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Guilty of Homelessness: Evaluating the Criminalization of Homelessness Through a Human Rights Framework

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**GUILTY OF HOMELESSNESS: EVALUATING THE CRIMINALIZATION OF
HOMELESSNESS THROUGH A HUMAN RIGHTS FRAMEWORK**

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ABSTRACT

Several international treaties and declarations affirm adequate housing as a fundamental human right. However, the United States, while a signatory to several of these agreements, does not recognize this right. Homelessness violates the right to housing. Moreover, homelessness often subjects individuals to additional rights violations. These additional violations often occur because governments criminalize homelessness.

Public order laws that criminalize basic life-sustaining behaviors, such as sitting, lying, and sleeping in public spaces, violate several constitutional rights when applied to unsheltered individuals experiencing homelessness. Devoid of any accommodation aside from the public streets, such individuals must necessarily perform the prohibited conduct in public, constantly risking arrest based solely on their status “crime” of experiencing homelessness.

This project uses primary and secondary domestic and international legal authority, including constitutional, statutory, and case law to analyze how the United States has systematically failed to recognize the right to housing, and specifically critiques statutory regimes that perpetuate and exacerbate homelessness by making it a crime. This project will then consider approaches that Scotland and France have taken that model the provisions of the right to housing described in the International Covenant on Economic, Social and Cultural Rights as possible exemplars for the United States. Preliminary research, including the applicability of these human rights-based international models suggests that the United States should adopt a human rights framework, including ratifying international instruments where appropriate, that recognizes and implements the human right to housing. Ultimately, the United States should respect and recognize the right to housing in order to appropriately and adequately combat the criminalization of homelessness.

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Franklin and his three-year-old son are experiencing homelessness¹ in Sarasota, Florida. They sleep in a makeshift tent in a city park every night. Franklin spends his mornings applying for as many jobs as he can while a friend cares for his son. He has not found employment for over a year. In the afternoons, Franklin sweeps the floors of a local coffee shop in exchange for the ten dollars he needs to purchase training pants for his son. One night, a Sarasota police officer wakes Franklin and his son who are sleeping on sleeping bags in a city park. The officer tells Franklin that he has violated a city ordinance prohibiting outdoor lodging.² The officer informs Franklin that if he agrees to go to a public shelter, the officer will not charge him for violating the ordinance—as long as he can provide the officer with proper identification.³ Because he has only made enough money to pay for his son’s child care expenses, Franklin has not been able to afford an identification card. Once the officer learns that Franklin does not have adequate identification, he rescinds the offer and charges him with violating the ordinance.⁴

Governments systematically and discriminatorily enforce ordinances that criminalize basic life-sustaining behaviors such as sleeping,⁵ sitting, and lying⁶ against unsheltered individuals experiencing homelessness, like Franklin and his son. Such public order laws⁷ criminalize the status of experiencing homelessness, violating the Eighth Amendment’s Cruel

¹ This article will use the phrase “experiencing homelessness” instead of phrases such as “the homeless,” “homeless people,” or “homeless person,” in order to reaffirm the autonomy and personhood of individuals experiencing homelessness. This is because the term “homeless” is often used linguistically to marginalize individuals experiencing homelessness by connoting their un-domiciled status with derogatory second-class meanings. Though homelessness is considered a status for purposes of Eighth Amendment analysis, homelessness is not an inherent identity. *See* Nat’l Coalition for the Homeless, *How You Can Help End Homelessness*, http://nationalhomeless.org/want_to_help/index.html#a (last modified Nov. 4, 2013).

² *See* SARASOTA, FLA., MUN. CODE § 34-41 (c) (5) (2014), <http://library.municode.com/index.aspx?clientId=11553>.

³ *Id.* at (d), (e).

⁴ *Id.* at (e).

⁵ Some ordinances equate “sleeping” with “camping.” *E.g.*, PORTLAND, OR., MUN. CODE § 14A.50.020 (2014), <http://www.portlandonline.com/auditor/index.cfm?c=28148>.

⁶ Some ordinances additionally state that sitting or lying constitutes obstruction of public thoroughfares. *E.g.*, LAS VEGAS, NEV., MUN. CODE § 10.47.010 (2013), <http://library.municode.com/index.aspx?clientId=14787>.

⁷ Throughout this article, the terms “criminalization,” “anti-homeless laws,” and “public order laws” will be used interchangeably. All refer to the types of laws that comprise the criminalization paradigm.

and Unusual Punishment Clause.⁸ Criminalization also violates various international agreements to which the United States is either a party or a signatory.⁹ Anti-homeless laws criminalize status and discriminatorily apply to individuals experiencing homelessness, which violates Articles 7¹⁰ and 26¹¹ of the International Covenant on Civil and Political Rights. Criminalization is furthermore proof of the United States' failure to respect the right to housing which violates the United States' obligations to the International Covenant on Economic, Social and Cultural Rights.¹²

Criminalization exists because the United States has failed to address homelessness adequately and effectively. Instead of focusing resources on ending homelessness, the United States has exacerbated homelessness by making it a crime. A human rights framework that recognizes the autonomy and personhood of all individuals can best address criminalization and shift governmental focus from emergency responses to permanent solutions. The United States can best establish this human rights framework by ratifying the International Covenant on Economic, Social and Cultural Rights, which contains the right to housing in Article 11.¹³

⁸ Jones v. City of Los Angeles, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007) (ruling that a Los Angeles city ordinance outlawing sitting, lying, or sleeping in public spaces violates the Cruel and Unusual Punishment Clause because it criminalizes homelessness).

⁹ Particularly relevant to this article are the International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Economic, Social and Cultural Rights. The United States has ratified the International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/RES/2200A(XXI) (Dec. 16, 1966) [hereinafter ICESCR].

¹⁰ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, CRUEL, INHUMAN, AND DEGRADING: HOMELESSNESS IN THE UNITED STATES UNDER THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 6 (2013).

¹¹ U.N. Secretary-General, *Extreme Poverty and Human Rights*, ¶ 18, U.N. Doc. A/66/265 (Aug. 4, 2011).

¹² U.N. Econ. and Social Council Comm. on Econ., Social and Cultural Rights, *Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights, The Maastricht Guidelines on Violations of Economic, Social & Cultural Rights*, ¶ 21, U.N. Doc. E/C.12/2000/13 (Oct. 2, 2000) [hereinafter *ICESCR Substantive Issues: The Maastricht Guidelines*].

¹³ ICESCR, *supra* note 9, at art. 11.

This article examines criminalization in the domestic and international human rights context and analyzes the implications of ratifying the International Covenant on Economic, Social and Cultural Rights. Part II of the article outlines the history of homelessness in the United States and the emergence of criminalization as a response. Part II also briefly explores the history of the applicable human rights framework and the development of the human right to housing. Part III explains how criminalization violates the Eighth Amendment, the International Covenant on Civil and Political Rights, and the United States' obligations to the International Covenant on Economic, Social and Cultural Rights.

Part IV assesses ratifying the International Covenant on Economic, Social and Cultural Rights and enacting a right to housing as a solution. Part IV also explains why implementing a right to housing is the best solution to eradicating criminalization and beginning to eliminate homelessness, and delineates international and domestic measures that support housing rights. Part IV specifies what a right to housing entails and describes the component parts of the right. The article then outlines the housing rights schema in Scotland and France as successful exemplars for the United States. Part IV then explains how the right to housing and a human rights framework address the criminalization paradigm and describes additional benefits and advantages implicit in ratifying the International Covenant on Economic, Social and Cultural Rights and enacting a right to housing. Finally, Part V addresses the most prevalent objection to domestic housing rights and explains how the United States can overcome this objection.

II. History

A. Homelessness

1. Domestic

The federal government defines homelessness in several ways,¹⁴ evidencing the difficulty of narrowing homelessness into a single definition.¹⁵ Many federal programs use the definition provided in the McKinney-Vento Homeless Assistance Act,¹⁶ which includes those who “lack[] a fixed, regular, and adequate night time residence”, those living in facilities “not designed for or ordinarily used as a regular sleeping accommodation for human beings”, and those who have shelter but “will immediately lose their housing”¹⁷ Another federal definition of homelessness details the characteristics of children experiencing homelessness and includes those “who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason.”¹⁸ This article focuses primarily on the plight of unsheltered individuals experiencing homelessness.

Modern homelessness emerged in the late 1970s.¹⁹ Previously, homelessness affected a only small fraction of older, single, white males living in urban areas.²⁰ The 1981-82 nation-wide recession and its residual effects,²¹ including especially the affordable housing crisis,²² greatly

¹⁴ Barbara Stark, *At Last? Ratification of the Economic Covenant as a Congressional-Executive Agreement*, 20 *TRANSNAT’L L. & CONTEMP. PROBS.* 107, 121 (2011).

¹⁵ See Jennifer E. Watson, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 *IOWA L. REV.* 501, 503 (2003).

