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Homeless Residency Restrictions

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HOMELESS RESIDENCY RESTRICTIONS

*Ben A. McJunkin**

ABSTRACT

Last year, the West Virginia House of Delegates introduced a radical proposal for responding to homelessness within the state: privately enforceable residency restrictions. As introduced, the restrictions prohibited homeless individuals from sheltering themselves, from being sheltered by others, or from receiving food or care within 1,500 feet of a school or childcare center. This prohibition was to operate statewide, transforming an issue that historically has been considered hyper-local into a subject of state concern. Moreover, the proposed bill established a private right of action for enforcement, legislating around the possibility of recalcitrant municipal governments declining to abide by the residency restrictions.

The structure of the West Virginia bill is unique in the context of responding to homelessness, a burgeoning national crisis. In this respect, the bill illustrates how future debates about homelessness policy may be shifting away from the traditional thinking that homelessness is a local issue best addressed by local governmental actors. However, the defining features of the West Virginia bill are not themselves novel. Instead, the bill may best be seen as an extension of three emergent trends in state governance to a novel subject matter.

This Essay thus explores three frontiers of homelessness law and policy that are implicated by the West Virginia bill. First, it draws upon lessons learned from sex offender residency restrictions to demonstrate the bill's potential for unintended, and undesirable, consequences in communities with sizable homeless populations. Second, it situates the use of state power to regulate a traditionally local concern amidst a recent trend in aggressive state-local preemption to question the wisdom and propriety of statewide responses to homelessness. Third, it compares the deployment of private enforcement mechanisms to similar legislation in other contexts—including Texas's fetal heartbeat bill—to highlight the pernicious and antidemocratic possibilities of marshaling private disdain for homeless residents. Throughout, the Essay

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explores how these features of the West Virginia bill expose the shifting thinking about the phenomenon of homelessness more broadly.

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I. INTRODUCTION

Homelessness is an emerging crisis nationally.¹ Although attempts to count the nation's homeless individuals are notoriously unreliable,² the federal government estimates that 580,466 individuals were homeless during a single point-in-time count in 2020.³ That number represents the fourth consecutive year

¹ See, e.g., Nathaniel Lee, *With More Than Half a Million Americans Unhoused, the U.S. Is Still Struggling to Solve the Homelessness Crisis*, CNBC (Jan. 7, 2022), <https://www.cnbc.com/2022/01/07/why-the-us-cant-solve-the-homelessness-crisis.html>.

² See, e.g., Alastair Boone, *Is There a Better Way to Count the Homeless?*, BLOOMBERG (Mar. 4, 2019), <https://www.bloomberg.com/news/articles/2019-03-04/the-problem-with-hud-s-point-in-time-homeless-count>.

³ U.S. DEP'T HOUS. & URBAN DEV., THE 2020 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 6 (2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf> [hereinafter 2020 AHAR PART 1]. There are obvious limitations to a single point-in-time count. See Boone, *supra* note 2. The U.S. Department of Housing and Urban Development permitted communities to modify or cancel the counting of unsheltered homeless in 2021 as a way of mitigating the spread of COVID-19. U.S. DEP'T HOUS. & URBAN DEV., CONDUCTING THE 2021 UNSHELTERED PIT COUNT 1 (2021), <https://files.hudexchange.info/resources/documents/Conducting-the-2021-Unsheltered-PIT-Count.pdf>. As a result, the most recent point-in-time counts for many states are missing data about homeless individuals who are living unsheltered, such as in cars or makeshift encampments. See, e.g., U.S. DEP'T HOUS. & URBAN DEV., HUD 2021 CONTINUUM OF CARE HOMELESS

of increasing homelessness following a decade of steady declines.⁴ At the same time, more and more individuals are experiencing “chronic” patterns of homelessness, defined as either continuous homelessness for at least one year or at least four periods of homelessness in the preceding three years.⁵ Experts attribute the reversal to the increased cost of housing and to a national shortage in affordable housing.⁶

As the number of homeless individuals has increased, so too has the percentage of those individuals who live unsheltered. “Unsheltered” homelessness describes the conditions of those individuals living in encampments, in vehicles, or in other places not designed for human habitation.⁷ In 2020, 39% of the federally counted homeless individuals were classified as unsheltered, up nearly 29% from just a few years prior.⁸ At current rates, the number of unsheltered homeless individuals will surpass the number of sheltered homeless individuals by 2028.⁹

In many ways, West Virginia is an exception to these trends. According to estimates from the U.S. Department of Housing and Urban Development, homelessness in the state decreased by nearly 41% between 2010 and 2020.¹⁰ And the percentage of West Virginians experiencing unsheltered homelessness has dropped to a mere 20.7%.¹¹ To achieve these successes, West Virginia’s collaborating organizations embraced proven strategies centered on promptly rehousing the state’s homeless residents.¹²

ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS – WEST VIRGINIA (Jan. 11, 2022), https://files.hudexchange.info/reports/published/CoC_PopSub_State_WV_2021.pdf.

⁴ Judy Woodruff & Karina Cuevas, *What’s Behind Rising Homelessness in America?*, PBS NEWS HOUR (Dec. 28, 2021), <https://www.pbs.org/newshour/show/whats-behind-rising-homelessness-in-america>.

⁵ 2020 AHAR Part 1, *supra* note 3, at 2, 64 (showing a 42.6% increase in chronic homelessness since 2016).

⁶ Woodruff & Cuevas, *supra* note 4.

⁷ See 2020 AHAR Part 1, *supra* note 3, at 3. See also Katy Miller, *Responding to the Growing Crisis of Unsheltered Homelessness and Encampments*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (May 25, 2022), <https://www.usich.gov/news/responding-to-the-growing-crisis-of-unsheltered-homelessness-and-encampments/>.

⁸ 2020 AHAR Part 1, *supra* note 3, at 6 (demonstrating a count of 226,080 unsheltered individuals in 2020 compared to 175,399 unsheltered individuals in 2014).

⁹ See *id.* (showing a 30.5% increase in unsheltered homelessness since 2015 and a 9.5% decrease in sheltered homelessness over the same period).

¹⁰ DEP’T HOUS. & URBAN DEV., PIT AND HIC DATA SINCE 2007: 2007–2021 POINT-IN-TIME ESTIMATES BY STATE (Feb. 2022), <https://www.hudexchange.info/resource/3031/pit-and-hic-data-since-2007/>.

¹¹ See *id.*

¹² W. VA. INTERAGENCY COUNCIL ON HOMELESSNESS, OPENING DOORS IN WEST VIRGINIA: A PLAN TO PREVENT AND END HOMELESSNESS 2015–2020 15 (2015),

In other respects, however, the West Virginia experience is typical. Cities across the state have struggled to respond effectively to local homelessness.¹³ They've adopted a patchwork of local ordinances that respond to homelessness in a traditional, and traditionally ineffective, way: criminalizing efforts to sleep, camp, or self-shelter, especially in business or commercial districts.¹⁴ They sweep populated downtown encampments in the hopes of driving residents toward more distant and less desirable shelters.¹⁵ These responses seek to relocate homeless residents in furtherance of such goals as stimulating local commerce or protecting local property values.¹⁶ They are counterproductive, however, when it comes to remedying the underlying condition of homelessness.¹⁷

This February, West Virginia took a novel tack. A member of the state's House of Delegates introduced House Bill 4753, which sought to impose statewide residency restrictions on individuals experiencing homelessness.¹⁸ Under the bill, West Virginia's homeless residents would not be permitted to

[http://www.wvich.org/docs/Opening Doors in WV Plan - FINAL- low res.pdf](http://www.wvich.org/docs/Opening_Door_in_WV_Plan_-_FINAL_-_low_res.pdf) (emphasizing "housing first" and "rapid re-housing" strategies).

¹³ See, e.g., City of Charleston News, *Mayor Goodwin Calls on Governor, State Legislature to Convene Special Session*, CITY OF CHARLESTON, W. VA. (Oct. 6, 2021), <https://www.charlestonwv.gov/news-items/wed-10062021-1603/gov-special-session-21> (quoting Charleston Mayor Amy Schuler Goodwin as proclaiming, "Saying that systems are broken is not an accurate way to tell the story of what's happening because it's not just broken, it's shattered.").

¹⁴ See, e.g., HUNTINGTON, W. VA., CITY ORDINANCE § 1111.04 (prohibiting camping in parks, on sidewalks, or in public parking lots); MORGANTOWN, W. VA., CITY ORDINANCE § 941.05(c) (prohibiting camping in parks).

¹⁵ Larmie Sanyon, *Many Residents of Homeless Camp in Morgantown Say They Don't Want to Leave*, 12WBOY (Jul. 17, 2020), <https://www.wboy.com/news/monongalia/many-residents-of-homeless-camp-in-morgantown-say-they-dont-want-to-leave/>; Katie Park, *Where Can You Go if You're Homeless in Charleston*, 13NEWS (July 6, 2021), <https://www.wowktv.com/news/local/where-can-you-go-if-youre-homeless-in-charleston/>; MetroNews Staff, *Homeless Encampment Cleared Out in Morgantown*, METRONews (Mar. 21, 2022), <https://wvmetronews.com/2022/03/21/homeless-encampment-cleared-out-in-morgantown/>; Jules Ogden, *ACLU: Morgantown Must Stop Destroying Homeless Encampments*, THE DA (Jan. 14, 2022), https://www.thedaonline.com/news/morgantown/aclu-morgantown-must-stop-destroying-homeless-tent-encampments/article_38ef8474-74db-11ec-95a5-07079d5dd038.html.

¹⁶ See, e.g., Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 69 (2015) ("Merchants and 'citizens' urge government officials to take action against chronic homelessness because of the economic drain on the merchant community."); Madeline Halimi, Note, *Siting Homeless Shelters in New York City: Fair Share Versus Borough-Based*, 47 FORDHAM URB. L. J. 1519, 1531 (2020) ("Opposing the sitings [of homeless shelters], residents fear that such facilities would lower their property values, increase pollution, traffic, and crime, and change their neighborhoods' demographic composition.").

¹⁷ See Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 107–11 (2019) [hereinafter Rankin, *Punishing Homelessness*].

¹⁸ H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022).

shelter or receive services within a specified distance of any school or daycare facility in the state.¹⁹ To ensure compliance, the bill also created a private right of action, allowing individual citizens to bring enforcement suits against recalcitrant local governments.²⁰

As a response to homelessness, West Virginia's H.B. 4753 is nearly unprecedented.²¹ This Essay critically evaluates the bill as indicative of future directions for anti-homelessness legislation. Part I juxtaposes H.B. 4753 with the traditional responses to homelessness—criminalization and marginalization. It highlights three beneficial features of traditional responses that, though not always effective at combatting homelessness, are sacrificed by the H.B. 4753 approach. Part II compares H.B. 4753's homeless residency restrictions with the sex offender residency restrictions that have proliferated since the late 1990s. As the sex offender experience demonstrates, residency restrictions tend to have unintended and undesirable consequences, not only for those subjected to them but for the community as a whole. This Part also reveals how H.B. 4753 reflects a shifting, and deeply troubling, perspective about the sorts of public benefits that justify the legal regulation of individuals experiencing homelessness. Part III ties H.B. 4753 to a recent trend in state laws preempting cities from affecting policy priorities. As this Part details, uniform, state-level residency restrictions for homeless individuals are arguably an unjustifiable infringement on local sovereignty. Lastly, Part IV exposes the problems with H.B. 4753's private enforcement mechanism, including its incompatibility with local democratic policymaking. In sum, West Virginia's H.B. 4753 constitutive features ought to be concerning to advocates of individuals experiencing homelessness. Legislation of this sort seems likely to retrench not only poverty but also the social stigma associated with living unhoused.

II. RESPONDING TO HOMELESSNESS

American cities respond to homelessness in two common ways: criminalization and marginalization. For unsheltered homeless residents,

¹⁹ See *id.* (introduced version) (1,500 feet); H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version) (1,000 feet).

²⁰ See H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version).

²¹ The text of H.B. 4753, as introduced, appears to have been modeled after a failed 2019 bill in the state of Washington. See Matt Markovich, *Bill Banning Homeless Encampments Near Schools Debated at the Capitol*, KOMO NEWS (Feb. 18, 2019), <https://komonews.com/news/project-seattle/bill-banning-homeless-encampments-near-schools-debated-at-the-capitol>. In August of 2022, the Los Angeles City Council voted to prohibit homeless camping near schools, although the measure lacks many of the noteworthy features of H.B. 4753. David Zahniser & Benjamin Oreskes, *L.A. Cracks Down on Homeless Encampments Near Schools, Over Protesters' Jeers*, L.A. TIMES (Aug. 2, 2022), <https://www.latimes.com/california/story/2022-08-02/l-a-cracks-down-on-homeless-encampments-outside-public-schools-daycare-centers>.

increasingly prevalent criminal ordinances make illegal most attempts to shelter themselves in public spaces.²² For those willing to brave sanctioned encampments or public shelters, the politics of municipal zoning tends to consolidate homeless individuals and distance them from city centers.²³ Together, these approaches operate to control the location of homeless residents within a given community, though neither is effective at reducing the prevalence of homelessness.

Criminalization and marginalization share several features that, collectively, define the traditional thinking about how best to respond to homeless populations. First, both camping bans and municipal zoning tend to prioritize excluding homeless residents from popular commercial areas, suggesting that a preeminent cost of homelessness is public avoidance of productive spaces.²⁴ Second, decisions about both camping bans and shelter zoning are overwhelmingly made at the local level, where communities have the autonomy to respond to homelessness in tailored ways fitting the community's self-conception.²⁵ Lastly, these decisions are made with input from—and in consideration of—competing constituent populations, including homeless residents.²⁶

West Virginia's House Bill 4753 is a stark departure from that traditional thinking. H.B. 4753 sought to impose residency restrictions on homeless encampments and shelters, distancing them from schools and daycares rather

²² See *infra* Part II.A.

²³ See *id.*

²⁴ See *infra* text accompanying notes 143–146. Cf. Jessica Farrish, *Homeless Council to Make Recommendations to City, County*, REGISTER-HERALD (Sept. 1, 2021), https://www.register-herald.com/news/homeless-council-to-make-recommendations-to-city-county/article_9a17c734-1223-5737-91e3-7d0fcdd1d8ce.html (describing how uptown business owners are responding to the presence of homeless individuals who loiter outside of businesses); MORGANTOWN/MONONGALIA TASK FORCE ON HOMELESSNESS, COMMUNITY-WIDE PLAN TO REDUCE HOMELESSNESS 2 (2011), <https://www.morgantownwv.gov/DocumentCenter/View/485/Community-Wide-Plan-to-Reduce-Homelessness-PDF?bidId=> (“Some residents of the community have the perception that some on the street are dangerous and therefore they prefer not to frequent downtown merchants.”).

