

## RETHINKING HOMELESS PEOPLE'S PUNISHMENTS

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*This article argues that we should rethink homeless people's punishments for violating quality-of-life ordinances. Those ordinances prohibit acts that are deemed to constitute urban nuisances—urban camping, public urination, and sleeping on sidewalks among them. Violating quality-of-life ordinances can result in expensive fines, administrative fees, and civil consequences for unpaid fines. In line with other scholars' work, this article demonstrates how our current punishment scheme entrenches individuals in homelessness and operates like a self-fulfilling prophecy. Lacking a private property right and stuck in a cycle of homelessness, homeless people will continue to alleviate their needs on public property and be subject to further coercion and punishment. Homeless people's punishments for violating quality-of-life offenses are also objectionable because they violate three types of proportionality constraints: the gravity of the prohibited conduct, the homeless person's moral blameworthiness, and their personal situation.*

*This article proposes an alternate punishment scheme that minimizes the prospect of entrenchment in homelessness and remedies those three proportionality concerns. It argues that the state should adopt a day-fine model for financial penalties, implement criminal justice debt absolution frameworks,*

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*New Criminal Law Review*, Vol. 22, Number 1, pps 73–98. ISSN 1933-4192, electronic ISSN 1933-4206. © 2019 by The Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Reprints and Permissions web page, <http://www.ucpress.edu/journals.php?p=reprints>. DOI: <https://doi.org/10.1525/nclr.2019.22.1.73>.

*and rethink the civil and criminal consequences associated with unpaid fines. A more proportional punishment scheme is neither a solution to the reality of homelessness nor a substitute for the state's responsibility to ensure better access to housing. However, this article's proposals can mitigate the gravest consequences associated with homeless people's punishments, prevent entrenchment in homelessness, and ensure homeless people are treated with greater respect.*

**Keywords:** *punishment, homelessness, proportionality, public property, quality-of-life offenses*

## INTRODUCTION

In the year 2006, Robert Lee Purrie was in his early sixties and had slept on the streets of Skid Row, Los Angeles, for roughly four decades.<sup>1</sup> In December 2002, having nowhere else to sleep, he fell asleep on a sidewalk and was awakened by LAPD officers.<sup>2</sup> He was issued a citation for violating a Los Angeles ordinance that prohibited sitting, sleeping, and lying down on the city's sidewalks.<sup>3</sup> The offense was punishable by six months imprisonment and/or a \$1,000 fine.<sup>4</sup> The maximum fine was the financial equivalent of nearly four and a half months' worth of welfare payments, or roughly two and a half months' worth of rent at the fair market price for Single Room Occupancy hotels (the city's cheapest rental accommodations).<sup>5</sup> He could not afford to pay the fine and a warrant was issued.<sup>6</sup>

Less than a month later, Robert Lee Purrie was once again caught sleeping on a sidewalk.<sup>7</sup> This time, the LAPD arrested him for the outstanding warrant, searched him, and jailed him overnight.<sup>8</sup> He was eventually released with a 12-month suspended sentence and was ordered to pay

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1. *Jones v. City of Los Angeles*, 444 F. 3d 1118, 1124 (9th Cir., 2006).

2. *Id.*

3. LOS ANGELES, CAL., MUN. CODE (2005), § 41.18(d).

4. *Id.*

5. *Jones*, *supra* note 1, at 1121–23 (9th Cir., 2006). At the time, the monthly welfare payment for single adults was \$221 (*id.* at 1122). The average fair market price for an SRO at the time was \$379 per month (*id.* at 1122).

6. *Id.* at 1124.

7. *Id.*

8. *Id.*

nearly \$200 in fees.<sup>9</sup> He lost most of his belongings in the process, including his clothes and blankets.<sup>10</sup> At the time he was ticketed and arrested, there was insufficient shelter space and other forms of accommodation for the number of homeless people in Skid Row.<sup>11</sup>

When homeless people are ticketed, arrested, or incarcerated for violating quality-of-life ordinances that regulate their most basic human acts, it raises crucial concerns about the concept and imposition of punishment. “Quality-of-life ordinances” are legal rules that regulate low-level urban incivilities (e.g., public urination, urban camping, noise, graffiti, littering) that are said to decrease residents’ quality of life and lead to the commission of more serious crimes.<sup>12</sup>

Many scholars have challenged the legitimacy of quality-of-life ordinances, arguing that those ordinances disproportionately and unfairly impact homeless people.<sup>13</sup> They contend that quality-of-life ordinances are unconstitutionally vague or overbroad, violate the fundamental right to travel, criminalize the status of homelessness, or violate the Equal Protection Clause.<sup>14</sup> Some argue that homeless people’s punishments can be cruel and unusual in nature, especially where homeless people are punished for alleviating their needs in public despite lacking free access to private property or a shelter space.<sup>15</sup> Much attention has been given to the

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9. *Id.*

10. *Id.*

11. *Id.* at 1122–23.

12. GEORGE KELLING & CATHERINE COLES, *FIXING BROKEN WINDOWS: RESTORING ORDER AND REDUCING CRIME IN OUR COMMUNITIES* 13–17 (1996); James Wilson & George Kelling, *Broken Windows: The Police and Neighborhood Safety*, THE ATLANTIC, March 1982.

13. See, e.g.: Farida Ali, *Limiting the Poor’s Right to Public Space: Criminalizing Homelessness in California*, 21 GEO. J. ON POVERTY L. & POL’Y 197 (2014); Benno Weisberg, *When Punishing Innocent Conduct Violates the Eighth Amendment: Applying the Robinson Doctrine to Homelessness and Other Contextual Crimes*, 96 J. CRIM. LAW & CRIMINOLOGY 329 (2005); Edward J. Walters, *No Way Out: Eighth Amendment Protection for Do-Or-Die Acts of the Homeless*, 62 U. CHI. L. REV. 1619 (1995); Tami Iwamoto, *Adding Insult to Injury: Criminalization of Homelessness in Los Angeles*, 9 WHITTIER L. REV. 515 (2007–2008).

14. For a summary of those approaches, see: Kathryn Hansel, *Constitutional Othering: Citizenship and the Insufficiency of Negative Rights-Based Challenges to Anti-Homeless Systems*, 6 NW. J.L. & SOC. POL’Y 445, 447–61 (2011); Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV. 1, 26–49 (1996).

15. Juliette Smith, *Arresting the Homeless for Sleeping in Public: A Paradigm for Expanding the Robinson Doctrine*, 29 COLUM. J.L. & SOC. PROBS. 293, 293–94 (1995–1996).

constitutionality of quality-of-life ordinances, the legitimate scope of those ordinances, the state's power to enact such legal rules, and the moral concerns underlying quality-of-life regulation more generally.

This article takes a different approach. It focuses primarily on the fundamental problems with homeless people's punishments for violating quality-of-life ordinances. As opposed to analyzing homeless people's punishments from the sole standpoint of constitutional law, this article builds on existing scholarly work in the fields of criminal law, punishment theory, legal philosophy, and public policy. Such an interdisciplinary approach aims to provide a sound theoretical and pragmatic basis for challenging the current punishment scheme imposed on homeless people for violating quality-of-life ordinances.

