Civilly 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. 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 “civilly 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


\(^5\) 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. 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. 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 visible and persuasively articulated in scholarship and advocacy, making these problems targets for reform. 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.

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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).
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. Such conditions are difficult, if not impossible, for many people experiencing chronic homelessness to meet. 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. 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.

Significantly, criminalization also extends to invisible persecution from state actors, such as pervasive over policing, 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. 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.
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 civilly 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


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-

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22 See Sent’g Project, supra note 21, at 2–8.


See ibid. (discussing redlining, restrictive covenants, and the history of preventing Black homeownership).


26 See Sent’g Project, supra note 23.


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

Poverty is a strong predictor of homelessness, and poverty rates demonstrate stunning racial inequities throughout the United States. 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. 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.

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. And "[t]hese 567,715 people represent a cross-section of America. They are associated


with every region of the country, family status, gender category, and racial/ethnic group.” 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. But, only 11.5 out of every 10,000 white Americans will experience homelessness.

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. 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, unfair housing, intentional displacement, or the legacies of slav-

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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/XWS-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 COLUM. 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.”).
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).
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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

Civilly 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


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”).
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).


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


\(^{55}\) See Pauw, supra note 54, at 319.


\(^{58}\) 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 CALEF. 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."

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 conditions that prevent them from defending themselves against a most formidable adversary: the State. 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. 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. 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. Inability to pay fines can negatively impact one’s financial credit. 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. 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. Even bench warrants, a civil tool, can prevent homeless people from accessing housing.

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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.
68 See id. at 18.
69 See Herring et al., supra note 15, at 142–43.
Predictably, civil processes increase one’s vulnerability to poverty, housing instability, and homelessness. Increased poverty and homelessness also heighten the likelihood of committing future criminal offenses, especially those outlawing public survival. 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. The futility and cruelty of this punitive process, at least one scholar has argued, “amounts to a system of organized sadism.”

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. Homelessness imposes extraordinary mental, financial, emotional, psychological, and physical traumas on the people experiencing it. 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.”

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 . . . .” 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 unhoused 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
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-
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people. 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.
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*. 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.” 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.” 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. 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.” 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.”

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

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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 [that will] still be invalidated on the grounds that it disproportionately punishes an act for which no punishment is permissible”).
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.’”).
Criminally Criminalizing Homelessness

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

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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).
103 See Austin, 509 U.S. at 610.
104 598 F. Supp. 3d 715 (E.D. Cal. 2019).
106 Id. at 726.
107 Id.
109 See id.
110 Id. at 1084 (citing WASH. REV. CODE § 10.01.180(3)(c) (2019)).
and the “banishment order backed up by criminal sanctions” overturned in *Schimelpfenig*. The modest fine in *Aitken*, the court opined, was “a far cry” from such severe forms of punishment. 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.

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* is the only decision (albeit unpublished) directly addressing the question of whether *Martin*’s reasoning applies to civil sanctions, answering in the affirmative. 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, and related criminal trespass laws as unconstitutional under the Eighth and Fourteenth Amendments. They also sought injunctive relief.


*Blake*, 2020 WL 4209227, at *4. (overturning a state judge’s order banishing a man convicted of murder from returning to his home county after serving his sentence).
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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.” 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.” 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. Accordingly, enforcement of the civil ordinances would violate both the Cruel and Unusual Punishment Clause and the Excessive Fines Clause of the Eighth Amendment.

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. 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. Regardless of how small a fine might appear to people with means, most people experiencing homelessness cannot pay such fees. 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.

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.
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).
not severely impact a typical housed citizen, severely impacts unsheltered people and serves no remedial purpose.\textsuperscript{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.\textsuperscript{143}

Excessive fines claims, such as those discussed in \textit{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. Constitution\textsuperscript{144} and many state constitutions prohibit “excessive fines.”\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{148} Thus, a fine or forfeiture violates the Eighth Amendment if it is “grossly disproportional to the gravity of a defendant’s offense.”\textsuperscript{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.\textsuperscript{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

\textsuperscript{142} See Skolnik, supra note 66, at 76–77.


\textsuperscript{144} U.S. CONST. amend. VIII.

\textsuperscript{145} See, e.g., WASH. CONST. art. I, § 14.


\textsuperscript{147} Id., 139 S. Ct. at 689.


\textsuperscript{149} Id.

