

RESPONSES

ENSURING DIGNITY AS PUBLIC SAFETY

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ABSTRACT

In his Distinguished Lecture for the Academy for Justice, Are Police the Key to Public Safety?: The Case of the Unhoused, Barry Friedman contends that America needs to rethink the meaning of “public safety.” Guaranteeing public safety is arguably the most foundational responsibility of government. Yet a too narrow understanding of what public safety requires may be at the root of our country’s overreliance on police to handle tasks for which they are ill suited. Through the lens of police interactions with the chronically homeless, Friedman suggests that a broader conception of public safety would include affirmatively providing for citizens and would better account for the safety trade-offs entailed in police deployments.

In this response to Friedman’s lecture, I connect Friedman’s more expansive definition of public safety to legal philosophies that elsewhere tend to speak in the language of ensuring human dignity. By highlighting the dignitarian strands in Friedman’s work on public safety, I hope to give Friedman’s account a richer theoretical grounding and more purchase in American constitutionalism. However, doing so also raises questions about whether Friedman’s legal prescriptions are fully consonant with the extremes of his theoretical commitments.

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INTRODUCTION

At any given moment, nearly half a million Americans are homeless.¹ Make no mistake, this is a societal failing. There are more than twenty empty homes in this country for every homeless individual.² Yet America has largely decided to turn to the power of criminalization to deal with these individuals, rather than to remedy the failure by providing for them.³ It is one of our deep pathologies that Americans have abdicated our shared responsibility for homelessness, decreeing instead that the condition is both a personal and a moral failing.⁴

It is in response to this tragic state of affairs that Barry Friedman offers his lecture, *Are Police the Key to Public Safety?: The Case of the Unhoused*.⁵ By examining how we police individuals experiencing homelessness, Friedman demonstrates how American understandings of the police and public safety are currently emaciated.⁶ Wishing only to remove unimaginable poverty from public view, we deploy the tool of criminalization against homelessness to empower police as law enforcers.⁷ As Friedman says: [W]e do not want unhoused people around. On the other hand, housing the homeless is expensive and people are generally unwilling to pay for it. So we call the police and ask them simply to make the homeless go away.⁸ As a result, we never address the root causes of homelessness, and we rarely stop to consider the costs entailed by our approach.

The real costs of policing homelessness comprise a significant component of Professor Friedman's lecture. He urges us to improve policing by embracing a cost-benefit analysis with respect to criminalization.⁹ Looking beyond the traditional measures of policing success—e.g., arrests made—Friedman highlights the costs entailed by deeming certain behavior criminal, and hence “dumping them in the hands of society's clean up squad, the police.”¹⁰ These costs include not only

1. U.S. DEP'T OF HOUS. & URB. DEV., CONTINUUM OF CARE HOMELESS ASSISTANCE PROGRAMS HOMELESS POPULATIONS AND SUBPOPULATIONS, HUD (2019), https://files.hudexchange.info/reports/published/CoC_PopSub_NatlTerrDC_2019.pdf (counting 567,715 homeless individuals during the annual point-in-time count in 2019).

2. See U.S. CENSUS BUREAU, QUARTERLY RESIDENTIAL VACANCIES AND HOMEOWNERSHIP, FOURTH QUARTER 2020 (Feb. 2, 2021), <https://www.census.gov/housing/hvs/files/qtr420/Q420press.pdf> (estimating 11.8 million year-round vacant homes in the United States).

3. Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL'Y REV. 1, 2–3 (1996).

4. See Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 21–22 (2016) (explaining how American notions rooted in the “bootstrap” work ethic and labor-desert principles lead to blaming homeless individuals for poverty that is viewed as self-inflicted).

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

6. See Friedman, *supra* note 5, at 1601–06.

7. *Id.*

8. *Id.* at 1624.

9. *Id.* at 1624–30.

10. *Id.* at 1625–27, 1637.

the harms caused when policing goes wrong, as it too often does,¹¹ but the harms of policing gone right.¹² Friedman notes, for example, that every arrest entails social costs, including court time, jail beds, and lost work.¹³ And those arrests do not necessarily result in reduced crime.¹⁴ This is especially true of arresting the homeless, which often just entrenches their poverty and reduces their options.¹⁵ Moreover, Friedman's work seems sympathetic to accounting for the "soft costs" of policing, such as the social cost of coercive police tactics short of arrest.¹⁶ This emphasis on cost-benefit analysis might suggest that Friedman is embracing a straightforwardly utilitarian philosophy. But Friedman's lecture also has a more essential, broader thesis that departs from rank utilitarianism: Friedman claims that public safety ought to be the first job of government, and yet American government has an insufficiently capacious understanding of what public safety entails.¹⁷ The reason we task police with addressing homelessness, Friedman explains, is that we fail to appreciate both what public safety means and who must be made safe. First, "public safety" is too often assessed from the perspective of those who benefit from deploying police, rather than those who are policed.¹⁸ For Friedman, this is a violation of the government's foundational obligation to protect its citizens.¹⁹ Second, a sufficiently capacious conception of public safety is one that requires the government to provide basic necessities to struggling citizens, not merely protect them from external harms.²⁰ By failing to view public safety through this broader lens, we miss that we all too frequently ask police to perform jobs for which they are ill-suited.²¹

Embracing a broader conception of public safety would have implications both for what we criminalize and what we ask police to do. Citing a recent decision by the Ninth Circuit Court of Appeals, Friedman suggests that the government should not be able to constitutionally criminalize behaviors, such as sleeping in public or

11. Recent attempts to quantify these costs abound. *See, e.g.,* Elanor Lumsden, *How Much is Police Brutality Costing America?*, 40 HAW. L. REV. 141, 165–90 (2017).

12. Friedman consistently counts interactions with the police as reducing safety. *See, e.g.,* Friedman, *supra* note 5, 1632–33 ("There is an unhoused person sleeping on a bench near your home. You do not feel safe. So, you call the police to remove him. Now, he is not safe."). Any cost-benefit analysis necessarily incorporates these normative judgments about which outcomes are considered benefits and which are considered costs. *See generally* Bernard E. Harcourt, *The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis*, 47 J. LEGAL STUD. 419 (2018).

13. Friedman, *supra* note 5, at 1627.

14. *Id.*

15. *Id.* at 1611–12.

16. *See Id.* at 1634 (referring to the problem of police "coercion in the shadow of due process"). For a detailed account of policing's coercion costs, see Rachel Harmon, *Federal Programs and the Real Costs of Policing*, 90 N.Y.U. L. REV. 870, 901–05 (2015).

17. Friedman, *supra* note 5, at 1602–03, 1629–30.

18. *Id.* at 1630–33.

19. *Id.* at 1633 ("Government may not harm the very people it is charged to protect.").

20. *Id.* at 1634.

21. *Id.* at 1603.

begging for food, without providing its citizens with adequate alternatives.²² He further suggests that the Supreme Court should revisit a controversial decision finding that the government has no affirmative duty to protect the population.²³ These suggestions would proliferate the duties we currently assign to police. As a result, police departments may need to be expanded, diversified, and restructured to better serve the diverse ends to which the government is properly obligated.²⁴

In Part I of this Essay, I interrogate the philosophical commitments of Friedman's broader thesis. Where he departs from utilitarianism, I read much of Friedman's contribution to our understanding of public safety as sounding in the language of human dignity. By exploring the dignitarian veins of Friedman's work, I highlight what I see as a tension between the commitment to ensuring human dignity, on the one hand, and Friedman's broadly statist proposals to improve policing, on the other. In particular, in Part II, I show how leading accounts of human dignity may require a different view of the two constitutional rulings that Friedman cites. If public safety consists of ensuring the dignity of all those subjected to government power, then Friedman may ultimately need to revise his views on what public safety permits and where the power to provide for public safety should be located.

