great Depression origins of the Article pointed to it being a broader obligation, requiring the State to aid vulnerable community members regardless of prevailing economic conditions. See Read, *supra* note 95 (describing the historical context behind the adoption of Article XVII of the New York State Constitution and its role in the plaintiffs' arguments in *Callahan*).

⁹⁸ See Final Judgment by Consent, *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. filed Aug. 1981), available at <https://www.coalitionforthehomeless.org/wp-content/uploads/2014/06/Callahan-ConsentDecree.pdf> [<https://perma.cc/9SLN-G5UV>] (detailing the consent decree reached between the plaintiffs and defendants in *Callahan*). In its initial decision, the trial court agreed with the plaintiffs and issued a preliminary injunction requiring the City to provide shelter to at least 750 men experiencing homelessness in the city. *Ensuring the Right to Shelter: The First Court Decision in Callahan v. Carey Requiring the Provision of Shelter for Homeless Men in New York City*, *supra* note 31. The plaintiffs knew that the City did not know the exact number of individuals experiencing homelessness in the city and, as a result, accepted the City's request to leave the exact number of beds required undetermined in the settlement—a choice that greatly increased the potential pool of individuals benefiting from the settlement. See Frazier, *supra* note 19 (describing the negotiations of the settlement agreement and the plaintiffs' ready acceptance of the City's request to leave the exact number of beds required as open). Unfortunately, this victory would ultimately be of small use to Callahan, who died on a Lower East Side street shortly after the initial judgment. *Id.*

⁹⁹ See Frazier, *supra* note 19 (describing the inclusion of provisions in the *Callahan* settlement governing how the City would manage its shelters and provide their services). This included specifications regarding the minimum distance between beds, the ratio of toilet facilities to shelter residents, compliance monitoring programs, and rules governing the way that intake centers operated. Final Judgment by Consent, *supra* note 98. Resolving the litigation via settlement has been a large part of the longevity of the right to shelter in New York City and the robustness of its provisions. See Read, *supra* note 95 (describing how the court orders underlying the settlement in *Callahan* place more

The *Callahan* settlement established a fundamental right to shelter for individuals experiencing homelessness that identified as men in New York City.¹⁰⁰ The right to shelter is enforced by court order and has been expanded via subsequent litigation to include all individuals experiencing homelessness, regardless of gender identity.¹⁰¹ The right to shelter regime in New York City is the most expansive in the United States—providing shelter to all individuals requesting it—and has become a central ordering principle for the way that the City conceives of its obligations to its residents.¹⁰²

significant restrictions on the City than an equivalent statutory framework because violating a court order would leave the City in contempt of court).

¹⁰⁰ See Final Judgment by Consent, *supra* note 98 (detailing the *Callahan* settlement); *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/our-programs/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/> [<https://perma.cc/8KG5-KU7A>] (describing the settlement in *Callahan* as establishing a fundamental right to shelter in New York City). As a result of the right to shelter, the rates of unsheltered homelessness in New York City are significantly lower than both the national average and those seen in other major metropolitan areas. See Sarah Holder & Kriston Capps, *What Ending 'Right to Shelter' Could Mean for New York City's Homeless Population*, BLOOMBERG (June 2, 2023), <https://www.bloomberg.com/news/articles/2023-06-02/new-york-city-s-right-to-shelter-mandate-for-homelessness-faces-new-test> [<https://perma.cc/KM2J-Z3AK>] (discussing the impact of the right to shelter in New York City on levels of street homelessness). Across the United States, 40.1% of all individuals experiencing homelessness are unsheltered, but in New York City only 5.6% are. *Id.* The rate of unsheltered homelessness in New York City is significantly lower than in Californian metropolitan areas where there is no equivalent right to shelter: San Diego City and County (48.7%); San Francisco (56.7%); Los Angeles City and County (70.5%); and Oakland, Berkeley/Alameda County (73.2%). *Id.*

¹⁰¹ See *Eldredge v. Koch*, 469 N.Y.S.2d 744, 744 (App. Div. 1983) (affirming the trial court's judgment that, as a matter of equal protection, the consent decree in *Callahan* extends to individuals identifying as women); *McCain v. Koch*, 502 N.Y.S.2d 720, 729–31 (App. Div. 1986) (holding that families experiencing homelessness are constitutionally entitled to shelter), *rev'd in part*, 511 N.E.2d 62 (N.Y. 1987); see also Final Judgment at 2, *Boston v. City of New York*, No. 402295/08 (N.Y. Sup. Ct. filed Sept. 17, 2008) (describing the City's obligations to provide shelter to families with children). In *Eldredge*, the court held that the City must provide shelter to women as well as men experiencing homelessness under New York's equal protection clause. See 469 N.Y.S.2d at 744 (holding that individuals identifying as women have the same constitutional protections as individuals identifying as men). In *McCain*, the court held that the failure of the City to provide shelter to families with children experiencing homelessness similarly implicated plaintiffs' equal protection rights given that the consent decree in *Callahan* provided that the City would provide shelter to single men. See *McCain*, 502 N.Y.S.2d at 720, 729–31. The final judgment in *Boston* similarly upheld the rights of families to be able to access City-provided shelter under the New York Constitution. See Final Judgment, *supra*, at 2.

¹⁰² See Read, *supra* note 95 (describing the broader cultural significance of the right to shelter in New York City). The right to shelter is a central part of the “policy ethos” of the city. *Id.* Although the right to shelter is an integral part of New York City's safety-net, as noted earlier, it has been a perennial object of annoyance for the City and its Mayors, who have repeatedly tried to dilute its core provisions. See *id.* (describing the efforts of various City Mayors to dismantle components of the right to shelter). In response to these efforts, the Coalition for the Homeless and The Legal Aid Society have brought successive lawsuits in support of the right to shelter and to enforce provisions of the *Callahan* settlement that have mostly succeeded in retaining its core provisions. See, e.g., *Callahan v. Carey*, No. 42582/79, 2012 N.Y. Misc. LEXIS 758, at *22 (Sup. Ct. Feb. 21, 2012) (holding that new eligibility standards introduced by the Department of Homeless Services for admission to City-run shelters

Efforts in California to introduce a right to housing are another example of a broader right to shelter regime.¹⁰³ In response to sustained and increasing levels of homelessness in California, legislators introduced two constitutional amendments into the state legislature in 2020 and 2022 to establish a “human right to housing” in the state—the first such right in the United States.¹⁰⁴ These

violated the City’s Administrative Procedure Act); *Callahan v. Carey*, 909 N.E.2d 1229, 1234 (N.Y. 2009) (holding that plaintiffs are entitled to receive copies of sanction notices issued by the Department of Homeless Services to shelter residents). *But see Callahan v. Carey*, 762 N.Y.S.2d 349, 352–53 (Sup. Ct. 2003) (holding that the City *may* require shelter residents to comply with programming to support “self-sufficiency” as a prerequisite to providing shelter). At the time of this Note’s publication, New York’s right to shelter was coming under renewed pressure after large numbers of individuals sought shelter in the city after arriving at the southern border of the United States. *See Hurubie Meko, What to Know About the Migrant Crisis in New York City*, N.Y. TIMES (Sept. 28, 2023), https://www.nytimes.com/article/nyc-migrant-crisis-explained.html?action=click&pgtype=Article&state=default&module=stylIn-ny-migrants&variant=show®ion=BELOW_MAIN_CONTENT&block=storyline_flex_guide_recirc [https://perma.cc/J83G-UB8U] (describing the arrival of more than 118,000 asylum seekers in New York City between spring 2022 and September 2023 and noting that more than 61,400 of those individuals stayed in city shelters). In response, the City introduced additional restrictions on accessing shelter, including forcing single adult asylum seekers to reapply for shelter housing every thirty days. *As Number of Asylum Seekers in City’s Care Tops 60,000, Mayor Adams Announces 30-day Notices for Adult Migrants, Intensified Casework to Help Adult Asylum Seekers Take Next Step*, NYC.GOV (Sept. 22, 2023), <https://www.nyc.gov/office-of-the-mayor/news/697-23/as-number-asylum-seekers-city-s-care-tops-60-000-mayor-adams-30-day-notices-for> [https://perma.cc/7A7L-AFHP]. Additionally, the City has also attempted to alter the *Callahan* consent decree to allow it to suspend the right to shelter when the Mayor or Governor declares a state of emergency. *See Request for Leave to Move for Modification of August 26, 1981 Final Judgment on Consent at 2–5, Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. filed Oct. 3, 2023), https://www.nyc.gov/assets/home/downloads/pdf/press-releases/2023/2023.10.03%20-%20Callahan%20v.%20Carey%20-%20City%27s%20Letter%20Application.pdf?utm_medium=email&utm_name=&utm_source=gov-delivery [https://perma.cc/Y5Y8-GWWV] (renewing the City’s application for leave to move to modify the consent decree due to the “historic, sustained and indeterminate expansion of the City shelter population”); Letter Application for Modification of Provision of Final Judgment on Consent, dated August 26, 1981 at 3, *Callahan v. Carey*, No. 42582/79 (N.Y. Sup. Ct. filed May 23, 2023) (detailing the City’s initial application for leave to move for modification of the consent decree in *Callahan* to allow it to suspend the right to shelter when the City “lacks the resources and capacity to establish and maintain sufficient shelter sites, staffing, and security to provide safe and appropriate shelter”).

¹⁰³ *See* ACA-10, 2019-2020 Cal. State Assemb. (Cal. 2020) (containing proposed assembly constitutional amendment creating a “human right to housing” in California); SCA 9, 2021-2022 Cal. State S. (Cal. 2022) (containing provisions of a proposed senate constitutional amendment establishing a “fundamental human right to housing” in California). California has significant numbers of people experiencing homelessness; it is estimated that 30% of the U.S. homeless population, approximately 172,000 individuals, lives in California. Morgan Rynor, *30% of Country’s Homeless Population Lives in California*, ABC10 (Dec. 20, 2022), <https://www.abc10.com/article/news/politics/30-percent-us-homeless-in-california/103-cba6762e-66bf-42e3-ba6a-259c11fb6f0a> [https://perma.cc/E5LW-XNYM]. Homelessness and housing security has been a long-running issue in California. *Id.* *See* generally PHILIPPE BOURGOIS & JEFF SCHONBERG, *RIGHTEOUS DOPEFIEND* (2009), for an excellent ethnographic account of the lives of some individuals experiencing homelessness in San Francisco.

