

“ARREST ALL STREET MENDICANTS AND BEGGARS:”  
HOMELESSNESS, SOCIAL COOPERATION, AND THE  
COMMITMENTS OF DEMOCRATIC POLICING

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ABSTRACT

*In “Are Police the Key to Public Safety?: The Case of the Unhoused,” Barry Friedman argues that one of the problems with policing in the United States is that it encompasses too narrow a view of public safety. In the case of homelessness, this narrow view fails to understand that providing shelter and subsistence to the unhoused is providing them with a basic form of safety as well. By this view, enforcing most laws against the behaviors associated with homelessness is unjust because it penalizes people for seeking a form of personal security that the government should have provided them with. This Essay argues that while this concern should guide police conduct in many cases, it does not mean the police have no legitimate reason to regulate the behavior of homeless people using discretionary enforcement of the criminal law. Police are not only tasked with providing some conception of safety but have a mandate to equitably broker and enforce the cooperative use of a community’s public spaces, which is a critical feature of democratic equality for both housed and unhoused people. Enforcing laws against the behaviors associated with homelessness should therefore be a balance between ensuring everyone has access to public spaces for various conceptions of recreation, transportation, expression, and commerce, and an awareness that even the most disruptive and uncooperative uses of public space by homeless people are a product of duress rather than choice. Both the housed and the unhoused have a legitimate claim on the commons, and while one is more urgent than the other, this does not mean the more urgent claim is an unrestricted one. Requirements of social cooperation may still apply to unhoused citizens, and when they do, it is the criminal law that empowers the police to broker and enforce them as necessary.<sup>1</sup>*

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\* This is one of the mandates accorded to the New York City Police Department by the city’s charter. See N.Y.C. CHARTER, ch. 18, § 435 (2004).

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1. We commonly use a lot of different adjectives to describe individuals without secure housing, including “homeless” and “unhoused.” For the purpose of this Essay, I will use these terms interchangeably. None of these terms should be read to objectify or dehumanize these individuals, nor to degrade their experience.

INTRODUCTION . . . . .	1682
I. A SCENE FROM GREENWICH VILLAGE . . . . .	1684
II. THREE ROLES OF THE POLICE . . . . .	1685
III. DEMOCRATIC EQUALITY IN TENSION WITH HOMELESSNESS . . . . .	1689
IV. BROKERAGE AND LEGAL DISCRETION . . . . .	1690
V. CAN VS. MUST IN ENFORCING LAWS AGAINST THE HOMELESS . . . . .	1693
CONCLUSION . . . . .	1695

## INTRODUCTION

In his lecture *Are Police the Key to Public Safety? The Case of the Unhoused*, Barry Friedman argues that the way in which the nation polices its homeless speaks volumes about more general problems with the police. That much is certainly true. He concludes by saying we need a more capacious understanding of public safety, one that prioritizes the security of this population by meeting its needs for shelter and security rather than criminalizing conduct such as sleeping in public or seeking subsistence through panhandling, especially when it is involuntary, so we can keep an undesirable population out of public view. That seems quite reasonable. In the end, he advocates for a conception of public safety that goes beyond a default recourse to the police, which may require expanding the police remit to social work and more specialized interventions. That is open to debate.<sup>2</sup> This Essay will not contribute much to that debate, however.

I intend to argue that we need not only a more capacious understanding of public safety, but also a broader understanding of police's role in public safety. Safety is certainly one of the things police are tasked with providing, and we are overdue for reconsidering what "safety" actually means if the way we achieve it imposes another set of unnecessary harms on people.<sup>3</sup> For the most part, however, I will bracket that off and observe that there is a lot of work to be done in figuring out who should partner with police in such a project, and how the work should be divided. Here, I will argue that in a democracy, the police should also broker and enforce the fair terms of social cooperation in public spaces when people lay legitimate but competing claims to them. In these cases, police need to resolve conflicting rights claims; if we let people sort it out for themselves, the results can often be illiberal and counter to a commitment to democratic pluralism. The problem with the police brokerage and enforcement of this cooperation, however, is that we empower them to do so principally via the criminal law. The same discretion and underdetermination built into criminal laws regulating public behavior that could make for careful compromise also allow for excessive criminalization and a

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2. For an example of a reply to Friedman, see generally Ben A. McJunkin, *Ensuring Dignity as Public Safety*, 59 AM. CRIM. L. REV. 1643 (2022).

3. See, e.g., Jeremiah Goulka, Brandon del Pozo & Leo Beletsky, *From public safety to public health: re-envisioning the goals and methods of policing*, 6 J. CMTY. SAFETY & WELL-BEING 22, 22–23 (2021).

tyranny of the majority over the homeless, who are an exceptionally vulnerable and powerless constituency.

