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Regulating Cleanups of Homeless Encampments

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ARTICLE

Regulating Cleanups of Homeless Encampments

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INTRODUCTION	8
I. CRIMINALIZATION AND CLEANUPS OF HOMELESS ENCAMPMENTS	11
II. FOUR RECENT REGULATIONS OF CLEANUPS: DENVER, LOS ANGELES, MIAMI, AND WASHINGTON, D.C.	16
III. THE LESSONS OF RECENT EXPERIENCE: LIMITATIONS AND THE NEED FOR NEW APPROACHES	29

INTRODUCTION

As the visible presence of persons experiencing homelessness has grown in major cities across the country in recent years¹ and

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¹ See Lola Fadulu, *Homelessness Rises 2.7 Percent, Driven by California's Crisis, Report Says*, N.Y. TIMES (Dec. 20, 2019), <https://www.nytimes.com/2019/12/20/us/politics/homelessness-trump-california.html>; Terrence McCoy, *'This Is Not Me': The Rise of Tent Encampments is Changing the Face of American Homelessness*, WASH. POST (Mar. 22, 2019), <https://www.washingtonpost.com/news/local/wp/2019/03/22/feature/homeless-living-in-a-tent-blocks-from-the-u-s-capitol-and-working-full-time/>; Jack Healy, *Rights Battles Emerge in Cities Where Homelessness Can Be a Crime*, N.Y. TIMES, (Jan. 9, 2017), <https://www.nytimes.com/2017/01/09/us/rights-battles-emerge-in-cities-where-homelessness-can-be-a-crime.html>.

moved to the forefront of national politics,² the impulse to criminalize homelessness has persisted. In a major report issued in 2012, the United States Interagency Council on Homelessness defined criminalization as “formal and informal law enforcement policies . . . adopted to limit where individuals who experience homelessness can congregate, and punish those who engage in life-sustaining or natural human activities in public spaces.”³

² E.g., Jeff Stein et al., *Trump Pushing for Major Crackdown on Homeless Camps in California, with Aides Discussing Moving Residents to Government-Backed Facilities*, WASH. POST (Sept. 10, 2019), <https://www.washingtonpost.com/business/2019/09/10/trump-pushing-major-crackdown-homeless-camps-california-with-aides-discussing-moving-residents-government-backed-facilities/>. Indeed, after a period of seeming continuity with the Bush and Obama administrations on their major policy approach to ending homelessness—a “Housing First” strategy of moving homeless individuals into permanent housing rather than temporary shelter—the Trump administration has recently begun to make its own mark. See Caroline S. Engelmayr, *As Homelessness Crisis Grows, the Trump Administration Has Made Few New Efforts*, L.A. TIMES (July 26, 2019), <https://www.latimes.com/politics/story/2019-07-25/trump-mostly-ignored-homeless-crisis-worsening> (noting Trump administration’s continued support of Housing First up to that point).

The White House Council of Economic Advisers released a report in 2019 deeming Housing First one of the “failed policies of the past,” and emphasizing the need for what it called “nonpunitive policing that seeks to move people off the streets and into services.” COUNCIL OF ECON. ADVISERS, *THE STATE OF HOMELESSNESS IN AMERICA* 19, 23–32 (Sept. 2019), <https://www.whitehouse.gov/wp-content/uploads/2019/09/The-State-of-Homelessness-in-America.pdf> [hereinafter STATE OF HOMELESSNESS]. Robert Marbut, appointed in 2019 as the director of the United States Interagency Council on Homelessness, is a strong critic of Housing First and a proponent of exerting police pressure on those deemed chronically homeless or shelter-resistant. See Benjamin Oreskes, *He Wanted to Ban Feeding Homeless People. Now He’s About to Lead a Federal Homeless Agency*, L.A. TIMES (Dec. 4, 2019, 1:30 PM), <https://www.latimes.com/california/story/2019-12-04/homeless-robert-marbut-interagency-council-executive-director-trump>. For an in-depth account of the Housing First strategy, see generally DEBORAH K. PADGETT ET AL., *HOUSING FIRST: ENDING HOMELESSNESS, TRANSFORMING SYSTEMS, AND CHANGING LIVES* (2015). For a concise summary, see generally NAT’L ALL. TO END HOMELESSNESS, *FACT SHEET: HOUSING FIRST* (Apr. 2016), <http://endhomelessness.org/wp-content/uploads/2016/04/housing-first-fact-sheet.pdf>.

³ U.S. INTERAGENCY COUNCIL ON HOMELESSNESS, *SEARCHING OUT SOLUTIONS: CONSTRUCTIVE ALTERNATIVES TO THE CRIMINALIZATION OF HOMELESSNESS* 7 (2012), https://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf [hereinafter SEARCHING OUT SOLUTIONS]. For a

In recent years, many local governments have turned to “cleanups” of homeless encampments or tent cities as a seemingly more benign response to homelessness than engaging in a concerted policy of repeatedly arresting individuals for, in effect, living in public.⁴ These cleanups respond to a sharp rise in the number and visibility of homeless encampments, as a report by the National Homelessness Law Center documents.⁵ The brutality of many of these cleanups, in which municipalities often seize all the belongings of the individuals in the encampment, has provoked major challenges in court as well as some efforts to regulate the cleanups through local ordinances.⁶ Surprisingly, cleanups of this kind have continued in some areas, even as the COVID-19 pandemic has swept the nation and although the Centers for Disease Control and Prevention has advised against dismantling encampments unless housing of some kind is available.⁷

critique of the Council of Economic Advisors report, see Kriston Capps, *Housing Organizations Slam White House Report on Homelessness*, CITYLAB (Sept. 23, 2019), <https://www.citylab.com/equity/2019/09/trump-homeless-white-house-report-california-housing-crisis/598219/>.

⁴ NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019, 12–14 (Dec. 2019), <http://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf> [hereinafter HOUSING NOT HANDCUFFS].

⁵ See NAT’L L. CTR. ON HOMELESSNESS & POVERTY, TENT CITY, USA: THE GROWTH OF AMERICA’S HOMELESS ENCAMPMENTS AND HOW COMMUNITIES ARE RESPONDING 7–8, 21–26 (2017), https://nlchp.org/wp-content/uploads/2018/10/Tent_City_USA_2017.pdf [hereinafter TENT CITY, USA].

⁶ *Id.* at 11–12; see also *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1024–26 (9th Cir. 2012), *cert. denied*, 570 U.S. 918 (2013); *Pottinger v. City of Miami (Pottinger I)*, 810 F. Supp. 1551, 1553–54 (S.D. Fla. 1992); Amended Complaint, *Lyll v. City of Denver*, No. 16-cv-02155-WJM-SKC, 2–10 (D. Colo. Oct. 17, 2016) [hereinafter *Lyll* Amended Complaint].

⁷ See UNIV. OF MIA. SCH. OF L. HUM. RTS. CLINIC & NAT’L L. CTR. ON HOMELESSNESS & POVERTY, A DEATH SENTENCE: VIOLATIONS OF THE RIGHT TO ADEQUATE HOUSING DURING COVID-19 IN THE UNITED STATES 3–7 (2020), <https://miami.app.box.com/s/unsmj4mphbv2go2g8qayc01lu1lulazy> (submission to Special Rapporteur on Adequate Housing, Mr. Balakrishnan Rajagopal); see also *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials*, CTR. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html> (last visited Sept. 10, 2020) (“Clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.”).

This Article examines four sets of rules—adopted or significantly revised in 2019—that regulate cleanups in Denver, Los Angeles, Miami, and Washington, D.C. The first three were adopted in response to federal court challenges to the practice of cleanups.⁸ The fourth was adopted voluntarily as part of a general city program to deal with homeless encampments.⁹ A close examination of these four sets of rules highlights the limits of any effort to regularize the practice of cleanups with the aim of protecting the rights and respecting the dignity of persons experiencing homelessness. The rules adopted in Denver, in particular, also point the way to another approach, aimed at preventing the poor public health conditions in many encampments—conditions typically invoked as justifying cleanups—by affirmatively providing services to those who have no choice but to live in public.¹⁰

I. CRIMINALIZATION AND CLEANUPS OF HOMELESS ENCAMPMENTS

Criminalization of homelessness can take many forms. These include laws that ban sleeping in public, living in vehicles, loitering, panhandling or begging, and sitting or lying down in public spaces.¹¹

⁸ *Lavan*, 693 F.3d at 1024–26; *Pottinger I*, 810 F. Supp. at 1553–54; *Lyll* Amended Complaint, *supra* note 6, at 2–10.

