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# The jurisprudence of universal subjectivity: COVID-19, vulnerability and housing

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**Abstract**

Drawing upon Martha Fineman's vulnerability theory, the paper argues that the legal claims of homeless appellants before and during the COVID-19 pandemic illustrate our universal vulnerability which stems from the essential, life-sustaining activities flowing from the ontological status of the human body. By recognizing that housing availability has constitutional significance because it provides for life-sustaining activities such as sleeping, eating and lying down, I argue that the legal rationale reviewed in the paper underscores the empirical, ontological reality of the body as the basis for a jurisprudence of universal vulnerability. By tracing the constitutional basis of this jurisprudence from Right to Travel to Eighth Amendment grounds during COVID-19, the paper outlines a distinct legal paradigm for understanding vulnerability in its universal, constant and essential form – one of the central premises of vulnerability theory.

**Keywords**

Vulnerability, housing, COVID, constitutional, Fineman

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## Introduction

In the wake of the federal government's Coronavirus Economic Stabilization Act of 2020,[1] states and cities across the USA have employed Fair Housing emergency assistance programs, eviction moratoriums and temporary shelter initiatives to address housing insecurity due to the economic fallout of the pandemic. In recent eviction cases in the wake of COVID-19, courts have upheld federal eviction moratoriums based on the statement by the Center for Disease Control that "...a national homelessness crisis could worsen the country's coronavirus outbreak."[2] Yet this raises questions about longer-term solutions to the housing availability crisis across the nation in general, the inequities in health caused by lack of housing in urban "death zones," and to what extent individual states and city governments will actively pursue deeper reforms in housing policy that aim to prevent future public health crises from occurring. After all, as one District Court said in 1992, "(A)n individual who loses his home as a result of economic hard times or physical or mental illness exercises no more control over these events than he would over a natural disaster."[3] The recognition of vulnerability to housing insecurity, particularly in the wake of COVID-19, continues to have important, but limited constitutional significance. For some, the temporary measures pursued by many city and state governments addressing housing insecurity in the wake of COVID-19 provides ample opportunity for governments to implement longer-term solutions to housing.[4] At the same time, there are very limited constitutional resources to support such initiatives, both at the federal and state level. This is so primarily because the U.S. federal constitution does not expressly include affirmative protections or guarantees for housing. Furthermore, the pandemic has brought to light a certain paradox for populations who reside in states or municipalities which lack a sufficient supply of adequate and affordable housing. In the midst of a pandemic, the question has been raised: how can one quarantine if one does not have a home (owned or rented)? Likewise, we could ask a more fundamental question: how can one exercise basic, life-sustaining activities of liberty, autonomy and privacy if one does not have a home? Federal District Courts have ruled that laws and ordinances which arrest or punish homeless individuals for performing life-sustaining acts in public where they have nowhere else to go are a violation of the Eighth Amendment,[5] and in some cases are a violation of the fundamental right to travel under equal protection.[6] In recent cases involving the COVID-19 pandemic, however, U.S. courts have gone further and been more willing to explicitly address not merely violation of fundamental rights and liberties of the homeless, but have also addressed the affirmative legal obligations that exist to provide housing and medical care for the homeless. Recently, California statutes on welfare mandating the provision of state support to the indigent have been interpreted to argue that housing for homeless populations is required to ensure the safety and health of homeless individuals at imminent risk of hazardous waste.[7] In this way, the issue of housing availability, particularly in the wake of COVID-19, demonstrates that life-sustaining conduct connected to housing needs is essential to the health and well-being of each and every individual in a political community.

In legal cases involving homeless appellants before and during the COVID-19 pandemic, a jurisprudence of housing availability has emerged which emphasizes what

Martha Fineman refers to as the features of the ontological body – the empirical, life-sustaining realities of the body which serve as the basis for universal human vulnerability. In the first section of the paper, I contextualize the jurisprudence of housing availability within Fineman's vulnerability theory. After highlighting the features of the ontological body as theorized by Fineman, I then review the constitutional grounds that have been given which prohibit the criminalization of life-sustaining activity in the context of insufficient housing availability. By recognizing that the objective, universal features of the human body that necessitate life-sustaining activities such as sleeping, eating and lying down have *constitutional significance,* I argue that this line of cases underscores the empirical, ontological reality of the body as the basis for a universal legal conception of vulnerability. As a result, it is argued that this jurisprudence of universal subjectivity provides an alternative legal grounding for the possibility of a constitutional right to housing, grounded in the basic human needs which stem from our shared, universal vulnerability theorized by Professor Martha Fineman.