¹⁰⁴ ACA-10, 2019-2020 Cal. State Assemb. (containing proposed assembly constitutional amendment creating a “human right to housing” in California); SCA 9, 2021-2022 Cal. State S. (Cal. 2022) (containing provisions of proposed senate constitutional amendment establishing a “fundamental human right to housing” in California); *see California Introduces First-in-the-Nation Amendment to*

proposed constitutional amendments are also noteworthy in that they follow a human right to housing approach.¹⁰⁵ Rather than a more narrow right to shelter for groups experiencing homelessness, resulting from a statutory grant or emanating from a constitutional source, a human right to housing is derived from broader international human rights as set out in the Universal Declaration of Human Rights (UDHR).¹⁰⁶ The right to housing recognized in the UDHR is codified in the International Covenant on Economic, Social and Cultural

Recognize Housing as a Human Right, NAT'L HOMELESSNESS L. CTR. (May 13, 2020), <https://homelesslaw.org/ca-amendment-to-recognize-housing-as-a-human-right/> [<https://perma.cc/D28F-WJDM>] (describing the assembly constitutional amendment as the first example of such a proposed constitutional amendment in the United States). In addition to these attempts to introduce a state-wide right to housing, there have also been city-level efforts to introduce similar obligations for government entities. See Benjamin Oreskes, *A Plan to Give Homeless People the Right to Housing Roils Sacramento*, L.A. TIMES (Nov. 19, 2021), <https://www.latimes.com/homeless-housing/story/2021-11-19/sacramentos-mayor-wants-a-right-to-housing-some-in-his-city-are-skeptical> [<https://perma.cc/5A3V-8SNL>] (describing the Sacramento Mayor's efforts to introduce an obligation to provide housing to individuals experiencing homelessness). For instance, in Sacramento, a proposed city ordinance, the "Housing Right and Obligation Act of 2021," would have created a right to housing that unsheltered individuals would have been obligated to utilize. See *Mayor's Proposed Right to Housing Ordinance*, File ID: 2021-01353, CITY OF SACRAMENTO 1, 5 (Nov. 16, 2021), https://sacramento.granicus.com/MetaViewer.php?event_id=4175&meta_id=653485&view_id=21 [<https://perma.cc/3WHD-USHL>] (detailing proposed provisions of a city ordinance that would obligate the city government to ensure housing to Sacramento residents and simultaneously obligate individuals experiencing homelessness to use this housing option).

¹⁰⁵ See Alexander, *supra* note 25, at 251–52 (describing the basis of the "human right to housing" as contained within international treaties and human rights declarations); *Housing as a Human Right*, NAT'L L. CTR. ON HOMELESSNESS & POVERTY, <https://homelesslaw.org/wp-content/uploads/2020/05/CA-Human-Right-to-Housing-Fact-Sheet.pdf> [<https://perma.cc/CL8E-9Z4Z>] (describing the "Housing as a Human Right" approach and its intersection with the proposed California constitutional amendment). A "[h]ousing as a human right" approach builds on international human rights concepts formed in the post-1945 international legal landscape to argue for individuals' right to housing as a matter of fundamental human rights. See *Housing as a Human Right*, *supra* (describing the background of the human right to housing). See generally Maria Massimo, Note, *Housing as a Right in the United States: Mitigating the Affordable Housing Crisis Using an International Human Rights Law Approach*, 62 B.C. L. REV. 273 (2021), for a discussion of the ways that human rights law principles can be utilized to address the housing crisis in the United States.

¹⁰⁶ See Alexander, *supra* note 25, at 251–52 (describing the Universal Declaration of Human Rights (UDHR) and the International Covenant on Economic, Social and Cultural Rights (ICESR)); *Universal Declaration of Human Rights—English*, UNITED NATIONS HUM. RTS.: OFF. HIGH COMM'R, <https://www.ohchr.org/en/human-rights/universal-declaration/translations/english> [<https://perma.cc/D6VR-N69U>] (containing the provisions of the Universal Declaration of Human Rights); *Housing as a Human Right*, *supra* note 105 (describing the "Housing as a Human Right" approach and its intersection with the proposed California constitutional amendment). The UDHR provides the foundation for the international human rights legal regime. *Universal Declaration of Human Rights—English*, *supra*; see *Housing as a Human Right*, *supra* note 105 (describing the UDHR). The UDHR emphasizes the "equal and inalienable rights" of all individuals based on their membership in "the human family" and argues that these basic human rights form the basis of "freedom, justice and peace in the world." See *Universal Declaration of Human Rights—English*, *supra* (containing the provisions of the UDHR). Article 25 of the UDHR explicitly recognizes the right to housing as incorporated under a broader right for individuals to a "standard of living adequate for the health and well-being of himself and of his family." *Id.*

Rights (ICESCR).¹⁰⁷ The United States has not yet ratified the ICESCR, leaving the “human right to housing” unrecognized at the national level.¹⁰⁸

2. A Limited Right to Shelter: Washington, D.C., Massachusetts, and the Ninth Circuit

Other, more limited right to shelter regimes can be seen in Washington, D.C., Massachusetts, and potentially in the Ninth Circuit following *Martin* in 2018.¹⁰⁹ These jurisdictions provide a right to shelter, limited in terms of when the right to shelter is afforded (Washington, D.C.), the population to which a

¹⁰⁷ *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, OFF. UNITED NATIONS HIGH COMM’R FOR HUM. RTS. 1, https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf [<https://perma.cc/D2SJ-C4M5>]; see *Housing as a Human Right*, *supra* note 105 (describing the ICESCR and its codifying of the right to housing as recognized in the UDHR). The ICESCR sets out seven elements that it views as constituting the right to housing: 1) “Security of tenure”; 2) “Availability of services, materials, facilities and infrastructure”; 3) “Affordability”; 4) “Habitability”; 5) “Accessibility”; 6) “Location”; and 7) “Cultural adequacy.” *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 3–4. These seven elements of the right to housing cover a range of substantive areas that the United Nations Committee on Economic, Social, and Cultural Rights identify as key to safeguarding a right to housing. *Id.*; see *Housing as a Human Right*, *supra* note 105 (describing the ICESCR and its codifying of the right to housing as recognized in the UDHR). For example, security of tenure encompasses safeguards against arbitrary evictions while also ensuring that renters and homeowners benefit from procedural protections and safeguards. *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 4–5; see Alexander, *supra* note 25, at 253–54 (discussing the security of tenure provisions within the ICESCR). Provisions regarding availability of services and infrastructure include ensuring that housing includes access to potable water, energy, and heating. *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 4; see Alexander, *supra* note 25, at 254 (discussing ICESCR provisions). The ICESCR also mandates that housing is affordable and requires minimum standards of habitability. *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 4; see Alexander, *supra* note 25, at 254 (discussing the affordability and habitability requirements within the ICESCR). Further, housing must be accessible to all individuals and located within easy access of employment and other vital services. *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 4; see Alexander, *supra* note 25, at 254 (discussing the accessibility provisions within the ICESCR). Finally, the human right to housing also obligates states to ensure that housing is culturally adequate. *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra*, at 4; see Alexander, *supra* note 25, at 254 (discussing cultural adequacy provisions within the ICESCR).

¹⁰⁸ See Maria Foscarnis, Brad Paul, Bruce Porter & Andrew Scherer, *The Human Right to Housing: Making the Case in U.S. Advocacy*, 38 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 97, 101 (2004) (indicating that, despite President Jimmy Carter signing the ICESCR, the Senate has not ratified it). Although the United States has not yet ratified the ICESCR, it did *sign* the UDHR in 1948. See Alexander, *supra* note 25, at 252–53 (discussing how the ICESCR was not ratified by the United States so the “human right to housing” is not binding national law).

¹⁰⁹ See D.C. CODE ANN. § 4-754.11 (West 2022) (establishing right for clients served by the Washington, D.C. Continuum of Care (CoC) to access shelter in “severe weather conditions”); MASS. GEN. LAWS ANN. ch. 23B, § 30 (West 2023) (promulgating provisions for the administration of “emergency housing assistance” to families in Massachusetts, including “pregnant woman [sic] with no other children”); *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) (holding that prosecuting individuals experiencing homelessness under anti-camping ordinances without providing sufficient shelter violates the Eighth Amendment), *amended by* 920 F.3d 584 (9th Cir. 2019).

right to shelter is granted (Massachusetts), and the scope of actual rights given to individuals experiencing homelessness (Ninth Circuit).¹¹⁰

Washington, D.C. provides individuals experiencing homelessness a limited right to access emergency shelter during periods of severe weather.¹¹¹ This right to shelter is codified by statute in the Homeless Services Reform Act (HSRA).¹¹² When the temperature, with wind chill, is thirty-five degrees Fahrenheit or lower, the district issues a hypothermia alert and individuals experiencing homelessness then have a right to access emergency shelter across a system of district-run shelters.¹¹³

Similarly, Massachusetts provides a right to shelter that is limited solely to families experiencing homelessness.¹¹⁴ Similar to Washington, D.C., the right to shelter in Massachusetts has a statutory basis.¹¹⁵ Known as Emergency

¹¹⁰ Compare § 4-754.11 (establishing right for clients served by the Washington, D.C. CoC to access shelter in “severe weather conditions”), with ch. 23B, § 30 (promulgating provisions for the administration of “emergency housing assistance” to families in Massachusetts, including “pregnant woman [sic] with no other children”), and *Martin*, 902 F.3d at 1048 (holding that prosecuting individuals experiencing homelessness under anti-camping ordinances without providing sufficient shelter violates the Eighth Amendment).

¹¹¹ § 4-754.11 (providing a right to shelter during “severe weather conditions”); see *Fact Sheet on Homelessness and Housing Instability in DC*, WASH. LEGAL CLINIC FOR HOMELESS, <https://www.legalclinic.org/wp-content/uploads/2019/04/Fact-Sheet-on-Homelessness-and-Housing-Instability-in-DC.pdf> [<https://perma.cc/W9DE-LENB>] (describing the right to shelter in D.C. as existing only during hypothermic or hyperthermic weather conditions). Severe weather is defined as when the temperature is below freezing or higher than ninety-five degrees Fahrenheit. See D.C. CODE ANN. § 4-751.01(35) (West 2018) (defining severe weather conditions).

¹¹² See § 4-754.11 (promulgating provisions of the Homeless Services Reform Act (HSRA)); *District of Columbia: FY23 Winter Plan*, INTERAGENCY COUNCIL ON HOMELESSNESS 1, 4, https://ich.dc.gov/sites/default/files/dc/sites/ich/page_content/attachments/Winter%20Plan%20FY23%20Approved%20_Finalized%202022%2011%2002%20_CLEAN_0.pdf [<https://perma.cc/ZA4J-XMMW>] (containing the plan developed by the Interagency Council on Homelessness to provide services to individuals experiencing homelessness during hypothermic weather conditions as mandated by the HSRA). The HSRA also created the district’s Interagency Council on Homelessness and established standards for the provision of housing instability-related services. *District of Columbia: FY23 Winter Plan*, *supra*, at 4.