This article's core argument is that homeless people's punishments generate five interrelated concerns. First, certain punishments can entrench individuals in the condition of homelessness.<sup>16</sup> When people become entrenched in homelessness, their freedom, autonomy, privacy, and security are limited.<sup>17</sup> Second, people entrenched in homelessness will continue to violate the very ordinances that only homeless people tend to violate *precisely because they are experiencing homelessness*. Entrenchment does more than undermine effective deterrence—entrenchment can increase the likelihood that certain individuals will continue to alleviate their needs on public property because they lack a private sphere.<sup>18</sup> Third, homeless people's punishments can be too severe given the nature of the prohibited conduct and in comparison to other offenses.<sup>19</sup> Fourth, some punishments ignore whether homeless people violate quality-of-life ordinances in a morally blameworthy fashion.<sup>20</sup> Fifth, punishments

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16. ALLARD K. LOWENSTEIN, INTERNATIONAL HUMAN RIGHTS CLINIC, "FORCED INTO BREAKING THE LAW": THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 16–17 (2016).

17. Marie-Eve Sylvestre & Céline Bellot, *Challenging Discriminatory and Punitive Responses to Homelessness in Canada*, in *ADVANCING SOCIAL RIGHTS IN CANADA* 155–56 (Martha Jackman & Bruce Porter eds., 2013). On the limitation of homeless people's freedom, see Jeremy Waldron, *Homelessness and the Issue of Freedom*, 39 *UCLA L. REV.* 295 (1991–1992).

18. Hannah Kieschnick, *A Cruel and Unusual Way to Regulate the Homeless: Extending the Status Crimes Doctrine to Anti-homeless Ordinances*, 70 *STAN. L. REV.* 1569, 1575 (2018).

19. On severity of punishment, see ANDREW VON HIRSCH, *CENSURE AND SANCTIONS*, 18 (1993).

20. Weisberg, *supra* note 13, at 364.

can be disproportionately harsh in light of a homeless person's personal situation.<sup>21</sup>

This article proposes a punishment scheme that avoids those proportionality problems and decreases the likelihood of entrenching people in homelessness. To be clear, implementing this article's proposals cannot justify the use of quality-of-life ordinances that are themselves morally objectionable. Nor will implementing this article's proposed punishment scheme lessen the state's responsibility to improve access to housing and address the root causes of homelessness. This article's core arguments and prescriptions, however, hold the potential to prevent disproportionate punishments, reduce the likelihood of entrenchment in homelessness, and ensure that the state treats homeless people with greater concern and respect.

This article is structured as follows. Part I provides an overview of quality-of-life ordinances and punishments for violating those ordinances. Part II sets out how certain punishments can entrench individuals in the condition of homelessness. Part III explores how homeless people's punishments can be disproportionate with regard to the true gravity of the offense, their culpability, and their personal situation. Part IV concludes this article. It argues that we can rethink homeless people's punishments and ensure that those sanctions are neither disproportionate nor entrench individuals in homelessness. Part IV advances three concrete proposals to that effect: implementing day-fines, putting in place unconditional and conditional debt absolution programs, and mitigating the mandatory criminal and civil consequences for unpaid fines.

## I. HOMELESSNESS AND QUALITY-OF-LIFE ORDINANCES

In Canada and the United States, quality-of-life ordinances prohibit an array of public acts that homeless people perform as part of their daily existence.<sup>22</sup> Those ordinances prohibit acts such as camping or sleeping on public property, public urination, panhandling, loitering, and sidewalk

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21. Neil Sobol, *Charging the Poor: Criminal Justice Debt and Modern-Day Debtors' Prisons*, 75 MD. L. REV. 486, 518 (2016).

22 NATIONAL LAW CENTER ON HOMELESSNESS & POVERTY, HOUSING NOT HAND-  
CUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 21–27 (2017).

sitting, amongst others.<sup>23</sup> The fines imposed for contravening quality-of-life regulation can be expensive. For instance, a City of Montreal's transportation by-law imposes a fine of up to \$500 (CA\$) for a person who sleeps on a subway bench.<sup>24</sup> In Dallas, Texas, an individual can receive a fine of up to \$500 (US\$) if they erect a temporary shelter on public property controlled by the city.<sup>25</sup>

Several studies demonstrate that homeless people often cannot afford to pay the fines that they receive. In some cities, over 90 percent of the fines issued to homeless people go unpaid. Professors Sylvestre and Bellot's research illustrates that over 16,800 tickets were issued to homeless people in the City of Toronto, Canada, between the years 2000 and 2006.<sup>26</sup> Approximately 99 percent of those fines were not paid.<sup>27</sup> In Ottawa, Canada, a similar proportion of fines issued to homeless people were not paid.<sup>28</sup> Comparable trends are found in American cities. In San Francisco, research demonstrates that 90 percent of the tickets issued to homeless people were not paid.<sup>29</sup>

The Canadian and U.S. legal systems both restrict the state practice of imprisoning individuals for their inability to pay criminal justice debts. The Supreme Court of Canada has made clear that "genuine inability to pay a fine is not a proper basis for imprisonment."<sup>30</sup> In the United States, the Supreme Court's 1983 *Bearden* decision established the general principle that indigent defendants cannot be imprisoned for their inability to pay

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23. *Id.*

24. MONTREAL, QC, R-036, BY-LAW PRESCRIBING STANDARDS OF SAFETY AND CONDUCT TO BE OBSERVED BY PASSENGERS IN THE ROLLING STOCK AND IMMOVABLES OPERATED BY OR FOR THE SOCIÉTÉ DE TRANSPORT DE MONTRÉAL § 4(c), § 26.

25. DALLAS, TX, MUN. CODE § 31-13(A), § 31-13.1(d).

26. Sylvestre & Bellot, *supra* note 17, at 181. See also Marie-Eve Sylvestre et al., *Le droit est aussi une question de visibilité: Occupation des espaces publics et parcours judiciaires des personnes itinérantes à Montréal et à Ottawa*, 26 CAN. J. OF LAW AND SOC'Y 531, 550 (2011).

27. *Id.*

28. *Id.*

29. OFFICE OF THE TREASURER & TAX COLLECTOR, CITY AND COUNTY OF SAN FRANCISCO, SAN FRANCISCO FINES & FEES TASK FORCE: INITIAL FINDINGS AND RECOMMENDATIONS, 15 (2017) [hereinafter SAN FRANCISCO FEES & FINES TASK FORCE]; citing COALITION ON HOMELESSNESS, PUNISHING THE POOREST: HOW THE CRIMINALIZATION OF HOMELESSNESS PERPETUATES POVERTY IN SAN FRANCISCO 2 (2015).

30. *R. v. Wu* [2003] 3 S.C.R. 530, at ¶ 3.

criminal justice debts.<sup>31</sup> Courts must first hold a *Bearden* hearing to see whether or not the defendant has the means to pay the fine before the defendant can be jailed.<sup>32</sup> During those hearings, courts will take into account the defendant's existing assets and good faith efforts to obtain new assets by seeking employment or applying for credit.<sup>33</sup>

The *Bearden* decision held that an indigent defendant unable to pay a fine can only be imprisoned for debt in two limited circumstances. First, the defendant can be imprisoned for debt if they did not make *bona fide* efforts to obtain sufficient money to pay their fines, notably by seeking employment or applying for credit.<sup>34</sup> Second, even if the defendant made such *bona fide* efforts, the defendant can still be imprisoned if "the state's traditional punitive goals could not be met by any alternatives."<sup>35</sup>

The American Civil Liberties Union (ACLU) has reported on how indigent persons have been imprisoned for debt without benefitting from a *Bearden* hearing in the states of Ohio, Louisiana, and Colorado.<sup>36</sup> The ACLU also observed that Louisiana courts have required indigent defendants to either pay their fine immediately or be jailed—a practice referred to as "pay or stay sentences" that the Fifth Circuit Court of Appeals had ruled unlawful decades prior.<sup>37</sup> Many scholars also describe the reemergence of debtors' prisons and imprisonment for debt.<sup>38</sup>

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31. *Bearden v. Georgia*, 461 U.S. 660, 667–68 (1983); *Tate v. Short*, 401 U.S. 395 (1971); *Morris v. Schoonfield*, 399 U.S. 508, 509 (1970). See also: *Williams v. Illinois*, 399 U.S. 235 (1970).

