

Civily Criminalizing Homelessness

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The criminalization of homelessness refers to the enactment and enforcement of laws and policies that punish unsheltered people for surviving in public space, even when those individuals have no reasonable alternative.² The constitutional and civil rights issues stemming from criminally charging unsheltered people for public survival are clear, albeit not uncontested. But cities often skirt legal challenges to criminalization by pursuing means other than criminal charges to punish homelessness. Many cities “civily criminalize” homelessness through civil enforcement, which extends from infractions or fines to “invisible persecution,” such as the persistent policing and surveilling of unsheltered people. While courts, legislatures, and advocates largely focus on criminal charges, those punishments are just the tip of the criminalization iceberg: civil enforcement is arguably more extensive and damaging. However, courts and legislatures largely do not protect people experiencing homelessness from civil criminalization. This Article argues for greater attention to the devastating impact of civil punishments, drawing from other critiques that expose how civil tools punish poor and vulnerable people. It also examines how punishment operates outside of both criminal charges and civil sanctions, severely penalizing unsheltered people and requiring reform.

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² This article endeavors to use person-centered terminology to phrase homelessness as an experience or an adjective, as opposed to an aspect inseparable from one’s identity. Using phrases such as “people experiencing homelessness” instead of “homeless people” seeks to humanize our neighbors and emphasize the systemic and societal causes of homelessness. *See, e.g.,* Jennifer L. Rich, *People Experience Homelessness, They Aren’t Defined by It*, U.S. INTERAGENCY COUNCIL ON HOMELESSNESS (June 28, 2017), <https://www.usich.gov/news/people-experience-homelessness-they-arent-defined-by-it>, archived at <https://perma.cc/RXN6-2H4D>. Some individuals with lived experience of homelessness question such phrasing. *See Please Stop Saying ‘People Experiencing Homelessness,’* INVISIBLE PEOPLE (Feb. 15, 2019), <https://invisiblepeople.tv/saying-people-experiencing-homelessness-will-not-influence-change/>, archived at <https://perma.cc/98PF-F3ZQ>. This article prioritizes human-centered language except in limited instances where such use would impede flow or readability.

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INTRODUCTION

The criminalization of homelessness is well documented.³ Criminalization refers to the enactment and enforcement of laws and policies that punish unsheltered people for surviving in public space, even when those people have no reasonable alternative.⁴ Examples of criminalization include laws that prohibit or severely restrict necessary, life-sustaining activities such as sitting, sleeping, receiving food, asking for help, or protecting oneself against the elements.⁵ Criminalization laws are proliferating across the country, and their popularity demonstrates how commonly cities pursue criminalization as a primary response to unsheltered homelessness.⁶ Indeed, the visibility of unsheltered people has generated a complex web of laws and enforcement techniques committed to rendering homeless people invisible.

While criminalization is well documented, its scope remains poorly understood by the public and inadequately illuminated by advocates and scholars. This Article offers a new continuum for understanding the

³ See generally NAT'L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS 2019: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES (2019), <https://nlchp.org/wp-content/uploads/2019/12/HOUSING-NOT-HANDCUFFS-2019-FINAL.pdf>, archived at <https://perma.cc/M5D4-QF85> [hereinafter NAT'L L. CTR.]; JUSTIN OLSON & SCOTT MACDONALD, SEATTLE UNIV. SCH. OF L., HOMELESS RTS. ADVOC. PROJECT, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT (2015), <http://ssrn.com/abstract=2602318>, archived at <https://perma.cc/WD6X-NGW2>; *Homeless Rights Advocacy Project*, SEATTLE UNIV. SCH. OF L., <https://law.seattleu.edu/centers-and-institutes/korematsu-center/initiatives/homeless-rights-advocacy-project>, archived at <https://perma.cc/WS8Y-JN43> (linking to several policy briefs documenting the criminalization of homelessness).

⁴ See Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 106–07 (2019).

⁵ See *id.* at 107.

⁶ See NAT'L L. CTR., *supra* note 3, at 11–14 (documenting that the National Law Center on Homelessness and Poverty (“NLCHP”) has surveyed 187 cities for over a decade, finding substantial increases in prohibitions against acts of public survival. For example, NLCHP has documented a 92% increase in prohibitions against camping (citywide); 50% increase against sleeping (citywide); 78% increase against sitting and lying down (particular places); 103% increase against loitering, loafing, and vagrancy (particular places); 103% increase against begging since 2006 (citywide); 213% increase against living in vehicles (particular places)).

criminalization of homelessness. One end represents perhaps a traditional understanding of criminalization laws as those prescribing criminal charges. Somewhere around the middle of the continuum is traditional civil enforcement, such as issuing tickets or fines instead of criminal charges. At the other end is what this Article calls “invisible persecution”: an enforcement regime that does not result in charges or civil sanctions and, therefore, does not generate an official record. It still manifests, however, as pervasive punishment, such as move-along orders, overpolicing, and surveillance.

Although invisible persecution does not result in a civil sanction, it can still be understood as “civil” enforcement in a colloquial sense: invisible persecution is considered such a contrast to more punitive methods that the law and society generally do not perceive it to be problematic. Both traditional civil enforcement and invisible persecution might appear more acceptable or “civil,” merely because they are not criminal. This Article challenges some of the assumptions that minimize concerns over the punishing impacts of enforcement outside of criminal charges.

Over the last several years, homeless rights advocates have made some progress exposing and defending against the devastating effect of criminal charges for public survival.⁷ But little to no progress—even a worsening of circumstances—is occurring with respect to civil enforcement and invisible persecution.

Legal, academic, and legislative arenas are predominantly occupied with one end of the continuum: criminalization as a criminal law phenomenon. To some extent, this focus makes sense; criminal punishments often trigger constitutional and procedural protections—such as the right to an attorney—that fuel advocacy.⁸ Moreover, advocacy often triages and focuses on the most obvious forms of institutional violence against vulnerable people: the lasting and devastating collateral impacts of jail, incarceration, and criminal histories are increasingly visible⁹ and persuasively articulated in scholarship and advocacy, making these problems targets for reform.¹⁰ So even while cities still regularly wield the criminal justice system as a primary response to homelessness, the hazards of this approach are increasingly clear.¹¹

⁷ See *id.* at 75–81.

⁸ See *Gideon v. Wainwright*, 372 U.S. 335, 335 (1963) (recognizing right to appointment of counsel for criminal defendants).

⁹ A criminal conviction can generate over 40,000 collateral consequences. See *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION (2020), https://niccc.csgjusticecenter.org/database/results/?jurisdiction=&consequence_category=&narrow_category=&triggering_offense_category=&consequence_type=&duration_category=&page_number=1, archived at <https://perma.cc/YA9U-CFN2>.

¹⁰ See generally *News & Resources*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://niccc.nationalreentryresourcecenter.org/news-resources> (last visited Mar. 6, 2021), archived at <https://perma.cc/KG2Y-VVHL>.

¹¹ See NAT'L L. CTR., *supra* note 3, at 75–81.

But despite its name, criminalization does not solely refer to criminal laws. Criminalization also encompasses the middle of the spectrum; civil enforcement often extracts significant, life-altering tolls from people who are unsheltered. Infractions commonly require homeless violators to avoid an area for a specific time period, appear in a certain court at a specific time, or pay a fee.¹² Such conditions are difficult, if not impossible, for many people experiencing chronic homelessness to meet.¹³ When they fail to comply—due to sickness, lack of transportation, behavioral health crises, or the panoply of challenges associated with poverty and homelessness—their civil infraction can then mutate into a misdemeanor through contempt provisions.¹⁴ But even if a violation remains civil, the consequences of non-compliance can be severe for unsheltered people, ranging from exponentially accelerating fines, the suspension of a driver’s license, or the threat of a bench warrant.¹⁵

Significantly, criminalization also extends to invisible persecution from state actors, such as pervasive overpolicing, profiling, and surveilling. Such persecution subjects unsheltered people to constant harassment, disruption, forced relocation, and interrogation that causes serious damage but does not generate an official record, does not offer a legal remedy, and remains “invisible” in the eyes of the law.

While battles over the criminalization of homelessness focus on criminal punishments, cities may be sensing advocates’ distraction and searching for paths that face less resistance. Cities find this opportunity in “civilly criminalizing homelessness”—increasingly shifting from criminal charges to non-criminal methods of civil enforcement and invisible persecution.¹⁶ By civilly criminalizing homelessness, cities can deprive homeless rights advocates of common constitutional and procedural tools to fight criminalization. Moreover, the trail of civil criminalization is harder to follow: records and data associated with invisible persecution are less consistently maintained or not maintained at all, presenting another challenge to advocates, who cannot change what they cannot prove exists. Even when such proof exists, the law shows relative insensitivity to evidence of systemic injustice.

The shift to civilly criminalizing homelessness also serves a cosmetic purpose for cities. A civil enforcement regime may suggest cities are taking

¹² See Rankin, *supra* note 4, at 107. People experiencing chronic homelessness most commonly bear the brunt of criminalization laws, and they suffer from disabling conditions that prevent them from working or maintaining housing, such as untreated severe mental illness, chronic health problems, substance use disorders, and often co-occurrence of many such disabilities. See *id.* at 103.

¹³ See *id.* at 107–08.

¹⁴ See *id.*

¹⁵ See Chris Herring et al., *Pervasive Penalty: How the Criminalization of Poverty Perpetuates Homelessness*, 67 SOC’Y FOR THE STUDY OF SOC. PROBS. 131, 142–43 (2020).

¹⁶ Accordingly, in the context of this Article, “civil criminalization” can encompass all non-criminal means of punishing homelessness, which may include traditional civil enforcement methods in the middle of the criminalization spectrum, as well as invisible persecution at the far end.

a friendlier, less punitive approach than engaging law enforcement with homelessness. The impacts are also less visible, not only because advocates are often preoccupied with battling the devastating impacts of criminal punishments, but also because the damage vulnerable people sustain from civil enforcement is harder to trace, harder to prove, and harder to remedy.

Given these respective challenges, the limited bench of homeless rights advocates must often prioritize fighting criminal charges, while the bulk of criminalization relentlessly continues.

I. THE INTERSECTIONALITY OF CRIMINALIZATION

To perceive the obscured bulk of the iceberg—the broad and underappreciated ways homeless people are civily criminalized—it helps to reflect on the intersectionality of criminalization. Efforts to control and erase poor people, BIPOC,¹⁷ immigrants, and other marginalized groups from public space are deeply embedded in American history.¹⁸ Race, poverty, homelessness, and criminalization are inextricably intertwined.¹⁹ This relationship, forged through America's legacy of systemic and structural racism, presents a crucial lens for understanding the systemic persecution, control, and punishment of unsheltered people in American society.

Abundant evidence and scholarship have laid bare, again and again, the American legacy of systemic racism.²⁰ Racial disparities exist at every stage

¹⁷ BIPOC is a common acronym for Black, Indigenous, and People of Color. *See, e.g.*, THE BIPOC PROJECT, <https://www.thebipocproject.org/> (last visited Apr. 14, 2021), *archived at* <https://perma.cc/CP9U-WWKC>.

¹⁸ *See generally* JAVIER ORTIZ & MATTHEW DICK, SEATTLE UNIV. SCH. OF L., HOMELESS RTS. ADVOC. PROJECT, THE WRONG SIDE OF HISTORY: A COMPARISON OF MODERN AND HISTORICAL CRIMINALIZATION LAWS 1 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602533, *archived at* <https://perma.cc/6L3Y-XT7J> (reviewing historical and contemporary efforts to purge marginalized groups from public space).

¹⁹ For more on the intersectionality of homelessness and other commonly stigmatized groups, *see* KAYA LURIE & BREANNE SCHUSTER, SEATTLE UNIV. SCH. OF L., HOMELESS RTS. ADVOC. PROJECT, DISCRIMINATION AT THE MARGINS: THE INTERSECTIONALITY OF HOMELESSNESS & OTHER MARGINALIZED GROUPS 33–42 (2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2602532, *archived at* <https://perma.cc/MLB5-HX5J>.

²⁰ *See, e.g.*, Francisco Valdes et al., Critical Justice: Systemic Advocacy in Law and Society (unpublished manuscript) (on file with author) (detailing advocacy strategies to overcome systemic racism and other forms of identity-based systemic injustice); Joe R. Feagin & Bernice McNair Barnett, *Success and Failure: How Systemic Racism Trumped the Brown v. Board of Education Decision*, 2004 U. ILL. L. REV. 1099, 1102 (2004); MICH. C.R. COMM'N, THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT 17 (2017), https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf, *archived at* <https://perma.cc/Y2EK-Q28E>; Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist. Here's the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/>, *archived at* <https://perma.cc/L4B4-ZDKY> (publishing a repository for resources).

of the criminal justice system.²¹ BIPOC are overpoliced, profiled, and face higher rates of prosecution and longer sentences.²²

Significant racial income disparities also exist. The wealth gap between Black and white families is glaring, with median white wealth measuring twelve times higher than median Black wealth.²³ The racial wealth gap is also worsening, with median Black household wealth steadily declining as white household wealth steadily increases.²⁴ If current trends continue, it would take 228 years for the average Black family to amass the same wealth as the average white family holds today.²⁵

Persistent racial inequality also echoes in rates of homeownership, a primary mechanism for wealth acquisition that comprises about two-thirds of all wealth for a typical household.²⁶ America's commitment to redlining, restrictive covenants, and lending discrimination entrenched the wealth gap by explicitly preventing most Black homeownership until the enactment of the Fair Housing Act in 1968.²⁷ However, racist housing and zoning policies, as well as real estate and lending practices, continue to sow racial and socio-economic segregation that feeds into the disproportionate representation of Black people in poverty and homelessness.²⁸ Today, Black and Latinx home-

²¹ See SENT'G PROJECT, REPORT TO THE UNITED NATIONS ON RACIAL DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 2–11 (2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/#:~:text=report%20to%20the%20United%20Nations%20on%20Racial%20Disparities,of%20Racism%2C%20Racial%20Discrimination%2C%20Xenophobia%2C%20and%20Related%20Intolerance,> archived at <https://perma.cc/5VXS-QMZX>; see also RANDALL KENNEDY, RACE, CRIME, AND THE LAW 76–135 (1997) (discussing the historical treatment of Black suspects in the criminal justice system); Gabriel J. Chin, *Race and the Disappointing Right to Counsel*, 122 YALE L.J. 2236, 2236 (2013) (noting “the Court has made it practically impossible to invoke racial bias as a defense; so long as those charged are in fact guilty, discrimination in legislative criminalization, in enforcement, and in sentencing practices are essentially unchallengeable”).

²² See SENT'G PROJECT, *supra* note 21, at 2–8.

²³ Janelle Jones, *The Racial Wealth Gap: How African-Americans Have Been Short-changed out of the Materials to Build Wealth*, ECON. POL'Y INST.: WORKING ECON. BLOG (Feb. 13, 2017), <https://www.epi.org/blog/the-racial-wealth-gap-how-african-americans-have-been-shortchanged-out-of-the-materials-to-build-wealth/>, archived at <https://perma.cc/YE9H-SH3A>.

²⁴ See Ibram X. Kendi, *There is No Middle Ground on Reparations: Americans Who Oppose Reparations Care More About Responding to Political Expediency than About the Emergence of Inequality*, ATLANTIC (June 19, 2019), <https://www.theatlantic.com/ideas/archive/2019/06/ibram-x-kendi-opposing-reparations-racist/592060/>, archived at <https://perma.cc/8CH4-VG4L>.

²⁵ DEDRICK ASANTE-MUHAMMAD ET AL., CFED & INST. FOR POL'Y STUD., THE EVER-GROWING GAP: WITHOUT CHANGE, AFRICAN-AMERICAN AND LATINO FAMILIES WON'T MATCH WHITE WEALTH FOR CENTURIES 5 (2016), https://ips-dc.org/wp-content/uploads/2016/08/The-Ever-Growing-Gap-CFED_IPS-Final-2.pdf, archived at <https://perma.cc/V36E-LKMG>.

²⁶ Jones, *supra* note 23.

²⁷ 42 U.S.C. §§ 3601–31. See generally RICHARD ROTHSTEIN, THE COLOR OF LAW (2017) (discussing redlining, restrictive covenants, and the history of preventing Black homeownership).

²⁸ See Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today.*, WASH. POST (Mar. 28, 2018), <https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/>, archived at <https://perma.cc/869L-G7VV>.

ownership rates trend nearly 30% lower than those of white families,²⁹ and the COVID-19 crisis is generating a “tsunami” of evictions that will continue to disproportionately impact BIPOC.³⁰

Poverty is a strong predictor of homelessness, and poverty rates demonstrate stunning racial inequities throughout the United States.³¹ Only 9% of white people live in poverty, but 19% of Latinx, 22% of Black, and nearly a quarter (24%) of Native American people do.³² When people suffer from economic hardship or lack of financial resources, what few resources they have are consumed by basic necessities, such as food, resulting in greater housing instability.³³

Given these and other structural disadvantages, unsurprisingly, BIPOC are disproportionately represented in homeless populations. On the one hand, homelessness can affect anyone. At least seventeen out of every 10,000 Americans were experiencing homelessness on a single night in January 2019 during HUD’s Annual Point-in-Time Count.³⁴ And “[t]hese 567,715 people represent a cross-section of America. They are associated

²⁹ Courtney Connley, *The Great Divide: Why the Homeownership Gap Between White and Black Americans is Larger Today than It Was Over 50 Years Ago*, CNBC (Aug. 21, 2020), <https://www.cnn.com/2020/08/21/why-the-homeownership-gap-between-white-and-black-americans-is-larger-today-than-it-was-over-50-years-ago.html>, archived at <https://perma.cc/AK5X-FLTX>; Senator Chris Coons (@ChrisCoons), TWITTER (July 1, 2020, 10:46 AM), <https://twitter.com/ChrisCoons/status/1278384587371094019>, archived at <https://perma.cc/VBF3-DK2E>.