¹¹³ *District of Columbia: FY23 Winter Plan*, *supra* note 112, at 11–13. Even though New York City has a comprehensive right to shelter, it also has a similar system of alerts to expand access to shelter services in the event of extreme weather. See *Extreme Cold: Code Blue*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/get-help/know-your-rights/extreme-cold-weather-code-blue/> [<https://perma.cc/76WC-MNM4>] (describing the “Code Blue” system of alerts during freezing weather); *Extreme Heat: Code Red*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/get-help/know-your-rights/extreme-heat-weather-code-red/> [<https://perma.cc/Q6BW-W4S9>] (describing the “Code Red” system of alerts during extremely hot weather).

¹¹⁴ See ch. 23B, § 30 (promulgating provisions for the administration of “emergency housing assistance” to families in Massachusetts, including “pregnant woman [sic] with no other children”).

¹¹⁵ *Id.*; see *Chap. 450. An Act Further Regulating Assistance to Certain Needy Persons*, STATE LIBR. MASS., <https://archives.lib.state.ma.us/bitstream/handle/2452/39556/1983acts0450.txt> [<https://perma.cc/RR5F-P4W7>] (containing provisions establishing right to shelter via a program assisting families). Governor Michael Dukakis created this right to shelter when enacting Chapter 450 of the Acts of 1983. See Nancy K. Kaufman, *State Government’s Response to Homelessness: The Massachusetts*

Assistance (EA), the program gives individuals a right to access shelter services provided they are residents of Massachusetts, meet income standards, and are pregnant or have children below the age of twenty-one years old.¹¹⁶ Further, applicants must demonstrate that they experienced homelessness or housing instability due to causes outside of their control.¹¹⁷

In 2018, in *Martin*, the Ninth Circuit Court of Appeals potentially recognized a narrow right to shelter for individuals experiencing homelessness.¹¹⁸ Six Boise residents brought *Martin* after the Boise police issued them a citation for violating city ordinances that prohibited sleeping in public spaces or private buildings without the owner's permission.¹¹⁹ In its decision, the court held these city ordinances unconstitutional under the Eighth Amendment be-

Experience, 1983–1990, 8 NEW ENG. J. PUB. POL'Y 471, 475 (1992) (describing origins of the right to shelter for families in Massachusetts via statute signed by Governor Dukakis in 1983). In 1983, approximately eight thousand to ten thousand people in Massachusetts were estimated to be experiencing homelessness and Chapter 450 of the Acts of 1983 was viewed as a model framework for dealing with homelessness in the United States. *See id.* at 472, 475 (describing initial estimates as to numbers of individuals experiencing homelessness in Massachusetts and the passage of Chapter 450 of the Acts of 1983).

¹¹⁶ *See* 760 MASS. CODE REGS. 67.02 (2023) (containing the program eligibility standards for Emergency Assistance (EA) coordinated by the Department of Housing and Community Development); *Apply for Emergency Family Shelter—EA*, MASS.GOV, <https://www.mass.gov/how-to/find-emergency-family-shelter> [<https://perma.cc/GD4W-SZWG>] (detailing the eligibility standards for families attempting to access the shelter system); Ruth Bourquin, *Basic Shelter Rights (Emergency Assistance)*, MASSLEGALHELP (Jan. 2011), <https://www.masslegalhelp.org/income-benefits/basic-shelter-rights> [<https://perma.cc/H6MD-6M52>] (describing the Emergency Assistance program and its application process). To be eligible, a family's income must be equal to or less than 115% of the Federal Poverty Level (adjusted for household size); in 2022, a family of four would require an income of \$30,000 or less to be eligible for emergency shelter. *See* 760 MASS. CODE REGS. 67.02(5)(a) (detailing the income eligibility standards for EA); *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Programs*, *supra* note 17 (detailing the 2023 federal poverty guidelines for the "48 contiguous states and the District of Columbia").

¹¹⁷ *See* 760 MASS. CODE REGS. 67.02(2) (containing provisions detailing which applicants are eligible for emergency assistance); 106 MASS. CODE REGS. 701.380 (2023) (regulations governing "Good Cause Criteria" for applicants to certain Massachusetts Government-administered programs); 760 MASS. CODE REGS. 67.06(1) (detailing additional eligibility standards for "Temporary Emergency Shelter"). For example, a "fire or other natural disaster" is identified as a legitimate reason for lack of housing, as is domestic abuse or violence. *See* 760 MASS. CODE REGS. 67.06(1)(e)(1) (describing procedures for proving no feasible alternative housing exists); 760 MASS. CODE REGS. 67.06(1)(a)(1) (providing that applicant households at risk of experiencing domestic abuse or experiencing homelessness because of domestic violence are eligible for shelter). *See* McJunkin, *supra* note 20, at 155, for a discussion of the ways that these eligibility criteria can be applied to reduce access to shelters.

¹¹⁸ *See Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018) (holding that prosecuting individuals experiencing homelessness under anti-camping ordinances without providing sufficient shelter violates the Eighth Amendment), *amended by* 920 F.3d 584 (9th Cir. 2019).

¹¹⁹ *Id.* (holding that Boise's anti-camping statutes violated the Eighth Amendment). One ordinance prohibited camping in "streets, sidewalks, parks or public places"—defining camping as an individual using public property as somewhere to live either temporarily or permanently. *Id.* The other ordinance forbade sleeping in or using a "building, structure, or public place, whether public or private" without permission. *Id.*

cause they criminalized sleeping outside or on public property without providing alternative shelter.¹²⁰ Although the Ninth Circuit's decision does not establish a right to shelter per se, it requires that a jurisdiction provide access to shelter before pursuing criminal sanctions against unsheltered individuals sleeping outside.¹²¹ As a result, the Ninth Circuit's decision could potentially form the basis for a broader right to shelter asserted via litigation if a jurisdiction criminalizes homelessness without providing shelter or other alternatives.¹²²

II. DIFFERENT PERSPECTIVES ON A RIGHT TO SHELTER

This Part of the Note explores arguments in favor of and against the right to shelter.¹²³ On one side of the debate, examined in Section A of this Part, the

¹²⁰ *Id.* The original 2018 opinion opened with a quotation from *Le Lys Rouge* (The Red Lily) by French writer Anatole France: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.” *Id.* The issue this quotation raises, of course, is that the burden of complying with such laws is higher for someone who has nowhere else to sleep but under a bridge—see Waldron, *supra* note 24, at 42, for a critique of rules forbidding sleeping on New York City subway cars, for instance. Eighth Amendment jurisprudence has created narrow protections for unhoused individuals against laws that criminalize inevitable aspects of homelessness in successive cases across the United States. *See, e.g.,* Pottinger v. City of Miami, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (holding that the criminalization of individuals for “harmless, involuntary conduct” violates the Eighth Amendment’s prohibition against cruel and unusual punishment); *see also* ROB ROSENTHAL & MARIA FOSCARINIS, *Responses to Homelessness: Past Policies, Future Directions, and a Right to Housing*, in A RIGHT TO HOUSING: FOUNDATION FOR A NEW SOCIAL AGENDA, *supra* note 26, at 316, 321 (describing litigation challenging statutes and ordinances that criminalize aspects of homelessness). *See Commonwealth v. Magadini* for an example of a case where a state court has considered similar issues. 52 N.E.3d 1041, 1050 (Mass. 2016). In *Magadini*, the Massachusetts Supreme Judicial Court held that an unhoused defendant could assert a necessity defense against a charge of criminal trespass for sleeping in a private building as he had no lawful alternative shelter. *See id.* (holding that a necessity defense can be asserted when the defendant has no lawful alternative option for shelter).

¹²¹ *See Martin*, 902 F.3d at 1048 (holding that the City of Boise’s statutes criminalizing sleeping in public spaces for individuals who cannot obtain shelter violates the Eighth Amendment). *Martin* builds on other Eighth Amendment federal court jurisprudence, which holds that individuals generally may not be punished criminally for activities that are necessary to live when there are no other places where they can do so lawfully. *See id.* (discussing how the *Martin* decision aligns with other Eighth Amendment jurisprudence prohibiting the criminalization of “life-sustaining activities” for individuals experiencing homelessness). What constitutes sufficient access to shelter is likely to be an area of considerable litigation should a jurisdiction decide to provide shelter while simultaneously criminalizing homelessness. *See* Blasi, *supra* note 31, at 34 (discussing the contours and implications of the holding in *Martin*). The settlement reached in *Martin*, for instance, included specialized training for police officers on populations that experience increased difficulty in accessing shelter in an apparent effort to head off these issues. *See Settlement Reached in Groundbreaking Martin v. Boise Case*, CITY OF BOISE (Feb. 8, 2021), <https://www.cityofboise.org/news/mayor/2021/february/settlement-reached-in-groundbreaking-martin-v-boise-case/> [<https://perma.cc/R7LJ-Z967>] (describing the settlement reached between the City of Boise and plaintiffs).

¹²² *See Martin*, 902 F.3d at 1035 (holding that individuals sleeping in public or private spaces without permission cannot be punished criminally if there is no alternative shelter); Blasi, *supra* note 31, at 34 (discussing the potential implications of *Martin*).

¹²³ *See infra* notes 126–162 and accompanying text.

wickedness of homelessness as a property problem arguably demands that states intervene in the property system to provide resilience to individuals experiencing homelessness.¹²⁴ On the other side of the debate, explored in Section B of this Part, opponents of a right to shelter argue that such a right runs counter to the U.S. traditions of favoring negative rights and limiting the role of the states in constituting affirmative rights.¹²⁵

A. Making the Case for a Right to Shelter: Responding to the Increasingly Wicked Property Problem of Homelessness and Allocating Resilience

Proponents of a right to shelter argue that only such an affirmative right can resolve the wicked property problem of homelessness and ensure that individuals experiencing homelessness can access increased resilience.¹²⁶ Modern homelessness can be conceptualized as the quintessential wicked property problem.¹²⁷ It is an inherently intractable and complex problem with multiple causes that implicates multiple stakeholders with divergent interests.¹²⁸ These stakeholders operationalize competing narratives regarding homelessness's causes and manifestations.¹²⁹ Depending on the perspective of the stakeholder, modern homelessness may be conceptualized as a failure of public policy, the product of deinstitutionalization, or the result of an inherently inequitable capitalist and extractive system.¹³⁰ Other factors implicated by stakeholders in-

¹²⁴ See *infra* notes 126–147 and accompanying text.