32. *Policing and Profit*, 128 HARV. L. REV. 1723, 1739 (2015).

33. Christopher Hampson, *The New Debtors' Prisons*, 44 AM. CRIM. L. REV. 1, 36 (2016).

34. *Id.*; *Bearden v. Georgia*, 461 U.S. 660, 668, 670–73 (1983).

35. *Bearden, id.* Quoted portion is in Hampson, *id.* at 36.

36. ACLU OHIO, *THE OUTSKIRTS OF HOPE: HOW OHIO'S DEBTORS' PRISONS ARE RUINING LIVES AND COSTING COMMUNITIES* (Cleveland, 2013); ACLU LOUISIANA, *LOUISIANA'S DEBTORS PRISONS: AN APPEAL TO JUSTICE*, 21 (New Orleans, 2015); ACLU COLORADO, *JUSTICE DERAILED: A CASE STUDY OF ABUSIVE AND UNCONSTITUTIONAL PRACTICES IN COLORADO CITY COURTS* (Denver, Oct. 2017).

37. *Frazier v. Jordan*, 457 F. 2d 726 (5th Cir., 1972).

38. Torie Atkinson, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of the New Debtors' Prisons*, 51 HARV. CIV. R./ CIV. LIB. L. REV. 189, 215 (2016); Hampson, *supra* note 33, at 10; Sobol, *supra* note 21; Fred O. Smith Jr., *Abstention in the Time of Ferguson*, 131 HARV. L. REV. 2283, 2317 (2018); KAREN DOLAN & JODY L. CARR, *POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY* 9–12 (Washington DC: Institute for Policy Studies, 2015); ALICIA BANNON, MITALI NAGRECHA, & REBEKAH DILLER, *CRIMINAL JUSTICE DEBT: A BARRIER TO REENTRY* 19–20. (New York: Brennan Center for Justice, 2010).

Although indigent persons cannot lawfully be jailed solely for their inability to pay fines, their criminal justice debts do not disappear. Expensive additional fees can be applied to unpaid fines.<sup>39</sup> In California, a civil assessment fee of \$300 is added onto unpaid fines.<sup>40</sup> Unpaid fines can be contracted out to collection agencies, divulged to consumer-reporting agencies, and result in a default civil judgment issued against the holder of the unpaid fine.<sup>41</sup>

Disclosing unpaid fines to debt collection or consumer reporting agencies can generate important consequences for homeless people. Homeless people's credit ratings plunge, which adversely impacts their ability to rent an apartment, receive a bank loan, or get access to utilities or other services.<sup>42</sup> Or, if homeless people do secure housing, their unpaid fines can still be recuperated, which risks sending them back on the streets. In other cases, unpaid fines can result in driver's license suspensions or revocations.<sup>43</sup> A suspended driver's license can lead to job loss.<sup>44</sup> When switching jobs because of a driver's license suspension or revocation, the new job tends to pay less.<sup>45</sup> The payment of criminal justice debt can also be imposed as a probation or parole condition.<sup>46</sup> When individuals breach

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39. Atkinson, *supra* note 38, at 198.

40. CALIFORNIA PENAL CODE, § 1214.1; SAN FRANCISCO FINES & FEES TASK FORCE, *supra* note 29, at 15.

41. Atkinson, *supra* note 38, at 217. *See also*: Catherine Chesnay, Céline Bellot, & Marie-Eve Sylvestre, *Taming Disorderly People One Ticket at a Time: The Penalization of Homelessness in Ontario and British Columbia*, 55 CAN. J. CRIMINOL & CRIM. J. 161, 176 (2013); SEATTLE UNIVERSITY SCHOOL OF LAW: HOMELESS RIGHTS ADVOCACY PROJECT, WASHINGTON'S WAR ON THE VISIBLY POOR: A SURVEY OF CRIMINALIZING ORDINANCES & THEIR ENFORCEMENT, 16 n.64 (Seattle, 2015). *See also*: Seattle Municipal Court, Collections Information, <https://www.seattle.gov/courts/tickets-and-payments/pay-my-ticket/collections-information> (Nov. 5, 2018).

42. Atkinson, *supra* note 38, at 217–18; LAWYER COMMITTEE FOR CIVIL RIGHTS OF THE SAN FRANCISCO BAY AREA, NOT JUST A FERGUSON PROBLEM: HOW TRAFFIC COURTS DRIVE INEQUALITY IN CALIFORNIA 18 (San Francisco, 2015) [hereinafter, LCCR–SAN FRANCISCO].

43. Atkinson, *supra* note 38.

44. LCCR–SAN FRANCISCO, *supra* note 42, at 17. In terms of decrease in income, that report cites: ALAN M. VOORHEES & EDWARD J. BLOUSTEIN, MOTOR VEHICLES AFFORDABILITY AND FAIRNESS TASK FORCE, XII (New Brunswick, NJ: Rutgers University, 2006).

45. VOORHEES AND BLOUSTEIN, *supra* note 44, at xii.

46. BANNON ET AL., *supra* note 38, at 28.



their probation or parole conditions, they can be cut off from social services, such as social security, public housing, or food stamps.<sup>47</sup>

When a homeless person is arrested for a quality-of-life offense, it may also create barriers to employment or housing.<sup>48</sup> Certain public housing authorities have excluded potential candidates for having been arrested, even if it did not result in conviction.<sup>49</sup> In other cases, homeless people receive criminal records for violating quality-of-life offenses. This can also lead to a loss of governmental benefits, restrict employment prospects, and limit access to housing.<sup>50</sup>

## II. PUNISHMENT AND ENTRENCHMENT IN HOMELESSNESS

Homeless people's punishments for violating quality-of-life ordinances are problematic because those punishments can entrench individuals in homelessness.<sup>51</sup> The process begins when a homeless person is arrested or fined for contravening some ordinance.<sup>52</sup> They may be unable to pay the fine, and thereby accumulate fees and possibly get a criminal record.<sup>53</sup> Their criminal justice debts can impact their employment prospects, credit rating, and access to housing, which in turn keeps them on the street and in a prolonged state of homelessness.<sup>54</sup>

As Waldron argues, punishment is supposed to recognize rather than disregard or destroy one's dignity.<sup>55</sup> Individuals are supposed to be able to suffer the deprivation or hard treatment associated with their punishment

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47. *Id.*

48. Elisha Jain, *Arrests as Regulation*, 67 STAN. L. REV. 809, 815, 835, 838 (2015).

49. *Id.*; HUMAN RIGHTS WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING, 44 (2004).

50. Jonathan Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1255 (2002).

51. 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, 741 (2013–2014); Kieschnick, *supra* note 18, at 1575.

52. Kieschnick, *supra* note 18, at 1574–76.

53. *Id.*

54. *Id.*

55. JEREMY WALDRON & MEIR DAN-COHEN, DIGNITY, RANK, AND RIGHTS 64 (2012).

but move on with their lives afterward.<sup>56</sup> The problem is that punishments affect individuals differently. As Narayan puts it, “Even standardized penalties can visit unjustified humiliation.”<sup>57</sup> The same punishment can therefore disproportionately impact certain individuals.