This Essay will therefore argue that we need police who explicitly understand that one of their duties is to regulate our public spaces in ways that allow for their shared use and the pursuit of a multitude of ends, including the survival of the unhoused. This does not mean that where and how unhoused people seek shelter in public trumps all other concerns, but it does mean their need to do so cannot be ignored and criminalized because it violates a community's norms, and frankly, aesthetics. Such a brokering is not just a matter of “order maintenance,” but a requirement of democratic pluralism. Sometimes, it will mean using the criminal law to regulate the behavior of homeless people. If our police consistently take this remit and use it for illiberal ends, we should wonder where they are getting their cues from. All the ingredients are already present in law and practice to transform policing the homeless from a process that criminalizes people in dire straits to one that promotes a fine balance between a homeless person's legitimate claim on our public spaces and the equally legitimate claims of his fellow citizens. Doing so equitably will require that police recognize the vulnerability of homeless people by judiciously exercising their prerogative to criminalize behaviors that make unfair or disruptive use of these spaces. In contrast, at present we seem to either use these laws as cudgels by which the norms and desires of the housed majority are imposed on the homeless, or we hear calls for reform that would substantially strip the police of the power to regulate the use of public space by homeless people at all. Neither of these extremes properly equips a democracy to meet the needs of the many people who have a right to use a community's shared spaces for a wide range of legitimate purposes, many of which conflict.

In making this argument, Part I of this Essay frames the dilemma that police face in a large city with an expectation that the police privilege the desires of the wealthy over the needs of the unhoused. Part II puts forth three roles of the police in society. Part III situates regulating the behavior of homeless people in the context of the need for police to broker and enforce the fair terms of social cooperation in public spaces as a condition of democratic equality for both homeless people and the remainder of the community, who also exert a legitimate claim on the use of these spaces. Part IV then highlights the discretionary nature of these transactions, and Part V emphasizes that such discretion should be exercised in a way that recognizes the homeless as an acutely vulnerable population whose use of public space most often drives from sheer necessity rather than choice. In this way, my reasoning departs from that of Friedman's: I do not believe we should largely abandon the police power to broker and enforce cooperation between the homeless and other people using the criminal law. Rather we should inform the use of police discretion with a more equitable and compassionate understanding of the urgent need for homeless people to make use of public spaces for shelter and subsistence. The Essay concludes by observing that even the most reasonable attempts to fairly situate the homeless in a system of social cooperation leaves them vulnerable to these

political pressures, which are exerted on police by those with a desire to keep the homeless and their crises out of mind and hidden from public view.

### I. A SCENE FROM GREENWICH VILLAGE

In 2012, when I was a police officer, I commanded the New York City Police Department's Sixth Precinct. It covers Greenwich Village, a well-known and evocative neighborhood that is home to New York University, a vibrant arts and music scene, a sometimes intolerably loud nightlife scene, and many rich and famous people. It is the type of precinct where when an SUV is stolen, it could be fashion designer Donna Karan's, and when the police track it down, they may get a personal thank you from the police commissioner. When I was assigned there, Brooke Shields and Courtney Love lived across the street from the precinct. President Obama paid periodic visits to the neighborhood to attend fundraising dinners with friends. It is a star-studded neighborhood that has a lot of significance to people for many different reasons, and these days it is one of the most expensive places to live in the world. I say all this to suggest it is the type of Manhattan neighborhood where some people are not very accepting of the homeless.

People familiar with the area know *Citarella* is an upscale, gourmet market on Sixth Avenue near the PATH train to New Jersey. Its other locations are on the Upper West Side, Upper East Side, in the Hamptons, and in Greenwich, Connecticut.<sup>4</sup> While I was precinct commander, it served as the preferred site for a local homeless person. John was a disheveled and homeless Black man who wore dirty and threadbare clothes. He used to sit on the pavement next to the market's entrance and beg for change all day. A roving quality of life surveillance unit from police headquarters would photograph him there and send me the pictures. Each came with a terse written mandate from the police commissioner to do something about the nuisance John was causing. The problem was that there was nothing *to* do. My officers would dutifully shoo him away, I would write a memo to the police commissioner about it, and John would soon return to his spot outside *Citarella* with remarkable determination.

After a sheaf of these letters and tense conversations with exasperated bosses at the borough headquarters that oversaw my precinct, I responded to the scene personally. When I got there, I called the New York Police Department's head criminal attorney, a lieutenant named Dan who had been advising field commanders for what must have been two decades already. I described the scene in front of me, and the letters I had received, and we discussed the law. John had dirty clothes, and his cardboard sign asking for money was crude, but he was not truly noxious. He also was not following people around or threatening anyone; he sat in silence next to *Citarella*'s door, but not in a way that blocked pedestrians. "I don't know what to tell the police commissioner," Dan said. "But you can't make the guy move. He's

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4. *Store Locator*, CITARELLA, [https://www.citarella.com/store\\_locator](https://www.citarella.com/store_locator) (last visited Feb. 15, 2022).

not breaking the law. What can I say? People just hate the homeless.” Dan wished me luck, offering no insight into what a precinct commander might do when he finds himself in a gauntlet between the police commissioner’s office, an ornery patrol borough commander, a stubborn homeless man, unambiguous case law, and the preferences of people who felt as though the homeless infringed upon the pleasant consistency to their shopping experiences in Greenwich Village, the Hamptons, and other wealthy enclaves where the homeless were largely a sight unseen. Looking back, it was a boutique microcosm of the problem homelessness poses for American policing.

