

A Homeless Bill of Rights (Revolution)

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This Article examines an emerging movement so far unexplored by legal scholarship: the proposal and, in some states, the enactment of a Homeless Bill of Rights. This Article presents these new laws as a lens to re-examine storied debates over positive and social welfare rights. Homeless bills of rights also present a compelling opportunity to re-examine rights-based theories in the context of social movement scholarship. Specifically, could these laws be understood as part of a new “rights revolution”? What conditions might influence the impact of these new laws on the individual rights of the homeless or the housed? On American rights culture and consciousness?

The Article surveys current efforts to advance homeless bills of rights across nine states and the U.S. territory of Puerto Rico and evaluates these case studies from a social movement perspective. Ultimately, the Article predicts that these new laws are more likely to have an incremental social and normative impact than an immediate legal impact. Even so, homeless bills of rights are a critical, if slight, step to advance the rights of one of the most vulnerable segments of contemporary society. Perhaps as significantly, these new laws present an opportunity for housed Americans to confront our collective, deeply-rooted biases against the homeless.

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I. INTRODUCTION

*Moral rights are an important source of legal rights, but it is also true that legal rights influence the content of moral rights.*¹

A new movement is afoot: in June 2012, Rhode Island passed the mainland's first Homeless Bill of Rights. State legislatures in California, Hawaii, Illinois, Connecticut, Oregon, Vermont, Missouri, and Massachusetts quickly followed suit, introducing their own bills. So far, Connecticut and Illinois have already joined Rhode Island with freshly enacted homeless bills of rights. Other states are actively evaluating the prospects for such legislation.²

Homeless bills of rights articulate a vibrant range of rights and remedies. For example, some provide the right to shelter, sustenance, or health care, while others incorporate rights against employment discrimination or police harassment. Some provide civil remedies for those whose statutory rights have been violated; at least one vests the creation, implementation, and enforcement of rights in an administrative entity. Although these new laws illustrate varying substantive provisions and strategic compromises, they share the

¹ Philip Harvey, *Aspirational Law*, 52 BUFF. L. REV. 701, 715 (2004).

² See *infra* Part III.

overarching goal of improving the lives of homeless Americans.

The emergence of this new legislative tool raises compelling questions. What exactly is a homeless bill of rights? What is its purpose? What are the differences and similarities across jurisdictions? What types of rights are or should be covered? How, if at all, are these rights different than those afforded to housed individuals? Do these laws announce any new rights? Or are they merely statutory reiterations of constitutional or civil rights already afforded to the homeless—or for that matter, to housed individuals? If homeless bills of rights are only statutory reiterations of already existing rights, how might these laws meaningfully improve the lives of homeless people?

On the other hand, if homeless bills of rights actually purport to create new rights for homeless people—such as positive social welfare rights—should advocates fight for judicial enforcement provisions? If a right is not judicially enforceable, is it really a right at all? Many legal scholars and homeless advocates contend that judicial enforceability is the *sine qua non* of a right.³ Indeed, virtually all homeless bills of rights advanced on the mainland United States explicitly provide for civil remedies.⁴ But others dispute the necessity of judicial enforceability to the realization of a right,⁵ instead emphasizing the realization of rights through agency implementation.⁶ After all, judicial rulings do not necessarily translate to agency implementation; to the contrary, judicial enforcement may be ineffectual⁷ or even provoke legislative repeal of a law.⁸ Accordingly, should homeless advocates expend significant resources to ensure homeless bills of rights contain civil remedies provisions? What approach best ensures the implementation and realization of rights for homeless Americans?

By their very nature, homeless bills of rights invite such robust rights-based inquiries. Ultimately, the value of a homeless bill of rights must be measured by its potential contribution to the lives of homeless Americans. Of course, any ideal outcome would significantly revise how American society perceives, values, and incorporates homeless people—the law would be part of a social movement that transforms

³ See *infra* notes 232, 233, and accompanying text.

⁴ See Table 1, Cross-Jurisdictional Comparison of Provisions. Massachusetts is an outlier, explicitly stating that the law does not create a new private right of action that would not already otherwise exist. See H. 3595, 188th Reg. Sess. § 31(d) (Mass. 2013).

⁵ See *infra* Part III.C. Indeed, many scholars question whether rights really exist at all. See generally, Michael McCann, *The Unbearable Lightness of Rights: On Sociolegal Inquiry in the Global Era*, 48 LAW & SOC'Y REV. 245 (2013).

⁶ See discussion *infra* Part IV.C.

⁷ See discussion *infra* Part IV.C.

⁸ See *infra* note 247 and accompanying text.

relationships between the housed and homeless from exclusive to inclusive. In this respect, homeless bills of rights might be understood as part of an effort to naturalize a normative vision. Social movement theory can help to explain how such a normative vision might become a reality.

This Article is the first to identify and analyze the new, growing phenomenon of homeless bills of rights in the United States. The Article is enriched with feedback and insights of homeless advocates nationwide, the result of dozens of interviews with advocates inside and outside of active jurisdictions. Part I introduces the specific context of homeless advocacy, spotlighting key issues with homelessness in the United States. Part II surveys case studies of current efforts to enact homeless bills of rights in nine states and Puerto Rico. This section briefly describes the history, content, and status of these bills, and draws substantive and strategic comparisons among these case studies. Part III introduces a rights revolution framework. Specifically, this section surveys rights-based theories and their application to social movement “rights revolutions.” It applies a rights revolution framework to these case studies and analyzes the potential challenges and benefits of this new legislative tool, both from a practical and theoretical perspective. The Article concludes that homeless bills of rights are more likely to have an incremental social and normative impact than an immediate legal impact. Even so, these new laws are an important step toward a long-overdue rights revolution for one of America’s most vulnerable populations. Perhaps as significantly, these new laws present an opportunity for housed Americans to confront our persistent, deeply-rooted biases against the homeless.⁹

⁹ The use of “the homeless,” an adjective, to refer to non-housed human beings, can be fairly criticized as dehumanizing. Some advocates, however, (such as the National Coalition for the Homeless) commonly use the phrase interchangeably as a noun and as an adjective. In this Article, I’ve tried to err on the side of using the phrase as an adjective unless such use impacts readability. I’ve also attempted to make analogous use of the phrase “housed” to refer to people with stable housing conditions.

II. SNAPSHOT OF HOMELESSNESS IN THE UNITED STATES

*Give me your tired, your poor, your huddled masses yearning to breathe free,
the wretched refuse of your teeming shore. Send these, the homeless, tempest-tossed to
me. I lift my lamp beside the golden door!*¹⁰

Despite the Statue of Liberty's welcoming message, the homeless remain one of the most vulnerable, reviled, and underserved populations in America. Estimating the number of homeless people in the United States is an elusive task¹¹ and, in the endeavor, it is easy to forget that numbers represent real human beings. There are no definitive estimates of U.S. homelessness, but some commonly cited numbers suggest that anywhere from 650,000 to 3.5 million Americans are homeless at any given time.¹² Nearly 40 percent of these people are families with children.¹³

¹⁰ The Statue of Liberty bears these first two lines of this sonnet from Emma Lazarus, "The New Colossus." *Statue of Liberty National Monument*, LIBERTYSTATEPARK.COM, <http://www.libertystatepark.com/emma.htm> (last visited Feb. 17, 2015).

¹¹ The slipperiness of the effort partly reflects the various ways and purposes the homeless may be defined or categorized into subcategories or subpopulations. The U.S. Department of Housing and Urban Development (HUD) considers an individual homeless if he or she lives in an emergency shelter, transitional housing program, safe haven, or a place not meant for human habitation, such as a car, abandoned buildings, or on the street. U.S. Department of Housing and Urban Development, *2013 Annual Homeless Assessment Report to Congress*, at 2 (2013) [hereinafter HUD 2013 Report to Congress]. But HUD also categorizes homelessness in various ways. *See, e.g., id.* at 2 (distinguishing definitions of "Chronically Homeless" and "Sheltered Homeless"). Moreover, the data can also be complicated by the use of varying baselines and measurements of time: estimates might focus on a single evening, a particular week, year, or other increment. *See, e.g., infra* note 12.

¹² Estimates vary depending on the methodology used. The lower estimate comes from the latest U.S. Department of Housing and Urban Development single-night-count, which is an annual "point-in-time" estimate of persons homeless on a single night. HUD 2013 Report to Congress, *supra* note 11, at 22. These point-in-time estimates are highly controversial and criticized for undercounting homelessness. *See, e.g.,* National Coalition for the Homeless, *How Many People Experience Homelessness?*, NATIONALHOMELESS.ORG (July 2009), <http://nationalhomeless.org/>. The higher estimate of 3.5 million is an annual estimation of Americans that experience homelessness over the course of a single year. *See* National Alliance to End Homelessness, *A Snapshot of Homelessness*, ENDDHOMELESSNESS.ORG, <http://www.endhomelessness.org/pages/snapshot> (last visited Feb. 17, 2015). Homelessness is a difficult number to measure definitively; the rising number of "unsheltered homeless" shows that more people—especially families—are sleeping in shelters, living in their cars, and taking up residence in tent communities. HUD 2013 Report to Congress, *supra* note 11, at 20 (stating that unsheltered homeless individuals increased in major cities in 2012).

¹³ *Id.* at 3–4.

In fact, homeless families represent one of the fastest growing segments of the homeless population.¹⁴ Children comprise approximately 23 percent of the homeless population.¹⁵ The majority of homeless children are under the age of seven.¹⁶ According to a 2011 study by the National Center of Family Homelessness, approximately one out of every forty-five children in the United States experiences homelessness at some point in the year.¹⁷ The number of homeless school children has grown dramatically; in 2011–2012, 40 states reported increases in their homeless student populations, and ten states reported increases of 20 percent or more.¹⁸ Last year, the number of homeless students enrolled in U.S. preschools and K-12 schools reached a record high of at least 1,168,354 children.¹⁹

Although one measure suggests a national decline in homelessness of nearly 4 percent from 2012 to 2013,²⁰ several states experienced a substantial increase in homelessness for the same time period.²¹ According to the latest U.S. Conference of Mayors report, 60 percent of surveyed cities reported a 7 percent average increase in

¹⁴ The percentage of homeless families increased by 1.4 percent (or 3,222 people) from 2011 to 2012. HUD 2013 Report to Congress, *supra* note 11, at 3.

¹⁵ The United States Conference of Mayors, *A Status Report on Hunger and Homelessness in America's Cities: A 23-City Survey*, at 13 (2007).

¹⁶ *The Characteristics and Needs of Families Experiencing Homelessness*, at 5, NATIONAL CENTER ON FAMILY HOMELESSNESS (2011), <http://www.familyhomelessness.org/media/306.pdf>.

¹⁷ National Center on Family Homelessness, *Children*, AMERICAN INSTITUTES FOR RESEARCH (2010), <http://www.familyhomelessness.org/children.php?p=ts>.

¹⁸ Brent Staples, *Homeless Kids in Rough Schools*, N.Y. TIMES, Nov. 14, 2013 (reporting data from the National Center for Homeless Education).

¹⁹ *U.S. Hits Record Number of Homeless Students*, FIRSTFOCUS.ORG (Oct. 24, 2013), <http://firstfocus.org/news/press-release/u-s-hits-record-number-homeless-students/> (citing data from the U.S. Department of Education). First Focus reports this is the “highest number on record, and a 10 percent increase over the previous school year. The number of homeless children in public schools has increased 72 percent since the beginning of the recession.” *Id.* Significantly, the estimate of homeless students is an underestimation of the number of homeless children in the United States. *Id.* (“[The] data [does] not include homeless infants and toddlers, young children who are not enrolled in public preschool programs, and homeless children and youth who were not identified by school officials.”).

²⁰ This estimate comes from the HUD single-night count data, which are soundly criticized as underestimations of homelessness. See HUD 2013 Report to Congress, *supra* note 11, at 1, 6; see also *How Many People Experience Homelessness?*, NATIONAL COALITION FOR THE HOMELESS (July 2009), http://www.nationalhomeless.org/factsheets/How_Many.html.

²¹ The U.S. Conference of Mayors, *2012 Status Report on Hunger & Homelessness*, at 2, available at <http://usmayors.org/pressreleases/uploads/2012/1219-report-HH.pdf> [hereinafter 2012 Conference of Mayors Report]; see also HUD 2013 Report to Congress, *supra* note 11, at 8.

homelessness overall.²² The number of homeless families increased in 71 percent of cities by an average increase of 8 percent.²³ And approximately 60 percent of cities expect the number of homeless families to continue to increase over the next year.²⁴

The causes of homelessness are commonly misunderstood. A popular instinct is to blame homeless people for their condition,²⁵ but research consistently indicates that the leading cause of homelessness is lack of affordable housing.²⁶ In fact, approximately 17 percent of homeless adults are employed, but still unable to afford housing.²⁷ For families with children, the most common causes of homelessness also include poverty, unemployment, eviction, and domestic violence.²⁸

Emergency shelter does not compensate for the lack of affordable housing. Due to lack of sufficient shelter, approximately 64 percent of cities turn away homeless families with children; shelters in 60 percent of cities turn away unaccompanied individuals.²⁹ This sustained increase in the unsheltered homeless warrants particular concern, because this subpopulation is the most vulnerable to death, illness, violence, and a litany of other maladies compared to sheltered individuals.³⁰ This subpopulation is also most affected by criminalization measures and ordinances, which penalize them for living on the streets and in public places.³¹ But, as explained below,

²² 2012 Conference of Mayors Report, *supra* note 21, at 2.

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ See generally JOEL BLAU, THE VISIBLE POOR: HOMELESSNESS IN THE UNITED STATES (1993) (analyzing and debunking persistent “myths” that homeless people are “somehow responsible for their own poverty”); see also discussion *infra* Part II.A.

²⁶ 2012 Conference of Mayors Report, *supra* note 21, at 2. Popular sentiment suggests that the housed perceive the causes of homelessness to be attributable to those who experience it; in other words, a persistent myth is that homelessness is caused by homeless people themselves. See discussion *infra* Part II.A.

²⁷ 2012 Conference of Mayors Report, *supra* note 21, at 2. See also Mireya Navarro, *In New York, Having a Job, or 2, Doesn't Mean Having a Home*, N.Y. TIMES, Sept. 17, 2013, at A1 (citing a study that “‘contrary to popular belief,’ 79 percent of homeless heads of family had recent work histories . . .”).

²⁸ 2012 Conference of Mayors Report, *supra* note 21, at 2. Approximately 16 percent of single homeless adults are victims of domestic violence. *I*

d.

²⁹ *Id.* at 3.

³⁰ See, e.g., *The Hard, Cold Facts About the Deaths of Homeless People*, NATIONAL HEALTH CARE FOR THE HOMELESS COUNCIL (May 29, 2006), available at <http://www.nhchc.org/wp-content/uploads/2011/09/HardColdFacts.pdf>.

³¹ National Law Center on Homelessness and Poverty, *Report: Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities*, at 6 (Nov. 2011), http://www.nlchp.org/Criminalizing_Crisis [hereinafter 2011 NLCHP Report]. See generally National Law Center on Homelessness & Poverty, *No Safe Place: The*

both temporarily sheltered and unsheltered people shoulder these special burdens.

A. *Hated & Homeless*

*People are afraid to get out of their cars when they see a homeless person . . . They haven't been a problem. They just scare people.*³²

Perhaps the greatest barrier to homeless rights is the prevalence of societal animus toward homeless people. Princeton University psychology professor, Susan Fiske, has spent years documenting persistent and deeply-held prejudice against poor and homeless people.³³ Professor Fiske's research shows that housed people frequently perceive homeless Americans as things, not as human beings.³⁴ Moreover, her research suggests that housed individuals react to poverty and homelessness with revulsion instead of sympathy.³⁵ Documented prejudice against the homeless is often associated with efforts to justify the prejudice: assumptions that homelessness is entirely self-induced helps to validate societal disdain.³⁶ But this

Criminalization of Homelessness in U.S. Cities (July 2014), http://nlchp.org/documents/No_Safe_Place [hereinafter 2014 NLCHP Report].