## Vulnerability theory

Martha Fineman's work on the "universal, vulnerable" legal subject is particularly relevant to the discussion of housing availability. For Fineman, the equality/nondiscrimination paradigm which governs virtually all public policy on housing and homelessness is " . . . the lens through which contemporary legal culture tends to assess the nature and effect of existing laws and determines the necessary direction of reform. As such, this paradigm provides the governing logic for both criticism and justification of the status quo. It is rooted in an understanding of the significance of the human being and a belief in their fundamental parity under law that also asserts the inherent value of individual liberty and autonomy, and thus is skeptical of state intervention into the 'private' sphere of life" (Fineman, 2020, p. 51). In relationships such as parent-child or landlord-tenant relationships which are considered primarily "private" and over which state regulation is limited, the remedy of inequalities arising within those spheres is limited by the " . . . jurisprudential logic that flows from an equality/antidiscrimination paradigm" (Fineman, 2020, p. 52). This dominant paradigm, for Fineman, is grounded upon an Enlightenment conception of legal subjectivity that can be characterized as follows:

> Our contemporary legal subject is posited as an autonomous and independent being whose primary demand is for liberty or freedom from state interference. He claims a right to autonomy to govern his own life while at the same time asserting his freedom from responding to the needs of others, who should be equally independent and self-sufficient . . . This liberal legal subject is a fully functioning adult in charge and capable of making choices. Unrestrained by the state, he will be rewarded according to his particular talents and individual efforts. His social relations are defined by concepts, such as consent, and supported by legal doctrines, such as contract and property. (Fineman, 2020, pp. 53–54)

As Fineman notes, inequalities arising from more universal features of human vulnerability and dependency (such as dependence on basic, affordable shelter for exercising

human needs), are consequently "....strictly considered to be an individual, not a societal, problem. Thus, such problems are deemed a personal, rather than public, responsibility" (Fineman, 2020, p. 54). As an alternative to this paradigm, Fineman's vulnerability theory proposes "... a legal subject that is primarily defined by vulnerability and need, rather than exclusively by rationality and liberty, more fully reflects the human condition" (Fineman, 2020, p. 54). As such, institutions should be built to respond to human vulnerability and dependence, focused on the universal aspects of human vulnerability as the primary considerations for a responsive state. Vulnerability theory, for Fineman, recognizes that spheres traditionally relegated to the "private" sphere, including the family relations and market relationships, are more often than not in fact issues of public, universal concern that involve relations of dependence and vulnerability which give rise to forms of inequality which the state and governments remain limited to address. As Fineman notes,

> that these constructed entities are deemed "private" institutions – even though we enact laws to facilitate their creation; determine their shape, terms, and responsibilities; and ease their functioning – is a paradox. They are creatures of law, brought into being by doctrines set out in corporate, family, property, corporate, employment, tax, trade, welfare, and other laws. The law determines the nature of the relationships between individuals within these essential social institutions, such as parent-child, employer-employee, shareholder-consumer, and so on. (Fineman, 2020, pp. 59–60)

With these recognitions, vulnerability theory "... expands our notion of what constitutes an injury of constitutional significance to include the gross neglect or willful disregard of circumstances of profound deprivation and unmet need on the part of some citizens ... [and] state responsibility as arising from the human needs organically rooted in universal vulnerability and dependency" (Fineman, 2020, p. 61). In this way, legal remedies for discrimination, unfair or unjust treatment are limited by the equality/non-discrimination paradigm which views goods like housing and health care as market goods pursued voluntarily through private relationships by rational individuals free from government discrimination. The dominant legal subject is independent, not dependent, capable and rational, not vulnerable. As a result, there are few resources to draw upon to provide remedies in cases of discrimination, violence, unfair or unjust treatment even when such treatment seems to violate basic, universal exercises of conduct essential to what it means to be human.

In addition, vulnerability theory emphasizes that the central characteristic of the human condition is our shared, universal vulnerability grounded in the empirical realities of the body. Rather than presupposing a rational, invulnerable body as the starting point for a legal conception of subjectivity, vulnerability theory begins with the premise that the human body is ontologically vulnerable – the very substance of the body necessitates its vulnerability to its environment. Because of this central thesis, vulnerability theory recognizes that the needs provided by housing are not *special* features of homeless populations, but rather basic, universal features of what it means to be human. In this way, homeless populations suffer a specific susceptibility to the COVID-19 pandemic and infectious disease more broadly, but the needs which housing provides – access to

safe, adequate shelter for sleeping, eating, lying down, etc – are in fact universal, basic and essential to being human.

At the same time, vulnerability theory acknowledges that homeless populations have a specific susceptibility to COVID-19, and to the lack of housing availability more broadly. Indeed, research from across many major urban cities in the United States have highlighted the stark inequity in mortality indexes for those who lack access to safe, affordable housing.[8] The mortality indexes found in these zones have been compared to areas declared as natural disaster zones, and in some cases have been found to have higher death rates than those in natural disaster areas (O'Connell, 2005, p. 2). The confluence of poor housing, disability, and social isolation in these areas have led some to describe these areas as "death zones" which pose significant health risks to those who lack access to safe, affordable shelter. Homeless populations in general have been found to have much lower life expectancy (Lima et al., 2020, p. 112945) are more likely to have chronic pre-existing health conditions which increase susceptibility to disease (Kaysin et al., 2020, pp. 1362–1364) and lack of housing itself has been identified as a major risk factor in repeat emergency room visits, with homeless individuals being 9 times more likely to return to emergency rooms within 30 days and 11 times more likely to return to emergency room departments over the course of 2 years (Amato et al., 2019, pp. 415–420). These and other factors point to the specific susceptibility of homeless populations to infectious diseases such as COVID-19, as well as to governmental responses to inequitable outcomes of the crisis upon communities of color (Novasky and Rosales, 2020, p. 130). Such public health crises affect street populations who lack adequate access to medical care as well as shelter populations in often over-crowded, congregate settings which are particularly susceptible to disease transmission. From the perspective of vulnerability theory, the *basic* needs at issue when speaking of housing the homeless are not special to homeless populations, but rather are universal needs that stem from the fact of being human. Specifically, vulnerability theory recognizes that it is precisely the essential features of the human body which make the need for exercising life-sustaining conduct universal, and constant.