²⁵ Consider the experiences of neighboring Arizona cities Scottsdale and Phoenix. Scottsdale has roughly 100 homeless residents, and the city has provided only limited shelter or services. See Renata Cló, *‘I’m Ready to Get Off the Streets’: Scottsdale Leaders Discuss Homelessness, But Help Falls Short of Problem, Some Say*, AZCENTRAL (July 3, 2021), <https://www.azcentral.com/story/news/local/scottsdale/2021/07/03/scottsdales-response-homelessness-falling-short-some-say/5133012001/>. By comparison, Phoenix has over 5,000 unsheltered homeless residents, and the city provides extensive shelter and service options, though still not enough to handle the demand. See Jessica Boehm, *Human Services Campus Opens 100-Bed Shelter Just in Time for Phoenix Summer Heat*, AZCENTRAL (Mar. 26, 2022), <https://www.azcentral.com/story/news/local/phoenix/2022/03/26/phoenix-homelessness-100-bed-shelter-opens-downtown-just-before-heat/7129499001/>.

²⁶ See *infra* text accompanying notes 59–63.

than centers of commerce.²⁷ It would do so from the distance of the State House in Charleston rather than leaving the decision to the discretion of the affected communities. And the bill recruits private actors to enforce its mandate, empowering a disaffected few whose views may be at odds with the interests and well-being of the greater populace. In these ways, H.B. 4753 represents a new frontier for responding to homelessness, one that shifts both the terms and the forums of the debate.

This Part surveys the traditional responses to homelessness. It highlights how criminalization is predominantly local, majoritarian, and often configured around the need to protect commercial districts. It also examines the zoning of sanctioned encampments and public homeless shelters, emphasizing how encampments and shelters—and thus homeless residents—are often consolidated in low-income residential areas, driven in part by the locality’s consideration of competing community interests. Taken together, criminalization and marginalization of homeless residents represent the longstanding traditional approaches to dealing with homelessness within a community. The Part concludes with a detailed recounting of H.B. 4753, illuminating the features that make it novel and noteworthy.

A. *The Traditional Responses: Criminalization & Marginalization*

Criminalization is an increasingly common response to homelessness in the United States, particularly unsheltered homelessness.²⁸ There are a variety of approaches to criminalizing homelessness, but most tend to center around the goal of removing those who are “visibly poor” from specific public spaces.²⁹ The National Law Center on Homelessness & Poverty recently surveyed 187 urban and rural cities throughout the country and found that 72% of cities had passed a law that prohibited the homeless from setting up unauthorized encampments in specified public areas.³⁰ Similarly, 50% of surveyed cities had laws that prohibited living in vehicles.³¹

²⁷ See generally H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022).

²⁸ A study by the National Law Center on Homelessness & Poverty (now the National Homelessness Law Center) found that various municipal ordinances criminalizing aspects of the homeless experience have each increased by between 29% and 213% in the period from 2006 to 2019. See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12–14 (Dec. 2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [Hereinafter HOUSING NOT HANDCUFFS].

²⁹ Rankin, *Punishing Homelessness*, *supra* note 17, at 102.

³⁰ HOUSING NOT HANDCUFFS, *supra* note 28, at 12.

³¹ *Id.* at 14.

Unlike traditional criminal laws, which ostensibly exist to punish blameworthy behavior,³² laws criminalizing homeless camping (and related conduct, such as loitering, trespass, or begging) may be best conceptualized as tools for controlling access to public spaces.³³ When the city of Charleston, West Virginia, considered criminalizing urban camping city-wide in 2021, the primary arguments advanced by proponents of the bill were couched in the need to reclaim public spaces for use by housed residents.³⁴ According to one city councilman, “The purpose of the bill is just to ensure equal access.”³⁵

Unlike the bill proposed in Charleston, most criminal restrictions on the location of homeless individuals do not apply city-wide but rather are tailored to promote public access to specified areas—often public commercial centers.³⁶ Local business owners are overwhelmingly advocates for criminalization,³⁷ and criminalization ordinances often specifically protect commercial districts.³⁸ City

³² See generally Douglas Husak, “Broad” Culpability and the Retributivist Dream, 9 OHIO ST. J. CRIM. L. 449 (2012).

³³ See generally Jamelia N. Morgan, *Policing Marginality in Public Space*, 81 OHIO ST. L.J. 1045 (2020).

³⁴ See Kim Rafferty, *Charleston City Council Proposes Bill to Cut Down on Homeless Camps*, WSAZ NEWS CHANNEL 3 (Sept. 21, 2021), <https://www.wsaz.com/2021/09/21/charleston-city-council-proposes-bill-cut-down-homeless-camps/>; Danielle Dindak, *Potential Legal Issues Raised Over Proposed Bill Criminalizing Camping in Charleston*, WCHS (Sept. 25, 2021), <https://wchstv.com/news/local/potential-legal-issues-raised-over-proposed-bill-criminalizing-camping-in-charleston>.

³⁵ Dindak, *supra* note 34.

³⁶ See HOUSING NOT HANDCUFFS, *supra* note 28, at 12 (showing that only 37% of surveyed cities have city-wide camping bans, compared to the 57% of cities that have targeted restrictions prohibiting camping in specified areas); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1, 17–18 (1996) (providing examples of typical criminal place restrictions). See also Amanda Aykanian & Wonhyung Lee, *Social Work’s Role in Ending the Criminalization of Homelessness: Opportunities for Action*, 61 SOC. WORK 183, 184 (2016) (“Antihomeless laws are often enacted in downtowns and business districts, justified as a way of protecting commerce and patrons.”).

³⁷ Andrew Cohen, *Clinic Study Details How Business Districts Target Homeless People*, BERKELEY L. (Sept. 18, 2018), <https://www.law.berkeley.edu/article/clinic-study-details-how-business-districts-target-homeless-people/>. See also Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 971 (2020); HOUSING NOT HANDCUFFS, *supra* note 28, at 15 (“Businesses and commercial entities also drive criminalization policies by lobbying for such laws and even by enforcing them with private security personnel.”) [hereinafter McJunkin, *Urban Camping*].

³⁸ McJunkin, *Urban Camping*, *supra* note 37, at 971; NAT’L L. CTR. ON HOMELESSNESS & POVERTY, NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 12 (2009), https://homelesslaw.org/wp-content/uploads/2019/02/No_Safe_Place.pdf (“These laws, designed to move visibly homeless people out of commercial and tourist districts or, increasingly, out of entire cities, are often justified as necessary public health and public safety measures.”). See also, e.g., PHILA., PA., MUN. CODE § 10-611(1)(b)–(c), (2)(g)–(h); RENO, NEV., MUN. CODE § 8.12.015(b); SEATTLE, WASH., MUN. CODE § 15.48.040.

leaders view criminalization as a way to “stand up for businesses downtown.”³⁹ Their thinking is that the presence of homeless individuals frightens away potential customers, hampering local commerce.⁴⁰

A second form of regulating the location of cities’ homeless residents is less studied but worth examining. When cities authorize specific encampment sites or permit the construction and operation of homeless shelters, they necessarily regulate the spaces within the city that homeless residents will occupy. Collectively, I refer to this set of decisions as “marginalization.” Marginalization, like criminalization, tends to privilege wealthy and commercial spaces, relegating homeless individuals to poorer residential neighborhoods, largely driven by the outcry of aggrieved residents.

Broadly speaking, homeless shelters tend to be zoned in poorer residential districts and are subject to heightened restrictions or permit requirements.⁴¹ Both permanent shelters and emergency facilities are subject to their city’s zoning, permitting, or licensing authority.⁴² Of course, homeless shelters—whether temporary or permanent—tend to be highly opposed by surrounding property owners, who fear declining property values, public safety risks, or increased nuisances.⁴³ Because “wealthier communities have the finances and influence to prevent elected officials from siting facilities that they do not want in their neighborhoods,” shelters are often forced into “central city portions of metropolitan areas” and out of better-resourced areas.⁴⁴ As a result, homeless shelters tend to be concentrated together in sites where city planners face the least NIMBY (“Not In My Backyard”) backlash.⁴⁵

Compared with traditional shelters, officially sanctioned homeless encampments are still a relatively rare phenomenon. But several cities around

³⁹ Jeremy Meyer, *Denver May Pursue Law Cracking Down on Homeless on 16th Street Mall*, DENVER POST (May 2, 2016), www.denverpost.com/breakingnews/ci_19160158.

⁴⁰ See Melissa Kovacs & Joanna Lucio, *Nuisance and Vagrancy Laws*, 54 ARIZ. ATT’Y 32, 33 (2018).

⁴¹ Steve Butler, *Changing Your Zoning Code to Accommodate Housing and Shelters for the Homeless*, MUN. RSCH. SERVS. CTR. (June 29, 2021), <https://mrsc.org/Home/Stay-Informed/MRSC-Insight/June-2021/Changing-Your-Zoning-Code-for-Homeless-Housing.aspx>.

⁴² Madeline Halimi, *Siting Homeless Shelters in New York City: Fair Share Versus Borough-Based*, 47 FORDHAM URB. L. J. 1519, 1536 (2020); Kelli Stout, Comment, *Tent Cities and RLUIPA: How A New Religious-Land-Use Issue Aggravates RLUIPA*, 41 SETON HALL L. REV. 465, 477 (2011) (“Some zoning ordinances directly limit meal or housing programs for the homeless; others require conditional use permits or semi-public use permits to host these programs.”).

⁴³ Michael B. Gerrar, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 509 (1994).

⁴⁴ Halimi, *supra* note 42, at 1531.

⁴⁵ *Id.* To complicate matters, some municipalities also mandate minimum distances between shelters, meaning that new shelters cannot always be added to accommodate growing homeless populations. Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 REAL PROP. PROB. & TR. J. 413, 431 (1986).

the country have recently experimented either with formally embracing encampments that developed organically⁴⁶ or with providing dedicated locations for homeless residents to construct encampments.⁴⁷ One of the more prominent examples of such an encampment was constructed in San Diego, California, in 2017.⁴⁸ The city council opened a city-owned parcel of land to homeless residents, providing each with a 13-by-13 “campsite,” 24-hour security, bathrooms, and storage.⁴⁹ Similarly-sanctioned encampments can be found in Seattle, Portland, and Las Vegas.⁵⁰

Although sanctioned encampments have been only lightly studied to date,⁵¹ the research supports a few preliminary conclusions. Officially sanctioned encampments tend to be located far from commercial centers and wealthy residential neighborhoods.⁵² Sanctioned encampments are also politically unpopular—liberals criticize them as “inadequate,” while conservatives criticize them as “too soft” on homelessness.⁵³ Many are managed by churches or third-party non-profits in order for the local government to evade responsibility and

⁴⁶ For example, the Seattle City Council has adopted ordinances that permitted existing homeless encampments to operate as an “accessory use” on both public and private lands. REBECCA COHEN, WILL YETVIN & JILL KHADDURI, UNDERSTANDING ENCAMPMENTS OF PEOPLE EXPERIENCING HOMELESSNESS AND COMMUNITY RESPONSES: EMERGING EVIDENCE AS OF LATE 2018 16 (2019), <https://www.abtassociates.com/files/Insights/reports/2019/Understanding-Encampments.pdf>.

⁴⁷ This was the approach of several California cities facing an increase in unsheltered homelessness over the past five years. See Mike McPhate, *California Today: Homeless Camps, with Official Blessing*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/us/california-today-homeless-camps-with-official-blessing.html>.

⁴⁸ Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 600 (2021) [hereinafter Rankin, *Hiding Homelessness*].

⁴⁹ City News Service & Susan Murphy, *San Diego Launches Campground for the Homeless*, KPBS (Oct. 9, 2017), <http://www.kpbs.org/news/2017/oct/09/san-diego-launches-homeless-campground>. Eventually, the city replaced the encampment site with several congregate tents. Rankin, *Hiding Homelessness*, *supra* note 48, at 601.

⁵⁰ SAMIR JUNEJO, NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS 4–5 (Suzanne Skinner & Sara K. Rankin eds., 2016), <https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=1006&context=hrap>; COHEN, *supra* note 46, at 16.

⁵¹ See generally JUNEJO, *supra* note 50; COHEN, *supra* note 46; Chris Herring, *The New Logics of Homeless Seclusion: Homeless Encampments in America’s West Coast Cities*, 13 CITY & CMTY. 285 (2014).

⁵² See Herring, *supra* note 51, at 294 (“In the higher rent districts of the downtown, police carry out an emboldened punitive approach, while simultaneously taking an unprecedented hands-off toleration of habitation within the abandoned industrial zone.”); see also *id.* at 298 (noting that sanctioned encampments were located on “unused city-owned land”), 301 (describing one sanctioned encampment as “located in an old neighborhood marked by aging buildings and abandoned orchards” and another as “far from residences and businesses”).

⁵³ See Herring, *supra* note 51, at 298.

criticism.⁵⁴ Unlike unsanctioned encampments, sanctioned encampments also tend to have substantial restrictions or behavioral requirements designed to benefit only the “deserving poor.”⁵⁵

The criminalization and marginalization of homeless individuals is a decidedly local issue. Survey research indicates that as many as 72% of cities have at least one law restricting homeless camping within city limits.⁵⁶ By contrast, only 17 states have passed legislation restricting camping, and the vast majority of those narrowly apply to specific areas of state interest.⁵⁷ The zoning and licensing efforts necessary to authorize homeless shelters and encampments are also fundamentally local processes, typically led by a city council.⁵⁸

Because of their decidedly local nature, criminalization and marginalization also spark deliberative discussion that can account for the needs of a diverse community, including homeless residents themselves.⁵⁹ Consider

⁵⁴ *Id.* Likely because of how difficult it is for a homeless shelter proposal to survive public resistance, most homeless shelters are likewise operated through religious organizations that can assert freedom of expression protections to surpass local restrictions. See Joy H. Kim, *The Case Against Criminalizing Homelessness: Functional Barriers to Shelters and Homeless Individuals’ Lack of Choice*, 95 N.Y.U. L. REV. 1150 (2020). However, some local governments preempt churches from operating as homeless service providers. For example, the residential zoning ordinance in Morgantown, West Virginia, specifies that customary uses (that is, permissible operations) of a church may *not* include medical clinics or homeless shelters. MORGANTOWN, W. VA. CITY ORDINANCE § 1329.02 (2022).

⁵⁵ See Herring, *supra* note 51, at 299, 301.

⁵⁶ HOUSING NOT HANDCUFFS, *supra* note 28, at 12.

⁵⁷ See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 7 (2021), <https://homelesslaw.org/wp-content/uploads/2022/02/2021-HNH-State-Crim-Supplement.pdf> [hereinafter STATE LAW SUPPLEMENT]. For example, Arizona’s statewide “unlawful camping” law prohibits camping within a specified distance of watering holes used by wildlife and domestic stock. AZ. REV. STAT. ANN. § 17-308 (West 2022). West Virginia’s statewide legislation prohibits camping only at “the state capitol complex,” “a county courthouse,” or specified municipal office buildings. W. VA. CODE ANN. § 61-6-18 (West 2022).