⁹ These four sets of rules are not addressed in the National Homelessness Law Center’s comprehensive report on encampments. *See generally* TENT CITY, USA, *supra* note 5. Three of them were adopted after the issuance of the report (Denver, Los Angeles, and Miami). Patrick Geiger insightfully describes the implementation of the D.C. rules but does not provide a legal analysis of them. *See generally* Patrick Geiger, Permanently Temporary: Homeless Encampments and Encampment Removal in Washington, D.C. (May 19, 2019) (unpublished M.S. thesis, George Washington University) (ProQuest No. 13880031).

¹⁰ Stipulated Motion for Preliminary Approval of Class Action Settlement and for Fairness Hearing, Exhibit 1, Full and Final Release and Settlement Agreement, *Lyll v. City & Cnty of Denver*, No. 16-cv-02155-WJM-SKC (D. Colo. Apr. 22, 2019), ECF No. 218-1, *modified*, Notice of Errata to Full and Final Release and Settlement Agreement, *Lyll v. City & Cnty. of Denver*, No. 16-cv-02155-WJM-SKC (D. Col. May 9, 2019), ECF No. 220 [hereinafter Denver Consent Decree].

¹¹ SEARCHING OUT SOLUTIONS, *supra* note 3, at 7; HOUSING NOT HANDCUFFS, *supra* note 4, at 12–14.

These laws may be enforced on an individual basis, but municipalities also resort to police sweeps of homeless encampments, clearing out areas where there are visible groups of people living in public.¹² Seizure and destruction of homeless individuals' property is another common tactic, sometimes on the pretense that the property has been abandoned, and other times as part of the process of evicting individuals from encampments.¹³ Further, police may simply order persons experiencing homelessness to leave or move on from a given area without any claim of a violation of a statute.¹⁴

Local governments have increasingly adopted criminalization.¹⁵ What motivates them to resort to this policy is typically "the frustration of business owners, community residents, and civic leaders who feel that street homelessness infringes on the safety, attractiveness and livability of their cities"¹⁶ The strategy behind criminalization is to respond to these pressures by erasing (or at least reducing) the public visibility of homeless individuals—without addressing the underlying causes of homelessness or making permanent housing, temporary shelter, and other services available.¹⁷ This erasure may be accomplished by driving people experiencing homelessness out of a particular area of a city or by at least pressing them to be less visible.¹⁸

¹² HOUSING NOT HANDCUFFS, *supra* note 4, at 40–41.

¹³ At issue in *Lavan*, 693 F.3d at 1025, was Los Angeles's policy of treating homeless persons' property as "abandoned" the moment it was set down in any public space. As the lower court had put it, the city argued that "because the homeless in this case stepped away momentarily to, *inter alia*, get water or shower, they abandoned all their possessions and the City was then free to seize and destroy them." *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1013 (C.D. Cal. 2011); *see also* HOUSING NOT HANDCUFFS, *supra* note 4, at 40–41, 77.

¹⁴ HOUSING NOT HANDCUFFS, *supra* note 4, at 53.

¹⁵ The National Homelessness Law Center has tracked resort to criminalization in 187 cities nationwide since 2006 and has found significant increases in that period, with the last three years since 2016 no exception to that trend. *Id.* at 37–49.

¹⁶ SEARCHING OUT SOLUTIONS, *supra* note 3, at 7.

¹⁷ *See* Stephen J. Schnably, *Rights of Access and the Right to Exclude: The Case of Homelessness*, in PROPERTY LAW ON THE THRESHOLD OF THE 21ST CENTURY 553, 557–58 (G.E. van Maanen & A.J. Van der Walt eds., 1996).

¹⁸ *Id.* at 555–61.

A number of courts have held that criminalization violates the Eighth Amendment and other constitutional protections.¹⁹ Beyond the question of its legality, criminalization contributes immensely to the insecurity and harshness of being forced to live on the streets.²⁰ In addition, arrests and destruction of property make it harder for those experiencing homelessness to find housing or jobs.²¹ And criminalizing homelessness is more expensive for cities than providing shelter or permanent housing and other services.²²

One notable trend has been to characterize cleanups as a response to what local officials typically deem a public health crisis.²³ This response may seem reasonable, even inevitable: Encampments can become the site of vermin, human waste, trash, discarded needles, and the like, posing a genuine public health threat.²⁴ It may also seem more humane, especially when contrasted with a policy of repeatedly arresting individuals who have nowhere else to go for resting or sleeping on a sidewalk.

At the same time, the root cause of the public health problem is the absence of essential services for those who have no choice but to live on the streets.²⁵ For example, the absence of available public

¹⁹ *E.g.*, *Martin v. City of Boise*, 920 F.3d 584, 616–17 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 674 (2019) (mem.); *McArdle v. City of Ocala*, 418 F. Supp. 3d 1004, 1008 (M.D. Fla. 2019); *Pottinger v. City of Miami (Pottinger I)*, 810 F. Supp. 1551, 1565 (S.D. Fla. 1992). *But see, e.g.*, *Joel v. City of Orlando*, 232 F.3d 1353, 1361–62 (11th Cir. 2000), *cert. denied*, 532 U.S. 978 (2001); *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1166 (Cal. 1995). For a very useful survey of the cases, see NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: A LITIGATION MANUAL 21–75 (2018), <https://nlchp.org/wp-content/uploads/2018/10/Housing-Not-Handcuffs-Litigation-Manual.pdf>.

²⁰ *See* HOUSING NOT HANDCUFFS, *supra* note 4, at 37–46.

²¹ *Id.* at 63–70.

²² *Id.* at 71–74.

²³ This was how the court characterized the Miami cleanups in 2018 even though many of the areas subject to cleanups in which homeless persons' belongings were destroyed were not part of the one Overtown location as to which local officials had declared a public health crisis. *Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1189 (S.D. Fla. 2019), *aff'd sub nom. Peery v. City of Miami*, No. 19-10957, 2020 WL 5823768 (11th Cir. Oct. 1, 2020).

²⁴ HOUSING NOT HANDCUFFS, *supra* note 4, at 99–100.

²⁵ The claim that people who are homeless are there by choice or as the consequence of bad choices—or that they have no agency as a consequence of mental health or substance abuse problems—is not infrequently made, especially in the context of claims that pressure must be exerted on those living on the streets to

bathrooms in most downtowns—a contrast to the great increase in the number of bathrooms in private homes over the past half century²⁶—creates a situation where people living on the streets have no practical alternative but to relieve themselves (typically as discreetly as possible) in public spaces.²⁷ The problem is made worse by the uncertain access that people experiencing homelessness have to private bathrooms in stores, businesses, and restaurants.²⁸ The result is bad for the urban landscape and equally poor for those experiencing homelessness, who would rather use a toilet.²⁹ Many factors drive the absence of public bathrooms, even in the face of good reason to believe that more public bathrooms would benefit everyone, not just those experiencing homelessness.³⁰ Sadly, one factor is a persistent belief, even among some homeless services providers, that providing public bathrooms somehow enables or encourages people to be homeless.³¹

get them to accept services. It is, for example, implicit in the Council of Economic Advisors' assumption that there is a demand for homelessness that increases when its conditions are made more favorable. *See* STATE OF HOMELESSNESS, *supra* note 2, at 5–7. For an insightful response to such claims, see TENT CITY, USA, *supra* note 5, at 17–19.

²⁶ Derek Thompson, *America Is Overrun with Bathrooms*, THE ATLANTIC (Jan. 23, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/why-do-american-houses-have-so-many-bathrooms/605338/>.

²⁷ LEZLIE LOWE, NO PLACE TO GO: HOW PUBLIC TOILETS FAIL OUR PRIVATE NEEDS 55–57, 61–62 (2018).

²⁸ *Id.* at 57; *see* Linda Robertson, *Human Waste from Homeless People Makes Downtown Miami Streets Unpleasant, Unsanitary*, MIA. HERALD (Oct. 19, 2020, 6:30 AM), <https://www.miamiherald.com/news/local/community/miami-dade/downtown-miami/article236262158.html>; David Smiley, *Feud over Miami Homeless Leads to Creation of “Poop Map,”* MIA. HERALD (May 14, 2015, 7:24 PM), <https://www.miamiherald.com/news/local/community/miami-dade/article21040056.html>.

²⁹ Joey Flechas, *As Super Bowl Crowds Grow in Miami, Advocates Are Monitoring Treatment of Homeless*, MIA. HERALD (Feb. 1, 2020, 6:30 AM), <https://www.miamiherald.com/news/local/community/miami-dade/downtown-miami/article239808528.html>; Robertson, *supra* note 28.