According to Fineman, contemporary conceptions of vulnerability define what it means to be vulnerable either by "... the episodic potential impairment of individual bodies" (Fineman, 2021, p. 4), or by "... certain demographic differences in bodies, associating them with distinct social, economic, or political disadvantages" (Fineman, 2021, p. 4). The second conception, one Fineman refers to as "special vulnerability," "... is common in professional discourses, such as law and public health, where there are frequent references to specific 'vulnerable populations'. Sometimes these populations are perceived as lacking in ability, capacity, or character. Quite often they are stigmatized as a result" (Fineman, 2021, p. 4). This conception, Fineman explains, results in the designation of "vulnerable populations" which provide "... the basis for arguing they deserve special legal and political consideration, some reparations for the diminished social, political, economic, or legal position they innocently occupy" (Fineman, 2021, p. 5). In contrast, vulnerability theory argues that "... individuals and groups described as 'vulnerable populations' should not be labelled vulnerable, nor should they be sequestered in discreet categories for the purpose of law and policy" (Fineman, 2021, p. 5). Rather, Fineman argues that vulnerability is itself a universal and constant feature of the

human condition, grounded in the body as a pre-political and pre-moral theoretical concept. As Fineman writes,

> the body in vulnerability theory is an ontological or anthropological concept, a fundamental reality, consistent over time, place, and space. Vulnerability is intrinsic to the body, actually indistinguishable from the body and, therefore, an element of the ontological. (Fineman, 2021, p. 6)

Importantly, for Fineman, the ontological status of the body is what grounds the argument that "... human vulnerability provides the primary legitimating justification for the coercive ordering of human relationships and endeavors through law" (Fineman, 2021, p. 6). As I argue in the following section, it is the ontological status of the human body and the life-sustaining activities which spring from that status upon which a jurisprudence of universal subjectivity may be constructed.

## The jurisprudence of universal subjectivity

Given the ontological reality of the human body and the life-sustaining activities which flow from our very being, the basic needs which housing provides gain constitutional significance from the perspective of vulnerability theory. In this section, I review the constitutional grounds that have been given which have led to the recognition of the constitutional significance of housing availability in American jurisprudence. With respect to the question of human vulnerability to the availability of housing, American constitutional jurisprudence contains somewhat of a paradox. On the one hand, the U.S. Supreme Court has infamously ruled that the federal Constitution does not guarantee a right to housing, and that state legislatures are the proper venue to address social and economic policy under the purview of the reserved powers of the individual states.[9] In general, federal and state constitutional rights to health and housing follow an individual, negative rights approach, viewing health care and housing as market goods pursued by individuals free from government discrimination (Leonard, 2010, p. 1392). As Fineman notes,

> The denial of positive rights means that the state has no constitutional responsibility to guarantee access to basic goods and services. As a result, the Constitution, as it is interpreted, thus tolerates (and even condones) state disregard for or abandonment and neglect of basic human needs. (Fineman, 2018, p. 52)

While state constitutions have often gone beyond the negative federal constitutional approach in affirming the provision of affordable housing as part of statutory laws requiring medical care to the indigent, it remains the case that affordable shelter, much like the right to health care, is not recognized as an affirmative, enforceable right in either U.S. federal or state constitutions (Leonard, 2010, p. 1392). On the other hand, federal courts have consistently maintained that while life-sustaining activities exercised in public spaces is unavoidable for homeless populations without reasonable

alternatives, such social and economic "problems" are issues for state legislatures and not the judiciary. In 2006, the Ninth Circuit explained their position:

> There is obviously a "homeless problem" in the City of Los Angeles, which the City is free to address in any way that it sees fit, consistent with the constitutional principles we have articulated. *See id.* By our decision, we in no way dictate to the City that it must provide sufficient shelter for the homeless, or allow anyone who wishes to sit, lie, or sleep on the streets of Los Angeles at any time and at any place within the City. All we hold is that, so long as there is a greater number of homeless individuals in Los Angeles than the number of available beds, the City may not enforce section 41.18(d) at all times and places throughout the City against homeless individuals for involuntarily sitting, lying, and sleeping in public.[10]

More recently, in *Blake v. City of Grants Pass*, three homeless citizens of an Oregon city with an undersupply of affordable housing units sought relief from local "anti-homeless" ordinances that restricted or prevented life-sustaining activities in public spaces. The Court ruled that, especially in light of the COVID pandemic, city laws which criminalize life-sustaining activities violate the Eighth Amendment's Cruel and Unusual and Excessive Fines clause.[11] The District Court in *Blake*, however, followed the line of reasoning in *Jones* when ruling against the city's anti-homeless ordinances that violated plaintiff's Eighth Amendment rights, remarking that " . . . this holding in no way dictates to a local government that it must provide sufficient shelter for the homeless."[12] The paradox of American jurisprudence on the question of housing, therefore, can be seen in the fact that housing availability has constitutional significance while housing itself is not recognized as an affirmative constitutional right.