⁵⁸ Cf. Abraham David Benavides & Julius A. Nukpezah, *How Local Governments are Caring for the Homeless During the COVID-19 Pandemic*, 50 AM. REV. PUB. ADMIN. 650, 655 (2020) (“Although the federal government provides the policy guidance through HUD and CD, and the state provides state specific guidance to all of their political units and nonprofit organizations, it is the local governments that are most efficient in managing the challenges that the homeless face.”).

⁵⁹ To be clear, the participation of homeless individuals or advocates for homeless individuals in local political decision-making remains uncommon. See William S. Burnett, *Ask the Homeless What They Need*, N.Y. TIMES (Nov. 24, 2015), <https://www.nytimes.com/roomfordebate/2015/02/19/homes-for-the-homeless/ask-the-homeless-what-they-need> (“More often than not policies are created without input from homeless people.”). However, research shows that political advocacy and networking by homeless service providers has been an effective strategy. Meghan Jarpe, Jennifer E. Mosely & Bikki Tran Smith, *Understanding the Collaborative Planning Process in Homeless Services: Networking, Advocacy, and Local Government Support May Reduce Service Gaps*, 25 J. PUB. HEALTH MGMT. PRAC. 262 (2019), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9016797/>. And local communities that have included the perspectives of homeless individuals and advocates have been successful in

again the debate over Charleston's proposed camping ordinance in 2021, which was ultimately rejected due to public pushback.⁶⁰ Local stakeholders weighed in on the measure, including members from the regional Continuum of Care, an organization dedicated to improving homeless services in and around Charleston.⁶¹ In deciding not to move forward with the bill, members of the Charleston City Council explicitly cited the potential detrimental impacts on homeless residents as a reason for restraint.⁶² This is not uncommon. City council hearings on both criminal ordinances and the legalization of encampments are dominated by discussions of local considerations, including heightened crime, property values, retailers' anxieties, and resident complaints.⁶³ By contrast, state-level processes frequently lack stakeholder participation and may be subject to the whims of particular administrations.⁶⁴

Make no mistake, criminalization and marginalization are not effective responses to homelessness. I have written elsewhere that the criminalization of homeless camping is an affront to human dignity, and it violates the central precepts of criminal law.⁶⁵ But criminalization and marginalization nevertheless represent the default responses to the existence of visible homelessness in many communities. As such, their prevailing features represent the traditional thinking about homelessness policy: it is local, tailored to the specific interests of a given community, and motivated by a desire to increase public access to productive spaces.

designing alternatives to criminalization. Cf. U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS 9–10 (2012), https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf (“By taking into account multiple viewpoints and gaining the benefit of new ideas and perspectives, several communities have implemented solutions that both help people who are homeless and address the concerns of the broader community.”).

⁶⁰ *As Public Speaks Out, Camping Bill Not Ready to Head to Charleston Council Committee*, WCHS (Nov. 2, 2021), <https://wchsnetwork.com/as-public-speaks-out-camping-bill-not-ready-to-head-to-charleston-council-committee/> [hereinafter *Camping Bill*].

⁶¹ See Dindak, *supra* note 34 (quoting the Executive Director of the Kanawha Valley Collective). See also *About Us*, KANAWHA VALLEY COLLECTIVE, <https://www.kanawhavalleycollective.org> (last visited Oct. 10, 2022).

⁶² *Camping Bill*, *supra* note 60 (“We want to make sure that it is something that is good for Charleston and not to hamper anyone’s ability to get housing or something like that.”).

⁶³ Herring, *supra* note 51, at 291.

⁶⁴ In 2021, West Virginia’s Governor, Jim Justice, disbanded the Interagency Council on Homelessness, which had been effective in bringing together stakeholders from across the state to influence homelessness policy. See Emily Allen, *West Virginia Had a Plan to End Homelessness. Gov. Jim Justice Hasn’t Made It a Priority*, MOUNTAIN STATE SPOTLIGHT (Oct. 13, 2021), <https://mountainstatespotlight.org/2021/10/13/west-virginia-had-a-plan-to-end-homelessness-gov-jim-justice-hasnt-made-it-a-priority/>.

⁶⁵ McJunkin, *Urban Camping*, *supra* note 37, at 961–62, 964–65.

B. West Virginia's House Bill 4753

On February 15, 2022, the West Virginia House of Delegates introduced H.B. 4753, which purported to prevent homeless communities from obtaining shelter or receiving services near schools and daycare facilities.⁶⁶ However, statewide concern about homelessness in West Virginia began percolating earlier, in late 2021, when the mayor of Charleston sent an open letter to Governor Jim Justice calling for concerted state action on homelessness and mental health.⁶⁷ Although official counts showed West Virginia's homeless population was in decline,⁶⁸ homeless visibility had been increasing in Charleston.⁶⁹ At the time, Governor Justice criticized the mayor's request, asserting that Charleston needed to address its own problems before asking for state intervention.⁷⁰

In January 2022, the Religious Coalition for Community Renewal (RCCR) applied for American Rescue Plan Act funding to build a day shelter inside the Bream Memorial Presbyterian Church in Charleston.⁷¹ RCCR's proposal indicated that the COVID-19 pandemic had created an unprecedented need for increased services for the Charleston homeless population.⁷² The only other full-service homeless center in the Charleston area had closed as a result of the pandemic, and Charleston's homeless community had experienced a

⁶⁶ See generally H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022).

⁶⁷ Letter from Amy Goodwin, Mayor of Charleston, W. Va., to Jim Justice, Governor of W. Va., Craig Blair, President, W. Va. Sen. & Roger Hanshaw, Speaker, W. Va. House of Delegates (Oct. 4, 2021), <https://www.charlestonwv.gov/sites/default/files/news-docs/2021-10/DOC100421-10042021142829.pdf>. See also Jeff Morris, *Charleston Mayor Wants Special Session on Substance Use, Homelessness, Mental Health*, WCHS (Oct. 6, 2021), <https://wchstv.com/news/local/charleston-mayor-wants-special-session-on-substance-use-homelessness-mental-health>.

⁶⁸ See *State of Homelessness in West Virginia*, NAT'L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-report/west-virginia/> (last visited Oct. 10, 2022). Some organizations, however, doubt that the homeless population has declined and suggest instead that homeless people are being undercounted. See Chris Schulz, *W. Va. Counts Its Homeless Population*, W. VA. PUB. BROAD. (Feb. 1, 2022), <https://www.wvpublic.org/wvpb-news/2022-02-01/w-va-counts-its-homeless-population>.

⁶⁹ Anthony Conn, *Charleston Homeless Population More Visible with Less Places to Go*, WCHS (Oct. 8, 2021), <https://wchstv.com/news/local/charleston-homeless-population-more-visible-with-less-places-to-go>.

⁷⁰ WSAZ News Staff, *Gov. Justice Tells Charleston Mayor to 'Clean Up Her Own House'*, WSAZ NEWSCHANNEL 3 (Oct. 7, 2021), <https://www.wsaz.com/2021/10/07/gov-justice-calls-out-charleston-mayor-letter-requesting-special-session/>.

⁷¹ RELIGIOUS COAL. FOR CMTY. RENEWAL, AMERICAN RESCUE PLAN ACT FUNDING APPLICATION (Jan. 20, 2022), https://www.scribd.com/document/557850409/RCCR-Application#from_embed.

⁷² *Id.* at 3–4.

dramatic increase in opioid overdoses.⁷³ At a public hearing on RCCR’s funding request, several members of the Charleston community expressed concerns over the proposed location of the services center, specifically its proximity to an existing preschool.⁷⁴ Within a week, House Minority Leader Doug Skaff—whose district comprises western Charleston⁷⁵—had proposed H.B. 4753 to preclude the RCCR proposal.⁷⁶

Despite the narrow impetus for H.B. 4753, the scope of the bill was, in fact, quite broad. As originally introduced, H.B. 4753 would “limit the locations for homeless encampments, temporary housing, or feeding areas within 1,500 feet” of schools and daycares.⁷⁷ This ban encompassed both regulated and unregulated housing and service provision occurring near schools or designated childcare facilities.⁷⁸ In fact, the text of H.B. 4753 was nearly identical to a 2019 bill in the state of Washington, which further clarified that prohibited encampments included tents, tiny homes, and even overnight “safe parking lots” that allowed individuals to sleep in their vehicles.⁷⁹ Further, H.B. 4753 made clear that local governments were prohibited not only from “authorizing” such encampments but also from merely “permitting” them.⁸⁰

Curiously, H.B. 4753 created a private right of action for public nuisance in the event that cities, such as Charleston, failed to abide by the bill’s restrictions, allowing aggrieved citizens to sue to enforce these provisions.⁸¹ The

⁷³ *Id.*

⁷⁴ Danielle Dindak, *Proposal for Day Shelter at West Side Church Receives Backlash*, WCHS (Feb. 9, 2022), <https://wchstv.com/news/local/proposal-for-homeless-day-shelter-at-west-side-church-receives-backlash>.

⁷⁵ *West Virginia House District 35 Map*, W. VA. LEG., http://www.wvlegislature.gov/districts/maps_large_version.cfm?cham=House&planyear=2010&district=35 (last visited Oct. 10, 2022).

⁷⁶ According to Skaff, “the bill was drafted before the incident [with RCCR]” and was inspired instead by his own personal experiences with homeless people and a growing concern for his daughter. Danielle Dindak, *Proposed W. Va. Bill Would Put Limitations on New Homeless Shelter Locations*, WCHS (Feb. 15, 2022), <https://wchstv.com/news/local/proposed-wva-bill-would-put-limits-on-homeless-shelter-locations>. See also Lori Kersey & Lacie Pierson, *Bill That Would Limit Homeless Shelters, Encampments Advances in WV House*, CHARLESTON GAZETTE-MAIL (Feb. 24, 2022), https://www.wvgazette.com/news/bill-that-would-limit-homeless-shelters-encampments-advances-in-wv-house/article_651942e3-5945-5ed1-b627-0f6d06085a3a.html.

⁷⁷ H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (introduced version).

⁷⁸ See H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version).

⁷⁹ Markovich, *supra* note 21.

⁸⁰ See H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (introduced version). An amended version of the bill approved by the House Judiciary Committee clarified that “authorizing or permitting” should be read as referring only to an “official action . . . to enact an ordinance or issue any regulatory license or permit.” H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version). Given the stated motivations of the bill’s proponents, it is unclear whether the introduced version of the bill was intended to be so limited, or also to apply to *inaction* by municipal officials.

⁸¹ H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022).

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bill was subsequently referred to the House Judiciary Committee, which added an additional right of action under a state statute providing for “extraordinary remedies” in the form of a Writ of Mandamus or Writ of Prohibition.⁸² Delegates Mike Pushkin and Chad Lovejoy voiced opposition to the bill.⁸³ They expressed concern that the bill would violate the First Amendment’s free exercise clause and disempower municipalities that try to address homelessness on a local level.⁸⁴

In proposing the bill, Skaff claimed to be responding to statewide concerns about homelessness and its impact on children walking to and from school.⁸⁵ Residents of Charleston’s west side, where RCCR’s proposed shelter would have been located, had been upset that their children had to “deal with the homeless” while at school.⁸⁶ Other Charleston residents claimed to have heard about homeless individuals “wandering in” to childcare facilities and “having altercations” with teachers over the lack of shower availability at nearby service centers.⁸⁷ Skaff argued that “kids walking to school shouldn’t have to fear because there’s a homeless encampment nearby.”⁸⁸

A public hearing on H.B. 4753 was held in late February 2022, highlighting the sharp divergence of perspectives on how best to respond to homelessness in the state.⁸⁹ Opponents of the bill argued that it had been derived from negative stereotypes, would interfere with religious practice, and would

⁸² See H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version). See also W. VA. CODE ANN. § 53-1-1 et seq. (West 2022).

⁸³ Kersey & Pierson, *supra* note 76.

⁸⁴ *Id.*

⁸⁵ Ava Rash, *West Virginians Voice Opinions During a Public Hearing on Homeless Facilities Bill*, WCHS (Feb. 28, 2022), <https://wchstv.com/news/local/west-virginians-come-out-to-voice-concerns-during-a-public-hearing-on-house-bill-4753>; see also Moriah Davis, *West Virginia Delegate Proposing Bill to Limit Where Homeless Encampments Are Located*, 13NEWS (Feb. 17, 2022, 8:50 AM), <https://www.wovktv.com/news/local/west-virginia-delegate-proposing-bill-to-limit-where-homeless-encampments-are-located/> (“Skaff says the problem is mostly seen around schools downtown like Mary C. Snow and Piedmont Elementary with many others in Kanawha City. The problem just isn’t in Charleston but across the state.”).

⁸⁶ See Rash, *supra* note 85.

⁸⁷ See Randy Yohe, *Bill Keeping Homeless People Away from Schools, Daycares Sparks Concerns*, W. VA. PUB. BROAD. (Feb. 28, 2022), <https://www.wvpublic.org/government/2022-02-28/bill-keeping-homeless-people-away-from-schools-daycares-sparks-concerns>.

⁸⁸ Jeff Jenkins, *Skaff’s Homeless Bill Passes House Judiciary Committee*, METRONews (Feb. 24, 2022), <https://wvmetronews.com/2022/02/24/skaffs-homeless-bill-passes-house-judiciary-committee/>.

⁸⁹ Lori Kersey & Lacie Pierson, *House Hearing Brings Charleston Municipal Issue to State Legislative Stage*, CHARLESTON GAZETTE-MAIL (Feb. 28, 2022), https://www.wvgazette.com/news/house-hearing-brings-charleston-municipal-issue-to-state-legislative-stage/article_0e93bce6-3805-552c-b3d8-b946854918a9.html.

likely fail to solve the underlying problem.⁹⁰ Charleston City Councilman Emmette Pepper condemned the bill as a political maneuver by local delegates in response to the isolated RCCR proposal in their district, calling the bill a “ham-handed attempt to . . . substitute a really broad rule for reasoned consideration.”⁹¹ Supporters of the bill were mainly parents who testified to their concern over the safety of their children.⁹² Some claimed that homeless individuals had shouted at them or their children on the way to school, while others claimed to have witnessed physical violence or indecent exposure.⁹³

Given the concerted opposition to H.B. 4753 and concerns about the underlying political motivations of the bill, the legislature delayed a final vote.⁹⁴ As a result, H.B. 4753 was not passed over to the Senate before the March 2 deadline for the session.⁹⁵ Although the House has the option of taking up the bill again next session, Skaff claims that “[i]nstead of a new law, a committee to study and propose legislation to address mental health issues and issues faced by homeless people is in the works.”⁹⁶

III. RESIDENCY RESTRICTIONS

The first feature of West Virginia’s H.B. 4753 that warrants extended discussion is the imposition of school-based residency restrictions. The version of the bill first proposed sought to prohibit homeless residents from sheltering or camping within 1,500 feet of a school or daycare.⁹⁷ This restriction ostensibly would apply to unsanctioned encampments as well as sanctioned encampments or shelters, including those predating the bill.⁹⁸ The amended version of the bill reduced the prohibited distance to 1,000 feet while clarifying that the residency restriction only applied to newly sanctioned homeless encampments and shelters.⁹⁹

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Lacie Pierson, *House Delays Vote on Bill to Limit Homeless Shelters in West Virginia*, CHARLESTON GAZETTE-MAIL (Mar. 1, 2022), https://www.wvgazette.com/news/legislative_session/house-delays-vote-on-bill-to-limit-homeless-shelters-in-west-virginia/article_55536e97-f86f-53d2-8678-9fe05f409d4b.html.