I. FRIEDMAN'S DIGNITARIAN COMMITMENTS

Early in his lecture, Friedman asserts that improperly assigning to police the responsibility to deal with social ills causes "not one but two sorts of harms around policing."²⁵ One harm is the risk entailed in every police deployment—that a confrontation may ultimately render someone less safe in a very traditional sense; "the hugely consequential and often tragic impacts on people and society as police pursue their mission."²⁶ The second harm is less visible but no less important. It is the harm to society of leaving the underlying social problems unresolved.²⁷ By concluding that a particular problem is a police matter, we often address only the superficial symptoms of a deeper societal failure.

These twin conceptions of harm animate my response to Friedman. For, in them, I see the echoes of a more robust legal philosophy—a philosophy that elsewhere tends to be couched not in the language of public safety, but in the language of human dignity. This Part explores the dignitarian commitments that I see undergirding Friedman's work. In particular, it situates the capacious conception of public safety that Friedman advances within the traditions of Martha Nussbaum and John Rawls, two philosophers who have dedicated their careers to examining the

22. *Id.* at 1634 (discussing *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018)).

23. *Id.* at 1631 (discussing *DeShaney v. Winnebago County*, 489 U.S. 189 (1989)).

24. *Id.* at 1639–42.

25. *Id.* at 1606.

26. *Id.* at 1603.

27. *Id.* at 1606.

demands of a just society. This Part also examines the legal frameworks in which a commitment to ensuring human dignity can be leveraged to tangibly improve public safety in the capacious sense that Friedman imagines.

A. *Dignity as Capabilities*

The most essential feature of Friedman's lecture is his call for us to reimagine the concept of public safety in a more capacious way. He argues, in the classic tradition of political philosophy, that "public safety" is the "first job of government."²⁸ The reason that individuals join together in society and voluntarily surrender some of their liberty to a sovereign is that the collective adherence to laws improves the safety and security of every individual.²⁹

For some Enlightenment-era thinkers, "public safety" was likely limited to physical security—protection from interpersonal violence—and perhaps the possession of property.³⁰ But Friedman urges us to imagine more. According to Friedman, "a capacious understanding of public safety actually imposes an affirmative requirement on society to help the homeless."³¹ Finding traces of this thought in the early works of Jeremy Bentham (and noting its endorsement even by some contemporary conservative figures), Friedman claims that society has a positive obligation to provide life's necessities to those for whom they are financially out of reach.³²

What are the basic necessities entailed by a capacious commitment to public safety? Food and shelter appear to be a given for Friedman.³³ But at times he goes far beyond simple sustenance. Friedman questions, for example, whether society must provide its citizens with bathrooms, clean water, or even education.³⁴ Although he falls short of announcing these as necessary components of "public safety" in the capacious sense,³⁵ I think his project may entail that conclusion. In

28. *Id.* at 1630.

29. *Id.* at 1631 (Thomas Hobbes, John Locke, and Jeremy Bentham).

30. *See, e.g.*, THOMAS HOBBS, THE ELEMENTS OF THE LAW, NATURAL AND POLITIC 111 (J.C.A. Gaskin ed., trans., Oxford Univ. Press 1994) (1640). According to Hobbes:

[A] man may . . . account himself in the estate of security, when he can foresee no violence to be done unto him, from which the doer may not be deterred by the power of that sovereign, to whom they have every one subjected themselves; and without that security there is no reason for a man to deprive himself of his own advantages, and make himself a prey to others.

Id.

31. Friedman, *supra* note 5, at 1634.

32. *Id.* at 1634–35.

33. *Id.* at 1635–36.

34. *Id.*

35. With respect to clean water and education, Friedman suggests that the government's obligation to provide adequate services may derive from the government voluntarily undertaking to provide these services in the first instance. *Id.* at 1636. Framed this way, Friedman offers a theory of what is owed in response to public dependency, not necessarily what is owed as a consequence of the government's obligation to promote public safety more broadly. *See id.* At other times, however, Friedman describes his dependency theory as if it is a lesser included alternative to a broader conception of public safety. *See id.* at 1634.

particular, I continue to return to the second of his twin conceptions of harm: by tasking police, alone, with public safety, Friedman contends that society is harmed because chronic social problems go unresolved.³⁶ If the first job of government is to avoid this harm, we must commit to an understanding of public safety that is sufficiently broad so as to require that society's deepest social ills get remedied.

So construed, Friedman's claims about public safety are very much aligned with the works of political philosophers who center human dignity in any theory of a just society. More so than Bentham, Friedman's contributions track the work of academics like Amartya Sen and Martha Nussbaum.³⁷ These theorists claim that, in order to be just, a society must begin by providing individuals with adequate opportunities to lead a dignified human life.³⁸ Dignity, in this worldview, is inextricably tied to the opportunity to develop basic human capabilities. Nussbaum, in particular, is credited with having developed a "capabilities approach" to human dignity.³⁹ She has argued both that all government-provided rights should be understood as entitlements to essential human capabilities and that advancing these rights requires material and institutional investment by a government in its citizens.⁴⁰ Mirroring Friedman, Nussbaum's basic human rights include entitlements to things like food, shelter, water, and education, but also bodily integrity, political participation, and much more.⁴¹

Nussbaum's capabilities approach to human dignity not only harmonizes with Friedman's "public safety" approach to the government's foundational duties, but also provides an important supplement to Friedman's work. Human dignity offers a touchstone for understanding *which* rights are truly foundational.⁴² Or, to use Friedman's vernacular, human dignity tells us which deeper social problems

36. *Id.* at 1606.

37. See generally Amartya Sen, *Equality of What?*, The Tanner Lectures On Human Values 195 (May 22, 1979); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997).

38. Nussbaum, *supra* note 37, at 279–80 (explaining that it is "the proper goal of government, to bring all citizens up to a certain basic minimum level of capability"); Sen, *supra* note 37, at 218 (suggesting that the basic capabilities of a person should include "[t]he ability to move about[,] . . . the ability to meet one's nutritional requirements, the wherewithal to be clothed and sheltered, [and] the power to participate in the social life of the community").

39. Ingrid Robeyns & Morten Fibieger Byskov, *The Capability Approach*, in *THE STAN. ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2020), <https://plato.stanford.edu/entries/capability-approach/>; see also Samuel Freeman, *Frontiers of Justice: The Capabilities Approach v. Contractarianism*, 85 *TEX. L. REV.* 385, 385–86 (2006) (reviewing MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITIES, NATIONALITY, SPECIES MEMBERSHIP* (2006)) (explaining that, "[w]orking from ideas of human dignity . . . Nussbaum presents an account of the central human capabilities that society must satisfy—by the provision of necessary rights, entitlements, and background social conditions").

40. See Martha Nussbaum, *Human Rights and Human Capabilities*, 20 *HARV. HUM. RTS. J.* 21, 21–22 (2007) ("All rights, understood as entitlements to capabilities, have material and social preconditions, and all require government action.").

41. *Id.* at 23–24 (listing ten central human capabilities).

42. Freeman, *supra* note 39, at 388 (explaining how the "fundamental moral value of *human dignity* demands that a minimal threshold level for each central capability be realized if a person is to live a dignified life worthy of a human being" (emphasis in original)).

society is obliged to resolve as part of its “first job,” something Friedman’s lecture does not do.⁴³ To be clear, I make no claim that Friedman would adopt Nussbaum’s particular list of capabilities as constitutive of his capacious conception of public safety. Rather, I merely wish to draw attention to the parallels between a theory of public safety that requires the government to provide for the poor and adequately solve deep social problems and a theory of government centered on developing individual human dignity.