¹⁶ Amended as the Homeless Emergency Assistance and Rapid Transition to Housing Act of 2009. 42 U.S.C.A. § 11302 (West 2012).

¹⁷ *Id.*

¹⁸ 42 U.S.C. § 11434a (2)(B)(i) (2006).

¹⁹ CHRISTOPHER JENCKS, *THE HOMELESS*, at v (1994).

²⁰ Maria Foscarinis, *Homelessness in America: A Human Rights Crisis*, 13 *J.L. SOC’Y* 515, 518 (2012).

²¹ See Bradley R. Haywood, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 *COLUM. HUM. RTS. L. REV.* 157, 161 (2002).

²² Donald Saelinger, *Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness*, 13 *GEO. J. ON POVERTY L. & POL’Y* 545, 548 (2006).

expanded the number and demographic of individuals experiencing homelessness on the public streets.²³

Initial domestic responses to the growing homelessness epidemic were primarily local. Community groups began responding with emergency aid in 1983.²⁴ Until the late 1980s, federal national disaster relief programs only provided limited support funds.²⁵ In 1987, however, Congress passed the first major federal response to homelessness, the Stewart B. McKinney Homeless Assistance Act.²⁶ The McKinney-Vento Homeless Assistance Act distributed funds to shelters and transitional housing facilities and created a small permanent housing program.²⁷ This act also created the United States Interagency Council on Homelessness to analyze the nation's response to homelessness and develop sustainable housing solutions.²⁸

2. International

In addition to these domestic responses, several treaties and international documents address homelessness and affordable housing. The International Bill of Human Rights contains the most notable of these documents.²⁹ The Universal Declaration of Human Rights (UDHR) was the first document drafted as part of the International Bill of Human Rights.³⁰ The United

²³ See *id.* at 548. See also Casey Garth Jarvis, *Homelessness: Critical Solutions to a Dire Problem; Escaping Punitive Approaches by Using a Human Rights Foundation in the Construction and Enactment of Comprehensive Legislation*, W. ST. U. L. REV. 407, 418 (2008).

²⁴ Maria Foscarinis, *Downward Spiral: Homelessness and its Criminalization*, 14 YALE L. & POL'Y REV. 1, 12 (1996).

²⁵ Maria Foscarinis, *Homelessness and Human Rights: Towards an Integrated Strategy*, 19 ST. LOUIS U. PUB. L. REV. 327, 331 (2000).

²⁶ This legislation is now known as the McKinney-Vento Homeless Assistance Act. Foscarinis, *supra* note 20, at 518.

²⁷ Foscarinis, *supra* note 25, at 331.

²⁸ See Maria Foscarinis, *The Federal Response: The Stewart B. McKinney Homeless Assistance Act*, in HOMELESSNESS IN AMERICA 160, 160-63 (Jim Baumohl ed., 1996).

²⁹ Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1220 (1987).

³⁰ See Katherine Barrett Wiik, *Justice for America's Homeless Children: Cultivating a Child's Right Shelter in the United States*, 35 WM. MITCHELL L. REV. 875, 919-20 (2009).

Nations General Assembly adopted the UDHR in 1948.³¹ While not a treaty itself, the UDHR holds substantial legal weight and is considered part of customary international law.³² Article 25 of the UDHR states, “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care.”³³

The two treaties that complete the International Bill of Human Rights codify many of the provisions contained in the UDHR. These are the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These treaties are legally binding on ratifying states.³⁴ The ICESCR affirms the right to housing in Article 11. Article 11 of the ICESCR states, “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”³⁵ The United States signed the ICESCR in 1977, but never ratified the document.³⁶ Other international documents affirm the human right to housing, but none feature the right so clearly and inclusively as the ICESCR.³⁷ The Habitat Agenda,³⁸ an international agreement signed by 171 countries including the United States, is the most recent document that addresses homelessness and affirms the right to housing.³⁹

³¹ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), 76 (Dec. 10, 1948) [hereinafter UDHR].

³² Wiik, *supra* note 30, at 917.

³³ UDHR, *supra* note 31, at 76.

³⁴ Park, *supra* note 29, at 1220.

³⁵ ICESCR, *supra* note 9, at art. 11.

³⁶ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, “SIMPLY UNACCEPTABLE:” HOMELESSNESS AND THE HUMAN RIGHT TO HOUSING IN THE UNITED STATES 17 (2011). *See infra* notes 141-147 and accompanying text for a discussion on the United States’ reasons to refrain from ratifying the document.

³⁷ MATTHEW CRAVEN, THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS 330 (Professor Ian Browlie ed., 1995).

³⁸ The Habitat Agenda, U.N. Doc. A/CONF.165/14, (June 14, 1996).

³⁹ Foscarinis, *supra* note 25, at 345.

B. Criminalization

Measures to punish individuals for experiencing homelessness date back to fourteenth century England. These laws prohibited vagrancy on the public streets.⁴⁰ Similar penal responses to homelessness have existed in the United States since the colonial era, modeled after the English paradigm.⁴¹ For example, vagrancy prohibitions in America punished individuals exhibiting “homeless” characteristics.⁴² Under these laws, police could arrest individuals on the public streets for being unemployed when one was capable of obtaining employment.⁴³ Throughout the 1970s and 1980s however, several lawsuits successfully challenged and struck down vagrancy laws. Courts in these cases held that vagrancy laws “encourage[d] arbitrary and erratic arrests and convictions.”⁴⁴

After the Supreme Court ruled vagrancy laws unconstitutional, communities were left without a legal means to systematically remove individuals experiencing homelessness from public sight. Cities then turned to alternative methods.⁴⁵ Throughout the 1980s-1990s, communities developed practices that included large-scale arrest sweeps, property sweeps, and arrest campaigns.⁴⁶ These practices formed the basis of what is now known as criminalization. “Criminalization” as it is broadly used today includes prohibitions against basic life-sustaining

⁴⁰ Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 301 (1996).

⁴¹ *Id.* at 302.

⁴² Jason Leckerman, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, U. PA. J. CONST. L. 540, 546 (2001).

⁴³ Smith, *supra* note 40, at 302.

⁴⁴ *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). *See also* *Kolender v. Lawson*, 461 U.S. 352 (1983).

⁴⁵ Jarvis, *supra* note 23, at 419.

⁴⁶ Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 647 (1992). *See also* Saelinger, *supra* note 22, at 550-51.

behaviors including sleeping,⁴⁷ camping,⁴⁸ sitting,⁴⁹ lying,⁵⁰ loafing,⁵¹ and obstruction⁵² of public thoroughfares.⁵³

III. The Criminalization Paradigm Violates Domestic and International Rights

Homelessness is a prima facie violation of the human right to housing.⁵⁴ Homelessness can furthermore exacerbate one's susceptibility to additional rights violations.⁵⁵ The United States has reacted to homelessness by enacting public order laws that make homelessness a crime. Such laws account for these additional violations in their enactment and application.⁵⁶ Anti-homeless laws violate the domestic and international rights of individuals experiencing homelessness in several ways.⁵⁷ First, they violate the Eighth Amendment to the Constitution

⁴⁷ *E.g.*, ATLANTIC CITY, N.J., MUN. CODE § 204-29 (2014), <http://www.ecode360.com/AT0848>: "No person shall sleep in the street, parks or any other public place within the City of Atlantic City."

⁴⁸ *E.g.*, PORTLAND, OR., MUN. CODE § 14A.50.020 (2014), <http://www.portlandonline.com/auditor/index.cfm?c=28148>: "It is unlawful for any person to camp in or upon any public property or public right of way"

⁴⁹ *See e.g.*, SEATTLE, WASH., MUN. CODE § 15.48.040 (A) (2013), <http://library.municode.com/index.aspx?clientId=13857>: "A person shall not sit or lie down upon a public sidewalk, or upon a blanket, chair, stool, or any other object placed upon a public sidewalk, during the hours between 7 a.m. and 9 p.m. . . ."

⁵⁰ *E.g.*, AUSTIN, TEX., MUN. CODE § 9-4-14 (E) (2013), http://www.amlegal.com/austin_tx/: "A person commits an offense if . . . the person is asleep outdoors; or . . . the person sits or lies down in the right- of-way between the roadway and the abutting property line or structure, or on an object placed in that area."

⁵¹ *E.g.*, BOISE, IDAHO, MUN. CODE § 9-10-05 (2012), <http://cityclerk.cityofboise.org/city-code/>: "It shall be unlawful for any person to loaf or loiter in or about the streets, alleys or public places in the City."

⁵² *E.g.*, LAS VEGAS, NEV., MUN. CODE § 10.47.020 (2013), <http://library.municode.com/index.aspx?clientId=14787>: "It is unlawful to intentionally obstruct pedestrian or vehicular traffic in an area open and available for pedestrian or vehicular traffic."

⁵³ *See* NAT'L LAW CTR. ON HOMELESSNESS & POVERTY & NAT'L COAL. FOR THE HOMELESS, HOMES NOT HANDCUFFS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 165-71 (2009), *available at* http://www.nationalhomeless.org/publications/crimreport/CrimzReport_2009.pdf.