⁹⁵ Lacie Pierson, *Bill to Limit Homeless Shelters Dies in House of Delegates*, CHARLESTON GAZETTE-MAIL (Mar. 2, 2022), https://www.wvgazette.com/news/legislative_session/bill-to-limit-homeless-shelters-dies-in-house-of-delegates/article_e50a7eb5-baf7-5cc7-9dd2-be0af6b0fd7e.html.

⁹⁶ *Id.*

⁹⁷ H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (introduced version).

⁹⁸ See *supra* notes 77–80 and accompanying text.

⁹⁹ H.B. 4753, 2022 Leg., Reg. Sess. (W. Va. 2022) (amended version).

The precise form of residency restriction imposed by H.B. 4753 is a relatively novel response to homelessness.¹⁰⁰ However, homeless individuals and communities are accustomed to navigating restrictions limiting where they can reside. As described above, most localities either have promulgated criminal ordinances carving out particular locations within which sheltering activities are prohibited or regulate the spaces homeless residents occupy through zoning and licensing shelters and encampments.¹⁰¹ Most commonly, these efforts work to protect commercial business districts, such as downtowns and main streets.¹⁰² The oft-articulated goal of traditional homeless restrictions is to reclaim public space in the places where the general public congregates.¹⁰³

Although new to the homelessness context, school-based residency restrictions are not themselves a new phenomenon. Beginning with Florida in 1995,¹⁰⁴ states have imposed similar restrictions on where individuals convicted of a sex offense may reside. These restrictions have proven ineffective at accomplishing their stated purpose—preventing recidivism—and have produced a large number of problematic side effects.

In this Part, I examine sex offender residency restrictions as a lens through which to evaluate the propriety of school-based residency restrictions for individuals experiencing homelessness. In the first section, I briefly describe the current state of sex offender residency restrictions before exploring the evidence of their unintended consequences. Mapping these onto the context of homelessness, the sex offender experience suggests that school-based residency restrictions will concentrate and entrench homelessness while separating homeless residents from needed resources. In the second section, I contend that the choice to impose school-based residency restrictions indicates a shifting rationale for the regulation of homeless individuals—one more explicitly grounded in invisibility rather than the regulation of public space.

¹⁰⁰ As noted above, the original text of the West Virginia bill draws heavily from a prior legislative effort in the state of Washington. However, that failed Washington bill is the only other example to be found of state-level bans on homelessness encampments near schools. *See generally* Markovich *supra* note 21.

¹⁰¹ *See supra* Part II.A.

¹⁰² *See supra* notes 36–40 and accompanying text.

¹⁰³ *See, e.g., supra* note 34–35 and accompanying text.

¹⁰⁴ *See* FLA. STAT. ANN. § 947.1405(7)(a)(2) (West 2022). *See also* Corey Rayburn Yung, *Banishment by a Thousand Laws: Residency Restrictions on Sex Offenders*, 85 WASH. U. L. REV. 101, 122 n.174 (2007).

A. Lessons from the Sex Offender Experience

At least 29 states have legislatively imposed restrictions on where those with a sex offense conviction can reside.¹⁰⁵ Although the specifics vary by state, these restrictions most commonly bar registered sex offenders from living within a specified distance of “designated areas where children were likely to congregate.”¹⁰⁶ These protected areas typically include schools, daycares, parks, or childcare facilities.¹⁰⁷ As but one example, West Virginia state law prohibits individuals with certain sex offense convictions from establishing a residence “within 1,000 feet of a school or child care facility.”¹⁰⁸

Sex offender residency restrictions have broad public support despite a lack of evidence of their efficacy.¹⁰⁹ Proponents say that the laws will protect children from sexual predators by reducing both the temptation and the opportunity for recidivism.¹¹⁰ Of course, these arguments essentialize those with a sex offense conviction as if they were a monolithic group specifically targeting children rather than a diverse array of individuals with unique motivations.¹¹¹

¹⁰⁵ Tamara Rice Lave, *Arizona’s Sex Offender Laws: Recommendations for Reform*, 52 ARIZ. ST. L.J. 925, 938 n.95 (2020) (citing Joanne Savage & Casey Windsor, *Sex Offender Residence Restrictions and Sex Crimes Against Children: A Comprehensive Review*, 43 AGGRESSION & VIOLENT BEHAV. 13, 16 (2018)). Researchers estimate that as many as 400 local communities have issued ordinances that operate similarly. Gina Puls, *No Place to Call Home: Rethinking Residency Restrictions for Sex Offenders*, 36 B.C. J.L. & SOC. JUST. 319, 322 (2016).

¹⁰⁶ Puls, *supra* note 105, at 321.

¹⁰⁷ See, e.g., Jill S. Levenson & Kristen M. Zgoba, *Sex Offender Residence Restrictions the Law of Unintended Consequences*, in SEX OFFENDER LAWS: FAILED POLICIES, NEW DIRECTIONS 180, 181 (Richard G. Wright ed., 2009) (2d ed. 2015).

¹⁰⁸ W. VA. CODE ANN. § 62-12-26(b)(1) (West 2022).

¹⁰⁹ Wayne A. Logan, *Constitutional Collectivism and Ex-Offender Residence Exclusion Laws*, 92 IOWA L. REV. 1, 9 (2006); Richard Tewksbury, *Evidence of Ineffectiveness: Advancing the Argument Against Sex Offender Residence Restrictions*, 13 CRIMINOLOGY & PUB. POL’Y 135, 135 (2014); Lave, *supra* note 105, at 938 (“Research overwhelmingly shows that residency restrictions do not lower the incidence of sex crimes against children, and for that and other reasons, they should be curtailed or abolished completely.”).

¹¹⁰ JANET MANDELSTAM & CARRIE MULFORD, U.S. DEP’T OF JUST., NAT’L INST. OF JUST. UPDATE NO. 223565, UNINTENDED CONSEQUENCES OF SEX OFFENDER RESIDENCY LAWS: CAN GIS MAPPING HELP?, (Aug. 2008), <https://www.ojp.gov/pdffiles1/nij/223565.pdf>.

¹¹¹ See Catherine L. Carpenter & Amy E. Beverlin, *The Evolution of Unconstitutionality in Sex Offender Registration Laws*, 63 HASTINGS L.J. 1071, 1096–97 (2012) (“Where enacted, [residency restrictions] are intended to apply to all registrants, including those whose convictions occurred prior to the enactment of the particular residency restriction, those whose crimes were committed against adult victims, and those whose crimes were of a nonsexual nature.” (internal citations omitted)).

Moreover, community support of residency restrictions is driven in large part by overestimates of the likelihood of recidivism.¹¹²

Sex offender residency restrictions have led to “unintended and unanticipated consequences in a number of cities.”¹¹³ Sex offender residency restrictions often result in very few places where affected individuals can lawfully reside, either congregating them in narrow parts of town or excluding them entirely.¹¹⁴ One common consequence is that overlapping exclusion zones push people with a sex offense conviction to live “in areas characterized by economic disadvantage, lack of physical resources, relatively little social capital, and high levels of social disorganization.”¹¹⁵ Studies mapping particular cities have shown that over 90% of a city may be off-limits due to the proximity of schools and daycares.¹¹⁶

Counterintuitively, residency restrictions may, in fact, contribute to reoffending. Residency restrictions make it harder for individuals to find and maintain safe, affordable, and legal housing.¹¹⁷ Individuals who have stable housing are less likely to re-offend than those who lack stability.¹¹⁸ “Housing restrictions appear to disrupt the stability of sex offenders by forcing them to relocate, sometimes multiple times, creating transience, financial hardship, and emotional volatility.”¹¹⁹

¹¹² See Caitlin J. Monjeau, Note, *All Politics Is Local: State Preemption and Municipal Sex Offender Residency Restrictions in New York State*, 91 B.U. L. REV. 1569, 1577 (2011) (“The study’s authors also found that community members dramatically overestimated sex offender recidivism rates, perhaps doubling or tripling the actual rates.” (citing Jill S. Levenson, Yolanda N. Brannon, Timothy Fortney, & Juanita Baker, *Public Perceptions About Sex Offenders and Community Protection Policies*, 7 ANALYSES SOC. ISSUES & PUB. POL’Y 137, 148 (2007))).

¹¹³ See U.S. DEP’T OF JUST., NAT’L INST. OF JUST. NO. 222759, SEX OFFENDER RESIDENCY RESTRICTIONS: HOW MAPPING CAN INFORM POLICY (Jul. 2008), <https://www.ojp.gov/pdffiles1/nij/222759.pdf>.

¹¹⁴ *Id.* One well-known story details how 2,500-foot residency restrictions in Miami forced individuals convicted of a sex offense to congregate in a homeless encampment along a section of the Julia Tuttle causeway. See Greg Allen, *Sex Offenders Forced to Live Under Miami Bridge*, NPR (May 20, 2009), <https://www.npr.org/2009/05/20/104150499/sex-offenders-forced-to-live-under-miami-bridge>.

¹¹⁵ Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531, 535 (2007).

¹¹⁶ See U.S. DEP’T OF JUST., *supra* note 113, at 2 (showing that a 2,500-foot exclusion zone in Newark would result in only 7% of the city being inhabitable). *Cf.* Ryals v. City of Englewood, 364 P.3d 900, 904 (Colo. 2016) (upholding a municipal ordinance that made “99% of the city off limits to qualifying sex offenders”).

¹¹⁷ Tewksbury, *supra* note 115, at 534.

¹¹⁸ See Sarah Geraghty, *Challenging the Banishment of Registered Sex Offenders from the State of Georgia: A Practitioner’s Perspective*, 42 HARV. C.R.-C.L. L. REV. 513, 514 (2007); Levenson & Zgoba, *supra* note 107, at 183.

¹¹⁹ Jill S. Levenson & Andrea L. Hern, *Sex Offender Residence Restrictions: Unintended Consequences and Community Reentry*, 9 JUST. RSCH. & POL’Y 59, 67 (2007).

Individuals subject to residency restrictions also experience increased social isolation. Physical distance from family members, friends, and even significant others can lead to a breakdown of valuable support structures at a time when individuals are trying to reintegrate into the community.¹²⁰ If a city has a high concentration of restricted areas, individuals may need to reside farther from employment opportunities or from needed services, such as mental health counseling.¹²¹

Mapping the lessons of sex offender residency restrictions onto the context of individuals experiencing homelessness reveals some preliminary, but significant, concerns. Residency restrictions are likely to cut homeless individuals off from valuable employment opportunities, needed treatment options, and available social services. The best available evidence indicates that addressing homelessness in a community requires the provision of housing assistance with wrap-around social services.¹²² Many agencies have also embraced an “employment first” approach, finding that job placement programs are both “effective and cost-effective.”¹²³ Residency restrictions undermine these evidence-based solutions by curtailing—in some cases drastically—the physical spaces that are reasonably available to individuals experiencing homelessness.¹²⁴

In addition, school-based residency restrictions may be especially pernicious for homeless schoolchildren. According to data collected from the U.S. Department of Education, nearly 1.3 million elementary and secondary school students were homeless in the 2019–20 school year.¹²⁵ By excluding homeless families from residing in areas around schools, residency restrictions are likely to impose additional transportation and logistical burdens on homeless

¹²⁰ See Elizabeth Esser-Stuart, Note, “*The Irons Are Always in the Background*”: *The Unconstitutionality of Sex Offender Post-Release Laws as Applied to the Homeless*, 96 TEX. L. REV. 811, 820 (2018); Tewksbury, *supra* note 115, at 537 (“[T]hese statutory restrictions impose serious limitations on the ability of offenders to reintegrate into communities as law-abiding residents.”).

¹²¹ See U.S. DEP’T OF JUST., *supra* note 113, at 1.

¹²² See Rankin, *Punishing Homelessness*, *supra* note 17, at 130–34.

¹²³ See Jean-Michel Giraud, *Employment First: A Powerful Tool for Ending Homelessness*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (Feb. 26, 2018), <https://www.usich.gov/news/employment-first-a-powerful-tool-for-ending-homelessness/>. But see Harris School of Public Policy, *Employment Alone Isn’t Enough to Solve Homelessness, Study Suggests*, U. CHI. NEWS (Jun. 29, 2021), <https://news.uchicago.edu/story/employment-alone-isnt-enough-solve-homelessness-study-suggests>.

¹²⁴ Residency restrictions may very well constrain homeless individuals even more than sex offenders because so many homeless individuals lack access to reliable transportation. See generally Erin Roark Murphy, *Transportation and Homelessness: A Systematic Review*, 28 J. SOC. DISTRESS AND THE HOMELESS 96 (2019).

¹²⁵ *National Overview*, NAT’L CTR FOR HOMELESS EDUC., <https://profiles.nche.seiservices.com/ConsolidatedStateProfile.aspx> (last visited Oct. 10, 2022).

families, some of which may prove insurmountable.¹²⁶ Homeless children already experience considerable educational disadvantages.¹²⁷ “Despite the characteristic role education plays in the lives of homeless children, many of them do not attend school regularly and over 20% of homeless school-aged children do not attend at all as a direct result of their homelessness.”¹²⁸ Residency restrictions are only likely to compound these disadvantages.

By implementing homeless residency restrictions based on proximity to schools and other places children congregate, West Virginia’s H.B. 4753 is replicating failed policy. As sex offender residency restrictions have amply demonstrated, school-based exclusion zones produce unpredictable and frequently undesirable consequences, disadvantaging not only those excluded but also the community as a whole. In the case of homeless residency restrictions, this failed policy is likely to entrench and concentrate homelessness while erecting a barrier to proven solutions. As the next section examines, these social costs would be imposed in furtherance of a deeply flawed and indefensible aim.

B. Surfacing Invisibility

One of the more remarkable features of H.B. 4753 is that it is transparently motivated by a desire to remove homeless individuals from public view. For years, scholars have suggested that the traditional responses to homelessness—both criminalization and marginalization—are grounded in a desire to distance homeless individuals from the rest of the community.¹²⁹ But proponents of such responses at least outwardly advance competing rationales, despite a paucity of evidence supporting them. By contrast, the proponents of H.B. 4753 (and the Washington bill on which it was modeled) have rather blatantly declared that homeless residency restrictions are needed solely to protect children from exposure to visible poverty. In this respect, H.B. 4753 reflects a shifting narrative about homelessness that, if left unchallenged, is likely to exacerbate the stigma associated with being unhoused while justifying policies that impede communities from cooperating toward a solution.