³⁰ LOWE, *supra* note 27, at 59.

³¹ Robertson, *supra* note 28 (views of chair of Miami-Dade County Homeless Trust); *see To Control Homelessness, Consultant Suggests Clearwater Change Rules, Withdraw Street Feedings*, TAMPA BAY TIMES (May 18, 2012), <https://www.tampabay.com/news/localgovernment/to-control-homelessness-consultant-suggests-clearwater-change-rules/1230918/> (advice by Robert Marbut

Indeed, the term “cleanups” obscures one common feature of them—that those living on the streets in an area that is “cleaned up” may be evicted from the area and told to leave and not return.³² It is not simply the accumulation of trash that is addressed but the visible presence of homeless persons themselves.³³ In this sense, a practice of regular “cleanups” shares much with criminalization.

to city to “crack down on urban enablers like open bathrooms, lax police enforcement and . . . ‘renegade food’ giveaways from charities and church groups”). For a critique, see David Peery, *Public Toilets Enable Homelessness? Not True, and a Ridiculous Excuse to Let Miami Streets Stay Filthy*, MIAMI HERALD (Dec. 19, 2019, 1:33 PM), <https://www.miamiherald.com/opinion/op-ed/article238544703.html>.

³² See, e.g., Justin Wm. Moyer, *D.C. Clears Longtime Homeless Encampment near Union Station*, WASH. POST (Jan. 16, 2020, 3:45 PM), https://www.washingtonpost.com/local/dc-clears-longtime-homeless-encampment-near-union-station/2020/01/16/27344240-37a4-11ea-a01d-b7cc8ec1a85d_story.html (noting policy announced by mayor that, after clearing of an encampment, people living in tents there will not be allowed to return). In hearings before the court on a motion to hold the City of Miami in contempt for violating the *Pottinger* Consent Decree, plaintiffs presented evidence that people were told to leave areas being cleaned up and not come back. As an email from the City manager’s office to Chief of Police put it, “[i]t is imperative that [cleanups of encampments] be coordinated with police in these locations and be patrolled in the future to ensure that homeless individuals do not return to these locations.” *Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1189 (S.D. Fla. 2019), *aff’d sub nom. Peery v. City of Miami*, No. 19-10957, 2020 WL 5823768 (11th Cir. Oct. 1, 2020). The district court, noting that the email had been careful to mention the importance of complying with the Consent Decree, interpreted this statement as representing a desire “to prevent the squalor and unsanitary conditions from re-manifesting after completing a clean-up . . .” *Id.*

³³ See Manuela Tobias, *Many Homeless Residents Refuse Help. But If They Accepted It, Fresno Couldn’t Help Them*, FRESNO BEE, <https://www.fresno-bee.com/news/local/article234085097.html> (last updated Aug. 28, 2019, 5:10 PM) (noting that, with cleanups, “homeless residents . . . frequently pack their belongings into makeshift carts on their way to the next temporary camp. . . . Another homeless resident . . . dubbed the result ‘the homeless shuffle.’”).

II. FOUR RECENT REGULATIONS OF CLEANUPS: DENVER, LOS ANGELES, MIAMI, AND WASHINGTON, D.C.

There have been recent notable challenges to the practice of cleanups of homeless encampments in Denver,³⁴ Los Angeles,³⁵ and Miami.³⁶ In all three instances, plaintiffs asserted that the cleanups, at worst, were pretexts to seize and destroy the property of those experiencing homelessness and, at best, were conducted with utter disregard for their rights.³⁷ For people with no place to live, losing their belongings can be devastating.³⁸ The loss of blankets, tents,

³⁴ *Lyall Amended Complaint*, *supra* note 6; see Tom McGhee, *Homeless Sue Denver Calling Sweeps Unconstitutional*, DENVER POST, <https://www.denverpost.com/2016/08/25/homeless-sue-denver-call-sweeps-unconstitutional/> (last updated Aug. 25, 2016, 5:49 PM).

³⁵ Amended Complaint, *Mitchell v. City of Los Angeles*, No. 16-cv-01750-SJO-JPR (C.D. Cal. Mar. 17, 2016); see Gale Holland & David Zahniser, *L.A. Agrees to Let Homeless People Keep Skid Row Property—and Some in Downtown Aren't Happy*, L.A. TIMES (May 29, 2019, 4:52 PM), <https://www.latimes.com/local/lanow/la-me-ln-homeless-cleanup-property-skid-row-downtown-lawsuit-mitchell-case-20190529-story.html>. There has been extensive litigation in Los Angeles over authorities' repeated sweeps of homeless encampments and seizure of property. See Gale Holland, *Although L.A. Mayor Calls Latest Crackdown on Homeless Camps a Success, Legal Issues Cloud City's Plans*, L.A. TIMES (Oct. 24, 2018, 4:00 AM), <https://www.latimes.com/local/lanow/la-me-ln-legal-issues-camps-20181024-story.html>; see, e.g., *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1033 (9th Cir. 2012) (rejecting position that “the government may seize and destroy with impunity the worldly possessions of a vulnerable group in our society”), *cert. denied*, 570 U.S. 918 (2013). The City is also bound by the Ninth Circuit's important recent decision in *Martin v. City of Boise*, 920 F.3d 584, 589 (9th Cir.), *cert. denied*, 140 S. Ct. 674 (2019), which noted that the Eighth Amendment prohibits criminalizing sitting or sleeping on public property if no shelter is available.

³⁶ *Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1179 (S.D. Fla. 2019), *aff'd sub nom.* *Peery v. City of Miami*, No. 19-10957, 2020 WL 5823768 (11th Cir. Oct. 1, 2020). See Joey Flechas, *A Decree Bars Police from Harassing Homeless People. Miami Has Moved to Terminate It*, MIA. HERALD, <https://www.miamiherald.com/news/local/community/miami-dade/article212189034.html> (last updated May 30, 2018, 8:00 PM). For a useful account of the origins of the *Pottinger* case, see generally Benjamin S. Waxman, *Fighting the Criminalization of Homelessness: Anatomy of an Institutional Anti-Homeless Lawsuit*, 23 STETSON L. REV. 230 (1994), and JAMES D. WRIGHT & AMY M. DONLEY, POOR AND HOMELESS IN THE SUNSHINE STATE: DOWN AND OUT IN THEME PARK NATION 253–64 (2011).

³⁷ See, e.g., *Lyall Amended Complaint*, *supra* note 6, at 2–4.

³⁸ *Id.* at 7.

and the like makes it harder to sleep and seek protection from the elements.³⁹ The loss of clothes and shoes makes daily life harder and may even occasion loss of work.⁴⁰ The loss of medicines, identification, eyeglasses, journals, and items with sentimental value like family photographs can be especially calamitous.⁴¹ Further, these cleanups are often the occasion for “closing” an encampment, scattering individuals elsewhere.⁴² This practice makes no sense because the larger, more visible encampments tend to arise in areas with access to services and often reflect a sense of (relative) safety in numbers.⁴³

In Denver and Los Angeles, federal consent decrees now govern the practice of cleanups.⁴⁴ In Miami, two administrative regulations, both enacted in connection with a now-terminated consent decree that protected against the criminalization of homelessness, govern the practice.⁴⁵ The District of Columbia, moreover, voluntarily

³⁹ *Id.* at 7, 24.

⁴⁰ *Id.* at 25.

⁴¹ See Geiger, *supra* note 9, at 63–79; see also Lyall Amended Complaint, *supra* note 6, at 7, 24–25.

⁴² Geiger, *supra* note 9, at 63–79.

⁴³ *Id.* at 43–62. At the same time, some encampments in less visible areas may be tolerated by local officials, with pressure on those experiencing homelessness to stay in those areas. See Chris Herring, *The New Logics of Homeless Seclusion: Homeless Encampments in America’s West Coast Cities*, 13 CITY & CMTY. 285, 296 (2014).

⁴⁴ See Denver Consent Decree, *supra* note 10. The main provisions governing cleanups are set out in Exhibit A to the Denver Consent Decree, but the body of the Decree has important provisions as well. See Final Judgment, *Lyall v. City of Denver*, No. 16-cv-02155-WJM-SKC (D. Colo. Sept. 23, 2019) (approving consent decree). For the Los Angeles Decree, see Stipulated Order of Dismissal, Exhibit A, Settlement and Release Agreement, *Mitchell v. City of Los Angeles*, No. 16-cv-01750-SJO-JPR (C.D. Cal. May 31, 2019) [hereinafter L.A. Consent Decree].