## II. THREE ROLES OF THE POLICE

As far as policing is concerned, homelessness is instructive because it involves activities that we would otherwise reasonably expect the police to regulate—and by coercion if need be. If a law professor set up a tent on the sidewalk outside his law school and decided to live there because he liked the convenient commute and his condominium did not get good natural light, we would expect the law school to team up with the police to have the tent removed, even if the professor did not urinate, defecate, or do drugs at the curbside. Yet, in the case of homelessness, this type of coercive regulation can easily seem excessive and unjust. In discussing why police have the power to remove a tent from the sidewalk in the first place, we can observe something instructive about the police role, namely that it extends beyond securing public safety *per se*. I will argue that it extends to brokering and enforcing the fair terms of social cooperation in a community’s public spaces and that this role is a largely unavoidable feature of the human condition in an urban environment. In the same way that Friedman remarks public safety is “the first job of government,” and that it motivates the creation of the state in the liberal tradition,<sup>5</sup> I will argue that this brokerage and enforcement is a requirement in a state committed to democratic pluralism. As such, people acting in some role with recourse to police powers are necessary for meeting it. In discussing why homelessness inherently introduces contradictions and tensions within this role, we can better understand the democratic obligations and constraints of policing, and how to better honor its democratic commitments. In framing the problems of policing in terms of homelessness, Friedman has picked a truly illuminating means by which to explore them.

I start with a brief consideration of police’s role to understand where regulating otherwise lawful public behavior fits in; then, I situate homelessness at this intersection.<sup>6</sup> I frame it in terms of three powers of the police. First, there is the duty to

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5. Barry Friedman, *Are Police the Key to Public Safety?: The Case of the Unhoused*, 59 AM. CRIM. L. REV. 1597, 1630–31 (2022).

6. See generally my forthcoming book, for a discussion on the roles of police; *THE POLICE AND THE STATE: SECURITY, SOCIAL COOPERATION, AND THE PUBLIC GOOD* (Cambridge University Press, 2022). The arguments here closely track it, asserting that a democracy’s police have three principal duties: to protect and rescue people

protect and rescue. It is the essence of public safety. Friedman invokes this power as being too narrow, though not wrong, and largely uncontroversial in and of itself. If there is anyone with a duty and corresponding power to break up an assault, stop a rape in progress, or put an end to a mass shooting on behalf of strangers they have never met before, it is the police. What makes this role interesting, however, is that all of us have the prerogative to protect other people from danger. We are allowed to use force not only in defense of ourselves, but also others. This is inherent to our personhood, as Locke notes when he lays out self-defense as a natural right, saying “I should have a right to destroy that which threatens me with destruction: for, by the fundamental law of nature, man being to be preserved as much as possible, when all cannot be preserved, the safety of the innocent is to be preferred . . . .”<sup>7</sup>

Sociologist Max Weber’s classic characterization of the government is that it is unique in having a monopoly on the legitimate use of force within its borders.<sup>8</sup> But the observation that a person can use force to protect and rescue someone else independent of any political arrangement gives us cause to wonder if Weber’s view is not precisely right. I will instead argue that what makes the police different, and the government unique, is that the prerogative of protection becomes a *duty* on the part of the government, and the police are the people *qua* government role actors who discharge it. In other words, the duty to protect and rescue comes from a police officer’s role and responsibilities as a government actor, but his power to use force to protect and rescue comes from his natural rights as a person. That so many people reel at the *DeShaney* court’s decision, holding that the government does not violate due process when it fails to protect people from the private violence of others, is evidence that my intuition about such a duty of the police are strong.<sup>9</sup> Regardless, it is hard to see where policing the homeless fits into this particular role of the police, because it does not seem to fit into it at all.

The second power of the police is to initiate and advance certain forms of judicial process. People predisposed to a legal mindset are inclined to think this is the main role of the police: to bring people and evidence to a judge, then participate in

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from physical dangers (especially interpersonal ones), to instigate a criminal court’s proceedings by presenting it with people and evidence, and to broker and enforce the fair terms of social cooperation in our public spaces. The book bootstraps its way into these roles by looking at what police are in fact expected to do when acting justly, then describes and analyzes these acts in terms of contemporary political philosophy.

7. JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 107 (Ian Shapiro ed., 2003). As an aside, it is interesting to note that while Locke accords people the ability to defend themselves as a natural right, he warns that we should first try to preserve man “as much as possible.” *See id.* This idea has been lost on legislators in many states who have eliminated the duty to retreat from a confrontation when a person can safely do so, resulting in hundreds of unnecessary homicides a year by one estimate. *See generally, e. g.*, Chandler McClellan & Erdal Tekin, *Stand Your Ground Laws, Homicides, and Injuries*, 52 J. HUM. RES. 621, 635–53 (2017).