When we turn to the question of the criminalization of homelessness – laws which criminalize life-sustaining activities necessary for daily survival without access to shelter – American jurisprudence has turned largely on the question of whether homeless individuals should be viewed as rational, voluntary agents violating city ordinances, or vulnerable populations dependent on exercising life-sustaining conduct in public places due to lack of housing availability. However, the legal claims of particular homeless appellants before and during the COVID-19 pandemic, I argue, illustrate the general, universal claims that stem from the essential, life-sustaining activities inherent to the ontological status of the vulnerable human body. By recognizing that the objective, universal features of the human body that necessitate life-sustaining activities such as sleeping, eating and lying down have *constitutional significance,* this line of cases underscroes the empirical, ontological reality of the body as the basis for a universal legal conception of vulnerability. This rationale, I argue, is the basis for a jurisprudence of universal subjectivity, grounded in the basic features of the universal vulnerable legal subject. The legal recognition that these claims have universal and not merely particular or special constitutional import demonstrates, at least to some degree, the acknowledgment of a distinct legal paradigm for understanding vulnerability in its universal, constant and essential form – one of the central premises of vulnerability theory. In what follows, I outline the constitutional bases of this rationale, and demonstrate how the recognition of the body's essential life-sustaining activities has led to the legal assertion

of the constitutional significance of the availability of housing. I do so by reviewing the constitutional arguments that have been given in American jurisprudence upholding the necessity of life-sustaining activities based on Right to Travel, Equal Protection and finally Eighth Amendment grounds.

## *Right to travel*

U.S. Federal District Courts have ruled that denying "necessities of life" involving life-sustaining activities like sleeping, eating and lying down without a compelling interest by least restrictive means is a violation of the fundamental right to travel, and is an unconstitutional violation of fundamental rights.[13] This reasoning is in part based on the Supreme Court's decision that any law or policy which effectively penalizes travel will be unconstitutional if it denies a person a "necessity of life," such as free medical care.[14] In 1941, the Supreme Court clarified that

> The conclusion that the right of free movement is a right of national citizenship stands on firm historical ground. If a state tax on that movement . . . is invalid, a fortiori a state statute which obstructs or in substance prevents that movement must fall. That result necessarily follows unless perchance a State can curtail the right of free movement of those who are poor or destitute. But to allow such an exception to be engrafted on the rights of national citizenship would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who were stigmatized by a State as indigents, paupers, or vagabonds to be relegated to an inferior class of citizenship. It would prevent a citizen because he was poor from seeking new horizons in other States. It might thus withhold from large segments of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of national citizenship, a serious impairment of the principles of equality. Since the state statute here challenged involves such consequences, it runs afoul of the privileges and immunities clause of the Fourteenth Amendment.[15]

This rationale has since been used by lower courts to invalidate anti-homeless ordinances restricting life-sustaining conduct in public spaces. As one famous District Court case concluded, "(I)f 'necessities of life' are denied, fundamental rights of travel are violated. Anti-homeless ordinances violate the fundamental rights of travel and migration without a compelling government interest through the least restrictive means."[16] On the basis of this fundamental rights analysis, the Court clarified that " . . . laws that prevent homeless individuals who have no place to go from sleeping, lying down, eating and performing other harmless life-sustaining activities burdens their right to travel."[17] The District Court in this case clarified some of the activities of life-sustaining conduct in question, writing that, "(I)ndeed, forcing homeless individuals from sheltered areas or from public parks or streets affects a number of 'necessities of life' – for example, it deprives them of a place to sleep, of minimal safety and of cover from the elements."[18] Finally, the Court significantly concluded that, while the homeless might in fact qualify as a "suspect class" under equal protection claims, a higher standard of equal protection analysis was not necessary, since fundamental rights were at issue:

> This court is not entirely convinced that homelessness as a class has none of these "traditional indicia of suspectness." It can be argued that the homeless are saddled with such disabilities, or have been subjected to a history of unequal treatment or are so politically powerless that extraordinary protection of the homeless as a class is warranted. However, resolution of this issue is beyond the scope of the evidence presented at trial and, in any event, is unnecessary for, as discussed below, we resolve the question of the appropriate standard to apply based on our determination that the City has infringed upon plaintiffs' fundamental right to travel.[19]

In cases as recent as 2019, Federal District Courts have found anti-homeless laws and ordinances violate the right to travel.[20] The rationale in this case was based in part on the equal protection ruling of *Shapiro*, which ruled as unconstitutional a Connecticut durational residency requirement for welfare benefits. In that case, a " . . . first class is granted and the second class is denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist – food, shelter, and other necessities of life."[21] The standard of Equal Protection claims has shown to be exceptionally difficult to meet for claims based on homelessness as a "suspect class." While some have forcefully argued for homelessness to be understood as the basis for a "suspect class" (Watson, 2003, p. 501), *Pottinger* demonstrated a different approach. In that case, the Court found that, because fundamental rights to the "necessities of life" were being curtailed, the ordinances in question required strict scrutiny to determine a compelling interest by the least restrictive means, and were found to be unconstitutional infringements on the right to travel.