If we think about public safety as a commitment to ensure the human dignity of all individuals in a society, Friedman’s call to reform the way we police the homeless has real bite. On the one hand, using police to respond to homelessness does nothing to redress the preexisting indignity of the situation. Individuals experiencing homelessness face a number of deprivations that render them less safe in the capacious sense: they often have insufficient food or water;⁴⁴ many of them lack any kind of shelter or protection from the elements;⁴⁵ they have no place to perform essential bodily functions, including sleeping;⁴⁶ and they are particularly vulnerable to theft and violence.⁴⁷ Police, alone, remedy none of these indignities. Responding to homelessness with police, moreover, often imposes new harms—that is, new indignities—that compound an already fraught situation.⁴⁸ A society committed to public safety in the capacious sense, by contrast, would invest government resources in expanding the fundamental capabilities of individuals experiencing homelessness, providing a more dignified, less dangerous existence.

B. Dignity as Incommensurability

The second of Friedman’s allusions to human dignity can be found in his observation that policing necessarily entails a choice about how we distribute public safety. Too often, we are blind to the distributional consequences of policing because, as Friedman aptly notes, we labor under a romanticized image of police that “ride around all day trying to catch criminals.”⁴⁹ But when we deploy police to remedy social problems such as homelessness, these distributional choices become more obvious. On the one hand, laws criminalizing fundamental aspects of homelessness make many people feel safer. As Friedman notes, “[s]ome people see the homeless populations as threatening, particularly those with obvious mental health

43. Friedman, *supra* note 5, at 1630.

44. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 35–36 (2019), <https://homelesslaw.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>.

45. *Id.* at 33 (estimating that two-thirds of chronically homeless individuals “are staying outdoors, in abandoned buildings, or other locations not suitable for human habitation”).

46. *Id.* at 36, 41 (noting lack of access to toilets, showers, laundry, and trash services).

47. *Id.* at 35, 66–67 (explaining that exposure to violence occurs both inside emergency shelters and outside on the streets).

48. Ben A. McJunkin, *Homelessness, Indignity, and the Promise of Mandatory Citations for Urban Camping*, 52 ARIZ. ST. L.J. 955, 963–68 (2020) (detailing the indignity of custodial arrests on individuals experiencing homelessness).

49. Friedman, *supra* note 5, at 1607.

issues.”⁵⁰ On the other hand, these laws also make those experiencing homelessness considerably less safe. They authorize the police to use various forms of force that threaten not only the physical safety of homeless individuals, but also the security of their property, their ability to work, and the community they may have developed.⁵¹

Friedman questions the soundness of laws against homelessness on a number of classic grounds—we are punishing behavior that does not cause harm; individuals experiencing homelessness are arguably not morally culpable; and the criminalization strategy is ineffective if not outright counterproductive.⁵² But he also challenges our entitlement as a society to redistribute safety through criminalization of those who are already unsafe. In his remarks on cost-benefit analysis, Friedman urges us to take account of the social costs of policing.⁵³ It is not enough, Friedman claims, that policing techniques are effective at providing benefits to the majority of society—benefits like crime reduction.⁵⁴ Rather, we must understand that those benefits come at a cost to the people being policed, and perhaps to society more generally.⁵⁵ While this may sound like simple utilitarianism, Friedman then goes further, questioning the morality of imposing those costs on the very individuals in society who are lacking “public safety” in the capacious sense of basic necessities, such as food and shelter.⁵⁶ Although he does not quite say it explicitly, I read Friedman as questioning whether a commitment to public safety, properly understood, precludes a certain set of trade-offs between the safety of the homeless and those who might benefit from policing homelessness more aggressively.

Friedman’s views on public safety’s trade-offs are admittedly underdeveloped in his lecture. But I view them as among his more interesting contributions. In considering what a more robust version of his argument may look like, my mind goes to a scholar who surprisingly has had little to say about the criminal law despite a career dedicated to understanding the very concept of justice.⁵⁷ That scholar is John Rawls. Like Friedman, Rawls eschewed simple utilitarianism in favor of a theory of government that precludes a certain set of trade-offs.⁵⁸ This commitment to human incommensurability is grounded in human dignity and admittedly

50. *Id.* at 1614. Other justifications for reducing visible homelessness include sanitation, commerce, and the use of publicly funded spaces. *Id.* at 1614–15.

51. *Id.*; see also McJunkin, *supra* note 48, at 965–66.

52. Friedman, *supra* note 5, at 1614–15.

53. *Id.* at 1637.

54. *Id.* However, Friedman also questions whether actions that seem effective (such as arresting a culpable actor) actually lead to long-term benefits (such as true crime reduction). *See id.*

55. *Id.* at 1637–38. For example, Friedman notes that employing ineffective approaches to homelessness deprives society of “the social benefit that accrues to all of us, knowing we have actually solved a difficult problem.” *Id.* at 1630.

56. *Id.* at 1636.

57. For a detailed account of what a Rawlsian theory of criminal punishment would entail, see Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 *BUFF. CRIM. L. REV.* 307 (2004).

58. Compare JOHN RAWLS, *A THEORY OF JUSTICE* viii (1971) (citing the traditional theories of the social contract shared by John Locke, Jean-Jacques Rousseau, and Immanuel Kant as sources of his work), with

indebted to Immanuel Kant.⁵⁹ But contrary to Kant (and Nussbaum), Rawls saw human dignity not as the *grounds* from which we divine what is owed to persons, but rather as the *reason* for our chosen social distributions—of rights, of opportunities, and of physical safety.⁶⁰

In this way, Rawlsean dignity is distinctly anti-utilitarian, much in the way that Friedman's work hints at being. Rawls writes:

[T]o respect persons is to recognize that they possess an inviolability founded on justice that even the welfare of society as a whole cannot override. It is to affirm that the loss of freedom for some is not made right by a greater welfare enjoyed by others.⁶¹

Quite similarly, Friedman writes that society may not reduce the safety of the homeless in order to increase the safety of others who seek protection from the homeless.⁶² To do so would be to violate society's fundamental duty of protection.⁶³

In evaluating the standards for a just society, Rawls formalized a dignitary principle that goes to the heart of how we should respond to the issue of homelessness: the difference principle. The difference principle states that social inequalities are justifiable only to the extent that they materially improve the position of those who are least well off.⁶⁴ As a distributive principle, it may be fairly said that what the difference principle absolutely forbids is taking something away from those who have the least in society in order to improve the position of those who have more. This is where I see the connection to Friedman's work. Friedman claims that a true commitment to public safety means providing for the poor because the existence of deep poverty in a world that also permits luxury is not a stable situation—that the potential for homelessness undermines the security of everyone in society.⁶⁵

If I am correct in my reading of Friedman, one possible consequence is that our distributional choices about policing and public safety ought to follow Rawls' difference principle. It should never be permissible to make individuals experiencing homelessness less safe in order to improve the safety of others. Friedman implicitly frames this conclusion as a cost-benefit failure: the choice to criminalize homelessness imposes broader social costs in the form of an instability that leaves us all insecure. But we may more simply view this as the demand of human dignity in a just society.

Friedman, *supra* note 5, at 1630–31 (citing the theories of Thomas Hobbes, John Locke, and Jeremy Bentham about why people form societies in his explanation of the government's duty to protect its people).

59. See RAWLS, *supra* note 58, at viii.

60. *Id.* at 586.