³⁰ Zoe Greenberg & Tim Logan, *A ‘Tsunami of Evictions’ Threatens to Strike Boston*, BOS. GLOBE (June 28, 2020), <https://www.bostonglobe.com/2020/06/28/metro/tsunami-evictions-threatens-strike-boston/>, archived at <https://perma.cc/SU48-TZCX>; see *Covid-19 Tools & Resources*, EVICTION LAB, <https://evictionlab.org/covid-resources/>, archived at <https://perma.cc/YV58-RPKT>; Katy O’Donnell, *Black Community Braces for Next Threat: Mass Evictions*, POLITICO (June 12, 2020), <https://www.politico.com/news/2020/06/12/mass-evictions-314699>, archived at <https://perma.cc/W5YX-XXG8>.

³¹ See Karma Allen, *More than 50% of Homeless Families Are Black, Government Report Finds*, ABC NEWS (Jan. 22, 2020), <https://abcnews.go.com/US/50-homeless-families-black-government-report-finds/story?id=68433643>, archived at <https://perma.cc/8AFK-5Q4N> (reporting on U.S. DEP’T OF HOUS. & URB. DEV., OFF. OF CMTY. PLAN. & DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS (2020), <https://www.huduser.gov/portal/sites/default/files/pdf/2019-AHAR-Part-1.pdf>, archived at <https://perma.cc/4U7A-FM3L>).

³² *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND. (2018) (2018 statistics), <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>, archived at <https://perma.cc/P3SM-WDMX>.

³³ See Emily Vyhananek & Margaret Babayan, *Washington Needs a State Cash Stimulus: Lawmakers Must Invest in the People and Communities that Drive Our Economy*, WASH. STATE BUDGET & POL’Y CTR.: SCHMUDGET BLOG (May 28, 2020), <https://budgetandpolicy.org/schmudget/washington-needs-cash-stimulus/>, archived at <https://perma.cc/R6NP-JMZ2> (observing low income families spend cash stimulus on necessities).

³⁴ *State of Homelessness: 2020 Edition*, NAT’L ALL. TO END HOMELESSNESS, <https://endhomelessness.org/homelessness-in-america/homelessness-statistics/state-of-homelessness-2020/> (last visited Apr. 14, 2021), archived at <https://perma.cc/MXT9-9W33> (citing *Point-in-Time Count and Housing Inventory Count*, HUD EXCH., <https://www.hudexchange.info/programs/hdx/pit-hic/> (last visited Apr. 14, 2021), archived at <https://perma.cc/TT9R-NHUS> [hereinafter NAT’L ALL.]).

with every region of the country, family status, gender category, and racial/ethnic group.”³⁵ But homelessness crystallizes the byproducts of pervasive discrimination through the disproportionate representation of BIPOC, who are much more likely to become homeless than their white counterparts: 159.8 out of every 10,000 Pacific Islanders will experience homelessness, while that number is 66.6 for Native Americans, 55.2 for Black Americans, 35.3 for multiracial Americans, and 21.7 for Latinx Americans.³⁶ But, only 11.5 out of every 10,000 white Americans will experience homelessness.³⁷

The devastating and far-reaching impacts of systemic discrimination and racism are undeniable. Despite the disproportionate representation of BIPOC among those who encounter the criminal justice system, poverty, and homelessness, the United States consistently fails to provide effective remedies or redress for systemic racism.³⁸ The legal system generally fails to recognize systemic injustice as punishment or otherwise actionable damage; calls for justice, whether for victims of unlawful force perpetrated by police,³⁹ unfair housing,⁴⁰ intentional displacement,⁴¹ or the legacies of slav-

³⁵ NAT'L ALL., *supra* note 34.

³⁶ *Id.*; see also *Racial Inequality*, NAT'L ALL. TO END HOMELESSNESS (Oct. 2020), <https://endhomelessness.org/homelessness-in-america/what-causes-homelessness/inequality/>, archived at <https://perma.cc/X5WS-ZRS2>. Put another way, Black individuals make up 13% of the U.S. general population but 40% of the nation's homeless population; Latinx individuals represent 18% of the nation's population but 22% of the homeless population; Native American individuals comprise 1% of the U.S. population but 3% of the homeless population; while white individuals account for 77% of the U.S. population but only 48% of the homeless population. *Id.*

³⁷ *Racial Inequality*, NAT'L ALL., *supra* note 36.

³⁸ See, e.g., Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 387 (2017) (“Constitutional litigation currently provides little or no recourse to address racial disparities in outcomes that are not demonstrably caused by intentional governmental racial discrimination, and race-specific remedies face a level of judicial scrutiny that is especially difficult to satisfy.”); L. Elizabeth Sarine, *Regulating the Social Pollution of Systemic Discrimination Caused by Implicit Bias*, 100 CALIF. L. REV. 1359, 1359 (2012) (noting the “legal system often fails to provide relief where implicit bias has caused systemic discrimination”); Nicole Gonzalez Van Cleve & Lauren Mayes, *Criminal Justice Through “Colorblind” Lenses: A Call to Examine the Mutual Constitution of Race and Criminal Justice*, 40 LAW & SOC. INQUIRY 406, 412 (2015) (“In the age of colorblindness and postracialism, racial inequality is rarely produced by acts of blatantly identifiable racism; it is systemic, institutionalized, and frequently functions without the active participation of any one bigoted decision maker.”).

³⁹ See, e.g., Laura Goolsby, *Why International Law Should Matter to Black Lives Matter: A Draft Petition to the Inter-American Commission on Human Rights on Behalf of the Family of Eric Garner*, 21 U. PA. J.L. & SOC. CHANGE 29, 29 (2018).

⁴⁰ See Anthony V. Alfieri, *Black, Poor, and Gone: Civil Rights Law’s Inner-City Crisis*, 54 HARV. C.R.-C.L. L. REV. 629, 659–60 (2019); see also Paul Jargowsky, *The Architecture of Segregation: Civil Unrest, the Concentration of Poverty, and Public Policy*, CENTURY FOUND. (Aug. 9, 2015), <https://tcf.org/content/report/architecture-of-segregation/>, archived at <https://perma.cc/F5HX-N6V7> (noting that discriminatory housing, zoning, and other policy choices are driving a dramatic increase in racialized poverty and segregation across the United States).

⁴¹ See Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation*, CTR. FOR AM. PROGRESS (Aug. 7, 2019), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/>, archived at <https://perma.cc/49TW-7EQY> (discussing intentional, government-sponsored displacement of Native American and Black communities).

ery,⁴² are met with relative indifference in the law. So systemic forms of discrimination, even forms that result in concrete harm to already vulnerable people, persist with virtual impunity.⁴³

The intersectionality of race and homelessness is instructive. Fighting the criminalization of homelessness with current legal tools can empower advocates to defend against certain rights violations. However, as this Article seeks to demonstrate, unsheltered people experience a pervasive systemic discrimination and violence not readily recognized or easily remedied in the law. This systemic injustice is well documented, but hard to prove in a way that meets legal standards. Existing law simply does not adequately value the harm and damage unsheltered people experience.

Moreover, just as many critical race scholars have observed an evolution from blatant, overt, and individualized racism to “kinder, gentler” forms of systemic and implicit racism that frustrate justice and equity,⁴⁴ the limits of the current legal structure encourage cities to exploit justice loopholes by moving from criminal punishments to “kinder, gentler,” and more “civil” methods of criminalization that are often impossible to document and are devoid of remedy.⁴⁵

Civily criminalizing homelessness is the ultimate gaslighting of unsheltered people, whose punishment continues unabated.

II. THE INVISIBILITY OF CIVIL CRIMINALIZATION AS PUNISHMENT

The limited construction of punishment is one way the law minimizes government-sponsored structural discrimination against homeless people. Attorneys must engage in complicated legal posturing around what outcomes constitute punishment worthy of protection or redress. As explained below, framing a punishment as “criminal” triggers greater legal protections for those who suffer it. Civil sanctions and invisible persecution, by contrast, generally are insufficient to warrant heightened legal protections or judicial

⁴² See Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>, archived at <https://perma.cc/URM3-WU08>.

⁴³ Legal remedies for systemic racism are rare. See, e.g., Palma Joy Strand, *Racism 4.0, Civility, and Re-Constitution*, 42 HASTINGS CONST. L.Q. 763, 770 (2015).

⁴⁴ See, e.g., Lawrence Bobo et al., *Laissez Faire Racism: The Crystallization of a Kinder, Gentler, Antiblack Ideology*, in RACIAL ATTITUDES IN THE 1990S: CONTINUITY AND CHANGE 15–44 (Jack Martin & Steven A. Tuch eds., 1997); William M. Carter, Jr., *The Thirteenth Amendment and Pro-Equality Speech*, 112 COLUM. L. REV. 1855, 1857–58 (2012) (describing a “‘new racism’ of systemic inequality, unconscious bias, and more subtle forms of racial exclusion”).

⁴⁵ See Eric S. Tars et al., *Can I Get Some Remedy?: Criminalization of Homelessness and the Obligation to Provide an Effective Remedy*, 45 COLUM. HUM. RTS. L. REV. 738, 746 (2014) (describing “the ease with which a city can circumvent narrowly crafted injunctive relief” after *Jones v. City of Los Angeles*, 444 F.3d 1118, 1138 (9th Cir. 2006), vacated as moot, 505 F.3d 1006 (9th Cir. 2007), where Los Angeles increased police enforcement targeting Skid Row residents “for minor violations such as jaywalking and littering at staggering rates of forty-eight to sixty-five times the rate in the rest of the city”).

scrutiny. This dynamic creates openings for cities to exploit by transforming the criminalization of homelessness from criminal charges to civil infractions or invisible persecution.⁴⁶

The distinction between civil and criminal punishment often captivates homeless rights advocacy because the degree of procedural and constitutional protections afforded to defendants depends on whether they are criminally or civilly sanctioned.⁴⁷ If a sanction is characterized as a punishment, it triggers various procedural and constitutional protections for defendants,⁴⁸ such as the right to an attorney⁴⁹ and prohibitions against excessive fines or penalties.⁵⁰ If the sanction is purely civil and non-punitive, then such procedures and protections do not apply.⁵¹ Sanctions serving the goals of retribution or deterrence likely amount to punishment for constitutional purposes, while sanctions serving remedial and restorative goals generally do not.⁵²

But the distinction between what qualifies as criminal “punishment” versus “something less” is often murky and arguably elastic, prompting advocates to fight for civil sanctions to be recategorized as punishment and thus worthy of greater legal protection. Civil forfeiture can constitute punishment.⁵³ Many scholars argue that immigration proceedings and the attendant risks of detention and deportation should be recategorized from civil to

⁴⁶ See Sara K. Rankin, *Hiding Homelessness: The Transcarceration of Homelessness*, 109 CALIF. L. REV. 559, 561 (2021) (discussing a “transcarceration movement from openly punitive campaigns that incarcerate unsheltered people to alluring campaigns that confine unsheltered people” outside of the criminal justice system).

⁴⁷ The differentiation between criminal punishment and civil penalty turns largely on legislative characterizations. The U.S. Supreme Court has consistently held that “whether a particular statutorily defined penalty is civil or criminal is a matter of statutory construction.” *United States v. Ward*, 448 U.S. 242, 248 (1980); *accord Allen v. Illinois*, 478 U.S. 364, 368 (1986); *One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 237 (1972); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 549 (1943). For example, in Oregon, “offense[s]” are “either a crime, as described in ORS 161.515, or a violation, as described in ORS 153.008.” OR. REV. STAT. § 161.505 (2011). Therefore, “[a] violation is not a crime.” *State v. Dahl*, 57 P.3d 965, 967–69 (Or. Ct. App. 2002), *aff’d*, 87 P.3d 650 (Or. 2004) (analyzing Oregon’s statutory distinctions between crimes and civil offenses and holding, among other things, that the Fifth Amendment does not apply to violations precisely because they are not crimes).

⁴⁸ See, e.g., *United States v. Lovett*, 328 U.S. 303, 316–17 (1946); see also *Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 239 (1872); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 322 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 333–34 (1866).

⁴⁹ U.S. CONST. amend. VI.

⁵⁰ U.S. CONST. amend. VIII.

⁵¹ *Cf. United States v. Halper*, 490 U.S. 435, 448 (1989) (applying the Double Jeopardy Clause to a monetary civil sanction). In *Halper*, the Court held a civil sanction could constitute punishment under the Double Jeopardy Clause, explaining that “retribution and deterrence are not legitimate, nonpunitive governmental objectives.” *Id.* at 448. The *Halper* Court also observed “a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment” *Id.*; see also *Austin v. United States*, 509 U.S. 602, 610 (1993) (relying on *Halper* to hold that civil forfeiture can be punishment). *Halper*’s method of analysis was ultimately abrogated in *Hudson v. United States*, 552 U.S. 93, 99 (1997), in favor of a return to *Ward*’s established rule, though *Halper*’s final holding was not reversed.

⁵² See *Austin*, 509 U.S. at 610.

⁵³ See *id.* at 622.

criminal proceedings to trigger certain constitutional protections,⁵⁴ while other scholars argue for a concept of “civil ‘punishment’ that is relevant for some but not all constitutional purposes.”⁵⁵

Contemporary right to counsel debates illustrate some subtle wrangling over when the threat of punishment should trigger legal protections rarely afforded to civil sanctions. Criminal law was the original and exclusive realm of the right to counsel.⁵⁶ Criminal prosecution, the reasoning goes, presents clear threats to a defendant’s physical liberty because of the possibility of imprisonment.⁵⁷ But this line between civil and criminal quickly blurs: lower courts recognize a right to counsel in civil cases “with a physical liberty interest at stake.”⁵⁸ Given the staggering threat of life-altering consequences that civil criminalization presents to unsheltered people and the pervasive systemic discrimination unsheltered people experience, limiting the liberty rationale to criminal charges is outdated and myopic.⁵⁹

Aside from the right to liberty, the right to counsel may also be implicated from power imbalances in adversarial settings.⁶⁰ The injustice of this imbalance has prompted compelling scholarship on the need to establish a right to counsel in eviction cases, stressing “the absurdity of a judicial system in which people with little understanding of the process are dragged into

⁵⁴ See, e.g., César Cuauhtémoc García Hernández, *What is Crimmigration Law?*, 17 IN-SIGHTS ON L. & SOC’Y 22, 24 (2017); Suzy McElrath et al., “Crimmigration,” with Tanya Golash-Boza, Ryan King, and Yolanda Vázquez, SOC’Y PAGES 10–11 (Feb. 24, 2014), <https://thesocietypages.org/roundtables/crimmigration>, archived at <https://perma.cc/AHM9-5V9Y>; Robert Pauw, *A New Look at Deportation as Punishment: Why at Least Some of the Constitution’s Criminal Procedure Protections Must Apply*, 52 ADMIN. L. REV. 305, 319 (2000) (“[C]ertain sanctions imposed by the government in civil proceedings may be punitive in nature, and in the circumstances where that is true additional constitutional safeguards apply.”).

⁵⁵ See Pauw, *supra* note 54, at 319.

⁵⁶ Kathryn A. Sabbeth, *Housing Defense as the New Gideon*, 41 HARV. J.L. & GENDER 55, 69–70 (2018).

⁵⁷ Kathryn A. Sabbeth, *The Prioritization of Criminal over Civil Counsel and the Discounted Danger*, 42 FLA. ST. U. L. REV. 889, 890 (2015).

⁵⁸ See *id.* at 901; see also Brooke D. Coleman, *Prison is Prison*, 88 NOTRE DAME L. REV. 2399, 2402–03 (2013) (“When incarceration is the consequence, the Court should analyze the issue of right to counsel in a similar fashion without regard to whether the party is subject to criminal or civil proceedings.”).

⁵⁹ Civil criminalization’s impacts include threats to physical liberty. See Rankin, *supra* note 4, at 107.

⁶⁰ See, e.g., Shani M. King & Nicole Silvestri Hall, *Unaccompanied Minors, Statutory Interpretation, and Due Process*, 108 CALIF. L. REV. 1, 20 n.100 (2020) (discussing *Turner v. Rogers*, 564 U.S. 431, 448 (2011), a civil contempt case, in which the Court “decided that a categorical right to counsel is not required under the Due Process Clause, but hinted that scenarios presenting a legal power imbalance . . . might justify a different conclusion”); Matt Adams, *Advancing the “Right” to Counsel in Removal Proceedings*, 9 SEATTLE J. FOR SOC. JUST. 169, 180 (2010) (“[G]iven the enormous interests that are at stake in removal proceedings [and] the sharp imbalance of powers created by the indisputably complex and adversarial nature of the proceedings, constitutional case law provides a framework to assert the right to assigned counsel.”).

court, where they confront lawyers arguing against them, and then, in relatively quick fashion, lose any right to their homes.”⁶¹

Such arguments are compelling, but apply with even greater force in the context of the criminalization of homelessness, where unsheltered people not only lack financial resources but often suffer from various disabling conditions⁶² that prevent them from defending themselves against a most formidable adversary: the State.⁶³ For people experiencing homelessness, the adversary is virtually always the State, regardless of whether they are ensnared in criminal or civil proceedings. The extraordinary power imbalance demonstrated in any litigated contest between the government and an individual experiencing homelessness is radically lopsided and consequential, with all risks and potential injustices borne entirely by the most vulnerable.⁶⁴ Criminalization—whether criminal or civil—is a quintessential demonstration of the inequitable, adversarial, and high stakes circumstances that should warrant a right to counsel, but do not.