¹²⁵ See *infra* notes 148–162 and accompanying text.

¹²⁶ See FOX O'MAHONY & ROARK, *supra* note 30, at 209–12, 222 (describing the concept of wicked property problems and how states intervene into the property system to allocate resilience); ROSENTHAL & FOSCARINIS, *supra* note 120, at 326 (arguing that actualizing the right to housing is key to preventing homelessness); Hartman, *supra* note 29, at 241 (arguing for the importance of a right to housing).

¹²⁷ See FOX O'MAHONY & ROARK, *supra* note 30, at 209 (describing a “wicked problem” as a “large-scale social challenge caught in causal webs of interlinking variables spanning national boundaries and with complexities of diagnosis and prognosis”); Rittel & Webber, *supra* note 56, at 160 (describing the concept of wicked problems).

¹²⁸ See EOIN O'SULLIVAN, REIMAGINING HOMELESSNESS: A BLUEPRINT FOR POLICY AND PRACTICE 33–34, 41–42 (2020) (describing the intractability of homelessness as a social issue and the different ways in which it is framed and understood collectively).

¹²⁹ See *id.* at 23 (detailing the different ways that homelessness is understood and framed by members of society); ROSENTHAL & FOSCARINIS, *supra* note 120, at 317 (describing evolutions in the way that society understands homelessness and its causes); FOX O'MAHONY & ROARK, *supra* note 30, at 207 (discussing the ways that wicked property problems are framed by different stakeholders); Roark & Fox O'Mahony, *supra* note 53, at 823 (describing how homelessness was reframed as “public-health emergency” during the COVID-19 pandemic); see also Viljoen, *supra* note 53, at 26–27 (detailing the ways that narrative framing is used by stakeholders in wicked property problems to simplify their “intricacies” and selectively highlight aspects of an alleged reality “to make them more prominent, definitive and solvable”).

¹³⁰ See *Why Are So Many People Homeless?*, COAL. FOR HOMELESS, <https://www.coalitionforthehomeless.org/why-are-so-many-people-homeless/> [<https://perma.cc/VW8D-GSP7>] (framing homelessness in New York City as the result of the deinstitutionalization of populations experiencing

clude long-term structural factors such as the lack of affordable housing or highly individual and contextualized factors ranging from race to domestic violence.¹³¹ Further, there is no readily understood definition of what constitutes homelessness or who experiences it.¹³² At the same time, all of the factors identified as potentially precipitating homelessness are multi-scalar and do not fall simply within the sphere of one actor or stakeholder; rather, they cut across all of them and leave a problem capable only of political resolution.¹³³ For example, the emergence of modern homelessness in New York City, which precipitated its right to shelter, coincided with a broader financial crisis that required action on a scale only possible by a government entity.¹³⁴ Finally, stakeholders are typically unwilling to bear the costs of solutions to homelessness due to diverging interests, which further compounds homelessness's intractability as a social problem.¹³⁵

At the same time, homelessness is indisputably a wicked *property* problem because it is a product of the ways in which the current property system constrains the rights of individuals to access property, use spaces, and—in the

mental health issues and the decline in housing supply); see also LastWeekTonight, *Homelessness: Last Week Tonight with John Oliver* (HBO), YOUTUBE (Nov. 1, 2021), <https://www.youtube.com/watch?v=liptMbjF3EE> (describing the public policy failures implicated in modern homelessness). See generally DON MITCHELL, *MEAN STREETS: HOMELESSNESS, PUBLIC SPACE, AND THE LIMITS OF CAPITAL* (2020) (discussing homelessness as the product of the U.S. capitalist system). The complexities of homelessness as a social issue means that small-scale policy responses to homelessness are often extraordinarily expensive, which further adds to perceptions of homelessness's intractability. See O'SULLIVAN, *supra* note 128, at 45–46 (discussing different state funding for services aimed at individuals experiencing homelessness).

¹³¹ See COLBURN & ALDERN, *supra* note 13, at 76, 81, 85, 88, 90, 127–36 (describing various individual causes of homelessness, such as mental health, poverty, unemployment, race, and substance use, and structural causes, such as affordable housing supply); O'SULLIVAN, *supra* note 128, at 38–39 (recounting studies showing that homelessness is the result of a confluence of “individual, social and structural factors”). Homelessness is thus inherently multi-scalar and at once a problem that can be conceptualized both from the perspective of structural causes or the product of individual decisions. See COLBURN & ALDERN, *supra* note 13, at 8–10 (describing how homelessness results both from structural and individual causes).

¹³² See COLBURN & ALDERN, *supra* note 13, at 45 (detailing objections to HUD's methodology of counting individuals experiencing homelessness, including that it does not capture the full scale of the problem of homelessness); O'SULLIVAN, *supra* note 128, at 23 (describing differing popular understandings of who experiences homelessness).

¹³³ See FOX O'MAHONY & ROARK, *supra* note 30, at 212 (discussing the intractability of wicked property problems); Rittel & Webber, *supra* note 56, at 160 (arguing that wicked problems “rely upon elusive political judgment for resolution”).

¹³⁴ See FOX O'MAHONY & ROARK, *supra* note 30, at 364–65 (describing the financial crisis in New York City in the 1970s); KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK'S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 295–96 (2017) (detailing increasing rates of homelessness and reductions in City services during the late 1970s).

¹³⁵ See O'SULLIVAN, *supra* note 128, at 41 (discussing the intractability of homelessness as a social issue); Michael Clark et al., *Homelessness and Integrated Care: An Application of Integrated Care Knowledge to Understanding Services for Wicked Issues*, 30 J. INTEGRATED CARE 3, 4 (2022) (arguing that homelessness is a wicked social policy issue and, as a result, has no ready solution).

most simple sense—exist.¹³⁶ For example, homelessness constrains an individual's ability to exercise their constitutional rights.¹³⁷ The interaction of the social components of homelessness with property law thus adds additional dimensions to homelessness as a wicked problem and therefore requires a solu-

¹³⁶ See FOX O'MAHONY & ROARK, *supra* note 30, at 212 (describing how private property overlaps with wicked social problems); Waldron, *supra* note 24, at 28 (describing the ways in which homelessness deprives individuals of the ability to "be somewhere"). Insofar as property rights provide a right to "be somewhere"—and, in its broadest sense, to exist—an individual's lack of property rights (which is a central and inseparable part of the experience of homelessness) means somebody is unable to do this. See Waldron, *supra* note 24, at 28 (detailing the ways in which homelessness interacts with property rights systems to deprive individuals of rights to access certain spaces). Waldron further argues that an assumption of property rights lies at the heart of many of the rights guaranteed by the Constitution as well as the broader protections envisioned by human rights frameworks. See *id.* at 47 (describing the interaction between homelessness, freedom, and the Bill of Rights). Individuals experiencing homelessness, however, are systemically prevented from being freely able to access places by property laws. See *id.* at 28–31 (describing property laws and the ways in which the right to exclude can constrain individuals experiencing homelessness). This limitation on the freedom of individuals experiencing homelessness effectively constrains their everyday lives in such a way that they are unable to benefit from any of the rights seemingly afforded them by law. See *id.* at 47 (describing the ways that individuals experiencing homelessness are closed off from actions "basic to the sustenance of a decent or healthy life, in some cases basic to the sustenance of life itself").

¹³⁷ See, e.g., Wayne Wagner, *Homeless Property Rights: An Analysis of Homelessness, Honolulu's "Sidewalk Law," and Whether Real Property Is a Condition Precedent to the Full Enjoyment of Rights Under the U.S. Constitution*, 35 U. HAW. L. REV. 197, 211–13, 214–16 (2013) (describing the historical association between real property and liberty at the time of the U.S. Constitution's ratification and the ways that constitutional protections such as a right to privacy are predicated upon access to real property). As just one example, constitutional protections against unreasonable search and seizure under the Fourth Amendment are arguably functionally predicated on access to real property. See *id.* at 217 (discussing the Fourth Amendment's protections and its interactions with property law). The two-step test used in Supreme Court jurisprudence to determine whether something falls under the protection of the Fourth Amendment relies on an individual demonstrating that they have an actual expectation of privacy that is recognized as objectively reasonable by society. See *Katz v. United States*, 389 U.S. 347, 351, 359, 361 (1967) (holding that police surveillance that involved electronically recording a defendant's private telephone calls from a public phonebooth constituted a search under the Fourth Amendment); Wagner, *supra*, at 217 (discussing Fourth Amendment protections, the *Katz* test, and its interaction with homelessness). Under the test set out in *Katz*, objects within the confines of the home or curtilage are typically subject to Fourth Amendment protections against a warrantless search, but objects in "'plain view' of outsiders" are not. See *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (setting out Justice Harlan's two-part test for protection under the Fourth Amendment). As an individual experiencing homelessness does not have access to a home or "constitutionally protected area" and their property is often completely in plain view, they arguably have fewer Fourth Amendment protections. See *Silverman v. United States*, 365 U.S. 505, 512 (1961) (holding that evidence procured by physically intruding into defendants' home—a "constitutionally protected area"—violates the Fourth Amendment and is thus inadmissible if procured without a warrant); Wagner, *supra*, at 217–18 (describing how individuals experiencing homelessness' personal belongings are not protected by the Fourth Amendment's prohibitions of unreasonable search and/or seizure). See generally David Reichbach, *The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law Is Going After Jones*, 47 U.S.F. L. REV. 377 (2012) (discussing how individuals experiencing homelessness have less protections against unreasonable search and seizure under the Fourth Amendment).

tion rooted in the property system itself.¹³⁸ Nevertheless, property laws in their current forms are fundamentally incapable of resolving homelessness because they are ultimately oriented toward reinforcing traditional notions of property.¹³⁹ The property system's focus on facilitating transactions between private institutions impedes its ability to mediate broader public and social issues such as homelessness.¹⁴⁰ At the same time, however, individuals experiencing homelessness's legal status, or rather lack thereof, is driven by the fact that they do not own property—leaving them in a state of legal disability that the property system both creates and perpetuates.¹⁴¹ The wickedness of homelessness as a property problem thus demands changes to the property system that, RPT theorists argue, can only be achieved through affirmative state intervention into the property system itself.¹⁴²

¹³⁸ See FOX O'MAHONY & ROARK, *supra* note 30, at 212–13 (describing the interaction between the property system and normative ideas regarding property); Alexander et al., *supra* note 60, at 743–44 (calling for a new property system that ensures universal access to resources).