61. *Id.*

62. Friedman, *supra* note 5, at 1632.

63. *Id.*

64. See RAWLS, *supra* note 58, at 78.

65. Friedman, *supra* note 5, at 1635–36.

C. Dignitarian Constitutionalism

I emphasize Friedman's dignitarian commitments here in part because human dignity, unlike public safety, is a concept with substantial legal purchase in obligating the government to extend rights and satisfy duties. As a matter of political philosophy, Friedman may very well be right that public safety is the first job of government.⁶⁶ But, constitutionally, public safety is primarily invoked to authorize the government to control its citizens. When evaluating legislation, public safety is a primary justification for the government's expansive "police power."⁶⁷ In criminal procedure, public safety operates as an exception that trumps a defendant's other rights.⁶⁸ Indeed, nearly every major court case to recognize a constitutional limitation on police practices has been criticized as a threat to public safety.⁶⁹

Human dignity, by contrast, has increasingly operated as a constitutional principle that regulates the government, rather than its citizens. Despite not appearing in the Constitution, dignity can be found in nearly a thousand Supreme Court opinions.⁷⁰ "The Supreme Court has invoked the term in connection with the First, Fourth, Fifth, Sixth, Eighth, Ninth, Eleventh, Fourteenth, and Fifteenth Amendments."⁷¹ Most recently, the jurisprudence of Justice Anthony Kennedy over the last two decades has "tightly wound the double helix of Due Process and Equal Protection into a doctrine of *equal dignity*."⁷² Kennedy's invocations of dignity have decriminalized sodomy,⁷³ struck down provisions of the Defense of Marriage Act,⁷⁴ and mandated the legalization of same-sex marriage throughout the United States.⁷⁵

For this reason, there may be practical value in situating Friedman's call to view public safety more expansively within theories of dignity. If, as Friedman contends, "public safety" means clean air and water as much as it means "clean"

66. *Id.* at 1630–31.

67. *See, e.g.*, *Hynes v. Mayor & Council of Borough of Oradell*, 425 U.S. 610, 619 (1976) ("[T]he police power permits reasonable regulation for public safety."); *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) ("Erie's efforts to protect public health and safety are clearly within the city's police powers.").

68. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649, 655 (1984) ("We hold that on these facts there is a 'public safety' exception to the requirement that Miranda warnings be given before a suspect's answers may be admitted into evidence . . .").

69. *See generally* Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 171 (1962) (examining criticisms of the Warren Court's criminal procedure "innovations").

70. Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 178 (2011).

71. *Id.* at 172–73 (footnotes omitted).

72. Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 HARV. L. REV. F. 16, 17, 21–23 (2015) (describing Justice Kennedy's use of equal dignity in various cases that led to its central role in *Obergefell v. Hodges*, 576 U.S. 644 (2015)).

73. *See generally* *Lawrence v. Texas*, 539 U.S. 558 (2003).

74. *See generally* *United States v. Windsor*, 570 U.S. 744 (2013).

75. *See generally* *Obergefell v. Hodges*, 576 U.S. 644 (2015).

streets,⁷⁶ the legal doctrines that can translate this vision into reality are already speaking in the language of dignity.⁷⁷ Friedman would be wise to do the same.

II. THE DIVERGENCE OF COMMITMENTS & CONSEQUENCES

Given Friedman's philosophical commitments to a conception of public safety that overlaps with leading theories of human dignity, I am surprised by his legal prescriptions. Friedman acknowledges that the problems in policing run deep—indeed, they run “to the core of the policing function itself.”⁷⁸ Yet his solutions to these problems reveal what Jocelyn Simonson has called a “technocratic sensibility” about policing.⁷⁹ Friedman does not question the inherent legitimacy of police departments as social instruments.⁸⁰ He merely seeks to reform departments by decreasing the harmfulness of certain policing practices. In some ways, Friedman's proposals may even be read to require that we consolidate additional power within police departments, to the detriment of communities—like the homeless—that have traditionally been hurt by over-policing.

This Part highlights two examples of how Friedman's resolution of legal issues governing how we police the homeless is at odds with the deeper dignitarian commitments that I identified in Part I. First, Friedman approvingly cites a recent ruling by the Ninth Circuit Court of Appeals that re-writes society's justifications for criminalizing homelessness. Although the immediate import of the decision is to limit police authority in some circumstances, it cloaks the criminalization of homelessness in a veneer of legitimacy that undermines Rawlsian dignity and runs contrary to the difference principle. Second, Friedman calls for the Supreme Court to overturn a longstanding precedent that permits police to opt for non-intervention. He would interpret the Constitution to impose a duty on government to become more involved in the lives of those who are already least safe. Yet the capabilities

76. “Clean” streets is a common euphemism for the use of policing and social control strategies to reduce crime and disorder. *See, e.g.*, PATRICK J. CARR, *CLEAN STREETS: CONTROLLING CRIME, MAINTAINING ORDER, AND BUILDING COMMUNITY ACTIVISM* (2005); *see generally* George L. Kelling & James Q. Wilson, *Broken Windows*, *THE ATLANTIC* (Mar. 1982), <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

77. For example, the Eighth Amendment guarantees prisoners “basic sustenance,” such as food and medical care, out of respect for “the essence of human dignity inherent in all persons.” *Brown v. Plata*, 563 U.S. 493, 510–11 (2011). Likewise, the provision of safe drinking water is essential to the protection of public health, which “is analogous to the many explicit and implicit recognitions of the right to human dignity found in the Constitution.” A. Dan Tarlock, *Safe Drinking Water: A Federalism Perspective*, 21 *WM. & MARY ENV'T L. & POL'Y REV.* 233, 249 (1997). The United Nations has gone so far as to declare that “[t]he human right to water is indispensable for leading a life in human dignity.” U.N. ECON. & SOC. COUNCIL, *GEN. COMMENT NO. 15* (2002), <https://www.unhcr.org/en-us/publications/operations/49d095742/committee-economic-social-cultural-rights-general-comment-15-2002-right.html>.

78. Friedman, *supra* note 5, at 1606.

79. *See* Jocelyn Simonson, *Power over Policing*, *BOS. REV.* (June 8, 2020), <http://bostonreview.net/law-justice/jocelyn-simonson-power-over-policing>.

80. *See* Friedman, *supra* note 5, at 1640 (“The culprit here is not necessarily the police, but society itself, which has failed to tackle the underlying social problem, and instead sent brute force to try to sweep it out of sight.”).

model of human dignity is arguably better served by heeding the recent calls to divest power from police and to reinvest in community-driven self-improvement, a call Friedman scarcely considers. If public safety means ensuring human dignity, we may be better served by empowering the people—not the police—to direct the course toward social betterment.

A. *Criminalization for Thee*

In 2018, a Ninth Circuit panel resolved a federal civil rights lawsuit brought on behalf of homeless individuals in the city of Boise, Idaho.⁸¹ Plaintiffs contended that criminal penalties for sleeping outside on public property violated their Eighth Amendment rights, because they had no other options for shelter.⁸² The court agreed. In articulating an admittedly “narrow” holding, the panel emphasized the homeless plaintiffs’ absence of choice.⁸³ “[A]s long as there is no option of sleeping indoors,” the opinion read, “the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”⁸⁴

That case, *Martin v. City of Boise*, has been praised by many. The National Homelessness Law Center, which helped file the initial lawsuit in 2009, hailed the *Martin* decision as “being essential to encouraging cities to propose constructive alternatives to homelessness.”⁸⁵ And, indeed, many cities bound by the Ninth Circuit’s ruling have worked to expand the availability of shelter offerings.⁸⁶ Friedman, likewise, is supportive of the *Martin* decision. He claims, for example, that *Martin* is correct in holding that punishment is “impermissible unless society steps up and offers alternatives.”⁸⁷ This is a fair characterization of the decision—the immediate takeaway from *Martin* is that the criminalization of unsheltered homelessness is unjustifiable unless shelter beds are available.

But Friedman also asserts that *Martin* exemplifies our constitutional obligation to criminalize only “conduct that is worthy of criminalization.”⁸⁸ And it is here that I think a dark side to *Martin* becomes evident. The implication of *Martin*’s rationale is that once homeless individuals have an option—for example, a bed in an emergency shelter—then sleeping in public becomes a matter of individual choice,

81. *Martin v. City of Boise*, 902 F.3d 1031, 1050 (9th Cir. 2018).

82. *Id.* at 1035.

83. *Id.* at 1048.

