

How and Why Homeless People Are Regulated Differently

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Many legal theorists have examined the ways in which homeless people are—and can be—regulated differently than people with homes. Previously applied legal theories have invaluablely contributed to understanding how quality-of-life offences disproportionately impact homeless people's negative freedom or violate their constitutional rights. Despite this, they have certain shortcomings in that they fail to address the harm to homeless people's freedom from potential interference, rather than just actual interference, and the state's capacity to enact rules that disproportionately impact those without access to housing.

This article argues that the republican theory of freedom (or republicanism) demonstrates how and why quality-of-life offences undermine homeless people's freedom but does so in ways that address those shortcomings. Applying Philip Pettit's republican theory of freedom as non-domination, the author argues that existing theoretical accounts, which are concerned with actual interference experienced by homeless people, fail to capture the risk of potential non-egalitarian interference when attempting to lawfully alleviate their needs in private. This risk can lead to homeless people abandoning their preferences, altering their pursuits, or being deferential towards others in order to avoid interference. Consistent with this theory of freedom, the author argues that homeless people who adopt these coping mechanisms to avoid actual interference are not meaningfully free and, furthermore, that the types of non-egalitarian trade-offs that homeless people must make to obey quality-of-life rules suggests that their freedom is undermined in ways ignored by negative freedom and constitutional theories.

The author argues that while theorists recognize that quality-of-life offences may disproportionately affect homeless people because they live in public, they rarely address the non-egalitarian implications of the state's greater capacity to regulate how homeless people alleviate their needs without the privacy of a home. Republicanism thus offers insight into how public authority's greater capacity to regulate common property and protect its value raises important egalitarianism concerns for those who have no private place to live.

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Introduction

How and why does the law regulate homeless people differently than people with access to housing? Some argue that quality-of-life offences criminalize homeless people and disproportionately impact them.¹ Quality-of-life bylaws and ordinances aim to promote community welfare by preventing crime, minimizing public disorder, and maintaining the attractiveness of public spaces.² Quality-of-life rules often regulate need-alleviating public acts that people are supposed to do in private—such as urinating, defecating, or sleeping.³ Theorists contend that these rules criminalize the public existence and survival of

1. See e.g. Maria Foscarinis, “Downward Spiral: Homelessness and Its Criminalization” (1996) 14:1 *Yale L. & Pol’y Rev* 1; National Law Center on Homelessness & Poverty, *No Safe Place: The Criminalization of Homelessness in U.S. Cities* (2014), online: <www.nlchp.org/documents/No_Safe_Place>; David M Smith, “A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy” (1994) 12:2 *Yale L. & Pol’y Rev* 487 at 494; Donald Saelinger, “Nowhere to Go: The Impacts of City Ordinances Criminalizing Homelessness” (2006) 13:3 *Geo J on Poverty L. & Pol’y* 545 at 559; Paul Ades, “The Unconstitutionality of Antihomeless Laws: Ordinances Prohibiting Sleeping in Outdoor Public Areas as a Violation of the Right to Travel” (1989) 77:3 *Cal L Rev* 595 at 619; Bill O’Grady, Stephen Gaetz & Kristy Buccieri, “Policing Street Youth in Toronto” in Stephen Gaetz et al, eds, *Youth Homelessness in Canada: Implications for Policy and Practice* (Toronto: Canadian Homelessness Research Network Press, 2013) 335 at 337–38; Alexandra Natapoff, “Gideon’s Servants and the Criminalization of Poverty” (2015) 12:2 *Ohio State J Criminal L* 445.

2. See Foscarinis, *supra* note 1 at 55. It should be noted, however, that the definition of “quality of life” evolves with time. See Nina Peršak, “Using ‘Quality of Life’ to Legitimate Criminal Law Intervention: Gauging Gravity, Defining Disorder” in AP Simester, Antje du Bois-Pedain & Ulfrid Neumann, eds, *Liberal Criminal Theory: Essays for Andreas von Hirsch* (Oxford: Hart, 2014) 225 at 232–34.

3. See Maria Foscarinis, Kelly Cunningham-Bowers & Kristen E Brown, “Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness” (1999) 6:2 *Geo J on Poverty L. & Pol’y* 145 at 147. The term “need-alleviating act” is taken from Andrew von Hirsch. Andrew von Hirsch, “Proportionate Punishment and Social Deprivation” in Andrew von Hirsch & Andrew Ashworth, eds, *Proportionate Sentencing: Exploring the Principles* (Oxford: Oxford University Press, 2005) 62 at 63–64.

homeless people because they have no private place to sleep or perform their bodily functions.⁴

Others contend that a homeless person's lived experience is characterized by a lack of freedom and independence.⁵ Jeremy Waldron argues that the combined effect of quality-of-life offences and property law rules disproportionately impact homeless people's negative freedom.⁶ Negative freedom is concerned with what people are free to do insofar as others cannot interfere with them or frustrate their wishes.⁷ According to Waldron's argument, "homelessness *consists* in unfreedom" because there is often nowhere homeless people can sleep or perform their bodily functions without interference by others.⁸

Jane Baron, on the other hand, argues that homelessness results in a non-egalitarian distribution of duties on those lacking access to housing.⁹ Building on Wesley Newcomb Hohfeld's concept of jural correlatives,¹⁰ she explains that homeless people have duties not to use or interfere with everyone else's property.¹¹ Yet because homeless people do not have their own private property, others lack reciprocal duties of non-interference towards homeless people.¹²

These scholars have invaluablely contributed to our understanding of how quality-of-life rules disproportionately impact the freedom, dignity, and autonomy of homeless people. Despite these important contributions, this article argues that there are two principal shortfalls to these existing accounts—shortfalls that can be elucidated by the republican theory of freedom (or republicanism) advanced by Philip Pettit.¹³

While the negative theory of freedom articulated by Isaiah Berlin construes freedom as non-interference, republicanism construes freedom as non-domi-

4. See Norman Siegel, "Homelessness: Its Origins, Civil Liberties Problems and Possible Solutions" (1991) 36:5 *Vill L Rev* 1063 at 1077.

5. See e.g. Jeremy Waldron, "Homelessness and the Issue of Freedom" (1991) 39:1 *UCLA L Rev* 295 [Waldron, "Issue of Freedom"]; Jeremy Waldron, "Community and Property: For Those Who Have Neither" (2009) 10:1 *Theor Inq L* 161 at 171ff; Christopher Essert, "Property and Homelessness" (2016) 44:4 *Phil & Publ Aff* 266 at 266, 287; Jane B Baron, "Homelessness as a Property Problem" (2004) 36:2 *Urb Law* 273 [Baron, "Homelessness"]; Jane B Baron, "Property and 'No Property'" (2006) 42:5 *Hous L Rev* 1425 at 1443ff.

6. Waldron, "Issue of Freedom", *supra* note 5 at 304.

7. See Isaiah Berlin, *Four Essays on Liberty* (New York: Oxford University Press, 1969) at 123 [Berlin, *On Liberty*].

8. Waldron, "Issue of Freedom", *supra* note 5 at 306 [emphasis in original].

9. Baron, "Homelessness", *supra* note 5 at 287.

10. Wesley Newcomb Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26:8 *Yale LJ* 710 at 710.

11. Baron, "Homelessness", *supra* note 5 at 287.

12. See *ibid.*

13. See e.g. Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997) [Pettit, *Republicanism*]; Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012) [Pettit, *On the People's Terms*]. Hereafter, the republican theory of freedom is also referred to as republicanism.

nation.¹⁴ Non-domination implies that a person is secure against a risk of interference by others, meaning others lack the power or possibility to interfere with a person's actions, plans, and purposes.¹⁵ Whereas negative freedom suggests a person is free so long as those wielding power over the person cause no interference, republicanism holds that a person cannot be free if they live with the awareness or fear that others have the potential to interfere with the person's choices and purposes.¹⁶ The republican theory of freedom therefore provides new insight into how the law regulates and can regulate homeless people differently than people with access to housing.¹⁷

The first shortfall of existing accounts is that arguments based on negative freedom are primarily concerned with the *actual* interference that homeless people experience in their daily lives.¹⁸ Yet homeless people might abandon their preferences, avoid certain spaces, be forced to make non-egalitarian trade-offs, or adopt a deferential attitude to avoid breaking quality-of-life rules and escape *potential* interference as well.¹⁹ Republicanism illustrates why homeless people adopting these coping mechanisms are not meaningfully free, even if they experience little actual interference by others in their daily lives.²⁰ This article argues that the republican theory of freedom—construing freedom as the lack of potential interference by others—captures how quality-of-life offences impact homeless people's freedom in these non-egalitarian ways.