Professor Sara Rankin is a leading light on responses to homelessness, especially criminal responses. Her research has extensively detailed how social

¹²⁶ While a single, 1,000-foot restriction around a particular school may not seem onerous, overlapping exclusion zones have the potential to cut off large swaths of urban and suburban communities.

¹²⁷ According to one study, homeless schoolchildren are “twice as likely to repeat a grade or be suspended from school” and “suffer from emotional or behavioral problems that interfere with learning at almost three times the rate of other children.” Sheila O’Leary, *Educating Homeless Children*, 8 GEO. J. ON POVERTY L. & POL’Y 513, 513 (2001).

¹²⁸ *Id.*

¹²⁹ See, e.g., Rankin, *Hiding Homelessness*, *supra* note 48, at 581–84; Rankin, *Punishing Homelessness*, *supra* note 17, at 102. See generally Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4 (2016) [hereinafter Rankin, *The Influence of Exile*].

stigma against the visibly poor operates in the background of homelessness policy, leading to local responses that tend to exile, rather than embrace, homeless residents.¹³⁰ According to Rankin, “Americans are stained by ‘the influence of exile’: deeply ingrained class and status distinctions that can inconspicuously, even unconsciously guide us to create and enforce laws and policies that restrict the visibility of poverty—of poor people—in public space.”¹³¹ Where criminalization is unavailable, cities have sought out additional methods for “hiding homelessness,” including marginalization and even involuntary commitment.¹³²

One common stigma associated with chronic homelessness is the metaphor of contagion. Researchers have shown that people respond to visible poverty with disgust and distancing, akin to an immune system rejecting pathogens.¹³³ Rankin has explained that our psychology drives us to “prevent contact with homeless people because we implicitly associate them with disease, perceiving them as ‘pathogenic threats’ we must avoid through ‘physical distancing’ to avoid potential contamination.”¹³⁴

Despite the undeniable influence of stigma, proponents of traditional responses to homeless tend to couch their policies in alternative justifications, such as “public safety.”¹³⁵ But the association of homelessness with criminality is unsupported.¹³⁶ “[A] person who is homeless is no more likely to be a criminal than a housed person, with one legal exception: camping ordinances.”¹³⁷ Individuals experiencing homelessness are actually less likely to be the cause of

¹³⁰ See, e.g., Rankin, *The Influence of Exile*, *supra* note 129, at 6–7.

¹³¹ Rankin, *Punishing Homelessness*, *supra* note 17, at 122.

¹³² See Rankin, *Hiding Homelessness*, *supra* note 48, at 590–602.

¹³³ Scott Clifford & Spencer Piston, *Explaining Public Support for Counterproductive Homelessness Policy: The Role of Disgust*, 39 POL. BEHAV. 2, 507–09 (2017).

¹³⁴ Rankin, *Punishing Homelessness*, *supra* note 17, at 122–23. Ironically, those without homes are the ones most at risk of literal contagion, whether on the streets or in public shelters. Amy Maxmen, *Coronavirus Is Spreading Under the Radar in US Homeless Shelters*, NATURE (May 7, 2020), <https://www.nature.com/articles/d41586-020-01389-3>; Chris Woodward, *As Homeless Are Suffering, Risk of Hepatitis, Typhus, and Other Diseases Is Growing*, USA TODAY (June 18, 2019), <https://www.usatoday.com/story/news/nation/2019/06/18/homeless-homelessness-disease-outbreaks-hepatitis-public-health/1437242001/>.

¹³⁵ See, e.g., Rankin, *Hiding Homelessness*, *supra* note 48, at 590 (“From this perspective, unsheltered people are often perceived as threats to public health and safety, justifying their removal from public spaces.”); Rankin, *The Influence of Exile*, *supra* note 129, at 35 (“Cities commonly invoke phrases like ‘public safety’ to insulate themselves from First Amendment challenges, and courts frequently defer to such rationales.”).

¹³⁶ JUNEJO, *supra* note 50, at 7–8 (“Opponents of homeless encampments often cite public safety concerns for nearby residents and school children to keep encampments out of their neighborhoods. Their public safety concerns often stem from isolated violent incidents rather than general trends.”).

¹³⁷ Rankin, *Punishing Homelessness*, *supra* note 17, at 127.

violent crime than housed individuals, and homeless women, teens, and children, in particular, are more likely to be the victims of crimes.¹³⁸

At times, proponents of criminalization and marginalization provide even more amorphous justifications. Some view the visibly homeless as a form of disorder that invites more serious crime.¹³⁹ On this view, “the mere presence of street homeless in the public sphere has the effect of unraveling the social order, leading to an increase in crime and thereby driving middle- and upper-class consumers out of downtown areas and into the suburbs.”¹⁴⁰ Researchers have never found any empirical support for this theory,¹⁴¹ and localities that have embraced this view have engaged in egregious examples of excessive policing.¹⁴²

A more honest justification for these efforts is that the presence of homeless residents makes spaces unavailable to housed citizens. Sometimes this is explicitly framed as a matter of public avoidance—housed citizens stay away from public spaces occupied by homeless residents to the detriment of local commerce or tourism.¹⁴³ Other times, the argument is made that homeless individuals, and unsheltered individuals in particular, are effectively converting public property for private use.¹⁴⁴ In other work, I’ve challenged the sincerity of such arguments.¹⁴⁵ But they are frequently advanced and taken earnestly in many instances.¹⁴⁶

¹³⁸ STATE OF WASH. DEP’T OF COM., HOMELESSNESS MYTHS AND FACTS (Dec. 2016) <https://www.commerce.wa.gov/wp-content/uploads/2016/12/hau-chg-mythsfacts-12-8-2016.pdf>.

¹³⁹ James Q. Wilson & George L. Kelling, *The Police and Neighborhood Safety: Broken Windows*, ATL. (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

¹⁴⁰ Donald Saelinger, Note, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 GEO. J. ON POVERTY L. & POL’Y 545, 553 (2006).

¹⁴¹ See, e.g., Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 314–16 (2006) (finding no evidence that increased police attention to misdemeanors reduces crime). Others have questioned whether the theory is empirically falsifiable. Mike Rowan, *The Illusion of Broken Windows Theory: An Ethnographic Engagement with the Theory That Was Not There*, 9 WM. & MARY POL’Y REV. 1, 2 (2017) (“The problem with the theory, empirically-speaking, is not that it has been debunked but, instead, that its logic is un-debunkable.”).

¹⁴² See generally K. Babe Howell, *The Costs of “Broken Windows” Policing: Twenty Years and Counting*, 37 CARDOZO L. REV. 1059 (2016) (detailing the experiences of zero-tolerance policing in New York City).

¹⁴³ See Saelinger, *supra* note 140, at 554 (“In a biannual assessment of criminalization laws nationwide, the National Coalition for the Homeless found dozens of instances where city officials affirmatively cited the need to keep the homeless population from interacting with tourists.”).

¹⁴⁴ See Jeremy Waldron, *Homelessness and Community*, 50 U. TORONTO L. J. 371, 373 (2000).

¹⁴⁵ See Ben A. McJunkin, *The Negative Right to Shelter*, 111 CAL. L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4034878.

¹⁴⁶ See, e.g., Dindak, *supra* note 34.

In contrast to the rationales offered for criminalization and marginalization, homeless residency restrictions have been proposed with little justification other than protecting children from viewing their homeless neighbors. Although some proponents have made passing allusions to public safety, the rationale most consistently articulated has been that homeless residents should be treated akin to undesirable businesses. The goal appears to be to spare children from exposure to visible homelessness, even in the absence of evidence that anyone is negatively impacted or deterred from occupying school spaces.

As noted previously, West Virginia's H.B. 4753 was modeled on a measure introduced in Washington.¹⁴⁷ The public debate surrounding that bill surfaced the rationale of homeless invisibility. The Washington bill's sponsor openly stated that homeless residents should not be near schools for the same reasons that "liquor and pot shops" are not permitted near schools.¹⁴⁸ Drawing on the same imagery that Rankin's work has chronicled, he posited that homeless camps are sites of "contamination everywhere" and therefore should not be "next to one of our schools."¹⁴⁹

When he introduced H.B. 4753, House Minority Leader Doug Skaff made similar public comments, analogizing the presence of homeless residents to "bars, video parlors, and cannabis dispensaries."¹⁵⁰ However, he also went further, implying that the residency restrictions should be justified by housed residents' fear of their homeless neighbors.¹⁵¹ "When you have to tell your kid and explain to them it's okay, it's okay and it's safe to go to school," Skaff said, "that's a problem."¹⁵² Without claiming that homeless residents actually pose a threat to children, Skaff cited numerous "testimonials" to support his view that housed residents' fear is well-grounded.¹⁵³

This shift in the narrative surrounding the appropriate response to homelessness should be a troubling development to homeless advocates. While many of us have long suspected that public support for criminalization and marginalization policies are tied to the ways in which these policies remove the "visibly poor" from public view,¹⁵⁴ homeless invisibility has not often been advanced as an articulable benefit of social policy. Homeless residency restrictions like those in West Virginia's H.B. 4753 announce openly what had previously been subtext: housed individuals would simply prefer to avoid seeing

¹⁴⁷ See Markovich, *supra* note 21.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Davis, *supra* note 85.

¹⁵¹ *See id.*

¹⁵² *Id.*

¹⁵³ *See id.*

¹⁵⁴ Rankin, *Punishing Homelessness*, *supra* note 17, at 102.

their homeless neighbors, even at the cost of undermining effective homeless policy. To accept such a justification for the legal regulation of homeless residences would be an affront to the fundamental dignity of those individuals experiencing homelessness.

IV. STATE–LOCAL PREEMPTION

The second feature of West Virginia’s H.B. 4753 that raises concern is the operation of state power to preempt local decisions about homeless residents. As detailed previously, the traditional approaches to regulating the locations of homeless encampments and shelters are criminalization and marginalization, processes that overwhelmingly occur at the local level.¹⁵⁵ By contrast, H.B. 4753 would regulate the location of homeless encampments and shelters as a matter of statewide policy, precluding local decisionmakers from tailoring solutions to the needs and details of their local communities.

Of course, local autonomy must necessarily yield to the exercise of state power.¹⁵⁶ This is because municipal governments are ultimately “creatures of the state,” more akin to corporations than to sovereign political entities.¹⁵⁷ However, many states, West Virginia among them, have adopted “home rule” legislation that permits local governments broad authority to make local decisions provided those decisions are not in direct conflict with federal or state statutes or the federal or state constitutions.¹⁵⁸ In theory, home rule not only authorizes local governments to act but also limits state preemption of local decisions to matters implicating statewide interests.¹⁵⁹ Historically, state legislatures have used preemption to encourage uniform regulation while coordinating local activities across the state.¹⁶⁰

¹⁵⁵ See *supra* Parts II.A. & II.B.

¹⁵⁶ See Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1184 (2018). But see Sarah L. Swan, *Constitutional Off-Loading at the City Limits*, 135 HARV. L. REV. 831, 837 (2022) (suggesting that federal jurisprudence preventing cities from “constitutional off-loading”—denying protected activities when comparable services are available nearby—has affirmed the legitimacy of cities as constitutional actors).

¹⁵⁷ JOHN FORREST DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 209 (5th ed. 1911). As Judge Dillon famously wrote: “Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so may it destroy. If it may destroy, it may abridge and control.” *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868).

¹⁵⁸ See generally Robert M. Bastress Jr., *Home Rule in West Virginia*, 122 W. VA. L. REV. 721 (2020) (discussing the history of home-rule in West Virginia and elsewhere).

¹⁵⁹ See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2012–13 (2018).

¹⁶⁰ Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957 (2019) (“Traditionally, states have invoked their power over local authority periodically

In the last decade, however, state laws designed to preempt local governments have become increasingly widespread and severe.¹⁶¹ For example, states have preempted local gun regulations, local fracking bans, localities' self-designation as "sanctuary cities," minimum wage rates, sick leave policies, plastic bag bans, and even decisions about how individuals can use the restroom.¹⁶² Increasingly, preemption is being used by conservative state legislatures to exercise dominion over powerful liberal cities while encouraging deregulation.¹⁶³ More aggressive use of preemption by state legislatures has become common, imposing blanket restrictions on local governments and imposing financial sanctions on cities and city officials who violate the state legislative agenda.¹⁶⁴ Scholars have termed this phenomenon "new preemption,"¹⁶⁵ "hyper preemption,"¹⁶⁶ and even "subnational authoritarianism."¹⁶⁷

In this Part, I connect the recent trend of aggressive preemption to West Virginia's use of state power to enforce homeless residency restrictions. I begin by more closely examining the trend of aggressive preemption. I focus on three specific features of the trend: conservative domination of liberal cities, preemption as a method of interest-group forum shopping, and preemption's inherently deregulatory nature. In the process, I examine how homeless residency restrictions—and H.B. 4753, in particular—exemplify these features at the expense of evidence-based homelessness policy. Lastly, I critique H.B. 4753 as an inappropriate and overreaching exercise of state power, given the absence of a demonstrable statewide interest.

A. *The Aggressive Preemption Trend*

As legislation designed to regulate the location of homelessness within a community, West Virginia's H.B. 4753 is uncommon in that it emanates from a state legislature. States have traditionally delegated the responsibility for

to vindicate concerns about statewide regulatory uniformity or to address particularly significant interlocal conflicts.”).

¹⁶¹ Briffault, *supra* note 159, at 1997.

¹⁶² See, e.g., Joshua S. Sellers & Erin A. Scharff, *Preempting Politics: State Power and Local Democracy*, 72 STAN. L. REV. 1361, 1375–76 (2020).

¹⁶³ Briffault, *supra* note 159, at 1997–98.

¹⁶⁴ See Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1067 (2017). *But see* Erin Adele Scharff, *Hyper Preemption: A Reordering of State-Local Relationship?*, 106 GEO. L.J. 1469, 1477–79 (2018) (detailing how expansive state preemption can be in practice).

¹⁶⁵ Briffault, *supra* note 159, at 1997.

¹⁶⁶ Scharff, *supra* note 164, at 1473.