Punishments that entrench people in homelessness are morally objectionable for two interrelated reasons. First, the punishments entrench individuals in a condition that undermines their freedom, autonomy, privacy, safety, and equal recognition in the community. As scholars such as Waldron and Essert observe, homeless people’s freedom and privacy is already restricted simply because they are experiencing homelessness.<sup>58</sup> Lacking their own private property, homeless people can only exist on others’ private property with their permission.<sup>59</sup> The private places where homeless people can lawfully be, and the conduct they can lawfully perform in private, are often subject to others’ control.<sup>60</sup> By entrenching people in the condition of homelessness, punishments contribute to individuals’ unfreedom, restricted autonomy, lack of privacy, and decreased safety.

Second, entrenchment in homelessness increases the likelihood that individuals will continually be punished for violating laws that only homeless people tend to violate.<sup>61</sup> This is no secret: some quality-of-life offenses are committed only by homeless people precisely because homeless people lack access to housing and must alleviate their basic needs somewhere.<sup>62</sup> Typical examples include laws that punish sleeping on sidewalks, camping in city parks, or sleeping on a subway bench. Few if any constitutional challenges to those types of laws are brought by defendants with access to housing.<sup>63</sup> And courts recognize that homeless people sleep on public

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56. *Id.*

57. Uma Narayan, *Degradingness and Intrusiveness*, in VON HIRSCH, *supra* note 19, at 80.

58. Waldron, *supra* note 17; Christopher Essert, *Property and Homelessness*, 44 PHIL. & PUB. AFF. 266, 276 (2016).

59. Essert, *supra* note 58, at 276.

60. *Id.*

61. Kieschnick, *supra* note 18, at 1575–76.

62. Waldron, *supra* note 17, at 314.

63. One exception is *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). In that case, the defendants were members of an organization that camped in a National Park to draw attention to homeless people’s plight.

property because they lack reasonable alternatives.<sup>64</sup> Homeless people alleviate their needs in the public sphere because they lack a private sphere. If punishment undermines homeless people's access to housing, homeless people will continue to lack a private sphere and will alleviate their needs on public property. The current punishment scheme therefore operates much like a self-fulfilling prophecy.

This raises important questions about whether deterrence is a valid justification for imposing harsh financial penalties on homeless people for violating quality-of-life ordinances. If punishments should deter homeless people and others from violating those ordinances in the future, the punishments lead to the opposite result and are counterproductive.<sup>65</sup> The punishments help ensure that homeless people will continue to lack the very private sphere that would allow them to comply with quality-of-life ordinances and alleviate their needs in private.

Two punishment-related fallacies might account for why the indignity of homeless people's punishment is ignored.<sup>66</sup> The first fallacy is that punishment is not as degrading as it seems because it does not involve imprisonment;<sup>67</sup> in other words, it's not so bad because it could have been worse. As Narayan explains, however, punishment for a given offense must also be independently justifiable, irrespective of the greater severity of other punishments.<sup>68</sup> The second fallacy is that punishment is fair because it does not violate some constitutional right.<sup>69</sup> That fallacy creates its own problems. Punishments may still be unethical even if they are constitutional. Punishments can be humiliating, disproportionately impact marginalized groups, or generate grave civil consequences without violating any constitutional rights.<sup>70</sup> Indeed, homeless people's punishments can add a particular form of insult to injury. The humiliation and indignity

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64. See, e.g.: *Pottinger v. City of Miami*, 810 F. Supp. 1551 (Dist. Court, SD Florida 1992); *Jones v. City of Los Angeles*, 444 F. 3d 1118 (9th Cir., 2006); *Abbotsford (City) v. Shantz*, 2015 BCSC 1909; *Victoria (City) v. Adams*, 2009 BCCA 563.

65. Maria Foscarinis, Kelly Cunningham-Bowers, & Kristen E. Brown, *Out of Sight—Out of Mind? The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 152 (1999).

66. Narayan, *supra* note 57, at 80.

67. *Id.*

68. *Id.*

69. *Id.* at 81.

70. *Id.*

of having to sleep on a subway bench or urinate in a public place is already serious. The humiliation and indignity of being punished for those acts is even worse.<sup>71</sup>

### III. HOMELESSNESS, PUNISHMENT, AND DISPROPORTIONALITY

#### A. Ignoring the Severity of the Prohibited Conduct

Entrenchment is not the only problem. The disproportionality of homeless people's punishments is another. Homeless people's punishments can be disproportionate given the nature of the prohibited conduct and in relation to other offenses. Such punishments communicate that the prohibited conduct is more reprehensible or blameworthy than it objectively is—the punishment is too severe for the crime.<sup>72</sup>

Andrew von Hirsch has explored how such punishments ignore the concept of “ordinal proportionality.”<sup>73</sup> Ordinal proportionality concerns the comparative severity of punishments across different offenses.<sup>74</sup> As von Hirsch explains, ordinal proportionality has three requirements: parity, rank ordering, and spacing.<sup>75</sup> Offenses that are similar in seriousness should have comparably severe punishments: parity.<sup>76</sup> The severity of punishment should be determined in comparison to the punishments imposed for other offenses and the level of reprobation associated with those offenses: rank ordering.<sup>77</sup> There must be space between punishments for different offenses to reflect their respective gravity: spacing.<sup>78</sup>

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71. Waldron, *supra* note 17, at 320. Waldron's exact quote is: “Moreover, though we say there is nothing particularly dignified about sleeping or urinating, there is certainly something deeply and inherently undignified about being prevented from doing so” (*id.*).

72. Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors' Prison*, 65 UCLA L. REV. 2, 16 (2018).

73. VON HIRSCH, *supra* note 19, at 18. *See also*: Dale Ives, *Inequality, Crime and Sentencing: Borde, Hamilton and the Relevance of Social Disadvantage in Canadian Sentencing Law*, 30 QUEEN'S L.J. 114, 135–36 (2004–2005).

74. VON HIRSCH, *supra* note 19.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

Homeless people's punishments can disregard the concept of rank ordering. The case of *Jones v. City of Los Angeles* is a good example.<sup>79</sup> As explained in this article's introduction, a Los Angeles ordinance imposed a fine of up to \$1,000 and/or 6 months of imprisonment for sleeping, sitting, or lying down on a sidewalk.<sup>80</sup> The California Penal Code imposes that same maximal punishment for the crimes of assault and drunk driving.<sup>81</sup> By imposing the same maximum punishments, the law expresses that sleeping on a sidewalk is as morally reprehensible as assaulting someone or driving under the influence of alcohol. This makes no sense. Assault and drunk driving directly harm or endanger basic human interests such as physical integrity, security, dignity, and autonomy—interests that sleeping on a sidewalk neither harm nor place at risk.<sup>82</sup> The punishment associated with the Los Angeles sidewalk ordinance is disproportionate because it ignores the concept of rank ordering.

## B. Ignoring Homeless People's Moral Blameworthiness

Homeless people's punishments can also be disproportionately severe given their moral blameworthiness (or lack thereof). The culpability standard for many quality-of-life ordinances is strict liability.<sup>83</sup> Furthermore, the severity of the punishments may not vary according to the offender's culpability in light of the circumstances, or the law might impose mandatory minimum financial penalties.<sup>84</sup> A homeless individual who intentionally urinates in front of an unsuspecting crowd can receive the same punishment as a homeless individual who, having nowhere else to go, privatizes their conduct by hiding in an alleyway to urinate. Although the latter did

79. *Jones v. City of Los Angeles*, 444 F. 3d 1118 (9th Cir., 2006).