This article proposes that quality-of-life offences prohibiting acts such as camping in public, public urination or defecation, and sleeping in public spaces are structured differently than traditional criminal and regulatory offences. This is because some quality-of-life rules, by requiring people to alleviate their needs in a private place, operate like affirmative duties to act. But unlike other affirmative duties to act, quality-of-life offences result in others possessing the power to consistently interfere with a homeless person's fulfillment of that duty in ways that fail to exculpate the homeless person from liability.

The second shortfall in existing theory is that scholars tend to focus exclusively on how laws disproportionately affect homeless people once they are en-

14. See Pettit, *On the People's Terms*, *supra* note 13 at 64.

15. See Tarunabh Khaitan, *A Theory of Discrimination Law* (Oxford: Oxford University Press, 2015) at 96–98, 100–01.

16. See Pettit, *On the People's Terms*, *supra* note 13 at 62; Berlin, *On Liberty*, *supra* note 7 at 123.

17. See Essert, *supra* note 5. Essert has recently argued that republicanism illustrates how homeless people's freedom is undermined by their lack of property, resulting in homeless people being dependent on others in many aspects of their lived experience. *Ibid.*

18. See Pettit, *Republicanism*, *supra* note 13 at 63–64.

19. See Pettit, *On the People's Terms*, *supra* note 13 at 64–65; Cécile Laborde & John Maynor, "The Republican Contribution to Contemporary Political Theory" in Cécile Laborde & John Maynor, eds, *Republicanism and Political Theory* (Malden, MA: Blackwell, 2008) 1 at 6–7.

20. See Pettit, *On the People's Terms*, *supra* note 13.

acted—the issue of how the law *does* regulate homeless people differently than people with homes. They are less concerned with the state’s *capacity* to enact rules that disproportionately impact those without access to housing. The latter is a distinct issue that examines how the law *can* regulate people with and without property differently.

This article argues that there may be compelling reasons for regulating a certain act in public, including to minimize damage to public spaces, solve collective action problems, promote safety, and protect public health.²¹ But these same reasons cannot always justify prohibiting and policing that same act in the privacy of one’s home. Furthermore, in some cases, it would be pro-foundly intrusive to regulate and surveil how people harmlessly alleviate their needs in private, making it difficult for such a rule governing private acts to satisfy proportionality analysis under section 1 of the *Canadian Charter of Rights and Freedoms*.²²

To be clear, this article does not intend to provide a complete section 1 *Charter* analysis that examines when quality-of-life offences justifiably restrict a person’s constitutional rights. However, a general consideration of the proportionality principles underlying section 1 of the *Charter* demonstrates why those with access to housing are afforded increased protection against the state’s capacity to police basic human acts that are done in the privacy of their homes. Conversely, a general consideration of the proportionality principles central to section 1 of the *Charter* suggests that homeless people do not benefit from a comparable degree of protection, due to the compelling justifications for regulating public spaces in order to protect their role and value.

While constitutional law and negative freedom theories can address the moral problems of quality-of-life offences that egregiously impact homeless people, they are less capable of addressing the state’s increased capacity to regulate so many different aspects of a homeless person’s daily existence. The republican theory of freedom, therefore, highlights the non-egalitarian capacity that the state possesses to regulate the lives of those without property to a much greater extent. In a world where the state increasingly regulates common property and access to affordable housing becomes more and more limited, republicanism illustrates why these realities generate important concerns. Ultimately, both the state and those with property power can be afforded control over the basic acts of people who have nowhere to live except in public.

21. See e.g. *Victoria (City) v Adams*, 2008 BCSC 1363 at para 172, 299 DLR (4th) 193 [*Adams* BCSC]; Foscarinis, *supra* note 1 at 55.

22. Part I of the *Constitution Act, 1982*, s 1, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

I. Homelessness, Public Property, and Quality-of-Life Rules

The starting point of this article's arguments is the distinction between common property and private property—a distinction that admittedly remains contested and complex.²³ Though an elaborate theoretical distinction between private property and common property is beyond the scope of this article, this section sets out how the terms “private property” and “common property” will be used and distinguishes their roles and values from each other.

Consider first private property. To avoid confusion, the term private property is used in this article to mean a thing or object over which a person can have a private right “to determine how the object is used and by whom”.²⁴ Individuals with a private property right have the power to exclude others—a power that some argue is the defining aspect of private property.²⁵ Private property includes spaces such as a house, apartment, shop, restaurant, and so on. Those holding a private property right also have the power to set the agenda of their property by determining how others can use it.²⁶

The power to set the agenda of one's private property and exclude others provides predictability and privacy in one's life by reducing the risk of outside interference by others.²⁷ Private property therefore gives people control over their future plans and way of living, by endowing its owners with the power to decide who can use their property and for what purposes.²⁸ Having a private property right also protects expectations by providing a home's inhabitants with privacy and security, while securing their possessions against outside interference.²⁹ Some have argued that private property's protection of these fundamental interests illustrates why private property can be intimately tied to one's personhood.³⁰ As Margaret Radin explains:

23. See Elinor Ostrom & Charlotte Hess, “Private and Common Property Rights” in Boudewijn Bouckaert, ed, *Property Law and Economics*, 2nd ed, vol 5 (Cheltenham, UK: Edward Elgar, 2010) 53 at 54.

24. Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 39 [Waldron, *The Right to Private Property*].

25. See e.g. Morris R Cohen, “Property and Sovereignty” (1927) 13:1 Cornell L Rev 8 at 12; Thomas W Merrill, “Property and the Right to Exclude” (1998) 77:4 Neb L Rev 730.

26. See Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58:3 UTLJ 275 at 278.

27. See Margaret Jane Radin, “Property and Personhood” (1982) 34:5 Stan L Rev 957 at 968; Joel Feinberg, *The Moral Limits of the Criminal Law Volume 2: Offense to Others*, vol 2 (Oxford: Oxford University Press, 1988) at 23–24.

28. See generally Adam J MacLeod, *Property and Practical Reason* (Cambridge: Cambridge University Press, 2015) at 12ff.

29. See D Benjamin Barros, “Home as a Legal Concept” (2006) 46:2 Santa Clara L Rev 255 at 259.

30. See Radin, *supra* note 27 at 959.

Most people possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world. They may be as different as people are different, but some common examples might be a wedding ring, a portrait, an heirloom, or a house.³¹

Like the term private property, the term common property also risks generating confusion.³² As Michael Robertson notes, common property is sometimes used interchangeably with terms such as “public property”, “public spaces”, or “public commons”.³³ However, some theorists use these terms to denote different concepts.³⁴ For the sake of avoiding potential confusion, this article adopts Sarah Hamill’s usage of the term “common property” to imply “instances of public property which are open to the public”, such as parks, streets, and sidewalks.³⁵ Furthermore, the term “common property” suggests that individuals are not required to secure someone’s permission to use the spaces the term encompasses.³⁶ As Crawford Macpherson observes, each person has a right to use common property.³⁷ Cities or the state enact laws that govern common property, including the times these spaces are open or closed to the public, and the types of conduct that are permitted in them.

Common property has an important role and value that distinguishes it from private property. Common property allows for intermingling, exchanges of ideas, public discourse, recreation, protest, and other forms of democratic gathering among an array of individuals with conflicting interests.³⁸ As Carol Rose argues, the possibility of such types of communal interaction enhances the value of public activities and gatherings, and the value of public space more generally.³⁹ Common property also permits gatherings and interactions that may not be possible on private property. Certain private spaces may be too small in size for certain types of recreation or activities. The closed nature of

31. *Ibid.*

32. See Waldron, *The Right to Private Property*, *supra* note 24 at 26 (discussing disagreement on the definition of “private property”).

33. Michael Robertson, “Common Property *Redux*” (2016) 49:2 UBC L Rev 563 at 563.

34. See e.g. Sarah E Hamill, “Private Rights to Public Property: The Evolution of Common Property in Canada” (2012) 58:2 McGill LJ 365 at 371. Hamill provides a useful summary of how theorists use terms such as “public property” and “common property” to mean different concepts. *Ibid.*

35. *Ibid* at 367, n 2.

36. See Waldron, “Issue of Freedom”, *supra* note 5 at 297–98.

37. CB Macpherson, “The Meaning of Property” in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 1 at 5.

38. See Robert C Ellickson, “Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning” (1996) 105:5 Yale LJ 1165 at 1168.

39. Carol Rose, “The Comedy of the Commons: Custom, Commerce, and Inherently Public Property” (1986) 53:3 U Chicago L Rev 711 at 779 [Rose, “Comedy”]; Carol M Rose, “Takings and the Practices of Property: Property as Wealth, Property as ‘Propriety’” in Carol M Rose, ed, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Boulder: Westview Press, 1994) 49 at 54–55 [Rose, “Takings”].

private spaces may preclude some forms of spontaneous interaction that occur on common property. Common property, therefore, has a certain sanctity, role, and value that distinguishes it from private property.