¹³⁹ See FOX O'MAHONY & ROARK, *supra* note 30, at 212 (detailing how the property system is built on theories that tend to focus on justifying the way it allocates power); see also Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273, 273, 284 (2004) (arguing that it is the lack of property owned by individuals experiencing homelessness that ultimately defines their legal status or rather lack thereof).

¹⁴⁰ See FOX O'MAHONY & ROARK, *supra* note 30, at 212 (discussing the focus of the property law system on facilitating private transactions and the growth of property laws as a functional institution around this goal).

¹⁴¹ See Baron, *supra* note 139, at 273, 284 (describing the legal status of “no property” and the way this legal status impacts the ability of an individual to exercise other legal functions); FOX O'MAHONY & ROARK, *supra* note 30, at 212 (exploring how the property theories at the heart of our property system are typically centered on reifying private property institutions).

¹⁴² See Roark & Fox O'Mahony, *supra* note 53, at 799–800 (describing the central role played by the state in formulating responses to political crises). In addition to allocating resilience to individuals, RPT also allows for an analysis of the ways that a state's interventions into the property system allocates resilience to itself. See *id.* (discussing how states' resilience needs drive their interventions into the property system). At its most basic level, homelessness poses a threat to state resilience because it signifies a very real failing of the social compact lying at the heart of the modern liberal state. See *id.* at 821–23 (describing the ways in which state resilience needs are shown by crises). The conflicts between homelessness advocates and others members of the community further heightens this vulnerability and strikes at states' legitimacy in being able to resolve and mediate significant societal problems. See *id.* at 820–21 (describing how property systems' resilience is a function of their abilities to “innovate in the face of unprecedented and unexpected challenges”). At the same time, the intractability and wicked nature of homelessness as a property problem further exposes state vulnerability by highlighting the continued failure of the state to resolve it. See *id.* at 811–12 (arguing that states' vulnerabilities drive them to intervene in the property system in ways that allocate resilience to themselves and vulnerable groups in society). The factual background of the circumstances leading to individual jurisdictions' introduction of a right to shelter further illustrates the ways in which state responses can be framed as a response to their vulnerability. See *id.* at 830 (describing how states' interventions in the property system during the COVID-19 pandemic were driven by the existential threat posed by the pandemic). For example, the introduction of the limited right to shelter for families in Massachusetts was in response to a growing social problem of homelessness. See Kaufman, *supra* note 115, at 471–75 (describing Governor Dukakis's prioritization of homelessness as a major social welfare issue and the passage of the right to shelter legislation as part of his response). Further, the

A right to shelter offers one potential way of actualizing such a transformation of the property system because it offers a solution, rooted within the property system itself, that systematically allocates resilience to individuals experiencing homelessness.¹⁴³ The right to shelter is also a progressive property approach because it focuses on the provision of rights and property interests collectively.¹⁴⁴ The right to shelter in the jurisdictions explored previously provide access to property for individuals that do not have private property of their own.¹⁴⁵ Moreover, a right to shelter provides individuals experiencing homelessness with access to property and the associated protections afforded within society.¹⁴⁶ Providing access to property through a right to shelter also reorients the property system to provide individuals with access to the re-

period leading up to the Ninth Circuit's decision in *Martin v. City of Boise* was also marked by the emergence of a significant and increasing population of individuals experiencing homelessness, a development that shone a light on the failure of punitive policies in tackling homelessness. See Complaint at 2, *Bell v. City of Boise*, 834 F. Supp. 2d 1103 (D. Idaho 2011) (detailing the large numbers of individuals experiencing homelessness in Boise following a recent economic downturn), *rev'd*, 709 F.3d 890 (9th Cir. 2013) (No. 09-cv-00540), 2009 WL 4379719, at *2; see also Timothy M. Mulvaney & Joseph William Singer, *Move Along to Where? Property in Service of Democracy: (A Tribute to André van der Walt)*, in TRANSFORMATIVE PROPERTY LAW: Festschrift in Honour of AJ VAN DER WALT 1, 2–3 (Gustav Muller, Reghard Brits, Bradley Slade & Jeannie van Wyk eds., 2018) (problematising punitive approaches to responding to homelessness and arguing for the need for state interventions to change the property system in a way that is centered around “fundamental democratic values”).

¹⁴³ See ROSENTHAL & FOSCARINIS, *supra* note 120, at 326 (arguing for the need for a right to housing, as part of broader transformations to the property system, to help prevent homelessness); Roark & Fox O'Mahony, *supra* note 53, at 810 (describing the way that a state's vulnerabilities drive state intervention into the property system to allocate resilience to the state).

¹⁴⁴ See ALEXANDER, *supra* note 85, at 55–57 (describing the role of collective obligations to enable human flourishing as part of progressive property approaches); Alexander et al., *supra* note 60, at 743–44 (arguing for progressive property approaches centering collectivist values).

¹⁴⁵ See Baron, *supra* note 139, at 284–85 (arguing that individuals experiencing homelessness live in a “no property” legal status). Under the conventional property system, which lacks a right to shelter, people experiencing homelessness are functionally unable to perform a range of basic functions essential to life. *Id.* This includes everything from being able to clean themselves, leave and store things, and own property. *Id.* Indeed, as Jeremy Waldron argues: “[t]here may not seem anything particularly autonomous or self-assertive or civically republican or ethically ennobling about sleeping or cooking or urinating,” however the performance of these actions are “precondition[s] for the sort of autonomous life that is celebrated and affirmed when Bills of Rights are proclaimed.” Waldron, *supra* note 24, at 47 (describing how basic fundamental rights are predicated upon a freedom and autonomy of living that is closed off to individuals experiencing homelessness). Thus, homelessness, through its interaction with property law, ultimately strips away individuals' freedom and leaves them functionally unable to exercise any constitutionally-recognized rights. See *id.* (describing the interaction between property law constraints on individuals experiencing homelessness and broader rights seemingly extended by law). A right to shelter changes this by providing access to property interests and allowing someone to “be somewhere” as of right. See *id.* at 28 (describing how homelessness's interaction with the property system prevents people from being able to “be somewhere”); Baron, *supra* note 139, at 284–85 (describing the legal impacts of not owning real property).

¹⁴⁶ See Wagner, *supra* note 137, at 214 (describing the interaction between the property system and individual constitutional rights).

sources they need to achieve human flourishing—a key component of a progressive property approach.¹⁴⁷

B. Arguments Against the Right to Shelter: The U.S. Tradition of Negative Rights and Problems with Right-Based Frameworks

Opponents of the right to shelter typically argue that such a right does not accord with the U.S. tradition of negative rights and identify deficiencies inherent in the use of any right-based framework to solve social problems.¹⁴⁸ The United States has generally followed a tradition of limited and negative rights regimes focusing on the provision of liberties and deemphasizing the role of the state in actively constituting rights.¹⁴⁹ This paradigm tends to emphasize protecting distinct and limited liberties rather than the broader redistributive goals of an affirmative rights framework such as a right to shelter.¹⁵⁰ As a result, opponents of a positive right to shelter argue that such a right is, at best, extremely difficult to actualize, and at worst, downright utopian.¹⁵¹ Others argue that the limited rights orientation of the U.S. legal system prevents interference with the market forces that control the housing market.¹⁵² Relatedly, an affirmative right to shelter would arguably be in opposition to the federal government's explicitly non-entitlement approach to providing housing assistance.¹⁵³

Opponents of the right to shelter also identify significant deficiencies with existent right to shelter regimes, ranging from the quality of shelters themselves to the ways in which state-provided shelters can be weaponized to crim-

¹⁴⁷ See, e.g., Alexander et al., *supra* note 60, at 743–44 (arguing that the role of the property system should be promote the ability of society members to access the resources they need to attain human flourishing and take part fully in society).

¹⁴⁸ See Alexander, *supra* note 25, at 259 (describing the U.S. legal system's general inclination toward negative rights regimes); Adams, *supra* note 33, at 276 (describing the limitations of a rights-based approach to solving social problems).

¹⁴⁹ See generally KATHARINE G. YOUNG, CONSTITUTING ECONOMIC AND SOCIAL RIGHTS (2012) (describing how rights central to human dignity are formed and codified legally); see also Adams, *supra* note 33, at 283 (describing the focus in the United States on negative rather than positive rights); Maria Foscarinis, *The Growth of a Movement for a Human Right to Housing in the United States*, 20 HARV. HUM. RTS. J. 35, 35–36 (2007) (detailing the ways that the U.S. legal framework focuses on protecting liberties or negative rights). This significantly complicates efforts to vindicate economic or social rights. See Foscarinis, *supra*, at 36 (describing the difficulties in trying to assert affirmative socioeconomic rights in the United States).

¹⁵⁰ See Adams, *supra* note 33, at 283 (describing the background of the U.S. legal system and the way that it conceives of rights).

¹⁵¹ See *id.* (recognizing that an affirmative right to shelter likely jars with the broader U.S. tradition of negative rights).

¹⁵² See *id.* at 284–85 (relaying the argument that creating an affirmative right to housing in the United States would interfere with the market forces and general laissez-faire approach to providing housing).

¹⁵³ See Noah M. Kazis, *The Failed Federalism of Affordable Housing: Why States Don't Use Housing Vouchers*, 121 MICH. L. REV. 221, 275–76 (2022) (describing federal government housing assistance as intentionally not universal in its reach and “almost as an act of government largesse”).

inalize homelessness and constrain individual choice.¹⁵⁴ Eligibility criteria can also narrow seemingly broad shelter guarantees, constraining the ability of individuals to access services.¹⁵⁵ For example, eligibility criteria in Massachusetts are used to deny access to shelter to significant proportions of applicants.¹⁵⁶

A further school of thought argues that affirmative rights-based frameworks are not the most effective way of protecting the interests of marginalized groups within society.¹⁵⁷ Proponents of this perspective argue that creating new affirmative rights can diminish the power of existing rights and lead policy makers to focus on misguided priorities.¹⁵⁸ One emerging perspective argues instead for an alternative formulation of the right to shelter as a negative, rather than affirmative, right.¹⁵⁹ Such a right would provide individuals experiencing homelessness with a right to self-shelter, whether through an encampment or the use of bedding in public spaces without fear of criminal punishment.¹⁶⁰ This perspective argues for an individual right to self-shelter as an outgrowth of Supreme Court substantive due process jurisprudence centered on a fundamental right to human dignity.¹⁶¹ This negative rights framework of

¹⁵⁴ See McJunkin, *supra* note 20, at 156, 157–58, 162, 170–71 (describing deficiencies in the provision of services in right to shelter jurisdictions in the United States, including poor quality shelters, issues of theft, and the use of shelters to constrain individual choice and facilitate the criminalization of homelessness).