³² A business owner in Richland, South Carolina quoted in Alan Blinder, *South Carolina City Takes Steps to Evict Homeless from Downtown*, N.Y. TIMES, Aug. 25, 2013, at A15.

³³ See, e.g., Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 10, 848 (2006) (describing study results placing homeless people in the "lowest" category, which "elicits the worst kind of prejudice—disgust and contempt—based on moral violations and subsequent negative outcomes that these groups allegedly caused themselves"); ALEXANDER TODOROV, SUSAN FISKE, & DEBORAH PRENTICE, SOCIAL NEUROSCIENCE: TOWARD UNDERSTANDING THE UNDERPINNINGS OF THE SOCIAL MIND 3 (2011) (describing how study participants "dehumanized [homeless people] as ill-intentioned, inept, unfamiliar, dissimilar, strange, and not uniquely human or quite typically human"); Lasana T. Harris & Susan T. Fiske, *Social Groups That Elicit Disgust Are Differentially Processed in mPFC*, 2 SOC. COGNITIVE AND AFFECTIVE NEUROSCIENCE 45, 45–51 (2007) (finding study participants dehumanize homeless people as stimuli that elicit "disgust").

³⁴ *Id.*

³⁵ *Id.*

³⁶ Joel Blau discusses this tendency and explains his efforts to distinguish carefully between a reasonable interest in the population's characteristics and the rather obsessive preoccupation with those individual traits—drugs, alcoholism, or mental illness—which some use to explain their current status. Once we acknowledge that these personal characteristics are not sufficient explanations of homelessness, we can begin to explore the real causes.

BLAU, *supra* note 25. See also Timothy Egan, *Govern in Poetry*, N.Y. TIMES (Dec. 19, 2013) (discussing societal tendency to blame the poor and concluding "that making the poor

impulse flies in the face of extensive research on contributors to homelessness, which suggests a more complex picture.³⁷ This disconnect is particularly acute with respect to the fastest growing segment of the homeless population—families with children—whose circumstances are not as easily attributed to “their fault.”³⁸

But scientific and economic research is not necessary to prove societal animus toward the homeless; popular culture abounds with examples of glorified violence against the homeless and anti-homeless sentiment.³⁹ For example, a recent issue of *Maxim* magazine suggested to its readers: “Kill one for fun. We’re 87 percent sure it’s legal.”⁴⁰ Similarly, popular fight videos and viral hits, such as “Bumfights,” feature “fights between homeless men plied by the producers with alcohol, as well as sadistic assaults, where terrified sleeping homeless people are startled awake and bound with duct tape.”⁴¹ The dehumanization of homeless people can take other forms of entertainment. In Seattle, a “self-proclaimed entrepreneur” offers \$2,000 “Homelessness Tours,” where voyeurs can get a thrill by “checking out . . . homeless haunts” and “try[ing their] hand at panhandling or sleeping on a park bench.”⁴²

out to be lazy, or dependent, or stupid, does not make them less poor[,] [i]t only makes the person saying such a thing feel superior.”)

³⁷ See, e.g., 2012 Conference of Mayors Report, *supra* note 21, at 2 (highlighting variables such as lack of affordable housing, poverty, and unemployment as key factors); BLAU, *supra* note 25, at 33–59 (discussing various studies of economic causes of homelessness); BRENDAN O’FLAHERTY, MAKING ROOM: THE ECONOMICS OF HOMELESSNESS 4–6 (1996) (analyzing various causes of homelessness and remarking that “[a]lcoholism is no more an explanation of homelessness than meteorite failure is an explanation of war”); Maria Julia & Helen P. Harnett, *Exploring Cultural Issues in Puerto Rican Homelessness*, 33 CROSS-CULTURAL RESEARCH 4, 318–30 (1999) (concluding, in part, that socio-cultural variables “such as familialism and intergenerational dependency” are unique and critical influences in Puerto Rican homelessness).

³⁸ 2012 Conference of Mayors Report, *supra* note 21, at 2 (listing primary causes of homelessness for families as lack of affordable housing, poverty, unemployment, eviction, and domestic violence).

³⁹ *Crimes Against America’s Homeless: Is the Violence Growing?*, S. 111–915, 111th Cong. at 57 (2010), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111shrg64876/pdf/CHRG-111shrg64876.pdf> (statement of Professor Brian H. Levin, California State University); see also *id.* at 171–229 (statement of the National Coalition for the Homeless).

⁴⁰ *Id.* at 60 (statement of Professor Brian H. Levin, California State University).

⁴¹ *Id.*

⁴² See Mark Byrnes, *People in Seattle Are Outraged By This \$2,000 “Homeless Tour”*, CITYLAB.COM (Oct. 4, 2013), <http://www.theatlanticcities.com/arts-and-lifestyle/2013/10/people-seattle-are-outraged-2000-homelessness-tour/7138>. The sponsor of the tour maintains that his goal is to increase understanding of homelessness, but the playful tone of the tour itinerary and the excessive private fee has provoked criticism. *Id.*

Of course, dehumanizing homeless people is not limited to mainstream society: homeless people are frequently the targets of “thrill-kills” or other forms of unprovoked violence. Indeed, the commission of bias-motivated violence is sufficiently common that the National Coalition for the Homeless publishes annual reports detailing the murder, torture, and assault of homeless people across the United States.⁴³

Even some elected officials appear to think open hostility toward the homeless is generally acceptable; recently, five-term Hawaii State Representative, Tom Brower, publicized his one-man effort to “clean up” public areas by destroying the possessions of homeless Hawaiian residents with a sledgehammer.⁴⁴ Representative Brower told the media, “If someone is sleeping at night on the bus stop, I don’t do anything, but if they are sleeping during the day, I’ll walk up and say, ‘Get your ass moving.’”⁴⁵ Representative Brower’s campaign may seem unusual, but to the contrary: as explained below, efforts to rid society of the homeless are increasingly codified by law.

B. The Criminalization of Homelessness

*[P]erhaps the single most significant attribute of homelessness is its visibility. Visible poverty disrupts the ordinary rhythms of public life.*⁴⁶

Any effort to stem homelessness must confront the growing phenomenon of state statutes and city ordinances that criminalize homelessness. Despite the fact that most cities lack adequate shelter space to allow homeless individuals the ability to conduct “life-sustaining” activities out of the public eye, 73 percent of American cities have ordinances prohibiting such activities as sleeping or camping, eating, sitting, begging or panhandling, and urinating or defecating in public.⁴⁷ At their core, these laws—often called “quality of life” laws—criminalize homeless people for visibly living in public. Joel Blau explains:

⁴³ See, e.g., *Hate Crimes against the Homeless: Violence Hidden in Plain View*, NATIONAL COALITION FOR THE HOMELESS (Jan. 2012), available at <http://www.nationalhomeless.org/publications/hatecrimes/hatecrimes2010.pdf>.

⁴⁴ See Jim Mendoza, *Lawmaker Hammers Home His Homelessness Solution*, HAWAII NEWS NOW (Nov. 18, 2013), <http://www.hawaiinewsnow.com/story/24003737/lawmaker-hammers-home-his-homeless-solution>.

⁴⁵ See Scott Keyes, *State Rep Uses Sledgehammer to Destroy Homeless People’s Possessions*, THINK PROGRESS (Nov. 19, 2013), <http://thinkprogress.org/economy/2013/11/19/2966371/hawaii-homeless-smash/>.

⁴⁶ BLAU, *supra* note 25, at 4.

⁴⁷ 2011 NLCHP Report, *supra* note 31, at 6–7.

[P]ublic displays of poverty are somehow improper. Since only the most desperate people exhibit their poverty, the slightest glimpse of their desperation makes others feel uneasy. Witnesses to homelessness then become like the unwilling spectators of an intimate domestic quarrel. They know these things occur, but firmly believe they should be kept private if at all possible.⁴⁸

Thus, criminalization laws are not an effort to address homelessness; instead, these laws seek to improve the quality of life of the housed by reducing the visibility of the homeless through incarceration or dislocation.⁴⁹

Such city ordinances criminalizing homelessness continue to increase. Of 234 cities surveyed by the National Law Center on Homelessness and Poverty (NLCHP), 53 percent prohibited begging or panhandling in public places, 40 percent prohibited camping in public places, and 33 percent prohibited sitting or lying down in public places.⁵⁰ These laws authorize police to perform “sweeps” to clear public areas of homeless people.⁵¹ Police sweeps often result in the confiscation and destruction of personal belongings, including identification, documentation, medications, and other property of sentimental value.⁵²

Criminalization measures can also perpetuate homelessness by creating barriers to access.⁵³ First, the loss of important documentation during police sweeps impedes the affected person’s ability to provide necessary identification for employment, housing, social services, and benefits.⁵⁴ Second, if a homeless person violates a “quality of life” ordinance, she can face criminal penalties such as arrest, jail time, and fines.⁵⁵ Many employers and Public Housing Authorities perform criminal background checks to determine baseline eligibility.⁵⁶ In addition, some states terminate or suspend certain social services and benefits when a person has been incarcerated.⁵⁷ As a result, homeless individuals who have been penalized for violating these ordinances

⁴⁸ BLAU, *supra* note 25, at 4.

⁴⁹ See, e.g., Professor Robert Adleman, University of Buffalo, quoted in Blinder, *supra* note 32, at A15 (“[T]hese ordinances and policies just redistribute homeless persons. They don’t solve the problem of homelessness.”).

⁵⁰ 2011 NLCHP Report, *supra* note 31, at 7–8.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 28.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 15, 35.

⁵⁶ 31 2011 NLCHP Report, *supra* note 31, at 32–34.

⁵⁷ *Id.*

find themselves unable to obtain gainful employment, permanent housing, or services and benefits.

Criminalization laws do not merely target homeless people; these laws also target people and organizations that might try to feed them. Homeless people are among those who struggle daily with hunger and inadequate access to food.⁵⁸ Nevertheless, cities also increasingly target individual citizens and groups who attempt to share food with the hungry.⁵⁹ These municipalities use a variety of legal prohibitions and restrictive policies to stop or discourage the sharing of food with the homeless.⁶⁰ Violators of these anti-food sharing laws can face significant criminal and financial penalties.⁶¹ Los Angeles, Philadelphia, Seattle, and Orlando are just a few of more than thirty cities that have either adopted or debated legislation to ban the feeding of homeless people in public places.⁶²

⁵⁸ Approximately 82 percent of surveyed cities reported that emergency food assistance increased in 2011 by an average of 22 percent. 2012 Conference of Mayors Report, *supra* note 21, at 1. According to surveyed cities, approximately 19 percent of people needing emergency food assistance do not receive it. *Id.* In 95 percent of surveyed cities, emergency food distributors had to reduce the quantity of food allocated to needy people because of a lack of resources. *Id.* In 89 percent of cities, these facilities had to turn hungry people away. *Id.*

⁵⁹ See generally National Coalition for the Homeless and the National Law Center on Homelessness & Poverty, *A Place at the Table: Prohibitions on Sharing Food with People Experiencing Homelessness*, NATIONAL COALITION FOR THE HOMELESS (Dec. 2010), available at http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing_2010.pdf. See generally National Coalition for the Homeless and the National Law Center on Homelessness & Poverty, *Feeding Intolerance: Prohibitions on Sharing Food with People Experiencing Homelessness*, NATIONAL COALITION FOR THE HOMELESS (Nov. 2007), available at http://www.nationalhomeless.org/publications/foodsharing/Food_Sharing.pdf.

⁶⁰ *Id.*

⁶¹ *Id.* at 3. These laws are particularly punitive in light of recent cuts to the Supplemental Nutrition Assistance Program (SNAP), which provides food assistance to approximately 47 million people. Additional cuts may be on the horizon, as Congress considers a Farm Bill that would further cut SNAP food assistance. See Brad Plumer, *Food Stamps Will Get Cut By \$5 billion This Week — And More Cuts Could Follow*, WASH. POST (Oct. 28, 2013), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/28/food-stamps-will-get-cut-by-5-billion-this-week-and-more-cuts-could-follow/>. The cuts are expected to put more pressure on the hungry and to increase demand at food banks.

⁶² Lawrence Downes, *Insert Homeless Headline Here*, N.Y. TIMES (Nov. 28, 2013) (surveying city efforts to ban feeding programs and observing that “[o]nce you move the homeless out of sight, they are almost out of mind.”); Adam Nagourney, *As Homeless Line Up for Food, Los Angeles Weighs Restrictions*, N.Y. TIMES, Nov. 26, 2013, at A1 (reporting on the L.A. ordinance and observing the city’s homeless “situation. . . has stirred no small amount of frustration and embarrassment among civic leaders, now amplified by fears of the hungry and mostly homeless people, who have come to count on these meals.”).

Advocates nationwide argue that these increasingly popular laws violate homeless Americans' constitutional rights and basic human dignity.⁶³ The discriminatory and pernicious impact of these "quality of life" laws makes them a top priority for many advocates.⁶⁴

C. The Costs of Homelessness

*Anytime there's a dollar tag, there will be a problem.*⁶⁵

Homeless bills of rights are critical tests, not only of societal attitudes toward the homeless, but also of societal and legislative attitudes toward positive rights. Economic and social rights are sometimes referred to as "positive rights" because they create new government obligations or actions.⁶⁶ Civil and political rights, on the other hand, are often referred to as "negative rights" because they recognize a right to be left alone; negative rights are protections from state interference or intrusion.⁶⁷ Positive rights are commonly perceived to be more expensive than negative rights; however, this proposition is hotly debated.⁶⁸ Moreover, some research suggests that positive social welfare rights remedies are less costly and more effective than other alternatives.⁶⁹ Nonetheless, in American politics, positive

⁶³ See, e.g., 2014 NLCHP Report, *supra* note 31. For example, the American Civil Liberties Union recently filed suit on behalf of a homeless couple in Miner, Missouri, a city in one of the states considering a homeless bill of rights. See Kevin Murphy, *A Homeless Couple Sues a Missouri Town for Asking Them to Leave*, REUTERS, Dec. 16, 2013, <http://www.reuters.com/article/2013/12/17/us-usa-homeless-missouri-idUSBRE9BG03820131217>.

⁶⁴ Each of the advocates interviewed identified criminalization of homelessness, frequently along with a right to housing, as a top priority. See, e.g., Telephone interview with Jim Ryczek, Executive Director, Rhode Island Coalition for the Homeless (Feb. 27, 2013); Telephone interview with Paul Boden, Organizing Director of Western Regional Advocacy Project (Feb. 22, 2013); Telephone interview with Alison Eisinger, Executive Director, Seattle King County Coalition on Homelessness (Feb. 28, 2013); Telephone interview with Karina O'Malley, Founder of Crossroads Justice Center & Shelter, Green Bay, Wisconsin (Feb. 28, 2013); Telephone interview with Lynn Lewis, Executive Director, Picture the Homeless, New York City (Mar. 4, 2013).

⁶⁵ Telephone interview with Adam Arms, Legal Coordinator, Western Regional Advocacy Project (WRAP) (Feb. 25, 2012).

⁶⁶ Frank Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863–64 (2001).

⁶⁷ *Id.* Observe also that many scholars critique the distinction between positive and negative rights as misleading. See, e.g., *id.* at 875–77; Mark Tushnet, *Social Welfare Rights & the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1909 (2004).

⁶⁸ See generally, STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (W.W. Norton & Co. 1999) (explaining that all legal rights—both positive and negative—must be enforced by the government and therefore no right is costless).

⁶⁹ See, e.g., *infra* note 78 and accompanying text.

rights discourse commonly centers on money.⁷⁰

For example, many advocates point to evidence that a primary cause of homelessness is a lack of affordable housing;⁷¹ therefore, any serious legislative effort to advance homeless rights must address affordable housing.⁷² Opponents respond that affordable housing remedies are, well, unaffordable.⁷³ Whether advocates prioritize affordable housing, health care, job training, education, or other positive remedies to stem homelessness, the apparent magnitude of the problem invites rejection. It is not economically or logistically feasible, opponents maintain, to solve homelessness.