There are compelling reasons to regulate common property and protect its role and communal value. Theorists have advanced different justifications for using quality-of-life offences to regulate the use of common property. Maria Foscarinis, Kelly Cunningham-Bowers, and Kristen Brown observe that such rules are often justified on the basis that they promote public welfare, sanitation, aesthetics, and safety, and protect economic interests.⁴⁰ According to some theories, a failure to adequately regulate common property, such as parks and sidewalks, will cause people to avoid them, ultimately depriving people of the very communal interaction and democratic gathering that these spaces permit.⁴¹

Garrett Hardin remarks that individuals using common property have conflicting individual interests and expectations.⁴² Each person seeks to maximize their use of common property so as to incur the greatest individual benefit.⁴³ In Hardin's view, a system of mutual coercion is necessary to prevent what he calls a "tragedy of the commons".⁴⁴ This tragedy occurs when many individuals' simultaneous attempts to maximize their individual benefit from common property ultimately undermine its value for everyone.⁴⁵ In Hardin's words: "Ruin is the destination toward which all men run, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a common brings ruin to all."⁴⁶

Quality-of-life offences provide the necessary mutual coercion that Hardin mentions. Arthur Ripstein observes that laws enacted by public institutions ensure that individuals do not unilaterally restrict others' choices in a way that frustrates individuals' purposes.⁴⁷ Quality-of-life rules therefore resolve collective action problems among people with different expectations, by dictating how common property can be used.

Quality-of-life rules can be comprehensive or non-comprehensive in nature. Comprehensive rules prohibit certain behaviours in all public places and at all times.⁴⁸ There are many examples of bylaws and ordinances that compre-

40. Foscarinis, Cunningham-Bowers & Brown, *supra* note 3 at 152–56.

41. See e.g. Robert Teir, "Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging" (1993) 54:2 *La L Rev* 285 at 288–89.

42. Garrett Hardin, "The Tragedy of the Commons" (1968) 162:3859 *Science* 1243 at 1244.

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. *Ibid.*

47. Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge: Harvard University Press, 2009) at 157.

48. See Foscarinis, *supra* note 1 at 16–17.

hensively prohibit certain public acts. The City of Victoria had bylaws that made it an offence to camp or erect temporary shelters on common property,⁴⁹ until the bylaws were ruled to be constitutionally overbroad by the British Columbia Court of Appeal in 2009.⁵⁰ A City of Saskatoon bylaw prohibits spitting, urinating, and defecating in any public place.⁵¹ A City of Dallas municipal ordinance bans sleeping in public at all times and in all public places.⁵² Lastly, the *Penal Code of California* bans lodging in public places.⁵³

Other quality-of-life offences are non-comprehensive, in that their scope of application is limited. These rules can prohibit specific public acts or limit access to public spaces between certain hours.⁵⁴ There are three forms of non-comprehensive rules. First, some rules limit access to areas such as parks or subway stations between certain times (generally at night). For instance, a City of Ottawa bylaw mandates park closures between 11 p.m. and 5 a.m. unless otherwise specified.⁵⁵ Second, rules can prohibit certain conduct at all times, but apply only to certain public spaces. One example is a City of Montreal bylaw that prohibits sleeping on subway benches and on the floor of subway stations at all times.⁵⁶ Third, certain rules prohibit an act at certain times and in certain public places. A provision of San Francisco's *Police Code* operates in this way. It proscribes sitting or lying on sidewalks between 7 a.m. and 11 p.m.⁵⁷

II. The Structure of Quality-of-Life Rules That Regulate Need-Alleviation

Quality-of-life rules presume complementarity between public and private spaces.⁵⁸ In other words, these rules presume that people have a default private

49. City of Victoria, bylaw No 07-059, *Parks Regulation Bylaw* (9 August 2007), s 14(d) as it appeared on 9 December 2009; City of Victoria, bylaw No 92-84, *Streets and Traffic Bylaw*, s 74 as it appeared on 9 December 2012.

50. *Victoria (City) v Adams*, 2009 BCCA 563, 313 DLR (4th) 29 [*Adams* BCCA].

51. City of Saskatoon, bylaw No 8354, *The Public Spitting, Urination and Defecation Prohibition Bylaw, 2004* (2018), s 4 [Saskatoon Bylaw].

52. *Johnson v City of Dallas*, TX, 61 F (3d) 442 (5th Cir 1995); Dallas, Tex, Code of Ordinances, vol 2, ch 31P § 31-13 (2018) [Dallas Code of Ordinances].

53. 1, Cal Penal Code tit 15, ch 2 § 647 (1985).

54. See Foscarinis, *supra* note 1 at 18.

55. City of Ottawa, bylaw No 2004-276, *Parks and Facilities By-law*, s 3.

56. City of Montréal, revised bylaw R-036, *By-law on the Standards of Safety and Conduct to be Observed by Persons in the Rolling Stock and Buildings Operated by or for the Société de Transport de Montréal*, ss 4(c)–(d).

57. SF, Cal, Police Code art 2 § 168(b) (Supp 2018).

58. See Jeremy Waldron, “Homelessness and Community” (2000) 50:4 UTLJ 371 at 373–74, 394.

place where they can do basic acts like sleep, urinate, and wash themselves.⁵⁹ So when people do these acts in public, they are considered to have undertaken the acts in a complementary way (or as an alternative) to what they could have done in private. This grounds individual responsibility because people could have obeyed the rule by sleeping or urinating in the privacy of their homes instead of in public.⁶⁰

The structure of some quality-of-life rules differs from other types of legal rules in two main ways. First, quality-of-life offences sometimes regulate need-alleviating acts in which everyone engages and that people cannot abstain from doing, such as sleeping and defecating. Second, quality-of-life rules require individuals to alleviate their needs in private to avoid breaking the rule. Each of the above-mentioned characteristics will be examined in turn.

First, some quality-of-life rules govern behaviours in which every human being needs to engage in. Waldron rightfully points out that people will harm themselves if they try and abstain from sleeping, urinating, or defecating for a sufficiently long period of time.⁶¹ In many respects, this is what distinguishes traditional criminal law prohibitions against assault or arson from a rule that regulates sleep or urination. One might question whether certain individuals cannot control their impulses to assault others or set fire to property.⁶² This is a complicated moral and scientific question tied to notions of voluntariness, fair blaming practices, and moral responsibility.⁶³ Though perhaps a limited number of individuals may be less able (or unable) to control these impulses, every individual must necessarily eat, sleep, and urinate. Quality-of-life rules therefore differ in how they regulate acts that everyone must do.

Second, quality-of-life offences can require individuals to do some act in private to avoid breaking the law. Having a private place to defecate, for instance, protects individuals from the hostile reactions generated by doing that act in public.⁶⁴ Many criminal laws are structured in a way that merely prohibits an individual from doing some act in any place, because the relevant act is reprehensible irrespective of whether it is committed in public or in private.⁶⁵ Prohibitions against assault, theft, and uttering threats are prime examples.

59. See *ibid.*

60. See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed (Oxford: Oxford University Press, 2008) at 23–24 (discussing the relationship between choice and freedom from criminal punishment).

61. Waldron, “Issue of Freedom”, *supra* note 5 at 321.

62. For discussion of irresistible impulse and its rejection, see Arlie Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012) at 114–24.

63. See Nicola Lacey & Hanna Pickard, “From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm” (2013) 33:1 *Oxford J Leg Stud* 1 at 2–5.

64. See Ruth Gavison, “Privacy and the Limits of Law” (1980) 89:3 *Yale LJ* 421 at 451.

65. See RA Duff, *Punishment, Communication, and Community* (Oxford: Oxford University Press,

Some criminal laws *do* require individuals to do a particular act in a private place. A consensual but public sexual act is considered to be indecent and unlawful, while the same sexual act undertaken in private is not.⁶⁶ It is not the nature of the act itself that is necessarily morally objectionable. Rather, the place where the act is done is deemed to be inappropriate.⁶⁷ Acts that are considered to be inappropriate only when they are done in public therefore require the provision of some private place to make the act lawful. Quality-of-life rules governing public urination, defecation, and public sleeping or camping are structured in this way.

Quality-of-life offences sharing both of the above-mentioned characteristics—that the regulated act must be engaged in by everyone and that it must be done in private to be legal—guide conduct differently than traditional criminal or regulatory offences that prohibit a positive act.⁶⁸ There are several reasons for this.