⁴⁵ One regulation is City of Miami Police Departmental Order 11, Chapter 10. See MIA. POLICE DEP’T, DEPARTMENTAL ORDS. 564–68 (Feb. 27, 2018), https://www.miami-police.org/DeptOrders/MPD_Departmental_Orders.pdf [hereinafter MIAMI POLICE D.O. 11]. Miami Police D.O. 11 was adopted pursuant to the consent decree in *Pottinger v. City of Miami (Pottinger I)*, 810 F. Supp. 1551 (S.D. Fla. 1992), see Final Order Approving Settlement and Dismissing Case, *Pottinger v. City of Miami*, No. 88-cv-2406 (S.D. Fla. Oct. 1, 1998), and was modified in 2014, see Order Granting Joint Motion to Approve Settlement, *Pottinger v. City of Miami*, No. 88-cv-2406 (S.D. Fla. Mar. 10, 2014). The consent decree required the City to adopt a Police Departmental Order to protect the

adopted a set of guidelines in connection with an announced policy against permitting large encampments of people experiencing homelessness.⁴⁶

property of homeless individuals and to limit the City's power to arrest them for misdemeanors for life-sustaining conduct such as obstructing sidewalks or being in the park after hours. *See* Settlement Agreement § V.7, at 5, *Pottinger v. City of Miami*, No. 88-cv-2406 (S.D. Fla. Feb. 27, 1998), ECF No. 382 [hereinafter *Pottinger* Consent Decree]; Addendum to Settlement Agreement, *Pottinger v. City of Miami*, No. 88-cv-2406 (S.D. Fla. Dec. 12, 2013), ECF No. 525-1 [hereinafter Addendum to *Pottinger* Consent Decree]. MIAMI POLICE D.O. 11 remains in effect even after the termination of the consent decree in 2019. *Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1196–97 (S.D. Fla. 2019), *aff'd sub nom.* Peery v. City of Miami, No. 19-10957, 2020 WL 5823768 (11th Cir. Oct. 1, 2020).

The other regulation is a city administrative policy. CITY OF MIAMI, POLICY NO. APM-1-19, TREATMENT OF HOMELESS PERSONS' PROPERTY (Jan. 14, 2019), <http://archive.miamigov.com/employeeerel/pages/CityAdminPolicies/APM/APM%201-19%20TREATMENT%20OF%20HOMELESS%20PERSONS'%20PROPERTY.PDF> [hereinafter MIAMI PROPERTY APM-1-19]. The policy was filed with the court in connection with a hearing on plaintiffs' motion to hold the City in contempt for violating the *Pottinger* Consent Decree and the City's motion to terminate the decree. *See Pottinger II*, 359 F. Supp. 3d at 1179, 1182 n.6. Because the policy was filed after the close of evidence, the court did not take it into account. *See id.* at 1182 n.6. In contrast to MIAMI POLICE D.O. 11, then, this administrative policy was developed unilaterally by the City of Miami. The policy remains in effect today.

⁴⁶ DISTRICT OF COLUMBIA, PROTOCOL FOR THE DISPOSITION OF PROPERTY FOUND ON PUBLIC SPACE AND OUTREACH TO DISPLACED PERSONS (Dec. 13, 2019), https://dmhhs.dc.gov/sites/default/files/dc/sites/dmhhs/page_content/attachments/Encampments%20Protocol_12.13.19.pdf [hereinafter D.C. ENCAMPMENTS PROTOCOL]. This supersedes the first version adopted in 2016. *See* DISTRICT OF COLUMBIA, PROTOCOL FOR THE DISPOSITION OF PROPERTY FOUND ON PUBLIC SPACE AND OUTREACH TO DISPLACED PERSONS (Nov. 21, 2016), https://dmhhs.dc.gov/sites/default/files/dc/sites/dmhhs/page_content/attachments/Encampments%20Protocol_12.13.19.pdf [hereinafter 2016 D.C. ENCAMPMENTS PROTOCOL]. For more information on the D.C. ENCAMPMENTS PROTOCOL, *see Encampments*, OFFICE OF THE DEPUTY MAYOR FOR HEALTH AND HUM. SERVS., <https://dmhhs.dc.gov/page/encampments> (last visited Sept. 10, 2020).

Patrick Geiger provides an excellent study of the D.C. ENCAMPMENTS PROTOCOL and its implementation. *See generally* Geiger, *supra* note 9. As he notes, the voluntariness of the adoption of the D.C. ENCAMPMENTS PROTOCOL—in contrast to the court-driven genesis of the rules in Denver, Miami, and Los Angeles—should not obscure how punitive the cleanups are in the eyes of persons experiencing homelessness. *Id.* at 82. The D.C. ENCAMPMENTS PROTOCOL is as

These four cities are not the only ones to have formally addressed the criteria and procedures for dealing with homeless encampments. The National Homelessness Law Center reported in 2017 that at least two cities—Indianapolis, Indiana, and Charleston, West Virginia—have adopted ordinances on the subject.⁴⁷ In Seattle and San Francisco, comprehensive ordinances on homeless encampments and cleanups were proposed but not adopted.⁴⁸ There are at least five other cities that have entered into settlements of federal lawsuits challenging cleanups of encampments in which they have agreed to some restrictions on the handling of the property of homeless individuals.⁴⁹ The more recent rules from Denver, Los Angeles, Miami, and Washington, D.C., are notably comprehensive but imperfect and merit close examination.

One fundamental characteristic that all four sets of rules have in common is that they leave very broad discretion in the hands of municipal authorities to select sites for cleanups.⁵⁰ They all refer to responding to threats to public health or safety and leave it at that.⁵¹ While the emphasis on cleanups has come in response to the rise of larger encampments of people living on the streets, the rules do not

much about regularizing a practice of clearing out encampments that conflict with a hip urban aesthetic as it is about protecting the rights of those living on the streets. *See id.* at 74–79; Joe Heim & Justin Wm. Moyer, *No Room on the Street: D.C. Orders Homeless Out of Underpass in Fast-Developing Neighborhood*, WASH. POST (Jan. 10, 2020), https://www.washingtonpost.com/local/no-room-on-the-street-dc-orders-homeless-out-of-underpass-in-fast-developing-neighborhood/2020/01/10/1704d604-319c-11ea-9313-6cba89b1b9fb_story.html (noting position of mayor that living on tents in streets “is not permitted in the District of Columbia”).

⁴⁷ TENT CITY, USA, *supra* note 5, at 108–12 (Apps. V and VI). The Charleston ordinance was enacted in response to a lawsuit challenging the city’s dismantling of an encampment in January 2016. *See id.* at 60.

⁴⁸ *Id.* at 113–21 (Apps. VII and VIII).

⁴⁹ *Id.* at 122–23 (App. IX) (settlements relating to Pittsburgh, Akron, Honolulu, Pomona, and Sacramento).

⁵⁰ *See, e.g.*, D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § V, at 3–4.

⁵¹ *See, e.g., id.* (referring to property “left in the public space [that] presents a security, health, or safety risk, interferes with community use of public space, or becomes a significant community nuisance”). The rules apply city-wide in Miami, Denver, and D.C., but only to a fifty-block area in downtown Los Angeles. *Compare* L.A. Consent Decree, *supra* note 44 § 4.a, at 4, Ex. B, at 30, *with* D.C. ENCAMPMENTS PROTOCOL § V, *supra* note 46, at 3.

limit cleanups to larger encampments.⁵² The rules do, however, impose requirements for advance notice of cleanups.⁵³ They also restrict what property can be seized or destroyed and provide for storage of belongings the city takes into custody during a cleanup.⁵⁴

Advance notice requirements vary. D.C. provides for fourteen days' advance written notice by a posting in the area;⁵⁵ Miami and Denver require at least seven days advance posting in the area,⁵⁶ and Los Angeles requires at least twenty-four hours' notice.⁵⁷ The significance of the notices, however, depends very much on the context. In D.C., the fourteen days' notice is for what the Protocol deems a "Standard Disposition," as opposed to an "Immediate Disposition" for which no advance notice is required at all.⁵⁸ The D.C. Encampments Protocol allows an Immediate Disposition where municipal authorities determine, in their complete discretion, that property belonging to homeless individuals "must be disposed of immediately due to an emergency, security risk, health risk, or safety risk"⁵⁹ The Denver Consent Decree likewise permits the city to provide less than seven days' notice for a cleanup if "the City determines that a public health or safety risk exists which requires it."⁶⁰ However, the decree also requires the city to document that risk and

⁵² See L.A. Consent Decree, *supra* note 44 § 4.a, at 4.