8. Jack Barbalet, *Violence and Politics: Reconsidering Weber’s ‘Politics as a Vocation’*, 55 SOCIOLOGY 56, 58 (2021).

9. *DeShaney v. Winnebago Cnty. Dept. of Soc. Servs.* 489 U.S. 189, 191 (1989).

the proceedings that determine someone's guilt or innocence of a crime (notwithstanding the staggering rate of plea bargaining).<sup>10</sup> This process may start in the aftermath of protection and rescue. It may also begin when the police believe a person has violated one of countless criminal laws that have little to do with physical danger, making this role a fundamentally distinct exercise of government power from protection and rescue. As a result, scholars like Rachel Harmon argue we should not exercise the power of arrest unless it serves some interest of the state beyond the simple act of the arrest itself, considering all the disruptions, harms and negative collateral consequences an arrest brings.<sup>11</sup> In Friedman's parlance, we are left to wonder in what way, exactly, countless arrests contribute to even a narrow conception of public safety, let alone a more capacious one. When he laments the criminalization of homelessness, in this framework, it can be expressed as an arbitrary or excessive exercise of the second power of the police, to no discernible, constructive end.

The third power of the police is the idea that the police are responsible for brokering and enforcing the fair terms of social cooperation in our public spaces. This underlies the commonly held belief that the police have at least some responsibility to deal with the problems presented by homelessness. We accept the idea that police have a role in regulating the flow of traffic; not simply because traffic enforcement can be reduced to a safety concern, but also because we expect the police to ensure people make fair use of shared roadways so that we can convey ourselves in ways that give our lives a consistent and predictable normalcy. We also appreciate it when the police shut down streets to traffic and repurpose them for street festivals and the parades that New York City throws when the Yankees and Giants win their championships (or when the ball drops on New Year's Eve in Times Square, or Macy's hosts its Thanksgiving Day Parade). We expect the police to help facilitate spontaneous and planned demonstrations, and we expect officers to reconcile the use of sidewalks and roads among the competing interests of protest, commerce, conveyance, and recreation. We also expect the police to stop loud parties in parks from going until all hours of the morning, stop heated dice games from playing out on street corners, and moderate the disruptive behavior of intoxicated people. In expecting all this of the police, we have accorded another power to them that is not about protection and rescue or about public safety, and that has no link to judicial process unless people stubbornly refuse to cooperate. The primary goal of the police in these cases is to secure social cooperation in public spaces by either brokerage or enforcement. The criminal law is what empowers them to do so. Thus, perhaps part of the problem is that police are under pressure to use this power too frequently, rather than to prioritize brokerage over enforcement.

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10. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 228, 288 (2011), and Robin West, *The Limits of Process*, in *NOMOS: GETTING TO THE RULE OF LAW* (Jay Fleming ed. 2011), 39–40.

11. See Rachel Harmon, *Why Arrest?*, 115 *MICH. L. REV.* 307, 332–33 (2016).

Few people have done a better job of vividly illustrating the vast scope of public conduct police officers may be called upon to negotiate than David Thacher. In considering a revisionary account of order maintenance, he remarks that:

Public spaces are shared spaces, and the people who share them often disagree about how they can legitimately be used. Their complaints range from the petty gripes of thin-skinned people unhappy with the hustle and bustle of urban life to the desperate pleas of the seriously aggrieved—complaints about raucous protestors in the city square trying to effect political change, about hookers and drug pushers selling their vices on the sidewalks, about teenagers trying to impress their friends in the park, about street musicians collecting tips, about gang members trying to assert control over turf, about families drinking beer on the beach, about misogynists harassing women from their front steps, about immigrants roasting cuy in city parks, about hawkers selling bootlegged videos on the sidewalk, about skateboarders practicing kickflips on the softball bleachers, about mentally ill people yelling at friends and strangers in city plazas, about business owners dumping trash in the gutter, about homeless men sleeping on bus stop benches, and about college students milling around on the sidewalk clutching plastic cups while Lady Gaga blasts from the fraternity speakers an hour before kickoff. Some of the targets of these complaints are exercising socially-sanctioned rights that legally *cannot* be infringed, while others are exercising important personal freedoms worth protecting as far as possible. At the same time, all of them make use of the public realm—the sidewalks, parks, airwaves, beaches, plazas, and bus stops that the members of our dense and interdependent society share—in ways that other people using those spaces consider excessive and impolitic, crowding out (they say) their legitimate claims to use those spaces themselves. *Order maintenance involves attempts to resolve these conflicts over the use of that shared environment; it is the police role in defining and regulating the fair use of public spaces.*<sup>12</sup>

Thinking as Thacher does is a subtle but important shift in how we conceive of the police role. A competing account is that the police powers can all be reduced to the protection of individual rights enshrined in the law, even the right to party.<sup>13</sup> This makes sense when we think about the police's duty to protect citizens from violence and the physical actions of others that impinge on autonomy and safety. It is less clear, however, how this perspective captures the cases where two people lay claim to the same public space to exercise incompatible uses for it, be it sex workers and "frat boys" or street vendors and pedestrians. By reframing order maintenance as brokering social cooperation with a recourse to enforcement, we can account for the competing rights of people with different goals without writing one

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12. David E. Thacher, *Order Maintenance Policing*, in *THE OXFORD HANDBOOK OF POLICE AND POLICING* 122, 122 (Robert J. Kane & Michael D. Reisig eds., 2014) (emphasis added).