⁷⁰ Frank Cross channels this sort of “pragmatic, consequentialist” evaluation of positive rights. Cross, *supra* note 66, at 878. He proposes various problems with positive rights, including what he calls “the economics of rights enforcement,” “the politics of rights enforcement,” and “the practical effect” of rights enforcement. *Id.* at 862. As a result, Cross observes that positive social welfare rights “are rare and quite limited”; generally, these rights are most clearly recognized when they “conform to majoritarian sentiment” and do not “impose substantial costs” on government budgets. *Id.* at 873. Although Cross focuses on constitutional positive rights, his critique has similar implications for positive statutory rights—such as a right to housing—that might be articulated in a homeless bill of rights.

⁷¹ Interviewed advocates expressed consensus on the lack of affordable housing as a primary cause of homelessness and as a priority issue. *See, e.g.*, Interview with Karina O’Malley, *supra* note 64; Interview with Eisinger, *supra* note 64; Interview with Ryczek, *supra* note 64; Interview with Boden, *supra* note 64. Advocates’ perspectives are confirmed by other studies, including the latest U.S. Conference of Mayors report. 2012 Conference of Mayors Report, *supra* note 21.

⁷² Housing is considered affordable when its cost constitutes 30 percent or less of a household’s monthly income. *The State of Homelessness in America 2012*, at 24, NATIONAL ALLIANCE TO END HOMELESSNESS (Jan. 17, 2012), <http://www.endhomelessness.org/library/entry/the-state-of-homelessness-in-america-2012>. In 2010, however, approximately one in four U.S. renter households spent 50 percent or more of their monthly income on housing. *Id.* In 2010, some states saw a severely high housing cost burden of over 80 percent of monthly household income. *Id.* Even in states with relatively low levels of housing cost burden, more than half of households below the poverty line still spent more than 50 percent of their income on housing. *Id.*

⁷³ *See, e.g.*, Mai Thi Nguyena, Victoria Basolob & Abhishek Tiwarib, *Opposition to Affordable Housing in the U.S.A.: Debate Framing and the Responses of Local Actors*, 30 HOUSING, THEORY, & SOC’Y 2, 107–30 (2012) (discussing opponents’ many motivations and arguments, including costs); Editorial, *Extreme Budget Cuts of 2014*, N.Y. TIMES (June 22, 2013), http://www.nytimes.com/2013/06/23/opinion/sunday/extreme-budget-cuts-of-2014.html?_r=0 (highlighting pending legislation to cut HUD affordable housing programs in light of economic pressures); Annie Lowrey, *As Automatic Budget Cuts Go Into Effect, Poor May Be Hit Particularly Hard*, N.Y. TIMES (Mar. 3, 2013), <http://www.nytimes.com/2013/03/04/us/politics/poor-face-most-pain-as-automatic-budget-cuts-take-effect.html?pagewanted=all> (discussing the impact of sequestration cuts on housing programs).

Instead, the impulse for legislative bodies is often to pursue what are perceived as cheaper, quicker fixes to “solve” homelessness. Frequently, these fixes amount to “out of sight and out of mind” strategies that remove the homeless from sight—such as criminalization laws or relocation initiatives.⁷⁴ For example, some cities—such as Honolulu, New York City, Baton Rouge, and San Francisco—have attempted to weed out homeless residents by offering them free, one-way transportation out of state.⁷⁵ Supporters maintain that these programs are an effort to return homeless residents to friends or relatives in other states; critics argue that such programs misdirect public funds in a transparent effort to “pass[] the problem of homelessness to another city,” instead of investing in solutions to homelessness.⁷⁶

⁷⁴ These criminalization or “quality of life” laws demonstrate the Broken Windows theory of community development: the first signs of poverty in a community are like the first broken windows; they must be repaired or removed immediately to prevent spreading deterioration. See, e.g., *Historical Criminalization Fact Sheet Homeless Bill of Rights Campaign*, at 2, WESTERN REGIONAL ADVOCACY PROJECT, available at <http://wraphome.org/images/stories/ab5documents/HistoricalCriminalizationFactSheet.pdf>. Adherents to this theory may view homeless people as “broken windows” that should be removed for the good of the community. *Id.* Joel Blau explains some of the psychological motivations behind Broken Windows laws:

If one encounter with a homeless person is awkward, the cumulative effect of many such encounters is discordant. Some people are generous and do not mind occasional requests for money. Too many requests, though, soon exhaust their generosity. Losing their capacity to engage in single charitable acts, they are increasingly inclined to see homelessness as a disfigurement of the landscape, and begging as a personal assault. After a while, public opinion sours, and demands intensify to get the homeless off the street.

BLAU, *supra* note 26, at 4. Such Broken Windows laws overtax the criminal justice system and cost taxpayers substantially more than providing housing for the homeless. See 2011 NLCHP Report, *supra* note 31, at 37–40. Advocates also contend these laws contradict traditional standards of fairness embodied in the Bill of Rights, especially the right to due process, the right to free speech, and the right to be free from cruel and unusual punishment. *Id.* at 19.

⁷⁵ See, e.g., Olivia B. Waxman, *Hawaii Offers Homeless One-Way Tickets Out of State*, TIME.COM (July 31, 2013), <http://newsfeed.time.com/2013/07/31/hawaii-offers-homeless-one-way-tickets-out-of-state/>. In a similar vein, states such as Nevada, have been sued by other municipalities for allegedly bussing homeless people out of state. See Rick Lyman, *Once Suicidal and Shipped Off, Now Battling Nevada Over Care*, N.Y. TIMES, Sept. 21, 2013, at A17 (describing class action lawsuit brought by San Francisco against state of Nevada and suggesting similar incidents in other cities).

⁷⁶ Waxman, *supra* note 75 (quoting Arnold S. Cohen, CEO of Partnership for the Homeless).

These common legislative responses avoid engagement with the thorny questions about whether or how positive rights could be afforded to the homeless.⁷⁷ Efforts to hide the visibility of homelessness not only fail to address the underlying problems of homelessness, but research suggests that such efforts are costly and ineffective in the long-run. Several studies show that incarceration of the homeless costs more than the provision of shelter or permanent housing.⁷⁸ Some projections estimate that on average, a city spends approximately \$87 per day to incarcerate a person, compared to \$28 per day to provide shelter for that person.⁷⁹ Other studies suggest a correlation between the provision of permanent supportive housing and a decrease in costs for incarceration, emergency room admissions, and behavioral health care.⁸⁰

The perennial debate over the cost-benefits of increasing support and services versus increasing penalties and enforcement is a fundamental and enduring tension.⁸¹ As explained below, this tension persists in the latest method of homeless advocacy: the state-level enactment of a homeless bill of rights.

⁷⁷ These avoidance strategies do not mean the legislative body avoids a normative judgment or action about whether positive rights should be afforded. To the contrary, such inaction is in fact a normative choice that reinforces social and distributive hierarchies that often disfavor minority rights. *See, e.g.,* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2330 (1990) (making similar observations and describing “governmental inaction [as] a choice . . . [that] reinforces incentives which are already skewed against supervisory control over government employees, and encourages the unbridled discretion which leads to unconstitutional conduct.”)

⁷⁸ *See Cost Savings with Permanent Supportive Housing*, NATIONAL ALLIANCE TO END HOMELESSNESS (Mar. 1, 2010), <http://www.endhomelessness.org/library/entry/cost-savings-with-permanent-supportive-housing> (charting the changes in state expenditures pre- and post-placement of homeless individuals in permanent supportive housing across four cities and one state); *see also Cost of Homelessness*, NATIONAL ALLIANCE TO END HOMELESSNESS (Dec. 3, 2013), http://www.endhomelessness.org/pages/cost_of_homelessness (surveying various studies concluding that permanent housing options are more cost-effective than the provision of temporary shelter).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See generally* HOLMES & SUNSTEIN, *supra* note 68 (arguing that all rights cost money, and therefore debates over the allocation and recognition of rights are, at their core, debates over the cost-benefit of those rights).

III. CASE STUDIES: CURRENT EFFORTS TO ADVANCE HOMELESS BILLS OF RIGHTS

Homeless bills of rights present the threshold question of whether the government should make statutory commitments to positive or negative rights for the homeless. Other inquiries logically follow: if the government makes such statutory commitments, what should the scope of those commitments be? Should they be aspirational? Or must they be capable of sustained implementation by government agencies? If the commitments are expected to improve the circumstances of homeless people, what redress should exist if the government fails to deliver on its commitments?

Several American jurisdictions are spotlighting these conversations by proposing, and in some instances enacting, statewide homeless bills of rights. This section offers a brief overview of significant developments in Puerto Rico, Rhode Island, and California.

A. *Puerto Rico: An Administrative Approach to Rights*

In 1998, Puerto Rico broke a barrier in U.S. homeless advocacy. It was the first U.S. territory to pass a homeless bill of rights, a legislative declaration of specific rights that belong to Puerto Rico's homeless citizens. Few mainland advocates interviewed for this Article reported knowing much or—in some instances—knowing anything about Puerto Rico's homeless bill of rights. Indeed, at the time of this writing, no other English scholarship has reported or evaluated Puerto Rico's homeless rights legislation.⁸² The lack of mainland knowledge regarding Puerto Rico's laws might be attributed to geographical distance and separation, distinctions between Puerto Rico's civil law tradition and the mainland's common law tradition, language barriers, or real or perceived cultural or demographic differences.⁸³ In any

⁸² Efforts to locate Spanish legal scholarship on Puerto Rico's Homeless Bill of Rights laws were also unsuccessful.

⁸³ The impact of Puerto Rico's culture, civil law tradition, and demographics present a rich and complex area for continued research. A very limited handful of studies suggest some starting points for legal scholarship to examine the impacts of these socio-cultural variables on the recognition of homeless rights, social welfare or positive rights, perceptions of agency, and the role of the state. See, e.g., Julia & Harnett, *supra* note 37, at 318–30 (analyzing cultural, demographic, and social differences between homelessness in Puerto Rico and in Columbus, Ohio and concluding, in part, that socio-cultural variables “such as familialism and intergenerational dependency” are unique and critical influences in Puerto Rican homelessness); Aileen Torres, Aida Garcia-Carrasquillo & Juan Noguera, *Sociodemographic Variables, Childhood Characteristics, and Family Risk Factors for Homelessness: A “Puerto Rican Paradox?”*, 32 HISP. J. OF BEHAVIORAL SCI. 4, 532–48 (2010) (supporting Julia and Harnett's “proposal that family factors are more salient

event, Puerto Rico's unique model is a compelling source of study and future research. As described below, Puerto Rico's provision of a broad range of positive and negative rights is unparalleled by any enacted legislation on the mainland. But the substantive scope of Puerto Rico's law is not the only unique contrast with the mainland states; Puerto Rico's law also articulates a detailed administrative scheme for homeless rights unlike any other.

Puerto Rico is also a unique jurisdiction for homeless rights because the Constitution of Puerto Rico, adopted in 1952, specifically identifies the homeless as a suspect class.⁸⁴ Still, abuses of homeless rights increased during the 1990s.⁸⁵ In 1998, Puerto Rico passed Act 250 to "provide services for the homeless, [and] to implement a well-integrated public policy that will allow these persons to meet their basic needs and have their rights respected."⁸⁶ Conceived as an administrative plan to mitigate homelessness, Act 250 established a commission within the Department of the Family, which was tasked with coordinating the efforts of government agencies, the private sector, and nonprofits.⁸⁷ The role of the Commission was to determine the best course of action to implement public policy regarding the homeless in Puerto Rico, focusing on housing, health, employment and income, and access to government services.⁸⁸ Act 250 was not intended to be judicially enforceable; instead, the creation,

predictors of risk in [Puerto Rico's homeless] population than other sociodemographic variables such as poverty and education levels" and proposing future research analyze "collectivism, interdependence, *familismo*, and multigenerational households and their relationship to homelessness"). There is a similar dearth of scholarship examining the impact of Puerto Rico's civil law tradition on social, cultural, political, and legal consciousness; such scholarship could help guide future research on Puerto Rico's Homeless Bill of Rights. See, e.g., Marta Figueroa-Torres, *Recodification of Civil law in Puerto Rico: A Quixotic Pursuit of the Civil Code for the New Millennium*, 12.1 ELECTRONIC J. OF COMP. L. (May 2008), available at <http://www.ejcl.org/121/art121-21.pdf>.

⁸⁴ See Telephone interview with Osvaldo Burgos Pérez, Chairman of the Commission on Human Rights and Constitutional Law Society and Professor of Law at the University of Puerto Rico School of Law (Feb. 27, 2013); see also Telephone interview with Glorin Ruiz Pastush, Volunteer at La Fondita de Jesus (Feb. 22, 2013). The Puerto Rico Constitution specifically recognizes "the right of every person to a standard of living adequate for the health and well-being of himself and of his family, and especially to food, clothing, housing, and medical care, and necessary social services." P. R. CONST. art. II, § 20. The Constitution also specifically prohibits discrimination on the basis of "social condition." P.R. CONST. art. II, § 1.

⁸⁵ P.R. CONST. art. II § 1. See also Interview with Pastush, *supra* note 84.

⁸⁶ Act No. 250, 13th Leg., 3d Sess. (P.R. 1998) (repealed 2007).

⁸⁷ *Id.* The new commission, the Commission for the Implementation of the Public Policy Regarding the Homeless, was structured as a committee chaired by the Secretary of the Department of the Family.

⁸⁸ *Id.* at 6–10.

implementation, and enforcement of the law was entirely vested in the Commission.⁸⁹

Shortly thereafter, in 2000, the Legislative Assembly of Puerto Rico⁹⁰ observed that “the homeless have rights in Puerto Rico . . . but on many occasions, due to their health, financial and social conditions, they do not know or are unable to claim their rights.” Accordingly, the Assembly passed Act 277.⁹¹ The purpose of Act 277 is to “impart . . . legitimacy not only to the homeless, but also to any representative of any assisting organization, be it public or private.”⁹² Act 277 allows advocacy groups to serve as “intercessors” for homeless individuals and act on their behalf in legal proceedings.⁹³ It also requires that the court try cases involving homeless individuals through quicker summary proceedings and waive court fees.⁹⁴

Despite these advances, by 2007, the Assembly noted that the Commission had “not developed models to address the homeless situation.”⁹⁵ Realizing that the government was only one among many different service providers for the homeless, the Assembly decided that a multi-sector approach would be more effective.⁹⁶ In September of 2007, the Assembly repealed Act 250 and replaced it with Act 130, which created a Multi-Sector Homeless Population Support Council.⁹⁷

The new Act 130 “aims to achieve the goal of eradicating homelessness . . . [and] make Puerto Rico a place where all human beings have a roof over their heads, and prompt and sensitive access to the basic services every human being is entitled to receive.”⁹⁸ The Act

⁸⁹ *Id.*

⁹⁰ Act No. 277, 13th Leg., 7th Sess. (P.R. 2000). The Asamblea Legislativa de Puerto Rico is the territorial legislature of the Commonwealth of Puerto Rico, which is responsible for the legislative branch of the government of Puerto Rico. The Legislative Assembly is a bicameral legislature consisting of an upper house, the Senate, and the lower house, the House of Representatives. Every bill must be passed by both houses and signed by the Governor of Puerto Rico to become law. The structure and responsibilities of the Legislative Assembly are defined in Constitution of Puerto Rico which vests all legislative power in the Legislative Assembly. In relevant respects, the Legislative Assembly of Puerto Rico is comparable to the bicameral structure and process of other state legislative bodies on the mainland. *See generally Asamblea Legislativa*, OSLPR.ORG, <http://www.oslpr.org/new/asamblealegislativa.aspx> (last visited Feb. 18, 2015).

⁹¹ Act No. 277, 13th Leg., 7th Sess. (P.R. 2000).

⁹² *Id.*

⁹³ *Id.* at § 698.

⁹⁴ *Id.* at § 691–701.

⁹⁵ Act No. 130, 15th Leg., 6th Sess. (P.R. 2007).

⁹⁶ *Id.* at 14.

⁹⁷ *Id.* at 21.