⁵⁴ U.N. Off. of the High Comm'r for Hum. Rts., *Human Rights Indicators*, 164, U.N. Doc. HR/PUB/12/5 (2012). The Special Rapporteur on adequate housing has described homelessness as "perhaps the most visible and most severe symptom of the lack of respect for the right to adequate housing." U.N. Off. of the High Comm'r for Hum. Rts., *Fact Sheet No. 21, The Right to Adequate Housing*, 21, U.N. Doc. Fact Sheet No. 21/Rev. 1 (2009).

⁵⁵ *See Human Rights Indicators*, *supra* note 54, at 164.

⁵⁶ The legal "status" of individuals experiencing homelessness is affected (violated) "through the application of existing criminal laws against the homeless, through the creation of new laws to target the homeless, through laws that seem to criminalize homelessness itself, and through depictions of the homeless that highlight their legally relevant differences from other citizens." The criminalization paradigm legally separates housed individuals from individuals experiencing homelessness by giving individuals experiencing homelessness "a different bundle of civic relations from full citizens." Judith Lynn Failer, *Homelessness in the Criminal Law*, in FROM SOCIAL JUSTICE TO CRIMINAL JUSTICE: POVERTY AND THE ADMINISTRATION OF CRIMINAL LAW 248, 251 (William C. Heffernan & John Kleinig eds., 2000).

⁵⁷ Maria Foscarinis et al., *Out of Sight – Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 151 (1999).

because they unlawfully criminalize a status.⁵⁸ Second, anti-homeless laws violate the ICCPR because they punish individuals experiencing homelessness⁵⁹ and unreasonably discriminate against them.⁶⁰ Third, anti-homeless laws manifest the United States' refusal to respect the human right to housing. This violates the United States' obligations regarding the ICESCR.⁶¹

A. Constitutional Violations: The Eighth Amendment

Anti-homeless laws violate the Cruel and Unusual Punishment Clause of the Eighth Amendment because they criminalize the status of experiencing homelessness.⁶² When there are no other alternatives beyond the public streets, unsheltered individuals experiencing homelessness must necessarily perform the prohibited but inherently innocent conduct in public. Laws that criminalize conduct that is inseparable from the status of experiencing homelessness thereby criminalize that status. This constitutes cruel and unusual punishment which violates the Eighth Amendment.⁶³

The Eighth Amendment and its status analysis apply to criminalization through what is known as the Robinson Doctrine.⁶⁴ In 1962 in *Robinson v. California*, the Supreme Court held a state statute unconstitutional because it criminalized the “status” of narcotic addiction.⁶⁵ In holding this, the Court reasoned that laws that criminalize a person’s status amount to cruel and unusual punishment.⁶⁶

⁵⁸ *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated on other grounds*, 505 F.3d 1006 (9th Cir. 2007).

⁵⁹ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 10, at 6.

⁶⁰ *See* 42 U.S.C.A. § 11313 (West, Westlaw through Dec. 2013).

⁶¹ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 75.

⁶² *Jones*, 444 F.3d at 1136.

⁶³ *Id.*

⁶⁴ *Smith*, *supra* note 40, at 294.

⁶⁵ *Robinson v. California*, 370 U.S. 660, 666 (1962).

⁶⁶ *Id.*

Several courts have analyzed whether this doctrine applies to conduct that is inextricably linked to a status.⁶⁷ In 1968, the Supreme Court upheld a city ordinance because it prohibited the specific act of drinking in public rather than a more general status.⁶⁸ However, Justice White discussed in his concurring opinion the implications of the decision if applied to individuals experiencing homelessness. He wrote,

[t]he fact remains that some chronic alcoholics must drink and hence must drink somewhere. Although many chronics have homes, many others do not. For all practical purposes the public streets may be home for these unfortunates, not because their disease compels them to be there, but because, drunk or sober, they have no place else to go and no place else to be when they are drinking. This is more a function of economic station than of disease, although the disease may lead to destitution and perpetuate that condition. For some of these alcoholics I would think a showing could be made that resisting drunkenness is impossible and that avoiding public places when intoxicated is also impossible. As applied to them this statute is in effect a law which bans a single act for which they may not be convicted under the Eighth Amendment—the act of getting drunk.⁶⁹

Justice White’s argument highlights some important points about status analysis in the context of homelessness. Unsheltered individuals experiencing homelessness lack private accommodation and must necessarily always sit, sleep, and lie in public spaces.⁷⁰ Therefore, if a law prohibits sitting, sleeping, and lying in public spaces, an unsheltered individual experiencing homelessness will necessarily always violate this law. Public order laws thereby criminalize the status of experiencing homelessness because the only place available for such individuals to perform the conduct is in the very environment the conduct is prohibited.⁷¹ When there are no

⁶⁷ Several courts have disagreed in deciding whether conduct equals status, especially under the circumstances of individuals experiencing homelessness. This is largely because the U.S. Supreme Court has remained moot on the issue. *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995). *See also* Simon, *supra* note 46, at 660.

⁶⁸ *Powell v. Texas*, 392 U.S. 514, 532 (1968).

⁶⁹ *Id.* at 551 (1968) (White, J., concurring).

⁷⁰ *Johnson v. City of Dallas*, 860 F. Supp. 344, 350 (N.D. Tex. 1994), *rev'd on other grounds*, 61 F.3d 442 (5th Cir. 1995). *See also* *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1583 (S.D. Fla. 1992).

⁷¹ *See Pottinger*, 810 F. Supp. at 1564, 1583. By making it illegal for individuals experiencing homelessness to sleep in the one area of the city they physically can, a city thereby makes it illegal for individuals experiencing homelessness to sleep at all; “a ban against activities in public places ‘amounts in effect to a comprehensive ban’ on those activities.” Failer, *supra* note 56, at 255 (quoting Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 318 (1991-1992)).

other options available, criminalizing conduct necessary for a human being to perform, and categorically necessary for an individual experiencing homelessness to perform in public, is cruel and unusual.⁷²

Distinguishing between individuals experiencing homelessness involuntarily and individuals, though few, experiencing homelessness voluntarily is also relevant for Constitutional analysis. Eighth Amendment protection applies to unsheltered individuals experiencing homelessness because their circumstances fulfill the status “three-part test.”⁷³ First, the individual must be experiencing homelessness involuntarily.⁷⁴ Second, the individual must not have any nonpublic spaces available to him or her in which to perform the prohibited activities.⁷⁵ Third, the prohibited activities must have been punished involuntarily.⁷⁶ If the composite answer to the three-part test is yes, then the public order law in question likely violates the Eighth Amendment.⁷⁷

B. Treaty Violations

1. ICCPR

Article 7 of the ICCPR prohibits State parties from subjecting individuals to “torture or to cruel, inhuman or degrading treatment or punishment.”⁷⁸ In the same way criminalization violates the Eighth Amendment, criminalization also violates Article 7 of the ICCPR. Though cities may appeal to legitimate governmental aims by criminalizing behavior necessary for unsheltered individuals experiencing homelessness to perform in public,⁷⁹ these aims do not

⁷² *Pottinger*, 810 F. Supp. at 1564.

⁷³ *See Foscarinis*, *supra* note 24, at 43.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ ICCPR, *supra* note 9, at art. 7.

⁷⁹ *See Tami Iwamoto, Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 29 WHITTIER L. REV. 515, 522-26 (2007).

justify the severity of the laws enforced.⁸⁰ Anti-homeless laws do not prohibit inherently criminal conduct,⁸¹ but rather criminalize inherently innocent and involuntary conduct that is inextricably linked to the status of experiencing homelessness. This amounts to cruel, inhuman, and degrading treatment,⁸² violating Article 7 of the ICCPR.⁸³

Criminalization is not only a “disproportionately punitive measure,” it is also a prejudicial and discriminatory practice.⁸⁴ Though public order laws may omit language that explicitly targets individuals experiencing homelessness, governments apply and enforce them against individuals experiencing homelessness in a discriminatory manner.⁸⁵ The United States federal government has even conceded this fact.⁸⁶

Article 26 of the ICCPR guarantees to all persons equal protection of the laws without any discrimination.⁸⁷ The United Nations Human Rights Committee interprets the term “discrimination” as it is used in the ICCPR to mean

any distinction, exclusion, restriction, or preference which is based on any ground such as . . . property, . . . or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.⁸⁸

The United Nations Secretary General has explained that economic and social status accurately falls under the “other” category of prohibited grounds for discrimination.⁸⁹ Accordingly, laws

⁸⁰ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 35.

⁸¹ Philip Lynch & Jacqueline Cole, *Homelessness and Human Rights: Regarding and Responding to Homelessness as a Human Rights Violation*, 4 MELB. J. INT’L. L. 139, 148 (2003).

⁸² *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 36.

⁸³ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 10, at 6.