¹⁵⁵ See *id.* at 150 (describing how eligibility criteria and shelter admission processes may create difficulties for some individuals trying to access shelters despite the seeming universality of the right to shelter in New York City).

¹⁵⁶ See *id.* at 155 (arguing that Massachusetts's narrow eligibility criteria drives lower acceptance rates of applicants for access to shelter).

¹⁵⁷ See Adams, *supra* note 33, at 276 (describing arguments that establishing rights is not the best approach for “difficult societal problems, such as poverty and homelessness”). Proponents of this view argue, variously, that the creation of affirmative rights frameworks can harm efforts to solve issues such as poverty by focusing society on the wrong issues. *Id.* Creating certain rights may overly narrow policymakers’ focus when it comes to resolving certain issues, leaving them focused on resolving one aspect of poverty rather than the overall “cycle of poverty” itself. *Id.* at 277. Further, rights can frequently become “their own end,” rather than merely a way of achieving a broader goal. *Id.*

¹⁵⁸ See *id.* at 277–78 (exploring how an affirmative right—particularly in the context of housing—may not be the most effective approach to combating homelessness and may in fact harm existing affirmative right frameworks).

¹⁵⁹ See McJunkin, *supra* note 20, at 174–75 (arguing for a negative right to shelter founded on the concept of dignity).

¹⁶⁰ See *id.* at 174 (describing how the negative right to shelter would allow individuals experiencing homelessness to conduct self-sheltering activities without threat of criminal punishment).

¹⁶¹ See *id.* at 175 (describing the constitutional bases for a negative right to shelter). Ben McJunkin argues that substantive due process protections for dignity found in Supreme Court jurisprudence center on ensuring self-determination—particularly relating to bodily autonomy and intimate relationships—in opposition to state efforts at criminalization. See *id.* at 174–75 (arguing for a negative right to shelter centered on the concept of individual human dignity). McJunkin argues that the Supreme Court’s decision in *Lawrence v. Texas* establishes a fundamental right to individual autonomy and human dignity. See 539 U.S. 558, 578 (2003) (holding that a law criminalizing sex between two individuals of the same gender violates the Fourteenth Amendment’s Due Process Clause); McJunkin,

dignity as individual autonomy acts as a buttress against efforts to criminalize sleeping outdoors.¹⁶²

III. TOWARD A NATIONAL RIGHT TO SHELTER

Section A of this Part argues for a national right to shelter, building on the theoretical framework explored in Part I and the arguments discussed in Part II.¹⁶³ Next, Section B argues for the place of a national right to shelter in a progressive property system.¹⁶⁴ Finally, Section C argues that the right to shelter in New York City offers a potential model for a national emergency right to shelter that actualizes progressive property notions.¹⁶⁵

A. The Need for a National Right to Shelter

A national right to shelter must be a central component of the way that the United States responds to its homelessness crisis.¹⁶⁶ The increasingly wicked problem of homelessness in the United States requires a fundamental reorientation of the property system if it is to remain viable.¹⁶⁷ With at least 580,000 individuals across the nation currently experiencing homelessness, the scale of the current problem cannot be overstated.¹⁶⁸ At the same time, the emergence

supra note 20, at 175–77 (describing the holding in *Lawrence*). McJunkin argues that the holding in *Lawrence* is broader than merely acknowledging a right premised on sexual autonomy; he suggests it is grounded in a respect for individual decision-making and bodily autonomy against outside—particularly government—interference. See McJunkin, *supra* note 20, at 183 (arguing that *Lawrence* establishes a broader right to personal autonomy transcending government intervention). Thus, McJunkin argues, *Lawrence* urges repeal of laws that burden this fundamental interest. See *id.* (arguing that, under *Lawrence*, laws that impact an individual’s ability to exercise core personal decision-making do not survive). Although the Court’s dignity jurisprudence was called into question by *Dobbs v. Jackson Women’s Health Organization*, McJunkin argues that *Dobbs* leaves *Lawrence* formally untouched and that its holding is limited to rights related to accessing abortion. See *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2278–79 (2022) (holding that there is no constitutionally-guaranteed right to abortion); McJunkin, *supra* note 20, at 184–85 (describing the impact of *Dobbs* on the Supreme Court’s dignity jurisprudence).

¹⁶² See McJunkin, *supra* note 20, at 183–86 (arguing that an individual’s fundamental dignity interest in deciding where they sleep could be protected under post-*Lawrence* Supreme Court jurisprudence around substantive due process).

¹⁶³ See *infra* notes 166–174 and accompanying text.

¹⁶⁴ See *infra* notes 175–194 and accompanying text.

¹⁶⁵ See *infra* notes 195–209 and accompanying text.

¹⁶⁶ See Alexander et al., *supra* note 60, at 743–44 (laying out the cornerstones of progressive property theory (PPT)); Adams, *supra* note 33, at 316 (arguing for a right to housing as part of broader anti-poverty efforts); Martinez, *supra* note 30, at 2 (suggesting that “a constitutional right to shelter—to temporary emergency shelter—needs to be recognized in order to begin to repair the dilemma of the homeless”).

¹⁶⁷ See Alexander et al., *supra* note 60, at 743–44 (detailing the ways in which a progressive property approach would change the property system).

¹⁶⁸ HUD 2022 Continuum of Care Homeless Assistance Programs Homeless Populations and Subpopulations, *supra* note 13. As discussed earlier, even this figure is likely a gross undercount. See,

of additional contemporary crises, ranging from climate change to global pandemics, show the increasingly wicked nature of property problems experienced across the United States.¹⁶⁹ Against this background, conventional property system notions that focus solely or primarily on private, individualized rights solely accrued by the owner are increasingly anachronistic and an obstacle to ensuring that all members of society can achieve their full potential.¹⁷⁰ Combining the lenses of Resilient Property Theory (RPT) and Progressive Property Theory (PPT) shows us that the property system is an inherently political product that can change to serve the emerging needs of contemporary society.¹⁷¹ The existent property system, primarily focused on the small-scale resolution of private property disputes, is wholly incapable of resolving the broader public policy issue of the modern homelessness crisis.¹⁷² Further, entire sys-

e.g., McJunkin, *supra* note 20, at 134 (describing how up to twenty million individuals may experience homelessness during their life).

¹⁶⁹ See ALEXANDER, *supra* note 85, at 169–71 (describing conventional property right notions such as the right to exclude and their limitations under a theory of property centered around human flourishing and ensuring access to resources); Roark & Fox O’Mahony, *supra* note 53, at 795 (discussing the emergence of contemporary crises such as global pandemics and their interaction with the property system). The interaction of contemporary crises and existing social issues with the property system provides additional dimensions to society’s wicked problems that further demand bold actions in response. See Roark & Fox O’Mahony, *supra* note 53, at 795 (describing the “age of crises” within which contemporary wicked property problems now occur). The impact of artificial intelligence (AI) on employment poses one further example of a future crisis with the potential to add further need for action in the face of a mass economic restructuring upending individuals’ access to property. See, e.g., Moore’s Law, Unemployment, and Homelessness: Why an Increasingly Automated Marketplace Demands Guaranteed Income Programs for Americans, GGU L. REV. BLOG (Apr. 20, 2021), <https://ggulawreview.com/2021/04/20/moores-law-unemployment-and-homelessness-why-an-increasingly-automated-marketplace-demands-guaranteed-income-programs-for-americans/> [<https://perma.cc/H63M-PT6G>] (arguing for a universal basic income program in response to the projected impact of automation on future levels of employment).

¹⁷⁰ See Alexander et al., *supra* note 60, at 743–44 (laying out the foundational concepts of PPT); Lee Anne Fennel, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1460–61 (2016) (arguing that conventional property conceptions such as the fee simple absolute are ill-suited to meet the modern property challenges inherent in contemporary society); see also Lisa T. Alexander, *Community in Property: Lessons from Tiny Homes Villages*, 104 MINN. L. REV. 385, 406 (2019) (arguing that “contemporary urban conditions” drive the need for alternative conceptions of property and tenure in the face of increasingly scarce resources).

¹⁷¹ See Roark & Fox O’Mahony, *supra* note 53, at 798–800 (describing conflicts over the origins of the property system and the ways in which property systems can be transformed by the pressure of crises and wicked property problems); Alexander et al., *supra* note 60, at 743–44 (noting the limitations of the property system’s focus on individual rights and the need for an approach that ensures access to resources for all society members); see also Debbie Becher, *The Public Nature of Private Property*, in *EMERGING TRENDS IN THE SOCIAL AND BEHAVIORAL SCIENCES* 1, 3–4 (Robert Scott & Stephen Kosslyn eds., 2015) (arguing that private property is inherently a product of the state rather than something existing naturally).

¹⁷² See FOX O’MAHONY & ROARK, *supra* note 30, at 212–13 (describing the disjuncture between the functional growth of property laws that facilitate transactions between individuals and the emergence of large-scale wicked property problems); Hartman, *supra* note 29, at 240 (describing the inad-

tems of constitutional protections are predicated on an individual's access to real property, something that the current property system systematically denies to hundreds of thousands of individuals across the nation.¹⁷³ The wicked property problem of homelessness thus demands a radical reorientation of the property system that expands access to property and centers progressive property values such as human flourishing.¹⁷⁴

B. A National Right to Shelter as Part of a Progressive Property System

A national right to shelter is an integral part of this progressive property system because it allocates resilience to vulnerable groups and simultaneously increases their capability to participate in society.¹⁷⁵ Accessing shelter is fundamental to an individual's ability to access other vital resources and the broader socioeconomic stability necessary to be a full member of society.¹⁷⁶ Individual right to shelter regimes across the United States provide positive examples of fundamental changes to property systems that provide resilience to vulnerable individuals experiencing homelessness.¹⁷⁷ By providing a right to shelter, jurisdictions such as New York City, Washington, D.C., and Massachusetts changed the property system to incorporate broader norms of social obligations between the state and its citizens.¹⁷⁸ These norms allocate resilience to

equacy of the current property system in supporting the needs of significant proportions of the U.S. population).

¹⁷³ See Waldron, *supra* note 24, at 47 (discussing how an individual's full enjoyment of their constitutional rights is predicated upon access to private property); Wagner, *supra* note 137, at 211, 217 (detailing the centrality of private property to protections under the U.S. Constitution).

¹⁷⁴ See Alexander et al., *supra* note 60, at 743–44 (describing the components of a progressive theory of property).