80. *Id.*; L.A., CAL., MUNI. CODE § 41.18(d) (2005).

81. CALIFORNIA PENAL CODE § 241 and CALIFORNIA VEHICLE CODE § 23152 and § 23536, respectively.

82. Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living Standards Analysis*, 11 OXFORD J. LEGAL STUD. 1, 910 (1991).

83. David Smith, *A Theoretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL'Y REV. 487 (1994).

84. *See, e.g.*: COMMISSION DES DROITS DE LA PERSONNE ET DES DROITS DE LA JEUNESSE—QUÉBEC, THE JUDICIARIZATION OF THE HOMELESS IN MONTREAL: A CASE OF SOCIAL PROFILING 3 (2009); BERKELEY LAW POLICY ADVOCACY CLINIC, CALIFORNIA'S NEW VAGRANCY LAWS: THE GROWING ENACTMENT AND ENFORCEMENT OF ANTI-HOMELESS LAWS IN THE GOLDEN STATE 24 (2015).

their best to obey the law and demonstrate concern for others' interests, the former did not. There are several reasons why punishments expressing equal culpability for both offenders are problematic.

First, the law does not require a stringent enough level of wrongdoing to capture the first homeless individual's culpability (intentionally urinating in front of many people) but to exclude the second homeless individual's lack of culpability (hiding in an alleyway to urinate). The law requires wrongdoing, but not enough wrongdoing to justify the existence or severity of a given punishment given the circumstances.<sup>85</sup> By not specifying a more demanding culpability standard, the severity of punishment may misrepresent or inflate how blameworthy the offender's conduct truly was.<sup>86</sup> The problem with such punishments is that they express *too much guilt*.<sup>87</sup> To paraphrase Duff, even if a person is not that innocent, they are not that guilty.<sup>88</sup>

Second, some punishments undermine the justifications for imposing strict liability in the first place. Strict liability is justified on various grounds.<sup>89</sup> There is the argument that strict liability offenses are not true criminal offenses and do not carry a comparable stigma, which is said to justify a lower culpability requirement in some circumstances.<sup>90</sup> That justification, however, can misfire as applied to homeless people's punishments. True, the criminal law imposes a particularly strong stigma through criminal records and formal expressions of the offender's guilt to the community.<sup>91</sup> But homelessness carries its own stigma. By entrenching individuals in homelessness, low-level culpability standards and expensive fines contribute to the stigma that homeless people characteristically experience.

There are other justifications for strict-liability, quality-of-life ordinances, such as administrative efficiency and optimal deterrence.<sup>92</sup> Those

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85. DOUGLAS HUSAK, *OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW* 74 (2007).

86. *Id.*

87. ANTONY DUFF, *TRIALS AND PUNISHMENTS* 155 (1991).

88. *Id.* Duff's actual quote is: "He is not that innocent, but he is not *that* guilty" (*id.*).

89. Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 419 (1992-1993).

90. Andrew Simester, *Is Strict Liability Always Wrong?, in APPRAISING STRICT LIABILITY* 24 (Andrew Simester ed., 2005).

91. SMITH AND HOGAN'S *CRIMINAL LAW* 7 (David Ormerod, John Cyril Smith, & Brian Hogan eds., 13th ed., 2011).

92. Levenson, *supra* note 89, at 424-25.

justifications are also problematic. Even if quality-of-life ordinances are administratively efficient in the short term, they generate important long-term costs and inefficiencies elsewhere in the justice system. Attempts to recuperate unpaid fines result in enormous administrative burdens and expenses.<sup>93</sup> Police and judicial resources are tied up emitting and enforcing warrants and bringing offenders before courts.<sup>94</sup> Defendants have to appear in court instead of working and may be forced to pay a ticket instead of their rent. Indeed, many inefficiencies and costs could be mitigated by imposing a higher culpability standard for certain offenses and avoiding recourse to punishment, expensive fees, and harsh consequences associated with unpaid fines.<sup>95</sup>

### C. Ignoring Homeless People's Personal Situation

Lastly, homeless people's punishments can be disproportionately harsh given their personal situation. In some cases, a homeless person may have committed an offense as culpably as others, yet there may be good reasons to punish that individual less severely.<sup>96</sup> At a basic level, punishments should be bearable, and many should only produce acute rather than chronic effects.<sup>97</sup> Some punishments are intended to devastate the offender (even if it should not be so), whereas others misfire and achieve equal devastation. Punishments are problematic when they should generate only short-term consequences, but disproportionately impact individuals by generating serious long-term consequences. A homeless person who sleeps on a sidewalk, pitches a tent in a park, or urinates behind a bush should not risk receiving a punishment that will keep them on the streets for days, weeks, or months longer. Even if there are compelling justifications for punishing individuals who culpably alleviate their needs on public property, the punishment should produce the least devastating and chronic consequences possible.

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93. SAN FRANCISCO FINES & FEES TASK FORCE, *supra* note 29, at II.

94. *Id.*

95. *Id.* at 15. See also Beth Colgan, *Graduating Economic Sanctions According to Ability to Pay*, 103 IOWA L. REV. 53, 61 (2017).

96. See, e.g., Antony Duff, *The Intrusion of Mercy*, 4 OHIO ST. J. OF CRIM. L. 361, 365 (2007).

97. WALDRON & DAN-COHEN, *supra* note 55, at 64.

Homeless people's circumstances lead to other types of proportionality concerns. For one, the total amount of a fine can be greater for homeless people compared to others.<sup>98</sup> As explained above, studies have shown that over 90 percent of homeless people do not pay their fines.<sup>99</sup> If fines are so expensive that homeless people will surely fail to pay them, homeless people must pay additional fees and face civil consequences that others do not.<sup>100</sup> The total amount of the fine is greater for homeless people because of their poverty as opposed to their culpability—those least able to afford the fines end up paying the most.<sup>101</sup>

Furthermore, those higher fines and administrative fees translate into longer jail time for homeless people who are imprisoned for debt.<sup>102</sup> When cities imprison individuals for debt, those unable to afford paying their fines and fees are credited with a certain amount of money per day spent in jail.<sup>103</sup> In Ohio, for example, jailed defendants were credited at a rate of \$50 per day of incarceration.<sup>104</sup> Those whose fines are more expensive due to administrative fees must stay in jail longer to pay off that higher amount.<sup>105</sup> More affluent individuals, however, risk paying less for their fines and spending less time in debtors' prisons compared to indigent people and homeless people.

#### IV. MITIGATING DISPROPORTIONALITY AND ENTRENCHMENT

##### A. Day-Fines

To recap, punishments for quality-of-life ordinances can entrench people in homelessness. The current punishment scheme results in three types of

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98. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CAL. L. REV. 277, 291 (2014).

99. See notes 26–29, *supra*.

100. Colgan, *supra* note 72, at 7; HARVARD LAW SCHOOL CRIMINAL JUSTICE PROGRAM, CONFRONTING CRIMINAL JUSTICE DEBT: A GUIDE FOR POLICY REFORM 15 (Sept. 2016) [hereinafter, CONFRONTING CRIMINAL JUSTICE DEBT].