For one, some quality-of-life offences operate similarly to rules that impose an affirmative duty to act. Suppose a rule states something along the following lines: it is an offence for any person to sleep in public.⁶⁹ Such a rule can also be construed as follows: everyone has the duty to sleep in a private place. Affirmative duties to act can require the duty-bearer to devote time, trouble, or planning in order to fulfill the duty.⁷⁰ This is evident in cases where a rule imposes an affirmative duty to perform an act in private to avoid liability. Suppose that a person is walking home late at night and has to urinate, but a law prohibits public urination.⁷¹ In order to obey the law, he or she must devote a degree of time and energy to find a private place, travel to it, and if applicable, get permission to use someone else's private property. Rules that prohibit a positive act generally do not require people to devote any comparable degree of time or energy to obey them. In general, all the agent has to do is be aware of the prohibition and refrain from doing whatever the law prohibits.

Additionally, affirmative duties to act restrict an agent's autonomy and liberty in ways that prohibitions against positive acts do not.⁷² Affirmative duties

2001) at 64; *R v Hinchey*, [1996] 3 SCR 1128 at para 26, 147 Nfd & PEIR 1, citing Alan W Mewett & Morris Manning, *Mewett & Manning on Criminal Law*, 3rd ed, (Toronto: Butterworths, 1994) at 16–17.

66. See *Criminal Code*, RSC 1985, c C-46, s 173.

67. See Feinberg, *supra* note 27 at 40; John Stuart Mill, *On Liberty*, 2nd ed (Boston: Ticknor and Fields, 1863) at 189.

68. For a discussion of the conduct-guiding function of rules, see Hart, *supra* note 60 at 23–24; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) at 214.

69. See e.g. Dallas Code of Ordinances, *supra* note 52, § 31-13.

70. See Tony Honoré, *Responsibility and Fault* (Oxford: Hart, 1999) at 44.

71. See e.g. Saskatoon Bylaw, *supra* note 51, s 4. The bylaw states: “No person shall defecate or urinate in public on any private property or in or on a public place.” *Ibid.*

72. See Jonathan Bennett, “Morality and Consequences” (Tanner Lectures on Human Values

to act require a person to adopt one particular course of conduct and refrain from doing anything else. When people are obliged to do something, they lose the freedom and autonomy that they normally have to act as they wish. Prohibiting a positive act, however, allows people to do any other lawful act, as long as they do not do what is prohibited.⁷³ Individuals therefore maintain a far greater degree of freedom and autonomy when the law merely forbids them from doing something. As Simester opines in this respect: “[C]ompare being prohibited from drowning the other swimmers when sun-bathing at a beach to being mandated to save (or, indeed, drown) them”.⁷⁴

Certain quality-of-life offences operate like affirmative duties to act, guiding conduct in similar ways, and can impose significant restrictions on freedom and autonomy. A person’s urgency to alleviate his or her needs restricts his or her ability to engage in other acts. This constraint stems from the human experience, not the law. A person is able to refrain from sleeping or performing bodily functions for a given period of time. During this time, they can plan out where they will do these things.

As time passes, however, the sense of urgency undermines an opportunity to engage in other acts. Thus, the greater a person’s urgency in having to alleviate their needs, the lesser the opportunity to engage in other acts. This sense of urgency also decreases the range of places where a person can sleep, urinate, or defecate. A person may not have the time to access a private place, such as a restaurant, bar, shopping mall, or public bathroom that is far away. So, the more a person needs to sleep or perform their bodily functions, the less freedom and autonomy they have to do other acts and choose where to alleviate their needs.

The fact that people must alleviate their needs distinguishes quality-of-life rules from laws that prohibit public nudity or sexual intercourse in public.⁷⁵ The agent retains the fundamental choice to abstain from sexual intercourse or public nudity if he or she pleases. Individuals retain a crucial degree of autonomy and freedom in deciding whether or not to do these acts and obey the applicable laws. They also retain the capacity to engage in all other non-prohibited acts. Thus, unlike a rule that requires individuals to urinate or defecate in private, a rule that requires individuals to be nude or have sexual intercourse in private does not impose an affirmative duty to act.

delivered at Brasenose College, Oxford University, 9, 16, 23 May 1980) in Sterling M McMurrin, ed, *The Tanner Lectures on Human Values, 1981*, vol 2 (Cambridge: Cambridge University Press, 2011) at 77.

73. See Andrew Ashworth, “The Scope of Criminal Liability for Omissions” (1989) 105:3 Law Q Rev 424 at 427.

74. AP Simester, “Why Omissions are Special” (1995) 1:3 Leg Theory 311 at 324.

75. *Criminal Code*, *supra* note 66, ss 173–75.

III. Affirmative Duties to Alleviate One's Needs in Private Versus Traditional Affirmative Duties to Act

Even though quality-of-life offences operate like rules that impose an affirmative duty to act, the former still differ from the latter in two key respects. First, others can control whether a person fulfills the affirmative duty imposed by quality-of-life offences to alleviate his or her needs in a private place. In contrast, for traditional rules that impose an affirmative duty to act, the person is the one who generally controls whether he or she fulfills the duty.

Scholars remark that rules creating liability for omissions restrict freedom by eliminating alternate lawful *courses of action*. For instance, French law imposes an affirmative duty to rescue.⁷⁶ When an individual is drowning, the agent cannot do anything other than save the victim. But the agent does not need a life-guard's or someone else's permission to do so. Quality-of-life offences impose a duty to act that operates differently. Notably, others can control whether an agent fulfills the duty to alleviate his or her needs in private by denying the agent access to their private property.

One might argue that in certain cases, the law imposes an affirmative duty to act *and* others have the potential to interfere with the agent's ability to fulfill that duty. The argument may go something like this. Doctors have an affirmative duty to assist a sick patient. The fulfilment of the duty is subject to the patient's consent. The consent requirement can frustrate doctors' fulfillment of their duty. It might therefore appear as if a doctor's ability to fulfill his or her duty of care is subject to interference by the patient. In this way, the patient might be said to have a degree of control over the doctor's ability to fulfill his or her affirmative duty.

But characterizing the patient's decision as a form of interference is misleading because the patient's autonomy is given primacy over the doctor's affirmative duty of care. This is true even if others view the patient's conception of well-being as irrational. When the patient refuses treatment, there is no interference with the doctor's duty of care because the doctor is acting consistently with the patient's wishes as opposed to frustrating them. The patient is therefore in the privileged position to make decisions regarding his or her health, provided the patient has the requisite legal capacity to do so.⁷⁷ Doctors who abstain from treating a patient who refuses care ultimately fulfill their legal duty.

76. Art 223-6 C pén [*Code pénal*].

77. See Pettit, *Republicanism*, *supra* note 13 at 55; *Re T*, [1992] EWCA Civ 18, [1993] Fam 95; *AC v Manitoba (Director of Child and Family Services)*, 2009 SCC 30 at para 30, [2009] 2 SCR 181.

This doctor/patient example illustrates the second way in which rules imposing a duty to alleviate one's needs in private differs from other rules imposing affirmative duties to act. In the example described above, the patient's refusal to accept treatment exculpates the doctor from liability. For traditional duties to act, interference with the agent's duty of care will provide a strong claim that the agent should be exculpated from liability. Consider again the duty to rescue that applies in France.⁷⁸ Suppose that another person restrained the agent from entering the water and saving the victim. This would militate in favour of exculpating the agent from liability because the agent lacked a fair choice or opportunity to fulfill the affirmative duty to act, even if he or she tried to fulfill it.⁷⁹

Conversely, suppose a homeless person asks a shopkeeper to use their bathroom. The shopkeeper exercises their power to exclude the homeless person. The homeless person has two duties in this case: the duty to urinate in a private place and the duty not to interfere with the shopkeeper's private property right. Yet the duty not to interfere with others' private property takes precedence over the homeless person's duty to alleviate his or her needs in private. As a result, the shopkeeper's refusal fails to exculpate the homeless person if the latter violates a quality-of-life bylaw.

The reality of homelessness means these types of situations can occur several times a day, especially in cases where public bathrooms or homeless shelter spaces are lacking. Those who own private property therefore possess something akin to a non-reviewable form of delegated authority over homeless people, because the decision to exclude others from their property is largely insulated from appeal, constitutional review, or judicial review.⁸⁰ As quality-of-life rules become more comprehensive in nature, and public resources ensuring complementarity become more limited, those with a private right increasingly are delegated such non-reviewable authority.

IV. Negative Freedom and Republicanism

The fact that some quality-of-life offences operate like affirmative duties to act generates important consequences for the homeless. The previous sections demonstrate how such rules disproportionately impact homeless people in sev-

78. *Code pénal*, *supra* note 76, art 223–6.