⁹⁸ *Id.*

enumerates several positive and negative rights guaranteed to the homeless, including the right to shelter;⁹⁹ nourishment;¹⁰⁰ medical attention;¹⁰¹ all social services and benefits for which they qualify;¹⁰² workforce training;¹⁰³ protection from law enforcement officers against any kind of mistreatment;¹⁰⁴ and free access to parks, town squares, and other public facilities.¹⁰⁵

Like the Commission created under Act 250, the Multi-Sector Council created under Act 130 was similarly situated in the Department of the Family and chaired by its Secretary.¹⁰⁶ However, in addition to retaining the former Commission's purpose of implementing and developing policy and strategy, the Council was also tasked with "seeking and developing new options" to provide services and housing for the homeless.¹⁰⁷ The twenty-one member Council is comprised of nine members from the government sector, nine members from a coalition of homeless services—two of whom must have experienced homelessness—and one member from the private sector.¹⁰⁸ Like its predecessor, Act 130 is not judicially enforceable; instead, it tasks the Council with responsibility for designing protocols to ensure agency implementation of the enumerated rights and with responsibility for enforcing compliance.¹⁰⁹

In December 2007, a few months after the passage of Act 130, members of the Assembly noted the persistent lack of protocols to facilitate access to public services.¹¹⁰ That month, the Assembly enacted Act 199, which required all government departments and agencies to establish protocols for the access and rendering of services to the homeless and to establish awareness trainings on homeless rights.¹¹¹ Act 199 also announced plans to publish these protocols for public inspection, thereby increasing accountability of service providers, including the government.¹¹²

⁹⁹ *Id.* at § 5(a)(1).

¹⁰⁰ *Id.* at § 5(a)(2).

¹⁰¹ Act No. 130, 15th Leg., 6th Sess § 5(a)(3) (P.R. 2007).

¹⁰² *Id.* at § 5(a)(4).

¹⁰³ *Id.* at § 5(a)(5).

¹⁰⁴ *Id.* at § 5(a)(6).

¹⁰⁵ *Id.* at § 5(a)(8).

¹⁰⁶ *Id.*

¹⁰⁷ Act No. 130, 15th Leg., 6th Sess § 5(a)(8) (P.R. 2007).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at § 6.

¹¹⁰ S.B. 1455, 15th Leg., 6th Sess., at 1–2 (P.R. 2007).

¹¹¹ *Id.* at 1.

¹¹² *Id.* at 4.

Most recently, in 2012, another bill for the protection of the homeless was introduced in the Puerto Rico House. The proposed bill, 3912, noted that, despite prior legislation, “very little has been achieved in advancing the effort to improve the situation of homelessness.”¹¹³ To address this perceived lack of progress, 3912 proposed specific procedures for identifying and treating homeless people suffering from substance abuse, physical, or mental health issues.¹¹⁴

In many respects, Puerto Rico’s Homeless Bill of Rights is visionary. Puerto Rico’s consistent enactment of homeless rights legislation over nearly two decades suggests that the notion of homeless rights may not be as politically divisive or as socially unpopular as it appears in many mainland jurisdictions.¹¹⁵ The law articulates a broad range of positive and negative rights that many mainland advocates identify as ideal. Moreover, as explained below, Puerto Rico’s administrative scheme also resonates with many social movement analyses, which observe that any fundamental change in human rights must engage not only the legislative branch, but also administrative entities.¹¹⁶

But many homeless advocates in Puerto Rico believe that the law, while substantively strong, has not been properly implemented or enforced.¹¹⁷ Some of these failures clearly relate to limited resources. For example, the Council is housed in the Department of Family, which has a broad set of responsibilities that distract it from sufficiently addressing the demands of Act 130.¹¹⁸ Indeed, the president of the Council is the Secretary of the Department of Family, and she has been “too busy” to preside over the Council’s meetings.¹¹⁹ Moreover, the administrative scheme is wracked by conflicts of interest: the Council is responsible for designing, implementing, and enforcing the law; the

¹¹³ *P. of C. 3912*, SENADO.PR.GOV (Apr. 20, 2012), available at <http://www.senadopr.us/Proyectos%20del%20Senado/pc3912-ta.pdf>.

¹¹⁴ *Id.*

¹¹⁵ Interview with Francisco de Jesus, former attorney and current volunteer at La Fondita de Jesus (Feb. 25, 2013) (noting that Puerto Rico’s political parties generally agree on policies that support homeless rights; “[t]he most difficult part is the implementation; once you’ve achieved that [policy].”).

¹¹⁶ See discussion *infra* Part IV.C.

¹¹⁷ Interview with Osvaldo Burgos Pérez, *supra* note 83; Interview with Francisco de Jesus, *supra* note 115; Interview with Pastush, *supra* note 84; Telephone interview with Tim Sherwood, retired professor of humanities and current volunteer with La Fondita de Jesus (Feb. 25, 2013).

¹¹⁸ See Interview with Pérez, *supra* note 84.

¹¹⁹ Interview with Sherwood, *supra* note 117.

law can impose administrative fines of up to \$5,000 per violation.¹²⁰ But nearly half of the Council's twenty-one members are also heads of the government agencies responsible for implementing the law.¹²¹ Accordingly, advocates are pushing for new legislation to either relocate the Council in the Housing Department, where some advocates see a more logical fit with issues affecting the homeless,¹²² or to convert the Council into a more autonomous or quasi-governmental agency, perhaps comparable to the Civil Rights Commission.¹²³

The challenge of implementation has sparked some interest in amending the law to provide for judicial enforceability;¹²⁴ the hope is, of course, that mobilizing judicial protections of homeless rights will result in more effective implementation and enforcement. As explained below, judicial enforcement might serve such a role, but the outcomes can be highly contextual and varied.¹²⁵ Certainly, Puerto Rico's unique administrative plan articulates ambitious goals for the island's homeless residents. But if the legislation still lacks sufficient implementation and enforcement, does it have a meaningful impact on homeless rights? Rhode Island's experience provides helpful comparisons.

B. Rhode Island: A Blueprint of Negative Rights

On June 20, 2012, Rhode Island became the first mainland state to pass a homeless bill of rights; as such, it has quickly become a model for many other mainland U.S. advocates that are evaluating similar legislation. Indeed, at the time of this writing, Illinois¹²⁶ and Connecticut¹²⁷ already passed homeless bills of rights based on the Rhode Island template. Hawaii, Oregon, Vermont, Missouri, and Massachusetts base their bills on Rhode Island's model, but have yet to

¹²⁰ Act No. 130, 15th Leg., 6th Sess § 7(k) (P.R. 2007).

¹²¹ Interview with Sherwood, *supra* note 117.

¹²² *Id.* But not all interviewed advocates favor relocation of the Council to another agency department. *See, e.g.*, Interview with Pérez, *supra* note 84.

¹²³ Interview with Sherwood, *supra* note 116; Interview with Pérez, *supra* note 84; Interview with Francisco de Jesus, *supra* note 115; Interview with Pastush, *supra* note 84.

¹²⁴ Interview with Pérez, *supra* note 84 (discussing the advantages of judicial enforceability, but stressing that those advantages cannot be realized without adequate access to counsel and to the judicial process).

¹²⁵ *See infra* Part IV.C.

¹²⁶ Bill of Rights for the Homeless Act, Pub. L. 098-0516, 2013 Ill. Laws, available at <http://ilga.gov/legislation/publicacts/98/PDF/098-0516.pdf>; *see also* Table 1, Cross-Jurisdictional Comparison of Provisions.

¹²⁷ Homeless Person's Bill of Rights, Pub. L. 13-251, 2013 Conn. Acts 1714; *see also* Table 1, Cross-Jurisdictional Comparison of Provisions.

enact such a law.¹²⁸

Even as a prototype, Rhode Island's motivations for the bill are common: the recent economic downturn and a lack of affordable housing transformed Rhode Island's homeless relief efforts into a "system bursting at the seams."¹²⁹ Since 2008, the number of homeless Rhode Islanders has increased by 24 percent.¹³⁰ Annual statistics from 2011 to 2012 show a 12.6 percent increase in homeless families; a 16.9 percent increase in homeless children; and a 23 percent increase in homeless veterans.¹³¹ Rhode Island's shelters, already stretched beyond capacity, have been unable to accommodate the influx of newly homeless individuals.¹³² Homeless individuals seeking jobs face persistent discrimination from employers on the basis of their housing status, creating persistent barriers to employment.¹³³ Service providers report that homeless clients routinely face harassment and discrimination, not just from housed individuals generally, but also specifically from city service workers, such as police and bus drivers.¹³⁴ Despite these grim prospects, in 2011, the Rhode Island legislature cut funding for a supportive housing plan earmarked for helping homeless people return to stable living situations.¹³⁵ In response, homeless advocates gained the support of a few legislators, who introduced several bills to assist homeless Rhode Islanders.¹³⁶ One of these bills was the Rhode Island Homeless Bill of Rights, which was

¹²⁸ H.B. 1205, 27th Leg., Reg. Sess. (Haw. 2013); H.B. 3122, 77th. 2013 Reg. Sess. (Or. 2013); H. 493, 2013 Reg. Sess. (Vt. 2013); S.B. 428, 97th Gen. Assemb., Reg. Sess. (Mo. 2013); H.B. 3595, 188th. Reg. Sess. (Mass. 2013). *See also* Table 1, Cross-Jurisdictional Comparison of Provisions.

¹²⁹ Tracey O'Neill, *RI's Homeless Numbers Climb by More Than Ten Percent*, GO LOCAL PROV (Apr. 3, 2013), <http://www.golocalprov.com/news/ris-homeless-numbers-climb-by-more-than-ten-percent/>.

¹³⁰ *Id.*

¹³¹ *Statistics on the Homeless In Rhode Island*, RHODE ISLAND COALITION FOR THE HOMELESS, <http://www.rhomeless.org/AboutHomelessness/HomelessnessStatistics/tabid/248/Default.aspx> (last visited Feb. 18, 2015).

¹³² Interview with Ryczek, *supra* note 64.

¹³³ Telephone interview with John Tassoni, Jr., State Senator, Rhode Island State Senate (Feb. 27, 2013).

¹³⁴ Interview with Ryczek, *supra* note 64.

¹³⁵ *Id.*

¹³⁶ These bills included S. 2203, a bill to fund supportive and affordable housing, and S. 2307, a bill requiring banks to allow residents in foreclosure to remain in their homes by paying rent. Both S. 2203 and S. 2307 remain in Committee. *See Passing the Homeless Bill of Rights*, RHODE ISLAND COALITION FOR THE HOMELESS (Apr. 7, 2013), <http://www.rhomeless.org/Resources/HomelessBillOfRights/HomelessBillOfRightsPassage/tabid/275/Default.aspx>.

enacted just a few months later.¹³⁷

The Rhode Island Homeless Bill of Rights was passed as an amendment to the state's Fair Housing Practices Act.¹³⁸ It specifically incorporates the state's constitutional equal protection provisions¹³⁹ and provides that "[n]o person's rights, privileges, or access to public services may be denied or abridged solely because he or she is homeless."¹⁴⁰ The statute enumerates seven negative rights for homeless Rhode Islanders: the right to (1) "use and move freely in public spaces;"¹⁴¹ (2) "equal treatment from all state and municipal agencies;"¹⁴² (3) be free from employment discrimination based on housing status;¹⁴³ (4) receive emergency medical care without discrimination based on housing status;¹⁴⁴ (5) vote;¹⁴⁵ (6) non-disclosure or confidentiality of public records;¹⁴⁶ and (7) "a reasonable expectation of privacy" for personal property.¹⁴⁷

The law does not grant homeless Rhode Islanders any new or special rights; indeed, it expressly provides that these rights are "the same rights and privileges as any other resident" of Rhode Island.¹⁴⁸ These rights, however, are judicially enforceable. Accordingly, aggrieved plaintiffs can seek "injunctive and declaratory relief, actual damages, and reasonable attorneys' fees and costs" if their rights are violated under the new law.¹⁴⁹

¹³⁷ S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. (R.I. 2012).

¹³⁸ One result of the amendment to the state's Fair Housing Practices Act is to add "housing status" to a list of explicitly articulated groups that are afforded protection against housing discrimination, including "race, color, religion, sex, sexual orientation, gender identity or expression, marital status, country of ancestral origin, or disability, age, familial status" or victims of domestic violence. *Id.* at § 34-37-1(b).

¹³⁹ *Id.* at § 34-37.1-2(2).

¹⁴⁰ *Id.* at § 34-37.1-3.

¹⁴¹ *Id.* at § 34-37.1-3(1).

¹⁴² *Id.* at § 34-37.1-3(2).

¹⁴³ S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. § 34-37.1-3(3) (R.I. 2012).

¹⁴⁴ *Id.* at § 34-37.1-3(4).

¹⁴⁵ *Id.* at § 34-37.1-3(5) (prohibiting discrimination in voter registration and other voting-related processes).

¹⁴⁶ *Id.* at § 34-37.1-3(6) (providing the "right to protection from disclosure of his or her records and information provided to homeless shelters and service providers to state, municipal and private entities without appropriate legal authority; and the right to confidentiality of personal records and information in accordance with all limitations on disclosure [under federal law]").

¹⁴⁷ *Id.* at § 34-37.1-3(7) (the right to privacy of personal property is co-extensive to "personal property in a permanent residence").

¹⁴⁸ *Id.* at § 34-37.1-3.

¹⁴⁹ S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. § 34-37.1-4 (R.I. 2012).

The bill was amended during the legislative process, shedding light on substantive and strategic negotiations between Rhode Island advocates and policymakers. Like many advocates nationwide, Rhode Island advocates viewed the right to housing and anti-criminalization efforts as top priorities.¹⁵⁰ Accordingly, the original draft humanized the problem of homelessness, grounding the legislation in the “fundamental belief [that] no person should suffer unnecessarily from cold or hunger, or be deprived of housing or the basic rights incident to such shelter from the elements.”¹⁵¹ The original draft also proposed several positive rights, such as the right to certain public services and benefits¹⁵² and to legal counsel.¹⁵³ These provisions, however, were narrowly drafted to confirm these rights were either co-extensive with those already afforded to “any” citizen¹⁵⁴ or were subject to existing eligibility guidelines.¹⁵⁵ Perhaps the most ambitious (and therefore, controversial) provision in the original draft guaranteed “the right to fair, decent and affordable housing in the community of his or her choosing, and access to safe and proximate shelter until such housing can be attained.”¹⁵⁶ Advocates knew the right to housing provision was a long shot; the legislature would likely perceive such a provision as too costly and reject it out of hand.¹⁵⁷ But after extensive discussion, including consultation with homeless Rhode Islanders, advocates felt the right to housing was too important not to include.¹⁵⁸ Even the proposal of a right to housing could serve as a “rallying cry” for constituents and spark important conversations about the dire housing conditions for many Rhode Island adults and children.¹⁵⁹

¹⁵⁰ Interview with Ryczek, *supra* note 64.

¹⁵¹ S. 2052, 2012 Gen. Assemb., Reg. Sess., § 34-37.1-2(2) (R.I. 2012), *available at* <http://webserver.rilin.state.ri.us/BillText12/SenateText12/S2052.pdf>.

¹⁵² *Id.* at § 34-37.1-3(9) (confirming “the right to receive public benefits and services offered to any other citizen of this state in accordance with the established eligibility guidelines for those services”).

¹⁵³ *Id.* at § 34-37.1-3(7) (providing “the right to legal counsel equal to that extended to any other citizen of the state”).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at § 34-37.1-3(9) (confirming “the right to receive public benefits and services offered to any other citizen of this state in accordance with the established eligibility guidelines for those services”).

¹⁵⁶ *Id.* at § 34-37.1-3(4) (providing “the right to fair, decent and affordable housing in the community of his or her choosing, and access to safe and proximate shelter until such housing can be attained”).

¹⁵⁷ Interview with Ryczek, *supra* note 64.

¹⁵⁸ *Id.* (describing one consideration as, “Can’t we just have the fight first, before we pull out the provision?”).

¹⁵⁹ *Id.*

As advocates predicted, the original draft's emphasis on social welfare rights such as hunger and housing was softened significantly in the revised Substitute A—presumably to remove any suggestion that the state would be obligated to address problems such as cold, hunger, or housing issues. Instead, the statement of legislative intent was reframed to emphasize the problem of discrimination. As revised, Substitute A articulated the “fundamental belief [that] no person should suffer unnecessarily or be subject to unfair discrimination based on his or her homeless status.”¹⁶⁰ Substitute A also removed advocates' preferred provisions for the right to certain services and benefits and to legal counsel, despite the fact that these provisions were narrowly drafted and ultimately announced already existing rights. Perhaps less surprisingly, the controversial right to housing and shelter provision was also removed.