¹⁷⁵ See *id.* (discussing how, under a progressive property approach, property laws should “promote the ability of each person to obtain the material resources necessary for full social and political participation”); NUSSBAUM, *supra* note 83, at 33–34 (describing the core capabilities integral to human flourishing and the place of adequate shelter within this formulation); Hartman, *supra* note 29, at 230 (arguing that housing has a unique role in supporting individuals' ability to access other opportunities in society).

¹⁷⁶ See Hartman, *supra* note 29, at 230 (stating that housing is central to an individual's ability to access resources and participate in society); see also Waldron, *supra* note 24, at 43, 47 (describing how individuals experiencing homelessness, by being deprived access to property, are prevented from performing activities that are central to life in a liberal democracy).

¹⁷⁷ See, e.g., Martinez, *supra* note 30, at 6–12 (describing the interplay between individual jurisdictional rights to shelter and a national right). The differing approaches taken to operationalizing a right to shelter across U.S. jurisdictions also provide examples of the form that a national right to housing could take and the populations that could be brought under its protections. See *id.* at 19–20 (discussing how a right to shelter lays the foundation for national rights).

¹⁷⁸ See generally Alexander, *supra* note 76 (detailing the manifestations of a social obligation norm in U.S. property law). Even though a formalized national right to shelter does not currently exist, these obligations created by individual jurisdictions have already changed the property system in ways that provide form to a potential future national right. See Roark & Fox O'Mahony, *supra* note 53, at 812, 821, 840 (describing how states assign resilience in ways that change the property system). See *supra* note 102 for a discussion of the ways that introducing a right to shelter can help reduce

both the state and to populations experiencing homelessness via a right to shelter.¹⁷⁹ Simultaneously, establishing a right to shelter establishes new norms of obligations between states and citizens while enabling access to property for individuals without any private property of their own.¹⁸⁰ In the absence of a codified national right, these jurisdictional rights to shelter provide potential normative frameworks for a national right to shelter which, grounded in progressive values, could enable sociopolitical participation and provide access to essential resources.¹⁸¹ Such jurisdictional rights also provide examples of the ways in which individual jurisdictions are able to provide potential form to a national right through a bottom-up approach to rights constitution.¹⁸²

Although the United States has traditionally favored negative rights over the creation of new rights, the scale of the current homelessness crisis demands action at the national level irrespective of the traditional deference for private actors within the property system.¹⁸³ At the same time, recognizing that modern homelessness is overwhelmingly the result of larger structural causes rather than the result of individual causal factors further evidences the need for a na-

rates of unsheltered homelessness. The rate of unsheltered homelessness in Boston, Massachusetts is only 2.7% versus a national average of 40.1%. See Holder & Capps, *supra* note 102 (discussing the impact of the right to shelter on reducing levels of unsheltered homelessness).

¹⁷⁹ See FOX O'MAHONY & ROARK, *supra* note 30, at 359–62 (discussing the ways in which state responses to vulnerability resulting from homeless squatting movements led to the state changing their approaches in ways that altered the property system).

¹⁸⁰ See *id.* (discussing the ways in which states shape and re-shape the property system by intervening in the property system); *Ensuring the Right to Shelter: The First Court Decision in Callahan v. Carey Requiring the Provision of Shelter for Homeless Men in New York City*, *supra* note 31 (setting out the trial court's initial decision in *Callahan v. Carey* and the obligations this placed on the City of New York).

¹⁸¹ See *supra* notes 90–122 and accompanying text; Alexander et al., *supra* note 60, at 743–44 (discussing the foundations of PPT as a theoretical concept enabling individuals to contribute to and participate in society).

¹⁸² See SHEILA R. FOSTER & CHRISTIAN IAONE, CO-CITIES: INNOVATIVE TRANSITIONS TOWARD JUST AND SELF-SUSTAINING COMMUNITIES 130, 132–33 (2022) (describing the ways that cities and local jurisdictions can facilitate the “bottom-up” management of assets and resources for the collective good of communities); Lisa T. Alexander, *Co-Cities: Reconceiving the City, the Commons, and New Governance Theory*, SLOG L. BLOG (Mar. 20, 2023), <https://www.sloglaw.org/post/co-cities-reconceiving-the-city-the-commons-and-new-governance-theory> [<https://perma.cc/9P4P-93NX>] (exploring the Co-Cities framework conceptualizing cities as “shared commons” that allow for a “bottom-up” mode of facilitating governance of resources); see also FOX O'MAHONY & ROARK, *supra* note 30, at 359–62 (discussing the role of local-level government actors in responding to wicked property problems); Valverde, *supra* note 30, at 285–87 (discussing the formation of localized government responses).

¹⁸³ See ROSENTHAL & FOSCARINIS, *supra* note 120, at 333 (arguing that the size and scale of the modern homelessness crisis requires a national response led by the federal government); Adams, *supra* note 33, at 316 (arguing that a right to housing is the most productive starting point in the face of the scale of current social issues facing U.S. society). The diffusion of responsibility in localized responses to homelessness together with the limited resources of sub-national governments means that only a national response can sufficiently tackle the scale of the issues posed by modern homelessness. See ROSENTHAL & FOSCARINIS, *supra* note 120, at 333–34 (describing the need for a federal response to homelessness).

tional response to the growing crisis.¹⁸⁴ The conventional property system effectively requires unhoused individuals to resolve their homelessness themselves: providing no remedy or mechanism to enable access to real property in the meantime.¹⁸⁵ It is patently unrealistic and unfair, however, to expect individuals experiencing homelessness to lift themselves out of homelessness when its causes are largely outside of their control.¹⁸⁶ The only remedy that the conventional property system offers individuals in this situation is the potential recognition of a future property right.¹⁸⁷ Given the scale of the current crisis, this is wholly inadequate.¹⁸⁸

Potential substantive due process negative right frameworks for a right to shelter fail to provide the scope necessary to provide a meaningful resolution to the problem of homelessness.¹⁸⁹ Such rights frameworks provide only slightly more expansive protection against the criminalization of homelessness than arguably already provided by courts' Eighth Amendment jurisprudence.¹⁹⁰

¹⁸⁴ See COLBURN & ALDERN, *supra* note 13, at 127–36 (arguing that modern homelessness is primarily the result of deficiencies in the housing supply and the unaffordability of available housing stock); *The Gap: A Shortage of Affordable Rental Homes*, *supra* note 17, at 5 (detailing the lack of affordable housing for households with the lowest incomes in the United States).

¹⁸⁵ See Baron, *supra* note 139, at 284–85 (describing the legal disabilities stemming from a lack of property); ROSENTHAL & FOSCARINIS, *supra* note 120, at 317 (arguing that the structural causes of homelessness, which are inherent in the contemporary property system, systemically prevent individuals from accessing housing).

¹⁸⁶ See ROSENTHAL & FOSCARINIS, *supra* note 120, at 317 (describing the ascendancy of explanations centering structural rather than individual factors in explaining homelessness).

¹⁸⁷ See Baron, *supra* note 139, at 284–85 (arguing that the property system deprives individuals experiencing homelessness of any property rights). Given that the conventional property system is focused on the mediation of private rights, without a right to shelter the only hope offered to individuals experiencing homelessness by the property system is that they will one day themselves have a property interest that can be recognized. See *id.* (describing the conventional focus of the property system on access to private property). The significant affordable housing crisis, however, means that this is unlikely. See *The Gap: A Shortage of Affordable Rental Homes*, *supra* note 17, at 5 (describing the significant lack of affordable housing in the United States).

¹⁸⁸ See COLBURN & ALDERN, *supra* note 13, at 5 (discussing the scale of the contemporary homelessness crisis); *The Gap: A Shortage of Affordable Rental Homes*, *supra* note 17, at 5 (describing the significant lack of affordable housing in the United States); McJunkin, *supra* note 20, at 134 (detailing the numbers of Americans that may experience homelessness during any given year).

¹⁸⁹ See McJunkin, *supra* note 20, at 185 (arguing that a negative right to shelter provides protection against the criminalization of homelessness). A negative right to shelter merely provides relief from criminal punishment for aspects of homelessness rather than posing any solution to the property problem of homelessness itself. *Id.*

¹⁹⁰ See *id.* (arguing for the place of a negative right to shelter in guarding against the criminalization of homelessness); see, e.g., *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018) (holding that prosecuting individuals experiencing homelessness under anti-camping ordinances without providing sufficient shelter violates the Eighth Amendment), *amended by* 920 F.3d 584 (9th Cir. 2019); *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (holding that the criminalization of individuals for “harmless, involuntary conduct” violates the Eighth Amendment’s prohibition against cruel and unusual punishment). The key difference between Eighth Amendment jurisprudence and the negative rights framework put forth by McJunkin is that under current Eighth Amendment jurisprudence, were a jurisdiction to provide what a court viewed as sufficient alternative

These frameworks also do not provide a meaningful pathway out of the homelessness crisis; rather, they merely provide a guard against officious government enforcement activity.¹⁹¹ For the same reasons that motivate the need for a national response to homelessness, this is a completely inadequate response to the scale of the current crisis experienced by members of vulnerable communities across the United States.¹⁹² A negative right to shelter fails to foreground human flourishing sufficiently and to ensure that individuals are provided with the capabilities necessary for broader social development and participation.¹⁹³ Without an explicit and codified right to shelter, individuals experiencing homelessness will continue to be disempowered by a property system that is more concerned with maintaining individual rights than providing access to resources for society's most vulnerable members.¹⁹⁴

C. New York City: A Model for a National Right to Emergency Shelter

The right to shelter implemented in New York City provides a potential framework for a national right to shelter centered on a more expansive property system focused on enabling human flourishing.¹⁹⁵ New York City's right to shelter provides basic protection against homelessness for individuals with no other housing options by ensuring that any individuals experiencing homelessness can access shelter on an emergency basis.¹⁹⁶ This allocates resilience to

shelter it could still conceivably criminalize sleeping in public or private spaces without permission. See McJunkin, *supra* note 20, at 185 (arguing that a negative right to shelter guards against the criminalization of homelessness). By contrast, McJunkin's conception of a negative right would potentially provide individuals experiencing homelessness with a right to self-shelter regardless of a jurisdiction's provision of shelter alternatives. See *id.* (arguing for a negative right to shelter).

¹⁹¹ See McJunkin, *supra* note 20, at 185 (arguing for a negative right to shelter founded on jurisprudence around substantive due process).

¹⁹² See ROSENTHAL & FOSCARINIS, *supra* note 120, at 333 (arguing for a national response to the homelessness crisis led by the federal government); *The State of the Nation's Housing*, *supra* note 18, at 6 (describing the scale of housing insecurity and the housing affordability crisis).