79. See Hart, *supra* note 60 at 152.

80. See Pettit, *Republicanism*, *supra* note 13 at 65. There are exceptions to this principle. Certain provincial human rights codes apply to private individuals providing certain services, and prohibit discrimination in the provision of these services. Some human rights codes include discrimination against a person on the basis that they are recipients of public assistance. See e.g. *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 2(m.01)(xiv). Others provide that a person's source of income can constitute a ground of discrimination. See e.g. *Human Rights Act*, RSNS 1989, c 214, s 5(1)(t).

eral non-egalitarian ways. First, homeless people may have to consistently devote time, energy, and planning to lawfully alleviate their needs in private, whereas people with housing generally do not. Second, the homeless consistently experience potential interference when attempting to alleviate their needs in private places. Third, when others interfere with a homeless person's duty to sleep or perform their bodily functions in private, the homeless person is not exculpated from liability. Fourth, when there are insufficient public resources available to homeless people, individuals with a private property right have a form of delegated authority over the homeless. Fifth, this delegated authority tends to be non-reviewable.

Some, such as Waldron, argue that quality-of-life rules are morally objectionable in how they disproportionately impact the negative freedom of homeless people.⁸¹ Negative freedom is primarily concerned with actual interference as opposed to potential interference.⁸² Berlin describes negative freedom in the following way: "I am normally said to be free to the degree to which no man or body of men interferes with my activity."⁸³ In another relevant passage, he writes:

The criterion of oppression is the part that I believe to be played by other human beings, directly or indirectly, with or without the intention of doing so, in frustrating my wishes. By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.⁸⁴

Building on Berlin's work, Waldron contends that homeless people lack negative freedom.⁸⁵ In his words:

At the very least, negative freedom is freedom from obstructions such as someone else's forceful effort to prevent one from doing something. In exactly this negative sense (absence of forcible interference), the homeless person is unfree to be in any place governed by a private property rule (unless the owner for some reason elects to give him his permission to be there). The familiar claim that, in the negative sense of "freedom," the poor are as free as the rest of us—and that you have to move to a positive definition in order to dispute that—is simply false.⁸⁶

According to Waldron's argument, homeless people's lack of negative freedom stems from two sources. First, quality-of-life rules restrict their negative freedom to alleviate their needs in public.⁸⁷ Second, those with a private right

81. Waldron, "Issue of Freedom", *supra* note 5 at 304.

82. See Philip Pettit, "The Instability of Freedom as Noninterference: The Case of Isaiah Berlin" (2011) 121:4 *Ethics* 693 at 701.

83. Berlin, *On Liberty*, *supra* note 7 at 122.

84. *Ibid* at 123.

85. Waldron, "Issue of Freedom", *supra* note 5 at 304.

86. *Ibid*.

87. *Ibid* at 311–12.

can deny homeless people access to their private property.⁸⁸ This impedes homeless people's ability to lawfully sleep, defecate, or urinate in private.⁸⁹ Waldron concludes that homeless people are negatively unfree because they lack complementarity between public and private space:

Since the public and the private are complementary, the activities performed in public are to be the complement of those appropriately performed in private. This complementarity works fine for those who have the benefit of both sorts of places. However, it is disastrous for those who must live their whole lives on common land.⁹⁰

Waldron's argument highlights important concerns regarding these types of quality-of-life rules. But negative freedom arguments overlook how quality-of-life rules impact homeless people's freedom in other notable ways that republicanism elucidates.

Republicanism construes freedom as the absence of potential interference.⁹¹ It is concerned with the moral problems inherent to situations or relationships where one individual unilaterally wields power over another person.⁹² It is exemplified by the historic contrast between the citizen as a free person and the slave who lives with a consistent risk of interference by others.⁹³ As Pettit argues:

The republican tradition is unanimous in casting freedom as the opposite of slavery, and in seeing exposure to the arbitrary will of another, or living at the mercy of another, as the great evil. The contrary of the *liber* or free person in Roman, republican usage was the *servus* or slave. Whereas the slave lived at the beck and call of a master, the free person enjoyed a status at the other extreme.⁹⁴

According to the republican theory of freedom an agent cannot be free knowing that he or she stand on unequal ground vis-à-vis others because others have the power to interfere with the agent at will. The agent is unfree because the agent cannot predict when others will interfere with his or her plans or purposes.⁹⁵ As Pettit argues, an unfree agent cannot look in the eye others who wield power over them, because the agent knows he or she are dependent on others' will and whims in order to be free:

88. *Ibid* at 311.

89. *Ibid* at 310–11.

90. *Ibid* at 301.

91. See Pettit, *Republicanism*, *supra* note 13 at 65–66.

92. See *ibid* at 66.

93. See *ibid* at 31–32.

94. *Ibid*.

95. See *ibid* at 85.

In the received republican image, free persons can walk tall, and look others in the eye. They do not depend on anyone's grace or favour for being able to choose their mode of life. And they relate to one another in a shared, mutually reinforcing consciousness of enjoying this independence. Thus, in the established terms of republican denigration, they do not have to bow or scrape, toady or kowtow, fawn or flatter; they do not have to placate any others with beguiling smiles or mincing steps. In short, they do not have to live on their wits, whether out of fear or deference. They are their own men and women, and however deeply they bind themselves to one another, as in love or friendship or trust, they do so freely, reaching out to one another from positions of relatively equal strength.⁹⁶

Christopher Essert has recently argued that republicanism demonstrates a primary problem ignored by negative freedom arguments.⁹⁷ Similarly to Baron, he argues that homeless people are constantly subject to others' choices because the homeless lack their own property.⁹⁸ Though homeless people can consistently be excluded by others from private property, they lack their own reciprocal power of exclusion.⁹⁹ This makes homeless people dependent agents, because nearly everything they do requires other people's permission: "Homelessness is a distinctive condition constituted not by a lack of goods or access to goods but by a lack of rights, in particular property rights. To be homeless is to be under the power of others—to be dominated by them or dependent on them—in respect of where one may be."¹⁰⁰

Having briefly set out some initial distinctions between negative freedom and republicanism, the next section builds on Essert's recent work. It illustrates how quality-of-life rules disproportionately impact the freedom of homeless people in two principal ways that a negative theory of freedom overlooks and that republicanism adequately takes into account.

V. How Quality-of-Life Offences Impact Homeless People's Freedom: Two Shortfalls to Negative Freedom Arguments

A. Negative Theory, Preference Adaptation, and Benevolent Treatment

The first shortfall of negative freedom arguments is that they are predominantly concerned with one's freedom from actual interference.¹⁰¹ Focusing ex-

96. Pettit, *On the People's Terms*, *supra* note 13 at 82.

97. Essert, *supra* note 5 at 276–78.

98. *Ibid.* See Baron, "Homelessness", *supra* note 5 at 287.

99. See Baron, "Homelessness", *supra* note 5 at 287.

100. Essert, *supra* note 5 at 266.

101. See Berlin, *On Liberty*, *supra* note 7 at 122–23; Charles Larmore, "Liberal and Republican Conceptions of Freedom" in Daniel Weinstock & Christian Nadeau, eds, *Republicanism: History*,

clusively on actual interference ignores how the homeless might change their preferences, adopt a deferential attitude, ingratiate themselves to others, avoid others, or renounce their own pursuits to avoid interference.¹⁰²

Along the lines of what Pettit argues, this focus leads to the absurd conclusion that homeless people who relinquish their authenticity, projects, or purposes are in fact free, as long as others do not actually interfere with them.¹⁰³ The republican theory of freedom, however, recognizes that an agent who changes his or her behaviour out of a reasonable fear of interference by others is not meaningfully free, even if others do not actually interfere with the agent.¹⁰⁴ Two examples illustrate this point.

First, Céline Bellot and Marie-Marthe Cousineau's research explains that some homeless people leave the subway system when they see special constables who enforce transportation bylaws.¹⁰⁵ They note that these homeless people do so to avoid being expelled or fined, even when they have not violated any bylaws.¹⁰⁶ These homeless individuals would not have a valid claim that constables undermined their negative freedom because they experienced no actual interference. Yet the fact that homeless people avoid public spaces even when they have done nothing wrong suggests that their freedom is impacted in non-egalitarian ways. Second, in *Abbotsford (City) v Shantz*, the Supreme Court of British Columbia observed that some homeless people move to hidden and secluded areas to avoid being fined for violating quality-of-life offences or being displaced by the police.¹⁰⁷ The Court concluded that it was more difficult for homeless people to receive services and support if they moved to more secluded places, while also increasing the risks to their health and safety.¹⁰⁸ In these two cases, the threat of interference is sufficient to make homeless people abandon their preferences in an attempt to escape interference.¹⁰⁹ Con-

Theory and Practice (London: Frank Cass, 2004) 96.