Strained distinctions between civil and criminal punishments are especially inappropriate given the relationship between civil infractions and criminal charges. The former can morph into the latter through “failure-to-appear” or “failure-to-pay” provisions.⁶⁵ Civil infractions often impose conditions, fines, or fees that are virtually impossible for impoverished homeless people to meet, and when they fail to do so, interest accrues on the original cost.⁶⁶ Inability to pay fines can negatively impact one’s financial credit.⁶⁷ Nonpayment of fines can result in suspension of one’s driver’s license, which in turn, can impact the ability to find work or commute to a job.⁶⁸ Non-payment can also lead to an arrest warrant, which drags people through the criminal justice system simply because they cannot afford the fines imposed.⁶⁹ Even bench warrants, a civil tool, can prevent homeless people from accessing housing.⁷⁰

⁶¹ Sabbeth, *supra* note 56, at 77–78.

⁶² See Rankin, *supra* note 4, at 103 (discussing the prevalence of disabling conditions such as chronic health problems or severe untreated mental illness among unsheltered people experiencing homelessness who are primary targets of criminalization laws).

⁶³ See Coleman, *supra* note 58, at 2425 (“Acknowledgement of the state’s power, as well as the amount of resources expended in certain civil proceedings, is completely lacking in the civil context.”).

⁶⁴ Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. 1478, 1505 n.118 (“When the resources and abilities of opposing parties are lopsided, the adversarial system will fail to produce accurate results.”).

⁶⁵ Rankin, *supra* note 4, at 107.

⁶⁶ See Terry Skolnik, *Rethinking Homeless People’s Punishments*, 22 NEW CRIM. L. REV. 73, 81 (2019).

⁶⁷ See KAREN DOLAN & JODI L. CARR, *THE POOR GET PRISON* 11 (2015).

⁶⁸ See *id.* at 18.

⁶⁹ See Herring et al., *supra* note 15, at 142–43.

⁷⁰ See *id.* at 140.

Predictably, civil processes increase one's vulnerability to poverty, housing instability, and homelessness.⁷¹ Increased poverty and homelessness also heighten the likelihood of committing future criminal offenses, especially those outlawing public survival.⁷² By punishing someone for being poor and homeless, cities make that person more resistant to recovery and more likely to be permanently resigned to a future of poverty and homelessness.⁷³ The futility and cruelty of this punitive process, at least one scholar has argued, "amounts to a system of organized sadism."⁷⁴

The collateral damages of civil infractions, when issued to poor and homeless people, are often utterly life altering and further entrench people in homelessness and poverty. But categorization of criminalization as civil or criminal seems immaterial given the incalculable punishment of homelessness itself.⁷⁵ Homelessness imposes extraordinary mental, financial, emotional, psychological, and physical traumas on the people experiencing it.⁷⁶ Whether subjected to incarceration or infractions that are impossible to resolve, poor and homeless people suffer mightily and unfairly, their circumstances worsen, and "nothing is gained."⁷⁷ Given the futility of punishing homelessness, "the real damage of anti-homeless laws generally comes not from any particular punishment rendered, but from the mere enforcement of the laws . . ." ⁷⁸ Debates over what measure of punishment should trigger greater legal protection have not yet evolved to encompass the severity and pervasiveness of systemic injustice and suffering borne by unsheltered people.

Such limited constructions of punishment show the law's insensitivity to the government's treatment of poor and marginalized people. The law's failure to address systemic discrimination and violence further entrenches

⁷¹ See Michele Gilman & Rebecca Green, *The Surveillance Gap: The Harms of Extreme Privacy and Data Marginalization*, 42 N.Y.U. REV. L. & SOC. CHANGE 253, 272–73 (2018) ("Criminalization policies that make it harder for people to exit homelessness—such as expensive fines and the collateral consequences of convictions—create barriers to employment and secure housing . . .").

⁷² See Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 23–24 (1985) (noting that crime is usually caused by frustration and aggression which may result from inequality caused by poverty, poor living conditions, unemployment, police brutality, and violence); Michele E. Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 549 (2013) (explaining that certain victimless crimes such as crimes relating to homelessness, drug use, truancy, turnstile jumping, and unlawful possession of a weapon are almost exclusively committed by the poor); Skolnik, *supra* note 66, at 76 ("[P]eople entrenched in homelessness will continue to violate the very ordinances that only homeless people tend to violate *precisely because they are experiencing homelessness.*" (emphasis in original)).

⁷³ See Rankin, *supra* note 4, at 108.

⁷⁴ DOLAN & CARR, *supra* note 67, at 5.

⁷⁵ See Rankin, *supra* note 4, at 104 ("Being homeless, in and of itself, is punishment.").

⁷⁶ See *id.* at 105–06.

⁷⁷ DOLAN & CARR, *supra* note 67, at 5.

⁷⁸ Elizabeth M. O'Connor, *The Cruel and Unusual Criminalization of Homelessness: Factoring Individual Accountability into the Proportionality Principle*, 12 TEX. J. ON C.L. & C.R. 233, 260 (2007).

it.⁷⁹ Today, law enforcement costs constitute one of the greatest portions of many city budgets, dwarfing allocations for affordable housing, behavioral health, and other crucial supports.⁸⁰ Private probation companies make millions from “the willingness of courts to discriminate against poor offenders who can only afford to pay their fines in installments over time.”⁸¹ The growing behemoth of the criminal justice system is supported, in no small part, by governments passing costs onto defendants in the form of criminal and civil fees.⁸² Many people are subject to eviction and forced onto the streets without representation.⁸³ The federal government is looking to weaken fair housing protections by gutting disparate impact claims⁸⁴ and to purge homeless people from public space by warehousing them in former correctional facilities.⁸⁵ Such systemic exploitation, oppression, and control—which disproportionately target and impact poor racial minorities and homeless people—is not presented as an official or transparent form of punishment.⁸⁶ But it illustrates the scope of invisible persecution, which leverages existing power imbalances that favor the government and punish vulnerable people who lack the financial resources, political power, and legal protections to change their fates.⁸⁷ Indeed, the hallmark of systemic violence against people experiencing homelessness is the failure of the law to respond.

III. OTHER LEGAL LIMITS TO DEFENDING AGAINST CRIMINALIZATION

Homeless rights advocates contend with these constraints, searching among limited legal tools to fight pervasive punishments of unsheltered peo-

⁷⁹ See generally Fred O. Smith, Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283 (2018) (discussing how local and state governments exploit procedural mechanisms to avoid accountability for structural and systemic constitutional violations).

⁸⁰ See *What Policing Costs: A Look at Spending in America's Biggest Cities*, VERA INST. JUST., <https://www.vera.org/publications/what-policing-costs-in-americas-biggest-cities> (last visited Mar. 6, 2021), archived at <https://perma.cc/MM4M-KFWW>.

⁸¹ DOLAN & CARR, *supra* note 67, at 18.

⁸² See *id.* at 10; see also THE ARTHUR LIMAN CENTER FOR PUB. INT. L., YALE L. SCH., TWENTY-FIRST ANNUAL LIMAN COLLOQUIUM: WHO PAYS? FINES, FEES, BAIL, AND THE COST OF COURTS VI–6 (2018), https://law.yale.edu/sites/default/files/area/center/liman/document/liman_colloquium_book_04.20.18.pdf, archived at <https://perma.cc/Z3JM-KB3M>.

⁸³ See Kathryn A. Sabeth, (*Under*)*Enforcement of Poor Tenants' Rights*, 27 GEO. J. POVERTY L. & POL'Y 97, 129 (2019).

⁸⁴ See Linda Morris & Alejandro Agustín Ortiz, *Trump Administration's New Rule Will Slam Door to Fair Housing*, ACLU (Oct. 16, 2019), <https://www.aclu.org/news/racial-justice/trump-administrations-new-rule-will-slam-door-to-fair-housing/>, archived at <https://perma.cc/WJU4-RKTV>.

⁸⁵ See Kriston Capps, *Trump's Plan to Criminalize Homelessness is Taking Shape*, BLOOMBERG CITYLAB (Dec. 17, 2019), <https://www.bloomberg.com/news/articles/2019-12-17/how-trump-is-criminalizing-homelessness>, archived at <https://perma.cc/H337-HQ32>.

⁸⁶ Such exploitation is grotesquely illustrated in the infamous Ferguson case, but occurs in many cities throughout the country. See Smith, *supra* note 79, at 2305–06 (citing Ruth Marcus, *Policing by Fleecing*, in *Ferguson and Beyond*, WASH. POST (Mar. 6, 2015), <http://wapo.st/1Eny5r>, archived at <https://perma.cc/L5UP-D3V7>).

⁸⁷ DOLAN & CARR, *supra* note 67, at 30.

ple. Even three of the most promising constitutional protections do not adequately account for the devastating impacts of civil criminalization. Eighth Amendment challenges to criminal prosecutions have seen recent support, and challenges under the Fourteenth and Fourth Amendments have also seen some success. But to the extent these constitutional protections apply to criminalization, they mostly apply to criminal charges, hardly to civil enforcement, and not at all to invisible persecution. As a result, homeless rights advocates often struggle to demonstrate that inequitable and pervasive forms of suffering are worthy of legal protection.

A. *Eighth Amendment: Cruel, Unusual, and Excessive Punishment*

The Eighth Amendment is a quintessential measure of punishment. It offers constitutional protection from cruel and unusual punishment, providing that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”⁸⁸ The Amendment’s purpose is to limit the government’s power to punish.⁸⁹ But, as applied to poor people and those experiencing homelessness, the prohibition against cruel and unusual punishment and excessive fines reflects the law’s restrictive and myopic understanding of the terms “cruel,” “unusual,” and “excessive.” While Eighth Amendment jurisprudence is developing to provide more reliable protections against criminal charges for public survival, its application to civil sanctions is unsettled.

The Eighth Amendment is a relatively new resource for homeless rights advocates seeking to challenge criminal charges for public survival. For years, courts have rejected Eighth Amendment claims on the bases that “homelessness is not a status, the prohibited conduct is not a result of homelessness, or that homeless individuals chose to engage in the prohibited conduct.”⁹⁰ But recently, the Ninth Circuit extended the Eighth Amendment’s prohibition against cruel and unusual punishment to cities prosecuting un-

⁸⁸ U.S. CONST. amend. VIII.

⁸⁹ See *Austin v. United States*, 509 U.S. 602, 609 (1993).

⁹⁰ *Joyce v. City and County of San Francisco*, 846 F. Supp. 843, 857 (N.D. Cal. 1994); see also *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1105 (Cal. 1995); Ron S. Hochbaum, *Bathrooms as a Homeless Rights Issue*, 98 N.C. L. REV. 205, 263 (citing *Joel v. City of Orlando*, 232 F.3d 1353, 1362 (11th Cir. 2000)). For more on the relationship between status and conduct in the context of homeless rights advocacy, see generally O’Connor, *supra* note 78; Seth Lemings, Note, *The De-Criminalization of Homelessness*, 10 U.C. IRVINE L. REV. 287 (2019). The legal significance of distinguishing status from conduct often begins with *Robinson v. California*, a 1962 case in which the U.S. Supreme Court prohibited the State of California from criminalizing the state of being addicted to the use of narcotics (as opposed to the actual use of narcotics). 370 U.S. 660, 667 (1962). Six years later, the Court distinguished *Robinson* in *Powell v. Texas*, with a plurality deciding that Texas could criminalize public drunkenness, since it is a “condition” rather than strictly a “status.” 392 U.S. 514, 533–34 (1968). *Powell* encouraged subsequent courts to construe criminalization laws as regulating conduct rather than the status of being homeless. See, e.g., Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619, 1619–20 (1995); see also *Austin*, 509 U.S. at 609.

sheltered people for sleeping or camping in public space in *Martin v. Boise*.⁹¹ The *Martin* court observed the Eighth Amendment prohibits punishing people for circumstances they cannot control, particularly circumstances that are the “universal and unavoidable consequences of being human.”⁹² The *Martin* court reasoned these protections extend to “conduct that is an unavoidable consequence of being homeless—namely sitting, lying, or sleeping on the streets.”⁹³ Although Boise argued it had sufficient shelter beds to accommodate its homeless population, the Ninth Circuit found most shelters imposed religious restrictions and other obstacles rendering them functionally inaccessible to many homeless Boiseans.⁹⁴ The *Martin* court held that “so long as there is a greater number of homeless individuals in [a jurisdiction] than the number of available beds [in shelters],” the government cannot prosecute homeless individuals for “involuntarily sitting, lying, and sleeping in public.”⁹⁵ Ultimately, under *Martin*, cities cannot “criminalize indigent, homeless people for sleeping outdoors, on public property, on the false premise they had a choice in the matter.”⁹⁶

Martin turned on the characterization of the plaintiffs’ public survival as necessary, involuntary, and inseparable from their existence;⁹⁷ but regardless of whether homelessness is characterized as status or conduct, given the shortage of housing, shelter, and other services in most cities,⁹⁸ *Martin* stands for the proposition that cities cannot punish unsheltered people for breaking the law merely by surviving in public space.⁹⁹ Thus, *Martin* is heralded as a win for homeless rights advocates, whose cases often stress the

⁹¹ 920 F.3d 584, 615 (9th Cir. 2019).

⁹² *Id.* at 617 (quoting *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007)).

⁹³ *Id.* (quoting *Jones*, 444 F.3d at 1137).

⁹⁴ *Id.* at 610.

⁹⁵ *Id.* at 617.

⁹⁶ *Id.*

⁹⁷ See O’Connor, *supra* note 78, at 236 (explaining that a criminalization law defended on the *Robinson v. California* grounds that it was valid because “it targeted purely involuntary behavior symptomatic of an individual’s homeless status [] will still be invalidated on the grounds that it disproportionately punishes an act for which no punishment is permissible”).

⁹⁸ MEGHAN HENRY ET AL., U.S. DEP’T OF HOUS. & URB. DEV., THE 2019 ANNUAL HOMELESS ASSESSMENT REPORT (AHAR) TO CONGRESS: PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 1 (2020), <https://files.hudexchange.info/resources/documents/2019-AHAR-Part-1.pdf> (reporting rates of unsheltered homelessness and shelter bed inventory across the country), *archived at* <https://perma.cc/E9DD-YCF4>; Benjamin Schneider, *Understanding Homelessness in America*, BLOOMBERG CITYLAB (July 6, 2020), <https://www.bloomberg.com/news/features/2020-07-06/why-is-homelessness-such-a-problem-in-u-s-cities> (observing the insufficiency of affordable housing, adequate shelters, and services for homelessness), *archived at* <https://perma.cc/3RHJ-LKCC>.

⁹⁹ *Martin*, 920 F.3d at 617; *see also* *Jones v. City of Los Angeles*, 444 F.3d 1118, 1136 (9th Cir. 2006), *vacated as moot*, 505 F.3d 1006 (9th Cir. 2007) (“Whether 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. . . . Appellants have made a substantial showing that they are ‘unable to stay off the streets on the night[s] in question.’”).

excessive and pervasive punishment of criminalizing vulnerable, unsheltered people for having no safe and legal place to go.

But *Martin* concerned only criminal charges, so its reach may hinge on the legal distinction between whether unsheltered people are threatened with criminal charges or civil sanctions. The Eighth Amendment's prohibition against cruel and unusual punishment is commonly construed to apply only to criminal punishments,¹⁰⁰ even though the Supreme Court has also observed that the Eighth Amendment "cuts across the division between the civil and the criminal law."¹⁰¹ For example, courts consider whether civil proceedings further punitive goals.¹⁰² Whether Eighth Amendment protections apply does not solely rest on whether the conduct is a criminal or civil violation, but rather, on whether prohibiting the conduct constitutes punishment.¹⁰³

Some courts are, indeed, declining to extend *Martin's* reasoning to civil cases. In *Butcher v. City of Marysville*,¹⁰⁴ a group of homeless plaintiffs alleged their Eighth Amendment rights were violated when the City evicted them from their encampment and destroyed their property.¹⁰⁵ The Eastern District of California rejected the plaintiffs' cruel and unusual punishment claim because the eviction did not immediately result in criminal charges and the court reasoned that the Eighth Amendment does not extend beyond the criminal process.¹⁰⁶

But other courts are "unwilling to hold definitively that *Martin's* rationale cannot extend" to civil sanctions."¹⁰⁷ In *Aitken v. City of Aberdeen*, the Western District of Washington considered homeless plaintiffs' claim that enforcement of the City's anti-camping ordinance amounted to punishment in violation of the Eighth Amendment.¹⁰⁸ The court observed the anti-camping ordinance threatened only a "small fine" instead of criminal sanctions and cited a Washington statute prohibiting the conversion of any civil fine into criminal contempt.¹⁰⁹ But the court did not stop at the distinction between criminal and civil sanctions; it contrasted the plaintiffs' complaint with the "systematic campaign against the homeless" alleged in *Pottinger*¹¹⁰

¹⁰⁰ See, e.g., *Ingraham v. Wright*, 430 U.S. 651, 698 (1977) (holding that corporal punishment in public schools could not violate the Eighth Amendment's prohibition of cruel and unusual punishment).

¹⁰¹ *Austin v. United States*, 509 U.S. 602, 610 (1993). But see *John Corp. v. City of Houston*, 214 F.3d 573, 580 (5th Cir. 2000) (holding that *Austin* did not overrule *Ingraham's* limitations on the Cruel and Unusual Punishment Clause).

¹⁰² See, e.g., *United States v. Halper*, 490 U.S. 435, 447 (1989).

¹⁰³ See *Austin*, 509 U.S. at 610.

¹⁰⁴ 398 F. Supp. 3d 715 (E.D. Cal. 2019).

¹⁰⁵ *Id.* at 726.

¹⁰⁶ *Id.*

¹⁰⁷ See, e.g., *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1082 (W.D. Wash. 2019).