13. For such a rights-based account of the police role, see generally SEUMAS MILLER & JOHN BLACKLER, *ETHICAL ISSUES IN POLICING* 19–30 (2005).



side off as a class of criminal offenders. This seems especially important in our approach to homelessness, as people experiencing homelessness make their competing claims on public space out of necessity.

### III. DEMOCRATIC EQUALITY IN TENSION WITH HOMELESSNESS

It is clear from Thacher's account that people's intended uses of public space in diverse, pluralist communities are bound to conflict. Fairly resolving such conflicts is critical to democratic equality in a state where people are free to pursue different, sometimes incompatible, conceptions of the good. The potential for conflicts is heightened, however, in a state that does a poor job of addressing homelessness. Without intending to ascribe duties or a power to the police *per se*, Elizabeth Anderson tracks this idea when she delineates the political and civil spheres of her conception of democratic equality, and what they mean for citizens.<sup>14</sup> In doing so, she illustrates the need for basic goods like shelter as well as the need for extensive social cooperation if people are to stand in relation to each other as equals in the public sphere, which to her, is the most important indicator of democratic quality. She therefore takes an expansive view of equality and invokes it in a wide range of pursuits in the public sphere: political, commercial, recreational, and social. She argues that:

To be capable of functioning as a human being requires effective access to the means of sustaining one's biological existence—food, shelter, clothing, medical care—and access to the basic conditions of human agency—knowledge of one's circumstances and options, the ability to deliberate about means and ends, the psychological conditions of autonomy, including the self-confidence to think and judge for oneself, freedom of thought and movement. . . . To be capable of functioning as a citizen requires rights to political participation, such as freedom of speech and the franchise, and also effective access to the goods and relationships of civil society. *This entails freedom of association, access to public spaces such as roads, parks, and public accommodations including public transportation, the postal service, and telecommunications.* This also entails the social conditions of being accepted by others, such as the ability to appear in public without shame, and not being ascribed outcast status.<sup>15</sup>

Under Anderson's view, democratic equality requires providing people with primary goods that homeless people do not have, or do not have enough of, such as food, shelter, and medical care.<sup>16</sup> Not doing so leads homeless people to co-opt public spaces to meet at least one of these needs: the need to set up shelter to survive. In Thacher's example, homeless people take up seats at a bus stop,<sup>17</sup> but they

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14. See Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 316–21 (1999).

15. *Id.* at 317–318 (emphasis added).

16. See *id.* at 327.

17. Thacher, *supra* note 12, at 122.

can also sleep in vestibules, on park benches, or across subway seats at rush hour. Meanwhile, other people have a democratic right to access the public spaces and conveyances that homelessness can often disrupt. This right isn't trivial or automatically trumped by the needs of homeless people regardless of the manner in which they utilize a given public space, but rather it is a basic feature of the fair use of the commons by equal citizens. These competing rights introduce a tension between the duties the state has to the housed and the unhoused: both are asserting their right to use the commons, albeit one more desperately than the other.

What exacerbates this tension is that homelessness often consists of profoundly private acts undertaken in public spaces, in ways that can be jarring, disruptive, and to a great extent uncooperative. The homeless make a claim on public space by getting there first, staying the longest, and making a type of use that precludes sharing or easy compromise. The intimacies and vulnerabilities of life at home are necessarily private acts and experiencing homelessness in a city brings them into the open in ways that we would not accept from people who had more options. Sleeping, defecating, urinating, fornicating, taking drugs, drinking: these are the things homeless people often have little choice but to do in public, but our cultural norms recoil from seeing them in the public spaces we reserve for drinking coffee, reading a book, or walking to work. These cultural norms are not entirely unreasonable. This is why many people's inclination is to criminalize the things homeless people do.

A democratic state owes its citizens a resolution of this tension, and it should begin with meeting people's basic needs by giving them shelter. When that is not possible, we should acknowledge the involuntary nature of homelessness and be mindful that human beings need physical space to exist, let alone survive, and in the case of homelessness, it often needs to be a public space. In the meantime, it is not wrong for police to impose limits on *where* the homeless can live in public, or *what* they can do in given places. We can loosely think of them as time, place, and manner restrictions for taking up physical space in a crowded environment with a multitude of contested uses. The challenge for police, then, is to impose these limits in ways that seek to broker a fair compromise rather than just impose the crude force of law, and to do so in a way that does not compound the misery and trauma of a homeless person. What we often see are the police imposing all the burdens of a supposed "compromise" on the homeless person alone. To be equitable, the customers at a gourmet grocery store may have to bear the sight of a disheveled unhoused person bearing a crude sign.