⁸⁴ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 31.

⁸⁵ *Id.* at ¶ 34. *See also* Failer, *supra* note 56, at 253.

⁸⁶ *See* 42 U.S.C.A. § 11313 (West, Westlaw through Dec. 2013).

⁸⁷ ICCPR, *supra* note 9, at art. 26.

⁸⁸ U.N. Off. of the High Comm’r for Hum. Rts., Hum. Rts. Comm., *CCPR General Comment No. 18: Non-Discrimination*, ¶ 7, U.N. Doc. HRI/GEN I/Rev. 9 (Vol. I) (1989).

⁸⁹ *Extreme Poverty and Human Rights*, *supra* note 11, at 7 n.7. *See also* U.N. Comm. on the Elimination of Racial Discrimination, *Reports Submitted by States Parties Under Article 9 of the Convention*, ¶ 298, U.N. doc. CERD/C/351/Add1 (Oct. 10, 2000); Organization of American States, *American Convention on Human Rights* art. 1, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

that discriminatorily apply to individuals based on their housing status are examples of prohibited discriminatory policy that violate Article 26 of the ICCPR.⁹⁰

2. ICESCR

Article 11 of the ICESCR affirms the human right to housing: “[t]he States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”⁹¹ The United States signed the ICESCR in 1977, but has never ratified the document.⁹² Absent ratification, the United States is not bound to adhere to the treaty’s text.

However, the United States does have several obligations regarding the ICESCR. As a signatory, the United States is required under accepted standard international law to “refrain from acts which would defeat the object and purpose of a treaty.”⁹³ Moreover, the body of human rights is indivisible and interdependent.⁹⁴ This means that a State party is equally accountable for violating an individual’s economic, social, or cultural right as it is for violating an individual’s civil or political right.⁹⁵ This is true regardless of whether the State party has ratified the appropriate Covenant.⁹⁶

According to the Economic and Social Council, a State can violate an individual’s economic and social rights through acts of commission.⁹⁷ Acts of commission include “deliberately retrogressive” measures that “reduce[] the extent to which . . . right is

⁹⁰ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 18.

⁹¹ ICESCR, *supra* note 9, at art. 11.

⁹² ICESCR, *supra* note 9.

⁹³ Vienna Convention on the Law of Treaties art. 18, May 22, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

⁹⁴ *ICESCR Substantive Issues: The Maastricht Guidelines*, *supra* note 12, at ¶ 4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at ¶¶ 14, 15.

guaranteed.”⁹⁸ Anti-homeless laws are acts of commission because they are degenerative measures, characteristic of the vagabond era, that violate the U.S. Constitution and the ICCPR. Criminalizing behavior necessary for unsheltered individuals experiencing homelessness to perform in public seriously hinders their ability to equitably enjoy the protection of domestic and international law.⁹⁹

A State party can also violate an individual’s economic and social rights through acts of omission. Acts of omission include failing to “reform or repeal legislation . . . manifestly inconsistent with an obligation to the [ICESCR]” and failing to “remove promptly obstacles” that hinder “the immediate fulfillment of a right guaranteed by the [ICESCR].”¹⁰⁰ The criminalization paradigm is also an act of omission because it perpetuates, rather than removes, anti-homeless laws. The criminalization paradigm systematically deprives individuals experiencing homelessness of their economic and social rights under the ICESCR.¹⁰¹ Moreover, criminalization misappropriates governmental funds to pursue anti-homeless policies, which significantly reduces the availability and feasibility of maintaining effective social services. This further diminishes the potential for individuals experiencing homelessness to exercise and enjoy their economic, social and cultural rights.¹⁰² The criminalization paradigm therefore directly opposes any attempt to respect the right to housing and precludes the United States from fulfilling its duties as a signatory to the ICESCR.¹⁰³

The criminalization paradigm violates both the civil and political rights and the economic, social, and cultural rights of individuals experiencing homelessness, in both the

⁹⁸ *Id.* at ¶ 14 (e).

⁹⁹ *See id.* at ¶¶ 11, 20.

¹⁰⁰ *Id.* at ¶ 15 (b), (g).

¹⁰¹ *Id.* at ¶ 21. *See also* CRAVEN, *supra* note 37, at 110.

¹⁰² *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 23.

¹⁰³ *Id.* at ¶ 75.

domestic and international legal contexts. Criminalization violates the Eighth Amendment because it is cruel and unusual punishment.¹⁰⁴ This cruel, degrading, and inhuman treatment also violates the ICCPR.¹⁰⁵ Criminalization also violates the ICCPR because it is a burdensome and discriminatory practice.¹⁰⁶ Finally, criminalization systematically violates the economic and social rights of individuals experiencing homelessness.¹⁰⁷ This prevents the United States from effectively eliminating homelessness and fulfilling its obligations as a signatory to the ICESCR.¹⁰⁸

IV. The United States Should Ratify the ICESCR and Enact a Right to Housing

Criminalization is not an effective or appropriate response to homelessness.¹⁰⁹ Anti-homeless laws exacerbate homelessness because they preclude communities from addressing and reducing the factors and causes that perpetuate it.¹¹⁰ Current conflicting policies prevent the United States from making any substantial progress towards effectively eliminating homelessness. Though the growing judicial consensus agrees that criminalization is ineffective and counter-productive, several courts still oppose this notion.¹¹¹ A human rights framework will allow the United States to most effectively address and eliminate homelessness and thereby eradicate criminalization.

Securing permanent housing can most effectively eliminate homelessness.¹¹² Moreover, the body of indivisible and interdependent human rights is a powerful framework in which to

¹⁰⁴ *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1564 (S.D. Fla. 1992).

¹⁰⁵ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 10, at 6.

¹⁰⁶ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 31.

¹⁰⁷ *ICESCR Substantive Issues: The Maastricht Guidelines*, *supra* note 12, at ¶ 21. *See also* CRAVEN, *supra* note 37, at 110.

¹⁰⁸ *Extreme Poverty and Human Rights*, *supra* note 11, at ¶ 75.

¹⁰⁹ U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS* 7 (2012).

¹¹⁰ *Id.*

¹¹¹ Foscarinis, *supra* note 24, at 2.

¹¹² *See* U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *supra* note 109, at 11-12.

challenge criminalization and develop the housing first scheme.¹¹³ The ICESCR offers a structured approach to enacting a right to housing. The United States should therefore ratify the ICESCR. Enacting a right to housing will most effectively address and curtail the underlying causes and effects of poverty and homelessness.¹¹⁴

A. The United States is Ready for a Right to Housing

Various international and domestic notions confirm the United States' capacity to enact a right to housing. First, U.S. representatives were integral in drafting the International Bill of Human Rights.¹¹⁵ This involvement indicates the United States' commitment to human rights norms. The United States' voluntary involvement in additional human rights instruments reinforces this commitment.¹¹⁶ Second, the United States' reasons to initially refrain from ratifying the ICESCR are now obsolete, and few to no current legitimate reasons justify the United States' continued abstention.¹¹⁷ Third, the federal government and numerous state governments have enacted measures that address criminalization, homelessness, and even housing, and attempt to rectify the current state of homelessness in the United States.¹¹⁸ Taken together, this composite suggests that the United States is ready for a right to housing.

The United States' significant involvement in the creation of the United Nations and the International Bill of Human Rights drafting process illustrates its commitment to human rights

¹¹³ The idea behind the housing first scheme is to provide individuals experiencing homelessness with housing first. Case managers and social service providers then work to provide these individuals with necessary social assistance after the individuals secure permanent housing. The housing first scheme prioritizes the need for housing and acknowledges that many individuals need additional social services in order to sustain the housing and maintain their personal health and well-being. NATIONAL ALLIANCE TO END HOMELESSNESS, WHAT IS HOUSING FIRST? (2006), available at http://b.3cdn.net/naeh/b974efab62feb2b36c_pzm6bn4ct.pdf. See also United States Interagency Council on Homelessness, *Housing First*, UNITED STATES INTERAGENCY COUNCIL ON HOMELESSNESS, http://usich.gov/usich_resources/solutions/explore/housing_first/ (last visited April 11, 2014).

¹¹⁴ See Kristen David Adams, *Do We Need a Right to Housing?*, 9 NEV. L.J. 275, 316 (2009).

¹¹⁵ See Linda M. Keller, *The American Rejection of Economic Rights as Human Rights & the Declaration of Independence: Does the Pursuit of Happiness Require Basic Economic Rights?*, 19 N.Y.L. SCH. J. HUM. RTS. 557, 561 (2003).

¹¹⁶ See *infra* notes 131-40 and accompanying text.

¹¹⁷ See *infra* notes 141-47 and accompanying text.