¹⁰⁸ See *id.*

¹⁰⁹ *Id.* at 1084 (citing WASH. REV. CODE § 10.01.180(3)(c) (2019)).

¹¹⁰ *Id.* (discussing *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1554 (S.D. Fla. 1992) (finding that the Miami Police Department engaged in "a custom, practice and policy of arresting, harassing and otherwise interfering with homeless people for engaging in basic activities

and the “banishment order backed up by criminal sanctions” overturned in *Schimelpfenig*.¹¹¹ The modest fine in *Aitken*, the court opined, was “a far cry” from such severe forms of punishment.¹¹² Still, without deciding whether *Martin* applies to civil sanctions, the court granted the plaintiffs’ motion for a preliminary injunction, finding sufficient irreparable harm because either type of ordinance prohibited camping on all public property in the City.¹¹³

At the time of this writing, a July 2020 decision from the U.S. District Court for the District of Oregon in *Blake v. City of Grants Pass*¹¹⁴ is the only decision (albeit unpublished) directly addressing the question of whether *Martin*’s reasoning applies to civil sanctions, answering in the affirmative.¹¹⁵ This class action, brought on behalf of “all involuntarily homeless individuals living in Grants Pass, Oregon,” challenged a series of civil ordinances that prohibited camping and sleeping, a park exclusion ordinance,¹¹⁶ and related criminal trespass laws as unconstitutional under the Eighth and Fourteenth Amendments.¹¹⁷ They also sought injunctive relief.¹¹⁸

Grants Pass produced evidence of 615 citations and 541 incident reports issued pursuant to the civil ordinances, and the evidence suggested enforcement against homeless residents was increasing significantly year over year.¹¹⁹ One class representative lost her job and housing a decade earlier and was living on the streets after being ejected from an emergency shelter when she stayed beyond its ninety-day stay limit.¹²⁰ She accrued

of life,” thus violating their Fourth, Eighth, and Fourteenth Amendment rights)). The *Pottinger* case resulted in a consent decree, Settlement Agreement, *Pottinger*, 810 F. Supp. 1551 (No. 88-2406-CIV-ATKINS), that remained in place until U.S. District Court Judge Moreno dissolved it in February of 2019. See Jerry Iannelli, *Judge Invalidates Miami’s Landmark Homeless-Protection Order from 1998*, MIA. NEW TIMES (Feb. 15, 2019), <https://www.miaminewtimes.com/news/miami-judge-throws-out-pottinger-homeless-protection-law-11087371>, archived at <https://perma.cc/CKE9-69E4>.

¹¹¹ *Aitken*, 393 F. Supp. 3d at 1084 (discussing *State v. Schimelpfenig*, 115 P.3d 338, 341 (Wash. Ct. App. 2005) (overturning a state judge’s order banishing a man convicted of murder from returning to his home county after serving his sentence)).

¹¹² *Id.*

¹¹³ *Id.* at 1085–86. Ultimately, the city settled. See Dan Hammock, *Settlement Reached in Second Aberdeen Homeless Lawsuit*, DAILY WORLD (Nov. 5, 2019), <https://www.thedailyworld.com/news/settlement-reached-in-second-aberdeen-homeless-lawsuit/>, archived at <https://perma.cc/3URB-HEJQ>.

¹¹⁴ No. 1:18-cv-01823-CL, 2020 WL 4209227 (D. Or. July 22, 2020).

¹¹⁵ See *id.* at *6.

¹¹⁶ Park exclusion ordinances are common tools for law enforcement to monitor and remove unwanted individuals. Common provisions allow for removal of individuals who break specifically articulated rules; in this case, the Grants Pass ordinance prohibited individuals from setting up or staying at “any place where bedding, sleeping bag, or other material [is] used for bedding purposes . . . for the purpose of maintaining a temporary place to live, whether or not such place incorporates the use of any tent, lean-to, shack, or any other structure, or any vehicle or part thereof.” See GRANTS PASS, OR., MUNICIPAL CODE § 5.61.010 (2019).

¹¹⁷ *Blake*, 2020 WL 4209227, at *4.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at *5.

¹²⁰ *Id.* at *4.

more than \$5,000 in unpaid fines for violating the challenged ordinances.¹²¹ A second class representative’s employment as a licensed home care provider ended and he resorted to living in his truck at a remote rest stop to avoid being “awakened and ticketed.”¹²² The third also lived in her vehicle and reported law enforcement regularly issued her move-along warnings.¹²³

The *Blake* court noted that, after *Martin*, Grants Pass amended its anti-sleeping and camping ordinances to remove the word “sleeping” in an effort to distinguish between sleeping—activity the City apparently acknowledged was involuntary—and camping, an activity the City maintained was voluntary.¹²⁴ But this amendment, the *Blake* court concluded, did not comport with *Martin*: “[I]t is not enough under the [Eighth] Amendment to simply allow sleeping in public spaces; the . . . 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.”¹²⁵ The court found, quoting *Martin*, Grants Pass had “far more homeless people than ‘practically available’ shelter beds”;¹²⁶ therefore, the City’s “practice of punishing people who have no access to shelter for the act of sleeping or resting outside while having a blanket or other bedding to stay warm and dry constitutes cruel and unusual punishment in violation of the Eighth Amendment.”¹²⁷

To reach its holding, the court reasoned the Eighth Amendment does not turn on whether criminalization laws are categorized as criminal or civil sanctions.¹²⁸ “[T]he label of crime or violation is not dispositive where the Eighth Amendment is concerned.”¹²⁹ Reviewing Supreme Court and other federal precedent,¹³⁰ the court stressed the determinative inquiry is whether a civil sanction “at least partially serves the traditional punitive functions of retribution and deterrence.”¹³¹ Noting “all civil penalties have some deterrent effect,”¹³² the court observed the fines at issue were punitive because they “serve no remedial purpose and were intended to deter homeless individuals from residing in Grants Pass.”¹³³ Further, the fines were excessive

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at *6.

¹²⁵ *Id.*

¹²⁶ *Id.* at *7 (quoting *Martin v. City of Boise*, 920 F.3d 584, 618 (9th Cir. 2019)).

¹²⁷ *Id.* at *8.

¹²⁸ *Id.* at *8–10.

¹²⁹ *Id.* at *8.

¹³⁰ *See id.* (discussing *Austin v. United States*, 509 U.S. 602, 609–10 (1993) (quoting *United States v. Halper*, 490 U.S. 435, 447–48 (1989) (“The notion of punishment, as we commonly understand it, cuts across the division between the civil and the criminal law.”)); *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019) (declining to reconsider the *Austin* Court’s unanimous judgment “that civil *in rem* forfeitures are fines for the purposes of the Eighth Amendment when they are at least partially punitive.”)).

¹³¹ *Id.* at *10 (citing *Austin*, 509 U.S. at 610).

¹³² *Id.* (citing *Hudson v. United States*, 522 U.S. 93, 102 (1997)).

¹³³ *Id.* at *11.

because they were “grossly disproportionate to the gravity of the offense.”¹³⁴ The court reasoned the plaintiffs were “being punished for engaging in the unavoidable, biological, life-sustaining acts of sleeping and resting while also trying to stay warm and dry.”¹³⁵ Because the plaintiffs could not afford to pay the fines, the court anticipated the potential collateral damages—such as increasing fines, suspensions of driver’s licenses, and damaged credit—that threatened real and long-term harm to Grants Pass’s unsheltered residents.¹³⁶ Accordingly, enforcement of the civil ordinances would violate both the Cruel and Unusual Punishment Clause and the Excessive Fines Clause of the Eighth Amendment.¹³⁷

The *Blake* decision is a thoughtful application of *Martin*’s rationale to the devastating impacts of civil enforcement on unsheltered homelessness, but the case is procedurally young. The City of Grants Pass will likely appeal.¹³⁸ It is too early to predict *Blake*’s outcome if appealed or its impact on other cases likely to arise within and outside of the Ninth Circuit.

Blake suggests some promise for challenging civil sanctions under the Eighth Amendment, at least in the Ninth Circuit where *Martin* remains good law. But, on balance, homeless rights advocates cannot count on the Eighth Amendment to apply to civil criminalization. Even the *Aitken* court, which declined to address the question directly, focused on the difference between a “small” fine and a criminal charge, demonstrating the judicial tendency to minimize the impact of civil sanctions on unsheltered people.¹³⁹ Regardless of how small a fine might appear to people with means, most people experiencing homelessness cannot pay such fees.¹⁴⁰ Even if a statutory provision like the one mentioned in *Aitken* prevents the conversion of an unpaid civil fine into criminal contempt, nonpayment unleashes a Pandora’s box of other brutal consequences, ranging from civil contempt to wage garnishment, lien impositions, exponential increases in financial penalties, driver’s license suspensions, and even incarceration.¹⁴¹

In other words, the distinctions between criminal and civil punishments are de minimis, particularly when applied to already vulnerable unsheltered people who—due to disabling conditions, severe shortages of housing and services, and the inescapable riptide of criminalization—face unlikely odds of emerging from poverty and homelessness. A civil infraction, which does

¹³⁴ *Id.* (quoting *United States v. Bajakajian*, 524 U.S. 324, 334 (1998)).

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See Notice of Appeal, *Blake*, 2020 WL 4209227 (No. 1:18-cv-01823 CL).

¹³⁹ *Aitken v. City of Aberdeen*, 393 F. Supp. 3d 1075, 1084 (W.D. Wash. 2019).

¹⁴⁰ See Herring et al., *supra* note 15, at 12 (discussing how 60% of homeless people surveyed did not pay their citations relating to anti-homeless laws because they could not afford it).

¹⁴¹ See *id.* at 13; Skolnik, *supra* note 66, at 96–97; Tamar Sarai Davis, *Social Distancing Fines and Fees Threaten to Criminalize Poverty, Harm the Economically Vulnerable*, PRISM (May 7, 2020), <https://www.ourprism.org/1943390>, archived at <https://perma.cc/DTG5-S3H6>.

not severely impact a typical housed citizen, severely impacts unsheltered people and serves no remedial purpose.¹⁴² The law must evolve to reflect a better understanding of the extraordinary vulnerability of unsheltered people and the systemic injustices that entrench them in poverty and homelessness. One such evolution would evaluate the enforcement of criminalization laws as disproportionate to the offense of public survival.¹⁴³

Excessive fines claims, such as those discussed in *Blake*, provide a helpful lens through which to understand the disproportionality of punishments as applied to unsheltered people. The Eighth Amendment of the U.S. Constitution¹⁴⁴ and many state constitutions prohibit “excessive fines.”¹⁴⁵ The Excessive Fines Clause of the Eighth Amendment “limits the Government’s power to extract payments, whether in cash or in kind, ‘as punishment for some offense.’”¹⁴⁶ It is a “constant shield” that is necessary to avoid imposition of fines that are “out of accord with the penal goals of retribution and deterrence” and out of proportion to the crime committed.¹⁴⁷ In evaluating excessiveness, “[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”¹⁴⁸ Thus, a fine or forfeiture violates the Eighth Amendment if it is “grossly disproportional to the gravity of a defendant’s offense.”¹⁴⁹

As a preliminary matter, when a homeless individual has no reasonable alternative but to engage in necessary, life-sustaining activities in public, no civil fine or forfeiture is proportionate to the offense of survival. One’s interest in survival is always of greater value than the government’s interest in preventing public survival. But the law commonly allows civil fines and forfeitures—that devastate unsheltered people—so long as the value of the fine is within a statutorily prescribed range.¹⁵⁰

The excessiveness of a fine should be considered relative to one’s financial circumstances: one person may be able to pay a fine with minimal impact, but another may not be able to pay it without extraordinary impacts or

¹⁴² See Skolnik, *supra* note 66, at 76–77.

¹⁴³ See *id.*; David Kroman, *Seattle’s Arrest Alternative, LEAD, Moves Beyond Police*, CROSSCUT (July 17, 2020), <https://crosscut.com/2020/07/seattles-arrest-alternative-lead-moves-beyond-police>, archived at <https://perma.cc/9PXF-F88X>; *Cahoots: Crisis Assistance Helping Out on the Streets*, WHITE BIRD CLINIC, <https://whitebirdclinic.org/cahoots/> (last visited Mar. 6, 2021), archived at <https://perma.cc/5KPU-JJHU>.

¹⁴⁴ U.S. CONST. amend. VIII.

¹⁴⁵ See, e.g., WASH. CONST. art. I, § 14.

¹⁴⁶ *Austin v. United States*, 509 U.S. 602, 609–10 (1993). The Eighth Amendment’s Excessive Fines Clause applies to the states. *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

¹⁴⁷ *Timbs*, 139 S. Ct. at 689.

¹⁴⁸ *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

¹⁴⁹ *Id.*

¹⁵⁰ See *United States v. Seher*, 562 F.3d 1344, 1371 (1st Cir. 2009) (stating that a strong presumption exists that a fine is constitutional if within a range determined by a legislative body).

may not be able to pay it at all.¹⁵¹ For example, a fine may be excessive if it deprives an individual of their livelihood.¹⁵²

Some legal scholars debate whether the proportionality of punishment should be evaluated subjectively, better reflecting the way people experience it.¹⁵³ For example, if a prisoner adapts to incarceration relatively easily, that person could be said to suffer less than most would expect.¹⁵⁴ Once discharged, a former prisoner may struggle mightily with reentry to society, but the collateral effects of their incarceration post-release are not considered part of the punishment the State imposes.¹⁵⁵ The same blind spot exists with respect to civil enforcement. Whether a fine appears relatively small or insignificant to the average person does not mean that a poor unsheltered person experiences it the same way. A civil infraction may not appear a severe threat to the average person who can comply with its terms, but most poor and unsheltered people cannot do so and suffer greater punishment as a result. The degree of shame, suffering, and condemnation inflicted matters to calculations of severity and proportionality.¹⁵⁶ The State should consider the foreseeable impacts of the laws it upholds and the consequences of their enforcement.¹⁵⁷

When the government chooses to punish unsheltered people for life-sustaining conduct in public, those people suffer not only the direct sanction (whether criminal or civil) but also the collateral effects.¹⁵⁸ This experience is inherently excessive and disproportionate to the offense of necessary public survival. The vast majority of people do not experience unsheltered homelessness and have multiple reasonable alternatives to public survival; unsheltered people are the intended targets of criminalization laws and are overwhelmingly the people who suffer from them.¹⁵⁹ But even if criminalization laws were applied to housed citizens, the impact would not be as severe as applied to chronically homeless people. People experiencing chronic

¹⁵¹ See, e.g., *United States v. Levesque*, 546 F.3d 78, 83 (1st Cir. 2008).

¹⁵² See *Timbs*, 139 S. Ct. at 688 (“[E]conomic sanctions [must] . . . not be so large as to deprive [an offender] of his livelihood.” (quoting *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 271 (1989))).

¹⁵³ See, e.g., John Bronsteen et al., *Retribution and the Experience of Punishment*, 98 CALIF. L. REV. 1463, 1465 (2010) [hereinafter Bronsteen et al., *Retribution*]; John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1059 (2009); David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1617, 1628 (2019); Dan Markel & Chad Flanders, *Benjamin on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 908–09 (2010).

¹⁵⁴ See Bronsteen et al., *Retribution*, *supra* note 153, at 1465.

¹⁵⁵ The objective evaluation of proportionality overlooks the ways that subjective experiences of a punishment, particularly the collateral consequences, may differ widely. See *id.* at 1482.

¹⁵⁶ See *id.* at 1486.

¹⁵⁷ See *id.*

¹⁵⁸ See *id.* at 1485 (discussing governmental responsibility for proximate harm caused by collateral effects of incarceration).

¹⁵⁹ See Rankin, *supra* note 4, at 102–04 (explaining that chronically homeless individuals are disproportionately targets of criminalization laws).

homelessness are among the most vulnerable individuals in America, disproportionately suffering from poor physical and mental health, psychiatric disorders, extreme poverty and material deprivation, abuse, victimization, and social isolation.¹⁶⁰

Ultimately, debates about whether criminalization laws are more appropriately categorized as criminal or civil sanctions completely miss the point: all forms of criminalization affect chronically homeless people in profound ways that are intrinsically disproportionate to the offense of necessary public survival.¹⁶¹ Current law fails to appreciate the extraordinary cruelty and excessiveness of civilly criminalizing homelessness.

B. Fourteenth Amendment: Inadequate Process & Unequal Protection

While Eighth Amendment challenges can be limited by the threshold question of whether a punishment is criminal, Fourteenth Amendment challenges cannot.¹⁶² However, the Fourteenth Amendment has its own limitations as a homeless rights advocacy tool.

Most successful Fourteenth Amendment challenges relate to procedural due process issues. Courts have held that homeless individuals have property rights to their personal possessions.¹⁶³ Government workers often sweep spaces where people experiencing homelessness are living, forcibly evicting them and seizing and destroying their essential belongings, including “camping gear, warm clothing,” medication, medical equipment, and “critical legal documents, such as birth certificates and social security cards, that are necessary to prove identity and to secure employment, public benefits, and even the very housing that a person needs to escape life on the streets.”¹⁶⁴ Irreplaceable items of sentimental value, such as photographs, poems, or family or military mementos, are also commonly seized and destroyed.¹⁶⁵ Because sweeps are often conducted with little to no advance notice, courts may find they violate procedural due process rights.¹⁶⁶

¹⁶⁰ See *id.* at 104–06.

¹⁶¹ Unsheltered people must be legally permitted to survive in public space when they lack a reasonable alternative. See Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 296 (1991) (“Everything that is done has to be done somewhere. No one is free to perform an action unless there is somewhere to perform it.”).

¹⁶² See, e.g., *Lavan v. City of Los Angeles*, 797 F. Supp. 2d 1005, 1016 (C.D. Cal. 2011).