101. Colgan, *supra* note 72, at 55–56.

102. Colgan, *supra* note 98, at 291.

103. Atkinson, *supra* note 38, at 207.

104. ACLU OHIO, *supra* note 36, at 7. That practice, and the practice of imprisonment of debt in Ohio more generally, have since changed. Atkinson, *id.* at 231.

105. Colgan, *supra* note 98, at 291.



disproportionate punishments for homeless people: some punishments violate the constraint of ordinal proportionality; some punishments are too harsh given the offender's culpability; and some punishments are too heavy given the offender's personal situation. Homeless people's punishments are disproportionate in part due to the culpability standard of strict liability for quality-of-life ordinances and the state's use of mandatory minimum fines.

The use of day-fines can both mitigate those three proportionality problems and mitigate the likelihood of entrenchment in homelessness.<sup>106</sup> Day-fines are a model of financial penalties that are in place in some European and Scandinavian countries.<sup>107</sup> Day-fines impose financial penalties that are proportional to a percentage of the offender's daily income and the severity of a given offense.<sup>108</sup> The total amount of a day-fine is calculated in two steps.<sup>109</sup> First, the severity of the offense is established by a number of points (the number of days).<sup>110</sup> The greater the offense severity, the greater the number of points.<sup>111</sup> Second, the offender's daily income is established by a number of units.<sup>112</sup> The number of days is then multiplied by the number of units.<sup>113</sup> Those earning greater income will pay more for a given offense, whereas those earning less will pay less for that same offense.<sup>114</sup> In Finland, for example, the amount of a day-fine is roughly one-half of an offender's daily income.<sup>115</sup> To prevent disproportionately high fines for affluent offenders committing minor offenses, the law can impose a statutory ceiling on the amount of a day-fine.<sup>116</sup>

106. See, e.g., Sally Hillsman, *Fines and Day Fines*, 12 CRIME & JUSTICE 49 (1990).

107. Tappio Lappi-Seppälä, *Sentencing and Punishment in Finland: The Decline of the Repressive Ideal*, in SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 94 (Michael Tonry & Richard Frase eds., 2001). Lappi-Seppälä estimates the amount of a day-fine to be about one-half of the offender's daily income after taxes. See Tappio Lappi-Seppälä, *Imprisonment and Penal Policy in Finland*, 54 SCANDINAVIAN STUDIES IN LAW 333, 336 (2009).

108. Hillsman, *supra* note 106, at 76.

109. Elena Kantorowicz-Reznichenko, *Day-Fines: Should the Rich Pay More?*, 11 REV. L. ECON. 481, 484 (2015).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. Lappi-Seppälä, *Imprisonment and Penal Policy*, *supra* note 107, at 336.

116. Colgan, *supra* note 95, at 96.

Day-fines have been used in certain American jurisdictions, including Staten Island (New York), Milwaukee (Wisconsin), Bridgeport (Connecticut), Maricopa County (Arizona), Des Moines (Iowa), and certain counties in Oregon.<sup>117</sup> As Colgan's work summarizes, day-fines have resulted in increased payment rates by offenders, increased collection rates by cities, decreased severity of offenders' fines, and decreased delinquent accounts and expenditures for cities.<sup>118</sup> Day-fines not only promote proportionality in punishment, but are both less costly and more effective across several metrics compared to traditional fines. San Francisco's Fines and Fees Task Force has recently called for the implementation of day-fines.<sup>119</sup> And a growing number of criminal justice scholars have argued in favor of day-fines, as well.<sup>120</sup>

Despite the value of day-fines, certain caveats are in order. First, day-fines are not a solution to the social reality of homelessness. Homeless people still need homes or the means to obtain housing. Second, just because the state can punish homeless people for violating quality-of-life ordinances (including with day-fines), it does not mean that the state should immediately resort to punishment when those ordinances are violated. Day-fines should only be imposed after less coercive means (e.g., warnings, community service, employment programs, addiction or mental health counselling) have either been offered, failed, or the individual prefers day-fines as opposed to other noncustodial punishments. Third, day-fines are still objectionable when they are imposed for quality-of-life ordinances that are themselves morally objectionable. For instance, if a city prohibits urban camping or sleeping on public property even though there are insufficient shelter spaces for the homeless population, homeless people

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117. See, e.g., DOUGLAS C. McDONALD, JUDITH GREENE, & CHARLES WORZELLA, *DAY FINES IN AMERICAN COURTS: THE STATEN ISLAND AND MILWAUKEE EXPERIMENTS* (National Institute of Justice, U.S. Department of Justice, 1992); SUSAN TURNER & JOAN PETERSILIA, *DAY-FINES IN FOUR U.S. JURISDICTIONS* (1996).

118. Colgan, *supra* note 95, at 67–73.

119. SAN FRANCISCO FINES & FEES TASK FORCE, *supra* note 29, at II.

120. Michael Tonry, *Community Punishments*, in *REFORMING CRIMINAL JUSTICE*, 201 (Academy for Justice, Vol. IV, 2017); Colgan, *supra* note 95, at 101–102; Alec Schierenbeck, *A Billionaire and a Nurse Shouldn't Pay the Same Fine for Speeding*, N.Y. TIMES, Mar. 15, 2018; Elena Kantorowicz-Reznichenko, *Day Fines: Reviving the Idea and Reversing the (Costly) Punitive Trend*, 55 AM. CRIM. L. REV. 333 (2018).

lack fair opportunities to obey the law.<sup>121</sup> Such a prohibition itself is therefore highly morally objectionable. The legitimacy of day-fines hinges on the legitimacy of the quality-of-life ordinances themselves.

## B. Unconditional and Conditional Criminal Justice Debt Absolution

Although day-fines are crucial to reduce the likelihood of entrenchment in homelessness and promote proportionality in punishment, there are other problems. Some homeless people have accumulated thousands of dollars' worth of unpaid fines. Day-fines may help those individuals avoid crippling debt in the future but do nothing to resolve their existing criminal justice debts. For instance, a homeless person in Montreal received roughly 374 tickets totaling nearly \$88,000 (CA\$) in unpaid fines, most of which were for sleeping or lying down on a subway bench.<sup>122</sup> Another homeless individual received approximately 176 tickets totaling about \$44,000 (CA\$) in unpaid fines, the majority of which were issued for that same conduct.<sup>123</sup> There are other examples.<sup>124</sup>

If individuals are to escape homelessness and avoid violating quality-of-life ordinances in the future, there must be a mechanism to rectify the lasting effects of disproportionate punishments that continue to hang over homeless people's heads. Preventing entrenchment with day-fines is not enough. An additional mechanism is needed to help individuals move past their criminal justice debts and transition out of homelessness: unconditional and conditional debt absolution.

Unconditional debt absolution implies that an individual's past criminal justice fines are simply erased. The individual is not required to make use of certain services or participate in programs as a precondition to clearing their criminal justice debts. Unconditional debt absolution has been used by cities such as San Francisco and New York, where judges have absolved

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121. *Pottinger v. City of Miami*, 810 F. Supp. 1551 (Dist. Court, SD Florida, 1992); *Jones v. City of Los Angeles*, 444 F. 3d 1118 (9th Cir., 2006); *Victoria (City) v. Adams*, (2009) BCCA 563. See, e.g. Terry Skolnik, *Homelessness and the Impossibility to Obey the Law*, 43 *FORD. URB. L.J.* 741 (2016).

122. Céline Bellot & Marie-Eve Sylvestre, *La judiciarisation de l'itinérance à Montréal: Les dérives sécuritaires de la gestion pénale de la pauvreté*, 47 *REVUE GÉNÉRALE DE DROIT* 11, 31 (2017).