¹¹⁸ See *infra* notes 148-59 and accompanying text.

principles. President Franklin D. Roosevelt and British Prime Minister Winston Churchill were largely responsible for initiating the creation of the United Nations.¹¹⁹ In August 1941, President Roosevelt and Prime Minister Churchill issued an “affirmation . . . ‘of certain common principles in the national policies of their respective countries on which they based their hopes for a better future for the world.’”¹²⁰ These cooperative measures set the stage for later human rights development.¹²¹

U.S. involvement was again impactful during the drafting process of the International Bill of Human Rights, beginning with President Franklin D. Roosevelt’s 1941 State of the Union Address.¹²² Roosevelt’s “Four Freedoms” speech marked a pivotal moment in human rights history. The speech highlighted the importance of economic concerns and established them on the world agenda.¹²³ The freedom from want, the third freedom enumerated in the speech, equates to economic security and an economically peaceful life for a nation’s population.¹²⁴ It was thus an American president that first set the “moral and philosophical tone which would support the demand for an international bill of human rights.”¹²⁵

The United Nations Economic and Social Council established a Commission on Human Rights in 1946 that drafted the International Bill of Human Rights. Eleanor Roosevelt headed this committee.¹²⁶ Eleanor Roosevelt’s advocacy efforts in this role were vital to the International

¹¹⁹ Wiik, *supra* note 30, at 912.

¹²⁰ United Nations, *The Atlantic Charter, History of the United Nations*, UNITED NATIONS, https://www.un.org/en/aboutun/history/atlantic_charter.shtml (last visited Feb. 16, 2014).

¹²¹ SVEN BERNHARD GAREIS & JOHANNES VARWICK, *THE UNITED NATIONS: AN INTRODUCTION* 140 (Lindsay P. Cohn trans., 2005).

¹²² Peter Meyer, *The International Bill: A Brief History*, in *THE INTERNATIONAL BILL OF HUMAN RIGHTS* xxiii, xxviii (Paul Williams ed., 1981).

¹²³ *See id.* at xxviii.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* at xxiv.

Bill of Human Rights and the UDHR.¹²⁷ U.S. representatives contributed significantly to drafting the UDHR, which contained provisions embracing both civil and political rights and economic, social, and cultural rights.¹²⁸ Though the UDHR is not a treaty and is therefore not binding on its signatories, scholars and commentators have indicated its authority as customary international law.¹²⁹ Several domestic courts have acknowledged the UDHR's legal status,¹³⁰ further indicating the United States' acceptance of human rights principles.

Several other notable and ratified international agreements affirm the right to housing and further demonstrate the United States' pledge to observe human rights norms. The Charter of the Organization of American States, ratified in 1951, asserts "adequate housing for all sectors of the population" as an achievable goal.¹³¹ The International Convention on the Elimination of All Forms of Racial Discrimination, ratified in 1994, affirms the human right to housing.¹³² Finally, the interdependency of rights between the ICESCR and the ICCPR demonstrates the United States' implicit support of economic and social rights through its commitment to civil and political rights.¹³³ The United States has also signed but not ratified several other international treaties that affirm the right to housing, including the Convention on the Elimination of All

¹²⁷ Keller, *supra* note 115, at 561.

¹²⁸ *Id.*

¹²⁹ *Id.* at 562. See also David Shiman, *The Human Rights Education Series: Topic Book 1: Economic and Social Justice: A Human Rights Perspective*, UNIVERSITY OF MINNESOTA HUMAN RIGHTS RESOURCE CENTER, <http://www1.umn.edu/humanrts/edumat/hreduseries/tb1b/index.html> (1999).

¹³⁰ See e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876, 883 (2d Cir. 1980).

¹³¹ Charter of the Organization of American States art. 34 (k), April 30, 1948, 119 U.N.T.S. 3.

¹³² International Convention on the Elimination of All Forms of Racial Discrimination art. 5 (e) (iii), Dec. 21, 1965, 660 U.N.T.S. 195.

¹³³ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *HOMELESSNESS IN THE UNITED STATES AND THE HUMAN RIGHT TO HOUSING* 28 (2004).

Forms of Discrimination Against Women,¹³⁴ the Convention on the Rights of the Child,¹³⁵ and the Convention Relating to the Status of Refugees.¹³⁶

The United States' involvement in the Habitat Agenda perhaps best demonstrates its commitment to human rights and the right to housing specifically. The Habitat Agenda explicitly proclaims the right to housing's importance. The United States is not only a signatory to the Habitat Agenda, but U.S. representatives also contributed significantly to drafting the document.¹³⁷ The parties to the Habitat Agenda agreed to ensure "the full realization of the human rights set out in international instruments and in particular, in this context, the right to adequate housing"¹³⁸ The document even reiterates this goal: "[w]e reaffirm our commitment to the full and progressive realization of the right to adequate housing, as provided for in international instruments."¹³⁹ The Habitat Agenda is not a treaty, but the United States' voluntary signature to the agreement illustrates its independent commitment to the rights enumerated within.¹⁴⁰

Though the United States may have had legitimate reasons to initially refrain from ratifying the ICESCR, those reasons no longer justify its continued refusal to ratify the treaty. The United States did not initially ratify the ICESCR primarily because the federal government was concerned that the treaty would infringe upon the sovereignty of the State.¹⁴¹ However, government officials expressed this caution in the Cold War era context; they feared these human

¹³⁴ Convention on the Elimination of All Forms of Discrimination Against Women art. 14 (2) (h), Dec. 18, 1989, 1249 U.N.T.S. 13, 19 I.L.M. 33.

¹³⁵ Convention on the Rights of the Child art. 27 (3), Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1456.

¹³⁶ Convention Relating to the status of Refugees art. 21, July 28, 1951, 189 U.N.T.S. 150.

¹³⁷ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 36, at 20.

¹³⁸ The Habitat Agenda, *supra* note 38, at ¶ 26.

¹³⁹ *Id.* at ¶ 39.

¹⁴⁰ See NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 133, at 13. See also *id.* at ¶ 25.

¹⁴¹ Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79, 82 (1992).

rights embodied a communist plan that threatened the way of American life.¹⁴² Now many years after aggressions against the Soviet Union have subsided, these reasons for rejecting ratification have lost much of their force.¹⁴³

Despite a brief period of support,¹⁴⁴ subsequent presidential administrations declined to ratify the treaty for political reasons.¹⁴⁵ These administrations expressed their reluctance to bind the United States to laws concerning mere “desirable social goals.”¹⁴⁶ Though housing and the elimination of homelessness may be desirable goals, they become a matter of national policy when the State instead employs criminal sanctions to respond to homelessness. Absent these feeble reasons, the United States lacks sufficient rationale to justify its continued refusal to ratify the ICESCR.¹⁴⁷

The United States has also enacted various domestic policies that support the right to housing. President Roosevelt’s 1944 State of the Union Address articulated a Second Bill of Rights, under which would fall “[t]he right of every family to a decent home”¹⁴⁸ The Preamble of the 1949 Housing Act incorporated a similar goal into federal law.¹⁴⁹ Later social welfare measures also support economic, social, and cultural rights, including “the earned

¹⁴² NATALIE HEVENER KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* 16 (1990).

¹⁴³ First, economic human rights are no longer considered innately communist or Soviet. Second, economic rights are becoming increasingly relevant in order to address the national poverty (and homelessness) epidemic. Third, the sphere of international law is changing and evolving. The United States is becoming increasingly involved in international cooperative measures and is increasingly concerned with its international image. Stark, *supra* note 141, at 82-86.

¹⁴⁴ During his term, President Jimmy Carter advanced several policies that bolstered domestic support of international human rights, including “upgrad[ing] the head of the State Department’s human rights division to an Assistant Secretary of State” and “sign[ing] the International Covenants and sen[d]ing them to the Senate urging ratification.” Meyer, *supra* note 122, at xlv. The Clinton administration also indicated support of the ICESCR. See Barbara Stark, *U.S. Ratification of the Other Half of the International Bill of Rights*, in *THE UNITED STATES AND HUMAN RIGHTS* 75, 75 (David P. Forsythe ed., 2000).

¹⁴⁵ Shiman, *supra* note 129.

¹⁴⁶ *Id.*

¹⁴⁷ See Stark, *supra* note 144, at 78-79.

¹⁴⁸ Franklin Delano Roosevelt, U.S. President, State of the Union Address to the United States Congress (Jan. 11, 1944), available at <http://www.presidency.ucsb.edu/ws/?pid=16518>.

¹⁴⁹ 42 U.S.C. § 1425(b) (1949) (repealed 1990).

income tax credit, food stamps, Medicaid, Medicare, school breakfasts and lunches, Social Security, and supplementary security income.”¹⁵⁰

In addition to the various federal measures, many states have enacted social support provisions compatible with the right to housing. For example, several state constitutions include social welfare provisions.¹⁵¹ Though some of these only implicitly support social welfare

¹⁵⁰ Chester Hartman, *The Case for a Right to Housing in the United States*, in NATIONAL PERSPECTIVES ON HOUSING RIGHTS 141, 150 (Scott Leckie, ed., 2003).