⁵³ See, e.g., D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A.1, at 5.

⁵⁴ See, e.g., *id.* § VI.C, at 7–8. Two are largely framed in terms of how the city will deal with property. L.A. Consent Decree § 4.b, *supra* note 44, at 4; MIAMI PROPERTY APM-1-19, *supra* note 45, at 5. Two refer more broadly to cleanups, but property is a central issue. D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 §§ VI.C–E, at 7–9; Denver Consent Decree, Ex. A, §§ A–D, *supra* note 10, at 14.

⁵⁵ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A.1, at 5.

⁵⁶ MIAMI PROPERTY APM-1-19 § IV.2, *supra* note 45, at 4 ("City personnel will place notices of Cleanup operation, at least seven (7) days prior to the cleaning date."); Denver Consent Decree, Ex. A, § A.1, *supra* note 10, at 14.

⁵⁷ L.A. Consent Decree, *supra* note 44 § 4.b.ii, at 4. The advance notice provided in other cities varies from forty-eight hours (Akron and Sacramento), to seven days (Pittsburgh), to fourteen days (Charleston, West Virginia), to fifteen days (Indianapolis). See TENT CITY, USA, *supra* note 5, at 108–12, 122–23 (Apps. V–VI, IX).

⁵⁸ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 §§ VI, VII, at 4–5, 9–10.

⁵⁹ *Id.* § VII, at 9.

⁶⁰ Denver Consent Decree, *supra* note 10 Ex. A, § A, at 14. As the experience with the Indianapolis ordinance shows, a city can make robust use of an emergency exception. TENT CITY, USA, *supra* note 5, at 58–59.

keep the documentation for a year.⁶¹ Local authorities could potentially read these broad exceptions for public health or safety to dispense with any advance notice during a pandemic.

How useful is advance notice to those living on the street? The answer is deeply contextual, as a glance at the Los Angeles Consent decree shows. That decree might appear to be the least protective, with only twenty-four hours' advance notice.⁶² But the reality may well be different when compared to the rules in the other cities. For one thing, in D.C., the initial posting for a Standard Disposition does not include the actual date of the cleanup.⁶³ The Final Notice with that date is posted only forty-eight hours before it takes place, and it may come later than the fourteenth day after the initial notice is posted.⁶⁴ With this uncertainty, two weeks' advance notice may function less like a planning device than a sword of Damocles. It is the forty-eight-hour Final Notice—not too different from Los Angeles's twenty-four-hour notice—that carries the most significance. Moreover, the Los Angeles Consent Decree mandates that people in the cleanup area be given a thirty-minute warning prior to the start, giving them time to move their belongings out of the way.⁶⁵ It also forbids the city from closing off more than one block at a time—an important protection.⁶⁶ These protections are mostly absent in the other sets of rules.⁶⁷ One protection missing from all four sets of rules are limits on how early in the day the cleanup may start.⁶⁸ In

⁶¹ Denver Consent Decree, *supra* note 10 Ex. A, § A.1, at 14.

⁶² L.A. Consent Decree, *supra* note 44 § 4.b.i, at 4.

⁶³ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A.1, at 5.

⁶⁴ *Id.* § VI.A.1, at 5.

⁶⁵ L.A. Consent Decree, *supra* note 44 § 4.b.ii, at 4.

⁶⁶ *Id.* § 4.b.iii.

⁶⁷ In practice, D.C. may also have a somewhat useful last-minute warning as well. The Protocol provides for Department of Human Services personnel to arrive a half-hour before the cleanup starts to see who would like to pack their belongings for city storage. D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 8. The original Encampments Protocol provided an hour's advance notice. 2016 D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 6. It is not clear why the period was cut in half. Honolulu similarly provides only a half-hour for individuals to move their property from an area to be cleaned up. *See* TENT CITY, USA, *supra* note 5, at 122 (App. IX). Charleston provides an hour. *See id.* at 111 (App. VI).

⁶⁸ *See, e.g.,* D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 §§ VI.A–C, at 4–8.

Denver, for example, the city has started them as early as four in the morning, waking people with blaring horns or sirens.⁶⁹

Even limitations of the sort that Los Angeles places on when cleanups take place may be stronger on paper than in practice. For example, both Los Angeles and D.C. provide for severe-weather suspensions of cleanups.⁷⁰ Los Angeles forbids proceeding with a cleanup if it is raining or below fifty degrees.⁷¹ D.C. commits not to carry out a planned cleanup if a hypothermia or hyperthermia alert is in place, which is a rather more stringent standard.⁷² Further, both contain a significant exception. The Los Angeles Consent Decree provides that the cleanup may proceed if “the Bureau of Sanitation determines that the cleanup is necessary to respond to an urgent condition risking public health or safety.”⁷³ In D.C., a cleanup may take place even if a hypothermia or hyperthermia alert is in place if city officials determine that it must be done immediately “due to an emergency, security risk, health risk, or safety risk”⁷⁴ D.C.’s practice makes clear that it will indeed carry out a planned cleanup even in very cold winter conditions.⁷⁵

The content of the required posted notice is broadly similar in all four regulations, including the date of the cleanup and contact

⁶⁹ See McGhee, *supra* note 33. The same occurred in Miami, where cleanups started as early as 6:00 a.m., with police cars with loudspeakers and bright lights rousing people from sleep and ordering them to move. See, e.g., Transcript of Evidentiary Hearing at 12–13, *Pottinger v. City of Miami*, No. 88-cv-2406, ECF No. 675 (S.D. Fla. Sept. 26, 2018) (testimony of Robert Rhodes). The district court accepted the testimony but justified the early start “so as not to impede both vehicular and pedestrian traffic.” *Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1191 (S.D. Fla. 2019), *aff’d sub nom. Peery v. City of Miami*, No. 19-10957, 2020 WL 5823768 (11th Cir. Oct. 1, 2020).

⁷⁰ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.F, at 9; L.A. Consent Decree, *supra* note 44 § 4.b.v, at 5.

⁷¹ L.A. Consent Decree, *supra* note 44 § 4.b.v, at 5.

⁷² D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.F, at 9.

⁷³ L.A. Consent Decree, *supra* note 44 § 4.b.v, at 5.

⁷⁴ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 §§ VI.F, VII, at 9.

⁷⁵ Between January 1 and 31, 2020, D.C. issued ten hypothermia alerts. See e.g., @DCHumanServ, TWITTER (Jan. 1, 2020, 8:54 PM), <https://twitter.com/DCHumanServ/status/1212552761499430913>. Nevertheless, the city conducted a cleanup of an underpass where people were living, ordering them out by January 9. See Heim & Moyer, *supra* note 46 (quoting an attorney for homeless persons, “[t]he city picked the snowiest and coldest time of the year to kick 40 people out of their homes” under an underpass in early January 2020).

information for questions about matters such as property retrieval and support services.⁷⁶ The Denver decree goes a step further, including as Exhibits the forms of the various posted notices.⁷⁷ This seems like a useful way to ensure that notices consistently meet the listed requirements.

The four sets of rules are significantly different in terms of what happens between the time the notice is posted and when the cleanup takes place. Only one of the four, the D.C. regulation, expressly provides for outreach to those living in the area to offer shelter, permanent housing, or other services—but only “when they are available.”⁷⁸ The City of Miami Protocol says nothing about outreach, but City officials state that, in practice, they provide outreach in the interim and set aside shelter beds sufficient to accommodate individuals who want shelter.⁷⁹ In general, it does not appear that any city commits to undertake a cleanup of a homeless encampment only when there is adequate shelter space for all those living at the encampment. The closest to such a commitment is Indianapolis’s ordinance, which provides that a cleanup may not proceed until there is sufficient shelter space for all the people at the encampment, but also provides for an exception in case of emergency.⁸⁰ Similarly, Charleston’s encampment ordinance does provide for outreach during the period leading up to a cleanup; it further provides that, if by the date of the cleanup there is no shelter for everyone at the encampment who wants it, those who have been unable to be placed “may” remain at the encampment site until shelter is located.⁸¹

⁷⁶ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A(1), at 5; L.A. Consent Decree, *supra* note 44 § 4.d.ii, at 4–5; Denver Consent Decree, *supra* note 10 Ex. A, §§ A.3–4, at 15; MIAMI PROPERTY APM-1-19, *supra* note 45 §§ IV.4.c, 5.d, at 4–5.

⁷⁷ Denver Consent Decree, *supra* note 10 Ex. A, §§ A.1–3, at 21–23.