102. See Pettit, *On the People's Terms*, *supra* note 13 at 64.

103. *Ibid.* It should be noted that in a revised edition of Berlin's work, Berlin admitted that construing freedom of non-interference led to the problem that people would abandon their authenticity and preferences to avoid interference. See Isaiah Berlin, *Liberty: Incorporating Four Essays on Liberty*, ed by Henry Hardy (Oxford: Oxford University Press, 2002) at 30–31.

104. See Pettit, *On the People's Terms*, *supra* note 13; Khaitan, *supra* note 15 at 100–01.

105. Céline Bellot & Marie-Marthe Cousineau, "Le métro: espace de vie, espace de contrôle" (1996) 20:4 *Déviance & société* 377 at 382, 385.

106. *Ibid.*

107. 2015 BCSC 1909 at para 213, 392 DLR (4th) 106.

108. *Ibid.*

109. See Kristy Buccieri, "Waldo 101: Mapping the Intersections of Space, Place, and Gender in the Lives of Ten Homeless Youth" in Stephen Gaetz et al, eds, *Youth Homelessness in Canada: Implications for Policy and Practice* (Toronto: Canadian Homelessness Research Network Press, 2013), 425 at 430.

sistent with what Nicholas Blomley argues, the account proposed in this article goes beyond “a narrowly circumscribed defense of negative liberties”.¹¹⁰

Negative freedom arguments also fail to capture the moral objections to quality-of-life rules in contexts where the power to exclude is exercised benevolently towards the homeless.¹¹¹ Suppose a city that prohibits public urination also lacks public bathrooms. Suppose further that every day, the same homeless person asks a shopkeeper to use their bathroom. The shopkeeper accepts the homeless person’s request one third of the time. Sometimes, the shopkeeper allows the homeless person to use the bathroom for two consecutive days. Other times, the shopkeeper denies the homeless person access to the bathroom for a consecutive week at a time. The homeless person, therefore, cannot predict when they can use the shopkeeper’s bathroom. He or she has a strong claim that their negative freedom is impacted when the shopkeeper denies permission to enter the shop’s bathroom. But the homeless person has a far weaker claim that their negative freedom is undermined when the shopkeeper benevolently gives the homeless person permission to use the bathroom.¹¹²

Republicanism, however, recognizes that even in these types of cases, the homeless person’s freedom is undermined by the shopkeeper’s unilateral power over the homeless person.¹¹³ The shopkeeper knows that he or she can deny the homeless person entry whenever he or she pleases. Conversely, the homeless person knows that the shopkeeper can refuse to let them use the bathroom at will.

This shared awareness that the shopkeeper wields some power over the homeless person provides compelling reasons why the homeless person being treated benevolently by the shopkeeper is still morally problematic despite the absence of actual interference.¹¹⁴ The asymmetrical power dynamic is a matter of moral concern because the homeless person is unilaterally subject to the shopkeeper’s whims, undermining any sense of security from interference in the homeless person’s life.¹¹⁵

Having no property therefore shapes the nature of a homeless person’s relationship with others and influences how these types of daily interactions take

110. Nicholas Blomley, “Homelessness, Rights, and the Delusions of Property” (2009) 30:6 *Urban Geography* 577 at 586.

111. See Essert, *supra* note 5 at 287.

112. See *ibid.*

113. See Pettit, *On the People’s Terms*, *supra* note 13 at 62; Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: W W Norton & Company, 2014) at 90.

114. See Pettit, *Republicanism*, *supra* note 13 at 60.

115. For a discussion of interference and domination in the master-slave dynamic, see Fabian Wendt, “Slaves, Prisoners, and Republican Freedom” (2011) 17:2 *Res Publica* 175 at 179–82.

place.¹¹⁶ As Khaitan argues: “What is key is that a person should not live in fear of a reasonable possibility that her negative liberty will be infringed. With this fear haunting our lives, we will be unfree.”¹¹⁷ Baron recognizes this point when she observes that it is morally problematic when others have the *capacity* to interfere with homeless people’s daily lives. She remarks that a primary normative consequence of homelessness is, in essence, *vulnerability* to others’ power.¹¹⁸

B. Negative Freedom, Resource Scarcity, and Trade-offs

The second shortcoming in examining how quality-of-life rules impact the negative freedom of homeless people relates to resource scarcity and trade-offs. In some instances, rules comprehensively prohibit camping in public. Yet there are insufficient shelter spaces in the city for all the homeless people within it. In these cases, homeless people cannot possibly obey such quality-of-life rules with any degree of predictability or consistency.¹¹⁹

Such a situation occurred in two Canadian cases: *Abbotsford (City) v Shantz*¹²⁰ and *Victoria (City) v Adams*.¹²¹ The trial courts in these cases concluded that those who slept in public without erecting shelters in order to obey quality-of-life rules risked suffering physical and psychological harm.¹²² The bylaws were deemed overbroad and were found to have interfered with the claimants’ section 7 constitutional right to life, liberty and security of the person.¹²³ American courts have arrived at similar conclusions in factually-analogous cases.¹²⁴ Both a negative theory of freedom and existing constitutional theory were capable of addressing the moral objections to rules that are arguably impossible for homeless people to obey due to extreme resource scarcity and the trade-offs that homeless people would have to make.¹²⁵

116. See Joseph William Singer, “Property as the Law of Democracy” (2014) 63:6 Duke LJ 1287 at 1299. As Singer explains: “Property institutions not only regulate the complexity of human interaction, but also *shape the character of those interactions.*” *Ibid* [emphasis in original].

117. Khaitan, *supra* note 15 at 101.

118. Jane B Baron, “The Contested Commitments of Property” (2010) 61:4 Hastings LJ 917 at 955.

119. See Sarah E Hamill, “Private Property Rights and Public Responsibility: Leaving Room for the Homeless” (2011) 30 Windsor Rev Legal Soc Issues 91 at 108–09.

120. *Supra* note 107.

121. *Adams* BCCA, *supra* note 50.

122. See *Abbotsford (City) v Shantz*, *supra* note 107 at para 188; *Adams* BCCA, *supra* note 50 at para 39.

123. See *Abbotsford (City) v Shantz*, *supra* note 107 at para 203; *Adams* BCCA, *supra* note 50 at para 116.

124. See e.g. *Jones v City of Los Angeles*, 444 F (3d) 1118 (9th Cir 2006) at 1137–38; *Bell v City of Boise*, 709 F (3d) 890 (9th Cir 2013) at 900; *Pottinger v City of Miami*, 810 FSupp 1551 (SDFla 1992).

125. See Scott McAlpine, “More than Wishful Thinking: Recent Developments in Recognizing the ‘Right to Housing’ under S 7 of the *Charter*” (2017) 38 Windsor Rev Legal Soc Issues

Such scarcity results in a clear lack of complementarity between public and private space and suggests the homeless are comprehensively unfree as Waldron argues. But in other contexts, it is unclear whether a particular rule disproportionately impacts the negative freedom of homeless people, or whether there is complementarity between public and private space. There are several interrelated reasons for this.

First, quantitatively evaluating whether there are sufficient homeless shelter spaces or public bathrooms does not tell us whether there is some minimally required quality of these resources. Some homeless shelters are overcrowded¹²⁶ or unsanitary.¹²⁷ A 2011 report explains that the Salvation Army shelter in Yellowknife had ten men sleeping in the same room.¹²⁸ The men slept on mats, one foot apart from one another.¹²⁹ Because the complementarity principle is primarily concerned with homeless people's lack of access to private property as opposed to the quality of property to which they have access, it is unclear whether there are minimal requirements for complementarity to obtain.

Second, it follows that the complementarity principle can ignore certain non-egalitarian trade-offs that homeless people must make to avoid violating quality-of-life rules. Some homeless people sleep on the street because certain shelters do not allow couples to lodge together, or do not allow pets.¹³⁰ Others avoid homeless shelters because they would be required to attend religious services in order to stay in them.¹³¹ When homeless people accept these types of trade-offs, they may not experience any actual interference from quality-of-life rules in ways that preoccupy constitutional theorists. The homeless can avoid fines, arrest, or imprisonment by making these sacrifices. The brunt of the moral concern in such cases, however, is the non-egalitarian nature of the trade-offs that homeless people must make to obey the law.

1 at 12–13. McAlpine notes that the claims were based on negative rights. *Ibid.* See also Terry Skolnik, “Homelessness and the Impossibility to Obey the Law” (2016) 43:3 *Fordham Urb LJ* 741 at 751.