123. *Id.* at 33.

124. See, e.g. Gary Warth, *Homeless Court offers alternative to revolving door*, *SAN DIEGO TRIBUNE*, May 7, 2018.

outstanding bench warrants and unpaid fines for quality-of-life ordinance violations. San Francisco's Chief Judge discarded roughly 66,000 outstanding warrants for unpaid quality-of-life citations.<sup>125</sup> New York City prosecutors requested the dismissal of hundreds of thousands of bench warrants for minor offenses, some of which were committed a decade prior.<sup>126</sup> New York City judges obliged, and approximately 644,000 bench warrants were remitted.<sup>127</sup> In that case, prosecutors sought to free up court resources, reduce the collateral consequences of warrants and convictions, and foster public confidence in the police and justice system.<sup>128</sup> Los Angeles' Police Chief has also called for the unconditional debt absolution of homeless people's outstanding bench warrants for quality-of-life ordinance violations.<sup>129</sup>

There are some parallels between unconditional debt absolution and the concept of mercy. Mercy implies that a reasonable and relevant factor justifies the mitigation of punishments that disproportionately impact certain offenders.<sup>130</sup> A combination of the offender's personal circumstances and the inflexibility of the punishment scheme may justify recourse to mercy.<sup>131</sup> Mercy reorients the focal point of punishment: emphasis shifts away from the offender's wrongdoing and toward the offender's own suffering.<sup>132</sup> Mercy therefore recognizes that normal punishments result in some individuals experiencing a disproportionate degree of hard treatment relative to the circumstances.<sup>133</sup> Similar considerations also underlie unconditional criminal justice debt absolution for homeless people. And like mercy, unconditional debt absolution operates more like a one-time gift rather than something to which individuals possess a right or

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125. Bob Egelko, *SF Judge Explains Why 66,000 Arrest Warrants Were Discarded*, SF GATE, Dec. 7, 2016.

126. James C. McKinley Jr., *644,000 Old Warrants Scrapped for Crimes Like Public Drinking*, N.Y. TIMES, Aug. 9, 2017.

127. *Id.*

128. *Id.*

129. Richard Winton, *LAPD chief proposes a "radical solution": Eliminate old bench warrants for homeless people*, L.A. TIMES, Aug. 15, 2018.

130. David Dolinko, *Some Naive Thoughts about Justice and Mercy*, 4 OHIO ST. J. CRIM. L. 349, 354 (2007); Rachel Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1364 (2008).

131. Barkow, *supra* note 130 (discussing mercy in jury nullification).

132. Duff, *supra* note 96, at 369.

133. *Id.*

entitlement.<sup>134</sup> Mercy, however, also generates legitimate preoccupations. It can be bestowed arbitrarily, undermine parity in sentencing, stem from improper considerations, or raise rule-of-law concerns.<sup>135</sup> Supposing unconditional debt absolution is rooted in mercy, it can perhaps lead to the same objections that the concept of mercy generates. This might account for why unconditional debt absolution remains rare in practice.

Extrication from homelessness, however, often requires more than freedom from one's debts. Mercy is often not enough. Nor is unconditional debt absolution in many cases. Even if financial obstacles are removed, personal and structural obstacles may prevent individuals from transitioning out of homelessness.<sup>136</sup> A more holistic approach is required to attack the root causes of homelessness that are not financial in nature, such as mental illness, physical disability, and addiction.<sup>137</sup>

Conditional debt absolution provides a more comprehensive approach, even though it is not a solution to the reality of homelessness nor a substitute for improved access to housing. A homeless person's criminal justice debts, outstanding warrants, and/or misdemeanor charges are absolved conditional to their using services or taking part in programs that transition people out of homelessness. Conditional debt absolution tends to be provided by specialized homeless courts or court programs that partner with community organizations and other justice system actors.<sup>138</sup>

Homeless courts are part of a wider trend toward specialized courts (also referred to as collaborative courts or problem-solving courts) that possess particular subject-matter expertise in criminal law or regulatory matters.<sup>139</sup> Specialized courts are less adversarial and more collaborative

134. JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 161 (1990).

135. Carol Steiker, *Murphy on Mercy: A Prudential Reconsideration*, 27 *CRIM. JUST. ETHICS* 45, 51 (2008); Dan Markel, *Against Mercy*, 88 *MINN. L. REV.* 1421, 1456 (2004).

136. See, e.g., Theresa Zhen & Vinuta Naik, *A Clean Slate Case Study of Community Lawyering*, 106 *CAL. L. REV.* 557, 559 (2018).

137. Gary Morse, *Causes of Homelessness*, in *HOMELESSNESS: A NATIONAL PERSPECTIVE* 7 (Marjorie J. Robertson & Milton Greenblatt eds., 1992).

138. Tatyana Kaplan, Monica K. Miller, & Emily F. Wood, *Looking Backward, Looking Forward: How the Evolution of Specialty Courts Can Inform the Courts of Tomorrow*, 54 *CT. REV.* 14, 17 (2018); Tina Rasnow, *Traveling Justice: Providing Court Based Pro Se Assistance to Limited Access Communities*, 29 *FORDHAM URB. L.J.* 1281, 1296 (2002); Scott L. Cummings, *The Politics of Pro Bono*, 52 *UCLA L. REV.* 1, 104 (2004).

139. Lawrence Baum, *Probing the Effects of Judicial Specialization*, 58 *DUKE L.J.* 1667, 1674 (2009). Other examples of specialized courts include drug courts or mental health

in nature.<sup>140</sup> Respect and concern for offenders' wellbeing, dignity, and quality of life are all central to problem-solving courts.<sup>141</sup> Homeless court programs are in place in certain cities in California, such as San Diego and Placer.<sup>142</sup>

In San Diego's homeless court, debt absolution can be conditioned on a homeless person completing supportive programs or taking advantage of initiatives offered by service providers.<sup>143</sup> Those programs and services include occupational training, literacy courses, mental health or addiction counselling, among others—all of which aim to address the root causes of homelessness.<sup>144</sup> A crucial element of San Diego's homeless court program is that the participants appear willingly before the court—they are not brought into custody.<sup>145</sup>

Montreal's PAJIC program is another debt absolution program. It operates out of the Montreal Municipal Court in conjunction with the Droits Devant community legal clinic.<sup>146</sup> Raffestin and Fortin have described in detail how PAJIC functions, and their description is summarized as follows.<sup>147</sup> Homeless people participating in PAJIC (the participants) first attend the Droits Devant legal clinic and take part in an initial informal meeting with a social worker from that clinic and a prosecutor.<sup>148</sup> The meeting is neither confrontational nor adversarial, and the participant's outstanding fines are not discussed.<sup>149</sup> Instead, the participant's life,

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courts (*id.*); see also Alexandra Natapoff, *Gideon's Servants and the Criminalization of Poverty*, 12 OHIO ST. J. CRIM. L. 445, 454 (2015).

140. Natapoff, *supra* note 139.

141. Stacy Burns, *The Future of Problem-Solving Courts: Inside the Courts and Beyond*, 10 U. MD. L.J. RACE RELIG. GENDER & CLASS 73, 80 (2010).

142. *Id.*; Mackenzie Myers, *Placer County's "homeless court" swaps fines for service*, PLACER HERALD, June 16, 2017.

143. STEVE BINDER & STEVE MERRIAM, *THE SAN DIEGO SERVICE PROVIDER TOOLKIT* 73 (2009).

144. *Id.* at 5.