¹⁵¹ At least twenty-one state constitutions contain some mention of welfare or charitable actions: Alabama (“It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor.”) ALA. CONST. art. IV, § 88; Alaska (“The legislature shall provide for public welfare.”) Alaska Const. art. VII, § 5; California: (“The Legislature, or the people by initiative, shall have power to amend, alter, or repeal any law relating to the relief of hardship and destitution, whether such hardship and destitution results from unemployment or from other causes, or to provide for the administration of the relief of hardship and destitution, whether resulting from unemployment or from other causes”) CAL. CONST. art. XVI, § 11; Colorado (regarding pension provisions for residents over sixty) COLO. CONST. art. 24, § 3; Idaho (“Educational, reformatory, and penal institutions, and those for the benefit of the insane, blind, deaf and dumb, and such other institutions as the public good may require, shall be established and supported...”) IDAHO. CONST. art. X, § 1; Illinois (“We, the People of the State of Illinois... in order to provide for the health, safety and welfare of the people; maintain a representative and orderly government; eliminate poverty and inequality... do ordain and establish this Constitution for the State of Illinois”) ILL. CONST. pmb.; Indiana (“The counties may provide farms, as an asylum for those persons who, by reason of age, infirmity, or other misfortune, have claims upon the sympathies and aid of society.”) IND. CONST. art. IX, § 3, Kansas (“The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society.”) KAN. CONST. art. VII, § 4; Louisiana (“The legislature may establish a system of economic and social welfare, unemployment compensation, and public health.”) LA. CONST. art. XII, § 8; Michigan (“The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern.”) MICH. CONST. art. IV, § 51; Mississippi (“The board of supervisors shall have power to provide homes or farms as asylums for those persons who, by reason of age, infirmity, or misfortune, may have claims upon the sympathy and aid of society...”) MISS. CONST. art. XIV, § 262; Missouri (“The health and general welfare of the people are matters of primary public concern...”) MO. CONST. art. IV, § 37; New York (“The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions...”) N.Y. CONST. art. XVII, § 1; Nevada (“Institutions for the benefit of the Insane, Blind and Deaf and Dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the State...”) NEV. CONST. art. XIII, § 1; North Carolina (“Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.”) N.C. CONST. art. XI, § 4; New Mexico (“Nothing in this section prohibits the state or any county or municipality from making provision for the care and maintenance of sick and indigent persons.”) N.M. CONST. art. IX, § 14; Rhode Island (“All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens.”) R.I. CONST. art. I, § 2; South Carolina (“The health, welfare, and safety of the lives and property of the people of this State and the conservation of its natural resources are matters of public concern.”) S.C. CONST. art. XII, § 1; Texas (“The Legislature shall have the power... for assistance grants to needy dependent children and the caretakers of such children, needy persons who are totally and permanently disabled because of a mental or physical handicap, needy aged persons and needy blind persons... The Legislature may provide by General Law for medical care, rehabilitation and other similar services for needy persons.”) TEX. CONST. art. III, § 51-a; Wyoming (“...it shall be the duty of the legislature to protect and promote these vital interests by such measures for the encouragement of temperance and virtue, and such restrictions upon vice and immorality of every sort, as are deemed necessary to the public welfare.”) WYO. CONST. art. VII, § 20.

programs, many explicitly commit the state to supporting economic and social needs. One state has even guaranteed shelter for every male experiencing homelessness who applies for it.¹⁵² The 1978 *Callahan v. Carey* case established a right to shelter for males experiencing homelessness in New York via a consent decree.¹⁵³ The parties in *Callahan* agreed that “[t]he City defendants shall provide shelter and board to each homeless man who applies for it”, provided the applicant qualifies for the home relief program in New York.¹⁵⁴ This right was later extended to include females¹⁵⁵ and families¹⁵⁶ experiencing homelessness. Though the right to shelter for individuals experiencing homelessness in New York is minimal and realistically unenforced,¹⁵⁷ it indicates that a right to housing is both possible and justified.

The most recent state policies enacted likely come the closest to explicitly addressing and challenging criminalization. Since 2012, three states have enacted statutes promulgating Homeless Bills of Rights. All three Homeless Bills of Rights are similar, guaranteeing the right of individuals experiencing homelessness to use and move freely in public spaces.¹⁵⁸ All three Homeless Bills of Rights prohibit anyone from denying any other individual’s rights solely on the basis of his or her housing.¹⁵⁹ These Homeless Bills of Rights exemplify states’ commitments to addressing disparate treatment based on housing status and challenging laws that disproportionately and discriminatorily affect individuals experiencing homelessness.

¹⁵² No. 42582/79 (N.Y. Sup. Ct. Aug. 26, 1981) (final judgment by consent), *available at* <http://www.coalitionforthehomeless.org/FileLib/PDFs/callahanconsentdecree.pdf>.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Edredge v. Koch*, 469 N.Y.S.2d 744 (N.Y. App. Div. 1983).

¹⁵⁶ *McCain v. Koch*, 511 N.E.2d 62 (N.Y. 1987).

¹⁵⁷ Thomas Byrne & Dennis P. Culhane, *The Right to Housing: An Effective Means for Addressing Homelessness?*, 14 U. PA. J. LAW & SOC. CHANGE 379, 386 (2011).

¹⁵⁸ CONN. GEN. STAT. ANN. § 1-500 (West 2013); 775 ILL. COMP. STAT. ANN. 45/10 (West 2013); R.I. GEN. LAWS § 34-37.1-3 (2012).

¹⁵⁹ § 1-500; 45/10; § 34-37.1-3.

A right to housing is not an illogical next step. The United States' history of human rights involvement, the weakness of the United States' previous rationale to abstain from ratifying the ICESCR, and the numerous social welfare policies enacted by various federal and state governments all illustrate the United States' implicit support for ending homelessness through a human rights framework. The United States is ready for a right to housing, and United Nations implementation guidelines will make for a smoother transition to this human rights framework.

B. Components of the Right to Housing

In order to address the gap between the goals set out in Article 11 of the ICESCR and the realities in many parts of the world, the United Nations published General Comment 4 on the right to adequate housing. In the document, the Committee for Economic, Social and Cultural Rights explains that the right to “adequate housing” should not be “interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one’s head” but “should be seen as the right to live somewhere in security, peace and dignity.”¹⁶⁰ Accordingly, the right to housing includes seven core components:

1) *Legal security of tenure.* A right to housing includes legal protection against forced eviction, harassment, and other threats.¹⁶¹

2) *Availability of services, materials, facilities, and infrastructure.* A right to housing includes a proper stock of materials necessary for essential “health, security, comfort, and

¹⁶⁰ U.N. Off. of the High Comm’r for Hum. Rts., Comm. on Econ., Social & Cultural Rts., *General Comment 4: The Right to Adequate Housing (Article 11(1) of the Covenant) (Sixth Session 1991)*, ¶ 7, U.N. Doc. E/1992/23 (1991).

¹⁶¹ *Id.* at ¶ 8 (a).

nutrition.”¹⁶² Specifically, all individuals should have access to safe drinking water and the necessary materials for cooking and washing.¹⁶³

3) *Affordability*. A right to housing means that individuals should not sacrifice other basic needs in order to procure funds to pay for housing.¹⁶⁴ States parties should furthermore make sure that the price of housing is proportionate to income levels.¹⁶⁵

4) *Habitability*. Housing accommodations should shield individuals from the “cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors” and should contain an adequate amount of space for its inhabitants.¹⁶⁶

5) *Accessibility*. All individuals should have equal access to housing.¹⁶⁷ However, disadvantaged groups should have some degree of priority in obtaining adequate housing, and housing law and policy should not discriminate against these groups.¹⁶⁸

6) *Location*. Housing should be located in communities with access to various opportunities and services, such as employment, education, health care, and other social amenities.¹⁶⁹

7) *Cultural Adequacy*. Finally, housing should not infringe upon cultural identity or appreciation, but should allow for cultural expression and diversity celebration.¹⁷⁰

C. Successful Housing Rights Models

Though many countries have ratified the ICESCR and thereby enacted a right to housing in their respective nations, two countries stand out as global paragons of housing rights. The

¹⁶² *Id.* at ¶ 8 (b).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at ¶ 8 (c).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at ¶ 8 (d).

¹⁶⁷ *Id.* at ¶ 8 (e).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at ¶ 8 (f).

¹⁷⁰ *Id.* at ¶ 8 (g).

United States should look to these nations as models in order to most effectively eliminate homelessness and thereby eradicate criminalization.