Although advocates lost some ground in Substitute A, the new draft gave clearer emphasis to advocates' other priority of decriminalizing homelessness. First, Substitute A revised the “right to equal treatment by all police departments” to a more precise “right to equal treatment by all law enforcement agencies . . . including the right to be free from searches or detention based upon his or her actual or perceived housing status.”¹⁶¹ Substitute A also articulated a new provision: “the right not to be subject to criminal sanctions for resting or sleeping in a public place in a non-obstructive manner when there is no available and accessible shelter space.”¹⁶² Both of these provisions directly confronted various municipal and state laws that advocates maintain criminalize the conduct of life-sustaining activities in public.¹⁶³

Unfortunately for homeless Rhode Islanders, neither of Substitute A's new criminalization provisions survived in the final, enacted bill. Law enforcement agencies reacted negatively to being singled out for the “equal protection” provision, so advocates struck a compromise by broadening the language to encompass “all state and municipal agencies.”¹⁶⁴ On the one hand, this development could be perceived as an improvement because the right to equal protection now arguably covers not only law enforcement agencies but also all

¹⁶⁰ S. 2052, Sub. A, 2012 Gen. Assemb., Reg. Sess., § 34-37.1-2(3) (R.I. 2012), available at <http://webserver.rilin.state.ri.us/BillText12/SenateText12/S2052A.pdf>.

¹⁶¹ *Id.* at § 34-37.1-3(2).

¹⁶² *Id.* at § 34-37.1-3(4).

¹⁶³ Interview with Ryczek, *supra* note 64. See, e.g., R.I. GEN. LAWS § 11-45-1 (2013) (prohibits the obstruction of sidewalk or building entrance).

¹⁶⁴ Interview with Ryczek, *supra* note 64.

other state and municipal agencies. The broader language, however, could also be perceived as obscuring advocates' efforts to spotlight the specific role of law enforcement in violating the basic rights of homeless Rhode Islanders.¹⁶⁵ Moreover, the compromised language no longer articulated the right to "be free from searches or detention" based on one's status as a homeless person. This omission, combined with the removal of "the right not to be subject to criminal sanctions for resting or sleeping in a public place," scrubbed the bill of any specific provisions to combat the criminalization of homelessness.¹⁶⁶

Still, advocates felt the revised Substitute B was a significant development: it would be the first state law to specifically focus on the basic rights of homeless citizens, it drew some attention to problems of discrimination against the homeless, and it fortified seven fundamental negative rights that were not being realized for Rhode Island's homeless citizens.¹⁶⁷ Accordingly, Substitute B, the final version of the bill, was passed the last day of the legislative session.¹⁶⁸

Because Rhode Island's bill was the first to be successfully enacted on the mainland, it is unsurprising that most mainland jurisdictions have adopted Rhode Island's as a model.¹⁶⁹ Illinois and Connecticut recently enacted homeless bills of rights inspired by Rhode Island; Oregon, Missouri, Hawaii, Vermont, and Massachusetts are among the states considering similar legislation.¹⁷⁰ Based on Rhode Island's template, many of these state proposals include the right to (1) move freely in public spaces, (2) receive equal treatment by state and municipal authorities, (3) be free from discrimination while seeking

¹⁶⁵ See generally 2011 NLCHP Report, *supra* note 31 (discussing the role of law enforcement in constitutional and civil violations of homeless people's rights). See generally 2014 NLCHP Report, *supra* note 31.

¹⁶⁶ The removal of the right to rest in public spaces came as a surprise to advocates; the provision easily passed the Senate on the last day of the legislative session, and advocates did not learn it was removed later that day in the House until the law was already passed. Interview with Ryczek, *supra* note 64 (describing the removal of the anti-criminalization measure as occurring "off the radar").

¹⁶⁷ *Id.* (explaining that it would have been "counterproductive to complain" about the removal of the anti-criminalization provision in light of the passage of the overall bill); Interview with Tassoni, *supra* note 133 (stressing that housing and employment discrimination was still a significant issue for homeless Rhode Islanders and thus a significant "short term" target for advocates).

¹⁶⁸ S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. (R.I. 2012).

¹⁶⁹ Most mainland advocates interviewed for this Article had not heard of Puerto Rico's legislation or did not know much about it. Although this Article reports on Puerto Rico's legislation to provoke comparisons and contrasts with emerging laws on the mainland, further research should examine Puerto Rico's potential as a model for mainland advocacy.

¹⁷⁰ See *supra* note 128.

or maintaining employment, (4) receive emergency medical care, (5) vote, register to vote, and receive documentation necessary for voter registration, (6) be protected from disclosure of information or records conveyed to a temporary residence such as a shelter, and (7) reasonable expectation of privacy regarding personal property.¹⁷¹ Most of the proposals also allow for reasonable attorney's fees for prevailing plaintiffs.¹⁷² Some also amend existing law to add a definition of "housing status" to either the housing or civil rights code.¹⁷³

Rhode Island and Puerto Rico enacted the first two homeless bills of rights in the United States, and some rudimentary but helpful contrasts can be drawn between them. First, Puerto Rico's law is far more expansive, both in terms of its longer history (the first law was enacted in 1998), the number of laws encompassed within it (Puerto Rico has enacted over half a dozen significant laws relating to homeless rights), and the scope of the provisions (Puerto Rico provides not only negative rights, but also a broad range of positive rights, including rights to shelter, food, job training, and healthcare).¹⁷⁴ By contrast, the new Rhode Island law articulates seven negative rights, all of which are rights that are currently afforded to housed citizens. Moreover, the Rhode Island statute does not anticipate an administrative scheme. Unlike Puerto Rico's plans for administrative design, implementation, and enforcement of homeless rights, the Rhode Island law centers on judicial enforcement.¹⁷⁵

Some could question whether Rhode Island's law can produce meaningful change.¹⁷⁶ In the most critical light, Rhode Island's model could be criticized for bending on advocates' top priorities such as a right to housing, right to counsel, anti-criminalization, and provisions specifically identifying the need for equal treatment from law enforcement. The result, some might argue, is that the Rhode Island law articulates rights already enjoyed by everyone—whether housed or homeless. The Rhode Island law does not articulate any new rights

¹⁷¹ See Table 1, Cross-Jurisdictional Comparisons of Provisions.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ See generally Act No. 250, 13th Leg., 3d Sess. (P.R. 1998) (repealed 2007); Act No. 277, 13th Leg., 7th Sess. (P.R. 2000); Act No. 130, 15th Leg., 6th Sess. (P.R. 2007). Compare Act No. 250, Act No. 277, and Act No. 130 with S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. (R.I. 2012).

¹⁷⁵ S. 2052, Sub. B, 2012 Gen. Assemb., Reg. Sess. § 34-37.1-4 (R.I. 2012).

¹⁷⁶ See, e.g., Interview with Arms, *supra* note 65 (admiring Rhode Island's accomplishments but opining that "Rhode Island's model is probably not strong enough" for California's needs); Interview with Eisinger, *supra* note 64 (opining that the "priority" is affordable housing and any homeless bill of rights that does not advance housing could distract legislators from taking more important action).

and arguably does not address the most pressing needs of homeless people.

But others insist that even incremental progress is progress, and Rhode Island advocates are advancing an incremental strategy.¹⁷⁷ Rhode Island advocates plan to wait a year or so and gather evidence of how the law is working. If necessary, they plan to return to the legislature and ask for amendments to fix areas that may not be working well.¹⁷⁸ Such a longer-term, incremental strategy may be particularly fitting for Rhode Island, where advocacy is constrained by a legislative session of approximately five to six months, shorter than some other jurisdictions.¹⁷⁹ As explained below, even modest, incremental gains can help to precipitate progressive rights reform.

C. *California: Mainland Ambitions for Positive Rights*

*California's bill is a canary in a coal mine.*¹⁸⁰

Although originally modeled after the Rhode Island Homeless Bill of Rights, the California bill—proposing a broad range of twenty-three rights—was markedly different out the chute. California Assemblyman, Tom Ammiano, first introduced the Homeless Person's Bill of Rights and Fairness Act on December 3, 2012.¹⁸¹ In April 2013, the first amended bill passed the California Assembly's Judiciary Committee by a majority vote of 7 to 3.¹⁸² The bill was originally

¹⁷⁷ Galanter, *infra* note 264, at 127 (discussing social movements and incremental progress). All advocates interviewed for this Article appreciated the practical value of incremental advocacy. *See, e.g.*, Interview with Arms, *supra* note 65; Interview with Pastush, *supra* note 84 (noting advocates' desire to achieve greater progress, but noting the current law is "better than nothing"); Interview with Ryczek, *supra* note 64 (explaining shortcomings in the current law, but stating, "When politicians do something good, and you come back and say, 'You didn't do it good enough,' they don't react well to that.").

¹⁷⁸ Interview with Ryczek, *supra* note 64.

¹⁷⁹ *See, e.g.*, *Dates of 2013 State Legislative Sessions*, BALLOTPEdia (Nov. 14, 2013), http://ballotpedia.org/Dates_of_2013_state_legislative_sessions. Rhode Island's legislative session is roughly comparable to the duration of most other states using Rhode Island's law as a model, including Hawaii's 2013 legislative session of approximately four months, and 2013 sessions in Missouri, Oregon, Illinois, and Connecticut of approximately five months. *See id.* California has a relatively long legislative session—approximately nine months. *See id.* This longer legislative session may support different substantive and strategic choices in California than in the other reviewed states.

¹⁸⁰ Interview with Arms, *supra* note 65.

¹⁸¹ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (introduced).

¹⁸² A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (amended Apr. 4, 2012 and Apr. 30, 2012).

expected to go to a full vote of the House Assembly in January 2014.¹⁸³ But then the bill moved to the Appropriations Committee, which suspended the bill, effectively killing it for the 2013 legislative session.¹⁸⁴ Soon after, advocates received the devastating news that the bill's original sponsor, Assemblyman Ammiano, was retiring and would not reintroduce the bill in the 2014 legislative session. Without a sponsor, California's bill languished. But, California's advocates are not finished fighting,¹⁸⁵ and the bill's history (and perhaps the bill's eventual reincarnation) offers valuable insights.

The bill's introductory language provides that "every person in the state, regardless of actual or perceived housing status, income level, mental illness, or physical disability, shall be free from specified forms of discrimination and shall be entitled to certain basic human rights."¹⁸⁶ It compares discrimination against the homeless to a long legacy of discriminatory laws that have since been repudiated, including Jim Crow laws from the segregation era, anti-Okie laws from the 1930's, which made it illegal to bring poor Dust Bowl immigrants into California, and so-called "Ugly" laws which made it illegal for persons with "unsightly or disgusting" disabilities to appear in public.¹⁸⁷

The California bill provides negative rights similar to those in Rhode Island, but also includes some of the advocates' priorities that were ultimately cut from Rhode Island's bill, such as adequate housing and shelter,¹⁸⁸ access to legal counsel,¹⁸⁹ equal treatment from law enforcement,¹⁹⁰ and anti-criminalization provisions.¹⁹¹ Also similar to Rhode Island, the California bill contemplates judicial remedies for aggrieved plaintiffs whose rights are violated.¹⁹²

¹⁸³ *Bill History*, CALIFORNIA LEGISLATIVE INFORMATION (Feb. 10, 2015), <http://leginfo.ca.gov/faces/billVotesClient.xhtml>.

¹⁸⁴ Telephone interview with Paul Boden, Organizing Director, Western Regional Advocacy Project (Dec. 20, 2013).

¹⁸⁵ See, e.g., *Civil Rights Issues*, WRAPHOME.ORG, <http://wraphome.org/work/civil-rights-issues> (last visited Feb 18, 2015) (discussing "WRAP Civil Rights").

¹⁸⁶ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (amended Apr. 4, 2012 and Apr. 30, 2012).

¹⁸⁷ *Id.* at § 2. The Western Regional Advocacy Project (WRAP), a key homeless advocacy player in efforts to pass California's bill, describes these historical analogues in its *Criminalization Fact Sheet*. *Criminalization Fact Sheet*, WRAPHOME.ORG, <http://wraphome.org/images/stories/wohotkpdf/criminalization%20fact%20sheet%20crossword.pdf> (last visited Feb. 18, 2015).

¹⁸⁸ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 3(a)(2) (Cal. 2012) (amended Apr. 4, 2012 and Apr. 30, 2012).

¹⁸⁹ *Id.* at § 53.2(a)(14)–(15).

¹⁹⁰ *Id.* at § 53.2(a)(1)–(10).

¹⁹¹ *Id.*

¹⁹² *Id.* at § 53.6 (providing for injunctive and declaratory relief, actual,

But California's bill is hardly negative rights boilerplate from Rhode Island: the California bill proposes more specific and detailed language regarding the right to engage in life-sustaining activities in public.¹⁹³ Indeed, the original bill provided the right to urinate in public; this provision provoked significant negative publicity and was removed from the amended version.¹⁹⁴ The amended version, however, arguably serves the same interest by clarifying provisions for sufficient public restrooms and hygienic supplies.¹⁹⁵

The California bill contains several other noteworthy anti-criminalization provisions that go beyond direct protections for homeless people. The bill explicitly provides protections for third parties that offer food or water to a homeless person, thus mooting anti-food sharing laws.¹⁹⁶ Moreover, the bill requires "every local law enforcement agency" to compile annual statistics showing the "number of citations, arrests, and other enforcement activities made pursuant" to specifically illustrated criminalization or so-called "quality of life" laws.¹⁹⁷ Law enforcement must make these statistics publicly

compensatory and punitive damages, and attorneys' fees).

¹⁹³ The California bill also articulates several negative rights never formally proposed in the Rhode Island legislation, including but not limited to the right to pray or practice religion in public and the right to decline shelter and services. *See id.* at § 3(53.2) (8) (right to pray); *Id.* at § 3(53.2) (9) (right to decline shelter).

¹⁹⁴ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 53.3 (f) (Cal. 2012) (introduced). Media coverage was decidedly negative. *See, e.g.,* Editorial, *Don't Give the Homeless a Bill of Rights*, THE PRESS ENTERPRISE (Jan. 9, 2013), <http://www.pe.com/opinion/editorials-headlines/20130109-editorial-dont-give-the-homeless-a-bill-of-rights.ece>.

¹⁹⁵ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 2(c) (6) (Cal. 2012) (amended Apr. 30, 2012) (noting the need for "access to safe, clean restrooms, water, and hygienic supplies" as particularly critical given "the proliferation of closures of public restrooms"); *Id.* at § 53.4(a)–(c) (detailing the obligations of local governments to provide "sufficient health and hygiene centers" and of the State Department of Public Health to fund such centers so "at a minimum, [the centers] shall contain public bathroom and shower facilities"). In this instance, the original draft's provision for the right to urinate—arguably a negative right—turned out to be more controversial than the related positive rights to public restroom facilities and hygienic supplies. Although the urination may have generated bad publicity and perhaps some bad will, it might also have added leverage to efforts to secure restroom facilities and hygiene supplies.

¹⁹⁶ *Id.* at § 53.3(b) (providing that people or organizations sharing food with the homeless "shall not be subject to criminal or civil sanctions, arrest or harassment by law enforcement"). The original draft sought immunity from civil or criminal liability for public employees offering "public resources" to a homeless person. A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 3(53.4) (Cal. 2012) (introduced); however, the amended version proposes only to protect such a public employee from employer retaliation for such actions. A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 3(53.3) (a) (Cal. 2012) (amended Apr. 30, 2012).