¹⁶⁷ James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829, 868 (2021).

regulating homeless residents to municipal governments.¹⁶⁸ As legislation designed to preempt local decision making in favor of uniform statewide policy, by contrast, H.B. 4753 is part of an increasing, and increasingly concerning, trend in state governance: aggressive state–local preemption.¹⁶⁹

It’s tempting to view the modern trend of aggressive preemption as merely an extension of historical state–local antagonism. After all, states have long retained the power to preempt local action and have frequently done so to protect statewide interests that might not be properly represented at the local level.¹⁷⁰ But this would be a mistake. As one commentator noted, “[t]hough it is hardly unprecedented for states to preempt local regulations, the breadth and ambition of the recent preemption efforts have rarely been seen in American history.”¹⁷¹ As the National League of Cities has catalogued:

At least twenty-five states, for example, currently use their authority to preempt local minimum wage laws while twenty-two states prohibit local paid sick leave ordinances. In the public health arena, thirteen states now ban local food and nutrition policies, ten states prevent local governments from regulating e-cigarettes, and forty-three states limit the authority of local governments to regulate firearm safety.¹⁷²

The aggressive preemption phenomenon not only represents the acceleration of intrastate preemption but also evidences a number of defining features exemplified by H.B. 4753. Most notably, laws preempting local authority appear increasingly partisan. “In an era of increased political polarization marked by geographic political sorting, urban residents are more liberal than their suburban, exurban, and rural counterparts.”¹⁷³ Where cities have sought to implement a liberal policy agenda on issues ranging from environmental harms to public health, conservative-led state legislatures have

¹⁶⁸ Cf. NAT’L HOMELESSNESS L. CTR., HOUSING NOT HANDCUFFS 2021: STATE LAW SUPPLEMENT 9–11 (2021), <https://homelesslaw.org/wp-content/uploads/2022/02/2021-HNH-State-Crim-Supplement.pdf> (showing that only a minority of states have laws restricting the homeless from camping in specified public places).

¹⁶⁹ According to Erin Scharff, so-called “hyper preemption” seeks to strip local authority to govern in broad areas of social policy without regard to whether state control is appropriate. Scharff, *supra* note 164, at 1473–74.

¹⁷⁰ See *id.* at 1476–79.

¹⁷¹ Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017).

¹⁷² National League of Cities, *Principles of Home Rule for the 21st Century*, 100 N.C. L. REV. 1329, 1339 (2022)

¹⁷³ Scharff, *supra* note 164, at 1482. See also Stahl, *supra* note 171, at 135 (“[P]reemption has become more prevalent because cities are now overwhelmingly Democratic while state legislatures, dominated by representatives of rural areas, are overwhelmingly Republican.”).

reached for preemption as a mechanism of correction.¹⁷⁴ This dynamic makes bills like H.B. 4753 particularly attractive in a state like West Virginia.¹⁷⁵ Although West Virginia as a whole is reliably conservative, with Republicans holding dominant positions in both houses of the state legislature,¹⁷⁶ major cities like Charleston and Huntington represent comparatively liberal enclaves within the state.¹⁷⁷ By imposing statewide homeless residency restrictions, H.B. 4753 would preclude those cities' more liberal local leaders from approving housing proposals like the one advanced by RCCR.

Increased partisanship has also led advocates to leverage preemption as a form of political forum shopping.¹⁷⁸ When influential interest groups lose at the local level, they often lobby state actors to pursue their same goals.¹⁷⁹ As Professor Paul Diller explained in an early and influential article on state/local preemption, “[i]ntrastate preemption is best understood less as a matter of abstract logic and more as one weapon among many used by interest groups to oppose local policies they dislike.”¹⁸⁰ When faced with particularly important policy goals, it appears that both Democrats and Republicans are willing to forsake institutional commitments in pursuit of their agenda.¹⁸¹ H.B. 4753 may very well reflect this phenomenon, as residents opposed to the RCCR proposal for a day shelter circumvented local leaders and appealed directly to their state delegate.¹⁸²

¹⁷⁴ Scharff, *supra* note 164, at 1481–83.

¹⁷⁵ In the case of H.B. 4753 itself, the bill was introduced by Democratic House Minority Leader Bill Skaff, reflecting the continuing possibility of inter-party disputes over the role of preemptive legislation. *See id.* at 1480 (“Debates over preemption are not always partisan—local policy may be subject to intraparty disputes.”).

¹⁷⁶ At the time of this writing, 78% of the West Virginia House of Delegates identified as Republican, as did 68% of state Senators. *See* W. VA. LEGIS., <https://www.wvlegislature.gov> (last visited Oct. 11, 2022).

¹⁷⁷ To use the House of Delegates as illustrative, the three districts comprising the greater Charleston area, Districts 35, 36, and 37, are represented by five Democrats and three Republicans. *Id.* Similarly, Huntington, in District 5, is currently represented by two Democrats and zero Republicans. *Id.*

¹⁷⁸ Scharff, *supra* note 164, at 1479.

¹⁷⁹ *See id.* at 1480 (detailing examples).

¹⁸⁰ Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1133 (2007). *See also* Schragger, *supra* note 167, at 1294.

¹⁸¹ *Cf.* Scharff, *supra* note 164, at 1473 (“Because one’s views about preemption authority are often influenced by one’s view of the substantive policy at stake, it can be difficult to ascertain consistent normative views about preemption authority.”). This behavior mirrors the phenomenon articulated in Eric A. Posner & Cass R. Sunstein, *Institutional Flip-Flops*, 94 TEX. L. REV. 485, 486–87 (2016). *See also* Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001).

¹⁸² As always in these situations, the record is relatively unclear regarding the background motivations for introduced legislation. Contemporaneous accounts link H.B. 4753 and the RCCR

Lastly, some scholars have argued that “[a] focus on structural bias better explains the politics of new preemption . . . [because] state preemption of local law favors conservative Republican agendas not cyclically or episodically but systematically.”¹⁸³ This is partly because state legislatures tend to be Republican (in contrast with reliably Democratic cities)¹⁸⁴ and partly because doctrines surrounding preemption favor deregulation.¹⁸⁵ Frequently, preemptive laws passed by states prohibit lower governments from enacting regulation without creating an alternative regulatory scheme.¹⁸⁶ Once again, H.B. 4753 fits the bill, precluding any local policies, no matter how well conceived, that might situate homeless residents too close to prohibited schools or daycare facilities. In this way, the bill advances a status quo grounded in marginalization at the cost of more progressive policies that might better integrate homeless residents into the community.

B. Justifying Preemption: The View from the Statehouse

According to Professor Erin Scharff, local—rather than state—control of policy is potentially justified by three rationales. First, local control has the capacity of ensuring greater preference satisfaction where policy preferences are heterogeneous.¹⁸⁷ “Because different taxpayers will have different preferences about which goods they prefer and at what prices, the existence of multiple jurisdictions ensures that a wider range of taxpayer preferences can be honored.”¹⁸⁸ Second, local control produces better substantive outcomes when addressing problems that are themselves local.¹⁸⁹ “Allowing local communities to make policy themselves helps ensure those crafting the policies are

shelter proposal. Rash, *supra* note 85. In addition, comments by Doug Skaff attribute the motivation to directly complaints from constituents. *See id.*

¹⁸³ Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 70 (2022).

¹⁸⁴ *Id.* See generally Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021) (showing that, due to districting schemes, geographic clustering, and gerrymandering means, state legislatures are recurrently controlled by the state’s minority party).

¹⁸⁵ Gould & Pozen, *supra* note 183, at 112 (citing Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101, 2127–28 (2019)); David Gartner, *Pandemic Preemption: Limits on Local Control Over Public Health*, 13 NE. U. L. REV. 733, 746 (2021) (finding that states who favor preemption implemented fewer COVID-19 policies at both state and local levels).

¹⁸⁶ Gould & Pozen, *supra* note 183, at 111. *But see* Briffault, *supra* note 159, at 2013–14 (pointing out Ohio as a notable exception to this trend and requiring new preemptive laws to articulate alternative regulatory schemes).

¹⁸⁷ Scharff, *supra* note 164, at 1491.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 1492.

stakeholders in the affected communities.¹⁹⁰ Third, local control ensures avenues for innovative policymaking.¹⁹¹

All three justifications for local control are present in the case of homeless residency restrictions. Views on homelessness are certainly heterogeneous. While some view individuals experiencing homelessness as community members in dire need of support,¹⁹² “[s]tudies suggest that Americans react to evidence of visible poverty with higher rates of negativity than to any other marginalized trait, including traits historically associated with discrimination, such as race or gender.”¹⁹³ While homeless advocates work toward proven solutions, such as providing supportive housing,¹⁹⁴ others “cannot fathom giving housing or help to someone who does not appear worthy.”¹⁹⁵ Local control of homeless policy provides greater preference satisfaction across the range of viewpoints, from compassion to disdain.¹⁹⁶

Moreover, homelessness is a decidedly local phenomenon. Homeless individuals occupy physical space within a specific community, impacting the lived experience of those physically proximate, both homeless and housed alike.¹⁹⁷ Especially with respect to the question of residency restrictions, it is hard to envision how the physical location of homeless individuals in one community affects distant communities around the state. Meanwhile, the costs of caring for the homeless are largely borne at the local level, either by municipal agencies or local private service providers.¹⁹⁸ As noted, the RCCR proposal that prompted

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² See, e.g., Joanna Laine, *From Criminalization to Humanization: Ending Discrimination Against the Homeless*, 39 *HARBINGER* 1, 13–15 (2015) (advocating for a “humanization” framework for homeless legal policy).

¹⁹³ Rankin, *Punishing Homelessness*, *supra* note 17, at 122.

¹⁹⁴ *Id.* at 132–34.

¹⁹⁵ *Id.* at 104.

¹⁹⁶ It can be tempting to view one of these viewpoints as illegitimate and therefore not normatively worth satisfying via local control. This is especially common in the preemption context, where preferences about “state” or “local” control all too commonly track the substantive outcome of the specific preemptive legislation at issue. See Scharff, *supra* note 164, at 1486–87. Here, I embrace a content-neutral defense of local control precisely because I believe that engagement with local political processes can be a pathway to changing viewpoints.

¹⁹⁷ In his influential article, *Controlling Chronic Misconduct in City Spaces*, Robert Ellickson illustrates the deeply spatial effects of homelessness within a given community. See generally Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning*, 105 *YALE L.J.* 1165 (1996). Although this perspective is noticeably one-sided. See generally Jeremy Waldron, *Homelessness and Community*, 50 *U. TORONTO L.J.* 372 (2000).

¹⁹⁸ See, e.g., Maria Ponomarenko, *Our Fragmented Approach to Public Safety*, 59 *AM. CRIM. L. REV.* 1665, 1672–74 (2022) (detailing how the city of Phoenix pays the “lion’s share” of costs for criminalizing homelessness and would need to pay for new supportive housing from its general

West Virginia's introduction of H.B. 4753 was grounded in the request to build a day shelter inside a local church to address the specific needs of Charleston's homeless residents.¹⁹⁹ To the extent that local control is grounded in the benefit of having decisions made by stakeholders in the affected communities, that benefit is undoubtedly present in this context.²⁰⁰

Lastly, local policymaking addressing homelessness has produced innovative responses that have proven effective over time. Local responses to homelessness run the gamut from criminalization measures and aggressive encampment sweeps to emergency shelters and social service provision to permanent supportive housing programs.²⁰¹ Not surprisingly, cities have experienced disparate results. Even among cities that superficially adopt similar approaches, differences in stakeholder commitments and agency coordination can produce drastically disparate outcomes.²⁰² Houston provides an instructive example. By embracing a housing-first approach and by marshaling an unprecedented coalition of local stakeholders, the city cut homelessness by nearly two-thirds in just a decade.²⁰³ It now stands as a model for other cities nationwide that want to adopt pragmatic, effective homeless policies.

By contrast, the arguments for state control of homeless residents are weak, at best. State control of public policy is most justifiable either when local policies produce negative externalities or when the policy requires uniformity and coordination to be effective.²⁰⁴ Neither rationale presents with much force in the case of homeless residency restrictions. Localities that choose to permit or authorize homeless encampments more proximate to schools and daycares are unlikely to negatively impact neighboring localities with contrary policy preferences. If anything, issuing a statewide policy is more likely to produce negative externalities by pushing homeless residents out of denser cities (with more, closer schools) into suburban or even rural communities, which may not be well suited to receive them.²⁰⁵ Nor do residency restrictions present an

fund). *But see id.* at 1674 (explaining how health care costs and existing housing programs are partially funded by the federal government and the state).

¹⁹⁹ See *supra* notes 71–76 and accompanying text.

²⁰⁰ This is not to say that local communities always make defensible decisions, especially when it comes to homelessness. See, e.g., Ezra Rosser, *The Euclid Proviso*, 96 WASH. L. REV. 811, 817 (2021) (“Deference to local governments allows not-in-my-backyard (NIMBY-ism) sentiments to run roughshod over the interests of poor communities.”).

²⁰¹ See Rankin, *Punishing Homelessness*, *supra* note 17, *passim*.

²⁰² See Michael Kimmelman, *How Houston Moved 25,000 People from the Streets Into Homes of Their Own*, N.Y. TIMES (Jun. 24, 2022), <https://www.nytimes.com/2022/06/14/headway/houston-homeless-people.html>.

²⁰³ *Id.*

²⁰⁴ See Scharff, *supra* note 164, at 1493.

²⁰⁵ See, e.g., LARRY T. PATTON, HOMELESSNESS, HEALTH, AND HUMAN NEEDS app. C, at 185 (Nat'l Acad. Sci. 1988), <https://www.ncbi.nlm.nih.gov/books/NBK218242/> (explaining that rural communities rarely have a formal social services system to respond to homeless residences, and

argument for uniformity or coordination since the effectiveness of any one locality's residency policy is not dependent on the behavior of neighboring localities.

In short, homeless residency restrictions imposed at the state level are an unjustifiable infringement upon local autonomy and likely come at the expense of optimal homeless policy. By tapping into the trend of aggressive preemption, H.B. 4753 represents a short-sighted victory for a narrow constituency and provides a dangerous model for homelessness policies going forward.

V. PRIVATE ENFORCEMENT

The final feature of West Virginia's H.B. 4753 that deserves sustained attention is the provision for private enforcement. As detailed above, H.B. 4753 creates a private cause of action permitting aggrieved individuals to sue their municipal governments for public nuisance in the event that a government should "authorize or permit" homeless encampments near schools.²⁰⁶ An amended version of the bill, moreover, created a secondary cause of action under a West Virginia statute that allows for the recovery of attorneys' fees and costs, rendering such private enforcement costless to the individuals involved.²⁰⁷

Private enforcement of traditionally criminal matters is not itself a novel idea. In the early 1970s, for example, proponents of economic reasoning about law advocated for private enforcement of criminal laws as a means of increasing the efficiency and efficacy of our justice system.²⁰⁸ Some late-20th century uses of private enforcement included progressive states supporting citizen suits for violations of environmental protection regulations.²⁰⁹ The idea was that self-interested individuals would supplement state action by bringing attention to environmental harms that may otherwise have gone unnoticed.²¹⁰

However, private enforcement has seen a recent resurgence as state legislatures have grappled with ideologically opposed municipal actors. Over the last decade, laws permitting private enforcement have more typically been deployed by conservative state legislatures seeking to reign in progressive local

that "[e]ven relatively low numbers of homeless individuals and families can easily overwhelm a rural community's resources").