1. Scotland

The United Kingdom ratified the ICESCR in 1976.¹⁷¹ Scotland then promulgated a right to housing in 1987. The Housing Act of 1987 established a priority right to housing for individuals experiencing homelessness as the result of an emergency.¹⁷² In 1999, Scotland established a Homelessness Task Force,¹⁷³ which “review[ed] the causes and nature of homelessness in Scotland; . . . examine[ed] [the] current practice in dealing with cases of homelessness; and . . . ma[de] recommendations” on how to effectively prevent and eliminate homelessness.¹⁷⁴ Under the Homelessness Task Force’s recommendations, Scotland passed the Homelessness Etc. Act of 2003.¹⁷⁵ This law abolished the priority need test and secured a right to accommodation for all individuals experiencing homelessness.¹⁷⁶

Under the 1987 law, Scottish authorities were only required to secure accommodation for individuals with priority need that were experiencing homelessness unintentionally.¹⁷⁷ Under the new Homelessness Etc. Act, authorities are now required to secure “settled” accommodation for all individuals experiencing homelessness unintentionally.¹⁷⁸ Settled accommodation includes both permanent and non-permanent housing.¹⁷⁹ Permanent accommodation is available through a Scottish Secure Tenancy, a Short Scottish Secure Tenancy, and an assured tenancy acquired

¹⁷¹ ICESCR, *supra* note 9.

¹⁷² Housing (Scotland) Act, 1987, c. 25, § 1 (d).

¹⁷³ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, HOUSING RIGHTS FOR ALL: PROMOTING AND DEFENDING HOUSING RIGHTS IN THE UNITED STATES 36 (5th ed. 2011).

¹⁷⁴ SCOTTISH EXECUTIVE, HOMELESSNESS TASK FORCE, HELPING HOMELESS PEOPLE: AN ACTION PLAN FOR PREVENTION AND EFFECTIVE RESPONSE ¶ 1 (2002).

¹⁷⁵ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 133, at 64.

¹⁷⁶ Homelessness etc. (Scotland) Act, 2003, § 5.

¹⁷⁷ Housing (Scotland) Act, c. 31.

¹⁷⁸ *Id.* at 8-9.

¹⁷⁹ *Id.* at 8.

through private landlords.¹⁸⁰ Non-permanent accommodations are available when permanent accommodations are inappropriate.¹⁸¹ However, even if an individual has acquired temporary housing, the duty to secure adequate housing is not fulfilled until permanent housing is obtained.¹⁸²

Scotland's sweeping legislative initiatives to eliminate homelessness have had a positive effect on the status of homelessness in the nation. Since enacting these laws, Scotland has seen a decline in homelessness overall,¹⁸³ especially "rough sleeping," or unsheltered homelessness.¹⁸⁴ Commentators attribute the decline in homelessness to such legislative and administrative measures.¹⁸⁵

2. France

Another country to which the United States should look that recently enacted a right to housing is France. France acceded the ICESCR in 1980,¹⁸⁶ but until recently had not taken significant action to enforce the right to housing. In 2006, the activist group Children of Don Quixote set up a tent city in a posh area of Paris in order to raise awareness of homelessness issues and call attention to the disparate housing conditions in France.¹⁸⁷ In 2007, in large part as

¹⁸⁰ *Id.* at 9.

¹⁸¹ The Homeless Persons (Provision of Non-Permanent Accommodation) (Scotland) Regulations, 2010, Scot. S.I. 2010 No. 2, ¶ 4.

¹⁸² NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 53 (2011).

¹⁸³ SUZANNE FITZPATRICK ET AL., INST. FOR HOUS., URBAN AND REAL ESTATE RESEARCH, HERIOT-WATT UNIV. & CTR. FOR HOUS. POLICY, UNIV. OF YORK, THE HOMELESSNESS MONITOR: SCOTLAND 2012, at 1 (2012).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* In 2009-10, 38,006 individuals experiencing homelessness applied for an entitlement to housing under the Homelessness Etc. Act. 61% of these individuals were able to secure settled accommodation. Most of this housing – 88% – was in the social rented sector, a 75% increase since 2002-03. KATE BERRY, HOMELESSNESS: SUBJECT PROFILE SPICE BRIEFING SB 11/36, at 9-10 (Scottish Parliament Information Centre 2011), available at http://www.scottish.parliament.uk/ResearchBriefingsAndFactsheets/S4/SB_11-36.pdf.

¹⁸⁶ ICESCR, *supra* note 9.

¹⁸⁷ Marie Loison, *The Implementation of an Enforceable Right to Housing in France*, 1 EURO. J. OF HOMELESSNESS 185, 188 (2007).

a response to these measures by social activist groups, the French government passed a law promulgating the right to housing.¹⁸⁸

The French housing law, *le Droit au Logement Opposable* (DALO), guarantees decent and suitable housing for all individuals residing in France.¹⁸⁹ Initially, DALO prioritized the right to housing for individuals with the most immediate need.¹⁹⁰ In January 2012, the right expanded to include those who qualified but had not yet acquired housing.¹⁹¹

The French law is modeled after Scotland's law and contains many similar provisions, including an expansive definition of homelessness and, perhaps most importantly, legal enforceability.¹⁹² Individuals who qualify for an entitlement to housing under DALO¹⁹³ undergo a review by a mediation committee.¹⁹⁴ The mediation committee must decide whether an individual has priority status and is therefore entitled to emergency shelter.¹⁹⁵ If individuals determined to have emergency need do not obtain emergency housing within a three or six month time period, they are entitled to appeal to an administrative court.¹⁹⁶

¹⁸⁸ *Id.* at 189.

¹⁸⁹ Loi 2007-290 du 5 mars 2007 instituant le droit au logement opposable et portant diverses mesures en faveur de la cohésion sociale [Law 2007-290 of March 5, 2007 establishing the enforceable right to housing and various measures to promote social cohesion], Journal Officiel de la République Française [Official Gazette of France], Mar. 6, 2007, art. 1, available at <http://legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000000271094>.

¹⁹⁰ Loison, *supra* note 187, at 189.

¹⁹¹ *Id.*

¹⁹² Loi 2007-290 du 5 mars 2007.

¹⁹³ Qualifications include individuals “in good faith” with a) no housing; b) individuals at risk for eviction without having acquired other forms of housing; c) individuals residing in temporary or transitional housing; d) individuals housed in “premises unfit for human habitation or otherwise unhealthy or dangerous;” e) individuals housed in an over-crowded or inadequate facility; f) individuals with disabilities; and g) guardians of minor children or individuals who have at least one dependent child with a disability. *Id.* at art. 7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ Marie Loison-Leruste & Deborah Quilgars, *Increasing Access to Housing: Implementing the Right to Housing in England and France*, 3 EURO. J. OF HOMELESSNESS 75, 86 (2009).

An administrative court in France upheld DALO for the first time in 2008.¹⁹⁷ The petitioner in the case, Namizata Fofana, a 26 year-old woman raising two children and living in a shelter, had repeatedly applied for housing accommodation, beginning in 2005.¹⁹⁸ When the French government passed DALO, Fofana applied for priority housing, but was denied by the mediation committee assigned to her case.¹⁹⁹ The mediation committee concluded that Fofana had priority status but her housing needs were not urgent.²⁰⁰ Fofana requested judicial review through the administrative court. The court awarded Fofana permanent housing after it ruled that the mediation committee unlawfully denied her right to housing.²⁰¹ Though Fofana's case is the only legal challenge to a violation under DALO to date, it illustrates that a justiciable right to housing is possible with a human rights framework.

The Homelessness Etc. Act of 2003 and the DALO law are proven paragons of effective housing rights legislation. Scotland²⁰² and France's²⁰³ shared legislative and judicial similarities with the United States make their laws particularly useful for the United States. The United States should look to these models to effectively eliminate homelessness and its criminalization.

D. Implications of ICESCR Ratification and Housing Rights Enactment

Criminalization exists because the United States has failed to effectively address and combat homelessness. Rather than criminalizing homelessness, the United States should allocate

¹⁹⁷ Tribunal Administratif de Paris [TA] [regional administrative court of first instance] Paris, May 20, 2008, No. 0807829J9/1 (Fr.), available at http://www.jurislogement.org/attachments/080_TA%20Paris,%2020%20mai%202008,%20r%C3%A9f%C3%A9r%C3%A9%20suspension.pdf.

¹⁹⁸ *Droit au logement opposable: la justice fait face à sa première saisine*, LE MONDE, May 15, 2008, http://www.lemonde.fr/societe/article/2008/05/15/droit-au-logement-opposable-la-justice-fait-face-a-sa-premiere-saisine_1045641_3224.html.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Kyra Olds, *The Role of Courts in Making the Right to Housing a Reality Throughout Europe: Lessons from France and the Netherlands*, 28 WIS. INT'L L.J. 170, 190 (2010).

²⁰² Eric S. Tars & Caitlin Egleson, *Great Scot!: The Scottish Plan to End Homelessness and Lessons for the Housing Rights Movement in the United States*, 16 GEO. J. ON POVERTY L. & POL'Y 187, 187 (2009).