¹⁹³ See NUSSBAUM, *supra* note 83, at 33–34 (discussing the core capabilities central to a democratic society that enables human flourishing). By failing to provide access to these most basic capabilities, a negative right to shelter does not enable human flourishing in the same way that an affirmative right does. *Id.*

¹⁹⁴ See Alexander et al., *supra* note 60, at 743–44 (describing the limitations of the property system's focus on individual rights and arguing for an approach centering human values built around ensuring access to resources for all society members).

¹⁹⁵ See Final Judgment by Consent, *supra* note 98 (detailing the settlement in *Callahan* that established a right to shelter in New York City).

¹⁹⁶ See *id.* (setting forth the settlement in *Callahan* establishing a right to shelter for individuals identifying as men experiencing homelessness); *Eldredge v. Koch*, 469 N.Y.S.2d 744, 744 (App. Div. 1983) (affirming the trial court's judgment that, as a matter of equal protection, the consent decree in *Callahan* extends to individuals identifying as women); *McCain v. Koch*, 502 N.Y.S.2d 720, 729–31 (App. Div. 1986) (holding that families experiencing homelessness are constitutionally entitled to shelter), *rev'd in part*, 511 N.E.2d 62 (N.Y. 1987); see also Final Judgment at 2, *Boston v. City of*

vulnerable members of society and fulfils progressive property goals by helping individuals develop the capabilities they need to participate fully in society.¹⁹⁷ It ensures that unsheltered individuals are able to overcome the legal disabilities associated with homelessness by providing them with limited access to property and ensuring access to basic rights and protections.¹⁹⁸ Similarly, a right to shelter potentially provides access to fundamental constitutional protections that unsheltered individuals are otherwise systemically prevented from accessing.¹⁹⁹ Although the right to shelter in New York City was established via court decree, the statutory frameworks adopted by other jurisdictions such as Washington, D.C. and Massachusetts provide examples of the way in which such a national right could be constituted via statute.²⁰⁰ Creating a right to shelter as a matter of statutory entitlement also arguably removes the conten-

New York, No. 402295/08 (N.Y. Sup. Ct. filed Sept. 17, 2008) (describing the City's obligations to provide shelter to families that have children).

¹⁹⁷ See Hartman, *supra* note 29, at 230 (describing how housing is central to an individual's access to societal resources).

¹⁹⁸ See Baron, *supra* note 139, at 284–85 (arguing that the property system places a central emphasis on private rights that leaves individuals experiencing homelessness shut out from basic legal rights and abilities).

¹⁹⁹ See Waldron, *supra* note 24, at 47 (illustrating how constitutional rights in the United States are predicated upon an individual's access to private property); Wagner, *supra* note 137, at 211, 217 (describing the ways that rights afforded under the U.S. Constitution require access to private property). It should be noted that the way that the right to shelter is implemented, and the form that shelters take, will likely impact the scope of constitutional protections afforded individuals. See, e.g., *Commonwealth v. Porter P.*, 923 N.E.2d 36, 44–45, 55 (Mass. 2010) (granting defendant's motion to suppress evidence of a firearm found during a warrantless search by police of his room in a homeless shelter on the grounds that the search violated the Fourth Amendment as he had a "reasonable expectation of privacy" in the shelter). But see *People v. Alston*, 792 N.Y.S.2d 73, 74 (App. Div. 2005) (holding that the defendant's contractual obligation to allow access to his locker in a homeless shelter meant he did not have a "reasonable expectation of privacy" in his locker); *People v. Gaffney*, 764 N.Y.S.2d 727, 727 (App. Div. 2003) (holding that defendant had no "reasonable expectation of privacy" in a room that was semi-public in a homeless shelter); *People v. McClain*, 814 N.Y.S.2d 738, 739 (App. Div. 2006) (holding that homeless shelter guidelines that permitted searches of lockers meant that defendant had no "reasonable expectation of privacy" in his locker).

²⁰⁰ See D.C. CODE ANN. § 4-754.11 (West 2022) (establishing a right for clients served by the Washington, D.C. Continuum of Care (CoC) to access shelter in "severe weather conditions"); MASS. GEN. LAWS ANN. ch. 23B, § 30 (West 2023) (promulgating provisions for administration of "emergency housing assistance" to families in Massachusetts, including "pregnant woman [sic] with no other children"). Although the *Callahan* consent decree, as a legal mechanism, is not a good model for the ways that a national right to shelter could be achieved—due to the inherent limitations of piecemeal impact litigation efforts—its content and provisions do provide a valuable framework for the potential codification of such a right. See Final Judgment by Consent, *supra* note 98 (detailing the *Callahan* settlement). In addition to establishing (in part via subsequent litigation) a universal grant of shelter for anybody experiencing homelessness, the consent decree's provisions contain a range of minimum standards that provide a model for future statutes establishing a right to shelter. See *id.* (setting out the settlement in *Callahan* and the minimum shelter standards governing everything from sleeping environment to accessibility of intake procedures).

tion usually inherent in competing property claims by placing the obligations on the state rather than on other individual property owners.²⁰¹

The protections against homelessness provided by limited rights to shelter such as in Massachusetts and Washington, D.C., by contrast, do not sufficiently address the scale of the current homelessness crisis because they only provide limited support targeted at certain groups or during certain periods of the year.²⁰² Homelessness in the United States today impacts all members of society and at all times of year: limiting the provision of shelter thus fails to provide a meaningful resolution to the homelessness crisis.²⁰³

Introducing a national right to shelter in the mold of that created in New York City would help pave the way for a more expansive future right to housing in the United States.²⁰⁴ Despite a human right to housing offering perhaps the most expansive fulfilment of a progressive property approach, it is telling that no jurisdiction in the United States has introduced a right to housing in this form.²⁰⁵ Implementing a national emergency right to shelter is likely an immediately more feasible proposition because it builds on existent jurisdictional responses to the wicked property problem of homelessness that have successfully expanded access to property from within the property system itself.²⁰⁶ At the same time, a national emergency right to shelter would create a path to a

²⁰¹ See ALEXANDER, *supra* note 85, at 55–57 (discussing general property-related obligations as something owed by and to society more broadly); Roark & Fox O'Mahony, *supra* note 53, at 796 (discussing the conventionally rivalrous nature of property and competing property claims).

²⁰² Compare Final Judgment by Consent, *supra* note 98 (establishing a comprehensive right to shelter in New York City), with ch. 23B, § 30 (promulgating provisions for administration of “emergency housing assistance” to families in Massachusetts, including “pregnant woman [sic] with no other children”), and § 4-754.11 (establishing right for clients served by the Washington, D.C. CoC to access shelter in “severe weather conditions”).

²⁰³ See Alexander et al., *supra* note 60, at 743–44 (arguing for a new property system that ensures universal access to resources). See generally *The 2022 Annual Homelessness Assessment Report (AHAR) to Congress—Part 1 Point-in-Time Estimates of Homelessness*, U.S. DEP'T HOUS. & URB. DEV. (Dec. 2022), <https://www.huduser.gov/portal/sites/default/files/pdf/2022-AHAR-Part-1.pdf> [<https://perma.cc/EX79-ZANF>] (describing the breakdown of demographic homelessness in the United States).

²⁰⁴ See Martinez, *supra* note 30, at 2 (describing how a right to shelter is a prerequisite for a future broader right to housing).

²⁰⁵ See *The Right to Adequate Housing: Fact Sheet No. 21 (Rev. 1)*, *supra* note 107 (describing the concepts making up the human right to housing); Alexander, *supra* note 25, at 253–54 (discussing human right to housing provisions within the International Covenant on Economic, Social and Cultural Rights (ICESCR)). By offering protections such as security of tenure that guard against arbitrary evictions, the human right to housing arguably goes further in centering progressive property notions than the limited right to shelter in New York City. See Alexander, *supra* note 25, at 253–54 (discussing the ICESCR's security of tenure provisions).

²⁰⁶ See FOX O'MAHONY & ROARK, *supra* note 30, at 216, 221–22 (describing how states' interventions into the property system allocate resilience and shape the property system); Roark & Fox O'Mahony, *supra* note 53, at 795, 800 (detailing the role of the states in shaping property systems); Martinez, *supra* note 30, at 2 (describing how a right to shelter is a necessary first step in establishing a future broader right to housing).

more expansive future human right to housing.²⁰⁷ By providing access to property, a national emergency right to shelter would also significantly mitigate the growing homelessness and affordable housing crisis.²⁰⁸ Finally, implementing a national emergency right to shelter would fulfil progressive property goals of enabling human flourishing and societal participation for the most vulnerable populations in the United States today.²⁰⁹

CONCLUSION

Although no formalized national right to shelter currently exists in the United States, such a right is essential to meaningfully tackling the contemporary homelessness crisis. The homelessness crisis can be conceptualized as a wicked property problem that poses significant harm to both the state and individuals experiencing homelessness. Utilizing a Resilient Property Theory (RPT) analysis shows the ways in which individual jurisdictions that have introduced a localized right to shelter regime have successfully changed the property system in a way that allocates resilience to vulnerable populations. Progressive Property Theory (PPT) provides a lens to explore further the place of a right to shelter as part of a progressive property system centering human flourishing. At the same time, the emergence of individual jurisdictional rights to shelter regimes within the United States brings renewed focus on the unique role and capability of the state in responding to wicked property problems and other crises. The emergence of modern homelessness as a wicked property problem illustrates the need for a greater state role in actively constituting basic rights and protections premised on ensuring greater socioeconomic equity. The right to shelter implemented in New York City provides a model of a potential future national right to emergency shelter that would ameliorate the current homelessness and affordable housing crisis.

JONATHAN BERTULIS-FERNANDES

²⁰⁷ See Martinez, *supra* note 30, at 2 (describing how a right to shelter helps lay the foundation for a future right to housing); FOX O'MAHONY & ROARK, *supra* note 30, at 225–26 (describing the role of property norms—the “property *nomos*”—and the ways in which these provide the outer limits to the changes that can occur within the property system).

²⁰⁸ See FOX O'MAHONY & ROARK, *supra* note 30, at 221 (describing how states intervene into the property system to allocate resilience); ROSENTHAL & FOSCARINIS, *supra* note 120, at 326 (arguing that realizing the right to housing is key to preventing homelessness); Hartman, *supra* note 29, at 240–41 (arguing for the importance of a right to housing).

²⁰⁹ See Alexander et al., *supra* note 60, at 743–44 (arguing that the property system should center human flourishing and enable individuals to participate fully in society).