²⁰⁶ See H.B. 4753, 85th Leg., Reg. Sess. (W. Va. 2022).

²⁰⁷ H.B. 4753, 85th Leg., Reg. Sess. (W. Va. 2022) (amended version) ("In addition to any private right of action for a public nuisance, redress for an alleged violation of this section may also be sought through the provisions of §53-1-1 *et seq.* of this code, which may include the awarding of reasonable attorney's fees and costs, if the petitioner prevails.").

²⁰⁸ See generally Gary Becker & George Stigler, *Law Enforcement, Malfeasance, and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974). The Becker and Stigler proposal included both compensating private enforcers from the criminal penalties imposed and making criminal enforcers liable for attorneys' fees and costs when private prosecutions failed.

²⁰⁹ See CAL. HEALTH & SAFETY CODE § 25249.7(d) (West 2022).

²¹⁰ See Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 5, 8 (2002).

policies.²¹¹ Perhaps most notably, Texas adopted a private-enforcement model for the state’s abortion ban, which ultimately precipitated the U.S. Supreme Court’s decision in *Whole Woman’s Health v. Jackson*.²¹² Unlike earlier examples of private-enforcement mechanisms in state law, the new frontier of private enforcement appears to be an attempt to avoid judicial review while permitting self-interested citizens to accomplish ends that could not be achieved through ordinary political processes.

In this Part, I consider the propriety of private citizen suits in enforcing homeless residency restrictions. I begin by highlighting the variety of approaches municipal actors have adopted in responding to increasingly visible homelessness. I then examine the recent trend in private enforcement as a mechanism for state legislatures to cabin municipal discretion. As I show, private enforcement mechanisms tend to operate by elevating minority interests above the policy preferences of a polity’s majority. I consider the conditions under which private enforcement is justifiable, ultimately concluding that homeless residency restrictions are not an instance where such private enforcement is justified.

A. *The Threat of Local Non-Enforcement*

In drafting H.B. 4753, the West Virginia House eschewed the option of making homeless residency restrictions a criminal matter (as is typically done with sex offender residency restrictions or homeless camping bans).²¹³ As detailed above, criminalization is the prevailing approach to confining the locations where our nation’s homeless can reside.²¹⁴ And while “urban camping” laws are most commonly municipal criminal ordinances rather than state laws, at least a few states have adopted criminal legislation that could have served as a model for H.B. 4753.²¹⁵ But the consequence of using criminalization as a tool

²¹¹ See, e.g., Jeffrey Sachs, *New Stop W.O.K.E. Act Fits Disturbing Pattern in Education Culture War*, PEN AM. (Dec. 23, 2021), <https://pen.org/stop-woke-act-fits-disturbing-pattern-education-culture-war/> (detailing laws permitting private enforcement for prohibited school district curriculum).

²¹² 142 S. Ct. 522 (2021).

²¹³ See *supra* Parts I.A. & II.A.

²¹⁴ See *supra* Part I.A.

²¹⁵ By 2021, 24 states—Alabama, Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Nebraska, Nevada, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia—had enacted criminal laws that prevent at least some specified forms of camping, sleeping, or lying down in public. STATE LAW SUPPLEMENT, *supra* note 57, at 7–9. In 2022, Missouri passed a sweeping new criminal bill despite pushback from health officials. Kurt Erickson, *Missouri’s Top Mental Health Official Balked at New Homeless Law. The Governor Signed It Anyway.*, ST. LOUIS POST-DISPATCH (July 16, 2022), <https://www.stltoday.com/news/local/crime-and-courts/missouri-s-top-mental-health-official->

is the delegation of enforcement discretion to local actors, including both police and prosecutors.²¹⁶ As this section details, those local actors have at times opted for non-enforcement—i.e., they have exercised discretion to not enforce applicable laws against homeless individuals—in the interest of the greater public and over the objection of some community residents.

Academics and journalists have recounted numerous stories of police officers exercising discretion around homelessness, even when not specifically authorized by governing statutes.²¹⁷ Recognizing that citations are pointless for individuals who are unable to pay, for example, some law enforcement officers in San Francisco have resorted to giving homeless residents advice about where and how to relocate camps to avoid being cited for camping violations.²¹⁸ As one San Francisco officer put it, “Look, we’re not really solving anybody’s problem. This is a big game of whack-a-mole.”²¹⁹ In other jurisdictions, officers are often instructed to arrest only after all other “therapeutic policing” efforts have been exhausted.²²⁰ A common theme among police officers’ decision to turn a blind eye to encampment bans is the understanding that criminalizing poverty is ineffectual, counterintuitive, or just plain wrong.²²¹

When police exercise discretion to the benefit of their city’s homeless residents, however, they often experience pushback from local property owners. In Phoenix, for example, residents of an upper-middle-class neighborhood grew

balked-at-new-homeless-law-the-governor-signed-it/article_99bde92c-03bf-54f0-b27a-e40a2fa586a8.html. Many of these bills share a common model. Kristian Hernández, *Homeless Camping Bans Are Spreading. This Group Shaped the Bills*, THE PEW CHARITABLE TRUSTS: STATELINE (Apr. 8, 2022), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/04/08/homeless-camping-bans-are-spreading-this-group-shaped-the-bills>.

²¹⁶ See generally W. Kerrel Murray, *Populist Prosecutorial Nullification*, 96 N.Y.U. L. REV. 173 (2021) (making the normative case for prosecutorial non-enforcement discretion); William J. Stuntz, *Virtues and Vices of the Exclusionary Rule*, 20 HARV. J.L. & PUB. POL’Y 443, 445 (1997) (explaining that criminal law provides substantial non-enforcement discretion to police).

²¹⁷ In some instances, by contrast, state law may provide officers with explicit discretion to respond to homelessness in harm-reducing ways. See, e.g., McJunkin, *Urban Camping*, *supra* note 37, at 979–81 (discussing police discretion to use citation release in lieu of arrest in Arizona).

²¹⁸ Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769 (Sept. 5, 2019).

²¹⁹ *Id.*

²²⁰ *Encampment Ordinance Goes into Effect*, CITY OF LAS VEGAS (Oct. 29, 2019), <https://www.lasvegasnevada.gov/News/Blog/Detail/city-council-to-hear-first-reading-of-new-ordinance-designed-to-connect-homeless-with-services-and-off-the-streets>.

²²¹ See Herring, *supra* note 218. One officer explained, “If we arrested a guy, we’d never clear those calls, and when we cite them, they won’t be able to pay and they’ll just be out here longer and less willing to cooperate.” *Id.* Another officer complained about having to respond to encampment calls: “I don’t know why they’re calling. I mean this seems like an ideal spot, out of the way . . . I know this is pointless, but you gotta move.” *Id.*

outraged at local police inaction in clearing nearby homeless camps.²²² The Phoenix PD's approach, to some residents' dissatisfaction, is to deploy homeless outreach teams to homeless encampments, withholding arrests or citations until or unless other criminal behaviors or public safety risks are involved.²²³ Meanwhile, callers complained that their requests for enforcement of urban camping laws were either ignored or dismissed.²²⁴

Prosecutors, too, have refused to enforce camping bans. When Tennessee state legislators passed a law that made camping on state property a felony, a Nashville DA reminded the media that he “[didn’t] believe in prosecuting those living in poverty,” and the state’s Governor expressed hesitance in signing the bill for worry of “inconsistent enforcement and unintended consequences.”²²⁵ In 2019, Dallas County DA John Creuzot announced his plan to end prosecuting public property criminal trespass cases, which he considered “an inhumane approach to dealing with homelessness.”²²⁶ San Antonio DA Joe Gonzales did the same.²²⁷ Admittedly, these sentiments have diminished as visible homelessness has risen, with prosecutors facing vocal criticism from constituents.²²⁸ Recently, two progressive prosecutors in California have faced high-profile recalls in part due to the specter of unsheltered homelessness in their districts.²²⁹

²²² Jessica Boehm, *How Metro Phoenix’s Inaction on Homelessness Burdens Working-Class Neighborhoods*, AZ CENT. (Mar. 9, 2022), <https://www.azcentral.com/in-depth/news/local/phoenix/2022/03/09/how-phoenix-inaction-homelessness-burdens-neighborhoods/6175756001/>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ Amanda Chin, *Questions Remain on How Law Making Camping Illegal on State, Public Property Is Enforced*, FOX17 WZTV NASHVILLE (May 10, 2022), <https://fox17.com/features/high-cost-of-homelessness/questions-remain-on-how-law-making-camping-illegal-on-state-public-property-is-enforced>.

²²⁶ Chris Roberts, *Don’t Revise Homeless Ordinances. Take Them Off the Books.*, AUSTIN AMERICAN-STATESMAN (June 17, 2019), <https://www.statesman.com/story/opinion/columns/your-voice/2019/06/17/opinion-dont-revise-homeless-ordinances-repeal-them/4892057007/>; Robert Wilonsky, *DA John Creuzot Has a Far Better Idea for Dallas than Just Jailing Away Its Homeless Crisis*, DALLAS MORNING NEWS (Oct. 4, 2019), <https://www.dallasnews.com/opinion/commentary/2019/10/04/da-john-creuzot-far-better-idea-dallas-just-jailing-away-homeless-crisis/>.

²²⁷ Roberts, *supra* note 226; Jim Lefko, *Policy Changes Means Homeless in San Antonio Will Not Be Charged with Criminal Trespass*, FOX 29 SAN ANTONIO (Apr. 24, 2019), <https://foxsanantonio.com/news/local/policy-changes-means-homeless-in-san-antonio-will-not-be-charged-with-criminal-trespass>.

²²⁸ Sara Cline, *Liberal US Cities Change Course, Now Clearing Homeless Camps*, ASSOCIATED PRESS (Mar. 11, 2022), <https://apnews.com/article/covid-business-health-ted-wheeler-poverty-edb884d8bf98e45b16372c1c8b7182e7>.

²²⁹ See Henry Grabar, *What the Great Pushback Against Urban Progressives is Really About*, SLATE (June 6, 2022), <https://slate.com/business/2022/06/los-angeles-mayor-election-san>

Beyond police and prosecutors, other local actors may take steps to authorize or tolerate homeless encampments in locations that aggravate nearby property owners. Nationally, cities vary in their approaches to permitting or tolerating homeless encampments. At one end of the spectrum, cities like Seattle have sanctioned homeless encampments on specified public parcels where the city provides essential services, such as water, showers, garbage collection, and even on-site mental health counseling.²³⁰ At the other end of the spectrum, cities such as Portland, Oregon, may issue permits for encampments on specified parcels with no further assistance or governance from the city.²³¹ Even where encampments are not officially sanctioned, Oregon state law requires cities to tolerate unauthorized encampments under certain circumstances.²³² And cities may be constitutionally prohibited from interfering with encampments on private property, such as church land.²³³

West Virginia's H.B. 4753 may, in fact, have been influenced by a proposal to permit a semi-permanent homeless encampment on private property in Charleston. In addition to the day-shelter proposal described above,²³⁴ RCCR also proposed constructing a community of 25 tiny homes in a church-owned parking lot.²³⁵ The RCCR proposal is part of a national trend of church leaders partnering with community organizations to convert vacant plots and parking lots into communities of small, typically one-bedroom homes.²³⁶ "[T]iny homes can fit nearly anywhere, and an advantage to building them on church properties is that they already have electricity, water, and other infrastructure in place."²³⁷ Supportive pastors see the tiny home movement as an outgrowth of other church projects, such as allowing homeless individuals to camp in cars in church parking

francisco-boudin-recall-progressives-crime-homelessness.html; Cindy Carcamo, *715,833 Signatures Turned in to Recall L.A. County D.A. Gascón, Election Officials Say*, L.A. TIMES (July 9, 2022), <https://www.latimes.com/california/story/2022-07-09/715-833-signatures-turned-in-to-recall-los-angeles-county-da-gascon-election-officials-say>.

²³⁰ JUNEJO, *supra* note 50, at 4.

²³¹ *Id.* at 5.

²³² H.B. 3115, 81st Leg. Assemb., Reg. Sess. (Or. 2021). *See also* Sophie Peel, *Oregon's New Law to Protect Homeless Campers May Not Change Portland Policy on Sweeps*, WILLAMETTE WEEK (June 10, 2021), <https://www.wweek.com/news/city/2021/06/10/oregons-new-law-to-protect-houseless-campers-may-not-change-portland-policy-on-sweeps/>.

²³³ JUNEJO, *supra* note 50, at 5.

²³⁴ *See supra* notes 71–76 and accompanying text.

²³⁵ Anthony Conn, *Location for Proposed \$3.5 Million Low-Barrier Homeless Housing in Charleston Undecided*, WCHSTV (Feb. 8, 2022), <https://wchstv.com/news/local/location-for-proposed-35-million-low-barrier-homeless-housing-in-still-undecided>.

²³⁶ *See* Holly Meyer, *A Roof Over Their Head: Churches Use Tiny Homes for Homeless*, ASSOCIATED PRESS (June 25, 2022), <https://apnews.com/article/religion-homelessness-36b9a986ebbf9317db08b7ac803e2600>.

²³⁷ *Id.*

lots.²³⁸ However, local residents in some communities have resisted these efforts, including through private lawsuits.²³⁹

B. *The Bounty Model of Private Enforcement*

In lieu of criminalization, West Virginia's H.B. 4753 extends a recent trend of empowering private citizens to enforce statewide restrictions on behavior that has traditionally been within the purview of the criminal law. Although laws creating pathways for private enforcement date as far back as the Civil War,²⁴⁰ the traditional model of private enforcement was justified by a set of assumptions about the benefits of private behavior that arguably no longer hold in more modern manifestations of this trend.

A core feature of traditional private enforcement actions is that the government retains the prerogative to control the investigation and prosecution.²⁴¹ For example, under the federal False Claims Act, any private individual seeking to be a relator must begin by notifying the Justice Department of the claim and the evidence and must defer to the Department's decision about whether to take over the prosecution of the case.²⁴² Even if the Justice Department declines to take over the case, the government maintains certain controls over the investigation and any subsequent court case.²⁴³ For example, the government may stay discovery or pursue alternative administrative remedies over the objection of the relator.²⁴⁴ In this way, private enforcement actions have long carried the features of public-private partnerships rather than purely private efforts.

Recently, however, state legislatures have begun to develop private enforcement mechanisms that exclude the public from the partnership. These new actions are constructed as exclusively private. Frequently, the explicit motivation for creating a private right of action is to circumvent a recalcitrant governmental actor. In other cases, the private right of action is designed as an

²³⁸ *Id.*

²³⁹ *See id.* (describing a failed lawsuit by Nashville, Tennessee, residents to prevent the construction of a tiny home community by a local church).