¹⁹⁷ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 53.5(a) (Cal. 2012) (amended Apr. 30, 2012).

available¹⁹⁸ and annually report them to the state Attorney General's Office.¹⁹⁹

California advocates are also pursuing positive rights never formally proposed in Rhode Island,²⁰⁰ including "access to income sufficient for survival;"²⁰¹ "access to clean and safe facilities," such as shelters or drop-in centers "24 hours a day, seven days a week;"²⁰² "access to safe, clean restrooms, water, and hygienic supplies;"²⁰³ and access to non-emergency health care.²⁰⁴

Some of the substantive differences between California's and Rhode Island's laws could be due, in part, to different strategic opportunities. California's longer legislative session allowed advocates to propose a broader, more ambitious bill. Although California advocates believed some of the original proposals would likely need to be removed or softened, they also knew they had several months to negotiate.²⁰⁵ Compared to the shorter sessions of Rhode Island-inspired states,²⁰⁶ California's strategy suggests that states with longer legislative sessions might be able to afford to start more aggressively. But California's opening strategy is not risk-free; a more expansive opening strategy could generate ill-will or disengagement from legislators who might view many of the provisions as non-starters.²⁰⁷

¹⁹⁸ *Id.* at § 53.5(16)(b).

¹⁹⁹ *Id.* at § 53.5(16)(c).

²⁰⁰ See Table 1, Cross-Jurisdictional Comparisons of Provisions.

²⁰¹ A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. § 3(a)(1) (Cal. 2012) (amended Apr. 30, 2012).

²⁰² *Id.* at § 3(a)(3).

²⁰³ *Id.* at § 2(c)(7).

²⁰⁴ *Id.* at § 3(a)(5).

²⁰⁵ Among other significant revisions from the original bill was a change in the number of existing laws the bill proposed to amend: the opening paragraph of the original bill proposed to amend six different California codes. A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (introduced). The subsequent revision, however, proposed to amend only two codes (the civil code and government code). A.B. 5, 2013–14 Gen. Assemb., Reg. Sess. (Cal. 2012) (amended Apr. 30, 2012). None of the interviewed advocates suggested it was an intentional strategy, but the original proposal of the controversial negative right to urinate in public seemed to provide some leverage to secure support for the positive right to sanitary facilities.

²⁰⁶ See *supra* note 179.

²⁰⁷ Homeless advocates recognize and regularly negotiate this delicate balance. See, e.g., Telephone Interview with Elisa Della, Director of Neighborhood Justice Clinic, East Bay Community Law Center (Feb. 20, 2012) (describing homeless bill of rights strategies as "hoping for the moon, but willing to compromise with the stars"); Interview with Arms, *supra* note 65 (explaining that advocates cannot push "a conversation ender," but need to "push the limits without being outrageous"); Telephone interview with Steve Diaz, Community Organizer (Feb. 27, 2012) (noting that if you "go in with a bang," you can create the "political wiggle room" to compromise).

Some of the differences in jurisdictional approaches could also stem from different perspectives on incremental approaches to legislative advocacy. Although Rhode Island's negative-rights-only approach appears relatively safe compared to California's, Rhode Island advocates may have a longer-term view of incremental progress. The Rhode Island bill, now enacted, provides a toehold for building statewide homeless rights. Rhode Island advocates plan to monitor, evaluate, and amend that toehold as necessary—a sort of “start small, but grow slowly and steadily” perspective.²⁰⁸ By contrast, California's opening strategy suggests a different view of incremental progress, one that requires a commitment to certain priorities before compromising on others.

On the one hand, California's approach avoids some potential critiques of Rhode Island-inspired bills: even after the bill was passed by the Judiciary Committee, California managed to preserve advocates' priority positive rights (such as affordable housing, non-emergency health care, and adequate sanitary facilities) as well as some of the prized negative rights (such as anti-criminalization and equal treatment from law enforcement). On the other hand, California's bill—however substantively preferable it might appear to some advocates—has yet to be successfully enacted. Still, California's bill arguably made significant contributions to the homeless bill of rights movement. Despite its ambitious provisions, the bill passed the Judiciary Committee by a wide majority. The proposal itself sparked important public discussion about the unfair treatment of homeless Californians. Although there are no clear sponsors to reintroduce the bill in the near future, Californian advocates promise that their efforts are far from exhausted.²⁰⁹ As with all the enacted and proposed homeless bills of rights, the relative risks and rewards to California's approach will be revealed in time.

IV. A HOMELESS RIGHTS REVOLUTION?

This section considers how homeless bills of rights might impact efforts to advance the social and legal rights of homeless Americans. Such inquiries into how the law “does or does not matter” to social movements are commonly framed as legal mobilization analyses.²¹⁰

²⁰⁸ See discussion *supra* part III.B.

²⁰⁹ See Interview with Boden, *supra* note 184.

²¹⁰ Michael McCann, *Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC. SCI. 17, 19 (2006) [hereinafter McCann, *Law and Social Movements*]. As a preliminary matter, many legal mobilization scholars reject the necessity or the efficacy of legal practice as a tool for social reform, noting that the “law is a primary medium

Legal mobilization examines how the law can advance or constrain change, including how individuals might use the law to advance their interests.²¹¹ Ultimately, “law is mobilized when a desire or want is translated into an assertion of right or lawful claim.”²¹² Accordingly, rights-based inquiries are at the core of legal mobilization.

The term “rights revolution” commonly refers to a specific historical development: the perceived historical shift of Supreme Court attention, away from an original, exclusive focus on the property rights of businesses and wealthy individuals and toward a more contemporary focus on creating, expanding, and delineating the individual civil rights of ordinary citizens.²¹³ The Supreme Court’s role in the rights revolution left an indelible and dramatic mark on American government, culture, and rights consciousness. Some believe the Supreme Court’s role in the rights revolution provided crucial and necessary support for the civil rights movement, but scholars still vigorously debate the causes, propriety, and legacy of the rights revolution.²¹⁴

of social control and domination.” Michael McCann, *Legal Mobilization and Social Reform Movements: Notes on Theory and its Application*, 11 *STUDIES IN LAW, POLITICS, AND SOCIETY* 225, 229 (1991) [hereinafter McCann, *Legal Mobilization*] (discussing such criticisms). In this view, the law contributes to the maintenance of status quo power hierarchies and generally frustrates resistance. *Id.* at 229–30. Indeed, McCann acknowledges this “double-edged” tension, but concludes that legal mobilization is an “important innovation” for many American social movements because legal strategies can be used “to open up closed processes, to win formal rights for citizen participation, to dramatize public issues, and to provide leverage against dominant groups in particular battles over policy.” Michael W. McCann & Helena Silverstein, *Social Movements and the American State: Legal Mobilization as a Strategy for Democratization*, in *A DIFFERENT KIND OF STATE? POPULAR POWER AND DEMOCRATIC ADMINISTRATION* 131, 132 (Gregory Albo et al. eds., Oxford U. Press, 1993). In other words, legal mobilization is not the only dimension of a social movement, but it can “offer varying degrees of opportunity or space for creative challenge” to existing patterns of social control and domination. McCann, *Legal Mobilization*, *supra* note 210, at 230.

²¹¹ Frances Khan Zemans, *Legal Mobilization: The Neglected Role of the Law in the Political System*, 77 *AM. POLIT. SCI. REV.* 690, 694 (1983) (“[W]hat the populace actually receives from government is to a large extent dependent upon their willingness and ability to assert and use the law on their own behalf.”). Legal mobilization analysts, however, recognize the law can be “double-edged, at once upholding the larger infrastructure of the status quo while providing limited opportunities for episodic challenges and transformations in that ruling order.” McCann, *Law and Social Movements*, *supra* note 210, at 19 (citing STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* (1974) and GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991)).

²¹² Zemans, *supra* note 211, at 694.

²¹³ CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* 2 (1998).

²¹⁴ Such debates often center on the propriety of an activist judiciary in a democratic society, the role of the judiciary in legitimizing rights, and by extension,

Nonetheless, the rights revolution should not be limited as a historical concept. Studies of “the” rights revolution inform the potential for “new” rights revolutions that may have an analogous impact on rights consciousness—and ultimately, social movements—in America.²¹⁵ In other words, the interpretive lens of the rights revolution is not solely retrospective; it offers a compelling prospective framework, particularly for segments of American society that continue to suffer from systemic oppression and discrimination. Homeless people indisputably fall into this category, and one aim of this Article is to reframe the rights revolution framework to assess the substantive and strategic potential of homeless bills of rights: how might these new laws meaningfully advance the legal and civil rights of homeless people?

One starting place is to gauge the necessary conditions for a rights revolution and to determine whether these conditions might exist in the context of homeless bills of rights. Scholars generally describe the following four factors as conditions necessary to a successful rights revolution: (1) a strong bill of rights or other rights-based constitutions or charters; (2) the presence of a “support structure for legal mobilization, consisting of rights-advocacy organizations, rights-advocacy lawyers, and sources of financing;” (3) an independent, activist judiciary; and (4) a culture of rights consciousness or a culture that frames disputes in terms of rights.²¹⁶ Application of these four necessary conditions to homeless rights advocacy suggests dismal prospects; however, such a sobering preliminary assessment does not

the necessity of judicial enforcement for successful social movements. *See, e.g.*, Sarah Staszak, *Realizing the Rights Revolution: Litigation and the American State*, 38 *LAW & SOCIAL INQUIRY* 222–45 (2013); CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 25 (Harvard Univ. Press 1993); MARK TUSHNET, *THE RIGHTS REVOLUTION IN THE TWENTIETH CENTURY* (Am. Hist. Ass’n 2009); Ann Southworth, *The Rights Revolution and Support Structures for Rights Advocacy*, 34 *LAW & SOC’Y REV.* 1203, 1208 (2000); EPP, *supra* note 213, at 4.

²¹⁵ Scholars have used rights revolution studies to assess the potential for new rights revolutions in other countries. *See, e.g.*, Bruce Wilson, *Institutional Reform and Rights Revolutions in Latin America: The Cases of Costa Rica and Colombia*, 1 *J. POL. IN LATIN AM.* 59 (2009) (looking at Colombian and Costa Rican court rules about access, standing, and formality that allowed for rights revolutions without extensive resources and support structures); E. S. Herron and K. A. Randazzo, *The Relationship Between Independence and Judicial Review in Post-Communist Courts*, 65 *J. POL.* 422 (2003) (noting that despite constitutional grants of power to the judiciary in the former communist bloc countries, informal factors such as economic conditions, executive power, and litigant’s identity affect how the courts operate); Lisa Conant, *Individuals, Courts, and the Development of European Social Rights*, 39 *COMP. POL. STUD.* 76 (2006) (discussing power of the supra-national courts and ease of access influence on expansion of rights in Europe).

²¹⁶ EPP, *supra* note 213, at 3.

doom the potential influence of homeless bills of rights.

A. *America's Rights Charters*

The first necessary condition for a rights revolution, a strong bill of rights and constitutional rights, might bode well for American society on a general scale, but not necessarily on a specific scale for the homeless. The presence of federal and state constitutions does not translate into positive rights for homeless people. The constitutional predisposition to positive rights—such as a right to shelter, health care, or sustenance—is decidedly adverse: constitutional positive rights generally do not thrive at the federal level because the federal constitution is a negative charter,²¹⁷ and such positive rights may not thrive at the state level because courts are reluctant to impose positive right obligations on state legislatures, even when an affirmative constitutional obligation is found.²¹⁸ In fact, of the fifty-one jurisdictions analyzed for this Article, twenty-nine of the state constitutions provide some degree of social welfare rights that implicate the homeless; however, many of the specific rights that homeless advocates prioritize do not appear to be realized by these constitutional charters.²¹⁹ Moreover, many of the fundamental civil and constitutional rights most treasured in America—rights to privacy, property, and freedom from discrimination—are routinely and especially denied to homeless Americans.²²⁰ Indeed, it is precisely these denials of civil and constitutional rights that spur interest in homeless bills of rights.

²¹⁷ TUSHNET, *supra* note 67, at 1895 (describing the rejection of constitutional welfare rights as “conventional wisdom”); *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (calling the U.S. Constitution “a charter of negative rather than positive liberties”). But other scholars contend the Bill of Rights contains positive rights. See, e.g., Holmes & Sunstein, *supra* note 68, at 52–54; Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992); Bandes, *supra* note 77, at 2271; compare Cross, *supra* note 66, at 873 (reviewing these perspectives and concluding “the rights recognized in the Constitution are not perfectly negative, [but] they are overwhelmingly oriented that way”).

²¹⁸ Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799, 819 (2002).

²¹⁹ *Id.* Indeed, as discussed below, due to challenges such as implementation bias, the statutory articulation of social welfare rights—such as those articulated in homeless bills of rights—does not necessarily improve rights-based prospects for homeless people. See *infra* note 247.

²²⁰ See *supra* note 74.

B. Support Structures and Financing

Poverty and marginalization undercut the ability of the homeless to capitalize on the second “necessary condition” for a rights revolution: support structures, including material resources.²²¹ According to Charles Epp, rights advocacy also demands significant and sustained financial resources, including government-supported financing.²²² To some, Epp’s argument may seem cynical: do rights really come down to money? But ignoring the role of material resources in rights advocacy is “wholly unjustified,” Epp contends, particularly given the historical reality of an uneven “litigation playing field.”²²³ Moreover, “the judicial process is costly and slow and produces changes in the law only in small increments, [so] litigants cannot hope to bring about meaningful change in the law unless they have access to significant resources.”²²⁴

But homelessness is associated with a relative lack of organization, power, and financial resources.²²⁵ Deficits in support structures then affect the potential for homeless rights advocacy and legal mobilization.²²⁶ Homeless people generally face significant obstacles to secure social change through the courts or through the legislative process. Courts often punt on matters of social or economic legislation because judges “presume any problems will be remedied within the

²²¹ EPP, *supra* note 213, at 3.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* Epp’s point relates to an extensive body of social science literature concerning the role of social movement organizations, or SMOs, to accomplish change; SMOs also tend to be successful “repeat players” that can secure favorable outcomes through the courts. See generally Marc Galanter, *Why the “Haves” Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC’Y REV. 95, 97–99 (1974) (explaining that individuals or organizations that occasionally access the courts are less successful in leveraging litigation to bring about social and political change than are “repeat player” litigants—such as affluent individuals and corporations—who can afford to engage in similar pieces of litigation over time); Beth Harris, *Representing Homeless Families: Repeat Player Implementation Strategies*, 33 LAW & SOC’Y REV. 911 (1999) (discussing how poverty lawyers can leverage power in judicial, administrative, political, and social venues).

²²⁵ See Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 33 RUTGERS L. REV. 563, 627 (2014) (discussing suspect classification factors of political power, organization, and representation as applied to homeless people); Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE U. L. REV. 135 (2011) (same); BLAU, *supra* note 25, at 94 (“The political impairment of the homeless derives from the circumstances of homelessness itself.”). See also McCann, *Legal Mobilization*, *supra* note 210, at 226 (discussing studies showing “the neediest groups of citizens typically lack the basic resources to employ litigation strategies”).

²²⁶ *Id.*

political process.”²²⁷ This deference creates a “dialogic default” because certain vulnerable groups are not protected by the judiciary, and “they also lack the types of resources typically required for effective political mobilization to pursue protection from the political branches of government.”²²⁸ When vulnerable groups like the homeless enter such a dialogic default, the result is the “stagnation” of their rights.²²⁹ These challenges can impede the proposal of homeless rights in the first place, their implementation, or their enforcement. Homeless rights advocates across the nation are a capable and committed lot, but they are limited in number and in financial resources. Accordingly, the current support structure for homeless rights faces an uphill battle.

C. *The Role of the Judiciary*

*[F]ormal legal actions to redress social wrongs are initiated almost daily, yet only rarely do they contribute to the development of a broad-based social movement.*²³⁰

The third contributor to a successful rights revolution, an activist judiciary, also withers when specifically applied to the homeless. In the context of homeless rights, an activist judiciary would make rights-based decisions in keeping with ideologies that recognize and value homeless rights. But, as explained in this section, courts are reluctant to depart from mainstream norms and generally enforce laws in line with the status quo as defined by society through its elected branches of government.²³¹ Given the general disposition of the status quo toward homeless people, a court is unlikely to forge new ideological ground on homeless rights.

Currently active homeless bills of rights demonstrate a strong mainland trend to pursue judicially enforceable bills; even Puerto Rico—a civil law jurisdiction that has so far centered its homeless rights legislation on an administrative model—appears to be considering

²²⁷ See, e.g., Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogic Default*, 35 *FORDHAM URB. L.J.* 629, 631 (2008).