¹⁶³ See, e.g., *id.*

¹⁶⁴ NAT'L L. CTR., *supra* note 3, at 77.

¹⁶⁵ See, e.g., TAI DUNSON-STRANE & SARAH SOAKAI, UNIV. OF HAW. AT MANOA, THE EFFECT OF CITY SWEEPS AND SIT-LIE POLICIES ON HONOLULU'S HOMELESS 19 (2015), http://blog.hawaii.edu/durp/files/2015/06/Houseless-Honolulu-Report.small_.pdf, archived at <https://perma.cc/V6TL-HNXT>.

¹⁶⁶ See, e.g., *Lavan*, 797 F. Supp. 2d at 1017–18 (holding homeless persons' unabandoned possessions are property within the meaning of the Fourteenth Amendment, such that the City must comport with due process requirements if it wishes to take and destroy them). Similarly, litigants have successfully raised Fourth Amendment claims when governments unreasonably seize and destroy unsheltered people's personal property. See *id.*

Governmental enforcement of criminalization laws can also amount to violations of the right to be free from state-created danger, a substantive due process right guaranteed under the Fourteenth Amendment.¹⁶⁷ When the State seizes a homeless person's belongings, it could be liable for "creating or exposing individuals to danger that they otherwise would not have faced."¹⁶⁸ State-created danger arguments often arise when cities take away a person's shelter, even informal shelter like tents or tarps, thus foreseeably increasing that person's exposure to the elements.¹⁶⁹ Seizing belongings like food and medicine can worsen a person's overall health. The options available to a person to mitigate harm after the State unconstitutionally creates danger is not relevant to the question of whether the government violated substantive due process at the outset. Rather courts must consider whether the State actor "left the person in a situation that was more dangerous than the one in which they found him."¹⁷⁰

At the heart of state-created danger theories is the fundamental value of human life. Courts often prioritize the prevention of human suffering over addressing financial concerns.¹⁷¹ If state actors affirmatively create conditions they know or should reasonably have known threaten a homeless person's survival, such as depriving a person of the ability to shield herself from the dangers of the outdoors or the city street, that action may violate substantive due process.¹⁷²

State-created danger arguments have taken on new urgency in the midst of COVID-19, a pandemic unprecedented in modern history.¹⁷³ Sweeping during the pandemic forcibly disperses a city's most vulnerable residents, affirmatively placing them in further danger of contracting and spreading the

¹⁶⁷ See U.S. CONST. amend. XIV, § 1.

¹⁶⁸ Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 103–04 (2015) (citing *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1101–02 (E.D. Cal. 2012)).

¹⁶⁹ See Brief for National Law Center on Homelessness & Poverty & The Homeless Rights Advocacy Project as Amici Curiae Supporting Respondent at 14–16, *Long v. City of Seattle*, 467 P.3d 979 (Wash. Ct. App. June 29, 2020) (No. 78230-4-1).

¹⁷⁰ *Kennedy v. City of Ridgefield*, 439 F.3d 1055, 1062 (9th Cir. 2006) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000)).

¹⁷¹ See, e.g., *Harris v. Bd. of Supervisors*, 366 F.3d 754, 766 (9th Cir. 2004) ("[When] '[f]aced with [] a conflict between financial concerns and preventable human suffering, [courts should have] little difficulty concluding that the balance of hardships tips decidedly' toward avoiding human suffering." (quoting *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983))).

¹⁷² See *Wood v. Ostrander*, 879 F.2d 583, 589–90 (9th Cir. 1989) (holding that the City's act of impounding a vehicle and leaving the driver in a high-crime area at night was an "affirmative action" violating plaintiff's substantive due process rights). For cases holding that involuntary exposure to the elements is a danger under substantive due process analysis, see *Munger*, 227 F.3d at 1089–90; *Cobine v. City of Eureka*, 250 F. Supp. 3d 423, 433 (N.D. Cal. 2017); *Sanchez*, 914 F. Supp. 2d at 1099–103; see also *In re Flint Water Cases*, 453 F. Supp. 3d 970, 993 (E.D. Mich. 2020) (holding bodily integrity claim plausibly alleged where plaintiffs contracted Legionnaire's disease after Flint changed its water source and knowingly exposed plaintiffs to disease-causing agents in the water).

¹⁷³ Tim Herrera, *The 20 Phrases That Defined 2020*, N.Y. TIMES (Dec. 21, 2020), <https://www.nytimes.com/2020/12/18/style/words-of-the-year-2020.html>, archived at <https://perma.cc/LS96-KTLQ>.

virus.¹⁷⁴ Minimizing exposure to COVID-19 is critical for particularly vulnerable populations including those experiencing homelessness, who are at higher risk of contracting and developing serious symptoms of COVID-19 than those who are housed.¹⁷⁵ Indeed, the Center for Disease Control and Prevention (“CDC”) recently issued guidance specifically related to unsheltered homelessness, finding a “[l]ack of housing contributes to poor physical and mental health outcomes, and linkages to permanent housing for people experiencing homelessness should continue to be a priority.”¹⁷⁶ The CDC further advises that absent the availability of individual housing units for everyone in an encampment, cities should “allow people who are living unsheltered or in encampments to remain where they are” as “clearing encampments can cause people to disperse throughout the community and break connections with service providers. This increases the potential for infectious disease spread.”¹⁷⁷ Instead, the CDC recommends that, to combat the spread of COVID-19, jurisdictions provide hygiene facilities and materials and help people living in encampments maintain sufficient space to social distance.¹⁷⁸ Thus, the CDC warns that unless individual housing units are available, cities should not clear encampments during community spread of COVID-19.¹⁷⁹

A few cities have endeavored to follow CDC guidance by dramatically and quickly increasing the number of temporary individual units as shelters.¹⁸⁰ But other cities ignore CDC guidance and disregard the risk of harm

¹⁷⁴ See Alyse D. Oneto & Samantha Batko, *Why Homeless Encampment Sweeps Are Dangerous During COVID-19*, URB. INST.: URB. WIRE (May 12, 2020), <https://www.urban.org/urban-wire/why-homeless-encampment-sweeps-are-dangerous-during-covid-19>, archived at <https://perma.cc/NHD6-WJPZ>.

¹⁷⁵ See S.F. United in Crisis, Opinion, *100 Medical Experts Advocate for More Hotels for the Unhoused, and Quickly*, S.F. EXAM’R (Mar. 24, 2020), <https://www.sfexaminer.com/opinion/opinion-medical-experts-advocate-for-more-hotels-for-the-unhoused-and-quickly/>, archived at <https://perma.cc/R4ND-RRZD>.

¹⁷⁶ *Interim Guidance on Unsheltered Homelessness and Coronavirus Disease 2019 (COVID-19) for Homeless Service Providers and Local Officials*, CDC (May 13, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/unsheltered-homelessness.html>, archived at <https://perma.cc/P5WH-EBBE>.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *id.*

¹⁸⁰ The Governor of California issued an executive order giving local governments flexibility to spend emergency homeless funding on dealing with the COVID-19 outbreak, Cal. Exec. Order N-35-20 (Mar. 21, 2020), <https://www.gov.ca.gov/wp-content/uploads/2020/03/3.21.20-EO-N-35-20-text.pdf>, archived at <https://perma.cc/3FCJ-MS4J>, including regulatory barriers for facilities built with the money, *Governor Newsom Takes Emergency Actions & Authorizes \$150 Million in Funding to Protect Homeless Californians from COVID-19*, OFF. OF GOVERNOR GAVIN NEWSOM (Mar. 18, 2020), <https://www.gov.ca.gov/2020/03/18/governor-newsom-takes-emergency-actions-authorizes-150-million-in-funding-to-protect-homeless-californians-from-covid-19/>, archived at <https://perma.cc/X7LQ-GP4Q>. But see Ananya Roy & Jonny Coleman, *People Are About to be Pushed into Homelessness on a Large Scale. Hotels Are Key to Keeping Them off the Streets*, APPEAL (July 17, 2020), <https://theappeal.org/hotels-housing-homelessness-crisis-coronavirus-evictions/>, archived at <https://perma.cc/KNZ8-4YSP> (“Los Angeles, emblematic of the inequalities that structure life and death in the United States,

to people experiencing homelessness, either through inaction or by packing as many unsheltered people as possible into indoor congregate shelters.¹⁸¹ Many cities simply persist with sweeps just as they did before the pandemic.¹⁸² Still, to date, no homeless rights advocate has prevailed on the merits of a state-created danger claim in a reported case stemming from these sweeps.¹⁸³

The Equal Protection Clause of the Fourteenth Amendment is the “constitutional text that most naturally suggests itself” when legal rights stem from “a comparison of burdens and opportunities” between the marginalized groups and everyone else.¹⁸⁴ Indeed, “Equal Protection principles—as well as a basic sense of fairness and decency—compel the rejection of . . . a law [that] treats similarly situated groups unequally and without a principled justification, resulting in a diminished or degraded moral status for the target.”¹⁸⁵ But the law does not equally protect unsheltered people in the context of criminalization laws.

Despite the proliferation of criminalization¹⁸⁶ and the pervasive, systemic discrimination unsheltered people experience,¹⁸⁷ they are not a suspect

is gripped by political inertia. Public officials at all levels of government have failed to enact policies that would protect tenants from displacement.”)

¹⁸¹ See Amy Maxmen, *Coronavirus is Spreading Under the Radar in US Homeless Shelters*, NATURE (May 7, 2020), <https://www.nature.com/articles/d41586-020-01389-3>, archived at <https://perma.cc/FBD5-7MYH>; Justin Wm. Moyer, *Hundreds of D.C.’s Homeless Have Tested Positive for Coronavirus as Shelters Try to Avoid Spread*, WASH. POST (May 8, 2020), https://www.washingtonpost.com/local/hundreds-of-dcs-homeless-have-tested-positive-for-coronavirus-as-shelters-try-to-avoid-spread/2020/05/08/2bcfc03c-8fb4-11ea-8df0-ee33c3f5b0d6_story.html, archived at <https://perma.cc/U99R-RY9D>. Congregate environments are wholly inappropriate during an infectious disease outbreak, a fact that motivated 100 medical experts to urge San Francisco to make hotel rooms available to every unhoused person in the City. See S.F. United in Crisis, *supra* note 174.

¹⁸² See, e.g., Dae Shik Kim Jr. & Guy Oron, *Seattle Destroyed Homeless Encampments as the Pandemic Raged*, NATION (Apr. 2, 2020), <https://www.thenation.com/article/society/seattle-homeless-sweeps-coronavirus/>, archived at <https://perma.cc/85XV-CR3P>; Rachel Riley, *Over 100 Forced to Disperse as Everett Evicts Homeless Camp*, HERALDNET (July 10, 2020), <https://www.heraldnet.com/news/over-100-forced-to-disperse-as-everett-evicts-homeless-camp/>, archived at <https://perma.cc/W5R5-9DCL>; Conrad Swanson, *Denver Sweeps Homeless Camps Despite CDC Advice to Leave Them During Pandemic*, DENVER POST (Apr. 30, 2020), <https://www.denverpost.com/2020/04/30/denver-homeless-sweep-coronavirus-covid-cdc/>, archived at <https://perma.cc/CFY6-79C2>.

¹⁸³ A few courts have issued preliminary injunctions finding state-created danger in the context of sweeps. See, e.g., *Sanchez v. City of Fresno*, 914 F. Supp. 2d 1079, 1093 (E.D. Cal. 2012).

¹⁸⁴ Frank I. Michelman, Foreword, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 11 (1969); see also James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (“It is far too late in the day to contend that the Fourteenth Amendment prohibits only racial discrimination; and to me, singling out the poor to bear a burden not placed on any other class of citizens tramples the values that the Fourteenth Amendment was designed to protect.”).

¹⁸⁵ Sara K. Rankin, *Invidious Deliberation: The Problem of Congressional Bias in Federal Hate Crime Legislation*, 66 RUTGERS L. REV. 563, 565 (2014).

¹⁸⁶ See NAT’L L. CTR., *supra* note 3; Rankin, *supra* note 4, at 109.

¹⁸⁷ See generally Rankin, *supra* note 185, at 610–19 (discussing evidence of systemic discrimination and violence supporting hate crime protection for unsheltered people).

class for equal protection purposes.¹⁸⁸ Accordingly, the level of scrutiny applied to government action that discriminates on the basis of homelessness is rational basis review. Given that virtually all government action withstands rational basis scrutiny, courts are not likely to invalidate criminalization laws, even if proven to disproportionately affect unsheltered people, because the State can so easily claim these laws are reasonably related to a legitimate state interest, such as public health or safety.¹⁸⁹ Thus, the Equal Protection Clause is largely blind to criminalization, as courts regularly “recognize and uphold [] legislation discriminating against the homeless as constitutional.”¹⁹⁰

Some critical race theorists have persuasively argued for heightened scrutiny to apply to welfare recipients’ equal protection claims based on their “state visibility,” the degree to which the State requires them to submit to increased government monitoring and intervention.¹⁹¹ Race, poverty, and state visibility closely align.¹⁹² Therefore, courts “ought to review laws that discriminate against or produce groups of individuals as the ‘state visible’ with the same heightened scrutiny with which racially discriminatory laws are reviewed.”¹⁹³

As explained below, a key feature of unsheltered homelessness is heightened state visibility, which in turn reinforces government-authorized discrimination and systemic injustice against vulnerable people who suffer from it.¹⁹⁴ The intersectionality of race, poverty, and homelessness presents opportunities for public actors to disguise illegal discrimination as something less.¹⁹⁵ Just as criminalization evolves into more sophisticated and systemic forms of discrimination that appear more “civil” and less actionable, so too should Equal Protection jurisprudence evolve to better respond to it.¹⁹⁶

¹⁸⁸ Although the U.S. Supreme Court has not directly answered this question, it has ruled that classifications based on wealth and housing are not suspect. *See* *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 465 (1988) (wealth); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972) (housing). *But see* Jennifer E. Watson, Note, *When No Place is Home: Why the Homeless Deserve Suspect Classification*, 88 IOWA L. REV. 501, 517 (2002).

¹⁸⁹ *See, e.g.*, *Davison v. City of Tucson*, 924 F. Supp. 989, 993 (D. Ariz. 1996) (“Given the City’s concerns about crime, sanitation, aesthetics, and homeless individuals’ use of fire, the Court would be hard-pressed to decide that the Defendants’ action could not withstand this relatively relaxed constitutional scrutiny.”).

¹⁹⁰ Watson, *supra* note 188, at 520.

¹⁹¹ Khiara M. Bridges, *Towards a Theory of State Visibility: Race, Poverty, and Equal Protection*, 19 COLUM. J. GENDER & L. 965, 968 (2010).

¹⁹² *Id.* at 969.

¹⁹³ *Id.* at 1026 (internal quotation marks omitted).

¹⁹⁴ *See infra* pp. 34–35.

¹⁹⁵ Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 17 (2016) (describing a transmutation of discrimination from overt racism through “a sort of release valve for the contemporary American conscience: as many forms of discrimination find less space in a normative framework, the stigmatization of poverty may present an attractive path of less resistance”).

¹⁹⁶ *See* Alice Giannini, *An Intersectional Approach to Homelessness: Discrimination and Criminalization*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 27, 34 (2017) (“What homeless people have in common is that they have all been subjected to a unique kind of discrimi-

C. *Fourth Amendment: No Reasonable Expectation of Privacy*

Along with the Fourteenth Amendment, Fourth Amendment claims are common tools to defend against sweeps and the destruction of unsheltered people's property. The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures."¹⁹⁷ Some courts recognize people experiencing homelessness have protected possessory interests in their property and rights to privacy in their tents or other temporary shelters under the Fourth Amendment or analogous state constitutional provisions.¹⁹⁸ While these constitutional protections address some forms of civil criminalization, they do nothing to address invisible persecution. Systemic discrimination influences legal determinations of the right to privacy, so unsheltered people experience a diminished right to privacy relative to people not experiencing homelessness, who tend to be wealthier and white.¹⁹⁹ Indeed, some scholars observe that Fourth Amendment law exacerbates systemic discrimination, facilitating the overpolicing and interrogation of marginalized communities.²⁰⁰

Fourth Amendment protections require "first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"²⁰¹ Some courts recognize the rights of unsheltered people to be free from unreasonable seizures under the Fourth Amendment.²⁰² Some courts expand this test and balance an individual's interest in a right to privacy against the government's interest in invading that privacy. For example, in *Lavan v. City of Los Angeles*, the Ninth Circuit affirmed that the city violated the Fourth Amendment rights of plaintiffs experiencing homelessness when it seized and immediately destroyed their personal property.²⁰³ The personal property included "personal identification documents, birth certificates, medications, family memorabilia, toiletries, cell phones, sleeping bags and blankets" that individuals "temporarily left on public sidewalks while [they] attended to necessary tasks such as eating, showering, and using restrooms."²⁰⁴ But cases like *Lavan* typically turn in part on whether the plaintiff's due process

nation characterized by social exclusion, social profiling, historic stigma, and prejudice. They have always been placed last in the entire social, political, and legal structure of our society. The focus of courts and tribunals when they intervene, should be the effects that provision has on a group of individuals based upon the position of that group in our society.").

¹⁹⁷ U.S. CONST. amend. IV.

¹⁹⁸ See, e.g., *Lavan v. City of Los Angeles*, 693 F.3d 1022, 1029, 1031 (9th Cir. 2012).

¹⁹⁹ See Kami Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 243 (2014) (noting "current Fourth Amendment standards afford less protection to economically disadvantaged citizens (particularly, the urban-dwelling poor) when compared with more affluent citizens").

²⁰⁰ See, e.g., *id.* at 254–58; Gilman & Green, *supra* note 71, at 283–84.

²⁰¹ *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

²⁰² See NAT'L L. CTR., *supra* note 3, at 77–78.