126. See Katherine Beckett & Steve Herbert, *Banished: The New Social Control in Urban America* (New York: Oxford University Press, 2010) at 113.

127. See e.g. Andrea Elliott & Rebecca R Ruiz, “New York is Removing Over 400 Children From 2 Homeless Shelters”, *New York Times* (21 February 2014), online: <www.nytimes.com/2014/02/21/nyregion/new-york-is-removing-over-400-children-from-2-homeless-shelters.html>.

128. Nick Falvo, *Homelessness in Yellowknife: An Emerging Social Challenge* (Toronto: The Canadian Homelessness Research Network Press, 2011) at 16.

129. *Ibid.*

130. See Marie-Eve Sylvestre, “Rethinking Criminal Responsibility for Poor Offenders: Choice, Monstrosity, and the Logic of Practice” (2010) 55:4 *McGill LJ* 771 at 806; Zoe Loftus-Farren, “Tent Cities: An Interim Solution to Homelessness and Affordable Housing Shortages in the United States” (2011) 99:4 *Cal L Rev* 1037 at 1051.

131. See e.g. Barry Jay Seltser & Donald E Miller, *Homeless Families: The Struggle for Dignity* (Chicago: University of Illinois Press, 1993) at 52.

Third, the complementarity principle can ignore the potential interference that homeless people experience, even when they do not require someone's permission to use some private space. The complementarity principle is concerned with contexts where permission is required to enter some private space, because it impacts a person's negative freedom to be there.¹³² But nobody needs permission to use a public bathroom. Even in these contexts, however, resource scarcity can undermine a homeless person's opportunity to urinate or defecate in private without potential interference by others.

For instance, many people may attempt to use a public bathroom at the same time. Some may monopolize the bathroom in a way that removes another person's opportunity to use it. Or, many people might use the resource at the same time, undermining its value as a reasonable alternative to urinating or defecating in public.¹³³ Similarly to how each person's simultaneous attempt to maximize their benefit from common property can undermine its usage for all, public bathrooms used by many people can result in these spaces experiencing a tragedy of the commons. In these cases, homeless people's freedom is conditional on others not simultaneously using the same public resource at the same time.

Lastly, in some cases, it may not be possible to measure whether there is complementarity between public and private space with any accuracy. Though the trial court in *Adams* observed that there were fewer shelter spaces than the number of homeless people in the city of Victoria, it is not always possible to conduct these types of quantitative assessments.¹³⁴ For instance, how many public bathrooms are required in a given city to provide the homeless with complementarity between public and private space? How can one determine whether a homeless person is negatively free to perform their bodily functions in private, if one cannot first determine whether there is in fact the complementarity Waldron describes? Republicanism avoids this problem by conceding that a person can be more or less free to engage in a certain act, without having to conclude in a binary fashion whether a person is or is not free.¹³⁵ The concern that republicanism elucidates is that the homeless risk greater and more consistent non-egalitarian interference when attempting to alleviate their needs

132. See Waldron, "Issue of Freedom", *supra* note 5 at 304.

133. See Gary Blasi & UCLA School of Law Fact Investigation Clinic, "Policing Our Way Out of Homelessness? The First Year of the Safer Cities Initiative on Skid Row", USC Center for Sustainable Cities, USC & UCLA (2007) at 26, citing Minutes, *LA Safer City Project: Central City East*, August 6, 2003. The report details how city officials in Skid Row, Los Angeles, observed roughly 1,000 people using outdoor bathrooms in an eight-hour period. They remarked that the conditions of the public bathrooms were deplorable. *Ibid.*

134. *Supra* note 21 at para 4.

135. See Pettit, *Republicanism*, *supra* note 13 at 58.

in private spaces, as opposed to whether complementarity between public and private space is empirically achieved.

VI. The State's Capacity to Regulate Homeless People

Scholars examining how quality-of-life offences regulate the homeless are often concerned with how these bylaws affect homeless people once they are enacted. They correctly argue that homeless people are disproportionately subjected to police surveillance and interference because they live in public and lack access to private places.¹³⁶ But this argument is rarely turned on its head. In other words, scholars rarely consider the extent to which the state can surveil and regulate how people alleviate their needs in the privacy of their homes.

Exploring this issue is crucial because it demonstrates why people with access to housing are protected from quality-of-life rules in ways that homeless people are not. The argument ultimately demonstrates why Anatole France's famous adage—that the law forbids both the rich and the poor from begging or sleeping under bridges—misses a crucial point regarding the law's potential to disproportionately regulate homeless people.¹³⁷ Notably, the non-egalitarian nature of quality-of-life offences also stems from the state's lesser capacity to regulate and surveil how people sleep, urinate, or defecate in their homes. The non-egalitarian nature of quality-of-life rules are attributable to two interrelated factors.

First, there are compelling justifications for protecting the distinct value and role of common property with quality-of-life offences that regulate some public act. However, such justifications apply with much less force to contexts where a person does that same act in private. Second, attempts to regulate some private act might be profoundly intrusive and undermine a person's expectation of privacy. Together, these two factors can explain why it may be justifiable to regulate some act in public, but far less justifiable to regulate that same act in private.

136. See Marie-Eve Sylvestre et al, "Le droit est aussi une question de visibilité: l'occupation des espaces publics et les parcours judiciaires des personnes itinérantes à Montréal et à Ottawa" (2011) 26:3 CJLS 531 at 532; Eric S Tars et al, "Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy" (2014) 45:3 Colum HRLR 738 at 739.

137. Anatole France, *The Red Lily*, vol I, translated by Winifred Stevens, vol 1 (London, UK: John Lane, 1910) at 95. The original quote as translated is: "At this task they must labour in the face of the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread." *Ibid.*

The following discussion unpacks these two factors, and demonstrate why it might not be justifiable under section 1 of the *Charter* to regulate certain acts that are done in the privacy of one's home. This argument demonstrates why the state has a greater capacity to regulate certain public acts, than it does to regulate those same acts when done in private. Ultimately, it illustrates why the state has a greater capacity to regulate and police homeless people than it does to regulate and police how people alleviate their needs in their homes.

Consider first how quality-of-life offences are justified for reasons that aim to protect the distinct role and value of common property, such as promoting spontaneous communal interaction between strangers, providing a place for recreation, and allowing forms of democratic gathering.¹³⁸ Quality-of-life offences also aim to protect the aesthetic value of common property, ensure these spaces are safe and sanitary, and help solve collective action problems.¹³⁹ But private property's value and role is different. Its purpose is not to provide the community with a place of democratic gathering, interaction, or recreation that people do not require someone else's permission. Rather, private property aims to protect expectations and provide predictability by preventing people from interfering with one's private life and personhood within the home.¹⁴⁰

Private property not only provides people with the power to exclude others, but the power to exclude themselves from common property and public interaction. Because private property has a different value and role than common property, the justifications for regulating common property—such as maintaining the aesthetic value of common spaces, protecting the environment from harm, or resolving collective action problems—may not apply to private property.¹⁴¹ Therefore, there may be less compelling justifications for regulating certain acts that are done in private, or a complete lack of justification for regulating certain acts done in private altogether. Two examples illustrate this point.

First, consider the reasons for banning people from camping in certain public spaces. For example, in *Adams*, the City's argument that bylaws prohibiting public camping were justifiable included the following reasons:

- (d) Protecting the park, its natural environment and amenities from damage or harm;
- (e) Ensuring that parks and public spaces are available for the use and enjoyment to all members of the public generally;
- (f) Public health considerations;

138. See Rose, "Comedy", *supra* note 39 at 779–80.

139. See Foscarinis, *supra* note 1 at 55; Elinor Ostrom, "How Types of Goods and Property Rights Jointly Affect Collective Action" (2003) 15:3 *J Theoretical Politics* 239 at 241.

140. See Radin, *supra* note 27 at 968.

141. See David A Conway, "Law, Liberty and Indecency" (1974) 49:188 *Philosophy* 135 at 139.

- (g) Respecting the public interest in the purpose and rationale for the creation of parks and public spaces.¹⁴²

Let us suppose that these are legitimate justifications for prohibiting camping in public spaces. But these justifications cannot apply with similar force to a law that would ban people from erecting a tent inside their home. It would be difficult to argue that prohibiting people from erecting tents in their homes is necessary for public health reasons, that it minimizes harm or damage to the environment, or serves the public interest. Such a rule would therefore fail proportionality analysis under section 1 of the *Charter*¹⁴³ because the prohibition is not instrumentally rational.¹⁴⁴ The prohibition would not be a logical means to achieve the desired ends.