⁷⁸ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.B, at 6. D.C. provides a legal right to shelter in hypothermic or hyperthermic conditions, but it carries out encampment cleanups under those conditions. *See supra* text accompanying note 75.

⁷⁹ Transcript of Evidentiary Hearing at 29, 43–44, *Pottinger v. City of Miami*, No. 88-cv-2406, ECF No. 677 (S.D. Fla. Nov. 1, 2018) (testimony of David Rosemond).

⁸⁰ *See TENT CITY, USA*, *supra* note 5, at 108–09 (App. V).

⁸¹ *See id.* at 111–12 (App. VI).

All the regulations provide for the disposition of property during a cleanup. Two of them call broadly for respect for the property of those experiencing homelessness.⁸² The Denver Consent Decree has no similar general prohibition, but it incorporates as a general provision, “govern[ing] every section” of the Consent Decree, an existing city protocol that gives detailed protection to homeless individuals’ property.⁸³ The D.C. Encampments Protocol, perhaps reflecting its origins, contains no general affirmation of respect for the property of homeless individuals.

There are four major issues relating to the handling of property, and the rules vary widely on each. First, what property at the site may the City discard, even if the owner is present? All four regulations provide that property that presents a public health or safety risk may be discarded, though the degree of specificity varies widely. Miami broadly permits disposal of “items that present a hazard to the health and safety of City Personnel or the Public,” with a non-exhaustive list of a few examples.⁸⁴ D.C. lists very specific types of

⁸² For Los Angeles, see L.A. Consent Decree, *supra* note 44 § 4.b, 4.c, at 4–5 (forbidding seizure of property “absent an objectively reasonable belief that it is abandoned, presents an immediate threat to public health or safety, is evidence of a crime, or is contraband”). As to Miami, see MIAMI POLICE D.O. 11, *supra* note 45, at § 10.7.1 (“The City shall respect the personal property of all homeless personsIn no event shall any officer destroy any personal property known to belong to a homeless person, or readily recognizable as property of a homeless person” unless it is contaminated or a health hazard). The federal consent decree that gave rise to the Miami Police Departmental Order clearly applied to all city employees, not just the police. *Pottinger* Consent Decree, *supra* note 45 § VI.9, at 5. While it is doubtful that non-police employees would consider themselves specifically bound by the Police Departmental Order, the City’s position is that even after termination of the decree, it will observe the decree’s protections. Joey Flechas, *Federal Judge Dissolves Homeless Protections from Police Harassment in Miami*, MIA. HERALD (Feb. 15, 2019), <https://www.miamiherald.com/news/local/community/miami-dade/article226339915.html>. It would have been better, however, for the City to expressly incorporate this language into the Administrative Protocol.

⁸³ Denver Consent Decree, *supra* note 10 Ex. A, § A.5, at 16. Even though the protocol pre-dated the consent decree, its incorporation into the decree is significant, given the enforcement provisions. *Id.* § 15, at 4.

⁸⁴ MIAMI PROPERTY APM-1-19, *supra* note 45 § A, at 1, § I.2.a, at 2; MIAMI POLICE D.O. 11, *supra* note 45 § 10.7.1 (permitting police officers to destroy homeless individuals’ property if it is “contaminated or otherwise poses a health hazard to an officer or to members of the public”).

property that may be discarded, but also adds a general proviso that city officials may dispose of any property that city workers deem “hazardous” and “unsafe to store.”⁸⁵ Further, the protections against disposal of property apply only during a “Standard Disposition.”⁸⁶ In cases of an emergency cleanup without advance notice (an “Immediate Disposition”), any property may “be disposed of immediately due to an emergency, security risk, health risk, or safety risk”⁸⁷

Denver and Los Angeles have more stringent requirements. Denver permits property to be discarded only if it poses an “immediate risk to public health or safety,” and “trash” is defined very specifically.⁸⁸ Los Angeles requires “an objectively reasonable belief” that the property “presents an immediate threat to public health or safety, is evidence of a crime, or is contraband.”⁸⁹ Los Angeles and Miami provide that bulky items such as mattresses, furniture, or large appliances may be discarded.⁹⁰ Denver allows mattresses to be disposed of but not furniture.⁹¹

Second, what happens to property that is not subject to disposal, when the owner is not present at the time? Miami and Los Angeles provide that property may be disposed of if there is good reason to

⁸⁵ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 7–8 (listing “live animals,” “illegal items,” “infested with bugs,” “explosives,” “wet or soiled items,” and “foods [or] liquids”).

⁸⁶ *Id.* § VI, at 4–9.

⁸⁷ *Id.* § VII, at 9–10.

⁸⁸ Denver Consent Decree, *supra* note 10, Ex. A, § A.5.b, at 16. Denver mandates a presumption that “[i]f there is any question concerning whether an item should be considered as trash or valuable property, the City will assume the property has value and it should be stored.” *Id.* at Ex. A, § A.5.f, at 16. By contrast, Miami permits disposal of anything that City workers deem “refuse”—an undefined term. MIAMI PROPERTY APM-1-19, *supra* note 45 § I.2.c, at 2.

⁸⁹ L.A. Consent Decree, *supra* note 44 § 4.b, at 4. Three of the sets of rules deal with weapons and contraband, *see id.*; Denver Consent Decree, *supra* note 10, Ex. A, § A.5.d, at 16; D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 8. One (Miami) is silent. *See generally* MIAMI PROPERTY APM-1-19, *supra* note 45.

⁹⁰ L.A. Consent Decree, *supra* note 44 § 4.e, at 6; MIAMI PROPERTY APM-1-19, *supra* note 45 § I.2.b, at 2; MIAMI POLICE D.O. 11, *supra* note 45, § 10.7.4.

⁹¹ Denver Consent Decree, *supra* note 10, Ex. A, § A.5.c, at 16.

believe it is abandoned.⁹² Denver may, in effect, have a strong presumption against deciding property is abandoned.⁹³ D.C., by contrast, appears to reserve maximum discretion as to how to treat property present at a cleanup site.⁹⁴ A closely related issue, not uncommon during cleanups, is what happens to property if the owner is not present when the cleanup begins, returns while it is in progress, and finds that it has been set aside for disposal (for example, by being placed on a garbage truck) or for storage? In practice, city workers have broad discretion and may refuse to give the property back, as happened in some Miami cleanups.⁹⁵ Only Los Angeles expressly addresses the issue, providing that medicine, medical equipment, and identification must be returned on request, with city workers having discretion to take other property to storage if it has already been set aside for storage.⁹⁶

Third, what property must be stored by the city, whether at the request of the owner or even if not claimed by anyone present during the cleanup? All four provide for city storage of certain property. Miami, Denver, and Los Angeles take the approach of identifying certain kinds of property as vital, requiring city workers to take them to storage if no one is present to claim them. In Miami, this includes items like identification, medicine, personal papers, clothing, or bedding.⁹⁷ Denver protects medicine, identification, and other extremely personal items but, more broadly, “[a]ny items of personal property that could reasonably be assumed to have value to any per-

⁹² MIAMI PROPERTY APM-1-19, *supra* note 45 § C, at 5; MIAMI POLICE D.O. 11, *supra* note 45, at § 10.7.3; L.A. Consent Decree, *supra* note 44 § 4.b, at 4.

⁹³ Denver’s presumption may function as a protection against too-easy determination of abandonment. *See supra* note 88.

⁹⁴ The Protocol provides that signs be posted advising that “property left on-site during the cleanup time may be immediately destroyed,” and that “some unattended, non-hazardous property may be stored, in the District’s discretion.” D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A(1), at 5.

⁹⁵ *See Pottinger v. City of Miami (Pottinger II)*, 359 F. Supp. 3d 1177, 1192 (S.D. Fla. 2019), *appeal filed*.

⁹⁶ L.A. Consent Decree, *supra* note 44 § 4.c.iv, at 4–5.

⁹⁷ MIAMI PROPERTY APM-1-19, *supra* note 45 §§ II.2.a–c, at 2–3. The Police Department Order, adopting the language of the *Pottinger* Consent Decree, expressly singles out for heightened protection “personal items such as identification, medicines and eyeglasses and other small items of importance.” MIAMI POLICE D.O. 11, *supra* note 45 § 10.7.2.1.

son” and lists examples, including tents, sleeping bags, musical instruments, phones, and furniture.⁹⁸ Los Angeles takes the approach of requiring the storage rather than disposal of any property that is unattended but not abandoned, so long as it is not a public health or safety threat or evidence of a crime or contraband.⁹⁹

D.C. and Miami both provide that individuals may request storage of their property;¹⁰⁰ the Denver and Los Angeles Consent Decrees, by contrast, do not provide for this possibility. While the former approach might appear more beneficial to those living on the streets, in fact, that approach appears to rest on a practice of removing all property belonging to homeless people in an area, either by disposing of the property or by taking it away for storage. In contrast, the Los Angeles and Denver decrees contemplate that only property that is left unattended and not abandoned will be taken to storage.¹⁰¹ In D.C., moreover, the amount of property that may be stored is limited to what the owner can fit within two forty-gallon storage boxes or bins—provided by the city—during the half-hour immediately preceding the cleanup.¹⁰²

⁹⁸ Denver Consent Decree, *supra* note 10, Ex. A., §§ A.5.c, A.5.e., at 16.