²⁴⁰ One of the earliest and most well-known examples of private enforcement is the Federal False Claims Act. 31 U.S.C.A. § 3729 (West 2022). Enacted in 1863, the False Claims Act permits private individuals to bring *qui tam* lawsuits to expose fraudulent claims for payment submitted to the government. *Id.* § 3730(b)(1).

²⁴¹ Poppy Alexander & Chris McLamb, *SB 8 Reveals the Difference Between a Private Vigilante Law and a Private Attorney General Statute*, HARV. L. & POL'Y REV. BLOG (Nov. 11, 2021), <https://harvardlpr.com/2021/11/11/sb-8-reveals-the-difference-between-a-private-vigilante-law-and-a-private-attorney-general-statute/>.

²⁴² 31 U.S.C.A. § 3730(b)(2), (c)(1) (West 2022).

²⁴³ *See U.S. ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1034–35 (6th Cir. 1994).

²⁴⁴ 31 U.S.C.A. § 3730(c)(4), (c)(5) (West 2022).

end run around constitutional restrictions on governmental conduct—effecting policy goals that would be unobtainable if the government attempted them directly.

The most salient example of this recent trend is found in Texas’s S.B. 8, also known as the Texas Heartbeat Act.²⁴⁵ The bill prohibits physicians from performing abortions if they have previously detected cardiac activity in the embryo,²⁴⁶ a limitation that many considered unconstitutional at the time of the bill’s passing.²⁴⁷ In order to sidestep constitutional challenges, the bill eschews criminalization in favor of authorizing private citizens to sue physicians civilly for prohibited abortions.²⁴⁸ Successful suits are rewarded with a cash “bounty” of at least \$10,000, ensuring that strong incentives exist for private citizens to bring enforcement actions.²⁴⁹ The result was a bill that successfully deterred many abortions—perhaps as effectively as criminalization itself—based solely on the threat of self-interested private actors initiating litigation.²⁵⁰

Part of the proffered reasoning behind S.B. 8’s bounty mechanism is to compensate those individuals who experience a “tort of outrage” from Texas women having abortions.²⁵¹ Although this argument has been publicly mocked, it demonstrates one of the key differences between classic and modern private enforcement regimes. Classic private enforcement mechanisms allow private

²⁴⁵ S.B. 8, 87th Leg. 3d Sess. (Tex. 2021).

²⁴⁶ Although the Texas statute refers to this activity as a “fetal heartbeat,” the term is medically inaccurate, as no heart has yet developed in the embryo—“the sound that you ‘hear’ is actually manufactured by the ultrasound machine.” Selena Simmons-Duffin & Carrie Feibel, *The Texas Abortion Ban Hinges on ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NAT’L PUB. RADIO (May 3, 2022), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>.

²⁴⁷ Prior to the U.S. Supreme Court’s 2022 decision in *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022), the due process clauses of the Constitution were read to preclude undue governmental burdens on the right to an abortion prior to the third trimester. See generally *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). Multiple state court challenges sought to declare S.B. 8 unconstitutional, even as a federal suit by the Department of Justice was pending before the Supreme Court. See *Supreme Court Lets Texas Abortion Ban Case Drag On*, ACLU (Jan. 20, 2022), <https://www.aclu.org/press-releases/supreme-court-lets-texas-abortion-ban-case-drag>.

²⁴⁸ See Mary Ziegler, *The Court Invites an Era of Constitutional Chaos*, ATL. (Dec. 10, 2021), <https://www.theatlantic.com/ideas/archive/2021/12/supreme-court-texas-abortion/620972/>.

²⁴⁹ See Marie Solis, *Texas Abortion Vigilantes: How the Ban Empowers Anti-Choice Citizens to Sue*, THE GUARDIAN (Sept. 8, 2021), <https://www.theguardian.com/world/2021/sep/08/texas-abortion-vigilantes-sb8-citizens-sue>.

²⁵⁰ According to Texas Attorney General Ken Paxton, who supported S.B. 8, “[a]bortions fell by 60 percent in Texas the first month after SB8 took effect.” Press Release, Ken Paxton, Att’y Gen. of Texas, Paxton Defends SB8, Saving Thousands of Lives in the Process (Feb. 28, 2022), <https://www.texasattorneygeneral.gov/news/releases/paxton-defends-sb8-saving-thousands-lives-process>.

²⁵¹ Alexander & McLamb, *supra* note 241.

parties to stand in for the government to vindicate the government's interests (such as the interest to avoid fraudulent claims or the interest to protect the environment). New private enforcement mechanisms are designed to encourage private action that is self-interested, perhaps even at odds with governmental interests.

West Virginia's H.B. 4753 likewise elevates the vindication of private interests above the greater public good. Although the bill does not contain a "bounty" provision akin to Texas's S.B. 8, the amended version of the bill does authorize private enforcement actions pursuant to a fee-shifting statute, making successful suits cost less to pursue. More importantly, the bill authorizes direct citizen suits against the local or municipal government for public-interested decisions, meaning that a single aggrieved citizen can override the will of the majority (or those acting on the public's behalf). In this way, H.B. 4753 transforms the public-private partnership of traditional private enforcement into private domination over public interests.

C. *Subordinating the Public Interest*

The growing legislative reliance on private enforcement for traditionally criminal matters has unearthed a number of critics. Perhaps most prominently, Professors Jon Michaels and David Noll have traced the rise in laws deputizing and subsidizing private citizens to sue over behavior that is traditionally within the purview of the criminal law—a dynamic they dub "vigilante federalism"—as attributable to federal dysfunction, political fragmentation, and hyper-partisanship.²⁵² "[A] common thread runs through the laws: they empower culture warriors, who often have suffered no material harm, to wield the power of the state to suppress the rights of disfavored or marginalized individuals and groups (or their allies)."²⁵³ Laws of this nature are deeply concerning in part because they accomplish their desired ends without the burden of traditional judicial review.²⁵⁴ But they are also concerning because they subordinate the determination of a community's well-being to the self-interest of a small number of private parties. As West Virginia's example shows, the new trend in privately

²⁵² Jon D. Michaels & David L. Noll, *Vigilante Federalism*, 107 CORNELL L. REV. (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3915944 (draft of Sep. 8, 2022).

²⁵³ *Id.* at 4.

²⁵⁴ By deploying private enforcers, this type of legislation avoids the possibility of a governmental defendant against whom constitutional remedies, including a declaratory judgment of unconstitutionality, can be sought. *See id.* at 23–24. *See also* Laurence H. Tribe & Stephen I. Vladeck, *Texas Tries to Upend the Legal System with Its Abortion Law*, N.Y. TIMES (July 19, 2021), <https://www.nytimes.com/2021/07/19/opinion/texas-abortion-law-reward.html/>.

enforceable laws is pernicious precisely because it short-circuits traditional political processes designed to make community-interested decisions.²⁵⁵

Normatively, private enforcement of matters that are traditionally criminal can be justified where increased enforcement is an “undifferentiated public good.”²⁵⁶ This may be the case, for example, in preventing and detecting frauds against the government.²⁵⁷ These statutes delegate the responsibilities of surveillance and prosecution to motivated private parties, ensuring that the statute achieves greater enforcement than may be possible through official (and typically resource-constrained) channels.²⁵⁸ When the result is additional frauds detected or deterred, and the public is therefore further insulated against private misconduct, private enforcement presents a coherent strategy.

But increased enforcement is not always an unmitigated good for a community. In many areas of traditionally criminal conduct, communities—and the public servants responsible for them—have begun to adopt more holistic, remedial approaches to some disfavored behaviors.²⁵⁹ In particular, the “progressive prosecutor” movement that has taken hold in the last decade has embraced the idea that “overly penal policies may actually circumvent” the goal of public safety.²⁶⁰ Rather than lead with criminal enforcement, progressive prosecutors may prefer to channel offenders into job training, diversion programs, or mental health and substance abuse counseling.²⁶¹ While these approaches remain contentious with some constituents,²⁶² the socially optimal approach for any given community is determined through local political processes aimed at promoting the best interests of the community as a whole.

²⁵⁵ Cf. Michaels & Noll, *supra* note 252, at 30 (“[P]rivate subordination regimes *invert* rights relative to widely accepted baselines, giving private parties who have the *weakest* claim to rights preeminent authority to surveil, prosecute, and sanction those who, at least on conventional understandings, have the *strongest* claim.” (emphasis in original)).

²⁵⁶ Barton H. Thompson, Jr., *The Continuing Innovation of Citizen Enforcement*, 2000 U. ILL. L. REV. 185, 200 (2000).

²⁵⁷ Cf. Michaels & Noll, *supra* note 252, at 36 (“Given that there is no constituency clamoring to legalize fraud—and that there is general, if not overwhelming, consensus that fraud is objectionable—relator lawsuits that pit the defrauded against the fraudsters pose little risk of rending communities in socially, culturally, and economically destabilizing ways.”).

²⁵⁸ See Thompson, *supra* note 256, at 187–88.

²⁵⁹ See Note, *Welfarist Prosecution*, 135 HARV. L. REV. 2151, 2158 (2022).

²⁶⁰ *Id.* at 2160. The first wave of self-identified progressive prosecutors emerged around 2016. See *id.* at 2158. Current estimates are that about 12% of the U.S. population is currently represented by a prosecutor who can be described as a reformer. EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION 290 (2019).

²⁶¹ *Welfarist Prosecution*, *supra* note 259, at 2164.

²⁶² See generally Radley Balko, *The Bogus Backlash Against Progressive Prosecutors*, WASH. POST (June 14, 2021), <https://www.washingtonpost.com/opinions/2021/06/14/bogus-backlash-against-progressive-prosecutors/>.

Permitting private parties to act as enforcers in fields where increased enforcement is not necessarily socially optimal can lead to excessive and inefficient enforcement. As Professor Matthew Stephenson has detailed in the context of federal statutes, private enforcers are prone to several types of errors that can be detrimental to the broader community.²⁶³ These errors are driven by the fact that private plaintiffs do not internalize the full social costs of enforcement, especially “the disruptive impact on affected communities.”²⁶⁴ Self-interested private parties may pursue a maximal enforcement agenda that serves their self-interest at the expense of other members of the relevant community whose interests should be considered.²⁶⁵

By authorizing private enforcement of homeless residency restrictions, West Virginia’s H.B. 4753 creates the possibility of just such socially sub-optimal outcomes. The bill takes the decision about how to address homelessness out of the hands of the local officials best positioned to make community-wide judgments and instead vests enforcement power in the hands of individuals who have self-interested reasons to prefer maximal enforcement. Consider again the situation in Charleston. Facing a growing (and increasingly visible) homeless population in the city, the RCCR proposed to construct a tiny-house community for some of the city’s homeless residents.²⁶⁶ To do so, however, it needed to identify suitable spaces, ultimately proposing four alternative locations around the city.²⁶⁷ Rather than allowing city officials to decide among these locations based on the best interests (and presumably even the will) of their constituents, H.B. 4753 ensures that a single, aggrieved citizen can effectively veto any or all suitable locations for the development, provided they are near a school.²⁶⁸

There is no one-size-fits-all solution to the social problem of homelessness.²⁶⁹ It is an issue that must be approached with the specifics of a given community’s best interests—including the interests of its homeless

²⁶³ Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114–17 (2005). Professor Barton Thompson describes this phenomenon as “the zealotry error”—the bringing of enforcement actions that impose net costs on the broader public. Thompson, Jr., *supra* note 256, at 201. “Critics [of private enforcement] have argued that citizen suits produce an unacceptable level of zealotry error.” *Id.* at 204.

²⁶⁴ Stephenson, *supra* note 263, at 115.

²⁶⁵ *See id.* at 115–18.

²⁶⁶ Conn, *supra* note 235.

²⁶⁷ *Id.*

²⁶⁸ Although the proximity between each of the proposed locations and nearby schools or childcare facilities is not clear, the preferred location “sits near Charleston Catholic High School, Sacred Heart Grade School and the church that operates a pre-school.” *Id.*

²⁶⁹ *But see* Rankin, *Punishing Homelessness*, *supra* note 17, at 130 (“[S]tudies consistently show that solving chronic homelessness is achievable through the evidence-based solutions of Housing First and permanent supportive housing [PSH].”).

residents—at the forefront.²⁷⁰ The fragmentation of political authority already all too often pushes local actors toward the most punitive approaches.²⁷¹ As do the preferences of those residents with entrenched political power.²⁷² So when local actors, whether police departments, prosecutors, or city officials, attempt to deviate from the status quo, they do so in search of a better outcome for the public at large (in some cases with the explicit support of their constituents).²⁷³ By authorizing self-interested citizens to enforce the state's homeless residency restrictions, H.B. 4753 disrupts the workings of this political process and subordinates the public interest to the desires of a specific class of housed individuals. Such an approach undoubtedly compounds the challenges of local leaders struggling with the needs of homeless residents and would likely exacerbate a seemingly intractable problem.

VI. CONCLUSION

West Virginia's House Bill 4753 represents a new frontier in American anti-homeless legislation. As this Essay details, the bill is a continuation of three existing trends in state-level legislation—residency restrictions, aggressive preemption, and private enforcement—each novel in the context of addressing homelessness. However, the lessons learned from our previous experience with these trends counsel strongly against their extension. First, establishing school-based exclusion zones for disfavored community residents leads to unanticipated and often counterproductive consequences for those affected. In the context of homelessness, the desire to exclude also renders transparent the previously subtextual motivation to merely remove poverty and suffering from public view. Second, the use of state power to compel action on what has historically been a hyper-local issue is ill-advised where local control has the potential for better, and more innovative, substantive outcomes. The arguments for state interference are weak at best, more indicative of interest group forum shopping than a well-considered need for uniformity and coordination. Lastly, the use of private

²⁷⁰ Elsewhere, I have argued that the principle of human dignity may require that the interests of homeless residents within a community are given unique weight relative to housed residents. See Ben A. McJunkin, *Ensuring Dignity as Public Safety*, 59 AM. CRIM. L. REV. 1643, 1656–58 (2022). For a more robust version of this argument, see Waldron, *supra* note 197, at 397 (“If not as a constitutional matter, then certainly as a matter of justice, those who have the power to regulate public places must pay special attention to the difference between the impact of a given regulation on a person who has a home and its impact on someone who is homeless.”).

²⁷¹ Ponomorenko, *supra* note 198, at 1674–75.

²⁷² McJunkin, *Urban Camping*, *supra* note 37, at 971–72 (“Coalitions in support of criminal ordinances against homelessness typically consist of merchants, property owners, and city officials, with unmatched fundraising efforts.”).

²⁷³ Houston, for example, embraced housing-first initiatives by marshalling the support of a broad coalition, including business leaders, public servants, and private service providers. See generally Kimmelman, *supra* note 202.

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citizen lawsuits as an enforcement mechanism empowers a small number of aggrieved citizens to subvert the policy preferences and political processes that account for the welfare of the broader public. Those who care about effective and efficient homeless policy must be prepared to push back on state attempts to establish homeless residency restrictions in West Virginia and elsewhere.