84. *Id.*

85. Press Release, Nat’l Homelessness L. Ctr., Supreme Court Lets *Martin v. Boise* Stand: Homeless Persons Cannot Be Punished for Sleeping in Absence of Alternatives (Dec. 16, 2019), <https://homelessnesslaw.org/supreme-court-martin-v-boise/>.

86. See, e.g., Gregory Scruggs, *Western Cities Scramble to Comply With Court Ruling on Homelessness*, U.S. NEWS & WORLD REPORT (Feb. 10, 2020, 8:00 AM), <https://www.usnews.com/news/cities/articles/2020-02-10/western-cities-scramble-to-comply-with-court-ruling-on-homelessness>.

87. Friedman, *supra* note 5, at 1634.

88. *Id.* at 1633

hence personal criminal culpability.⁸⁹ In those cities that have expanded their shelter offerings in *Martin*'s wake, the most immediate consequence is triggering additional criminal enforcement against homeless residents.⁹⁰ Other cities have been more blatant about prioritizing criminal enforcement, for example by outfitting police officers with live access to shelter availability and so ensuring that they have constitutional cover to make an arrest.⁹¹ By tying criminalization of homelessness to the availability of alternatives, *Martin* arguably justifies the criminalization of homeless individuals for the simple sin of declining government services.

The *Martin* opinion thus whitewashes a history of criminalization that has long been driven by animus. The crime of being homeless dates back to the founding of the country.⁹² Rather than being premised on the personal choice to decline services, historical scholars have found that early vagrancy laws were designed to identify and punish classes of individuals deemed "unworthy" of services in the first instance.⁹³ Far from trying to drive individuals toward needed resources, laws against homelessness largely sought to drive the visibly poor away from towns and cities.⁹⁴

The historical approach to criminalizing homelessness stands in sharp contrast to understandings of Rawlsian dignity. Although Rawls himself did not explore the conditions for just criminalization,⁹⁵ Sharon Dolovich has theorized about the necessary conditions for a Rawlsian criminal justice system.⁹⁶ Most relevant here, Dolovich claims that questions about what behaviors to criminalize should happen

89. See *Martin*, 902 F.3d at 1048 n.8 ("Naturally, our holding does not cover individuals who *do* have access to adequate temporary shelter, whether because they have the means to pay for it or because it is realistically available to them for free, but who choose not to use it.") (emphasis in original).

90. See Sara K. Rankin, *Hiding Homelessness; The Transcarceration of the Homeless*, 109 CALIF. L. REV. 559, 577–78 (2021) (discussing how Las Vegas simultaneously expanded shelter options and increased criminalization following the *Martin* decision); Cameron Baskett, Note, *Cruel & Unusual Camping*, 109 KY. L.J. 593, 601, 605 (2020) (explaining that some cities have embraced "the construction of large, centralized facilities that are available to the homeless twenty-four hours a day," resulting in "very few instances in which no alternative sleeping space is available and, therefore, little protection for the homeless population against the criminalization of persons sleeping outside on public property").

91. See Erasmus Baxter, *Phoenix's Draft Homelessness Plan Raises Hopes and Concerns*, PHX. NEW TIMES (July 7, 2020, 9:30 AM), <https://www.phoenixnewtimes.com/news/phoenix-draft-homeless-plan-hopes-portal-advocates-community-gallego-11478370>.

92. See, e.g., *An Act for Suppressing and Punishing Rogues, Vagabonds, Common Beggars, and Other Idle, Disorderly, and Lewd Persons*, in THE PERPETUAL LAWS OF THE COMMONWEALTH OF MASSACHUSETTS 411 (2d ed., 1801), <https://books.google.com/books?id=ADw4AAAAIAAJ>.

93. Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209, 215–16 (1989).

94. See Harry Simon, *Towns Without Pity: A Constitutional and Historical Analysis of Official Efforts to Drive Homeless Persons from American Cities*, 66 TUL. L. REV. 631, 633–34 (1992).

95. As Chad Flanders has observed, Rawls does discuss "criminals" at various points in *A Theory of Justice*. See Chad Flanders, *Criminals Behind the Veil: Political Philosophy and Punishment*, 31 B.Y.U. J. PUB. L. 83, 84–85 (2016). However, these references tend to essentialize criminal behavior as evidence of an inherently deviant nature. See, e.g., RAWLS, *supra* note 58, at 571. Consequently, Rawls does not engage with the central question of when laws identifying certain conduct as criminal are justifiable in a well-ordered society.

96. See generally Dolovich, *supra* note 57, at 326–29.

behind a Rawlsean “veil of ignorance.”⁹⁷ Behind the veil, those making the criminalization decision would not know in advance whether they occupy the position of criminal—*i.e.*, the target of state punishment—or crime victim.⁹⁸ This thought experiment invites lawmakers to directly assess the public safety benefits of criminalization with the threats to safety inflicted on those criminalized.⁹⁹

What the veil of ignorance reveals to us is that people would likely never criminalize homelessness were they not already secure enough in their social station to know that it will likely never afflict them.¹⁰⁰ We see this revelation borne out in reality—those who support and pass the laws are often those least at risk of experiencing homelessness.¹⁰¹ They benefit from laws that never bind them. Ironically, the *Martin* opinion alludes to this asymmetry. The opinion opens by quoting Anatole France’s *The Red Lily*: “The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread.”¹⁰²

If we focus more narrowly, however, on the reasoning of the *Martin* opinion, a further inconsistency with Rawlsean dignity becomes apparent. Viewing the criminalization of homelessness as punishing the voluntary choice not to use available shelter services, as *Martin* implicitly does, results in a societal distribution of safety that—at least in some cases—violates Rawls’s difference principle. The opinion endorses the impermissible approach of making some individuals experiencing homelessness less safe in order to improve the safety of others.

The lynchpin of my difference principle argument is the recognition that utilizing shelter services renders some homeless individuals less safe than sleeping “rough.”¹⁰³ Shelters can be dangerous.¹⁰⁴ Many individuals experience physical or sexual violence in shelters.¹⁰⁵ Property theft is also common.¹⁰⁶ Shelter populations

97. *Id.* at 356; see generally RAWLS, *supra* note 58, at 136–39.

98. Dolovich, *supra* note 57, at 356–57.

99. *Id.* at 358.

100. See *id.* at 372–74 (explaining the role of morally arbitrary contingencies, such as poverty, lack of education, interfamily violence, and racial and ethnic discrimination on criminalization decisions made from behind the veil of ignorance).

101. See McJunkin, *supra* note 48, 971–72 (explaining how laws against urban camping are frequently driven by business interests that have captured local politics).

102. *Martin v. City of Boise*, 902 F.3d 1031, 1035 (9th Cir. 2018).

103. Lynn McMordle, *Why Some Homeless People Prefer Sleeping Rough to Hostels or Hotels*, CONVERSATION (June 26, 2020), <https://theconversation.com/why-some-homeless-people-prefer-sleeping-rough-to-hostels-or-hotels-139414>. “Sleeping rough” is a common synonym for unsheltered homelessness—sleeping “on the streets, in desert washes, in vehicles or another place not meant for habitation.” Jessica Boehm, *Phoenix Residents Reported 1,500 Homeless Encampments. See Where They Are*, AZCENTRAL (May 7, 2019, 5:24 PM), <https://www.azcentral.com/story/news/local/phoenix/2019/05/06/phoenix-homelessness-increase-reported-encampments-community-services/3410072002/>.

104. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 44, at 35.

105. *Id.*; see also Michael Alison Chandler, *For Homeless Women, Violence Is a Pervasive Part of Their Past and Present, Report Shows*, WASH. POST (Feb. 19, 2018) https://www.washingtonpost.com/local/social-issues/for-homeless-women-violence-is-a-pervasive-part-of-their-past-and-present-report-shows/2018/02/19/b928d74c-10e6-11e8-9065-e55346f6de81_story.html.

106. NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 44, at 35.

turn over regularly, meaning that such crimes are rarely remedied and offenders are largely left unaccountable.¹⁰⁷ Further, most shelters are sex-segregated, which breaks up homeless families and separates individuals from their support networks.¹⁰⁸ Shelters also tend to have limits on personal property, forcing individuals to choose between a bed for the night and their essential possessions.¹⁰⁹ And yet these shelters close during the day, sending their residents back out onto the streets to fend for themselves with fewer resources.¹¹⁰ Disease transmission is another common concern.¹¹¹ In the era of COVID-19, traditional shelters have proven to be demonstrably more dangerous than comparable homeless encampments.¹¹²

Some estimate that as many as 77% of homeless individuals would rather take their chances on the street than subject themselves to a government-funded or government-provided shelter.¹¹³ As a practical matter, we also know that cities are not attempting to channel homeless individuals into shelters because they genuinely believe that shelters provide a uniformly better environment for the homeless. Rather, the preference for shelters is a preference for a reduction in homeless visibility.¹¹⁴ In Friedman's terms, this is a policy choice to enhance the safety of those who "see the homeless populations as threatening,"¹¹⁵ often at a cost to the safety of the individuals being sheltered. Because the reduction in safety is imposed on those who are already relatively unsafe (compared to those who have the luxury of simply preferring not to confront such unimaginable poverty and human suffering), *Martin's* implicit justification for criminalization violates the difference principle.

I need not belabor this point. So long as shelter services do not universally improve the safety and security of individuals experiencing homelessness, the *Martin* decision advances a justification for criminalizing homelessness that is unsustainable through a Rawlsian lens. Those who are the targets of criminalization must either voluntarily use a shelter, in which they are potentially rendered

107. Cf. Eleanor Goldberg, *It Doesn't Make Any Sense to Arrest People Who Are Homeless*, HUFFPOST (Dec. 22, 2017), https://www.huffingtonpost.ca/entry/arresting-homeless-people_n_5a39843de4b0b0e5a79dfbc8 (discussing shelter turnover and the vulnerability of people in shelters to theft).

108. NAT'L L. CTR. ON HOMELESSNESS AND POVERTY, *supra* note 44, at 34.

109. *Id.*

110. Goldberg, *supra* note 105.

111. NAT'L L. CTR. ON HOMELESSNESS & POVERTY, *supra* note 44, at 35.

112. See Thomas Fuller, *Isolation Helps Homeless Population Escape Worst of Virus*, N.Y. TIMES (Dec. 25, 2020), <https://www.nytimes.com/2020/12/23/us/coronavirus-homeless.html>.

113. LINDSEY DAVIS, COAL. FOR THE HOMELESS, VIEW FROM THE STREET: UNSHELTERED NEW YORKERS AND THE NEED FOR SAFETY, DIGNITY, AND AGENCY 11 (2021) ("Seventy-seven percent of respondents stated that they have tried the municipal shelter system and instead choose to stay on the streets."); see also Jeremy Jojola & Katie Wilcox, *We Asked 100 Homeless People if They'd Rather Sleep Outside or in a Shelter*, WWW.9NEWS.COM (Nov. 21, 2017, 7:42 AM), <https://www.9news.com/article/news/investigations/we-asked-100-homeless-people-if-theyd-rather-sleep-outside-or-in-a-shelter/73-493418852> (conducting informal survey of 100 homeless individuals in Denver and finding that 70% prefer sleeping on the streets rather than accepting shelter services).

114. See Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 122–23 (2019).

115. Friedman, *supra* note 5, at 1614. Other justifications for reducing visible homelessness include sanitation, commerce, and the use of publicly funded spaces. *Id.* at 1614–15.

less safe, or be subject to state punishment, through which they are potentially rendered less safe.

With this understanding, it becomes hard to see why Friedman embraces *Martin* as openly as he does. Perhaps unaware of the public safety drawbacks of homeless shelters, he equates their provision with the provision of simpler goods like food and public restrooms. To be clear, the *Martin* decision has immediate tangible benefits for some homeless individuals—it prevents arrests where individuals have no alternative to sleeping on the street.¹¹⁶ But it implies a justification for the imposition of criminal liability that is at odds with my best understanding of Friedman’s philosophical commitments, specifically Rawls’ difference principle. This divergence of commitments and consequences is echoed in one other cornerstone of Friedman’s lecture, which the next section examines.

B. Defunding, Not *DeShaney*

The most surprising thing about Friedman’s lecture is that it ends with a call for what seems like more policing. His “takeaway” is that society needs “holistically-trained generalist specialists” as first responders.¹¹⁷ To be holistically trained, Friedman’s first responders would receive “training in a wide swath of disciplines.”¹¹⁸ But—importantly—Friedman continues to include both law enforcement and the use of force under their prerogative.¹¹⁹ This suggestion builds upon Friedman’s work elsewhere, in which he proposes that the police could eventually be replaced by “a set of highly-trained first responders who have the capacity to address all the sorts of social problems police today face, from domestic violence to substance abuse to noise complaints.”¹²⁰ Although Friedman does not say whether existing police departments would house these first responders, their functions, as Friedman describes them,¹²¹ sound a lot like what we have always asked police to do.¹²² Is additional investment in training and deploying (potentially forceful) first responders really Friedman’s “future of policing”?¹²³

On one hand, this should probably not be surprising. Since the earliest days of American policing, crises over police legitimacy have been met with reform

116. *Martin v. City of Boise*, 902 F.3d 1031, 1048 (9th Cir. 2018).

117. Friedman, *supra* note 5, at 1640.

118. *Id.* (including “mediation, diagnosis of health issues, basic EMS, mental health, what social services are available, and so on” as areas of training).

119. *Id.* Admittedly, Friedman recognizes that “those should be absolute last resorts.” *Id.*

120. Barry Friedman, *Disaggregating the Policing Function*, 169 U. PA. L. REV. 925, 993–94 (2021).

121. See Friedman, *supra* note 5, at 1640.

122. See Egon Bittner, *Florence Nightingale in Pursuit of Willie Sutton: A Theory of the Police*, in *THE POTENTIAL FOR REFORM OF CRIMINAL JUSTICE* 27, 33 (Herbert Jacob ed., 1974) (“A policeman is always poised to move on any contingency whatever, not knowing what it might be, but knowing that far more often than not he will be expected to *do something*.” (emphasis in original)).

123. Friedman, *supra* note 5, at 1640.

proposals that expand and center police power.¹²⁴ Fundamentally, these reform proposals call for more democratic involvement in policing, more departmental bureaucracy, more procedural justice, or more tools and technology.¹²⁵ They never call for less policing. At various points in his career, Friedman has made each of these moves.¹²⁶ Reforms in these modes tend to focus narrowly on measurable successes.¹²⁷ They seek tangible metrics to quantify efficiency and improvement without unsettling policing's central role in American society.¹²⁸

On the other hand, we are in a criminal justice moment where the commitment to police as a social institution has never been weaker. Police departments across the country are faced with calls to “defund” or even abolish policing as we know it.¹²⁹ Citizens increasingly want to divest resources away from policing. They want to invest, instead, in the communities that have historically been over-policed.¹³⁰ Leading academics are joining them.¹³¹ And some cities have begun to experiment with approaches to creating public safety that do not involve police.¹³²

As between these two choices, I would have expected Friedman's dignitarian commitments to lead him to question policing's foundations. If a capacious conception of public safety is about solving deeper social problems, there is increasingly reason to doubt that police—even reformed police, such as Friedman's holistic first responders—are the right tool for that job.¹³³ Indeed, many police

124. See SAMUEL WALKER & CHARLES M. KATZ, *The History of the American Police*, in *THE POLICE IN AMERICA: AN INTRODUCTION* 28–63 (9th ed. 2018).

125. Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CALIF. L. REV. 1781, 1802–14 (2020).

126. See, e.g., BARRY FRIEDMAN, *UNWARRANTED: POLICING WITHOUT PERMISSION* (2017) (arguing for enhanced democratic oversight of policing, improved procedural justice, and the use of technology to enhance police accountability).

127. Simonson, *supra* note 79.

128. *Id.*; see also Ta-Nehisi Coates, *The Myth of Police Reform*, *THE ATLANTIC* (Apr. 15, 2015), <https://www.theatlantic.com/politics/archive/2015/04/the-myth-of-police-reform/390057> (explaining how modest reform proposals can operate as a means of avoiding deeper questions about the function and intention of policing as a system and the operation of the American criminal-justice system).

129. See, e.g., Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 277, 282 (2020); Farah Stockman & John Eligon, *Cities Ask if It's Time to Defund Police and 'Reimagine' Public Safety*, N.Y. TIMES (June 8, 2020), <https://www.nytimes.com/2020/06/05/us/defund-police-floyd-protests.html>; Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <https://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html>.

130. See, e.g., Kaba, *supra* note 129.

131. See ALEX S. VITALE, *THE END OF POLICING* (2017); Akbar, *supra* note 125, at 1842–45; Tracey L. Mears, *Policing: A Public Good Gone Bad*, BOS. REV. (Aug. 1, 2017), <http://bostonreview.net/law-justice/tracey-l-meares-policing-public-good-gone-bad>.

132. *Majority of Minneapolis City Council Plans to Dismantle the Police Department*, N.Y. TIMES (June 17, 2020, 9:14 AM), <https://www.nytimes.com/2020/06/07/us/protests-today-george-floyd-video.html>. *But see* Astead W. Herndon, *How a Pledge to Dismantle the Minneapolis Police Collapsed*, N.Y. TIMES (Sept. 26, 2020, 10:15 PM), <https://www.nytimes.com/2020/09/26/us/politics/minneapolis-defund-police.html>.

133. See Coates, *supra* note 128 (“Police officers fight crime. Police officers are neither case-workers, nor teachers, nor mental-health professionals, nor drug counselors. One of the great hallmarks of the past forty years of American domestic policy is a broad disinterest in that difference.”).

abolitionists conceive of “public safety” as requiring the absence of police.¹³⁴ Many more are open to tolerating a world with fewer police if it means reallocating funds to improve education, health care, housing, and employment.¹³⁵ At their core, calls to defund the police are about investing public resources in helping citizens rather than controlling them.¹³⁶ These investments may even satisfy Friedman’s “correct measure of a benefit around policing”—reducing crime and fostering a community’s sense of safety.¹³⁷

Nowhere is Friedman’s tension with the current moment clearer than in his call for the Supreme Court to overturn *DeShaney v. Winnebago County*. *DeShaney* has quite tragic facts.¹³⁸ A father beat his four-year old child so severely that the child suffered permanent brain damage and fell into a life-threatening coma.¹³⁹ The beating occurred more than two years after county officials had first been alerted to the possibility that the father was abusing his son.¹⁴⁰ In the intervening time, county agents had taken a number of steps to protect the child, including temporarily relieving the father of custody, providing the father with counseling services, and making monthly visits to the home for a period of time.¹⁴¹ However, the government had declined to take the more drastic step of permanently separating the child from his father.¹⁴² The lawsuit alleged that the county’s failure to keep the child safe from his father was an actionable deprivation of liberty.¹⁴³ To the surprise of many, the Supreme Court disagreed. The *DeShaney* Court declared that the government has no inherent duty to protect people from privately inflicted harms.¹⁴⁴

Now step away from the facts and consider a world in which *DeShaney* comes out the other way. The right that the plaintiffs were seeking to enforce was an entitlement to safety in the narrow, not the capacious, sense. It would create an entitlement to be free from private physical violence, and the government would be affirmatively obligated to serve as everyone’s protector. First responders, at least,

134. See, e.g., Kaba, *supra* note 129 (“[A] ‘safe’ world is not one in which the police keep [B]lack and other marginalized people in check through threats of arrest, incarceration, violence and death.”).

135. See, e.g., Annie Lowrey, *Defund the Police*, THE ATLANTIC (June 5, 2020), <https://www.theatlantic.com/ideas/archive/2020/06/defund-police/612682>.

136. See Alex S. Vitale, *The Only Solution Is to Defund the Police*, THE NATION (May 31, 2020), <https://www.thenation.com/article/activism/defund-police-protest>.

137. See Friedman, *supra* note 5, at 1631. Studies have demonstrated the crime-reducing effects of education, jobs, and housing. See, e.g., Stephen Machin, Olivier Marie & Sunčica Vujić, *The Crime Reducing Effect of Education*, 121 ECON. J. 463, 479 (2011); Gillian B. White, *Can Jobs Deter Crime?*, THE ATLANTIC (June 25, 2015), <https://www.theatlantic.com/business/archive/2015/06/can-jobs-deter-crime/396758/>; Matthew Yglesias, *Study: Adding Low-Income Housing to Poor Neighborhoods Lowers Crime and Boosts Property Values*, VOX (May 2, 2016, 2:30 PM), <https://www.vox.com/2016/5/2/11568262/low-income-housing-impact>.

138. 489 U.S. 189, 191 (1989) (“The facts of this case are undeniably tragic.”).

139. *Id.* at 193.

140. See *id.* at 192.

141. *Id.* at 192–93.

142. *Id.*

143. *Id.* at 193.

144. *Id.* at 197 (“As a general matter, then, we conclude that a State’s failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.”).

if not police, in particular, would have an enforceable duty to intervene in every situation where someone's safety may be in jeopardy. They would be required to separate children from parents to investigate potential abuse.¹⁴⁵ They would be required to disrupt domestic violence, likely through mandatory arrests and no-contact orders.¹⁴⁶ Above all else, they would continually, and actively, intervene in the lives of citizens to promote a particularly narrow conception of safety that is arguably at odds with Friedman's more aspirational proposals.

If *DeShaney* were overturned, the government's newfound duties would not only be invasive but also taxing. Contrary to the contemporary political moment, the manpower needed to stay vigilant against private harms would necessitate considerable new investments in policing the population. Hence Friedman's takeaway. In this regard, Friedman's work ends up aligning with so many reformers, particularly those within police departments or unions, who claim that the solution to policing's problems is to invest more in police.¹⁴⁷ Recent years, however, have flooded the public consciousness with enough images of police misconduct to raise serious doubts that further investments and expanded police power (even in the hands of newfangled first responders) could ever be implemented equitably and responsibly.¹⁴⁸

Friedman's views on *DeShaney* are arguably inconsistent with a broader commitment to ensuring human dignity. Nussbaum's capabilities theory of dignity, in particular, frequently directs us to eschew the language of positive "rights," like the right to protection at issue in *DeShaney*.¹⁴⁹ Instead, a theory grounded in human dignity asks whether government is arranged to provide its citizens with "abilities

145. Compare Anne C. Dailey, *Children's Constitutional Rights*, 95 MINN. L. REV. 2099, 2170 (2011) (arguing, like Friedman, that *DeShaney* was wrongly decided because children need to be protected in order to ensure their autonomy), with Sarah Abramowicz, *Beyond Family Law*, 63 CASE W. L. REV. 293, 320–23 (2012) (highlighting how criminal interventions often fail to account for the harm inflicted upon children as a result of separation from parents and parental incarceration).