However, this way of analysis only applies to government action, and says nothing about the *lack* of government action on housing provision. If there exists a state statute requiring housing provision for the homeless as a requirement for providing medical care, then it might be claimed that failure to do so violates state constitutional statutes. However, in states where no such statute exists, it cannot be claimed that the "necessities of life" are being actively curtailed by government simply because there is a lack of sufficient housing infrastructure. An insufficient infrastructure of housing that is largely inaccessible to the poor is, in itself, not currently recognized as repugnant to the U.S. Constitution, which only appears to restrict active violations of fundamental rights by state and city governments, and does not provide a basis to compel states to make housing an affirmative, enforceable right.

## *Eighth Amendment*

Various challenges to municipal anti-homeless ordinances across the U.S. by homeless individuals have in recent years given rise to novel judicial interpretations of the constitutional significance of the provision of housing. Building upon federal rulings since the 1990s regarding the universal, unavoidable conduct of homeless individuals in the context of insufficient housing, the *Jones-Martin* line of cases recognizes homelessness as a constitutionally cognizable status due to the involuntary and unavoidable nature of universal, life-sustaining conduct without recourse to adequate shelter, and recognizes the due process implications for "vulnerable populations" of the homeless who lack the

ability for adequate legal representation and defense. This "equal process" constitutional analysis – examined in the final section of the paper (Garrett, 2019, p. 2) – lays the groundwork for the argument that housing has constitutional significance, and that lack of affordable, adequate shelter implicates due process and equal protection for vulnerable populations.

This argument has been bolstered by recent cases involving housing and homelessness during the COVID-19 pandemic, where the central issue is the cruel and/or unduly harsh conditions created by governments which lack or deny sufficient accessibility to affordable, adequate shelter to their citizens. In recent eviction cases in the wake of COVID-19, courts have upheld federal eviction moratoriums,[22] based on the CDC's recognition that "... a national homelessness crisis could worsen the country's coronavirus outbreak."[23] The lack of affordable shelter therefore has taken on significance not only for constitutional reasons in the *Jones-Martin* line of cases, but also for public health and safety reasons in the wake of the growing pandemic. Both of these reasons are reflected in *Blake's Pass* and *LA All. for Human Rights*, lending to the conclusion that housing availability has constitutional significance because of the nature of the life-sustaining activities which it provides – activities which, as I argue, are essential to the universal vulnerable legal subject.

In *Jones v. City of Los Angeles* (2010), the court underscored the lack of housing availability and the involuntary nature of universal, life-sustaining conduct as the primary factors in determining the constitutionality of municipal ordinances criminalizing the activity of homeless individuals. The court found that,

> Because there is substantial and undisputed evidence that the number of homeless persons in Los Angeles far exceeds the number of available shelter beds at all times, including on the nights of their arrest or citation, Los Angeles has encroached upon Appellants' Eighth Amendment protections by criminalizing the unavoidable act of sitting, lying, or sleeping at night while being involuntarily homeless. A closer analysis of Robinson and Powell instructs that the involuntariness of the act or condition the City criminalizes is the critical factor delineating a constitutionally cognizable status, and incidental conduct which is integral to and an unavoidable result of that status, from acts or conditions that can be criminalized consistent with the Eighth Amendment.[24]

In a particularly important section addressing the constitutionality of the ant-camping ordinance, the court said that, "(W)hether sitting, lying, and sleeping are defined as acts or conditions, they are universal and unavoidable consequences of being human. It is undisputed that, for homeless individuals in Skid Row who have no access to private spaces, these acts can only be done in public."[25] Further, the court ruled that, "... by criminalizing sitting, lying, and sleeping, the City is in fact criminalizing Appellants' status as homeless individuals."[26] As a result, the holding affirmed that "....the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."[27] In addition, the court pointed out the practical limitations homeless individuals face in defending their constitutional rights, pointing out that

> . . . the practical realities of homelessness make the necessity defense a false promise for those charged with violating section 41.18(d). Homeless individuals, who may suffer from mental illness, substance abuse problems, unemployment, and poverty, are unlikely to have the knowledge or resources to assert a necessity defense to a section 41.18(d) charge, much less to have access to counsel when they are arrested and arraigned. Furthermore, even counseled homeless individuals are unlikely to subject themselves to further jail time and a trial when they can plead guilty in return for a sentence of time served and immediate release. Finally, one must question the policy of arresting, jailing, and prosecuting individuals whom the City Attorney concedes cannot be convicted due to a necessity defense.