⁹⁹ L.A. Consent Decree, *supra* note 44 § 4.b, at 4. Indianapolis provides for mandatory storage of “clothing, blankets, identification documents, birth certificates, and other personal documents and effects.” *See TENT CITY, USA, supra* note 5, at 108 (App. V).

¹⁰⁰ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 7; Denver Consent Decree, *supra* note 10 §§ A.3–4, at 15; MIAMI PROPERTY APM-1-19, *supra* note 45, at 3–4. Of course, this right does not extend to property subject to immediate disposal (*e.g.*, if deemed a public health hazard); *see also supra* text accompanying note 55–61.

¹⁰¹ *See* L.A. Consent Decree, *supra* note 44, § 4.b, at 4; Denver Consent Decree, *supra* note 10, Ex. A § A.5, at 16 (referring to “unattended” property).

¹⁰² D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 7. The Protocol gives District employees discretion to reject storage of a tent in one of the bins if they decide it is not functional. *Id.* The other three sets of rules do not place volume limits on the property that may be stored, but in the parts of Los Angeles outside the area covered by the consent decree, city officials limit what can be kept on the street to what fits in a sixty-gallon container. *See Holland & Zahniser, supra* note 35. Indianapolis restricts storage to what fits in a ninety-six-gallon container. *See TENT CITY, USA, supra* note 5, at 108–09 (App. V).

Fourth, how long will property be stored, and how may the owner retrieve it? D.C. and Denver provide sixty days, and Los Angeles and Miami provide ninety days of storage.¹⁰³ Denver provides that medicines must be retained until the expiration date, and identification documents must be retained indefinitely unless they have an expiration date.¹⁰⁴ All of the rules provide for signs to be posted in the area post-cleanup with information on the storage facility.¹⁰⁵ Los Angeles, alone among the four cities to do so, sets a strict timeline for how soon stored property must be made available to the owner.¹⁰⁶ Miami requires that the city contact owners who have put a name tag with contact information on their property.¹⁰⁷ In terms of accessibility, D.C. and Denver both require storage facilities to operate within certain hours,¹⁰⁸ while Miami and Los Angeles do not expressly state what hours storage facilities are to operate.¹⁰⁹

Finally, the four sets of rules vary significantly as to compliance. The Miami and D.C. rules, adopted as regulations, have no provi-

¹⁰³ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.C, at 7; Denver Consent Decree, *supra* note 10, Ex. A, § A.3.d, at 15; L.A. Consent Decree, *supra* note 44 § 4.d.i, at 10; MIAMI PROPERTY APM-1-19, *supra* note 45 §§ III.3, IV.5.a, V.2, V.4, at 3–5. Time periods in other jurisdictions vary from as short as fourteen days (Charleston, West Virginia), to thirty days (Akron), to forty-five days (Honolulu), to sixty days (Indianapolis). *See* Tent City, USA, *supra* note 5, at 108, 110–12, 122–23 (Apps. V–VI, IX).

¹⁰⁴ Denver Consent Decree, *supra* note 10 Ex. A § J, at 20.

¹⁰⁵ L.A. Consent Decree, *supra* note 44 § 4.d.ii, at 5; MIAMI PROPERTY APM-1-19, *supra* note 45 § IV.5.d, at 5; D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.E, at 9; Denver Consent Decree, *supra* note 10, Ex. A § A.6, at 16–17.

¹⁰⁶ L.A. Consent Decree, *supra* note 44 § 4.d.v, at 6 (medication, tents, sleeping bags, blankets, and other vital property must be available at storage center within twenty-four hours of seizure; other property, within seventy-two hours).

¹⁰⁷ MIAMI PROPERTY APM-1-19, *supra* note 45 § IV.5.d, at 5; *see also id.* § II, at 2–3 (requiring that homeless persons identify their property with a tag or label with their contact information).

¹⁰⁸ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.D, at 8 (“[N]ormal government business hours”); Denver Consent Decree, *supra* note 10, Ex. A § A.6, at 16–17 (“The City shall extend the hours the storage facility shall be open to 6:00 a.m. – 8:30 a.m. Monday, Tuesday, Wednesday, and Friday and 12:00 p.m. – 6:00 p.m. on Thursdays.”).

¹⁰⁹ *See generally* MIAMI PROPERTY APM-1-19, *supra* note 45 (making no mention of hours during which storage facilities shall remain open); L.A. Consent Decree, *supra* note 44 (silent as to what hours storage facilities operate).

sions for complaints, enforcement, or even input by those experiencing homelessness. Indeed, the D.C. Protocol expressly disclaims the creation of any rights.¹¹⁰ The Los Angeles and Denver rules, embodied in consent decrees, provide for court enforcement after good faith efforts to resolve disputes informally.¹¹¹ The Denver decree also creates an advisory group consisting of persons experiencing homelessness and their representatives, which meets with City officials every three months.¹¹²

III. THE LESSONS OF RECENT EXPERIENCE: LIMITATIONS AND THE NEED FOR NEW APPROACHES

What lessons might we draw from a detailed comparison of these four sets of rules? One is the importance of a process that goes beyond government officials formulating rules and procedures in the usual way. It is hardly a surprise that rules that emerge from negotiation, with court proceedings in the background—as was the case with Denver, Los Angeles, and partly, Miami—are generally more precise and protective.

The D.C. Encampments Protocol shows signs of lack of careful attention in drafting (or a propensity for ambiguity that leaves municipal authorities with maximum discretion). For example, the original Encampments Protocol did not include a severe-weather exception even though, in practice, city officials may have taken that into account.¹¹³ The severe-weather exception was added only in the 2019 revision.¹¹⁴ Moreover, it is difficult to know what persons experiencing homelessness are to make of their property protections from the ambiguous signage posted before a cleanup.¹¹⁵ The original 2016 D.C. Encampments Protocol was even worse, providing for

¹¹⁰ D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § I, at 1 (“This protocol does not create any enforceable third party rights on behalf of any member of the public or any individual whose property may be the subject of this protocol.”).

¹¹¹ Denver Consent Decree, *supra* note 10, Ex. A § 15, at 5; L.A. Consent Decree, *supra* note 44 § 22, at 14–15.

¹¹² Denver Consent Decree, *supra* note 10, Ex. A § F, at 19.

¹¹³ See Geiger, *supra* note 9, at 64. See generally 2016 D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 (lacking a severe weather exception).

¹¹⁴ Compare 2016 D.C. ENCAMPMENTS PROTOCOL, *supra* note 46, with D.C. ENCAMPMENTS PROTOCOL, *supra* note 46, at 9.

¹¹⁵ See D.C. ENCAMPMENTS PROTOCOL, *supra* note 46, at 5.

signs that seemed to flatly state that any property at the site on the day of a cleanup would be destroyed.¹¹⁶

The drafting of the Miami Administrative Policy shows a similar lack of clarity on basic questions. For example, it provides that police are bound by the Policy (except in the case of a conflict with Police Departmental Order 11), but as noted earlier, the Policy does not provide that the property protections of Police Departmental Order 11 (and the underlying *Pottinger* Consent Decree) apply to all city employees.¹¹⁷ It refers to seizure or disposal of all “unattended” property without clarifying what that term means.¹¹⁸ Suppose, for example, the owner briefly stepped away from his or her property but asked someone else to watch over it. Is that property “unattended?” Another section of the Policy may answer this question, referring to seizure and disposal of property “when the Homeless Person is not present.”¹¹⁹ This phrase may well refer to the property owner, although that is not made clear. If it does, the Policy—by allowing property to be treated as “unattended” if an individual identifies the property as belonging to someone else—is entirely inconsistent with the basic requirement of the Consent Decree, incorporated into the current Miami Police Departmental Order, that no “personal property known to belong to a homeless person, or readily recognizable as property of a homeless person (i.e., clothing and other belongings organized or packaged together in a way indicating it has [not] been abandoned)” should be destroyed.¹²⁰

Nothing, of course, stops municipalities from reaching out to those experiencing homelessness and their advocates to include them in the drafting of procedures. The Denver model of an advisory group may point to an effective way municipalities could incorporate homeless persons’ experiences in their drafting processes.