²²⁸ *Id.*

²²⁹ *Id.* at 636.

²³⁰ McCann, *Legal Mobilization*, *supra* note 210, at 238.

²³¹ See, e.g., ROSENBERG, *supra* note 211, at 13–15 (discussing such external pressures on the judiciary that limit its ability to affect social reform); William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 *U. PA. L. REV.* 419, 500 (2001); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 *MICH. L. REV.* 2062, 2067 (2002). See also William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 *DUKE L.J.* 1215, 1225 (2001) (noting that the Civil Rights Acts “announced great antidiscrimination principles but were narrowly construed by a post-Reconstruction judiciary afraid to disturb the political consensus in favor of racial segregation”).

judicial redress provisions.²³² This predisposition stems from the view that court-centered enforcement is necessary to save a law from being merely aspirational. The presumption of judicial remedies is also fueled by legal scholarship, which tends to equate the existence of a right with its enforcement.²³³ Indeed, rights revolution scholarship is predisposed to see judicial enforcement as the ultimate hallmark of a right. In the rights revolution, the judiciary ultimately enforced—and thus, made real—civil rights and liberties.²³⁴

Certainly, the judiciary can play a significant role in social change. Judicial pronouncements can benefit social movements by bestowing a sense of legitimacy to rights claims, mobilizing constituents, providing publicity, and increasing a rights claimant's bargaining power.²³⁵ Even the threat of litigation can provide helpful leverage.²³⁶ Moreover, litigation need not be successful in order to advance social movements; even unsuccessful litigation can support reform.²³⁷

But the promise of judicially enforceable rights may prove elusive.²³⁸ First, many of the rights treasured by homeless advocates are rendered practically unenforceable due to real and perceived political and economic limitations.²³⁹ For example, in discussing Franklin D. Roosevelt's historic proposed entitlement to "a useful and remunerative job," Cass Sunstein observed:

²³² The vast majority of advocates interviewed for this Article stressed the vital importance of judicial enforcement. *See, e.g.*, Interview with Ryczek, *supra* note 64 ("Do you want 'feel good' legislation, or do you want it to be enforceable?"); Interview with Eisinger, *supra* note 64 (describing judicial enforceability as "real protection" and the lack of judicial protection as a "problem"); Interview with Pérez, *supra* note 84 (discussing the advantages of judicial enforceability).

²³³ For example, Frank Cross argues, "[t]he notion of a legal right necessarily implies law, which implies government enforcement. The claim that legal rights require legal enforcement is tautological . . ." Cross, *supra* note 66, at 861 (discussing the role of government action in the definition of legal rights). *See also* Holmes & Sunstein, *supra* note 68, at 43 (explaining that all legal rights depend on government enforcement).

²³⁴ EPP, *supra* note 213, at 3.

²³⁵ *See, e.g.*, MICHAEL MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION 144–45 (1994). *See generally* Douglas NeJaime, *Winning Through Losing*, 96 IOWA L. REV. 941 (2001) (arguing that even judicial defeats can advance social reform movements).

²³⁶ MCCANN, *supra* note 235, at 144–45.

²³⁷ NeJaime, *supra* note 235, at 941.

²³⁸ *See* Harris, *supra* note 224, at 916–17 (documenting governmental retreat from social welfare reforms and discussing barriers to implementation of rights remedies); Southworth, *supra* note 214, at 1208 (discussing analyses of the various factors, beyond judicial enforcement, that determine whether rights are recognized).

²³⁹ Cross, *supra* note 66, at 880–93.

With respect to judicial enforcement, the difficulty [with a right to work] does not lie in ambiguity or vagueness, but in the limited resources of government and the extreme difficulty of ensuring the rights . . . are respected in practice No nation can ensure that every citizen has a job; a certain level of unemployment is inevitable.²⁴⁰

The potential budgetary toll of any social welfare rights legislation is a pragmatic constraint, both on judicial enforcement and on administrative implementation.²⁴¹ Moreover, the justiciability of positive rights is a political constraint.²⁴² Although statutory rights are distinct from constitutional rights, if positive rights become part of homeless bills of rights and these rights are later challenged, courts are more likely to push for enforcement if these rights “seem to conform to majoritarian sentiment” and do not “impose substantial costs on the budget of the government at any level.”²⁴³ To the extent homeless advocates succeed in securing the inclusion of new social welfare remedies in homeless bills of rights, as an economic and political matter, the judiciary may review even statutory violations with a degree of caution and deference, ultimately allowing legislatures to determine the destiny of such laws.²⁴⁴

This prediction is supported by state court trends with respect to statutory rights to housing. Following the Supreme Court’s lead,²⁴⁵ state courts generally refuse to recognize a right to housing in state

²⁴⁰ CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 210 (2009).

²⁴¹ See generally Cross, *supra* note 66 (discussing pragmatic, economic limitations on judicial enforcement); see also Harris, *supra* note 224, at 922–23, 926–27 (discussing case studies about the budgetary influences on agency implementation).

²⁴² The justiciability of social welfare rights is hotly debated. Some scholars contend that judicial intervention in matters of economic and social policy is a breach of the separation of powers doctrine. See, e.g., Cross, *supra* note 66, at 887–93 (discussing various political critiques). Others argue that courts frequently (and properly) decide issues that affect budgetary and economic policy. See Nice, *supra* note 227, at 629. See generally Harris, *supra* note 224.

²⁴³ Cross, *supra* note 66, at 873–74.

²⁴⁴ Although my prediction relates to the judiciary’s review of statutory rights, it resonates with Mark Tushnet’s constitutional law prescription for “weak judicial remedies.” Tushnet, *supra* note 67, at 1910–11. Through this model, courts identify the violation of a right but then provide only light oversight of a remedial plan’s implementation. *Id.* at 1910. In light of potential constraints on judicial enforcement, advocates can strengthen their position by advocating for a role in implementation. See Harris *supra* note 224, at 911–17; discussion *infra* notes 263–268 and accompanying text.

²⁴⁵ *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (explaining that despite the importance of safe, sanitary housing, “the Constitution does not provide judicial remedies for every social and economic ill.”).

constitutions.²⁴⁶ But even when state courts recognize a statutory duty to provide housing, judicial enforcement efforts frequently prompt state legislatures to repeal or modify the law at issue.²⁴⁷ The bottom line is, “courts generally lack the independence and resources to enforce their decisions against recalcitrant groups in government and society.”²⁴⁸ As a result, the enactment of positive social welfare rights can be empty, symbolic legislative gestures that dissipate—even when tested in court.²⁴⁹

Moreover, a pre-occupation with judicial enforceability obscures the critical role of administrative agencies in the implementation of rights. Beth Harris’s work persuasively argues that lawyers representing homeless families must conceive of advocacy “beyond the courtroom into the implementation process.”²⁵⁰ Homeless advocates must assume this role because neither rights litigation nor rights

²⁴⁶ Most state courts refuse to recognize a constitutional duty for states to provide shelter; New York is a well-recognized exception. *See Callahan v. Carey*, No. 79-42582 (N.Y. Sup. Ct. Dec. 5, 1979) (recognizing a right to emergency shelter based on state constitutional guarantee of aid, care, and support for the needy).

²⁴⁷ A few state courts have attempted to enforce explicit, mandatory statutory obligations to provide shelter to the homeless. *See, e.g., Baltimore v. Dist. of Columbia*, 10 A.3d 1141 (D.C. 2011) (construing language that the city “shall” provide sufficient shelter in severe or frigid weather as a statutory entitlement, but concluding that plaintiffs had not established city’s failure to provide such shelter); *Ctr. Twp. of Marion County v. Coe*, 572 N.E.2d 1350, 1354 (Ind. Ct. App. 1991) (requiring the town trustee to comply with emergency shelter provisions); *Clark v. Milwaukee County*, 524 N.W.2d 382, 386 (Wis. 1994) (finding a \$98.00 shelter stipend insufficient for “health and decency”); *Hilton v. New Haven*, No. 8904–3165, 1989 Conn. Super. LEXIS 52 (Conn. Super. Ct., Dec. 27, 1989) (ordering the city of New Haven to provide shelter services to anyone claiming to need them). But significantly, many states and municipalities do not respond to such decisions by implementing the original statutory provisions; instead, when tested, these legislatures commonly repeal or significantly narrow their statutory obligations. *See, e.g., NYC Department of Homeless Services Procedure No. 12-400*, COALITION FOR THE HOMELESS, available at http://coalhome.3cdn.net/3a34f202045a8e03d4_rgm6benw9.pdf (last visited Feb. 18, 2015) (modifying the *Callaghan* consent decree by allowing implementation of state regulations to deny shelter due to non-compliance with administrative rules); D.C. Code § 4-751.01 (proposing to limit the *Baltimore* holding by requiring individuals seeking shelter to prove district residency via valid identification); IND. CODE ANN. § 12-2-1-6 (avoiding the *Marion County* holding by repealing specific code provision); *1995 Wisconsin Act 18*, WISCONSIN STATE LEGISLATURE, <https://docs.legis.wisconsin.gov/1995/related/acts/18> (last visited Feb. 18, 2015) (avoiding the *Clark* finding by amending county law to remove the burden placed upon the government. *See also Chapter 319s* Financial Assistance*, CONNECTICUT STATE LEGISLATURE, §§ 17b-120 and 121, http://www.cga.ct.gov/current/pub/chap_319s.htm#secs_17b-120_to_17b-121 (last visited Feb. 18, 2015) (nullifying the *Hilton* holding by repealing state law requiring provision of emergency shelter by municipalities).

²⁴⁸ McCann, *Law and Social Movements*, *supra* note 210, at 32.

²⁴⁹ *Id.* at 33.

²⁵⁰ Harris, *supra* note 224, at 911 (citing Galanter, *supra* note 224, at 154).

legislation alone can ensure agency implementation of rights.²⁵¹ Barriers to implementation frequently include budgetary constraints, waning political commitment, and administrative resource constraints; however, implementation can also be thwarted by agencies' general resistance to change.²⁵² So homeless advocates, Harris contends, must carve out means to influence the implementation process.²⁵³ "Court orders and judicially constructed remedies can provide lawyers points of access to implementation decisions" through specific provisions for ongoing court supervision, the designation of independent monitors, and the incorporation of advocates within the agency decision-making and implementation process.²⁵⁴ By "penetrating" the implementation process, advocates can help to overcome barriers to implementation by influencing agency policies and practices.²⁵⁵ Rights implementation is most likely to occur when advocates persuade agencies that changes in their administrative practices are in the agencies' best interest.²⁵⁶ Such interest convergence occurs when advocates "transform their substantive legal frames and agendas into organizational infrastructures that enhance, rather than threaten, the reputations of the targeted organizations."²⁵⁷

Therefore, homeless bills of rights are more likely to be realized when advocates secure a role in the implementation process.²⁵⁸ Because administrative agencies, including law enforcement, play such a significant role in the rights experience of homeless Americans, the relevance of implementation becomes even more pronounced. So far, mainland bills appear to concentrate on judicial enforcement, but

²⁵¹ *Id.* at 911–16 (reviewing related sociolegal scholarship).

²⁵² *See generally, id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 915.

²⁵⁶ Harris, *supra* note 224, at 916.

²⁵⁷ *Id.* Harris's point invokes Derek Bell's interest convergence theory, which essentially contends that civil rights progress (especially affirmative action) only occurs when it benefits white elites. *See, e.g.,* Derrick Bell, *Diversity's Distractions*, 103 COLUM. L. REV. 1622, 1624 (2003); DERRICK BELL, SILENT COVENANTS: *BROWN V. BOARD OF EDUCATION* AND THE UNFULFILLED HOPES FOR RACIAL REFORM 149 (2004) (referring to *Grutter* as a "prime example" of the interest-convergence thesis). *See also* Harvey, *supra* note 1, at 721 ("Particular claims do not take hold in a society and become institutionalized unless they serve the interests and attract the enduring support of strategically powerful interest groups.").

²⁵⁸ Harris, *supra* note 224, at 933. Harris's work suggests other factors can impact whether a rights claim is successfully realized through the implementation process, including whether the court assumes an ongoing oversight role, whether organizational outcomes are monitored, and whether methods of accountability are enforced. *Id.*

have not yet incorporated administrative implementation provisions. Puerto Rico's legislation is impressive for its attention to administrative implementation. For example, the laws establish a multi-sector Commission, the Commission's membership must include at least two homeless residents, and the Commission's duties involve the development of substantive policies, implementation plans, and forms of assessment.²⁵⁹ Puerto Rico's legislation, however, is hampered by a structural conflict of interest because the same agency develops, implements, and enforces the law.²⁶⁰ But if Puerto Rico incorporates judicial enforcement provisions and corrects the structural conflicts of interest, those modifications could have significant results. Ideally, advocates would also consider the specific structural and strategic advice from Beth Harris's careful analysis of the implementation of homeless rights laws.²⁶¹

But interest in homeless bills of rights should also appreciate that the realization of homeless rights even exceeds judicial enforcement and agency implementation. Some argue that there is no such thing as an unenforced right; such "rights" amount only to "toothless" moral claims.²⁶² As explained above, judicially enforceable laws certainly can be valuable tools in rights advocacy. But there are reasons why advocates still might want to pursue homeless bills of rights, even if the prospects of judicial enforcement or agency implementation currently seem depressed. As a primary matter, it is too simplistic to equate enforcement with a right; such an absolute posture

treats enforceability as though it were a switch with only two positions—on or off. Reality is far more complicated . . . [because] the practical enforceability of rules depends on a range of other factors such as how much money a potential plaintiff has to spend on legal fees, the current state of public opinion, and even the identity of the judge to whom a case is assigned To define legal rights as synonymous with legal outcomes, or even "expected" legal outcomes, fails adequately to account for the grey areas and uncertainties that define the ground between what the law promises (or

²⁵⁹ See discussion *supra* notes 117–123 and accompanying text.

²⁶⁰ See discussion *supra* notes 117–123 and accompanying text.

²⁶¹ See generally Harris, *supra* note 224.

²⁶² See Holmes & Sunstein, *supra* note 68, at 17 (calling unenforced moral rights "toothless by definition"). Many advocates interviewed for this Article agreed with this characterization of unenforceable rights. See, e.g., Interview with Ryczek, *supra* note 64 (contrasting "feel good" laws with "enforceable" ones); Interview with Arms, *supra* note 65 (explaining that "watered down" bills are inadequate because they do not have any "teeth" and are "basically feel good measures"); Interview with Eisinger, *supra* note 64 (stressing the need for laws to be more than "just for show").

seems to promise) and what it delivers in fact.²⁶³

Even under projections where homeless bills of rights are not likely to be immediately enforced or implemented, this new legislative tool can still serve a valuable role in publicizing and catalyzing homeless rights claims. Marc Galanter famously suggested that the law should be understood “as a system of cultural and symbolic meanings [rather] than as a set of operative controls.”²⁶⁴ In other words, homeless bills of rights, as a statutory legal medium, may indirectly support homeless rights advocacy through “centrifugal” and “radiating” effects on the social movement building process.²⁶⁵ These effects include “catalyzing movement building efforts, generating public support for new rights claims, or providing pressure to supplement other political tactics.”²⁶⁶ This perspective liberates rights from the confines of the judiciary, recognizing that rights are “claimed and negotiated in a wide variety of settings, including courts but also legislatures, agencies, the workplace, the media, public squares and private interactions, and how these various forms of activism influence one another in complex ways.”²⁶⁷

In summary, judicial enforcement is not the only relevant venue for realizing rights; other government agencies and social settings negotiate rights and contribute to their definition.²⁶⁸ This broader perspective of rights discourse helps to explain why social movements must anticipate the relationship between the law and rights consciousness.

²⁶³ Harvey, *supra* note 1, at 712–13.

²⁶⁴ Marc Galanter, *The Radiating Effects on Courts*, in *EMPIRICAL THEORIES ABOUT COURTS* 117, 127 (Keith Boyum & Lynn Mather eds., 1983).