\textsuperscript{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.\textsuperscript{151} For example, a fine may be excessive if it deprives an individual of their livelihood.\textsuperscript{152}

Some legal scholars debate whether the proportionality of punishment should be evaluated subjectively, better reflecting the way people experience it.\textsuperscript{153} For example, if a prisoner adapts to incarceration relatively easily, that person could be said to suffer less than most would expect.\textsuperscript{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.\textsuperscript{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.\textsuperscript{156} The State should consider the foreseeable impacts of the laws it upholds and the consequences of their enforcement.\textsuperscript{157}

When the government chooses to punish unsheltered people for lifesustaining conduct in public, those people suffer not only the direct sanction (whether criminal or civil) but also the collateral effects.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{151} See, e.g., United States v. Levesque, 546 F.3d 78, 83 (1st Cir. 2008).
\textsuperscript{154} See Bronsteen et al., Retribution, supra note 153, at 1465.
\textsuperscript{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.
\textsuperscript{156} See id. at 1486.
\textsuperscript{157} See id.
\textsuperscript{158} See id. at 1485 (discussing governmental responsibility for proximate harm caused by collateral effects of incarceration).
\textsuperscript{159} See Rankin, supra note 4, at 102–04 (explaining that chronically homeless individuals are disproportionately targets of criminalization laws).
\end{flushright}
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{164} Irreplaceable items of sentimental value, such as photographs, poems, or family or military mementos, are also commonly seized and destroyed.\textsuperscript{165} Because sweeps are often conducted with little to no advance notice, courts may find they violate procedural due process rights.\textsuperscript{166}

\textsuperscript{160} See id. at 104–06.

\textsuperscript{161} Unsheltered people must be legally permitted to survive in public space when they lack a reasonable alternative. See Jeremy Waldron, Essay, \textit{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.”).

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

\textsuperscript{163} See, e.g., id.

\textsuperscript{164} NAT'L L. CTR., \textit{supra} note 3, at 77.


\textsuperscript{166} See, e.g., Lavan, 797 F. Supp. 2d at 1017–18 (holding homeless persons’ unattended 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.
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) (“[W]hen [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).
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. 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.”

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.” 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.

Thus, the CDC warns that unless individual housing units are available, cities should not clear encampments during community spread of COVID-19.

A few cities have endeavored to follow CDC guidance by dramatically and quickly increasing the number of temporary individual units as shelters. But other cities ignore CDC guidance and disregard the risk of harm.
to people experiencing homelessness, either through inaction or by packing

Many cities simply persist with sweeps just as they did before the pan-

The Equal Protection Clause of the Fourteenth Amendment is the “con-
stitutional text that most naturally suggests itself” when legal rights stem
from “a comparison of burdens and opportunities” between the marginal-
ized groups and everyone else.\footnote{Frank I. Michelman, \textit{Foreword, On Protecting the Poor Through the Fourteenth Amendment}, 83 \textit{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.”).} 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 prin-

Despite the proliferation of criminalization\footnote{See \textit{Nat’l Ctr.}, supra note 3; \textit{Rankin, supra note 3}, at 109.} and the pervasive, sys-
temic discrimination unsheltered people experience,\footnote{\textit{See generally Rankin, supra note 185, at 610–19 (discussing evidence of systemic discrimination and violence supporting hate crime protection for unsheltered people).} they are not a suspect
class for equal protection purposes. 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. Thus, the Equal Protection Clause is largely blind to criminalization, as courts regularly “recognize and uphold[] legislation discriminating against the homeless as constitutional.”

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. Race, poverty, and state visibility closely align. 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.”

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. The intersectionality of race, poverty, and homelessness presents opportunities for public actors to disguise illegal discrimination as something less. 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.
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. 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.


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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{220} The court observed Pippin slept in his tent, an intimate practice analogous to grounds for a hotel guest’s reasonable expectation of privacy.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{217} Id. at 911 (citing Sandoval, 200 F.3d at 659).
\textsuperscript{218} Pippin, 403 P.3d at 912, 917.
\textsuperscript{219} Id. at 914.
\textsuperscript{220} Id. at 914–15.
\textsuperscript{221} Id. at 915 (citing State v. Jordan, 156 P.3d 893, 898 (Wash. 2007)).
\textsuperscript{222} Id.
\textsuperscript{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

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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”).


227 See Simmons, supra note 199, at 260.


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.” 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. 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%. 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. 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.”

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-
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.\textsuperscript{235} The law tolerates and encourages pervasive profiling of unsheltered people based on their appearance and presence in public space.\textsuperscript{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.\textsuperscript{237} Indeed, intersectionality of race and poverty—as ultimately expressed in homelessness—particularly attracts overpolicing.\textsuperscript{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.”\textsuperscript{239} In other words, the very presence of BIPOC, poor, and unsheltered people is coded as disorder.\textsuperscript{240}

Broken windows policing, profiling, and overpolicing are conjoined, enabling social and spatial control practices and sending a message of who belongs where.\textsuperscript{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.\textsuperscript{242} Law enforcement officials’ implicit biases affect their


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

\textsuperscript{237} See Devon W. Carbado, \textit{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”).