#### IV. BROKERAGE AND LEGAL DISCRETION

The laws that govern and guide the expectations of social cooperation in public spaces are simply that: guides for the police to use, ones that empower them to take physical action when necessary, rather than hard and fast rules about lawful conduct. This reinforces the idea that the police do not first seek to dictate and

enforce the terms of cooperation, but preferably broker them. The idea of brokering rather than enforcing manifests itself in two ways. First, the police have the explicit discretion to enforce or not enforce these laws,<sup>18</sup> and second, that some of these laws—especially the laws against disorderly conduct—are deliberately vague and underdetermined.<sup>19</sup>

The cases in which the police have discretion are clear: nearly all laws which describe a prohibited, nonviolent action, and which impose minor consequences for breaking it, are ones in which the police have near-total discretion in enforcing. Consider, for example, the laws against public urination, drinking alcohol in public, jaywalking, posting signs, begging, busking, playing dice, trespassing, smoking in parks, gathering in large groups in parks, vending on city streets, making excessive noise, and nearly all traffic laws. There is little or no doubt as to what it means to break one of these laws, the consequences for breaking them are minor, and the police have near-complete and unilateral discretion in how these laws are enforced. The millions of people who have received warnings for such violations rather than a charge no doubt appreciate this fact, even if countless others feel they may have had these laws enforced against them for biased or unfair reasons.

The police have discretion in the enforcement of these laws because in a democracy they should be expected to broker, as well as enforce, the terms of social cooperation, including among the homeless. Explicitly giving the police discretion in these cases can be taken as acknowledgement that there are good reasons to correct a condition without resorting to the judicial system. It is the law as written, plus the discretion to enforce it, that provides a basis for construing the police’s power in this way. The first emphasis in securing social cooperation is to make fair decisions about who may be required to sacrifice their desires in order to achieve it. There is no reason why these decisions must necessarily be followed by citing a person with a violation of the law, especially if the outcome is that the problem at hand has been solved. Sometimes, however, the grounds for discretion can shift from instance to instance, such as during spontaneous protests of different sizes, durations, times, and places, or spontaneous celebrations (such as in the aftermath of an important civil rights victory or Superbowl win).

The main point behind applying law to these cases is that it is the means by which the government explicitly invokes its power to coerce in matters that are not

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18. See Herman Goldstein, *Police Discretion: The Ideal Versus the Real*, 23 PUB. ADMIN. REV. 140, 141 (1963); JOHN KLEINIG, HANDLED WITH DISCRETION: ETHICAL ISSUES IN POLICE DECISION MAKING 1 (1996); Brandon del Pozo, Emily Sightes, Jeremiah Goulka, Brad Ray, Claire A. Wood & Leo A. Beletsky, *Police discretion in encounters with people who use drugs: operationalizing the theory of planned behavior*, 18 HARM REDUCTION J. (2021), at 4–5.

19. For a survey of their vagueness and underdetermination across states and an argument that this is grounds for their abolition, see Rachel Moran, *Doing Away with Disorderly Conduct*, 63 B.C. L. REV. 65, 73–75 (2022), and Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CAL. L. REV. 1637, 1647–49 (2021).

By my view, as argued later in this Essay, the need for the government to protect a pluralist form of social cooperation requires recourse to the discretionary enforcement of laws that can be used to regulate common but potentially disruptive behaviors.

ones of protection and rescue. The current status quo consists of a vast body of laws on the books, each with an accompanying allowance for discretion.<sup>20</sup> I will argue they collectively empower the police to foster social cooperation without being told by many citizens to mind their own business because the officers would ultimately be powerless to engage in the necessary brokering and enforcement if the process did not offer a recourse to coercion in its firmament. There also needs to be at least a few sufficiently underdetermined laws, such as the ones governing disorderly conduct, to allow the police to broker and enforce cooperation in situ in the remainder of the cases in which no clear law obtains, but for which something needs to be done in the immediate sense because a conflicting use of public space is at hand or is imminent. New York State's statute, for example, has six subsections that collectively cover a wide range of behavior:

A person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof:

1. He engages in fighting or in violent, tumultuous or threatening behavior; or
2. He makes unreasonable noise; or
3. In a public place, he uses abusive or obscene language, or makes an obscene gesture; or
4. Without lawful authority, he disturbs any lawful assembly or meeting of persons; or
5. He obstructs vehicular or pedestrian traffic; or
6. He congregates with other persons in a public place and refuses to comply with a lawful order of the police to disperse; or
7. He creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.<sup>21</sup>

The importance of disorderly conduct statutes to secure cooperation in our civic spaces should not be underestimated. This is in spite of civil liberties advocates who express concern with how underdetermined these laws are, and point to cases in which the police have used this vagueness to take prohibitive actions that they assert were biased, unnecessary, or unfair.<sup>22</sup> It is always possible to abuse or misapply the power of the law, but this does not, in and of itself, diminish a law's usefulness or necessity. If anything, these concerns highlight the need for police officers to understand what is at stake democratically when they perform their work, especially in cases of homelessness where people have diminished autonomy. The vagueness of disorderly conduct allows the police to ensure that large and unruly protests can be guided in ways that prevent danger and violence, or disperse

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20. For a survey of the broad discretionary powers of the police, see Robert E. Worden & Sarah J. McLean, *Police Discretion in Law Enforcement*, in *ENCYCLOPEDIA OF CRIMINOLOGY AND CRIM. JUST.* (Gerben Bruinsma & David Weisburd eds., 2014).