²⁰³ *Lavan*, 693 F.3d at 1030–31.

²⁰⁴ *Id.* at 1024.

rights have also been violated: if the City comports with basic due process rights, a court is unlikely to remedy the seizure and destruction of a homeless person's limited belongings—even if those items are crucial to their survival.²⁰⁵

Courts should recognize the realities of homelessness when determining whether an unsheltered person's privacy rights have been violated.²⁰⁶ An unusual example of such recognition is *State v. Pippin*, where the Washington Court of Appeals determined that an encampment resident had a privacy interest in his makeshift tent under the Washington State Constitution.²⁰⁷ William Pippin was living under an enclosed tarp on public property held up between a post on a public road and a chain link fence on private property.²⁰⁸ Officers, who were seeking to enforce a previously unenforced public camping ban, arrived at the encampment around 10:30 a.m., but could not see inside Pippin's dwelling.²⁰⁹ One officer "rapped" on Pippin's dwelling, announcing themselves as police.²¹⁰ Pippin responded "in a groggy voice . . . 'Hello, yeah here, just waking up.'" ²¹¹ The officers told him to exit the tent to discuss the camping ban, and "Pippin slowly and lethargically responded that he would come out in a moment."²¹² The officers provided conflicting testimony about how long they waited—somewhere between five seconds and five minutes—before one officer grew impatient and lifted the tarp, discovering Pippin sitting in bed with a bag of what appeared to be methamphetamine next to him.²¹³ Pippin was arrested and charged with possession of methamphetamine.²¹⁴

Pippin moved to suppress the evidence, arguing in relevant part that his tent was protected by the Fourth Amendment's guarantee against unreasonable searches of "houses" and the Washington State Constitution's analogue prohibiting invasion of one's "private affairs, or his home."²¹⁵ The trial court granted the motion, primarily relying on *United States v. Sandoval*,²¹⁶ where the Ninth Circuit held a similarly situated defendant had a subjective expectation of privacy even when he was engaged in illegal activity, and his expectation was objectively reasonable when he was camping on public land

²⁰⁵ *Id.* at 1032–33.

²⁰⁶ *See State v. Pippin*, 403 P.3d 907, 917 (Wash. Ct. App. 2017) ("[T]o call homelessness voluntary, and thus unworthy of basic privacy protections is to walk blind among the realities around us. Worse, such an argument would strip those on the street of the protections given the rest of us directly because of their poverty. Our constitution means something better.").

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 910.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 910–11.

²¹⁴ *Id.* at 911.

²¹⁵ *Id.* at 911–12 (quoting WASH. CONST. art. I, § 7).

²¹⁶ 200 F.3d 659, 661 (9th Cir. 2000).

without permission because he was never asked to vacate.²¹⁷ The Washington Court of Appeals declined to address the Fourth Amendment claim, instead holding Pippin's "private affairs" were intruded upon in violation of the Washington State Constitution.²¹⁸ To reach this holding, the court determined the touchstone of privacy protection was whether his tent constituted a "dwelling," such that it "served as a refuge or retreat from the outside world."²¹⁹ In this assessment, the more Pippin's tent "could be the repository of objects or information showing his familial, political, religious, or sexual associations or beliefs, and the more it could contain objects intimately connected with his person, then the more his tent and the belongings within" triggered state constitutional protection as to his "private affairs."²²⁰ The court observed Pippin slept in his tent, an intimate practice analogous to grounds for a hotel guest's reasonable expectation of privacy.²²¹ Further,

The tent also gave him a modicum of separation and refuge from the eyes of the world: a shred of space to exercise autonomy over the personal. These artifacts of the personal could be the same as with any of us, whether in physical or electronic form: reading material, personal letters, signs of political or religious belief, photographs, sexual material, and hints of hopes, fears, and desires. These speak to one's most personal and intimate matters.²²²

The court's meditation on the importance of Pippin's tent to his life, his security, and his privacy is highly unusual; similar judicial introspection on Fourth Amendment grounds—as opposed to a state analogue—does not exist. But the thrust of *Pippin*'s reasoning almost sounds like an admonition of how disconnected and unconcerned the law is generally with the denial of the right to privacy for unsheltered people:

The law is meant to apply to the real world, and the realities of homelessness dictate that dwelling places are often transient and precarious. The temporary nature of [a] tent does not undermine any privacy interest. Nor does the flimsy and vulnerable nature of an improvised structure leave it less worthy of privacy protections. For the homeless, this may often be the only refuge for privacy in the world as it is.²²³

The value *Pippin* affords to the circumstances of unsheltered people is rare; it is an outlier. Even when Fourth Amendment challenges secure some protection against civil enforcement, right to privacy jurisprudence ignores

²¹⁷ *Id.* at 911 (citing *Sandoval*, 200 F.3d at 659).

²¹⁸ *Pippin*, 403 P.3d at 912, 917.

²¹⁹ *Id.* at 914.

²²⁰ *Id.* at 914–15.

²²¹ *Id.* at 915 (citing *State v. Jordan*, 156 P.3d 893, 898 (Wash. 2007)).

²²² *Id.*

²²³ *Id.* (internal citations omitted).

invisible persecution and other forms of systemic discrimination unsheltered people endure.

Many scholars show how Fourth Amendment determinations disadvantage poor and marginalized groups because their socioeconomic class and housing status differentially impact their privacy rights.²²⁴ The degree of privacy protection one receives often depends on the surroundings they can afford.²²⁵ For example, the search of a brick-and-mortar home generally requires probable cause and a warrant, but if one lives in their vehicle or cannot afford a home, these conditions severely weaken their privacy rights.²²⁶ Poor people endure greater surveillance and policing than their wealthier counterparts, often resulting in criminal charges, civil sanctions, and daily persecution.²²⁷ Ultimately, Fourth Amendment jurisprudence reinforces systemic inequities: it makes “wealthier suspects better off than they otherwise would be and may make poorer subjects worse off.”²²⁸

The frailty of the Fourth Amendment is particularly concerning when applied to people experiencing homelessness. The home is a primary measure of privacy, and unsheltered people must live in public, constantly exposed to surveillance: “[T]hey typically make their ‘home’ on property that they are not entitled to be on; their belongings and activities are on ‘open fields’ which common passersby can easily see;”²²⁹ and this involuntary transparency disproportionately exposes them to aggressive surveillance and policing. The bar to policing unsheltered people, then, is low compared to their wealthier neighbors. And, “[b]y raising the cost of the tactics that most intrude on privacy, Fourth Amendment law lowers the cost of other tactics, and those are the tactics that are most useful in uncovering the crimes of the

²²⁴ See, e.g., Michele Estrin Gilman, *The Class Differential in Privacy Law*, 77 BROOK. L. REV. 1389, 1444–45 (2012).

²²⁵ See Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391, 401–05 (2003); see also David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 MISS. L.J. 143, 192 (2002) (noting it is “much easier for rich people than for poor people to stay home when engaged in activities they wish to keep private. Granting homes more privacy than other places therefore tilts Fourth Amendment protection in favor of the rich and against the poor, who are forced to conduct much of their lives outside of their residences”).

²²⁶ Arnold H. Loewy, *United States v. Jones: Return to Trespass—Good News or Bad*, 82 MISS. L.J. 879, 880 (2013).

²²⁷ See Simmons, *supra* note 199, at 260.

²²⁸ William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265, 1266 (1999).

²²⁹ Simmons, *supra* note 199, at 249–50 (quoting David Reinbach, *The Home Not the Homeless: What the Fourth Amendment Has Historically Protected and Where the Law Is Going After Jones*, 47 U.S.F. L. REV. 377, 381–85 (2012)). In most cases upholding warrantless searches of individuals living in tents, courts have relied on the fact of unlawful presence on public land as a bar to reasonable expectations of privacy. Courts reason that “a trespasser who places his property where it has no right to be has no right of privacy as to that property.” *Amezquita v. Hernandez-Colon*, 518 F.2d 8, 11 (1st Cir. 1975) (quoting *State v. Pokini*, 367 P.2d 499, 509 (Haw. 1961)).

poor.”²³⁰ Thus, current Fourth Amendment jurisprudence may actually fuel the persecution of unsheltered people.

IV. INVISIBLE PERSECUTION

Unsheltered people lack sufficient protection against civil enforcement, but they lack any protection from invisible persecution. Individuals experiencing homelessness are disproportionately surveilled, policed, interrogated, and harassed by state actors, private security, and housed people. Such relentless enforcement is a particularly pernicious form of criminalization because it is pervasive, not legally cognizable, and operates in ways that are difficult to prove. Though such persecution is invisible to the law, its presence and damaging impact are undeniable.²³¹ The law’s tolerance of such persecution ensures its systemic quality.

For unsheltered people, persecution is both omnipresent and elusive. Nationally, criminalization laws are proliferating: over the last decade, for example, city-wide bans on camping increased 70%; city-wide bans on begging, loitering, and loafing increased 103%; and bans on sleeping in one’s vehicle increased a staggering 213%.²³² But significantly, invisible enforcement methods, which do not generate an official record, also appear to be ballooning. Most jurisdictions do not maintain records of police engagements with unsheltered people in general, even if those engagements result in charges or citations. And far fewer jurisdictions maintain records of such engagements when they do *not* result in charges or citations but still result in forced displacement, interrogation, searches, and other authorized harassment of unsheltered people. Despite the challenges of researching these hidden police practices, some studies have persevered (often depending on interviews and surveys of unsheltered people) and strongly suggest that most anti-homeless policing does not generate an official record, resulting in a potent but virtually invisible enforcement regime.²³³ Overall, “official statistics cannot directly measure the frequency and formality of police-citizen interactions because they provide information only on the relatively small percentage of encounters in which an officer formally invokes the law.”²³⁴

Invisible persecution encompasses profiling and overpolicing, perpetual evictions through move-along warnings and sweeps, the deputization of private citizens, and the special stigma surrounding homelessness. Such sys-

²³⁰ Stuntz, *supra* note 228, at 1267.

²³¹ Pervasive penalty encompasses “consistent punitive interactions with state officials that rarely result in arrest, but that do material and psychological harm. This process not only reproduces homelessness, but also deepens racial, gender, and health inequalities among the urban poor.” Herring et al., *supra* note 15, at 131.

²³² NAT’L L. CTR., *supra* note 3, at 12–14.

²³³ See, e.g., Herring et al., *supra* note 15, at 137 (analyzing data on the “pervasive penalty” of invisible persecution methods in San Francisco, such as move-along warnings).

²³⁴ John Liederbach & Lawrence F. Travis III, *Wilson Redux: Another Look at Varieties of Police Behavior*, 11 POLICE Q. 447, 450 (2008).

temic punishments thrive, not only due to legal support, but also due to their elusive nature.

A. Profiling & Overpolicing

Law enforcement officers have long been permitted to profile, or assume criminality, based on one's appearance, particularly one's race and apparent homelessness.²³⁵ The law tolerates and encourages pervasive profiling of unsheltered people based on their appearance and presence in public space.²³⁶

The broken windows theory provides a psychological blueprint for understanding contemporary law enforcement, reflecting the American tradition of associating criminality with BIPOC, poor, and unsheltered people. It creates a sense of urgency to surveil and control areas predominantly occupied by marginalized groups.²³⁷ Indeed, intersectionality of race and poverty—as ultimately expressed in homelessness—particularly attracts overpolicing.²³⁸ They “are more vulnerable to police contact and violence because members of these groups often have non-normative identities to which stereotypes of criminality and presumptions of disorder apply.”²³⁹ In other words, the very presence of BIPOC, poor, and unsheltered people is coded as disorder.²⁴⁰

Broken windows policing, profiling, and overpolicing are conjoined, enabling social and spatial control practices and sending a message of who belongs where.²⁴¹ Profiling, whether based on one's race or visible poverty, grants law enforcement nearly unfettered discretion to stop and engage even law-abiding targets.²⁴² Law enforcement officials' implicit biases affect their

²³⁵ See Kevin R. Johnson, *How Racial Profiling in America Became the Law of the Land: United States v. Brignoni-Ponce and Whren v. United States and the Need for Truly Rebellious Lawyering*, 98 GEO. L.J. 1005, 1006 (2010) (“[T]he use of racial profiling by law enforcement authorities in the United States has long been permitted and encouraged, if not expressly authorized, by U.S. constitutional law.”).

²³⁶ See Giannini, *supra* note 196, at 36 (noting facially neutral laws are discriminatorily applied to people experiencing homelessness).

²³⁷ See Devon W. Carbado, *Blue-On-Black Violence: A Provisional Model of Some of the Causes*, 104 GEO. L.J. 1479, 1485–86 (2016) (“The basic idea is that if police officers do not vigorously focus their attention on low-level crimes and signs of disorder in a given community, that community will experience more serious and long-lasting problems of criminality and social upheaval.”); see also Herring et al., *supra* note 15, at 133 (describing the police practice of “rabble management” in areas where people experiencing homelessness live as “the routine jailing of the disreputable and disaffiliated for minimal offenses in the interests of public order”).

²³⁸ See Carbado, *supra* note 237, at 1486–87 (noting such policing “derives at least in part from economic marginalization itself functioning as a sign of disorder”).

²³⁹ *Id.* at 1497.

²⁴⁰ See *id.* at 1489.

²⁴¹ See *id.* at 1493.

²⁴² See, e.g., Jeff D. May et al., *Pretext Searches and Seizures: In Search of Solid Ground*, 30 ALASKA L. REV. 151, 181–82 (2013) (reviewing statistics demonstrating the disproportionate impact racial profiling has on people who have not committed crimes).

visual assessments of race and poverty, activating their perceptions about which people are criminal, who seems suspicious, and whether someone belongs.²⁴³ The law, the media, and social-cultural messaging mutually reinforce implicit biases that identify the targets of profiling.²⁴⁴ Whether conducted by law enforcement, private security guards, or citizens armed with social media, profiling hinges not only on the prejudicial association of poor people with criminality, but upon the expected imprimatur of the law.²⁴⁵

Targeted surveillance and overpolicing—as well as the attendant risks of violence from law enforcement and wealthier individuals—are all too familiar to marginalized communities. Racial profiling, for example, subjects BIPOC, particularly Black males, to frequent and baseless encounters with police. The Supreme Court has not found that law enforcement practices such as stop-and-frisk,²⁴⁶ suspicionless witness stops,²⁴⁷ and pretextual stops²⁴⁸ violate the Constitution. They are routinely upheld,²⁴⁹ despite clear

²⁴³ See generally Rankin, *supra* note 195 (discussing implicit biases against unsheltered people).

²⁴⁴ Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1557 (2005) (discussing racial profiling and noting “implicit bias can be exacerbated or mitigated by the information environments we inhabit”).

²⁴⁵ See, e.g., Mary I. Coombs, *The Constricted Meaning of “Community” in Community Policing*, 72 ST. JOHN’S L. REV. 1367, 1370 (1998) (“[T]he only constitutional limit on an officer’s arrest decision is whether the officer has seen some law broken. It is constitutionally irrelevant why he or she has chosen to enforce this law against this person at this time.”); Michael Gentithes, *Suspicionless Witness Stops: The New Racial Profiling*, 55 HARV. C.R.-C.L. L. REV. 492, 494 (2020) (“[S]uspicionless witness stops are highly intrusive, provoke anxiety for the young people of color who are often seized in full public view, include detailed questioning from the officers designed to elicit self-incriminating information, and can be conducted *ad nauseam* without expending significant police resources or generating negative publicity.”); David A. Harris, *The Stories, the Statistics, and the Law: Why Driving While Black Matters*, 84 MINN. L. REV. 265, 268 (1999) (“Aside from the possibility of suing a police department for these practices—a mammoth undertaking, that should only be undertaken by plaintiffs with absolutely clean records and the thickest skin—there is no relief available.”).

²⁴⁶ See *Terry v. Ohio*, 392 U.S. 1, 30 (1968); see also Simmons, *supra* note 199, at 255.

²⁴⁷ See *Illinois v. Lidster*, 540 U.S. 419, 423 (2004). See generally Gentithes, *supra* note 245 (explaining how police officers can constitutionally conduct suspicionless witness stops under *Lidster*).

²⁴⁸ See, e.g., *Whren v. United States*, 517 U.S. 806, 819 (1996); see also Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946, 976 (2002); May et al., *supra* note 242, at 183; O’Connor, *supra* note 78, at 243 (“[Some] cities . . . eschew laws explicitly criminalizing activities associated with homelessness, but which nevertheless target the homeless population. Such cities generally use statutes that appear neutral towards the homeless on their faces—that is, target relatively specific conduct . . . that does not seem to be predominantly performed by the homeless population—but enforce them against the homeless disproportionately.”).