Because of the situation of homeless individuals in the city, the court suggested that the policy of arresting and prosecuting those in violation of the anti-camping ordinance amounted to "... merely police harassment of a vulnerable population."[28]

In *Martin v. Boise City*, the court followed the reasoning of *Jones* in finding that, "... an ordinance violates the Eighth Amendment insofar as it imposes criminal sanctions against homeless individuals for sleeping outdoors, on public property, when no alternative shelter is available to them."[29] Again, linking the availability of shelter to the constitutionality of municipal anti-homeless ordinances, the court ruled that, "... as long as there is no option of sleeping indoors, the government cannot criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter."[30] As a result, the holding in *Martin* echoed that of Jones: "(W)e conclude that a municipality cannot criminalize such behavior consistently with the Eighth Amendment when no sleeping space is practically available in any shelter."[31]

## *COVID-19 and universal vulnerability*

Since the COVID-19 pandemic and the response of state governments to manage the public health crisis, several cases involving homeless citizens' claims of discriminatory treatment have once again raised the issue of housing infrastructure as a necessary condition for life-sustaining conduct. In a case involving three homeless appellants, the Court was presented with, "... three class representatives [who] all share the need to conduct the life sustaining activities of resting, sleeping, and seeking shelter from the elements while living in Grants Pass without a permanent home."[32] Recognizing the plaintiffs' specific susceptibility to the COVID-19 pandemic and the public health crisis, the Court observed that

> With the lack of access to the most basic of human needs, including running water, toilets, and trash disposal, infectious diseases – like COVID-19 – can spread quickly. Uprooting homeless individuals, without providing them with basic sanitation and waste disposal needs, does nothing more than shift a public health crisis from one location to another, potentially endangering the health of the public in both locations. This concern is particularly acute during the current COVID-19 pandemic.[33]

In this way, the Court acknowledges the absurdity of punishing and even relocating individuals for being homeless in a municipality where affordable housing is not widely available or accessible. Because of this, the Court found that the local anti-homeless

ordinances "... unconstitutionally punished them for conducting life-sustaining activities and criminalized their existence as homeless individuals."[34] The Court continued, clarifying that

> ... it is not enough under the Eight Amendment to simply allow sleeping in public spaces; the Eight Amendment also prohibits a City from punishing homeless people for taking necessary minimal measures to keep themselves warm and dry while sleeping when there are no alternative forms of shelter available.[35]

However, in finding that the ordinances violated the Eighth Amendment's Cruel and Unusual clause and the Excessive Fines clause, it also said that such a ruling "....does not automatically translate to a finding that Grants Pass officials acted with deliberate indifference or reckless disregard for Plaintiffs' fundamental rights."[36] In a similar case, a District Court in California concluded that, "... the Eighth Amendment prohibits the City from punishing involuntary sitting, lying, or sleeping on public sidewalks that is an unavoidable consequence of being human and homeless without shelter in the City of Los Angeles."[37] In each of these cases, however, the Courts emphasized that the rulings did *not* imply that the cities had an affirmative duty to provide shelter for the homeless.

From the perspective of vulnerability theory, the above cases illustrate that the state recognizes the harm caused by criminalizing life-sustaining activity, but *only* when there is a lack of sufficient housing availability. In other words, if the life-sustaining conduct of individuals is considered *involuntary* due to lack of shelter alternatives, then the state recognizes the potential for harm by criminalizing such conduct. However, these cases also illustrate that the state does *not* recognize harm caused by a lack of adequate and affordable housing in-itself. Indeed, as long as a city or municipality refrains from criminalizing such conduct, there is no harm recognized by a lack of sufficient housing availability by itself. Once again, this is consistent with the federal ruling of *Lindsey v. Normet* that the U.S. constitution does not guarantee an affirmative right to housing.

However, some states have relied upon existing state statutes for providing welfare and support for indigent citizens as a mechanism for pressuring city governments to act on providing affordable shelter. In 2020, in *LA All. For Human Rights v. City of Los Angeles*, the Court relied upon provisions of California state statutes on welfare to conclude that there *does* in fact exist an affirmative duty to provide shelter to the homeless. The Court relied upon California state statutes, which affirm that, "(E)very county and every city and county shall relieve and support all incompetent, poor, indigent persons, and those incapacitated by age, disease, or accident, lawfully resident therein, when such persons are not supported and relieved by their relatives or friends, by their own means, or by state hospitals or other state or private institutions."[38] Specifically focusing on the threat of COVID-19, the Court observed that that this novel virus "... poses an especial danger to the vulnerable homeless population. Without adequate access to shelter, hygiene products, and sanitation facilities, individuals experiencing homelessness face a greater risk of contracting the novel coronavirus, and an outbreak in the homeless community would threaten the general public as well."[39] In the context of the inaction of the City and County on the issue of housing amid the growing pandemic, the Court observed that, "(T)he severe health hazards attendant on living near