145. *Id.* at 6.

146. See, e.g.: Bellot & Sylvestre, *supra* note 122; Véronique Fortin & Isabelle Raffestin, *Le Programme d'accompagnement justice-itinérance à la cour municipale de Montréal (PAJIC): Un tribunal spécialisé ancré dans le communautaire*, 47 REVUE GÉNÉRALE DE DROIT 177, 197 (2017).

147. Fortin & Raffestin, *supra* note 146, at 188.

148. *Id.*

149. *Id.* at 189.

interests, and steps to gain access to housing are what matter.<sup>150</sup> After the informal meeting, the prosecutor sometimes determines that the participant's outstanding fines will be unconditionally absolved by a court at a later date.<sup>151</sup> In other cases, the prosecutor requests an additional meeting to verify whether the participant continues to benefit from certain programs, make use of certain services, or take other positive steps toward gaining access to housing.<sup>152</sup> Debt absolution is conditional in such contexts.<sup>153</sup>

Whether absolution is conditional or unconditional, the participant later appears at municipal court to finalize the process.<sup>154</sup> The prosecutor summarizes the proactive steps taken by the participant to transition out of homelessness, and the participant answers nonconfrontational questions about their trajectory.<sup>155</sup> The presiding judge then declares that the participant's fines have been absolved, and the participant receives a certificate attesting completion of the PAJIC program.<sup>156</sup> In general, those who participate in PAJIC can only have their debts absolved once.<sup>157</sup>

There are some notable differences between unconditional and conditional debt absolution. The former more closely approximates a unilateral grant of mercy, whereas the latter resembles a collaborative restorative justice mechanism. Conditional debt absolution may therefore promote a range of core restorative justice values that unconditional debt absolution may not promote, such as empowerment, respectful listening, accountability, and emotional restoration.<sup>158</sup> The individual's own participation, efforts, and accountability are also central to conditional debt-absolution. Like mercy, however, unconditional debt absolution often depends more on others' actions and good will, as opposed to the individuals' own actions leading up to the absolution of their fines.

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150. *Id.* at 189–90.

151. *Id.* at 190.

152. *Id.*

153. *Id.* at 191.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. John Braithwaite, *Principles of Restorative Justice*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS 9–10 (Andrew von Hirsch et al. eds., 2003); John Braithwaite, *Setting Standards for Restorative Justice*, 42 BRIT. J. CRIMINOLOGY 563, 570 (2002).

### C. Rethinking the Civil and Criminal Consequences for Unpaid Fines

Suppose that the state implements day-fines and debt absolution but does not modify the civil or criminal consequences associated with unpaid fines. In such cases, homeless people who are unable to pay a day-fine may still be subject to expensive administrative fees, driver's license suspensions, or disclosure of their unpaid fine to consumer reporting agencies.<sup>159</sup> Preventing disproportionate punishments and entrenchment in homelessness also requires the civil and criminal consequences of unpaid fines to be modified.<sup>160</sup> Three proposals merit particular consideration.

The first proposal is the most straightforward and has been discussed at length by others. In short: the unconstitutional practice of debtors' prisons should stop.<sup>161</sup> There are obvious reasons for this. Imprisonment for debt demeans human dignity by jailing individuals irrespective of their actual desire to pay their fines, which fails to treat those individuals with respect and as rational agents.<sup>162</sup> The political legitimacy of courts and respect for the criminal justice system are put into question when judges ignore the Constitution's requirements by jailing indigent persons without holding *Bearden* hearings.<sup>163</sup> Such punishments are also objectionable because they disregard basic procedural fairness requirements.

Second, as others have argued, it is necessary to rethink the severity of administrative fees.<sup>164</sup> To prevent entrenchment in homelessness and poverty, the severity of administrative fees for unpaid day-fines should be commensurate with the proportionality of day-fines themselves. Otherwise, administrative fees can disproportionately exceed the amount of a day-fine and undermine its effectiveness.<sup>165</sup>

Lastly, certain civil consequences should not be imposed mandatorily and should only be imposed as a last resort. Like certain forms of punishments, civil consequences that cause particularly devastating collateral

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159. Atkinson, *supra* note 38, at 217. Sobol, *supra* note 21, at 504.

160. Beth Colgan, *Fines, Fees, and Forfeitures*, 18 CRIMINOLOGY, CRIM. J. & SOC'Y 22, at 30–31 (2017).

161. Atkinson, *supra* note 38, at 198; Hampson, *supra* note 33, at 44–46.

162. Colgan, *supra* note 160, at 28.

163. Atkinson, *supra* note 38, at 227; CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 100, at 16; Colgan, *supra* note 160, at 30–31.

164. Colgan, *supra* note 160; CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 100, at 18.

165. Sobol, *supra* note 21, at 504.



consequences for individuals should be avoided as much as possible.<sup>166</sup> Mandatory civil consequences that should be avoided include driver's license suspensions, disclosing unpaid fines to consumer reporting agencies, and cutting off social services benefits in the event a fine remains unpaid.<sup>167</sup> There are alternatives to mandatory civil consequences. Defendants could be offered greater flexibility in payment schedules to decrease the likelihood that civil consequences will be imposed.<sup>168</sup> Or defendants could be allowed to choose amongst several civil consequences that would be imposed if fines remain unpaid for a given period of time.

## CONCLUSION

This article argued that we should rethink homeless people's punishments for violating quality-of-life ordinances. It explained how punishments and civil consequences associated with unpaid fines entrench individuals in homelessness.<sup>169</sup> Entrenched in homelessness and lacking a private sphere, homeless people are more likely to alleviate their needs on public property and be punished for it.<sup>170</sup> For that reason, homeless people's punishments constitute a form of self-fulfilling prophecy.

This article also demonstrated why homeless people's punishments can be disproportionate in three principal ways. First, punishments can ignore the concept of ordinal proportionality and be too severe, given the nature of the prohibited conduct and its relation to other offenses.<sup>171</sup> Second, homeless people's punishments can be too harsh in light of their culpability.<sup>172</sup> Third, punishments can ignore homeless people's personal situations and result in harsher offenses due to administrative fees and longer prison time.<sup>173</sup> Those three proportionality problems play a role in entrenching individuals in homelessness.

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166. Colgan, *supra* note 160, at 30–31; CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 100, at 16.

167. *Id.*

168. CONFRONTING CRIMINAL JUSTICE DEBT, *supra* note 100, at 18.

169. Kieschnick, *supra* note 18, at 1575.

170. *Id.*

171. VON HIRSCH, *supra* note 19, at 18.

172. Weisberg, *supra* note 13, at 330.

173. Colgan, *supra* note 98, at 291.

Different legal mechanisms can prevent entrenchment in homelessness and ensure that homeless people's punishments are more proportionate. Instead of imposing fixed financial penalties irrespective of income, the state should impose day-fines.<sup>174</sup> Unconditional or conditional debt absolution are other solutions that can assist individuals with criminal justice debts to transition out of homelessness. Resembling a restorative justice mechanism, conditional debt absolution may foster important values that unconditional debt absolution may not. Finally, it is also necessary to reconsider the severity and mandatory nature of civil and criminal consequences associated with unpaid fines.<sup>175</sup> All of those measures are no substitute for the state's responsibility to ensure access to housing and address the root causes of homelessness. The state, however, can still mitigate the most egregious consequences that stem from homeless people's punishments and strive to treat homeless people with greater respect.

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174. Colgan, *supra* note 160, at 30–31.

175. *Id.*