21. N.Y. Penal Law § 240.20 (West 2021).

22. See Moran, *supra* note 19, at 2.

disorderly groups before their actions turn violent, in both cases attempting to balance democracy, peace, and public safety. In the matter at hand, they are also integral to correcting many of the most uncooperative or disruptive aspects of homelessness without ultimately requiring enforcement. Wording the relevant statutes more precisely would hamper a police department’s ability to do so efficiently and with discretion, and would impair them from taking action when new or unpredictable circumstances prevail.<sup>23</sup>

#### V. CAN VS. MUST IN ENFORCING LAWS AGAINST THE HOMELESS

When I reserve the ability of the police to use their discretion in enforcing laws to regulate homeless behavior because it is what allows them to fulfill a critical role obligation, Friedman and I seem to part ways. In his Article, he discusses *Martin v. Boise*, where the court ruled that the city of Boise could not punish a homeless person simply for sleeping outside in public when sleeping was a biological necessity, and there were no alternatives.<sup>24</sup> He uses the court’s overarching logic to conclude that this means it is impermissible to enforce a variety of laws against the homeless, and it implies an affirmative obligation to provide them with basic necessities if we want to broaden our views of public safety. Friedman says:

[A]t the least, *Martin* holds—I think correctly—that punishment is impermissible unless society steps up and offers alternatives. So, you cannot criminalize camping without providing a place to sleep. I think that obligation goes further. You cannot criminalize urinating in public if you do not provide ready bathrooms. And I am not sure why you can criminalize panhandling unless you provide food to those who cannot afford it. That already is an important hook for an affirmative obligation. If you do not want to be bothered by all this conduct of those who are unhoused, you have to take care of them.<sup>25</sup>

Friedman’s point may conflate the problem of categorically enforcing a law against a person who has no option but to break it with reserving the right to enforce it when they break it under certain more serious (in this case, read uncooperative) circumstances, especially if you are transparent about what those circumstances are. If there are no public restrooms, then it would be wrong to criminalize a homeless person simply for urinating outside, but not for urinating in the middle of the street in full view of children (and bracketing off concerns about mental illness in such a case). Likewise, criminalizing a person for camping is different than enforcing the

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23. Another law that is underdetermined but crucial for brokering social cooperation is harassment, a minor violation which in most states consists of acting towards a person in a way that creates annoyance and alarm but serves no other legitimate purpose (see, for example, N.Y. Penal Law § 240.26 (West 2022)). Such a statute may be used to protect minorities and other populations from oppressive behavior by majorities in public spaces as well as private ones. The degree to which police departments are willing to bring racial, anti-Muslim, anti-Semitic, or anti-gay harassment cases, for example, considering how quickly they can implicate the First Amendment, may be a measure of their commitment to protecting pluralism from populism.

24. *Martin v. City of Boise*, 133 HARV. L. REV. 699, 699, 702 (2019); see Friedman, *supra* note 5, at 1634–35.

25. See Friedman, *supra* note 5, at 1634–35.

rules against camping in crowded civic spaces and being transparent about the difference. I will argue the reason why we have deliberately underdetermined laws and accord police the discretion to enforce them is—ideally—because people seem intuitively capable of understanding the difference between these cases, and they value such differences. The *Martin* court may agree, as it was silent on whether its decision meant the homeless could sleep *anywhere* in public, leaving municipalities free to prohibit encampments in some places—say, a park in the middle of the city—as long as there was a reasonable alternative that was presumably less disruptive.<sup>26</sup> In other words, it may be too simple to say either homelessness is criminalized, or it is not.

Remarkably, the police of another era may have understood the need to provide alternatives while reserving the right to enforce egregious cases better than police today. As Eric Monkkonen writes, “[a]most from their inception in the middle of the nineteenth century until the beginning of the twentieth, American police departments regularly provided a social service that from our perspective seems bizarrely out of character—they provided bed and, sometimes, board for homeless poor people [. . .].”<sup>27</sup> The accommodations were crude, but they were available at police station houses in several major US cities (for example, Boston, Chicago, New York and New Orleans), and often included a bed, or a place to sleep, and a breakfast.<sup>28</sup> Officers did not find this incongruous; it seemed to accord with the police goal of regulating disruptive but fundamentally noncriminal behavior by keeping the homeless off the streets after sundown and giving them shelter from the elements.<sup>29</sup>

This account of policing at the dawn of the era of the US metropolitan police department supports my argument that we currently hold too narrow a conception of policing. If we accept the need for the government to broker and enforce the fair terms of social cooperation in public spaces, then it is hard to see how anyone can effectively do this except people we would call police by virtue of the responsibilities and powers accorded to them. They need to have the power to enforce cooperation when brokering is not forthcoming, and the transaction will certainly be aided by everyone understanding that the government is empowered to impose a solution but expected to do so fairly. By this view, the problem for homeless people is that their circumstances put them in a vexing bind: they are not law school professors living their entire private lives in public because doing so is their eccentric conception of the good, but because we have a system by which living inside requires resources they simply do not have access to, and as physical objects they cannot just collapse into an invisible point that does not take up space. Add to this

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26. See *Martin v. City of Boise*, *supra* note 24, at 704; see generally *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019).