overpasses, underpasses, and ramps – to say nothing of the public health risks illuminated by the ongoing COVID-19 pandemic – present just such an urgent crisis and better inform the constitutional understanding of ordered liberty."[40] The Court concluded that the City and County had failed to act pursuant to the state statutes requiring the provision of medical care, stating that, "... by failing to provide adequate shelter or alternative housing options, the City and County of Los Angeles have essentially forced individuals experiencing homelessness to camp in these dangerously polluted locations. It is clear to the Court that the Due Process Clause does not allow this kind of governmental conduct."[41] Because the City and County had failed in the Court's eyes to take action, the Court then took upon itself to prescribe the action and timeframe for policy changes, stating, "(A)s part of this humane relocation effort, and to promote the underlying public health and safety goals, the City of Los Angeles and County of Los Angeles shall provide shelter – or alternative housing options, such as safe parking sites, or hotel and motel rooms contracted under Project Roomkey – to individuals experiencing homelessness."[42]

While these judicial directives of the decision were later vacated on condition of an agreement between the City and County to address the housing problem in Los Angles, the reasoning the Court drew upon is highly significant. Most importantly, The Court relied upon what it recognized as the binding precedent in *Martin*, which the Court said "... gave constitutional significance to the availability of shelter – which, in this context, could plausibly implicate the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments."[43] The Court's recognition that housing availability may arguably implicate both Due Process and Equal Protection is highly significant, because it departs from the traditional, negative rights approach to housing as a market good pursued by individuals. Rather, by recognizing the failure of state government to provide housing infrastructure as a statutory requirement for providing more affordable housing, the Court gave constitutional significance to the availability of housing itself. In this way, *LA All. For Human Rights v. City of Los Angeles* represents what some legal scholars and constitutional lawyers have called "equal process" analysis which seeks to address class-discrimination as an instance of the "intersection" of equal protection and due process. The basic rationale for considering wealth and economic disadvantage stems from the recognition that "... indigent people often suffer from both (1) arbitrary decision-making and inadequate access to courts, as well as, (2) the unequal outcomes that result" (Garrett, 2019, p. 405). In traditional, "negative rights" constitutional analyses,

> ... wealth is not subject to heightened scrutiny under the Equal Protection Clause and because procedural unfairness can more severely impact indigent people who do not have the same access to attorneys and other aspects of the legal process. (Garrett, 2019, p. 407)

Instead, "equal process" analysis with regard to housing availability recognizes the intersection of procedural and substantive due process with equal protection for those classes arbitrarily lacking access to the physical, legal, and economic conditions for the exercise of basic, life-sustaining activities essential to being human. This method of constitutional analysis provides support for affirmative, enforceable constitutional rights

to housing, especially in states and cities where "death zones" and areas of insufficient or unaffordable housing effectively and arbitrarily prevent indigent populations from exercising basic, fundamental rights of life, liberty and privacy.

This legal rationale – that housing has constitutional significance because it provides for basic, life-sustaining activity – is extremely significant from the perspective of vulnerability theory. In short, this rationale is an acknowledgment that the basic, universal features of human vulnerability theorized by Fineman have constitutional significance. In this way, the form of vulnerability which grounds the legal rationale is *not* special or episodic, but rather the same form of vulnerability which we all share as human beings with vulnerable bodies biologically compelled to eat, sleep, lay down, etc. The legal claims of particular homeless appellants before and during the COVID-19 pandemic illustrate that life-sustaining activities including sleeping, lying down, eating, bodily safety and other harmless life functions are so basic to the human condition that they may not be criminalized under conditions of housing unavailability. The claims, I argue, demonstrate the general, universal nature of the ontological body in Fineman's vulnerability theory. The legal recognition that these basic, life-sustaining activities have universal and not *merely* particular or exceptional constitutional import demonstrates the acknowledgment that vulnerability theory offers an alternative legal paradigm for understanding humanity in its universal, constant and essential form – one of the central premises of vulnerability theory.

## Conclusion

Research has shown that in states with constitutions which expressly affirm protections for health and medical care, such states have better health outcomes, particularly for minority populations. In fact, the state constitutional recognition of affirmative duties to provide health care, "... is associated with a reduction in the infant mortality rate of 7.8%." This link between affirmative constitutional rights to health and medical care and health outcomes is significant with respect to equal protection issues as well, since it is shown that, "... the introduction of a stronger constitutional commitment to health and health care reduces the racial gap in infant mortality" (Matsuura, 2015, pp. e48–e54). By the same token, states which lack affirmative commitments to housing infrastructure not only run the risk of violating the fundamental constitutional rights of individuals, but urban "death zones" which lack affordable shelter produce worse mortality indexes in the population compared to those in some natural disaster areas. From the perspective of individuals, one's residence in a particular state or city – which is mostly arbitrary – determines one's constitutional protections for housing and medical care, and thus determines health outcomes based on arbitrary measures. This lack of uniformity in states' constitutional protections for housing creates arbitrary and unequal outcomes for individuals across states – outcomes which are largely based on race and class.