²⁴⁹ See May et al., *supra* note 242, at 152–53 (“One of the most pressing legal issues facing the nation is the belief that officers engage in racial profiling through the use of the pretext stop.”); see also Abraham Abramovsky & Jonathan I. Edelman, *Pretext Stops and Racial Profiling After Whren v. United States: The New York and New Jersey Responses Compared*, 63 ALB. L. REV. 725, 726 (2000) (“[T]he *Whren* Court validated one of the most common methods by which racial profiles are put into effect—the pretext stop.”); I. Bennett Capers, *Rethinking the Fourth Amendment: Race, Citizenship, and the Equality Principle*, 46 HARV. C.R.-C.L. L. REV. 1, 12 (2011) (“Here, the fact that our current Fourth Amendment jurisprudence now fosters an atmosphere in which racial profiling is often unremarkable and

evidence that these practices disproportionately impact urban, poor communities as well as harass, demean, stigmatize, and traumatize their targets.²⁵⁰ The “lack of stricter constitutional standards has tolerated, if not blatantly encouraged, the use of aggressive police tactics” against the urban poor, while similar treatment against wealthier white neighbors would evoke widespread outrage.²⁵¹

Overpolicing and surveilling of BIPOC, poor, and unsheltered people also occurs at a macro level through state-sponsored information gathering and monitoring, such as requiring paperwork and interviews to access welfare or shelter.²⁵² To earn such benefits, applicants often must answer highly personal questions relating to their sexual history, mental health, substance use, and experience with domestic violence.²⁵³ Even after submitting such private information, they are often subjected to continued monitoring to ensure compliance.²⁵⁴ Such forced exposure—which disproportionately impacts marginalized groups—amounts to state visibility,²⁵⁵ which is generally authorized and thus functions as a “social control mechanism” to “exert influence and reproduce power relations.”²⁵⁶ The forced exposure of marginalized groups underscores their special vulnerability and differentiates them from others who are more privileged and can afford greater privacy.²⁵⁷

Although poor people are subjected to greater surveillance and policing than their wealthier counterparts, the law generally supports it.²⁵⁸ Given the

juridically tolerated, and in which racial minorities perceive themselves to be second-class citizens, evidences the current Court’s retreat from concerns about equality and citizenship.”).

²⁵⁰ With respect to racial profiling, see Carbado, *supra* note 248, at 976 (discussing the disproportionate and traumatizing impact of racially disparate policing); Gentithes, *supra* note 245, at 496; Harris, *supra* note 245, at 288–89, 326. Criminalization of homelessness clearly targets unsheltered people, particularly people experiencing chronic homelessness. See, e.g., Rankin, *supra* note 4; see also O’Connor, *supra* note 78, at 243 (“[C]ities generally use statutes that appear neutral towards the homeless on their faces—that is, target relatively specific conduct (with apparent social cost) that does not seem to be predominantly performed by the homeless population—but enforce them against the homeless disproportionately.”).

²⁵¹ Simmons, *supra* note 199, at 265–66.

²⁵² See, e.g., Bridges, *supra* note 191, at 968; Gilman & Green, *supra* note 71, at 270–75.

²⁵³ See Gilman & Green, *supra* note 71, at 270–71. See generally KAARYN S. GUSTAFSON, CHEATING WELFARE: PUBLIC ASSISTANCE AND THE CRIMINALIZATION OF POVERTY (2011) (explaining that welfare policies are predicated on distrust of those seeking assistance); Suzanne Skinner & Sara K. Rankin, *Shut Out: How Barriers Often Prevent Meaningful Access to Emergency Shelter*, 6 HOMELESS RTS. ADVOC. PROJECT (2016). Similar critiques have targeted federal in forma pauperis paperwork as unnecessarily “invasive” and “demeaning.” See Hammond, *supra* note 64, at 1503 (“Even if an in forma pauperis form is precisely targeted, poor litigants are being asked too much to plead their poverty.”).

²⁵⁴ See Gilman & Green, *supra* note 71, at 260, 275, 293; Bridges, *supra* note 191, at 985 (“[S]tate visibility encompasses the ability of the state not only to ask invasive questions, but also to demand answers that may substantiate the state’s insistence upon maintaining a regulatory (and punitive, if necessary) relationship with the subject.”).

²⁵⁵ See, e.g., Bridges, *supra* note 191, at 968.

²⁵⁶ Gilman & Green, *supra* note 71, at 260.

²⁵⁷ See Bridges, *supra* note 191, at 981.

²⁵⁸ See Gilman & Green, *supra* note 71, at 283 (“[M]arginalized people tend to have less privacy in their homes, bodies, and decisions than their more privileged counterparts.”); Kami

dearth of legal protection and their vulnerability to constant surveillance and policing, unsheltered people are essentially powerless to defend themselves against it.

B. Deputizing Citizens

The degree of systemic discrimination and violence homeless people suffer is also clear in the deputization of private citizens and private security to exclude unsheltered people from public space. Citizens are deputized in at least three ways. First, police often engage with and sometimes run social media pages committed to policing homelessness. Police often act on information citizens post on these pages. Second, police create other tools for citizens to act as more effective deputies. Third, police coordinate with business improvement districts (“BIDs”), who serve a private policing function, to share information. The deputization of private citizens blurs the line between citizens and police, contributing to the over-surveillance of people experiencing homelessness.

Popular social media platforms such as Nextdoor commonly host a strong law enforcement presence alongside citizens sharing neighborhood information, obscuring distinctions between citizen and police surveillance.²⁵⁹ Nextdoor’s activation of citizens as an extension of law enforcement has resulted in citizen-led surveillance teams.²⁶⁰ The deputization of private citizens to surveil neighborhood activity also generated significant evidence of racial profiling in citizen-driven complaints through the platform.²⁶¹ Un-

Chavis Simmons, *Future of the Fourth Amendment: The Problem with Privacy, Poverty and Policing*, 14 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 240, 255 (2014) (discussing scholarly opinions that Fourth Amendment protections fail to “reach ‘the face-to-face law enforcement interactions that many residents of poor, urban neighborhoods face on a daily basis’”); see also Evanie Parr, *When a Tent is Your Castle: Constitutional Protection Against Unreasonable Searches of Makeshift Dwellings of Unhoused Persons*, 42 SEATTLE U. L. REV. 993, 1004 (2019) (“Traditional approaches to Fourth Amendment protections based on property rights and reasonable expectations of privacy fail to adequately address the realities of the lives of poor people and, in fact, reinforce systemic inequality.”).

²⁵⁹ See Sarah Emerson, *The Police Are Watching on Nextdoor*, MEDIUM: ONEZERO (June 3, 2020), <https://onezero.medium.com/the-police-are-watching-on-nextdoor-718996fcbd6a>, archived at <https://perma.cc/5CAW-FY3W> (“While posting content about protesters and other individuals may seem innocuous, or even helpful, Nextdoor users should be aware that in all likelihood, the police are watching.”).

²⁶⁰ See, e.g., *Tucson Police Department Goes Digital to Fight Crime*, NEXTDOOR: BLOG (Sept. 24, 2014), <https://blog.nextdoor.com/2014/09/24/tucson-police-department-goes-digital-to-fight-crime/>, archived at <https://perma.cc/QBA7-L42W> (reporting on a law enforcement and Nextdoor partnership to institute a “virtual neighborhood watch” program throughout the city of Tucson).

²⁶¹ See Natalie Hopkinson, *Opinion, How Social Media Turns Neighbors into Vigilantes*, HUFFPOST (May 22, 2018), https://www.huffpost.com/entry/opinion-hopkinson-nextdoor-gentrification-police_n_5b036b18e4b0a046186f0e27, archived at <https://perma.cc/E5N3-TNV6>; Sam Levin, *Racial Profiling Via Nextdoor.com*, EAST BAY EXPRESS (Oct. 7, 2015), <https://www.eastbayexpress.com/oakland/racial-profiling-via-nextdoorcom/Content?oid=4526919>, archived at <https://perma.cc/4DJL-PRAM>.

surprisingly, “Nextdoor is being used to actively surveil, police, and spread animosity against local homeless populations.”²⁶²

Citizens use other social media platforms like Facebook, Instagram, and Twitter for similar purposes.²⁶³ For example, a small business owner in Everett, Washington created a Facebook page that hosts a twenty-four-hour livestream video of a homeless encampment through what he calls the “Tweakerville Cam.”²⁶⁴ The purpose of the livestream is to “shame” the homeless residents, agitate neighbors, and prompt police and city intervention.²⁶⁵ At the time of this writing, the Facebook page had over 14,000 “likes” and over 16,000 followers.²⁶⁶

These nongovernmental social media pages are even run with police assistance in some cases. Rex Schellenberg, a man experiencing homelessness in Los Angeles, is suing the city over Facebook pages, such as “Crimebusters of West Hills and Woodland Hills” and “Homeless Transient Encampments of our West Valley.”²⁶⁷ Members use these pages to document their thoughts about unsheltered people in their community, posting and sharing “sensitive and sometimes erroneous information” in texts, photos, and videos.²⁶⁸ Mr. Schellenberg claims that police “target and harass” him with the help of these groups, who are “putting a target on our back.”²⁶⁹ In response to comments that citizens should not post private information and pictures of any person without their consent, the founder of these Facebook pages reportedly said such actions were “legal” because the “police run this page.”²⁷⁰ Apparently, Los Angeles Police Department (“L.A.P.D.”) officers had served as administrators for these pages in the past and had made de-

²⁶² Rick Paulas, *On Nextdoor, the Homeless Are the Enemy*, MEDIUM: ONEZERO (Sept. 30, 2019), <https://onezero.medium.com/how-nextdoor-encourages-hate-of-the-homeless-9200475cda43>, archived at <https://perma.cc/9KQ7-4AEQ>.

²⁶³ See @streetpeopleoflosangeles, INSTAGRAM, <https://www.instagram.com/streetpeople-oflosangeles/> (last visited Mar. 6, 2021); see also @betersoma, TWITTER, <https://twitter.com/betersoma> (last visited Mar. 6, 2021); @la.homeless, INSTAGRAM, <https://www.instagram.com/la.homeless/> (last visited Mar. 6, 2021).

²⁶⁴ Eric Wilkinson, ‘North Everett Tweaker Cam’ Live Streaming Homeless Camp, KING 5 NEWS (Aug. 10, 2017), <https://www.king5.com/article/news/local/everett/north-everett-tweaker-cam-live-streaming-homeless-camp/463489391>, archived at <https://perma.cc/JJE8-TWN7> (“A Tweaker is derogatory slang for a methamphetamine addict.”).

²⁶⁵ *Id.*

²⁶⁶ See North Everett Tweaker Cam, FACEBOOK, https://www.facebook.com/North-Everett-Tweaker-Cam-152916738594274/?ref=page_internal (last visited Mar. 6, 2021), archived at <https://perma.cc/T6WJ-TR7V>.

²⁶⁷ See Emily Alpert Reyes, *Homeless Man Sues L.A. Over Facebook Pages Used by Police, Alleging Harassment*, L.A. TIMES (Feb. 11, 2020), <https://www.latimes.com/homeless-housing/story/2020-02-11/homeless-lawsuit-facebook-pages>, archived at <https://perma.cc/PDR6-3TZD>.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ Letter from Paul Boden, W. Reg’l Advoc. Project, Tristia Bauman, Nat’l L. Ctr. on Homelessness & Poverty, Steve Diaz, L.A. Cmty. Action Network & Megan Hustings, Nat’l Coal. for the Homeless, to Cal. Att’y Gen.’s Off. (Nov. 20, 2018), <https://ktownforall.org/wp-content/uploads/2019/08/Los-Angeles-AG-Complaint-update-20181.pdf>, archived at <https://perma.cc/SMC4-YQGW>.

tailed posts.²⁷¹ Ultimately, the L.A.P.D. banned its officers from using these social media pages because of the prevalence of “threats and bullying against homeless people.”²⁷² The L.A.P.D. Valley Division Chief explained his decision was based on his observation that the pages encourage the use of violence against people experiencing homelessness, as evidenced in comments like, “Let me put rat poison in a soup, and give it out to individuals,” and, “When do we start shooting?”²⁷³

Such social media groups offer a toxic megaphone to “facilitate anti-homeless cyberharassment and cyberstalking,” leading to “the digital humiliation, taunting, shaming, and derision” of unsheltered people.²⁷⁴ Members have been documented as discussing detailed ways to attack unsheltered people, such as using “baseball bats, fire hoses, pigeon spike strips, Clorox, stink bombs, poison oak, and even ‘sugar solution spray.’”²⁷⁵ Members have spread private and potentially defamatory information about unsheltered residents, including instances where police officers publicized information about “individuals’ identity, criminal records, mental health status or treatment history, and history of drug or alcohol dependency.”²⁷⁶ The mix of official policing power with citizen-fueled anger is dangerous for unsheltered people.

But the mass activation of citizens to police public space also occurs on official government platforms. For example:

[C]ity officials turned residents of San Francisco into quasi informants by urging them to report signs of disorder using a non-emergency 311 line and a mobile application, Open311. According to the Mayor’s Office, “The new SF311 app for residents and visitors to San Francisco allows users to quickly and easily report quality of life issues by sending pictures, a brief description and a map-based location.” With respect to enabling gentrification through the policing of public disorder, the government of San Francisco has an app for that.²⁷⁷

Thus, even governmental reporting platforms effectively empower citizens to contribute to the excessive policing and surveillance of unsheltered people.

²⁷¹ *Id.*

²⁷² Josh Cain, *Critics, Supporters of Valley’s Crimebusters Facebook Group Vent at LAPD Town Hall*, L.A. DAILY NEWS (Sept. 10, 2019), <https://www.dailynews.com/2019/09/10/critics-supporters-of-valleys-crimebusters-facebook-group-vent-at-lapd-town-hall/>, archived at <https://perma.cc/P3HC-2NQN>.

²⁷³ *Id.*

²⁷⁴ Boden et al., *supra* note 270, at 3.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ Carbado, *supra* note 237, at 1494 (quoting News Release, Office of the Mayor, Mayor Lee Launches New Open311 Platform to Improve City’s 311 Customer Service (Aug. 8, 2013), <https://sfmayor.org/article/mayor-lee-launches-new-open311-platform-improve-citys-311-customer-service>, archived at <https://perma.cc/7XUQ-2H72>).

BIDs also act as extensions of law enforcement to police people experiencing homelessness in downtown areas.²⁷⁸ BIDs commonly coordinate with local police and private security to expand the reach of policing practices.²⁷⁹ Even in instances where BIDs offer social service outreach, this outreach is commonly paired with move-along warnings and other efforts to push unsheltered people from public space, which is “experienced by homeless people as an additional form of policing, surveillance, and harassment.”²⁸⁰ The privatization of broken windows policing further entrenches the overpolicing and civil criminalization of unsheltered people.²⁸¹

The mass activation of citizens to police people experiencing homelessness not only systematizes their stigmatization and persecution, it also fans the flames of vigilantism. Housed people commonly commit acts of violence, including assault and murder, against homeless people.²⁸² But even in the absence of vigilantism, unsheltered people are relentlessly subjected to a public-private gauntlet of surveillance and criminalization, creating the omnipresent torment of having no safe and legal place to exist.

C. Pervasive Stigma

The persecution of unsheltered people results in profound damage to individual and collective self-esteem, reinforcing the reality that persecution is a standard part of their daily lives.²⁸³ The systemic denial of place and property—the imposition of exile—is a hallmark of such persecution. Place and property are core to American identity. “We feel and act about certain things that are ours very much as we feel and act about ourselves, and thus between what a man calls me and what he simply calls mine the line is

²⁷⁸ See generally U.C. BERKELEY L.: POL’Y ADVOC. CLINIC, HOMELESS EXCLUSION DISTRICTS (2018), <https://www.law.berkeley.edu/wp-content/uploads/2018/09/SSRN-id3221446.pdf>, archived at <https://perma.cc/TWX3-3HEQ>.

²⁷⁹ See *id.* at 5.

²⁸⁰ *Id.* at 2.

²⁸¹ See, e.g., *id.* at 12 (reporting more than half of BIDs use citizen partnership groups and private security to “directly enforce[] anti-homeless laws”).

²⁸² See, e.g., NAT’L L. CTR. ON HOMELESSNESS & POVERTY & U.S. HUM. RTS. NETWORK UPR HOUS. WORKING GRP., HOUSING AND HOMELESSNESS IN THE UNITED STATES OF AMERICA 8–9 (Sept. 15, 2014), https://nlchp.org/wp-content/uploads/2018/10/UPR_Housing_Report_2014.pdf, archived at <https://perma.cc/2V24-CHVQ> (reporting from 1999 to 2013, housed individuals perpetrated at least 1,437 acts of violence against individuals experiencing homelessness in 47 states, Puerto Rico, and the District of Columbia, resulting in 375 deaths); NAT’L COAL. FOR THE HOMELESS, VULNERABLE TO HATE: A SURVEY OF BIAS-MOTIVATED VIOLENCE AGAINST PEOPLE EXPERIENCING HOMELESSNESS IN 2016–2017 (2018), http://nationalhomeless.org/wp-content/uploads/2019/01/hate-crimes-2016-17-final_for-web2.pdf, archived at <https://perma.cc/A55H-8J5V> (reporting from 1999 to 2017, housed individuals committed at least 1,785 acts of violence against individuals experiencing homelessness, resulting in 475 deaths).

²⁸³ Gentithes, *supra* note 245, at 496 (“Suspicionless stops are ‘damaging to the detainees’ self-esteem, and reinforce the reality that racism and intolerance are for many African-Americans a regular part of their daily lives.”).

difficult to draw.”²⁸⁴ Property and place ground our sense of identity, dignity, and stability.²⁸⁵ This intimate connection may be best understood through the centering concept of home²⁸⁶ and the persecution of those who lack it.

When a person lacks property, place, and home, this deficit is understood as comprehensive failure, destroying not only “one’s sense of self but also how others perceive that self.”²⁸⁷ This stigma is reinforced through the communicative power of the law itself.²⁸⁸ Thus, the experience of unsheltered homelessness is one of profound stigma; the criminalization of homelessness reinforces this stigma by authorizing the functional exile of already vulnerable people from public space.²⁸⁹ Criminalization makes homelessness worse²⁹⁰ and subjects unsheltered people to relentless punishment for surviving in public space. Such systemic discrimination, encouraged and authorized by the government, should be legally intolerable.

D. Perpetual Eviction

One of the most traumatic aspects of homelessness is being subjected to forced displacement and constant ejection, condemned to a never-ending march from one place to another. This perpetual state of eviction not only amounts to persecution, but it is also very difficult to document.