27. ERIC H. MONKKONEN, POLICE IN URBAN AMERICA 86 (1981).

28. See *id.* at 90–91.

29. See *id.* at 91–92.

the likelihood that many homeless people’s most disruptive behaviors are the product of mental health and substance use issues that both diminish their agency and make it difficult to hold down the type of work that secures shelter.<sup>30</sup> What that leaves us with is a categorical error on the part of the government and citizens who expect the police to simply arrest all the beggars and mendicants for what they have done to survive. If the police have a legitimate claim on coercion in regulating behavior in these cases, it is because we *all* have a duty to be socially cooperative in public spaces—because democratic pluralism depends on it—and not because people who sleep on benches or set up tents in parks have *ipso facto* forfeited their claim on a space that belongs to them too.

### CONCLUSION

Where does this leave things? First, this account puts the police in the ironic position of having an obligation to protect the pluralist interests of homeless people as a vulnerable minority population from people who want to dominate public spaces to satisfy their own interests. It is ironic because it is so counter to what we have come to expect of US police officers, who may be more apt to exert the will of a populist majority on the homeless regardless of how it degrades their welfare, and for reasons that are only nominally uncooperative, like panhandling, but that are unpleasant to see. The behaviors that comprise homelessness may be ones that police have a legitimate reason to regulate, and the laws that empower them to do so are reasonable because they can be enforced with discretion. However, this discretion must give the homeless fair consideration as people in distress. Part of protecting pluralism means protecting the interests of people who engage in a certain type of life not by choice, but out of diminished autonomy or the involuntary results of misfortune.

Claims on public space made out of necessity have at least as much purchase as claims made as a deliberate choice, and this should temper the side the police come down on as they broker and enforce the terms of cooperation. It may not be unreasonable to ask a homeless person to break camp in a crowded park in the middle of the day, but officers should not go looking to displace homeless people from the far corners of wooded city parks where they are barely noticed and do not monopolize its use. It is one thing to stop homeless people from turning a civic space into an ad hoc tent city to the exclusion of other legitimate uses, and another to exile people to distant, inconvenient locations where their access to services is disrupted, or to make them move simply because the law allows it and other people

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30. See, e.g., Ajay Manhapra, Elina Stefanovics, & Robert Rosencheck, *The Association of Opioid Use Disorder and Homelessness Nationally in the Veterans Health Administration*, 223 *DRUG AND ALCOHOL DEPENDENCE* 1, 6 (2021); Cilia Mejia-Lancheros, James Lechaud, Tim Aubry, Kathryn Wiens, Patricia O’Campo, Vicky Stergiopoulos, & Stephen Hwang, *Multi-Trajectory Group Profiles of Well-Being and Associated Predictors Among Adults Experiencing Homelessness and Mental Illness: Findings From the At Home/Chez Soi Study, Toronto Site*, *SOC. PSYCHIATRY AND PSYCHIATRIC EPIDEMIOLOGY* 68, 72 (2021).

do not like their look. Pluralism is precisely about protecting the democratic equality of people that the majority would outcast if given the opportunity. If the police profession takes protecting rights seriously, it should act accordingly.

To close, we can return to Greenwich Village. The ire of the police commissioner and the pressure he put on commanders to use underdetermined laws such as disorderly conduct statutes to forcibly move homeless people like Joseph are precisely why Friedman is so concerned about the state of American policing. Officers were asked to use arrest as a near-literal cudgel to keep a man away from a swanky supermarket. If I had arrested this man and charged him instead of calling the police department's lawyer, it would have made the shoppers at Citarella happy because I had used the force of law to get rid of an unsightly person. Even if he soon returned, nobody could accuse me of not trying. On John's end, he would amass a growing arrest record, warrants if he did not make it to court, possibly fines, and short but disruptive stints of imprisonment. In the end, it would have solved nothing.

But that does not mean the police cannot solve anything with the law. Consider an exception that proves the rule from my time as a NYPD precinct commander. Before long, my staff and I knew what to expect in the envelopes from the police commissioner. The only question was what the attached photo would show. We normally expected it to be of Joseph, or maybe a homeless person reclined on a patch of sidewalk drinking, but one time we were taken by surprise. It was a photo of a homeless woman sitting on an open sofa bed in the middle of a crowded sidewalk on 14<sup>th</sup> Street near Broadway, with her belongings arranged around her as if it were her bedroom. We all broke out into awkward laughter; we were surprised we had missed her on patrol, and we felt busted. "That, we need to do something about," my community affairs officer said. We were not in the habit of scouring every park, alleyway, and bench for homeless people and panhandlers (the police commissioner's office was quick to remind us of that), but we felt we had an obligation to stop a person from setting up a full-fledged bedroom on a busy street in the middle of the day. It was not a fair way to use the space, even for a homeless person with few other options. It would be the criminal law that empowered us to enforce a solution that would move the woman to another location, albeit without a sofa bed on the street, even if we had no intention of using that same law to charge her. What we did was elemental to policing a pluralist democracy.