²⁶⁵ *Id.*

²⁶⁶ McCann, *Legal Mobilization*, *supra* note 210, at 230 (discussing Galanter’s theory).

²⁶⁷ Southworth, *supra* note 214, at 1214 (citing Helena Silverstein, *UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* 12 (1996) (discussing McCann’s work). Advocates know well that social change is always “an inside game and an outside game.” Interview with Ryczek, *supra* note 64 (explaining the need to work not only with political insiders, but also with the media and other aspects of the public to create a receptive environment for homeless advocacy); McCann, *Legal Mobilization*, *supra* note 210, at 235 (discussing benefits of media coverage to social movements).

²⁶⁸ Southworth, *supra* note 214, at 1208 (“Courts . . . are not the only arenas in which activists invoke rights claims and attempt to give them legal force, and they are not the only institutions to have contributed to the expansion of individual rights.”).

D. Homeless Rights Consciousness

The fourth “necessary condition” for a rights revolution is a culture of rights consciousness. Generally speaking, American culture is a “rights conscious” culture, but private and institutionalized biases against the poor (and the homeless in particular) make this consciousness contextual. In other words, this rights consciousness is more generous on a general and abstract level, and less so when applied directly to individuals that are largely rejected by society, such as the homeless. A wealth of research showing negative societal attitudes toward the homeless²⁶⁹ and the prevalence of discriminatory laws targeting the homeless²⁷⁰ support this proposition. Indeed, social movement scholars seem to recognize that the poor and homeless are generally less successful in legal mobilization, “largely owing to the absence of favorable social conditions.”²⁷¹ Put more bluntly, prevalent, negative societal attitudes toward the homeless limit the potential of movement mobilization. These limitations persist not only in the biases of housed individuals, but also in the learned disengagement of homeless people themselves.²⁷² Legal mobilization research suggests

²⁶⁹ See discussion *supra* Part I.A.

²⁷⁰ See discussion *supra* Part I.B.

²⁷¹ See, e.g., McCann, *Law and Social Movements*, *supra* note 210, at 34 (“[W]elfare rights and the rights of the homeless—have found very little at all to cheer about in the records of legal action.”).

²⁷² See generally Michael McCann, *Expanding the Horizons of Horizontal Inquiry into Rights Consciousness: An Engagement with David Engel*, 19 IND. J. GLOBAL LEGAL STUD. 467, 471–72 (2012) (discussing how “marginal groups, especially the poor” may be unengaged in rights advocacy in part because they “internalize blame and endure when they suffer injury”). Joel Blau further explains how the experience of homelessness can undermine legal and political rights engagement:

Political activity requires a certain minimal self-confidence, a belief in one’s power to bring about change. Yet loss of this faith is one of the first psychological effects of homelessness. Stigmatized and facing constant rejection, many homeless people gradually come to accept the world’s own view of them, and this self-image gradually destroys their feelings of political efficacy. The message is a simple one: someone without a home is an inconsequential person, and the actions of an inconsequential person cannot have political consequences.

BLAU, *supra* note 25, at 94. Moreover, research suggests that legal mobilization is least likely to succeed “among persons unattached to relatively stable associational networks, caught in ‘dead end’ life situations where opportunity structures vary little, and lacking material resource support for defiant action.” McCann, *Legal Mobilization*, *supra* note 210, at 240. These trends “help explain why legal advocacy for [marginalized groups like the homeless] offers little hope of empowerment, and may even add to their victimization.” *Id.* at 240–41. Nonetheless, McCann and others conclude that legal mobilization can be particularly helpful in early stages of a social movement, through agenda-setting, building constituencies, and generating new rights claims and consciousness. *Id.* at 276 (reviewing various “pessimistic” legal mobilization theories and urging a “more subtle, complex, and balanced perspective”

that “the capacity and inclination of people to envision law as an appropriate resource for pursuing their interests varies based upon social location,” including class and wealth.²⁷³ Given that the status quo is generally antagonistic—or at best, apathetic—to homeless rights and given that homeless people face extraordinary obstacles to collective mobilization, the outlook for a homeless rights revolution may appear pessimistic. But, as explained below, homeless bills of rights might help.

V. THE ROLE OF HOMELESS BILLS OF RIGHTS

*The most frequently expressed criticism of economic and social human rights is that they are mere aspirations to which governments may pay lip-service but have no duty to secure in practice. What these critics fail to note is that this is true of virtually all human rights claims when they are first accorded formal recognition Indeed, the aspirational recognition of unenforced rights may be a necessary stage in their historical development.*²⁷⁴

Even if the requisite conditions for a homeless social movement do not yet exist, homeless bills of rights can help to make conditions more conducive to change. Given the pervasive discrimination and hostility homeless people continue to face, homeless bills of rights are arguably emerging in the nascent stages of a potential rights revolution. Thus, homeless bills of rights might be a significant initial step in forming a new rights consciousness; even if they face challenges in enforcement and implementation, these emerging laws can transform the “discursive possibility and relational power . . . to some degree.”²⁷⁵ After all, “[p]erhaps the most significant point at which law matters for many social movements is during the earliest phases of organizational and agenda formation.”²⁷⁶ Developing laws can serve as a catalyst to raise consciousness about the rights of marginalized groups, like the homeless, by setting an agenda in “which movement

on the potential usefulness of legal rights advocacy to social movements). Indeed, the codification of homeless rights may be one of the few forms of “bargaining leverage” available to homeless people. *See, e.g., id.* at 246. Finally, Marc Galanter and Beth Harris’s work clearly establishes the ability of poverty lawyers to use such leverage from judicial decisions through the implementation process, ultimately shaping norms, policies, and actions within administrative agencies. Harris, *supra* note 224, at 912–16 (discussing Galanter’s work and the role of lawyers in the implementation of redistributive reforms that benefit homeless people).

²⁷³ Jeffrey R. Dudas, *Book Review of Law and Social Movements: Contemporary Perspectives*, 2 ANN. REV. L. SOC. SCI. 17 (2006) (book review).

²⁷⁴ Harvey, *supra* note 1, 717–18.

²⁷⁵ McCann, *Law and Social Movements*, *supra* note 210, at 34.

²⁷⁶ *Id.* at 25.

actors draw on legal discourses to name and to challenge existing social wrongs or injustices.”²⁷⁷ Laws that clearly announce civil, constitutional, and human rights—like the homeless bills of rights—facilitate new discursive, epistemological, and normative grounding for social movements.²⁷⁸

Rather than expressing the rules we currently are willing to live by, human rights norms tend always to exceed our reach. They are a kind of law by which human societies set goals for themselves. By asserting that everyone has these rights, even when we are not prepared to honor them in practice, we challenge ourselves to live up to our own aspirations That may not sound like true law, but given the power of human rights claims to drive the historical process, it would be foolish to dismiss human rights proclamations as toothless or lacking in legitimacy simply because the struggle to enforce them has yet to be won.²⁷⁹

Instead, homeless bills of rights can be understood as playing a potentially significant role in the evolution of a homeless rights revolution. Certainly, so far, the newly enacted laws generally affirm that homeless citizens should be entitled to the same rights as those afforded to the housed, such as rights to freedom from discrimination or rights to privacy and property. Some of these rights claims (at least when applied to homeless people) may not seem generally accepted, enforceable, or even likely to be implemented. But, as with many fundamental rights, “bits and pieces” can be gradually secured over time.²⁸⁰ As homeless rights claims are incrementally secured, the rights agenda can grow and expand.²⁸¹ Rights advocates understand their work is never truly done; the hallmark of such fundamental rights claims is that they “remain a work in progress rather than a finished project.”²⁸² The evolutionary process of agenda building around rights

²⁷⁷ *Id.*; see also Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 76 (2001) (“A statute . . . may provide an opportunity for identity formation by a group of potential participants.”).

²⁷⁸ McCann, *Law and Social Movements*, *supra* note 210, at 25–29; see also Dudas, *supra* note 273, at 1 (citing MCCANN, *supra* note 235; STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY AND POLITICAL CHANGE* (U. Mich. Press, 2d. ed. 2004); Jeffrey R. Dudas, *In the Name of Equal Rights: ‘Special’ Rights and the Politics of Resentment in Post-Civil Rights America*, 39 LAW & SOC’Y. REV. 723 (2005)).

²⁷⁹ Harvey, *supra* note 1, at 718–19.

²⁸⁰ *Id.* at 722.

²⁸¹ *Id.* (“The second thing that happens when rights are partially secured is that People reconceive the practical policy goals embodied in the right, raising their sights in a way that always leaves the right beyond their grasp. In other words, the right remains aspirational.”).

²⁸² *Id.* at 723. Harvey also describes the efforts of rights advocates as “hav[ing]

claims is particularly pronounced where, as here, the basic rights denied to a marginalized group of people are otherwise considered basic, fundamental human rights.

At their core, homeless bills of rights can help to educate, raise awareness, and increase understanding about the unfair discrimination and hostility homeless people commonly experience.²⁸³ Housed society is generally familiar with and accepting of rights discourse, including statutory rights. The codification of rights for homeless people, then, is a particularly visible venue for impacting rights consciousness. The enactment of homeless bills of rights might—and hopefully will—strike housed Americans as odd, prompting questions like: Aren't these rights the same rights "everyone" enjoys? Why do homeless people need a separate affirmation of these fundamental rights? Such dissonance creates a unique opportunity to change public perceptions and attitudes about homelessness.

Moreover, the codification of fundamental rights might not just educate the housed public, but it could help to empower advocates and homeless citizens. As advocates help to inform homeless people about their options for asserting claims pursuant to these new laws, homeless citizens might sense legitimate entitlement to better, fairer conditions. "[W]hen citizens begin to assert their rights that imply demands for change, there develops a new sense of efficacy; people who ordinarily consider themselves helpless come to believe they have some capacity to alter their lot."²⁸⁴

The current deficit of homeless rights consciousness can be a major motivation behind homeless bills of rights. At a minimum, homeless bills of rights will provoke conversation and increase opportunities for housed individuals to consider and discuss homeless rights. The potential shift in discursive possibility can impact housed society and its proxies in the legislature, law enforcement, and other administrative agencies. Accordingly, in instances where the legislature opens the door to specific expressions of homeless rights—even slightly, as it has done in some jurisdictions with homeless bills of

many way stations but no real terminus." *Id.* at 724. *See also* McCann, *Legal Mobilization*, *supra* note 210, at 238 (describing analogous pay equity claims advocates as viewing these claims as "one historical step in the long-term struggle for progressive wealth redistribution in modern society.").

²⁸³ McCann, *Legal Mobilization*, *supra* note 210, at 234 ("At the most minimal level, legal rights advocacy holds the potential for simply expanding citizen awareness and understanding about social relations; in short, it can help to educate citizens about the systematic sources and character of unjust victimization.").

²⁸⁴ *Id.* (internal citations and quotations omitted).

rights—such legislation presents an opportunity to transform basic rights consciousness. Perhaps these homeless bills of rights will have their most enduring impact on the American culture of rights discourse.

VI. CONCLUSION

The naming of homeless rights in legal practice is, of course, constrained by societal attitudes toward these rights.²⁸⁵ The trend so far suggests that advocates' top priorities are not likely to be incorporated into a homeless bill of rights—at least on the mainland. As demonstrated above, efforts to improve the lives of homeless Americans commonly value positive rights, such as affordable housing and healthcare, as well as negative rights, such as the abrogation of homeless criminalization laws. Although the mainland effort is in its very early stages, none of the currently enacted mainland bills—Rhode Island, Illinois, or Connecticut—specifically incorporate these top priorities.²⁸⁶ California's proposed bill tried to test these boundaries; although the bill made significant progress, it ultimately failed. At least for now, the newly enacted laws generally affirm that homeless citizens should be entitled to the same rights as those afforded to the housed, such as rights to freedom from discrimination or rights to privacy and property. Although the Puerto Rico legislation has a much more expansive substantive reach, the island's experience suggests that even if these rights are enacted, they may not be successfully implemented. This leaves some advocates wondering whether homeless bills of rights are worth the investment.

But one reason these laws are likely to be limited as proposed, enforced, or implemented actually demonstrates why these laws are necessary: housed society generally perceives homeless people as non-human. Putting aside common economic objections to positive rights,²⁸⁷ the general mainland resistance to anti-criminalization measures reflects popular attitudes among housed Americans: we do not like to be confronted with visible poverty.²⁸⁸ We also prefer to blame homeless people for their own condition, which expunges any

²⁸⁵ *Id.* at 230 (explaining that legal practice both constraints and expands possibilities in rights discourse).

²⁸⁶ Of course, advocates have secured some targeted successes with respect to these priorities, but so far these successes are not related to codification in homeless bills of rights.

²⁸⁷ See generally Cross, *supra* note 66, at 880–87; discussion *supra* notes 72–76.

²⁸⁸ 2011 NLCHP Report, *supra* note 31. See generally 2014 NLCHP Report, *supra* note 31.

sense of obligation to support or protect homeless rights.²⁸⁹ So perhaps the greatest obstacle to homeless rights stems from a lack of legal rights consciousness about homeless people and the extraordinary persecution and discrimination these men, women, and children endure as a result.

Homeless bills of rights present an important opportunity to impact American rights consciousness. The emergence of these new laws may encourage housed Americans to confront—and perhaps one day, overcome—our persistent, deeply-rooted biases against the homeless. Regardless of whether homeless advocates' ideal provisions are enacted, enforced, or implemented in the near future, even modest versions of these new laws can stake an important claim in the movement building process. After all, the U.S. Declaration of Independence and the Bill of Rights remained dormant and aspirational for years after their enactment, but like all declarations of fundamental rights, these documents set crucial goals for society to achieve over time.²⁹⁰

Such is the slippery and complex nature of rights. Perhaps no other topic generates the same richness of debate: what are rights; when do rights exist; how do rights (and should they) influence or control the behavior of government and individuals? Ultimately, it is through this rabbit hole that homeless bills of rights must travel. To be sure, it is not a simple journey, but the quest will be worthwhile if these new laws can make a meaningful difference in the rights of homeless people, and how housed Americans value and recognize them.

²⁸⁹ See discussion *supra*, at Part I.B.

²⁹⁰ Harvey, *supra* note 1, at 717–18.

Table 1: Cross-Jurisdictional Comparisons of Provisions

The chart below compares common provisions among current mainland drafts of homeless bills of rights. Puerto Rico’s legislation is excluded from this chart due to its unique provisions.

Key

P1.....Included in proposed legislation

P2.....Included in substitute legislation
(only applicable to RI, HI, IL, CT, and CA)

L.....Included in engrossed legislation
(only applicable to RI, HI, IL, CT, and CA)

X.....Not included

Com.....In Committee

	RI	HI	IL	CT	OR	VT	MO	MS	CA
Date introduced	1/11/12	1/23/13	1/30/13	2/15/13	2/21/13	3/12/13	3/13/13	5/13/13	12/3/12
Bill number	SB 2502	HB 1205 (P1), 1889 (P2), 2661 (L)	SB 1210	SSB 896	HB 3122	HB 493	SB 428	H.3595	AB 5
Status	Signed into law	Both in com.	Signed into law	Signed into law	Com.	Com.	Com.	Com.	Suspended
Right to . . .									
Housing status/homeless person definition	P1, P2, L	P2, L	P1, P2 removed, L replaced	P1, P2, L altered	P1	P1	P1	P1	P1, P2
Move freely	P1, P2, L	P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2, L
Equal treatment	P1, P2, L (amended terms used)	P1, P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2 specifies law enforcement, L
Seek, maintain employment	P1, P2 added maintain, L	P1, P2, L	P1, P2 removed "seek", L enrolls	P1, P2, L	P1	P1	P1	P1	P1, P2
Emergency medical care	P1, P2, L	P1, P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2
Vote	P1, P2, L	P1, P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2
Information disclosure protection	P1, P2, L	P1, P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2, L removes
Personal property privacy	P1, P2, L	P1, P2, L	P1, P2, L	P1, P2, L	P1	P1	P1	P1	P1, P2
Attorney’s fees	P2, L	P1	P1, P2, L	X	X	X	P1	X	P1, P2
Public notice	X	P2	X	P1, P2, L changed "shall" post notice to "may"	X	X	X	X	X