²⁰³ Eric S. Tars et al., *The Champagne of Housing Rights: France's Enforceable Right to Housing and Lessons for U.S. Advocates*, 4 NE. U. L.J. 429, 435 (2012).

more resources towards eliminating both criminalization and homelessness. The United States can best accomplish this by ratifying the ICESCR. Ratifying the ICESCR will establish a right to housing in a human rights framework. The implications of enacting a right to housing are threefold. First, a human rights lens will create a common legal framework in which to address and effectively challenge criminalization. Second, a human rights framework will initiate the paradigm shift necessary to most adequately eliminate homelessness. Third, ratifying the ICESCR will increase access to beneficial international resources.

First, ratifying the ICESCR and implementing a right to housing will establish a common legal framework in which to approach homelessness and its criminalization.²⁰⁴ Though Eighth Amendment protection from criminalization is still fairly strong under the Robinson Doctrine, a right to housing will bolster this protection and hamper criminalization. A human rights framework and the right to housing will allow judicial decision makers to more effectively assess laws that target individuals experiencing homelessness. Under a right to housing, a law that criminalizes homelessness in effect criminalizes the failure to exercise the right to housing. The Eighth Amendment restricts the kinds and severity of punishment inflicted for a certain crime, but the Eighth Amendment also “imposes substantive limits on what can be made criminal and punished as such.”²⁰⁵ Arresting someone for not exercising their right to housing would certainly constitute cruel and unusual punishment.

A human rights framework will also incite the paradigm shift necessary to eliminate homelessness and its stigmatization. Negative social attitudes about homelessness have stigmatized the status and denied individuals experiencing homelessness of their social worth.²⁰⁶ Such attitudes have perpetuated the prejudice and injustice that underlie criminalization. A

²⁰⁴ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 173, at 15. *See also* Stark, *supra* note 144, at 80.

²⁰⁵ *Ingraham v. Wright*, 430 U.S. 651, 667 (1977).

²⁰⁶ NAT'L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 173, at 18.

human rights framework will dismantle discriminatory and stereotypical attitudes by affirming the autonomy and dignity of all persons.²⁰⁷

Changing societal attitudes by increasing understanding and empathy can furthermore lead to a comprehensive policy shift in the way a government addresses and responds to homelessness.²⁰⁸ Assimilating human rights principles into legislation addressing homelessness can help a nation internalize those norms.²⁰⁹ In the United States, this can help develop the governmental posture required to eliminate homelessness.²¹⁰

Finally, ratifying the ICESCR and implementing a right to housing will increase access to additional review processes and international resources. Upon ratification, the Human Rights Council will include adherence to the ICESCR in its Universal Period Review of the United States. The Universal Periodic Review examines each State party's commitment to and fulfillment of international human rights obligations.²¹¹ A State party is subject to review based on the human rights obligations in "(1) the UN Charter; (2) the Universal Declaration of Human Rights; (3) human rights instruments to which the State is party (human rights treaties ratified by the State concerned); (4) voluntary pledges and commitments made by the State (e.g. national human rights policies and/or programmes implemented); and, (5) applicable international humanitarian law."²¹² The Human Rights Council includes in its final reports comments regarding a State party's adherence to human rights obligations as well as recommendations for

²⁰⁷ Nestor M. Davidson, *Rights as a Functional Guide for Service Provision in Homeless Advocacy Creating Healthy Communities: Ending Homelessness*, 26 ST. LOUIS U. PUB. L. REV. 45, 54-55 (2007).

²⁰⁸ Byrne & Culhane, *supra* note 157, at 384.

²⁰⁹ Ann M. Piccard, *The United States' Failure to Ratify the International Covenant on Economic, Social & Cultural Rights: Must the Poor Always Be with Us?*, 13 SCHOLAR 231, 255 (2010).

²¹⁰ *Id.*

²¹¹ G.A. Res. 60/251, ¶ 5 (e), U.N. Doc. A/RES/60/251 (March 15, 2006).

²¹² U.N. Off. of the High Comm'r for Hum. Rts., *Basic Facts About the UPR*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R FOR HUM. RTS., <http://www.ohchr.org/EN/HRBodies/UPR/Pages/BasicFacts.aspx> (last visited Jan. 24, 2014).

the State party to bolster human rights fulfillments.²¹³ The Universal Periodic Review can help the United States monitor its human rights obligations and ensure adherence to both the ICESCR and the ICCPR.

Ratifying the ICESCR will also allow access to the Economic and Social Council's periodic review. Upon ratification the United States commits to reporting practices that discuss its adherence to ICESCR obligations.²¹⁴ After reviewing these reports, the Economic and Social committee can submit to the General Assembly recommendations for the United States to undertake.²¹⁵ This additional review process specific to obligations contained in the ICESCR can help the United States most effectively implement the specific human right to housing.

V. Objection: The *Lindsey* Precedent

Perhaps the strongest argument against implementing a right to housing in the United States is the Supreme Court's decision in *Lindsey v. Normet*. The plaintiffs in *Lindsey* challenged an Oregon law on Due Process and Equal Protection grounds, claiming a "need for decent shelter" and the "right to retain peaceful possession of one's own home."²¹⁶ The Court ruled,

[w]e do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, or any recognition of the right of a tenant to occupy the real property of his landlord beyond the term of his lease without the payment of rent or otherwise contrary to the terms of the relevant agreement. Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.²¹⁷

Thus, under the *Lindsey* decision, the Constitution does not guarantee a right to housing.

²¹³ *Id.*

²¹⁴ ICESCR, *supra* note 9, at art. 16.

²¹⁵ *Id.* at art. 21.

²¹⁶ *Lindsey v. Normet*, 405 U.S. 56, 73 (1972).

²¹⁷ *Id.* at 74.

However, there are several reasons why *Lindsey* is not precedent for a human right to housing as described in the ICESCR. First, the *Lindsey* Court ruled that there is no right to housing *of a particular quality*, and did not rule on the right to any housing at all.²¹⁸ Other courts have also mentioned the *Lindsey* decision, but many have done so only in terms of housing adequacy.²¹⁹ Moreover, General Comment 4, while instrumental in clarifying what “adequate” means, is not binding on States parties. The United Nations furthermore recognizes that the achievement of each component of adequate housing may not be feasible for every State party. Article 2 of the ICESCR even states that each State party is only required to enact the right to housing “to the maximum of its available resources.”²²⁰

Second, the *Lindsey* Court focused on the terms of the lease in question, which evidences its assumption that such housing must necessarily be free.²²¹ However, the ICESCR does not require that any housing be provided free of charge.²²² Taking in conjunction the *Lindsey* Court’s focus on housing quality and cost, it is possible to ignore its decision as housing rights precedence in the United States.²²³

VI. Conclusion

The United States is plagued by a paradigm of criminalization. Municipalities are increasingly enacting and discriminatorily enforcing public order laws that criminalize basic life-sustaining conduct that unsheltered individuals experiencing homelessness must necessarily

²¹⁸ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 173, at 118.

²¹⁹ *Id.* See also *e.g.*, *United Farmworkers of Florida Housing Project v. Delray Beach*, 493 F.2d 799, 808 (5th Cir. 1974). (“We should note here that the farmworkers’ appeal is not based primarily upon a claim of a denial of a fundamental right to decent housing, see *Lindsey v. Normet . . .*”)

²²⁰ ICESCR, *supra* note 9, at art. 2 (1).

²²¹ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 173, at 118.

²²² *Fact Sheet No. 21, The Right to Adequate Housing*, *supra* note 54, at 6. Moreover, the obligations set forth in the ICESCR are slightly more lenient than those in the ICCPR and would allow for compromises in order for a nation to fulfill its provision commitments. This makes the *Lindsey* decision more compatible with ICESCR obligations. Meyer, *supra* note 122, at xxxiv.

²²³ NAT’L LAW CTR. ON HOMELESSNESS AND POVERTY, *supra* note 173, at 118-19.

perform in public. Unsheltered individuals experiencing homelessness must necessarily live in public, and are therefore categorically destined to break the law. Criminalization violates the Eighth Amendment's protection against cruel and unusual punishment. Criminalization also violates the International Covenant on Civil and Political Rights as well as the United States' obligations to the International Covenant on Economic, Social and Cultural Rights.

Homelessness is a *prima facie* violation of the human right to housing, but the United States does not recognize this right. The United States' failure to evaluate homelessness and its criminalization through a human rights lens has both perpetuated criminalization and prevented the United States from effectively eliminating homelessness. Though some lawsuits have successfully challenged the constitutionality of criminalization measures, an appropriate and effective legal framework in which to assess these public order laws has evaded American jurisprudence.

The best way to eradicate criminalization is to establish a human rights framework and the human right to housing. The United States should enact and implement a domestic right to housing by ratifying the International Covenant on Economic, Social and Cultural Rights, using Scottish and French models as successful examples. Such measures will establish a common legal framework in which to address laws targeting individuals experiencing homelessness, and will provide the United States with a more effective way to eliminate homelessness. A right to housing will most appropriately shift governmental efforts from unconstitutional measures and inadequate emergency responses to permanent solutions. A human rights framework is the best hope to transform the national conversation on homelessness from misunderstanding and intolerance to recognition and respect.