¹¹⁶ See 2016 D.C. ENCAMPMENTS PROTOCOL, *supra* note 46 § VI.A(1), at 4 (posted signs would say only that “any items not removed by the cleanup deadline are subject to removal and disposal . . .”).

¹¹⁷ See *supra* note 82.

¹¹⁸ MIAMI PROPERTY APM-1-19, *supra* note 45 §§ II.2, V, at 2, 5.

¹¹⁹ *Id.* § IV.5, at 4–5.

¹²⁰ MIAMI POLICE D.O. 11, *supra* note 45 § 10.7.2.2. This language is taken from the *Pottinger* Consent Decree. See *Pottinger* Consent Decree, *supra* note 45, at 12; Addendum to *Pottinger* Consent Decree, *supra* note 45 § VII.14.F.1, at 7. The Departmental Order omits the word “not” from the language of the *Pottinger* Consent Decree, apparently inadvertently.

Moreover, those engaged in formulating rules would do well to consult other cities' regulations.

Legislation regulating cleanups may well be preferable to the simple promulgation of administrative rules. Legislation engages communities and provides opportunities for the public, including those with the greatest stake in the matter, to play a role in its formulation. The need to gather broad support for a constructive approach to dealing with the challenges that homelessness poses may help ensure that an ordinance will be backed by greater commitment. At the same time, there is no gainsaying the advantage of prevailing in litigation and securing a court order or consent decree. The Denver Consent Decree expressly provides for attorneys' fees to a prevailing party in an action to enforce it.¹²¹

The most important lesson, however, may be that any attempt to regularize cleanups and ban the indiscriminate destruction of property that too often accompanies them suffers from inherent limitations. As Geiger notes, "'cleanups' are violent. During cleanups, people experiencing homelessness lose their property and exert a huge amount of energy in moving their belongings, both of which are major stress inducers for an already vulnerable population."¹²²

¹²¹ Denver Consent Decree, *supra* note 10 Ex. A § 15, at 5.

¹²² Geiger, *supra* note 9, at 64; Nuala Sawyer, *Sweeps of Homeless Camps in S.F. Are Creating a Public Health Crisis*, U.S. CAL. ANNENBERG CTR. FOR HEALTH JOURNALISM (Mar. 21, 2019), <https://www.centerforhealthjournalism.org/2019/03/14/sweeps-homeless-camps-sf-are-creating-public-health-crisis> ("Victims of encampment sweeps also suffer from losing their community, however informal and temporary it might be. As camps are broken up and people scatter, they lose a life-saving safety net . . . There are also significant mental health side effects of these sweeps. Starting over from scratch is exhausting for many homeless people, and combined with the loss of community, many people rely on drugs like speed to stay awake at night to better protect themselves against theft, rape and physical assault."). For a description of particularly brutal series cleanups in Fresno in the early 2000s in which encampments were repeatedly bulldozed, see Jessie Speer, *The Right to Infrastructure: A Struggle for Sanitation in Fresno, California Homeless Encampments*, 37 URB. GEOGRAPHY 1049, 1054–56 (2016); see also *Case Profile: Kincaid v. City of Fresno*, C.R. LITIG. CLEARINGHOUSE (July 1, 2013), <https://www.clearinghouse.net/detail.php?id=11218>; cf. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* 295–99 (2016) (detailing material and psychic toll inflicted on renters through eviction and consequent loss of belongings, community, and stability).

If carefully drafted and conscientiously implemented, cleanup regulations can reduce this violence and the accompanying stress inflicted on persons experiencing homelessness. That is a valuable achievement. But even regulated cleanups are still stressful and energy-consuming.¹²³ One need only imagine being forced to move from one apartment to another several times a month with the possibility of losing all of one's belongings if something goes wrong. Further, not everyone can be present at every cleanup. People living on the streets have jobs, medical appointments, and countless other reasons why they might be absent, even with notice. All the regulations provide for municipal seizure of belongings of persons not present at the time of the cleanup, with some—but not all—of those belongings carted off to storage. This is better than having the belongings simply thrown in the trash, but the challenges of retrieving property from a storage center likely add to the stresses that persons living on the streets experience.

More effective strategies, like Housing First and, in the long run, serious efforts to provide for affordable housing,¹²⁴ are obviously essential. The Denver Consent Decree, however, points to an additional strategy in the interim. It addresses the fact that larger encampments or even smaller groupings of people living on the streets become unsafe and unclean because of the lack of services. Rather than simply restraining and regulating the cleanups, the Denver Consent Decree requires the provision of some storage lockers, more trash receptacles (especially in the summer), two to four Port-o-Lets, and needles and sharps boxes for disposal of syringes.¹²⁵ The locations of these services is to be discussed with the advisory

¹²³ See Patrick Geiger & Aaron Howe, *D.C.'s Homeless Encampment 'Cleanups' Are Only Making Things Worse*, WASH. POST (Apr. 19, 2019), https://www.washingtonpost.com/opinions/local-opinions/dcs-homeless-encampment-cleanups-are-only-making-things-worse/2019/04/19/757775da-5262-11e9-88a1-ed346f0ec94f_story.html. The stress from having only a half-hour or one hour to pack up one's belongings, *see supra* note 67, is likely considerable.

¹²⁴ NED MURRAY ET AL., FLA. INT'L UNIV. JORGE M. PÉREZ METRO. CTR., MIAMI AFFORDABLE HOUSING MASTER PLAN 9–11 (Draft 2020), https://is-suu.com/fiometrocenter/docs/city_of_miami_affordable_housing_master_plan_draft; *see* Andres Viglucci & Rene Rodriguez, *Miami Finally Has a Strategy to Tackle Its Housing Affordability Crisis*, MIA. HERALD (Jan. 7, 2020), <https://www.miamiherald.com/news/business/real-estate-news/article238954388.html>.

¹²⁵ Denver Consent Decree, *supra* note 10 Ex. A, § E, at 18–19.

group.¹²⁶ The Consent Decree also provides for greater access to the city's recreational centers¹²⁷ and calls for attempting to procure a mobile health unit for those living on the streets.¹²⁸ This imperative is even stronger in a time of public health crisis, when those with no choice but to live on the streets and in parks are at greater risk along with the general public. It also calls for expanding the Denver Day Works program—a “supported work program designed to provide a low- to no-barrier work experience for people throughout the city who are experiencing homelessness, while also connecting participants to supportive services such as food, shelter, and other necessities.”¹²⁹

The Denver Consent Decree bears some resemblance to other innovative approaches, including authorizing encampments in certain areas with services, legalizing the creation of encampments on private property with the owner's permission, and creating low-barrier emergency shelters.¹³⁰ Another approach might be to create resource centers in downtown areas, where persons experiencing homelessness could have access to showers, lockers, meals, and other services during the day. What all these approaches have in common is a recognition that, so long as homelessness persists, basic decency mandates affirmative efforts to reduce the harm of having to live on the streets.¹³¹ Regulating cleanups is a step in that direction but—even as an interim policy pending effective efforts to end homelessness—ultimately, an inadequate one.

¹²⁶ *Id.* Similarly, the settlement that Pomona entered into calls for the city to fund a center with storage lockers that homeless individuals may use. *See* TENT CITY, USA, *supra* note 5, at 123.

¹²⁷ Denver Consent Decree, *supra* note 10, Ex. A § G, at 20.

¹²⁸ *Id.*, Ex. A § H, at 20.

¹²⁹ *See* *Denver Day Works*, DENVERGOV.ORG, <https://www.denvergov.org/content/denvergov/en/housing-information/resident-resources/job-help.html> (last visited Sept. 10, 2020); *see also* Denver Consent Decree, *supra* note 10, Ex. A § L, at 20. The consent decree, however, expressly disclaims any *legal* commitment to secure the funds. *Id.*

¹³⁰ *See* HOUSING NOT HANDCUFFS, *supra* note 4, at 100–01; TENT CITY, USA, *supra* note 5, at 66–81; *see also* Speer, *supra* note 122, at 164–65 (arguing for “infrastructural rights” in encampments, such as provision of toilets).

¹³¹ The National Homelessness Law Center's “Encampment Principles and Practices” provides a useful framework for efforts to deal with encampments constructively and with dignity for those experiencing homelessness. *See* TENT CITY, USA, *supra* note 5, at 14–15.