The second example involves laws that ban urinating and defecating in public, notably because it is unsanitary and offensive to others. Yet if people do these acts in their bathrooms within their homes, it largely eliminates the sanitation and offence concerns that exist when people defecate or urinate in public.¹⁴⁵ Thus, there may be less compelling reasons for regulating and policing how people urinate or defecate when in the privacy of their homes.

This argument is subject to an important caveat. The state can legitimately set basic standards of sanitation within one's home,¹⁴⁶ and those living in public housing can be subject to a greater degree of regulation and police scrutiny than those living in more private forms of housing.¹⁴⁷ For example, a dwelling house that is unsanitary can be declared unfit for habitation and its inhabitants can be ordered to vacate the premises.¹⁴⁸ The state therefore maintains the capacity to regulate certain private and non-criminal acts that generate profound sanitation or public health concerns, such as a person defecating in some area other than their bathroom. It is, of course, extremely rare that a person will do this. It would therefore be difficult to justify intrusively policing how people urinate or defecate in the privacy of their homes on that basis. On the contrary, it is easier to justify regulating public defecation and urination in public areas

142. *Adams* BCSC, *supra* note 21 at para 172.

143. See *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200.

144. See Hamish Stewart, *Fundamental Justice: Section 7 of the Canadian Charter of Rights and Freedoms* (Toronto: Irwin Law, 2012) at 151. For proportionality analysis generally, see Aharon Barak, "Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy" (2002) 116:16 Harv L Rev 19 at 147–48.

145. See Conway, *supra* note 141 at 139.

146. See e.g. City of Montréal, bylaw No 03-096, *Bylaw Concerning the Sanitation and Maintenance of Dwelling Units* (16 June 2003) [Montréal Bylaw].

147. See Jeffrey Fagan, Garth Davies & Adam Carlis, "Race and Selective Enforcement in Public Housing" (2012) 9:4 J Empirical Leg Stud 697 at 699–700.

148. See Montréal Bylaw, *supra* note 146, ss 19, 25.

because it generally creates a greater risk to public health and has the potential to offend others.

Even if there are compelling justifications for regulating some act in private, such regulation might be profoundly intrusive and undermine the significant expectation of privacy that one has in their home.¹⁴⁹ This provides a further reason why rules that regulate very private conduct might not satisfy proportionality analysis under section 1 of the Charter. As the Supreme Court of Canada stated in the seminal case *R v Feeney*: “There is no question that the common law has always placed a high value on the security and privacy of the home.”¹⁵⁰ The Supreme Court of Canada has also recognized that individuals tend to engage in some of their most private activities within their homes.¹⁵¹ A home’s physical barriers would also limit the state’s ability to surveil people and determine whether they in fact broke a rule regulating need-alleviating acts that are done in private. One’s expectation of privacy, coupled with the profoundly intrusive nature of a rule that regulated how a person slept in their beds or urinated in their bathrooms, militate in favour of such a rule failing proportionality analysis under section 1 of the *Charter*. The burden of such a rule on a person’s privacy and dignity would vastly outweigh the societal benefits that the rule aims to secure.¹⁵²

The arguments presented in this section therefore demonstrate why the state’s capacity to regulate and police some public acts is much greater than its capacity to regulate and police those same acts when they are done in the privacy of one’s home. Indeed, there are a host of compelling justifications for regulating common property that often simply are inapplicable to private property. This includes maintaining the aesthetic value of neighbourhoods¹⁵³ promoting the efficiency of public ways like sidewalks,¹⁵⁴ preventing damage to parks,¹⁵⁵ or solving collective action or coordination problems related to the use of common property.¹⁵⁶

149. See *R v Feeney*, [1997] 2 SCR 13 at para 43, 146 DLR (4th) 609; *R v Tessling*, 2004 SCC 67 at paras 15–16, 21–22, [2004] 3 SCR 432.

150. *Supra* note 149 at para 43.

151. See *R v Patrick*, 2009 SCC 17 at para 44, [2009] 1 SCR 579.

152. See Aharon Barak, “Proportionality and Principled Balancing” (2010) 4:1 L & Ethics Human Rights 1 at 11.

153. See Adam M Samaha, “Regulation for the Sake of Appearance” (2012) 125:7 Harv L Rev 1563 at 1620–22 (summarizing aesthetic-related justification for regulating public space with quality-of-life offences).

154. See Nicholas Blomley, “How to Turn a Beggar into a Bus Stop: Law, Traffic and the Function of the Place” (2007) 44:9 Urban Studies 1697 at 1697–99.

155. See *Adams BCCA*, *supra* note 50 at paras 121–22.

156. See *Ostrom*, *supra* note 139 at 241.

These types of justifications are deeply tied to the value of common property as places of democratic and communal gathering, recreation and relaxation for a broad array of different kinds of people. In light of common property's role and value, it makes sense that the state has a greater capacity to regulate what people do in those spaces. Common property's role and value are completely different from the places where we live our most private and intimate moments insulated from the risk of interference by others.

This ultimately explains why quality-of-life offences not only regulate homeless people differently than people with homes, but why they can. As long as there are compelling reasons to regulate common property in order to protect its sanctity and value, there is the potential to regulate the daily lives of those who have nowhere else to be. In practice, this means that the state will continue to have the capacity to impose duties on homeless people, while both the state and those with private property will continue to have the power to control whether homeless people fulfill these duties. Admittedly, homeless people can challenge the constitutionality of quality-of-life offences that egregiously impact their freedom once such rules are enacted. But this does not remove the serious egalitarian concern regarding the state's greater capacity to enact these rules in the first place, and ultimately, for homeless people to live with the risk of interference by those wielding power over them.

Conclusion

This article argues that the republican theory of freedom demonstrates how quality-of-life rules undermine homeless people's freedom in ways that both a negative theory of freedom and constitutional law can overlook. Republicanism illustrates why homeless people adopting certain coping mechanisms to avoid interference are not free and why it is morally objectionable for others to unilaterally wield power over those who are experiencing homelessness. Because quality-of-life offences operate like rules that impose affirmative duties to act, others have the power to unilaterally interfere with homeless people's fulfillment of their duties in ways that fail to exculpate the homeless from liability.

Constitutional law is admittedly capable of addressing situations where the homeless must make clearly unacceptable trade-offs to obey quality-of-life rules, such as having to sacrifice their physical or mental health to obey a rule that bans camping in public.¹⁵⁷ Negative freedom arguments also show why such trade-offs are morally problematic. But both theories can ignore the non-

157. See *Abbotsford (City) v Shantz*, *supra* note 107; *Adams BCCA*, *supra* note 50.

egalitarian trade-offs that the homeless routinely make to avoid violating all types of quality-of-life offences—a concern that republicanism captures.

Furthermore, constitutional theory and negative freedom do not generally consider how and why the state has a greater capacity to regulate and police certain public acts such as camping or defecating, but a much lesser capacity to regulate those same acts when they are done in the privacy of one's home. The compelling justifications for enacting rules that protect the sanctity, role, and value of common property, can either be absent or apply with less force when some act is done in private.¹⁵⁸ This demonstrates why a state's attempt to regulate or police how a person harmlessly alleviates their needs in the privacy of their homes might not be justifiable under section 1 of the *Charter*. Such regulation might not be instrumentally rational, or the rule's profound impact on a person's privacy or dignity would outweigh its benefit to society.

In an era where access to affordable housing is becoming increasingly difficult,¹⁵⁹ and cities are regulating common property to a greater extent,¹⁶⁰ one might pause to consider the cumulative effects of these two realities. They not only risk criminalizing those who have no private property. Rather, lacking private property in cities that increasingly regulate common property has the potential to fundamentally transform our status as equal and free citizens in the community.¹⁶¹

To the extent that having a private property right becomes a privilege that is more and more out of reach, it risks widening the asymmetries in power between those with and without access to housing. Ultimately, those who have a private property right stand to be afforded increased power and authority over those who do not, while the most basic acts of those having property remain protected from others' control. In a world that increasingly regulates common property, to lack property is to lack protection against others' power over us.

158. See Conway, *supra* note 141 at 139.

159. See Timothy MacLeod, S Kathleen Worton & Geoffrey Nelson, "Bridging Perspectives and Balancing Priorities: New Directions for Housing Policy in Canada" (2016) 35:3 *Can J Community Mental Health* 55 at 56.

160. See Catherine T Chesnay, Céline Bellot & Marie-Ève Sylvestre, "Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia" (2013) 55:2 *Can J Corr* 161 at 162; National Law Center on Homelessness and Poverty, *supra* note 1. The report notes the increase in quality-of-life rules in the cities surveyed by the NLCHP. *Ibid.*

161. See Kathryn Hansel, "Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems" (2011) 6:2 *Northwestern JL & Social Policy* 445.