Move-along warnings are likely one of the most common forms of invisible persecution. In one year, San Francisco issued over 14,000 citations for violations of various “anti-homeless laws”; over 69% of unsheltered people surveyed were cited within the past year, and 22% of those individuals were cited over five times.²⁹¹ Nearly half reported city officials recently taking and destroying their valuable personal property.²⁹² But over 80% of such interactions were “not resolved through citation or arrest, but by police warnings and requests” that homeless people stop engaging in life-sustaining activities in public or move along.²⁹³ Indeed, fully 70% of respon-

²⁸⁴ Nestor M. Davidson, *Property and Identity: Vulnerability and Insecurity in the Housing Crisis*, 47 HARV. C.R.-C.L. L. REV. 119, 119 (2012) (discussing the psychological influence of property and homeownership as contributors to the Great Recession) (internal quotation marks omitted).

²⁸⁵ *Id.* at 119–20.

²⁸⁶ *Id.* at 125.

²⁸⁷ *Id.* at 119.

²⁸⁸ *See id.* at 125 (discussing how “law played a central role in elevating the meaning of homeownership”).

²⁸⁹ Rankin, *supra* note 195, at 4.

²⁹⁰ Rankin, *supra* note 4, at 104.

²⁹¹ Herring et al., *supra* note 15, at 7.

²⁹² *Id.* (“Several had lost tools, bikes, or computers used for their work, expensive daily medicine needed to treat HIV and Hepatitis C, and ID and benefit cards that were key to their survival on the streets.”). Persistent racial disparities were also evident: BIPOC “were cited, searched, and had property taken at higher rates than did white survey participants.” *Id.*

²⁹³ *Id.* *See generally* NAT’L L. CTR. ON HOMELESSNESS & POVERTY, HOUSING AND HOMELESSNESS IN THE UNITED STATES OF AMERICA (2019), <http://nlchp.org/wp-content/uploads/>

dents were forced to move.²⁹⁴ Another study showed Denver police issued over 5,000 move-along warnings to homeless city residents in a single year and noted a 475% increase in such contacts within the last three years.²⁹⁵

Sweeps are closely related to move-along orders, but unlike move-alongs, sweeps are associated with physical acts of enforcement to move people and seize property. Sweeps sometimes generate criminal charges or civil infractions, but cities increasingly publicize when they decline to issue such outcomes, attempting to create a positive picture of sweeps as necessary for outreach or public health and safety.²⁹⁶ Even if a jurisdiction keeps some record of sweeps, generally the information is limited and exceedingly difficult to track.²⁹⁷ More often, the only people who will ever know details about a sweep are the targets and the enforcers.

The traumatic and devastating consequences of sweeps—which forcibly relocate vulnerable people who often have no safe and legal place to go—are well documented,²⁹⁸ but legal remedies are rooted in property rights rather than concerns about discrimination or systemically facilitated human suffering. Sometimes, individuals experiencing homelessness may successfully defend against sweeps if the facts fit the confines of the Fourth or Fourteenth Amendments, but if state actors provide adequate notice or follow basic protocols in a sweep, the law completely ignores the overarching punishment sweeps impose.

Without solutions to their homelessness, unsheltered people experience sweeps and move-along orders as a constant and endless cycle of eviction. Unsheltered people commonly report feeling a relentless exile from public space, “like a constant pestering that keeps you from ever feeling relaxed or belonging just about anywhere.”²⁹⁹ Some describe feeling like “nuisances,” “burdens,” “trash,” “the scourge,” “the plague,” “dirt,” “a black mold you

2019/10/Housing-Homelessness-US-UPR-2019.pdf, archived at <https://perma.cc/C7B8-TRDB>.

²⁹⁴ Herring et al., *supra* note 15, at 7.

²⁹⁵ Nantiya Ruan et al., *Too High a Price 2: Move on to Where? 2* (U. Denv. Sturm C. L., Working Paper no. 18-14, 2018).

²⁹⁶ See, e.g., Rankin, *supra* note 46 (discussing Seattle’s approach to sweeps). Such pictures are misleading: not only are sweeps shown to worsen health and safety outcomes for unsheltered people, but evidence suggests they fail to connect people with meaningful service. See, e.g., Ruan et al., *supra* note 295, at 7.

²⁹⁷ Seattle is an example of a jurisdiction that maintains some records of sweeps it conducts, but the challenges of finding and interpreting this information are many. See, e.g., Erica C. Barnett, *As Seattle Reopens, the City Faces Tough Questions About its Response to Homelessness*, CIS FOR CRANK (June 23, 2020), <https://thecisforcrank.com/2020/06/23/as-seattle-reopens-the-city-faces-tough-questions-about-its-response-to-homelessness/>, archived at <https://perma.cc/XW83-FTKK> (discussing the unavailability and unreliability of information relating to sweeps).

²⁹⁸ See, e.g., SAMIR JUNEJO, *NO REST FOR THE WEARY: WHY CITIES SHOULD EMBRACE HOMELESS ENCAMPMENTS* (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2776425, archived at <https://perma.cc/4HCX-SL85>.

²⁹⁹ Herring et al., *supra* note 15, at 9.

can't get rid of," "pests," and "like we're nothing, zero," from these evictions.³⁰⁰

Sweeps can adversely impact one's physical and mental health as well, negatively impacting one's sense of security and stability. Sweeps and move-alongs have been shown to create a heightened risk of assault.³⁰¹ One survey reported 30 percent of respondents as feeling less safe after being forced to move; for trans and gender non-conforming respondents, the number nearly doubled, with 59 percent reporting they felt less safe after an eviction.³⁰² Sleep deprivation, anxiety, and worsening mental health also occur.³⁰³ Even without criminal charges and citations, sweeps and move-along orders inflict stress, fear, and trauma on already vulnerable populations.³⁰⁴

Ultimately, such government-sponsored actions are cruel exercises in futility. With no safe and legal alternative place to go, unsheltered people often respond to evictions by dispersing temporarily, then returning after police have left.³⁰⁵ Too often, all that changes is that eviction aggravates the situation.

E. Invisibility

This Article argues that less visible forms of civil criminalization, such as invisible persecution and systemic discrimination, are more insidious because public and private actors can more easily exploit them without consequence—not only because generally they are not legally cognizable, but also because they are difficult to prove. Enforcement that does not generate a record evades detection, interfering with accountability and systemic justice.

The challenge of invisible data also plagues BIPOC, who should, in theory, be protected against racial profiling and discrimination.³⁰⁶ But data concerning racial profiling is similarly difficult to obtain because "records concerning police conduct are either irregular or nonexistent."³⁰⁷ Official "hostility" to maintaining sufficient records may also prevent data collection

³⁰⁰ *Id.* at 10.

³⁰¹ *Id.*; Ruan et al., *supra* note 295, at 9.

³⁰² Herring et al., *supra* note 15, at 10.

³⁰³ JUNEJO, *supra* note 298, at 16–18; Ruan et al., *supra* note 295, at 9–10.

³⁰⁴ Herring et al., *supra* note 15, at 12.

³⁰⁵ *Id.* at 13; *see also* Ruan et al., *supra* note 295, at 1 ("[M]ove-on orders leave homeless people with nowhere to go. Instead, they are merely pushed from one place to the next.").

³⁰⁶ Race and ethnicity are recognized as suspect classes worthy of heightened scrutiny under Equal Protection inquiries and many statutory protections relate to racial discrimination. Still, systemic discrimination on the basis of race persists largely unabated. *See* Valdes et al., *supra* note 20. The use of statistics to establish intentional discrimination in racial profiling and targeting remains an open question, *see* Elizabeth A. Knight & William Kurnika, *Racial Profiling in Law Enforcement: The Defense Perspective on Civil Rights Litigation*, 30 BRIEF 17, 22 (2001), even while statistics are generally admissible to prove the existence of a pattern or practice of discrimination in the employment context. *See* Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977).

³⁰⁷ Harris, *supra* note 245, at 276.

efforts.³⁰⁸ Even when some statistical data might exist, racial profiling “is almost impossible to prove [] unless the police officer is more honest than most police officers are likely to be, since the Supreme Court has refused to find violations of the equal protection clause on the basis of even statistically indisputable patterns of racialized decision making.”³⁰⁹ Thus, the inaccessibility of data, combined with the general hostility of the law to using data proving systemic bias, is an enormous problem even for racial profiling and discrimination cases.

Unsheltered people lack some of the constitutional and statutory protections afforded on the basis of race,³¹⁰ so the unavailability of data compounds the challenge of identifying systemic discrimination against unsheltered people as an issue worthy of governmental knowledge and intervention. Data affects societal and governmental perception of whether this experience is sufficient to compel intervention or action. The law is likely to remain ambivalent to the suffering of homeless people if coherent and calculative data remains unavailable. Indeed, the relative invisibility of anti-homeless enforcement practices is key to preserving them.

Governmental failure to collect consistent data about the impact of laws on unsheltered people is one problem. While the government fails to collect adequate data showing the persecution homeless people face, whatever data it does collect is often used to further criminalize them.³¹¹ While unsheltered people shoulder the punishment of criminalization, the harms they experience receive inadequate attention. Instead, data collection should focus on humanizing the experience of unsheltered people: Does a specific law or policy make their lives better or worse? Does a specific intervention address the underlying causes of homelessness or worsen them? Framing data collection in a humanizing way and focusing on the impacts of laws on homeless people’s lives would expose the failure of criminalization as a tool to solve homelessness and the need for laws and policies to evolve.

V. EXPOSING & ENDING CRIMINALIZATION

Legal reform is necessary to stem the systemic criminalization of homelessness. Reforms should adequately value the systemic harms unsheltered people experience as a result of all forms of criminalization.³¹² Reforms should also consider the normative impact of excluding homelessness

³⁰⁸ *Id.*

³⁰⁹ Coombs, *supra* note 245, at 1371 n.22.

³¹⁰ See generally Rankin, *supra* note 185 (discussing various statutory protections on the basis of race and other marginalized groups as compared to people experiencing homelessness).

³¹¹ See Gilman & Green, *supra* note 71, at 270.

³¹² Similar critiques have been articulated in the context of right to counsel in eviction, which disproportionately affects BIPOC. See, e.g., Sabbath, *supra* note 83, at 125 (“Calculations of non-economic damages underestimate harms by exacerbating biases of race, gender, and class . . . the pain of women, and specifically Black women, is routinely minimized.”).

from explicit anti-discrimination protections and undervaluing the harms of pervasive discrimination and invisible persecution.

Prohibiting the criminalization of homelessness would not eliminate homelessness, but it would mitigate a powerful contributor to it: its legal acceptability. Criminalization is predisposed to favor wealthier white majorities at the expense of people experiencing homelessness, BIPOC, and other marginalized groups. The systemic discrimination and violence unsheltered people experience—solely because they have no reasonable alternative but to survive in public space—is inconceivable to most housed citizens. The fact that criminalization imposes persecution and suffering is acceptable to society as long as those harms apply to unsheltered people.³¹³ Legal reforms that publicly denounce the stigmatization of homelessness could reduce the prevalence of explicit criminalization, change public perceptions about the acceptability of persecuting homeless people, and make unsheltered people more “psychologically resilient when they do experience it.”³¹⁴

Ultimately, legal reform must be bold and centered on the experience of unsheltered people; after all, the law evolves from “societal choices, rather than deriving, somehow, in an inevitable fashion” from precedent.³¹⁵ Some advocates have made compelling arguments that a right to housing and other equitable judicial remedies are the only reforms that will “prevent criminalization and allow homeless persons to fully participate in our democratic society in accordance with their full human rights.”³¹⁶ A guaranteed right to counsel, even in civil cases, for indigent people would certainly help.³¹⁷ Legislative reforms, such as homeless bills of rights, can fortify protections against criminalization and help to change the way people litigate, legislate, and think about homelessness generally.³¹⁸

Growing movements to defund police share synergies with the movement to decriminalize homelessness. The majority of 911 calls to police are for nonviolent occurrences.³¹⁹ This trend, combined with higher risk of po-

³¹³ Reformers could consider recalibrating the scales in favor of unsheltered people, as Professor Rosser explains:

[I]t might be appropriate to increase the property rights of the poor and simultaneously deny those same rights to the non-poor . . . this more nuanced vision would protect a homeless person’s right to sleep outdoors while finding no corresponding right for an owner of a conventional home to sleep in public places.

Ezra Rosser, *Destabilizing Property*, 48 CONN. L. REV. 397, 439 (2015).

³¹⁴ Danieli Evans Peterman, *Socioeconomic Status Discrimination*, 104 VA. L. REV. 1283, 1352 (2018).

³¹⁵ Rosser, *supra* note 313, at 410 (arguing property law needs to engage with “critical scholarship with alternative normative perspectives”).

³¹⁶ Tars et al., *supra* note 45, at 742.

³¹⁷ See Rosser, *supra* note 313, at 455.

³¹⁸ See generally Sara K. Rankin, *A Homeless Bill of Rights (Revolution)*, 45 SETON HALL L. REV. 383 (2015).

³¹⁹ See, e.g., Chris Herring, *Compliant-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769, 779 (2019) (San Francisco study); Jeff Asher & Ben Horwitz, *How Do the Police Actually Spend Their Time?*, N.Y. TIMES (June 19, 2020), <https://www.nytimes.com/2020/06/19/upshot/unrest-police-time-violent-crime.html>, archived at

lice use of force with marginalized groups³²⁰ and other negative outcomes associated with criminalization, supports arguments to shift funding priorities away from law enforcement led responses to homelessness, which are shown to be among the most expensive and least effective interventions.³²¹ Advocates should then press on lawmakers to shift funds away from police, which commonly comprise one of the greatest portions of city budgets,³²² to proven, non-punitive solutions like supportive housing.³²³

Current policy responses at the intersection of policing and homelessness are insufficient. The new Justice in Policing Act includes a provision to collect better data concerning various characteristics of each “civilian against whom a local law enforcement officer . . . used force,” including housing status.³²⁴ This provision does not address the bulk of criminalization, which does not generate official records or necessarily involve the use of force. But this provision moves the needle on the dearth of data concerning interactions between law enforcement and unsheltered people, however slightly.

In June 2020, the Trump administration issued an Executive Order announcing “it is the policy of the United States to promote the use of appropriate social services as the primary response to individuals who suffer from impaired mental health, homelessness, and addiction All officers should be properly trained for such encounters.”³²⁵ On the one hand, this order may appear like a positive development to increase trauma-informed training for law enforcement; however, the order also misses the key point behind anti-criminalization work: law enforcement is the wrong tool for responding to unsheltered homelessness. A far better strategy is to not involve law enforcement at all. Several cities are successfully experimenting with alternatives to citizens and businesses that make 911 calls to complain about or request responses to people experiencing homelessness. Outreach workers, instead of police, serve as first responders and provide crisis interventions.³²⁶

<https://perma.cc/L5UP-D3V7> (surveying New Orleans, Montgomery County, Maryland, and Sacramento); Louis Casiano, *Seattle City Council Faces New Calls to ‘Defund’ Police*, FOX NEWS (July 9, 2020), <https://www.foxnews.com/us/seattle-city-council-calls-to-defund-police>, archived at <https://perma.cc/T8RG-MSB4> (Seattle report).

³²⁰ See, e.g., Frank Edwards et al., *Risk of Being Killed by Police Use of Force in the United States by Age, Race – Ethnicity, and Sex*, 116 PROC. NAT’L ACAD. SCI. 16793, 16794 (2019), <https://www.pnas.org/content/pnas/116/34/16793.full.pdf>, archived at <https://perma.cc/3RM4-THQF>.

³²¹ See Rankin, *supra* note 4, at 104.

³²² See generally VERA INST. JUST., *supra* note 80.

³²³ See generally LAVENA STATEN, PENNY WISE BUT POUND FOOLISH: HOW PERMANENT SUPPORTIVE HOUSING CAN PREVENT A WORLD OF HURT (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3419187, archived at <https://perma.cc/K2G3-NWY4>.

³²⁴ Justice in Policing Act of 2020, S. 3912, 116th Cong. § 223(a)(2)(A)(i) (2020).

³²⁵ Exec. Order No. 13,929, 85 Fed. Reg. 37,325 (June 16, 2020).

³²⁶ See, e.g., WHITE BIRD CLINIC, *supra* note 143 (program in Eugene, Oregon); LJ Dawson, *Denver Looks to Take Cops Out of Mental Health-Related 911 Rescues*, DENVER POST (Oct. 11, 2019), <https://www.denverpost.com/2019/10/11/denver-police-cahoots-mental-health/>, archived at <https://perma.cc/4V37-S9ZJ> (similar program in Denver, Colorado).

Currently, neither the courts nor the legislature adequately protect people experiencing homelessness from persecution.³²⁷ The punishing impact of criminalization, in all its forms, is not yet appreciated in the law or understood by society generally. Given these challenges, lawyers seeking social change must consider all tools at their disposal, including litigation, legislation, and policy tools, as well as political action.³²⁸

Punishing unsheltered people for surviving—whether through criminal charges, civil sanctions, or invisible persecution—is morally wrong and should be legally intolerable. In fact, “[i]t is only in the context of a society as enamored with the linked ideas—that America is the land of opportunity and that the poor are largely undeserving—that such straightforward claims are seen as matters of law reform instead of self-evident truths.”³²⁹ It should be a straightforward proposition that people should not be punished for their homelessness, but cities across the country persist in doing so. The case for change is urgent and undeniable: there is simply no “civil” way to criminalize homelessness.

³²⁷ See Rankin, *supra* note 185, at 622 (quoting Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law & Dialogical Default*, 35 *FORDHAM URB. L.J.* 629, 662–63 (2008)) (discussing Julie Nice’s theory of dialogic default, where marginalized groups simultaneously lack judicial protection and legislative advocacy power, resulting in the “‘stagnation’ of their social and constitutional rights”).

³²⁸ See, e.g., Rosser, *supra* note 313, at 467.

³²⁹ *Id.* at 454.