\textsuperscript{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”).

\textsuperscript{239} Id. at 1497.

\textsuperscript{240} See id. at 1489.

\textsuperscript{241} See id. at 1493.

\textsuperscript{242} See, e.g., Jeff D. May et al., \textit{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. The law, the media, and social-cultural messaging mutually reinforce implicit biases that identify the targets of profiling. 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.

Targeted surveillance and over policing—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, suspicionless witness stops, and pretextual stops violate the Constitution. They are routinely upheld, despite clear evidence that these practices disproportionately impact marginalized communities.

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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.
248 See, e.g., Whren v. United States, 517 U.S. 806, 819 (1996); see also Devon W. Carbado, (E)raciing the Fourth Amendment, 100 Mich. L. Rev. 946, 976 (2002); May et al., supra note 224, at 183; O’Connor, supra note 78, at 243 (“[S]ome 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. Edelstein, 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 implicit in the ordinary course of law enforcement activity.”).
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evidence that these practices disproportionately impact urban, poor communities as well as harass, demean, stigmatize, and traumatize their targets. 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.

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. 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. Even after submitting such private information, they are often subjected to continued monitoring to ensure compliance. Such forced exposure—which disproportionately impacts marginalized groups—amounts to state visibility, which is generally authorized and thus functions as a “social control mechanism” to “exert influence and reproduce power relations.” The forced exposure of marginalized groups underscores their special vulnerability and differentiates them from others who are more privileged and can afford greater privacy.

Although poor people are subjected to greater surveillance and policing than their wealthier counterparts, the law generally supports it. 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.”), 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 (“Cities 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.”).

Simmons, supra note 199, at 265–66. See, e.g., Bridges, supra note 191, at 968; Gilman & Green, supra note 71, at 270–75. 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.”).

See Gilman & Green, supra note 71, at 260, 275, 293; Bridges, supra note 191, at 985 (“State 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.”).

See, e.g., Bridges, supra note 191, at 968. See Gilman & Green, supra note 71, at 260. See Bridges, supra note 191, at 981. 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-718996ebd6a, archived at https://perma.cc/SCAW-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.”).


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-

263 See @streetpeopleoflosangeles, INSTAGRAM, https://www.instagram.com/streetpeopleoflosangeles/ (last visited Mar. 6, 2021); see also @bettersoma, TWITTER, https://twitter.com/bettersoma (last visited Mar. 6, 2021); @la.homeless, INSTAGRAM, https://www.instagram.com/la.homeless/ (last visited Mar. 6, 2021).
265 Id.
268 Id.
269 Id.
tailed posts.\textsuperscript{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.”\textsuperscript{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?”\textsuperscript{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.\textsuperscript{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.’”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{277}

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

\textsuperscript{271} Id.


\textsuperscript{273} Id.

\textsuperscript{274} Boden et al., supra note 270, at 3.

\textsuperscript{275} Id.

\textsuperscript{276} Id.

BIDs also act as extensions of law enforcement to police people experiencing homelessness in downtown areas. BIDs commonly coordinate with local police and private security to expand the reach of policing practices. 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.” The privatization of broken windows policing further entrenches the overpolicing and civil criminalization of unsheltered people.

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. 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. 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


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”).


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.” Property and place ground our sense of identity, dignity, and stability. This intimate connection may be best understood through the centering concept of home 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.” This stigma is reinforced through the communicative power of the law itself. 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. Criminalization makes homelessness worse 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. Nearly half reported city officials recently taking and destroying their valuable personal property. 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. Indeed, fully 70% of respon-

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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.
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


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


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, C IS 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).


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

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300 Id. at 10.
301 Id.; Ruan et al., supra note 295, at 9.
302 Id.; Ruan et al., supra note 15, at 10.
303 Herring et al., 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.”).

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).

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307 Harris, supra note 245, at 276.
efforts. 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.” 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, 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. 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. Reforms should also consider the normative impact of excluding homelessness

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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., Sabbeth, 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. 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.”

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. 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.” A guaranteed right to counsel, even in civil cases, for indigent people would certainly help. 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.

Growing movements to defund police share synergies with the movement to decriminalize homelessness. The majority of 911 calls to police are for nonviolent occurrences. 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 simultane-
ously 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.

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
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
lice use of force with marginalized groups 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. Advocates should then press on lawmakers to shift funds away from police, which commonly comprise one of the greatest portions of city budgets, to proven, non-punitive solutions like supportive housing.

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. 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.” 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.


See Rankin, supra note 4, at 104.

See generally Vera Inst. Just., supra note 80.


Currently, neither the courts nor the legislature adequately protect people experiencing homelessness from persecution. 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.

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.” 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.

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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.