146. Compare G. Kristian Miccio, *The Death of the Fourteenth Amendment: Castle Rock and its Progeny*, 17 WM. & MARY J. WOMEN & L. 277, 295–98 (2011) (arguing, like Friedman, that the Due Process clause of the Fourteenth Amendment should require a duty to intervene to prevent intimate partner violence), with Leigh Goodmark, *Should Domestic Violence Be Decriminalized?*, 40 HARV. J. L. & GENDER 53, 103 (2017) (arguing that mandatory interventions and a preference for incarceration hurt domestic violence victims), and Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 50, 56–59 (2006) (arguing that mandatory domestic violence protection orders are effectively state-imposed divorce, often to the detriment and against the desires of the victim).

147. See, e.g., David Hughes, *I'm a Black Police Officer. Here's How to Change the System*, N.Y. TIMES (July 16, 2020), <https://www.nytimes.com/2020/07/16/opinion/police-funding-defund.html> (suggesting that communities defund the police, provided that they "then re-fund them, better").

148. Without attempting to compile a comprehensive list of names, the last decade of policing has shocked the national conscience with the deaths of Daunte Wright, George Floyd, Atatiana Jefferson, Breonna Taylor, Botham Jean, Sandra Bland, Stephon Clark, Philando Castile, Alton Sterling, Freddie Gray, Walter Scott, Tamir Rice, Michael Brown, and Eric Garner at the hands of police.

149. Nussbaum, *supra* note 37, at 274–75 ("The language of rights to some extent cuts across this debate and obscures the issues that have been articulated."). The distinction between so-called "positive" and "negative" rights traces back to Isaiah Berlin's famous lecture that was subsequently published. See Isaiah Berlin, *Two Concepts Of Liberty*, in *FOUR ESSAYS ON LIBERTY* 121–22 (Oxford Univ. Press, 1969).

to do and to be certain things deemed valuable.”¹⁵⁰ To the extent that dignity entails recognizing essential enforceable rights, they are frequently “rights to be free from government interference in certain areas of choice.”¹⁵¹

I suspect that Friedman believes a positive governmental duty to intervene is a necessary first step to ensure provision of essential services—e.g., food, water, and education. But he seemingly overlooks how overbearing governmental intervention, and in particular police intervention, has historically impeded the development of human capabilities and, ultimately, of dignity. As Neomi Rao eloquently explained, “restraint or removal of state interference maximizes dignity because it leaves the individual free to exercise his autonomy in whatever fashion he should choose consistent with the rights and freedoms of others.”¹⁵² From a human dignity perspective, we may even question whether *government* is the right tool for delivering public safety in the capacious sense. At the heart of movements to defund or abolish police is a call for more community control.¹⁵³ This includes not only community control over policing—the laws, institutions, and policies that offer carceral responses to social problems¹⁵⁴—but also community control over social services that aim to resolve those deeper problems in other ways.¹⁵⁵

As just one example, consider the recent call to replace police funding with a meaningful investment in community mental health care.¹⁵⁶ Individuals experiencing homelessness suffer mental health issues at a remarkable rate.¹⁵⁷ The same is true of our jail and prison populations.¹⁵⁸ In many cases, untreated mental health issues have contributed to—if not outright caused—incarceration and homelessness.¹⁵⁹ Investments in community-based mental health programs not only make us “safer” by resolving a deep social problem that can disrupt cycles of homelessness and incarceration, but the funding directly empowers the local communities that offer such services.¹⁶⁰ If the first job of government is to ensure public safety in the broad sense, perhaps what is needed is for government to get out of the way.

150. Nussbaum, *supra* note 37, at 275.

151. *Id.* at 276.

152. Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187 (2011).

153. *See, e.g.*, Kaba, *supra* note 129.

154. *See* Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 813–15 (2021).

155. *See* Akbar, *supra* note 125, at 1834–37.

156. *See* Lindsay Schnell, *Defund Police? Some Cities Have Already Started by Investing in Mental Health Instead*, USA TODAY (June 27, 2020, 10:33 AM), <https://www.usatoday.com/story/news/nation/2020/06/22/defund-police-what-means-black-lives-matter/3218862001>.

157. Rankin, *supra* note 114, at 105 (estimating that 30–40% of homeless individuals are affected with psychiatric disorders); *see Mental Health By the Numbers*, NAT’L ALL. ON MENTAL ILLNESS (Feb. 2022), <https://www.nami.org/mhstats> (estimating 21% of U.S. adults experienced mental illness in 2020).

158. BUREAU OF JUST. STAT., INDICATORS OF MENTAL HEALTH PROBLEMS REPORTED BY PRISONERS AND JAIL INMATES 2011–12 (June 2017) (finding that 37% of prisoners and 44% of jail inmates had been previously diagnosed with a mental disorder).

159. *See, e.g.*, NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOMELESSNESS IN AMERICA: OVERVIEW OF DATA AND CAUSES (2015) (listing mental illness and a lack of needed services as one of the four primary causes of homelessness for unaccompanied individuals).

160. *Cf.* Simonson, *supra* note 79 (discussing the need to shift power from police to communities).

Consistent with Nussbaum's model, defunders and abolitionists would argue that investments of these sorts enhance the capabilities of the public.¹⁶¹ The most commonly discussed uses of reallocated police funding are schools, housing, jobs, and health care.¹⁶² Defunding is about improving the potential opportunities and outcomes for traditionally underserved communities.¹⁶³ Some commentators have even suggested that these investments could reduce crime more effectively than traditional policing.¹⁶⁴ This suggests that public safety—in both the narrow and the broad sense—may be better achieved by investing government resources in communities starving for them than in tying the government's hands with civilly enforceable duties of protection.

Given his capacious view of public safety, which echoes dignitarian thinking elsewhere, it is surprising that Friedman fails to explore the potential for reforms like police defunding or abolition—reforms that might actually empower the communities that have been historically harmed by the way we practice policing. It is at least arguably a better path toward the provision of essential services and the development of human potential. Indeed, giving marginalized groups the resources and freedom to take part in their own self-governance can be its own form of dignity.¹⁶⁵

CONCLUSION

Friedman invites us to rethink the concept of public safety. And he encourages us to reconsider our approach to policing, in particular policing of marginalized communities such as those experiencing homelessness. But those two tasks may not be connected in the way that Friedman envisions. If public safety means more than physical security from private violence, why affirmatively commit the government to combat private violence? Such a commitment would entail substantial investments in a policing system (or some approximation of it) that isn't working. We could instead imagine a world in which those investments are made in our communities, in order to build our citizens' capacities for a dignified life. Investing in communities would promote public safety of a different order, and perhaps a preferable one. Likewise, if a capacious understanding of public safety should guarantee that those who are already least safe may not be sacrificed to promote

161. See, e.g., Kaba, *supra* note 129.

162. *Id.*; Lowrey, *supra* note 135.

163. See Lowrey, *supra* note 135.

164. See, e.g., Kaba, *supra* note 129. According to Kaba:

When people, especially white people, consider a world without the police, they envision a society as violent as our current one, merely without law enforcement—and they shudder. As a society, we have been so indoctrinated with the idea that we solve problems by policing and caging people that many cannot imagine anything other than prisons and the police as solutions to violence and harm.

Id.

165. See Jeremy Waldron, *The Dignity of Groups*, 2008 ACTA JURIDICA 66, 84 (2008).

the safety of others, then we must rethink our regulatory criminal policies that seek to drive homeless individuals toward temporary shelters.

Public safety, properly understood, means enacting laws and policies that ensure the basic dignity of every individual. In some cases, that must mean reducing government in order to create space for individual and community autonomy. It means decriminalization of many behaviors attendant to homelessness, so that the individuals experiencing it have true choice in how best to ensure their own safety. It means investing in solving the problems that lead to private violence, perhaps at the expense of combatting violence itself. Above all else, it means thinking deeply about the values to which we are committed and asking whether the state as we know it is the right vehicle for delivering upon them. I invite Friedman to think similarly about his own commitments—to human dignity and to the legal prescriptions that he embraces. Upon inspection, he may discover a separation between them and new possibilities for public safety therein.