From the perspective of vulnerability theory, the temporary governmental responses to housing insecurity and homelessness during COVID-19 are ill-equipped when faced with the constant, universal needs which housing provides us all. Because there is neither a *federal* constitutional recognition of the universality of housing needs, nor a federal mandate to enforce state's affirmative commitments social and economic rights,

individual rights and liberties as well as basic human needs universal to the human condition of vulnerability will continue to be systematically deprived. Since the paradigmatic legal subject is independent, not dependent, city ordinances that criminalize universal acts of sleeping, lying down and eating – even when there is not a sufficient infrastructure of housing in place – are still often seen as rational, voluntary choices and thus enforceable and punishable. Further, in situations such as the COVID-19 pandemic where temporary emergency measures provide short-term stop-gaps for the ongoing need for adequate shelter, there are few resources to draw upon to mandate and provide long-term, structural remedies for treatment which seems to violate basic, life-sustaining exercises of conduct essential to what it means to be human. From the perspective of vulnerability theory, these shortcomings stem from the dominant legal paradigm under which notions of harm, discrimination and rights are defined, viewing positive rights such as housing as inimical to the protection of the individual liberty of rational actors within the private spheres of economics, business, home and family life.

However, Fineman's vulnerability theory, I argue, provides an alternative legal paradigm for grounding the notion of housing as a basic constitutional right. Viewing the cases reviewed in this paper from the perspective of vulnerability theory, we are able to recognize the basic, shared sense of vulnerability which marks each of us as human beings with bodies biologically compelled to eat, sleep, lay down, and perform other life-sustaining functions. The particular claims of homeless appellants before and during the COVID-19 pandemic can therefore be viewed as forms of the kind of universal claims that stem from the essential, life-sustaining activities inherent to the ontological status of the vulnerable human body. Most significantly, the legal rationale reviewed in this paper acknowledges that the objective, universal features of the human body that necessitate life-sustaining activities such as sleeping, eating and lying down have *constitutional* significance. This rationale – based on the necessity of essential, life-sustaining activities of the body – is the basis for a jurisprudence of universal subjectivity. This form of jurisprudential reasoning, it is hoped, will contribute to a legal framework of vulnerability which speaks and gives legal recognition to our ontological status as universally vulnerable beings.

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## Notes

1. 15 U.S.C. 116 (2020).
2. *Meade Communities, LLC v. Walker* (2020) No. CV CCB-20-200, 2020 WL 5759762, at *2.
3. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1564.
4. Novasky and Rosales (2020).
5. *Martin v. City of Boise* (2019) 920 F.3d 584 (9th Cir.), cert. denied sub nom. *City of Boise, Idaho v. Martin*, 140 S. Ct. 674, 205 L. Ed. 2d 438.
6. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
7. *See La All. for Human Rights v. City of Los Angeles* (2020) No. LACV2002291DOCKES, 2020 WL 2615741, at *3 (C.D. Cal. May 22, 2020), vacated, No. CV2002291DOCKES, 2020 WL 3421782.
8. O'Connell (2005).
9. *Lindsey v. Normet* (1972) 405 U.S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36.
10. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006.
11. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *4.
12. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *15.
13. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
14. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
15. *Edwards v. People of State of California* (1941) 314 U.S. 160, 181, 62 S. Ct. 164, 170, 86 L. Ed. 119.
16. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
17. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
18. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
19. *Pottinger v. City of Miami* (1992) 810 F. Supp. 1551, 1580.
20. *Aitken v. City of Aberdeen* (2019) 393 F. Supp. 3d 1075.
21. *Shapiro v. Thompson* (1974) 394 U.S. 618, 627, 89 S. Ct. 1322, 1327, 22 L. Ed. 2d 600 (1969), overruled in part by *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).
22. 15 U.S.C.A. § 9058 (West).
23. *Meade Communities, LLC v. Walker* (2020) No. CV CCB-20-200, 2020 WL 5759762, at *2.
24. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1132 (9th Cir. 2006), vacated, 505 F.3d 1006.
25. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1136 (9th Cir. 2006), vacated, 505 F.3d 1006.
26. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1136 (9th Cir. 2006), vacated, 505 F.3d 1006.
27. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1136 (9th Cir. 2006), vacated, 505 F.3d 1006.
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32. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *4.
33. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *15.
34. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *4.
35. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *6.
36. *Blake v. City of Grants Pass* (2020) No. 1:18-CV-01823-CL, 2020 WL 4209227, at *15.
37. *Jones v. City of Los Angeles* (2007) 444 F.3d 1118, 1138 (9th Cir. 2006), vacated, 505 F.3d 1006.
38. Cal. Welf. & Inst. Code § 17000 (West).
39. *LA All. for Human Rights v. City of Los Angeles* (2020) No. LACV2002291DOCKES, 2020 WL 2512811, at *1.
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42. *LA All. for Human Rights v. City of Los Angeles* (2020) No. LACV2002291DOCKES, 2020 WL 2512811, at *3.
43. *LA All. for Human Rights v. City of Los Angeles* (2020) No. LACV2002291DOCKES, 2020 WL 2512811, at *3.

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